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**AGENDA-SETTING IN STATE COURTS OF LAST
RESORT**

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Abstract

The attention given to a specific issue area by a political institution drives the types of policies adopted by the institution. For this reason, scholars study agenda-setting and its impacts within institutions to shape issue attention. Yet much of the research on judicial agenda-setting has focused on individual behavior within the confines of the U.S. Supreme Court. This excludes the possibility of accounting for how institutional structure shapes a court's agenda as the Court's formal procedures have not changed significantly in the past 80 years. This previous research suggests that institutions themselves do not have an effect on a court's issue agenda or the types of cases it hears. On the other hand institutional differences might interact with the individual motivations of judges and litigants to influence the composition of a court's docket, but scholars have not identified these effects due to the continued focus on the U.S. Supreme Court.

In this project, I develop a theory of institutional judicial agenda-setting which accounts for the motivations of justices, litigants, and interest groups, the parties which have the most influence on a court's agenda, and how institutional rules effect agenda-setting at both the macro- (e.g. a court's overall policy agenda) and micro- (e.g. whether or not an individual case is heard) levels. More specifically, the project leverages cross-state variation in state courts of last resort (COLRs) to empirically test

hypotheses about how two broad aspects of COLRs – jurisdictional rules/procedures and processes for selection and retention of justices – interact to shape the courts' agendas. In doing so, I develop a generalized model of agenda-setting applicable to any court of last resort. I apply this framework and use new data sources to evaluate how state COLRs shape their agendas. I find that that macro-policy attention is not easily explained by institutional and strategic factors; that judges engage in sincere, not sophisticated, agenda-setting; and that campaign contributions to a state COLR justice from parties involved in litigation increases judicial access.

This project offers an integrated, generalized theory of how both justices and litigants shape the judicial agenda, and is the first broad, systematic examination of agenda-setting in state courts of last resort. In the former case, the research identifies to what degree ideological and retention concerns factor into the policy attention of courts and justices' decisions to hear appellate cases, while assessing how litigants balance their desire for judicial victory with their resources and knowledge about the probability of success when facing a hostile court. In the latter case, the research examines the processes of important appellate courts and seeks to resolve the dispute over whether or not these courts are important policymaking institutions. Understanding how justices and litigants influence the agenda-setting process has implications for the strategies of these groups when deciding whether or not to appeal cases or voting to grant or deny appellate review.

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Dedication

For my mother.

Chapter 1

Introduction

On September 17, 1998, John Lawrence and Tyson Garner were arrested and charged with engaging in “deviate sexual intercourse with another individual of the same sex.”¹ While the details of the incident are murky,² the defendants did not dispute the charged facts. Instead, with the support of local gay rights activists and Lambda Legal, a national advocacy organization for lesbians and gay men, Lawrence and Garner challenged the constitutionality of the sodomy statute in court. While the U.S. Supreme Court previously ruled in *Bowers v. Hardwick*³ that the U.S. Constitution did not confer “a fundamental right to engage in homosexual sodomy,” their core argument was that the sodomy statute was an unconstitutional violation of their civil rights under the Fourteenth Amendment and therefore the charges should be dismissed.

Their legal argument did not persuade the trial court, where they pled no contest and the judge sentenced each to a 200 dollar fine. The defendants appealed this

¹The following discussion is based on [Carpenter \(2012\)](#).

²[Carpenter \(2012\)](#) provides a compelling argument that the defendants in fact never engaged in sex.

³478 U.S. 186 (1986)

decision to the Texas Fourteenth Court of Appeals. There, a three-member panel heard oral arguments in the case. The defendants' attorneys expected this hearing to be a mere formality, only a necessary stage before they could move on to the U.S. Supreme Court. All three judges were Republicans⁴, and one – Chief Justice Paul Murphy – was instrumental in building the Republican Party in southeast Texas in the 1970s. At the time of the hearing, the Texas Republican Party was controlled by religious conservatives who vigorously defended the state's sodomy law, so the attorneys did not expect to receive a favorable hearing in the Texas courts.

Lawrence and Garner's legal team was therefore surprised by the serious interest displayed by the judges. They were even more shocked when on June 8, 2000, the panel issued a 2-1 decision striking down the sodomy law on the grounds that it treated homosexual sodomy differently than heterosexual sodomy (which had been legalized by the legislature in 1974), unconstitutionally discriminating on the basis of sex. This decision was met favorably by the defendants' legal team, but it also mobilized the law's supporters. Just days after the panel's decision, the Texas Republican Party convened for its state convention, immediately denounced the decision, and incorporated in the party platform an even stronger statement of support for the sodomy law. More importantly, the state GOP publicly rebuked the justices who voted to overturn the law and called for party members to oppose them in their reelection campaigns. Implicitly, the party threatened all judges that if they opposed the party's position on the law, then they could expect to face a challenger in their next election. The Harris County GOP chairman even went so far as to draft a letter to a justice who voted to strike down the sodomy law, demanding that the justice either reverse his ruling or resign.

⁴All Texas state judges are elected in partisan elections.

After these public threats, the Fourteenth Court of Appeals decided to rehear the appeal *en banc*. Additionally, the court decided to issue an opinion without holding oral arguments. On March 15, 2001, the full court voted 7-2 to reverse the panel's original decision and uphold the sodomy law. Several justices involved in the decision privately expressed concerns over the political ramifications of the decision (Carpenter 2012). In this politicized climate, a month later the defendants filed a petition for discretionary review in the Texas Court of Criminal Appeals, the state's highest court dealing with criminal law issues. Here, all nine judges on the court were Republicans. Given the public debate over the case and the fact that an appellate panel had originally struck down the law as unconstitutional, Lawrence and Garner's attorneys believed the court would at least hear the case, even if it would eventually rule against them on the merits. The court held onto the petition for over a year before announcing without comment that it would not grant the appeal. Attorneys representing both the defendants and the state believed the refusal to hear the case represented "a major abdication of judicial responsibility" (Carpenter 2012, pp. 179). However, by refusing to hear the case, the judges also avoided making a decision with potentially significant ramifications: while a judge may honestly believe the law to be unconstitutional, a vote to strike down the sodomy law guaranteed an intra-party challenge during their next election. By rejecting the appeal, the judges avoided making a statement on the law and preserved the status quo for future legislative or judicial action. Indeed, just two years later the U.S. Supreme Court granted the defendants' appeal and reversed its earlier decision in *Bowers v. Hardwick*, striking down the Texas sodomy law as an unconstitutional violation of individual privacy rights.⁵

⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

Before the Supreme Court could issue a decision on the merits in *Lawrence*, many important decisions had to be made in order for the case to even reach the Court. First, the defendants had to decide whether to challenge their convictions. In the past, many gay men would quietly plead guilty to avoid public attention. Next, the defendants needed strong legal advocates who could make convincing arguments as to why the law was unconstitutional. As a special interest group, Lambda Legal possessed significant resources, both legally and financially, to enable this litigation. Following this support, the defendants initiated an appeal to the Texas Court of Appeals. As a matter of law, the defendants were entitled to a review of the trial court decision by a three-judge panel. Subsequent to this panel's decision the full court had the discretion to rehear the entire case *en banc*, which it chose to do so (likely in response to the political pressure). The defendants then submitted a petition to the Texas Court of Criminal Appeals to review the lower court's decision. In Texas, litigants are not guaranteed review in the Criminal Court of Appeals, so the judges themselves had to decide whether to hear the case; in *Lawrence*, they declined to do so, again probably because for political reasons. Finally, the defendants appealed to the U.S. Supreme Court where their appeal required the support of at least four justices to even be considered for oral arguments.

At any point in the process, a different decision could have changed how the case played out. The defendants could have declined to appeal their convictions. Lambda Legal might have declined to intervene in the case because the defendants' personal histories could have drawn a negative public reaction. The appellate panel could have upheld the law as constitutional, removing the political pressure in the case. The Criminal Court of Appeals could have accepted the case and issued a decision based on an interpretation of the Texas constitution, preventing the U.S. Supreme Court

from reviewing the decision.⁶ The Supreme Court might have declined to hear the case in deference to its earlier decision in *Bowers v. Hardwick*. In short, there were many points in the decisionmaking process which determined whether the case remained on the judicial agenda.

Lawrence v. Hardwick encapsulates the larger question of how courts set their agendas. Why do judges decide to grant review? What happens when courts are required to hear appeals? How can litigants and attorneys maximize their probability of obtaining appellate review? In this project, I develop a theory of institutional judicial agenda-setting which accounts for the motivations of justices, litigants, and interest groups, the parties which have the most influence on a court's agenda, and how institutional rules effect agenda-setting at both the macro- (e.g. a court's overall policy agenda) and micro- (e.g. whether or not an individual case is heard) levels. More specifically, the project leverages cross-state variation in state courts of last resort (COLRs) to empirically test hypotheses about how two broad aspects of COLRs – jurisdictional rules/procedures and processes for selection and retention of justices – interact to shape the courts' agendas.⁷ In doing so, I develop a generalized model of agenda-setting applicable to any court of last resort.

This project offers an integrated, generalized theory of how justices, litigants, and interest groups shape the judicial agenda, and is the first broad, systematic examination of agenda-setting in state courts of last resort. In the former case, the research identifies to what degree ideological and retention concerns factor into the policy attention of courts and justices' decisions to hear appellate cases, while

⁶Under its federal system of government, the Supreme Court only has jurisdiction to hear cases involving an interpretation of the U.S. Constitution or federal law.

⁷Typically states refer to their highest court as a “supreme court,” but several states deviate from this practice. In this project I use the generic term “court of last resort” to emphasize the fact that these courts exercise final appellate review over the vast majority of cases initiated in state judicial systems.

assessing how litigants balance their desire for judicial victory with their resources and knowledge about the probability of success when facing a hostile court. In the latter case, the research examines the processes of important appellate courts and seeks to resolve the dispute over whether or not these courts are important policymaking institutions. Understanding how justices and litigants influence the agenda-setting process has implications for the strategies of these groups when deciding whether or not to appeal cases or voting to grant or deny appeals by permission.

In Chapter 2, I review existing knowledge about agenda-setting predominantly derived from the U.S. Supreme Court. I identify the prominent role of individual preferences and sophisticated behavior by justices and litigants, while explaining how as a unique institution Supreme Court agenda-setting is very different from appellate court agenda-setting as a whole. I define a generalized institutional strategic model of judicial agenda-setting that accounts for the preferences and roles of judges and litigants, while also accounting for institutional structure and variation across appellate courts. From this model, I derive several implications on judicial agenda-setting at the macro, mezzo, and micro-levels. Chapter 3 focuses this model on state COLRs, and identifies institutional and ideological features which vary across these courts. Using this information, I prepare to empirically assess hypotheses about state COLR agenda-setting.

Chapters 4 and 5 evaluate the model's implications on macro-level policy attention in state COLRs. In Chapter 4, I employ machine learning methods to collect a new, comprehensive data set of policy attention in state COLRs (2003–11). This data provides superior coverage of state COLR policy attention by identifying cases' policy content and procedural path over a number of years, whereas previous data collection efforts only cover a single year or fail to adequately identify the procedural path of

the case. After validating the classification results, I provide a descriptive overview of state COLR policy attention in the late 2000s, confirming that most state COLR policymaking involves criminal issues. Using this data, in Chapter 5 I test hypotheses regarding institutional, separation-of-powers, and caseload factors on macro-policy attention in the state COLRs. I find little support for a broad, overarching model of macro-policy attention, and identify potential reasons for these findings and alternative methods to improve this approach by focusing on politically salient policy subtopics.

In Chapter 6 I explore mezzo-level policy attention and revisit the degree to which state COLRs are ideological actors. Extending [Caldeira, Wright and Zorn \(1999\)](#) and the sophisticated agenda-setting model to state COLRs, I highlight several weaknesses in the authors' original test of the model and explain why it might not apply in state COLRs. I use a unique data set of judicial decisions to grant or deny review in a sample of states to test these hypotheses and find that within these states, justices act in a sincere, not sophisticated, manner. Justices are sophisticated only to the extent that they avoid cases when the court is ideologically fractured, but when it comes to the specific details of the case justices are not concerned with how their colleagues will vote on the decision on the merits. This finding supports my argument that agenda-setting in the U.S. Supreme Court is not the same as agenda-setting in other COLRs.

I address the unique institution of judicial elections in Chapter 7 in an evaluation of micro-level agenda-setting. Unlike virtually every other nation, many state COLRs use elections to select and retain judges. I consider how attorneys might use this feature to proactively work to increase their access to the court by contributing to candidates' campaigns. While most research on attorney donations considers them in light of decisions on the merits, I think of attorneys as lobbyists and use theories of

lobbying and legislative access to propose that attorneys donate to judicial campaigns in order to increase the probability of their cases being heard by the COLR. I find that in Mississippi, petitioner contributions increase the probability of a judge voting to grant review, whereas contributions from the respondent decrease the likelihood of the case being granted review. These results provide evidence of another manner in which elected judges are responsive to their campaign contributors.

Finally, in Chapter 8 I summarize my findings and draw conclusions as to how well the generalizable model of judicial agenda-setting explains agenda formation in state COLRs. I discuss the limitations of this study, as well as limitations inherent in any study of state COLR decisionmaking, and evaluate the implication of these results on the study of judicial politics broadly defined, comparative judicial politics, and state courts. Finally I describe my plans for future research in this field, including the formation of agenda-setting rules in the states, other aspects of agenda-setting such as opinion and panel assignment, and the relationship between campaign contributions and judges' macro-policy attention.

Chapter 2

Institutions, Agenda-Setting, and the Judiciary

In policymaking a key feature is the process of *agenda-setting*, the means by which issues receive attention and generate potential policy shifts (Schattschneider 1975). Agenda-setting dictates how problems are constructed and defined (Schneider and Ingram 1993), how issues and policy solutions are interpreted (Kahneman and Tversky 1984; Tversky and Kahneman 1986), and which issues receive the most attention in a given time period (Downs 1972; Kingdon 1995). In short, any attempt to study how policy decisions are made must account for how issues reach the agenda.

Theories of agenda-setting can be grouped into two broad categories: individual and institutional. Individual theories of agenda-setting tend to emphasize the role of information processing and limited cognitive abilities in explaining limitations on issue attention within humans (Jones 1994; Zaller 1992). Scholars also study agendas within political institutions (e.g. legislatures, executives, judiciaries, the media), as the policymaking process depends heavily on institutions to shape policy outcomes.

While institutions also have limitations related to their capacity to attend to a large number of issues, they can overcome some of these problems by parallelizing their workload (Jones and Baumgartner 2005) and using informational cues to prioritize issues (Krutz 2005; Sulkin 2005). Even still, institutional agendas at any given time are limited to a finite number of issues. As such, actors' ability to shape the agenda will dictate the relevant policy issues being addressed within political institutions.

Different institutions have various mechanisms and processes for managing their agendas, with the result that institutional context is important to the formation of agendas. For instance, the majority parties in the U.S. Congress have a tremendous amount of power to concentrate attention on specific issues while blocking other issues from being considered (Cox and McCubbins 2005); at the same time, they do not possess absolute control over the agenda, since any member can introduce legislation on topics important to them (Sulkin 2005). Other institutions such as the media do not have this hierarchical control of the agenda, as various media outlets cover different issues in a competition for consumers (Baum and Groeling 2008; Iyengar and Kinder 2010). Additionally, institutional agendas are not formed within a vacuum but are responsive to other institutions and political actors (Baumgartner and Jones 2010; Jones 1994).

While each institution manages its agenda differently, the judiciary is unique in its agenda-setting process for its reliance on outside actors to create its agenda. Courts typically have very little control over their own agendas: at the appellate level in the United States, judges must either hear all cases brought before them or can only refuse to hear certain cases through discretionary procedures (Baum 2012). This agenda control differs from Congress or the president, since these institutions are capable of raising any issue within their jurisdiction without a need for outside parties

to take action. Through their participation in litigation, interest groups and other non-judicial actors thus play a large role in shaping the judicial agenda both directly through the case selection process (Black and Owens 2011; Caldeira and Wright 1988) and indirectly by influencing the selection of judges to appellate courts (Caldeira and Wright 1998; Caldeira, Hojnacki and Wright 2000). While legislators must frequently respond to, and even encourage, interest group participation (McCubbins and Schwartz 1984), they can still act independently of these groups; courts do not have this power. In addition, in the context of judiciaries, nearly all of the research on agenda-setting has focused on the U.S. Supreme Court (e.g. Caldeira, Wright and Zorn (1999); Black and Owens (2009)). This focus is limiting because of the resulting lack of institutional variation, both in the process and in the incentives of individual judges and litigants. For this reason, scholars know relatively little about how institutional rules and procedures affect a court's agenda and the types of cases judges hear under different procedural regimes.

In the rest of this chapter, I examine previous attempts to explain judicial agenda-setting and derive a general theory of agenda-setting applicable to different appellate courts. First, I review theories of agenda-setting in the U.S. Supreme Court and the focus on the justices' motivations and incentives, the intersection of law and politics, and the activity of litigants and third-party actors. Then drawing on this knowledge, I lay out a theory of judicial agenda-setting grounded in the competing preferences of judges, litigants, and interest groups, and describe the effect of case selection procedures and selection/retention mechanisms on agenda-setting.

2.1 Existing Models of Judicial Agenda-Setting: The Role of Individual Actors

As noted above, previous research on agenda-setting emphasizes the role of judges and litigants in shaping judicial agendas. This emphasis stems in part from the fact that most studies of judicial agenda-setting analyze behavior on the U.S. Supreme Court (Perry 1991; Segal and Spaeth 2002). The Supreme Court's docket is almost entirely discretionary; that is, the Court has discretionary procedures by which justices can dismiss appeals without a decision on the merits. This ability to hear only cases which the justices consider important is a form of direct agenda control; however, it is also exclusively negative in that justices can block issues from being placed on the agenda but cannot add any issues without litigation occurring.¹ Given discretion over the cases they hear, justices typically only grant a small number of petitions (Epstein et al. 2012, Tables 2-5 & 2-6). Moreover, the accepted cases are not a random sample of all eligible appeals, but instead have been strategically granted by ideologically-motivated justices (Caldeira, Wright and Zorn 1999; Cameron, Segal and Songer 2000) with additional concerns for legal (Black and Owens 2009, 2011) and separation of-powers (Owens 2010) implications.

2.1.1 Justices' Motivations

Appellate courts with discretionary dockets, especially courts of last resort such as the U.S. Supreme Court, tend to be viewed as policymaking agencies of government (Dahl

¹Recent work on the litigant-signal model suggests justices have some indirect influence over their docket in these situations (Baird 2004, 2007; Baird and Jacobi 2009; Rice 2014), but it could also be the case that litigants act completely in their own interests without regard to the preferences of justices in these states.

[1957](#)). Discretionary control over a court's docket, combined with the frequent usage of lower appellate courts, reduces the need for a court to engage in error correction and instead allows it to focus on important issues of government policy ([Hellman 1982](#)). As such, justices should be expected to seek out cases with important implications for governmental power, constitutional disputes, and the role of government in society.

A sincere model of judicial agenda-setting suggests that justices should vote to grant appeals by permission when they seek to overturn the lower court decision ([Perry 1991](#)). That is, justices will vote to hear cases when they disagree with the previous ruling in the case. This makes sense in that justices on COLRs, having been granted wide discretion over their caseload, should not seek to increase their workload without sufficient cause. If the justice agrees with the lower court decision, then she should vote to reject the appeal: by taking no action on the merits, the justice's preferred outcome will stand. Only if the justice wants to reverse the previous ruling should she vote to grant the appeal.

Unfortunately, basic logic and empirical evidence suggests this sincere model is overly simplistic and does not account for other competing factors in deciding whether or not to grant an appeal by permission. If a justice is motivated purely by the desire to reverse lower court decisions with which she disagrees, voting to hear these appeals does not in and of itself guarantee a desired outcome. If the petition is granted, the justice still needs a majority of the members of the COLR to reverse the previous decision in the case. Failure to do so would result in not only maintaining the *status quo* outcome in the case, but also establishing precedent which binds lower courts nationwide to follow the COLR's logic in all future similar cases (also known as the doctrine of *stare decisis*). Judicial politics scholars Jeff Segal and Harold Spaeth recognize this fact in their assertion that U.S. Supreme Court justices only hear cases

when they believe they can win on the merits, as

“[e]ven if the Court could hear all cases with which a justice disagreed, it is not necessarily in that justice’s best policy interest to have all such cases reviewed. If the justice will likely lose on the merits, it is preferable that the case not be heard at all” ([2002](#), p. 255-256).

[Perry \(1991\)](#), ch. 7) authored the first in-depth study of agenda-setting within the U.S. Supreme Court and found anecdotal evidence that justices look ahead to the outcome on the merits to reject appeals which they would otherwise want to grant, but are likely to lose on the merits. Justices did not vote based upon merely their own ideological preferences, but accounted for the other members of the court as well. In interviews with justices and their clerks, actors in the Supreme Court made clear they balanced their personal interest in hearing the appeal with the possible outcome if another set of justices authored the majority opinion.

Strategic Agenda-Setting

[Perry](#)’s groundbreaking study of judicial agenda-setting spurred other scholars to consider a more strategic model of voting in appeals by permission. Again focusing scholarly attention on the U.S. Supreme Court, in this “strategic” view justices are still assumed to strongly consider the ideological ramifications of their votes to grant or deny appeals by permission, but also act as rational actors in that they consider the actions of other justices on the court as well. Where a sincere justice would vote to grant or deny an appeal based entirely on his preferred decision on the merits, a strategic, or “sophisticated”, justice would vote based upon both his own ideological preferences as well as his beliefs as to the probability of success given the other justices on the court. [Caldeira, Wright and Zorn \(1999\)](#) used justice-vote-level data on a

set of decisions to grant or deny discretionary review in the U.S. Supreme Court to show how justices systematically used “aggressive grants” and “defensive denials” in an attempt to shape the Court’s docket and maximize the Court’s consistency with their policy preferences. Justices who vote to grant an appeal in order to affirm the lower court decision when it was their preferred option are characterized as aggressive in attempting to grant the petition and control the decision on the merits, whereas “defensive denials” occur when justices vote to deny a petition when they disagreed with the lower court decision but believe they are likely to lose on the merits.

Further study of petitions for discretionary appeals in the U.S. Supreme Court confirms the viability of the strategic model of agenda-setting. [Benesh, Brenner and Spaeth \(2002\)](#) extends the strategic framework to explain why justices utilize aggressive grants to affirm the lower court ruling. While non-strategic concerns influence justices’ decisions, justices who can more easily predict the decision on the merits due to a larger anticipated margin of victory, more experience on the Court, or lower complexity of the case are more likely to grant petitions on which they vote to affirm the lower court ruling. Yet legal concerns continue to influence justices’ decisions to grant or deny an appeal, sometimes even strongly enough to override their ideological preferences ([Black and Owens 2009](#)). Justices also look to outside groups to determine if a legal dispute is salient and merits attention by the Court: amicus curiae briefs ([Caldeira and Wright 1988, 1990; Collins 2004](#)), recommendations by the solicitor general ([Black and Owens 2011; McGuire and Caldeira 1993](#)), and legislative/executive preferences ([Owens 2010; Segal 1997](#)) have all been shown to be important influences on whether or not the Court grants an appeal by permission.

The Intersection of Law and Politics

While political scientists tend to view justices as political actors with ideological motivations for their behavior (Dahl 1957; Epstein, Landes and Posner 2013; Segal and Spaeth 2002), justices are also responsive to legal factors. Justices are unique among political officials in that they have enormous power and influence over policy outcomes, yet strong norms exist to limit the influence of personal motivations and ideological beliefs over justices' actions (Knight and Epstein 1996). Nearly all appellate judges are trained in the law, and as such are inculcated early in their career to behave as an attorney, not a politician. Additionally, justices have very little control over implementing their own decisions. Alexander Hamilton states it most forcefully in Federalist #78 as he argues for ratification of the newly drafted U.S. Constitution (emphasis added):

“Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. *It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.*” (Madison,

[Hamilton and Jay 1987\)](#)

Moreover, even if justices want to act on their policy preferences, it is in their best interests to not appear blatant in their actions. The legislative and executive branches of government are more likely to enforce decisions with which they disagree if the court maintains popular support and public legitimacy ([Gibson, Caldeira and Baird 1998](#); [Gibson 2009](#); [Gibson et al. 2011](#); [Hall 2010b](#); [Lindquist and Klein 2006](#)). As such, justices have strong incentives to respond to legal factors during case selection, or at least to give the impression of doing so.

[Perry \(1991\)](#) was one of the first studies by a political scientist to explore potential legal factors influential to the agenda-setting process, conducting in-depth interviews with active and former U.S. Supreme Court justices and their law clerks to determine how those deeply involved in the Court's work view their role in agenda-setting. [Black and Owens \(2009\)](#) classify [Perry](#)'s arguments into three main legal factors: legal conflict, judicial review, and legal importance. One of the most important functions of any COLR is to resolve legal conflicts amongst lower courts. A legal conflict exists when two or more courts adopt differing interpretations over the intent or application of a law. In these situations, COLRs are responsible for resolving this conflict. For instance, the U.S. Supreme Court states in Rule 10 that petitions to appeal by permission, known formally as a writ of *certiorari*, will be granted "only for compelling reasons" ([Supreme Court of the United States 2013](#)). Such reasons include

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or

sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. ([Supreme Court of the United States 2013](#))

When legal conflict exists, the Court faces a strong norm to resolve the conflict no matter the justices' individual beliefs on the merits of the dispute.

Judicial review by a lower court presents another opportunity for the U.S. Supreme Court to review a decision based upon legal factors. When courts strike down laws as unconstitutional, legal norms dictate the Court should review the decision ([Shapiro et al. 2013](#), p. 264). The power of judicial review is one of the strongest policy tools courts have, but it also has the potential for significant abuse. It is a tool used sparingly by the Court: as of the conclusion of the 2013 term, the Court has only declared 176 federal statutes unconstitutional ([Congressional Research Service 2013](#), p. 2277-325), less than one per term on average.² As one justice notes

“[I]f a single district judge rules that a federal statute is unconstitutional, I think we owe it to Congress to review the case and see if, in fact, the statute they've passed is unconstitutional.” ([Perry 1991](#), p. 269)

²The Court has also struck down 953 state constitutional or statutory provisions and 124 local ordinances ([Congressional Research Service 2013](#))

Finally, the legal importance of a case can also determine whether or not the Court renders a decision on the merits. As several justices note in [Perry \(1991\)](#), sometimes the public demands the Court resolve an issue. Alternatively, certain cases are simply more important than others. The impact of the Court's decision in *Brown v. Board of Education*³ which struck down the practice of segregation in public schools, is inarguably more important than administrative standards of review in deportation proceedings.⁴ Even if a justice has doubts that the decision on the merits will be favorable to his preferred outcome, he will still vote to grant review based upon the legal importance of the case.

[Black and Owens \(2009\)](#) evaluated the strength of these factors relative to other policy-oriented theories of judicial agenda-setting using a sample of non-unanimous U.S. Supreme Court *cert* decisions ([Blackmun 2007](#)). Their findings confirm justices' desires to grant review when they believe the policy outcome of a decision on the merits is ideologically preferable to the lower court's ruling ([Caldeira, Wright and Zorn 1999; Segal and Spaeth 2002](#)). However consistent with Perry's expectations, [Black and Owens](#) also find evidence that justices' ideological concerns can be overridden by jurisprudential factors such as legal norms. If policy and the law conflict, justices become more likely to grant review in cases which they would otherwise reject and sacrifice their policy concerns for legal expectations. But not only does the law constrain justices' actions; it can also be used as a guise to engage in ideologically preferable behavior: when policy and the law coincide, justices are more free to act on their personal preferences. Thus, the law acts as "both a constraint on and an opportunity for Supreme Court justices" ([Black and Owens 2009](#), p. 1072).

³347 U.S. 483 (1954)

⁴See *Judulang v. Holder*, 132 S. Ct. 476 (2011)

2.1.2 The Influence of Litigants

As previously noted, appellate judges have limited control over the cases and issues upon which they issue decisions. In courts with mandatory jurisdiction, judges must hear all properly filed appeals regardless of their desire to act on the case. Compared to these institutions, the U.S. Supreme Court and other courts with discretionary jurisdiction have far more freedom to determine what issues deserve their limited time and attention. Again though, these justices are still limited to exercising negative agenda control: they can reject review, but still must wait for an appeal involving a specific issue before they can act on it.

Under these circumstances, litigants and interest groups have outsized influence over judicial agenda-setting. Issues cannot be brought before a court without a litigant. Litigants establish the factual circumstances of the case and help frame the issues involved in the dispute. They are responsible for expending the resources necessary to bring an appeal before the court. Interest groups fund and support many of these appeals and actively lobby the Court on issues before it through legal briefs. In short, any explanation of judicial agenda-setting must account for litigants and interest groups. In the following section I summarize previous research on interest groups and litigants, and their influence on judicial agenda-setting.

Interest Groups

Interest groups are active in establishing the judicial agenda even before justices are appointed to the Court. Since the Court's docket is largely determined by the justices themselves, influencing the membership of the Court allows a group to shape the types of issues the Court will hear. These activities are important when justices themselves have the power to filter the cases they hear, because it potentially predisposes them to

be active in specific issue areas. Justices do not hear cases at random, so the sample of cases they grant review is subject to the ideological preferences and jurisprudential concerns previously noted. Since the failed nomination of Judge Robert Bork to the U.S. Supreme Court in 1987, interest groups actively lobby the president and senators whenever a vacancy occurs on the Supreme Court ([Caldeira and Wright 1998](#); [Caldeira, Hojnacki and Wright 2000](#)). The confirmation process for judicial appointments introduces a veto point ([Moraski and Shipan 1999](#)) where interest groups can lobby senators to block objectionable appointments. This type of public advocacy has been shown to influence senators' confirmation votes ([Segal, Cameron and Cover 1992](#)) and has been held responsible, in part, for the withdrawn Supreme Court nomination of Harriet Miers in 2005 ([Whittington 2006](#)).

More typically, litigants and interest groups establish the pool of appeals from which the Supreme Court can grant review. In the United States, Article III §2 of the Constitution limits the Supreme Court's jurisdiction to "actual cases or controversies." The Court has interpreted this clause to mean that it can only act on cases which present an actual, ongoing legal dispute between two or more parties. As such, every case requires a set of litigants who disagree over the application or judicial interpretation of a law.⁵ Litigants are therefore responsible for bringing issues before the Court through legal challenges.

Interest groups participate in litigation either by directly initiating litigation or by participating in cases as *amicus curiae*. Interest groups as varied as the ACLU, NAACP, Americans United for Life, and Americans for Effective Law Enforcement have initiated numerous litigation campaigns in furtherance of specific policy goals

⁵In contrast, some states permit their respective supreme courts to issue *advisory opinions*, an opinion issued by a court expressing its interpretation of a law or constitutional provision in the absence of a legal case.

(O'Connor and Epstein 1983; Stewart and Sheffield 1987), though the effectiveness of using the courts to press for social change has been challenged by some scholars (Rosenberg 2008). Litigation is most utilized by long-standing organizations with sufficient resources to mount such a campaign, groups who cannot achieve their goals through the legislative process, and organizations representing large, clearly defined groups of individuals and interests (Scheppele and Walker Jr 1991; Wasby 1983).

Along with litigating through test cases, interest groups also intervene in relevant cases to which they are not a direct party. Individuals and organizations can participate as *amici curiae*, or “friends of the court,” by submitting legal briefs in support of or opposition to granting review for specific appeals. These briefs act as a signal to the Court about which interest groups are concerned over the fate of the appeal. In essence, the briefs act as a heuristic for justices to gather information on public interest in the case. Caldeira and Wright (1988) find that *amici* briefs communicate to the Court what interests are involved, who is at risk, and size and variety of the interests paying attention to the outcome of the appeal. Caldeira and Wright (1990) extend this research to examine which interest groups are most active in the Court, discovering that a wide range of interest groups (e.g. public advocacy groups, corporations, governments) participate in the agenda-setting process. Litigators can use this to their advantage by soliciting organized interests as *amici* on their petitions for *certiorari* (McGuire and Caldeira 1993; McGuire 1994).

While the Court historically has been perceived to have little positive agenda control, recent developments in theoretical approaches to judicial agenda-setting suggest a more active role for the Court. Under the “litigant signaling model” the Court remains dependent on outside actors to bring issues before it, but justices can signal potential litigants as to their willingness to hear specific issues (Baird 2007).

Interested parties, attorneys, and interest groups receive these signals and initiate litigation with the intent of appealing the case to the Supreme Court. Due to the length of time necessary to litigate the issue in the lower courts, the Court will not hear review any of these cases until several years later.

Analysis of the U.S. Supreme Court's agenda over time supports this theory (Baird 2004; Baird and Jacobi 2009) as politically salient Supreme Court decisions within a particular policy area are associated with an increase in the number and quality of Court decisions in that same policy area. Rice (2014) expands upon these previous analyses to examine the agenda of the entire federal judiciary and evaluates this interest group model of agenda-setting in contrast to a more conventional legal perspective, where the Court settles disputes within areas of law and decisions should lead to fewer cases. While decisions by the Court in a policy area do lead to fewer overall decisions being issued in that policy area by the lower courts, Rice also finds evidence of an increase in interest group activity and in the number of published opinions in the same policy area, offering support for a positive model of agenda control.

Solicitors General and Repeat Players

Tanenhaus (1963) authored one of the earliest models of the U.S. Supreme Court's *certiorari* decisions. Known as "cue" theory, it recognizes that the Court receives so many petitions for review that justices can not possibly read each legal brief in detail. Instead, justices utilize cues to separate "the *certiorari* petitions requiring serious attention from those that are so frivolous as to be unworthy of careful study" (Tanenhaus 1963, p. 118). Evaluating *cert* decisions, the authors identify statistically significant cues, including when the federal government seeks review, the presence of lower court conflict in a given case, and when a civil liberties issue is present. Over

time, scholars examining the issue rejected cue theory; while some cues such as the presence of the federal government are significantly related to a *cert* decision, cue theory does not strongly identify why these cues matter (Ulmer, Hintze and Kirklosky 1972). As stated by Teger and Kosinski, “[c]ue theory ends up saying that the Justices tend to accept cases that they think are important. Seen in this light, cue theory is not much of a theory” 1980, p. 845.

Knowing that cues such as these are important factors in deciding whether or not to grant review, scholars continued to investigate and theorize how cues work. Across a host of different studies, one cue appeared especially resilient to different model specifications: the role of the solicitor general. The United States Solicitor General is the government’s chief appellate litigator, tasked with formulating the government’s legal position, determining whether or not to appeal lower court decisions to the Supreme Court or join an appeal as an *amicus curiae*, and arguing on behalf of the United States before the Supreme Court. The solicitor general tends to be successful before the Court in both the agenda-setting stage (Black and Owens 2011; Caldeira and Wright 1988, 1990; McGuire and Caldeira 1993; Owens 2010; Perry 1991) as well as decisions on the merits (Bailey, Kamoie and Maltzman 2005; McGuire 1995; Zorn 2002).

Explanations for this high degree of success fall into three major categories: resources, separations-of-powers, and repeat player status. For one, the government of the United States (and most governments in general) possesses significantly more resources to pursue litigation than any other individual or organization (Black and Boyd 2012; Sheehan, Mishler and Songer 1992). The government can devote thousands of hours to case research and preparation, and call upon the large arsenal of government litigators to craft and perfect its legal arguments. Compared to even the wealthiest

individual or largest corporation, the resources of the government cannot be matched. [Sheehan, Mishler and Songer \(1992\)](#) find that federal and state governments have a net advantage over its opponents in decisions on the merits, but that the resource advantage is not absolute. Outside of the federal government, the resource advantage is mitigated by changing ideological preferences on the Court. [Black and Boyd \(2012\)](#) apply the resource advantage model to the Court's agenda-setting decisions, finding similar evidence that resource-advantaged litigants are more successful at obtaining appellate review but that the effect is moderated by a justice's ideology.

The solicitor general's success can also be attributed to the Court's role and interaction with the other branches of government. U.S. Supreme Court justices have previously reported deference to the executive's preferences when granting appellate review ([Perry 1991](#); [Black and Owens 2011](#)). As a representative of the United States government, the Court similarly defers to the preferences and arguments of the solicitor general ([Bailey, Kamoie and Maltzman 2005](#); [Black and Owens 2011](#); [Owens 2010](#)). While formally independent with its own source of power, the Court still relies on Congress and the president to implement its decisions. If the Court steps too far outside the policy preferences of these institutions, implementation of the decision could be delayed or the decision reversed entirely ([Segal 1997](#)). When the Court faces these concerns, the justices will often look to the solicitor general to clarify the government's position.

Finally, solicitors general are more successful because they appear before the Court so frequently ([Caldeira and Wright 1988](#); [McGuire 1995](#)). The solicitor general, both individually and as an institutional office, regularly interacts with the Court. When the United States petitions a case to the Supreme Court, the solicitor general approves (and often authors) the government's brief. If a case involving the United States comes

before the Court, the solicitor general argues the government's position. If the Court wants to hear the United States' position in a case to which it is not a party, it is the solicitor general who responds to this request. Over time, the Court comes to rely upon the solicitor general for information and expertise, leading some scholars to refer to the solicitor general as the "tenth" justice ([Caplan 1987](#)). Furthermore, this type of relationship and success rate is not limited to solicitors general: experienced litigators with more practice before the Supreme Court are more likely to experience success before the Court than inexperienced attorneys ([McGuire 1995](#)). This evidence suggests experience matters, and by the nature of his or her job the solicitor general acquires a great deal of it.

2.2 An Institutional Strategic Model of Agenda-Setting

While these models explain U.S. Supreme Court justices' preferences and how they respond to other actors, each of them is directly tied to the Supreme Court as its source of knowledge and expectations about behavior. However the U.S. Supreme Court is an extremely atypical institution to which no other court is similar. As such, these explanations are not directly generalizable to other appellate courts, or even other COLRs. The design of the court offers extraordinary insulation for and protection of sitting justices. Justices on the Supreme Court possess lifetime tenure and therefore are protected from personal or professional retaliation for their actions. In contrast, many sub-national judges, as well as judges in foreign courts, serve for fixed-length terms and must pass through a retention process to maintain their position ([Epstein, Knight and Shvetsova 2001](#)); such jurists are thus responsive not only to

their own personal preferences but also to those of the actors responsible for their retention. As such, the “attitudinal model” of behavior, the dominant model of judicial decisionmaking over the past twenty years, does not apply outside of the Supreme Court. Any theory of agenda-setting derived from this model (Benesh, Brenner and Spaeth 2002; Caldeira, Wright and Zorn 1999; Perry 1991) cannot be used to explain another court’s agenda-setting behavior.

Beyond the motivations and incentives of judges and litigants, the U.S. Supreme Court is unusual in its procedures for selecting cases and establishing its agenda. Many COLRs handle a sizeable number of appeals by right, or cases on which the court must issue a ruling (Schauffler and Strickland 2012). On these issues judges have no control over their agenda and are forced to issue a ruling on the matter. However the Supreme Court’s mandatory docket is only a small fraction of its overall agenda and continues to decline (Soltoff and Zorn 2015; Starr 2005). Because procedural rules have changed so infrequently on the Supreme Court, one cannot even leverage change over time within the Court to assess the impact of institutional variation on agenda-setting.

For these reasons, I propose a new theory of agenda-setting which integrates insights from the individual and institutional theories described above, but incorporates institutional design to explain variation in agenda-setting priorities and actions. It begins with the assumption that COLR justices are rational actors seeking to maximize their goals (Segal and Spaeth 2002). Unlike U.S. Supreme Court justices, this model considers justices’ motivations as a mix of three (potentially competing) goals: 1) implementing their personal policy preferences; 2) retaining their judicial position; and 3) minimizing (or, at least, managing) their individual workload. This broad conception of judicial goals is consistent with previous research on non-life

tenured justices, which recognizes that most judges' independence is limited, and that they must temper their actions to conform with the preferences of other actors (Langer 2002). I add the additional assumption that, given all else is equal, justices prefer to limit the number of cases on which they decide: if they can achieve their goals through fewer cases and less work, they will.

I also incorporate litigants and interest groups in this model of agenda-setting, since justices necessarily rely upon them to put issues on the agenda. I assume litigants are rational actors motivated by their desire for a positive outcome but which possess varying levels of resources. As to a positive outcome, some litigants will be unconcerned with broader policy ramifications and are solely concerned with winning their case; other litigants who seek to implement wide-ranging policy through the courts will be more strategic in their decision whether or not to appeal a lower court ruling (Brace, Yates and Boyea 2012). On the matter of resources, litigants possess different levels of resources to pursue their cases, and these varying resources will translate into varying levels of success in the courts (Galanter 1974; Brace and Hall 2001). Judicial appeals are costly affairs, and parties must balance their desire to win on the merits with the potential costs incurred from further litigation. This implies that resource-poor litigants have a lower probability of filing appeals with appellate courts, and when they do their case is less likely to receive a full hearing on the merits.

Interest groups may act as litigants by initiating litigation, but they can also operate as independent actors to pursue their goals. Unlike individual litigants, interest groups are concerned with broad policy outcomes and utilize the courts as one political institution among many to achieve their objectives (Holyoke 2003; Scheppele and Walker Jr 1991). In so doing, they will attempt to shape policy attention in COLRs through any legitimate means available. It is these types of litigants who will

most likely account for the potential decision on the merits before deciding whether or not to appeal.

Several additional assumptions are necessary to complete this model. First I adopt the core assumptions of Langer (2002) that justices can knowingly risk electoral or policy retaliation for their actions, that they have incomplete information regarding the preferences of other institutional actors, and that electoral and policy retaliation against a justice incurs some cost.⁶ I also assume justices have incomplete information about other justices' preferred outcomes, but that they can (imperfectly) anticipate the outcomes of future decisions and incorporate this knowledge into their own decisions. Finally, I assume the probability of further appellate review is low, but not necessarily zero. COLRs are, by definition, usually the final level of appellate review, so further appeals to a higher court are unlikely.

These assumptions suggest certain behavior by justices, litigants, and interest groups with respect to judicial agenda-setting. Justices want to make good public policy and will seek to hear cases if they believe they can win on the merits and still retain their seat. At the same time, justices also want to minimize their workload when possible, and therefore are unlikely to hear a case unless it helps them pursue a policy preference or increase their probability of retaining their seat on the bench. Litigants care about winning their own cases and are generally not concerned with the impact of policy decisions on other parties. As such they will pursue their case as long as they disagree with the lower court decision and the potential benefits of victory outweigh the costs associated with filing an appeal. Interest groups are concerned with broader policy outcomes and the impact of COLR decisions on issues of concern. These groups could be devoted to a single issue (e.g. tax policy, education, agriculture)

⁶As I describe below, the specific nature of these costs varies depending on the institutional context.

or fit a broader ideological description (e.g. liberal or conservative policies). The resources of these groups will dictate their tactics, but could include behavior such as influencing the selection of justices to COLRs, initiating and funding litigation on issues of concern, or incentivizing justices to hear specific appeals.

While these individual-level assumptions about the motivations of justices and litigants are consistent within any court, my model allows the institutional structure to vary widely across different court systems. *Institutional rules and procedures adopted by COLRs alter the consideration and importance of different motivations by justices and litigants.* In order to understand how judges, litigants, and interest groups act to shape a court’s agenda, one must first identify the relevant institutional features and evaluate how they should alter the competing preferences and relative power of these actors. Here, I describe two major aspects of institutional design which alter the agenda-setting process and identify potential implications on judicial agenda-setting.

2.2.1 Procedural Path

Appellate cases can reach COLRs through one of two procedural paths: appeals by *permission* and by *right*.⁷ Appeals by right are cases the court is required to hear. The court must render a decision on the merits for these types of appeals, whether or not the court wants to hear the case. For example, state COLRs in the United States are required to review all initial appeals by a criminal defendant sentenced to death.⁸ It does not matter whether the justices believe the appeal is frivolous or raises a substantial question of law: the COLR must decide the appeal on the merits of the

⁷Also known as *discretionary* and *mandatory* appeals.

⁸*Gregg v. Georgia*, 428 U.S. 153 (1976) requires each state with the death penalty to create an appellate process which guarantees “meaningful review” of each death penalty conviction by the COLR.

legal arguments.

Under an appeal by permission, COLRs have the option to dismiss an appeal without making a decision on the merits. In these situations, the court does not make a judgment as to the merits of the case; instead, the court does not believe the lower court decision needs to be reviewed and the previous decision stands without a precedent being set. The vast majority of appeals to the U.S. Supreme Court are appeals by permission. When the petition is denied (also known as a denial of *cert*), lower courts cannot consider the Court's action as a signal of agreement with the original decision.⁹ Traditionally, COLRs which handle mostly discretionary appeals reject most petitions for review ([LaFountain et al. 2010](#)).

Generally these procedural requirements are established via the constitution or a legislative act, though occasionally COLRs are delegated the rulemaking power to alter these procedures. Justices operating on COLRs with mostly appeals by right have little opportunity to strategically shape their agenda through the conventional means of granting or denying review. For litigants and interest groups seeking review in these courts, the barrier to judicial access is removed by requiring all cases to be reviewed. Conversely, justices with mostly discretionary appeals are similar to U.S. Supreme Court justices in that they have significant negative agenda control. Litigants and interest groups must devote significant resources just to have their case reviewed, and as such the types of issues appealed under discretionary procedures will be different from the caseload under mandatory procedures.

⁹“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case...” (see *United States v. Carver* 260 U.S. 482 [1923])

Decision Rules Under Appeals by Permission

Under discretionary procedures, COLR justices vote on which cases will receive full hearings before the court. Voting on petitions to appeal has been closely studied in the U.S. Supreme Court (Perry 1991; Caldeira, Wright and Zorn 1999; Black and Owens 2009). All of these studies are based on the Supreme Court’s “Rule of Four” that requires four justices’ votes to grant review. The rule appears countermajoritarian by empowering a minority to impose its will on the minority, but scholars recognize the nature of the rule and posit that it is not really countermajoritarian because justices are strategic actors and take into account the likely decision on the merits if the Court hears the appeal (Segal and Spaeth 2002). Their hypothesis is that when justices think they will lose on the merits, they will vote to deny review and prevent the Court from establishing a binding precedent (negating any countermajoritarian effects of the Rule of Four).

Two important questions raised by this thinking are is the rule really countermajoritarian, and if so, why not a different number? The U.S. Supreme Court adopted the Rule of Four through its general rulemaking authority, via a majority decision of the justices themselves. At any time, the majority could change the rule to impose a different voting requirement, such as a five vote majority. Yet the Rule of Four dates back as far as 1924 (Provine 1980), and no majority has seen fit to overturn this procedural rule. Lax (2003) models *certiorari* as an interaction with compliance by lower courts, theoretically demonstrating that the rule in fact strengthens the majority through signalling to lower courts and inducing compliance with U.S. Supreme Court precedents. The Rule of Four is thus superior to a “Rule of Five” and sufficient such that to induce compliance, a smaller rule is unnecessary (2003, p. 82). If COLRs act in accordance with Lax’s theory of auditing and compliance, then the minimum

number of votes to grant review in any given court should be $\frac{N}{2} + 1$, where N is the number of justices on the court. However there is no firm requirement that COLRs must adhere to this decision rule.

These varying agenda processes should produce systematically different caseloads. Cases heard subsequent to mandatory appeals will be a mixture of “easy to decide” cases (with justices engaging in error-correction and typically agreeing on the outcome) and “difficult” cases (those which justices cannot strategically avoid, or are controversial). With appeals by permission, justices have a measure of control over what cases they hear and will strategically vote to grant or deny appeals depending on whether they believe they can win on the merits. In all instances, the more ideologically cohesive the court, the more likely a majority coalition will form. However the more votes are required to grant the appeal, the more difficult it should be to hear the case, since a larger coalition is necessary at the agenda-setting stage to grant the appeal. This suggests that for discretionary appeals, ideological cohesion on the court will lead to an *increase* in the number of appeals by permission while a higher voting threshold will lead to a *decrease* in the number of appeals. Clear expectations are that *a*) a specific issue will be absent if the COLR has no jurisdiction,¹⁰ *b*) a given issue will be prevalent if it is an appeal by right, and *c*) the prevalence of a given issue if it is an appeal by permission is a function of the interaction of the ideological balance on the COLR and the number of votes required to grant the appeal.

These procedural rules also should produce measurable differences in the behavior of COLR justices as it relates to appeals by permission. Justices know their colleagues relatively well, and can make informed decisions to vote to grant or deny review

¹⁰Some COLRs are explicitly prohibited from issuing decisions in cases involving certain policy or legal issues ([Pfander 1999](#)), or if the litigant does not submit the appeal in a timely fashion (for example, see *Ledbetter v. Goodyear Tire & Rubber Co.* 550 U.S. 618 [2007]).

based upon the expected outcome on the merits. We would expect justices serving on ideologically dissimilar courts will be less inclined to vote to grant review since they have more difficulty predicting the decision on the merits, while justices on ideologically cohesive courts will be more likely to grant review. This voting behavior will be conditional on both the voting rule and how close the justice is to the ruling majority on the court. First, the greater number of votes necessary to grant review, the less likely a justice will be able to obtain enough affirmative votes to grant review. Justices on COLRs with higher thresholds to grant review will in general be less likely to vote to grant review in any given appeal since it is more difficult to form a voting coalition to secure the appeal. Second, justices will be less likely to vote to grant review the farther they are from the median of the court. State COLR justices still seek to maximize their preferences through decisions on the merits, so justices who are outliers or in the ideological minority will prefer to deny review rather than allow the majority to impose a decision far from the preferences of the justice ([Perry 1991](#); [Caldeira, Wright and Zorn 1999](#)).

2.2.2 Selection/Retention Method

At the federal level, the process of presidential nomination and Senate confirmation to life terms is straightforward, though scholarship suggests it is much more complex in practice ([Moraski and Shipan 1999](#); [Johnson and Roberts 2004](#); [Krehbiel 2007](#)). However, once nominees survive the appointment process, they do not have to worry further about their job security. In contrast, many COLR justices share neither this lifetime tenure nor this method of initial selection ([Epstein, Knight and Shvetsova 2001](#); [Schauffler and Strickland 2012](#)). Instead, they face regular time periods when an outside body determines whether or not the justice will retain her position on the

bench, and many different forms of selection and retention exist.

Justices on the vast majority of COLRs across the world are appointed to office, either by the head of government, a judicial council, or another government agency ([Central Intelligence Agency 2010](#)). Within the United States, while some justices on sub-national COLRs are appointed to office by either the governor or legislature, most are popularly selected in public elections. Several different variations of judicial elections are utilized ([American Judicature Society 2013](#)), including:

- Partisan elections – a contested election where multiple candidates run for the same judicial office, obtain the official endorsement of a political party, and their party affiliation is listed on the ballot;
- Nonpartisan elections – a contested election where multiple candidates run for the same judicial office, but the candidates' party affiliation is not identified on the ballot; and
- Retention elections – a non-contested election where a justice is initially appointed by the governor (often with the advice of a nominating commission) and voters then decide whether the judge should remain on the bench.

Legal scholars and social scientists alike have raised concerns about the merits of judicial elections ([Caufield 2007; Chemerinsky 1998; Champagne 2000; Shepherd 2008; Streb 2007](#)) and their impact on judicial decisionmaking. The legal community has been especially active in this debate, as groups such as Justice at Stake, the Brennan Center for Justice, and the American Bar Association have drafted and advocated for proposals to replace judicial elections with appointment systems ([American Bar Association 2003; Shepherd 2013](#)). Challengers to this narrative have also written substantially on the topic, employing empirical analysis to counter many of the normative assertions

offered by appointment advocates (Bonneau and Hall 2009; Gibson 2008, 2009; Gibson and Caldeira 2012; Hall and Bonneau 2013; Kritzer 2011). These studies find little empirical support for the claims made by judicial reformists, instead presenting a much more favorable interpretation of judicial elections: expensive, partisan campaigns increase, rather than reduce, citizen participation in judicial elections (Bonneau 2004, 2005), while money does not in fact “buy” elections (Hall 2001, 2009), but supports elections which help to “enhance the quality of democracy and create an inextricable link between citizens and the judiciary” (Bonneau and Hall 2009, p. 17).

While these empirical results offer many different implications on the efficacy of judicial elections, selection methods clearly influence the behavior of justices, litigants, and interest groups in specific ways. Partisan judicial elections generate higher turnout and competition than nonpartisan elections (Bonneau and Hall 2009), so the method of selection influences the types of candidates elected to office. Interest groups are increasingly active campaign financiers in these elections, with a strong incentive to contribute to justices’ electoral campaigns. For example, justices who receive contributions from business interest groups are more likely to vote in favor of businesses (Kang and Shepherd 2011; Shepherd 2013). Business interest groups would therefore achieve significant benefits by getting favorable judicial candidates selected to office. Litigants and attorneys also potentially draw benefits from supporting judicial candidates; for example, Cann (2007) finds that Georgia Supreme Court justices are more likely to vote for attorneys who contribute to their previous electoral campaign, while Cann, Bonneau and Boyea (2012) extend this research to decisions by justices in Michigan, Nevada, and Texas, accounting for both partisan and nonpartisan COLRs. At the same time, money is only one of several important factors in determining which judicial candidate wins an election (Bonneau and Hall 2009).

Money and campaign spending could have two different effects on judicial agenda-setting. The first possibility is that money influences who is selected to the COLR. Different justices will have different policy interests, and when they control their own docket (i.e. when appeals are by permission) they can grant review in cases addressing the specific issues which interest them. This process of review will lead to a different pool of decisions on the merits depending on the composition of the COLR ([Kastellec and Lax 2008](#)). As such, interest groups should not only spend money on judicial elections because of their concern for the final outcomes of cases before the COLR, but also to ensure the Court is naturally predisposed to review cases involving their issues of concern.

Another possibility is a more direct path: that money influences whether or not an appeal is granted review. In this view, contributions are not targeted to influence electoral outcomes, but are designed to curry favor with the justice and increase the probability of the justice voting to grant review ([Austen-Smith 1995](#)). In this scenario, a contribution is offered to ensure access to the judiciary, in a manner similar to a lobbyist contributing to a legislator's electoral campaign in order to have the attention of the legislator on important issues. In one of the only studies on this topic, the [Feldman et al. \(2001\)](#) reports evidence that the probability of judicial review by the Texas Supreme Court increases when justices receive campaign contributions from business petitioners. In such a situation, judicial selection and the electoral environment could have a significant effect on the agenda of state COLRs.

Term Length

As the method of selection and retention effect the decisionmaking on COLRs, so too does the length of terms. Fixed term lengths restrict the ability of justices to act

freely and independently in their decisionmaking if their decisions are contrary to the policy preferences of the entity responsible for retaining the justices. Particularly in popular retention systems, justices will need to bring their decisions more in line with the popular position if they want to remain in office.

The extent of this shift in position depends in part on the length of term. In the legislative context, the framers of the U.S. constitution deliberately set the term lengths of senators to be longer than representatives to decrease their responsiveness to public pressures.¹¹ The longer term length grants senators more independence early in their term since they still have plenty of time to adjust their positions to match what their constituents support (Kuklinski 1978; Thomas 1985). Likewise, justices possess similar freedom through longer terms of office. This grants justices greater freedom in the earlier years of their terms, while restricting behavior closer to the end of their term if they seek to retain office (Huber and Gordon 2004).

The effects of retention systems and term lengths on judicial behavior might not be limited solely to the selection of justices and their decisions on the merits: it could also have a profound impact on judicial agenda-setting. Justices should be most responsive to bodies which decide on their continued position on the court. When differences exist between the preferences of the public and its elected officials, strategic justices should respond most strongly to the preferences of the institution responsible for deciding upon their retention. Just as “aggressive grants” and “defensive denials” are used by U.S. Supreme Court justices to improve ideological outcomes (Perry 1991; Caldeira, Wright and Zorn 1999), so too state COLR justices can use the agenda-setting process to improve their odds of retention. When justices have discretion over the cases they hear (i.e. when appeals are by permission), justices might use their agenda-setting

¹¹James Madison, “Federalist #62,” in *The Federalist Papers*, http://thomas.loc.gov/home/histdox/fed_62.html

powers to avoid especially contentious issues which would weaken their likelihood of retaining office (see Chapter 1 and the Texas Court of Criminal Appeals behavior in *Lawrence*). If a justice receives such a case, he can vote to deny review and avoid the case entirely. Hall (1992) finds evidence that justices act strategically to minimize electoral opposition by suppressing dissent even if the decision is contrary to their ideological preferences. If the opportunity presents itself, a strategic justice may also seek to avoid the case entirely by denying review.

In some situations, justices may simply have no choice but to hear the case because of strong legal norms to resolve contentious or important issues regardless of the outcome (Perry 1991; Black and Owens 2009). In fact there are numerous examples of justices who lack lifetime tenure rendering decisions in publicly contentious cases which later cost them their jobs. California Chief Justice Rose Bird was denied retention by voters in 1986 over her refusal to enforce California's death penalty statute (Culver and Wold 1986). In 2010, three Iowa Supreme Court justices lost their jobs in a retention election after voting to overturn an Iowa statute prohibiting same-sex marriage (May 2013). In both of these situations, it is unclear how the justices could have avoided rendering a decision. In the former case, following the U.S. Supreme Court's decision in *Gregg v. Georgia* 428 U.S. 153 (1976), states imposing the death penalty must conduct an appellate review of all death sentences. In the Iowa case, the district court had already struck down the law as unconstitutional. Under traditional legal norms, the COLR was expected to review this decision. "Defensive denials" for electoral concerns may not be possible in highly salient and legally important cases, but when cases could be threatening but are not yet salient justices could be expected to engage in this behavior.

2.3 Summary

In this chapter, I examined the power and preferences of judges, litigants, and interest groups in the agenda-setting process for the U.S. Supreme Court. Based on these competing preferences, I derived a general framework for explaining agenda-setting in the context of other COLRs. After explaining the various preferences of each actor, I considered the influence of specific institutional structures on agenda-setting and generated several predictions about how they influence judicial agenda-setting. Having established why these institutional structures are important to explaining agenda-setting, in the following chapter I summarize the institutional variation across state COLRs and describe how they differ from each other.

Chapter 3

Institutional Design in State Courts of Last Resort

In this project I focus on state COLRs, as these important courts exhibit a broad range of institutional and procedural designs. State COLR provide 52 different opportunities¹ to explore why justices grant certain appeals over others, the effect of outside parties on judicial access and issue attention, and how courts shape their overall agenda. Prior research suggests selection/retention methods (Hall 1992; Langer 2002), term lengths (Huber and Gordon 2004), and jurisdictional rules (Eisenberg and Miller 2009) all have significant influences on the behavior of justices and the decisions reached by the courts. Given these and other forms of institutional variation, state COLRs are logical settings in which to empirically test an institutional-strategic model of judicial agenda-setting. Institutional rules varies dramatically between states and thus should alter the behavior of justices, litigants, and interest groups acting in different states. Furthermore, the effects of this behavior should be apparent at

¹Oklahoma and Texas split COLR jurisdiction between two courts: one exclusively for criminal appeals, the other for all other cases.

multiple levels of aggregation: at the macro-level, or overall issue attention by COLRs, and at the micro-level, or actions taken by individuals both within the process of litigation and outside the courthouse. In the remainder of this chapter, I identify relevant institutional rules and outline the differences across state COLRs.

3.1 Procedural Path

The primary source for data on state COLR structure and institutional rules is the National Center for State Courts' (NCSC) *State Court Organization Series (2012)*. The center conducts a survey of state court administrators every six years dating back to the 1980s. The most recent iteration of the survey was conducted in 2010. The report identifies extensive information about the state judicial system, including all trial and appellate courts. Of relevance here, the SCO includes detailed records of appellate court jurisdiction, or what I refer to as the procedural path, across different types of appeals based on the legal nature of the dispute: civil, capital criminal, non-capital criminal, administrative agency, juvenile, disciplinary,² original proceedings,³ and interlocutory.⁴

According to the *State Court Organization Series (2012)*, there are four possible procedural paths: appeal by permission, appeal by right, appeal by permission and/or right, and no jurisdiction. The first two are exactly the same as described in Chapter 2. An appeal by permission and/or right means that the COLR could receive appeals following either procedure within this case type. These rules take various forms, and are generally based on the specific subject-matter of the appeal. For example, all

²Including discipline for both attorneys and judges.

³“An action that comes to the appellate court in the first instance” (*State Court Organization Series 2012*)

⁴An appeal from the ruling of a trial court before a final decision is reached in the case.

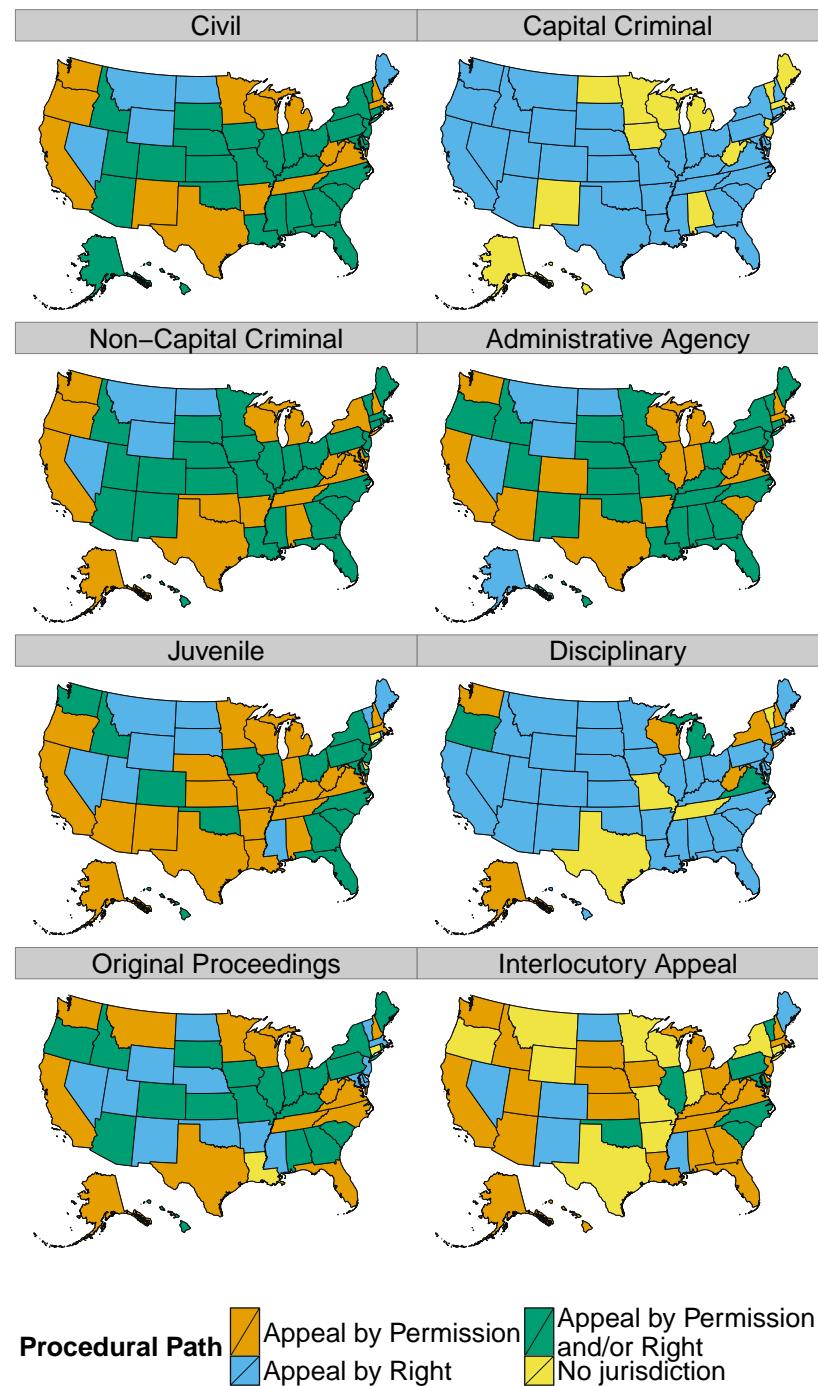
criminal appeals submitted to the Connecticut Supreme Court involving a sentence of greater than 20 years are submitted as appeals by right, whereas any appeal of a sentence less than 20 years is submitted as an appeal by permission; in Alabama, any civil appeal exceeding \$50,000 is heard by right, while disputes under this limit are heard by permission. Alternatively, a court may lack jurisdiction over a case. In this situation, the COLR is explicitly prevented from accepting an appeal. While potentially trivial, an actual example of this would be the Oklahoma and Texas Supreme Courts: the state constitutions create a Court of Criminal Appeals to act as the court of last resort for all criminal cases, so the “Supreme Courts” do not hear any criminal appeals.

Figure 3.1 identifies the appellate procedures across these eight different case types for each state, demonstrating the wide variation of approaches by states to appellate procedure. For major types of cases such as civil, non-capital criminal, and administrative agency appeals, states provide a broad mix of procedural paths to appeal. In two areas, states are much more uniform. In capital criminal cases, the U.S. Supreme Court requires each state with the death penalty requires the COLR to hear appeals by right.⁵ In states where the COLR is responsible for disciplining attorneys and/or judges for misconduct, most COLRs hear these cases by right.

Across all case types, on one extreme states such as Nevada, South Dakota, and Wyoming must hear almost every case brought before it (see Figure 3.2. At the other extreme are states like Michigan, New Hampshire, Washington, and Virginia which have discretion over virtually every type of case. The pattern of procedural paths utilized in state COLRs does not appear to be based on region or ideology. Historically state COLRs exclusively utilized appeals by right until the mid-20th

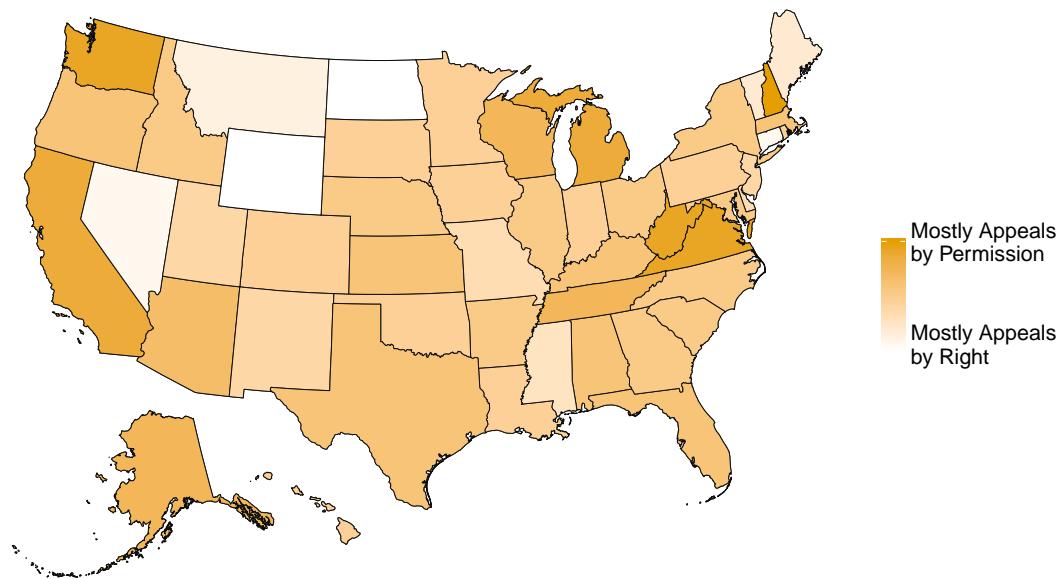
⁵This guarantee only protects an initial appeal. Subsequent appeals by defendants may be treated as appeals by permission.

Figure 3.1: COLR Appellate Procedure by Case Type



Source: Schauffler and Strickland (2012).

Figure 3.2: Summary of State COLR Appellate Discretion



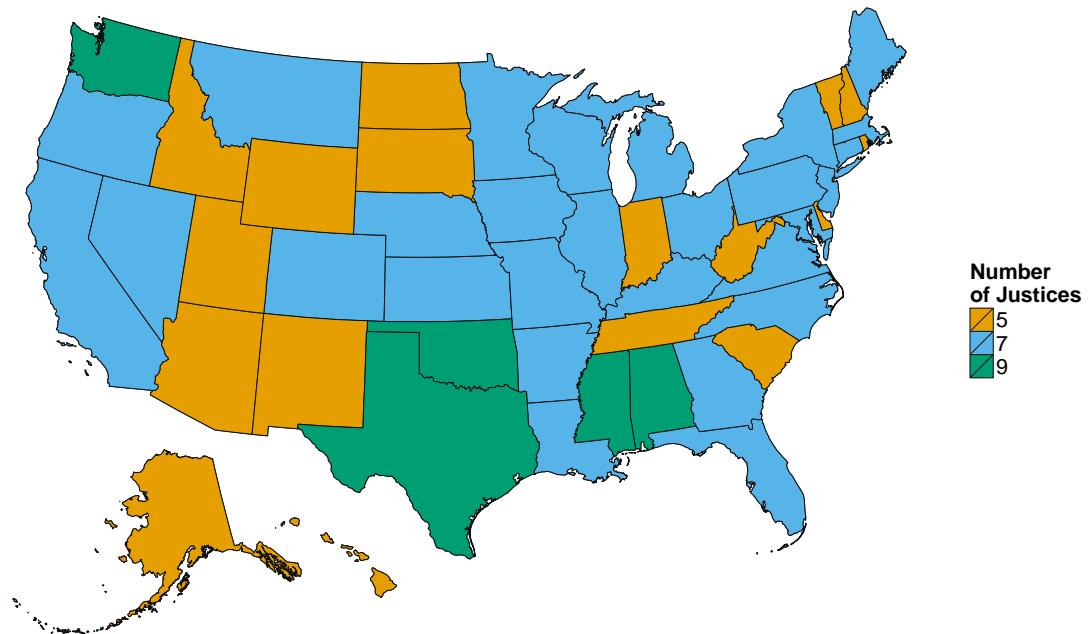
Source: Schauffler and Strickland (2012).

century and the wider implementation of intermediate appellate courts (IACs) (Kagan et al. 1978); since then, state COLR dockets are more likely to be comprised of appeals by permission. While some state COLRs continue to hear most appeals by right, most states have shifted to appellate systems which provide COLR justices more discretion over the cases they hear.

Decision Rules Under Appeals by Permission

COLRs which hear appeals by permission have different decision rules in order to determine whether the court will grant review in a case. While the U.S. Supreme

Figure 3.3: Number of Justices on the COLR



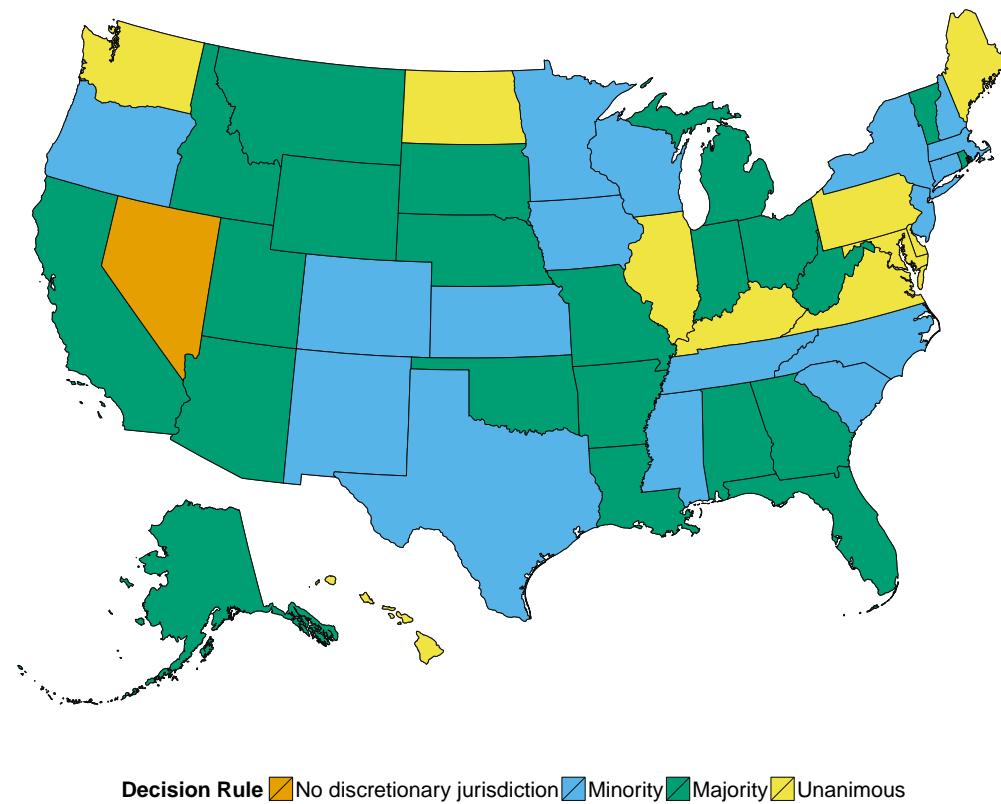
Source: Schauffler and Strickland (2012).

Court requires four out of nine justices to grant review, state COLRs differ in both the number of votes required to grant review as well as the total number of justices on the court. Figure 3.3 identifies the number of full-time justices sitting on each COLR; states vary between five and nine justices with most states having only seven.

Figure 3.4 identifies whether the state COLR utilizes a minority, majority, or unanimity voting rule to grant review.⁶ Unlike the U.S. Supreme Court and as

⁶States which adopt unanimity rules consider petitions to appeal by permission on smaller panels, rather than the entire court considering the petition *en banc*. Justices are randomly assigned to these panels and the membership typically rotates on a regular basis (*State Court Organization Series 2012*).

Figure 3.4: COLR Voting Requirements for Petitions to Appeal by Permission



Decision Rule ■ No discretionary jurisdiction ■ Minority ■ Majority ■ Unanimous

Source: Schauffler and Strickland (2012).

predicted by Lax (2003), most state COLRs adopt majority or unanimity decision rules to grant review in appeals by permission. Only 17 states require just a minority of justices to grant review.⁷

⁷While some states such as Montana and North Dakota hear nearly all appeals by right, they still include provisions for granting review in the small number of cases which they may consider by permission. Nevada, which hears all appeals exclusively by right, does not have any procedure for reviewing petitions to appeal by permission.

3.2 Selection and Retention Methods

In the United States, each state independently determines how to select and retain justices on their COLR. Since the founding of the country, several waves of judicial reforms led to a wide variety of selection methods ([Coalition for Justice 2008](#)). Originally, states appointed judges for life; the founders wanted strongly independent judges based upon their dealings with judges under colonial rule, who served at the pleasure of the king and were perceived to be biased. This is why all federal judges are appointed for life. However, beginning in the 1820s states began to adopt partisan electoral methods consistent with the principles of the Jacksonian era. In these times, political leaders believed it most important to hold judges accountable to the popular will. Appointed judiciaries were seen as being controlled by the wealthy elite.

Under the populist movement of the late 19th century, many states shifted to nonpartisan elections in order to reduce the “political machine” influence over judicial elections. Eventually though, judicial elections faced criticism for injecting politics into the judiciary and causing judges to act like politicians. This subsequently led to the Missouri plan in 1940. Under this plan, judges are nominated by a nonpartisan commission, the governor appoints one of these candidates, and after a couple of years the judge faces a retention election to serve a full term in office. This hybrid system became popular predominantly in midwest and western states. Following a wave of changes in the 1960s, few states have made modifications to their systems of selection and retention.⁸

Many states utilize different systems for the initial selection of justices and the

⁸In 2002, the North Carolina legislature established nonpartisan, rather than partisan, elections for justices ([American Judicature Society 2013](#)); in April 2015, West Virginia approved changes to change the state’s partisan election system for judges to a nonpartisan system, effective with the 2016 general election ([Dickerson, John. “Judicial elections in West Virginia will now be nonpartisan.” Legal Newsline Legal Journal, 1 April, 2015.](#)).

subsequent retention of them. When a position on the COLR is vacant,⁹ the five major types of initial selection methods in state COLRs are:

1. Partisan election
2. Nonpartisan election
3. Legislative appointment – justices are nominated and confirmed by the legislature.
4. Gubernatorial appointment – justices are nominated by the governor and confirmed by the legislature or a judicial council.
5. Merit selection – also known as the “Missouri Plan.” Judicial applicants are evaluated by a nonpartisan or bipartisan nominating commission which forwards the names of the best qualified candidates to the governor, who then appoints one of these nominees.

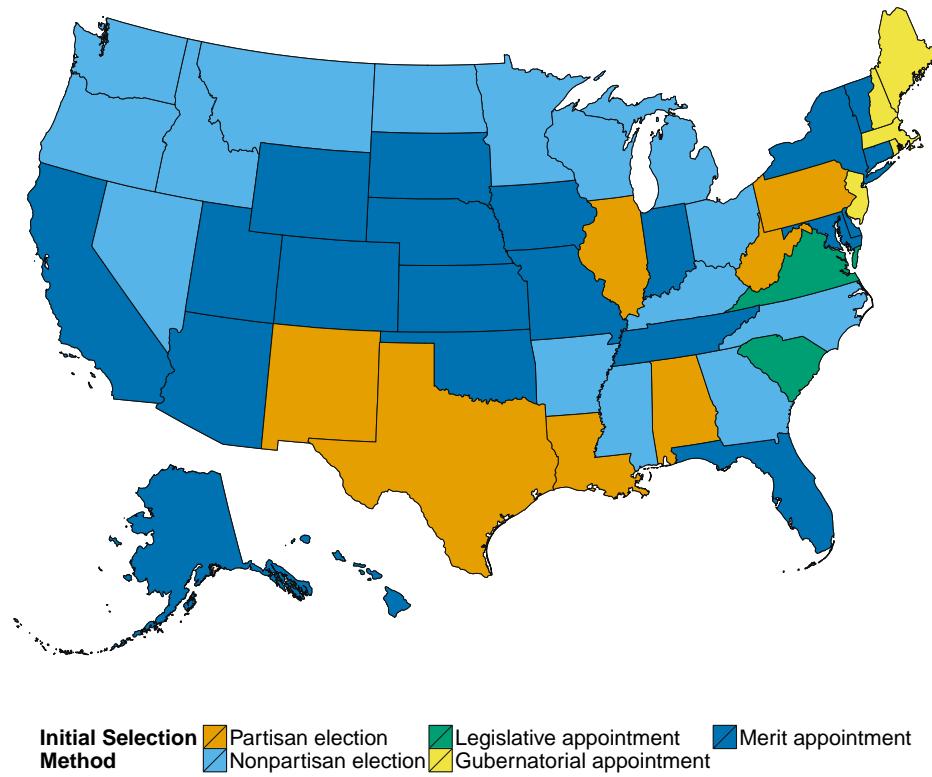
Figure 3.5 identifies the method of initial selection for each state COLR. The most common method of selection is merit selection, followed closely by nonpartisan elections (see Figure 3.6). Pure gubernatorial appointments are confined to several New England states which have not significantly modified their selection methods since the 1700s, while only two states (South Carolina and Virginia) empower the legislature with appointing justices.

Following the initial term, another set of retention methods is used to determine whether the justice remains in office. These methods include:

1. Partisan election

⁹Or alternatively the first general election after the governor has made an interim appointment.

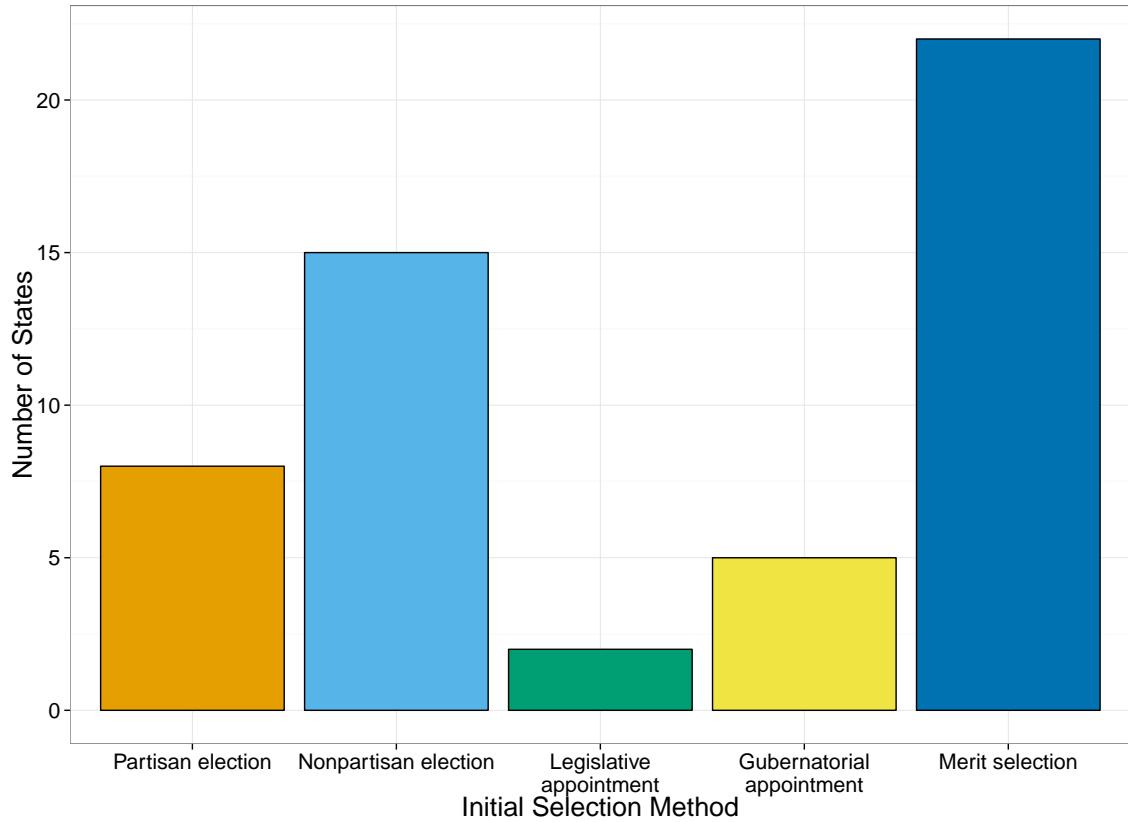
Figure 3.5: Initial Selection Method



Note: Initial selection methods for the civil and criminal COLRs in Oklahoma and Texas are identical. Source: [Schauffler and Strickland \(2012\)](#).

2. Nonpartisan election
3. Retention election
4. Gubernatorial/legislative reappointment
5. Merit appointment – a nominating commission recommends whether or not the justice should be reappointed. If the nominating commission recommends reappointment, then the governor decides whether or not to reappoint the

Figure 3.6: Summary of Initial Selection Methods



Note: Selection methods for the civil and criminal COLRs in Oklahoma and Texas are identical. Source: [Schauffler and Strickland \(2012\)](#).

justice.¹⁰

6. Life tenure – justices do not serve fixed length terms, but instead are appointed for life (or until a mandatory retirement age).

Figure 3.7 reports the retention method utilized by each state COLR. Combined with the initial selection method, we get a fuller picture of the politicization of selecting and retaining justices in each state. Rhode Island utilizes the most similar system to

¹⁰In Hawaii, the nominating commission makes the final determination and the governor is not involved.

the federal judicial selection process: the governor appoints one of several candidates identified by a nominating commission, and the state senate confirms the nominee. Once appointed, the justice serves for life. Massachusetts and New Hampshire follow similar processes, except that they mandate retirement once a justice reaches the age of 70.

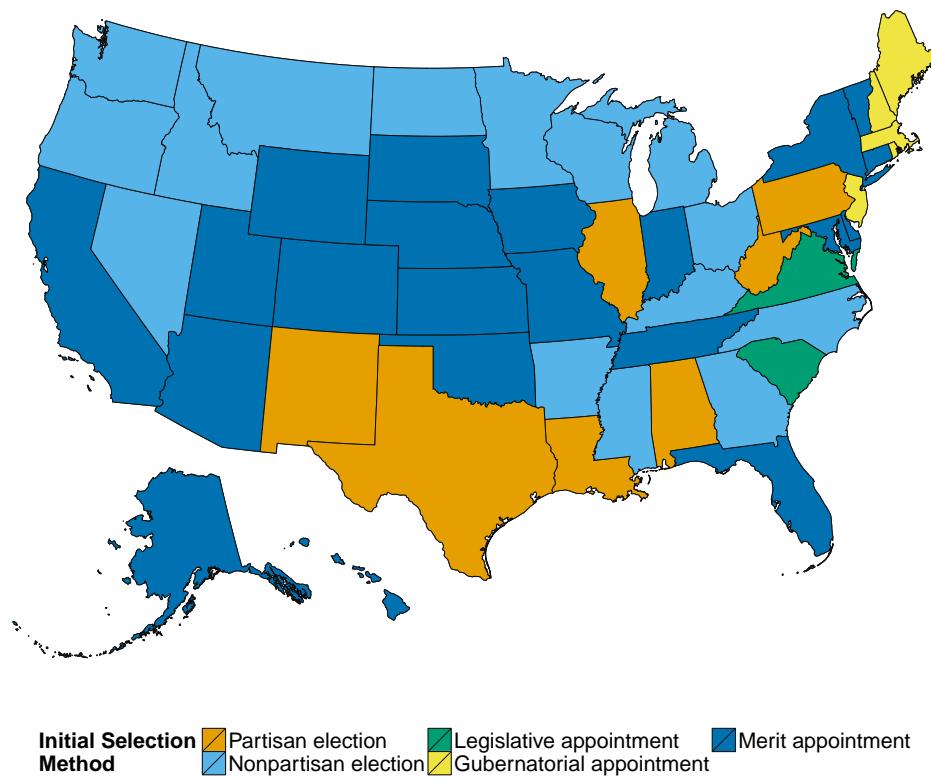
However, these selection methods are highly unusual among state COLRs. Virtually every other state enforces fixed length terms as opposed to life or quasi-life tenure.¹¹ Upon completion of their initial term, the vast majority of COLR justices must win some form of public election in order to retain their office. 21 states utilize retention elections (see Figure 3.8), where justices run in non-competitive elections and the public votes whether or not to retain the justice. Typically states which use merit appointments for initial selection pair them with retention elections for determining whether the justice will remain in office, however there are exceptions: Illinois and Pennsylvania use partisan elections to initially select justice, and the winner can seek another term in non-competitive retention elections. Competitive elections allow for challengers to campaign against the incumbent justice. Justices appear on the ballot either with partisan labels (five courts) or not (14 courts). A small minority of states use gubernatorial/legislative appointments or merit reappointments to retain COLR justices.

While most COLRs use fixed length terms, the length of these terms varies across the states. Figure 3.9 identifies the length of a full term in office for each state's COLR.¹² Term lengths vary from six to fourteen years for COLR justices in states

¹¹In New Jersey, justices are initially appointed to a 7-year term, and if retained by the governor and senate, serve until age 70.

¹²Many states implement shorter term lengths for the initial term in office, then offer longer terms upon successful retention. For instance, Arizona Supreme Court justices are initially appointed by the governor to a term of at least two years. Upon the next general election after this two year period, justices are retained upon popular vote to a fixed six year term.

Figure 3.7: Retention Method

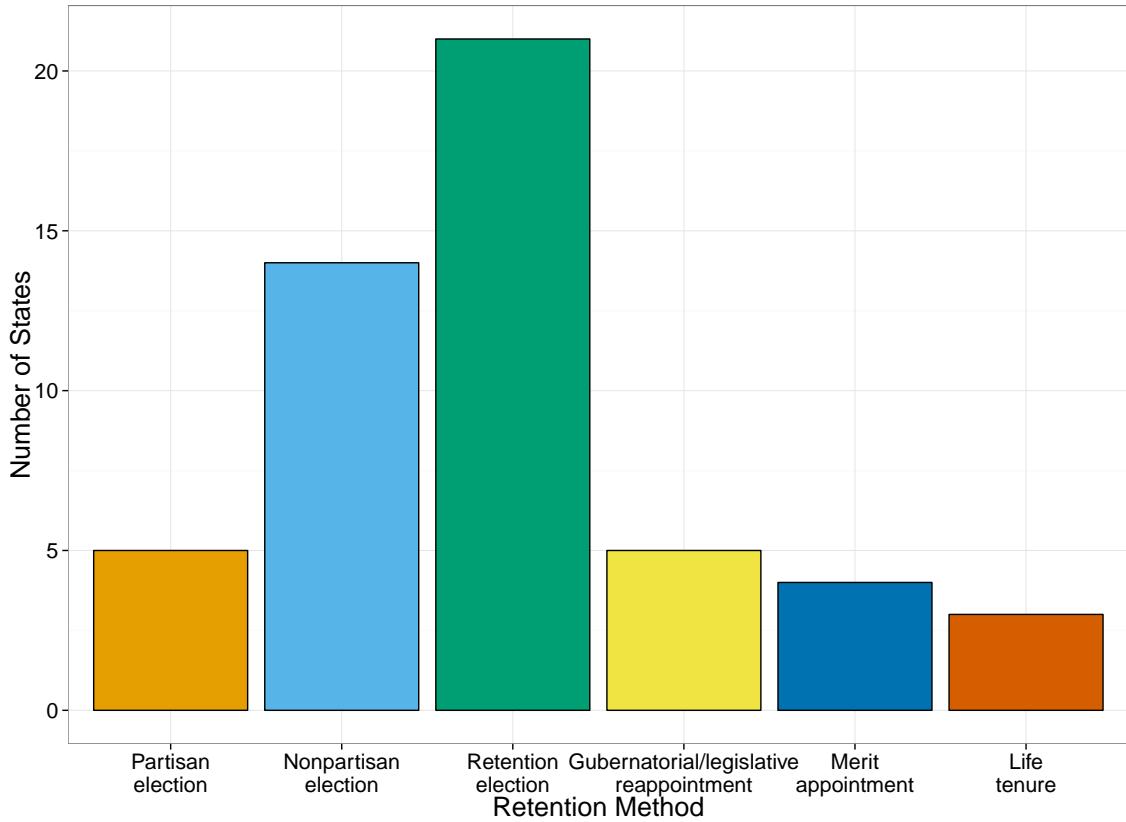


Note: Initial selection methods for the civil and criminal COLRs in Oklahoma and Texas are identical. Source: Schauffler and Strickland (2012).

with fixed term lengths.¹³ These term lengths are associated with the type of retention method used by the state COLR. Figure 3.10 summarizes the frequency of each term length in state COLRs, separated by the retention method used in the state. States with competitive elections (i.e. partisan and nonpartisan elections) are more likely to have shorter term lengths between six and eight years, while justices with non-competitive elections (i.e. retention elections) and appointed justices tend to have longer term lengths between eight and twelve years. These differences make sense

¹³Median term length is eight years. <http://www.judicialselection.us>

Figure 3.8: Summary of Retention Methods



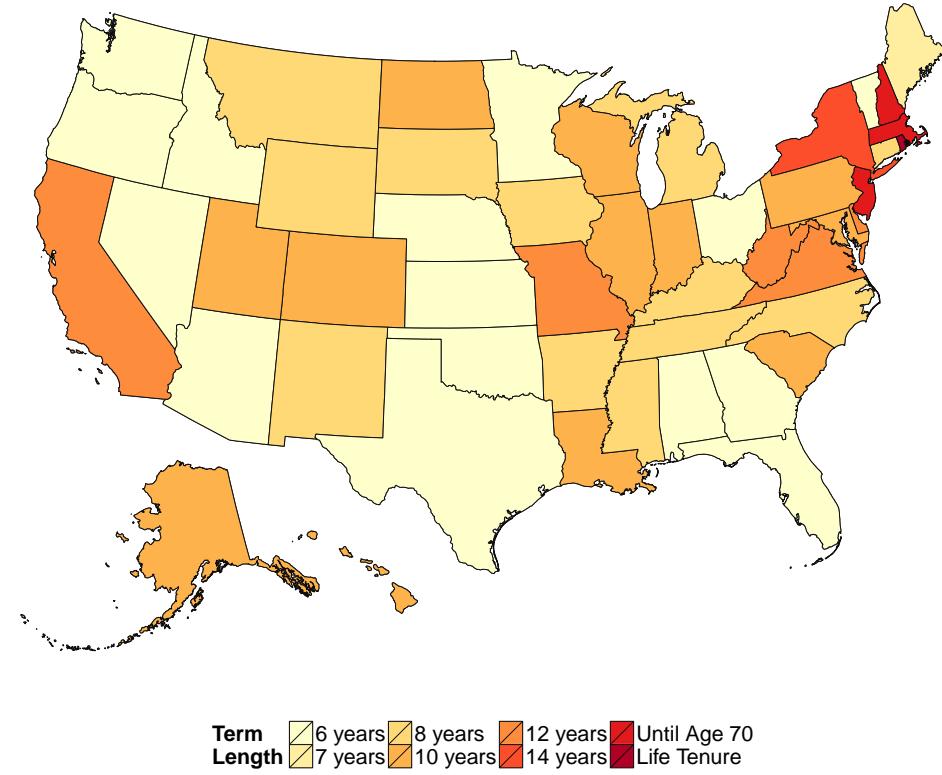
Note: Retention methods for the civil and criminal COLRs in Oklahoma and Texas are identical. Source: [Schauffler and Strickland \(2012\)](#).

because states which seek to hold justices accountable to the public should want to employ competitive, frequent elections ([Kuklinski 1978](#); [Thomas 1985](#)).

3.3 Ideological Composition

Because state COLRs are linked closely with the entity responsible for its justices selection and retention, and because political elite and mass public ideology differ tremendously across the states ([Berry et al. 2010](#)), we should expect the ideological composition of state COLRs to differ as well. Scholars have developed several measures

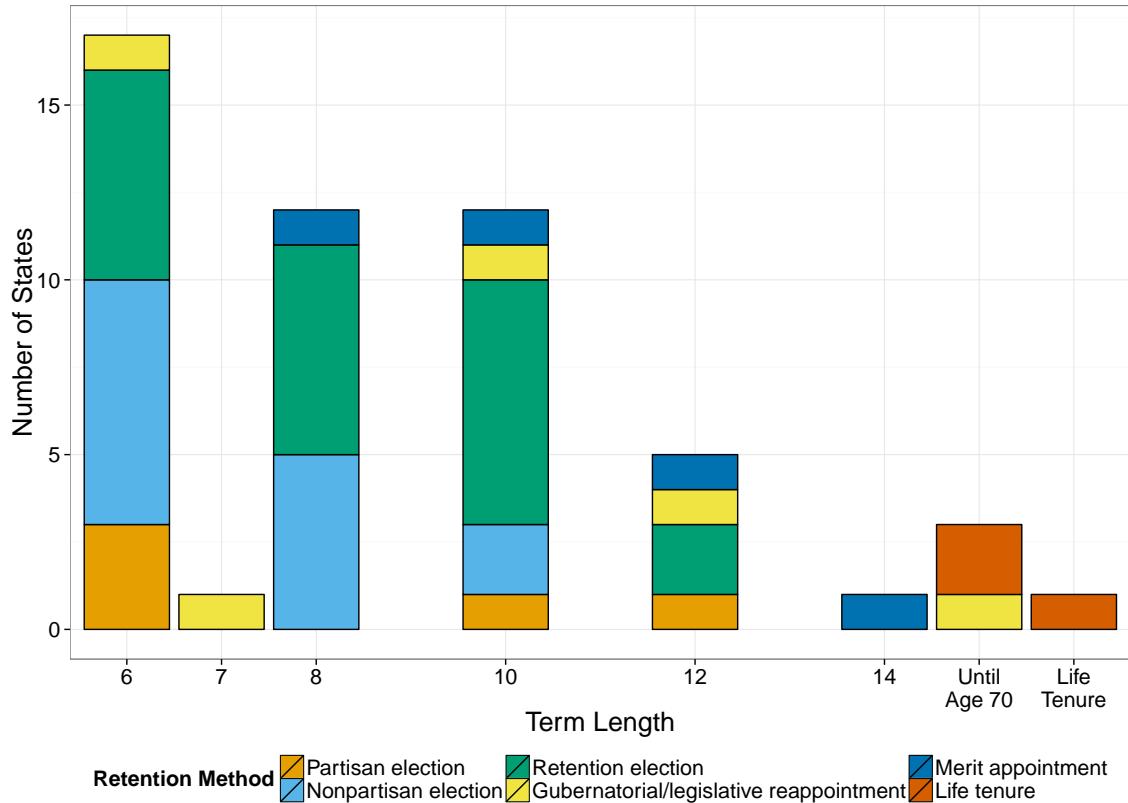
Figure 3.9: Term Length



Note: Term length is defined as the length of a full term in office upon successful retention. Term lengths for the civil and criminal COLRs in Oklahoma and Texas are identical. Source: [Schauffler and Strickland \(2012\)](#).

of judicial ideology, each with their varying strengths and weaknesses. Earlier attempts measure ideology based on past voting behavior ([Hall 1992](#)), partisan affiliation ([Brace and Hall 1997; Hall and Brace 1992](#)), or journalists' perceptions ([Emmert and Traut 1994](#)). Party-adjusted judge ideology (PAJID) scores have been used in research on judicial decisionmaking over the past decade ([Brace, Langer and Hall 2000](#)) and attempt to overcome limitations inherent in the earlier approaches. However PAJID scores have not been updated since 2004; as a result, justices who join state COLRs after this period lack PAJID scores. Furthermore, the reliability of PAJID scores in

Figure 3.10: Summary of Term Length



Note: Term length is defined as the length of a full term in office upon successful retention. Term lengths for the civil and criminal COLRs in Oklahoma and Texas are identical. Source: [Schauffler and Strickland \(2012\)](#).

assessing voting behavior of state COLR justices has been called into question ([Bonica and Woodruff 2012](#)).

A new measure of judicial ideology is estimated using the CFscore procedure based upon campaign finance data ([Bonica 2013b, 2014](#)). This method generates ideal-point estimates of ideology for a wide range of political actors, including Congress, the president, governors, state legislatures, and other elected state officials such as justices. Positive values indicate greater conservatism, and negative values indicate greater liberalism. Ideological estimates for elected state COLR justices are based upon

contributions received while running for election, while the estimates for justices who are appointed are based upon the ideal-point estimate of the appointing body (generally the governor, though occasionally the legislature).¹⁴

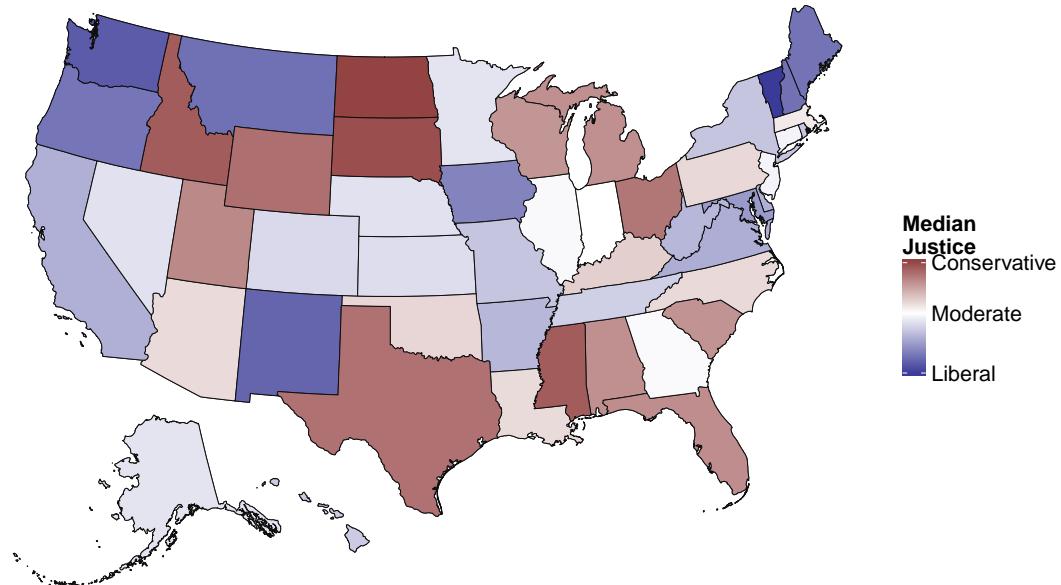
In this project, I use justices' CFscores to measure their ideology. Figure 3.11 identifies the ideological preference of the median justice on the COLR. These preferences generally adhere to expectations based on the overall perception of the state. Southern states such as Alabama and Texas have strongly conservative median justices, while liberal states such as California, Connecticut, New Hampshire, and Washington have moderate-to-strong liberal COLR medians. Some exceptions are notable, such as Arizona having a liberal COLR median. Overall, there is a significant degree of ideological diversity across the COLRs.

Along with diversity across states, within the COLR justices have the potential to be ideologically diverse. This is important as I expect COLRs with ideologically dissimilar justices will have different agenda-setting incentives than COLRs where the justices are ideologically consistent. Figure 3.12 displays the standard deviation of the CFscores for each justice serving on the COLR in 2010. Large standard deviations indicate an ideologically dissimilar COLR, while small standard deviations suggest an ideologically similar court. Southern and New England states have the most ideologically similar courts, while states in the Mid-West and West tend to have less ideological cohesion. Again, like with the median position of the court, state COLRs have a wide range of ideological cohesion which will assist in evaluating hypotheses about ideology, strategic behavior, and judicial agenda-setting.

In this chapter, I reviewed the institutional structure of state COLRs and highlighted the large diversity in procedural rules and institutional design. Along with

¹⁴See [Bonica and Woodruff \(2012\)](#) for a detailed description of the estimation process.

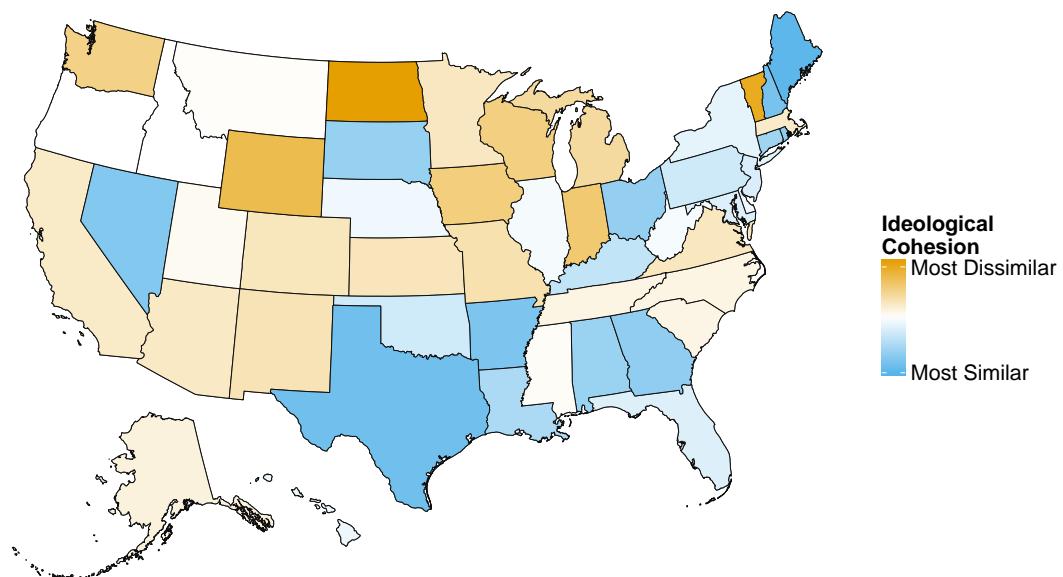
Figure 3.11: State COLR Median Ideological Position (as of 2010)



Note: Oklahoma and Texas report the median justice for the state supreme court, not the criminal court of appeals. Source: [Bonica and Woodruff \(2012\)](#).

these institutional differences, I also identified a method of estimating judicial ideology and examined the ideological differences between the justices and the COLRs. Using this knowledge and the theory outlined in Chapter 2, I now turn towards empirically evaluating the relationship between institutions, actors, and the judicial agenda. In the following two chapters, I describe a new source of data for measuring macro-policy attention in state COLRs and test several hypotheses about how institutional and strategic factors shape policy attention in state COLRs.

Figure 3.12: State COLR Ideological Cohesion (as of 2010)



Note: Oklahoma and Texas report the ideological cohesion for the state supreme court, not the criminal court of appeals. Source: [Bonica and Woodruff \(2012\)](#).

Chapter 4

Determining Judicial Policy

Attention and Procedural Path

Due to the complexity of collecting data across 52 different courts, social scientists and legal scholars tend to rely on a small handful of datasets which have painstakingly collected detailed information on judicial decisions (Brace and Hall 2007), but are not easily maintained and updated with more recent decisions. Furthermore, the coding schemes employed by these researchers are not necessarily conducive to social scientific research on agenda-setting, which concentrates more on the policy subjects of judicial decisions, rather than the legal rationales or areas of law cited in these decisions. Recent efforts to extend machine learning approaches to coding judicial decisions in the federal courts (Evans et al. 2007; McGuire and Vanberg 2005; Szmer and Edwards 2011) demonstrates the potential for these approaches in state courts. Research efforts are already underway to use automated computational methods to extract relevant information from hand-coded decisions (Hall and Windett 2013).

In this chapter, I employ supervised machine classification techniques to identify

the policy attention and procedural path of every state COLR decision from 2003–11. First, I review prior efforts to collect data on state COLR decisions and identify the different coding schemes used to classify policy attention. Next, I provide an overview of supervised text classification and lay out the procedures I use to classify each case for its policy content and procedural path (i.e. an appeal by permission or by right). I review the accuracy and reliability of this approach for each variable, and finally use this new data source to present a descriptive overview of policy attention in state COLRs.

4.1 Data Sources of State COLR Decisionmaking

One significant obstacle to studying state supreme courts is the difficulty collecting useful information on their decisions. Indeed, much of the scholarly research on judicial politics focuses on the U.S. Supreme Court, in part to the availability of data to empirically test hypotheses (Spaeth et al. 2011). Since state supreme courts are comprised of many different institutions with larger caseloads, more barriers exist to collecting and coding this data. Traditionally, scholars concentrated their empirical research on case studies of a single issue (Hall 1992; Hall and Brace 1992) or state (Cann 2007), utilized samples of decisions (Kang and Shepherd 2011; Shepherd 2013), or collected data on a single year (Eisenberg and Miller 2009). More recently, Brace and Hall (2007) conducted a major project to collect detailed information on all state supreme court decisions over a multi-year period. This dataset contains information on every state supreme court decision published in 1995–98, and includes extensive variables on issue attention, party type, prior judicial history, and individual judicial votes and opinion-authors. A more recent project by Hall and Windett (2013) utilizes

text scraping programs to build a dataset of state supreme court decisions over a larger time frame (1995–2010) based upon human-generated variables from LexisNexis.

Each of these major projects have unique benefits and drawbacks. [Brace and Hall \(2007\)](#) coded their variables using human coders who read every opinion. With over 7,000 decisions each year, continually maintaining this dataset is prohibitively expensive; for this reason, it has not been updated since the original version. Without more recent data on state supreme court decisions, researchers cannot determine trends over time or assess if judges' behavior has changed in the past twenty years. At the same time, [Hall and Windett \(2013\)](#) rely almost exclusively on automated coding scripts; this makes their data easier to update, but utilizes previously coded content which is targeted towards legal scholars, not social scientists.¹

These data sources also present a dilemma when conducting research which relies on cases' procedural paths. In the agenda-setting process, I expect justices and litigants to behave differently when their appeal is by permission rather than by right. However existing datasets do not code cases for this important variable. Neither [Brace and Hall \(2007\)](#) nor [Hall and Windett \(2013\)](#) code cases as to whether they are appeals by permission versus by right. Without knowledge of how the case arrived before the COLR, hypotheses about institutional strategic agenda-setting cannot be evaluated.

Ideally, we would create a dataset of state supreme court cases which contains information useful to social scientists, but can be easily updated to incorporate new decisions. Machine learning approaches have been developed to classify political texts based upon many different dimensions, including underlying topics ([Grimmer 2010](#); [Hopkins and King 2010](#); [Rice 2012](#)), ideology ([Lauderdale et al. 2012](#)), and sentiment

¹Major databases such as Westlaw and LexisNexis invest significant resources coding judicial decisions from both state and federal courts, but since their audiences are predominantly practicing attorneys they tend to code for legal, not social scientific, variables and adopt classification schemes more relevant to lawyers.

(Rice and Zorn 2014). In the remainder of this chapter, I demonstrate the benefits of applying these methods to state supreme courts' policy attention and procedural pathway. First, I explicitly define how I intend to measure policy attention.²

4.1.1 Defining Policy Attention in the Courts

Issue attention within the judiciary has a fluid definition depending on how scholars seek to study the courts. For a legal scholar, issue attention means the areas of law in which courts render decisions. That is, they are concerned with area of law being challenged in the litigation, as well as the court's interpretation of it and the ramification on future decisions. This is how the major databases such as Westlaw and LexisNexis code their decisions, since their audiences are predominantly practicing attorneys.³ Datasets based upon this classification scheme are therefore of limited use to social scientists, who are more interested in courts' attention to different public policy spheres, such as health, agriculture, education, or transportation (Hall and Windett 2013).

As noted previously, scholars also have substantial difficulties creating and maintaining datasets of state supreme court decisions coded specifically for social scientific variables. Each project adopts their own unique classification schemes which are not always comparable to other institutions. For example, Brace and Hall (2007) classify cases into five major issue areas with hundreds of subtopics. While this approach measures policy attention as social scientists typically discuss issue attention, the coding structure is alternately too sparse (only five major issue areas) or too complex

²The procedural pathway for each case is defined using the measure discussed in chapter 2: either the appeal was by permission, or it was by right.

³Examples of these categories from LexisNexis include administrative law, copyright law, civil procedure, and mergers & acquisitions law.

(hundreds of subtopics with only a handful of cases occurring annually). Other projects utilize LexisNexis's or Westlaw's major areas of law ([Eisenberg and Miller 2009](#); [Hall and Windett 2013](#)), which are not as useful to a social scientific approach to policy attention.

The classification scheme utilized in this project should meet several criteria. First, it should measure policy attention as social scientists typically define attention. Second, it should be cross-institutional; that is, we can compare the court's attention to actors in other branches of government. Fortunately, such a classification scheme already exists. The Policy Agendas Project (PAP) ([Baumgartner and Jones 2014](#)) originated as an effort to track changes in policy activity within various policy domains over time within the United States. In its current incarnation, the project maintains ten distinct data sets tracking policy attention in the post-World War II era in congressional bills, executive orders, U.S. Supreme Court cases, public opinion, and news media coverage. In order to assess policy attention, the authors developed a codebook with 20 major topic areas and 220 subtopics. The major topic areas cover different policy domains such as macroeconomics, health, education, social welfare, etc.

Multiple offshoots of this project have been developed to assess policy attention in contexts outside of the U.S. federal government, including the Comparative Agendas Project ([Baumgartner 2015](#)), which assesses policy attention cross-nationally, and the Pennsylvania Policy Agendas Project (PA-PAP) ([McLaughlin et al. 2010](#)), which tracks policy attention over time in the commonwealth of Pennsylvania. In this project, I utilize the PA-PAP major policy topic codes to classify the policy content of state COLR decisions. The PA-PAP classification scheme is modeled on the original PAP, retaining most of the same content codes as the PAP with minor adjustments for

different policy activities at the state and local level.⁴

4.2 Classifying COLR Decisions Using Machine Learning

Supervised text classification is appropriate for classifying documents based upon a pre-determined coding scheme (such as the PA-PAP) by using the textual features of a small sample of hand-coded documents to predict the topics or codes of a larger set of documents (Friedman, Hastie and Tibshirani 2009). Documents are assumed to comprise a “bag of words” where the order of word usage does not provide any relevant information (Jurafsky and James 2009). The basis of this process is identifying patterns of word usage across documents and connecting documents with similar word usage (Grimmer and Stewart 2013). The assumption is that documents which use similar words are likely related to one another. For instance, if two cases make repeated references to “abortion,” there is a strong probability that both cases involve issues of health and reproductive rights.

Many different computer algorithms are currently available which can be used to make these predictions. Commonly used algorithms include logistic regression, support vector machine, neural networks, and random forests (Friedman, Hastie and Tibshirani 2009), and software implementations of these various algorithms are widely

⁴Major policy topics include Agriculture; Banking, Finance, Domestic Commerce; Civil Rights and Liberties; Community Development, Housing Issues; Defense; Education; Energy; Environment; Fiscal and Economic Issues; Foreign Trade; Health; International Affairs and Foreign Aid; Labor, Employment, Immigration; Law, Crime, and Family; Local Government and Governance; Public Lands and Water Management; Social Welfare; Space, Science, Technology, Communications; State Government Operations; Transportation. Note that Foreign Trade and International Affairs and Foreign Aid are retained from the original PAP, however are excluded in this study because there are no state COLR cases which involve these topics.

available (Jurka et al. 2013). By using computer algorithms to analyze documents rather than relying solely on human coders, we can classify a large collection of documents relatively quickly at a much lower cost.

This does not mean humans are entirely excluded from the classification process. As a supervised method, all these algorithms initially rely on a data set of coded observations on which it can learn how different textual features predict various topics (i.e. a “training set”). Once trained on this set, the algorithm is applied to a virgin set of observations previously coded by humans but which were left out of the initial training set (i.e. a “test set”). The predictions of the algorithm are then compared to the true topic codes (as determined by human coders) to determine its accuracy rate. This process can be iterated so that after a human reader verifies the automated topic codes, these observations are incorporated into an updated version of the training set which is used to further refine the algorithm’s predictions.

Similar to a human coding process which relies on multiple coders and inter-coder reliability tests to ensure the validity and reliability of the topic codes, multiple algorithms can be used to generate ensemble predictions. For instance, an ensemble prediction using two algorithms requires each algorithm to independently predict the topic of a document. If both algorithms predict the same topic, then we have stronger support for this classification decision. If the algorithms disagree, then a human (or alternatively a third algorithm) can make a third independent prediction to break the tie and determine which topic code is correct for that document.

4.2.1 Identifying Cases and Preparing Text for Analysis

Because I am interested in policy attention across all state COLRs, first I need to identify the universe of potential cases to include in my analysis. For this project,

I include all written, published decisions from 2003–11 reported by state COLRs in Westlaw.⁵ This allows me to capture a cross-sectional set of cases from every state COLR, while also providing an extended time period to ensure the analysis is not biased by year-specific effects. In order to identify these cases, I perform a keyword search to identify all decisions where the COLR issues a substantive decision on the merits with at least one justice writing an opinion on the decision.⁶ I download a list of all of these decisions, including the case title, date of decision, legal citation, and a brief one-to-two sentence summary of the case. To perform textual analysis on the written opinion and relevant meta-data, I perform a similar search using LexisNexis and download a full-text copy of the opinion(s) and meta-data generated by LexisNexis.⁷ I then match the Westlaw list of decisions to the LexisNexis set of documents.

I explored using several different sets of textual information to classify decisions for policy attention and procedural pathway (Soltoff 2014). Rather than relying solely on the full-text opinion as written by the individual justices, I instead elect to use two sets of meta-data provided by Westlaw and LexisNexis. For policy attention, I utilize the short case summary published by Westlaw.⁸ To identify the procedural pathway, I utilize two separate types of textual information: the procedural posture reported

⁵Westlaw is the official reporter of judicial decisions for most state judiciaries and provides the most comprehensive data source of all relevant cases.

⁶The exact search terms were DA(aft 12-31-2002 & bef 01-01-2012) & CO(high) & SY,DI(held affirmed reversed vacated remanded ordered) OR HG(held affirmed reversed vacated remanded ordered) % st(DC)

⁷I originally decided to use Westlaw to identify the universe of cases because its search engine allowed for more specificity in my search terms to filter out miscellaneous orders of the court which are not substantive decisions on the merits. In the future, I will explore using LexisNexis as the sole data source for identify and coding cases.

⁸For example, the summary for *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), is “FAMILY LAW - Marriage. Denying civil marriage to same-sex couples violated state constitutional equal protection principles.”

by LexisNexis,⁹ and the name of the state.¹⁰ Both of these textual summaries of the decisions provide information specific to each classification task and render more accurate predictions by the algorithms.

In order to reduce potential noise in the data, I conduct several steps to pre-process the text into relevant terms, also known as *t*okens (Rice 2012; Blei 2012). First, I remove all punctuation from the set of summaries, and convert all letters to lower case. Next, I remove a list of common, non-informative words from each document, and stem each term.¹¹ Once I complete these pre-processing steps, I determine the term-frequency of all remaining tokens.¹² By comparing the term-frequency across documents, the algorithms can determine patterns of term usage which are predictive of policy attention or procedural pathway.

4.2.2 Classifying Policy Attention

For policy attention, I use an ensemble prediction model with a set of three algorithms: support vector machine, glmnet, and maximum entropy.¹³ In order to initially train

⁹For example, the procedural posture *Goodridge* is “Plaintiff marriage license applicants sued defendants, the state public health department and commissioner, in the Suffolk Superior Court Department (Massachusetts) for a judgment that their exclusion from access to marriage licenses violated Massachusetts law. The trial court granted defendants’ summary judgment motion and denied that of the applicants. The applicants appealed, and the state supreme court granted direct appellate review.”

¹⁰Since each state implements different rules of appellate procedure (see Chapter 3, knowledge of in which state the case is being heard will improve our predictions. For example, any case heard in Montana is very likely to be an appeal by right since that court’s rules of appellate procedure require most cases to be heard in this manner. Contrast this with West Virginia, which until 2011 heard all appeals exclusively by permission.

¹¹For instance “employment”, “employer”, and “employee” all become “employ.”

¹²Though this process, I only utilize unigrams, or individual tokens. This separates two-or-more-word phrases into the individual words which make up the larger phrase. For instance, “medical malpractice” would be treated as two tokens: “medical” and “malpractice,” even though they are used jointly. Further applications will explore the usage of bigrams and n-grams of varying length.

¹³ The **RTextTools** package in R provides three low memory algorithms – support vector machine, glmnet, and maximum entropy – and six high memory algorithms – scaled linear discriminant analysis (SLDA), bagging, boosting, random forest, neural networks, and regression tree (Jurka et al. 2011).

the model, I rely on the decisions from the Pennsylvania PAP dataset, which contains all decisions from the Pennsylvania Supreme Court from 1979–2010 ($n = 4900$). I obtain case summaries from Westlaw for each of these decisions and prepare the text following the steps outlined above. In order to assess the validity and reliability of each algorithm, the Pennsylvania dataset is randomly split into a training (90%) and test (10%) set. I use the training set to initially train the model and evaluate its effectiveness on the test set (Friedman, Hastie and Tibshirani 2009). By comparing the ensemble model’s predictions on the held-out test set, I can evaluate the model’s effectiveness and accuracy at predicting policy attention in state COLR decisions.

The initial iteration of the model is effective, but leaves room for significant improvement. To improve on the model’s predictions, I use the initial model to predict policy topic codes for the set of COLR decisions from 2003–11. If all three algorithms converge on the same topic code, either myself or a research assistant manually review the predicted topic code to ensure its validity. If it is clearly incorrect, the automated topic code is changed to the most likely topic code based on the coder’s informed knowledge of the codebook. Once this verification process is complete, all decisions with verified topic codes – both from the original PA-PAP data set as well as the new 2003–11 data set – are used to estimate a new ensemble prediction model using the same principles as before: training the model on a portion of the data, and testing its reliability on a held-out set of cases.

This process is completed for several iterations until the model’s predictions are sufficiently accurate. Accuracy of an ensemble prediction model can be measured in several different ways. Here, these predictions are compared to the true values from

While low memory algorithms may only take a few minutes for training and classification, high memory algorithms can take several hours or multiple days. Based on the tradeoff between accuracy and efficiency, I selected these three algorithms for the final ensemble model.

Table 4.1: Ensemble Agreement Coverage and Recall for Policy Topic Models

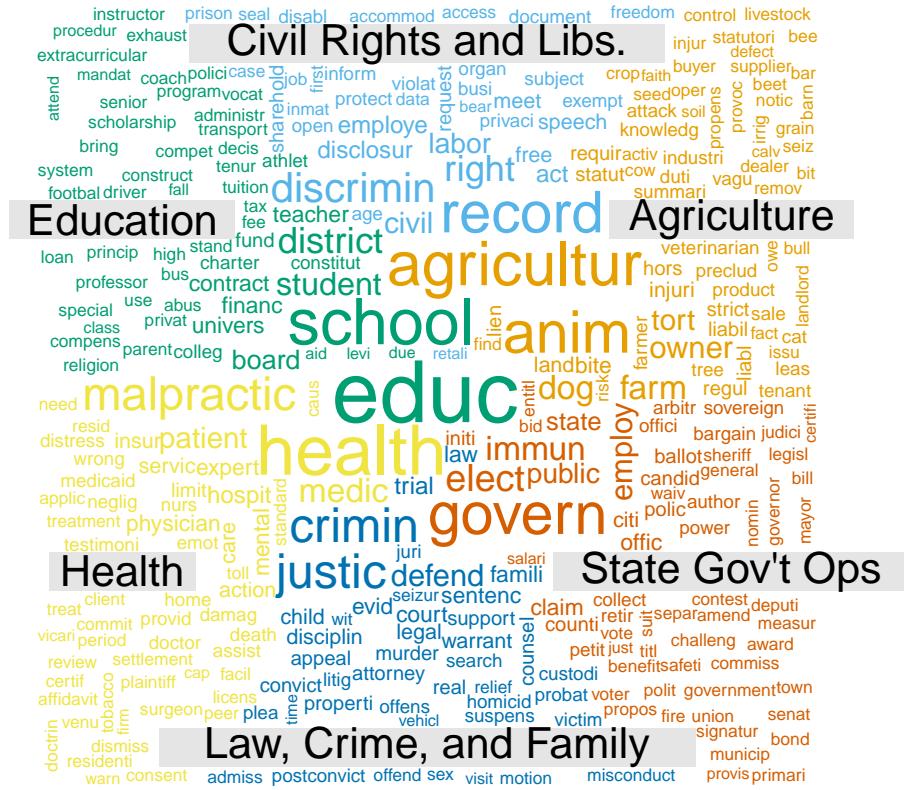
	Coverage	Recall
$n \geq 1$	1.00	0.94
$n \geq 2$	0.99	0.95
$n \geq 3$	0.90	0.98

Note: Policy topic models estimated with support vector machine, `glmnet`, and maximum entropy algorithms. All models are estimated using R 3.0.1 and the `RTextTools` library.

the final version of the test set to generate two statistical measures: *coverage*, the percentage of test observations for which a code is identified, and *recall*, the percentage of covered observations which are correctly predicted. Generally as the number of independent algorithms which converge on the same value increase, coverage will decrease but recall will increase.

Table 4.1 reports the coverage and recall of the final ensemble model predicting policy attention. When using a single algorithm (any of the separate algorithms incorporated into the ensemble model) to predict the policy topic of a case, the algorithm make a prediction for 100% of the test set, while its accuracy rate – or recall – is 94%. That is, if we apply any of the algorithms to a randomly selected case, the algorithm will make a correct prediction 94% of the time. However such a task does not take advantage of the ensemble method of prediction. In order to do that, I look to see how frequently the independent algorithms select the same policy topic code for each case. For 99% of the observations in the test set, at least two of the three algorithms predict the same policy topic. Of that 99%, 95% of the predictions are correct. Finally all three models converge on the same topic in 90% of observations, while the accuracy rate for this subset increases to 98%. Since traditional inter-coder reliability tests require at least 90% of agreement, these results suggest the supervised

Figure 4.1: Most Common Terms, by Topic



Note: Word cloud generated using R 3.0.1 and the `wordcloud` library.

ensemble method of prediction is robust and can be used to classify all the cases in the 2003–11 data set.

Rather than relying solely on statistical measures of precision and accuracy, one can also use a basic eye-test in the form of a word cloud to assess whether the prediction model seems valid. A word cloud visualizes free form text by displaying the most frequent terms associated with a set of documents, dynamically adjusting the font size of the term relative to its frequency of occurrence within the documents. Here, the terms are the exact same as those used to generate the ensemble prediction model, so they visualize the most common tokens associated with each topic.

Figure 4.1 plots a word cloud of the most common terms from the 2003–11 data set for six policy topics. For example, the most common terms associated with Civil Rights and Liberties include “discrimin,” “civil,” “right,” and “record.”¹⁴ Likewise, for Education the most common terms are “educ,” “school,” “student,” “teacher,” and “univers.” These terms all appear to be validly related to the major policy topic. This does not mean that individual terms can only be used to predict a single policy topic; for instance, “employe” could refer to a Civil Rights case, but it could also refer to an Education case (possibly a dispute involving a teachers union), and the ensemble prediction model accounts for these possibilities. However within each category as displayed here, these terms pass a facial validity test.

4.2.3 Classifying the Procedural Path

For the procedural path, I use an ensemble prediction model with a set of three algorithms: support vector machine, glmnet, and random forest.¹⁵ In order to train the model, I rely on [Eisenberg and Miller \(2009\)](#) who collect data on all state COLR decisions from 2003. Unlike [Brace and Hall \(2007\)](#) and [Hall and Windett \(2013\)](#), [Eisenberg and Miller](#) classify each decision as either an appeal by right or an appeal by permission. The authors trained a team of research assistants to perform this task by reading each decision, so the original coding decisions are assumed to be accurate. Since the [Eisenberg and Miller \(2009\)](#) data overlaps with my 2003–11 data set, I merge the two sources together which provides over 7,000 coded cases with which to train the ensemble prediction model.

I follow procedures similar to those implemented to classify policy attention. I

¹⁴A significant subtopic within Civil Rights and Liberties is public records requests, explaining the frequency of “record.”

¹⁵See Footnote 13.

Table 4.2: Ensemble Agreement Coverage and Recall for Procedural Path Models

	Coverage	Recall
$n \geq 1$	1.00	0.89
$n \geq 2$	1.00	0.89
$n \geq 3$	0.92	0.92

Note: Policy topic models estimated with support vector machine, `glmnet`, and maximum entropy algorithms. All models are estimated using R 3.0.1 and the `RTextTools` library.

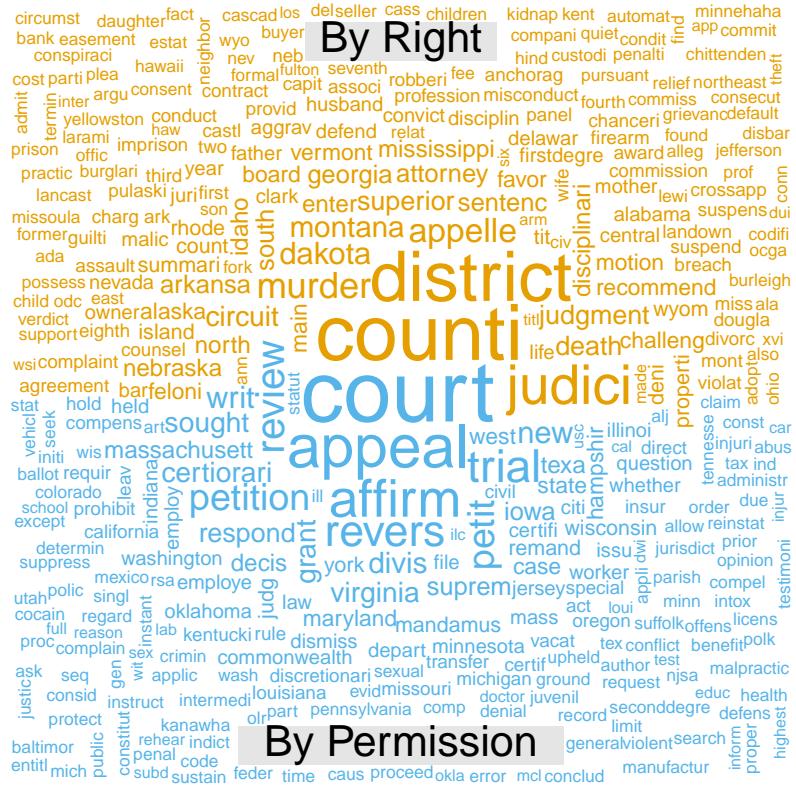
utilize the procedural posture summary reported by LexisNexis as the text source on which to build the prediction model, along with the name of the state in which the case originates. The hand-coded observations are randomly split into a 90% training set and 10% test set. The text is pre-processed as previously described, and the ensemble model is estimated using the training set. I then estimate coverage and recall statistics based on the model's performance predicting whether or not cases in the test set are appeals by permission or by right. Table 4.2 reports these statistics. Overall, when at least two algorithms agree on the procedural pathway, the model generates predictions for 100% of the observations in the test set with an accuracy rate of 89%.¹⁶ For a dichotomous variable, this is a very good accuracy rate. Furthermore, the ensemble predictions are 88% more accurate compared to a random guess and 73% more accurate than predictions based on the median procedural path (assuming all cases are appeals by permission).¹⁷

Considering the model was making a prediction between just two possible values and that the textual information was noisy even after pre-processing the text, this is

¹⁶Accuracy increased to 92% when all three algorithms were in agreement, but coverage dropped to only 92%.

¹⁷These statistics are based on the *proportional reduction in error* (PRE), defined as $\frac{(E_1 - E_2)}{E_1}$, where E_1 is the number of prediction errors without knowledge of the algorithm predictions (i.e. random guess or median procedural path) and E_2 is the number of prediction errors made by the ensemble prediction model.

Figure 4.2: Most Common Terms, by Procedural Pathway



Note: Word cloud generated using R 3.0.1 and the `wordcloud` library.

an extraordinarily strong accuracy rate. Figure 4.2 visualizes the most common terms associated with each pathway. Some terms are to be expected, such as “petition,” “grant,” or “*certiorari*” for appeals by permission and “appelle” and “death”¹⁸ for appeals by right. Others do not make as much sense; for instance, the most common terms in appeals by right are “counti,” “district,” and “judici.” It is unclear why exactly these signify appeals by right vs. by permission.

However, it is not surprising that some of the most common terms are the names

¹⁸Following *Gregg v. Georgia* 428 U.S. 153 (1976), most death penalty appeals are mandatory, regardless of state.

of states. As expected, knowing the state where the case is being litigated provides a significant amount of information about the case's procedural pathway. California, Massachusetts, Virginia, Wisconsin, and others all appear as terms representing appeals by permission, which conforms with our knowledge that most types of cases in these states are heard by permission. Other states such as Idaho, North Dakota, South Dakota, and Vermont have rules which largely favor appeals by right, so cases in these states are likely to be appeals by right.

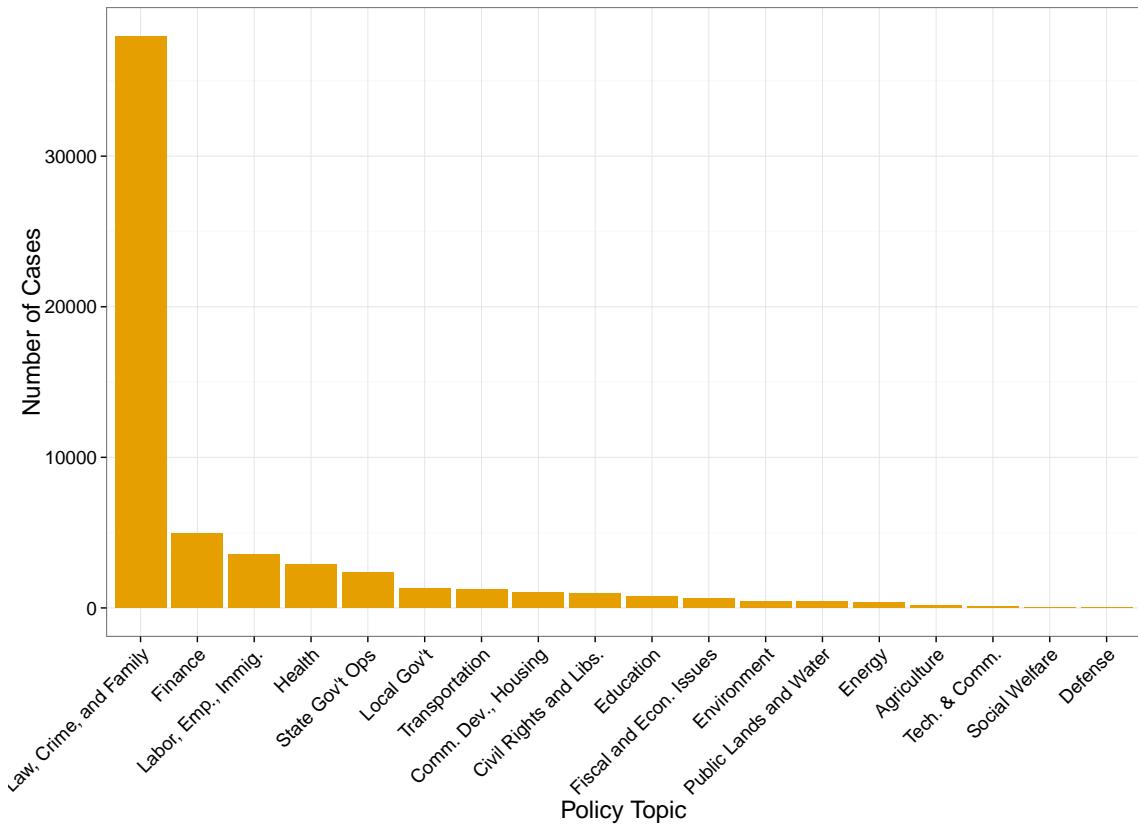
Overall, the supervised machine learning models perform well at classifying cases for their policy content and procedural pathway. The next step is to utilize this data to evaluate hypotheses about how judges and litigants influence agenda-setting in state COLRs. First though, given that this is the first comprehensive data set of policy attention in state COLRs, I present some descriptive statistics about the general state of judicial policy attention.

4.3 Policy Attention in State COLRs

4.3.1 Policy Attention Across States

While other scholars have examined state COLRs' agendas by their legal issues ([Brace and Hall 2007; Hall and Windett 2013](#)), this study is one of the first to examine state COLR policy attention. Figure 4.3 displays the total number of cases heard within each policy area over the nine-year period, separated between appeals by right and by permission. Unsurprisingly, state COLRs' agendas are dominated by Law, Crime, and Family issues, which include the vast number of criminal appeals. During this period in time, over 64% of cases decided by state COLRs involved some issue of crime, marriage and/or divorce, or police services. The next largest categories include Finance;

Figure 4.3: Policy Attention in State COLRs (2003–11)



Labor, Employment, and Immigration; Health; and State Government Operations. Again, these topics are not surprising given the functions and responsibilities of state government for regulating these activities.

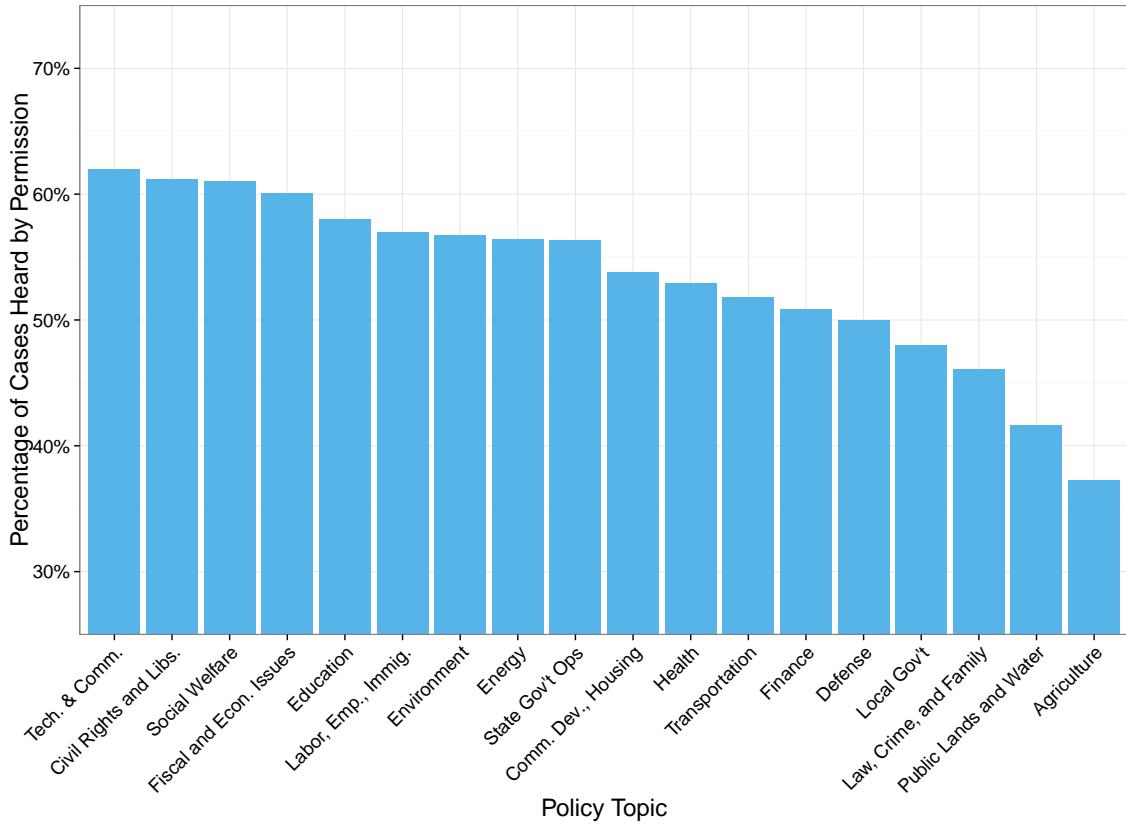
While state COLRs hear a significant number of cases involving issues traditionally controlled by the state, rather than national, governments, in other areas the courts rarely exercise their power. For instance, one of a state government's primary functions is to provide for the welfare of its residents. Examples of programs supporting this mission include Temporary Assistance for Needy Families (TANF), Aid to Families with Dependent Children (AFDC), Supplemental Nutrition Assistance Program (SNAP), Special Supplemental Nutrition Program for Women, Infants, and Children (WIC),

and other programs designed to combat poverty and social ills.¹⁹ Previous research on determinants of welfare policy focuses on actions by state legislatures, governors, and bureaucracies, as well as the role of interest groups, ideology, and public opinion (Barrilleaux, Holbrook and Langer 2002; Erikson, Wright and McIver 1989, 1993; Gray et al. 2010; Holbrook and Van Dunk 1993). Notably absent is any attention to the role of state courts in arbitrating these disputes and exerting policy influence over welfare programs. State COLRs have previously been shown to exercise control over government policy, including campaign and electoral regulation, workers' compensation, unemployment compensation, and even welfare benefits (Langer 2002). Yet in this nine-year period, each state on average heard just a single case involving social welfare policy. As an institution, state COLRs are not active policymakers in social welfare, so it is little surprise that scholars predominantly ignore their role in explaining welfare policymaking.

An important indicator of judicial agenda-control versus litigant agenda-control is the percentage of cases heard as appeals by permission. If this percentage is high, then COLR judges had a significant degree of control over which cases they heard and whether or not they act in specific policy areas. If the percentage is low, then the number of decisions is driven more predominantly by outside forces (i.e. litigants and attorneys), forcing the judges to act even if they would rather not. Figure 4.4 displays the percentage of cases heard by permission within each of the 18 policy areas. In no single issue area do state COLRs hear cases exclusively by permission or by right. In truth, the appeals by permission rate ranges from a high of 62% for Technology and Communication cases to a low of 37% for Agriculture cases. This does not mean that

¹⁹While the federal government provides a significant amount of funding for these programs, they are still administered at the state-level and states have varying degrees of flexibility and independence in administering these programs. Note that Medicaid, a social health care program for individuals and families with low income, is classified separately under Health.

Figure 4.4: Percentage of Cases Heard by Permission, by Policy Topic (2003–11)



in certain states the COLR hears certain policies only by permission or only by right, just that at the national level state COLRs do not uniformly or even strongly provide for a single procedural path to appeal within specific policy domains.

In order to assess differences across the states, Figure 4.5 visualizes the percentage of appeals by permission within each state irrespective of policy domain. Several states such as Maine, Montana, Nevada, North Dakota, South Dakota, and Vermont hear most appeals nearly exclusively by right, whereas other states such as Iowa, Michigan, New Hampshire, and West Virginia hear almost all appeals by permission. Note that since the 1960s, the rules that determine cases/ procedural path effectively never change over time. Furthermore, this pattern holds across different policy areas.

Figure 4.5: Percentage of Cases Heard by Permission, by State (2003–11)

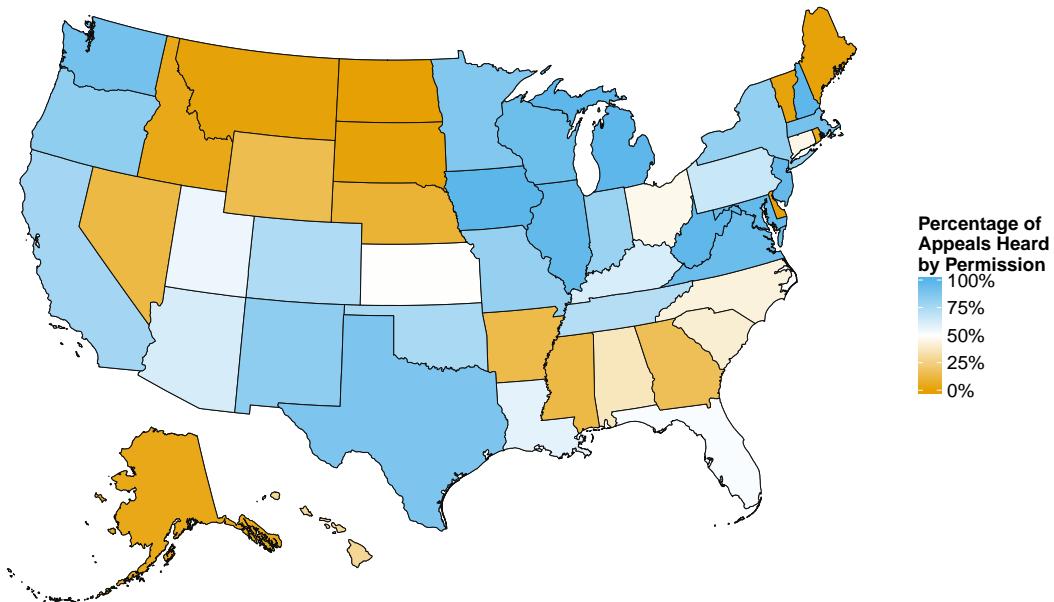
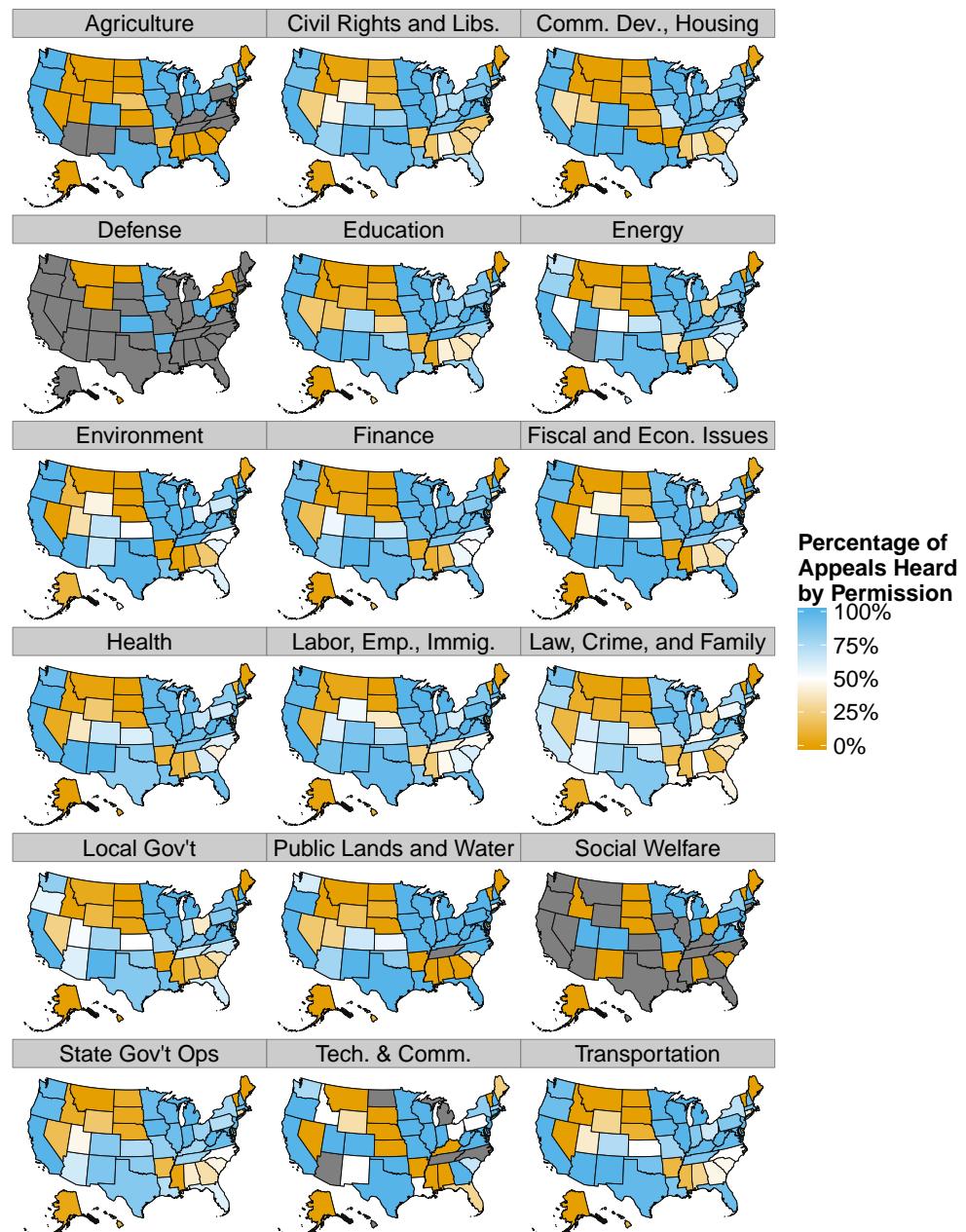


Figure 4.6 reports the same information with separate plots for each major policy topic. While there are some differences across policy areas, states which hear a majority of appeals by permission within one policy area are likely to hear most appeals by permission in other policy areas as well.

Within each policy area, some state COLRs predominantly hear appeals either by permission or by right while others hear an equal mix. Figure 4.7 displays issue-specific scatterplots of the number of appeals by right heard by a state COLR compared to the number of appeals by permission (aggregated over 2003–11). If a state COLR heard the same number of appeals by right and by permission, then it would be located along the diagonal line which reports a one-to-one relationship between procedural

Figure 4.6: Percentage of Cases Heard by Permission, by State and Policy Topic (2003–11)



Note: States which did not hear any cases in a specific policy area are shaded in grey.

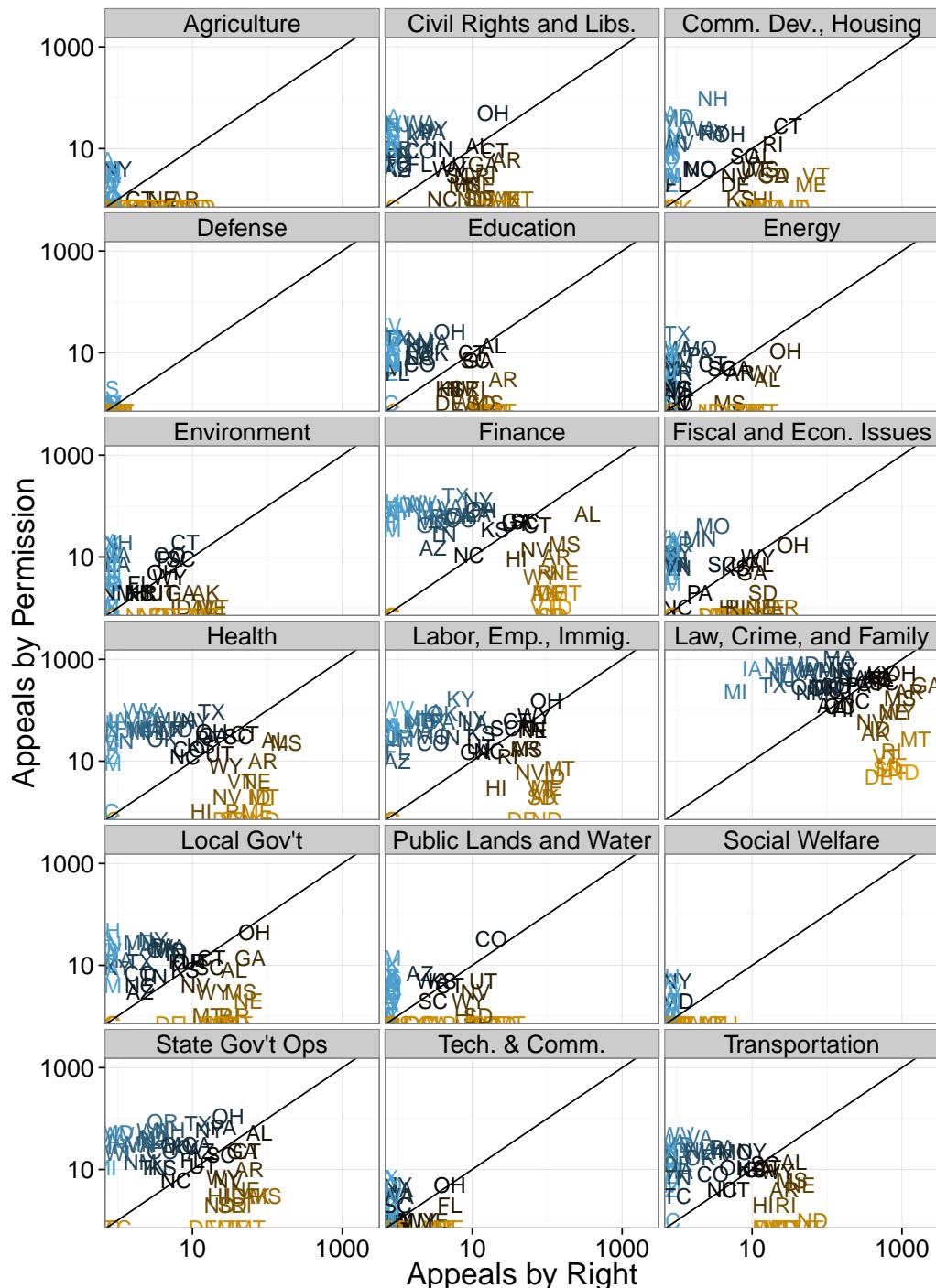
paths and the state's label would be shaded in black. As the number of appeals by right and by permission diverge, the shading of the point label reflects this increasing gap. In some instances, state COLRs hear the same number of appeals regardless of procedural path. For example, Georgia, North Carolina, Ohio, and Wyoming heard approximately the same number of Labor, Employment, and Immigration cases as appeals by right and appeals by permission. However, in many policy areas states hear appeals either predominantly as appeals by permission or by right. Within Labor, Employment, and Immigration, Arizona, Florida, and West Virginia hear nearly all appeals by permission, whereas Delaware and North Dakota hear all appeals by right.

These findings are notable for two reasons. First, they confirm expectations about dominant procedural paths based on the National Center for State Court's State Court Organization classification of appellate procedures (see Figure 3.1) and provide further evidence that the supervised classification model accurately predicts procedural path for each individual state. Second, it becomes clear that there is much more polarization at the state level as to whether states hear appeals by permission or by right. Unlike what we observed for different policy domains, across states we see dramatic differences in the rate of appeals by permission relative to appeals by right. This suggests that while the number of overall appeals is influenced by policy-specific factors, the number of appeals by permission (while controlling for overall caseload) is influenced more strongly by state-specific factors, rather than policy-specific factors.

4.3.2 Policy Attention Over Time

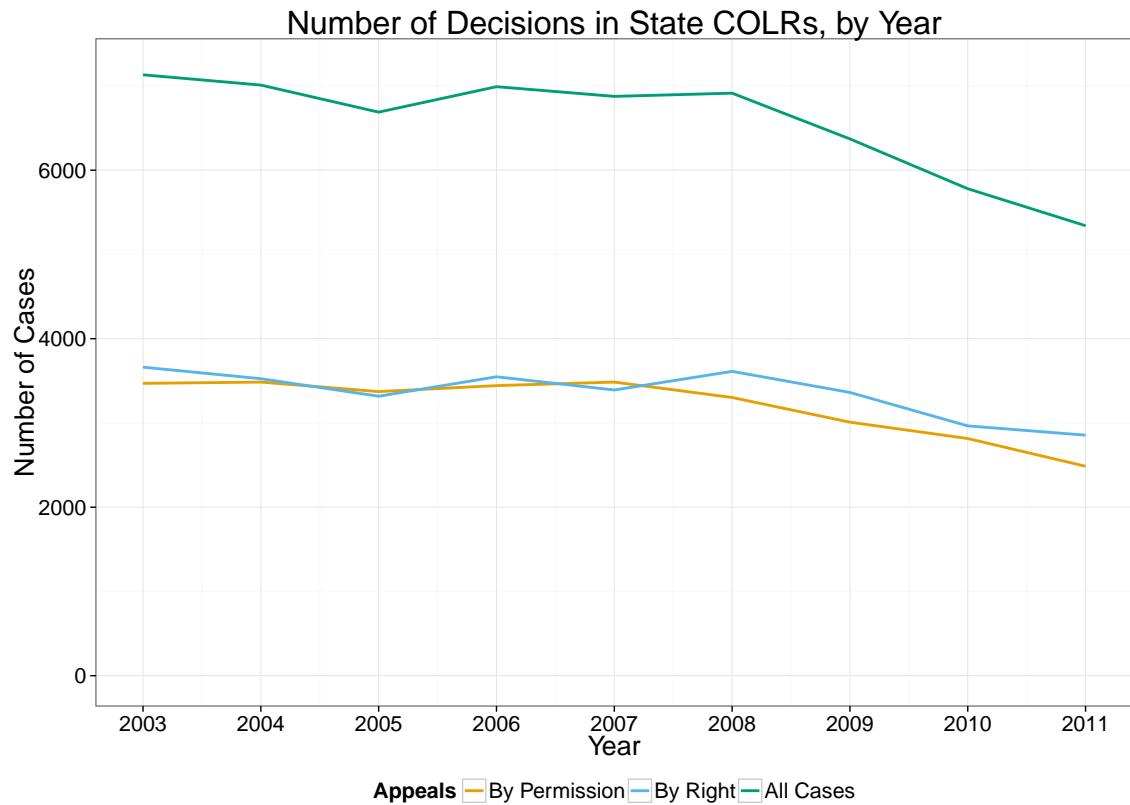
Because we observe state COLR decisionmaking over a nine-year period, we can assess trends in policy attention over time. While the time series is not as lengthy as other major judicial decisionmaking data sources ([Spaeth et al. 2011](#)), we can begin to

Figure 4.7: Number of Appeals by Right vs. Appeals by Permission, by State and Policy Topic (2003–11)



Note: Axes are log-scaled. States with the same number of appeals by right and by permission are shaded in black. States which hear more appeals by permission are colored in blue, while states which hear more appeals by right are shaded in orange.

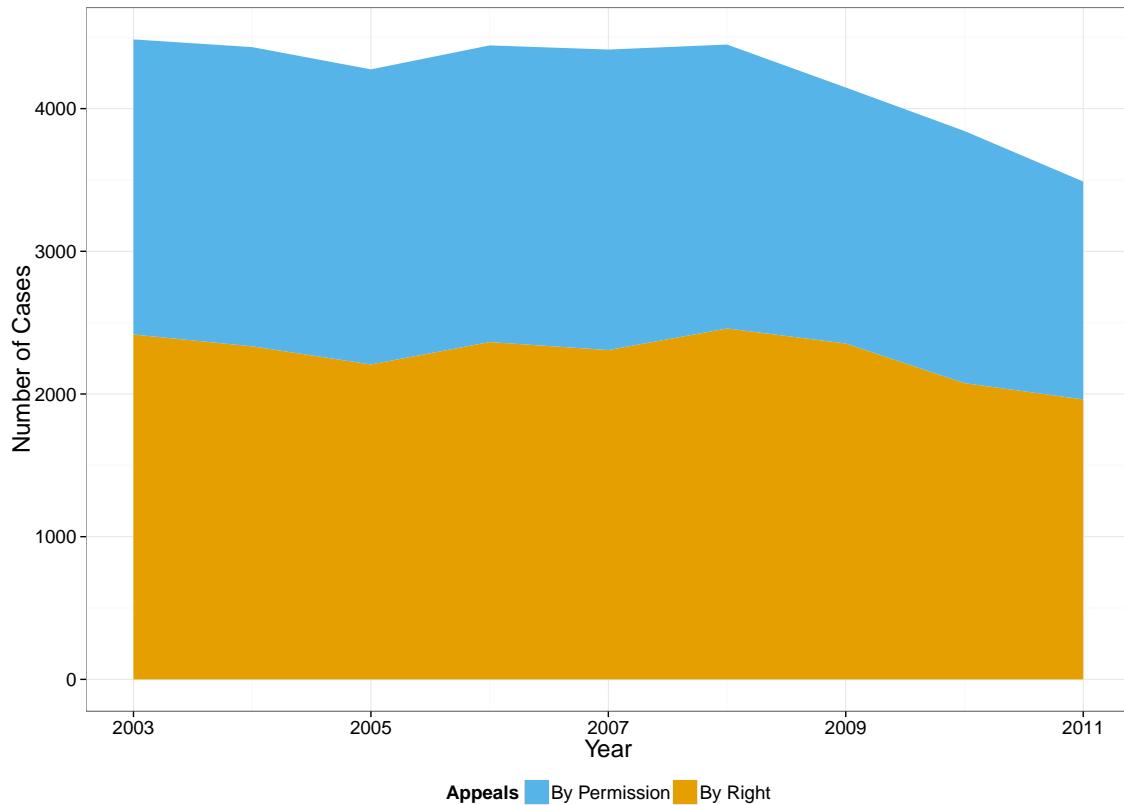
Figure 4.8: Written, Published Substantive Cases in State Courts of Last Resort, by Year



examine state COLRs and see how their policy attention changes throughout the 2000s. Overall, state COLRs are deciding fewer cases at the end of the decade than at the beginning. Figure 4.8 illustrates this trend, both for the aggregated count of cases as well as separately for appeals by permission and by right. Both types of appeals show a significant decline in the number of decisions from 2009–11.

Figure 4.9 reports the number of Law, Crime, and Family cases annually, with separate lines for appeals by permission and by right. Much of the overall decline is attributable to a decline in the number of Law, Crime, and Family decisions. We already knew that these cases account for the majority of state COLRs’ dockets, so

Figure 4.9: Law, Crime, and Family Cases in State Courts of Last Resort, by Year



the decrease in the number of decisions in this area will have a substantial impact on the overall caseload. There is a substantial decline in the number of cases within this policy area in the final three years, for both appeals by permission and those by right. These findings conform with trends estimated from aggregated caseload statistics from the National Center for State Courts ([LaFountain et al. 2012](#)).

While Law, Crime, and Family issues are a major component of state COLRs agendas, these courts also render a significant number of decisions on other policies. Figure 4.10 reports similar trends, but excludes Law, Crime, and Family. With the adjusted scales, we now see a significant number of decisions issued in other policy areas typically associated with state government. State COLRs are active policymakers in a

wide range of policy areas, predominantly Finance; Labor, Employment, Immigration; Health; State Government Operations; and Local Government. To a lesser extent, these courts also issue a substantial number of decisions annually in other areas such as Civil Rights and Liberties; Community Development, Housing; Education; and Transportation. In most policy areas, the COLRs tend to hear an equal number of appeals by permission and by right or slightly more appeals by permission.

State COLRs issue many decisions annually, but separately within each policy area the annual number of decisions tends to be quite small. Figure 4.11 illustrates this by presenting boxplots for the annual total number of decided appeals within each topic area for each state, separated by whether the appeals are by permission or by right. With the exception of Law, Crime, and Family, most state COLRs in a typical year issue only a handful of decisions in each policy area. The median number of appeals within each state, year, policy area, and procedural path (i.e. appeal by permission or by right) is zero. In fact, 60% of state COLR annually fail to hear a single case within any given policy area.

Taken as a whole, these findings suggest two facts to consider when formulating and evaluating hypotheses about macro-level policy attention in state COLRs. First, COLR attention to Law, Crime, and Family is possibly governed by a different agenda-setting process than other policies. Such a conclusion makes sense when one realizes that the vast majority of criminal prosecutions occur in state courts.²⁰ Previous studies of agenda-setting on the U.S. Supreme Court mostly ignore this entire policy area because there is only a small set of cases for the Court to even consider hearing, much less render decisions on the merits. Patterns of behavior and influences on

²⁰In 2010, 78,428 criminal cases were initiated across the entire federal judicial system (*History of the Federal Judiciary: Criminal Cases 2014*). In that same year, state courts initiated 20,437,849 criminal cases (Court Statistics Project 2012).

Figure 4.10: Policy Attention in State Courts of Last Resort, by Year and Policy Topic (Excluding Law, Crime, and Family)

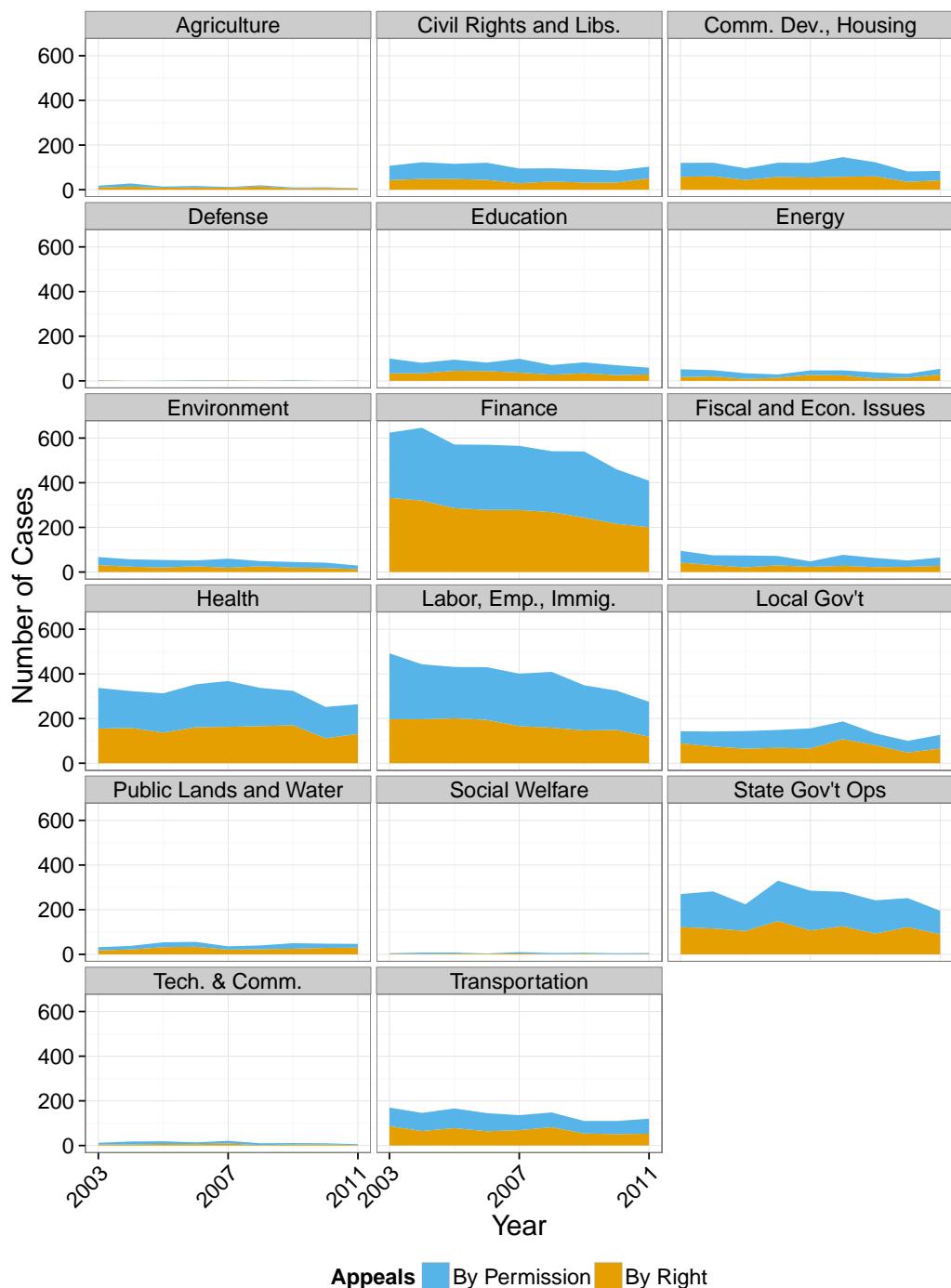
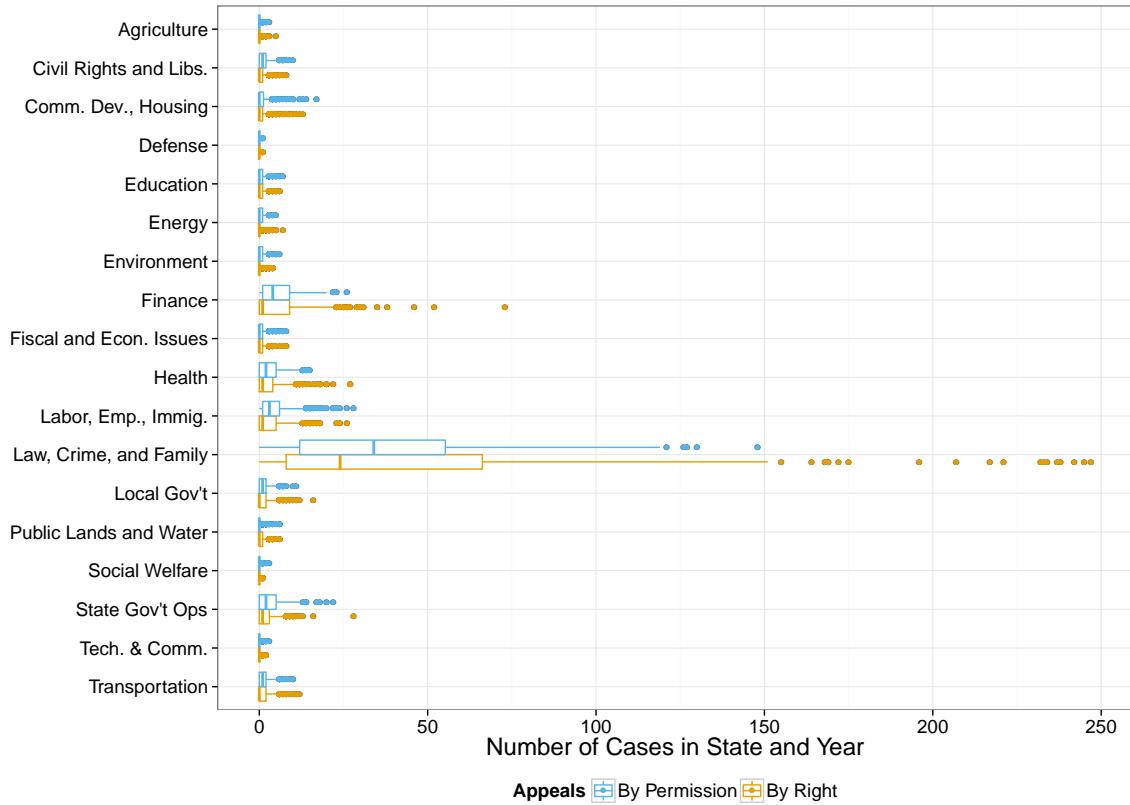


Figure 4.11: Policy Attention in State Courts of Last Resort, by State, Topic, and Year



agenda-setting in other issue areas such as Finance or Health may not apply to Law, Crime, and Family cases. Second, most states are annually inactive in many policy areas, and when they do act typically hear fewer than 10 cases (excluding Law, Crime, and Family). Because of this, even a relatively small empirical relationship between judge, state, or litigant factors could have a substantial impact on the court's overall agenda.

In this chapter I identified a new approach to measuring policy attention and procedural path in state COLRs. Using supervised machine learning techniques, I classified all state COLR decisions from 2003–11 and validated my coding decisions

using standard assessments of coverage and recall. From this data, I provided an overview of policy attention across the states and found that procedural path is a strong determinant of policy attention. In the following chapter, I use this data to evaluate several hypotheses of judicial agenda-setting derived from the institutional-strategic model.

Chapter 5

Macro-Policy Attention in State Courts of Last Resort

Policy attention in an institution can be measured at different levels of aggregation. In this chapter, I seek to explain differences in state COLRs' *macro-level* policy attention. By macro-level attention, I mean the total number of cases heard in a given policy area. Why does Colorado hear so many Public Lands and Water cases? Why does North Carolina not hear Civil Rights and Liberties cases? Why do state COLRs decide lots of Education cases, but rarely decide Social Welfare cases?

In the following section, I identify three sets of hypotheses about appeals by permission and by right which are derived from the institutional-strategic theory of judicial agenda-setting: institutional, separation-of-powers, and caseload. I evaluate these hypotheses using the measures of policy attention described in Chapter 4. Based on separate models estimated for appeals by permission and by right within each major policy area, I find little support for an institutional-strategic explanation for macro-policy attention in state COLRs. I conclude with a discussion about the impact

of these findings.

5.1 Hypotheses

5.1.1 Institutional Hypotheses

With appeals by permission, justices have the opportunity to strategically select the cases they will review. Previous research on state COLRs suggests that justices' decisions on the merits are shaped in part by their perception of professional retaliation (Hall 1987, 1992, 1995; Langer 2002). Specifically, when justices are retained through gubernatorial or legislative appointment, they are more likely to moderate their decisions and act in accordance with the preferences of the entity responsible for retention, rather than their own personal preferences. These governmental institutions are more likely to pay attention to the decisions of the court in policy-relevant areas than is the public under an electoral retention system. Public awareness of and retaliation for state COLR decisions is typically low and limited to highly salient issues involving the death penalty and other social policies.¹ Conversely, institutionalized government bodies such as legislatures and governors have stronger incentives and more resources to evaluate judicial decisions, so justices in these courts should avoid contentious decisions by limiting their overall work within salient policy topics.

Elected Court Hypothesis The number of appeals by permission heard within a policy area will be higher if the court is retained through elections.

Research on decisionmaking in state courts also demonstrates that the strategic behavior of judges differs depending on term length. Longer term lengths insulate

¹Blume and Eisenberg (1998) and Sulzberger, A. (2010, November 3). “In Iowa, Voters Oust Judges Over Marriage Issue.” *The New York Times*, pp. A1.

judges from retaliation for their decisions, so they will be less fearful of acting in policy areas. In death penalty cases, justices are more responsive to public preferences when their terms are shorter (Brace and Hall 1995; Hall 1992), while Huber and Gordon (2004) finds trial judges' sentencing decisions become more punitive as they approach election. Brace, Hall and Langer (1998); Langer (2002) find evidence that justices are more likely to review decisions when they have longer term lengths.

Term Length Hypothesis The number of appeals by permission heard within a policy area will be higher as the justices' term length increases.

Courts also possess institutional resources which facilitate an increased workload. The more professionalized an institution, the greater capacity it has to generate and evaluate information in the policymaking process (Squire and Hamm 2005; Squire 2007). In the context of courts, these resources can include salaries, law clerks and staff size, budgets, and docket control (Glick and Vines 1969; Brace and Hall 2001; Squire 2008). A court with a greater amount of resources is considered a more professionalized court, and therefore should have the capacity to hear a larger number of appeals.

Professionalized Court Hypothesis The number of appeals by permission heard within a policy area will be higher in more professionalized courts.

In the U.S. Supreme Court, affirmative votes from four out of nine justices (i.e. the "Rule of Four") are required in order to grant a petition to appeal by permission. State COLRs, however, use a variety of decision rules for granting appeals (see Figure 3.4). As the number of votes required to grant a petition to appeal increases, the marginal effect any single vote has on whether or not the appeal is granted decreases. A justice's importance to the granting of an appeal by permission is smaller if he or she needs to gather a larger coalition of justices to grant the appeal. This requires more work and

effort on the part of the justice merely to get the appeal docketed, before the court even considers the merits of the appeal. Since a justice's individual vote will be less valuable as more votes are necessary to grant a petition to appeal, he or she should be less likely to vote to grant an appeal in any given case. As such, courts with majority decision rules should grant and review more appeals by permission than courts with a minority rule.

Majority Decision Rule Hypothesis The number of appeals by permission heard within a policy area will be lower under a majority voting rule.

The presence of an intermediate appellate court (IAC) is likely to increase a court's selectivity over its discretionary docket. Because an IAC offers litigants an alternative venue for dispute resolution, the COLR should receive fewer petitions to appeal by permission. With a smaller pool of appeals, the high court can be more selective in the decisions it reviews. Perhaps within a specific policy area the COLR might utilize this smaller workload to grant a larger number of appeals ([Brace, Hall and Langer 1998](#); [Langer 2002](#); [Tarr and Porter 1988](#)), however across all types of policy areas this effect should be negligible.²

Intermediate Appellate Court Hypothesis The number of appeals by permission heard within a policy area is smaller if the state utilizes an intermediate appellate court.

²For similar reasons, I also expect IACs to reduce the number of appeals by right: as the first level of appellate review, IACs filter out dissatisfied litigants who are less likely to pursue a second appeal to the COLR. In states without an IAC, a litigant's only avenue to appeal by right is through the COLR and the court is required to review the decision. However due to issues of missingness in other measures relevant to appeals by right, I am unable to evaluate this hypothesis.

5.1.2 Separation-of-Powers Hypotheses

If judges behave strategically when facing appeals by permission, then the COLR will likely weight several different strategic concerns. The first concern for the court should be the preferences of the state government ([Langer 2002](#)). When faced with a hostile legislature or executive, the court should be less likely to act in a policy area by hearing appeals. If they did so, justices could face multiple forms of retaliation. To deny the court a policy victory, the government could act to limit or overturn the decision. If it strongly disagreed with the decision, legislators or the governor could attempt to remove the justice from office or prevent his or her retention. A government more closely aligned with the court would be less likely to act in this way, since it should be more satisfied with the court's decision and have no need to retaliate.

Legislative Avoidance Hypothesis The number of appeals by permission heard within a policy area will decrease as the ideological distance between the court and the legislature increases.

Gubernatorial Avoidance Hypothesis The number of appeals by permission heard within a policy area will decrease as the ideological distance between the court and the governor increases.

Justices will likely consider not just the preferences of outside actors, but those of their fellow justices as well. Courts with ideologically similar members improve a justice's ability to predict the outcome on any given appeal. Consider the example of a conservative justice who seeks conservative decisions on the merit. Now assume he sits on a court with ideologically dispersed members: that is, there are a mix of conservative, liberal, and moderate justices with no single ideological block possessing

a majority coalition. In this scenario, the justice will have more difficulty forecasting the probable decision on the merits since different majority coalitions could arise depending on the issue involved in the appeal. Because the court lacks a strong majority consensus capable of controlling the outcome of appeals, justices should be hesitant to grant review and in order to avoid a potentially undesired outcome.

Ideological Cohesion Hypothesis The number of appeals by permission heard within a policy area will decrease as the court's justices become more ideologically dissimilar.

Divided government provides justices with more flexibility to act within policy areas because the legislature and executive cannot as easily retaliate as it could if it were unified (Brace, Hall and Langer 1998, 2001; Langer 2002). Whether it seeks to overturn the policy decision or weaken and remove the justice, actors in a divided government are less likely to have a common objective and work together to pursue it. Additionally, litigants may also turn to the courts in a period of divided government because they cannot achieve their desired policy outcome through the legislative process.

Divided Government Hypothesis The number of appeals by permission heard within a policy area will be higher when the state government is divided.

5.1.3 Caseload Hypotheses

When litigants have the power to submit appeals by right, then justices no longer have control over the number or types of cases they hear. Litigants are the primary, if not only, driving force behind a court's agenda. As such, we should expect that a court's mandatory agenda is shaped strongly by the overall workload of the state

judiciary. As trial courts and lower appellate courts are more active and hear more cases, the state COLR's workload should also be expected to rise. Unless the lower courts produce more satisfactory outcomes when appeals will potentially be reviewed by right, the sheer quantity of cases will increase the COLR's workload compared to if the justices could filter through the appeals.³

Potential Appeals Hypothesis The number of appeals by right heard within a policy area will increase as the lower courts' caseloads increase.

Proportion Appealed Hypothesis The number of appeals by right heard within a policy area will increase as the proportion of lower court decisions appealed to the COLR increases.

The mandatory caseload of a COLR should also be influenced by the number of attorneys in the state. Each attorney's time is finite, so there is generally a limit to how many clients any individual attorney can actively represent in court. When more attorneys are available in the state, more prospective litigants will have the opportunity to bring their dispute to the court system. Likewise, more attorneys will be available to pursue appeals on behalf of clients dissatisfied with the initial decision. Alternatively, a state may have more attorneys because there is a greater demand for appellate litigation. In this scenario, the number of attorneys is determined by the number of prospective litigants rather than the number of litigants being determined by the availability of attorneys. Regardless of the causal direction, appeals by right should increase when more attorneys are present within the state.

Available Attorneys Hypothesis The number of appeals by right heard within a policy area increases as the per capita number of lawyers increases.

³These hypotheses also serve as proxy controls for the population and size of the state.

5.2 Research Design and Data

To evaluate these hypotheses, I require the total number of appeals by permission and by right heard in a given state for a given year within a policy area. I use the data set described in chapter 4. The dependent variables of interest are the number of appeals heard in a given policy area in each state and year under both procedural paths (*Number of Appeals by Permission* and *Number of Appeals by Right*). Consistent with the hypotheses previously described, the following variables are used to explain the two dependent variables:⁴

Judicial Elections Coded 1 if the state utilizes partisan, nonpartisan, or retention elections to retain justices, 0 otherwise ([American Judicature Society 2013](#)).

Term Length The number of years of a full term in office ([American Judicature Society 2013](#)).

Judicial Professionalism A continuous measure of the degree to which the state COLR has adequate institutional support to structure and manage its docket ([Brace and Hall 2001](#)).

Majority Decision Rule 1 if the court requires a majority of justices to vote affirmatively in order to grant review, 0 otherwise ([American Judicature Society 2013](#)).

Intermediate Appellate Court 1 if the state utilizes an intermediate appellate court, 0 otherwise ([American Judicature Society 2013](#)).

Distance to Upper Chamber The absolute difference between the CFScore for the

⁴Table 5.1 reports the expected directionality of their estimated coefficients.

median member of the COLR and the median member of the upper legislative chamber (Bonica and Woodruff 2012; Bonica 2013b).

Distance to Lower Chamber The absolute difference between the CFScore for the median member of the COLR and the median member of the lower legislative chamber⁵ (Bonica and Woodruff 2012; Bonica 2013b).

Distance to Governor The absolute difference between the CFScore for the median member of the COLR and the governor (Bonica and Woodruff 2012; Bonica 2013b).

Ideological Fractionalization of the Court The standard deviation of the CFScores of all the members of the state COLR (Bonica and Woodruff 2012).

Divided Government 1 if both chambers of the legislature and the governor are not controlled by the same party, 0 otherwise (Klarner 2011).

Number of Cases Filed in Lower Courts Last Year The logged grand total number of cases filed in the lower courts in the previous year (Court Statistics Project 2012).

Proportion of Lower Court CasesAppealed *Number of Cases Filed in Lower Courts Last Year* divided by the grand total number of cases (normalized by 1,000) filed in the COLR (Court Statistics Project 2012).

Lawyers Per Capita The number of lawyers employed per 1,000 residents (U.S. Census Bureau 2014).

⁵I omit Nebraska from the analysis because its legislature is unicameral and nonpartisan.

Table 5.1: Hypothesized Direction of Model Coefficients

Variable	Permission	Right
Dependent Variables		
Number of Appeals by Permission		
Number of Appeals by Right		
Independent Variables		
Institutional Factors		
Judicial Elections	+	
Term Length	+	
Judicial Professionalism	+	
Majority Decision Rule	-	
Intermediate Appellate Court	-	
Separation-of-Powers Factors		
Distance to Upper Chamber	-	
Distance to Lower Chamber	-	
Distance to Governor	-	
Ideological Fractionalization of the Court	-	
Divided Government	+	
Caseload Factors		
Number of Cases Filed		+
in Lower Courts Last Year		
Proportion of Lower Court Cases		+
Appealed		
Lawyers Per Capita		+
Random-Effects		
State		
Year		
Observation		

Since the dependent variables are counts of events, Poisson regression is an appropriate regression approach. Observations in the dataset are grouped by state, policy topic, year, and procedural. As such, each case total within policy topics is unlikely to be independent of each other, just as case totals within each state or year are unlikely to be independent of each other. To account for these differences, I estimate separate multilevel models for *Number of Appeals by Permission* and *Number of Appeals by*

Right by policy topic, with a varying intercept for each state and year (Gelman and Hill 2007). This applies a soft constraint to the coefficients, allowing both between and within-group variation by modeling it directly from the data. Because the dependent variable is overdispersed, I correct for this by also including a random effect for each observation (Elston et al. 2001).

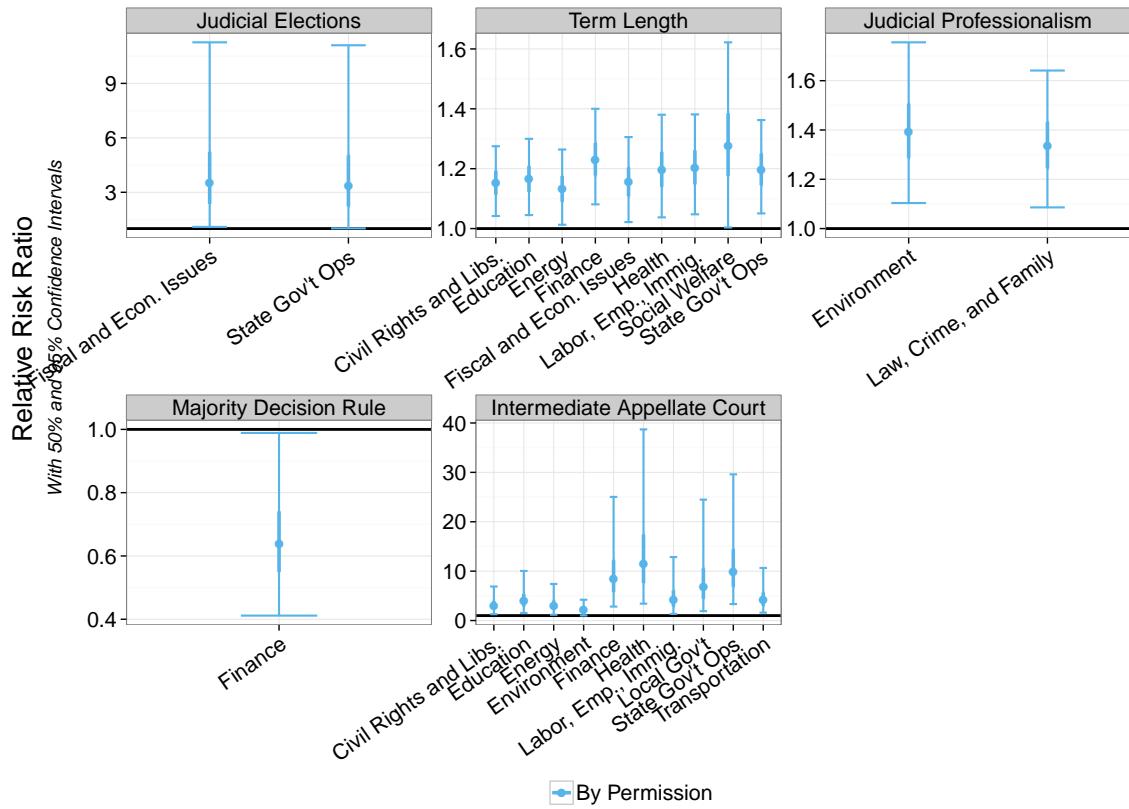
5.3 Results

Full model results are available in Appendix A. Rather than attempting to directly interpret the estimated coefficients in their log-incident rate ratio form, I derive a series of plots of the incident risk ratio (IRR) change associated with a one-unit increase in each independent variable. Figure 5.1 displays the relationships between institutional covariates and *Number of Appeals*.⁶ As a reminder, I expect *Judicial Elections*, *Term Length*, and *Judicial Professionalism* to be associated with an increase in *Number of Appeals by Permission*, and *Majority Decision Rule* and *Intermediate Appellate Court* with a decrease in *Number of Appeals by Permission*.

Support for these hypotheses varies across different policy topics. For Fiscal and Economic Issues and State Government Operations, COLRs with elected justices on average hear three to four times appeals by permission annually than COLRs with appointed justices. For a substantial number of policy areas, a one-unit increase in *Term Length* increases the estimated number of appeals by permission by a factor of between 1.1 and 1.3. Likewise, increased judicial professionalism is associated with an increase in the IRR of deciding appeals by permission for Law, Crime, and Family and Environmental cases. This is especially noteworthy since Law, Crime, and Family

⁶To simplify the display, I only plot risk ratios which are statistically significant at the 95% confidence interval.

Figure 5.1: Relationship Between Institutional Covariates and Number of Cases Heard in State Courts of Last Resort



Note: Changes in predicted count of appeals estimated based upon models from Table 6.1 with remaining covariates held constant at their mean value. Error bars represent 95% confidence intervals.

cases comprise the majority of state COLRs dockets; even a marginal increase in judicial professionalism can significantly alter the COLR's policy attention.

For the institutional hypotheses which predict decreases in the number of appeals by permission, the empirical evidence does not support these arguments. *Majority Decision Rule* is only associated with a decrease in the number of Finance cases, and the relationship is not significantly distinguishable from zero for other policy areas. More surprisingly, for a large number of policy areas the presence of an IAC is

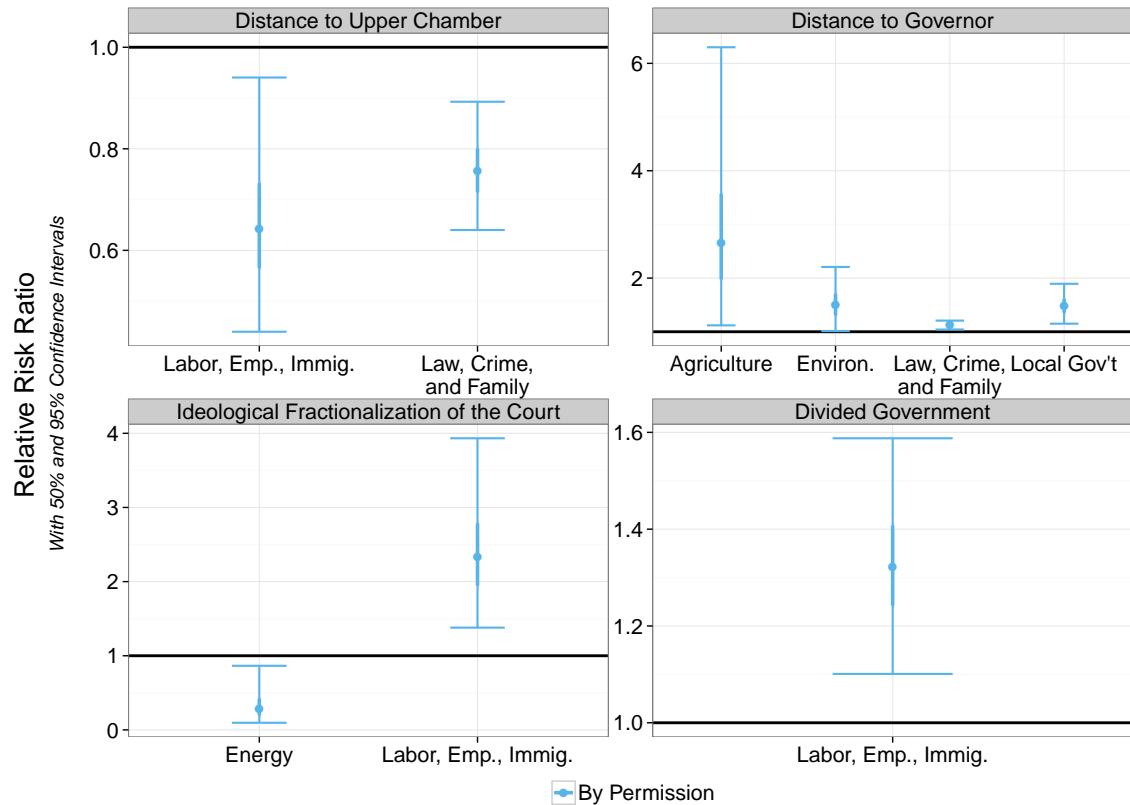
associated with an *increase* in the number of cases decided, rather than a decrease. The IRRs for these covariates range between 2 and 11, with the 95% confidence interval soaring above 20 for several policy areas. Based on these findings, there is contradictory evidence that institutional factors influence state COLR agenda-setting in appeals by permission; in certain policy areas institutional factors are associated with increased numbers of cases, however for IACs the estimated relationship is in the opposite direction from the original hypothesis.

For the separation-of-powers hypotheses, I expect *Distance to Upper Chamber*, *Distance to Lower Chamber*, *Distance to Governor*, and *Ideological Fractionalization of the Court* to all be associated with a decrease in *Number of Appeals by Permission*, while *Divided Government* to be associated with an increase in *Number of Appeals by Permission*. Figure 5.2 shows the change in the IRR of appeals associated with a one-unit increase in each of these covariates. Again, I find limited and contradictory evidence regarding these hypotheses. In two major policy areas (Labor, Employment, Immigration; and Law, Crime, and Family), COLRs hear fewer appeals by permission as their ideological distance from the upper chamber of the legislature increases.⁷ Likewise, COLRs decide 1.3 times more Labor, Employment, and Immigration cases under divided government.

However in several areas, including Law, Crime, and Family again, COLRs decide more cases as their ideological distance from the governor *increases*. This suggests rather than avoiding confrontation, COLRs are not afraid of acting in policy domains even when they ideologically differ from the governor. The same contradiction is present for *Ideological Fractionalization of the Court*. For Energy cases, a COLR only decides .28 times the number of Energy cases for every one-unit increase in fractionalization.

⁷*Distance to Lower Chamber* was never statistically significant in any of the individual policy models.

Figure 5.2: Relationship Between Separation-of-Powers Covariates and Number of Cases Heard in State Courts of Last Resort



Note: Changes in predicted count of appeals estimated based upon models from Table 6.1 with remaining covariates held constant at their mean value. Error bars represent 95% confidence intervals.

However for Labor, Employment, and Immigration cases the exact opposite relationship is found; for every one-unit increase in *Ideological Fractionalization of the Court*, on average COLRs decide 2.3 times more cases. Based on these findings, there is some conflicting evidence that separation-of-powers factors influence state COLR agenda-setting, though not always in the expected direction.

Finally for the caseload hypotheses, I expect *Number of Cases Filed in Lower Courts Last Year*, *Proportion of Lower Court CasesAppealed*, and *Lawyers Per*

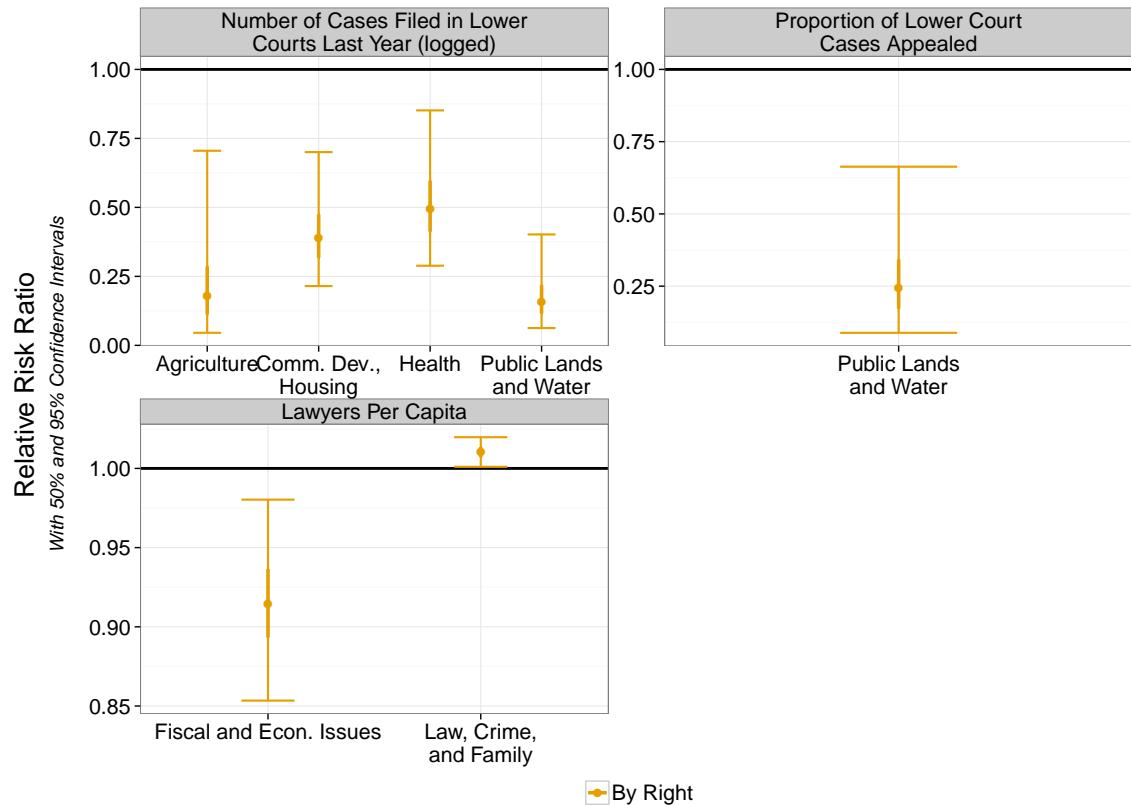
Capita to be associated with increases in *Number of Appeals by Right*. Figure 5.3 illustrates the predicted change in *Number of Appeals by Right* associated with a one-unit increase in each of these covariates. Across all policy areas, there is virtually no support for these caseload hypotheses. The vast majority of policy areas do not report statistically significant relationships, and those that do are almost always in the opposite direction. In several areas, increases in the caseload of lower courts are associated with decreases, rather than increases, in the number of decided cases. For Public Lands and Water, as *Proportion of Lower Court CasesAppealed*, the number of appeals by right decided decreases. Finally, an increase in *Lawyers Per Capita* is associated with a slight increase in the rate of Law, Crime, and Family decisions (IRR = 1.01) and a slight decrease in Fiscal and Economic Issues cases (IRR = 0.91). Based upon these findings, there is little evidence that caseload factors influence state COLRs' mandatory agendas.

5.4 Discussion

In this chapter, I derived several sets of hypotheses about how institutional, separation-of-powers, and caseload factors influence state COLRs' mandatory and discretionary agendas. I evaluated these hypotheses using a unique dataset of judicial decisions and policy attention in state COLRs. I found some evidence that institutional and separation-of-powers factors shape discretionary agendas, but no evidence that caseload factors influence mandatory agendas.

These findings are discouraging for acceptance of the institutional-strategic theory of agenda-setting. While it may be true that this theory does not explain macro-level policy attention, there are a number of factors which might explain the lack of robust

Figure 5.3: Relationship Between Caseload Covariates and Number of Cases Heard in State Courts of Last Resort



Note: Changes in predicted count of appeals estimated based upon models from Table 6.1 with remaining covariates held constant at their mean value. Error bars represent 95% confidence intervals.

support in this chapter. First, the variables used to evaluate the caseload hypotheses are particularly blunt measures of judicial caseloads and have significant missingness due to differential reporting standards across the states ([Court Statistics Project 2012](#)). They are blunt in that they only measure the number of cases across all policy areas, with no specific measures within each policy domain. While the NCSC collects information within different types of legal appeals and updated their reporting system in 2006 to include more refined measures of caseloads, its surveys and data are

targeted primarily towards court administrators, not social scientists; for this reason, it categorizes cases based on legal structure rather than public policy implications. The other criticism of these surveys is that they rely on court administrators to provide comprehensive summaries of their caseloads: most states only return partially-completed surveys with data at the broadest level of aggregation. Even with the increase in caseload categories, most state COLRs do not sufficiently report their statistics to allow meaningful analysis of these variables. Implementing more refined measures of policy attention and activity in the lower courts could improve the validity and reliability of these variables.

Secondly, the results may simply suggest that institutional and strategic factors are not substantially relevant at this high level of aggregation. Even within specific policy areas such as Civil Rights and Liberties, many of these cases are low-salience in that they attract very little attention from the public and other branches of government. If these cases are not considered important outside of the judiciary, then justices and litigants are unlikely to consider these outside pressures when submitting or granting appeals. One possible approach to evaluating this possibility is analyzing macro-attention in more specific categories of policy topics. The Policy Agendas Project ([Baumgartner and Jones 2014](#)) uses 220 minor policy topic codes along with its 20 major policy topics to measure policy attention at a more specific level. Measuring and modeling state COLR policy attention using micro topic codes may reveal categories of cases which attract more salience and lead to greater consideration of institutional, separation-of-powers, and caseload factors in establishing the agenda. Another possible approach is to examine agenda-setting decisions not at the macro-level, but at a lower level of aggregation. By focusing on more salient and controversial cases at this level, we might begin to see institutional-strategic behavior. In the following two chapters,

I take this approach to examine how justices decide to grant review in appeals by permission.

Chapter 6

Judicial Voting in Appeals by Permission

The concept that judges are sophisticated agenda-setters who anticipate a court's final decision and utilize that information to help determine whether or not the judge decides to grant review is well-supported in the context of the U.S. Supreme Court (Benesh, Brenner and Spaeth 2002; Caldeira, Wright and Zorn 1999; Perry 1991). Supreme Court justices are perceived to be ideologically motivated actors (Segal and Spaeth 2002) who seek to maximize their preferences, in part by preventing the Court from hearing cases when they anticipate a sub-optimal outcome on the merits. Case factors and legal norms play an important role in the agenda-setting process (Black and Owens 2009, 2011; Caldeira and Wright 1988, 1990; Owens 2010), yet social scientists still predominantly believe the justices act strategically to maximize their preferences at both stages of the decisionmaking process.

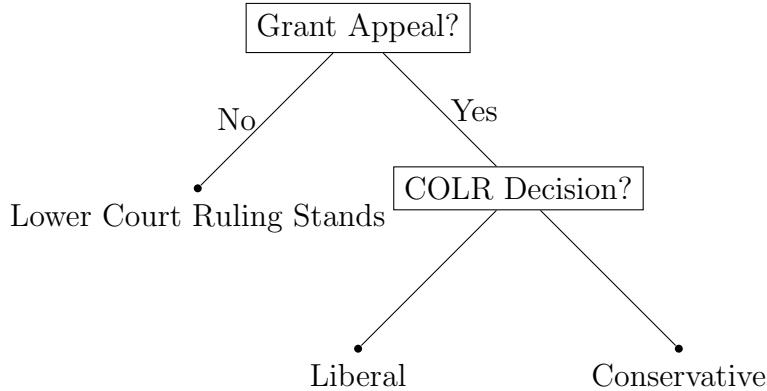
Many of these findings are supported by empirical evidence from the U.S. Supreme Court, yet there are many courts where judges have an influence over the agenda-

setting process. Whenever a judge has the power to grant or deny cases a place on the court's agenda, understanding the judge's preferences and concerns about the types of cases he wants included on the docket are crucial to understanding how the court renders decisions on the merits and issues policy decisions. Individual state COLRs in the United States are such institutions where judges frequently exercise agenda-setting power. While we know a great deal about how state COLR justices arrive at their decisions on the merits (Brace and Hall 1997; Brace, Hall and Langer 1998, 2001; Hall 1992; Hall and Brace 1992; Langer 2002), we know relatively little about how they set their discretionary agenda.¹ Specifically, we do not know what factors influence a state COLR justice's decision to grant or deny review.

In this chapter, I evaluate how these justices' preferences shape individual agenda-setting decisions. This is the first known assessment of individual judicial agenda-setting in state COLRs. I review the theoretical framework of sincere and sophisticated models of agenda-setting, identify empirical evidence supporting sophisticated agenda-setting on the U.S. Supreme Court, and posit several reasons why state COLR justices may in fact be sincere agenda-setters. Drawing upon hypotheses generated from these models, along with other non-ideological considerations, I test these models on a unique dataset of non-unanimous judicial decisions to grant or deny review across six state COLRs. I find substantial evidence that state COLR justices engage in sincere agenda-setting, rather than the sophisticated agenda-setting which occurs in the U.S. Supreme Court.

¹Unlike the U.S. Supreme Court, many state COLRs hear certain appeals by right. In this chapter, I am only concerned with appeals where justices exercise discretion over whether or not they review it.

Figure 6.1: Appellate Process for Appeals by Permission



6.1 Sincere and Sophisticated Models of Judicial Agenda-Setting

Like the U.S. Supreme Court, state COLRs generally follow a standard procedure for decisions on whether or not to grant appeals by permission, as well as decisions on the merits.² Figure 6.1 illustrates this procedure through the agenda-setting and decision on the merits stages. First, the COLR must decide whether or not to grant the appeal (g). If it denies the appeal (d), then the lower court ruling is upheld. However if the COLR grants the appeal, then the justices must establish a new outcome by either affirming or reversing the lower court decision. In practice, this will result in a new outcome which can be considered either liberal (l) or conservative (c).

I assume that each case on the COLR's docket addresses a single dimension of the law. Three possible outcomes can result from the COLR's decision regarding a case. First, if the COLR denies the appeal, the point D represents the position of the status quo (i.e. the lower court's decision). If the COLR grants the appeal, L represents the

²I draw heavily upon Caldeira, Wright and Zorn (1999) to explain the theoretical models.

outcome if the COLR decides the case liberally on the merits and C if the COLR decides the case conservatively. These outcomes can be ordered preferentially (e.g. $L < D < C$). Given the specific facts and legal constraints involved in each case, justices are assumed to have complete information about the location of these possible outcomes prior to granting or denying the appeal.

State COLR justices are assumed to have single-peaked preferences over the outcomes of L , C , and D . For instance, $L > D > C$ denotes that a justice prefers granting the appeal and deciding it liberally over denying the appeal and leaving the lower court ruling in place, while both of these outcomes is favored over granting the appeal and deciding the case conservatively. A justice might also prefer leaving the lower court decision intact, such as $D > L > C$. This preference ordering might result when a justice does not feel the case involves an issue with importance such that it merits the intervention by the COLR. Justices are not only motivated by ideological concerns, but also pressures over their workload. All else equal, COLR justices are assumed to prefer to hear fewer cases of more significance rather than a greater number of less important cases. Strategies for a justice are the pair of votes in the decision process, one to grant or deny the appeal and one on the merits. Given the potential decisions at each stage, justices have four strategies from which to choose: (g, l) , (g, c) , (d, l) , (d, c) .

Under a *sincere* model of behavior, a justice votes for his favorite alternative at each stage of a decisionmaking process ([Caldeira, Wright and Zorn 1999](#)). This means that the justice does not consider the ramifications of his decision in an early stage on later stages of the decision process, but only considers how his decision will effect the outcome at the contemporary stage. In the context of judicial agenda-setting, this means a justice will vote to grant or deny an appeal by permission solely on

their preferred outcome on the merits. For example, the strategy for a justice with preference $L > D > C$ is always (g, l) . This is true whether the anticipated outcome on the merits is L or C because the justice, while she is assumed to know this outcome is likely, does not factor this information in her decision to grant or deny the appeal.

The sincere agenda-setting strategy differs significantly from a *sophisticated* approach. Under a sophisticated strategy, the justice's decision on whether to grant or deny the appeal is conditional on the anticipated outcome on the merits. In this way, sophisticated justices are forward-thinking because they select a strategy which maximizes their outcomes at each stage of the decision process. Compared to the sincere justice, the sophisticated justice with preference $L > D > C$ will only implement the strategy g, l if he anticipates L to be the likely outcome on the merits. If he instead anticipates the conservative decision C , then the strategy g, l fails to maximize his preferences. Remember that the justices still prefers $D > C$; if he does not believe he can achieve his desired outcome L , then he will pursue a strategy that improves the likelihood of his second-preferred outcome D . Therefore if the anticipated outcome is C , then the sophisticated justice will employ the strategy d, l . For this justice, it is preferable that the less desired lower court outcome be allowed to stand rather than the COLR imposing a conservative decision: not only is this decision less desirable from an ideological standpoint, it also establishes a more conservative precedent that will be difficult for the justice to overturn in a future case.

This sophisticated agenda-setting results in two strategies that would not occur under sincere agenda-setting. The first is the “aggressive grant,” or when a justice votes to grant an appeal in order to affirm the lower court decision ([Benesh, Brenner and Spaeth 2002](#)). At first glance, this strategy does not appear to be different from a sincere justice deciding to grant an appeal. However, the sincere justice votes to grant

an appeal because she wants to overturn the lower court decision and impose either a liberal L or conservative C decision. The sophisticated justice votes to grant review because he wants to overturn the lower court decision *and anticipates the COLR deciding the case at his preferred outcome*. The sincere justice decides to grant the appeal simply because of her desired outcome; the sophisticated justice decides to grant the appeal because of his desired outcome and the likely decision of the COLR.

The second strategy found only under sophisticated behavior is the “defensive denial” (Perry 1991; Caldeira, Wright and Zorn 1999). This occurs when a justice votes to deny an appeal when the status quo outcome (D) is their second choice (e.g. $L > D > C$) and their least preferred outcome is the most likely result on the merits. The justice would prefer to grant the appeal and impose a liberal (L) decision, but believes that the COLR would actually implement a conservative (C) decision. Since this is the justice’s least preferred outcome, denying the appeal (D) is still preferable to C . A sincere justice would never follow this strategy, since granting the appeal and voting for a liberal decision on the merits (g, l) is the only possible path to L .

6.1.1 Why Sincere Agenda-Setting Might Occur in State COLRs

While evidence from the U.S. Supreme Court strongly implies that state COLR justices should also adopt sophisticated agenda-setting strategies (see Chapter 2), there are several reasons to support the possibility of sincere behavior. First, the U.S. Supreme Court is a highly atypical judicial institution. Justices are appointed by the president with Senate confirmation, and once confirmed are guaranteed lifetime tenure. This results in a court which is highly insulated from the legislative and executive branches, as well as the mass public. The overwhelming majority of national high courts, as well as state COLRs, utilize selection and retention mechanisms which provide much

less independence ([Epstein, Knight and Shvetsova 2001](#)). The institutional rules and norms of the U.S. Supreme Court have been relatively static over time, such that institutional design cannot be shown to explain changes in judicial behavior. Finally, these institutional rules and norms are also atypical compared to the larger body of national and sub-national COLRs. For instance, the U.S. Supreme Court has maintained a nearly exclusive discretionary docket since the 1920s. However, most other COLRs have a mix of appeals by permission and by right such that justices can only exercise individual control over a non-random portion of their docket. These factors suggest that models of U.S. Supreme Court judicial behavior may not generalize to other COLRs.

In a study of the Supreme Court of Canada, [Flemming \(2005\)](#) applies models of agenda-setting based upon research on the U.S. Supreme Court to a different national high court which operates with different institutional rules and norms. Flemming finds the sophisticated model of agenda-setting lacking in this non-American context, driven in part by procedural differences which hinder a Canadian justice's ability to forecast the court's decision on the merits. First, unlike in the United States where *cert* petitions are heard by the entire Court, applications for leave to appeal to the Supreme Court of Canada are heard by three-member panels, of which only two justices are needed to grant leave.³ Second, when leave is granted the Court can either hear the case *en banc* or as a five or seven-member panel. Justices participating in the leave panel do not know who which justices would participate in a decision on the merits,⁴ while justices who dissent from the initial decision to grant the appeal can be excluded from the participating in the full decision (p. 87). These institutional rules

³As [Flemming \(2005\)](#) notes, the vast majority of leave to appeal decisions are decided unanimously.

⁴Between 1986 and 1997, 77% of all cases were hear by panels of either five or seven justices, while only 23% were heard by the full nine-member court *en banc* (p. 85).

make sophisticated agenda-setting prohibitively difficult, and therefore leads justices on the Canadian Supreme Court to rely on other considerations when granting leave. Outside of the institutional context of the U.S. Supreme Court, sophisticated judicial agenda-setting may be a rare phenomenon.

Another potential reason that the sophisticated model does not generalize to the states is that state COLR justices do not view themselves as ideologically motivated political actors, but instead serve an important function within the legal system as error correctors. In the past fifty years, social scientists have accepted the notion that the U.S. Supreme Court is a political institution with important policymaking powers ([Casper 1976](#); [Dahl 1957](#)), that justices on the Court are motivated, in part, by ideological considerations ([Segal and Spaeth 2002](#)); and that these justices strategically utilize the agenda-setting process to achieve these goals ([Black and Owens 2009](#); [Benesh, Brenner and Spaeth 2002](#); [Caldeira, Wright and Zorn 1999](#)). Likewise, at the state level researchers have empirically demonstrated that justices' decisions on the merits are responsive to ideological ([Langer 2002](#)) and electoral concerns ([Hall 1987, 1992](#); [Hall and Brace 1992](#)).

However, there is also compelling evidence that state COLR justices are less ideologically motivated than their federal counterparts at certain stages of the decisionmaking process. In a study of the Oregon Supreme Court over a ten-year period, [Wasby \(2008\)](#) finds a significant degree of consensus as it relates to decisions on the merits. Not only are dissenting votes rare on the court, but the majority opinion is not assigned for ideological reasons but instead to the justice who expressed the most interest in the case or was considered an expert on the relevant area of law. Majority opinion writers are known to have a substantial amount of control over the outcome of the case ([Lax and Cameron 2007](#); [Wahlbeck 2006](#)), so the assignment procedure is

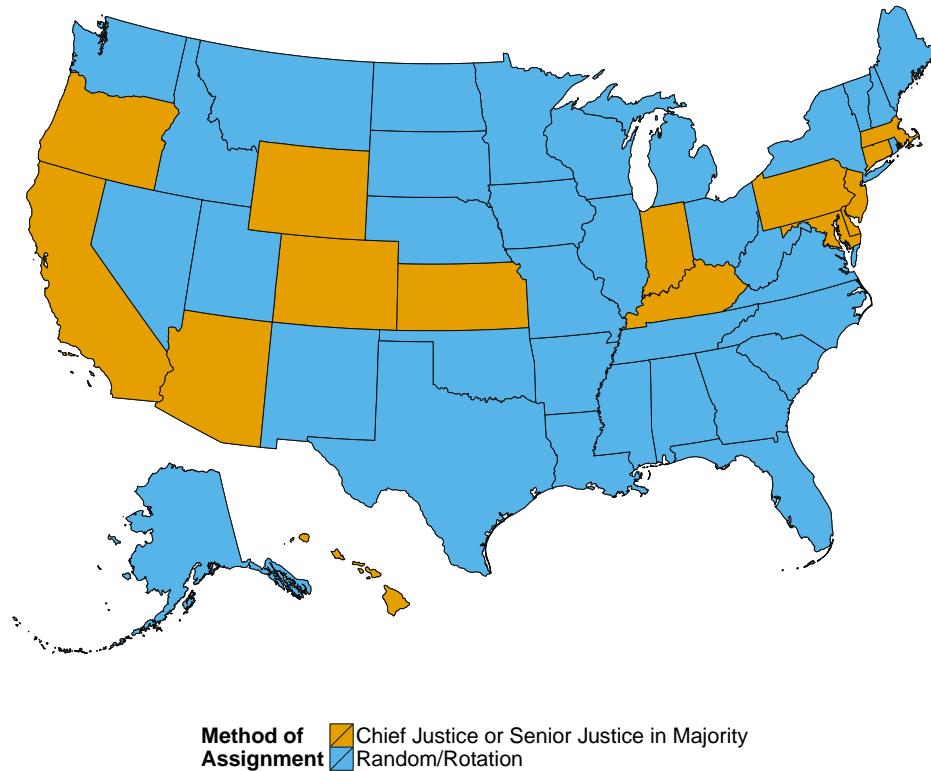
not a trivial matter. This approach to opinion assignment suggests a court that is not motivated by ideology, but instead by error-correction: if the lower court made an error in its decision, then the justice most likely to detect the error would be one who is passionate about or an expert in that area of the law.

Admittedly the cases the Oregon Supreme Court considered during the time period under analysis are not directly equivalent to a discretionary agenda-setting process since the court was required to hear all appeals (i.e. appeals by right, also known as mandatory jurisdiction). However, a large number of state COLRs utilize a system of random or rotational opinion assignment ([Hall 1989](#)). Unlike the system utilized in the U.S. Supreme Court majority opinion assigner is the senior member in the majority, most states assign the majority opinion either at random or by some rotational method to assign each justice an equal number of opinions (see Figure 6.2). The method of assignment does not depend on whether the COLR hears primarily appeals by permission or by right.⁵ Additionally, while ideological considerations are taken into account when a single justice controls the majority opinion assignment, judicial experience and expertise are also influential factors in determining which justice writes the majority opinion ([Szmer, Christensen and Kaheny 2012](#)).

If state COLR justices are less concerned with the ideological motivations of their colleagues when assigning majority opinions, then justices might also be less concerned with their colleagues' ideological motivations when deciding which appeals to grant. This behavior would reflect a sincere agenda-setting process, rather than a sophisticated one. Under this approach, a justice would seek to grant appeals where they think an error was made regardless of the potential decision on the merits. Under a random or rotational system of opinion assignment, the justice has no knowledge

⁵For example, West Virginia, which at the time heard appeals exclusively by permission, assigns majority opinions through a rotation determined by the chief justice.

Figure 6.2: Majority Opinion Assignment Rules, by State Court of Last Resort in the United States (as of 1990)



Source: Hall (1989).

of who will eventually write the decision of the court and therefore cannot account for this possibility in his first-stage decision of whether or not to grant the appeal. Instead, the justice relies entirely on his own belief of whether an error was made by the lower court, and if so whether or not that error is significant enough to necessitate review by the COLR.

A final possibility is that state COLRs' justices are influenced by nonstrategic factors unrelated to their preferences. Such an agenda-setting process undoubtedly occurs in courts which hear all appeals by right (Eisenberg and Miller 2009), as the

court’s docket is driven exclusively by factors outside of the control of the justices (e.g. litigants’ decision whether or not to pursue an appeal).⁶ However, even U.S. Supreme Court justices sometimes defer to legal norms and expectations when determining whether or not to grant *certiorari* ([Black and Owens 2009](#)). State COLR justices may be as deferential, or even more so, to these expectations. For example, U.S. Supreme Court justices are more likely to grant *cert* when the United States is a petitioner in the case ([Caldeira and Wright 1988](#); [Black and Owens 2011](#)). One could expect a similar phenomenon in state COLRs, where justices are more likely to grant appeals if the state is a petitioner. If justices are more concerned with these legal factors and selecting legally “important” cases, then their decision strategy will conform to neither the sincere nor sophisticated models. Instead, the presence or absence of these cues will be most strongly associated with whether or not a justice decides to grant an appeal.

6.1.2 Hypotheses

The sincere and sophisticated models of judicial behavior, along with nonstrategic considerations, lead to several hypotheses about how state COLR justices are expected to decide petitions to appeal by permission. Under the sincere model, an error-correcting justice would seek to reverse lower court decisions he believes to be incorrect. While a host of factors may determine what the justice believes to be incorrect, one way of operationalizing this belief is by examining the ideological direction of the lower court decision.⁷

⁶Even in courts which hear appeals by permission, litigants account for the ideological preferences of justices when deciding whether or not to appeal ([Brace, Yates and Boyea 2012](#)).

⁷[Calleira, Wright and Zorn \(1999\)](#) reject the notion that the directionality of the lower court decision should influence a justice’s decision to grant review. Under the sophisticated model, this could be correct as the justice’s decision should be driven by his ideological convergence or divergence

All judges have a finite amount of resources with which to manage their caseload. Especially when a justice has control over his docket, he will seek to expend his resources only on the most important cases. Here though, justices might differ as to what makes a case “important.” One type of justice may believe his responsibility is to correct errors made by lower courts ([Traynor 1957](#)): when the justice believes the lower court erred, he will grant the appeal in order to reverse the decision. But what does it mean that the lower court “erred?” If we assume justices are ideologically motivated, then a justice will believe the lower court decision is wrong if he disagrees with the ideological direction of it. Therefore when the lower court ruling differs ideologically from the justice’s preferences, he should become more likely to grant the appeal in order to reverse the decision. If the lower court decision is ideologically similar, then the justice will be less likely to grant the appeal.

Sincere Error-Correcting Hypothesis For a conservative (liberal) justice, the probability of granting an appeal decreases if the lower court decision is conservative (liberal).

Alternatively, justices may be more concerned with establishing legal precedent. Especially in judicial systems with an intermediate appellate court (IAC), COLR justices could instead seek to affirm lower court decisions with which they agree –

from the court. However, whether or not the justice agrees with the lower court decision does influence a justice’s decision to grant review *under either sincere or sophisticated agenda-setting*. Recall the potential outcomes L , C , and D . A sincere justice will vote for her most preferred outcome, regardless of the anticipated decision by the court. So if the justice’s preferences are $L > D > C$, then her strategy will be (g, l) . However, imagine instead that the justice’s preferences are $D > L > C$; that is, the justice would most prefer to deny the appeal and leave the lower court ruling in tact. Under this order of preferences, her strategy will be d, l . Importantly, a sophisticated justice would utilize the exact same strategy. But [Caldéira, Wright and Zorn \(1999\)](#) do not allow for this possibility, since the model does not account for whether or not the justice agrees with the lower court decision. In order to fully evaluate the accuracy of the sincere model of agenda-setting, the empirical model should account for whether or not the justice prefers the lower court decision.

thereby establishing a precedent and binding all lower court judges (and potentially future COLR justices) to adhere to the decision.⁸ This approach leads a justice to being more likely to grant an appeal when the lower court ruling is ideologically similar to the justice's preferences, and less likely to grant an appeal when the decision differs ideologically.

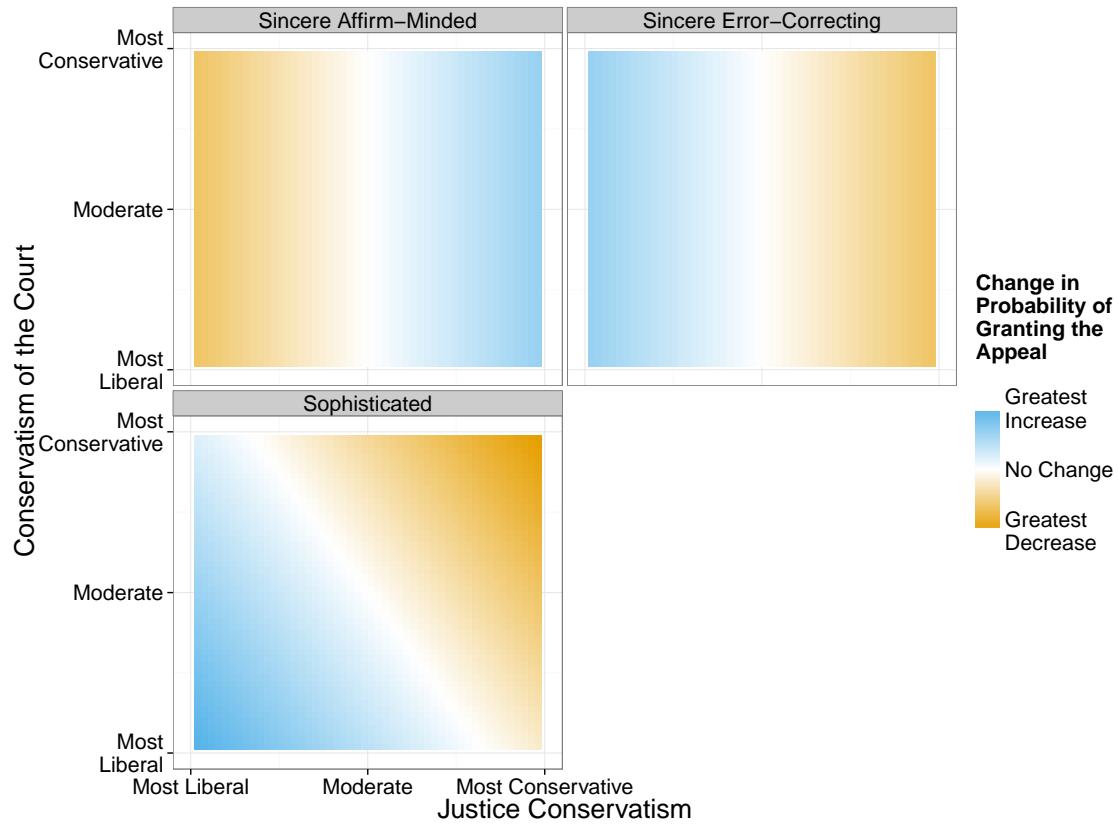
Sincere Affirm-Minded Hypothesis For a conservative (liberal) justice, the probability of granting an appeal increases if the lower court decision is conservative (liberal).

A sophisticated justice will account for the anticipated decision by the COLR on the merits when deciding whether or not to grant the appeal. The sophisticated justice's decision will not rely on the direction of the lower court decision, but instead is dependent entirely on that justice's ideology relative to the rest of the court. If the court is conservative, then the probability of granting an appeal by permission increases as the justice's ideology and the anticipated decision on the merits becomes more conservative. Conversely, when the court is liberal, then the probability of granting an appeal decreases as the justice's ideology and the anticipated decision on the merits becomes more conservative (see Figure 6.3 for a graphical depiction of the expected changes in probability).

Sophisticated Hypothesis The probability of a justice granting an appeal increases as the court becomes more conservative and as the justice becomes more

⁸State COLRs historically affirm lower court decisions at much higher rates than the U.S. Supreme Court (Benesh, Brenner and Spaeth 2002); this pattern is likely driven in part by the much larger mandatory docket in state COLRs (courts exercising mandatory jurisdiction are much more likely to affirm lower court decisions rather than reverse). However, Eisenberg and Miller (2009) still finds that when exercising discretionary jurisdiction state COLRs only reversed 51.6% of lower court decisions,⁹ whereas the U.S. Supreme Court has reversed in nearly two-thirds of its decisions since the 1946 term (Spaeth et al. 2011). This suggests that, at minimum, state COLR justices are more inclined to grant review and affirm compared to U.S. Supreme Court justices.

Figure 6.3: Simulated Models of a Justice Deciding to Grant an Appeal by Permission



conservative.

Sophisticated ideological considerations should not be confined only to distance from the ideological center of the court. Courts with ideologically similar members improve a justice's ability to predict a majority coalition on any given case. Consider the example of a conservative justice who seeks conservative decisions on the merit. Now assume he sits on a court with ideologically dispersed members: that is, there are a mix of conservative, liberal, and moderate justices with no single ideological block possessing a majority coalition. In this scenario, the justice will have more difficulty forecasting the probable decision on the merits since different majority coalitions could arise depending on the issue involved in the appeal. Given this increased uncertainty,

justices on ideologically dissimilar courts will be less likely to vote to grant appeals by permission.

Sophisticated Ideological Cohesion Hypothesis The probability of a justice voting to grant review will decrease as the court's justices become more ideologically dissimilar.

Non-Ideological Hypotheses

A variety of non-ideological factors could also influence a justice's decision to grant review. Recall that state COLRs use a variety of decision rules for granting appeals (see Chapter 3). As the number of votes required to grant a petition to appeal increases, the marginal effect any single vote has on whether or not the appeal is granted decreases. A justice's importance to granting an appeal by permission is smaller if he needs to gather a larger coalition of justices to grant the appeal. This requires more work and effort on the part of the justice merely to get the appeal docketed, before the court even considers the merits of the appeal. Since a justice's individual vote will be less valuable as more votes are necessary to grant a petition to appeal, he should be less likely to vote to grant an appeal in any given case. As such, justices should respond by seeking to grant a smaller number of petitions which have a better probability of garnering enough votes to grant the petition.

Majority Decision Rule Hypothesis The probability of a justice voting to grant review is lower under a majority voting rule than a minority voting rule.

Case facts are also important to determining if a justice decides to grant review (Black and Owens 2009; Caldeira, Wright and Zorn 1999). One factor is whether or not the government is a petitioner in the case. The U.S. Supreme Court is more

likely to grant *cert* when the United States government petitions the Court (Black and Owens 2011; Caldeira and Wright 1988). Similarly, we would expect state COLR justices to be more likely to grant an appeal if a state government agency or official submits the appeal.

Government Petitioner Hypothesis The probability of a justice voting to grant review is higher if the government is the petitioner.

State court systems handle the vast majority of criminal cases in the United States, so state COLRs are likely to be inundated with these appeals. Unless the defendant or the state raises a constitutional claim, COLR justices are unlikely to desire reviewing what are arguably routine cases (e.g. ineffective defense counsel, excessive errors, overly harsh sentences). These cases lack a level of importance which justifies review by the COLR. As such, justices should be predisposed to reject criminal appeals.

Criminal Appeal Hypothesis Relative to all other appeals, the probability of a justice voting to grant review will be lower relative if the appeal involves a criminal dispute .

6.2 Data & Methods

In order to evaluate the influence of voting rules on petitions to appeal by permission, I collected information on COLR decisions to grant or deny appeals by permission across four states: Florida, Georgia, Mississippi, and West Virginia. All of these courts publish electronic records of all case dispositions, including individual justices' votes for each petition to appeal by permission. I collected all non-unanimous decisions on

petitions to appeal by permission from 2009–12¹⁰ and coded individual justices’ votes to grant or deny the appeal.

While these states were selected partially because they are the only states to systematically publish individual justices’ decisions to grant or deny review, they still provide significant insight into agenda-setting behavior applicable to all state COLRs. First, the sample states vary on several institutional characteristics which are commonly argued to influence judicial behavior, including selection and retention mechanisms (Hall 1992), term lengths (Huber and Gordon 2004), and the ideological composition of the courts (Langer 2002). Second, all of the state COLRs in the sample assign majority opinions randomly to the justices. While this may predispose the justices against behaving in a sophisticated fashion, it is important to reiterate that, unlike in the U.S. Supreme Court, most state COLRs utilize random or rotational opinion assignment systems which preclude the chief justice or senior associate justice from strategically assigning the majority opinion (see Figure 6.2). Finally, by only sampling non-unanimously decided petitions I bias the results towards an ideological theory of agenda-setting; the vast majority of petitions to appeal by permission are disposed of unanimously (Court Statistics Project 2012), and as such are much less likely to have an ideological dimension to the justice’s decision. However the primary goal of this paper is to assess the sincere and sophisticated models of judicial agenda-setting, which assume justices’ decisions are ideologically motivated. Including unanimous petitions, which are likely to contribute little to our understanding of the ideological motivations of justices, would only add additional noise to the model.

In order to identify relevant court orders, I conducted a LexisNexis search with

¹⁰On December 1, 2010, the West Virginia Supreme Court of Appeals revised its appellate procedures to abolish most appeals by permission and instead require a decision on the merits “in every properly prepared appeal” (Office of the Clerk of Court 2011, fn. 1). As such, I utilized case disposition orders from 2009–10, prior to the implementation of appeals by right.

specific keywords to identify all non-unanimous disposition orders in each state. This includes any order issued by the COLR in which at least one justice dissented from the decision. After identifying potentially relevant cases, each order was read to determine if it was a petition to appeal by permission.¹¹ After screening the disposition orders for petitions to appeal by permission, I read each order and coded for a variety of content. Firstly, I determined whether or not the petition to appeal was granted by the COLR. Orders where the court granted the petitioner's appeal but limited the scope of the appeal to a specific set of questions were classified as the petition being granted. From this, I identified every justice participating in the decision to grant or deny the appeal and whether or not they dissented from the court's order.¹²

The dependent variable of interest is whether or not a justice voted to grant review in a case (*Vote to Grant Review*).¹³ Measures involving judicial ideology are estimated using the CFscore procedure based upon campaign finance data (Bonica 2013b, 2014). This method generates ideal-point estimates of ideology for a wide range of political actors, including Congress, the president, governors, state legislatures, and other elected state officials such as justices. Ideological estimates for elected state COLR justices are based upon contributions received while running for election, while the estimates for justices who are appointed are based upon the ideal-point estimate of

¹¹Other types of orders which drew at least one vote of dissent included petitions for interlocutory appeals, rehearings, and certified questions. As these decisions do not fall within the definition of an appeal by permission, I excluded them from all subsequent analyses.

¹²As well as the regular members of the court, if a substitute justice was assigned to participate in a petition to appeal by permission, I recorded their votes as well. For the purposes of this analysis, I include only votes cast by permanent justices on the court, with the exception of West Virginia. Justice Joseph P. Albright took medical leave in September 2008 due to a cancer diagnosis. Retired Justice Thomas McHugh was appointed to serve Albright's leave of absence; however Justice Albright passed away in March 2009. Subsequently, McHugh was appointed by the governor to fill Albright's term until the next general election in 2010. Since McHugh previously served on the court and subsequently ran in the general election to fill out Albright's term, I consider him to be a *de facto* member of the court prior to his official appoint and include his votes in these cases in the analysis.

¹³Table ?? summarizes the variables of interest and their specific coding format.

the appointing body (generally the governor, though occasionally the legislature).¹⁴ Party-adjusted judge ideology (PAJID) scores have typically been used in previous research on judicial decisionmaking over the past decade (Brace, Langer and Hall 2000). However PAJID scores have not been updated since 2004, whereas this study only includes cases after 2008; as a result, some justices participating in these decisions lack PAJID scores. Furthermore, the reliability of PAJID scores in assessing voting behavior of state COLR justices has been called into question (Bonica and Woodruff 2012), while CFscores have been shown to reliably predict state judicial votes.

Justice Conservatism is measured as the justice's CFscore (with positive values indicating a more conservative ideology, and negative values indicating a more liberal ideology). To determine the relative ideology of the court as a whole (and therefore the anticipated decision on the merits), the *Conservatism of the Court* is measured as the mean of the CFScores for all the members of the state COLR, excluding the voting justice. The *Ideological Cohesion of the Court* is measured as the standard deviation of the CFScores of all the members of the state COLR, again excluding the voting justice.¹⁵

Conservative Lower Court Decision measures the ideological outcome of the lower court ruling. This variable is coded using the approach developed by Spaeth et al. (2011) for coding the ideological direction for U.S. Supreme Court decisions. This approach determines whether the lower court's decision is liberal or conservative depending on the issue(s) ruled upon by the court and which party in the case is

¹⁴See Bonica and Woodruff (2012) for a detailed description of the estimation process. Since judicial CFscores were first released, Justice Keith Blackwell of Georgia was appointed to the state COLR in July 2012. His CFscore is based upon the CFscore of the appointing governor.

¹⁵Since the voting justice's ideology is already incorporated into the model through *Justice Conservatism*, it is unnecessary to include their own ideological preferences in the overall court measures. The lack of certainty regarding the court's anticipated decision is in part due to uncertainty about how the other justices would vote on the decision: justices are not uncertain about their own preferences, and therefore they should not be included in the ideological variables for the entire court.

left better off by the court's decision. Consistent with the ideological variables where larger values indicate stronger conservatism, *Conservative Lower Court Decision* is a dichotomous indicator of whether or not the ideological direction of the lower court decision is conservative.

The potential influence of legal norms is measured by two variables. The first, *Criminal Appeal*, is a dichotomous measure indicating whether or not the appeal is the result of a criminal prosecution. It does not control for which party in the case is pursuing the appeal. Most criminal appeals involve a criminal defendant appealing either his conviction or the sentence imposed by the trial court judge. However, it also includes situations when the government is appealing a decision by the intermediate appellate court (IAC) which reduced or overturned a defendant's criminal sentence. The second variable, *Government Petitioner*, is a dichotomous indicator of whether or not the government is petitioning the state COLR to grant the appeal.

Majority Decision Rule is measured by a dichotomous indicator of whether or not the court requires a majority of justices to vote affirmatively in order to grant review. Each state COLR in the sample refers petitions to appeal by permission to the entire court for a vote; however the courts are not all the same size¹⁶ so the raw number of affirmative votes necessary to grant the appeal is insufficient. One could normalize the votes necessary to grant the appeal by the total membership participating in the decision to arrive at a proportion theoretically between zero and one, however in practice there is not a significant amount of difference in this value for majority rule courts, so I instead use the simpler dichotomous approach.

One potential concern not yet noted is that some courts do not report all judicial dissents from petitions to appeal by permission equally. In most states, it is common

¹⁶Florida and Georgia utilize seven justices, while Mississippi use nine justices and West Virginia just five ([Schauffler and Strickland 2012](#)).

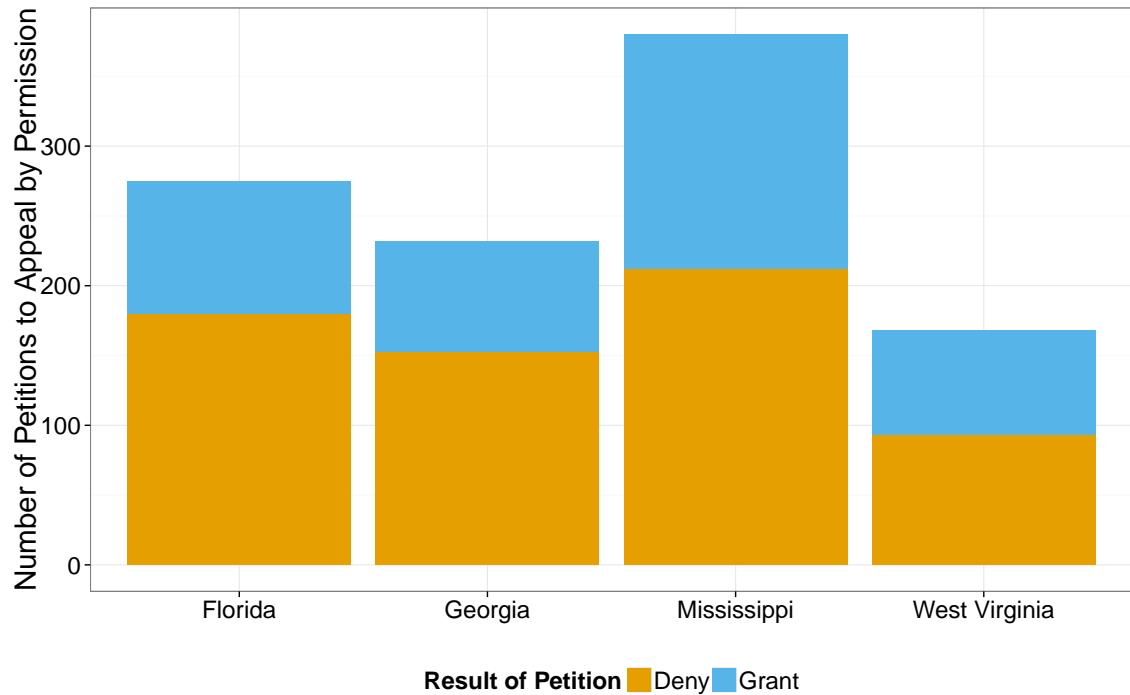
practice not to record or release any information about justices' votes to grant or deny review. In other states such as Indiana,¹⁷ the court identifies justices who dissent from a *denial of review* but not dissents when the court *grants review*. Finally, some courts release judicial dissents from all court orders granting or denying review. Florida, Georgia, Mississippi, and West Virginia release all dissents, regardless of the outcome of the court order.

Since the dependent variable is binary, I estimate a series of logistic regression models. Observations in the dataset are grouped by case, justice, and state. As such, each justice's votes across cases is unlikely to be independent of each other, just as decisions within each state or case are unlikely to be independent of each other, even after controlling for justice, case, and state-specific factors. To account for these differences, I estimate a multilevel model with a varying intercept for each state, justice, and case ([Gelman and Hill 2007](#)).

In order to capture the interactive effects predicted by the sincere and sophisticated models of agenda-setting, I estimate three separate models. The first model evaluates only the sincere model, and includes all of the non-ideological variables previously identified as well as an interaction term between *Justice Conservatism* and *Conservative Lower Court Decision*. The second model evaluates the sophisticated model, and includes the same covariates as the sincere model while replacing the interaction term with an interaction between *Justice Conservatism* and *Conservatism of the Court*. Finally, to directly evaluate the competing models of judicial agenda-setting, I estimate a third model using all of the same covariates and both the sincere and sophisticated interaction terms.

¹⁷Confirmed via private correspondence with the clerk of court.

Figure 6.4: Number of Non-Unanimous Petitions to Appeal by Permission Granted, by State (2009–12)

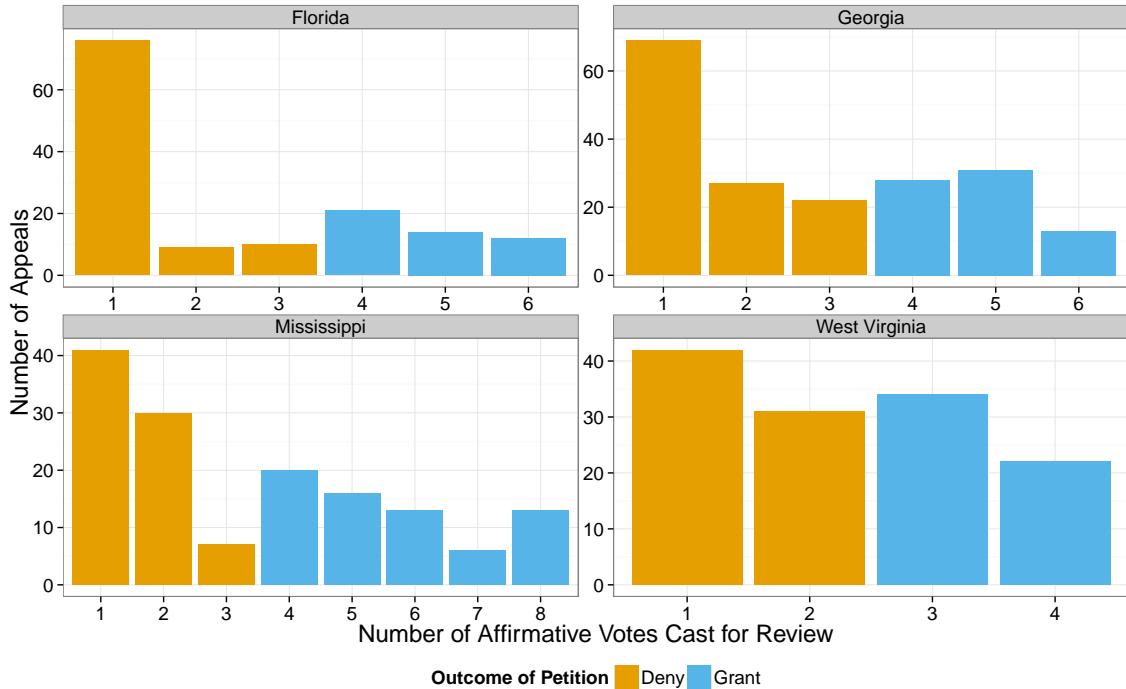


6.3 Results

6.3.1 Descriptive Results

Figure 6.4 reports the number of petitions to appeal by permission that were non-unanimously decided in each state COLR, illustrating the significant variance in grant rates across the sample states. Over the four year period, Mississippi issued the most non-unanimous decisions (380), followed by Florida, Georgia, and West Virginia respectively. West Virginia only utilized appeals by permission for two of the four years in the study, but the court was on pace to issue more non-unanimous decisions than Florida or Georgia prior to the procedural change. Mississippi and West Virginia had the largest proportion of appeals granted, with grant rates of approximately 44%

Figure 6.5: Number of Votes to Grant Review, By Appeal (2009–12)

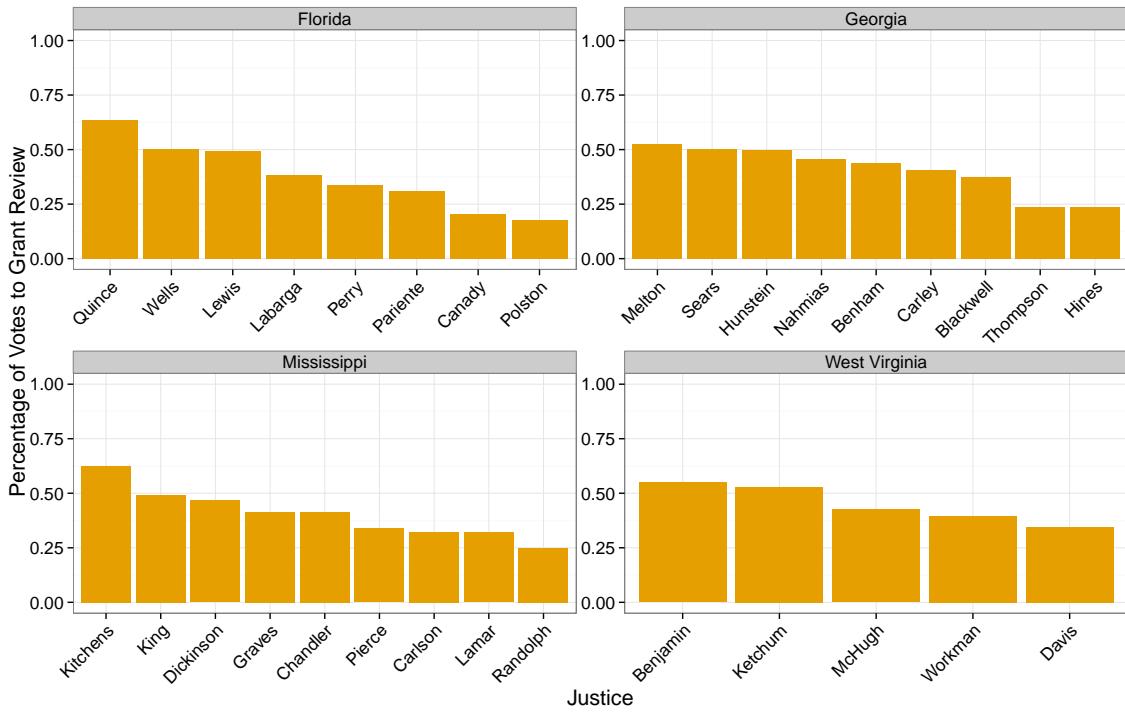


in each state, while Florida and Georgia both granted only 34% of non-unanimously decided petitions to appeal. Figure 6.5 reports the number of affirmative votes cast for each petition to appeal by permission. This allows us to examine the relative frequency of affirmative vote share cast for non-unanimous decisions (i.e. 6-1, 5-2, 4-3). For every state, the modal number of votes to grant a petition to review when the decision is non-unanimous is one ($n = 228$). However a significant number of petitions (173) in the sample are decided by the minimum winning coalition.¹⁸ That is, 29% of petitions would have been decided differently if just one justice had switched his or her vote.

Justices also vary significantly as to their unconditional frequency with which they vote to grant petitions to appeal by permission. Figure 6.6 reports the frequency of

¹⁸For Florida, Georgia, and Mississippi, this is four votes. For West Virginia, this is three votes.

Figure 6.6: Frequency of Voting to Grant Review, By Justice



Note: Minimum of five votes on petitions to appeal by permission.

affirmative votes to grant petitions to appeal by permission in this sample of non-unanimous decisions. Florida has the largest range of frequencies, from Quince voting to grant 63% of petitions while Polston only voted to grant 18% of these appeals. More typically, in this sample justices' individual grant rates are between 30 and 50%. This variation in grant rates between justices suggests that factors beyond the case facts are influencing justices' decisions to grant review; otherwise, the grant rates should be nearly the same regardless of justice.

Table 6.1: Logistic Regression Models of the Decision to Grant a Petition to Appeal by Permission

	Sincere	Sophisticated	Both
Criminal Appeal	0.04 (0.09)	-0.02 (0.09)	0.06 (0.09)
Government Petitioner	0.03 (0.13)	0.21 (0.13)	0.05 (0.13)
Majority Decision Rule	-0.15 (0.45)	0.84 (0.82)	0.95 (0.86)
Ideological Cohesion of the Court	-0.97 (0.56)	-1.22* (0.62)	-1.09 (0.60)
Justice Conservatism	0.15 (0.21)	-0.08 (0.30)	0.40 (0.31)
Conservative Lower Court Decision	-0.47* (0.10)		-0.47* (0.10)
Justice Conservatism	-0.64* (0.11)		-0.64* (0.11)
x Conservative Lower Court Decision			
Conservatism of the Court		1.80* (0.63)	1.87* (0.63)
x Conservatism of the Court			-0.25 (0.54)
Constant	0.60 (0.52)	-0.68 (0.85)	-0.55 (0.87)
Variance Components			
State level	0.091	0.329	0.381
Justice level	0.312	0.327	0.331
Case level	0.638	0.747	0.623
Observations			
	5,234	5,234	5,234
Log Likelihood	-3,294.37	-3,335.04	-3,291.67
Akaike Information Criterion	6,610.75	6,692.09	6,609.34
Bayesian Information Criterion	6,682.94	6,764.28	6,694.66

Note: Estimated coefficients are log-odds ratios with standard errors in parentheses.

*p<0.05 (one-tailed)

6.3.2 Multivariate Analysis

The results of the multilevel models are reported in Table 6.1. The first column reports the results of the sincere agenda-setting model, with one interaction term between *Justice Conservatism* and *Conservative Lower Court Direction*. If the lower court decision is conservative, then liberal and conservative justices vote to grant at ap-

proximately the same rate (the estimated coefficient is not statistically distinguishable from zero). However if the lower court decision is conservative, then conservative justices are less likely to vote to grant review than are liberals. The estimated coefficients for both *Conservative Lower Court Direction* and the interaction term with *Justice Conservatism* are negative and statistically significant. This supports the hypothesis that justices are sincere error-correctors: the probability of voting to grant review decreases when the justice and the lower court decision are ideologically similar.

The second column reports the results from the sophisticated agenda-setting model, with an interaction term between *Justice Conservatism* and *Conservatism of the Court*. As a reminder, the Sophisticated Hypothesis states that the probability of a justice granting an appeal increases as the court becomes more conservative and as the justice becomes more conservative. If this is accurate, then the estimated coefficients for *Justice Conservatism* and *Conservatism of the Court* should be negative and their interaction term positive. Here, the point estimate for *Justice Conservatism* is slightly less than zero but not statistically significant, while that for *Conservatism of the Court* is positive and statistically significant. Furthermore, the interaction term is not statistically distinguishable from zero, suggesting we cannot be confident the relationship between *Justice Conservatism* and *Vote to Grant Review* differs as the ideological leaning of the court changes. These findings thus fail to support the sophisticated model of judicial agenda-setting.

Both of these estimated models implicitly assume that only one set of hypotheses can be correct: in the sincere model, the interaction between *Justice Conservatism* and *Conservatism of the Court* is assumed to be zero through the omission of an interaction term, while the sophisticated model assumes there is no interaction between *Justice Conservatism* and *Conservative Lower Court Direction*. In order to directly compare

the competing effects of these hypotheses and relax the assumption that only one decisionmaking strategy can be correct, the third column in Table 6.1 reports the model estimated with both sets of interaction terms along with all the other covariates present in the first two models.¹⁹

When allowing for the possibility of either interaction, the evidence continues to provide clear support for the sincere error-correcting hypothesis. Similarly to the sincere-only model, the estimated coefficient for *Justice Conservatism* is statistically insignificant, while for *Conservatism of the Court* the coefficient is positive and statistically distinguishable from zero. Their interaction term is negative and substantially smaller than zero. *Conservatism of the Court* remains positive while its interaction term with *Justice Conservatism* is not statistically distinguishable from zero. Additionally, the “Sincere” and “Both” models provide better overall model fit relative to the Sophisticated-only model,²⁰ so this provides evidence that the sincere explanation of judicial agenda-setting better explains the behavior observed in the data.

So far I have assessed each coefficients’ independent relationship with *Vote to Grant Review*. Analyzing the estimated coefficients individually will not necessarily reveal underlying uncertainty about the relationship of *Vote to Grant Review* with *Justice Conservatism*, *Conservative Lower Court Direction*, *Conservatism of the Court* due to the covariance of the constituent terms with their interaction term (Brambor, Clark and Golder 2006). A more intuitive method of analyzing these estimated effects is through the graphical depiction of marginal effects. Figure 6.7 illustrates the marginal effect of *Conservative Lower Court Direction* on *Vote to Grant Review* across the

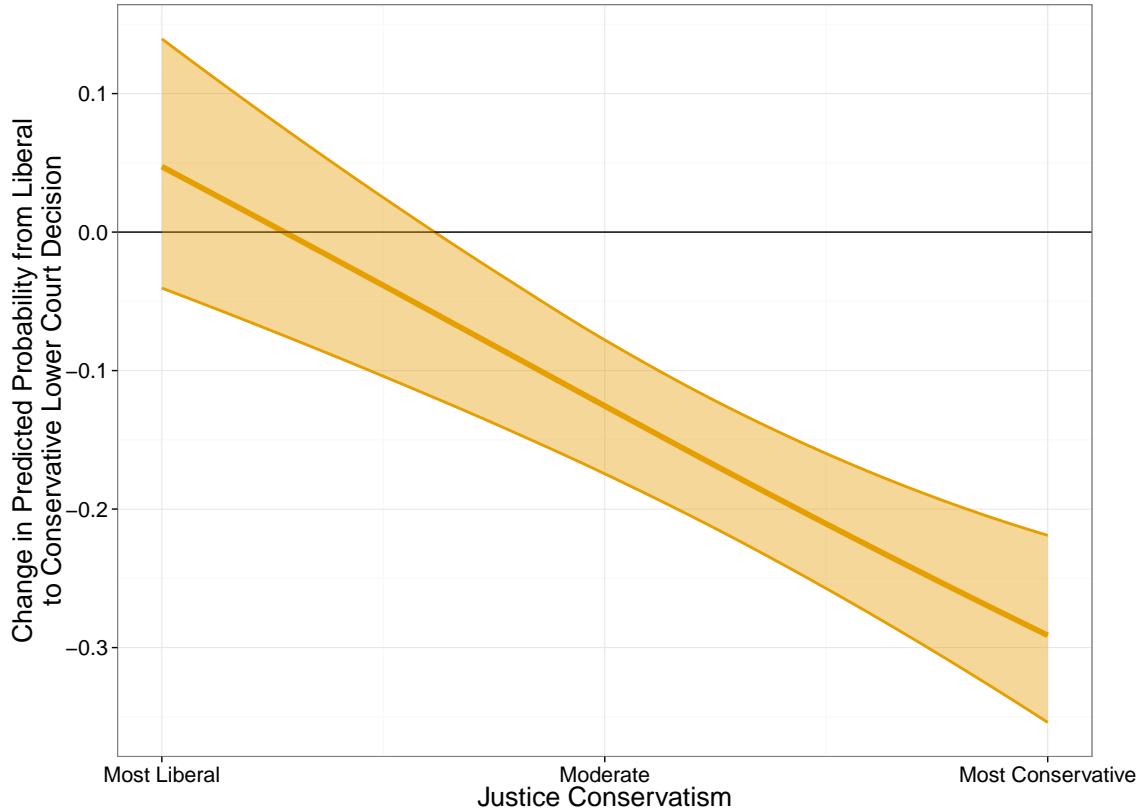
¹⁹All remaining analyses in this chapter are based upon this final model.

²⁰Likelihood ratio tests comparing the “Sincere” and “Sophisticated” models ($\chi^2_0 = 81.34$, p-value < 0.001) and “Sophisticated” and “Both” models ($\chi^2_2 = 86.7$, p-value < 0.001) are statistically significant.

potential range of *Justice Conservatism*. As anticipated from the logged odds ratios, the most liberal justice is 5% more likely to grant an appeal when the lower court decision is conservative compared to when the lower court decision is liberal, though this effect is statistically indistinguishable from zero. However the marginal effect becomes more powerful, negative, and distinguishable from zero as the justice becomes more conservative: a moderate justice ($CFScore = 0$) is 13% less likely to grant an appeal from a conservative decision as opposed to a liberal decision, while the most conservative justice is nearly 30% less likely to review a conservative lower court decision. By accounting for the covariance of these three variables, this change in the probability of granting review supports the sincere error-correcting hypothesis, as justices are more inclined to review decisions when they should be inclined to reverse rather than affirm.

Figure 6.8 displays the marginal effect of *Conservatism of the Court* on *Vote to Grant Review*, controlling for *Justice Conservatism*. Examining the marginal effects of *Conservatism of the Court* and *Justice Conservatism*, justices do not appear to be sophisticated agenda-setters as it pertains to their ideological preferences. Regardless of their personal ideology, justices are always more likely to grant review when the court leans conservative as opposed to liberal. This effect is mostly consistent for justices, though liberals are slightly more likely to grant review under this scenario than conservatives (the predicted probability of granting review is .55 for liberal justices and .42 for conservative justices). Likewise, Figure 6.9 illustrates the marginal effect of *Justice Conservatism* on *Vote to Grant Review* while controlling for the *Conservatism of the Court*. Here, the expected change in predicted probability of granting review from the most liberal to the most conservative justice is extremely small regardless of the ideological leaning of the other members of the court. In fact,

Figure 6.7: Marginal Effect of a Conservative Lower Court Decision on the Decision to Grant Appeal

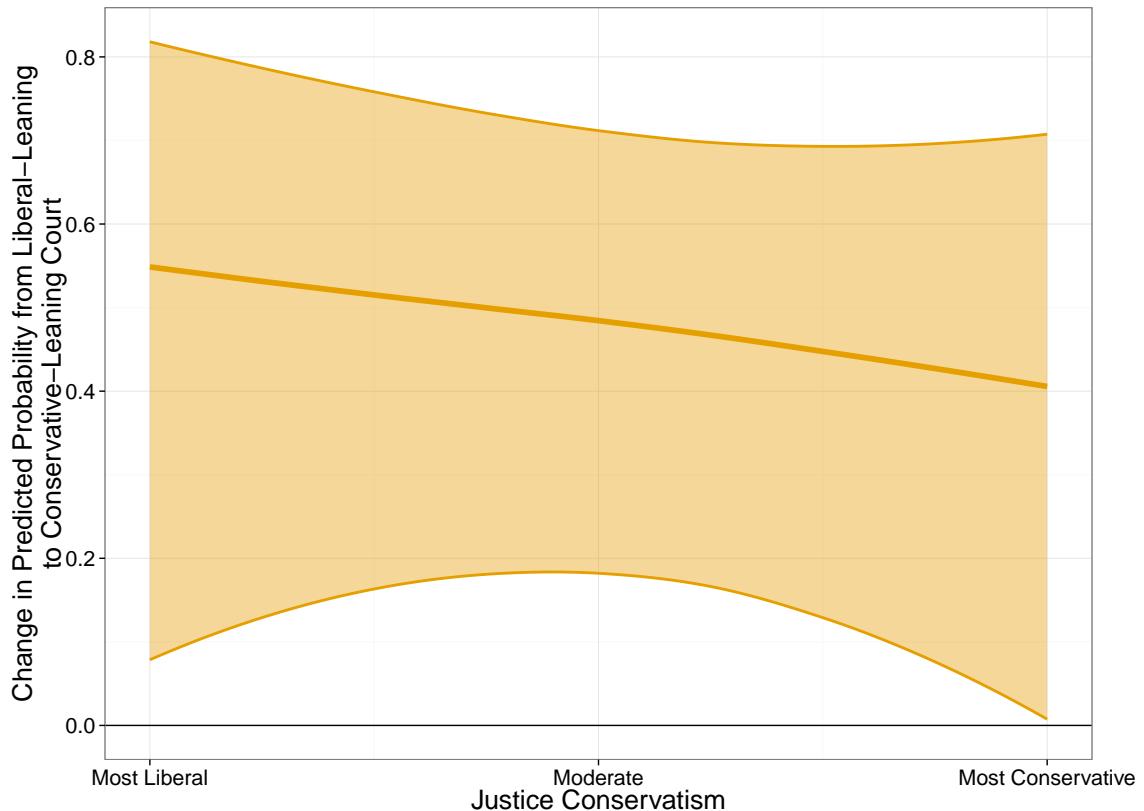


Note: Predicted probabilities estimated with remaining covariates held constant at their mean value. Shaded areas represent 95% confidence intervals.

the marginal effect is statistically indistinguishable from zero, so there is no support for the sophisticated agenda-setting hypotheses. When ideology influences justice's decisions to grant review, it is in conjunction with the ideological direction of the lower court decision and not the ideological direction of the COLR.

Based upon the estimated combined model and the marginal effects of *Conservative Lower Court Direction* and *Conservatism of the Court*, there is no evidence to support the Sophisticated Hypothesis. State COLR justices' decisions to grant or deny review are not associated with the anticipated outcome on the merits. Instead,

Figure 6.8: Marginal Effect of Ideological Leaning of the Court on the Decision to Grant Appeal

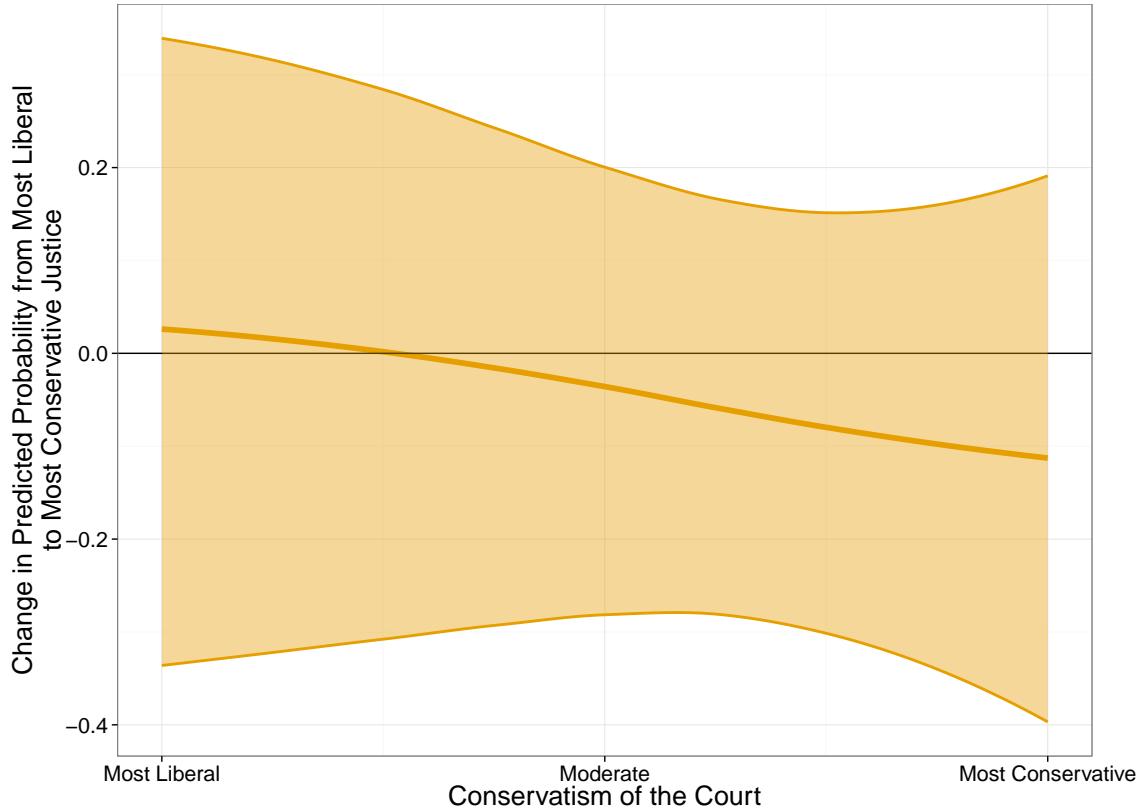


Note: Predicted probabilities estimated with remaining covariates held constant at their mean value. Shaded areas represent 95% confidence intervals.

there is substantial evidence to support the Sincere Error-Correcting Hypothesis as conservative and conservative-leaning justices are more likely to grant review when the lower court decision is liberal. The directionality of the interaction between *Justice Conservatism* and *Conservative Lower Court Direction* also provides further evidence, however this relationship for liberal and liberal-leaning justices cannot be confidently asserted as the marginal effect of *Conservative Lower Court Direction* for these justices is not statistically distinguishable from zero.

These results do not mean that justices lack any sophistication in their agenda-

Figure 6.9: Marginal Effect of Justice's Ideology on the Decision to Grant Appeal



Note: Predicted probabilities estimated with remaining covariates held constant at their mean value. Shaded areas represent 95% confidence intervals.

setting decisions. Recall that sophisticated agenda-setting can occur not only as a result of a justice's ideology relative to the rest of the court, but also based on how uncertain a justice might be about the potential decision on the merits. Decisions on COLRs with ideologically dissimilar justices are harder to predict because an individual justice will have difficulty forecasting how each justice will vote on a specific case, therefore justices on COLRs with less cohesion should be less likely to grant review independent of their personal preferences and the facts of the case (the Sophisticated Ideological Cohesion Hypothesis). Here, we find that regardless of

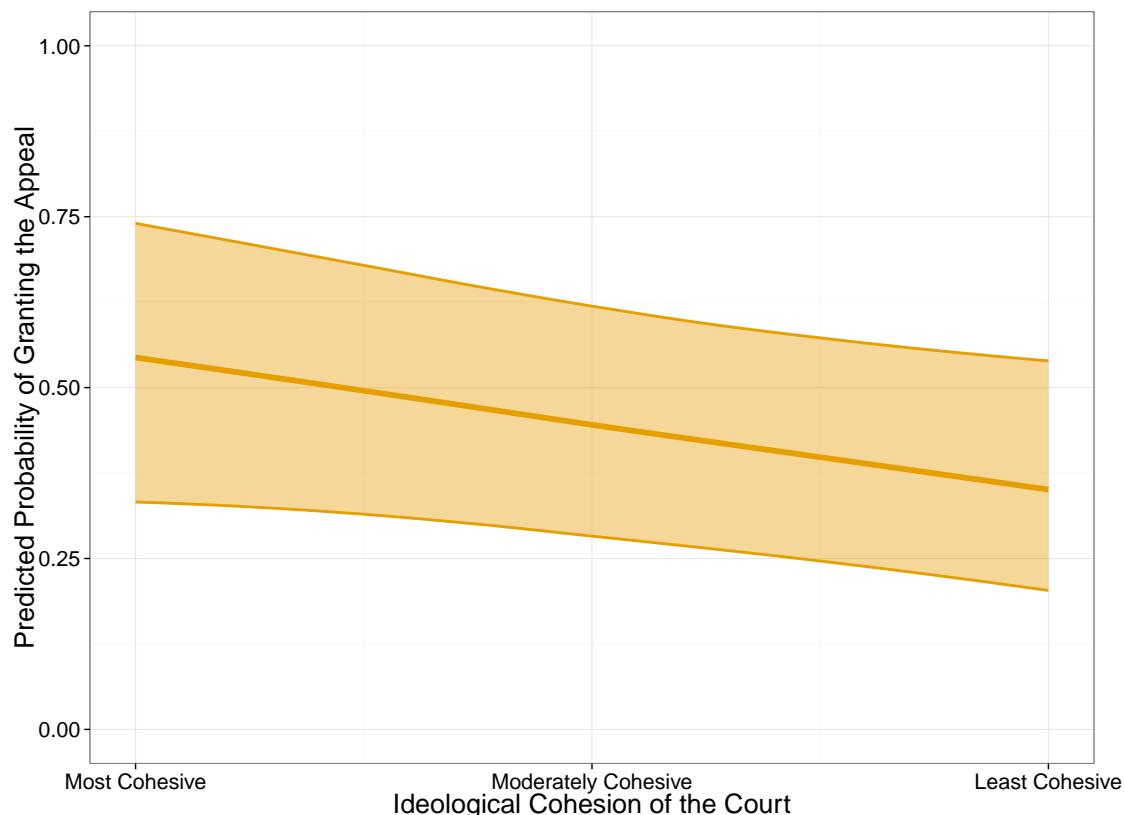
the model formulation, *Ideological Cohesion of the Court* is negative and marginally significant.²¹ As ideological cohesion of the court breaks down, justices are less likely to grant review *regardless of their own ideological position and that of the rest of the court*. Figure 6.10 reports the change in predicted probability as the court becomes less cohesive. While the decrease is barely distinguishable from zero, its substantive impact can be large: a justice on the most ideologically dissimilar court is 35% less likely to grant review compared to a justice on a court with complete ideological similarity. Justices can be sophisticated and forward-thinking about their agenda-setting decisions, but the evidence suggests this only occurs to the extent that justices cannot reliably forecast the decision on the merits.

The remaining institutional and non-sophisticated hypotheses also are not supported by the regression analysis. Justices on courts with majority decision rules are no more or less likely to grant review than if they utilized a minority decision rule. While justices are anticipated to be less likely to grant criminal appeals, the estimated coefficient is signed correctly but substantively small and not statistically distinguishable from zero. Finally, justices are expected to be more likely to grant review in appeals where the government is the petitioner, yet I find no evidence to support this hypothesis; government petitioners are no more or less likely to be granted review by the state COLR justices.

The results for this final hypothesis, the Government Petitioner Hypothesis, are especially concerning given the extensive literature on U.S. Supreme Court agenda-setting which consistently finds that federal government participation in an appeal increases the likelihood of review (Black and Owens 2009; Benesh, Brenner and Spaeth 2002; Caldeira and Wright 1988; Caldeira, Wright and Zorn 1999; Owens 2010).

²¹It is not statistically distinguishable from zero using a 95% confidence interval, but is distinguishable using a more relaxed 90% interval.

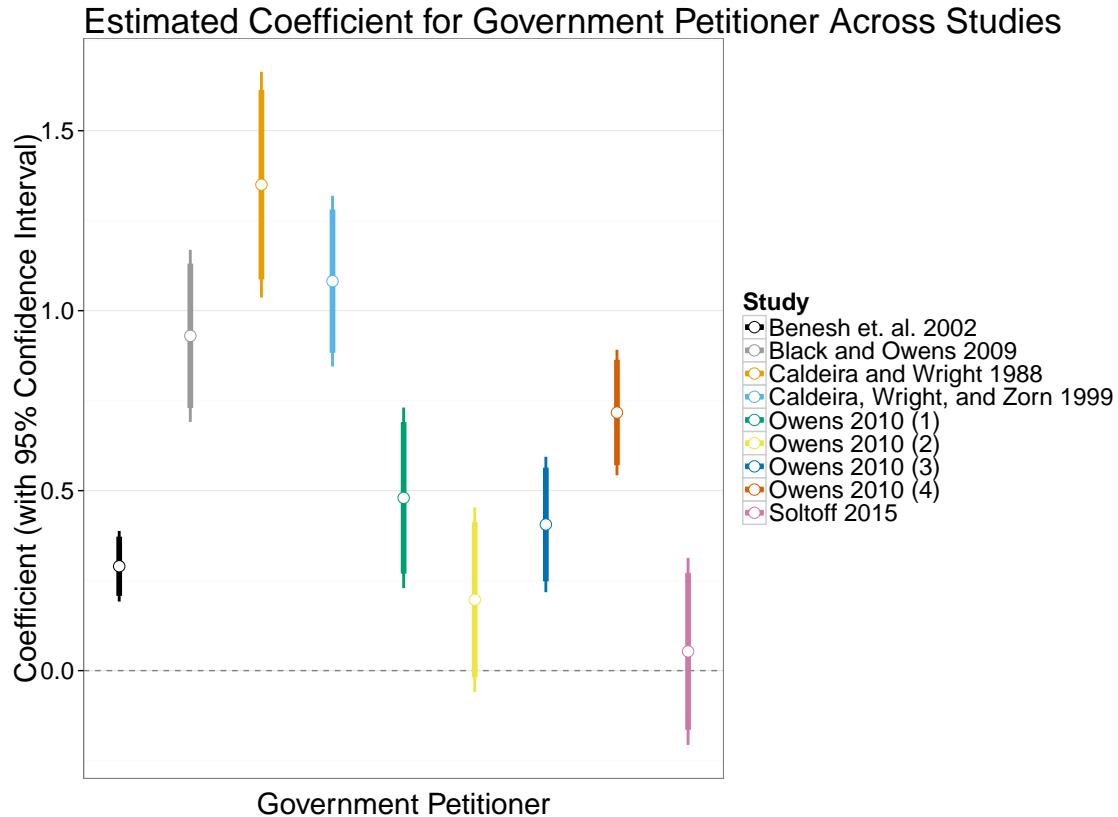
Figure 6.10: Predicted Probability of the Decision to Grant Appeal, by Ideological Cohesion of the Court



Note: Predicted probabilities estimated with remaining covariates held constant at their mean value. Shaded areas represent 95% confidence intervals.

Figure 6.11 illustrates the estimated magnitude and confidence of this relationship in several prominent studies on judicial agenda-setting. In virtually every instance, this relationship is positive and statistically, as well as substantively, significant. Yet in this study, state COLR justices are not more likely to grant review when requested by agencies or officials of their respective state governments. Once again, these results suggest that judicial agenda-setting on state COLRs is a distinct process from agenda-setting on the U.S. Supreme Court.

Figure 6.11: Estimated Coefficient for Government Petitioner Across Studies



Note: Benesh, Brenner and Spaeth (2002); Caldeira and Wright (1988); Owens (2010) utilize probit regression, while Caldeira, Wright and Zorn (1999) implement generalized estimating equations (GEEs).

6.4 Discussion

In this chapter, I assessed whether state COLR justices engage in sincere or sophisticated agenda-setting. Based upon all non-unanimous decisions to grant or deny review from a sample of four state COLRs, the empirical evidence favors a sincere agenda-setting model. State COLR justices are more likely to grant review when they seek to reverse the lower court decision, regardless of their ideological proximity to the rest of the court. There is no evidence to support the notion that state COLR justices

are forward-looking in the decisionmaking process by utilizing “aggressive grants” and “defensive denials” to avoid undesirable outcomes, however there is limited evidence to suggest justices avoid granting review when they have more difficulty predicting the final decision on the merits. Finally, non-ideological factors which are traditionally reliable indicators of decisions to grant review in the U.S. Supreme Court, such as the government petitioning for review, do not explain individual judicial decisions to review in state COLRs.

There are several potential weaknesses in the research design which could hinder the generalizability of this study. I only assess agenda-setting in four of the 52 state COLRs. Furthermore, the selection of these states are non-random and are based primarily upon the availability of information on individual justices’ decisions to grant review. Potentially more troubling is the possibility that justices are aware their agenda-setting decisions are made public, and adjust their behavior accordingly. However, it is unlikely that the sample size could be enlarged to include additional states. Most courts refuse to release justice-level decisions on petitions to appeal by permission, preferring to promote an image of strength and unanimity ([Shapiro et al. 2013](#), ch. 5.6). Even studies of agenda-setting on the U.S. Supreme Court rely on the archived personal records of retired and deceased justices ([Black and Owens 2009, 2011; Caldeira, Wright and Zorn 1999](#)). After an exhaustive review, only Florida, Georgia, Mississippi, and West Virginia are known to release all judicial decisions to grant review, and there are no comparable archives of state COLR justices’ personal records from which to collect data. As such, this study relies on the best (and only) data available at this time.

In response to these critiques, there is also no reason to believe these four states are atypical of the rest of the state COLRs. Like the majority of state COLRs, justices on

these courts are elected through a mixture of competitive and non-competitive elections. Justices vary ideologically so that there is an ample mix of liberals, moderates, and conservatives to examine. By examining decisions over a four-year time period, the likelihood that these results are driven by atypical behavior in a specific year is low. The sampling procedure was designed to be as generous as possible to the sophisticated agenda-setting hypotheses by focusing on non-unanimous decisions where we should expect the greatest likelihood of sophisticated behavior, yet I still fail to find substantial evidence of strategic agenda-setting

These findings support the need for renewed attention to and study of judicial agenda-setting outside of the U.S. Supreme Court. In the past decade scholars have devoted increased attention to agenda-setting cross-nationally ([Flemming 2005](#)) and throughout the entire federal judiciary ([Baird 2007; Rice 2014](#)), yet we still do not study state COLR agenda-setting as intensely. This chapter represents a first step towards reconsidering the individual motivations of state COLR justices when deciding to grant review. In the next chapter, I extend this work to evaluate justices' agenda-setting decisions are connected to another institutional aspect: elections and campaign contributions.

Chapter 7

Campaign Contributions and Judicial Agenda-Setting: Does Money Buy Access?

Scholars and legal activists alike are concerned with the role and influence of campaign contributions in judicial decisionmaking. While some organizations advocate for the abolition of competitive judicial elections due to the conflicts of interest raised by this selection process (American Bar Association 2003; Shepherd 2013), other researchers argue that many of the normative arguments used to attack judicial elections are not supported by empirical evidence (Bonneau and Hall 2009). Much of this debate surrounds the impact of campaign contributions on the outcome of judicial elections and the decisions on the merits issued by elected courts. However, this research fails to consider another potential locus of contributions' influence in the decisionmaking process, that of agenda-setting.

Agenda-setting and case selection is an important step in issuing policy decisions

and determining which groups are left better off ([Bachrach and Baratz 1962](#); [Baumgartner and Jones 2010](#)). Organizations and interest groups interested in securing policy decisions utilize campaign contributions to gain access to elected officials and secure their positions on the institutional agenda in legislatures ([Lohmann 1995](#)), yet scholars have not seriously considered a similar process within elected courts. Some preliminary evidence suggests that campaign donors are more likely to have their cases reviewed by elected courts ([Feldman et al. 2001](#)), and that this influence can be detected in the court's decisions on the merits ([Soltoff 2015](#)). However, a closer examination of individual justice's decisions to grant review and their association with campaign contributors involved in the appeal is warranted to determine what, if any, influence campaign donors have over the case selection process.

In this chapter, I turn to the question of money's potential influence on state high courts' agendas. I articulate a theory of campaign contributions and judicial access, explain why attorneys are likely to engage in such behavior, and develop several hypotheses as to how contributions and other case factors influence individual judicial decisions to grant review. I evaluate these hypotheses using a unique dataset of individual judicial votes in non-unanimous decisions to grant or deny review in Mississippi and West Virginia. I find strong evidence that justices in Mississippi are more likely to grant review when they receive contributions from the petitioner's attorney and deny review when they receive contributions from the respondent's attorney, while in West Virginia attorneys' contributions have no measurable impact on justices' votes to grant review. These findings reveal a previously undetected influence of money in judicial decisionmaking. I conclude with a discussion of these findings, the potential weaknesses in the research design, and some directions for further research.

7.1 Contributions and Political Access

In any policymaking process a key feature is the process of *agenda-setting*, the means by which issues receive attention and generate potential policy shifts. Agenda-setting dictates how problems are constructed and defined (Schneider and Ingram 1993), how issues and policy solutions are interpreted (Kahneman and Tversky 1984; Tversky and Kahneman 1986), and which issues receive the most attention in a given time period (Downs 1972). Because agenda-setting is important for shaping policy outcomes (Bachrach and Baratz 1962), political actors utilize sophisticated strategies to control an institution's agenda. In Congress, this can include the decision of whether or not to introduce a bill (Sulkin 2005), hold a public hearing or report the bill out of committee (Krutz 2005), or even hold a vote in the full chamber (Wawro and Schickler 2006).

Given the importance of agenda-setting on policy outcomes, organized interest groups hire professional lobbyists to pursue their legislative goals. One path by which lobbyists seek to influence the agenda is by contributing to the electoral campaigns of key legislative members. These contributions are generally unsuccessful at directly shaping legislative outcomes through legislators' roll-call votes (Fleisher 1993; Grenzke 1989; Roscoe and Jenkins 2005; Wright 1985, 1989; Wawro 2001). Instead, they are effective in their missions by obtaining access to legislators and providing valuable information about topics of concern (Ansolabehere, Snyder and Tripathi 2002; Lohmann 1995). Lobbyists themselves report one of their primary motivations for contributing to congressional candidates is to ensure access to legislators and the ability to discuss with them issues of importance (Herndon 1982; Sorauf 1994). Empirically, legislators devote more of their time and resources to their donors' issues (Ansolabehere, Snyder and Tripathi 2002; Austen-Smith 1995; Hall and Wayman 1990; Langbein 1986) and are more likely to meet with donors (Kalla and Broockman 2014).

7.1.1 Contributions and Agenda Access

In courts with discretion over their dockets, also known as appeals by permission, judges can exercise agenda-control by dictating which cases will be granted review. Judges respond to a multitude of factors in deciding whether or not to grant review, including their ideological preferences ([Segal and Spaeth 2002](#)), expectations about the likely decision on the merits ([Perry 1991; Caldeira, Wright and Zorn 1999](#)), and institutional norms ([Black and Owens 2009; Blackmun 2007](#)). Litigants seeking review of lower court decisions have similar motivations to interest groups in legislatures: they are dissatisfied with the status quo and seek to implement a new policy. Rather than pursuing a remedy through the legislative process, litigants use the judicial system to obtain favorable results. If the COLR hears appeals by right, then there is no additional hurdle to overcome because all the litigant has to do to ensure review is submit its appeal within the allotted time-frame. However when COLRs hear appeals by permission, the litigant must secure the support of a certain number of justices before the case can be reviewed and decided on the merits.¹

In order to secure this support, the litigants will be expected to engage in what is essentially a form of lobbying. The litigant's attorneys will submit a brief arguing why the COLR should review the lower court decision, in a manner similar to a lobbyist meeting with a legislator to discuss a topic of concern. Factors known to influence the decision to grant review include the allegation and presence of a conflict in legal interpretation ([Caldeira and Wright 1988](#)), the perceived importance of the issue ([Black and Owens 2009](#)), and whether the attorney representing the litigant is a frequent participant in litigation before the court ([McGuire 1995](#)). Litigants may also

¹In the U.S. Supreme Court, four out of nine justices must agree to grant review (i.e. the Rule of Four). Decision rules on whether to grant appeals by permission vary across the states (see Chapter 3).

seek to emphasize the importance of the issue by soliciting other groups to submit “friend of the court”, also known as *amicus curiae*, briefs. Such tactics are similar to interest groups coordinating their lobbying efforts to bring attention to an issue (Hojnacki 1997; Kollman 1998). These briefs can serve as cues to justices that the issues raised in the appeal are important to not only the litigants themselves, but a wider community, and have been shown to be effective at increasing the probability of review (Black and Owens 2011; Caldeira and Wright 1990; McGuire and Caldeira 1993).

It should therefore not be a surprise if attorneys representing litigants also sought to obtain access to the judiciary by contributing to justices’ electoral campaigns. In the 38 states where COLR justices are elected (American Judicature Society 2013), judicial candidates are permitted, with some limitations,² to raise campaign funds through contributions from the public. However for litigants, like interest groups in legislatures, we should expect such behavior to occur through a litigants’ attorneys, just as corporations and interest groups typically interact with legislators through professional lobbyists. Litigants are unlikely to engage in this behavior directly because of the pool of potential donors (i.e. individual citizens and corporate entities), very few are actively involved in litigation before the state COLR. The vast majority of individuals have no direct contact with state COLRs, so they would have no need to seek access to these courts. Furthermore, those potential litigants with the resources to contribute to electoral campaigns likely find more value in spending money on legislative or executive elections. For example, one of the most active groups of litigants in state courts are businesses (Hall and Windett 2013), yet businesses as an

²For instance, most states with elected judiciaries prohibit candidates from directly soliciting campaign contributions. These restrictions were recently upheld as constitutional by the U.S. Supreme Court in *Williams-Yulee v. Florida Bar* (2015).

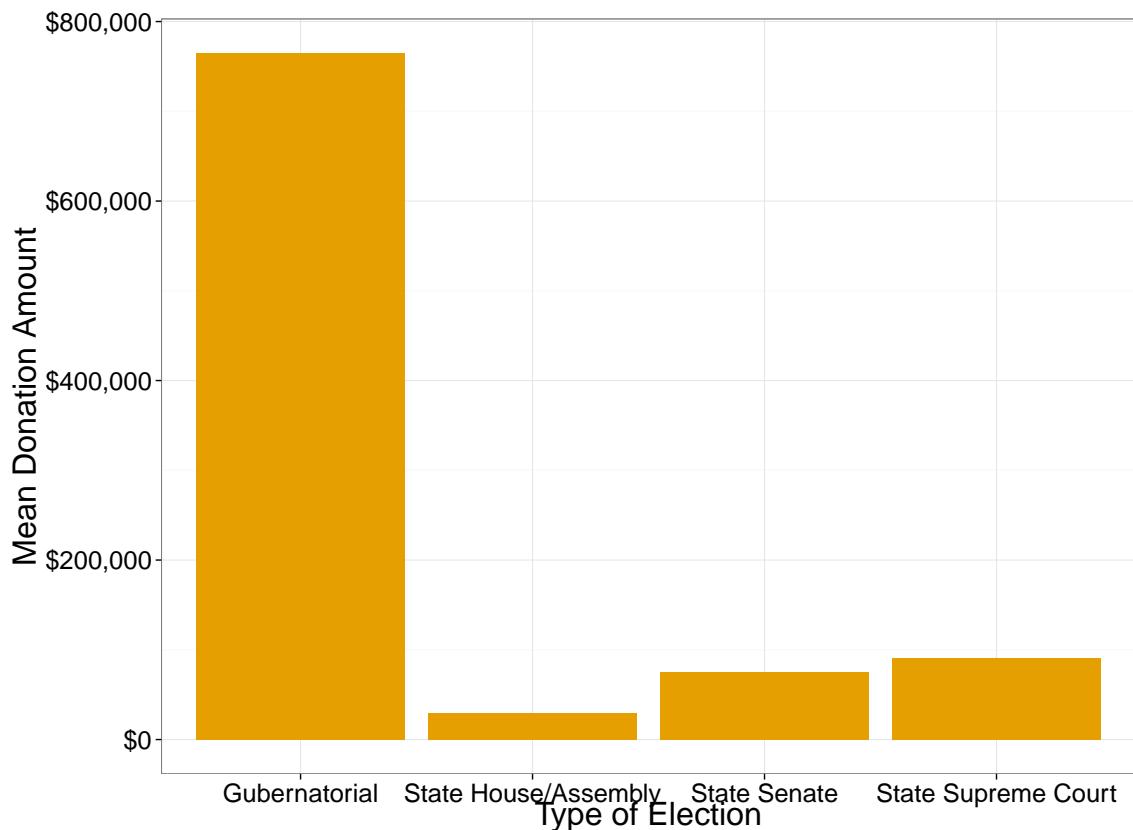
interest group spend far more money per race on gubernatorial and state senate races (see Figure 7.1).

Attorneys, on the other hand, have strong motivations to contribute in the pursuit of judicial access. Attorneys are far more likely to interact with judges on a consistent basis than litigants or other third-parties, since judges are ethically prohibited from discussing cases in an *ex parte* manner ([Scheppele and Walker Jr 1991](#)). If a litigant wants to persuade a justice to hear an appeal, then the litigant will need an attorney to broker this discussion. Furthermore an attorney's primary goal is to win cases on behalf of his clients. Failure to secure favorable outcomes over time should cause litigants to seek other, more effective attorneys. An attorney who cannot appeal an unfavorable ruling because the state COLR denies review is ineffectual and will eventually lose clients. For these reasons, attorneys and their law firms should be expected to contribute to justices' electoral campaigns in order to secure access to the COLR.

7.1.2 Electoral Spending and Judicial Decisionmaking

It should therefore not be a surprise if attorneys engaging in litigation also sought to increase their access to the judiciary by contributing to justices' electoral campaigns. Attorneys as a group are one of the largest donors to judicial elections ([Boyea 2014](#)), and represent a larger proportion of contributions relative to other types of state electoral races (see Figure 7.2). Previous studies of contributions and judicial decisionmaking find evidence that justice's decisions are associated with contributions from attorneys involved in the case ([Cann 2007; Cann, Bonneau and Boyea 2012](#)). In particular, [Soltstoff \(2015\)](#) finds that the relationship between attorney contributions and judicial decisions is moderated by whether the court hears appeals by permission or by right:

Figure 7.1: Mean Contributions to Public Candidates by Businesses in 2011-12, by Election Type



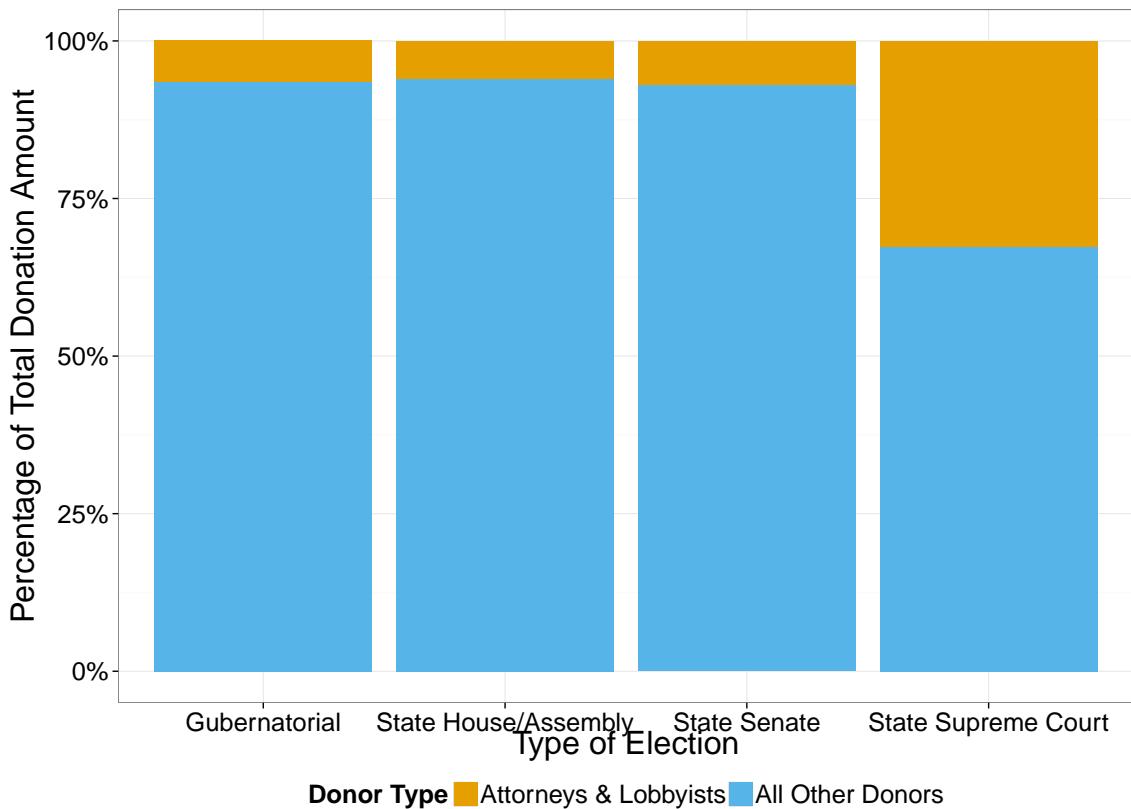
Note: Figure based upon data from the National Institute for Money in State Politics.

Justices on courts which hear civil appeals by permission are less likely to vote in favor of businesses when they receive contributions from the attorney representing the non-business litigant.

To date, only one study has directly explored the relationship between campaign donors and a state court's decision to grant review. Feldman et al. (2001) examine decisions on petitions to review in the Texas Supreme Court from 1994-98 to determine whether the court was more likely to grant review if the petitioner³ contributed to

³Defined as either the attorney, the attorney's law firm, and other attorneys employed by that firm, as well as litigating parties who are institutional entities (e.g. Exxon or El Paso Electric Co.).

Figure 7.2: Total Contributions to Public Candidates in 2011-12, by Election Type



Note: Figure based upon data from the National Institute for Money in State Politics.

justices serving on the court. The authors find that donors are responsible for filing 40% of the 3,942 single-sided petitions,⁴ and that the court is four times more likely to grant the petition if it was filed by a donor.⁵ In addition, the acceptance rate increases as petitioners contribute more money; petitioners who contributed between \$1,000-\$10,000 had a 23% acceptance rate versus a 56% acceptance rate for petitioners contributing more than \$250,000. Contributions from respondents did not have an

⁴Single-sided petitions are cases where only the petitioner seeks review of the lower court decision. Presumably, the respondent is satisfied with the lower court decision and does not want the court to review the decision.

⁵20% of petitions filed by donors were granted by the court, versus only 5.5% filed by non-donors.

effect on the court's decision to grant or deny review. When examining the difference in contributions between the petitioner and respondent, acceptance rates increase by 36% as the petitioner contributes \$100,000 more than the respondent, whereas the acceptance rate increases by a mere 3% if the respondent contributes \$100,000 more than the petitioner.

While [Feldman et al. \(2001\)](#) provide evidence that contributions increase the likelihood of judicial review, there are several limitations of the study which prevent a strong conclusion that money buys access to judges. First, the study examines only the aggregated decision to grant or deny review. For this reason, it cannot conclude that individual justices are more likely to vote to grant review for campaign donors, as we do not know individual Texas Supreme Court justices' votes on these petitions. All we know is that the court as a whole is more likely to grant review when donors to sitting justices participate as petitioners on the case. Second, [Feldman et al. \(2001\)](#) do not control for additional factors known to enhance the probability of review. For instance, the Texas Supreme Court only hears civil appeals;⁶ presumably then, many of the petitioners are businesses appealing unfavorable lower court decisions. In the context of the U.S. Supreme Court where justices are appointed and therefore do not receive campaign contributions, businesses are still far more likely to win cases independent of ideology and other relevant case-factors ([Sheehan, Mishler and Songer 1992; Songer, Sheehan and Haire 1999](#)). Furthermore, law firms who specialize in appellate litigation should be more likely both to petition the court for review *and* contribute to justices on the court. The relationship [Feldman et al.](#) find between contributing petitioners and the decision to grant review may thus be confounded by these additional factors.

⁶The Texas Court of Criminal Appeals has exclusive appellate jurisdiction over criminal cases.

In order to better determine if contributions influence judicial access, one should examine individual justice's votes to grant or deny review. Additionally, one needs to control for other factors which may confound the relationship between contributions and judicial votes. In the following section, I propose several hypotheses about how contributions and other case factors should influence judicial decisions to grant review.

7.1.3 Hypotheses

In cases where only one party seeks to appeal in a case, petitioners seek to have the state COLR review unfavorable lower court rulings and overturn these decisions. Because petitioners are not satisfied with the outcome in the lower court, they are the party which desires access to the state COLR. When the petitioning attorneys have previously contributed to a justice's electoral campaign, that justice should be expected to pay closer attention to the appeal. While the justice may still be inclined to vote against the petitioner on the merits, and the petitioner's contribution cannot alter this decision, the contribution may cause the justice to at minimum examine the petition more closely and grant review. Following this logic, a justice who received campaign contributions from the petitioner should be more likely to grant review. Furthermore, justices should be more responsive to larger donors and the probability of granting review should be higher as the contribution amount increases ([Feldman et al. 2001](#)).⁷

Petitioner Contribution Hypothesis The probability of a justice voting to grant review increases as the campaign contributions received from the petitioner

⁷In the remainder of this chapter, references to contributions from the petitioner and respondent apply specifically to the attorneys, not the individual litigants themselves. Individual litigants are rarely campaign contributors to justices participating on their case ([Cann 2007; Hazelton, Montgomery and Nyhan 2013; Soltoff 2015](#)).

increase.

Unlike petitioners, the respondent in a case is typically satisfied with the lower court decision and does not want the COLR to review this ruling. Because of this, the respondent prefers that the court reject the petition for review. If contributions can be used to increase judicial access, then it is also possible that they can be used to suppress access to the judiciary. That is, justices may be less likely to grant review when they receive contributions from the respondent. However there is little evidence from legislatures that lobbyists and interest groups use contributions to suppress issues from the agenda; instead, they contribute in an effort to bring attention to their issues ([Ansolabehere, Snyder and Tripathi 2002](#); [Langbein 1986](#)). It is therefore possible, but unlikely, that respondents can use contributions to prevent judicial review.

Respondent Contribution Hypothesis The probability of a justice voting to grant review decreases as the campaign contributions received from the respondent increase.

As we saw in Chapter 6, case facts may be important to determining whether a state COLR justice decides to grant review. One factor is whether or not the government is a litigant in the case. The U.S. Supreme Court is more likely to grant *cert* when the United States government petitions the Court ([Black and Owens 2011](#); [Caldeira and Wright 1988](#)). Similarly, state COLR justices should be more likely to grant an appeal if a state government agency or official submits the appeal. Additionally, when the government is the respondent in the case the court may interpret this as a sign that the government does not want the appeal heard. As the government possesses a tremendous advantage in the federal court system ([Sheehan, Mishler and Songer 1992](#); [Songer and Sheehan 1992](#)) this advantage may very well carry over into the

state judiciaries, therefore we may expect justices to be less likely to grant an appeal if the state government is the respondent.

Government Petitioner Hypothesis The probability of a justice voting to grant review increases if the government is the petitioner in the case.

Government Respondent Hypothesis The probability of a justice voting to grant review decreases if the government is the respondent in the case.

State COLR justices may also be more likely to grant an appeal from a business petitioner. Businesses typically possess larger amounts of resources with which to initiate litigation, and have been shown to enjoy higher levels of success in the U.S. Supreme Court ([Epstein, Landes and Posner 2012](#); [Sheehan, Mishler and Songer 1992](#)) and state COLRs ([Wheeler et al. 1987](#)). Independent of campaign contributions, justices may be more likely to grant an appeal if a business petitions the court and less likely to grant review if a business is the respondent.

Business Petitioner Hypothesis The probability of a justice voting to grant review increases if a business is the petitioner in the case.

Business Respondent Hypothesis The probability of a justice voting to grant review decreases if a business is the respondent in the case.

State court systems handle the vast majority of criminal cases in the United States, so state COLRs are likely to be inundated with even more of these appeals. Unless the defendant or the state raises a constitutional claim, COLR justices are unlikely to desire reviewing what are arguably routine cases. These cases lack a level of importance which justifies review by the COLR. As such, justices should be predisposed to reject criminal appeals.

Criminal Appeal Hypothesis The probability of a justice voting to grant review decreases if the appeal involves a criminal case.

7.2 Data & Methods

In order to evaluate the influence of campaign contributions on decisions to grant review, I collected information on COLR decisions to grant or deny appeals by permission from Mississippi and West Virginia. Mississippi utilizes nonpartisan elections to retain justices for eight-year terms, while West Virginia employs partisan elections and 12-year terms. These courts publish electronic records of all case dispositions, including individual justices' votes for each petition to appeal by permission. Furthermore, these courts provided access to docket sheets for each petition in order to identify all attorneys participating in the appeal. I collected all non-unanimous decisions on petitions to appeal by permission from the calendar year 2012 for Mississippi and from 2009–10 for West Virginia, and coded individual justices' votes to grant or deny the appeal.⁸

There are two important features about these courts which I highlight here as they are directly relevant to subsequent analysis. First, the Mississippi judicial system uses a “deflective” appellate system. In this deflective system, all appeals from trial courts are submitted directly to the Mississippi Supreme Court. The COLR may assign any case to the state Court of Appeals except for cases involving the “death penalty,

⁸I also collected the same information for petitions to review in 2012 from Florida (retention elections with six-year terms). I coded this data following the same procedures as for Mississippi and West Virginia. However, upon completion of this process I discovered that in the sample, justices rarely participated in decisions to grant review involving campaign donors. Due to the rarity of this event and resulting multicollinearity due to the lack of variation on the contribution variables, I was unable to successfully estimate a multivariate model. For this reason, I omit Florida from all remaining analysis.

utility rates, annexations, bond issues, election contests, a trial court’s ruling that a statute is unconstitutional, attorney discipline, judicial performance, and certified questions from federal courts” ([Sweet 2009](#)). After the Court of Appeals renders a decision, if either party is dissatisfied with the outcome they may file a petition to appeal by permission to the Mississippi Supreme Court. At this point the case is treated like a petition to appeal by permission in any other state. The data collected here only includes petitions initiated from the Court of Appeals.⁹

Second, unlike most other states West Virginia does not possess an intermediate appellate court (IAC).¹⁰ Additionally, until 2010 the West Virginia Supreme Court of Appeals only heard appeals by permission; in West Virginia, there was no guaranteed right of appeal from a trial court decision. On December 1, 2010, the COLR revised its appellate procedures to abolish most appeals by permission and instead require a decision on the merits “in every properly prepared appeal” ([Office of the Clerk of Court 2011](#), fn. 1). This abrupt shift in procedure is one of the very few instances where state COLRs procedures for case selection have changed in the past 40 years, and the change was not random. Following the court’s decision to refuse two petitions for appeal from multi-million dollar class action verdicts,¹¹ Chesapeake Energy Corporation and other business publicly announced plans to cancel construction of facilities within the state.¹² The West Virginia Chamber of Commerce began applying pressure to the Supreme Court of Appeals to adjust their rules to offer an appeal by right.¹³ In April

⁹As an example, in 2013 the Mississippi Supreme Court received 23 case filings which it was required to accept, while it received 922 notices of appeal which it was permitted to deflect to the Court of Appeals ([2013 Annual Report 2014](#)). In that same year, the high court received 213 petitions to review from a Court of Appeals decision and granted 69.

¹⁰See Chapter 3 for more details.

¹¹*Estate of Garrison G. Tawney v. Columbia Natural Resources, LLC*, No. 080482, and *Wheeling-Pittsburgh Steel Corporation v. Central West Virginia Energy Company*, Nos. 080182 and 080183

¹²Mehalic, Jeffrey V. “Chesapeake Cancels Plans to Build Regional HQ, Blames WV Supreme Court’s Rejection of Appeal.” *West Virginia Business Litigation*, 29 May, 2008.

¹³Mehalic, Jeffrey V. “Does West Virginia Need Another Appellate Court? Depends on Whom

of 2009, Governor Manchin ordered an Independent Commission on Judicial Reform to “evaluate and recommend proposals for judicial reform in West Virginia.” The final report was delivered in November of that year and included proposals to create an IAC and implement a deflective appellate system (*Final Report 2009*). The state legislature attempted to enact these reforms, however was defeated in committee following testimony by then-Chief Justice Robin Jean Davis who spoke against the proposed legislation.¹⁴ Amidst a continued push by the business community to introduce a right of appeal in the state judicial system, the justices implemented new Court rules which provide for “a complete review” of all petitions for appeal from a final circuit court order,¹⁵ though some argue the new rules do not provide for “meaningful” review.¹⁶ Because of the protracted and public nature of this dispute, it is quite plausible that justices (knowingly or unknowingly) began responding to this pressure by altering their decisions to grant review in cases involving businesses. For this reason, justices’ agenda-setting behavior in West Virginia may be significantly biased towards granting all appeals involving businesses, regardless of campaign contributions from the petitioner or respondent. I will return to this issue in the discussion of the results.

I implemented a LexisNexis search with specific keywords to identify all non-unanimous disposition orders in each state. This includes any order issued by the COLR in which at least one justice dissented from the decision. After identifying the potentially relevant order, each order was read to determine if it was a petition to

You Ask.” *West Virginia Business Litigation*, 8 February, 2010.

¹⁴Dickerson, Chris. “Appellate court, right of appeal bill dies in committee.” *The West Virginia Record*, 4 March, 2010.

¹⁵Perry III, Rory L. Clerk of Court. “An Open Letter to All Persons Interested in the Supreme Court’s Revision of the Rules of Appellate Procedure, In Response to an Open Letter to the Chief Justice by Steve Roberts on Behalf of the West Virginia Chamber of Commerce.” 3 February, 2010.

¹⁶Jernigan, W. Henry and Jill Rice. “West Virginia needs Substantive Right of Appeal.” 5 October, 2010.

appeal by permission.¹⁷ After screening the disposition orders for petitions to appeal by permission, each order was coded for a variety of content. Firstly, I determined whether or not the petition to appeal was granted by the COLR. Orders where the court granted the petitioner's appeal but limited the scope of the appeal to a specific set of questions were classified as the petition being granted. From this, I identified every justice participating in the decision to grant or deny the appeal and whether or not they dissented from the court's order.¹⁸

Based upon the docket number for the petition to appeal, I identified the attorneys and law firms representing both the petitioner(s) and the respondent(s).¹⁹ I matched each attorney, law firm, and other attorneys employed by the law firm to recorded campaign contributions to each justice in his or her previous electoral cycle.²⁰

¹⁷Other types of orders which drew at least one vote of dissent included petitions for interlocutory appeals, rehearings, and certified questions. As these decisions do not fall within the definition of an appeal by permission, I excluded them from all analysis.

¹⁸Votes from substitute judges temporarily assigned to the case were excluded from the analysis with the exception of Justice Thomas McHugh of West Virginia. Justice Joseph P. Albright took medical leave in September 2008 due to a cancer diagnosis. Retired Justice McHugh was appointed to serve during Albright's leave of absence, however Justice Albright passed away in March 2009. Subsequently, McHugh was appointed by the governor to fill Albright's term until the next general election in 2010. Since McHugh previously served on the court and subsequently ran in the general election to fill out Albright's term, I consider him to be a *de facto* member of the court prior to his official appoint and include his votes in these cases in the analysis.

¹⁹Docket sheets from the Mississippi Supreme Court are publicly available on the court's web site. Docket information from the Supreme Court of Appeals for West Virginia was obtained via private correspondence with the Office of the Clerk of Court.

²⁰All contribution records are obtained from the Database on Ideology, Money in Politics, and Elections (DIME) ([Bonica 2013a](#)). The data are originally collected by the National Institute for Money in State Politics (NIMSP) using state-mandated campaign finance disclosure records. DIME records utilize entity resolution techniques to identify all unique individual and institutional donors.

I matched each of the attorneys, law firms, and employees of the litigants (if the litigant was an institutional entity) and law firms to campaign donors for each justice involved in the case. As an example, if "Denny Crane" is named as an attorney for the litigant "Alan Shore" and "Crane, Poole, and Schmidt" is his law firm, any contributions by Crane individually and Crane, Poole, and Schmidt institutionally to the justice would be included. Additionally, if "Shirley Schmidt" is not a named attorney in the case, but works at Crane, Poole, and Schmidt *and* individually contributes to the justice, then her contribution would also be included in this total if the name of her employer is included in the contribution record.

Donors and named litigants were matched using the `RecordLinkage` package for R (3.0.1) and scored on a confidence index from zero to one, with larger values indicating higher confidence in the

The dependent variable of interest is whether or not a justice votes to grant review in a case (*Vote to Grant Review*). The following variables are incorporated to explain *Vote to Grant Review*:

Petitioner Contributions The logged dollar amount of contributions from the petitioner's attorney, the attorney's law firm, and other employees of the petitioner or law firm.

Respondent Contributions The logged dollar amount of contributions from the respondent's attorney, the attorney's law firm, and other employees of the respondent or law firm.

Government Petitioner A dichotomous indicator of whether the petitioner is a government official or agency.

Business Petitioner A dichotomous indicator of whether the petitioner is a business.

Government Respondent Justices may also respond to the litigant status of the respondent in the case. As such, I include a dichotomous indicator of whether the respondent is a government official or agency.

Business Respondent A dichotomous indicator of whether the respondent is a business.

Criminal Appeal A dichotomous indicator of whether the appeal is the result of a criminal prosecution.²¹

match. Contributions were limited to in-state donors in order to reduce the number of potential matches between donor and attorney. Out-of-state contributions are infrequent, representing only 5% of all contributions received during the 2011–12 electoral cycle (Casey 2014). All matches scored greater than 0.925 using the Jaro-Winkler algorithm and 0.80 using the Levenshtein algorithm were manually reviewed to verify correct matches.

²¹One possibility is that the Criminal Appeal Hypothesis only applies when the defendant is the

Since the dependent variable is binary, logistic regression is an appropriate multivariate approach. Observations in the dataset are grouped by case, justice, and state. As such, each justice's votes across cases is unlikely to be independent of each other, just as decisions within each state or case are unlikely to be independent of each other, even after controlling for justice, case, and state-specific factors. To account for these differences, I estimate separate multilevel models for Mississippi and West Virginia, with a varying intercept for each justice and case (Gelman and Hill 2007).

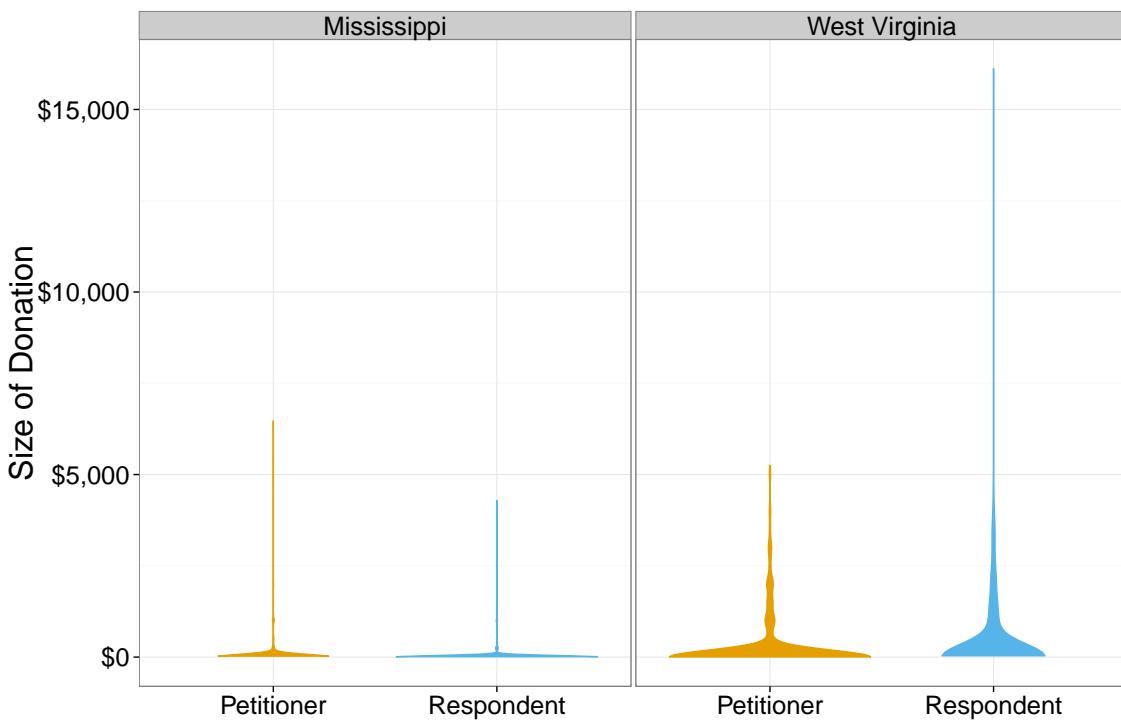
7.3 Results

7.3.1 Descriptive Results

If justices habitually recuse themselves from cases involving campaign donors, or petitioners rarely contribute to justices' campaigns, then petitioners' contributions should have no influence on the probability of deciding to grant review. Within this sample of cases, contributions from either the petitioner or the respondent are not common, but neither are they rare. Figure 7.3 displays the distribution of contribution amounts from petitioners and respondents in the data. The overwhelming majority of petitioners and respondents do not contribute to any given justice's electoral campaign. In fact, justices received contributions from a petitioner or respondent in the case in approximately 10% of the decisions in Mississippi, and slightly over 30% of the

petitioner in the case. If the government is appealing a sentencing decision or a lower court decision to overturn the conviction, a justice might be more inclined to grant review. However, in this sample of cases there are only five cases in West Virginia where the government is appealing a decision involving a criminal prosecution, and 11 cases in Mississippi involving similar circumstances. Because of this, specifying the variable as a dichotomous indicator of whether the defendant in a criminal case initiates the appeal or including an interaction between *Criminal Appeal* and *Government Petitioner* results in near-perfect multicollinearity. As such, I operationalize the variable as simply an indicator of a criminal dispute, with the understanding that the vast majority of these represent circumstances where the defendant is the petitioner.

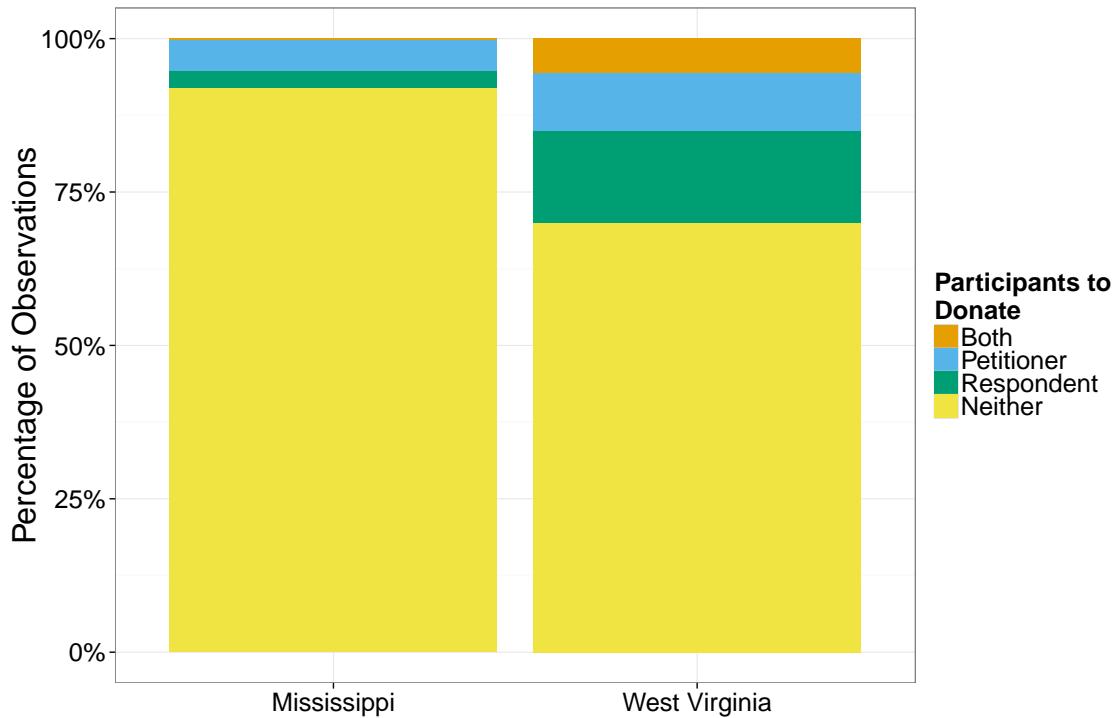
Figure 7.3: Total Contributions to Each Justice in Each Case



decisions in West Virginia (see Figure 7.4).

When petitioners and respondents contribute, most contributions are under \$2,500 (see Figure 7.5). The largest contribution from either side is \$17,000 from a respondent in West Virginia; the largest contribution given in Mississippi was for \$10,000. Overall, petitioners tend to give more than respondents, though the distribution of contributions is similar for both parties. This finding conforms with the contribution hypotheses if one assumes that attorneys cannot predict if they will typically be petitioners or respondents in cases. Under such circumstances, attorneys who regularly appear before the court should be expected to contribute to justice's campaigns regardless of whether they are typically petitioners or respondents.

Figure 7.4: Proportion of Observations Involving Contributions to a Justice from Participants



7.3.2 Multivariate Analysis

Table 7.1 reports the results of the estimated multilevel logistic regression models. I first examine the results for justices in Mississippi. Consistent with the Petitioner Contribution Hypothesis, petitioner contributions are positively associated with an increase in the probability of a justice deciding to grant review: a \$1,000 contribution from the petitioner's attorney is associated with a 15% increase in the probability of a vote to grant review relative to no contribution.²² Likewise, a \$1,000 contribution from the respondent's attorney is associated with a 24% decrease in the probability of a vote to grant review, supporting the Respondent Contribution Hypothesis.

²²While the variable in the model is originally specified in logged dollars, in this section I report results in more easily interpretable raw dollar amounts.

Figure 7.5: Total Contributions to Each Justice in Each Case, Omitting Contributions of \$0

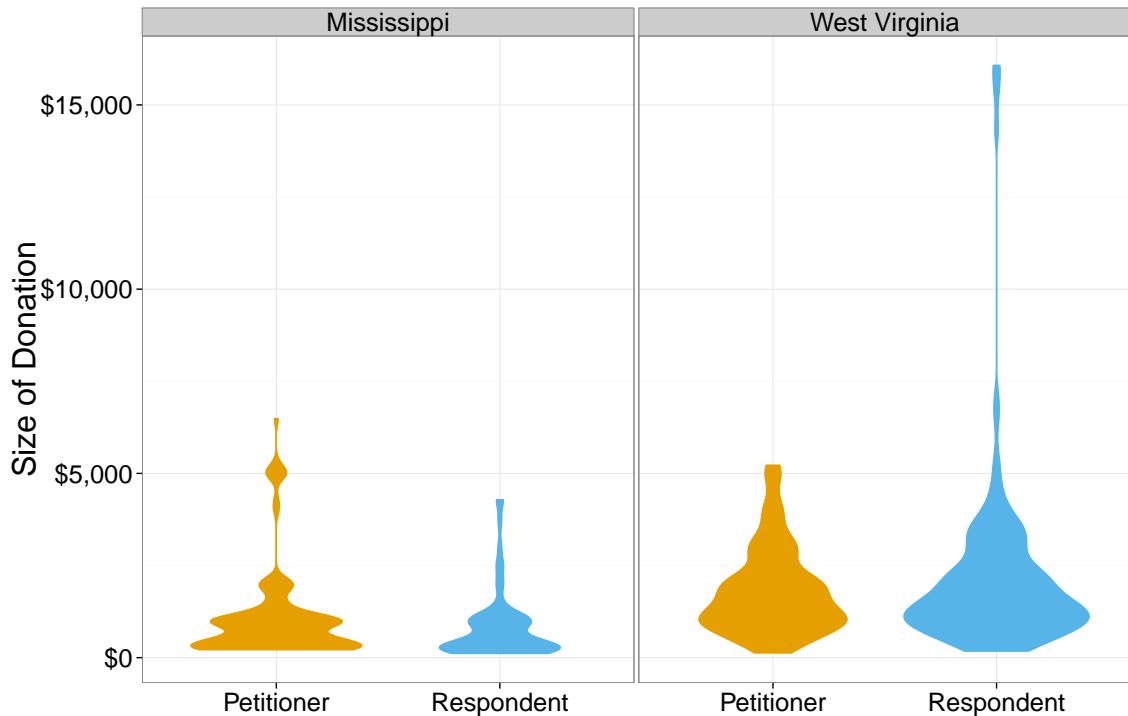


Figure 7.6 graphs the predicted probability of a judicial decision to grant review at varying contribution amounts (with a 95% confidence interval). The top panels report the predicted probability associated with petitioner and respondent contributions for Mississippi justices. While the confidence intervals are a bit wide, the change in predicted probability is statistically distinguishable from zero at the 95% significance level. These results support the Petitioner and Respondent Contribution Hypotheses, and demonstrate that in Mississippi, attorney contributions are associated with changes in the probability of judicial decisions to grant review.

However, for justices in West Virginia, contributions do not seem to have an effect on decisions to grant review. The estimated coefficients for petitioner and respondent contributions are not statistically distinguishable from zero. The bottom panels of

Table 7.1: Campaign Contributions and Judicial Decisions to Review

	Mississippi	West Virginia
Petitioner Contributions (logged)	0.13* (0.04)	-0.02 (0.03)
Respondent Contributions (logged)	-0.16* (0.05)	0.03 (0.03)
Government Petitioner	1.01* (0.39)	0.48 (0.32)
Business Petitioner	0.95* (0.37)	0.02 (0.28)
Government Respondent	0.68 (0.37)	-0.52* (0.26)
Business Respondent	0.62 (0.39)	-0.26 (0.24)
Criminal Appeal	-0.07 (0.20)	0.45 (0.27)
Constant	-1.20* (0.41)	-0.11 (0.31)
Variance Components		
Justice level	0.329	0.151
Case level	1.056	0.066
Observations	2,204	702
Log Likelihood	-1,348.22	-474.74
Akaike Information Criterion	2,716.44	969.49
Bayesian Information Criterion	2,773.42	1,015.03

Note: Estimated coefficients are log-odds ratios with standard errors in parentheses.

*p<0.05

Figure 7.6 plot the change in predicted probability of a vote to grant review. The slopes of the lines are flat, indicating little change in the probability of granting review regardless of the dollar amount of the contribution. Any change which does occur is well within the 95% confidence interval. These results fail to support either the Petitioner or Respondent Contribution Hypotheses, and are surprising as West Virginia is widely accused of being one of the most partisan, expensive COLRs in

Figure 7.6: Predicted Probability of a Judicial Decision to Review



Note: Predicted probabilities estimated based upon models from Table 7.1 with remaining covariates held constant at their mean value. Shaded areas represent 95% confidence intervals.

the nation,²³ and therefore should be most susceptible to the influence of attorney contributions. However due to the ongoing controversy over the lack of an appeal by right in West Virginia, the justices' decisions in this time period could very well bias any connection between contributions and agenda access. Even controlling for whether the petitioner or respondent is a business is unlikely to sufficiently correct for this impact.

²³e.g. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009); Bannon et al. (2013); Skaggs (2010).

For both states I control for additional case factors which might influence a justice's decision to grant review. I hypothesize that a justice is more likely to grant review if the petitioner is either a government official or agency, or a business entity. I also control for if the respondent is one of these entities. Finally, I hypothesize that a justice will be less likely to grant review if the case is a criminal appeal. In Mississippi, justices are 68% more likely to grant review when the government is the petitioner in the appeal, and 66% more likely to grant review when a business is the petitioner (justices are no more or less likely to review criminal appeals). These results suggest that independent of contributions, institutions such as government agencies and businesses still maintain an advantage in getting their cases reviewed independent of the contributions from their attorneys. As for justices in West Virginia, I only find a statistically significant relationship between *Government Respondent* and *Vote to Grant Review*. A justice in West Virginia is 24% less likely to grant review when the government is the respondent in the appeal, supporting the Government Respondent Hypothesis. In neither state were justices more or less likely to grant review in criminal appeals.

In summary, I evaluated several hypotheses about how state COLR justices decide to grant or deny review for appeals by permission. I find significant evidence that contributions influence decisions to grant review in Mississippi, while contributions are not influential in West Virginia. The litigant status of the petitioner matters in Mississippi, as justices are more likely to grant review if one of the parties is a business or government agent. Finally, justices in West Virginia are less likely to grant review if the respondent is a government agency or official.

7.4 Discussion

In this chapter, I proposed a new theory of how campaign contributions influence judicial behavior beyond electoral outcomes and decisions on the merits. Drawing upon research from legislative politics, I hypothesized that attorneys act in ways similar to lobbyists in order to secure access to the judiciary by increasing the probability of justices granting review. Using a unique dataset of individual judicial decisions to grant review in Mississippi and West Virginia, I find evidence that justices on the Mississippi Supreme Court are more likely to grant review when the petitioner's attorney has previously contributed to the justice's electoral campaign. This study is the first attempt to establish a direct relationship between campaign contributions and judicial agenda-setting, and the results partially support the hypothesis that contributions influence judicial access.

This study is only a first step towards greater understanding of how campaign contributions influence access to the judiciary. I only assess judicial decisionmaking in two states. While campaign fundraising by judicial candidates is relatively high in Mississippi and West Virginia, these states are by no means representative of all justices who receive campaign contributions. Furthermore, I only assess agenda-setting decisions over a two or four-year time period within these states. Different justices serving on the same court may behave differently, so measuring agenda-setting within such a narrow time frame limits the generalizability of these findings. However even within this limited time frame, I still find evidence that judicial contributions influence decisionmaking during the agenda-setting stage, supporting prior research which suggested this relationship (Eakins 2006; Feldman et al. 2001; Soltoff 2015).

Further work needs to be done in order to bolster the results from this analysis. Most importantly, the sample of cases needs to be expanded to span more years. Not

only will this result in additional observations and improve the accuracy and reliability of these results, it will also permit the testing of additional agenda-setting hypotheses. For instance, previous research suggests justices' responsiveness to campaign donors might not be static throughout their term of office. Justices who serve fixed-term appointments and face reelection must also be concerned with securing another term in office. This suggests justices should heed the preferences of their constituents (Downs 1957; Mayhew 1974) or campaign donors (Morton and Cameron 1992) in order to increase their probability of reelection. Justices who engage in this retrospective or prospective behavior (Huber and Gordon 2004; Hall 2014) may therefore be more likely to grant review of donors' appeals at the beginning or end of their term. Likewise, justices may also engage in sincere or sophisticated agenda-setting based upon their ideological preferences (Perry 1991; Black and Owens 2009; Caldeira, Wright and Zorn 1999). Within a single court over a short time frame, these ideological preferences are difficult to measure and evaluate due to the static membership of the court. However with more years of observations and varying memberships on the courts, ideological agenda-setting strategies can be assessed not only to determine if it exists (see chapter 6), but also if they alter the relationship between contributions and decisions to grant review.

We should also work to determine whether these results generalize to all COLRs with judicial elections and campaign fundraising. Unfortunately very few courts release individual judicial decisions to grant or deny review, so it is virtually impossible to utilize the research design from this study on a larger sample of states. With a growing public attention to the importance of denied appeals and its substantive impact,²⁴ perhaps in years to come courts will become more open in their decisionmaking process

²⁴Liptak, Adam, "Justices Drawing Dotted Lines With Terse Orders in Big Cases," *The New York Times*, 27 October, 2014.

and release individual votes to grant or deny appeals. Until then we might consider examining aggregate decisions to grant or deny review across all cases (Feldman et al. 2001), or focus on a sample of cases within an issue area such as business cases (Soltoff 2015) or an even smaller substantive topic which attracts both significant amounts of contributions and litigation such as Indian gaming disputes (Norris and Glennon N.d.). Advances in automated entity matching greatly reduce the time and resources necessary to match participants in litigation with campaign donors (Soltoff 2015), so even a large-scale study with thousands of cases is feasible. Given the findings here, further assessment of the relationship between campaign contributions and judicial access is warranted.

Chapter 8

Conclusion

Agenda-setting is an important stage in policymaking which shapes the outcomes of policy decisions ([Schattschneider 1975](#)), often with little notice or awareness ([Bachrach and Baratz 1962](#)). Yet while we have numerous explanations of agenda-setting in the U.S. Supreme Court ([Baird 2007](#); [Perry 1991](#); [Rice and Zorn 2014](#); [Segal and Spaeth 2002](#)), few scholars address agenda-setting in other judicial contexts. This failure to identify and understand agenda-setting in other courts is problematic for two reasons. First, because of the static nature of the Supreme Court we do not know how differences in institutional rules and procedures effect agenda-setting behavior by judges and litigants. Second, the U.S. Supreme Court is an exceptional institution whose structure and design is unique among courts of last resort; for this reason, explanations of agenda-setting in the U.S. Supreme Court may not apply to other COLRs. In this dissertation project, I sought to provide a generalized theory for explaining judicial agenda-setting across COLRs. From this theory, I examined how judges, litigants, and interest groups interact with each other and the institutional design of the COLR to shape agenda-setting at the macro, mezzo, and micro-levels.

8.1 Chapter Summary

In Chapter 2, I review previous research on agenda-setting in the U.S. Supreme Court and the dominant themes of individual preferences and highly-sophisticated behavior by justices and litigants. Drawing on this knowledge, while highlighting its weaknesses in directly explaining behavior in other COLRs, I develop a generalized institutional strategic model of judicial agenda-setting. This model accounts for the varying and competing preferences of judges and litigants as well as differences in institutional design. Following these assumptions, I posit several implications of the model on COLRs while accounting for differences in institutional rules and procedures, specifically procedural path and methods of judicial selection. Rather than focusing on one specific aspect of agenda-setting, this model of agenda-setting offers implications on behavior at the macro, mezzo, and micro-level, providing a fuller picture of judicial agenda-setting and identifying how the preferences and behavior of judges, litigants, and attorneys interact to influence judicial attention. Chapter 3 extends this model to state COLRs and describes several institutional and ideological features of these courts which vary significantly, demonstrating the necessity for and relevance of a generalized model of agenda-setting.

Chapters 4 and 5 assess macro-level policy attention in state COLRs. Chapter 4 describes existing sources of data on state COLR decisionmaking, highlighting the difficulty of assessing agenda-setting using prior data sets. I collect a new, comprehensive data set of policy attention in state COLRs from 2003–11, the first of its kind, demonstrating how machine learning approaches are effective at classifying cases for policy content and procedural path. Using written summaries of different components of the judicial opinions, I discover key textual features which differentiate cases by policy issue and appeals by permission versus by right. From this data, I document a

decline in policymaking by state COLRs in the late 2000s and confirm that the bulk of policymaking by state COLRs focuses on Law, Crime, and Family issues. While states vary significantly by attention to different policy areas, the typical behavior by state COLRs is to not act in any area.

Using this same data, in Chapter 5 I evaluate state COLRs' macro-policy attention based on institutional, separation-of-powers, and caseload hypotheses. While the institutional-strategic theory of agenda-setting predicts institutional design and differing policy preferences of judges, elected officials, and interest groups will interact to alter attention across policy areas, I find little empirical support for these hypotheses. I identify potential reasons for these findings and suggest methods to improve this type of study in the future by focusing on politically salient policy subfields.

Moving away from a macro-level focus, in Chapter 6 I revisit [Caldeira, Wright and Zorn \(1999\)](#) and the sophisticated agenda-setting model which they tested based on decisionmaking on the U.S. Supreme Court. This chapter highlights several weaknesses in how the authors initially tested the model and identifies reasons why it might not apply in state COLRs. I collect detailed information on judicial decisions to grant or deny review in a sample of states and find that at least within these states, justices appear to be sincere, not sophisticated, agenda-setters. Justices are more likely to grant review of lower-court decisions they are expected to overturn in the decision on the merits, while their ideological distance from the rest of the court does not influence this decision. However justices are sophisticated in the sense that they seek to avoid cases when the court is ideologically fractured: justices are less likely to grant review when the the court's members are more ideologically dispersed. This finding provides further evidence that agenda-setting in the U.S. Supreme Court is distinct from agenda-setting in other COLRs.

In Chapter 7 I consider how attorneys can proactively work to improve their access to the judiciary by participating in judicial elections and financially contributing to candidates' campaigns. Previous research on attorney donations focuses on their effect on decisions on the merits (Cann 2007; Cann, Bonneau and Boyea 2012; Soltoff 2015), however I apply theories of lobbying and legislative access to explain how attorneys donate to judicial campaigns in order to secure access to the COLR in the form of obtaining review in appeals by permission. Using judicial decisions and records of campaign contributors, I find that petitioner donations increase the probability of a vote to grant review, whereas donations from respondents act as suppressants to prevent decisions from being reviewed. Justices' responsiveness to campaign donors demonstrates how elected judges are susceptible to the same electoral and campaign considerations as other elected officials.

8.2 Limitations

In the course of this project, I encountered several limitations which hindered a fuller examination of state COLR agenda-setting and suggest potential criticisms of the work. I touch on many of these issues within each specific chapter, however there are a few overarching concerns I summarize here. The first reflects the difficulty in defining "policy attention" and the measures of policy attention in Chapters 4 and 5. While I utilize a robust measure of policy attention (Baumgartner 2015; McLaughlin et al. 2010; Baumgartner and Jones 2014), limiting policy attention to only 18 major categories imposes a large degree of bluntness. A more refined measure of policy activity may be necessary to isolate and detect differences in macro-policy attention based on institutional-strategic factors. Fortunately the framework for such

an approach already exists and its viability demonstrated in this project. Adapting the PAP’s minor policy topic codes for state COLR decisions will increase the accuracy and specificity of policy attention, and the machine learning approach for classifying policy attention implemented in Chapter 4 provides a template for such a project. The main hurdle that must be overcome is developing a training set of hand-coded decisions sufficiently large enough to enable algorithmic predictions by computers. A sufficiently detailed training set already exists for major topic codes (McLaughlin et al. 2010), however this set must be expanded in order to generate enough observations to train the ensemble prediction model on each of the minor policy topic codes. This task will require either hand-coding a new, larger set of state COLR cases, or adapting previously coded cases from another court which uses the same policy coding scheme (such as the Policy Agendas Project’s U.S. Supreme Court dataset of each case decided from 1945–2009).

While I had sufficient data on state COLR decisions for the chapters on macro-level agenda-setting, Chapters 6 and 7 were negatively affected by the inaccessibility of judicial vote information on petitions to review by permission. The vast majority of state COLRs deny access to this data; in these states, absent a public dissent there is no way to determine which justices voted to grant review and which voted to deny.¹ Furthermore, these restrictions are a deliberate attempt by courts to obscure disagreement and non-unanimity between justices on the court (Shapiro et al. 2013). The secrecy of this process is difficult to accept given that some scholars believe the process of granting review lacks the normal aspects of judicial decisionmaking: absent are “collegial deliberation, constraining criteria, majority rule, and public accountability” (Cordray and Cordray 2004, p. 398). All of these factors should cause

¹A practice which is discouraged even in the U.S. Supreme Court (Linzer 1979).

justices to behave more ideologically and strategically, so a sophisticated model of agenda-setting should be evaluated on as many of these courts as possible. It is perhaps ironic then that two state COLRs which are frequently targeted by judicial reform advocates for their partisan intensity and expensive electoral campaigns, Mississippi and West Virginia, are also the most open about their agenda-setting decisions.

Only being able to examine four (or two) states makes it difficult to argue that these findings are generalizable to all state COLRs. As I have shown, state COLRs differ tremendously on their institutional design and patterns of behavior by justices and litigants involved in these judicial systems. It is nearly impossible to account for every difference in institutional rules and procedures while also examining the substantive issue of agenda-setting. In this project I work with the data available and use it to create the strongest test of the institutional-strategic theory. My findings support several arguments of the theory and suggest it explains agenda-setting across many different COLRs. While this may be true, we would need to evaluate justices' decisions in a larger range of states in order to provide empirical support for this claim. Because this is simply not currently possible, scholars interested in studying state COLR agenda-setting should push for more open courts and wider access to data on agenda-setting decisions.

8.3 Implications for Future Research

These findings raise a number of significant implications for scholars interested in judicial politics broadly defined, comparative judicial politics, and state courts. For scholars broadly interested in judicial politics, this research demonstrates a need to explore and apply theories of judicial behavior to courts other than the U.S. Supreme

Court. For scholars who study courts comparatively, these findings suggest new avenues for understanding judicial agenda-setting. Finally for those interested in state courts, this project indicates the need to consider agenda-setting more carefully and how the rules and procedures are designed.

First, consider the implications on research about judicial politics generally. The U.S. Supreme Court is an important policymaking body in the United States ([Segal and Spaeth 2002](#)); its power and authority, as well as the readily accessible data on the Court, its justices, and its decisions, explain why it has captured so much attention within the scholarly community. Yet it is only one institution, a relatively static court whose design and rules of procedure are atypical. So much focus on agenda-setting on the Supreme Court has left scholars with a dearth of knowledge about the preferences and actions of justices, litigants, and interest groups in other COLRs. Theories of agenda-setting on the U.S. Supreme Court are inadequate at explaining agenda-setting in other institutional contexts.

This project suggests that while we can learn from the Supreme Court and apply some of the principles of agenda-setting derived from studying it to other COLRs, there are important differences we must consider. Agenda-setting in state COLRs is not random or haphazard; it is not entirely controlled by litigants nor are justices simply engaged in rote error-correction. Justices and litigants are simply responsive to incentives which differ across institutional contexts. Unlike justices on the Supreme Court, state COLR justices engage in sincere agenda-setting: they seek to review lower court decisions that they are inclined to reverse. But justices are also strategic agenda-setters: perhaps not in the sense of maximizing policy preferences, but they do seek to grant review in cases involving their campaign donors and thereby maximizing their probability of reelection. For scholars studying the judiciary, this

research suggests we can learn more about judges if we consider courts besides the U.S. Supreme Court.

Second, these findings offer a new approach to studying agenda-setting across national high courts. Scholars have previously attempted to adapt models of judicial agenda-setting from the U.S. Supreme Court to the Supreme Court of Canada (Flemming and Krutz 2002; Flemming 2005), finding significant differences in behavior even when these courts share many common features (lifetime or quasi-lifetime appointments, primarily appeals by permission, common law countries, federal systems of government, etc.). However many countries' COLRs do not share these same features. Careful consideration of institutional design and rules of procedure may be of assistance to understanding how these COLRs' agendas are shaped.

Finally, this research supports a renewed attention to agenda-setting in state COLRs. Even if scholars are not strictly interested in issue attention, agenda-setting still plays a significant role in shaping decisions on the merits. Individuals and organizations make considerations about whether to submit an appeal and how to craft their argument based on their knowledge of the justices (Brace, Yates and Boyea 2012), so the decision whether to pursue an appeal shapes the policy output of a COLR. Developing vote-based measures of judicial ideology (Hall 1992; Lukasik and Hudak 2009) without accounting for agenda-setting decisions which factor into the sample of votes can lead to biased measures of ideology (Kastellec and Lax 2008).

This study also has implications for interest groups which use the courts to advance their agendas. Corporations, for one, rely on litigation to resolve disputes. Well-connected interest groups have begun to spend more money on state COLR races following the *Citizen's United* ruling which expanded independent spending in state and federal elections (Bannon et al. 2013). However all this spending did not

necessarily result in positive judicial outcomes. In at least one instance, corporations had difficulty even getting their cases heard by the West Virginia Supreme Court (see Chapter 7). In response, the business community lobbied not only the court but also the *legislature* to change the appellate rules: if they could not win or even be heard under the existing rules, then it makes sense (if one has the resources) to change the rules for future disputes. While the number of situations where the conditions are ripe for this exact problem to appear (no appeal by right to the COLR, and no IAC) are small, it is possible that alternative scenarios could occur in the future which would make this lobbying relevant. For instance, the legislature could strip a COLR's jurisdiction to hear appeals involving specific, controversial policies just as the U.S. Congress has done (Pfander 1999).

8.4 Future Directions

8.4.1 Formation of Agenda-Setting Rules

This final implication, that state legislatures could strategically alter a COLR's design and rules of procedure, provides a natural starting point for expanding on this study. In this project, I assume institutional structures and procedures are constant over time. Unlike the U.S. Supreme Court, I study multiple state COLRs and so obtain institutional variation through a cross-sectional design. However in doing so, I assume these rules of procedure are exogenously imposed on COLRs in essentially a random way. That is, I do not consider why some states adopt appeals by permission versus appeals by right, nor do I examine why some states elect their justices while others appoint them. For the most part, I do not consider these questions because there was been little change over the past thirty years.

However the problems raised in Chapter 7 by West Virginia's shift in appellate procedure demonstrate the fact that these rules are not created haphazardly, but are carefully constructed by political actors who have incentives to create a stronger or weaker COLR. An important question worth answering is what factors influence the creation and alteration of states' COLR jurisdictional rules? Prior to the 1900s, state COLRs rarely possessed discretion over their dockets ([Kagan et al. 1978](#)). The shift to discretionary control began in the early 20th century as states began restructuring their court systems and IACs were created to absorb a portion of the COLRs' workloads. This reformist movement reached its peak in the 1960s when many states amended their constitutions to grant COLRs discretion over different types of cases.

Importantly, these jurisdictional rules were, and continue to be, largely determined externally from the court, either through constitutional provision or legislative statute. Judges did not have power to unilaterally exercise discretionary control over their dockets through inherent rule-making authority. What factors then convinced state legislatures to enact these reforms? Was it merely a reaction to increased litigation rates and a desire to increase judicial efficiency by lessening COLR workloads? Or did legislators begin to recognize courts as policymaking bodies? As policymaking bodies COLRs would need to have some control over which cases they hear to avoid being overburdened with many frivolous appeals. In essence, was the movement towards discretionary control a response to overworked courts which needed relief to ensure continued access to the judicial process, or an effort to increase the power and authority of COLRs to participate in shaping government policy?

The first explanation suggests factors such as workload and judicial resources will be associated with a COLR gaining discretionary jurisdiction, while the second explanation requires unpacking the political climate within a state to determine

why legislators would want to increase the power of another political institution. For instance legislators might have believed that a more powerful COLR could be controlled if they possessed authority over judges appointed to the court. By controlling the membership of the COLR, legislators could be relatively sure that the court would uphold its policy in the long-run, even if the majority party lost control of the legislature in the future ([Landes and Posner 1975](#); [Ramseyer 1994](#)). This would suggest that COLRs were more likely to gain discretionary jurisdiction when the legislature played a key role in the judicial selection process compared to a system which excluded the legislature (e.g. judicial elections). Scholars have not significantly considered these explanations in recent years:² with a new attention on state COLR agenda-setting, it may be time to reexamine why these reforms were enacted and how they changed the COLRs' docket ([Eisenberg and Huang 2011](#)).

8.4.2 Campaign Contributions and Macro-Policy Attention

One potential problem with studying macro-policy attention is that much of what state COLRs do has little political salience and few ideological implications. Expecting a grand, overarching model of agenda-setting to apply across all policy domains may be unrealistic. Instead, this institutional-strategic model may be more applicable to specific issues which have more salience or ideological implications; focusing my analysis on these specific areas may reveal sophisticated behavior on the parts of judges and litigants.

Given the controversy over judicial elections and the implications of this selection method on decisionmaking, it would be interesting to examine how contributions influence individual judges' attention to issues involving their campaign contributors.

²For a contemporary examination of these changes, see [Pelekoudas \(1963\)](#)

Similar to legislatures, potential donors might want to limit their contributions to judges who are actively involved in the contributor's policy area. One hypothesis might be that judges are more likely to hear cases involving these issues as the contributions from that industry increase ([Norris and Glennon N.d.](#)). This is an extension of Chapter 7 and the contributions for judicial access hypothesis, but instead tests the hypothesis using the number of cases heard by the COLR rather than individual judicial decisions to grant or deny review.

In order to seek out these contributions, judges might also take a more active stance in these cases when they are heard – regardless of the importance of the case or the judge's contribution to the decision on the merits ([Min 2015](#)). Another hypothesis might be that judges are more likely to write concurring or dissenting opinions as the contributions they receive from donors within that industry or policy area increase. By writing an opinion, the judge can send a signal to potential donors that he or she will be attentive to this issue if and when future cases arise. I can use existing data on opinion writing in decisions on the merits ([Hall and Windett 2013](#)) and combine this with my knowledge of policy attention and procedural path as described in Chapter 4 to evaluate campaign contributions and judicial attention on all elected state COLR judges, rather than only decisions to grant review in Mississippi and West Virginia.

8.4.3 Opinion and Panel Assignment

This project examines two aspects of agenda-setting: overall attention to an issue, and whether or not to hear an appeal. However there are other dimensions of agenda-setting which I do not directly examine here. The first is how COLRs assign cases to justices. In many states, the COLR sits *en banc* with all justices participating in the decision. However in 11 states, COLRs issue a substantial number of decisions

sitting as panels ([Schauffler and Strickland 2012](#)). The panels are randomly selected at varying intervals, rotating membership annually, monthly, or even by case. This practice is similar to the federal courts of appeal and other IACs which divide their workload across smaller sub-units of the court. The second is how opinions are assigned to justices on the COLR. While the most recent data available is a couple decades old, most states utilize a random or rotational process to assign the opinion of the court (see Figure 6.2). While this system may be sufficient for cases where the COLR is in agreement on the decision on the merits, such an approach likely breaks down if the justice assigned the opinion cannot convince a majority of the COLR to sign on to his or her opinion.

Both of these processes are part of judicial agenda-setting, and both have potential implications on judicial behavior. Random assignment in the federal courts of appeal has been used to assess partisanship and ideological decisionmaking to mixed results ([Hall 2010a; Sunstein 2006](#)). More importantly though, it is not entirely clear whether opinions and panels are assigned truly “at random.” Although scholars typically assume, and the courts themselves claim, that federal appellate judges are randomly assigned to cases, evidence suggests this may not be entirely accurate ([Chilton and Levy 2015](#)). Furthermore, non-random assignment can have a substantial impact on the subsequent decisions of the court if justices have differing probabilities of voting for the petitioner versus the respondent ([Eisenberg, Fisher and Rosen-Zvi 2012](#)). A similar problem arises if the COLR claims to randomly assign opinions to justices but instead follows a different procedure. In the U.S. Supreme Court, the majority opinion writer is assigned by the senior justice in the majority following the initial conference discussion. [Wasby \(2008\)](#) reports that on the Oregon Supreme Court, opinions were assigned occasionally based upon which justice expressed the most interest in the case

or had the most expertise about the relevant area of law. There is nothing inherently wrong with assigning opinions non-randomly; however if a COLR claims to assign opinions randomly and then doesn't, this has the potential to undermine confidence in the court. The recent project by [Hall and Windett \(2013\)](#) includes information on which justices participated or authored an opinion on each case, so it would provide sufficient information to evaluate the randomness of panel and opinion assignment over time.

Appendix

Results of Poisson Regression Models for Macro-Policy Attention

Table A.1: Poisson Regression Models of Agenda-Setting in State COLRs, Appeals by Permission

	Agriculture	Civil Rights and Libs.	Comm. Dev., Housing	Education	Energy
Judicial Elections	0.59 (0.93)	0.86 (0.49)	-0.77 (0.54)	0.88 (0.51)	1.05 (0.54)
Term Length	0.15 (0.10)	0.14* (0.05)	0.10 (0.06)	0.15* (0.06)	0.12* (0.06)
Judicial Professionalism	0.21 (0.24)	0.24 (0.14)	0.11 (0.18)	0.04 (0.15)	-0.08 (0.16)
Majority Decision Rule	-0.50 (0.58)	-0.23 (0.27)	-0.36 (0.28)	-0.44 (0.29)	-0.16 (0.31)
Intermediate Appellate Court	1.20 (0.88)	1.09* (0.43)	0.98 (0.52)	1.37* (0.48)	1.08* (0.47)
Distance to Upper Chamber	-0.85 (1.00)	0.21 (0.32)	0.24 (0.29)	-0.08 (0.37)	-0.15 (0.54)
Distance to Lower Chamber	1.18 (0.94)	-0.08 (0.32)	-0.47 (0.30)	0.18 (0.36)	-0.10 (0.54)
Distance to Governor	0.98* (0.44)	0.06 (0.14)	0.16 (0.14)	0.02 (0.15)	0.03 (0.22)
Ideological Fractionalization of the Court	-1.14 (1.06)	0.05 (0.40)	0.24 (0.35)	-0.58 (0.44)	-1.24* (0.56)
Divided Government	-0.30 (0.46)	-0.01 (0.15)	-0.25 (0.15)	0.16 (0.16)	0.11 (0.22)
Constant	-5.73* (1.84)	-3.22* (0.92)	-1.57 (1.00)	-3.28* (1.01)	-3.17* (1.03)
Variance Components					
Year	0.192	0.010	0.019	0.037	0.049
State	0.867	0.746	1.265	0.826	0.595
Observation	0.732	0.124	0.030	0.084	0.201
Observations	373	373	373	373	373

Note: Estimated coefficients are log-incident rate ratios with standard errors in parentheses.

*p<0.05

Table A.2: Poisson Regression Models of Agenda-Setting in State COLRs, Appeals by Permission (cont.)

	Environment	Finance	Fiscal and Econ. Issues	Health	Labor, Emp., Immig.
Judicial Elections	-0.56 (0.37)	0.85 (0.61)	1.25* (0.60)	0.72 (0.67)	1.06 (0.65)
Term Length	0.07 (0.04)	0.21* (0.07)	0.14* (0.06)	0.18* (0.07)	0.18* (0.07)
Judicial Professionalism	0.33* (0.12)	0.17 (0.16)	-0.27 (0.18)	-0.03 (0.18)	-0.05 (0.17)
Majority Decision Rule	-0.34 (0.26)	-0.45* (0.22)	-0.38 (0.35)	0.02 (0.24)	-0.13 (0.24)
Intermediate Appellate Court	0.73* (0.36)	2.13* (0.56)	0.94 (0.51)	2.44* (0.62)	1.42* (0.58)
Distance to Upper Chamber	0.63 (0.39)	-0.26 (0.18)	0.39 (0.39)	-0.13 (0.22)	-0.44* (0.19)
Distance to Lower Chamber	-0.42 (0.41)	0.02 (0.19)	-0.60 (0.39)	-0.38 (0.22)	0.17 (0.19)
Distance to Governor	0.40* (0.20)	0.11 (0.08)	0.15 (0.16)	0.15 (0.09)	-0.10 (0.08)
Ideological Fractionalization of the Court	0.33 (0.46)	0.10 (0.27)	-0.01 (0.49)	0.24 (0.33)	0.85* (0.27)
Divided Government	0.16 (0.19)	0.09 (0.08)	-0.21 (0.16)	0.06 (0.10)	0.28* (0.09)
Constant	-2.30* (0.75)	-3.14* (1.10)	-3.44* (1.11)	-3.79* (1.20)	-3.23* (1.15)
Variance Components					
Year	0.021	0.004	0.051	0.011	0.024
State	0.334	1.748	1.077	2.134	2.119
Observation	0.126	0.059	0.125	0.046	0.049
Observations	373	373	373	373	373

Note: Estimated coefficients are log-incident rate ratios with standard errors in parentheses.

*p<0.05

Table A.3: Poisson Regression Models of Agenda-Setting in State COLRs, Appeals by Permission (cont.)

	Law, Crime, and Family	Local Gov't	Public Lands and Water	Social Welfare
Judicial Elections	-0.09 (0.66)	0.83 (0.71)	0.51 (0.62)	0.39 (1.13)
Term Length	-0.09 (0.07)	0.13 (0.08)	0.05 (0.07)	0.24* (0.12)
Judicial Professionalism	0.29* (0.11)	0.32 (0.21)	-0.06 (0.19)	0.07 (0.32)
Majority Decision Rule	0.04 (0.11)	-0.40 (0.37)	-0.73 (0.38)	-0.91 (0.76)
Intermediate Appellate Court	0.17 (0.30)	1.92* (0.65)	1.17 (0.61)	0.52 (0.95)
Distance to Upper Chamber	-0.28* (0.08)	0.25 (0.31)	0.59 (0.59)	-1.35 (1.60)
Distance to Lower Chamber	0.15 (0.09)	0.02 (0.31)	-0.81 (0.62)	0.48 (1.51)
Distance to Governor	0.11* (0.04)	0.39* (0.13)	0.003 (0.29)	-0.10 (0.72)
Ideological Fractionalization of the Court	0.13 (0.13)	-0.50 (0.42)	0.31 (0.70)	2.52 (1.79)
Divided Government	-0.01 (0.04)	-0.11 (0.14)	0.03 (0.25)	0.54 (0.66)
Constant	3.87* (1.10)	-3.74* (1.38)	-3.13* (1.24)	-8.30* (2.66)
Variance Components				
Year	0.011	0.044	0.039	0.079
State	2.513	1.784	0.895	0.600
Observation	0.021	0.053	0.150	2.131
Observations	373	373	373	373

Note: Estimated coefficients are log-incident rate ratios with standard errors in parentheses.

*p<0.05

Table A.4: Poisson Regression Models of Agenda-Setting in State COLRs, Appeals by Permission (cont.)

	State Gov't Ops	Tech. & Comm.	Transportation
Judicial Elections	1.21*	-0.10	0.66
	(0.61)	(0.62)	(0.53)
Term Length	0.18*	0.10	0.11
	(0.07)	(0.06)	(0.06)
Judicial Professionalism	0.12	-0.01	0.10
	(0.17)	(0.20)	(0.16)
Majority Decision Rule	-0.13	-0.15	-0.24
	(0.26)	(0.42)	(0.28)
Intermediate Appellate Court	2.30*	1.09	1.42*
	(0.56)	(0.62)	(0.48)
Distance to Upper Chamber	0.11	0.25	0.39
	(0.23)	(0.75)	(0.31)
Distance to Lower Chamber	-0.13	-0.35	-0.42
	(0.24)	(0.78)	(0.32)
Distance to Governor	0.16	0.04	0.03
	(0.10)	(0.30)	(0.14)
Ideological Fractionalization of the Court	-0.18	-0.55	0.32
	(0.32)	(0.76)	(0.42)
Divided Government	0.03	-0.17	0.03
	(0.10)	(0.31)	(0.14)
Constant	-4.02*	-3.42*	-3.00*
	(1.18)	(1.19)	(1.03)
<hr/>			
Variance Components			
Year	0.025	0.081	0.023
State	1.447	0.577	1.027
Observation	0.053	0.230	0.096
Observations	373	373	373

Note: Estimated coefficients are log-incident rate ratios with standard errors in parentheses.

*p<0.05

Table A.5: Poisson Regression Models of Agenda-Setting in State COLRs, Appeals by Right

	Agriculture	Civil Rights and Libs.	Comm. Dev., Housing	Education	Energy
Number of Cases Filed in Lower Courts Last Year (logged)	-1.72*	-0.35	-0.95*	-0.26	-0.19
Proportion of Lower Court CasesAppealed	(0.70)	(0.31)	(0.30)	(0.30)	(0.45)
Lawyers Per Capita	-1.00	-0.10	-0.50	0.34	-0.25
Constant	(0.73)	(0.34)	(0.27)	(0.33)	(0.63)
	0.03	-0.01	0.01	-0.01	-0.01
	(0.02)	(0.01)	(0.01)	(0.01)	(0.02)
Variance Components					
Year	8.22	1.46	5.71*	0.47	-0.90
State	(5.20)	(2.44)	(2.31)	(2.38)	(3.62)
Observation					
Observations	266	266	266	266	266

Note: Estimated coefficients are log-incident rate ratios with standard errors in parentheses.

*p<0.05

Table A.6: Poisson Regression Models of Agenda-Setting in State COLRs, Appeals by Right (cont.)

	Environment	Finance	Fiscal and Econ. Issues	Health	Labor, Emp., Immig.
Number of Cases Filed in Lower Courts Last Year (logged)	-0.19 (0.45)	-0.27 (0.22)	-0.24 (0.50)	-0.70* (0.28)	-0.40 (0.24)
Proportion of Lower Court CasesAppealed	0.36 (0.47)	0.09 (0.17)	-0.52 (0.51)	-0.27 (0.28)	0.02 (0.21)
Lawyers Per Capita	-0.02 (0.03)	-0.0002 (0.01)	-0.09* (0.04)	0.005 (0.01)	-0.02 (0.01)
Constant	-0.74 (3.52)	1.83 (1.78)	2.95 (3.96)	4.95* (2.18)	3.23 (1.93)
Variance Components					
Year	0.158	0.007	0.123	0.049	0.038
State	4.269	3.470	5.426	2.612	3.325
Observation	0.247	0.069	0.128	0.319	0.053
Observations	266	266	266	266	266

Note: Estimated coefficients are log-incident rate ratios with standard errors in parentheses.

*p<0.05

Table A.7: Poisson Regression Models of Agenda-Setting in State COLRs, Appeals by Right (cont.)

	Law, Crime, and Family	Local Gov't	Public Lands and Water	Social Welfare
Number of Cases Filed in Lower Courts Last Year (logged)	-0.07 (0.13)	-0.36 (0.27)	-1.84* (0.47)	-0.22 (5.82)
Proportion of Lower Court CasesAppealed	0.16 (0.09)	-0.14 (0.27)	-1.42* (0.51)	-0.21 (15.52)
Lawyers Per Capita	0.01* (0.005)	-0.01 (0.01)	-0.01 (0.03)	0.002 (0.16)
Constant	2.84* (1.04)	2.38 (2.13)	12.31* (3.72)	-9.88 (53.15)
Variance Components				
Year	0.003	0.058	0.105	10.111
State	2.003	2.432	2.312	21.738
Observation	0.034	0.133	0.815	111.193
Observations	266	266	266	266

Note: Estimated coefficients are log-incident rate ratios with standard errors in parentheses.

*p<0.05

Table A.8: Poisson Regression Models of Agenda-Setting in State COLRs, Appeals by Right (cont.)

	State Gov't Ops	Tech. & Comm.	Transportation
Number of Cases Filed in Lower Courts Last Year (logged)	-0.39 (0.24)	0.40 (1.96)	-0.17 (0.25)
Proportion of Lower Court CasesAppealed	-0.14 (0.22)	0.45 (4.00)	0.31 (0.25)
Lawyers Per Capita	0.02 (0.01)	-0.01 (0.08)	-0.01 (0.01)
Constant	2.15 (1.88)	-11.05 (16.63)	0.52 (1.93)
Variance Components			
Year	0.048	0.996	0.032
State	2.326	5.747	1.632
Observation	0.080	34.303	0.132
Observations	266	266	266

Note: Estimated coefficients are log-incident rate ratios with standard errors in parentheses.

*p<0.05

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