A State Friendly Court

An Analysis of Norwegian Supreme Court Decisions

Master Thesis

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November 2012

Abstract

The aim of this thesis is to test the state friendly hypothesis by comparing and integrating three different approaches to the study of judicial behavior in a hierarchical regression analysis. Decisions of the Norwegian Supreme Court in civil cases tend to favor the state over private party litigants. Acting as a court of last resort, only cases where the decision will have an impact beyond the case in question are adjudicated by the Supreme Court. By definition the sources of law do not point to a single indisputable solution in these cases. The question is whether these sources of law can be shaped to conform to a justice's desired outcome through preference initiated behavior. Based on the assumption that law is not the sole determinant of judicial decisions in the Supreme Court the following research question is established: *What factors can explain the decisions of Supreme Court justices when the state is a party?*

Building on theoretical and analytical frameworks from the literature on judicial behavior an integrated hierarchical model based on legal factors, attitudinal factors and strategic factors is developed in the theory-section of the thesis. This is an innovation in the social-science study of judicial decisions on the Norwegian Supreme Court, which thus far has failed to account for the strategic aspects and legal aspects of judicial decision-making. Another development presented in the thesis is the introduction of multilevel analysis as an analytical tool for the study of judicial decisions. The analysis is based on a two-level hierarchical generalized linear model where judges are nested in panels. 2,217 justice-observations grouped in 445 panels are included in the analysis. Predictors are added both at level-one and level-two based on hypotheses established for each level in the hierarchical framework.

The analysis identified seven significant predictors affecting the probability of voting for or against the state. Interestingly, the significant predictors included both individual-level explanatory factors and group-level explanatory factors. However, the expected relationship between a proxy for ideology and the justices' votes was not evident. The evidence supports the application of an integrated hierarchical model of judicial behavior in the analysis of judicial decisions. In unanimous decisions there is variance explained by the grouping structure in the data, which it is not possible to model in single-level analyses. Thus a hierarchical analytical framework is preferable to single-level analysis in studies including unanimous decisions.

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"The political element must be acknowledged, it must be revered, and it must be delimited.
This is part of my legal world view (Smith 1990, 426, author's translation)."

Chapter 1 - Introduction

An interesting attribute of the Norwegian Supreme Court is that it is 'state friendly' insofar as statistically, the state wins more cases than private party litigants in civil cases.[1] This is one of four claims constituting the state friendly hypothesis. Predisposition to vote in favor of the state due to personal attributes and ideological preferences of the justices constitute the second claim. The third claim is concerned with the impact of the collegial nature of the Court. A fourth claim relates to the importance of a case. In salient cases attitudes are expected to operate particularly strongly. Acting as a court of last resort, the Supreme Court only adjudicates cases where the decisions will have an impact beyond the case in question (Schei 2010, 13; 2011, 7). Only the hardest cases "where the different sources of law do not point to one single and/or indisputable solution", are dealt with by the Court (Sunde 2011a, 11). When the authoritative legal sources do not provide a clear-cut answer to a dispute more than one solution can be legally justifiable (Skoghøy 2011a, 713). The question is whether this can lead to legal sources being shaped to conform to a justice' desired outcome – either consciously or sub-consciously, placing public interests before private interests.

1.1 Research question

The aim of the thesis is to test the state friendly hypothesis by comparing and integrating three different approaches to the study of judicial behavior based on the following research question:

What factors can explain the decisions of Supreme Court justices when the state is a party?

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[1] 'State friendly' is the literal translation of the Norwegian term 'statsvennlig'. In previous research on judicial behavior on the Norwegian Supreme Court the term 'government friendly' has been used as a translation of the Norwegian term (e.g., Grendstad, Shaffer, and Waltenburg 2011b). However, differentiating between the terms 'government friendly' and 'state friendly' is pertinent when the analysis' focus is not so much on the effect of appointing government on the justices votes, but rather the effect of a variety of legal, attitudinal and institutional factors. In the hierarchical modeling approach used in this thesis the term 'state friendly' is employed to indicate a favorable position relative to the system. The idea is similar to that of Skåre (1999, 67) who employs the term 'system friendly' rather than 'state friendly'. In the thesis the term 'state friendly' is applied, but the reasoning is similar to that of Skåre. If a judge is labeled 'state friendly' that may indicate that he or she favors the state apparatus, or system, not necessarily the incumbent government.

The analysis will include all civil cases decided in five-justice panels from 1990 to 2010 where the state was a party to the proceedings.[2] By including unanimous decisions as well as non-unanimous decisions one can examine attributes causing disagreement as well as factors leading to agreement. The inclusion of all civil cases in the analysis separates the thesis from the majority of judicial research on the Norwegian Supreme Court thus far, which has been preoccupied with non-unanimous cases.

1.2 Analysis of judicial decisions

Although it is potentially difficult to divulge the effect of individual legal sources in determining a judge's decision in unanimous cases, they do account for almost 80 percent of the cases decided by the Norwegian Supreme Court (Schei 2011, 8).[3] Grendstad et al. (2011b, 20) suggest that non-unanimous cases are specifically interesting because by themselves the legal sources fail to account for disagreement among the judges in these cases. Hence, it is reasonable to presume that non-unanimous cases can divulge a justice' preference for either the public or private interests (Skoghøy 2011a, 720). However, rather than indicating diverse views some legal factors may indicate coherent views (Jacobsen 2011, 15). Songer and Siripurapu (2009, 66) point to the fact that justices themselves deny the importance of attitudes in unanimous decisions.[4] Instead they stress the nature of the cases litigated and collegiality (e.g., Schei 2004; 2011). By utilizing a multilevel statistical approach these assumptions can be tested for all cases, including both non-unanimous and unanimous decisions.

Different methodological frameworks have been applied to study the decisions and outputs of courts, and several competing models orient and account for judicial behavior and decision-making procedures. In order to assess the state friendly nature of the justices in the Norwegian Supreme Court an integrated model of judicial behavior is developed based on legal, attitudinal and strategic frameworks. Following Gibson (1983, 32), in order to understand decision making, the models must be capable of incorporating effects operating at various

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[2] Sunde (2011a, 6) clarifies the distinction between civil and criminal cases in the Norwegian legal system: "The Norwegian categorization of civil and criminal cases are the same as in the English common law tradition, where the category civil law embraces all law (including administrative law, labour law, trade law and civil procedural law) that is not criminal law and criminal procedural law."

[3] The term 'judge' is used to denote a person presiding over court proceedings at any level in the judicial hierarchy, while the denomination 'justice' is used specifically for members of a Supreme Court.

[4] Songer and Siripurapu (2009) base this notion on the perspectives of the justices on the Supreme Court of Canada.

levels of the analysis. Individuals make decisions, but they do so within the context of group, institutional and environmental constraints.

The inherent hierarchical structure of the judicial decision-making process enables the utilization of a multilevel framework. A two-level hierarchical generalized linear model with a latent variable approach where judges are nested in panels will form the framework for the analysis. The aim is to model the effect of judge-level and panel-level explanatory factors on the probability of a justice voting for or against the state. In a multilevel analysis the variance explained by the hierarchical structure of judicial decisions can be assessed and accounted for. Within this framework legal, attitudinal and strategic approaches to studies of judicial behavior can be integrated in a single model without violating the assumptions inherent in a single-level analysis.

1.3 Overview of the thesis

The remainder of the thesis is organized as follows. Chapter two provides a brief introduction to the concept of judicial behavior and how it applies to the Norwegian legal system. In the next chapter, three theoretical models forming a framework for an integrated model of judicial behavior are outlined. Chapter four presents the organization and procedure of the Supreme Court, in addition to its political function. At the end of this chapter several hypotheses are established based on the theoretical framework provided in chapter three and a discussion of the state friendly nature of the Supreme Court. Chapter five and six outlines the statistical method and data used in the analysis. In chapter five the benefits of multilevel analyses are assessed and a two-level hierarchical generalized linear model based on a latent variable approach is developed. Chapter six provides a description of the judicial decisions data used in the analysis and outlines the operationalization of the explanatory variables and control variables. In chapter seven the analysis and results are presented and discussed and it is asserted that a hierarchical analysis is required for studies of judicial decisions. Finally, chapter eight provides a conclusion and implications of the study.

Chapter 2 - Relevance of judicial behavior

Research on the Norwegian judicial system has been limited in scope from a political science point of view and besides a few, but notable, exceptions; contributions to the literature on the Norwegian Supreme court have been provided by legal scholars. Historically, comparative politics scholars in Europe have tended to ignore law and courts when studying government institutions (Stone Sweet 2000, 2). However, recent developments in the use of statistical methods and the availability of extensive data on Supreme Court decisions have the potential to yield more realistic and effective analyses of judicial behavior. By employing multilevel analysis several approaches to judicial behavior can be tested in one single model. This strategy also captures the inherent hierarchical structure of the judicial system. The ability to discern a more nuanced view of the Court with regard to the factors affecting the votes of the justices through the use of new forms of analyses will benefit the development of research on judicial decisions in Norway.

2.1 Judicial behavior

Being one of the three branches of government it is curious that only a selected few study the Norwegian Supreme Court from a political science perspective. The judges themselves acknowledge that ideological preferences as well as personal preferences are elements inherent in the Court's decision-structure; affecting the justices' case assessments both in trivial and important cases (Grendstad, Shaffer, and Waltenburg 2012b, 240-241). In addition, the interactions among the justices can also affect the outcome of judicial decisions. Michalsen (2006, 90, author's translation) points out that "the Supreme Court is first and foremost a collegial court". The Court consists of individuals who interrelate within a framework determined by a number of different factors, including, but not limited to, individual, collegial and institutional factors (Sunde 2012, 196).

Through the ongoing internationalization and the more general judicialization of the Norwegian society there has been a shift in the balance of power from the legislature to the courts.[5] Judicialization of politics implies either "a transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts", or "the spread of judicial decision-making methods outside the judicial province" (Vallinder 1994, 91). It can also be conceived

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[5] For a detailed overview of these processes see chapter six in the final report from the Power and Democracy research project presented in NOU 2003:19.

of as a process in which judicial actors, procedures and categories gradually dominate or displace legislative politics (Rehder 2007, 18).

Judges face new academic challenges as new areas are regulated by law and more social issues are judicialized (Skoghøy 2011b, 8). The Supreme Court's function is maintained and protected through the judges' work and decisions (Grendstad et al. 2012b, 241). With political power being transferred from elected officials to appointed officials, the study of courts from a political science perspective is indeed highly relevant. Especially when one considers the potential effect personal preferences and attributes can have on case outcomes when combined with the collegial configuration of the Supreme Court. Legal scholars are also of the opinion that the Supreme Court should be studied by scholars from other backgrounds than that of law in order to discern a more nuanced picture of the Court (Sunde 2011b; 2012, 171).

The shift of power from the political sphere to that of the courts follows as a consequence of an ongoing internationalization of the judicial sphere. Through the incorporation of central human rights conventions into Norwegian law and the ratification of the EEA (European Economic Area) and EFTA (European Free Trade Association) agreements the courts have gained an increased amount of influence due to the vertical shift of power from the legislative branch of government to supranational agencies.[6] At first glance this vertical transition of sovereignty can look as if it constrains and limits the Supreme Court's influence. However, the ratification of international conventions opens up for a significant control over the legislature by the courts. When international conventions are applied to retain, modify or supersede Norwegian law, it is the courts – and in final instance the Supreme Court – that decides the effect of laws passed by the Norwegian Parliament (Schei 2011, 326-327).

"Legalization of politics may empty the political sphere and thus produce democratic deficit" (Gloppen et al. 2010, 179, note 13). If that is the case the political preferences of the judges will be vital in understanding political processes much the same way as the preferences of the members of parliament are. The judicialization of politics, according to Ferejohn (2002, 63-64), tends to produce the politicization of courts. The result being that judicial decision-making has a propensity to become politics carried out by other means. Were law to be created mainly through precedent the political preferences of the judges would have to be

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[6] For an introduction to the process of judicialization see Ferejohn (2002).

made clear in advance. Research on judicial behavior thus has the ability to shed light on a central political process, ensuring its transparency (Sunde 2012, 169). The Norwegian Supreme Court "pronounces judgment in the final instance" (Norges Høyesterett 2011). Consequently it is not only the case in question that is left for the Supreme Court to decide, but also to determine the contents of the current legal doctrine (Skoghøy 2011b, 14).

Chapter 3 - Models of decision-making – a theoretical overview

This chapter provides an introduction to various approaches for studying judicial decisions. After explaining the role of courts with regard to their accountability functions in representative democracies an overview and description of legal, attitudinal and strategic frameworks for studying judicial decisions are provided. Following the overview of the different models an integrated hierarchical model for analysis of judicial behavior is established.

3.1 Accountability functions of courts

Accountability structures and relationships are integral to modern representative democracies, and courts form a central part of these structures through mechanisms of vertical and horizontal control.[7] Gloppen et al. (2010, 13) defines political accountability as "a relationship between two sets of actors; citizens, who are the principals with whom legitimate political authority ultimately rests, and the rulers, who are their agents". Political accountability is also frequently termed vertical accountability to refer to the hierarchical relationship between *the people* and *the ruler*. The main mechanism available to citizens for exercising vertical accountability, also known as popular control, is the election of representatives. In parliamentary systems elections are held for the legislature, which then selects the executive. The judicial branch is appointed by the executive (sometimes in cooperation with the legislature). In presidential systems both the legislature and the executive are elected. Judiciaries are rarely directly elected, and are usually appointed in a similar manner to that of a parliamentary system (Gloppen et al. 2010, 11-16).[8]

Courts regulate interactions of ordinary citizens and constrain exercises of authority by political officials and institutions (Shepsle and Bonchek 1997, 412). "*The courts accountability function* refers to their ability to prevent illegitimate use of political power (Gloppen 2004, 112, emphasis in original)." Courts provide an avenue of *vertical accountability* by enabling individuals and groups to use litigation to protect and advance their rights and interests. The relative importance of this function depends on the effectiveness

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[7] Accountability is considered in terms of the definition provided by Grant and Keohane (2005, 29); namely that accountability "implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met". For a detailed overview of accountability functions, see chapter two in Gloppen et al. (2010), Gloppen, Gargarella, and Skaar (2004) and Grant and Keohane (2005).

[8] One well known exception is the election of state-level judges in some states in the United States.

of other channels of popular control. Courts are also crucial to the system of *horizontal accountability* between state institutions, and they hold other state actors to the law and the constitution.

Horizontal accountability, in short, deals with accountability relationships between different state institutions (Gloppen et al. 2010, 13). O'Donnell (1999, 38 quoted in Gloppen et al. 2010, 14) provides a well-known definition of horizontal accountability: "[it is] [t]he existence of state agencies that are legally enabled and empowered and factually willing and able, to take actions that span from routine oversight to criminal sanction or impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful". In this capacity the courts also serve to protect channels for vertical popular control (Gloppen et al. 2010, 15-16). Thus the relative importance of the vertical control functions of the courts depends on how well they serve their role as a horizontal control mechanism.

Following Gloppen et al. (2010, 19), "[t]he assessment of the accountability functions of courts requires us not only to examine the concrete behavior and decisions of the courts, but also take into consideration whether they actually do what we normatively expect them to do". A variety of approaches have been applied to understand decisions of courts and the extent to which they are able to exercise their accountability functions including, but not limited to, individual, institutional and legal explanations. The extent to which courts contribute toward securing the democratic process depends on the political context and democratic challenges in the particular society. If courts fail to serve their democracy-enhancing role it can potentially have major implications for the entire institutional system (Gloppen et al. 2010, 18-21).

An important function of courts is the sanction of abuse of political power and violation of rights. Through litigation individuals and groups might gain political voice, and by securing such societal accountability directly or through securing the conditions for such litigation courts serve as a protector of minorities against the *tyranny of the majority* (Gloppen et al. 2010, 20). Central to this accountability function is the concern of "how to guard the guardians" and prevent misuse by the judiciary itself (Gloppen et al. 2010, 21). The Norwegian Supreme Court, for example, has a tendency to decide cases in favor of the state at a higher rate than for private party litigants, as discussed earlier. If a case is decided in favor

of the state without sufficient justification based on the available legal sources and equitable considerations, the question that should be asked is whether or not the court is fulfilling its role as an accountability structure.[9] The principle of minority protection is not always adhered to when substantial government interests are at stake. Lund (1987, 215, author's translation) has noted that "in cases where substantial state interests are involved, and where it concerns decisions of government and parliament, one can generally disregard that the courts will rule in disfavor of the state". Research on judicial decisions is one approach which has the ability to shed light on what is a central political process, ensuring its transparency (Sunde 2012, 169). By analyzing court decisions the accountability function of the Norwegian courts can be evaluated, and their effectiveness ensured.

3.2 Models of decision-making

Judges are sometimes referred to as *legislators in robes*. This notion is based on the assumption that judges have the opportunity to act on their own personal policy preferences when shaping the legal context of a country through their decisions (Shepsle and Bonchek 1997, 419). Within this framework decisions of judges are, like those of other political actors, "a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do" (Gibson 1983, 9). Richards and Kritzer (2002, 305) highlights the importance of considering "[w]hether or not courts generally, and the Supreme Court specifically, differ from legislative bodies [since it] has major implications for how we think about the role of courts and analyze their processes and outputs". If judges are considered to be political actors largely following their ideological preferences a court would only differ from a small legislative body "in the selection of its members, its technical rules and procedures, and its inability […] to initiate issues to consider" (Richards and Kritzer 2002, 305). The opposing view is that judicial decision-making has unique characteristics that distinguish it from decision making in legislative settings (Lax 2007, 591). Most approaches to studies of judicial decisions are situated somewhere between these extremes.

Different methodological frameworks have been applied to study the decisions and outputs of courts, and several competing models orient and account for judicial behavior and decision-

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[9] Equitable considerations (*reelle hensyn*) allows courts to adapt the law to changing social and political conditions (Grendstad, Shaffer, and Waltenburg 2010, 76). They are a heterogeneous group of arguments that are relevant when one considers legal questions. These arguments do not directly relate to the law, preparatory work, customary law, precedent, or other bounded categories (Kjønstad 2006, 358). It "involves the making of decisions by reference not only to predefined rules but also to policy considerations such as utility and fairness" (Magnussen 2005, 69).

making procedures. Most approaches to judicial behavior agree that justices consider the facts of the case and the available legal sources. The degree to which these *legal* sources actually affect the decisions of judges is disputed. Scholars typically divide the study of judicial decisions into two large categories: legalism and realism. Legalists would argue that the law is essential for understanding court decisions, and that judges create and apply legal rules through methods that are objective, impersonal, and politically neutral (Epstein and Jacobi 2010, 342-343).[10] In this view "[a] judge makes policy by resolving legal disputes, […], by deciding cases that present themselves as bundles of facts (Lax 2007, 591)."

Contrary to legalism, realists contend that the facts of the case and relevant legal sources can be shaped to conform to the outcome a judge desires based on her ideological and personal attributes (e.g., Segal and Spaeth 2002; Tate 1981). These attitudinal approaches tend to view judges as "single-minded seekers of legal policy" (George and Epstein 1992, 325). Diverting somewhat from the attitudinal framework, advocates of rational choice paradigms assert that "judges do not make decisions in a vacuum, but rather take into account the preferences and likely actions of other relevant actors, including their colleagues, their judicial superiors, and members of the other branches of government" (Epstein and Jacobi 2010, 341). Institutions provide the structure within which decision-making occurs, thereby affecting the choices that can be made (Maltzman, Spriggs, and Wahlbeck 2000, 13).[11]

Attempts have also been made to reconcile the various strands of legalism and realism in integrated models of judicial behavior. Wahlbeck, Spriggs, and Maltzman (1999, 507) conclude that the willingness to disagree with the majority's legal reasoning in Supreme Court decisions stems from a combination of attitudinal, strategic and institutional factors. In this view Supreme Court justices are rational actors who pursue their policy goals within constraints. Brace and Hall (1993, 917) support this view, suggesting that "judicial decisions are the result of a complex interaction of preferences, rules, and structures". By omitting institutional features models of judicial behavior are rendered simplistic and incomplete (Brace and Hall 1997, 1207).

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[10] Legal models are often ill defined and include various, and often contradicting, theoretical approaches. However, all legal models are based to some extent on doctrinalism, reasoned judgment and adhere to the concept of "rule of law" (Cross 1997, 263).

[11] The concept of an institution is viewed in terms of the definition provided by North (1990, 13, quoted in Maltzman et al. 2000, 12-13): "Institutions are the rules of the game in society or, more formally, they are the humanly devised constraints that shape human interaction."

In the following sections three different approaches to the study of judicial decisions – legal, attitudinal and strategic – are accounted for and discussed, before a suggestion for a general model of judicial behavior is outlined. The models considered below will form the theoretical basis for the analysis of state friendliness in the Norwegian Supreme Court and the development of a hierarchical model for analysis of Supreme Court decisions.

3.2.1 The legal model

The legal model in its simplest form can be viewed as mechanical jurisprudence, which posits a single correct answer to legal questions that judges are to find (Segal and Spaeth 2002, 48). This is a naïve form of the model, mainly applied by the proponents of the attitudinal approach to frame the Supreme Court decision-making research question as law versus the political attitudes of the justices, whereas legal scholars usually rely on more sophisticated approaches (Kritzer and Richards 2005, 33). Cross (1997, 255) provides a general description of the classical legal model in formalistic terms: "the model suggests that the path of law can be identified through reasoned analysis of factors internal to the law". Thus, court decisions are structured by establishing what case factors are relevant for decision-making, and the decisions are substantially influenced by the facts of the case and how they relate to the relevant law, legislative intent, and precedent (Richards and Kritzer 2002, 305). Generally, the legal model holds "that judicial votes result from the application of use of professional interpretative techniques, or modes of reasoning from legal principles as taught in law schools, to the interpretation of various sorts of legal texts" (Brisbin 1996, 1004).

Positivist, or *mechanical*, approaches to law are no longer adhered to by most contemporary scholars (Cross 1997, 255; Tiller and Cross 2006). Decisions are not considered to be solely based on "reasoned response to reasoned argument" (Shapiro 1987, 737) yielding "legal reasoning that can generate outcomes in controversial disputes independent of the political or economic ideology of the judge" (Johnson 1984, 252). Legal scholars recognize that judicial ideology influences judicial decisions (Tiller and Cross 2006, 520). This notion rejects the basics of positivism, which cannot admit legal reasoning based upon ideological inclinations irrespective of legal structures (Cross 1997, 261).[12] Newer schools of thought, such as *legal*

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[12] An in-depth analysis of the development of sources of law theory is beyond the scope of this thesis. For a general overview of the development of modern jurisprudence see Morrison (1997). The position of the Norwegian approach to legal theory relative to American is considered closer in chapter four. For an overview of development of Norwegian jurisprudence see Askeland (2003) and Bernt et al. (1999).

realism and *Critical Legal Studies*, differ from the classical positivist approach in that they recognize the effect of judicial ideology (Tiller and Cross 1999, 217).

The adjudication of cases on Norwegian Supreme Court is an example of what can be considered an approach based on a legal realism adopted from the historical formalistic approach (Askeland 2003).[13] There is a general consensus within the Norwegian legal community that judges – through their personality and values – are affected by the environment and the part of society he or she belongs to (Schei 2011, 17-18). Norwegian legal professionals would argue that it is possible to arrive at different conclusions while still adhering to the law if the authoritative legal sources do not provide a clear-cut answer to the dispute in question (Skoghøy 2011a, 713). In Smith's (1975, 316) view, cases adjudicated by the Supreme Court should offer several different solutions that are legally justifiable, otherwise the cases should normally not have appeared before the Court. When the premise of the courts is to provide a convincing decision based on juridical arguments the reality is that there is hardly any limit to the variety of results that can be justified with legal reasoning (Lund 1987, 216-217). The extensive use of equitable considerations in decisions of the Supreme Court – "to ensure a fair outcome" (Grendstad et al. 2011b, 6) – is a prime example of the considerations central to the concept of legal realism.

An inherent issue with the legal model of decision making, relayed by Segal and Spaeth (2002, 86), is that "by being able to explain 'everything', in the end it explains nothing". If various aspects of the legal model can support either side of a given dispute and the quality of these positions cannot be validly and reliably measured *a priori*, then the legal model hardly satisfies as an explanation of Supreme Court decisions (Segal and Spaeth 2002, 86). Advocates of the attitudinal approach points out that justices create the law that guides their own decision-making, so the law itself is a reflection of the justices' attitudes (Richards and Kritzer 2002, 306). The cases appearing before appellate courts are principal in nature, and "[b]ecause clear cases do not represent a significant share of the disputes actually adjudicated by judicial bodies, legal rules cannot be a major determinant of judicial behaviour" (Dyevre 2010, 312).

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[13] Legal realists reject the view that law is a determinate body of doctrine or that precedent and statutes determine the outcome of legal disputes. Realists argue that judicial decisions are strongly under-determined by legal rules, concepts and precedent (Bix 2012). The effect of legal realism and the Scandinavian legal culture on decisions and procedure of the Norwegian Supreme Court is considered in the next chapter.

However, as Friedman (2006, 264) phrases it, "the question is not so much whether law plays a role, as what role it plays". To study the behavior of judges one has to assert whether judges are just like any other political actors or if law might constrain their behavior. Political science has a tendency to trivialize law, and in many instances social scientists have disregarded or ignored legal doctrine completely (Friedman 2006; Tiller and Cross 2006, 520). This is based on the aforementioned assumption assumption that the law, as understood by legal academics, does not really matter to judges (Tiller and Cross 2006, 522). Citing Lax (2011, 132): "the accoutrements of law are not just superfluous details to be set aside by modelers and other sophisticated political scientists; the idiosyncrasies of legal policy making are critical for building useful theories, be they formal or informal". By disregarding law one essentially refutes the premise of the entire structure of the legal community and the nature of the judicial process; namely that law does matter (Friedman 2006; Gillman 2001, 466).[14] Thinking about judges as political creatures does not obviate the need to consider cases and rules (Lax 2007, 592).

When specifying a legal model of decision-making one has to consider law within a larger framework rather than viewing it as nothing more than mechanical jurisprudence. Critics of the approach taken by Segal and Spaeth claim that they present an antiquated perspective of legal reasoning that incorrectly suggests how justices should automatically adhere to prior controlling precedents (e.g., Bartels 2009; Friedman 2006; Gillman 2001). Rosenberg (1994, 7) label Segal and Spaeth's legal model a "straw person", and claim that in virtually every area where Segal and Spaeth find support for the attitudinal model a properly understood legal model would produce similar results. Tiller and Cross (2006, 532-533) calls for greater attention to the core elements of legal analysis and how they relate to a more sophisticated model of judicial behavior. It is widely believed that personal elements are constrained by professional obligations and jurisprudential schools of thought (e.g., Gillman 2001, 466). Affiliation with the judiciary and their training as lawyers are other factors considered to be possible constraints in addition to law itself (Benesh and Spaeth 2007, 755). The legal view recognizes that law is not everything, but still claim that it is something important (e.g., George and Epstein 1992; Lax 2011; Richards and Kritzer 2002; Tiller and Cross 2006, 522).

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[14] Gillman refers to the legal education and the judicial system in the United States, but the general idea is also applicable for the Norwegian judicial system.

3.2.2 The attitudinal model

In contrast to the legal model, the attitudinal model claims that judges are seekers of policy, and make decisions in light of their brute policy preferences (Benesh and Spaeth 2007, 756; Dyevre 2010, 300; Segal and Spaeth 2002). "The attitudinal model implies that a change in judicial personnel may bring about a change in judicial policies, thus inviting those who hold the power to appoint judges to pick individuals that share their policy agenda (Dyevre 2010, 301)." The model contends that the political attitudes of the judges are the most important influence on the votes of the judges (Songer and Siripurapu 2009, 66). When deciding a dispute the judges view the facts of the case in light of their own ideological attitudes and values. Hence, as identified by Grendstad et al. (2011b), the attitudinal model would argue that when presented with the same legal facts, two justices can arrive at different conclusions because different ideological and attitudinal preferences informed their decision. This notion undermines the claims in legal thought about the constraining influence of law (Friedman 2006, 264).

The clear presence of some ideological factors in decision-making does not, however, prove that they are the only factors present. Both the attitudinal and the legal models may influence judicial decisions (Cross 1997, 309). The idea of underlying values shaping the decisions justices make is integral to both attitudinal and legal views – they differ on which values drive decision-making (Bailey and Maltzman 2008, 370). According to Richards and Kritzer (2002, 307), "attitudes influence the development of law, but law can also affect the decisions of the Court [through processes that are not purely attitudinal]". How to measure the influence of law is a recurring question in quantitative research on courts. Lax (2011, 133) holds that "[j]udicial behavior can be consistent with legal theory in form and function, while consistent with political accounts of the incentives faced by judges". In a similar manner, Bartels (2009, 475) claim that the effect of law is often highly nuanced and difficult to validate with social science research designs.

Segal and Spaeth (2002) suggest that four factors allow Supreme Court justices to decide cases almost exclusively on the basis of their ideological preferences: (1) the Supreme Court justices do not face electoral and political accountability; (2) they have no ambition for higher office; (3) the Supreme Court is the court of last resort; and (4) legal rules governing decision making in the cases that come to the Supreme Court do not limit discretion. The model

contains a deceptively simple logic: "justices come to the Supreme Court with their ideological preferences fully formed and, in light of contextual case facts these preferences cast overwhelming influence on their decision making" (Unah and Hancock 2006, 296, citing Segal and Spaeth 1993). Thus, according to Unah and Hancock (2006, 296), the attitudinal model is a complete and adequate model of Supreme Court behavior.[15]

Building on a slightly different framework than the earlier versions of the attitudinal approach,[16] the theoretical base of the attitudinal model as articulated by Segal and Spaeth (2002) nonetheless includes two very important links to its sociological and psychological roots:

> "First, the attitudinal model continues to view the votes of the justices as shaped by forces (in particular, preferences) exogenous to the strategic context of the Court. Second, the attitudinal approach continues to view individuals as the analytical building blocks and outcomes as the aggregated preferences of the Court majority (Maltzman et al. 2000, 12)."

There is an important aspect relating to the first link that is worth noting, namely that the model in its pure form is limited to the decisions on the merits. In other areas attitudinalists expect that attitudes will be a crucial factor shaping decisions, but not the only factor (Segal and Spaeth 2002, 96). The notion of the attitudinal model in its pure form only being applicable in the decisions on the merits is contested. Other scholars have interpreted the model as attempting to explain more than justices' final votes on the merits (Knight, 1994 cited in Maltzman et al. 2000, 10, note 5).

Analyses of judicial behavior applying attitudinal models tend to view courts as "a conglomeration of individual judges" (Rehder 2007, 12). Individual decisions are explained in terms of policy preferences, values and attitudes. One can view the relationship between judges and their appointing authority in terms of a principal-agent framework: justices become independent of those actors who appointed them when they receive life tenure, and as a result the principal can no longer control his agent. In light of the four factors identified by Segal and Spaeth (2002) outlined above, personal preferences are consequently the most important variables in explaining judicial behavior (Rehder 2007, 12). A substantial amount of research supports the basic proposition of the attitudinal model – that "the ideology of the justices drive their decisions" (Segal and Spaeth 2002, 433). Indeed, Pinello (1999) found that

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[15] Some authors, however, would claim that the attitudinal model only offers an incomplete explanation of legal decision-making, considering that the model cannot provide a complete explanation of justices' votes (e.g., Cross 1997).

[16] For an overview of the historical development of the attitudinal models see Gibson (1983), Maltzman et al. (2000), and Segal and Spaeth (2002).

ideology was a statistically significant determinant of decisions for every level of courts through a meta-analysis of 84 available comparative studies.

The attitudinal perspective advocated since the late 1970s suggests that preferences, not roles or backgrounds, shape behavior. However, the impact of personal attributes, or background characteristics, has also been shown to exhibit significant effects on judicial decisions (Brace and Hall 1993, 918). Historically, personal attributes were conceptualized as an indirect link to voting behavior (e.g., Gibson 1983; Tate 1981; Tate and Handberg 1991). More recently they have been identified as having a direct influence on judicial decisions (e.g., Brace and Hall 1995, 11). The works that have associated various types of background characteristics of judges with their voting behavior are closely related to attitudinal studies. They indicate that ideological values and personal preferences can be conceived of as being shaped by personal attributes (Brace and Hall 1993, 918). Brace and Hall (1995, 11; 1997, 1213) point out that Tate has suggested that attitudes and attributes are related in the United States Supreme Court to the extent that operationally they may be interchangeable. Consequently, personal attributes have been used as surrogates for justices' ideological preferences (Brace and Hall 1997, 1213). While some would argue that personal attributes constitute a separate model there is not, from a theoretical point of view, compelling reasons for separating the concepts of attitudes and attributes As an example: when explaining state friendliness on the Norwegian Supreme Court the effect of personal attributes is expected to yield equal, if not stronger, significant effects than ideological attitudes, based on the results of previous studies (e.g., Jacobsen 2011).

3.2.3 The strategic interaction model

Empirical evidence suggests that strategic accounts of judicial decision-making can explain behavior that may not otherwise be understood as driven solely by attitudinal concerns (Hettinger, Lindquist, and Martinek 2004, 124). In contrast to the attitudinal framework, strategic accounts belong to "a class of nonparametric rational choice models, as they assume that goal-directed actors – including judges – operate in a strategic or interdependent context" (Epstein and Jacobi 2010, 343). The strategic approach recognizes that the behavior of individual justices is shaped in part by the actions and preferences of their brethren in addition to the institutional environment in which decisions are rendered. It differs from the behavioral tradition in that it contradicts two of its central tenets: "that human behavior is predetermined

and that the individual action can be aggregated to account for political outcomes" (Maltzman et al. 2000, 13).

The development of the strategic approach can be traced back to the application of rational choice paradigms to legal questions in the works of Schubert, Pritchett and Murphy in the early 1960s. Most scholars, however, remained committed to theories drawn from social psychology rather than economics, and by the 1980s predictions from variants of the social-psychological models predominated thinking about law and courts (Epstein and Knight 2000).[17] With the number of strategic accounts applied to understand judicial politics increasing steadily throughout the 1990s, Epstein and Knight (2000, 652) asserted that the field of judicial politics was undergoing a "sea change". In the first decade of the 2000s strategic accounts have been the dominant theme in literature on judicial decisions, and scholars have theorized that judges may evidence strategic behavior in a variety of contexts (Epstein and Jacobi 2010; Hettinger et al. 2004, 124).

According to Maltzman et al. (2000, 14), the heart of strategic action is interdependency: justices' choices are shaped by the preferences and likely actions of other relevant actors. Bartels (2009, 474) acknowledges the relative importance of institutions when explaining that "[l]egislators, judges, bureaucrats, voters and other actors make decisions within an institutional context defined by formal and informal rules that constrain individual discretion and ultimately shape actors' choices". Attitudinalists, in contrast to those adhering to rational choice, would dispute the idea of Supreme Court justices being constrained by their institutional environment (e.g., Segal and Spaeth 2002). However, as Richards and Kritzer (2002, 305) note, freedom from review or electoral accountability does not prevent the justices from erecting other constraints that shape their decision-making process. Proponents of strategic interaction would agree that "despite the importance of ideology, the collegial context in which judges decide cases has a significant effect on how their preferences are expressed" (Meinke and Scott 2007, 909).

Dyevre (2010) provides a distinction between two institutional, or strategic, models, which can be useful for establishing strategic frameworks: the *institutional internalist* model and the *institutional externalist* model. The institutional internalist model of judicial decision-making can be viewed as a collegial game (Dyevre 2010, 302). Consequently, the most important

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[17] For an extensive overview of the development of rational choice approaches see Epstein and Knight (2000) and Epstein and Jacobi (2010).

institutional feature of the Court is its collegial character. In pursuing their policy goals, judges are often severely constrained by their institutional environment (Gillman and Clayton 1999 cited in Dyevre 2010, 302). Institutions provide the structure within which decision-making occurs and thereby affect the choices that can be made (Maltzman et al. 2000, 13). Constraints can thus be imposed on the relevant actors in form of informal or formal rules and procedures. These internal rules can constrain the justices' capacity to translate their preferences into legal policy outcomes. As a result, the judges engage in strategic behavior as they attempt to shape the Court's policy output in conformance with their desired policy outcome (Maltzman et al. 2000, 14-15).

The institutional externalist model, as identified by (Dyevre 2010), emphasizes the broader institutional context in which courts operate. In this model the hierarchical structure of the judiciary is seen as a potential constraint on judges from acting on their own preferences, in addition to the influences of other branches of government in the separation-of-powers system (Epstein and Jacobi 2010, 350-351). Within this framework, the Supreme Court is in essence a political institution interacting with other institutions (Richards and Kritzer 2002, 306). The model holds that pressures from outside the legal system can affect case outcomes if the court is responsive to the larger political environment (George and Epstein 1992, 325).

Epstein and Jacobi (2010, 351) point to the fact that some analysts find this level of strategizing unnecessary because political actors and judges share the same political preferences. This line of thought can be traced back to as early as 1957 when Robert A. Dahl wrote that "[…] the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities […]" (Dahl 2001, 570, honorary reprint). If ruling regimes have the opportunity to appoint new members to appellate courts every few years, it is unrealistic to suppose the court would stand against any major alternatives sought by a lawmaking majority. However, empirical studies have failed to validate this notion (Epstein and Jacobi 2010, 352).[18]

Ferejohn and Pasquino (2004, 1692) have argued that the importance of judicial deliberation constitutes a distinctive feature of the European model of constitutional adjudication. This sentiment is based on the closed deliberations of many European high courts where oral

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[18] The effects of external factors on the Supreme Court are not considered further in this analysis. To ensure parsimony only factors internal to the judicial system are included in the models. The reasoning behind this choice is the availability of data and the complexity of the analysis if this level is included. For an overview of the theoretical and empirical approaches to analysis of external factors see Epstein and Jacobi (2010).

arguments are not used. Proceedings in the Norwegian Supreme Court, in contrast, are always oral in cases heard in division, Grand Chamber and plenary session (The Supreme Court of Norway 2007). Following Ferejohn and Pasquino (2004, 1697), "[i]nternal deliberation if fundamentally about deciding what the court should do: is it aimed at persuading fellow Justices or being persuaded by them to agree on a common action". Dyevre (2010, 303) points out that "any account of judicial decision-making in terms of collegial interactions and internal strategies is bound to remain speculative". There is, however, a substantial amount on research on the U.S. Supreme Court and the U.S. Courts of Appeals which suggests that collegial politics is highly relevant for analyzing judicial decisions. Strategic models are also concerned with the effect the constraint of legal variables and other institutional rules and procedures can have on case outcomes and the votes of the individual justices.

3.2.4 Toward an integrated model – law, attitudes and institutions

Gibson (1983, 32-33) proposed the integration of individual and contextual theories of judicial behavior to bridge the micro-macro gap and develop cross-level models. Comprehensive models can be developed by incorporating influences from various levels, which in turn has the potential to yield better predictions and a higher level of explanatory power for judicial decisions. Brace and Hall (1997, 1207) provides a rationale for developing more complex models when stating that "judicial decisions are considerably more than the simple product of the cases at hand, the judges rendering decisions, or the environments within which courts operate". In an earlier paper they identify that decisions are not merely the collective expression of individual preferences or the application of legal rules, but rather a result of a complex interaction of preferences, rules and structures (Brace and Hall 1993, 916-917).

The reconciliation of various attitudinal and institutionalist approaches is also considered by Dyevre (2010). He outlines a general theory of judicial behavior, incorporating the competing accounts of attitudinal and institutional approaches from both the United States and European literature within a hierarchical framework. The analysis of state friendly voting on the Norwegian Supreme Court will also be based on the concept of a hierarchical framework. An extension to the framework suggested by Dyevre is the inclusion of legal aspects of judicial decision-making. Rather than trying to establish a general theory, the aim of this thesis is to develop a hierarchical model for analysis of Norwegian Supreme Court decisions. Brace and

Hall (1993, 917) serve as a point of departure for the development of an integrated model. They identify four categories of major variables that must be included in an analysis of judicial decisions: justices' personal preferences, case characteristics, institutional arrangements and environmental characteristics.

A two-level hierarchical model will form the framework for the analysis of state friendly voting. The votes of the justices will serve as the dependent variable, indicating whether they vote for or against the state. Consequently, the first level will include variables identifying different characteristics of the judges. The second level will include variables related to cases and panels. Within this framework the three models outlined in subsections 3.2.1 through 3.2.3 can be tested together in a single hierarchical model. The attitudinal model can be fitted to level one and the strategic model and legal model can be fitted to the second level.[19] Hypotheses and theoretical expectations for the analysis are established in the next chapter after an overview of the organization and procedure of the Norwegian Supreme Court and an introduction to the state friendly hypothesis has been presented.

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[19] The rationale for combining the legal approach and the strategic approach at the same level is presented in the methods chapter.

Chapter 4 - A state friendly court – organization and procedure of the Supreme Court

In light of the overview of different theoretical models presented in the previous chapter this chapter provides an introduction to the role of the courts in the Norwegian legal system and the organization and procedure of the Supreme Court. Following the overview of the Supreme Court an introduction to legal culture and sources of law theory is provided, before the political function of the Court is discussed. The overview of the political function of the Supreme Court is relevant to the discussion of the state friendly nature of the Court presented in section 4.5. In conclusion several hypotheses are established based on the theoretical framework outlined chapter three and the state friendly hypothesis discussed in sub-section 4.5.1.

4.1 Norwegian Courts

Norwegian courts, represented by the Supreme Court at the pinnacle of the legal system, constitute one of three juxtaposed state powers. Constitutional theory states that each branch of government – the executive, the legislature, and the judiciary – should be responsible for a segmented area of political power. However, a more realistic understanding, as identified by Grendstad et al. (2011b, 5), is that these branches share power, and that their power overlaps. Central to the division of power is the independence of the courts, as stated in the sixth principle drafted by the Constitutional Committee in 1814 (Stortinget 2012b). Through court developed authority to review the constitutionality of legislation and the legality of administrative decisions, the position of the courts relative to the other branches of government has been expanded from the original authority provided by the Constitution.

Magnussen (2005, 69) defines the premise and role of the court system in the following terms: "Legitimacy, confidence and autonomy in the court system are dependent on people trusting the institution to make decisions based on predefined legal rules. Simultaneously, confidence in the system is also dependent on the system's capability to adjust to changes in values in society." Courts do not only have to make decisions based on predefined legal rules, in addition they have to adjust these rules according to the general perception in society of what these rules should constitute. They are also responsible, through the function of horizontal accountability, to hold other state actors to the law and the constitution.

In the Norwegian legal system the role of the courts is primarily to resolve disputes and settle criminal cases. The courts also serve a vital function through their control of the other

branches of government, and it is their right and duty to review the constitutionality of legislation when those questions present themselves in the cases adjudicated. In addition to providing constitutional review the courts can review legislation conflicting with human rights legislation given precedent over other Norwegian laws. Administrative decisions to secure individuals' protection accorded by the law are also reviewed by the courts, which is of more practical importance than constitutional review and review of legislation in conflict with laws given precedent.[20] The control functions exercised by the Norwegian courts are substantial, and the state is often a party to the proceedings in the cases adjudicated. This underlines the need of the courts' independence from the executive and legislative branches of government (Schei 2012, 21-25).[21] Norwegian courts exercise a graded constitutional protection, where individual and political rights and freedoms are protected more strongly than economic rights and positions. The Constitution and judicial review serve as safeguards for individuals and minorities (Smith 2000, 10).[22]

4.2 Organization and procedure of the Supreme Court

Positioned at the summit of the Norwegian legal system the main task, or function, of the Supreme Court is "to ensure uniformity of legal process and to contribute to the resolution of matters on which the law is unclear" (The Supreme Court of Norway 2007). In addition to these tasks the Supreme Court has "a responsibility for the evolution of the law – within the framework of existing legislation – as and when required by new societal problems" (The Supreme Court of Norway 2007). In the following paragraphs the organization and procedure of the Court are outlined before the legal sources applied by the Court and the political function of the Court are discussed in sections 4.3 and 4.4, respectively.

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[20] A distinctive feature of the Norwegian legal system is that judicial review is of concrete character (control *in concreto*) and happens *ex post*, after the contested act or provision has been set in force. Judicial review of ordinary legislation can only be undertaken in connection with individual cases. Any court or judge asked to decide in a case where constitutional issues are involved will have to act as a constitutional judge. In this sense the review system is decentralized. Legislative provisions cannot be declared null and void with *erga omnes* effect, and will remain until they are amended or repealed. Consequently, the effect of unconsitutionality will never go beyond the possible non-application of the act in question in the case in question. The practice of judicial review in Norway falls primarily under articles 97 and 105 of the Constitution (Nguyên-Duy 2011, 2, note 3).

[21] The role of the Supreme Court as a state power has developed since the adoption of the Constitution in 1814. From being a minor state power, subdued by the executive and legislative branches, the Supreme Court has increased its importance through the function of judicial review of legislative and executive decisions (Smith 2012, 153). For an in-depth overview of the development of an enhanced role of the courts in the separation of powers system see Smith (2012).

[22] Smith (2000, 10) point out that the Supreme Court in some cases may have gone to great lengths to accept the Parliament's view of constitutional provisions. Thus failing to uphold their own provisions.

4.2.1 Organization of the Supreme Court

The Norwegian Supreme Court is an appellate court of last resort with discretionary jurisdiction.[23] Article 88 of the Norwegian Constitution provides that "[t]he Supreme Court pronounces judgment in the final instance" (Stortinget 2012a).[24] Acting as a court of last resort, the Supreme Court only adjudicates cases where the decision will have an impact beyond the case in question (Schei 2010, 13; 2011, 7). Historically, according to Sunde (2011a, 1-2), the Supreme Court has been the focal point in the Norwegian legal system mainly due to two factors: the pyramid shape of the legal system, and the long absence of academic law. With only two specialized courts next to the district courts in the first instance, only one specialized court next to the Courts of Appeal in the second instance, and only one Supreme Court with general jurisdiction in the last instance, the organization of the Norwegian legal system entrusts the Supreme Court with significant judicial power.[25] Rulings of the Court have had the role of precedent due to the long absence of academic law that could compete with the Supreme Court as a source to insight into law together with the Court's position at the pinnacle of the legal system. Consequently, being "[v]iewed as a legitimate norm producing body in the Norwegian legal system, the Supreme Court has also been studied as such" (Sunde 2011a, 2).

Individual cases appearing before the Norwegian Supreme Court are heard by five justices, and the Court works in two parallel and equal divisions (Norges Høyesterett 2011). In cases concerning abandoning existing precedence, entangled legal questions and the relationship between law and constitution the Supreme Court have since 1926 been supposed to meet in plenary session referred to as *Plenum*. The list was expanded in 2005 to include cases where a

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[23] The Norwegian Supreme Court, being an appellate court, has no original jurisdiction.

[24] Aarbakke (2003, 265) asserts, based on article 88 of the Constitution, that a judge should perform judicial activities, not partake in judicial law-making exceeding the establishment of precedent.

[25] There are in fact four levels in the Norwegian judicial hierarchy but the arbitration boards (*Konfliktråd*et) are usually not viewed as a separate instance as they do not consider criminal cases, and because there are several exceptions to the general rule that civil cases have to be treated by an arbitration board before appearing before one of the courts in the first instance (Ot.prp.nr.44 2000-2001, 30). The specialized courts in the first instance include the Land Consolidation Courts and the Labor Court, in addition to several court-like administrative bodies such as the Consumer Disputes Commission, the Market Council, the Patients' Injury Compensation Board, the County Social Welfare Boards, the Immigration Appeals Board and the Social Security Board (Domstol.no 2012b). In the second instance only the Land Consolidation Courts have an appeal level (Sunde 2011a, 2). A separate instance with original jurisdiction deals with the process of impeachment: The Court of Impeachment (*Riksretten*) serves as a separate court with the mandate provided by article 86 in the Constitution to "pronounce judgment in the first and last instance in such proceedings as are brought by the Storting against Members of the Council of State or of the Supreme Court or of the Storting for criminal or other unlawful conduct in cases where they have breached their constitutional obligations" (Stortinget 2012a).

statute seems to be in conflict with treaties ratified by the Parliament. When cases of this type have been less grave, the Court has since 2008 met in a *Grand Chamber* consisting of eleven judges (Sunde 2011a, 8).

Currently there are 19 judges on the Court in addition to the Chief Justice. Appointments to the Supreme Court are made by the sitting cabinet – formally by *the King in Council* – after recommendation from the Judicial Appointments Board and a recommendation from the Supreme Court.[26] The Judicial Appointments Board was established in 2002 as an independent agency under the Norwegian Courts Administration (Skoghøy 2011b, 18).[27] Before the establishment of Courts Administration the central administration of Norwegian courts was managed by the Court division of the Ministry of Justice.[28] Following the evaluation of the Norwegian court system in *Domstolene i samfunnet* (NOU 1999) and the proposition for reform of the central administration of Norwegian courts given in *Om lov om endringer i domstolloven m.m. (den sentrale domstoladministrasjon og dommernes arbeidsrettslige stilling)* (Ot.prp.nr.44 2000-2001), the Norwegian Courts Administration was established and former practice for appointments was codified in the Courts of Justice Act (*Lov om domstolene*).[29]

Prior to 2002 the Ministry of Justice obtained recommendations from an independent advisory agency before new appointments to the lower courts.[30] For appointments to the Supreme Court the only independent advice was an unofficial oral brief presented to the Minister of Justice by the Chief Justice after consultation with the other members of the Court (Ot.prp.nr.44 2000-2001, 125). With the establishment of the Judicial Appointments Board in 2002 the advisory procedure was expanded to include appointments to the Supreme Court.[31]

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[26] "The Judicial Appointments Board" is the official translation of the agency's Norwegian name "Innstillingsrådet for Dommere" provided by the Norwegian Courts Administration (Domstol.no 2012a). Grendstad et al. (2011b) employ the translation "Advisory Council for the Appointment of Judges", which does offer a better translation seeing that the agency only provides recommendations and does not actually partake in the appointment process. To avoid confusion, however, all translations of Norwegian names in the thesis are the official translations provided by the agencies websites unless otherwise noted. E.g., *supra* note 25.

[27] The changes to the Courts of Justice Act and the establishment of the Judicial Appointments Board were made in 2001, but did not take effect until late 2002. For an overview of the procedural arrangements of the Appointments Board see Innstillingsrådet for dommere (2012).

[28] The Ministry of Justice was renamed Ministry of Justice and Public Security (*Justis- og Beredskaps-departementet*) in 2012. For the sake of simplicity, *Ministry of Justice* is used in the text.

[29] Translations of Norwegian laws are based on the translations compiled by the Faculty of Law Library at the University of Oslo (2012). The exceptions are references to the Constitution, which are based on the official translation provided by the Norwegian Parliament (2012a).

[30] This practice was established in the early 1990s (Skoghøy 2011b, 19).

[31] Not including the appointment of a new Chief Justice, which still resides with the Ministry of Justice.

The advice of the Chief Justice is still a part of the process, but is now formalized and made public.[32] Unlike advice given by the leaders of lower courts, which is presented as a written statement to the Judicial Appointments Board, the recommendation of the Chief Justice is presented directly to the Ministry of Justice after the Appointments Board has made its recommendation (Courts of Justice Act, art. 55b).

Only persons 30 years or above with judicial qualifications can be appointed to the Norwegian Supreme Court. The appointment is irremovable, but Supreme Court judges have to retire at the age of 70, as all public officials. Judges can be suspended by trial alone, and can also be punished through the process of impeachment.[33] Appointments to the Norwegian courts are regulated by articles 54, 55 and 55a-i in the Courts of Justice Act in addition to article 21 and article 91 in the Norwegian Constitution.[34] The Appointments Board consists of three judges, a lawyer, one lawyer employed by the government and two members who are not lawyers.[35] Recruitment to available positions on the courts is the domain of the Norwegian Courts Administration, the individual courts, and to some extent the Ministry of Justice. The Appointments Board only nominates candidates, and does not partake in the recruitment process (Innstillingsrådet for dommere 2012, 6).[36]

Recommendations from the Judicial Appointments Board are based on a principle of broad recruitment to ensure the representation of a variety of legal professions on the Court as well as to ensure cultural, social, and demographic diversity.[37] Requirements for Supreme Court judges are higher than for judges appointed to the lower and specialized courts. The Judicial

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[32] In 2010 Chief Justice Schei decided to make his advice regarding the appointment of new justices' public. Prior to this decision it had not been customary for the Chief Justice to publicize his advice regarding new appointments.

[33] Neither have occurred thus far (Sunde 2011a, 5).

[34] An extensive overview of the legal premise for appointments can be found in the policy note of the Appointments Board (Innstillingsrådet for dommere 2012) and in chapter eight of *Om lov om endringer i domstolloven m.m. (den sentrale domstoladministrasjon og dommernes arbeidsrettslige stilling)* (Ot.prp.nr.44 2000-2001).

[35] It should be noted that the members of the Judicial Appointments Board are appointed by *the King in Council* for a four year period with the option of being reappointed for one period.

[36] The appointment of interim justices does not follow the normal procedure for appointments. Advice on the appointment of interim justices is not part of the mandate of the Judicial Appointments Board and the process is informal, with the initiative resting with the Supreme Court. Considering that the interim justices can have a significant impact on the outcome of decisions, the appointment procedure is questionable. Unlike the regular appointments to the Court where the Appointments Board makes an independent recommendation based on a selection of suitable candidates, the selection of interim justices is not independent of the Ministry of Justice (Smith 2012, 161-162).

[37] An interesting point mentioned in the policy note of the Appointments Board (2012, 13) is that in the appointment process questions relating to the political preferences of the candidates are not asked, and neither are their positions on politically charged issues and case dispositions.

Appointments Board always provides a list of three nominees, as long as there are three qualified candidates, ranked from one to three according to suitability. *The King in Council* may choose amongst all three candidates, but rarely selects number two or number three (Innstillingsrådet for dommere 2012).[38]

4.2.2 Procedure of the Supreme Court

Justices sit in both divisions of the Supreme Court as well as the Appeals Committee of the Supreme Court in accordance with a rotation system. The Appeals Committee was classed as a separate court until 2008 when it changed its name from *Høyesteretts kjæremålsutvalg* to *Høyesteretts ankeutvalg*, and became an integrated part of the Supreme Court after the implementation of the new Dispute Act (*Lov om mekling og rettergang i sivile tvister*). Proceedings in the Appeals Committee are in writing, although the implementation of the Dispute Act allows for oral proceedings if required. If cases are of a principle character requiring oral proceedings they are usually referred to treatment in division (Schei 2008). Cases brought before the Committee are heard by three judges (Norges Høyesterett 2011). The most experienced judge chairs the Court during proceedings and during the counseling, but the Chief Justice chairs the Court if he is among the judges in chamber, and always in plenary sessions (Sunde 2011a, 8).

Right to appeal in civil cases changed with the implementation of the Dispute Act.[39] The Appeals Committee now needs a valid reason for granting appeal whereas before the implementation of the act act the Committee needed a valid reason for refuting an appeal (Schei 2008; Skoghøy 2008, 488). This change ensures that important cases are granted appeal while less important cases are filtered out. As mentioned in chapter two, cases are selected because they are complex, controversial, or in some other way considered important. Acting as a court of last resort, the Norwegian Supreme Court only adjudicates cases where the decision will have an impact beyond the case in question. Cases can also be granted leave to appeal if there are circumstantial reasons for a Supreme Court decision on the matter (Schei 2010, 13; 2011, 7; Skoghøy 2008, 491). The number of cases referred by the Appeals

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[38] As of June 2012 this has occurred nine times (Innstillingsrådet for dommere 2012, 51). Articles 55b and 55c of the Courts of Justice Act also provides an option for selecting a candidate not nominated by the Appointments Board. *The King in Council* thus has the option to ignore the advice of the Board, but this alternative has never been used.

[39] Only civil cases are considered here. For an overview of the appeals process in criminal cases see Skoghøy (2008).

Committee in civil cases has been approximately 14.5 percent of the total number of appeals heard by the Committee annually for the past five years (Norges Høyesterett 2012). The change from the right to appeal to a system where appeals are granted based on a given set of principles ensures a clearer and stronger tie between the role of the Supreme Court in developing law and interpretation of the law, and the cases selected for adjudication (Schei 2008; Skoghøy 2008).

Proceedings of the Supreme Court in cases heard in division, Grand Chamber and plenary session are always oral, and are generally conducted in open court. Unlike in the District Courts and the Courts of Appeal evidence and testimonies are not presented directly before the Supreme Court. Nor does the Supreme Court conduct inspections outside the court (The Supreme Court of Norway 2007). The judges take turns writing the majority vote, but the chair can decide to abandon this procedure if the judge whose turn it is does not wholeheartedly support the vote.[40] Dissenting votes are written by the dissenter or dissenters as a case can have more than one dissenting vote (Sunde 2011a, 8). Opinions and reasoning of the Court are published on the Supreme Court website in addition to being printed in *Norsk Retstidende* and published in the Lovdata Foundation legal information system. Dissenting opinions are also published.

4.3 Legal culture and sources of law

Unlike many other European countries judicial power is not divided amongst specialized courts in the final instance of the Norwegian legal system.[41] Consequently, all civil and criminal disputes will appear before the Supreme Court if they are granted appeal after a decision in one of the Courts of Appeal. Pronouncing judgment in the final instance, the Supreme Court holds significant power when it comes to the development of the current legal doctrine (Schei 2004, 131). When the Supreme Court considers legal questions where there is no set precedent, the Court creates new law in that the approach taken by the Supreme Court in solving legal issues sets the standard for the other courts in the Norwegian legal system (Eckhoff and Helgesen 1997, 189).

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[40] In principle it is the presiding judge who determines who writes the majority vote, but the practice is that the responsibility rotates based on the time spent since a judge last wrote the majority vote. An interesting detail is that the presiding judge never writes the majority vote (Schei 2010, 15).
[41] Article 88 of the Norwegian Constitution prevents the division of judicial power amongst specialized courts in the final instance of the legal system (Schei 2012, 17).

4.3.1 Legal culture

Legal culture provides a framework for analyzing law through institutional and intellectual structures. Sunde (2010, 11) defines legal culture as "ideas and expectations of law made operational by institutional (-like) practices". The institutional structure of legal culture is made up of institutions that shape law through their practices. Law consists of two major kinds of institutions: conflict resolution and norm producing institutions. The court system forms the basis for conflict resolution institutions in developed states, while norm producing institutions include both the courts and the lawmakers. Since it is impossible to foresee and prescribe solutions to all possible conflicts, the courts never cease to produce norms: "courts have to supply the legal system with legal norms to clarify or alter norms made through lawmaking, and to fill the lacunae of laws" (Sunde 2010, 21-22).

In addition to an institutional structure, legal culture also consists of an intellectual structure. The intellectual structure is formed around a question of what law ought to be, and the ideas shaping law (Sunde 2010, 24-26). "Legal culture is partly shaped by the surrounding society; partly it is shaped by trends in scholarship, ideologies among lawyers and other groups of individuals (Nylund 2010, 167)." Nylund (2010, 167) notes that legal culture provides the framework for "doing law, thinking about law and talking about law". These structures may change and develop over time. Hence, the interplay of institutional and intellectual structures, according to Sunde (2010, 29), is more suitable to study the legal historical and present aspects of law than legal systems or legal traditions.

The development of a Nordic legal culture is related to the close cultural, historical and linguistic links between the Nordic countries.[42] "Similar laws enable co-operation and sharing ideas and influences, and similar ideas, ideals and methods result in similar laws (Nylund 2010, 179)." An important development for the Nordic legal culture was the introduction of legal realism, which is a theory of what law is and what the role of lawyers and legal scholars are.[43] Scandinavian realism was influenced by the American realist movement of the 1920s, and provided a modern theory to supply the Nordic identity with a pragmatic and equal legal culture (Nylund 2010, 174-175). After the Second World War legal realism became the dominant view of courts in Scandinavia (Graver 2000, 431). In Norway, it was Torstein

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[42] For an overview of the historical development of the Nordic legal culture see Nylund (2010).
[43] *See supra* note 13.

Eckhoff and his contemporaries who paved the way for this theoretical position.[44] The influence of realism on the Nordic legal culture is seen through the application of legal sources and legal reasoning in judicial decisions. Scandinavian legal realism, although it appears in slightly different versions in the different countries, still has a considerable impact on the way Nordic lawyers think about law, legal sources and legal reasoning (Nylund 2010, 175).

4.3.2 Sources of law

Sources of law theory state the factors that should be considered when making decisions on the content of current law, and the relative importance of the individual factors. Sources of law are factors that can solve or contribute to the solving of legal questions (Nygaard 1999, 35). In Norway, source of law principles are not statutory. Consequently, legal principles are determined by the practice of the Supreme Court (Andenæs 2009, 3-6). The use of legal sources in the courts, in addition to providing a standard for other appliers of law, is reflected in the account of legal sources in legal textbooks (Skoghøy 2011b, 12). Supreme Court practice may have an impact on two levels: first, decisions may serve as the basis for formation of rules over time. Second, the Supreme Court practice may impact the formation of legal principles applied when courts determine the outcome of legal questions (Nygaard 1999, 57). Legal rules can be deducted from several legal principles, deciding which factors are relevant for the current case. Andenæs (2009, 6) points out that source of law principles are not usually explicitly mentioned in Supreme Court decisions, but from these decisions one can identify the underlying principles.

Legal realism, through its normative foundations, focus on norm creation through judicial precedent (Sunde 2012, 170). The approach differentiates between factors that have to be considered and factors that can be considered when solving legal questions. It is the position in legal theory taught to Norwegian law students, and has been the dominant view in Norwegian jurisprudence for the past decades (Askeland 2003, 11, 13). The position was spearheaded by the legal scholar Torstein Eckhoff. In the book *Rettskildelære* (1971) he described the application of law the way it occurred in the court system, and presented a

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[44] In addition to Eckhoff, Johs. Andenæs and Carsten Smith played central roles in development of the Norwegian legal culture based on the principles of legal realism (Sunde 2012, 170).

model for evaluating decisions based on a number of legal factors.[45] Graver (2003, 2) notes that "[i]n the Norwegian legal culture, legal doctrine is expected to refer to the sources of law as they appear to the judge". According to Eckhoff and Helgesen (1997, 22), one face two questions when accounting for what determines a legal question: The first is concerned with what is relevant. In other words, what one is allowed to consider based on the source of law principles. Second, the relevant factors should be categorized. This is a question of having a systematic approach.

Central to Eckhoff's (1971) description of the judicial process was the division of legal sources into seven categories and the institutionalization of equitable considerations.[46] These source factors include the text of statutes, preparatory works, judicial practice (of the courts), administrative practice, custom, conceptions of justice (especially in legal literature), and equitable considerations.[47] The seven sources of law identified by Eckhoff can be grouped according to three major types of decision rules according to Bernt et al. (1999, 209): Legal arguments relating to legislative intent, including law and preparatory works forms the first category. The second category contains legal arguments related to practice and custom, while equitable considerations form the basis for the third category. These general categories can also incorporate other legal sources than those identified by Eckhoff (Kjønstad 2006, 362).[48]

Bernt et al.'s (1999) approach has been applied by Grendstad et al. (2010) to describe the decision rules of the Norwegian Supreme Court to build a framework for analysis of state friendly voting.[49] While this approach simplifies the interpretation of the Court's decision rules, it has been criticized, along with Eckhoff's approach, for placing too much emphasis on

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[45] Eckhoff's methodological approach has been adopted, to some extent, by nearly every new Norwegian legal textbook published after *Rettskildelære* (Askeland 2003, 13). According to Graver (2000, 432), the paradigm shift in sources of law theory following Eckhoff's introduction of legal realism was not due to his separation of legal sources into different factors (which had been proposed earlier by other legal scholars), but rather the dematerialization, or formalization, of legal concepts and the emphasis on the personal considerations of appliers of law.

[46] The concept of equitable consideration was not originally introduced by Eckhoff, but he discussed the term to a greater extent than legal scholars had done previously (Kjønstad 2006, 361).

[47] Eckhoff also considers international law as an eight category, which has since been incorporated as one of the formal legal sources. The translations of Eckhoff's categories are based on the entries in the legal dictionary *Jussleksikon* on Ordnett.no.

[48] Eckhoff's seven categories and Bernt and Doublet's trifold categorization are just two ways of approaching sources of law theory. Historically, only two categories were considered, while more recent works have identified upwards of twelve sources (Kjønstad 2006, 360-362).

[49] Grendstad et al. do in fact refer to Doublet and Bernt (1992) when listing major types of decision rules. Here the categorization employed by Bernt et al. (1999) in *Juss, samfunn og rettsanvendelse* is used as an example, but it does not differ from the approach in *Retten og vitenskapen* (Doublet and Bernt 1992). For the use of the term 'state friendly' rather than 'government friendly', *see supra* note 1.

equitable considerations (e.g., Graver 2000; Magnussen 2005). This notion is, however, disputed by Skoghøy (2011b, 13) who points out that the emphasis on equitable considerations is in line with the prevailing perceptions of the legal system in the Norwegian society.[50]

The courts use and application of sources of law have become more extensive and open over the past 50 years (Skoghøy 2011b, 13). Equitable considerations have received greater emphasis, and the votes are of a more principal nature.[51] The Supreme Court has developed a tendency to not only decide the case in question, but also give the Court's opinion on principal questions brought up in the discussion of the case. Another development in the application of sources of law is the less strict adherence to precedent by the Supreme Court. The Court is also more inclined to cite legal theory in its decisions (Skoghøy 1996). Through the process of internationalization Supreme Court decisions in areas of law regulated by international treaties ratified by the Parliament will establish new limits, thus confining the scope of action available to legislators. Due to this function the Supreme Court will obtain a stronger presence of a constitutional court (Schei 2004, 133).

Equitable considerations differ from the other sources of law in that they are not stipulated by formal rules. Judges are appointed on account of their qualifications as members of the legal profession, and equitable considerations are not judicial questions in a strict sense. When considering what is a fair or reasonable outcome judges operate outside the formal judicial framework. If equitable considerations become a major factor in legal determinations by the courts, it may give rise to issues of legitimacy (Magnussen 2005, 71). Equitable considerations provide appliers of law with what almost constitutes a *carte blanche* when deciding the contents of legal rules (Askeland 2003, 20). The result is that precedent based on considerations of what is fair and reasonable tend to be less binding on the Court than precedents based on more stable sources of law, making it harder to predict the outcome of Supreme Court decisions (Magnussen 2005, 72).[52] Legal realism indicates that the application

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[50] The dominant legal textbook in Norwegian law schools, *Rettsgrunnlag og standpunkt* (Nygaard 1999), follows the main arguments advocated by Eckhoff (Skoghøy 2011b, 12); although, from a civil law perspective rather than Eckhoff's public law perspective.

[51] For an overview of what constitutes equitable considerations see Kjønstad (2006) and Magnussen (2005), in addition to *supra* note 9.

[52] Some argue that the Norwegian source of law theory is in a period of change (e.g., Askeland 2003; Graver 2000; Kjønstad 2006). Kjønstad (2006, 378) provides three reasons for placing less emphasis on equitable considerations: (1) the Norwegian society is less homogeneous than it used to be, and different cultural and religious views make it harder to agree on what constitutes a fair and reasonable outcome; (2) it is difficult to

of law is a subjective endeavor, and that the scope of action available for subjective considerations increases with legal and social developments (Graver 2000, 465).

4.4 Judicial politics – political functions of the Norwegian Supreme Court

In the study of judicial behavior there has not been a tradition of separating judicial politics from legislative politics (Sunde 2012, 180). Sunde (2012, 182) argues that the Supreme Court is engaged in politics to fulfill its primary function as a dispute resolver through decisions vested in legal sources. This does not mean that the Court has the freedom of other political actors. Judicial politics is "a court's ability and desire to affect the distribution of benefits and duties in different societal contexts in light of arguments claimed to be legally valid" (Sunde 2012, 180, author's translation). Michalsen (2006, 92, author's translation) assert that "the courts do not have the political freedom of other actors, but is bound by what constitutes legal sources, the current principles of interpretation and the nature of the individual case". Legal scholars would argue that judicial politics differ from legislative politics in that legislative politics provides the framework for judicial politics (e.g., Bernt et al. 1999, 30; Schei 2011, 320; Smith 2012, 156). The discussions in the following sub-sections are not an attempt to decide whether the Supreme Court is a political institution, which it is, but to what degree judicial politics differ from legislative politics and how that can affect analyses of judicial decisions.[53]

4.4.1 Political functions

Central to the discussion of the political function of the Supreme Court is the question of what constitutes politics and policy-making. David Easton's (1953, cited in Shepsle and Bonchek 1997, 13) definition of politics as "the authoritative allocation of values for a society" is a useful point of departure. This definition does not reduce politics to party politics, or limit the concept of politics to strategic behavior to alter social conditions. Closely related to the concept of politics is policy-making, which can be viewed as "the capacity of an institution to make authoritative decisions regarding the distribution of rights and resources" (Grendstad, Shaffer, and Waltenburg 2011c, 3). Keeping in mind the definition of politics presented by Easton, the concept of policy-making can be expanded to include values. The inclusion of

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establish the consequences of a particular outcome, such as the goodness of the outcome; and (3) the amount of legal literature has increased significantly over the past decades, making it harder to discuss equitable considerations and preparatory works.

[53] The Supreme Court is, in short, a political institution due to its political function of interpreting laws and the Constitution (Grendstad et al. 2011b).

values ensures that the definition encompass Supreme Court decisions where there is not so much a question of distribution of rights and resources, but rather an allocation of values.

Grendstad, Shaffer, and Waltenburg (2012c, 531) believe that Sunde's approach, where law and politics are two opposing positions, is not particularly functional in studies of judicial behavior. They claim that the judicial branch of government ought to be studied based on attitudinal models developed in the social sciences, seeing that there is no reason why Norwegian legal practitioners and judges would be immune to influence from their personal preferences. Grendstad et al.'s (2012c, 530, author's translation) premise is that "conflict is a prerequisite for the legislative politics adopted by the Storting between contending interests, and conflict is a prerequisite for judicial politics and the development of law established in the Supreme Court through argumentation and considerations leading up to a solution to a dispute between two parties". Although it is uncontroversial to assert that the institutional frameworks are different for legislative and judicial politics, the advantage of separating the two concepts can appear futile.

A description of the Supreme Court in terms of a political body is provided by Grendstad et al. (2010, 81), who contend "[t]hat a political institution which adjudicates disputes over constitutional and statutory issues is a political body is self-evident, since the decisions of a nation's highest court can and do have political implications (Grendstad et al. 2010, 81). The prevailing view is that the Supreme Court cannot exist outside of politics and political culture (Rosen, 2006, cited in Grendstad et al. 2010, 81; Schei 2011; Smith 2012); the role of the Supreme Court is not only to solve individual disputes, but also to develop the current legal doctrine. In the development of precedent and interpretation of legal sources the Supreme Court is exhibiting what can be considered to be a political function.

Schei (2011, 319; 2012, 25-26) provides an overview of the foundation for attributing a political function to the Supreme Court. In his view, four points can briefly summarize the basis for this assumption: (1) there are similarities between the foundations for Supreme Court decisions and the foundations for decisions by political organs; (2) the effects of parliamentary legislation and the decisions of courts are similar; (3) legislation have to fulfill political purposes and have political effects, and when the Courts apply the law they realize, correct, complement, or set aside these effects; and (4) the Courts exercise control over other

state actors and hold them to the law and the constitution through the function of horizontal accountability, enabling them to intervene in political decisions.

4.4.2 Judicial politics and legitimacy

Bernt et al. (1999, 219) point out that relative to the role of the judges and the appointment process, the consideration of political legitimacy causes multiple problems. Judges are appointed based on their professional background and their ability to interpret legal rules. They are not selected based on a political program, and do not have a mandate to decide what legal rules are in force. If the decisions of the Court, as Lund (1987, 213) states it, are more often than not dependent upon the justices' values, including political assessments that can sometimes coincide with party politics, they are essentially political decisions. This is also implied by Smith (2000, 11, author's translation), who explains that "[t]he attitude of the Supreme Court should not primarily be towards following precedent, but rather to consider and, if possible, create precedent". Defining the activity of courts as legislative politics does not change the fact that courts partake in political activities similar to that of other political actors. This can be viewed as nothing more than a "terminological trick" to separate the actions of judges from the actions of politicians (Sunde 2012, 183).

When the Supreme Court creates law it does it through decisions in individual cases, while legislators are free to decide the time and the area of law when they create new laws. Consequently, the leeway available to the courts to make politically based decisions is different from that of the politicians. The scope of action is narrower, and legal decisions have to be, or at least appear to be, vested in legal sources (Schei 2011, 325-326, 334). However, through the interpretation of what the current application of the law should be the courts, and in the final instance the Supreme Court, decides the contents of laws. This positions the courts within the legislative process (Smith 2012, 156).

Following the division between judicial politics and party politics outlined above may serve a useful purpose when analyzing the decisions of courts within a multilevel framework. Acknowledging the difference in institutional arrangements in the courts and the legislature and incorporating them in analytical frameworks may answer the critique from Norwegian legal scholars regarding the attitudinal approach, and the general disregard of legal doctrine in

studies of judicial behavior by social scientists.[54] A hierarchical model can incorporate the intellectual and institutional structures identified by Sunde (2012), while at the same time testing the attitudinal approach advocated by Grendstad et al.

4.4.3 Political dimensions

The low dissent rate in the Norwegian Supreme Court has been taken to indicate that the Court is preoccupied with judicial politics, making decisions based on the formal sources of law. Judges do not view themselves as ordinary political actors, and have a distant relationship, at least consciously, to legislative politics (Sunde 2012, 185-186). Grendstad et al. (2010, 74) notes that "[a]mong judicial scholars, the Norwegian Supreme Court […] is assumed to decide cases primarily on the legal merits, rather than on political or philosophical grounds".[55] If judges decide cases primarily on the legal merits, "courts are not legislatures, and judges are not legislators" (Lax 2011, 152).[56] The predominant view among judicial scholars may well be that the Court decides cases primarily on the legal merits, but they are also conscious of other influences. Smith (1975, 300, author's translation) wrote that "[i]t is also every reason to believe that judicial decisions are influenced largely by the same kinds of arguments and social factors that influence legislators and officials in the administration". In other words, judgments are not apolitical; rather they are influenced by the attributes, attitudes and interactions of the judges. "Judicial legislation will, as other legislation, be a form of political activity (Smith 1975, 298, author's translation)." Schei (2011, 334) agrees with Smith in that the influence of ideology and attitudes in judicial decisions displays a political dimension. At the same time there is a difference between the freedoms legislators have in their assessments (*de lege ferenda*) compared to the limited freedom available to judges in their assessments (*de serentia ferenda*) (Smith 1975, 98). Courts, unlike the other state powers who are free to enact their political preferences within the framework of the Constitution, are bound by a methodological system that sets constraints on how results can be justified (Smith 1990, 427; Smith 2012, 155-156).

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[54] This is achieved by controlling for different legal and institutional variables assumed to constrain the policy space in which judges are free to act on their preferences.

[55] The claim is somewhat exaggerated. Most legal practitioners and judges acknowledge the influence of equitable considerations in decisions, which are based on considerations not grounded in the formal legal sources. Some, however, consider the reliance on equitable considerations to be too extensive. *See supra* note 52.

[56] The role of the Supreme Court in relation to the other branches of government has been debated since the adoption of the Norwegian constitution in 1814. One of the most prominent debates, considering whether or not the Supreme Court was a political organ (which is no longer subject to any serious debate), took place between Jens Arup Seip and Johs. Andenæs in 1965 (Andenæs 1965a; 1965b; Seip 1965a; 1965b).

However, "it is not reasonable to claim that creating legal rules in the Storting is a political activity, while creating legal rules in the Supreme Court is an apolitical activity" (Smith 1975, 98, author's translation). Cases appearing before the Supreme Court generally have more than one possible outcome, and Supreme Court justices can reach both consensus and dissensus with equally coherent judicial arguments (Grendstad et al. 2012c, 531). Smith (1975, 298, author's translation) suggests that "any collegial court is […] a form of legislative assembly in miniature – whether the court likes it or not and whether or not it accepts it". The institutional frameworks of courts and legislatures may be different, but not to the extent that social science models cannot be applied to analyze court decisions. Schei (2012, 20, author's translation) provides an interesting perspective when observing that "the independence of judges is not only a question of independence from authority structures outside the realm of the courts, but also a question of the independency of individual judges relative to the other judges in a court – including the presiding judge". The interactions among judges in a court appear to be interrelated with their preferences and the influence of legal factors. Consequently, analyzing judicial behavior along only one of these dimensions would fail to grasp the complexity of court decisions.

The core issues regarding the interrelations between law and politics can be summed up by one quantitative and one qualitative question. Quantitatively, one can estimate the extent to which a political element is inherent in the application of law. The qualitative question is concerned with what political considerations are acceptable, and which have to be dismissed in the application of law. The extent of the political element can be estimated by examining the use and application of equitable considerations in judicial decisions. It is only through an extensive analysis of judicial decisions the leeway available to the courts can be described (Smith 1990, 427). The first question is empirical, while the second question is of a normative character. Here the aim is to describe the leeway available to the courts, not to determine what political considerations are acceptable.

4.5 A 'state friendly' court

Discussions of whether the Supreme Court is a political organ through its participation in the political process, as indicated in the previous sections, are for the most part rendered irrelevant. What is interesting is if this participation may compromise the general principles of law for the protection of individuals and groups. The courts, and more specifically the

Supreme Court, constitute one of three state powers. Rule of law assumes that courts are independent of the political authorities, yet, at the same time the courts have to be loyal to the law and the legislative will through the prevalent conception of law (Graver 2012).[57] Chief Justice Smith (1996, 193, author's translation) asserted that "[w]e have to be attentive to any statements that have the characteristics of a legal source. But we cannot have a relationship with the other branches of government so close that our attentiveness exceeds this limit." The extent to which courts exercise their role as an organ for the state is difficult to disclose due to the nature of judicial decisions. Persuasive arguments vested in legal sources constitute the foundation for these decisions, but the reality is that there are hardly any limitations to the variety of results that can be justified with legal reasoning (Lund 1987, 216).

An interesting attribute of the Norwegian Supreme Court is that it is 'state friendly', in so far as statistically, the state wins more cases than it loses. While the percentage of pro-state decisions definitely is significantly higher than for private party litigants, it can be considered natural that the state wins more cases than private litigants (Skoghøy 2011a, 719; Tellesbø 2006, 65). The state represents the public interest, and it would be an issue of concern if it were to lose more cases than it won. Theoretically, however, one would expect the distribution of results pursuant of either the state or private litigants, at least in the Supreme Court according to Skoghøy (2011a, 719), to be evenly proportioned. Approximately 20 percent of the total number of cases heard by the Appeals Committee is granted leave to appeal. The strict filtering process should in theory reduce the imbalance between the results pursuant of the state and those of the private parties.

Government Advocate Sven Ole Fagernæs (2007) provides an explanation for why one should not expect the outcomes to be proportional. In the majority of the cases appearing before the Supreme Court, the state is the appellee, meaning that it won in the previous instance. The probability of a result pursuant of the state in the Supreme Court is thus higher than for the appellant. Another reason is the appeals process itself. The state is restrictive when it comes to appealing to the Supreme Court, not viewing it as a court in the third instance in place for correcting incorrect decisions of the lower courts but rather a place for deciding principal legal questions. Thus, the screening function of the Supreme Court suggests that the distribution of results should not be evenly proportioned. A result pursuant

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[57] 'Legislative will' is used in accordance with Graver (2012, 554), who views it as an institutional concept incorporating not only the Parliament, but also the government (i.e., the Council of State), the ministries, and other parties to the legislative process.

to the government interest does not in and of itself define the Court or justices as 'state friendly' (Skåre 1997, 501). However, if there are other factors involved in making favorable decisions for the state, the relationship with the Court should be considered closely. An example would be the preference of public over private interests in court decisions due to the composition of the Supreme Court (Smith 1997, 4).

If there are situations where a justice' decision is placing greater emphasis on the state's interests and or gives less considerations to the interest of the opposing party in court proceedings than what is established by the current legal doctrine, the Court is exhibiting a state friendly nature (Kjønstad 1999, 103; Tellesbø 2006, 67). Central to the claim of 'state friendliness' is the question of whether a case is decided in favor of the state, or public interest, at the expense of private parties without sufficient justification based on the available legal sources and equitable considerations (Skoghøy 2011a, 712; Smith 1997, 4). The concept of 'state friendliness' calls into question the assertion that the current legal doctrine equals the results the Supreme Court arrives at in its decisions (Tellesbø 2006, 65). If there is not sufficient justification for a result pursuant of the state, at least from a political science perspective, the decision must rest on other factors than what the current legal doctrine prescribes.

4.5.1 The state friendly hypothesis

The state friendly hypothesis, according to Grendstad et al. (2011b, 4), builds on two distinct but related claims.[58] First, the Norwegian Supreme Court is state friendly because it decides cases in favor of the state at a much higher rate than those of private party litigants (Grendstad et al. 2011b; Kjønstad 1999). This claim is supported empirically by the fact that the state over time wins approximately 60 to 80 percent of the cases where it was a party, depending on the area of law involved (Kjønstad 1999, 97; Ryssdal 2007, 1).[59] Presumably, one of the reasons for the higher rate is due to the government having greater resources and a

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[58] Grendstad et al. use the term 'government friendly'. *See supra* note 1.

[59] A high percentage of victories do not necessarily indicate that the Court has a 'state friendly' inclination. The results are dependent upon a variety of factors, including, but not limited to, the screening of the cases heard by the Court, the appearance of the state as both petitioner and respondent, and the fact that the state represents, and has to represent, a number of interests across a variety of issues (Grendstad et al. 2011b, 4; Kjønstad 1999, 104). If the victory rate for the state is particularly high in an area of law it may lead to private parties not appealing due to the fear of losing, thus creating the perception of an artificially high victory rate for the state (Kjønstad 1999, 104).

significantly higher limit on expenditures than its opponents (Fagernæs 2007, 54; Tellesbø 2006, 77).

Predisposition to vote in favor of the state over time is the second claim identified by Grendstad et al. (2011b, 4). The assumption is specifically linked to discussions of the impact of justices' background on their decisional behavior in Court. Justices bring with them a set of values to the Court primarily rooted in their background, which leads to favoring the state when casting their votes. Østlid (1988, 41) believes that there is no doubt that there is a connection between judges' political perceptions and their behavior as judges. It is a possibility that in cases appearing before the courts with political relevance they may pronounce judgments affected by political perceptions.

The following hypotheses can be established based on background characteristics of the justices expected to impact decisions identified in the judicial decisions' literature:

> *h1.1*: The decision to vote in favor of the state in civil cases where the state is a party is affected by the nature of the previous legal career of the justices.
>
> *h1.2*: Former employment with the Legislation Department increases the likelihood of voting in favor of the state
>
> *h1.3*: Former employment with the Government Advocate increases the likelihood of voting in favor of the state.
>
> *h1.4*: Former employment with the Director General of Public Prosecutions increases the likelihood of voting in favor of the state.
>
> *h1.5*: The nature of the appointing government impacts the propensity for voting for or against the state.
>
> *h1.6*: Oslo-born justices are more state friendly than other judges.

Through analysis of the votes of individual justices and the outcome of court decisions one can "ascertain which *legal forces* affect a justice's decisional behavior with respect to voting in favor of the [state] party or not" (Grendstad et al. 2011b, 4, emphasis in original).[60] The flexibility of judicial methodology enables justices to pursue their preferences while still adhering to the law. Only the hardest cases, "where the different sources of law do not point

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[60] Grendstad et al. (2011b) employ the term 'legal forces' to account for factors that influence judicial decisions, which are not legal sources. In an earlier paper published in *Retfærd*, and another paper published in *Tidsskrift for Rettsvitenskap* in 2011, they apply the term 'extra-legal forces' to represent the same general concept as 'legal forces'. In this paper the concepts of 'extra-legal forces' will be used to describe the effect of different factors on the propensity to vote in favor of the state; be they vested in legal, attitudinal or strategic considerations.

to one single and/or indisputable solution", are dealt with by the Court (Sunde 2011a, 11). When the authoritative legal sources do not provide a clear-cut answer to the dispute in question, more than one solution can be legally justifiable (Skoghøy 2011a, 713).[61] Consequently, preference initiated behavior can become part of the reasoning behind a decision.

Two additional claims can be included in the state friendly hypothesis identified by Grendstad et al. Kjønstad (1999, 97, author's translation) asserts that "the explanations of the possible state friendly [nature of the] Supreme Court is not to be found in individual characteristics [of the justices], but in structural characteristics [of the Court]". He points out that it is not the background of individual judges and how they vote in certain cases that are central, but the legal environment that may form in the Supreme Court if recruitment is predominantly from the state administration. The nature of the recruitment process will shape the collegial character of the Court over time, and thus have the potential to affect the outcome of cases if the composition becomes unbalanced. Schei (2004, 138) support this claim when he states that the composition of the court can be reflected in the outcome of a case, especially in non-unanimous decisions. It is also considered by Skoghøy (2011b, 15), who is of the opinion that the increase in judicial review is related to the broadening recruitment to the Court. However, contrary to Schei and Skoghøy, Smith (1997, 4) moderates the assumption of state friendly characteristics due to overrepresentation of former public employees and maintains a focus on the effect of individual preferences of judges.

From these assessments the following hypotheses can be established for the second level in the hierarchical model of judicial decisions:

> *h2.1*: Panels where justices with background from the Legislation Department are in majority are more likely to vote in favor of the state.
>
> *h2.2*: Homogenous panels where all justices were appointed by a Social-Democratic government are more likely to vote in favor of the state.

These hypotheses deal with the collegial nature of the Supreme Court. Analyses of the collegial impacts on voting have not been the major focus of studies of judicial decisions in the Norwegian Supreme Court to date, so rather than strict hypothesis testing the analysis at

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[61] A hypothesis relating to why some judges dissent more often than others is that it is because their perception of society and their basic judicial methodology is out of step with the majority, another reason stated is that these judges are poorer legal professionals. Both hypotheses, however, are unacceptable when considering that cases before the Supreme Court can have more than one legally justifiable solution (Smith 1975, 310; Østlid 1988, 19).

this level takes the form of exploration. Several authors have suggested that rather than being dependent upon the votes of the panel majority an individual justice may constrain the votes of the majority by threatening to dissent (e.g., Kastellec 2007; 2011a)

Importance of the case is another claim that can be added to the state friendly hypothesis. The justices' attitudes are expected to operate particularly strongly in salient cases (e.g., Collins 2008; Unah and Hancock 2006). Different areas of law may not be the direct cause of state friendly voting, but they can indicate whether some areas make the Court more prone to favor the state over individuals in its decisions. As pointed out earlier, Lund (1987, 215) has noted that when substantial state interests are involved one can generally disregard that the courts will rule in disfavor of the state. Social security law and tax law, which both fall within the general category *economic* cases, are two relevant examples of areas of law that are important for the state. This is mainly due to the significant impact the outcome in these cases can have on the state's revenue. Another interesting area of law is concerned with international agreements. The Supreme Court has a tendency to vote in favor of the state in cases concerning EU law and EEA law (Fredriksen 2011, 97). What constitutes substantial interests is not easy to determine, and neither is the relative importance of a case without reverting to subjective considerations. However, cases where the Government Advocate is representing the state can be considered of a higher importance than when the state is represented by another party. It is apparent that some areas of law are more important for the state than others.

To test these claims four additional hypotheses are established for the second level of the analysis:

h2.3: When substantial state interests are at stake the justices are susceptible to favor the state over private parties in civil cases where the state is a party.

h2.4: In cases where the Government Advocate represents the state the justices are more likely to vote in favor of the state.

h2.5: In cases regarding EU law and EEA law the justices are more likely to favor the state over private parties.

h2.6: In economic cases the justices are more likely to favor the state over private parties.

h2.7: The state is more likely to win if it is the appellant, i.e., the respondent.

4.5.2 Explaining the state friendly nature of the Court – a hierarchical model and hypotheses

Preference of public over private interests is, as already mentioned, central to the state friendly hypothesis. Lund (1987, 215) explained that even though the judicial branch of government is the enforcer of the state's authority, the Norwegian courts are primarily team players guarding the state's interests, the control function being secondary. Recalling the model established at the end of the previous chapter, the analysis of the state friendly hypothesis will be based on a two-level hierarchical model. Due to the exploratory nature of the analysis the hypotheses outlined above are of a somewhat general nature. Other factors than the ones listed in the hypotheses may influence the propensity to vote in favor of the state, but they take the form of exploration rather than strict hypothesis testing. The operationalization of the explanatory variables is outlined in the data chapter along with the control variables. Expectations regarding the impact of the control variables on the analysis are also discussed in chapter six.

The different hypotheses belong to different levels of the analysis. Table 4.1 provides an overview of the hypotheses and their placement in the hierarchical model. In the next chapter a formal overview of the two-level model and the method used for estimations is provided. In chapter six the explanatory variables and the control variables are presented together with their expected outcome based on previous analyses of judicial decisions in the Norwegian Supreme Court.

Table 4.1. State friendly hypotheses

Justice-level hypotheses

h1.1: The decision to vote in favor of the state in civil cases where the state is a party is affected by the nature of the previous legal career of the justices.

h1.2: Former employment with the Legislation Department increases the likelihood of voting in favor of the state

h1.3: Former employment with the Government Advocate increases the likelihood of voting in favor of the state.

h1.4: Former employment with the Director General of Public Prosecutions increases the likelihood of voting in favor of the state.

h1.5: The nature of the appointing government impacts the propensity for voting for or against the state.

h1.6: Oslo-born justices are more state friendly than other judges.

Panel-level hypotheses(panel)

h2.1: Panels where justices with background from the Legislation Department are in majority are more likely to vote in favor of the state.

h2.2: Homogenous panels where all justices were appointed by a Social-Democratic government are more likely to vote in favor of the state.

Panel-level hypotheses (case)

h2.3: When substantial state interests are at stake the justices are susceptible to favor the state over private parties in civil cases where the state is a party.

h2.4: In cases where the Government Advocate represents the state the justices are more likely to vote in favor of the state.

h2.5: In cases regarding EU law and EEA law the justices are more likely to favor the state over private parties.

h2.6: In economic cases the justices are more likely to favor the state over private parties.

h2.7: The state is more likely to win if it is the appellant, i.e., the respondent.

Chapter 5 - Method

The existence of data grouped at different levels in hierarchies is neither accidental nor ignorable (Goldstein 2011, 1) In this chapter the method for analysis of the state friendly hypotheses derived in chapter four is outlined and discussed.[62] The chapter opens with an overview of the benefits of multilevel modeling and hierarchical structured analyses. Then the issues arising from ignoring hierarchical structures are reviewed, before three different approaches for the assessment of whether a multilevel analysis is required for an analysis are considered. In section 5.2 a multilevel framework for analysis of the state friendly hypotheses outlined in the previous chapter is established, and a two-level hierarchical generalized linear model is presented. Finally, the validity of the research method is considered in light of the available data and theoretical framework.

5.1 Multilevel analysis

Many kinds of data have a hierarchical, clustered, or nested structure, and social research regularly involves problems that investigate the relationship between individuals and society. One can generally see "that individuals interact with the social context to which they belong, that individual persons are influenced by the social groups or contexts to which they belong, and that those groups are in turn influenced by the individuals who make up that group" (Hox 2010, 1). Multilevel data are structures that consist of multiple units of analysis, one nested within the other (Steenbergen and Jones 2002, 218). Individuals and groups can be defined at separate levels in this hierarchical system. The term 'multilevel analysis' indicate the application of statistical models for data that have two or more distinct hierarchical levels (Hox and Roberts 2011, 4). Several advantages are offered by multilevel models that ordinary single-level analyses cannot capture. In addition to allow independent variables at any level of a hierarchical structure, random effects for clusters and subjects can be added for higher levels in the hierarchy (Guo and Zhao 2000, 443; Hedeker 2010, 26).

The purpose of multilevel modeling, like ordinary regression analysis, is to model the relationship between a response variable and a set of explanatory variables. (Rabe-Hesketh and Skrondal 2012, 1). Agresti et al. (2000, 28) note that "in many applications [...] the

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[62] The introduction to multilevel analysis in this chapter assumes that the reader has a basic knowledge of logistic regression analysis and a general understanding of the application of statistics in the social sciences. For a general introduction to multilevel analysis see Goldstein (2011), Hox (2010), Leeuw and Meijer (2008a), Luke (2004), or Snijders and Bosker (2012). Guo and Zhao (2000) provides an excellent introduction to multilevel modeling for binary data.

dependency structure is more complex than the independent observations assumed by ordinary models for categorical or continuous variables". Thus, ignoring the relationships between members of a group and omitting the importance of group effects may render traditional statistical analyses invalid (Fielding and Goldstein 2006, 8). Contrary to traditional regression analysis multilevel modeling account for observations at different levels in a hierarchy to resolve the shortcomings of single-level analyses. "Multilevel analysis enables the derivation of information about relationships among measurements operating at different levels simultaneously (Fielding and Goldstein 2006, 9)." The theoretical argument for using multilevel modeling techniques is that much of what social scientists study is hierarchical in nature. To account for these structures the analytic techniques should also be multilevel (Luke 2004, 4). Snijders and Bosker (2012, 2) provides a useful description when they consider multilevel analysis as "a methodology for the analysis of data with complex patterns of variability, with a focus on nested sources of such variability". At each level of nesting there is variability that has a distinct interpretation. The goal of multilevel analysis is to account for variance in a dependent variable that is measured at the lowest level of analysis by considering information from all levels of analysis (Steenbergen and Jones 2002, 219).[63]

Analyses of judicial decisions can benefit from the multilevel approach, seeing that the nature of the decisions conforms to the multilevel framework both on an empirical and a theoretical level. Judicial decisions can be viewed in terms of a hierarchically structured system where judges are nested within panels, interacting with, influencing, and being influenced by each other. There is a relationship between the variables characterizing the individuals and the variables characterizing the panels, or groups. Thus, the statement that "[f]ixed effects models, which assume that all observations are independent of each other, are not appropriate for analysis of […] clustered […] data" holds for studies of judicial decisions (Hedeker 2010, 26). Multilevel analysis "encourages systematic analysis of how covariates measured at various levels of a hierarchical structure affect the outcome variable and how the interactions among covariates measured at different levels affect the outcome variable" (Guo and Zhao 2000, 444). By utilizing single-level analysis of judicial decisions some of this variability

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[63] There are also models investigating the effect of individual variables on group outcome, where the outcome variable is at the highest level in the analysis (Hox 2010, 8). This can also be modeled in other ways. Notably, in some variations of multiple membership structures units at the individual level can become a higher-level units, while higher-level units become lower-level units when groups are considered as multiple members of individuals (Goldstein 2011, 259-260).

would not be captured. In addition, there are several issues that may arise if a hierarchical data structure is ignored.

Hierarchical modeling and related methods have not been prominent in the study of judicial decisions. Although several scholars present arguments in favor of integrated models of judicial behavior (e.g., Brace and Hall 1993; 1997; Dyevre 2008; 2010), the extent to which these methodological approaches have been applied in research has been limited. In the American literature on judicial behavior multilevel analysis is sometimes used, but rarely to account for more than two theoretical positions at the time (e.g., Bartels 2009; 2011). Studies of Norwegian Supreme Court decisions are in a similar position, considering that the hierarchical structure of the data is generally ignored or accounted for in single-level models using robust standard errors. Two recent multilevel analyses by Berntsen (2012) and Skiple (2012) are the exceptions.

5.1.1 The issue of hierarchy

Ignoring the clustering of data can lead to incorrect standard errors, confidence intervals, and significance tests, and carries significant statistical costs (Goldstein 2011, 3). Traditional linear and binary regression models tend to underestimate the standard errors when the structure of the data is hierarchical and the assumption of independently and identical distributed observations is ignored (Guo and Zhao 2000, 444; Leeuw and Meijer 2008b, 1). Historically, multilevel structures have been analyzed by aggregating or disaggregating variables to a single level of interest followed by some form of *standard* (single-level) analysis (Hox 2010, 3). Failing to account for the multilevel nature of the data may lead to erroneous conclusions, because independence assumptions are likely to be violated (Snijders and Bosker 2012, 6). Thus, analysis of variables from different levels in a hierarchy at one single common level is inadequate, and leads to two distinct types of problems. The first is statistical and is concerned with aggregation and disaggregation of data. If data is aggregated from many sub-units to fewer values for higher-level units information is lost, and the statistical analysis loses power. Disaggregation of data leads to the opposite problem. By disaggregating data for a few higher-level units to many sub-level units, significance tests will reject the null-hypothesis far too often, leading to spurious results (Hox 2010, 3; Leeuw and Meijer 2008b, 1).

The second problem is conceptual and is concerned with the fallacy of misinterpreting results by analyzing the data at one level and formulating conclusions at another level.[64] *Ecological fallacy*, which the interpretation of aggregated data at the individual level, is the most common fallacy and is often used as a definition of the conceptual problem (Hox 2010, 3; Leeuw and Meijer 2008b, 1). In essence, the conceptual problem deals with the fact that a correlation between macro-level variables cannot be used to make assertions about micro-level relations (Snijders and Bosker 2012, 15). An interesting paper by Wilson (2006) reviews the effect ecological fallacy can have on studies of judicial behavior through a reanalysis of Segal and Spaeth's (2002) attitudinal model. He finds that ecological fallacy leads to a significant reduction in the model's explanatory power when it is accounted for in the analysis. There are also other potential fallacies that are discussed in the statistical literature. An example is the *atomistic fallacy*, which is the formulation of inferences at a higher level based on analyses performed at a lower level (Hox 2010, 3).

5.1.2 Assessing the need for a multilevel model

The need for a multilevel model in an analysis can be assessed empirically, statistically or theoretically. Empirically, the intraclass correlation coefficient can measure the proportion of variance in the dependent variable that is accounted for by groups. By assessing the intraclass correlation one can determine whether a multilevel model would be useful in analyzing the data in question. The statistical justification for a multilevel model is concerned with the nature of the observations. If the assumption of independent error terms is violated due to nested structures in the data, ordinary regression analysis will produce standard errors that are too small, potentially leading to an increased frequency of type I errors.[65] Multilevel models account for the clustering of the data, and will produce unbiased errors and parameter estimates. The theoretical justification for a multilevel model is based on the notion that researchers should use multilevel statistical models when the theoretical framework or hypotheses are composed of constructs operating and interacting at multiple levels (Luke 2004, 17-23).

Multilevel models enable the combination of multiple levels of analysis in a single comprehensible model by specifying predictors at different levels (Steenbergen and Jones

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[64] Fallacies are a problem of inference and not of measurement (Luke 2004, 6).
[65] A type I error is the rejection of the null-hypothesis when it is true. i.e., asserting the presence of a condition when it is actually absent.

2002, 219). The propositions from Dyevre (2010) and Brace and Hall (1997) for integrated models of judicial behavior fits well within this framework. Theoretical explanations spanning several levels can be analyzed without the probable misspecification of models composed of only a single level. Analyzing integrated models of judicial decisions in a single-level analysis would violate several of the basic assumption for a regression analysis mentioned above. In multilevel models one can assess the average correlation between variables within groups and between groups, and account for the biases in the standard errors (Hox 2010, 4-5).

Another feature of multilevel models is the ability to explore causal heterogeneity. By specifying cross-level interactions it is possible to determine whether the causal effect of lower-level predictors is conditioned or moderated by higher-level predictors (Steenbergen and Jones 2002, 219). This is particularly interesting when considering the relationships and interactions inherent in judicial decisions. Keeping that in mind, a multilevel model potentially entails significant benefits compared to analysis carried out at only one level.[66]

5.2 Establishing a multilevel framework

The three theoretical approaches identified in chapter three and four can be fitted to a two-level hierarchical model, where judges are nested in panels. In this structure the dependent variable, the vote of the individual justices', is a variable measured at the first level.[67] The logic behind the model is that the effects legal and structural variables have on individual votes can be considered. This would answer the critique from legal scholars regarding social scientists ignorance of legal influences on judicial decisions. In addition to consider the effect of case related variables, the analysis can also account for some of the other structural factors in judicial decision-making, such as the clustering of judges in panels.

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[66] Identifying and accounting for cross-level interactions and random slopes is beyond the scope of this thesis. The state friendly hypothesis has not been tested in a multilevel model prior to this study on decisions of the Norwegian Supreme Court. Due to the exploratory nature of the analysis only random intercepts are applied to the model.

[67] Variables relating to characteristics of the judges could conceivably be placed at a higher level in the hierarchical structure if case outcomes served as the dependent variable, e.g., *supra* note 63. Aiming for parsimony rather than complexity, the judges are placed at the first level in the hierarchy and the justices' votes serve as the dependent variable. An analysis of case outcomes rather than the votes of the individual justices would require a multiple membership model, which is beyond the scope of this thesis.

5.2.1 A hierarchical generalized linear model

Considering the dichotomous dependent variable and multilevel nature of the judicial decisions' data a hierarchical generalized linear model, more specifically a logistic regression model, will form the basis for the analysis.[68] There are two specific reasons for using logistic regression rather than linear regression. A meaningful model for dichotomous variables provides fitted values between one and zero, and thus has a restricted range of possible outcomes. Linear regression can take the fitted values outside the allowed range, which would not result in a meaningful model. The second reason is that there is often some natural relation between the mean and the variance of the distribution for discrete variables, which can lead to a relation between the parameters in the fixed part and the parameters of the random part of the model (Snijders and Bosker 2012, 289-290).

Ordinary regression models are extended in two ways by generalized linear models: "(1) it allows for non-normal responses, and (2) it allows modeling a function of the mean rather than the mean itself (Agresti et al. 2000, 29)." The problem of non-normality distributed variables is approached by generalized linear models by including the necessary transformations and the choice of the appropriate error distribution explicitly in the statistical model (Hox 2010, 113). Error terms are assumed to follow a logistic distribution and the random effects a normal distribution (Hedeker 2008, 241). "The random effects represent unobserved heterogeneity and induce dependence between units nested in clusters (Skrondal and Rabe-Hesketh 2009, 659)." When models include random effects they are usually referred to as generalized linear mixed models, which can be viewed as an extension to the generalized linear models that only allows fixed effects in the predictor (Agresti et al. 2000, 29).[69]

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[68] The dependent variable, whether a judge votes for or against the state, is coded dichotomously with the value 1 indicating a vote pursuant of the state and the value 0 indicating a vote against the state.
[69] Hierarchical generalized linear mixed models are sometimes also referred to as generalized linear mixed-effects models.

Generalized linear models are defined by three components: (1) an outcome variable with a specific error distribution (in this case binominal); (2) a linear additive predictor; and (3) a link function (in this case the logit link). The options of choosing a non-normal error distribution and using a nonlinear link function are extensions to the standard linear regression models (Hox 2010, 113-114). A two-level non-linear model can be written, using algebraic notation, in the general form

$$y_{ij} = \pi_{ij} + r_{ij}$$

where π_{ij} is the sum of the probability of the outcome y_{ij} and r_{ij} a residual (Snijders and Bosker 2012, 295).[70]

The probability π_{ij} is estimated via a nonlinear link function for the linear predictor, defined by

$$\pi_{ij} = f(\gamma_{00} + \gamma_{10}x_{ij} + u_{0j}),$$

in which π_{ij} is the expected value for the ij-th level-one unit, or, stated differently, level-one unit i in level-two unit j. f is a nonlinear function of the linear predictor ($\gamma_{00} + \gamma_{10}x_{ij} + u_{0j}$). To complete the model the distribution for the observed response $y_{ij}|\pi_{ij}$ has to be specified (Goldstein 2011, 111). The probability of a response equal to one can be defined as $\pi_{ij} = Pr(y_{ij} = 1)$, which in this case is the Bernoulli distribution (Guo and Zhao 2000, 446).

5.2.2 Developing a two-level model

Figure 5.1. A two-level model

Panels

Judges
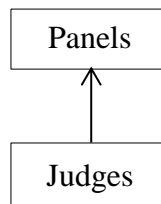
The generalized linear model for dichotomous data can be specified by a logistic regression model. The model has a binominal (μ) distribution with mean μ, and the link function is the logit function given by $\pi = \text{logit}(\mu)$. Extending the generalized linear model to a multilevel structure, the probability distribution for π_{ij}, which is the probability of a response equal to

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[70] The notation is as follows: i denote the level-one units and j denote the level-two units.

one for the observed response y_{ij} changes to (μ, n_{ij}). The mean and logit link function remains the same as in the single-level logistic model (Hox 2010, 113, 117).[71]

When multilevel data is analyzed the standard procedure is to begin with a simple model, before expanding it in several interconnected steps to include multiple random effects. The simplest case of a hierarchical model is a random effects analysis of variance model, which is an unconstrained model also known as an *empty* model. Explanatory variables do not figure in this model, and consequently it only contains random groups and random variations within groups (Snijders and Bosker 2012, 49). Estimation of an unconditional, or empty, model is usually the first step in a multilevel analysis.

For a two-level model the *empty* model is designated by the following formula

$$y_{ij} = \gamma_{00} + u_{0j} \qquad\qquad \text{(empty model)}$$

where γ_{00} designates the probability distributions for the group-dependent probabilities and u_{0j} the random effects accounting for variation at level two.[72] In other words, the only fixed-effect (γ_{00}) is the average value of the dependent variable across all subjects, and the error term can be viewed as the variability between panels (u_{0j}) (Luke 2004, 20-21). From the empty model the respective variance of the residual error can be obtained ($\sigma^2_{u_0}$), and the intraclass correlation can be estimated to identify the proportion of variance explained at the panel level. Intraclass correlation indicates the proportion of the variance explained by the grouping structure in the population, and can help decide whether a multilevel model is required (Hox 2010, 33-34; Luke 2004, 18-19). That is not to say that the intraclass correlation measures the strength of a multilevel model over ordinary least squares, or similar, regressions. It would be incorrect to interpret the coefficient as a measure of the magnitude of difference between a multilevel model and a single-level model (Roberts et al. 2011, 220-221) For the panel level the intraclass correlation can be estimated by the formula

$$\rho = \frac{\sigma^2_{u_0}}{\sigma^2_{u_0} + \sigma^2_e}.$$

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[71] n_{ijk} indicates the number of trials, and if there is only one trial the data is dichotomous (Hox 2010, 117).
[72] The model does not include a separate parameter for the level-one variance This is because the level-one residual variance of the dichotomous outcome variable follows directly from the success probability, i.e., var(e_{ij}) $= \pi_{ij}(1-\pi_{ij})$ (Snijders and Bosker 2012, 291, 295).

Following the estimation of the unconstrained model and the assessment of the intraclass correlation explanatory variables are added to the model.[73] Variables at the individual level are added first, before variables at the panel level are included. Model fit and changes to the intraclass correlation are assessed at each step in the process. For the variables at the second level random effects can be specified in the form of random intercepts and random slopes.[74] While it is normal to include random intercepts in multilevel models, random slopes require strict theoretical justifications before being included.

Expansions of the model are done in several interconnected steps, depending on the empirical and theoretical justifications for the analysis. In the case of one explanatory variable the following formulas (adapted from Snijders and Bosker 2012, 90) apply for the different levels when employing a multistage formulation:

$$Y_{ij} = \beta_{0j} + \beta_{1j}x_{ij} \qquad \text{(level-one)}$$

$$\beta_{0j} = \gamma_{00} + u_{0j} \qquad \text{(level-two model for intercept)}$$

$$\beta_{1j} = \gamma_{10} + u_{1j} \qquad \text{(level-two model for slope)}$$

With substitution, the reduced form of the multistage formulation of a two-level model with random intercepts will be as follows:

$$y_{ij} = \gamma_{00} + \gamma_{10}x_{ij} + u_{0j} \qquad \text{(two-level random intercept model)}.$$

Including a logit link function provides the generalized linear formulation of the combined two-level random intercept model:

$$y_{ij} = \text{logistic}(\pi_{ij})$$

$$\log[\pi_{ij} / (1-\pi_{ij})] = \gamma_{00} + \gamma_{10}x_{ij} + u_{0j},$$

or alternatively as

$$\pi_{ij} = \text{logistic}(\gamma_{00} + \gamma_{10}x_{ij} + u_{0j}) \qquad \text{(two-level random intercept with logit)}.$$

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[73] If a latent variable approach is used, which is detailed in sub-section 5.2.3, the standard logistic distribution for the level-one residual implies a variance (σ_e^2) of $\pi^2/3$, and the formulas for estimating the intraclass correlation outlined above can be used to estimate the proportion of the variance explained at each level (Snijders and Bosker 2012, 305).

[74] Random slopes are sometimes referred to as random coefficients. Here the analysis is limited to the inclusion of random intercepts. *See supra* note 66.

5.2.3 A latent variable approach

The hierarchical generalized linear model can be formulated as a threshold-model in which the dichotomous outcome variable y is conceived of as the result of an underlying non-observed continuous variable y^*. y is equal to one if the non-observed variable y^* is larger than some threshold (Guo and Zhao 2000, 447; Snijders and Bosker 2012, 303). Goldstein (2011, 129) point out that when the outcome variable is truly discrete, such as mortality or voting, the threshold model would seem to have less justification. There is, however, not a significant bias caused by the application of a threshold model.

A threshold-model can help ease the interpretation of generalized linear models. To represent a logistic regression model, the level-one residual of the latent variable must have a logistic distribution (Snijders and Bosker 2012, 304). The unobserved latent variable for a logistic distribution has a mean of zero and a variance of $\pi^2/3$ (Hedeker 2008, 240). In logistic regression the underlying latent variable is rescaled when new explanatory variables are added to the model, so the lowest level residual variance (σ_e^2) will always equal $\pi^2/3$. A level-one residual is not included in the model because σ_e^2 is a scale factor set to 1.00 when a binominal distribution is applied. The variance of a logistic distribution with a scale factor 1.00 is $\pi^2/3$, yielding a constant lowest-level residual variance (Hox 2010, 128, 133-134). Thus the following formula represents the two-level random intercept model:

$$\pi_{ij} = \text{logistic}(\gamma_{00} + \gamma_{10}x_{ij} + u_{0j}\,[+\,e_{ij}]).$$

If the logistic model is presented as a threshold-model, the formula for estimating the intraclass correlation in sub-section 5.2.2 can be applied directly. The advantage of this approach is that the residual intraclass correlation can be estimated by simply extending the definition detailed in sub-section 5.2.2 (Snijders and Bosker 2012, 305).

5.2.4 Cross-classification and multiple membership structures

A possible extension to the two-level hierarchical generalized linear model is the inclusion of cross classification and multiple membership structures, which were briefly considered in section 5.2 in relation to alternative nesting structures. The assumption of the multilevel structure outlined above, following Snijders and Bosker (2012, 205), is "that each lower-level unit is perfectly nested in one, and only one higher-level unit". This is a rather weak assumption considering that reality is often far more complicated. Underlying structures are

often too complex to be fitted in a strict nested structure (Browne, Goldstein, and Rabash 2001, 103). Judicial behavior is one example, where the same lower-level units belong to several higher-level units.

Hierarchies analyzed in the social sciences are often imperfect. Units may belong to more than one unique higher-level unit (multiple membership), or uniquely to a higher-level unit of one type while simultaneously belonging to a unique higher-level unit of a different type, which are not nested (cross-classified) (Snijders and Bosker 2012, 205). Chung and Beretvas (2011, 13) found that the consequence of using regular multilevel analysis on multiple membership structures can lead to substantially underestimated intraclass correlation coefficients, resulting in researchers selecting traditional regression models over multilevel models. Although it is beyond the scope of this thesis to include these types of structures in the analysis they should be considered for future studies of judicial decisions when imperfect hierarchical models form the framework for analysis.[75] An example is in studies of non-unanimous judicial decisions where the intraclass correlation is frequently close to zero. In the analysis in chapter seven the imperfect nested structure is taken into consideration in the interpretation of the results, but it is not explicitly modeled in the statistical analysis.

5.3 Validity of the research method

Given the hierarchical structure of the data, an analytical approach that takes the nested structure into consideration seems to be appropriate. Both theoretical and statistical justifications for a multilevel approach are present, and as indicated by the discussions in this chapter, not taking the hierarchical structure into account could lead to biased estimates. A single-level analysis of the data on judicial decisions within the theoretical framework presented in this thesis would by definition result in ecological fallacy. Thus the only viable option besides a multilevel statistical analysis is a qualitative analysis of judicial decisions. However, if the aim is to estimate the extent to which a political element is inherent in the application of law it is, as Smith (1990, 427) viewed it, only through an extensive analysis of judicial decisions the leeway available to the courts can be described. This will require a statistical analysis.

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[75] For an extensive overview of cross-classified and multiple membership models and their applications see Beretvas (2011), Fielding and Goldstein (2006), chapters 12 and 13 in Goldstein (2011), and chapter 13 in Snijders and Bosker (2012).

To conclude the overview of the methodological approach a brief discussion of the choice to model case predictors and panel predictors at the same level is required. Although panels and cases are not equivalent, they can be placed at the same level in the hierarchical model. Panels can be considered in terms of being a case attribute. Thus the model is not miss-specified if both the panel-specific predictors and the case-specific predictors are considered to be attributes of the cases.

Chapter 6 - Data

The operationalization of the predictors used in the analysis is presented in this chapter. Explanatory factors and controls are outlined in turn based on their placement in the hierarchical structure. The theoretical justification for the inclusion in the analysis is specified for each variable presented, in addition to their expected direction and how they are coded. In conclusion, a brief discussion of the validity and reliability of the data is provided.

6.1 Judicial decisions

Data on judicial decisions used in this thesis is predominantly provided by the Political Behavior on the Supreme Court of Norway database (DORANOH) established by Grendstad, Shaffer, and Waltenburg (2012a). The information on judicial decisions in this database is retrieved from decisions published in the Lovdata Foundation legal information system and decisions published in *Norsk Retstidende*. Data characterizing the individual justices in the database were acquired from publicly available information and personal inquiries to the relevant agencies and individuals.[76]

The analysis includes 445 civil cases decided in five-justice panels from 1990 to 2011 where the state was a party to the proceedings, appearing either as a plaintiff or respondent.[77] Explanatory variables and control variables were selected based on the hypotheses outlined in chapter four and prior studies of judicial decisions. The majority of the variables belonging to the first level, the justice-level, were chosen specifically to test the results of existing research on judicial behavior in the Norwegian Supreme Court by Grendstad et al. (2011b; 2011c). The judge-specific variables used in the analysis are based on the corresponding variables coded in the DORANOH database.

Case-specific variables were also retrieved from the database, with the exception of five variables. Application of EU and EEA law in decisions is based on the categorization presented by Fredriksen (2011). The complexity variable was coded primarily by the author, with help from research assistant Nesli Cin for the period 1990 to 2000. Whether the state appeared as a plaintiff or respondent in consensus cases was also coded by the author, and this

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[76] For a detailed overview of how these data were retrieved see Grendstad et al. (2011b; 2011c).
[77] See appendix A for a list of the cases included in the analysis.

identification served as the basis for the selection of cases for the analysis.[78] The presence of the Government Advocate and the representation of the state by the Office of the Government Advocate were also coded by the author. The panel-specific variables consist of aggregations of the individual-level variables from the DORANOH database compiled by the author.[79]

6.1.1 Civil cases

Civil cases are selected for the analysis of the 'state friendly' hypothesis because most civil cases that appear before the Supreme Court in Norway are questionable (Schei 2010; 2011). Following the advice of Kjønstad (1999, 106-107), some constraints are considered for the selection of cases. Other analyses have limited themselves to cases that are considerably questionable and cases where significant state interests are at stake. For this analysis all civil cases where the state was a party to the proceedings, decided in five-justice panels, are included. Areas of law that are considerably questionable are controlled for through the use of case-specific variables within a hierarchical framework.

The selection of cases that are considerably questionable tends to be a subjective endeavor. Thus, to avoid subjectivity, the only requirement for selection is that the state was a party to the proceedings. This excludes cases where municipalities (*kommuner*) were party to proceedings against private party litigants, and also cases where municipalities appear as both plaintiff and respondent. Some analyses of state friendliness have included municipalities as an entity representing the state, but those cases are excluded from this study.[80] The reason is that it is difficult to determine what constitutes state friendly voting when two municipalities meet in court. To avoid subjective classifications of decisions in cases where municipalities, and not the state, are party to proceedings against private party litigants are excluded. Criminal cases are also left out of the analysis because the state generally does not have a particular interest vested in criminal cases adjudicated by the Court, as these cases typically deal with due process protection.

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[78] The possible outcomes of a case decided in five-justice panels where a state win or loss is recorded are the following: 5-0; 4-1; 3-2; 2-3; 1-4; and 0-5.

[79] Appendix B details the procedure for coding additional variables.

[80] See Skåre (1999).

6.1.2 Selection bias

The Norwegian Supreme Court has a discretionary jurisdiction similar to that of the United States Supreme Court. An Appeals Selection deals with both interlocutory orders and decisions; the Committee might decide the matter, refuse or grant leave to appeal (Sunde 2011a, 6). The Court's selection procedure raises the potential for selection bias in the inferences drawn from its cases (Kastellec and Lax 2008, 408). According to Kastellec and Lax (2008, 436) scholars can draw conclusions within a single set of cases, so long as it is recognized that any effects of case factors so measured cannot be said to represent general preferences of the judges over all cases or as applied to other sets of cases. The main problem is that inferences drawn from a selection of cases only represent a portion of the cases considered for adjudication by the Court. An example would be to apply the results from an analysis of civil cases in a prediction of the outcome of criminal cases.

There is another issue related to the selection of cases with regard to inferences. Kastellec (2012, 1) assert that "whether judicial diversity has large-scale consequences depends on whether it leads to differences not just in individual voting by judges, but also to differences in case outcomes". Considering that the votes of the justices rather than case outcomes serves as the basis for the statistical analysis, inferences can be made for the effect of various predictors on individual justices' votes but not for the effect of individuals on case outcomes. Estimations of individual effects on case outcomes require a different analytical framework.[81]

Acting as a court of last resort, the Norwegian Supreme Court only adjudicates cases where the decision will have an impact beyond the case in question (Schei 2010, 13; 2011, 7).[82] Cases are selected because they are complex, controversial, or in some other way considered important. The selection of cases varies over time: a given area of law might receive attention for a shorter period of time before disappearing from the docket for a prolonged period. When the Court deems that the issues within that area of law have been clarified, it moves on to other areas of concern. Thus the precise selection strategy employed by the justices will affect the set of Supreme Court cases observed in a given area of the law in a given time period (Kastellec and Lax 2008, 408). Consequently, "conclusions about judicial behavior may vary

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[81] *See supra* note 67 and section 5.2.4.
[82] Cases can also be granted leave to appeal if there are circumstantial reasons for a Supreme Court decision on the matter (Skoghøy 2008, 491).

by court, by judge, and by case, or even by the time period in which decisions are rendered"
(Friedman 2006, 271).

6.1.3 Five-justice panels

Five-justice panels were selected for the analysis due to the inclusion of a panel-level in the hierarchical model. The explanatory variables at this level are easier to interpret when only decisions in five-justice panels have to be considered. For decisions in *Grand Chamber* and plenary session a threshold for influence would have to be specified rather than a simple dichotomous variable indicating whether the panel is homogenous or not.[83] This is also the reason for not including a variable controlling for cases where constitutional issues are present. If the Court considers a case concerning the relationship between law and constitution they are likely to meet in *Grand Chamber* or plenary session. A variable indicating the presence of a constitutional issue in a case would thus fail to signify the importance of constitutional issues if the sample only consists of decisions in five-justice panels. The number of cases heard in *Grand Chamber* and plenary session are low enough that their absence will not have a significant impact on the other explanatory variables. The consequence for the analysis when excluding decisions in *Grand Chamber* and plenary session is that inference can only be made for decisions in five-justice panels.

6.2 Variables

In addition to the outcome variable, 24 variables are included in the analysis. The structure of the following sub-sections is reflecting the hierarchical structure of the data and the corresponding hypotheses listed in table 4.1. First the explanatory variables for each level in the model are outlined, before the control variables are presented in relation to the level they correspond to. The theoretical justification for including each variable is presented briefly, in addition to the expected direction of the outcome and how they are coded for the analysis. A summary of the variables included in the analysis is presented in table 6.1.

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[83] The utilization of a threshold in five-justice panels is also an interesting notion, but the theoretical justification for coding Norwegian decisions in this fashion is limited.

Table 6.1. Variable descriptions

Variable	Operationalization	Hyp. relationship	Mean
justiceforstate	1 = Pro state 0 = Against state	(dep. variable)	.638
Level-one explanatory variables			
flegisdep	1 = Former employment leg. dep. 0 = No	+	.422
fgovadv	1 = Former employment Gov't advocate 0 = No	+	.374
fpubpros	1 = Former employment Pub. pros. 0 = No	+	.074
osloborn	1 = Born in oslo 0 = Elsewhere	+	.348
appgov	1 = Social democratic appointment 0 = Non-socialist	+	.636
Level-one control variables			
fprivprac	1 = Private practice 0 = No	-	.442
lawprof	1 = Law professor 0 = No	-	.148
fjudge	1 = Former judge 0 = No	+	.462
female	1 = Female 0 = Male	(no expected direction)	.244
c_age	Age measured in years	+	.022
interim	1 = Interim justice 0 = Associate justice	+	.035
chief	1 = Chief 0 = No	(no expected direction)	.037
c_seniority	Time spent at the Supreme Court	+	.012
post2002	1 = Appointment post 2002 0 = Appointment pre 2002	(no expected direction)	.157
Level-two explanatory variables (panel)			
p4legisdep	1 = Four-justice majority (flegisdep) 0 = No	+	.077
pappgov	1 = Homogenous panel (appgov) 0 = No	+	.059
Level-two control variables (panel)			
pchief	1 = Chief in panel 0 = Chief not in panel	(no expected direction)	.187
Level-two explanatory variables (case)			
govadvocate	1 = Gov't Advocate present 0 = Not present	+	.029
plaintiff	1 = State is plaintiff 0 = State is respondent	+	.330
econ	1 = Economic issue 0 = No	+	.444
eueea	1 = Case concerning EU or EEA 0 = No	+	.029
Level-two control variables (case)			
c_complex	Complexity measured by legal references	(no expected direction)	-.007
dissent	1 = Dissent 0 = Consensus	+	.237

6.2.1 The dependent variable

The dependent variable indicates whether the justices voted for or against the state in civil cases decided in five-justice panels where the state was a party to the proceedings, appearing either as a plaintiff or respondent (*justiceforstate*). The variable is dichotomous, with the value 1 indicating a vote pursuant of the state and the value 0 indicating a vote against the state. For a hierarchical model the effect of individual-level predictors on justices' votes is interesting, especially compared to the effects of variables at higher levels in the analysis. The amount of variance explained by the panel levels is also of a particular interest. At this point it is important to recall that the consequences of judicial diversity depend on whether it leads to differences not only in the votes of individual justices, but also to differences in case outcomes (Kastellec 2012, 1). Decisions are not merely a collective expression of individual preferences or the application of legal rules. Case outcomes are a result of complex interactions of rules, preferences and structures (Brace and Hall 1993, 26). In studies of the votes of individual justices it is not possible to assess whether the predictors cause differences not only in individual behavior, but also in case outcomes.

6.2.2 Level-one explanatory factors – justice predictors

The explanatory variables included at the first-level of the hierarchical model account for the attitudinal and personal attributes approaches to studies of judicial decisions. Personal preferences and attitudes cannot be measured reliably by direct measures. Thus, indirect measures, or proxies, are frequently applied by researchers. The nature of the justices' previous legal career has been identified as a probable cause of state friendly voting on the Norwegian Supreme Court (e.g., Kjønstad 1999). Grendstad et al. (2011b) tested the effect of prior employment with the *Legislation Department*, the *Office of the Government Advocate*, and the *Office of the Director General of Public Prosecutions*. These variables are also included here (*flegisdep*, *fgovadv*, *fpubpros*). The three variables are coded dichotomously, where the value one indicates former employment with a public agency and zero no former employment.

An indication of the appointing government is the fourth variable included at the first-level of the model (*appgov*). In attitudinal approaches it is as already mentioned necessary to include proxies for measures of ideology and personal preferences. These attributes cannot be measured directly, and consequently indirect measures have been developed. In the

international literature appointing government is established as an appropriate proxy for measuring basic political preferences (e.g., Segal and Spaeth 2002). Grendstad et al. (2011b; 2011c) have found significant effects of ideology on the votes of Supreme Court justices in decisions in the Norwegian Supreme Court when applying appointing government as a proxy for ideology.

However, the use of appointing government as a proxy is disputed. Supreme Court justices' Schei (2011) and Skoghøy (2011a) have criticized the approach taken by Grendstad et al. claiming that if they knew the appointment procedure it would become obvious that appointing government as a measure of ideology is essentially pointless. Schei and Skoghøy do have some valid points, which are also dealt with by Grendstad et al. (2012b) in a more recent paper where they develop an alternative measure of ideology based on expert surveys. Due to the fact that the new measure only covers the current members of the Court, appointing government is used as a proxy for ideology in this analysis.

The expectation is that the effect of the appointing government is moderated by the other variables introduced at the judge-level. Like the previous variables introduced to the analysis the measure of the appointing government is coded as a dichotomous variable where the value one indicates an appointment by a social-democratic government and the value zero indicates an appointment by a non-social democratic government. Judges appointed by social-democratic governments are expected to have a higher inclination to favor the state over private parties than judges appointed by non-social democratic governments.

Whether or not a justice was born in Oslo constitutes the basis for the final hypothesis at the judge-level. Background characteristics are central to decisional behavior according to attitudinal perspectives, and one such measure is the place of birth. Grendstad et al. (2011c, 10) identifies the historical tension between center and periphery in the Norwegian political history as a potential extra-legal factor influencing decisions. The center-periphery effect is expected to be caused by the concentration of elite players in the capital (Shaffer, Grendstad, and Waltenburg 2011, 18). Justices born in Oslo are anticipated to be more likely to side with the government due to an Oslo-cephalic outlook. The variable is dichotomous, with the value one indicating that a judge was born in Oslo and the value zero indicating that the judge was born in another part of the country (*osloborn*).

6.2.3 Level-two explanatory factors – panel predictors

To test the effect of collegiality panel-specific explanatory variables are included in the analysis. This is the third aspect of the state friendly hypothesis discussed in chapter four. Chief Justice Schei (2004, 138) and Kjønstad (1999, 97) have pointed out that the legal environment of the Court can have an impact on the decisional behavior of the justices. This is also mentioned by Skoghøy (2011b, 15), who views the increase in judicial review by the Supreme Court as a consequence of the broadening recruitment to the Court. U.S. research also suggests that the context in which judges decide cases has a significant impact on their decisions (e.g., Meinke and Scott 2007). A judge is not only expected to be influenced by her own legal views, but also those of her colleagues (Kastellec 2011b, 378).

Two variables are included at this level (*p4legisdep, pappgov*). They are aggregations of individual-level variables, and indicate whether a panel is homogenous, in case of the aggregation of appointing government, and dominated by a majority, in case of the aggregated variable indicating former employment with the Legislation Department. Both variables have an expected direction where there is a positive increase in the probability of an outcome pursuant of the state. They are coded dichotomously, with the value one indicating a homogenous panel or majority panel, and the value zero a heterogeneous panel.

6.2.4 Level-two explanatory factors – case predictors

Explanatory factors at the case-level are included in the analysis to test the effect of different legal-variables and case-related variables to see whether legal constraints influence the outcome of judicial decisions. Several recent studies have investigated the influence of case-level factors and legal variables on judicial decisions to account for the effect of the law in decisions (e.g., Bartels 2011; Benesh and Spaeth; Gillman 2001; Lax and Rader 2010; Wahlbeck et al. 1999). The first factor included at the case-level is a dichotomous variable indicating the presence of the Government Advocate (*govadvocate*).[84] Important cases are expected to increase the likelihood of an outcome pursuant to the state. The presence of the Government Advocate rather than another lawyer from the Office of the Government Advocate or another entity representing the state's interests can be taken as an indication of

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[84] The Office of the Government Advocate represents the public party and the public interests in civil cases appearing before the courts, and answers to the Office of the Prime Minister. The Government Advocate provides legal advice to the government and the ministries, but is prohibited to perform any work for the Parliament or any of its offices or institutions (Regjeringsadvokaten 2012).

importance. In the United States, Bailey, Kamoie, and Maltzman (2005) and McAtee and McGuire (2007) found that the presence of the United States Solicitor General has a significant influence on the Supreme Court. Their results suggest that the Solicitor General has a direct impact on decisions reached by the Court; not only as an apolitical legal expert but also as a political actor. The Norwegian Government Advocate has a similar position relative to the Supreme Court, and consequently a similar impact on Court decisions is expected.[85]

Whether the state appears as a plaintiff or respondent is the second explanatory variable included at the case-level (*plaintiff*). In the majority of the civil cases appearing before the Supreme Court the state is the appellee, meaning that it won in the previous instance. The probability of a result pursuant to the state's interests is thus higher than for the appellant (Fagernæs 2007). Government Advocate Fagernæs (2007) has explained that the state is restrictive when it comes to appealing to the Supreme Court, and as a result it is expected that the state wins more cases than it loses. The variable is coded dichotomously, with the value one indicating that the state is the appellee and the value zero indicating that it is the appellant.

The higher limit on expenditures and greater resources of the state relative to private parties is another of the factors expected to influence case outcomes (e.g, Ryssdal 2007). Economic cases are by definition important for the state, and it is expected that the presence of economic issues will affect outcomes (*econ*). Grendstad et al. (2011c) identified cases concerning economic interests as a field where political preferences are likely to surface in non-unanimous decisions. However, Tellesbø (2006, 77) notes that in tax related cases the resources are more evenly distributed, which leads to a lower victory rate for the state. Skiple (2012) support this notion when indicating that some economic cases are more salient than others. This differentiation is, however, not applied here. There is not enough data on legal categories for decisions in civil cases to test for different economic issues, such as tax-law and social-security law. Economic issues are measured by a dichotomous variable coded one if the case concerns an economic issue and zero if not.

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[85] The variable *ogovadvocate* is included in one of the models in the analysis in place of the variable *govadvocate*. This variable indicates whether the state is represented by an advocate from the Office of the Government Advocate. It is coded in the same way as the *govadvocate*-variable.

Fredriksen (2011) has suggested that the outcome of Supreme Court decisions in cases dealing with EU law and EEA law can be taken to indicate that the Court is exhibiting a state friendly nature.[86] This is based on the fact that the state has won the majority of important cases where EU and EEA law have been the central issues. However, Fredriksen (2011, 97) also notes that the state has not appealed several cases where principal questions were at stake, which suggests that the statistics may not provide a complete picture of the role EU and EEA law plays in court cases. None the less, this is another important area of law, which may indicate whether the Court has a state friendly inclination. The variable is dichotomous, coded one if EU and EEA law are central issues and zero if they are not present (*eueea*).

6.2.5 Level-one control variables – justice predictors

Ten control variables are included at the judge-level of the model. Three of these variables serve as controls for the effect of previous legal career (*privprac*, *lawprof*, *fjudge*). Contrary to the variables indicating public employment introduced as explanatory factors two of these variables are not expected to increase the probability of an outcome pursuant of the public party. Former employment in a private practice and former employment at a university as a law professor are expected to moderate the influence of former public employment. Former employment as a judge in a lower instance, on the other hand, is expected to increase the likelihood of a vote pursuant of the state. This expectation is based on the significant impact of former employment as a judge on the probability of voting in favor of the government identified by Jacobsen (2011). The variables are dichotomous, with the value one indicating former employment and the value zero no former employment.

Social background of the justices is controlled for by two variables. The gender of the judges is the first of these variables expected to impact policy choices. A number of studies have found significant effects of the impact of gender on decisions (e.g., Boyd, Epstein, and Martin 2010; Collins, Manning, and Carp 2010; Farhang and Wawro 2004; McCall 2008; Songer et al. 2010). While it is not expected to have a substantial impact on a state friendly voting, the gender of the justices still have to be included as a control variable in the analysis. The variable is given the value one for female justices and zero for male justices (*female*).

Grendstad et al. (2011b, 18) hypothesize that a conservative defense of the status quo might produce a state friendly predisposition. When people get older they tend to become more

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[86] For an overview of the application of EU and EEA law in Norwegian courts see chapter 7 in NOU 2012:2.

conservative. Consequently, the older the judges get the more likely they are to defend the status quo, which for the purpose of the state friendly discussion is the social welfare system. Age is thus included as a control variable. The variable is metric, indicating the justices' age (*c_age*). In the analysis this variable is grand mean centered to give it the interpretation of an average justice rather than the value zero, which does not provide a substantial interpretative meaning.

Appointment as an interim justice is also included as a control variable (*interim*). Temporary justices are not appointed based on an independent recommendation from the Judicial Appointments Board. Consequently they can in theory be selected based on their view on policy issues, or lack thereof (Smith 2012, 159-161). Interim justices are not independent of the executive branch of government, hence it is necessary to control for their impact on case outcomes. The variable is coded dichotomously, with the value one indicating an interim justice and the value zero an associate justice. It is expected that interim justices have a higher probability of voting for the state than associate justices.

Similar to interim justices the Chief Justice is expected influence decisions, and is therefore included as a control variable both at the individual- and panel-level (*chief*, *pchief*). The chief Justice serves as the presiding justice regardless of seniority. When the justices meet in council the presiding judge always takes the floor first. If the Chief Justice is present he will account for the facts of the case and the views of the different parties involved. He will then present his views on the case, what issues are present and how these should be solved (Schei 2010). International research suggests that the Chief Justice has unique reasons for discouraging conflict in the courts (e.g., Brenner and Hagle 1996; Wahlbeck et al. 1999, 498). There is no explicit hypothesis for the Chief Justice regarding his impact on state friendly outcomes at the individual-level (the panel level is considered in the next sub-section). Jacobsen (2011) found a negative effect of being the Chief Justice and voting in favor of the state, and that is the expectation here as well. The variable is coded one for the Chief Justice and zero for other justices.

Seniority and appointment after 2002 are the final variables included at the judge-level of the analysis (*c_seniority*, *post2002*). If the Court is exhibiting a state friendly inclination due to the socialization process and collegial interactions of the judges, it is expected that a judge will become more state friendly over time. Thus a measure of the time spent at the Court is

included in the analysis. An appointment after the establishment of the Judicial Appointment Board in 2002 is also included to control for the effect of new appointment procedures. Seniority is measured in years by subtracting the date of appointment from the date the vote was cast. The variable is grand mean centered. Appointment after 2002 is a dichotomous variable where the value one indicates appointment after 2002 and the value zero appointment before 2002.

6.2.6 Level-two control variables – panel predictors

There is only one control variable introduced at the panel-level. As discussed above, the chief justice may have reasons for discouraging conflict and promoting a unified voice of the Court. A control variable is thus included to control for the effect of the chief justice being part of a panel (*p_chief*). There is not an explicit hypothesis for the effect the presence of the chief in a panel, but the expected direction is that the presence of the chief reduces the probability of a favorable outcome for the state. The variable is coded dichotomously, with the value one indicating the presence of the Chief Justice.

6.2.7 Level-two control variables – case predictors

Control variables are introduced at each level of the model. At the case-level, a variable measuring case complexity and a variable indicating dissent are included. The complexity of a case is expected to lead judges to disagree about the locations of policy alternatives (e.g., Edelman, Klein, and Lindquist 2008; Lindquist, Martinek, and Hettinger 2007; Wahlbeck et al. 1999). One would thus expect to see an increase in separate opinions in complex cases. This is a new measure introduced in analyses of state friendliness on the Norwegian Supreme Court, but it has frequently been applied in the American literature (e.g., Collins 2008). The variable is included as a control, but there is no expected direction of the relationship. Complexity is measured by counting the number of legal sources cited in individual cases (*c_complex*). The variable is grand mean centered.

An indicator of dissent is the second control variable introduced at the case-level (*dissent*). The research on judicial behavior on the Norwegian Supreme Court has been preoccupied with analyses of cases with dissenting opinions. Grendstad et al. (2011b, 20) argue that non-unanimous cases are specifically interesting because by themselves the legal sources fail to account for disagreement among the judges in these cases. In these cases ideology is assumed to be especially important. A control for dissenting opinions is included to see if the effects

measured differ in consensus decisions and decisions with dissenting opinions. The variable is dichotomous, with the value one indicating dissent and the value zero indicating consensus.

6.3 Validity and reliability of the data

The question inherent in any social science study is whether "the observations meaningfully capture the ideas contained in the concepts" (Adcock and Collier 2001, 529). In this chapter the operationalization of the variables has suggested that the face validity of the theoretical concepts is retained when they are quantified and presented as variables. The operationalizations introduced in the thesis are based on measures already established in literature on judicial behavior, thus there is not an extensive discussion of their validity presented here.

Reliability of the data is satisfactory considering that it is based on quantifications of published judicial decisions. As with any statistical analysis there is a potential for errors being introduced in the data when observations are coded. The Lovdata Foundation legal information system is not a research tool, but rather an aid for practicing lawyers. However, with good routines for entering and controlling the data the risk of bias is reduced.[87] There may be random errors in the individual variables, but there is not a consistent bias in the data caused by the coding procedure.[88] The relatively large selection of cases reduces the risk of bias in the analysis due to errors in the observations.

Being a rather underdeveloped field, research on judicial behavior in Norway will take the form of a combination of exploratory and theory-testing analysis.[89] The results will not be directly applicable beyond the cases in question, keeping in mind the points raised by Kastellec and Lax regarding conclusions, but they will give an indication of the relationship between the explanatory factors and the votes of the justices. By unveiling factors influencing judicial decisions one can better predict the outcome of cases, both in the past and the future.

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[87] The procedure for entering observations in the DORANOH-database, which also includes a discussion of the potential for errors, is covered in the report *Expanding DORANOH June-August 2011* by Skiple and Bergset (2011).
[88] See appendix B for details of the coding procedure.
[89] Limited from a political science point of view. Recent developments such as the establishment of the DORANOH (Political behavior on the Norwegian Supreme Court) database (Grendstad et al. 2012a) and the work of Grendstad et al. (2010; 2011a; 2011b; 2011c; 2012b) has led to a vast expansion of the field.

Chapter 7 - Analysis and results

Within the theoretical framework established in chapter three and four the results of the hierarchical model presented in chapter five is assessed in this chapter. First the result of an unconditional model is reviewed, and the intraclass correlation is computed to empirically assess whether a multilevel model is appropriate. Then the unconditional model is expanded in several steps to include explanatory variables and control variables at level-one and level-two. For each step in the process the model fit is evaluated using information criteria and likelihood-ratio tests. After a full model including predictors at both level-one and level-two has been established, a reduced model is presented. In the reduced model each predictor's impact on the model fit has been assessed individually rather than in blocks of several predictors. The reduced model is then compared to the full model. In conclusion the theoretical expectations of the analysis and the hypotheses established in chapter four are evaluated in light of the results of the hierarchical regression analysis.

7.1 A two-level model

The two-level hierarchical generalized linear model outlined in chapter five is the point of departure for the analysis of judicial decisions. When multilevel data is analyzed one usually start with a simple model, before expanding it in several interconnected steps to include random effects. An unconditional model without predictors serves as the baseline model. When the intraclass correlation coefficient has been calculated to assess the multilevel structure empirically, predictors are added to the individual-level and panel-level in turn. After a complex model with predictors at both levels has been established, a reduced model is considered with regard to parsimony. Only the final model is reviewed in detail with regard to the impact of the predictors on the outcome variable. The estimation method for the models is maximum likelihood with mean and variance adaptive Gauss–Hermite quadrature.[90] Units with missing values are omitted from the analysis, resulting in available data on 2,217 justices

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[90] The exceptions are two models estimated with reweighted iterative generalized least squares with second order penalized quasi-likelihood approximation. Models based on maximum likelihood estimation were fitted using the xtlogit-command in the statistical package Stata (StataCorp 2011b). Attempts were also made to fit the maximum likelihood models with the Stata commands xtmelogit and gllamm, but convergence issues occurred when the model complexity increased. For models based on penalized quasi-likelihood the runmlwin-command (Leckie and Charlton 2011) was applied in Stata to trigger model estimation in the statistical package MLwiN (Rasbash et al. 2012).

in 445 panels.[91] Model fit is assessed with the Akaike information criteria and the Bayesian information criteria, in addition to likelihood-ratio tests.[92] The threshold for accepting a model based on the likelihood-ratio tests is set at ten-percent.

7.1.1 An unconstrained model

As discussed in section 5.1.2 there are several ways of determining the requirement for a multilevel model in statistical analyses. The theoretical discussions in chapter three and four, in addition to the formal framework established in chapter five and the overview of the data structure presented in chapter six provide theoretical and statistical justifications for the application of a multilevel framework in the analysis. To empirically assess the requirement for a hierarchical model an unconstrained, or unconditional, model has to be estimated. From the unconditional model the intraclass correlation coefficient (ρ) can be calculated as discussed in section 5.2.2. This will identify "the proportion of the variance explained by the grouping structure in the population" (Hox 2010, 15). In the judicial decisions data the intraclass correlation coefficient indicate the proportion of the variance of a justice' vote for or against the state explained by the hierarchical structure of the data. Stated differently; the variance in individual votes for or against the state explained by the judicial panels and case-specific variables. The results from the unconditional model fitted to the judicial decisions data are presented in table 7.1. Intraclass correlation is estimated by calculating the ratio of the level-two variance to the sum of the level-one and level-two variances. The estimation is based on a latent variable approach as discussed in sub-section 5.2.3.

The unconditional model presented in table 7.1. indicates an estimated 92 percent probability of voting for the state.[93] However, the unconditional model estimated with penalized quasi-likelihood suggests a probability of 73 percent, which is closer to the population mean of .64. It appears that the model estimated with maximum likelihood overestimates the probability of a vote for the state. The intraclass correlation coefficient indicates that 92.5 percent of the variance in the unconstrained model is explained by the grouping structure of the data (table 7.1). This is a relatively large coefficient, but a substantial intraclass correlation was expected due to the high number of cases with unanimous decisions and the low number of cases with

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[91] With 445 panels included in the analysis the minimum threshold for good estimates in multilevel designs, identified as 50 level-two units by Maas and Hox (2004, 135), is surpassed by a substantial margin. Hence the sample size is not introducing bias in the analysis.

[92] An overview of model selection based on information criteria is presented by Hamaker et al. (2011).

[93] Given the formula $\pi_0 = \text{logistic}(\gamma_0) = \exp(\gamma_0)/(1+ \exp(\gamma_0))$ (Snijders and Bosker 2012, 296).

non-unanimous decisions. A large intraclass correlation is an empirical justification for employing multilevel analysis. The difference between the maximum likelihood estimates and the refitted model with second order penalized quasi-likelihood linearization (pql2) suggests that the maximum likelihood estimate of the variance might have an upward bias.[94] Quasi-likelihood estimation provides more moderate results, and in light of the theoretical framework the lower variance value is sensible.[95]

Table 7.1. An unconstrained two-level model of state friendly voting

Variables	Unconstrained model				Unconstrained model (pql2)			
	Coef.	S.E.	exp(b)	S.E.	Coef.	S.E.	exp(b)	S.E.
Fixed effects								
Intercept	2.539***	(0.370)	12.66	(4.689)	0.984***	(0.210)	2.675	(0.562)
Random effects								
σ_e^2		$\pi^2/3$				$\pi^2/3$		
$\sigma_{u_0}^2$		40.87				9.692		
ρ		.925				.747		
AIC		1656.238				-		
BIC		1667.681				-		
Log likelihood		-810.654				-		
N(judges)		2,217				2,217		
N(panels)		445				445		

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

pql2 = second order penalized quasi-likelihood linearization

Although quasi-likelihood appear to yield more robust results than the numerical estimation with maximum-likelihood, the application of a quasi-likelihood approach entails constraint issues. Reweighted iterative generalized least squares with second order penalized quasi-likelihood approximation is not based on maximum likelihood estimation, and consequently likelihood-tests and information criteria are not available for assessing model fit (Hox 2010, 120).[96] Maximum likelihood estimation is thus retained for the buildup of the hierarchical model to enable likelihood ratio tests as new variables are added to the model. The

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[94] Penalized quasi-likelihood is equivalent to maximum restricted likelihood estimation.

[95] Hox (2010, 121-123) note that second order penalized quasi-likelihood has a tendency to underestimate regression coefficients and variance components. When there is a combination of small groups and a high intraclass correlation quasi-likelihood can produce a severe bias (Hox 2010, 139). Considering the exploratory nature of this study type I errors are preferable to type II errors. Hence penalized quasi-likelihood is applied as a robustness check.

[96] In models fitted with penalized quasi-likelihood the alternative to likelihood-ratio tests is a Wald test.

exploratory nature of the analysis and the fact that the threshold for significant values is set at ten percent suggests that the use of maximum likelihood is unlikely to inflict bias in the estimates.[97] To test the robustness of the model estimated by maximum likelihood, the final model is also fitted with second order penalized quasi-likelihood.

Table 7.2. Two-level model of state friendly voting - level-one predictors (model one and two)

Variables	Level-one explanatory predictors				Level-one control predictors			
	Coef.	S.E.	exp(b)	S.E.	Coef.	S.E.	exp(b)	S.E.
Fixed effects								
flegisdep	0.679***	(0.210)	1.972	(0.414)	0.558**	(0.280)	1.747	(0.489)
fgovadv	-0.070	(0.212)	0.933	(0.198)	-0.203	(0.309)	0.816	(0.252)
fpubpros	0.353	(0.381)	1.424	(0.542)	-0.306	(0.542)	0.736	(0.399)
osloborn	-0.056	(0.214)	0.946	(0.202)	0.083	(0.256)	1.086	(0.278)
appgov	-0.142	(0.222)	0.868	(0.192)	0.052	(0.242)	1.053	(0.255)
fprivprac					-0.136	(0.338)	0.873	(0.295)
fjudge					0.370	(0.288)	1.447	(0.416)
lawprof					-0.726*	(0.439)	0.484	(0.213)
female					-0.643**	(0.320)	0.526	(0.168)
c_age					0.021	(0.025)	1.021	(0.025)
interim					0.654	(0.678)	1.923	(1.304)
chief					-1.245*	(0.715)	0.288	(0.206)
c_seniority					-0.030	(0.027)	0.971	(0.026)
post2002					-0.062	(0.399)	0.940	(0.375)
Intercept	2.433***	(0.419)	11.39	(4.773)	2.642***	(0.625)	14.05	(8.780)
Random effects								
σ_e^2		$\pi^2/3$				$\pi^2/3$		
$\sigma_{u_0}^2$		42.354				43.349		
ρ		.928				.929		
AIC		1623.004				1623.812		
BIC		1662.932				1715.075		
Log likelihood		-804.502				-795.906		
N(judges)		2,217				2,217		
N(panels)		445				445		

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

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[97] Models included in the analysis are fitted with 30 integration points when the xtlogit-command is used. The sensitivity of the results relative to the number of integration points has been assessed statistically with refitted quadrature approximation. All variables were within the relative difference of 0.01 percent suggested by the Stata manual (StataCorp 2011a, 11) when the reduced model was refitted with 60 and 120 integration points. The exceptions were three level-two variables. To account for this deviation a model with second order penalized quasi-likelihood linearization is applied to test the robustness of the reduced model based with maximum likelihood approximation. *See supra* note 90.

7.1.2 Level-one explanatory variables – justice predictors

Adding level-one explanatory predictors is the second step in the estimation process. The variables introduced in model one are based on hypotheses *h1.1* through *h1.6* established in section 4.5.1. The intraclass correlation increased slightly from the unconditional model to model one, suggesting that the introduction of level-one explanatory variables did not improve the model.[98] However, the AIC and BIC values decreased along with the log likelihood, suggesting a better model fit (table 7.2). This is supported by the likelihood-ratio test presented in table 7.3, which confirms that model one provides a better fit than the unconditional model (table 7.1). Former employment with the Legislation Department is the only significant effect, and consequently only hypothesis *h1.2* is supported by the findings thus far (table 7.2).[99] This is interesting considering the significant effects of appointing government and former employment with the Director General of Public Prosecutions found by Grendstad et al. (2011b). The inclusion of unanimous and non-unanimous cases decided between 1990 and 2010 in the analysis rather than non-unanimous cases decided between 1945 and 2009 may account for the differing results. However, the results from a logistic analysis of government friendly voting on the Norwegian Supreme Court in non-unanimous decisions between 1991 and 2009 by Jacobsen (2011) were similar to the findings in table 7.2. This indicates that the different time periods can be responsible for some of the variation in the results.

Table 7.3. Likelihood-ratio tests of the unconstrained model and model one and model one and model two

Unconstrained model nested in model one
LR chi2(5) = 12.30
Prob > chi2 = 0.031

Model one nested in model two
LR chi2(9) = 17.19
Prob > chi2 = 0.046

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[98] Due to the nature of multilevel logistic regression model, as outlined in section 5.2, level-one variance is fixed. When level-one predictors are added to the analysis the effect is an increase in the random-effect variance terms and the absolute value of the regression coefficients rather than a decrease in the level-one variance (Hedeker 2008, 241).

[99] The support for hypothesis *h1.1* is discussed in relation to the reduced model in section 7.3.

7.1.3 Level-one control variables – justice predictors

Model two in table 7.2. represents the next expansion of the analysis. In this model control variables are introduced at level-one, expanding the model to include both explanatory predictors and control predictors at the individual-level. The information criteria increased from model one indicating a worse fit, but the log likelihood decreased (table 7.2). A likelihood-ratio test of model one nested in model two does indicate that the fit has improved as suggested by the log likelihood, and model two is thus kept as the base model for the introduction of level-two predictors (table 7.3).

Three control variables have significant effects at the individual-level. Both the effect of being female and the effect of being the Chief Justice have a negative impact on voting for the state. This is also the direction of the effect resulting from being a law professor. Interestingly, model two does not indicate a significant effect of being appointed after 2002 nor is there an effect of seniority or age present. Perhaps most interesting is the absence of an effect of having worked in a private practice prior to appointment to the Court. With the introduction of control-variables the effect of former employment with the Legislation Department has decreased slightly, and the estimates are now significant at a five-percent level rather than at the one-percent level. The other level-one explanatory variables remain insignificant (table 7.2).

7.1.4 Level-two explanatory variables – panel predictors

The introduction of explanatory variables at the second-level of the analysis displays the hierarchical structure of the model. Variables are introduced in two different blocks at this level. First the explanatory variables and control variables for the panel-specific factors are introduced in model three and model four (table 7.4). Then the explanatory variables and control variables relating to case specific factors are added to the analysis in models five, six and seven (table 7.6 and table 7.8).

Hypotheses *h2.1* and *h2.2* appear to be confirmed by the panel-specific explanatory variables included in model four (table 7.4). The effect of homogenous panels where all five justices were appointed by a social-democratic government and the effect of a four justice majority with background from the Legislation Department are both significant at the one-percent level. With the inclusion of the level-two explanatory predictors the strength of the level-one explanatory variables has been reduced, and the effect of being a law professor has become

insignificant. As expected the intraclass correlation was reduced from model two (table 7.2), and the likelihood-ratio test of model two nested in model three indicated a better model fit (table 7.5). The value of the AIC is lower as anticipated, but the BIC value has increased (table 7.4).

Table 7.4. Two-level model of state friendly voting - level-two panel predictors (model three and four)

Variables	Level-two panel explanatory predictors				Level-two panel control predictors			
	Coef.	S.E.	exp(b)	S.E.	Coef.	S.E	exp(b)	S.E
Fixed effects								
flegisdep	0.543*	(0.280)	1.721	(0.482)	0.546*	(0.280)	1.726	(0.483)
fgovadv	-0.189	(0.309)	0.828	(0.256)	-0.188	(0.309)	0.828	(0.256)
fpubpros	-0.252	(0.541)	0.777	(0.421)	-0.247	(0.541)	0.781	(0.423)
osloborn	0.075	(0.255)	1.077	(0.275)	0.072	(0.255)	1.075	(0.274)
appgov	0.021	(0.241)	1.021	(0.246)	0.018	(0.241)	1.018	(0.246)
fprivprac	-0.122	(0.337)	0.885	(0.298)	-0.122	(0.337)	0.885	(0.298)
fjudge	0.381	(0.287)	1.464	(0.420)	0.381	(0.287)	1.463	(0.420)
lawprof	-0.700	(0.438)	0.496	(0.217)	-0.698	(0.438)	0.497	(0.218)
female	-0.627*	(0.320)	0.534	(0.171)	-0.627*	(0.320)	0.534	(0.171)
c_age	0.021	(0.025)	1.021	(0.025)	0.021	(0.025)	1.022	(0.025)
interim	0.643	(0.675)	1.902	(1.283)	0.641	(0.675)	1.899	(1.281)
chief	-1.239*	(0.712)	0.290	(0.206)	-1.187*	(0.714)	0.305	(0.218)
c_seniority	-0.029	(0.027)	0.972	(0.026)	-0.029	(0.027)	0.971	(0.026)
post2002	-0.061	(0.398)	0.940	(0.374)	-0.061	(0.398)	0.941	(0.374)
p4legisdep	3.106***	(1.191)	22.33	(26.58)	3.051**	(1.192)	21.14	(25.20)
pappgov	4.162***	(1.423)	64.21	(91.34)	4.125***	(1.423)	61.85	(88.01)
pchief					-0.604	(0.936)	0.547	(0.511)
Intercept	2.126***	(0.631)	8.378***	(5.288)	2.241***	(0.652)	9.400***	(6.128)
Random effects								
σ_e^2	$\pi^2/3$				$\pi^2/3$			
$\sigma_{u_0}^2$	42.133				41.165			
ρ	.926				.926			
AIC	1615.73				1617.368			
BIC	1718.4				1725.742			
Log likelihood	-789.865				-789.684			
N(judges)	2,217				2,217			
N(panels)	445				445			

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Justices are nested in panels in the data, and the same justices appear multiple times. This can affect the BIC value, which weights the parameters based on ln(N) rather than the constant 2 used by AIC. Determining N can be problematic when the data is grouped. The default is to

consider the number of observations as N, but it can yield biased BIC values when units are interdependent. However, considering the panels as N would result in the BIC value being misused if used to compare models (StataCorp 2011a, 157-159). Thus the default measure is retained, and the BIC value is viewed in relation to the other measures of model fit.

Table 7.5. Likelihood-ratio test of models two and three and models three and four

Model two nested in model three
LR chi2(2) = 12.08
Prob > chi2 = 0.002

Model three nested in model four
LR chi2(1) = 0.36
Prob > chi2 = 0.547

7.1.5 Level-two control variables – panel predictors

The presence of the chief justice in a panel is the only control variable introduced in model four (table 7.4). Both the BIC and AIC increased relative to model three, and the likelihood-ratio test in table 7.5. indicates a worse model fit. The variable is not significant, and had no impact on the intraclass correlation. Consequently, the variable is dropped from the analysis before the addition of case-specific predictors in model five, six and seven (table 7.6 and table 7.8). Model five is thus compared to model three rather than model four.

7.1.6 Level-two explanatory variables – case predictors

Case predictors constitute the second block added to the panel-level. In model five explanatory factors for hypotheses *h2.5* and *h2.6* are introduced (table 7.6). The intraclass correlation is slightly reduced with the inclusion of the new variables, but the model fit is worse than model three where the only variables at the second level are panel-specific explanatory predictors (table 7.4). Although the variable indicating the presence of an economic issue is significant at the ten-percent level, it is not included in the next model due to the model fit.

Model six includes two additional case predictors, indicating whether the state appeared as plaintiff or respondent and the presence of the Government Advocate. As with model five, the assessment of model fit indicates that the new variables do not improve the model (table 7.6). This means that hypotheses *h2.4* and *h2.7* are not supported by the analysis, seeing that neither *govadvocate* or *plaintiff* are significant.

Table 7.6. Two-level model of state friendly voting - level-two case predictors (models five and six)

Variables	Level-two explanatory case predictors				Level-two explanatory case predictors			
	Coef.	S.E.	exp(b)	S.E.	Coef.	S.E.	exp(b)	S.E.
Fixed effects								
flegisdep	0.555**	(0.280)	1.741	(0.488)	0.544*	(0.280)	1.723	(0.483)
fgovadv	-0.174	(0.309)	0.840	(0.260)	-0.187	(0.309)	0.829	(0.256)
fpubpros	-0.215	(0.541)	0.807	(0.437)	-0.246	(0.541)	0.782	(0.423)
osloborn	0.065	(0.255)	1.067	(0.272)	0.078	(0.255)	1.081	(0.276)
appgov	0.016	(0.241)	1.016	(0.245)	0.019	(0.241)	1.019	(0.246)
fprivprac	-0.106	(0.337)	0.899	(0.303)	-0.123	(0.337)	0.884	(0.298)
fjudge	0.394	(0.287)	1.483	(0.426)	0.383	(0.287)	1.466	(0.421)
lawprof	-0.678	(0.438)	0.508	(0.222)	-0.693	(0.438)	0.500	(0.219)
female	-0.617*	(0.320)	0.540	(0.173)	-0.622*	(0.320)	0.537	(0.172)
c_age	0.021	(0.025)	1.022	(0.025)	0.021	(0.025)	1.021	(0.025)
interim	0.640	(0.674)	1.897	(1.278)	0.641	(0.674)	1.897	(1.279)
chief	-1.218*	(0.712)	0.296	(0.211)	-1.243*	(0.712)	0.289	(0.205)
c_seniority	-0.028	(0.027)	0.972	(0.026)	-0.029	(0.027)	0.972	(0.026)
post2002	-0.051	(0.398)	0.951	(0.379)	-0.054	(0.398)	0.948	(0.377)
p4legisdep	3.153***	(1.209)	23.41	(28.31)	3.196***	(1.192)	24.43	(29.13)
pappgov	4.020***	(1.435)	55.72	(79.98)	4.117***	(1.441)	61.38	(88.48)
econ	-1.259*	(0.696)	0.284	(0.198)				
eueea	2.010	(1.910)	7.460	(14.25)				
plaintiff					-1.047	(0.749)	0.351	(0.263)
govadvocate					1.673	(2.058)	5.330	(10.97)
Intercept	2.598***	(0.692)	13.44***	(9.301)	2.393***	(0.673)	10.95***	(7.370)
Random effects								
σ_e^2		$\pi^2/3$				$\pi^2/3$		
$\sigma_{u_0}^2$		40.615				40.577		
ρ		.925				.925		
AIC		1615.878				1617.144		
BIC		1729.956				1731.223		
Log likelihood		-787.939				-788.572		
N(judges)		2,217				2,217		
N(panels)		445				445		

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 7.7. Likelihood-ratio test of models three and five and models three and six

Model three nested in model five

LR chi2(2) = 3.85

 Prob > chi2 = 0.146

Model three nested in model six

LR chi2(2) = 2.59

Prob > chi2 = 0.275

7.1.7 Level-two control variables – case predictors

Two control variables are added to the analysis in model seven (table 7.8). Compared to model three model seven provides a better fit. The values of the information criteria have been reduced, and the likelihood-ratio test presented in table 7.9. confirms these changes. The intraclass correlation has also been reduced slightly, indicating that some of the variance is explained by the addition of the control variables for the case-predictors. These predictors moderate the effect of the panel-specific explanatory variables. *Dissent* is a control for cases with dissenting opinions, and the variable is significant at the one-percent level. Prior research on judicial behavior in Norway has focused on cases with dissenting opinions, and how personal attributes can influence decisions in these cases. Thus the significant effect of the predictor is interesting, and warrants further investigation. The measure of case complexity, on the other hand, is not significant. In total, six predictors – former employment with the Legislation Department; being female; being the Chief justice; a four justice panel majority with background from the Legislation Department; a homogenous panel with appointments by a social democratic government; and dissenting opinions – are significant for a justice' vote for or against the state (table 7.8).

Table 7.8. Two-level model of state friendly voting - level-two case predictors (model seven)

Variables	Coef.	S.E.	exp(b)	S.E.
		Level-two control case predictors		
Fixed effects				
flegisdep	0.549**	(0.280)	1.732	(0.485)
fgovadv	-0.165	(0.308)	0.848	(0.261)
fpubpros	-0.209	(0.541)	0.811	(0.439)
osloborn	0.073	(0.255)	1.075	(0.274)
appgov	0.023	(0.241)	1.023	(0.247)
fprivprac	-0.105	(0.337)	0.900	(0.303)
fjudge	0.390	(0.287)	1.477	(0.423)
lawprof	-0.667	(0.438)	0.513	(0.225)
female	-0.624*	(0.320)	0.536	(0.171)
c_age	0.020	(0.025)	1.021	(0.025)
interim	0.640	(0.673)	1.897	(1.276)
chief	-1.249*	(0.714)	0.287	(0.205)
c_seniority	-0.029	(0.027)	0.973	(0.026)
post2002	-0.039	(0.397)	0.962	(0.382)
p4legisdep	3.015**	(1.239)	20.39	(25.27)
pappgov	3.175**	(1.433)	23.93	(34.30)
dissent	-3.513***	(0.767)	0.030	(0.023)
c_complex	-0.026	(0.067)	0.974	(0.065)
Intercept	3.204***	(0.658)	24.63	(16.21)
Random effects				
σ_e^2		$\pi^2/3$		
$\sigma_{u_0}^2$		39.088		
ρ		.922		
AIC		1599.071		
BIC		1713.15		
Log likelihood		-779.536		
N(judges)		2,217		
N(panels)		445		

Standard errors in parentheses

*** $p<0.01$, ** $p<0.05$, * $p<0.1$

Table 7.9. Likelihood-ratio test of models three and seven

Model three nested in model seven

LR chi2(1) = 20.30

Prob > chi2 = 0.000

7.2 A reduced two-level model

In part due to the exploratory nature of the analysis, and for the sake of parsimony, a reduced model was fitted to the judicial decisions data (table 7.10). The model was built by assessing each predictor's impact on model fit individually rather than in blocks (not shown here). Table 7.11. presents the likelihood-ratio test of the reduced model (model eight) nested in model seven, and indicates that the reduced model provides a significantly better fit. A consideration of the values of the information criteria supports the test in that the reduced model fits the data better than the complete model presented in table 7.8.

Eight predictors have significant effects in the reduced model fitted with maximum likelihood, not counting the intercept. Two predictors – *econ* and *ogovadvocate* – were included in the reduced model, but not in the full model presented in table 7.8. When added to the model individually, the variable indicating the presence of an economic issue did lead to an improved model fit unlike when added together with the variable indicating the presence of EU and EEA law in model five (table 7.6). The variable *ogovadvocate* is a variable indicating that the Office of the Government Advocate represented the state. In model six a similar variable – *govadvocate* – indicating the presence of the Government Advocate on behalf of the state did not lead to an improved fit (table 7.6). The small number of cases where the Government Advocate represents the state can have caused the insignificant effect. *ogovadvocate* is thus included in the reduced model to test if the insignificant result is replicated with a larger number of observations, or if hypothesis *h2.3* can be confirmed.

To test the robustness of the estimates the reduced model was re-estimated with penalized quasi-likelihood. The result is similar to the robustness test of the unconditional model in table 7.1. Maximum likelihood estimates appear to be generally higher than the estimates from the reweighted iterative generalized least squares estimation. Although penalized quasi-likelihood is known to have a tendency to underestimate regression coefficients and variance components, the results from model nine will serve as the basis for the discussion in sections 7.2.1 and 7.3. The conservative estimates are in line with the theoretical expectations, and in light of the sensitivity of the maximum likelihood estimates discussed in note 97 they appear to be more reliable.

Table 7.10. Two-level model of state friendly voting - reduced model (model eight and nine)

Variables	Reduced model				Reduced model fitted using pql2			
	Coef.	S.E.	exp(b)	S.E.	Coef.	S.E.	exp(b)	S.E.
Fixed effects								
flegisdep	0.737***	(0.216)	2.089	(0.451)	0.563***	(0.172)	1.756	(0.302)
fjudge	0.546***	(0.209)	1.725	(0.361)	0.428**	(0.168)	1.534	(0.258)
female	-0.514**	(0.262)	0.598	(0.157)	-0.382*	(0.208)	0.682	(0.142)
chief	-1.159**	(0.553)	0.314	(0.174)	-0.856**	(0.431)	0.425	(0.183)
p4legisdep	2.897**	(1.267)	18.12	(22.96)	1.578*	(0.941)	4.847	(4.560)
pappgov	2.904**	(1.436)	18.24	(26.19)	1.586	(1.231)	4.883	(6.009)
econ	-0.533	(0.676)	0.587	(0.397)	-0.245	(0.465)	0.783	(0.364)
ogovadvocate	1.636**	(0.782)	5.137	(4.015)	0.857*	(0.519)	2.357	(1.224)
dissent	-3.418***	(0.752)	0.033	(0.025)	-1.519***	(0.458)	0.219	(0.100)
Intercept	1.838**	(0.843)	6.281	(5.297)	0.496	(0.568)	1.643	(0.934)
Random effects								
σ_e^2	$\pi^2/3$				$\pi^2/3$			
$\sigma_{u_0}^2$	37.724				10.255			
ρ	.920				.757			
AIC	1581.597				-			
BIC	1644.34				-			
Log likelihood	-779.799				-			
N(judges)	2,217				2,217			
N(panels)	445				445			

Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

pql2 = second order penalized quasi-likelihood linearization

Table 7.11. Likelihood-ratio test of models seven and eight

Model eight nested in model seven

LR chi2(9) = 0.53

Prob > chi2 = 1.000

7.2.1 Interpretation of the reduced model

The model refitted with penalized quasi-likelihood differs slightly from the reduced model estimated with maximum likelihood (models nine and eight). As in the unconditional model presented in table 7.1 the variance and intraclass correlation are reduced in the refitted model. Only seven predictors are significant in this model, compared to the eight significant predictors obtained with the maximum likelihood estimation. The panel effect of appointing government is no longer significant, and the significance level of four of the other predictors has been reduced. Included amongst the significant predictors is the effect of former

employment with the Legislation Department (*flegisdep*); the effect of having served as a judge prior to appointment to the Supreme Court (*fjudge*); an effect of being female (*female*); an effect of being the Chief Justice (*chief*); an effect of Government Advocate representation (*ogovadvocate*); and an effect of there being a dissenting vote in a case (*dissent*) (table 7.10).

Logistic regression coefficients are interpreted as the predicted probability of an outcome when all other coefficients are set to zero.[100] The probability of voting for the state for a male justice without any of the employment characteristics or panel characteristics present (all variables set to zero) in a case where there is a unanimous decision is 62.2 percent. For a female justice there is a predicted probability of voting for the state of 52.8 percent given the same characteristics (table 7.10).

Former employment with the Legislation Department prior to appointment to the Supreme Court has a positive effect on state friendly voting. For a male justice with this background the predicted probability of a state friendly vote is 74.2 percent, a relatively large increase in absolute value from a justice without this experience. The predicted probability of a female justice voting in favor of the state if she has previously been employed at the Legislation Department is 66.3 percent. Previously having served as a judge has a predicted probability similar to that of former employment with the legislative department for both male and female justices, with probabilities of 71.6 percent and 63.2 percent (table 7.10).

If the office of the Government Advocate represents the state the predicted probabilities increase. A male justice without any other characteristics present has a predicted probability of 79.5 percent for voting for the state. Female justices have a similar increase, the probability increasing 19.7 percentage points to a predicted probability of 72.5 percent. When former employment at the Legislation Department is accounted for the predicted probabilities increases to 87.2 percent for male justices and 82.3 percent for female justices.

The effect of being the Chief Justice is interesting. Contrary to the predicted probability of 62.2 percent for a male justice when all other variables are set to zero, the predicted probability for a Chief Justice is 41.1 percent. If the Office of the Government Advocate represents the state the predicted probability of a vote pursuant of the state increases to 62.2

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[100] In the following paragraphs the values of all predictors are set to zero unless otherwise noted. Predicted probabilities are calculated from the regression coefficients based on the formula presented in *supra* note 93.

percent for the Chief Justice. In combination with having previously served as a judge the probability is 71.6 percent.

Three panel effects have significant values in model nine (table 7.10). For male justices the effect of being in a panel where there are four justices with background from the Legislation Department is a predicted probability of 88.8 percent for a vote pursuant of the state. Female justices have a predicted probability of 84.4 percent. In combination with background from the Legislation Department the predicted probability is 93.3 percent for male justices and 90.5 percent for female justices. If the Office of the Government Advocate represents the state, which is the second significant panel effect, the predicted probabilities increase to 97.1 percent for male justices and 95.7 percent for female justices.

Cases where there are dissenting votes, the final significant panel effect, tend to produce lower predicted probabilities for a vote pursuant of the state. The predicted probability of 26.4 percent for male justices and 19.7 percent for female justices in cases where there is a non-unanimous decision is a clear indication of this effect. However, when the Office of the Government Advocate represents the state the predicted probabilities increase to 59.8 percent and 50.4 percent for male and females, respectively. If there is a four justice majority panel with background from the Legislation Department the probability is similar to that in unanimous decisions with predictions of 87.8 and 83.1 percent.

There is a caveat related to the interpretation of the predicted probabilities in cases with non-unanimous decisions. A preliminary analysis including only cases with dissenting votes suggested that there is no variance explained by the grouping structure of the data (not shown here). When non-unanimous cases are analyzed the significant effects of panel predictors are no longer apparent. Thus the results of the analysis explain the decisions of justices in cases with unanimous decisions, but the decisions of the justices in cases where there are dissenting votes are not thoroughly explained by the hierarchical model. However, from a theoretical and statistical point of view there is substantial justification for analysis of judicial decisions employing multilevel modeling. The choice of including only non-unanimous decisions may introduce bias in the estimates and would only explain behavior in cases where there is not a unanimous decision.[101]

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[101] This issue was also assessed in section 5.2.4.

7.3 Hypothesis testing and theoretical expectations in light of model estimations

7.3.1 Individual-level predictors and hypotheses

The results from the reduced hierarchical model estimated with penalized quasi-likelihood (table 7.10) provide support for four of the hypotheses presented in table 4.1. At the individual level the effect of former employment with the Legislation Department is significant. This supports the hypothesis that former employment at the department increases the likelihood of a justice voting for the state (*h1.2*). A positive effect reflects the theoretical expectations and the results of other analyses of state friendly voting.

The second hypothesis at the individual-level supported by the results is the effect of previous legal career. Although neither former employment with the Office of the Government Advocate nor former employment with the Director General of Public Prosecutions had significant effects, there were significant effects of former employment with the Legislation Department and having served as a judge prior to appointment to the Supreme Court. However, considering that the control variables for private practice and law professors were insignificant, the support for hypothesis *h1.1* is rather weak. There appears to be an effect of the previous legal career of the justices, but only for some career types.

Hypotheses *h1.3* to *h1.6* were not confirmed by the results of the regression analysis. Based on previous analyses of the state friendly voting of the Supreme Court justices in cases with non-unanimous decisions by Grendstad et al. (2011b) and Jacobsen (2011) hypotheses *h1.3, h1.4* and *h1.6* were not expected to be confirmed. However, in light of on the results from an analysis of economic voting by Grendstad et al. (2011c) the effect of being born in Oslo was expected to have an influence on the model fit, if not a significant effect.

One of the more interesting results of the analysis is the absence of an effect of appointing government. At no point in the analysis did the variable indicating appointment by a social-democratic government retain a significant effect. Thus there is no evidence of a relation between appointing government and the ideological preferences of the justices. As discussed earlier the measurement of ideology is indirect, and there is a potential for failing to capture the effect of ideology when this measure is applied in statistical analyses. One reason might be that the state friendly voting is not a representation of a 'state friendly' inclination but

rather a 'system friendly' preference.[102] When Grendstad et al. (2011b) analyze decisions between 1945 and 2009 they fail to account for the fact that Social-Democratic governments were in power for the majority of the period in question. A vote pursuant of the state preference might thus indicate a system friendly inclination. In order to test this effect one would have to control for the incumbent government to see whether the pattern changes when there is a change in government. Hence, the conclusion drawn from this analysis is that there is not an effect of appointing government in Supreme Court decisions after 1990 in civil cases where the state was party to the proceedings.

7.3.2 Panel-level predictors and hypotheses

Hypotheses at the panel-level included hypotheses *h2.1* and *h2.2* (table 4.1). They were represented in the analysis by the variables *p4legisdep* and *pappgov*, which indicated panel composition. Only the effect of a four justice majority with background from the Legislation Department remained significant in the refitted reduced model (table 7.10). The overrepresentation of justices with background from the Legislation Department has a substantial impact on state friendly voting. Collegiality is thus confirmed as a significant factor influencing the vota of the Supreme Court justices. These findings support the assertions made by Kjønstad (1999) and Schei (2004) concerning the legal environment of the Court discussed in section 4.5.1.

7.3.3 Case-level predictors and hypotheses

The case-specific hypotheses include hypotheses *h2.3* through *h2.7* presented in table 4.1. Of these hypotheses only *h2.4* is supported by the findings, and this is only after it has been revised to include representation by the Office of the Government Advocate rather than the Government Advocate. Hypothesis *h2.3* is supported if one considers the representation of the state by the Office of the Government Advocate as an indication of importance. However, with the insignificant effects of economic cases and cases concerning EU and EEA law this hypothesis is not well supported by the findings.

7.3.4 Theoretical expectations

In light of the theoretical expectations the findings were as expected even though several of the hypotheses were rejected. The support for a hierarchical model is substantial, as seen in

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[102] See supra note 1.

the effect the different analytical approaches integrated in the hierarchical model had on the model estimates. Background characteristics do account for some of the variation in the votes of the justices, but the multilevel analysis indicates that a substantial part of the variation is explained by panel-specific predictors and case-specific predictors. The results suggest that to ignore the collegial nature of the Supreme Court and the effect of case-specific factors will lead to a severely underspecified model. Thus the theoretical expectations of the appropriateness of an integrated model of judicial behavior hold for decisions in which the state is a party to the proceedings.

7.4 Limitations of the study – applicability of international research and methodological approaches

A potential limitation of the study is the methodological approach and the applicability of international research in studies of judicial behavior in the Norwegian courts. Sunde (2012, 172) questions the approach taken by Grendstad et al. (2010), who base their analyses on models developed in the American judicial literature. In response to Sunde's reservations on the use of an American framework for studies of the Norwegian judicial system some of the issues concerning method and the relevance of research and literature are considered briefly in the following paragraphs.

7.4.1 Judicial politics in Europe

Research on judicial policy-making in Europe remains limited in some respects compared to the extensive coverage the topic has received in the United States. The traditional distinction between common law and civil law systems has been acknowledged as one of the underlying reasons for the difference (Rehder 2007, 6). Historically, according to Shapiro and Stone (1994, 397-398), there has been "a strong commitment in Western liberal-democratic political ideology to the separation of law and politics and to a vision of judges as independent, neutral law appliers rather than political policy makers". In this sense the prevailing perception has been that courts and judges were outside politics. The judges are being tasked with applying the law, not making it, which largely downplays the courts as policymakers (Dyevre 2008, 3; 2010, 98).

7.4.2 Judicial politics in the United States

In the United States, the Supreme Court justices are appointed by the President with the advice and consent of the Senate. Article III of the United States Constitution provides that justices "shall hold their Offices during good Behaviour" – the term "good behaviour" understood to mean justices may serve for life, unless impeached and convicted by Congress, resign or retire. The nature of the appointment procedure makes it political, as Presidents have a tendency to appoint justices broadly sharing their ideological views. This relates to the jurisdiction of the Court, regulated by section two in Article III of the Constitution: An important category of law for the Supreme Court is constitutional questions, and this area has a clearer political dimension than other categories (Sunde 2012, 176). In the United States the courts have a long history of determining constitutional limits for legislatures, and consequently it is not surprising that appointments to the Supreme Court and other federal courts have become partisan political issues (Ferejohn 2002, 41). The ability judges have to write separate opinions and dissenting opinions, in addition to decisions offering binding precedent also separates the United States Supreme Court from most of the European high courts.

Judicial politics literature on the U.S. Supreme Court was dominated by the attitudinal model from the 1960s throughout the early 1990s (Dyevre 2010, 301),[103] with Jeffrey A. Segal and Harold J. Spaeth currently being its leading advocates (see Segal and Spaeth 2002).[104] Until recently the use of the attitudinal model has been virtually absent from research on European courts, and it has been argued that the methods used to study the American judicial system cannot be applied to the study of judicial politics in Europe (Dyevre 2010, 300). The conventional explanation points to the secrecy surrounding judicial deliberation and the prohibition of separate opinions on some European courts. Where separate or dissenting opinions are allowed they tend to be rare, and this lack of voting records and anecdotal evidence limits the usefulness of the attitudinal approach (Stone Sweet 2000, 48). In European courts the actions of individual justices are masked by the use of a single opinion 'of the court' to enhance prestige and legitimacy. As a result the focus shifts from the individual as the unit of analysis to the institution (Volcansek 1999, 2).

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[103] For an extensive overview of the development of judicial politics literature in the United States see Cross (1997), Epstein and Knight (2000), Gibson (1983) and Segal and Spaeth (2002).
[104] The attitudinal model, as asserted in chapter three, claims that judges are seekers of policy, and make decisions in light of their brute policy preferences (Benesh and Spaeth 2007, 756; Dyevre 2010, 300; Segal and Spaeth 2002). It is also sometimes referred to as the social-psychological model.

In the American literature the late 1990s and early 2000s offered a "sea change" in studies of judicial politics as variants of the social-psychological paradigm began to give way to rational choice approaches (Epstein and Knight 2000, 625). This strategic approach to judicial politics places actors within a larger framework. According to Epstein and Jacobi (2010, 342), "[j]udges do not make decisions in a vacuum, but rather take into account the preferences and likely actions of other relevant actors, including (*a*) their colleagues, (*b*) their judicial superiors, and (*c*) members of the other branches of government".

7.4.3 Historical perspective

Research on European courts has historically focused on the macro-level and the political impact and functions of judicial action, while the focus in American research has been predominantly on the micro-level and politics of judicial action. The difference in perspective leads back to the differing perceptions of the legal system – the American literature viewing it as an extension of the political system and the European literature viewing it as an autonomous sphere (Rehder 2007, 17). Strategic accounts of judicial decision-making follows this framework. The internal form, which views judicial decisions as a collegial game, is more common in the American literature than in the European, which mostly focuses on the external relationship between the courts and other political actors.[105]

A third factor, disregarded by many social scientists both in the American and European literature, is legal doctrine.[106] The disregard is based on the presumption that the law, as understood by legal academics, does not really matter to judges (Tiller and Cross 2006, 522). Central to the discussion of judicial behavior in this thesis has been how law together with institutional factors can constrain preference initiated behavior on the Supreme Court.

7.4.4 Comparative frameworks

The Norwegian Supreme Court is one of the few high courts aside from the other Nordic courts and those of the British Isles with the competence to handle all civil and criminal cases in addition to administrative law and constitutional questions. As the Norwegian Supreme Court is not a constitutional court the juridical dimension is more prominent in the decision-

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[105] As pointed out in chapter three, it has been argued that internal deliberation constitutes a distinctive feature of the European model of constitutional adjudication, but that practical limitations reduces the value of this approach (e.g., Ferejohn and Pasquino 2004, 1692).
[106] Legal doctrine is the law, or what constitutes the law, and is outlined in the form of the *legal model* in chapter three. A thorough discussion of the concept is presented by Tiller and Cross (2006).

structure than the political dimension (Sunde 2012, 177-178). However, there are several similarities between the U.S. Supreme Court and the Norwegian Supreme Court, which supports the use and application of models developed for studying the American judicial system in analyses of the decisions of the Norwegian Supreme Court: Appointments to both courts are irremovable, and retirement at age 70 in the Norwegian Supreme Court is not very different from the life-long tenure of the American justices. Separate and dissenting opinions are encouraged in both courts, and opinions are made public.[107] Another distinctive feature present in the U.S. Courts of Appeals (but not the Supreme Court) and the Norwegian Supreme Court is random assignment of justices to rotating panels.

Both the attitudinal approach and the strategic approach have the potential to yield valid and interesting results in studies of the Norwegian Supreme Court. Arguments against using American methods when studying European courts do not consider that the Norwegian Supreme Court is more similar to the United States Supreme Court than most of the European high courts and constitutional courts. However, neither the attitudinal model nor the strategic interaction model in and of themselves provides an adequate framework for studying the judicial system. With focus on the 'state friendly' hypothesis this study asserted that models developed in the American judicial behavior literature, with slight alterations, can yield significant results when analyzing judicial decisions in Norway.[108]

7.4.5 Limited inference

As previously asserted in section 6.1.2 the Supreme Court's selection procedure raises the potential for selection bias in the inferences drawn from its cases. Scholars can draw conclusions within a single set of cases, so long as it is recognized that any effects of case factors so measured cannot be said to represent general preferences of the judges over all cases or as applied to other sets of cases (Kastellec and Lax 2008, 408, 436). "[C]onclusions about judicial behavior may vary by court, by judge, and by case, or even by the time period

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[107] Other European courts sharing similar traits to that of the U.S. Supreme Court and the Norwegian Supreme Court include the European Court of Justice and the European Court of Human Rights.

[108] Analyses of judicial behavior in Norway can also manage without references to the American judicial politics literature and judicial system. Formal models of judicial behavior can be deducted from Norwegian legal theory independent of the models developed in the American context. The effect of personal attributes and attitudes, in addition to collegial interactions have been considered and discussed extensively by Norwegian legal scholars (e.g., Eckhoff 1971; Smith 1975). Thus, the models developed in the American literature are not that dissimilar from models that could have been developed independently based on the Norwegian approach to legal theory.

in which decisions are rendered" (Friedman 2006, 271). The result of the analysis is thus only applicable for other civil cases proximate in time to the case sample of the analysis.

Another limitation of the study is that inferences can only be made for the votes of the individual justices and not the case outcomes. Hence the assertion of Kastellec and Lax (2008, 436) regarding consequences of extra-legal factors – "whether judicial diversity has large-scale consequences depends on whether it leads to differences not just in individual voting by judges, but also to differences in case outcomes" – cannot be affirmed with the analytical framework presented in this thesis. For these types of inferences an alternative framework is required, which was briefly discussed in note 67 and section 5.2.4.

Chapter 8 - Conclusion

The aim of this thesis was to test the state friendly hypothesis by comparing and integrating three different approaches to the study of judicial behavior based on the following research question: *What factors can explain the decisions of Supreme Court justices when the state is a party?*

An integrated model of judicial behavior was developed based on previous research from Norway and the United States to account for attitudinal, legal and strategic factors believed to influence judicial decision-making. This model served as the framework for the discussion of the state friendly nature of the Norwegian Supreme Court. From the four claims of the state friendly hypothesis several hypotheses were derived to assess the effect of 24 legal and extra-legal factors on the propensity for state friendly voting. These hypotheses were related to different factors at distinct levels of the hierarchical model of judicial behavior.

The two-level hierarchical framework suggested the requirement of a multilevel analytical method, and from the theoretical and statistical discussion this was affirmed. Thus a two-level multilevel generalized linear model where judges are nested in panels was established to analyze the judicial decisions data. At the second level of the model both factors relating to the judicial panels and case-specific variables were included. Within this structure factors derived from attitudinal model is fitted to level-one and factors derived from the legal model and strategic model to level-two.

An unconditional model provided the empirical justification for employing multilevel analysis. Then several models of increasing complexity were fitted to the data with maximum likelihood estimation to assess the impact of the different theoretical models. Finally, a reduced model was established by assessing each predictor's impact on the model fit individually. To test the robustness of the results the model was refitted with penalized quasi-likelihood approximation. Based on the theoretical expectations and statistical framework the refitted reduced model was preferred to the reduced model estimated with maximum likelihood.

The findings of the hierarchical regression analysis offer support for the theoretical framework. From the assessment of the intraclass correlation coefficient the appropriateness of a multilevel analytical approach was confirmed. The analysis identified seven significant predictors affecting the probability of voting for or against the state. Interestingly, the

significant predictors included both individual-level factors and group-level factors. Level-one predictors associated with the attitudinal approach to judicial decisions confirmed the hypothesis linking former employment with the Legislation Department to a justice propensity to vote pursuant of the state. The other hypotheses associated with the individual-level of the model were not supported by the findings. Interestingly, this included the hypothesis linking appointing government to state friendly voting. None of the models found any support for this assertion.

Collegiality was confirmed as an influential factor by the findings. A panel-specific predictor indicating a four-justice majority with background from the Legislation Department had a substantial effect on the propensity for a state friendly vote. For male justices there is a predicted probability of 88.8 percent for voting pursuant of the state if the case is decided in a panel with these attributes. This suggests that the strategic approach to studies of judicial decisions should be accounted for in analyses of the Norwegian Supreme Court. The other hypothesis concerned with the impact of strategic interaction, the panel effect of appointing government, was not supported by the findings. This is surprising considering the impact ideology have had at the individual-level in other studies of judicial behavior.

The legal model is also supported by the findings, although not to the same extent as the attitudinal and strategic approach. When the state is represented by the Office of the Government Advocate the predicted probability of voting for the state increase for all justices. This supports the expected constraining influence of case-specific factors. Hence this effect should be accounted for in other analyses of judicial decisions. There was, however, no support for the other case-specific hypotheses. The expected impact of salient cases was nonexistent, and whether the state appeared as plaintiff or respondent had no effect on the votes of the justices.

This thesis has argued that integrated models of judicial behavior estimated within hierarchical frameworks are preferable to the limited focus of the attitudinal model in single-level analyses. In unanimous decisions there is variance explained by the grouping structure in the data, which it is not possible to model in single-level analyses. The identification of panel-effects and the absence of ideological effects are particularly interesting, and warrant further investigation.

8.1 Implications

Attitudinal approaches were the dominant force in the judicial politics literature in the United States for close to 40 years. More recently, Grendstad et al. (2010; 2011a; 2011b; 2011c; 2012b; 2012c) and Shaffer et al. (2011) have advocated use of the attitudinal framework provided by Segal and Spaeth (2002) in studies of the decisions of the Norwegian Supreme Court. The findings in this thesis have indicated that strategic factors and legal factors also influence judicial behavior and decision-making. Votes pursuant of the state are not merely influenced by the political preferences and attitudes of the justices, but rather, in the terms of Brace and Hall (1993, 917), by "a complex interaction of rules, preferences and structures". The findings suggest that by omitting institutional features of judicial behavior models are indeed rendered simplistic and incomplete, thus confirming the assertions of Sunde (2012) regarding the effect of intellectual and institutional structures.

Theoretical, empirical and statistical justifications for the application of a multilevel model to fit the hierarchical judicial decisions data indicate that analyses ignoring these structures are incorrectly specified. To avoid the probable misspecification of models conducted at only a single level, methodological approaches controlling for the multilevel nature of the judicial decisions data should be considered in studies of judicial decisions.

8.2 Suggestions for future research

The hierarchical generalized linear model utilized in the analysis in this thesis can be extended to include random coefficients and cross-level interactions in addition to random intercepts. An alternative structure where the individual influence on case outcomes is assessed would also provide an interesting endeavor and enable a test of the assertions of Kastellec and Lax (2008) concerning the consequences of judicial diversity. The multiple membership structure of the judicial decisions data should also be tested to see whether it affects the estimated intraclass correlation and regression coefficients in the manner identified by Chung and Beretvas (2011).

Appendix A - Cases

Table A1. List of cases

Rt-1990-1235	Rt-1993-278	Rt-1995-72	Rt-1998-1328	Rt-1999-946
Rt-1990-1274	Rt-1993-321	Rt-1995-85	Rt-1998-1372	Rt-2000-1028
Rt-1990-1285	Rt-1993-409	Rt-1995-955	Rt-1998-1425	Rt-2000-1056
Rt-1990-410	Rt-1993-528	Rt-1996-1122	Rt-1998-1666	Rt-2000-1066
Rt-1990-657	Rt-1993-578	Rt-1996-1188	Rt-1998-1742	Rt-2000-1214
Rt-1990-781	Rt-1993-587	Rt-1996-1190	Rt-1998-1764	Rt-2000-1473
Rt-1990-791	Rt-1993-66	Rt-1996-1384	Rt-1998-1771	Rt-2000-1729
Rt-1990-838	Rt-1993-671	Rt-1996-1410	Rt-1998-1779	Rt-2000-1739
Rt-1990-861	Rt-1993-694	Rt-1996-1457	Rt-1998-1794	Rt-2000-1865
Rt-1990-946	Rt-1993-739	Rt-1996-1473	Rt-1998-1795	Rt-2000-1981
Rt-1991-1090	Rt-1994-1036	Rt-1996-1495	Rt-1998-1988	Rt-2000-2014
Rt-1991-1104	Rt-1994-1105	Rt-1996-1510	Rt-1998-29	Rt-2000-220
Rt-1991-1157	Rt-1994-1244	Rt-1996-232	Rt-1998-383	Rt-2000-23
Rt-1991-1167	Rt-1994-132	Rt-1996-369	Rt-1998-40	Rt-2000-244
Rt-1991-1311	Rt-1994-1398	Rt-1996-509	Rt-1998-430	Rt-2000-253
Rt-1991-1355	Rt-1994-1470	Rt-1996-51	Rt-1998-607	Rt-2000-268
Rt-1991-1468	Rt-1994-1545	Rt-1996-513	Rt-1998-623	Rt-2000-402
Rt-1991-424	Rt-1994-158	Rt-1996-551	Rt-1998-794	Rt-2000-436
Rt-1991-557	Rt-1994-235	Rt-1996-561	Rt-1998-811	Rt-2000-452
Rt-1991-586	Rt-1994-323	Rt-1996-568	Rt-1998-929	Rt-2000-46
Rt-1991-624	Rt-1994-326	Rt-1996-6	Rt-1998-937	Rt-2000-591
Rt-1991-668	Rt-1994-557	Rt-1997-1099	Rt-1999-1087	Rt-2000-758
Rt-1991-745	Rt-1994-568	Rt-1997-1430	Rt-1999-1303	Rt-2000-772
Rt-1991-954	Rt-1994-691	Rt-1997-1564	Rt-1999-1312	Rt-2000-788
Rt-1992-1105	Rt-1994-76	Rt-1997-1602	Rt-1999-1347	Rt-2000-977
Rt-1992-1150	Rt-1994-813	Rt-1997-1646	Rt-1999-138	Rt-2001-1006
Rt-1992-1235	Rt-1995-1	Rt-1997-1784	Rt-1999-14	Rt-2001-1049
Rt-1992-1303	Rt-1995-1044	Rt-1997-1987	Rt-1999-1502	Rt-2001-1123
Rt-1992-1401	Rt-1995-124	Rt-1997-343	Rt-1999-1517	Rt-2001-1163
Rt-1992-1511	Rt-1995-1278	Rt-1997-383	Rt-1999-157	Rt-2001-1201
Rt-1992-217	Rt-1995-1317	Rt-1997-403	Rt-1999-1916	Rt-2001-1229
Rt-1992-229	Rt-1995-1422	Rt-1997-407	Rt-1999-1924	Rt-2001-1265
Rt-1992-242	Rt-1995-1529	Rt-1997-410	Rt-1999-1980	Rt-2001-1444
Rt-1992-306	Rt-1995-1636	Rt-1997-428	Rt-1999-458	Rt-2001-1481
Rt-1992-321	Rt-1995-1939	Rt-1997-51	Rt-1999-608	Rt-2001-1497
Rt-1992-581	Rt-1995-350	Rt-1997-550	Rt-1999-637	Rt-2001-1661
Rt-1992-643	Rt-1995-447	Rt-1997-580	Rt-1999-727	Rt-2001-170
Rt-1993-1220	Rt-1995-455	Rt-1997-653	Rt-1999-74	Rt-2001-187
Rt-1993-1333	Rt-1995-479	Rt-1997-860	Rt-1999-748	Rt-2001-207
Rt-1993-249	Rt-1995-506	Rt-1998-1140	Rt-1999-901	Rt-2001-282
Rt-1993-268	Rt-1995-54	Rt-1998-1164	Rt-1999-922	Rt-2001-394

Rt-2001-428	Rt-2003-619	Rt-2005-394	Rt-2006-720	Rt-2008-233
Rt-2001-450	Rt-2003-662	Rt-2005-416	Rt-2006-735	Rt-2008-270
Rt-2001-512	Rt-2003-764	Rt-2005-469	Rt-2006-769	Rt-2008-343
Rt-2001-640	Rt-2003-82	Rt-2005-495	Rt-2007-1	Rt-2008-410
Rt-2001-752	Rt-2003-833	Rt-2005-548	Rt-2007-1003	Rt-2008-438
Rt-2001-762	Rt-2003-861	Rt-2005-577	Rt-2007-1217	Rt-2008-478
Rt-2001-851	Rt-2004-1092	Rt-2005-597	Rt-2007-1263	Rt-2008-513
Rt-2001-995	Rt-2004-1105	Rt-2005-607	Rt-2007-1354	Rt-2008-524
Rt-2002-1080	Rt-2004-134	Rt-2005-692	Rt-2007-140	Rt-2008-560
Rt-2002-1247	Rt-2004-1343	Rt-2005-734	Rt-2007-1401	Rt-2008-577
Rt-2002-1298	Rt-2004-1723	Rt-2005-855	Rt-2007-1511	Rt-2008-681
Rt-2002-1322	Rt-2004-1737	Rt-2005-86	Rt-2007-1543	Rt-2008-688
Rt-2002-1331	Rt-2004-1860	Rt-2005-951	Rt-2007-1573	Rt-2008-727
Rt-2002-1469	Rt-2004-1921	Rt-2006-1062	Rt-2007-1612	Rt-2008-738
Rt-2002-164	Rt-2004-1985	Rt-2006-1099	Rt-2007-1653	Rt-2008-794
Rt-2002-1646	Rt-2004-2	Rt-2006-1105	Rt-2007-1801	Rt-2008-803
Rt-2002-1691	Rt-2004-200	Rt-2006-1129	Rt-2007-1815	Rt-2008-932
Rt-2002-180	Rt-2004-2000	Rt-2006-1199	Rt-2007-1822	Rt-2008-939
Rt-2002-19	Rt-2004-241	Rt-2006-1217	Rt-2007-209	Rt-2009-105
Rt-2002-304	Rt-2004-312	Rt-2006-1232	Rt-2007-246	Rt-2009-1090
Rt-2002-352	Rt-2004-344	Rt-2006-1265	Rt-2007-257	Rt-2009-1153
Rt-2002-387	Rt-2004-487	Rt-2006-1281	Rt-2007-281	Rt-2009-1195
Rt-2002-391	Rt-2004-523	Rt-2006-1300	Rt-2007-302	Rt-2009-1208
Rt-2002-456	Rt-2004-569	Rt-2006-1348	Rt-2007-392	Rt-2009-1237
Rt-2002-618	Rt-2004-583	Rt-2006-1367	Rt-2007-667	Rt-2009-1261
Rt-2002-64	Rt-2004-658	Rt-2006-1382	Rt-2007-721	Rt-2009-1356
Rt-2002-718	Rt-2004-738	Rt-2006-1435	Rt-2007-848	Rt-2009-1374
Rt-2002-747	Rt-2004-957	Rt-2006-1519	Rt-2007-899	Rt-2009-1400
Rt-2002-798	Rt-2004-992	Rt-2006-1573	Rt-2007-912	Rt-2009-1432
Rt-2002-996	Rt-2005-1157	Rt-2006-1649	Rt-2008-1014	Rt-2009-1473
Rt-2003-1233	Rt-2005-117	Rt-2006-1657	Rt-2008-1160	Rt-2009-1485
Rt-2003-1324	Rt-2005-1356	Rt-2006-1665	Rt-2008-1284	Rt-2009-1577
Rt-2003-1345	Rt-2005-1409	Rt-2006-262	Rt-2008-1307	Rt-2009-1626
Rt-2003-1531	Rt-2005-1421	Rt-2006-333	Rt-2008-1336	Rt-2009-1632
Rt-2003-1730	Rt-2005-1434	Rt-2006-343	Rt-2008-135	Rt-2009-170
Rt-2003-1821	Rt-2005-1461	Rt-2006-349	Rt-2008-145	Rt-2009-203
Rt-2003-185	Rt-2005-1550	Rt-2006-364	Rt-2008-1510	Rt-2009-32
Rt-2003-293	Rt-2005-1585	Rt-2006-396	Rt-2008-1537	Rt-2009-354
Rt-2003-375	Rt-2005-1638	Rt-2006-404	Rt-2008-1555	Rt-2009-425
Rt-2003-409	Rt-2005-1647	Rt-2006-449	Rt-2008-1665	Rt-2009-441
Rt-2003-504	Rt-2005-229	Rt-2006-564	Rt-2008-1705	Rt-2009-534
Rt-2003-536	Rt-2005-238	Rt-2006-593	Rt-2008-1747	Rt-2009-546
Rt-2003-557	Rt-2005-279	Rt-2006-602	Rt-2008-195	Rt-2009-661
Rt-2003-60	Rt-2005-306	Rt-2006-607	Rt-2008-218	Rt-2009-705

Rt-2010-513
Rt-2010-527
Rt-2010-790
Rt-2010-858
Rt-2010-979
Rt-2009-715
Rt-2009-839
Rt-2009-851
Rt-2010-1047
Rt-2010-1070
Rt-2010-1131
Rt-2010-1153
Rt-2010-1184
Rt-2010-1345
Rt-2010-1430
Rt-2010-1500
Rt-2010-1613
Rt-2010-224
Rt-2010-236
Rt-2010-306

Appendix B - Coding procedure

The variables not retrieved from the DORANOH database include all the panel-specific variables and five of the case-specific variables. Panel-specific variables are simple aggregations of the individual-level DORANOH data. The case-specific variables were coded from decisions published in the Lovdata Foundation legal information system. Lists of decisions for each year included in the analysis were retrieved from the DORANOH database prior to coding new variables. This ensured that the information on the cases present in the DORANOH database did not deviate from the decisions published by Lovdata. After the case-specific variable had been coded they were merged with the individual data retrieved from the DORANOH database.

A variable indicating whether the state won or lost served as a preliminary indicator of state friendly voting. This was then recoded after the dataset was merged based on information on the votes of the individual justices and an additional variable indicating if the state appeared as plaintiff or respondent. The assessment of whether the state won or lost was done by the author based on the information provided by Lovdata and a review of the outcome of each decision. Decisions where the outcome was unclear were excluded from the analysis. Thus any misspecifications in the coding of the dependent variable and the selection of cases are entirely due to the author.

The coding of the presence of the Government Advocate and the representation of the state by the Office of the Government Advocate followed the same procedure as the indicator for plaintiff or respondent. These variables are based on information listed in the field *parter* in the Lovdata database. Case complexity, which is a count of the number of legal sources cited in a decision, is based on the number of legal sources listed in the field *henvisninger i teksten*.

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