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Leverage in Legislation: When do State Legislatures Rely on the Judiciary?

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Abstract

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by Alex Pennington

Legislatures carry an enormous responsibility to create and pass laws. They also have an electoral interest in ensuring these laws are enforced correctly. The extensive responsibility of bureaucratic oversight at the federal level is executed by the fully professional United States Congress. State legislatures must also oversee the bureaucratic actions in their state, however these law-making bodies differ in their capacity to execute this oversight due to their large differences in professionalism. States with fewer resources may bridge the gap in resources by leveraging ex-ante and ex-post controls of government agencies written into legislation as a substitute for oversight capacity. Through such controls the legislature can activate a judicial branch to act as a substitute and relieve the law-making bodies with less capacity of their oversight burden.

Using a graded response model of enabling statutes, I estimate the latent measure of 'judicial access' from the legislature in licensing bills and Administrative Procedure Acts. I hypothesize that judicial access will increase when a state is less professional. In addition legislatures will decrease judicial access when the executive is the sole appointer of judges. I also observe an interaction of professionalism and judicial selection methods in the state with mixed results.

State Legislatures and Judicial Access

The governing regime of the United States is one that is built on a balance of powers between three branches of government. In addition to the executive, legislative and judicial there is also a struggle for power over the bureaucracy. At the federal level, Congress is challenged to maintain its dominance over the bureaucracy (Moe, 1987). State legislatures share this burden, yet differ significantly in their professional capacity.

Not only are state legislatures lacking in professionalism compared to the United States Congress, but states themselves are not equal in their capacity as legislative bodies. The variance across the states in their professionalism is quite wide, which presents an interesting phenomenon to study (Squire, 2007). States like Montana and the Dakotas operate part-time, with low compensation and a small staff. Wyoming has one of the shortest biennial sessions combined with an average compensation of $6,000 per legislator which pales in comparison to the more professional states. California's legislative branch is often seen as the most comparable in terms of professionalism to the United States Congress due to its high average salary of $213,405 as well as time spent on the job per legislator, lengthy biennial session and number of staff available to members (Bowen and Greene, 2014).

The gulf in professionalism is a concern for the balance of powers in the states as evidence suggests that more amateur legislatures defer to an increasingly professional bureaucracy within the executive branch (Boushey and McGrath, 2015).

If the balance of powers within a state government risks tilting towards the executive, a less professional legislature may find an ally in the courts to relieve the law-makers of the costly activity of executive oversight. Courts have the power of judicial review over executive actions to prevent bureaucratic drift and violations of legislative intent. It is this

judicial power that can be activated and modified by the legislature as a substitute for legislative oversight.

A professional legislature is more likely to have the resources available to competently review agency actions to ensure that as laws are executed and that agencies follow the intent of the legislative body. A citizen legislature may not have this luxury and must instead leverage its power over the judiciary to complete this task.

Literature Review

The determination of procedural control over the bureaucracy and the level of independence to allocate an agency is determined by the trade-off between the outcomes of the expert agency tackling the heavy costs of crafting complicated policy versus risking bureaucratic drift (Bawn, 1995). The increasing expertise of an agency relieves legislatures of gaining such expertise themselves and spending valuable resources to create policy while still affording electoral benefits to the representative (Huber and Shipan, 2002; Epstein and O'Halloran, 1999; Moe, 1989.) Delegation is restricted when the costs of deferring to the executive branch are too high. For instance, when there is a high risk of bureaucratic drift and shirking away from the legislature's preferences. Under periods of divided government when agencies are often perceived to have the same policy interests as the executive, legislatures tend to write longer, more constraining statutes to limit agency interpretation and prevent such shirking in favor of an executive against legislative intent (Epstein and O'Halloran, 1999).

A comparative analysis of the states offers empirical leverage as there exists variation across the state institutions and their outcomes, as well as an analysis of counterfactuals that do not exist at the national level. One such factor to observe is the differing levels of professionalism among legislatures; citizen legislatures may rely more on agency expertise given their reduced capacity and increased costs in creating extensively researched

and constrained legislation (Krause and Woods, 2014.) The relationship of professional capacity and deference has raised questions by scholars like Boushey and McGrath over the balance of powers in state governments. The stark contrasts between some states concern McGrath and Boushey, who assert that professionalism is a concern in relation to the executive branch (2015).

The preeminence of the governor as the 'chief legislator' in many states places amateur state legislatures at the mercy of the executive branch (Rosenthal, 2009 p264). Under such conditions the question over the balance of powers is not an unfounded concern. Volden finds that executives can flex executive expertise and veto powers to increase deference to agencies in spite of legislative restriction (2002.) In states where a consistently and increasingly professional executive branch reigns, deference to the bureaucracy can be an inexpensive and attractive option to a lawmaking body.

Legislative deference to another branch of government would not be a concern if the law is followed as intended. However, perfect compliance is impossible to achieve and a legislature must have oversight procedures in place to ensure government agencies are acting in accordance with legislative, and not executive, interests (Moe, 2012).

In terms of professionalism, it has been demonstrated that the alternating capacities of legislative bodies indeed has an effect on their oversight capabilities (Huber and Shipan, 2002; Reenock and Poggione, 2004; Squire and Moncrief, 2015.) Boehmke and Shipan (380) demonstrate that professionalism has a magnifying effect of higher regulation and oversight in more professional states (Boehmke and Shipan, 2015.) Specifically a higher level of professionalism was associated with an amplified effect of bureaucratic consistency with legislative intent due to a larger capacity for oversight.

Two questions emerge from this study. First, through what mechanisms can a less professional legislature ensure a bureaucracy executes legislative intent? Secondly, how can

legislatures become more efficient in their legislative duties by delegating certain tasks to other branches without surrendering constitutional power?

Efficiency is typically a problem in large institutions like representative legislatures. Moe attacked congressional dominance and argued that the US Congress was at an institutional disadvantage in its capability of limiting deference to agencies due to its sluggishness and the need for compromise. Legislative power instead was rested in oversight functions through ex-ante and ex-post controls (Moe, 1987.) Police-style monitoring is an expensive procedure even for the US Congress, so it often benefits them to operate with 'fire alarms' and wait for an affected group to pull the trigger (McCubbins and Schwartz, 1984.) Using the threat and practice of ex-post controls over agencies is a method that can engender accountability from an agency and provide representatives with a less costly, and a more public (and therefore electorally beneficial) display of legislative authority. For state legislatures whose resources pale in comparison to the federal Congress, there is a clear motivation to employ fire alarms over a costly and wasteful monitoring process.

Previous research on control of the bureaucracy has employed useful, but ultimately limiting shortcuts that present a simple view of the relationship while disregarding important controls available to the legislature.

One paper by Huber, Shipan and Pfahler to outline legislature's control over the bureaucracy attempts to take advantage of multistate data (Huber, Shipan, and Pfahler, 2001.)By observing Medicaid laws and the length of statutes, the writers provide for a partial look into what drives state legislatures to craft more detailed legislation, with the notion that longer legislation is less susceptible to agency interpretation.

This paper however does not account for the ex-post control of judicial review. Shipan's earlier definition of judicial review as "a political variable that a legislature can use to

affect policy outcomes" is still a feature of state governments to be investigated regarding congressional control (Shipan, 2000). McGrath expanded the work of Huber, Shipan and Pfahler work using the same dataset of Medicaid laws where "the courts serve as an exogenous constraint on strategic behavior" to find that ex-ante and ex-post controls are not mutually exclusive nor necessarily substituted (McGrath, 2013 p391). Instead the use of the non-external controls is a strategic decision by legislatures as they tend to write "more constraining statutes when the likelihood that state courts intervene on their behalf is neither very high nor very low."

These results though only tell us about the length of the statutes and when courts are most likely to intervene in the states. Courts, however, are not completely autonomous actors with the ability to review a case. A suit must be made in order for the court to take part in the oversight process. Another constraint upon the judicial branch is the legislation itself. The law may be lengthy or short and thus respectively considered constraining or not. But it would take only one sentence from the legislature to preclude a law from judicial review, or to open an agency up to judicial scrutiny. What McGrath's study lacks is a specific mechanism that can explain how a legislature can craft a statute to activate the judicial branch as a substitute for legislative oversight and offer them a wide-breadth of power to act on the legislature's behalf. Judicial review is an important variable to consider and it has been neglected in studies observing the relationship between the legislature and the bureaucracy. If the courts can be guided through provisions of judicial review altered by the legislature, when and how do law-making bodies provide for intervention by the courts?

Two assumptions must be true for delegation to the judiciary to be an attractive option. First, the courts have to be an effective form of constraint over the bureaucracy and secondly, the legislatures must be able to delegate to and trust the courts to act in the legislature's interest.

In regards to the first assumption, Robert Kagan's *Adversarial Legalism* comments on the unusually high ability the courts have to intervene with agency policy making (Kagan, 2004). While agencies are often deferred to by the judiciary, law suits are still expensive to government bodies and the penalties can be harsh; rules and decision can be reversed, wasting the energy and extra payments to litigants may be levied against the agency in a case of wrongdoing. The ever present danger of judicial review is sometimes enough to prevent an agency from following through with a rule or action and a threat of a lawsuit may even be enough to change it as the costs of going to court for an agency can be extremely high in terms of legal fees and time spent on a case (Kerwin and Furlong, 1994.)[1]

This is why any agency decision must meet the purpose of legislation, satisfy the expertise of the agency and pass the judiciary's standards of review. Thus when agencies act, they must also consider the composition of the courts they may come up against to satisfy the judge's preferences (Canes-Wrone, 2003; Howard and Nixon, 2002; Ferejohn and Shipan, 1990).

Having established that the courts can be an effective tool to ensure the bureaucracy stays within its sanctioned deference zone via the legislature, the question remains as to why a legislature would delegate to the courts. Such an action assumes an amount of trust between the branches and delegation has been demonstrated at the federal level (Barnes, 2004; Lovell, 2003). This alliance of sorts between the legislature and the judiciary branches can also be extended to the states, however, the focus of the relationship has often turned to the conditions that pits the branches against one another (Miller, 2009;Langer, 2002).

Suspicion amongst the branches is healthy, but a law making body within a state does have power over the courts to exercise. The legislature has several oversight functions for the courts that even the most amateur legislature could enact to provide leverage over

[1] See *Environmental Change* by Rosemary O'Leary (O'Leary, 2010).

the judiciary and efficiently oversee executive agencies. Among their powers, legislatures control the budget for state courts and can punish via reducing the appropriations (Squire and Moncrief, 2015). They also have the ability to restructure the court systems to further punish the courts (Hogan, 2006 p197). Additionally, law-making bodies can have an effect on the docket by constraining what type of judicial review can occur and when, as well as impacting the workload of the court systems by editing and including sentencing structures into legislation – creating more work or less for the judicial branch (p49). Finally, judges, their opinions and their institutions may be criticized in public and are often lambasted in congressional campaigns for reelection. Those judges who seek to curry favor with the public for electoral votes or to preserve the legitimacy of their role would not want to make themselves a target for campaigns across their state (Langer, 2002 p38). This implies public scrutiny of both judges and legislators and there are certainly motivations for courts and legislators to cooperate in the interests of their shared constituency.

Providing Judicial Access

If citizen legislatures are unable to access as many resources as their professional counterparts to create detailed legislation, practice extensive policy making and commit to legislative oversight, they can instead employ shortcut solutions. In their balance of powers argument, Boushey and McGrath are concerned with the institutional vulnerability of state legislatures where their lack of professionalism, in comparison to the executive, is a chink in already rusty armor. This relationship though is presented as a dichotomy and does not take into account the other branch of government: the judiciary. If weaker law-making bodies find it expensive with their limited resources to assert their authority and have the ability to insert provisions into the laws they write, they can leverage legislative powers of delegation and rely on the fully-professional judicial branch to exercise oversight on their behalf.

In a state system defined by shared powers and checks and balances, the legislative and judicial branches share oversight powers over the executive branch and its agencies. The legislature also has checks over the court in this matter. In addition to a legislature's formal powers over the courts outlined in the previous section, the legislature can determine the boundaries of the court's jurisdiction and can prescribe access and powers of review.

Through such provisions law makers can choose to grant as much or as little power to the courts as they wish and can manifest themselves in several ways. Initially, the judicial branch is limited by the fact that a case must be filed in order for them to act. The courts are hampered by the reactive nature of the institution and legislatures can use the judiciary's nature to their advantage. Legislatures can deter cases from reaching the court by placing the costs of proceedings and burden of proof against the government on other actors. A legislature may want to restrict a court's ability to review agency actions that were a result of costly legislation written to extract that particular action from an agency. A more professional legislature has the luxury of higher compensation, staff and time on the job and can allocate resources to oversight when the law-makers want to ensure agency compliance with legislative intent. Such legislatures may want to avoid judicial oversight as the lawmakers do not need to entrust another branch with their policy objectives.

Conversely, a citizen legislature has the opposite incentive. To make their duties as efficient as possible, one possible avenue to release the pressure oversight duties is to rely on the courts. Using simple, easily employed provisions within legislation, the law-making body of a state can instead promote the courts as an option for oversight. When a legislature is unable to craft constrained legislation and instead has to rely on agency expertise to interpret laws as necessary, oversight becomes an increasingly important function to ensure agency actions are in line with the legislatures policy preferences. If an agency strays from legislative intent, the legislature can enlist then judiciary as an ally and can direct oversight cases to the courts through public incentives to file suit (Farhang, 2010).

A citizen legislature can also stack the deck in favor of the public to further incentivize the use of the courts by providing for a wide definition of standing as well as placing the burden of proof and costs onto the government agency in question.

A legislature's flexibility of providing for access to the courts is beside the crucial element of the judicial process once a case has been filed, which legislators are also able to restrict or widen. Law-makers can delegate as much power to the court as they wish by prescribing the scope of judicial review (or even precluding it entirely). By determining the limits of what actions can be taken by the court and defining whether the substance or procedure of the agency ruling is in question a legislature can further enlist the courts ability to oversee a government agency. A state legislature can deter agency noncompliance by increasing the chances a lawsuit can be brought against the agency. This preventative measure may be enough of a deterrent in its own right. However if the legislature perceives the court as an ally, further discretion can be given to the courts to overturn transgressions by the executive branch. As an ally, the court will have the ability to overturn, and in extreme cases of discretion, dictate how a law should be read by an agency in terms of legislative intent. This can be an attractive option for a citizen legislature as precious resources do not have to be expended to keep an agency within the bounds of the legislature's intent if the courts in that state are able to provide such guidance.

The courts then do significantly affect how agencies operate and the legislature can have influence over the judiciary. Clauses that deal with judicial review are fairly simple to include within specific legislation and can be widened or restricted by the legislature to make the strategic decision of allowing the courts various levels of oversight over how to adjudicate governmental agencies (McCann, Shipan, and Wang, 2016).[2] A citizen legislature wishing to avoid the costs of detailed legislation on an expert issue will delegate to

[2] An easy fall-back for most states is already located in their respective administrative procedure acts (APAs) and can be further restricted or loosened within the legislation making judicial review an easier tactic to rely on by either submitting the legislation to the APA or simply altering it for the specified legislation.

an agency, but can also avoid the additional costs and provide wide access and delegate to the courts to oversee the implementation of legislative intent.

Thus instead of fighting a war on two fronts in which a legislature is attempting to rein in the judiciary and executive, an amateur legislature can choose to focus on one branch, the judiciary, to balance out the executive. Thus I arrive at my first hypothesis for the concept of jurisdictional power over the courts by the legislature, simply refereed to as judicial access:

H1: Less professional state legislatures are more likely to increase judicial access.

In addition to a simple additive relationship between professionalism and judicial access, observing the states presents a more complex relationship. Conducting an analysis across states will not only provide for empirical leverage, but also allow for a deeper understanding of conditions when legislatures widen judicial access.

The interaction between legislatures and the courts can be extremely complicated among the states, ranging from the contentious to some that can even be quite amiable (Miller, 1995 p101). The level of legislative trust in the courts can be eroded or increased through other institutional barriers across the United States. Only 14 legislatures across the states have a significant or sole role in judicial appointments. Elsewhere judges are not selected with input from the legislature as occurs in the federal government, but through elections or solely through the executive branch. This begs the question as to why a law-making body would further depend on the judicial body to ensure legislative intent.

The interaction between the branches is conditional on the institutional relationship between the courts and the other branches. In a state like Massachusetts, where a Republican Governor can appoint the judges for life, and has significant budgetary power over

the judiciary,[3] there is little room for trust from the Democratic legislature. The collaboration between a legislature and the state courts may increase in a state like South Carolina, where the legislature appoints and retains judges with no interference from the executive and shares in monetary power over the judicial branch. Consequently, my second hypothesis is:

H2: State legislatures that are a party to the selection process and appointment of judges are more likely to increase judicial access.

Because such institutional controls available to the legislature can amplify legislative trust of the judiciary, and a citizen legislature may also defer more to the courts when they are a party to the selection process of judges in comparison to a citizen legislature where a governor selects judges. My third hypothesis is an interaction between professional capacity and selection method:

H3: A state legislature's decision to widen judicial access is dependent on their professionalism and the judicial selection method in that state.

Specifically, when the executive branch is the sole actor in the selection and appointment of judges, a more professional legislature will heavily restrict judicial access. When the legislature is a party to the nomination and appointment of judges, they will be more willing to defer to the judicial branch. However the more professional a legislature, and thus increasingly capable of oversight, the legislative branch will still restrict judicial access, but not to the extent a legislature would if the governor was the only party to the nomination and appointment process. I also hypothesize similarly for judges appointed by election, where a legislature will still defer less to the judicial branch, but not as harshly as compared to a sole-governor process.

[3]The judiciary submits its budget request to the executive who then proposes the initial budget to be edited by the legislature. Once the state legislature has agreed on a budget the Governor can then reduce or veto sections or line items.(**mass**)

Yet another element that affects the belief of aligned preferences between the branches is perceived ideology. The more closely aligned the legislature and judicial branch, the more likely a legislature will be to rely on the judicial branch as an ally. Therefore I would expect an additive relationship between the matching ideology and judicial access and this will be accounted for. However since the legislature does not need to rely on the courts, but only chooses to in relation to an imposing executive branch, the regime of government is important to consider. If a legislature and executive party match in government, all else equal, why would a law-making body invest effort in bringing another branch into the process of reviewing, or even endangering the law? If the legislature and the governor are similarly aligned, there would be no need for a legislature to provide additional judicial access than what is already established in the states. It is only when there is a clear split between the governor and legislature in terms of party will the law-makers be willing to secure their work from one branch of government, the executive, by enlisting the other, a judiciary whose purpose is to maintain legislative intent. Thus, when the government is divided the legislature can be aligned with the courts against an opposing executive, providing the fourth hypothesis:

H4: Under a divided government, judicial access provided by the legislature to the courts will increase.

Creating A Measure of Judicial Access

The measure of judicial access as defined in this paper is only one aspect of judicial review as applied to the relationship of state courts, legislatures and executive agencies. As my unit of analysis is individual statutes from the states, I need comparable laws that are similar in intent to distinguish the level of judicial access between the states.

Comparable laws can be found in the activating legislation of various governing boards that possess legal authority to create rules and enforce them. Licensing and permit agencies are a prime example of such boards that enforce legislation, create rules and carry out disciplinary procedures. Furthermore they are also very similar across the states in purpose and procedure making these enabling statutes commensurable for measurement across the different states. A medical licensing board in Wyoming must complete its duties of setting standards for obtaining a license, certifying physicians and holding disciplinary procedures just as the New York State Board of Medicine must do. When each board has a similar function to complete, I can observe how each legislature exposes that board to judicial review in the statute executing the board's power and note the differences between each state.

The unit of analysis in this paper then is individual statutes of all 50 states from three types of enabling administrative legislation; medical licensing boards,[4] gun licensing laws[5], and provisions within state Administrative Procedure Acts (APAs) on contesting agency actions and decisions.

Each of the laws creating these boards provides a specific, comparable way to assess judicial access across state legislatures that crafted each law. It is important to note that each of these boards varies across several dimensions; political, salience and power. Gun licensing and environmental statutes carry a heavy political weight and are more likely to make a decision that becomes salient to the public. Medical licensing is not as highly political nor salient to the public at large, but legislatures still have an interest in promoting a professional workforce of health care providers.

[4]Specifically the licensing of general physicians and surgeons. Some states have boards specifically for various medical professions and others are more comprehensive. Thus it was necessary to focus on one area and I chose general medicine as it widely reaches the entire population.

[5]Here I have collected laws on any licensing permits for handguns. This includes permits for buying, transferring and concealed or unconcealed carry permits. Many laws apply the same standards to each of these provisions, Arizona is one state that has a different standard for permits to buy/carry and to transfer. Rhode Island, Vermont, Virginia, West Virginia, and Wyoming are excluded as they either do not have laws for handguns or respondents apply directly to the courts and not a government agency to be reviewed.

In their powers and duties, all boards are similar in their purpose, but some have the power to review while others may not have the capacity to hold administrative hearings and must instead defer to an Administrative Law Judge (ALJ) or specific office for administrative hearing which may affect how a legislature handles judicial review.[6]

In regards to my theory, the legislature can activate or restrict access to the courts and define the level of discretion the court can exercise in each case based on several factors: the number of procedures, standing, the level of review, the scope of review, burden of proof and a number of financial incentives (McCann, Shipan, and Wang, 2016). To create a measurement of judicial access, I observed each of these features, outlined in Table 1, within each enabling statute.[7]

Judicial review of agency actions within the federal government and states is not just a judicial power to be acted upon when necessary. As previously stated, legislatures have good reason to be wary of the courts given the power of review. However, each variable in Table 1 provides Legislatures with a menu of options with which to vary access to the courts, but also to require certain approaches judges must take.

TABLE 1: Variables and Coding for GRM

Variable	Definition	Effect on Judicial Access
Procedure		
Time Limit	There is a time limit on when a case can be filed with a court.	Negative
	No limit.	Positive
Days	The number of days before the time to bring a case expires.	Positive

[6]The final varying dimension between policy areas is the participants and effects of each piece of legislation. Medical licensing is directly aimed at a singular profession and gun licensing concerns a larger public. The effects of revoking the license of one doctor or gun owner potentially only hurts one individual (and maybe helps a handful of citizens). Ideally I would also observe licenses such as contracting work or environmental permits where denying a government contract or permit does not just inhibit an individual from a certain practice. These licenses can influence an entire industry or business enterprise. These four areas of law would then cover an extensive number of issues and cross multiple dimensions to create a measure of judicial access. Such an analysis would be extensive and illuminating, but is not within the scope of this paper, but is a possibility for future research.

[7]Additional information as to why each variable in Table 1 is included is in Appendix B.

Table 1 – continued from previous page

Variable	Definition	Effect on Judicial Access
Venue	A person bringing suit must exhaust all agency channels before appealing to a court.	Negative
	A person bringing suit does not need to exhaust agency channels before appealing to a court.	Positive
Steps	The number of proceedings through agency tribunals before appealing to court.	Negative
Standing	Only those adversely affected by decision can bring suit.	Negative
	Any interested/potentially involved party has standing and can be involved in judicial proceedings.	Positive
Hearing		
Review	The legislature places restrictions on the review powers of the court.	Negative
Burden	The burden of argument falls on the agency.	Positive
	The burden of argument falls on a private individual.	Negative
Scope	The court has more power to decide upon a case. E.g. The court does not have to keep the record and can modify decisions.	Positive
Incentives		
Payment	Payments to litigants who bring cases against an agency are included in the law.	Positive
Costs	An agency bears the cost of preparing the record for the hearing.	Positive
	An individual bears the cost of preparing the record for the hearing.	Negative

TABLE 1: The different features of legislation that can widen or restrict judicial access. In the final column, negative indicates that this feature will have a negative loading (it is a restrictive feature) or a positive one (will grant wider access) on judicial access. Information on the coding of these variables is located in Appendix B.

A graded response model (GRM) is applied to assess each of these ordinal variables to find which grants petitioners the greatest access to the courts and how much power the court is granted by the legislature. The GRM, an ordinal item response theory (IRT), assumes each variable coding is a function of a latent variable, in this instance judicial access; providing for a wider scope of review is a function of the state legislature wishing to grant wider judicial access in the legislation. After examining the scores of each variable, the GRM

posts an estimation for each observation's latent variable which for this study would be a state legislatures granting of judicial access.[8]

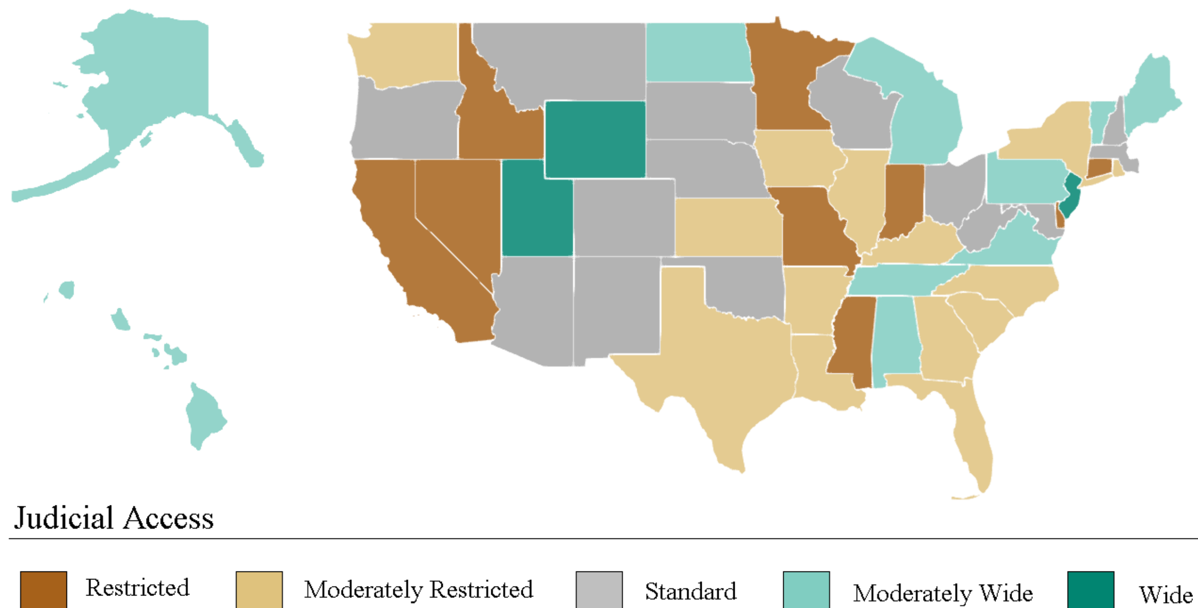

FIGURE 1: Categorical assignment of judicial access in each state for medical license legislation.Coding for each state is as follows: Restricted $\leq -.75$; Moderately Restricted $\leq -.25$; $Standard < -.25, > .25$; Moderately Wide $\geq .25$; Wide $\geq .75$

The enabling legislation for state licensing boards is observed and analyzed along with which state and year each law was enacted.[9] If a legislature amended a law in a way that significantly altered the coding of a previous version of the law, a new entry was made for that legislature.

Figure 1 applies the latent measure of these provisions to present the level of judicial

[8]In the past, item response theories have produced ideal points for state legislators (Shor and McCarty 2011) and Supreme Court Justices (Martin and Quinn 2002; Bailey and Maltzmann 2008). Graded response models as a form of IRT have been increasingly applied to the social sciences (Samejima, 1969; Thissen and Steinberg, 1986; Samejima, 2010).

[9]Some laws available through Lexis Nexis do not carry a full history, thus while a licensing board may have existed since 1940, the oldest statute available may be from 1990's. In these cases I coded the oldest available record if previous records could not be located in Lexis, the state legislature's database or library archives of bills passed.

access that was given in each state for their medical license legislation. Immediately noticeable is the variance across the states for one area of policy, which indicates there are shifts in the amount of judicial access provided.

The scale of my measure is balanced and ranges from a more restrictive measurement (-1.88) in the states of California, Illinois and Nevada. This make sense as both Illinois and Nevada do not allow review of contested cases for medical licenses and California has strict provisions in place and highly limit review by the courts.

A higher level of judicial access is displayed in the states of Utah, Wyoming and New Jersey where each of these states has a policy of no time limit in which to bring a case and de novo review of agency actions. While other variables differ among these states, reviewability, time limit and scope of review are highly important to the court's power. At the conclusion of my paper, as well as in Appendix C, I will further analyze the GRM to understand what is driving my measure and demonstrate my measurement of judicial access is tapping into key variables that drive a courts ability in reviewing the law.

Data

My measure of judicial access by state, policy and year enacted reveals the characteristics that influence a court's power in a state to review agency actions. This data is applied into a fixed-effects regression to test within policy area what drives a legislature to provide wider or narrower judicial access. Given multiple states and years within each policy area, accounting for time is a difficulty and was accounted for in my small dataset by controlling for year, $year^2$ and $year^3$ with no significant effect and a practically zero effect on the model.

My first model assesses an additive effect of professionalism on judicial access and I will observe a similar, more conventional method of professionalism based on the Squire Index

to test my first hypothesis which predicts a negative relationship between professionalism and judicial access.[10]

As per my second and third hypotheses, judicial selection method is included in my models as a legislature may only provide access if they are the ones to select the judge.[11] Judicial selection will be a categorical variable in three parts; sole governor appointment, legislative input in the selection process and elections.

Divided government is employed as a binary variable and depends on whether all branches of government are controlled by the same party or not. The divided government variable will act as a control and test of my fourth hypothesis. Additionally political uncertainty will be accounted for in the state using the electoral competitive state measure from Holbrook and Van Dunk(Holbrook and Van Dunk, 1993).[12]

Term limits are also a feature among some state legislatures and will be accounted for with a binary variable. If legislators are term limited they may wish to impose more ex-post controls on executive agencies by providing access to the courts. Judicial access may be substituted for legislative review because it is increasingly unlikely the same legislature will be able to review an action and assess its match with the original legislature's intent.

Additional legislative characteristics accounted for in my model include a binary control for the party in power in the legislature to account for the fact that one party may have a tendency to practice deference to agencies or the courts. I also include a binary variable for veto-proof legislatures - is it possible that legislatures who ultimately do not have to

[10] Bowen and Greene (**Bowen2014**) collect data following Squire's coding rules, but obtain data biennially between 1973 and 2010. With this data, instead of creating a measure that is relative to the US Congress, they perform a MDS model that produces a variable along the first dimension that has "a clear, strong linear relationship" with the Squire index (highly correlated at $r = .92$).

[11] Data from IPPSR (Jordan and Grossmann., 2016), the National Conference of State Legislatures and Klarner (Klarner, 2003).

[12] Calculated as: 100-(average percent of winning candidate votes), winning margin, (percent uncontested seats) (percent safe seats) over four year moving average.

include the executive in their bargaining to pass a bill have a different relationship with the courts as an ally? Finally, I also include a variable for state legislatures in the South.

My second model will be an interaction between the professionalism measure and whether the legislature is a part of the judicial appointment process to test my third hypothesis. A review of the marginal effects should demonstrate a more positive effect on judicial access as professionalism decreases and the legislature is a part of the selection process compared to when the legislature is not a party to the selection and appointment of judges. Alternately as a legislature becomes more professional judicial access will decrease more rapidly when the legislature is not a party to the judicial selection process.

The third model will include an ideological matching variable between the courts and the legislature as previously mentioned. The variable is binary where 0 indicates no match and a 1 indicates a match between median ideology of the highest court in the state and the majority party of the state legislature. Matching court ideology is used to discern whether judicial access increases when legislatures match in ideology with the courts[13].

Results

The first model in Table 2 tests my first hypothesis, which theorizes a negative relationship between increasing professionalism and judicial access.[14]

Model 1 indicates that an increase of one unit in the MDS score of legislative professionalism is associated with an average negative impact on judicial access[15] by .12 controlling for

[13]See Appendix B for a full explanation of the variables, coding and source.

[14]Each of these models was tested with additional controls of $year, year^2$ and $year^3$ to account for time with a statistically zero effect on the model. Additional controls employed with a zero effect were state ideology and population size and density. The results were not changed other than when $year^2$ and $year^3$ were included veto powers slipped to $p < .1$ significance in model 2.

[15]which ranges from -1.88 to 2.68

other variables. My first test follows the initial hypothesis as the sign is negative. However the professionalism variable approaches statistical significance, but does not meet conventional standards at 95%, thus I cannot reject the null hypothesis.

The explanatory variable of which judicial selection method is utilized in each state is also correctly signed. In comparison to a sole governor selection and appointment method, when the legislature is involved in the process or judicial selection is via elections each has a positive impact on judicial access. While second hypothesis predicts the positive sign of a legislative or election method of selection would increase the likelihood a legislature would defer to these judges, the confidence intervals much too wide to state significance of these variables.

The other controls also have no significant effect besides a veto proof legislature. All else equal, a veto proof legislature may restrict judicial access as the law-making body has an opportunity to pass a bill that has as little executive influence as possible. With no need to account for an executives policy preferences to make a bill viable as approved legislation, there is no need to rely on the judicial branch to secure legislative intent. If the legislature invested time into the bill knowing that it was veto proof, it may be restrictive enough to ensure the legislature's policy position with little need to make scrutiny of the law easier by increasing judicial access for the courts.

The second model initially demonstrates similar results. Veto proof legislatures retain significance and other controls are insignificant. Professionalism is now classed as significant, yet cannot be directly interpreted as Model 2 features an interaction between the judicial selection method and professionalism to test my third hypothesis.

Figure 3 portrays the marginal effects of my interaction with interesting results.[16] Each bar represents the selection method as my third hypothesis posits that the relationship

[16]More data is available in from the marginal effects in Appendix D.

TABLE 2: Regression Models of with Fixed Policy Effects Judicial Access

	Judicial Access		
Model	**1**	**2**	**3**
Professionalism	-0.12+	-0.20**	-0.40**
	[-0.24,0.01]	[-0.35,-0.05]	[-0.63,-0.16]
Judicial Selection			
In comparison to sole Governor			
Legislature Involvement	0.17	0.11	0.43
	[-0.30,0.64]	[-0.42,0.65]	[-0.22,1.08]
Elections	0.11	0.11	0.32
	[-0.32,0.54]	[-0.32,0.54]	[-0.25,0.88]
Electoral competitiveness	0	0	0.02
	[-0.02,0.02]	[-0.02,0.02]	[-0.01,0.04]
Divided government	-0.1	-0.01	0.25
	[-0.55,0.36]	[-0.47,0.44]	[-0.26,0.75]
Term limits	-0.1	-0.07	0.13
	[-0.54,0.34]	[-0.51,0.36]	[-0.37,0.63]
Unified democratic control	0.06	0.1	0.72
	[-0.46,0.59]	[-0.43,0.62]	[-0.00,1.44]
Veto Proof Legislature	-0.49*	-0.41*	-0.69*
	[-0.87,-0.10]	[-0.80,-0.03]	[-1.26,-0.12]
South	-0.15	-0.13	-0.39
	[-0.66,0.37]	[-0.65,0.38]	[-0.99,0.21]
Prof*selection			
Legislature		0.06	0.38
		[-0.47,0.60]	[-0.20,0.96]
Election		0.30*	0.62**
		[0.02,0.57]	[0.25,0.98]
Ideology Match			-0.05
			[-0.54,0.44]
Constant	0.04	-0.01	-0.75
	[-0.91,1.00]	[-0.96,0.94]	[-1.96,0.47]
N	117	117	77
Adjusted R^2	0.036	0.059	0.232

95% confidence intervals in brackets

Pvalues $+p < 0.1, *p < 0.05, **p < 0.01, ***p < 0.001$

between judicial access and professionalism is dependent on how the judges in that state are selected.[17] In states where the executive branch both nominates and affirms the judges, a more professional legislature should be less likely to assign wide access to the judiciary. The negative direction indicates this relationship is indeed present. The small confidence interval that does not cross the zero line also indicates that this relationship is significant.

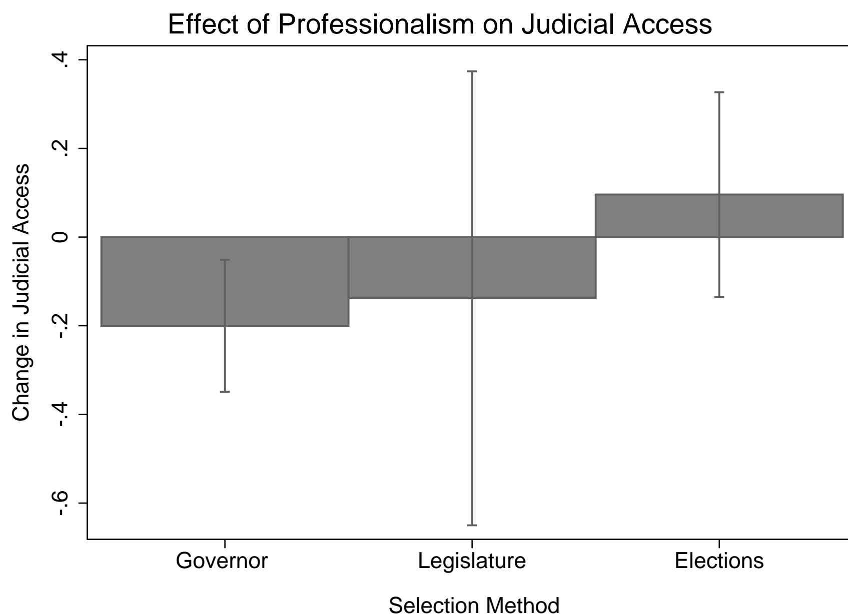

FIGURE 2: Model 2: Bar chart of marginal effects of selection method on professionalism with confidence intervals.

Secondly when higher professional legislatures are a party to the process of judicial selection, either in collaboration with the governor or a sole legislative duty I hypothesize a negative relationship that is not as extreme as compared to a sole-governor process. The marginal effects do show a less negative effect (a difference of .062) demonstrating a more professional legislature is less likely to grant wider judicial access even when the law-making body is a party to the selection process, but not as harshly when compared to when the governor selects and appoints the judges. This relationship though carries a large confidence interval, which makes it indistinguishable from the null hypothesis.

[17] Combining selection methods into a binary variable of governor and non does not yield more significant results, but if anything hides the positive aspect of elections in both interaction models.

Interestingly when judges are elected, professional legislatures are more likely to provide wider judicial access. I hypothesized a relationship similar to the previous legislature selection dependency, but this sign is in the opposite direction. Maybe this could be due to the fact these judges are held accountable by the same public legislators are attached to and thus more susceptible to follow legislative intent to satisfy their constituency. As previously mentioned, Langer's work on state elected judges highlights the vulnerability of elected judges as campaign targets for legislators (Langer, 2002). This suggests quite a close relationship between elected judges and law-makers, but is once again an insignificant result.

My third model in Table 2 retains the interaction and adds the court ideology match variable to account for the court ideological matching variable, which is insignificant.[18] In this model observations are much more limited due to the measurement of court ideology time frame. Veto proof legislatures retain significance. In addition under this model unified Democratic legislatures are seen to have a positive relationship, all else equal, at the .1 level with judicial access. This is a tenuous result based on smaller data, but does have the correct positive sign associated with the theory that one party control, specifically Democratic legislatures are more likely to grant judicial access.

The marginal effects of the interaction in Model 3 are graphed in Figure 3. The difference between the margins in Model 3 from the previous is reflected in a the significance between the selection methods. The fewer observations do not aid in interpreting the large confidence intervals from legislative selection. The relationship between professionalism and judicial access as dependent on selection by the governor is now much more negative. The key difference between Models 2 and 3 is that the relationship between governor appointments and elected judges are significantly different from one another and demonstrate distinct relationships meaning that selection method of judges does have a different

[18]The drop in the number of observations results from the data used to create the ideological matching variable which only covers years between 1990-2010.

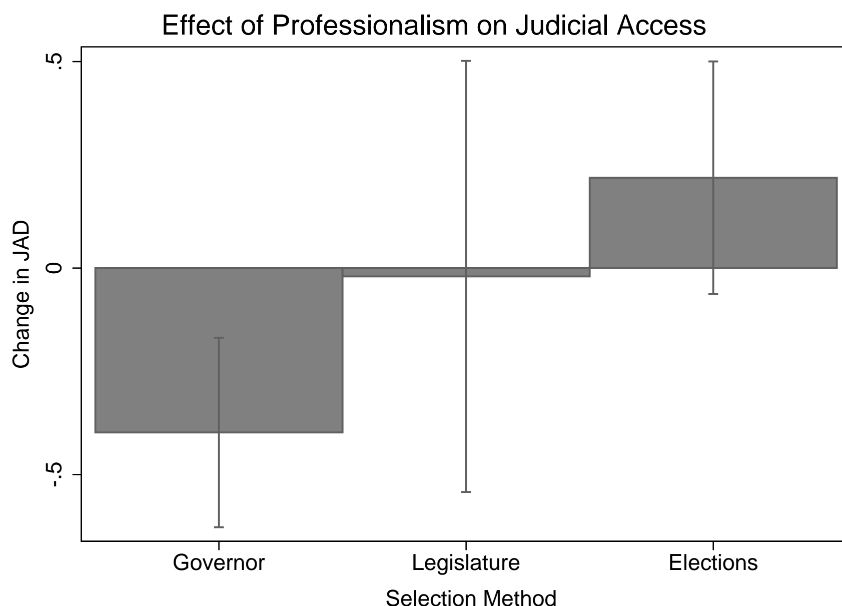

FIGURE 3: Model 3: Bar chart of marginal effects of selection method on professionalism with confidence intervals.

effect on how professionalism is associated with judicial access. Specifically, a governor model of judicial selection has a larger negative effect on the relationship between professionalism and judicial access compared to judges who are elected. The wide confidence intervals of elected judges however does not discern whether the relationship of an elected judges model is positive or negative for the effect of professionalism on judicial access.

Discussion

State legislatures differ from one another in many ways. Two outstanding features are the bodies' resources to fulfill their duty and the powers the body has in regards to the other branches. The diverging professionalism between legislatures has often been a concern for scholars interested in the balance of powers and judicial access could provide a relief to overburdened legislatures who may not be able to act out oversight powers as comprehensively as other legislatures might.

Hence my first hypothesis predicted that as professionalism increases, judicial access decreases and my first model is unsuccessful in finding such a relationship after controlling for other variables. The sign for professionalism is negative and statistically significant at the .1 level, which is tenuous at best.

With more data and a deeper exploration of this relationship with other models of research I would expect increasingly robust results that provides evidence for my initial hypothesis. Such a finding may explain how the comparatively less professional legislatures are still able to craft detailed legislation that defers more to an executive branch yet retain a significant oversight feature by leveraging the courts power of judicial review. While not a perfect balance, the legislatures that may seem to have a lower ability may instead have an alternate capacity where a concentration of ex-ante and ex-post controls are placed on executive agencies to be enforced by another branch. Such a practice would relieve the legislative body of a costly police style monitoring system of an executive agency that has been extremely delegated to.

One explanation for my lack of results could be due to the incapacity of some legislatures to craft laws that allow for judicial access. Highly professional legislatures have the capacity and expertise to carefully assess how much power they want to give to the courts, whereas a part-time body may not possibly afford the luxury of debating, assessing and ascertaining a comfortable level of judicial access if it is a concept on their radar. A related hypothesis may still hold in that the relationship may not be linear. Instead this relationship may curve so as to account for the most amateur legislature and most professional as ones that do not exercise wide judicial access, but states between these extremes on the scale may have the capacity and incentive to increase judicial access.

My second hypothesis focused on the judicial selection method, expecting judicial access to increase when the legislature is a party to the process. Initially selection method seemed to have no obvious effect on judicial access until it was interacted with professionalism.

After observing the marginal effects of professionalism via selection method did the evidence begin to paint a mixed picture for my theory.

When legislatures are a party to the judicial selection and appointment process in my second model, there is a negative relationship between professionalism and judicial access. My theory predicts that the more professional a legislature, the less they will depend on the judicial branch even if they appoint the judges and these results will vary by the selection method. My results on legislative selection methods are not accurate enough to comment on, but when the governor is responsible for judicial appointments more professional legislatures are much less likely to depend on the judiciary than judges selected by elections. In fact, when judges are elected my data provides unexpected insight into a relationship where more professional legislators may provide wider judicial access in their legislation. If this finding can be substantiated by more data, it could have an interesting impact for studies focusing on the relationship between elected judges and legislators. Perhaps elected judges are too vulnerable to act alone and ally themselves with the legislature. Or possibly that these judges who roughly share the same constituents as legislators are strongly aligned ideologically which would increase judicial access.

In addition to the selection of judges, there are other constraints which may be important to view in future research. The method of judicial retention among the states is another moving part in the complex machinery of shared powers among the branches,[19] as is budgetary power. Perhaps judicial selection catches a glimpse of a much more complex relationship in attempting to determine which state government procedures can influence judicial access.

My fourth hypothesis concerns divided government, which did not harbor any significant results with different signs between Models 1, 2 and Model 3.

[19] I did conduct a model with judicial retention methods coded similarly to selection method. This data however was more limited and produced results with standard errors too large to discern any relationship.

In this paper I have sought to observe judicial review as a dependent variable that can be manipulated by the legislative branch. State legislatures have the tools and capability to enlist the courts as an ally in preserving legislative intent, even substituting the judicial power of review for legislative oversight.

The legislature can provide access by either driving or deterring lawsuits against government agencies dependent on whether they believe the court is sympathetic to the legislature's policy preferences. Once a suit is in place the legislative body guides how the court can rule on the case via provisions written into law, giving as much or little deference to the courts as the law-making body is willing to trust the judicial branch.

My measure of judicial access and deference has attempted to capture these guiding provisions within the laws governing agency actions. While it is an early measurement of a latent variable, I am confident that what is captured by the graded response model is an indication of one branch's attempt to control judicial review within the states.[20]

This study is the initial step in providing a measure of judicial access and applying it to the states. Observing the federal system of the United States offers empirical leverage to understand not only how the separate states may operate, but also under what conditions judicial access is widened. This preliminary analysis would benefit greatly from additional data as the total observations severely limits the explanatory analysis. Yet even in these early stages the data presents some indication of the nature of judicial access.

This is currently one measure of judicial access based on a small amount of data. In future work, some variables may be simplified or possibly deleted from the measure to derive a measure of judicial access that is driven by the substantive decisions of a legislature to purposefully place provisions into its laws based on notions of deferring to the courts.

[20]Table C.1. in the Appendix C presents the discrimination (α) and difficulty (β) parameters for the latent measure of judicial review. These parameters characterize how the measure of judicial access is created and will enable me to understand the driving features behind the measure.

Conclusion

In a system of separate and shared powers, the interaction between branches of the government are complex. This first foray into the judicial access variable has affirmed past theories and begins to shed some light on what conditions a legislature may decide to substitute the court's power for its own.

There is some promise in my results in explaining how judicial access is granted or restricted. However the concept, measurement and testing of my models needs more data and expansion into other areas of law and governmental relations. My limited observance of licensing laws is a narrow selection of laws and expanding into more political areas such as environmental agency creation and legislation reaches broader and more political boundaries. Expansion into other legislation that has a larger impact on the population, and is more salient to the general public would also probably hold more explanatory power than the particular business of occupational licensing and government permits.

Other future work would further refine the judicial access variable. Understanding what drives judicial access could enlighten how a legislature perceives its court and the responsibilities each branch has to its constituency and one another.[21]

Currently, legislatures of varying capacities have the ability to defer to the judicial branch. My data currently shows that as legislatures become more professional, they will defer less to the courts. Alternately as legislatures are less professional, they are more likely to grant wider judicial access and substitute the court's power of bureaucrat oversight for their own. Additionally when the governor of a state selects and appoints the judges, the legislature is less likely to grant judicial access the more professional they become compared to other judicial selection methods.

[21] I begin this task in Appendix C by analyzing the difficulty and discrimination parameters of the GRM.

These findings may be weak, but open the door to future research possibility that further understand collaboration between two branches that are often seen at odds with one another.

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Appendix A

Summary Statistics

TABLE A.1: Judicial Access Variable Summary Statistics

Variable	Obs	Mean	Std. Dev.	Min	Max
Review	163	2.214724	0.5745888	1	4
Time Limits	159	0.8176101	0.4479962	0	2
Days	159	85.22642	122.1379	0	365
Venue	158	0.6075949	0.4898387	0	1
Steps	160	1.06875	0.7104067	0	3
Burden	159	1.402516	0.7387939	0	2
Scope	160	2.89375	1.276773	0	4
Standing	159	0.4025157	0.4919542	0	1
Payment	157	0.1082803	0.5136548	0	4
Costs	154	0.4545455	0.4995542	0	1

TABLE A.2: Regression Model Variables

Variable	Obs	Mean	Std. Dev.	Min	Max
Judicial Access	163	0.0001882	0.8925429	-1.8803	2.68504
Professionalism	120	-0.0909492	1.374452	-1.7787	6.51972
Selection Method	160	2.125	0.8448884	1	3
Competitiveness	125	42.03228	12.15081	10.1265	64.1228
Divided Government	143	0.4895105	0.501647	0	1
Term Limits	163	0.2208589	0.4161039	0	1
Unified Democratic Control	143	0.2657343	0.443276	0	1
Ideology Match	100	0.74	0.440844	0	1
Veto Proof Legislature	143	0.3426573	0.4762662	0	1
South	163	0.2269939	0.4201795	0	1

Appendix B

Variable Coding

TABLE B.1: Explanatory Variables

Variable	Definition	Coding	Source
Professionalism	Scores based on the first dimension of an MDS model that follows similair coding to the Squire index biennially over the years 1973-2010. This measurement has the advantage over the Squire index of biennial data, and not just one measure for each state in each decade. This measure is reported to correlate highly to the Squire index however (r=.92, p=.000).	Continuous	Bowen, D. C., & Greene, Z. (2014). Should we measure professionalism with an index? A note on theory and practice in state legislative professionalism research. State Politics & Policy Quarterly, 1532440014536407.
Compete	Holbrook and Van Dunk measure. 100-(average percent of winning candidate votes), winning margin, (percent uncontested seats) (percent safe seats) over four year moving average.	Continuous	Holbrook, Thomas M., and Emily Van Dunk. 1993. "Electoral Competition in the American States." The American Political Science Review, 87(4): 955–62.
Divided Government	All branches of government are not controlled by the same party.	1= Divided 0= Unified	Klarner, Carl E. 2003. "Measurement of the Partisan Balance of State Government." State Politics and Policy Quarterly 3 (Fall): 309-19
Unified Democratic rule	Democratic control of governor's office and the legislature.	1= Dem. Control 0= Else	Ibid
Veto Proof	Party in power has enough voting members to override a a gubernatorial veto.	1= Veto Proof 0= Else	Ibid

Table B.1 – continued from previous page

Variable	Definition	Coding	Source
South	Legislature is in a Southern state.	1=Southern 0= Else	Ibid
Term limits	Whether term limits were enacted in the state during that year.	1= Term limits enacted and legal 0= No term limits, or they have been repealed	The Term Limited States. National Conference of State Legislatures. 2015. http://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx
Matching Court Ideology	Binary variable of a match between median ideology of state supreme court and majority party of the state legislature.	1=Match 0=Else	Windett, J. H., Harden, J. J., & Hall, M. E. (2015). Estimating Dynamic Ideal Points for State Supreme Courts. Political Analysis, 23(3), 461-469.; Bonica, A., & Woodruff, M. J. (2015). A Common-Space Measure of State Supreme Court Ideology. Journal of Law, Economics, and Organization, 31(3), 472-498.

TABLE B.2: Variables and Coding for GRM

Variable	Definition	Coding
Procedure		
Time Limit	Is there a time limit on when a case can be brought for review?	1=Yes 0= No
Days	How many days until a case can no longer be brought for review? If no limit is set data is coded at 365 days.	Continuous
Venue	Can a case to be brought to court before agency channels have been exhausted?	0 = No 1 = Yes
Steps	The number of proceedings through agency tribunals before appealing to judicial court e.g. California requires agency hearing, then to office of administrative hearings or to separate administrative law judge, then to municipal court = 3 steps.	0: More than one additional step 1: One additional step 2: Straight to court

Table B.2 – continued from previous page

Variable	Definition	Coding
Standing	Binary variable indicating level of standing for a person to bring suit.	0 = Only those adversely affected by decision 1 = Any interested/potentially involved party has standing
Hearing		
Review	Coded as to how the legislation designed review.	1 = Precluding review 2 = Limiting review: Certain actions can occur only when agencies have been argued to, and found guilty of acting are extremely outside discretion. 3 = No limits to review
Burden	Indicating who has the burden of proof in the case in increasing ease for the non-agency individual. If there is no explicit mention it is assumed to be the appealing party	0= On the individual 1 = On the appealing party. 2 = On the agency
Scope	Ordered categorical in increasing delegation for the court.Coded as the highest scope of review a court can take and suggest in reviewing the agency action once specifications of review have been met.	0 = court has to accept agency's findings of fact/ be kept to the record 1 = Court/agency can take additional information into account 2 = Court requires agency to take additional information into account 3 = Court can remand/set aside parts of or entire law 4 = De Novo/ court can modify decision
Incentives		
Payment	Variable indicating if payment of costs to agency or litigant are included in law.	0 = Agency shall receive costs 1 = No costs reimbursements specified 2 = Winner may receive reimbursement 2 = Winner shall receive reimbursement
Cost	Who bears the cost of preparation for the hearing? If not explicitly mentioned it assumed to be the agency.	0 = Individual bears the cost 1 = Agency bears the cost

Theory of Inclusion for Each GRM Variable

Providing judicial access manifests itself in three stages. First are the steps a litigant has to go through before judicial review becomes an option. Some states require individuals to maneuver through several hoops within the bureaucracy before they can apply for a review by the court. California for example is a state where a person has to be heard by the agency, appeal to their specific board, must then appeal to the Office of Administrative Hearings where an ALJ will review the case who will then in turn decide on the facts of the hearing and only when an agency has accepted or rejected the ALJ's findings can an individual file for a review by the municipal court. In contrast, once a professional and occupational board has issued a decision on revocation of a license or a punishment of a professional under their jurisdiction in the states of Maryland or Illinois, that individual can appeal instantly to the courts.

When a petition for review is sent to the court the standing of the person comes into question. Even though the courts can make a decision on standing, legislatures can intentionally give standing to public groups willing to bring trial as a tool of enforcement in the courts (Smith, 2006). Some states are strict in their definitions of standing and only allow those 'adversely' affected by an agency to file a suit against an agency action. There are others however that allow for parties who may be affected by such an agency decision to join a case. Such legislation provides for a wider access to judicial review for other potentially affected groups to have standing as opposed a very narrow definition.

A final procedure for litigants to complete before a hearing in court is in the form of when to file for review. There is often a limit imposed on when a litigant can bring a case to the courts. Often 30 days from the action of an agency is provided, but again some states have no limit and in the past for California it has been as low as 20 days which limits the possibility of an appeal reaching the judicial branch.

Secondly, once the procedural hoops have been jumped through, the court must then exercise their power of review in the hearing which can also be altered by legislation. Initially, the ability review of the law must be questioned. If the law itself states it cannot undergo review then the court has almost no power to exercise. If a court can review a law, then it is either granted complete discretion to do so, or it is limited by the law to certain requirements that must be met before exercising particular discretion. Many statutes often require the court to stick to the record of the agency unless it is both argued and proven by the opposing party that the court acted arbitrarily. Only then can the court exercise its review powers to move beyond the record and modify the agency's decision.

Once the breadth of review has been set the scope must be defined and statutes often prescribe actions that the court can take once the review of a law has been complete. In regards to action against agencies the legislature has several options for the courts to follow. Should the legislature wish to restrict the judiciary's power of review, the minimal amount of discretion can be to allow the courts to review the agency's record of the administrative decision, consider the evidence and then either confirm the ruling or remand

it back to the agency. Widening this discretion further would give the court power to deny the ruling by an agency or even to modify the decision themselves.[1]

Finally, legislatures can further shape judicial access through incentives or deterrents to those who would bring a case against a government agency. A legislature can decide who has the burden of proof or suffers the costs of litigation, which can greatly influence the decision of an individual to go to court. If it is the agency who has to prove their decision was made within legal bounds, the burden is shifted onto the government and not the individual, thus making the case easier and more conducive to appeal for the non-agency litigant.

In terms of the capacity to offset costs to parties of the case, there are two costs counted in the latent judicial access variable. First is the cost for preparing the record for the court. Colorado and Georgia are states place the financial burden of preparing the record for the court to assess on the non-agency individual whereas others explicitly rest the responsibility on the agency. Such a provision can be a deterrent to individuals in pursuing further action against an agency as it will undoubtedly add to the costs accumulated through the appeals process. By placing this financial responsibility upon the agency, a piece of legislation can incentivise a non-agency individual to pursue further action outside of the bureaucracy.

Secondly, legislation can offer a further attempt to activate action against agency by suggesting or requiring a court to offset the legal fees and increase damage payments to individuals (Farhang, 2010).

With each of these variables as outlined in Table 1, I hope to capture the accessibility of the courts and how much deference a legislature provides to the judicial branch in ensuring legislative intent from state agencies.

[1]Review and scope are closely related factors of review, but are distinct concepts. Review concerns the stipulations that occur before a court can practice elements of review. Scope relates to how a court can act once the requirements for review have been met. The state of Iowa allows for a limited review of agency actions on medical licensing, however the highest court is only able to hear new information and remand the case. The courts of Nevada also have a limited review of agency action, but once the stipulations are met the court's scope allows them to modify an agency's decision. So once an agency has been proven to act beyond its statutory limit in the state, the court can react with its wide discretionary powers to correct the actions of the agency.

Appendix C

GRM Results and Analysis

	Coef.	Std. Err.	z	$P > z$	95% CI	
Review						
α	3.066	0.772	3.970	0.000	1.552	4.579
β						
$>=2$	-1.632	0.209	-7.810	0.000	-2.041	-1.222
$>=3$	0.612	0.132	4.630	0.000	0.353	0.871
4	3.125	0.496	6.300	0.000	2.152	4.097
Time Limits						
α	-1.110	0.297	-3.730	0.000	-1.693	-0.527
β						
$>=1$	1.470	0.351	4.180	0.000	0.781	2.159
2	-3.599	0.948	-3.800	0.000	-5.457	-1.741
Days						
α	2.241	0.436	5.140	0.000	1.386	3.096
β						
$>=10$	-2.073	0.303	-6.850	0.000	-2.666	-1.480
$>=15$	-1.976	0.288	-6.870	0.000	-2.540	-1.413
$>=20$	-1.767	0.254	-6.960	0.000	-2.264	-1.269
$>=28$	-1.485	0.213	-6.970	0.000	-1.902	-1.068
$>=30$	-1.409	0.203	-6.930	0.000	-1.808	-1.011
$>=35$	0.349	0.130	2.690	0.007	0.095	0.604
$>=40$	0.580	0.142	4.070	0.000	0.301	0.859
$>=45$	0.628	0.146	4.310	0.000	0.342	0.913
$>=60$	0.677	0.149	4.550	0.000	0.385	0.968
$>=90$	1.071	0.178	6.030	0.000	0.723	1.420
$>=100$	1.187	0.187	6.350	0.000	0.821	1.553
$=365$	1.226	0.190	6.450	0.000	0.853	1.598

Table C.1 – continued from previous page

	Coef.	Std. Err.	z	$P > z$	95% CI	
Venue						
α	0.477	0.215	2.220	0.026	0.056	0.898
β						
1	-0.976	0.532	-1.830	0.067	-2.019	0.067
Steps						
α	0.436	0.202	2.160	0.031	0.040	0.832
β						
$>= 1$	-2.573	1.227	-2.100	0.036	-4.978	-0.167
3	3.332	1.509	2.210	0.027	0.375	6.289
Burden						
α	0.611	0.223	2.740	0.006	0.173	1.048
β						
$>= 1$	1.535	0.577	2.660	0.008	0.404	2.666
Scope						
α	2.192	0.473	4.630	0.000	1.265	3.119
β						
$>= 1$	-1.655	0.248	-6.660	0.000	-2.142	-1.168
$>= 2$	-1.151	0.188	-6.110	0.000	-1.521	-0.782
$>= 3$	-0.672	0.143	-4.680	0.000	-0.953	-0.391
4	0.203	0.130	1.570	0.117	-0.051	0.457
Stand						
α	-0.094	0.190	-0.490	0.621	-0.467	0.279
β						
1	-3.923	8.095	-0.480	0.628	-19.788	11.943
Payment						
α	1.243	0.442	2.810	0.005	0.377	2.109
β						
2	2.762	0.724	3.810	0.000	1.342	4.182
Costs						
α	-0.311	0.207	-1.500	0.133	-0.716	0.094
β						
$>= 1$	-0.642	0.654	-0.980	0.326	-1.923	0.640

Analysis of Results

The difficulty of each measure establishes how 'difficult' it would be for a court to obtain the measured item from legislation. A low difficulty is characterized by a high probability that a court will attain a certain amount of judicial access from legislation. The low difficulty items, an easily attainable variable coding for a court, in this analysis were having stipulations to review before a court could act, the presence of time limits and the limit to bring review within 60 days, having one bureaucratic step of review before gaining access to the courts and receiving standing. These low difficulty items are not unexpected as they seem to be standard procedure across many courts, thus increasing the likelihood that legislation will include such provisions within the laws.

The high difficulty items are also largely expected. Obtaining De Novo review for instance is a difficult achievement for legislation that provides little judicial access. The widest scope of review then is then reserved for laws that provide the largest deference to the courts with De Novo becoming more likely an option as judicial access increases.

Interestingly, financial incentives to provide access have relatively high alphas. Eligibility of a plaintiff's right to payment for wrong-doing is among the most difficult items. This is partly due to the low data and rarity in which this provision occurs, but if these numbers remain high provide a strong argument consistent with Farhang for legislative intent to provide public access to the courts. Getting to the courts is half the battle and financial incentives are both a carrot for the public and stick for the agencies. Disincentives to agencies also explain why the burden of proof and legal argument that rests on the government is a high difficulty parameter. Such provisions within legislation are more likely when attempting to widen judicial access and are not simply added to all laws.

Difficulty is only one measure provided by the GRM. The discrimination statistics can reveal which variables are are better to distinguish between a piece of legislation with low judicial access and one with high. Even though the number of steps and payment variables had high difficulty, overall these variables are not ones that can differentiate the level of judicial access well between two different pieces of legislation. Standing, costs, burden and venue also have low betas.

The high discriminatory variables include the scope and type of review and the number of days to apply for review. These variables are not surprising and should distinguish quite well a law that either restricts or widens deference to the courts. Minimize the scope and remove the ability to review a law and there is no deference to the judiciary in the legislation. Increasing the time limit for review and placing the burden of proof on an agency increases access to the courts.

Appendix D

Marginal Effects

To assess the effect of professionalism interacted with judicial selection method on judicial access and deference, I have to observe the marginal effect (the first partial derivative) of professionalism on the expected value of judicial access by selection method:

$$E(JAD) = \alpha + \beta_1(Professionalism) + \beta_2(JudgeSelection)\beta_3(Competitiveness) + \beta_4(DivGov) + \beta_5(TermLimits) + \beta_6(UnfiedDem) + \beta_7(Professionalism) * \beta_8(JudgeSelection)$$

TABLE D.1: Marginal Effects of Model 2 Interaction of Professionalism and Selection Method

	dy/dx	Std. Err.	t	P>t	[95% Conf. Int]	
Professionalism						
Governor	-0.2002	0.0759	-2.64	0.008	-0.3489	-0.0514
Legislature	-0.1381	0.26126	-0.53	0.597	-0.6502	0.37393
Elections	0.09592	0.11779	0.81	0.415	-0.1349	0.32678

TABLE D.2: Marginal Effects of Model 3 Interaction of Professionalism and Selection Method

	dy/dx	Std. Err.	t	P>t	[95% Conf. Int]	
Professionalism						
Governor	-0.3981	0.1171	-3.4	0.001	-0.6276	-0.1686
Legislature	-0.0203	0.26631	-0.08	0.939	-0.5422	0.50167
Elections	0.21873	0.14372	1.52	0.128	-0.063	0.50042