

Judicial Independence & Modern Judicial Campaigns:
An Examination of Nonpartisan Retention Elections[†]

Brandice Canes-Wrone^{*}

Tom S. Clark^{**}

Jee-Kwang Park^{***}

(*very preliminary draft*)

[†] Very preliminary draft. Prepared for presentation at the Colloquium on Law, Business and Economics, The University of Texas Law School, February 23, 2009. Comments and suggestions very welcome.

^{*} Professor of Politics and Public Affairs, Princeton University, bcwrone@princeton.edu

^{**} Assistant Professor of Political Science, Emory University, tom.clark@emory.edu

^{***} Research Associate, Woodrow Wilson School, Princeton University, jkpark@princeton.edu

Introduction

Throughout the history of the United States, states have struggled with the question of how best to select judges. The legal profession has pushed for greater judicial independence, while others have sought to make judges accountable to the public. Thus unlike federal judges who enjoy lifetime federal tenure after their initial appointment, most state judges face some type of regular election. The method of initial selection varies considerably, while three types of elections for subsequent terms select state judges: partisan, nonpartisan, and retention elections. In partisan elections, judicial candidates run for office with a partisan label, just as in most legislative or gubernatorial elections. In nonpartisan systems, judicial candidates have no partisan affiliation, but can still face a challenger. By comparison, in retention elections, does not face a challenger on the ballot in addition to running without a party label; she retains her seat pending a specified percentage of votes that approve of her retaining the seat.

Over the years, the general trajectory of reform has been from partisan to nonpartisan to retention elections. The intellectual thrust behind each of these successive reforms has been an effort to promote judicial independence by insulating judges from political pressure.¹ The American Bar Association (ABA) considers retention elections

¹ A less mentioned but still important virtue an ideal judicial selection method should have is legitimacy. Recently judicial election has become quite politicized. State judges have to raise money to support their campaigns even from special interest groups, which raises voter's eyebrows about fairness of the court. Negative ads in politicized judicial election often make voters see judicial election indifferent from other political election. Thus this politicized judicial campaign does harm to legitimacy of the court (Gibson 2008). When it comes to politicized campaign, available data show that unlike other selection methods, there is virtually no fundraising or campaign in recent retention elections as they are rarely challenged (Sample et al 2007). Although retention election has become more politicized (Goodman and Marks 2006), retention election is still the election least plagued by new style judicial campaign. In that sense, retention election may contribute to legitimacy of the court.

the preferred electoral system, and favors a particular type of retention system, the “Missouri” plan.² In the Missouri plan, a nominating commission proposes candidates to an elected official, typically a governor, and the official selects one of the candidates. The judge can then face an initial retention election as well as retention elections after all subsequent terms. The term Missouri plan came about because Missouri was the first state to adopt this type of plan in 1940 (Epstein, Knight and Shvetsova (2002, 200)). Currently fourteen states employ a version of this system—whereby a nominating commission is vested with the primary power in the initial selection and reselection occurs via retention elections-- to select state supreme court justices.³ Three additional states utilize retention elections for reselection but employ other means for initial selection.⁴

In recent years the merit plan and other forms of retention systems have come under a variety of criticisms. Some have argued that special interests can unseat judges by publicizing a distorted view of their records prior to a retention election (Aldrich 2002). Others have contended that the nominating commissions give too much control to trial lawyers, lack transparency in their decision-making, and are not sufficiently

² While the American Bar Association prefers the merit plan to other types of electoral systems, it prefers a lifetime appointment or reselection by a commission over any type of electoral system. *See*, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY app. A, at 4 (2003), *available at* <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> [hereinafter JUSTICE IN JEOPARDY].

³ These states include Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Utah, and Wyoming. *See* American Judicature Society, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2003), at http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.

⁴ These states include California, Illinois and Pennsylvania. *See* American Judicature Society, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2003), at http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf.

accountable.⁵ All of these criticisms indicate that retention elections may not induce judicial independence to the extent that advocates of the system have predicted. In Tennessee, such criticisms helped justify politicians' 2008 decision to allow the merit system to expire and be replaced by partisan elections.

Despite the fact that judicial selection remains a significant policy issue, and that retention elections are a critical part of this debate, the literature has little to say regarding the effects of these elections. Do they, as hypothesized, produce more judicial independence than partisan or nonpartisan electoral systems? Do retention systems insulate judges from pressure to cater to public opinion? And if so, do the systems produce other striking patterns of decisions that fit with critics' complaints?

Most of the literature on the effects of judicial selection compares appointed and elected systems without distinguishing among types of the latter. For instance, we know that elected judges are more likely to overturn state statutes (Langer 2002) and cater to public opinion (e.g., Brace and Boyea 2004). Other research compares the two types of competitive elections—partisan versus nonpartisan—but does not examine retention systems. Tabarrok and Helland (2002) provide evidence that judges in partisan systems grant higher tort awards than do judges in nonpartisan systems. Caldarone, Canes-Wrone, and Clark (2009) find that on hot button issues, judges in nonpartisan systems have less independence from public opinion than do judges in partisan systems.

A few studies have compared systems that utilize nominating commissions—“Missouri plan” systems along with systems in which judges need not face elections to retain their seats-- to other electoral systems. This work has suggested that merit systems

⁵ See, e.g., “The ABA Plots a Judicial Coup.” Wall Street Journal Editorial. August 14, 2008; Lt. Governor of Tennessee Ron Ramsey, “Judicial Selection Reform Long Overdue.” June 9, 2008.

do not produce fundamentally different patterns of decisions. For instance, Romero, Romero, and Ford (2002) find that rulings in racial discrimination cases are not affected by whether the judge was selected in through the merit system. Likewise, Atkins and Glick (1974) suggest that the merit plan does not tend to favor a particular type of appellant. Because these studies group together different types of reselection systems-- both with respect to the electoral systems and the “merit plans” that encompass lifetime appointments, systems that reselect via nominating commission and systems that reselect via retention election—it remains possible that differences exist among particular types of systems.

Moreover, these studies fail to examine the judges’ responsiveness to public opinion. This issue has become more important over time as judges have become subject to a “new-style” judicial campaign that has featured increased participation by interest groups, greater sums of money, and more explicit policy statements by judicial candidates (Hojnacki and Baum 1992). Retention elections have not been immune from this trend. Indeed, others have noted that modern judicial campaigns may turn retention elections into contests that differ little from those for legislative or other elected office (Squire and Smith 1988).

In this article, we discriminate among the three most common electoral systems through which state judges are selected – partisan competitive, nonpartisan competitive, and retention elections. In particular, we argue that in the context of the “new-style” judicial campaign (Hojnacki and Baum 1992), which features increased participation by special interests, greater sums of money spent, and more open policy statements by candidates – the expectations that nonpartisan competitions will be less political than

partisan elections may be wrong. Indeed, others have noted that modern campaigns may turn retention election into partisan contests (Squire and Smith 1988). Indeed, the modern judicial campaign places policy issues at the center, despite the goal of reformers to focus judicial contests on competence and merit. For example, Aspin and Hall (1994) find that 60% of judges standing for retention thought that the elections affect their behavior on the bench. Traut and Emmert (1998) show that increases in public support for the death penalty in California were associated with greater judicial support for the death penalty in California. Thus, contrary to conventional wisdom which suggests that retention elections insulate judges from political pressure, judges facing retention elections may be quite responsive to public opinion when they rule on the salient issues.

Theoretical Argument

In the literature on judicial elections, and retention elections in particular, a consistent expectation is that retention elections, as compared with competitive elections, promote independence from public opinion. In the context of a retention election, voters are supposed to evaluate judges on the basis of their competence or merit, not on their policy views or partisanship. Without the influence of either party labels associated with judges or opponents on the campaign trail, the focus of these contests, it is argued, will be on a judge's performance in office rather than her alignment with public policy preferences. Indeed, as we described it above, this goal has been central to the implementation of reforms from competitive elections to retention elections in many states.

Modern judicial campaigns, however, involve dynamics not necessarily contemplated by the argument for retention elections. In particular, the rise of the "new-style" judicial campaign (Hojnacki and Baum) has changed the landscape of judicial

elections. Previously relatively low-information elections without much participation by special interests or campaign activity on the part of the candidates, judicial elections during the final decades of the twentieth century came to resemble their counterparts for legislative and executive offices. Special interests began to participate in judicial campaigns more forcefully, the amount of money spent in these campaigns sky-rocketed (Shephard 2009), and, importantly, judicial candidates began to speak more openly and widely about their policy views. This last development ultimately even gained assent from the Supreme Court, when it declared in *Republican Party of Minnesota v. White* (2002) that the First Amendment protects the right of candidates for judicial office to take policy positions during a campaign.

In the context of new-style judicial campaigns, the hypothesized insulation from public opinion afforded by retention elections would seem especially important. The rise of the new style judicial campaign threatens judicial independence and raises issues of accountability. An election featuring opponents for office who are supported by mobilized, well-financed interest groups creates a greater incentive for judges to cater to public opinion – rather than decide cases strictly in light of the facts and their reading of the law – than a retention election lacking such a competitor.⁶

Unfortunately, it is in the context of the new style judicial campaign that the effects of retention (and nonpartisan) electoral systems may be precisely the *opposite* of those predicted by their proponents. In this context, so-called hot-button issues (e.g., the death penalty, abortion, tort reform) often become the focus of judicial elections, with special interests using their resources to identify and publicize a candidate's previous

⁶ Note a similar argument may be advanced with respect to nonpartisan versus partisan elections (Caldarone, Canes-Wrone and Clark 2009). We turn to this possibility below.

decisions that may be presented as an unpopular position. For interest groups concerned with less salient political issues, they may still focus their efforts on more salient issues to defeat judges who the groups oppose on the less salient issues.

Consider, for example, a judge who votes to overturn a death penalty sentence. While the decision may have been well justified from a legal perspective – indeed, perhaps the decision was *required* from a legal perspective – the judge’s opponent in an election, or an interest group seeking to prevent the judge from being retained, could publicize the decision and label the judge as weak on crime. In the low-information environment that characterizes judicial elections, this could be all the information a voter has about a judge when she enters the ballot box. (This is particularly true in retention elections where there are no partisan labels in the ballot box to help the voter out.) This hypothetical example in fact describes well the 1986 election in California in which 3 State Supreme Court justices failed to be retained.

In October 1986, six of the seven justices of the California Supreme Court stood for retention. (That so many of the justices faced retention in a single year was in-and-of-itself unusual.) among these six justices standing for reelection was Chief Justice Rose Bird, who was fiercely opposed by conservatives and groups representing victims of crime. Their central complaint about Bird was that she had been too liberal on the death penalty. Even the governor at the time announced his intention to vote against retaining Bird, specifically citing her votes in death penalty cases (Wold and Culver 1987, 349). While it has been observed that Bird’s campaign was not very forceful in her defense (Wold and Culver 1987), an astonishing amount of money was raised and spent in opposition to Bird. In fact, the three justices who were defeated – Bird, Cruz Reynoso,

and Joseph Grodin – collectively spent less than half of what their opponents spent campaigning against them. Polls taken after the election suggest that voters overwhelmingly perceived Bird , Cruz and Reynoso as weak on the death penalty and lenient towards criminals and that those views were primary in determining their votes against the judges (Wold and Culver 1987, 353).

Had the California elections been partisan, contrary to conventional wisdom, one might have expected a very different dynamic. Recent research has argued that whereas progressive reformers seeking to end partisan judicial elections during the early 20th century expected nonpartisan elections to insulate judges from political pressure, in the context of the new-style judicial campaign, removing partisan labels from the ballot box has had precisely the opposite effect (Franklin 2002; Canes-Wrone and Schotts 2007; Caldarone, Canes-Wrone and Clark 2009; Canes-Wrone and Clark 2009). The logic behind this argument is simple. In low-information elections, such as judicial elections, any piece of information a voter has exerts a greater influence on her vote choice. Because party identification is a very strong cue for voters – it conveys a great deal of information about a candidate’s position on a wide variety of policy issues and places candidates relative to each other – party labels on a ballot can potentially overwhelm what a voter may have heard about a single vote by a candidate. That is, a voter may have heard that judge so-and-so voted to overturn a death penalty. If that is all the voter has heard about a candidate when she casts her vote, then if that voter supports the death penalty, she may be inclined to vote against the candidate.⁷ However, if the voter

⁷ Indeed, while only a single piece of information may be a very noisy signal about a candidate’s position in an ideological dimension, if it is all of the information that a voter receives about an otherwise unknown candidate, then it will exert a strong influence on her subjective posterior evaluation of the candidate. In this sense, it is rational for a voter to cast her vote on the basis of this single piece of information.

observes a party label and sees that the judge in question is a Republican, because party labels are such strong cues, she will be more willing to vote in favor of the candidate who is supposedly weak on crime. After all, comparing the Democratic candidate with the Republican candidate, a voter would reasonably expect the Republican candidate to be tougher on crime and more supportive of the death penalty, despite this one vote that was publicized during the campaign.⁸

Our general hypothesis derives directly from this logic. We expect that in partisan electoral systems, the presence of a party label provides some “political cover” for a judicial candidate. She need not worry as much about casting an unpopular vote in a case involving a salient issue as does her counterpart in a system with nonpartisan retention elections (or even nonpartisan competitive elections). An unpopular vote may become politicized, and she may have some incentive to follow public opinion; indeed, the literature clearly demonstrates that elected judges are more sensitive to public opinion than their counterparts in non-elective systems. However, judges in nonpartisan retention systems (and nonpartisan competitive systems) do not have the party label to provide political cover and must worry to a greater extent about each vote in politically salient cases. Thus, we expect that, contrary to conventional wisdom, judges in retention (and nonpartisan competitive) elections who will be more sensitive to public opinion than judges in partisan competitive elections. As a consequence, we should observe a stronger

⁸ The logic here is analogous to the “Nixon-Goes-to-China” hypothesis developed by Cameron, Segal and Songer (2000) in their study of strategic auditing by the Supreme Court, as well as numerous other studies of principal-agent relationships. The voter, as a principal to an agent judge, must decide whether the judge has “misbehaved.” If the judge is known to be a conservative (i.e., has a Republican party label), then learning of a liberal (i.e., anti-death penalty) vote is not as alarming as if the voter has no prior information about the judge’s predispositions.

correlation between public opinion and judicial votes in these states than in states with partisan systems.

Of course, this expectation applies particularly to cases involving so-called “hot button” issues more so than it does to cases that are less politically salient. Voters may place more weight on these issues (e.g., abortion, the death penalty, business-environment relations, and tort reform) than other less salient issues, and it is precisely on these salient issues that the party labels serve as most meaningful cues. Ironically, though, it is precisely these politically-salient issues that are at the center of the new-style judicial campaign. Thus, in the context of modern judicial elections it is precisely those issues that would seem to exacerbate the effects we predict that have come to be most prominent in judicial campaigns.

These effects should distinguish nonpartisan retention elections from partisan competitive elections; they should also distinguish nonpartisan competitive elections from partisan competitive elections (Caldarone, Canes-Wrone and Clark 2009; Canes-Wrone and Clark 2009). In both cases, the nonpartisan systems should encourage greater responsiveness to public opinion than the partisan systems. However, we remain agnostic about the difference between nonpartisan retention and nonpartisan competitive elections. The notable distinction between these two systems is the presence of a competing candidate; however, as we have seen, retention elections often feature the active participation of special interests. Their participation can serve a similar function to that of a competitor. Thus, while there are differences between these two systems, we remain agnostic about the effect these differences should have on the level of responsiveness to public opinion.

Empirical Analysis

Data

To assess the differences among states with partisan, nonpartisan and retention electoral systems, we assemble new data and combine those data with existing data. In particular, we extend the data from Caldarone, Canes-Wrone and Clark (2009; Canes-Wrone and Clark 2009); their data include all votes by all judges in abortion cases from states with partisan or nonpartisan statewide elections for the state court of last resort between 1980 and 2006. We extend their data to include all states with nonpartisan retention elections.

States. By "nonpartisan retention elections," we mean electoral systems in which state supreme court justices face only retention election. For example, Pennsylvania, where justices are first elected through a partisan election and then stand for retention, is not included as a case of retention election state. Our list of states using nonpartisan retention elections includes: Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, Wyoming. We do not include cases from states before they adopted a nonpartisan retention system. Thus, we do not include cases from New Mexico before 1989, South Dakota before 1995, Tennessee before 1995, or Utah before 1986.

Cases and votes. To identify the universe of cases, we replicated the search performed in Caldarone, Canes-Wrone and Clark (2009) for states with nonpartisan retention elections. We conducted a Westlaw search for cases involving abortion, identifying 418 abortion cases in the seventeen states with nonpartisan retention elections. For each case, we code each judge's vote as either pro-choice or pro-life. A

pro-life vote is a vote that makes it less likely a woman would be able to obtain an abortion in that state.

Judicial ideology. As has been well-documented in the literature, a primary determinant – if not *the* primary determinant – of judicial voting is a judge’s own ideology, or policy preferences. In the analysis of state courts, we lack reliable, valid measures of judicial ideology.⁹ Thus, we opt for each judge’s partisan affiliation as the first component of our control for judicial ideology. These data come from both existing and original data sources. We begin with the NSF-funded data compiled by Laura Langer (CITE). However, Langer employs a potentially problematic coding rule; in states with retention elections or when she is unable to find party affiliation, she assumes a judge’s party is the same as the current governor. We therefore undertook an extensive data collection to identify the partisan affiliations of judges whose party IDs were assumed to be shared with the governor. To do so, we consulted *The American Bench* as well as local newspaper coverage of the judges. When we were unable to ascertain a judge’s affiliation, we assumed it was as coded by Langer. Among our 2,962 observations, we uncovered 718 instances – about 24% of the data – in which Langer’s coding assumption led to a miscode of the judge’s partisan affiliation.

⁹ One measure that has been used in the literature, is the so-called PAJID scores. However, these scores appear problematic on their face. For example, the distribution of PAJID scores for all judges is unimodal, whereas one would expect a bimodal distribution as is normally the case with ideal point estimates. In addition, the average PAJID score for Republican judges is 45.1, and the average score for Democratic judges is 46.8, on a scale of 0-100, a difference that is not statistically significant ($t=1.44$). One would naturally expect a greater difference between the distributions of ideal points for Republicans and Democrats.

Public opinion. To measure public opinion, we follow Caldarone, Canes-Wrone and Clark (2009). In particular, we use the CBS-New York Times survey, which since 1989 regularly asks respondents about their views on abortion; respondents are given three options. They may say that abortion should be (a) legal without restriction, (b) legal but with greater restrictions than it currently is, or (c) completely prohibited. Before 1989, the wording of the survey was slightly different, but analysis suggests the change in question wording had no effect on respondents' answers (Caldarone, Canes-Wrone and Clark 2009).

Erickson, Wright and McIver (1993) demonstrate these surveys can be used to estimate state-level public opinion by pooling survey responses over a decade. In particular, because evidence suggests public opinion about abortion remained relatively stable over the period of analysis here (Brace et al. 2002), the method recommended by Erickson, Wright and McIver provides a reliable and valid method for estimating state-level public opinion about abortion. To measure public opinion, we construct a variable, *pro-life opinion differential*, which captures how pro-life a state leans. In particular, this variable is equal to the total proportion of respondents in either of the two “pro-life categories” (i.e., available but with greater restrictions, or strictly prohibited), minus the proportion of respondents in the “pro-choice category” (i.e., legal without restriction). Because public opinion has historically leaned towards restrictions on abortion, this variable ranges from a low of -0.16 (most pro-choice) to a high of 0.45 (most pro-life).

Case categories. Following Caldarone, Canes-Wrone and Clark (2009; Canes-Wrone and Clark 2009), we divided all cases into one of five substantive categories, defined by

the legal question at hand: (1) trespassing and protests – cases involving anti-abortion protests and trespassing, (2) minors – cases involving minors’ requests for judicial bypass of parental notification requirements, (3) personhood – cases involving whether a fetus can be considered as a legal person (usually, in a wrongful death action), (4) wrongful birth – cases involving accusations a physician caused an unwanted birth, and (5) other/miscellaneous – cases involving public funding for clinics performing abortions. Among 418 cases, 23 cases are classified into trespassing and protests, 55 cases into minors, 103 cases in personhood, 66 cases into wrongful birth, and 171 into other/miscellaneous category.

Case facts. We control for the facts of each case which may make a pro-choice or pro-life outcome more or less likely. Specifically, for four of the five substantive case categories, we code the central factual claim at hand. We follow Caldarone, Canes-Wrone and Clark (2009; Canes-Wrone and Clark 2009) in our coding. For trespass cases, we code whether the protest in question took place inside an abortion clinic or at a doctor's home. If so, we expect a judge to be more likely to vote in a pro-choice direction. For cases involving minor requests for judicial bypass, we cod the relevant fact as whether the minor has consulted a medical professional or pro-life organization. If so, we expect the judge to be more likely to vote in a pro-choice direction. In personhood cases, we cod the relevant fact as whether a fetus has been killed (for example, in a car accident). If so, we expect a judge to be more likely to vote in a pro-life direction. Finally, in wrongful birth cases, we code the relevant fact as whether the doctor has been accused of misinterpreting tests results, as opposed to not providing available tests, failing to relay

test results, or incorrectly performed a procedure. When the doctor has simply misinterpreted a test result, we expect a judge to be more likely to vote in a pro-life direction.

Method

These data fit very naturally into a hierarchical structure; they are constituted by judges nested in states, which are in turn nested in selection systems. Because of this structure, each observation – a vote by a judge – is not necessarily independent of each other observation. There may be correlation among a single judge’s votes or among votes by all judges in a state, etc. As a consequence, we cannot simply pool the observations and estimate a standard regression model. Multilevel modeling allows us to account for the potential correlation among observations within units without having to separate the data into subsets of observations that we assume to be independent (Gelman and Hill 2007). Here, we employ multilevel empirical models to assess the effect of each selection method on judges’ votes. In particular, we estimate a logit regression model as follows with case i and indices j , s , and m for judge, state and selection method, respectively:

$$\Pr(\text{Vote}_{ji} = 1 | x) = \Lambda(\alpha + \beta_1 \text{PartyID}_j + \beta_2 \text{Opinion}_{s[i]} + \beta_3 \text{Facts}_i + \beta_4 \text{CloseElectionPL}_{j[s[i]]} + \beta_5 \text{CloseElectionPC}_{j[s[i]]} + \gamma_{m[i]}^{\text{method}} \text{Opinion}_{s[i]} + \alpha_j^{\text{judge}} + \alpha_{s[j]}^{\text{state}} + \alpha_{m[j]}^{\text{method}} + \varepsilon_{ji}) \quad (1)$$

Where Vote_{ji} equals 1 if judge j casts a pro-choice vote in case i and 0 otherwise. The subscript $s[j]$ indicates the state in which judge j serves; $m[j]$ indicates the selection method under which judge j serves.

The first feature of our model is that we include random, or modeled, intercepts for each level in the data (e.g., judge, state, selection method). Formally, we model the intercepts as follows:

$$\alpha_j^{judge} \sim N(0, \sigma_{judge}^2) \quad \text{for } j = 1, \dots, n$$

$$\alpha_s^{state} \sim N(0, \sigma_{state}^2) \quad \text{for } s = 1, \dots, 33$$

$$\alpha_m^{method} \sim N(0, \sigma_{method}^2) \quad \text{for } m = 1, 2, 3$$

The upshot of including modeled intercepts for each judge and state is that we can include these effects while also evaluating the effect of selection method. If we were to include so-called “fixed” effects, we would not be able to do this, because the judge and state effects could be subsumed by the selection method effects, as selection method does not vary within a the state or judge level (save for the exception of Arkansas).

Importantly, because our measure of judicial policy preferences is crude – party affiliation – the modeled effects allow us to estimate from the data each judge’s proclivity to vote pro-choice. These effects, then, encompass correlation in the voting of each judge beyond what is captured by her party identification.

The second feature of our model to notice is that we include a modeled, or random, slope for the public opinion variable. There is a main effect of public opinion, which is captured by β_2 ; however there is also an additional slope – essentially a shift in the slope, for each of the selection methods. Formally, we model the method-specific coefficients as follows:

$$\gamma_m^{method} \sim N(0, \sigma_\gamma^2) \quad \text{for } m = 1, 2, 3$$

For selection method m , the correlation between public opinion and a judge’s vote is given by $\beta_2 + \gamma_m$, which is simply the main effect of public opinion, plus the selection method-specific slope. The difference in slopes among the selection systems is the crucial test of our theoretical claim, and by estimating the correlation between public opinion and voting in this way, we can directly assess the differences across selection methods.

Results

The results of our analysis are shown in Table 1. As is immediately apparent, and as one would naturally expect, the partisan affiliation of a judge is a strong predictor of the probability she will vote in a pro-life direction. Democratic judges are much less likely to vote in a pro-life direction than are Republican judges. In fact, holding all other variables at their means, the predicted probability of a pro-life vote for a Democratic judge is 0.41, while the predicted probability of a pro-life vote for a Republican judge is 0.53.

Next, notice the effect of public opinion. There is a positive coefficient on the main effect of public opinion, suggesting that as the public becomes more conservative, judges are more likely to cast pro-life votes. Recall, though, that the total effect is given by the combination of the main effect and the method-specific effect.¹⁰ Therefore, we must consider the method-specific coefficients. The *pro-life differential* coefficient for partisan systems is $\gamma_{partisan}=-2.91$ with the facts control and $\gamma_{partisan}=-1.03$ without the facts control. That these coefficients are negative indicates that the magnitude of the correlation in partisan systems is *less than* the main effect ($\beta_2+\gamma_{partisan}=-1.36$, with the facts control; $\beta_2+\gamma_{partisan}=1.48$, without the facts control). The coefficient for nonpartisan systems, by contrast, is *positive* ($\gamma_{nonpartisan}=1.19$, with the facts control; $\gamma_{nonpartisan}=0.50$, without the facts control); this indicates that the effect of public opinion in nonpartisan systems is *greater than* the main effect ($\beta_2+\gamma_{nonpartisan}=3.04$, with the facts control; $\beta_2+\gamma_{nonpartisan}=3.01$, without the facts control). This confirms the general pattern reported in Caldarone, Canes-Wrone and Clark (2009). Now, finally, consider the method-specific

¹⁰ In fact, the main effect itself refers to the effect of *pro-life opinion differential* when a state has no selection system; substantively, this quantity is meaningless.

coefficient associated with retention systems. As with nonpartisan systems, this coefficient is negative and is in fact virtually the same ($\gamma_{retention}=1.31$, with the facts control; $\gamma_{retention}=0.50$, without the facts control). Thus, the magnitude of the effect of *pro-life opinion differential* in retention systems is greater in partisan systems, but and essentially identical to that in nonpartisan systems: ($\beta_2+\gamma_m=2.86$, with the facts control; $\beta_2+\gamma_m=3.01$, without the facts control).

The best way to see these effects is visually, as we do in Figure 1. Here, we see the predicted probability of a pro-choice vote as a function of *pro-life opinion differential* for each of the three systems (judge's party ID assumed to be Democrat; because PartyID is not involved in any interaction terms, assuming a Republican judge simply shifts the lines upward). The pattern that emerges here is striking. As the discussion of the coefficients above would indicate, there is a marked difference between the correlation in partisan systems and the correlation in the other systems. In particular, there is an *inverse* relationship between public opinion and the propensity to vote in a pro-life direction in states with partisan systems, though this line is statistically indistinguishable from a flat line ($p\leq 0.29$, one-tailed). By contrast, the correlation between *pro-life opinion differential* and the probability of a pro-life vote is positive in both nonpartisan and retention systems ($p\leq 0.02$, one-tailed); in fact, the slopes in the two systems are essentially identical to each other. This pattern is precisely what was predicted above. There is a much stronger correlation between public opinion and judicial voting in retention (and nonpartisan) systems than in partisan systems.

	Facts Control	No Facts Control
PartyID _j	-0.40 (0.18)	-0.36 (0.14)
Opinion _{s[i]}	1.55 (1.79)	2.51 (1.09)
Facts _i	0.57 (0.20)	--
CloseElectionPL _{js[i]}	0.20 (0.18)	0.16 (0.14)
CloseElectionPC _{js[i]}	0.72 (0.48)	0.21 (0.35)
Method-Specific Opinion _{m[i]}		
Partisan systems	-2.91 (1.04)	-1.03 (0.71)
Retention systems	1.31 (1.17)	0.50 (0.74)
Nonpartisan systems	1.19 (1.49)	0.50 (0.76)
Intercept	-0.46 (0.40)	-0.63 (0.31)
Case category intercepts		
Trespassing	0.05 (0.22)	0.32 (0.17)
Minors	0.56 (0.24)	0.10 (0.17)
Personhood	-0.30 (0.20)	-0.01 (0.15)
Wrongful birth	-0.28 (0.23)	-0.09 (0.17)
Miscellaneous	--	-0.29 (0.16)
N	836	1294

Table 1: Determinants of pro-life votes; logit coefficients shown (standard errors in parentheses); estimates from empirical model (1); dependent variable is probability of a pro-life vote; judge-, state-, and method-specific intercepts not shown

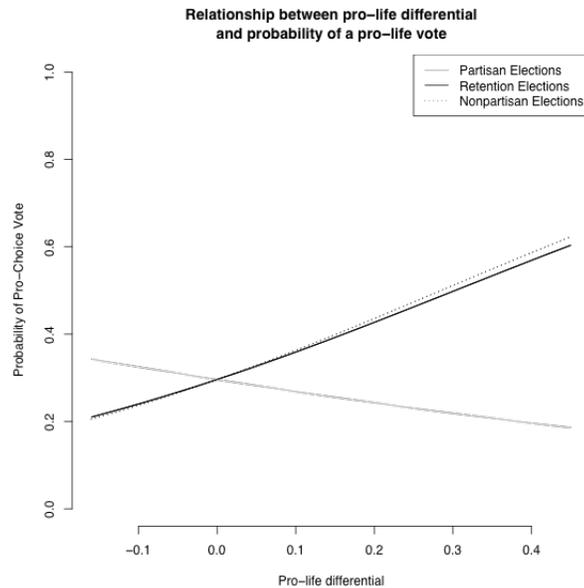


Figure 1: Predicted probability of a pro-life vote under each of three selection systems; judge assumed to be a democrat; case assumed to be in "miscellaneous" category; probabilities derived from estimates from model with the fact controls

Next, consider the effect of case facts. In the model with the facts control, we find a positive and statistically significant coefficient. The estimated coefficient indicates that, ceteris paribus, when the facts in a case point in a pro-life direction a judge is about 10% more likely to rule in a pro-life direction than when the facts point in a pro-choice direction. Thus, while public opinion and judicial partisanship exert a strong influence on a judge’s predisposition to vote in a pro-life or pro-choice direction, the facts of a case nevertheless remain consequential. This finding comports with long-standing findings in the literature (Segal 1986); while judge ideology and other factors, such as public opinion and institutional structures, influence a judge’s proclivity to vote in one direction or another, the facts of a case are nevertheless important. In the language of “case space” (Cameron 1993), judicial ideology can be thought of as an influence on a judge’s preferred cut-point in “case space”, while case facts determine the location of that case. Thus, moving a judge from the left to the right can change the probability the judge will

vote in a “liberal” direction in any given case, but so, too, can changes in the underlying facts of the case.

The estimated coefficients associated with electoral proximity indicate that judges facing a temporally proximate reelection in a pro-life or a pro-choice state are no more or less likely to vote in a pro-life direction than judges for whom reelection is more than two years away. While this finding appears in some tension with conventional findings suggesting electoral proximity induces judges to vote in a “popular” direction, it does comport with the finding in Caldarone, Canes-Wrone and Clark (2009) that once controlling for selection method, electoral proximity does not seem to be associated with a greater proclivity for a “popular” decision.¹¹

Finally, consider the modeled intercepts. With respect to the case categories, personhood and wrongful birth cases are somewhat less likely than trespassing and minors cases, though these differences are statistically insignificant. With respect to the judge- and state-specific intercepts (which we did not report in Table 1), we find little of substantive interest. Notably, though, with respect to the method-specific intercepts, each estimated intercept is zero – i.e., there are no differences in the baseline probability of a pro-life vote among judges from states with partisan, nonpartisan, and retention elections. To be sure, the theoretical argument we have advanced does not predict any differences in the raw probability of a pro-life vote across selection systems; that we find no difference is further reassuring that the effects we have detected here are not due to underlying variation in the nature of cases across the selection systems.

In sum, then, these results provide considerable support for our claim that judges in partisan systems are actually more insulated from public opinion than their

¹¹ See also Canes-Wrone and Clark (2009).

counterparts in nonpartisan (retention or competitive) systems. Because they have a party label in the ballot box that can convey a great deal of information to voters about their policy preferences, they do not need to worry as much about any given vote. By contrast, in an environment in which any given vote may become publicized by interest groups and judicial candidates have no party label to overcome that vote, judges in nonpartisan elections will be *more* sensitive to public opinion than their partisan counterparts. This relationship is precisely the opposite of what was expected by judicial reformers pushing for a move to nonpartisan elections.

Discussion and Conclusion

Perhaps no question about the design of state courts is as consequential as how the method of selection affects the independence of judges. Judicial independence is critical for the legitimacy of courts and is associated with other normatively-desirable outcomes. Sequential reforms of judicial selection methods throughout the course of American history have sought to remove politics and partisan pressure from the judicial process. The introduction of elections, subsequent reforms to nonpartisan elections, and, more recently, retention elections have each promised to further insulate judges from political pressure when deciding case.

However, we have argued that in the context of the modern judicial campaign the intended goals of these reforms may be turned on their heads. In an environment in which judges are often obliged to make policy statements and defend their records on salient political issues, nonpartisan retention elections (and their competitive counterparts) give rise to an incentive for judges to be hyper-sensitive to public opinion. To assess this

possibility, we have examined judges' responsiveness to public opinion in abortion cases since 1980.

The findings reported here stand conventional wisdom on its head. Judges in states with nonpartisan retention (and competitive) elections are in fact more responsive to public opinion than judges in states with partisan elections. Rather than further insulate judges from political pressure, nonpartisan elections actually induce greater sensitivity to the political preferences of the electorate. The normative implications of this finding are considerable. They suggest contemporary judicial reforms must consider the modern electoral environment in which judges campaign when articulating the expected implications of various selection methods.

Of course, there remains work to be done. As we noted above, we believe our argument applies most directly to so-called "hot-button" issues. Future research can and should explore this notion. Such analyses could consider responsiveness to public opinion across issue areas of varying political significance. Future research can, and should, extend the analysis here to other "hot button" issues, such as the death penalty, tort reform, and civil liberties. The groundwork laid here points in the direction of such future research.

References

- Aldrich, Stephen C. 2002. "Minnesota Judicial Elections: Better than the 'Missouri Plan.'" *Bench & Bar of Minnesota* 59??.
- Aspin, Larry T. 2007. "Judicial Retention Election Trends 1964-2006." *Judicature* 90(5): 208-213.
- Aspin, Larry T., and William K. Hall. 1994. "Retention Elections and Judicial Behavior." *Judicature* 77: 306-307.
- Atkins, Burton M., and Henry R. Glick. 1974. "Formal Judicial Recruitment and State Supreme Court Decisions." *American Politics Quarterly* 2: 427-449.
- Brace, Paul, Kellie Sims-Butler, Kevin Arceneaux, and Martin Johnson. 2002. "Public Opinion in the American States: New Perspectives Using National Survey Data." *American Journal of Political Science* 46(1): 173-189.
- Caldarone, Richard P., Brandice Canes-Wrone, and Tom Clark. 2009. "Nonpartisan Elections and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions." *Journal of Politics* forthcoming.
- Cameron, Charles M., Jeffrey A. Segal, and Donald R. Songer. 2000. "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions." *American Political Science Review* 94(1):101-16.
- Canes-Wrone, Brandice, and Tom Clark. 2009. "Judicial Independence and Nonpartisan Elections." *Wisconsin Law Review* forthcoming.

- Erikson, Robert S., Gerald C. Wright, and John P. McIver. 1993. *Statehouse Democracy: Public Opinion and Policy in the American States*. Cambridge: Cambridge University Press.
- Gelman, Andrew, and Gennifer Hill. 2007. *Data Analysis Using Regression and Multilevel/Hierarchical Models*. Cambridge: Cambridge University Press.
- Gibson, James L. 2008. "Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns." *American Political Science Review* 102(1): 59-75.
- Goodman, Shira J., and Lynn A. Marks. 2006. "Lessons from an Unusual Retention Election." *Court Review* 42 (Fall/Winter 2006): 6-14.
- Gordon, Sanford C., and Gregory A. Huber. 2007. "The Effect of Electoral Competitiveness on Incumbent Behavior." *Quarterly Journal of Political Science*. 2(May): 107-138.
- Hojnacki, Marie, and Lawrence Baum. 1992. "'New-Style' Judicial Campaigns and the Voters: Economic Issues and Union Members in Ohio." *Western Political Quarterly* 45(4): 921-48.
- Langer, Laura. 2002. *Judicial Review in State Supreme Courts: A Comparative Study*. Albany, NY: State University of New York Press.
- O'Callaghan, Jerome. 1991. "Another Test for the Merit Plan." *Justice System Journal* Vol. 14(3) -15(1): 477-485.
- Reddick, Malia. 2002. "Merit Selection: A Review of the Social Scientific Literature." *Dickinson Law Review* 106(4) 729: 729-45.

- Romero, Francine Sanders, David W. Romero, and Victoria Ford. 2002. "The Influence of Selection Method on Racial Discrimination Cases: A Longitudinal State Supreme Court Analysis." *Research on Judicial Selection 2*: 17-31.
- Sample, James, Lauren Jones, Rachel Weiss, and Jesse Rutledge. 2007. *The New Politics of Judicial Elections 2006. How 2006 Was the Most Threatening Year Yet to the Fairness and Impartiality of Our Courts- and How Americans Are Fighting Back*. Washington, DC: Justice at Stake Campaign.
- Segal, Jeffrey. 1984. "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981." *American Political Science Review* 78(4): 891-900.
- Shepherd, Joanna M. 2008. "Money, Politics, and Impartial Justice." *Duke Law Journal* 58:623-85.
- Squire, Peverill, and Eric R. A. N. Smith. 1988. "The Effect of Partisan Information on Voters in Nonpartisan Elections." *Journal of Politics* 50(1): 169-179.
- Tabarrok, Alexander, and Eric A. Helland. 2002. "Partisan Judicial Elections and Home Court Advantage." *Corporate Legal Times* March 1, 2002.
- Traut, Carol Ann, and Craig F. Emmert. 1998. "Expanding the Integrated Model of Judicial Decision Making: the California Justices and Capital Punishment." *Journal of Politics* 60(4):1166-1180.
- Watson, Richard A., and Rondal G. Downing. 1969. *The Politics of the Bench and the Bar: Judicial Selection under the Missouri Nonpartisan Court Plan*. New York: John Wiley and Sons.

