Describing the State Solicitors General

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It is well-established that the U.S. Solicitor General is among the most successful of the parties that appear before the U.S. Supreme Court.[1] However, scholars have paid little attention to the recent development of state-level analogues, the state solicitors. In fact, with one exception,[2] there is no scholarly exploration of these actors who are currently established in 32 states. This article describes the reasons why the states have created solicitor's offices—a process that began in earnest in the late 1980s—and sheds some light on the ways in which these offices operate. Besides being important to the states in their litigation efforts, understanding the state solicitors will also allow us to better grasp the extent to which the success of the Solicitor General is uniquely determined by the court in which the solicitor advocates and the resources available to his or her office.

> Thirty-two states now have solicitors general, but little attention has been paid to these justice system actors. Why were solicitor's offices created and what do the state solicitors do?

The article first provides a detailed description of the state solicitors' offices based on interviews with former state solicitors and the scant literature that exists on them. Second, it analyzes the characteristics of states that led the effort to create state solicitors offices in the early 1990s in an effort to understand what leads a state to establish these offices. In doing so it utilizes the State Supreme Court Data Project, which contains data on virtually every case heard by the state supreme courts between 1995 and 1998.[3] The article then discusses how solicitors may aid a state's litigation efforts and proposes an agenda for future research of these little-known actors.

Describing the solicitors

State solicitors are defined here as the state's chief appellate attorney with, at the very least, the authority to supervise some civil appeals by the state to the state supreme court, although in reality solicitors will also focus some of their energies on the federal appellate courts and the U. S. Supreme Court. For the most part, states bifurcate the appellate process between civil and criminal cases—and in most states the attorney general has created a position that is in charge of overseeing criminal appeals that is separate from the office of a state solicitor.[4]

The need for state solicitors is also the result of the internal organization of most attorneys' general (AG's) offices. In most states, the AG has only appellate authority in criminal cases, and is not responsible for trying cases at the trial level, a responsibility usually delegated to a district attorney. On the civil side, the AG has much broader authority over the litigation process, being in charge of most civil cases in which the state is a party from the trial stage all the way up to the state supreme court. As Layton notes, the greater complexity on the civil side means that responsibilities are often divided along substantive lines, with individual chiefs in charge of particular appellate areas such as tax law or child support enforcement. This means that there is a greater need for the coordination of arguments on the civil side than there is on the criminal side, since, for instance, the appellate chief in the tax division may make an argument that makes victory more

The author would like to thank Larry Baum, Elliot Slotnick and Jan Box-Steffensmeier for their helpful comments and Dan Schweitzer and six anonymous former state solicitors for insight and information into the operation of solicitors' offices.

1. See, for instance, Lincoln Caplan, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (New York: Alfred A. Knopf, 1987); Rebecca Mae Salokar, THE SOLICITOR GENERAL: THE POLITICS OF LAW (Philadelphia, PA: Temple University Press, 1992); James Spriggs and Paul Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 AM. J. POL. SCI. 365 (1997); Kevin McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505 (1998).

2. James Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?* 3 J. OF APPELLATE PRAC. 533 (2001).

3. The State Supreme Court Data Project is available at http://www.ruf.rice.edu/~pbrace/statecourt/. The data set contains almost all state supreme court decisions from every state supreme court between 1995 and 1998. The single limitation is that the investigators stopped coding cases after they had coded 200 cases in a given state in a given year.

4. *Supra* n. 2.

State solicitors are the state's chief appellate attorney with the authority to supervise some civil appeals to the state supreme court, as well as federal appellate courts and the U.S. Supreme Court.

likely in the case at hand or in tax cases in general but that makes it more difficult for the state in other areas of law.

Given these organizational needs, one of the few consistencies among states with respect to the office of a solicitor is that they are primarily involved in civil cases. The term "state solicitor" is one that I borrow from Layton,[5] who notes that states use a variety of names for the office of a chief appellate attorney ranging from state solicitor general to chief of the civil division; thus, state solicitor is an omnibus term meant to refer to all of these offices.

Most state solicitors have a background that suggests that they are or will become elite members of the legal profession.[6] Many are former federal appellate clerks, several have been former Supreme Court clerks, and several have served as clerks on state supreme courts. Further, many move on to important positions, as several are now federal appellate court judges, state supreme court justices, or occupy other high-level elected positions such as state attorney general.

Interestingly, women have been particularly successful securing positions as state solicitors—positions that have catapulted them onto state supreme courts in at least two instances: Virginia Linder in Oregon and Victoria Graffeo in New York. Indeed, Layton[7] notes that during the 1996 Supreme Court term women argued 14 percent of the cases before the Court, but that women argued 44 percent of the cases in which state attorney general

5. Supra n. 2.
6. Tony Mauro, *Solicitous Behavior*, The American Lawyer, August, 1, 2003, at 1.
7. *Supra* n. 2.

offices were involved.

Partially, the invisibility of the state solicitors in the academic and professional literatures is a result of the fact that these offices are recent creations resulting from two relatively recent trends. First, the states have seen the number of civil appeals increase steadily since the 1970s, particularly as Congress devolved authority over many programs to the states.[8] This devolution of authority in turn led the states to begin their own regulatory regimes or sue the federal government to force it to keep its commitments.[9]

However, as Layton[10] stresses, the need for an appellate specialist in the AG's office is not only a result of increasing numbers of lawsuits and regulatory action, it is also a by-product of the increasing complexity of civil appeals in the state courts. Partially this is because the states themselves turned away from federal courts that they perceived as hostile to their interests and began to look toward their own state courts to help them with their new regulatory responsibilities, and partially this is because non-governmental litigants turned to the state courts to enforce their rights.[11] To summarize: "The recent development of state solicitors whose work more closely parallels that of the Solicitor General was…prompted by the increase in appellate workload, the increased complexity of cases on appeal, and the increasing risk of loss."[12]

The relationship between a state AG and a state solicitor differs from the relationship between the Solicitor General and the Attorney General at the federal level. Whereas the Solicitor General typically owes his allegiance to the president who appointed him or her,[13] in the states it is the AGs who decide if there will be a solicitor[14] and who that person will be. Thus, there is a close relationship between most state solicitors and the attorney general who appoints them. The closeness of this relationship is reflected in the statements of several former solicitors indicating that they, where possible, attempt to advance the agenda of the AG and that support from the AG is critical to the success of the office.[15]

Similarly, the Solicitor General is frequently found to be in policy congruence with his or her appointing president, except in cases in which the Solicitor General is invited to participate before the Court, in statutory cases, and in cases in which the Solicitor General is tasked with defending the enforcement powers of the federal government.[16] Most of the cases studied here, being cases in which the state participates as a party to litigation, are cases in which the state solicitor will find him or herself defending the enforcement powers of the state government.

I have also examined cases in which states with solicitors have participated as amici before their state supreme courts in an attempt to better understand how similar their relationship to their state supreme courts is to the Solicitor General's relationship to the Supreme Court. In general two things are readily apparent. First, state solicitors between 1995 and 1998 participated significantly less frequently as amicus than did their federal counterpart. No state filed in more than 11 percent of the available cases on a state supreme court's docket and the average rate of filing was just under 3 percent. Compare this with a rate of over 20 percent of Supreme Court cases for the Solicitor General during the Clinton presidency (the most comparable era of study).[17] Second, and similar to their participation as parties, the solicitors, and the states in general, are most frequently concerned with protecting their regulatory and enforcement powers and less with the so-called "agenda cases" used by the Solicitor General to advance presidential policy.[18]

In general it is fair to say that state solicitors have less independence than does the Solicitor General.[19] It is true that at the state level, as with the relationship between the AG and the Solicitor General at the federal level, the state solicitor is more likely to be a highly qualified lawyer first and a politician second. In many cases the reverse is true of the state AGs, most of whom must win statewide elections to become the AG and are not gifted appellate advocates.[20]

Size and centralization

The state solicitors' offices themselves can be divided along two different axes: size and degree of centralization. In the bigger offices, the state solicitor's office is closely analogous to the Solicitor General's, with many assistants and broad participation in most of the cases in which the state is a litigant.[21] Examples of states with this type of office include Illinois and New York. In the

8. Timothy Conlan, *And the Beat Goes On: Intergovernmental Mandates and Preemption in an Era of Deregulation*, 27 PUBLIUS: THE J. OF FEDERALISM 129 (1992).

9. Cornell Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. OF POL. 525 (1994).

10. *Supra* n. 2.

11. Paul Chen, *The Institutional Sources of State Success in Federalism Litigation Before the U.S. Supreme Court*, 25 LAW. & POL'Y 455 (2003).

12. *Supra* n. 2, at 537.

13. Salokar, *supra* n. 1.

14. In some states the solicitor is authorized by statute, like the Solicitor General, but in other states there is no authorizing statute and the position exists at the discretion of the attorney general. In some states the position will come into existence and then disappear when a new AG is elected, though this pattern is relatively rare. See Mauro, *supra* n. 6.

15. Marcia Coyle, *Justices Listen to a Key Voice: State Solicitors General Get More Time in High Court*, National Law Journal, April 7, 2008, at 1.

16. For a good discussion of the congruence between the president's policy positions and those of the Solicitor General, see Richard Pacelle, Jr., *Amicus Curiae or Amicus Praesidentis? Reexamining the Role of the Solicitor General in Filing Amici*, 89 JUDICATURE 317 (2006). It is difficult to know the extent to which the state supreme courts invite the participation of the state solicitors in cases, particularly given that I am working only with cases in which the state's participation is required as a party. Three-quarters of the cases that the states with solicitors participate in as amicus are either criminal cases, cases involving the general regulatory power of another government (like a municipality), tort cases, or contract cases.

17. Rebecca Deen, Joseph Ignagni, and James Meernik, *The Solicitor General as Amicus, 1953-2000: How Influential?* 87 JUDICATURE 60 (2003).

18. Richard Pacelle, Jr., BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION (College Station, TX: Texas A & M Univ., 2003); see particularly chapter 5. As Pacelle notes, *supra* n. 16, the agenda cases tend to cluster in civil liberties and non-criminal civil rights cases, but as Table 2 illustrates the states are simply not involved in many of these kinds of cases, at least as parties.

19. *Supra* n. 6.

20. *Supra* n. 15.

21. *Supra* n. 15.

Table 1. Descriptive information on the state solicitors

State	Title of position	Year established	Supervise all appeals
Alabama	Solicitor General	2003+	No
Alaska	Unknown	2003+	Unknown
Arizona	Solicitor General	1994	Yes
California	Solicitor General	2003	Unknown
Colorado	Solicitor General	1974	Yes
Connecticut	Unknown	2003+	Unknown
Delaware	State Solicitor	1969†	Unknown
Florida	Solicitor General	1999	Yes
Hawaii	Unknown	2007	Yes
Illinois	Solicitor General	1987	Yes
Indiana	Solicitor General	2005	Unknown
Kansas	Solicitor General	1999	Yes
Maine	State Solicitor	1997	Unknown
Maryland	Solicitor General	2002	No
Michigan	Solicitor General	1939	Yes
Minnesota	Solicitor General	1992 (disappears after 1998 until 2009)	No
Missouri	Appellate Counsel/ Solicitor General	1994	Yes
Nebraska	Solicitor General	2003+	Yes
Nevada	Solicitor General	2008	Unknown
New Jersey	Unknown	1999	Unknown
New York	Solicitor General	1981	Yes
North Carolina	Solicitor General	2004	Unknown
North Dakota	Chief, Civil Litigation Division	2003	Unknown
Ohio	Solicitor General	1994	Yes
Oregon	Solicitor General	1970	Yes
Pennsylvania	Chief, Appellate Litigation	Unknown (pre-1994)	Yes
South Dakota	Deputy AG In Charge of Appeals	1994	Yes
Tennessee	Solicitor General	1990	Yes
Texas	Solicitor General	1999	Yes
Utah	Solicitor General	1992	No
Vermont	Civil Division Chief	1994	Yes
Virginia	Solicitor General	2000	Yes
Washington	Solicitor General	1994	Yes

Information comes from James Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?* 3 J. OF APPELLATE PRAC. 533 (2001) , Dan Schweitzer, State SGs, <dschweitzer@NAGG.org>, July 19, 2007. Private email message to author, and searches on Lexis/Nexis.
In the "Year Established" column, 2003+ indicates the office was established sometime after 2003. Year established counts time since the continuous presence of a state solicitor's office (see text for a definition).
† According to Layton, as of 2001 Delaware did not have a solicitor although searches indicate the continuous presence of one as early as 1969.

smaller offices, the solicitor acts as something closer to a traditional appellate chief—these offices have fewer assistants and tend to play a more advisory role in most cases, although they will handle the most important appeals themselves. In the smaller offices, the focus is clearly on the three courts most important to any state: the Supreme Court, the applicable federal circuit court, and the state supreme court. Cases that may be important to the state in the federal district courts or in the intermediate state appellate courts are often left to others.[22] An example of a state with this smaller type of office is Alabama.

There are two basic models with respect to the degree of control over the appellate process.[23] In centralized offices a separate appellate office under the direction of the solicitor performs all the appellate work. In the decentralized model, which predominates among the states, the solicitor and her deputies edit briefs authored by other attorneys in the AG's office and set up training programs to improve the state's work product. Offices that are centralized will also tend to be big.

There are also two career tracks within state solicitor's offices. Solicitors themselves, tied as they are to the electoral fortunes of an AG, typically stay only for four-to-eight years. Similarly, some of the assistants in a solicitor's office will be short-term employees, spending three-to-five years gaining valuable experience practicing before appellate courts before moving on to more lucrative opportunities in private practice. On the other the end of the spectrum, many assistants in a solicitor's office will make a career of it. High-quality lawyers are willing to work in state solicitors' offices for less than the market will bear for their services because of the docket typically handled by the office: it is varied, interesting, and important.[24]

Who has SG offices?

Table 1 lists the states that are known to have established solicitor-like offices, the years those offices were established, and, where possible, the authority possessed by a state's solicitor. It is important to note that the authority is not always clearly defined.

It is exceedingly difficult to determine the exact dates of establishment for two reasons. First, many solicitors are not authorized by any statute but are instead creations of the attorney general and so can come into and out of being with a particular AG. Though this type of fluctuation has decreased, it nevertheless makes establishing dates of

22. *Supra* n. 15.
23. Dan Schweitzer, *State SGs*, dschweitzer@NAGG.org, July 19, 2007. Private email message to author.
24. *Supra* n. 6.

existence difficult. Many of these offices were established several times. For instance, this appears to have been the case in both North Dakota and Washington, which had earlier iterations of the office. There are also instances in which the office appears briefly and then disappears. For example, it appears that in Arkansas there was a state solicitor between 1987 and 1990, and then the office disappeared and is yet to return.

The dates of establishment in the table are based on the following criterion: whether or not a solicitor's office, once in existence, appeared in a case at least once every five years.[25] This is a relatively loose standard that should tend toward the over-counting of solicitor's offices, since one would expect at least this minimal amount of activity in any state where a solicitor's office has been created and is active. This table should be considered tentative because of the difficulty inherent in determining the presence of an office that exists at the whim of the attorney general in most states.

Second, in some states attorneys called solicitors existed in the early twentieth century but they did not have the duties and responsibilities that we currently associate with a solicitor general-like actor.[26] Thus, the table presents information that is current and accurate as best as can be gathered from existing publications, discussions with former solicitors, and searches in the Lexis/Nexis database. Furthermore, determining the extent of authority for a solicitor can also be difficult because just as the existence of the office can fluctuate, so too can the authority of that office. The norm, however, appears to be to give state solicitors broad authority over the appellate practice within states.

Three waves

A good place to begin trying to understand the importance of state solicitors is to discern the reasons why states create these offices. It should be noted that part of the explanation is probably not systematic. Some state attorneys general simply felt a need for better state level advocacy and took the initiative in creating a position to help the state perform more adequately on appeal in both the state and federal courts.[27]

A pattern emerging from Table 1 is that solicitor's offices were established in three distinct waves. States that were early adopters created the offices before 1995, several states created offices in the late 1990s and in 2000, with a final large group moving to create the offices after 2003. There are 16 states that were early establishers and exploring how they compare to the others sheds some light on the motivation for the creation of these offices.[28]

It is important to explore relevant differences at both the state and case level when trying to understand the establishment of solicitor's offices. First, it may be that only certain states possess the requisite resources necessary to establish such an office. Second, it is plausible that the early adopter states must handle cases that are qualitatively different than those in states that lagged in the creation of these offices. Though establishing state and case level factors that *caused* a state to create a solicitors office in the first place is difficult, given the data that follows the creation of the office in early adopter states, a comparison of the two types of states is nevertheless suggestive.

Because it is necessary to collect both state and case level data to understand the solicitors I have turned to the State Supreme Court Data Project (SSCDP).[29] Further, because there are over 4000 civil cases in which the state is involved as a litigant in the states between 1995 and 1998 and because I had to read each case to gather the relevant attorney data, I sampled the cases.[30]

The initial sample consisted of 900 cases, which was narrowed to 845 after instances in which the state was on both sides of the case were eliminated. Most importantly, the sample of cases is substantially similar to the population with the exception that I purposely sampled more cases from states that were early adopters and more cases involving amicus participation in general. To the data set I have added a number of state level variables that may affect the likelihood of creating a state solicitor's office.[31] Table 2 provides a basic outline of the differences between states that established solicitors by 1994 and those that did not.

25. Continuous operation means that the solicitor's office makes an appearance at least every five years from the date listed in the table. This standard is an attempt to get around difficulties noted in the text surrounding the ephemeral nature of these offices for much of the 20th century. Appearances in any court, be it a state level trial court or the relevant federal circuit court or the state supreme court, were canvassed for appearances.

26. *Supra* n. 2.

27. Interviews with state solicitors in these early adopter states did not indicate that success in one particular court motivated the creation of these offices. That is, the state solicitors interviewed did not tend to believe that they were hired to focus exclusively on the state supreme court or the federal appellate courts.

28. States counted as having established solicitor's offices before 1995 (using the continuous operation standard) include Arizona, Colorado, Delaware, Illinois, Michigan, Minnesota, Missouri, New York, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, and Washington. Including Minnesota in this group is questionable given the relative inactivity of that office, but the results described in this paper are robust to the exclusion of Minnesota as a state having established a solicitor's office before 1995.

29. *Supra* n. 3.

30. The counts for attorney experience (both state and opponent) are based on a sample of 845 cases. Sampling these cases was required because in order to generate the measure it was necessary to count appearances backwards for each attorney in each case for five years. Experience is coded as the number of previous appearances by the most experienced attorney on a litigation team in the state supreme court in the five years prior to the case being coded. Though the most experienced attorney is usually the measure used in political science others are plausible. I tested the relationship using the mean number of appearances for each side as well as the total number of appearances for each side and the relationship described in the article does not change.

31. Many of the state level characteristics appearing in the table are self-explanatory. The entries for reappointment, retention election, non-partisan election, partisan election and life tenure represent the percentage of states in each category using that type of system to retain justices on the bench once they have served an initial term. Divided government measures those states in which the legislature is controlled by one party and the executive is controlled by another. Court resources is a principal component factor score of the salary paid to state supreme court justices, the number of law clerks assigned to each justice and the number of staff attorneys employed by a state supreme court. This data was gathered from Carol Flango and David Rottman, APPELLATE COURT PROCEDURES (Williamsburg, VA: National Center for State Courts, 1998). Higher scores indicate greater resources. All of the other state level characteristics are self-explanatory.

Table 2. State and case characteristics from states considered early adopters (pre-1995) of the solicitor model

Characteristic	With solicitors	Without solicitors
State level		
Reappointment	0.25	0.24
Retention election	0.44	0.33
Non-partisan election	0.31	0.24
Partisan election	0.06	0.18
Life tenure	0.00	0.09
AG elected	0.94	0.82
Divided government	0.50	0.58
Attorneys per capita (per thousand)	2.90	2.80
AG budget (in millions)	4.47	3.99
Attorneys in AG's office	195	133
Court resources	0.11	–0.15
Population (in millions)	6.33	4.97
Case level		
State is petitioner	0.36	0.35
Economic regulation	0.57	0.56
Agency action	0.41	0.39
Elections	0.07	0.03*
Privacy	0.04	0.05
First Amendment	0.02	0.03
Amicus brief filed	0.22	0.18
Constitutional issue	0.12	0.12
Number of issues per case	1.35	1.48^
Non-unanimous decisions	0.43	0.26*
State attorney experience	27.75	8.52^
State attorney experience (Solicitors not included)	9.02	8.52
Opponent attorney experience	2.79	2.82

* difference is significant at $p<0.05$ (χ^2 test); ^ difference is significant at $p<0.05$ (t-test)

The most apparent difference between early adopters and other states is that the early adopters have more resources devoted to both their state supreme courts (as measured by court resources) and their own litigation efforts (as measured by the AG's budget and number of attorneys in the AG's office). Furthermore, the early adopter states have considerably larger populations, which may explain their ability to commit significantly more resources to litigation. Other than size and resources the states with solicitors and those without are substantially similar in terms of state level characteristics. Indeed, none of the state level differences is statistically significant.

Several factors stand out at the case level.[32] Early adopter states are significantly more likely to have cases challenging elections in their state supreme courts. Furthermore, the early adopter states are more likely to be dealing with contentious state supreme courts as indicated by the number of cases that are decided non-unanimously.

Perhaps not surprisingly given that solicitor's offices are designed to capture inherent experience advantages accruing to the state, those states that were early adopters have litigation teams that are significantly more experienced than their opponents, an advantage that disappears if the experience of solicitors is not included in the calculation. Therefore, in these early adopting states the solicitors appear to be fulfilling the goal of states to have more experienced litigation teams. This experience advantage is also noteworthy given the findings of several political scientists with respect to the importance of experience in litigation.[33]

To summarize, the early adopting states tend to have larger populations, more resources devoted to litigation, more contentious courts, and more experienced attorneys. They also have dockets that are slightly different than states that adopted the solicitor model later or have not yet adopted that model, given that they handle more cases involving challenges to election laws and election administration, although it is possible that the very creation of a solicitor's office will have affected these case-level characteristics.

Winning in court

The ultimate question is whether solicitors help their state govern-

32. Several of the case level characteristics require explanation. The economic regulation entry represents the percentage of time in which the state found itself litigating cases in which some type of economic regulation (such as determining the applicability of a corporate tax) was involved. The agency action entry represents cases in which action taken by a state administrative agency (such as a public utilities commission) is at issue). The constitutional issue entry records the percentage of the time that the state found itself facing either a federal or state constitutional challenge. Dissent rate measures the number of times that at least one justice on the state supreme court dissented from the majority holding in a case. Finally, the attorney experience entries are calculated by noting the names of each of the attorneys in a case for each side and counting the number of previous appearances for each of those attorneys before the state supreme court over the previous five years. The entries represent the experience of the most experienced attorney for each side, a practice that accords with the work of others who have studied attorney experience (see McGuire, *supra* n. 1).

33. Kevin McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. OF POL. 187 (1995); McGuire, *supra* n. 1; Andrea McAtee and Kevin McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?* 41 LAW & SOC'Y REV. 259 (2007). But see Maxwell Mak, "Repeat Players: A Reexamination of Litigator Experience at the Supreme Court," paper presented at the 2006 Midwest Political Science Association Annual Conference.

ments win more frequently. Using the SSCDP it is possible to answer the question. States that were early adopters of the solicitor model won about 59 percent of their cases between 1995 and 1998. States that had not adopted the model by 1995 won approximately 63 percent of their cases, a difference that is not statistically significant. One might suspect that the creation of solicitors offices has improved state's litigation efforts, but it is difficult to draw inferences from these statistics given that in the early adopter states solicitors could be raising win rates toward the overall mean level or a simple regression to the mean could be driving movement toward the mean. In other words, it may be that we would observe movement toward the mean win rate solely by chance, which means that attributing change to the solicitors is simply guess work with this data. Furthermore, we cannot discern whether low win rates motivated the establishment of these offices to begin with without data on success from before the creation of these offices. Therefore, it is necessary to understand what win rates look like before a state adopts the solicitor model.

Fortunately, six states—Florida, Kansas, Maine, New Jersey, Texas and Virginia—established solicitors' offices immediately after the early adopters, creating offices in 1997, 1999, or 2000. Unfortunately, in looking at these states no clear pattern emerges: the states that adopted solicitor's offices between 1997 and 2000 won 67 percent of their cases compared to 62 percent for states that had not yet adopted the solicitor model—a difference that is statistically indistinguishable from no difference.

If the states are not motivated to adopt the solicitor model because it allows them to win more frequently in their own state supreme courts, then it may be that the policy diffusion literature helps to explain the spread of these offices. Though a full-blown analysis of the diffusion of the solicitor innovation is beyond the scope of this article, one explanation prominent in the policy diffusion literature is promising: the theory of social learning. Scholars have posited that diffusion is the result of policy leaders', in this case state attorneys general, search to solve policy problems.[34] As noted above, the policy problem that seemed to motivate the creation of solicitor's offices were the increasing complication and stakes of state litigation in the 1980s and 1990s.

A potential forum in which social learning may have lead to the spread of the solicitor model are the annual meetings of state attorneys general hosted by the National Association of Attorneys General (NAAG) and in particular NAAG's attempts to better the advocacy of states before the U.S. Supreme Court through the Supreme Court initiative.[35] Further, there is evidence that the state AGs were particularly innovative policy leaders in the states in the 1990s, as suggested by their role in state litigation against the tobacco industry; litigation that ultimately led to a $206 billion settlement in 1998.[36]

Better legal arguments

How can solicitors help the state perform better in court? Interviews and correspondence with solicitors indicated a surprisingly consistent message: sound and consistent legal argument with an eye toward the policy implications of decisions and establishing a long-term relationship with the state supreme court. As one solicitor put it: "You are trying to establish a brand and the key to establishing a brand is having a unified message and our brand was honesty and truth."[37]

According to a document coauthored by several then-serving state solicitors, there were three major goals in establishing the office of state solicitor.[38] First, decision making needs to be centralized. Centralization allows for greater consistency in advancing the attorney general's position in an area of law and in general. Second, product control—control of the quality of briefs and arguments before a court—is critical because it allows the state to build a reputation and relationship with the court. Third, solicitors are uniquely positioned to provide training to the attorneys in the AG's office on the special skills necessary for appellate advocacy.

One striking feature of conversations with several state solicitors was their reference to the state as a repeat player, usually in the context of the ability of the state to establish particularly favorable precedents over time—an opportunity that exists for states most prominently in their own courts. Ted Cruz, the former solicitor of Texas, notes:

> You're going to be up there [the state supreme court] over and over again. We have been quite successful in our state Supreme Court on the issue of sovereign immunity. Going back to 1999, the office very systematically looked for good cases to take there and to build the doctrine to protect the state interest.[39]

These types of efforts will cascade throughout the state's docket before a supreme court, as doctrines like sovereign immunity will serve to protect the state in multiple legal issue areas and will make victory easier. This suggests one area for potentially

34. See, for example, Jack Walker, *The Diffusion of Innovations Among the American States*, 63 Am. Pol. Sci. Rev. 880 (1969); Christopher Mooney, *Modeling Regional Effects on State Policy Diffusion*, 54 Pol.. Res. Q. 103 (2001); Frederick Boehmke and Richard Witmer, *Disentangling Diffusion: The Effects of Social Learning and Economic Competition on State Policy Innovation and Expansion*, 57 Pol. Res. Q. 39 (2004).

35. I thank two anonymous reviewers for suggesting this as potential explanation for the expansion of the state solicitor model. For more on NAAG and the Supreme Court initiative see http://www.naag.org/supreme_court.php. It is worth noting that the growth of the solicitor model began in earnest in the 1980s, which corresponds with the emergence of NAAG as an independent group in 1980. Finally, there is a suggestion that one former solicitor in particular, Jeffrey Sutton of Ohio, began aggressive advocacy on behalf of the states in the Supreme Court and that his success may have gotten the attention of other attorneys general (see *supra* n. 6).

36. David Widner and James LaPlant, *State Lawsuits against "Big Tobacco": A Test of Diffusion Theory*, 32 St. & Local Gov. Rev. 132 (2000).

37. There are several quotations that are unattributed. These come from interviews with several former state solicitors in which I promised anonymity. I interviewed or corresponded with six former state solicitors from five different states.

38. National Association of Attorneys General (NAAG), NAAG Management Series: Effective Management for Appellate Advocacy (Washington, D.C.: National Association of Attorneys General, 1995).

39. *Supra* n. 15 (quoting Texas Solicitor Ted Cruz).

fruitful future research: do the states increase their win rates over time as state solicitors are able to build strong lines of favorable precedent?

Aside from establishing strong lines of favorable precedent, the solicitors seem to focus heavily on establishing a general norm of deference by the court to the state's agencies, particularly in their rulemaking functions. One solicitor elaborated on this point by mentioning that it is the duty of the state supreme court to help the state function—that the reality is that state government must have a special relationship with the state supreme court because they are all part of the enterprise of governing the state. He continued by noting: "The judges understand that the state has to operate. The [AG's] office's view is basically that if the state has a reasonable position then it should win, because government administration has to operate."

There is some indication that the solicitors may be especially effective in more legally difficult or complex cases. Several solicitors described the job of being the state's chief appellate attorney in terms of simplifying statutorily complex areas of law, like tax codes, and simplifying them in a way that the state supreme court could readily understand the consequences for the state of ruling in one direction or another. Another described the process not as one of simplification, but in terms of coherence and organization—ultimately coming back to the notion that the state had to make consistent legal arguments before the state supreme court. It is interesting to note that the data do suggest that states without solicitors took slightly less complex cases to their state supreme courts.

Another way in which the state solicitors appear to aid states in their litigation efforts is by appealing cases selectively. This is manifested in the recognition that certain cases make better law for the state than others. But this selectivity has benefits beyond only appealing cases in which the state is likely to be able to win; it also highlights the importance of a case. "[S]tate solicitors play a role much like that of the Solicitor General: they use their position to emphasize to the court before which they are appearing the importance of a particular case."[40] Thus, the appearance of a solicitor in a case might indicate that that case is particularly important to the AG and perhaps the state as a whole, and this alone may improve the chances of the state in these cases before the state supreme court. And, as noted above, at least with respect to amicus filings the state solicitors are more selective than their federal counterparts—whether this selectivity in amicus cases leads to greater success must await further study. The states are not frequent amicus participants, largely because of their already overwhelming workload.

This indication of salience will be especially strong in cases in which the state is appealing a ruling from the lower court.[41] This is because in the overwhelming majority of cases appealed to a state supreme court, the state will be the respondent. Thus, when the state chooses to appeal it is in a position as a party more similar to that of the Solicitor General when he files an amicus brief. States do not typically appeal just because they are unhappy with the outcome at the lower level but because there is some broader policy concern at stake.[42] Not unexpectedly, when the state solicitors are appellants they are significantly more successful than when they are appellees (t-test = 1.46, p = 0.07) and, more interestingly, the difference in success as appellant versus appellee is significant in states with solicitors but not in states without solicitors. Put differently, states with solicitors seem to have a greater relative advantage in being the appellant than do states without solicitors, hinting at least that the selectivity of the solicitors may be a major factor in their abilities to aid states in their litigation efforts.

As political scientists have shown,[43] the experience of the attorney representing a party can be a critical component of success in appellate courts. As the comparison of early adopter states with other states in Table 2 shows, the states with solicitors have significantly more experienced attorneys representing them than do the non-early adopting states. It is intriguing to note that though the early adopter states seem to be represented by significantly more experienced attorneys, they do not seem to prevail in court any more frequently than the non-early adopting states.

Finally, the state solicitors are likely to be able to establish a special relationship with the justices on a state supreme court because they appear so frequently before that court. Partially this is reflected in the establishment of a brand before the court. As one state supreme court justice says, "The role of the state solicitor is that, in the most important cases, the attorney general is providing to us a person who is familiar with the way the court addresses issues and provides reliable assistance, especially if that person holds the respect of the court."[44] This mirrors the comments of one solicitor who says that the solicitor should be

THERE IS SOME INDICATION THAT THE SOLICITORS MAY BE ESPECIALLY EFFECTIVE IN MORE LEGALLY DIFFICULT OR COMPLEX CASES.

40. *Supra* n. 2 at 542.
41. *Supra* n. 27.
42. *Supra* n. 27.
43. *Supra* n. 27.
44. *Supra* n. 15 (quoting Missouri Supreme Court Justice Ray Price, Jr.).

viewed as the authoritative voice of the state before the supreme court and that the justices should trust the solicitor.

To summarize, the solicitors may be able to help the state prevail in state supreme courts for a number of reasons, but among the most likely are that they are able to make better legal arguments,[45] they help the state build favorable precedent over time, they provide information that justices view as reliable, and their presence is likely to indicate the importance of a case to the state's other elites, including judges. Of course, there is one category of advantage neglected to this point: ideological explanations.

Policy agreement

Solicitors themselves are reluctant to admit that success before the court is a result of policy agreement between the justices and the AG and/or executive or that the justices may react strategically to the presence of the state as a litigant.[46] Instead, the solicitors tend to characterize deference to the state in terms of sound legal arguments and precedents. To be sure, in certain circumstances, some solicitors see that politics play a role in the decision making of justices and even in the arguments made by the attorney general's office. But these instances are rare according to the solicitors, occurring largely when the AG files an amicus brief and, at least in some states, primarily in criminal cases. Of course, this does not mean that policy agreement between the position taken by the AG and the policy preferences of justices does not play a role. Indeed, some solicitors note that the cases in which the state is a party are particularly likely to involve issues of public interest.[47] And one solicitor memorably described the state solicitor's office as a "fulcrum between law and politics."

Tentative conclusions

This preliminary description of the state solicitors allows us to draw several tentative conclusions. First, it appears that, to a large extent, solicitors themselves believe that their ability to aid the state in litigation is premised on their skill in making better legal arguments to the court than state attorneys with less appellate experience. That state solicitors are capable of capturing the inherent experience advantages that should accrue to states is apparent in the fact that state solicitors boost the average experience of attorneys representing the state by over 300 percent. The advantage of having a solicitor to represent the state in litigation is that his or her efforts should build favorable lines of precedent in areas of law like sovereign immunity that will cascade throughout the state's docket.

Second, the states adopted the solicitor model in three distinct waves. By analyzing those states that were early adopters of the model and comparing them with states in the other two waves of adoption we have learned that the early adopting states were larger, devoted greater resources to their attorney general, and had state supreme courts that were significantly more contentious than their later adopting counterparts.

Nevertheless, comparison between first and second wave adopters fails to demonstrate that states were motivated to create the solicitors offices because they were not faring well in litigation. However, the policy diffusion literature, and in particular a social learning approach, may offer useful explanations for the spread of the solicitor innovation. Scholars will need to focus on the role played by state AGs and by the National Association of Attorneys General in facilitating communication between AGs.

In order to better understand the state solicitors considerably more analysis will be necessary. Most importantly, exploring how theories of Solicitor General success in the Supreme Court apply to the state solicitors will allow us to better understand both the uniqueness of the Solicitor General's advantages and, just as importantly, to highlight more precisely the ways in which the state solicitors aid the states in their litigation efforts. Another important avenue of inquiry will be to collect systematic data on the state solicitors from each state and longitudinal data on the states that created the solicitors offices to generate a more rigorous understanding of the timing of the creation of these offices. ⚖

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45. To understand how state solicitors might make better legal arguments than the average attorney representing the state, recall the distinction between procedural and substantive experience. State solicitors are appellate procedure experts as opposed to experts in a specific area of law, such as tax law. In most appellate courts, given that the facts of a case are well-established at the trial court level, substantive issues will not be as important as procedural and legal issues in the determination of a case. All else equal, state solicitors should be in a better position to make strong arguments to the court on behalf of the state.

46. But see *supra* n. 2.

47. *Supra* n. 23.