The Conditional Effects of Ideology and Institutional Structure on Judicial Voting in State Supreme Courts

Paul Brace
Clarence Carter Professor
Department of Political Science
Rice University
6100 Main Street
Houston, TX 77005
pbrace@rice.edu

Jeff Yates
Department of Political Science
University of Georgia
Athens, GA 30602
jyates@uga.edu

Brent D. Boyea
Department of Political Science
The University of Texas at Arlington
601 S. Nedderman Drive
Arlington, TX 76019
boyea@uta.edu

The Conditional Effects of Ideology and Institutional Structure on Judicial Voting in State Supreme Courts

Abstract

Two enormously influential perspectives on courts offer fundamentally different predictions about court outcomes and the effects of judge ideology on those outcomes. Well-known to political scientists studying courts, the ideological voting (***IV***) literature argues that judge ideology is a strong predictor of court outcomes and that those outcomes should be proximate to the policy preferences of courts. Less known to political scientists but highly influential, the law and economics perspective (***LE)*** focuses on settlement behavior of litigants who try to minimize costs and thus estimate likely outcomes in court, and settle simpler cases pre-trial. In this case selection process litigants respond to cues that signal likely outcomes with the result that only complex, less predictable cases make it to trial leading to win-rates that coalesce at fifty percent for plaintiffs or defendants. From this perspective, litigant strategies cancel out the effects of judge ideology and court outcomes do not correspond to judges' ideological preferences. We reconcile these perspectives by examining tort cases in state supreme courts from 1995 through 1998. The contrasting perspectives stem from the fundamental institutional processes upon which each perspective is based. The ***LE*** perspective dominates in states without lower appellate courts (LAC) where process of appeal in these state supreme courts is litigant-driven, with win-rates hovering at fifty percent and deviations from that norm accounted for by forces influencing litigant uncertainty. The ideological voting predicted by the ***IV*** literature occurs primarily in the context of state supreme court strategic reversals of LAC decisions---a process commensurate that operating with the U.S. Supreme Court. When it comes to judicial outcomes, institutional structure is a critical element shaping the influence of litigant strategy and judge ideology.

Introduction

There is a well-established literature familiar to most political scientists who study courts (henceforth labeled ***IV***) that argues that judges, with preferences over policy outcomes, vote ideologically when rendering judicial opinions (see e.g. Segal and Cover 1989; Segal 1997; Segal and Spaeth 1993; Segal, Epstein, Cameron and Spaeth 1995; Gely and Spiller 1990; de Figuerido and Tiller 1996; McCubbins, Noll, and Weingast 1989, 1995; Cross and Tiller 1998). This literature has been vastly influential in political science approaches to studying law and courts.

There is another perspective perhaps less familiar to political scientists but nonetheless important. The field of law and economics has provided a powerful account of how judicial processes operate (henceforth labeled ***LE***) (see e.g., Posner 1973; Eisenberg and Farber 1977; Priest and Klein 1984; Witmann 1985; Kessler, Meites and Miller 1996). In their well known "selection hypothesis" regarding disputes and litigation, Priest and Klein (1984) note that taking cases to court has costs and this perspective deduces that litigant settlement behavior will seek to avoid those costs where possible. Litigants make estimates of who is likely to win and lose and simpler cases commonly settle in pre-trial. The cases that go to trial according to this perspective are difficult, complex and less predictable. As there are no obvious winners or losers in these cases, it is predicted that plaintiff/defendant win-rates will hover at fifty percent.[1]

The "fifty percent rule" has become a very prominent idea in the ***LE*** perspective, discussed in major legal texts (Posner 1998; Polinsky 1989; Cooter and Ulen 1988) and showcased as a fundamental feature of the ***LE*** field (Donahue 1988). While influential, there has been a theoretical debate about strategy and/or rationality — that is, how the plaintiff/defendant might predict the probability of winning . Kessler, et al. (1996) provide a survey of empirical studies on the Priest-Klein hypothesis which notes that the fifty percent rule in its simplest form had not been supported empirically in most of the empirical studies and suggest modifications to

[1] In their seminal study, Priest and Klein (1984) found that plaintiffs consistently won 50% of the time in sampled cases in the Cook County (Illinois) and Hamilton County (Ohio) courts.

the rule. These modifications commonly focus on forces shaping the ability of litigants to deal with uncertainty including the legal environment and litigant resources, as well as variations in stakes at risk for litigants. Litigants with more resources, or more at stake, may be less eager to settle pre-trial but ultimately may suffer losses greater than fifty percent.

One thing that does not seem to be in dispute in ***LE*** is that the case selection process resulting from strategic litigants should cancel out the effects of judge ideology when it is known. This presents a striking anomaly with the equally influential ***IV*** perspective that stresses the importance of judge ideology on judicial outcomes. Within ***LE*** a sizable body of literature derived from formal models argues that judges may be motivated ideologically but as long as that ideology is known, litigants will make strategic decisions about whether to pursue their case with that ideology in mind (Priest and Klein 1984; Wittman 1985, 1988; Waldfogel 1995). Because of litigant strategies, courts hear non-random samples of cases. Litigants seeking liberal (conservative) outcomes don't pursue their cases in conservative (liberal) courts. If a litigant needs a liberal outcome but faces a conservative court they have more incentive to settle pre-trial or to drop the case. The opposite would also hold. The cases that go to court either have no obvious ideological direction or were there based on miscalculations by one of the litigants. Such miscalculation could go in either direction in the long run. In the end, according to this perspective, the effects of judge ideology should be nullified by litigant strategy.

If judges are voting ideologically to produce outcomes that are proximate to their own policy preferences, as suggested by the ***IV*** literature, it would stand to reason that defendant/plaintiff win-rates should not coalesce around fifty percent if courts are markedly liberal or conservative. In tort cases we would expect to see more outcomes favoring plaintiffs where courts are more liberal, and more outcomes favoring defendants where courts are more conservative (Sheehan, Mishler and Songer 1992).

There is another notable difference between the ***IV*** and ***LE*** approaches. Overwhelmingly, the ***IV*** literature has been focused on the United States Supreme Court although

there have been studies of federal appeals and state supreme courts as well (Brace and Hall 1995; Giles, Hettinger and Peppers 2001; Langer 2002; Brace and Boyea 2004). Alternatively, the ***LE*** literature on case selection has focused primarily on trial courts (see e.g. Waldfogel 1998) although there are some exceptions (Hanssen 1999; Clermont 2000). While it could be that ideological voting operates in the highest court in the land, but is canceled out by strategic litigant case selection in trial or lower appellate courts, this is by no means an obvious conclusion. Indeed, if there is anywhere in the American judiciary where the ideology of judges is well-known, it is in the United States Supreme Court. While judges in state trial courts or state supreme courts are not as prominent as justices on the United States Supreme Court, lawyers commonly make it their business to gauge the preferences of judges they argue cases before and their long-run professional and financial success commonly hinge on these estimates.

We argue below that these seemingly opposed perspectives can be productively reconciled by considering institutional design and forces driving cases reaching appeal. To consider this we examine all tort cases decided by state supreme courts in the years 1995 though 1998.[2] We distinguish between states with and without lower appellate courts (LAC). State supreme courts without LACs have non-discretionary dockets and we reason the appeal process is litigant driven in these courts. The cases that go to appeal are the result of litigant calculations influenced by the degree of uncertainty litigants bear. As certainty goes up, we reason that deviations from the fifty percent rule will go down. Moreover, we would predict that judge ideology would not influence outcomes in these courts because litigants adjust their strategies to incorporate judge ideology. While these are appeals, in states without LACs, they resemble decisions to go to trial because they are exclusively litigant driven.

Other states have LACs and their supreme courts have discretion to let lower court

[2] These data are found within the State Supreme Court Data Archive (SSCDA), which includes a near universal sample of state supreme court cases from 1995 to 1998. State dockets exceeding 200 cases in a single year are selected from a random sample of 200 cases. In most instances, case quantities, including tort case quantities, are unaffected due to the limited size of many state supreme court dockets.

decisions stand or to hear a case. While litigant strategies will still play a large role in selecting cases for further appeal, judge strategy ultimately determines which cases get on the docket. Unlike their counterparts in non-LAC states, jurists in these supreme courts operate in an environment more like the United States Supreme Court. They get to choose from all non-settled cases the ones they wish to decide, allowing them an opportunity to exercise their ideological preferences through agenda control.

We thus might expect to find judge ideological preferences operating in courts with discretionary dockets but not necessarily in all outcomes. Recent research has offered a new perspective on the effects of ideology in the United States Supreme Court that is relevant here. McGuire, Smith and Caldeira (2004) reason that parties seeking review from the US Supreme Court are rational actors who have lost in a lower court and petition the high court only when they estimate they will win on the merits. When litigants estimate that their preferred outcome is closer to the preferences of the justices than to the outcome they received in the lower court, they will pursue an appeal to the high court. Alternatively, litigants typically do not pursue their case to the high court if they perceive the lower court's decision will be affirmed: it would be a waste of time and money.

Ultimately, not all litigants pursuing appeals to the US Supreme Court make accurate calculations. Inaccurate calculations result in affirmances of lower court decisions and McGuire, Smith and Caldeira argue that these cases are not likely to provide evidence of ideological voting. Alternatively, when petitioners make accurate calculations about the ideological preferences of the court, lower court decisions are reversed. What is particularly notable about this important insight for current purposes is that the accurate estimates (reversals) should reflect the prevailing ideology of the court, while inaccurate estimates (affirmances) will not. When it comes to the American states, the appellate structure in states with LACs resembles the process operating below the United State Supreme Court. These state supreme courts have the discretion to make strategic reversals and we would thus hypothesize that judge ideology should exert an influence

in reversals of lower court cases.

We select tort litigation in state supreme courts for analysis. This choice is justified on several grounds. First, it is the area of law commonly examined in analyses of case selection processes and win-rates and provides the best evidence for the hypothesized processes (Eisenberg 1990). Second, tort cases are commonly examined because they lend themselves to the types of strategic calculations presumed to affect the distribution of cases that come to courts. Litigants face potential costs and benefits from litigation and from pre-trial settlement and must weigh their choices strategically. Such calculations are decidedly different from those in criminal proceedings or in cases involving civil rights or liberties where the stakes and cost calculations are significantly different. Convicted criminals will often exhaust all appeals. Social groups commonly persist in courts against short odds to achieve desired civil reforms in the long-run. Third, tort cases commonly have an ideological direction. Plaintiffs, typically individuals or groups representing individuals, seek compensation for damages caused by a business, professional, or government. A decision in favor of a plaintiff is commonly viewed as a liberal outcome while one favoring defendants is construed as a conservative outcome (e.g. Sheehan, Mishler, and Songer 1992; Yates, Tankesley, and Brace 2005). There are clear liberal and conservative sides to most tort cases and it is an area of law where it is reasonable to expect judges' ideology to exert an influence. When it comes to torts, litigants face conventional strategic imperatives in cases with ideological dimensions. These are ideal conditions for considering how strategic case selection processes and judge ideology may interactively operate in American state supreme courts.

In the analysis below we posit two fundamentally different processes to be operating in American state supreme courts in tort litigation that have significant influences on win-rates and on the effects of judge ideology in influencing judicial outcomes. Before considering these specific hypotheses it will be useful to explore the nature of win-rates in tort cases in state supreme courts to gauge how well the fifty percent hypothesis performs regarding these outcomes

and, conversely, any *prima facie* evidence of clear ideological bias.

Analyzing Plaintiff Win-Rates in State Supreme Courts

We divide our consideration of win-rates among states that have and do not have LACs for the reasons noted above. Table 1 presents plaintiff win-rates in twelve areas of tort litigation appealed before state supreme courts. Our first concern is whether there is widespread evidence of departures from the fifty percent expectation. The statistical test here is a Bernoulli trial. Those trials are modeled by a random variable which can take only two values, 0 and 1, with 1 being thought of as "success". If P is the probability of success, then the expected value of such a random variable is p. p is estimated with the number of observer successes out of the total number of trials with variance $p(1-p)$. Just as in the conventional test for a fair coin, evidence of bias requires a combination of departures from the fifty percent norm and a sufficient number of trials. In the current example, there may be no significant evidence of departure from the fifty percent rule even if the observed win-rates appear to favor one side or the other if there are insufficient observations to render a strong probabilistic conclusion. Alternatively, there may be seemingly modest bias in some states but substantially more cases and such modest bias may nonetheless be statistically significant.

Examining Table 1 the most notable feature of these win-rates is that only one category of tort (i.e. discrimination) is statistically different from fifty percent, and that is only in states with LACs. This pattern would seem to provide compelling evidence for the fifty percent hypothesis. If we assume there is an ideological direction to tort cases, there is little evidence of ideological bias in outcomes when grouped by area of law.

[Table 1 here]

The effects of ideological bias could be masked when grouping cases by areas of law. Ideological bias could be more likely at the court level. Table 2 illustrates it is modest at best. The thirty-six states presented in this table had plaintiff win-rates that were not statistically

different from fifty percent. Consistent with the fifty percent case selection hypothesis, plaintiffs and defendants who go to appeal win at rates that are statistically indistinguishable in almost three-quarters of state supreme courts.

[Table 2 here]

While limited, there is some evidence of ideological bias in the states listed in Table 3. Fourteen states had win-rates that were statistically different from fifty percent and ten of these had LACs. Of the fourteen, only three were biased in favor of the plaintiff while eleven tilted toward the defendants. Two of the three courts favoring plaintiffs had a LAC. Overall, the evidence concerning ideological bias in tort appeals in state supreme courts is sparse when viewed from the perspective of win-rates. In sum, bias is the exception rather than the rule, it is predominantly conservative and it is most likely to occur in courts with discretionary dockets. Overall, tort outcomes in state supreme courts correspond remarkably well to the fifty percent hypothesis when viewed by area of law or even on a court-by-court basis.

[Table 3 here]

The preliminary evidence would suggest that strategic litigants are acting in the manner hypothesized by the fifty percent rule. We can look below the surface to see if in fact variations in win-rates are influenced by factors that could be reasoned to shape uncertainty. While significant departures from fifty percent win-rates are the exception and not the norm, there is nonetheless variation in the degree of departure from this norm. As we reason below, we expect to see smaller departures from the fifty percent norm when litigants have a stronger basis for estimating potential outcomes. The magnitude of departure from fifty percent should increase as a function of uncertainty that litigants face if case selection is litigant driven as we hypothesize it is in states without LACs. This expectation does not extend to outcomes in courts with LACs because case selection in those courts is a joint function of litigant and court strategies. In these courts litigants need to pursue their appeal and the court has to grant review. This process resembles that operating in the US Supreme Court.

This distinction is not trivial. The majority of literature concerning the effects of ideology on court outcomes centers on the United States Supreme Court while the preponderance of literature on the fifty percent rule focuses on trial courts. As we reason below, conflicting hypotheses concerning the effects ideology has on outcomes in tort cases can be resolved by taking the appellate structure and the nature of the judicial vote into consideration.

I. Uncertainty and the Fifty Percent Win-Rate Rule

The ***LE*** perspective posits that win-rates are driven by litigant strategies and that, other things being equal, plaintiffs and defendants should experience wins at fifty percent because the cases that actually reach the bench do not have obvious or simple solutions. From this perspective, it is uncertainty about outcomes that leads cases to go to court. Given this basic premise, we would expect that institutional and contextual variables that reduce uncertainty should also reduce departures from the fifty percent win-rate hypothesis in states without LACs. As noted above, our expectations about the effects of these influences are weaker when it comes to states with LACs.

Strategic litigants would be expected to try to estimate the preferences of courts. Uncertainty results from two sources. First, features of courts may increase the accuracy of litigant estimates of court preferences. Second, litigants may vary in their capability to make estimates of likely outcomes. We consider each of these categories below.

Features of Courts.

What can reduce uncertainty for litigants about prospective outcomes? Judge **seniority** should provide information about judge preferences. Judges with a longer history on the bench would have a track-record and litigants would have a stronger basis for estimating the likely outcome of an appeal so we would expect average judge seniority on a court to reduce deviations from the fifty percent win-rate. At the other extreme, if a court is primarily comprised of very junior or freshman jurists, then litigants have little basis for guessing how the court might decide

their case. This, in turn, may cause errors in estimation and deviation from the fifty percent expectation.

Court **size** should operate in a similar manner. State supreme courts range in size from three to nine justices. When courts are have more justices there is a larger amount of information about voting preferences of the judges and less turns on the proclivities of one or two justices. Furthermore, larger deliberative entities are generally regarded as providing more accurate, consistent, and reliable decisions (Abramowicz 2000; Surowieki 2004). We would expect that larger courts provide better and more plentiful information for prospective appellants and as a consequence, there should be less deviation from the fifty percent win-rate hypothesis in states with larger state supreme courts.

Hanssen (1999) makes a compelling case for the effects of judicial elections on litigation. He reasons that **elect**ed judges are more predictatable than appointed judges. Judicial appointment is intended to promote judicial independence and these judges should be less predictable (Landes and Posner 1975). While Hanssen's concern is with litigation rates (i.e., more cases go to trial when there is less certainty about judge preferences), the hypothesis should also extend to win-rates. Specifically, we would expect smaller deviations from the fifty percent win-rate norm when there is more information about judge preferences and, following Hanssen's logic, we hypothesize that elected justices are more predictable in their voting. Deviations from the fifty percent win-rate should be smaller in states that elect their state supreme court justices.[3]

State supreme courts vary substantially in the resources they have to support their operations. Court **professionalization** has been shown to influence court outcomes (Brace and Hall 2001; Hero 1998; Yates, Tankersley and Brace 2005). More professionalized courts have

[3] To operationalize states with elected methods of selection, we have separated those states with elective methods of re-selection from those states with appointive or retention election formats. Twenty states use either partisan or non-partisan elections to retain incumbent judges, while another thirty states use appointive methods of selection or non-competitive retention elections.

more staff, higher operating budgets, and smaller dockets providing them with more time and resources for their deliberations. Other things being equal, increased professionalization increases the likelihood that courts will produce more defensible and legally consistent decisions that are less likely to be subsequently overturned. Courts with overcrowded dockets and very limited resources are more prone to error and are less predictable as a consequence. We would expect higher levels of state supreme court professionalization to reduce litigant uncertainty about prospective outcomes and, as a result, we would anticipate deviations from fifty percent win-rates to be smaller in states with more professionalized state supreme courts.

In courts where judges serve longer **term**s, litigants have a stronger basis for estimating likely outcomes. The more litigants can learn about judge preferences, the fewer miscalculations will be made about pursuing their appeal. On courts where judges serve long terms, litigants and their counsel have a stronger basis for estimating prospective outcomes and cases with obvious solutions should be less likely to go to appeal. We thus hypothesize that where courts have longer terms, deviations from the fifty percent rule should be smaller.[4]

The ***LE*** approach reasons that while judges may vote ideologically, litigants would soon key in on these ideological proclivities and the effects of judge ideology on outcomes would be nullified.[5] The reason for this is quite simple. Litigants with cases with liberal dimensions would be unlikely to appeal an adverse trial outcome to a conservative court. A plaintiff that lost

[4] Length of judicial term varies substantially among the states from six years to fourteen years in forty-seven states. Three states additionally – Massachusetts, New Hampshire, and Rhode Island – designate lifetime terms for state supreme court justices. For both Massachusetts and Rhode Island, which do not restrict term, we have operationalized term length using an exogenous value, the average United States life expectancy (US Center for Disease Control 2003), and subtracted the age of entry from that value. For New Hampshire which has mandatory retirement at the age of seventy, we have subtracted the age of entry from seventy. While no single measure is completely satisfactory for lifetime tenure states, perceived duration of term is largely satisfied by this approach.

[5] We in fact tested judicial ideology (both in levels and change) in auxiliary models using both our main dependent variable (absolute deviations from fifty-percent) and an alternative dependent variable (deviations from fifty-percent, with lower values indicating defendant favoring deviations and higher values indicating plaintiff favoring deviations) and found that ideology did not have any statistically significant effect on either measure of deviation from the fifty percent win-rate expectation.

a medical malpractice suit at trial should not be inclined to appeal that outcome to a higher court known to be conservative. This selection process means that this conservative court seldom receives cases where they can exhibit their ideological preferences. The same would be true for liberal state supreme courts. A firm successfully sued at trial for negligence would be unlikely to appeal that outcome to a liberal state supreme court. However, what if there was uncertainty about judge ideology? We might expect new membership on a court to produce **ideological change** and this change could increase litigant uncertainty resulting in greater departures from the fifty percent norm.

Litigant Capability

Litigants commonly vary in terms of their capabilities (Galanter 1974) and this should be particularly true in tort cases where plaintiffs are typically inexperienced individual litigants who are taking a "single-shot," pitted against defendant businesses who are often well seasoned "repeat players" in court. Because they have more resources and experiences we would expect such defendants to make fewer errors in estimation concerning the outcome of an appeal. Plaintiffs, alternatively, should be more plagued by uncertainty because of their comparative disadvantage in resources and experience in court. Because of this, we expect the departure from the fifty percent norm to increase as the proportion of **plaintiff appeals** increases in states without LACs.[6] Misjudgments by plaintiffs are not expected to promote bias in outcomes in states with LACs because courts would typically be disinclined to hear cases they would affirm.

Our dependent variable for our first analysis is the degree of deviation in plaintiff/defendant win-rates from fifty percent (i.e. **outcome bias**). The ***LE*** perspective posits a general equilibrium of fifty percent in these win-rates conditioned by the factors influencing litigant uncertainty. We further posit that these forces should operate when the case selection

[6] We would also expect the direction of this bias to be in favor of defendants if in fact plaintiffs were inclined to misestimate their chances in court. In auxiliary analyses we in fact find significant bias in favor of the defendant in plaintiff initiated appeals, suggesting a higher level of strategic miscalculation by plaintiffs.

process is driven by litigant strategies but not where judges have discretion over which cases they hear. We thus divide our analysis of the effects of uncertainty on outcome bias into states with and without LACs.

II. Ideology, Appellate Structure and Strategic Reversals

In our second analysis we consider the conditions under which state supreme court justices' voting can be explained by the ideological voting hypothesized in the ***IV*** literature. Our dependent variable for this analysis is simply the proportion of liberal voting outcomes (i.e., justices' votes for plaintiffs) per annum in tort cases in state supreme courts (**liberal vote proportion**). As noted above, McGuire, Smith and Caldeira (2004) (see also McGuire and Stimson 2004) make a convincing case that the effects of ideology on outcomes should be conditioned by nature of the case. Appellants may make accurate and inaccurate estimates of the preferences of judges and courts may choose to review cases or not. Affirmances of lower courts occur when a petitioner misestimates the appellate court's ideology. They are no better off than they were before they brought the appeal and have had to bear additional costs of litigation. These cases represent strategic miscalculations and are not expected to provide evidence of ideological voting. Alternatively, reversals occur when a petitioner accurately estimates that the outcome of their case in a lower court would be overturned in the higher court. Because the appellate process operates primarily to correct error, these strategic reversals cases are expected to be more frequent; given discretionary jurisdiction, courts would generally let lower court decisions they favor stand and intervene to reverse lower court decisions they oppose.

When courts have discretion over their dockets they should select cases for review with lower court outcomes that are inconsistent with their preferences. A conservative court should reverse liberal lower court outcomes and liberal courts should reverse conservative lower court outcomes. It is in these cases where the effects of justice ideology should be evident (McGuire, Smith and Caldeira, 2004; McGuire and Stimson 2004). From this perspective the influence of judge ideology on judicial outcomes is contingent on court discretion and the type of case being

heard. Following this reasoning, we expect the effects of judge ideology to surface in states with LACs in reversals. We do not expect ideology to have an impact in courts with non-discretionary dockets, or in affirmances.

Ultimately, we thus posit that the effects of court ideology on outcomes in tort cases (at least) in state supreme courts are contingent upon the fundamental structure of the court system. The implication is that the effect of judge ideology on outcomes is, at root, a matter of institutional design. When judges have discretion to select cases, ideology matters. When they do not have this discretion, litigant strategies and the effects of uncertainty cancel out the influence of judge ideology on outcomes in tort appeals. The variables discussed above for both of our analyses are defined and described in Table 4.

Results

I. Uncertainty and Deviations from the Fifty Percent Win-Rate

We begin with our findings for absolute deviations from the fifty percent hypothesis. Our dependant variable is, again, the percentage of wins by the plaintiff minus fifty percent, expressed as an absolute value.[7] Our interest is with influences that may operate to promote or retard departures from the expected equilibrium of fifty percent. We compare the effects of these variables for all states and then contrast their effects for states with and without LACs. Our expectation is these variables will function most effectively when the appellate process is litigant driven (i.e., when there is no LAC) and less effectively when judges can act strategically in selecting cases for review as is the case when there are LACs.[8]

---

[7] As previously discussed in footnote five, in an auxiliary analysis we found directional biases favoring one party or the other, depending on context. For this dependent variable, we consider the absolute deviation of differences from fifty percent because we are interested in discerning the generalizable factors that lead to litigant error in either direction.

[8] Our unit of analysis is the state-year and our variables represent state-year averages of aspects of all tort cases filed in state supreme courts. Variation among the quantity of tort appeals before the state supreme courts (used to compute such averages) may affect the overall model; therefore, weights related to the quantity of tort appeals are incorporated to account for such differences. We use analytical weights (aweights in STATA) to address this variance in the number of tort appeals in state supreme courts. In STATA, aweights, or analytic weights, are

The Overall model presented in column one of Table 5 explains approximately 27 percent of the variance and performs reasonably well. In this model the correctly signed and statistically significant coefficients for size of court, justice term length, and elected method of selection provide support for our hypotheses. These results conform to our expectations: when there are more judges, there are longer terms, and when you elect judges, litigants face less uncertainty and win-rates stay closer to fifty percent, other things being equal.

[Insert Table 5]

When we consider the results for states with LACs in column two no single variable emerges as a significant influence on deviations from the fifty percent norm. This stands in striking contrast to the results for states without LACs in column three. As hypothesized, court size, elected method of selection, and longer judicial terms receive directional support and are statistically significant. Substantively, larger state supreme courts decrease deviation from fifty percent support for the plaintiff by approximately 4.5 percent per additional justice. Elected courts reduce departure from fifty percent by over 11 percent and a standard deviation increase in justices' term lengths (3.47 years) is associated with an almost 3 percent decrease in deviation. In addition, plaintiffs' appeals are strongly and significantly associated with deviations from the fifty percent norm. For every ten percent increase in the number of plaintiff appeals, there is a 3.8 percent departure from the fifty percent norm. Since plaintiffs are commonly "single-shot" individuals going up against "repeat player" organizations, this finding is consistent with capability theories of litigation. Plaintiffs appear less capable of estimating outcomes.

It is notable that ideology exerts no statistically discernable effects on win-rates within either appellate structure. In addition to the ideological change measure reported above, in auxiliary analyses we also considered the effects of basic ideology, and the effects of both

---

weights that are inversely proportional to the variance of an observation; i.e., the variance of the j-th observation is assumed to be sigma^2/w_j, where w_j are the weights. Thus, the observations represent averages and the weights are the number of elements that gave rise to the average. See http://www.stata.com/help.cgi?weights . Analytical weights allow modification to the ordinary least squares procedure where heteroskedastic error may exist (Kennedy 1998).

measures of ideology, on percentage of plaintiff victories. We found no significant effects for either measure of ideology on either absolute bias or direction of bias. The uniform null result concerning ideology would conform to the **LE** thesis that case selection processes cancels out the effects of judge ideology.

What ultimately emerges from the comparison of findings between the two appellate systems illustrates the effect of LACs, court discretion, and litigant strategies on case selection and outcomes. When there are LACs the variables we hypothesize to influence litigant uncertainty exert no influence on deviations from the fifty percent win-rate. Presumably litigant strategies are being confounded by court strategies when they can exercise discretion to hear cases. Alternatively, where there are no LACs, deviations from the fifty percent norm are significantly smaller where courts are larger, where judges are elected, and where judge terms are longer. On these courts, deviations from the fifty percent norm are significantly higher where there are higher proportions of plaintiff appeals, indicating that litigant ability to estimate uncertainty also plays a role. In combination, institutional features and litigant capabilities, conditioned by the appellate structure, significantly influence departures from the fifty percent norm anticipated by the **LE** perspective.

II. Ideology, Appellate Structure and Strategic Reversals

In this analysis we consider the effects of ideology on outcomes, taking into consideration the nature of the case (affirmances versus reversals) and the nature of the appellate court structure with the expectation that the effects of ideology will be evident only in reversals in states with LACs.

Table 6 presents the analysis of proportion of judge votes favoring plaintiffs, which we contend is a reflection of liberal outcomes. We would expect liberal judges to support plaintiffs more than conservative judges. We have divided our analysis into votes in reversals where theory would lead us to expect ideological voting, and affirmances, where the same theory would predict no ideology effects. Following past practice, we also divide our analysis into states with and

without the discretionary docket control afforded by the presence of a LAC. We anticipate that judicial discretion in case selection is a necessary condition for ideological influence on outcomes.

The results in Table 6 conform exactly to the expectations offered by McGuire, et al., and the supplemental caveat we offer here. Specifically, ideological voting in these tort cases is evident in reversals but not in affirmances just as McGuire, et al., posit. However, this relationship emerges only in judicial structures where the courts have discretionary dockets, much like the US Supreme court. In these instances, we surmise, courts can issue strategic reversals that fit their ideological preferences. Alternatively, the effects of ideology are not evident in states without LACs in either reversals or affirmances. We surmise this is because in these states the case selection process is driven exclusively by litigant case selection processes that operate to cancel out the influence of judge ideology. We also do not find significant ideological effects in affirmances more generally. Like McGuire et al., we surmise these cases are the result of miscalculations on the part of the petitioner which nullifies the effects of judge ideology.

Conclusion

The findings presented above shed light on the foundations of the empirical support for two major theoretical approaches to the understanding of judicial processes and should help researchers understand the role institutional structure plays in shaping the judicial process and judicial outcomes. Our results provide support for both the ***LE*** and the ***IV*** perspectives but reveal several important conditions that allow each explanation to function. Specifically, the ***LE*** hypotheses of the fifty percent win-rate operates where case selection is litigant-driven and departures from it are shaped by institutional factors that influence levels of uncertainty for litigants, and the ability of litigants to deal with uncertainty. This model does not function well where case selection is shaped by judicial discretion. While litigants no doubt remain strategic in these situations, it is the court that ultimately shapes the docket in LAC states and variables

reasoned to influence litigant strategies were not significant in these states.

When it comes to the effects of judge ideology, the opposite is true. As predicted by the ***LE*** approach, judge ideology does not exert an influence on outcomes when case selection is litigant-driven. Presumably litigants take the ideological preferences of courts into consideration when they decide to take their case to court (or not). Consistent with ***IV*** approaches, we find that ideology emerges as appropriately signed and statistically significant in cases involving reversals. This effect, however, is limited to courts afforded discretionary control of their dockets by the presence of LACs (much like the US Supreme Court).

We believe these findings have far-reaching implications for broad understandings of the judicial process. In our judicial system there are two fundamental processes operating. One is litigant-driven, occurring primarily at the trial level but also in appellate courts without discretionary jurisdiction. The rule of law from these litigated cases results from a case selection process that tends to weed out cases with more obvious or ideological solutions. The other system is driven by the complex interplay of litigant strategies and judge/court discretion. Litigants unsatisfied with lower court rulings may strategize that a higher court will sympathize with their plight but whether their case is heard or not is in the hands of the court. Consistent with McGuire et al., specifically, and the ***IV*** literature more generally, a system of ideological judge voting is evident. Courts strategically reverse lower court rulings when they have discretionary control of their docket.

Judicial outcomes are a product of litigant strategies and judge preferences mediated by institutional structures. We have identified the conditions where litigant strategies play a sizable role, and where judge ideology exerts a significant influence. Comprehensive theories of judicial decision-making must consider both the processes that do and do not shape court dockets, and the conditions under which judges may register their preferences. When courts do not have docket control, litigant strategies operate to cancel out judge ideological effects. When courts can pick their cases they may strategically reverse lower court decisions and exhibit their ideological

preferences. Judge ideology is not universally important or unimportant but conditional on the structure of the court and the nature of the case.

Bibliography

Abramowicz, Michael. 2000. "En Banc Revisited." *Columbia Law Review* 100:1600-1641.

Brace, Paul and Brent Boyea. 2004. "State Public Opinion, the Death Penalty and the Practice of Electing Judges." Presented at the Annual Meeting of the American Political Science Association, Chicago, IL.

Brace, Paul and Melinda Gann Hall. 1995. "Studying Courts Comparatively: The View from the American States." *Political Research Quarterly*: 48-5-29.

Brace, Paul and Melinda Gann Hall. 2001. "'Haves' Versus 'Have Nots' in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases." *Law and Society Review* 35: 393-417.

Brace, Paul, Laura Langer, and Melinda Gann Hall. 2000. "Measuring the Preferences of State Supreme Court Judges." *Journal of Politics* 62: 387-413.

Clermont, Kevin M. 2000. "Anti-Plaintiff Bias in the Federal Appellate Courts." *Judicature* 84: 128-134.

Cooter, Robert and Thomas Ulen. 1988. *Law and Economics*. New York: Addison-Wesley.

Cross, Frank and Emerson H. Tiller. 1998. "Judicial Partisanship and Obedience to Legal Doctrine: Whistle-blowing on the Federal Court of Appeals." *Yale Law Journal* 107: 2155-2176.

de Figuieredo, John M. and Emerson H. Tiller. 1996. "Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary." *Journal of Law and Economics* 39: 435-462.

Donahue, John J. 1988. "Law and Economics: The Road Not Taken." *Law & Society Review* 22: 903-926.

Eisenberg, Theodore J. 1990. "Testing the Selection Effect: A New Theoretical Framework with Empirical Tests." *Journal of Legal Studies*, Vol. 19, No. 2, June: 337-358.

Eisenberg, Theodore, and Henry S. Farber. 1977. "The Litigious Plaintiff Hypothesis: Case Selection and Resolution." *Rand Journal of Economics* 28: S92-S112.

Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9: 95-160.

Gely, Rafael, and Pablo Spiller. 1990. "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases." *Journal of Law, Economics and Organizations* 6: 263-300.

Giles, Michael W., Virginia A. Hettinger and Todd Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas." *Political Research Quarterly* 54: 623-641.

Hanssen, F. Andrew. 1999. "The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election versus Appointment of State Judges." *Journal of Legal Studies* 28: 205-232.

Hero, Rodney. 1998. *Faces of Inequality: Social Diversity in American Politics*. New York: Oxford University Press.

Kennedy, Peter. 2003. *Guide to Econometrics*. Cambridge, MA: MIT Press.

Kessler, David, Thomas Meites and Geoffrey Miller. 1996. "Explaining Deviations from the Fifty Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation." *Journal of Legal Studies* 25: 233-259.

Landes, William M. and Richard A. Posner. 1975. "The Independent Judiciary in an Interest Group Perspective." *Journal of Law and Economics* 29: 875-901.

Langer, Laura. 2002. *Judicial Review in State Supreme Courts: A Comparative Study.* Albany: State University of New York Press.

McGuire, Kevin T. and James A. Stimson. 2004. "The Least Dangerous Branch: New Evidence on Supreme Court Responsiveness to Public Preferences." *Journal of Politics* 68: 1018-1035.

McGuire, Kevin T., Charles E. Smith Jr., and Gregory A. Caldeira. 2004. "A Spatial Model of Supreme Court Voting." Presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL.

McCubbins, Mathew D., Roger Noll, and Barry R. Weingast. 1989. "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies." *Virginia Law Review* 75: 431-482.

McCubbins, Mathew D., Roger Noll, and Barry R. Weingast. 1995. "Politics and Courts: A Positive Theory of Judicial Doctrine and the Rule of Law." *Southern California Law Review* 68: 1631-83.

Polinsky, A. Mitchell. 1989. *An Introduction to Law and Economics, 2nd Edition*. Gaithersburg, MD: Aspen Law & Business.

Posner, Richard A. 1973. "An Economic Approach to Legal Procedure and Judicial Administration." *Journal of Legal Studies* 13: 1-55.

Posner, Richard A. 1998. *Economic Analysis of Law*. Gaithersburg, MD: Aspen Law & Business.

Priest, George and Benjamin Klein. 1984. "The Selection of Disputes for Litigation." *Journal of Legal Studies* 13: 1-55.

Segal, Jeffrey. 1997. "Separation-of-Powers Games in the Positive Theory of Congress and the Courts." *American Political Science Review* 91: 28-44.

Segal, Jeffrey, and Albert Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83: 557-65.

Segal, Jeffrey A., Lee Epstein, Charles M. Cameron, and Harold J. Spaeth. 1995. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *Journal of Politics* 57:812-823.

Segal, Jeffrey A. and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press.

Sheehan, Reginald S., William Mishler, and Donald Songer. 1992. "Ideology, Status, and the Differential Success of Direct Parties before the Supreme Court." *American Political Science Review* 86: 464-471.

Surowieki, James. 2004. *The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations.* New York: Doubleday Books.

US Center for Disease Control. National Center for Health Statistics. 2003. "National Vital Statistics Report." 54: 1-40.

Waldfogel, Joel. 1998. "Reconciling Asymmetric Information and Divergent Expectations: Theories of Litigation," *Journal of Law and Economics* 41: 451 – 476.

Wittman, Donald. 1985. "Is the Selection of Cases for Trial Biased?" *Journal of Legal Studies* 14: 185-214.

Wittman, Donald. 1988. "Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data." *Journal of Legal Studies* 17: 313-352.

Yates, Jeff, Holley Tankersley, and Paul Brace. 2005. "Do Institutions Really Matter? Assessing the Impact of State Judicial Structures on Citizen Litigiousness." Presented at the Annual Meeting of the American Political Science Association, Washington, DC.

Table 1
Plaintiff Success Rates by Areas of Tort Litigation
within States without Lower Appellate Courts

State	State Has No Lower Appellate Court (*N*)	State Has Lower Appellate Court (*N*)
Automobile	48.89% (194)	53.08% (471)
Discrimination	45.12% (46)	**44.11% (139)**
Libel	45.00% (52)	45.04% (115)
Medical Malpractice	53.29% (105)	44.67% (386)
Labor - Miscellaneous	44.70% (23)	61.17% (82)
Premises Liability - Government	46.40% (51)	46.81% (155)
Premises Liability - Private	50.30% (123)	53.14% (343)
Product Liability	43.78% (74)	52.01% (293)
Professional Malpractice	41.79% (89)	45.78% (290)
Toxic	28.79% (17)	44.57% (62)
Workers' Injury - Government	53.93% (175)	46.46% (322)
Workers' Injury - Private	47.84% (285)	51.35% (688)

Note: Entries in **bold** are statistically different from 50 percent at the .05 level

Table 2
Plaintiff Win-Rates
Not Significantly Different from Fifty Percent

State	Plaintiff Win-Rates (*N*)	Lower Appellate Court
Alaska	42.28% (149)	N
California	45.21% (73)	Y
Colorado	51.89% (106)	Y
Connecticut	45.28% (106)	Y
Delaware	56.36% (55)	N
Florida	52.00% (75)	Y
Georgia	56.92% (65)	Y
Hawaii	49.25% (67)	Y
Indiana	63.46% (52)	Y
Kansas	46.07% (89)	Y
Kentucky	53.33% (90)	Y
Louisiana	46.83% (126)	Y
Maine	42.42% (165)	N
Maryland	50.00% (86)	Y
Michigan	52.13% (94)	Y
Mississippi	45.30% (181)	Y
Missouri	53.73% (67)	Y
Montana	52.91% (206)	N
Nebraska	50.43% (234)	Y
New Hampshire	54.81% (104)	N
New Jersey	56.38% (94)	Y
New Mexico	61.82% (55)	Y
New York	45.37% (108)	Y
North Carolina	51.79% (56)	Y
North Dakota	42.67% (150)	N
Ohio	50.00% (188)	Y
Oklahoma	53.62% (138)	Y
Pennsylvania	50.39% (127)	Y
Rhode Island	46.91% (162)	N
South Carolina	47.11% (154)	Y
Tennessee	56.30% (119)	Y
Utah	47.12% (104)	Y
Virginia	55.63% (151)	Y
Washington	48.39% (93)	Y
West Virginia	51.16% (172)	N
Wisconsin	40.28% (72)	Y

Table 3
Plaintiff Win-Rates Statistically Different From Fifty Percent (.05 level)

State	Plaintiff Win-Rates (*N*)	Lower Appellate Court
Favored Defendant		
Alabama	44.01% (309)	Y
Arkansas	37.11% (159)	Y
Idaho	39.04% (146)	Y
Illinois	39.29% (112)	Y
Iowa	30.73% (179)	Y
Massachusetts	31.68% (101)	Y
Minnesota	40.00% (110)	Y
South Dakota	35.71% (154)	N
Texas	29.68% (219)	Y
Vermont	33.75% (80)	N
Wyoming	24.34% (152)	N
Favored Plaintiff		
Arizona	80.95% (42)	Y
Nevada	60.00% (110)	N
Oregon	65.31% (49)	Y

Table 4
Variable Descriptions for Models of Vote Instability and the Proportion of Liberal Votes

Dependent Variables	Value Description	Mean	Std.Dev.	Min/Max
Outcome Bias	= absolute value (observed plaintiff win-rate – 50 %)	10.44	8.15	0/39.66
Liberal Vote Proportion	= proportion of justice votes in favor of plaintiff	.48	.12	.13/.89

Independent Variables	Value Description	Mean	Std.Dev.	Min/Max
Court Ideology	= measure of state supreme court liberalism, ranging conservative to liberal (Brace, Langer and Hall 2000)	39.31	16.14	5.52/81.39
Elect	= 1 if state supreme court justices are elected 0 otherwise	.42	.49	0/1
Ideological Change	= absolute value (observed court ideology – previous year's court ideology)	2.22	3.12	0/20.73
Plaintiff Appeals	= percentage of cases that are plaintiff initiated appeals	65.47	16.98	12.50/100
Professionalization	= factor score of staff, salary, docket, and justices per capita, ranging non-professionalized to highly professionalized (Brace and Hall 2001)	.001	.96	-1.25/4.83
Seniority	= average years of justice service by state supreme court	8.47	2.96	2.88/18.9
Size	= number of justices on state supreme court	6.44	1.27	5/9
Term	= length of the term (in years) for state supreme court justices	9.08	3.47	6/20

Table 5

Win-Rates in Tort Cases
Predicting Deviations from Fifty Percent Plaintiff/ Defendant
Prais-Winsten regression, correlated panels corrected standard errors (PCSEs)
Dependent Variable: Abs. Val[Obs. Plaintiff Win-rate – 50 percent]

	Overall			States with Lower Appellate Courts			States without Lower Appellate Courts		
	Coef.	s.e.	t	Coef.	s.e.	t	Coef.	s.e.	t
Seniority	0.3449	0.2891	1.19	0.2635	0.3836	0.69	-0.3910	0.6694	-0.58
Size	**-0.7736**	**0.3625**	**-2.13**	-0.2265	0.4352	-0.52	**-4.6834**	**1.4855**	**-3.15**
Elect	**-2.2138**	**0.7066**	**-3.13**	0.4268	1.6392	0.26	**-11.1271**	**1.1585**	**-9.60**
Professionalization	-0.4397	0.3426	-1.28	-0.0265	0.1627	-0.16	0.8922	2.3610	0.38
Term	**-0.2247**	**0.1240**	**-1.81**	0.1637	0.1095	1.49	**-0.8496**	**0.2738**	**-3.10**
Plaintiff Suit	-0.0014	0.0411	-0.04	-0.0495	0.0543	-0.91	**0.3842**	**0.1485**	**2.59**
Ideological Change	-0.1346	0.1954	-0.69	0.0486	0.2626	0.19	-0.3473	0.3614	-0.96
Constant	**0.3449**	**0.2891**	**2.43**	**9.3255**	**4.9821**	**1.87**	**26.7624**	**10.4032**	**2.57**
N	141			108			33		
R2	.27			.32			.50		
Rho	.15			.19			-.02		

Entries in **bold** are significant at the .05 level. (Year dummy variables included in the model are not displayed).

Table 6

Predicting the Liberal Proportion of State Supreme Courts Votes in Tort Cases
Prais-Winsten regression, correlated panels corrected standard errors (PCSEs)
Dependent Variable: Proportion of Votes Favoring Plaintiff

States with and without Lower Appellate Courts

	Combined			Reversal			Affirm		
	Coef.	s.e.	t	Coef.	s.e.	T	Coef.	s.e.	t
Court Ideology	0.0005	0.0006	0.93	**0.0023**	**0.0007**	**3.42**	-0.0001	0.0009	-0.10
Constant	**0.4399**	**0.0220**	**19.96**	**0.5454**	**0.0258**	**21.11**	**0.2861**	**0.0328**	**8.73**
N	200			200			200		
R2	.81			.81			.55		
rho	.25			.28			.35		

States with Lower Appellate Courts

	Coef.	s.e.	t	Coef.	s.e.	T	Coef.	s.e.	t
Court Ideology	**0.0015**	**0.0005**	**2.88**	**0.0029**	**0.0008**	**3.71**	0.0013	0.0009	1.44
Constant	**0.4034**	**0.0193**	**20.93**	**0.5040**	**0.0291**	**17.33**	**0.2497**	**0.0335**	**7.46**
N	156			156			156		
R2	.85			.80			.62		
rho	.23			.27			.27		

States without Lower Appellate Courts

	Coef.	s.e.	t	Coef.	s.e.	T	Coef.	s.e.	t
Court Ideology	-0.0008	0.0009	-0.92	0.0011	0.0007	1.56	-0.0022	0.0014	-1.51
Constant	**0.4911**	**0.0336**	**14.62**	**0.6509**	**0.0254**	**25.61**	**0.3157**	**0.0552**	**5.72**
N	44			44			44		
R2	.63			.81			.45		
rho	.21			.31			.40		

Entries in **bold** are significant at the .05 level. (Year dummy variables included in the model are not displayed).