
State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court

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This article examines how institutional design leads state governments to win their cases before the U.S. Supreme Court. We analyze whether states are more likely to prevail on the merits when they create a formal solicitor general office and have an attorney from that office argue their cases before the Court. We employ an analytical matching approach and find that attorneys from state solicitor general offices are significantly more likely to win their cases compared to other kinds of state attorneys. Accordingly, if states prioritize victory before the Court, they should consider creating state solicitor general offices and granting those solicitors general the authority to control their appellate litigation.

In *Medellin v. Texas* (2008), the state of Texas enhanced its reputation as a successful litigant before the U.S. Supreme Court. At issue was whether Texas violated the Vienna Convention on Consular Relations when it arrested Jose Medellin and later sentenced him to death (Ho 2010). Medellin was a Mexican national who lived illegally in Texas since he was a child. After he brutally murdered two teenage girls, the police arrested and Mirandized him. Medellin waived his rights, confessed, and subsequently received a death sentence. Yet, shortly thereafter, he filed for habeas corpus relief, alleging that Texas violated his rights under the Vienna Convention because authorities never told him he could notify the Mexican consulate of his arrest. The case made its way to the Supreme Court, where six justices ultimately sided with Texas. In a nod to the quality of lawyering, even the *New York Times*—opposed as it was to the Court’s decision—noted that Texas Solicitor General Ted Cruz made a persuasive presentation (Stout 2008).

On the other hand, in *Holmes v. South Carolina* (2006), South Carolina added another loss to its poor record before the High Court. The Court held that the state erred when it refused to allow a convicted felon to offer exculpatory evidence supporting his claim that a third party actually committed the murder of which he was

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convicted. South Carolina argued that the evidence against the defendant was so strong that he could not introduce the exculpatory evidence. South Carolina had won just one out of eight (13 percent) of its cases since the Court's 1990 term—and this case followed the losing pattern. In a unanimous opinion cutting against the state, Justice Alito wrote that South Carolina's position made "no sense."

At least since the seminal study by Galanter (1974) on the significance of "repeat players," scholars of law and politics have considered the importance of legal advocacy and expertise, and the consequences they hold for litigants and legal change in American society. In particular, the ability of repeat players to utilize their multiple legal advantages—expertise, resources, reputations, and the like—to secure more favorable legal outcomes has reinforced the importance of specialized legal institutions. Litigants who do not enjoy the benefits of experienced counsel and other legal resources are subject to significant disadvantages, especially in their ability to generate favorable legal change. And state governments are no different. States that fail to develop specialized litigation institutions will suffer when they defend themselves in federal court. When, on the other hand, a state creates a specialized legal institution that consists of knowledgeable attorneys who direct the state's appellate litigation, it can enhance its chances of success. Such institutional design fosters both expertise to improve performance and a degree of legal credibility that should enhance how the justices view the state's attorneys. Yet, few studies have explicitly examined the role of institutional design—and specialized state solicitors general (SGs) in particular—in shaping the litigation effectiveness of state governments before the U.S. Supreme Court.

In this study, we consider the importance of legal (appellate) expertise and its importance for state governments seeking to defend their policies before the U.S. Supreme Court. What factors lead some states to win before the Court while others seem destined to lose? The answer, we contend, turns on institutional design and the attributes institutions can foster. Specifically, we argue that states with a formal solicitor general office (OSG)—and that use the attorneys within that office to argue their cases—experience systematically greater success before the U.S. Supreme Court because they foster team-based appellate expertise and professionalism.

Using an analytically rigorous matching technique, we review over 400 Supreme Court cases decided between the 1989 and 2007 terms where a state was a party, and examine the conditions under which those states won (or lost) their cases. The empirical results demonstrate that states are more likely to win when they utilize attorneys from a formal state OSG, even after accounting for the general levels of institutional resources that vary across states.

Specifically, a state that uses a state OSG attorney to litigate before the U.S. Supreme Court has a 0.24 greater probability of winning its case than a similar state that does not use an OSG attorney. And we retrieve these results even after accounting for contextual features that might be associated with state success, such as state (non-OSG) institutional resources and ideological compatibility with the Court.

These findings make three contributions. First, they answer an important question about whether state efforts to improve their appellate success have actually done so. Legal experts have noted the increasing role of state SGs in Supreme Court litigation, but have not determined whether those solicitors have enhanced state success on the merits. As Mauro states, “whether the trend [in states utilizing a formal solicitor general’s office] has resulted in more wins for the states at the Supreme Court is difficult to say” (Mauro 2003: 1). Our results suggest that if states want to enhance their batting averages before the Supreme Court, they should create formal, professionalized SG offices with appellate specialists who argue their cases.

Second, and relatedly, the results highlight the importance of institutional design. While a number of scholars have analyzed, for example, the design of constitutions (Miller and Hammond 1989), central banks (Jeong, Miller, and Sobel 2009; North and Weingast 1989), bureaucratic agencies (Lewis 2003), and the effects of such design, little scholarship examines how institutional design can lead to success before the judiciary (but see Black and Owens 2012; Wohlfarth 2009). Our findings target that scholarly paucity. What is more, the results of this study reinforce the importance of specialized litigation institutions and the significant advantages they foster in the federal judiciary (Galanter 1974).

Third, knowing why states succeed before the Court informs us about a substantial amount of judicial activity. States participate as parties in approximately one quarter of all Supreme Court cases. Understanding this large bloc of cases can enhance scholarly knowledge of Supreme Court behavior generally. And while previous scholars have contributed a number of insightful works on state governments in the federal judiciary (Goelzhauser and Vouvalis 2013; Spill Solberg and Ray 2005; Clayton and McGuire 2001; Waltenburg and Swinford 1999; Clayton 1994; Kearney and Sheehan 1992; Epstein and O’Connor 1988), it is still unclear empirically whether (and how much) state efforts to enhance their success before the U.S. Supreme Court through OSGs have actually paid off.

Our study unfolds in five parts. First, we establish the importance of studying states and their success before the Supreme Court. Second, we theorize the conditions under which states will be more likely to succeed on the merits before the Court. Third, we

explain our data, our analytical matching strategy, and our empirical measures. Fourth, we discuss our methods and results. Fifth, we discuss the implications of our findings.

Critical Players: The States as Litigants Before the U.S. Supreme Court

State governments appear collectively before the U.S. Supreme Court more than any other party aside from the federal government.¹ As Figure 1 shows, states have been regular parties before the Court since at least 1946. Their involvement, of course, has fluctuated over time. In the 1940s and 1950s, they participated in 15–25 cases per term (roughly 15–20 percent of the Court’s docket). Yet, in the 1960s and 1970s, state participation increased to 30 percent of the Court’s docket. In recent decades, state party participation has dropped below 20 percent in a mere five terms. Even after the

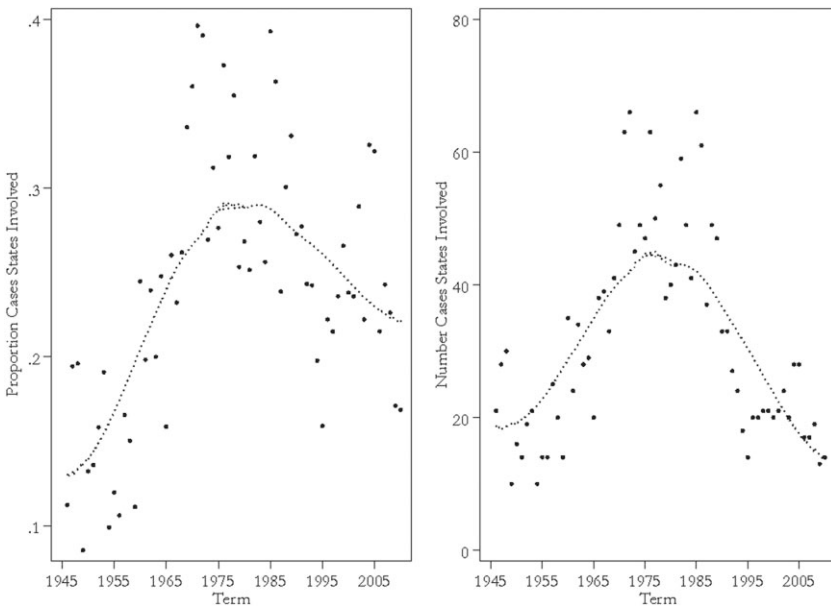


Figure 1. Scatterplot of the Proportion of the Supreme Court’s Docket Involving States as Parties per Term (Left Figure), and the Number of Supreme Court Cases per Term Involving States as Parties (Right Figure), 1946–2010. Dotted Lines Represent the Average Value Over Time Using a Lowess Smoother.

¹ Data on state participation in the Supreme Court come from the Supreme Court Database, which is available at: <http://scdb.wustl.edu/>.

Court's docket shrunk in the 1990s (Owens and Simon 2012), states retained their status as frequent parties before the Court, participating in 23 percent of the Court's cases on average. In 2004 alone, state governments litigated 33 percent of the Court's cases.

Not only do states appear frequently before the Court, they often litigate cases with substantial policy consequences. Roughly 38 percent of cases involving the state governments between the 1946 and 2010 terms turned on issues of criminal procedure. Civil rights issues comprised 17 percent of the cases in which states were parties. What is more, many of the states' cases have attracted substantial interest group participation, further signifying their political and legal salience. For example, the Court received 78 amicus curiae briefs in *Webster v. Reproductive Health Services* (1989), 54 amicus briefs in *Regents of the University of California v. Bakke* (1978), and 53 amicus briefs in *Washington v. Glucksberg* (1997) (Collins 2008).

While states, overall, have performed fairly well before the Supreme Court (winning 52 percent of their cases on average), significant variation exists in state success by year and across states.² As Figure 2 shows, from 1959 to 1969, the states never won more than half their cases. Since then, however, states have won roughly 56 percent of the time. Perhaps more important for our purposes, though, is the variation among the states. The right-hand portion of Figure 2 shows the variation in success among states that litigated 10 or more cases between the Court's 1946 and 2010 terms. The variation is marked. Massachusetts, for example, won 72 percent of the 47 cases it litigated. Of the 35 cases Oregon litigated, it won 25 (71 percent). Furthermore, California won 66 percent of its 225 cases and Michigan won 65 percent of its 52 cases. On the other hand, South Carolina won only 32 percent of its 25 cases, and Mississippi won a mere 28 percent of its 39 cases.

Though it is possible to attribute states' varying success to political factors, region, or other contextual features, we believe there is a more systematic component at work. We contend that some states win more than others because they have created, and rely on, state SG offices with appellate specialists to litigate cases. As we explain below, such institutions foster team-based appellate expertise within an office that generates professionalism and, in turn, success.

The Importance of Institutional Design

Institutional design influences legal and policy outcomes. Lewis (2003) finds that presidents, under certain conditions, create

² As petitioners, states prevailed 70 percent of the time during the 1946–2010 Court terms; as respondents, they won 40 percent of their cases.

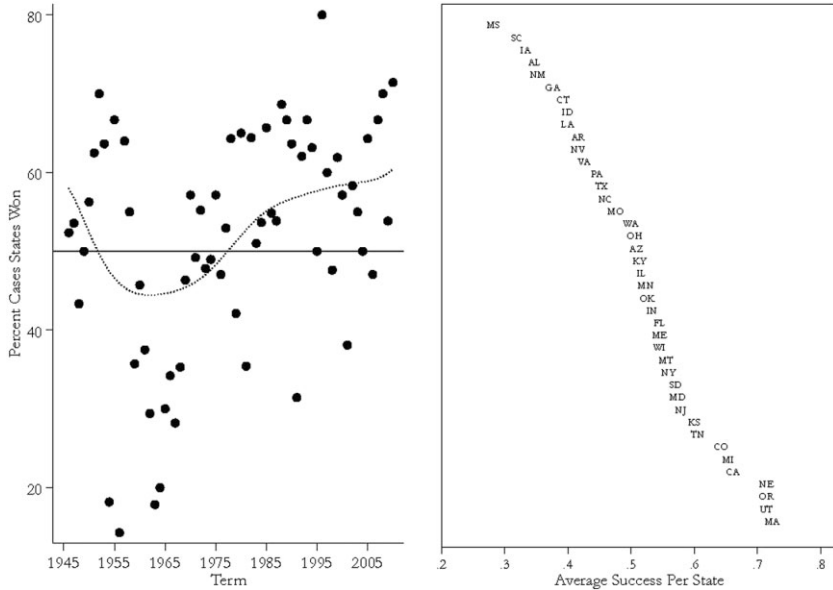


Figure 2. Scatterplot of the Percentage of Victories for States as Parties to Supreme Court Cases per Term (Left Figure), and the Percentage of Victories per State, Among Those States Arguing Ten or More Cases Before the Court (Right Figure), 1946–2010. The Dotted Line on the Left Panel Represents the Average Value Over Time Using a Lowess Smoother. The Solid Horizontal Line Reflects 50% Success.

agencies that generate more favorable policies. Presidents with strong public support—or who face a politically divided Congress—create new agencies that are placed under executive control, which makes it easier for them to ensure that subordinates follow their commands. Congress, likewise, structures bureaucratic institutions so as to expand its influence and limit presidential control (Lewis 2003; Snyder and Weingast 2000). McCubbins, Noll, and Weingast (1987) argue that majority coalitions use agency design to protect their policies and ensure that certain agency outcomes are more likely to occur in the future than others. On a more historical note, Miller (1989) notes how the eradication of boss politics and the spoils system led to a change in policies. With experts now manning the helm, business could invest and grow with more certainty and stability. In each instance, the design of an institution and its rules had a direct effect on policy outcomes.

In a similar vein, scholars are increasingly exploring the importance of institutions and state appellate behavior (see, e.g., Ho 2010; Layton 2001; Miller 2010; Provost 2003, 2006). For example, Clayton and McGuire (2001) and Clayton (1994) suggest that

greater resources might drive the success of state governments before the Court. Kearney and Sheehan (1992) find that ideological agreement between a state and the Court leads to greater state success. Waltenburg and Swinford (1999) argue that states have become more capable litigators in recent years, and that the pro-states' rights Rehnquist Court encouraged increased state activity (and productivity). That is, as a result of having to defend their policies in the Supreme Court, state Attorney General offices grew in importance, acquired more resources, and became more capable litigators before the High Court.³ And Miller (2010) provides a detailed account of state SGs and their roles before state supreme courts.

Only two studies, to our knowledge, touch on whether the creation of state OSGs has led to more success for states before the U.S. Supreme Court. Epstein and O'Connor (1988) analyzed all criminal cases decided between 1969 and 1985 to determine which states won their cases and why. They concluded that states with specialized offices (not OSGs though) to handle criminal litigation at the Supreme Court were 19 percent more likely to win their cases than states without such offices. They also discovered that such offices were more important to southern states than to northern states because "the southern states [were] starting from a lower baseline" than nonsouthern states (Epstein and O'Connor 1988: 672). Despite the study's suggestion that specialized litigators enhance success, it cannot definitively tell us whether the recent rise in the adoption of state OSGs has led to increased state success. The data employed by Epstein and O'Connor (1988) focus only on criminal cases and end just before Chief Justice Rehnquist initiated his federalism push. Further, the study examines decisions *before* states created their OSGs in the last two waves of adoption. According to Miller (2010), there have been three waves of states adopting OSGs. The first wave began before 1995. The second took place in the late 1990s, and the third occurred after 2003. Because the Epstein and O'Connor (1988) data predate these last two waves, it is unclear whether we can make inferences from the study about the impact of state OSGs as institutions.

Goelzhauser and Vouvalis (2013) suggest that state OSGs may lead to success for state governments. The authors focus specifically on the role of state SGs at the Supreme Court's agenda stage. They find that the presence of a state OSG in a case leads to a 0.07 increase in the probability that the Court grants review to a state's

³ Other scholars have examined the frequency of state litigation before the Supreme Court (Lavery and Palmer 2001; Morris 1987) and how the strategies of states have changed over time (Clayton and McGuire 2001; Provost 2003, 2006). Solberg and Ray (2005), for example, find that ideological and case-level factors lead some states to succeed before federal circuit courts of appeals.

case. The involvement of state SGs improves the odds of review because they are highly qualified lawyers who specialize in Supreme Court litigation and, likewise, know how to screen cases to ensure the state seeks review of only the most meritorious cases. As a consequence, state SG participation drives up the probability of Supreme Court review. Still, even though state OSGs can increase the odds that the Supreme Court hears a state's case, it remains unclear whether state OSG success carries over to the merits stage amidst the numerous competing influences that shape justices' merits decisions. It is possible (though unlikely) that state SG expertise comes exclusively in the form of knowing which cases are most certworthy. Thus, we return to the question that motivates our study: whether state governments that utilize SG offices experience greater success before the Supreme Court than states that fail to create and utilize such offices.

Expertise, State SGs, and Success at the U.S. Supreme Court

We argue that a state SG office will lead states to heightened success before the Court. This is the case for two reasons. First, OSGs foster team-based appellate expertise (Goelzhauser and Vouvalis 2013). The attorneys within these offices have and use substantial expertise in appellate matters. Second, the office exudes greater professionalism, which leads to enhanced credibility among decision makers. For these two reasons, state OSGs should outperform other attorneys.

The Importance of Appellate Expertise to State OSG Success

State OSGs vary in terms of structure and duties (see, e.g., Symposium 2010: 635–637) but they are all generally charged with applying their appellate expertise toward prevailing in court (Ho 2010: 474–475). James Layton, Solicitor General of Missouri, argues that there are four broad categories of state SGs (Symposium 2010: 640–641). First, in some states, the SG retains and oversees a group of his or her own appellate specialists. Second, in other states, there is one SG (and perhaps a small number of staff attorneys) who supervises an existing appellate infrastructure of agency attorneys. Third, some states use a mixture of the first two models, with a state OSG and staff that can handle many civil appeals but not all of them. In essence, the state OSG takes the most important appeals and leaves (but oversees) the remainder for agency attorneys. Finally, in some states, the SG simply acts as a consultant to the Attorney General. Yet, even these

SGs have considerable appellate expertise and may handle the most sensitive and complex Supreme Court cases (Symposium 2010: 641).

State SGs themselves tell us that state governments employ them precisely because of their appellate expertise (Layton 2001). States have moved toward OSGs because “[a]ppellate advocacy is specialized work. It draws upon talents and skills which are far different from those utilized in other facets of practicing law” (Ho 2010: 472). As Dan Schweitzer, Supreme Court Counsel for the National Association of Attorneys General, once stated: “there is a particular skill set to being an appellate lawyer;” state governments “want someone with that skill set to have some role to play in the appellate products that go to the courts” (Symposium 2010: 647). Given their important roles and frequent participation before the Court, some states have sought better representation.

State SGs can employ their expertise in appellate procedure to enhance state success. Appeals courts have unique rules, filing procedures, and institutional quirks that can be difficult to navigate. Actors who specialize in those courts enjoy an immediate advantage over those who do not (Nordby 2009). For example, one reason Texas Attorney General (now U.S. Senator) John Cornyn created his state’s OSG was because the attorneys in that office missed important deadlines to file Supreme Court appeals (Symposium 2010: 652). Cornyn wanted to ensure that Texas would have attorneys conversant in appellate procedure, and thus created the Texas OSG.

The heightened appellate expertise fostered by state SG offices also affords them an advantage in terms of deciding whether to pursue an appeal in the first place (Goelzhauser and Vouvalis 2013). An appellate expert who frequently appears before the Supreme Court is likely to know what types of cases the justices are likely to hear—and how it might decide those cases—better than a line attorney in an agency or in the Attorney General’s office who rarely, if ever, argues before the Supreme Court. Knowing the key issues that can attract the Court’s attention at the agenda stage can help a case move forward. And making accurate predictions about how the Court will decide a case on the merits can determine whether to appeal at all. As Kenneth Geller, a one-time principal deputy for U.S. Solicitor General Rex Lee, once stated: “In an average year we may only appeal 80 cases; that means another 420 won’t be appealed. We want the Court to hear those cases that are the most important to the government . . .” (*quoted in Jenkins 1983: 736*).

State SGs and their teams of appellate experts also can use their expertise to persuade the Supreme Court to support their legal position on the merits of the case. Judges and justices respect

high-quality work and are more inclined to give an appellate specialist the benefit of the doubt. Briefs by these specialists “start being read with the presumption that what’s being said in there is accurate” (Symposium 2010: 649). For example, numerous commentators argue that the federal SG office is successful because its attorneys are effective at crafting the “right” arguments that appeal to justices specifically and collectively. The familiarity with the Court leads these attorneys to provide justices with the precise information they seek. In short, because they have expertise about appellate procedure, the prospect of prevailing on the merits, and a greater ability to persuade the justices, state SGs can lead their states to greater success before the Supreme Court.

The Importance of Professionalism to State SG Success

At the same time, state OSG attorneys are also likely to win because they are professionals who possess credibility in the eyes of the Court. Research shows that entities run by professionals are more likely to exude the impression of political neutrality, objectivity, and stability. In other words, the justices should take the arguments of professionals more seriously than they do with nonprofessionals with less legal credibility (McGuire 1995). And professionals often do, in fact, foster increased stability. For example, Jeong et al. (2009) discuss how creating a professionalized central bank allowed the United States to manage its economy more effectively. By creating an independent federal bank consisting of professionals with interests unaligned with politicians (i.e., their interests were to create and stabilize a strong economy), the economy could find stability. In a similar vein, the use of professionals in the early twentieth century helped eradicate boss rule and generated a more efficient distribution of public services (Knott and Miller 1987; Miller 1989). As Miller (1989) states, business could now invest “without having to worry that the next change in party control in their city government would result in a new round of extortion or elimination of their property rights . . .” (691). Professionals, with incentives beyond short-term political gains, signaled long-term stability.⁴

Certainly, we know that state SGs have made a concerted effort to be professional and credible. Gregory Coleman, the first Solicitor General of Texas, once explained that he went out of his way to ensure that his actions were credible and professional when he assumed the office, knowing that his actions would set precedent

⁴ To be sure, state SGs typically serve at the pleasure of their appointing Attorneys General, who are elected and, as such, there are occasional political winds that push their sails. But on the whole, these attorneys take their duties seriously and professionally.

for how all later SGs would be expected to behave. As he stated: “We wanted the briefs, both in substance and in style, to look professional [and] to look like we had put our very, very best into it” (Symposium 2010: 656). He stated further: “After a period of ten years, I think the office is well-known for the quality and the performance of the advocacy in representing the state. I was very pleased to be a part of that” (Symposium 2010: 656). Other state SGs agree. Florida Solicitor General Scott Makar once stated: “the office has a higher duty to the state, its [citizens], and agencies to not merely advance a political, agenda-driven position” (Nordby 2009: 242).

And judges have in fact noticed state OSG professionalism. In a recent symposium on state OSGs, Fifth Circuit Judge Carolyn Dineen King stated: “we understand the lawyers for the state have an institutional role that transcends the politics of the moment. They, no less than we, serve the cause of fidelity to the rule of law . . . I must say, I applaud the development of excellent SG offices. They are an enormous aid to our court” (Symposium 2010: 680). Her colleague, Judge Priscilla Owen, echoed those remarks when she declared that state SGs take “the longer view,” refuse to “take inconsistent positions,” and do “what is responsible for the big picture” (Symposium 2010: 681). Both judges agreed that they have developed the same relationship with the Texas OSG as they have with the U.S. Solicitor General Office (Symposium 2010: 695).

Perhaps the most vocal judicial recognition of state SG quality—and their abilities to generate success before the Supreme Court—comes from a recent interview Justice Scalia gave to the *New York Magazine* (Senior 2013). In his interview, Scalia commented that having good attorneys makes his job easier. He and his colleagues, he said, depend on lawyers to clarify the facts and the law, and that justices listen to them because they know more about the case and the subject than the justices. Importantly, he singled out state SGs as particularly helpful, noting that the creation and use of these SGs has been a major improvement:

Another change is that many of the states have adopted a new office of the solicitor general, so that the people who come to argue from the states are people who know how to conduct appellate argument. In the old days, it would be the attorney general—usually an elected attorney general. . . Some of them were just disasters. They were throwing away important points of law, not just for their state, but for the other 49. (Senior 2013)

As Scalia’s comment suggests, states that fail to create and rely on an OSG do not reap the same benefits of appellate expertise and professionalism. To be sure, this is not to say that states without an OSG employ unqualified attorneys with no experience and little

professionalism. Rather, we claim that, on average, there will be a greater collective appellate expertise and professionalism among OSG attorneys than others. In states without an OSG, the line attorney in the state agency that litigated the case will make a decision to appeal to the Supreme Court, and in some non-OSG states, the attorney who litigated the case in the lower courts may litigate in the U.S. Supreme Court (Epstein and O'Connor 1988: 665). And while the Attorney General may oversee the criminal appellate docket and some noncriminal matters, there is little centralization and maximization of collective appellate expertise. It may even be possible that none of the attorneys involved have any appellate experience at all. Given the importance of appellate expertise and professionalism—and the fact that state SGs tend to have both—we expect that *state SGs (or deputy SGs) will be more likely to win their cases in the Supreme Court than non-OSG attorneys who argue for states.*

Analytical Matching Strategy and Data

To examine whether the presence of a state OSG systematically leads to greater state success before the Court, we are essentially asking a “but for” question—but for the presence of the state SG, would the state have won its case? The most appropriate way to make this determination, of course, would be to observe what happens in a case without a state SG, and then, after the case is decided, rerun history and have the same justices decide the same case but with the state having created and employed an OSG attorney (Epstein et al. 2005). Since we cannot do this, we turn to matching analysis.⁵

Matching methods have taken on increasing importance in political science research. In a recent book-length treatment of the U.S. Solicitor General, Black and Owens (2012) examine whether the federal OSG influences Supreme Court justices to behave in ways they otherwise would not. Boyd, Epstein, and Martin (2010) use matching methods to determine that the presence of a female judge on a circuit court panel leads the two male judges to vote more liberally in sex discrimination cases than they otherwise would. And Epstein et al. (2005) find that war causes justices to vote differently than they do in peacetime.

Matching is a way for researchers to “prune” their data and remove “imbalance” between the treatment and control groups that might otherwise lead to inappropriate inferences (Black and

⁵ Our discussion here is based on the analysis employed by Black and Owens (2012). For a more extended discussion, consult Black and Owens (2012: 73–77).

Owens 2012). Stated more plainly, matching removes observations in which the treatment and control groups have dramatically different characteristics; it retains observations that are as similar as possible, save for the fact that one group observes the treatment effect and the other does not. The analyst takes the data he or she has collected on the topic of interest and matches observations such that the values of covariates in the control group and treatment group are as close as possible to one another. Observations that do not match across groups are discarded. Failure to match the data could result in erroneous inferences about the effects of the independent variable on the dependent variable.

For our purposes, we want a treatment group and a control group that are similar in all relevant features save for the presence of a state OSG attorney litigating on behalf of the state. That is, our treatment is whether a state OSG attorney argued the case. If we observe differences in the probability of victory between the treatment group (an attorney from a state OSG argued the case) and the control group (a non-OSG attorney argued the case), we can infer that the presence of a state SG led to the change.

While it is difficult to obtain perfect balance between the treatment and control group, scholars can nevertheless minimize that imbalance and achieve “approximate balance.”⁶ Once the data are approximately balanced, researchers can fit standard parametric models to the data. As Ho et al. (2007) state, approximately balanced data lead to stronger statistical estimates and less model dependence. “The only inferences necessary [after approximately balancing the data] are those relatively close to the data, leading to less model dependence and reduced statistical bias than without matching” (Iacus, King, and Porro 2009: 1).

Using a recent innovation called coarsened exact matching (CEM) (Iacus, King, and Porro 2009, 2010, 2012), we matched our treatment and control groups on an “institutional score” (which we define below) that reflects the general degree of institutionalization (apart from a formal state OSG) that varies across states.⁷ We did so because we expect that different states with varying degrees of resources and commitment toward supporting their governmental institutions have consequences for both their litigation success and

⁶ One primary empirical challenge is the trade-off between maximizing balance versus the degree of data loss. Thus, one will generally be unable to match on every relevant nontreatment factor and still retain sufficient data to conduct standard statistical analysis. In this study, we match on a principal factor—state institutionalization—that is likely to affect the existence of state OSGs and state success, which significantly improves the balance in our sample without excessively reducing the number of usable observations.

⁷ Coarsened exact matching is a useful matching approach because, among other desirable empirical properties, it minimizes data loss when reducing imbalance; it allows the researchers more control over the appropriate matches; and it is computationally efficient (Iacus, King, and Porro 2012).

proclivity to institute a formal OSG. When a state has increased resources overall, it may succeed more in Court (Clayton 1994; Clayton and McGuire 2001). Because some states have a more professionalized legislative and judicial apparatus, they might be better able to win before the Court. A more professionalized legislature, for example, might pass better laws than a part-time legislature, making the state SG's defense of the law easier. Additionally, states with greater resources and institutional commitment should also be better equipped to adopt a formal OSG. Thus, we wish to identify state governments with similar levels of institutional resources and professionalism, thereby providing greater analytical leverage over the independent impact of the presence of an OSG attorney on state success. In other words, we first isolate those states with similar levels of institutionalization, and then divide them into those that employed a formal OSG and those that have not. And then we can estimate those states' (marginal) probability of success based on whether they adopted (and utilized) a formal OSG to argue the case before the Court.

We match on a composite of features that combine to create an "institutional resource" score for each state. By matching on an institutional resource score, we aim to balance our treatment and control groups on relevant traits that identify the sophistication of each state. For example, Epstein and O'Connor (1988) find that some states, because of their broader policies, have better reputations and operate from stronger starting points. These state traits "represent microcosms that Supreme Court Justices may perceive as negative or positive" (664). Thus, to create a "General Policy Score" variable, Epstein and O'Connor (1988) combined a number of scales such as innovativeness, antidiscrimination and consumer protection statutes, and the amount of money allocated to social welfare programs.⁸

Following McGuire's (2004) work on the evolutionary institutionalization of the Supreme Court, we conduct a principal components factor analysis on four variables to create a state institutional resource measure. First, we account for the general

⁸ Indeed, a brief analysis of state success suggests that states with more resources are more likely to win before the Court. When we conduct a bivariate regression of whether a state won its case before the Supreme Court on the institutional resource score (detailed below) for that state, we find a strong and positive association between institutionalization and state success ($p > 0.000$). This suggests, then, that a state is more likely to win if it has institutionalized its governing apparatus. Therefore, we must be careful not to compare states without strong professional institutions (and no state OSG) against those with strong professional institutions (but an OSG). Inferring that the OSG leads to success might be erroneous, given the role of the professionalized institutions. As such, we matched our treatment and control groups such that the two have similar institutional resources scores. We should point out that our findings support the importance of the state OSG on success even while we match on, and control for, those resources. In other words, we retrieve our results even after controlling for this potential confounding factor.

professionalism of the state's court of last resort, as measured by the degree of its docket control (Squire 2008). Specifically, the proportion of each state court's docket that is composed of discretionary cases represents the degree of that court's docket control. Second, and relatedly, we account for the general professionalism of the state's court of last resort, as measured by its jurisdictional authority. Squire (2008) measures jurisdictional authority using a count of the number of issue areas where the state court may exercise discretion over the decision to review cases, among seven primary issue areas—administrative agency, civil, disciplinary, juvenile, interlocutory, noncapital crime, and original proceeding. Third, we measure the professionalization of the state's legislature to account for the potential that a more professionalized legislature may be better equipped to pass laws that can withstand judicial scrutiny. State legislative professionalism reflects a composite of legislator salary and benefits, service demands (i.e., length of the legislative session), and total staff size for the average legislator.⁹ Last, we account for the monetary resources that each state allocates to its judiciary using annual budget appropriations. To code this variable, we rely on the annual amount of direct expenditures each state allocates to its judicial system, as reported by the U.S. Census.¹⁰ Thus, for each state and each year, we retrieve one institutional resource score that is a function of the common variance in state court professionalism, state legislative professionalism, and the state's expenditure on its judiciary.

The resulting institutionalization score represents the general degree of resources and commitment that each state devotes toward its governing apparatus. A low score means the state has devoted few resources to its judiciary, has a part-time legislature, and a less professionalized state supreme court. A larger score, on the other hand, highlights a state that has devoted considerably greater resources to its institutions. The principal components analysis resulted in one principal axis with an eigenvalue greater than 1, which accounted for 71 percent of the common variance. Figure 3 provides a visual representation of the states' institutional resource score for the terms in which they litigated a case before the Court.

⁹ The data on state court and legislative professionalism come from the State Politics and the Judiciary (SPJ) data set, available at: http://academic.udayton.edu/sppq-TPR/tp_r_data_sets.html. The SPJ data, in turn, come from Squire (2007, 2008).

¹⁰ These data are available at: http://www.census.gov/govs/state/historical_data.html. While we would have preferred data on the expenditure by each state on its appellate lawyers, the Census does not provide it. Also, we do not measure appropriations as a proportion of a state's budget because we account for the impact of institutional support on a state's ability to defend legislation and state court decisions before a single, common venue.

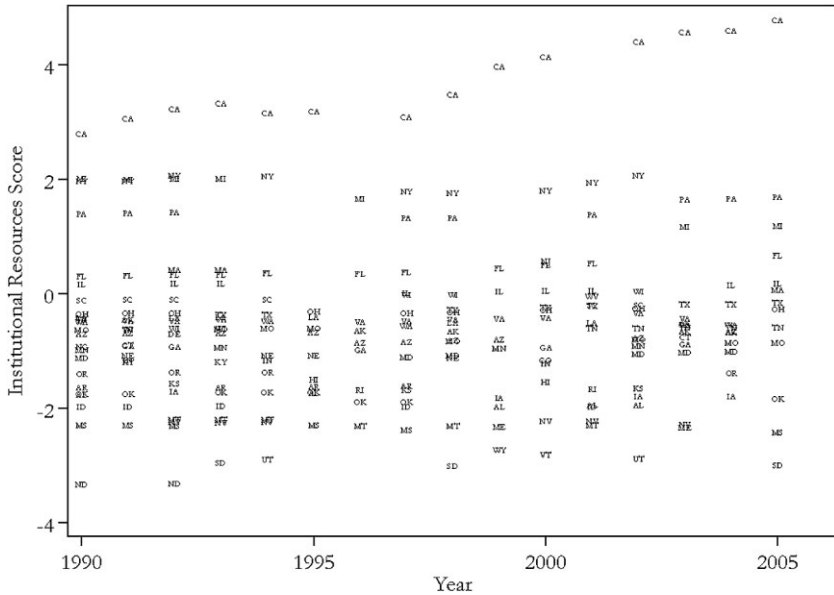


Figure 3. Institutional Resource Scores for States During Years in Which They Litigated a Case Before the Supreme Court, 1989–2005.

With our matching strategy on hand, we move to our dependent variable and main covariate of interest. We started with 446 cases decided by the Supreme Court between the 1989 and 2005 terms in which a state government was a party to the case.¹¹ We began our sample in 1989 because that is roughly when scholars have been able to obtain more reliable data on state SGs. There is little agreement among scholars as to when various state OSGs were created. As Miller (2010) states: “it is exceedingly difficult to determine the exact dates of establishment” of these offices (241). With the increase in scholarship on states as litigants, and the consistency with which Lexis has named attorneys providing oral argument since the late 1980s, we selected this time period for our

¹¹ We identify all cases involving a state government as a litigant using the *petitionerState* and *respondentState* variables in the Supreme Court Database (available at: <http://scdb.wustl.edu/>). Because data for the institutional resource scores end in 2005, our models only extend through that year. We began with 500 cases but after cleaning the data and removing cases in which two states challenged each other, we were left with 446. As we discuss below, our matching strategy left us with 386 usable observations. For those who are concerned about data loss, we reiterate what Boyd, Epstein, and Martin (2010) state: “While it may seem counterintuitive, balanced data that are comparable—even if smaller in number—are preferable to a complete sample for the purpose of estimating causal effects” (398, fn. 25). What is more, our findings hold even when we estimate a nonmatched probit regression model. Further, in the Appendix S1, we provide a visual comparison of the distribution of observations by state when comparing the full sample of state cases to the sample following the matching procedure.

examination. The more recent time period also allowed us to conduct online searches to verify the identity of the attorneys Lexis identified in the cases. We examine all orally argued opinions, *per curiam*, and judgments of the Court in cases brought to the Court through certiorari or appeal by a state as a litigant. We ignore cases in which two states challenged each other as parties.

Our dependent variable reflects whether the final disposition in each case supports the state's position. We code the dependent variable as 1 if the state won on the merits and 0 if not.¹² Our main covariate of interest (i.e., the treatment effect) is whether the attorney who argued for the state was from a state SG office.¹³ We code *State SG Office* as 1 if the state attorney who orally argued before the Court was from a state OSG; 0 otherwise. To determine whether the arguing attorney hailed from a state OSG, we obtained the name and title of each attorney who provided oral argument to the Court. If the attorney's title was "Solicitor General" (N = 42), "Solicitor General Assistant" (N = 4), or "Solicitor General Deputy" (N = 3), we coded *State SG Office* as 1.¹⁴

While we expect that states will be more likely to win on the merits when they are represented by an OSG attorney, we control for a host of features that may also lead them to success.¹⁵ We start with whether the state is the petitioner in the case. We do so to control for the Court's well-known proclivity to reverse cases it reviews (Perry 1991). We code *State Petitioner* as 1 if the state was the petitioner in the case and 0 if it was the respondent. Next, there is considerable evidence to suggest that the U.S. Solicitor General influences justices to vote in favor of the federal government (Black

¹² To determine whether the state won or lost before the Court, we looked to the *Winning Party*, *petitionerState*, and *respondentState* variables in the Supreme Court Database. For example, if the state was a petitioner and the Database codes the petitioner as the winning party, the dependent variable equals 1.

¹³ To isolate the independent impact of institutional design and state SG offices further, one could include a control variable for each state attorney's experience at oral argument (measured as the number of previous appearances arguing a case before the Supreme Court). Subsequent results for the impact of state SG offices are robust to accounting for state attorney experience.

¹⁴ In one instance, Lexis identified James R. Layton, Solicitor General of Missouri, as "Chief Deputy Attorney General." We coded this observation as a 1. See the Appendix S1 for a compilation of all state attorneys (and their titles) that argued before the Supreme Court in our sample of cases. Ideally, we would have liked to create an additional, more nuanced, indicator that accounted not only for the presence of an OSG in the state, but also the formal institutional authority of the state's SG. Unfortunately, there is no reliable means to distinguish among the four types of SG offices Layton identified (Symposium 2010: 640–641). Nevertheless, our main covariate—which codes for whether state SGs participate during oral argument—is a reasonable proxy for states that significantly empower their state SGs (as opposed to states that only allow their SGs limited authority to supervise litigation loosely). We discuss this empirical challenge further in our Results section.

¹⁵ Ho *et al.* (2007) suggest researchers include controls to minimize the effects of any remaining imbalance in the data after preprocessing.

and Owens 2012; Wohlfarth 2009). To measure whether the U.S. Solicitor General supported the state in a case, we created *Solicitor General Support*. If the U.S. Solicitor General's office filed an amicus curiae brief on the merits of the case supporting the state, we coded *Solicitor General Support* as 1. If the state challenged the United States, or if the United States filed an amicus brief in opposition to the state's position, we coded *Solicitor General Support* as -1 . In all instances when the United States did not take a position, we coded *Solicitor General Support* as 0.¹⁶

We also control for the Supreme Court's ideological proclivity to support a state's position on the merits. One might expect a liberal (conservative) Court to be more likely to support the state's position if it also reflects a liberal (conservative) argument, whereas the Court should be less likely to favor the state when it pushes an ideologically divergent position. To measure how the ideological content of the state's position aligns with the ideological composition of the Court, we follow Johnson, Wahlbeck, and Spriggs (2006) and Black and Owens (2012). We first determine the ideological direction of the lower court decision as reported in the Supreme Court Database. If the lower court decision was liberal (conservative), we code a state petitioner as making a conservative (liberal) argument. If the state's argument was conservative, we coded our *Ideological Distance* variable as the Martin and Quinn (2002) value of the median member in the majority coalition. If the argument was liberal, we coded our variable by multiplying the median majority member's Martin–Quinn score by -1 .¹⁷

We further control for the net number of amicus curiae briefs filed in favor of the state government. When more briefs are filed in support of the state than its opponent, the Supreme Court may see that as a signal of the general popularity for, or strength of, the state's position. Alternatively, the briefs may provide justices with supportive information. We have strong reason to believe that a state with more outside groups on its side is, on average, more likely to win its case (Collins 2004; Collins 2008). Thus, we create a variable—*Net Amici Support*—that measures the net number of amicus briefs filed in favor of the state's position.¹⁸ Next, we account for the potential that state success varies systematically depending on the primary issue context of each case. In particular,

¹⁶ To determine the presence and position of the U.S. SG for Court terms prior to 2002, we looked to data provided by Collins (2008). For Court terms after 2001, we determined whether the SG supported the state by looking to each case's record in Lexis.

¹⁷ We retrieve nearly identical results for all covariates when we code *Ideological Distance* using the median justice on the Court rather than the median of the majority coalition.

¹⁸ Collins (2008) provides amici data through the 2001 term; we updated those data for the 2002–2007 terms by looking to Lexis.

we specify a separate dichotomous predictor for *Criminal Procedure*, *Civil Rights*, *First Amendment*, and *Federalism* cases. Each issue predictor takes on a value of 1 if the case primarily involves the designated issue area; 0 otherwise.¹⁹ Last, we account for each state's *Population* (in millions) at the time of the Court's decision.²⁰

Methods and Results

Recall that the purpose of matching is to balance the treatment and control groups such that the two are as similar as possible but for the presence of the treatment effect. We summarize balance using L_1 , a measure built into the CEM program that provides an easy-to-interpret index of the degree of imbalance across all multivariate combinations of pretreatment variables in a data set (Iacus, King, and Porro 2010).²¹ A value of 0, which is the minimum possible value taken by L_1 , corresponds to perfect balance between the treatment and control groups. L_1 's theoretical maximum of 1 indicates that no overlap exists between the two groups. Our post-matching value of L_1 (0.078) is roughly 70 percent smaller than its unmatched value (0.26).

Models 1 and 2 in Table 1 present probit regression results (with robust standard errors clustered on each state) following the CEM approach, while models 3 and 4 present the results of a nonmatched probit regression model.²² Models 1 and 3 show the baseline impact of a state OSG by simply regressing whether the state prevailed (on the merits) on whether a state SG argued the case using the matched versus nonmatched data, respectively. Both models show a significant and positive relationship between a state OSG arguing the case and subsequent success on the merits. Models 2 and 4 estimate the impact of a state OSG after adding the relevant control variables using the matched and nonmatched data,

¹⁹ We utilize the "issueArea" variable in the Supreme Court Database to identify the primary issue context of each case.

²⁰ We retrieved the population data of each state over time from the U.S. Census. As a robustness check, we also accounted for cases involving southern states (Epstein and O'Connor 1988). We coded *Southern State* as 1 if the state under consideration was southern; 0 otherwise. We coded the following as southern states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. Including this control did not alter our findings appreciably, and itself was not statistically significant.

²¹ The calculation of L_1 is analogous to the construction of a univariate histogram in the sense that the number of bins an analyst uses will alter the shape of the result figure. So, too, is the case in the calculation of L_1 , where the cutpoints used will affect the degree of overlap calculated.

²² We include the nonmatched results for those who may be skeptical of matching and, further, to show that our results hold up even under a standard regression approach.

Table 1. The Impact of Institutional Design on State Success Before the U.S. Supreme Court, 1989–2007

	Matched		Nonmatched	
	Model 1	Model 2	Model 3	Model 4
State SG office	0.37** (0.15)	0.52** (0.25)	0.37** (0.19)	0.48** (0.25)
Institutional score		0.15** (0.07)		0.12* (0.08)
State petitioner		0.77** (0.20)		0.85** (0.18)
Net amici support		0.07** (0.03)		0.08** (0.03)
U.S. SG support		0.59** (0.15)		0.41** (0.13)
Ideological distance		-0.75** (0.38)		-0.59* (0.43)
Population (millions)		-0.03** (0.01)		-0.00 (0.01)
Criminal procedure		0.06 (0.19)		-0.07 (0.18)
Civil rights		0.09 (0.36)		-0.08 (0.29)
First amendment		-0.41** (0.32)		-0.24 (0.28)
Federalism		0.50 (0.32)		0.22 (0.38)
Constant	0.15 (0.11)	0.12 (0.23)	0.16 (0.11)	-0.10 (0.26)
Observations	386	323	441	378
χ^2	4.58**	244.24**	3.84**	84.38**

Note: Table entries are probit regression coefficients with robust standard errors, clustered on each state, in parentheses. * $p < 0.10$; ** $p < 0.05$ (one tailed). The dependent variable represents whether a state government won on the merits before the U.S. Supreme Court. Matched observations are matched on institutional score.

respectively. Once again, looking to *State SG Office* (i.e., the treatment variable), we observe that a state with an OSG attorney who argued the case is much more likely to win compared to an otherwise institutionally similar state that does not utilize such an attorney. What is more, we obtain this result even after matching on our institutional resources score and including statistical controls.²³

Figure 4 illustrates the magnitude of a covariate's impact on state success using the empirical results from the matched, fully specified model 2 in Table 1. We compute predicted probabilities while holding all variables at their mean or modal values (i.e., the state government is the respondent and does not utilize a state SG)

²³ For those readers skeptical of a matching approach, the empirical results are generally consistent across both types of empirical specifications—that is, models 3 and 4 show that the coefficient on *State SG Office* remains positive and statistically significant ($p < 0.05$; one tailed), as do the effects of most of the control predictors. The matched, fully specified model (i.e., model 2) estimates an impact for the state OSG variable that is somewhat larger in magnitude than its nonmatched counterpart (i.e., model 4). What is more, all empirical results are consistent across models if we estimate classical standard errors or nonclustered robust standard errors.

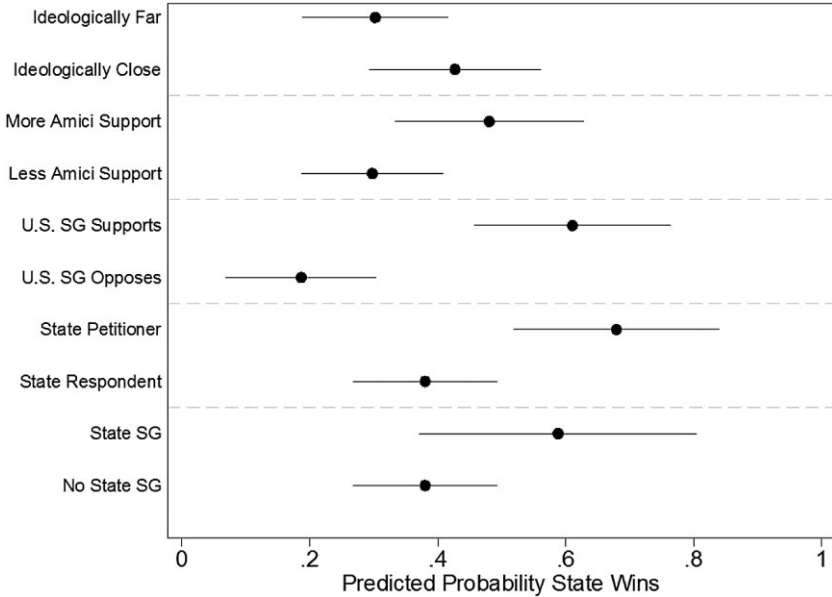


Figure 4. The Predicted Success of State Governments Before the U.S. Supreme Court. The Dots Represent the Predicted Probability That a State Will Prevail on the Merits Using Results From Model 2 in Table 1, While the Solid Horizontal Lines Represent 95% Confidence Intervals.

and isolate the independent impact of a change in each main covariate.²⁴ For instance, the bottom panel of Figure 4 isolates the predicted probability of state success when comparing a case without an OSG attorney to one where an OSG attorney argues the case. We observe that a *respondent state* that does not use a formal OSG will win its case with an expected 0.38 probability. When, however, a state OSG attorney argues the case, the probability of victory increases to 0.59. This change of 0.21 is not only statistically significant, but also substantively meaningful. If we instead examine the predicted impact of a *petitioner state* OSG, we still see a positive, though somewhat smaller, effect. A petitioner state OSG can improve the state's already high probability (0.68) of winning by 0.16, raising the expected probability of state success to 0.84.²⁵

²⁴ We compute all predicted probabilities using the SPOST program (Long and Freese 2006).

²⁵ We reiterate that our matching strategy explicitly matches cases along the institutional resource dimension, and thus the results reflect states with similar institutional resources. We do not, for example, match a poorly resourced state against a well-resourced state. Rather, we match states that are similar on the institutional resource dimension. Second, we include our institutional resource score as a control in the model, meaning that our state OSG effect persists *even while* accounting for state institutional resources. Last,

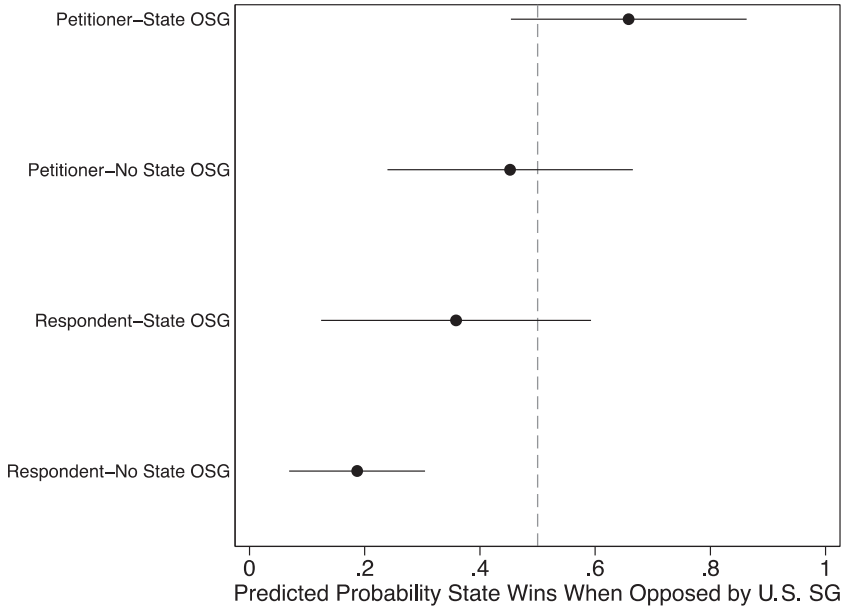


Figure 5. Predicted Success of States in the U.S. Supreme Court When Squaring Off Against the United States, With and Without a State OSG. The Dots Represent the Predicted Probability That a State Will Prevail on the Merits Using Results From Model 2 in Table 1, While the Solid Horizontal Lines Represent 95% Confidence Intervals.

One additional way to view the magnitude of the impact of a state OSG on state success is to look at when a state must square off against the U.S. Solicitor General. Figure 5 presents these simulated results, which further underscore the importance of states adopting OSG institutions in order to maximize their chances of prevailing before the Supreme Court. When holding all other variables at their medians (or, where appropriate, modes), we see that a *respondent state* without an SG’s office—that squares off against the U.S. Solicitor General’s office—has a 0.19 probability of winning. Yet, when that respondent state has an OSG attorney to argue before the Court, the probability of state victory increases to 0.36, a 17 percent change. The predicted

there is no evidence that the impact of a state SG office is conditional on the degree of state institutional resources.

One may also wonder whether this is actually a two-staged process. Before the Court rules in favor of the state, it must first agree to hear the case. As we stated above, there is evidence to suggest that the Court is more likely to hear a case filed by a state OSG (Goelzhauser and Vouvalis 2013). Indeed, we observe that the effect of having an OSG for states seems to be stronger when states are respondents than when they are petitioners. Still, the fact that they are so much more likely to win when they are respondents *with* an OSG versus respondents *without* an OSG leads us to believe that, if anything, our results here are understated.

change in the probability of state success is slightly larger when we observe states as *petitioners* against the U.S. government as the respondent. A petitioner state that does not use an SG's office and that squares off against the U.S. government in this scenario has a 0.45 probability of winning; but when that state petitioner litigates with a state OSG, its probability of winning increases by 0.21 to 0.66. Using a state OSG attorney helps states, especially when they must litigate against an opposing argument by the influential U.S. Solicitor General.

Most of the other variables in Table 1 perform as expected. First, ideological compatibility affects a state government's chances of success on the merits. A state making an ideologically pleasing argument to the Court has a 0.43 probability of winning while a state making an ideologically incongruent argument has only a 0.30 probability of winning. The role of amicus curiae briefs is also an important factor driving state success. Moving from one standard deviation below the mean of the net amicus brief (dis)advantage for the state (i.e., three more briefs filed against the state than for it) to one standard deviation above the mean (i.e., four more briefs filed in support of the state than against it) generates a 0.18 increase in the probability of state victory—shifting the probability of state success from 0.30 to 0.48. When the U.S. Solicitor General's office opposes a state respondent, the state has a mere 0.19 probability of winning. But when the SG's office supports the state as a respondent, that probability jumps to 0.61.²⁶ Petitioner status also demonstrates a meaningful (and large) impact. When a state is a respondent before the Court (and there is no state SG office), its probability of victory is 0.38. When it is a petitioner, however, the state's expected probability of success increases substantially to 0.68.²⁷

Some institutional design questions remain. Is it enough for a state simply to create an OSG that has loose supervision over state attorneys who then argue on behalf of the state, or does a state

²⁶ We should note that a state is significantly less likely to win its case when the United States opposes it as a party; on the other hand, it appears that the states are slightly more successful when they square off against the United States as an amicus.

²⁷ One concern might be that our findings are simply capturing a spurious relationship between victory and the creation of state OSGs. That is, one might wonder whether states that win become more likely to create an OSG and thus, what appears to be OSG influence is simply the continuation of some other trend that preceded it. We find this argument to be unpersuasive and unsupported by existing accounts of state adoptions of a formal OSG. First, anecdotal evidence suggests that states have created OSGs when displeased with their appellate performances. For example, we stated above that Texas Attorney General John Cornyn created his state's OSG because he was tired of his nonexperts failing to meet deadlines and losing cases on appeal. Second, we contend it is unlikely that such an argument accurately reflects political behavior, and that there is little reason to expect a state Attorney General to cede power to a state OSG if his or her success rate was already high.

need to create a strong OSG that can coordinate and be heavily involved in the cases he or she chooses? In other words, which of the four kinds of SG offices we described above are more successful?²⁸ Unfortunately, we cannot answer that question directly, since there are no data on the kinds of SG office each state has used per year over our study. Indeed, even for the most recent years, such data elude us. We can, however, compare our results from above—which looked at whether a state SG *argued* for the state (and therefore was heavily involved in the case)—with results that look only at whether the state had (but did not necessarily use) the state SG office in the case. That is, we can compare a extensively involved SG to one that does not appear to be extensively involved. To do so, we returned to Miller (2010), who describes whether and when the states adopted SG offices. We took those data and recoded our state SG attorney variable as 1 if the state *had an SG office* during the dispute (though, again, that office *need not have argued* before the High Court in the case); 0 otherwise.²⁹ In other words, rather than looking at the identity of the attorney arguing for the state, we simply looked at whether the state had an OSG when the Court decided the state's dispute.

We then refit our fully specified model of state success. The data show that simply having an OSG is not enough. The positive coefficient on *State SG Office* is nowhere near conventional levels of significance in the matched model ($p > 0.449$). The results are even less supportive in the nonmatched model ($p > 0.962$). What this suggests to us, then, is that states seeking to design an institution that will lead to heightened success before the High Court should not create toothless OSGs that have little control over the direction and strategy of cases. Rather, they should create more powerful offices that may even look similar to the U.S. Solicitor General's office. In other words, in terms of Layton's four categories of SG offices (Symposium 2010: 640–641), the data suggest the “SG as consultant” model is least useful to states. The first three models, on the other hand, which all observe more extensive SG control, oversight, and visible activity (i.e., arguing before the Supreme Court) appear most useful.

²⁸ Readers will recall that in some states, the SG retains and oversees a group of his or her own appellate specialists. In others, there is one SG (and perhaps a small number of staff attorneys) who supervises an existing appellate infrastructure of agency attorneys. Others use a mixture of the first two models. Finally, in some states, the SG simply acts as a consultant to the Attorney General (Symposium 2010: 640–641).

²⁹ Because it takes time for an attorney's role to take effect in a case, we coded the state as having an OSG in the calendar year after the state adopted an OSG. For example, if the state adopted an OSG in 1994, we treated all cases the Court decided in 1995 on as one in which the state used an OSG.

Conclusion

Legal advocacy and legal expertise matter. In an interview on the quality of lawyering, Chief Justice Roberts stated: “[We] may not see your strong case. It’s not like judges know what the answer is. I mean we’ve got to find it out . . . And so . . . [without quality lawyering] we may not see that you’ve got a strong case” (Lacovara 2008: 285). As Roberts argues, good lawyering can win a case and bad lawyering can lose it. Indeed, a fairly recent study on oral argument confirms as such: Lawyers who make strong oral arguments are more likely to win than those who make weaker arguments (Johnson, Wahlbeck, and Spriggs 2006).

And the effects of lawyering are exacerbated when facing off against a repeat player. Parties that challenge repeat players face considerable difficulties. Repeat players tend to have the resources to stack the deck in their favor, all the way from the trial court to the Supreme Court (e.g., Galanter 1974). Repeat players, on the other hand, can use their advantages to secure legal change or protect legal positions. They know what arguments justices seek, which issues win, and how to frame cases appropriately. Scholars have known this for years. Still, what remained unclear was how actors can enhance the probability that attorneys have the capacity to make strong arguments. Are there institutions that can channel more effective litigation outcomes?

We set out to demonstrate how states that adopt and use a SG (or OSG attorney) to litigate before the Supreme Court can generate systematically greater success on the merits. Building from existing studies on the success of states before the Court and the role of appellate expertise more generally, we argued that the existence of a state OSG fosters team-based appellate expertise and signals credibility and professionalism to the High Court. Using analytically rigorous matching methods (as well as unmatched probit regression), we demonstrate that state OSG attorneys who argue before the Court experience systematically greater success than non-OSG attorneys. Overall, the results suggest that institutional design can play an integral role in the ability of states to protect and further their policies.

The results also contribute to the study of judicial behavior. The fact that Supreme Court justices are more likely to side with a state OSG attorney than an otherwise similar non-OSG attorney suggests that they can be persuaded by the quality of counsel—and that they pay close attention to who appears before them. At bare minimum, the results suggest that scholars should further examine how resources and expertise influence judicial outcomes.

Perhaps more importantly, these findings answer whether state institutional design—and the creation of OSGs in particular—across

the country during the last two decades has been a worthy exercise for states seeking to defend policies before the U.S. Supreme Court. It has. States win when they design formal legal institutions to foster increased appellate litigation expertise and credibility—and then empower those state SGs to argue their cases before the justices. They are better able to protect their interests before the Court and thereby preserve the policies of state legislators. Just as important, they are also better able to shape the broad contours of doctrine the U.S. Supreme Court creates. What is even more remarkable about all this is that it was not long ago that Justice Powell lamented about the generally poor quality of lawyering among state attorneys appearing before the Supreme Court (Morris 1987). Put plainly, states that want to perform better in the judiciary would be well advised to not only increase their resources generally, but also to consider designing—and empowering—specialized legal institutions to conduct appellate litigation.

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Supporting Information

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Appendix S1. State Solicitors General and Attorneys Before the Supreme Court.

Appendix S2. Data Distribution Following Analytical Matching Strategy.