

THE INTER-BRANCH STRUGGLE OVER TORT REFORM: TESTING A
SEPARATION OF POWERS MODEL IN THE STATE CONTEXT

By

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To my loving parents, Joseph and Debra

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CHAPTER I

INTRODUCTION

Differences in Tort Law

In 1997, Athan Montgomery was born severely brain damaged due to Dr. Gregory Drezga's negligent use of forceps during his delivery. Heidi J. Judd, Athan's mother, brought a medical malpractice suit against Dr. Drezga before a district court in Utah. The jury found in favor of Heidi and Athan, awarding \$22,735.30 for the expenses already incurred to maintain his life, and an additional \$1,000,000 as the amount necessary to maintain his life during his expected lifespan. Additionally, the jury awarded Athan \$1,250,000 in noneconomic damages to compensate for "the difference between a life as a normal, healthy boy, and a life as he must now live it: severely brain damaged, with drastically reduced life experiences and expectations" (*Judd v. Drezga* 103 P.3d 135 (2007)).

One year later in Ohio, another infant boy was rendered severely brain damaged due to medical negligence. As a result of the negligent care he received during the first sixteen minutes of his life, baby Garrett suffered an oxygen deficiency resulting in permanent brain damage, cerebral palsy, and additional medical complications. Garrett's parents, Sharon and Christopher Bach, successfully sued the Dr. Dina DiCenzo for medical negligence. The jury awarded both Sharon and Christopher \$3,000,000 dollars and Garrett 15.4 million dollars in damages. Additionally, the trial court granted the Bach's motion for prejudgment interest, bringing the Bach's total compensation to nearly twenty-four million dollars.

Both the Judd and Bach families suffered incredible losses due to medical negligence which were recognized by two different juries, one in Utah and one in Ohio. The jury in Utah awarded Heidi Judd and Athan a little over two million dollars while the jury in Ohio awarded the Bach's a combined total of nearly 24 million dollars. While the jury verdicts produced dissimilar outcomes, the discrepancy in outcomes did not end with there. In the case of *Judd v. Drezga* (2007), the Supreme Court of Utah upheld a legislative statute that limited the amount of noneconomic damages the Judd's could receive to \$250,000. Hence, the jury verdict of \$1,250,000 dollars in noneconomic damages was reduced to only \$250,000.

In 1986, the Utah state legislature enacted a "tort reform" statute which placed a limit on the amount of noneconomic damages that could be recovered by victims of medical malpractice. In 2004, Heidi Judd challenged the constitutionality of the statutory damage cap after the jury verdict she was awarded has been reduced by the court. Judd claimed that the cap violated the open courts provision, the uniform operation of the laws provision, due process, the right to jury trial, and the separation of powers doctrine of the Utah State Constitution. In a 3-2 decision, the Utah Supreme Court denied each of Heidi Judd's claims, upholding the severe reduction in damages. Hence, the final amount of compensation awarded to the Judd family was not a result of the jury verdict, but a rather a legislative enactment upheld by the Utah Supreme Court.

Though less direct, the Ohio Supreme Court and General Assembly (the state legislative branch), also defined the outcome in the Bach's medical malpractice suit against Dr. DiCenzo. In 1996, the Ohio General Assembly enacted H.B. 350 a comprehensive tort reform statute that included a cap on noneconomic damages of

200,000 dollars. This provision, along with the entire statute, was struck down by the Ohio Supreme Court in the case of *State ex. Rel Ohio Academy of Trial Lawyers v. Sheward* 86 Ohio St. 3d. 451 (1999). In a 4-3 decision, a bitterly divided Ohio Supreme Court found that the tort reform statute violated the separation of powers doctrine and the “one-subject rule” of the Ohio Constitution. As a result of the Court’s decision, the Bach’s received several million as opposed to \$200,000 dollars in compensation for their suffering.

The different outcomes observed in the cases of *Bach v. DiCenzo* (2005) and *Judd v. Drezga* (2004) highlight the vast differences in public policy across the fifty-states. The cases’ disparate outcomes were a result of the interaction between the state legislatures and state supreme courts over the issue of damage caps. Damage caps are just one specific type of tort reform statute that has been considered by state legislatures. Developments in tort law have been some of the most significant policy areas left primarily to the states and the inter-branch struggle for control of the tort system has been one of the most contentious separation of powers battles ever encountered in state governments.

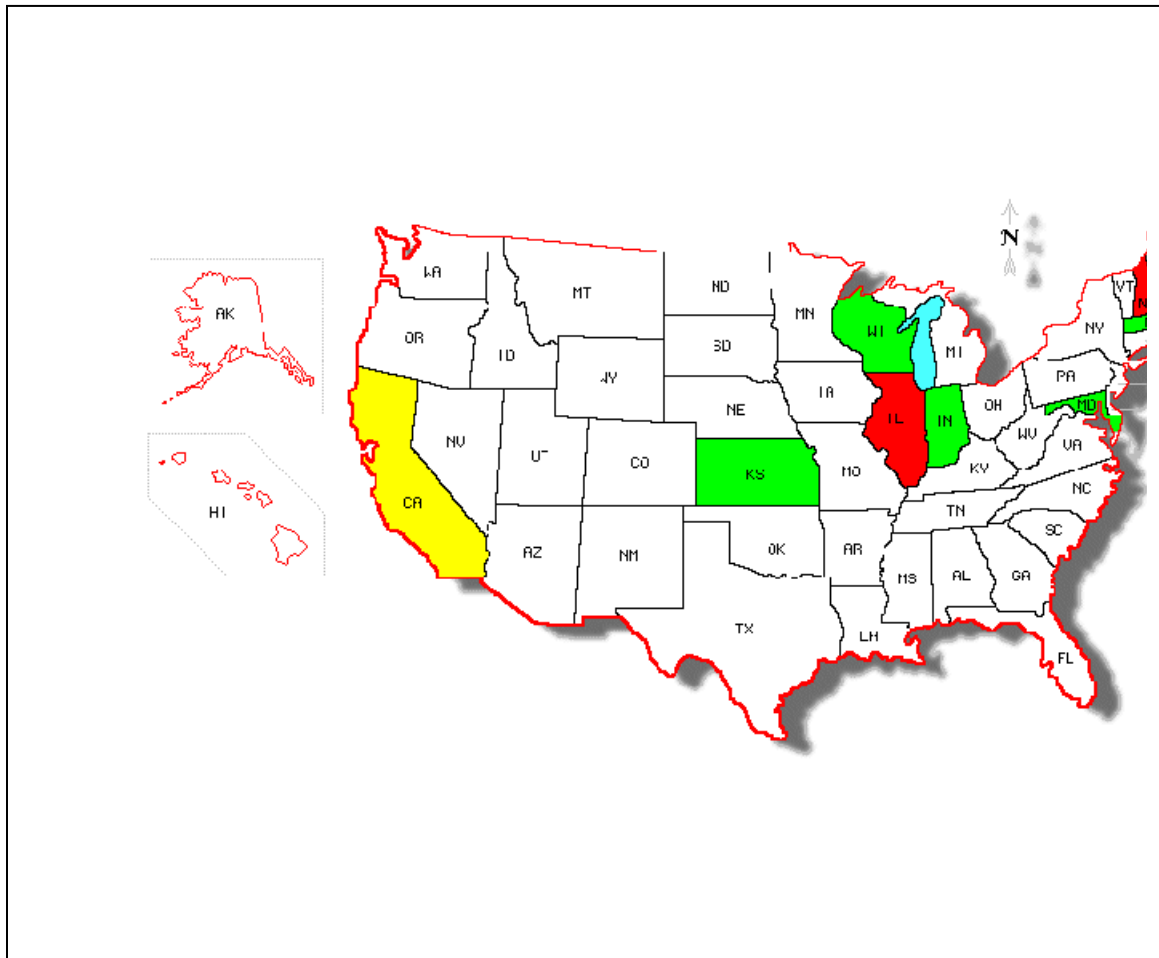
Tort law encompasses all cases in which persons sue to recover damages for civil wrongs resulting in death, damages, and injury. The doctrines that facilitate resolution of tort law cases have traditionally been developed by the state supreme courts through their decisions concerning the common law. The doctrines have changed dramatically over the last few decades and have sparked considerably controversy, causing state legislatures to consider legislative means of modifying or overturning the doctrines enunciated by the state supreme courts. These legislative “tort reform” initiatives have not gone

unchallenged; state supreme courts have invalidated more than a hundred tort reform statutes (Schwartz and Lorber 2001).

The tort reform movement has produced a legally and politically salient battle between state legislators and justices seeking to shape tort reform policy in conformity with their ideological preferences and their collective decisions have significantly influenced state tort litigation and its outcomes. While the comparison between the *Bach* and *Judd* outcomes highlights the salient policy implications behind the tort reform movement, I want to further emphasize the vast differences in tort law across both space and time.

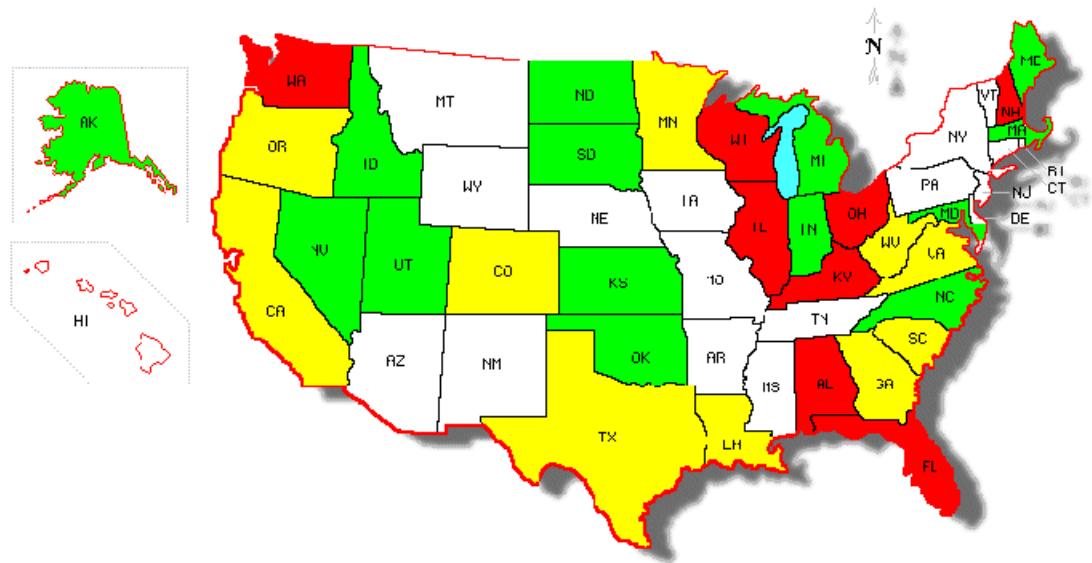
Figure 1.1 displays the states in which damage caps were considered by 1985. Caps on noneconomic or punitive damages had been enacted by eight states by 1985. In two of these states, Illinois and New Hampshire, the state supreme courts had struck down the enacted damage caps, and in one state, California, a damage cap was upheld by the state supreme court.

Figure 1.1 Damage Cap Statutes in 1985



Green=Statute Enacted
Red=Statute Enacted and Struck Down
Yellow=State Enacted and Upheld
White=No Actions Taken

Figure 1.2 Damage Cap Statutes in 1995



Green=Statute Enacted
Red=Statute Enacted and Struck Down
Yellow=State Enacted and Upheld
White=No Actions Taken

Figure 1.2 displays the reality of tort reform ten years later. By 1995, there was substantially more activity across the fifty states. Tort reform damage cap statutes had been enacted in all but seventeen states and judicial review of these statutes had taken place in well over half of these states. Damage caps had been upheld by fourteen state supreme courts, and struck down by eleven.

highlighted between tort law in Utah versus Ohio is not an isolated example. The differences in the tort reform movement have led to widely different outcomes in civil litigation cases across the fifty states.

Tort Reform as a Separation of Powers Battle

While the salient policy implications behind the tort reform movement make it interesting to study by itself, what makes tort reform theoretically interesting is that the struggle has taken place within an institutional context that has the potential to promote strategic behavior, in a separation of powers (SOP) system. American governmental systems at both the state and federal levels are characterized by shared rather than strictly separated powers. While the law-making power has been vested formally in the legislative branch and the interpretation of law in the judicial branch, in both theory and practice these formal lines are transgressed frequently. Hence, in reality, the development of public policy in SOP systems depends critically on the interactive cooperation of the legislature, executive, and judiciary, any one of which may foreclose policy making via inaction, veto, or judicial review.

SOP systems may foster contentious political environments in which participants vie for strategic control over policy outcomes. Because legislators and justices understand that policy outcomes are ultimately dependent not only on their own choices but on the choices of other political actors in the system, they have the incentive to act strategically in light of the anticipated behavior of other players in the SOP system. Hence, policies emerging from these systems, such as tort reforms, may be perceived as the product of interdependent decision-making by strategic actors.

Within this dissertation, I will analyze the strategic interaction between state actors using a theoretical model that accounts for the preferences of the actors involved and the institutional structures that channel those preferences to produce certain policy outcomes. Through the lens of the tort reform movement, I will investigate how public policy is shaped by the interdependent decision-making of elite actors. Hence, the goal is to provide both a general model of how policy is formulated under a system of separate powers and a concrete explanation of how the tort reform movement has developed in the fifty states.

While the impact of SOP has been studied extensively at the national level, it has not been much considered in the study of policy making at the state level. Yet state legislation as shaped by these various governmental actors constitutes a substantial source of legal policy affecting the nation's citizens. Developments in tort law have created a natural experimental setting in which to examine how separation of powers affects public policy in the state governments. The different tort reform developments across the fifty states offer a wide array of institutional features, diverse political environments, and elites with disparate political goals.

Within this dissertation, I offer a strategic account of state policy-making in which both legislators and justices might choose to act contrary to their sincere preferences in the short term in order to maximize their policy objectives in the long run (Epstein and Knight 1998). Following a rational choice paradigm, I assume that both legislators and justices are policy-motivated actors who prefer to move policy in their ideologically desired direction while simultaneously maintaining their institutional position and preserving the legitimacy of their institution.

Hence, I utilize a neo-institutional approach to examine the behavior of state elite actors. Neo-institutional approaches are part of a broader trend in recent social science scholarship that displays “a renewed interest in studying how political behavior is given shape, structure, and direction by particular institutional arrangements and relationships” (Gillman and Clayton 1999:5). Neo-institutionalism contends that legislators and justices have policy objectives, but they must act to achieve their policy goals within a constrained political environment. Different intra-and inter-institutional constraints may encourage strategic behavior through each stage of the policy-making process.

I evaluate the different conditions that foster strategic behavior at each stage of the policy-making process by considering the different intra-and inter-institutional constraints on elite behavior. Specifically, I examine the conditions that foster strategic decision-making by legislators when choosing whether or not to enact a statute and the conditions that foster strategic decision-making by justices when exercising the power of judicial review.

To get to the heart of these questions and lay the theoretical groundwork for my empirical analysis, I rely upon a formal state separation of powers model (SSOP), in which public policy is viewed as the final result of the interaction of institutional context, the political environment, and the competing preferences of elite actors. I argue that it is the interaction of these three factors that best explain the differences in tort law across the fifty states and in combination provide the most realistic explanation of state policy-making. The rest of this chapter is spent elaborating on these three factors and why they are of central importance to my theory.

The Preferences of Elite Actors

One of the most significant inter-institutional constraints on the behavior of elite actors is assumed to be the preferences of the coordinate branch. Central to my theory is the assumption that both legislators and justices have policy preferences and have an opportunity to express their policy preferences within the context of state policy-making. If legislators and justices are not policy-minded individuals cable of pursuing policy-minded goals then there is no need for a strategic theory to explain policy-making. Fortunately, much evidence suggests that both legislators and justices pursue policy-minded goals. Stemming originally from the field of economics, the rational choice model portrays political elites as rational beings who are able to rank order their goals and then pursue the goals that maximize their utility.

While acknowledging that legislators pursue multiple goals, one important goal is thought to be pursuing policies in line with their ideologies. A wealth of literature supports the idea that legislators care about the ultimate fate of public policy (Miller and Stokes 1963; Wittman 1983; Alesina 1985; Calvert 1985) and that legislative preferences affect legislative behavior (Fiorina 1974; Entman 1983; Poole and Rosenthal 1985). Additionally, there is no denying that the legislative branch must play a fundamental role in the policy-making process. By constitutional design the role of the legislature is to “legislate,” and there is substantial evidence that legislative preferences do predict legislative outcomes (MacRae 1958, 1965, 1970; Clausan 1973; Jackson 1971, 1974; Poole 1981; Poole and Smith 1983; Poole and Rosenthal 1984). Hence, the assumption that legislatures have both the desire and the ability to pursue public policy in line with their ideological preferences is well grounded within the discipline.

Justices, like legislators, are expected to have and be able to pursue policy-minded goals as well. Again, much evidence lends support to this dual assumption. The attitudinal model of judicial decision-making postulates that the primary goal of justices is to vote in line with their ideological preferences. The attitudinal model is the most dominant model of judicial decision-making within the last half century, especially when studying the Supreme Court (Pritchett 1948; Schubert 1965; Segal and Spaeth 1996; 2002). Central to the attitudinal model is the notion that justices act as policy-makers; justices' votes serve as a direct expression of their policy preferences.

While the attitudinal model has been tested more frequently in Supreme Court research, it has also influenced the study of mid-level courts as well (Songer, Davis, and Haire 1994; Hall and Brace 1989; Brace, Hall, and Langer 1999; Hettinger, Lindquist, and Martinek 2006). The attitudinal model acknowledges that the U.S. Supreme Court is in a unique position that allows the justices to primarily vote their ideologies, but studies of the mid-level courts support the idea that lower court justices pursue policy-minded goals as well. A strategic theory of state policy-making does not require that justices only have policy-minded goals, only that policy preference is one significant influence on their behavior. (I expand this point in later sections.)

The power of judicial review provides courts with the opportunity to insert their policy preferences in the policy-making process. The power of judicial review, established in *Marbury v. Madison* ICR. 137 (1803), gives each court in the United States the power to invalidate laws in conflict with the United States or state constitutions. Judicial review allows judges to evaluate actions by the legislative branch on constitutional grounds. Essentially, judicial review gives judges the power to “unmake

public policy” (Langer 2002). In exercising the power of judicial review, judges can influence the nature of existing public policy while also shaping the future of public policy (Langer 2002). In theory, when choosing to invalidate a state law, state supreme court justices put their own policy preferences over those of the state legislature.

The power of judicial review has long been used by state supreme court justices to enhance their role in the policy-making process (Sheldon 1987). Charles Sheldon discovered that some state supreme courts declared legislative enactments unconstitutional even before *Marbury v. Madison* (1803). And since the 1970’s scholars have noted that state supreme courts have taken on a more active role in the policy-making process (Sheldon 1987, Tarr and Porter 1998, Glick 1991). Evidence suggests that state supreme court justices use the power of judicial review to advance their policy preferences (Brace, Hall, and Langer 1999, Langer 1997, 2002; Stricko-Neubauer 2006).

Because justices and legislators are both policy-motivated and have the ability to affect public policy, a separation of powers system of government produces a contentious environment when legislators and justices simultaneously hold competing preferences. Because the development of public-policy within these systems depends on the interactive cooperation of these coordinate branches, differences in policy preferences can encourage conflict and retaliation (Langer 2002). Langer (2002) explains that “the relationship among state governmental actors is one characterized by political pressure, political games, and contentious behavior” (11).

Separation of powers models have been developed to examine the impact of inter-branch conflict on both judicial and legislative outcomes (Marks 1989; Eskridge 1991;

Gely and Spiller 1990; Martin 2001; Vanberg 2001; Rogers 2001). SOP models assume that both legislators and justices are rational actors who must often engage in strategic rather than sincere behavior to maximize their own utility. In particular, SOP models propose that legislators and justices vote strategically and prospectively by considering the possible reactions of other governmental actors. Elite actors behave strategically when they recognize that their ability to achieve their goals is dependent upon the preferences and expected actions of other actors (Epstein and Knight 1997). Instead of following their personal or sincere preferences in the short-term, elite actors might behave contrary to their sincere preferences in order to maximize their utility in the future.

Strategic behavior occurs when legislators or justices alter their behavior in response to threats by one another (Langer 2002). An example would be a state supreme court avoiding judicial review of a statute it would prefer to strike down because it fears retaliation from a state legislature or, instead, a state legislature choosing not to enact a statute it would prefer to see enacted because it fears that the court will strike it down. Separation of powers models can allow us to predict under which contexts we expect justices or legislators to behave strategically rather than sincerely. To put it another way, SOP models can allow us to predict when both legislators and justices are expected to be constrained within the policy-making process.

The impact of SOP and the strategic behavior of elite actors have been studied in a number of ways. Scholars have translated strategic assumptions into variables to include in their quantitative analysis (Maltzman, Spriggs, and Wahlbeck 2000), used strategic assumptions as a starting point for qualitative analysis (Schelling 1960; Murphy

1962; North 1990; Knight and Epstein 1996), and have undertaken formal equilibrium analysis (Marks 1989; Eskridge 1991; Calderia, Wright and Zorn 1999; Vanberg 2001; Rogers 2001). The prevalence and success of these multifaceted SOP models speaks to the relevance of beginning any study of state policy-making through a separation of powers lens.

However, while SOP models have been developed extensively in connection with studies of the Supreme Court and Congress, they have been far less employed in the study of policy-making at the state level (for notable exceptions see Traut and Emmert 1998, Brace, Hall, Langer 1999, Langer and Brace 2005). The most comprehensive state SOP study to date is Laura Langer's *Judicial Review in State Supreme Courts* (2002). Langer utilizes a quantitative approach to analyze for 1970-1993 what conditions foster the exercise of review in four areas of law. Langer's work lays the important groundwork for understanding SOP at the state level by introducing a spatial model to explain what conditions encourage strategic rather than sincere behavior by state supreme court justices.

Langer's model depicts a situation in which legislative ideology is thought to constrain the influence of judicial ideology in the decision-making process. Justices operate in "contextual safety zones" that depict the extent to which justices anticipate retribution for their voting behavior. One of the primary determinants in conceptualizing a justices "safety zone" is the ideological distance between the court and the state legislature. Langer finds that in issue areas that are salient to the legislature, legislative ideology does constrain the behavior of justices. When the ideological divide between a court and legislature is extreme, justices are less likely to vote their sincere preferences.

Similarly, Stricko-Neubauer (2006) considers the influence of legislative ideology on judicial decision-making in four different issue areas. She finds that in cases addressing social issues, divergent ideology does promote strategic behavior.

Studies have suggested that legislators behave strategically as a result of divergent preferences as well. Langer and Brace (2005) have modeled a legislature's decision to enact public policy as a game between state supreme courts and legislatures. They examine the influence of court ideology on the enactment of state abortion and death penalty laws since 1970, and find that the courts' policy preferences encourage/discourage the likelihood of policy enactment. This result has been referred to as the "passive influence" of judicial review (Brace and Hall 2001; Langer and Brace 2005; Vanberg 2005). With the passive influence, the mere threat of judicial review by the court keeps the legislature from enacting a statute. Hence, rather than playing only a reactionary role in the policy-making process, courts are seen as active petitioners playing salient roles in the legislative enactment stage as well (Shipan 1997; Wilhelm 2005). Wilhelm's (2005) research supports this view that the state supreme court's power of judicial review is preemptory. She finds that the justices actually petition legislatures to alter public policy before it becomes law through their docket, ideological disposition, and the likelihood of intervention.

The above research supports the view that competing elite preferences play a salient role in the policy-making process. Because both justices and legislators have the desire and means to pursue policy-minded goals, a strategic account of elite behavior is necessary. The ability of legislators and justices to achieve their goals depends on the preferences of one another. Under a system of separate powers, legislatures and justices

might have to behave strategically rather than sincerely in the short term in order to maximize their policy-minded goals in the long-term. Additionally, the salience of competing preferences is conditioned by the political environment in which the elite actors are operating. The political environment in which the court and legislature operate structures their interaction.

The Political Environment

Broadly Defined

Though policy disagreement between the legislature and the court is central to my strategic account, it is only one among many inter-institutional constraints which might promote strategic behavior. I define these additional inter-institutional features as the broader “political environment”. Many different factors might define the political environment, including mass public opinion, interest group preferences, preferences of the executive branch, political party influence, state inter-party competition, state demographics, and regional influence. I argue that these different factors combine in different ways to create a policy environment that is either hostile or receptive to certain policies such as tort reform. The political environment may act as direct constraint on elite decision-making and may also condition the interaction between the legislative and judicial branches. The formal model I develop in Chapter II further examines direct and indirect effects of the political environment on elite decision-making. In this section, I first define some of the features that influence the political environment broadly speaking, and highlight their possible effect on elite decision-making. Next, I argue that

the political environment is conceptualized differently based upon different issue areas and I specifically discuss the political environment in which tort reforms have been considered by state elite actors.

In order for factors in the political environment to promote strategic behavior, legislators and justices must both be aware of these factors and consider them relevant when making their decisions. Much existing literature suggests that both legislatures and justices pay attention to a number of different inter-institutional factors and that certain factors do promote strategic behavior. For instance, much evidence suggests the public opinion has a salient effect on elite decision making.

The relationship between public opinion and legislative behavior is fairly direct. In pursuing the goal of reelection, legislators must be sensitive to public opinion. Legislators are aware of constituency opinion and it significantly affects their choices. Numerous studies have shown a connection between constituency preferences and roll-call voting (Kuklinski 1978; Uslander and Weber 1979; Erikson and Wright 1980; Schwartz, Fenmore, and Volgy 1980; Page et al. 1984) and a causal link has been established between citizen ideology and state policy outputs (Wright, Erikson, and McIver 1987, 1993; Hill and Hinton-Anderson 1995; Norrander 2000; Brace et al. 2002).

Public opinion has been shown to influence the behavior of the judicial branch as well. Lawrence Baum (2006) argues that Supreme Court justices pay attention to their “audiences”. Supreme Court justices have been known to care about their depiction by the media (Davis 1994), grant interviews (Glendon 1994), and respond to press criticisms (Jeffries 1994). Additionally, scholars have shown congruence between the justices’ positions on specific issues and public opinion (Barnum 1985; Marshall and Ignagni

1994; Weissberg 1976; Marshall 1989). Scholars have also demonstrated a relationship between broad public opinion patterns and the justices' preferences (Mishler and Sheehan 1993 1996; Link 1995; Stimson, Mackuen, and Erikson 1995). Note, however, that other scholars argue that this connection has been overstated (Norpoth and Segal 1994; Flemming and Wood 1997).

Studies that find any connection between public opinion and Supreme Court decision-making are particularly interesting considering the insulated position of the Supreme Court. The Supreme Court is thought to be isolated from public pressure. Supreme Court justices were granted life tenure so that “the independence of judges may be an essential safeguard against the effects of occasional ill humors in society” (Hamilton, Federalist 78). Yet despite life tenure, some evidence suggests that Supreme Court justices are influenced by public opinion. We might expect this relationship to be even more prominent in courts where the institutional design does not foster the same degree of judicial independence. Like legislators, the majority of state supreme court justices face the electorate at some point in their judicial careers. Hence we might expect a stronger and more direct relationship between public opinion and the behavior of justices who must seek reelection. Studies of judicial decision-making in the state supreme courts support this relationship.

Brace and Hall (1995, 1997) and Brace, Hall, and Langer (1999), Hall and Brace (1992) and Hall (1992) have highlighted the important role selection method and public opinion play in influencing judicial behavior in the state courts. The authors find that the impact of public opinion is often conditioned by a state's judicial selection method and that the justices' sensitivity to public opinion may promote strategic voting behavior in

some circumstances. Additionally, Stickland-Neubauer (2006) incorporated public opinion into her model of judicial review in the state supreme courts and found some evidence that justices behave strategically in light of public opinion. The above research suggests that state supreme court justices do pay attention to public opinion and that under certain conditions public opinion promotes strategic behavior.

Scholars have also demonstrated that interest group participation can significantly affect judicial decision-making. Interest group participation in the form of *amicus briefs* has been shown to frame issues (Epstein and Kobylka 1992), lead to higher winning percentages at the decision-on-the merits stage (Sorauf 1976; Lawrence 1990; McGuire 1990), and to increase the likelihood of cases being heard (Calderia and Wright 1988; McGuire and Caldeira (1993). A wealth of research suggests that interest group activity significantly influences the behavior of legislative elites as well (for examples see Truman 1951; Lowi 1969; Olson 1982; Schumaker et al. 1986; Gray and Lowery 1996). Pressure from organized interests sends signals to both legislatures and courts about the state of the political environment and often significantly affects the choices made therein.

Furthermore, the preferences of the executive branch might also shape the political environment. When enacting legislation, the legislature must take into account the threat of executive veto. If the state legislature suspects that a bill is likely to be vetoed by the governor they might behave strategically by declining to pursue the bill in the first place. Also a governor might assert pressure on the legislature to pursue certain policies. For instance, in Florida Governor Jeb Bush issued a press release regarding tort reform that urged the Florida Legislature to take action. Governor Jeb Bush stated “Several states have enacted tort reform recently, and without significant action, Florida

risks falling behind and jeopardizing its jobs-friendly business climate. I look forward to working with the House and Senate this session on these important civil justice issues” (released March 15, 2005).

The executive branch has been shown to influence the behavior of judicial actors as well. The president of the United States and the state governors can petition the courts through their respective solicitor or attorney generals. These individuals represent the executives’ interests through both legal representation and the submission of *amicus briefs*. Solicitor General participation has been shown to contribute to increased executive success before the Supreme Court (Calderia and Wright 1988; Segal 1990; Salokar 1992; George and Epstein 1992). Hence, while my main focus is on the interaction between justices and legislatures, I must also take into account the preferences of the executive branch as a possible inter-institutional constraint. The executive may significantly contribute to whether a political environment is hostile or receptive to changing the status quo.

In addition, a variety of state-level factors might also contribute to the nature of the political environment. For instance, the level of state inter-party competition has been shown to affect state policy outputs (Dawson and Robinson 1963; Dye 1966; Barrilleaux, Holbrook, and Langer 2002). Different socioeconomic factors, such as state expenditures and urbanism, have been shown to influence state policy-making as well (Glick and Vines 1973; Atkins and Glick 1976; Glick and Pruet 1986). Regional factors have also been shown to influence state policy-making. Policy diffusion effects have been witnessed, meaning that states are more likely to adopt certain policies if

neighboring states have adopted them (Hays and Glick 1997; Minstrom 1997; Mooney 2001).

In summary, a variety of factors contribute to a broad definition of a state's "political environment." Whether or not an overall environment is supportive or hostile to certain policies may be defined by public opinion, interest group participation, executive preferences, state demographics, and regional factors. While this list is by no means exhaustive, I argue that these specific inter-institutional factors might encourage strategic behavior by state government elites. However, these different factors are expected to influence elite behavior only under certain conditions.

Consider the influence of public opinion, for example. Public opinion should not be expected to constrain judicial decisions unless three conditions are met. First, the justices must be aware of the direction of public opinion. If the justices cannot decipher the public mood or if the public has no opinion on an issue, then public opinion will have no salient effect on judicial decision-making. Second, the public must pay attention to the decisions made by the state supreme court. If the justices know the mass public is at odds with their sincere preferences, yet the public never pays attention to the behavior of the court, then the justices have no reason to act strategically. And finally, in order for public opinion to encourage strategic behavior, the public must have some means of punishing justices who oppose public opinion. Even if the court knows public opinion is at odds with their sincere preferences and that the public is paying attention to the court's actions, the justices can still behave sincerely as long as the public has no means of punishing them. Hence, justices who never face reelection are less likely to be constrained by public opinion.

The public opinion example highlights the importance of considering the unique political environment in which different issues are considered. For instance, factors such as level of issue salience matter. Public opinion, interest groups, and the executive branch will not constrain behavior in issue areas in which the mass public, organized interests, and the government are not interested. Hence, what makes tort reform such an interesting lens from which to study state policy-making is the widespread attention to the issue. The tort reform movement has received widespread attention by both elites and the mass public, creating the perfect natural experimental setting in which to examine the effects of the political environment. In the preceding section, I discuss in detail the nature of the political environment in the context of state tort reform.

Defining the Tort Reform Environment

In the context of state tort reform, I argue that the campaign for reform has been elite-driven and that the media and interest groups have worked together to create a political environment that has become increasingly supportive of tort reform. The success of the pro-reform movement in framing the debate over tort reform can be attributed to a number of different factors including: the strength of the “pop tort reform” policy entrepreneurs; selective media coverage of civil litigation and the use of “tort tales”; the accessibility of the pro-reform message; and the failure of tort reform opponents to utilize outsider strategies successfully (Daniels and Martin 1995, Haltom and McCann 2004).

Haltom and McCann (2004) argue that the most successful policy entrepreneurs in the tort reform movement have been the “populist tort reformers.” They use the label

“pop tort reformers” to tie together a diverse group of actors including “corporate-sponsored policy elites, intellectuals, public relations specialists, lobbyists, and media personalities” all who advocate reform of the tort system (Haltom and McCann 2004, 15). The American Tort Reform Association (ATRA) has been cited as one of the most influential and far reaching “pop tort reform” groups because of its ability to appeal to the mass public (Haltom and McCann 2004). Haltom and McCann (2004) describe the ATRA as the “primary agent of systematization, creation, and dissemination of knowledge for pop reform of civil justice” (43). The ATRA, among other pop tort reform groups, has been extremely influential in framing the debate over tort reform through the use of “outsider strategies” (Kingdon 1984, Haltom and McCann 2004). By choosing to “go public”, pro-reformers have successfully infiltrated the media with negative stories about civil law and in turn have framed how citizens view the civil justice system (Ricci 1993, Haltom and McCann 2004).

Haltom and McCann (2004) have identified the intrinsic relationship between the “pop tort reform” groups and the mass media. They use the label “tort tales” to describe the different anecdotes and horror stories told about civil justice in the United States, a prime example being the story of the woman who sued McDonalds after spilling hot coffee. After systematic analysis of the news coverage of civil litigation across the country, Haltom and McCann (2004) conclude that there has become a “blurred convergence of serious news, mass entertainment, and pop reform propaganda” (15). They find a clear pro-reform bias, with newspaper articles frequently claiming that litigation costs too much, lawyers are greedy, civil damages have soared, and civil suits are frivolous.

The pro-reform message as expressed in the media has significantly influenced mass public opinion on civil litigation in the United States (Daniels and Martin 1995, Haltom and McCann 2004). The success of the pro-reform movement can be attributed to the accessibility of the message. The “tort tales” are framed in a particular format and include clear villains and heroes (Daniels and Martin 1995, Stone 1997, Haltom and McCann 2004). Additionally, by emphasizing traditional American values such as individualism and personal responsibility, the pro-tort reform message connects nicely with the conservative values emphasized in the broader culture wars debate (Haltom and McCann 2004). The opponents of tort reform have not succeeded in framing their arguments in an equally accessible manner. While many scholars have challenged the existence of a “litigation crisis” through an accumulation of data, “such sophisticated forms of knowledge simply do not translate into modern mass communication” (Haltom and McCann 2004, 109). Additionally, the most prominent anti-reform group, the American Trial Lawyers Association (ATLA) has chosen to focus on insider strategies rather than influencing mass public opinion (Daniels and Martin 1995, Haltom and McCann 2004).

In summary, research suggests that pro-reform interest groups, especially the ATRA, and biased media coverage have produced an overall political environment that is conducive to tort reform. However, while these arguments are convincing, they do not systematically consider how the pro-reform message varies across both space and time. Because this dissertation looks at the tort reform movement across all fifty states between 1975 and 2004, I can consider how changes in the political environment affect elite decision-making. Building from the arguments above, I expect that as exposure to media

coverage increases and when the influence of pro-reform interest groups is present the political environment will increase the likelihood of successful tort reform in a state, essentially by empowering the branch of government which seeks tort reform.

Additionally, I assume that citizens' political predispositions will affect how different states react to the pro-reform message and formulate opinions on tort reform. Zaller (1992) argues that the formation of mass public opinion is affected by both the extent of the exposure to elite discourse on the issue and the political predispositions of the citizenry. Hence, the political environment depends on both the political predispositions of the citizenry and the degree and nature of exposure to elite discourse on tort reform. The most supportive political environment is one in which the majority of citizens are conservative and have been exposed to pro-reform news coverage.

While the nature of the political environment is expected to influence the interaction between the coordinate branches, its effect is mediated by the institutional structure of the state. The effects of the political environment on elite behavior are conditioned by institutional structure. For example, I argue above that citizens in conservative states who have been exposed to pro-reform news coverage are more likely to support tort reform. If justices are aware of this public support, they might be more likely to uphold tort reform legislation even if their sincere preferences would suggest they would prefer to strike the legislation down. This strategic behavior might be heightened for justices seeking reelection because their careers are beholden to the people. Additionally, justices with longer tenures might be more likely to behave sincerely because the people have less of an opportunity to punish them for failing to heed to their preferences. Institutional features provide linkages between the elite actors

and the broader political environment. As explained by Brace and Hall (1999): “Judges’ goals are pursued strategically in response to context and to institutional arrangements that link the two” (285). Hence, the influences of public opinion, interest group participation, executive preferences, and any additional factors that make up the political environment, depend upon institutional design.

The Institutional Structure

The neo- institutional approach to studying elite decision-making is attractive because it explicitly defines the relationship between the external political environment and the institutional structure. As advanced by Hall and Brace (1999), the neo-institutional approach acknowledges that the goals of justices are institutionally dependent. Different institutional features create to a greater or lesser degree linkages to the political environment. Judges respond to a “host of stimuli” which are modified by structural characteristics that can minimize or enhance their importance. Recall the previous discussion concerning selection method: The importance of public opinion (external environment) is enhanced when justices face elections (institutional design). The influence of the external environment on judicial behavior is conditioned by the institutional structure.

Research supports this inter-dependent relationship between institutional structure and political environment. Elected judges have been found more responsive to the political environment than appointed justices (Brace and Hall 1997; Traut and Emmert 1998; Hall and Brace 1999). Justices in states with high electoral competition are found to be particularly responsive to their political environment (Brace and Hall 1993 1997;

Hall and Brace 1999). The goals of elected justices are interdependent; the justices must balance the goal of pursuing policy with the goal of reelection (Hall 1987, 1992, 1995). And while justices retained by the legislature or governor are freer from electoral pressures (Brace, Hall, and Langer 1999) they might be more constrained by the preferences of the legislature or governor. Hence, we see the mutually dependent relationship between the political environment and the institutional structure. What stimuli receive the greatest response from a justice (elite preferences or public opinion) depend upon his or her method of selection.

While selection method is one important institutional constraint, many other institutional variations exist between the state supreme courts which influence judicial behavior. The behavior of justices is influenced by the existence of an intermediate appellate court (Glick and Pruet 1986; Hall and Brace 1989; Brace and Hall 1990), opinion assignment procedures (Hall and Brace 1989; Brace and Hall 1990), vote order (Hall and Brace 1989, 1992; Brace and Hall 1990), and judicial term lengths (Brace and Hall 1995, 1997). Each of these institutional features might encourage strategic behavior when interacted with the political environment. For example, justices with longer term lengths should be more willing to vote their sincere preferences when facing a hostile political environment than justices with shorter term lengths. Additionally, justices operating in a system with an intermediate appellate court might have greater opportunities to advance their sincere preferences because they have greater control over choosing which cases they want to hear. While I will talk more about specific hypotheses later in the dissertation, these examples highlight the relationship between intra- and inter-institutional constraints.

State legislatures, like state courts, vary greatly in their institutional design. Measures of legislative professionalism have been devised in order to conceptualize the institutional differences that characterize state legislatures (Berkman 1994; Berry, Berkman, and Schneiderman 2000; Squire 1992, 2007). The most recent measure of professionalism, introduced by Peverill Squire (2007), defines professionalism in terms of legislative salary and benefits, time demands of service, and staff and resources. Squire finds that much variation exists between the state legislatures among all of these features. As with justices, the goals of legislators are institutionally dependent. Their ability to pursue their policy goals or respond to the stimuli of their political environment is conditioned by their level of professionalism. Legislatures with limited resources will have a more difficult time translating their sincere policy preferences into law.

Just as institutional structure conditions the relationship between elite behavior and the political environment, it conditions the relationship between the two coordinate branches as well. Remember that legislators or justices might be persuaded to act strategically rather than sincerely when they fear retaliation by the coordinate branch. While a difference in policy preferences is thought to be an important predictor of retaliation, it is not the only signal. Institutional features may send important signals as well. For instance, a court might fear retaliation less if it knows it is dealing with a less professional legislature that might not have the means to retaliate. Or a legislature might be more inclined to enact a statute against the preferences of an elected court when it knows that public opinion is against the court. Institutional structure acts as the linkage between competing elite preferences and the political environment.

A Strategic Approach to State Policy-Making

The American states make up fifty different laboratories in which to examine how different intra and inter-institutional features might constrain the behavior of elite actors. Utilizing a fifty state comparative design allows me to simultaneously consider an immense array of both contextual and institutional hypotheses concerning the strategic behavior of state elites. The fifty states offer a wide array of institutional features, diverse political environments, and elites with disparate political goals.

While the fifty states in themselves provide an ideal natural experimental setting, the tort reform movement provides additional sources of variation. State elites differ in the direction and intensity of their preferences regarding tort reform. Public opinion as well as interest group attention varies in degree and directionality as well. Also, state courts differ in the types of tort cases heard and the percentage of their docket comprised of tort cases (Brace, Hall, and Langer 2001). The development of the tort reform movement in the fifty states has been a dynamic process in which legislators and justices have sought to advance their own policy goals in environments that often promote strategic behavior.

Through the course of this dissertation, I will continue to advance the argument that state public policy is the end result of the interaction between elite preferences, political environment, and institutional structure. In the course of this introduction, I have suggested several features which might encourage strategic behavior by elite actors. As my dissertation progresses, I will seek to identify the specific conditions under which both legislators and justices are expected to behave strategically. I develop a general

theory regarding how policy is formulated under a system of separate powers and test that theory empirically in the real-world context of tort reform in the fifty states.

In the next chapter, I introduce my formal state separation of powers model (SSOP). Through the formal model, I am able to capture the dynamic relationship between legislatures and courts and also account for the influence of the political environment and institutional structure. Through equilibrium analysis, I generate a number of hypotheses that are empirically tested in Chapters III-V. In Chapter III, I evaluate a legislature's decision whether or not to enact a tort reform statute. Within Chapter IV, I consider the judicial agenda-setting stage by evaluating a state supreme court's decision to accept a case challenging the constitutionality of a tort reform statute. Chapter V considers individual justices' votes in cases challenging tort reform statutes. In the final chapter, I discuss the broader implication of my research.

CHAPTER II

THE STATE SEPARATION OF POWER MODEL

In the previous chapter, I argued that the differences in tort reform among the fifty states must be viewed as the end result of the interaction of the institutional context, political environment, and preference distribution of elite actors. A separation of powers system of government produces a dynamic environment in which legislators and justices inter-dependently shape public policy and often act strategically rather than sincerely in order to maximize their individual utility. Additionally, a federal system has produced a number of institutional differences among the fifty states that shape the behavior of these elite actors. Furthermore, each state has a unique political environment in which factors such as public opinion, interest group preferences, party influence, and demographics influence the adoption of public policy. Hence, a variety of different intra- and inter-institutional features affect the relationship between the coordinate branches and in turn shape public policy.

In this chapter, I identify the conditions under which legislatures and courts are constrained in the policy-making process. Certain environments are expected to lead to increased strategic behavior by either the legislative or judicial branches. I identify these conditions and further develop my theoretical argument through a simple game theoretic model that considers how the institutional structure and political environment affect the interaction between state courts and legislatures.

The State Separation of Powers (SSOP) model formalizes the interaction between legislators and courts within the state context. Like all models, the SSOP model is a stylized representation and cannot capture the full complexity of the development of

public policies such as tort reform. Throughout this chapter, I will explain how the model reflects real world conditions and how the simplified elements of the model might affect the hypotheses. Though the game theoretic model necessarily simplifies reality, it is nonetheless an extremely attractive and effective tool in examining the inter-dependent relationship between courts and legislatures. The model seeks to explain how individual decisions are interrelated and how these interrelated decisions result in particular outcomes. Game theory acknowledges that an individual's choices are influenced by their social setting and provides a means to "formalize social structure" allowing one to examine how the structure of the game affects individual decisions (Morrow 1994).

Within this chapter, I use the SSOP model as a hypotheses building tool to make general predictions about when legislators and justices are expected to behave strategically. By "formalizing" the institutional structure and political environment, I can derive hypotheses from the game's equilibria that predict when certain outcomes will be achieved. Additionally, I can see how the equilibria predictions differ when the institutional characteristics change. The model's equilibria might generate unexpected or even counterintuitive hypotheses, and may also serve as a "consistency check" in constructing a theory of state policymaking (Vanberg 2005).

For instance, in Chapter I, I mentioned the Ohio Supreme Court case of *State ex. Rel Ohio Academy of Trial Lawyer v. Sheward* (1999) in which the Court struck down tort reform statute H.B. 350. This decision was only one interaction among many between the state legislature and state supreme court in Ohio. Prior to the enactment of H.B. 350 and the *Sheward* decision, the Ohio Supreme Court had struck down similar tort reform statutes enacted by the General Assembly. And after the *Sheward* decision the

Court upheld another damage cap enacted by the legislature in the case of *Arbino v. Johnson & Johnson* (2007). Taken as a whole, the behavior of the Ohio State Supreme Court and General Assembly seems puzzling. A number of very different outcomes were observed: a) the General Assembly willing to enact tort reform legislation (H.B. 350) even though its previous attempts at reform had been rebuffed by the Court; b) the Court striking down the entire statute in the *Sheward* case when it had previously struck down similar legislation in a piecemeal fashion; c) the General Assembly retaliating against the Court by enacting comprehensive tort reform legislation (S.B.80); d) and finally, the Court choosing to uphold the constitutionality of S.B. 80 even though they declared similar statute unconstitutional in *Sheward*.

Thus, even when considering how the tort reform movement has developed in a single state a number of different interactions between the court and legislature occur. We observe the legislature as an all powerful entity willing to enact legislation despite negative judicial review, the court willing to engage in an extended struggle with the legislature in pursuit of its policy goals, and finally, the court upholding the will of the legislature. When looking at tort reform across all fifty states the different types of interactions multiply even further (recall Figures 1.1-1.3).

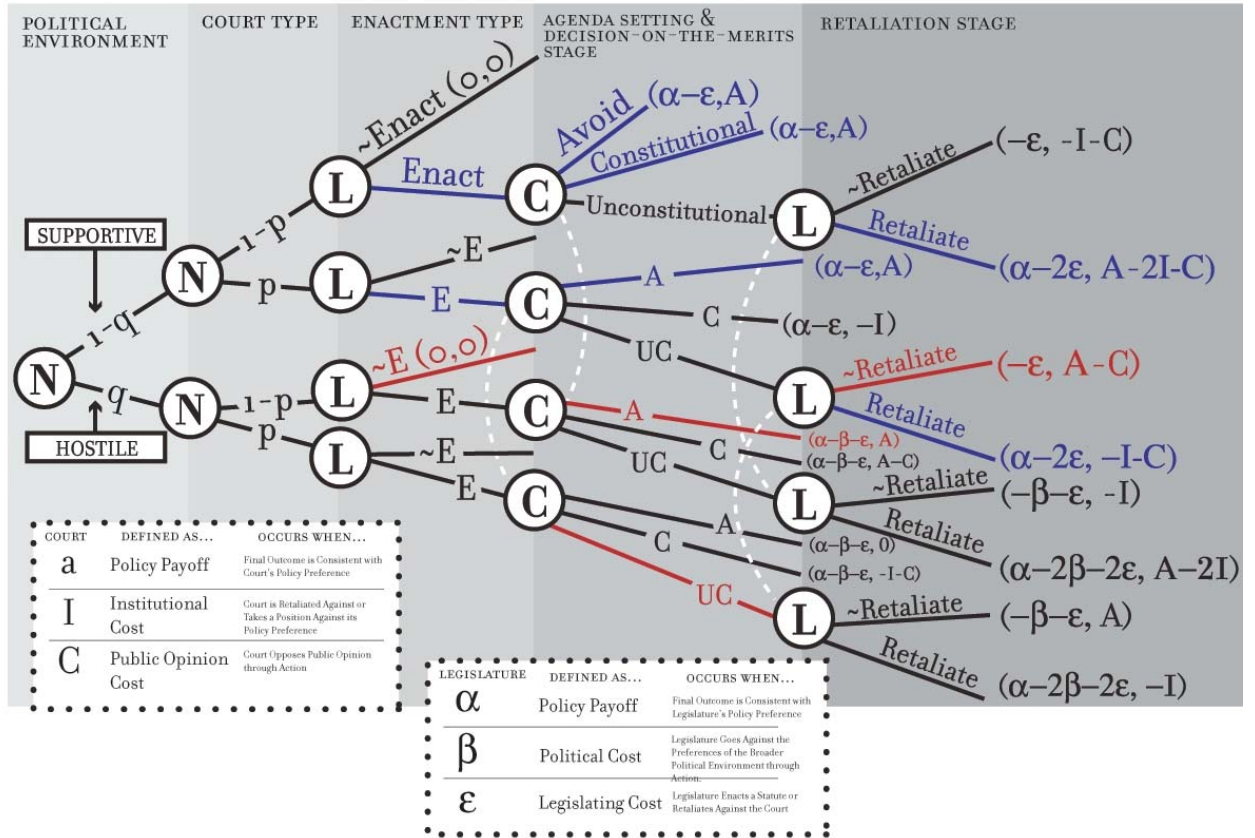
The strength of the SSOP game lies in its ability to explain these apparently dissimilar interactions using a single theoretical model. While these different interactions are often treated as particular events that require individualized explanations, the SSOP model can incorporate them into a universal framework. What once looked like puzzling or even contradictory behavior can be explained as rational behavior through the SSOP model (Marrow 1994, Vanberg 2005). Hence, the purpose of creating

an SSOP model is to demarcate the dynamics of state policy-making rather than to explain the details of any one policy-making scenario. Such an approach is attractive because it generates hypotheses that are independent from the observed outcomes. Additionally, the model can make predictions regarding when different types of interactions between the coordinate branches are likely to occur.

In the sections to follow, the SSOP game is defined in terms of the sequence of events, the players, the information the players have when making decisions, and finally the payoffs the players receive when different outcomes are achieved. The SSOP model utilizes a similar sequence of events and court types as Vanberg's (2005) game but makes adaptations that better reflect policy making at the state level. After the game is specified, a number of decision-making thresholds are defined that predict when the players are expected to pursue certain actions. These decision-making thresholds lead to the game's equilibria. After discussing the game's equilibria outcomes, I consider how the expected outcomes change when the institutional structure is varied. I conclude by making some general observations that lead to the specific hypotheses tested in Chapters III-V.

The Sequence of Events and Environment Types

Figure 2.1 The State Separation of Powers Model



The players in the SSOP game are nature (N), a legislature (L), and a court (C). I incorporate two conditions central to my analysis (the political environment and comparative elite ideology) into the model as moves by nature. The game begins with nature making two moves. In its initial move, nature determines the political environment. In Chapter I, the political environment was broadly defined as a culmination of the different inter-institutional conditions in place when legislators and justices make their decisions and defined more specifically in the context of state tort

reform. In the real world context of state policy-making different factors, such as public opinion and interest group activity, interact to create an environment that is to varying degrees either hostile or supportive of policy change. However, to simplify the game, the political environment is defined in the model dichotomously as either hostile (H) to or supportive (S) of changing the status quo.

I assume that both the court and the legislature have incomplete information regarding the political environment when making their moves. This distinction most accurately captures the reality of state policy-making. The political environment encompasses a number of different factors and though some might have effects that are more transparent than others, we should not expect that courts and legislatures know with absolute certainty how these different factors will interact, and ultimately what type of environment they will produce. For example, while a state legislature might have some idea that public opinion is supportive of tort reform and also that there are active interest groups opposed to tort reform, the legislators are ultimately unsure of whether not the anti-tort reform groups can successfully mobilize public opinion against the reforms.

While we might think the court has a slight informational advantage as the second mover in the game, I assume that they too cannot know with certainty the nature of the political environment. In reality the political environment is dynamic; issue salience, intensity of preferences, and resources can all fluctuate making a court less than certain about the political environment in which it is operating. The uncertainty shared by the legislature and the court is captured through a probability reflecting each player's subjective belief that the political environment is hostile captured by $q \in (0, 1)$. A high q

(close to 1) implies that both players are fairly certain the political environment is hostile, meaning that it is not conducive to changing the status quo.

After determining whether the political environment is hostile or supportive, nature makes the second move of the game and determines the court's type. Like the political environment, the court can be either hostile (H) or supportive (S) of the legislature's policy preferences. I assume the legislature wants to see the status quo changed. Hence, a supportive court shares the policy preferences of the legislature and wants to see the status quo changed, while a hostile court does not share the policy preferences of the legislature and would prefer the status quo to any statute the legislature might enact.

As discussed in Chapter I, the ideology of the court is expected to significantly influence its policy preferences; however, the model need not specify that ideology alone should account for the policy preferences of the court. The court's preferences regarding certain policies might also be influenced by legal or institutional factors. In other words, while the model assumes that the court is policy-motivated, it does not assume that ideology is the sole motivator behind judicial preferences. Demonstrated through the court's payoffs and keeping with the underlying conceptualization of behavior within the model, the judicial actors are also constrained by extra-ideological factors.

When choosing whether to enact a statute, the legislature is concerned with the court's type. If the court is supportive then the possibility of judicial review should pose little threat. However if the court is hostile, the legislature will likely fear that the court will find an enacted statute unconstitutional. But similar to the political environment, when choosing whether to enact a statute, it does not know with certainty which type of

court it must deal with. In the context of state policy-making, the policy preferences of the court are not always transparent. Certain contextual factors may foster transparency while others do not. For example, while some states have mechanisms that allow for increased communication between the state legislature and courts (such as advisory opinions) others do not. As a result, state legislatures should not be assumed to have complete information regarding the preferences of the state supreme courts. This additional source of uncertainty for the legislature is captured by the probability $p \in (0, 1)$. A high p (close to 1) implies that the legislature is fairly certain that it is dealing with a hostile court.

In summary, by the time the legislature makes its initial move, it faces two sources of uncertainty: the political environment and court type. When choosing whether to enact a statute (E) or not ($\sim E$) the legislature can be in any one of four environment types. These four environment types are summarized in Table 2.1.

Table 2.1 Environment Types

Environment	Description
I. Supportive/ Supportive	The Court and the political environment support changing the status quo.
II. Supportive/ Hostile	The Court favors changing the status quo but the political environment does not.
III. Hostile/ Supportive	The Court opposes changing the status quo but the political environment is supportive.
IV. Hostile/Hostile	The Court and the political environment oppose changing the status quo.

If the legislature chooses not to enact then the game ends and the status quo outcome is achieved. However, if the legislature does enact then the court has the next

move. The court can choose between three moves: it can avoid reviewing the statute (A), uphold the statute (C), or find the statute unconstitutional (UC). This tripartite choice takes into account the importance of the agenda-setting stage of judicial decision-making. Instead of forcing the court to make a decision on the merits, the agenda-setting stage is incorporated into the model, allowing the court the additional option of refusing to review the statute in question. Langer (2002) and Brace, Hall, and Langer (1999) have shown that the potential for strategic behavior is not limited to the decision-on-the-merits stage of judicial decision making.

The presence of a discretionary docket is thus an important source of institutional variation that may affect the behavior of state supreme court justices; in courts with discretionary dockets, justices can choose cases that serve as the best vehicles for moving public policy in their desired direction or can avoid taking a case if they fear retaliation by the legislature.¹ The importance of this institutional characteristic will become clear towards the end of the chapter when I discuss the equilibria outcomes and how they change when the court is forced to rule on the merits.

If the court chooses to avoid a case or find the statute constitutional then the game ends with the legislature successfully enacting its preferences into law. However, if the court finds the enacted statute unconstitutional then the legislature is given the final move of the game. At this final stage, the legislature chooses either to retaliate (R) against the court or do nothing (\sim R). Though retaliation might come in a number of different forms, I assume that when the legislature retaliates it is able to reinstate its policy preferences.

¹ Thirteen states have discretionary jurisdiction over civil appeals, nineteen have mandatory jurisdiction, and eighteen have a combination, mandatory jurisdiction of some civil appeals and discretionary jurisdiction over others (Bureau of Justice Statistics 1998).

This may occur by enacting another statute, or by a constitutional amendment reversing the decision of the court. If the legislature does not retaliate, then the court has successfully replaced the policy preferences of the legislature with its own preferences.

The Player's Payoff Components

Before we can consider the player's strategy profiles, their payoff components must be specified. The different payoff components received by the legislature and the court are summarized in Table 2.2.

Table 2.2 SSOP Player's Payoff Components

Court	Defined As:	Occurs When:
A	Policy payoff	Final Outcome is Consistent with Court's Policy Preference
I	Institutional Cost	Court is Retaliated Against or Takes a Position Against its Policy Preference
C	Public Opinion Cost	Court Opposes Public Opinion through Action
Legislature	Defined As:	Occurs When:
α	Policy payoff	Final Outcome is Consistent with Legislature's Policy Preference
β	Political Cost	Legislature Goes Against the Preferences of the Broader Political Environment through Action.
ϵ	Legislating Cost	Legislature Enacts a Statute or Retaliates Against the Court.

The Court's payoffs are a function of three components: policy preference, public opinion, and institutional concerns. I assume the court has a preference for the policy under review captured by the policy payoff $A > 0$. The court achieves the payoff A anytime the final outcome of the game is consistent with its policy preferences. Because

a supportive court shares the same policy preferences as the legislature, it receives the payoff A anytime a statute is successfully enacted. A hostile court, on the other hand, receives the policy payoff A when it can successfully replace the legislature's policy with its own by declaring the statute unconstitutional.

Again, given all the different inter- and intra-institutional constraints faced by state supreme court justices, it would be naive to assume that justices are only motivated by policy preferences. As discussed in Chapter I, method of selection and retention is another important source of institutional variation that might affect judicial decision-making. Because a majority of state supreme court justices face some type of election in the course of their career, I assume that justices have electorally-motivated concerns, and like their legislative peers must also be concerned with public opinion. Thus, the court pays a cost $c > 0$ for opposing public opinion through action. I assume this cost only occurs when the political environment is opposed to the action taken by the court. Though the political environment encompasses more than simply public opinion, the overall context of the political environment shapes public opinion in a substantial way. Recall the discussion about the political environment regarding tort reform.

Additionally, I assume that the court is sensitive to its institutional position vis a vis the legislature and seeks to avoid both retaliation and having to support the legislature when its own policy preferences diverge. While retaliation naturally calls into question the court's institutional position, I argue that feeling that it has to support the legislature when the two are actually opposed is equally damaging to the court's institutional position. When doing so, the court concedes to the will of the legislature. Hence, while the legislature might deal the court a blow through retaliation, the court sets itself back

when it succumbs to the legislative will. Hence, the court pays a cost $I > 0$ if the legislature retaliates or if it upholds a statute with which it disagrees.

The legislature's payoffs, like the court's, include both political and policy-motivated components. The legislature receives a payoff $\alpha > 0$ if it successfully implements its desired policy either because the court complies or because the legislature retaliates. The legislature must pay a public opinion cost $\beta > 0$ when its actions are in conflict with the political environment. As with the court, I assume that the legislature will only pay this cost when it goes against the political environment because this cost reflects the ability of the overall political environment to shape public opinion and affect the legislature's political success. Additionally the legislature pays a cost $\alpha > \epsilon > 0$ for both legislating and retaliating. This cost captures the fact that legislating can be costly due to time constraints, competing issues, and the difficulty in obtaining a legislative majority. The payoffs received by each player for each outcome are summarized in Table 2.3.

Table 2.3 SSOP Possible Outcomes

Court Preferences S or H	Political Environment S or H	E or ~E	A, C, or UC	R or ~R	Legislature's Payoff	Court's Payoff
Environment I (1-p, 1-q)						
S	S	~E			0	0
S	S	E	A		$\alpha - \varepsilon$	A
S	S	E	C		$\alpha - \varepsilon$	A
S	S	E	UC	R	$\alpha - 2\varepsilon$	A-2I-c
S	S	E	UC	~R	$-\varepsilon$	-I-c
Environment II (1-p, q)						
S	H	~E			0	0
S	H	E	A		$\alpha - \beta - \varepsilon$	A
S	H	E	C		$\alpha - \beta - \varepsilon$	A-c
S	H	E	UC	R	$\alpha - 2\beta - 2\varepsilon$	A-2I
S	H	E	UC	~R	$-\beta - \varepsilon$	-I
Environment III (p, 1-q)						
H	S	~E			0	A
H	S	E	A		$\alpha - \varepsilon$	0
H	S	E	C		$\alpha - \varepsilon$	-I
H	S	E	UC	R	$\alpha - 2\varepsilon$	-I-c
H	S	E	UC	~R	$-\varepsilon$	A-c
Environment IV (p, q)						
H	H	~E			0	A
H	H	E	A		$\alpha - \beta - \varepsilon$	0
H	H	E	C		$\alpha - \beta - \varepsilon$	-I-c
H	H	E	UC	R	$\alpha - 2\beta - 2\varepsilon$	-I
H	H	E	UC	~R	$-\beta - \varepsilon$	A

The Decision-Making Thresholds

The predictions of the SSOP model demonstrate that state policy-making is the end result of the interaction between elite preferences, political environment, and institutional structure. Not surprisingly, policy implementation is expected to occur most readily in a supportive political environment with shared elite preferences. However, when one of these conditions does not hold the predictions of the model vary. The

greater the probability that the political environment and the court are supportive ($q=1$, and $p=1$, respectively), the more likely it is that the legislature will be able to implement the policy of its choosing. Following Vanberg (2005), I discuss the predictions of the model in terms of decision-making thresholds and I limit my attention to pure strategies. The proofs behind the different thresholds can be found in the Chapter's Appendix A.

The Retaliation Threshold

Using backward induction, I start at the end of the game by first defining the Legislature's Retaliation Threshold:

$$\text{Retaliate iff } q < \varepsilon - \alpha/\beta$$

At this stage of the game, the legislature knows that it is dealing with a hostile court because a supportive court would never find the enacted statute unconstitutional ($A > A - 2I$, $A > -I$, $A > A - 2I - c$, $A > -I - c$). However, the legislature is still uncertain about the political environment type. While the decision to retaliate allows the legislature to implement its desired policy, it can also lead to public backlash against the legislature when the environment is hostile. Therefore, whether the legislature decides to retaliate is based on its expectations about the likelihood of each scenario. When the probability that the political environment is hostile (q) rises above a certain threshold, the legislature decides that retaliation is too costly. As the legislature is increasingly convinced that it is operating within a hostile political environment it becomes less likely to retaliate against the court.

Additionally, the Retaliation Threshold depends upon three critical factors: policy preferences, the cost of public backlash, and the cost of enacting. As the legislature's

policy preference over the issue (α) increases, the threshold also increases, meaning that the legislature is more likely to retaliate. As the cost of public backlash (β) increases, the legislature is increasingly less likely to enact because the threshold under which the legislature will choose to retaliate narrows. And as the cost of legislating increases, the threshold decreases as well. In summary, the legislature's decision whether to retaliate depends upon its beliefs concerning the political environment type, the intensity of its own policy preferences, the cost of public backlash, and the cost of enacting new legislation.

The Avoidance Threshold

Next, the Avoidance Threshold defines the supportive court's decision between finding a statute constitutional and avoiding the issue by not accepting the case. I assume that if a supportive court is indifferent between finding a statute constitutional and avoiding a case, it will choose to find the case constitutional. This tie-breaking option reflects the value justices find in taking part in the policy-making process. By accepting the case, the court has the opportunity to impose its own policy preferences directly into law. However, due to the potential cost imposed for opposing public opinion, avoiding the case weakly dominates finding the statute constitutional. When the court chooses to avoid the case they receive a payoff of A , while when accepting the case and upholding the statute the court can receive a payoff of either A or $A-c$. Hence the Judicial Avoidance Threshold is:

Find Constitutional iff $-cq=0$

The supportive court should only rule on the merits if either c or q is equal to zero, meaning that either there is no public opinion cost or it is absolutely certain that the political environment is supportive. This threshold necessarily raises a question: Why do we witness justices taking and upholding cases? The possible answers to this question demonstrate the importance of taking into account the institutional structures within each state. When considering institutional differences the decision to take a case is not as unlikely as it may seem when looking at the threshold alone. First, the method of selection and retention matters. We might expect c to equal zero for a court that does not face competitive elections. Later in the chapter, I will discuss in detail how the game changes when there is no public opinion cost for the court ($c=0$). Additionally, there might be circumstances in which the political environment is transparent and the court can be confident that it is acting within a supportive political environment ($q=0$). Finally, as discussed previously, the court's ability to control its docket affects judicial decision-making. In the real-world context of state policy-making, avoidance is not always an option because some courts have mandatory rather than discretionary dockets. Later in the chapter, I will discuss how the game changes when the avoidance option is removed.

The Judicial Veto Threshold

The Judicial Veto Threshold defines the parameters in which a hostile court will choose to find a statute unconstitutional rather than avoid the case. Finding the statute constitutional is never a pure strategy for the hostile court. The expected utility received for avoiding (0) is greater than the utility received when finding the statute constitutional regardless of the political environment. Additionally, when the legislature can retaliate

against the court, avoidance is always preferred to finding the statute unconstitutional ($0 > I > I - c$). Hence, the Judicial Veto threshold defines the conditions under which a court will find the statute unconstitutional when the legislature cannot retaliate:

$$\text{Find Unconstitutional iff } q < c - A/c$$

The equation suggests that the threshold in which the court should choose Unconstitutional over Avoid is fairly broad when it knows the legislature cannot retaliate. The court's decision is a function of the strength of its own policy preferences and the expected public opinion cost. The court should only choose to avoid when the probability of a hostile environment is low and the public opinion cost is higher than the policy gain. And as the intensity of its policy preference increases, the court should be more likely to find the statute unconstitutional.

The Legislative Enactment Threshold

At the initial stage of the game, the legislature faces two sources of incomplete information and can be in any one of four decision-making environments. When choosing whether to enact a statute, the legislature must consider “ pq ”, the joint probability that the court and political environment are hostile. In the first case (Case I), I define the Legislative Enactment Threshold when the Judicial Veto Threshold has not been met ($q > c - A/c$). Under these circumstances, the Legislative Enactment Threshold is:

$$\text{Enact iff } q < \alpha - \epsilon / -\beta$$

The Legislative Enactment Threshold is a function of three factors, policy preference, the cost of legislating, and cost of public backlash. As the probability that the environment is hostile increases, the threshold in which the legislature will enact narrows.

As the legislature's policy preferences intensify the threshold increases. And finally, as both the cost of legislating and the cost of public backlash increase, the threshold becomes smaller. Interestingly, we see that the legislature does not directly take into account the court type when legislating within this scenario, as p has dropped from the equation.

The Legislative Enactment Threshold is defined primarily by the nature of the political environment. As long as q falls below a certain level, the legislature recognizes that court's judicial veto threshold has not been met and that its Legislative Enactment Threshold has been met ($c-A/c < q < \alpha-\epsilon/\beta$). Instead of having a direct effect, the effect of judicial ideology on legislative decision-making is conditioned by the political environment. The legislature's beliefs about the nature of the political environment influence both its perception of its own strength and the strength of the court.

This same dynamic is in place when considering the legislature's decision whether to enact under a second scenario (Case II) in which the court will veto and the legislature cannot retaliate ($\epsilon-\alpha/\beta < q < c-A/c$). In Case II, the decision not to enact strictly dominates the decision to enact ($0 > -\epsilon > -\beta-\epsilon$). When q reaches a certain threshold, the legislature knows that the court can veto and it cannot retaliate without incurring the cost of public backlash. Under this scenario, the legislature chooses not to enact legislation. Again, the political environment defines the legislature's and court's decision-making calculus.

In the third scenario (Case III), the probability the environment is hostile is less than both the Judicial Veto Threshold and Retaliation Threshold ($q < c-A/c$ and $\epsilon-\alpha/\beta$),

meaning that the court will veto and the legislature will retaliate. Under Case III, the legislature's decision is defined by:

$$\text{Enact iff } q < \alpha - 2\varepsilon/2\beta$$

This threshold encompasses the same factors as the threshold defined in Case I, while taking into account the additional cost of retaliating and the threat of incurring the cost of public backlash not once but twice. When the legislature believes that the Judicial Veto Threshold has been met for the hostile court, the Enactment Threshold is smaller than the threshold defined in Case I in which the court will not veto. Once again the relationship between the court and the legislature is conditioned by the nature of the political environment. The legislature is willing to accept judicial veto as long as its beliefs about the political environment suggest that retaliating will be less costly than not seeing its policy preferences become law.

The Equilibria Predictions

There are two different types of equilibrium interactions predicted by the SSOP model, in one the legislature is constrained, and in the other, the legislature prevails. The *Constrained Legislature Equilibrium* is defined as:

- I. Legislature (\sim Enact, \sim Retaliate)
Court (Hostile/Unconstitutional, Supportive/Avoid)

In this equilibrium, the Retaliation Threshold has not been met for the legislature. Knowing this, a hostile court will veto as long as $q < c - A/c$. And if the Judicial Veto Threshold has been met for the hostile court a supportive court will always avoid ($q \neq 0$). This equilibrium predicts that no statute will be enacted because a legislature will never enact when a hostile court can veto and it cannot retaliate (Case II). In this equilibrium

we see that the players' beliefs about the political environment drive their decision-making. The effect of the judicial branch on legislative behavior is conditioned by its beliefs about the political environment type. In this equilibrium, the legislature acts strategically by censoring its own behavior in light of the anticipated behavior of the court. This outcome has been referred to as "autolimitation", the "passive influence", or the "preemptive power" of judicial review (Brace and Hall 2001, Langer, Brace, and Hall 2005, Vanberg 2005) in which the mere threat of judicial review keeps the legislature from enacting.

This equilibrium prediction demonstrates that the preemptive power of judicial review only occurs when the political environment is opposed to the legislative agenda. While the legislature does take into account the preferences of the court, the influence is indirect. The legislature's beliefs regarding the political environment define its beliefs regarding the future moves made by the court. The legislature is willing to oppose a hostile court as long as the political environment is supportive. The game predicts two such equilibria in which the legislature is able to enact a statute successfully. The *Legislature Prevails Equilibria* are defined as:

II. Legislature (Enact, Retaliate)
Court (Hostile/Avoid, Supportive/Avoid)

III. Legislature (Enact, Retaliate)
Court (Hostile/Avoid, Supportive/Constitutional)

In these equilibria, the Retaliation Threshold has been met for the legislature. When the Retaliation Threshold has been met, a hostile court will always avoid and a supportive court will either avoid or find the statute constitutional if it is certain the

environment is supportive. Hence in these equilibria, a legislature enacts a statute and the court accepts the statute regardless of its type.

Changing the Institutional Structure

Scenario 1: Mandatory Docket

As mentioned earlier, many state supreme courts do not have complete control over their dockets. Sometimes state supreme courts are forced to rule on the merits because they do not have the option of avoiding. When the avoidance option is removed from the SSOP game the decision-making thresholds change and the equilibrium predictions vary. When the court has a mandatory docket, a supportive court will always find the statute constitutional; the decision to find the statute constitutional weakly dominates finding the statute unconstitutional.

In the original SSOP game, the hostile court will always avoid when it knows the legislature will retaliate. However, when forced to choose between finding a statute unconstitutional and constitutional, the hostile court will find the statute unconstitutional if $q > 1/2$ even when the legislature will retaliate. Hence, unlike in the original version of the game, there can be an equilibrium outcome in which the legislature enacts, the court finds unconstitutional, and the legislature retaliates. Also, when the avoidance option is removed, the likelihood of a hostile court choosing to find unconstitutional when the legislature cannot retaliate is extremely high. The only time a hostile court will uphold the statute is if it is fairly certain it is in a supportive environment and the cost of public

backlash is very high. In summary, having a mandatory rather than discretionary docket increases the likelihood of a hostile court finding a statute unconstitutional.

Scenario 2: No Public Opinion Cost

While the SSOP game includes a public opinion cost for justices, in the reality of state policy-making there are a variety of scenarios in which c might actual equal zero. For instance, while a majority of state supreme court justices face reelection at some point in their careers, others do not. Some justices are reappointed and others face uncompetitive retention elections in which justices are very rarely unseated. Under these circumstances, we should not expect the justices to pay a public opinion cost. Additionally, as justices approach retirement there is no reason to believe they should still be concerned with public opinion. Hence, to capture the reality of state policy-making we must consider how the decision-making thresholds of the game change when the court is less concerned with public opinion.

When there is no public opinion cost, a supportive court will always find a statute constitutional rather than avoid taking a case. When the legislature can retaliate, a hostile court will still always choose to avoid the case rather than find the statute unconstitutional. However, when the legislature cannot retaliate, a hostile court will always find the statute unconstitutional ($A > 0$). Hence, the absence of a public opinion cost also increases the likelihood that a hostile court will find a statute unconstitutional.

Scenario 3: Mandatory Docket and No Public Opinion Cost

In the third and final scenario, the court has a mandatory docket and has no public opinion cost. Again, under this set of circumstances a supportive court will always find a statute constitutional and the hostile court will always strike the statute down when the legislature cannot retaliate. Additionally, under this scenario a hostile court is indifferent between finding a statute constitutional and unconstitutional when the legislature can retaliate. Regardless of the political environment, the hostile court receives the same payoff for finding the statute constitutional and finding the statute unconstitutional and being retaliated against. Thus, under this scenario there is an equilibrium outcome in which the legislature enacts, the court finds that statute unconstitutional, and the legislature retaliates.

When changes are made to the institutional structure of the SSOP model, the decision-making behavior of the elite actors also changes. When a legislature chooses to enact legislation, it should be aware that the likelihood of a hostile court finding a statute unconstitutional is highest when the court has a mandatory docket and is not concerned with public opinion. Hence, under these circumstances, the legislature must be increasingly confident that it can successfully retaliate if it believes the court is hostile. While retaliation was never a Bayesian equilibrium outcome in the original SSOP game, it becomes one when the court cannot choose to avoid the issue. Additionally, the likelihood of this outcome increases when the court does not pay a public opinion cost.

General Observations

The predictions generated from the SSOP model have led me to a number of general observations that translate into the specific hypotheses tested in Chapters III-V:

Observation 1:

Courts and legislatures behave strategically in relation to one another. Justices and legislators behave strategically by acting contrary to their sincere preferences in the short term in order to maximize their policy objectives in the long run (Epstein and Knight 1998). They do so because they anticipate the likely reactions of other players in the SSOP game. Indeed, the formal model assumes that the actors' choices are conditioned upon their expectations regarding the next player's move in the game. When the policy preferences of the justices and legislators diverge, each has more to fear regarding retribution from the other. For the court, this relationship is fairly straightforward. Retaliation is very costly for the court. If the court anticipates that the legislature can retaliate it will avoid ruling against the legislature under almost all circumstances instead of following its sincere preferences.

For the legislature, the decision between acting sincerely and strategically is indirectly dependent on the preferences of the court. If a legislature believes that a court is likely to veto an enacted statute it must consider whether or not it can retaliate, based on its expectations concerning the political environment. If the political environment does not favor the legislature and the court will veto, the legislature acts strategically by censoring its own behavior. Hence, in certain circumstances, both legislators and justices may fear retribution enough to pursue actions that are inconsistent with their own policy preferences. The game's equilibria clearly show this type of strategic behavior. In the

Constrained Legislature Equilibrium, the legislature chooses not to enact because it cannot retaliate against a hostile court. In the *Legislature Prevails Equilibria*, the hostile court acts strategically by avoiding ruling on a statute rather than finding it unconstitutional because it expects the legislature to retaliate. The equilibria predictions demonstrate that the coordinate branches' ability to see their policy preferences become law are dependent upon the policy preferences of one another and the nature of the political environment.

Observation 2:

The political environment and public opinion have both a direct and indirect effect on the behavior of legislators and justices. The nature of the political environment defines the thresholds under which the legislature and court are expected to pursue certain courses of action. The political environment signals to legislators and justices whether or not they should expect to pay a public opinion cost. As the games equilibrium predictions demonstrate, public opinion matters. It matters both to legislators and justices and it matters to justices more or less depending on their method of selection/retention.

The equilibrium predictions of the model demonstrate that the nature of the political environment is a more salient predictor of legislative behavior than the policy preferences of the court. When a legislature is confident that the political environment is supportive of changing the status quo, it will enact legislation regardless of the preferences of the court. Recall, that the Legislative Enactment Threshold did not include p , the probability that the court is hostile. As long as the political environment favors the legislature, it does not have to worry about the preferences of the court. Hence,

differences in policy preference between the legislature and court are only expected to affect legislative behavior when the political environment is not supportive of the legislative agenda. This interesting observation has gone untested in previous studies of state policy-making. While others have considered how the difference between legislative, judicial, and citizen preferences affect the enactment of public policy, a conditional relationship as seen through the SSOP game has not been empirically tested (Brace, Langer, and Hall 2005).

The SSOP model clearly demonstrates that the political environment and the cost of opposing public opinion have both a direct and indirect effect on the behavior of legislators. While the political environment is crucial to the legislature's decision-making calculus, the nature of the political environment also provides an additional informational component about the strength of court. When a legislature knows that a court does not care about public opinion, it in turn knows that the court will be more likely to find the statute unconstitutional if it is hostile. Hence, a legislature will have to be confident that it has enough public support to retaliate.

This same type of relationship holds for the court as well. While elected justices are expected to care directly about public opinion, all justices look to the political environment as an indicator of the strength of the legislative branch. When the court suspects that the political environment is at odds with the legislatures' sincere policy preferences, it is more emboldened to act. Hence, when salient issues are at stake, public opinion can act as a direct and indirect constraint on legislators and justices by providing cues about when electoral and inter-branch retaliation is likely to occur.

Observation 3:

The institutional structure of the state court system affects both judicial and legislative decision-making. As the institutional characteristics of the SSOP game were varied the decision-making thresholds and the game's equilibria predictions changed, proving that institutional structure significantly influences elite decision-making. As discussed in Chapter I, we now see through the SSOP game specifically how the institutional structure defines the relationship between the branches and also their ties to the broader political environment.

Discretion in a court's docket is one important institutional difference that affects state policy-making. The game's equilibria demonstrate that the ability to avoid cases allows the state supreme court to avoid ever paying an institutional cost. When a court has the option to avoid, it can always avoid being retaliated against. Additionally, it can avoid having to outwardly support a statute in which it disagrees. However, when state supreme courts have mandatory dockets and are forced to rule on the merits, supportive courts are more likely to uphold statutes, and hostile courts are more likely to strike down statutes. Thus, docket control influences the behavior of the legislature as well. If a state legislature believes that a state supreme court with a mandatory docket has divergent policy preferences, it must be confident that it has enough public support to retaliate.

Differences in selection method affect the behavior of state supreme court justices and legislators in the same way. When justices are not held accountable to an electorate they are more likely to pursue their sincere preferences. Justices are more likely to uphold statutes when they support changing the status quo, and are more likely to strike

down statutes when they are against changing the status quo. When a court has a mandatory docket, is not held accountable to public opinion, and has policy preferences divorced from legislative preferences, it is more likely to find a legislative enactment unconstitutional.

Conclusion

The SSOP model demonstrates formally how the interaction of elite preferences, political environment, and institutional structure influence state public policy. The SSOP model and the broader theoretical arguments involved have many empirical implications that can be tested in the context of state tort reform. The observations drawn from the model will be used to construct specific hypotheses tested in the following chapters. The SSOP model has made a number of theoretical contributions to the study of state policy-making. First, the model has identified the conditions under which state legislatures and courts should pursue certain courses of action. As noted in the beginning of the chapter, the results of the formal model can help to explain elite behavior that previously seemed particularistic or even sporadic. For instance, in the case of Ohio, the formal model helps to explain why under certain circumstances the General Assembly prevailed against the Court and why under different circumstances it did not.

Additionally, the model can explain how the different institutional structures across the fifty states have contributed to the vast differences among state tort reforms. Finally, the SSOP model has led to a unique observation that has not been previously tested. The model suggests that the relationship between legislative and judicial preferences is indirect. Legislatures look primarily to the political environment to assess

their strength. As long as they are confident that the political environment is conducive to pursuing their policy goals, legislatures do not have to be concerned with the preferences of the court. Hence, the relationship between legislative behavior and judicial preferences is conditional. This particular relationship and the overall strength of the formal model in explaining state elite decision-making will be substantiated by the empirical tests in the chapters to follow. Chapter III considers the state legislatures' decisions whether to enact tort reform legislation.

CHAPTER III

THE LEGISLATIVE ENACTMENT STAGE

In the previous chapter, I developed a state separation of powers model that identified the conditions under which both legislators and justices are expected to be constrained in the policy-making process. Two central theoretical components were incorporated into the SSOP model as moves by nature: comparative elite ideology and the political environment. Hence, the game's equilibria outcomes and decision-making thresholds can be examined to make predictions about the likely effect of both the political environment and the preferences of the coordinate branches at each stage in the decision-making process, beginning with the legislature's decision to enact.

The SSOP model acknowledges that courts may not only play a reactionary role in the political process, but may play an active role as well by influencing legislative decisions to enact statutes. Scholars have just recently begun to consider state supreme courts as active players in the policy-making arena and there is already some evidence that courts preemptively shape public policy through the mere threat of overturning a statute (Langer and Brace 2005; Wilhelm 2005; Stiles and Bowen 2007). In Chapter I, I discussed how Langer and Brace (2005) modeled a legislature's decision to enact public policy as a game between state supreme courts and legislatures. The authors found some evidence supporting the "passive influence" of judicial review, finding that court ideology affected the likelihood of enactment of abortion and death penalty statutes. Additionally, Wilhelm (2005) found that court preferences and the likelihood of intervention affected the enactment of education policy.

The SSOP model I developed in Chapter II, allows me to theoretically build on the previous work done by Langer and Brace (2005) and Wilhelm (2005). The SSOP model not only recognizes that a court may have preemptive power over the enactment of legislation, but further refines the conditions under which a state supreme court is expected to constrain a state legislature. At the legislative enactment stage, the SSOP model suggests that a conditional relationship exists between the political environment and court preferences. When the legislature is choosing whether to enact a statute it faces two sources of incomplete information: the court type and the political environment type. The enactment decision-making threshold, however, only directly reflects the salience of the political environment. As long as the probability that the political environment is supportive reaches a certain threshold, the court type becomes irrelevant to the decision-making calculus of the legislature (when $q < \alpha - 2\varepsilon/2\beta$). When this threshold is met, the legislature can enact a statute regardless of the preferences of the court because it has the political capital to retaliate against the court if necessary.

If this threshold has not been met, however, the preferences of the court become a critical component in the legislature's decision whether to enact a statute. When the probability the environment is hostile lies somewhere between $\alpha - 2\varepsilon/2\beta$ and $\alpha - \varepsilon/\beta$, the legislature can enact legislation but does not have the public support needed to retaliate against a hostile court. Under these circumstances, the preferences of the court become extremely important to legislative decision-making, because a legislature will never enact a statute when it cannot retaliate against a hostile court. Hence, the model predicts a conditional relationship between the political environment and court preferences. When the legislature is fairly certain the political environment is supportive, the preferences of

the court have no effect on its decision to enact. When the political environment is less supportive or ambiguous, court preferences will have a salient effect on legislative decision-making, with court hostility decreasing the likelihood of enactment.

Within this chapter, I examine the conditional effect of judicial preferences on legislative decision-making in the context of state tort reform. The key to successfully analyzing this relationship lies in defining the political environment. In the first chapter, I discussed the nature of the political environment regarding tort reform. I argued that the campaign for tort reform has been elite-driven and that the media and interest groups have worked together to create a political environment that has become increasingly supportive of tort reform. I discussed how this pro-reform climate was created over time and also how the tort reform movement has varied from state to state.

This substantial variation across time and amongst the fifty states allows me to empirically test the conditional relationship between a state's political environment and judicial preferences. Additionally, beyond the interactive effect between the political environment and court preferences, I expect a number of other variables will affect a legislature's decision whether or not to enact tort reform legislation. I elaborate upon the conditional relationship and the factors expected to affect legislative decision-making in the proceeding section.

Hypotheses

The Political Environment and Judicial Preferences

When a legislature has a significant level of support from the broader political environment, it need not take into account judicial preferences when choosing whether or not to enact legislation. When the political environment is supportive of reform, the legislature does not need to take into account the likely actions of the court because it has the political capital to retaliate against a hostile court if necessary. As I argued in the first chapter, the overall environment has become increasingly supportive of tort reform due to a variety of different factors; however, the level of support for reform varies across states and across time.

Following from the work of Daniels and Martin (1995), Haltom and McCann (2004) and Zaller (1992), I argue that support for tort reform is best conceptualized by considering interest group activity, media bias, and the political predispositions of a state's citizenry. The American Tort Reform Association (ATRA), formed in 1986, is arguably the most influential and far-reaching pro-reform interest group due to its success in infiltrating the mass media (Daniels and Martin 1995, Haltom and McCann 2004). Since the founding of the ATRA, the political environment has been more conducive to tort reform and in turn state legislatures have been increasingly able to rely on public support of tort reform. Hence, I hypothesize,

H1: State legislatures should be more likely to enact tort reform legislation after the founding of the ATRA.

Additionally, the mass media has been a key player in influencing public opinion regarding tort reform. Through selective news coverage and the use of tort tales, the

media has led the mass public to believe that the majority of civil suits are frivolous, jury verdicts are out of control, and that they are the ultimate victims of a litigious society. Public support for tort reform can be generated by elites when citizens perceive a problem with the existing system. Thus,

H2: State legislatures are more likely to enact tort reform legislation when there is negative news coverage of civil litigation.

Citizens' political predispositions are expected to affect how they react to the pro-reform message espoused by the both the ATRA and the mass media. Mass public opinion is influenced by both the extent of exposure to elite discourse on the issue and the political predispositions of the citizenry (Zaller 1992). Conservative citizens should be more likely to accept the pro-reform message because of the emphasis on personal responsibility and individualism. Hence,

H3: State legislatures are more likely to enact tort reform legislation in states in which the citizens are conservative.

When the ATRA is active, pro-reform media coverage is present, and citizens are conservative, legislatures should be sufficiently confident that they have the public support necessary to enact tort reform legislation. In summary,

H4: State legislatures are more likely to enact tort reform legislation when the political environment is supportive.

When the political environment is supportive, a state legislature does not need to directly take into account the preferences of the judicial branch. The legislature has enough political capital to enact tort reform legislation regardless of its expectations about the likely action of the judicial branch. However, when a legislature cannot count on the mobilization of sufficient public support, a legislature must be sensitive to judicial preferences. Retaliation against the court can be very costly. As the formal model

demonstrates, retaliation involves both the time and effort of enacting new legislation or passing a constitutional amendment. Additionally, retaliation involves the threat of incurring public backlash. Courts in the United States derive considerable political capital from their perceived institutional legitimacy (Calderia and Gibson 1992, Gibson and Baird 1997) and the mass public expresses more diffuse support of the judicial branch than the legislative branch (Hibbing and Theiss-Morse 1995). Hence, in considering retaliation against a court, a legislature must be confident that it can rely on the public for support.

If a state legislature does not have a sufficient level of public support to make retaliation less costly, than the legislature must take into account the preferences of the court when choosing whether to enact. As expressed in the SSOP model, both policy and institutionally motivated concerns are expected to influence court preferences. The interaction between policy and institutionally motivated concerns is expected to be especially salient concerning tort reform. Previous studies demonstrating the preemptive power of state supreme courts have focused on ideologically cohesive issues such as abortion and death penalty law (Langer and Brace 2005). In these areas of law it is clear why judicial ideology is viewed as the most salient predictor of the court's decision whether to overturn a statute. The motivations behind court preferences regarding tort reform are not as overt.

Support for tort reform is usually considered a conservative issue position because tort reform statutes are primarily written to limit the ability of plaintiffs to collect damages. However, the tort reform movement is also described as a "turf war" in which justices seek to keep tort law under their jurisdiction (Schwartz, Behrens, and Taylor

1997). Hence, while I expect liberal courts will be more hostile to tort reform, I expect that professional courts will be more hostile as well. More professional courts are more likely to be offended by legislative encroachment into their “turf” and are also more likely to have the resources necessary to challenge the legislature. Court hostility, as expressed in terms of both liberalism and professionalism, should influence a legislature’s decision at the enactment stage when the political environment is not supportive of tort reform.

H5: When the political environment is not supportive, court hostility should decrease the likelihood of enactment.

Legislative and Gubernatorial Preferences

As discussed in Chapter I, legislators pursue policy-minded goals. The Enactment Threshold of the SSOP game demonstrated that as the intensity of a legislature’s policy preferences increased, the threshold in which it would choose to enact widened. When behaving sincerely, conservative legislatures are expected to favor tort reform. Thus,

H6: Conservative state legislatures are more likely to enact tort reform legislation.

Institutional concerns are expected to influence legislative decision-making as well. Legislative professionalism is expected to influence a legislature’s desire and ability to act. Legislative professionalism is conceptualized in terms of institutional resources including pay session length, and staff. A more professional legislature is expected to be more likely to wage a “turf war” against the court because it is more confident in its own abilities to make law, and because the cost of legislating is decreased.

H7: Professional state legislatures are more likely to enact tort reform legislation.

Gubernatorial preferences are also expected to influence the enactment of legislation. When enacting a statute, the legislature must take into account the threat of executive veto. If a state legislature suspects that a bill is likely to be vetoed by the governor, it might behave strategically by declining to pursue the bill in the first place. Also, a governor might assert pressure on the legislature to pursue certain policies. For instance, in 2005 Governor Jeb Bush issued a press release urging the Florida Legislature to take action regarding tort reform. Republican governors have tended to be more supportive of tort reform due to the conservative nature of the issue. Hence, I hypothesize,

H8: State legislatures are more likely to enact tort reform legislation when the governor is Republican.

Additionally, unified versus divided party control of the government is expected to influence a legislature's ability to enact legislation. Research on policy enactment has suggested that state governments under unified party control are more productive in enacting policies than those under divided control (Berry and Berry 1990, 1992; Alt and Lowry 1994; Langer and Brace 2005). Thus,

H9: State legislatures are less likely to enact tort reform legislation under divided party control.

Control Variables

Research has demonstrated a positive regional affect on policy diffusion across the states, meaning that states are more likely to enact certain policies if neighboring states have enacted similar policies (Hays and Glick 1997; Minstrom 1997; Mooney 2001). Thus, I expect,

H10: State legislatures are more likely to enact tort reform legislation when neighboring states have enacted tort reform legislation.

I've discussed how the mass media and interest groups have worked together to influence the mass public's perception about the need for tort reform. However, beyond this effect, there is the possibility that an actual need for tort reform might affect legislative decision-making. The necessity of tort reform is often justified by a discussion of both the frequency and severity of civil litigation (Danzon 1984; Lee, Brown, and Schmit 1994). The tort reform movement has been attributed to a perceived "litigation explosion" engendering popular perception that increases in civil litigation are increasingly burdensome to society (Johnston 2007). Additionally, three different "medical malpractice crises" have been identified in the last four decades defined by escalating insurance premiums (Viscusi et al. 1993; Thorpe 2004). Rather than simply the perception of a "litigation crisis" or "medical malpractice crisis", the actual reality of the situation might be influencing legislative decision-making. Or in contrast, if the mere perception of the need for tort reform is driving legislative decision-making than these hypothesized relationships should be insignificant.

H10: As the amount of civil filings increase, state legislatures are more likely to enact tort reform legislation.

H11: As insurance premiums increase, state legislatures are more likely to enact tort reform legislation.

Research Design and Methodology

The Dependent Variable

The hypotheses articulated in the previous section are examined by considering the legislative enactment of tort reform statutes across all fifty states between 1975 and

2004. I include four types of tort reform statutes in my analysis: 1) caps on punitive damages; 2) caps on non-economic damages; 3) statutes abolishing joint and several liability; 4) statutes abolishing the collateral source rule.

Punitive damages are the damages awarded in order to deter the behavior of the defendant rather than award the plaintiff. Proponents of tort reform often cite excessive punitive damage awards as evidence of the need to reign in jury verdicts through legislative caps. For instance, media coverage of the “McDonald’s hot coffee case” *Liebeck v. McDonald’s Corp.* (1994) frequently called attention to the 2.7 million dollar punitive damage award as evidence that jury verdicts have become excessive (Robbennolt and Studebaker 1999; Haltom and McCann 2001). Despite empirical evidence showing that punitive damages are awarded infrequently and are rarely large, caps on punitive damages have become a critical component of the tort reform movement (Robbenalt and Studebaker 1991; Haltom and McCann 2001). The American Tort Reform Association, for instance, favors punitive damage caps, arguing that punitive damage jury awards are unpredictable and lead to inconsistent outcomes. The ATRA makes a similar argument regarding non-economic damages.

Non-economic damages are the damages awarded to a plaintiff for intangible injuries such as pain and suffering. Non-economic damages are also referred to as “quality-of-life” damages. In the case of *Judd v. Drezga* (2007) discussed in Chapter I, the justices discussed how the 1.25 million dollars awarded to baby Athan was meant to compensate for “the difference between a life as a normal, healthy boy, and a life as he must now live it: severely brain damaged, with drastically reduced life experiences and expectations”. Proponents of tort reform argue that legislative caps on non-economic

damages are needed to combat a “medical malpractice crisis” in which doctors are forced to close their practices due to rising insurance costs.

Joint and several liability is a system of recovery in which plaintiffs may recover all damages from any one of the defendants regardless of their percentage of the fault. Many state legislatures have enacted statutes abolishing the rule of joint and several liability, replacing it with a rule of proportionate liability in which defendants can only be responsible for their percentage of the fault. Statutes abolishing joint and several liability became a central focus of tort reform advocates in the early stages of the movement (Lee, Brown, and Schmit 1995). Abrogation of the collateral source rule has also been a principle objective of tort reform proponents. The collateral source rule prohibits the defense from providing evidence at trial demonstrating that a plaintiff has already been compensated from other sources such as insurance or worker’s compensation. Proponents of tort reform argue that the collateral source rule allows plaintiffs to collect twofold for their injuries, while opponents argue that the rule keeps plaintiffs from being penalized for carrying insurance.

Damage caps statutes and statutes abolishing joint and several liability and the collateral source rule are all considered tort reform statutes because they limit a plaintiff’s ability to collect damages. I have chosen to focus my attention on these four specific types of tort reform statutes because they have been the most popular and pervasive. The years in which each of these statute types became law was available through “The Database of State Tort Law Reforms” constructed by Ronen Avraham (2006). The database is the most “detailed, complete, and comprehensive” dataset of tort reforms in the United States (Avraham 2006). Funded by NSF grant #045221, Avraham organized a

comprehensive dataset of tort reform statutes by integrating a number of online datasets and sorting through state codes' and case law. Among a number of other variables, the database includes the statute type and effective date of tort reform statutes enacted in all fifty states, which forms the basis of the dependent variable in my model. The dependent variable in my model is a dichotomous realization of whether or not each of these statute types became law in a given year. Due to the nature of this dependent variable, I have chosen to use Stratified Cox Methodology.

The Stratified Cox Model

I have chosen to use an event history model because I am interested in both the likelihood that an event will occur and how my independent variables influence the timing of the event's occurrence. More specifically, I have chosen to use Stratified Cox methodology to estimate my model for the reasons outlined by Langer and Brace (2005) in their study on the enactment of abortion statutes: first, the different tort reform statutes are assumed to be independent and unordered; second, the likelihood and rate of enactment varies across the four different tort reforms, as presumably some tort reform statutes are more controversial than others. For example, legislatively capping damages has been more controversial than statutes abolishing joint liability (Kelly and Mello 2005, Conroy 2006). The Stratified Cox Model estimates the likelihood of a statute being enacted in a particular year given that it was not enacted in a previous year. The Stratified Cox model estimates the likelihood of a state enacting any one of the four statutes types within a given year. The Stratified Cox model accounts for the fact that the different statute types are not expected to be enacted at the same rate. By allowing the

different policies to have different hazard rates, the Stratified Cox methodology produces the most accurate estimates (Box-Steffensmeier and Jones 2004).

The model considers the legislative enactment of tort reform over a twenty-four year period 1975-2004. The states that do not enact a given tort reform statute during the period are right-censored (see Langer and Brace 2005, Box-Steffensmeier and Jones 1997). Additionally, a couple of states that already had a given policy in place prior to 1975 have necessarily been excluded from the analysis. Hence, at this point, it is important to discuss the decision and consequences of beginning the analysis in 1975. Box-Steffensmeier and Jones (2004) acknowledge that one of the most salient concerns when using an event history model is determining “when the clock starts ticking.” While sometimes the answer is obvious, other times it is not so clear. When the answer is less than obvious, such as the start of the tort reform movement, the authors recommend looking for a “sensible and defensible definition”, while simultaneously acknowledging that the researcher must often be guided by data availability. I begin my analysis with 1975 for both of the reasons outlined by Box-Steffensmeier and Jones (2004). First, by almost all accounts, the modern conversation on “tort reform” was first introduced in the mid 1970’s (Danzon 1984, Viscusi et al. 1993, Thorpe 2004). Second beginning with 1975 allows me to include a wide array of important independent variables. Fortunately, this decision has led to very little loss of information; there are only four cases that have been excluded from the analysis because the state all ready had a statute in place before 1975.

Additionally, the model accounts for the fact that legislatures can reenact tort reform statutes if the state supreme court strikes a statute down. If a court strikes down a

tort reform statute, the state reenters the model at that point in time because the event might then reoccur. For instance, if a punitive damage cap is enacted by the Alabama legislature in 1990 and struck down by the supreme court in 1993, the state reenters the model in 1993 because another punitive damage cap could be enacted. This follows from the SSOP game's assumption that the court does not always have the last move; the legislature can retaliate by choosing to enact new legislation.

The Independent Variables

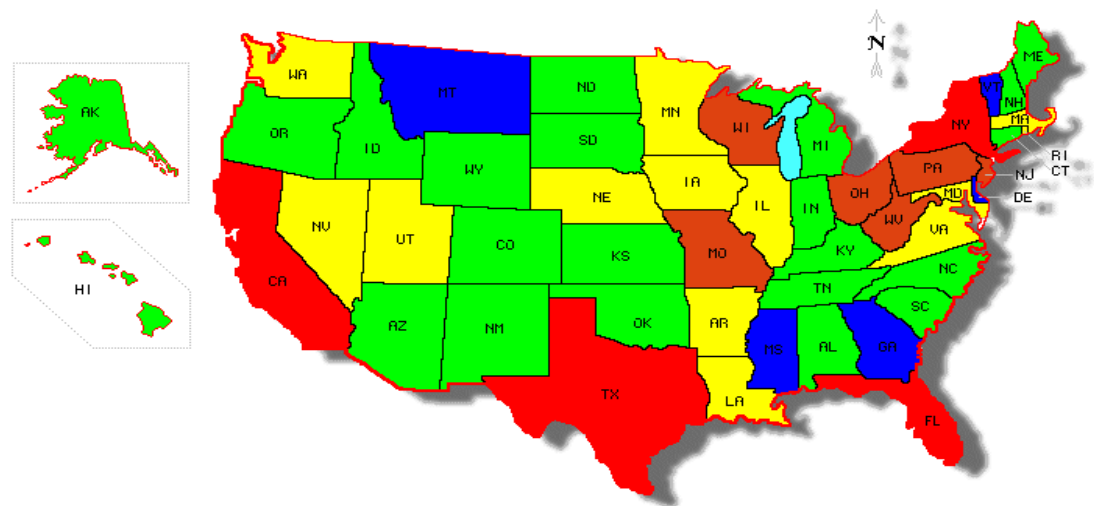
The conditional relationship expected between the political environment and court preferences is operationalized as an interactive variable capturing the effect of court hostility within an environment in which retaliation would be costly. Following from my discussion of the political environment in the context of tort reform, a very supportive environment is one in which the state's citizens are conservative, there is pro-reform news coverage, and the ATRA is present. If one of these conditions does not hold, a state legislature is not expected to have the sufficient public support necessary to retaliate and is expected to be constrained by court preferences.

Citizen ideology is measured using the Berry et al. (1998) measure of citizen ideology. The Berry et al. measure is based on interest group ratings of members of Congress as well as election results. The Berry et al. measure is attractive because it accounts for changes in citizen ideology across time, and it is more precise than previous measures of citizen ideology because it considers the share of the electorate supporting certain candidates rather than simply the electoral outcome. The measure is on a 0-100 scale with higher numbers representing increased liberalism. For the purposes of my

analysis, conservative citizen ideology is conceptualized as one standard deviation below the mean ideology.

Pro-reform news coverage is measured as the number of news stories in each state/year which contain the phrase “frivolous lawsuits”. This data was collected by the author using Lexis/Nexus. As I mentioned in Chapter I, pro-reform news coverage has varied across both time and space. Figure 3.1 shows the number of stories containing the phrase “frivolous lawsuits” across the states in 2000.

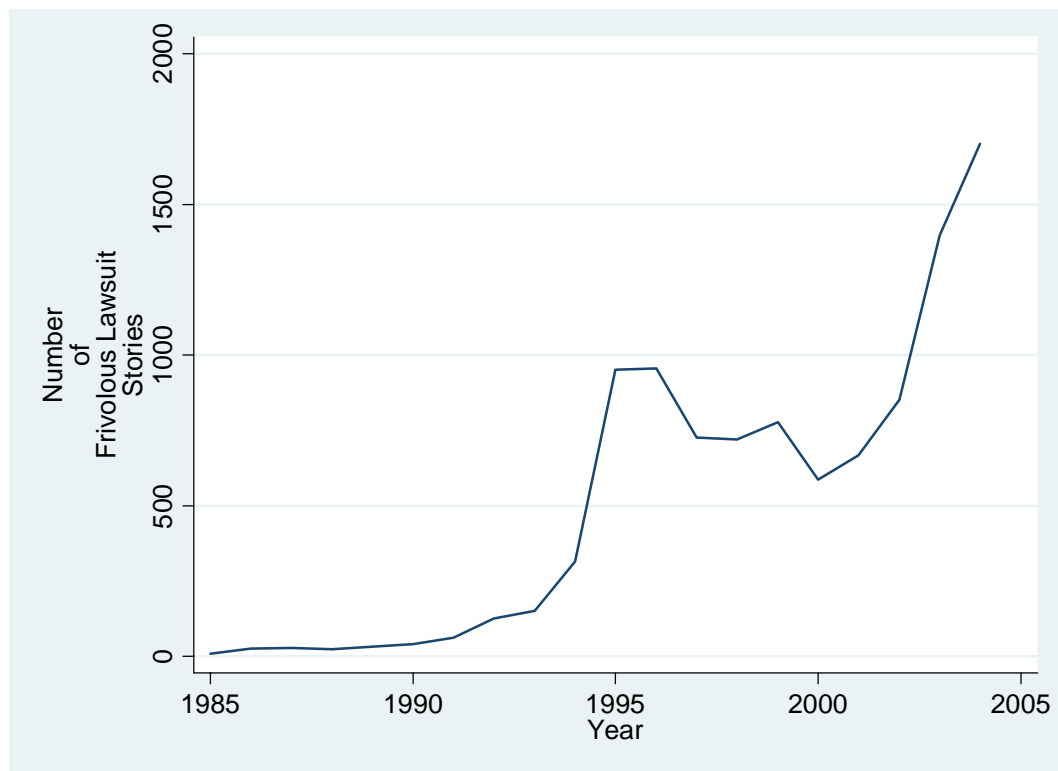
Figure 3.1 Pro-Reform News Coverage across the States in 2000



Red= 51-100 stories
Orange= 21-50 stories
Yellow=10-20 stories
Green=1-9 stories
Blue=0 stories

Figure 3.2 demonstrates how the news coverage has changed over time. While in the initial years of the movement pro-reform news coverage was scarce, there was a country-wide increase in coverage 1990 -1995 and 2000-2005.

Figure 3.2 Pro-Reform News Coverage across Time



In summary, constrained environment is a dichotomous variable equal to one when one of these conditions does not hold: pro-reform news coverage, ATRA influence, and conservative citizens. In order to test the conditional relationship between the political environment and court preferences, this dichotomous variable is interacted with a measure of court hostility. As discussed previously, court hostility is expressed in

terms of both court ideology and court professionalism. Court ideology is captured using the Brace et al. (2001) PAJID measure of judicial ideology in which higher scores indicate increased liberalism. The PAJID measure of judicial ideology uses the Berry et al. measure of either elite or citizen ideology at the time of the justices initial selection to the bench (using the elite measure for appointed justices and the citizen measure of elected justices) and weighs these scores by the justice's political party (Brace Langer, Hall 2001). Court professionalism is operationalized through the Squire (2007) measure of court professionalism which includes indicators of pay, staff resources, and docket control. Higher numbers indicate increased professionalism. Courts that are well funded, staffed, and have more discretion over their dockets are considered more professional. Court hostility is an interaction between court professional and court ideology. Hence, the most hostile state supreme court is one in which justices are both liberal and professional.

The Berry et al. (1998) measure of state elite ideology is used as a surrogate measure of legislative ideology. The Berry et al. measure is an annual measure of state elite ideology based on interest group rating of members of Congress and takes into account the relative strength of the political parties in both chambers of the legislative branch and the governorship. The Berry et al. measure is one a 0-100 scale with higher numbers representing increased liberalism. While, the Berry et al. measure is the best surrogate measure of legislative ideology available for the time period studied, I must note that the measure is only a surrogate for legislative ideology and cannot be used to distinguish between legislative and gubernatorial preferences. Thus, I include a measure of gubernatorial support to try to isolate the effect of gubernatorial preferences.

Gubernatorial support is a dichotomous variable equal to one when the governor is Republican and zero otherwise.

Legislative professionalism is captured through the Squire (2007) measure which includes indicators of pay, session length, and staff resources. These indicators are expected to reflect a legislature's ability to act. Legislatures that have better paid members, longer session lengths, and more staff resources are considered more professional. The measure is available for 1979, 1986, 1996, and 2003 and the data is extrapolated for additional years. Higher values represent more professional legislatures. Divided party control is also a dichotomous variable, equal to one when different parties control the two houses of the legislature or different parties control the legislature and the governorship. These data were collected from Carl Klarner's Partisan Balance Dataset, available through *The State Politics and Policy Quarterly Data Resource*.

Neighboring state enactments is the percentage of states in the preceding year that enacted tort reform legislation. This variable was computed by the author using the Avraham (2006) "Database of State Tort Reforms". Insurance premiums is an interval level variable indicating the insurance premiums for each year divided by the consumer price index. This variable was collected from the *Statistical Abstract of the United States* available through the U.S. Census Bureau, and does not vary across states. Civil filings is an interval level variable of the number of civil filings in the state trial courts of general jurisdiction divided by the population in each state/year. This data was available through the Bureau of Justice Statistics and National Center for State Courts' Statistics Project *State Court Caseload Summary Statistics*.

Table 3.1 summarizes the relationships I expect between the independent variables and the likelihood of state legislature enacting a tort reform statute. When the political environment is not supportive, court hostility is expected to decrease the likelihood of enactment. Legislative liberalism and divided party control are also expected to decrease the likelihood of enactment. Increased legislative professionalism, gubernatorial support, and neighboring state enactments are expected to increase the likelihood of enactment. Additionally, an increase in insurance premiums and civil filings is expected to increase the likelihood of enactment.

Table 3.1 Expected Relationships between the Independent Variables and the Likelihood of Enactment

Independent Variables	Likelihood of Enactment
Environment Type x Court Hostility	--
Legislative Liberalism	--
Legislative Professionalism	+
Divided Party Control	--
Gubernatorial Support	+
Neighboring State Enactments	+
Insurance Premiums	+
Civil Filings	+

Results

Table 3.2 Stratified Cox Model of Legislative Tort Reform Enactments 1975-2004

Covariate	Coefficient	Standard Error	Z-Zone
Environment x Court	-.020	.013	-1.56*
Court Liberalism	.014	.009	1.68**
Court Professionalism	-.230	.774	-.290
Positive News Coverage	.822	.191	4.29**
ATRA Presence	-29.499	374	.000
Citizen Ideology	.013	.010	1.34*
Legislative Liberalism	-.020	.008	-2.34**
Legislative Professionalism	2.030	.899	2.25**
Divided Party Control	-.361	.184	1.96**
Gubernatorial Support	.057	.293	.190
Neighboring State Enactments	.750	1.151	.650
Insurance Premiums	.003	.003	1.20
Civil Filings	.005	.003	1.66**

Observations 3,493

LR2 22.76

Log Likelihood -472.826

*Significant at the .1 level or better; ** Significant the .05 level or better

Table 3.2 presents the results of the Stratified Cox regression analysis of the timing of tort reform statutes. The signs on the coefficients indicate whether the covariates are associated with an increase or decrease in the likelihood of enactment. Positive coefficients mean that the variable decreases the time until enactment, while negative coefficients mean that the variable increases the time until enactment. A number of variables achieve statistical significance in the expected direction. The interaction between the political environment and court preferences, legislative liberalism, legislative professionalism, divided party control, news coverage, and civil filings, are all statistically significant in the expected direction at the .10 level or better. Court professionalism (taken alone), ATRA presence (taken alone), insurance premiums,

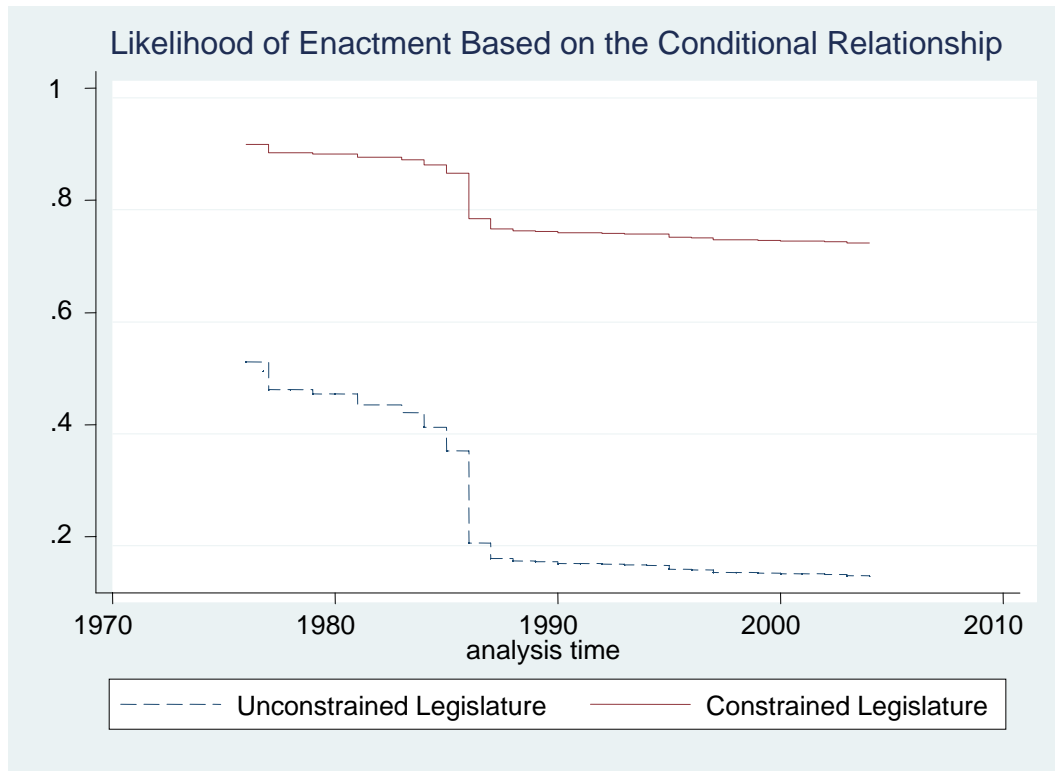
gubernatorial support, and neighboring state enactment fail to achieve significance at any respectable level.

The results support the conclusion that a conditional relationship exists between the political environment and the preferences of the court in influencing a legislature's decision to enact. When the political environment is not supportive, the preferences of the court have a very salient effect on legislative decision-making. The likelihood of enactment decreases as court hostility increases. In other words, as a court becomes increasingly liberal and professional, the legislature is less likely to enact. Figure 3.3 shows the difference in enactment rates when a legislature is unconstrained, meaning that the political environment is supportive, versus when the legislature is most constrained, meaning that the political environment is not supportive and the court is both liberal and professional. We can see graphically that when the political environment is hostile, court preferences have a significant effect on both the rate and likelihood of enactment.

When the legislature is in a supportive political environment, in 2005 the likelihood of a state not having enacted a tort reform statute is at nearly zero, meaning that state legislature operating within a supportive environment is almost one hundred percent likely to have enacted a tort reform statute by 2005. However, when the political environment is not supportive, court hostility significantly reduces the likelihood of enactment. The likelihood of non-enactment in 2005 is over seventy percent, meaning that when the environment and court are both hostile, the likelihood of enactment is less than thirty percent. An unconstrained legislature is over seventy percent more likely to enact a tort reform statute than a legislature that must face a hostile court in a less than

supportive environment. When a legislature cannot retaliate, court hostility dramatically decreases the likelihood of enactment.

Figure 3.3 Interaction Effect: Court Hostility x Political Environment on Decision to Enact Tort Reform Legislation

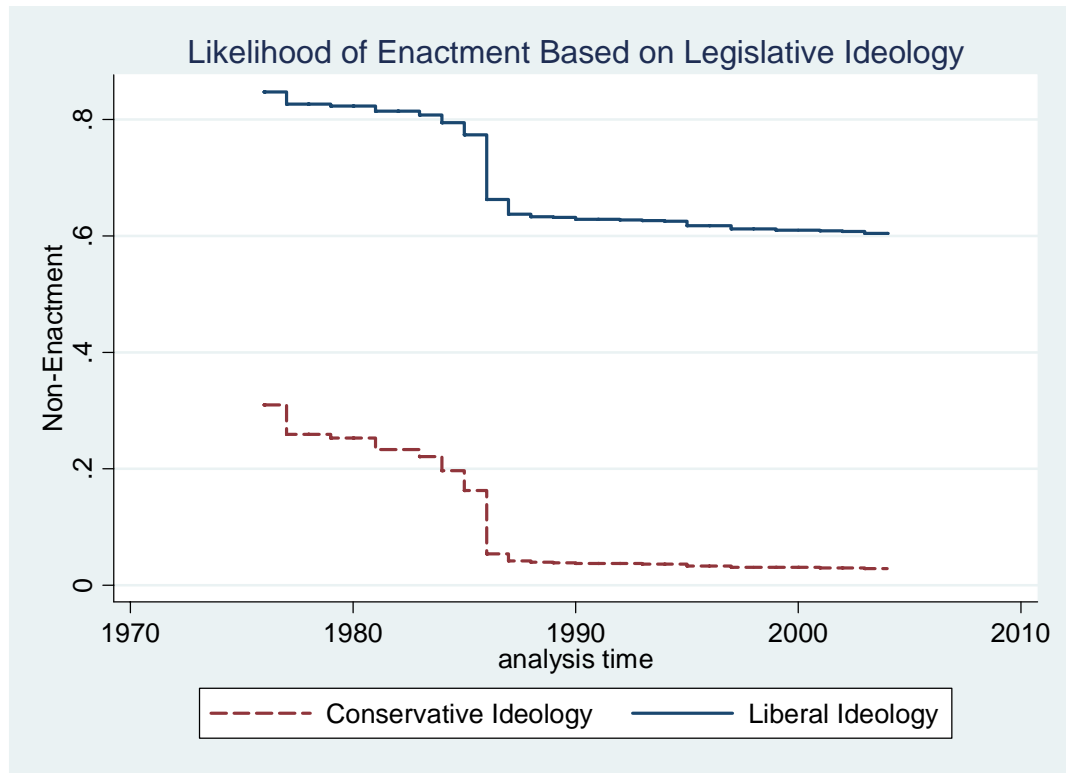


Contrary to hypothesis, court liberalism alone increases rather than decreases the likelihood of enactment – and its effect would have been statistically significant (at .05) had I hypothesized its positive effect in advance. This finding also supports the conclusion that the relationship between court preferences and legislative decision-making is conditioned by the political environment. In general, a legislature may be more likely to enact tort reform statutes in states with liberal courts because the tort reforms are meant to curb liberal court decisions. However, when the political

environment is hostile, court liberalism decreases the likelihood of enactment because the legislature does not have the political capital necessary to retaliate against the court. Court preferences only encourage strategic behavior by state legislators when the political environment is not supportive. As long as the state legislators can mobilize public support for tort reforms, they behave sincerely by enacting reforms to counter liberal court doctrines.

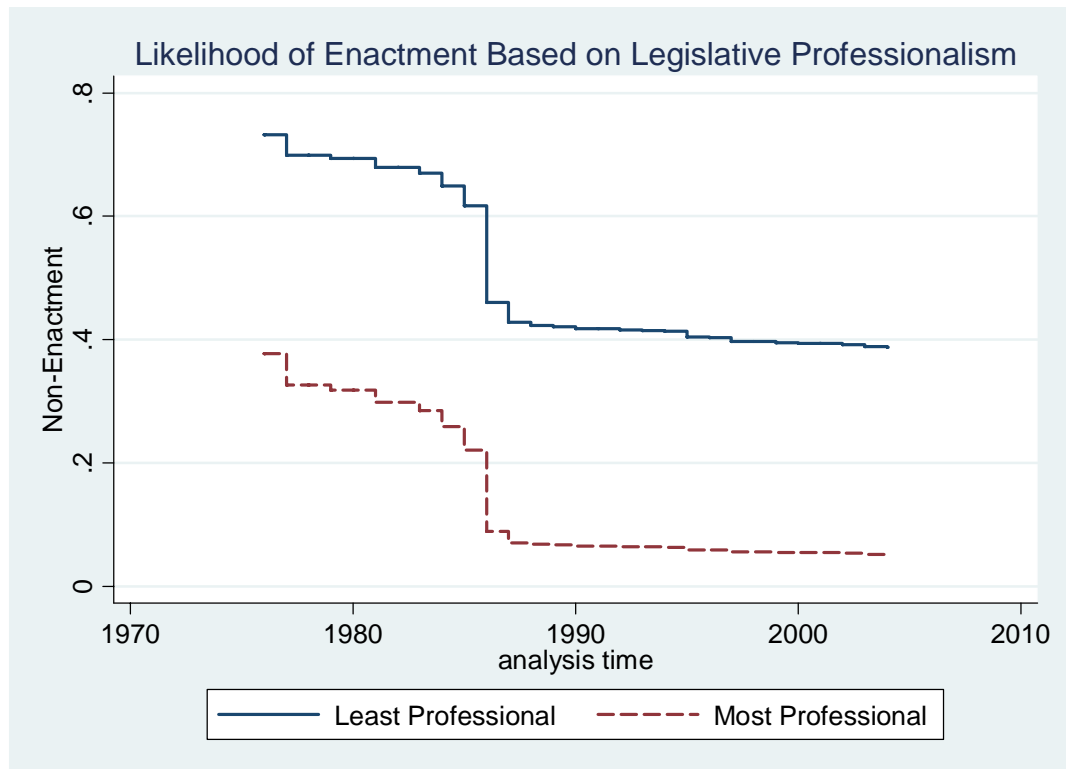
In addition to the interactive effect, a number of other independent variables have a salient effect on legislative decision-making. As expected, legislative liberalism decreases the likelihood of enactment. Figure 3.4 shows the differences in enactment rates between the most liberal state legislature and the most conservative state legislature. Legislative liberalism decreases both the rate and likelihood of enactment. The likelihood of the most conservative state legislature having a tort reform statute enacted by 2005 is almost one hundred percent compared to only forty percent for the most liberal state legislature. However, while the effect of legislative ideology is quite substantial, the change in rates is slightly less than the change between an unconstrained and constrained legislature, as explained above. While state legislators are influenced by their own policy preferences, they must often act strategically in light of the policy preferences of the broader political environment including the judicial branch.

Figure 3.4 Effect of Legislative Ideology on the Decision to Enact Tort Reform Legislation



While state legislators are influenced by their policy preferences, they are also affected by institutional concerns. Figure 3.5 shows the difference in rate of enactment between the most professional and least professional state legislature. The more professional state legislature is 35 percent more likely to have enacted a tort reform statute by 2005 than the least professional legislature. Institutional resources influence a legislature's ability to successfully enact legislation. The relative cost of enacting legislation is less for a more professional state legislature.

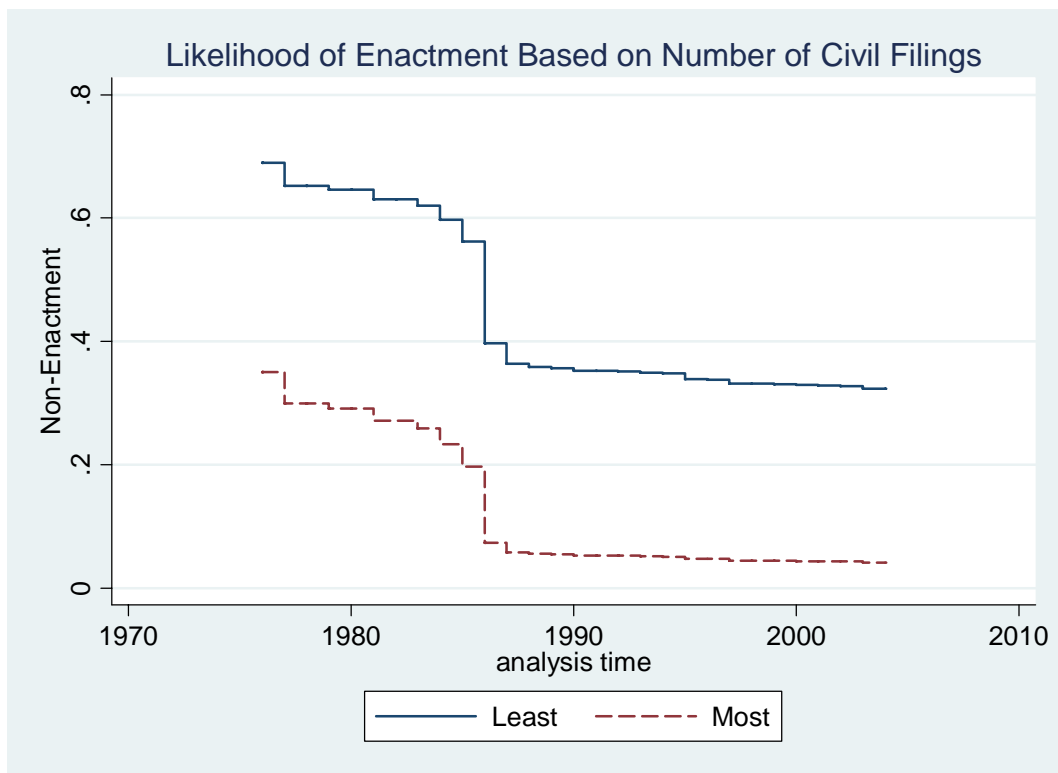
Figure 3.5 Effect of Legislative Professionalism on the Decision to Enact Tort Reform Legislation



Three additional inter-institutional factors also have a significant effect on the legislative enactment of tort reform statutes. Divided control of government leads to an increase in the time until enactment. This result is in line with previous studies that demonstrated that legislatures are more productive under unified control. There is also some evidence that an actual need for tort reform rather than simply a perceived need has influenced the decision of state legislators to enact tort reform statutes. As the rate of civil filings increase, the rate and likelihood of enactment increases as well. A rise in the amount of civil filings has a salient effect on the enactment of tort reform legislation.

Figure 3.6 displays the difference in enactment when the number of civil filings is held at its minimum and maximum values. When the number of civil filings peak, the likelihood of enactment is near one hundred percent in 2005 compared to less than seventy percent when the number of civil filings is held at its minimum. An increase in the number of civil filings seems to be an appropriate indicator of the necessity of tort reform. When legislators witness an increase in the number of civil cases filed they are more likely to enact tort reform legislation.

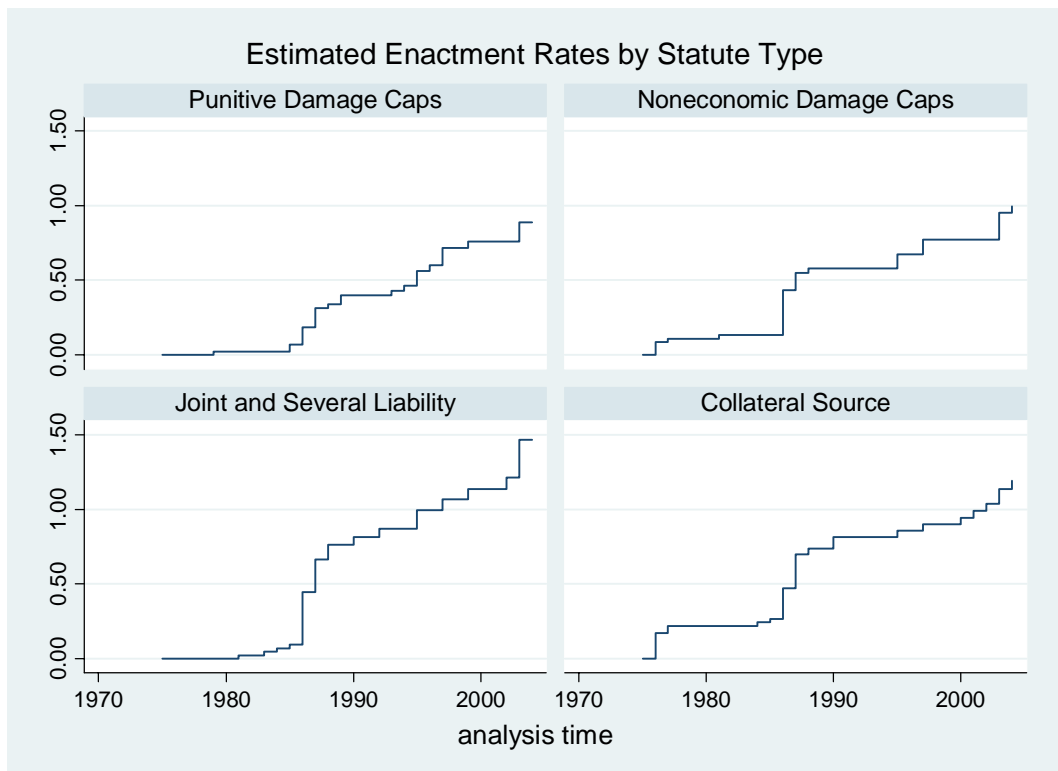
Figure 3.6 Effect of Increase in Civil Filings on the Decision to Enact Tort Reform Legislation



In addition, the model demonstrates that the rate and likelihood of enactment differs according to statute type. Note the difference in enactment rates across the four different types of tort reform statutes. The graphical representation of the rates, as seen in

Figure 3.7, supports my decision to use a Stratified Cox model. Forcing the statute types to assume the same baseline hazard rate of enactment would have distorted my conclusions. The differences seen between the statute types support my contention that some tort reform statutes are viewed as more controversial than others and this affects the rate of enactment. Statutes abolishing joint and several liability and collateral source benefits were enacted at a faster rate than legislative damage caps.

Figure 3.7 Enactment Rates by Tort Reform Statute Type



Only five of the independent variables, court professionalism (taken alone), ATRA presence (taken alone), gubernatorial support, insurance premiums, and neighboring state enactments failed to achieve statistical significance. The failure of

court professionalism to achieve statistical significance is not a surprise. I hypothesized that a state legislature only has to consider the preferences of the state supreme courts when it cannot retaliate. Thus, while court professionalism plays a salient role in influencing legislative decision-making through the conditional relationship, court professionalism alone does not have an effect on a legislature's decision to enact. The failure of gubernatorial support to achieve statistical significance is not particularly surprising either. As I mentioned earlier, the surrogate measure of legislative ideology in the model also takes into account the preferences of the executive branch. While I included the party of the governor to try to isolate the effect of gubernatorial preferences, it is possible that the Berry et al. measure of elite ideology actually captures the preferences of the executive branch more accurately than mere party identification. Or perhaps, because the analysis spans such a large time span, republicanism does not accurately capture conservatism.

Instead of a policy diffusion effect, it appears that similar forces have affected the likelihood of tort reform statutes being enacted across the states during certain time periods. As can be seen in Figures 3.3 through 3.6, a number of states chose to enact statutes in the mid-1980's during the perceived "medical malpractice crisis". Rather than a policy diffusion effect in which a state enacts a tort reform statute and neighboring states then follow suit, the broader political environment seems to have encouraged policy change across states at the same time. While variations among the states made some states more conducive to reform than other states, there were periods of time when the overall climate was more favorable to reform.

Conclusion

The SSOP model, introduced in Chapter II, highlighted the interdependent nature of state policy making. The three different stages of the policy-making process: the legislature's decision to enact, the court's decision whether to take the case, and the decision-on-the-merits stage are all inherently intertwined. While the exercise of judicial review has been studied as an example of courts' salient role in the state policy-making process, the preemptive power of a court to influence policy-making at the enactment stage has not been given adequate attention (for notable exceptions see Langer and Brace 2005, Wilhelm 2005).

In this chapter, I explored how the interdependent relationship between the state legislatures and state courts might promote strategic behavior at the legislative enactment stage. My empirical results support the predictions derived from the SSOP model, and suggest that the role of the court in the policy-making process may be more complicated than previously thought. The strategic relationship between a state legislature and supreme court is defined by the nature of a state's political environment. While state supreme courts may have preemptive power over the enactment of legislation, the power is not absolute. As my equilibria predictions and Stratified Cox results demonstrate, the relationship between the coordinate branches is dependent upon the decision-making environment.

When the political environment is supportive, a state legislature can enact tort reform legislation regardless of the preferences of the judicial branch. However, when a state legislature cannot rely on sufficient mobilization of public support, retaliation against the court can be very costly. When the legislature cannot retaliate, court

preferences significantly influence legislative decision-making. When the political environment is not sufficiently supportive, court hostility encourages strategic behavior by state legislatures. A legislature that does not fear retaliation is seventy percent more likely to enact tort reform legislation than a constrained legislature facing a hostile court.

Moreover, the model demonstrates that ideology is not the only salient predictor of legislative behavior. Institutional features also affect the strategic interaction between state elite actors. In the battle to define tort law, state legislatures and courts must rely on institutional resources in order to translate their preferences into policy outcomes. More professional state legislatures have more policy success than less professional state legislatures. Additionally, more professional state supreme courts pose more of a threat to state legislatures because they have both the desire and ability to shape public policy.

The results of this analysis support my argument that public policy is best viewed as the end result of the interaction between institutional structure, the political environment, and the preferences of elite actors. Through both the SSOP and Stratified Cox statistical models, I was able to further refine the conditions under which state legislatures are expected to be constrained in the policy-making process. In the context of state tort reform, state legislators behave strategically by declining to enact legislation when facing a hostile court in a non supportive environment. In the next chapter, I explore the conditions under which state supreme court justices are constrained at the agenda-setting stage.

CHAPTER IV

THE AGENDA-SETTING STAGE

In order to accurately capture the strategic behavior of justices in exercising the power of judicial review, the two stages of judicial decision-making must be considered: the agenda-setting stage and the decision-on-the-merits stage. At the state supreme court level, justices first decide to hear a case by granting review and then make a decision on the outcome by voting on the merits. When policy-making is viewed as a separation of powers game, it becomes clear that the two stages of decision-making are interdependent and that strategic behavior is not limited to the decision-on-the merits stage. If justices fear public backlash or retaliation by the legislative branch, they might behave strategically at the agenda-setting stage by refusing to grant review. Hence, in order to fully understand the strategic relationship between the coordinate branches, we must consider judicial behavior at each stage of the decision-making process, beginning with the decision to accept, rather than avoid, a judicial review challenge.

The agenda-setting is in itself comprised of two different stages (Langer 2002). First, a litigant must appeal a lower court decision to the state supreme court. Second, the court must decide to resolve the constitutional challenge raised by the litigants. Hence, even a state supreme court with a mandatory docket can behave strategically at the agenda-setting stage. A court may have to put a case on its docket, but it can still decide whether or not to rule on the substantive merits of the case. Langer (2002) discusses how certain legal thresholds - standing, mootness, jurisdiction and others - might serve as gatekeeping mechanisms that allow courts to avoid ruling on a constitutional challenge. State supreme courts can also choose to simply dismiss the judicial review challenge and

resolve other issues raised by the litigants. Choice exists in whether or not to resolve a judicial review challenge, and therefore so does the potential for strategic behavior. I expect that institutional features and the broader political environment will define the strategic relationship between the court and the legislature at the agenda-setting stage, just as they define a legislature's decision to enact. The SSOP model developed in Chapter II makes predictions about the conditions under which justices are constrained when deciding whether to resolve a constitutional challenge. Before discussing the implications of the SSOP model, I will briefly highlight research supporting a strategic approach to understanding judicial decision making at the agenda-setting stage.

Strategic Behavior at the Agenda-Setting Stage

Scholars have long acknowledged the relationship between the two stages of judicial decision-making and potential for strategic behavior; however, much of this research has been focused on the US Supreme Court. Much evidence suggests that justices make strategic decisions at the agenda-setting stage by looking ahead to the expected outcome on the merits. Schubert (1959) first considered whether justices behave strategically when voting to grant *writs of certiorari*, and found evidence that justices' votes were related to their preferred outcome on the merits. Sidney Ulmer (1972) was the first to theorize that justices pursue an "error correction" strategy, deriving more of a benefit from reversing rather than upholding lower court decisions. He hypothesized that justices would behave strategically at the agenda-setting stage by voting against granting cert when they supported the lower court decision. Ulmer (1972) found evidence of this type of strategic behavior on the US Supreme Court, a finding

later substantiated by the work of Brenner (1979), Palmer (1982) and Brenner and Krol (1989).

Palmer (1982) found a positive relationship between a vote to grant cert and the decision on the merits to reverse the lower court; he also found a positive relationship between a vote to grant cert and a vote with the majority at the merit stage. Perry (1991) found that justices engage in what he labeled as “defensive denials” and “aggressive grants” when voting on cert petitions. A justice votes a “defensive denial” when his or her preferred outcome appears unlikely to prevail at the merits stage; an aggressive grant vote conversely occurs when a justice is confident that his or her preferred outcome will be decided. Boucher and Segal (1995) examined the extent to which Supreme Court justices engage in aggressive grants and defensive denials and found that justices engage in aggressive grants but not defensive denials. Justices who support affirming the lower court decision consider the likely outcome at the merits stage when voting whether to grant cert. Additionally, Epstein and Knight (1998) demonstrated that justices engage in both forward thinking and bargaining during the cert process. This research provides compelling evidence that justices behave strategically at the cert stage with a mind to the merits stage. Justices attempt to protect preferred policy from lower courts from reversal in an unfavorable court environment as well as expand the scope of the preferred policy when in a favorable court environment.

Many scholars have noted the interdependence of the two stages of judicial decision making and have found ample evidence that justices behave strategically at the agenda-setting stage in anticipation of the future actions of their colleagues. However, strategic behavior in light of other actors in the separation of powers system has been far

less studied at the agenda-setting stage, though notable exceptions do exist. Brace, Hall, and Langer (1999) found that inter-institutional features affect state supreme court decisions to hear challenges to state abortion statutes. Justices pay attention to the likely reactions of the coordinate branch and certain institutional features encourage strategic behavior. Brace, Hall, and Langer (1999) found that divided government, selection method, docket control, and term length all significantly affected the likelihood of a state supreme court having a docketed judicial review case.

Langer (2002) found similar results in her study of the judicial review of campaign and election law, worker's and unemployment compensation law, and welfare benefit law. Langer found that state supreme court justices behave as if they are constrained by the preferences of the legislative branch in cases of election and campaign law. The presence of divergent supreme court and legislature preferences decrease the likelihood of a state supreme court having a docketed judicial review case. However, justices appear to behave sincerely regarding cases of worker and unemployment compensation and welfare benefits. Langer (2002) argued that state supreme court justices are constrained by the preferences of the legislative branch in campaign and election law cases because it is an issue area particularly salient to elite actors. The court's exercise of judicial review directly affects the reelection chances of other elite actors.

Sticko-Neubauer (2006) further considered how either elite or mass preferences might affect a court's propensity to hear a judicial review challenge, dependent upon the type of case and different institutional features. Contrary to Langer, Stricko-Neubauer (2006) found no evidence that justices are constrained by elite preferences regarding

campaign and election law. However, Stricko-Neubauer (2006) did find evidence of strategic behavior at the agenda-setting stage regarding social issue cases. Stricko-Neubauer (2006) found that preference divergence decreased the likelihood of a court hearing a judicial review challenge when justices are retained by state elites.

While some evidence exists that state supreme court justices take into account elite preferences when choosing whether to engage in judicial review, the evidence is scant and sometimes even contradictory. And, though scholars have sought to identify the conditions under which strategic rather than sincere behavior is most likely, the relationship between the broader political environment and elite behavior has been under emphasized. The SSOP model I developed in Chapter II formalizes the relationship between elite preferences, institutional structure, and the political environment, and allows for predictions regarding when justices are expected to be constrained at the agenda-setting stage of judicial review.

The SSOP Model at the Agenda-Setting Stage

The SSOP model's thresholds define a supportive court's decision between avoiding a statutory challenge and upholding a statute, and a hostile court's decision between avoiding and striking down a statutory challenge. The decision to avoid weakly dominates a supportive court's decision to uphold. The logic behind this outcome is similar to the logic behind the "error correcting" strategy. Justices derive more utility from striking down statutes that are contrary to their policy preferences than they do from upholding statutes which support their policy preferences. If justices agree with the status quo, they have less incentive to review a case. Additionally, the SSOP model

suggests that the political environment plays a salient role in a court's decision whether to decide a judicial review challenge. If the court suspects the political environment does not support the preferences of the judicial branch, it has even less of an incentive to assert its own position when it supports the status quo.

The SSOP model suggests that court hostility should increase the likelihood of a court having a docketed judicial review when the legislature cannot retaliate. A supportive court does not have an incentive to change the status quo, whereas a hostile one receives a policy payoff when choosing to rule on the merits. However, this effect is only expected when the court is unconstrained by the state legislature. When the legislature can retaliate against a hostile court, the court will always choose to avoid, rather than strike down, a statutory challenge. As discussed in the previous chapter, the legislature has the political capital to retaliate against a hostile court when the political environment reaches a certain threshold of support. Once again, the SSOP model suggests that a conditional relationship exists between the political environment and elite preferences. When the political environment is supportive (i.e. the legislature can retaliate), preference divergence between the legislature and the court should decrease the likelihood of a docketed judicial review challenge.

The SSOP model demonstrates that the political environment and public opinion have both a direct and also indirect effect on the behavior of justices at the agenda-setting stage. All justices must consider the political environment because it provides cues about when legislative retaliation is likely to occur. Hence, the political environment is expected to have an indirect effect on the decision-making of state supreme court justices. Additionally, mass public opinion is expected to exert a direct effect on the behavior of

some justices. Different selection and retention methods link the justices' futures to both the mass public and also to other elite actors by varying degrees.

The SSOP model shows that the probability of a court hearing a judicial review challenge changes when the justices are beholden to public opinion. When justices face competitive reelections, the cost of opposing public opinion can be particularly high. Therefore, the SSOP model predicts that when justices face competitive retention elections, public opinion will act as a direct constraint on their behavior when their policy preferences diverge from the preferences of the mass public. Under this scenario, a court will be more likely to avoid ruling on a judicial review challenge. The option of avoiding the controversy allows the court to avoid paying a public opinion cost.

However, as discussed in Chapter II, the option of avoiding a judicial review challenge is not equally accessible across the fifty state supreme courts. For instance, nineteen state supreme courts have mandatory dockets for civil appeals. Though these state supreme courts can still rely on gatekeeping mechanisms to avoid ruling on the constitutional challenge, strategic avoidance is not as effortless for these courts as for courts that can simply deny review. Additionally, gatekeeping mechanisms or the refusal to resolve the constitutional challenge within a docketed case might actually draw more attention to the behavior of the court, denying the court the benefits of avoidance. Hence, the SSOP model suggests that when the court has a mandatory docket, it will be more likely to engage in judicial review.

The SSOP model sheds light on the conditions under which courts are expected to review challenges to tort reform statutes. Specific hypotheses derived from the SSOP model are discussed in the next section. However, the SSOP model only focuses on how

a few key independent variables affect a court's decision-making calculus. Additional variables which might affect the likelihood of a court hearing a docketed judicial review case are also considered in the proceeding section.

Hypotheses

When a court is unconstrained, meaning that it does not fear retaliation, preference divergence between the court and legislature is expected to increase the likelihood of a court having a docketed judicial review challenge. A state supreme court is expected to be unconstrained when the political environment is less supportive of tort reform. As in Chapter II, a supportive political environment is defined as one in which the American Tort Reform Association is active, there is pro-reform news coverage, and citizens are conservative. When one or more of these conditions does not hold, the state legislature does not have the political capital to retaliate against the court. When the court does not expect retaliation, it can behave sincerely. As the court is increasingly more liberal than the state legislature, the likelihood of the court hearing a judicial review challenge should increase because a court receives more of a payoff for challenging rather than accepting the status quo.²

However, when the political environment is supportive of tort reform, divergent preferences should decrease the likelihood of a docketed tort reform challenge. When a hostile court fears retaliation, it will avoid ruling on a judicial review challenge because it

² One potential problem is deciding where the status quo stands if a lower court has invalidated a tort reform statute. I argue that the state supreme courts do not consider the status quo changed until it has ruled on the merits. Conflicting lower court decisions preserve the status quo because citizens cannot rely on a definitive definition of the law. This type of reasoning by state supreme court justices is supported by research that demonstrates that state supreme court justices are more likely to invalidate state laws if lower courts have found the law unconstitutional (Emmert 1992, Langer 2002).

cannot decide according to its sincere preferences. Hence, when the political environment is supportive, more liberal state supreme courts should be less likely to have a docketed tort reform challenge when they face conservative state legislatures. Thus, I hypothesize,

H1: When the political environment is supportive, the likelihood of a docketed tort reform challenge decreases as the ideological distance between the court and legislature increases.

State supreme courts as a whole look to the political environment to assess the retaliatory strength of the legislative branch, but justices retained through competitive elections must also be concerned with electoral retaliation. When justices face competitive retention elections their fate is ultimately tied to the preferences of the mass public. Thus, when justices are more liberal than their constituents they risk retaliation when asserting their sincere preferences regarding tort reform. Liberal justices are expected to behave strategically in light of this threat by avoiding a tort reform challenge.

Hence,

H2: When justices are retained by competitive retention elections, the likelihood of a docketed tort reform challenge decreases as the ideological distance between the court and the mass public increases.

By avoiding ruling on a tort reform challenge, justices opposed to tort reform can shirk retaliation without having to rule against their sincere preferences at the decision on the merits stage. In the previous section, I argued that some courts have more of an opportunity to engage in this type of strategic behavior. The presence of an intermediate appellate court is identified as institutional feature that provides state supreme courts with more discretion over their dockets (Glick 1991; Brace, Hall, Langer 1999; Langer 2002).

Thus, the presence of an intermediate appellate court might facilitate the strategic deflection of controversial cases.

However, while this effect seems entirely plausible, other scholars have found that the presence of an intermediate appellate court increases the likelihood of a court hearing a judicial review challenge (Langer 2002; Stricko-Neubauer 2006). Intermediate courts might increase the likelihood of judicial review by decreasing the workload of state supreme court justices and filtering through more mundane cases so that only the most complex and difficult cases are appealed to the state supreme court (Langer 2002; Stricko-Neubauer 2006). Additionally, an intermediate appellate court might lead to increased inter-court conflict and thus increased likelihood of judicial review (Langer 2002). In this light, the presence of an intermediate appellate court might make strategic avoidance easier, but it might also provide justices with an opportunity to choose cases which are the best vehicles for advancing their policy preferences. Considering this, I offer a two-tailed hypothesis,

H3: The presence of an intermediate appellate court should increase/decrease the likelihood of a docketed tort reform challenge.

Beyond the relationships highlighted by the SSOP model, a number of other factors might influence the strategic relationship between the legislature and the court. Different institutional features affect both the court's ability to act and the legislature's ability to retaliate against a hostile court. As discussed in the previous chapters, court professionalism is expected to influence a court's desire and ability to act. More professional courts are expected to resent legislative invasion into their "turf" and also feel more confident about standing up to the legislature. Also, more professional state courts have the resources necessary to challenge the state legislature. Hence,

H4: The likelihood of a docketed tort reform challenge should increase with an increase in court professionalism.

In contrast, increased legislative professionalism should decrease the ability of a court to assert its sincere preferences into the policy-making process. When a state legislature is more professional, it is also expected to have the incentive and ability to act, meaning that state supreme courts should fear retaliation from more professional state legislatures. Thus,

H5: The likelihood of a docketed tort reform challenge should decrease with an increase in legislative professionalism.

State supreme courts should be less constrained during periods of divided government. The ability of a state legislature to retaliate against a court should decrease under periods of divided government because retaliation requires coordination between the legislative chambers and among the executive and legislative branch. A state legislature will have a more difficult time enacting a new tort reform statute or engaging in a constitutional override when the government is divided (Brace, Hall, Langer 1999; Langer 2002; Stricko-Neubauer 2006).

H6: The likelihood of a docketed tort reform challenge will increase under periods of divided government.

Constitutional override of a judicial decision is an extreme form of retaliation against the court. Constitutional amendment not only reverses the decision of the court but also affects the options available to future justices (Langer 2002). Because state constitutions are more easily amended than the United States Constitution, constitutional override is a relevant concern for state supreme court justices when deciding whether to engage in judicial review (Langer 2002). Some state supreme courts are expected to fear retaliation through constitutional override more acutely than others because the difficulty

in amending state constitutions varies across states. Some state constitutions require a two-thirds vote in the legislature and subsequent approval by the electorate in order to amend the constitutions. In these states, the difficult amendment procedure is expected to decrease the court's fear of constitutional override.

H7: The likelihood of docketed tort reform challenge will increase in states with a difficult amendment procedure.

Longer term lengths have been shown to increase the likelihood of court hearing a judicial review challenge (Brace, Hall, and Langer 1999; Langer 2002). Longer terms lengths increase judicial independence and decrease judicial accountability to the public and other elite actors. Justices with longer term lengths are expected to be able to pursue their sincere preferences with less constraint because they are less fearful of a negative retention vote (Langer 2002). When justices have longer term lengths they are less likely to be punished by the public or other elite actors for one particular decision (Stricko-Neubauer 2006). Therefore, I expect,

H8: The likelihood of docketed tort reform challenge will increase as judicial term length increases.

In summary, a court's decision to exercise judicial review is influenced by a number of different factors. When deciding whether to engage in judicial review, a court behaves strategically by looking ahead to the expected reaction of both the state legislature and mass public. A court is constrained by the preferences of other actors in the system when institutional and environmental factors facilitate legislative or electoral retaliation. Table 4.1 summarizes the relationships I expect between these different factors and the likelihood of a court hearing a tort reform challenge.

Table 4.1 Expected Relationships between the Independent Variables and the Likelihood of a Court Hearing a Tort Reform Challenge

Independent Variables	Likelihood of a Docketed Case
Supportive Environment x (Court Liberalism-Legislative Liberalism)	-
Elected Court x (Court Liberalism-Mass Public Liberalism)	-
Intermediate Appellate Court	-- or +
Increased Court Professionalism	+
Increased Legislative Professionalism	--
Divided Government	+
Difficult Amendment Procedure	+
Longer Term Lengths	+

Research Design and Methodology

The Dependent Variable

The hypotheses articulated in the previous section are examined by considering the existence of cases challenging the constitutionality of legislative tort reform statutes on state supreme court dockets across all fifty states between 1975 and 2004. Agenda-setting is conceptualized here as the existence of a docketed tort reform challenge, rather than an actual vote at the agenda-setting stage because state supreme courts do not record their decisions to accept or deny hearing a case (Langer 2002). Therefore, the dependent variable is a dichotomous realization of whether a state supreme court has a case challenging the constitutionality of a tort reform statute on its docket in a given year. I focus on challenges to the four types of statutes considered in Chapter III: 1) caps on punitive damages; 2) caps on noneconomic damages; 3) statutes abolishing joint and several liability; 4) statutes abolishing the collateral source rule.

I have chosen to employ Stratified Cox methodology for the same reasons outlined in Chapter III. First, I have chosen an event history model because I am interested in the overall likelihood of a court hearing a tort reform challenge, as well as how my independent variables influence the timing of when it chooses to hear a challenge. Second, I have chosen the Stratified Cox model, in particular, because the likelihood and rate of a court docketing a tort reform challenge might vary across the four different statute types. In Chapter III, the rates of enactment differed according to statutes type, with state legislatures enacting statutes abolishing joint and several liability and the collateral source rule at faster rates than damage caps. Similarly, I do not expect state supreme courts to accept cases challenging the constitutionality of these statute types at the same rate. Courts might be more likely to rule on statutes abolishing joint and several liability and the collateral source rule sooner after enactment because these statutes are considered less controversial than damage cap statutes. Or instead, courts might be more likely to accept cases challenging damage cap statutes at a faster rate because of their policy salience.

The Stratified Cox Model estimates the likelihood of a challenge to each of the statute types being heard by a state supreme court in a particular year given that it was not heard in the previous year. Logically, a state supreme court only has an opportunity to docket a case challenging a tort reform statute after a statute has been enacted. Thus, states enter the analysis at different years depending on when a state legislature enacted a particular statute type. These data, also used in Chapter III, were available from the Avraham (2006) “Database of State Tort Reforms”. Schwartz and Lorber (2001) have identified all state court decisions resolving a constitutional challenge to a tort reform

statute between 1983 and 2001 and Mark Behrens has identified the cases resolved after 2001. I identified the state court decisions prior to 1983 through a West Law search of the statute numbers of tort reform laws enacted before 1983. I have read and coded all of the state supreme court cases on a number of independent variables, one being the type of statute considered. This research provided the necessary information to construct the dependent variable for this model.

The Independent Variables

The conditional relationship expected between the political environment and elite preferences is conceptualized as an interactive variable capturing the effect of divergent preferences within a political environment in which the legislature is expected to retaliate. As in Chapter III, a supportive environment (in which retaliation is likely) is one in which the ATRA is active, there is pro-reform news coverage, and citizens are conservative. Thus, a supportive environment is a dichotomous variable equal to one when all of these conditions hold. The interaction looks at the difference between court and legislative ideology in a supportive political environment. The Brace et al. (2001) PAJID measure of judicial ideology and the Berry et al. measure of elite ideology are used as surrogates for the preferences of the state supreme courts and legislatures. Recall that both measures are on a 0-100 scale with positive numbers indicating greater liberalism. In terms of the interaction, positive numbers indicate that the court is more liberal than the state legislature. When the court is constrained (i.e. the political environment is supportive) increased court liberalism is expected to decrease the likelihood of a court having a docketed tort reform challenge.

The conditional relationship hypothesized between selection method and court-mass public preference divergence is operationalized as an interaction capturing the effect of increased court liberalism when justices are retained by competitive retention elections. Competitive elections is a dichotomous variable equal to one when justices are retained by voters in an election involving an opponent. The Berry et al. measure of citizen ideology is used as a surrogate for state public opinion and positive numbers indicate that the state supreme court is more liberal. When justices are retained through competitive retention elections, increased court liberalism is expected to decrease the likelihood of a court having a docketed tort reform challenge.

A dichotomous variable captures whether a state has an intermediate appellate court. Divided government is also a dichotomous variable equal to one when different parties control the two houses of the legislature or different parties control the legislature and the governorship. Court and legislative professionalism are measured using the Squire measures of professionalism. (For additional information on how these variables were measured please refer to Chapter III).

Amendment difficulty is a dichotomous variable equal to one when a state requires that a constitutional amendment be passed by a 2/3 vote in the legislature and approved by the electorate. Thirty states require this difficult amendment procedure requiring both a super legislative majority and electoral approval (Langer 2002). Term length is measured by number of years, and ranges from six to a life term. Justices on the New Hampshire and Massachusetts supreme courts serve until age seventy; a proxy variable of twenty years is used for these two cases. Rhode Island justices are the only ones who serve life terms; a proxy variable of thirty years is used in this instance.

Results

Table 4.2 Stratified Cox Model of Docketed Tort Reform Challenges 1975-2004

Covariate	Coefficient	Standard Error	Z-Zone
Supportive Environment x (Court Liberalism-Legislative Liberalism)	-.027	.021	-1.27*
Supportive Environment	.597	.434	1.38*
Court Liberalism-Legislative Liberalism	.017	.007	2.51**
Elected Court x (Court Liberalism-Mass Public Liberalism)	-.024	.014	-1.73**
Elected Court	.077	.273	.28
Court Liberalism-Mass Public Liberalism	-.009	.010	-.87
Intermediate Appellate Court	.582	.464	1.26
Court Professionalism	2.175	1.219	1.78**
Legislative Professionalism	-1.239	1.387	-.89
Divided Government	-.321	.237	-1.36
Difficult Amendment Procedure	.198	.290	.68
Longer Term Lengths	-.097	.053	-1.82

Observations 2,140

LR2 24.82

Log Likelihood -241.532

*Significant at the .1 level or better

** Significant the .05 level or better

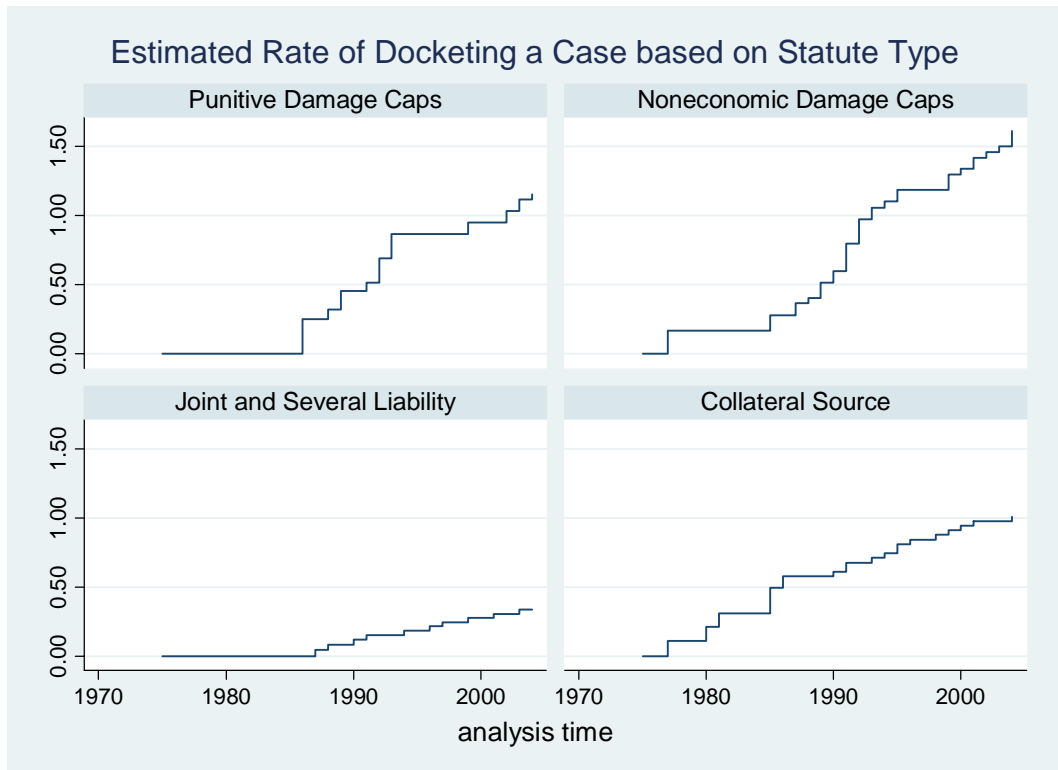
Table 4.2 displays the results of the Stratified Cox regression analysis of the timing of docketed tort reform challenges. The signs on the coefficients indicate whether the covariate is associated with an increase or decrease in the likelihood of a court having a docketed tort reform challenge. A number of the hypothesized relationships are supported by the results, which provide evidence of strategic behavior at the agenda-setting stage. The interaction between the political environment and elite preferences, as well as the interaction between retention method and mass preferences, both achieve statistical significance in the expected direction.

Institutional features also appear to influence the behavior of justices at the agenda-setting stage. Court professionalism significantly increases the likelihood of a court having a docketed tort reform challenge. Additionally, the presence of an intermediate appellate court would have achieved statistical significance if a one-tailed hypothesis was offered predicting that an intermediate appellate court would increase the likelihood of a docketed tort reform challenge. While this result was not predicted by the SSOP model, the finding is supported by previous research. Surprisingly, divided government and term length are signed in the unexpected direction and would have been statistically significant if so hypothesized. Legislative professionalism and amendment procedure fail to achieve statistical significance at any acceptable level.

Before discussing the substantive effects of the independent variables, I want to first draw attention to the different rates of docketing a tort reform challenge based on statute type. Figure 4.1 demonstrates the necessity of using Stratified Cox methodology. Cases challenging the different statute types were docketed at different rates, with damage cap statutes docketed at a faster rate than statutes abolishing joint and several liability and the collateral source rule. In Chapter III, the rate at which state legislatures enacted tort reform statutes varied according to statute type, with the state legislatures taking longer to enact controversial damage caps. However, at the agenda-setting stage, we see the opposite relationship; courts accept challenges to these statutes at a faster rate. Overall, state supreme courts appear more likely to engage in judicial review of the most controversial types of tort reforms. However, while this result seems to suggest that state courts are willing to challenge state legislatures on controversial issues, the model also

provides evidence that justices must sometimes behave strategically at the agenda-setting stage.

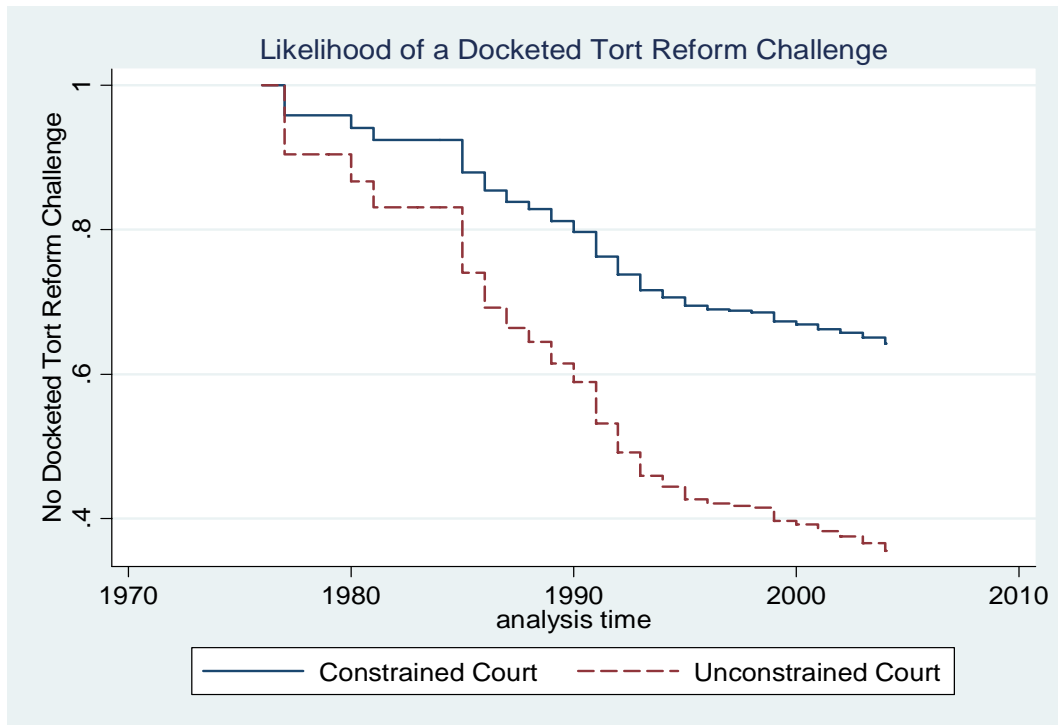
Figure 4.1 Rates of Docketing Tort Reform Challenges according to Statute Type



When the legislature can retaliate, the difference in elite preferences significantly decreases the likelihood of a docketed tort reform challenge. Figure 4.2 graphically displays the likelihood of a court having a tort reform case on its docket when it is constrained (i.e. the legislature can retaliate) versus unconstrained (i.e. the legislature cannot retaliate). When the political environment supports the legislature, liberal state supreme courts are less likely to hear a case challenging a tort reform statute. Because liberal justices fear retaliation for voting their sincere preferences, they strategically avoid

docketing a tort reform challenge. When a liberal court faces a conservative legislature in an environment conducive to tort reform, the likelihood of a tort reform challenge is less than forty percent compared to almost seventy percent when the court is unconstrained. The results suggest that the relationship between a state supreme court and legislature is conditioned by the nature of the political environment. When a court fears retaliation, it acts contrary to its sincere preferences at the agenda-setting stage.

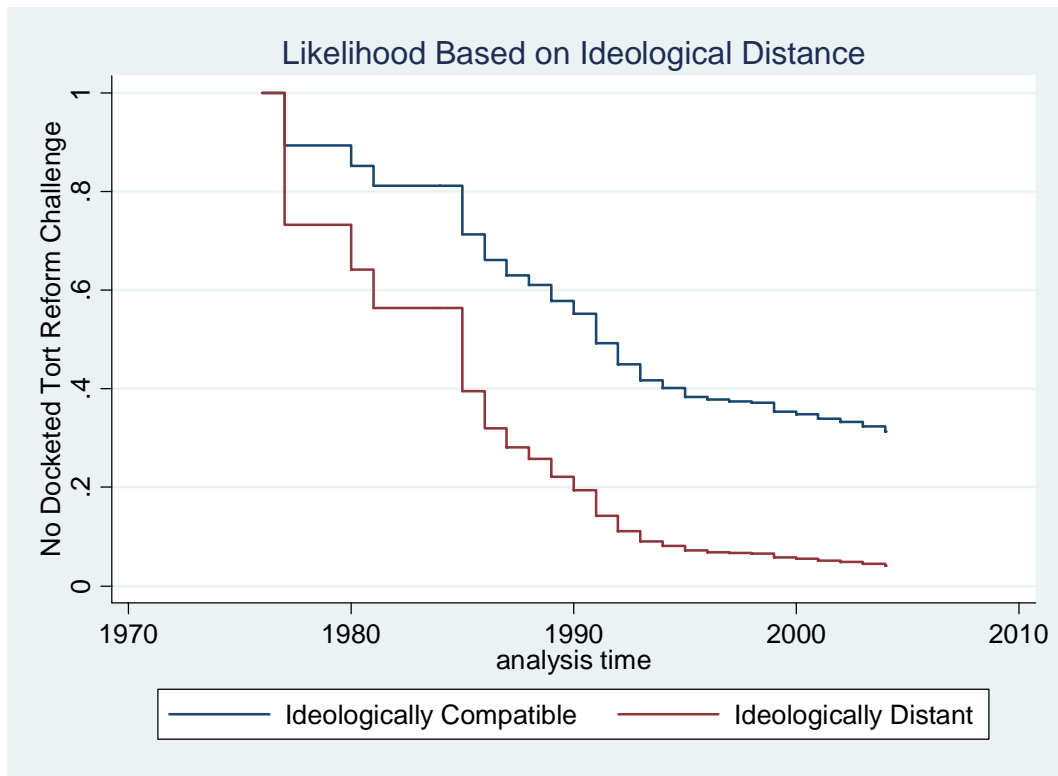
Figure 4.2 Interaction between the Political Environment and Elite Preferences



The SSOP model predicts that when courts are behaving sincerely, court liberalism should increase the likelihood of a docketed tort reform challenge because there is more incentive for justices to change rather than simply uphold the status quo. The results support this strategy. In general, a state supreme court is more likely to have a

docketed tort reform challenge when it is increasingly more liberal than the state legislature. Figure 4.3 displays the different rates in which state courts accepted a tort reform challenge based on whether they shared the preferences of the legislative branch. When the state supreme court and legislature have the same preferences, the likelihood of a docketed tort reform challenge by 2004 is seventy percent, compared to ninety percent when the court is more liberal than the state legislature. In general, more liberal state courts are twenty percent more likely to have a docketed tort reform challenge than courts that are ideologically compatible with the state legislature. However, when justices are constrained, preference differences signal likely retaliation, and substantially decrease the likelihood of a court docketing a tort reform challenge.

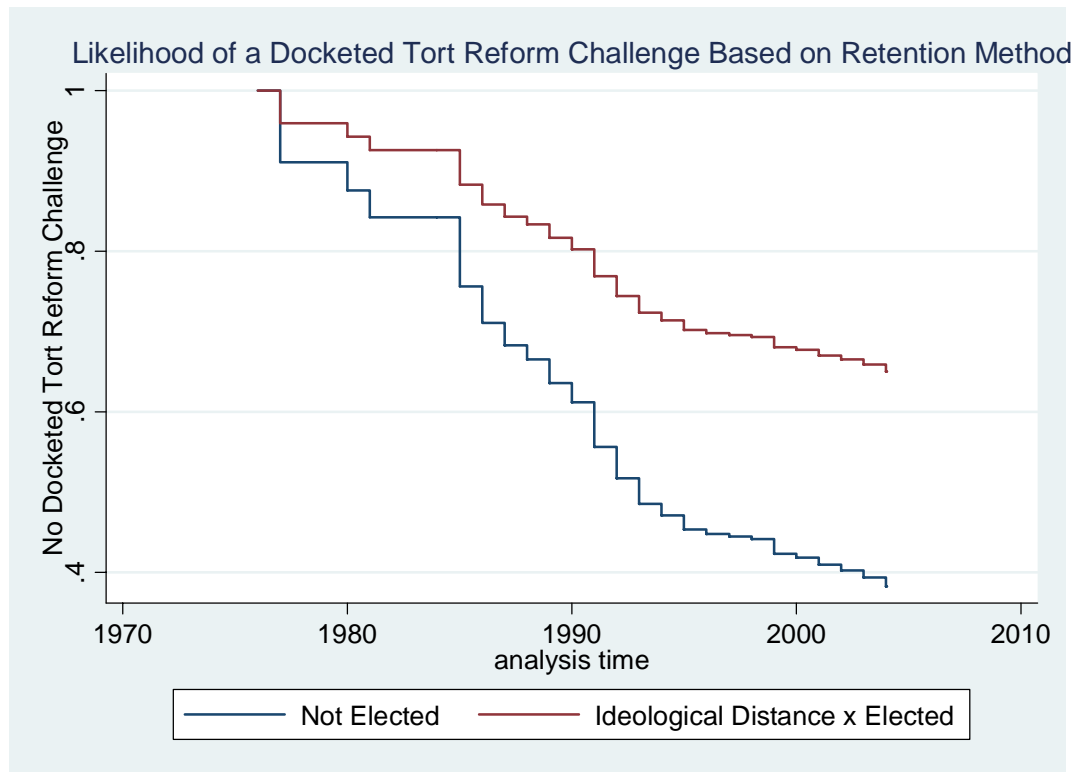
Figure 4.3 The Effect of Ideological Distance on the Likelihood of Docket Tort Reform Challenge



While the overall political environment may constrain justices by making elite retaliation more likely, justices who face retention by the public must be concerned with electoral retaliation as well. When justices are retained by the public, they are held directly accountable to public opinion. Thus, justices are expected to behave strategically by avoiding cases when their sincere preferences diverge from those held in the mass public. The results suggest that justices retained through election do engage in this type of strategic behavior.

Figure 4.4 shows the likelihood of a docketed tort reform challenge when a liberal court is held accountable to a conservative public compared to a court that does face retention elections. The non-elected court is over twenty percent more likely to have a docketed tort reform challenge than the court constrained by public opinion. Justices appear to be sensitive to the threat of electoral retaliation. When justices are held accountable to public opinion, justices behave strategically by avoiding cases when their preferences diverge from the mass public. Thus, method of retention is an important institutional feature influencing judicial decision-making at the agenda-setting stage. Public opinion can have both an indirect and direct effect on judicial decision making depending on justice's method of retention.

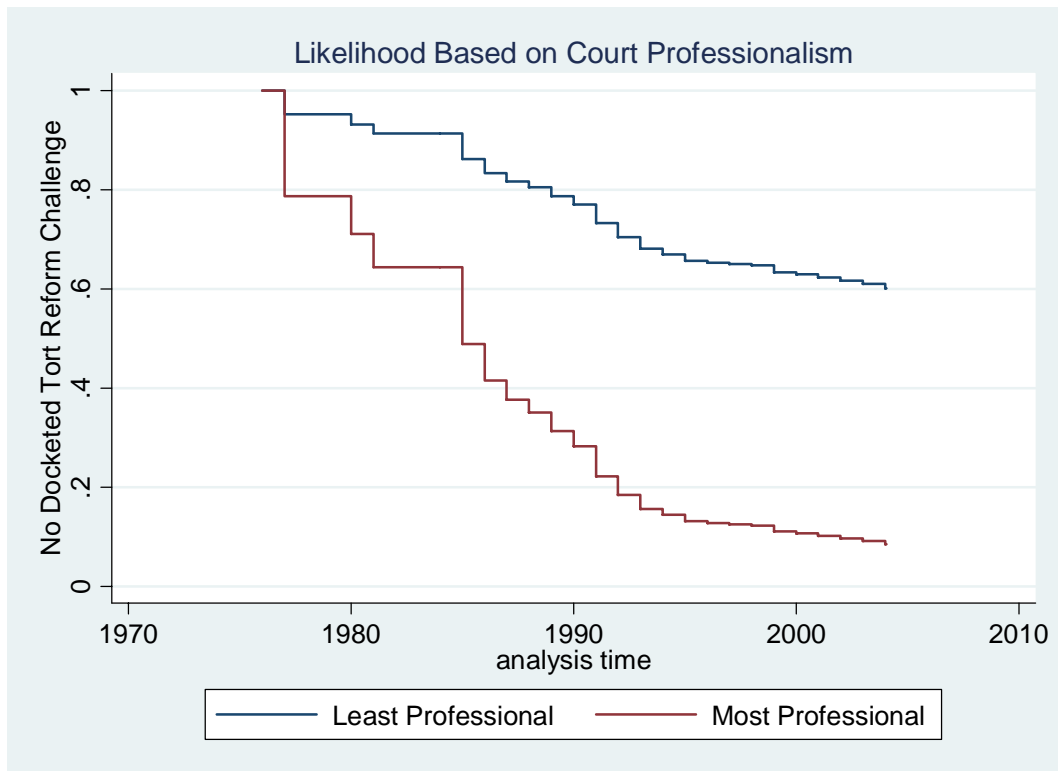
Figure 4.4 Interaction between Retention Method and Mass Preferences



Differences in institutional professionalism also significantly affect the likelihood of a court having a docketed tort reform challenge. I hypothesized that more professional state courts would be more likely to have a docketed tort reform challenges because they are more likely to possess both the desire and ability to pursue policy-minded goals. More professional courts are more likely to resent legislative enactment of tort reform and also have the resources necessary to act. The results support the hypothesized relationship. More professional state supreme courts are significantly more likely to have a tort reform challenge on their docket. Figure 4.5 shows the difference in likelihood between the most and least professional state supreme courts. The most professional state supreme court is fifty percent more likely to hear a tort reform challenge. The

likelihood of the most professional state supreme court not hearing a tort reform challenge by 2004 is only ten percent compared to sixty percent for the least professional state supreme court. Increased court professionalism dramatically increases the likelihood of a court having a docketed tort reform challenge.

Figure 4.5 Effect of Court Professionalism on the Likelihood of a Docketed Tort Reform Challenge

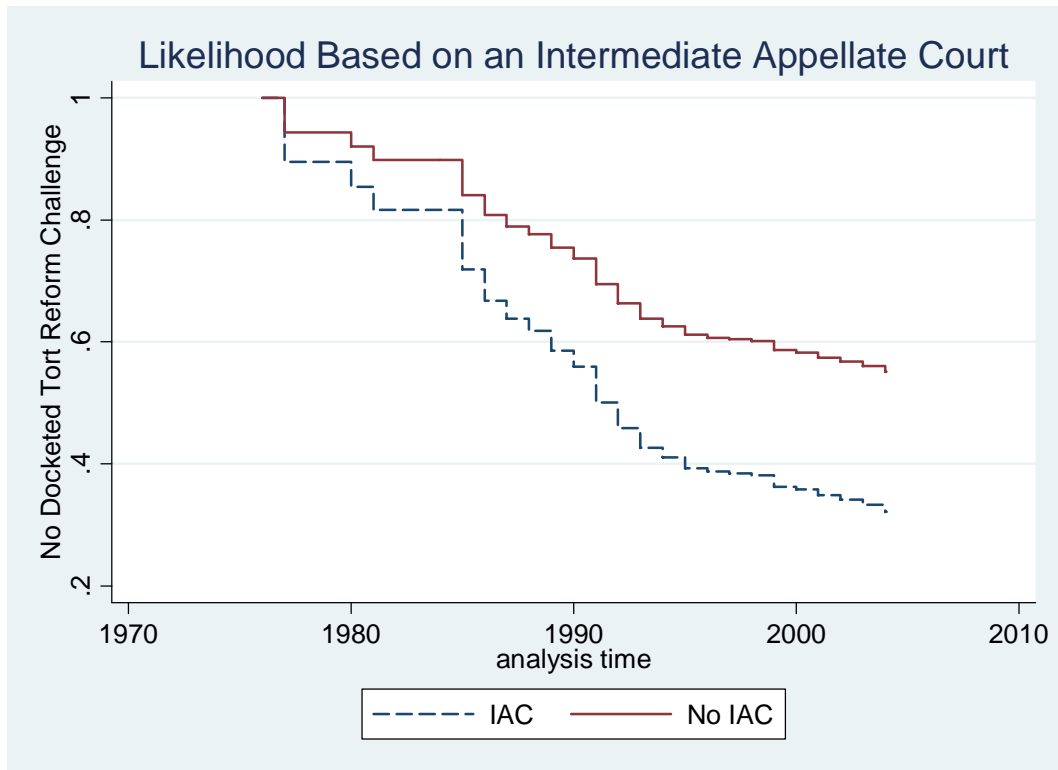


Surprisingly, legislative professionalism does not have a similar effect on the likelihood of a docketed tort reform challenge. I expected that courts would be more likely to fear retaliation by more professional legislatures due to the greater resources at their disposal. However, while the coefficient is in the expected direction, legislative professionalism does not have a significant effect on judicial decision-making at the agenda-setting stage. Perhaps, the nature of the political environment so accurately

captures the ability of a legislature to retaliate against the court that institutional features become insignificant. While the court pays attention to the broader political environment and the policy preferences of the legislature, the professionalism of the legislature has no effect.

Additionally, a state's amendment procedure has no significant effect at the agenda-setting stage. This result is somewhat surprising given that both Langer (2002) and Stricko-Neubauer (2006) found that amendment difficulty significantly increased the likelihood of a docketed judicial review case over a range of case types. The null result in my model may be due to the particular issue being studied. Because of the nature of the tort reform issue, legislators might find that reenacting tort reform legislature is a more appealing form of retaliation than pursuing a constitutional amendment. While statutes involving abortion and the death penalty are arguably more absolute in nature, tort reform is a complicated legal issue in which legislators can make small changes without altering the purpose of a statute. For instance, recall the discussion of tort reform in Ohio. After the Ohio Supreme Court struck down a comprehensive tort reform statute in the *Sheward* case, the Ohio General Assembly enacted another damage cap statute very similar to the one previously struck down. Only a handful of states have pursued tort reform constitutional amendments, and only Texas and Nevada have been successfully in capping damages through constitutional amendment. Instead of constitutional amendment, state legislatures appear more likely to retaliate by enacting similar statutes. Thus, if courts do not expect legislatures to retaliate through constitutional means the difficulty of constitutional amendment would not influence their decision-making.

Figure 4.6 Effect of an Intermediate Appellate Court on the Likelihood of a Docketed Tort Reform Challenge



While the SSOP model predicts that courts with discretionary dockets have more of an opportunity to behave strategically at the agenda-setting stage, this result was not supported by the model. Instead, states with intermediate appellate courts are twenty percent more likely to have a docketed tort reform challenge (refer to Figure 4.6). This result is supported by previous research showing that states with intermediate appellate courts were more likely to have docketed judicial review cases (Langer 2002, Stricko-Neubauer 2006). Instead of encouraging strategic avoidance, perhaps the presence of an intermediate appellate court gives state supreme courts the discretion to choose cases that are the best vehicles for turning their policy preferences into law.

While the model offers considerable support for a number of my hypotheses, the relationships that are perhaps the most difficult to explain are those that are signed in the unexpected direction. The results suggest that divided government decreases the likelihood of a docketed tort reform challenge. Langer (2002) actually found the same relationship involving judicial review challenges to campaign and election laws and Stricko-Neubauer (2006) with judicial review cases involving social issues. Perhaps, when justices are able to behave sincerely they are more likely to challenge unified governments because they recognize that unified governments are more likely to dominate the policy-making process. When governments are unified, courts might feel an increased need to protect the rights of the minority or simple to insert their own policy preferences into law.

Term length was also signed in the wrong direction. In general, term length does not appear to be a strong indicator of a justice's perceived fear of retaliation. Previous research only provides minimal support for the relationship between term length and the likelihood of hearing a judicial review challenge; for the majority of issues term length had no significant effect on decision making at the agenda-setting stage (Langer 2002, Stricko-Neubauer 2006). Additionally, the negative effect of longer term lengths is likely attributed to anomalies in the data. States in which justices serve the longest terms (Rhode Island, New Hampshire, and Massachusetts) are not states in which tort reform has been aggressively pursued by the state legislatures.

Conclusion

In this chapter, I explored the conditions under which justices are expected to behave strategically at the agenda-setting stage of judicial review. Previous research suggests that strategic behavior is not limited to the decision on the merits stage and that justices behave strategically in light of other relevant actors in the political system. The SSOP model developed in Chapter II made predictions about when the political environment and various institutional features are likely to constrain justices in the policy-making process. The SSOP model and the empirical results support a strategic account of judicial decision-making in which justices act contrary to their sincere preferences when they fear legislative or electoral retaliation. The relationship between the legislature and the court is conditioned by the nature of the broader political environment; the political environment signals to justices the strength of the coordinate branch. When the political environment supports tort reform, state supreme courts are constrained by the preferences of the legislative branch.

However, all else being equal, state supreme courts act aggressively in deciding to engage in judicial review of tort reform statutes. Justices accept challenges to damage cap statutes at a faster rate than the less controversial types of tort reforms. Additionally, in general, state supreme courts are more likely to hear tort reform challenges when they are increasingly more liberal than the state legislators. And more professional state supreme courts are much more likely to engage in judicial review of tort reform statutes. However, despite all the evidence of the willingness of the state supreme courts to engage in judicial review of tort reform statutes, courts are not unconstrained actors in the policy-making process.

Justices behave strategically in response to the threat of retaliation from the legislature and the mass public. When the political environment signals that legislative retaliation is possible, a court is significantly less likely to engage in judicial review when its preferences diverge from the preferences of the legislature. The political environment has an indirect effect on the behavior of justices by warning the court when legislative retaliation is likely to occur. Additionally, the preferences of the mass public have a direct effect on the behavior of state supreme courts when justices fear electoral retaliation. When justices face competitive reelections, courts are significantly less likely to engage in judicial review of tort reform statutes when their preferences are not in line with public opinion.

The findings presented in this chapter further support my contention that the tort reform movement is best studied through a separation of powers lens. The broader political environment and different institutional features, such as selection method, define the nature of the relationship between the coordinate branches at the agenda-setting stage of judicial review. When justices fear retaliation for going against preferences of the legislature or mass public, they act strategically by avoiding cases challenging the constitutionality of tort reform statutes. The model refines the conditions under which justices pursue sincere and strategic courses of action at the agenda-setting stage of judicial review. Chapter V considers these conditions at the decision on the merits stage.

CHAPTER V

THE DECISION ON THE MERITS

Introduction

In this chapter, I explore the relationship between the political environment, elite preferences, and institutional features in influencing an individual justice's votes on the constitutionality of tort reform. While the previous chapters demonstrated strategic decision-making by legislatures and courts, this chapter will allow for a further examination of both the extent of strategic behavior and the conditions under which strategic behavior is most likely to occur. Directly taking into account the extent of strategic behavior at the agenda-setting stage, in this chapter I examine how the political environment and different institutional features affect individual justices' decision-making.

At the decision on the merits stage, I expect justices to behave strategically when subjected to the same types of constraints explored in Chapter IV. While courts were seen to behave strategically at the agenda-setting stage, there is still the potential for strategic behavior at the decision-making stage of judicial review. Courts may have been precluded from strategically deflecting cases at the agenda-setting stage due to institutional constraints. Or perhaps, justices are strategic actors but are not necessarily "super" strategic; meaning that while the threat of retaliation may not have been considered by all justices at the agenda-setting stage, the threat is recognized when justices must vote on the merits. Indicators of the possibility of legislative retaliation are potentially more relevant at the decision-making stage of judicial review. Additionally,

because the level of analysis is now the individual justice's vote, I can more accurately examine the effect of preference divergence between each individual justice and the state legislature as well as the justices and the mass public. Thus, I can now examine the effect of the broader political environment and institutional features on the behavior of individuals and revisit the conditional hypotheses examined in Chapter IV.

Hypotheses

In this model, I posit the same interaction between the broader political environment and elite preferences, and retention method and mass public opinion. I hypothesize,

H1: When the political environment is supportive, the likelihood of a justice voting to strike down a tort reform statute decreases as a justice is increasingly more liberal than the state legislature.

H2: When justices are retained through competitive elections, the likelihood of a justice voting to strike down a tort reform statute decreases when a justice is increasingly more liberal than the mass public.

Additionally, other factors that might increase the threat of either legislative retaliation are expected to decrease the likelihood of a justice striking down a tort reform statute. As examined in the previous chapters, institutional professionalism is expected to affect the relationship between the coordinate branches. Court professionalism is expected to increase the likelihood of a justice striking down a tort reform statute because justices serving on more professional courts have the necessary resources to challenge the state legislature. Increased legislative professionalism, on the other hand, is expected to increase the threat of retaliation and decrease the likelihood of a justice voting to strike down a tort reform statute.

H3: The likelihood of a justice voting to strike down a tort reform statute increases with an increase in court professionalism.

H4: The likelihood of a justice voting to strike down a tort reform statute decreases with an increase in legislative professionalism.

In addition, certain institutional features are expected to facilitate a state legislature's ability to retaliate against a hostile court by enacting a new statute or pursuing a constitutional amendment. While many of these features were not significant at the agenda-setting stage, perhaps individual justices are more sensitive to the role certain institutional features play in encouraging legislative retaliation at the decision-making stage. Thus, I hypothesize,

H5: The likelihood of a justice voting to strike down a tort reform statute increases under periods of divided government.

H6: The likelihood of a justice voting to strike down a tort reform statute increases in states with a difficult amendment process.

H7: The likelihood of a justice voting to strike down a tort reform statute decreases in states with a Republican governor.

While the influence of interest groups plays a part in defining the political environment, I also expect interest groups to play a direct role in influencing judicial decision-making. As explained in Chapter I, the pro-reform interest groups have played a more effective role in pursuing outsider strategies than anti-reform interest groups. While pro-reform interest groups like the ATRA have chosen to "go public" and attempt to influence mass public opinion, anti-reform groups, such as the American Trial Lawyers Association, have chosen to primarily pursue an insider strategy and appeal directly to the legislators and justices through lobbying and submitting amicus briefs. At the decision on the merits stage, I can examine the effect of interest groups pursuing an insider strategy to directly influence judicial decision-making. I hypothesize,

H8: The likelihood of a justice voting to strike down a tort reform statute decreases as the number of pro-reform amicus briefs outnumbers the anti-reform amicus briefs.

Additionally, I consider the influence of the lower court decision. I expect that when the lower court has struck down a tort reform statute, a justice will be more likely to vote against the constitutionality of the statute. Research has show that justices are more likely to strike down statutes when a lower court has found the statute unconstitutional (Emmert 1992, Langer 2002). Thus, I hypothesize,

H9: The likelihood of a justice voting to strike down a tort reform statute increases when the lower court has struck down the tort reform statute.

Finally, I control for the effect of case salience on judicial decision-making in a number of ways. First, I use the total number of amicus briefs filed as a surrogate measure of case salience. Amicus briefs have been used as a measure of case salience in other studies of judicial decision-making (see Maltzmann and Walhbeck 1996) and in this analysis the measure does not elicit the drawbacks identified by Epstein and Segal (2000) because I focus on only one issue area. Additionally, I look at the influence of the type of statute being challenged. In the previous chapters, I discussed how damage cap statutes are considered more controversial than statutes abolishing joint and several liability and the collateral source rule. While the state legislatures enacted damage cap statutes at slower rates than the other statute types, state supreme courts accepted challenges to damage cap statutes at a faster rate. Hence, I expect that statute type might affect the likelihood of justices voting to strike down a tort reform statute.

I expect that the type of constitutional challenge raised by the litigants might have an effect on judicial decision-making. Particularly, I am interested in how justices react to a direct separation of powers challenge. When a litigant raises a separation of powers challenge, this might signal to the justices the importance of the case not only in

terms of issue salience, but in terms of the court’s institutional position vis-à-vis the legislature. The expected effect of each of these salience variables might be different depending on whether justices engage in sincere or strategic decision-making. Hence, I simply control for these variables by offering two-tailed hypotheses:

H10: The likelihood of a justice voting to strike down a tort reform statute increases/decreases as the number of amicus briefs filed increases.

H11: The likelihood of a justice voting to strike down a tort reform statute increases/decreases when the court is considering a damage cap statute.

H12: The likelihood of a justice voting to strike down a tort reform statute increases/decreases when a separation of powers challenge has been raised.

Table 5.1 summarizes the relationships I expect between the independent variables and the likelihood of a justice voting to strike down a tort reform statute.

Table 5.1 Expected Relationships between the Independent Variables and the Likelihood of a Court Hearing a Tort Reform Challenge

Independent Variables	Likelihood of a Vote to Strike Down a Tort Reform Statute
Supportive Environment x (Court Liberalism-Legislative Liberalism)	-
Elected Court x (Court Liberalism-Mass Public Liberalism)	-
Court Professionalism	+
Legislative Professionalism	-
Divided Government	+
Republican Governor	-
Amicus	+ or -
Pro-Reform Amicus	-
Damage Cap Statute	+ or -
SOP Challenge	+ or -

Research Design and Methodology

The dependent variable in this model is an individual justice's vote to strike down a tort reform statute. The value of the dependent variable is equal to one if a justice votes to strike down a tort reform statute and zero otherwise. I consider the individual justices' votes in cases challenging the constitutionality of the four types of tort reform statutes considered in the previous chapters: 1) caps on punitive damages; 2) caps on noneconomic damages; 3) statutes abolishing joint and several liability; 4) statutes abolishing the collateral source rule. The state supreme court cases challenging tort reform statutes between 1983 and 2004 were identified by Schwartz and Lorber (2001) and Behrens. I identified the tort reform challenges considered before 1983 through a Westlaw search of the statute numbers of tort reforms enacted prior to 1983. Table 5.2 lists the cases included in this analysis and Figure 5.1 displays the proportion of votes corresponding to each statute type. Noneconomic and punitive damage caps were included as one category in Figure 5.1 because sometimes legislatures do not distinguish between the two, and instead place a cap on general damages instead.

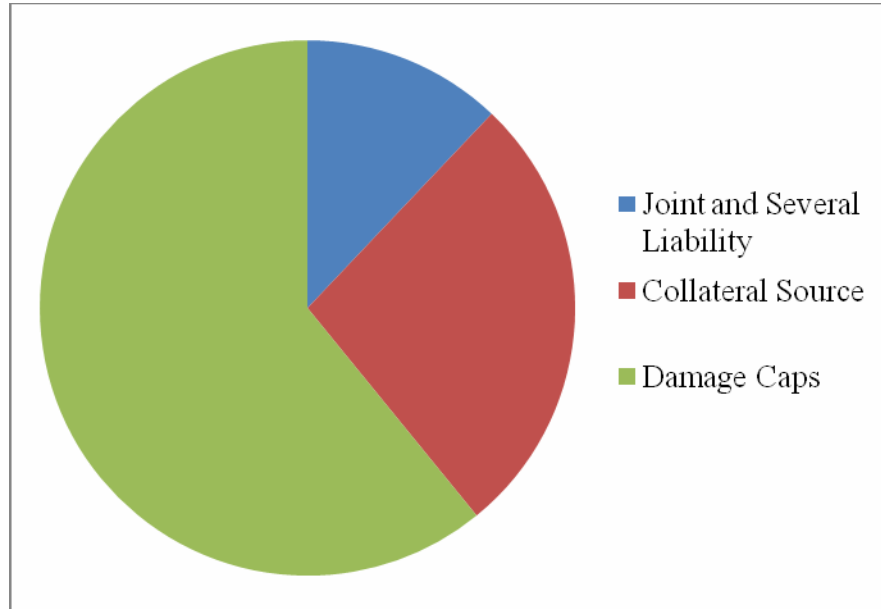
Table 5.2 Case Citations

State	Year	Case Citation
Alabama	1991	592 So. 2d. 156
Alabama	1991	581 So. 2d. 414
Alabama	1991	589 So.2d 184
Alabama	1993	627. So. 2d. 878
Alabama	1995	671 So. 2d. 1334
Alabama	1996	681 So. 2d 1337
Alabama	2000	782 So. 2d 223
Alaska	1998	964 P. 2d 453
Alaska	2002	56 P.3d 1046
Alaska	2003	78 P.3d 710
Arizona	1977	570 P.2d 744
California	1985	695 P.2d 665
California	1988	44 Cal.3d 1188
Colorado	1992	824 P.2d 783
Colorado	1992	827 P.2d 531
Colorado	1993	851 P.2d 901
Colorado	2004	95 P.3d 571
Delaware	1995	668 A.2d 1370
Florida	1981	403 So. 2d. 1325
Florida	1986	498 So. 2d 421
Florida	1987	507 So.2d 1080
Florida	1992	608 So.2d 800
Florida	1993	618 So.2d 189
Florida	2000	761 So. 2d 1040
Georgia	1991	261 Ga. 41
Georgia	1993	436 S.E.2d 632
Georgia	1993	436 S.E. 2d 635
Georgia	1993	434 S.E.2d 450
Idaho	2000	4 P.3d 1115
Illinois	1997	179 Ill.2d 367
Indiana	2003	789 N.E.2d 467
Iowa	1980	293 N.W. 2d 550
Iowa	1985	369 N.W. 2d 417
Iowa	1991	473 N.W. 2d 612
Kansas	1983	661 P.2d 1251

Kansas	1985	237 Kan. 503
Kansas	1987	241 Kan. 663
Kansas	1988	243 Kan. 333
Kansas	1989	778 P.2d 823
Kansas	1990	246 Kan. 336
Kansas	1991	248 Kan. 824
Kansas	1993	254 Kan. 315
Kansas	1993	252 Kan. 1010
Kansas	2001	19 P.3d 132
Kentucky	1995	892 S.W.2d 571
Louisiana	1992	607 So.2d 517
Maine	1991	597 A. 2d 50
Maryland	1992	325 Md. 342
Massachusetts	1989	541 N.E. 2d 329
Michigan	2004	685 N.W.2d 174
Minnesota	1990	463 N.W.2d 722
Minnesota	1990	453 N.W.2d 326
Missouri	1992	832 S.W.2d 898
Missouri	1993	863 S.W. 2d 876
Missouri	1997	947 S.W.2d 424
Missouri	2002	79 S.W.3d 901
Montana	1989	238 Mont. 21
Montana	1994	267 Mont. 237
Montana	1996	927 P.2d 1011
Montana	2003	68 P.3d 654
Nebraska	1987	412 N.W.2d 438
Nebraska	2003	663 N.W.2d 43
New Hampshire	1981	121 N.H. 894
New Hampshire	1980	424 A. 2d 825
New Hampshire	1991	134 N.H. 50
New Hampshire	1999	143 N.H. 523
North Carolina	2004	594 S.E.2d 1
Ohio	1991	61 Ohio St.3d 624
Ohio	1991	576 N.E.2d 765
Ohio	1994	71 Ohio St.3d 552
Ohio	1994	69 Ohio St.3d 415
Ohio	1995	73 Ohio St.3d 260
Ohio	1999	86 Ohio St.3d 451
Ohio	1999	87 Ohio St.3d 204

Ohio	2001	748 N.E.2d 1111
Ohio	2004	808 N.E.2d 381
Oregon	1995	322 Or. 281
Oregon	1999	987 P.2d 463
Oregon	2002	47 P.3d 476
Oregon	2002	51 P.3d 1232
South Carolina	1990	391 S.E. 2d 564
South Carolina	1992	413 S.E.2d 31
South Dakota	1996	544 N.W.2d 183
Texas	1988	757 S.W. 2d 687
Texas	1990	801 S.W. 2d 841
Utah	2004	103 P.3d 135
Virginia	1989	376 S.E.2d 525
Virginia	1999	509 S.E.2d 307
Washington	1989	771 P.2d 711
West Virginia	1991	414 S.E. 2d 877
West Virginia	2001	552 S.E.2d 406
Wisconsin	1995	531 N.W.2d 70
Wisconsin	2000	63 N.W.2d 120
Wisconsin	2001	628 N.W.2d 842
Wisconsin	2004	682 N.W.2d 866

Figure 5.1 Proportion of Cases by Case Type



Through carefully reading of these cases I obtained the dependent variable of interest, each justice's decision on the constitutionality of the tort reform statute, as well many of the important independent variables included in the model. The cases were coded by the author on a number of different dimensions including: each justice's vote to strike down or uphold the statute in question; whether or not each justice was in the majority; each justice's opinion behavior, whether the court affirmed or reversed the lower court decision, whether the lower court had struck down a tort reform statutes, the statute type, title, and year enacted; the constitutional challenges raised, and number of amicus briefs filed supporting and opposing tort reform.

The coding of these cases provided the necessary data to test hypotheses H8-H12. The rest of the hypotheses are tested utilizing the same data and operationalizations as described in Chapters III and IV. Additionally, I control for the dependence between the two stages of judicial review by incorporating the Inverse Mill's Ratio generated from the

agenda-setting model into this model as independent variable.³ The Inverse Mill's Ratio is critical because the strategic calculations seen in the agenda-setting model affect the cases that are decided on the merits. Ignoring the effect of strategic decision-making at the agenda-setting stage would result in selection bias and biased coefficients.

³ In order to calculate the Inverse Mill's Ratio (IMR), I had to estimate the agenda-setting model using probit analysis rather than the Stratified Cox analysis described in Chapter IV. While I believe that the Stratified Cox model is superior to the probit model for analyzing the agenda-setting stage, using probit analysis did not change the direction or significance of the independent variables, demonstrating that incorporating the IMR from the probit model is a sufficient control for the agenda-setting stage in this model. Also, because my dependent variable is a different unit of analysis in the agenda-setting stage, I use the IMR for the court/year for each justice on the court. While this is not as accurate a correction as having a single IMR for each justice, it is the best possible alternative given data availability and is superior to simply ignoring the agenda-setting stage (Langer 2002).

Results

Table 5.3 Probit Analysis of an Individual Justice's Vote to find a Tort Reform Statute Unconstitutional 1975-2004

Covariate	Coefficient	Std. Error	Z-Score
Supportive Environment x (Court Liberalism-Legislative Liberalism)	-.013	.007	-1.91**
Supportive Environment	-.541	.214	-2.53***
Court Liberalism-Legislative Liberalism	.012	.005	2.46***
Elected Court x (Court Liberalism-Mass Public Liberalism)	-.006	.006	-.99
Elected Court	.595	.142	4.18***
Court Liberalism-Mass Public Liberalism	.001	.006	.15
Court Professionalism	.252	.619	.41
Legislative Professionalism	-.3201	.782	-4.09***
Divided Government	.307	.126	2.43***
Difficult Amendment Procedure	.379	.169	2.24**
Republican Governor	.301	.201	1.50
Amicus	.055	.032	1.73**
Pro-Reform Amicus	-.095	.051	-1.83**
Damage Cap Statute	-.053	.132	-.40
SOP Challenge	-.089	.151	-.60
Lower Court Finds UC	.188	.191	.99
Selection Variable: Inverse Mill's Ratio	.984	.402	2.45***

Observations 599

Log Likelihood= -349.813

Pseudo R2= 0.134

*Significant at the .1 level or better

**Significant at the .05 level or better

*** Significant at the .01 level or better

Table 5.3 displays the results of the probit analysis of an individual justice’s vote to strike down or uphold a tort reform statute. The signs of the coefficients indicate whether the covariate is associated with an increase or decrease in the likelihood of a justice finding a tort reform statute unconstitutional. Table 5.4 displays the predicted probabilities of a justice voting to find a statute unconstitutional at different levels of the statistically significant independent variables. The predicted probabilities indicate the maximum substantive effect of the independent variables on the dependent variable.

Table 5.4 Predicted Probabilities of an Unconstitutional Vote

Situation	Probability of Unconstitutional Vote
All Variables at Mean	38.34%
Supportive Environment x (Court Liberalism-Legislative Liberalism)	17.04%
Supportive Environment	21.68%
Court Liberalism-Legislative Liberalism	69.44%
Elected Court	48.15%
Legislative Professionalism	6.16%
Divided Government	43.52%
Difficult Amendment Procedure	41.73%
Republican Governor	43.91%
Amicus Briefs	65.74%
Pro-Reform Amicus Briefs	17.59%

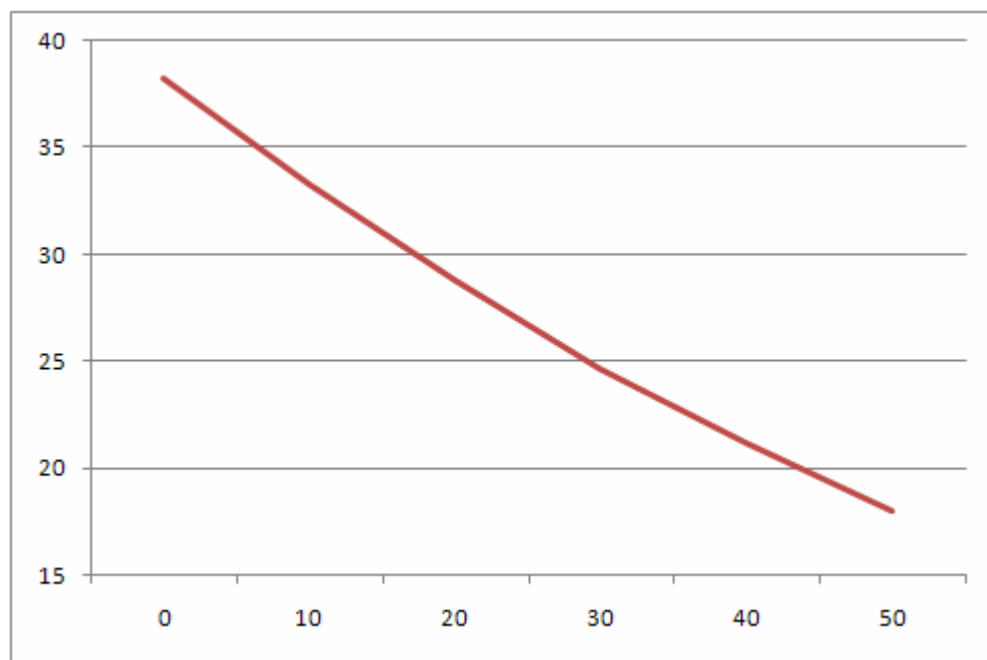
Before discussing the results of the independent variables, I want to first draw attention to the significance of the selection variable, the Inverse Mill’s ratio. The significance of this variable indicates that case selection at the agenda-setting stage affects a justice’s vote on the merits. When the selection variable is removed from the

model, the substantive results of the model are affected. While the statistical significance of the coefficients remains unchanged, the substantive impact of several variables change when the selection variable is removed from the model. The impact of legislative professionalism, the political environment, the interaction between the political environment and elite preferences, and the ideological distance between the court and legislature are all overestimated, while the impact of the amendment procedure, amicus briefs, pro-reform briefs, and retention method are underestimated. When the decision on the merits stage is considered in isolation of the agenda-setting stage, biased and inefficient coefficients are produced. Ignoring the agenda-setting stage leads one to underemphasize the importance of institutional variables and overemphasize the role of elite preferences. Additionally, excluding the agenda-setting stage reduces the overall fit of the model. Judicial decision-making is most accurately captured when the relationship between the two stages of judicial review is recognized. The inclusion of the selection variable into the model increases my confidence in the relationships found between the other independent variables and a justice's decision on the merits.

Several of the hypothesized relationships are supported by the results of the model. The results suggest that strategic behavior is not limited to the agenda-setting stage of judicial review and that the political environment conditions the relationship between the coordinate branches at the decision on the merits stage. As witnessed at both the enactment stage and the agenda-setting stage, the interaction between the political environment and elite preferences is statistically significant in the expected direction. When the political environment is supportive, the difference in elite preferences significantly decreases the likelihood of justice finding a statute unconstitutional. When

all variables are held at their mean, the likelihood of a justice finding a tort reform statute unconstitutional is a little over thirty-eight percent. However, when the political environment is supportive and the legislature is expected to retaliate, increased ideological distance between a justice and the state legislature decreases the likelihood of an unconstitutional vote by over twenty percent. When a liberal justice faces a conservative legislature in a supportive political environment, the likelihood of a justice voting to strike down a tort reform statute is only seventeen percent. Figure 5.2 displays the change in predicted probabilities as a justice becomes increasingly more liberal than the state legislature. When justices fear legislative retaliation they are significantly less likely to strike down a tort reform statute.

Figure 5.2 The Effect of the Interaction Between the Political Environment and Elite Preferences on the Probability of Voting to Strike Down a Tort Reform Statute

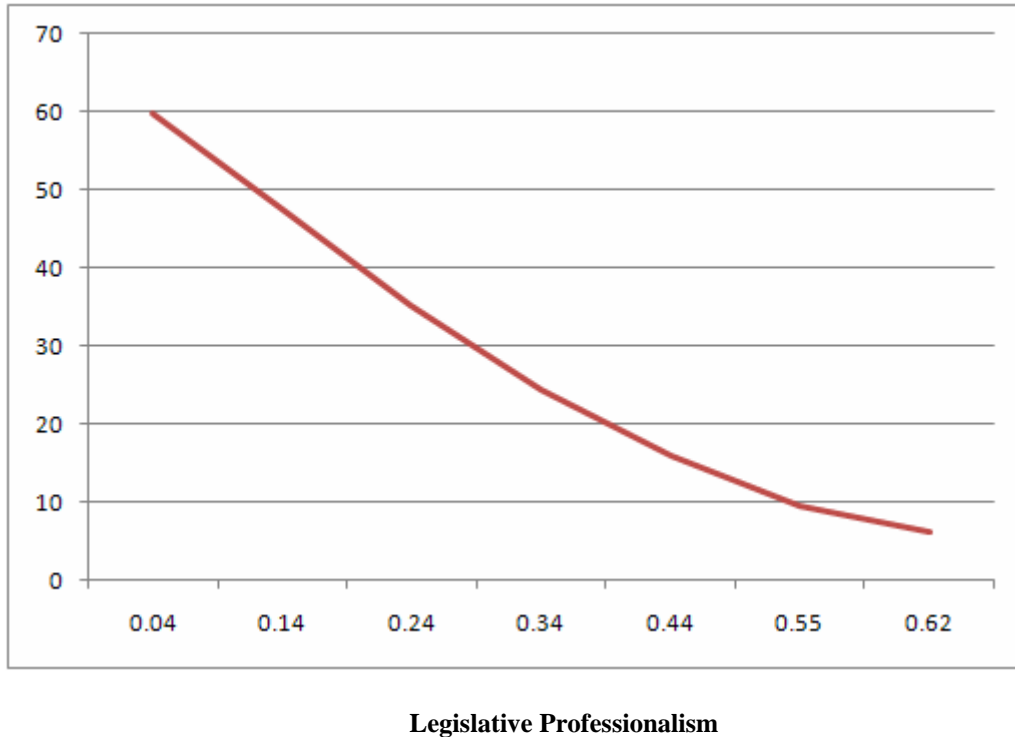


Court Liberalism-Legislative Liberalism

Additionally, unlike in the agenda-setting model, a number of additional variables meant to capture the ability of the legislature to retaliate against the court achieve statistical significance. A difficult amendment procedure and the presence of divided government both have a statistically significant, although small, effect on judicial decision-making. A difficult amendment procedure increases the likelihood of an unconstitutional vote by a little over three percent, and the presence of divided government increase the likelihood by a little over five percent.

The degree of professionalism of the state legislature has a substantial impact on the likelihood of a justice finding a tort reform statute unconstitutional. While legislative professionalism did not have a statistically significant effect at the agenda-setting stage, legislative professionalism does constrain justices at the decision on the merits stage of judicial review. Though high levels of legislative professionalism do not keep courts from engaging in judicial review, it dramatically decreases the likelihood of a justice voting to strike down a tort reform challenge. State supreme justices are much less likely to challenge more professional state legislatures. When facing the most professional state legislature, justices will only strike down a tort reform statute six percent of the time compared to nearly sixty percent of the time when facing the least professional legislature. Figure 5.3 displays the change in predicted probabilities going from the least to most professional state legislature.

Figure 5.3 The Effect of Legislative Professionalism on the Probability of Voting to Strike Down a Tort Reform Statute



Also, somewhat surprisingly, justices retained through competitive retention elections are significantly more likely to find a tort reform statute unconstitutional. Justices retained through competitive retention elections are almost ten percent more likely to vote to strike down a tort reform statute. This result may be interpreted as another constraint imposed by other elite actors on the behavior of justices. The result might be driven by the unwillingness of justices retained through gubernatorial or legislative approval to strike down legislative enactments. This result makes sense if we assume that tort reform is traditionally more salient to elites than mass actors. While the pro-reform movement has infiltrated the mass public to various degrees, the tort reform movement has been elite-driven. Thus, it makes sense that justices would fear retaliation

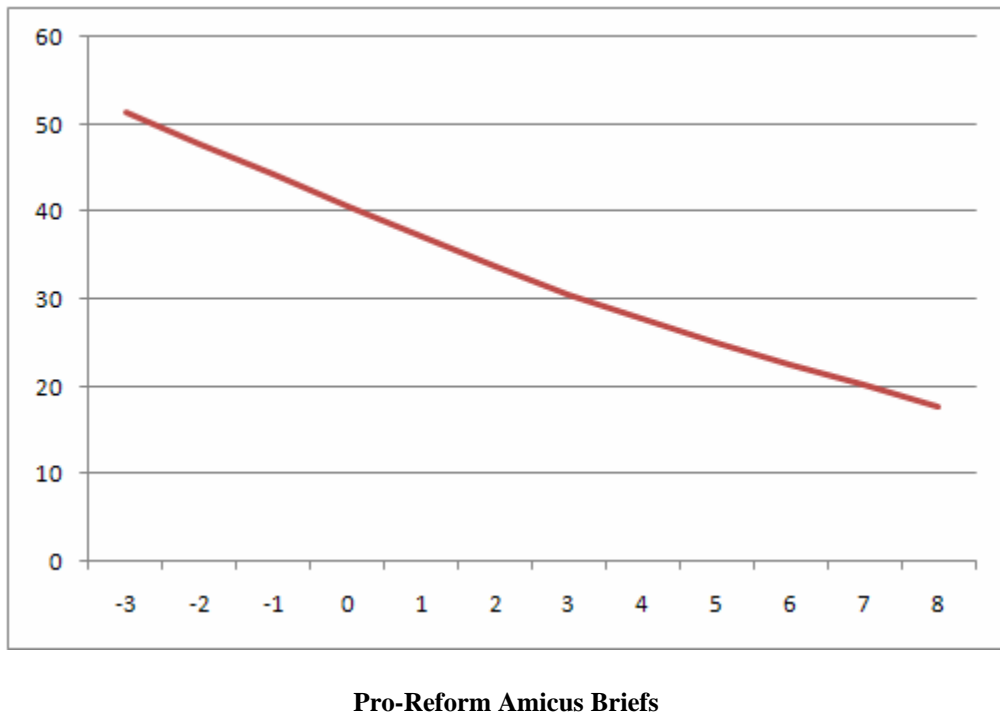
more in states in which they are retained through gubernatorial or legislative approval rather than competitive elections.

Thus, while the results indicate that justices behave strategically in fear of retaliation from the legislative branch, justices do not appear to be directly constrained by the preferences of the mass public at the decision on the merits stage. While the interaction between retention method and mass preferences is in the expected direction, it did not achieve statistical significance at any acceptable level. However, a supportive political environment statistically decreases the likelihood of a justice finding a tort reform statute unconstitutional regardless of his or her ideological distance from the legislative branch. Justices are over sixteen percent less likely to vote to strike down a tort reform statute when the political environment supports tort reform. While citizen preferences alone have no effect of judicial decision-making, the political environment has both a direct and indirect effect on the behavior of justices at the decision on the merits stage.

Interest group participation also appears to exert both a direct and indirect effect on judicial decision-making. While the presence of the American Tort Reform Association, as encompassed in the political environment, decreases the likelihood of a justice voting against a tort reform statute, amicus briefs submitted to the court have a direct and substantively significant effect on the behavior of justices as well. As the number of pro-reform amicus briefs increases the likelihood of a justice finding a tort reform statute unconstitutional decreases by over twenty percent. When the number of briefs opposing tort reform exceeds the amount of briefs in favor of tort reform at its maximum, the likelihood of an unconstitutional vote is over fifty percent compared to

less than twenty percent when the pro-amicus briefs exceed the opposing briefs at the maximum level. Figure 5.4 graphically displays the difference in predicted probabilities based on the number of briefs supporting and opposing tort reform.

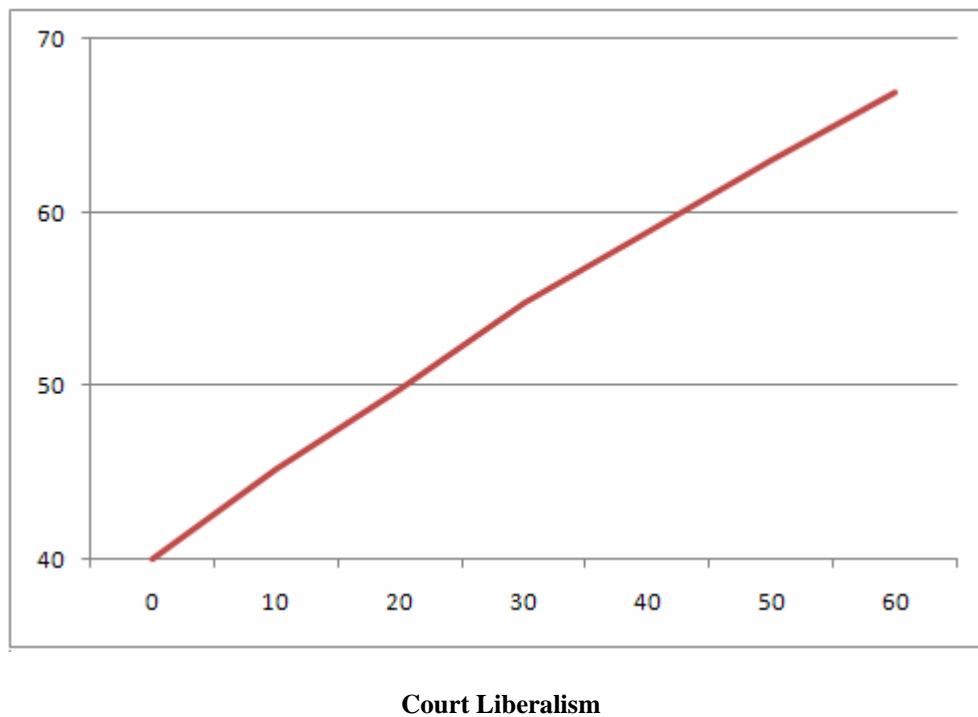
Figure 5.4 The Effect of Pro-Reform Amicus Briefs on the Probability of Voting to Strike Down a Tort Reform Statute



While justices are influenced by both the broader political environment and the preferences and retaliatory strength of the legislative branch, justices are not simply blind followers of the legislative branch. In general, justices are more likely to strike down a tort reform statute when they are increasingly more liberal than the state legislature. Justices who are more liberal than the state legislature are nearly thirty percent more likely to find a tort reform statute unconstitutional than justices who are ideologically compatible with the legislature. Figure 5.5 displays the differences in predicted

probabilities as a justice becomes increasingly more liberal than the state legislature. When justices are behaving sincerely, judicial liberalism significantly increases the likelihood of an unconstitutional vote.

Figure 5.5 The Effect of Elite Ideological Distance on the Probability of Voting to Strike Down a Tort Reform Statute

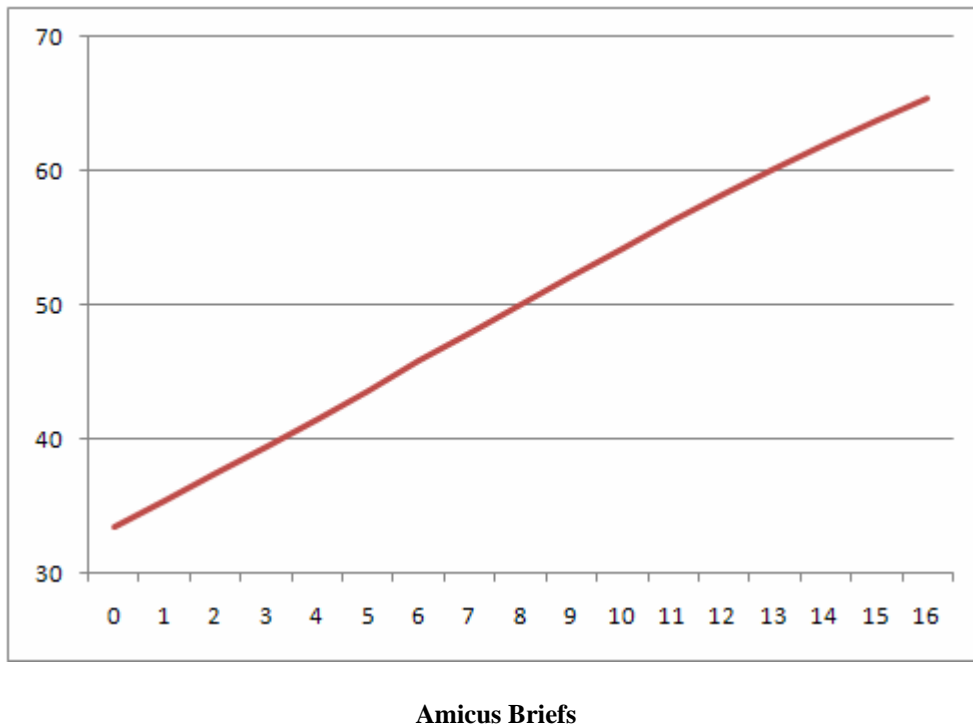


Court ideology is the most salient predictor of sincere behavior at the decision on the merits stage of judicial review. While court professionalism significantly increases the likelihood of a court hearing a judicial review challenge, court professionalism does not significantly influence a justice's decision on the merits. Though the level of court professionalism influences the desire and ability of justices to insert their preferences into the policy-making process, it does not appear to affect their actual preferences for or

against tort reform. More professional courts are more likely to hear challenges to tort reform statutes, but court professionalism has no significant effect on an individual justice's decision to strike down tort reform statutes.

While justices are motivated by policy preferences, they also appear to be motivated by the level of case salience as measured by the total number of amicus briefs filed. Figure 5.6 displays the change in predicted probabilities from no amicus briefs to the maximum number filed. As the number of amicus briefs increases, the likelihood of a tort reform statute being found unconstitutional increases by over thirty percent. In general, justices appear to use salient cases as a venue for striking down tort reform statutes. Instead of bending to the will of the legislature in the most salient cases and asserting themselves in less high profile cases, justices appear more willing to strike down statutes when other actors are paying attention.

Figure 5.6 The Effect of Amicus Briefs on the Probability of Voting to Strike Down a Tort Reform Statute



While case salience has a significant effect on a justice's decision on the merits, case type has no discernable effect at this stage of judicial review. While state supreme courts were more likely to engage in judicial review of damage cap statutes, there is no statistically significant difference between justices' decisions on the merits based on statute type. This finding emphasizes the importance of incorporating the agenda-setting stage into the model. When looking at the agenda-setting stage in isolation, one might assume that justices were accepting cases challenging damage caps statutes at a faster rate because they were looking to strike them down, however the model does not support this relationship.

A lower court decision finding a tort reform statute unconstitutional has no effect on a state supreme court justice's decision on the merits. While this result was initially

surprising considering the success of this variable in other studies of judicial review, a closer look at the data helps to explain this null result. In this issue area, the constitutionality of a tort reform statute was rarely raised in the lower courts. Lower courts overruled a tort reform statute in only eight cases. In the vast majority of the cases, no constitutional challenge was raised in the lower court or the court certified the constitutional question to the state supreme court without ruling on the merits.

Additionally the type of constitutional challenge raised did not have a statistically significant effect on a justice's vote on the merits. There was no significant relationship between the likelihood of striking down a tort reform statute and a separation of powers constitutional challenge. Perhaps this null result is due to the conflicting behaviors discussed in the two-tailed hypothesis. A separation of powers challenge might exert different influences on the behavior of justices depending on whether they fear retaliation by the legislature. While a separation of powers challenge might further dissuade a constrained court from striking down a statute, it equally might energize an unconstrained court's desire to strike down a statute. Hence, in future work I plan test how case facts, such as the type of constitutional challenge raised, interact with environmental variables.

Finally, the most puzzling result was the direction of the coefficient for Republican governorship and the fact that the variable would have been significant if so hypothesized. Contrary to my hypothesis, the model shows that justices are more likely to overturn a tort reform statute when the governor is Republican. While initially puzzled by these results, I discovered the problem of using the party of the governor as a surrogate for gubernatorial policy preference. Due to the large span of years my data encompasses, 1975-2004, Republicanism reflects different policy preferences based on

the years and states in question. To test whether this effect was influencing this variable, I tested the model only looking at cases decided after 1988, when the election of H.W. Bush confirmed the strength of the Republican Party in the South (Moreland, Steed, and Baker 1991). When I tested the model on this subset of cases, the governor party variable was no longer statistically significant in any direction while the significance of all the other variables remained constant.

Conclusion

The results of this model demonstrate that justices are forward-thinking actors who realize the threat of retaliation by the legislative branch when deciding whether to strike down tort reform statutes. While strategic behavior was recognized at the agenda-setting stage, strategic behavior is not limited to the agenda-setting stage. The threat of retaliation by the legislature is actually a more salient predictor of judicial decision-making on the merits. Justices are less likely to strike down a statute when the political environment is supportive and they are more liberal than the state legislature. Additionally, justices are less likely to strike down a tort reform statute when the legislature is more professional. Justices are more likely to strike down a statute when institutional conditions reduce the threat of retaliation; justices are more likely to invalidate statutes under periods of divided government and in states with a difficult amendment procedure.

Once again, the model supports a conditional relationship between the political environment and elite preferences. When justices fear retaliation they behave strategically by voting against their sincere preferences. The model also demonstrates that

when justices are unconstrained they aggressively pursue their policy preferences. In general, liberal justices are substantially more likely to strike down tort reforms. Also justices are more likely to strike down tort reforms when other elite actors are paying attention; as the total number of amicus briefs filed increases, justices are more likely to invalidate tort reform statutes.

This final empirical model demonstrates that strategic behavior occurs at each stage of the policy-making process. The SSOP model predicts that if legislators and justices had perfect information, strategic behavior would be essentially limited to the enactment and agenda-setting stages. We would not witness tort reform statutes being struck down because a legislature would not enact a tort reform statute if it could not retaliate against a hostile court, and a court would not strike down a statute if the legislature could retaliate. Chapter III demonstrated that strategic decision-making does occur at the enactment stage; judicial preferences significantly affect legislative decision-making when the legislature cannot retaliate. Chapter IV demonstrated that justices strategically deflect cases based on legislative preferences and the political environment. Finally, this model demonstrates that even when these previous strategic calculations are taken into account, justices still sometimes act contrary to their sincere preferences at the decision-making stage of judicial review.

The results substantiate the presence of strategic behavior in the first two stages, while simultaneously demonstrating that strategic behavior still occurs in this final stage. Justices only voted to strike down tort reform statutes thirty-eight percent of the time. While this percentage might seem low when thinking about the tort reform movement as a separation of powers battle between courts and legislatures, the percentage makes sense

when considering the strategic calculations made by the state legislatures at the enactment stage. Additionally, the significance of the selection variable in this model, substantiates the conclusion from Chapter IV that strategic behavior occurs at the agenda-setting stage. The case selection process is not random and does affect individual justices' votes on the merits. Finally, though strategic calculations were made at each subsequent stage, justices still take strategic considerations into account when deciding on the merits. The interaction between the political environment, elite preferences, and institutional features substantially impact judicial decision-making.

CHAPTER VI

CONCLUSION

This dissertation investigates how public policy is formulated under a system of separated powers. Through formal and empirical analyses, the dissertation analyses how the inter-dependent decision making of elite actors shapes the types of policies emerging from the fifty states. The State Separation of Powers model developed in Chapter II introduces a general theory of decision-making in a system of separated powers which is then tested in the real-world context of tort reform in the fifty states. The dissertation is meant to serve as both a comprehensive model of how policy is formulated in the state governments and a comprehensive explanation of how the tort reform movements has developed. Studying the tort reform movement through a separation of powers lens not only illuminates the current state of knowledge on tort reform but also provides an ideal natural experimental setting in which to advance a separation of powers theory. Hence, the dissertation makes a contribution to the literatures on separation of powers, state policy-making, and tort reform.

Previously, most of the existing literature on tort reform has been descriptive or normative in nature, focused on describing in detail the tort reform movement in a single state (Moore 2006, Daniels and Martin 2006, Kahlenberg 2006) or arguing for or against legislative or judicial intervention in the policy-making process (Conroy 2006, Kelly and Mello 2005, Johnston 2007). Public law scholars have joined the popular debate on tort reform using both legal and political rationales to defend their arguments. While sophisticated arguments have been developed justifying and denouncing the behavior of

states justices and legislators, they do not offer a comprehensive explanation of elite behavior by generating precise hypotheses that can be empirically tested. In contrast, I argue that the tort reform movement is best examined through a dynamic separation of powers model and a comparative empirical design.

I argue that vast differences in tort law across the fifty states are a direct result of the dynamic interaction between state legislatures and state courts. The debate over tort reform has produced a legally and politically salient battle between the coordinate branches with both legislatures and justices seeking to insert their policy preferences into the law. The collective decision-making of these elite actors has significantly influenced state tort litigation leading to disparate outcomes for citizens pursuing civil litigation from one state to the next. The tort reform issue truly highlights the effect of elite decision-making on the lives of citizens.

Additionally, what makes tort reform theoretically interesting is that the battle over tort law has taken place in an institutional context which promotes strategic behavior. Because judges and legislatures recognize that the future of tort law rests upon their joint interactions they have the incentive to behave strategically in reaction to the anticipated behavior of one another. This dissertation has considered the potential for strategic behavior at each stage of the policy-making process. Through the SSOP model and empirical analysis, the dissertation identifies the conditions that encourage strategic behavior by legislatures when choosing whether to enact statutes, and the conditions encouraging strategic behavior by justices when exercising the power of judicial review.

While the impact of a separation of powers system and the strategic behavior of elite actors has been studied in a number of ways, few studies have analyzed the impact

of a separation of powers through a comprehensive multi-method approach. Additionally, while SOP models have been developed in connection with the studies of the Supreme Court and Congress, they have been far less employed in the study of state policymaking. The SSOP model developed in Chapter II captures the dynamic relationship between legislatures and courts while simultaneously controlling for the influence of the political environment and institutional structure. The SSOP model introduces a number of theoretical contributions to the study of state policy-making and elite decision-making. The SSOP model has predictive power, indentifying the conditions under which legislatures and courts should pursue certain courses of action.

Additionally, the model explains how varying the institutional structure influences elite decision-making. When the institutional structure of the formal model is varied, the actors' decision-making thresholds change. The model predicts that when justices are not beholden to public opinion and do not have a discretionary docket, they are more likely to find a statute unconstitutional at the decision on the merits stage of judicial review.

The SSOP model highlights the interdependent nature of state policy making, leading to an observation previously untested in the literature. The SSOP model indicates that the relationship between legislative and judicial preferences is conditioned by the political environment. Legislatures assess their strength by considering the status of the political environment. When legislatures are convinced that the political environment is supportive of their policy goals, legislatures do not have take into account the preferences of the court. When the political environment is supportive, legislatures have the political capital to retaliate against a hostile court if necessary. However, when the political

environment is less supportive the legislature retaliation against the court is costly and judicial preferences must be considered. Thus, under certain circumstances the court has preemptive power over the enactment of legislation.

Chapter III further explores how the interdependent relationship between legislatures and state courts promotes strategic behavior at the legislative enactment stage. The empirical model defines the conditions under which courts are expected to have preemptive power over the enactment of legislation. I utilize an event history model that considers the rate and likelihood of the enactment of tort reform legislation across all fifty states between 1997 and 2004. The empirical results support a conditional relationship between the political environment and elite preferences. When the legislature does not have the political capital to retaliate, court preferences significantly influence the enactment of tort reform statutes. A constrained legislature is seventy percent less likely to enact legislation than a legislature operating in a supportive political environment.

The results of Chapter IV further support the conditional relationship between the political environment and elite preferences. When the political environment supports tort reform, justices opposed to tort reform are constrained by the preferences of the legislative branch. Justices anticipate the threat of retaliation by both the legislature and the mass public. When justices face competitive reelections, courts are less likely to engage in judicial review when their preferences diverge from the mass public. The results of the event history model refine the conditions under which justices pursue sincere and strategic courses of action at the agenda-setting stage. The broader political

environment and the institutional structure affect the relationship between the legislature and court at the agenda-setting stage of judicial review.

Chapter V demonstrates that contrary to the predictions of the SSOP model, strategic behavior is not limited to the enactment and agenda-setting stages. The threat of retaliation by the legislature remains a salient predictor of judicial decision-making on the merits. Justices are less likely to strike down a tort reform statute when the political environment is supportive and the legislature is more conservative. Additionally justices are less likely to strike down a statute when the institutional conditions encourage retaliation by the legislature. At the decision-making stage, justices are influenced by their own preferences and the preferences of the legislative branch, the political environment, and the state's institutional structure.

Through a formal model and a fifty state comparative design, this dissertation tests a vast array of contextual and institutional hypotheses concerning the strategic behavior of elite actors. Testing the hypotheses in the context of state tort reform, this dissertation provides not only a comprehensive explanation of how the tort reform movement has developed, but also introduces a general theory of elite decision making in a separation of powers system. The empirical results demonstrate that strategic behavior occurs at each stage of the policy making process and further refines the conditions in which strategic behavior is expected. The results support my argument that state public policy is the end result of the interaction between elite preferences, political environment, and institutional structure.

APPENDIX

I. Legislature's Retaliation Threshold:

$$EU(R) = q(\alpha - 2\beta - 2\varepsilon) + (1-q)(\alpha - 2\varepsilon)$$

$$EU(\sim R) = q(-\beta - \varepsilon) + (1-q)(-\varepsilon)$$

$$-2\beta\alpha + \alpha - 2\varepsilon > -\beta q - \varepsilon$$

$$\text{Retaliate iff } q < \varepsilon - \alpha / -\beta$$

II. Court's Avoidance Threshold:

$$EU(C) = q(A - c) + (1-q)A$$

$$EU(A) = A$$

$$\text{Find UC iff } -cq = 0$$

III. Judicial Veto Threshold:

Case I. When $q < \alpha/\beta$ (i.e. the Legislature will retaliate.)

$$EU(A) = 0 \text{ or } 0$$

$$EU(UC) = -I \text{ or } -I - c$$

Court will always avoid taking case in this scenario.

Case II. When $q \geq \alpha/\beta$ (i.e. the Legislature will not retaliate.)

$$EU(UC) = q(A) + (1-q)(A - c)$$

$$EU(A) = 0$$

$$A - c = cq > 0$$

$$\text{Find UC if } q < c - A/c$$

IV. Legislature's Enactment Threshold:

Case I. When $q > c - A/c$ i.e. The Court will not veto.

$$EU(\sim E) = 0$$

$$EU(E) = (1-p)(1-q)(\alpha - \varepsilon) + (1-p)(q)(\alpha - \beta - \varepsilon) + (p)(1-q)(\alpha - \varepsilon) + pq(\alpha - \beta - \varepsilon)$$

$$\text{Enact iff } q < \alpha - \varepsilon / \beta$$

Case II. When $q < c-A/c$ and $q > \varepsilon-\alpha/\beta$ i.e. The Court will veto and the Legislature will not retaliate.

$$EU(\sim E)=0$$

$$EU(E)=-\varepsilon, -\beta-\varepsilon, -\varepsilon, -\beta-\varepsilon$$

The Legislature will never enact under in this scenario.

Case III. When $q < c-A/c$ and $q < \varepsilon-\alpha/\beta$ i.e. The Court will veto and the Legislature will retaliate.

$$EU(\sim E)$$

$$EU(E)=(1-p)(1-q)(\alpha-2\varepsilon)+(1-p)(q)(\alpha-2\beta-2\varepsilon)+(p)(1-q)(\alpha-2\varepsilon)+pq(\alpha-2\beta-2\varepsilon)$$

$$\text{Enact iff } q < \alpha-2\varepsilon/2\beta$$

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