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JUDICIAL INDEPENDENCE

IN THE AMERICAN STATES

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JUDICIAL INDEPENDENCE

IN THE AMERICAN STATES

by

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Dedication

In loving memory of my father, John Freeman Blake.

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JUDICIAL INDEPENDENCE

IN THE AMERICAN STATES

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The special role courts play in a democracy requires designers of constitutions to consider the delicate trade-offs between democratic accountability and judicial independence. This dissertation analyzes the decisional consequences of state supreme court institutional structures. States utilize several types of election and elite reconfirmation, and each method carries a systematically different risk of incumbent defeat. My theory predicts that as reappointment uncertainty increases, judicial independence decreases. I define judicial independence as decisions made by judges using only considerations that are internal to the rule of law. I measure judicial independence by quantifying the external influence of partisan, elite, popular, and economic pressures applied to judges. I conclude by considering the normative implications of the empirical findings. Because judicial independence is a problem of optimization, not maximization, constitutional designers hope to strike a balance between

some form of judicial accountability, popular constitutionalism, and judicial independence.

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Chapter One: The Growing Importance of State Supreme Courts

> [A]ny selection or retention method that makes popularity the standard for measuring fitness for judicial office creates an unacceptable risk of conflict between the judge's duty to apply the law impartially and his or her interest in retaining office.
>
> Justice John Paul Stevens (1998)

On April 3, 2009, Iowa became the center of attention in American politics, and for once, the reason had nothing to do with the state's caucuses. State supreme courts rarely make front-page news, but this was no ordinary day. A unanimous Iowa Supreme Court announced its decision in *Varnum v. Brien* (2009), holding that the state's definition of marriage as being between one man and one woman violated the guarantee of equal protection in the Iowa Constitution. The court ordered local officials to begin to issue marriage licenses to same-sex couples seeking them. With the bang of a gavel, Iowa became just the fourth state in the country to legalize gay marriage. The three prior states were Massachusetts, California,[1] and Connecticut.

There are, of course, two major differences between the earlier states and Iowa. First, justices in the four states are selected and reappointed in very different ways. Supreme court justices in Massachusetts enjoy life tenure,[2] while the governor of Connecticut nominates justices from a list prepared by a judicial selection commission. At the end of their eight-year terms, the governor must renominate them, and the legislature must confirm them again. Justices in California and Iowa initially earn their

[1] California voters subsequently overturned the state supreme court decision legalizing gay marriage through the Proposition 8 ballot initiative in November 2008. In 2012, the 9th Circuit Court of Appeals struck down Proposition 8 as a violation of the Equal Protection Clause in the U.S. Constitution (*Perry v. Brown* 2012).

[2] There is a mandatory retirement age of 70 for justices in Massachusetts. Nineteen other states utilize mandatory retirement ages of some sort.(American Judicature Society 2013e).

seats in essentially the same manner, but at the end of each term – 12 years and eight years, respectively – are subject to a non-competitive retention election.

The other key difference between Iowa and the other states that had legalized gay marriage is in ideology. Just a year prior to the Iowa court's decision, Governor Mike Huckabee, an ordained Baptist minister, won the Iowa caucuses on a socially conservative platform. While Barack Obama won the state in the general election, Iowa is much more conservative than California, Connecticut, and Massachusetts.

In November 2010, Iowa made front-page news again when three of the justices of the Iowa Supreme Court that issued *Varnum* suffered defeats in their reelection bids. Despite millions of dollars spent by Christian conservatives to oppose these justices, none of the three justices raised any money or hired any staff to mount a reelection campaign (Sulzberger 2010). They were the first incumbent justices ever to suffer reelection defeat since Iowa had adopted its current system of retention elections in 1962.[3]

Did these justices not understand the potential electoral ramifications of their gay-rights decision? Did they believe their primary responsibility was to the law (as they saw it) rather than to the voters? Issuing a decision congruent with a judge's view of the rule of law is an example of judicial independence, while suppressing that view in favor of the contrary views of outside actors would be an example of non-independence. Federal judges have comparatively very little to worry about in terms of popular retribution for their decisions; the Constitution grants them life tenure and salary protection. The states,

[3] Iowa's experience is typical of state with merit selection and retention elections. Carbon (1980) studied the first 45 years of retention election history across the 20 states that utilized them at either the supreme court or lower court level. The study demonstrated that across all those state-years, only 33 judges seeking retention were defeated at the polls.

on the other hand, employ a variety of different judicial structures, which are listed in Table 1.1. Forty-seven states require judges to be reappointed to their seats in some form at least once. Ninety percent of the nation's judges face some sort of popular election (Streb 2009). Only 29 states protect judges' salaries from being reduced (National Center for State Courts 2009).

The degree to which state supreme court justices lose their jobs varies considerably. Justices who have recently stood for reelection in partisan judicial elections face a defeat rate higher than incumbent governors as well as U.S. House and Senate incumbents (Bonneau and Hall 2009, 86). Justices in states with nonpartisan elections also face a fairly risk of losing reelection, while retention elections typically provide high levels of job security, as do states in which judges must be reconfirmed. Table 1.2 lists these risks. Of course, judges in all 50 states (and the federal system) face the threat of impeachment.

Under what conditions do state supreme court justices exhibit judicial independence? That is, do different forms of reappointment, with their corresponding levels of job security, structure the degree to which judicial decisions reflect how judges view the law, rather than how outside actors view the law? The answers to all of these questions are dependent upon an understanding of why the United States is one of only three countries in the world where even a few judges are elected.[4]

[4] The others are Japan and Switzerland, and in both those countries, the percentage of judges elected is very small (Shugerman 2009).

The Origin of Judicial Elections in America

Judicial independence has been a concern in the American political order since before there was even a United States. Prior to the American Revolution, the royal governor, acting on behalf of the British Crown, appointed judges, and, unlike their brethren serving in England, colonial judges served at the pleasure of the monarch. The Declaration of Independence listed judicial independence as a grievance, saying of King George III: "He has made Judges dependent on his Will alone, for the Tenure of their Offices, and Amount and Payment of their Salaries" (Jefferson 1776). During the Revolution, the right to jury trials was often suspended, which placed the fate of colonists in the hands of judges who have strong incentives to serve the King's interests, rather than those of the law. The Declaration also decried the practice of sending colonists back to English soil for trial.

The initial state constitutions, which reflected the same sentiments against concentrated executive power as the Articles of Confederation, typically divided the responsibilities of judicial appointments between governors and legislatures. Legislatures utilized several tools to maintain their dominance over the judicial system. Judges who rendered unpopular decisions might find themselves called before the legislature to explain themselves. Legislatures would adjust the number of seats on courts, or, as the Jeffersonian coalition did at the national level in the early 1800s, eliminate a layer of the court system altogether. State legislatures would also oversee state judiciaries by serving as the final redress of grievances, not unlike the British House of Lords. The Rhode Island General Assembly continued this practice almost until the Civil War (Tarr 2012).

Scott Gerber's (2011) history of judicial independence traces the U.S. Constitution's prohibition against salary reductions to negative experiences with colonial courts. Not infrequently, colonial legislatures would use salaries as a weapon to control judges. However, the founding consensus on judicial independence reflected in Article III of the U.S. Constitution was not universally shared. Jefferson's conception of judicial independence thus mirrored the early state experiences: "A judge independent of a king or executive is a good thing; but independence of the will of the nation is a solecism, at least in a republican government." As James Monroe lamented to Jefferson: "The [Federalist] party had retreated into the judiciary" through John Adams' midnight appointments, which took full advantage of the institutional protections of Article III. As president, Jefferson favored a constitutional amendment that would redefine "good behavior" in terms that would allow presidential removal of judges upon recommendation of Congress for a much broader set of offenses than "treason, bribery, or other high crimes and misdemeanors" (Tarr 2012).

Early courts thus faced powerful incentives to become captured either by strong governors or strong legislatures, and there is evidence that during this time period state courts were more deferential to legislatures (Sheldon 1999). Following the Panic of 1837, eight states defaulted on their debt, mostly because of overspending on toll road, railroad, and canal projects. As a result, 16 states adopted new constitutions, and on the eve of the Civil War 24 of the 34 states elected their judges in partisan elections (Carbon and Berkson 1980, 9). The reforms in judicial selection, coupled with strengthening the position of governors and bringing more transparency to state legislatures, were meant to

restore the balance of power in state politics (Tarr 2012). In other words, despite the modern assumption that elected courts are less independent, judicial elections became a method to free courts from the potentially corrupting influence of legislative oversight.

Despite the fact that only three states employed judicial elections when he toured America, Alexis de Tocqueville (2003, 314) predicted in his typical, yet astonishingly prescient style that this move towards democratizing the judiciary would generate as much controversy as the system it replaced. He wrote, "sooner or later these innovations will have dire results and that one day it will be seen that by diminishing the magistrates' independence, not judicial power only but the democratic republic itself has been attacked." However, the evidence from the early years of judicial elections, according to Jed Shugerman (2012), is that state courts were particularly aggressive in striking down laws.

By the turn of the century, however, the partisan nature of judicial elections turned from a potential virtue into a frequent vice. Party machine control of politics extended to the nomination of judges, who were almost always party stalwarts (Tarr 2012). Progressive reformers, as part of their broader reform agenda, introduced nonpartisan elections in nine states by 1920, beginning with North Dakota. Around the same time, the American Judicature Society developed an alternative method of insulating state judges from politics. According to this model, judicial councils, comprised of judges would serve as a nominating body who would consider nominees on the grounds of professional, rather than partisan, qualifications. At the end of the judge's first term (and each subsequent term), the voters of the state would be asked whether or

not to retain the judge in a noncompetitive election. If a majority of voters decided not to retain a judge, the nominating council would select a new judge.

California became the first state to implement merit selection with retention elections in 1934, and by 1960, 15 other states had followed suit. Much of the impetus for California's reform came from a young Oakland prosecutor frustrated with widespread corruption scandals and rising crime rates in California. This political newcomer wrote an article in the Chamber of Commerce's *California Journal of Development* urging the state to get tough on crime by getting less partisan in its judicial selection. The author's name was Earl Warren (1934, as cited in Shugerman 2012). Following California's adoption of merit selection, the American Bar Association, which had previously supported elections as a means of promoting judicial independence, endorsed its own version of merit selection, adding representatives from the legal community to judicial councils. The first state to adopt this modified plan was Missouri, which is why merit selection with retention elections is often referred to as the Missouri Plan. The spread of retention elections occurred mainly through rural states in the Great Plains.

The evolution of state supreme court reappointment methods has followed some broad historical trends, but these institutional developments have not been universal. Why do some states change their selection methods and not others? Epstein, Knight, and Shvetsova (2002) question the typical historical narrative on this account and hypothesize that the motivating factor is political uncertainty. When a ruling coalition in a state is less stable, leaders are more likely to maximize judicial independence through

institutional design choices. Andrew Hanssen (2004) collected data on every change in state supreme court selection method between 1900 and 1990 and tested this hypothesis. His model found that states that tend to move to retention election systems have higher levels of two-party competition and greater differences between party platforms. This hypothesis is also supported in comparative courts literature (Epstein, Knight, and Shvetsova 2001; Ginsburg 2003; Hirschl 2007).

There are virtues and vices for each of these reappointment arrangements. When elites are in charge of judicial reappointments, it relieves voters of the obligations of gathering information about judges to cast an informed ballot. On the other hand, judges who are directly responsible to the people are more likely to strike down laws passed by the legislature than those responsible to elites (Langer 2002; Shugerman 2012). Even the virtue of life tenure can turn into a vice – for example, when justices remain on the bench long after they are mentally capable of doing the job.

Why Judicial Independence Matters

As *Varnum* so vividly demonstrates, judicial independence and rights protection are intimately connected. If judges are worried about retaliation for unpopular decisions, it becomes difficult for them to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials" (*West Virginia v. Barnette* 1943, 638). On the other hand, for half a century, legal theorists have pondered the problem posed by the U.S. Supreme Court when five politically unaccountable justices can strike down a law supported by 100+ million Americans. This vexing problem in legal theory, which Alexander Bickel (1962) termed the

"countermajoritarian difficulty" is assumed to be a necessary tradeoff: Article III allows federal judges the leeway to counter the wishes of the majority by striking down a democratically-enacted law.

Judicial independence could be used to protect underlying principles of constitutionalism, but it could also be used as a means of engaging in judicial tyranny (Ferejohn and Kramer 2002; Ferejohn 1998). At the same time, accountability through judicial elections is also only instrumentally valuable to a deeper commitment to democracy (Bonneau and Hall 2009), but accountability could also undermine rule of law and separation of powers by turning courts into majoritarian institutions, rather than a forum to solve legal problems.

Unfortunately, as Burbank and Friedman (2002, 9) acknowledge: "[v]ery little of this work [on judicial independence] even acknowledges the existence of state courts, let alone considers how the variety of arrangements governing state judiciaries might affect general theories of judicial independence." One major problem in the judicial independence literature, according to Terri Peretti, is that "[w]e need precise measures of judicial independence and research that then tests its causes and consequences. For example, we cannot simply assume that tenure and salary protection guarantee judicial independence" in everyday judicial practice (2002, 122–23). Studying judicial independence at the state level will help political scientists gain a greater understanding of the diversity of state constitutional arrangements and the of these institutions on judicial decisionmaking in ways that an N = 1 study of the U.S. Supreme Court cannot provide (Putnam, Leonardi, and Nanetti 1994). Federalism, on the other hand, offers

scholars a chance to measure variation at the same point in time across most similar regions with contrasting institutional designs.

Gaining additional empirical information about judicial independence can inform some much deeper normative questions, including: should a polity conceive of judges as "representatives of the people" or apolitical arbiters? Who can be trusted to balance the competing normative ideals of rule of law democracy: the people, governors/legislators, or judges? Which vice, judicial tyranny or a subservient judiciary, is more likely to occur, and which is more damaging to the health of a polity?

My dissertation will also serve a practical purpose. The U.S. Supreme Court has also ruled that judges have a due process obligation to recuse themselves when large campaign contributions pose a "risk of actual bias" (*Caperton v. A.T. Massey Coal* 2009). When Hugh Caperton sued Massey Coal in 1998, a state trial court in West Virginia found for Caperton and ordered $50 million in damages. The Supreme Court of Appeals (the highest court in West Virginia) reversed the decision and dismissed the case. Prior to the high court ruling, Caperton asked Justice Brent Benjamin to recuse himself, as he had accepted $3 million in campaign contributions from the C.E.O. of Massey Coal. Justice Benjamin had narrowly upset a Democratic incumbent in 2004 in the (then) second most expensive judicial race in American history. Since *Caperton*, fewer than a dozen states have reformed their recusal rules (Gibeaut 2012). This dissertation will explore whether a case like this is an anomaly or a more prevalent problem. Spending on judicial elections has increased dramatically in recent years (Bonneau 2009), especially

among special interest groups (Goldberg 2009), which has led some state governments to experiment with public financing schemes for judicial candidates (Goldberg 2002).

Since 1950, 28 states have changed their judicial selection methods (American Judicature Society 2013a). Interest groups such as the American Judicature Society, the Brennan Center for Justice, and Justice at Stake (Goldberg 2008) have expressed major concerns about judicial elections, in large part because of their supposed impact on judicial independence, while experts at the Federalist Society (DeBow 2003) and the Heritage Foundation (O'Malley 2010) have spoken favorably about democratic accountability provided by judicial elections. In November 2010, voters in Nevada voted against a ballot measure to adopt a retention election system in lieu of their current system of nonpartisan elections (Plant-Chirlin 2010). Justice Louis Brandeis once famously called the states "laboratories of democracy" (*New State Ice Co. v. Liebmann* 1932, 312). This research would provide empirical evidence that could greatly inform this constitutional experimentation in the future.

Organization of This Project

Chapter 2 outlines the different selection and retention methods currently used in the American states. I offer definitions of judicial independence along two different dimensions and develop the theory of reappointment uncertainty from the resulting principal-agent problem. After operationalizing the theory, the chapter considers several possible objections to and complications with using reappointment uncertainty to explain state supreme court behavior.

Chapter Three proceeds to consider whether the polarizing role of partisanship is dependent on reappointment uncertainty. At the same time, Chapter 3 develops a comprehensive theory of dissensus on state supreme courts. This chapter, using a multi-level probit model, examines whether justices are more likely to write a dissent when the ideological distance from the majority opinion writer increases. The results indicate dissensus is structured on ideological grounds only in instance where reappointment uncertainty is high.

Chapter Four analyzes the external pressure placed on state supreme courts by the governing coalition in a state. Using a multi-level probit analysis of two major legal issues, this chapter analyzes the degree to which reappointment uncertainty affects the responsiveness of state supreme court justices to changes in the ideology of a state's governing coalition. The only instance in which a state supreme court mirrors changes in state-level ideology is in nonpartisan election states, where reappointment uncertainty is high.

Chapter Five turns to an emerging problem among those state supreme courts that reelect their judges – that of campaign finance. This chapter begins with a recent history of campaign finance in judicial elections. Then, the chapter utilizes an instrumental-variables probit analysis to diagnose the role of campaign contributions in shaping judicial decisions, specifically donations from persons working in different sectors of the business community and lawyers. The analysis suggest that there is an endogeneity problem, and, once solved for using a variety of instrumental variables, there is a direct relationship between campaign contributions and judicial behavior.

Chapter Six concludes this project with a reflection on the normative implications of the data analysis. Given the frequency with which states redesign their constitutional orders (Council on State Governments 2012; Levinson 2012), this is more than just an academic question. In light of the evidence presented in this dissertation, complemented by the findings in other studies of state supreme courts, I lay out a case in favor of the Missouri plan of merit selection and retention elections.

The conclusion also discusses how scholars should view state supreme courts within debates of democratic theory. Democratic constitutionalism may rest on the consent of the governed, but that does not automatically mean that any temporary factional passion (Madison 2010) should be accommodated. Taken to the extreme, judicial independence can produce a countermajoritarian difficulty, but judicial accountability taken to the extreme could result in a subservient judiciary.

Bonneau and Hall (Bonneau and Hall 2009) focus on judicial elections as a mechanism to achieve popular constitutionalism, but they do not acknowledge alternate avenues for the people (or their elected representatives) to maintain supremacy in determining constitutional meaning. Constitutional amendment or calling a new constitutional convention can accomplish the goals of popular constitutionalism without disrupting the rule of law through the threat of sanction for judges who refuse to toe the line. Amending or abandoning a constitution represents a deeper-throated expression of the voice of "We the People" because the procedures by which this change is accomplished are more rigorous than getting 50 percent plus one of the public (or the legislature) to throw a judge out of office. Madison's concern with factionalism is just as

relevant today as it was in his day: the promise of American constitutionalism is legislating based on the common good, and that does not automatically equate to raw majoritarianism.

Chapter Two: Reappointment Uncertainty, Institutional Design, and Judicial Independence

> At present it will be sufficient to remark that no citizen of Virginia can be prejudiced either in his person or his property, by any of the government of this commonwealth (or of the United States) so long as the judiciary departments of those governments, respectively, remain uncorrupt, and independent of legislative or executive control. But whenever the reverse of this happens, by whatever means it may be effected (whether fear or favour), liberty will be no more, and property but a shadow.
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> St. George Tucker (1803, as cited in Tarr 2012)

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The State of State Supreme Courts

Tables 2.1, 2.2., and 2.3 present information on all 50 state courts and features of their different judicial election systems. Partisan judicial elections are similar to elections for other political offices. The partisan label on the ballot provides voters valuable information for their vote choice, which explains why voter roll-off in these races is typically much lower (Bonneau and Hall 2009). Partisan elections are even more common for state trial court judges; currently 19 states use partisan elections for at least some of their judges (Shepherd 2013, 4). Nonpartisan judicial elections vary a bit more: Michigan and Ohio hold partisan primaries to determine the two nominees who appear on the general election ballot without party identification.[5] The rest of these states allow candidates on the general election ballot without formal input from either party. Recent studies have demonstrated some evidence that voters can tell relevant ideological

[5] While Bonneau and Hall (2009) classify these two states as having partisan elections, I disagree. Most voters do not participate in primaries, and therefore they lose a significant amount of information by not having the party affiliation listed on the ballot at the general election. I would use the same logic to disagree with these authors' on classifying Illinois, New Mexico, and Pennsylvania as partisan election states. While these three states do select their freshman justices through partisan elections, incumbent justices are reelected through retention elections, and the literature suggests that the retention audience is more important to judges (Savchak and Barghothi 2007). In addition the analysis presented in Chapter 3 demonstrates that justices in these three states behave more like retention election judges than judges responsible to a political party.

differences between candidates (Bonneau and Cann 2012) and that these races are often driven by political considerations (Hall 2001).

One reason why voters can often overcome the information disadvantage posed by nonpartisan elections is a recent change in U.S. Supreme Court doctrine. In *Minnesota v. White* (2002), the Court ruled that state bar association restrictions on judicial candidates violated the First Amendment's protection of free speech. Because of the decision, candidates are free to discuss the ideological or partisan affiliations (even in states with nonpartisan judicial elections). In many states, judicial candidates are even free to make commitments on controversial issues (Caufield 2009). While increased spending on judicial elections has provided a larger quantity of information to voters, the *White* decision also led to an increase in the quality of information (Baum and Klein 2009; Hojnacki and Baum 1992).

Retention elections allow voters to decide whether to reappoint a sitting justice who appears on the ballot without an opponent. In this system, there is always a difference between the method in which justices achieve their first term and retention for any subsequent term. Most states that utilize retention elections initially select their justices through a merit system. According to a study compiled by the American Judicature Society, judges in retention elections are opposed on a variety of different grounds including: professional competence, judicial philosophy, judicial conduct and temperament (all common reasons), issuing controversial decisions, criminal activity and scandals (less common reasons) (Carbon and Berkson 1980). Voters often lack information about judicial incumbents, absent an ethical problem or hugely controversial

decision. In the absence of a meaningful alternative (an opposing candidate) or evidence of maladministration, and given the level of trust that judges enjoy in the American democratic order (Hibbing and Theiss-Morse 2002), the default option for most voters may be to retain judges.

Most of the states with any of these three reappointment methods conduct statewide, single-seat elections, while a few others create judicial districts (like legislative districts) or conduct multimember seat elections. In Illinois, New Mexico, and Pennsylvania, state supreme court justices initially run in a partisan election, but at the end of each of their terms, they are subject to a retention election. Incumbents in Illinois need 60 percent of the vote to retain office, and justices in New Mexico need to claim at least a 57 percent share of the vote. Twenty-two states, including those with and without judicial elections, utilize a mandatory retirement age for judges. In several states, the government or nonprofit organizations distribute (or make available) a guide to provide voters with more information about the qualifications and public statements of judicial candidates.

Other states, mostly part of the original 13 colonies, do not conduct judicial elections. These states require judges to be periodically renominated by the governor and reconfirmed by the state legislature, but in four states, the governor plays no formal role in the selection or retention of judges. As Table 1.2 demonstrates, judges in reconfirmation states enjoy high levels of job security, which seems a bit puzzling in light of the politicized nature of judicial confirmations on the federal bench (Binder 2009). Further analysis of appointment politics in these states reveals some interesting findings.

Five of the seven states that have elite actors reapprove judges impose mandatory retirement ages, and in those states, freshmen judges tend to reach to the bench close to that retirement age.[6] The average freshman state supreme court justice appointed in Connecticut, New Jersey, New York, South Carolina, Virginia, or Vermont between 1980-1997 would only be eligible to serve 1.76 terms. This means that, on average, judicial turnover is fairly high in these states, which may provide the incentives necessary for promoting judicial job security. State legislators and governors may be willing to reapprove nominees of an ancien regime if they know that the effects of that decision would be short lasting.

Five of the seven utilize judicial nominating commissions to present the governor with a short list of candidates.[7] Because these commissions select nominees on merit, it becomes very difficult for legislators or governors to anticipate whether the refusal to reapprove a sitting judge will lead to the nomination and approval of a new judge who is any more faithful an agent than her predecessor. Beyond these strategic calculations, there may be benefits in terms of legitimacy and collegiality that governors and legislators accrue by acting in such a cooperative fashion. Governor Chris Christie of New Jersey, a Republican, recently broke with tradition by refusing to reappoint an incumbent justice for his second term because he was a Democrat, a decision which sparked considerable outcry from the Democratically-controlled legislature (Pérez-Peña 2010).

[6] The other two states are Delaware and Maine (American Judicature Society 2013e). The average freshman justice appointed in these states between 1980-1997 took her seat on the bench at age 53.1, which is slightly (but not statistically significantly) higher than the national average of 52.8 during the same period.

[7] The other two states are Maine and Virginia (American Judicature Society 2013d).

Interestingly, only a handful of states have created anything even resembling life tenure for judges. In New Jersey, state supreme court justices achieve life tenure (through age 70) upon being renominated and reconfirmed once. The reappointment of Hawaiian state supreme court justices is the sole responsibility of their judicial commission, and the commission's criteria for removal of judges are more akin to the standards for the impeachment of judges. Massachusetts and New Hampshire grant life tenure to judges, subject to a mandatory retirement age.[8] Rhode Island, despite being the most vocal opponent to the ratification of the U.S. Constitution, is the only state in the union that grants life tenure akin to Article III.[9]

Judicial Independence as a Concept

What, precisely, is judicial independence? Why would we expect it to be a meaningful part of a democratic constitutional order, given that law is a social enterprise? How could political scientists observe independence in nature? Of whom are judges supposed to be independent, and why would such a separation be normatively desirable? As Alan Tarr (2012) has stated: "Defenders [of judicial independence] have tended to be long on pieties and short on precision." Thus, the project begins by fashioning a definition of judicial independence along two dimensions.[10]

[8] Despite the presence of a mandatory retirement age, Massachussets and New Hampshire are referred to in this project as states with life tenure for easy of terminology.
[9] Yet the structure of the Rhode Island judiciary is not exactly like Article III because judicial nominees must be confirmed by both houses of the legislature, and the governor can only nominate a candidate presented on a slate from the state judicial commission.
[10] In the comparative context, Rios-Figueroa and Staton (2009) test the validity of thirteen different judicial independence measures, which tap into two dimensions: *de jure* and *de facto* independence. The *de facto* independence measures are further deconstructed in terms of measures of judicial power and autonomy.

Institutional Independence

Institutional judicial independence refers to rules and norms designed to isolate courts from outside influence. State constitutions provide courts with a number of forms of institutional independence. These institutions include: salary protection, merit selection of judges, fixed jurisdiction, a fixed number of judges on a court, and, most importantly, tenure of office: whether for life or until a mandatory retirement age (Brinks and Blass 2010).

Impeachment is a tricky accountability measure because it may or may not function in a similar fashion as voters or legislators behave in making reappointment decisions. Article III of the U.S. Constitution defines the term of office for federal judges as during "good behavior," which, today, essentially means life tenure. In early state constitutions, the term good behavior referred to a standard of good conduct in office (Tarr 2012). Many early constitutions also created grounds for impeachment that were much broader than today. For example, the New Hampshire Constitution of 1784 includes "maladministration in office" as an impeachable offense. Many of the voters in Iowa who wanted to oust the members of their supreme court for legalizing gay marriage would likely conceive of their votes along the lines of maladministration.

However, not all supporters of retention elections think that citizens ought to use their vote in such a fashion. Political scientist and American Judicature Society officer Rachel Caufield argued that the Missouri plan system, which created judicial retention elections, was intended to allow citizens to remove judges only for nonideological

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The measures of *de jure* independence roughly map onto my notion of institutional independence, while measures of judicial autonomy correspond to my conceptualization of decisional independence.

reasons (Deffelmeyer 2011). This is a curious argument, however, considering the Iowa Constitution allows for judges to be impeached (1857). According to data collected by Bratton, Spill, and Sill (2012), no state supreme court justice has been removed from office through the impeachment process since at least 1950.

Decisional Independence

A judge renders an independent decision when she considers only factors that are internal to the rule of law. Key rule of law considerations include a commitment to *stare decisis*, adherence to the canons of statutory interpretation, a proper application of doctrine to particular case facts, and handling only those issues properly raised and minimally necessary to decide a case (Kmiec 2004). Developed by James Gibson (1978), judicial role theory posits that judges see themselves as tasked with certain obligations, including that of impartiality. Subsequent research has argued that these perceived roles are dependent on the institutional context in which they serve (Carman 2012). Attitudinalist political scientists (e.g., Segal and Spaeth 2002) and hard line legal realist law professors (e.g., Frank 1973) would argue that the rule of law is a fiction. Regardless of whether that is an empirically valid conclusion, judges think it exists and attempt to fulfill their role in order to pursue it.

Judicial independence relies on a notion of sincerity. Appellate courts often deal with hard cases in which more than one plausible solution is present under traditional legal variables such as following precedent (Cardozo 1922). Judges who view the law through an ideological lens may still be acting independently because they are upholding

the law – as they see it. The normative concern about judicial non-independence is judges will change their behavior to reflect the contrary views of outside actors.

While this definition of decisional independence might seem to lack much precision, each quantitative chapter of the dissertation will operationalize, and measure, a different example of decisional independence. I define independence as a continuous, rather than a discrete variable. The largest disadvantage of defining decisional independence dichotomously is that it sets up a straw man. Every judicial system in the United States is set up to not only allow, but also encourage, some outside influence. No one would say, for instance, that the filing of *amicus curiae* briefs undermines judicial independence. Outside influence occurs when third parties send signals to a court (Rubin 2002); these signals range from legal and ethical options like newspaper editorials to questionable tactics, such as making undue threats of impeachment, or even illegal signals like offering bribes. If signals from third parties are ever present, it might seem like the only way to achieve judicial independence would be to lock judges in a dungeon. This is both unrealistic and normatively unsatisfying.[11]

Conversely, the main disadvantage to a continuous conceptualization of judicial independence is that it becomes difficult to define where on the continuum independence ends and non-independence begins. Studying state supreme courts partially remedies this problem, however, because scholars can make relative comparisons of independence between different states. Independence is a problem of optimization, not maximization. Over the course of American history, each of these reappointment methods developed in

[11] One could distinguish, however, between an *amicus* brief and an impeachment threat in that the former is purely a soft-power form of persuasion, while the latter is not.

the hopes of striking a balance between some form of judicial accountability (from impeachment to electoral defeat) and decisional independence.

Reappointment Uncertainty and Judicial Independence

The problem with most of the existing state court studies of judicial independence is a lack of rich theorizing. For example, Choi, Gulati, and Posner (2010) seem to think that reappointment methods might have something to do with principal-agent theory, but they provide no clear reasons how different reappointment structures alter the incentives for the agents. Similarly, Brace and Boyea (2008) assume that all forms of election form the same decisional incentives and that there were no meaningful differences between tenured justice and untenured ones.

Other state supreme court scholars have devoted more careful attention to the decisional consequences of institutional arrangements. Laura Langer (2002, 2003)[12] develops a theory of judicial review on state supreme courts that reflects the principal-agent problem facing justices. Justices who are reconfirmed by legislators and governors are more reluctant to strike down laws than justices who are directly accountable to the people because principals who are governing elites are likely more sensitive to this type of judicial behavior. Scott Comparato (2003) finds that *amicus curiae* briefs communicate more policy information in state with judicial elections and more information regarding the preferences of the other branches of government in states with legislative or gubernatorial reappointment. This interest group strategy provides judges with the most useful information for their respective retention methods.

[12] See also Brace, Hall, and Langer (1998).

The appointment of judges represents a potential principal-agent problem. There two types of principals in this game: the public and elites (mostly political parties, governors, and legislatures). The principal must be concerned with the possibility of shirking on the part of the agent, which can arise when there is a divergence between the preferences of the two parties. In this context, the principals are looking to ensure that the justices they appoint or elect issue decisions with which they will agree. This assumption is supported in the federal judicial politics literature (e.g., Segal and Spaeth 2002; but see Tribe 1985).

Principals, essentially, have two tools with which to accomplish these goals: the initial screening process by which agents are selected and on-the-job monitoring (elections and reappointments). The first limits the potential for adverse selection (Moe 1995), which occurs when principals lack information of the preferences of agents. Before the U.S. Supreme Court decided *Republican Party of Minnesota v. White* (2002), states were free to restrict the types of discussions and promises that judicial candidates made, which could exacerbate the problem of adverse selection. This information gap should disappear as first-time candidates demonstrate their preferences as incumbents. The presence of a partisan label on the ballot should reduce the potential for adverse selection compared to justices running in nonpartisan election. However a recent study (Bonneau and Cann 2012) demonstrates voters are able to infer the ideology of nonpartisan judicial candidates.

Lewis Kornhauser (2002, 53) has argued: "[C]oncepts of judicial independence play little, if any, role in the explanation of how judicial institutions function either in

isolation or in relation to other political or social institutions." There is some evidence for this statement from the federal judicial politics literature. Over the course of American history, such a disagreement between elites in Washington and members of the U.S. Supreme Court has not existed to much of a meaningful degree, according to these authors. This feature of American political development is likely not a failure of life tenure and salary protection to insulate the justices to the point that they feel free to disagree with the ruling coalition. It is more likely that this constitutional consensus is the result of an appointment process that has secured faithful agent judges.

On-the-job monitoring limits moral hazard with the threat of punishment. There are several different variables in the monitoring system: the length of judicial terms, the type of behavior considered legitimate grounds for dismissal, whether dismissing a justice and appointing a replacement is a one-stage or two-stage process, and the amount and type of information about past behavior presented to principals at the time of the decision. The most important consequence of the principal-agent problem is that different reappointment systems create different levels of job security.

Jed Shugerman (2012) breaks the question of judicial independence into two dimensions: relative independence (freedom from whom?) and general independence (how much independence?). Reappointment methods structure both dimensions of his concept. When political elites serve as principals, they may be less likely to suffer from adverse selection because they will have greater knowledge about their agents before they are appointed. They also may do a better job of reducing moral hazard because it is easier for them to monitor judicial performance than the public at-large. Reappointment

methods also establish levels of general independence by specifying the length of a judicial term, the threshold for removal from office, etc.

The fact that multiple principals play a role in appointing agent judges makes the game more complicated (Waterman and Meier 1998). In the case of states with elite reconfirmation, it is fair to assume an equal level of information between the principals - the governor and the chambers of the legislature. The principal-agent literature suggests that in these situations that if these different principals have differing preferences that it leaves room for the agents to professionalize (Moe 1985). In the case of partisan elections, there is an informational asymmetry between party elites who nominate a candidate and the voters who choose in the general election. It would be tempting to think that this asymmetry would make party elites the more important principal, but the high reappointment uncertainty in partisan elections is more likely a function of a skeptical general electorate.

These considerations lead to the key prediction:

> *Reappointment uncertainty theory*: assuming justices are rational actors, their behavior will be constrained by the divergent preferences of outside actors in relation to the level of reappointment uncertainty they face.

Gary Jacobson (1987) found that members of Congress "run scared" – that is they never think of themselves as electorally invulnerable, despite the fact that many of them essentially are. Members of Congress, according to the author, campaign hard and put great effort into constituency services, even if their next election seems assured. Legislative scholars continue to debate whether this hypothesis is valid (Hirano and Snyder, Jr. 2009; Kousser, Lewis, and Masket 2007; McGhee and Pearson 2011), but the

logic motivating the theory seems plausible in the context of state supreme courts. Huber and Gordon (2004) have demonstrated that trial court judges in Pennsylvania facing retention elections become more punitive in their criminal sentencing as their election date nears, regardless of their underlying judicial ideology.

Congressional elections are much higher information affairs than judicial elections (Schaffner and Diascro 2009), although recent increases in judicial campaign spending may be mitigating this problem by making these elections more high-profile (Hall and Bonneau 2008). In judicial elections with two opposing candidates, experienced challengers tend to fare better against incumbent judges, and voters appear to be cognizant of candidate qualifications (Hall and Bonneau 2006).

In applying principal-agent theory to congressional monitoring of the bureaucracy, Weingast and Moran (1983) confronted a paradox: why would bureaucrats feels constrained by the threat of congressional oversight when Congress does relatively little of it? Bureaucrats, instead, conform to congressional expectations in order to achieve budgetary incentives and avoid the threat of ex post investigations. The threat of sanction to judges exists everywhere, even in states with life tenure because of the possibility of impeachment. However, impeachment is not much of a credible threat. Which threats are considered credible is a function of institutional context and communal norms.

Americans have historically opposed sanctioning the U.S. Supreme Court, but often then go to the polls that November and vote a state judge out of office. How does that contradiction make sense in light of the popularity of courts compared with other

branches of government? The U.S. Supreme Court probably enjoys higher levels of diffuse support than state supreme courts, given its higher visibility. The larger answer concerns established norms of political behavior. Retaliations against the U.S. Supreme Court, of any sort, are very rare, but judicial elections happen on a regular basis. Although both are sanctioned forms of accountability within the constitutional order, impeaching a U.S. Supreme Court justice would likely be seen as so uncommon as to be inappropriate, whereas voting out a state court judge would be seen as common enough to be considered appropriate. If a state cut the salaries of their justices in the wake of an unpopular decision – which is a legal option in many states – the people of that state would likely be skeptical because it is an uncommon punishment.

Operationalizing Judicial Independence: Institutions and External Pressures

If judicial independence exists, how would political scientists observe and quantify it? As Lewis Kornhauser (2002, 52) observes, "Judicial independence…is not directly observable. In empirical studies, then, the analyst has to use some proxy for independence." Judicial independence is even trickier than many other abstract concepts in political science because, over the course of American history, the same institutions that established to promote decisional independence have sometimes evolved into external pressures that could undermine judicial independence (Shugerman 2012).

Assuming that state supreme court justices are rational actors who wish to keep their jobs, they will make judicial decisions in ways that will balance their competing obligations to uphold the rule of law (as they see it), while also attempting to please

outside actors who pose a threat to their reappointment. The degree to which they attempt to be faithful agents to their principals depends on how those external pressures filter through each state's reappointment method. Figure 1.1 outlines this relationship and its impact on judicial decisionmaking.

Decisional independence occurs when the institutions designed to promote independence blunt these external pressures, thereby ensuring that the resulting decision reflects legal considerations. Figure 2.2 illustrates a hypothetical example of institutional independence producing decisional independence. Political parties, the mass public, and interest groups all have strong preferences – as represented by the bold lines emanating from those actors – about the outcome of judicial decisions. However, none of those actors writes judicial decisions directly. Their goals must be achieved indirectly through the justices serving on their state supreme court. The mediation of that influence take place within an institution (this example utilizes partisan elections). Note that despite the strong preferences going into the judges' decisionmaking process, the resulting influence from those outside actors is quite small – as represented by the thin line connected to judicial decisions. The change in the thickness of those causal arrows is the result of a well-functioning institution designed to promote judicial independence. As a result, the justice is much more strongly influenced by the rule of law – as represented by the bold line connecting the law to judicial decisions.

Courts, though part of the broader political order (McCloskey 2004), are also unique institutions, designed to be neutral arbiters who can resolve disputes between two parties. The two adverse parties and the neutral judge form a triadic dispute resolution

system of justice (Shapiro 1986). None of the actors listed at the left of Figure 2.1 are included in triadic dispute resolution system. Quantifying the relationships outlined in Figure 2.1 constitutes the goal of the analytical portion of this dissertation. The following hypotheses are derived from the historical analysis developed earlier in this chapter and in reaction to the existing political science research on judicial independence on state supreme courts.

Party Polarization Hypothesis

Choi, Gulati, and Posner (2010, 296) argued, "Judges have the duty to enforce the law impartially, without regard to the legally irrelevant characteristics of the litigants or the goals of political parties." When judges are not only responsible to the law, but also to voters, and a political party as well, the incentive structure for judicial decisionmaking likely changes as well. States in which partisanship is not a relevant qualification for holding judicial office might plausibly end up with judges who do not issue decisions along ideological lines, whereas judges who must seek renomination might feel compelled to send signals to party elites.

The decision to dissent or join a majority coalition is a function of different policy, strategic, and institutional considerations (Maltzman, Spriggs, and Wahlbeck 2000). After taking into account the legal arguments and other institutional norms, every justice (save for the one assigned to write the majority opinion) must decide what to do with her vote. Is the decision to dissent is structured on partisan lines? While the federal appellate court literature seems to answer "yes" to this question (Hettinger, Lindquist, and Martinek 2007; Sunstein et al. 2006), it is also careful to point out important

institutional differences between these courts and the U.S. Supreme Court, where partisanship (or ideology) matters even more. State supreme courts, where institutional design varies much more wildly, can provide valuable insights as to the different incentives presented to judges in different principal-agent relationships.

> *Party Polarization Hypothesis*: The degree to which partisan differences structure judicial decisionmaking on a state supreme court depends on the degree of reappointment uncertainty those justices face.

Governing Coalition Capture Hypothesis

Scholars beginning with Robert Dahl (1957) and continuing onward (Barnum 1985; Friedman 2009; Graber 1993; McCloskey 2004; McGuire and Stimson 2004; Mishler and Sheehan 1993; Powe 2009; Rosenberg 1992; Whittington 2005) would, to some degree, challenge the meaningfulness of judicial independence. The literature on the U.S. Supreme Court has not revealed much disagreement with the dominant ruling coalition over time. Nonetheless, the relationship between the preferences of the ruling coalition and high courts deserves reevaluation in the context of differing institutional designs.

When a judge votes in a way consistent with how she sees the law is an example of judicial independence. Altering that decisionmaking calculus in order to conform to changing preferences of the ruling coalition is an example of non-independence. However, when job security is high, judges will not feel much pressure to do so. Thus, when the reappointment uncertainty principle is applied, it leads to the following hypothesis:

> *Governing Coalition Capture Hypothesis*: State supreme court justices change the ideological direction of their judicial decisions to follow changes in the ideological direction of the political environment in their state only to the degree to which they face reappointment uncertainty.

Interest Group Capture Hypothesis

Unlike the first three hypotheses, interest groups are not part of the constitutional design that appoints or reappoints state supreme court justices. However, the normative implications of interest group capture are perhaps even more dangerous than other forms. Most of the congressional literature that examines the role of money in politics has not found strong evidence of a *quid pro quo* relationship between contributor and legislator (see Stratmann 2005). Recent scholarship on money in state politics (Powell 2012), on the other hand, reveals a much different picture: the more money legislators raise, the more she accommodates her donors at the expense of her constituents in her policy decisions. Early scholarly investigations into the role of money in judicial elections (Bonneau and Cann 2009; Cann 2007; McCall 2003) have also demonstrated that some justices are influenced by lawyers who contribute and then appear in their courtroom. There is also evidence that higher levels of campaign spending drive electoral success in judicial elections (Bonneau and Hall 2009).

The incentive structure established by reappointment institutions may differ in this analysis compared to the others undertaken in this dissertation. Candidates in partisan judicial elections, though they enjoy the lowest level of job security, also automatically enjoy the highest amount of free information conveyed to voters at the polls – their party identification. This information can be a double-edged sword, if, for

example, voters are unhappy with a justice's party at the national level. Party identification is also an important signal to potential campaign contributors as well. With more information about a candidate's probable future behavior, contributors discount the utility of a contribution if the contributor's interests are strongly at odds with the worldview of the candidate.

Justices in nonpartisan elections have to overcome the lack of information on the ballot and identify their worldview with voters through other means (Canes-Wrone, Clark, and Park 2012; Canes-Wrone and Clark 2009). This could make the necessity of raising money more important in these races than in partisan election races. If money is a more important consideration for these candidates, they may be more willing to accommodate the interests of their contributors. Moreover, since there is no oversight from either political party, justices in nonpartisan elections may feel as though these accommodations are less likely to be noticed. Justices in partisan election states must fend off the threat of a primary challenge, which could mean that faced between following the interest of a campaign contributor and voting in a way to please their party, assuming they conflict, partisan considerations might triumph. Many justices in partisan elections states have used their service on state supreme courts as a stepping-stone to campaigns for governor, state attorney general, and U.S. House and Senate. Their primary concern may be upward mobility, not remaining on the bench.

The largest obstacle to measuring this relationship is the classic "chicken and egg" problem that confronts any study of campaign finance. Instrumental variables probit can diagnose and solve this problem (Bonneau and Cann 2009). The goal is to

find variables correlated with the incentive to donate to any candidate, no matter what their ideological inclinations might be. The campaign finance literature has demonstrated that contributors are rational (Wright 1996) – that is, they not only want to maximize the chance that the candidates they back will in turn back them, but they also want to invest in candidates who are likely to win. The advantage provided by incumbency reduces this uncertainty for contributors, which makes freshman versus non-freshman justices a promising starting point for an instrumental variables analysis.

> *Interest Group Capture Hypothesis:* Justices will adjust their voting behavior in the ideological direction sought by their contributions only if they operate in electoral systems with high reappointment uncertainty.

Data

The empirical analysis for this project relies mostly on data from the State Supreme Court Data Project (Brace and Hall 2001). This comprehensive dataset includes 21,000 decisions from over 400 state supreme court justices from all 50 states between 1995 and 1998. The principal investigators have found their data to be both reliable and valid (Brace and Hall 1998). This same dataset also includes important biographical data on all of the justices sitting on state supreme courts during this time. Further biographical information is provided in the State Supreme Court Career Database (Bratton, Spill, and Sill 2012). Additional features of state judicial systems and other valuable state-level political data comes from the State Politics and the Judiciary dataset (Lindquist 2010). Finally, data on campaign contributions in judicial elections comes from the National Center on Money in State Politics (2012). Data on two-party competition in each state comes from the Berry elite ideology scores (1998).

Potential Problems with Reappointment Uncertainty

Decisional Independence without Institutional Independence?

The traditional assumption of the principal-agent theory of judicial decisionmaking is that judges behave according to a rational calculation of self-interest (Epstein and Posner 2013; Murphy 1964). In the context of state supreme courts, this assumption translates into a desire be reelected or reappointed, if applicable. It is possible, though, that judges who must be periodically reappointed will behave independently even when profound differences in constitutional worldviews exist between judges and reappointing agents. Helmke and Staton (2011) develop a formal model that demonstrates that increasing judicial tenure can actually lead to more deferential courts because it increases the degree to which judges value their seats. In other words, if judges view their appointment more as a less desirable "temp job" than a very rewarding and life-long career, justices might be more willing to risk losing it by issuing an unpopular, but (in their minds) correct opinion.

Thus, institutional independence might be neither necessary nor sufficient to spur decisional independence. There is some early evidence from early American history that might support this claim. Scott Gerber's (2011) study of colonial and state courts found the first example of judicial review being invoked occurred in New Jersey in 1780, despite the fact that the New Jersey Constitution at the time did not protect judicial salaries and folded the judicial system within the executive branch. This relationship

warrants further scholarly investigation, and the diversity of institutional structures that exist at the state level, both then and now, provide an excellent laboratory.

Selection Effects, Not Reappointment Effects

Because different actors select justices across the states, justices might be appointed for different reasons. Judicial nominating commissions may seek candidates who possess objective merit,[13] while political parties that nominate judges may be looking for faithful agents of a party platform. Research into judicial role theory demonstrates that justices in states with different institutional environments have differing notions of the acceptability of judicial activism (Carman 2012). It is plausible to think that levels of judicial independence would vary across states, not because of differences in reappointment uncertainty, but because differing principals appoint or elect justices with different conceptions of the judicial role. In other words, selection matters, reappointment does not.

Much of the existing literature on state supreme courts makes this assumption. For example, Bonneau and Hall classify (2009) Illinois, Pennsylvania as partisan elections states because that is how freshman justices are chosen. However, incumbents are reappointed the bench through retention elections, which are much friendlier to incumbent protection than a competitive, partisan election. The American Judicature Society (2013e) takes the assumption a step further. They classify Ohio and Michigan as

[1313] Supporters of judicial elections (Bonneau 2013b) are quick to cite Professor Brian Fitzpatrick's article (2009) suggesting that judicial commissions nominate candidates that are dramatically more liberal than their state's median voter. However, this study is based on data from two states (Tennessee and Missouri) during a timeframe in which a strong Democratic party coalition controlled state government. In addition, the study only attempts to infer the ideology of justices based on incomplete data of their campaign contributions and party primary participation, rather than analyzing their behavior on the bench.

states with partisan elections because they have party primaries, despite the fact that they appear on the November ballot without party identification. On the other hand, Savchak and Barghothi (2007) present evidence that state supreme court behavior is more of a product of reappointment method than initial selection method.

How should political scientists untangle this messy web of incentive structures? Are state supreme court justices more forward looking or products of their past? One methodological technique that can assist is using random slopes in multi-level models (Gelman and Hill 2007). Using reappointment methods as a second level allows the relationship between the explanatory variable and the dependent variable to differ across groups independently. Random slopes have potential to yield unbiased coefficients representing conceptualizations of judicial independence. This technique would also be useful in allowing the influence of partisanship to vary independently across different reappointment methods. Thus, random slopes allow for comparisons within a group of state about which variables are doing the most work: levels of partisanship that are the product of a selection system or levels of uncertainty associated with reappointment.

Considering Other Factors of State Politics

Even if there is a relationship between job security and decisional independence, it could exist along dimensions other than reappointment method. Perhaps the political culture in states without protections of judicial salaries is more anti-incumbent than in others. Judges in states with mandatory retirement ages might behave more independently than other judges because of the decreasing utility of their tenure. States with procedures for judicial recall elections might very well have lower levels of job

security for state supreme court justices. Job security could also plausibly be a function of the level of two-party competition in a state. States that have long-term stability in their political coalitions might be less inclined to remove judges as well as those states with more one-party dominance.

To test these alternate specifications of job security, I construct a model analyzing what factors in state-level politics influence the number of incumbent justices defeated who were seeking reappointment between 1980 and 1997. Table 2.4 describes the variables in greater detail.[14] Because the dependent variable is a count, negative binomial regression is appropriate. I assume a lack of statistical independence in this model, as multiple incumbents are often on the ballot in a state in the same year. As terms of office vary state-to-state, the number of judges is included as an exposure term. States with partisan elections serve as the baseline reappointment category.

The results of the regression, presented in Table 2.5, suggest that when reappointment methods are held constant the other features of state-level politics do not drive incumbent job security. The only variable outside of the several reappointment methods that approaches conventional levels of statistical significance is Judicial Recall ($p = 0.058$), though the coefficient is in the opposite direction than predicted. That is, states with judicial recall election procedures tend to defeat slightly fewer incumbent justices seeking reappointment than other states. Reappointment methods, on the other hand, are strongly associated with levels of incumbent defeat.[15] While there is no

[14] The variables for Party Competition Mean and Variance use Berry (1998) elite ideology scores rather than Ranney (1965) scores because the latter are not available for many state-years during the timeframe analyzed.

[15] Running the same model with those states included does not yield substantively different results.

statistically significant difference in the number of defeats between states with partisan elections (the baseline) and states with nonpartisan elections, justices in states with retention elections, and elite reconfirmation are much less likely to suffer defeats. The standard error for life tenure states is so high because there is no variation, as no justice was impeached during the timeframe analyzed.

Chapter Three: Party Polarization on State Supreme Courts

> In the early 1990s, large corporate interests began buying control of many of our state Supreme Courts and many of our lower courts…Our aim is to bring Democratic and progressive groups together to combat the corporate takeover of our state appellate courts.
>
> Democratic Judicial Campaign Committee (2013)

In the spring of 2011, the eyes of the media, interest groups, and operatives from both parties focused on Wisconsin, where newly elected Governor Scott Walker (R) attempted to eliminate collective bargaining rights for state employees. After a protracted battle with Democrats in the state legislature, Walker's proposal passed. Both sides prepared themselves for a battle in the courts over the measure's legality. At the same time, a justice of the Wisconsin Supreme Court, former Republican state legislator David Prosser, was facing reelection. The nonpartisan election between Justice Prosser and Assistant Attorney General JoAnne Kloppenburg was viewed as a referendum on Governor Walker and his agenda (Davey 2011).

After a hard-fought and expensive campaign ("Tainting Justice With Politics" 2011), Chief Justice Prosser narrowly won another term on the court. Conservative interest groups lined up behind Prosser's campaign because of his past partisan activity and his voting record on the court. Why did liberal groups flock to Kloppenburg? Her liberal credentials were much less clear: she had served as a Wisconsin assistant attorney general under an equal number of Republican and Democratic attorneys general, and she had no elected or judicial experience. Besides, the intention of nonpartisan elections is to remove the saliency of partisanship (Carbon and Berkson 1980) – Kloppenburg was responsible to the people directly, not a party.

Liberal groups assumed that Kloppenburg would cast more liberal votes than Prosser, despite the nonpartisan nature of the election. Since she lost, we cannot test that hypothesis for her case, but this subject deserves greater study. Do different reappointment methods for state supreme courts[16] structure the role of partisanship in judicial behavior differently? I develop and justify a conceptualization of judicial independence based on the salience of partisanship in shaping the decision of whether or not to join the majority opinion.

Justices chosen in partisan elections are responsible to a political party, in addition to the general electorate and, of course, the law. If these justices see themselves as agents serving a political party as a principal, they should feel a stronger motivation to structure their decisions along partisan lines. Justices in nonpartisan elections do not enjoy much better levels of job security and do not enjoy the free information that a partisan label provides to voters. By structuring their dissents on partisan or ideological grounds, these justices could send a signal to voters through the news media to communicate this same information.

The results of my model suggest that the relationship between the decision to dissent and the ideological distance between the majority opinion writer and the justice in question is strongly contingent on the institutional environment in which that justice operates. Specifically, ideological differences matter much more in states that have higher risk reappointment methods. The rate of dissent overall is also significantly higher

[16] Not all states call their court of last resort a supreme court and or use the title justice for the members of these courts. However, in this dissertation, the term state supreme court refers to all state high courts and justices to refer to their members.

on courts where seats are less secure. My model of dissensus will also test a comprehensive set of ideological, strategic, and institutional variables. The results suggest that justices on state supreme courts reflect their partisanship through their dissents only when they need to send signals to key reappointment actors. This chapter will attempt to address some problems in the literature on dissensus on state supreme courts.

Reappointment Uncertainty and Party Polarization

In a series of seminal studies, Paul Brace and Melinda Gann Hall (Brace and Hall 1990, 1993, 1997; Hall 1992, 1995) studied how differing institutional pressures affected state supreme court behavior. They found that electoral accountability led judges to conform their behavior to the expectations of their appointing principals. Justices suppressed dissents they otherwise would have joined or written, changed their votes when it was clear that their position would not prevail, and were especially likely to alter their behavior in the run up to an election. While significant, these studies suffered from several drawbacks. The analyses were conducted in only a small number of states, primarily in states with high reappointment uncertainty. In addition, pooled probit as a method for these data may be inappropriate because it cannot represent the multi-level nature of the data. Finally, these studies focus only on death penalty cases, which could lead to problems generalizing to less salient legal issues or states that do not have the death penalty.

Choi, Gulati, and Posner (2010, 296) demonstrated creativity in their measure of decisional independence at the state supreme court level. They argued, "Judges have the

duty to enforce the law impartially, without regard to the legally irrelevant characteristics of the litigants or the goals of political parties." They measure the extent to which a judge tends to write opinions in opposition to another judge from the same political party. They then test whether judges in different selection methods vary significantly along this dimension and found no significant difference in behavior across different selection methods.

This is a potentially useful measure of judicial independence, but it suffers from several theoretical and methodological flaws. The key independent variable might be reappointment methods, not selection methods because the literature indicates judges are forward-looking (Savchak and Barghothi 2007). The logic to this approach dictates that once on the bench, justices will be concerned about how to keep their jobs, not how they got there. Second, according to the authors' classification system, when a judge like Antonin Scalia dissents from a majority opinion written by David Souter, this is an example of judicial independence because the two justices are appointees of the same political party. Their classification system does not allow enough room for ideological variation within one political party, a problem the authors themselves acknowledge. Finally, the authors employ a problematic definition of an opposing opinion: writing a dissenting opinion when a majority opinion exists, but also writing a majority opinion when a dissent exists. While it is true that judges choose to write a dissent in order to

oppose a majority opinion, no judge chooses to write a majority opinion in order to oppose a dissent.[17]

If properly constructed, measuring the influence of ideology – as mediated by reappointment structures – could provide a useful lens to understand judicial independence on state supreme courts. Behaving in a partisan fashion is a powerful signal to elites and to the general public that provides information about a judge that could be very important in a reappointment decision. If, however, there is a low risk of losing one's job, a justice may feel significantly less pressure to reflect their partisanship in their judicial decisionmaking. Instead, judges can feel free to follow other considerations internal to the adjudication process.

> *Party Polarization Hypothesis*: The degree to which partisan differences structure judicial decisionmaking on a state supreme court depends on the degree of reappointment uncertainty those justices face.

Brent Boyea (2007) posited a directly contradictory hypothesis between judicial selection methods and judicial polarization. He analyses the ideological range of justices across different states and concludes that voters restrict the range of ideological acceptability of candidates, while elites can appoint more ideologically polarized judges. There are several problems with his approach. First, not all forms of election or appointment have the same principals and the same incentives. Second, when he proceeds to consider levels of consensus on state supreme courts, the author examines

[17] While some opinions are initially written as dissents and later, by virtue of fluxuations in the voting blocs, become majority opinions, this assumption is too strong to a useful modeling strategy.

death penalty cases, an unrepresentative legal issue because it is not universal across the states, either in statute or in application.

Another potential criticism of conceptualizing judicial independence through the lens of judicial polarization would note that judicial independence is supposed to measure the influence of inappropriate outside influences. They would argue that decisionmaking based on partisanship or judicial ideology is neither inappropriate nor an outside influence. My continuous measurement of judicial independence addresses the first concern. It would be unreasonable to label any influence of judicial ideology as inappropriate, but one can compare the relative levels of partisanship across different reappointment methods. Endogeneity poses a larger potential problem to my conceptualization.

Because different actors select justices across the states, these actors may have different goals in mind when making their selection. Judicial nominating commissions may seek candidates who possess objective merit, while political parties that nominate judges may be looking for faithful agents of a party platform. If these justices in partisan election states end up voting along partisan lines, they are simply behaving according to the predictions of the agents who put them there. This kind of behavior is due to selection effects, not a lack of judicial independence. Judicial independence, in part, relies on a notion of sincerity. Judges who change their mind about a case as a result of a bribe are behaving insincerely and non-independently. However, judges who view law through an ideological lens may still be acting independently.

To counter this potential problem, I will pay special attention to three states: Illinois, New Mexico, and Pennsylvania. Justices in these states win their initial appointment in a partisan election, but at the end of each term thereafter, they are subject to a retention election. If partisanship is endogenous to judicial decisionmaking, we should expect justices in these systems to behave in ways similar to states that always use partisan judicial elections. If, however, partisanship is exogenous, one should expect these justices to behave like justices in states that always use retention elections. In other words, if selection effects dominate, the influence of partisanship should not fade over time despite the fact that justices in these three states no longer are directly responsible to a political party.

A General Theory of Dissensus on State Supreme Courts

Collegiality is a distinctive feature of all appellate courts, taking the form of both consensual and nonconsensual behavior among members. While the very early history of the U.S. Supreme Court featured a struggle to achieve consensus among the justices, the feature of the Supreme Court most drastically altered by the constitutional revisions occurring after 1937 (and the one most in need of explanation) was this institutional norm of consensus. More recently, scholars have begun to pay renewed attention to the institutional context of the U.S. Supreme Court – its group dynamics, but also the rules, norms, practices, and other interactions among the justices that structure those group dynamics. Their work reflects a broad concern for mapping the justices' strategic decisions to write their preferences into the law so far as possible within the context of Court norms, rules, and practices. Maltzman and Walhbeck (1996, 583) summed up the

strategic approach to the study of collegiality, stating "the strategic model portrays justices as responding to the positions articulated by other justices." Justices behave strategically to achieve the goal of exerting influence through opinion writing on the present Court, as well as future ones.

Institutional Hypotheses

In addition to providing a window into understanding judicial independence, reappointment methods of state supreme courts are important institutions that could structure the overall level of dissensus. One would expect that states with partisan judicial elections would feature the highest level of dissensus, as partisanship is more salient in the selection of these justices compared to the other systems. The competitive nature, and high uncertainty, of nonpartisan elections would likely increase the willingness to dissent, but for other reasons. Dissents are powerful signals to the media (Blake and Hacker 2010), which nonpartisan justices can utilize to reassure the public of their ideological *bona fides*. The lack of partisan identification on the general election ballot leaves voters without the most basic tool for assessing the ideological compatibility of judicial candidates.

The principle of collegiality manifests itself in judicial behavior in several important ways. First, perceptions of institutional roles could influence the decision to dissent. Several studies have presented evidence that chief justices dissent less frequently than associate justices (Blake and Hacker 2010; Collins 2008; Wahlbeck, Spriggs, and Maltzman 1999), given their special institutional role as *primus inter pares*. Likewise, the existence of a freshman effect was first postulated by Howard (1968), who argued

that new justices undergo a period of adjusting to life on the Court, which may influence them to avoid conflict with their fellow justices. This chapter will test whether these findings apply on state supreme courts. As justices become more adjusted to working with each other, justices will become more accustomed to following norms of consensus and gain more experience with finding optimal strategies in bargaining and accommodation to achieve that end.

The institutional environment of any court also structures workload pressures in a variety of ways. Spriggs, Maltzman, and Wahlbeck (1999) examine the effect of workload on the number of revisions a majority opinion writer is willing to circulate. While finding that majority opinion writers behave strategically to accommodate other justices in the majority coalition, increased workload diminishes the number of opinion drafts a majority opinion writer will circulate. Likewise, Sheldon (1999) found that as the number of cases on the docket of the Washington State Supreme Court declined, justices authored more dissenting opinions. With fewer majority opinion assignments resulting from a smaller caseload, justices have more time to research and prepare dissenting opinions. Conversely, a large caseload, which often results from mandatory right of appeal, would place significant time constraints on each justice, preventing them from fixating on their dissenting opinions. A smaller docket also may contain a higher percentage of highly salient cases and more disagreement, which would be consistent with the findings of Blake and Hacker (2010).

Prior research (O'Brien 1999) suggests the amount of time that a justice can devote to dissenting opinions is positively related to the number of law clerks at her

disposal. Research on the federal courts of appeal (Hettinger, Lindquist, and Martinek 2007) has revealed that cases heard *en banc* produce more dissents than cases heard on panels. The size of state supreme courts varies from five to nine justices, and smaller courts conduct a very high percentage of their work in panels. Even so, roughly half the votes cast from courts with nine justices are in panels, not *en banc*.

Legal Hypotheses

When deciding whether to dissent, it is likely that some legal issues provide a greater motivation than others, depending on the salience of the issue. The salient case may evoke a response from a justice motivated by preferences for particular policy outcomes. However, scholars have also viewed salience as a strategic factor that influences willingness to bargain (Spriggs, Maltzman, and Wahlbeck 1999). The theoretical justification for exploring the influence of salience on justices' behavior relates to the justice's level of concern about a policy outcome. A salient case triggers the desire to influence a majority opinion (Knight and Epstein 1997) or to establish a jurisprudential alternative that a future Court might adopt (Blake and Hacker 2010).

Wahlbeck, Spriggs, and Maltzman (1999) found that Supreme Court justices are more likely to write separately in cases of high political and legal salience. Collins (2008) came to a similar conclusion using public and justice-specific measures of salience. Similar to these authors, I predict higher levels of dissent in cases where *amicus curiae* briefs have been filed and cases involving constitutional review. In addition cases that include multiple legal issue offer justices more points upon which to disagree, which

increases the likelihood of dissensus (Corley, Steigerwalt, and Ward 2013). In addition the government's involvement in a tort case has been an indication of salience in other studies of state supreme court behavior (Cann 2007).

Strategic Hypotheses

Langer's model of judicial review on state supreme courts (Langer 2002, 2003) includes a novel conceptualization of policy preference divergence between judges. In addition to measuring the ideological distance between the justice in question and the majority opinion writer, Langer also includes the ideological distance between the justice in question and the chief justice. Not every state provides the chief justice with the privilege of assigning opinions (Hall 1989), but in the states that do, associate justices have an incentive not to antagonize the chief justice so that in future cases, they will continue to get better opinion assignments. I hypothesize that in states with these opinion assignment rules, associate justices will be likely to suppress dissents when the chief justice is the majority opinion writer.

Measuring Judicial Independence and the Causes of Dissensus

Data and Variables

Most of the data for this analysis will come from tort cases in the State Supreme Court Data Project (SSCDP) (Brace and Hall 2001). The analyses will exclude cases with *per curiam* opinions and all data points representing the majority opinion writer in a given case. The unit of analysis is the justice-vote, but it excludes the votes of *ad hoc* justices – retired judges, or judges of lower courts who temporarily fill in on state

supreme courts. The dependent variable is whether the justice in question dissents,[18] which means the model excludes instances in which the justice in question is the majority opinion author. A justice who writes or joins a dissenting opinion is coded as a 1; all other voting activity is coded as 0.[19] The independent variable of interest is the ideological distance between the justice in question and the majority opinion writer. The standard measure of judicial ideology for state supreme court justices is Party Adjusted Judge Ideology (PAJID), as outlined by Brace, Langer, and Hall (2000), using, in part, the elite ideology scores of Berry et al. (1998). Other studies of dissent on the U.S. Supreme Court (e.g., Maltzman, Spriggs, and Wahlbeck 2000) and federal courts of appeal (e.g., Hettinger, Lindquist, and Martinek 2007) employ ideological distance between the majority opinion writer and the justice in question as a rubric for measuring the incentive to dissent.

The control variables come either from within the SSCDP or the State Politics and Judiciary Dataset (Lindquist 2010). More detailed descriptions of all the variables are provided in Table 3.1, although one note is in order. The standard measure for state supreme court workload is the presence of an intermediate appellate court (Brace and Hall 1990, 1997; Choi, Gulati, and Posner 2010). The underlying assumption is that

[18] One could conceive of an ordinal arrangement of judicial consensus, with 0 corresponding to joining the majority opinion, 1 corresponding to writing or joining a concurring opinion, 2 corresponding to writing or joining an opinion that concurs in part and dissents in part, and 3 corresponding to writing or joining a dissenting opinion. I ran a ordered logit model with robust standard errors clustered for each justice. This model yielded similar findings on the key variables as the multi-level model I employ.

[19] Judicial politics scholars often measure dissensus as writing separately versus joining the majority opinion (*e.g.*, Wahlbeck, Spriggs, and Maltzman 1999). The problem with this approach is that it treats regular and special concurrences equivalently. Often times, regular concurrences do not express any degree of disagreement with the logic of the majority opinion, making this a flawed measure of dissensus. Unlike the Spaeth dataset of the U.S. Supreme Court, the SSCDP does not differentiate between regular and special concurring opinions.

these courts fulfill the need for a mandatory right of appeal, leaving the state high court free to choose its own docket with discretion. While this assumption is true of the design of the federal judicial system, it is not true at the state court level. Seventeen states which utilize intermediate appellate courts still maintain mandatory jurisdiction. Thus, this analysis uses the jurisdictional data from the State Politics and Judiciary Dataset to operationalize workload pressures.

Methodology

The dichotomous nature of the dependent variable lends itself to a probit (or logit) regression analysis, but the assumption of independence of errors does not hold because this is essentially a panel dataset. If the role of ideology is hypothesized to be dependent on institutional context, this suggests a model using an interaction term. Traditional interactions with categorical variables are reliant on a baseline category upon which the other coefficients are built. Drawing inferences from this approach becomes difficult when the sample is non-random in nature. Gelman and Hill (2007) suggest a multi-level approach to model interactions between independent variables of interests and categorical variables identifying important groups within a sample. The data will be analyzed using a multi-level logistic model, generating a random slope for the ideological distance variable within each reappointment method.[20]

Analyzing the Role of the Political Environment on State Supreme Court Decisionmaking

[20] However, like traditional interactions, it is important to interpret results from visualizations of the mode, not simply from a regression table (Brambor, Clark, and Golder 2006).

The results of the multilevel analysis, presented in Table 3.2, demonstrate the degree to which institutional design shapes state supreme court behavior. The fixed effects[21] for the Ideological Distance variable, while positive in sign, are not statistically significant, which indicates that any effect that the ideological distance might have over the decision to dissent depends upon the particular reappointment method in which a justice is operating. The random effects of ideological distance are presented visually by reappointment method in Figure 3.1. The predicted probabilities and confidence intervals are plotted over the actual range of ideological distances for each reappointment method.

Ideology structures the decision to dissent when reappointment uncertainty is high. In states with partisan and nonpartisan elections, differences in party affiliation and ideology between the justice in question and the majority opinion writer tend to increase the likelihood of writing or joining a dissent.[22] However, when states employ constitutional designs that limit reappointment uncertainty promote less partisan judicial behavior, this influence of partisanship disappears. The slopes for elite reconfirmation and life tenure states are flat, and the slope in retention election states is slightly negative.

Figure 3.1 also sheds light on the differing levels of dissensus overall between the reappointment methods. Justices in nonpartisan elections states dissent at the highest rate, while justices in states with life tenure are the least likely to disagree. The former finding is puzzling in light of the development of this institution as a means to free state supreme courts from the influence of strong party organizations (Tarr 2012). Despite its

[21] The term "main effects" is often used instead of "fixed effects" (Gelman and Hill 2007).
[22] While the slopes for partisan and nonpartisan election states do not appear to be very pronounced, the confidence intervals do not overalap.

origins, nonpartisan elections present considerable risk to judicial incumbents today, so this finding is consistent with the reappointment uncertainty theory.

The higher level of partisan disagreement (and overall dissensus) among justices in nonpartisan states may be a way to signal the media, party organizations, and the public at large as to what the justice's true legal preferences really are. Bonneau and Hall (2009) present a great deal of evidence that demonstrates that the partisan label on the ballot provides voters valuable information for their vote choice. Justices in nonpartisan election states must face electoral opponents (unlike justices in retention election states) but without this key heuristic, though Bonneau and Cann (2012) have found that voters can infer ideology in nonpartisan elections from campaign advertisements.

States with lower-levels of reappointment uncertainty exhibit much higher degrees of consensual behavior, and what disagreement there may be is not structured by differences in ideology or partisanship. This finding runs directly contrary to the predominant theory in judicial politics at the U.S. Supreme Court – the attitudinal model (Segal and Spaeth 2002). While a full analysis of the behavioral differences between life-tenured state courts and the U.S. Supreme Court is beyond the scope of this analysis, several possible hypotheses comes to mind. First, as Madison discussed in *Federalist 10* (Madison 2010), one of the primary advantages offered by an expansive republic is cross-cutting cleavages. Thus, the U.S. Senate is probably more polarized and heterogeneous than most principals who select or reappoint state judges. Many state political cultures are much more homogenous and historically stable than the nation as a whole (Elazar 1970).

Second, there is a difference in salience among state-level principals versus federal-level principals. Presidents spent huge amounts of resources to research potential Supreme Court nominees (Nemacheck 2008), probably more resources than any governor who has appointing authority. In the most common system of state judicial appointments, merit selection, ideological orthodoxy is not considered. Given the low amounts of media coverage and voter knowledge of judicial candidates, the people are certainly less invested in choosing "the right kind of judge" compared to federal-level principals. Finally, while state supreme courts do decide high salience cases, such as gay marriage (e.g., *Baehr v. Miike* 1993, *Baker v. Vermont* 1999, *Goodridge v. Department of Public Health* 2003, *In re Marriage Cases* 2008, *Varnum v. Brien* 2009) and school finance (e.g., *Edgewood Independent School District v. Kirby* 1989, *Rose v. Council for Better Education* 1989), on many cases, the highest court in a state is not the highest court in the land. Cases that raise federal questions can be appealed to the U.S. Supreme Court, which may give state supreme court justices institutional incentives to behave more consensually.

The remaining institutional variables performed as expected. Workload pressures resulting from a mandatory right of appeal to a state supreme court lead to fewer dissents. Justices with more resources (law clerks) are significantly more likely to issue dissenting opinions, which is consistent with findings of O'Brien (1999). Courts with larger memberships produce more dissents than smaller ones, and justices working on a panel are more consensual than justices sitting *en banc*. This latter finding is similar to the federal appellate court literature (Hettinger, Lindquist, and Martinek 2007). Chief

justices are less likely than associate justices to issue dissenting opinions, which provides further evidence of their unique judicial role (Wahlbeck, Spriggs, and Maltzman 1999). Freshmen are less likely to dissent, though this finding falls short of conventional levels of statistical significance.

The one potentially puzzling institutional finding is that courts with more experienced justices are more dissensual than courts with lower tenure levels. The prediction is that, over time, justices become more expert at bargaining and accommodation with their colleagues, which lowers the need for dissenting opinions. This finding in the opposite direction as expected is also puzzling in light of the fact that justices in life tenure states exhibit more consensus than justices in any other reappointment method. Further investigation into ideological polarization among different election cohorts over time may be warranted.

The legal and strategic variables performed less well. The presence of *amicus curiae* briefs leads to more dissents than cases that are less legally salient. The coefficient of the legal complexity variable was negative, as predicted, but it did not come close to achieving statistical significance. The coefficient for constitutional review cases is in the opposite direction as predicted, although this finding is not statistically significant. There is also no statistically significant relationship between the likelihood of dissent in cases where the chief justice is the majority opinion writer.

The deeper theoretical question, however, remains: does evidence of partisan behavior suggest evidence of non-independence? If one assumes that all judges should see the law in the same manner then this positive interaction indicates non-independence.

Legal realists (Cardozo 1922; Frank 1973) and supporters of the attitudinal model (Segal and Spaeth 2002) would dispute the accuracy of this assumption. Judicial independence is threatened when illegitimate outside signals influence judicial decisions. If, however, partisanship (or judicial ideology) is endogenous to judicial preferences, its influence cannot be evidence of non-independence. It is clear from the results that partisanship is not endogenous to all types of state supreme courts, but one could make the case that the partisan nature of judicial recruitment might produce very different justices in these high-risk states than others.

On the other hand, the results in Table 3.3 suggest that neither partisanship nor judicial ideology are endogenous to judicial decisionmaking. The only difference between Table 3.2 and 3.3 is that the latter includes an additional random slope for an additional reappointment method – hybrid states. Recall from earlier that Illinois, New Mexico, and Pennsylvania appoint new justices to their state supreme court via a partisan election, but when these justices go up for reapproval, they do so in a non-competitive retention election. If partisanship or ideology were endogenous, the justices in these three hybrid states should behave in ways similar to justices in partisan election states. On the contrary, Figure 3.2 reveals that justices in hybrid states behave more closely to justices in retention election states – that is, ideological distance and partisan differences do not significantly increase the likelihood of dissenting.

There is a second endogeneity problem that this conceptualization of judicial independence may encounter. Thus far, I have assumed judges only follow the path of partisanship when they need to gain an advantage through it, which should be in cases

when the risk of losing their job is higher. However, this approach may only explain the behavior of judges from the majority party in a state. Revealing one's true liberal credentials in Texas, for example, is not strategic, and thus liberal justices in that state may behave in a less partisan but less independent fashion (Hall 1992). On the other hand, Helmke and Staton (2011) argued that life tenure may undermine judicial independence because the high utility associated with holding such an appointment. With high utility comes more caution in using the power associated with judgeship. If judges with short, fixed terms value the job less, they will be less afraid to challenge authority because a temporary job has less utility.

Table 3.4 presents a test of these rival hypotheses in a multilevel logit model. The regression only includes states with partisan or nonpartisan elections, and it is further limited to justices in those states whose ideology is out of sync with the people of their state. In order to make that determination, I classified justices with a higher than midpoint PAJID score (Brace, Langer, and Hall 2000) as liberal and states with a higher than average?? value on the Erikson, Wright, and McIver state ideology score (1993) as liberal. The regression interacts the ideological distance between the outlier justice and majority opinion writer and the absolute value of the state ideology score, which represents the degree of ideological polarization in the state. The results in Table 3.4 suggest that the Helmke and Staton approach may be a bit more persuasive. When a justice is a large outlier in her state and there is a large distance between herself and the majority opinion writer, the justice is more likely to dissent, although these results are not statistically significant. I reran this model with an eye on salience. The results in Table

3.4 are essentially the same as those that only include tort cases or cases in which the majority is overturning a criminal's sentence.

Implications for State Constitutional Design

Throughout American history, designers of state constitutions have attempted to find an optimal combination of judicial independence and accountability through different reappointment methods. These data indicate that these constitutional structures have real behavioral consequences. Partisanship is only a salient feature of judicial decisionmaking when the strategic and institutional context dictates that it be so. When reappointment uncertainty is lower, state supreme court justices base their decisions on other strategic and legal considerations. In this regard, these results are consistent with other studies of dissent on state supreme courts (Brace and Hall 1990, 1993, 1997; Hall 1992, 1995), but they also provide a much more comprehensive picture of state supreme court behavior.

At the same time, these results differ significantly from Brace and Hall's past work on state supreme courts. Justices in high-risk reappointment methods (partisan and nonpartisan elections) who are ideological outliers in comparison to their state do not suppress dissenting votes when the majority opinion is being written by a majority party justice. As a result, one can more confidently conclude that where cross-party agreement exists, it is a result of rule-of-law considerations, rather than a sort of "false consensus" motivated by strategic, electoral considerations. In a related vein, the partisan difference (or ideological distance) approach employed here assumes that partisanship offers a judge a different path than the one that would otherwise be required by the rule of law.

Dissents can be motivated by both partisanship and what the law actually requires if the two overlap. Unfortunately, measuring this accurately would be extremely difficult.

Now we can better understand the high stakes of the campaign between Justice David Prosser and JoAnne Kloppenburg. Liberals in Wisconsin did not have a firm guarantee that JoAnne Kloppenburg would oppose Governor Walker's anti-union legislation if she were elected because she was not directly responsible to the Democratic Party. However, under its current system of nonpartisan elections, the results of this model suggest that partisanship is likely to be a significant cleavage on the Wisconsin Supreme Court.

Chapter Four: State Supreme Court Justices "Following the Election Returns"

> No matter whether the country follows the flag or not, the Supreme Court follows the election returns. – Mr. Dooley
>
> Finley Peter Dunne (1963)

While legal theorists have spent decades wrestling with the countermajoritarian difficulty (Bickel 1962), state supreme courts may face the opposite problem – a majoritarian difficulty that could undermine the rule of law. Justice Sandra Day O'Connor has taken an even stronger stand against judicial elections. O'Connor has written op-eds and lent her name to campaigns to reform state courts to increase judicial independence. Interestingly, O'Connor is one of only two[23] Supreme Court justices born in the 20th century who had experience as a state judge. President Reagan elevated her to the U.S. Supreme Court while she was serving an interim appointment on the Arizona Court of Appeals. Prior to that post, Justice O'Connor had run for a Superior Court judgeship in Maricopa County, needing to win a partisan primary along the way.

According to O'Connor biographer Joan Biskupic, O'Connor prevailed despite being outspent by her opponent, who had been appointed by the governor to temporarily fill the newly-created seat. Much like modern campaigns for judge, Justice O'Connor's campaign literature stressed being tough on crime: "As a lawyer and as a legislator I am deeply concerned about the need to strengthen the enforcement of the laws that govern our conduct. As a citizen, a wife and a mother, I want to help replace fear in our streets with strength in our courtrooms" (Biskupic 2006, 65).

[23] The other is Justice William Brennan, who served on the Supreme Court of New Jersey after having served two years on a Superior Court in that state.

This chapter explores the influence of different reappointment methods on levels of responsiveness to changes in the political environment. Do judges issue more liberal opinions as their state governing coalition becomes more liberal? Does that level of responsiveness vary across reappointment methods by levels of uncertainty?

Reappointment Uncertainty and the Political Environment

Scholars have found some evidence that state supreme court justices respond to electoral pressures. Hall (1995) and Brace and Hall (1997) find that in states with strong public support for the death penalty, justices are more likely to uphold death sentences, especially when an election is looming. One major drawback of these studies is that they do not have precise figures for public ideology at the state level. More recent research has attempted to solve this problem. Brace and Boyea (2008) found that elected justices are more sensitive to public opinion on the death penalty than appointed justices, but they assume all methods of judicial elections are created equal as well as all methods of elite appointment are created equal. Life tenured judges, for example, might behave differently than justices who must seek gubernatorial/legislative reapproval.

Similarly, the behavioral incentives for justices might differ depending on whether their reappointment comes with a partisan label or whether the justice faces an opponent or not. Canes-Wrone, Clark and Park (2012) take this into account in their study of state supreme courts and abortion cases. The authors found that justices in retention elections and nonpartisan elections states are sensitive to public opinion, while justices in partisan elections states behaved independently of public opinion, a

counterintuitive finding that the authors did not satisfactorily explain, either theoretically or *post hoc*. This finding counters their theory that greater levels of information constrain judicial behavior, as well as the findings of (Caldarone, Canes-Wrone, and Clark 2009). Why would party agents in charge of renomination of judges permit such behavior? The study also does not examine judicial behavior in states that do not have judicial elections. If justices in these states are also responsive to public opinion, it changes the conclusions one can make concerning relative levels of decisional independence.

Shepherd (2009) utilized a creative measure of judicial independence for state supreme court behavior. The author looked at state supreme court votes after an election in which the governorship of the state in question flipped from one party to the other between 1996 and 1997 and found that judicial behavior changes toward the preferences of the new party in power. Before jumping to conclusions that this demonstrates a lack of judicial independence, Shepherd only tested three states (which all featured partisan judicial elections). Even more problematically, it is not at all clear what methods the author used to compare pre-election behavior to post-election behavior. If tested more rigorously, this measure could be a useful indication of decisional independence.

Governing Coalition Capture Hypothesis

The rule of law presumes that earlier cases decided by courts restrain the choices available to future courts. If a court changes its outlook on the law overnight because of a critical election, it would undermine decisional independence by ignoring the rule of law. If a change in the political environment does not result in a change in the ideological outlook of a justice, that would be an example of decisional independence. If

a change in the political environment leads to an ideological change on a state supreme court in the opposite direction, that would be an example of countermajoritarian behavior (Bickel 1962).

When the political environment in a state changes, state high court justices have an incentive to be sensitive to these cues, regardless of whether they are directly responsible to the public or elite actors. The governing coalition is directly responsible for reappointing unelected judges, but it plays an important role in states with judicial elections as well. Political elites have more resources to monitor judicial behavior than the average citizen, and if they find that behavior objectionable, they can inform the public about it through the media (Zaller 1992).

> *Governing Coalition Capture Hypothesis*: State supreme court justices change the ideological direction of their judicial decisions to follow changes in the ideological direction of the political environment in their state only to the degree to which they face reappointment uncertainty.

Data and Methods

Most of the data for this chapter's analysis will come from the State Supreme Court Data Project (SSCDP) (Brace and Hall 2001), although the analysis excludes six states[24] that elect their state supreme court justices in judicial districts because it is very difficult to gather data at the sub-state level. I will test the reappointment uncertainty hypothesis the same set of torts cases used in Chapter 3. The unit of analysis is the justice-vote. The model also excludes the votes of *ad hoc* justices – retired judges, or judges of lower courts who temporarily fill in on state supreme courts. The dependent

[24] These states are Illinois, Kentucky, Louisiana, Maryland, Mississippi, and Nebraska.

variable is whether the justice in question casts a liberal vote, which is one in favor of the original plaintiff.[25]

The key independent variable is the change in the governing coalition, calculated using the annual difference in Berry elite ideology scores (Berry et al. 1998). The original Berry scores relied on unadjusted interest-group ratings from a state's members of Congress to infer information about the ideological position of each state legislature and governor. More recently, Berry et al. (2010) suggested that substituting NOMINATE scores (Poole and Rosenthal 1985) provided a marginal improvement in convergent validity over their previous estimation method. However, for the mid-1990s, the timeframe for the analysis in this dissertation, the NOMINATE approach dramatically reduces the amount of variation in state ideology from year to year. As the authors acknowledge, NOMINATE scores are fixed, whereas the interest-group scores can vary for the same members of Congress. Thus, in 47 of the 50 states there is at least one year in which the NOMINATE-based scores are identical to the year before.

Shor and McCarty (2011) offer a more direct approach to measuring state legislative ideology by analyzing state roll call records. Unfortunately, the amount of missing data in the Shor and McCarty dataset renders it unhelpful for this project. Berry et al. (2013) find that their measure performs basically as well as those of Shor and McCarty. Thus, faced with several imperfect choices, this dissertation will employ the original Berry elite ideology scores (1998). As Berry et al. (2010, 125) conclude,

[25] I use an justice-vote unit of analysis rather than a justice-level approach because it allows for the inclusion of case-level controls and additional points of analysis. The percentage of liberal versus conservative vote across all reappointment methods are very similar to each other and to an even 50-50 split.

"[U]sers of the extant measure probably have not been led astray in their substantive conclusions."

The annual difference includes a one-year lag. When a justice is deciding a case in 1995, she will be reacting to the change in the political environment that occurred between 1993 and 1994. The goal of this variable is *not* to measure public opinion in all 50 states on a given issue. Rather, the goal *is* to approximate how state supreme court justices make their own approximations. Many states do not have newspapers or universities that do state-level polling regularly, but all justices will have a rough sense as to the mean ideology of the citizens of their state.

For almost every justice, the SSCDP includes PAJID scores, which is the standard measure of the state supreme court ideology (Brace, Hall, and Langer 2001), which range from conservative to liberal. The model also includes case-level controls: state involvement and constitutional cases. Prior studies (Bonneau and Cann 2009; Cann 2007) have demonstrated that state involvement in tort cases produces more liberal votes. Some state torts cases[26] have state and federal equal protection or due process implications (Wriggins 2010), and these cases may be more likely to be resolved in favor of the original plaintiff than other cases. Table 4.1 contains a description of all the variables.

As in Chapter Three, the dependent variable is dichotomous, which lends itself to a logit or probit model, and a multi-level logistic regression model can best measure the

[26] By this, I do not mean cases arising under alleged violations 42 U.S.C. § 1983, which allows citizens to sue the federal government for violations of federal constitutional rights.

effect of the key independent variable across different group variables. Like the previous chapter, a random slope is used for each reappointment method.

Analyzing the Nexus between Reappointment Uncertainty and Polarization

A positive slope indicates non-independent behavior because it demonstrates significant influence of changes in the governing coalition on judicial decisions. A coefficient that is not significantly different from zero indicates that outside influences do not affect a justice's vote. This would meet the proposed definition of decisional judicial independence. A negative coefficient indicates countermajoritarian behavior (Bickel 1962). This type of finding means that as the state environment becomes more liberal, the justices become more conservative. Recall from Chapter 1 that partisan elections have the highest level of reappointment uncertainty, followed by nonpartisan elections, retention elections, elite reconfirmation, and life tenure at the lowest. Thus for each set of interaction terms, one would expect to find larger effects in states with partisan elections followed by smaller effects in states with nonpartisan elections, retention elections, and life tenure if the reappointment uncertainty hypothesis is correct.

The results, presented in Table 4.2, indicate general support for my hypothesis. Model 2 is identical to Model 1 except that it includes an additional random slope for the three hybrid states – Illinois, New Mexico, and Pennsylvania – which use partisan elections for open seats but retention elections for incumbent justices. The fixed effects and random effects in both models are basically the same. There are statistically significant fixed and random effects for changes in the political environment, meaning

that as a state becomes more liberal the likelihood of a liberal vote increases across the board, but that there are significant variations across the reappointment methods.

Those random effects are presented visually in Figures 4.1, which corresponds with Model 1, and 4.2, which includes the hybrid states in Model 2. Like in Chapter 3, the reappointment method that demonstrates the lowest level of decisional independence is nonpartisan elections, as that group has the strongest positive slope. Justices in partisan elections states have the highest level of reappointment uncertainty, and the slope for that group is not quite as strongly positive as the one for nonpartisan elections. These findings supplement those of Shepherd (2009), who only measured the effects of environmental changes in three states with partisan elections.

The main differences in the results between Figures 4.1 and 4.2 occurs in retention elections and elite reappointment states. When hybrid states are added in Figure 4.2 the remaining retention election states appear more responsive to changes in the political environment, a finding that runs contrary to the reappointment uncertainty theory. It is justices in the three hybrid states who are initially chosen by partisan actors rather than nonpartisan judicial commissions. While Figure 4.1 indicates that justices in elite reappointment states appear to move in the opposite direction as their states, in Figure 4.2 the slope for these justices flattens out, which indicates judicial independence.

In both figures, justices who have life tenure became more liberal as their states became more conservative, and vice versa. These results suggests the presence of countermajoritarian behavior (Bickel 1962). When justices with life tenure issue decisions that run contrary to current electoral trends in their state, they can weather any

ensuing controversy because they do not need to seek reappointment. The only way for these justices to be held accountable is through impeachment, and issuing unpopular opinions is not considered legitimate grounds to remove judges from office.[27] When thinking of an explanation of countermajoritarian behavior, one must keep in mind that judicial decisions are product of a form of supply and demand. Even if a set of justices do not change their view of the law, countermajoritarian behavior will occur if litigants bring a distinctly new set of cases before a court. For example, if litigants bring cases that challenge legal precedents that had previously have been thought of as settled, the justices behavior will appear to have become more liberal. However, the real change is in new baseline supply of radically conservative cases.[28]

The control variables in Models 1 and 2 behave largely as predicted. Judicial ideology is a strong predictor of votes. The sign of the coefficient for constitutional cases is in the predicted direction (positive), but it fails to achieve statistical significance. However, state involvement in a tort case is produces significantly fewer liberal votes than cases in which the state is not involved. This finding runs contrary to the hypothesis.

These data suggest that scholars should reject the framework offered by Brace and Boyea (2008), who broke their analysis along the lines of elected versus appointed justices. This typology is not accurate enough because it combines different methods of reappointment with very different risks. My findings also differ from those of Canes-

[27] Recent data in the states indicate that state legislatures are abiding by this convention (Bratton, Spill, and Sill 2012).
[28] The reverse could happen just as easily: justices could appear to become more conservative as radically more liberal cases overtake the docket.

Wrone, Clark, and Park (2012), who presented evidence that judges in partisan election states behave independently of public opinion and judges in retention election states adhere to public opinion in abortion cases. These differences could be a result of the differences in issue areas and timeframes measured in each study, the lack of data on unelected state supreme court justices, or perhaps because these authors utilized random intercepts, not random slopes in their methodological approach.

Implications for State Constitutional Design

This research also sheds light on the nature of representative institutions. The U.S. Supreme Court has ruled that the Voting Rights Act applies to judicial elections (*Chisom v. Roemer* 1991), meaning that thinking of elected judges as representatives of the people has some merit. Congressional scholars will be quick to argue that members of Congress tend to vote in ways consistent with the views of their constituents (*e.g.*, Bartels 1991). In their classic work, Miller and Stokes (1963) studied the voting behavior of House of Representatives members. They found a strong influence based on the policy preferences within their districts, although conditions of influence presupposing effective communication between congressmen and their districts are less convergent. On the other hand, justices on the U.S. Supreme Court exhibit signs of responsiveness to changes in public and elite opinion, even though the public knows very little about the Court or its work.

In the context of judicial elections, the amount of political information communicated to voters is a key consideration. Judicial elections often do not attract

much attention from the media (Schaffner and Diascro 2009), although levels of campaign spending in judicial elections has increased drastically in recent years (Bonneau 2009). One could infer that despite low levels of information, the mere threat of electoral defeat built into certain reappointment methods can produce judicial behavior that is consonant with public or elite preferences (Jacobson 1987). When elites are in charge of reappointing justices, we might expect this information imbalance to be overcome, yet justices in these states enjoy low levels of reappointment uncertainty. In many instances analyzed here, justices in these states take advantage of this discretion and behave independently of public opinion and changes in the political environment.

The question remains whether (or how much) judicial responsiveness to changes in governing coalition is normatively desirable. Alexander Bickel (1962) ultimately accepts the countermajoritarian difficulty as the surest way to protect minority rights from capricious majorities. However, using the security of institutional judicial independence as a means to force a skeptical public to accept a vision of the law that they do not accept has not been a particularly effective strategy throughout American history (Rosenberg 1993). In fact, Bickel does not consider the long-run implications of an aggressively countermajoritarian court. If any court continually overplays its hand, it will lose the political capital to protect minority rights in the future.

Non-responsiveness to changes in the governing coalition or public opinion poses a threat to democracy by making the judiciary out of touch. On the other hand, too much responsiveness renders the potential for the protection of minority rights almost impossible. Finding that balance is, in part, a matter of personal taste, and a key concern

for state policymakers. As states continue to debate potential changes to their judicial selection and reappointment methods in the future, hopefully this dissertation will help inform those decisions.

Chapter Five: Does Money Buy Justice?

> [U]nder a realistic appraisal of psychological tendencies and human weakness…the probability of actual bias rises to an unconstitutional level.
>
> Justice Anthony Kennedy (*Caperton v. A.T. Massey Coal* 2009, 2263)

When Hugh Caperton sued Massey Coal in 1998, a state trial court in West Virginia found for Caperton and ordered $50 million in damages. The Supreme Court of Appeals[29] reversed the decision and dismissed the case. Prior to the high court ruling, Caperton asked Justice Brent Benjamin to recuse himself, as he had accepted $3 million in campaign contributions from Don Blankenship, the C.E.O. of Massey Coal. Justice Benjamin, a Republican, had narrowly upset a Democratic incumbent in 2004 in what was then the second most expensive judicial race in American history. On appeal, the U.S. Supreme Court ruled that elected judges have a due process obligation to recuse themselves when large campaign contributions pose a "risk of actual bias" (*Caperton v. A.T. Massey Coal* 2009). Justice Benjamin defended himself by stating that in prior cases, as a lower court judge, he had ruled against Massey Coal ("Judicial Independence: Only in America" 2009).

Campaign finance in judicial elections raises two important, yet contradictory, normative concerns. If Justice Benjamin was inclined to vote against Massey Coal, but the $3 million contribution changed his mind, then one could argue that justice is for sale. If, however, Justice Benjamin was already sincerely inclined to support Massey Coal in the lawsuit in question, it means that Don Blankenship had not received a *quid pro quo*. Instead, the fear might be that powerful interests are able to stack state supreme courts

[29] The Supreme Court of Appeals is the court of last resort in West Virginia.

with judges who sincerely share their interests, which may or may not coincide with what the law requires in a given case.[30] Like other forms of elections, higher levels of campaign spending drive electoral success in judicial elections (Bonneau and Hall 2009).

Is *Caperton* an anomaly or an indication of a more prevalent problem in the rule of law? Surprisingly, polling data from those directly involved in this practice admit that there may be a systematic problem. In 2001, the non-profit advocacy group Justice at Stake published a survey of over 2,400 state judges (Greenburg and DiVall 2002). The survey found that 35 percent of state supreme court justices believe campaign contributions had at least some influence on judicial decisions, and 68 percent also expressed support for limiting contribution levels to judicial candidates. In 2007, another Justice at Stake poll of business leaders found that 79 percent of them believed campaign contributions affected judicial decisions, yet 93 percent of those surveyed strongly supported judicial recusal when a case involves a campaign contributor. In fact, 71 percent of business leaders surveyed favored depoliticizing judicial selection by adopting a Missouri plan of merit selection followed by retention elections (Zogby and Peck 2007). On the other hand, James Gibson's experimental research (2012) has demonstrated that judicial elections also have a legitimation effect on the public that may be sufficient to eclipse the public's disdain for money in judicial elections.

Spending on judicial elections has increased dramatically in recent years. During the 1990s, judicial candidates raised $83.3 million, but in the next decade, that amount

[30] Incredibly, the television ads funded by an independent group that Blankenship funded did not laud Justice Benjamin's acumen on corporate law. Instead, they criticized the Democratic incumbent for being soft on crime (*Caperton v. A.T. Massey Coal* 2009).

more than doubled to $206.7 million. Of that figure, business interests contributed $62.6 million, with the plaintiff's bar running a close second with $59.3 million. Independent expenditures on judicial races are also on the rise, comprising 30% of the money spent during the 2009-2010 election cycle. Business interests are much more likely to spend money on television advertising than the plaintiff's bar (Shepherd 2013, 5–6).

Some state governments have responded with public financing schemes for judicial candidates (Goldberg 2002), but these programs are now in doubt after the U.S. Supreme Court's decision in *Citizens United* (2010) or they have proven ineffective (Corriher 2013). Since *Caperton*, fewer than a dozen states have reformed their recusal rules (Gibeaut 2012). One such state is Louisiana, and a study (Palmer 2010) found that even when justices on that state's supreme court recused themselves when large contributors appeared before them, a risk of actual bias still occurred when small contributors appeared before the court.

The goal of this chapter is to develop and test a comprehensive theory of judicial independence and test it on the richest amount of data of any study to date, using advanced methods that are appropriate to handle the endogenous nature of this question.

Reappointment Uncertainty and Campaign Cash

Most of the congressional literature that examines the role of money in politics has not found strong evidence of a *quid pro quo* relationship between contributor and legislator (see Stratmann 2005). Recent scholarship on money in state politics (Powell 2012), on the other hand, reveals a much different picture: the more money legislators raise, the more they accommodate their donors – at the expense of their constituents – in

their policy decisions. Early scholarly investigations into the role of money in judicial elections (Bonneau, Cann, and Boyea 2012; Bonneau and Cann 2009; Cann 2007; McCall 2003) have also indicated that some justices are influenced by lawyers who contribute and then appear in their courtroom. These studies focused on only a few states, which makes generalizing from the results difficult.

Though lawyers account for much of the pool of campaign donations in judicial elections, opponents of judicial elections are also concerned with the influence of corporations and other interest groups, which these studies do not consider. Kang and Shepherd (2011) and Shepherd (2013) examine the influence of contributions from the business community, but they apply their independent variable – the total dollar contributions from all sectors – to all business cases. A better approach to a judge-vote unit of analysis would be to match contributions from particular sectors of the business community to cases in which they have a direct interest. The studies also do not consider the potential competing influence from liberal groups, such as trial lawyers.

Applied to the context of campaign finance for state supreme races, it follows from the reappointment uncertainty theory:

> *Interest Group Capture Hypothesis:* Justices will adjust their voting behavior in the ideological direction sought by their contributions only if they operate in electoral systems with high reappointment uncertainty.

This hypothesis presupposes that candidates for judicial elections need to raise money. The reappointment uncertainty theory also applies at another level: justices will only raise significant amounts of money if their job security is in jeopardy. Judicial candidates in partisan elections, by definition, have to win at two stages: securing the

endorsement of their party and winning a general election. Prior studies have shown that partisan races are more likely to recruit challengers and raise more money than nonpartisan elections (Bonneau and Hall 2009). Justices in retention elections typically do not raise much, if any, money, but recent retention elections have attracted rapid increases in outside spending ("Judicial Elections, Unhinged" 2012).

Potential Problems with Reappointment Uncertainty

The incentive structure established by reappointment institutions may differ in this analysis compared to the others undertaken in this dissertation. Candidates in partisan judicial elections, though they enjoy the lowest level of job security, also automatically enjoy the highest amount of free information conveyed to voters at the polls – their party identification. Party identification is also an important signal to potential campaign contributors. With more information about a candidate's probable future behavior, contributors are more likely to discount the utility of a contribution if the contributor's interests are strongly at odds with the worldview of the candidate.

Justices in nonpartisan elections have to overcome the lack of information on the ballot and identify their worldview with voters through other means. Lack of voter information is even higher in the timeframe captured in the State Supreme Court Database (1995-1998). The data used in this dissertation predates *Republican Party of Minnesota v. White* (2002), when the U.S. Supreme Court allowed state judicial candidates to discuss current legal controversies during their campaigns. Without information in the media or on the ballot, voters might be more dependent on campaign advertising to inform their decision. This could make the necessity of raising money

more important in these races than in partisan elections, even though nonpartisan states have lower levels of reappointment uncertainty. If money is a more important consideration for these candidates, they may be more willing to accommodate the interests of their contributors when they conflict with the justice's ideology. Moreover, since there is no oversight from either political party, nonpartisan elections justices may feel as though these accommodations are less conspicuous.

Partisan elections justices must fend off the threat of a primary challenge, which could mean that faced between following the interest of a campaign contributor and voting in a way to please their party, assuming they conflict, partisan considerations might triumph. Many partisan elections justices have used their service on state supreme courts as a stepping-stone to campaigns for governor, state attorney general, and U.S. House and Senate. Their primary concern, often, is upward mobility, not remaining on the bench (Geyh 2003). Either way, these justices should be expected to be more partisan in their decisionmaking.

Data and Methods

This analysis, like the others in this project, relies on data from the State Supreme Court Data Project (SSCDP) (Brace and Hall 2001). Additional features of state judicial systems and other valuable state-level political data comes from the State Politics and the Judiciary dataset (Lindquist 2010). The Judicial Elections Data Initiative (JEDI) (Martin 2010) provides additional details about the personal attributes of the justices. Data on campaign contributions in judicial elections comes from the National Institute on Money in State Politics (NIMSP) (2012).

Like Chapters 3 and 4, the analysis includes tort cases from six legal areas: medical malpractice cases, automobile torts, toxic substances and environmental torts, products liability cases, premises liability cases, and insurance cases. Each of these legal issues is of great concern to various segments of the business community, on the one hand, and lawyers, on the other. In order to examine these two interest groups vying against each other in the same case, tort cases were selected with businesses as the original defendant and non-businesses as the original plaintiff. For more information about what types of plaintiffs were chosen from the SSCDP, see Appendix A. The NCMSP tracks the occupation of each donor to judicial elections, and business contributions are paired with relevant cases to test for a possible influence. Unfortunately, the NCMSP does not give any detail about what types of attorneys (corporate, public interest, etc.) make contributions. Appendix B contains a description of the coding procedure used to select cases and match contributions.

State supreme court justices included in the analysis share the following attributes. First, they served the full four years (1995-1998) recorded in the State Supreme Court Data Project. Second, they did not face an election between 1995 and 1998. Third, they did not face mandatory retirement (due to age) during the term they were serving. In other words, these judges have an incentive to raise campaign contributions because they are eligible to run for reelection. Fourth, the justices serve in states in which the NCMSP has campaign contribution data available for each year from 1995-1998.

The unit of analysis is the judge-vote. The dependent variable is whether the justice in question cast a liberal vote, defined as a vote for the original plaintiff. The independent variables of interest are contributions from the business industry involved in the case and lawyers. Utilizing total dollar contributions would skew the distribution at both low- and high-dollar levels of contributions, thus the natural log of business and attorney contributions are used instead. A justice's liberalism will be measured using party-adjusted judge ideology (PAJID) (Brace, Langer, and Hall 2000). Like Chapter 4 the model includes two additional, dichotomous controls: state involvement and constitutional cases.

Addressing Endogeneity

The largest obstacle to measuring this relationship is the classic "chicken and egg" problem that confronts any study of campaign finance. Do justices vote the way they do because they have been influenced by campaign contributions from donors with divergent preferences? Alternatively, do donors contribute to justices because they are already inclined to vote in their interests? The answers to both questions are normatively important, but the most useful social science model can tell policymakers precisely which of these issues are in play in their state. The most recent study of campaign contributions in judicial elections (Shepherd 2013) utilizes multilevel modeling with random intercepts for each justice and state. This approach cannot discern the direction of these conflicting causal arrows.

Instrumental variables probit can diagnose and solve this endogeneity problem (Bonneau and Cann 2009; Dorsch 2013). Instrumental variables are related to the

endogenous regressors but not causally related to the dependent variable (Maddala 1983). Successful instrumental variables will correlate with the incentive of either business leaders or attorneys to donate to any judicial candidate, regardless of the candidate's ideological proclivity in a given tort case. The model includes four instrumental variables: whether or not the justice in question is a freshman, whether or not the justice in question was a quality judicial candidate, the number of torts cases on the docket in 1996, and the strength of a state's campaign finance regimen (Witko 2005).

The campaign finance literature has demonstrated that contributors are rational (Wright 1996) – that is, they not only want to maximize the chance that the candidates they back will in turn back them, but they also want to invest in candidates who are likely to win. A justice who has survived her freshman term has achieved an electoral advantage of incumbency, which creates an incentive with donors to "back the winner," regardless of ideological leaning. Likewise, judicial elections scholars have demonstrated that quality candidates, that is candidates who have won a prior election to office, tend to perform better than electoral newcomers (Bonneau and Hall 2009). If donors have more of an assurance that donations will not be wasted on a poorly executed campaign, they will be more likely to contribute, regardless of the candidate's ideology.

Interests groups on both sides of torts cases will likely wish to invest more resources when there are more torts cases on a state supreme court's docket. When a donor's interests dominate the judicial landscape, they will likely be more active in making contributions than when they have less at stake. Finally, the Witko index measures the limit of a potential supply of campaign contributions by identifying the

strength of a state's campaign finance regimen. The index is more comprehensive than a simple maximum contribution amount for a donor in a given state; it takes into account a variety of campaign finance laws on the books in each state in 2002. The index, a series of dummy variables similar in structure to Newmark's approach (2005) to measuring the stringency of lobbying regulation, includes various disclosure and reporting rules, public financing provisions, and several campaign contribution and spending limits.

Analyzing the Influence of Money in State Supreme Court Decisionmaking

Table 5.1 describes the variables in greater detail. Because each judicial elections system has systematically different levels of reappointment uncertainty the same model will be repeated for partisan elections and nonpartisan elections.[31] Incumbents in only two retention elections raised any reelection funds, two Pennsylvanians running for reelection after their freshman terms.[32] Because so few judge-votes in retention elections states have variation in the key independent variables, they are excluded from analysis.

The results for partisan elections in Table 5.2 include a traditional probit analysis supplemented with an instrumental variables probit. The Wald exogeneity test examines whether the two campaign contribution variables are exogenous to the model. The resulting χ^2 value indicates that this null hypothesis can be rejected at the $p < 0.01$ level,

[31] Though it would have been desirable for controlling for the panel nature of the data, I was not able to cluster the standard errors on either instrumental variables model (partisan or nonpartisan), as the resulting model would not converge under any of a variety of settings in Stata.

[32] Along with Illinois and New Mexico, Pennsylvania appoints new justices to their state supreme court via a partisan election, but when these justices go up for reapproval, they do so in a non-competitive retention election.

suggesting that these variables require instrumentation. The overidentification test[33] indicates that the null hypothesis – the IV-probit model is overidentified – can be rejected, although just barely ($p = 0.051$). The overidentification test is based on the observation that the residuals should be uncorrelated with the set of exogenous variables if the instruments are truly exogenous. The control variables performed as expected in both probit models of partisan election states. Judicial ideology is a strong predictor of judicial decisions even after instrumental variables are applied. Justices are more inclined to cast liberal votes when the government is party to a case and when a case involves a constitutional claim.

The results from both methodological approaches are fairly similar, although the coefficient for lawyer contributions, which is statistically significant in the instrumental variables model, fall just short of statistical significance using a traditional probit model ($p = 0.051$). There is mixed evidence of interest group capture taking place on state supreme courts with partisan elections. Contributions from business decrease the likelihood of a liberal vote, even after taking into account differences in judicial ideology and correcting for endogeneity by using instrumental variables. This finding suggests that justices in these states pay attention when tort cases are brought before them by segments of the business community that contribute heavily to their campaigns.

Somewhat strangely, both types of probit models of partisan elections states indicate that an increase in contributions from lawyers decreases the likelihood of a

[33] The Amemiya-Lee-Newey minimum χ^2 is derived from the Stata procedure ivprobit, with the twostep option (Newey 1987) enabled. The estimates presented in each table, however, are derived using MLE. This is appropriate because both approaches utilize the same exclusion restrictions (Schaffer 2010).

liberal vote, the opposite direction than hypothesized. Two considerations put this finding into context. First, the National Institute for Money in State Politics does not differentiate in its coding scheme between different types of lawyers. Thus, these figures include contributions from trial lawyers and other legal specialists, including, potentially, corporate attorneys. However, the American Judicature Society notes in several states that the bulk of contributions in judicial elections came from individuals associated with state trial lawyer associations (American Judicature Society 2013c).

Second, as Joanna Shepherd (2013, 3) notes: "In contrast [to the business community], the plaintiffs' bar in many states is typically much more diverse in their economic interests because they represent such a diverse range of clients." The diversity of interests served by the bar formed the basis for much of the previous scholarship examining the influence of campaign contributions on state supreme court decisionmaking because many cases featured attorneys on both sides who were campaign contributors (Bonneau, Cann, and Boyea 2012; Bonneau and Cann 2009; Cann 2002).

Table 5.3 presents traditional and instrumental variables probit models for nonpartisan elections states. Once again, the Wald test suggests an endogeneity problem ($p < 0.01$) for which the instrumental variables provided a solution, according to overidentification test ($p = 0.621$). The other control variable, government involvement in a case, yielded a coefficient in the predicted direction (positive) but its effect falls just short of statistical significance in both probit models. In both probit models, the coefficients for business contributions and lawyer contribution variables are in the predicted direction and achieve statistical significance ($p < 0.001$).

The evidence of interest group capture is much stronger in states with nonpartisan elections. When included alongside campaign contribution data, judicial ideology in nonpartisan elections states does not have a statistically significant effect on decisionmaking in either the traditional or instrumental variables probit approach. Running a simple bivariate probit model would, however, produce a significant relationship for judicial ideology. This means that in cases in which there is a conflict between a justice's ideological predilections and the interests of a campaign contributor, the latter prevails in formulating the justice's decision.

Nonpartisan election justices tend to raise considerably less money than their partisan elections brethren, but campaign contributions – especially from the business community – tend to be more influential. According to Table 5.4, a business contribution of $10,000 to a nonpartisan elections justice, *ceteris paribus*, reduces the probability of a liberal vote by over five percent, while an identical contribution from lawyers only increases the chance of a liberal vote by less than one percent. Again, the lack of more precise classification on what type of attorneys are making contributions might account for part of this disparity.

This model attempts to tackle some of the methodological issues, both in terms of measurement and statistical technique, which other studies (e.g., Kang and Shepherd 2011; McCall 2003; Shepherd 2013) have left unanswered, and it includes a much broader and deeper dataset than others (e.g., Bonneau and Cann 2009, 2009; Cann 2007). More importantly, it considers the problem of donor-recipient relationships in the context of institutional designs that create different behavioral incentives.

Implications for State Constitutional Design

Pennsylvania has utilized partisan elections to select its judges since before the Civil War, but in 1968, it adopted retention elections for reappointing its Supreme Court justices (American Judicature Society 2013a). Following the conviction of Justice Orie Melvin on corruption charges (Ward 2013), the legislature is considering moving to merit selection, which would make Pennsylvania a more traditional Missouri plan state (Bonneau 2013a). Such a change would likely reduce the financial stakes involved in Pennsylvania judicial elections and promote greater levels of judicial independence. In addition, creating a merit selection process may reduce the probability of selecting overly ambitious judges like Melvin in the future.

In 1998, North Carolina began electing its justices through nonpartisan elections, replacing the system of partisan elections that had existed since the Civil War (American Judicature Society 2013a). The North Carolina General Assembly is now considering a proposal to return to the partisan elections system it only recently abandoned (Severino 2013). The data analyzed in this chapter suggest this proposed change may actually reduce the influence of campaign contributions, but it might increase the degree to which ideology drives judicial decisionmaking. Considering the evidence of partisan and ideological behavior currently taking place in North Carolina, returning to partisan elections may not make much of a difference on this front.

The first African-American female to serve on the North Carolina Supreme Court, Justice Patricia Timmons-Goodson abruptly retired in November, 2012, just before

Governor Bev Perdue, a Democrat, was set to be replaced by an incoming Republican. Purdue then bypassed the judicial commission, which traditionally makes recommendations for mid-term nominations, to select a candidate ("Perdue To Bypass Panel Method To Choose NC Justice" 2012). Justice Paul Newby, who recently defeated an incumbent with $2.3 million in support from conservative interest groups, refused to recuse himself from participating in a review of the redistricting plan passed by the Republican-dominated state legislature (White 2012).

Returning to the recusal posed in West Virginia *Caperton v. A.T. Massey Coal* (2009), the results from this analysis suggest that across the landscape of competitive judicial elections both threats to judicial independence exist. First, justices in partisan election states tend to be reliable agents, representing the preferences of the parties who nominated them. If a justice who is nominated by the Democratic Party sincerely sees the law through blue-tinted glasses (that is with a liberal judicial worldview) and votes accordingly, it does not pose a problem to the rule of law because his decisions do not change based on the contrary views of outside actors.

On the other hand, there is evidence of a *quid pro quo* in nonpartisan election states. This finding is troubling to the rule of law because it undermines the neutrality needed for an adversarial judicial system to function effectively (Shapiro 1986). If there were problems with justice being up for sale in the mid-to-late 1990's, the prospects for the modern state supreme court landscape are incredibly troubling, given the rise in campaign spending and donations from interest groups since that time (Bonneau 2009; Goldberg 2009; Hall and Bonneau 2008). State policymakers would be very well-served

to consider these findings when debating changes to judicial reappointment methods, public financing of judicial elections, or judicial recusal rules.

Chapter Six: Optimizing Judicial Independence Through Institutional Design

> Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.
>
> Thomas Jefferson (1950)

Thomas Jefferson's belief in each generation's ability to determine its own constitutional destiny never quite caught on at the national level, though, as this chapter will later demonstrate, state policymakers seem much more comfortable with constitutional experimentation.[34] Prior studies, both qualitative (Shugerman 2012) and quantitative (Hanssen 2004) have suggested that these institutional designs were created in attempts to preserve judicial independence from changing political circumstances over the course of American history. This dissertation began by asking whether these differences in institutional design, particularly those affecting state supreme courts, affected levels of judicial independence exhibited by the justices operating within them.

Judicial independence is a difficult concept for political scientists to measure. In the three preceding empirical chapters, I have presented three different conceptual approaches of how an independent judge would behave with regard to different external pressures they may encounter: the agendas of political parties, the governing coalition, and campaign contributors. The different judicial reappointment methods – partisan elections, nonpartisan elections, retention elections, and elite reconfirmation – produce varying levels of job security, while justices with life tenure need worry only about impeachment. The proposed linkage between institutional design and judicial decisionmaking is reappointment uncertainty; that is, when judicial institutions are

[34] Prophetically enough, Jefferson's calculations of a constitution lasting 19 years turns out to be the exact median age of a national constitution in the history of the world (Elkins, Ginsburg, and Melton 2009).

designed to give justices more certainty over their job security, one should expect them to exhibit greater levels of independence.

Chapter 3 applied reappointment uncertainty to the decision to dissent on state supreme courts. Unlike the U.S. Supreme Court, where ideology heavily structures this process, dissensus on state supreme courts is much lower, overall, and less a function of ideological differences. Judicial ideology plays a role in the decision to dissent in states with high levels of reappointment uncertainty. States with low levels of reappointment uncertainty not only produce fewer dissents along partisan grounds, but many fewer dissents overall. The evidence presented also suggests that state supreme court behavior is influenced by reappointment methods, not selection methods.

Chapter 4 considered one implication of reappointment uncertainty: the relationship between judicial decisionmaking and the preferences of the governing coalition. I hypothesized that justices will follow the ideological direction of the majority coalition governing in their state if reappointment uncertainty is high. The results supported this hypothesis. Chapter 4 also considered the possibility that too much judicial independence might be counterproductive to a healthy democratic order. In some instances, states with life tenure became significantly more liberal (conservative) as their state became more conservative (liberal).

Finally, Chapter 5 examined the role reappointment uncertainty plays in campaign finance in state supreme court elections. In this context, reappointment uncertainty plays a complex role in partisan elections because of the multiple principals a justice in these states must serve. The instrumental variables approach undertaken in the Chapter

examined the possibility that the goals of a justice's party might conflict with the goals sought by his campaign contributors. When in conflict, partisanship tends to play a much bigger role in judicial decisionmaking of these justices. In nonpartisan elections states, justices seem more willing to accommodate the interests of their campaign contributors at the expense of their own sincere view of the law, when they come into conflict.

In more recent years, a higher percentage of incumbents in judicial elections have faced challengers, and the quality of challengers is increasing. As the amount of money spent in judicial elections increases, voter roll-off decreases (Bonneau and Hall 2009). Voters in judicial elections may possess sophistication levels comparable to other down-ballot campaigns (Bond, Covington, and Fleisher 1985), although voters in several recent state polls have self-reported a lack of information about judicial candidates (American Judicature Society 2013b). If this trend continues, it is entirely possible that the levels of job security measured across reappointment methods could change. Justices in nonpartisan election states might lose some of the benefit they enjoy by having their incumbency status listed on the ballot. More information about incumbents running in a retention election might lower levels of job security as well. My theory of reappointment uncertainty is contingent upon levels of political sophistication, though voter knowledge should, in turn, be a result of constitutional design.

However, regardless of what levels of job security result from different reappointment, one important consequence of institutional design remains: the mere possibility of judicial accountability is not sufficient to induce compliance with the divergent interests of appointing principals. In contrast to some the principal-agent

literature on congressional oversight of the bureaucracy (Weingast and Moran 1983), the threat of not being reelected or reappointed must be viewed as credible in order to be effective. State supreme court justices feel constrained only when their reappointing agents are attentive, united, and opposed – the same conditions Sean Theriault (2003) identified to predict instances in which Congress limits its own authority.

Need for Further Research

Though many more political scientists are now studying state supreme courts than in the past, many fundamental aspects of this portion of this literature remain underdeveloped. The development of new ideal points for state legislators (Berry et al. 2010; Shor and McCarty 2011) has not yet been incorporated into ideology estimates of state supreme court justices. The State Supreme Court Data Project, while invaluable in terms of its comprehensiveness, is becoming increasingly outdated. Scholars are collecting new data on state supreme court decisions, some which has been shared publicly (Shepherd 2013), while other data, unfortunately, is not (Choi, Gulati, and Posner 2010).

Comparison studies between the data in the mid-1990s and in more time would shed light on the effect, if any, of the increasing political salience of judicial elections. Proponents of judicial independence have argued (Caufield 2009) that the U.S. Supreme Court in *Republican Party v. White* (2002) changed the rhetoric of judicial elections by affirming the free speech rights of judicial candidates. It remains an open question whether this decision has changed judicial decisionmaking as well. Recent data is also essential to study the effectiveness of public financing regimes for judicial elections,

another area of state politics that is understudied (cf. Hazelton, Montgomery, and Nyhan 2013). The claim made by Brian Fitzpatrick (2009) that judicial nominating commissions select judges who are ideologically out of step with their state (more liberal) needs much more rigorous investigation.

Further questions concerning judicial independence on state supreme courts also remain. Comparing the influence of campaign contributions using a more recent dataset to those presented herein would be instructive. Supplementing the quantitative analysis in this project with qualitative data would create a richer understanding of state supreme court decisionmaking. Interviews with current and former state supreme court justices would help generate additional hypotheses and test the validity of the assumptions made in the state court literature. One of the most interesting differences between federal-level and state-level American constitutionalism is the presence of positive rights in many state constitutions (Zackin 2013). In many instances, elected state supreme courts (e.g., *Edgewood Independent School District v. Kirby* 1989, *Rose v. Council for Better Education* 1989) have struck down education finance schemes as violative of state guarantees of a free and equal public education and ordered the legislature to formulate alternative plans. Case studies of these instances, as well as quantitative analysis, could shed new light on the debate over the effectiveness of litigation to achieve social change (Rosenberg 1993) and judicial competency in policymaking (Horowitz 1977).

Diagnosing the Empirical Implications of Constitutional Design

What good does this information concerning state supreme court design serve? First, it provides new insight into a number of different political science literatures. It fits

within the literature of comparative constitutional design (e.g., Gauri and Brinks 2010) by providing an American perspective on the empirical consequences of institutional choices. It contributes to a fuller understanding of the evolution of American state politics (Shugerman 2012) to adapt to changing political and economic circumstances, such as the growth of political parties, the concentration of power among elites, and the power of economic interests to influence elections. States have chosen different strategies to address these problems based on their own historical experience and that of neighboring states.

Most of the U.S. Supreme Court literature on judicial independence (e.g., Bergara, Richman, and Spiller 2003; Clark 2010; Rosenberg 1992), demonstrates that the Court does not translate its institutional independence into decisional independence. The story at the state-court level is much different, despite much larger incentives to be sensitive to the views of outside actors. There are several possible reasons for this disparity. First, presidents might be looking to select a different type of Supreme Court justice than state actors are looking for in choosing a state judge. This rationale seems especially plausible in Missouri plan states, where the merit selection process attempts to limit the ideological dimensions of judicial selection (but see Fitzpatrick 2009).

State supreme court justices are products of particular legal cultures that inculcate expectations of the judicial role (Carman 2012). These expectations, likely, would include traditional norms of ignoring the views of outside actors, despite strategic reasons that would undermine these norms. The position of state supreme court justice might also be viewed as less prestigious than a U.S. Supreme Court justice, such that state court

justices would rather vote sincerely at the expense of their job security. Members of the U.S. Supreme Court, on the other hand, jealously guard their position as the pinnacle of the American legal system. Perhaps state supreme court justices feel as though they can exert their independence without outside actors perceiving their recalcitrance, given that they get much less media attention (Schaffner and Diascro 2009).

Even more importantly, this project provides an excellent opportunity to engage in diagnostic political science (Lepawsky 1967). Aristotle, the first (and arguably greatest) political scientist in history, defined our discipline as the study of the state. In so doing, he provides much more than a unit of analysis; he urges political scientists to study the state in a way similar to that which a physician studies the body. Medical doctors examine deficiencies in the body using the most rigorous – and unbiased – empirics available to them. They do this, not out of a rational calculation that their time in medicine would earn them greater utility than spent in other pursuits, but out of a concern for the health of that body. Shared medical norms, codified in the Hippocratic Oath, unite physicians in their discipline.

The task of political science must be to use empirical inquiry to diagnose dysfunctions within the body politic. Diagnostic political science is not a form of ideological advocacy, just as the practice of medicine is not ideological. Being aware of, and intimately concerned with, the normative implications of one's findings does not inherently bias the empirical inquiry. The correct diagnosis to a medical or political problem must be made with the best available empirical data in order for treatment options to be debated.

When empirical political scientists stop after presenting their findings and ignore the broader normative framework in which those results are situated, they miss an opportunity to engage with a wider audience for their scholarship. This is an especially acute problem in light of recent failures to persuade Congress to continue supporting National Science Foundation funding for political science research (Sides 2013). It also artificially substantively important research questions from being answered because out of fear in engaging in the normative implications. By avoiding these questions, the discipline misses opportunities to build better theories as well.

In order to start that diagnoses, we must first understand the virtues and vices connected to the two largest principles at work in the design of judicial reappointment institutions – judicial independence and popular constitutionalism.

The Promise and Perils of Judicial Independence

Virtues

Courts, and in particular appellate courts, are unique institutions within a democratic order. While the decisions they render have implications for the broader political community, their primary duty is to resolve disputes between two parties. In the adversarial system, judges hear both the arguments raised by the parties and issue a ruling (Shapiro 1986). Political parties, political elites, the public at-large, campaign contributors are external to this dispute resolution process. Institutional judicial independence is designed to grant judges the ability to focus on the main task at hand –

interpreting the law as they see it to decide individual cases. Judicial independence is, quite simply, necessary to the rule of law.

Because these external actors yield a great deal of political power, their influence could easily be exerted to promote the interests of the majority at the expense of individual litigants seeking protection of minority rights. Judicial protection of rights, while an imperfect mechanism in reality (Rosenberg 1993), are an essential feature of American constitutional design. Legislatures and executive institutions are designed, primarily, to pursue majoritarian goals. Judiciaries need to be structured differently in order for the separation of powers to achieve its full normative potential. From this perspective, judicial independence dates back to Magna Carta, one of the first efforts in the history to limit the power of the sovereign. Judicial independence dictates that those arrested for breaking the king's law were not judged by agents of the monarch, but by a jury of their peers. Executive manipulation of state judges, as discussed in Chapter 2, was one of the primary reasons judicial elections were introduced early in American history.

Vices

First coined by Bickel (1962), the countermajoritarian difficulty refers to the threat posed to the legitimacy of judicial review; specifically, when a small number of unelected judges serving life terms strikes down a law as unconstitutional, they override majority will as expressed through by representative institutions. When courts exercise their institutional independence to combat the wishes of the majority, constitutional conflict is a distinct potential (Gillman 1992). The countermajoritarian difficulty is

premised on the notion that it is the prerogative of the legislative branch to set law and policy (Blackstone 2001). Courts should respect that prerogative because legislatures are designed to be representative, yet deliberative, institutions, drawing legitimacy from the consent of the governed.

Appellate courts, on the other hand, are much less well designed to serve as representative institutions. First they lack the specialized knowledge that modern legislators or bureaucrats possess to administer solutions to complex social problems (Horowitz 1977). The creation of specialized courts that handle complex issues of administrative law, tax, bankruptcy provide evidence of this difficulty. Second, appellate courts are simply too small to reflect the diverse constituencies (Perry 1991) that would be represented in a legislature, especially in a country where cross-cutting cleavages are considered an important feature of constitutional design (Madison 2010, 10).

Finally giving courts wide discretion to act independently creates a very hierarchical constitutional culture (Levinson 1989). When popularly-elected institutions delegate authority to courts, they are discounting the possibility that non-judges should, or even could, play a role in constitutional interpretation. Members of the U.S. Supreme Court are fond of arguing that "[w]e are not final because we are infallible, but we are infallible only because we are final" (*Brown v. Allen* 1953), but the Court creates a sense of infallibility because of the strength of their position in the American constitutional order is so secure.

The Promise and Perils of Popular Constitutionalism

Virtues

Judicial accountability serves a number of purposes. The first is to provide a disincentive to judges acting illegally or unethically. Many different processes can accomplish this function, from legislative impeachment to failure to secure renomination to electoral defeat or recall. The broader virtue of judicial accountability that periodic reappointment of judges serves is engaging judges with a larger audience in a constitutional conversation (e.g., Ackerman 1993; Hogg and Bushell 1997; Kramer 2006; Levinson 1989; Powe 2009; Pozen 2010; Tushnet 2000). One variation of this approach – the theory of popular constitutionalism – rejects the notion that courts should always have the final say in the determination of constitutional meaning. Popular constitutionalism offers several benefits to the health of a democratic order, all of which increase democratic legitimacy by having citizens play a more important role in both ordinary and higher-order lawmaking. Many of the virtues of popular constitutionalism reverse the vices of judicial independence and vice versa.

The vast quantity of voting behavior literature (e.g., Kinder and Kiewiet 1981) connecting the state of the economy to the two-party vote share in America demonstrates the degree to which politics has become a game of rent-seeking. Political scientists have bought into conception of political life at a definitional level, by defining politics as "who gets what, when, how" (Lasswell 1936). Combined with an incredibly strong network of interest groups, who often play the same game (Rauch 1999), the scope of modern American politics can be very shallow, despite the vast amount of resources being

allocated by political institutions. Popular constitutionalism hopes to redirect the answer to the pollster's question: "Is the country headed in the right direction?" away from a quick appraisal of the unemployment rate and towards a more introspective evaluation of the practices and values that constitute American politics.

Bruce Ackerman has documented that it is very difficult to raise the stakes of politics in this way, not only because the Article V system of constitutional change (at the federal level) is so cumbersome, but because citizens would need to consider constitutional change with "a seriousness that they do not normally accord to politics" (1993, 6). This vision of constitutionalism, though it might seem overly-ambitious, is rooted in the Protestant tradition, which has defined the country's dominant religious and political traditions (Elazar 1970; Levinson 1989). Part of this difficult is rooted in the ignorance about both politics and civics, more broadly, which currently shapes the American political landscape. The extent of citizen misinformation is well-documented in the literature (e.g., Delli Carpini 1996), but one particular favorite among the many disheartening findings is that more Americans can correctly identify the Three Stooges than the three branches of government (Hearst Corporation 1987). The long-term problems with such levels of ignorance is that dramatic action only takes place after the country has gone past a tipping-point. A commitment to popular constitutionalism conditions a people to engage in a more critical evaluation of the health of a polity before a war or economic crisis force such questions onto the national agenda.

Judicial elections may help in implementing this constitutional approach. Chris Bonneau and Melinda Gann Hall (2009) have found that voters tend to make fairly-well

informed choices in judicial elections by preferring more experienced candidates and by participating at rates similar to those of other down-ballot races. Bonneau and Cann (2012) have also demonstrated that voters in nonpartisan elections can discover the candidate who is ideologically more proximate without the benefit of partisan label on the ballot.

James Gibson (2012) continues this line of research by demonstrating the legitimating effects of judicial elections. While voters find the influence of campaign contributions in judicial elections distasteful, they do not object to all forms of judicial electioneering. More importantly, whatever negative effects might take place due to high levels of spending or negative advertising in a judicial election, the benefits of judicial elections overwhelm them and increase diffuse support for judicial institutions. Gibson frames his analysis in terms of the tension between democratic accountability and judicial independence, and this may be too narrow an understanding of his findings. Gibson's own past work on the positivity bias exhibited towards courts (Gibson and Caldeira 2009) might suggest that judicial elections draw ordinary people into a conversation about constitutional values.

Vices

The most obvious potential problem is distinguishing popular constitutionalism from raw majoritarianism (Alexander and Solum 2005). The people rule in a democracy, but one purpose of a constitution is to establish an institutional design that is more sophisticated and deliberative than government-by-Nielsen-ratings. Madison's concerns for limiting the influence of majority factionalism dominates his thinking in the Federalist

Papers (2010). Governing institutions that are too responsive would accommodate temporary and unreasonable passions to a degree, which, in the mind of Madison, would threaten the stability of the state. Judicial elections, according to this line of reason, could threaten the rule of law if they accommodate similar swings in the mood of the electorate.

Madison's vision of a large republic with cross-cutting cleavages provides more insight into state judicial elections. State polities (Elazar 1970) tend to be more culturally homogenous, which means that the threat to minority rights is more prevalent at the state level. Indeed, Scot Powe's study (2002) of the Warren Court turned conventional wisdom on its head: though the Warren Court struck down many laws as unconstitutional, most of these laws were state statutes. In turn, most of these state statutes were outliers that did not have much support within the national ruling coalition. Viewed in this light, it becomes much more difficult to call the Warren Court countermajoritarian. Allowing homogenous states to put additional majoritarian pressures on their state judiciaries could easily undermine minority rights protections.

Though one of the fundamental principles of American democracy is "free trade in ideas" (*Abrams v. United States* 1919, 630), the marketplace established by judicial elections is a potentially very harsh one. The point of a market is for its contents to be in flux, but the goals of the rule of law are to provide predictability and uniformity in a legal system. If judicial elections lead to changes in judicial behavior, it could create shocks in the legal system, which undermines this goal. In this particular battle between the public and their judges over the proper reach of the law, the two actors approach the market

from very different perspectives. While the public may have an abstract appreciation for the principles by which the rule of law is executed – *stare decisis*, the canons of statutory construction, judicial minimalism, etc. – their conception of the law is based mainly in terms of the underlying social and political values being expressed in the law (Zeisberg 2009). While judges are certainly concerned with these values as well, they approach their task with much greater concern for rule of law than most ordinary citizens might appreciate.

A Practical Solution: The Missouri Plan

I believe as though social scientists should explain any potential biases they had before embarking on a project, even if it is impossible to overcome them completely (cf. Gurwitt 2001). Like most political scientists, I entered graduate school without much an understanding (and certainly not an appreciation) of the various institutional designs of state courts. I assumed that life tenure for judges was a constitutional necessity for designing an effective, yet fair, democratic government. Given the U.S. Supreme Court's historical propensity to conform to the wishes of outside actors in spite of its institutional independence (e.g., Clark 2010; McCloskey 2004; Powe 2009), any stronger system of judicial accountability seemed destined to undermine the rule of law.

The data on reappointment uncertainty used in this project tell a different story, however. The periodic reappointment of state supreme court justices, in and of itself, does not cause judges to be very sensitive to the preferences of outside actors. The justices analyzed in my project are much more pragmatic in their strategic calculus.

Retention election justices, for example, understand that, from time to time, a very small number of their rank will be defeated in their quest for reelection, and yet they exhibit levels of decisional independence very similar to state-level justices who enjoy life tenure. Consistent with the greater emphasis on flexibility at the state-level of constitutional design (see the discussion of state constitutional conventions and amendments below), most states want more flexibility than the federal government in staffing their benches, even if they choose not to utilize that discretion all that often.[35]

Having completed this project, I have a much different perspective on judicial elections (and reappointments overall). Judicial independence should be thought of in terms of optimization, not maximization. To adopt the latter perspective would require the total isolation of judges from their community.[36] Such a judicial design is neither realistic nor normatively desirable. Viewed in that light, the task for state constitutional designers is to choose institutions that balance popular constitutionalism, as expressed through democratic accountability, alongside the rule of law, as expressed through judicial independence. Different people can justify different equilibrium points along this continuum, but as for me, the optimal balance is produced by the Missouri system of merit selection and retention elections.

The Missouri plan exhibits several positive indicators of judicial independence. Chapter 3 revealed little to no evidence that Missouri plan courts exhibit partisan polarization or ideological polarization. As the evidence in Chapter 4 indicates, justices

[35] As a reminder, there is only one state in the union (Rhode Island) that neither requires their state supreme court justices to be reappointed nor imposes a mandatory retirement age – the key ingredients in Article III of the U.S. Constitution.

[36] The closest approximation to this model might be trial judges in Colombia, who are hidden from view during drug trials to limit the possibility of assassination (Nagle 2011).

in these states do not change the ideological direction of their decisionmaking as the ideology of the governing coalition in their state changes. In addition, there are many fewer dissenting opinions written in Missouri plan states than in states with higher levels of reappointment uncertainty.

The results of this dissertation fit within a larger scientific literature diagnosing the workings of the Missouri plan. Reddick (2010) finds evidence that Missouri plan judges are significant less likely to violate judicial ethics laws than partisan or nonpartisan elected judges. Hanssen (1999) argues that Missouri plan states show higher evidence of predictability of law based on differences in litigation rates between those state and non-merit selection states. Choi, Gulati, and Posner (2010) find Missouri plan states enjoy enjoys high levels of prestige, second only to appointed states, based on rates of inter-state citations. Survey data of judges echoes this finding (Cann 2006), and retention election judges believe that competent performance is the key to retention (Aspin and Hall 1993). More states have changed their judicial selection/reappointment methods to the Missouri plan than any other system in the last half century, which suggests the system is popular with policymakers and voters who have to ratify the change (Dubois 1989). There is much less money involved in retention elections, and less evidence of campaign contributions influencing votes (Shepherd 2013).

An Ideal Solution: State Constitutional Amendments or Conventions

Citizens are not so uninformed or self-interested to able to shape their own constitutional destiny. Constitutional amendment or calling a new constitutional

convention can accomplish the goals of popular constitutionalism without disrupting the rule of law through the threat of sanction for judges who refuse to toe the line. Amending or abandoning a constitution represents a deeper-throated expression of the voice of "We the People" because the procedures by which this change is accomplished are more rigorous than getting 50 percent plus one of the public[37] to throw a judge out of office. This procedural rigor will likely spur more deliberation before action is taken, and if action is taken, it can lay claim to greater democratic legitimacy.

It would be a mistake to conclude that, based on the federal experience, that amending state constitutions or calling new state constitutional conventions are so unrealistic (Levinson 2012) that judicial elections are the only practical solution to pursue popular constitutionalism. While the federal government has had just two constitutions in its history, Table 6.1 indicates the average state has undergone just under three constitutions, despite the fact that 37 of the 50 states are younger than the country. For example, in just over a century, Alabama has approved 855 amendments to its latest Constitution.[38] Virginia's latest constitution of six was adopted in 1971, and since then, it has been amended almost twice as many times as the national Constitution. Virginia may be a bit of an outlier in this regard because the members of the Confederacy were forced to rewrite their constitutions as a condition of reentering the Union during Reconstruction.

[37] See Table 1.3 for exceptions.
[38] This extraordinary rate of change exists, mostly, because, as Dillon's Rule (*Clinton v. Cedar Rapids & Missouri River Railraod* 1868) state, the state must be explicit in which powers it delegates to localities. See Gillette (1991) for a history of Iowa Supreme Court Justice John F. Dillon and his famous rule.

Even accounting for regional differences, the pace of constitutional development at the state level is remarkably faster than at the federal level. The only state constitution with fewer amendments than the U.S. Constitution's 27 is Illinois, but that is likely because the national document has had a 183-year head start. Unlike the vast majority of states, the U.S. Constitution does not sanction its own demise by including procedures for calling a new constitutional convention.[39] Perhaps most remarkably, 14 state constitutions require self-examination, by requiring periodic referenda on whether to call a new convention.

"'Is This Heaven?' 'No, It's Iowa'"[40]: Concluding Thoughts

Returning to the Iowa Supreme Court, it would be safe to call their ruling in the same-sex marriage countermajoritarian behavior. Not only did the decision in *Varnum v. Brien* (2009) overturn a state statute defining marriage as between one man and one woman, Iowans opposed the ruling in public opinion polls (Clayworth and Beaumont 2009).[41] Few retention elections result in the spending of significant amounts of money – either by the candidate or interest groups. With less information given to voters, it reduces the impact of salient decision, which is a key condition for incumbent defeat (Cann and Wilhelm 2011). In 2008, however, Iowa' state supreme court races did attract a great deal of spending by interest groups.

[39] Interestingly, the Articles of Confederation did include procedures for whole-sale constitutional change, which the founders ignored when they convened in Philadelphia in 1787 (Johnson 2003).
[40] For a more in depth discussion on the relationships between heaven, baseball, and Iowa see Kinsella (1999).
[41] Interestingly, a significant segment of the Iowa electorate expressed no opinion on the ruling.

The decision and electoral defeats afterwards in Iowa highlights how institutional designs can have important consequences for judicial decisionmaking, minority rights, inter-branch relations, and representation theory. At the end of the day, all democracies rule by the consent of "We the People," and thus any judiciary that completely ignores the constitutional views of its people cannot survive for long (Hamilton 2010). However, this reality of democratic constitutionalism does not automatically justify judicial accountability through contested elections. Bonneau and Hall's (2009) defense of judicial elections combines rigorous methods, excellent data, and a well-grounded theory of political engagement. These authors used strong evidence to advance crucial normative questions about democratic constitutionalism. Americans may well be up to the task of electing judges, at least in comparison to the level of sophistication at which they elect other officials (Bond, Covington, and Fleisher 1985).

What Bonneau and Hall left unaddressed in their book[42] was a countervailing, and I believe, equally important normative question about judicial independence and the rule of law. In the same spirit, the goal of this work is to diagnose another normative concern with empirical data. Democratic constitutionalism may rest on the consent of the governed, but that does not automatically mean that any temporary factional passion (Madison 2010) must be accommodated because passions, by definition, are not constitutive. Taken to the extreme, judicial independence can produce a countermajoritarian difficulty, but judicial accountability taken to the extreme could result in a subservient judiciary. Bonneau and Hall focus on judicial elections as a

[42] I would be remiss not to note these author's earlier works on judicial independence (Boyea et al. 2009; e.g., Brace and Hall 1990, 1993, 1997; Hall 1995).

mechanism to achieve popular constitutionalism (Kramer 2006), but they do not acknowledge alternate avenues for the people (or their elected representatives) to maintain supremacy in determining constitutional meaning.

Interestingly, I suspect the people of Iowa view democratic constitutionalism in the same fashion as Madison. Booting some judges out of office may not require a deep deal of deliberation, and this is deeply troublesome to some scholars (Croley 1995; Geyh 2003; Pozen 2010). After the ruling, Iowa's governor flipped from Democratic to Republican control, with the state legislature remaining almost evenly divided. Several constitutional amendments have been introduced to define marriage as between one man and one woman, but they have not passed. Why is this so? The polling data showed a nearly even division over whether to amend the Constitution to ban gay marriage (Clayworth and Beaumont 2009). Judges come and go, but the waves created by throwing judges out of office can continue long into the future.

Constitutional amendments are more fundamental. The people of Iowa, it appears, would like to proceed more cautiously and thoughtfully before making a more permanent solution to their definition of Iowa values and their conception of democratic constitutionalism. In 2012, they applied that same cautiousness to creating more uncertainty in their judicial system. Justice David Wiggins, also part of the majority in *Varnum*, won his retention election, and unlike his counterparts in 2008, he mounted a campaign that was supported by a variety of interest groups (Mehaffey 2012). As Baum (2003, 38) notes, "[A]n effective campaign in support of an incumbent can neutralize the impact of an opposition campaign, even if the opposition spends more money." Is this a

perfect example of a constitutional dialogue taking place between people and their judges? Maybe not, but it is certainly better than the alternatives.

Figures and Tables

Table 1.1. Reappointment Methods of State Supreme Courts, 1995-98[43]

Partisan Election	Nonpartisan Election	Retention Election	Elite Reconfirmation	Life Tenure
Alabama	Georgia	Alaska	Connecticut	Hawaii
Arizona	Idaho	California	Delaware	New Jersey[44]
Arkansas	Kentucky	Colorado	Maine	Massachusetts
Louisiana	Michigan	Florida	New York	New Hampshire
North Carolina	Minnesota	Illinois	South Carolina	Rhode Island
Texas	Mississippi	Indiana	Vermont	
West Virginia	Montana	Iowa	Virginia	
	Nevada	Kansas		
	North Dakota	Maryland		
	Ohio	Missouri		
	Oregon	Nebraska		
	Washington	New Mexico		
	Wisconsin	Oklahoma		
		Pennsylvania		
		South Dakota		
		Tennessee		
		Utah		
		Wyoming		

Table 1.2. Percentage of State Supreme Court Incumbents Defeated, Faced Close Election, or Denied Reappointment, 1980-97

Method	Defeated	Close Races	N
Retention	2.0	2.8	252
Nonpartisan	8.7	17.9	184
Partisan	17.8	34.9	152
		Denied Reappointment	N
Confirmation		1.4	74

Data taken from Hall (2001), Bratton, Spill, and Sill (2012), and Martin et al. (2010). Close races are defined as elections in which the incumbent receives 55 percent of the vote or less.

[43] Reappointment methods are listed for these years because they coincide with the years available in the State Supreme Court Data Project (Brace and Hall 2001). Subsequently, several states have changed their reappointment methods (see Bonneau and Hall 2009).

[44] Justices in New Jersey are appointed by the governor and confirmed by the state senate, and if they are reappointed and reconfirmed after their first term, they earn life tenure. In the timeframe 1995-1998, each member of the New Jersey Supreme Court had earned life tenure.

Table 2.1. State Supreme Court Appointment and Reappointment Methods, 2012

State	Appointment Method	Reappointment Method (if different)
Alabama	Partisan election	
Alaska	Gubernatorial appointment from commission	Retention election
Arizona	Gubernatorial appointment from commission	
Arkansas	Nonpartisan election	
California	Gubernatorial appointment with commission confirmation	Retention election
Colorado	Gubernatorial appointment from commission	Retention election
Connecticut	Gubernatorial nomination from commission, legislative appointment	
Delaware	Gubernatorial nomination from commission, senate consent	
Florida	Gubernatorial appointment from commission	Retention election
Georgia	Nonpartisan election	
Hawaii	Gubernatorial appointment from commission, senate consent	Commission vote
Idaho	Nonpartisan election	
Illinois	Partisan election	Retention election (60% vote needed)
Indiana	Gubernatorial appointment from commission	Retention election
Iowa	Gubernatorial appointment from commission	Retention election
Kansas	Gubernatorial appointment from commission	Retention election
Kentucky	Nonpartisan election	
Louisiana	Partisan election	
Maine	Gubernatorial nomination, senate consent	
Maryland	Gubernatorial appointment from commission, senate consent	Retnention election
Massachusetts	Gubernatorial appointment with approval of governor's council	
Michigan	Partisan primary, nonpartisan election	
Minnesota	Nonpartisan election	
Mississippi	Nonpartisan election	
Missouri	Gubernatorial appointment from commission	Retention election
Montana	Nonpartisan election	Retention election if unopposed
Nebraska	Gubernatorial appointment from commission	Retention election
Nevada	Nonpartisan election	
New Hampshire	Gubernatorial nomination from commission, appointment by executive council	
New Jersey	Gubernatorial appointment, senate consent	Reconfirmed only once, then tenure achieved
New Mexico	Partisan election	Retention election (57% vote needed)
New York	Gubernatorial appointment from commission, senate consent	
North Carolina	Nonpartisan election	
North Dakota	Nonpartisan election	

Table 2.1., cont.

State	Appointment Method	Reappointment Method (if different)
Ohio	Nonpartisan election	
Oklahoma (Civil)	Gubernatorial appointment from commission	Retention election
Oklahoma (Criminal)	Gubernatorial appointment from commission	Retention election
Oregon	Nonpartisan election	
Pennsylvania	Partisan election	Retention election
Rhode Island	Gubernatorial appointment from commission, legislative confirmation	
South Carolina	Legislative election	
South Dakota	Gubernatorial appointment from commission	Retention election
Tennessee	Gubernatorial appointment from commission	Retention election
Texas (Civil)	Partisan election	
Texas (Criminal)	Partisan election	
Utah	Gubernatorial appointment from commission, senate consent	Retention election
Vermont	Gubernatorial appointment from commission, senate consent	Legislative approval
Virginia	Legislative election	
Washington	Nonpartisan election	
West Virginia	Partisan election	
Wisconsin	Nonpartisan election	
Wyoming	Gubernatorial appointment from commission	Retention election

Data from American Judicature Society (2013e).

Table 2.2. State Supreme Court Institutional Features, 2012

State	Court Size	Term	Retirement Age	Jurisdiction	Judicial Recall	Salary Protection
Alabama	9	6	70	Mandatory	No	Yes
Alaska	5	At least 3 years first, 10 years subsequent	70	Mandatory	Yes	Apply all
Arizona	5	At least 2 years first, 10 years subsequent	70	Both	Yes	Yes
Arkansas	7	8		Mandatory	No	Unclear
California	7	12		Discretionary	Yes	Unclear
Colorado	7	At least 2 years first, 10 years subsequent	72	Discretionary	Yes	Yes
Connecticut	7	8	70	Discretionary	No	Unclear
Delaware	5	12		Mandatory	No	Unclear
Florida	7	At least 1 year first, 6 years subsequent	70	Discretionary	No	Unclear
Georgia	7	6		Mandatory	Yes	Yes

Table 2.2., cont.

State	Court Size	Term Length	Retirement Age	Jurisdiction	Judicial Recall	Salary Protection
Hawaii	5	10	70	Mandatory	No	Apply all
Idaho	5	6		Mandatory	No	Yes
Illinois	7	10		Discretionary	No	Yes
Indiana	5	At least 2 years first, 10 years subsequent	75	Discretionary	No	Yes
Iowa	7	At least 1 year first, 8 years subsequent	72	Both	No	Unclear
Kansas	7	1 year first, 6 years subsequent	70	Discretionary	No	Unclear
Kentucky	7	8		Discretionary	No	Yes
Louisiana	7	10	70	Both	Yes	Yes
Maine	7	7		Mandatory	No	Yes
Maryland	7	At least 1 year first, 10 years subsequent	70	Discretionary	No	Unclear
Massachusetts	7	Tenure	70	Both	No	Unclear
Michigan	9	6	70	Discretionary	Yes	Apply all
Minnesota	7	6	70	Both	No	Yes
Mississippi	9	8		Mandatory	No	Yes
Missouri	7	1-3 years first, 12 years subsequent	70	Both	No	Yes
Montana	7	8		Mandatory	Yes	Yes
Nebraska	7	At least 3 years first, 6 years subsequent		Discretionary	No	Unclear
Nevada	7	6		Mandatory	Yes	Yes
New Hampshire	5	Tenure	70	Discretionary	No	Unclear
New Jersey	7	7 years for first, then tenure	70	Both	Yes	Yes
New Mexico	5	8		Mandatory	No	Unclear
New York	7	14	70	Mandatory	No	Yes
North Carolina	7	8	72	Discretionary	No	Yes
North Dakota	5	10		Mandatory	Yes	Yes
Ohio	7	6	70	Discretionary	No	Yes
Oklahoma (Civil)	9	At least 1 year, 6 years subsequent		Mandatory	No	Yes
Oklahoma (Criminal)	5	At least 1 year, 6 years subsequent		Mandatory	No	Yes
Oregon	7	6	75	Both	Yes	Yes
Pennsylvania	7	10	70	Both	No	Apply all
Rhode Island	5	Life Tenure		Mandatory	No	Yes
South Carolina	5	10	72	Mandatory	No	Yes
South Dakota	5	At least 3 years, 8 years subsequent		Mandatory	No	Unclear
Tennessee	5	8		Discretionary	No	Yes
Texas (Civil)	9	6	74	Discretionary	No	Unclear
Texas (Criminal)	9	6	74	Discretionary	No	Unclear

Table 2.2., cont.

State	Court Size	Term Length	Retirement Age	Jurisdiction	Judicial Recall	Salary Protection
Utah	5	At least 3 years first, 10 years subsequent	75	Mandatory	No	Yes
Vermont	5	6	70	Mandatory	No	Unclear
Virginia	7	12	70	Discretionary	No	Yes
Washington	9	6	75	Discretionary	Yes	Unclear
West Virginia	5	12		Discretionary	No	Yes
Wisconsin	7	10	70	Discretionary	Yes	No
Wyoming	5	At least 1 year first, 8 years subsequent		Mandatory	No	Yes

Data from American Judicature Society (2013e) and National Center for State Courts (2009).

Some state constitutions allow judges salaries to be lowered if it is part of a pay cut that applies to all state workers.

Table 2.3. Judicial Election Features, 2012

State	Ballot Type	Geography	General Election	Commit Clause	Public Finance	Voter Guide
Alabama	Singlemember	Statewide	November	No	No	Nonprofit
Alaska	Singlemember	Statewide	November	No	No	Government
Arizona	Singlemember	Statewide	November	No	No	Government
Arkansas	Singlemember	Statewide	November	Yes	No	
California	Singlemember	Statewide	November	No	No	Government (distributes)
Colorado	Singlemember	Statewide	November	No	No	Nonprofit
Florida	Singlemember	Statewide	November	No	No	Nonprofit
Georgia	Singlemember	Statewide	August	Yes	No	Nonprofit
Idaho	Singlemember	Statewide	November	Yes	No	
Illinois	Singlemember	District	November	Yes	No	Nonprofit
Indiana	Singlemember	Statewide	November	No	No	Government
Iowa	Singlemember	Statewide	November	No	No	Government
Kansas	Singlemember	Statewide	November	No	No	Government
Kentucky	Singlemember	District	November	Yes	No	
Louisiana	Singlemember	District	December	Yes	No	
Maryland	Singlemember	District	November	No	No	Nonprofit
Michigan	Multimember	Statewide	November	No	No	Government
Minnesota	Singlemember	Statewide	November	No	No	Nonprofit
Mississippi	Singlemember	District	November	Yes	No	
Missouri	Singlemember	Statewide	November	No	No	Government
Montana	Singlemember	Statewide	November	No	No	
Nebraska	Singlemember	District	November	No	No	Nonprofit
Nevada	Singlemember	Statewide	November	No	No	

Table 2.3., cont.

State	Ballot Type	Geography	General Election	Commit Clause	Public Finance	Voter Guide
New Mexico	Singlemember	Statewide	November	Yes	Yes	Nonprofit
North Carolina	Singlemember	Statewide	November	No	Yes	Government (distributes)
North Dakota	Singlemember	Statewide	November	Yes	No	
Ohio	Singlemember	Statewide	November	Yes	No	Government
Oklahoma	Singlemember	District	November	No	No	
Oregon	Singlemember	Statewide	November	No	No	Nonprofit
Pennsylvania	Multimember	Statewide	November	No	No	Nonprofit
South Dakota	Singlemember	District	November	No	No	
Tennessee	Singlemember	Statewide	November	No	No	Government
Texas	Singlemember	Statewide	November	No	No	Nonprofit
Utah	Singlemember	Statewide	November	No	No	Government (distributes)
Washington	Singlemember	Statewide	November	Yes	No	Government
West Virginia	Multimember	Statewide	November	Yes	No	
Wisconsin	Singlemember	Statewide	April	Yes	Yes	Nonprofit
Wyoming	Singlemember	Statewide	November	No	No	Nonprofit

Data from American Judicature Society (2013e).

Table 2.4. Variable Descriptions

Dependent Variable	**Description**
Incumbent Defeat	Number of incumbent state supreme court justices defeated who were seeking reappointment between 1980-1997
Independent Variable	
Nonpartisan Elections	1 for states with nonpartisan elections to reappoint judges, 0 otherwise
Retention Elections	1 for states with retention elections to reappoint judges, 0 otherwise
Elite Reconfirmation	1 for states with gubernatorial and or legislative reappointment of judges, 0 otherwise
Life Tenure	1 for states with life tenure for judges, 0 otherwise
Mandatory Retirement Age	1 for states with mandatory retirement age, 0 otherwise
Judicial Recall	1 for states with judicial recall procedures, 0 otherwise
Salary Protection	1 for constitutional protection against the lowering of judicial salaries, 0 otherwise
Party Competition Mean	6.21 to 41.90 average folded Berry elite ideology score[45]
Party Competition Variance	2.38 to 12.43, standard deviation of average folded Berry elite ideology score

[45] The theoretical mean of the Berry (Berry et al. 1998) Elite Ideology score is 50 with a range of 0-100. In order to transform this index from one measuring ideology into interparty-competition levels, I calculated |Berry score - 1| /2 over each state-year, which is a technique similar to Hanssen (2004). I then took an average of the folded scores.

Table 2.5. Negative Binomial Regression of Factors Influencing State Supreme Court Incumbent Defeat, 1980-97

Variable	**Coef.**	**S.E.**	***p***
Nonpartisan Elections	-0.297	(0.374)	0.427
Retention Elections	-1.197	(0.393)	0.002
Elite Reconfirmation	-3.294	(1.050)	0.002
Life Tenure	-16.807	(1352.659)	0.990
Mandatory Retirement Age	-0.045	(0.301)	0.881
Judicial Recall	-0.697	(0.368)	0.058
Salary Protection	-0.106	(0.339)	0.755
Party Competition Mean	0.020	(0.023)	0.385
Party Competition Variation	0.064	(0.066)	0.332
Constant	-2.459	(0.925)	0.008

N = 50, χ^2 = 30.19, Pseudo-R^2 = 0.204
As terms of office vary state-to-state, the number of judge-elections is included as an exposure term. Data taken from Bratton, Spill, and Sill (2012) and Lindquist (2010).

Figure 2.1. Structural Relationship of Institutional and Decisional Independence

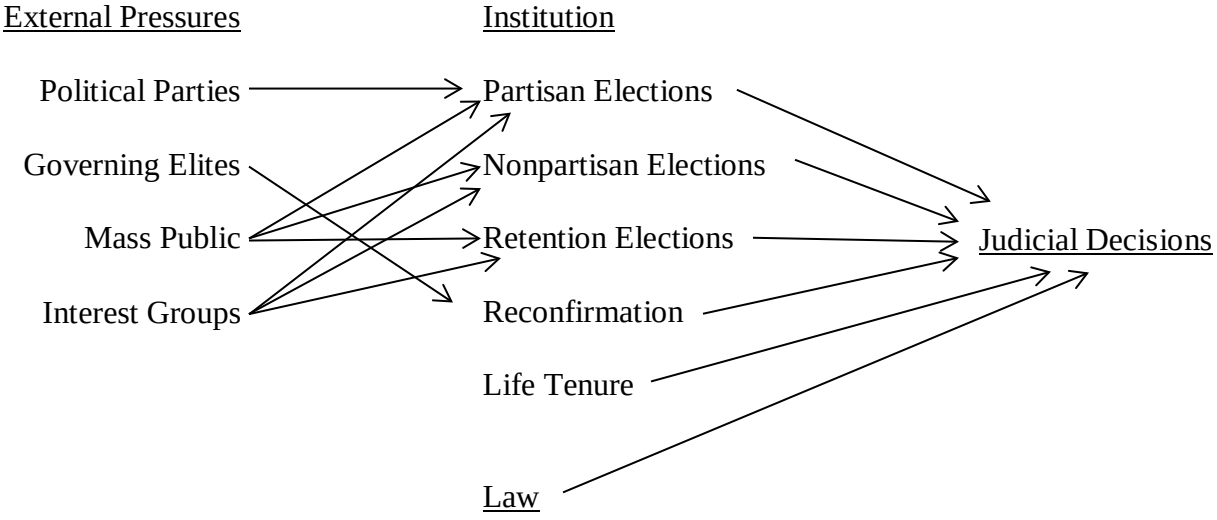

Figure 2.2. Example of Institutional Independence Creating Decisional Independence in Partisan Election State

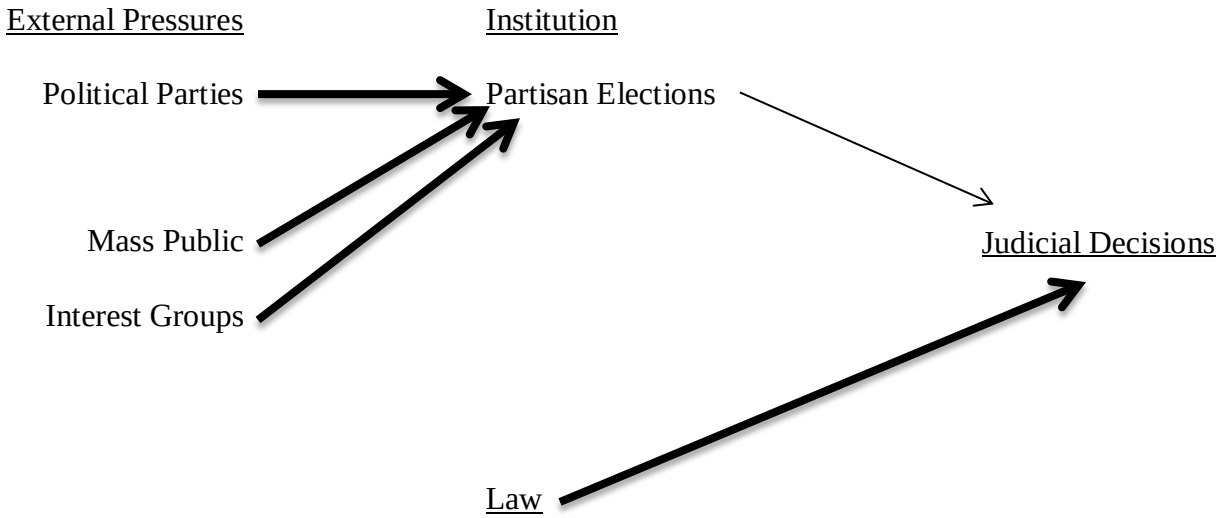

Table 3.1. Variable Descriptions

Dependent Variable	**Description**
Dissent	1 for joining or writing a dissenting opinion, 0 otherwise (SSCDP)
Independent Variables	
Ideological Distance	0-84, the absolute value difference in PAJID scores between the justice in question and the majority opinion writer
Legal Complexity	0-3.40, natural log of number of legal issues raised in a case (SSCDP)
Amici Present	1 if any briefs *amicus curiae* were submitted, 0 otherwise (SSCDP)
Constitutional Claim	1 if case involves a claim under the state constitution, 0 otherwise (SSCDP)
Mandatory Jurisdiction	0 if state has discretionary jurisdiction in civil cases, 1 if has mandatory jurisdiction, .5 if combination (Lindquist 2010)
Law Clerks	1-6, number of law clerks assigned to state supreme court justices (Lindquist 2010)
Court Size	5-9, number of justices on each state supreme court (SSCDP)
En Banc	1 for cases head *en banc*, 0 otherwise (SSCDP)
C.J. Writing Majority	1 for cases in which the chief justice has written the majority opinion (SSCDP)
C.J. Makes Assignments	1 for states in which the chief justice assigns the majority opinion (SSCDP)
Median Tenure	0-17, median tenure of justices on court-year in question (Lindquist 2010)
Chief Justice	1 if the justice in question is the chief justice, 0 otherwise (SSCDP)
Freshman	1 if justice in question is a freshman, 0 otherwise (Bratton et al. 2012)
Outlier Justice Polarization	0.006-48.75, |Justice Ideology – 50| for liberal justices in conservative states and vice versa, SSCDP
State Ideological Polarization	.25-50, |State Ideology – 50|, Berry et al. (1998)

Table 3.2. Multilevel Logit Model of Dissensus on State Supreme Courts in Tort Cases Using Partisan Differences and Ideological Distance, 1995-1998

Fixed Effects	**Coef.**	**S.E.**	***p***
Ideological Distance	0.001	0.002	0.536
Legal Complexity	0.002	0.064	0.971
Amici Present	0.285	0.082	0.001
Constitutional Claim	-0.285	0.234	0.223
Mandatory Jurisdiction	-0.384	0.071	0.000
Law Clerks	0.212	0.031	0.000
Court Size	0.128	0.026	0.000
En Banc	0.583	0.089	0.000
C.J. Writing Majority	0.079	0.109	0.465
C.J. Makes Assignments	-0.165	0.078	0.034
C.J. Writing * Makes	0.128	0.177	0.468
Chief Justice	-0.176	0.087	0.043
Freshman	-0.107	0.082	0.189
Median Tenure	0.052	0.009	0.000
Constant	-4.585	0.320	0.000
Random Effects	**S.D.**	**S.E.**	
Ideological Distance	0.002	0.002	
Constant	0.521	0.182	
Wald χ^2	269.22	$p <$	0.001
N	14,270		

Figure 3.1. Levels of Dissensus Across Ideological Distance, By Reappointment Method

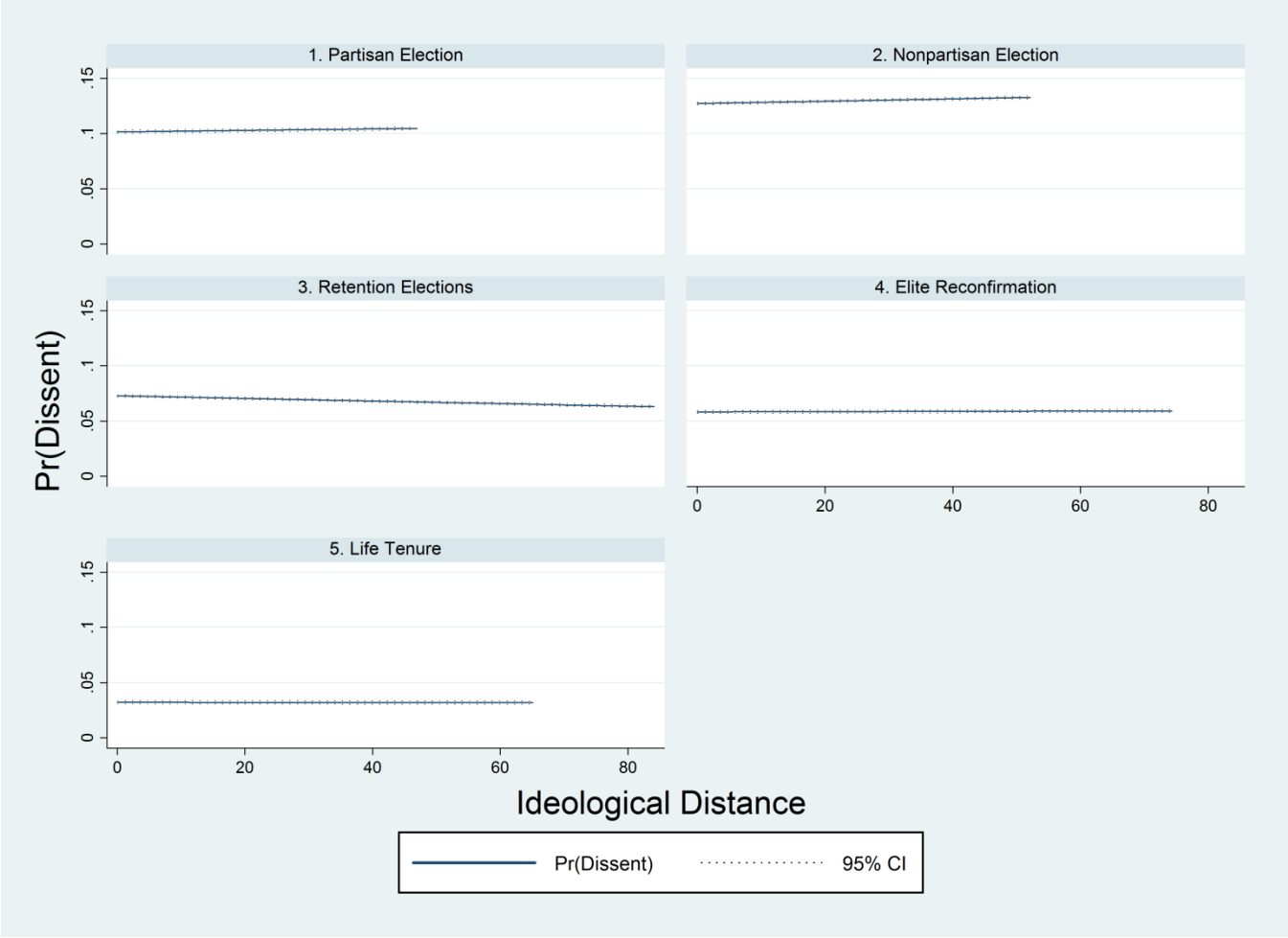

Table 3.3. Multilevel Logit Model of Dissensus on State Supreme Courts, Including Hybrid States

Fixed Effects	**Coef.**	**S.E.**	***p***
Ideological Distance	0.001	0.002	0.604
Legal Complexity	-0.001	0.064	0.994
Amici Present	0.305	0.082	0.000
Constitutional Claim	-0.301	0.235	0.200
Mandatory Jurisdiction	-0.382	0.071	0.000
Law Clerks	0.208	0.036	0.000
Court Size	0.127	0.026	0.000
En Banc	0.572	0.089	0.000
C.J. Writing Majority	0.064	0.109	0.555
C.J. Makes Assignments	-0.173	0.079	0.028
C.J. Writing * Makes	0.129	0.178	0.468
Chief Justice	-0.181	0.087	0.036
Freshman	-0.114	0.082	0.163
Median Tenure	0.052	0.009	0.000
Constant	-4.521	0.295	0.000
Random Effects	**S.D.**	**S.E.**	
Ideological Distance	0.002	0.002	
Constant	0.473	0.157	
Wald χ^2	255.13	$p <$	0.001
N	14,270		

Figure 3.2. Levels of Dissensus from Across Ideological Distance, Including Hybid States

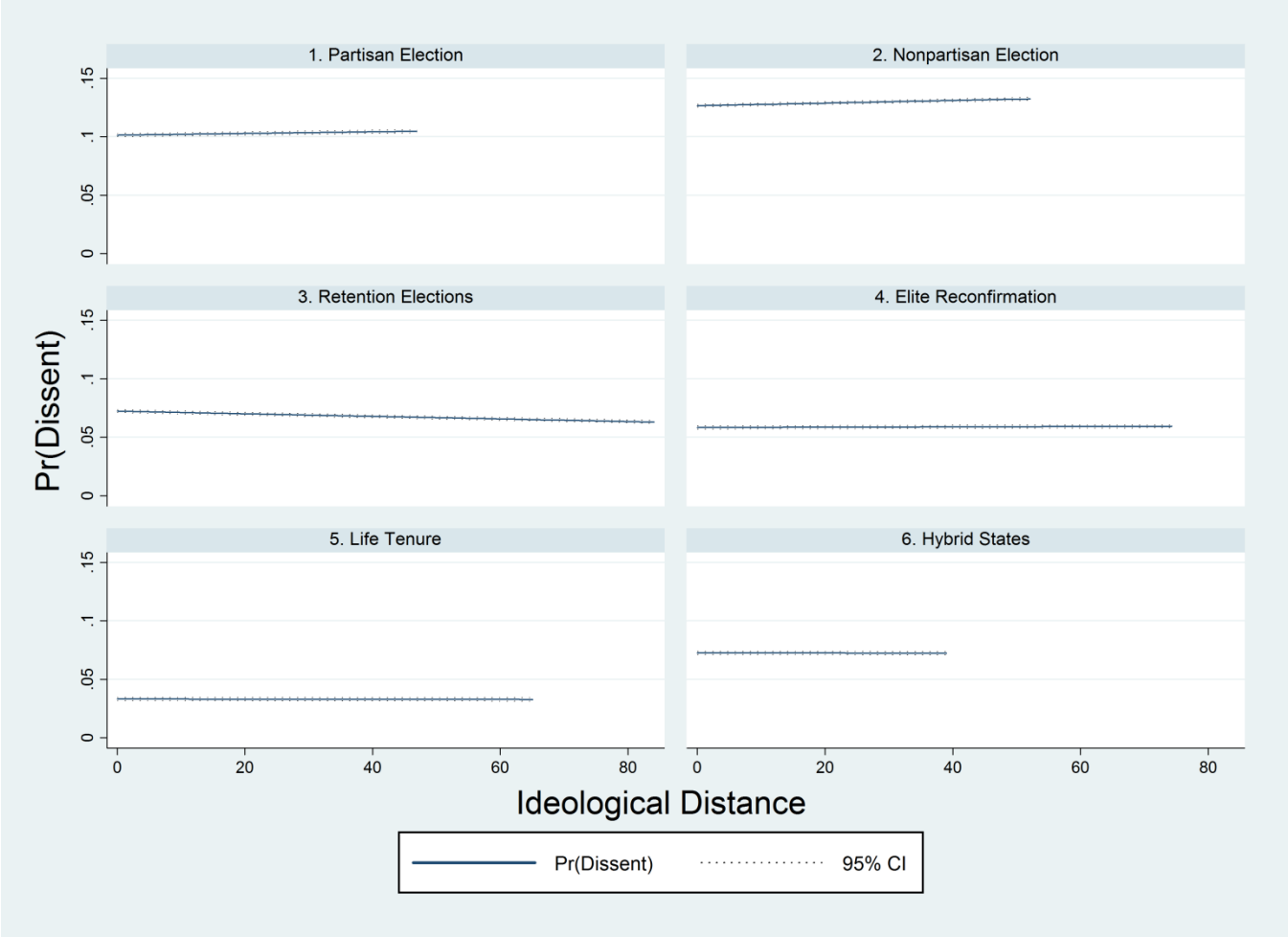

Table 3.4. Dissensus Among Outlier Justices on Partisan and Nonpartisan Election State Supreme Courts

Fixed Effects	**Coef.**	**S.E.**	***p***
Outlier Justice Polarization	0.019	0.030	0.522
State Ideological Polarization	-0.020	0.021	0.335
Outlier Justice Pol. * State Ideo. Pol.	0.001	0.001	0.459
Constant	-2.716	0.599	0.000
Random Effects	**S.D.**	**S.E.**	
Judge	1.005	0.166	
Wald χ^2	4.48		
N	2,046		

Table 4.1. Variable Descriptions

Dependent Variable	**Description**
Liberal Vote	1 for a liberal vote, 0 otherwise
Independent Variables	
Justice Liberalism	0.01 to 1 PAJID score for justice liberalism (Brace, Langer, and Hall 2000)
State Liberalism	-36.48 to 42.55 score for annual change in elite ideology (increase in liberalism) in a state with a one-year lag (Berry et al. 1998)
State Involved	1 if state or local government involved in case, 0 otherwise (SSCDP)
Constitutional Claim	1 if case involves a claim under the state constitution, 0 otherwise (SSCDP)

Table 4.2. Multilevel Logit Models of State Supreme Court Responsiveness to Changes in the Political Environment in Select Tort Cases, 1995-1998

	Model 1			**Model 2**		
Fixed Effects	Coef.	S.E.	*p*	Coef.	S.E.	*p*
State Liberalism	0.003	0.001	0.000	0.003	0.001	0.001
Justice Liberalism	0.203	0.103	0.049	0.211	0.103	0.041
State Involved	-0.364	0.152	0.017	-0.359	0.152	0.018
Constitutional Claim	0.002	0.003	0.478	0.002	0.003	0.508
Constant	-0.207	0.054	0.000	-0.190	0.053	0.000
Random Effects	**S.D.**	**S.E.**		**S.D.**	**S.E.**	
State Liberalism	0.006	0.003		0.006	0.003	
Constant	0.087	0.033		0.089	0.034	
Groups	5			6		
Wald χ^2	22.77			21.90		
N	13,860			13,860		

Figure 4.1. Influence of Changes in the Political Environment on Judicial Decisionmaking in Tort Cases, 1995-1998 (Model 1)

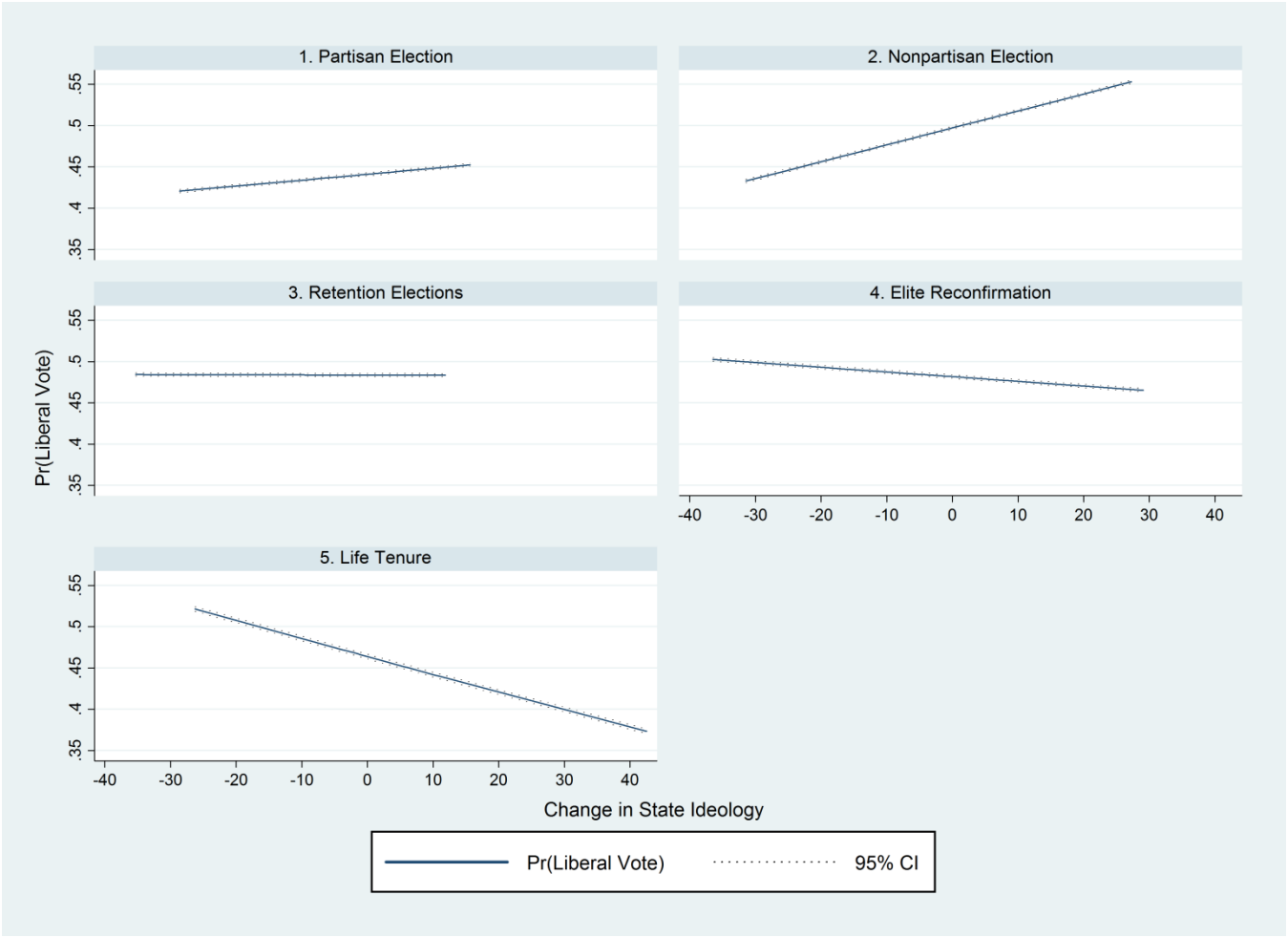

Figure 4.2 Influence of Changes in the Political Environment on Judicial Decisionmaking in Tort Cases, Including Hybrid States

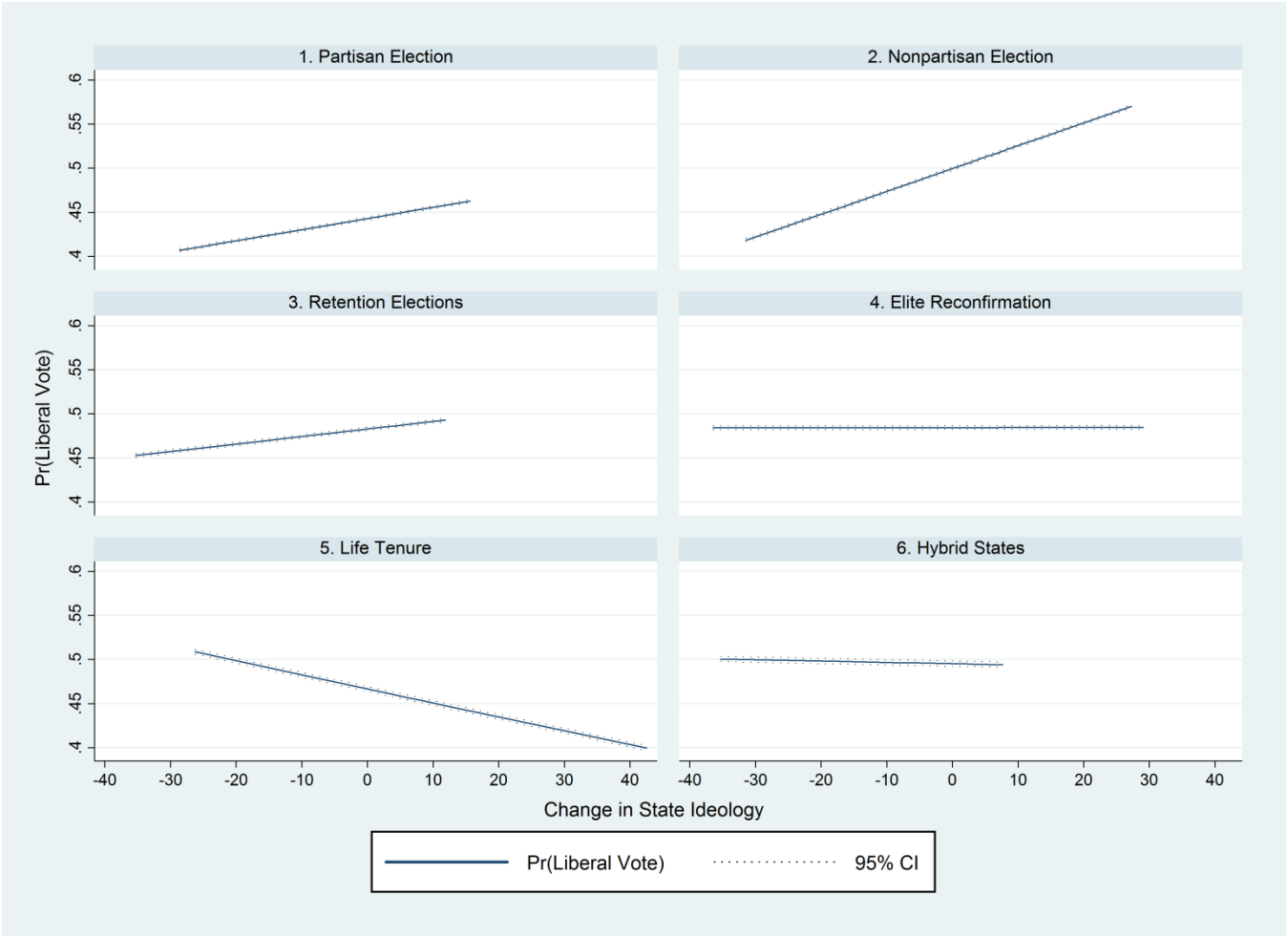

Table 5.1. Variable Descriptions

Dependent Variable	**Description**
Liberal Vote	1 for a liberal vote, 0 otherwise (SSCDP)
Independent Variables	
Business Contributions	3.2189 to 13.741, natural log of total contributions from relevant industry in last election (NIMSP)
Lawyer Contributions	6.9078 to 13.654, natural log of total contributions from lawyers in last election (NIMSP)
Justice Liberalism	0.01 to 1, PAJID score for justice liberalism (Brace, Langer, and Hall 2000)
State Involved	1 if state or local government involved in case, 0 otherwise (SSCDP)
Constitutional Claim	1 if case involves a claim under the state constitution, 0 otherwise (SSCDP)
Instrumental Variables	
Torts Docket	5 to 97, number of tort cases in each state in 1996 (SSCDP)
Campaign Finance Stringency	3 to 17, Witko (2005) index of state campaign finance law stringency
Quality Candidate	1 if justice had run for office prior to most recent election, 0 otherwise (JEDI)
Freshman	1 if justice is a freshman, 0 otherwise (SSCDP)

Table 5.2. Probit and Instrumental Variables Probit Models of Selected Tort Cases in Partisan Election States, 1995-1998

	Probit			**Instrumental Variables**		
Variable	Coef.	S.E.	p	Coef.	S.E.	p
Business Contributions	-0.122	0.037	0.001	-0.149	0.075	0.048
Lawyer Contributions	-0.086	0.044	0.051	-0.192	0.061	0.002
Justice Liberalism	0.018	0.007	0.012	0.025	0.012	0.034
Government Involved	1.019	0.341	0.003	0.950	0.341	0.005
Constitutional Claim	1.352	0.629	0.032	1.297	0.627	0.038
Constant	1.532	0.582	0.008	2.873	0.817	0.000
(Probit) Pseudo-R^2 = 0.063, (IV) Wald Exogeneity Test χ^2 = 15.10 ($p < 0.001$)						
(Both) n = 674, (IV) Amemiya-Lee-Newey minimum χ^2 = 5.954 ($p = 0.051$)						

Table 5.3. Probit and Instrumental Variables Probit Models of Selected Tort Cases in Nonpartisan Election States, 1995-1998

	Probit			Instrumental Variables		
Variable	Coef.	S.E.	p	Coef.	S.E.	p
Business Contributions	-0.150	0.031	0.000	-0.209	0.036	0.000
Lawyer Contributions	0.224	0.054	0.000	0.352	0.074	0.000
Justice Liberalism	-0.006	0.004	0.140	-0.011	0.005	0.016
Government Involved	-1.067	0.565	0.059	-1.025	0.537	0.056
Constitutional Claim	(omitted)					
Constant	-1.174	0.559	0.036	-1.992	0.712	0.005
(Probit) Pseudo-R^2 = 0.056, (IV) Wald Exogeneity Test χ^2 = 9.51 ($p < 0.01$)						
(Both) n = 469, (IV) Amemiya-Lee-Newey minimum χ^2 = 0.954 ($p = 0.621$)						

Table 5.4. Change in Probability of a Liberal Vote (Marginal Effect) of $10,000 in Campaign Contributions, By Electoral System

Contribution Type	**Electoral System**	**M.E.**
Business Contributions	Partisan Elections	-0.021
Lawyer Contributions	Partisan Elections	-0.003
Business Contributions	Nonpartisan Elections	0.014
Lawyer Contributions	Nonpartisan Elections	-0.157

Table 6.1. American Constitutional Development at the State and Federal Level

State	Number of Constitutions	Convention Procedure	Periodic Convention Call	Most Recent Effective Date	Number of Amendments	Amendments /Yr
Alabama	6	Yes	No	1901	855	7.70
Alaska	1	Yes	Yes	1959	29	0.55
Arizona	1	Yes	No	1912	147	1.47
Arkansas	5	No	No	1874	98	0.71
California	2	Yes	No	1879	525	3.95
Colorado	1	Yes	No	1876	155	1.14
Connecticut	4	Yes	Yes	1965	30	0.64
Delaware	4	Yes	No	1897	142	1.23
Florida	6	Yes	No	1969	118	2.74
Georgia	10	Yes	No	1983	71	2.45
Hawaii	1	Yes	Yes	1959	110	2.08
Idaho	1	Yes	No	1890	123	1.01
Illinois	4	Yes	Yes	1971	12	0.29
Indiana	2	No	No	1851	47	0.29
Iowa	2	Yes	Yes	1857	54	0.35
Kansas	1	Yes	No	1861	95	0.63
Kentucky	4	Yes	No	1891	41	0.34
Louisiana	11	Yes	No	1974	168	4.42
Maine	1	Yes	No	1820	172	0.90
Maryland	4	Yes	Yes	1867	225	1.55
Massachusetts	1	No	No	1780	120	0.52
Michigan	4	Yes	Yes	1964	30	0.63
Minnesota	1	Yes	No	1858	120	0.78
Mississippi	4	No	Yes	1890	125	1.02
Missouri	4	Yes	Yes	1945	114	1.70
Montana	2	Yes	No	1973	31	0.79
Nebraska	2	Yes	No	1875	228	1.66
Nevada	1	Yes	No	1864	136	0.92
New Hampshire	2	Yes	Yes	1784	145	0.64
New Jersey	3	No	No	1948	45	0.70
New Mexico	1	Yes	No	1912	160	1.60
New York	4	Yes	Yes	1895	220	1.88
North Carolina	3	Yes	No	1971	30	0.73
North Dakota	1	No	No	1889	150	1.22
Ohio	2	Yes	Yes	1851	172	1.07
Oklahoma	1	Yes	Yes	1907	187	1.78

Table 6.1., cont.

State	Number of Constitutions	Convention Procedure	Periodic Convention Call	Most Recent Effective Date	Number of Amendments	Amendments /Yr
Oregon	1	Yes	No	1859	249	1.63
Pennsylvania	5	No	No	1968	30	0.68
Rhode Island	3	Yes	Yes	1986	10	0.38
South Carolina	7	Yes	No	1896	497	4.28
South Dakota	1	Yes	No	1889	215	1.75
Tennessee	3	Yes	No	1870	39	0.27
Texas	5	No	No	1876	474	3.49
Utah	1	Yes	No	1896	115	0.99
Vermont	3	No	No	1793	54	0.25
Virginia	6	Yes	No	1971	46	1.12
Washington	1	Yes	No	1889	105	0.85
West Virginia	2	Yes	No	1872	71	0.51
Wisconsin	1	Yes	No	1848	145	0.88
Wyoming	1	Yes	No	1980	98	3.06
United States	2	No	No	1788	27	0.12
Average (all states)	2.94	41/50 = Yes	14/50 = Yes		147.56	1.44
Average (non-South)	2.08	33/39 = Yes	13/39 = Yes		124.54	1.11

Data from Council on State Governments (2012)

Appendix A

Table A.1. Coding Scheme for Plaintiffs in State Supreme Court Data Project

Agent, fiduciary, trustee, or executor
Attorney (includes bar applicant or law student)
Buyer/purchaser/consumer
Child or children
Disability benefit claimant
Disabled person
Employee or job applicant - not able to identify race or gender
Employer/supervisor
Heir or beneficiary
Husband or ex-husband
Landlord or owner
Licensee or permit holder
Parent or parents
Parolee
Patient
Person accused, indicted, or suspected of crime
Person convicted of crime
Person involuntarily committed
Physician or health care professional
Political candidate
Pretrial detainee
Prisoner
Protestor, demonstrator, picketer
Public official – elected
Public official - non elected
Public official - don’t know if elected or not elected
Seller/creditor
Stockholder
Student or student applicant
Taxpayer
Teacher
Tenant or lessee
Unemployed person or claimant
Voter
Welfare recipient or welfare applicant
Wife or ex-wife

Appendix B

Table B.1. Coding Scheme for National Institute on Money in State Politics Data

Lawyers	**Premises Liability**
Business	Sector
Attorneys & law firms	Energy & Natural Resources
Medical Malpractice	Industry
Industry	Business Associations
Business Associations	Construction
Conservative Policy Organization	Crop Production & Basic Processing
Health Professionals	Crop Production & Basic Processing & Livestock
Hospitals & Nursing Homes	Dairy
Insurance	Farm Bureaus
Pharmaceuticals & Health Products	Food Processing & Sales
	Forestry & Forest Products
Automobile	Freight & delivery services
Industry	Livestock
Automotive	Lodging & Tourism
Business Associations	Movie Theatres
Conservative Policy Organization	Poultry & Eggs
Business	Recreation & Live Entertainment
Motor homes & camper trailers	Retail Sales
Motorcycles, snowmobiles & other motorized vehicles	Telephone Utilities
	Tobacco
Toxic Products	
Industry	Business
Aluminum Mining & Processing	Veterinarians
Business Associations	
Conservative Policy Organizations	**Insurance**
Electronics Manufacturing & Services	Industry
Nuclear Energy	Insurance
Oil & Gas	
Smelting & Refining	
Waste Management	
Business	
Agricultural chemicals (fertilizers & pesticides)	
Chemical & Related Manufacturing	
Computer manufacture & services	

Table B.1., cont.
Products Liability
Industry
Agriculture
Beer, Wine & Liquor
Business Associations
Chemical & Related Manufacturing
Conservative Policy Organization
Electronics Manufacturing & Services
Food & Beverage
Miscellaneous Manufacturing & Distributing
Pharmaceuticals & Health Products
Tobacco companies & tobacco product sales
Business
Aircraft manufacturers
Auto manufacturers
Computer manufacture & services
Manufacturers of railroad equipment
Steel manufacturing
Truck & trailer manufacturers
Wine & distilled spirits manufacturing

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