
REVERSAL, DISSENT, AND VARIABILITY IN STATE SUPREME COURTS: THE CENTRALITY OF JURISDICTIONAL SOURCE

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State Supreme Courts (“SSCs”) exercise two major sources of authority: mandatory and discretionary jurisdiction. This Article assesses 7055 SSC cases decided with written opinions in 2003 to provide the first comprehensive study of the relation between jurisdictional source and SSC performance. Approximately half of the cases were discretionary and half were mandatory. Jurisdictional source is associated with several important aspects of SSC behavior. Aggregated across states, courts reversed 51.6% of discretionary jurisdiction cases, compared to 28.1% of mandatory cases. The jurisdictional source also affected dissent rates: 26.7% of discretionary cases generated at least one dissenting opinion, compared to 18.8% of mandatory cases. Striking interstate variation overlays the mandatory-discretionary distinction. Reversal rates in SSC discretionary jurisdiction cases ranged from 88% in Texas to 31% in Ohio. Across courts with substantial mandatory jurisdiction, reversal rates ranged from 68% in Arizona to 13% in Florida and 9% in the Texas Court of Criminal Appeals. These results are consistent with models that account for state and case category effects. Surprisingly, after controlling for state and case category, discretionary case opinions are shorter than mandatory case opinions. The evidence suggests that studies of SSC outcomes, dissent patterns, judicial policy preferences, and other characteristics should take account of jurisdictional source.

INTRODUCTION

State supreme courts are influential institutions. They exercise final authority over the vast majority of lawsuits filed in the United States. Together, they pronounce and shape legal doctrine by issuing thousands of opinions a year. In the aggregate, they are probably the most significant judicial institutions for the lives of United States citizens, even though, as Kagan et al. noted thirty years ago, they are often “over-shadowed in the public eye by the federal courts.”¹ Recognizing the importance of SSCs, scholars have studied important features of SSC decision-making, including patterns of case outcomes,² effects of judicial selection procedures,³ responses to decisions of the United States Supreme Court,⁴ endowment effects,⁵ dissent rates,⁶ workload patterns,⁷ voting strategies,⁸ measures of judicial preference,⁹ and

¹ Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 121 (1977).

² See Craig F. Emmert, *An Integrated Case-Related Model of Judicial Decision Making: Explaining State Supreme Court Decisions in Judicial Review Cases*, 54 J. POL. 543, 543-44, 549 (1992); Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843, 843-44 (1961); Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1192 (1978).

³ See Burton M. Atkins & Henry R. Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AM. POL. Q. 427, 434 (1974); John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 467-68 (1999); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 235 (1987).

⁴ See Paul Brace, Melinda Gann Hall & Laura Langer, *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265, 1265 (1999); Bradley C. Canon, *Organizational Contumacy in the Transmission of Judicial Policies: The Mapp, Escobedo, Miranda, and Gault Cases*, 20 VILL. L. REV. 50, 55-56 (1974); Valerie Hoekstra, *Competing Constraints: State Court Responses to Supreme Court Decisions and Legislation on Wages and Hours*, 58 POL. RES. Q. 317, 318 (2005).

⁵ See Paul Brace & Melinda Gann Hall, “*Have*” Versus “*Have Nots*” in State Supreme Courts: *Allocating Docket Space and Wins in Power Asymmetric Cases*, 35 LAW & SOC'Y REV. 393, 393 (2001).

⁶ See Paul Brace & Melinda Gann Hall, *Integrated Models of Judicial Dissent*, 55 J. POL. 914, 921 (1993); Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54, 56-57 (1990); Steven A. Peterson, *Dissent in American Courts*, 43 J. POL. 412, 412 (1981).

⁷ See Kagan et al., *supra* note 1, at 122; Herbert M. Kritzer et al., *The Business of State Supreme Courts, Revisited*, 4 J. EMPIRICAL LEGAL STUD. 427, 429 (2007).

⁸ See Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 428 (1992).

⁹ See Paul Brace, Laura Langer & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387, 388 (2000).

more. This impressive literature, however, fails to explore a fundamental feature of SSC dockets: the distinction between cases that SSCs *must* adjudicate (mandatory jurisdiction) and cases they *may* – but need not – adjudicate (discretionary jurisdiction).¹⁰

This Article explores that distinction. Drawing from a set of 7055 cases decided with written opinions in 2003 across all the SSCs (including two specialized criminal courts in Texas and Oklahoma), we categorized 3318 cases as based on discretionary jurisdiction, 3563 cases as based on mandatory jurisdiction, and the remaining cases with ambiguous or missing jurisdiction. Thus, of cases with a categorized jurisdiction, 48.2% arose under discretionary jurisdiction and 51.8% arose under mandatory jurisdiction.

Jurisdictional source is associated with virtually every important aspect of SSC behavior. With respect to case outcomes, in 51.6% of discretionary jurisdiction cases, SSCs reversed the judgment below, as compared to only 28.1% of mandatory jurisdiction cases.¹¹ Jurisdiction is also significantly associated with patterns of concurrence and dissent: for example, 26.7% of the discretionary cases generated at least one dissenting opinion, as compared with 18.8% of the mandatory cases.¹²

Jurisdictional source helps to explain SSC workloads in one important area: capital punishment. Capital cases account for over 7% of the mandatory cases in the study but only 1% of the discretionary cases. In other respects, the mandatory-discretionary distinction is not strongly associated with case

¹⁰ One author considers discretion to review across sixteen states. See Note, *supra* note 2, at 1196, 1200. For early studies of the exercise of discretionary jurisdiction by the California Supreme Court, see generally Note, *To Hear or Not to Hear: A Question for the California Supreme Court*, 3 STAN. L. REV. 243 (1951) [hereinafter *To Hear or Not to Hear*]; Note, *To Hear or Not to Hear: II*, 4 STAN. L. REV. 392 (1952) (reexamining the findings of *To Hear or Not to Hear*). For related early studies, see David W. Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57, 58 (1969); Lawrence Baum, *Decisions to Grant and Deny Hearings in the California Supreme Court: Patterns in Court and Individual Behavior*, 16 SANTA CLARA L. REV. 713, 715 (1976); Edward N. Beiser, *The Rhode Island Supreme Court: A Well-Integrated Political System*, 8 LAW & SOC'Y REV. 167, 173 (1973); Bradley C. Canon & Dean Jaros, *External Variables, Institutional Structure & Dissent on State Supreme Courts*, 3 POLITY 175, 178 (1970); Bradley C. Canon & Dean Jaros, *State Supreme Courts - Some Comparative Data*, 42 SPECTRUM 260, 261 (1969); Daryl R. Fair, *An Experimental Application of Scalogram Analysis to State Supreme Court Decisions*, 1967 WIS. L. REV. 449, 450. For a fascinating theoretical analysis, see Steven Shavell, *On the Design of the Appeals Process: The Optimal Use of Discretionary Review Versus Direct Appeal 2* (Harvard Law & Econ. Discussion Paper No. 625, 2009), available at <http://ssrn.com/abstract=1326563>.

¹¹ The mandatory case reversal rate is lower than to the 36.8% reported for sixteen SSCs in Note, *supra* note 2, at 1201. The 56.1% discretionary case reversal rate is higher than the 50% reversal rate that the Note reported. *Id.*; see also *infra* tbl.3 (listing reversal rates).

¹² See *infra* tbl.5.

category workloads. Outside the capital punishment area, a strong linear association exists between a case category's percent of SSC mandatory and discretionary jurisdiction workloads. For example, criminal procedure cases made up 10.7% of mandatory cases and 12.7% of discretionary cases, while products liability cases comprised only 0.6% of mandatory cases and 0.7% of discretionary cases.

SSC jurisdiction is not strongly associated with other case characteristics. Surprisingly, opinions in discretionary cases are actually shorter on average than those in mandatory cases – a finding that is inconsistent with our intuition that discretionary cases tend to be more controversial or difficult than mandatory cases.¹³ Nor did we find a chief judge effect: chief judges are no more likely to write the principal opinion in discretionary cases than in mandatory cases. They write about 17% of both discretionary and mandatory case opinions. Nor do chief judges dissent more often in mandatory cases than in discretionary cases. In results of our analysis not reported here, no significant association emerged between jurisdiction and judicial tenure in office for judges who wrote principal opinions.

Although these nationwide effects are quite robust, substantial interstate variation exists. Across SSC discretionary jurisdiction cases, reversal rates range from 88% in Texas to 31% in Ohio.¹⁴ Across courts with substantial mandatory jurisdiction, reversal rates range from 68% in Arizona to 13% in Florida and 9% in the Texas Court of Criminal Appeals.¹⁵

Rates of case-level dissent similarly vary. In SSCs with substantial discretionary jurisdiction, the percentage of cases with at least one dissent ranges from about 81% in Mississippi to only about 4% in Nebraska and Massachusetts.¹⁶ In SSCs with substantial mandatory jurisdiction, dissent rates range from 60% in Mississippi to less than 2% in Kansas.¹⁷ Investigating the causes of this remarkable level of interstate variation is a challenge for future research into SSC decision-making.

Part I of this Article describes relevant background and why jurisdictional source matters. Part II describes the data and Part III reports descriptive and regression results. Part IV discusses the results. As this summary suggests, the major conclusion that emerges from this study is that descriptions of SSC activity are incomplete unless they account for jurisdictional source. Likewise, models of SSC decisions and of judicial preferences cannot be accepted at face value unless they account for jurisdictional source and other mechanisms shaping the selection of cases for review.

¹³ This study had data for the amount of time between argument and decision for relatively few cases (918). In these cases, no significant difference existed between times for mandatory and discretionary cases.

¹⁴ See *infra* tbl.3.

¹⁵ See *infra* tbl.3. But see *infra* note 80.

¹⁶ See *infra* tbl.5.

¹⁷ See *infra* tbl.5.

I. BACKGROUND AND HYPOTHESES

This Part first provides a sketch of the history of SSC jurisdiction. It then discusses why jurisdictional source is likely to matter in assessing SSC characteristics, including reversal and dissent rates.

A. *Jurisdiction and SSCs*

1. Brief History of SSC Jurisdiction

SSC jurisdictional history is analogous to that of the United States Supreme Court. Article III of the Constitution vests the Supreme Court with “appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”¹⁸ In the Republic’s early years, the Justices were able to keep up with the Court’s docket, even with the burdens of riding circuit.¹⁹ But increased business caused the Court to fall behind in its opinions as the nineteenth century progressed.²⁰ Congress addressed this problem in 1891 by establishing nine intermediate appellate courts and giving the Supreme Court limited discretion over which cases it would hear.²¹ It was not until 1925, however, that Congress conferred broad discretionary jurisdiction on the Court.²² But the discretion was not unfettered: the Court was still (in theory)²³ required to review appeals of state court decisions finding treaties, federal statutes, and state statutes repugnant to the constitution, treaties, and laws of the United States.²⁴ Congress eliminated this requirement in 1988,²⁵ giving the Supreme Court essentially complete discretion over its appellate caseload.²⁶

SSCs have followed a similar path, but the progress towards discretionary jurisdiction has not been uniform across states. Like the Supreme Court, SSCs

¹⁸ U.S. CONST. art. III, § 2, cl. 2.

¹⁹ See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 813-14 n.589 (1984).

²⁰ See Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 508 & n.64 (1974) (noting early steps toward giving the Supreme Court discretionary jurisdiction); Estreicher & Sexton, *supra* note 19, at 814.

²¹ Judiciary Act of 1891, ch. 517, §§ 3-7, 26 Stat. 826-28 (1891).

²² Judiciary Act of 1925, ch. 229, §§ 128, 237(b), 43 Stat. 936, 937-38 (1925).

²³ The mandatory requirement was sometimes observed in the breach. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9-10 (1959).

²⁴ See Judiciary Act of 1925, § 237(b), 43 Stat. at 937 (allowing certain types of cases to be heard by the Supreme Court through a writ of error).

²⁵ Pub. L. No. 100-352, 102 Stat. 662 (codified at 28 U.S.C. § 1257 (2006)).

²⁶ See Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 389 (2004).

originally had mandatory jurisdiction.²⁷ Over time, however, many SSCs achieved substantial control over their dockets, especially when intermediate courts of appeals were created to provide initial appellate review. The movement towards discretionary SSC jurisdiction began in the late nineteenth century. For example, discretionary jurisdiction for New York's Court of Appeals, that state's highest court, originated with an 1894 constitutional amendment to limit "the volume of business to the Court's ability to dispose of it."²⁸ The California Supreme Court's discretionary jurisdiction dates from a 1904 amendment to the state constitution, again in response to docket pressure.²⁹ Some of the development of discretionary review and intermediate courts is of recent vintage.³⁰

Unlike the United States Supreme Court, however, SSCs have not uniformly moved to complete discretionary jurisdiction. In some states, all review is discretionary,³¹ in others, all review is mandatory,³² and others provide for a mix of mandatory and discretionary jurisdiction. Common categories of cases that receive mandatory SSC jurisdiction include capital cases,³³ appeals involving life imprisonment or other lengthy sentences,³⁴ disciplinary proceedings involving a state judge or member of the state bar,³⁵ cases invalidating a state statute on constitutional grounds,³⁶ and cases with a dissent

²⁷ See Kagan et al., *supra* note 1, at 128.

²⁸ Charles S. Desmond, *The Limited Jurisdiction of the New York Court of Appeals – How Does It Work?*, 2 SYRACUSE L. REV. 1, 1-2 (1950) (analyzing five hundred appeals decided in 1948-1949 and 1923-1924).

²⁹ See *People v. Davis*, 81 P. 718, 720 (Cal. 1905) ("At the time this constitutional amendment was put forward and adopted, this court had been for years unable to dispose of the business before it as fast as it accumulated, and the cases were decided from two to three years after the appeals were filed. . . . The amendment was adopted chiefly for the purpose of affording a remedy for this evil."). For the development of intermediate appellate courts and the growth of SSC selectivity in sixteen states, see Kagan et al., *supra* note 1, at 128-32.

³⁰ For example, Kagan et al. wrote when Minnesota and Kansas lacked intermediate appellate courts. Kagan et al., *supra* note 1, at 131. These states now have appellate courts. See Kansas Judicial Branch, <http://www.kscourts.org> (last visited Oct. 29, 2009); Minnesota Judicial Branch, <http://www.mncourts.gov> (last visited Oct. 29, 2009).

³¹ For example, appeal to the West Virginia Supreme Court is by petition. See W. VA. R. APP. P. 3(c), 7(c). SSCs may also have original jurisdiction over various matters not systematically accounted for in this study. *E.g.*, ILL. CONST. art. VI, § 4(a) ("The Supreme Court may exercise original jurisdiction in cases relating to revenue, mandamus, prohibition or habeas corpus and as may be necessary to the complete determination of any case on review.").

³² See *infra* note 39.

³³ *E.g.*, CAL. CONST. art. VI, § 11(a); ILL. CONST. art. VI, § 4(b).

³⁴ See, *e.g.*, KY. CONST. § 110(2)(b) (providing for mandatory jurisdiction for death sentences or imprisonment for twenty years or more).

³⁵ *E.g.*, WASH. DISCIPLINE R. FOR JUDGES 1(a).

³⁶ *E.g.*, LA. CONST. art. V, § 5(D).

in the intermediate appellate court.³⁷ Some instances of mandatory jurisdiction might best be described as quirky: for example, Kentucky and Tennessee retain mandatory SSC jurisdiction for appeals in workers' compensation cases.³⁸ Not surprisingly, states that retain substantial elements of mandatory SSC jurisdiction tend to have smaller populations,³⁹ sometimes without an intermediate appellate court.⁴⁰ Even in states without intermediate courts, however, elements of discretionary review can substantially shape SSC outputs.⁴¹

2. Jurisdictional Distribution of SSC Cases and the Degree of Discretionary Case Filtering

Overall, in 2003, the year covered by this study, National Center for State Courts ("NCSC") data show that forty-three states reported completing a total of 25,578 mandatory jurisdiction matters, and forty-six states reported completing a total of 59,677 discretionary petitions.⁴² Thus, it appears that over twice as many cases arrive at SSCs via discretionary jurisdiction than via mandatory jurisdiction. As the differing numbers suggest, a limitation of studies of state courts, including this one, is that neither uniform nor complete reporting of caseload information exists across all states. Only substantial,

³⁷ *E.g.*, N.Y. CONST. art. VI, § 3(b)(1); N.C. GEN. STAT. § 7A-30 (2007); N.J. CT. R. ANN. 2:2-1(a). In New York, the legislature may abrogate this appeal right. N.Y. CONST. art. VI, § 3(b)(8). In fact, the legislature has chosen to do so with N.Y. C.P.L.R. 5601(a) (McKinney 2008), that requires dissents by two justices to support an appeal as of right.

³⁸ See *infra* note 73 and accompanying text.

³⁹ *E.g.*, ME. REV. STAT. ANN. tit. 4, § 57 (West 2000); SUPREME COURT OF NEV., REPORT TO THE 74TH REGULAR SESSION OF THE NEVADA STATE LEGISLATURE, 2007, REGARDING THE CREATION OF THE NEVADA COURT OF APPEALS, at 16 tbl.3 (2007) [hereinafter SUPREME COURT OF NEV. REPORT] (showing New Hampshire and West Virginia SSCs with discretionary jurisdiction in 100% of cases, but Rhode Island with 32%, Maine and Montana with over 20%, and South Dakota with over 10%).

⁴⁰ States without intermediate appellate courts include Delaware, Maine, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming. SUPREME COURT OF NEV. REPORT, *supra* note 39, at 8 n.20. The District of Columbia, not included in this study, also has no intermediate appellate court. *Id.* North Dakota authorizes the use of a temporary court of appeals "if the chief justice certifies to the governor that the supreme court has disposed of two hundred fifty cases in the twelve months preceding September first of any year." N.D. CENT. CODE § 27-02.1-02(1) (2006).

⁴¹ See, *e.g.*, WYO. STAT. ANN. § 5-2-119 (2009).

⁴² SHAUNA M. STRICKLAND, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2004, at 105 tbl.1 (2005). A complete estimate of SSC cases can include some small categories, bringing the NCSC total estimated completed SSC cases or petitions in the 2003 to 90,223. *Id.*

ongoing efforts by the NCSC have provided the aggregate, comparable cross-state information that currently exists.⁴³

Case-filtering associated with discretionary review is substantial, both at the state and national levels. For example, in fiscal year 2005-2006, the California Supreme Court received 5591 petitions and granted review in only 3% of them.⁴⁴ Of over 3400 original proceedings, the California Supreme Court denied or transferred to courts of appeal all but thirteen.⁴⁵ Over 9000 dispositions included only 125 cases disposed of by written opinion.⁴⁶ In 2005, the New York Court of Appeals “decided 961 motions for leave to appeal in civil cases” and granted only 6.4% of them.⁴⁷

Forms of case filtering also exist for mandatory jurisdiction, even though SSCs are required to hear and dispose of such cases. Obviously, SSCs would be overwhelmed if they had to grant a full-scale hearing and issue a written opinion in each of the more than 25,000 mandatory cases that come to them each year.⁴⁸ SSCs with substantial mandatory dockets manage the caseload by employing labor-saving devices such as deciding cases on the briefs without oral argument,⁴⁹ referring mandatory cases to panels rather than deciding them en banc,⁵⁰ and affirming the decision below by means of summary per curiam orders. In addition, the difference between the more than 25,000 SSC mandatory case dispositions reported by the NCSC for 2003 and the approximately 3500 mandatory SSC cases with available written opinions suggests that a large majority of mandatory SSC cases are dealt with by such means.⁵¹

On the other hand, the intensity of filtering appears to be lower for mandatory than for discretionary cases. The NCSC data show that SSCs handle about twice as many discretionary cases as mandatory cases.⁵² But our data show that SSCs issued written opinions in roughly the same numbers of

⁴³ See National Center for State Courts, http://www.ncsconline.org/D_About/index.htm (Mar. 11, 2009). For access to the NCSC's data, see NCSC: Research: Court Statistics Project, http://www.ncsconline.org/d_research/csp/CSP_Main_Page.html (Oct. 25, 2009).

⁴⁴ JUDICIAL COUNCIL OF CAL., 2007 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 1996-1997 THROUGH 2005-2006, at 8 tbl.5 (2007), available at <http://www.courtinfo.ca.gov/reference/documents/csr2007.pdf>.

⁴⁵ *Id.* at 9 tbl.6.

⁴⁶ *Id.*

⁴⁷ STUART M. COHEN, ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 6 (2005).

⁴⁸ See *supra* note 42 and accompanying text.

⁴⁹ *E.g.*, LA. SUP. CT. R. 8, § 4.

⁵⁰ *E.g.*, ALA. R. APP. P. 16(a) (permitting the Alabama Supreme Court to sit in divisions of five justices).

⁵¹ See *infra* tbl.5.

⁵² See STRICKLAND, *supra* note 42, at 105 tbl.1.

mandatory and discretionary cases. Thus, case filtering appears to be only about half as intense for mandatory cases as it is for discretionary cases.

B. *Why Discretionary Review Matters and Hypotheses*

Discretionary review is important for at least two reasons. First, discretionary review tends to shift dockets away from traditional case-based adjudication and toward issue-based adjudication. Judicial preferences manifest themselves differently in the two classes of adjudication. While the shift towards issue-based adjudication suggests that differences should exist between discretionary and mandatory jurisdiction case outputs, theories of case- versus issue-based jurisdiction do not necessarily forecast the direction of those differences. The direction of expected differences depends largely on the particular criteria states use to implement SSC discretion over the cases they review.

1. *The Distinction Between Issue-Based and Case-Based Adjudication*

Theoretical work on collegial courts suggests that judicial behavior may differ in significant ways depending on whether the court reaches results on a case-by-case basis or via issue-by-issue adjudication. Such work distinguishes between issue-centered decision-making, where the court's main concern is to establish some principle applicable in future cases, and case-centered decision-making, where the goal is to achieve a fair resolution of the particular controversy.⁵³ One expects courts with greater discretionary jurisdiction to be more issue-focused than courts with greater mandatory jurisdiction, which are likely to be more case-focused.

The relationship is not perfect, of course. Judges with discretionary jurisdiction may select some cases on the basis of the facts, especially if they consider the matter important. The result is a case-based ruling in a discretionary matter. Conversely, judges in mandatory cases will sometimes be primarily concerned with an issue rather than a case's outcome. Some state mandatory jurisdiction rules, in fact, appear to select for "close" cases where the resolution of the issue, rather than the case outcome, is likely to be most salient to the judges – as when there is a dissent in the lower court⁵⁴ or when the decision below has invalidated a law or ordinance on constitutional grounds.⁵⁵

Nevertheless an association between discretionary jurisdiction and issue-based adjudication is predictable. SSCs are probably more inclined to grant review of cases where the issue is important simply because resolution of the

⁵³ See Lewis A. Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J.L. ECON. & ORG. 441, 445-46 (1992); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 24 (1993) (examining how case-based outcomes and issue-based outcomes may differ).

⁵⁴ See *supra* note 37.

⁵⁵ LA. CONST. art. V, § 5(D); FLA. R. APP. P. 9.030(a)(1)(A).

issue affects many other cases whereas case-based adjudication primarily affects only the litigants then before the court. SSC rules are often explicit on this point, making an issue's importance a consideration in deciding whether to grant review.⁵⁶

2. Discretionary Selection Criteria and Their Implications

a. *Predictions About Reversal Rates, Dissensus, and Opinion Characteristics*

Reversal Rates. The importance of an issue or case does not necessarily forecast a difference between mandatory and discretionary case outcomes. A case that is important because it affects many other cases need not be especially difficult. But importance or other selection criteria often are associated with factors likely to affect outcomes. Lower court cases that conflict with one another are important because of their non-uniformity and should be particularly subject to SSC review. Because such cases embody judicial disagreement, one expects them to be unusually amenable to being reasonably decided in either direction. This in turn suggests that discretionarily reviewed cases are more subject to reversal because it will be less clear than in the mass of cases that the lower court was correct.

Given discretion to select cases coupled with human nature, one also expects judges to tend to review outcomes with which they disagree. Lower court decisions in accord with judges' policy preferences do not threaten those preferences and judges have less reason to review them than to review lower court cases with which judges disagree. The tendency to review cases one believes to be erroneous should tend to increase discretionary case reversal rates.

Thus, both non-uniform lower court decisions, and the instinct to review cases with which one disagrees, point towards greater reversal rates in discretionary cases than in mandatory cases. We therefore expect that SSC reversal rates should be higher in discretionary jurisdiction cases than in mandatory jurisdiction cases.⁵⁷ This pattern is well-established in federal

⁵⁶ For example, California's Rules of Court state that the SSC may review an intermediate court of appeal decision "[w]hen necessary to secure uniformity of decision or to settle an important question of law." CAL. R. CT. 8.500(b)(1); *see also*, LA. SUP. CT. R. X § 1(a)(2) (listing among reasons considered for review, "[a] court of appeal has decided, or sanctioned a lower court's decision of, a significant issue of law which has not been, but should be, resolved by this court").

⁵⁷ Prior research on SSCs, mostly reporting old data, does not clearly resolve this question. In 1949, according to one study, the California Supreme Court reversed, modified, or reversed in part sixty-four of the one hundred cases in which it granted a petition to review. *To Hear or Not to Hear*, *supra* note 10, at 250-51. Not all discretionary review by state courts results in such substantial reversal rates, however. In 1948-1949, New York's highest court affirmed about 70% of discretionary cases. Desmond, *supra* note

courts: the Supreme Court in the 2003 Term reversed or vacated over 70% of the cases it accepted for discretionary review,⁵⁸ whereas the federal circuit courts of appeal, exercising mandatory jurisdiction, affirmed approximately 80% of the cases they adjudicated.⁵⁹ The test of this hypothesis in state courts can be more rigorous than at the federal level because many SSCs exercise both mandatory and discretionary jurisdiction at the same time. One can therefore explore both within-court and between-court differences.

Dissensus. Greater uncertainty about discretionary cases' merits also suggests that these cases are more likely than mandatory cases to generate non-unanimous opinions. We therefore predict that dissensus levels will be higher for discretionary than for mandatory cases. Although individual judicial influence on the mass of cases has not definitively been shown to be associated with case outcomes,⁶⁰ individual judges' views often are associated with case outcomes in the select sample of cases that are adjudicated to final appeal.⁶¹ We expect individual judicial preferences to be even more manifest in the subset of appealed cases selected for review based on their importance or

28, at 3-4 (stating also that in 1923-1924 the court affirmed about two-thirds of such appeals).

⁵⁸ *The Supreme Court, 2003 Term – The Statistics*, 118 HARV. L. REV. 497, 505 tbl.II(D) (2004) (showing that out of the seventy-six cases the Court reviewed on writ of certiorari and disposed of by full opinion, it reversed 64.5% and vacated 13.2%). The Court vacated 95.2% of the forty-two cases it disposed of by memorandum orders. *Id.* This figure excludes a handful of specialized dispositions. *Id.* at 505 n.o.

⁵⁹ See Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 130 (2001) [hereinafter Clermont & Eisenberg, *Defendants' Advantage*]; Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 952 tbl.1 [hereinafter Clermont & Eisenberg, *Plaintiphobia in the Appellate Courts*] (showing an overall 18.37% reversal rate for appeals from federal civil trials in fiscal years 1988-1997); Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 664 tbl.1 (2004) [hereinafter Eisenberg, *Appeal Rates and Outcomes*].

⁶⁰ For example, judge effects do sometimes show up in published opinion studies, but this does not necessarily carry over to the mass of decisions. See Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 263-64, 281 (1995); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1381, 1453 (1998) (using the consideration by courts of a common legal issue as a way to control for concerns about strength of cases).

⁶¹ For example, a recent study shows a pronounced effect of sex in judging. See Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging* 31 (July 19, 2007) (unpublished paper), available at <http://ssrn.com/abstract=1001748> (finding that sex discrimination complainants do better before woman judges in published federal appellate opinions).

difficulty. Jurisdictional source is of course not the only factor expected to be associated with reversal and dissensus rates. This study considers other factors, such as case categories, to the extent the data allow.

Opinion Characteristics. Since we hypothesize that discretionary cases tend to be closer and generate more dissensus than mandatory decisions, it is straightforward to hypothesize that opinions in discretionary cases will be longer than opinions in mandatory cases. We also predict that majority opinions in discretionary cases are more desirable for judges to write because, being issue-based, they will tend to have greater influence. We thus predict that chief judges, who presumably have influence in opinion assignments, will tend to write a higher percentage of majority opinions in discretionary cases than in mandatory cases. We also predict that judges with less tenure on a SSC, and therefore presumably less influence in opinion assignment, will write a lower percentage of majority opinions in discretionary cases than in mandatory cases.

b. *Case Category Workload Predictions*

Other factors being constant, a case category subject to mandatory jurisdiction could be expected to comprise a higher proportion of mandatory jurisdiction opinions in a mandatory jurisdiction state than the category's share of discretionary jurisdiction opinions in a discretionary state. The possibly increased proportion, however, is sensitive to the number of cases in a category within a state and to the case filtering process antecedent to SSC review. For category-specific mandatory jurisdiction to affect SSC docket proportions materially, a sufficient supply of cases within a category must exist and survive decisions to appeal. Nevertheless, across all states, a case category consistently afforded mandatory jurisdiction status might be expected to constitute a relatively high proportion of the written opinions. For example, because capital cases often receive mandatory SSC review, one expects a higher proportion of capital punishment opinions for SSCs required to adjudicate capital appeals.

Aside from capital cases, predictions about case categories' shares of mandatory and discretionary opinions are difficult to develop. In general, one expects large case categories, such as criminal cases, to comprise a substantial portion of opinion output for both mandatory and discretionary cases.⁶² One also expects a reasonably high correlation between written opinion proportions and case categories across jurisdictions. Assume, for example, that SSCs are reasonably similar and that screening techniques, even in mandatory cases, allow them substantial discretion in selecting cases for written opinions. Under these assumptions, a given case category is likely, other things equal, to

⁶² Prior research suggests the degree of substantiality varies across states, even for criminal cases. Kagan et al. report that, for 1940-1970, criminal cases comprised from 31.0% to 9.5% of sixteen SSCs' caseloads. Kagan et al., *supra* note 1, at 148 tbl.2.

represent a similar proportion of both the mandatory and the discretionary written opinions of SSCs.

II. DATA CONSIDERATIONS AND DESCRIPTION

Studies of SSC decision-making, mostly conducted in the fields of political science and sociology, tend to rely on major data projects or on ad hoc case collections constructed for purposes of a particular study. Neither class of data sources systematically account for jurisdictional source across a complete cross section of SSC cases.

A. *Prior SSC Data Sets*

Kagan et al. and Paul Brace and Melinda Gann Hall have assembled notable SSC data sets. Kagan et al. gathered a sample of 5904 cases decided by sixteen SSCs between 1870 and 1970 in an effort to develop “a representative sample of the entire flow of SSC litigation.”⁶³ The Kagan et al. database is an excellent tool for exploring trends over time, but its sample is limited to sixteen states, to eighteen cases per SSC for each five-year period, and ends in 1970.⁶⁴ The sample within any given year is too small to estimate reliably reversal rates, dissent rates, or workloads within a particular court in a year. Given the interstate variability in outcomes and dissent rates documented in this study, assessments of key SSC factors based on a more complete cross-sectional sample are essential to describing and understanding SSC activity.

Paul Brace and Melinda Gann Hall oversaw the State Supreme Court Data Project, which includes data on about 21,000 reported decisions by fifty SSCs from 1995 through 1998.⁶⁵ The Brace and Hall database is a superb snapshot of four years of fairly recent SSC activity in cases resolved by available opinions. But it does not satisfactorily distinguish between cases reviewed under mandatory and discretionary authority and, therefore, does not allow assessment of the key factor shaping SSC outputs that we address.⁶⁶

⁶³ *Id.* at 122.

⁶⁴ The sample was designed to explore changes in SSC dockets over time. In a Note using the database to explore discretionary review, the sample was described in part as follows:

The sample period was from 1870 to and including 1970. The sample of cases included 18 cases randomly selected from every fifth year of the published reports of each of 16 state supreme courts, for a total of approximately 6,000 cases (South Dakota and Idaho, two sample states, were not states for the first four sample years).

Note, *supra* note 2, at 1196 n.24.

⁶⁵ See State Supreme Court Data Project, <http://www.ruf.rice.edu/~pbrace/statecourt> (last visited Oct. 21, 2009).

⁶⁶ The Codebook for the Brace and Hall database reports the values for the variable “juris” (“Manner in which state supreme court takes jurisdiction”) to include a code for “Appeal/Certiorari” as well as “Application for Appeal/Certiorari,” but does not appear to fully distinguish between mandatory and discretionary jurisdiction. State Supreme Court

B. *This Study's Data*

This study includes every SSC substantive opinion available online via Westlaw (with some further checking on LexisNexis), whether or not formally published, for all SSCs for cases decided in calendar year 2003.⁶⁷ The Westlaw searches included a date restriction to the year 2003 (“da(2003)”), terms designed to limit the cases returned in a search to those decided by a state’s highest court (“co(high)” or similar terms), and terms designed to limit the cases returned to those with actual decisions on the substantive or procedural merits and not merely procedural rulings (“holding held”). Cases identified by these searches that were not actual decisions on the merits, almost always with citation to authority,⁶⁸ were eliminated from the sample. Thus, a substantial number of summary dispositions without opinion were eliminated.

The resulting database of 7055 decisions provides a reasonably complete picture of reported SSC doctrinal decisional activity in 2003. The data thus provide a basis for assessing the relation, in these cases, between jurisdiction and reversal rates, dissent rates, workload, and other attributes of SSC behavior. Unlike prior studies, we include the specialized criminal appellate courts with final authority in Oklahoma and Texas, though we limit the sample to cases available through the major legal databases – a process that yields few written opinions of the Oklahoma Court of Criminal Appeals.⁶⁹

Even allowing for substantial limitations, noted below, the cases we study are especially important. Cases with readily available opinions are the cases that announce and influence legal doctrine. They are the cases that provide the reasoning available to courts and litigants that rest at the heart of a common law system. If the pattern of outcomes, dissent, and workload vary by jurisdictional source in these cases, those findings are important in explaining the content and development of legal doctrine.

Data Project Codebook 1, <http://www.ruf.rice.edu/~pbrace/statecourt/Codebook.zip> (last visited Oct. 29, 2009).

⁶⁷ This study does not include cases from the District of Columbia.

⁶⁸ The study includes North Carolina SSC cases without traditional opinions or citation to authority that were reviewed because of a dissent in a lower court. See N.C. GEN. STAT. § 7A-30(2) (2007) (authorizing mandatory appeals when the intermediate appellate court’s decision was with dissent). The relevant details of these cases were obtained from lower court opinions which are available on the North Carolina Supreme Court’s website. North Carolina Court System, <http://www.nccourts.org> (last visited Oct. 27, 2009).

⁶⁹ The data include eighteen Oklahoma Court of Criminal Appeals (“CCA”) cases found on Westlaw. The Oklahoma Attorney General makes available a larger set of CCA decisions. See Oklahoma Public Legal Research System, <http://oklegal.onenet.net/sample.basic.html> (last visited Oct. 21, 2009) (containing CCA opinions from 1929 to present).

This database is subject to significant limitations, however. Since the opinions cover only one year, we cannot assess trends over time.⁷⁰ Nor can we assess the full range of SSC activity because we lack or have not compiled systematic information about the many cases that do not lead to available opinions.⁷¹ Our study omits substantial SSC activity including decisions on petitions for discretionary review, actions on procedural matters not involving the substance of a case, and summary dispositions on the merits not involving a written opinion.⁷² We thus examine only one slice (albeit the most important slice doctrinally) of a broader universe of SSC activity.

Even among matters SSCs address in available opinions, the range of SSC activity required us to exercise judgment about what to include in our analyses. Since our interest is SSC adjudication of traditional legal disputes, we excluded SSC decisions rendered in their supervisory roles over state attorneys. Thus, we excluded the many SSC opinions addressing lawyer misbehavior or similar bar matters. Tennessee's highest court has mandatory jurisdiction, implemented through special panels of the court, over workers'

⁷⁰ Trends over time in dissensus, for example, can substantially vary. See Russell Smyth & Paresh Kumar Narayan, *Multiple Regime Shifts in Concurring and Dissenting Opinions on the U.S. Supreme Court*, 3 J. EMPIRICAL LEGAL STUD. 79, 80-83 (2006).

⁷¹ For example, one surprising result is the few criminal law opinions available from the Alaska Supreme Court. Case outputs consisting of memorandum opinions and judgments are available for public inspection in appellate clerks' offices. See About the Alaska Court System, <http://www.state.ak.us/courts/ctinfo.htm#supreme> (Oct. 21, 2009). The boilerplate language on the North Carolina Supreme Court's website suggests the impressive range of low visibility SSC activity that can occur. North Carolina Court System, <http://www.nccourts.org> (last visited Oct. 27, 2009). The site makes available the opinion activity of the court, but lists a wide range of matters not captured in available opinions. For example, on December 29, 2003, the court issued eleven opinions. But its web posting for that and other months notes many other activities:

In addition to the above listed opinions, the court considered 62 other matters. The other matters may include, but are not limited to, notices of appeals based upon constitutional questions, petitions for discretionary review, petitions for writ of certiorari in death cases, death stays, petitions for writs of certiorari in other criminal and civil cases, petitions for writs of supersedeas, motions for temporary stays, petitions for writs of mandamus, petitions for writs of habeas corpus, . . . motions for appropriate relief, and direct appeals from decisions of the judicial standards commission and the utilities commission. The court also considers motions for extensions of time and motions to amend on a daily basis. Such "routine" motions are not included in the petition list published by the court each month.

2003 North Carolina Supreme Court Cases, <http://www.aoc.state.nc.us/www/public/sc/opinions/sc2003.htm> (last visited Oct. 21, 2009).

⁷² See STRICKLAND, *supra* note 42, at 106-13 tbl.2 (showing, where available, state-by-state numbers of discretionary petitions that were granted). For example, a LexisNexis search for all 2003 decisions by the Oregon Supreme Court yields 959 documents. A search of the decisions for the phrase "petition for review denied" yields 715 documents.

compensation claims.⁷³ Brace and Hall's data show employee injury and workers' compensation claims comprised over 10% of the Tennessee Supreme Court's docket from 1995 to 1998.⁷⁴ The combination of specialized panels and such a substantial fraction of the docket could make Tennessee's results not reasonably comparable with those of other states. We therefore did not include Tennessee workers' compensation cases in some of the analyses.

Another potential limitation of our study stems from selection effects. Most cases are not appealed and, in intermediate appellate courts, about one-half of appeals are not pursued to completion.⁷⁵ Settlement and other case-clearing activity persist at all litigation levels. These selection effects have yielded predictions of appellate success ranging from 50%, to tending towards 50%,⁷⁶

⁷³ Any party to the proceedings . . . may, if dissatisfied or aggrieved by the judgment or decree of that court, appeal to the supreme court, where the cause shall be heard The supreme court may, by order, refer workers' compensation cases to . . . the special workers' compensation appeals panel. This panel shall consist of three (3) judges designated by the chief justice, at least one (1) of whom shall be a member of the supreme court.

TENN. CODE ANN. § 50-6-225(e)(1)-(3) (2008). Kentucky also has special procedures for workers' compensation claims. In 2003, Workers' Compensation Board decisions were subject to direct review by the Kentucky Court of Appeals without the need for trial court adjudication. KY. R. CIV. P. CR 76.25(1). Those decisions are subject to review by the Supreme Court of Kentucky, which has held that such review is guaranteed by the Kentucky Constitution and is not discretionary. *Vessels v. Brown-Forman Distillers Corp.*, 793 S.W.2d 795, 798 (Ky. 1990). Since no special tribunal of the Supreme Court of Kentucky adjudicates these cases, we include them in the study. See also MINN. STAT. ANN. §§ 176.471, 176.481 (West 2008) ("Where the Workers' Compensation Court of Appeals has made an award or disallowance of compensation or other order, a party in interest . . . may have the order reviewed by the Supreme Court on certiorari . . ."); MONT. CODE ANN. § 39-71-2904 (2007) ("[A]n appeal from a final decision of the workers' compensation judge shall be filed directly with the supreme court of Montana in the manner provided by law for appeals from the district court in civil cases.").

⁷⁴ State Supreme Court Data Project Court Level Data Set, <http://www.ruf.rice.edu/~pbrace/statecourt/NSF9598.zip> (last visited Oct. 22, 2009).

⁷⁵ See Clermont & Eisenberg, *Defendants' Advantage*, *supra* note 59, at 131 tbl.1 (showing 21,415 trial judgments and a 20.85% appeal rate, which means over 4000 cases were initially appealed, but only identifying 2143 final affirmances and reversals); Clermont & Eisenberg, *Plaintiphobia in the Appellate Courts*, *supra* note 59, at 951 (showing defendants who lose at trial and appeal only pursue about 29% of their appeals to completion, while plaintiffs pursue 51% of appeals to completion); Eisenberg, *Appeal Rates and Outcomes*, *supra* note 59, at 664 tbl.1 (showing 21.0% of cases that reach a judgment for plaintiff or defendant are appealed, but only 11.4% of cases are appealed to conclusion); Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 130 tbl.1 (2009) (showing 12% of state trials are appealed, but 6.8% are appealed to completion).

⁷⁶ George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4-5 (1984); Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*,

to acknowledgment of selection effects but mixed forecasts of their bottom-line influence of the observed pattern of appellate outcomes,⁷⁷ to regarding selection effect considerations as ambiguous.⁷⁸ For present purposes, the central point is that discretionary jurisdiction adds another layer of selection to the profile of cases that appellate courts review.

Other selection stages could obscure or magnify the patterns produced by the discretionary review. And it is theoretically possible that all observed patterns differentiating between discretionary and mandatory cases are mere artifacts of such antecedent case selection. But such complete obfuscation seems unlikely. Substantial evidence exists that case characteristics transcend selection processes. For example, case categories in which plaintiffs do relatively well at the settlement stage are also categories in which plaintiffs do well at the litigation stage.⁷⁹ Although we do not generate specific hypotheses relating to the effects of non-jurisdictional aspects of case selection, the selection background effects should be considered in assessing our results.

C. Terminology, Coding, and Aggregate Statistics

Some description of basic terminology and coding is necessary. Table 1 shows the distribution of case outcomes.

Table 1. State Supreme Court Outcomes

<i>Outcome</i>	<i>Frequency</i>	<i>Percent</i>
Affirmed	3588	50.86
Affirmed in part and reversed in part	524	7.43
Affirmed in part, reversed in part, and vacated	11	0.16
Affirmed in part and vacated	114	1.62
Writ or petition denied	162	2.30
Writ or petition denied in part and granted in part	17	0.24
Writ or petition granted	153	2.17
Reversed	1947	27.60
Reversed and vacated	42	0.60
Vacated	299	4.24
Other, outcome not coded	198	2.81
Total	7055	100.00

Source: SSC Westlaw opinions, 2003.

29 J. LEGAL STUD. 685, 707 (2000) (explaining that where appellate panel identity is known, Priest-Klein hypothesis predicts a fifty percent appellate success rate).

⁷⁷ Daniel Kessler, Thomas Meites & Geoffrey Miller, *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 237, 242-48 (1996).

⁷⁸ Eisenberg & Heise, *supra* note 75, at 127 (discussing the Kessler, Meites, and Miller analysis and concluding that their “focus on possible differences across case categories is plausible”).

⁷⁹ Theodore Eisenberg, *Negotiation, Lawyering, and Adjudication: Kritzer on Brokers and Deals*, 19 LAW & SOC. INQUIRY 275, 292-93 (1994); Theodore Eisenberg, *The Relationship Between Plaintiff Success Rates Before Trial and at Trial*, 154 J. ROYAL STAT. SOC’Y 111, 113 (1991).

A case has *dissent*, coded as a 0-1 variable, if any judge dissented from the majority's disposition and has *concurrence*, similarly coded, if any judge concurred in the majority's opinion. Dissent occurred in 22.2% of our 7055 cases and concurrences occurred in 16.4% (these rates are lower than the rates in subsample limited to cases with an identifiable jurisdictional source). A case has *dissensus*, coded as a 0-1 variable, if it contains a dissent or concurrence in the result only. Dissensus was present in 31.5% of the 7055 cases.⁸⁰

Jurisdiction is treated as *mandatory* when review by an SSC is of right and as *discretionary* when the SSC may decline to hear a case. Of 7055 cases, 3318 (47%) were based on discretionary jurisdiction, 3563 (50.5%) were based on mandatory jurisdiction, and 174 (2.5%) had missing or ambiguous jurisdiction.

We defined forty-five case categories to help assess SSC outcomes and workloads by case categories to allow comparison of workloads across states and to allow study of reversals and dissensus as a function of case categories. Table 2 reports the distribution of case categories for all SSCs combined. In analyses below, we aggregate the two constitutional law categories together, "Tort, Intentional" into "Tort, Other," and categories with fewer than twenty five observations into "Miscellaneous."

Table 2. Case Categories of State Supreme Court Cases

<i>Category</i>	<i>Frequency</i>	<i>Percentage</i>
Administrative Law	121	1.77
Atty. Fees	6	0.09
Atty. Malpractice	4	0.06
Capital Punishment	295	4.30
Civil Procedure	568	8.29
Const. Law (Structure)	63	0.92
Const. Law (Rights)	207	3.02
Contract, Buyer Pltf.	67	0.98
Contract, Fraud – Consumer	33	0.48
Contract, Fraud – Other	19	0.28
Contract, Other	120	1.75
Contract, Seller Pltf.	42	0.61
Corporate	53	0.77
Criminal, Evidence	462	6.74
Criminal, Procedure	797	11.63
Criminal, Sentencing	256	3.73
Criminal, Substance	632	9.22
Debtor-Creditor	100	1.46
Election Law	36	0.53
Employment, Benefits	348	5.08
Employment, Disc.	50	0.73

⁸⁰ A case cannot count more than once towards dissensus. If a case has both a dissent and a concurrence, it increases the dissensus count only by one.

Table 2 (continued)

Employment, Other	125	1.82
Estates	51	0.74
Family Law	267	3.89
Insurance	229	3.34
Labor Law	24	0.35
Land Use	166	2.42
Landlord-Tenant	52	0.76
Medical	133	1.94
Minors, Guardianship	255	3.72
Miscellaneous	84	1.23
Municipalities	37	0.54
Natural Resources	16	0.23
Premises	106	1.55
Professions	101	1.47
Public Benefits	18	0.26
Public Records	19	0.28
Real Property	199	2.90
Securities	7	0.10
Tax	148	2.16
Tort, Auto	123	1.79
Tort, Intentional	21	0.31
Tort, Other	317	4.62
Tort, Products Liability	42	0.61
Trusts	36	0.53
Total	6855	100.00

Note: Table omits 200 cases, 2.83% of the sample, with uncharacterized or missing case categories. Source: SSC Westlaw opinions, 2003.

III. RESULTS

This analysis explores four main topics: reversal rates, dissensus rates, case category distributions in decisional workloads, and opinion-specific effects. For each topic, we examine its relation to jurisdictional source and its variation across states.

A. *Reversal Rates*

Reversal rates significantly differ for mandatory and discretionary cases.⁸¹ Overall, SSCs reversed (using the *reversed* variable described above) 2287 of 5875 cases (38.9%). This aggregate figure combines heterogeneous rates in mandatory cases and discretionary cases. Of the 3161 cases reviewed under mandatory jurisdiction, SSCs reversed 887 cases, or 28.1%. Of the 2714 cases reviewed via discretionary jurisdiction, SSCs reversed 1400 cases, or 51.6%. This difference is statistically significant, well beyond $p < 0.0001$.

⁸¹ See *infra* tbl.3 (illustrating the range of reversal rates for both jurisdictional sources across the fifty states).

Table 3 shows, for each state, the reversal rates for discretionary and mandatory cases. The relation between reversal rates and jurisdictional basis is striking at the state level as well as at the aggregated national level. In states with both classes of jurisdiction and at least ten cases of each type, reversal rates in discretionary cases almost uniformly exceeded those in mandatory cases.

Table 3. Reversal Rates and Source of Jurisdiction

<i>State</i>	<i>Discretionary reversal rate (%)</i>	<i>N Discretionary</i>	<i>Mandatory reversal rate (%)</i>	<i>N Mandatory</i>
AK	66.7	3	31.0	116
AL	68.1	47	59.9	167
AR	44.4	18	24.4	180
AZ	65.0	20	67.9	28
CA	58.1	74	15.8	19
CO	61.3	31	36.4	11
CT	45.5	66	32.5	80
DE	.	0	38.8	67
FL	46.9	49	12.5	56
GA	60.9	46	18.8	207
HI	25.0	4	28.0	132
IA	46.9	147	.	.
ID	37.5	8	23.9	109
IL	46.5	71	.	.
IN	48.4	62	40.0	15
KS	41.2	51	32.1	56
KY	31.6	133	12.7	102
LA	82.3	96	61.1	18
MA	32.9	164	.	.
MD	61.7	133	0.0	2
ME	0.0	1	32.0	125
MI	73.8	65	.	.
MN	43.0	86	50.0	4
MO	57.4	54	40.0	15
MS	58.8	17	20.4	167
MT	80.0	5	20.3	305
NC	55.6	18	38.8	67
ND	.	0	23.3	150
NE	34.8	23	28.1	128
NH	35.6	163	.	.
NJ	54.3	81	.	.
NM	70.8	24	100.0	2
NV	.	0	42.0	50
NY	32.0	125	0.0	6
OH	31.3	32	14.3	56
OK	81.0	42	0.0	1
OKC	30.0	10	50.0	4
OR	75.0	20	27.8	18
PA	56.5	62	38.2	55
RI	.	0	16.6	145
SC	55.1	78	31.7	41
SD	50.0	2	30.2	126

Table 3 (continued)

TN	53.8	39	13.3	15
TX	87.9	66	.	.
TXC	67.5	83	9.1	22
UT	22.2	9	40.5	37
VA	42.5	87	20.0	5
VT	50.0	2	32.6	95
WA	53.5	99	.	0
WI	50.0	76	.	0
WV	60.7	122	.	.
WY	.	.	29.3	157
Total	51.6	2714	28.1	3161

Note: Excludes cases with ambiguous outcome statuses. Source: SSC Westlaw opinions, 2003.

Investigating outliers from the general pattern of higher reversal rates in discretionary cases confirms the higher reversal rates in discretionary cases. Arizona was the only state with a substantial number of mandatory cases in which the mandatory reversal rate was higher than the discretionary rate.⁸² This elevated rate was due to many capital sentences that were reversed or vacated due to the Supreme Court's decision in *Ring v. Arizona*,⁸³ which invalidated Arizona's capital punishment procedure. Excluding capital cases, Arizona had too few mandatory SSC cases with unambiguous outcomes to provide a meaningful mandatory reversal rate.

Alabama's high reversal rate in mandatory jurisdiction cases (59.9%) is initially surprising because its civil jurisdiction includes direct appeal from trial courts in all cases involving at least \$50,000.⁸⁴ However, Alabama's SSC has authority to transfer less significant cases to the state's Civil Court of Appeals.⁸⁵ Thus, depending on the frequency with which Alabama's SSC deflects cases to lower courts, the mandatory docket will look more or less like a discretionary docket. This explains the roughly equivalent reversal rates for discretionary and mandatory cases in that state.

⁸² See *supra* tbl.3 (indicating that of Arizona's forty eight cases, the mandatory reversal rate of 67.9% exceeded the 65% discretionary reversal rate). Note that five other states (Hawaii, Minnesota, New Mexico, Oklahoma (in its Court of Criminal Appeals), and Utah) all had reversal rates that were higher for mandatory than discretionary cases, but these states also had fewer than ten discretionary or mandatory cases.

⁸³ 536 U.S. 584, 609 (2002) (rejecting as unconstitutional the Arizona practice that "allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty").

⁸⁴ ALA. CODE § 12-3-10 (1975).

⁸⁵ *Id.* § 12-2-7(6); *Ex parte R.B.Z.*, 725 So. 2d 257, 260 (Ala. 1997) ("The only way the Court of Civil Appeals may take jurisdiction over a matter not expressly assigned to that court by § 12-3-10 is by a transfer pursuant to § 12-2-7(6), a transfer commonly called 'deflection.'").

Pennsylvania's rate of reversal for mandatory cases (38.2%) easily exceeds the average rate. The Supreme Court of Pennsylvania's Internal Operating Procedures encourage the use of per curiam orders for cases that do not involve novel issues or facts.⁸⁶ The reduced use of opinions in such cases could lead to an inflated mandatory case reversal rate. The presence of many capital cases (twenty-two of sixty-five mandatory appeals before the Pennsylvania SSC were capital cases)⁸⁷ also influences Pennsylvania's reversal rate in mandatory cases.

The high Louisiana reversal rate in mandatory jurisdiction cases (61.1%) exists because these mandatory appeals consist largely of cases in which a lower court declared a law or ordinance unconstitutional.⁸⁸ Such cases, which call into question express state and local policies, are probably less likely to result in affirmance than most mandatory appeals. In fact, if the court did not decide such cases under mandatory jurisdiction, it would probably accept them under discretionary jurisdiction. When such cases are prominent on mandatory jurisdiction dockets, one expects high reversal rates.

State-specific factors also tend to explain below-normal reversal rates in mandatory cases.⁸⁹ For example, the data suggest Florida's low reversal rate in mandatory cases (12.5%) is a function of two different factors. As shown in Figure 1 below, Florida has a high rate of mandatory jurisdiction reversals in civil cases (43%). This is probably because mandatory review in civil matters

⁸⁶ THE SUPREME COURT OF PENNSYLVANIA INTERNAL OPERATING PROCEDURES III.A.3 n.1 (2005), available at <http://www.aopc.org/NR/rdonlyres/72C4BC36-AC28-4E1C-8A86-7F5D469BFE51/0/IOP.pdf>, declares that per curiam opinions are appropriate where the decision:

- 1) does not establish a new rule of law;
- 2) does not alter, modify, criticize or clarify an existing rule of law;
- 3) does not apply an established rule of law to a novel fact situation;
- 4) does not constitute the only, or only recent binding precedent on a particular point of law;
- 5) does not involve a legal issue of continuing public interest; or
- 6) whenever the Court decides such an order is appropriate.

⁸⁷ Differences in the numbers of cases on the docket (sixty-five) and reported in Table 3 (fifty-five) are attributable to the definition of the "reversed" variable and its exclusion of some cases with ambiguous outcomes.

⁸⁸ Louisiana's Supreme Court has direct appellate review of cases in which a law or ordinance has been declared unconstitutional. LA. CONST. art. V, § 5(D). For cases addressing lower court findings of unconstitutionality, see, for example, *La. Assessors' Ret. Fund v. City of New Orleans*, 849 So. 2d 1227, 1229 (La. 2003) (reversing a finding that statutes were unconstitutional as they applied to municipalities); *State v. Dilosa*, 848 So. 2d 546, 551 (La. 2003) (affirming a finding that grand jury provisions in Orleans Parish were unconstitutional local laws); *Ring v. State*, 835 So. 2d 423, 429 (La. 2003) (vacating finding of unconstitutionality on ripeness grounds).

⁸⁹ See *supra* tbl.1 (showing below average mandatory reversal rates in several states, including Florida).

largely consists of “decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.”⁹⁰ In this sense, Florida is similar to Louisiana. But the higher rate in civil matters is swamped by forty-six mandatory capital case appeals in which the reversal rate is only 6.5%, resulting in a net below-average rate of reversal for mandatory cases.⁹¹

The distinction between mandatory and discretionary case reversal rates holds for disaggregated civil and criminal categories. Nationwide, the reversal rate for discretionary civil cases was 53.2% as compared with 32.4% for mandatory civil cases. For non-capital criminal cases, the reversal rate for discretionary cases was 48.9% compared with 28.2% for mandatory cases. For capital cases, the reversal rate was 46.7% in discretionary cases and 19.9% in mandatory cases.

Figure 1 shows the mandatory and discretionary reversal rates for states with at least five decisions satisfying our definitions of affirmed or reversed in civil or criminal (including capital) cases. The data are sorted in descending order of reversal rate in discretionary cases. Thus, for example, in civil discretionary cases, Texas had the highest reversal rate and Kansas had the lowest. In mandatory jurisdiction civil cases, Louisiana had the highest reversal rate and Rhode Island the lowest.

⁹⁰ FLA. R. APP. P. 9.030(a)(1)(A)(ii).

⁹¹ *Id.* at 9.030(a)(1)(A)(i). Capital cases account for forty-six of fifty-six mandatory Florida cases in Table 3.

Reversal Rate by State, Civil Cases

State	Discretionary Cases	Mandatory Cases
TX	0.85	0.95
MT	0.80	0.85
LA	0.75	0.80
AL	0.70	0.75
NM	0.65	0.70
NC	0.60	0.65
SC	0.55	0.60
WV	0.50	0.55
MI	0.45	0.50
PA	0.40	0.45
GA	0.35	0.40
MD	0.30	0.35
CA	0.25	0.30
OR	0.20	0.25
CO	0.15	0.20
OK	0.10	0.15
MO	0.05	0.10
WY	0.00	0.05
NE	0.00	0.00
IA	0.00	0.00
IL	0.00	0.00
IN	0.00	0.00
VA	0.00	0.00
FL	0.00	0.00
AR	0.00	0.00
MA	0.00	0.00
NH	0.00	0.00
OH	0.00	0.00
NY	0.00	0.00
KS	0.00	0.00
WY	0.00	0.00
UT	0.00	0.00
RI	0.00	0.00
VT	0.00	0.00
SD	0.00	0.00
NV	0.00	0.00
ME	0.00	0.00
HI	0.00	0.00
AK	0.00	0.00

Reversal Rate by State, Criminal Cases

State	Discretionary Cases	Mandatory Cases
TX	0.85	0.80
MT	0.80	0.75
LA	0.75	0.70
AL	0.70	0.65
NM	0.65	0.60
NC	0.60	0.55
SC	0.55	0.50
WV	0.50	0.45
MI	0.45	0.40
PA	0.40	0.35
GA	0.35	0.30
MD	0.30	0.25
CA	0.25	0.20
OR	0.20	0.15
CO	0.15	0.10
OK	0.10	0.05
MO	0.05	0.00
WY	0.00	0.00
NE	0.00	0.00
IA	0.00	0.00
IL	0.00	0.00
IN	0.00	0.00
VA	0.00	0.00
FL	0.00	0.00
AR	0.00	0.00
MA	0.00	0.00
NH	0.00	0.00
OH	0.00	0.00
NY	0.00	0.00
KS	0.00	0.00
WY	0.00	0.00
UT	0.00	0.00
RI	0.00	0.00
VT	0.00	0.00
SD	0.00	0.00
NV	0.00	0.00
ME	0.00	0.00
HI	0.00	0.00
AK	0.00	0.00

Note: Mandatory and discretionary case reversal rates at the state level, in descending order by rate of discretionary case reversal. Source: SSC Westlaw opinions, 2003.

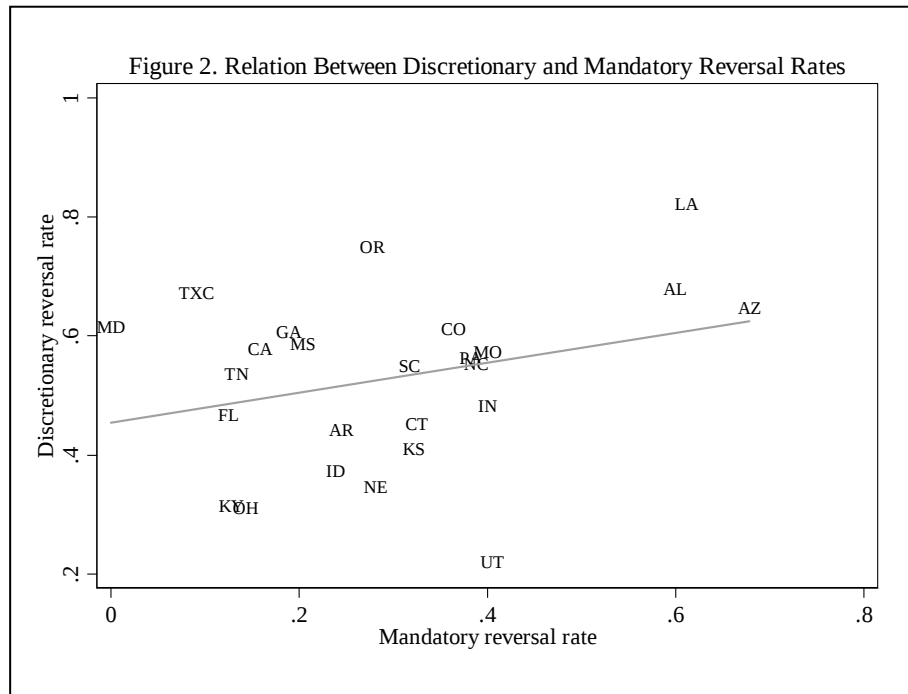
In discretionary cases, a reasonably strong correlation exists between civil and criminal reversal rates within states. Jurisdictions with high reversal rates for civil cases also generally displayed high reversal rates for criminal cases, while jurisdictions with low reversal rates for one category also tended to be low for the other. The correlation coefficient for discretionary civil and criminal case reversal rates is 0.34 ($p=0.04$). No similar association exists between civil and criminal reversal rates in mandatory cases. The correlation coefficient is small – 0.08 – and is significant at $p=0.68$.⁹² Appendix Figures A1 and A2 show the relations between civil and criminal reversal rates. The stronger discretionary case association may indicate the use of similar criteria to select discretionary civil and criminal cases.

An initial reasonably strong correlation exists between mandatory and discretionary reversal rates within states. Figure 2 explores this relation for states with at least ten observations for both mandatory and discretionary cases. The correlation coefficient is 0.47, significant at $p=0.03$. The significant relation is not an artifact of Arizona's *Ring*-related capital cases.⁹³ Excluding Arizona, the correlation coefficient is 0.45, significant at $p=0.04$. The result is sensitive, however, to including Arizona, Louisiana, and Alabama, the three states with the highest mandatory case reversal rates. Excluding Alabama, Arizona, and Louisiana, the correlation coefficient between mandatory and discretionary reversal rates drops to 0.12 with an associated p -value of 0.62. Thus, the modest association between state mandatory and discretionary reversal rates likely stems from mandatory jurisdiction case-specific thresholds (invalidation of a statute by a lower court in Louisiana) or circumstances (a federal ruling requiring vacating many cases in Arizona; deflection authority in Alabama) that produce atypically reversible sets of cases for mandatory SSC review.⁹⁴

⁹² The correlations and significance levels are based on states with at least ten discretionary cases for the discretionary case comparison and with at least ten mandatory cases for the mandatory case comparison.

⁹³ See *supra* note 80 and accompanying text.

⁹⁴ See *supra* notes 80, 82 and 85 and accompanying text (describing the legal irregularities of Arizona, Alabama, and Louisiana, resulting in atypical reversal rates in mandatory SSC cases).



Source: SSC Westlaw opinions 2003.

Case outcomes vary by case category, but the pattern of jurisdictional influence persists. Table 4 shows reversal rates by case category, further broken down by jurisdictional source.⁹⁵ Discretionary case reversal rates range from 27.8% in Professions cases to 80.0% in Contract, Seller Plaintiff cases. The low Professions rate may be attributable to the inclusion of bar supervision cases in this category. The next lowest discretionary case reversal rate is 35.7% in Municipalities cases. Mandatory case reversal rates range from 15.4% in Employment, Discrimination cases to 60.0% in Contract, Fraud – Consumer cases.

The differences between mandatory and discretionary case reversal rates follow a consistent pattern. In thirty-three of the thirty-five case types, the discretionary case reversal rates exceed the mandatory case reversal rates. Only Municipalities and Tax cases depart from this pattern, and the differences there are small and statistically insignificant.⁹⁶ In more than half of the case categories (eighteen of thirty-five), the difference in reversal rates exceeds 20%.

⁹⁵ For purposes of this and other tables, small case categories (fewer than thirty observations) are combined with other related categories.

⁹⁶ See *infra* tbl.4 (demonstrating a negative figure for both Municipalities and Tax cases in the Discretionary-mandatory difference (%) column).

Despite the range of reversal rates across case categories, the rates vary less than they do across states. For mandatory cases, the mean reversal rate across states is 31% with a standard deviation of 14.2%. Across case categories, the mean reversal rate is 31% with a standard deviation of 9.5%. This difference in standard deviations is significant at $p=0.02$.

Similarly, the mean reversal rate across states (which should be distinguished from the aggregate reversal rate for all states combined) in discretionary cases is 52.1% with a standard deviation of 15.5%, compared to a case category mean reversal rate of 53.5% with a standard deviation of 10.9% ($p=0.04$). Both mandatory case reversal rates have lower standard deviations than their corresponding discretionary case reversal rates. The relative reversal rate stability across case categories suggests that controlling for case category may help explain the variation in reversal rates across states to the extent the case category mix varies across states.⁹⁷ This topic is explored in Part III.E below.

⁹⁷ See *infra* tbl.4.

Table 4. Reversal Rates by Jurisdictional Source and Case Category

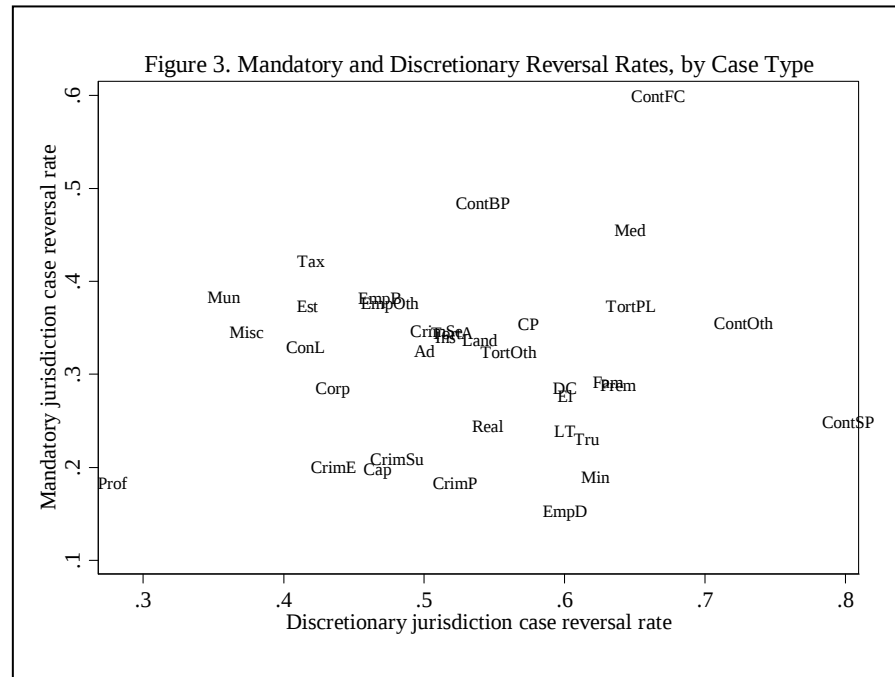
Case category	Combined reversal rate (%)	Combined N	Discretionary case reversal rate (%)	Discretionary cases N	Mandatory case reversal rate (%)	Mandatory cases N	Discretionary-mandatory difference (%)
Administrative Law	42.1	107	50.0	58	32.7	49	17.3
Capital Punishment	21.6	236	46.7	15	19.9	221	26.8
Civil Procedure	45.1	448	57.4	195	35.6	253	21.9
Const. Law	37.7	236	41.5	130	33.0	106	8.5
Contract, Buyer	50.9	57	54.2	24	48.5	33	5.7
Plaintiff							
Contract, Fraud-	62.5	24	66.7	9	60.0	15	6.7
Consumer							
Contract, Other	49.6	117	72.7	44	35.6	73	37.1
Contract, Seller	41.2	34	80.0	10	25.0	24	55.0
Plaintiff							
Corporate	36.4	44	43.5	23	28.6	21	14.9
Criminal, Evidence	31.6	427	43.5	209	20.2	218	23.4
Criminal, Procedure	34.8	710	52.2	345	18.4	365	33.8
Criminal, Sentencing	43.6	211	50.9	116	34.7	95	16.1
Criminal, Substance	34.5	571	48.1	285	21.0	286	27.1
Debtor-Creditor	39.5	86	60.0	30	28.6	56	31.4
Election Law	39.3	28	60.0	10	27.8	18	32.2
Employment, Benefits	43.5	310	46.8	198	38.3	120	8.5
Employment, Disc.	46.5	43	60.0	30	15.4	13	44.6
Employment, Other	43.0	114	47.5	61	37.7	53	9.8
Estates	38.6	44	41.7	12	37.5	32	4.2

Table 4 (continued)

Family Law	42.4	217	63.1	84	29.3	133	33.8
Insurance	43.4	189	51.5	101	34.1	88	17.4
Land Use	44.0	150	53.9	76	33.8	74	20.2
Landlord-Tenant	40.0	45	60.0	20	24.0	25	36.0
Medical	56.8	111	64.6	65	45.7	46	19.0
Minors, Guardianship	34.5	229	62.2	82	19.0	147	43.1
Miscellaneous	36.0	150	37.3	75	34.7	75	2.7
Municipalities	37.0	27	35.7	14	38.5	13	-2.7
Premises	50.0	96	63.8	58	28.9	38	34.8
Professions	21.5	78	27.8	18	18.3	60	9.4
Real Property	34.5	165	54.5	55	24.5	110	30.0
Tax	42.1	133	41.9	62	42.3	71	-0.3
Tort, Auto	43.1	102	52.0	50	34.6	52	17.4
Tort, Other	43.2	273	56.0	125	32.4	148	23.6
Tort, Products Liability	51.5	33	64.7	17	37.5	16	27.2
Trusts	42.3	26	61.5	13	23.1	13	38.5
Total	39.0	5871	51.6	2711	28.1	3160	23.5

Note: Excludes cases with ambiguous outcome status. Source: SSC Westlaw opinions, 2003.

Figure 3 shows the relation between mandatory and discretionary reversal rates for each case category. No significant linear association exists between case categories' mandatory and discretionary reversal rates, a result consistent with the state-level pattern discussed with respect to Figure 2.



Source: SSC Westlaw opinions, 2003. Abbreviations: Ad=Administrative Law; Cap=Capital Punishment; CP=Civil Procedure; ConL=Const. Law; ContBP=Contract, Buyer Pltf.; ContFC=Contract, Fraud-Consumer; ContOth=Contract, Other; ContSP=Contract, Seller Pltf.; Corp.=Corporate; CrimeE=Criminal, Evidence; CrimP=Criminal, Procedure; CrimSe=Criminal, Sentencing; CrimSu=Criminal, Substance; DC=Debtor-Creditor; El=Election Law; EmpB=Employment, Benefits; EmpD=Employment, Disc.; EmpOth=Employment, Other; Est=Estates; Fam=Family Law; Ins=Insurance; Land=Land Use; LT=Landlord-Tenant; Med=Medical; Min=Minors, Guardianship; Misc=Miscellaneous; Mun=Municipalities; NR=Natural Resources; Prem=Premises; Prof=Professions; Real=Real Property; TortA=Tort, Auto; TortOth=Tort, Other; TortPL=Tort, Products Liability; Tru=Trusts.

B. *Dissensus*

As discussed in Part I, individual judicial preferences, manifested by dissents or concurrences in the result, may emerge differently in issue-based as

opposed to case-based adjudication.⁹⁸ Overall, 1563 of 7055 SSC cases (22.2%) contained at least one dissent. As in the case of reversal, this aggregate figure combines heterogeneous rates for mandatory and discretionary cases. Of the 3563 cases reviewed under mandatory jurisdiction, 671 (18.8%) had a dissent. Of 3318 cases discretionarily reviewed, 886 (26.7%) had a dissent. This difference is statistically significant well beyond $p < 0.0001$. There were 326 discretionary cases (9.8%) and 343 mandatory cases (9.6%) with a concurrence in result; these rates are not significantly different ($p = 0.807$). There were 564 discretionary cases (17.0%) with some form of concurrence (in result, with majority opinion, or otherwise) and 518 mandatory cases (14.5%). The difference is significant at $p = 0.005$. Dissensus, the additive combination of dissent and concurrence in result, is driven more by dissent because the dissent rate is greater than the concurrence rate; 1126 discretionary cases (33.9%) had dissensus compared to 932 mandatory cases (26.2%; $p < 0.0001$).⁹⁹

In its first and third numerical columns, Table 5 shows the dissent rate for discretionary and mandatory cases in each state. The relation between dissent rates and jurisdictional basis is strong at the state as well as at the aggregate level. In nineteen of the twenty-six states with at least ten cases of each jurisdictional type, dissent rates were higher in discretionary cases than in mandatory cases. For one atypical state, Arizona, the decision in *Ring v. Arizona* explains the unusual relation.¹⁰⁰ The table's last two columns display dissensus rates. This is a conservative measure of dissensus because it only includes concurrences in result as concurrence and not opinions that did something other than concur in result.

⁹⁸ See *supra* Part I.B (hypothesizing about the relationship between case category, jurisdictional source, and judicial preference).

⁹⁹ A dissent without concurrence appeared in 651 discretionary cases and 329 discretionary cases had a concurrence without dissent; 478 mandatory cases had a dissent without concurrence and 325 mandatory cases had a concurrence without a dissent. If one only counts concurrences in result as discordant from the majority decision, 1126 discretionary cases (33.9%) and 932 mandatory cases (26.2%) had discord ($p < 0.0001$).

¹⁰⁰ 536 U.S. 584, 609 (2002); see also *supra* note 80 and accompanying text.

Table 5. Dissent and Discord Rates and Source of Jurisdiction

State	Dissent rate, discretionary cases (%)	N discretionary cases	Dissent rate, mandatory cases (%)	N mandatory cases	Dissensus rate, discretionary cases (%)	Dissensus rate, mandatory cases (%)
AK	0.0	3	7.9	139	0.0	7.9
AL	48.1	104	34.3	201	65.4	48.8
AR	24.2	66	19.8	197	25.8	19.8
AZ	19.2	26	26.5	34	23.1	52.9
CA	35.6	90	20.0	20	40.0	20.0
CO	51.2	43	27.8	18	51.2	33.3
CT	13.0	77	12.8	86	14.3	17.4
DE	0.0	1	2.7	75	0.0	2.7
FL	50.9	57	46.2	65	57.9	70.8
GA	18.9	53	11.7	222	24.5	15.8
HI	42.9	7	19.4	139	42.9	27.3
IA	6.9	160	.	.	8.1	.
ID	0.0	10	16.9	118	10.0	21.2
IL	34.8	92	.	.	41.3	.
IN	30.6	72	33.3	18	40.3	33.3
KS	6.9	58	1.7	60	6.9	1.7
KY	30.8	156	35.6	118	35.9	45.8
LA	42.5	120	36.8	19	48.3	57.9
MA	4.3	186	.	.	26.3	.
MD	27.3	139	25.0	4	32.4	25.0
ME	0.0	1	6.1	147	0.0	6.8
MI	53.8	78	.	.	71.8	.
MN	29.7	101	40.0	5	34.7	40.0
MO	22.1	68	16.7	18	23.5	22.2
MS	80.8	26	59.9	187	92.3	77.0
MT	40.0	10	21.5	344	40.0	25.3
NC	7.7	26	4.3	69	42.3	72.5
ND	0.0	1	9.9	172	0.0	20.9

Table 5 (continued)

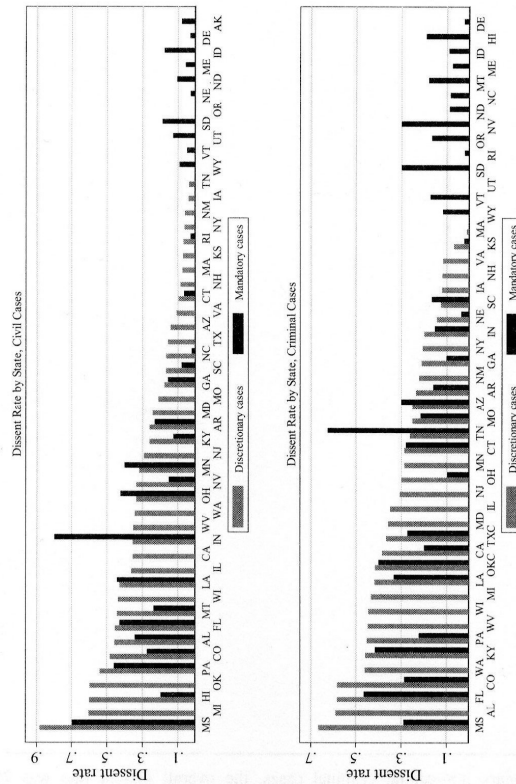
NE	3.7	27	2.9	139	3.7	3.6
NH	9.6	177	.	.	13.0	.
NJ	29.5	88	.	.	34.1	.
NM	11.5	26	0.0	2	15.4	0.0
NV	33.3	9	20.0	60	33.3	21.7
NY	9.6	125	16.7	6	10.4	16.7
OH	32.5	40	26.6	64	42.5	28.1
OK	59.7	67	0.0	2	76.1	50.0
OKC	41.7	12	40.0	5	75.0	60.0
OR	0.0	29	5.3	19	0.0	5.3
PA	50.0	68	35.9	64	60.3	53.1
RI	5.3	19	2.5	163	5.3	2.5
SC	14.6	82	10.0	50	25.6	16.0
SD	0.0	2	20.9	148	0.0	30.4
TN	12.8	47	31.3	16	14.9	31.3
TX	15.7	83	.	.	21.7	.
TXC	37.4	99	27.3	22	59.6	59.1
UT	0.0	11	11.6	43	0.0	14.0
VA	11.0	100	0.0	7	11.0	0.0
VT	50.0	2	7.3	109	50.0	8.3
WA	39.5	114	0.0	1	50.9	0.0
WI	42.6	94	0.0	1	50.0	0.0
WV	36.7	166	.	.	38.0	.
WY	.	.	10.2	167	.	13.8
Total	26.7	3318	18.8	3563	33.9	26.2

Source: SSC Westlaw opinions, 2003.

We again explore differences in mandatory and discretionary cases across the broad categories of civil and criminal cases. Figure 4 shows, for each state, the dissent rate in civil and criminal cases as a function of jurisdictional basis. The figure is limited to case categories with at least five decisions. For civil cases, the overall dissent rate in discretionary cases was 26% compared to 19% for mandatory cases ($p < 0.0001$). For criminal cases, the dissent rate in discretionary cases is 28.6%, compared to 18.6% in mandatory cases ($p < 0.001$).¹⁰¹

¹⁰¹ For discretionary non-capital criminal cases, the overall dissent rate was 28.3% compared to 16.3% for mandatory cases ($p < 0.0001$). For discretionary capital cases, the overall dissent rate was 39.4% compared to 27.9% for mandatory capital cases ($p = 0.221$). Thus, mandatory capital cases had dissent rates similar to those in non-capital discretionary cases and discretionary capital cases had the highest dissent rates. The absence of a statistically significant difference between discretionary and mandatory capital cases is likely attributable to the small number (thirty-three) of discretionary capital cases. At the observed dissent rates, the capital case sample had a power of only 0.23 to detect a difference that was significant at $p = 0.05$.

Figure 4. Civil and Criminal Case Dissent Rates



Note: Zero dissent rate in Oregon civil cases is based on twenty-two discretionary and thirteen mandatory cases. Zero dissent rate in Utah criminal cases is based on eight discretionary and three mandatory non-capital cases and one mandatory capital case. Extreme dissent rate in Tennessee mandatory criminal cases is based on eight cases, including dissent in three of four capital cases and two of four non-capital cases. Extreme dissent rate in Indiana mandatory civil cases is based on five cases. Source: SSC Westlaw opinions, 2003.

If one isolates civil cases, only four states had higher dissent rates in mandatory cases than discretionary cases. Louisiana, as noted above, has jurisdictional rules that lead to mandatory review of close cases.¹⁰² Two states' high mandatory case dissent rates may simply be due to small sample size; Indiana's high dissent rate in mandatory cases is based on dissents in four out of five cases, while Minnesota's 40% rate is based on dissents in two of five cases. Under the Ohio Constitution, appeal to the SSC is "a matter of right" in cases "involving questions arising under the constitution of the United States or of this state."¹⁰³ By Ohio Supreme Court rule, however, the court may dismiss an appeal claimed as of right "as not involving any substantial constitutional question."¹⁰⁴ So the appeal "of right" component of Ohio's docket, coded as a mandatory appeal, has a discretionary aspect in important classes of cases.¹⁰⁵

As in the case of reversal rates, substantial interstate variation exists in dissent rates under both mandatory and discretionary sources of jurisdiction. Limiting the focus to states with at least twenty opinions for a jurisdictional basis, Table 5 shows that discretionary dissent rates ranged from 81% in Mississippi to 4% in Nebraska. Similarly, the mandatory jurisdiction dissent rates ranged from 60% in Mississippi to 2% in Kansas, and this difference is highly statistically significant.

But interstate variation is not the whole dissent story. Despite widely varying dissent rates, a strong association exists between a state's mandatory case dissent rate and its discretionary case dissent rate. Figure 5 shows this linear association, which has a correlation coefficient of 0.82 for the thirty-two states with at least five cases of each type, significant at $p < 0.0001$.¹⁰⁶

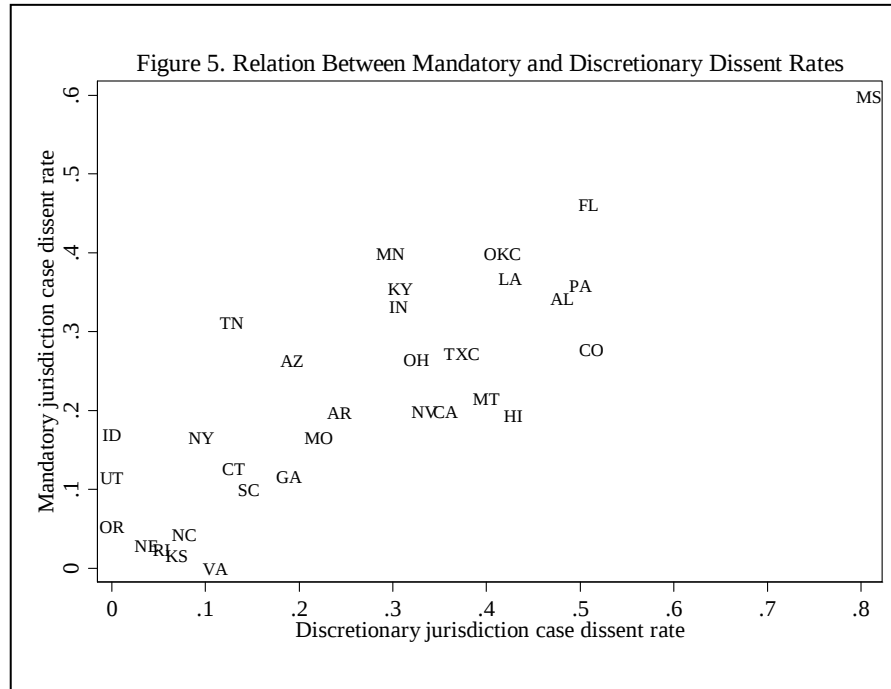
¹⁰² See *supra* note 88 and accompanying text (explaining the Louisiana SSC direct appellate review in circumstances delineated by the state constitution).

¹⁰³ OHIO CONST. art. IV, § 2(B)(2)(ii).

¹⁰⁴ OHIO SUP. CT. PRAC. R. III § 6(A)(1). Ohio's Constitution authorizes state supreme court rules to supersede conflicting state statutes. OHIO CONST. art. IV, § 5(B).

¹⁰⁵ In non-capital criminal cases, only three states had higher mandatory case dissent rates than discretionary case dissent rates. And the most striking rate, a 60% rate in Pennsylvania mandatory non-capital criminal cases, is based on dissent in three of five cases. South Carolina had a 25% dissent rate in mandatory jurisdiction non-capital criminal cases based on dissents in two of eight cases. It also had a 12.5% dissent rate in discretionary non-capital criminal cases based on dissents in five of forty cases.

¹⁰⁶ Mississippi's extremely high dissent rates raise the possibility that the correlation coefficient is spuriously large. Even excluding Mississippi, however, the correlation coefficient of 0.77 remains significant at $p < 0.0001$.



Source: SSC Westlaw opinions, 2003.

The strong dissent rate association across jurisdictional sources seen in Figure 5 contrasts with the absence of association between mandatory and discretionary reversal rates across states and across case types, as shown in Figures 2 and 3 above. Dissent rates, unlike reversal rates, are driven by individual judges without the cushioning effect of collegial decision-making in a context that requires a consensus single case-level outcome. Individual judge propensities softened by combined, collegial outputs can thus emerge in decisions to dissent that require no consensus with colleagues.

We now explore differences in rates of dissent broken down by specific case categories. Table 6 shows dissent rates by case category, broken down by jurisdictional source.¹⁰⁷ Dissent rates vary less across case categories than across states.¹⁰⁸ Only two dissent rates reach 50%, both in small case categories (fourteen “Contract, Fraud – Consumer” discretionary cases, and twenty “Torts, Product Liability” mandatory cases). No other mandatory case category dissent rate even reaches 35%, and no other discretionary case category dissent rate reaches 40%.

¹⁰⁷ For purposes of this table, small case categories (fewer than thirty observations) are combined with other categories.

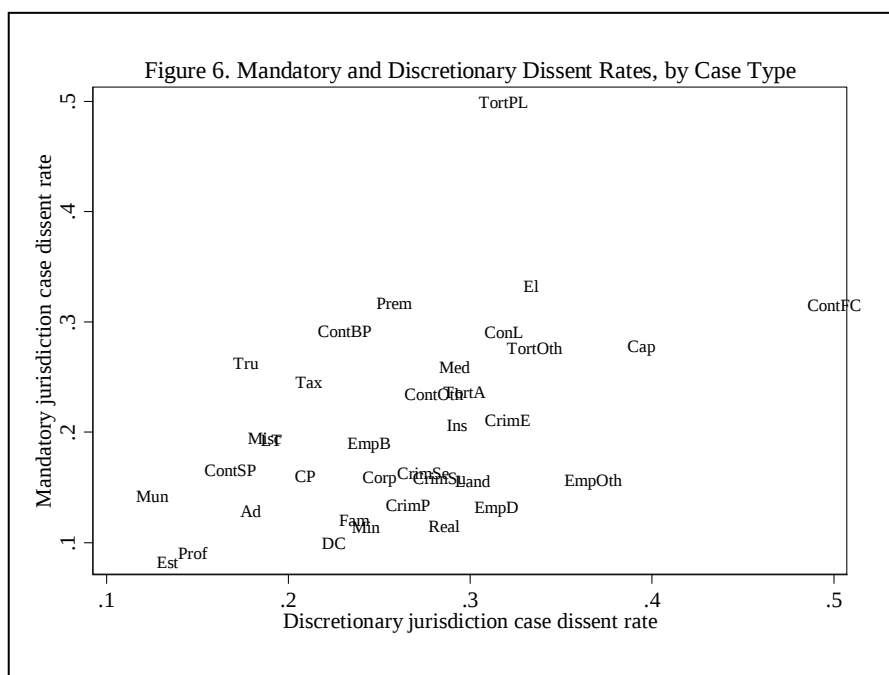
¹⁰⁸ Compare tbl.5, with tbl.6 (demonstrating that the range of dissent rates among case category is narrower than the diverse set of dissent rates across states).

Table 6. Dissent Rates and Case Categories

Case category	Combined			Discretionary cases			Mandatory cases			Discretionary-mandatory difference (%)
	Dissent rate (%)	N		Dissent rate (%)	N		Dissent rate (%)	N		
Administrative Law	15.7	121		17.9	67		13.0	54		4.9
Capital Punishment	29.2	295		39.4	33		27.9	262		11.5
Civil Procedure	18.5	567		20.9	282		16.1	285		4.8
Const. Law	30.7	270		31.8	157		29.2	113		2.6
Contract, Buyer Plaintiff	26.9	67		23.1	26		29.3	41		-6.2
Contract, Fraud – Consumer	39.4	33		50.0	14		31.6	19		18.4
Contract, Other	25.2	139		28.0	50		23.6	89		4.4
Contract, Seller Plaintiff	16.7	42		16.7	12		16.7	30		0.0
Corporate	20.8	53		25.0	28		16.0	25		9.0
Criminal, Evidence	26.6	462		32.0	231		21.2	231		10.8
Criminal, Procedure	20.3	797		26.6	418		13.5	379		13.1
Criminal, Sentencing	22.7	256		27.4	146		16.4	110		11.0
Criminal, Substance	22.2	632		28.3	318		15.9	314		12.4
Debtor-Creditor	15.0	100		22.5	40		10.0	60		12.5
Election Law	33.3	36		33.3	15		33.3	21		0.0
Employment, Benefits	22.4	348		24.4	217		19.1	131		5.3
Employment, Disc.	26.0	50		31.4	35		13.3	15		18.1
Employment, Other	27.2	125		36.8	68		15.8	57		21.0
Estates	9.8	51		13.3	15		8.3	36		5.0
Family Law	16.9	267		23.6	110		12.1	157		11.5
Insurance	25.3	229		29.3	123		20.8	106		8.5
Land Use	22.9	166		30.1	83		13.7	83		14.4
Landlord-Tenant	19.2	52		19.0	21		19.4	31		-0.4
Medical	27.8	133		29.1	79		25.9	54		3.2
Minors, Guardianship	16.5	255		24.2	99		11.5	156		12.7
Miscellaneous	19.1	178		18.7	91		19.5	87		-0.8
Municipalities	13.5	37		12.5	16		14.3	21		-1.8
Premises	28.3	106		25.8	62		31.8	44		-6.0
Professions	11.0	100		14.7	34		9.1	66		5.6
Real Property	17.6	199		28.6	70		11.6	129		17.0
Tax	23.0	148		21.1	71		24.7	77		-3.6
Tort, Auto	26.8	123		29.7	64		23.7	59		6.0
Tort, Other	30.5	338		33.5	161		27.7	177		5.8
Tort, Products Liability	40.5	42		31.8	22		50.0	20		-18.2
Trusts	22.2	36		17.6	17		26.3	19		-8.7
Total	22.7	6853		26.9	3295		18.9	3558		8.0

Source: SSC Westlaw opinions, 2003.

As in the case of dissent rates across states, a strong association exists between a case category's mandatory case dissent rate and its discretionary case dissent rate. Figure 6 shows this association, which has a correlation coefficient of 0.48 for thirty-five case categories, significant at $p=0.004$. Again, individual judge propensities can emerge in dissents that are muted in the decision to reverse or affirm by a group.



Source: SSC Westlaw opinions, 2003.

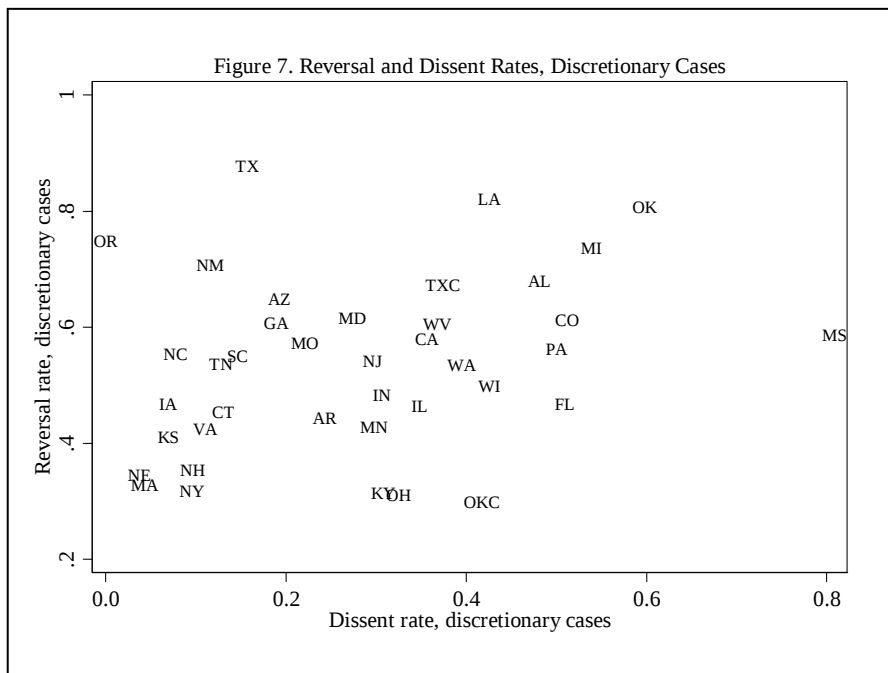
The differing relation between mandatory and discretionary reversal rates and dissent rates raises a question about the relation between dissent rates and reversal rates. At the state level, no strong association emerges between dissent rates and reversal rates in mandatory cases. For the thirty-five states with at least ten mandatory jurisdiction cases, the correlation coefficient for reversal and dissent rates is -0.019 ($p=0.91$). Reversal rates tend to cluster from about 15% to 40%.¹⁰⁹ Dissent rates are more diffuse, with several states having dissent rates of less than 10%, while the rate in one state exceeds 80%, as shown in Table 5.

Somewhat different results emerge for discretionary jurisdiction cases. Figure 7 shows the relevant data. Here, a near-significant correlation exists between dissent rates and reversal rates. The correlation coefficient for thirty-

¹⁰⁹ See *supra* fig.3 (depicting the grouping of states' mandatory jurisdiction case reversal rates in a relatively narrow range of 15% to 40%).

nine states with at least ten cases is 0.28 ($p=0.09$). Individual judges' propensities to dissent are more associated with decisions to reverse in discretionary cases than in mandatory cases.

In both mandatory and discretionary cases, judges tend to dissent more when the decision below is reversed than when it is affirmed. In discretionary jurisdiction cases, judges dissented in 29.9% of reversed cases compared to 22.0% of affirmed cases ($p<0.001$). Likewise, in mandatory jurisdiction cases, judges dissented in 25.3% of reversed cases as opposed to 15.6% of affirmed cases ($p<0.001$).



Source: SSC Westlaw opinions, 2003.

C. Case Categories' Share of SSC Decisional Workloads

We also examine the relation between jurisdictional source and case category. Table 7 reports, for both mandatory and discretionary cases, the distribution of SSC workloads by case category. The distribution does not differ materially from that suggested by Table 2's report of case categories, without disaggregation by jurisdictional source.¹¹⁰ Only Criminal, Procedure constitutes more than 10% of either the discretionary or mandatory workload. Criminal, Substance is the second largest case category for both jurisdictional

¹¹⁰ See *supra* tbl.2 and accompanying text (depicting the relative frequencies of each of forty-five case categories).

sources, followed by Civil Procedure as the third largest for both sources of jurisdiction.

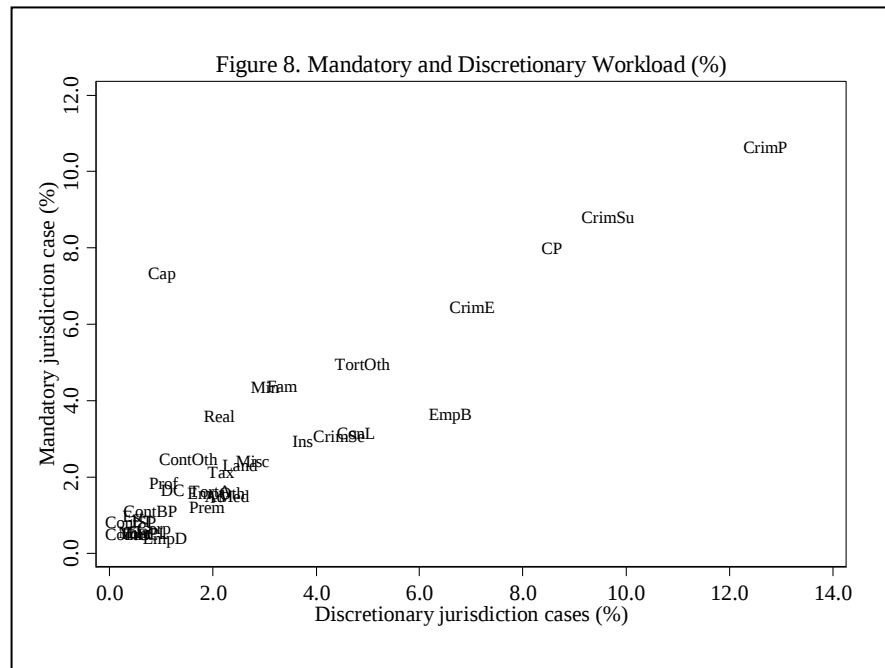
Table 7. Case Categories and Jurisdiction

<i>Case category</i>	<i>Mandatory case N</i>	<i>Mandatory cases (%)</i>	<i>Discretionary case N</i>	<i>Discretionary cases (%)</i>
Administrative Law	54	1.5	67	2.0
Capital Punishment	262	7.4	33	1.0
Civil Procedure	285	8.0	282	8.6
Const. Law	113	3.2	157	4.8
Contract, Buyer Pltf.	41	1.2	26	0.8
Contract, Fraud – Consumer	19	0.5	14	0.4
Contract, Other	89	2.5	50	1.5
Contract, Seller Pltf.	30	0.8	12	0.4
Corporate	25	0.7	28	0.8
Criminal, Evidence	231	6.5	231	7.0
Criminal, Procedure	379	10.7	418	12.7
Criminal, Sentencing	110	3.1	146	4.4
Criminal, Substance	314	8.8	318	9.7
Debtor-Creditor	60	1.7	40	1.2
Election Law	21	0.6	15	0.5
Employment, Benefits	131	3.7	217	6.6
Employment, Disc.	15	0.4	35	1.1
Employment, Other	57	1.6	68	2.1
Estates	36	1.0	15	0.5
Family Law	157	4.4	110	3.3
Insurance	106	3.0	123	3.7
Land Use	83	2.3	83	2.5
Landlord-Tenant	31	0.9	21	0.6
Medical	54	1.5	79	2.4
Minors, Guardianship	156	4.4	99	3.0
Miscellaneous	87	2.4	91	2.8
Municipalities	21	0.6	16	0.5
Premises	44	1.2	62	1.9
Professions	66	1.9	34	1.0
Real Property	129	3.6	70	2.1
Tax	77	2.2	71	2.2
Tort, Auto	59	1.7	64	1.9
Tort, Other	177	5.0	161	4.9
Tort, Products Liability	20	0.6	22	0.7
Trusts	19	0.5	17	0.5
Total	3558	100.0	3295	100.0

Source: SSC Westlaw opinions, 2003.

Figure 8 shows the relation between mandatory and discretionary jurisdiction workloads by case category. The rates of mandatory jurisdiction cases of one category are highly correlated with the rates of the discretionary jurisdiction cases of the same category, with a correlation coefficient of 0.872 ($p < 0.0001$) for the thirty-five case categories shown. Even for small case

categories, the fraction of the caseload is highly correlated by case type. For eighteen case categories with less than 2% of the mandatory jurisdiction caseload, the correlation coefficient between mandatory and discretionary jurisdiction workloads is 0.716 ($p=0.0008$). Given the substantial differences in the pattern of mandatory jurisdiction across states, this strong correlation may suggest that SSCs effectively avoid writing substantive decisions in unwanted mandatory cases.¹¹¹



Source: SSC Westlaw opinions, 2003. Abbreviations: Ad=Administrative Law; Cap=Capital Punishment; CP=Civil Procedure; ConL=Const. Law; ContBP=Contract, Buyer Pltf.; ContFC=Contract, Fraud—Consumer; ContOth=Contract, Other; ContSP=Contract, Seller Pltf.; Corp.=Corporate; CrimE=Criminal, Evidence; CrimP=Criminal, Procedure; CrimSe=Criminal, Sentencing; CrimSu=Criminal, Substance; DC=Debtor-Creditor; El=Election Law; EmpB=Employment, Benefits; EmpD=Employment, Disc.; EmpOth=Employment, Other; Est=Estates; Fam=Family Law; Ins=Insurance; Land=Land Use; LT=Landlord-Tenant; Med=Medical; Min=Minors, Guardianship; Misc=Miscellaneous; Mun=Municipalities; NR=Natural Resources; Prem=Premises; Prof=Professions; Real=Real Property; TortA=Tort, Auto; TortOth=Tort, Other; TortPL=Tort, Products Liability; Tru=Trusts.

Interstate variation in case category proportions is not strikingly large. This is true for both mandatory and discretionary jurisdiction cases. In no state does

¹¹¹ See *supra* tbl.3 and accompanying text (displaying in the “N Mandatory” column the diversity of numbers of mandatory cases across states).

any case category other than Criminal, Procedure account for more than 10% of the mandatory or discretionary case workload. Aside from the strong correlation between mandatory and discretionary jurisdiction case category shares, the most striking feature in Figure 8 is the proportion of capital cases on the mandatory docket. Other than large criminal categories and civil procedure cases, capital cases constitute the largest fraction of mandatory case workloads. This is even more striking because several states have no capital punishment and others rarely impose death sentences; adjusting for these factors supports a reasonable claim that capital cases are the largest fraction of mandatory dockets.

D. *Opinion Characteristics*

As suggested in Part I, one expects characteristics of judicial opinions to vary by jurisdictional source. We expected discretionary cases to have longer opinions, and to have opinions written more often by chief judges and by judges with longer tenure on their courts.¹¹² Because discretionary cases tend to be more influential, judges with greater seniority seemed more likely to write the opinions.

Table 8 summarizes tests of our opinion-related hypotheses. It includes only cases in which a traditional dispositive opinion was available and thus excludes, for example, cases disposed of without an SSC opinion.¹¹³ It suggests that none of our initial theories were correct. Contrary to expectations, opinions were actually longer in mandatory cases, as shown in Table 8's first row. However, that difference disappears when capital cases are excluded from the sample. Chief justices wrote about the same percentage of principal opinions in mandatory and discretionary cases; the tenure of judges writing discretionary case principal opinions was not materially different from the tenure of judges writing mandatory case principal opinions. None of the mandatory-discretionary differences we expected are statistically significant at $p=0.05$. Judges writing principal opinions in discretionary cases were older, on average, than judges writing discretionary case opinions, but the difference (58.2 years versus 57.7 years) was small and insignificant. We do find, however, that female and non-white judges wrote principal opinions in discretionary cases significantly more frequently than they wrote principal opinions in mandatory cases. This result contradicts our expectations, and might indicate that SSCs give somewhat greater power over the development of doctrine to female or non-white judges. However, the effect for female and non-white judges disappears in the regression analysis presented below.

¹¹² See *supra* Part I.B.2.a.

¹¹³ See *supra* note 68 (concerning the source of many North Carolina dispositions).

Table 8. Opinion-Related Hypotheses

	<i>Discretionary cases</i>	<i>N discretionary cases</i>	<i>Mandatory cases</i>	<i>N mandatory cases</i>
Opinion length (mean pages)	9.3	3269	10.2	3493
Opinion length excluding capital cases (mean pages)	9.2	3236	9.2	3234
Tenure of judge who wrote principal opinion (mean years)	8.5	2736	8.2	2864
Age of judge who wrote principal opinion (mean years)	58.2*	2736	57.7	2864
% OF PRINCIPAL OPINIONS				
Chief judge wrote principal opinion	17.2%	2699	17.3%	2785
Female judge wrote principal opinion	29.6%*	2699	24.1%	2785
Non-white judge wrote principal opinion	10.2%*	2696	5.7%	2786

Note: * Difference between discretionary and mandatory cases significant at $p < 0.05$. Numbers in the “% of Principal Opinions” portion of the table are the total number of cases for which opinion author, gender, or race information was available. The number of opinions written by judges with the row characteristic is the product of the percent in the first or third numerical column times the number of observations in the applicable second or fourth numerical column. Source: SSC Westlaw opinions, 2003.

E. Modeling SSC Reversals, Dissensus, and Opinion Characteristics

Two principal results are the associations between discretionary jurisdiction and reversal and dissent rates. Table 9 reports regression models for two dependent variables: reversal and dissent. For both dependent variables, the models include the principal independent variable.¹¹⁴ We coded cases for which jurisdiction was ambiguous as missing and omitted. The models include dummy variables for states and case categories, which are not shown in the table. Additional models, not reported in the table, include: (1) case category fixed effects and state random effects, (2) state fixed effects and case category random effects, and (3) a crossed random effects model for states and case categories. They yielded results not materially different from Table 9.

Table 9. Logistic Regression Models and Reversal and Dissent

	<i>Reversed=dependent variable</i>	<i>Dissent=dependent variable</i>
Discretionary dummy variable	0.820** (7.92)	0.348** (3.45)
Pseudo r-squared	.106	.145
% correctly classified	68.1%	78.4%
% reduction in error over naïve model	18.2%	5.1%
Observations	5868	6845

Note: ** indicates significant at $p < 0.01$; robust z-statistics in parentheses. Models include state and case category fixed effects. Naïve models are 39.0% reversals and 22.8% dissents. Source: SSC Westlaw opinions, 2003.

Both models show substantial and significant discretionary jurisdiction effects. Core results are thus robust to these methods of accounting for states and case categories. The effects are of reasonably large magnitude. The probability of a reversal in a discretionary jurisdiction case is about 0.19 greater than in a mandatory jurisdiction case. The probability of a dissenting opinion in a discretionary jurisdiction case is about 0.05 greater than in a mandatory jurisdiction case.

One concern about simple models is that a case's discretionary status is not exogenous; it is likely a function of at least case category and state. Some case categories are more likely to produce cases subject to discretionary review, and states differ in the rules covering discretionary review and the degree of such review.¹¹⁵ Much of this concern should be alleviated by results in Table 3 with respect to states and in Table 4 with respect to case categories. Those tables show that within both states and case categories, a strong discretionary case

¹¹⁴ The principle independent variable is an indicator variable for discretionary jurisdiction. It equals "1" if a SSC case was based on discretionary jurisdiction and zero if it was based on mandatory jurisdiction.

¹¹⁵ See, e.g., *supra* notes 84-85 and the accompanying text (explaining the unusual rules governing discretionary review in Alabama).

reversal effect survives. As a further check on the core results, we explored two-equation models in which reversal (or dissent) are modeled as a function of discretionary case status, and discretionary status was modeled as a function of state and case category dummy variables. The same two-equation model was explored in relation to dissent. These results did not materially differ from those reported in Table 9.

We have preliminarily explored models that account for the makeup of case panels, aggregated at the case level. In models that account for the percent of a panel consisting of Republicans or Democrats,¹¹⁶ consisting of women, or consisting of Caucasians, results do not noticeably change. However, these individual judge characteristics are likely best left to analysis of SSC cases at the judge level, rather than at the case level, which is the focus of this Article. Group level outcomes can mask the preferences of individual voter characteristics within the group.¹¹⁷

We also explored the relation between reversal tendencies and SSCs' workloads, as measured by filings per judge. Increased docket pressure might lead SSCs to accept for discretionary review a set of especially close or contentious cases that are more reversal-prone than cases selected from less crowded dockets.¹¹⁸ For example, the discretionary docket pressure on the United States Supreme Court leads to reversal rates of over 70%, noticeably higher than the reversal rates for most states' discretionary cases.¹¹⁹ The NCSC collected data on filings per justice.¹²⁰ Figure 9 shows, for civil discretionary and mandatory cases, the relation between reversal rates and filings per SSC justice. No noticeable pattern emerges, so we have no evidence that docket pressures drive reversal rates. Similar results obtain for criminal discretionary and mandatory cases. The results are not sensitive to combining state SSCs that sit in panels with those that always sit en banc. The figure also does not materially change if limited to SSCs that only sit en banc.

¹¹⁶ In the political affiliation models, we included square terms to account for the likelihood that panels substantially dominated by judges from either party would be more or less likely to reverse or dissent.

¹¹⁷ See, e.g., Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 308 (2001) (identifying personal individual characteristics tending to affect jurors' votes in capital cases).

¹¹⁸ See, e.g., *supra* note 29 and accompanying text (discussing the driving role of docket pressure in California's discretionary jurisdiction).

¹¹⁹ See *supra* note 58 and accompanying text.

¹²⁰ STRICKLAND, *supra* note 42, at 106-16 tbl.1 (depicting the data for the number of mandatory cases and discretionary petitions filed per judge and containing extensive explanatory footnotes for additional information).

Figure 9. Reversal Rates and SSC Filings per Judge
Discretionary and Mandatory Civil Cases

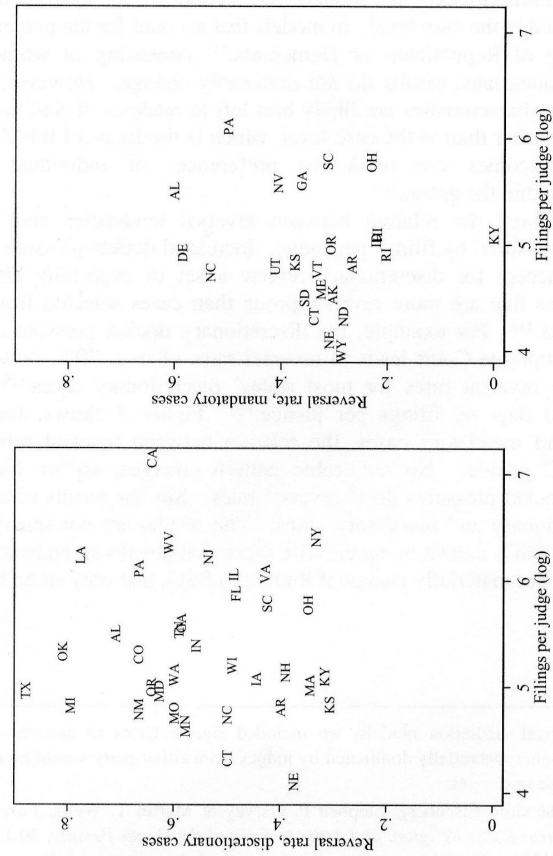


Table 8's opinion-related results for gender and race are not robust to models that account for state and case category. Table 8 indicates that female judges author a higher proportion of discretionary case principal opinions than of mandatory case principal opinions.¹²¹ Preliminary analysis indicates that, in models that account for state and case category, a discretionary case is negatively associated with the likelihood of a female judge writing the case's principal opinion. No significant association exists between the discretionary case status and the likelihood of a non-white judge writing the principal opinion.

Surprisingly, after controlling for state and case category, discretionary case opinions are shorter than mandatory case opinions. The difference is small, about one page, but statistically significant. One possible explanation for the relative length of discretionary case opinions is that case-filtering in mandatory cases leads to unusually complex, and thereby longer, mandatory case opinions. Alternatively, the per curiam order without opinion might dispose of many routine mandatory cases. Opinion-filtering in mandatory cases thus tends to equalize the complexity and therefore opinion length of mandatory and discretionary cases.

Some of this effect may be at work but is unlikely to explain the full opinion effect we observe. First, the effect is not simply that discretionary opinions are not longer than mandatory opinions; discretionary opinions are shorter. Second, if the filters leading to opinions included in the data explained this phenomenon, we might expect other effects also to be unobservable. For example, if opinion-filtering truly leads mandatory opinions to behave like discretionary opinions, then the observed differences in reversal and dissent rates should also fade. Yet, they do not.

IV. DISCUSSION OF RESULTS

Because jurisdictional source may influence manifestations of judicial preferences, these results have implications for a wide range of studies. The notably different reversal rates in discretionary and mandatory cases establish that case outcomes are associated with jurisdictional source.¹²² Important efforts exist to model appellate court outcomes and lower court behavior with the goal of assessing case and attitudinal factors associated with outcomes.¹²³ These results suggest that such efforts are incomplete unless one accounts for jurisdictional source. Moreover, judicial preferences may manifest themselves

¹²¹ See *supra* tbl.8 and accompanying text (detailing the patterns of opinions written by female judges based on discretionary source).

¹²² See *supra* tbl.3 and accompanying text (depicting the marked difference between discretionary and mandatory reversal rates (51.6% and 28.1% respectively)).

¹²³ See, e.g., David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 579-80 (2003); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305 (2002).

differently depending on whether the adjudication is case or issued-based. This distinction is, in itself, associated with jurisdictional source.¹²⁴ Similar considerations apply to studies of dissenting opinion behavior. Thus, studies seeking to assess judicial preferences need to account for jurisdictional source, as Jonathan Kesteliec and Jeffrey Lax recently suggested with respect to the United States Supreme Court.¹²⁵

Outcomes. Those data offer an opportunity to compare case outcomes with those reported in other studies. The overall 28.1% reversal rate observed in mandatory cases is close to reversal rates reported for intermediate federal appellate courts;¹²⁶ reversal rates in federal appellate court cases leading to opinions are reportedly about one-third.¹²⁷ A study covering one hundred years (1870 to 1970) and sixteen SSCs reported a mandatory case reversal rate of 36.8% in published opinions.¹²⁸ The same study reported a discretionary case reversal rate of 50%,¹²⁹ close to the 51.6% reversal rate observed here. The decreased mandatory case reversal rate may be attributable to a number of factors, including the substantial shift continuing over time towards discretionary jurisdiction in SSCs, leaving a different set of cases for mandatory review, or to a different cross-section of cases being appealed to SSCs.

Dissent. The decision to dissent is fundamentally an individual judges' choice, not a case-level characteristic.¹³⁰ We therefore leave more detailed consideration of dissent to future work at the individual case level, with consideration of the array of policy preferences, case characteristics, and institutional arrangements found to relate to dissent.¹³¹ For now, we simply note the association between jurisdictional source and dissent rates.

Case Category Workloads. The dominance of discretionary review also has implications for describing and assessing SSC workloads. Although we have not explored the topic of SSCs' complete workloads systematically, even casual assessment of SSC activity suggests that an accurate workload description cannot be accomplished by studying the cases SSCs decided on the merits. With SSCs in large states addressing less than 10% of the cases in which parties seek review on the merits, a substantial portion of the workload is in deciding what to review. The full workload would also include a

¹²⁴ See *supra* Part III.B.

¹²⁵ Jonathan P. Kesteliec & Jeffrey R. Lax, *Case Selection and the Study of Judicial Politics*, 5 J. EMPIRICAL LEGAL STUD. 407, 436-37 (2008).

¹²⁶ See *supra* tbl.3.

¹²⁷ Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 517-18 (1989).

¹²⁸ Note, *supra* note 2, at 1201.

¹²⁹ See *id.*

¹³⁰ See *supra* Part III.B.

¹³¹ Brace & Hall, *supra* note 6, at 915 (citing the importance of studying the sources of influence on judicial choice).

determination of SSCs' work in their capacities as overseers of state bars and other responsibilities that vary by state.¹³²

CONCLUSION

Agenda-setting in the United States Supreme Court has been extensively studied.¹³³ The results of our study suggest the importance of similar efforts to analyze cases through the lens of jurisdictional source for SSCs. Reversal rates

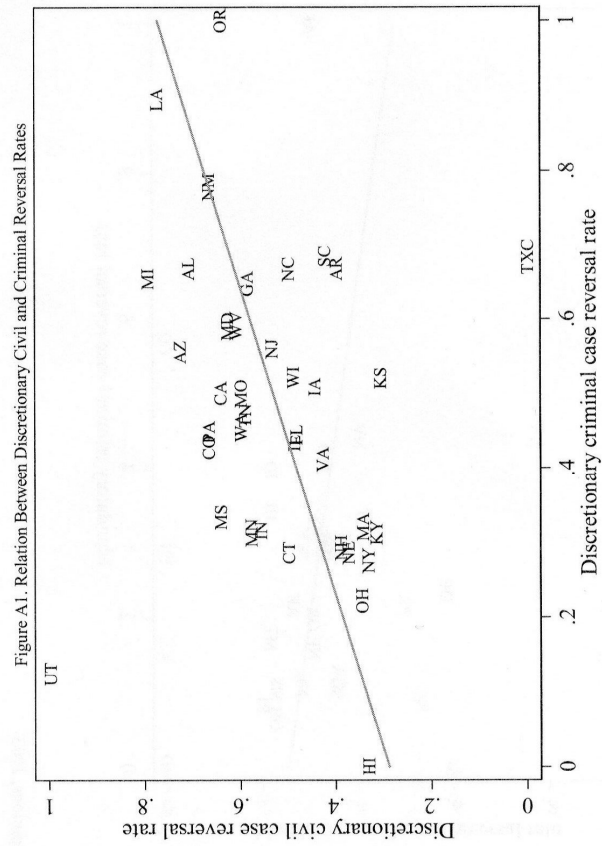
¹³² Nevertheless, the case categories comprising SSC decisional workloads can reveal information about SSC responses to economic and social change. Kagan et al., *supra* note 1, at 124. The aggregate level distribution of case categories, *supra* tbl.2, can usefully be compared with earlier case category distribution reports. The criminal case share reflected in this study's data of the 2003 SSC decisional docket does not differ materially from that reported by Kritzer et al. for SSCs for the period 1995 to 1998. Kritzer et al., *supra* note 7, at 431 fig.1. The contract share is lower than the 13% contract share reported by Kritzer et al. *Compare supra* tbl.2, with Kritzer et al., *supra* note 7, at 431 fig.1. They report family and estates as having a 6% share. Kritzer et al., *supra* note 7, at 431 fig.1. The 2003 case distribution shows the combination of Estates, Family Law, Minors, Guardianship, and Trusts as having about a 9% share, nearly a 50% increase. *See supra* tbl.2. Finally, the 16% tort share we find in 2003 is considerably lower than 23% tort share reported in Kritzer et al. *Compare id.*, with Kritzer et al., *supra* note 7, at 431 fig.1. This is especially noteworthy because Kritzer et al. show tort cases comprising an increasing portion of SSC dockets from 1870 through 1998. Kritzer et al., *supra* note 7, at 431 fig.1. The substantial decline between 1995-1998 and 2003 would comprise a major shift in the growth of tort on SSC decisional dockets. We also find a notable decline in public law cases, from 15% in 1995-1998 to about 10% in 2003. *Compare supra* tbl.2, with Kritzer et al., *supra* note 7, at 431 fig.1. These comparisons, however, must be made cautiously because the classification system used by Kritzer et al. may not perfectly align with the one used in the instant study.

Of course, these aggregated case category figures do not reveal variation within a state. Judge Desmond's report of the New York Court of Appeals docket for 1923-1924 and 1948-1949 allows us to roughly estimate that court's docket makeup over time. Overall, a substantial shift from private to public law occurred. In 1923-1924, criminal cases comprised 8.6% of the docket. Desmond, *supra* note 28, at 4 tbl.3. The criminal case share increased to 12.6% in 1948-1949, and our data show New York criminal cases comprising about 25% of the decisional docket. Constitutional law accounted for over 10% of New York's 2003 docket but was not even an identified case category in Judge Desmond's listing. Tort cases comprise about 14% of the 2003 decisional docket, not materially different from the 14.8% share in 1948-1949 and the 16.4% share in 1923-1924 (the figure combines Desmond's "Negligence" and "Torts other than negligence" categories). The growth of criminal law and constitutional law shares has come at the expense of private law categories. Estates, Family Law, and Minors, Guardianship combined for about 4.6% of the 2003 docket, down from 11.8% of the 1923-1924 docket and 10.6% of the 1948-1949 docket. *See id.* Contract categories declined from 16.6% of the 1923-1924 docket, to 6% of the 1948-1949 docket to about 3.8% of the 2003 decisional docket. *See id.* Landlord-Tenant was 3.1% of the 2003 docket, down from 5.4% of the 1948-1949 docket but up from a 0.8% share of the 1923-1924 docket.

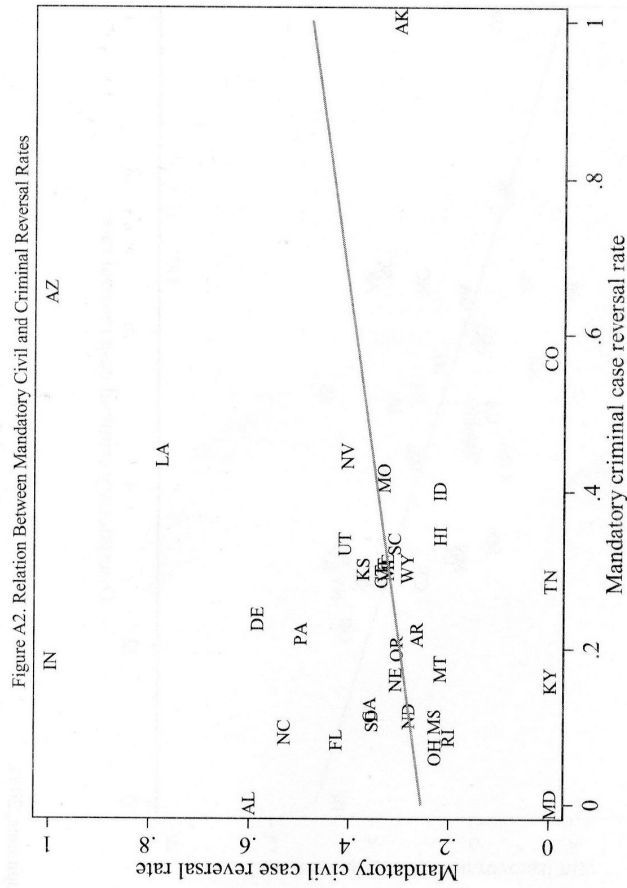
¹³³ *E.g.*, Brace & Hall, *supra* note 5, at 395-96.

and dissent rates are significantly associated with jurisdictional source. While we make no claim that jurisdictional source *causes* particular outcomes, it is clear that SSC case selection processes profoundly influence the observed pattern of SSC outputs. Studies of important aspects of SSC activity, including case outcomes and manifestations of judicial policy preferences, should thus more fully account for jurisdictional source.

APPENDIX



Source: SSC Westlaw opinions, 2003.



Source: SSC Westlaw opinions, 2003.