# Judicial Independence and Retention Elections

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Judges face retention elections in over a third of US state courts of last resort and numerous lower courts. According to conventional wisdom, these elections engender judicial independence and decrease democratic accountability. We argue that in the context of modern judicial campaigns, retention elections create pressure for judges to cater to public opinion on "hot-button" issues that are salient to voters. Moreover, this pressure can be as great as that in contestable elections. We test these arguments by comparing decisions across systems with retention, partisan, and nonpartisan contestable elections. Employing models that account for judge- and state-specific effects, we analyze new data regarding abortion cases decided by state supreme courts between 1980 and 2006. The results provide strong evidence for the arguments. (*JEL* D72, K40)

## 1. Introduction

Throughout US history, states have struggled with the question of how best to select judges. The legal profession has pushed for judicial independence, while others have sought to make judges accountable to the public. Most state judges face some type of regular election, and three types dominate the state judicial selection process: 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, a judge does not face a challenger on the ballot or

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run with a party label; he or she wins reelection pending a specified percentage of votes that approve of his or 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. The American Bar Association considers retention elections the preferred electoral system and favors a particular type of retention system, the *Missouri Plan*.[1] This plan prescribes a nominating commission that proposes candidates to an elected official, typically a governor, and the official selects one of the candidates. The judge then faces a retention election at the next general election and for any subsequent terms. The term "Missouri Plan" came about because Missouri was the first state to adopt this type of plan in 1940 (Epstein et al. 2002: 200). Currently, 15 states employ the system to select judges for the highest appellate courts, which we refer to as state supreme courts.[2] Four additional states utilize retention elections but employ other means for initial selection or multiple methods for reselection.[3]

According to conventional wisdom, retention elections insulate judges from the typical pressures of contestable races. As Reid (1999: 68) summarizes, "Judicial retention elections are intended to preserve the court's role as an impartial and detached resolver of disputes by ensuring that judges can retain their seats without engaging in the fund raising, politicking, and electioneering that characterize political elections and the political process." Troutman (2008: 1792) points out that the elections "create a bias in favor of keeping appointed judges in office and only removing judges with serious ethical lapses since a mere plurality of yes votes is needed to stay in office." In sum, retention systems are supposed to lack the campaigns associated with contested races and therefore encourage judicial independence from public opinion.

In recent years, the Missouri Plan has come under attack, and some of this criticism has focused on retention elections. Bybee and Stonecash (2005) observe, "... across the nation sleepy judicial retentions have been turned into expensive partisan slugfests, as single-issue interest groups and political parties have subjected judges to the kind of rough-and-tumble treatment traditionally reserved for ordinary political candidates."[4] Detractors have also argued that nominating commissions give too much control to trial lawyers.[5] In the

1. Although the American Bar Association favors the Missouri Plan to other types of electoral systems, it prefers a lifetime appointment or reselection by a commission over any type of electoral system (American Bar Association 2003).

2. These states include Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming.

3. These states include California, Illinois, New Mexico, and Pennsylvania. In California, the governor nominates a candidate that must be confirmed by the Commission on Judicial Appointments. In Illinois and Pennsylvania, justices are initially selected through partisan elections. In New Mexico, the initial selection is akin to that in the Missouri Plan but judges then face a partisan election, followed by retention elections.

4. See also Lozier (1996).

5. For example, see "The ABA Plots a Judicial Coup," *Wall Street Journal*, August 14, 2008, A12.

wake of these criticisms, several states have recently considered reforming or abolishing the Missouri Plan. In Missouri itself, a petition has been filed for a 2010 referendum that would abolish retention elections in favor of partisan ones; at this time of writing, local election boards are in the process of verifying signatures.[6] In 2009, the Missouri Senate debated adopting a purely appointive system that would eliminate retention elections, although that proposal was filibustered (Rosenbaum 2009). Also that year, the Tennessee legislature considered moving to a system without retention elections but ultimately reformed the selection process by altering the makeup of the nominating commission (Sisk 2009).

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 not fully explored the effect of retention elections on judicial decisions. Rather, most scholarship on judicial selection contrasts electoral mechanisms (taken as a whole) with appointive systems (e.g., Hanssen 1999; Langer 2002). Where the literature has specifically focused on retention elections, it has generally compared them with appointive systems that lack elections rather than other types of electoral systems (e.g., Aspin and Hall 1994; Hall 2001). Still other scholarship has simply grouped together all merit/commission nomination procedures, without distinguishing between those that utilize retention elections and those that do not (e.g., Atkins and Glick 1974; Webster 1995). Finally, although a few studies have explicitly compared judicial decisions in systems with retention elections versus other systems (Bright and Keenan 1995; Gordon and Huber 2007; Saphire and Moke 2008), none to date has directly assessed how judicial responsiveness to public opinion varies across those systems.[7]

Because previous research has either not distinguished among the various electoral mechanisms or not directly related judicial decision making to public opinion, several questions remain unanswered. Do retention elections, as hypothesized, engender judicial independence? In particular, compared with partisan and nonpartisan systems, do retention elections reduce pressure to cater to public opinion? And do they produce other patterns of decisions that fit with critics' complaints?

These questions have become more relevant as judges have become subject to a *new-style* judicial campaign, to use the language of Hojnacki and Baum (1992). This new-style judicial campaign has featured increased participation by interest groups, explicit policy statements by candidates, and more spending (e.g., Hojnacki and Baum 1992; Abbe and Herrnson 2003). Retention elections have not been immune from these developments, despite the preclusion

6. "Missouri's Retention Election System in Peril," *Minnesota Lawyer*, May 31, 2010. Available at http://www.minnlawyers.com/type.cfm/Legal%20News (accessed June 20, 2010).

7. Yet another strand of the literature analyzes how retention elections affect the likelihood of referenda. Spiller and Vanden Bergh (2003) find that the combination of retention elections and divergent preferences among the House, Senate, and governor increase the likelihood of initiatives for constitutional amendments.

of challengers. In fact, scholarship suggests that modern judicial campaigns can turn retention elections into events that differ little from traditional electoral contests (e.g., Squire and Smith 1988; Abbe and Herrnson 2003).

In this article, we argue that in the context of the new-style judicial campaign, retention elections will not insulate judges from the pressure to cater to public opinion on hot-button issues. To the contrary, the lack of a party label makes the judges susceptible to being characterized by one or two isolated decisions. Accordingly, judges facing retention elections should be at least as likely as judges facing partisan contests to cater to public opinion on issues salient to voters. We proceed to test this argument as well as compare retention systems to contestable nonpartisan ones. In particular, we examine data on judicial decisions about abortion policy in states that had retention, partisan, or nonpartisan judicial elections between 1980 and 2006.

Section 2 describes recent developments in judicial campaigns, and Section 3 lays out the theoretical argument. Section 4 describes the estimation procedure, data, and results. Section 5 concludes by discussing the implications for judicial reform and future steps for the research community.

## 2. Developments in Judicial Campaigns

The rise of the new-style judicial campaign has significantly altered the landscape of judicial elections. Historically, these races were low-key events that differed starkly from campaigns for other types of offices (e.g., Hojnacki and Baum 1992; Champagne 2001). Judicial candidates sought the approval of bar associations and discussed their qualifications with anyone who would listen (Schotland 2007). The first new-style campaign is commonly dated to 1978, when a group of district attorneys in Los Angeles worked to defeat a large number of trial judges (e.g., Champagne 2001; Schotland 2007). Less than a decade later, in 1986, three California Supreme Court justices lost a retention election after interest groups campaigned against the justices on the grounds that their records were anti-death penalty (Dann and Hansen 2001).

Several developments characterize the new-style judicial campaign. Most significantly, special interests have begun to participate forcefully (e.g., Iyengar 2002; Manweller 2005; Streb 2007). Not only local and state groups but also national ones enter into state judicial contests. As Schotland (2007) notes, "non-candidate groups, many from out of state, are providing enormous sums of money for judicial races and promoting ugly, even damaging campaigns" (1093). Across all types of elections—partisan, nonpartisan, and retention—interest groups have conducted expensive advertising that targets specific judges based on their decisions (e.g., Traut and Emmert 1998; Caufield 2005). These groups are sometimes concerned with broad policy agendas but also can be focused on single policy issues such as abortion.

For instance, in 2000 Justice Cathy Silak of the Idaho Supreme Court lost her race for reelection after being characterized as favoring late-term abortions. One advertisement proclaimed, "Will partial birth abortion and same-sex marriage become legal in Idaho? Perhaps so if liberal Supreme Court

Justice Cathy Silak remains on the Idaho Supreme Court" (Champagne 2001: 1402). More recently, Kansas Supreme Court Justice Carol Beier has been targeted by Kansans for Life for opinions she authored in 2006 and 2008.[8]

In other cases, groups have been concerned with less salient matters but exploited hot-button issues. In 2004, Don Blankenship, a wealthy coal executive, paid for ads opposing Justice Warren McGraw of West Virginia (a state with partisan elections). Blankenship's opposition to Justice McGraw was motivated by the judge's decisions against corporate defendants, but he publicized the judge's vote in a case involving child molestation. Blankenship later admitted he may have misconstrued the judge's record on crime but noted that the issue was perfect for a campaign (Liptak 2009).

Related to the increase in interest group activity are other trends that have caused judicial elections to become more like elections for other offices. The amount of money involved has increased substantially; in fact, judicial races now sometimes involve multimillion dollar campaigns. In 1980 campaign spending for the election of the chief justice of the Ohio Supreme Court totaled only $100,000, and by 1986 it totaled $2.8 million (Champagne 2001: 1397–8). Across all supreme court races, average campaign spending was less than $375,000 in 1990 and had risen to $890,000 by 2004 (Shepherd 2009). Shepherd attributes this increase to interest groups' realization that contesting judicial elections can be an effective way of pursuing policy objectives.

Another development involves the increased frequency with which judicial candidates speak openly about their policy views (Champagne 2002; Iyengar 2002). This last development even gained assent from the Supreme Court, when it declared in *Republican Party of Minnesota v. White* 536 U.S. 765 (2002) that the First Amendment protects the right of candidates for judicial office to take policy positions during a campaign. Notably, although the Supreme Court's *White* decision represents a watershed moment in the practice of judicial campaigns, it represented more of a culmination of the developments over the preceding decades than a wholehearted turn in events.

Indeed, although new-style judicial campaigns commonly involve negative attacks on sitting judges for their decisions, these elections—even retention ones—also involve proactive campaigns in which incumbent judges portray their candidacies positively. In a 1998 retention election, Justices Ming Chin and Ronald George of the California Supreme Court engaged in expensive proactive campaigns after they were targeted by pro-life groups for voting to strike down a law that required parental consent for minors to obtain abortions (Dann and Hansen 2001). Pennsylvania Supreme Court Justice Russell Nigro, who faced a retention election in 2005, began raising funds even before he was targeted by any particular interest group. As the *Philadelphia Daily News* reported (McDonald 2005), "Nigro is building a war chest against

8. "Anti-abortion Group Plans Effort to Oust Kansas Supreme Court Justice Carol Beier," *Lawrence Journal-World & News*, January 22, 2010. Available at http://www2.ljworld.com/news/2010/jan/22/anti-abortion-group-plans-effort-oust-kansas-supre (accessed June 10, 2010).

potential out-of-state interest groups who might swoop in and run negative TV ads against him."

In sum, judicial elections are no longer sleepy affairs that bear little resemblance to elections for other offices. Although the races remain *low-information* contests whereby voters know little about candidates (e.g., Franklin 2002; Schaffner and Diascro 2007), new-style campaigns provide voters with isolated sets of information, particularly from interest groups. Even retention elections often involve interest group activity, fundraising, and the publicizing of incumbents' decisions. It is in the context of this new-style campaign that the effect of retention elections on judicial decisions may be quite different from that predicted by proponents.[9]

## 3. Theoretical Argument

A standard expectation is that the lack of a contestable election promotes judicial independence. As Carrington (1998: 97) notes:

> As originally envisioned by the retention election's proponents, it was expected that the professional judge running without opposition would be retained in the absence of scandalous misconduct. It was a device to satisfy the voters' appetite for self-governance without risk that they would have any improper influence on judges or cause the electoral process to impose improper pressures upon them.

Similarly, Aspin and Hall (1987: 703) observe that "Judicial retention elections differ from the more traditional partisan or nonpartisan contests in several respects. The absence of traditional voting cues including party labels, candidate appeals, incumbency, campaigns, and relatively fewer issues . . ." distinguishes these contests. Prior to the growth of the new-style judicial campaign, there was little reason to question this traditional idea that the lack of a potential challenger would insulate incumbents and thereby increase judicial independence.

Modern judicial campaigns, however, involve dynamics not necessarily contemplated by the original advocates for retention elections. As discussed in the previous section, local and national interest groups now devote substantial resources to identifying and publicizing judges' previous decisions. In particular, on hot-button issues an interest group can readily label a candidate as favoring one side of a policy debate versus another—such as pro- versus anti-death penalty or pro- versus anti-eminent domain. Because voters have little other information about the judge, these isolated decisions can become the deciding factor in the election. Indeed, even interest groups concerned with less salient political issues can try to use a judge's voting record on a hot-button issue to defeat him or her.

9. See Gibson (2008) for evidence on how the new-style judicial campaign has affected the legitimacy of state supreme courts.

Consider, for example, a judge who votes to overturn a death penalty sentence. The decision may have been well justified from a legal perspective—indeed, perhaps the decision was *required* from a legal perspective—yet an interest group could publicize the decision and label the judge as weak on crime. In the low-information environment that characterizes judicial elections, this decision could become the most significant data a voter has about a judge. This is particularly true where there are no partisan labels in the ballot box, as is the case with retention elections.

Consistent with these arguments, some recent research argues that nonpartisan elections encourage judges to be responsive to public opinion on salient issues (e.g., Franklin 2002; Caldarone et al. 2009).[10] We contend the logic applies to retention elections, despite the fact that they lack challengers. Given the involvement of national and local interest groups in judicial campaigns, incumbent judges facing a retention election can anticipate the possibility of organized opposition that advertises his or her record in a negative light. In fact, in a retention election, a voter's only information about a judge may come from attack ads that emphasize an isolated decision or two. The fact that such interest group activity does not arise in every race is consistent with the argument that judges need to be concerned about the threat of such activity; in equilibrium, special interests will target only those judges who have not heeded the threat and issued unpopular decisions on hot-button issues.

By comparison, in partisan races, a candidate's party identification has a strong influence on vote choice (e.g., Klein and Baum 2001; Iyengar 2002). Accordingly, party labels can overwhelm what a voter may have heard about a candidate's decisions. This is not to argue that interest group activity necessarily has no influence on partisan judicial races. However, such influence will be undercut by the fact that the ballots offer information on candidates' partisan affiliations

Continuing with the previous example, say a conservative voter who favors the death penalty learns a judge voted to overturn it in a particular case. If the voter observes a party label and sees that the judge in question is a Republican, she may well prefer that candidate to the Democrat, despite the decision. After all, the voter could reasonably expect the Republican candidate to be more supportive of the death penalty, despite the one vote that was publicized during the campaign.[11] By comparison, absent the party cue, the voter may be inclined to vote against the incumbent, even if she does not have an explicit challenger. Given her information, the voter may rationally decide to take her chances with the replacement under the assumption that the replacement stands a better chance of supporting the death penalty.

More generally, we expect that in retention systems, the lack of a party label will encourage justices to avoid casting unpopular votes in cases involving hot-button issues. The involvement of national interest groups in state judicial

10. See Canes-Wrone and Shotts (2007) for a formalization of this argument.

11. The logic here is similar to that in the Cameron et al. (2000) study of strategic auditing by the Supreme Court.

races means that any particular judge could become a target of a campaign to characterize the judge by a small set of decisions. By comparison, in partisan systems, the presence of a party label will provide some *political cover* such that justices will not face the same pressure to cater to voters' policy preferences. Thus, we expect that on hot-button issues, judges facing retention elections will be at least as sensitive to public opinion as are judges facing partisan elections.

In addition, retention elections may not engender greater judicial independence from popular pressure than nonpartisan (contestable) elections, at least for the sorts of salient issues that become the focus of judicial campaigns. The notable distinction between these two systems is the presence of a competing candidate. However, as we have discussed, retention elections often feature the active participation of special interests and always feature the threat of such participation. This interest group involvement can serve a similar function to that of a competitor, particularly with respect to highlighting an incumbent's previous decisions. Consequently, the lack of a contestable election may not lead to differential responsiveness to public opinion.

## 4. Empirical Analysis

### 4.1. Method

Multilevel or mixed modeling is useful as a means of analyzing observations that are likely to be correlated within *units* or *levels* of analysis (e.g., Gelman and Hill 2007). The approach facilitates accounting for the potential correlation among observations within units without having to separate the data into subsets that are assumed to be independent. Data on state supreme court votes also fit naturally into such a structure. Any given vote by a judge is potentially correlated with that judge's votes on other cases as well as votes by other judges within that state (say, because of otherwise unaccounted for differences in state law).

Formally, we estimate the following model for case $i$, judge $j$, and state $s$:

$$\begin{aligned}\Pr(\text{Prolife Vote}_{ij} = 1) = \Lambda(&\beta_0 + \beta_1 \text{Prolife Opinion}_i \\ &\times \text{Retention Election}_i + \beta_2 \text{Prolife Opinion}_i \\ &\times \text{Nonpartisan Election}_i \\ &+ \beta_3 \text{Prolife Opinion}_i \times \text{Partisan Election}_i \\ &+ \beta_4 \text{Retention Election}_i \\ &+ \beta_5 \text{Nonpartisan Election}_i + \Omega \text{Controls}_{ij} \\ &+ \alpha_j^{\text{judge}} + \alpha_s^{\text{state}})\end{aligned} \tag{1}$$

where $\Lambda$ represents the cumulative standard logistic distribution, $\alpha_j^{\text{judge}} \sim N\left(0, \sigma^2_{\text{judge}}\right)$ for $j = 1, \ldots, 415$ and $\alpha_s^{\text{state}} \sim N\left(0, \sigma^2_{\text{state}}\right)$ for $s = 1, \ldots, 30$. The variables Prolife Vote$_{ij}$ and Prolife Opinion$_i$ are described below, along with all controls.

Note that for ease of interpretation, we have included an interaction term for each of the three systems, along with main effects for two of the systems and constant. (The substantive results are of course identical if we exclude the constant and include a main effect for each of the three systems, or if instead, we include a main effect for public opinion and interact this main effect with only two of the systems.) The coefficient on a given interaction term represents the effect of public opinion in that system. Thus, if the theoretical arguments are correct, $\beta_1$ should be significantly positive. Moreover, the theoretical perspective would be refuted if $\beta_2$ were significantly greater than $\beta_1$. We expect retention elections to induce significant responsiveness to public opinion, and this responsiveness should be at least as great if not greater than that engendered by partisan elections. Our arguments do not concern the main effects of the systems, which are represented by $\beta_4$, $\beta_5$, and the constant term $\beta_0$. These controls are included, however, to allow for the possibility that the choice of system has a direct effect on justices' votes independent of public opinion (e.g., if justices are likely to vote in a more liberal direction just because the system involves retention elections).

The model also includes random intercepts for each judge and state. These random intercepts account for any omitted judge- and state-specific covariates. Importantly, the random effects allow us to encompass correlation in the voting of each judge as well as across judges serving in the same state. We will also discuss findings from alternative specifications such as fixed effects and basic logit models, and as will become clear, the main results are robust.

### 4.2 Data

Abortion is a prototypical hot-button issue in new-style judicial campaigns, as described in Section 2. Thus, if the theoretical arguments are correct, they should receive support in the context of abortion decisions. We collected data on abortion decisions issued between 1980 and 2006 in the highest appellate courts of states that had retention elections during this period and combined these data with the Caldarone et al. (2009) data on abortion decisions from states with contestable elections. The final data set includes all states that had retention elections during this period with a couple of exceptions. First, it does not include states with district-based rather than statewide elections (such as South Dakota and Oklahoma) because the available public opinion surveys are at the state level. Second, we excluded the few states that require a partisan election prior to retention elections. That leaves 14 states with retention elections for at least some years.

The states and selection methods are summarized in Table 1.

For each state, the table shows the initial year a selection method was adopted. As detailed elsewhere (e.g., Epstein et al. 2002; Canes-Wrone and Clark 2009), states tended to adopt partisan elections in the 19th century, nonpartisan elections early in the 20th century, and retention elections later in the 20th century. Between 1980 and 2006, the vast majority of states did not modify

Table 1. State Courts of Last Resort with Statewide Retention, Partisan, or Nonpartisan Elections, 1980–2006

| State name | Partisan elections | Nonpartisan elections | Retention elections |
|---|---|---|---|
| Alabama | 1867– | — | — |
| Alaska | — | — | 1959– |
| Arizona | — | — | 1974– |
| Arkansas | 1864–2000 | 2001– | — |
| California | — | — | 1934– |
| Colorado | — | — | 1966– |
| Florida | — | — | 1976– |
| Georgia | 1896–1982 | 1983– | — |
| Idaho | — | 1934– | — |
| Indiana | — | — | 1970– |
| Iowa | — | — | 1962– |
| Kansas | — | — | 1958– |
| Maryland | — | — | 1970– |
| Michigan | — | 1939– | — |
| Minnesota | — | 1912– | — |
| Missouri | — | — | 1940– |
| Montana | — | 1935– | — |
| Nebraska | — | — | 1962– |
| North Carolina | 1868–2003 | 2004– | — |
| North Dakota | — | 1909– | — |
| Nevada | — | 1864– | — |
| New Mexico | 1912–1988 | — | —[a] |
| Ohio | — | 1883– | — |
| Oregon | — | 1931– | — |
| Tennessee | 1974–1993 | — | 1994– |
| Texas[a] | 1876– | — | — |
| Utah | — | 1951–1984 | 1985– |
| Washington | — | 1907– | — |
| Wisconsin | — | 1848– | — |
| Wyoming | — | — | 1976– |
| West Virginia | 1880- | — | — |

[a]New Mexico adopted a hybrid system of retention and partisan elections beginning 1989, and is therefore not included as a state with retention elections. Texas has two courts of last resort, which separately deal with criminal and civil cases.

the electoral system. Only two states switched to retention elections, Tennessee and Utah, and only in Tennessee do we have observations from before and after the switch. As the analysis proceeds, we discuss models that exploit this intertemporal variation in Tennessee, and these results strongly support the major arguments.

To identify the universe of cases, we replicated the search performed in Caldarone et al. (2009), which involved both utilizing the Westlaw case categories and conducting an open search of the term abortion in the set of all cases heard by the courts of last resort in the relevant states. In those states with retention elections, this procedure unearthed 360 votes in 59 cases concerning the design or implementation of abortion. By comparison, we have

388 votes from the nonpartisan systems and 532 votes from the partisan systems.[12]

We designated a judge's vote as prochoice or pro-life depending on how it influenced a woman's ability to obtain an abortion in that state legally. The variable Prolife Vote$_{ji}$ is coded as 1 if judge $j$ votes in a pro-life direction in case $i$ and 0 otherwise. To take one example, if a judge issued a decision that abortion protestors could not target a doctor's home, the vote was characterized as pro-choice. If the judge decided that a minor could not receive a bypass to obtain an abortion without parental consent, the ruling was characterized as pro-life. We do not include votes by judges sitting by designation or temporarily, as they were not facing the same electoral pressures. The mean of Prolife Vote is 0.42, suggesting that 42% of the votes supported the pro-life position. Table A1 provides full descriptive statistics for this variable and the independent variables, which are described below.

4.2.1 Public Opinion. To measure public opinion, we use CBS-New York Times (NYT) surveys. Erikson et al. (1993) demonstrate that these data can be employed to estimate state-level public opinion by combining responses across a decade, and research suggests that public opinion about abortion has remained relatively stable since 1980 (e.g., Brace et al. 2002). We accordingly pool together the surveys from 1985 to 1995 and those from 1996 to 2006. Unfortunately, no surveys were conducted between 1980 and 1984. Consequently, for the minority of observations (<15%) that occur during those five years, we utilize the 1985–1995 surveys.

The CBS-NYT surveys offer respondents three categories of opinion about abortion: (1) that it be legal without restriction, (2) that it be legal but with greater restrictions than currently exist, or (3) illegal in all circumstances. The wording of the surveys changed somewhat in 1989, but analysis suggests that this change did not influence respondents (Caldarone et al. 2009).[13] Using these categorizations, we constructed a variable, Prolife Opinion, which captures the degree to which a state leans pro-life. In particular, the variable equals the total proportion of respondents in either of the two *pro-life categories* (i.e., greater restrictions or strictly prohibited), minus the proportion of respondents in the *pro-choice category* (i.e., legal without restriction). This variable ranges from −0.16 (most pro-choice) to 0.45 (most pro-life).

12. The number of observations in the main analysis is slightly lower due to difficulty obtaining the control variables, such as party affiliation, for a few of the observations.

13. Since 1989, the surveys have asked, "Which of these comes closest to your view? 1. Abortion should be generally available to those who want it. Or 2. Abortion should be available but under stricter limits than it is now. Or 3. Abortion should not be permitted?" whereas earlier surveys stated, "Should abortion be legal as it is now, or legal only in such cases as rape, incest, or to save the life of the mother, or should it not be permitted at all?"

4.2.2 Judicial Ideology. As has been well documented, a major determinant of judicial voting is a judge's ideology. A popular measure for state supreme court justices is their party affiliation (e.g., Hanssen 2000; Langer 2002). We employ this measure, using three dichotomous indicators according to whether the judge is a Democrat, Republican, or Independent; Republicans are the omitted reference category. We began assembling this information with National Science Foundation–funded data compiled by Langer (2002). However, Langer uses a common coding rule that is potentially problematic for the particular question at hand. Like others (e.g., Hanssen 2000), she assumes a judge's party is the same as the appointing governor if she cannot otherwise identify it. Because of the different role of the governor across the types of selection systems under examination, we want to avoid using the governor's affiliation as much as possible and entirely in states with contestable elections. We therefore undertook an extensive data collection to identify the partisan affiliation of each judge, consulting *The American Bench* as well as local newspapers.

These efforts were successful in that for only 16 judges in systems with contestable elections could we not independently identify the party affiliation. In these systems, we never use the appointing governor's party to measure judicial ideology, and therefore, we exclude the 16 observations for which party identification could not be ascertained. In retention systems, where governor approval is required, the governor's party affiliation is used if we (or the Langer database, which helpfully codes whether a judge's party affiliation is gleaned from the appointing governor's affiliation or another source) could not otherwise identify the judge's party. However, we have also conducted the analysis with Langer's coding for all systems and received substantively similar results, which are available upon request.

4.2.3 Electoral Proximity. Although the theoretical perspective does not derive predictions concerning electoral proximity, other work suggests this factor should influence the decisions of elected judges. In particular, some scholarship finds that they should be particularly sensitive to public opinion as the time for reelection approaches. We therefore identified for each vote whether that judge's term ends within the following two years. Two indicators, Electoral Proximity PL and Electoral Proximity PC, capture whether the judge faces reelection within two years in a pro-life leaning state (i.e., Prolife Opinion is positive) or pro-choice leaning state (i.e., Prolife Opinion is negative or zero), respectively.

4.2.4 Case Categories. We divided the cases into substantive categories defined by the legal question, using the categories identified by Caldarone et al. (2009) as the four most common types of abortion cases. These categories include (1) *trespassing* cases about anti-abortion protests and trespassing, (2) *minors* cases that concern minors' requests for judicial bypasses of parental notification requirements, (3) *personhood* cases about whether a particular

fetus can be considered as a legal person (usually, in a wrongful death action), and (4) *wrongful birth* cases in which a physician is accused of causing an unwanted birth due to actions such as failing to give a genetic test. In addition, we have a fifth category, for miscellaneous cases. If a case involved multiple abortion-related issues but only one that fit into one of the four nonmiscellaneous categories, we classified the case in the relevant nonmiscellaneous category. In no case did the primary legal question at hand deal with more than one of the non-miscellaneous categories. Approximately 27% of the observations fall into the wrongful death category, 23% into minors, 16% into trespassing, and 12% into wrongful birth. A series of indicators, one for each category, is included to capture any effects that case type may have on judges' decisions.

4.2.5 Case Facts. Finally, we control for facts that may make a pro-choice versus pro-life outcome more likely. Specifically, for the case categories other than miscellaneous, we code the central factual claim at hand. For trespassing cases, we follow work that emphasizes the significance of place in abortion-related trespass claims (e.g., Zick 2006). If the protest or alleged trespassing occurred inside the clinic or at a doctor's home, we expect a judge to be more likely to vote in a pro-choice direction than if the protestors' activity occurred outside a clinic. For cases involving minors' requests for judicial bypasses, we make use of the *Bellotti v. Baird* 443 U.S. 622 (1979) ruling. In particular, this case holds that states must grant a bypass if the minor is sufficiently mature and informed. We therefore code whether the minor had consulted either a medical professional or a pro-life organization for information about abortions; if she had, then we expect the judge to be more likely to vote in a pro-choice direction.

The coding for personhood cases, which regard whether a legally defined person has died, is based on whether the fetus in question was viable. As Stanley (2003: 1551) observes, "[c]ourts have commended viability as a sensible standard in wrongful death law because of the supposed legal significance of the point where the fetus is able to exist separately outside of the womb." We accordingly expect a judge to be more likely to vote in a pro-life direction if the fetus is viable. Finally, in wrongful birth cases, we code whether the doctor has been accused of misinterpreting tests results rather than not providing available tests, failing to relay test results, or incorrectly performing a procedure (e.g., claiming to have performed an abortion yet not having performed one). If a physician has misinterpreted results, he or she might find experts willing to justify the interpretation. By contrast, the failure to give a test or relay the results can more easily be characterized as an attempt to withhold information. Bopp et al. (1989: 485) supports this point, surmising that "the wrongful birth cause of action . . . creates a financial incentive for physicians to recommend amniocentesis and genetic screening in borderline cases, and in possibly most or all cases for the particularly 'cautious' physician."

Table 2. Retention Elections, Public Opinion, and Judicial Independence

| | With fact control | | Without fact control | |
|---|---|---|---|---|
| | Coefficient (SE) | Marginal effect | Coefficient (SE) | Marginal effect |
| Prolife Opinion | | | | |
| × Retention Election | 4.00 (2.02)* | 0.98 | 3.37 (1.50)* | 0.81 |
| × Nonpartisan Election | 5.01 (2.04)* | 1.23 | 4.23 (1.59)* | 1.02 |
| × Partisan Election | −1.48 (2.44) | −0.36 | 1.44 (2.08) | 0.35 |
| Retention Election | 0.02 (1.09) | 0.004 | 0.69 (0.88) | 0.17 |
| Nonpartisan Election | 0.02 (1.08) | 0.01 | 0.04 (0.90) | 0.01 |
| Democratic Judge | −0.40 (0.21) | −0.10 | −0.42 (0.17)* | −0.10 |
| Independent Judge | −0.65 (0.68) | −0.16 | −0.39 (0.52) | −0.09 |
| Electoral Proximity PL | 0.26 (0.19) | 0.06 | 0.19 (0.15) | 0.05 |
| Electoral Proximity PC | 1.04 (0.91) | 0.25 | 0.53 (0.51) | 0.13 |
| Case facts | 0.59 (0.21)* | 0.15 | — | — |
| Case categories | | | | |
| Trespassing | — | — | 0.72 (0.25)* | 0.17 |
| Minors | 0.74 (0.31)* | 0.18 | 0.42 (0.25) | 0.10 |
| Personhood | −0.32 (0.27) | −0.08 | 0.26 (0.22) | 0.06 |
| Wrongful birth | −0.51 (0.36) | −0.13 | −0.07 (0.26) | −0.02 |
| Constant | −0.77 (1.03) | | −1.22 (0.87) | |
| Random effects | | | | |
| State, SD (SE) | 1.00 (0.27) | | 0.89 (0.19) | |
| Judge, SD (SE) | 0.51 (0.15) | | 0.39 (0.13) | |
| Sample size | 818 | | 1233 | |
| Log likelihood | −522.02 | | −787.09 | |

Dependent variable equals Pr(Prolife Vote = 1) as described in equation (1). Marginal effects are at the means of the independent variables. The omitted case category is *trespassing* in the analysis that controls for case facts and *miscellaneous* cases in the other analysis.
*Significant at $p = 0.05$, two-tailed.

## 5. Results

Table 2 presents the results.

Notice first the effect of public opinion for states with retention elections, which is given by the interaction term for retention elections and public opinion. Regardless of whether we control for the facts of the case or analyze a wider set of data without this control, the effect of public opinion is significant at $p \leq 0.05$, two-tailed, for judges facing retention elections. Moreover, the magnitude of the effect is consequential. At the means of the independent variables, a 10 percentage point increase in pro-life public opinion increases the likelihood of a pro-life vote by 8–10 percentage points; the higher value comes from the test that controls for case facts, the lower value from the test of the larger data set.[14]

14. With the fact control, the marginal effect (0.98) multiplied by a public opinion shift of 10 percentage points equals 0.098, suggesting the probability of a pro-life vote increases by around 10 percentage points. Without the fact control, the calculation is $0.81 \times 0.1 = 0.081$, suggesting an increased probability of eight percentage points.

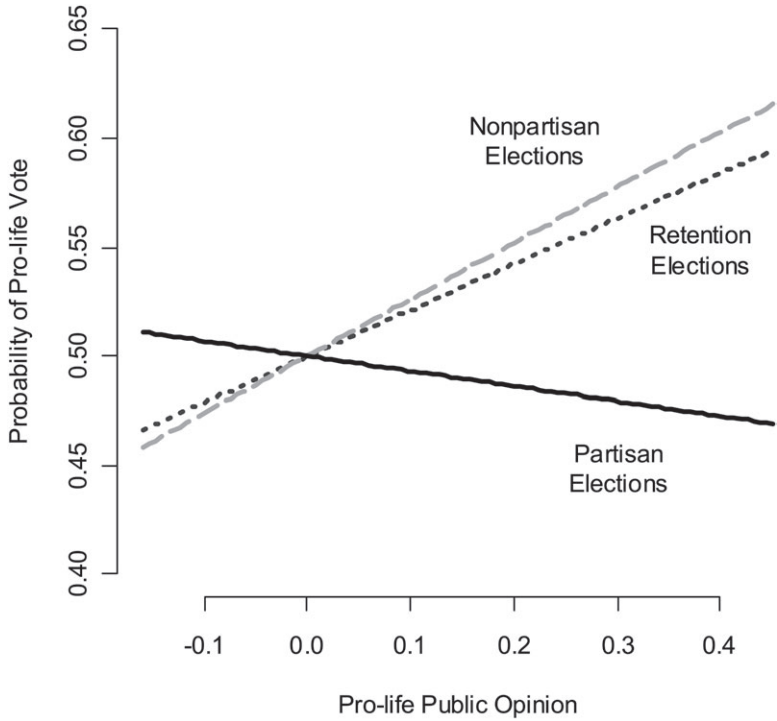
By comparison, the effect of public opinion in states with partisan elections is small in magnitude and not significant by any conventional standard. In one of the tests, the coefficient is even negative. These results contrast with the conventional wisdom that partisan elections induce greater accountability. In fact, despite the large standard errors on the coefficient for the effect of public opinion in partisan systems, the difference between it and the analogous coefficient for retention systems is reasonably significant in the specification that controls for case facts ($p = 0.04$, one-tailed). The results thus not only suggest that retention elections fail to insulate judges from the pressure of catering to public opinion on a hot-button issue but also create greater pressure than traditional partisan elections do.

Furthermore, this difference between systems becomes more significant in alternative specifications that reduce collinearity involving the public opinion variables; as is often the case, the collinearity between the main effects and interaction terms is reasonably high (e.g., the correlation between Nonpartisan Election and Nonpartisan Election × Prolife Public Opinion is $\rho = 0.7$). If we use a different type of specification, where the dependent variable is defined by whether the vote is popular in the state at that time, then there is no need for interaction terms and the likelihood of a popular decision is significantly more likely in retention than partisan systems ($p = 0.05$, two-tailed). Further details and results from this specification are given in Table A2. Alternatively, if we drop from equation (1) the main effects of the electoral systems, then the results again strengthen. The difference between retention and partisan systems is significant at $p = 0.05$, two-tailed, and the effect of public opinion in systems with retention elections remains significant at these levels. Table A3 details these results.

In all of the tests, the impact of public opinion is relatively similar in retention systems and (contestable) nonpartisan ones. This finding also contrasts with conventional wisdom, which suggests that the lack of an explicit challenger provides insulation from electoral pressures. The marginal effect of public opinion in states with nonpartisan elections is slightly higher in Table 2, but this difference is never significant at conventional levels. Moreover, in some of the alternative specifications, public opinion affects judges in retention systems more than judges in nonpartisan systems (although again, the difference is insignificant). These results suggest that for a hot-button issue like abortion, judges in retention and nonpartisan contestable systems face similar incentives to cater to public opinion.

One way to compare the effect of opinion across the three systems is visually. Figure 1 graphs the predicted probability of a pro-life vote as a function of Prolife Opinion for each of the systems, using the results from the specification that controls for case facts and holding each other independent variable at its sample mean.

The pattern that emerges is striking. Consistent with the previous discussion, there is a marked difference between systems with partisan elections and the other systems. With partisan elections, the relationship between public opinion and the propensity to vote in a pro-life direction is fairly flat. By contrast, the




Note: Estimates assume all other variables are at their means.

Figure 1. Public Opinion and Judicial Decisions across Electoral Systems.

correlation between Prolife Opinion and the probability of a pro-life vote is clearly positive in both nonpartisan and retention systems. These two lines are fairly similar, corresponding to the lack of a significant difference between these systems. Interestingly, Figure 1 suggests that in retention and nonpartisan systems, a pro-choice vote is more likely than not if opinion leans in a pro-choice direction. Similarly, a pro-life vote is more likely than not if support for greater restrictions outweighs opposition by at least five percentage points (holding all else equal). Of course, the likelihood of a vote in a particular direction does not range from zero to one given that public opinion is only one influence on judicial voting.

Indeed, the controls generally have the anticipated effects. As is immediately apparent in Table 2, the partisan affiliation of a judge helps predict a judge's decision. Democratic judges are less likely to vote in a pro-life direction than are Republican judges ($p < 0.05$, two-tailed, in the analysis of the full data set and $p = 0.06$, two-tailed, in the analysis that controls for case facts). According to the marginal effects in both columns, Democratic judges are 10% less likely to vote in a pro-life direction than are Republican judges. The difference between Independents and Republicans is insignificant

however. Also consistent with expectations, the main effects of the electoral systems do not affect judicial decisions. That is, independent of public opinion and other factors, a judge is not likely to vote in a pro-life or pro-choice direction simply because his state has a certain type of electoral system. This remains the case even if we drop the random intercepts, so that the specification consists of a basic logit.

Consider next the effect of case facts. In the model with the facts control, we find a positive and statistically significant coefficient. This estimate indicates that when the facts in a case point in a pro-life (pro-choice) direction, a judge is about 15% more likely to rule in a pro-life (pro-choice) direction, ceteris paribus. Thus, whereas public opinion and judicial partisanship exert a strong influence on a judge's vote, case facts nevertheless remain consequential. This result comports with long-standing findings in the literature (e.g., Segal 1986).

The coefficients associated with electoral proximity indicate that judges facing a temporally proximate reelection are no more or less likely to vote in a pro-choice direction than those for whom reelection is more than two years away. This finding is somewhat surprising, and results in part from the inclusion of judge-specific random intercepts, which previous studies have generally not included. If we exclude these intercepts, then the effect of electoral proximity in states with pro-life leanings is marginally significant ($p = 0.11$, two-tailed) in the specification that controls for case facts. Moreover, all major findings remain. (Further details are available upon request.)

The final set of coefficients concerns the different case categories, and these estimates suggest pro-life decisions are more likely in cases involving minors or trespassing than other cases. (The omitted case category is *trespassing* in the analysis that controls for case facts and *miscellaneous* in the analysis of the full data set; recall that there is no case facts variable for the miscellaneous cases.) If we assume that state judges feel at least somewhat bound by federal precedent, these differences can be readily explained. For trespassing cases, the First Amendment grants protestors large latitude (e.g., Clapman 2003). With respect to the minors category, the Supreme Court was explicit in *Bellotti v. Baird* 443 U.S. 622 (1979) about the conditions under which a judicial bypass must be granted; accordingly, federal law allows bypasses to be denied when these conditions are not met. By comparison, federal precedent leans in a more pro-choice direction for personhood and wrongful birth cases. The federal courts have restricted the legal standing of fetuses (e.g., Mans 2004) and rejected arguments that parenthood is a blessing when a child has congenital defects (e.g., Murtaugh 2007).

Finally, Table 2 supports the inclusion of the random intercepts in that the variance components appear to be significant. Notably, however, the main findings do not depend upon the inclusion of these random effects. If they are dropped in favor of a basic logit model, then the effect of public opinion in retention systems (and contestable nonpartisan ones) remains strongly significant ($p \leq 0.05$, two-tailed), and the effect of public opinion in partisan systems is not significant at any conventional level. Separately, if we analyze a fixed effects model that exploits the fact that we have observations from

before and after Tennessee moved from partisan to retention elections, the results strongly support the major arguments. Public opinion influences judicial decisions in retention systems, and this influence is significantly greater than that in partisan systems ($p \leq 0.05$, two-tailed). Full details of these analyses are available upon request.[15]

In sum, then, these results provide considerable support for the hypothesis that retention elections encourage judges to be responsive to public opinion on hot-button issues. In an environment in which any given vote may become publicized by interest groups and judicial candidates have no party label that may provide additional information to voters, judges will be at least as sensitive to public opinion as their counterparts facing contestable partisan elections. Indeed, most of the results suggest that retention elections will encourage judges to become more sensitive to opinion than judges in partisan systems. This relationship is precisely the opposite of what was expected by judicial reformers pushing for a move to retention elections. Moreover, the evidence that judges facing retention and contestable nonpartisan elections are similarly likely to cater to public opinion suggests that the lack of an explicit challenger provides less insulation than reformers have anticipated.

## 6. Discussion and Conclusions

Perhaps no question about the design of courts is as consequential as how the method of selection affects the independence of judges. Judicial independence is associated with societal benefits such as civil liberties and economic growth, and is critical for the legitimacy of courts. Sequential reforms of judicial selection methods throughout the course of American history have sought to eliminate political pressures from the judicial process. The moves from legislative reappointment to elections, then to nonpartisan elections, and, more recently, retention elections have each promised to further insulate judges from politics when deciding cases.

We have argued that in the context of the modern judicial campaign, the intended goals of these reforms may not be met. In an environment in which judges are often obliged to defend their records on salient political issues and make policy statements, retention elections (and their competitive complement, nonpartisan elections) can create incentives for judges to cater to public opinion. To assess this possibility, we have examined state supreme court judges' responsiveness to public opinion in abortion cases since 1980.

15. We have also analyzed a selection model that incorporates the fact that supreme courts have discretionary review even thought Caldarone et al. (2009) find no evidence of a selection effect in states with contestable elections. We collected data regarding all intermediate appellate level abortion cases for the first eight states, by alphabetical order, with retention systems and employed the Heckman selection model of Caldarone et al. (2009). These results do not support the use of a selection model ($\chi^2_{[1]} = 0.14$, $p = 0.71$). The instrumental variables in the first-stage equation included whether the lower court decision was split (given that split decisions should be more likely to be reviewed) and whether the lower court decision aligned with the median supreme court justice's partisan affiliation. These instrumental variables were jointly significant at $p \leq 0.05$, two-tailed.

The findings reported here stand conventional wisdom on its head. Judges in states with retention elections, like judges in states with nonpartisan elections, showed no sign of being insulated from public opinion. As public opinion became more pro-choice, these judges became more disposed to issuing pro-choice decisions. This was the case even controlling for myriad influences such as the judges' party affiliations, case facts, and the type of case. By comparison, judges in partisan systems were not responsive to shifts in public opinion. We have argued that this result should be expected because the partisan label guarantees that voters have some information about the judge beyond any isolated decisions that interest groups have publicized.

The implications of these findings are considerable. Most obviously, they suggest that contemporary judicial reformers cease assuming that retention elections necessarily promote judicial independence from political concerns. This assumption has been accepted with little empirical support, and the evidence here casts doubt on its universality. Of course, we have focused on the highest state appellate courts and limited our claim to issues that are salient to voters. Thus, we are not asserting that the results would necessarily extend to local judicial elections in which interest group activity may be minimal. This caveat leads into a second broader implication, which is that reformers should consider the contemporary electoral environment when predicting the effects of various selection methods.

Current debates in several states center on how best to arrange a judicial system. In one prominent case, West Virginia is considering whether to move from partisan elections to some other method. Local election boards in Missouri are in the process of verifying signatures regarding a petition for a 2010 referendum to abolish retention elections in favor of partisan ones. Advocates on each side of these debates often invoke notions regarding judicial independence as well as democratic accountability. By overlooking the nature of modern judicial campaigns, these advocates have missed an important and unintended consequence of retention and nonpartisan elections. We do not intend to promote one mechanism or the other given that such advice depends in part on normative aims. Instead, this study suggests that reformers, after clarifying their normative goals, must consider the context of the contemporary political environment when considering which selection mechanism will best achieve those goals.

The study also highlights the importance of subjecting reformers' and scholars' claims to empirical analysis. Future research can and should explore responsiveness to public opinion on other hot-button issues, such as the death penalty or eminent domain, as well as issues that are unlikely to be salient to the general public, such as technical contract questions. It is possible, of course, that on these sorts of technical issues, judges facing retention elections exercise greater independence from public opinion than do other elected judges. However, since these issues are exceedingly unlikely to form the basis of any campaign—whether it be a partisan, contested nonpartisan, or retention contest—the lack of an explicit challenger may or may not engender greater independence.

Correspondingly, scholarship is needed on the extent to which a lack of judicial responsiveness to public opinion is associated with other influences on judicial decisions. For instance, does a decline in democratic accountability increase judges' concern for legal precedent and other legal factors or instead induce more partisan voting? This question is worth pursuing not only for the electoral systems but also for lifetime appointments. Moreover, in comparing elective versus appointive systems, potential variation within each category should be considered; as this analysis has shown, substantial differences can exist among elective systems.

Finally, it is worth considering how campaign spending and resources may condition the effects we have demonstrated. One might suspect that the resources of a candidate's opponents or supporters can affect judges' incentives. An important point in this regard is that interests who participate in elections may not focus on the issue that directly concerns them. Recall our discussion about Don Blankenship's successful efforts to unseat West Virginia Supreme Court Justice Warren McGraw by publicizing his vote in a sex abuse case. Blankenship did not care about crime-related cases so much as the likelihood the justice would be hostile toward Blankenship's business interests (Liptak 2009). An open question is whether such threats from well-funded interests affect judicial independence on the issues with which the interests are concerned or simply the hot-button issues that dominate judicial campaigns. The analysis here lays the groundwork for such future research.

## Appendix

Table A1. Descriptive Statistics

| Variable | Observation | Mean | SD | Minimum | Maximum |
|---|---|---|---|---|---|
| Prolife Vote | 1233 | 0.418 | 0.494 | 0.000 | 1.000 |
| Prolife Opinion | 1233 | 0.221 | 0.145 | −0.158 | 0.446 |
| Prolife Opinion × Retention Election | 1233 | 0.042 | 0.104 | −0.114 | 0.429 |
| Prolife Opinion × Nonpartisan Election | 1233 | 0.048 | 0.104 | −0.158 | 0.428 |
| Prolife Opinion × Partisan Election | 1233 | 0.130 | 0.165 | 0 | 0.446 |
| Retention Election | 1233 | 0.292 | 0.455 | 0 | 1 |
| Nonpartisan Election | 1233 | 0.294 | 0.456 | 0 | 1 |
| Partisan Election | 1233 | 0.414 | 0.493 | 0 | 1 |
| Democratic Judge | 1233 | 0.534 | 0.499 | 0 | 1 |
| Independent Judge | 1233 | 0.020 | 0.141 | 0 | 1 |
| Republican Judge | 1233 | 0.446 | 0.497 | 0 | 1 |
| Electoral Proximity PL | 1233 | 0.275 | 0.447 | 0 | 1 |
| Electoral Proximity PC | 1233 | 0.022 | 0.146 | 0 | 1 |
| Case facts | 818 | 0.619 | 0.486 | 0 | 1 |
| Trespassing | 1233 | 0.165 | 0.371 | 0 | 1 |
| Minors | 1233 | 0.227 | 0.419 | 0 | 1 |
| Personhood | 1233 | 0.270 | 0.444 | 0 | 1 |
| Wrongful birth | 1233 | 0.119 | 0.324 | 0 | 1 |
| Miscellaneous cases | 1233 | 0.219 | 0.414 | 0 | 1 |

Table A2. Alternative Dependent Variable

| | With fact control, coefficient (SE) | Without fact control, coefficient (SE) |
|---|---|---|
| Retention Election | 1.12 (0.55)* | 0.95 (0.49)* |
| Nonpartisan Election | 1.30 (0.56)* | 0.65 (0.47) |
| Party aligned with public opinion | 0.29 (0.19) | 0.13 (0.14) |
| Election within two years | 0.25 (0.18) | 0.18 (0.15) |
| Case facts aligned with public opinion | 0.69 (0.20)* | — |
| Case categories | | |
| Trespassing | — | 0.25 (0.24) |
| Minors | 0.73 (0.29)* | 0.15 (0.24) |
| Personhood | −0.33 (0.26) | −0.04 (0.21) |
| Wrongful birth | −0.33 (0.34) | −0.35 (0.26) |
| Constant | −1.74 (0.40)* | −1.17 (0.43)* |
| Random effects | | |
| State, SD (SE) | 0.80 (0.24) | 0.97 (0.19) |
| Judge, SD (SE) | 0.49 (0.15) | 0.37 (0.13) |
| Sample size | 818 | 1233 |
| Log likelihood | −528.90 | −789.31 |

Dependent variable equals Pr(Popular Decision = 1) where a popular decision equals 1 if the decision is pro-life and public opinion leans in a pro-life direction (Prolife Opinion is positive) or if the decision is pro-choice and opinion is pro-choice (Prolife Opinion is negative or zero). Party affiliation is transformed from equation (1) so that the variable equals 1 if the judge is a Democrat and the state leans pro-choice or the judge is a Republican and the state leans pro-life. If the judge is an Independent, the variable equals 0.5. Otherwise it equals zero. Case facts are also transformed so that the variable equals 1 if the facts support a decision in line with public opinion (e.g., a pro-life fact and opinion that leans pro-life). All other variables are defined as in equation (1), and just as in that equation a mixed effects logit model is employed. The omitted case category is *trespassing* in the analysis that controls for case facts and *miscellaneous* cases in the analysis of the full data set.
*Significant at $p = 0.05$, two-tailed.

Table A3. Excluding Main Effects for Electoral System

| | With fact control, coefficient (SE) | Without fact control, coefficient (SE) |
|---|---|---|
| Prolife Opinion | | |
| × Retention Election | 4.00 (1.81)* | 4.25 (1.40)* |
| × Nonpartisan Election | 5.03 (1.78)* | 3.53 (1.42)* |
| × Partisan Election | −1.52 (1.42) | 0.65 (1.20) |
| Democratic Judge | −0.40 (0.20)* | −0.45 (0.16)* |
| Independent Judge | −0.65 (0.68) | −0.42 (0.52) |
| Electoral Proximity PL | 0.26 (0.19) | 0.18 (0.15) |
| Electoral Proximity PC | 1.04 (0.91) | 0.53 (0.50) |
| Case facts | 0.59 (0.20)* | — |
| Case categories | | |
| Trespassing | — | 0.68 (0.25)* |
| Minors | 0.74 (0.31)* | 0.42 (0.25) |

*Continued*

Table A3. *Continued*

| | With fact control, coefficient (SE) | Without fact control, coefficient (SE) |
|---|---|---|
| Personhood | −0.32 (0.27) | 0.23 (0.22) |
| Wrongful birth | −0.51 (0.35) | −0.09 (0.26) |
| Constant | −0.75 (0.40) | −0.84 (0.33)* |
| Random effects | | |
| State, SD (SE) | 1.00 (0.26) | 0.94 (0.20) |
| Judge, SD (SE) | 0.51 (0.15) | 0.39 (0.13) |
| Sample size | 818 | 1233 |
| Log likelihood | −522.02 | −787.90 |

Dependent variable equals Pr(Prolife Vote = 1). The omitted case category is *trespassing* in the analysis that controls for case facts and *miscellaneous* cases in the analysis of the full data set.
*Significant at $p = 0.05$, two-tailed.

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