THE SUPERVISORY POWER OF STATE SUPREME COURTS

98 SOUTHERN CALIFORNIA LAW REVIEW (forthcoming 2025)

ADAM B. SOPKO*

ABSTRACT

State supreme courts are currently center stage, as they face some of the most important issues of our time. But nearly all of the attention is focused on their ability to interpret state constitutions to provide rights guarantees that the U.S. Supreme Court has diminished or eliminated from the Federal Constitution. While important, judicial review is but one power available to state high courts to protect rights and provide for the general welfare. Their supervisory power—the primary source of judicial administrative authority—has served as a vital source of policymaking power to safeguard individual rights and enhance the public good. Supreme courts have relied on their supervisory power to reimagine the state criminal justice systems, reduce homelessness, strengthen voting rights, expand protections for immigrants, and more. Despite its significance, this feature of state court practice has gone virtually unnoticed. As advocates increasingly look to state courts to address more and more of society's complex and consequential issues, this distinctive aspect of their power is worth exploring.

* Associate Professor, University of Colorado Law School. Aaron Caplan, Zach Clopton, Adam Crews, Colin Doyle, Marcus Gadson, Tara Grove, Andrew Hammond, Jon Marshfield, Tim Mulvaney, Jim Pfander, Miriam Seifter, Dan Walters, Bob Williams, Abby Wood, Rob Yablon, Quinn Yeargain, and Adam Zimmerman provided helpful comments. The Article also benefited from faculty presentations at Colorado, Loyola-Los Angeles, Northeastern, Oklahoma, Rutgers, and Texas A&M, as well as discussions at the 2025 Emerging Scholars Conference in Public Law and the State Constitutions Lab. I'm grateful to Mary Berg (Wisconsin) and Charlotte Gude (Wisconsin) for terrific research assistance. The editors of the *Southern California Law Review* provided superb editorial assistance. Thanks also to Sarah Alexander for the constant support and Hunter Sopko for the long weekend naps that made this Article possible.

This Article unpacks the supervisory power by mapping its sources, applications, and limits. The supervisory power has a basis in all fifty state constitutions and enables supreme courts to oversee their judiciary's workload and operations. But as this Article shows, high courts are using this power beyond the humdrum of judicial administration to enhance substantive rights and remedies, facilitate their law development and agenda-setting capabilities, and mediate interbranch frictions. The Article's core claim is that these more expansive applications of the supervisory power are generally defensible based on the evolution of state judiciaries and supreme courts' unique role in state government. The twentieth century saw a dramatic reimagining of state high courts from inferior instruments for the other branches to powerful, coordinate members of the state policymaking apparatus. In addition to overseeing the judiciary's operations, the supervisory power thus plays an important role in a high court's ability to contribute to state governance.

This account of the supervisory power is broad but not unlimited. The Article highlights the supervisory power's internal and external limits and sketches its metes and bounds to help frame its future applications. The Article then considers this judicial practice within larger debates on judicial policymaking and state constitutional structure. It engages with critiques of a more active judicial role and lawmaking powers. It explains that the key institutional assumptions behind such assessments do not map so easily onto the unique structure of state judiciaries. Stepping back, the Article encourages a broader but more nuanced view of state judicial power and the function of state high courts that wield it.

INTRODUCTION

In recent years, advocates have increasingly looked to state judiciaries to serve as a backstop against federal rights retrenchment.[1] More and more,

1. *See, e.g.*, Matthew Segal & Julie Murray, *State Supreme Courts Offer the Best Chance to Advance Rights*, AM. CIVIL LIBERTIES UNION (May 2, 2023), https://www.aclu.org/news/civil-liberties/state-supreme-courts-offer-the-best-chance-to-advance-rights [https://perma.cc/X5JA-2KKE]; Alicia Bannon, Opinion, *The Supreme Court Is Retrenching. States Don't Have To.*, POLITICO (June 29, 2022), https://www.politico.com/news/magazine/2022/06/29/supreme-court-rights-00042928 [https://web.archive.org/web/20230923215043/https://www.politico.com/news/magazine/2022/06/29/supreme-court-rights-00042928]; Eyal Press, *Can State Supreme Courts Preserve—or Expand—Rights?*, NEW YORKER (June 3, 2024), https://www.newyorker.com/magazine/2024/06/10/can-state-supreme-courts-preserve-or-expand-rights [https://web.archive.org/web/20250225120737/https://www.newyorker.com/magazine/2024/06/10/can-state-supreme-courts-preserve-or-expand-rights].

state high courts are taking up some of the most consequential issues of our time, ranging from abortion rights and climate change to gender and racial equality.[2] Driving this turn to the states is the realization that state supreme courts can interpret state constitutions to provide greater rights protections than their federal counterpart.[3]

But as some courts scholars have reminded us, a narrow focus on judicial review risks an incomplete understanding of how these institutions function.[4] For those who study state courts, limiting our attention to conventional features of judicial power is more likely to result in undertheorized conceptions of what it is state courts do. However, for those looking to state courts as a possible response to regressive federal policies, such a singular view risks overlooking the full potential of state judiciaries. Indeed, for state high courts, their supervisory power—the primary source of their administrative authority—has played an essential part in their role as constitutional innovators and in providing for the public good.

The supervisory authority is a freestanding source of flexible, discretionary power.[5] It can supplement or enhance other aspects of court authority, as well as serve as a standalone basis for judicial action. It is not subject to many of the traditional limits on judicial authority, like

2. *See, e.g.*, Press, *supra* note 1; Lara Bazelon & James Forman, *Aim Lower, Liberals Have Lost the Supreme Court for a Generation. Their Only Hope Is to Seize State Courts and Launch a Counterrevolution.*, N.Y. MAG. (July 5, 2023), https://nymag.com/intelligencer/2023/07/liberals-should-use-state-courts-to-check-the-supreme-court.html [https://web.archive.org/web/20241122062319/https://nymag.com/intelligencer/2023/07/liberals-should-use-state-courts-to-check-the-supreme-court.html]; *Reproductive Rights in State Constitutional Law*, *Transcript of Panel from Symposium: The Promise and Limits of State Constitutions*, STATE CT. REP. (Feb. 9, 2024), https://statecourtreport.org/our-work/analysis-opinion/reproductive-rights-state-constitutional-law [https://perma.cc/S5MC-9XNY]; Martha F. Davis, *The Greening of State Constitutions*, STATE CT. REP. (Aug. 14, 2023), https://statecourtreport.org/our-work/analysis-opinion/greening-state-constitutions [https://perma.cc/TLZ6-E3YP].

3. *See, e.g.*, Christine Fernando & Andrew DeMillo, *Abortion Debate Creates 'New Era' for State Supreme Court Races in 2024, with Big Spending Expected*, ASSOCIATED PRESS (Dec. 29, 2023), https://apnews.com/article/state-supreme-courts-abortion-redistricting-2024-931a453131fac282815ae31b4f0ea271 [https://web.archive.org/web/20250421024008/https://apnews.com/article/state-supreme-courts-abortion-redistricting-2024-931a453131fac282815ae31b4f0ea271] (statement of Brigette Amiri, deputy director at the ACLU's Reproductive Freedom Project) ("After Roe v. Wade was overturned, we had to turn to state courts and state constitutions as the critical backstop to protecting access to abortion."); Jess Krochtengel, *State Constitutions Take Spotlight Post-Dobbs*, LAW360 (Jan. 10, 2023), https://www.law360.com/articles/1564233/state-constitutions-take-spotlight-post-dobbs [https://perma.cc/C9FX-R9HW].

4 *See* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 207–08 (1983) (suggesting state constitutional law scholars too often overlook aspects of state court power beyond judicial review); *cf.* Martin Shapiro, *Public Law and Judicial Politics, in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II 365, 365–66 (Ada W. Finifter ed., 1993) (making a similar claim concerning scholars who study the U.S. Supreme Court).

5 *See infra* Section II.B.1.

justiciability and stare decisis, enabling courts to act where they might otherwise be unable to. And courts can use the power through adjudication as well as outside of resolving a case. Thus, at its most basic level, the power enhances state supreme court capacity.[6]

The supervisory power has roots in all fifty state constitutions and provides the authority for supreme courts to manage the judiciary. It enables them to oversee judiciary personnel, control the court system's workload, and supervise its general operations.[7] Courts rely on the power to close courthouses due to inclement weather, impose workplace vaccination policies for judiciary personnel, manage complex litigation, revise and implement new jury instructions, and more.

However, this Article shows that state high courts use the power for much more than that. Indeed, despite its seemingly managerial focus, state supreme courts have relied on their supervisory power to craft sub-constitutional rights, strike statutes, and fill policy gaps left by the legislative and executive branches, among other more expansive applications.

In the past few years alone, the supervisory power has been at the center of some of the highest-profile cases in state courts. For example, following a report revealing a Massachusetts drug lab had fabricated evidence in thousands of cases over several years, the Commonwealth's highest court fashioned a historic remedy, ordering dismissal of more than 24,000 convictions obtained as a result of the lab's work.[8] Several states have reformed their jury systems, emphasizing the harsh realities of racial bias in jury selection, porous nature of federal constitutional protections, and bleak outlook at the U.S. Supreme Court for revitalizing relevant doctrines.[9] Nearly a dozen supreme courts sought to limit the harms associated with homelessness in their states during the COVID-19 pandemic by preventing trial courts from hearing eviction proceedings.

Additional examples abound. High courts have relied on their

[6] *See infra* notes 98–154 and accompanying text; *infra* notes 155–194 and accompanying text.

[7] For more detail on the definition this Article uses, *see infra* notes 20–22 and accompanying text.

8. *See* Comm. for Pub. Couns. Servs. v. Att'y Gen., 108 N.E.3d 966, 988–89 (Mass. 2018); Press, *supra* note 1.

9. *See, e.g.*, Order Amending Rules 18.4 & 18.5 of the Rules of Criminal Procedure & Rule 47(e) of the Rules of Civil Procedure, In re Rules 18.4 & 18.5, Rules of Crim. Proc. & Rule 47(e), of the Ariz. Rules of Civ. Proc., No. R-21-0020 (Ariz. Aug. 30, 2021); State v. Andujar, 254 A.3d 606, 626 (N.J. 2021); N.J. CTS., RULE 1:8-3A ("REDUCTION OF BIAS IN THE EXERCISE OF PEREMPTORY CHALLENGES") (August 2022) https://www.njcourts.gov/sites/default/files/attorneys/jury-reforms/newrule183a.pdf [https://perma.cc/8DZQ-MUFR]. *See also* Thomas Ward Frampton & Brandon Charles Osowski, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1, 54–56 (2024) (studying the role of state supreme court rulemaking power and supervisory authority in jury reform in the context of additional ways state courts can exceed the limits of constitutional doctrine).

supervisory power to craft sub-constitutional privacy rights; enhance administrative protections for incarcerated people; provide a right to civil representation for indigent parties; allow non-parties to appeal adverse decisions; and facilitate global settlements in complex civil cases.[10] Further, courts have used their supervisory power to collaborate with other branches to make policy across a host of important areas ranging from public health to criminal justice and housing.

Many of these examples drew national attention and helped highlight the possibilities and promise that lie in state institutions to make our legal system more just.[11] But while the spotlight shined on the outcomes themselves, what made them possible largely remained in the shadows—the courts' supervisory power.

Like state high courts, the U.S. Supreme Court has supervisory power as well. To sharpen our understanding of the state-court power, we should consider its federal counterpart, too. As we shall see, the two differ in important ways. The federal supervisory power is rarely used, narrower in scope, and less powerful. Despite this asymmetry, the U.S. Supreme Court's supervisory power has attracted a significant amount of scholarly attention.[12] That literature has largely viewed the power with skepticism.[13] Critics question its legitimacy because it lacks a plausible source, is inconsistent with the Court's role, and is in tension with federal separation-of-powers principles.[14]

Things look very different in the states. The supervisory power is a regular part of supreme court practice, its applications are more expansive, and its reach significantly more potent than its federal analogue.[15] Further,

10. *See infra* Part II.A.1 (providing additional examples).

11. *See, e.g.*, Press, *supra* note 1; Leah Litman, Mary Ziegler, Erwin Chemerinsky, Anthony Sanders, Ilya Somin, Michael Burger, Julie Murray, Miriam Seifter, Andrea Lewis Hartung, Marcus Gadson, Joshua A. Douglas, Meryl Justin Chertoff & Kathrina Szymborski Wolfkot, *2023's Most Significant State Constitutional Cases*, STATE CT. REP. (Dec. 19, 2023), https://statecourtreport.org/our-work/analysis-opinion/2023s-most-significant-state-constitutional-cases [https://perma.cc/3YMJ-52U6].

12. *See, e.g.*, Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984); Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001); James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515 (2001); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433 (2000) [hereinafter Pfander, *Jurisdistion-Stripping*]; Bruce A. Green, *Federal Courts' Supervisory Authority in Federal Criminal Cases: The Warren Court Revolution That Might Have Been*, 49 STETSON L. REV. 241 (2020).

13. *See* Note, *Equity and the Power of Procedural Supervision*, 137 HARV. L. REV. 1425, 1426 n.11 (2024) (collecting sources).

14. *See infra* notes 264–274 and accompanying text.

15. *See infra* Section II.A.1.

state supreme courts invoke the supervisory authority proactively, not waiting for parties to file suit, challenging certain institutional assumptions as to how courts exercise authority.[16] Despite its significance, the state supervisory power has generated little scholarly attention. This Article thus shines a light on a consequential yet overlooked aspect of state court practice.

The Article's core claim is that these more expansive applications of the supervisory power are a generally defensible aspect of state supreme court practice that follows from the modern institutional development of state high courts and can be defended as a distinctive feature of their role in state governance.

To advance that thesis, Part I begins by exploring where the supervisory power comes from. It first canvasses all fifty state constitutions, showing that the power has a basis in each state charter. That constitutional foundation alone, however, does not provide the supervisory power's full genealogy. Part I thus turns to how the relevant state constitutional provisions came to be—as well as the institutional developments that prompted them. It traces the evolution of modern state supreme courts and their need for a broad, flexible source of power. During the twentieth century, state court reformers like Roscoe Pound and the American Judicature Society sought to elevate state judiciaries from simply a collection of courts to a meaningful coordinate branch. Their efforts changed the structure of court systems, the role of supreme courts in state governance, and the scope of supreme court authority. They gave supreme courts more power—namely, the supervisory power—and revised the background assumptions that governed how courts use it. That background tells us where the supervisory authority came from and provides context to understand the broader applications at the heart of this Article.

Part II presents a descriptive account of the supervisory authority, highlighting state high courts' more expansive applications of the power. That account shows us that state supervisory practice is vast and varied. To account for this complexity, the Article provides a taxonomy that describes both the power's many functions and its key attributes. It shows that the power is a highly flexible, potent form of judicial authority that enables supreme courts to effectuate the judiciary's prerogatives as well as the public interest. This account is deepened by considering its federal counterpart. A brief review of the U.S. Supreme Court's supervisory power demonstrates

16. As described in greater detail below, this is distinguishable from advisory opinions, still another manifestation of state court power that is often used to differentiate state high courts from their federal counterpart. *See infra* note 192 and accompanying text. Briefly, advisory opinions are still reactive in nature—a coordinate branch (governor or legislature) will seek the high court's advice on an issue. In contrast, state high courts, when wielding the supervisory power, need not wait.

that state supervisory power differs in kind—a feature of state court practice that exceeds the boundaries surrounding its federal analogue.

Part II presents a broad, potent, highly discretionary form of judicial power. However, the supervisory power is not unlimited. Part III explores its boundaries and limits. To account for the power's breadth and flexibility, I propose a model I refer to as the *zone of supervision* that sketches the perimeter of the power's permissible uses. I then turn to how courts are sanctioned when they step outside their zone of supervision. In short, state constitutional structure provides tools to control and limit judicial power when courts exceed their zone of supervision.

Finally, Part IV considers the supervisory power's theoretical and normative implications. At a conceptual level, this Article's account of the supervisory power expands our understanding of supreme courts' policymaking capacity and role within a state's broader governance apparatus. As a normative matter, Part IV considers the arguments against expansive notions of judicial policymaking and concludes such criticisms are based on institutional assumptions that do not track state judicial structure. Thus, broad uses of the supervisory power are not per se problematic; we should instead evaluate each use on a retail level with regard to the court's own zone of supervision.

Stepping back, the Article makes three contributions. First, it offers a taxonomy that maps supreme courts' varied uses of their supervisory power and its key attributes. Second, it plots the supervisory power's limits and proposes a model that both explains prior uses of the supervisory power and helps frame its application in the future. Finally, the Article makes a normative claim, arguing that supreme courts' expansive use of their supervisory power is a generally defensible and legitimate feature of state court practice.

One additional note before proceeding: this Article is in service of a larger project to understand state courts and their role in state governance. For years, these institutions have largely occupied a scholarly "backwater."[17] But as we have seen, that relative inattention to state courts has surfaced at the heart of some of the most pressing issues of our time, complicating those questions in the context of both state and federal public law.[18] To that end,

17. *Cf.* Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994) (describing the perceptions of some scholars of the field of federal courts).

18. *See, e.g.*, Press, *supra* note 1 (discussing the role of state institutions in the context of democracy, climate, criminal justice, and more); Moore v. Harper, 600 U.S. 1 (2023) *cf.* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 207–08 (1983) (noting the paucity of scholarship on the various powers of state high courts beyond judicial review in the state constitutional law literature).

this Article's thesis supports a broader call to conceive of state courts on their own terms.[19] We should not presume that frames and norms born in the federal courts are appropriate, ideal, or even applicable to state courts. Instead, these institutions deserve their own investment to surface their puzzles and better understand their possibilities.

I. THE CREATION OF STATE JUDICIARIES AND THE SUPERVISORY POWER

The supervisory power is the lifeblood of state supreme courts. As this Article shows, it enables them to facilitate the judiciary's day-to-day operations, protect their institutional interests, advance their prerogatives as a coequal branch in state governance, and more. To understand this power, then, we must evaluate both how it came to be and its relationship to courts' institutional identity. This Part takes up that task. As shown in the first Section below, the supervisory authority is a constitutional power—it claims a constitutional basis in all fifty states, either through express provision or judicial interpretation of more general language.

But these constitutional roots do not tell us everything. We must also consider the creation of the underlying state constitutional provisions—and the institutions they empower. The second Section traces that story by exploring the institutional development of modern state supreme courts and its connection to the supervisory power. State court reform efforts during the twentieth century sought to elevate state judiciaries from simply a collection of courts to a meaningful coordinate branch. Those efforts changed the structure of court systems, their role in state governance, and the scope of supreme court authority. They gave supreme courts more power—namely, the supervisory power—and revised the background assumptions that governed how courts use it. Those changes set the baseline for both the institution and modern supervisory practice.

Before turning to where the supervisory power comes from, we should note this Article's definition of the concept. State courts have rarely provided a clear description of the power. They have largely relied on vague statements and citations to capture the wide universe of how they use the

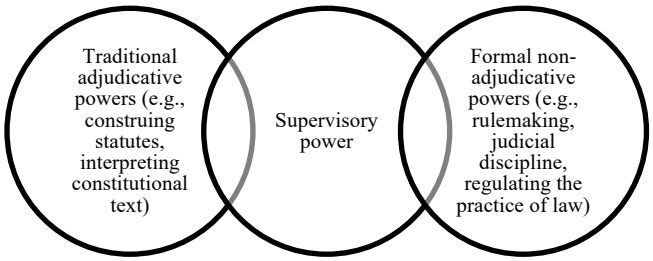
19. In this sense, I join some of the existing voices calling for a greater substantive and methodological emphasis on the nuance and complexity that attend state courts. *See, e.g.*, Adam B. Sopko, *Invisible Adjudication in State Supreme Courts*, 102 N.C. L. REV. 1449 (2024); Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 250–55 (2018); Anna E. Carpenter, Alyx Mark, Colleen F. Shanahan & Jessica K. Steinberg, *The Field of State Civil Courts*, 122 COLUM. L. REV. 1165 (2022); Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031 (2020).

power.[20] This Article's definition reflects that ambiguity but attempts to bring clarity to the concept through the synthesis of this distinctive court practice within states and across them.

The supervisory authority is a power that state high courts possess either because it is expressly provided by a state's constitution or because courts have adopted it by construing more general constitutional provisions.[21] It is the primary source of administrative authority for state high courts to oversee the judiciary. It facilitates judicial administration, personnel management, and general control of the court system's workload and operations. Those categories include both judiciary policymaking and case management decisions.[22] While this power may at times implicate other aspects of supreme court authority, like regulatory oversight of the practice of law and judicial discipline, courts typically understand these powers as distinct from their supervisory authority.

Figure 1 below approximates the relative relationship between the supervisory power and more familiar forms of judicial authority.

FIGURE 1. THE SUPERVISORY POWER VERSUS OTHER FORMS OF COURT POWER



[20] *See, e.g.*, Bennett L. Gershman, *Supervisory Power of the New York Courts*, 14 PACE L. REV. 41, 44 (1994) ("[T]he New York courts have never actually formulated a doctrine of supervisory jurisdiction, nor have the courts carefully analyzed the principles underlying the exercise of such power. The decisions most often are guarded, ad hoc, unreasoned, and inconsistent.").

21. The constitutional basis for this power is discussed in greater detail below. *See infra* notes 23–**Error! Bookmark not defined.** and accompanying text.

22. And here, there can be a range in terms of scope. For example, policymaking can include questions like whether judiciary personnel must be masked in the workplace during a contagious pandemic, as well as how best to eliminate racial bias from the court system. Case management can include decisions like whether a particular case should be transferred to another judge and whether several hundred disputes arising from a single mass tort should be consolidated on a single court's docket.

The forms of power overlap because the supervisory authority is its own standalone source of power that courts use as the sole source of a decision. But courts can also rely on the power to supplement other aspects of their authority. For example, to enhance their powers of ordinary judicial review, a court might use its supervisory power to override justiciability defects or find that a party has violated a statute and use their supervisory power to enhance the regularly available remedy.

It can also supplement other distinct forms of judicial power, like courts' disciplinary authority over judges. For example, a supreme court's formal disciplinary authority may avail it of only a limited number of sanctions—suspending a judge or removing them—whereas the court can discipline judges in other ways that fall below such penalties via the supervisory power, like transferring a case away from a judge for misbehavior that does not rise to the level of formal suspension or removal. These brief examples highlight the supervisory power's hallmark of flexibility and informality, which I discuss in more detail in Section II.A.

To be sure, this simplistic diagram does not fully capture the supervisory power's nuance. That is best demonstrated through the examples provided in Part II. This rough sketch is designed to help complement the basic definition provided above as well as the more detailed historical and doctrinal discussions that follow.

A. STATE CONSTITUTIONAL ROOTS

State high courts in all fifty states claim a constitutional basis for their supervisory power. In thirty-two states, the power is expressly provided for in the state constitution. The language differs somewhat from state to state, but formulations include "[g]eneral administrative and supervisory authority," "administrative supervision over all the courts of the state," "general supervision and control of courts of inferior jurisdiction," "general superintending control over all inferior courts," "administration and supervision," and so on. These clauses vest this power in the supreme court, chief justice, or both. Of these, twenty-one have a clause that explicitly refers to a supervisory authority.[23] In the other eleven states, courts rely on the

23. Those states are Alabama, Ala. Const., § 140; Arkansas, Ark. Const. amend. LXXX, § 4; Colorado, Colo. Const. art. VI, § 2 (1); Delaware, Del. Const. art. IV § 13; Illinois, Ill. Const. art. VI, § 16; Indiana, Ind. Const. art. VII, § 4; Iowa, Iowa Const. art. V, § 4; Louisiana, La. Const. art. V, § 5(A); Michigan, Mich. Const. art. VI, § 4; Missouri, Mo. Const. art. V, § 4; Montana, Mont. Const. art. VII, § 2; New Mexico, N.M. Const. art. VI, § 3; New York, N.Y. Const. art. VI, § 28; Ohio, Ohio Const. art. IV, § 5; Oklahoma, Okla. Const. art. VII, § 4; Pennsylvania, Pa. Const. art. 5, § 10; Texas, Tex. Const. art. V, §§ 3, 31; Vermont, Vt. Const. ch. II, § 30; West Virginia, W.Va. Const. art. VIII, §§ 3, 16; Wisconsin, Wis. Const. art. VII, § 3; Wyoming, Wyo. Const. art. V, § 2.

constitution's general grant of judicial power or another specific clause,[24] infer the power from multiple clauses related to the judiciary,[25] or from the judiciary article as a whole.[26]

A further ten supreme courts refer to their supervisory authority as an "inherent" power, one that necessarily flows from the structure of the state's judiciary and the position of the court at the top of the judicial hierarchy.[27] One could fairly describe these states as constitutional as well, since the underlying judicial structure, like the supreme court itself, is a creature of the state constitution.

In another six states, the supervisory power is said to come from both the state constitution and a statute.[28] In the remaining two states, the source

24. In Maine, Maryland, and Washington, the high courts point to the general judicial power clause in the state constitution. Me. Const. art. VI, § 1 (judicial power clause); State v. White, 285 A.3d 262, 273 (Maine 2022) (construing it as such); Md. Const. art. IV, § 18; In re Petition for Writ of Prohibition, 539 A.2d 664, 669–70 (Md. 1988); Wash. Const. art. IV, § 1; State v. Fields, 530 P.2d 284, 286 (Wash. 1975). In Alaska and New Jersey, the supreme courts locate their supervisory power in a constitutional provision that vests both rulemaking power as well as regulatory authority over the practice of law. Alaska Const. art. IV, § 15; N.J. Const. art. VI, § 2. That Alaska and New Jersey locate their supervisory power in the same place should be unsurprising, as the judiciary article of Alaska's constitution was based primarily on New Jersey's. *See* Mildred R. Hermann, *Building a State Judiciary*, 39 NEB. L. REV. 265, 271–72 (1960); Robert F. Williams, *Alaska, The Last Statehood Constitution, and Subnational Rights and Governance*, 35 ALASKA L. REV. 139, 154 (2018) (noting that one of the drafters of the Garden State's judicial article participated in the drafting of Alaska's first constitution).

25. Arizona, Ariz. Const. art. VI, §§ 1, 3; Kentucky, Ky. Const. §§ 110, 115, 116; Barker v. Com., 379 S.W.3d 116, 126 (Ky. 2012) (stating that sections 110, 115, and 116 of the Kentucky Constitution "extend to the Supreme Court of Kentucky supervisory powers over the judicial branch"); Utah Const. art. V, § 1, art. VIII, §§ 1, 4; State v. Thurman, 846 P.2d 1256, 1266 (Utah 1993). To be sure, Utah's high court has referred to its supervisory power as "inherent," as well as "constitutionally granted." *Id.*; Pleasant Grove City v. Terry, 478 P.3d 1026, 1040 (Utah 2020). As noted in this Article, such conceptions of the supervisory power are not inconsistent—because the supreme courts are creatures of the state constitution, their powers, even if unwritten or underdetermined, flow from the constitution itself.

26. Florida, Fla. Const. art. V; North Carolina, N.C. Const. art. IV; South Carolina, S.C. Const. art. V.

27. These states are California, People v. Delgadillo, 521 P.3d 360, 370 (Cal. 2022), as modified (Feb. 15, 2023), reh'g denied (Feb. 15, 2023); Connecticut, State v. Holloway, 553 A.2d 166, 171–72 (Conn. 1989); Georgia, Hayes v. State, 405 S.E.2d 660, 668 (Ga. 1991) (Benham, J., concurring); Fleming v. State, 270 S.E.2d 185, 188 (Ga. 1980); Kansas, State v. Sherman, 378 P.3d 1060, 1076 (Kan. 2016) (referring to "our inherent supervisory powers"); Minnesota, State v. McNeilly, 6 N.W.3d 161, 193–94 (Minn. 2024); Mississippi, Dorrough v. State, 437 So. 2d 35, 37 (Miss. 1983); Nebraska, State v. Moore, 730 N.W.2d 563, 564 (Neb. 2007); Nevada, Halverson v. Hardcastle, 163 P.3d 428, 429, 439–41, 443 (Nev. 2007) (recognizing this court's supervisory authority to administrate rules and procedures "when reasonable and necessary for the administration of justice"); Cooper v. State, 422 P.3d 722, 727 (Nev. 2018) (invoking inherent supervisory power to adopt a rule to "ensure basic fairness and to further the administration of justice"); Rhode Island, Cardinale v. Cardinale, 889 A.2d 210, 223 (R.I. 2006); and Virginia, In re Bennett, 871 S.E.2d 445, 446 (Va. 2022). The Rhode Island Supreme Court has variously described the power as "inherent," "constitutional," State v. Jackson, 570 A.2d 1115, 1117 (R.I. 1990), and statutory. 8 R.I. Gen. Laws Ann. § 8-1-2. (West 2025). However, it does appear to more frequently and recently refer to the power as "inherent."

28. These states are Hawaii, Haw. Const. art. VI, § 1; Haw. Rev. Stat. § 602-4; (2025); Idaho,

of the supreme court's supervisory power is unclear; the high courts have either declined to offer an explanation or have offered competing explanations without a clear basis to suggest why one may be correct versus the other.[29]

To be sure, there is additional nuance behind these descriptions and categories. In the hybrid states, all six supreme courts have said expressly that their power comes from both statute and state constitution. However, a close reading of their opinions suggests those may be more claims of form than of substance. Indeed, in five of those six states, courts have noted in footnotes or suggested in dicta that the statute simply recognizes the authority codified in the state constitution—it does not provide it—and that even if the underlying statutes were repealed, their power would not change.[30]

While it is helpful to know that all state high courts recognize their supervisory authority as a constitutional power, that does not fully account for how courts use it. To deepen our understanding of the supervisory authority, we must consider how the underlying state constitutional provisions came to be by tracing the formation of modern state supreme courts. As we shall see, that story helps explain this feature of state court practice and provides insights into its normative implications.

Idaho Const. art. V, § 2; Idaho Code Ann. § 1-212; (West 2025); Massachusetts, Mass. Gen. Laws ch. 211, § 3 (2024); North Dakota, N.D. Cent. Code Ann. § 27-02-05.1 (West 2025); N.D. Const. art. VI, § 2; South Dakota, S.D. Const. art. V, § 12; S.D. Codified Laws § 16-2-20 (2025); and Tennessee, Tenn. Code Ann. §§ 16-3-501–04 (West 2025). Though the Massachusetts Supreme Judicial Court often points to a statute as the source of its supervisory power. *See* Mass. Gen. Laws ch. 211, § 3 (2024). However, it has previously said that the statute merely "confirm[s]" the court's supervisory authority that is vested by the Commonwealth's constitution. *See, e.g.*, Matter of DeSaulnier, 274 N.E.2d 454, 456 (Mass. 1971). Hawaii, Idaho, South Dakota, and Tennessee seem to have a similar understanding of their power. *See, e.g.*, State v. Pattioay, 896 P.2d 911, 924 n.28 (Haw. 1995) (noting that the court's supervisory power is "derived from the state Constitution and are not confined by or dependent on statute"); State v. Oldenburg, 538 P.3d 1054, 1056 (Idaho 2023) (similar); S.D. Codified Laws § 16-2-20 ("Pursuant to S.D. Const., Art. V, § 11 the Chief Justice of the Supreme Court shall have and exercise such general direction and supervision of the work of the circuit courts . . . ."); In re Bell, 344 S.W.3d 304, 305, 314 n.13 (Tenn. 2011) (noting that the legislature "may enact statutes that aid the Court in the exercise of its inherent supervisory power," but cannot "enact statutes that frustrate or are in direct conflict with [it]").

29. These states are New Hampshire and Oregon. New Hampshire's high court has said its supervisory power comes from statute but has also suggested that the authority is inherent in the court's role as the highest in the state. *E.g.*, *In re* C.T., 999 A.2d 210, 220 (N.H. 2010). Oregon's supreme court has not explicitly referred to its supervisory power in opinions, *e.g.*, State v. Lakeside, 561 P.2d 612, 622–23 (Or. 1977) (Denecke, C.J., dissenting) ("This court has not yet expressly held that we have supervisory power over the administration of justice in the trial courts."), but has assumed its existence, in some cases. *See, e.g.*, State v. Shipley, 375 P.2d 237 (Or. 1962); State v. Marsh, 490 P.2d 491 (Or. 1971). However, the Court has not offered any additional details as to where the authority comes from.

30. *See, e.g.*, *Pattioay*, 896 P.2d at 924 n.28 (noting that the court's supervisory power is "derived from the state Constitution and are not confined by or dependent on statute"); State v. Oldenburg, 538 P.3d 1054, 1056 (Idaho 2023); Kermmoade v. Quality Inn, 612 N.W.2d 583, 590 (S.D. 2000); Fullmer v. State Farm Ins. Co., 514 N.W.2d 861, 868 (S.D. 1994) (Henderson, J., concurring in part, dissenting in part); *In re Bell*, 344 S.W.3d at 314.

B. THE DEVELOPMENT OF MODERN STATE SUPREME COURTS

This Section reviews the institutional development of state supreme courts and its connection to their supervisory power.

It begins with the need for state judicial reform in the early twentieth century. The diagnosis for these changes came from Roscoe Pound, who argued in 1906 that America's state courts were too disorganized and complicated, and their operations and administration were subject to excessive legislative and executive oversight. At the heart of Pound's critique was the observation that state governments had two branches—executive and legislative—and a collection of courts; they "d[id] not have any true judicial department."[31] This observation served as the central theme for the court reform movement.

This Section then examines the changes themselves and their relevance to supervisory practice. In brief, the various reforms to elevate state judiciaries to meaningfully serve as coordinate branches affected the structure of court systems, their role in state governance, and the scope of supreme court authority. Importantly, the court reform movement gave supreme courts more power—namely the supervisory power—and revised the background assumptions that governed how they use it. Those changes set the baseline for both the institution and modern practice.

1. The Need for Reform

From the colonial era through the nineteenth century, state judiciaries largely consisted of complex, fragmented networks of courts. Borrowing from the English tradition, there was a court for nearly every kind of case—admiralty, civil, criminal, equity, probate, et cetera—distributed across a multitude of jurisdictions—city, village, state, et cetera.[32] Their jurisdiction often overlapped, and they relied on highly formal, complicated rules of practice and pleading.[33] Suits frequently bounced between courts for years due to being improperly pled for a given forum, and when a case finally reached the proper forum, courts often resolved it on procedural grounds rather than on the merits.[34] As a result, routine litigation was incredibly slow, unpredictable, and primarily an "elaborate contest of lawyerly arts."[35]

31. *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 32 ANN. REP. A.B.A. 578, 593 (1909).

32. *See, e.g.*, R. Stanley Lowe, *Unified Courts in America: The Legacy of Roscoe Pound*, 56 JUDICATURE 316 (1973).

33. Roscoe Pound, *The Rule-Making Power of The Courts*, 12 A. B. A. J. 599, 599 (1926).

34. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 120 (4th ed. 2019); Lowe, *supra* note 32, at 317.

35. FRIEDMAN, *supra* note 39, at 116.

Institutionally, state courts were generally weak and insufficiently insulated from other branches, allowing them to intrude on judicial prerogatives and strong-arm their decision-making. Local governments were typically the source of funding for much of the early state court systems, creating perverse incentives for local political regimes to influence judicial behavior.[36] Similarly, legislatures asserted a significant amount of oversight into judicial administration, especially rulemaking.[37] They were typically slow to respond to necessary changes to procedural rules, made litigation even more complicated when they did, and used their rulemaking power to advance partisan interests and patronage.[38]

By the turn of the twentieth century, the public viewed state courts as too slow, complex, ineffective, and politicized.[39] Enter Roscoe Pound. In a (now famous) speech, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Pound diagnosed the many flaws and inadequacies in state courts and proposed a solution: a unified court system.[40] He "attack[ed]" the existing approach to judicial administration in state courts as overly technical and inefficient, rendering courts largely ineffective.[41] He would refine his model judiciary over the subsequent decades, but at the heart of his vision, which served as the intellectual foundation for the state courts we have today, was the goal that "[u]nification . . . result in a real judicial department as a department of government."[42]

Pound's basic view was that judiciaries should consist of a fixed number of courts organized into two or three tiers (for example, local and statewide trial courts and a supreme court) and that courts use a set of streamlined procedural rules to resolve cases on their merits more often.[43] He also emphasized the need to vest supervisory power in the supreme court, free from legislative override, to oversee the functioning of all judiciary business.[44] Without these elements, he argued, states could not have a "true

36. *See* LARRY BERKSON & SUSAN CARBON, COURT UNIFICATION: HISTORY, POLITICS AND IMPLEMENTATION 1–2 (1978).

37. *Id.*

38. *See* ROBERT W. TOBIN, CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM 146 (1999); Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 466 (1997).

39. *See* TOBIN, *supra* note 38, at 146.

40. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395 (1906).

41. John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y. 176 , 177 (1937).

42. Roscoe Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 J. AM. JUDICATURE SOC'Y. 225, 230–31 (1940).

43. *Id.*

44. *Id.* at 229–30.

judicial department."[45]

2. State Court Modernization

Pound's diagnosis and proposed intervention of a unified judiciary served as catalysts for broader efforts to reimagine state judiciaries. Over the twentieth century, leading scholars like Henry Wigmore and Arthur Vanderbilt, and national organizations like the American Bar Association and American Judicature Society, among others, all built upon Pound's conceptual foundation by proposing a variety of model judiciary articles for states to adopt in their constitutions.[46] By mid-century, reformers were in accord that their stated mission could not be accomplished unless state judiciaries had the ability and authority to control their business.[47] This linkage between establishing state judiciaries as independent, coequal branches of government and centralizing control over their operations was a central theme of the reform efforts in the latter half of the twentieth century and is largely what spawned the supervisory power we know today.[48]

Ensuring supreme courts had the capacity to oversee the judicial branch and function as a coequal branch in state governance motivated many of the judicial innovations we see in current state constitutions. Consolidating and centralizing the many courts within state systems in favor of a clear hierarchy, with the supreme court at the top, ensured a clear chain of command and control over cases and administrative business. Supreme courts were given greater (in many instances plenary) control over procedural and administrative rulemaking as well.[49] Together, these changes gave the judiciary complete control over workload—enabling the supreme court to transfer cases and judges to optimize court resources and craft rules that better met the needs of the judiciary and litigants.

One particular reform along these lines warrants additional discussion—the streamlining of supreme courts' prerogative writ power. Prerogative writs—mandamus, habeas corpus, prohibition, certiorari, and quo warranto—date back to seventeenth-century England, where they "made

45. *Id.* at 231.

46. *See, e.g.*, BERKSON & CARBON, *supra* note 36, at 5–8 (summarizing the various proposals); Allan Ashman & Jeffrey A. Parness, *The Concept of a Unified Court System*, 24 DEPAUL L. REV. 1 (1974) (same).

47. *See* BERKSON & CARBON, *supra* note 36, at 6–8; TOBIN, *supra* note 38, at 21.

48. *See* TOBIN, *supra* note 38, at 21–22, 146–48; Carl Baar, *The Scope and Limits of Court Reform*, 5 JUST. SYS. J. 274, 275 (1980) ("The various structural and procedural reforms all reflect a desire to maintain the judiciary as a branch of government separate from executive and legislature, and capable of operating its own affairs."). This stage of state court reform is occasionally referred to as the "modern courts" movement. *See, e.g.*, MICHAEL L. BUENGER & PAUL J. DE MUNIZ, AMERICAN JUDICIAL POWER: THE STATE COURT PERSPECTIVE 35–36 (2015).

49. TOBIN, *supra* note 38, at 146.

up the heart of the supervisory powers of King's Bench."[50] At bottom, these extraordinary forms of relief provided control over lower courts to "secure the lawful and effective administration of justice."[51] Indeed, for much of their existence, "[t]he authority that a state supreme court exercised over lower courts was generally confined to [prerogative writs]" or writs of error—that is, what we might understand today as an ordinary appeal.[52] Relief issued in summary fashion where remedies at law were unavailable or unable to address the alleged harm. These writs were tools to ensure justice was done if and when a lower court erred in some extraordinary fashion.

That early practice formed the basis for the power wielded by state supreme courts after the founding.[53] State high courts referred to their prerogative writ power in sweeping terms: "hampered by no specific rules or means,"[54] "unlimited,"[55] "plenary."[56] This was because prerogative writs were designed to prevent an "injustice" caused by a lower tribunal, and such errors could come in many forms; thus, the remedial power necessarily had to be sufficiently flexible and adaptable.[57]

Despite this intended flexibility, state prerogative writ practice nevertheless operated within the procedural norms of the time and thus was subject to the same complexity and formality that sparked the reform movement. Indeed, the broader effort to streamline procedure and practice in state courts included the prerogative writ system.[58] Innovations included "all writs" or "in lieu of prerogative writs" amendments in state constitutions.[59] These provisions vested more power in supreme courts to

50. Pfander, *Jurisdiction-Stripping*, *supra* note 12, at 1442.

51. *See, e.g.*, Pushaw, *supra* note 12, at 803; *see also, e.g.*, S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40 (1951).

52. Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1013 (2003–2004)

53. Pfander, *Jurisdiction-Stripping*, *supra* note 12, at 1449 ("Americans quite consciously borrowed the model of King's Bench in contending that their supreme courts enjoyed supervisory authority to monitor inferior tribunals."). States adopted different formulations of "supervisory power"—superintending control, supervisory authority, superintendence, etc.—to refer to the same aspect of judicial power.

54. Hutchins v. City of Des Moines, 157 N.W. 881, 889 (Iowa 1916).

55. State ex rel. Fourth Nat. Bank of Phila. v. Johnson, 79 N.W. 1081, 1086 (Wis. 1899).

56. Loeb v. Collier, 59 So. 816 (La. 1912).

57. *See, e.g.*, State v. Roy, 60 P.2d 646, 662 (N.M. 1936) ("As new instances of these occur, it will be found able to cope with them. And, if required, the tribunals having authority to exercise it will, by virtue of it, possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted.").

58. *See, e.g.*, *In re* LiVolsi, 428 A.2d 1268, 1276–77 (N.J. 1981) ("The prerogative writ clause of the 1947 New Jersey Constitution was intended to streamline and strengthen the traditional prerogative writs which were available in the pre-1947 Supreme Court.").

59. *See, e.g.*, IOWA CONST. art. V, § 4; KY. CONST. § 110(2)(a); ARK. CONST. art. VII; N.J. CONST. art. VI, § 5.

provide relief in instances that might not have fallen easily into existing categories and more discretion to grant relief notwithstanding technical errors from a petitioner that would have otherwise foreclosed a remedy under prior practices. In other words, distinct from ordinary appellate review, this reform enabled high courts to intervene at any stage of litigation to correct an error or omission that is sufficiently unfair or unjust.[60]

In addition to prerogative writ powers, changes to state judicial articles granted supreme courts administrative powers, explicitly granting them policymaking power to issue orders and directives to govern judiciary and non-court personnel alike. Relatedly, courts were given regulatory authority over judges and the state bar in the form of disciplinary power.[61] Reformers also recognized these changes to court structure necessitated a "soft[er]" side to court business.[62] As a truly coequal branch, judiciaries require the ability to engage in "high politics" to maintain their prerogatives.[63] Indeed, as one commentator noted, such capacity is "essential" to realizing the reform movement's larger goal of elevating the judiciary above a mere collection of courts.[64] Formal design choices and informal norms, like placing the chief justice as the head of the court system, regularizing the chief's political responsibilities, and creating government relations offices within the judiciary, for instance, help foster this capability.[65] All of these changes flow from the need for the supreme court to supervise and oversee the operations of the court system and each resulted in an expansion of judicial power.[66]

New Jersey was the first state to implement "modern court" reforms.[67] Numerous states followed suit in the decades that followed, as reformers and scholars continued to refine the ideal judiciary structure and model

60. *See, e.g.*, Monks v. N.J. State Parole Bd., 277 A.2d 193, 198 (N.J. 1971) (providing a synthesis of New Jersey's relevant history); *In re* Jerrell C.J., 699 N.W.2d 110, 124–38 (Wis. 2005) (Abrahamson, C.J., concurring); Larry Howell, *"Purely the Creature of the Inventive Genius of the Court": State Ex Rel. Whiteside and the Creation and Evolution of the Montana Supreme Court's Unique and Controversial Writ of Supervisory Control*, 69 MONT. L. REV. 1, 58–68 (2008).

61. *See* BUENGER & DE MUNIZ, *supra* note 48, at 152–54. *See also* Nora Freeman Engstrom & James Stone, *Auto Clubs and the Lost Origins of the Access-to-Justice Crisis*, 134 YALE L.J. 123 (2024).

62. *See* Sopko, *supra* note 19 (discussing the "soft power" of state supreme courts); TOBIN, *supra* note 38, at 108, 167–70.

63. *Cf.* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1064–65 (2001) (describing "high politics" as "the promotion of larger political principles and ideological goals" and distinguishing it from "low politics"—a singular focus on partisan power plays).

64. Baar, *supra* note 48, at 278.

65. *See* TOBIN, *supra* note 38, at 47–49, 148–53.

66. *See* Buenger, *supra* note 52, at 1011–21.

67. *See, e.g.*, Lowe, *supra* note 32, at 318 ("New Jersey was the first to truly embrace the concept of court unification.").

constitutional article.[68] This interstate variation sparked a substantial debate among scholars as to what constitutes a truly "unified" judiciary—that is, which features distinguish unified from non-unified states.[69] By the early 2000s, over half of state judiciaries referred to their court systems as "unified," notwithstanding significant structural and administrative differences between them.[70] Due to the widespread, but inconsistent, approach to unification by courts and the conceptual disagreement among scholars, commentators have increasingly downplayed the value of evaluating unification at a retail level, with a granular focus on precise constitutional provisions.[71] Instead, viewing the concept at wholesale emphasizes the reformers' goal of establishing state judiciaries as coordinate branches of government and the associated changes in judicial perceptions and identity.

3. State Supreme Courts and State Governance

The accretion of these reforms had a significant impact on the identity of state supreme courts and informs the supervisory practice as we know it today. Specifically, there are two overlapping effects from the court reform movement that offer support for this conception of the supervisory authority. One concerns the ascendancy of state high courts' role as a policymaker in state governance. The other relates to the increasing importance of independence for the newly established concept of a coequal branch.

The modern court reform movement came on the heels of broader governmental changes at the state level. These changes significantly influenced the policymaking capacity of state high courts. As Alan Tarr has shown, twentieth-century court reform sprang from a larger effort to shift the largely plenary policymaking power away from state legislatures.[72] Rather than a commitment to advancing the general welfare, legislators overwhelmingly pursued personal patronage and partisan interests.[73] Indeed, by the middle of the nineteenth century, it was apparent that organizing governance around the legislature, based on the idea that they are the most

68. Beginning in 1920, with the American Judicature Society's model constitutional article, good-government organizations and scholars introduced a new unification model every 10–15 years. William Raftery, *Unification and "Bragency" A Century of Court Organization and Reorganization*, 96 JUDICATURE 337 (2013). Each subsequent refinement made slight tweaks to things like the number of tiers of trial courts, the level of legislative involvement in administration and rulemaking, and the role of lay judges, among other modifications. *Id.*

69. *See, e.g.*, *id.* (synthesizing the debate on unification in the literature).

70. *See, e.g.*, *id.* at 337; Ashman & Parness, *supra* note 46, 19–21.

71. *See, e.g.*, Ashman & Parness, *supra* note 46, at 27–28; TOBIN, *supra* note 38; Raftery, *supra* note 68.

72. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 118–26 (2000).

73. *See id.* at 117.

democratic and thus responsive branch, proved to be a mistake.[74]

State constitutions were revised to place a substantial number of limits on legislative power, like single-subject rules, the creation of legislative sessions, and positive rights. These and related changes enhanced the level of judicial review applicable in state government. Relatedly, courts were increasingly seen as the primary "safeguard against slipshod government" in the states.[75] Thus, in addition to a more expansive conception of judicial power, these design choices supported the concept of a more active, engaged judiciary.

Further, as part of the larger project of decentralizing policymaking power, state high courts were folded more directly into the state governance apparatus. In addition to their existing ability to craft new causes of action under the common law, courts were given the power to oversee the regulation of the practice of law and judicial discipline,[76] and they were vested with the authority to exercise appointment powers,[77] direct prosecutorial discretion,[78] and issue advisory opinions.[79] Others were given responsibilities to oversee statutory reform and participate in the legislative apportionment process. Some were even tasked with determining when officials in coordinate branches are no longer able to discharge their duties.

In addition to diffusing policy and governance powers to the courts, other reform-era changes enhanced supreme courts' policymaking capacity —most notably, the prevalence of discretionary appellate jurisdiction and the creation of intermediate appellate courts. These innovations shifted high courts from a position of mechanical error correction to one of law development. These conceptual changes were broadly felt too, as no one particular combination of reforms was necessarily responsible for shifting state high courts from a reactive, adjudicatory body that intervenes as a last

74. *See, e.g.*, Charles Chauncey Binney, *Restrictions Upon Local and Special Legislation in the United States*, 41 U. PA. L. REV. 613, 621 (1893) (discussing various state constitutional reforms shifting power away from the legislature as premised on the "belief that legislatures are by nature utterly careless of the public welfare, if not hopelessly corrupt").

75. *See* Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972); TARR, *supra* note 72, at 123–24 (discussing marked increase in number of statutes state supreme courts invalidated under new state constitutional provisions).

76. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1902 (2001).

77. *See, e.g.*, N.J. CONST. art. VI, § 7, ¶ 2 (vesting the Chief Justice with the power to appoint trial judges to the appellate courts); Maya Dukmasova, *Dominance of Appointed Judges in Primary Election Highlights Illinois Supreme Court's Power*, INJUSTICE WATCH (Feb. 8, 2024), https://www.injusticewatch.org/judges/judicial-elections/2024/illinois-supreme-court-appointments-explainer [https://perma.cc/3783-NAK9].

78. Anna Roberts, *Dismissals as Justice*, 69 Ala. L. Rev. 327, 330–44 (2017).

79. Hershkoff, *supra* note 76, at 1845.

resort, to an engaged, proactive agent of state governance.[80] Indeed, as Robert Kagan and others have shown, this story of institutional development reflects the "societal consensus" at the time that state supreme courts should serve as coequal participants in state governance who, like the other branches, wield their power to provide for the state's general welfare.[81]

The second relevant factor is the increasing importance of judicial independence—specifically, what that means and its linkage to the supervisory power. Before the court reform movement, considerations of independence were focused on judges—ensuring they were properly insulated to make unpopular decisions—but not on the judiciary itself.[82] This makes a certain amount of sense, as state judiciaries, as a singular branch of government, were functionally nonexistent, so there was no real institution to protect. They lacked a clear political head, relied almost entirely on the other branches for operations and administration, and were funded by local governments. Institutional independence thus came not from the judiciary's standing as a branch of government but from the independence each individual judge enjoyed.[83]

But the reform efforts changed this. As Robert Tobin and Michael Buenger have shown, what emerged is an institutional identity of state judiciaries.[84] As noted above, the modern court reform movement came on the heels of broader state-level governmental changes.[85] Those structural changes included experimenting with various methods of judicial selection, like popular elections and various formulations of merit selection, that would ensure greater independence of state court judges wielding this enhanced policymaking power.[86]

80. *See* Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Evolution Of State Supreme Courts*, 76 MICH. L. REV. 961, 962, 967 (1978) [hereinafter Kagan, *Evolution*]; Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 155 (1977) [hereinafter Kagan, *Business*].

81. *See, e.g.*, Kagan, *Evolutions, supra* note 80, at 983 (discussing the "emerging societal consensus that state supreme courts should not be passive, reactive bodies, which simply applied 'the law' to correct 'errors' or miscarriages of justice in individual cases, but that these courts should be policy-makers and, at least in some cases, legal innovators"); Buenger, *supra* note 52, at 1016 ("Perhaps the greatest impact brought by the modern institutionalization of the judiciary is . . . a broad 'institutional' independence, which involves notions of collective purpose with its attendant budgetary and political consequences.").

82. *See* G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES 52–58 (2012).

83. Buenger, *supra* note 52, at 1014.

84. *See generally* TOBIN, *supra* note 38, at 119–53 (tracing the relevant history); Buenger, *supra* note 52, at 1016 ("Perhaps the greatest impact brought by the modern institutionalization of the judiciary is an alteration of how courts view themselves."); *see also* Kagan, *Evolutions*, *supra* note 80, at 975–80.

85. See TARR, *supra* note 72, chs. 4 & 5.

86. *See, e.g.*, TARR, *supra* note 82, at 79–81.

Within these broader changes were the more specific judicial reforms discussed above. Relevant here, unification centralized more responsibilities in state judiciaries by assigning control over more programs and social services, vesting administrative and operational control in the judiciary itself —including budgetary decisions—and enhancing the scope of available judicial power to manage this construct.[87] As a result, the influence of state courts relative to coordinate branches grew tremendously.[88] Whereas in the past, state judiciaries posed a modest political threat to other branches, their elevation as a coordinate, unified branch thrust state courts deep into the political thicket. Their increased power and influence posed potential threats to the prerogatives and interests of other, now coordinate, branches.[89]

The reform movement thus imposed more responsibilities for non-adjudicative services onto judiciaries, made them more publicly accountable, and increased the level of inter-branch friction. These changes reestablished a baseline assumption of both supreme courts' role and authority.[90] These assumptions tracked the central themes of Pound and the other reformers, including the necessity that high courts wield a broad supervisory power to operate the newly established judicial branch.[91] Further, the changes incentivized courts to develop identities that accounted for both their institutional interests as an independent branch of government, as well as the interests of the public, the primary source of accountability. It is in this institutional context that state high courts wield their supervisory power.

II. THE SUPERVISORY POWER IN THE U.S. AND STATE SUPREME COURTS

Part I explored the source of the supervisory power by highlighting its constitutional basis in all fifty state charters. It further examined the historical context behind these state judicial articles and the broader institutional development that prompted them. At the center of that

87. *See supra* notes 46–71 and accompanying text.

88. *See* Buenger, *supra* note 52, at 1015–19.

89. *Id.* at 1019 (noting that the changes brought about by the court reform movement "altered traditional relationships within the judiciary and among the judiciary and the coordinate branches, especially the legislature," which "have created a climate ripe for conflicts over the breadth and limits of the judiciary's institutional independence").

90. *See id.* at 1018–19 ("These same changes also altered traditional relationships within the judiciary and among the judiciary and the coordinate branches, especially the legislature."); TOBIN, *supra* note 38, at 119–34 (noting that state courts of the twentieth century were unrecognizable compared to prior centuries).

91. *See* TOBIN, *supra* note 38, at 23 ("Underlying these reforms was the unspoken premise that unless top judicial leaders actually have and use the authority to put the judicial house in order, then the judiciary does not deserve to be called a third branch of government"); Ashman & Parness, *supra* note 46, at 30–32; Frank V. Williams III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 611–14 (2007).

discussion is the growth of state judiciaries as meaningfully coequal branches, the expansion of the judicial role in state government, and the enhancement of supreme court power. That story provides helpful context for understanding the broader applications of the supervisory power at the heart of this Article.

This Part takes up the question of application by synthesizing the nature of the supervisory power and the ways state high courts use it. It provides a taxonomy that organizes the vast supervisory practice and distills the power's hallmark features. To deepen our understanding of this aspect of state court practice, this Part considers the U.S. Supreme Court's supervisory power, as well. That comparison further illustrates the breadth and scope of the state power and raises normative implications taken up in Part III.

A. STATE SUPREME COURT SUPERVISORY POWER

This Section provides an overview of the nature of the supervisory power as well as the ways state supreme courts use it. It draws on a survey of all fifty state high courts. The survey began with a review of judiciary articles in state constitutions as well as statutory codes to derive a set of keywords. Westlaw searches were then conducted for each state.[92] Since documents germane to this study, like administrative orders, are rarely collected by Westlaw, judiciary websites were also searched. Due to the significant limitations on access to state court documents,[93] secondary sources were also consulted.

This Article's primary descriptive contribution is surfacing and typologizing the many ways state high courts use their supervisory power beyond its quotidian administrative applications. To name a few, it can expand substantive rights and enhance remedies; facilitate supreme courts' law development and agenda-setting capacities; and help mediate interbranch frictions. In short, the supervisory power expands state supreme court capacity. It can supplement or enhance other aspects of court authority, as well as serve as a standalone basis for judicial action. It is immune from many of the traditional limits on judicial power (e.g., justiciability) and can be wielded outside of adjudication as well as within it. To be sure, this Article's definition describes a vast landscape of judicial practice. As the

92. *See, e.g.*, Zachary D. Clopton, *Power and Politics in Original Jurisdiction*, 91 U. CHI. L. REV. 83, 106 (2024) (relying on similar methods to study original jurisdiction in state high courts).

93. *See, e.g.*, Sopko, *supra* note 19, at 1464–67 (summarizing the transparency gap between state supreme courts and the U.S. Supreme Court and describing the challenges it presents scholars trying to understand state supreme court behavior). As a result of these methodological and technological limitations, the findings may be incomplete. *See, e.g.*, Weinstein-Tull, *supra* note 19, at 1036–37 (discussing the methodological challenges of studying state courts); Carpenter, *supra* note 19, at 266–68 (similar).

first Article to provide a comprehensive review of the supervisory power's more expansive applications,[94] greater explication is needed to understand the concept. This Part takes up that task by sketching the many uses for which state high courts rely on the supervisory power.[95] It then provides a holistic account of the nature of the power.[96]

1. Uses

Uses of the supervisory power by state supreme courts are nuanced and varied. To demonstrate that breadth and complexity, this Section includes applications that are both representative and illustrative of state high court practice. This Section also provides a taxonomy to further conceptualize the power and its institutional implications.

One important descriptive insight this Article offers is that state court use of the supervisory power is not limited to the litigation context. Thus, this Section distinguishes between adjudicative and non-adjudicative uses.

a. Adjudicative

First consider the ways courts use their supervisory power in the course of adjudicating disputes.

i. Rights and remedies

State supreme courts frequently rely on their supervisory power to reinforce constitutional and statutory rights. This most often comes in the form of ad hoc procedural rules or frameworks that enhance underlying substantive rights, like due process or protections against unreasonable searches. Courts also rely on the power to enhance or expand ordinary remedies. Some have even used their supervisory authority to craft substantive protections from outside their constitution's bill of rights.

As to ad hoc rules and additional procedures, some state high courts have fashioned rules and procedures that exceed substantive protections under both the state and federal constitutions. For example, courts have enhanced the showing required for criminal defendants to waive counsel;

[94] Indeed, the two most comprehensive studies of the state supervisory power, *see* Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 GA. L. REV. 411 (2020); FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY (1994), are offered as a universal description of the practice in both state and federal judiciaries. But as this Part shows, the power is meaningfully different at the state level. As such, this Article is the first comprehensive review of the phenomenon at the state level. *Cf. supra* note 17–19 and accompanying text (urging for scholars to study state courts on their own terms rather than presuming both federal and state systems share common assumptions).

[95] *See infra* Section II.A.1.

[96] *See infra* Section II.A.2.

strengthened protections for effective assistance of counsel; and extended the provision of assigned counsel to municipal court proceedings—all under the supervisory power.[97] Such applications are common among state high courts and, as discussed below, this aspect of state supervisory practice is distinguishable from the U.S. Supreme Court's narrower approach.[98]

While less common, some state supreme courts have used their supervisory power to craft sub-constitutional substantive rights. Here, courts are announcing a rule under the supervisory power (rather than, e.g., the Speedy Trial Clause or Free Speech Clause) but drawing on constitutional values and principles for its content. New York's high court, for instance, has developed a privacy right based on the "spirit of the Constitution," and the Michigan Supreme Court crafted substantive protections for certain grand jury indictees.[99] These decisions resemble common-law-like reasoning and center both on an abstract value (for example, fairness) as well as the proper functioning of the legal system. Indeed, the New Jersey Supreme Court's "fairness and rightness doctrine," a body of law that includes several sub-constitutional substantive and procedural rights, is the product of its supervisory authority.[100]

Beyond rights, courts also rely on the power to enhance remedies. Specifically, courts use their authority to fashion extraordinary remedies for violations of constitutional and statutory rights and obligations.[101] Along these lines, the Massachusetts Supreme Judicial Court's order discussed in the introduction illustrates how some courts use their supervisory power as

97. *See, e.g.*, State v. Connor, 973 A.2d 627 (Conn. 2009) (competence for waiver); Johnson v. State, 948 N.E.2d 331 (Ind. 2011) (effective assistance of counsel); Rodriguez v. Rosenblatt, 277 A.2d 216 (N.J. 1971) (extending provision of assigned counsel to municipal court proceedings).

98. Green, *supra* note 12, at 257.

99. *See* People v. De Bour, 352 N.E.2d 562 (N.Y. 1976); People v. Duncan, 201 N.W.2d 629 (Mich. 1972). *See also* People v. Glass, 627 N.W.2d 261, 264 (Mich. 2001) (overruling *Duncan* as an impermissible use of the supervisory power by "creating a substantive right").

100. *See generally* Bruce D. Greenberg, *New Jersey's "Fairness and Rightness" Doctrine*, 15 RUTGERS L.J. 927 (1984). *See also* Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 747 n.109, 747–48 (1992) (situating New Jersey's fairness doctrine in the broader context of state constitutionalism and the development of state law as an alternative form of protection); Adam B. Sopko, *Catalyzing Judicial Federalism*, 109 VA. L. REV. ONLINE 144 (2023) (similar). One view of the New Jersey Supreme Court's more recent fairness and rightness doctrine decisions—a product of its supervisory power conferred by the state constitution—is that the court has conflated that purely state-law doctrine with "fundamental fairness" doctrine—a strand of due process doctrine that flows from the Fourteenth Amendment of the U.S. Constitution. *E.g.*, State v. Ramseur, 524 A.2d 188, 442 (N.J. 1987) (Handler, J., dissenting); Doe v. Poritz, 662 A.2d 367 (N.J. 1995); State v. Njango, 255 A.3d 1164, 1173 (N.J. 2021). Another view is cross-pollination—a feature of the supervisory power. *See infra* notes 127–130. Whether the court is intentionally developing doctrine across parallel paths or has mistakenly conflated these two distinct doctrines is not clear.

101. *See, e.g.*, Farmer v. Admin. Dir. of the Ct., 11 P.3d 457, 466 (Haw. 2000); State v. McKinney, 756 N.W.2d 678 (Iowa 2008).

a way to provide broad, systemic relief.[102] It is also used to fashion remedies for conduct that is not prohibited by statute or constitution but nevertheless violates notions of "justice," "fairness," and the "proper administration" of the criminal justice system.[103] The key insight here is that courts understand the supervisory power as sufficiently flexible to remedy the variety of forms unfairness and threats to the proper administration of justice may take.[104]

The uses thus far have focused on systemic applications to address "pervasive" inefficiencies or injustices. But the supervisory power serves as a tool to correct perceived unfairness for individual litigants as well.[105] As explained in more detail above, this common feature of the supervisory power is a progeny of state high courts' prerogative writ power.[106] Courts often refer to their supervisory power as a product or consequence of this historical practice.[107] In these cases, courts use their power, via original petition, interlocutory motion, or sua sponte, to correct some aspect of a case, often before a final judgment. The purpose behind this aspect of supervisory practice is "to ensure public confidence in the integrity and fairness of the judicial system."[108] Accordingly, applications vary widely from revising discovery rulings[109] and correcting improper sentencing procedures,[110] to modifying the scope of lower-court rulings[111] and addressing explicit judicial bias mid-trial.[112] The representative case among all state judiciaries is where a lower court has erred, with respect to either applying binding law or discretionary decision-making, and the resulting prejudice cannot be remedied on appeal. However, in some states, high courts have used the

102. *See supra* note 9 and accompanying text.

103. *See, e.g.*, *In re* Yasiel R., 120 A.3d 1188, 1190–91 (Conn. 2015); State v. Moore, 730 N.W.2d 563 (Neb. 2007); Comm. for Pub. Couns. Servs. v. Chief Just. of Trial Ct., 142 N.E.3d 525 (Mass. 2020); St. Joseph Med. Ctr., Inc. v. Turnbull, 68 A.3d 823 (Md. 2013).

104. *See, e.g.*, State v. Cook, 847 A.2d 530 (N.J. 2004) (observing that because "[t]he judiciary bears the 'responsibility to guarantee the proper administration of justice . . . and, particularly, the administration of criminal justice,'" the "courts thus have the 'independent obligation . . . to take all appropriate measures to ensure the fair and proper administration of a criminal trial'"); Comm. for Pub. Couns. Servs. v. Chief Just. of Trial Ct., 142 N.E.3d 525 (Mass. 2020).

105. State v. Edwards, 102 A.3d 52, 75 (Conn. 2014); *see also* Howell, *supra* note 60, at 58–68.

106. *See supra* notes 50–60 and accompanying text.

107. *See, e.g.*, *In re* Petition for Writ of Prohibition, 539 A.2d 664, 669 (Md. 1988) ("[W]e may assume that the common law power of the Court of King's Bench to issue prerogative writs was possessed by the Provincial Court and passed to the General Court. This is consistent with the authorities we have cited and with the notion that the mandamus and prohibition powers ordinarily reside in the highest court of original jurisdiction."); Ingram v. Oneok, Inc., 775 P.2d 810 (Okla. 1989).

108. State v. Elson, 91 A.3d 862, 885 (Conn. 2014).

109. *See, e.g.*, Howell, *supra* note 60.

110. *See, e.g.*, State v. Elson, 91 A.3d 862 (Conn. 2014); People v. Culbertson, 596 P.2d 1200, 1201 (Colo. 1979).

111. *See, e.g.*, State v. Lee, 328 P.3d 424 (Idaho 2014).

112. *See, e.g.*, Joseph v. Scranton Times L.P., 987 A.2d 633 (Pa. 2009).

supervisory power along these lines where appellate relief was sufficient.[113]

ii. Law development

As the courts of last resort in their respective states, supreme courts are tasked with addressing matters of first impression, updating precedents where necessary, and shepherding the state's common law, among other law development responsibilities.[114] The supervisory power plays an active part in supporting this duty. It serves as a tool to provide more control over what a high court decides and when it decides it.

First, courts rely on the power to reach the merits in cases—a necessary part of doctrinal development. Courts can sua sponte reach cases not presently before them by transferring suits pending in lower courts,[115] as well as reach issues not fully developed or raised by parties once a case reaches their docket.[116] Additionally, the supervisory power overrides many of the conventional limitations on judicial power and party presentation that may limit judicial review and thus limit a court's ability to guide state law.

For example, supreme courts from Alabama to Hawaii have said traditional standing and mootness rules do not limit the court's supervisory power, meaning an otherwise nonjusticiable case can still be resolved.[117] At least one court has said explicitly that stare decisis does not attach to the court's supervisory authority;[118] others have implied as much.[119] In several states, supreme courts have said their supervisory power exceeds the boundaries of their subject-matter jurisdiction.[120] Despite the traditional rule that "[o]ne who is not a party to an action . . . is not entitled to appeal from

113. *See, e.g.*, Rivera v. Cataldo, 537 P.3d 1167 (Haw. 2023); Pierce v. Anderson, 912 N.W.2d 291 (N.D. 2018); Smith v. Bd. of Cnty. Comm'rs of Okla. Cnty., 208 P.2d 177 (Okla. 1949).

114. *See* Kagan, *Evolutions*, *supra* note 80; Victor Eugene Flango, *State Supreme Court Opinions as Law Development*, 11 J. APP. PRAC. & PROCESS 105 (2010).

115. *See, e.g.*, State v. Davis, 493 N.W.2d 820 (Iowa 1992); Norelli v. Sec'y of State, 292 A.3d 458 (N.H. 2022).

116. *See, e.g.*, Unwired Telecom Corp. v. Parish of Calcasieu, 903 So.2d 392 (La. 2005); *In re* Fortieth Statewide Investigating Grand Jury, 191 A.3d 750, 754 (Pa. 2018); Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Conn., Inc., 84 A.3d 840 (Conn. 2014).

117. *Ex parte* State *ex rel.* Ala. Pol'y Inst., 200 So.3d 495, 498 (Ala. 2015), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015); Ball v. Chapman, 289 A.3d 1 (Pa. 2023); State v. Moniz, 742 P.2d 373 (Haw. 1987); GHP Horwath, P.C. v. Kazazian, 543 P.3d 1035, 1050 ¶ 65 (Colo. 2024).

118. *In re* Kading, 235 N.W.2d 409, 414 (Wis. 1975) ("If this power were strictly limited to the situations in which it was previously applied, it would cease to be superintending, since this word definitely contemplates ongoing, continuing supervision in response to changing needs and circumstances.").

119. *See, e.g.*, Mellor v. Parish of Jefferson, 370 So.3d 388 (La. 2023); *In re* N.J. Rules of Ct., Part VII, Guideline 4 (N.J. Feb. 23, 2024) (order), *available at* https://www.njcourts.gov/sites/default/files/notices/2024/02/n240226a.pdf?cb=d1e5a648 [https://perma.cc/EJ5E-TX55].

120. *See, e.g.*, State v. Milner, 72 A.3d 1068, 1073 (Conn. 2013); People v. Max, 198 P. 150, 152 (Colo. 1921).

the judgment of a lower court," the supreme courts of Iowa and North Carolina have relied on their supervisory power to review appeals filed by non-parties to the underlying suit.[121] The high courts in several states have said filings are not necessary to invoke the supervisory power.[122] Nor are cases that lack a statutory or constitutional basis for review necessarily beyond a court's reach.[123]

Once a case is before a supreme court, various party presentation requirements, like issue preservation, can narrow the scope of judicial review, limiting the reach of a court's intervention. However, the supervisory power can override these rules as well.[124] Moreover, courts suspend customary finality requirements, which often exclude certain cases from appellate review until they have reached some level of resolution, enabling courts to reach the underlying merits sooner than they otherwise would.[125] The supervisory power can also override standards of review, a more subtle feature of judicial review, like applying a plain error standard but not requiring a showing of prejudice.[126]

Second, courts use their supervisory authority to develop the underlying substance of the law. Supervisory decisions not only presage state constitutional decisions; they set an analytical foundation to help frame the underlying right or value. For example, over a series of decisions, Alaska's Supreme Court used its supervisory power to sketch a variety of procedures to protect witnesses who are compelled to testify.[127] In the cases, the Court balanced the state's prosecutorial interests with the risk that compelled testimony may expose the witness to criminal liability. In a third case, the

121. *See, e.g.*, State v. McKinney, 756 N.W.2d 678 (Iowa 2008); *In re* Brownlee, 272 S.E.2d 861, 869–71 (N.C. 1981) (allowing appeal by nonparty).

122. Republican Party of Ark. v. Kilgore, 98 S.W.3d 798, 801 (Ark. 2002); McDunn v. Williams, 620 N.E.2d 385, 414 (Ill. 1993); *see also infra* notes 192–196.

123. *See, e.g.*, *Max*, 198 P. at 152 (noting that the court has the "right" and "duty" to review the case "[i]rrespective of whether [it] is now before us on review or under our original jurisdiction, or neither, . . . by virtue of" the court's supervisory power); Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979) (recognizing the supreme court's inherent appellate jurisdiction); Eighner v. Tiernan, 184 N.E.3d 194, 202 (Ill. 2021); People v. Salem, 47 N.E.3d 997, 1004 (Ill. 2016); Jordan v. Reed, 544 P.2d 75, 79 (Alaska 1975).

124. State v. Hewett, 154 S.E.2d 476, 478 (N.C. 1967); Rivera v. Cataldo, 537 P.3d 1167, 1171 (Haw. 2023) (reaching finality in class action brought by indigenous people); *Ex parte* State of Ala. Dep't of Revenue, 993 So. 2d 898, 900-01 (Ala. 2008) (See, J., concurring); Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Conn., Inc., 84 A.3d 840, 872–78 (Conn. 2014); *In re* Est. of Funk, 849 N.E.2d 366, 403 (Ill. 2006); State v. Elson, 91 A.3d 862. (Conn. 2014).

125. Nygaard v. Taylor, 900 N.W.2d 833, 836 (N.D. 2017) (invoking supervisory power to hear appeal of interlocutory order otherwise not appealable by statute because it "is an issue of vital concern regarding matters of important public interest"); *Ex parte* Averyt, 487 So. 2d 912, 913–14 (Ala. 1986).

126. *In re* Carl S., 510 P.3d 486, 488 (Alaska 2022).

127. Surina v. Buckalew, 629 P.2d 969 (Alaska 1981); State v. Serdahely, 635 P.2d 1182 (Alaska 1981) (per curiam).

Court held that a subsequently enacted statute providing a form of compelled testimony violated the state constitution's Fifth Amendment analogue, reasoning it exceeded the prior boundaries set out by the court's supervisory power.[128] The Court "piece[d] together" its prior supervisory decisions to provide the "scope" of the state constitution's right against self-incrimination.[129] In these cases, courts draw on the rules, frameworks, values, and policies developed under the supervisory power to, as Chief Judge Judith Kaye put it, "nourish" the state constitution.[130]

Finally, the supervisory power can help supreme courts assert more control over how they decide an issue. Specifically, its highly flexible nature and lack of traditional limitations allow courts to resolve issues temporarily, until internal or external factors provide the basis for a more permanent resting place, like a constitutional decision, amendment, or statute. For example, in cases raising novel questions of federal constitutional rights, courts have recognized that the U.S. Supreme Court has not yet decided the issue and instead used their supervisory power to address the challenged conduct until the U.S. Supreme Court reaches it.[131] In instances where legislation is pending or would be preferred, supervisory authority can act as a placeholder until a relevant statute or regulation is enacted.[132]

128. *See* State v. Gonzalez, 853 P.2d 526 (Alaska 1993).

129. *Id.* at 530.

130. *See, e.g.*, Grinols v. State, 74 P.3d 889, 894 (Alaska 2003). *Cf.* Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 743 (1992) (discussing the interplay between state constitutions and the common law). This law development feature extends outside the courtroom. In some instances, supervisory decisions are codified into formal court rules, legislation, or constitutional amendments. For example, across multiple cases and several years, Connecticut's high court relied on its supervisory authority to reduce the effects of racial bias in the use of peremptory strikes. *See, e.g.*, State v. Rigual, 771 A.2d 939 (Conn. 2001); State v. Patterson, 645 A.2d 535 (Conn. 1994); State v. Holloway, 553 A.2d 166 (Conn. 1989). *See also* Frampton & Osowski, *supra* note 9, at 14*; Rigual*, 771 A.2d at 943 (extending *Holloway* to apply to all peremptory strikes, which arguably eliminated peremptory strikes in practice). The accumulation of these decisions served as the foundation for the court's ultimate decision to convene a task force to recommend reforms to the judiciary's peremptory rule, which were ultimately codified in a court rule by the state's judicial council. *See* Connecticut Practice Book § 5–12 (2025). *See also* CONNECTICUT JUDICIAL BRANCH, REPORT OF THE JURY SELECTION TASK FORCE TO CHIEF JUSTICE RICHARD A. ROBINSON (2020), https://jud.ct.gov/Committees/jury_taskforce/ReportJurySelectionTaskForce.pdf [https://perma.cc/DJZ7-83Z3].

131. *See, e.g.*, State v. Medrano, 65 A.3d 503, 532 (Conn. 2013) (recognizing a "nationwide split" among lower federal courts over a question concerning the Fifth Amendment and instead addressing the issue via the supervisory power); Commonwealth v. Phelps, 301 A.2d 678, 679 (Pa. 1973) (addressing a question of federal due process via the supervisory power after noting that the U.S. Supreme Court has not yet had a chance to address it); State v. Deatore, 358 A.2d 163, 170 (N.J. 1976) (noting that the U.S. Supreme Court has not yet reached the issue and the lower federal courts are in "disarray"); State v. Hartley, 511 A.2d 80, 97–98 (N.J. 1986) (similar).

132. *See, e.g.*, People v. Lemcke, 486 P.3d 1077, 1095 (Cal. 2021) (addressing a flaw in jury instructions via supervisory power but referring the question to the Judicial Council and its Advisory Committee on Criminal Jury Instructions—a policymaking body "comprised of jurists, scholars and

This feature of the supervisory authority has an intersystemic aspect as well. The power can provide stability for state law in the face of federal doctrinal churn. For instance, when a line of U.S. Supreme Court case law is less than clear, state high courts may develop a variety of interpretations before the U.S. Supreme Court finally clarifies the underlying rules. That clarification may reveal that a state's interpretation was wrong, requiring a change in the law on the books in that state.[133] In these instances, some courts have chosen to retain their interpretation but as a matter of their supervisory authority rather than the relevant provision of the U.S. Constitution.[134] Alternatively, where a state high court has lockstepped the state constitution and the U.S. Supreme Court has "repudiate[d]" the underlying federal rule, some state courts have chosen to resolve the issue temporarily under the supervisory power to decide at a later date whether they wish to retain the old rule under the state constitution or re-yoke it to the U.S. Supreme Court's new one.[135]

iii. Interbranch engagement

Some state supreme courts rely on the supervisory power to facilitate another institutional responsibility—engaging with other branches. This includes both collaboration and resistance. In both circumstances, the supervisory power serves as a flexible tool for courts to combine the expertise and interests of each branch and to more easily navigate inevitable frictions.

When collaborating with other branches, courts often develop policies that affect both the judiciary and the state's legal system writ large.[136] The supervisory power's open-ended nature helpfully provides a way to adapt and implement the interests, expertise, and views of the branches to the situation.[137] For example, the Arkansas Supreme Court's supervisory power

practitioners specializing in criminal law"—for a permanent fix); State v. Skipwith, 165 A.3d 1211, 1222 (Conn. 2017) (McDonald, J., concurring) (arguing the court should have relied on its supervisory authority to fashion a temporary procedure to implement state constitution's victims' rights provisions until the legislature issued its own version via statute).

133. *See, e.g.*, People v. Jimenez, 580 P.2d 672, 679 (Cal. 1978), *overruled on other grounds by* People v. Cahill, 853 P.2d 1037 (Cal. 1993).

134. *Jimenez*, 580 P.2d at 679 (relying on the supervisory power to ensure the "continuity . . . [of state] law on this issue").

135. *See, e.g.*, State v. Polanco, 61 A.3d 1084, 1087 (Conn. 2013).

136 *See, e.g.*, Hans A. Linde, *Observations of a State Court Judge*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 117–22 (Robert A. Katzmann ed., 1988) (offering perspectives on inter-branch relations as a justice of the Oregon Supreme Court).

137 *See* Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1071 (1998) (noting as Connecticut's chief justice, that "[g]oing the route of supervisory authority leaves more flexibility for further input from all the interested constituencies").

was central to its collaboration with the other branches in revising the state's criminal code.[138] It relied on the authority to enact a revised set of procedural rules based on input from a commission consisting of representatives from all three branches, the bar, academy, and activists.[139]

Collaboration might include operationalizing a broad policy objective announced by another branch as well. For example, during the COVID-19 pandemic, New Jersey's governor issued an executive order allowing certain prisoners to apply for early release in light of certain health risks.[140] Invoking its supervisory power to implement the policy, the Supreme Court crafted a "framework" and expedited procedure that marshalled judicial resources to effectuate the order while balancing due process considerations.[141]

The power can also help courts navigate interbranch tension, especially when it implicates the courts themselves. As with examples of cooperation, the supervisory power's flexibility enables courts to tailor context-specific rules. For example, in response to a series of decisions from executive agencies perceived as coercive to the court system, the Delaware Supreme Court relied on its supervisory authority to hold that executive agencies do not have jurisdiction over judicial branch labor disputes (unlike public employee unions in other branches).[142] Following a gubernatorial veto of judicial salary increases some considered necessary, Illinois's high court used its supervisory power to invalidate the executive action and set aside procedural defects to enforce a lower court's order requiring an increase in appropriations.[143]

iv. Oversight

Finally, all state supreme courts, through individual justices, the chief justice, or an administrative office, are responsible for administering the judicial branch.[144] Though this Article is focused on uses of the supervisory power beyond its quotidian administrative applications, some courts have taken notably expansive views of their oversight responsibilities and their

[138] *In re* Ark. Crim. Code Revision Comm'n, 530 S.W.2d 672 (Ark. 1975) (per curiam).

[139] *Id.*

140. *In re* Request to Modify Prison Sentences, 231 A.3d 667, 673 (N.J. 2020). The issue came to the court via original petition from the public defender's office and ACLU. *Id.*

141. *Id.* at 672.

[142] Superior Ct. v. State, Pub. Emp. Rels. Bd., 988 A.2d 429, 431 (Del. 2010). For more on the role of the supervisory power in inter-branch labor disputes, see STUMPF, *supra* note 94, at 54.

[143] *See* Weems v. App. Ct., Fifth Dist., 992 N.E.2d 1228 (Ill. 2012); Jorgensen v. Blagojevich, 811 N.E.2d 652 (Ill. 2004).

[144] *See* BUENGER & DE MUNIZ, *supra* note 48, at 169.

judiciary's overall workload that are worth considering.

For example, the Arkansas Supreme Court has relied on its supervisory power to appoint an "independent consultant" to audit and recommend solutions to address chronic backlog in lower court districts.[145] In response to a constitutional amendment providing California's lower courts with "unlimited" habeas corpus jurisdiction, the Supreme Court promulgated a filing procedure to avoid confusion stemming from overlapping jurisdiction that would ensure an efficient and "equitable" case flow.[146] While these examples may seem routine on their face, the courts' explanations for their choices center "important considerations of public policy" and other normative values. In that sense, these brief examples illustrate additional ways state high courts use their supervisory power to operationalize notions of the general welfare within the proper administration of justice.

Complex litigation is another example where supreme courts rely on their supervisory power to manage systemwide workload and where choice and values can enter the decision. These uses of the power often resemble federal multidistrict litigation practice but are ad hoc and based purely on a supreme court's discretionary evaluation of what is best in a particular situation for the judiciary, litigants, and public.[147]

Here, too, supreme courts have used this oversight aspect of the supervisory power to achieve normative ends through the active management of such mass litigation. For example, at a time when Philadelphia's trial courts had among the largest asbestos dockets in the country, the Pennsylvania Supreme Court used its supervisory power to consolidate almost 2,000 cases and order all pending matters to proceed immediately to a nonjury trial.[148] At the heart of the court's decision was its emphasis on achieving "timely justice."[149] Similarly, Colorado's high court coordinated a spate of water law cases in a single trial court and promulgated an ad hoc procedure to resolve them as efficiently as possible.[150] Animating the court's order was its recognition that it is an integral part of the state's lawmaking apparatus and that the complex cases could frustrate its ability to

[145] *In re* Phillips Cnty., 2013 Ark. 55 (2013).

[146] *In re* Roberts, 115 P.3d 1121, 1132 (Cal. 2005), *as modified* (Aug. 24, 2005).

147. *See, e.g.*, *In re* Okla. Breast Implant Cases, 847 P.2d 772 (Okla. 1993); *In re* Att'y Gen. L. Enf't Directive Nos. 2020-5 & 2020-6, 252 A.3d 135 (N.J. 2021). *See also* Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. 1649, 1660–62 (2021) (collecting other examples).

148. Pittsburgh Corning Corp. v. Bradley, 453 A.2d 314 (Pa. 1982).

149. *Id.* at 317.

150. Se. Colo. Water Conservancy Dist. v. Huston, 593 P.2d 1347 (Colo. 1979). *Cf.* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017).

contribute to state water policy by overloading judicial resources.[151]

Beyond control over courts and global workload, the oversight function of the supervisory power includes control over judges, too. This use of the supervisory power is distinct from formal disciplinary proceedings.[152] Supreme courts rely on the power to ensure individual members of the judiciary are properly "administ[ering] justice" and comporting themselves with the high court's conception of fairness and equality.[153] Thus, race-conscious jury assignments that violate notions of equality, wielding judicial power in a way that is "oppressive and improper," and presiding over cases in ways that fail to meet the supreme court's quality standards are the kinds of conduct supreme courts rein in with their supervisory power.[154]

b. Non-adjudicative

As judges and commentators have long observed of the federal courts, they are "reactive" institutions that lack a "self-starter," meaning the judicial power requires "someone outside of the judicial system" to initiate it.[155]

To be sure, the U.S. Supreme Court can and does set its own agenda by signaling an appetite for certain kinds of cases to external actors, selecting cases that advance their interests, and defining the questions presented to help ensure particular outcomes.[156] These instances of judicial choice constitute a form of policymaking but nevertheless are still limited by the Court's reactive design.[157] Indeed, as Martin Shapiro and Alec Stone Sweet put it, "litigants activate" the Court, which, in turn, defines the "parameters" for how it impacts law and policy.[158]

Along these lines, state supreme courts operate very differently. Relevant to this Article, wielding their supervisory power is not necessarily

151. *See Huston*, 593 P.2d at 1350–51.

152. *See, e.g.*, *In re* Merlo, 17 A.3d 869, 871 (Pa. 2011) (elaborating on the distinction).

153. *See, e.g.*, Horn v. Rincker, 417 N.E.2d 1329, 1334 (Ill. 1981); Robinson v. Robinson, 237 S.W.2d 20, 22 (Ark. 1951).

154. *See, e.g.*, People v. Burgener, 62 P.3d 1, 23 (Cal. 2003), *as modified* (Apr. 9, 2003); *In re* Judges of Mun. Ct. of City of Cedar Rapids, 130 N.W.2d 553 (Iowa 1964); Williams v. City of Valdez, 603 P.2d 483, 491–92 (Alaska 1979); *Robinson*, 237 S.W.2d at 22.

155. WALTER F. MURPHY & JOSEPH TANENHAUS, THE STUDY OF PUBLIC LAW 65–66 (1972) (quoting Justice Robert H. Jackson); Marc Galanter, *The Radiating Effects of Courts*, *in* EMPIRICAL THEORIES ABOUT COURTS 117, 122 (Keith O. Boyum & Lynn Mather eds., 1983).

156. The literature on this point is voluminous. *See, e.g.*, Lawrence Baum, *Case Selection and Decisionmaking in the U.S. Supreme Court*, 27 L. & SOC'Y REV. 443 (1993); Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 SUP. CT. ECON. REV. 1 (2008).

157. *See* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 732 n.98 (1994).

158. MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 293 (2002).

contingent on a litigant invoking the judicial machinery. Rather, state supreme courts can and do proactively use their supervisory power to craft policy, contribute to state governance, engage with other branches, protect their institutional prerogatives, and promote their own conception of the general welfare. It is this proactive nature of the supervisory power that enables state supreme courts to serve as more than a passive policymaker, as with their federal counterpart, but instead an active agent in state governance.[159]

i. Policymaking for the general welfare

In addition to the reactive applications above, supreme courts can and do use their supervisory authority as a proactive policymaking mechanism. Specifically, it serves as a source of power that enables courts to advance particular normative ideals and contribute to a state's general welfare based on its evaluation of what is necessary. Consider some recent examples.

Fines and fees. The supervisory power played an important role in reducing or eliminating the imposition of fees and fines. While the issue is not new, the pernicious effects and racial disparities caused by over-reliance on such penalties and obligations attracted renewed attention in 2014 after a police officer killed Michael Brown in Ferguson, Missouri.[160] The U.S. Department of Justice's subsequent investigation and report drew a national spotlight on the ways some courts and local governments use fees and fines as a revenue generator.[161] In response to evidence showing the race and class

159. While this claim shares some thematic overlap with Jerry Dickinson's theory of "judicial laboratories," they are distinguishable on a conceptual level. *See* Gerald S. Dickinson, *Judicial Laboratories*, 27 U. PA. J. CONST. L. 75 (2025) He borrows from Justice Brandeis's famous metaphor casting state legislatures as laboratories. Dickinson's illuminating account seems to suggest we reframe state high courts as more like legislatures than federal courts. *See, e.g.*, *id.* at 108 ("[S]tate courts have a 'democratic pedigree' that federal courts do not, and thus have fundamentally different roles and purposes that appear more akin to legislators than federal judges"); *see also id.* at 81–128 (arguing "state courts should be understood and recognized as 'judicial laboratories of democracy' that primarily serve and function as political, policymaking and democratic agents akin to state legislatures"). This account perhaps unnecessarily cedes conceptual ground to the federal judiciary. In contrast, at the core of this Article is the notion that state supreme courts are distinctive from their federal counterpart and yet still best understood as courts, thus advancing a more pluralist conception of the institution. Indeed, as discussed in the Introduction, this Article is in service of a broader project to understand state courts on their own terms. *See supra* notes 18–21 and accompanying text; *see also* Sopko, *supra* note 100, at 161. In this way, the Article's framing of state high courts as agents of governance is based on an account of state high courts as such.

160. Jane S. Schacter, *Glimpses of Representation-Reinforcement in State Courts*, 36 CONST. COMMENT. 349, 367 (2021)

161. *See* CIV.CIVIL RIGHTS DIV.DIVISION, U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015). https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/Y3R3-XNST].

implications of such policies, several state supreme courts used their supervisory powers to rethink the role of these penalties, with a more just judiciary serving as their North Star.[162]

For example, after reviewing a report from a committee tasked with studying the impacts of court fees, the New Jersey Supreme Court invoked its supervisory authority to dismiss nearly 900,000 outstanding municipal cases and over $7 million in fines.[163] It also narrowed the circumstances in which judges can impose fees and capped permissible amounts.[164] The court's actions were driven by its conception of a just court system: one that does not allow local governments to use the judiciary as a means of extraction.[165] New Jersey was not alone—high courts in Illinois, Kentucky, Michigan, and Virginia, used their supervisory power to make similar changes to their respective court systems.[166]

Housing moratoria. Another recent example arose during the COVID-19 pandemic, which, in addition to the public health crisis, prompted significant social and economic instability nationwide.[167] Among the myriad effects of these shocks was housing security. Indeed, a policy challenge that government at all levels faced during the pandemic was how to balance the public health impacts of mass displacement with the economic considerations flowing from the significant job and wage loss across the country.[168] During this period, state actors enacted a "largely unprecedented" set of housing policies to try and manage the crisis.[169] State supreme courts, it turns out, played a proactive role, using their supervisory authority to

162. *See* Schacter, *supra* note 160, at 367–76; Christopher D. Hampson, Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1030 (2016).

163. NAT. CTR. FOR STATE CTS., REFORMS TO CRIMINAL FINES AND FEES CASE STUDY: NEW JERSEY (2024), https://www.ncsc.org/__data/assets/pdf_file/0033/99690/FFP-Case-Study-New-Jersey-Final.pdf [https://perma.cc/G3LC-V9NJ].

164. *See* Colleen O'Dea, *Municipal Courts too Quick to Levy Fines and Need Major Reforms — Report*, N.J. SPOTLIGHT NEWS (July 18, 2018), https://www.njspotlightnews.org/2018/07/18-07-17-municipal-courts-too-quick-to-levy-fines-need-other-reforms-report [https://perma.cc/ZQC2-BVDC].

165. *See, e.g.*, Kala Kachmar, *NJ Chief Justice: Stop Turning Municipal Courts into Moneymakers*, ASBURY PARK PRESS (Apr. 18, 2018), https://www.app.com/story/news/investigations/watchdog/investigations/2018/04/17/nj-chief-justice-acknowledges-money-making-municipal-court-practices/525400002/#:~:text=More%20than%20a%20year%20after,disturbing%22%20and%20%22troubling.%22 [https://perma.cc/V2AU-BG3U].

166. *See* Schacter, *supra* note 160, at 373.

167. *See generally, e.g.*, Vicente Javier Clemente-Suárez, Eduardo Navvarro-Jiménez, Libertad Moreno-Luna, María Concepción Saavedra-Serrano, Manuel Jimenez, Juan Antonio Simón & Jose Francisco Tornero-Aguilera, *The Impact of the COVID-19 Pandemic on Social, Health, and Economy*, 13 SUSTAINABILITY (2021).

168. *See, e.g.*, Emily A. Benfer, Robert Koehler, Alyx Mark, Valerie Nazzaro, Anne Kat Alexander, Peter Hepburn, Danya E. Keene & Matthew Desmond, *COVID-19 Housing Policy: State and Federal Eviction Moratoria and Supportive Measures in the United States During the Pandemic*, 33 HOUSING POL'Y DEBATE 1390, 1392–93 (2022).

169. *Id.* at 1391.

initiate and shape these policies.[170]

The most common form of housing policy interventions were eviction moratoria, where supreme courts would severely limit, or prohibit entirely, court-ordered evictions. As with most state-level policy responses, interventions varied. Court-imposed moratoria differed in duration, scope, and reach.[171] Courts also framed the underlying issue differently in their orders—a feature of the supervisory power. For some, their order defined the issue as eviction itself, whereas for others, courts saw themselves as wielding their supervisory power to help limit larger social issues, like homelessness and the continued spread of COVID-19.[172] For example, the South Carolina Supreme Court suspended all pending and future evictions for a period of months in recognition of the "difficulties," like "housing insecurity and homelessness," the pandemic would cause "individuals."[173] Tennessee's high court prohibited all judiciary personnel from "tak[ing] any action to effectuate an eviction . . . based upon the failure to make a rent, loan, or other similar payment," due to "the increasing economic issues caused by this pandemic."[174]

In addition to moratoria, supreme courts also crafted policies and procedures that modified or supplemented their existing eviction process. Supreme courts in Michigan and New Jersey, for instance, instituted diversionary policies requiring landlords and tenants to attempt settlement before an eviction action could be filed.[175] Notably, the courts here were not

170. *See, e.g.*, Anne Kat Alexander*, Residential Eviction and Public Housing: Covid-19 and Beyond*, 18 IND. HEALTH L. REV. 243, 255–56 (2021).

171. *See* Benfer et al., *supra* note 168, at 1399–1404.

172. *Compare, e.g.*, *In re* Fifth Order Modifying and Extending Declaration of Judicial Emergency in Response to COVID-19 Emergency, https://www.vacourts.gov/news/items/covid/2020_0608_scv_amendment_to_fifth_order.pdf*, and* Order Declaring Statewide Judicial Emergency (Amended), GA. SUP. CT. (Mar. 14, 2020), https://www.gasupreme.us/wp-content/uploads/2020/03/CJ-Melton-amended-Statewide-Jud-Emergency-order.pdf *with, e.g.*, S.C., Statewide Evictions and Foreclosures, 2020-03-18-01 (Mar. 18, 2020), https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2020-03-18-01[https://perma.cc/6UZA-TM66]*, and Tennessee*, Eviction Lab, https://evictionlab.org/covid-policy-scorecard/tn/ (last visited Aug. 1, 2024).

173. *S.C., Statewide Evictions and Foreclosures*, *supra* note 176.

174. *See Tennessee*, *supra* note 176.

175. *See* Karen Merrill Tjapkes & Ashley Lowe, *COVID-19 Eviction Crisis: Large-Scale Development of Eviction Diversion Programs in Michigan*, MICH. BAR J. (Nov. 2021), https://www.michbar.org/journal/Details/COVID-19-eviction-crisis-Large-scale-development-of-eviction-diversion-programs-in-Michigan?ArticleID=4268#:~:text=Legal%20services%20programs%2C%20recognizing%20the,the%20money%20owed%20to%20them; *New Jersey Launches Eviction Diversion and Legal Services Program for Low-Income Households at Risk of Eviction*, Nat. Low Income Housing Coat. (July 10, 2023) https://www.hcdnnj.org/index.php?option=com_content&view=article&id=1744%3Adca-launches-comprehensive-eviction-defense-and-diversion-program-in-all-court-vicinages-in-new-

reactively deciding disputes between parties but rather were proactively issuing policies to try and limit the perceived social and economic effects of a crisis affecting the state.[176]

Problem-solving courts. The instances above are more recent examples of the ways state supreme courts have affirmatively used their supervisory power to contribute to state governance. Another use along these lines, perhaps with a longer pedigree, is the creation of problem-solving courts.[177] Supreme courts use their supervisory authority to create specialized dockets, procedures to manage them, and groups of judges to hear the cases, all within the existing judicial infrastructure.[178] These choices are made "outside the crucible of litigation."[179]

Like the examples above, specialty courts are another way supreme courts are addressing issues they perceive as important and using their supervisory power to fashion responses.[180] Indeed, specialty courts originated as a judicial policy solution to increasing rates of recidivism among drug offenders and spike in incarceration rates from a turn to tough-on-crime politics. As a former Chief Judge of New York's judiciary explained, these courts enable judiciaries to affect a "quiet revolution" to give victims and communities "enhanced safety and a greater voice" and a way for the judiciary to meaningfully contribute to society without "simply proliferating legal process."[181] Supreme courts across the country have created and manage specialty courts that touch on a range of issues, from homelessness and guns, to mental health and opioids. It is not the existence of these courts that makes them notable, but the discretion available to state

jersey&Itemid=147 [https://perma.cc/7L5T-MME4] (discussing the supreme court's creation of a diversion program during the pandemic).

176. To be sure, this discussion is not to suggest that these interventions were successful or a net benefit to the populace. In fact, preliminary research suggests the results were mixed. *See, e.g.*, Lauren Sudeall, Elora Lee Raymond & Philip M. E. Garboden, *Disaster Discordance: Local Court Implementation of State and Federal Eviction Prevention Policies During the Covid-19 Pandemic*, 30 GEO. J. ON POVERTY L. & POL'Y 545, 558–60 (2023). Instead, these examples are offered to highlight how state high courts wield their power and institutional insights we can draw from that practice.

177. Recognizing the literature draws distinctions between specialty, problem-solving, and "status" courts, I refer to them collectively here as problem-solving courts, as supreme courts can create all three under their supervisory authority. *See generally* Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481 (2017) (discussing the distinctions).

178. *See, e.g.*, Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 151 (2004); Candace McCoy, *Commentary, The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1513–17 (2003).

179. Michael C. Pollack, *Courts Beyond Judging*, 46 BYU L. REV. 719, 728 (2021); Judith S. Kaye, *Problem-Solving Courts: Keynote Address*, 29 FORDHAM URB. L.J. 1925, 1928 (2002) ("Problem-solving courts are a significant departure from our traditional adversarial model for case dispositions.").

180. *See* Collins, *supra* note 181, at 1488–89.

181. Kaye, *supra* note 183, at 1928.

supreme courts to conceptualize and experiment with solutions to address issues they foresee as necessitating interventions to benefit the state's health, safety, and general welfare.[182]

ii. Interbranch engagement

In addition to serving as a source of affirmative policymaking, the supervisory power provides a way for supreme courts to engage with other actors outside of litigation. Here, it provides a tool for courts to advance desirable policies and pursue institutional interests.

A common application along these lines was discussed above—courts craft ad hoc rules and procedures that influence the investigative and prosecutorial discretion of state executive branch officers.[183] But as we know, state courts operate in a federal system, and so we should expect interactions with the federal government, as well. Indeed, some courts have relied on their supervisory power to affect the scope of *federal* executive authority.

For example, during the Trump administration, U.S. Immigration and Customs Enforcement ("ICE") officers significantly increased their presence in state courthouses, arresting people coming to court as a defendant or witness in cases unrelated to immigration.[184] Relevant here, ICE typically relies on "administrative" warrants, which are not reviewed by a neutral party to determine if it is based on probable cause.[185] Contemporaneous studies of this dramatic change in federal policy showed the increased threat of immigration enforcement had a chilling effect on state legal systems, preventing "immigrants from reporting crimes and participating in court proceedings."[186]

Several state supreme courts, particularly in blue states, responded by

182. *See* Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1584 (2018) (offering a theory of problem-solving courts as "as proactive institutions responsible for the pursuit of socially beneficial outcomes"); *cf. supra* note 180 and accompanying text.

183. *See supra* notes 98–10498-104 and accompanying text.

184. *See* Douglas Keith, *States Push Back Against ICE Courthouse Arrests*, Brennan Ctr. for Just. (Nov. 22, 2019), https://www.brennancenter.org/our-work/analysis-opinion/states-push-back-against-ice-courthouse-arrests [https://perma.cc/6NHE-TTVP].

185. *See* Lindsay Nash, *Deportation Arrest Warrants*, 73 STAN. L. REV. 433, 436 n.2, 437 (2021).

186. Press Release, New ACLU Report Shows Fear of Deportation is Deterring Immigrants from Reporting Crimes, Am. Civ. Liberties Union, ACLU (May 3, 2018 11:45 AM), https://www.aclu.org/press-releases/new-aclu-report-shows-fear-deportation-deterring-immigrants-reporting-crimes [https://perma.cc/H8T2-BA2A]; AM. CIV. LIBERTIES UNION, FREEZING OUT JUSTICE: HOW IMMIGRATION ARRESTS AT COURTHOUSES ARE UNDERMINING THE JUSTICE SYSTEM (2018), https://www.aclu.org/publications/freezing-out-justice [https://perma.cc/2LSJ-RYZY]; Immigrant Def. Project, Safeguarding the Integrity of Our Courts: The Impact of ICE Courthouse Operations in New York State (2019), https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf.

enacting new policies pursuant to their oversight of their state's court system. For example, the Oregon Supreme Court promulgated a rule that required a heightened showing from ICE in order to make an arrest within or around Oregon courthouses. The high courts in Connecticut, New York, and Washington enacted similar policies for their respective court systems.[187]

Moving beyond the executive branch, high courts can and do use their supervisory authority as a defense against perceived incursions from the legislature or to assert their prerogatives over the coordinate branch.

Consider letters of address. These are formal letters issued by state high courts to coordinate branches that provide legal analysis of pending legislation or possible executive action.[188] In some sense, they are like advisory opinions. However, they differ in at least one important respect—advisory opinions typically require a request from another branch, whereas letters of address are issued sua sponte. For example, the Michigan Supreme Court has sent several letters to coordinate branches, as far back as the nineteenth century, noting that pending or recently enacted legislation was unlawful.[189] Pennsylvania's Supreme Court issued a similar letter intended to "mak[e] [their] views known" that the state constitution prohibited application of state public records laws to supreme court rulemaking procedures.[190] Maine's Supreme Judicial Court provided advice that pending legislation that purported to require cameras in courtrooms was unlawful.[191] And Massachusetts's Supreme Judicial Court issued guidance sua sponte concluding various statutes that reclassified certain members of judiciary staff as part of the executive branch were constitutional.[192]

These examples illustrate ways supreme courts can use their

187. N.Y. Unified Ct. Sys. Off. of the Chief Admin. Judge, Directive 1-2019 (Apr. 3, 2019), https://www.immigrantdefenseproject.org/wp-content/uploads/OCA-ICE-Directive.pdf.

188. These letters are typically included in case reporters as published decisions, as well. *See, e.g.*, *In re* 1976 PA 267, 255 N.W.2d 635 (Mich. 1977); *In re* 42 Pa.C.S. § 1703, 394 A.2d 444 (1978).

189. *In re* 1976 PA 267, 255 N.W.2d 635 (Mich. 1977); *In re* Court of Appeals, 125 N.W.2d 719, 719-20 (Mich. 1964); Matter of Head Notes to Opinions, 8 N.W. 552 (Mich. 1881).

190. *In re* 42 Pa.C.S. § 1703, 394 A.2d 444, 446 (Pa. 1978). Notably, a "member of the people of the Commonwealth of Pennsylvania" sought a writ of mandamus from the U.S. Supreme Court ordering the state high court to vacate its letter because it violated the Fourteenth Amendment. Petition for a Writ of Mandamus, Kubert v. Supreme Ct. of Commonwealth of Pa., 440 U.S. 905, (1979) (No. 78-1038), https://link.gale.com/apps/doc/DW0109869485/SCRB?u=wisc_madison&sid=bookmark-SCRB&xid=84fd7f02&pg=4. Petitioner's theory was that the state court violated due process in sua sponte issuing a decision that invalidated a statute. His theory turned on the assumption that the judicial power was limited to "adjudicat[ion]" and judicial review does not extend beyond the boundaries of adjudication. *Id.* at 5–6 (citing Marbury v. Madison, 1 Cranch 137 (1803)). The U.S. Supreme Court denied the petition without elaboration. 440 U.S. 905.

191. *In re* Chapter 515, Pub. Laws of 1985, 12 Media L. Rep. 2067 (Me. 1986).

192. First Just. of Bristol Div. of Juv. Ct. Dep't v. Clerk-Magistrate of Bristol Div. of Juv. Ct. Dep't, 780 N.E.2d 908, 912 n.3 (Mass. 2003).

supervisory authority to affirmatively engage with other branches, but the key insight is that the supervisory power enhances their ability to act affirmatively. This feature has two notable benefits. It increases their independence, since courts need not wait for a proper case challenging a coordinate branch's actions that threatens judicial prerogatives. This can minimize the "risk [of] creating and prolonging unnecessary tension between [the] branches of government."[193]

But it is the supervisory power that creates opportunities for supreme courts to consider and weigh these factors against their institutional interests and possibly act free from the confines of litigation.[194]

2. Attributes

The prior Section explored various ways in which state courts rely on their supervisory power. Turning from the how to the what, the discussion below examines the nature of the supervisory power by reviewing its key attributes.

a. Freestanding

The supervisory power functions as a freestanding source of judicial authority.[195] It is distinct from conventional aspects of state judicial power, like judicial review and common lawmaking, as well as more distinctive manifestations, like attorney discipline. This has implications on the scope and availability of the court's authority.

First, because supervision spans a court's adjudicative and non-adjudicative authority, the power is not limited by a supreme court's jurisdiction.[196] In other words, when a court's administrative or operational interests are implicated, their power is not constrained by the various

193. *See, e.g.*, First Just. of Bristol Div. of Juv. Ct. Dep't, 780 N.E.2d at 912; *In re* 42 Pa. C. S. § 1703, 394 A.2d at 446. This feature may be especially useful where the underlying intrusion does not incentivize or readily warrant litigation from parties but nevertheless creates separation-of-powers concerns. *See* Jeffrey A. Parness, Correspondence, *Public Process and State-Court Rulemaking,* 88 YALE L.J. 1319 (1979). However, such actions can raise political costs for the judiciary. *See, e.g.*, Dan Packel, *Pa. Justices Won't Force Legislature to Fund Court System*, LAW360 (Sept. 26, 2012, 7:59 PM), https://www.law360.com/articles/381962/pa-justices-won-t-force-legislature-to-fund-court-system [https://perma.cc/M286-F6L6].

194. *See, e.g.*, *In re* Sunshine L., 255 N.W.2d at 636 ("It is our opinion that 1976 PA 2671976 PA 267 is an impermissible intrusion into the most basic day-to-day exercise of the constitutionally derived judicial powers."); *In re* 42 Pa. C. S. § 1703, 394 A.2d at 449–51.

195. *See, e.g.*, *In re* Avellino, 690 A.2d 1138, 1140 (Pa. 1997); *State ex rel.* CityDeck Landing LLC v. Circuit Ct. for Brown Cnty., 922 N.W.2d 832, 842–43 (Wis. 2019); Ingram v. Oneok, Inc., 775 P.2d 810, 812 (Okla. 1989);Archer v. State, 859 A.2d 210, 229 (Md. 2004). *See also* Pfander, *supra* note 12, at 1524–25.

196. *See supra* note 125 (collecting cases).

jurisdictional or procedural defects that might otherwise foreclose review.[197] And second, because the power is freestanding and constitutionally based, it means the supervisory power cannot be narrowed by statute.[198]

b. Lower showing needed

In some states, the supreme court has conditioned supervisory relief on a certain showing of prejudice, not unlike ordinary judicial review.[199] However, because it is a separate power, some courts have required litigants to make a showing to warrant relief that is correspondingly different from that needed to prevail on a constitutional or statutory claim.[200] When invoking their supervisory power, the interests implicated go beyond just the rights of the individual litigant but encompass the court system's prerogatives, as well.[201] Additionally, unlike a constitutional claim, courts are often using the supervisory power to modify or create new procedures or policies rather than invalidate statutes, further altering the institutional

197. *See supra* notes 187–198187-198 and accompanying text. This includes doctrines like stare decisis, justiciability, waiver, and so on. *See supra* note 114–135 and accompanying text. Many of these doctrines can be waived or suspended when courts are resolving issues that implicate the public interest, as well. *See, e.g.*, Miriam Seifter & Adam B. Sopko, *Standing for Elections in State Court*, 2024 U. ILL. L. REV. 1571, 1586 n.147 (2024) (discussing the public-interest exception to standing in state courts).

198. *See, e.g.*, *Ex parte* State *ex rel.* Alabama Pol'y Inst., 200 So. 3d 495, 498 (Ala. 2015); Superior Ct. v. State, Pub. Emp. Rels. Bd., 988 A.2d 429, 431 (Del. 2010); Order *re* Guideline IV, *supra* note 119. This claim warrants some additional qualifications. As discussed in detail above, *supra* Section I.A, 47 states have located their supervisory power in their state constitution. In those states, the relationship between the legislative and supervisory powers is relatively straight forward—when they conflict, the latter prevails. The remaining three states are less clear on this question. However, even in Massachusetts, for example, where the high court seemingly leans most heavily on a statutory source for its supervisory power, the Supreme Judicial Court has suggested in dicta that in at least some instances its supervisory authority is superior to legislative action. *See, e.g.*, First Just. of Bristol Div. of Juv. Ct. Dep't v. Clerk-Magistrate of Bristol Div. of Juv. Ct. Dep't, 780 N.E.2d 908, 916 (Mass. 2003). Courts have signaled a general interest in approaching such conflicts on a case-by-case basis, especially in states where the high court has yet to definitively sketch the exact source and contours of the power, like in Massachusetts, North Dakota, and Oregon. *See, e.g.*, State *ex rel* N. Dakota Dep't of Health & Hum. Servs. v. State, 5 N.W.3d 547, 549 (N.D. 2024), *reh'g denied* (Apr. 24, 2024); Sopko, *supra* note 19 (collecting sources). As I explain in detail below, this question implicates the supervisory power's operative boundaries, which I term the *zone of supervision*. *See infra* Section III.A1. As a result, while the supervisory power is generally superior to conflicting legislation, it depends on the specifics of the conflict and the metes and bounds of a court's zone of supervision. *But see* Bruce Ledewitz, *What's Really Wrong with the Supreme Court of Pennsylvania*, 32 DUQ. L. REV. 409, 421 (1994) (offering a somewhat contradictory account of the Pennsylvania Supreme Court's supervisory power).

199. *See supra* notes 201–205201-205 and accompanying text. *But see* State v. Larrabee, 321 P.3d 1136, 1154 n.12 (Utah 2013) (Lee, J., dissenting) (arguing that the court's supervisory power "falls outside the bounds of adversary proceedings" and thus is "disconnected from [the court's] judicial power to decide cases").

200. *See, e.g.*, State v. Ceballos, 832 A.2d 14, 42–43 (Conn. 2003); Galauska v. State, 532 P.2d 1017, 1019 (Alaska 1975) (Boochever, J., dissenting).

200. *See, e.g.*, *Ceballos*, 832 A.2d at 42–43; State v. Mattatall, 219 A.3d 1288, 1293–94 (R.I. 2019); State v. Clark, 752 S.E.2d 907, 922–23 (W.Va. 2013).

201. *See infra* notes 287–293287-293.

interests at stake in litigation.[202]

c. Discretionary

The power is also entirely discretionary.[203] To be sure, some courts have devised standards that purport to cabin its availability, but such decisions are purely a product of choice. For example, they ask whether the underlying issue presents an "extraordinary circumstance,"[204] is "sufficiently compelling,"[205] or "serves the interests of judicial economy."[206] Others lack a standard along these lines but instead describe use of the power as rare or infrequent to suggest there's a presumption against its use.[207] But these standards are judicially imposed and courts rarely explain why a given case rises or fails to meet these thresholds.[208] Additionally, some courts have significantly increased their use of the supervisory power, notwithstanding continued adherence to such presumptions, as in Connecticut, Illinois, and Montana.[209]

More often, courts decline to provide any kind of standard governing their supervisory power or explicitly refer to it as a choice.[210] The structural guardrails that ordinarily cabin discretion are similarly absent. Considerations like text, precedent, and parties' arguments that generally impose some guidance—even if minimal—on courts in the adjudicative context are not implicated.[211] The discretionary nature of the power is especially acute in the non-adjudicative context, as courts need not wait for a party or litigant to initiate it, thus removing one of the strongest limits on judicial power.[212]

202. *See, e.g.*, *Galauska*, 532 P.2d at 1019 (Boochever, J., dissenting).

203. *See, e.g.*, Dobbins, *supra* note **Error! Bookmark not defined.**, at 417 (describing the power as "an almost pure expression of a court's exercise of discretion").

204. Strawn v. Merchants Mortg. & Tr. Corp., 605 P.2d 51, 53 (Colo. 1980).

205. Commonwealth v. Carman, 455 S.W.3d 916, 924 (Ky. 2015).

206. Mellor v. Parish of Jefferson, 370 So.3d 388, 391 (La. 2023).

207. *See, e.g.*, Sopko, *supra* note 19, at 1479–81 (collecting citations).

208. *See, e.g.*, State v. Marquez, 967 A.2d 56, 84 (Conn. 2009); Averhart v. State, 614 N.E.2d 924, 934 (Ind. 1993).

209. *See, e.g.*, *In re* Yasiel R., 120 A.3d 1188, 1208 (Conn. 2015) (Espinosa, J., dissenting) ("Today's decision exemplifies the routine manner in which this court invokes its supervisory authority of late."); Wauconda Fire Prot. Dist. v. Stonewall Orchards, 828 N.E.2d 216, 233 (Ill. 2005) ("It is true that we have previously issued opinions pursuant to our supervisory authority. However, until today, this step has only been taken in the most extraordinary circumstances requiring our supervision over the court system." (citation and emphasis omitted)); Howell, *supra* note 60, at 58–71 (describing the Montana Supreme Court's expansion of its supervisory power).

210. *See, e.g.*, State *ex rel.* Universal Processing Servs. of Wis., LLC v. Circuit Ct. of Milwaukee Cnty., 892 N.W.2d 267, 279 (Wis. 2017).

211. *Cf.* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 823 (2008).

212. *See, e.g.*, Galanter, *supra* note 155, at 117, 122; SHAPIRO & STONE SWEET, *supra* note 158, at 293.

d. Flexible

In addition to its discretionary nature, a hallmark of the supervisory power is its flexibility.[213] This manifests in two respects. First, rather than a fixed set of applications or possible contexts in which the power might apply, courts typically see it as open ended. The supervisory power is primarily a tool that enables the supreme court to address whatever needs arise in its responsibilities overseeing the judiciary. Those needs often result from unpredictable external factors, like a once-in-a-generation pandemic or a national recession.[214] Thus, the power necessarily must be sufficiently adaptable. Relatedly, the supervisory authority maintains the integrity of the court system and ensures the proper administration of justice. This objective similarly requires a certain level of flexibility, as injustice can come in many forms.[215]

And second, the underlying doctrine generated by the supervisory power is supple.[216] Conventional constitutional analysis is generally quite rigid; the permanence of constitutional rules, additional factors like precedent and methodological commitments, and the specter of U.S. Supreme Court review can lead to quite wooden forms of decision making.[217] Supervisory decisions, in contrast, are explicitly understood by state high courts as closer to policymaking than mechanical application of existing law to fact.[218] They explicitly consist of interest balancing and weighing various considerations, some of which may be absent from the underlying case.[219] Further, these decisions are often—though not always[220]—applied prospectively, which further blunts the force of precedent, minimizes the cost of overruling, and offers courts the lawmaking

213. *See, e.g.*, Unwired Telecom Corp. v. Parish of Calcasieu, 903 So.2d 392, pincite (La. 2005).

214. *See, e.g.*, *supra* notes 171–180171-180 and accompanying text; Ted Z. Robertson & Christa Brown, *Judiciary's Inherent Power to Compel Funding: A Tale of Heating Stoves and Air Conditioners*, 20 ST. MARY'S L.J. 863, 868–73 (1989).

215. *Cf.* Dobbins, *supra* note **Error! Bookmark not defined.**, at 455.

216. *See, e.g.*, In Int. of M.D., 921 N.W.2d 229, 246 (Iowa 2018), *as amended* (Mar. 5, 2019) (Christensen, J., concurring).

217. *See* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1165 (1985) (contrasting the strictures imposed by a constitutional decision with a comparable decision under a supreme court's supervisory power).

218. *See, e.g.*, State v. Gordon, 913 P.2d 350, 353 (Utah 1996); *In re* Jerrell C.J., 699 N.W.2d 110, 120 (Wis. 2005); State v. Ledbetter, 881 A.2d 290 (Conn. 2005). Justices have confirmed as much publicly, *see, e.g.*, Abrahamson, *supra* note 217, at 1165; Peters, *supra* note **Error! Bookmark not defined.**, at 1071, as well as in private conversations I had with current and former members of several high courts in the course of researching this project.

219. *See, e.g.*, State v. Pouncey, 699 A.2d 901, 907–09 (Conn. 1997); State v. Pineda, 13 A.3d 623, 638–40 (R.I. 2011); Roman v. State, 570 P.2d 1235, 1242–44 (Alaska 1977); Hess v. State, 536 P.2d 366, 368 (Okla. Crim. App. 1975).

220. *See, e.g.*, *In re* Yasiel R., 120 A.3d 1188, 1197–1202 (Conn. 2015); State v. Garcia, 29 P.3d 919, 923, 933 (Hawaii 2001).

latitude "comparable to that of legislatures."[221]

However, despite its highly flexible nature, the supervisory power is not without bite. Though the U.S. Supreme Court has never invalidated a statute under its supervisory power,[222] such a result is not uncommon among state supreme courts.[223] Additionally, not only have state high courts narrowed the discretion of executive and legislative actors; they have also forced state actors to take discretionary action, like ordering the legislature to appropriate a specific amount of funding.[224] As such, the open-ended nature of the power does not necessarily dilute its potency.

e. Normative in nature

Orders and decisions issued under a supreme court's supervisory authority are explicitly subjective in their content. To be sure, this is not to say they are arbitrary. Quite the opposite—decisions are often highly evaluative of the underlying needs of the judiciary, the state's larger legal system, and, in some instances, the population writ large. Courts may draw on various sources of facts, policy, science, and so on, to inform their decision.[225] But paired with its highly discretionary nature and few formal constraints, it is in this sense that the supervisory power is predominantly a means for courts to operationalize normative or subjective views of the state's law and policy. The underlying premise of decision-making pursuant to the supervisory power is not what a prior case, text of a statute, or other sources provide to address a given issue. Instead, courts start from a place that's closer to first principles and ask what they "should" do.[226]

221. *Garcia*, 29 P.3d at 927.

222. *See* Barrett, *supra* note 12, at 373.

223. *See, e.g.*, *In re* Bell, 344 S.W.3d 304, 314 (Tenn. 2011); Kremer v. State Ethics Comm'n, 469 A.2d 593 (Pa. 1983); State v. Duncan, 264 S.E.2d 421, 423 (S.C. 1980); Idaho Jud. Council v. Becker, 834 P.2d 290, 293 (Idaho 1992); Charles Toutant, *'Not Losing Sleep': Judges Won't Enforce This Law in Their Courtrooms*, N.J. L.J. (Feb. 21, 2024, 3:15 PM), https://www.law.com/njlawjournal/2024/02/21/not-losing-sleep-judges-wont-enforce-this-law-in-their-courtrooms [https://perma.cc/4ZTJ-N8AZ]; *see also* Superior Ct. v. State, Pub. Emp. Rels. Bd., 988 A.2d 429, 431 (Del. 2010); *supra* notes 193–198.193-198. This is not inconsistent with the claim made above concerning legislative override of the power, *see supra* note 205 and accompanying text, which referred to statutes narrowing the supervisory power. The discussion here concerns high courts affirmatively invalidating statutes as inconsistent with their supervisory authority.

224. *See, e.g.*, Allegheny Cty. v. Commonwealth, 534 A.2d 760, 765 (Pa. 1987). This stands in contrast to a writ of mandamus, which orders government actors to take ministerial—i.e., non-discretionary—action. *E.g.*, Doherty v. Caisley, 470 N.E.2d 319, 323 (Ill. 1984) (discussing the differences).

225. *See, e.g.,* State v. Green, 216 A.3d 104, 114 (N.J. 2019).

226. State v. Ramseur, 524 A.2d 188, 295 (N.J. 1987) (O'Hern, J., concurring); Roman v. State, 570 P.2d 1235, 1243–44 (Alaska 1977); People v. Coleman, 533 P.2d 1024, 1041–47 (Cal. 1975); State v. Shaw, 227 A.3d 279, 289-90 (N.J. 2020); Pleasant Grove City v. Terry, 478 P.3d 1026, 1040–42 (Utah 2020); Lavallee v. Justs. in Hampden Superior Ct., 812 N.E.2d 895, 906–12 (Mass. 2004).

***

The discussion thus far has shown the state supervisory power came as a result of broader state-level governmental reforms that elevated the political status of state judiciaries, expanded their role in governance, and enhanced their power. This Part has demonstrated that the power is a discretionary, flexible, standalone form of judicial authority that increases the capacity of courts and overrides many of the traditional limits on their power. Courts have used their supervisory power beyond the day-to-day management of the judiciary to enhance remedies, strengthen rights, and navigate interbranch relations.

To expand our understanding of the state supervisory power, we should also consider its federal counterpart. That comparison shows that the state supervisory authority is more expansive, potent, and legitimate. It raises important normative implications for how we evaluate this aspect of state judicial practice and challenges some institutional assumptions concerning state high courts. I elaborate on these implications in Part IV.

B. U.S. SUPREME COURT SUPERVISORY POWER

Similar to state courts, the U.S. Supreme Court's supervisory authority refers to powers that enable it to oversee the federal judiciary's operations "in order to preserve the integrity of judicial processes."[227] However, as shown below, the federal high court's supervisory power is narrower, significantly more limited, and generally considered an illegitimate feature of federal practice. Thus, the key takeaway from this brief comparison is that while state and federal supervisory powers share common elements, the former is a distinctive feature of state court practice.

1. Comparison

Looking at the Court's use of the power as a whole, it largely falls along two tracks—ad hoc rulemaking and remedial enhancement.[228]

Cases fall along the first track where relevant procedural, statutory, or constitutional sources come up short.[229] The Court perceives an omission in

227. Matthew E. Brady, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 STAN. L. REV. 427, 427 n.2 (1982).

228. One additional feature bears mention here. While the Court did invoke its supervisory power in civil cases, the overwhelming majority of its applications were in criminal matters. *See, e.g.*, Beale, *supra* note 12, at 1433. This is one additional feature that distinguishes it from state high courts, which are less substantively limited in using the power.

229. Its decision in *Castro v. United States*, 540 U.S. 375 (2003), demonstrates. There, the Court recognized no statute nor constitutional right required district court judges inform litigants as to the effects

relevant statutes or rules of procedure that affects the "quality" or proper functioning of federal litigation and uses its supervisory power to address it.[230] On the second track, the Court uses its supervisory power as an auxiliary form of remedial authority to execute statutory and constitutional policies. In these cases, the Court perceives the existing enforcement mechanism fails to sufficiently implement a statute's underlying objective or constitutional right's core values and uses the supervisory power to span the remedial gap. These features of the Court's supervisory power are similar to the applications discussed in Part II.A—state high courts use their own authority along the same lines.[231]

The federal supervisory power is also flexible, consisting largely of balancing by the justices. Some scholars have described it as "procedural common law" or "procedural law-making."[232] Others have referred to supervisory decisions as "essentially legislative" in that the Court's reasoning is more akin to policymaking than legal analysis.[233] This, too, parallels the state supervisory power.[234]

Despite these similarities, there are significant differences between the state and federal supervisory powers. Notably, the Court's own power is limited to adjudication, unlike its state counterparts. Further, when it crafts ad hoc rules, the protections they afford litigants rarely exceed existing Constitutional limits—i.e., federal supervisory rules seldom offer more protection than the Constitution.[235] And the Court has never invalidated a

of recharacterizing an improperly filed motion as a habeas petition, but still held as much under its supervisory power based on notions of proper administration and existing practice among most federal circuits. *Id.* at 382–83.

230. *See* Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 195–96 (1969).

231. *See supra* Section II.A.

232. Barrett, *supra* note 12, at 332; Hill, *supra* note 235, at 194.

233. Hill, *supra* note 235, at 214; *see also, e.g.*, Young v. United States *ex rel.* Vuitton Et Fils S.A., 481 U.S. 787, 803–09 (1987) (plurality opinion); Roviaro v. United States, 353 U.S. 53, 60–61 (1957); Jencks v. United States, 353 U.S. 657, 666–72 (1957).

234. *See supra* Section II.A.2.

235. Arguably the Court's highwater mark was *Elkins v. United States*, 364 U.S. 206 (1960), where the Court broke with decades of precedent upholding the silver-platter doctrine and prohibited the use of evidence in *federal* courts that was obtained by *state* officials in violation of the Fourth Amendment. *Elkins* presaged the Court's decision in *Mapp v. Ohio* just one year later, where it incorporated the exclusionary rule against the states through the Fourteenth Amendment. 367 U.S. 643, pincite (1961). Indeed, "[a] number of the supervisory power decisions had constitutional overtones, and several of the decisions later anticipated constitutional rulings." Beale, *supra* note 12, at 1451. *Mapp* is largely considered to be the starting point of the Warren Court's criminal procedure "revolution." *See generally, e.g.*, Yale Kamisar, Mapp v. Ohio*: The First Shot Fired in the Warren Court's Criminal Procedure 'Revolution', in* Criminal Procedure Stories 46 (Steiker ed., 2006); Michael Vitiello, *Introducing the Warren Court's Criminal Procedure Revolution: A 50-Year Retrospective*, 51 U. PAC. L. REV. 621, 621 (2020); Dr. Donald F. Tibbs, *The Start of a Revolution:* Mapp v. Ohio *and The Warren Court's Fourth*

statute with its supervisory power. In these ways, it is fair to say that the U.S. Supreme Court's supervisory authority is narrower and less potent than its state-level alternative.

2. Judicial Administration & Constitutional Structure

The differences between the state and federal powers can primarily be explained by structural features of the state and Federal Constitutions and their respective judiciaries.

As discussed in Part I, state court systems evolved into a unified model, placing the supreme court as the administrative head of the courts and centralizing in the high court operational powers and responsibilities. The federal courts followed a different path. Federal court reformers, like William Taft, pursued a decentralized design. While the Supreme Court is the highest court of the judiciary, administrative and operational responsibility is diffused across a vast network of judicial agencies.[236]

For example, the Judicial Panel on Multidistrict Litigation both consolidates complex civil cases in a single trial court for pretrial proceedings, and fashions rules that govern relevant procedures.[237] The Administrative Office for the federal courts oversees the judiciary's pretrial supervision and probation services for criminal defendants.[238] The Judicial Conference serves as the courts' primary policymaking arm, developing policies to implement the myriad statutes governing the federal courts, as well as advising Congress on the federal judiciary's needs and interests.[239] Together, they create a constellation of supervision. Thus, whereas supreme courts administer state judiciaries, the federal court system is administered by the federal judiciary.[240]

Amendment Case That Almost Wasn't, 49 STETSON L. REV. 499, 500 (2020). This is notable because the Court's significant expansion of constitutional rights during this period is understood to have capped its development of the supervisory power. Green, *supra* note 12, at 257.

236. Jonathan Petkun & Joseph Schottenfeld, *The Judicial Administrative Power*, 93 GEO. WASH. L. REV. 349, 353 (2025).

237. *See* 28 U.S.C. § 1407.

238. Probation and Pretrial Services History, U.S. CTS., https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history [https://perma.cc/ZQ8R-ALEG].

239. Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1599–1608 (2006).

240. *Compare, e.g.*, *supra* Section I.B*, with, e.g.*, *supra* notes 244–247244-247 and accompanying text. To be sure, some have suggested the Supreme Court's shadow docket can operate as an extension of its supervisory practice. Andrew Hammond, *The D.C. Circuit as a Conseil d'Etat*, 61 HARV. J. LEGIS. 81, 129–31 (2024). To the extent the shadow docket is functionally an extension of the Court's supervisory authority, a prior study on its state-level counterpart has shown the scope and reach of state high court shadow dockets are sufficiently more expansive as to differ in kind from the U.S. Supreme Court's. *See generally* Sopko, *supra* note 22 (see generally requires an explanatory parenthetical).22.

Further, unlike state courts, the administrative power of the federal courts is almost entirely statutory.[241] This structural distinction raises institutional considerations as to the scope of the power courts wield and the source of the prerogatives behind it. Since the various judicial agencies are creatures of statute, many of the first-order policy choices are made by Congress rather than the Supreme Court.[242] Even where Congress delegates broad discretion to the judiciary, it is wielded by a vast bureaucratic apparatus, rather than a single decision-making institution.[243] To be sure, the Chief Justice wields a significant amount of influence over this system, but the underlying structure is sufficiently decentralized as to allow for inter-agency conflicts and even for agencies to countermand the Chief Justice's own prerogatives.[244] In these ways, the structural distinctions between how state and federal courts are administered plays a substantial part in the scope of the supervisory authority available to the respective high courts.

Constitutional structure similarly contributes to the differences between the state and federal supervisory powers. The source of the federal supervisory power is contested in the literature,[245] but the federal government can only exercise those powers provided for by the Constitution, and scholars generally agree, whatever its source, Article III significantly limits its scope.[246] Broad uses of the supervisory power is said to exceed these limits by providing the justices with a "freestanding" source of policymaking authority that enables them to resolve disputes based on normative assessments of justice and fairness rather than a statute or constitutional provision. In other words, sketching public policy, crafting the suite of remedies available for violations, and determining the methods of

241. Petkun & Schottenfeld, *supra* note 236, at 356–63 (discussing Congress's role in crafting the federal judicial power); *supra* Section I.A.3.

242. *See* Petkun & Schottenfeld, *supra* note 236, at 374 (describing Congress's delegation of pretrial detention and probation services to the federal courts); Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1011–15 (2000).

243. Petkun & Schottenfeld, *supra* note 236, at 353.

244. *See, e.g.,* Robert Schmidt, *A Turf War Over Training Judges*, LEGAL TIMES, Sept. 29, 1997, at 1 (describing a "turf" battle between the Federal Judicial Center and the Administrative Office); Linda Greenhouse, *Vote Is a Rebuff for Chief Justice*, N.Y. TIMES (Mar. 15, 1990) at A16, https://www.nytimes.com/1990/03/15/us/vote-is-a-rebuff-for-chief-justice.html [https://web.archive.org/web/20150525200242/https://www.nytimes.com/1990/03/15/us/vote-is-a-rebuff-for-chief-justice.html] (reporting that the Judicial Conference modified proposals originally drafted at the Chief Justice's direction to undermine his primary policy goal of limiting habeas corpus).

245. Charles M. Yablon, *Inherent Judicial Authority: A Study in Creative Ambiguity*, 43 CARDOZO L. REV. 1035, 1094 (2022) (suggesting the power is inherent); Pfander, Marbury*, supra* note 12, at 1602–03 (arguing it necessarily flows from the Court's position as the highest court in the federal system); Pushaw, *supra* note 12, at 866 (same); *see also* Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 32–38 (2012) (locating the supervisory power in both statutory grants of authority as well as its place on the judicial hierarchy). *But see* Beale, *supra* note 12, at 1477–78 (rejecting statutory sources).

246. *See, e.g.*, Pushaw, *supra* note 12, at 844; Beale, *supra* note 12, at 1465–73.

enforcement are all issues that fall to nonjudicial branches. State constitutions, in contrast, limit and distribute powers rather than grant them, and as discussed in Part I, modern government reform allocated greater policymaking responsibilities to supreme courts and created the supervisory power as one of their primary tools to do so.

In sum, the U.S. Supreme Court has a supervisory power that shares several features with its state counterpart. It is flexible and has largely served as a source of policymaking power to craft ad hoc procedural rules and enhance remedies. However, the two differ meaningfully. The federal power is both rarely used and narrower in scope.[247] It is limited to adjudication, rarely afforded parties the level of relief seen in state courts, and never served as the basis to invalidate a statute. These distinctions are largely products of the fact that state constitutions generally allocate more administrative policymaking power to state courts than their federal counterpart and that power is centralized in supreme courts whereas in the federal judiciary it's diffused across a host of actors.

III. BOUNDARIES AND LIMITS

The discussion thus far has described the supervisory power of state supreme courts and connected this feature of state court practice to the institutional development of modern state judicial systems. That analysis defends the broader uses of the power reviewed in Part II as both institutionally and constitutionally grounded. But this Article's thesis is a qualified rather than wholesale defense of the practice. This Part thus considers the supervisory power's limitations. As Part II showed, the supervisory authority's applications are vast and the power itself quite discretionary. To account for this breadth and ambiguity, this Part proposes a model it terms the *zone of supervision* to sketch the supervisory power's boundaries. It then discusses how state constitutional structure provides tools to sanction courts when they cross them.

A. BOUNDARIES

This Section sketches the supervisory power's metes and bounds through a model that both explains prior uses of the power and helps frame how courts might use it in the future.

The model relies on two variables drawn from the descriptive and institutional accounts above: the legalness of the underlying issue and its proximity to judiciary interests. Together, the variables create a two-

247. Gershman, *supra* note **Error! Bookmark not defined.**, at 47; *supra* Section II.B.1.

dimensional space this Article refers to as the *zone of supervision*, which represents the idealized conception of the supervisory power. This perimeter demarcates the scope of a court's supervisory power. Uses that fall outside should be viewed with skepticism. Section III.B explores the various sanctions available when a court does wield its power beyond its zone of supervision. But first, this Section unpacks the model by exploring its two variables.

1. Legalness

Legalness here refers to the nature of the underlying issue or intended application.[248] Based on this attribute, supreme courts may consider the supervisory power to be appropriate or ill-suited to addressing the question. In this context, legalness falls along a spectrum.. The spectrum turns on the informal nature of the supervisory power and the fact that it overlaps with other forms of judicial authority. On the one end are applications of the power that are insufficiently legal or too policy-like. At the other end are applications that are too legal.

State high courts consider applications of the supervisory power as too policy-like when they implicate a multitude of competing interests and lack a basis to weigh them or have multiple potential resolutions without clear criterion to evaluate them. For example, when asked to impose a requirement that jurors in a criminal proceeding identify their race before voire dire, the Connecticut Supreme Court declined, explaining that the central issue—the interaction between the ways jurors self-identify with the perceptions of prosecutors—was too complex.[249] Iowa's high court similarly refused to craft a rule under its supervisory power requiring certain probation proceedings precede related criminal trials, explaining that such a rule implicates sufficiently complex questions of public safety best left to the legislature.[250]

At the other end of the spectrum are applications that are too "legal,"

248. I borrow this term from the extensive literature on norms and the nature of rules. *See, e.g.*, M.P. Golding, *The Morality of Law by Lon L. Fuller*, 76 ETHICS 225, 226 (1966) (reviewing LON L. FULLER, THE MORALITY OF LAW (1964)) (referring to "legalness" as determined by the context in which a rule is made based on a system's various sources of law-making); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1630 n.59 (2000) (describing "legal-ness" as capturing a rule's underlying nature, source, and force); *cf.* Frederick Schauer, *Institutions and the Concept of Law: A Reply to Ronald Dworkin (With Some Help From Neil MacCormick)* 11 (Univ. Va. L. Sch. Pub. L. & L. Theory Working Paper Series, Working Paper No. 129, 2009), https://law.bepress.com/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1199&context=uvalwps (referring to the legal properties of an institution's identity as its "legal-ness").

249 State v. Raynor, 221 A.3d 401 (Conn. 2019).

250 State v. Wahlert, 379 N.W.2d 10, 14 (Iowa 1985). *See also supra* notes 160–200 and accompanying text.

meaning courts decline to exercise their supervisory power because the issue calls for a more formal or durable source of power.[251] For example, North Carolina's supreme court declined to use the supervisory power to reach the merits of an as-applied challenge to a statute in a consolidated case because it was appealed before any record development in the individual actions.[252] And Kansas's high court refused to use its supervisory power to issue ad hoc relief, reasoning the precise remedy sought existed in a statute.[253]

2. Proximity to the Judiciary

The supervisory authority's purpose as power supreme courts wield to oversee and manage the judicial branch serves as a boundary as well. Application of the supervisory power is sensitive to its relative proximity to the judiciary and its responsibility overseeing the state's justice system.[254] That is not to say the supervisory power is limited to contexts that only concern the judiciary, but it is to suggest that there must be a sufficient nexus between the policy or relief sought pursuant to the supervisory authority and judiciary operations and its interests.[255]

On one end is high proximity to the judiciary. While comparatively rare, there may be some contexts where supreme courts might see their intervention as unwarranted or inappropriate. This often arises in areas where lower court discretion is typically expected, like decisions related to appointing counsel, courtroom management, contempt orders, and so on.[256] But for the most part, situations with a significant nexus to judicial operations or interests will warrant use of the supervisory power.[257]

---

[251] *See, e.g.*, Reynolds v. Superior Ct., 528 P.2d 45 (Cal. 1974) (declining to craft a prohibition on reciprocal discovery under the supervisory power because it implicates too many constitutional rights, both state and federal, and is best reviewed as such); State v. Higgins, 826 A.2d 1126, 1144 (Conn. 2003) (refusing to hold the supervisory power bars application of transferred intent to support conviction of crime more serious than the one intended because that is a "substantive" question).

[252] State *ex rel.* Edminsten v. Tucker, 323 S.E.2d 294 (N.C. 1984).

[253] State v. Gray, 403 P.3d 1220, 1227 (Kan. 2017) (noting that the court "need not consider" suppression under the supervisory authority because it was provided for by state statute); *accord* Bauguess v. Paine, 586 P.2d 942 (Cal. 1978) (reaching a similar conclusion but in the context of attorneys fees policies).

254. *See, e.g.*, Gershman, *supra* note **Error! Bookmark not defined.**, at 64–97.

255. *See, e.g.*, Dobbins, *supra* note **Error! Bookmark not defined.**, at 422–29.

256. Of course, this is not a hard-and-fast description. Any given exercise of discretion by a trial court could necessitate intervention for abuse or violation of certain rights. Instead, what I am referring to here is the use of supervisory power in a categorical fashion. *See, e.g.*, Dobbins v. State, 845 N.W.2d 148, 156 (Minn. 2013) (declining to create a freestanding "prophylactic requirement" concerning trial court process for appointing counsel because such requirement would intrude on a matter committed "to the discretion of the trial court").

257. *See, e.g.*, *In re* Domitrovich, 257 A.3d 702, 715 (Pa. 2021) (invoking supervisory power sua sponte because the underlying operational issue was central to the judiciary's integrity); Idaho Jud. Council v. Becker, 834 P.2d 290 (Idaho 1992) (similar); *see also* Joseph v. Scranton Times L.P., 987 A.2d 633 (Pa. 2009); Travelers Indem. Co. v. Bd. of Trustees of Univ. Ark., 646 S.W.3d 361, 366 (Ark.

On the other end are issues that are too remote from the judiciary's interests or administration. As the relationship between the judiciary's interest in the proper administration of justice and responsibility for operations and the sought-after relief grows more attenuated, supervisory power is considered less appropriate. For example, crafting evidentiary rules or rules of criminal procedure is closer to the judiciary than announcing a rule under the supervisory power that would directly control law enforcement conduct.[258] And sketching rules concerning public access to internal records for a component of the judiciary differs materially from an agency that is constitutionally separate.[259]

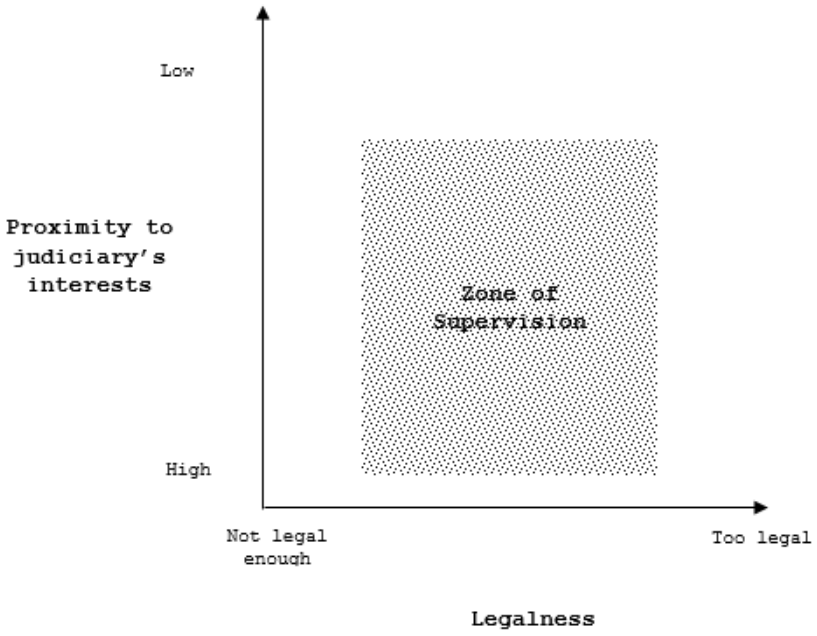
As noted, both variables—legalness and proximity to the judiciary—exist on spectrums. Bringing them together, we can see a sweet spot where the supervisory power is best suited or most appropriate. This Article terms the area the *zone of supervision*. It is in this space that courts should wield their supervisory power. Applications that fall outside its contours should presumptively be viewed as overreach. Figure 2 below serves as an illustration.

FIGURE 2. ZONE OF SUPERVISION

2022) (invoking supervisory power to review an issue not properly presented because it turned on a local trial court's COVID-19 vaccination policy); GHP Horwath, P.C. v. Kazazian, 543 P.3d 1035, 1050–53 (Colo. 2024) (crafting a pro se filing rules based on judiciary workload); Horn v. Rincker, 417 N.E.2d 1329 (Ill. 1981) (transferring and consolidating cases based on considerations of fairness and judiciary workload).

258. *See, e.g.*, Commonwealth v. Thomas, 68 N.E.3d 1161, 1168 (Mass. 2017) (declining to use the supervisory authority to craft a new process for eyewitness identification procedures because the power "does not extend to law enforcement agencies"); State v. Marquez, 967 A.2d 56, 84 (Conn. 2009) (similar).

259. *Compare, e.g.*, Comm'n on Jud. Discipline & Disability v. Digby, 792 S.W.2d 594 (Ark. 1990) (declining to exercise supervisory power over the Commission on Judicial Discipline & Disability because it is constitutionally separate from the judiciary)*, with, e.g.*, *In re* Bennett, 871 S.E.2d 445(Va. 2022) (noting that the supervisory power reaches questions of records within the judiciary).



Two points of clarification are warranted. First, this model is not based on fixed points. In fact, the variables are contingent. As discussed in Part II, the power is highly discretionary and flexible. This adaptability allows courts to frame applications of the power in different ways that may place it within or beyond the zone of supervision.

For example, consider again pandemic eviction moratoria. Suppose two courts issue moratoria that are identical in every way except the reasons for them. Court A says it is invoking its supervisory power because it feels that the potential harms to unhoused people during a historic pandemic outweigh the economic harms to landlords. Court B explains that due to social distancing requirements, the number of cases the judiciary can process is significantly reduced and it must prioritize criminal cases, custody disputes, and domestic violence hearings over eviction proceedings due to speedy trial requirements and liberty interests. The outcomes under either framing are the same—no eviction proceedings—but one might reasonably think Court B's moratorium is closer to the heart of its zone of supervision.

These choices reflect a linkage between how courts frame applications of the power and their understanding of the specific contours of their zone of supervision. To a certain extent, this is to be expected, as scholars have

established the contextual nature of a given supreme court's power in the literature.[260] Indeed, interstate variation is not uncommon.

For example, consider how state high courts divided over a rule requiring law enforcement to record custodial interviews. Several courts considered the issue under state and Federal Constitutions as well as the supervisory power and split on the question.

The high courts in Minnesota, New Hampshire, New Jersey, and Wisconsin, for instance, understood the question to be well within the bounds of their supervisory power's zone of supervision, as it implicated their duty "to take all appropriate measures to ensure the fair and proper administration of a criminal trial."[261] For the supreme courts of Connecticut, Kentucky, Maryland, and Vermont, though, the issue neither raised a constitutional question nor was it appropriate for supervisory relief and was thus best suited for the legislature.[262] There are other examples,[263] and they each illustrate how the variables within the model sketched above are not fixed across states but, due to the nature of the doctrine, are quite fluid.

Second, when an application of the supervisory power falls outside of the zone of supervision, it does not mean such a use of judicial power is

260. *See, e.g.*, MARY CORNELIA ALDIS PORTER & G. ALAN TARR, STATE SUPREME COURTS IN STATE AND NATION 60–63 (1990); HARRY P. STUMPF & JOHN H. CULVER, THE POLITICS OF STATE COURTS 6–8 (David J. Estrin ed, 1992); LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY 40 (2002); BUENGER & DE MUNIZ, *supra* note 48, at 9–19.

261. State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994); State v. Barnett, 789 A.2d 629, 632 (N.H. 2001); State v. Cook, 847 A.2d 530 (N.J. 2004); *In re* Jerrell C.J., 699 N.W.2d 110, 121 (Wis. 2005).

262. *See* State v. Lockhart, 4 A.3d 1176, 1199–1200 (Conn. 2010) ("Although we do have supervisory authority over the administration of justice, ...we believe that the legislature is better suited to gather and assess the facts necessary to establishing a recording requirement, [thus] we defer to this branch."); Brashars v. Com., 25 S.W.3d 58, 63 (Ky. 2000) (similar); Baynor v. State, 736 A.2d 325, 332 (Md. 1999) (similar); State v. Gorton, 548 A.2d 419, 422 (Vt. 1988) ("The most appropriate means of prescribing rules to augment citizens' due process rights is through legislation.").

263. Consider other examples, the propriety of allowing testimony from a parole revocation hearing at trial for the charges that prompted the revocation. Iowa's supreme court noted neither the state nor Federal Constitutionsfederal constitutions were implicated, and the issue was ill-suited to the supervisory power due to the complex interests implicate by such a rule and that it was best left to the legislature. State v. Wahlert, 379 N.W.2d 10, 14 (Iowa 1985). But for several other states, the issue fell squarely in the zone of supervision, as it implicated the fairness and integrity of the judicial system and necessitated a careful balancing of interests, as the courts feared permitting convictions where the state used the revocation hearing purely as an investigatory tool to prove its case in the subsequent trial. *See, e.g.*, McCracken v. Corey, 612 P.2d 990 (Alaska 1980); People v. Coleman, 533 P.2d at 1024 (Cal. 1975); State v. Hass, 268 N.W.2d 456, 460 (N.D. 1978); State v. DeLomba, 370 A.2d 1273 (R.I. 1977); State v. Evans, 252 N.W.2d 664 (Wis. 1977). We have seen a similar dynamic with eyewitness identification procedures. According to Connecticut's high court, "[t]he circumstances surrounding the various identification procedures present too many variables" for the supervisory power and is best suited to legislative revision. State v. Marquez, 967 A.2d 56, 84 (Conn. 2009). But for the supreme courts in Alaska and New Jersey, the issue was one of admissibility of evidence and whether current rules properly protected defendants' rights and supported a fair criminal justice system and thus was well-suited to their supervisory role over criminal trials. *See* Young v. State, 374 P.3d 395, 412–13 (Alaska 2016); State v. Henderson, 27 A.3d 872, 909 (N.J. 2011).

inappropriate or illegitimate. Developing a rule or framework may be well within the court's power—but just not its supervisory authority. For example, a court may determine requiring custodial interrogation of juvenile suspects is outside its zone of supervision, but it is required by the state constitution's due process clause or a provision of a relevant statute. The supervisory authority is a standalone power and thus can supplement other forms of judicial power as well as serve as an alternative basis for a court to act.

B. LIMITS

A court's zone of supervision is subject to both internal and external factors that police its boundaries. But both factors implicate the state's political environment.

Internally, as multimember bodies, a supreme court's composition is crucial to how and when it wields power.[264] The supervisory authority is no exception. Thus, changes in a court's composition can influence whether a given application of the supervisory power falls within the zone of supervision or should instead be seen as exceeding authority. For example, in the early 2000s, the Michigan Supreme Court experienced "deep divisions" along these lines.[265] After decades construing the supervisory power broadly,[266] a new majority of the court took a narrower view of its zone of supervision.[267]

While these internal factors can limit the supervisory power, the primary checks are external. Indeed, state constitutions "prioritize[] external checks on government more than internal checks."[268] Following the "first wave" of state constitutions at the founding, subsequent charters from California to Connecticut emphasized control of government through novel structural innovations, like single-subject rules, statewide gubernatorial

264. *See, e.g.*, Paul Brace, Laura Langer & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387 (2000); Nicholas W. Waterbury & Alan J. Simmons, *The Impact of Judicial Selection Method on State Supreme Court Justice Ideology*, 53 AM. POL. RSCH. 209 (2024).

265. *See* Cynthia Person & Susan Jezewski Evans, *Constitutional Law*, 52 WAYNE L. REV. 435, 436 (2006); Helen Hershkoff, *The Michigan Constitution, Judicial Rulemaking, and* Erie*-Effects on State Governance*, 60 WAYNE L. REV. 117, 119 (2014).

266. *See, e.g.*, Abrahamson, *supra* note 217, at 1164 (pointing to the Michigan Supreme Court's broad use of its supervisory power as an innovative example of how state supreme courts can use their authority outside of traditional judicial review).

267. *See* Hershkoff, *supra* note **Error! Bookmark not defined.**, at 119. Of course, this can cut the other way, too, where a change in court composition produces a more expansive concept of the supervisory power. *See, e.g.*, *In re* Yasiel R., 120 A.3d 1188, 1208 (Conn. 2015) (Espinosa, J., concurring in part and dissenting in part); Weems v. App. Ct., Fifth Dist., 992 N.E.2d 1228, 1230 (Ill. 2012) (Kilbride, J., dissenting).

268. Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 561 (2023).

elections (versus legislative selection), and the creation of referendum, initiative, and recall processes.[269] It is these unique structural features that offer legal and political tools to constrain government authority.[270] Thus, the most consequential check on state judicial power is the state's political processes, as defined by a state's particular constitutional structure, norms, and history.[271]

Consider some of the relevant structural features common to state constitutions. The vast majority of justices stand for some kind of election. And even in the states that rely on a different method of selection, those mechanisms are not distorted by things like the Electoral College. These features offer some level of majoritarian control over who is wielding judicial power. Further, with one exception, all state constitutions impose mandatory retirement, term limits, or both, which help facilitate churn as to court personnel. Further, the meaningful availability of popular initiative and amendment can similarly serve as a form of judicial sanction.[272] Taken together, these and other structural considerations play, as Laura Langer has shown, "defin[ing]" roles as to the contours of a supreme court's power.[273]

The coordinate branches similarly channel a state's politics to influence the shape of a court's power and what judges consider overreach or lack of compliance. As Meghan Leonard has observed, the coordinate branches of state government "have increased ability to fight back" against state supreme courts, relative to their federal counterparts.[274]

Both branches have constitutional and political tools that can narrow and check courts. In state's that rely on executive appointment, for instance, governors have used this authority to reconfigure courts they think of as activist, a tack Gov. Chris Christie attempted in New Jersey.[275] Executives

269. *See* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 247–48 (2d ed. 2023); TARR, *supra* note 72, at 107–25, 150–62; Marshfield, *supra* note 268, at 570 ("[T]he state constitutional tradition has long recognized that liberal constitutional amendment processes can have a chilling effect on courts.").

270. *See, e.g.*, G. Alan Tarr, *State Constitutional Politics: An Historical Perspective*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 3, 4–18 (G. Alan Tarr ed. 1996).

271. Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward A State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1675–85 (2010).

272. *See generally* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES (2018) (discussing the history and politics of state constitutional amendment).

273. LANGER, *supra* note 294, at 39–41; *see also* Devins, *supra* note **Error! Bookmark not defined.**, at 1676–79.

274. Meghan E. Leonard, *State Legislatures, State High Courts, and Judicial Independence: An Examination of Court-Curbing Legislation in the States*, 37 JUST. SYS. J. 53, 54 (2016).

275. See, e.g., Robert P. George, *In Replacing Supreme Court Justice John Wallace, NJ Gov. Chris Christie Made Good on His Promise*, N.J.COM (May 09, 2010, 10:14 AM),

have also used their fiscal powers to slash court budgets or offer lower court judges raises in exchange for support of measures that check supreme court power.[276] As leaders with a statewide base, governors have also successfully galvanized popular support via direct democracy to bypass the legislature and override or countermand the courts.[277]

State constitutional structure and politics similarly afford legislatures several tools to meaningfully check judicial power. In the states where legislatures play a role in reconfirming or retaining justices, Thomas Gray has suggested the availability of such a sanction can and does chill potential abuses of judicial power.[278] Legislatures can also use their impeachment power as a way to threaten or check judicial overreach.[279] Similarly, there is a growing literature exploring the effects of court-curbing legislation at the state level that shows it can limit court power through direct (modifying substantive or procedural features) and indirect (galvanizing public support against the court) means.[280]

State constitutions also provide the possibility of constitutional amendment, which can check judicial power and modify its undesirable applications. Studies of the constraining role of such measures suggest that using amendment to keep statutory and constitutional text brief and detailed through frequent revision can "limit . . . the judiciary's capacity to shape public policy" by narrowing their interpretive discretion and "minimiz[ing] the need for ongoing judicial determinations in the development of evolving public policies."[281]

As a result of many of these structural features, most state high courts operate in closer proximity to their state's political thicket than their federal

https://www.nj.com/njv_guest_blog/2010/05/in_replacing_supreme_court_jus.html [https://perma.cc/8BZY-5XW7] (quoting Gov. Christie as saying "I will remake the court and I will remake it on this one simple principle. If you (want to) legislate, (then) run for the Legislature, don't put on a black robe and go to the Supreme Court . . . . . .(T)here won't be any justices that I either reappoint or put on that court that do that.").

276. *See, e.g.*, Lincoln Caplan, *The Political War Against the Kansas Supreme Court*, NEW YORKER (Feb. 5, 2016), https://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court [https://perma.cc/5T7V-EUZ6].

277. *See, e.g.*, Glenn Smith & Brendan Bailey, *Legislative Reform of California's Direct Democracy: A Field Guild to Recent Efforts*, 47 CAL. W. L. REV. 259, pincite (2011).

278. *See* Thomas Gray, *The Influence of Legislative Reappointment on State Supreme Court Decision-Making*, 17(3) STATE POL. & POL'Y Q. 275 (2016).

279. *See* LANGER, *supra* note 294, at 38–39 (discussing examples).

280. *See, e.g.*, Meghan E. Leonard, *State High Courts and Horizontal Constraints*, *in* RESEARCH HANDBOOK ON JUDICIAL POLITICS 204–06 (Michael P. Fix & Matthew D. Montgomery eds., 2024).

281. Emily Zackin & Mila Versteeg, *De-Judicialization Strategies*, 133 YALE L.J. F. 228, 232 (2023).

counterparts.[282] As discussed in Part I, this was an intentional design choice as part of court unification efforts. That said, not all courts and chief justices are equally adept at the judicial statesmanship aspect of their jobs.[283] In this way, a court's political savvy can (perhaps subtly) influence the boundaries of a court's power and thus its zone of supervision as well.[284]

In sum, the distinctive vision for government that elevated supreme courts to truly coordinate branches and produced the supervisory power was also responsible for the constitutional features that limit it. These structural considerations produce internal and external political factors that can genuinely sanction and check court power. Indeed, the state public law literature has long recognized state courts are subject to political forces to a degree "unknown in the federal system."[285] The accumulation of these elements produce a governance structure capable of "absorb[ing]" broad applications of judicial power "much more constructively than the federal system."[286]

With these boundaries and limits in mind, the next Part considers what to make of the supervisory power, as well as its broader implications.

IV. IMPLICATIONS

During the nineteenth and twentieth centuries, states from Alaska to Maine revised and redefined the structure of their governments through a flurry of constitutional conventions and amendments.[287] Among other things, these changes elevated state judiciaries to equal status with other branches, made them more independent vis a vis the other branches, reconceptualized the role of state high courts by expanding their responsibilities, made them more accountable to the public, and, importantly, deliberately increased their power.[288]

282. *See* Marshfield, *supra* note 268, at 570 (noting that "state courts are intentionally tied to politics in ways that have no federal analog").

283. *See* TOBIN, *supra* note 38, at 48–55.

284. *See id.*; LANGER, *supra* note 294, at 39–41; TOBIN, *supra* note 38, at 48–49 (discussing examples of the "more active and sophisticated political involvement of the judicial branch").

285. Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1613 (2001); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248–51 (1972); Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1561 (1997); Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1081 (1991).

286. Jonathan L. Marshfield, *Rethinking Structural Injunctions in State Constitutional Litigation*, 85 LA. L. REV. 491, 519–20 (2025).

287. *See generally* DINAN, *supra* note **Error! Bookmark not defined.** (offering a historical account of this period of state constitutional change).

288. *See supra* Part I.

The increase in power and political status gave high courts more tools to control their operations and advance their interests. The supervisory power is one such tool and, as Part II shows, courts have used it beyond its routine administrative applications to make and shape policy across a range of contexts. This policymaking dimension of the supervisory power implicates a host of theoretical and normative questions.

This Part works through the major threads of those analyses. Conceptually, this Article's account of the supervisory power suggests a more active role for courts within the state policymaking apparatus in which they operate as equal partners with the other branches to advance the state's general welfare.[289] The supervisory power provides high courts with a more precise and flexible tool to contribute to a state's ongoing governance project. To be sure, this account of a supreme court's role raises normative questions related to the legitimacy of judicial policymaking. While a comprehensive theory of interbranch relations is outside the scope of this Article, Part IV.B engages with some of the primary critiques of judicial lawmaking. In brief, the institutional assumptions that animate these important arguments do not map so easily onto the separation-of-powers principles at the heart of state constitutions, nor the institutional assumptions that underlie how state judicial power is allocated.

A. THEORETICAL IMPLICATIONS

At a basic level, the supervisory power provides an additional tool for supreme courts to actively participate in state governance, within adjudication and outside of it. While the power can perform that function across a range of applications, its capacity to provide signaling, facilitating, and coordinating functions is especially important.[290]

As a signaling device, supreme courts can call on the other branches to take action or they can share their perspective on the underlying legal or policy issue outside of the strictures of ordinary constitutional litigation. For example, by enhancing constitutional values via procedural rules,[291] courts can share concerns regarding law enforcement tactics without barring the behavior entirely as an "unreasonable search" or "cruel and unusual punishment." Similarly, an area of law or policy might benefit from the unique tools and institutional capabilities of the legislature but various exigencies or other factors may necessitate a temporary solution. Here, too, courts can signal the policy gap for the legislature and offer an initial solution

[289] *See supra* Section I.B.

290. *Cf.* AILEEN KAVANAGH, THE COLLABORATIVE CONSTITUTION (David Dyzenhaus & Thomas Poole eds., 2024).

291. *See supra* Section II.A.

that reflects the judiciary's perspective and expertise.[292]

The supervisory power similarly enables courts to operationalize and facilitate policies crafted by the other branches. The decision by New Jersey's high court to fashion a framework implementing the governor's prisoner release policy during the pandemic is illustrative.[293] There, and in similar examples, high courts invoke the supervisory power to effectuate the policy choices other branches have codified.[294]

Supreme courts can also coordinate actions between and among the branches towards effective governance. Consider again the Arkansas Supreme Court's decision to bring the branches together to redraft the state's criminal code from the ground up or the California Supreme Court's Collaboration on Mental Health Issues that resulted in related legislation.[295] High courts across the country have similarly relied on their supervisory power to engage the other branches and channel their collective roles towards a specific policy goal.[296] These examples demonstrate how the supervisory power enables courts to help harness the state's full policy capacity towards a shared objective, or at least provide a venue to align on what those shared objectives are.[297]

These features illustrate some of the ways the supervisory authority empowers courts to contribute to state governance by engaging with other branches. Part II illustrated how supreme courts can make policy directly, in adjudication and beyond it. Together, we see how the supervisory power expands a supreme court's policymaking capacity beyond the binary means afforded by judicial review. These applications of the supervisory power highlight a distinctive role for high courts in state governance, thus raising broader implications for allocation of powers and interbranch dynamics.

Recent work on state separation-of-powers principles suggests that a

292. *See, e.g.*, State v. Skipwith, 165 A.3d 1211 (Conn. 2017).

293. *See supra* notes 140–141 and accompanying text.

294. *See, e.g.*, Tyler v. State, 903 N.E.2d 463 (Ind. 2009); Griggs v. Superior Ct., 546 P.2d 727 (Cal. 1976); Bennett v. Auto. Ins. Co. of Hartford, 646 A.2d 806 (Conn. 1994); *in re* Individuals in Custody of State, No. SCPW-21-0000483, 2021 WL 4762901 (Haw. Oct. 12, 2021).

295. *See* JUD. COUNCIL Cal., Admin. OFFICE Cts., Task Force FOR Criminal Justice Collaboration On Mental Health Issues: Final Report 29 (2011), http://courts.ca.gov/documents/Mental_Health_Task_Force_Report_042011.pdf; Cal. Comm. Rep., Ca A.B. 2190 (NS), 2013–2014 Reg. Sess. (2014).

296. *See, e.g.*, Sopko, supra note 19, at 1506–08 (collecting examples).

297 Criminal justice reform provides several examples along these lines, especially in the context of pretrial detention, jury reform, and sentencing. *See, e.g.*, Frampton & Osowski, *supra* note 9; Thomas Zambito, *NJ Supreme Court Committee Urges Historic Changes to State's Bail System*, NJ.com (Mar. 20, 2014, 3:09 PM), https://www.nj.com/news/2014/03/chief_justices_committee_urges_historic_changes_in_njs_bail_system.html [https://web.archive.org/web/20240609020232/https://www.nj.com/news/2014/03/chief_justices_committee_urges_historic_changes_in_njs_bail_system.html].

core commitment at the heart of state constitutions is effective government. Scholarly accounts have suggested state constitutional structure favors pragmatic conceptions of institutional relations over theoretical.[298] John Devlin, for instance, has argued the distinctively mixed design of state government also suggests state constitutional structure prioritizes pragmatism and practice over political theory.[299] This work rejected generic notions of government structure and institutional assumptions based on the Federalfederal Constitution. Instead, scholars have elaborated on the significance of the unique structural arrangements and deliberate design choices in state constitutions.

However, this work has framed state interbranch relations almost exclusively around conflict and contestation.[300] But as Jonathan Marshfield has shown, a Madisonian theory of separation of powers finds little purchase in state constitutions.[301] In other words, the notion that "ambition can be made to counteract ambition" between the branches is not the organizing principle behind state institutional structure. Rather, Dan Rodriguez has suggested that the core commitment that animated modern state constitutional development is good government.[302] People prioritized a structural regime that is "pragmatic" and can provide for their general welfare.[303] Part I explored this reorientation in the specific context of court reform—it was a catalyst for the supervisory power—but Rodriguez shows it applies across the entire constitutional structure.

Developing conceptions of interbranch relations that prioritize conflict or minimize collaboration leaves this core aspect of state constitutional structure undertheorized. To be sure, friction and "showdowns" are inevitable (and perhaps desirable).[304] But developing conceptions of interbranch relations that focused on contestation limits the explanatory value of such theories and points towards a parochial conception of state

[298] *See, e.g.*, Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1130–31 (2004); Miriam Seifter, *State Legislative Vetoes and State Constitutionalism*, 99 N.Y.U. L. REV. 2017, 2040–47 (2025); Marshfield, *supra* note 269, at 627–29.

[299] John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1266 (1993).

[300] No doubt, such interactions are crucial to understanding how state power is distributed, but they are not fully representative of interbranch relations and thus limits the explanatory value of such theories.

301. Marshfield, *supra* note 268, at 583–615.

302. *See generally* DANIEL B. RODRIGUEZ, GOOD GOVERNING: THE POLICE POWER IN THE AMERICAN STATES (2024) (suggesting state constitutions are organized around a structural logic that prioritizes good governance over other values like inter-branch competition) .

303. *Id.* at 179.

[304] *Cf.* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008).

constitutional structure.[305]

This Article's account of the supervisory power helps widen our lens accordingly and lays the groundwork for a more fulsome analysis of interbranch relations that elevates the role of cooperation.[306] It demonstrates some of the ways the supervisory power can serve as a tool for courts to contribute to the governance process through expanded policymaking,[307] filtered through the judiciary's institutional expertise and distinctive political incentives (i.e., their zone of supervision).[308]

B. NORMATIVE IMPLICATIONS

With this conceptual analysis in mind, we might ask then what we should make of the supervisory power. As discussed above, and noted throughout the Article, the supervisory power implicates foundational questions of state judicial power and role. Absent a comprehensive theory of state courts, though, we cannot fully evaluate the supervisory power's normative implications. Thus, in working through the primary themes of that analysis, this Section's discussion is accordingly tentative and brief.

We might fairly describe the supervisory authority as a judicial policymaking tool. As noted in Part II, the power plays a direct (e.g., ad hoc procedural rulemaking) and indirect (e.g., reaching a constitutional issue no party raised) part in enhancing a court's capacity to make and influence state policy. To evaluate such aspects of judicial power, the courts literature often inquires as to whether courts are wielding the proper power and whether they are using it appropriately.[309] This is a vast literature that spans disciplines from law to social science, but two variables common to analysis along these lines are legitimacy and a court's proper role.

It is fairly uncontroversial to say that American constitutional governance entails some level of judicial policymaking.[310] What is typically contested is how much is too much. Robert Kagan famously offered an institutional frame he termed "adversarial legalism" to help critique what he

[305] *See, e.g.*, James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS UNIV. L. REV. 109, 128–31 (1998). *Cf.* KAVANAGH, *supra* note 290, at 32–50, 76–85.

[306] RODRIGUEZ, *supra* note 302, at 193 (noting that "collaboration is essential to realize the aims of good governing").

[307] *See supra* Part II.

[308] *See supra* Part III.

309. *See, e.g.*, Bruce G. Peabody, *Legislating from the Bench: A Definition and A Defense*, 11 LEWIS & CLARK L. REV. 185, 197–208 (2007).

310. *See, e.g.*, Jeb Barnes, *Bringing the Courts Back In: Interbranch Perspectives on the Role of Courts in American Politics and Policy Making*, 10 ANN. REV. POL. SCI. 25, 27 (2007).

saw as an overreliance on courts as policymakers.[311] The thrust of Kagan's nuanced argument against a broader vision of judicial policymaking is that American litigation is overly formal and participatory, which narrows the inputs and available tools for courts, creates higher political and economic costs, and as a result is generally less desirable than less court-driven alternatives.[312]

This critique of judicial policymaking is worth considering. However, I think the account of the supervisory power sketched here, and the broader institutional assumptions it brings with it, undermine or perhaps even obviate some of the concerns Kagan's theory advances. In brief, Kagan's critique assumes judicial policymaking comes exclusively through adjudication—indeed it is in the very name of his concept (adversarial). But as discussed in detail in Part II, that is not the case with the supervisory power. It can and does operate outside of the confines of adjudication.

In this way, the supervisory power pushes court authority closer to what Kagan sees as an idealized notion of "bureaucratic legalism."[313] In this non-adjudicative context, many of the formalities associated with adjudication—rules of evidence, civil procedure, etc.—are not applicable. Instead, the process is substantially less formal, bringing judicial interventions closer to what Kagan sees as a normatively desirable government concept he terms "political and expert judgment."[314]

And yet even when courts do rely on the power in the course of resolving a dispute, it can overcome many of what Kagan sees as the problems with making policy through adjudication. Specifically, the structure of adjudication and corresponding formality of procedural rules results in parties seeking broad policy outcomes under the guise of narrow, highly technical legal questions. Here, too, this Article's account of the supervisory power can address some of these critiques of judicial policymaking. For example, high courts can and do rely on the authority to reframe or expand the questions presented, override otherwise rigid procedural rules, and other features that might narrow judicial inputs. Further, courts can convene commissions or task forces to operate as enhanced evidence-gatherers to supplement a lone appellate record and better inform their decision making.

311. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2d ed. 2019) Kagan's work sparked an entire literature on adversarial legalism that has expanded the concept. *E.g.*, Jeb Barnes & Thomas F. Burke, *Untangling the Concept of Adversarial Legalism*, 16 ANN. REV. L. & SOC. SCI. 473, 473 (2020). My discussion here is largely focused on Kagan's own claims rather than those of his subsequent interlocutors.

312. *See* KAGAN, *supra* note 311, at 10–14, 30–40.

313. *See id.* at 11–13.

314. *See id.* at 11–12.

As discussed above, the supervisory power helps illuminate the institutional posture of state high courts and the ways that they challenge some of the background assumptions we typically assign to "courts."[315] Kagan's critique further sharpens that point: generic concepts of what courts do don't map so easily on to state courts and, with that, nor do some of the normative arguments against robust judicial policymaking roles in governance.

The supervisory power may also have normative consequences for a high court's legitimacy.[316] The legitimacy of judicial policymaking is the subject of a rich literature, but scholars' central theses generally focus on the concept of unaccountable institutions wielding purely discretionary power to issue sweeping, final rulings on consequential issues of social policy.[317] In short, the legitimacy considerations turn on institutional aspects of courts and the nature of the power they wield.[318]

As to structural factors, policymaking by courts is thought less legitimate because of how power is allocated between and among the branches. As courts wield their power in ways that look less and less like interpretation and adjudication, some scholars suggest we should be increasingly skeptical, since constitutional design is said to leave lawmaking to the other branches.

These are important considerations, but we should consider them in light of state constitutional structure. As Neil Komesar has shown, institutional evaluation does not proceed in a vacuum.[319] In other words, a narrower view of state court power—that is, rejecting the account of supervisory power advanced in this Article as normatively undesirable—will likely result in enhancing legislative and gubernatorial power. Passively redistributing authority this way towards a generic equilibrium would be generally inconsistent with the deep skepticism of policymaking by legislatures and executives that animated modern constitutional development.[320] It could disrupt the allocation of policymaking directed to

315. *See supra* Section III.C.1.

316. To be clear, here I am referring to normative legitimacy. Whether the supervisory power is descriptively legitimate is largely an empirical question that is outside the scope of this Article.

317. *See, e.g.*, Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1522–23 (2022) (synthesizing relevant literature).

318. *See, e.g.*, Peabody, *supra* note 309, at 197–208.

319. *See generally* Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657 (1988) (analyzing institutional competency and capacity of courts in policymaking and suggesting that such analysis is necessarily comparative); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994) (elaborating on this claim).

320. *See* RODRIGUEZ, *supra* note 302, at 25–28; TARR, *supra* note 72, at 118–26.

the judiciary. In short, state constitutional structure perhaps invites more judicial policymaking than our generic conceptions of institutional roles allow.

Moreover, the accountability of courts (or lack thereof, as the case often is at the federal level) often provides a basis for evaluating the legitimacy of their power. As discussed above, and well established in the literature, state courts are more democratic, more accountable, and subject to more horizontal checks than their federal counterparts.[321] For these reasons, normative critiques of judicial policymaking generally do not map well onto state courts, as these arguments are generally tailored to federal features (e.g., life tenure) or universal conceptions of courts.

Beyond these structural elements, normative evaluations of judicial policymaking often focus on the nature of the power itself and the content of the decisions it produces. On the latter, tired rhetoric, like "legislating from the bench" is well known. But it speaks to a more serious concern that courts are straying too far from devices we generally think of as providing some limitations on court power—text, interpretive canons, precedent, etc.[322]

However, these evaluations assume a certain universe of forms of judicial power—largely a binary between constitutional and statutory interpretation. For example, consider the Warren Court's procedural revolution. The U.S. Supreme Court crafted a host of procedural rules and frameworks that largely enhanced protections for criminal defendants based on its interpretation of the Fourth, Fifth, Sixth, and Eighth Amendments. Thus, the critiques of decisions like *Miranda* and others are that they lack a basis in precedent and their rules cannot reasonably be squared with the underlying text.[323] These cases affected the Court's legitimacy because for critics, traditional constitutional adjudication required more fidelity to things like text and case law.

The supervisory power, however, is a decidedly different formulation of judicial authority. As discussed in greater detail in Parts I and II, it is ideally situated for the kind of decisional contexts that require more latitude and discretion than might be available under ordinary judicial review. In this way, the power's very flexibility is what could make it a more legitimate alternative to otherwise conventional methods of power. Indeed, as a distinctive source of authority, the supervisory power offers an additional

321. *See supra* notes **Error! Bookmark not defined.**–313 and accompanying text.

322. *See* Peabody, *supra* note 309, at 203–04.

323. *See, e.g.*, Richard H. Fallon, *Judicial Legitimacy and The Unwritten Constitution: A Comment on* Miranda *and* Dickerson, 45 N.Y.L. SCH. L. REV. 119, 121–24; Thomas Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law,* 91 HARV. L. REV. 1117, 1127–29 (1978).

tool that can serve as an alternative to attempting to craft doctrinal rules or tests based on ill-fitting constitutional text or precedent or engaging in the debates over "lockstepping."

Further, we might consider judicial policymaking undesirable because the resulting decisions are sweeping and final and often concern consequential issues of social policy. As a general matter, "state judicial review does not have the same finality" as its federal analogue.[324] But more specifically, the supervisory power is understood as even less final than ordinary judicial review. Whereas the latter might be thought of as "a big red stop sign" to the other branches,[325] use of the supervisory power is perhaps better thought of as an invitation to "dance," as some former chief justices have put it.[326] Indeed, justices have said implicitly and explicitly that a virtue of the supervisory power is its provisional nature.[327] As Chief Justice Ellen Peters put it, relying on "supervisory authority leaves more flexibility for further input from all the interested constituencies."[328] In these ways, use of the supervisory power does not have the same aggrandizing effects as other formulations of judicial power that are said to risk a court's legitimacy.

In sum, our evaluation of the supervisory power should account for two considerations. First, our evaluation should consider its potential for courts to advance their prerogatives and conflict with other branches, as well as its potential to facilitate their cooperation and coordination. Second, while the power is broad, flexible, and highly discretionary, it is subject to boundaries and rooted in both text and institutional context of state constitutions.[329] Further, under a closer examination, we see that traditional arguments against judicial policymaking do not readily track the nature of the supervisory power and structure of state constitutions so easily. As a result, our evaluations of the supervisory power should proceed at the retail rather than wholesale levels. In other words, that courts use the supervisory power along the lines sketched in this Article should not per se raise normative problems. Rather, we should take each application on its own terms and consider it in the context of a court's zone of supervision.

324. Marshfield, *supra* note **Error! Bookmark not defined.**, at 570.

325. *Cf.* Hon. Jeffrey S. Sutton, *21st Century Federalism: A View from the States*, 46 HARV. J.L. & PUB. POL'Y 31, 34 (2023).

326. *Cf.* Shirley S. Abrahamson & Robert L. Hughes, *supra* note 285; Peters, *supra* note 137, at 1071.

327. *See, e.g.*, State v. Skipwith, 165 A.3d 1211 (Conn. 2017) (McDonald, J., concurring); People v. Lemcke, 486 P.3d 1077, 1089 (Cal. 2021); Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1071 (1998).

328. Peters, *supra* note 137, at 1071.

329. *See supra* Section III.A.

CONCLUSION

The state supervisory power enables supreme courts to wield conventional forms of their power with fewer constraints and to assert it in seemingly unconventional ways, as well. This Article offers a descriptive and theoretical account of this important aspect of state supreme court practice—as well as a qualified normative defense of it. It shows that the supervisory power is an essential feature of judicial independence and the broader role of state supreme courts as agents of governance. This feature of state high court practice has been an essential aspect of state constitutional structure, before state high courts' current moment in the spotlight[330] and will be after. To overlook this vital feature of state governance comes at our own peril, as state supreme courts are too important—and now more than ever—to overlook.

330. *See, e.g.*, Press, *supra* note 1.