STATE SUCCESS IN STATE SUPREME COURTS: JUDGES, LITIGANTS AND STATE SOLICITORS

DISSERTATION

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By

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ABSTRACT

It is a well-known fact among those who study courts and judges that governments win cases at unusually high rates. Though this high rate of success is an established empirical fact, it is not clear why governments should fare so well. What, exactly, are the sources of the extraordinary successes of governments in litigation? What does this high level of success mean for the independence of state courts?

Utilizing the institutional variation offered by the U.S. state supreme courts, I explain state litigation success rates using the major judicial decision making theories as well as theories concerning party capabilities in litigation. I focus specifically on whether attitudinal or strategic models of decision making explain judicial behavior in state supreme courts and thus state success. In so doing, I integrate judicial decision-making and litigant capability approaches in a unified analysis of judicial decision making in the state supreme courts. I also investigate the ways in which the varying informational needs of the justices alter the litigation environment. Finally, and for the first time in the political science literature, I investigate the unique role that state solicitors play in aiding states in their litigation efforts. Specifically, I show that the solicitors are not closely analogous to the federal Solicitor General because of certain institutional deficits unique to state solicitors.
Dedicated to my parents and to Rachel
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CHAPTER 1

INTRODUCTION: THE GOVERNMENT GORILLA

Governments are almost universally the most successful litigants in appellate courts. One synthesis of the research on governments as litigants noted that governments were incredibly successful and called them “gorillas” (Kritzer 2003), and with good reason: in almost every country studied national governments or sub-national (i.e. state and local) governments win more of their cases than any other type of litigant. This level of success occurs in courts in advanced democracies and less developed countries (Haynie et al. 2005; McCormick 1993) as well as several levels within the United States, including the U.S. Supreme Court (Sheehan et al. 1992), the federal courts of appeal (Songer and Sheehan 1992), and the state supreme courts (Wheeler et al. 1987; Farole 1999). Further, the government’s advantage is usually substantial: on average governments win about two-thirds of the cases they participate in, regardless of the opponent. The same pattern holds in the data used for analysis in this project. Between 1995 and 1998, in civil cases, the state governments won over 61% of their cases—a number that is comparable to, if a bit lower than, the average rate of success for governments in other studies (including studies of the state supreme courts). Further, it is worth noting that none of the state’s opponents—be they business, organizations or local governments—wins more than 44% of their cases against the government. Therefore, the state is not
only highly successful, but it is uniformly successful in the time period analyzed in this project.

In fact, the tradition of government success is so strong that some (Kritzer 2003; Lempert 1999) have questioned whether governments fit within developed theories of litigant success, which tend to assert that some combination of material resources and a longer litigation time horizon make particular types of parties more likely to succeed than others\(^1\)—these parties are the so-called haves/repeat players (Galanter 1974). State governments can typically be considered a “have.” For example, the median number of lawyers working for the state in an Attorney General’s office between 1995 and 1998 is 109, or about the size of a medium law firm. Further, the median budget for the Attorney Generals in the state during this time period is approximately $20 million. State governments are also clearly repeat players in the state supreme courts—in fact, as I will demonstrate below—the state governments are the ultimate repeat players in the state supreme courts appearing significantly more frequently as a party than any other litigant.

It may be that governments have advantages that are unique to them and that help tilt the balance of power in any given case in their direction. Or it may be that governments simply have more resources and a longer litigation time horizon than all but the largest corporations; in other words, that governments simply have more of the same kinds of advantages theoretically available to any litigant. These “extra” advantages possessed by government can be described in terms of their ability to either directly affect the judges who hear a case or, indirectly, the law that should form the basis of any legal

\(^1\) A “longer litigation time horizon” refers to the fact that some litigants are more capable of settling cases that are likely to make bad precedent for them in the future. The notion is that a litigant like a state government can afford to settle a case that, were it to be decided by an appellate court, would set a precedent that would make winning future cases difficult. I return to an extensive discussion of this source of advantage in the concluding chapter of this project.
opinion or the cases that are appealed to the state supreme court in the first place. I explore the sources of these potential extra advantages in more detail in chapter 2, but a quick listing would include the ability to create and authoritatively interpret the law, the opportunity to select judges, the ability to affect the continued tenure of judges on a court and the reliance of the courts on the other branches of state government for the enforcement of their decisions.

Are governments simply uber-litigants or are they something altogether different, with access to unique avenues of influence not available to even the most powerful non-governmental litigants? Answering this question is more important than it might, at first, seem. Though understanding the sources of government success is important in and of itself, it is only by capturing the “specialness” of the relationship between a court and its government that we can begin to answer questions about the independence of the judges on those courts. If governments are treated differently than other litigants, something not necessarily indicated by their sheer rate of success, then we may have reason to question whether and in what circumstances state supreme court justices can be thought of as independent decision makers.

The independence of courts is theoretically central to their ability to function as legitimate mechanisms of dispute resolution.\(^2\) This can be most easily seen in Shapiro’s conception of triadic conflict resolution: two parties have a dispute and seek a third-party to resolve it (1981). Of course, the potential problem in this triadic relationship is that neither of the two parties to the dispute have an \emph{a priori} reason to adhere to the decision

\(^2\) By “independent” I mean that a judge is free to decide a case in a way that the judge believes to be correct without tailoring that decision to any interest other than his or her own conscience. In the words of a former Tennessee state supreme court justice: “Judicial independence is the judge’s right to do the right thing or, believing it to be the right thing, to do the wrong thing” (Birch, quoted in \emph{Justice at Stake} 2009).
of the third-party. Therefore, Shapiro argues, much of the formality of courts in developed democracies centers around maintaining the legitimacy of courts as neutral decision makers—in his words these countries “substitute law for consent” (1981, 5). When one of the parties in the dispute is also the party that selected and employs the supposedly neutral third-party dispute resolver then the problem of non-independence can be acute.\(^3\)

The importance of an independent judiciary is a long-running theme in United States politics. Ensuring that federal judges were as independent as possible—in reaction to the perceived dependence of state court judges—was one of the guiding principles in the writing of Article III of the constitution and the granting of judges life tenure (Hamilton, *Federalist 78*). Most state supreme court justices do not enjoy life tenure. In fact, only 4 of the 50 states appoint their judges for life (or until some mandatory retirement age) whereas, in the rest of the states, judges must be reelected or reappointed periodically. Therefore, if the question of judicial independence is apt when we study the federal courts it is doubly so when studying the state supreme courts. In essence, variance in state selection and retention systems allows us to get at the question of whether life tenure is necessary for judicial independence.

When governments are litigants the question of the independence of a court is important because of the fact that, in most states, justices are in the position of judging the legality of the behavior of their employers. Knowing that governments do exceedingly well in court, while not surprising, is potentially a problem for independent

\(^3\) Haynie (1994) found that the Philippine Supreme Court tended to favor individuals (or have-nots) over the government and she speculates that this is because the court is seeking to increase its legitimacy with the public by appearing independent. But this finding stands out on research into litigant success and may be symptomatic of courts in younger democracies with less of a tradition of independence.
courts because it suggests favoritism or bias. Therefore, understanding the reasons for the success of government becomes critical because it allows us to determine whether governments are simply better litigants or whether they are something different altogether. For instance, we might be comforted if state governments seem to simply have better lawyers than those they oppose since, ostensibly, those with important cases opposing the state could also attract the talents of capable attorneys. Alternatively, we might be disturbed to learn that the sources of government success are unique to governments—evidence of which might come from the relative importance of various modes of retention or the importance of state solicitors as litigators on behalf of the state (who are uniquely creatures of government). Or, more likely, we might discover that governments receive special treatment in certain situations but not others. The point is that if the sources of government success are accessible to other litigants, then a high rate of government success does not impugn the independence of state supreme courts.

It is clear that independence is at the heart of scholarly inquiries about how courts affect society and about how individual judges make decisions. Indeed, the focus on state courts and the question of independence is both appropriate and timely, given the increasing amounts of money flowing into state supreme court judicial races, the advocacy of several prominent interest groups to alter the method of selecting judges in the state to ensure their independence (on this debate, see Hall 2001), and the Supreme Court’s renewed interest in this issue (see, e.g., Caperton v. A.T. Massey Coal Co.). However, little of this debate makes the explicit connection between independence and the presence of the government as a litigant, often choosing to focus on the influence of litigants who contribute large sums to state supreme court justices’ reelection campaigns.
(Cann 2007) or on whether particular types of selection and retention systems promote more or less independence (Hall 2001). But given that the states are almost universally the most frequent litigants before the state supreme courts it seems that a concern with independence must take into account the unique context wherein the state is party to the litigation.4 This dissertation begins the process of attempting to understand how the judicial decision making dynamic changes when the state is present.

Just as analyzing the different sources of government success can help us understand what that success means for the independence of courts, it can be helpful to analyze state success in different contexts—the variation in rates of success between conditions can tell us whether certain factors have an interactive or conditional relationship with those factors that contribute to state success. In this project, I specify three theoretically interesting sub-samples and analyze whether the explanatory theories of state success vary in their ability to explain success in each. Those sub-samples are high salience cases, non-unanimous cases and complex cases.5 I treat them in detail in chapter 2.

Analytical Approach

In order to determine why governments are so successful and what that means for the independence of state courts, it is necessary to create some theoretical structure. In

4 Lest I be accused of creating a strawperson argument, some scholars have argued that even the theoretically most independent of all courts, the U.S. Supreme Court, is more often than not “subservient” to the political interests that dominate the rest of the federal government (Rosenberg 1992) or that the Court is institutionally incapable of great independence (Rosenberg 1991; Horowitz 1977). Therefore, it may be proper to begin with the notion that state supreme courts are not independent and instead ask why they show independence in the presence of the state as a litigant. But framing the question this way departs widely from the rationale of the debate on the independence of courts, which clearly assumes, right or wrong, that courts are the most independent of the branches of government.

5 High salience cases are those in which either an amicus brief has been filed or a constitutional issue is present in the case. Non-unanimous cases are those that have at least one concurring or dissenting vote. Complex cases are those cases that involve more than one legal issue.
general, the pertinent theories can be organized by the party in the litigation context on which they focus: the judge or the litigants.

There are three major theories of judicial decision making and each of them is present in my analysis of state success in state supreme courts. First, attitudinal theories of judicial decision making posit that judges make decisions based on their policy preferences in a given case. In this theory, judges simply side with the litigant who is most sympathetic to their own preferences—e.g., a liberal judge can be expected to side with a criminal defendant more frequently than a conservative judge. Next, strategic theories of decision making have become increasingly popular explanations of state success. These theories hold that judges will, at least occasionally, have to forgo their preferred policy outcome in favor of another choice in order to accommodate the preferences of a powerful actor such as another judge on the court or another branch of government. Strategic theories of decision making have been particularly powerful explanations of decision making in the state courts because there is more interaction among branches of government at the state level than at the federal level. Note that strategic theories of decision making assume that judges wish to make decisions on the basis of their policy preferences but that they are constrained by the environment in some way. Finally, legal theories of decision making hold that judges decide cases based on the law. Though few political scientists believe that a strict version of the legal theory of decision making is operative in appellate courts, most believe that the law, particularly when interacted with the facts of a case, can at least constrain decision making in important ways.
The other set of theories revolves around the parties to litigation, the plaintiff and defendant. I focus a great deal of analytical energy on understanding what I call the informational theory. This theory acts as a bridge between theories of litigant success and theories of judicial decision making. The basis of the informational theory is that judges need reliable information on the likely consequences of their policy choices and that the litigants are the actors best positioned to provide that information. Therefore, litigants are in a position to influence judges through the quality of information that they provide. This theory, then, connects the resources available to litigants to the decision making of judges and can be considered one of the causal mechanisms of litigant success. The other major theory dealing with litigants is called party capability theory and it simply states that more capable parties, often referred to as repeat players, should be more likely to prevail than less capable parties. I will discuss what is meant by the term “capability” in chapter 2, but as I have indicated above, this usually means material resources.

Using these theories as a guiding framework, I undertake a largely empirical and statistical analysis of state success. To this end, I divide the analysis between two chapters. In chapter 4 I take a conditional approach to understanding state success using a selection of civil cases occurring in the state supreme courts between 1995 and 1998. By conditional, I mean that I analyze the factors that help the state succeed in several different kinds of cases: high salience cases, non-unanimous cases and complex cases. As I have noted, I believe this approach provides additional purchase on the question of whether states possess unique advantages in the litigation context and introduces sophistication to our understanding of the government as a gorilla. In chapter 5, using interviews, correspondence, secondary sources and data, I tell the story of the state
solicitors, actors who are unique creations of the state litigation apparatus and provide something of a case study in the ways in which the state has access to litigation resources unavailable to non-governmental litigants. This chapter approaches the state solicitors, who are new in the political science literature, from the perspective of the well-established literature on the federal Solicitor General.

Both the theoretical approach, centered on paying careful attention to the parties to litigation, and the empirical approach, looking for conditional success and at actors unique to governments, allow us to better understand what high level of government success might mean for the independence of state supreme court justices.

The State Supreme Courts and States as Litigants

In this section, some helpful background information on the state supreme courts and the state as a litigant is offered to guide the reader through the remaining pieces of the dissertation. Most, though not all, state supreme courts sit atop a judicial hierarchy not unlike that which exists in the federal system. That is, the state supreme courts are usually shielded from trial courts by an intermediate appellate court. When this is the configuration, state supreme courts frequently have largely discretionary dockets and are allowed to pick and choose the cases that they wish to hear. Comparable to the original jurisdiction of the U.S. Supreme Court, many state supreme courts—twenty in my dataset—are required to hear certain types of cases, usually those involving certain administrative appeals (most commonly workers compensation cases). Carrying the lack of discretion further, in 1998 seventeen states required their state supreme courts to hear every civil appeal as a matter of right. In other words, about a third of the state supreme courts look more like the federal Courts of Appeal than they do the U.S. Supreme Court
with respect to the amount of control they maintain over their dockets, which is to say little to none.

The state supreme courts hear a wide mix of cases, broader than that heard in federal courts. First, most state supreme courts hear both civil and criminal appeals. I discuss in more detail the cases that make up my data in chapter 3, so in Table 1.1 I provide a general breakdown of the range of cases heard by state supreme courts between 1995 and 1998.

<table>
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<tr>
<td>Civil Private</td>
<td>36</td>
</tr>
<tr>
<td>Criminal</td>
<td>32</td>
</tr>
<tr>
<td>Civil Public</td>
<td>30</td>
</tr>
<tr>
<td>Non-Adversarial</td>
<td>1</td>
</tr>
<tr>
<td>Juvenile</td>
<td>1</td>
</tr>
</tbody>
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**Table 1.1: Cases in State Supreme Courts, 1995-1998**

The categories of cases that we would expect to dominate in the state supreme courts do in fact dominate—the standard civil and criminal cases. Two things should be noted about the types of cases heard by state supreme courts. First, Table 1.1 belies significant variation in the dockets of the individual courts—that is very few have a docket that looks like the average docket. Some states have dockets that are dominated by criminal cases, others are dominated by civil cases (see Brace and Hall 2005). Also of note, the “civil government” category is composed of cases in which the state government is a party and these cases represent about a third of all the cases heard by the

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6 The exceptions here are Texas and Oklahoma, which have two state supreme courts each: one to hear criminal appeals and one to hear civil appeals.
When the civil government and criminal categories are combined it is evident that governments are the most frequent participants before state supreme courts—a state or local government official is one of the parties in a state supreme court case about two-thirds of the time.

Since I focus exclusively on those cases in which the state government is a litigant, it is worth exploring exactly how the state typically participates in a case. Approximately 58% of the time the state is the respondent in the state supreme court—i.e., more often than not the state is in the position of reacting to the party opposing it. This makes the high rate of state success all the more impressive since scholars generally believe that second level courts that have discretionary jurisdictions favor petitioners, a point to which I return in some detail in future chapters.

The method by which states handle the enormous amount of litigation for which they are responsible can also have consequences for rates of success. Though I discuss the differing methods of administration in chapter 5, it is worth pointing out that in most states the local prosecutors or district attorneys handle criminal cases from trial all the way through appeal, meaning that state level litigators usually have little to do with criminal appeals. On the other hand, the state Attorneys General are usually specifically tasked with defending the state in any case involving the state that is not a criminal prosecution. For this reason I focus exclusively on civil cases. Typically, within an Attorney General’s office the attorneys are divided into working groups, usually by substantive area of expertise (Layton 2001). For example, a tax division will handle all of the state’s tax cases from trial through appeal to the state supreme court. This can create

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7 A large number of the civil government cases are those that involve regulation of attorneys and these cases are not included in the data set used for the analyses in chapters 4 and 5.
difficulties for the state, as the tax division may make arguments that benefit the state in
tax cases, but not in welfare cases or on the issue of sovereign immunity. States have
created state solicitors in an attempt to get around the difficulties posed by having several
different groups of lawyers advocating before the state supreme court on behalf of the
state. In a sense, the state solicitors are an attempt by the state to concentrate the
experience advantages that would otherwise be diffused across several different
substantive divisions into one or several highly skilled attorneys and to coordinate legal
arguments so that they benefit the state as a whole and not just one particular agency.

Organization

Chapter 2 details the theoretical framework for the analyses that follow as well as
the motivation for the creation of the three theoretically interesting sub-samples: high
salience cases, non-unanimous cases, and complex cases. Chapter 3 describes the
sampling procedure used to create the data as well as describing that sample and the
coding and sources of all of the variables included in the analyses. In chapter 4, I present
an analysis of the sample as a whole as well as the three sub-samples. In chapter 5 I
describe and analyze the state solicitors, including models of their ability to help the state
succeed in cases as well as a model of the factors that make the appearance of a state
solicitor in a case more or less likely. Finally, in chapter 6 I conclude with thoughts about
what the preceding analyses tell us about the uniqueness of the state as a litigant and the
implications of those findings for the independence of state courts and judges.
CHAPTER 2

THEORY, SUBSAMPLES AND HYPOTHESES

Courts are fundamentally venues for dispute resolution. Disputes frequently involve two private parties, and when this is the case, the government may serve as a neutral arbiter of their dispute by providing a place and a person to resolve the controversy. The dynamic changes dramatically when one of the parties to the dispute is the government, and for obvious reasons. In this scenario, the neutrality of the person charged with resolving the dispute may be fairly called into question given that a judge is also a member of government. This is the story developed by Shapiro (1981) and explored in this dissertation. As noted in the introductory chapter, I ask whether courts can be considered independent given the widely recognized empirical regularity of their success in court. Put differently, can judges be considered independent decision makers if governments win at high rates?

Answering that question requires a determination of the reasons for government success. It is not enough to point to the fact that governments are usually overwhelmingly successful as proof of judicial dependence on the state. To conclude that ubiquitous government success means that courts are not independent we must determine whether the sources of government success are available only to the government-qua-government or whether government is something closer to a super litigant. Making this determination
will allow us to say whether governments receive special treatment from judges or whether they are treated more or less like other litigants with considerable resources.

This chapter proceeds in three parts. First, I will lay out the theories relevant to the inquiry, focusing particularly on the need of judges for information on the likely policy outcomes stemming from their choices. Second, I will discuss the need to break the data into three distinct sub-samples, as doing so allows me to get at the nuances of state government success. Finally, I will describe the hypotheses that will further guide inquiry into the connection between high levels of government success and the independence of courts.

**Theories of Judicial Decision Making**

The theories important to understanding the questions posed above can be broken down into two subsets based on which of the two parties that appear in a case they describe: the judge and the litigants. First, and probably most importantly, a study of state government success in court will need to focus lavish attention on the decision maker—the judge. To that end, I detail the three major theories of judicial decision making—the attitudinal, strategic and legal—before focusing on the role that information may play in the judicial decision making matrix.

*The Attitudinal Theory*

The attitudinal model simply asserts that justices make choices primarily based on their ideological preferences (Segal and Spaeth 2002). In the state supreme courts, ideological considerations have been powerful predictors of judicial decision making in several different types of cases. Most prominently, ideology has mattered in cases in
which justices are tasked with deciding whether convicted criminals should be executed (Brace and Boyea 2008; Hall 1987; Brace and Hall 1995) and when considering who should win in tort cases (Brace et al. 2001). Some have found that the impact of ideology varies with the case facts (Emmert and Traut 1994), while others have found that ideology is not a prominent explanatory factor in sexual harassment cases (McCall 2003) or in cases involving gender discrimination (Songer and Tabrizi 1999). In a study of cases in which havevs were pitted against have-nots in state supreme courts (and in which amicus briefs were filed), Brace and Hall (2001) found that ideology was a significant predictor of judicial behavior on the merits but not in the agenda setting stage.

These disparate findings on the effect of ideology in decision making could stem from the variable impact of ideology or they could result from a situation in which ideology, as a proxy for policy preferences, does not match up well with judicial choices in certain issue areas. Thus it is important to distinguish between the concept of ideology and policy preferences. Policy preferences refer to the policy that a justice would prefer in any given case. Ideology, here, is meant as a broad term in judicial decision making. Ideology is considerably easier to measure, but may not be applicable across all types of cases. Thus, while there is a clear expectation that ideology will matter in criminal cases generally, and particularly in cases involving a highly salient issue like the death penalty or civil liberties issues, it is not clear that ideology will be a powerful explanatory factor in areas of law that are more economic or mundane in nature.¹

¹ Indeed this is an active area of debate for scholars of federal courts, many of whom have argued that there is no ideological component to judging in technical (and economic) areas of law such as tax, bankruptcy and intellectual property (Staudt et al. 2006; but see Sag et al. 2007).
**Strategic Theories of Decision Making**

The strategic model of decision making is one of second-best choices: justices must account for the preferences of other powerful actors in the system, such as the executive and legislature, when considering their own preferences in a case (Epstein and Knight 1998). In the strategic model, justices will, at least occasionally, need to subordinate their first choice to a second-best choice in order to avoid a potentially worse third outcome. Though these models have focused on policy retaliation at the Supreme Court level (see, e.g., Spiller and Gely 1992), at the state court level justices face a much more fundamental issue: staying on the bench. Thus, strategic behavior at this level may not be premised solely on policy retaliation but may instead also be motivated by a fear that the state can make staying on the bench more difficult. Thus, the motivation for strategic behavior when the state is a party will likely vary by state based on the type of system used to retain justices (see Savchak and Barghothi 2007). Others have noted the concern of state supreme court justices with the political elites that influence their prospects for continued tenure on the court (Schubert 1959, 129-42; Adamany 1969). Indeed, Langer says: “state supreme court justices…pay closer attention to the preferences of other actors when the rules of the game force them to do so” (2002, 73).

Nevertheless, there is a considerable line of scholarship on the state courts and the state supreme courts in particular that suggests that justices do fear policy retaliation (Baum 1997). For instance, Langer (2002) concludes that state supreme court justices respond strategically to the preferences of other state politicians: “state supreme court justices vote sincerely when they feel they can and strategically when they feel they must” (2002, 123). More often than not, the higher the salience of the issue area in which
the justice’s choice must be made, the more likely the preferences of other actors are to be a factor taken into account by the justice (Langer 2002; Hall 1987, 1992; Vines 1965).

The intertwining of two types of strategic considerations can create a behavioral equivalence problem: we may observe strategic behavior but we may not know whether that behavior occurs as a result of fear of policy retaliation or as a result of a desire to stay on the court, or both. In every case analyzed in this dissertation the state is a party to the litigation, and this allows for extra leverage on this problem. If we observe that the type of retention system in use in a state plays a decisive role in the decision making of justices, then we may infer that continued tenure is a strategic consideration on the part of justices. If justices seem to change their behavior on the basis of the anticipated ideological reaction of the state’s elites, then we may infer that strategic behavior is oriented toward policy concerns.

Legal Theories of Decision Making

Theoretically and normatively, scholars in political science expect that the law will play some role in legal decision making, but conceptualizing and operationalizing the law has been difficult (Gillman 2001). Approaches have varied from the creation of various precedent-based regimes (Richards and Kritzer 2002), in which the justices establish a test or level of scrutiny for a particular type of case, to fact-based specifications (Segal 1984), in which certain facts are weighted differently within a regime. It is not clear whether “legal” explanations include situations in which the facts present in a case appear to help determine judicial voting. Clearly the law structures the interpretation of case facts and determines which facts are going to be relevant in any given issue area. So in this sense the law channels the importance of case facts, even if
the presence or absence of those facts for decision making is not strictly a legal consideration and those “facts” can be manipulated to fit a result-oriented decision (Posner 2008). The intermixing of legal and factual considerations leads me to the term legal/factual.

In the context of this project, determining whether judicial choices arise from legal/factual considerations is fairly difficult. This is so because I choose not to focus on a single issue area such as environmental law (Lawler and Parle 1989) or search and seizure cases (see, e.g., Segal 1984; Scherer 2005), where it is possible to include a model of the potentially relevant law or case facts or both. Instead, I explore an aggregation of cases that range from typical civil liberties cases, to the regulation of professions and licensing, to tax cases, to cases involving zoning, to the commission of torts by government employees, just to name a few. The diversity of issues makes controlling for the effect of the law and/or case facts difficult. A second problem with attempting to make specific inferences about the effect of law arises when we consider that even if sample limitations are introduced to include only cases arising from particular issue areas, the state law on any given issue will vary across states. Therefore, I do not have any specific hypotheses with respect to legal theories.

Informational Theories of Judicial Decision Making

The three theories above all focus on explaining why judges vote the way that they do by highlighting the reactions of the judges themselves to various internal (i.e. attitudinal) and external (i.e. strategic) considerations. Informational theories of judicial decision making stand apart from these other approaches in that they focus on the interaction of the judge with the litigants (and possibly amici), an interaction premised on
the need of a judge for reliable information about the policy consequences of a choice. Therefore, informational theories focus scholarly attention not just on how a judge is likely to decide a case, but on how the sources of information incorporated by a judge in the decision making process will affect the ultimate decision.

Scholars have long noted that government decision makers lack full and reliable information on the available policy alternatives (Lupia and McCubbins 1998), and that is particularly likely to be true of judges (see, e.g., Posner 2008; Johnson 2004; Johnson et al. 2006; McAtee and McGuire 2007; McGuire 1993; McGuire and Caldeira 1993). This means that judges are constantly in search of information on the likely consequences of choosing one alternative over another. The questions, then, are what are the likely sources of this information and how will the search for information play out in the state supreme courts in the presence of the state as a party?

First, information on likely policy consequences has, in simplified form, two potential sources—the litigants (or amici) and the court itself. As parties with unique insights and private information, the litigants (and more accurately their lawyers), are capable of reducing the uncertainty with which judges must make decisions. However, this information is not necessarily reliable, because litigants have an incentive to distort the information they provide to favor their position (e.g., Bailey et al. 2005). Thus, the court must judge the reliability of the information presented by the attorneys for each party. That judgment is likely to be premised on the frequency with which the justices on the court encounter those attorneys, because attorneys that appear frequently before the court are unlikely to damage their reputations by providing misleading information (McGuire 1995).
The court may also gather information from research on past cases. However, there are some upper limits on the amount of research each justice will be able to perform because of time pressures and a general preference for leisure over work (Baum 2006; 1994). This means that as the time pressures increase and the resources available to the justices decrease, the court will become more reliant on the litigants for information about the likely policy consequences of siding with one party over the other in a case. This opens the door for litigants to influence the decision making behavior of the justices.

Second, the need for information is likely to be acute on the state supreme courts, as compared with the U.S. Supreme Court, for a number of reasons. The state supreme courts have a considerably higher workload than do the justices on the U.S. Supreme Court. Between 1995 and 1998 the average state supreme court heard 141 cases a year whereas the U.S. Supreme Court heard about 85 cases a year. This difference is exacerbated when we consider that typically the U.S. Supreme Court justices have 4 clerks assigned to their chambers whereas the average state supreme court justice has only 2 clerks. Therefore, the state supreme courts are highly likely to be dependent on the litigants for information on policy consequences—a supposition borne out in the following quote from a California State Supreme Court justice:

[A] good advocate is likely to know quite a bit more than the judges before whom he argues….The fact is that judges need help, and they look to the attorneys for guidance. They want to understand the legal principles, and they also want to know the practical alternatives for the decision with which they are presented (Grodin 1989, 39).

Further, there is some evidence to suggest that the dockets of the state supreme courts are not only larger but are considerably more diverse than that of the U.S. Supreme Court. Partially, this is the result of the institutional structures in some states—not all states have
intermediate appellate courts that shield them from cases they would prefer not to decide. Partially, it is the result of the states regulating a wider scope of behavior than the federal government.

It is also the case that, independent of the presence of an intermediate appellate court, some state supreme courts have a mix of mandatory and discretionary cases. Twenty of the state supreme courts have civil dockets that include cases taken via both mandatory and discretionary jurisdiction. This means that, on the whole, the dockets of state supreme courts are likely to be considerably more diverse than that of the U.S. Supreme Court. This is important because when judges cannot specialize in one type of issue area they are in greater need of information (Posner 2008). The sources of information available to the justices on state supreme courts and the limitations on their ability to filter that information and gather their own data on policy consequences means that the ability of the litigants to provide that knowledge is probably a particularly important source of influence on the outcomes of cases.

**Theories of the Litigant**

If judges are the primary actors in any analysis of who wins in court and why, then litigants are not far behind in the literature on success in court. Partially, this is because they are one of the two actors present in the courtroom and thus seem central to any exploration of success. But their place in my study is central because it is in understanding how judges treat variously situated litigants that we can truly come to understand whether governments are treated differently from other parties before the court. I divide theories of the litigant into two distinct pieces, one dealing generally with all litigants and the other taking a closer look at the government as a litigant.
Party Capability Theory

The wellspring for research on why certain parties do better than others in court is the seminal article by Marc Galanter in 1974. In that article, Galanter divided litigants in two separate ways: repeat players (RP)/one-shotters (OS) and haves/have-nots. RPs are those like the federal and state government, as well as large corporations, that are likely to find themselves in court repeatedly. OS litigants are those that tend to encounter the legal system only once in their lifetimes, this would include most individuals and small businesses. Galanter’s original paper on the subject of party capability made a distinction not only between repeat players and one-shotters, but also between haves and have-nots.

The RP/OS distinction focuses on the abilities of the parties before the court to shape the law in their favor over the long term and, presumably, to gain both substantive and procedural knowledge of the courts in which they appear. The have/have-not distinction is based on the resources we would typically expect each party to possess. Usually, “haves” will be those parties with the ability to hire experienced counsel and to spend considerable sums on litigation. To a large degree, those parties that are repeat players are also haves in the litigation context—certainly state governments can be considered both a RP and a have. The difference between the two distinctions is

2 This advantage has to do with something scholars typically term the “litigation time horizon” (Galanter 1974). What is meant is that repeat players, because they know they will be back in court, have the ability to settle cases that, if tried or appealed, may set precedent that is not favorable to them. Thus over time the law, based as it is on reasoning from precedent, comes to strongly favor repeat players. Because my data span a relatively short time period, from 1995-1998, I am not able to capture the potential effect of this advantage for the states. For a further discussion of what this means with respect to what I can and cannot say about state success from this project, see the concluding chapter.

3 An example of a party that is likely to be a RP but not necessarily a have is an interest group like the ACLU—it will have highly experienced attorneys and will appear in court frequently, but will not likely have the virtually limitless resources of a government or large corporation. An example of a party that may be a have, but not a RP, is a very wealthy individual or perhaps educational institution that does not frequently find itself in court, but that has considerable resources.
important to keep in mind in that the success of “capable” parties, a term I use for parties that are typically both RPs and haves, may be attributable to one or both of their potential advantages. This is equally true when the major party of interest is the state: does the enormous advantage enjoyed by governments accrue to them as a result of repeat player status, resource disparities or because of some other inherent advantage? I explore each of these potential sources of advantage in chapter 4.

Since Galanter’s 1974 article, scholars have spent a fair amount of time discerning who wins at the various levels of the American court system (Sheehan et al. 1992; Spill Solberg and Ray 2005; Wheeler et al. 1987) and in other countries (Helmke 2005; Haynie et al. 2005). In general, they have found that more capable parties—typically repeat players and haves—have fared better than less capable parties. In this respect, an ad hoc theory, here termed party capability theory, formed. Party capability theory is just the idea that more capable litigants should prevail over less capable litigants, where capable parties are most often those we consider RPs and haves in Galanter’s original framework.

The central concept in party capability theories is the idea of capability, a term that has not always been explicitly defined or clearly measured. At bottom, capability in a litigation context is composed of two elements: experience and resources. Experience can be further sub-divided into substantive and procedural branches. “Resources” is an omnibus term intended to capture both monetary and personnel advantages. Because capability has not always been explicitly defined, it is not entirely clear which kinds of capability most contribute to litigant success (Lempert 1999), although McGuire (1998),
McAtee and McGuire (2007), and Johnson et al. (2006) have shown that attorney experience can be a critical determinant of success, at least at the Supreme Court level.

It is thought that advantages accrue to litigants with more experienced attorneys because the Court is in search of reliable information on the policy implications of any given decision. The Justices find information from attorneys who have appeared before them frequently, and who will presumably appear before them in the future, more reliable than information from relative novices (see, e.g., Johnson 2001; Comparato 2003), perhaps because more experienced attorneys will tend to be more competent attorneys (see the section on informational needs above). I explore whether this explanation for greater success holds in the state supreme court context in the chapters that follow.

*Governments as Litigants*

As noted, in general the party capability literature has tended to confirm the expectation that highly capable parties will win more often than not. Indeed, the ultimate repeat player in these studies is most frequently the government, both state and federal. Multiple studies over many different time spans and in different courts and different countries have confirmed that governments are the most successful litigants (Wheeler et al. 1987; Farole 1999; Sheehan et al. 1992; Haynie et al. 2005), so much so that some (Lempert 1999; Kritzer 2003) have questioned whether governments can really be considered in the same class as other typical repeat players and haves such as large corporations and insurance companies.

In chapter 1 I proposed a simple dichotomy with respect to the government as a litigant: either governments simply have more of the same kind of advantages available to all litigants (those advantages discussed above in the party capability section) or
governments have access to special advantages unavailable to other litigants. I have only briefly addressed the sources of these potential “extra” advantages and so below I turn to a more detailed discussion of several of these potential advantages: the ability to select judges, the reliance of courts on other branches of government for enforcement of their decisions, the fact that the state is the lawmaker, and the ability to provide more reliable information than any other litigant.

While the source of the state government’s success is often assumed to be a result of its relative capabilities in comparison to its opponents, other highly capable parties that we expect are both RPs and haves do not fare as well as do governments. It is possible that the state enjoys an advantage above and beyond those provided by its capabilities. Partially this “extra” advantage is likely the result of justices being in ideological agreement with the government that appointed them (see Dahl 1957).

To the extent that justices are members of the ruling regime (or are at least in ideological agreement with it), they will also tend to give the government the benefit of the doubt (Rosenberg 1991, 14-15; but see Helmke 2005). Indeed, considering that scholars have treated justices as agents that are part of the governing regime (Shapiro 1964; Shapiro 1968; Kritzer 2003), and not separate from it, it is plausible that we will witness a high rate of agreement with the state not because the state has a particularly strong legal case, but because judges are in ideological agreement with the government that appointed them in the first place, or alternatively with the public that elected them and the other government politicians to whom they are responding (Dahl 1957). In short “Government is not just ‘more capable’ in terms of resources and experience, but it has a fundamental advantage that flows from the fact that it sets the rules by which cases are
brought and decisions are made, and it is government officials, judges, who make the
decisions” (Kritzer 2003, 361).

There is another, more pragmatic, reason that we might expect that courts will
defer to governments, and that is that they must rely on the other branches of government
for enforcement of their decisions. The notion is that if a state supreme court, or any court
for that matter, is seen as obstructionist to the other branches of government, then the
court might find that their decisions go un-enforced or are laxly enforced. The inability of
a court to enforce its decisions has been a central concern of the discipline for many
years, but in the context of the relationship between the other branches of government
and the courts, Kritzer (2003, 358) puts the finest point on the matter: “the generalist
courts are particularly dependent on the other parts of government and have to be wary of
being perceived as being overly inclined to put roadblocks in the paths those other parts
of government are seeking to travel.”

Though it is difficult to generalize how the law/facts affects decision making in
this sample, I do expect that in cases where the government is defending economic
regulation that it will have an easier time legally justifying its position. This expectation
extends from the fact that the law is generally more favorable to the state in its attempt to
regulate economic activities than it is for the regulation of the political and private
activities of citizens (Epstein and Walker 2004). That is, economic regulation must
usually be defended only on something approaching a “rational basis” whereas other

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4 The Economic Regulation variable included in later models can be considered as belonging to “legal”
theories of decision making in the sense that it represents a broad standard of deference to the state, but it
can also be considered as a piece of a party capability explanation of state success since the state is the only
party to whom such deference is shown. In other words, such deference, though legally established, can
only be established by and given to parties that are governments. Therefore, I tend to discuss this variable
with other party capability variables, while often attributing its influence to legally recognized standards of
deferece.
types of government action are more likely to invoke a lesser standard of deference from the courts, something approaching a “strict scrutiny” standard. Though it is not clear that these types of scrutiny apply to state courts in the same way as they do to federal courts, as an analogy it is probably true that economic regulation gets greater deference from state courts than do other types of government regulation.

However, we need not rely on a supposed relationship of the application of scrutiny standards in the state and federal courts. This is because cases involving economic regulation are also much more likely to involve agency review, wherein complaints are funneled through administrative tribunals before reaching the court system. The funneling of these cases through an administrative review process should allow the state to settle those cases where it is likely to lose in court. Therefore, those cases that involve economic regulations and that have made their way through both an administrative review process and the state court system are likely to be cases in which the state has a strong reason for opposing its opponent. There may be several layers of administrative review here that mean that, on balance, justices who are hearing a case at the state supreme court level may have good reason to give some deference to the state’s position in a case, particularly where the state has been victorious in lower tribunals. This is similar to the situation in the federal courts to the extent that, under the *Chevron* doctrine, the courts are to defer to agency interpretation so long as that interpretation is reasonable and not against congressional intent.

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5 A $\chi^2$ test shows that agency action occurs more frequently in cases involving economic regulation than in any other; the statistic is 18.93, $p < 0.000$. In fact, over 65% of the cases in which agency action is under review in my sample, economic regulation of some sort is involved.

If we observe deference in these cases, determining whether it arises from legal/factual reasons or from ideological or strategic ones is difficult because of the possibility of behavioral equivalence: we would observe deference to the state in regulatory cases if the justice felt such deference was legally due or if deference accorded with ideological proclivities or strategic considerations. Deference might be expected in terms of party capability as well as from a legal perspective. This is because the state is unique in that it is the only party that makes the law that justices must subsequently interpret to decide whether the state has prevailed in its case, and thus it can be expected to be an especially capable party (see footnote 2).

Furthermore, Kritzer (2003) does an excellent job of illustrating specific instances in which the state, as a lawmaker, can create laws that broadly favor state governments in litigation. There are at least four potential rules that state governments have created or can take advantage of that are likely to boost their legal position in any given case. First, states may shield themselves from liability behind doctrines of sovereign immunity that eliminate responsibility for common torts arising out of the actions of government employees. Second, the Eleventh Amendment prevents individuals or corporations from suing states—except on a right afforded strong protection by the 14th Amendment—unless the state has given the opposing party permission to sue.7 Third, states can, and do, impose very strict statute of limitations requirements that narrow the time within which the state can be sued. Fourth, state governments have the authority to directly limit the potential liability of the state by limiting the availability of damages—a limitation that can dramatically alter the incentive structure of potential litigants.

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7 Although the 11th Amendment applies to suits involving federal law and so tends to involve lawsuits in federal courts, it is also possible that these lawsuits can proceed in state courts.
Finally, among explanations for the sources of government success, states are uniquely positioned among all litigants in that they appear with great regularity before the state supreme courts. If, as I am about to assert in the section that follows on informational theories, attorney experience is a key component of success, then states are in a good position to capture the experience advantages that attend to regularly appearing before a court. Though there is any number of ways in which this might be accomplished, the most apparent is to create a state solicitor’s office that focuses the task of appellate advocacy in one or a few select individuals.

The state’s lawyers will accrue experience whether or not a state solicitor’s office is created, and so we must ask whether those states that establish state solicitors’ offices are abnormal in some way. I will present evidence to suggest that state solicitors are more likely to be established in states that lose more frequently in state supreme courts than average. Throughout, I term this effect a selection effect and I explore it in chapter 5. This selection effect is in contrast to my expectation that the establishment of these offices should aid the state in litigation even when the solicitor is not directly participating in a case because solicitors often initiate training programs and coordinate arguments to ensure that there is a synergistic effect in cases in which the state is a party. In a sense there are two competing explanations with respect to state solicitors. First, they are able to help the state broadly (when they are not actually arguing a case) by increasing the skill of all of the state’s lawyers. Second, the solicitors help the state directly in those cases in which they appear by making persuasive arguments on behalf of the state. Though I do not present them here, I will return to several specific theories of how the state solicitors may be able to help the state in chapter 5.
Sub-Samples: High Salience, Non-Unanimous and Complex Cases

For purposes of analysis, I divide my population of cases, discussed in Chapter 3, into several smaller sub-samples. Here I pause to justify those divisions on theoretical grounds. There is reason to believe that certain types of cases will create qualitatively different decision making environments for courts. Broadly, the justification for separately analyzing high salience, non-unanimous and complex cases is that in each the informational needs of the justices are likely to differ, policy preferences will be more or less constrained and the prevalence of strategic reactions will be modified. Table 2.1 presents these expectations.

<table>
<thead>
<tr>
<th>Explanatory Factor</th>
<th>High Salience Cases</th>
<th>Non-Unanimous Cases</th>
<th>Complex Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Informational Needs</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Importance of Attorney Experience (State and Opponent)</td>
<td>Low</td>
<td>High</td>
<td>High</td>
</tr>
<tr>
<td>Importance of Court Resources</td>
<td>High</td>
<td>High</td>
<td>High</td>
</tr>
<tr>
<td><strong>Policy Preference Based Reactions</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Importance of Judge’s Preferences</td>
<td>High</td>
<td>High</td>
<td>Moderate</td>
</tr>
<tr>
<td>Reaction to State's Governing Elites</td>
<td>High</td>
<td>High</td>
<td>Moderate</td>
</tr>
<tr>
<td>Divided Government</td>
<td>High</td>
<td>High</td>
<td>Moderate</td>
</tr>
</tbody>
</table>

Table 2.1: Variation in Expectations by Sub-sample and Type of Explanation:

“Low” means this explanation will be less important in this sub-sample than the sample as a whole. “Moderate” means this explanation will be about as important as in the sample as a whole. “High” means this type of explanation will be more important in these cases than in the sample as a whole.
In high salience cases, defined as those cases in which there is at least one amicus brief filed or a constitutional issue is present in the case, it reasonable to believe that parties other than the parties to the litigation will be interested in the outcome of the case. This is true by definition since at least one third-party is concerned enough to file a brief.\(^8\) Constitutional issues are included with cases that attract amicus attention because, similar to cases with amicus briefs, cases involving constitutional issues are likely to garner attention from people beyond the parties to the case (Langer 2002). Thus, it is possible that strategic behavior will be more prominent in these high salience cases since it is possible that these are the types of cases most likely to be revisited by interested parties when it is time to reappoint or reelect a justice and/or the cases in which policy preferences will be most prominent. Some hypotheses are attenuated while others are expected to be more relevant when compared to an analysis of the sample as a whole.

In high salience cases I expect that policy preferences will be strong predictors of judicial vote choice. On the Supreme Court this has certainly been true, even when scholars have controlled for the relative capabilities of parties to the case (McAtee and McGuire 2007). In fact, it is thought that in highly salient cases justices are more likely to be aware of the policy implications of their decisions and that this fact will make them less susceptible to persuasion by experienced advocates (McAtee and McGuire 2007).

However it is also reasonable to expect that theories about the informational needs of justices on the Supreme Court will not necessarily apply in a straightforward manner to justices on the state supreme courts. The writings of state supreme court justices

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\(^8\) It may be that most cases that involve the government as a litigant can be considered as invoking the interest of a powerful third party—the other branches of government—regardless of whether an amicus brief is present, although this point probably overstates the case.
suggest that they are rather reliant on the parties to provide them with information. As such it is possible that the informational needs of state supreme court justices will increase, as opposed to decrease, as the salience of the case increases. This is because in these cases understanding the policy implications of a decision may be particularly important.

Lastly, I also expect that in these high salience cases justices will be most responsive to the strategic environment (see, e.g., Langer 2002). If high salience cases are those in which parties other than the litigants are most likely to be interested, then it is in these cases that the justices should be most sensitive to the policy proclivities of the state’s elites.

In the non-unanimous cases I expect that justices will be in need of more information on the policy consequences of their decisions than they will be in the average or ordinary case. This is because where there is a lack of unanimity, the case is more likely to be legally close. Scholars of the federal Courts of Appeals frequently make a distinction between “easy” and “hard” cases (Goldman 1966; 1975). In “easy” cases it is thought that the law, when combined with case facts, will dictate that one party win the case (see, e.g., Posner 2008). However, in difficult cases there will be no legalistic reason to decide the case in favor of one party or another.

However, the same distinction between easy and hard cases is probably not applicable to state supreme court cases given that most cases before a state supreme court, including statutory cases, are likely to have “at least two plausible interpretations” (Kaye 1994, 303)—thus, most cases before these courts can be considered as falling toward the “hard” end of the legal difficulty spectrum. Nevertheless, the easy/hard
distinction is a helpful heuristic when discussing non-unanimous cases. It is probable that these non-unanimous cases are even more likely to tend toward the hard side with respect to the ease of the legal decision making required of the justice since, by definition, at least one justice disagrees with the majority’s logic for a decision. Thus, I expect that the influence of good appellate advocacy will be magnified when compared to the effects of such advocacy in the sample as a whole.

By definition, the non-unanimous cases are those in which the policy preferences of justices should come to the fore, since it is in these cases that we are able to observe disagreement over legal policy outcomes—consensus should not mask ideological disagreement in these cases. Further, given that in many of these cases at least one justice will stand out from the rest because of a dissent, strategic considerations should be heightened in non-unanimous cases.

The final group of cases that I set aside for analysis is the legally complex cases. Legally complex cases involve more than one legal issue. This is distinct from those cases that are non-unanimous in the sense that the legally complex cases involve at least two issue areas, whereas in the non-unanimous cases there is likely to be only one legal issue area in play. In complex cases the need for information is particularly high because it is particularly difficult to judge how case outcomes, multiple legal policy areas and policy preferences will interact (Bailey et al. 2005). Put differently, justices may have differing preferences depending on which legal issue is personally most important to them (Maltzman and Wahlbeck 1996); a situation that is only exacerbated by the fact that there may be multiple opinions in circulation, thus complicating the process of discerning the likely outcome (see, e.g., Maltzman et al. 2000).
With respect to legally complex cases, I expect that the importance of quality advocacy will be particularly apparent in this sub-sample as compared to all of the others. The effect of policy preferences are likely to be most attenuated in the legally complex cases because justices will have difficulty determining their own preferences relative to the potential multiple outcomes available (Hoekstra and Johnson 2003) and will thus be greedy for reliable information on potential policy consequences. The informational approach is particularly pertinent when the government is a party because in most cases it will be able to offer persuasive interpretations of the law given that it is the lawmaker. Therefore, where informational needs are exacerbated governments should succeed at higher rates.

**Hypotheses**

It is now possible to explore the implications of the theories discussed above in the state supreme courts. This section proceeds by theory—that is, I detail my hypotheses based on the theory from which they are drawn. Table 2.2 lists each of the hypotheses, the variables associated with them and my expectations for the signs of the coefficients for those variables.
<table>
<thead>
<tr>
<th>Hypothesis</th>
<th>Variable</th>
<th>Expected Effect on State Success</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Attitudinal Explanations</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) When the position advocated for by a state in a particular case is closer to the policy preferences of a justice that justice will be more likely to vote in favor of the state.</td>
<td>Ideologically Consistent</td>
<td>+</td>
</tr>
<tr>
<td><strong>Strategic Explanations</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(2) As the retention system makes a justice more reliant on the state for maintenance of tenure on the bench, the justice will become more likely to side with the state.</td>
<td>Retention System Type</td>
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<tr>
<td>(3) When the state is experiencing divided government, a justice will be less likely to decide in favor of the state.</td>
<td>Divided Government</td>
<td>-</td>
</tr>
<tr>
<td>(4) (a) The greater the ideological distance between the state’s governing elites and the partisanship of a justice, the less likely a justice should be to decide a case in favor of the state (strategic reaction).</td>
<td>Elite Distance</td>
<td>+/-</td>
</tr>
<tr>
<td>(b) The greater the ideological distance between the state’s governing elites and the partisanship of a justice, the more likely the justice should be to decide a case in favor of the state (attitudinal reaction).</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Party Capability Explanations</strong></td>
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<td></td>
</tr>
<tr>
<td>(5) When the state is defending a regulation, a justice is more likely to side with the state than she is in other issue areas in which the state litigates.</td>
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<td>(6) As the resources devoted by the state to litigation increase, justices will become more likely to vote in favor of the state.</td>
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<tr>
<td>(7) A justice will be less likely to vote in favor of a state when the state’s opponent is a have.</td>
<td>Have</td>
<td>-</td>
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Table 2.2: Hypotheses, Associated Variables and Expectations (Continued)
Table 2.2 Continued

(8) A justice will be more likely to vote in favor of the state in a case in which a state solicitor is present. Solicitor Present +

(9) A justice will be more likely to vote in favor of the state in cases occurring in states in which the state has created a state solicitor’s office, regardless of whether a solicitor is actually present in the case. Solicitor +

**Party Capability/Informational Explanations**

(10) As the state’s opponent’s attorney’s number of previous appearances before the state supreme court increases, a justice should be less likely to vote in favor of the state. Opponent Experience -

(11) As the state’s attorney’s number of previous appearances before the state supreme court increases, a justice should be more likely to vote in favor of the state. State Experience +

**Informational Explanations**

(12) As the resources made available to the court increase, justices will be less likely to vote in favor of the state. Court Resources -

(13) A justice on a court that has an intermediate appellate court below it will be less likely to vote in favor of the state. Intermediate Appellate Court -

(14) As the number of cases heard by the court increase a justice should be more likely to side with the state. Docket Size +

(15) If the state wins the case at the lower court, a justice should be less likely to vote for the state. Lower Court Decision -

**State Litigation Environment Explanations**

(16) As the population of a state increases a justice should be less likely to side with the state. Population -

(17) As the number of attorneys per capita increases a justice should be less likely to vote in favor of the state. Attorneys Per Capita -

(18) When the state is a petitioner in a case, a justice should be more likely to vote in favor of the state. State Petitioner +
**Attitudinal Hypothesis**

From the attitudinal theory I have derived a single hypothesis that effectively captures the role that policy preferences are expected to play in cases in which the state is a party:

1. When the position advocated by a state in a particular case is the same as the partisanship of the justice, that justice will be more likely to vote in favor of the state.

I discuss the measures of policy preferences in Chapter 3. The basic logic of this hypothesis is simple to understand: if partisanship is an accurate proxy for the policy preferences of a justice in any given legal issue area, then when the state takes a position that is consistent with the justice’s partisanship (and thus presumed policy preferences) the state should be more likely to prevail.

**Strategic Hypotheses**

I have three hypotheses intended to capture the presence of strategic behavior on behalf of justices. I have suggested that the type of retention system used in a state should have some effect on the willingness of justices to side with the state:

2. As the retention system makes a justice more reliant on the state for maintenance of tenure on the bench, the justice will become more likely to side with the state.

More specifically, retention system is measured as an ordinal variable: states that grant justices life tenure are coded as 0, states that elect justices in non-partisan elections or partisan elections are coded 1, states that use retention elections are coded 2 and states that reappoint their state supreme court justices after a set amount of time are coded 3. I expect that justices that must rely on the other actors in the state system for job security.

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9 The appendix to Chapter 3 includes a listing of all the variables included in the models in Chapter 4, including their sources and coding.
will tend to side with the state more frequently than justices that are not reliant on these actors for their jobs (see, e.g., Shepherd 2008). Those justices who, as in the federal model, once appointed retain their seats until retirement or death are expected to be the least responsive to other state-level actors. Those who must periodically face the electorate are expected to be somewhat responsive to other state-level actors and to the electorate, although they are likely to feel less beholden to the state than those that rely directly on the governor and/or the legislature for reappointment.

Furthermore, it should be true, as other have found (Langer 2002), that justices will be less likely to side with the state when the other two branches—the governor and legislature—are from different parties. Thus,

(3) When the state is experiencing divided government, a justice will be less likely to decide in favor of the state.

The logic here is relatively straightforward: if the state government is united, i.e. both houses of the legislature and the executive are controlled by the same party then a justice should be more reluctant to rule against the state, given that united state governments will have an easier time countering decisions with which they disagree and/or sanctioning justices.

I believe that the ideological distance between state level politicians and the position taken by the state will affect decision making behavior. More specifically,

(4) (a) The greater the ideological distance between the state’s governing elites and the partisanship of a justice, the more likely a justice should be to decide a case in favor of the state.¹⁰
(4) (b) The greater the ideological distance between the state’s governing elites and the partisanship of a justice, the less likely a justice should be to decide a case in favor of the state.

¹⁰ I refer the reader to the discussion of the measure of elite distance in chapter 3 for proof of the notion that state elites take ideologically consistent positions in the cases in this data set.
If justices think strategically about their choices, then they should be more likely to constrain those choices when the potential for policy retaliation from the state’s elites is greatest—when the ideological distance between the politicians and the justice is large. Alternatively, if the justices are primarily motivated by policy concerns, and the state’s position in a case can be considered a representation of the policy preferences of the state’s elites, then the further apart the two are, the less likely the justice should be to vote in favor of the state.

*Party Capability Hypotheses*

One of the major reasons for believing that the state is more successful than other repeat players is that governments are treated differently because they are governments, something that I treat as an extra “capability” of governments and thus as an explanation belonging to the realm of party capability theories of success. I have argued above that this special treatment is most likely to be present in cases in which the state is defending its regulatory prerogative since, on some level, it is this function that defines the core of what it means to govern:

> (5) *When the state is defending an economic regulation, a justice is more likely to side with the state than in other issue areas in which the state litigates.*

Put simply, if the state is given the benefit of the doubt at the margin, as suggested by others (Kritzer 2003; Rosenberg 1991), then this marginal benefit should be most prominent in government economic regulation cases. This is because it is in these regulatory cases that there are likely to have been multiple layers of administrative and judicial review before the case reaches the state supreme court and because legally the scrutiny with which the regulation is examined will be lower.
I have several hypotheses about how the capabilities of the parties before the state supreme courts will affect the likelihood of a justice voting in favor of the state. First is the hypothesis about how state resources will impact decision making at the state level:

(6) As the resources devoted by the state to litigation increase, justices will become more likely to vote in favor of the state.

The first is a straightforward hypothesis: as the state spends more on litigation it should become more likely to prevail, all else equal. It is also useful to hypothesize about how the capabilities of the state’s opponents will affect decision making.

(7) A justice will be less likely to vote in favor of a state when the state’s opponent is a have.

Unfortunately, the measurement of opponent resources is difficult given the multiple types of parties that appear before the state supreme courts. I use an indicator variable for the type of party that is opposing the state in any given case. I distinguish between the capabilities of individuals and other litigants including local government, businesses and organizations. Unlike previous work on party capabilities in litigation, I do not distinguish between the relative capabilities of businesses, local governments and organizations because doing so is not possible given the organization of the SSCDP.\(^1\)

I also expect that states will fare better in those cases in which state solicitors appear:

(8) A justice will be more likely to vote in favor of the state in a case in which a state solicitor is present.

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\(^1\) Consider that, in the SSCDP, the general groupings of litigant type include an incredibly diverse set of subgroups. For instance, in the business grouping, everything from major airlines and insurance companies are included with small family owned business. Though to some extent it is possible to distinguish between type of business by the area in which it does business, it is not possible to distinguish among, say, manufacturing interests that are international conglomerates and those that are small local operations. Therefore, I code this variable at a high level of aggregation.
A full exploration of why and how the presence of a state solicitor in a case might benefit the state is presented in chapter 5, although all of the theories on the success of the Solicitor General, including greater experience (McGuire 1995), selectivity (Zorn 2002) and the ability to signal the ideological preferences of the administration to the Court (Bailey et al. 2005), are possibilities at the state level as well. Furthermore, I discuss the difficulties with coding whether a solicitor is “present” in a case in the next chapter.

I also control for whether a state has established a solicitor’s office in the first place. I expect that states that have these offices should, on the whole, fare better than those that do not:

(9) A justice will be more likely to vote in favor of the state in cases occurring in states in which the state has created a state solicitor’s office, regardless of whether a solicitor is actually present in the case.

My belief, based on interviews with several solicitors, is that this simple indicator of the presence of a state solicitor’s office will be able to capture some of the potential institutional effect of creating the office. Creating the office should benefit the state whether or not a solicitor is actually present in a case. This is so because it is my expectation that the solicitors are able to help better coordinate appellate resources and provide better training to the state’s attorneys who do appear before the state supreme courts. Hence, states that have created the office should garner marginal benefits whether or not the solicitor is actually present in a case.

Of course, I expect that the experience of each party’s lawyer is likely to be an important determinant of who wins any given case.¹² Hence,

¹² Scholars have typically distinguished between two kinds of experience available to a lawyer: substantive and procedural. Substantive experience is experience within a particular field of law, e.g., a tax lawyer has
As the state’s opponent’s attorney’s number of previous appearances before the state supreme court increases, a justice should be less likely to vote in favor of the state.

As the state’s attorney’s number of previous appearances before the state supreme court increases, a justice should be more likely to vote in favor of the state.

As I discuss in detail in chapter 3, I log the number of previous appearances because I believe that each additional appearance after the first one will yield only marginal increases in attorney experience (see McGuire 1995; McAtee and McGuire 2007). These two hypotheses are also considered informational hypotheses that help explain how the need of the justices to reduce uncertainty factors into their decision making.

Informational Hypotheses

Scholars of state supreme courts have found that as the resources of a court increase, where resources include things like the number of staff and clerks available, judicial salary, and number of justices on the bench, that a have-not party will be more likely to prevail (Brace and Hall 2001). Therefore,

As the resources made available to the court increase, a justice will be less likely to vote in favor of the state.

The causal mechanism here is thought to be that on courts with greater resources justices will be more likely to look past their default deference to the state—a situation that favors the state’s opponents. This is so because as the resources of the court increase it will have greater time and ability to investigate more fully those positions that it might otherwise

substantive experience in tax law. On the other hand, procedural experience is experience before a particular court. So, for instance, we might say that though the Solicitor General is not an expert in any specific substantive area of law, he is an expert on the procedural norms and preferences of the Justices on the Supreme Court. My measure of attorney experience focuses on procedural expertise since this is what interviews with solicitors indicated is important in appellate courts.
assume are correct. I characterize this as an informational hypothesis because it speaks to
the court’s ability to gather information independently of the parties appearing before it.

I have noted the role that the presence of an intermediate appellate court can play
in how justices encounter information. Along with the experience of the attorneys
representing the state and the court resources variable, there are two variables that pertain
to the workloads of state supreme courts that I include and that are considered as
informational explanations of decision making. Because of that the presence of an
intermediate appellate court can play a crucial role in the decision making process of
justices on the merits. I expect that state supreme courts that are shielded from trial courts
by an intermediate appellate court will be better positioned to closely examine a state’s
arguments in favor of its position, a situation that should, all else equal, disfavor the state.

(13) A justice on a court that has an intermediate appellate court below it will
be less likely to vote in favor of the state.

Furthermore, and in symmetry with the informational hypothesis about intermediate
appellate courts, I expect that as the workload of a court increases, it will have less time
to give careful consideration to the state’s opponent’s arguments, a situation that should
favor the state. Thus,

(14) As the number of cases heard by the court increases a justice should be
more likely to side with the state.

Further, an increased workload will further burden the justices’ ability to gather
information on their own, perhaps increasing the influence of litigants that can provide
reliable information.
State Litigation Environment Hypotheses

A final set of variables is included in an attempt to capture the potential effect of the state’s litigation environment on the decision making of state supreme courts. One of these variables is state population.

\[ (15) \] As the population of a state increases a justice should be less likely to side with the state.

As explained by Brace and Hall (2001), it is expected that as the population increases so will the supply of good cases on which to challenge the typical “haves.” In my analysis, the ultimate “have” is the state and so as the cases challenging the state become “better” in some abstract sense we should expect the state to prevail less frequently.

As another attempt to capture the state litigation environment I include a variable that captures the number of attorneys per capita within a state; this is another factor that Brace and Hall (2001) suggest should affect the ability of have-not litigants to prevail in state courts.

\[ (16) \] As the number of attorneys per capita in a state increases a justice should be less likely to vote in favor of the state.

The logic backing hypothesis 18 is similar to the logic of hypothesis 17, as the supply of attorneys increases, have-not litigants should be better able to the secure the services of a competent attorney.

Finally, it has long been noted by scholars of appellate courts that those courts tend to take the cases that they wish to reverse (see, e.g., McGuire et al. 2009). Therefore, all else equal, I expect that when the state is a petitioner in a case (i.e. when it has lost and appeals to the state supreme court) it should be more likely to win.

\[ (17) \] When the state is a petitioner in a case, a justice should be more likely to vote in favor of the state.
CHAPTER 3

DATA AND MEASUREMENT

In this chapter I explain the data that are used for the analyses in chapter 4 and for parts of chapter 5. Further, I discuss the measurement of my dependent variable and independent variables, including an appendix at the end of this chapter that shows, by variable, the conceptualization, operationalization and sources of the data. I detail my modeling strategy in chapter 4.

Data Sources

The basis of the data used in this dissertation is the State Supreme Court Data Project (SSCDP), an NSF-funded project led by Paul Brace and Melinda Gann Hall. The SSCDP codes almost every state supreme court case between 1995 and 1998. In some instances, where a court’s docket exceeded 800 total cases over these four years, the researchers only coded 800 cases. This occurs in a few states and makes the SSCDP something very close to but not exactly the population of cases heard by state supreme courts from 1995-1998.

The SSCDP contains variables that capture everything from the order in which opinion writing duties are assigned on the court to legal aspects of the decision to the types of parties before the court. Furthermore, it includes individual level information on
each of the justices participating in the cases (Bonneau et al. 2006), including their ideology in the form of a PAJID score and the partisan identification of the judge.

Supplemental data was gathered from a variety of sources, all of which are detailed in the appendix to this chapter. Information on the number of previous appearances for attorneys was gathered from Lexis/Nexis and Westlaw. Information on many state level characteristics was gathered from the *Book of the States* and the replication data set that accompanies Spill Solberg and Ray 2005,¹ among other sources.

**Sampling Procedure**

Though the SSCDP is comprehensive it does not contain all of the information that I needed in order to adequately test the hypotheses described above. Because it is necessary to supplement the information contained in the SSCDP and because this required reading each case, I decided to select a sample of cases to make the coding process feasible. Table 3.1 outlines the sampling process detailed below.

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¹ This data set is available at http://www.lsu.edu/faculty/lray2/data/data.html (last checked May 29, 2008).
Cases | Procedure
---|---
Population | 4004 Civil cases in which the state is a party, excluding cases involving regulation of the bar.
Sample | 900 Random selection from sample frame, with specified over-samples
Step 1 | 300 Sample of cases from the 12 states with state solicitors as of 1994. Once sampled these cases were eliminated from sample frame
Step 2 | 120 Sample of cases with amicus participation. These cases were then eliminated from sample frame
Step 3 | 480 Random selection from remaining cases in sampling frame
Step 4 | -54 Cases eliminated from the sample because state is not truly party to litigation or state is both petitioner and respondent
Step 5 | -10 Cases involving more than 4 issues are eliminated from the sample because it is not clear in these cases how to correctly count the number of issues in a case.

**Total Usable Sample** | 836

Table 3.1: Sampling Procedure
Since state solicitors are likely to appear mainly (in some states exclusively) in civil cases (Layton 2001), I started by defining the population of cases as those that involved a civil issue and in which the state is a party. Furthermore, I chose to analyze only civil cases because states are not really parties in most criminal cases in the sense that county level prosecutors who have tried the case from its inception usually handle these cases instead of attorneys at the Attorney General’s office (Layton 2001). Focusing only on civil cases has the added benefit that there is considerably more variation in the type of parties that oppose the state, as in criminal cases the state’s opponent is almost always a convicted individual. Further, civil cases pose a greater challenge for the state even if to justices and the general public they are likely to be less salient on the whole (Baum 2003; Hall 1987).

Using these parameters, I began with a population of 4004 cases defined by the presences of the state government as a party in the case and from this population I selected 900 cases (22% of the total). Table 3.2 describes the sample by the number of cases that I selected from each state.

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2 The state is considered a party to litigation whenever the state has been sued or is suing in its corporate capacity, as an agency, or a state official is participating in litigation in an official capacity.

3 It is also true, however, that most of the groups that become involved in state supreme court campaigns do so for economic reasons and not because of strong preferences with respect to criminal law (Baum 2003). So even though the focus of the campaign advertisements run by these groups is likely to be on the criminal decisions of these judges, the motivation for putting the votes of justices in these cases before the public is in fact economic.

4 I omitted cases in which the state supreme court dealt with the regulation of the state bar (of which there were just over 970 cases) from this sample.
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<tr>
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<tbody>
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<td>22</td>
<td>3.50</td>
<td>2.63</td>
</tr>
<tr>
<td>OH</td>
<td>212</td>
<td>32</td>
<td>5.29</td>
<td>3.82</td>
</tr>
<tr>
<td>OK</td>
<td>65</td>
<td>9</td>
<td>1.62</td>
<td>1.08</td>
</tr>
<tr>
<td>OR</td>
<td>106</td>
<td>31</td>
<td>2.65</td>
<td>3.70</td>
</tr>
</tbody>
</table>

Table 3.2: Comparison by State of Cases in the Population and the Sample: Includes only those cases in which the state appears as a party, but excludes all cases classified as bar regulation cases in the SCDP.  

(Continued)
Table 3.2: Continued

<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>PA</td>
<td>108</td>
<td>2.70</td>
<td>32</td>
<td>3.82</td>
</tr>
<tr>
<td>RI</td>
<td>124</td>
<td>3.10</td>
<td>27</td>
<td>3.23</td>
</tr>
<tr>
<td>SC</td>
<td>90</td>
<td>2.25</td>
<td>17</td>
<td>2.03</td>
</tr>
<tr>
<td>SD</td>
<td>50</td>
<td>1.25</td>
<td>27</td>
<td>3.23</td>
</tr>
<tr>
<td>TN</td>
<td>39</td>
<td>0.97</td>
<td>29</td>
<td>3.46</td>
</tr>
<tr>
<td>TX</td>
<td>78</td>
<td>1.95</td>
<td>8</td>
<td>0.96</td>
</tr>
<tr>
<td>UT</td>
<td>62</td>
<td>1.55</td>
<td>8</td>
<td>0.96</td>
</tr>
<tr>
<td>VT</td>
<td>102</td>
<td>2.55</td>
<td>30</td>
<td>3.58</td>
</tr>
<tr>
<td>VA</td>
<td>29</td>
<td>0.72</td>
<td>4</td>
<td>0.48</td>
</tr>
<tr>
<td>WA</td>
<td>73</td>
<td>1.82</td>
<td>24</td>
<td>2.87</td>
</tr>
<tr>
<td>WV</td>
<td>152</td>
<td>3.80</td>
<td>30</td>
<td>3.58</td>
</tr>
<tr>
<td>WI</td>
<td>41</td>
<td>1.02</td>
<td>13</td>
<td>1.55</td>
</tr>
<tr>
<td>WY</td>
<td>163</td>
<td>4.07</td>
<td>30</td>
<td>3.58</td>
</tr>
<tr>
<td>Total</td>
<td>4004</td>
<td>100%</td>
<td>837</td>
<td>100%</td>
</tr>
</tbody>
</table>
The selection process proceeded in three distinct phases. First, given my interest in state solicitors, I over-sampled cases from those states with solicitors by randomly selecting cases from states that had established solicitor’s offices by 1994. Though there were only 12 states with solicitors by 1994, 300 of the 900 cases in the sample include cases from these states (33% of the sample). In contrast, in the population 26% of the cases come from states with state solicitors. I have over-sampled these cases because I expect, based on information from interviews with solicitors, that state solicitors will only actually participate in a case about 25% of the time—thus I need a fairly large sample of these cases in order to have a sufficiently large subset in which I observe solicitor participation.\(^6\)

Next, to the sample of cases from states with solicitors, I added an over-sample of cases in which an amicus participated, selected randomly from those cases with amicus participation. Since amicus participation is generally infrequent in the state supreme courts I suspected that a random sample would provide insufficient cases in which to analyze these high salience cases by themselves, especially given that the other component of high salience cases—constitutional cases—are rare in the sample, occurring only 11% of the time. Note that I did not oversample the constitutional cases, only the cases in which there was amicus participation. Given that a fair number of cases in the states with solicitors also involved amicus participation, I eliminated these cases from the sampling frame and selected 120 cases that involved amicus participation. This brought the total number of cases with amicus participation to 171 in the sample, or 19%.


\(^6\) In fact, it turns out that solicitors are present in these cases at a slightly higher rate than I anticipated. Of the 300 cases from states with solicitors I observed solicitor participation in 35% of those cases.
of the total. This represents a doubling of these cases from the population, in which only about 9% of cases include amicus participation. Taken together, the solicitor over-sample and the amicus over-sample comprise just over 46% of the total cases sampled, or 420 of 900 cases.

After eliminating the 120 additional amicus cases from the population I selected 480 cases at random from those remaining. This brought the total sample to 900 cases, but unfortunately many of the cases had to be subsequently eliminated. I was forced to remove several cases that did not, in reality, involve the state as a party in the litigation or included cases in which one branch of the state government was in opposition to another branch. This resulted in the elimination of 54 cases from the sample, leaving a total usable sample of 846 cases. Finally, I eliminated 10 cases in which the number of issues before the court was coded as exceeding five—this number of issues is highly unlikely and upon reading these cases I could not resolve the coding of this variable for these cases. Given that complexity is of central concern in this project I choose to leave those cases aside in my analysis, although including these 10 cases does not appreciably change my results. Though sampling occurred at the case level the analyses in chapter four proceed at the judge-vote level. In the 836 cases included in the analyses to follow there is an average of 5.5 votes per case for a total number of 4631 votes.

Potentially, this process of over-sampling has created a sample that is not representative of the population. Of greatest concern is how this sampling procedure

---

7 Fairly frequently the state will be named as a party even though it will have no real interest in the litigation.
affects the dependent variable in most of my analyses—whether the state wins cases. In the population the justices vote with the state in 61.4% of the cases, whereas justices vote with the state 62.1% of the time. Obviously, the sample and the population match up closely on the dependent variable of a justice’s vote in favor of the state.

Unrepresentativeness is most likely to manifest in a sample that is comprised of a case mix that is unlike the population. Table 3.3 presents the breakdown of cases by type in the population and in the sample.

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Percentage of Cases from SSCDP</th>
<th>Percentage of Sample Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Regulation</td>
<td>42%</td>
<td>56%</td>
</tr>
<tr>
<td>Government Tort</td>
<td>15%</td>
<td>21%</td>
</tr>
<tr>
<td>Privacy</td>
<td>5%</td>
<td>5%</td>
</tr>
<tr>
<td>Elections</td>
<td>4%</td>
<td>5%</td>
</tr>
<tr>
<td>Private Tort</td>
<td>5%</td>
<td>4%</td>
</tr>
<tr>
<td>First Amendment</td>
<td>1%</td>
<td>2%</td>
</tr>
<tr>
<td>Total Number of Cases</td>
<td>4004</td>
<td>837</td>
</tr>
</tbody>
</table>

Table 3.3: Comparison of Population in SSCDP to Sample by Case Type: Totals do not equal 100% because residual categories have been omitted. Percentages in SSCDP are based only on those cases in which the government appears as a party.

These six categories of cases represent the major categories in which state governments participate. The sample and the population contain similar kinds of cases, although the sample contains slightly more cases of economic regulation and government torts.

---

8 The following percentages are in terms of justice votes, which is the unit of analysis in most models. Thus, in this paragraph I talk about whether a justice votes in favor of the state.
Nevertheless, the sample is not so different from the population so as to cause concern or to invalidate inferences made from it.

Since I divide the sample of 836 cases into several separate sub-samples of interest it is worth spending some time analyzing the sample characteristics of each of those sub-samples. Table 3.4 displays the amount of overlap between the samples (or the number of cases that each sample shares with another).

<table>
<thead>
<tr>
<th></th>
<th>High Salience</th>
<th>Non-Unanimous</th>
<th>Complex</th>
<th>Cases Unique to Category</th>
<th>Percent of Total Cases Composed of Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Salience</td>
<td>---</td>
<td>43%</td>
<td>31%</td>
<td>39%</td>
<td>27%</td>
</tr>
<tr>
<td>Non-Unanimous</td>
<td>35%</td>
<td>---</td>
<td>28%</td>
<td>48%</td>
<td>33%</td>
</tr>
<tr>
<td>Complex</td>
<td>26%</td>
<td>29%</td>
<td>---</td>
<td>56%</td>
<td>32%</td>
</tr>
</tbody>
</table>

**Table 3.4: Percent of Cases Shared Between Subsamples:** Percentages represent the percentage of cases in the column category fitting into the row category. In other words, the number of Non-Unanimous cases that are also considered high salience is 43%.

In general, the sub-samples are unique enough to be treated differently. The high salience sample contains a large number of complex cases: about one-third of the high salience sample is also complex. The high salience sample also contains a large number of non-unanimous cases; nevertheless, about a third of the cases in the high salience sub-sample are unique to that sub-sample. Similarly, the non-unanimous sample is composed half of unique cases and half of cases that also appear in the complex and high salience sub-samples. The complex sub-sample is the most distinctive of the three, with only about
45% of the sample being composed of cases from the high salience or non-unanimous groups. Together, the relative independence of each sample suggests that analyzing each separately can tell us something about the ability of states to prevail in state supreme courts that simply treating them all alike would not.

**Measurement**

In this section I describe the measurement of several of the more important or difficult to understand variables in the analysis—the variables that I have created and that are not standard in the SSCDP. All variables, including those described in the text here are discussed in the table included in the appendix to this chapter; this is sufficient given that for most variables the measurement is straightforward. The dependent variable in the models presented in chapters 4 and parts of 5 is the votes of justices and panels on various subsets of the data in cases in which the state is a party. The votes are coded as being either in favor of the state or against it, based on whether the state is the petitioner or respondent and whether the justice voted in favor of the petitioner or the respondent. This coding of the dependent variable limits what I can say about the explanatory power of party capability theory in particular. This is because party capability theorists often assert (Galanter 1974) and have shown (Songer et al. 1999) that repeat players, such as state governments, often have longer litigation time horizons that allow them to settle cases that, if decided on the merits, would result in an unfavorable precedent. My measurement of the independent variable is incapable of capturing the ability of state governments to settle those cases that are particularly unfavorable to them, and thus it may be an overestimate of the “true” success of states because it does not measure those
cases that are never appealed to the state supreme court but that the state would likely lose.\textsuperscript{9}

In addition to the dependent variable included in the SSCDP, I have added several variables that are necessary in order to test many of my hypotheses. I have created a measure of the \textbf{experience of the attorneys} representing the state and the state’s opponent in each case. Though I measured this several ways, in the models presented here I count the number of previous appearances\textsuperscript{10} by each of the attorneys representing the respective sides before the state supreme court over the five years before the case. I then use the number of the attorney who appeared most for each side as the experience measure for that party.\textsuperscript{11} Thus, if three attorneys in a case represent the state and they had 4, 7, and 12 previous appearances each, then the state would be represented as having 12 previous appearances.

This method is consistent with the approach taken by scholars of the Supreme Court who are concerned with attorney experience (McGuire 1998; McAtee and McGuire 2007; Johnson et al. 2006) and accords with the belief that the most senior attorney on a litigation team likely directs the efforts of the other attorneys. In each of the models in the chapters that follow I estimated the models with alternative specifications of this variable.

\textsuperscript{9} In some sense the dependent variable is imperfect in the other direction: it underestimates the ability of the state to build precedent that is favorable for itself in the future by accepting present losses. Nevertheless, this underestimation is mitigated by the fact that the current success of the state will be predicated to some extent on its ability to swallow the bad cases and prevent unfavorable precedent at a time preceding my sample.

\textsuperscript{10} I counted as an appearance any instance in which either Lexis/Nexis or Westlaw indicated that the attorney of interest appeared as counsel for a party in a state supreme court case. Appearances as the drafter of an amicus brief to the court are not considered in the measure of experience.

\textsuperscript{11} I do this because in many states, given the information in state reporters, it is impossible to determine who presented the oral argument or who should otherwise be considered the lead attorney. Instead, I proceed on the reasonable assumption that the attorney with the most experience is likely the attorney with authority over the litigation.
and the results were substantially similar.\textsuperscript{12} I counted as a previous appearance only those instances in which the lawyer was representing a party to the case, but not those instances in which the attorney appeared as a representative of a third party amicus. Finally, to account for the diminishing return of additional previous appearances before the court beyond the first appearance, I have calculated the natural log plus one\textsuperscript{13} of the number of appearances for the most experienced attorney for each side in each case (see McAtee and McGuire 2007), as this is a way to capture the diminishing gain in experience accruing to an attorney for each appearance beyond the initial one.

I have also coded whether, when appropriate, a \textbf{state solicitor appears} as a representative of the state in a case. I counted a state solicitor as present whenever their name appears as a counsel in the case. I also counted a solicitor as present when another attorney not the state solicitor, but identified as an assistant state solicitor, appears as counsel. This method undoubtedly underestimates the actual participation of state solicitors and their assistants at the state supreme court level, since I am at the mercy of the state supreme court’s reporter to accurately identify the counsel in a case and because those who are not state solicitors but are assistants in the office of the solicitor—equivalent to federal assistant Solicitors General—are not always identified as being in that office. Further, this measure is an under-representation of the presence of state solicitors since I had to omit all appearances by the Colorado state solicitors in this time

\textsuperscript{12} Specifically, these alternative operationalizations included the total experience level for each side—in the example in the text this number is 4+7+12 = 23—and the mean level of experience for each side—in the example in the text this number is 23/3 = 7.67.

\textsuperscript{13} I add one because many attorneys have no previous appearances before the court and the natural log of zero is undefined.
period—this is because interviews indicated that the state solicitor was included as having participated in a case when in fact he or she did not.\textsuperscript{14} Thus, in Colorado it was impossible to distinguish instances of genuine participation by the solicitor. For these reasons, solicitors probably participate more frequently than they appear to in this data and this means that I have underestimated their impact in litigation in all that follows. I have opted to include cases from Colorado in the analyses that follow, but to treat cases from the state as though a solicitor never appears on behalf of the state.

Measuring the \textbf{policy preferences of justices} has been a central endeavor for scholars of judicial behavior for half of a century (see, e.g., Brace et al. 2000; Segal and Cover 1989; Nagel 1962). Scholars of state supreme courts have relied on the ideology scores created by the leading researchers in state supreme courts: the Party Adjusted Judicial IDEology scores (PAJID) (Brace et al. 2000). PAJID scores combine the method used to select the justice and the ideology of citizens and elites in a state at the time of appointment. The scores of elites and citizens are weighted to account for the method of selection at use in a state when the justice first ascended to the bench. For instance, if a state elects its justices, then citizen ideology will get more weight than will elite scores. In this sense PAJID scores are closely linked to the political environment at the time a justice is selected to the state supreme court.

Instead of using the PAJID score to capture judicial ideology, I opt for the partisanship of the justice as a proxy for ideology. Though this is a time-tested and frequently used proxy for ideology (see, e.g., Pinello 1999), some scholars have been

\textsuperscript{14} Indeed, one interviewee indicated that most of the senior attorneys in the Colorado Attorney General’s office were listed as counsel of record in cases in order to sow some amount of confusion with the state’s opponent.
critical of its use in the states, believing that it fails to account for the wide variation present between states in the meanings of party labels in those states (Brace et al. 2000). Put differently, we can reasonably expect that a Democrat in Mississippi is more conservative than a Democrat in Massachusetts. Nevertheless, using the PAJID score in the analyses that follow is problematic. Using PAJID scores to capture the ideology of a state supreme court justice creates a collinearity problem with another of my variables that measures the distance of a particular justice from the elites in the state. This is because in that elite distance measure I use the PAJID score to calculate distance and therefore including the PAJID score again for the measure of a justice’s ideology is close to double-counting the PAJID score. I opt instead for a clean partisanship variable to capture judicial ideology. Although this measure is not perfect it is essentially interchangeable with the PAJID measure in these models, as using either leads to the same substantive conclusions in most of the models.

Using the partisan identification of each judge in the dataset I create two measures intended to capture the **effect of ideology** on judicial decision making. First, I create a variable that captures, dichotomously, those situations in which the state takes a position in a case that is consistent with the partisan identification of the judge. Thus, when this variable is coded 1 the state has taken a position in the case that the justice should find ideologically agreeable. Interestingly, only about half the time does the state take a position that is consistent with a justice. Second, in order to capture potential strategic interactions between the elites in a state and a justice, I create a distance measure by taking the absolute value of the difference in a justice’s partisan identification and the elite ideology score assigned by Berry et al. (1998). These scores range from .02 to .98
with higher scores indicating greater distance between the state level elites and the justice.

For the elite distance measure to be a useful proxy for capturing the strategic reactions of justices and panels to the other branches of government, it is necessary to show that the state tends to take positions that are consistent with the ideological proclivities of the state’s elites. Dividing state ideology at the median and then looking at the position taken by the state in each case allows for a determination of whether the state’s elites are able to influence the position taken by the state in a case. Doing this shows that the states do take the ideological position we would expect them to at least 50% of the time—further a $\chi^2$ test indicates that this is a statistically significant inclination with a p-value of 0.006 ($\chi^2 = 7.66$, d.f.=1). This means that conservative administrations tend to advocate for conservative outcomes in cases; the opposite is also true.

At the state level, I have added a number of variables as well. First, I added variables describing the state AG’s budget in 1995-1998 and the number of attorneys working in the state AG’s office in this time period. I included a variable coding the population of each state and the numbers of attorneys per capita in each state. There is also a variable included capturing whether the state was experiencing divided government.

There are two factor analysis scores used to capture the resources available to states and those available to supreme courts. For the state resource measure, I used principal component analysis to create a single factor that accounts for the budget of the Attorney General’s office in the time period of interest and the number of attorneys
working in the AG’s office. Only the first factor is retained as the state’s resource score. I also used principal component analysis to create a factor score for the resources available to a state supreme court, which is based on the number of clerks available to a justice, the number of staff attorneys available and the salary of the supreme court justices. Again, I retain only the first factor resulting from this factor analysis. With respect to both the state resources score and the court resources score the retained factors have factor loadings above 0.90, indicating that there is likely only one factor in the data (Weller and Romney 1990). Finally, there are many variables coded from data available in the SSCDP and the appendix to this chapter provides details on the coding and sources of all of the variables not discussed in the text and included in the analyses that follow.

**Describing the Data**

It is worth describing the data in some detail; to that end, Table 3.5 provides the basic descriptive statistical information for each variable included in the models that follow.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dependent Variable</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State Win</td>
<td>0.621</td>
<td>0.485</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>State Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Solicitor</td>
<td>0.413</td>
<td>0.492</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Divided Government</td>
<td>0.529</td>
<td>0.451</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Population$^1$</td>
<td>5.717</td>
<td>5.214</td>
<td>0.488</td>
<td>32.297</td>
</tr>
<tr>
<td>Attys. Per Capita$^2$</td>
<td>2.901</td>
<td>0.911</td>
<td>1.651</td>
<td>5.636</td>
</tr>
<tr>
<td>Retention System</td>
<td>1.608</td>
<td>0.834</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Intermediate Appellate Court</td>
<td>0.778</td>
<td>0.415</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Docket Size$^3$</td>
<td>141</td>
<td>42</td>
<td>55</td>
<td>200</td>
</tr>
<tr>
<td>State Resources</td>
<td>0.010</td>
<td>1.002</td>
<td>-0.929</td>
<td>6.394</td>
</tr>
<tr>
<td>Court Resources</td>
<td>0.012</td>
<td>0.995</td>
<td>-1.695</td>
<td>4.075</td>
</tr>
<tr>
<td><strong>Case Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Have</td>
<td>0.351</td>
<td>0.477</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Solicitor Present</td>
<td>0.135</td>
<td>0.341</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Opponent Atty. Experience$^4$</td>
<td>2.689</td>
<td>6.117</td>
<td>0</td>
<td>60</td>
</tr>
<tr>
<td>State Atty. Experience$^4$</td>
<td>17.74</td>
<td>33.365</td>
<td>0</td>
<td>164</td>
</tr>
<tr>
<td>Economic Regulation</td>
<td>0.563</td>
<td>0.496</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>State Petitioner</td>
<td>0.372</td>
<td>0.483</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Amicus</td>
<td>0.211</td>
<td>0.409</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Complex</td>
<td>0.307</td>
<td>0.461</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Dissent</td>
<td>0.258</td>
<td>0.438</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Salient</td>
<td>0.279</td>
<td>0.449</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Non-Unanimous</td>
<td>0.375</td>
<td>0.484</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>Judge Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ideologically Consistent</td>
<td>0.474</td>
<td>0.499</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Elite Distance</td>
<td>0.461</td>
<td>0.271</td>
<td>0.02</td>
<td>0.98</td>
</tr>
</tbody>
</table>

**Table 3.5: Descriptive Statistics of Included Variables:** 1. Population is in millions. 2. Attorneys per capita coded per 1,000 state residents. 3. Number of cases heard per year. 4. In the models, the natural log plus one is included in the model. The numbers presented here are the actual number of previous appearances.
There are several things worth noting. First, the state tends to win more often than not. About 62% of all the votes in the dataset are in favor of the state’s position in a case. This is about the rate of success found in previous studies of the state supreme courts in Wheeler et al. (1987) and Farole (1999). Second, the state and opponent attorney experience variables reveal the differences in the attorneys typically representing each side. Quite clearly the state has a regular experience advantage vis-à-vis its opponents: the mean number of previous appearances for the state’s opponent’s attorney is 3, versus 18 for the state.

Economic regulation cases make up over half of the sample, about 56% of the cases and the votes, and so I think it worthwhile to pause and describe these types of cases in some detail. What, precisely, is included under the rubric of economic regulation? Table 3.6 provides a summary of the types of cases that compose the general economic regulation grouping in the data.

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Percent of Overall Category</th>
<th>State Win Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxes</td>
<td>28.1%</td>
<td>0.66</td>
</tr>
<tr>
<td>License</td>
<td>17.1%</td>
<td>0.68</td>
</tr>
<tr>
<td>Welfare</td>
<td>16.4%</td>
<td>0.65</td>
</tr>
<tr>
<td>Environmental</td>
<td>5.8%</td>
<td>0.52</td>
</tr>
<tr>
<td>Zoning</td>
<td>4.7%</td>
<td>0.82</td>
</tr>
<tr>
<td>Eminent Domain</td>
<td>4.1%</td>
<td>0.74</td>
</tr>
<tr>
<td>Utility</td>
<td>3.8%</td>
<td>0.67</td>
</tr>
<tr>
<td>Consumer Protection</td>
<td>2.1%</td>
<td>0.70</td>
</tr>
<tr>
<td>Transportation</td>
<td>1.7%</td>
<td>0.75</td>
</tr>
<tr>
<td>Other</td>
<td>23.7%</td>
<td>0.61</td>
</tr>
</tbody>
</table>

Table 3.6: Economic Regulation Cases
Six types of cases comprise the economic regulation category. Of those, cases involving the implementation and constitutionality of state tax laws are the single largest category. As evidence of the breadth of state regulation, the other category is the next biggest, followed by the enforcement of licensing regulations for professionals like doctors, dentists and others (but excluding the licensing of lawyers which are coded as bar regulation cases and are omitted from the sample). Next come welfare cases, which usually involve the disbursement of Medicaid benefits and cases involving the enforcement (or non-enforcement) of environmental regulations.

The economic regulation cases can also be described in terms of the difficulty they typically pose to the state. The second column of Table 3.6 lists the rate at which the state wins each type of case in the economic regulation category. All of the sub-categories show the state winning at or above 60% of the time, with the notable exception of cases involving environmental regulation in which the state only prevails 53% of the time. It is hard to take much from these success rates since the number of cases in any one category is very small—for instance there are only 28 cases involving environmental regulation of some sort in my data. The one thing that is clear from Table 3.6 is that the state prevails in almost every area of regulation at extremely high levels, suggesting that the courts give special deference to the state when it acts with respect to its regulatory prerogatives.

Finally, I spent some time in chapter 2 describing the advantage that accrues to the state in cases where it is defending agency action and indicated that the economic regulation cases were largely synonymous with agency regulation. That this is the case is evinced by the fact 65% of all the agency actions in this data set occur in cases of
economic regulation\textsuperscript{15} with the bulk of the remainder occurring in government tort cases (22%). I should note that I do not expect the state to fare particularly well in economic regulation cases solely because it is defending the actions of a regulatory agency, because I expect that there is also a legal advantage in cases of economic regulation premised on the (likely) lower standards that courts hold governments to in these cases.\textsuperscript{16} Therefore the advantage of states in cases of economic regulation is a combination of the fact that they are frequently defending agency action and that there is a lower threshold for them to overcome in justifying the regulation at issue than there is in other areas of law.

Of the remaining case types listed in Table 3.4, government torts form the next largest grouping of cases. These are typically workers compensation cases. Privacy cases are self-explanatory: cases in which the state attempts to regulate some behavior that another claims is protected by privacy provisions in either the state or federal constitution—abortion cases are included in this category. Election cases involve state regulation of both state and federal elections, including redistricting cases and ballot access cases, among others. Private tort cases, when they involve the government, are typically cases in which a government employee has committed a tort and the state has (likely) waived its sovereign immunity to suit. The majority of the private tort cases in this data set typically involve some type of worker’s compensation issue. Finally, First Amendment issues are those involving the rights of free speech, including things like obscenity laws, aid to parochial schools, and, most frequently, the regulation of commercial speech.

\textsuperscript{15} Put slightly differently, of all of the economic regulation cases present in the data set just under half involve some sort of agency action and these cases comprise 65% of all the agency actions in the data.

\textsuperscript{16} I have analogized this advantage to the levels of scrutiny analysis prevalent in federal constitutional law.
It is useful to describe the cases in the dataset by reference to whether they implicate the constitutionality of a state statute because others have tended to focus on cases involving constitutional questions. Langer (2002) treats cases in several issue areas invoking state constitutions in some detail, finding that justices are particularly likely to react strategically to their decision making environment as the salience of the issue area increases when constitutional questions are involved. My sample is considerably different. Only 11.5% of the cases in my sample involve the constitutionality of a state statute; most of the cases ask the state supreme court to interpret the meaning of a statute (but do not call into question whether the state has the right to pass such a law in the first instance). In this way this sample is a bit more representative of the scope and type of question most frequently posed to state supreme court justices. Of course, cases invoking the constitutionality of a state statute are significantly more likely to be cases in which an amicus brief is filed, but the presence of an amicus brief is not coterminous with whether a constitutional question is being asked. Evidence for this can be gleaned from the fact that in the sample over 75% of the amicus cases do not involve any state constitutional issue. Therefore, when I analyze high salience cases, I am primarily analyzing cases in which an amicus brief was filed (although I include in the high salience grouping cases involving constitutional issues as well, since prior research has indicated that these are also likely to be cases that provoke interest from actors outside the parties to the case).

\[17\] Of course, a state supreme court is probably free to reach a constitutional issue even when one is not raised by the litigants, something that is confirmed in studies of voting fluidity on the U.S. Supreme Court (McGuire and Palmer 1995; Palmer 1999)
CHAPTER 4

JUDICIAL BEHAVIOR AND STATE SUCCESS IN STATE SUPREME COURTS

In this chapter I present the results of a number of models estimated to test the hypotheses I proposed in chapter 2 and using the data I described in chapter 3. Because there are many models and several different ways of analyzing the myriad results, I have attempted to simplify the presentation of the analyses by dividing my discussion into two separate parts. First, I will discuss the results of the model for the sample including all of the cases and then I will turn to the models for each of the three subsamples of cases.

Before discussing the model of all cases, it is necessary to detail my modeling strategy briefly. Given that I have a dichotomous dependent variable, I use a logit link function in the regression models presented in this chapter. I model the data at the level of each justice’s vote in a given case; this approach is in accord with the recommendations and practices of most scholars in the field (see, e.g., Gibson 1983; Giles and Zorn 2000; Zorn 2006). To account for the potential non-independence of the errors I cluster the errors by judge. As Zorn (2006) and others have recognized (e.g.,

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1 The other potential unit of analysis in this data is a case-level analysis. In other words, it is possible to model state success as a phenomenon of winning or losing a given case. While this approach makes some sense substantively in that it gets at the question of whether a state wins a case or not, it does not allow for judge level explanations of the reasons for that success—a concern that is central to this project. Furthermore, given that 78% of the cases in this data set are decided without dissent, the conclusions taken from models at either level are substantially similar.

2 This choice is based on the fact that most of the theoretical concerns in this dissertation center on judicial decision making. As others have noted (Gibson 1983), the judge is typically the central unit of analysis in studies of decision making. Throughout I use a one-tailed level of statistical significance given that I have clear directional expectations for the coefficients of most variables.

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67
Brace and Boyea 2008; Bartels 2006), the various interdependencies in judicial data that are pooled and cross-sectional can cause serious misspecification errors.

Figure 4.1: Theoretical Nesting of State Supreme Court Data: Arrow directions represent that that level of observation is nested in another level. Because judges do not nest within cases, nor do cases nest within judges, the best way to treat these levels is as though they are cross-classified.

With respect to the statistical analyses, there are difficulties caused by the hierarchical or nested nature of the data. Data is said to be nested when one level (level 1) nests within a higher level (level 2). Here there are at least two levels, and arguably there are four levels, present in the data. It is possible to consider the votes of justices nested
within cases and within justices simultaneously, although there is no theoretical reason to consider that justices are nested within cases or that cases are nested within justices (Zorn 2006). Finally, all three of the levels described—votes, cases, and justices—can be considered nested within states. That is, although we cannot say that every justice in a state will be present in every case, or alternatively that every case will be decided with a full complement of justices, it is possible to subsume both of these levels within states. Figure 4.1 depicts this nesting structure, with cross-classification describing levels that do not nest perfectly within one another.

There are several approaches to handling data with a nested structure, and the two most popular are multilevel modeling and clustering of standard errors (Primo et al. 2007). Multilevel models are appropriate when a researcher is particularly interested in determining which levels in the data contribute most to an explanation of the phenomena of interest (Raudenbush and Bryk 2002; Steenbergen and Jones 2002). However, multilevel modeling is computationally intensive (see, e.g., Skrondal and Rabe-Hesketh 2008) and requires specification of the variance structures for the error terms—misspecification of which can affect coefficient estimates.³ A second difficulty with multilevel modeling approaches is that measurement error is a considerable problem in multilevel modeling (Steenbergen and Jones 2002). Lastly, multilevel modeling is a maximum likelihood technique with unknown small sample properties. In my data there

³ A researcher must also specify the error structure when using a clustering approach—that is, they must specify the level at which clustering occurs. However, because clustered standard errors are a post-estimation adjustment, misspecification of the structure of the error terms does not affect the coefficient estimates (Primo et al. 2007).
are often relatively few level two units (and never more than 50) and this can cause difficulties in producing stable coefficient estimates, as it does in my data.\(^4\)

There are many ways, methodologically, to deal with these interdependencies or clustering, but unfortunately none of these approaches is foolproof. Luckily, according to Zorn (2006, 338), the choice of method is not as important as the choice about how to cluster the errors. Clustering is necessary because data within a cluster cannot reasonably be treated as independent—that is, in this instance, we would expect that votes by the same justice (or in the same case or in the same state) tend to cluster together. This lack of independence violates one of the core assumptions of regression analysis and will cause the estimation of biased standard errors. Clustering is a method of “fixing-up” these errors post-estimation to adjust for the presence of non-independence.

**Summary of the All Cases Model**

Table 4.1 presents the results for the logit model of individual justices’ votes in all cases included in the data set. The model fits the data marginally well with a percent reduction in error of 2 percentage points. The variables are presented by the level to which they belong; for example, Population is a variable that varies by state, not by case or judge, and so is listed as a state level characteristic.

\(^4\) The small numbers of level two units, here states, can also be a problem when clustering errors, since models with dichotomous variables must be estimated using a maximum likelihood approach. Luckily, Monte Carlo work, as highlighted by Primo et al. (2007) suggests that 50 level-2 clusters are sufficient for the asymptotic properties of maximum likelihood to be in effect (see Bertrand et al. 2006).
<table>
<thead>
<tr>
<th>Variable</th>
<th>Expectation</th>
<th>Coefficient</th>
<th>S.E.</th>
<th>Δ in Predicted Probability</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Solicitor</td>
<td>+</td>
<td>0.026</td>
<td>0.075</td>
<td></td>
</tr>
<tr>
<td>Divided Government</td>
<td>-</td>
<td>-0.023</td>
<td>0.067</td>
<td></td>
</tr>
<tr>
<td>Attorney's Per Capita</td>
<td>-</td>
<td>-0.025</td>
<td>0.053</td>
<td></td>
</tr>
<tr>
<td>Population</td>
<td>-</td>
<td>-0.066</td>
<td>0.014</td>
<td>-0.08</td>
</tr>
<tr>
<td>State Resources</td>
<td>+</td>
<td>0.199</td>
<td>0.056</td>
<td>0.05</td>
</tr>
<tr>
<td>Court Resources</td>
<td>-</td>
<td>0.096</td>
<td>0.064</td>
<td></td>
</tr>
<tr>
<td>Intermediate App. Ct.</td>
<td>-</td>
<td>-0.229</td>
<td>0.109</td>
<td>-0.05</td>
</tr>
<tr>
<td>Docket Size</td>
<td>+</td>
<td>0.042</td>
<td>0.011</td>
<td>0.04</td>
</tr>
<tr>
<td>Retention System Type</td>
<td>+</td>
<td>0.195</td>
<td>0.045</td>
<td>0.13</td>
</tr>
<tr>
<td><strong>Case Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Repeat Player</td>
<td>-</td>
<td>-0.188</td>
<td>0.052</td>
<td>-0.04</td>
</tr>
<tr>
<td>Solicitor Present</td>
<td>+</td>
<td>0.266</td>
<td>0.118</td>
<td>0.06</td>
</tr>
<tr>
<td>State Experience</td>
<td>+</td>
<td>0.012</td>
<td>0.027</td>
<td></td>
</tr>
<tr>
<td>Opponent Experience</td>
<td>-</td>
<td>-0.153</td>
<td>0.035</td>
<td>-0.03</td>
</tr>
<tr>
<td>Economic Regulation</td>
<td>+</td>
<td>0.187</td>
<td>0.056</td>
<td>0.04</td>
</tr>
<tr>
<td>Complex</td>
<td>+</td>
<td>0.205</td>
<td>0.075</td>
<td>0.05</td>
</tr>
<tr>
<td>Non-Unanimous</td>
<td>-</td>
<td>-0.267</td>
<td>0.079</td>
<td>-0.06</td>
</tr>
<tr>
<td>Salient</td>
<td>-</td>
<td>0.021</td>
<td>0.077</td>
<td></td>
</tr>
<tr>
<td>State Petitioner</td>
<td>+</td>
<td>0.065</td>
<td>0.080</td>
<td></td>
</tr>
<tr>
<td><strong>Judge Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ideologically Consistent</td>
<td>+</td>
<td>0.182</td>
<td>0.069</td>
<td>0.04</td>
</tr>
<tr>
<td>Elite Distance</td>
<td>+/-</td>
<td>-0.211</td>
<td>0.128</td>
<td>-0.03</td>
</tr>
<tr>
<td>Constant</td>
<td>NA</td>
<td>0.246</td>
<td>0.254</td>
<td></td>
</tr>
</tbody>
</table>

N: 4766  
Wald $\chi^2$: 157.49 (p<0.00)  
PRE: 0.02

**Table 4.1: Logit Model, All Cases, 1995-1998**: bolded coefficients are significant at p<0.05 (one-tailed). Predicted probabilities are calculated by increasing continuous variables one standard deviation from their means and by switching dichotomous
variables from 0 to 1. The ordinal Retention System variable is shifted from its minimum (life tenure) to its maximum (reappointment).

Thirteen variables reach statistical significance consistent with theoretical expectations for the direction of the coefficient. I have organized the discussion of these results by theories to which the variables speak. Beginning with the attitudinal model, if the state takes a position that is ideologically consistent with a justice, then the probability that that justice will vote in favor of the state increases by four percentage points, a finding that is consistent with the attitudinal model. The effect is surprisingly moderate and indicates that the explanation for state success may not be as simple as suggesting that the state and the court are often close ideologically, given turnover on the court and replacement of justices by governing elites. Speaking of elites, a one standard deviation increase in the distance of elites from a judge decreases the probability of a vote in favor of the state by three percentage points. The negatively signed coefficient indicates that the justices on state supreme courts have an attitudinal reaction to the policy preferences of elites (as opposed to a strategic reaction). Given that the elite distance variable is negative in every model that I will present in this chapter, it seems safe to assume that in most cases the justices do not react to elite policy preferences strategically. If anything, the results of the all cases model tend to demonstrate that state success is highly conditional, and exploring the conditions under which the state is more or less likely to succeed requires looking at three theoretically interesting sub-samples: high salience cases, cases in which the decision making is non-unanimous and cases that are legally complex.
From the perspective of strategic theories of decision making, the type of retention system in use in a state has a rather dramatic effect on the likelihood that the state is going to persuade a justice of the correctness of its position. Moving from a system wherein justices are appointed for life to one in which they are reappointed by either the governor or the legislature increases the probability of a vote for the state by thirteen percentage points. One way of thinking about the magnitude of this effect is to contemplate how much better the federal government would likely fare in the U.S. Supreme Court if the justices were not among the most independent judges in the world. The significance and magnitude of this variable (and its consistent effect in models for the sub-samples) suggests a strategic concern on the part of the justices that is premised on a desire to stay on the court as distinct from one based on a concern over policy reversal. I will return to what the consistent effect of retention system type means in light of concerns over the independence of judges in the discussion section.

Several of the informational variables also reach statistical significance. In what will become a common refrain in this chapter, increasing the size of a state supreme court’s docket by 40 cases (or one standard deviation) increases the probability of a vote for the state by four percentage points. This is consistent with an informational theory of judging in which state supreme court judges are in search of information about the consequences of their policy choices because it shows that as the pressure to decide any one case increases, the justices become more likely to defer to the state—likely the more believable advocate when it comes to espousing the policy consequences of altering state law.
The attorney experience variables bridge the informational and party capability approaches. Increasing the experience of the attorney representing the party opposing the state by one standard deviation decreases the probability of a vote for the state by three percentage points. Similarly, the state solicitor variables can be seen as bridges between informational and party capability approaches. Consistent with my predictions, both the solicitor variable (which captures whether a solicitor’s office is present within a state) and the solicitor present variable (which captures whether a solicitor is present on behalf of the state in a case) are positive, though only the solicitor present variable achieves statistical significance. When a solicitor is present the state is six percentage points more likely to garner the vote of a justice. Though the story of the solicitors is fleshed out considerably below and in chapter 5, it suffices to say at this juncture that the effect of solicitors is conditional—they are clearly not the “Tenth Justice” that the Solicitor General appears to be in the U.S. Supreme Court. Exploring why that is the case is a central focus of chapter 5. Nevertheless, as will become clear below, in the conditional models of state success state solicitors are a consistently positive and statistically significant presence for the state.

Recall that party capability theories simply assert that, all else equal, more capable parties should win in court more frequently than less capable parties. The results from the all cases model seem to bear this out. I find that increasing the resources devoted by the state to litigation increases the likelihood of success by five percentage points. As other have found (Farole 1999; Wheeler at el. 1987) and as predicted by the party capability approach, when the state faces an opponent that can be considered a have it fares four percentage points worse than it does when it faces an individual.
Consistent with Brace and Hall (2001) I find that several of the characteristics of a state’s litigation environment affect the rate at which the state is able to win in court. A one-standard deviation increase in the population of a state (here about 5.5 million people) decreases the probability that a justice will vote in favor of the state by eight percentage points. However, contrary to my expectations, when the state is a petitioner there is no increase in the likelihood that it will prevail. When the state supreme court is shielded from the trial courts by an intermediate appellate court, the justices are five percentage points less likely to vote in favor of the state.

Also of note, the economic regulation variable reaches statistical significance. When the state is defending an economic regulation it is, as predicted, about four percentage points more likely to win. Attributing the influence of this variable is difficult given that, theoretically, deference to the state on these issues can be seen as a piece of a party capability theory of success or can be attributed to a legal theory of success. Disentangling the explanation for this effect is difficult because the state is a privileged party that is also the lawmaker.

Two case characteristics that I hypothesized would be proxies for an altered decision making environment have the expected effect on judicial decision making in the state supreme courts. First, in complex cases, in a pattern that will become dramatically apparent later in this chapter, the state tends to do considerably better than its opponents—on the order of five percentage points better. Second, where the decision is not unanimous, the state’s probability of securing a justice’s vote decreases by six percentage points. This indicates that when the state loses a case it is likely that at least
one of the justices on a state supreme court will dissent.\textsuperscript{5} This finding is one reason, among many that I will discuss, to believe that justices view victory for the state as a sort of default position.

**Summary of Results for the Subsamples**

In an effort to avoid needless repetition and to better crystallize how the effects of the variables are conditional, Table 4.2 presents the results of models for the high salience, non-unanimous and complex sub-samples as well as a model which I call the “typical” cases. These typical cases are composed of those cases that are unanimous, involve no complexity and are not salient. I am not particularly interested in the effects of variables in this typical case sub-sample, except as they provide a baseline for comparison of the effects in the other models. Table 4.2 shows only how each variable affects the predicted probability of a vote in favor of the state along with model fit statistics for each model. Model coefficients and standard errors are presented in the appendix to this chapter.

\textsuperscript{5} This is confirmed by a chi-square test which indicates that dissent is significantly more likely when the state loses a case (chi-square = 52.17, p= 0.000).
<table>
<thead>
<tr>
<th>Variable</th>
<th>Expectation</th>
<th>Δ in Predicted Probability</th>
<th>Δ in Predicted Probability</th>
<th>Δ in Predicted Probability</th>
<th>Δ in Predicted Probability</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State Level</strong></td>
<td></td>
<td>Typical Sample</td>
<td>Salient Sub-Sample</td>
<td>Non-Unanimous Sub-Sample</td>
<td>Complex Sub-Sample</td>
</tr>
<tr>
<td>Solicitor</td>
<td>+</td>
<td>0.12</td>
<td>-0.07</td>
<td>0.02</td>
<td>-0.19</td>
</tr>
<tr>
<td>Divided Government</td>
<td>-</td>
<td>-0.05</td>
<td>-0.06</td>
<td>0.00</td>
<td>-0.01</td>
</tr>
<tr>
<td>Attorney's Per Capita</td>
<td>-</td>
<td>0.02</td>
<td>-0.05</td>
<td>-0.02</td>
<td>0.00</td>
</tr>
<tr>
<td>Population</td>
<td>-</td>
<td>-0.13</td>
<td>-0.05</td>
<td>-0.03</td>
<td>0.04</td>
</tr>
<tr>
<td>State Resources</td>
<td>+</td>
<td>-0.10</td>
<td>0.03</td>
<td>-0.01</td>
<td>0.08</td>
</tr>
<tr>
<td>Court Resources</td>
<td>-</td>
<td>-0.05</td>
<td>0.00</td>
<td>0.00</td>
<td>-0.01</td>
</tr>
<tr>
<td>Intermediate App. Ct.</td>
<td>-</td>
<td>-0.04</td>
<td>-0.31</td>
<td>-0.07</td>
<td>-0.12</td>
</tr>
<tr>
<td>Docket Size</td>
<td>+</td>
<td>0.08</td>
<td>0.05</td>
<td>0.02</td>
<td>0.01</td>
</tr>
<tr>
<td>Retention System Type</td>
<td>+</td>
<td>0.21</td>
<td>-0.02</td>
<td>0.13</td>
<td>0.26</td>
</tr>
<tr>
<td><strong>Case Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Repeat Player</td>
<td>-</td>
<td>-0.08</td>
<td>-0.02</td>
<td>0.01</td>
<td>0.00</td>
</tr>
<tr>
<td>Solicitor Present</td>
<td>+</td>
<td>-0.17</td>
<td>0.12</td>
<td>0.10</td>
<td>0.23</td>
</tr>
<tr>
<td>State Experience</td>
<td>+</td>
<td>0.05</td>
<td>-0.03</td>
<td>-0.01</td>
<td>-0.01</td>
</tr>
<tr>
<td>Opponent Experience</td>
<td>-</td>
<td>-0.08</td>
<td>-0.01</td>
<td>-0.01</td>
<td>0.01</td>
</tr>
<tr>
<td>Economic Regulation</td>
<td>+</td>
<td>-0.03</td>
<td>-0.03</td>
<td>0.05</td>
<td>0.06</td>
</tr>
<tr>
<td>Complex</td>
<td>+</td>
<td>---</td>
<td>0.04</td>
<td>0.00</td>
<td>---</td>
</tr>
<tr>
<td>Nonunanimous</td>
<td>-</td>
<td>---</td>
<td>-0.06</td>
<td>---</td>
<td>-0.17</td>
</tr>
<tr>
<td>Salient</td>
<td>-</td>
<td>---</td>
<td>---</td>
<td>-0.10</td>
<td>0.00</td>
</tr>
<tr>
<td>State Petitioner</td>
<td>+</td>
<td>0.00</td>
<td>0.03</td>
<td>0.08</td>
<td>0.00</td>
</tr>
<tr>
<td><strong>Judge Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ideologically Consistent</td>
<td>+</td>
<td>0.03</td>
<td>-0.01</td>
<td>0.06</td>
<td>0.03</td>
</tr>
<tr>
<td>Elite Distance</td>
<td>+/-</td>
<td>-0.01</td>
<td>-0.03</td>
<td>-0.05</td>
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</tr>
<tr>
<td>Constant</td>
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<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>N</td>
<td></td>
<td>1485</td>
<td>1320</td>
<td>1775</td>
<td>1493</td>
</tr>
<tr>
<td>Wald χ2</td>
<td></td>
<td>(p&lt;0.00)</td>
<td>(p&lt;0.00)</td>
<td>(p&lt;0.00)</td>
<td>(p&lt;0.00)</td>
</tr>
<tr>
<td>PRE</td>
<td></td>
<td>0.12</td>
<td>0.07</td>
<td>0.03</td>
<td>0.09</td>
</tr>
</tbody>
</table>

Table 4.2: Change in Predicted Probability across Subsamples (Continued)
Table 4.2: Continued: bolded coefficients are significant at p<0.05 (one-tailed).

Predicted probabilities are calculated by shifting continuous variables up one standard deviation from their mean and by shifting from not present (0) to present (1) for dichotomous variables. The ordinal Retention System variable is shifted from its minimum (life tenure) to its maximum (reappointment).

I organize the following discussion by theory and variable, carrying across each of the sub-samples. I organize the discussion this way since it is my contention that we can learn about the theories to which these variables speak by focusing on their conditional effects.

**Attitudinal Theory**

There are two variables that capture the predicted effects of the attitudinal model: Ideological Consistency and Elite Distance. The effect of ideological consistency between the position taken by the state in a case and the partisanship of a judge is fairly attenuated. Only in those cases in which the decision is non-unanimous does ideological consistency make a statistically significant difference, increasing the probability of a vote in favor of the state by six percentage points. More curiously, in the salient cases—a set of cases in which others studying the Supreme Court have found prominent effects for policy preferences (McAtee and McGuire 2008)—the effect of ideological consistency is not only insignificant but is incorrectly signed. Though technically indistinguishable from zero, the sign of this coefficient raises some question about whether the cases in which amicus briefs are filed or those that involve constitutional issues are the most salient in state supreme courts. It is plausible that all cases that involve the state as a party in the
state supreme courts are an order of magnitude more salient than cases involving private parties and therefore that the distinction, in this sample, between salient and non-salient is a meaningless one. In any case, this presents a puzzle that I am not well-positioned to explain.  

Recall from my discussion of the Elite Distance variable above that this variable serves to help explain two theories, attitudinal theories and strategic theories of decision making. If the coefficient for this variable is positive, then the indication is that justices react to increasing distances between themselves and the state’s elites strategically by subverting their policy preferences to the preferences of the elites. Conversely, a negative coefficient indicates a straightforward attitudinal reaction to increasing distance—as the state’s elites, and the state’s attorney who represents those elites, moves further from a justice that justice is decreasingly likely to vote for the state in a case. In each of the sub-samples, the Elite Distance coefficient is negative, and it reaches statistical significance in the salient and non-unanimous cases, decreasing the probability of a vote in favor of the state by three percentage points and five percentage points respectively. This suggests that attitudinal reactions are stronger than are policy-based strategic reactions.

In any case, it appears that there is a policy preference based reaction to the state as a litigant, but this effect does not appear to be strong—certainly not as strong as are similar reactions in the U.S. Supreme Court. Of course, it may be that with better measures of the policy preferences of the state supreme court justices the attitudinal model can be extended more confidently to explanations of behavior on the state supreme

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6 Part of the difficulty in explaining the decision making process in the high salience cases is a product of this being the smallest sample—in other words the standard errors in the model of high salience cases are likely to be inflated, but adding more cases would probably not change the sign of the Ideologically Consistent variable.
courts. Finally, it should be remembered that I have isolated a singly unique set of cases in which the strategic stakes for the justices are likely to be particularly acute.

**Strategic Theory**

In order to understand how the justices react strategically it is useful to analyze the effect of the Retention System variable. Recall that this variable is coded so that judges with life tenure receive a zero, those in the system using retention election a one, justices in a state using partisan or non-partisan elections a two, and those who are reappointed by governors or legislatures receiving a three. The effect of retention system is dramatic and statistically significant in all but the high salience sub-sample—pointing again to the uniqueness of the salient cases. In any case, Figure 4.2 presents the predicted probability that a justice will vote in favor the state.

![Figure 4.2: Effect of Retention System Type on Probability of Vote in Favor of the State](image)

Figure 4.2: Effect of Retention System Type on Probability of Vote in Favor of the State
The effect of changing retention systems is consistent and predictable, except in the high salience cases. This suggests that justices are concerned with continued tenure on the bench, even if they are not overly concerned about the policy-based reactions of a state’s political elites in these cases; a finding echoed in other state court research that finds that attention to the party responsible for continued tenure can be a powerful predictor of state court judge behavior (Schubert 1959, 129-42; Adamany 1969; Savchak and Barghothi 2007). Once again, among all of the sub-samples, the complex cases stand out as uniquely affected by the type of retention system in use in a state.

Further support for a strategic account of judicial decision making can be seen in the importance of the divided government variable in the high salience cases. Recall that this variable captures situations in which the state government is in a weakened position vis-à-vis the state supreme court. Therefore, the negative coefficient indicates that state supreme court justices are about six percentage points less likely to vote with the state when there is a reduced likelihood of successful retaliation.

*Informational Theory*

To this point I have neglected informational explanations of state success. There is strong support in the data for the notion that state supreme court justices are particularly greedy for information on the likely policy consequences of their decisions and that the ability to provide reliable information is an important component of success. Of note, as the size of a state supreme court’s docket increases the state becomes more likely to win the vote of a justice. This effect is consistently positive and is statistically

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7 Of course, when the question is whether or not the state should prevail in a case, a justice is not in the position to have to search far to discern what it is that the state would prefer as an outcome.
significant in the high salience subsample. Figure 4.3 demonstrates the effect of increasing docket size in increments of twenty cases on the predicted probability that the state will secure the vote of a justice.

Figure 4.3: Docket Size and the Predicted Probability of a Vote in Favor of the State

The figure clearly demonstrates the exceptionalism of the complex cases, where it appears that the state is successful enough that the marginal effect of any additional case is too small to matter. Generally speaking, as the workload of a state supreme court increases and the justices have less time to spend on any particular case they become increasingly likely to simply defer to the state in that case. Justices on courts with workloads on the high end of the sample, 200 cases, are about 15 percentage points more likely to side with the state than are justices in courts which only hear 80 cases a year. This is preliminary evidence that the workloads of the justices, and therefore their informational needs, are important pieces of any explanation of state success in the state.
supreme courts. This also establishes a concept to which I will return in the discussion section below: deference to the state can be thought of in terms of a default state, such that when a justice is in doubt the safest course of action is to take the state’s position in a case.

The importance of attorney experience, particularly the state’s opponent’s attorney experience, also seems to buttress the importance of informational explanations. Again with the exception of the complex cases, the Opponent Attorney Experience variable is correctly signed and either achieves or approaches statistical significance. Figure 4.4 demonstrates the common pattern and the exceptional nature of the complex cases.

Figure 4.4: Effect of Opponent Attorney Experience on Predicted Probability of Vote for the State
The complex cases appear to stand out because the state wins the bulk of these cases, regardless of what the state’s opponent brings to the table. The effects here are less dramatic than they might otherwise seem because it is difficult for the state’s opponent to find counsel with this level of experience—only about 7% of the sample is represented by attorneys with at least 9 previous appearances. More interestingly, in the most salient cases the effect of opposing the state with even minimally experienced counsel is dramatic given that just one previous appearance by the opponent’s attorney is enough to reduce the state’s chances of securing a justice’s vote by five percentage points in the all cases sample.

As opposed to the relative importance of opponent attorney experience in the most important cases, it appears that the experience of the state’s attorney has little effect on the decision making behavior of state supreme court justices in cases in which the state is a party. In fact, only in the relatively uninteresting typical case subsample does the State Attorney Experience variable reach statistical significance. In contrast with the opponent experience variable, the state experience variable is consistently incorrectly signed supporting the conclusion that the experience of the state’s attorneys has little bearing on how the justices vote.

The unimportance of state attorney experience dovetails nicely with the notion that justices tend to see deference to the state as a default position: if you are planning to side with the state unless given a good reason to do otherwise, then the reliability of the information presented by the state’s attorney will be less important than the reliability of the information given by the party opposing the state. Indeed, if the sample of cases is divided by the size of the docket within a state, then the reliance on the attorneys (both the opponents and the states) increases dramatically. See Table B.4 in the Appendix.
importance of docket size and the experience of the counsel opposing the counsel indicates that state court judges are reliant on the parties for information. That they are generally reliant on the parties can be taken from the insignificance and unexpected sign of the Court Resources variable. But even when they do not trust the parties to provide reliable information, it does not appear that the justices regularly rely on their own ability to gather information.

With respect to the two solicitor variables patterns are clearly present. Recall that the Solicitor variable captures whether or not a state has established a solicitor’s office, whereas the Solicitor Present variable measures whether or not a solicitor actually appears in the case at issue as an advocate on behalf of the state. The Solicitor variable has the expected effect only in the typical cases, where having a solicitor’s office appears to increase the probability of a vote for the state by twelve percentage points. Otherwise the effects of this variable are indistinguishable from no effect. Curiously, where the presence of the solicitor’s office matters the most, in typical cases, the presence of a solicitor has a decidedly deleterious effect on state success. This likely indicates that the solicitor’s offices play a role in improving the litigation ability and strategies of other attorneys who represent the state, a focus of that office indicated by interviews with several state solicitors. However, when the case is not special in some way and the solicitor intervenes, it likely indicates a situation in which the state is already in serious peril, perhaps because of arguments made by less experienced attorneys in the lower courts—and the solicitors are infrequent participants in these cases.

Even more interestingly, the presence of a state solicitor has a dramatic and statistically significant effect in each of the subsamples, indicating that however the
solicitor helps the state, that help is not limited to one type of case. Figure 4.5 presents the effect of the presence of a solicitor in a case across each of the subsamples.

Figure 4.5: Predicted Probabilities of Vote for the State by Subsample and Presence of a Solicitor

Solicitors have the most dramatic impact in the complex cases, increasing the probability that a justice will vote in favor of the state by 23 percentage points. This suggests that solicitors have their greatest effect in cases where there are multiple legal issues potentially controlling a case; it suggests that solicitors primarily help the state by making persuasive legal arguments in cases where the state supreme court justices are in need of clarification on the state of the law. As I have indicated, the solicitors are discussed extensively in chapter 5, but it is clear that any influence that they have is largely a by-product of their ability to make persuasive legal arguments given their prominence in those cases in which the law is likely unclear. Solicitors have the next most dramatic
effect in the high salience cases, where they boost the state’s chances of securing a justice’s vote by fifteen percentage points. Again, as will become clearer in chapter 5, this is to be expected given that solicitors are most likely to focus on these most important of cases.

*Party Capability Theory*

There is some support for the party capability approach to explaining state success, evidenced first in the importance of the opponent’s attorney’s experience if we consider capabilities broadly defined. However, it is not the case that more resourced parties—i.e. the haves—are more capable of hiring more experienced attorneys. In fact, on average, individuals hire attorneys with more previous appearance than do those we might consider the typical have. For this perspective, money must be considered a blunt instrument when opposing the state. However, there is a clear connection between the experience of a state’s attorneys and the resources the state devotes to litigation. States that devote more than the median level of resources to litigation are represented by attorneys with an average of 17 more appearances than their counterparts in the less well-heeled states. Of course, this too does not prove that resources help parties prevail, given the ineffectiveness of the state’s attorney’s experience in the decision making matrix of state court judges.

More straightforward support for the party capability approach can be found in the importance of the State Resources variable’s direct effect on persuading justices and in the effect of the Have variable. State resources matter mainly in the complex cases, but not in the other sub-samples—yet more evidence of the unique nature of the complex cases. Have status is statistically significant only in the sample that includes all of the
cases. That being a have seems to matter in only the least important, or typical, cases suggest that “have” status is not much of a benefit when facing a government.

The Economic Regulation variable fails to provide much support for the notion that the justices defer more frequently when the state is defending its regulatory prerogative in the subsamples. This is a surprising finding given the fact that the state solicitors interviewed for this project singled out regulatory cases as those in which cooperation between the state executive and judiciary was particularly crucial and central to understanding the reaction of the state supreme courts when the state was a party. The coefficient is in the predicted direction but never achieves statistical significance, with the exception of the complex cases where it helps the state by six percentage points.

State Litigation Environment

There is a set of variables that others who have investigated the party capability hypothesis found important in the state court context. These are the variables that describe the context in which state litigation occurs: the population of a state and the number of attorneys within a state (Brace and Hall 2001). Their findings and explanations for those findings imply that states with larger populations should have courts that are more likely to side with have-nots or parties that are not haves. Given that government is the ultimate have, we should expect that more populous states have a more difficult time succeeding. There is some support for this supposition in the data: the Population variable reaches statistical significance in the all cases sample and is in the predicted direction in that sample as well as in the high salience and non-unanimous sample. The constant refrain of complex case exceptionalism applies here as well: Population not only is an insignificant predictor of state success in these cases but it is incorrectly signed. There is
also some support for the notion that the more attorneys that are within a state (measured on a per capita basis) the more likely a non-have will be to succeed. Though it fails to achieve statistical significance in any models, the Attorneys Per Capita variable is in the predicted direction in the salient and non-unanimous cases (again the complex cases appear to be unique). There is, therefore, some limited support for the notion that the litigation environment within a state is consequential for state success, although the effect of these two factors appears to be significantly mitigated in comparison to results for models of have success when neither of the parties is a government.

When the state is a petitioner it is expected that winning should be easier given the propensity of appellate courts to take those they wish to reverse. For the most part petitioner status is not consequential in this data, likely because whether the state is the petitioner or the respondent makes very little difference in the likelihood of success. Overall, the state wins 62% of the time whether it is the petitioner or not—that is, its success rate is identical when it is the petitioner and when it is the respondent. However, petitioner status does matter in the non-unanimous subsample, where the state’s chances improve by eight percentage points.

The presence of an intermediate appellate court, whatever it means in terms of the discretionary nature of a court’s docket, should make the state less likely to persuade a justice to vote in its favor. This is because state supreme courts that enjoy an intermediate appellate court should have more time to consider any individual case and should have a more fully-developed record to consider. Indeed, the data bear out that those state supreme courts without intermediate appellate courts hear about forty more cases per year than do state supreme courts that have an intermediate appellate court. Therefore the
presence of an intermediate court appears to play a role in reducing the need of the justice for information, but it does so in a way that is independent of simply reducing the caseload of the court. The Intermediate Appellate Court variable is in the predicted direction and reaches statistical significance in the high salience and complex cases. Therefore, the presence of an intermediate appellate court does make it less likely that the state will succeed in a way that does not appear to be highly conditional on the type of case being heard. The fact that the effect of an intermediate appellate court is greatest in the high salience cases, reducing the state’s chances of a favorable vote by 31 percentage points, coupled with the importance of the docket size variable is evidence of the importance of the workload (and by proxy the informational needs) of the justices in these most important cases.

**Discussion**

Though the effect of the various factors that might matter in state success are clearly conditional and complex, we can learn a good deal about which theories are most likely contributing to an explanation of state success in the state supreme courts and which theories may not matter in the unique and important situation where the state government is a litigant. In this section I tie together the various theoretical strands woven above as well as discuss the normative implications of the analyses to this point, particularly as they pertain to questions of state success and the independence of courts.

*Understanding the Theoretical Contributions*

I posited at the outset that there were five theories that could potentially help explain why it is that governments win so frequently in court: attitudinal, strategic and legal theories of judicial decision making, as well as theories on the capability of litigants
and an informational theory that ties the persuasiveness of litigants to the decision making of justices. As one might expect, each of the theories contributes something to understanding state success. The most intriguing is the informational approach. It is clear that the size of a state court’s docket and the experience of the attorney opposing the state are relatively consistent factors in determining votes for the state. As I have intimated, this frames judicial decision making when the state is a party in terms of a default level of deference to the state, from which state supreme court justices are unlikely to depart unless persuaded by the state’s opponent to do so (at least when all the cases are considered together). Furthermore, the need for information on the likely policy consequences of a decision is exacerbated by increasing the number of cases that a court must hear. Table B.4 in the appendix to this chapter presents a pair of models that divides the sample at the median caseload for courts in my sample. The results of those two models show that opponent experience and state attorney experience do not matter when the court hears less than 140 cases per year (the mean number of cases in the dataset), but both state experience and opponent experience are significant predictors when the case load exceeds 140 cases per year. In the high-workload model the opponent’s experience is considerably more consequential than the state’s experience as can be seen in Figure B.1 in the appendix. Therefore, from the state’s perspective there exists a paradox: increasing the justices’ workload is likely to increase the probability that you gain any one justice’s vote, but it will conversely increase the opportunity for your opponents to defeat you when they can hire experienced counsel. Further support for the informational model comes from the uniform contribution to success made by the presence of a state solicitor in a case.
The informational influences are not as robust as they could be, a conclusion taken from the fact that the variables representing this theory have an erratic and theoretically unpredicted effect across each of the sub-samples. Scholars of the effect of litigation experience in the U.S. Supreme Court have shown that in high salience cases the effect of attorney experience should be greatly diminished vis-à-vis more ordinary cases (McAtee and McGuire 2007). That pattern does hold here, as the experience variables generally fail to reach statistical significance in the high salience cases. On the other hand, state solicitors are critically important in these high salience cases, and this does suggest that reliance on highly experienced litigators is a factor in these cases. Whether this can be said to alter the conclusion that information will be least important in the most salient cases will require a further exploration of exactly how it is that solicitors contribute to the state’s success.

In general, those who study judicial decision making have given a place of prominence to attitudinal explanations of choice. Nevertheless, as scholars have branched out from studying the Supreme Court they have noted that the role for ideology, partisanship, and/or policy preferences is highly conditional on certain contextual situations. Like these scholars, I have found that the role for policy preferences in these cases is highly conditional. When we consider only the model of all of the cases, it is clear that the state is more likely to succeed when it takes a position in a case that is ideologically consistent with a justice. Surprisingly, however, this pattern holds only in the non-unanimous sub-sample. This bit of information tells us two important facts. First, the non-unanimous sub-sample is more likely capturing ideological disagreement among the justices than it is any notion of legal difficulty. Second, ideology is most prominent in
cases in which there is disagreement—a finding that jibes with studies of the modern Supreme Court (where most cases are non-unanimous) and studies of the so-called “hard” cases in the Federal Courts of Appeals. Given that the vast majority of state supreme court cases are decided unanimously, about 67% in this sample, there are simply fewer occasions for us to observe the operation of preferences. Hence, it appears that policy preferences play some role in state success, and probably play a role greater than what can be detected through regression techniques. Nevertheless, the role for ideology is clearly less prominent in the state supreme courts when the state is a party than it is where the case is heard in a state supreme court but two private parties are involved (Brace and Hall 2001).

Strategic accounts of judicial decision making have long been prominent in the state courts literature (Savchak and Barghothi 2007; Langer 2002; Brace and Hall 1993; Adamany 1969). I find that there is strong support for one version of strategic theories of decision making and no support for another version of that theory. In the states there are at least two motivations for strategic action on the part of a state supreme court justice. One involves the concern with implementation of policy familiar to scholars of the Supreme Court (e.g., Epstein and Knight 1998) and this concern is clearly potentially present for state supreme court justices. A second concern, unique to state judges in the United States, is the desire to stay on the bench. Therefore, when we observe strategic behavior in the state supreme courts it is important to be as clear as possible about the likely motivation that underlies that behavior. I found some evidence that the justices are

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9 Sickels (1965), in a fascinating study of the Maryland Supreme Court, notes that the high level of unanimity on the court masks a good deal of underlying ideological disagreement. Sickles suggests that the position taken by the court is often dictated by who is assigned to author the court’s opinion.
motivated to behave strategically because of their concerns over policy outcomes. Both the Elite Distance variable nor the Divided Government variable play a prominent role in the high salience cases indicating the likelihood of a strategic reaction in those cases in which third-parties are most interested.

It is clear that the justices are motivated by concerns over their ability to stay on the court, as the Retention System variable is among the most consistent and influential of all of the variables included in the models, with the exception of the high salience cases. This finding dovetails nicely with those of Savchak and Barghothi (2007) and demonstrates that a primary motivation behind judicial decision making is concern with the opinion of the constituency most likely to affect continued tenure. The work of Hanssen (2004) shows that the type of judicial selection (and by implication retention) system in use in a state can be predicted on the basis of political competition within the state. According to Hanssen, independent courts are best thought of as devices that render policy more durable over time, and so we see more independent court structure in states where the political competition is most fierce (i.e. where without an independent court policy is unlikely to be durable). The findings here buttress this claim because they tend to show that justices can be made more or less responsive to state government by altering the methods by which they stay on the court, although interestingly this may not hold for the most important cases, where, as noted above, the reactions of the justices appear to be primarily oriented toward policy concerns. Interestingly, the ability of the state to influence justices by using tenure related threats is minimized in the most important high salience cases.
As I noted in chapter 2, the sample of cases included in the data set is incredibly diverse, ranging from tax law to environmental law to the rules of ballot access. As such, it is not surprising that discerning the impact of law is difficult. To the extent that the informational theory is apt, it might be argued that judges desire information not only on the likely policy consequences of their decisions but also so that they can make correct legal decisions. Indeed, as I will argue in the next chapter, the great importance of the solicitors in complex cases (and relative importance in high salience and non-unanimous cases) at least hints that justices may seek information on legal policy and not just policy.

Of all of the theories covered in this project, party capability approaches have the closest association with explanations for government success (see Kritzer 2003). I have argued that part of the difficulty with party capability approaches is that they have loosely defined the concept of capability that is central to the theory. In an effort to improve that conceptualization I have included measures not only of resources, but also of attorney experience. As I have already discussed, opponent attorney experience is a component of the explanation of state success in this data. This would seem to support a party capability approach, but I have also discussed the fact that there is no link between being a have and being represented by experienced counsel. Have status does predict a lower likelihood of a vote for the state as do the resources devoted by a state to litigation efforts. Therefore, there is good reason to believe that both money and attorney experience are important pieces of the explanation of who wins and who does not. It seems that resources are best thought of as a blunt instrument since their effect is difficult to pinpoint: they do not allow the state’s opponents to hire more experienced counsel; and where more resources lead to more experienced attorneys, in the states, the experience of state attorneys does
not seem to matter. Instead, the effect of greater resources appears to be diffuse, mattering in the background in a way that I am not precisely able to pinpoint. It may be that in the case of the state, greater resources in the litigation apparatus lead to more careful argument in the lower courts. It may be that for opponents, greater resources aid in ways that have little to do with hiring experienced counsel (such as the ability to hire an endless number of experts in support of a position). The most likely explanation for the success of resourced parties, however, is their ability to swallow the cases that would set bad precedents. I cannot get at these kinds of explanations without longitudinal data.

*The Independence of Courts and Government Success*

I began chapter 2 with the assertion that understanding the sources of government success in court could help us understand whether governments received special treatment and whether this special treatment calls into question the independence of courts. Having analyzed the results, it is possible to draw some firm conclusions on these issues.

In one sense, it is reassuring to note that state supreme court justices seem to favor opponents of the state that are capable of hiring highly experienced attorneys, at least overall. This is comforting because it suggests that state supreme court justices react in a predictable way—as the opponent of the state makes a better argument, the opponent is more likely to secure the vote of a justice. But it is notable that the advantage that accrues to litigants with more experienced counsel is not a significant factor in predicting who will win in the most salient of cases. At the very least, this means that in those cases that are most likely to set policy those opposing state governments do not have access to the means of mounting a serious challenge to the state just by hiring more experienced
counsel. Furthermore, even if those opposing the state could effectively combat its advantages by hiring more experienced counsel, that advantage would be tempered by the fact that in this data set almost half of all attorneys for those opposing the state have no previous appearances before the state supreme court.

The potential importance of the experience of counsel highlights the need for more research on the ways in which interest groups are particularly capable of influencing the course of law in favor of those who are either disadvantaged or, at the very least, opposed to the government in any given case. This finding dovetails with the intriguing findings of Songer et al. (2000) that amicus support for disadvantaged litigants can help to neutralize the advantage enjoyed by opponents with resources. But the notion that the experience of the counsel matters is particularly intriguing because it suggests that the parties themselves have some control over the likely outcomes when they face government.

There is substantially more evidence that state governments receive a good deal of special treatment, as litigants, in state supreme courts. First, there is the notion that I have developed throughout this chapter that state supreme court justices appear to view a vote for the state as something like the default position in many cases. This is not necessarily inappropriate, given that in most cases the state should be better positioned to say what the law means and how it should be interpreted. Nevertheless, this is good evidence that, all else equal, state supreme court justices are less independent in their decision making when the state is a party. The specialness of the state’s relationship with its supreme court is highlighted by the universal importance of state solicitors, an institution that only governments are in the position to create in the first place.
Contravening evidence that the state has a special relationship with its state supreme court arises in the disparate treatment of the state when it litigates as a petitioner versus the treatment of the state’s opponents in the same situation. Contrary to my expectations, the state does not benefit from being a petitioner. It may be the case that deference to the state is present not only in the state supreme court but in the lower courts as well. Given that the state typically appeals only those cases that it loses, it is reasonable, from the justices’ perspective, to view a state petitioner as a party with a weaker than usual case.

Perhaps more disconcerting for those who believe that independence is primarily valuable when facing government, states are capable of manipulating the institutional environment to create more or less independent courts. Though this insight is not new (e.g., Hanssen 2004), what is surprising are the number of ways in which a state could, if it chose to do so, make its supreme court less independent.

One clear way to decrease the independence of the court is to make the justices reliant on either the governor or the legislature for reappointment. In the data set those states that reappoint their justices win 13% more frequently than do states that appoint justices for life. This is clearly the result anticipated by Hanssen (2004), and further confirmation of it here reinforces the notion that state supreme court justices, most of the time, are highly strategic decision makers when the state is a party to the litigation. Interestingly, this pattern does not hold true in the most salient of cases, where the justices appear to react strategically (given the importance of the elite distance variable), but on the basis of policy concerns and not out a desire to retain a position on the bench.
What is more important, in terms of the contributions of this work, is that the method of retention used in a state is not the only source of influence that a state might use to make judges less likely to rule against the state. Among the most important means of decreasing the independence of judicial decision making in this instance is to simply increase the workload of the court—a tactic that is most likely to work for the most important cases. This is a particularly subtle way of increasing the likelihood that a justice will vote in a state’s favor, particularly when contrasted with the rather obvious influence that controlling retention gives. Note, this does not mean that the increase in cases must be cases involving the state, only that increasing the workload of the court will increase its reliance on the state in those cases in which the state is a party.

Nevertheless, I want to reiterate that siding with the state is not necessarily the incorrect decision, even if it appears to decrease the independence of the court from the rest of government. This is because siding with the state may be the legally correct decision in the vast majority of cases. This implies that state supreme court justices care about getting the law right, and some scholars have found that the law is important to decision making in the state supreme courts in narrow substantive areas (e.g., Lawler and Parle 1989).

It is also worth noting that of all of the sub-samples analyzed in this chapter, the complex sub-sample stands out as the place where the state does unusually well. Partially this is the result of better arguments by the state in cases where there is, perhaps, no clear policy outcome. Partially this may be the result of failure at the lower level by the state’s

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10 This may seem like a difficult task in many states given that state supreme courts typically have discretionary dockets, but recall that it is also true that many state supreme courts have mandatory jurisdiction that can be altered by state legislatures.
opponent to assert a clear legal reason for victory. Indeed, the state is particularly unlikely to be the petitioner in complex cases, suggesting that it won in the lower court. Further, as I will argue in chapter 5, the substantively large effect of the presence of a solicitor in these cases suggests that the law, however amorphously defined, plays some role in the success of the state because state solicitors are probably best conceptualized as legal agents of the court. This result also suggests that legally correct decisions are important to the justices. Nevertheless, it is not clear that the informational burden for the justices increases in these complex cases or that if it does it affects their decision making in any discernable way. This conclusion is drawn from the unimportance of either of the attorney experience variables or the size of the docket and may simply indicate that once a case reaches a certain level of legal difficulty, the state is highly likely to prevail.

Finally, though it appears that the characteristics of the justices themselves matter—as evinced by the importance of ideological agreement in some of the models—it seems that the institutional and case contexts matter more. Put differently, the justices react strongly to the parties and case before them, and these contextual factors are considerably more substantively important in determining the outcome of a case than are the policy preferences of a justice. This conclusion goes hand-in-hand with the notion that states are uniquely situated as a litigant because they can alter the context in which the state supreme court justices make their choices.
CHAPTER 5

STATE SOLICITORS IN STATE LITIGATION

In the previous chapter, as demonstrated in Figure 4.5, the state solicitors appear to play a pivotal role in state success. The state is significantly more likely to secure the vote of a justice, whether the case is salient, non-unanimous, or complex. This result is as expected, particularly given evidence of the importance of the federal Solicitor General in Supreme Court litigation and the trend among states to create state solicitors’ offices. Modeled as they are on the office of the Solicitor General, state solicitors, whether they actually appear in a case or refine the arguments of other state attorneys arguing on behalf of the state, should have some effect on the success of their client. Further evidence of the importance of solicitors comes from the fact that the institution of solicitors’ offices have spread so thoroughly throughout the states, swelling from only 13 states in 1994 to 32 currently. And this success is likely enabled by the fact that solicitors’ offices attract high caliber of attorneys. The puzzle of this chapter is to understand the effectiveness of state solicitors in state supreme courts in light of the expectation that they should be major players in state litigation and by comparison to learn more about the likely sources of the federal Solicitor General’s remarkable level of success.

A glance at Figure 4.2 in the previous chapter, comparing predicted probabilities of success, shows that the solicitors clearly have a greater effect in the complex cases than they do anywhere else. At bottom, I will argue in this chapter that this means that, at
least at this early stage of their evolution, solicitors are best thought of in terms of “agent of the court” theories of Solicitor General success.

This chapter proceeds in four parts. First, I describe the solicitors, their duties and authorities, the type of lawyer that serves in the office and how they view their roles in state litigation. After describing the offices in some detail, I analyze the appearance of solicitors and the characteristics of states that had adopted the office by 1994. Then, I explain and analyze several theories of success, taken from the expansive literature on the federal Solicitor General. Finally, I sum up by comparing the state solicitors to the Solicitor General.

**Describing the Solicitors**

State solicitors are defined here as the state’s chief appellate attorney with, at the very least, the authority to supervise all civil appeals by the state to the state supreme court. This definition narrows somewhat the number of states that are considered as having created the office of state solicitor because some states have chief appellate attorneys that do not have supervisory authority over all civil appeals. I have chosen the narrower definition because where the state solicitors do not have supervisory authority over all civil appeals it is difficult to determine the extent of their authority and sometimes their participation at the case level. Furthermore, I focus only on civil cases in this dissertation because, for the most part, states bifurcate the appellate process between civil and criminal cases—and in most states the Attorney General has created a position that is in charge of overseeing criminal appeals that is separate from the office of a state solicitor (Layton 2001). Thus, one of the few consistencies among states with respect to the office of a solicitor is that they are primarily involved in civil cases. The term “state
“solicitor” is one that I borrow from Layton (2001), who notes that states use a variety of names for the office of a chief appellate attorney ranging from state solicitor general to chief of the civil division, thus, state solicitor is an omnibus term meant to refer to all of these offices.

Most state solicitors have a background that suggests that they are or will become elite members of the legal profession (see Mauro 2003). Many are former federal appellate clerks, several have been former Supreme Court clerks, and several have served as clerks on state supreme courts. Further, many move on to important positions, as several are now federal appellate court judges, state supreme court justices or occupy other high-level elected positions such as state Attorney General.

Partially, the invisibility of the state solicitors in the academic and professional literatures is a result of the fact that these offices are recent creations that are the result of two relatively recent trends. First, the states have seen the number of civil appeals increase steadily since the 1970s, particularly as Congress devolved authority over many programs to the states (Conlan 1991). This devolution of authority in turn led the states to begin their own regulatory regimes or sue the federal government to force it to keep its commitments (Clayton 1994). However, as Layton (2001) stresses, the need for an appellate specialist in the AG’s office is not only a result of increasing numbers of lawsuits and regulatory action, it is also a by-product of the increasing complexity of civil appeals in the state courts. Partially this is because the states themselves turned away from federal courts that they perceived as hostile to their interests and began to look

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1 Interestingly, women have been particularly successful securing positions as state solicitors—positions that have catapulted them onto state supreme courts in at least two instances: Virginia Linder in Oregon and Victoria Graffeo in New York. Indeed, Layton (2001) notes that during the 1996 Supreme Court term women argued 14% of the cases before the Court, but that women argued 44% of the cases in which state Attorney General offices were involved.
toward their own state courts to help them with their new regulatory responsibilities, and partially this is because non-governmental litigants turned to the state courts to enforce their rights (Chen 2003). To summarize: “The recent development of state solicitors whose work more closely parallels that of the Solicitor General was…prompted by the increase in appellate workload, the increased complexity of cases on appeal, and the increasing risk of loss” (Layton 2001, 537).

The need for state solicitors is also the result of the internal organization of most AGs offices. In most states, the AG has only appellate authority in criminal cases, but is not responsible for trying cases at the trial level, a responsibility usually delegated to a district attorney. On the civil side, the AG has much broader authority over the litigation process, being in charge of most civil cases in which the state is a party from the trial stage all the way up to the state supreme court. As Layton notes, the greater complexity on the civil side means that responsibilities are often divided along substantive lines, with individual chiefs in charge of particular appellate areas such as tax law or child support enforcement (2001). This means that there is a greater need for the coordination of arguments on the civil side than there is on the criminal side, since the appellate chief in the tax division may make an argument that makes victory more likely in the case at hand or in tax cases in general but that makes it more difficult for the state in other areas of law.

The relationship between a state AG and a state solicitor differs from the relationship between the Solicitor General and the Attorney General. Whereas the Solicitor General typically owes his allegiance to the president who appointed him, in the
states it is the AGs who decide if there will be a solicitor\(^2\) and who that person will be. Thus, there is a close relationship between most state solicitors and the Attorney General who appoints them. The closeness of this relationship is reflected in the statements of several former solicitors indicating that they, where possible, attempt to advance the agenda of the AG and that support from the AG is critical to the success of the office (Coyle 2008). And in general it is fair to say that state solicitors have less independence than does the Solicitor General (Mauro, quoting Schweitzer, 2003). It is true that at the state level, as with the relationship between the AG and the Solicitor General at the federal level, the state solicitor is more likely to be a highly qualified lawyer first and a politician second. In many cases the reverse is true of the state AGs, most of whom must win statewide elections to become the AG and are not gifted appellate advocates (Mauro 2003).

The state solicitors’ offices themselves can be divided along two different axes: size and degree of centralization. In the bigger offices, the state solicitor’s office is closely analogous to the Solicitor General’s office, with many assistants and broad participation in most of the cases in which the state is a litigant (Coyle 2008). Examples of states with this type of office include Illinois and New York. In the smaller offices, the solicitor acts as something closer to a traditional appellate chief—these offices have fewer assistants and tend to play a more advisory role in most cases, although they will handle the most important appeals themselves. In the smaller offices, the focus is clearly on the three courts most important to any state: the Supreme Court, the applicable federal

\(^2\) In some states the solicitor is authorized by statute, like the Solicitor General, but in other states there is no authorizing statute and the position exists at the discretion of the Attorney General. In some states the position will come into existence and then disappear when a new AG is elected, though this pattern is relatively rare (see Mauro 2003).
circuit court, and the state supreme court. Cases that may be important to the state in the federal district courts or in the intermediate state appellate courts are often left to others (Coyle 2008). An example of a state with this smaller type of office is Alabama.

There are two basic models with respect to the degree of control over the appellate process maintained by the solicitor’s office (Schwietzer 2008). In centralized offices a separate appellate office under the direction of the solicitor performs all the appellate work. In the decentralized model, which predominates among the states, the solicitor and her deputies edit briefs authored by other attorneys in the AG’s office and setup training programs to improve the state’s work product. Offices that are centralized will also tend to be big.

There are also two career tracks within state solicitor’s offices. Solicitors themselves, tied as they are to the electoral fortunes of an AG, typically stay in the office only for 4 to 8 years. Similarly, some of the assistants in a solicitor’s office will be short-term employees, spending 3-5 years in the office gaining valuable experience practicing before appellate courts before moving on to more lucrative opportunities in private practice. On the other the end of the spectrum, many assistants in a solicitor’s office will make a career of it. High-quality lawyers are willing to work in state solicitors’ offices for less than the market will bear for the services because of the docket typically handled by the office: it is varied, interesting and important (Mauro 2003).

As I have noted, there are 12 states that, by the definition established above, are considered as having state solicitors by 1994. These are states with solicitors in my data. Since 1994 there has been an explosion of state solicitors, and now there are solicitors of one type or another in 32 states. Table 5.1 below provides some basic descriptive
information about current solicitors’ offices, those established by 1994 and included in my data set are in bold. Fortuitously, no solicitors’ offices were created between 1995 and 1998. It is important to note that the authority of these offices is not always clearly defined.
<table>
<thead>
<tr>
<th>State</th>
<th>Title of Position</th>
<th>Year Established</th>
<th>Supervise All Appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Solicitor General</td>
<td>2003+</td>
<td>No</td>
</tr>
<tr>
<td>Alaska</td>
<td>Unknown</td>
<td>2003+</td>
<td>Unknown</td>
</tr>
<tr>
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<td>Solicitor General</td>
<td>1986</td>
<td>Yes</td>
</tr>
<tr>
<td>California</td>
<td>Solicitor General</td>
<td>2003</td>
<td>Unknown</td>
</tr>
<tr>
<td>Colorado</td>
<td>Solicitor General</td>
<td>1988</td>
<td>Yes</td>
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<tr>
<td>Connecticut</td>
<td>Unknown</td>
<td>2003+</td>
<td>Unknown</td>
</tr>
<tr>
<td>Delaware</td>
<td>Solicitor General</td>
<td>2003+</td>
<td>Unknown</td>
</tr>
<tr>
<td>Florida</td>
<td>Solicitor General</td>
<td>1999</td>
<td>Yes</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Unknown</td>
<td>2003+</td>
<td>Yes</td>
</tr>
<tr>
<td>Illinois</td>
<td>Solicitor General</td>
<td>1988</td>
<td>Yes</td>
</tr>
<tr>
<td>Indiana</td>
<td>Solicitor General</td>
<td>2003+</td>
<td>Unknown</td>
</tr>
<tr>
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<td>Solicitor General</td>
<td>1999</td>
<td>Yes</td>
</tr>
<tr>
<td>Maine</td>
<td>Unknown</td>
<td>2003+</td>
<td>Unknown</td>
</tr>
<tr>
<td>Maryland</td>
<td>Solicitor General</td>
<td>2002</td>
<td>No</td>
</tr>
<tr>
<td>Michigan</td>
<td>Solicitor General</td>
<td>1988</td>
<td>Yes</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Solicitor General</td>
<td>2003+</td>
<td>No</td>
</tr>
<tr>
<td>Missouri</td>
<td>State Solicitor</td>
<td>1999</td>
<td>Yes</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Solicitor General</td>
<td>2003+</td>
<td>Yes</td>
</tr>
<tr>
<td>Nevada</td>
<td>Solicitor General</td>
<td>2008</td>
<td>Unknown</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Unknown</td>
<td>1999</td>
<td>Unknown</td>
</tr>
<tr>
<td>New York</td>
<td>Solicitor General</td>
<td>1981</td>
<td>Yes</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Solicitor General</td>
<td>2003+</td>
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</tr>
<tr>
<td>North Dakota</td>
<td>Solicitor General</td>
<td>2003+</td>
<td>Unknown</td>
</tr>
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<td>Ohio</td>
<td>Solicitor General</td>
<td>1994</td>
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</tr>
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<td>Oregon</td>
<td>Solicitor General</td>
<td>1970</td>
<td>Yes</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Civil Law Division Chief</td>
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<td>Yes</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Deputy AG In Charge of Appeals</td>
<td>1994</td>
<td>Yes</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Solicitor General</td>
<td>1990</td>
<td>Yes</td>
</tr>
<tr>
<td>Texas</td>
<td>Solicitor General</td>
<td>1999</td>
<td>Yes</td>
</tr>
<tr>
<td>Utah</td>
<td>Solicitor General</td>
<td>1994</td>
<td>No</td>
</tr>
<tr>
<td>Vermont</td>
<td>Civil Division Chief</td>
<td>1994</td>
<td>Yes</td>
</tr>
<tr>
<td>Virginia</td>
<td>Solicitor General</td>
<td>2000</td>
<td>Yes</td>
</tr>
<tr>
<td>Washington</td>
<td>Solicitor General</td>
<td>1994</td>
<td>Yes</td>
</tr>
</tbody>
</table>

**Table 5.1: Descriptive Information on the State Solicitors:** Information comes from Layton (2001), Schweitzer (2008) and searches on Lexis/Nexis. Bolded entries are states that had established a solicitor’s office by 1994 and that are consider as having a solicitor in the data set. In the “Year Established” column, 2003+ indicates the office was established sometime after 2003. Note, many of these offices were established several
times. For instance, this appears to have been the case in both North Dakota and Washington, which had earlier iterations of the office. There are also instances in which the office appears briefly and then disappears soon thereafter. For example, it appears that in Arkansas there was a state solicitor between 1987 and 1990, and then the office disappeared never to return. This table should be considered tentative because of the difficulty inherent in determining the presence of an office that exists at the whim of the Attorney General in most states.

It is exceedingly difficult to determine the exact dates for the establishment of the solicitors’ offices for two reasons. First, many are not authorized by any statute but are instead creations of the Attorney General and so can come into and out of being with a particular AG. Though this type of fluctuation has decreased, it nevertheless makes establishing dates of existence difficult. Second, in some states attorneys called solicitors existed well back into the early twentieth century but they did not have the duties and responsibilities that we currently associate with a Solicitor General-like actor (Layton 2001). Thus, the table presents information that is current and accurate as best I can gather from existing publications, discussions with former solicitors, and searches in the Lexis/Nexis database. Furthermore, determining the extent of authority for a solicitor can also be difficult because just as the existence of the office can fluctuate, so too can the authority of that office at any given time.
Winning in Court

Now we can turn our attention to ways in which state solicitors help the state perform better in court. Interviews and correspondence with solicitors indicated a surprisingly consistent message on this issue: sound and consistent legal argument with an eye toward the policy implications of decisions and establishing a long-term relationship with the state supreme court. As one solicitor put it: “You are trying to establish a brand and the key to establishing a brand is having a unified message and our brand was honesty and truth.”

According to a document coauthored by several then-serving state solicitors, there were three major goals in establishing the office of state solicitor (NAAG 1995). First, decision making needs to be centralized. Centralization allows for greater consistency in advancing the Attorney General’s position in an area of law and in general. Second, product control—control of the quality of briefs and arguments before a court—is critical because it allows the state to build a reputation and relationship with the court. Third, solicitors are uniquely positioned to provide training to the attorneys in the AG’s office on the special skills necessary for appellate advocacy.

One striking feature of my conversations with several state solicitors was their reference to the state as a repeat player, usually in the context of the ability of the state to establish particularly favorable precedents over time—an opportunity that exists for states most prominently in their own courts. Ted Cruz, the former solicitor of Texas, notes:

You’re going to be up there [the state supreme court] over and over again. We have been quite successful in our state Supreme Court on the issue of sovereign immunity. Going back

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3 There are several quotations throughout this chapter that are unattributed. These quotations come from interviews with several former state solicitors in which I promised the interviewees anonymity. I interviewed or corresponded with six former state solicitors from five different states.
to 1999, the office very systematically looked for good cases to take there and to build the doctrine to protect the state interest (Coyle 2008, quoting Cruz).

These types of efforts will cascade throughout the state’s docket before a supreme court, as doctrines like sovereign immunity will serve to protect the state in multiple legal issue areas and will make victory easier. This suggests one area for potentially fruitful future research: do the states increase their win rates over time as state solicitors are able to build strong lines of favorable precedent?

Aside from establishing strong lines of favorable precedent for the state, the solicitors seem to focus heavily on establishing a general norm of deference by the court to the state’s agencies, particularly in their rulemaking functions. One solicitor elaborated on this point by mentioning that it is the duty of the state supreme court to help the state function—that the reality is that state government must have a special relationship with the state supreme court because they are all part of the enterprise of governing the state. He continued by noting: “The judges understand that the state has to operate. The [AG’s] office’s view is basically that if the state has a reasonable position then it should win, because government administration has to operate.”

There is some indication that the solicitors may be especially effective in more legally difficult or complex cases. Several solicitors described the job of being the state’s chief appellate attorney in terms of simplifying statutorily complex areas of law, like tax codes, and simplifying them in a way that the state supreme court could readily understand the consequences for the state of ruling in one direction or another. Another described the process not as one of simplification, but in terms of coherence and organization—ultimately coming back to the notion that the state had to make consistent legal arguments before the state supreme court.
Another way in which the state solicitors appear to aid states in their litigation efforts before their own supreme courts is by appealing cases selectively. This is manifested in the recognition that certain cases make better law for the state than others. But this selectivity has benefits beyond only appealing cases in which the state is likely to be able to win; it also highlights the importance of a case. “[S]tate solicitors play a role much like that of the Solicitor General: they use their position to emphasize to the court before which they are appearing the importance of a particular case” (Layton 2001, 542). Thus, the appearance of a solicitor in a case will tend to indicate that that case is particularly important to the AG and perhaps the state as a whole, and this alone may improve the chances of the state in these cases before the state supreme court.

This indication of salience will be especially strong in cases in which the state is appealing a ruling from the lower court (NAAG 1995). This is because in the overwhelming majority of cases appealed to a state supreme court, the state will be the respondent. Thus, when the state chooses to appeal it is often in a position similar to that of the Solicitor General when he files an amicus brief. This is because states do not typically appeal just because they are unhappy with the outcome at the lower level but because there is some broader policy concern at stake (NAAG 1995). Further, the states are not frequent amicus participants, largely because of the already overwhelming workload that they face.4 Thus, when the state is a petitioner, the presence of a solicitor should be especially effective at highlighting the salience of the case to the state.

Finally, the state solicitors are likely to be able to establish a special relationship with the justices on a state supreme court because they appear so frequently before that

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4 On average, the state attorneys in my data set had participated in just one case as an attorney on an amicus brief in the five years previous to their appearance in the state supreme court.
court. Partially this is reflected in the establishment of a brand before the court. As one state supreme court justices says, “The role of the state solicitor is that, in the most important cases, the attorney general is providing to us a person who is familiar with the way the court addresses issues and provides reliable assistance, especially if that person holds the respect of the court” (Coyle 2008, quoting Missouri Supreme Court Justice Ray Price Jr.). This mirrors the comments of one solicitor who says that the solicitor should be viewed as the authoritative voice of the state before the supreme court and that the justices should trust you.

To summarize, the solicitors may be able to help the state prevail in state supreme courts for a number of reasons, but among the most likely are that they are able to make better legal arguments, they help the state build favorable precedent over time, they provide information that justices view as reliable, and their presence is likely to indicate the importance of a case to the state’s other elites. Of course, there is one category of advantage that I have neglected to this point: ideological explanations.

Solicitors themselves are reluctant to admit that success before the court is a result of policy agreement between the justices and the AG and/or executive or that the justices may react strategically to the presence of the state as a litigant (but see Layton 2001). Instead, the solicitors tend to characterize deference to the state in terms of sound legal arguments and precedents. To be sure, in certain circumstances, some solicitors see that politics play a role in the decision making of justices and even in the arguments made by

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5 To understand how state solicitors might make better legal arguments than the average attorney representing the state, recall the distinction between procedural and substantive experience. State solicitors are appellate procedure experts as opposed to experts in a specific area of law, such as tax law. In most appellate courts, given that the facts of a case are well-established at the trial court level, substantive issues will not be as important as procedural and legal issues in the determination of a case. All else equal, state solicitors should be in a better position to make stronger arguments to the court on behalf of the state.
the Attorney General’s office. But these instances are rare according to the solicitors, occurring largely when the AG files an amicus brief and, at least in some states, primarily in criminal cases. Of course, this does not mean that policy agreement between the position taken by the AG and the policy preferences of justices does not play a role in cases in which the state is a party. Indeed, some solicitors note that the cases in which the state is a party are particularly likely to involve issues of public interest (NAAG 1995). And one solicitor memorably described the state solicitor’s office as a “fulcrum between law and politics.”

Data and Methods

The data used for the appearance model and the outcome model that follows are substantially similar to the data described in chapter 3. Here I use data from the SSCDP and many of the same variables found in the models in chapter 4 and described in chapter 3. Five new variables are introduced in the models that follow, and those variables are described in the appendix to this chapter. I offer three analyses to help better understand the state solicitors. First, I briefly describe the relevant differences between the states that were early adopters of the solicitor model (those that had adopted state solicitors by 1994) and those states that had not adopted the solicitor model by the beginning of my data set. Second, I model the factors associated with the appearances of a state solicitor in a case. Third, I use theories of the success of the Solicitor General in an attempt to understand the factors contributing to the success of the state solicitors.

One major difference in the models presented in this chapter versus those presented earlier is that the models in this chapter use significantly more limited data sets. These limits are different for each of the two models presented and the limits are
introduced to insure that inferences are made to the correct population. In the appearances model, which models those case characteristics that correlate with the appearance of a state solicitor for the case, the population of study is all cases occurring in the eleven states with solicitors where the appearance of a solicitor can be reasonably accurately measured.\textsuperscript{6} Cases are the unit of analysis in the appearances model because appearing is a case level occurrence. In other words, if a solicitor appears in a case, then she appears to all of the judges hearing that case. In the second model, the outcomes model, the goal is to predict the factors that are associated with a solicitor winning the vote of a justice when the solicitor appears in a case. Here the population of interest is those cases in which a solicitor appears, and the unit of analysis is a justice’s vote (as in the models presented in chapter 4).

**Understanding the Establishment and Appearance of Solicitors**

A good place to begin the analysis is in trying to understand why the 12 states that are early establishers of state solicitors’ offices were so far out in front of other states in the creation of this office. Part of the explanation is probably not systematic. Some state Attorneys General simply felt a need for better state level advocacy and took the initiative in creating a position to help the state perform more adequately on appeal in both the state and federal courts.\textsuperscript{7}

The question remains, however, whether there is something systematic about these states that makes them more or less likely to establish these offices. In other words,

\textsuperscript{6} I exclude Colorado, which had established a solicitor’s office by 1994, because an interview with a former solicitor from Colorado indicated that judging an appearance by the court’s reported opinion was impossible given that Colorado’s Attorney General’s Office routinely listed almost every plausible attorney as one of record to make determining which attorney was responsible for a single case more difficult for the state’s opponents.

\textsuperscript{7} Interviews with state solicitors in these early adopter states did not indicate that success in one particular court motivated the creation of these offices. That is, the state solicitors interviewed did not tend to believe that they were hired to focus exclusively on the state supreme court or the federal appellate courts.
are their systematic differences that cause (or result from) the establishment of a state solicitor’s office within a state. Though establishing state and case level factors that caused a state to create a solicitors office in the first place is difficult, given that I have data that follows the creation of those offices, a comparison of the two types of states is nevertheless suggestive. A basic outline of the differences between states that established solicitors by 1994 and those that did not can be seen in Table 5.2 below.

The most apparent difference between these early adopters and other states is that the early adopters have significantly more resources devoted to both their state supreme courts and their own litigation efforts. Furthermore, the early adopter states have considerably larger populations, which may explain their ability to commit significantly more resources to litigation. Other than size and resources the states with solicitors and those without are substantially similar in terms of state level characteristics.
Table 5.2: Comparison of States with Solicitors and those without Solicitors: The case characteristics scores represent the mean number of cases that share that characteristic. ♠ Per 1,000 state population. ♣ These are principal component factor scores, with higher scores indicating greater resources. ♥ Measured in millions.

Only two factors stand out as different at the case level. First, states that have solicitors are significantly more likely to experience dissent than are states without solicitors. Second, and not surprisingly, state with solicitors have significantly more
experienced attorneys representing the state than do states that do not have a solicitor’s office. So, in summary, the states that were early adopters of the state solicitor model have more resources and are more likely than other states to face contentious state supreme courts.

However, because the analysis to this point has only looked at states that had already established state solicitors in order to fully understand the motivation for creating these offices, we must look at a set of states that, as of 1998, had not yet established state solicitors’ offices. Fortunately, a group of six states—Florida, Kansas, Missouri, New Jersey, Texas and Virginia—established solicitors’ offices in 1999. In looking at these states a clear pattern emerges: states are motivated to establish state solicitor’s offices because they are losing in the state supreme court. States without solicitors in 1998 and that did not establish an office in 1999 won 62% of their cases in this data set. On the other hand, the six states that established an office in 1999 won only 52% of their cases, a difference that is statistically significant ($\chi^2 = 3.13$, $p = 0.08$).

**Modeling State Solicitor Appearances**

Because we know so little about the state solicitors, an exploration of those cases in which they are most likely to appear can help inform the analyses that follow. Furthermore, understanding the case level factors that attract solicitor participation will better allow for comparisons to participation patterns of the Solicitor General and allow us to discern whether the factors that make a solicitor more likely to appear in a case also correlate with winning a case. To reiterate, the model below captures the factors associated with the appearance of a solicitor in a case on behalf of the state, not necessarily whether that appearance helped the state prevail in a case. Table 5.3 presents
the results of a logit model in which the dependent variable is whether a solicitor appeared\textsuperscript{8} in a case or not (1 if yes, 0 otherwise). The standard errors are clustered at the case level (since the appearance of a solicitor is a case-level phenomenon), and the sample is limited to only those 11 states in which I actually observe the appearance of a solicitor (Colorado is excluded because of the difficulties involved in determining the legitimate participation of a solicitor in a case).

The table demonstrates that solicitors tend to appear in those cases that we would most expect them to take an interest in: cases in which an amicus brief has been filed or cases in which a state or federal constitutional provision is at issue. Theoretically, the model confirms what interviews and correspondence with several state solicitors indicated: state solicitors seek to participate in only the most consequential and important cases. On the other hand, the solicitors tend to avoid, where they can, the more routine cases coming to state supreme courts.

\textsuperscript{8} I use the term “appearance” in the same way as I defined that term in chapter 3.
Table 5.3: Model of State Solicitor Appearances: bolded coefficients are significant at p<0.10 (two-tailed). Standard errors are robust to account for heteroskedasticity.

Changes in predicted probabilities of a solicitor appearing in a case are calculated by shifting continuous variables one standard deviation above their mean and by changing dichotomous variables from not present (0) to present (1). The dependent variable in this model is whether a solicitor appeared as counsel in a case (1 = yes).

When an amicus brief has been filed, solicitors are 19 percentage points more likely to appear on behalf of the state. Similarly, when a constitutional provision is at issue a solicitor is 21 percentage points more likely to appear. Cases in which an amicus brief is filed or a constitutional provision is at issue are those cases that were considered the high salience cases in chapter 4. It is not surprising that there is a strong correlation between appearances in these cases and the notion of salience because, as the Layton
quote above indicates, solicitors are wont to use their appearance in a case as a way to highlight the importance of that case or when the case itself is likely to have far-reaching policy implications.

The subject matter of the case can also be an important determinant of whether a solicitor is likely to appear. Cases involving agency action—where the state AG is tasked with defending the policy making activity of a state agency—are 17 percentage points less likely to draw the attention of a solicitor than are other cases. Most likely this is because these cases are routine and when they are important, that importance will be indicated by the presence of an outside amicus brief or the involvement of the state or federal constitution. Conversely, in cases involving the state’s prerogative in cases of economic regulations not involving agency action, the solicitor is 13 percentage points more likely to be involved in the case. It is the case that there is significant overlap between cases of economic regulation and cases in which agency action is at issue—a \( \chi^2 \) test indicates a significant correlation (18.55, p<0.000)—so the question is why the cases of economic regulation that do not involve agency action are highly likely to draw solicitor interest. The best answer is that these are the non-routine cases of economic regulation that are significantly more likely to involve a constitutional issue than is a typical case of economic regulation also involving agency action. Put differently, since most cases involving agency action are cases of economic regulation, but over half of the cases involving economic regulation do not involve agency action, those cases of economic regulation not involving agency regulation appear to be attractive to the state solicitors.
Finally, it appears that when the state is a petitioner in a case, the solicitor is 17 percentage points more likely to appear than when the state is the respondent. As interviews and secondary materials on the state solicitors suggest, the solicitors like to use the state’s power to petition the state supreme court cautiously (i.e. not simply when the state loses at the lower level, but only when some larger issue is at stake). Therefore, it is not surprising that when the state petitions the state supreme court to reconsider the decision of a lower court the solicitor is heavily involved in the process. In short, the results from the model in Table 5.3 clearly suggest that solicitors wish to be involved only in the most salient, far-reaching cases that appear on the state supreme court’s docket.

Theories of Solicitor General Success

Having analyzed what it is that motivates the solicitors to appear in a case, the next logical step is to try to understand what factors make them more or less likely to help the state secure a justice’s vote. Given my concern with whether governments can be considered as uniquely advantaged litigants, a focus on the factors that make solicitors, which are uniquely governmental actors, successful is apt. Since the state solicitors are virtual unknowns in the academic literature, it is useful to begin a theoretical inquiry into their ability to help states win by comparing them to their nearest analogues in the literature: the Solicitor General. The political science literature on the Solicitor General is rich with theories of why the SG is so successful. In general, these theories can be collapsed into three omnibus categories: agent of the court explanations, repeat player explanations, and case selectivity explanations.⁹

⁹ There is at least one other competing explanation for the success of the Solicitor General in the Supreme Court. Bailey et al. (2005) have espoused an ideological signaling theory in which the key to the ability of
One conception of the Solicitor General is that he is the “Tenth Justice” so ingrained in the decision making process of the Court that he is essentially an agent of the Court (Caplan 1987). The Solicitor General is thought to be uniquely capable of providing the Court with reliable information on the state of the law. Partially, this success is a result of perceived independence from the executive—a perception necessary for the SG to be seen as a reliable purveyor of legal information (Salokar 1992).

Fundamentally, then, the SG is a legal actor when he acts as an agent of the court. The Justices trust the views of the SG on the state of law and, if they are deciding cases using something close to the legal model of decision making, then this ability to provide reliable information on the state of the law would explain the incredible success of the SG before the Court.

Others have located the success of the SG in the superior advocacy skills that he develops through repeated appearances before the Court (McGuire 1998; Spriggs and Wahlbeck 1997; Galanter 1974). In the repeat player conception of the SG it is not simply that the SG is seen as a neutral party providing reliable legal information to the

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the Solicitor to succeed at extremely high rates is his ability to reliably signal information to the justices. In this signaling model, information can be sent reliably in two situations: (1) when the Solicitor and justice are ideologically proximate and (2) when the Solicitor sends a signal that is ideologically inconsistent with his known policy preferences (a sort of Nixon-to-China moment). Bailey and his coauthors find clear-cut evidence that the Solicitor is more capable of persuading individual justices in these two circumstances. Though there is no theoretical reason that this explanation for Solicitor success could not apply to the state solicitors there are some difficulties involved. For one, Bailey et al. focus on those cases in which the Solicitor General is unconstrained in the ideological position he can argue: when the government files an amicus brief. I do not yet have information on similar cases in the states—indeed this project is designed to specifically look at situations in which the government is a party in the litigation instead of a “friend of the court.” Second, Bailey et al. have unique data on the policy preferences of each of the major branches of government so that they can place the president (and presumably the Solicitor) on the same ideological scale as the justices. This allows them to accurately test the notion that there is an ideological component to the Solicitor’s success. Though there are good measures of both the ideology of state level elites (Berry et al. 1998) and the ideology of state supreme court justices (Brace et al. 2001), these measures are not explicitly on the same scale. For these reasons, I do not test the ideological signaling theory in the state supreme courts here, although there is no reason to believe that such a theory does not apply to the state solicitors in much the same way that it applies to the Solicitor General.
Court; instead, the SG is uniquely capable of fashioning persuasive arguments that use the language of the law to convince the Justices of the SG’s position.

Finally, other scholars of the Solicitor General see some of the SG’s extraordinary success in the Court as a result of careful selection of cases for appeal (Zorn 2002). Since the SG’s office is the final authority on the appellate activity of the U.S. when the federal government is a party in litigation, its ability to carefully screen for cases in which it is highly likely to win is probably central to its success at both the certiorari and merits stages in the Court. And, with respect to the merits stage, Zorn says “When a litigant can select forty cases for appeal from a pool of over a thousand, and when the litigant has highly specialized means for making the best possible selections, the odds of achieving a successful outcome on the merits will naturally be quite high” (2002, 163).

Each of these theories was developed in the very specialized context of the U.S. Supreme Court and the Solicitor General and the extent to which they will apply to the state supreme courts and the state solicitors is questionable. Given that state solicitors have existed in their current forms for a significantly shorter period of time than the Solicitor General has, their ability to perform reliably as an agent of the Court is likely to be less than that of the Solicitor General. Layton (2001) indicates that this may be a factor not only of the comparatively short time over which these offices have existed, but also of the fact that state solicitors are often only last minute consultants on briefs written by attorneys in other divisions. Further diminishing the potential of a state solicitor to serve as an agent of the court is the fact that they are less likely to have a staff of career appellate attorneys in place that survives from the administration of one AG to another (Layton 2001).
Countervailing the comparatively diminished institutional capacity of the state solicitors is the fact that, for reasons explored in chapter 4, justices on state supreme courts are significantly more likely to be in need of reliable policy information from the advocates before them than are Supreme Court justices.\textsuperscript{10} This greater reliance on the parties to litigation for information presents state solicitors, and the state’s opponents, with an increased opportunity to influence the votes of justices.

Another difference between the state supreme courts and the Supreme Court that is likely to alter the ability of a solicitor-like actor to affect decision making is the fact that many state supreme court justices must either be reappointed or reelected in order to stay on the bench. Furthermore, strategic reactions are likely to extend to concerns over policy outcomes more broadly in state supreme courts than in the Supreme Court since the decisions of state supreme courts are more vulnerable to reversal by other branches of the state government than are the decisions of the Supreme Court with respect to other branches of the federal government. The vulnerability stems from the fact that state supreme courts decide, as a proportion of their docket, more statutory cases than does the Supreme Court (which are easier to reverse than constitutional cases), and the fact that when they decide a state constitutional issue the state constitutions are easier to amend (see, e.g., King 2007; Langer 2002).

\textsuperscript{10} To summarize, the state supreme court justices have fewer resources available to them in the form of clerks to gather information independently of the litigants, they have larger dockets, and they deal with a more diverse docket. See chapter 2 for a discussion of the informational theories of success.
Hypotheses

What are the testable implications of the three theories of Solicitor General success as they apply to the state solicitors? The agent of the court explanation tends to focus on solicitors as a legal actor and as such:

*(1) State solicitors are more persuasive in those cases in which the justices have a less clear sense of the law than in cases where the law is clear.*

As I have conceptualized this in previous chapters, the most legally indeterminate cases are those in which there are potentially multiple controlling issues (the complex cases) or those cases in which the law is unlikely to control the resolution of the case at bar (the cases in which there is a lack of unanimity). Put differently, these two sets of cases are those in which resort to the law alone is not likely to provide the justices with a clear way to resolve the case. However, the results in chapter 4 strongly suggest that the non-unanimous cases are capturing policy disagreement and not legal indeterminacy; therefore, if the state solicitors are agents of the court, they should be predominantly influential in the complex cases.

Repeat player explanations place the ability of the solicitors to gather high levels of experience before the court at the center of explanations for success. Two hypotheses flow out of the expectation that experience is the key to solicitor success:

*(2) Solicitors are more successful with greater experience.*

*(3) Solicitors will have diminished ability to influence the court when opposed by highly experienced counsel.*

The first hypothesis is straightforward, the second requires a bit of explanation. If the success of solicitors is premised on their ability to offer unusually persuasive arguments
to the court, then that ability will be lessened when the opposing counsel is able to
counteroffer persuasive and reliable arguments.

Finally, according to selectivity theories, solicitors are likely to be able to select
cases so that they are successful in the state supreme courts:

(4) More selective state solicitors’ offices should be more successful than those
who appear frequently.

The logic here is that if careful selection of cases is a critical component of the success of
state solicitors those that are more selective will benefit more from the selection effect.

Analysis of Theories of Solicitor Success

In order to test the theories of solicitor success espoused above, I have created a
logit model that tests each theory simultaneously in the presence of several controls. That
model is presented below in Table 5.4, analyzing only those cases in which state
solicitors appear.

Before discussing the results of this model, it is important to note that there is
little connection between the model presented in Table 5.3 and the model presented in
Table 5.4. In other words, there does not appear to be a selection effect at work in this
data—solicitors are not more likely to succeed because of the cases they choose.
Evidence that this is the case comes from the fact that the errors between the equation
estimating solicitor appearance and the model estimating solicitor success are not
correlated, something that is true across multiple specifications of each of those models.\(^\text{11}\)

\(^{11}\) In other words the \(\rho\) parameter in several Heckman selection models never approaches standard levels of
statistical significance.
Table 5.4: Outcome Model of Solicitor Success: bolded coefficients are significant at p<0.10 (two-tailed). Standard errors are clustered by justice. Changes in predicted probabilities of a justice voting in favor of the state are calculated by shifting continuous variables one standard deviation above their mean and by changing dichotomous variables from not present (0) to present (1). The dependent variable in this model is whether a justice voted in favor of the state (1 = yes).

As might be expected from previous models of state success, the solicitors tend to do considerably better when the case become complex. In these cases, the mere appearance of a state solicitor increases the likelihood of a vote in favor of the state by 18 percentage points. Other than in cases where there is more than one legal issue in play, the solicitors seem to do little to help the state win. As I have argued above, the non-
unanimous cases seem to be cases in which policy disagreements drive the lack of consensus instead of some sort of legal ambiguity. In any case, the solicitors have no discernable effect in these cases. Taken together, these results suggest that where solicitors help the state they do so in the vein that is suggested by agent of the court theories of Solicitor General success.

Paradoxically, solicitors appearing in cases that raise constitutional issues appear to harm the state, making the vote of a justice for the state 27 percentage points less likely. This is surprising given the professed focus of solicitors on these cases. Therefore, a closer examination of this result is warranted. It does not appear to be the case that solicitors are taking constitutional cases in which the state is inherently disadvantaged, at least judging by results from the lower courts in these cases. Put differently, a solicitor is about as likely to represent the state in a constitutional case when the state won at the lower court level as when it lost at that level. Further, in those constitutional cases in states with solicitors in which the solicitor does not appear and the state is represented by another attorney from the AG’s office, the state actually tends to do significantly better. Instead, it appears that the constitutional cases that attract the attention of state solicitors also tend to attract the attention of highly experienced opposing counsel. Counsel for the state’s opponent in constitutional cases where the state is represented by a solicitor has, on average, 2.5 previous appearances. Compare this to the average of 0.7 previous appearances for the opponent’s counsel in cases in which the state solicitor is not present. Therefore, it seems that solicitors appear to do less well in these constitutional cases largely because they face a better opponent than do counsel in other constitutional cases.
within these states. Put differently, a counterfactual problem exists, since we cannot know how well the state would have done were a solicitor not present.  

As in previous models, it is useful to consider the State Petitioner and Lower Court Decision variables in tandem. When the state is a petitioner a justice is 11 percentage points less likely to side with the state; a finding that is surprising given the solicitors caution in abusing the right to appeal to the state supreme courts.

There is little evidence for a repeat player explanation of state solicitor success. It is clear that greater experience on behalf of the solicitor adds little to the probability that a justice will vote for the state. In fact the opposite effect is present in this data; when the experience of the state solicitor increases by one standard deviation, about 5 more appearances, a justice becomes about 2 percentage points less likely to vote for the state. Though this effect is significant it is substantively small and the opposite of that predicted by a repeat player theory of success, so I am inclined to discount it to some extent. This is because the diminishing returns of repeated appearances on the court are likely to be so strong that, beyond a certain minimum threshold, additional appearances are not likely to contribute much to how the justices evaluate information from an attorney or how well an attorney is able to tailor information to pivotal justices. Instead, where the solicitors have high numbers of appearances it probably suggests that the state is frequently in a bad position vis-à-vis its opponent. Put differently, in states where solicitors are forced to appear frequently, and thus amass considerable experience, this is likely symptomatic of either a court that is relatively hostile to the state or an inability on the part of the state to prevent bad cases from reaching the highest level appellate court. Furthermore, greater

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12 To be clear, these conclusions are not based on the selection model presented earlier given that that model does nothing to help us predict case outcomes. Instead, where I talk about suspected selection effects in this section I am basing that discussion on inferences from the data itself.
experience on the part of the attorney opposing the state seems to have little independent effect in these cases.

State solicitors who appear less frequently do not do significantly better than those solicitors who appear with great frequency. Though the coefficient for the Frequency of Solicitor Appearance variable is positive, indicating that less selective solicitors do about as well as more selective solicitors, the variable fails to even approach standard levels of statistical significance. It is possible that, with more data, the selection theory of success could find support at the state level, but it is not supported in this data.

Finally, there is strong evidence to suggest that when the justices react to the solicitor on ideological grounds that they treat him or her as an agent of the political elites within a state—a finding that is not at all surprising given the degree to which solicitors see themselves as agents of the Attorney General who appoints them. The Elite Distance variable indicates that if the distance between a judge and the state level elites increases one standard deviation, the probability of a vote for the state decreases 9 percentage points. Figure 5.1 illustrates the effect of increasing distance from the elites.
Figure 5.1: The Effect of Elite Distance on the Probability of a Vote for the State in Cases in which the State is represented by a State Solicitor: Higher percentages indicate greater distance between a state’s political elites and a state supreme court justice.

In essence, the solicitor appears to be seen as a party representing or espousing the political views of the Attorney General and other political elites. Note that that reaction is stronger when a state solicitor is present than it is in the more general models presented in chapter 4 where the state is more frequently represented by an ordinary attorney from the Attorney General’s office.

In summary, one theory of Solicitor General success appears helpful in understanding the success of state solicitors in state supreme courts. Agent of the court theories assert that justices will see the state solicitors as actors tasked with bringing them
accurate information on the state of the law and that the repeating nature of the relationship between the state solicitor and the court will ensure that the solicitor does not shirk and attempt to provide biased information to the court. This story of state solicitors as agents of the court is complicated by the apparent treatment by the justices of a solicitor as ideologically bound to the state’s elites. That is, there is clear evidence that justices do not simply view the state solicitor as a neutral actor without any bias. Instead, given the importance of the solicitors in the complex subset of cases, it appears that the justices rely on the solicitor when they are in great need of information that can clarify the state of the law for them. The other three theories of Solicitor General success do not appear applicable to the state solicitors and the next task is trying to understand why this is the case.

Comparing the Solicitor General and the State Solicitors

Given the apparent difficulty that theories based on the success of the Solicitor General\textsuperscript{13} have explaining state solicitor success, it makes sense to search for relevant differences between the Solicitor General and the state solicitors and to try to determine whether these differences will matter in explanations of success. There are seven important and distinct reasons why we should expect the state solicitors to be less successful than the Solicitor General, and it is because of these differences that theories of Solicitor General success do not help explain a great deal about state solicitor success. Table 5.5 lists these differences and gives a brief summary of each.

\textsuperscript{13} I use the term “Solicitor General” to refer to the federal Solicitor General even though several states also use this term to refer to their state solicitors.
<table>
<thead>
<tr>
<th>Difference</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Relatively short period of existence</td>
<td>Less opportunity to build favorable precedent over time--brand is not as strong</td>
</tr>
<tr>
<td>2. Administrative responsibilities</td>
<td>Divided attention</td>
</tr>
<tr>
<td>3. Last minute consultation on briefs</td>
<td>Opportunities to develop consistent and strong arguments diminished</td>
</tr>
<tr>
<td>4. Less independence from AG</td>
<td>Potentially constrained by political realities of AG who must get reelected to office</td>
</tr>
<tr>
<td>5. High turnover in the office</td>
<td>Experience is accrued more slowly if at all</td>
</tr>
<tr>
<td>6. Fewer resources available</td>
<td>Each case get less attention</td>
</tr>
<tr>
<td>7. Efforts split between several venues</td>
<td>Less branding, less trust from court in any one venue</td>
</tr>
</tbody>
</table>

Table 5.5: Differences Between the Solicitor General and the State Solicitors

First, the state solicitors have existed, in an institutional sense, for a considerably shorter period of time than has the Solicitor General. The Solicitor General’s office was established in 1870, whereas most of the versions of state solicitors that appear in this data set were established in the 1980s. Therefore the state solicitors have had considerably less time to build up favorable precedent on behalf of the state, to develop a reputation for high standards of advocacy and to create trust between the state supreme courts and the office. One former state solicitor described the task before the state solicitors as building a brand that represents truth in advocacy—but it is clear that the state solicitor brand in a state is less well-known to the state supreme court justices than is the Solicitor General brand to justices on the U.S. Supreme Court.

Though originally tasked with many administrative duties, like issuing legal opinions on behalf of the president and traveling throughout the Reconstruction South as
a surrogate for the Attorney General (Waxman 1998), by the mid-20th century the
Solicitor was responsible only for litigation on behalf of the U.S. The state solicitors do
not, for the most part, have the luxury of being allowed to focus solely on their duties as
the state’s chief appellate litigator. Instead, they are often responsible for a host of
administrative tasks that include creating training programs for other attorneys in the
office, drafting advisory opinions for the Attorney General, and serving on the faculty of
the state law school (Layton 2001). The extraneous duties, while reflecting the early
evolution of the Solicitor General’s office, burden the state solicitors and make them less
effective advocates than they otherwise could be.

A third reason to expect the state solicitors to be less effective than the Solicitor
General is that they are often last-minute consultants on many litigation decisions and
briefs. Compare this to the Solicitor General, who has more or less complete control over
the appellate process when the federal government is a party (Zorn 2002). Because of the
diffuse way in which the states have long handled civil appeals—delegating the task of
appealing to the state supreme courts to various division chiefs—the state solicitor is
often in the position of being a consultant on arguments that have already been
formulated by those with substantive expertise and a sometimes narrow vision of how,
for example, a winning argument in a particular tax case will damage the state in many
other cases. Therefore, the state solicitors are comparatively limited in their ability to
craft the best possible arguments.

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14 It is likely true that the Solicitor General continues to play a leading advisory role to the president on
legal policy matters and that he or she has some administrative responsibility within the Department of
Justice (including running the Office of the Solicitor General), but these burdens are undoubtedly
comparatively less than what is faced by most state solicitors.
Another major difference between the Solicitor General and the state solicitors is the fact that their respective bosses likely have different motivations. Though few would deny that the federal Attorney General is usually a politician, it seems clear that the state Attorney Generals are more purely politicians than is the federal AG. This is most likely because the state AGs are required to win statewide elections to get to and stay in office. This fact will make them attuned to the desires of their statewide constituencies and will affect the range of arguments open to the state solicitor. This is not to say that the Solicitor General has unlimited authority to make any argument he might wish—clearly the president’s agenda is a factor—but a state solicitor is more likely to be cabined by the state Attorney General than the Solicitor General is by the president. This is because the state solicitors are closely bound to their Attorney Generals. Frequently the existence of the office itself is tenuous, and more often than not the solicitor is in close physical proximity to the state Attorney General. Therefore, though both the Solicitor General and the state solicitors are no doubt limited by the political ambitions of their bosses, this limitation is likely to be a bit more problematic for the state solicitors.

As I have noted above, there is frequently very high turnover in the state solicitors’ offices. The attorneys working beneath the Solicitor General have often been in place for many years, although the average length of service for a deputy Solicitor General is about 6 years (Salokar 1992). Not unlike the state solicitors, it seems that there are two tracks within the Solicitor General’s office—one for attorneys who make a career out of the position and one for attorneys who use the experience as a stepping-stone to other prestigious positions. Though no data is available on the average tenure for
attorneys in the state solicitor’s office, it is probably lower than what we observe for the Solicitor General.

In general it is also the case that the state solicitors will have fewer resources available to them than will the Solicitor General. The Solicitor General has approximately 20 attorneys on staff and is a completely separate organization within the Department of Justice (Salokar 1992). Contrast this with the situation that exists in many state solicitors offices, where there are fewer assistants and/or those assistants are shared with other departments within the state Attorney General’s office. This means that combined with the point above about attorney experience, the state solicitors will have less help on any given case and the help will likely be less experienced than counterparts in the Solicitor General’s office.

Finally, though the Solicitor General’s office is tasked with representing the federal government in its appeals within the federal court system, the focus of the office is heavily tilted toward the Supreme Court (Salokar 1992). Contrast this with the situation that exists for the state solicitors, where three courts potentially absorb attention: the state supreme court, the relevant federal court of appeals, and the U.S. Supreme Court. Although the majority of business for the state solicitors is before the state supreme court, cases in the federal Courts of Appeal, and particularly before the Supreme Court, are likely to garner considerable attention, given their potential policy importance. Therefore, the attention of the state solicitor is likely to be diffused across these three courts. Combine this with the fact that the state solicitors generally operate with smaller and less experienced staffs, and their potential advantage in any one of these courts should be diminished.
In sum, the state solicitors look more like the Solicitor General did 50-60 years ago than the Solicitor General today. This means that theories developed to explain the success of the Solicitor General will not be a perfect explanation of the success of state solicitors. Further, the disadvantages faced by the state solicitors mean that they are simply not as successful in state supreme courts as the Solicitor General is in the Supreme Court. Future research will need to track whether the success of state solicitors improves over time and whether the solicitors evolve in a way that is similar to what we have observed in the Solicitor General’s office. Furthermore, research on the capabilities of the Solicitor General at the beginning of that office would provide a useful point of departure for analysis of the state solicitors.

Discussion

Having described the solicitors, analyzed patterns of appearance and success, and noted that they are quite dissimilar to the Solicitor General in many important ways, there is still the task of tying what we have learned about the state solicitors back to what this all means for the state as a litigant and the independence of state supreme courts. What, then, can we take from the two analytical models presented in this chapter?

First, the state solicitors clearly try to focus on those cases that are most likely to have far-reaching policy implications. Specifically, they are significantly more likely to appear as counsel in cases where an amicus brief has been filed or where a constitutional issue is present. They also are attuned to protecting the state’s regulatory prerogative in areas that involve economic policy—an area that has traditionally been seen as part of the normal business of the state by many state lawmakers. Second, though they appear frequently when the case is likely to be salient, they do not help the state much in these
cases. In fact the evidence suggests that when a solicitor appears in a constitutional case the state is significantly less likely to prevail. This could mean that the solicitors are unhelpful although the more likely explanation is that the solicitors appear in cases that the state is already somewhat more likely to lose. Therefore, one clear indication from the presence of a state solicitor in a case seems to be that such a case is likely to have far-reaching policy implications and the state feels that it is unlikely to prevail.

Most noticeably in the model of solicitor success, the solicitors appear to help the state tremendously when the case is complex. I have asserted that this means that the solicitors are particularly adept at making legal arguments that the justices find convincing when the controlling provision (or provisions) in a case is not clear. This reinforces a finding from chapter 4 about how altering the informational needs of the justices can alter which litigants are more or less likely to prevail when the state is a party. It also brings us squarely back to the issue of the independence of courts when the government is a litigant.

The apparent inability of the state solicitors to do much to alter the outcome in favor of the state in many of the most important cases should bolster arguments about the independence of courts in those cases that are most likely to matter to the public. Nevertheless, it is hard to determine how well the state “should” be doing in these most salient cases and it may be that solicitors do help the state prevail. And even in the relatively unpersuasive model of solicitor success, the seeds of overweening government influence are apparent: the state governments are considerably more likely to win when there is some confusion about the law in the minds of the justices and solicitors are particularly effective at resolving those ambiguities in favor of the state. Again, though,
this should not be taken as an assertion that such influence is improper—the state
solicitors are highly skilled lawyers who are unlikely to ever go beyond the bounds of
ethical advocacy. Further, the state is the lawmaker and so its representative’s
interpretation of what it meant should probably be considered authoritative when the law
does not dictate or even strongly suggest that one party should win.
CHAPTER 6

CONCLUSION

In this final chapter I will present some concluding thoughts, centered on both the empirical and theoretical results that stand out most prominently from the analyses presented in chapters 4 and 5. I focus particularly in the theoretical discussion on the ways in which my results seem to differ from the findings of others who have studied state courts and litigant capabilities. Then I turn my attention to the limitations that are inherent in this study, with a focus on the limitations presented by cross-sectional data and other inadequacies in the data. Finally, I discuss directions for future research and for studying state success in a more longitudinal framework.

State Success

I began by asking why it is that governments win in courts at such high rates and what this means for the independence of courts. The analyses in chapter 4 and 5 have shown us that governments are unique among litigants—they are clearly not just like other powerful repeat players in the litigation environment. This is because governments can potentially influence courts and judges in ways unavailable to other litigants. Two of the most prominent explanatory variables in my models were the method of retention system in use in a state and the size of the state supreme court’s docket; both of these variables are uniquely affected by the decisions of the state’s elites. Put differently, it is difficult to imagine a large insurance company or manufacturing interest having the
ability to single-handedly alter the type of retention system used in a state or the degree to which a state supreme court will have a discretionary docket. Therefore, there are avenues of influence open to the state that are not available to any other type of litigant.

The success of the state and its unique ability to influence judges in its favor is not necessarily a sign that courts lack independence from the other branches of government. It may, instead, be a question of how we measure the independence of a court, because it is entirely plausible to suggest that the state governments should win approximately 65% of their cases on the merits. Therefore, a high rate of success does not undermine independence because it is difficult for us to know how many cases the state should win given the positions that it takes in cases. Nevertheless, that the state is uniquely successful as a litigant opens the door to charges that the state gets special treatment.

It is difficult to know whether state supreme court justices are less independent in their decision making when the state is a party than they otherwise would be. Studies have repeatedly shown that governments are more successful than even other powerful litigants, but as I have noted, that high level of success, though suggestive, is not conclusive evidence of a lack of independence. Further, as others have shown, state judges react to the constituencies that matter most in allowing them to keep their jobs (Hall 1987; Savchak and Barghothi 2007), whether that constituency is in government or not. All that can be definitively said from the analyses here is that the state governments clearly have the potential to situate themselves uniquely among all litigants appearing before a state supreme court. But without knowing the exact motivations for the decisions of a justice in a case it is impossible to say whether that justice treats the state differently than she would where the litigant not the state. Further, the difficulties of counter-factual
inference cannot be overcome in trying to answer this question since there are never two
government litigants that are similarly situated in any given case.

It is clear that state governments do not rely exclusively on the same kinds of
advantages available to other powerful litigants, like an extended litigation time horizon
and material resources. Nevertheless, as I discuss later in this chapter, I cannot say much
about the effect of a government’s litigation time horizon without longitudinal data.
Furthermore, I have shown that devoting an increasing level of support to state litigation
efforts helps the state win cases in at least some sub-samples. Therefore, it is also the case
that those advantages usually seen as the sources of success for other powerful litigants
are important to (or potentially important to) the state governments as well.

Though the state governments are clearly among the most powerful litigants in the
state supreme courts, it is not the case that there is no predictable way to defeat them. The
models show that those opposing the state able to hire highly experienced counsel
enjoyed a decent chance of defeating the state in any given case, except in the most
important cases where the policy-based reactions to the state’s elites seem to eclipse the
informational needs of the justices, a finding that dovetails somewhat with work on the
Supreme Court (McAtee and McGuire 2007). Interestingly, there was little link between
the suspected resources of a litigant and their capability of hiring more experienced
counsel. And it does not appear to be important whether the state is represented by highly
experienced counsel, partially because the state is treated with a certain amount of default
deference by the state supreme court. Indeed, even the (usually) highly experienced state solicitors are not more successful with increasing experience.¹

Furthermore, it appears that state solicitors contribute to state success in ways that are highly conditional, at least at the early stage of their development that I can capture with my data. It seems that having a state solicitor appear in a case that is legally complex can aid the state a great deal, giving credence to the notion that state solicitors are often best thought of in terms of an agent-of-the-court type role. Though the solicitors undoubtedly help the state prevail much like the Solicitor General, it is difficult to predict the causes of that success using theories developed for the Solicitor General. I discussed why that is so extensively in chapter 5, but suffice it to say that given the nascent nature of the solicitors in the early to mid 1990s it is not surprising that their success is less than those of the long-established Solicitor General.

Judicial Decision Making

Legal theories of decision making were not tested in this project, largely because of the difficulty inherent in trying to measure the effect of law across a wide range of legal issue areas. The one variable that might have captured the effect of legally-oriented decision making directly, the Economic Regulation variable, reaches statistical significance in the complex sub-sample, but because of equivalency problems it is difficult to know whether this variable represents a legal or party capability response to the state. Nevertheless, there is more that can be said about legal theories of decision making. Given the importance of attorney experience in most models, and given the apparent effectiveness of the state solicitors in those situations in which the law can be

¹ It is the case that when the state is represented by an attorney with more experience it tends to win more than it does when it is represented by a less experienced attorney. This fact is not borne out in the models because other covariates that account for state success obviate the importance of state attorney experience.
presumed to be complex and relatively unclear, it seems that state supreme court justices have a clear desire to get the law right, whatever that may mean. To put this a little differently, I have framed the need for information in terms of justices’ wanting to understand the policy consequences of their choices, but in a court part of that policy choice must have a legal component—there must be a legal rule or opinion that allows a judge to reach a desired outcome. Therefore, the desire to make legally appropriate decisions can be thought of as opening the door to litigant influence. In this sense the legal theories of decision making lurk somewhere in the background of this project.

Perhaps the most prominent of explanations for the decision making of appellate court judges, the attitudinal theory, is supported in only some models. The prevalence of ideological decision making is apparent in the importance of the Ideologically Consistent variable in the overall model of all of the cases. Furthermore, that the Ideologically Consistent variable also matters in the non-unanimous cases makes sense—for it is in the non-unanimous cases that we would expect to see ideological decision making. Of course the results in the all cases model are no doubt highly influenced by the inclusion of the non-unanimous cases in the sample and it may be that ideological decision making is considerably more prominent than what we observe in this data because of the high rate of unanimity that is present—about 68% of all cases are decided unanimously. Therefore, as Sickels (1965) noted, high levels of unanimity may mask ideological decision making.

Segal and Spaeth (2002) note the major preconditions that make attitudinal decision making so prevalent on the U.S. Supreme Court: (1) a completely discretionary docket, (2) no ambition for higher office, and (3) life tenure. But few of these conditions are present in all of the state supreme courts. First, in the aggregate, the relationship
between policy preferences and decision making is obscured by the fact that many state supreme courts far fall short of having a completely discretionary docket. Second, ambition is likely to play a role in the decision making of many state supreme court judges who wish to become federal judges or move on to other elected offices, such as the Attorney General’s office. Finally, in all but five states state supreme court judges are accountable to someone for continued tenure on the bench. Therefore, the apparent inapplicability of the attitudinal model to many of these cases should not be surprising from a theoretical standpoint. Further, as noted, high level of unanimity in the data no doubt masks some of the influence of policy preferences in decision making.

I noted in chapter 2 that scholars have found a prominent role for strategic decision making in the state supreme courts. There is an inherent difficulty in studying the state courts and strategic behavior because, unlike federal judges, state judges do not all have life tenure. Therefore, the motivation to behave strategically may be policy oriented, tenure oriented, or both. The evidence presented in chapter 4 suggests that when state supreme court justices behave strategically they seem to do so out of a concern over continued tenure and less so based on policy concerns, although policy-based reactions to the state’s elites do matter in several of the models. The power of concerns over tenure is the primary reason to believe that state governments have a good deal of potential leverage in being allowed to determine the methods by which state supreme court judges are selected and retained.

Party capability espouses the straightforward notion that more capable parties should be more successful in court. A point of departure for this analysis is the oft noted empirical regularity of extreme government success in court (see, e.g., Kritzer 2003). The
question naturally arises as to whether governments should be treated under the same framework as other powerful litigants, given this record of success. This study goes part of the way in answering that question: it depends on the type of case. This is part of the payoff of studying state government success in a highly conditional way—in some kinds of cases the states do not perform, as predicted by the models, appreciably better than other powerful litigants like an insurance company, but in some kinds of cases they have a clear advantage that makes them something other than simply another repeat player. In high salience cases the state is not at a great advantage simply because it is the state, but in other cases, particularly where the law is unclear, the state seems to have a tremendous advantage, the sources of which I have only begun to touch in my analysis in chapter 5 of the state solicitors and which may not be inappropriate given that the state is the lawmaker.

Throughout the analyses in chapter 4 and chapter 5, one model of judicial decision making/litigant influence stood out in its explanatory power, the informational model. Specifically, I argued that state supreme court justices were particularly likely to need reliable information on the policy consequences of their choices and that that reliance would lead them to turn to the litigants’ attorneys. It turns out that only the experience of the attorney representing the state’s opponent affects their voting behavior. Combined with the fact that the state is highly successful, I have taken the one-sided importance of attorney experience to mean that state success is something of a default position from which the justices do not depart without good reason. State supreme court justices appear to react rationally to better arguments on behalf of the state’s opponent in most cases, which suggests that the special treatment of the state as a litigant has its
limits. It also appears that the justices tend to view the solicitors as reliable sources of information, particularly when the need for information is acute (as in complex cases).

If the informational model is an accurate model of decision making in the state supreme courts, then this has implications for other theories of decision making. Because both the attitudinal model and most versions of the strategic model require the judge to understand the policy implications of his decision, and because I have shown that the source of that information can determine how influential the information is, it behooves scholars of state courts to analyze the interactive relationship between decision making and the sources of information that form the bases for a decision. Attitudinal theories of decision making require that judges be able to accurately place a case stimulus in ideological space and there can be little doubt that the arguments presented by the litigants have some effect on this placement. Similarly, in most inter-branch accounts of strategic decision making, judges must assess how others will view a case from a policy standpoint and it is easy to imagine that adversarial litigants will readily present the policy outcome that makes a victory in the case most likely. All of this is increasingly likely to be true as the workload of a court increases and the judges on a court have a diminished ability to independently assess the likely consequences of a decision for themselves. Therefore, scholars should look to situations wherein the same judges have varying workloads to determine the degree to which informational burdens accentuate or attenuate traditional theories of judicial decision making. To some extent I have done this across courts, as the states present excellent comparative opportunities, but our inference on this issue can be placed on more solid ground by finding unique opportunities within a single court.
Limitations

This study is limited in some obvious ways. There are limitations imposed by the data. The data is fundamentally cross-sectional in the sense that it only captures what is occurring between 1995 and 1998. Theoretically, successful parties are capable of swallowing the bad cases and create increasingly favorable legal precedent for themselves over time. I cannot test whether this is a major component of state government success with data that spans only the four years between 1995 and 1998, largely because we would not expect to observe the building of favorable precedent over so short a time.

Longitudinal data would also be useful in the study of the state solicitors, especially given that the state solicitors are relatively recent creations. We know that over time the Solicitor General became an increasingly capable advocate before the Supreme Court and, with longitudinal data, we have the opportunity to discern the situations in which that is more or less true for the state solicitors as they develop reputations before their state supreme courts. Understanding the development of the state solicitors should be supplemented with attempts to understand the evolution of the Solicitor General’s office as well.

I have not explicitly accounted for the fact that in many states the state supreme court can avoid conflict with the state government by simply refusing to hear cases in the docketing stage. Although this is a legitimate criticism, it is difficult to truly understand how strategic thinking at the docketing stage will affect decisions on the merits, because there are no data available on the cases that the state supreme courts did not hear. That is,
there is no record of the cases that the state supreme courts decided not to decide that is readily accessible for all fifty states.

Another obvious limitation of my study is that it is incapable of capturing the legal factors at work in favor of the state governments. I have noted the reasons why it is difficult to capture the effects of law given my data, but it is likely that much of the state governments’ advantages accrue to them because they are the lawmakers. Therefore, the law is likely to play a larger role in state success than what I have suggested. But there is no doubt that, were those data available, they would improve the models of state success presented in this project.

Finally, it is difficult to answer the question of how frequently the state should win. Without a baseline expectation for what is appropriate it is impossible to say whether state governments winning over 60% of their cases indicates that state supreme courts are less independent than they should be. Drawing conclusions based on simple aggregate winning percentages is made particularly difficult by the fact that, as I have noted, government success may be (or is likely) premised on government’s ability to tilt legal rules in its favor. Therefore, government success might be considered the legally appropriate result and in this sense there is little potentially wrong with observing a high level of government success. Nevertheless, in back of the question about the appropriate level of government success lurks the more difficult issue of whether or not governments should be allowed to tilt the legal playing field in their favor. This does not change the fact that we can learn a good deal from variations in success rates, as I have demonstrated in this project, but it does demonstrate that drawing normative conclusions requires some sort of baseline expectation of success.
Future Directions

As my discussion above indicates, one major direction for future research is to gather longitudinal data on the state supreme courts and the state solicitors. One approach may be to gather longitudinal data on state supreme court cases in areas of the law that have evolved over a significant period of time to allow us to better understand how the state can shape the law in its favor over time. For instance, one area that seems potentially promising involves the battles over state sovereign immunity or perhaps enforcement of environmental law. With respect to the state solicitors, durational studies would allow us to not only better understand the state solicitors in light of the theories of the success of the Solicitor General, but also understand the factors that lead states to establish these offices in the first place. It would also be useful to compare the work of the state solicitors across institutional contexts, most likely how they perform in the state supreme courts and how they do in federal appellate courts.

Another direction for future research that would not rely on gathering longitudinal data would be to study whether the state supreme court justices react differently to different branches of government. Though the overwhelming majority of cases are in the supreme court on the basis of executive action, there are also a considerable number of cases from the legislative branch and we might reasonably expect that courts more closely tied to the governor for continued tenure will react differently to the presence of the legislature as a party than will courts that must rely on legislative reappointment for continued tenure on the bench.

Although there is a developing body of work on how the informational needs of judges affect their decision making, most of that work is on the role of information in the
Supreme Court. But because there is considerable variation in the contexts within which state supreme court justices make their decisions, there is room to explore further the factors that increase or decrease the informational needs of justices as well as variations in the sources on which they are more less likely to rely—including a source that is omitted from this study, amicus briefs.

Lastly, we know very little about how litigation time horizons operate over time to alter the incentives of differently situated litigants. Therefore, there is a need to look at how the state governments and other powerful litigants can operate to build favorable precedent over time in particular areas of law.
APPENDIX A

ADDITIONAL INFORMATION FOR CHAPTER 3
Below is a table that lists all of the variables included in the analysis or used to select sub-samples. It includes the operationalization of each variable, its level of measurement and its source.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Conceptualization</th>
<th>Measurement</th>
<th>Sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Success</td>
<td>Did the state win the case? In this case did the state convince the justice to vote in favor of its position?</td>
<td>Measured based on whether the state was petitioner or respondent and who was coded as winning party in the Brace and Hall dataset.</td>
<td>SSCDP</td>
</tr>
</tbody>
</table>

**State Level Variables**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Conceptualization</th>
<th>Measurement</th>
<th>Sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retention System</td>
<td>How do justices remain on the bench once appointed? There are six possibilities: (1) partisan election, (2) non-partisan election, (3) retention election (merit selection), (4) executive re-appointment, (5) legislative re-appointment, and (6) life tenure. I collapse partisan and non partisan election into one category and give retention elections their own category. Gubernatorial reappointment and legislative reappointment are collapsed into one category and life tenure is given its own category.</td>
<td>Measured based on who does the retaining. The variable is ordinal with increasing values representing increasing reliance on the state for retention of a seat on the bench. Therefore, life tenure = 0, election (partisan and nonpartisan) = 1, retention election = 2, and reappointment (gubernatorial and legislative) = 3.</td>
<td>Book of the States</td>
</tr>
<tr>
<td>Table A.1: Continued</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>----------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>State Resources</strong></td>
<td>What kind of resources (monetary and personnel) can the state bring to bear in litigation?</td>
<td>Measured as a principal component factor analysis of the state’s budget for the AG and the number of attorneys in the AG’s office. Only the first component is retained as the resource measure.</td>
<td>Solberg and Ray (2005)</td>
</tr>
<tr>
<td><strong>State Solicitor</strong></td>
<td>Does the state have a state solicitor’s office? This is important because a potential effect of the state solicitor is his or her ability to review and coordinate civil appeals.</td>
<td>Dichotomous measure of whether the state has established the office.</td>
<td>Layton (2001), NAAG (1995), Schweitzer (2007) and others</td>
</tr>
<tr>
<td><strong>Court Resources</strong></td>
<td>What resources are available to the state supreme court?</td>
<td>Measured as a principal component factor analysis of the salary (in 1994 dollars) for justices, the number of clerks available to the court and the number of staff attorneys available to the court. Only the first factor is retained.</td>
<td>Flango and Rottman 1998</td>
</tr>
<tr>
<td><strong>State Population</strong></td>
<td>How many people lived in the state?</td>
<td>Measured as the number of people living in the state as of the 2000 census.</td>
<td>U.S. Census Bureau</td>
</tr>
<tr>
<td><strong>Attorneys Per Capita</strong></td>
<td>The number of attorneys per 1,000 people living in the state.</td>
<td>Measured as the number of attorneys per 1,000 people living in the state as of 2000.</td>
<td>U.S. Census Bureau</td>
</tr>
<tr>
<td><strong>Intermediate Appellate Court</strong></td>
<td>Is there an intermediate appellate court between the state supreme court and the trial courts?</td>
<td>Coded 1 when there is an intermediate appellate court and 0 otherwise.</td>
<td>Flango and Rottman 1998</td>
</tr>
</tbody>
</table>
### Table A.1: Continued

<table>
<thead>
<tr>
<th>Variable</th>
<th>Description</th>
<th>Measurement</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Docket Size</strong></td>
<td>How many cases did the state hear per year?</td>
<td>Measured as the average number of cases heard per year by the state supreme court.</td>
</tr>
<tr>
<td><strong>Divided Government</strong></td>
<td>Does the same party control both the state legislature and the executive branch?</td>
<td>Measured as a trichotomous variable. A divided government is one in which the same party fails to control the executive and both houses of the legislature. When this is true for all four years in the data set this variable is coded 1, when it is true for only some portion of the time it is coded 0.5 and when the government is united from 1995 to 1998 it is coded 0.</td>
</tr>
</tbody>
</table>

#### Justice and Case Level Variables

<table>
<thead>
<tr>
<th>Variable</th>
<th>Description</th>
<th>Measurement</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Petitioner/Respondent</strong></td>
<td>Is the state the petitioner in this case? Did the state appeal the lower court decision?</td>
<td>Measured dichotomously.</td>
</tr>
<tr>
<td><strong>Complex</strong></td>
<td>Dichotomous coding of whether the case involves more than one legal issue.</td>
<td>Equals one when the case involves more than one legal issue.</td>
</tr>
<tr>
<td><strong>Ideologically Consistent</strong></td>
<td>Did the state take a position in the case that is consistent with the partisan identification of the justice?</td>
<td>Measured dichotomously. SCDP and coding equals to 1 if the state took a position consistent with the partisan Lexis/Nexis identification of the justice.</td>
</tr>
<tr>
<td>Variable</td>
<td>Description</td>
<td>Measurement</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Elite Distance from Justice</td>
<td>How far are the state’s elites (including the governor and the legislature) from a justice ideologically?</td>
<td>Measured continuously. The elite ideology score is subtracted from the justice’s partisan identification and the absolute value of this difference is used as the measure.</td>
</tr>
<tr>
<td>Opponent Experience</td>
<td>How much experience does the opposing counsel possess?</td>
<td>Measured as the natural log of the number of previous appearances.</td>
</tr>
<tr>
<td>Have</td>
<td>Is the state's opponent in this case one that has traditionally been considered a have?</td>
<td>Measured dichotomously with individuals coded 0 and business, organizations and local governments coded 1.</td>
</tr>
<tr>
<td>State Litigant Expertise</td>
<td>How frequently in the last five years has the attorney for the state appeared before this court?</td>
<td>Measured as the natural log of the number of previous appearances.</td>
</tr>
<tr>
<td>State Solicitor Present</td>
<td>Is a member of the state solicitor’s office arguing this case before the state supreme court?</td>
<td>Dichotomous measure equal to one when the state solicitor appears in a case.</td>
</tr>
<tr>
<td>Economic Regulation Case</td>
<td>Was this a case in which the state is defending a regulation?</td>
<td>Dichotomous measure, equal to 1 when the case is in the general economic regulation category in the SSCDP.</td>
</tr>
</tbody>
</table>
### Table A.1: Continued

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
<th>Coded dichotomously and equal to 1 when applicable.</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amicus</td>
<td>Has at least one amicus brief been filed in the case?</td>
<td>Equality is 1 when an amicus brief is present.</td>
<td>SCDP</td>
</tr>
<tr>
<td>Dissent</td>
<td>Is there a dissenting opinion in this case?</td>
<td>Equality is 1 if there was at least 1 dissenting opinion.</td>
<td>Lexis/Nexis or Westlaw</td>
</tr>
<tr>
<td>Salient</td>
<td>Can this case be considered likely to draw the interest of those who are not parties to the case?</td>
<td>Equality is 1 if the cases involves a constitutional issue or there is an amicus brief in the case.</td>
<td>SCDP</td>
</tr>
<tr>
<td>Non-unanimous</td>
<td>Was this case decided unanimously by the state supreme court?</td>
<td>Equality is 1 if there was either a dissent and/or a concurrence. These categories refer to votes and not necessarily to separate opinions.</td>
<td>SCDP</td>
</tr>
</tbody>
</table>
APPENDIX B

LOGIT MODELS FOR THE SUBSAMPLES IN CHAPTER 4
<table>
<thead>
<tr>
<th>Variable</th>
<th>Expectation</th>
<th>Coefficient</th>
<th>S.E.</th>
<th>Δ in Predicted Probability</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Solicitor</td>
<td>+</td>
<td>-0.429</td>
<td>0.162</td>
<td>-0.07</td>
</tr>
<tr>
<td>Divided Government</td>
<td>-</td>
<td>-0.299</td>
<td>0.131</td>
<td>-0.06</td>
</tr>
<tr>
<td>Attorney's Per Capita</td>
<td>-</td>
<td>-0.022</td>
<td>0.093</td>
<td>-0.05</td>
</tr>
<tr>
<td>Population</td>
<td>-</td>
<td>-0.054</td>
<td>0.030</td>
<td>-0.05</td>
</tr>
<tr>
<td>State Resources</td>
<td>+</td>
<td>0.097</td>
<td>0.096</td>
<td>0.03</td>
</tr>
<tr>
<td>Court Resources</td>
<td>-</td>
<td>0.124</td>
<td>0.111</td>
<td>0.00</td>
</tr>
<tr>
<td>Intermediate App. Ct.</td>
<td>-</td>
<td>-1.320</td>
<td>0.316</td>
<td>0.31</td>
</tr>
<tr>
<td>Docket Size</td>
<td>+</td>
<td>0.060</td>
<td>0.018</td>
<td>0.05</td>
</tr>
<tr>
<td>Retention System Type</td>
<td>+</td>
<td>-0.034</td>
<td>0.089</td>
<td>-0.02</td>
</tr>
<tr>
<td><strong>Case Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Repeat Player</td>
<td>-</td>
<td>-0.116</td>
<td>0.122</td>
<td>-0.02</td>
</tr>
<tr>
<td>Solicitor Present</td>
<td>+</td>
<td>0.647</td>
<td>0.261</td>
<td>0.12</td>
</tr>
<tr>
<td>State Experience</td>
<td>+</td>
<td>-0.011</td>
<td>0.054</td>
<td>-0.03</td>
</tr>
<tr>
<td>Opponent Experience</td>
<td>-</td>
<td>-0.076</td>
<td>0.069</td>
<td>-0.01</td>
</tr>
<tr>
<td>Economic Regulation</td>
<td>+</td>
<td>0.213</td>
<td>0.130</td>
<td>-0.03</td>
</tr>
<tr>
<td>Complexity</td>
<td>+</td>
<td>0.199</td>
<td>0.136</td>
<td>0.04</td>
</tr>
<tr>
<td>Nonunanimous</td>
<td>-</td>
<td>-0.562</td>
<td>0.138</td>
<td>-0.06</td>
</tr>
<tr>
<td>Salient</td>
<td>-</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>State Petitioner</td>
<td>+</td>
<td>0.144</td>
<td>0.143</td>
<td>0.03</td>
</tr>
<tr>
<td><strong>Judge Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ideologically Consistent</td>
<td>+</td>
<td>-0.052</td>
<td>0.135</td>
<td>-0.01</td>
</tr>
<tr>
<td>Elite Distance</td>
<td>+/-</td>
<td>-0.623</td>
<td>0.260</td>
<td>-0.03</td>
</tr>
<tr>
<td>Constant</td>
<td>NA</td>
<td>1.917</td>
<td>0.136</td>
<td></td>
</tr>
</tbody>
</table>

N                                      1320
Wald χ2                                120.42 (p<0.00)
PRE                                    0.07

Table B.1: Logit Model of High Salience Cases: bolded coefficients are significant at p<0.05 (one-tailed). Predicted probabilities are calculated by increasing continuous variables one standard deviation and by switching dichotomous variables from 0 to 1.
The ordinal Retention System variable is shifted from its minimum (life tenure) to its maximum (reappointment).
Table B.2: Logit Model of Non-Unanimous Cases: bolded coefficients are significant at p<0.05 (one-tailed). Predicted probabilities are calculated by increasing continuous variables one standard deviation and by switching dichotomous variables from 0 to 1.
The ordinal Retention System variable is shifted from its minimum (life tenure) to its maximum (reappointment).
<table>
<thead>
<tr>
<th>Variable</th>
<th>Expectation</th>
<th>Coefficient</th>
<th>S.E.</th>
<th>∆ in Predicted Probability</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State Level</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Solicitor</td>
<td>+</td>
<td>-0.936</td>
<td>0.183</td>
<td>-0.19</td>
</tr>
<tr>
<td>Divided Government</td>
<td>-</td>
<td>-0.058</td>
<td>0.137</td>
<td>-0.01</td>
</tr>
<tr>
<td>Attorney's Per Capita</td>
<td>-</td>
<td>-0.054</td>
<td>0.090</td>
<td>0.00</td>
</tr>
<tr>
<td>Population</td>
<td>-</td>
<td>0.045</td>
<td>0.035</td>
<td>0.04</td>
</tr>
<tr>
<td>State Resources</td>
<td>+</td>
<td><strong>0.629</strong></td>
<td>0.160</td>
<td><strong>0.08</strong></td>
</tr>
<tr>
<td>Court Resources</td>
<td>-</td>
<td>-0.059</td>
<td>0.151</td>
<td>-0.01</td>
</tr>
<tr>
<td>Intermediate App. Ct.</td>
<td>-</td>
<td><strong>-0.894</strong></td>
<td>0.195</td>
<td><strong>-0.12</strong></td>
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<td>Docket Size</td>
<td>+</td>
<td>0.007</td>
<td>0.021</td>
<td>0.01</td>
</tr>
<tr>
<td>Retention System Type</td>
<td>+</td>
<td><strong>0.464</strong></td>
<td>0.080</td>
<td><strong>0.26</strong></td>
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<tr>
<td><strong>Case Level</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Repeat Player</td>
<td>-</td>
<td>-0.032</td>
<td>0.109</td>
<td>0.00</td>
</tr>
<tr>
<td>Solicitor Present</td>
<td>+</td>
<td><strong>1.151</strong></td>
<td>0.333</td>
<td><strong>0.23</strong></td>
</tr>
<tr>
<td>State Experience</td>
<td>+</td>
<td>-0.108</td>
<td>0.046</td>
<td>-0.01</td>
</tr>
<tr>
<td>Opponent Experience</td>
<td>-</td>
<td>0.050</td>
<td>0.075</td>
<td>0.01</td>
</tr>
<tr>
<td>Economic Regulation</td>
<td>+</td>
<td><strong>0.351</strong></td>
<td>0.114</td>
<td><strong>0.06</strong></td>
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<tr>
<td>Complexity</td>
<td>+</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Nonunamious</td>
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<td><strong>-0.844</strong></td>
<td>0.139</td>
<td><strong>-0.17</strong></td>
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<tr>
<td>Salient</td>
<td>-</td>
<td>-0.045</td>
<td>0.137</td>
<td>0.00</td>
</tr>
<tr>
<td>State Petitioner</td>
<td>+</td>
<td>-0.019</td>
<td>0.139</td>
<td>0.00</td>
</tr>
<tr>
<td><strong>Judge Level</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ideologically Consistent</td>
<td>+</td>
<td>0.133</td>
<td>0.119</td>
<td>0.03</td>
</tr>
<tr>
<td>Elite Distance</td>
<td>+/-</td>
<td>-0.119</td>
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<td>-0.01</td>
</tr>
<tr>
<td>Constant</td>
<td>NA</td>
<td>1.107</td>
<td>0.460</td>
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</tr>
</tbody>
</table>

N 1493
Wald χ² 160.88 (p<0.00)
PRE 0.09

**Table B.3: Logit Model of Complex Cases:** bolded coefficients are significant at p<0.05 (one-tailed). Predicted probabilities are calculated by increasing continuous variables one standard deviation and by switching dichotomous
variables from 0 to 1. The ordinal Retention System variable is shifted from its minimum (life tenure) to its maximum (reappointment).
<table>
<thead>
<tr>
<th>Variable</th>
<th>Low Caseload</th>
<th></th>
<th>High Caseload</th>
<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Expectation</td>
<td>Coefficient</td>
<td>S.E.</td>
<td>Coefficient</td>
</tr>
<tr>
<td><strong>State Level</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Solicitor</td>
<td>+</td>
<td>0.039</td>
<td>0.114</td>
<td>-0.132</td>
</tr>
<tr>
<td>Divided Government</td>
<td>-</td>
<td>-0.077</td>
<td>0.084</td>
<td>0.189</td>
</tr>
<tr>
<td>Attorney's Per Capita</td>
<td>-</td>
<td>-0.177</td>
<td>0.073</td>
<td><strong>-0.533</strong></td>
</tr>
<tr>
<td>Population</td>
<td>-</td>
<td><strong>-0.052</strong></td>
<td>0.016</td>
<td><strong>-0.133</strong></td>
</tr>
<tr>
<td>State Resources</td>
<td>+</td>
<td><strong>0.119</strong></td>
<td>0.059</td>
<td><strong>0.797</strong></td>
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<tr>
<td>Court Resources</td>
<td>-</td>
<td>0.070</td>
<td>0.090</td>
<td>0.226</td>
</tr>
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<td>Intermediate App. Ct.</td>
<td>-</td>
<td><strong>-0.350</strong></td>
<td>0.181</td>
<td>-0.284</td>
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<tr>
<td>Docket Size</td>
<td>+</td>
<td><strong>0.069</strong></td>
<td>0.164</td>
<td>-0.079</td>
</tr>
<tr>
<td>Retention System Type</td>
<td>+</td>
<td>0.073</td>
<td>0.069</td>
<td>0.058</td>
</tr>
<tr>
<td><strong>Case Level</strong></td>
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<td></td>
</tr>
<tr>
<td>Repeat Player</td>
<td>-</td>
<td><strong>-0.142</strong></td>
<td>0.071</td>
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</tr>
<tr>
<td>Solicitor Present</td>
<td>+</td>
<td><strong>0.609</strong></td>
<td>0.164</td>
<td>0.141</td>
</tr>
<tr>
<td>State Experience</td>
<td>+</td>
<td>-0.086</td>
<td>0.038</td>
<td><strong>0.121</strong></td>
</tr>
<tr>
<td>Opponent Experience</td>
<td>-</td>
<td>-0.038</td>
<td>0.048</td>
<td><strong>-0.299</strong></td>
</tr>
<tr>
<td>Economic Regulation</td>
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<td>-0.030</td>
<td>0.085</td>
<td><strong>0.425</strong></td>
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<td>Complexity</td>
<td>+</td>
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<td>0.111</td>
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<tr>
<td>Nonunanimous</td>
<td>-</td>
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<td>0.108</td>
<td><strong>-0.530</strong></td>
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<td>Salient</td>
<td>-</td>
<td>-0.009</td>
<td>0.102</td>
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<tr>
<td>State Petitioner</td>
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<td><strong>0.206</strong></td>
<td>0.105</td>
<td><strong>-0.280</strong></td>
</tr>
<tr>
<td><strong>Judge Level</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ideologically Consistent</td>
<td>+</td>
<td><strong>0.211</strong></td>
<td>0.098</td>
<td>0.121</td>
</tr>
<tr>
<td>Elite Distance</td>
<td>+/-</td>
<td>-0.022</td>
<td>0.153</td>
<td>-0.027</td>
</tr>
<tr>
<td>Constant</td>
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<td>4.518</td>
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<tr>
<td>N</td>
<td>2336</td>
<td>2430</td>
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<td></td>
</tr>
<tr>
<td>Wald χ2</td>
<td>(p&lt;0.00)</td>
<td>191.88</td>
<td>250.23</td>
<td>(p&lt;0.00)</td>
</tr>
<tr>
<td>PRE</td>
<td>0.01</td>
<td>0.07</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Table B.4: Models by Caseload:** bolded coefficients are significant at p<0.05 (one-tailed).
Figure B.1: Differential Effect of State and Opponent Attorney Experience in High Caseload Courts
APPENDIX C

ADDITIONAL INFORMATION FOR CHAPTER 5
Table C.1 presents information on the coding of variables that appear for the first time in either the appearance or the outcome model presented above.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Model</th>
<th>Coding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitutional Issue</td>
<td>Both</td>
<td>Coded 1 if the case raises a state constitutional issue or a federal constitutional issue, 0 otherwise.</td>
</tr>
<tr>
<td>Ideologically Consistent (Panel Level)</td>
<td>Appearance</td>
<td>Coded 1 if the state took a position in a case consistent with the partisanship of the mode partisanship on the panel, 0 otherwise.</td>
</tr>
<tr>
<td>Elite Distance (Panel Level)</td>
<td>Appearance</td>
<td>The absolute value of the difference between the panel's mode partisanship and the Berry et al. elite ideology score for a state.</td>
</tr>
<tr>
<td>Solicitor Experience</td>
<td>Outcome</td>
<td>Coded in the same way as the State Attorney Experience and Opponent Attorney Experience variables. The natural log plus one of the number of previous appearances by this attorney, not the office, over the previous five years in the state supreme court.</td>
</tr>
<tr>
<td>Frequency of Solicitor Appearance</td>
<td>Outcome</td>
<td>The percentage of the time that a solicitor appears on behalf of the state, calculated as the total number of appearances in a year divided by the number of cases the state supreme court heard in a year.</td>
</tr>
</tbody>
</table>

**Table C.1: Additional Variables:** All of these variables are coded from data that is present in the SSCDP.
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Case Cited