Retention Politics in State Supreme Courts: The Power of Elites and the Limitations of Voter Oversight of the Judicial Branch

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Preface and Acknowledgements

This project formally began in late 2013, though – like most intellectual endeavors – its roots are much older. It relies on an accumulation of ideas, experiences, and interests developed over more than a decade. The number of people and institutions who have contributed some amount to that development along the way is far greater than I could ever itemize and mention. Thus, I offer a blanket acknowledgement that whatever I have accomplished here is indebted to the broader community of people that I have met and interacted with over the years as I have moved through the education system.

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Abstract and *Very* Short Introduction

The central question of this entire research project is "What are the political effects of making high-court appellate justices serve time-limited, but renewable, terms?" I argue that the primary effect is creating a strong incentive for justices to behave strategically to make sure they keep their positions at the end of their current term. The nature and strength of this incentive is determined by who states give the retention choice to. The common options – governors, legislators, and voters – have variable traits that lead to different expectations. Governors and legislators have informational advantages over voters because of their extensive resources and expertise, while legislators and voters face collective action problems in using their retention powers that governors – acting unilaterally – do not. The stronger the retainer is in these attributes, the stronger the incentive will be for the justice to behave strategically.

In practice, this strategic behavior manifests itself in justices making rulings that are favorable to the retainer's preferences. This is a departure from a purely independent model of judging – such as the attitudinal model – in which judge's decisions are based on some internal calculus of legal interpretations, policy preferences, or consequentialist cost-benefit analysis. Through this change in behavior, retainers have influence over the policies created in state supreme courts. Justices move policy in the governor's direction (relative to the counterfactual in which all justices have life terms).

I test this by analyzing thousands of criminal appeals from high courts in more than thirty states over the period of 1995-2010. Among governors, I find considerable evidence that needing to be retained leads justices to vote in line with the governor's preferences. Among legislatures, I find similar influence, but find it limited by partisan barriers: majority parties police justices of the rival party. For voters, however, I find no such influence. In fact, I find

evidence of a null or negligible effect for voters' preferences. These results largely match my theoretical expectations and lead to the conclusion that political elites' informational advantages and reduced collective action barriers make them far more influential when they get to decide judicial retention. This gives them extra leverage over policy and substantially reduces judicial independence. Voters, despite all of the many fears articulated about them deciding judicial offices, most often lack sufficient information to actually influence judicial behavior. These results should point critical focus away from elections and towards reappointments as threats to independent and consistent justice.

Chapter 1

Theory: The Importance of Information and Unconstrained Retention Power

A key feature of state judiciaries – especially in contrast with the federal judiciary – is variation in the means of judicial selection and retention. Unlike the dominant lifetime appointment system of the federal judiciary, state judges are picked in a variety of ways, given terms of varying durations, and retained at the end of those terms in an even greater variety of methods. Some state judges are appointed to their long terms of office by governors, but some are appointed by state legislatures. Many judges are elected and re-elected after relatively short terms. Even among those that are elected, some face a rival on the ballot while voters in other states are simply given the choices "YES" and "NO" on whether the justice will continue on to an additional term. Sometimes, justices are listed as members of parties, but many times they are listed non-partisanly. Some states use primaries, and some of those use partisan primaries and others do not. Within each state, these elements vary at different levels of the judiciary. A trial court judge might be elected while a supreme court justice might be appointed. In short, the variation in institutional design for how a lawyer becomes a judge is extensive. Yet, a key feature for the vast majority of these judges is that there is some accountability – their stay on the bench is not permanent, and most will require the consent of a separate actor to continue in their office past an initial term.

This need for retention forms the obvious basis for influence on the judiciary and the weakening of judicial independence. An extensive literature has formed specifically around how judicial elections may influence judicial behavior as justices maneuver to remain reelectable among their constituents, avoiding unpopular salient decisions close to their reelection days. Empirical evaluations of other retention systems (elite reappointment systems) have been far more limited. Also limited is a theoretical explanation for individual judicial responses to retention pressures. The existing framework – the Separation of Powers model – typically treats

courts as unified actors, interacting with other branches of government, and modifying their behavior to avoid unwanted retaliation from other centers of policy-making power. The end goal in these models is policy: courts setting policy in their favored position. These models are helpful for understanding certain types of court behavior, but they are limited in explaining the behavior of individual judges in both policy and non-policy terms, responding to specific pressures from retention actors.

In this chapter, I advance a theory of judicial retention pressures that treats judges as individuals, but also accounts for the varying attributes of those charged with retaining. The theory focuses on several key attributes of the judicial system. First, I recognize that judges have both policy (case outcomes) and non-policy (retaining office) preferences. For some justices, these non-policy preferences may be so great that they overcome the desire to set policy in a case or set of cases. Second, I recognize that retainers vary in their capacities in several key ways. Some retainers – like governors – have strong institutional monitoring resources. Others, like voters in a retention election, have very limited information and rely on their memory and media coverage. Some retainers, like legislatures, face collective action problems to exercise their powers of selective retention, while a governor can wield that power unilaterally. These varying attributes lead to different predictions about the type and amount of influence a retainer will have.

To fully articulate a theory of judicial independence in state supreme courts, I construct a formal model of judicial decisions and the reappointment/reelection process. First, I offer a prosaic explanation of the context of the model and its underlying logic and suggestions. Then, I offer the model itself and its solutions and comparative statics. The end of this chapter provides a list of hypotheses that will inform empirical testing in subsequent chapters.

Assumptions about Justices

The vast majority of the individuals I analyze in this project are state supreme court justices, some of the most esteemed and prestigious legal actors in the United States. It is important to say more about who these people are as a group and what their motivations are. Opinions across legal practice, legal academia, and judicial politics scholars vary on what actually motivates legal decisions. Practicing lawyers and legal academics prioritize legal doctrine while political scientists for more than half a century have overwhelmingly looked away from doctrine to things such as values and policy preferences (Schubert 1962; Danelski 1966; Gillman 2001; Segal and Spaeth 2002, but see Bailey and Maltzman 2011).

In this project, I assume that justices are rational actors with preferences over case outcomes in addition to preferences for their own personal advancement and success. Their choices are rationally based on their preferences, but strategic in implementation. This means that much of the hard work in theorizing about their behavior comes in the stage of divining preferences for a set of actors who leave a thin and potentially misleading record of their actions. This record is ironically quite voluminous despite being so thin. Justices are among the few actors in government who typically must offer a written explanation for their actions. Despite the thousands of pages of decisions that any justice accumulates over a career, much of the literature on judicial politics implies a great deal of artifice in these writings. The citations to precedents and applications of "three-part tests" become blurry under rigorous empirical analysis (Spriggs and Hansford 2001). It is difficult to take decisions at face value when many stronger empirical patterns are consistently observed – patterns that imply strategic action (Epstein and Knight 2000; Epstein, Knight, and Martin 1996; Hettinger, Lindquist, and Martinek 2004; Zorn and Bowie 2010; Black and Owens 2016). the significance of policy outcomes over legal

doctrines, the role of public opinion and other judicial audiences (Baum 2009; Clark 2011) and the overall predictability of votes despite a long process of briefing and arguments before the decision is made.

Fortunately, in this project, I make no theoretical claim about endogenous justice preferences. This enables me to make fewer assumptions than are typically necessary. I make no assumptions about the internal genesis of these preferences. Instead, I assume that opinions do not reflect an absolutely accurate explanation of judicial decision-making. All justices have an ideal outcome in any given case that is determined only by internal factors. I assume that they are happier with results that are closer to this ideal and happiest when the result is exactly this ideal. The focus of this project will be how external factors – political institutions – influence the decisions of state supreme court justices, pulling them away from their internal ideal and towards the ideals of rival political actors. Other work has shown that external actors can impact justice decisions (Clark 2011; Canes-Wrone, Clark, and Kelly 2014). For example, hierarchical institutions, such as court appeal structures, may lead justices to alter their decisions in individual cases strategically so that the "long run" outcomes better match their internal preferences (e.g. Smith and Tiller 2002, but see Hettinger et al. 2004). There is also evidence that non-judicial political institutions, and the public opinion that empowers them, have some limited power over courts (Clark 2011). Finally, in the state-specific context, there is competing evidence that popular opinion in the form of competitive and retention elections may introduce further deviation from preferences (Bonneau and Hall 2009; Canes-Wrone et al. 2009, 2012, 2014; Hall and Bonneau 2006).

State courts offer the additional complication of time-limited, repeatable terms. Very few state court justices have life terms. This makes them resemble typical elected politicians,

with their "electoral connection" (Mayhew 2004). Therefore, I assume that, like virtually all other political actors, justices have a preference for retaining their job. Being a state supreme court justice is frequently the capstone of a career on the bench; maintaining that position until retirement is often a significant goal. State supreme court justiceships are high-prestige positions that put the holder in one of the most significant positions in state government. They work at the top of a separate and equal branch of government and enjoy a level of respect and deference not granted to any other non-military public officials. Justices also earn a reasonably high salary for state employees,[1] have friendly work schedules, and have the power to decide state policy on a variety of issues, including on consequential and widely salient topics. These are all perks of keeping the position and could form the basis of an alternative set of non-policy preferences: the desire to keep the job, prestige, and policy-making authority.

The preceding reasons for interest in keeping the office are many of the same reasons political scientists believe members of Congress desire reelection. But just as a member of Congress must balance her own preferences with those of her constituents to guarantee reelection every two years, there are rational reasons to expect that a justice's decisions will not be based solely on which outcome is closest to the justice's ideal. Instead, the justice's personal preferences should be balanced with the preferences of the actors who decide whether to retain the justice for an additional term. As discussed in the introduction, the specific identity of this

[1] In 2016, the average state supreme court justice in the United States earned $170,226. This is in comparison to $137,415 for governors and $30,123 for state legislators (data from the National Center for State Courts, the National Conference of State Legislatures, and the Council of State Governments). Despite this, every state supreme court justice could instantly earn multiples of their salary in the private sector. I assume that those who opt for judicial service over the private sector are those who prioritize other attributes (such as prestige and policy-making power) over pure monetary compensation, given a certain minimum level of compensation, which the state judiciary provides.

retainer and the mechanisms through which retention occurs varies considerably from state to state and level to level within each state judiciary. However, the similarity with elected politicians points to a different framework of analysis that may be theoretically productive: the principal-agent relationship.

Conceiving of Justices as Agents

Despite the implications of the word "independence" in "judicial independence," justices of state supreme courts may be thought of as agents within a typical principal-agent framework. Their state has a set of appellate cases which it must adjudicate every year. Either the governor, legislature, or the electorate (principals) then chooses justices (agents) to exercise that judicial power. The principals do not follow along with every pleading, brief, or oral argument that follows. They lack this level of information, a situation typical of the principal-agent dilemma (Miller 2005). They also do not know specifically the preferences and intentions of the justices they appoint to fulfill these tasks. Yet, they must allow the agents to decide the cases. Though we do not typically think of justices as acting "on behalf of" people or even demonstrating the elements of representation, their behavior can easily be nested into this principal-agent logic. Other scholarship has conceived of justices as agents, typically with higher justices within the judicial hierarchy as principals (Songer and Segal 1994, Clark 2009), however the same logic can apply to more powerful actors within the state government. Besley (2004) provides a good overview and benchmark for conceiving of office-holders as agents with simultaneous concerns for policy and career benefits as well as the implications this has for effectively administering issues that impact society.

The end of a judicial term brings one of the most important events in the delegation relationship to the forefront. Then the retainer must decide whether to keep the justice or select a

new justice to perform these judicial tasks. Sometimes, rules or individual retirement choices render this a moot choice, but in the large majority of the time, the justice can receive – and wants – another term. And the retainer must choose whether to grant that. These simple facts form the scaffolding of concerns over judicial independence and selection in the states. Justices and retainers each have preferences over policy, but the justice is an agent who is subject to the retainer's willingness to let them stay in office. These facts imply that the key place to look for electoral influence on justices is in retention – keeping the job. And they imply that retainers have the potential to impact judicial behavior.

How Differences in Principals Impact Freedom of Agents

One key factor differentiating the types of principals (governors, legislatures, and electorates) is their capacity to observe actions taken by justices. If decisions are rendered in a vacuum and no other entity can see them, then there is no reason for a justice to care about any other actor's preferences. The justice would simply vote its own preference every time. While their decisions certainly do not exist in a vacuum, they are also not observed equally by every type of retainer. Observation enables retainers to effectively use their power. If they know nothing about their justices, they cannot effectively punish by stripping office. If monitoring enhances power, differences in the principal's capacity to monitor will explain some differences in the influence they exert on judicial decision-making.

Governors and legislators actors have professional staffs that perform due diligence on nominations and confirmations. They have the capacity to be aware of all decisions made by all justices in their state. State and local bar associations issue reports on nominee qualifications while public interest organizations may submit reports drawing attention to particular decisions or patterns of judicial "temperament" that might be undesirable. While these reports are often

publicly available, it is far more likely that political officials and staff will be aware of them than the voting public. Rather than being posted to a website, this information is delivered to the governor's office and attention is drawn to it by the responsible group.

In stark contrast, the public is notoriously ill informed about the behavior of courts. Even the specifics of very important decisions at the United States Supreme Court become known to only a small percentage of the electorate. Gibson and Caldeira (2009) provide a good overview of the arguments for and against levels of political knowledge about the Supreme Court. Despite their findings of higher general knowledge than previously thought, specific information and detail is still lacking. It is safe to assume that knowledge of state courts is even lower. Systematic knowledge of decisions (significant and otherwise) by state courts is not present among the broad voting population. To the extent that they are informed, they likely know about a small number of decisions, perhaps only one. Their knowledge of those decisions is almost certainly driven by media or partisan summaries and not the justices' own words. A local newspaper columnist's description of the case will be more influential over public opinion than the actual text of the decision. Therefore, citizens are far more likely to know about decisions that touch already divisive issues such as abortion, gay rights, other "cultural" debates, or criminal sentencing decisions (such as choosing whether to stay an execution). These are the types of cases most likely to receive the substantial media and partisan coverage necessary to communicate the rulings to the public. Citizens are far less likely to know much about the court's rulings on complicated business laws, taxation policy, or the power of state regulatory agencies.

These facts imply that observation of a justice's behavior is driven by two primary factors: the difficulty of observing and the level of case salience. First, the difficulty of

observing: for regular voters, they must invest their time and energy into reading complex legal documents. For an untrained person with a "day job," this is an arduous task. Governors, by comparison, have this task performed for them by trained subordinates, whose work can then be condensed and summarized such that the governor can act on all of the relevant information without great expense of his or her own time and energy. Second, the choice to observe is driven by case salience. As the probability that the court does something a person deems significant decreases, the incentive for that person to find out more about them before delegating those choices also decreases. There is no reason to invest effort in picking the "right" person if the decisions they will make are unimportant. It is only as the salience of the cases increases that it is worth the extra cost to find out about the candidate for the job so that a better choice can be made. It is also true that the salience of an already decided case increases the probability of the reelector becoming aware of it, however this is best thought of in terms of lowering the cost of observation. Salient cases receive more coverage and thus ask less of the electorate to become aware of them. Consider the metaphor of a newspaper. If a case decision is on the front page, "above the fold," in large print, it takes much less work for a voter to find out about it as opposed to a decision mentioned in a bullet of recent events in a small article on page C7.

When combined, these two factors imply when justices should have more and less autonomy. When the ease of observation is higher or the salience of the actions to be taken is higher, the reelector will be far more likely to watch the justice's behavior closely. This is especially true for citizens, where there is a meaningful cost to becoming informed. Hoekstra (2000) showed that the salience of a case and the ease of acquiring information had direct and significant effects on citizen awareness of the case. This, in turn, means that the justice will have to exhibit behavior pleasing to the reelector more often to keep the job. Ultimately, in the case of

state supreme courts, this will lower judicial independence. And because observation costs are lower for governors, and because we know that governors have a wider portfolio of salient issues, then it is logical to expect that governors have more of an infringing power over justices than do their electorates.

Factors that May Insulate Justices

The ultimate punishment threatened to justices (though very infrequently realized) is that they will not be retained. This Damoclesian possibility is the one weapon the retainer holds to induce justice loyalty on the bench. Therefore, anything that limits the potency of that weapon would also increase judicial independence. Such factors may include varying values of justice positions, political costs of inter- and intra-branch conflicts over retention, public constraints on other branches interfering with the judiciary, the difficulty of collective action, and a justice's uncertainty over the identity and preferences of the retainers who will make the decision, often years in the future.

First, justices may value the job to varying degrees. I assume that, all else equal, justices want to keep their job. They accepted it in the first place, after all. Yet, it is also true that justices give up substantial private-sector earnings by taking the job, which typically pays a fraction of what they would stand to make as a partner in a major law firm. And, after a long term (some are as long as fourteen years), a justice may have obtained all they want out of the job in terms of prestige. Similarly, as justices age, some may wish to retire rather than continue such a demanding job. Members of the Supreme Court of the United States, such as Justices Sandra Day O'Connor and David Souter, have retired "early" despite having a life term. The less a justice desires the job, the less influence retainers have.

Second, there are significant potential political costs to be paid by political elites in reappointment states. Governors may come into conflict with the legislature over refusing to reappoint. Because governors typically require confirmation of new nominees, governors may be constrained in their choice about a retention due to anticipated conflict over a replacement. Legislators face potential difficulties as well. Justices of their own party (typically picked by many members of the party still in the legislature) have political connections and backgrounds with member of the party. This means that a majority party faces significant barriers to policing its own justices – it would involve stepping on toes of those connected to that justice within the party. Coming to an agreement about one copartisan relative to another raises factionalism and internal conflict. By comparison, rigorously evaluating justices appointed by the rival party poses no such problems. Thus, the enforcement mechanism is more easily used against rival-party appointees, and legislatures should be more influential in those cases.

A third potential limitation on the effective use of retention power is that it may be fundamentally dangerous and norm-breaking to be seen as "politicizing the judiciary." Governors may be punished by voters for "playing politics" with the court. Alternative, voters may punish the governor for appointing extreme justices who do not share their values on salient issues. Governors may wish to appear to pick justices who are "tough on crime" or who respect abortion rights. Legislators face a similar, but more disaggregated, barrier. Voters may hold them accountable for their judicial choices, but it is often less clear who exactly is responsible, given the number of legislators involved.

Fourth, justices may not know what their retainers want. This seems remarkably simple and unlikely, but one factor brings it into reality: time. Consider a gubernatorially appointed justice with five years remaining in her term. The serving governor is term limited and thus

forced to leave the office in just three years. Thus, who the governor is in two years may be difficult to predict, especially for governors, given that each party retains some plausible chance of winning, but advances considerably different candidates. The present is often some rough indicator of the future – New York does not become Alabama overnight – but there is uncertainty. Given enough uncertainty, it may no longer be in the justice's interest to worry about retention. For voters, this uncertainty comes in numerous ways. On one hand, voters change, and sometimes quickly. Popular support for gay marriage went from 37% to 55% in just six years.[2] A popular "defense of marriage" vote in 2009 could look like a bigoted extremist vote in a 2014 election. In addition to the problem of time, voters are also less coherently ideological and partisan than politicians. Given knowledge of a politician's party, or just a few known positions on prominent issues, and justices can predict with reasonable accuracy their position on a host of other issues. For voters, this is far less certain and consistent. State voters collectively combine positions across party platforms and ideological dogmas, such as majority support for gun rights and gay marriage (for example, Indiana),[3] or for abortion access and the use of the death penalty simultaneously (for example, California).[4]

Finally, and very importantly, collective action poses a huge barrier to effectively using retention powers to influence behavior. Simply, making decisions in larger groups is difficult. Preference aggregation is famously complicated, relying on more and more members to be

[2] These percentages come from work by the Pew Research Center and are available at: http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/

[3] Local polling finds that a majority of Indianans favor homosexual marriage rights (http://www.nwitimes.com/news/local/govt-and-politics/polls-find-majority-of-hoosiers-support-lgbt-civil-rights/article_48f854f5-533b-5f17-82f7-6f5227587461.html), but

[4] A large majority of Californians support abortion access according to local polling (http://www.mercurynews.com/2013/09/26/poll-results-californias-opinions-on-fracking-marijuana-abortion-and-more/), and in 2016 a majority of the state's voters chose to keep the death penalty in voting on Proposition 62.

informed and make coherent choices is difficult, and the costs of persuasion efforts by interested groups rise with the number of participants. Thus, a governor, who makes the choice unilaterally, is most suited to using the retention power as a tool of influence. Legislatures, with small majority groups typically less than 50 or 100 members, face larger barriers – especially when managing their own internal factions. Finally, voters face by far the greatest obstacles. For example, in the 2016 Texas Supreme Court elections, each of the three races featured more than 8.7 million votes and the winning candidate (all three incumbents) got at least 4.75 million votes. Organizing and communicating at the level of millions of voters to make a single collective choice is incredibly difficult and dramatically limits the ability of voters to cleanly use reelection control to police justice behavior.

Summary of Expectations

The preceding arguments lead to a set of expectations about when and how justices will be influenced by their retention desires. These expectations vary by the nature of the retainer. First, I expect that governors will have strong ideological influence over judicial behavior through their retention mechanism. This is because governors are strong, ideologically coherent and predictable political actors with significant state-provided monitoring resources and legal expertise. They are informed enough to make good use of their retention power and wield that power unilaterally, unencumbered by significant collective action problems. Their influence will be ideological – more conservative governors will induce more conservative rulings than more liberal governors – because the governors themselves value ideological consistency and their ideological preferences are predictable by justices. I expect that governors will be the most influential retainers and that justices needing to be reappointed by governors are the least independent justices in the United States.

Second, I expect that legislatures will have similar influence to that of governors, but it will be more narrowly defined and subject to greater encumbrance by collective action problems. Legislatures have significant resources and expertise to be well informed, and, like governors, receive substantial outside help (from, for example, interest groups) to stay aware of the judiciary's behavior. The main additional limitation imposed on legislators relative to governors is that they are unable to wield their power unilaterally. No single legislator can decide to reappoint or not. They must come together to make a collective choice among tens of members. This can limit their effective use of the reappointment power. Specifically, I argue that it will limit their ability to police the quality of their own party's justices. Because of the factional politics inherent in threatening to replace a copartisan, legislative majorities will often struggle to build a sufficient coalition of agreement to get rid of a replace a justice of their own party. Because of this, those justices are often insulated from legislative influence. By comparison, it is easy for majority parties to come together to interrogate a member of the opposition. In these cases, their collective action problems mitigated, legislatures should be significantly influential.

Finally, electorates pose the smallest threat to judicial independence. They are generally uninformed about judicial behavior, extremely less so than legislatures or governors. Lacking information, they cannot effectively wield their reelection discretion. Because there may be little relationship between behavior and outcome, justices have no incentive to be deferential or responsive. The electorates' difficulties are compounded by their immense size – typically millions of voters. There are extensive costs in informing, persuading, and mobilizing the number necessary to break the public's default stance towards retention in judicial elections. Thus, I expect that elections writ large are a poor means of influencing judicial behavior and elected judges are the most independent.

Elections vary in their rules. Some feature no opposition, some feature opposition but no partisan labels, and others still feature competitive partisan contests. While I largely focus on the difference between elite and electoral systems more broadly construed, I believe there are implications from my theory for what to expect from different types of elections. Conventional views are that partisan elections provide partisan cues that overwhelm information about actual performance (Canes-Wrone, Clark, and Kelly 2014), while the low-information elections such as retention and nonpartisan elections make justices more vulnerable to public displeasure at their actual decisions. My theory presents a different argument: partisanship typically brings with it higher levels of resources, campaign infrastructure, spending, and likelihood of competition. Thus, while individual races in other election types may occasionally become overwhelmed by a justice's vote in a specific case, partisan elections do far more to neutralize the disadvantages that electorates face in becoming informed and reaching a collective decision. Partisan apparati pose a more credible threat of delivering information to the voters that the justice is out of step with the population. A liberal democratic justice in a "red state" knows that his opposition in an upcoming election will be able to campaign about unpopularly liberal votes the justice cast. And they will be attached to strong partisan identities activated with appearances with other prominent politicians and copartisans. In short, these informational advantages in the partisan system should make electorates in partisan reelection states more, not less, influential. Thus, I expect that if any election system shows significant influence on justices, it would be a partisan election.

A second aspect of voter influence is exactly what it would look like. With governors and legislators, the most logical starting point is for ideological influence. Conservative politicians want conservative outcomes. But for voters, this is less clear. They are not as

ideologically consistent, coherent, or puritanical. Huber and Gordon (2004), for example, argue and support that criminal trial judges do not respond to voters multidirectionally (more lenient in liberal situations and more punitive in conservative ones), which we might think of as ideologically. Instead, they respond "unidirectionally," becoming more punitive across the board. This is generally seen as a strategy to avoid potentially damaging cases of perceived leniency, while largely ignoring the possibility of giving voters different levels of response based on their different preferences. Based on my own arguments, this would make sense. There is little chance that voters would be sufficiently aware of this nuanced variation to reward it. And the unidirectional response mitigates the potential of any one case becoming an albatross for its perceived immoral leniency. Thus, I expect that judges will not respond to voters with ideological variation in both directions. If electorates have any effect, it will be in inducing justices to be systematically more punitive to limit the possibility of any one pro-defendant vote becoming a media sensation and overwhelming their candidacy. This prediction is largely confined to the criminal sphere which is the focus of my empirical analyses. It would not apply to a similar study using torts cases, for example.

Finally, it is worth noting a crucial, if obvious, prediction. Justices are only responsive when they have to be. For justices who cannot be retained due to retirement, I expect no such influence. Justices rationally owe nothing to their appointers. They are prospective actors. In the absence of credible threats of a loss of position, they will decide in the way they like most. Thus, when a justice cannot be retained, they will be act independently. The place to look for retention influence is in the behavior of justices eligible for a new term. And the empirical way to measure this effect is in the difference in behavior between votes cast when eligible for a new

term and votes cast when not – both within and across justices. Table 1.1 provides a summary of theoretical expectations.

Table 1.1. Summary of Expectations.

Retainer	Monitoring Capacity	Enforcement Mechanism Power	Level of Influence	Type of Influence
Governor	High	High	High	Ideological
Legislature	High	Moderate (High, but limited for copartisans)	Moderate	Ideological
Voters	Low	Low	Low	Punitive
- Retention	Low	Low	Low	Punitive
- Nonpartisan	Low	Low	Low	Punitive
- Partisan	Moderate	Moderate	Moderate	Ideological

Chapter 2

Formal Statement of the Theory

The Baseline Model: A Principal-Agent Theory of Judicial Reappointment

The most basic form of the model is a two-player, two-period ($t \in \{1,2\}$) game between a Retainer, *R*, and a judge, *J*. *R* is any actor empowered to retain *J*, who is *R*'s judicial agent. Reappointing governors, reappointing legislators, and reelecting voters are all examples of *R*. *J* is empowered to decide the winner of cases (picking one of two parties in a dichotomous choice). The core sequence of events features *J* deciding a case, a random chance that *R* observes *J*'s decision, *R*'s choice whether to Reappoint *J*, and then either *J* or a randomly drawn replacement judge deciding a second case. I assume that the cases in each time period are on sufficiently similar topics that both actors' preferences and intensity of interest in the second-round case are the same as their preferences and interest in the first-round case.

R derives utility from the outcomes of legal cases and also prefers to minimize political costs. To that effect, *R*'s utility function is defined as: $u_R = \Omega_R - cI(R = 0)$, where Ω_R is a function which awards one unit of utility for each case decided in *R*'s preferred direction and a negative unit of utility for each case decided against *R*'s preferred direction.[5] The second term in *R*'s utility function represents the political cost of Not Retaining and entering the appointment process with a new and untested candidate. I assume that c is a positive number,[6] and $I(R = 0)$ is an indicator function which takes the value "1" when *R* Retains *J* and "0" otherwise.

[5] $\Omega_R = \sum_{t=1}^{t=2}[I(A_t = 1)] - [I(A_t = 0)]$, where $I(A_t = x)$ is an indicator function for whether *J* chooses Agree at time *t*.

[6] An argument can be made that costs could be negative. A retainer may believe that it will incur costs by retaining, such as an angry voter reaction. I assume this will not be the case based on empirical regularities. Voters, the vast majority of retainers, face no differential cost between voting one way or another on a ballot. And judicial appointments and retention are not regular (or even semi-regular) election elements at the state level. In conversations with executive-branch staffers in states with gubernatorial reappointment and legislators on judicial-retention committees in states with legislative reappointment, all indicated that voters pay little attention to state judicial appointments and that it had never been a meaningful campaign issue. Based on these conversations, it would be reasonable to conclude that a state legislator's statement on an

J has two (sometimes competing) interests. First, it wants to decide cases in line with its preferences. I assume that the actual ability to decide the case is important to *J* rather than simply the outcome itself. This is because each case has a written decision articulating the rationale and logic that defends against future attacks on the ruling. Being a part of deciding and specifying the ruling is essential to controlling its precedential impact. To this effect, I assume that *J* gets no utility from the same decision taken by any other *J* – notably, if *J* is replaced.[7] *J*'s utility function is $u_J = \theta I(R = 1) + \Omega_J$. θ is a variable that represents the rents gained by retaining office for *t = 2*, which we might think of as compensation, prestige, and other perks of the office. $I(R = 1)$ is an indicator function which takes the value "1" when *R* Retains and "0" otherwise. Ω_J is a function that grants one unit of utility for each case decided in *R's* preferred direction and a negative unit of utility otherwise.[8] By fixing the value of each case outcome at one unit of utility, θ becomes a measure of the value of the office relative to the value of deciding a case. On topics that justices care a lot about, θ may be quite small, while it may be extremely large when a justice does not care about a particular case topic.

Finally, there are two types of *J*: those that Agree (J_A) with *R*'s preference over case outcomes, and those that Disagree (J_D). This represents a substantial simplification from a continuous ideological line. However, given that cases typically have two potential outcomes (one of two parties wins), a simplified view of preferences makes the model much more accessible without reducing analytic power. "Agree" and "Disagree" are simplifications even over a system of dichotomous preferences held by both *R* and *J*. Consider a model in which both

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ongoing appointment controversy at the federal level is more important for voters' responses than the legislator's actual votes on state appointees.

[7] This assumption is relaxed in a subsequent version of the model. It yields only slight changes to the solution equilibria and no changes to the comparative statics.

[8] $\Omega_J = \sum_{t=1}^{t=2} I(A_t = 1, J_A = 1) + I(A_t = 0, J_A = 0) - (I(A_t = 1, J_A = 0) + I(A_t = 0, J_A = 1))$.

R and *J* have preferences either for pro-defendant rulings or pro-prosecutorial rulings in criminal cases. Abstractly, I might label these preferences Pro-Defendant and Pro-Prosecutor or even just "A" and "B." Choosing to only allow *J*'s type to vary, and have that vary between Agree and Disagree effectively collapses the two-by-two typeset into its two useful analytical conditions: when the types align and when they do not. Both Agree and Disagree types of *J* have the same utility function. *J* knows its type, but *R* only knows the distribution of types, which is determined by *a*, the probability of *J* being of the Agree type, which is assumed to be distributed (0,1). This type dichotomy assumes that all players know the actual preferences of *R* in any given case.

The full sequence of the game is as follows:

1. Nature determines the type of *J*, based on the probability of being Agree-type, *a*.
2. *J* decides the first case at $t = 1$, choosing whether to vote in agreement with *R*'s preferences ($v_1 \in \{0,1\}$).
3. *R* observes *J*'s vote with probability *o* (distributed (0,1)).
4. *R* chooses whether to Retain *J* ($r \in \{0,1\}$).
5. If *R* chooses Retain, then the game continues, *J* chooses whether to vote in agreement with *R*'s preferences for the second case at $t = 2$ ($v_2 \in \{0,1\}$), and then the game ends and payouts are distributed.
6. If *R* chooses Not Retain, then *R* pays the political cost, *c*, and is awarded a new judge by random draw from the distribution specified by *a*. The new judge then chooses whether to vote in agreement with *R*'s preferences for the second case at $t = 2$ ($v_2 \in \{0,1\}$), and then the game ends and payouts are distributed.

Results

The solutions to the game are Perfect Bayesian Equilibria in which each player's choice at each stage in the game is a best choice at that stage, given reasonable beliefs it has about the type of the other player. To be considered reasonable, those beliefs must be consistent with Bayesian updating principles. These solutions indicate several useful theoretical predictions to inform empirical testing. The primary result is that justices should be more responsive to retainer preferences when it needs to be reappointed compared to when it does not. Retiring justices should be immune from retention pressures. The model also indicates which attributes of a retainer enable it to have greater influence. A retainer's influence is proportional to the likelihood of them observing judicial behavior. Additionally, larger retaining bodies (legislatures and, especially, electorates) should be less influential through retention politics. Retainers should also be more influential the more heterodox the justice's preferences. These results support clear predictions: elites with greater monitoring capacity should be more influential, and governors with their unilateral action capacity should be more influential.

In the final round (the second case), *J* will have a strictly dominant strategy to choose its preferred outcome. *J*'s type and *R*'s beliefs about *J*'s type are irrelevant for this fact. Thus *J*s of the type Agree will choose Agree and *J*s of the type Disagree will choose Disagree. This common feature of finite games is caused by the lack of consequences for defection in the final time period due to the game's conclusion. The end of the game mirrors the retirement of judges in observed reality. In the present game, Ω_J will increase by one with a strategy matching *R's* type and decrease by one otherwise. Note that this is also true of replacement justices. Thus, the expected value of a random draw from the replacement justices to *R* at $t = 2$ can be written as:

$$(1)\ a + (-1)(1 - a) = 2a - 1$$

(with the additional political cost, -*c*, attached, as described in its utility function). This knowledge of what will come in the final round of the game motivates all preceding choices. Therefore, R's core strategy in retention is to increase the proportion of Agree type justices in the second round of play. It wishes to avoid adversely selecting Disagree-type justices into the second-round pool. In realistic terms, retainers want to use their control over the composition of the judiciary to make it more likely to rule in ways the retainer likes.

Next, consider *R*'s decision to reappoint. *J* should reappoint if and only if the expected value of reappointing in $t = 2$ is greater than or equal to the expected value of a replacement justice in $t = 2$, defined above as $(2a - 1) - c$. Because of the dominant strategies for *J* in the final round, I can compare the value of a Retained *J* to the expected value of a replacement *J*. It is important to note that *R*'s decision comes after Nature determines whether *R* observes *J*'s behavior at $t = 1$. Thus, *R* has strategies for cases in which it observes and cases in which it does not. *R*'s strategy if it does not observe *J*'s behavior at $t = 1$ is fairly straightforward: *R* will always choose Retain. This is because *J* and its potential replacement come from the same distribution, *a*. Absent new information about *J*, *R*'s expectations for *J* and a replacement are identical. However, because Not Retaining comes with an additional cost, *c*, then Retaining is always preferable when *R* does not observe *J*'s $t = 1$ behavior.[9]

When *R* does observe *J*'s first-round behavior, the logic is slightly more complicated. It is useful to consider *R*'s choice if it knows *J*'s type with certainty. The utilities for Retain (left) and Not Retain (right) if *R* knows that *J* is of the type Agree are:

$$(2)\ \Omega_{A,A} \geq \Omega_A + (2a - 1) - c;\ \Omega_A = 1;\ \Omega_{A,A} = 2$$

[9] Specifically: $\Omega_X + (2a - 1) \geq \Omega_X + (2a - 1) - c$.

(3) $1 \geq a - \frac{c}{2}$; This is always true

Thus, it is always preferable for *R* to Retain Agree-type *J*s. For the type Disagree:

(4) $\Omega_{D,D} \geq \Omega_D + (2a - 1) - c; \Omega_D = -1; \Omega_{D,D} = -2$

(5) $c \geq 2a$

R will choose Not Reappoint when costs are lower and the probability of getting an agreeable replacement is higher. This set of inequalities shows that if *R* was absolutely certain of *J*'s type, it would always accept an agreeable *J* and accept a disagreeable *J* only when $c \geq 2a$. Despite its primary desire to keep disagreeable judges off the bench, a Retainer will even keep a known disagreeable judge if the costs of Not Retaining are sufficiently high or the likelihood of getting an agreeable replacement are too low. It might simply not be worth it to go through a difficult political fight for a fresh appointee.

Knowing how a Retainer would treat a Judge whose types it knows, the question becomes the Retainer's belief about the Judge's type. A suitable starting belief is that Judge is an Agree type with probability *a*, Nature's distribution, which *R* knows. However, by the point of Retainer's choice, it will have already observed a vote and will need to update that belief accordingly. The result is that *R* will, in equilibrium, reappoint if *J* plays Agree and Not Reappoint if *J* plays Not Agree. The logic underlying this is simple: even if *R* knew that *J*s of either type would play Agree at $t = 1$, it would still prefer to Retain because its expectations of keeping and replacing are equal, but replacing comes with additional costs (*c*). Thus, no amount of pooling between types could induce *R* to reject when it observes Agree at $t = 1$. This is supported by the following Bayes' Rule calculation for the probability that a Justice is an Agree type, given that the justice played Agree in the first case:

$$(6)\ \Pr(Ag|A) = \frac{\Pr(A|Ag)*\Pr(Ag)}{(\Pr(A|Ag)*\Pr(\text{Ag}))+(\Pr(\text{A}|\text{D})*\Pr(\text{D}))} = \frac{a}{a+\Pr(A|D)(1-a)}$$

Therefore, no matter what value *a* takes, if *R* observes an Agree vote in the first round, there is only an $\frac{a}{a+\Pr(A|D)(1-a)}$ probability that *J* is an Agree type. Given this, *R*'s choice to Retain versus Not Retain is expressed in the following inequality:

$$(7)\ \Omega_{A,A}\left(\frac{a}{a+\Pr(A|D)(1-a)}\right) + \Omega_{A,D}\left(1-\frac{a}{a+\Pr(A|D)(1-a)}\right) \geq \Omega_A + (2a-1) - c;$$

$\Omega_A = 1$ (one pos. choice), $\Omega_{A,A} = 2$ (two pos.), and $\Omega_{A,D} = 0$ (one pos., one neg.)

$$(8)\ \frac{2a}{a+\Pr(A|D)(1-a)} \geq 2a - c;\ \text{this is always true.}$$

Variation in values of *a* or $\Pr(A|D)$ do not impact this choice because nothing can be lost relative to Retaining, and even if the expected utilities from decisions equal out (when $\Pr(A|D) = 1$), the positive cost term, *c*, always makes Retaining preferable. This process has shown that if *R* updates its belief about *R's* type in accordance with Bayes' Theorem, it should always Reappoint if it observes an Agree vote. Thus, based on the preceding calculations, *R* would Not Retain when it sees Disagree, so long as $c \leq 2a$.

This clarifies choices at $t = 1$ for *J*. A *J* of the type Disagree will know that to choose Disagree in the first round is also choosing the end of its tenure as a judge if rejection costs are sufficiently low *and if the case is observed*. The Disagree *J*'s choice to play Disagree is thus a function of *c*, *o*, and its own preferences. When $c \geq 2a$, disagree-type *J*s will always choose Disagree, no matter *o*. This is because the political costs of being replaced are so great that J knows *R* will choose Retain. They are insulated from any pressure from their principal.

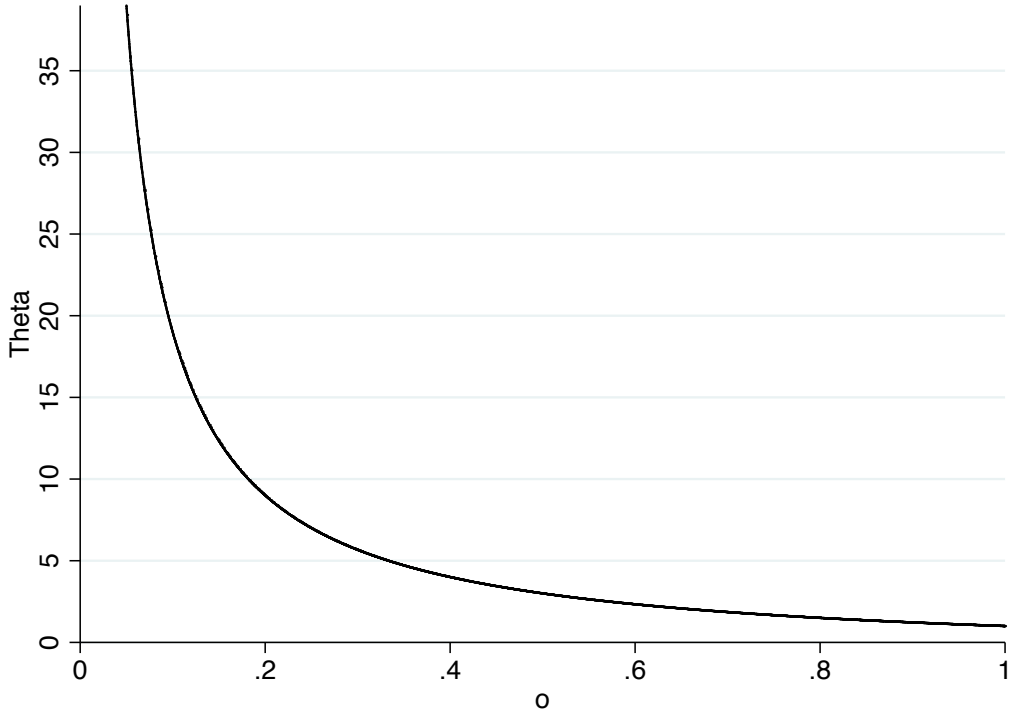
However, when $c \leq 2a$, a disagreeable *J* would have the following calculation of whether to vote Disagree relative to Agree:

(9) $o(\Omega_D) + (1-o)(\Omega_{D,D} + \theta) \geq (o)(\Omega_{A,D} + \theta) + (1-o)(\Omega_{A,D} + \theta)$; $\Omega_D = 1$ (one pos. choice) $\Omega_{D,D} = 2$ (two pos.), and $\Omega_{A,D} = 0$ (one pos., one neg.)

(10) $\frac{2}{(1+\theta)} \geq o$

A Disagree-type *J* will still play Disagree when $\frac{2}{(1+\theta)} \geq o$, and will play Agree otherwise. This is intuitive, since this means that Disagree types will play Agree only when they place sufficient value on keeping their job or when the likelihood of their behavior being observed is sufficiently low. Figure 2.1 indicates the indifference curve for values of *o* and θ for a Disagree-type *J*. A disagreeable *J* will vote Agree in the first round for all values above the curve, but will vote Disagree in the first round for all values below the curve. As θ increases, *J* is less tolerant of the possibility that its choice will be observed. As *o* increases, lower values placed on job retention can still sustain strategic behavior. In the special case of *o* = 1, when first-round behavior will be observed by *R* with certainty, the point of indifference is $\theta = 1$, that is when the value of keeping the job equals the value of deciding a case in the favored direction.

Figure 2.1. Relationship Between Being Monitored and the Value of Job Retention Necessary to Sustain Strategic Behavior



This completes the basic set of pure-strategy equilibria for the minimal model. The equilibrium paths for each type and for specific parameters are as follows:[10]

1. Where $c \geq 2a$, a *J* of either type will vote its preference in $t = 1$; *R* chooses Retain; *J* votes its preference in $t = 2$.
2. Where $c \leq 2a$ and $\frac{2}{(1+\theta)} \leq o$, a *J* of either type plays Agree at $t = 1$, and *R* plays Retain, and J plays its type at $t = 2$.
3. Where $c \leq 2a$ and $\frac{2}{(1+\theta)} \geq o$, a *J* of type Agree votes Agree and a *J* of type Disagree votes Disagree in $t = 1$; *R* chooses Retain if $o = 0$ and, if $o = 1$, *R* chooses Retain if it

[10] Additionally, there are paths that involve indifference, when $c = 2a$ or $\frac{2}{(1+\theta)} = o$. These are less theoretically interesting, but they are part of the complete set of equilibria.

observes Agree and Not Retain if it observes Disagree; Retained J then plays its type at $t = 2$.

If limitations on judicial independence are assumed to mean justices voting strategically against their own preferences, then it is first clear that this does not happen in $t = 2$, when J no longer faces reappointment. However, it can happen in $t = 1$, when J face retention. This is the simplest prediction of the base model: retention power should only limit judicial independence for those awaiting retention, not those who no longer face it. The model also shows when judicial independence might be more limited for those facing retention. Of the three equilibrium paths, number two is the lone example of retention pressures impacting a judicial decision. This is the equilibrium path in which a justice votes differently than its own preference. The model provides four comparative statics that predict when this path is more likely:

1. Judicial independence increases over increasing values of c.[11]
2. Judicial independence decreases over increasing values of a.[12]
3. Judicial independence decreases over increasing values of θ.[13]
4. Judicial independence decreases over increasing values of o.[14]

Next, I review each and apply them to the various retention systems to assess their implications.

First, judicial independence increases as it becomes costlier for retainers to reject retention. This factor most applies to political elites due to the potential for inter- and intra-branch conflict. Governors may trigger difficulties with their state senate – or with voters – if

[11] Based on Equation 5.
[12] Based on Equation 5.
[13] Based on Equation 10.
[14] Based on Equation 10.

they do not retain justices. That said, state legislatures tend to be weaker than governors due to low professionalism and their typical part-time status (Kousser and Phillips 2012). Given the primacy of budget fights and the need to focus disagreement on areas of larger policy gain, state legislatures rarely pose too large of a barrier to governors in appointment politics. Similarly, state legislatures may create internal factional problems if they attempt to police certain types of justices, specifically those from within the majority's own party. Voters face costs in voting, but not costs in rejecting to retention specifically, and thus this factor likely does not apply to them.

Judicial independence decreases as the likelihood of a replacement justice being likeminded with the retainer increases. This is because a seat becomes more valuable the more certain a retainer can be of the quality of the replacement. There is no value in replacing an unreliable justice with a similarly unreliable justice. Governors and legislatures benefit from this relationship. They have the resources to investigate each potential candidate, to interview them, and analyze thousands of pages of documentation about every aspect of the candidate's lives. They can have significant information about their appointees and thus can replace justices with some certainty in the identity of the replacement. There are exceptions, of course – and sometimes conservative appointees turn out to be moderate justices, but there is some connection between who a governor or legislature believes they are appointing and what happens when the justice gets on the bench. For voters, this is a significant weakness. In a retention election context – the most common – voters do not even get to pick the replacement. They rely on the governor to do so. They know relatively little about who the governor will pick. If they are rejecting a governor's pick, their replacement will simply be a new pick by the same governor. This reduces the incentive for voters to engage in retention politics in these types of elections. In nonpartisan and partisan elections, voters get a choice between two or more options, but are

often considerably less informed than governors and legislatures are about those candidates. Partisan elections provide at least a party's stamp of approval, giving some meaningful information about a candidate's values and priorities. This is one reason that partisan elections may be the ripest type of election for retention influence, though elections generally fall short in this criterion.

Third, as a value of a judicial position to a justice grows, their independence declines. Intuitively, the more a justice wants to keep their job, the stronger the sway the retaining actor will have. This factor, while very important, is also the least empirically tractable. It is extremely difficult to measure the subjective value of a position to a justice at any given point in time. There is also little apparent relationship between the type of retention system and the value of the position, except through the reduction of independence.

Fourth, and most importantly, as the likelihood of a judicial choice being observed increases, judicial independence declines. Simply, as monitoring capacity increases, so does a retainer's influence. This works out to the benefit of governors and legislatures, who have the capacity to observe every vote a justice takes in every case over an entire term or even career. Retrospectively, the information is nearly perfect. Comparatively, voters have a much lower chance of learning about any particular case or action. In fact, this probability is likely close to zero for the vast majority of cases. This means that voters face a significantly tougher challenge in becoming sufficiently informed to influence judicial behavior. Here again, there are slight differences between the election types. Retention elections, stripping away a challenger, remove one of the clearest ways of publicizing judicial behavior. These elections rely on interest groups to compete with the candidate's own messaging. This substantially weakens the public's influence. Nonpartisan elections provide a challenger, but with fewer guarantees of that

candidate's ability to marshal resources and professional political skill. Partisan elections provide a greater likelihood of these things and thus, again, put their voters in the strongest position to influence judicial behavior through retention.

In the next sections, I extend the base model to address several potential critiques. These extensions show the robustness of the expectations and yield new comparative statics. Upon the completion of these extension, I summarize the combined comparative statics and their implications. From those, I draw empirical predictions which will be tested in subsequent chapters.

Extensions

Allowing for "Free Riding"

In the base model, I assume that justices get their utility from deciding cases themselves, not from the final decision being implemented (which might now become part of θ). This is a strong assumption, and in this section I relax it by assuming that *R's* utility comes from the final policy and not from the expressive act of deciding cases in their preferred direction. For this model, all parameters and utility functions of the base model are repeated exactly, except that now Ω_J will register utility (positive or negative) for *J* in round two, even if *J* is replaced.

It is important to start by recognizing the parts of the model that are not changed by relaxing this assumption. Intuitively, that includes an Agree-type *J*. Since they will always vote Agree in the first round and be reappointed, they have a strictly dominant strategy to make the decisions themselves and gain the extra utility from prestige rents (no matter the size of θ or a). This leaves only a Disagree-type *J* for which free riding might exist. In such cases, the choice is between *J* voting its type at $t = 1$ and losing its job or voting against its type to keep its job, however now with the ability to benefit from policy decided by the replacement judge. That

choice is described by the following inequality in which voting sincerely is on the left and voting strategically against immediate interests is on the right:

$$(11) \quad (o)(\Omega_D + (1-2a)) + (1-o)(\Omega_{D,D} + \theta) \geq (o)(\Omega_{\square,D} + \theta) + (1-o)(\Omega_{A,D} + \theta);$$

$\Omega_D = 1$ (one pos. choice), $\Omega_{D,D} = 2$ (two pos.), and $\Omega_{A,D} = 0$ (one pos., one neg.)

$$(12) \quad a \leq \frac{1}{o} - \theta$$

A Disagree-type *J* will be more likely to vote Disagree at $t = 1$ and lose its job when the probability of a replacement Disagree type is sufficiently high or the utility derived from the job sufficiently low. Figures 2.2 and 2.3 show the indifference curves for values of a, o, and θ in this revised model. The space above each line is the area of values in which a Disagree-type J will vote strategically against its immediate interest, at the specified value of θ. The area under the curve is the set of values for which a disagreeable *J* will vote sincerely.

Figure 2.2. The Value of Job Retention Necessary to Sustain Strategic Behavior as Retainer's Monitoring Capacity and Replacement Agreeableness Change

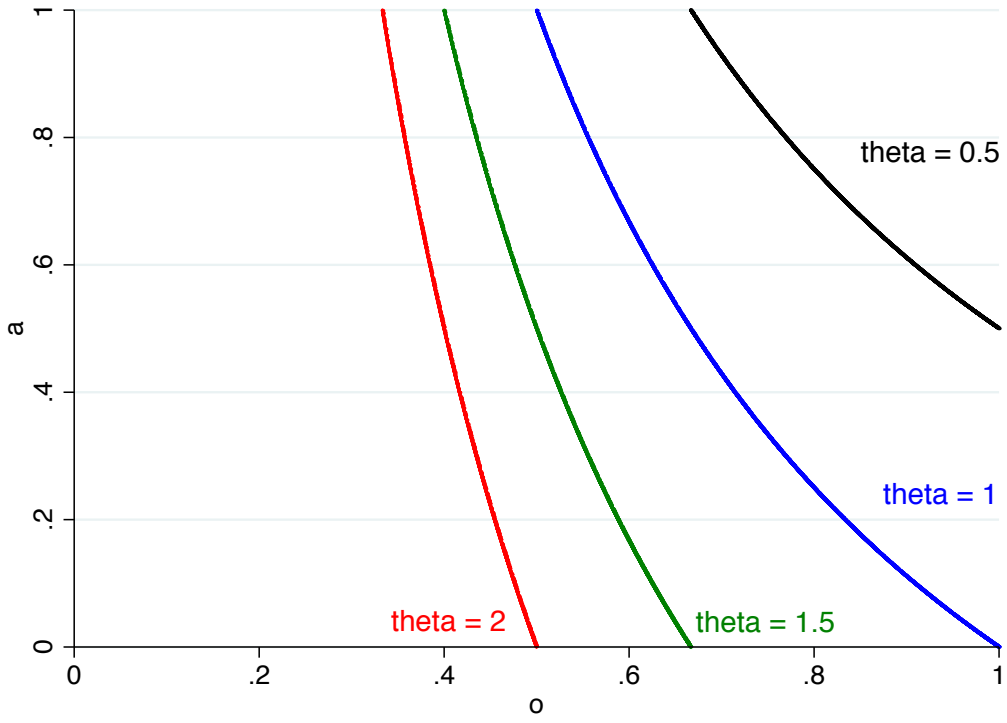
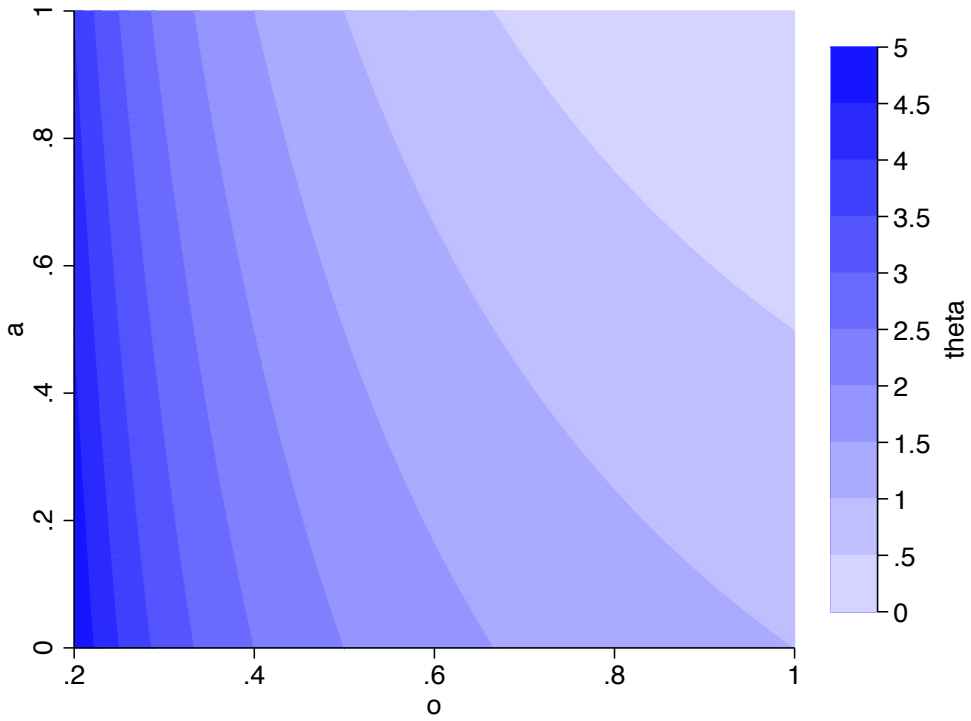


Figure 2.3. The Value of Job Retention Necessary to Sustain Strategic Behavior as Retainer's Monitoring Capacity and Replacement Agreeableness Change



The key result from this extension is that none of the comparative statics from the base model change. Judicial independence still decreases as a, o, and θ increase, and it decreases over increasing values of c. Thus, the results of the base model are robust to free riding and the simplification used in the base model is a relatively costless convenience.

Modelling Collective Action: Retainers as Voting Bodies

In the base model, I treat the retainer, R, as a unified decision maker. No matter whether R observes J's choice at $t = 1$, the choice to Retain is made by a single actor, R. This reasonably represents the process in executive-reappointment states. Governors get to unilaterally decide on judicial retention, with only the slight problem of managing an internal hierarchical network of information flow and advice as potential collective-action problems. Yet, in every other retention system, this level of unilateral action is not possible. Instead, a majority decision must

be reached by a group of voting retainers. In some states, this is a legislature, and in other states these are voters.

This is an important difference. The collective action barriers to denying retention are great. Oversight of agents by multiple principals is fraught with extra difficulty (Gailmard 2009). The difficulties in acquiring information about a justice are then exacerbated in multiple-retainer systems because each voting member of the majority coalition has to be brought along. Additionally, each member of the group has its own costs associated with rejecting tenure. Instead of a single actor to be informed and be in a position to make such a choice, multiple actors must each become informed and be in a position to reject retention. This multiplication of necessary events makes policing judicial behavior a harder – and less likely – event for multiple-member retaining bodies.

I incorporate these collective action barriers into the base model by opening up the retention decision to a choice made by a collection of three *R*s. These *R*s form a majority-rule voting block to decide on the success or failure. Though heavily stylized, a three-person voting group is analytically consistent with larger voting bodies. There is no loss in generality by using a three-person group. In a further simplifying assumption, I stipulate that R_1 and R_2 form a likeminded majority, with R_3 having contrary preferences. In the game, each *R* observes *J*'s behavior at $t = 1$ with the same probability, but separately drawn. Thus, when $o = 0.9$, each *R* observes with probability 0.9, but it is possible that some observe while another does not. There is only a 0.81 probability that they both observe. In addition to unique determination of observation, each *R* also has its own unique cost of rejection, labeled c_1, c_2, and c_3. In the context of legislators, these may be thought of in terms of the costs incurred in having to put forward a replacement nominee but may also include damage to relationships and coalitions

from rejecting a nominee. For example, it is conceivable that the costs are higher to reject a nominee from one's own party, who may have shared political allies or even past ties to the legislator herself. Each *R* then chooses either to Retain or Not Retain, with the majority determining the outcome.

One analytical convenience of assuming a two-voter likeminded majority is that it renders the third voter irrelevant for consideration. No matter the arrangement of votes, the third (minority) voter will not impact the result. An Agree-type *J* (and any *J* choosing Agree in the first round) will always receive both majority votes to Retain, rendering the third vote irrelevant. The only way a Disagree-type *J* can be rejected for retention is if it votes Disagree in the first round and both of the two-voter majority choose Not Retain, as it will always receive the minority's one vote for Retain if it plays Disagree. There is no set of parameters that would lead to only one member of the majority voting to reject, joined by the one minority member. Thus, the third member can be discarded from the analysis and focus turned to the two-member majority. To be rejected, both majority members must choose Not Retain.

Much as in the base model, an Agree-type *J* will always play Agree and the majority will always choose Retain, regardless of any other parameter. Only Disagree-type *J*s have a strategic decision to make. In the base model, *R* only rejects retention when its cost are sufficiently low, and thus disagreeable *J*s only consider voting against their preferences when $c \leq 2a$. In the modified multi-*R* model, this logic remains true but now Disagree type *J*s consider voting contrary to their preferences when both $c_1 \leq 2a \; and \; c_2 \leq 2a$. This is the first element that makes multi-person retainers more difficult: it is more likely that some member of the necessary coalition will face too high a political cost to reject the justice and thus decide for retention, breaking the majority.

Additionally, there is the problem of information. While I assume that all *R*s have the same probability, *o*, to observe judicial behavior at $t = 1$, whether they actually observe is independently drawn. Just as in the base model, an *R* that does not observe will always choose Retain. Thus, forming a Not Retain coalition requires that each *R* observe the judicial behavior at $t = 1$ for a rejection to occur. This is a second barrier imposed by the need for collective action. As the number of voters grows, the probability of a sufficient number of them observing judicial behavior to make a rejection decision decreases.

In the base model, a Disagree-type J's decision to act strategic in round one was expressed in equation 10, which is now modified to reflect the fact that two, rather than one, *R* must observe. *o* in equation 10 has been converted to o^2, representing the necessary combination of independent draws of *o*. The following inequality represents the choice to cast a sincere vote (left) versus casting a strategic vote (right).

$$(13) \quad (o^2)(\Omega_D) + (1 - o^2)(\Omega_{D,D} + \theta) \geq (o^2)(\Omega_{A,} + \theta) + (1 - o^2)(\Omega_{A,D} + \theta); \Omega_D = 1$$

(one pos. choice) $\Omega_{D,D} = 2$ (two pos.), and $\Omega_{A,D} = 0$ (one pos., one neg.)

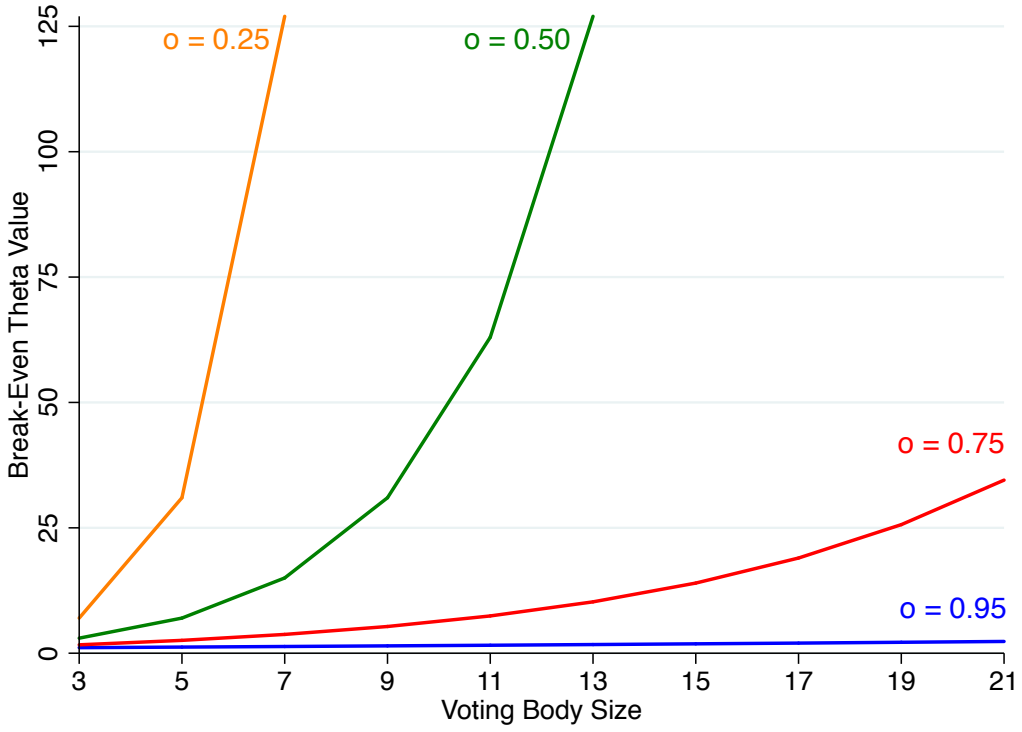
$$(14) \quad \frac{2}{(1+\theta)} \geq o^2$$

The comparative statics of this expanded model are unchanged from the base model. This model does provide a new comparative static: as the number of deciders increases, the likelihood of strategic behavior by judges decreases. Thus, we should expect legislatures to face larger barriers to influencing judicial behavior than governors, and electorates to face larger barriers than legislatures.

Consider the following stylized example: There are groups of three to 19 individuals, in which groups of two to 10 voters form the bare majority in disagreement with the justice's

preferences (thus, there is a disagreeable *J*). To reject retention, the entirety of these bare majorities must choose Not Retain. For presentation, I assume that individual voter costs to rejection are satisfied such that each of the two to 10 voters could plausibly reject if they observed dissatisfying behavior. The following figure presents the necessary value of θ (the value of retaining office) to justify strategic behavior for multiple values of *o*, across different numbers of deciders. For any specific value of *o*, increasing the number of voters making the retention decision increases the necessary value *J* must place on retention to engage in strategic voting at $t = 1$. Thus, increasing the number of retention voters decreases the probability of strategic voting and increased judicial independence.

Figure 2.4. The Value of Job Retention Necessary to Sustain Strategic Behavior as Voting Body Size Increases



The analysis presented in Figure 2.4 assumes a bare majority. If there are 21 voters, then 11 are in favor of one outcome and 10 are in favor of the opposite outcome. A situation

approximately like this is common in modern American legislatures, in which two parties are often relatively close in power. Yet among the voting population, such close divides are not always the case. Canes-Wrone, Clark, and Kelly (2014) estimate that as many as 90% or 95% of voters in Utah and Wyoming support execution as a lawful punishment in at least some circumstances. In many states, more than 70% favor some possibility of execution. Thus, not every circumstance features a bare majority that a justice must cater to. Imagine the following stylized example: there are twenty-one voters in an electorate to decide on a justice's retention. Of those 21, 16 prefer a specific case outcome (for example, upholding the death penalty) and five prefer the opposite.

A justice may personally favor the minority outcome (thus, is a Disagree-type within the model), but voting so risks offending the majority and being kicked out of office in the retention vote. But the majority does not need all 16 voters to manage to reject the justice's retention bid. They only need 11 out of 16; the minority (which agrees with the justice) will vote for retention. As the size of the majority who disagree with the justice increases, the smaller the portion of those voters that have to observe the justice's behavior and have suitable costs in order to complete a retention rejection. This means that as the unpopularity of a justice's preferences in a case rises with the voters, so do the justice's incentives to be strategic. Figure 5 presents the results, analogous to Figure 4, for the breakeven value of θ as the size of the majority preference increases within the stylized 21-voter electorate, for three of the same values of o. $o = 0.25$, featured in Figure 2.4, is excluded here because its break-even value of θ is very high for all X-axis values.

Figure 2.5. The Value of Job Retention Necessary to Sustain Strategic Behavior as Majority Size Increases in a 21-Member Retention Body

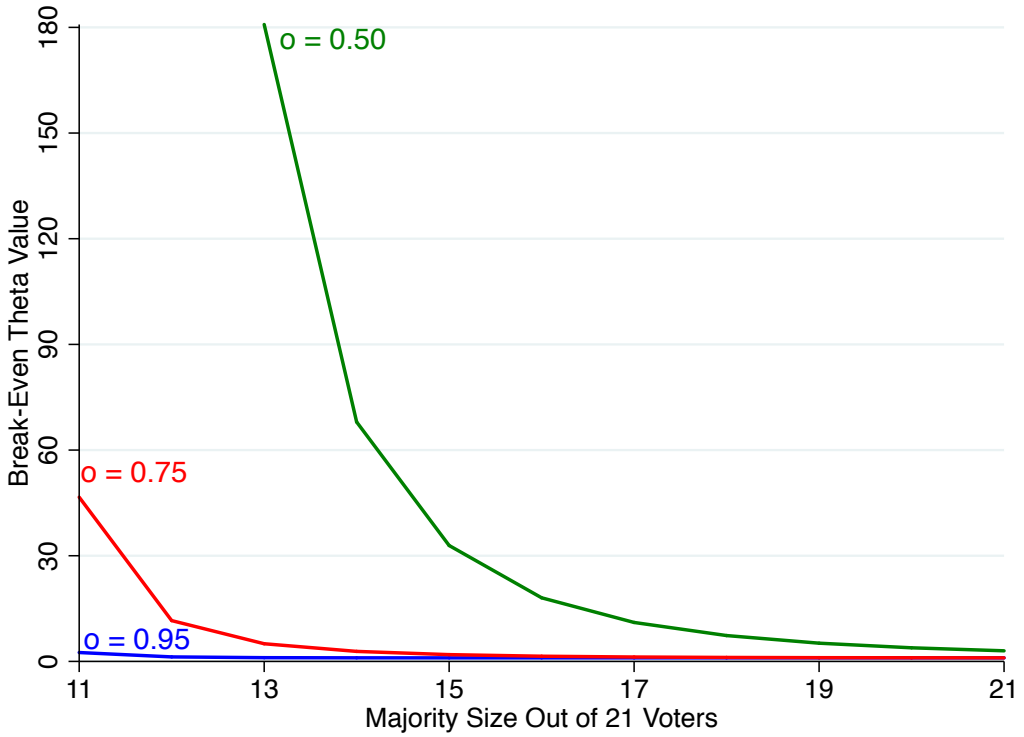


Figure 2.5 indicates that as the size of the majority opposed to a justice's preferences increases (here, moving from a bare majority of 11 voters out of 21 to the full 21 voters), the value a justice must place on job retention to engage in strategic behavior declines precipitously. Thus, justices should have less judicial independence the more unpopular their preferences are because their opposition has a larger margin for error in information acquisition and cost tolerance.

This section has added several important comparative statics without changing any in the baseline model. First, all else equal, the more members there are in a multi-voter retention body, the more judicial independence a justice should enjoy. Second, judicial independence decreases as a justice's preferences become more unpopular among multi-voter bodies. Third, these relationships are interactive with the likelihood of observation. Predictions vary dramatically depending on the probability of retaining voters learning about a decision. Thus, elected justices should have their least judicial independence when a case is very salient (and likely to be

observed) and the voters agree on a position. This prediction supports the general findings about judicial responsiveness to public opinion about the death penalty – cases that are publicly salient and with high levels of public support, despite much lower levels of support among judges. Based on this section, I add two additional hypotheses:

Theory to Testing: Empirical Implications of this Model

From this model, I draw several clear expectations. The first is that justices are only strategic over retention when they can actually be retained. If they are ineligible for a new term, then they do not care what their retainer thinks about their job performance. Thus, those who can still obtain a new term should be more deferential to the preferences of their retainer than the ineligible. This eligible-versus-ineligible difference is key and will form the basis of the empirical testing. The formal hypothesis is stated as:

> **Strategic Deference Hypothesis:** The votes of those still eligible for retention will conform to the preferences of retainers to a greater degree than do those of justices no longer eligible for retention, all else equal.

The Retention Eligibility Hypothesis is the most general possible statement: retention matters. Retainable justices are responsive to the preferences of their retainers. But I argue at length that there is variation in the ability of retainers to influence judicial behavior. Thus, I offer more specific hypotheses.

Governors offer the clearest case of strong, ideological influence. They are well situated in every dimension discussed, with considerable monitoring resources and a strong enforcement power. Thus, I hypothesize that justice's behavior correlates with governors' ideological preferences.

Strategic Deference Hypothesis (Governors): The votes of those still eligible for reappointment will conform to the ideological preferences of governors to a greater degree than do those of justices no longer eligible for reappointment, all else equal.

I also hypothesize that legislatures are influential, but I argue that their influence is limited by the partisan context of legislative institutions. Legislatures are able to use their reappointment power efficiently against out-party members, but not against copartisans, because of the costs involved in intra-party conflict.

Legislative Influence Hypothesis: Reappointment-eligible, out-party appointee justices vote in line with their legislature's preferences more often than reappointment-ineligible, out-party justices do, and this effect is systematically greater than the comparable effect for in-party justices.

I also argue in these theoretical chapters that voters writ large lack the resources to effectively monitor judicial behavior and face often insurmountable collective action problems. These render them mostly toothless to impact more than a small number of highly salient cases. Thus, I do not expect that a heightened correlation with voter preferences should exist for eligible compared to ineligible justices.

Voter Weakness Hypothesis: Reelection-eligible justices do not vote meaningfully more often in line with voter ideological preferences than do reelection-ineligible justices, all else equal.

I argue for a clear hierarchy in this paper. The influence of political actors is greater on justices than the influence of voters.

Political Elite Influence Hypothesis: The level of ideological influence by political elites (governors and legislatures) on judicial voting through retention pressures (as measured by the difference between eligible and ineligible justices) is greater than the same ideological influence (similarly measured) among voters.

Finally, I argue that if we look down below elections writ large to different types of elections, there are reasons to expect variation in outcomes. Specifically, I argue that partisan elections mitigate some of voters' disadvantages in information and mobilization.

Partisan Elections Hypothesis: The level of ideological influence by voters in partisan elections on judicial voting through retention pressures (as measured by the difference between eligible and ineligible justices) is greater than the same influence (similarly measured) among voters in retention and non-partisan elections.

Collectively, then, I argue that governors exert the strongest and most consistent influence on judicial behavior because they are the actor most enabled by resources and power to do so. Second, legislatures who get to reappoint limit judicial independence and induce strategic behavior, but only among out-party members. Voters exert the least influence, and I argue possibly none at all, or none that would be deemed substantively meaningful. If there is a type of election that yields systematic ideological influence, it is partisan elections because of the useful information-spreading and voter-mobilizing mechanisms they provide.

In the next chapter, I explain necessary background on the state court system, the types of elections, their history and recent use, and use some qualitative work to support some of the assumptions made in these theoretical chapters. In the subsequent chapters, I conduct empirical tests on these expectations. First, I look deeply at an interesting but understudied set of states:

states which use gubernatorial appointment *and reappointment*. I find strong evidence across numerous tests that justices respond to governor preferences, but only when the justice needs to be reappointed. This evidence is consistent across the length of justice's terms and is detectable over thousands of votes within criminal law appeals. Then, I look at the three states that give reappointment power to state legislatures. I craft tests suitable to the data availability and the unique rules in these states and find, as predicted, that legislatures do have strong influence – on appointees of the out-party. Once the party that appointed a justice loses power, the justice moderates in the direction of the new majority. There is no similar evidence of deference and responsiveness for justices appointed by ruling majority parties. Finally, I conduct a series of tests on justices who face reelection. I pursue a number of different tests with a variety of different measurement strategies but am unable to find consistent and robust evidence of responsiveness to voters sufficient to be detectable in the whole criminal docket. I then conduct a test of negligible results and find consistent evidence that voters collectively have an effect significantly less than a meaningful or substantively significant level. Finally, when I disaggregate election types, I find that partisan elections are the ones most likely to yield ideological responsiveness in voters with no similar effects found among those reelected in retention and nonpartisan elections. Collectively, these results largely support my theoretical arguments that the most important factors for determining the power held by a retaining actor is its level of monitoring power and its capacity to efficiently enforce its preferences through strategic retention.

Chapter 3

Retention in State Courts

In this chapter, I review several essential features of the state courts system and specifically how justices get on the court and stay on the court. I review the history of these institutions and their present use. Finally, I seek to support some of the assumptions I make in the preceding chapters with evidence from actual judicial retention events as well as qualitative evidence collected through interviews.

The State Court System

One byproduct of the United States' federal and disaggregated structure is the birth of a multiplicity of overlapping legal systems and their relevant courts. Any given physical location in the United States may be simultaneously subject to federal, state, county, municipal, and even additional (for example, military) laws and regulations. There are two main court structures that come out of these systems: federal and state courts. The federal courts are the most popular subject of media attention and scholarly research, but they handle a small minority of the total caseload in any given year. The combined set of civil, criminal, and bankruptcy cases in the federal court system in the twelve-year period up to March 2010 was under two million.[15] By comparison, the state courts in calendar-year 2010 handled about 48 million non-traffic cases, and over 103.5 million cases total.[16] The disparity in criminal law (largely a state-run issue) is just as stark. There were more than 20.4 million state criminal cases in 2010, compared to only about 77,000 in the federal courts. The answer to the question "where are legal disputes resolved in the United States?" is overwhelmingly the state courts.

[15] This number comes from the official website of the U.S. Courts System and is available at: http://www.uscourts.gov/sites/default/files/statistics_import_dir/IndicatorsMar10.pdf
[16] This number comes from an annual report by the Court Statistics Project and is available at: http://www.courtstatistics.org/other-pages/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx

The courts that rule over these state systems are state courts of last resort, colloquially known as "State Supreme Courts" even though their names vary. There are fifty-two of them – 48 states have a single court of last resort and two states (Texas and Oklahoma) have split criminal and civil courts of last resort. They range in size from five to nine members and are the final arbiters of the law on more than 99% of cases that come before them. Only in the rare case of appeal to the federal court system are their rulings overturned. Even then, their determinations can only be overturned as it relates to a question of federal law. On questions of state law (such as "what does this statute mean?" or "what rights are provided by the state constitution above the U.S. Constitution?"), even the Supreme Court of the United States is unable to overrule them. Thus, these are powerful actors with considerable policy discretion and little competition for final say.

Despite this, Americans know little about these institutions or these justices. Even after millions of dollars spent over months of campaigning leading up to a judicial election, voters are often unable to even name even the incumbent justice (ABA 2003). Ironically, the state justice most likely to be known may not even be from a person's own state. Texas Supreme Court justice Don Willett has crafted an extensive social media presence and amassed more than 100,000 combined followers on Twitter and Facebook, which may be more than the entire set of his national colleagues combined.[17] Yet, when the most notable state supreme court justice in the country is known for posting internet memes rather than for the thousands of cases he is responsible for helping decide in a given term, it speaks to the complete lack of knowledge and information about these institutions in the wider public.

[17] Justice Willett uses the Twitter handle @JusticeWillett. Follower counts are accurate as of May 2017. Available at: https://twitter.com/JusticeWillett/

How did Don Willett become a justice of the Texas Supreme Court? After a career in Republican political and legal circles, including the Bush Administration in both Texas and the White House, and the Perry Administration in Texas, he was appointed by Rick Perry to fill an empty seat on the Texas Supreme Court in 2005.[18] Within a year, Willett had to contest a partisan competitive election to keep his seat on the bench. In Texas, and many states with competitive elections, when a vacancy occurs between elections, governors get to pick a temporary candidate who must then face an election either at the next immediate election or at the end of the previous justice's term, depending on state rules. In his first partisan primary in 2006, Willett barely beat out a Republican rival in an election of over 500,000 voters.[19] That November, he received more than two million votes to become a fully elected justice. He would go on to win reelection in 2012, obtaining about 300,000 more votes than Senator Ted Cruz did.[20] Willett will be on the ballot again in 2018. This is one career arc of a single, if rather digitally expansive, justice. But the story is typical.

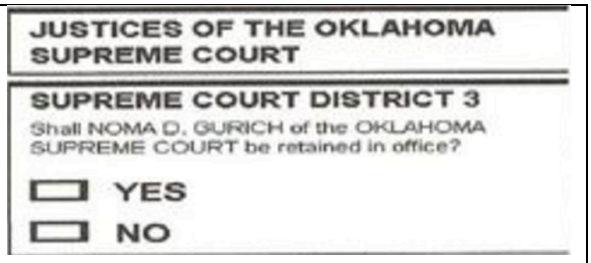
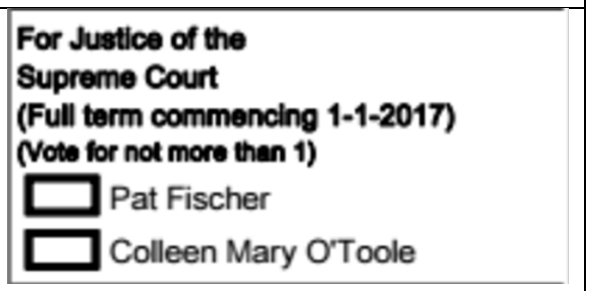
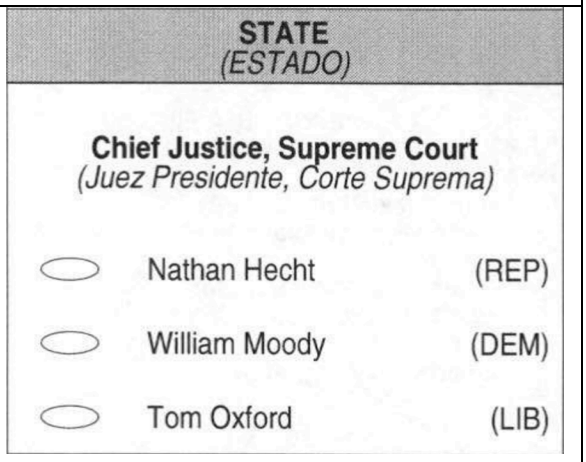
Most justices in state supreme courts serve time-limited terms like the six-year term in Texas. They are as short as six and as long as 14 years. Only three states (Massachusetts, New Hampshire, and Rhode Island) avoid retention by giving life or age-limited terms. Age-limited terms are quite common, used by the majority of states. Typically these involve forced retirement at an age between 70 and 75 years old.

The biggest and most notorious variation in the state courts, and the subject of this project, is how justices are selected and retained. Justice Willett was appointed and then

[18] A more detailed background is available at http://www.txcourts.gov/supreme/about-the-court/justices/justice-don-r-willett/
[19] http://elections.sos.state.tx.us/elchist118_state.htm
[20] http://elections.sos.state.tx.us/elchist164_state.htm

immediately elected and reelected. His is an example of judicial elections in the United States, a subject of ample criticism (ABA 2003). Justice Willett's elections are partisan – he runs as a Republican against other Republicans as well as Democrats and Libertarians. In other states, the elections are competitive but nonpartisan, meaning that candidates do not have partisan labels by their names and cannot officially intertwine their campaigns with partisan systems. Finally, the most common system in the United States – called the "merit system" or "Missouri plan" involves governors picking justices, who then shortly thereafter run a retention election where they face no opposition but simply a "yes" or "no" question of whether the justice is retained. This effectively gives the population a veto over a governor's choice – but no capacity to pick anyone as a replacement. In the case of a rejection, the governor simply makes a new choice. These justices then face regular retention elections at the end of each successive term. Figure 3.1 provides three example ballots to illustrate the differences.

Figure 3.1. Examples of Election Ballots

Retention Election	
Nonpartisan Election	
Partisan Election	

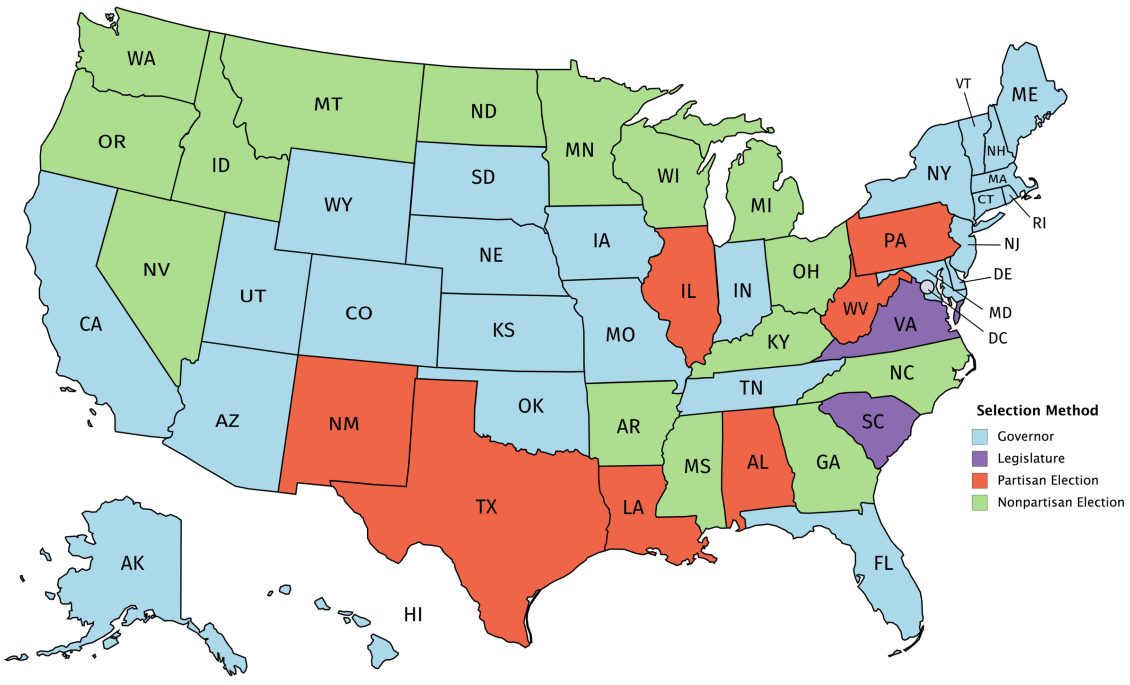
These differences may seem minor, but they are the subject of extensive debate and research. The Retention Election system is often seen as selecting better judges, using governors and merit selection committees to find qualified candidates. Voters then retain these appointees at rates typically greater than 85% and as high as 99% (Caufield 2009; Kritzer 2015). High rates of reelection are also found in nonpartisan races, though with the occasional (and notorious) examples of unpredictable losses. Indeed, nonpartisan elections are perhaps the most heavily criticized type of election exactly because they give voters total selection power, feature

competitive elections and campaigning, but generally feature the lowest information levels (Hall 2016).

When justices are not elected, they are typically appointed. Merit plan justices are appointed by governors, along with many others whose position came open between elections (like Justice Willett). But in eight states justices are appointed *and reappointed*. Their retention is handled by political elites, not voters. This is true in Connecticut, Delaware, Maine, New Jersey, New York, South Carolina, Vermont, and Virginia. In the first five, governors reappoint. In the last three, legislatures reappoint. These systems give retention power to elected political elites.

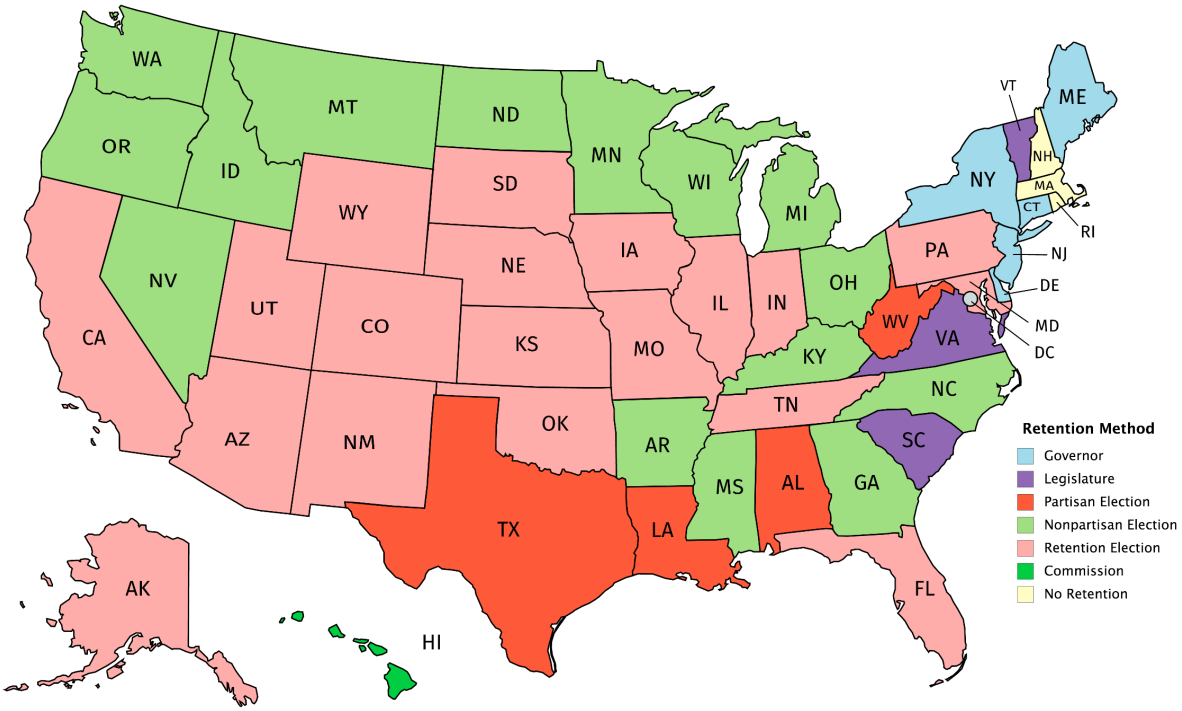
Figures 3.2 is a map of initial selection systems, color coded by state.

Figure 3.2. State Supreme Court Selection Mechanism, by State



There is considerable variation in selection systems, with governors being the more common selectors, typically with some type of constraint (such as a commission to produce a limited set of candidates to choose from, or legislative confirmation requirements). Figure 3.3 is a similar graph, except now color-coded by retention systems – that is, how does a justice get an additional term once they are already on the state's supreme court.

Figure 3.3. State Supreme Court Retention Systems, by State



In Figure 3.3, new methods emerge and the role of political elites declines. The plurality of states use noncompetitive retention elections, another large group of states use nonpartisan elections, while only four states use partisan elections for retention. The use of political elites to retain justices through appointment is restricted to the colonial states.

These different patterns and systems are largely owed to historical circumstances. Initially, states overwhelmingly used appointment systems, but 19th century waves of fear over political corruption led to the adopt of elections (Shugerman 2012). This was followed again in the Progressive Era, ushering in a round of adoption of nonpartisan elections, again in a response to fears over corruption (this time partisan). Finally, the middle of the 20th century brought about a focus on judge quality and the fear that elected judges were not as capable as their appointed counterparts. This led to the adoption of the Missouri or Merit Plan, wherein nonpartisan commissions picked qualified judges as potential nominees, a governor picks one of the candidates, and then voters get the chance to kick them out at a regular interval. Thus, the pattern of adoption is contingent on the dominant system at the time of entry into the U.S. as well as geographic and ideological proximity to early-mover states who initiated later changes.

Judicial Appointments in the United States: Substantiating Theoretical Assumptions

In the preceding theoretical chapters, I make a number of assumptions about governors and legislatures that are key to the implications of the theory. In this section, I describe the appointment and reappointment processes in the eight states in which political elites handle judicial retention. In this description, I hope to substantiate that governors and legislatures do have access to information about judicial behavior, use it, care about their appointment power, and use it to promote ideological goals.

Governors

Five governors have the power to reappoint justices to their state supreme courts – those in Connecticut, Delaware, Maine, New Jersey, and New York. I argue that these governors (and governors who do initial appointments as well) have significant resources to monitor judicial

behavior and make an informed appointment choice. A key feature that helps substantiate this assumption is that gubernatorial administrations have an internal delegation structure. Within each gubernatorial administration, there are numerous levels of staff with varying portfolios of responsibility. Governors are not individually responsible for much work on any topic and handle virtually nothing until it has reached a high stage of development and preparation. In each, there is a "point person" on judicial matters and judicial appointments. In interviews with people involved in these processes, I discovered that these hierarchies of delegation can be quite extensive. In an anonymous interview, one such point person indicated that "five to seven" people would work on a nomination internally before it would be sent up to "senior staff," such as the governor's top advisors and ultimately the governor him or herself. The goal at these stages is not to reach a decision – that is done by the senior staff and the governor – but rather to accumulate all information possible, sift through it and summarize it in a way that is relevant to the governor's decision.

For lower levels, judicial candidates may apply for positions. In New York, for example, those who wish to apply for consideration to an open judicial position (as well as all those requested to apply) must fill out a 45-page questionnaire.[21] This form is exhaustive, including requests for complete descriptions of professional and employment history, litigation history, all case decisions written, certifications, criminal history, and outside work, to name just of a few of its numerous items. The investigative dossier compiled on each serious candidate includes financial information, information about the candidate's family and other relations, and anything that might be of interest. In interviews, the thoroughness of each process was always

[21] http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/Judicial-Appointment-Questionnaire_2013_06.pdf

highlighted, as well as the overriding goal of finding all information that could indicate some aspect about the candidate that would work against the governor's interests. One interviewee described each dossier as "eight-inches thick." While this is likely hyperbole, it is indicative of the amount of information accumulated when making these decisions.

Executive administrations do not make these decisions alone. In addition to their own internal deliberations, they receive help from outside sources. In some states, there are external committees of lawyers, judges, and citizens that help screen applicants for qualifications. In New York, Gov. Cuomo has several regional committees of ten or more people who meet and review applications and present the Governor with a recommendation on the candidate's qualifications. An additional, higher-level committee exists specifically for Court of Appeals (New York's highest court) nominations. While these are ostensibly about "qualifications" in a more objective sense, such as that most slippery concept "judicial temperament," the actual process also helps to weed out those who are ideologically unwanted. A member of such a screening committee indicated to me in an unnamed interview that the members of such committees have diverse backgrounds and focuses. There are typically members who specialize in criminal law, others in civil litigation. There are typically also lawyers with a focus on minority-related or gender-related discrimination law. The interviewee indicated that, for example, a judge with extreme view on gender equality would draw the attention of the members of the committee with those experiences. The interviewee noted that the only level of diversity typically lacking on these committees was financial or class diversity. Everyone was, by definition, successful enough to be put on the committee, and thus reasonably well off.

These committees purport to filter out extreme and unqualified candidates, but because they are picked by the governor and share the governor's values, they effectively act as an

additional filter for the governor's preferences. Indeed, in New York, Governor Cuomo has been criticized for stocking these committees not with the most esteemed and objective lawyers, but rather with "cronies" who have political and partisan connections to him (New York Daily News 2011). In Connecticut, a more formal judicial nominating commission handles this process, but even there, half of its members are picked by the governor and the remainder by a variety other officials, giving the governor outsized influence over the preferences guiding the evaluations. In other states, the process may remain internal or outside advice may be more informally solicited. In each case, governors have other people tasked with helping them do the work of evaluating a judge or justice's record and filtering out those who are not desirable.

There are yet more layers of help. Interest groups regularly give their input on a potential candidate. Interviews confirmed that interest groups regularly provide their advice – solicited and otherwise – about whether a candidate is a good pick for appointment or reappointment. Because interest groups exist for a diverse array of policy areas, governors are potentially keyed to a host of issues that a justice might be out of step on. And given the connections between interest groups and politicians – and their ideological coherency – a governor can reliably count on these organizations to be accurate evaluators of a judge's positions. A state pro-choice group, such as a state chapter of NARAL, is likely to offer a credible signal to a Democratic governor about a judge's position on abortion questions.

Consider the contentious reappointment question of Judge Victoria Graffeo in New York in 2014. A Governor George Pataki (Republican) appointee, she came up for reappointment under Democratic Governor Andrew Cuomo. Numerous activist and interest groups made direct appeals to the Cuomo administration to not reappoint her, drawing his attention to the judge's positions on a variety of issues important to liberal Democrats (Politico 2014). For example, the

Human Rights Campaign sent Governor Cuomo a letter on October 8, 2014, stating that they "respectfully urge you not to reappoint Victoria A. Graffeo to the Court of Appeals."[22] Importantly for my point in this project, they did not stop merely at this suggestion. A subsequent paragraph states:

> "In 2006, Judge Graffeo joined the majority opinion against marriage equality for New York's gay and lesbian couples. While many Americans have evolved on LGBT rights, in 2010 Judge Graffeo declined to recognize a lesbian mom as a full parent despite her legal relationship to the biological mother. Consistently she has shown a lack of respect for constitutional rights afforded to all Americans and instead defers to the legislature on issues that are appropriate subject matter for the courts."

This letter draws attention to two specific rulings that Graffeo was part of, both on LGBTQ rights, and of interest to liberal politics in New York. For my purposes, it is also notable that those rulings were four and eight years old at the time. Interest groups are more than an update on recent behavior – as watching the news might provide to a voter – but instead to give an evaluation with a long memory. The information they provide – and the directions they point internal evaluators in – help to reduce the recency bias in evaluation. And Human Rights Campaign was far from alone – they were joined in letters and statements by NOW and NARAL, among others. Ultimately, Governor Cuomo rejected reappointment for Judge Graffeo, instead appointing the liberal Judge Leslie Stein (New York Democrat & Chronicle 2014).

Interest groups also include professional organizations like bar associations, giving the governors quality signals about the judge's reputation in the legal community itself. The Maine Bar Association, for example, features an extensive process of judicial evaluation that begins at the trial court stage, building up histories of surveys of local lawyers about the judges that can then help inform later decisions on whether a judge should be nominated to a higher position or

[22] http://www.hrc.org/blog/hrc-urges-governor-cuomo-not-to-reappoint-judge-victoria-a.-graffeo

renominated to a position they hold.[23] This information stretches over years and is another form of long-term information that eventually makes its way to the governor.

These various entities – both internal and external – work as information filters, or a funnel, building an immense stock of information on each candidate (and maintaining it into the future for reevalation) and then filtering it down to the essential elements: how qualified is the judge?, does the judge have any personal liabilities?, does the judge share the governor's ideological positions? Though governors would be hesitant to admit in public that they inject ideological "litmus tests" into their judicial evaluations, unnamed interviewees admitted that it was a valuable consideration. Governors see judicial selection as an opportunity to influence policy and put their stamp on the judicial branch. This power and opportunity – "prerogative," in the words of multiple interviewees – is valued greatly, especially in high-leverage situations. For example, one interviewee who runs the internal appointment operation for a sitting governor indicated that their office valued changing the actual outcomes of cases, what social scientists might call "moving the median." When such an opportunity arises, ideology can rise to trump all other considerations, such that even an admittedly qualified and liked justice might be replaced with one more ideologically agreeable. In an anonymous interview, a person directly involved in the Judge Graffeo reappointment process in New York confirmed that the rejection was not over her qualifications, but rather the potential to change the composition of the Court of Appeals – moving it in line with Governor Cuomo's liberal Democratic preferences. This points to one of the implications in the model: by moderating themselves in the direction of a governor's preferences, this leverage is reduced: the gains of a switch, and its impact on the outcome of cases, are less apparent. As this ability to swing a court declines, other considerations – like the

[23] http://www.mainebar.org/page/Judicial

desire to avoid public outcry or a legislative battle – may intrude to push the governor towards reappointment.

All of the preceding paints a picture of a governor that is very informed, with a network of resources available, pushing the necessary information up to them, such that when the time comes to make a decision, their choice is based on hundreds of hours of work by likeminded individuals. It is an advantage of information that no other single actor in retention politics ever possesses. Without ever needing to themselves log onto WestLaw or read the Legal Roundup in the local newspaper, a governor can make a decision that is fully informed on a judge's entire career, with no case unturned. Any potential step out of line that reveals a gap between what the governor wants and what the justice does could very well end up in a report, drawing the attention of an interest group or a screening committee member, and thus ultimately make its way to the governor in the form of a warning of the judge being out of step on that topic. And this all assumes that the governor has zero prior knowledge and makes no other effort. In fact, many governors were previously attorneys themselves, served as an Attorney General or in some other legal capacity. They are not incapable or uneducated on these topics and may very well know many of the leading judges in their owns state.

Legislatures

The process in legislatures shares some similarities with those mentioned previously for governors, but with some key differences. First, no individual legislator has the same level of resources and support as a governor – so their informational power must come through combined knowledge and developed expertise. Like governors, many legislators have legal backgrounds. Indeed, many legislators are currently practicing lawyers given the part-time nature of many state legislatures. But state legislators, lacking the elaborate internal staff that governors have, serving

limited days in the state capital, and having a wide variety of other issues to attend do, must delegate more. It is unsurprising then that interviews with legislators of judicial retention committees revealed a much higher reliance on outside groups. For example, in Virginia, screening and evaluation of smaller and regional judgeships are done by the bar association of the county in which the position is based. These local decisions are given wide deference unless they strongly conflict with committee preferences. Interviewees also indicated that highly connected interest groups can have strong influence over decisions. For example, the group PROTECT, which focuses on the protection of child victims of crime and mistreatment, has had some success in some states, including Virginia, at pressuring legislators over certain judicial appointments, and especially reappointments, when the judge is considered too lenient. The organization has recently become active in South Carolina politics as well.[24] One Virginia legislator indicated in an unnamed interview that reports are generated for each judge, indicating the criminal conviction rate in their court and the state average.

Despite the greater reliance on outside groups and greater levels of deference at lower courts, each interviewee in state legislatures indicated that legislatures zealously valued their power to change the composition of the state's highest court – again, each used the word "prerogative." The legislatures in all three states – South Carolina, Vermont, and Virginia – have each built up internal structures (committees on the judiciary and judicial retention) that help develop expertise and resources to exercise the legislature's judicial oversight power. Many members stay on these committees for numerous sessions, sometimes for decades, allowing them to become very familiar with judges and justices in their court system. While not as well staffed as executive administrations, these committees often include one or more staff attorneys and

[24] http://www.protect.org/

members donate their own staff hours to helping conduct business. Committees also serve as beacons for the oft-solicited outside information. Committees – and their chairs – serve as destinations for letters and comments, and venues for hearings and testimony. For higher courts, the power to control the composition is something important enough to be worth the time to develop institutions and knowledge to be effective.

In Virginia, appointment prerogatives were an issue of recent controversy as the Democratic Governor Terry McCauliffe performed a recess appointment, nominating Jane Roush. Under Virginia law, governors can fill vacancies while the legislature is at recess and then the legislature must vote to confirm them in the next session or else they are voided. Republicans, who controlled the state Senate in the aftermath, balked at what they saw as Governor McCauliffe's failure to consult with them on his choice, robbing them of their constitutional power over the courts (Washington Post 2016). There was considerable tension over this for months. A Republican unnamed interviewee protested that this issue was not about ideology or party, but about respecting the separation of powers. But the underlying dynamics paint a different picture. Roush, a liberal from northern Virginia, was to replace Leroy Millette, an appointee of former Governor Tim Kaine. Thus, the chance to replace a liberal member with a more conservative member provided the Republican-controlled state legislature a high-leverage situation in an extremely competitive (and changing) state. It is of little surprise then that the Republicans fought so hard on this issue, ultimately rejecting Roush's vote for a full term, ending her time on the court as an interim justice. Their replacement was a former attorney under the conservative Attorney General Ken Cuccinelli (Washington Post 2016; Richmond Times-Dispatch 2016). Much like Governor Cuomo in New York, the conservatives of the

Virginia General Assembly profited in the composition of their state high court through the strategic use of replacement.

It is also important to note the partisan dimension in this case – the legislature's voice was exclusively that of the Republican majority (and its leadership). And the judges in question were a retiring Democratic appointee, a replacement Democratic interim appointee, a Democratic governor, and ultimately a Republican replacement. The Republicans succeeded in fighting it because they were able to work together well enough against a common opponent – the Democratic party. A small detail of this case points in the direction of my argument about the legislature's limitations. In the theory chapters, I argue that legislatures would struggle to police the behavior of their own members because of the difficulty of factional politics – some parts of the party favor the incumbent, others a replacement, and perhaps others a different replacement. Bridging these gaps is difficult and costly and often not worth the benefits. In the case of Justice Raush however, the Republican Senate actually did confirm her (but she failed in a separate vote in the House). The reason for their confirmation is that they struggled to agree on a replacement of their own (Washington Post 2016). Ultimately, they punted that question and let the House take the lead. If they have this level of difficulty coming together on a replacement when opposing a rival justice, imagine the difficulties they face when one of their own copartisans is the justice in question.

Judicial Elections

Virtually everything in the preceding two sections does not apply to voters in judicial elections. Unlike governors, voters do not have numerous staff working to compile reports and memos on major candidates. There are no screening committees meeting to provide extra information and guidance on a judge's suitability. Though interest group letters and official

statements are made public, they are not forced into the decision-making process of voters in the way they are for political elites. Voters do not have meetings with presidents of such organizations. If they hear from them at all, it would be in a short 15- or 30-second advertisement – if a local interest group can pay for the advertising fees.

What voters do get is the news – though even that they get in small and inconsistent doses. And this news is overwhelmingly biased to recent events, sensational stories, and criminal and social-issue cases. A fuller perspective on a justice's decisions is not easy to come by reading only news reports. And the typical voter lacks access to sources of information about their judges and candidates. Sources like WestLaw and Lexis are expensive subscriptions. Newer sources such as Google Scholar are incomplete and less well known. Even if voters have access to these sources, they lack the expertise to understand them. Legal language is dense, overlong, convoluted, and full of terms of art and legalese that the lawyers at NARAL or the staff attorneys in the Virginia Senate can understand, but that typical – even educated – voters will struggle to easily make sense of. Thus, the barriers to becoming an informed voter are extremely high.

In the absence of information, what can voters rely on? The general answer to this has been to simply re-elect incumbents. This trend would serve to nullify most of the potential for influence, since justices left, right, and center know that they are almost certain to be retained no matter what they decide. In partisan elections, party cues and party operations help reduce this informational gap (Klein and Baum 2001). In the absence of that, voters might simply go by seemingly irrelevant factors such as the recognition or familiar sound of names (Kam and Zechmeister 2013; Rottman and Schotland 2001). And if voters do not even know who the candidates are, it is hard to also expect them to have an informed position about what the

candidate believes and what they had already done as a judge. Without this information, there is no way to attach the use of the retention power to judicial behavior. And without that attachment, there is no rational reason for judges to be responsive or deferential to voter preferences.

Perhaps no case is more illustrative than the 1990 judicial elections in Washington, which then, as now, used nonpartisan ballots. The sitting Chief Justice of the Washington Supreme Court, Keith Callow, lost to a man who did not even campaign for the job, Charles Johnson. Johnson, only 39 at the time, ran only so there would be a contested race (which he believed was important), but spent only $500 on his campaign and was so certain of his defeat that he did not even watch the election returns – instead opting to go to sleep. Ultimately, more than 203,000 Washington voters opted for Johnson over the sitting and respected Chief Justice. The likeliest explanation offered at the time, and still the best available today, is that Callow had extremely low name recognition, spending only $5,500 on his campaign. He lacked a campaign manager or any meaningful way to communicate with voters. Additionally, some voters may have confused the challenger with one of several local officials, including another trial judge named Charles Johnson and another Supreme Court justice named Charles Smith. Callow summarized the result as "There are more Johnsons than Callows." (Chicago Tribune 1990; Los Angeles Times 1990; New York Times 1990). Almost twenty-seven years later, Johnson is still on the court, having been reelected numerous times.

The total policy impact of the 1990 choice by Washington voters is difficult to calculate, but likely considerable over such a long period of time. Yet, it is hard to escape the conclusion that this impact was determined randomly. And this is a core problem. The 1990 election is an example of voters *removing* a justice, and yet even then it is an indication of their relative

weakness. The voters did not remove Callow because they disliked him – they did not know him well enough to know that (New York Times 1990). Instead, his result was totally divorced from his behavior on the court. It is conceivable that no single vote he cast in his preceding term, or even his whole career, impacted his probability of winning in 1990 at all. The lesson for other judges to take from Callow's defeat was not that they should "do what the voters want;" it was that justices should make sure that a large portion of the electorate knew who they were. The lesson was to hire a campaign manager (New York Times 1990), spend money on advertisements, and make public appearances, not "don't cast that unpopular vote." This undercuts any reasons for judges to be responsive to voters' ideological preferences – there simply is not enough information for there to be a causal relationship between the judge's judicial behavior and the voters' electoral behavior.

A Brief Comment on the Frequency of Judicial Retention

The colorful stories in this chapter of judicial rejection are useful for illustrating that these are possible events. For governors and legislatures, at least, there are credible threats that justices could be denied new terms. Indeed, it has happened four times this decade in the eight states that use elite reappointment (the examples provided of Justices Graffeo and Roush, plus two by New Jersey Governor Chris Christie). Yet, in a broader context, these are very rare events. Prior to Chris Christie's rejection of Justices John Wallace and Helen Hoens (Star Ledger 2010; Star Ledger 2013) in 2010 and 2013, no New Jersey Supreme Court justice had been rejected for reappointment without an ethics scandal in the modern history of the court. These are not impossible events – but they are rare. All told in the United States, more than 90% of justices who seek another term are given one.

Yet this is not evidence against my arguments – rather, I see it as evidence for them. In most cases, rejection of reappointment is off-the-equilibrium-path behavior. In theory, it is not supposed to happen, unless judges care so much about present policy and so little about future policy and the perks of the office that it is worth it to them to make a stand on certain issues, even if it means losing their job – as perhaps Judge Graffeo did when deciding the gay marriage cases which drew so much criticism. What the theory predicts is that most justices will moderate themselves so that it is not worth it to political elites to get rid of them – and for most of recent history, that appears to be what has happened. And in election states, most voters are uninformed – and the theory predicts that those voters will simply retain in that case. Again, this appears to be what has happened.

And What About the Justices?

One irony of this project is that its focus is on the individual-level behavior of justices, and yet the vast majority of the evidence and focus is on everyone but the justices – governors, legislators, staffers, and voters. The obvious reason for this is that it is extremely difficult to get judges to speak candidly about how they go about their job. This should be for fairly obvious reasons. The strongest is that judges are steeped in traditions of dispassion. The typical justice's existential mythology, with the occasional exception of someone like Richard Posner (1987), is perhaps best articulated by Chief Justice John Roberts's (2005) famous line that his "job is to call balls and strikes and not to pitch or bad."[25] The judge-as-umpire analogy may be essential to the judiciary's legitimacy as a branch which creates policy without being democratically accountable, yet it leaves no room for strategic career-protecting behavior. The judge-as-umpire

[25] This was given in his opening statement at his Senate Judiciary Committee nomination hearing, which is available at: http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/

cannot have a different strike zone batter-to-batter depending on what its boss wants the outcome to be.[26]

In this project, I did interview one former state supreme court justice – James Zazzali, of the New Jersey Supreme Court, who served for about seven years, including one as Chief Justice. He denied any role of ideology or partisanship in his appointments or job performance and praised the current appointment and reappointment system in New Jersey as fair and objective. Chief Justice Zazzali was gracious with his time and I have no evidence to believe that his statements are anything but an accurate personal reflection on his time and experiences in the New Jersey judiciary.

Sometimes alternative perspectives do shine through cracks in the shell that the judiciary builds around itself, however. Up the highway from Chief Justice's Zazzali, at the Connecticut Supreme Court, a 2006 political scandal shines a light on justice's preferences and willingness to act strategically to get them. The sitting Chief Justice in early 2006 was William Sullivan, who was soon due to retire. The governor, Jodi Rell, would get to pick the replacement Chief Justice. Sullivan wanted it to be his junior colleague Peter Zarella, and the governor was amenable. There was a problem, however: the court had taken a case about how FOIA rules applied to court documents, and Sullivan and Zarella were both voting on the unpopular side of a 4-3 majority.

[26] One irony in this case is that Chief Justice Roberts's analogy may in fact be correct. Umpires, and referees in major sports generally, have been shown to have a variety of conscious and subconscious biases which undercut their outwards appearance as objective arbiters. Modern ball-tracking technology reveals that umpires are incredibly inconsistent and subjective. More criminally, referees in the NBA have been accused of corruption and pushing certain types of results beneficial to the league. In the infamous *Calciopoli* scandal in 2006, referees in Italy's top soccer league were found to have been compromised by some of the most prominent teams in the league, including Italy's most storied team, Juventus – who were ultimately kicked out of the league for a year as a result. Thus, actual sports officials are probably no more objective and dispassionate than the judges Chief Justice Roberts analogized them too.

Sullivan's solution to this problem was to attempt to delay the release of the case – which had already been decided – until Zarella had been appointed and confirmed. This scandal was ultimately revealed and Zarella withdrew himself from consideration (Hartford Courant 2006).

While this is not a clear-cut case of judges altering their vote to achieve their career aspirations, it is an example of justices acting strategically and manipulating the judicial system in a way that advances non-policy goals. It may be that Justice Sullivan was a "bad apple" and that this was an extreme and rare incident, but it does shine a light on the fact that justices are aware of themselves and their own careers. They understand the political implications of the choices they make. They know who has power over their professional advancement. And in this case, they were willing to change the way they do their job to try to optimize their outcomes. But for the *Hartford Courant*'s investigative work, this would be unknown. When discussing exactly this calculus (would a judge ever change their behavior to protect or advance their career?) with a member of the Virginia General Assembly – himself a lawyer who interacts with judges, but is also partly responsible for appointing them – the representative simply responded, "Well, what would *you* do?"

Chapter 4

Executive Influence on State Supreme Court Justices: Strategic Deference in Reappointment States

State supreme court justices are often the final arbiters of law in their jurisdictions. Yet, in states that grant governors the power to selectively reappoint supreme court justices, justices' independence is limited. These governors are well positioned to monitor justices' decisions and are institutionally empowered to remove justices whose jurisprudence veers too far away from the governor's preferences. This power gives governors substantial influence over judicial decision-making by justices who are eligible for another term on the bench. I test this proposition on an exhaustive set of state supreme court criminal appeals from 1995 to 2010, and show that votes by justices who need to be reappointed are strongly correlated with executive preferences, while votes by those who are ineligible for reappointment are not. To further support my argument that the reappointment power itself is the source of this executive influence, I show that this influence is not found in similar states where governors lack reappointment power. These findings show that elite reappointment strongly limits judicial independence.

Note: This article in its present form is the result of journal submission and numerous conference presentations. Reviewer requests introduce small variations in testing strategy, model and variable choices, and terminology in comparison with other chapters. Most notably, presentation style has been altered for publication purposes.

On November 3, 2009, Chris Christie defeated the incumbent, Jon Corzine, to become Governor of New Jersey. Despite decades of unbroken reappointments by New Jersey governors, Christie soon refused to reappoint two state supreme court justices to tenured status.[27] In response to Christie's first refusal, the president of the state Senate, Stephen Sweeney, said, "[The justice's] removal is an affront to judicial independence. The governor has sent the message to judges across the entire state that if they aspire to sit on the Supreme Court they better start practicing politics rather than law." (Star Ledger 2010). In this paper, I show that state supreme court[28] justices in states like New Jersey had internalized this message long before Governor Christie was elected. They had already been practicing politics with the governor in mind. I analyze justices who face executive reappointment and argue that they have – and act on – a rational incentive to strategically defer to their governor's preferences. Reappointment-eligible justices are not purely independent deciders.

Sweeney's idea of what judges should do – independently practice law rather than politics – is an idealized notion of justice that political scientists have struggled to find empirical support for. In addition to legal influences, state justices also balance ideological, administrative, and personal considerations. Much of the literature on political influences in state courts focuses on the impacts of judicial elections in hyper-salient cases, the sway of public opinion, and the influence of rising campaign spending (Bonneau 2005; Hall and Bonneau 2006; Bonneau 2007; Bonneau and Hall 2010; Canes-Wrone, Clark, and Kelly 2014). This has the unintended consequence of making appointed judges seem closer to the ideal of independent

[27] Governor Christie's example is not unique. In 2014, Democratic governor Andrew Cuomo refused to reappoint Justice Victoria Graffeo, a Republican appointee who was up for reappointment after fourteen years on the bench. In 2015, another Republican appointee, Justice Susan Read, resigned rather than seek an uncertain reappointment from Governor Cuomo.
[28] I use "state supreme courts" as a convenient stand-in term for all state courts of last resort.

legalism and draws our attention to a narrow slice of cases rather than the potential of consistent influence across the docket. In five states, governors decide retention in addition to the initial appointment.[29] Justices in these reappointment states are subject to a host of competing political forces. I test whether governors' power to reappoint gives them significant influence over reappointment-eligible justices' decisions and find that it does.

Executive influence cuts sharply against the grain of judicial independence, often seen as a hallmark of a functioning democracy. To be independent is to be free of outside pressures and influences. The judicial branch, within the separation-of-powers framework broadly employed in the United States, is meant to check the powers of the other branches. The judiciary can strike down laws and invalidate executive actions that conflict with the state or federal constitutions. It is the only institution that can tell lawmakers what the law is.[30] However, the federal system of life appointment fails to answer Juvenal's timeless question: "*quis custodiet ipsos custodes*?"[31] Some states answered this question by giving governors the power to selectively reappoint justices. While this provides a level of oversight of the judiciary, I show that judicial independence is partially lost as the price of this oversight.

Judicial Vulnerability to Executive Reappointment Power

Unlike their counterparts in the federal judiciary, the vast majority of state supreme court justices serve time-limited terms, ranging from six to fourteen years. Terms solved the problem

[29] I do not address any potential effects of judicial nominating commissions or confirmation bodies. The role of nominating commissions is minimal for reappointments, where incumbents start out with a presumption of qualification. While confirmation bodies may impact reappointments, they cannot force governors to reappointment or reject. Separate explorations found no mediating effect by nominating commissions or confirmation bodies.
[30] In the states, this is analogous to the arguments in *Marbury v. Madison*, 1 Cranch 137 (1803).
[31] Decimus Junius Juvinalis, *Satires*, VI. Popular translation: "Who watches the watchmen?"

posed by incompetent or corrupt judges: they could be easily, if belatedly, replaced. But if limiting the length of judicial terms solved one problem, it created another: some entity must have the authority to retain justices at the end of those terms. In many states, that choice is left to the people in some form of election. But in five states – Connecticut,[32] Delaware, Maine, New Jersey, and New York – the governor has the power to renew expiring judicial terms.[33]

When studying the potential influence of other branches on courts, scholars often situate the judiciary in separation-of-powers (SOP) games. In these theories, a court, treated as a unitary actor (the median member), makes decisions within a multi-branch policy-making process. The key feature is that the court must take into account the end result of that process, including how other branches might respond, when making their choices. Langer (2002, 2003) and Johnson (2015) provide multiple examples in state courts. Epstein, Knight, and Martin (2001) articulate SOP logic for the United States Supreme Court. This has been a useful way of thinking about court behavior and how problems such as the lack of jurisdiction control or law-enforcement power shapes courts' latitude in decision making.

Yet, retention does not fit neatly into the existing SOP framework because retention focuses on a justice-level, rather than court-level, relationship. Retainers, such as governors and

[32] Connecticut is often classified as a legislative reappointment state (see Shepherd 2009b) because of the unique language of its Constitution that states that: "The judges of the supreme court […] shall, upon nomination by the governor, be appointed by the general assembly…" (Article V, Sec. 2). However, I classify Connecticut as an executive reappointment state because its essential features (notably, the governor being the first mover) are identical to the typical institution of executive appointment with legislative confirmation. The role of legislative "confirmation" – the term often used in local coverage of Connecticut judicial nominations – in reappointments is ripe for further inquiry.

[33] While I refer to these states as having a common system, they practice variations on the central theme. For example, New Jersey has only one retention moment: a tenure decision after a seven-year term. If the justice is granted tenure, they do not face retention again. I take these variations into account in designing this research and coding the relevant variables.

voters, make choices about individual justices, not courts as a whole. Therefore, other political actors may have different retaliation portfolios for each justice. Consider a court where three justices are not eligible for a new term because of mandatory retirement ages, but four others are. This means that the possibilities for retaliation vary across justices. This is not a rare situation; it is the norm in reappointment states. Thus, I take the analysis one layer deeper and analyze how each justice relates to the executive branch.

When analyzed individually, the retention relationship between governors and justices resembles a principal-agent relationship. While courts are not agents in classical contract terms, and the judiciary is a "co-equal branch of government," individual justices' relationships with their retainers carry many of the attributes of principal-agent relationships. Every state has a set of appellate cases that it must adjudicate, and a formal branch of the government designated to dispose of them. Those tasked with controlling the composition of the bench do not follow along with every pleading, brief, and oral argument; they lack this level of information, a situation typical of the principal-agent relationship (Miller 2005). Retainers must allow justices to decide cases on the state's behalf and accept the result, but do not know the justices' true preferences or how they will rule. Analogizing to principal-agent relationships does not conflict with the SOP approach, but it does help for looking within the unified court to analyze the individualized relationships between justices and other political actors within the SOP policy-making framework. This principal-agent logic is well suited to analyzing how judicial career incentives affect behavior (Ramseyer and Rasmusen 2010).

I follow Langer (2002) in assuming two things about justices. First, I assume that they have preferences over case outcomes. Because I focus on the influence of external factors on justices, I assume nothing else about these preferences. They may be the result of policy

attitudes, legal interpretations, some combination of the two, or other factors. No matter what endogenous processes generate these preferences, my arguments focus on how justices get pushed away from those preferences by exogenous forces.

Second, I assume that justices also have preferences over their career outcomes and in most cases want to keep their office and the pay, prestige, and policy-making power that come with it. These assumptions fit prior research that has found that elected judges exhibit an electoral connection (Hall 1992; Huber and Gordon 2004; Canes-Wrone, Clark, and Park 2012; Canes-Wrone, Clark, and Kelly 2014). In a comparative context, Ramseyer and Rasmusen (2001) explain the overwhelming conservatism of Japanese lower courts by showing that judges were rewarded and punished in their progress through the judicial bureaucracy based on how deferential they were to the conservative preferences of the ruling party in politically salient cases. Pérez-Liñán, Ames, and Seligson (2006) find that career concerns in Bolivian lower courts lead to deference to the higher court that influences their promotion. Garoupa and Ginsburg (2009) review how career concerns and judicial recruitment systems in a variety of civil-law countries influence judicial behavior and independence.

Appointed justices in American state supreme courts likely also have strategic self-preservation and career-advancement motives layered on top of their endogenous legal and policy preferences. This desire for self-preservation and professional success gives governors an opportunity to influence justices. However, successfully influencing agents often requires two elements: monitoring capacity and an enforcement mechanism. Governors, with extensive monitoring resources and the ability to deny retention, are well situated in both of these aspects.

Monitoring plays a central role in maintaining an agent's loyalty towards its principal. A principal with better monitoring capacity, all else equal, can retain tighter control over its agent.

Even when a principal has a strong enforcement mechanism, it will not be precise enough to control agent behavior in the absence of an effective means of monitoring. While electorates have generally low information levels (ABA 2003) and poor monitoring capacity outside of the salient cases that get local coverage (Hoekstra 2000), governors are in an excellent position to observe judicial behavior. Though courts are steeped in arcane traditions favoring privacy and opacity, they also, by convention, provide voluminous information on what they do and why they do it. Though governors have many other concerns – such as the annual budget battle with the state legislature (Kousser and Phillips 2012) – they have large, professional staffs of assistants, who can read and decipher legal decisions and thus monitor justices' behavior.[34]

In New York, for example, governors have created external committees[35] of lawyers that assist the governor's office in sifting through large quantities of judicial, professional, and personal information on judicial candidates and incumbents.[36] These committee members are diverse in terms of ideology, party, legal specialization, and interests.[37] In addition to the outside experts that the governor's office invites to help, other actors submit reports on qualifications and suitability. These include bar associations, interest groups, and concerned citizens. The governor's office has no shortage of information and a low marginal cost for obtaining detailed evaluations of the merits of any particular appointment or reappointment candidate.

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[34] All governors should have sufficiently adequate staff that close monitoring is possible. However, states vary in the level of professionalization and funding for executive branches. These variations may be ripe for subsequent research.

[35] For example, see New York Governor's Executive Order No. 15, from April 27, 2011. Similar committees existed under other governors as well, across the states and time period I analyze.

[36] One interviewed member of such a committee described the process of sifting through "eight inches of documents" covering a candidate's past judicial decisions, financial and criminal records, as well as information on the candidate's family members.

[37] For example, committees contain members whose legal practices are in different specialties, allowing for a broad, but detailed, analysis of each judge's legal record.

Within a typical governor's administration itself, staff members evaluate the extensive documentation and the reports created by the evaluation committees, while also interviewing candidates for appointment and reappointment.[38] Collectively, these resources – specialized and diverse – allow the governor's office to form detailed evaluations about judges and justices. Once the governor and senior staff enter the process, they are empowered to make an informed and targeted decision about appointment. One factor that they are likely to consider in this process is the ideological agreement of the justices.[39]

Enforcement is the second significant factor in influencing agents. In the absence of an enforcement mechanism, agents have few reasons to defer to their principal because they face no consequences. Some justices are appointed to life terms and others are appointed to terms at an age such that they are ineligible for a second term. In these cases, the governor lacks a strong enforcement mechanism.[40] However, governors that have the power to reappoint justices to additional terms have a significant means of influence. In one decision, the governor can fire the justice, stripping them of a job, compensation, and prestige.

Monitoring capacity and enforcement mechanisms work together. Because governors can monitor justices, enforcement does not have to be bluntly or randomly applied. And if justices know they can be rewarded or punished based on a precise evaluation of their own individual choices, they have an incentive to alter their behavior in the direction of the

[38] One interviewed staff member with significant responsibilities over judicial appointment in a northeastern state indicated that five to ten staff members would be involved in evaluating a candidate for appointment or reappointment.
[39] Multiple interviewees with roles in the appointment process in northeastern states confirmed that ideological agreement was a factor in reappointment decisions, though the relative importance varies from situation to situation.
[40] The governor likely still has other, weaker enforcement mechanisms, in conjunction with the state legislature. This may be through salary control, court organizational reforms, or jurisdictional aggression as seen in the federal example in Clark (2011).

governor's preferences. This intensive monitoring capacity theoretically allows governors to influence even less notable cases that an electorate would simply never hear of.

One possible limitation is that the governor's actual use of the enforcement mechanism is insufficiently credible to alter judicial behavior. It is an empirical fact that refusals to reappoint, like the two by Governor Christie mentioned in the introduction, are very rare. After rejections, elites – like state Senator Sweeney – commonly invoke shock at the lost innocence of a suddenly politicized system, appealing to traditions of bipartisanship. But the rarity of rejection does not mean governors are irrelevant or weak or that rejections are not taken seriously. Rejections are plausible and credible; empirically, they do occur. I show that rejections are rare because justices sufficiently alter their behavior to avoid them.

Despite these reasons to expect executive ideological influence through retention, the existing literature on this question is sparse and mixed. Langer (2002) found evidence for influence for those with retention power in tests not specifically focused on executives. Shepherd (2009b) specifically analyzed reappointment states and found that justices who needed to be retained by a governor were deferential. More recently, Johnson (2014, 2015) found no evidence that governors exert influence through retention pressures, despite evidence that they are influential through other means. One common feature in this line of research is a focus on direct inter-branch relations: how a court responds when another branch is a litigant or has one of its actions challenged before the court. I focus instead on ideological deference, which allows for the possibility that a liberal governor may in fact make a retention-seeking justice *more* likely

to rule against the state in criminal cases. It also helps us understand deference when the governor (or one of her actions) are not before the court.[41]

Scope and Hypotheses

In this paper, I analyze one subset of all state supreme court votes: criminal appeals. Criminal cases provide the best opportunity for a clean test of my theoretical arguments. Crime policies map well onto an ideological dimension, with conservatives generally being more punitive and favoring fewer defendants' protections than liberals across almost every aspect of criminal law. Criminal cases also represent a substantial part of the docket. Picking criminal law results in a dataset that is large, reliably coded, and coherent with the theoretical predictions.

Choosing criminal cases partially mitigates the problem of docket discretion. Because of mandatory appeals for some crimes, norms in favor of taking appeals from those sentenced to serious penalties, and the weakness of some state intermediate appellate courts, state supreme courts generally have less docket discretion over these cases. This cannot eliminate the potential selection effects of discretionary jurisdiction, but it does limit them in comparison with other areas of law. A separate analysis showed no relationship between the retention status of justices and the rate of taking criminal cases. The types of cases, however, may vary based on the situation. Exhaustive data on the set of potential cases are not available, preventing the use of a sample-selection model to address these concerns. Even so, it is important to note that even if

[41] Though the "State" is always before the Court in criminal cases, these cases highlight one limitation of a focus on inter-branch relations in the state context. Because so many parts of the state government are often independently elected (state's attorneys and attorney generals, for example), assuming that the Governor always wants the state, broadly defined, to win may be an overgeneralization.

justices systematically take different cases in light of their retention pressures, this would still be a significant and meaningful form of executive influence – though a more difficult one to test.

One limitation of this choice is that most governors, as the state's chief executive, want to be (or at least appear) tough on crime. This means that the differences between liberal and conservative governors may be more muted on criminal issues than the comparable gap between liberal and conservative legislators or voters. But while all governors may want to be tough on crime, conservatives generally want to be tougher. The average liberal governor is likely to prefer more pro-defendant rulings than a conservative. I do not assume that a liberal would vote for defendants in every case – they are not "pro-crime." Instead, my assumption is only that conservatives favor prosecutors more frequently and consistently than liberals do, across the wide range of issues within criminal law. Thus, a conservative would vote for the prosecution, all else equal, a greater portion of the time. This implies the following hypothesis:

Strategic Deference Hypothesis: Reappointment-eligible justices show more deference to their governor's preferences than reappointment-ineligible justices do.

The Strategic Deference Hypothesis predicts that retention-eligible justices pay close attention to the preferences of their governor and rule in a way that will help guarantee their retention. This means they are more deferential to their governor than retention-ineligible justices are. The Strategic Deference Hypothesis accounts for variation in punitiveness: more conservative governors should influence the retention-eligible justices on their courts to cast more votes for the prosecution. The choice to analyze criminal appeals raises a higher bar for this hypothesis, because there is likely less variation in preferences across the ideological spectrum on criminal

law than there is in other issues. If conservatives favored one type of decision – and liberals the opposite – every time, then it would be easier to detect a governor's effect.

To test my hypothesis, I use a series of quantitative analyses. First, I test for, and find, systematic effects across all criminal appeals over a sixteen-year period, indicating that governors have broad and deep influence over the votes of justices that still need to be reappointed. Then, to further support identification of the retention power as the specific cause of this influence, I conduct a placebo test on states in which the legislature, rather than the governor, is given the reappointment power and I find no evidence of comparable executive influence. Finally, I show that individual-level effects aggregate up to changes in case dispositions. Collectively, these results strongly support the Strategic Deference Hypothesis.

Testing

The Data

I begin with a dataset of state supreme court decisions on criminal appeals from 1995-2010, which is a subset of Hall and Windett's (2013) dataset of all decisions from all states for those years. I analyze the set of states that use executive appointment *and* at least one reappointment (Connecticut, Delaware, Maine, New Jersey, and New York) plus the three states that use executive appointment with no retention requirement (Massachusetts, New Hampshire, and Rhode Island). These three non-reappointment states are the universe of states that use both an initial appointment and then a federal-style life- or age-limited term. They approximate a control group and provide information on how justices behave when they never face retention.

Testing my hypothesis requires coding ideological outcomes for each case, which are not included in Hall and Windett's dataset. Because I exclusively analyze criminal appeals, I code decisions in favor of defendants as liberal, and those in favor of states as conservative. While

coding case outcomes dichotomously has obvious shortfalls, there is no better method available for coding the quantity of cases necessary to draw systematic inferences about state courts. The shortfalls amount to rough edges rather than invalidation. Some cases are stronger or weaker "liberal" victories, but the vast majority of cases which find in the favor of defendants will do so through a more liberal interpretation or application of legal standards. Even in cases which do not alter the law, but simply correct deviations by lower-court justices, the act of higher-court policing promotes a more pro-defendant judiciary and strengthens defendants' rights.

To code these outcomes, I used a combination of party names, procedural history summaries, and my own reading of cases to determine who the parties were and who had appealed from (and lost at) the lower court. The tradition of the prosecution having a common name in every case (such as "The State") makes identifying parties reliable, while case decisions and prior-history information identify the losing party in the lower-court decision. I then used the court's disposition (for example, "affirmed" or "reversed") in the case to determine the outcome for the defendant. I coded a case as a victory for the defendant if they improved their situation (such as an overturned conviction or a reduced sentence) on appeal, or if they maintained their situation in an appeal by the prosecution. I conducted numerous personal readings and quality-control checks to verify the reliability of the coding, and I personally read all cases which failed to produce a clear code based on the Hall and Windett dataset.

Variables

The dependent variable, **Liberal Vote**, takes the value "1" when the vote is pro-defendant and "0" when it is in favor of the state. A justice is considered as voting pro-defendant when Hall and Windett code them as voting with a pro-defendant majority or against a pro-prosecution majority. A small (about 2.8% of the total) set of cases cannot be reasonably

coded as either victories or defeats for the defendant (often due to mixed results on separate legal questions which are difficult to objectively weigh against each other). Because of the difficulty of reliably coding these cases and their infrequence, I drop them from the analysis.

The key independent variables that will test the Strategic Deference Hypothesis include a measure of each justice's eligibility for additional terms, a measure of each governor's ideology, and in interaction of those two terms. I argue that the effect of eligibility is conditional on the governor's preferences (eligibility should make justices more conservative under conservative governors and more liberal under liberal governors). Therefore, the Strategic Deference Hypothesis only includes a prediction for the interaction term between the two.

The first key independent variable, **Eligible**, takes the value of "1" when the justice is eligible for an additional term on the date a decision was published and "0" otherwise. As a measure, Eligible improves on previous analyses that applied each state's overall institutional design (such as whether it uses executive reappointments) to every justice in that state (but see Shepherd 2009a and Hall 2014 for a better focus on individual justice situations). Treating all justices within an executive reappointment state equally introduces measurement error because it marks justices who were not eligible for another term as facing reappointment. At any given time, state supreme courts in reappointment states are made up of mixes of reappointment-eligible and -ineligible justices. Eligible separates out those who were appointed but cannot be reappointed from those who must still face reappointment. This individualization helps to identify the executive influence directly related to reappointment powers.

I accumulated the information necessary to code Eligible from newspaper articles, official state documents, and biographies. Justices are deemed ineligible when they could not legally hold another term due to mandatory retirement ages or had announced an intention to

retire or take a different job. For example, if a justice is reappointed to an eight-year term when they are 66 years old, and the state has a mandatory retirement age of 70, then the justice is ineligible for another term after their reappointment. Thus, all votes cast before the reappointment would be coded as eligible, while all those taken after the reappointment would be coded as ineligible. Each coding is tailored to the specific rules that applied to each justice as of the day the decision was announced. For example, justices in New Jersey who obtained tenure after their first term are counted as ineligible for the remainder of their time on the court.

This coding scheme is intentionally blunt. I treat justices with 14 years left in their term identically to those with only one year left. While over-time effects are interesting avenues for additional research, I focus on the impacts of retention-eligibility itself.[42] Because only public behavior is observable, I also count as eligible justices who had privately decided to retire but who had not yet announced it. Any resulting measurement error biases tests against my predictions because it reduces the observable differences between eligible and ineligible justices.

The second key independent variable is **Governor's Ideology**, which is an ideology measure of the governor serving on the day the vote was published.[43] To measure this, I use Bonica's (2014) CFscores, which utilize campaign donations to scale ideology for many state and federal political actors since 1980. CFscores are exogenous to the data-generating process[44] and cover a wide range of political actors for a long period of time in one common space.

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[42] A separate, preliminary analysis indicates that there is not an over-time or recency-bias effect and that the executive influence I describe in this paper is found consistently throughout a justice's term. This is a subject for future research.

[43] In the short window between Election Day and Inauguration Day, I use the CFscore of the governor-elect rather than the actual serving governor.

[44] I do not use the dynamic IRT measures created by Windett, Harden, and Hall (2015) for this reason. Since the votes I analyze are some of the votes used to create those scores, they are not suitable for this analysis. I note, however, that their inclusion would not alter my results.

Specifically, I subtract from each governor's score the average score of governors within that specific state, meaning that the resulting measure is the governor's conservatism or liberalism relative to the state's average. I use this differenced approach because my ultimate models include state-specific intercepts, however all results are robust to using the unaltered CFscore as well. Governors in the dataset average 0.03 on this relative score, ranging from -1.10 to 1.38, with a standard deviation of 0.42.[45] Governor's Ideology picks up any covariation between governors' preferences and justices' votes for reasons other than retention politics, such as their role in the lawmaking process that determines judicial compensation and workload. Because higher CFscores are more conservative, any effect of Governor's Ideology should be negative.

The final independent variable is the interaction, **Eligible X Governor's Ideology**, which measures the extra relationship that the votes of eligible justices have with the governor's preferences in comparison with the votes of ineligible justices. This interaction directly tests the Strategic Deference Hypothesis, which states that eligible justices are more deferential to governors than ineligible justices are. Because higher CFscores are more conservative, there should be a negative relationship between Eligible X Governor's Ideology and Liberal Vote.

In addition to the dependent and independent variables, I also control for each justice's own preferences. **Appointing Governor's Ideology** is the CFscore of the governor who initially appointed the justice, again differenced from the average appointing score in the state. If appointers effectively pick likeminded justices, then those with more liberal appointers should cast more liberal votes. I choose the justice's appointer's score, instead of the justice's own CFscore, because the proxy score is consistently available (many appointed justices lack their own score) and the logic of CFscores is more compelling for political actors that regularly

[45] Their undifferenced CFscores average -0.26 (S.D. = 0.54) and range from -1.18 to 0.88.

participate in campaign finance, like governors. Using appointers as proxies is an established measurement strategy for appointed judges (Giles, Hettinger, and Peppers 2001). In this case, CFscores for governors have no apparent relationship with state supreme court cases. Using proxies has limitations, as not all justices closely match their appointers, given variations in initial selection processes (McLeod 2012). Recognizing this, I also present models using justice fixed effects to control for any unobserved heterogeneity in justice preferences.

Finally, I include a set of potentially important covariates. **Defendant Appealed** is coded as a "1" when the defendant brought the appeal and "0" otherwise. This provides an indicator of the ideological direction of the lower-court's decision. I expect that cases brought by defendants are less likely to receive a pro-defendant outcome than those brought by the state. **Murder** is coded as a "1" when at least one of the defendant's charges was murder, and "0" otherwise. A murder case's high stakes encourage lower courts to follow existing rules and precedents closely to avoid mistrials and reversals. However, the high penalties of a murder conviction (and automatic rights of appeal) dramatically increase the rate of appeals in these cases. Because defendants are more likely to appeal, while those appeals are of lesser average merit, the rate of success should be lower for defendants appealing murder convictions. The seriousness of the crime likely also leads to more conservative attitudes when interpreting legal issues on appeal. I expect that cases involving murder charges receive fewer liberal rulings on appeal.[46] **Past Executive Experience** is coded as a "1" when the voting justice had served in the state or federal executive branch before becoming a judge. Because of the executive's law enforcement role, I expect that these justices are less likely to vote for defendants on appeal.

[46] I highlight murder cases because of their distinctive gravity and strong correlation with case outcomes on appeal. In Appendix 1, Table A1-5, I present models which control for "case facts," which include a much larger variety of case charges as well as legal issues.

Scholars repeatedly find that judges are responsive to public opinion in a variety of high-salience situations (Hall 1992; Brace and Boyea 2008; Caldarone, Canes-Wrone, and Clark 2009; Cann and Wilhelm 2011; Canes-Wrone, Clark, and Park 2012; Besley and Payne 2013; Canes-Wrone, Clark, and Kelly 2014). Avenues for direct popular influence on justices in the absence of elections are limited,[47] however a measure of public opinion may also be thought of as capturing unobserved political and social changes that impact both voters and courts. To measure **Voter Liberalism**, I use partisan voting as a proxy. Specifically, I measure the Democratic presidential candidate's two-party vote share in the state in each presidential election between 1992 and 2012, and I subtract from it the national Democratic two-party vote share. This difference represents the state's relative liberalism (positive values) or conservatism (negative values). Presidential races offer a common choice across states. Deducting the national average controls for candidate differences across elections. For the years between elections, I assume a linear transformation from the previous election to the next election. As with Governor's Ideology and Appointing Governor's Ideology, I difference each state-year score from the state's average over the 16-year time period. Because Voter Liberalism increases in liberalism, higher values should be positively associated with liberal votes.

Legislatures may also influence judicial behavior. Not only are they responsible for justice compensation and the court system's organization, but they are also signals of public opinion. Clark (2011) shows that Congress influences judicial decision-making through "court curbing;" state legislatures may also have this capacity. Unfortunately, CFscore data are too incomplete for state legislatures (especially in the 1990s). Thus, I measure **Legislature Ideology**

[47] Having elected elites, rather than voters, handle judicial oversight essentially functions as a form of delegation from the public to a smaller set of actors with weaker collective-action barriers (Ramseyer and Rasmusen 2010).

using Shor and McCarty's (2011) state legislature common space scores, each differenced from the state's average over the time period.[48] As with CFscores, higher values represent more conservatism, thus increased scores should be negatively associated with liberal votes. Table 1 presents summary statistics of all variables.

Table 4.1. Summary Statistics

Variable	Mean	S.D.	Min	Max
Liberal Vote	0.246	0.431	0	1
Governor's Ideology	0.031	0.417	-1.100	1.378
Appointing Gov.'s Ideology	0.007	0.554	-1.087	1.061
Executive Experience	0.483	0.500	0	1
Defendant Appealed	0.843	0.364	0	1
Murder	0.233	0.423	0	1
Voter Ideology	0.134	1.278	-3.206	2.987
Legislature Ideology	-0.003	0.210	-0.730	0.540
Eligible	0.484	0.500	0	1

Note: Averages are taken at the unit of votes, not unique scores.

Model Specifications

To test the Strategic Deference Hypothesis, I analyze whether a justice's eligibility status conditions the influence of the governor's ideology on the probability that a justice will cast a liberal vote (the dependent variable in each model). To illustrate the robustness of my results, I present a variety of model specifications. Despite the dichotomous dependent variable, I use Ordinary Least Squares (OLS) in the body of the text for ease of interpretation and reliability with a variety of fixed effects and clustering options. All results are reproduced using logistic regression in Appendix 4.1, Table A4.1-1, and are highly similar in both significance levels and

[48] Shor and McCarty's data lack values for some states in some years, especially in 1995, 2009, and 2010. No year lacks all states. I do not see a reason why missing data in these three years biases the results I report in any particular direction. Despite this missing-data issue, the Shor and McCarty scores provide the best common-space estimate of legislature ideology.

effect size estimates. I begin with a base model including all of the variables described in the preceding section. On top of this, I pursue different clustering options to address the fact that votes are correlated within justices and cases.[49]

I expand on the base model with two alternative models including fixed effects at one of two levels: justice or case. First, Justice fixed effects create a unique intercept for each justice and capture unobserved heterogeneity between justices. This helps alleviate concerns that the available ideology measures of state supreme court justices are inadequate. Second, I include case fixed effects. Case fixed effects create a very difficult and highly identified test for the Strategic Deference Hypothesis. Specifying unique intercepts for each case highlights variation between justices on *the same case*. If governors influence the votes of some justices (the retention eligible), but not others, in a particular case, that is the strongest possible evidence for retention-driven executive influence. While this provides strong identification in theory, case-level fixed effects likely understate effect sizes in these analyses. State court collegiality is high and unanimous rulings are frequent. One likely reason for this is that high workloads discourage justices from spending the effort to dissent once a core majority has been formed. Thus, within a particular case, collegiality reduces variation between justices and makes it more difficult to detect a governor's influenced, which may have led to the court's core majority. This is easiest to envision in a case where the majority of the court is eligible. An ineligible justice in this case has workload-driven incentives to join the majority rather than voting any alternative preference. This understates executive influence on the case and makes for the most conservative test.

[49] While judicial vote data are clearly not independent, they are potentially correlated on a variety of different levels, and it is not always clear which level is the best for clustering. In addition to justices and cases, my results in the base model are also robust to clustering within state-year, governor-year, and governor.

Results: The Impact of Governors on Justice Votes

In Table 4.2, I present five Ordinary Least Square regression models. Models 1-3 include the base model with different standard errors (unclustered, justice-clustered, and case-clustered, respectively). Model 4 adds justice fixed effects and Model 5 includes case fixed effects. The Strategic Deference Hypothesis predicts that the coefficient for Eligible X Governor's Ideology will be negative and statistically significant in each model.

Table 4.2. Retention-Eligible Justices Vote in Line with their Governors' Preferences

Dependent Variable:	(1)	(2)	(3)	(4)	(5)
Liberal Vote	Base	Justice Clust.	Case Clust.	Justice FEs	Case FEs
Governor's Ideology	**-0.027**	**-0.027**	-0.027	**-0.019**	
	(0.007)	(0.008)	(0.017)	(0.008)	
Eligible	**-0.034**	-0.034	**-0.034**	-0.024	**-0.025**
	(0.009)	(0.020)	(0.009)	(0.016)	(0.004)
Eligible X Gov.'s Ideology	**-0.087**	**-0.087**	**-0.087**	**-0.085**	**-0.028**
	(0.017)	(0.017)	(0.033)	(0.020)	(0.011)
Appointing Gov.'s Ideology	0.000	0.000	0.000		**-0.005**
	(0.005)	(0.006)	(0.005)		(0.002)
Defendant Appealed	**-0.102**	**-0.102**	**-0.102**	**-0.102**	
	(0.007)	(0.024)	(0.020)	(0.007)	
Murder	**-0.085**	**-0.085**	**-0.085**	**-0.085**	
	(0.006)	(0.016)	(0.014)	(0.006)	
Executive Experience	**-0.018**	**-0.018**	**-0.018**		**-0.013**
	(0.005)	(0.007)	(0.004)		(0.002)
Voter Liberalism	-0.001	-0.001	-0.001	0.001	
	(0.002)	(0.002)	(0.005)	(0.002)	
Legislature Ideology	**-0.067**	**-0.067**	**-0.067**	**-0.078**	
	(0.013)	(0.017)	(0.030)	(0.015)	
Justice Fixed Effects				√	
Case Fixed Effects					√
Clustering Level		Justice	Case		
N	27,797	27,797	27,797	27,797	27,797
Clusters		105	5,696		

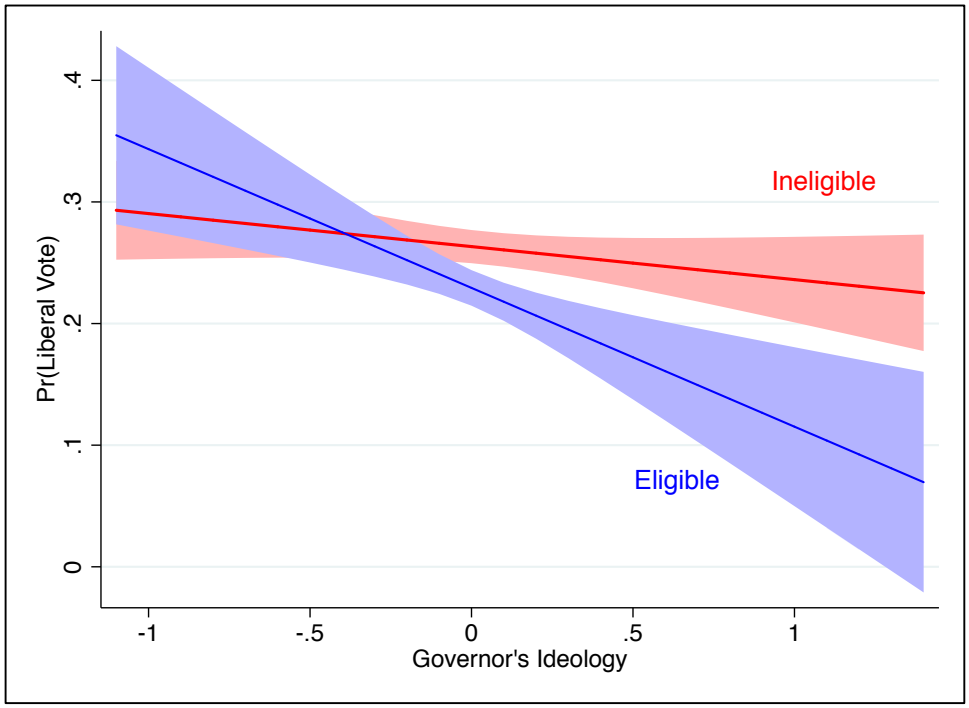
Note: Numbers in cells are Ordinary Least Squares regression coefficients with standard errors in parentheses. Constants and state-specific dummies are included, but not presented. Bolded coefficients are significant at the $p<0.05$ level, one-tailed tests.

The results in Table 4.2 support the Strategic Deference Hypothesis. The interaction term, Eligible X Governor's Ideology, is negative and significant in all five models. Governor's Ideology has a stronger relationship with vote choice for the retention-eligible than the ineligible, even when controlling for many other relevant factors that impact vote choice and case- and justice-specific intercepts. In Models 1-4, a one-point increase of conservatism in a state's governor corresponds to about 8.5% fewer pro-defendant votes by retention-eligible justices in comparison to retention-ineligible justices. As expected, the estimated effect is smaller in Model 5 (about 2.8%), which uses case fixed effects. But, as discussed in the preceding section, case fixed effects likely mute executive influence due to collegiality norms. This argument is supported by the fact that the estimated relationship is five times stronger in non-unanimous cases.[50] In addition to the models in Table 4.2, and the replication using logistic regression in Table A4.1-1 of the Appendix, I also pursue alternative specifications in Table A4.1-2 of the appendix. These specifications include alternative levels of clustering and the combination of clustering and fixed effects in the same models. Across all three tables, the interaction term is statistically significant and negative in fifteen out of fifteen specifications.

To help visualize executive influence, I present (in Figure 4.1) the estimated probabilities of liberal votes for retention-eligible and -ineligible justices as the governor's ideology varies. The values come from Model 2 in Table 4.2 and hold all other variables at their median values.

[50] In a model which drops all unanimous cases, the OLS coefficient on the interaction term in a case-fixed-effects model is -0.137 (S.E. 0.056). This is analogous to the logistic regression replication in Table A1, Model 5, which drops all unanimous cases in a case-fixed effects model for being perfectly predictive and also finds a much larger relationship. That said, unanimous cases are still worth considering because executive influence can influence these decisions, especially when a majority of the court is retention-eligible.

Figure 4.1. Retention-Eligible Justices Become More Conservative under Conservative Governors



Note: Area plots represent 95% confidence intervals.

Figure 4.1 reveals the substantial impact of being retention-eligible on a justice's vote and the influence that reappointment power gives to governors. As the occupant of the governor's mansion becomes more conservative, so do the justices who still need to be reappointed. The slopes of the lines are significantly different and the predicted effect of eligibility is distinguishable from zero for a majority of the ideology space. Based on Model 2, a change equivalent to the distance between an average northeastern Republican governor (0.29) and an average northeastern Democratic governor (-0.75) increases the probability of a liberal vote by a retention-eligible justice by about 11.5 percentage points. By comparison, retention-ineligible justices would only be expected to move 2.8 percentage points in the liberal direction for the same change. A more extreme shift, moving from a full point above the state average to a full point below produces an estimated 22.8-percentage-point increase in the likelihood of

casting a liberal vote (compared to 5.4% for the ineligible). All of these shifts are statistically significant and, given that the base rate of liberal votes is only 24.6%, are also meaningful.

These results have profound implications for criminal justice in the northeast. Reappointment-eligible justices in this dataset cast more than 15,000 votes in criminal cases. It is likely that many hundreds or as many as a thousand were cast differently than they would have been under a typical governor from the opposite party. This is enough votes to alter many case outcomes and, in a subsequent section, I show that these votes do alter final decisions. Even when they do not, minority votes weaken precedent and invite challenges and differentiation. The long-run impact of these votes could be exponentially larger because thousands of other defendants will be subsequently tried based on the precedents established in these cases.

Additional Tests

The preceding section provides evidence of strong executive influence over justices who are eligible for an additional term. To further explore executive influence, I conduct two additional tests. First, to help support identification of the retention power as the mechanism of executive influence, I analyze states in which justices must be reappointed, but that power lies with the legislature rather than the governor. In these states, I should not – and do not – find evidence of extra executive influence on retention-eligible justices. Second, I aggregate up to the level of case outcomes and find that influence on individual votes impacts the ultimate disposition of appeals. Collectively, these tests provide evidence that retention is the key mechanism of the influence I present in this paper and that the results have strong substantive significance through the impact on case outcomes.[51]

[51] Appendices A2 and A3 include additional tests meant to further explore and validate the causal effect and mechanism. In Appendix A2, I analyze votes cast under term-limited

Cross-State Placebo Test

If executive reappointment drives strategic deference, then eligible justices should only be deferential to their governors when the governor handles reappointment. In many states, other actors control reappointment. For example, the legislature is responsible for reappointment decisions in Virginia, South Carolina, and Vermont.[52] While a full test of how justices in those three states vote is beyond the scope of this article, they are useful for a placebo test. These are a group of justices who *can* be reappointed, but whose fate does not rest with the governor. Therefore, if my arguments are correct, I should find that eligible justices in these states are no more deferential to their governors than ineligible justices are.

To test this, I add all votes from 1995 to 2010 in Virginia, South Carolina, and Vermont to the dataset used in Table 2. Additionally, I separate Eligible into two different types: **Eligible – Governor**, which identifies that a Governor has the power to reappoint, and **Eligible – Legislature**, which identifies that a legislature has the power to reelect. The base category is all justices who were not eligible for a new term across all eleven states (some because they had life terms, others because they had announced their impending retirement, and others because they were no longer legally eligible due to age). I interact each of the eligible categories with

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governors and find some, but mixed, evidence that justices do not defer to governors who cannot decide their reappointment due to executive term limits. In Appendix A3, I conduct a simple difference-in-differences analysis of elections where parties swap control of the executive branch. I analyze votes taken in the two years preceding and following the election and show that justices (controlling for their pre-election vote rates) move in the direction of the new executive, while those in states where the incumbent party won the election do not.

[52] There is variation within these states. In Vermont, governors fill vacant seats, but legislatures exclusively control retention at the end of terms. South Carolina uses a legislative election system for initial selection. Virginia also uses a legislative election system, but the governor has the power to appoint when the legislature is in recess. In recent years in Virginia, governors have made several significant appointments to the Supreme Court. While the method of initial selection varies to some degree, justices in all three are initially appointed by elected political elites and, crucially, are retained by the legislature rather than the governor.

Governor's Ideology. If my arguments are correct, then the interaction term, **Eligible – Governor X Governor's Ideology**, should be significant, as well as significantly different from the interaction term, **Eligible – Legislature X Governor's Ideology**. This would imply that governors have stronger influence when they have the power to reappoint than when they do not. The results are presented in Table 3 and use the same model specifications employed in Table 4.2. Again, these results are robust to estimation using logistic regression and those models are presented in Appendix 4.1, Table A4.1-3.

Table 4.3 shows that the formal power to reappoint matters. While governors and legislatures undoubtedly exert influence over the justice system through a variety of means, the one with the authority to reappoint has a crucial additional lever of power. Eligible justices in states where governors decide reappointment show deference to their governors. The interaction term, Eligible – Governor X Governor's Ideology, is statistically significant in all five models, largely mirroring the main model in Table 4.2. However, in states where the legislature has reappointment power, there is no comparable deference. In four of the five models, the interaction between Eligible – Legislature and Governor's Ideology is insignificant or in the wrong direction, with a small estimated effect. In Model 4, with justice fixed effects, the interaction, Eligible – Legislature X Governor's Ideology is significant, however it is still considerably smaller than the effect in executive reappointment states. The executive interaction term is statistically distinguishable (in the predicted direction) from the legislative interaction at the $p<0.01$ level in each model, implying more influence for governors with appointment power than governors without. The upshot of these results is that eligible justices in executive-reappointment states vote differently than ineligible justices vis-à-vis the governor's preferences, while there is little or no difference in legislative-reappointment states. This provides the

strongest evidence yet that the governors' reappointment power is the mechanism powering their influence.

Table 4.3. Retention-Eligible Justices Are Responsive to their Governors' Preferences

Dependent Variable:	(1)	(2)	(3)	(4)	(5)
Liberal Vote	Base	Justice Clust.	Case Clust.	Justice FEs	Case FEs
Governor's Ideology	**-0.041**	**-0.041**	**-0.041**	**-0.031**	
	(0.006)	(0.008)	(0.014)	(0.008)	
Eligible – Governor	**-0.031**	-0.031	**-0.031**	-0.023	**-0.021**
	(0.009)	(0.020)	(0.009)	(0.017)	(0.004)
Eligible – Legislature	-0.018	-0.018	-0.018	-0.018	**-0.030**
	(0.012)	(0.017)	(0.011)	(0.017)	(0.005)
Eligible – Gov. X	**-0.072**	**-0.072**	**-0.072**	**-0.073**	**-0.027**
Governor's Ideology	(0.017)	(0.017)	(0.033)	(0.020)	(0.012)
Eligible – Leg. X	-0.000	-0.000	-0.000	**-0.020**	0.030
Legislature's Ideology	(0.009)	(0.011)	(0.018)	(0.010)	(0.007)
Republican Appointee	0.000	0.000	0.000		-0.003
	(0.004)	(0.007)	(0.004)		(0.002)
Defendant Appealed	**-0.063**	**-0.063**	**-0.063**	**-0.063**	
	(0.007)	(0.023)	(0.017)	(0.007)	
Murder	**-0.102**	**-0.102**	**-0.102**	**-0.102**	
	(0.006)	(0.013)	(0.012)	(0.006)	
Executive Experience	-0.004	-0.004	-0.004		-0.002
	(0.005)	(0.007)	(0.003)		(0.002)
Voter Liberalism	**0.006**	**0.006**	**0.006**	**0.006**	
	(0.002)	(0.002)	(0.002)	(0.002)	
Legislature Ideology	**-0.080**	**-0.080**	**-0.080**	**-0.091**	
	(0.012)	(0.017)	(0.027)	(0.014)	
Justice Fixed Effects				√	
Case Fixed Effects					√
Clustering Level		Justice	Case		
N	35,251	35,251	35,251	35,251	35,251
Clusters		139	7,090		

Note: Numbers in cells are Ordinary Least Squares regression coefficients with standard errors in parentheses. Constants and state-specific dummies are included, but not presented. Bolded coefficients are significant at the $p<0.05$ level, one-tailed tests.

Getting from Votes to Outcomes

The focus of this paper is individual-level choices: votes by justices. But much of the potential policy significance of the findings is driven by case outcomes. While larger majorities strengthen precedential durability, the shift of a single vote away from the majority is not as important as flipping the whole case outcome. Therefore, to establish strong substantive significance for this individual-level relationship, I also show that these shifts in vote probabilities aggregate up to meaningful shifts in the probabilities of victory for defendants.

To assess the effect on outcomes, I aggregate up to the case level, reproducing my overall model from Table 4.1 but with the dependent variable being **Liberal Outcome** rather than Liberal Vote. All individual-level variables are averaged over all justices participating in the decision. Thus, Appointing Governor's Ideology becomes **Average Appointing Governor's Ideology**. Eligible becomes **Percent Eligible**, which is simply the percentage of justices participating in the decision who were reappointment-eligible. Otherwise, the overall structure of the models remains the same as those used in Table 4.2. If the individual-level effect aggregates up to outcome-level significance, then the interaction term, **Percent Eligible X Governor's Ideology**, should be negative and significant. The results are presented in Table 4.4, and analogous logistic regression models are presented in Appendix 4.1, Table A4.1-4.

Table 4.4. Influence on Votes Shifts Case Outcomes

Dependent Variable: Liberal Outcome	(1)	(2)	(3)
Governor's Ideology	-0.023	**-0.023**	**-0.023**
	(0.017)	(0.013)	(0.012)
Percent Eligible	-0.033	-0.033	-0.033
	(0.054)	(0.053)	(0.055)
% Eligible X Governor's Ideology	**-0.111**	**-0.111**	**-0.111**
	(0.050)	(0.053)	(0.051)
Avg. Appointing Gov.'s Ideology	0.025	0.025	0.025
	(0.020)	(0.016)	(0.019)
Defendant Appealed	**-0.103**	**-0.103**	**-0.103**
	(0.017)	(0.031)	(0.031)
Murder	**-0.082**	**-0.082**	**-0.082**
	(0.013)	(0.018)	(0.018)
% Executive Experience	-0.034	-0.034	-0.034
	(0.032)	(0.023)	(0.023)
Voter Liberalism	0.002	0.002	0.002
	(0.005)	(0.005)	(0.005)
Legislature Ideology	**-0.088**	**-0.088**	**-0.088**
	(0.027)	(0.026)	(0.027)
Clustering Level		State-Year	Gov.-Year
N	5,697	5,697	5,697
Clusters		116	136

Note: Numbers in cells are Ordinary Least Squares regression coefficients with standard errors in parentheses. Constants and state-specific dummies are included, but not presented. Bolded coefficients are significant at the $p<0.05$ level, one-tailed tests.

Table 4.4 shows that the effects presented thus far aggregate up to changes in case outcomes. The interaction term between Percent Eligible and Governor's Ideology is negative and significant, as predicted. As the percentage of voting justices that are eligible increases, the governor's influence also increases. To visualize the magnitude of the effect, I present a contour plot analyzing the governor's influence as both the governor's ideology and the percentage of justices that are reappointment-eligible vary. The results are presented in Figure 4.2.

Figure 4.2. Influence of Governors on Case Outcomes Based on Percentage Of Justices Eligible for Retention

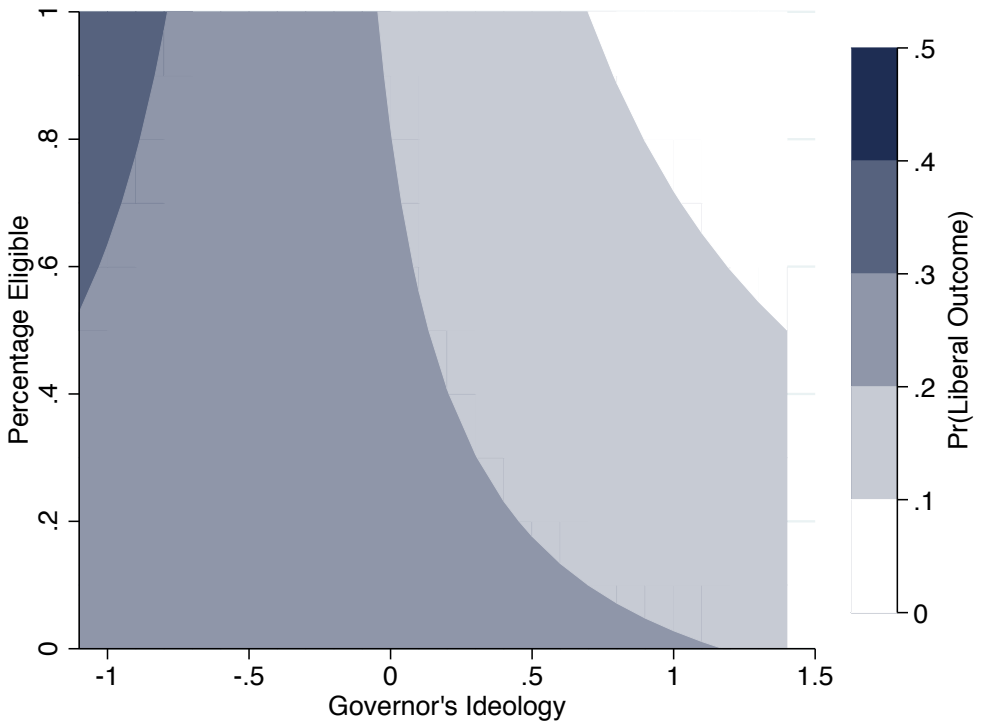


Figure 4.2 shows that when a higher percentage of voting justices are reappointment eligible, the governor's ideology can more than double the expected rate of a liberal outcome (moving from a conservative governor to a liberal governor). When the percentage of justices that are eligible is low, the variation corresponding to change in the governor is much lower, indicating that the governor's influence is weaker. At the mean percentage of eligible justices hearing a case in the dataset (51.8%), a shift between the average northeastern Republican and Democratic governors changes the likelihood of a pro-defendant outcome by 6.2 percentage points. This implies that voters' decisions in the ballot box likely altered the outcomes of hundreds of defendants' final criminal appeals.

Discussion and Conclusion

This article began with a proposition: If justices are rational actors who wish to keep their jobs and governors make reappointment decisions, then justices should care about what governors want. Justices might even go so far as to let their governor's preferences enter into their own calculus when deciding cases. And governors are in a prime position to enforce just this kind of deference. Staffed with lawyers and assistants, they can keep a watchful eye on the judicial branch. In criminal cases during the late 1990s and 2000s, reappointment-eligible justices were systematically more pro-prosecution when their governors were more conservative. These tests indicate that gubernatorial elections not only impact executive policy on criminal law, but also the punitiveness of the courts they get to appoint and reappoint – which also often includes trial courts and appellate courts.

Criminal law requires the most serious attempt at objectivity. Within each decision is an actual case, stemming from a real criminal prosecution. Though analysis of appellate decision-making justifiably focuses on the long-term impacts of the resulting precedents, the most immediate effect of any decision is the outcome it stipulates for the parties involved in the case. And yet, my analyses imply that whether a defendant wins their appeal might depend, in part, on who won the last gubernatorial election – a fact utterly unrelated to their crime or legal argument. If governors exert influence over justices, who are ostensibly meant to check the power of the executive branch, courts cannot truly be independent and government powers cannot be separated.

My findings also add to a body of research across a variety of court systems (for example, Ramseyer and Rasmusen 2001; Pérez-Liñán, Ames, and Seligson 2006; Ramseyer and Rasmusen 2010) which show that career concerns limit judicial independence and provide

political and ideological influence to those who control advancement and retention within court systems. In this paper, I have pursued a significant, albeit blunt, form of this dynamic: a justice's simple desire for professional self-preservation. Though some have argued that career considerations are weaker influencers of judicial behavior in common-law rather than bureaucratic legal systems (Garoupa and Ginsburg 2009), my results imply that the relative lack of mobility within the legal system in the American states does not insulate them from political pressures. The desire to retain their job functions largely the same as the desire to promote to new jobs.

Research on judicial retention systems should ultimately be directed at understanding the consequences of each system so that our choices to change to (or to keep) specific systems are as informed as possible. A simple summary of decades of such inquiry is that there is no perfect system. Life terms can violate norms of accountability and democracy. Elections can be subject to the whims of uninformed voters, rancorous polarization, and campaign money. Even if an election works in an idealized way, justices are still returned to office only by appeasing public opinion, which may lead to volatile and unpredictable legal doctrines. Yet, at least the public is an inattentive principal. One of the very facts that scholars bemoan – the uninformed public – is also potentially a protection of judicial independence. Governors have a much greater capacity to monitor justices. Because of this, governors can systematically affect judicial decisions to the extent that it is even evident when looking at every case in a large issue area, as in this paper. This raises troubling questions about justice and fairness and the independence of state judiciaries when executives are empowered to staff state courts.

Appendix 4.1 – Additional Models

Table A4.1-1. Replication of Table 4.2 using Logistic Regression

Dependent Variable: Liberal Vote	(1) Base	(2) Justice Clust.	(3) Case Clust.	(4) Justice FEs	(5) Case FEs
Governor's Ideology	**-0.134**	**-0.134**	-0.134	**-0.097**	
	(0.040)	(0.040)	(0.089)	(0.044)	
Eligible	**-0.168**	**-0.168**	**-0.168**	-0.118	**-0.523**
	(0.047)	(0.095)	(0.044)	(0.088)	(0.102)
Eligible X Gov.'s Ideology	**-0.414**	**-0.414**	**-0.414**	**-0.396**	**-0.703**
	(0.090)	(0.088)	(0.161)	(0.107)	(0.264)
Appointing Gov.'s Ideology	0.010	0.010	0.010		**-0.131**
	(0.026)	(0.032)	(0.027)		(0.002)
Defendant Appealed	**-0.462**	**-0.462**	**-0.462**	**-0.464**	
	(0.038)	(0.107)	(0.089)	(0.039)	
Murder	**-0.505**	**-0.505**	**-0.505**	**-0.515**	
	(0.038)	(0.094)	(0.087)	(0.038)	
Executive Experience	**-0.106**	**-0.106**	**-0.106**		**-0.482**
	(0.031)	(0.042)	(0.022)		(0.084)
Voter Liberalism	-0.002	-0.002	-0.002	0.006	
	(0.013)	(0.015)	(0.029)	(0.015)	
Legislature Ideology	**-0.306**	**-0.306**	**-0.306**	**-0.380**	
	(0.069)	(0.083)	(0.147)	(0.084)	
Justice Fixed Effects				√	
Case Fixed Effects					√
Clustering Level		Justice	Case		
N	27,797	27,797	27,797	27,797	3,438
Clusters		105	5,696		

Note: Numbers in cells are logistic regression coefficients with standard errors in parentheses. Constants and state-specific dummies are included, but not presented. Bolded coefficients are significant at the $p<0.05$ level, one-tailed tests.

Table A4.1-2. Additional Robustness Check Models for Table 4.2

Dependent Variable: Liberal Vote	(1) State-Year Clusters	(2) Gov.-Year Clusters	(3) Governor Clusters	(4) Justice FEs & Clusters	(5) Case FEs & Clusters
Governor's Ideology	**-0.027**	**-0.027**	**-0.027**	**-0.019**	
	(0.014)	(0.013)	(0.013)	(0.007)	
Eligible	**-0.034**	**-0.034**	**-0.034**	-0.024	**-0.025**
	(0.012)	(0.012)	(0.019)	(0.023)	(0.006)
Eligible X Gov.'s Ideology	**-0.087**	**-0.087**	**-0.087**	**-0.085**	**-0.028**
	(0.035)	(0.032)	(0.027)	(0.018)	(0.017)
Appointing Gov.'s Ideology	0.000	0.000	0.000		**-0.005**
	(0.005)	(0.004)	(0.004)		(0.002)
Defendant Appealed	**-0.102**	**-0.102**	**-0.102**	**-0.102**	
	(0.029)	(0.029)	(0.050)	(0.023)	
Murder	**-0.085**	**-0.085**	**-0.085**	**-0.085**	
	(0.019)	(0.019)	(0.032)	(0.016)	
Executive Experience	**-0.018**	**-0.018**	**-0.018**		**-0.013**
	(0.005)	(0.018)	(0.008)		(0.002)
Voter Liberalism	-0.001	-0.001	-0.001	0.001	
	(0.005)	(0.004)	(0.005)	(0.003)	
Legislature Ideology	**-0.067**	**-0.067**	**-0.067**	**-0.078**	
	(0.026)	(0.026)	(0.023)	(0.018)	
Justice Fixed Effects				√	
Case Fixed Effects					√
Clustering Level	State-Year	Gov.-Year	Governor	Justice	Case
N	27,797	27,797	27,797	27,797	27,797
Clusters	116	136	28	105	5,696

Note: Numbers in cells are Ordinary Least Squares regression coefficients with standard errors in parentheses. Constants and state-specific dummies are included, but not presented. Bolded coefficients are significant at the $p<0.05$ level, one-tailed tests.

Table A4.1-3. Replication of Table 4.3 using Logistic Regression

Dependent Variable: Liberal Vote	(1) Base	(2) Justice Clust.	(3) Case Clust.	(4) Justice FEs	(5) Case FEs
Governor's Ideology	**-0.204**	**-0.204**	**-0.204**	**-0.152**	
	(0.034)	(0.039)	(0.071)	(0.038)	
Eligible – Governor	**-0.155**	**-0.155**	**-0.155**	-0.110	**-0.420**
	(0.046)	(0.093)	(0.044)	(0.087)	(0.099)
Eligible – Legislature	-0.079	-0.079	-0.079	-0.070	**-0.721**
	(0.062)	(0.080)	(0.053)	(0.090)	(0.160)
Eligible – Gov. X	**-0.339**	**-0.339**	**-0.339**	**-0.336**	**-0.535**
Governor's Ideology	(0.089)	(0.084)	(0.159)	(0.105)	(0.261)
Eligible – Leg. X	-0.004	-0.004	-0.004	**-0.101**	0.767
Legislature's Ideology	(0.048)	(0.050)	(0.090)	(0.054)	(0.231)
Republican Appointee	-0.001	-0.001	-0.001		-0.074
	(0.024)	(0.036)	(0.023)		(0.064)
Defendant Appealed	**-0.283**	**-0.283**	**-0.283**	**-0.283**	
	(0.034)	(0.104)	(0.077)	(0.034)	
Murder	**-0.582**	**-0.582**	**-0.582**	**-0.590**	
	(0.033)	(0.076)	(0.074)	(0.033)	
Executive Experience	-0.023	-0.023	-0.023		-0.079
	(0.028)	(0.041)	(0.019)		(0.072)
Voter Liberalism	**0.033**	**0.033**	**0.033**	**0.031**	
	(0.009)	(0.010)	(0.021)	(0.011)	
Legislature Ideology	**-0.371**	**-0.371**	**-0.371**	**-0.444**	
	(0.063)	(0.083)	(0.132)	(0.076)	
Justice Fixed Effects				√	
Case Fixed Effects					√
Clustering Level		Justice	Case		
N	35,251	35,251	35,251	35,229	4,761
Clusters		139	7,090		

Note: Numbers in cells are logistic regression coefficients with standard errors in parentheses. Constants and state-specific dummies are included, but not presented. Bolded coefficients are significant at the $p<0.05$ level, one-tailed tests.

Table A4.1-4. Replication of Table 4.4 using Logistic Regression

Dependent Variable: Liberal Outcome	(1)	(2)	(3)
Governor's Ideology	-0.116	-0.116	-0.116
	(0.101)	(0.078)	(0.071)
Percent Eligible	-0.174	-0.174	-0.174
	(0.317)	(0.271)	(0.278)
% Eligible X Governor's Ideology	**-0.555**	**-0.555**	**-0.555**
	(0.301)	(0.285)	(0.272)
Avg. Appointing Gov.'s Ideology	0.196	0.196	**0.196**
	(0.135)	(0.120)	(0.118)
Defendant Appealed	**-0.475**	**-0.475**	**-0.475**
	(0.095)	(0.143)	(0.143)
Murder	**-0.550**	**-0.550**	**-0.550**
	(0.092)	(0.123)	(0.122)
% Executive Experience	-0.301	-0.301	-0.301
	(0.239)	(0.191)	(0.195)
Voter Liberalism	0.014	0.014	0.014
	(0.031)	(0.038)	(0.037)
Legislature Ideology	**-0.424**	**-0.424**	**-0.424**
	(0.161)	(0.139)	(0.141)
Clustering Level		State-Year	Gov.-Year
N	5,697	5,697	5,697
Clusters		116	136

Note: Numbers in cells are Ordinary Least Squares regression coefficients with standard errors in parentheses. Constants and state-specific dummies are included, but not presented. Bolded coefficients are significant at the $p<0.05$ level, one-tailed tests.

Table A4.1-5. Replication of Table 4.2 Including "Case Facts"

Dependent Variable: Liberal Vote	(1) Base	(2) Justice Clust.	(3) Case Clust.	(4) Justice FEs
Governor's Ideology	**-0.028**	**-0.028**	**-0.028**	**-0.020**
	(0.007)	(0.008)	(0.017)	(0.008)
Eligible	**-0.034**	**-0.034**	**-0.034**	-0.026
	(0.009)	(0.021)	(0.009)	(0.016)
Eligible X Gov.'s Ideology	**-0.085**	**-0.085**	**-0.085**	**-0.083**
	(0.017)	(0.017)	(0.033)	(0.020)
Appointing Gov.'s Ideology	0.000	0.000	0.000	
	(0.005)	(0.006)	(0.005)	
Defendant Appealed	**-0.090**	**-0.090**	**-0.090**	**-0.090**
	(0.008)	(0.024)	(0.021)	(0.008)
Executive Experience	**-0.018**	**-0.018**	**-0.018**	
	(0.005)	(0.007)	(0.004)	
Voter Liberalism	-0.001	-0.001	-0.001	0.001
	(0.002)	(0.002)	(0.005)	(0.002)
Legislature Ideology	**-0.069**	**-0.069**	**-0.069**	**-0.078**
	(0.013)	(0.017)	(0.030)	(0.015)
Case Facts	√	√	√	√
Justice Fixed Effects				√
Case Fixed Effects				
Clustering Level		Justice	Case	
N	27,797	27,797	27,797	27,797
Clusters		105	5,696	

Note: Numbers in cells are Ordinary Least Squares regression coefficients with standard errors in parentheses. Constants and state-specific dummies are included, but not presented. "Case Facts" include type of charge and legal topics invoked, as coded using textual analysis of case summary strings in the Hall and Windett dataset. No case-fixed-effects model is presented because case facts are invariant within cases. Bolded coefficients are significant at the $p<0.05$ level, one-tailed tests.

Appendix 4.2 - The Boundaries of Executive Influence: Term Limits

Governors have influence on a justice's decision-making because there is a possibility that the governor will still be in office when the justice's term ends. Even if the governor's term ends earlier, incumbency advantages often mean that governors are reelected. However, some governors have term limits that means they will definitely be out of office by a certain date. This means that a justice could reasonably look toward their retention and know that the present governor will not be deciding their reappointment. If my arguments that the reappointment power drives executive influence is true, these term-limited governors should have reduced influence. Therefore, I expect that justices casting votes when the governor is prohibited by term limits from being in office when the justice's term ends should be less deferential than justices who must consider the possibility of the present governor deciding their reappointment.

To test this, I reanalyze the cases in the overall model presented in Table 4.2 of the main paper, except that I only use votes cast by retention-eligible justices. In Table 4.2, I showed that eligible justices are strongly deferential to their governor's preferences. Thus, I should find that those eligible justices serving under term-limited governors are less deferential than other eligible justices. I use a new variable, **Governor Limited**, which takes the value of "1" when the governor at the time of the vote is prohibited by term limits from being the governor when the voting justice's term expires. It takes the value of "0" in all other situations. A positive coefficient on an interaction term between Governor Limited and Governor's Ideology would imply that eligible justices vote less in line with their governor's preferences when the governor cannot possibly reappoint them. All other control variables carry over from Table 4.2 in the main paper. The results of these tests are presented in Table A4.2-1.

Table A4.2-1. Retention-Eligible Justices Are Responsive to their Governors' Preferences

Dependent Variable: Liberal Vote	(1) Base	(2) Justice Clust.	(3) Case Clust.	(4) Justice FEs	(5) Case FEs
Governor's Ideology	**-0.114**	**-0.114**	**-0.114**	**-0.111**	
	(0.019)	(0.018)	(0.038)	(0.008)	
Eligible – Gov. Limited	0.002	0.002	0.002	-0.006	**0.011**
	(0.009)	(0.008)	(0.012)	(0.010)	(0.005)
Eligible – Gov. Limited X	**0.075**	**0.075**	0.075	**0.083**	-0.003
Gov.'s Ideology	(0.036)	(0.034)	(0.053)	(0.048)	(0.019)
Appointing Gov.'s Ideology	0.002	0.002	0.002		0.001
	(0.007)	(0.006)	(0.006)		(0.003)
Defendant Appealed	**-0.057**	-0.057	**-0.057**	**-0.057**	
	(0.011)	(0.038)	(0.027)	(0.011)	
Murder	**-0.024**	**-0.024**	-0.024	**-0.024**	
	(0.009)	(0.013)	(0.018)	(0.009)	
Executive Experience	-0.009	-0.009	**-0.009**		**-0.007**
	(0.007)	(0.007)	(0.005)		(0.003)
Voter Liberalism	0.004	0.004	0.004	0.003	
	(0.003)	(0.005)	(0.006)	(0.003)	
Legislature Ideology	**-0.136**	**-0.136**	**-0.136**	**-0.149**	
	(0.026)	(0.047)	(0.052)	(0.029)	
Justice Fixed Effects				√	
Case Fixed Effects					√
Clustering Level		Justice	Case		
N	13,449	13,449	13,449	13,449	13,449
Clusters		105	5,696		

Note: Numbers in cells are Ordinary Least Squares regression coefficients with standard errors in parentheses. Constants and state-specific dummies are included, but not presented. Bolded coefficients are significant at the $p<0.05$ level, one-tailed tests.

The results in Table A4.2-1 provide some evidence that justices vote less in line with their governor's preferences when the sitting governor cannot be their reappointer due to term limits. The coefficient for the interaction term is positive and statistically significant in all but the models which cluster or include fixed effects at the case level, indicating that justices with term-limited governors do not show the same deference to their governor's preferences as eligible justices without term-limited governors do. This reinforces the findings that governors

gain substantial influence through their power to reappoint. When they lose the capacity to reappoint a justice – in this case due to term limits – they lose a substantial amount of influence. These results are mixed, however, because of the failure of the coefficients to achieve significance in Models 3 and 5. This may be because of the difficulty of measuring at the case level, as discussed in the main text. It may also be because justices use the current governor – even if term limited – as a proxy for the likely identity of the future governor. If a state has a liberal governor today, it may be reasonable to believe that there's a greater likelihood of there being a liberal, rather than conservative, governor in five years. In such a case, while a governor would lose specific influence, they would retain the appearance of influence within the statistical tests because they would serve as a proxy for the preferences of the future governor.

Appendix 4.3 – The Impact of Elections: A Difference-in-Differences Test

To offer further evidence of executive influence, I analyze the ways individual justices respond to changes in their principal's preferences. The most drastic ideological shifts likely occur when the party in control of the governorship changes. I argue that reappointment-eligible justices should become more conservative when their governor becomes more conservative. Eligible justices should become more conservative in their voting when a Democratic governor is replaced by a Republican one and more liberal when the opposite occurs. I can test whether this is true using a very simple difference-in-differences design.[53] Eligibility itself is not the "treatment" in this approximation of an experiment. Instead, a party change in the governor's mansion is the treatment and elections are the assignment-to-treatment mechanism. All elections come with some level of randomness – their outcomes can be predicted but not known with certainty. And the outcomes of those elections are not closely related to anything state supreme court justices do or whether any particular justice is eligible for a new term.

To conduct the test, I first identify the treatment group. Governorships changed parties four times in reappointment states between 1995-2010: New Jersey in 2001 and 2009, New York in 2006, and Maine in 2002.[54] The justices in these states and years make up my treatment group – those whose principal changed. It would be possible to fill out my control group with justices from every other election in the dataset. However, this would result in a significant imbalance in

[53] The data do not lend themselves to a more econometrically rigorous difference-in-differences approach, because when aggregated to the justice level, there are too few observations and there are only four instances of governorships changing parties in the 16-year time range.

[54] Maine in 2002 is a complicated example since it is a switch between Angus King, an Independent who later became a Democrat, and John Baldacci, a liberal Democrat. While this is not as clean as a switch from Republican to Democrat, Baldacci does rate as significantly more liberal than King during King's time as an Independent. And since King did run against credible Democratic candidates, he was definitely from a different party. I choose to include Maine in 2002 for these reasons, but its exclusion would not eliminate the finding.

control group size and would also include justices in differing situations. Because justices may change their behavior even before the result of an election is known – especially if the outcome is very certain – it is important that the justices that make up the control group had roughly similar expectations before the election as to what the result would be. To mitigate this problem and keep the group sizes comparable, I pick a subset of the remaining election years to serve as the control group. To pick the control cases, I estimated a logistic regression to predict whether incumbent parties retained governorships in all of the elections in my dataset.[55] I then generated post-estimation predicted probabilities for each election, which I use as propensity scores of being treated. I selected the four elections with probabilities most similar to those of my four treatment cases. They are: Delaware in 2000 and 2008, New Jersey in 1997, and New York in 2002. This group of eight elections represents the sample of justices I analyze, with four treatment elections and four control elections.

In each state, I analyzed all eligible justices who made at least twenty criminal law votes in the two years on each side of the election.[56] For each justice, I calculated a pre- and post-election vote rate for the pre-election governor's preferred outcome (thus, the rate of conservative votes when the pre-election governor was a Republican). The difference between the two is the amount of change toward (positive) or away (negative) from the preferences of the pre-election governor. If a justice cast 30% liberal votes with a Republican governor before an election and 50% liberal votes with a Democratic governor after, that is a -0.2 shift away from the Republican governor's preferences. Based on my hypothesis, I predict that these differences

[55] As predictors, I used: whether the incumbent governor was on the ballot, how many elections in a row the incumbent party had won, the incumbent party's seat share in the state legislature before the election, and a linear time trend.

[56] Because two years extends past the end of the dataset for New Jersey's 2009 election, I hand coded all 2011 criminal cases by the New Jersey Supreme Court and added them to this analysis.

will be negative when the governor's party changes and significantly different from cases in which the governor's party retains the office.

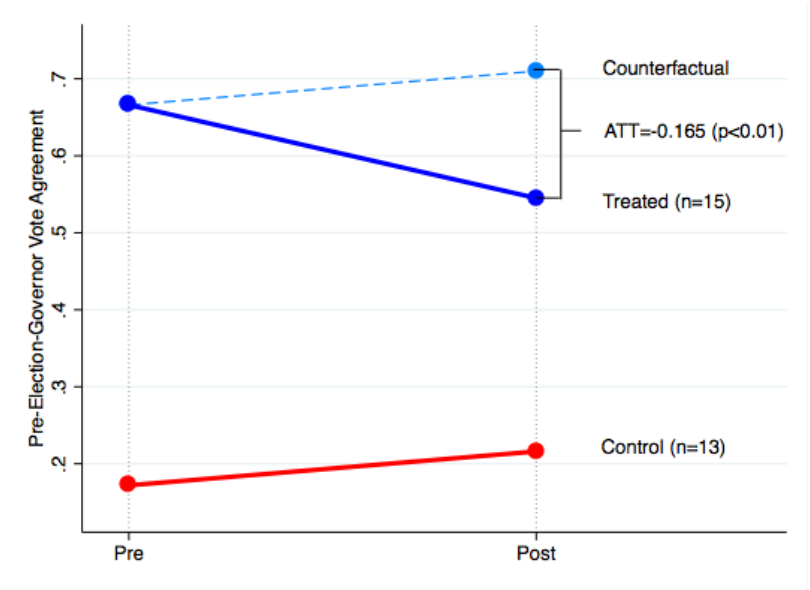
Table A4.3-1. Difference-in-Differences Test of Justices when Governor Partisanship Changes (Treated) and Remains the Same (Control) in the Two Years Before and After an Election

Group	*Pre-Election*	*Post-Election*	*Difference*
Treated (n=15 justices)	0.666	0.545	-0.121
Control (n=13 justices)	0.172	0.216	0.044
Difference	0.494	0.329	-0.165 (0.02) *

Standard error of the difference in parentheses. *=p<0.05

Table 4 shows that eligible justices in treated states behaved differently than eligible justices in control states. When the partisanship of the governor changed, eligible justices moved in the direction of the new governor. When the partisanship remained consistent, the justices did not; in fact, they moved a little bit further in the direction of the reelected party. The difference of 0.165 is an even larger effect than estimated in the large-N regressions. Figure A4.3-1 presents the ATT (Average Treatment Effect on the Treated) and the function of the parallel-paths identifying assumption used to estimate the counterfactual.

Figure A4.3-1. Difference-in-Differences Diagram for Table A4.3-1



There are several caveats to this analysis. First, changing parties is not exactly the same as changing ideologies. In preceding sections, I treated ideology as a continuous concept. In this test, I assume that Democrats and Republicans map perfectly onto dichotomous liberalism and conservatism. These are necessary simplifications, though in each case the Democrat had a more liberal CFscore than their Republican counterpart. Second, the groups start off very different. This is because one group has all Democratic governors and the other has mostly Republican governors. The data do not provide sufficient variety to have a control group of similar reelection probabilities that also featured the same starting parties. Third, the ATT I estimated is not the impact of governors through retention eligibility but the impact of governors on eligible justices. It would be ideal to run a triple-difference-in-differences analysis that includes ineligible justices, but that is not possible given the data. Some states have few or no ineligible justices in the time periods analyzed. Even if this ATT measures governors' overall impact, it shows their importance and influence over their states' judiciaries.

Chapter 5

The Influence of Legislative Reappointment on State Supreme Court Decision-Making

Most state supreme court justices have time-bound terms that require them to be reappointed or reelected after a certain amount of time. In three American states, South Carolina, Vermont, and Virginia, the legislature has the sole power to retain justices. Legislatures, and their specialized judiciary committees, are well positioned to monitor judicial behavior and can reject retention for justices who are unacceptable. This turns the legislature's oversight authority into influence over policymaking by justices who still need to be reappointed to additional terms. But some justices (co-partisans) are insulated from this influence by their connections to the majority party, which substantially increases the likelihood of their retention. I show that, between 1995-2014, justices appointed by the minority party who were eligible for a new term voted more in line with the preferences of their legislature than those who were no longer eligible for a new term due to mandatory or voluntary retirement. No similar effect is found among appointees of the majority party. To support my argument that it is the legislature's reappointment authority that gives them this power, I conduct a placebo test to show that governors in these states enjoy no comparable influence on reappointment-seeking justices. This legislative influence represents a substantial limitation on judicial independence.

Note: This article in its present form is the result of journal submission and numerous conference presentations. Reviewer requests introduce small variations in testing strategy, model and variable choices, and terminology in comparison with other chapters. Most notably, presentation style was changed for publication. This chapter was published as an article in April 2017 by *State Politics and Policy Quarterly*.

The judicial power is perhaps the most vexing component of the modern democratic state. The core tension is intuitive: effective democracy requires that justice be impartial, consistent, and able to enforce the limitations on other political actors; but a purely independent judge lacks the accountability and representativeness required in a democracy. In a system of independent judicial power, there are few responses to undesirable judicial outcomes short of difficult constitutional amendments. But in a system of tight political control of the judiciary, policy may swing dramatically with the political winds, and other branches may be free to exceed their constitutional prerogatives. While the federal system has come down firmly on the side of judicial independence, states have developed a variety of institutional structures to control both how people become *and* remain judges. The most common such system involves at least one popular election, positioning justices within an explicitly democratic structure. Other systems place judges directly in the sway of another major branch of the state government, such as the legislature. In these cases, justices are accountable, but they are accountable to some of the very actors they are meant to check within the American separation-of-powers framework. And unlike the low-information environment of judicial elections, legislatures, with their specialized committees and staff, effectively monitor judicial behavior and actually exercise their oversight power. This induces justices to behave strategically, limiting judicial independence, and thereby creates influence for the legislature.

The existing literature on state supreme courts is highly informative about the impact of judicial retention systems: relative to having life terms, they create substantial incentives for justices to behave strategically. But the focus in this literature has largely been on the impact of electing judges. While very successful for describing the impact of electoral institutions, it has led to a narrowed focus on the situations in which we think electorates might influence judges:

highly salient cases (such as death penalty reviews) that are likely to receive media coverage, with extra attention on cases near the end of a judicial term. But systems of political reappointment by legislatures merit their own separate, tailored theorizing and empirical analysis. In this paper, I explore the situations in which justices have incentives to behave strategically to increase their likelihood of being reappointed by their legislature.

Modern legislatures, made up of political elites, have the institutional capacity and resources to closely track judicial behavior (both actively and retrospectively) across the length of a justice's term. Today's legislative structures are the result of centuries of development and reform that has promoted expertise development. They are able to monitor judicial behavior with the looming threat of an uncertain retention as their enforcement mechanism. This enables legislators to effectively exercise their oversight authority, creating the incentives for strategic behavior by justices. Despite their powers, legislatures do have to overcome internal collective action problems. The difficulty of managing intraparty disputes means that the legislature's power will be most easily exercised against judicial appointees of the out (or minority) party, who lack close connections with the majority party and its leaders.

To evaluate my arguments, I leverage state mandatory retirement ages to compare votes taken by justices in their final (retiring) term to those they took earlier in their careers when they were still eligible to be reappointed by the legislature. I test my hypothesis on a twenty-year period of criminal law cases decided in all three states that use legislative retention for state supreme court justices. The results indicate that out-party appointees who still need to be reappointed vote far more often in line with their legislature's preferences than they do once they are in their final term. As legislatures become more liberal, so do the justices needing to be reappointed. I detect this effect systematically in a large dataset of votes that range over justices'

entire terms, and include a substantial docket of cases, many of which never received any public attention, but which are well within the view of the legislature. This effect is also considerably larger than the similar effect of eligibility for reappointment among in-party appointees.

These results imply that that justices in legislative-reappointment states behave strategically rather than sincerely when they need to guarantee that they keep their jobs. This strategic behavior functions as a form of influence for the legislature, which constrains justices from deciding cases (and setting policy) as they might in the absence of reappointment. Because of the legislature's informational capacities, this influence extends across time and down the docket, representing an arguably stronger limitation on judicial independence than found in electoral states.

Strategic Judicial Behavior and Legislative Influence

A recurring focus in the study of judicial politics (and essentially all political actors) is the difference between "sincere" and "strategic" behavior. In some situations, justices and judges act "sincerely," deciding according to their own set of personal preferences, which are most often seen as attitudinal (see Segal and Spaeth 2002), but could also be legalistic, or derived from any number of combinations of those and other factors. In contrast, strategic behavior diverts in some way from sincerity in the immediate decision in order to achieve an ultimate outcome that is closest to a judge's preferences, typically at some later point in time or on a different level of outcome.

Strategic behavior by judges is frequently thought of in the separation of powers context, in which the judiciary must divert from its sincere preferences to achieve its most favored possible outcome, in light of the powers and preferences of the other branches of government. The formalized version of the Separation of Powers (SOP) game (see Epstein, Knight, and

Martin 2001; Langer 2002) typically treats a court as a unified actor (embodied in a median justice), which must make policy through deciding cases. The key feature of SOP models is that the other branches of government also have a role and the capacity to retaliate if they do not like the court's decision. Thus, courts must always make policy with the likely responses of their co-equal branches in mind, which can sometimes induce them to behave strategically rather than sincerely. In this way, sincere versus strategic considerations invoke judicial independence. An independent judiciary is one capable of sincere voting. A judiciary forced to be strategic is less independent. In addition to this context, strategic behavior has been found within the judicial hierarchy itself (Clark 2009), within electoral contexts (Huber and Gordon 2004), and in the words of the opinions justices write (Black et al 2016), to name just a few diverse examples.

In state supreme courts, the clearest pressure that can induce strategic judicial behavior is retention politics. The great majority of American state supreme court justices serve lengthy, but time-limited, terms. This institutional choice by state founders and subsequent reformers reflects concerns about the unrestrained independence of life terms. A time-bound term allows for the possibility of removing corrupt or incompetent judges, who might have remained on the bench for decades in a system with life terms. Limiting the length of judicial terms also created a new institutional power: someone must choose whether a sitting justice will remain on the bench after the end of their initial term. Some states have granted this power to governors and a majority of states allow voters to decide. In three states, however, legislatures play the decisive role. In South Carolina and Virginia, the legislatures conduct both initial appointment and reappointment. In Vermont, the legislature chooses whether to retain justices initially appointed by the governor. Like elections and executive reappointment, legislative reappointment constrains judicial behavior, and thus independence, in comparison with life terms. However,

legislators are different from voters and governors in important and distinct ways, and this points us in the direction of *when* and *how* we might observe strategic judicial behavior. Placing the retention power in the hands of the legislative branch, an explicitly ideological institution in modern American politics, points to the possibility of systematic *ideological* influence. In this section, I outline the underlying assumptions and arguments that collectively lead to the expectation of legislative influence on judicial behavior.

I follow Langer (2002) in assuming that justices care primarily about two things: case outcomes and their own professional success. First, I assume that justices have preferences for how any given case should be decided, which inform "sincere" decision making. This assumption is agnostic as to what informs these preferences, which are only defined as existing prior to any external pressures or strategic considerations. Second, I assume that justices care about their own professional success and want to keep their prestigious office, its compensation, and the power to decide even more cases in the future. There is evidence that elected justices show an "electoral connection" (Hall 1992; Canes-Wrone, Clark, and Park 2012; Canes-Wrone, Clark, and Kelly 2014) analogous to what we find in other politicians, such as members of Congress. It is logical that this connection would also exist among those whose "electorate" is the membership of the state General Assembly. This desire to retain their office creates the incentives for justices to act strategically, which I conceive of here as voting insincerely in cases in order to increase their likelihood of retention. These accumulated insincere votes represent a form of legislative influence over justices who still need to be reappointed to future terms.

A remaining question is *when* we should observe justices acting strategically with regards to retention politics. They should only do so when it is necessary to keep their jobs.[57] Thus, the extent to which they act strategically is a function of the capacity of the legislature to monitor and punish their behavior. The legislature must have detailed knowledge and understanding of judicial behavior in order to induce strategic deference. Second, they must have some means of enforcement, typically a form of punishment, to serve as their retaliation mechanism. Both elements are necessary. Information without an enforcement mechanism is impotent. Similarly, an enforcement mechanism employed in a state of ignorance is a blunt and useless tool. Only when an enforcement mechanism is combined with expertise in when and how it should be used can it have the intended effect of incentivizing judicial deference. Legislatures combine both of these elements. They have the institutional resources and structure to cheaply develop expertise in judicial behavior and also the power to reject retention (effectively to fire). I now explore these two prongs – monitoring capacity and enforcement power – in more detail.

The first major reason we should expect to see strategic behavior among justices in legislature-retention states is that legislatures have substantial professional resources and internal structures that make acquiring information and developing expertise efficient and effective. Legislatures have staff that can perform research and write reports. Though state legislatures are generally underfunded compared to their federal counterparts, they still have sufficient resources to track state supreme court decision making. Legislatures also profit from centuries of institutional development that encouraged the efficient cultivation of expertise. The hallmark of this is the committee system (see e.g. Krehbiel 1992). Recent work has shown that this extends

[57] The expectations in this section are explicitly about strategic behavior relative to retention politics. Justices have a variety of other reasons to behave strategically that are beyond the scope of this paper.

to state legislative committees, including judiciary committees (Hamm, Hedlund, and Post 2011; Battista 2012). Vermont, Virginia, and South Carolina are no exceptions. The South Carolina House of Representatives and Senate have Judiciary Committees with 25 and 23 members, respectively. Virginia's House of Delegates and Senate have 22- and 15-member Courts of Justice standing committees, respectively. Vermont's House and Senate have 11- and 5-member Judiciary committees, respectively. Thus, each state has at least 16 legislators on a committee which allows them to specialize in the judiciary. These committees hold hearings, compose reports, and also serve as a magnet for outside actors (such as interest groups and bar associations) to deliver information.[58]

Committees also have clerks, attorneys, and support staff. South Carolina's House committee, for example, has two permanent staff attorneys. Thus, these committees are able to monitor and understand state supreme court decision-making. In addition to regular judiciary committees, Vermont has an eight-member Joint Committee on Judicial Retention focused specifically on this task. South Carolina has a ten-member nominating commission, which has the first move in the retention process, which includes six members of the legislature.[59]

This level of expertise development stands in stark contrast to the informational environment explored by most existing studies of retention politics, that of popular judicial

[58] Interviews conducted by the author with three different legislators on judiciary and judicial retention committees confirmed that outside groups – bar associations, interest groups, and citizens – submit comments and reports on candidates for appointment and reappointment. All interviewees identified bar associations and activist organizations as important voices in the appointment and reappointment process. While these reports may often be publicly available or even publicized, the probability that they are read and understood by legislators or their staffs is considerably higher than by a critical mass of voters.

[59] All information in this, and the preceding, paragraph about the composition and resources of the committees in all three states were obtained from the websites of each assembly, as of the 2015 session. Committee composition changed over the 1995-2014 period, but these are informative examples of the resources and structures available to aid in judicial oversight.

elections. Voters in judicial elections are notoriously low information voters, often swayed by a small number (as few as one) of recent and highly salient cases. Thus, the literature that has developed around this area has, understandably, looked for effects on judicial voting on highly divisive issues like death penalty (Hall 1992; Canes-Wrone, Clark, and Kelly 2014) and abortion decisions (Caldarone, Canes-Wrone, and Clark 2009). I argue that legislatures have sufficient informational advantages that it is reasonable to expect influence not only on the most salient cases, but on a variety of cases up and down the ballot. The legislature does not rely exclusively on media and activist attention to become aware of a case. Reports compiled in advance of an appointment or reappointment vote typically contain extensive and diverse documentation on a justice's entire body of work, as well as personal, financial, and other information.

When the existing literature has looked at issues that might be more appropriate for elite-reappointment systems, it has tended to focus on situations in which another branch is the party to a case (Shepherd 2009) or when a law passed by the other branches is challenged (Langer 2002). These tests provide strong evidence of elite influence when given the power to reappoint justices, but do not test for ideological influence. Given the increasing ideological consistency and polarization among elected politicians in the last several decades, this is an important place to look for influence. Thus, the scope of my argument – and the testing I pursue in subsequent sections – is broader and different than the existing theoretical and empirical literature. I argue that justices have the ability to influence ideological behavior even in cases in which they are not parties and when the issue is not likely to receive media attention.

Monitoring capacity is a necessary but insufficient condition to induce strategic behavior from justices. If the legislature cannot punish justices in any way, then even a very informed legislature would have little or no influence. Legislatures lack day-to-day enforcement

mechanisms, though they may engage in the politics of salary control and jurisdiction limitation (such as in the federal example outlined by Clark 2011). They also have roles to play in policymaking as typically described in separation-of-powers theory. But, most importantly, they have a powerful tool to control justice behavior: the power to fire them. At set intervals (ten years in South Carolina, twelve in Virginia, and six in Vermont), justices face a retention vote in their general assemblies. This is a strong, if infrequently available, enforcement mechanism that strikes at one of the two key interests I have assumed justices have: professional success. The loss of a job, its prestige, and its power to set policy is a serious blow for many justices. Because this is a fate they would strongly prefer to avoid, the legislature's enforcement mechanism has the necessary bite to be an effective influencer.

These two features – monitoring capacity and an enforcement mechanism – work in tandem. Monitoring capacity ensures that the enforcement mechanism can be precisely and reliably applied, which enhances its effectiveness. Justices know that their legislature – or at least specialized parts of it that are delegated that task – can follow their judicial decisions. And that if those votes are sufficiently out of step with the legislature's preferences, they have the capacity to take away that justice's job. Their detailed monitoring capacity ensures that their influence is not limited to the most visible and salient issues. This has one clear implication: a self-interested justice's decisions will be strategic, avoiding stepping too far away from the legislature's preferences.

Despite these strengths, legislatures do have limitations. Namely, they face collective action problems and have a large number of tasks to accomplish with limited time. While the barriers to agreement are not nearly so great as for electorates of millions of voters, legislatures must coordinate within partisan structures to build majorities to achieve anything, including

rejecting retention.[60] Retention votes in these legislative chambers feature the same types of partisan vote whipping and organization as other legislative activities that are more familiar to scholars.[61] And once a justice is rejected, legislators face a horserace battle to find a replacement. On top of these barriers, legislators serve long careers, with recurring committee positions, meaning that some or even a majority of those responsible for putting a justice on the court could also be responsible for the retention. This may give those legislatures a level of responsibility for and attachment to that justice, who was likely the favored candidates of some of the principal movers in the majority party at the time of their initial appointment. This may make it costlier for them to reject the justice, dramatically increasing the policy flexibility a justice can sincerely work in. Langer (2002) uses a spatial model to describe policy flexibility that justices can have, describing "safety zones" in which justices can vote sincerely. She shows that when legislative coalitions are harder to develop against a justice and when there is less ideological distance between the justice and the legislature, a justice's safety zone is larger, leading to less strategic behavior. In-party and out-party justices diverge in both of these criteria and, as a result, in-party justices are able to vote far more sincerely than out-party justices.

These limitations have one clear implication for which justices we might expect to behave strategically: justices will primarily be concerned when they were appointees of the out-

[60] Compare this, for example, to governors, who are unitary actors with the power to reject a justice's retention. They face little or no collective action barrier to this decision. And because governors serve shorter careers than most legislators, they are often not the governor who appointed the justice up for retention. They lack existing connections to, or responsibility for, that justice, even if they are co-partisans. Thus, governors, unlike legislators are less constrained in executing their reappointment prerogative. This is one reason why I analyze legislators alone in this paper, rather than following the trend of collapsing them together with gubernatorial reappointers. Legislative systems have unique attributes meriting their own dedicated study.

[61] Borden 2014 provides a journalistic account of one recent contentious reappointment vote in South Carolina.

of-power party (or "out party"). When justices were initially appointed by the party still controlling the legislature (the "in party"), policing their behavior is a much harder task. They were agreeable to the majority caucus to get the position in the first place and policing their behavior would take considerable effort within the party. As Shepherd (2009) argued, legislative appointees have strong connections to the legislatures that picked them. I refine this slightly and argue that these appointees have strong connections to the *majority coalitions* that picked them. It would not be worth the political cost to organize within the majority to replace a co-partisan justice and then agree upon a replacement. The gains of replacing a justice of their ideological stripe with one marginally closer to their ideal would be relatively small compared to this cost. Thus, this kind of oversight should only prevent the most extreme ideological defections.

If in-party appointees have little reason to be strategic because they are insulated by existing relationships and the collective-action barriers faced within the party, then out-party appointees are in the exact opposite situation. Lacking the existing relationships and prior endorsement, they are the most obvious targets of a new legislative majority. It is nowhere near as difficult for the party to organize internally around replacing an appointee of the rival party. And the likely gains are much larger (potentially replacing a liberal with a conservative and swinging a court, for example), making it worth the time and political effort. Thus, justices have substantial incentive to behave strategically – by moderating their decision-making to appear more in line with the legislature and reduce the potential gains of replacement.

Legislatures are also limited by the uncertainty that justices may have over the identity (and thus preferences) of the legislature that will exist at the time of their reappointment. In some cases, justices may still have years left in their term. But those justices will still know that they will be evaluated for decisions taken across their term. In such a situation, the present

legislature is an informative (but imperfect) proxy for what the future legislature is likely to look like. State legislatures did not change frequently in this time period, and individual legislators (such as the members of judicial committees) have long and stable careers. Thus, I assume that justices look to the legislative preferences at the time of their decision as their best indication of future conditions. To the extent that this assumption is incorrect, my resulting empirical tests will be biased against finding the effect I argue for.

One key fact remains – only some justices are eligible for a reappointment. Due to mandatory retirement ages, some justices are beyond the reach of their legislature.[62] If they cannot be reappointed no matter what they do, then they have no incentive to vote strategically around the issue of retention – because the legislature no longer has the means to punish them. This status is unique for each justice. In each case, some justices of the court are still eligible for an additional term, while others are forced into retirement due to their age. This, combined with the preceding arguments, yields a set of four expectations for when retention concerns would induce strategic behavior from justices to increase their retention likelihood. These expectations are presented in Table 5.1 and then in an explicit hypothesis below.

Table 5.1. Theoretical Expectations for Strategic Retention-Seeking Behavior

	Reappointment-Eligible	**Retiring**
Out-Party	Strategic	*Not Strategic*
In-Party	*Not Strategic*	*Not Strategic*

[62] Vermont and Virginia justices must retire at 70, while South Carolina justices must retire at 72.

Legislative Influence Hypothesis: Reappointment-eligible, out-party appointee justices vote in line with their legislature's preferences more often than reappointment-ineligible, out-party justices do, and this effect is systematically greater than the comparable effect for in-party justices.

The Legislative Influence Hypothesis states that out-party appointees are more strategically deferential to their legislature's preferences when eligible for further terms than when ineligible or when they are majority-party appointees. My explicit empirical prediction is that retention-eligible, out-party appointees vote more in line with their legislature than out-party retiring justices, and that this difference is greater than the difference between eligible and retiring justices among in-party appointees. I test this hypothesis on a set of all criminal cases between 1995-2014 from high courts in South Carolina, Vermont, and Virginia – the universe of states that use legislative appointments for judicial retention. I show that out-party justices are more deferential to their legislature's preferences when they are eligible for another term, while there is no difference between retiring and eligible in-party justices, and that the difference between these two differences is pronounced and statistically distinguishable. Finally, in a placebo test, I show that these justices show no such deference to their governors, who lack the ability to reappoint them. Collectively, these tests support the Legislative Influence Hypothesis.

Testing

The Data

I construct a cumulative dataset of all criminal-case justice votes from 1995-2014 in the three states where legislatures reappoint justices – Vermont, South Carolina, and Virginia. For the years 1995-2010, I rely on Hall and Windett's (2013) dataset of all state supreme court cases.

I extended this to 2014 for the three aforementioned states to increase temporal range and also to increase the number of justices in the dataset.[63] Criminal cases have several helpful features for my analysis. First, criminal-law outcomes map well onto ideological preferences. Modern American liberalism and conservatism are distinctly opposed in terms of limits on police investigative power, defendants' protections in criminal trials, and favored levels of punitiveness in sentencing. I assume that, all else equal, liberals prefer more pro-defendant rulings than conservatives do. I do not assume that liberals prefer exclusively pro-defendant rulings, only that they should be systematically more likely than conservatives to favor defendants.

Second, choosing criminal law partially mitigates research-design concerns about court agenda control. In most studies of courts, discretionary jurisdiction allows justices to pick the cases they will decide. This creates the potential for biased inference that is often unmeasurable and uncorrectable, even with sophisticated statistical methods. However, state-court justices have less freedom over criminal cases than United States Supreme Court justices have over their docket. The weakness, workloads, or total absence of intermediate appellate courts places extra weight on state supreme courts to be part of the administration of justice rather than pure arbiters of theoretical legal questions. Vermont, for example, lacks an intermediate appellate court, leaving the state's appellate work to its Supreme Court. This means that the court lacks discretion over taking criminal cases. Virginia and South Carolina's Supreme Courts are each required to hear appeals for capital cases, and have discretionary jurisdiction over appeals in non-capital cases. In general, criminal appeals, with their significant prison-time penalties, are heard at high rates because there is a greater obligation for each case to end with a just outcome.

[63] I extended the dataset by hand, using Lexis keyword searches to identify criminal cases by the three state supreme courts between 2011 and 2014 and personally coding all necessary variables.

Variables

The dependent variable, **Liberal Vote**, takes the value "1" when a justice's vote is pro-defendant and "0" when it is pro-prosecution. In a small subset of cases (about 5%), the defendant won on some questions but not on others. For example, one conviction may be overturned but all others affirmed. These cases are difficult to reliably code because the relative weights of answers to different legal questions are highly subjective and difficult to consistently evaluate. Therefore, I exclude these cases from the analysis.

There are three main independent variables. First, I measure whether a justice was eligible for an additional term at the time a case was decided. Second, I include a measure of the ideology of the legislature serving at the time the case was decided. Finally, I interact the two. The Legislative Influence Hypothesis predicts that eligible justices' votes will better match the preference of the legislature than the votes of ineligible justices do. Therefore, the Legislative Influence Hypothesis only includes a direct prediction about the interaction term: the difference between the two groups (eligible and ineligible) in terms of how highly their votes covary with the preferences of the legislature.

The first independent variable, **Eligible**, takes the value "1" when the justice was eligible for an additional term on the date the decision was published and "0" if the justice was no longer eligible for another term. I accumulated the information necessary to code Eligible from newspaper articles, official state documents, and state- or media-provided biographies. Justices are deemed ineligible when they could not legally hold another term due to age restrictions or had already announced an intention to retire or take a different job (such as an appointment to the federal judiciary). This method is imperfect because it counts as eligible those justices who had already decided to retire but who had not announced it yet. Any error in this direction biases

tests against my predictions because it counts as eligible those who are in fact not concerned with subsequent terms, diminishing the ability to differentiate between the eligible and ineligible. This coding is also very blunt in that it treats those with twelve years left in their term identically to those with one year left, which makes for a more conservative test. My goal in this paper is not to search for localized effects at the very end of terms. Instead, I argue that legislatures' monitoring capacities mean they should have influence over a broad range of cases, and that their influence should be sufficiently systematic to be detectable in the votes of justices across various stages in their terms and careers.[64] My strategy with the Eligible variable is equivalent to studies (for example, Shepherd 2009 and Hall 2014) which analyze the differences in final-term behavior,[65] though I focus semantically on describing the eligibility for an additional term to be consonant with the treatment I describe: the need for an additional term induces the strategic deviation away from sincere behavior. In subsequent empirical tests, I argue that the differences in behavior between the eligible and the ineligible (and between eligible and ineligible periods within a justice's own career) is owed to retention-seeking strategic behavior.

[64] Separate analyses revealed no evidence of time-driven variation in legislative influence, though the complicated question of over-time variation and changing levels of a justice's certainty in the identity (and thus preferences) of the reappointer merit a full inquiry of their own.

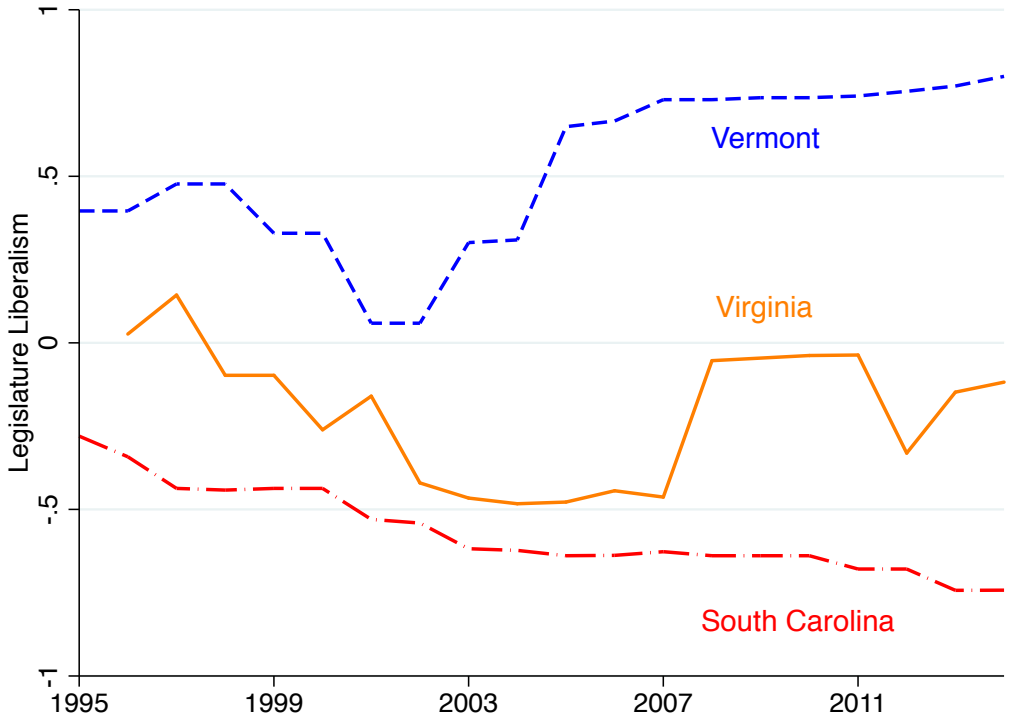
[65] This research design is also similar to the extensive line of research on final-term differences in Congressional voting. Snyder and Ting (2003) provide a theoretical and empirical introduction, while Rothenberg and Sanders (2000), Carson et al (2004), and Jenkins and Nokken (2008) are examples of the long debate of various empirical approaches to using the "final term" or "lame duck" design to identify effects on decision making. The evidence is, at best, mixed that members of Congress behave substantially differently when not facing re-election. The results I present in this paper imply a greater difference between judicial "final term" and "seeking reappointment" behavior than members of Congress exhibit. This literature is informative, however, for the importance of clearly identifying the relevant subset of actors where the effect is theoretically likely to be found. For example, differences between members of Congress in extreme versus moderate districts (as in Snyder and Ting 2003) may be analogous to the differences I draw between in-party and out-party judicial appointees.

I also include a measure of **Legislature Liberalism** as a second independent variable. Because I argue that reappointment-eligible justices defer to the ideological preferences of their reappointment, their decisions should be correlated with the ideologies of their reappointing legislatures. All justices – even those in their final terms – have reasons to be responsive to their legislature: legislatures determine pay and court structure and can take "court curbing" actions similar to those Congress takes against the United States Supreme Court (see Clark 2011). Similarly, justices' own preferences may be responsive to the same social forces that shape political change in other elites, leading to justices becoming more liberal or conservative as other branches do. However, because I analyze the difference between eligible and ineligible justices, this does not threaten the validity of my analyses. I analyze the additional legislative influence specific to eligible justices and attribute it to their unique retention dilemma. I use Shor and McCarty's (2011) measures of state legislature ideology, which is derived from state roll-call votes and mapped onto a common space using survey measures of candidate ideology. South Carolina, Vermont, and Virginia provide significant within-legislatures and between-states variation. Using the most updated version of their dataset, only two state-years are missing (1995 and 2009 in Virginia). I exclude all votes from those years and have no reason to believe that this biases my analyses. I include the score for the legislature as of the date that the case decision was announced.

The measure of ideology should match the actual way the votes are taken for judicial retention. Thus, for Vermont and South Carolina, which conduct judicial retention votes in the entire assembly (House and Senate combined), I use the ideology score of the median member in the combined chamber. Virginia conducts separate and equal votes in each chamber and thus I take an average of the medians of each chamber as the measure of the Virginia legislature's

ideology.[66] While Shor and McCarty scores increase in conservatism, I flip this scale to increase in liberalism to be consonant with the dependent variable and other ideology measures in the model. In Figure 5.1, I present these weighted scores for the reappointment bodies.[67]

Figure 5.1. Changing Preferences of Legislative Judicial Reappointment Bodies Between 1995 and 2014



[66] Though I opt for the legislative chamber as a whole, analyses using the median member of the relevant reappointment committee, as well as the chair of the committees, also achieve similar results, though with more uncertainty and weaker model fit.

[67] One concern about these data may be that there are a couple of significant changes in the time series. This may mean that justices were unable to use the legislature's preferences at time *t* as a useful indicator of likely preferences at time *t*+*x*, which would undermine the mechanism I argue for. A more detailed analysis indicates that this is likely not the case. As far as four years forward in time (*t*+4), the median absolute change in Legislature Liberalism was 0.099. Typical changes gradually increase the further forward in time, but even at t+6, the median absolute change was only about 0.2 points. Thus, change occurred, but not often so drastically as to undermine the usefulness of present conditions to predict future conditions. Additionally, the change evident in Figure 1 is not "noisy." State time series generally follow recognizable patterns that reflect the underlying political change in each state.

Finally, I combine these two variables into an interaction term, **Eligible X Legislature Liberalism**. This variable measures the difference between eligible and ineligible justices for the levels of covariation between votes and the legislature's ideology. If the Legislative Influence Hypothesis is correct, I should find a positive coefficient for this interaction term among out-party appointees and no, or a significantly smaller, effect among in-party appointees. As Legislature Liberalism increases, eligible justices should be more likely to vote liberally in comparison to ineligible justices.

In addition to the dependent and independent variables, I control for other determinants of judicial decision-making. The most important factor to control for is a justice's own ideology. My strategy to deal with this (and all other justice-specific factors) is the inclusion of justice fixed effects. This creates a within-justice analysis in which information about the independent variable is derived from changing behavior within each individual justices' career. This does explicitly assume that judicial ideology is constant across time.[68] By including justice-specific intercepts and designating being retention-eligible as the treated condition, I identify votes taken by retiring justices as the closest approximation of their "sincere" preferences, and then use the independent variables to measure diversions from that owed to requiring a reappointment.

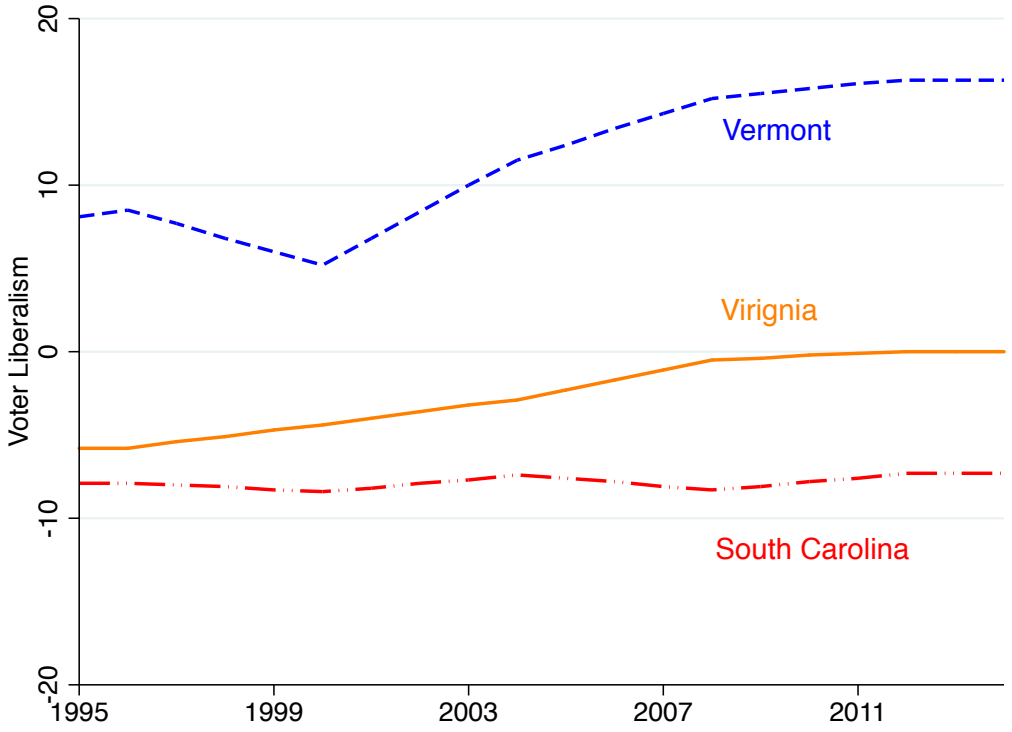
Judges have been shown to be responsive to public opinion in a variety of high-salience situations (Hall 1992; Brace and Boyea 2008; Caldarone, Canes-Wrone, and Clark 2009; Canes-Wrone, Clark, and Park 2012; Besley and Payne 2013; Canes-Wrone, Clark, and Kelly 2014). This responsiveness is weaker in less visible cases (Cann and Wilhelm 2011). If justices are responsive to public opinion and legislature preferences closely mirror public opinion, then

[68] The only dynamic scores available (Windett, Harden, and Hall 2015) are based on the same roll-call votes I analyze in this paper and are thus unsuitable for inclusion in my analysis.

Legislature Liberalism may show a significant effect even if public opinion drives the effect. Therefore, I control for public opinion. I measure state **Voter Liberalism** by comparing how the states voted in presidential elections. I assume that voting for a Democrat is a sign of increased liberalism relative to voting for a Republican candidate. Unlike state-specific elections (such as gubernatorial contests), presidential elections provide a common reference point across all states because each state votes on the same two candidates. Specifically, I subtract the national democratic share of the two-party presidential vote from the state's democratic share of the two-party presidential vote.[69] This creates positive scores for states more liberal than the nation as a whole and negative scores for those that are more conservative. This method provides values only for election years, so to complete the time series, I assume a constant, linear change between elections. I reproduce 2012's score for 2013 and 2014. Figure 2 presents these values for all three states between 1995 and 2014.

[69] These data were taken from David Leip's Atlas of Presidential Elections, available at: http://uselectionatlas.org.

Figure 5.2. Changing Levels of Voter Liberalism Between 1995 and 2014



Justices may also be responsive to governors, who share the legislature's power to alter justice compensation and jurisdiction, and who can influence the enforcement of judicial decisions. Johnson (2014, 2015) has recently found evidence of executive influence of judicial decision-making at the state level. Therefore, I include **Governor Ideology**, measured as Bonica's (2014) CFscore of the governor serving on the day the decision is published – except in the brief period between Election Day and Inauguration Day, in which the governor-elect's score is used. CFscores are based on campaign donations and provide a consistent scale across states and time. To be consonant with other measures in the model, I flip Bonica's scale to be increasing in liberalism rather than conservatism.

Finally, I include a case-specific covariate. **Defendant Appealed** is coded as a "1" when the defendant brought the appeal and "0" otherwise. This doubles both as important information

on the procedural history of the case and an indicator of the ideological direction of the lower-court's decision. In most situations, when defendants bring appeals, it is because they lost at the lower court (either at trial or an intermediate appellate court). This lower-court ruling is the best proxy we have of the proper application of existing law. Therefore, all else equal, defendants should be less likely to win at the state supreme court level when they brought the appeal.[70]

Results

To test the Legislative Influence Hypothesis, I estimate a logistic regression with Liberal Vote as the dependent variable; Eligible, Legislature Liberalism, and Eligible X Legislature Liberalism as the independent variables; plus Defendant Appealed and justice fixed effects. The interaction term, Eligible X Legislature Liberalism, identifies the higher or lower level of covariation between justices' voting and legislatures' preferences for those still reappointment-eligible compared to those that are not. The Legislative Influence Hypothesis predicts that reappointment-eligible out-party justices are more deferential than their retiring colleagues. "Deference" in statistical terms represents a slope effect – the changing probability of a liberal vote as the legislature's ideology changes. Thus, to support the hypothesis, the interaction term should be positive and statistically significant among out-party appointees, and significantly greater than the interaction term among in-party appointees.

I use the terms "in-party" and "out-party" to describe parties in and out of power. Thus, an "in-party appointee" is a justice who was appointed by a party that is in power when the

[70] Full descriptive statistics are presented in Table A1 of the Appendix.

justice casts a vote in a case.[71] I code all other justices as out-party appointees.[72] In total, about 65.9% of votes were cast by minority-party appointees. This number is so high because of the partisan realignment in Virginia and South Carolina. Many justices, especially in the first half of the time range, were appointed by southern Democrats in the final years of their control of southern legislatures. Those justices' careers continued into the many years of Republican control. This results in a high rate of justices having been appointed by the rival party. Importantly, this realignment was nearly or totally finished by the time my analysis begins in 1995. These partisan shifts do pose some problems for the analysis, however. Justices appointed by the Democratic party in the late 1980s may not have been as ideologically out of step with the Republicans in the 2000s as the basic partisan labels might indicate. However, this limitation biases against finding differences in the two groups, making my tests more conservative. Additionally, the underlying logic of the importance of partisan connections to create collective-action barriers to protect in-party appointees applies to these justices appointed under the older partisan alignment.

I estimate two models for each relevant subset. Model 1 and Model 2 are estimated on the set of votes cast by out-party appointees. Model 2 differs from Model 1 only by having its

[71] Because of their differing retention procedures, this rule varies by state. For South Carolina and Vermont, this means having a majority of all members of the legislature, regardless of chamber. For Virginia, it means unified legislative control under the same party that appointed the justice.

[72] There are a few harder cases to diagnose, notably how to treat situations when legislative control is split. This only applies in Virginia, where the two chambers of the state legislature make separate, independent retention votes. I choose to code all Virginia justices as "out-party appointees" at times when the legislature is split. Excluding these justices or classifying them as "in-party appointees" does not substantially alter the results I present.

standard errors clustered on justices.[73] Models 3 and 4 are estimated on the set of votes cast by in-party appointees. Again, Model 4 differs from Model 3 only in standard error clustering. The results are presented in Table 5.2.

Table 5.2. Differing Levels of Deference Among Majority and Minority Party Appointees

Variable	***Model 1 (Out-Party Appointees)***	***Model 2 (Out-Party Appointees)***	***Model 3 (In-Party Appointees)***	***Model 4 (In-Party Appointees)***
Legislature Liberalism	0.43 (0.33)	0.43 (0.22)	0.49 (0.57)	0.49 (0.54)
Eligible	0.24 (0.18)	**0.24 (0.11)**	-0.26 (0.23)	-0.26 (0.18)
Elig. X Leg. Liberalism	**0.71 (0.34)**	**0.71 (0.24)**	-0.13 (0.37)	-0.13 (0.27)
Governor Liberalism	**0.37 (0.04)**	**0.37 (0.06)**	**0.16 (0.06)**	**0.16 (0.06)**
Defendant Appealed	**0.17 (0.08)**	0.17 (0.12)	-0.18 (0.11)	-0.18 (0.17)
Voter Liberalism	0.02 (0.02)	0.02 (0.02)	**0.05 (0.03)**	**0.05 (0.01)**
Constant	-0.22 (0.26)	-0.22 (0.17)	-0.04 (0.87)	-0.04 (0.15)
N	5,443	5,443	2,855	2,855
F.E. Level	Justices	Justices	Justices	Justices
S.E. Clusters	None	31 Justices	None	27 Justices

Note: Numbers in columns are logistic regression coefficients with standard errors in parentheses. Bolded coefficients are statistically significant at the $p<0.05$ level or better (two-tailed tests).

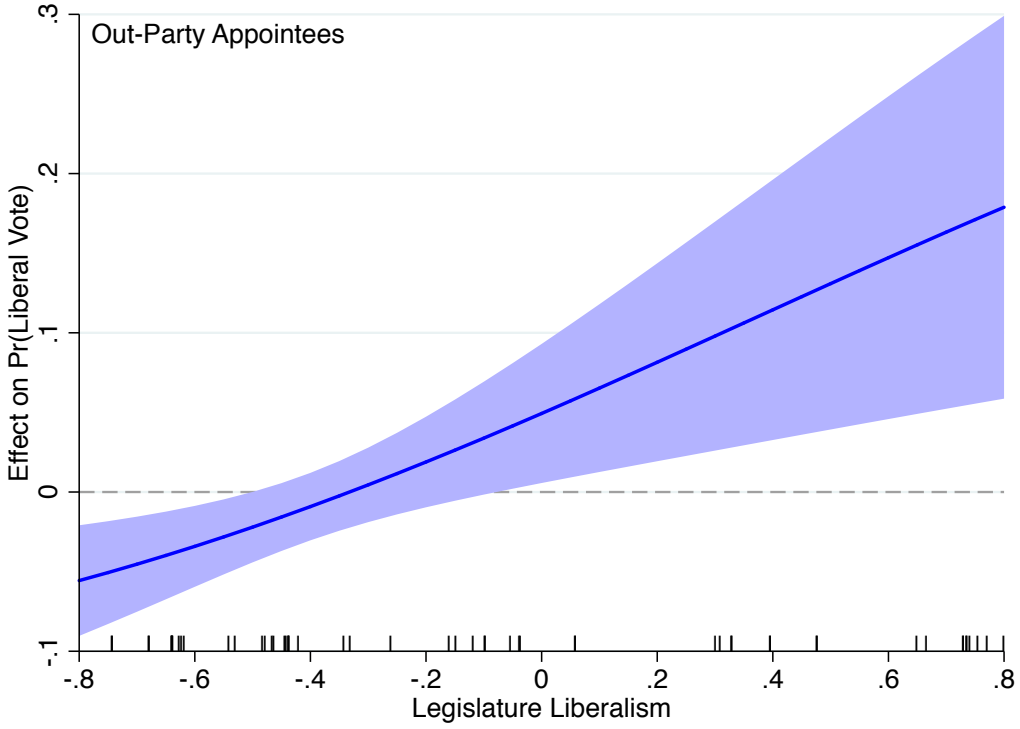
Table 2 indicates that out-party, retention-eligible[74] appointees are systematically deferential to their retaining legislatures. Within a justice's career, they vote more in lines with the preferences of their legislature when they are an out-party justice that still needs to be reappointed to additional terms. When their appointing party falls out of power, justices may see this as a signal of what awaits them at the end of their term and moderate themselves

[73] Given the use of fixed effects and having a relatively small number of clusters, the suitability of cluster-adjusting standard errors is debatable. Therefore, I present models with and without cluster-adjusted standard errors.

[74] I observe 24 of the 31 justices in Models 1 and 2 in the treatment condition (Eligible = 1).

accordingly. At the same time, justices appointed by the current majority party show no signs of deference. This implies that justices feel relatively safe while the party that appointed them remains in power. Once that party falls out of power, however, justices begin to moderate themselves to be more acceptable to the new majority. The difference between the out-party and in-party effects is statistically significant, comparing across models 1 and 3 (p<0.10) or 2 and 4 (p<0.05). Contrary to the findings of Huber and Gordon (2004) in the electoral context, I also find no evidence that retention-eligible justices are systematically more punitive. Figure 5.3 presents Model 2's main effect graphically, showing the effect of being retention eligible on the probability of casting a liberal vote for differing levels of Legislature Liberalism.

Figure 5.3. Marginal Effect of Retention Eligibility as Legislature Liberalism Increases, Out-Party Appointees



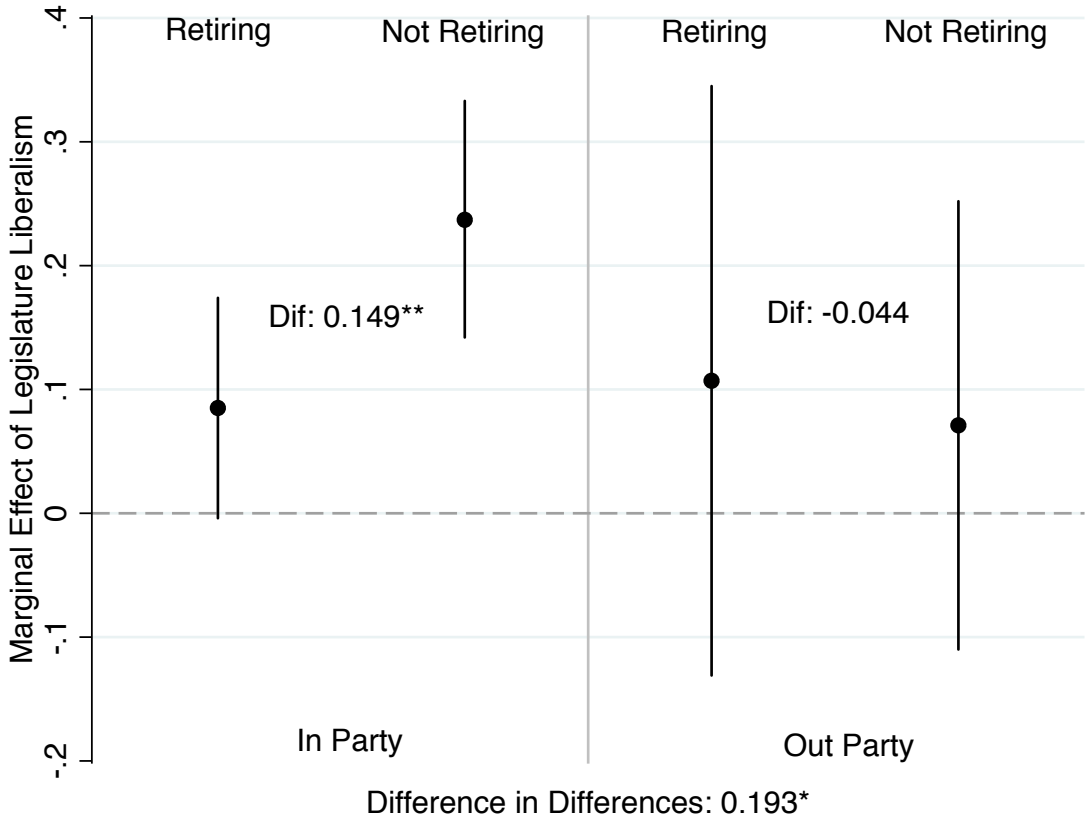
The key result depicted in Figure 3 is that, among out-party appointees, retention eligible justices – as opposed to those in their final term – vote much more in line with their legislature's

preferences. When the legislature is more liberal, these justices vote for defendants at higher rates. When the legislature is more conservative, they vote against defendants at higher rates. This trend is fairly consistent across values of Legislature Liberalism, and is locally distinguishable from zero at both ends of the graph. All three states feature at least five general assemblies (typically two years each) in statistically distinguishable regions of the graph, indicating that the results are not driven only by one state. The off-centered nature of the graph, and the stronger effect size on the liberal side of the graph is likely due to the asymmetries of northern and southern Democratic politics, especially when viewed over the last thirty years. The gap between Democrats and Republicans is greater in the states that populate the right side of the graph (primarily Vermont and recent Democratic successes in Virginia) than it is in the left side of the graph (primarily South Carolina and years of Republican ascendancy in Virginia), where southern Democratic appointees from the 1980s and 1990s need only moderate themselves slightly to be palatable to the Republicans that have controlled the state for the last two decades.

While Figure 5.3 presents Legislature Liberalism's influence on the direction and size of the retention eligibility effect among out-party justices, another way to look at the same data is to consider how a justice's status vis-à-vis retention impacts the importance of the legislature's preferences in their decision making. In Figure 5.4, I present the results of Models 2 and 4 in this light. The numbers presented are the marginal effects of a one-point change in Legislature Liberalism on a justice's probability of casting a liberal vote. On the left side of the figure are justices appointed by the out party (Model 2) and on the right side are justices appointed by the in party (Model 4). Within each half, justices are separated by whether they are retiring or whether they remain eligible for an additional term. The important comparisons for assessing

the Legislative Influence Hypothesis are the differences between Retiring and Not Retiring in each half of the graph (whether the legislature has influence through retention power), and the difference between those two differences (whether the legislature's influence is greater on out-party appointees).

Figure 5.4. Marginal Effect of Legislature Liberalism for Different Types of Justices



In Figure 5.4, one group of justices stand out: the retention-eligible out-party appointees, the subject of this paper and also the group pointed out in Table 1. For in-party appointees as well as retiring out-party appointees, the marginal effect of a one-point increase in Legislature Liberalism is about a 0.1 increase in the probability of a liberal vote, though this is not statistically distinguishable from zero for either of these three groups. For retention-eligible out-

party appointees, however, the estimate is an increase of 0.24, more than double the size and distinguishable from zero at $p<0.001$. Within out-party justices, the difference in effect of Legislature Liberalism between Retiring and Non-Retiring justices is 14.9 percentage points and is statistically distinguishable at the $p<0.01$ level. The comparable difference among in-party justices (-4.4 percentage points) is not statistically significant. The logic of my analysis is that if retention is important, then non-retiring justices should behave differently than comparable retiring justices. This difference is creditable to eligibility for additional terms and thus is best explained by strategic retention-seeking behavior. Among out-party justices, that pattern holds (there is a statistically distinguishable difference). Among in-party justices, the pattern does not hold. In fact, I estimate that retiring in-party judges actually voted in line with their legislature more often than non-retiring in-party justices did (though this difference is not significant). The difference between these differences (19.3 percentage points) is significant ($p<0.05$), indicating that legislative retention influence was far greater on out-party appointees.

When taken together, Figures 5.3 and 5.4 strongly support the Legislative Influence Hypothesis. The best interpretation of these data is that two criteria are necessary for strategic deference to the legislature driven by retention pressures: first, a justice needs to be an out-party appointee; and second, a justice needs to be eligible for additional terms, thus needing the legislature's approval. These are exactly the two criteria I argue for in this paper.

Notably, these results differ from the most comparable analysis in the literature. Shepherd (2009) did not find substantial differences in behavior between justices eligible for another term and those retiring in states where legislatures reappoint justices. Shepherd argued that this was explained by the strong connections that justices have with the long-serving legislators, meaning that even justices who cannot be reappointed still have connections that

make them deferential and likeminded. I build on these arguments by differentiating between in-party and out-party appointees, which vary considerably on the level of connections to the deciding majority in the legislature. I show that once this additional layer is taken into account, meaningful differences between eligible and retiring justices are found for those out-party appointees who have weaker connections to the majority.

The coefficients on the remaining control variables provide interesting information about other research questions in state courts. Governor Liberalism is strongly associated with more pro-defendant rulings. Given the use of fixed effects, this indicates that when conservative governors are replaced with liberal governors, justices vote more liberally.[75] This at least partially comports with recent findings by Johnson (2014, 2015), indicating that governors can influence state supreme court decision making, even in the absence of reappointment powers. There are a variety of potential explanations, including the governor's influence over law enforcement and the governor's role in the lawmaking process that determines pay raises, jurisdiction, and workload.

In terms of responsiveness to the public, only in-party justices consistently show such a relationship. It is impossible to say that this is due to deference to public opinion. It may also be that justices – members of the public – are acted upon by the same events and social forces that alter public opinion. Canes-Wrone, Clark, and Kelly (2014) find that justices who are retained through elite reappointment are responsive to public opinion. My results for in-party appointees echo theirs, but differ for out-party appointees, who are responsive to the legislature and not the public. The reason for the difference between the groups is not clear. Retention concerns are

[75] Despite this broad influence, there is no difference in executive influence between the retention-eligible and the retiring justices. This is described in more detail in the Placebo Test section later in this paper.

likely primary for out-party appointees, while secondary audiences (see Baum 2009) become important for in-party justices who are insulated from retention worries by their connections in the legislature.

A Placebo Test: Executive Influence in Legislative Reappointment States

I argue that legislatures have influence specifically because they have the power to reappoint. This is the mechanism through which I arrive at the data presented in the preceding sections. If this is true, then it should be that other major actors who lack this reappointment power should not show similar levels of influence. The most apparent rival actor is a governor. In these three states, governors are not necessary for reappointment to the court. Though they have other means of influence, there is no reason for retention-eligible justices to behave differently from retiring justices with respect to the governor. To add support to the mechanism I highlight, I conduct a placebo test and replicate Table 5.2, except instead of interacting Eligible with Legislature Liberalism, I interact it with Governor Liberalism. If I am right, I should see no significant relationship. Again, I separate between out-party and in-party appointees, except now defined by the party of the governor.[76] The results are reported in Table 5.3.

[76] The results are the same no matter whether I define out-party relative to the governor's party, the legislature's party, or pooling them all together.

Table 5.3. Placebo Test of Gubernatorial Influence

Variable	***Model 1 (Out-Party Appointees)***	***Model 2 (Out-Party Appointees)***	***Model 3 (In-Party Appointees)***	***Model 4 (In-Party Appointees)***
Governor Liberalism	**0.73 (0.24)**	**0.73 (0.31)**	**0.62 (0.19)**	**0.62 (0.15)**
Eligible	-0.15 (0.18)	-0.15 (0.24)	**-0.35 (0.15)**	**-0.35 (0.10)**
Elig. X Gov. Liberalism	-0.17 (0.19)	-0.17 (0.26)	0.06 (0.16)	0.06 (0.13)
Legislature Liberalism	-0.29 (0.32)	-0.29 (0.21)	0.35 (0.33)	0.35 (0.48)
Defendant Appealed	**0.37 (0.10)**	**0.37 (0.18)**	**-0.21 (0.09)**	**-0.21 (0.09)**
Voter Liberalism	0.02 (0.03)	0.02 (0.02)	0.04 (0.03)	0.04 (0.02)
Constant	-0.56 (0.31)	-0.56 (0.45)	**0.65 (0.28)**	**0.65 (0.19)**
N	4,138	4,138	4,210	4,210
F.E. Level	Justices	Justices	Justices	Justices
S.E. Clusters	None	31 Justices	None	31 Justices

Note: Numbers in columns are logistic regression coefficients with standard errors in parentheses. Bolded coefficients are statistically significant at the $p<0.05$ level or better (two-tailed tests).

The placebo test in Table 5.3 is passed. The interaction term is insignificant in all four models and improperly signed in Models 1 and 2, pertaining to out-party justices. The clearest interpretation of these data is that the governor's ideology does not matter more for those who need to be reappointed than to those who are retiring. This supports the idea that the key mechanism is the power to reappoint – exclusively held by legislatures rather than governors. While governors' ideology is strongly associated with judicial votes, as the models in Table 5.2 also indicate, it is important to note that this applies evenly to all justices and does not vary based on whether justices are leaving office, which indicates that something other than retention politics is the source of executive influence.

Conclusion

This article is about the strategic ways that justices respond to legislative oversight and appointment authority, and the influence this creates for the legislative branch. "Oversight"

carries connotations of meritocracy and correction. Things are overseen so that problems are prevented or resolved. Indeed, corrupt, unethical, and capricious judges can, and are, removed through retention procedures. Yet, oversight also brings influence. The ability to remove undesirable justices induces strategic compliance in understandably self-interested justices who wish to retain their job. Thus, "oversight" limits judicial independence, which likely has value in certain areas of good governance (Maskin and Tirole 2004). In states with legislative judicial reappointments, this oversight power is entrusted to a group of blatantly political, partisan, and ideological actors: state legislators. It should be no surprise then that their reappointment power brings with it ideological influence over judicial decision-making. Legislators are strongly positioned to make use of this potential influence. Because they can internally delegate to committees and party structures and have legislative staff to perform research, the costs to track the behavior of the supreme court are small. The capacity to monitor and then punish justices who veer too far from desired decisions turns legislators from overseers to influencers, particularly of out-party appointees.

The result of these legislative capabilities is that oversight becomes influence. Rationally self-interested justices, specifically those who lack connections with the majority party, defer to the preferences of the legislature, making sure to remain acceptable to the legislative majority. This influence is consistent over time and is detectable in a large docket of criminal cases. Collectively, these findings indicate that when states choose to invest power over courts in their state legislature, they are reducing judicial independence and giving the legislature substantial ideological influence on judicial outcomes.

Though I believe these findings are generalizable to a variety of issues that legislatures may care about, these results have special implications for criminal law. In total, South Carolina,

Virginia, and Vermont held 60,924 people in prison as of the end of 2014 (Carson 2015). In the 20-year period of criminal appeals I analyze, South Carolina and Virginia executed 115 individuals. As of January 1, 2016, those two states held fifty prisoners with a pending death sentence (NAACP 2016). The stakes of criminal justice are always high. These are the cases that most require objectivity, independence, and a fair and predictable application of existing law. Yet my analysis implies that at least some part of the fate of a criminal defendant was determined at the ballot box, when voters decided the composition of their state legislature. This brings back into the focus the democratic conflict I discuss in the introduction of this paper. That criminal justice outcomes fluctuate and vary across defendants due to the political context poses significant normative problems in a system in which similarly situated people should receive similar outcomes. Yet, at the same time, justices being responsive to representatives of the people also has democratic appeal. This article adds to our knowledge of the extent and depth of the legislature's influence in systems where they get to retain state supreme court justices. The implications of a judiciary so closely tied to its legislature deserve further thought and investigation.

Appendix 5.1. Descriptive Statistics

Table A5.1-1 – Descriptive Statistics

Variable	Mean	Standard Deviation	Min	Max
Liberal Vote	0.31	0.46	0	1
Legislature Liberalism	-0.14	0.48	-0.74	0.80
Eligible	0.76	0.43	0	1
Governor Liberalism	-0.13	1.01	-1.09	1.54
Voter Liberalism	-0.57	8.27	-8.40	16.30
Defendant Appealed	0.83	0.38	0	1

Chapter 6

The Negligible Ideological Influence of Voters on State Supreme Court Decision-Making

The preceding chapters of this project articulate a theory of political influence for retaining actors – governors, legislators, and voters. The core argument is that not all retainers are created equally, and those with better monitoring capacity and stronger and easier to use enforcement mechanisms should be more influential. I argue that these are political professionals – governors and legislators – who have experience, expertise, resources, and limited collective-action barriers with which to influence their judicial branches. Voters, by comparison, have fewer informational resources with which to monitor judicial behavior. Even when they learn about a judicial decision, they face enormous collective-action problems to actually use their retention discretion.

In the first empirical chapter, I supported these hypotheses by first showing extensive ideological influence for reappointing governors. Rather than independent justices, the evidence indicates that justices are constrained by the preferences of the governors who could reappoint them. And this influence takes on specifically ideological dimensions – more conservative governors influence their justices into more conservative votes. In the second empirical chapter, I supported the theory by showing that legislators ideologically influence justices of their opposing parties. There is no evidence that they do the same to justices originally picked by their own party. This strong influence among out-party judges is likely explained by the collective action problems that legislators face compared to the unilateral powers of a governor. Collectively, these chapters support my argument that political elites have strong ideological influence over retainable justices. And the variation between the types of elites supports the notion that individual components like the ease of use of the enforcement mechanism matter for levels of influence.

In this chapter, I test whether the remaining significant retaining actor – voters – are as powerless as my theory expects. While it may be reasonable to take voters' positions into account in an extremely small number of highly public cases, these should be insufficient to be detectable in a large body of votes. Also, voters are less coherently ideological than political elites, and thus they should exert less ideological influence. To the extent that voters do influence justices, it should be the type of "unidirectional convergence" found by Huber and Gordon (2004), in which all justices simply behave more punitively in advance of their elections to avoid the possibility of an unpopularly lenient decision. This is not the same as ideological influence because there is no difference in how justices respond to liberal and conservative constituencies.

This question is not new or novel in the way the first two chapters are. The vast majority of research on retention effects in state supreme courts is about judicial elections and their effects. This makes sense for a variety of reasons. First, a majority of states use elections for retention at the appellate level and even more states use elections at the trial level. As the most common method, it is not surprising that it would receive the most interest. Second, elected justices are clearly analogous to elected officials in many other offices which political science has extensive previous research on. Research on campaign finance and representation, to name just two topics, is informative for judicial politics. Indeed, the extent to which elections bring money, organized interests, and campaign politics, into the justice process has been a common focus of research (Hall 2016, 2014a; Kritzer 2015; Bonneau and Hall 2013, 2008; Bonneau, Hall, and Streb 2011; Bonneau 2007, 2005).

Third, electing justices is internationally extremely rare and is a distinctive aspect of the American political system. Thus, judicial elections draw extensive interest (and criticism) for

the unique moral and political questions they pose. Research often takes on a tone of advocacy for or against elections, or some type of election. A 2016 article (by Hall) included the secondary title "Or Why Nonpartisan Elections Really Do Stink," while Geyh (2003) simply went with "Judicial Election Stink." Bonneau and Hall offered "In Defense of Judicial Elections" in 2009, and Hall has over time offered arguments that judicial elections can work to make courts representative and responsive institutions (Hall 1995; Hall 2014b). Others, such as Shepherd (2013), Redish and Aronoff (2014), Geyh (2003), and Pozen (2008), offer more critical arguments, focusing on how election money could impact case decisions relevant to donors and how the fundamental concepts in even well-run and regulated elections defy core values of judicial independence. Berry (2015), writing for the Brennan Center for Justice, argues that elections have the effect of leading to more punitive and less lenient justice for criminal defendants. The American Bar Association (2003) has also been a consistent opponent of judicial elections.

Thus far, the empirical research is mixed but implies some impacts on judicial decision making in certain types of cases. The most common investigation has been about death penalty decisions. The most recent and sophisticated such test, by Canes-Wrone, Clark, and Kelly (2014) finds that those facing retention and nonpartisan elections are systematically more likely to uphold death penalty sentences, but find no significant variation in responsiveness to popular opinion about the death penalty. They do find, however, that partisanly reelected justices are "dynamically responsive" to popular opinion: as more citizens come to support the death penalty, so do the justices. These mixed but suggestive results are not outliers. Hall (2014) also finds some effects by voters, though framed as "representation" rather than voter influence. Indeed, Hall is a pioneer in the effects of judicial retention, and especially on death penalty decisions,

with articles in 1992 and 1994 (with Brace). The focus on hyper salient cases extends also to abortion (Canes-Wrone, Clark, and Park 2012; Caldarone, Canes-Wrone, and Clark 2009; Brace, Hall, and Langer 1999) and gay marriage votes (Lewis, Wood, and Jacobsmeier 2014), where voters and public opinion have been found to influence judicial behavior. Ultimately, the nature of elections and their impact varies heavily by state and may change subtly over time (Baum 2017; Kritzer 2015).

Despite all of this interest, the vast majority of attention to the potential effects of elections has been too narrowly defined and poorly identified. The question most typically posed by existing research designs is: do states which reelect justices vote differently on a small set of cases which raise great public interest, such as the death penalty or the legality of gay marriage? This is far too narrow because courts, in fact, decide far more cases than just these few on death penalties or highly public social values questions. A typical justice may have fewer than a handful of such votes per year out of hundreds of cases. This common research question is also poorly defined, because it focuses on differences between states rather than between justices. States are pooled into categories based on their method of retention and all justices are assumed to be subject to these pressures. Because of this, there is never within-justice variation on the concept of interest: retention pressure. Hall (2014) is a notable exception to this, finding that those in their final terms behave differently than those who are still eligible for additional terms.

In this chapter, I improve on these limitations by expanding the range of cases analyzed to an entire topic area (criminal law). This includes cases which are very salient, but also includes cases of moderate and lower public exposure. The vast majority of cases are ones that do not receive a lot of attention. But they are meaningful cases nevertheless. They decide the

legal fate of thousands of individuals, and exponentially more when their precedential weight is factored in. A state's unique set of criminal laws is built through decades of these seemingly routine cases. If voters are influential on justices systematically rather than simply in a few notable cases per year, their influence should be detected across a whole docket area. It reveals the depth and pervasiveness of the influence to find the patterns in pools of tens of thousands rather than hundreds of cases.

I also better identify the effect because I separate out – within a state, and within a justice's career – whether they were still eligible for reelection. Because of mandatory retirement, promotion to other positions, or early announced voluntary retirement, many justices cast votes at a point in time in which reelection pressures could not possibly apply to them. By analyzing the difference within a justice's career, I identify the effect of reelection on justices, not the differences between states, which may be owed to a nearly infinite set of other factors. This method requires fewer assumptions, asks less of the measures and statistical models, and ultimately estimates the impact of facing an election. There are other potential effects of elections, such as the types of justices they initially place on the bench. Voters make very real choices that lead to different policy outcomes under the candidates they picked compared to those they did not (Baum, Gray, and Klein 2016). But determining those effects requires different and equally focused research designs.

Based on the theories articulated in Chapters 1 and 2, I argue that voters should have less of an effect on judicial behavior than governors and legislatures.

> **Political Elite Influence Hypothesis:** The level of ideological influence by political elites (governors and legislatures) on judicial voting through retention pressures (as

measured by the difference between eligible and ineligible justices) is greater than the same ideological influence (similarly measured) among voters.

I also argue that voters have a negligible or null effect on retention-eligible justices' behavior.

Voter Weakness Hypothesis: Reelection-eligible justices do not vote meaningfully more often in line with voter ideological preferences than do reelection-ineligible justices, all else equal.

I show evidence that voters collectively exert minimal ideological influence on their reelectable state supreme court justices. I find mixed evidence that justices systematically act more punitively when they face a reelection, but I find that, collectively, elections give voters little ideological influence. More conservative electorates get no more punitive behavior out of justices facing reelection than out of those that are ineligible for another term. Using methods to test the significance of minimal relationships, I show that elections have a negligible ideological impact on judicial behavior.

I expand the tests to consider different types of elections – retention, nonpartisan, and partisan varieties – and find that retention and nonpartisan elections follow the general trend described above of minimal influence, but that there is some (however mixed) evidence of strong ideological influence through partisan elections. None of these results are robust to all measurement strategies and rely on a balance across differing model results and picking which measures of public opinion are most convincing and relevant to this question. In comparison to the strong, robust findings in preceding chapters, these results generally support my argument that elections are not strong influencers of judicial criminal behavior.

Testing

The Data

As with the preceding chapters, this chapter relies on the Hall and Windett dataset of state supreme court cases from 1995-2010. I select criminal law and procedure cases from this dataset, continuing the empirical strategy of previous analyses.[77]

I analyze a large but incomplete set of states that cover the three major types of elections (retention reelection, non-partisan reelection, and partisan reelection). The list of states I use is incomplete for several reasons. First, I only analyze states that have statewide seats, so states with districted reelection (such as Illinois and Louisiana) are not included. I also include states with irregular and unique systems, such as Hawaii, which retains justices through an irregular commission system. Finally, I exclude a set of states for which the data in the Hall and Windett dataset were not usable for this analysis.[78] In total, I analyze votes in 23 states, which are listed in Table 6.1. The three partisan election states I use are the only states which use partisan statewide retention elections.

[77] Specifically, I include all cases coded as "Criminal Law & Procedure" cases. This is not exhaustive – some criminal law cases end up coded in "Constitutional Law" or "Evidence" Legal Areas. However, the vast majority of criminal cases fall under "Criminal Law & Procedure" and I use that as a representative sample. I have found no evidence that these different codings are particularly meaningful given that most cases combine multiple codings under West and Lexis headnote systems, while the dataset provides only one, meaning that most cases would fall under multiple if allowed. I believe this justifies treating the process that leads to a criminal case ending up in "Criminal Law & Procedure" versus a different coding as-if random.

[78] Specifically, these states are those for which the Hall and Windett dataset included an excessive number of "No Disposition" result codings, which are likely due to irregular phrasing in the announcement of the courts' decisions.

Table 6.1. States Included in Analysis (by Retention System)

Retention Election	Nonpartisan Elections	Partisan Elections
Alaska	Arkansas	Alabama
Arizona	Georgia	Texas
California	Idaho	West Virginia
Colorado	Michigan	
Iowa	Minnesota	
Kansas	Nevada	
New Mexico	North Dakota	
Pennsylvania	Ohio	
South Dakota	Oregon	
Tennessee	Wisconsin	

Variables

I largely replicate the variables used in preceding chapters. I repeat variable descriptions for clarity. The dependent variable, **Liberal Vote**, takes the value "1" when a vote is pro-defendant and "0" when it is in favor of the state. In fewer than 5% of cases, it is impossible to reasonably code whether the case is pro-defendant, usually do to conflicting aspects in a multi-component ruling. Because of the difficulty of reliably coding these cases and their infrequence, I drop them from the analysis. As the name implies, I assume that pro-defendant votes are more often liberal votes, expanding rights and defendants' protections.

Recall that the prediction is that there is no relationship between voter ideology and justice votes in these cases. That is, conservative voters do not influence judges to be more conservative than they otherwise would be, and neither do more liberal voters. To test this, I use a combination of different variables. First, there is **Eligible**, an indicator of whether a justice was eligible for reappointment at the time the case decision was announced. This follows the pattern of preceding chapters. As with those chapters, I pursue an interactive strategy: I multiply this indicator by a measure of voter preferences to determine what extra amount of covariation

exists between those preferences and the votes of eligible justices than exists for ineligible justices.

As a first measure of voter ideological preferences, I carry over **Voter Liberalism** from the preceding chapters, and now label it Voter Liberalism (Electoral). Recall that this variable measures the relative liberalism in presidential election voting, such that states which vote more often for Democratic candidates are considered more liberal than states which vote more for Republican candidates. Because voter preferences are a main independent variable in this test, rather than simply a control variable – and because voter preferences are difficult to measure, I use a variety of different measurement approaches. In addition to Voter Liberalism (Electoral), I also use Berry et al.'s Citizen Ideology scores, which I will call **Voter Liberalism (Berry)**. These are based on the liberalism and conservatism of the politicians that voters send to Congress.

A third approach, **Voter Liberalism (Pacheco)**, is an estimate of the percentage of a state's citizens who consider themselves liberal, which comes from Juliana Pacheco's research using multi-level regression with post-stratification (MRP). MRP methods use a large number of survey responses across states and over time to estimate state-year specific estimates of public opinion. In the final approach, **Voter Liberalism (Death Penalty)**, I use a second measure from Pacheco's MRP research: state-level death penalty approval by year. To make the polarity of this measure match the others, I subtract the measure from one, indicating the percentage that were not classified as death penalty supporters in a given state and year. This final measure has strengths and limitations. Its main added value over the other measures is that by focusing on the death penalty, it likely gets closer to public opinion specific to criminal justice issues, which may be more useful for this project. Its main drawback is that the data are less complete and cover a

smaller time range, resulting in tens of thousands of votes being dropped from the analysis. Additionally, while the death penalty question is a criminal-justice topic, it is also the most famous and widely known criminal justice issue and may exhibit different behavior than criminal justice questions on which the electorate is less informed.

Collectively, these approaches cover a variety of possible measurement choices and different sources of information. Rather than pick one, I recognize that even seemingly justified research choices can lead to biased and misleading inferences. The best approach, in light of the "garden of forking paths" (Gelman 2014) problems of research design, is to consider a variety of potential approaches and present the results for each. Thus, each version of Voter Liberalism is given its own model (which includes that measure and an interaction term with Eligible) and I will evaluate the models holistically across measures. Table 6.2 contains a summary of the different measures and Table 6.3 is a correlation table of the measures.

Table 6.2. Descriptive Statistics of Different Measures of Public Opinion

	Electoral	*Berry*	*Pacheco*	*Death Penalty*
Completeness	100%	100%	100%	49.9%
Average	-4.24	48.35	0.19	0.25
SD	6.70	11.30	0.03	0.05
Minimum	-21.12	13.46	0.13	0.14
Maximum	9.25	79.28	0.30	0.39
Average Absolute Change $(E[\lvert X_{i,t+1}-X_{i,t}\rvert])$	0.57	4.76	.01	0.01
Average Within-State SD	1.95	6.13	.02	0.03

Table 6.3. Correlation Table of Different Measures of Public Opinion

	Electoral	*Berry*	*Pacheco*	*Death Penalty*
Electoral	1.00	0.58	0.55	0.15
Berry	-	1.00	0.29	0.12
Pacheco	-	-	1.00	0.42
Death Penalty	-	-	-	1.00

Tables 6.2 and 6.3 indicate that while all four versions of the variables are positively correlated, there is considerable variation. The two most similar variables are, unsurprisingly, the two electoral variables: Electoral (based on presidential outcomes) and Berry (based on the ideologies of the winners of congressional elections). The two Pacheco survey-based measures are less correlated. The table also indicates some potential differences between global public opinion and opinion on a criminal justice issue such as the death penalty. Even in liberal states, capital punishment is generally popular, and the variation between the states does not strongly match the variation in global ideology (that is, very liberal states are not dramatically less supportive of the death penalty that very conservative states). Collectively, these variables are a diverse approach to measurement. Thus, consistent results across all four will increase certainty in the findings.

In addition to the set of independent variables, I also include relevant controls which continue from previous chapters. The first is **Governor's Ideology**, which is an ideology measure of the governor serving on the day the decision announcing a vote was released, except in the short window between Election Day and Inauguration, in which the new governor is counted rather than the actual serving governor. To measure this, I use Bonica's (2013) CFscores, which rely on campaign finance information for donors and recipients. Larger scores are associated with more conservative members. I also include a measure of legislative

preferences, **Legislature Ideology**, using Shor and McCarty's (2011) state legislature common space scores.[79] As with CFscores, higher values represent more conservatism.

Defendant Appealed is coded as a "1" when the defendant brought the appeal and "0" otherwise. This provides an indicator of the ideological direction of the lower-court's decision. I expect that cases brought by defendants are less likely to receive a pro-defendant outcome than those brought by the state. **Murder** is coded as a "1" when at least one of the defendant's charges was murder, and "0" otherwise.

I avoid using control variables that are constant across a justice's career because they would be inappropriate given the use of justice fixed effects. Thus, I do not include any demographic or career information about justices (such as whether they were appointed), or partisan information (which can be difficult to reliably determine and rarely, if ever, changed in a justice's time on the bench). I also include no measures of judicial ideology. All non-vote based measures are static (and thus invariant within justices), and vote-based measures are inappropriate since they would be based on the very votes I analyze. Even measures based on votes in non-criminal cases would be problematic as they would effectively be post-treatment variables, impacted by the very process I test in this paper. I rely on justice fixed effects to separate justices based on their overall likelihood to rule for defendants.

Analysis

In the initial test, I analyze the impact of justice eligibility for reelection. First, I analyze whether justices defer to the specific ideological preferences of their voters. If justices facing

[79] Shor and McCarty's dataset lacks measures for some states in some years, especially in 1995, 2009, and 2010. I do not see a reason why missing data in these three years biases the results I report in any particular direction. Despite this missing-data issue, the Shor and McCarty scores provide the best common-space estimate of legislature ideology.

reelection are responsive to voters, then the interaction term, Eligible X Voter Liberalism, should be statistically significant and positive. Second, I look for evidence that the justices are systematically more punitive when facing retention. This will be the case if Eligible has a statistically significant, negative coefficient. I estimate these tests with OLS linear probability models, with the results presented in Table 6.4. Similar results are obtained using logistic regressions – those results are presented in Table A6.1-1 in Appendix 6.1.

Table 6.4. Influence on Judicial Behavior by Voters

Variable	*Model 1*	*Model 2*	*Model 3*	*Model 4*
Eligible	-0.029*	-0.041	-0.124	-0.106
	(0.012)	(0.034)	(0.068)	(0.071)
Voter Lib. (Electoral)	-0.003			
	(0.002)			
Voter Lib. (Berry)		-0.000		
		(0.001)		
Voter Lib. (Pacheco)			-0.875*	
			(0.369)	
Voter Lib. (Death Penalty)				0.041
				(0.285)
Elig. X VL (Electoral)	0.000			
	(0.001)			
Elig. X VL (Berry)		0.000		
		(0.001)		
Elig. X VL (Pacheco)			0.484	
			(0.340)	
Elig. X VL (Death Penalty)				0.380
				(0.286)
Governor Ideology	-0.004	-0.004	-0.005	-0.022*
	(0.005)	(0.005)	(0.005)	(0.010)
Legislature Ideology	-0.006	-0.000	-0.013	0.134**
	(0.010)	(0.001)	(0.011)	(0.025)
Defendant Appealed	-0.009	-0.010	-0.010	-0.022
	(0.014)	(0.014)	(0.014)	(0.016)
Murder	-0.158 **	-0.158**	-0.158**	-0.171**
	(0.010)	(0.010)	(0.010)	(0.013)
Constant	0.141**	0.171**	0.320*	0.168
	(0.023)	(0.036)	(0.062)	(0.087)
N	68,262	68,262	68,262	34,366

Note: Coefficients are logistic regression coefficients with standard errors (clustered by justice [n=290 in models 1-3, n=219 in model 4]]) in parentheses. *=p<0.05; **=*p*<0.01.

The models in Table 6.4 are very informative for this research question. First, no result is robust to the measurement choice question. Models using measures constructed by Pacheco (in columns three and four) yield different results than those in columns one and two. From the perspective of looking for deference to voters owed to needing re-election, the place to look for ideological deference is in the interaction term. If justices respond to liberal voters with more pro-defendant behavior, but to conservative voters with more pro-prosecution behavior, then there should be a positive and significant coefficient on the interaction term between Voter Liberalism and Eligible. My prediction is that there would be no such significance, and there is none. The coefficient on the interaction term in all four models falls short of any conventional level of statistical significance, though all four are positive. The second way elections may influence judges is through a universal move towards conservativism – a unidirectional shift among those needing to be reelected not found among the ineligible justices. There is some limited evidence for this: (1) one of the four models features a significant negative coefficient, (2) all four models feature negative coefficients, (3) two models estimate large effects of eligibility, and one of those is very near conventional levels of statistical significance. In Table 6.5, I present estimates of effect sizes for Eligible and the interaction term. The effect of eligible is the difference between being eligible and not being eligible (the base category in the regressions). The effect of the Voter Liberalism variable in each column is the effect of a change of the average within-state standard deviation of that particular measure.

Table 6.5. Effects from Table 3 in Percentage Points for Meaningful Levels of Voter Change

Variable	Electoral	Berry	Pacheco	Death Penalty
Eligible	-2.90*	-4.10	-12.40	-10.55
	(1.20)	(3.40)	(6.80)	(7.13)
Voter Liberalism	0.10	0.12	0.97	1.14
Interaction	(0.29)	(0.43)	(0.68)	(0.86)

Note: The effect for Eligible is the difference between being eligible and being ineligible. The effect of Voter Liberalism is the effect of the size of an average (within-state) one standard deviation change in Voter Liberalism. All units are percentage points of the likelihood of a pro-defendant vote.

Once Voter Liberalism is standardized onto comparable scales for each variable, the picture is clearer. Both Pacheco-based measures suggest about one percentage point more pro-defendant behavior for each standard deviation more liberal a state grows. For the non-Pacheco measures, it is closer to 0.10 percentage points. Similarly, in the models with Pacheco's data, the estimated effect of eligibility is about 10 to 12 percentage points more punitive. In the non-Pacheco models, it is around three to four points. In the "electoral" measure's model, the estimate is significant at 2.90 percentage points more punitive.

The only clear result to take from these tables thus far is that clear electoral effects on justices cannot be supported by the data. At best, they are inconclusive. In the next section, I attempt to bring more clarity through applying Rainey's (2014) method of arguing for and testing negligible effects.

Defining a Negligible Effect

The first step in testing a negligible or null relationship, as I have argued for in this project, is to specify a threshold at which an effect becomes substantively meaningful. To my knowledge, this has never been done before in the judicial politics context, and thus the existing literature provides no guidance. Philosophically, it is possible to argue that anything that would change any single case outcome – meaning someone is likely to go to prison rather than go free,

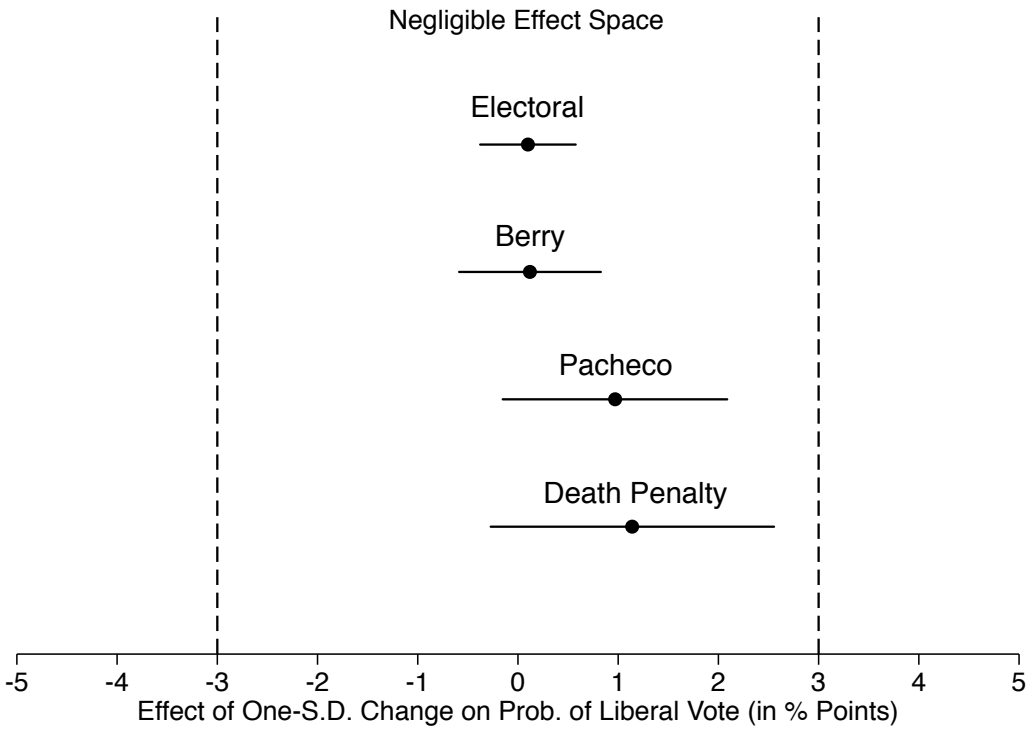
or the reverse – is significant. Inherently, it is necessary to make some value judgment in deciding what level of change has substantive meaning. I opt for a threshold of three percentage points. This is certainly in some ways arbitrary. The number could be set at two percentage points or five or any of the infinite set of numbers near or around those values. I choose three percentage points to use a small, whole number which would represent meaningful numbers of changes to case outcomes for thousands of defendants. Consider a five-justice panel in which each justice independently votes for the prosecution 73% of the time, a fairly typical number. The prosecution would win a simple majority about 87.4% of cases. With a shift towards defendants of only three percentage points, prosecution majorities drop to 83.7% of cases. Shifts of only one or two percentage points lead to gains of less than one percentage point of cases for defendants in terms of actual majorities. A three-percentage-point shift is the first whole number where the expected gains in final dispositions are at least one full percentage point.

Testing hypothesized negligible relationships has a limited history in political science, being first proposed by Rainey in 2014. It has a much longer history in other fields, however. The basic concept is to use two one-sided hypothesis tests on points of pre-defined substantive significance (in place of the typical null of zero). Thus, I define three and negative three as the alternative relevant points. Mathematically, this approach is identical to estimating a 90% confidence interval and testing whether the entirety of this interval falls between the specified interval of substantive-significance thresholds.

Specifically, I estimate informal Bayesian posterior distributions from the effect sizes and standard errors presented in Table 4, simulating a million draws from the posterior distribution implied by the Central Limit Theorem. I then take the 5^{th} and 95^{th} percentile results of these draws as the 90% confidence interval. To pass a test of negligible results (equivalent to a *p*-

value under 0.05 in conventional testing), the entire 90% confidence interval should be within the demarked space of negligible effects. This process is in accordance with the suggested system put forth by Rainey (2014). As Rainey notes, there is no exactly perfect or "correct" threshold for substantive significance, but the smaller the thresholds, the stronger the claim and evidence. Figure 1 presents the results of this test, indicating a single 90% confidence interval for the effect of a one-standard deviation increase in voter liberalism for each different measure. The "Negligible Effect Space" is marked by two vertical dashed lines.

Figure 6.1. Testing the Negligible Reelection Effect of Voters on Justice Behavior

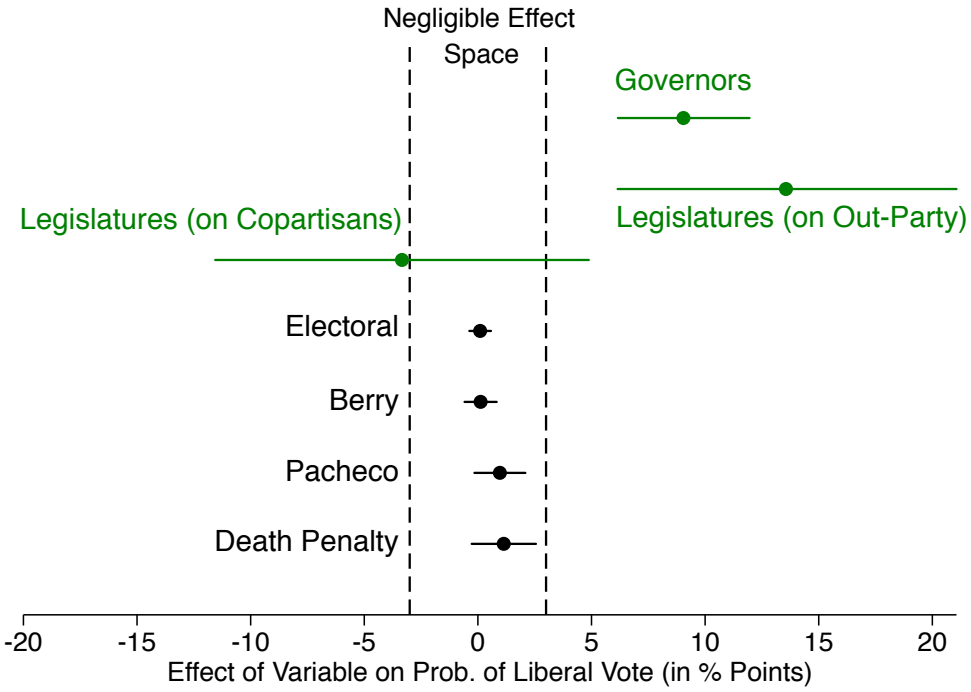


In Figure 6.1, I substantiate that, under all four measurement systems, the ideological retention effect voters have on justices is negligible. While being eligible for a reelection may induce justices to reflexively be more punitive (these results are inconclusive and definitely cannot be statistically established as "negligible"), there is some certainty that there is no

consistent ideological deference of the type I presented in previous chapters. Justices are not responsive to voters preferences, per se, so much as they are reflexively punitive to avoid the appearance of leniency. Note that even death penalty opinion, which more closely tracks beliefs about criminal justice, does not show judicial responsiveness. A standard deviation increase in voter preferences on the death penalty is only associated with about 1.1 percentage point more votes for defendants, with a 90% confidence interval that includes both zero and 2.5 percentage points.

These results are substantially different than those obtained in the preceding chapters. In Figure 6.2, I replicate Figure 6.1, but now add in similar estimates from preceding chapters. For governors and legislatures, which are not as continuous (they jump at election points), I include estimates of the potential effect of an election. For governors, I use the distance between the average Republican and Democratic candidates. For legislatures, I use the average within-state gap between the 25th percentile (the more moderate side) of each party. I choose this because median party members are rarely, if ever, candidates to be chamber (or combined-chamber) medians after elections.

Figure 6.2. Comparison of Effects by Voters and Elected Politicians on Justice Behavior



Voters have a very different level of ideological influence on judicial behavior than elected elites. Governors show at least four times the ideological influence as voters, while the data indicate that legislators can be even more effective at ideologically influencing the behavior of their subject rivals. The magnitudes of these effects are dramatically different than those for voters' preferences. While all of the 90% confidence interval for the governors and legislatures (on out-party justices) is comfortably outside of the Negligible Effect Space, voters' preferences are fully contained within them.

Types of Elections

While I have found no evidence for deference by the combined group of all justices facing elections, there is considerable variation in the types of elections that justices face. And these have possible implications for whether justices may feel pressure to change their behavior.

In the theoretical chapter, I argue that partisan elections neutralize some of the informational differences between voters and elected officials. Because partisan elections typically mean at least one well-funded and organized opponent with the ability to communicate unpopular behavior to voters (and to use partisan organizational tools to overcome collective-action barriers), this is the type of election I would most expect to exhibit meaningful effects.

> **Partisan Elections Hypothesis:** The level of ideological influence by voters in partisan elections on judicial voting through retention pressures (as measured by the difference between eligible and ineligible justices) is greater than the same influence (similarly measured) among voters in retention and non-partisan elections.

To test this possibility, I separate out Eligible into three distinct versions (Eligible – Retention Election, Eligible – Non-Partisan Election, and Eligible – Partisan Election), one for each of the major types of elections in state high courts. I use these variables in the same way I have used previous versions of the Eligible variable. The base category remains those justices in these states that were no longer eligible for reelection. The results of linear probability OLS models are depicted in Table 6.6. Table A6.1-2 in Appendix 6.1 replicates the results in logistic regressions. In Table 6.7, I again present interpretable change values for the three versions of "Eligible" and the three interaction terms, each in percentage-point changes of the typical standard deviation (within state) increase in each variable.

Table 6.6. Influence on Judicial Behavior by Retention Method

Variable	*Model 1*	*Model 2*	*Model 3*	*Model 4*
Eligible – Retention	-0.036*	0.001	-0.055	-0.160
	(0.018)	(0.041)	(0.069)	(0.107)
Eligible – Nonpartisan	-0.013	-0.015	-0.047	0.052
	(0.018)	(0.049)	(0.072)	(0.082)
Eligible – Partisan	-0.157*	-0.066	-0.404**	-0.355**
	(0.040)	(0.049)	(0.137)	(0.115)
Voter Lib. (Electoral)	-0.001			
	(0.002)			
Voter Lib. (Berry)		0.000		
		(0.001)		
Voter Lib. (Pacheco)			-0.702*	
			(0.355)	
Voter Lib. (Death Penalty)				0.273
				(0.311)
Retention X VL (Electoral)	-0.002			
	(0.002)			
Retention X VL (Berry)		-0.000		
		(0.001)		
Retention X VL (Pacheco)			0.125	
			(0.345)	
Retention X VL (Death Penalty)				0.721
				(0.423)
Nonpartisan X VL (Electoral)	-0.001			
	(0.002)			
Nonpartisan X VL (Berry)		0.000		
		(0.001)		
Nonpartisan X VL (Pacheco)			0.187	
			(0.365)	
Nonpartisan X VL (Death Penalty)				-0.244
				(0.314)
Partisan X VL (Electoral)	-0.008*			
	(0.004)			
Partisan X VL (Berry)		-0.001		
		(0.001)		
Partisan X VL (Pacheco)			1.838*	
			(0.782)	
Partisan X VL (Death Penalty)				1.417*

				(0.559)
Governor Ideology	-0.005	-0.005	-0.005	-0.010
	(0.005)	(0.005)	(0.005)	(0.010)
Legislature Ideology	-0.004	-0.000	-0.011	0.140**
	(0.010)	(0.010)	(0.010)	(0.025)
Defendant Appealed	-0.009	-0.010	-0.010	-0.021
	(0.014)	(0.014)	(0.014)	(0.016)
Murder	-0.158**	-0.158**	-0.158**	-0.171**
	(0.010)	(0.010)	(0.010)	(0.013)
Constant	0.159**	0.153**	0.290**	0.096
	(0.023)	(0.040)	(0.061)	(0.093)
N	68,262	68,262	68,262	34,366
R^2	0.100	0.100	0.101	0.113

Note: Coefficients are logistic regression coefficients with standard errors (clustered by justice [n=290 in models 1-3, n=219 in model 4]]) in parentheses. *=p<0.05; **=*p*<0.01.

Table 6.7. Effects from Table 5 in Percentage Points for Meaningful Levels of Voter Change

Variable	Electoral	Berry	Pacheco	Death Penalty
Retention	-3.60*	1.00	-5.50	-16.00
	(1.80)	(4.10)	(6.90)	(10.70)
Nonpartisan	-1.30	-1.50	-4.70	5.20
	(1.80)	(4.90)	(7.20)	(8.20)
Partisan	-15.70*	-6.60	-40.40**	-35.50**
	(4.00)	(4.90)	(13.70)	(11.50)
Retention Interaction	-0.39	0.00	0.25	2.16
	(0.39)	(0.61)	(0.69)	(1.27)
Nonpartisan Interaction	-0.20	0.00	0.37	-0.73
	(0.39)	(0.61)	(0.73)	(0.94)
Partisan Interaction	-1.56*	-0.61	3.68*	4.25*
	(0.78)	(0.61)	(1.56)	(1.68)

Note: The effect for Eligible is the difference between being eligible and being ineligible. The effect of Voter Liberalism is the effect of the size of an average (within-state) one standard deviation change in Voter Liberalism. All units are percentage points of the likelihood of a pro-defendant vote.

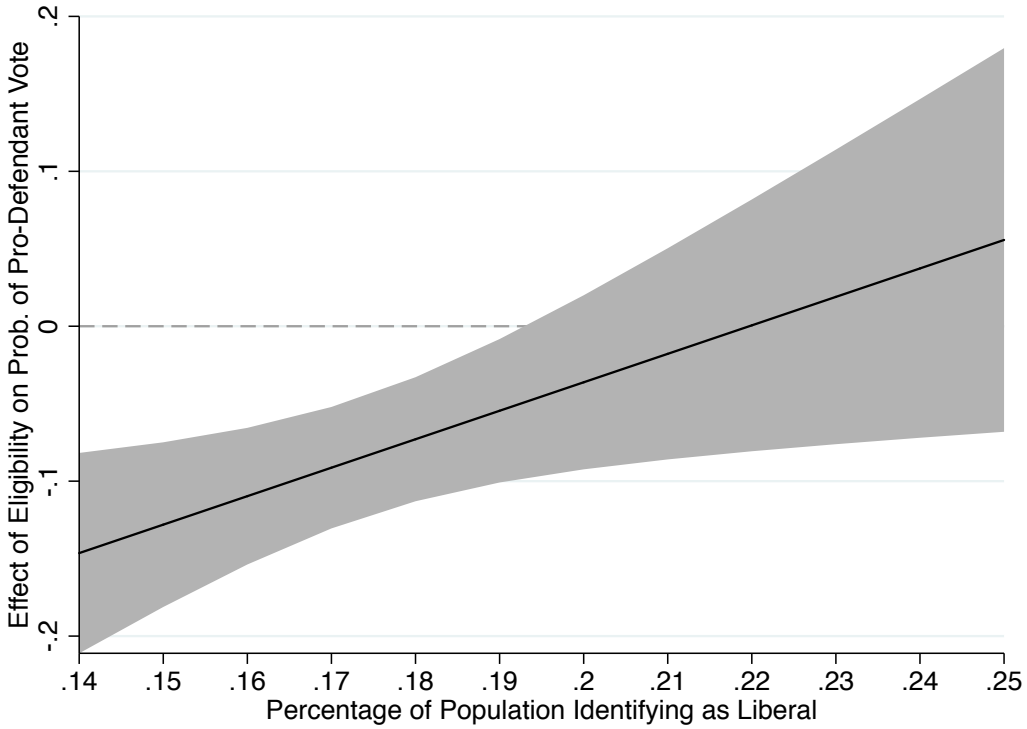
The results are, again, unfortunately mixed, but with some clearer ledges to stand on.

There are no significant ideological results for the retention and nonpartisan election systems.

That is, when justices face no opponents or no guarantee of an organized and funded opponent, they exhibit no apparent deference to popular opinion. Justices do not change in response to their constituents' preferences. There is a solitary result pointing to a unidirectional shift towards punitiveness in retention elections, however this is not found in any other model. There is substantial uncertainty in many of the estimates, and again the results diverge substantially between the Pacheco-based scores and the other measures.

One area where there is some evidence is that partisan elections influence judges facing reelection. In three of the four models (only excluding the "Berry"-based model), justices who are eligible for a partisan election are more punitive in a statistically significant way, but with dramatically different effect estimates (ranging from 15.7 to 40.4 percentage points more punitive). Additionally, two of the four measures (both Pacheco-based measures) show a strong relationship between voter preferences and judicial voting. This implies that justices who face partisan reelection vary their extra punitiveness by the preferences of the voters. Unfortunately, another measurement choice (the electoral) indicates the opposite – that justices are less punitive as constituencies grow more conservative. The balance of these tests may point towards ideological deference to votes in these states, but it is highly contingent on measurement choice and I cannot have any certainty in these results. For illustrative purpose, in Figure 6.3, I present a marginal effect plot for the combined effect of eligibility on those facing partisan reelections, using the Pacheco variable measuring the percentage of the population that identifies as "liberal."

Figure 6.3. Marginal Effect of Being Eligible for a Partisan Reelection as Voter Liberalism Varies



In Figure 6.3, there is a clear upwards slope in the likelihood of a pro-defendant ruling as a larger and larger share of the population professes itself to be liberal. The area of the effect that is statistically significant is in the areas which are most conservative (where less than one fifth of the population identifies as liberal). The effect size in this range of state liberalism can exceed ten percentage points in the more punitive direction. Though justices do become more pro-defendant as the state becomes more liberal, this never reaches a statistically significant difference in observed states. This is some evidence that justices in states with partisan elections do respond to the opinions of their voters, however this is the strongest possible case. Other models produce conflicting, and even opposite, results.

Discussion and Conclusion

Judicial elections are the most popular subject of state judicial politics research. Numerous scholars and popular commentators have wondered about the impacts of America's peculiar choice to elect state appellate judges. Yet, much of this research has been limited by data availability and research design choices that leave large questions unanswered and the overall importance of elections ill defined. In this chapter, I have conducted more rigorous analyses of the effects of elections on judicial decision making in a large portion of the docket: criminal law. Analyzing thousands of cases, I find little evidence to say that "elections" considered broadly affect judicial behavior systematically. In fact, I statistically establish that elections in general have a negligible ideological effect. That is, more conservative states do not induce more conservative outcomes from their reelectable justices (in comparison to their ineligible counterparts).

In deeper analysis, I separate elections by their type. An extensive literature is built up around the variations in types of elections. I find there is good reason for this. There is substantial evidence for strong ideological impact by partisan elections. More conservative electorates get more conservative results from justices facing reelection. No such effect is found for retention and nonpartisan elections. These results collectively indicate that while elections as a whole do not produce the substantial effects feared, partisan elections in particular may.

Another important lesson from this research is that these results are highly contingent on measurement choice. Measuring public preferences is incredibly difficult, and thus I have attempted to use a variety of measurement strategies, ranging from simple electoral outcomes to more sophisticated MRP methods. The results I report are not robust across all measurement strategies except that "elections" collectively have a negligible effect on judicial behavior. All

other results are contingent on measurement choices. It is possible to choose one measure and get a completely different result from another defensible measure. This should give us further reservation in attributing substantial influence to voters. Authors in these areas should test their expectations with a variety of measurement approaches and report all to provide a fuller understanding of the range of outcomes.

Despite the uncertainty and the potential of meaningful effects for partisan elections, the overall thrust of these tests is that simply having an election does not give voters significant influence over a wide range of cases. Their influence is likely restricted to a few highly salient cases, especially those that fall near a reelection day. Partisan elections, with substantial resources involved and party communication operations, make electorates come to more closely resemble political elites. But other elections simply do not provide the type of clear impact found for elected elites.

Appendix 6.1

Table A6.1-1. Model Results for Table 3 using Logistic Regression

Variable	*Model 1*	*Model 2*	*Model 3*	*Model 4*
Eligible	-0.147*	-0.262	-0.652	-0.565
	(0.063)	(0.184)	(0.350)	(0.408)
Voter Lib. (Electoral)	-0.021*			
	(0.009)			
Voter Lib. (Berry)		-0.001		
		(0.004)		
Voter Lib. (Pacheco)			-4.689*	
			(1.893)	
Voter Lib. (Death Penalty)				0.437
				(1.672)
Elig. X VL (Electoral)	0.003			
	(0.008)			
Elig. X VL (Berry)		0.002		
		(0.004)		
Elig. X VL (Pacheco)			2.554	
			(1.761)	
Elig. X VL (Death Penalty)				2.017
				(1.635)
Governor Ideology	-0.021	-0.022	-0.024	-0.100*
	(0.027)	(0.027)	(0.027)	(0.048)
Legislature Ideology	-0.034	0.000	-0.056	0.684**
	(0.054)	(0.052)	(0.055)	(0.126)
Defendant Appealed	-0.045	-0.047	-0.045	-0.102
	(0.068)	(0.068)	(0.068)	(0.080)
Murder	-0.903 **	-0.903**	-0.902**	-1.013**
	(0.061)	(0.061)	(0.061)	(0.076)
Constant	-1.779**	-1.713**	-0.828*	-0.901
	(0.094)	(0.202)	(0.373)	(0.472)
N	68,257	68,257	68,257	34,349

Note: Coefficients are logistic regression coefficients with standard errors (clustered by justice [n=287 in models 1-3 and n=213 in model 4]) in parentheses. *=p<0.05; **=*p*<0.01.

Table A6.1-2. Model Results for Table 5 using Logistic Regression

Variable	*Model 1*	*Model 2*	*Model 3*	*Model 4*
Eligible – Retention	-0.169*	-0.038	-0.337	-0.763
	(0.082)	(0.232)	(0.379)	(0.586)
Eligible – Nonpartisan	-0.070	-0.141	-0.140	0.332
	(0.105)	(0.284)	(0.404)	(0.518)
Eligible – Partisan	-0.709**	-0.337	-2.006**	-1.757**
	(0.207)	(0.251)	(0.642)	(0.632)
Voter Lib. (Electoral)	-0.008			
	(0.012)			
Voter Lib. (Berry)		0.001		
		(0.004)		
Voter Lib. (Pacheco)			-3.814*	
			(1.890)	
Voter Lib. (Death Penalty)				1.724
				(1.835)
Retention X VL (Electoral)	-0.007			
	(0.009)			
Retention X VL (Berry)		-0.002		
		(0.005)		
Retention X VL (Pacheco)			0.960	
			(1.876)	
Retention X VL (Death Penalty)				3.421
				(2.290)
Nonpartisan X VL (Electoral)	-0.004			
	(0.035)			
Nonpartisan X VL (Berry)		0.002		
		(0.005)		
Nonpartisan X VL (Pacheco)			0.397	
			(2.011)	
Nonpartisan X VL (Death Penalty)				-1.428
				(1.855)
Partisan X VL (Electoral)	-0.035			
	(0.019)			
Partisan X VL (Berry)		-0.002		
		(0.006)		
Partisan X VL (Pacheco)			9.319**	
			(3.674)	
Partisan X VL (Death Penalty)				6.962*
				(3.042)

Governor Ideology	-0.025	-0.026	-0.024	-0.043
	(0.027)	(0.027)	(0.028)	(0.048)
Legislature Ideology	-0.023	-0.002	-0.053	0.707**
	(0.054)	(0.053)	(0.054)	(0.122)
Defendant Appealed	-0.044	-0.046	-0.045	-0.099
	(0.068)	(0.069)	(0.068)	(0.081)
Murder	-0.902**	-0.903**	-0.903**	-1.009**
	(0.061)	(0.061)	(0.061)	(0.075)
Constant	-1.864**	-1.926**	-1.031**	-1.082*
	(0.123)	(0.246)	(0.373)	(0.551)
N	68,257	68,257	68,257	34,349
Pseudo R^2	0.086	0.086	0.087	0.098

Note: Coefficients are logistic regression coefficients with standard errors (clustered by justice [n=287 in models 1-3, n=213 in model 4]]) in parentheses. *=p<0.05; **=*p*<0.01.

Chapter 7

Discussion and Conclusion

Discussion and Conclusion

This dissertation project began in part as a response to the discussion – and sometimes obsession – with judicial elections among academics, popular intellectuals, and political pundits. A Google search for "judicial elections" provides 274,000 results, and more than 6,000 newspaper articles have been written on the topic, and a similar search in Google Scholar returns 7,100 academic books and articles. So far, in 2017, an average of about 12 new articles or books each month are published that at least mention judicial elections. More papers had been written about the effects of elections on death penalty decisions than had been written about the institution of executive judicial appointments in the states entirely. A leading book on gubernatorial power (Kousser and Phillips 2012) has no space for judicial appointments. To my knowledge, legislative appointments had never been analyzed in a large-N quantitative way tailored to those institutions.

One key recurring word in this discussion is "information." Indeed, it is also the most important word in this project. But I draw different conclusions about information. Normatively, we like informed decisions, especially informed electorates. In the debate over judicial selection and retention, information is given pride of place. So there is no shortage of concern over the voters' lack of information. And the entities that have more information – screening and merit committees, governors and legislatures – are seen as superior and better evaluators of justice.

My argument and findings paint a counter-intuitive picture, however. Information gives power – and not to justices. The informed actors that decide judicial appointments and reappointments gain a lot of influence over the courts they oversee. Informed oversight becomes

influence. And this influence is held by a group of ideologically coherent and polarized individuals. It is not surprising then that their influence would come along these lines.

The much-maligned uninformed voters are largely rendered impotent by this "uninformed" quality. Far from being a great threat to the judicial system, it is likely this lack of information is the only thing *preserving* it in these states. A system in which justices must stand for retention every six years before fully informed voters would likely eviscerate much of what remains of judicial independence and legal stability. Meanwhile, the actors who actually have the most power and influence over their judiciaries – governors and legislatures – have gone largely unanalyzed and uncritiqued. As polarization and partisan division increase and filter into the states, these systems pose great risk to the independence and coherency of the judiciary.

This is the perspective that I brought to this project. In the theory sections, articulated prosaically in Chapter 1 and formally in Chapter 2, I put forth a principal-agent framework that analyzes the key conditions under which judicial independence might be infringed through selection and retention pressures. I identify retention as the key source of influence, and that converting this oversight authority to influence requires informed monitoring and effective ease of use of the retention rejection power. In the absence of informed monitoring, there can be no connection between behavior and outcomes. Without such a connection, there is no reason for behavior to change. Without a rejection tool that is effective and easy to use, then even an informed retainer is unable to wield any influence.

Both of these attributes pointed to governors and legislatures as much greater threats to judicial independence than voters may pose. Voters simply lack this information and face huge collective action barriers. The often-true cliché that most voters are not even able to identify the names of judicial candidates is a clear indication that voter response to patterns of judicial

behavior is simply not regularly possible. What can – and does – happen is that one or two high-profile cases manage to gather considerable media attention, especially near to an election. And, in the absence of other information, this high-profile case is the totality of information known about the candidate and completely shapes the voter's perception. This has led to the widespread empirical focus on cases most likely to achieve this widespread media coverage – death penalty cases, abortion cases, and gay marriage cases. Yet judges decided thousands of cases, not just the few of these that they might hear in a career.

Perhaps the great difference between the power held by political elites and voters is the depth and breadth of this influence. Elected judges may look over their shoulder at voters when they approach a case they know has the potential to explode into a popular debate. But with political elites as their retainers, judges know that every single case they take has the potential to be flagged and end up in a report. The level and thoroughness of the monitoring is exponentially higher. Every dictum in a decision and ever vote in an unknown case could potentially point executive or legislative evaluators toward an unfavorable view of the judge.

Another crucial difference is the simple higher level of ideological coherence and consistency of elected politicians. Voters can be complicated, unpredictable, changing, and fluctuate between the different turnout groups of different kinds of elections. Their beliefs do not perfectly match onto the coalitional frameworks politicians are forced into in the American two-party system. Yet governors and legislators are exactly those kinds of ideologically coherent politicians. Ideological gains are important to these retainers, and their preferences are predictable, making it easier for judges to anticipate the impacts of their actions. The range of issues that politicians care about tends to be much broader as well. Not only do they have strong positions on social issues, but they also fight vigorously over tax and economic issues, and have

their own vested interests in various separation of powers questions and bureaucratic government issues.

At every step in the thought process, the issues in play repeatedly pointed me towards the conclusion that in the broad scheme of a whole docket, voters could not have that much influence. Perhaps they did in one or two cases per term, but not something that could be detectable in hundreds of cases per year. Governors and legislatures, however, are much better situated on the factors I argue are important and seem capable of considerable ideological influence that intrudes on judicial independence.

A good theory without rigorous testing of its falsifiable conclusions is not very productive science, however. One initial step I took was an investigation, in Chapter 3, of some of the background of these selection and retention institutions, as well as some anecdotal evidence of events which support some of the assumptions I make. There is substantial evidence that governors and legislatures are very well informed about candidates, do use this information, and do value their appointment powers. Recent cases highlight the value that political elites place on these positions. Infamous events also highlight the remarkably low levels of information that voters have. And finally, there are known examples of judges changing their behavior to advance their own career prospects.

In the next three chapters, I take on a systematic analysis of case votes in the three types of retention systems. In each, I analyze thousands of votes in criminal law appeals. When analyzing governors, in Chapter 4, I find that judges who are eligible to be reappointed vote more often in line with the governor's preferences than ineligible voters do. Using fixed effects, I am able to isolate this variation within a justice's own career. Becoming ineligible to have another career results in a freeing of the justice's vote pattern away from being strongly

correlated with the governor's preferences. In additional analyses, I show that eligible justices change when the governor changes, moving on average more than 16 percentage points in the direction of the new governor's preference, in terms of likelihood to vote for defendants.

When analyzing legislatures, in Chapter 5, I find similar, but more limited results. Legislatures exert considerable influence – perhaps even more than governors – but only over justices initially appointed by their minority party. Majority party justices vote the same whether they are eligible or ineligible. This implies that legislatures are limited by the difficulties of preference aggregation within their caucuses. The far easier task of coming together against a partisan rival creates far more influence for legislatures, as these minority-party appointees vote far more in line with the legislature's preferences when they are eligible than when they are ineligible for a new term.

Finally, in Chapter 6, I analyze electorates. First, I look at elections broadly, and find no evidence of significant ideological influence. Eligible and ineligible justices vote about the same with respect to voter preferences. More conservative voters do not induce more punitive decisions. Using a method for testing negligible results, I find statistically significant evidence that elections broadly construed do not provide voters meaningful influence over judicial decision making. When broken up by types of elections – retention, nonpartisan, and partisan – the results become less clear and more inconsistent, with some results pointing towards a strong effect for partisan voters and other results indicating the opposite. These models are highly dependent on measurement choice, which should give pause for drawing strong conclusions about them.

The upshot of these empirical chapters is that some of the concern in the current debate may be misplaced. While articles continue to churn out about the dangers of nonpartisan

elections, governors and legislatures have wielded considerable power over their state judiciaries. In these states, politicization has only seemed to increase in recent years, as some of the events discussed in Chapter 3 highlight. Thus, I argue that the debate about elections should be understood in the context of what is normatively desirable, and what options there are to reach that. If judicial independence and consistency are the goals, then perhaps elite appointment and especially elite reappointment are greater threats than elections. If democratic responsiveness is the right normative goal, then the evidence I find indicates that elections provide little of that as variation in judicial behavior does not seem to coincide with variation in popular opinion. In democratic terms, they are little more than superficially pleasing blind stamps of approval that occasionally land on the wrong name.

I study the time period from 1995-2010 (and through 2014 in the legislative analysis), yet I recognize that politics are not static. One thing the recent spate of reappointment rejections have in common is intense partisanship and politicization of the courts. This is not unique to Virginia, New Jersey, or New York. The death of Supreme Court Justice Antonin Scalia brought about a wave of partisan maneuvering over the open position – with Judge Merrick Garland never receiving a vote after being nominated by President Obama. The Republican Senate went on to eliminate the filibuster for Supreme Court confirmations to raise President Trump's nominee, Neil Gorsuch, to the Court. These may be signs that the polarization and politicization of the judicial process, which has been steadily increasing since the Reagan administration, may now be intruding on the states. In the future, judges may find themselves more often embroiled in sudden partisan conflict that overwhelms their own attributes and merits. This may, in the long term, actually serve to reduce political influence on sitting justices – by removing the connection between behavior and outcomes. Then, the primary impact political elites would

have on their judiciary would be through selection – picking one candidate over another and hoping that they know the candidates well.

Among the many things this project does not do is investigate these selective influences. How does a governor picking one candidate over another impact policy? These are meaningful questions worthy of research, but are not addressed here. I argue that, once a justice is on the bench, whatever value in selecting them versus another has been earned. After that, the justice is prospective and focused on retention. But understanding the full range of governors and legislatures' influence on judiciaries also requires some understanding of their influence through selection.

Policy lessons are often hard to draw from social science research. The results can be muddled and unclear, or highly contingent on unrealistic assumptions. In this case, the implications are fairly straightforward. Institutions of political appointment and reappointment create clear centers of influence for reappointers and this will eventually intrude on judicial independence, making courts less consistent and objective. Picking who gets this oversight power – if one is going to exist – is crucial. Voters, for all their flaws, are largely unintrusive. Though they may occasionally produce anomalous or discouraging results, on the whole they do not impact their judiciary with nearly the same depth and breadth as legislators and governors do. I do not offer a clear suggestion that one system is distinctly better than others. Even the federal system, with its life terms, is subject to numerous critiques as a non-democratic institution. Yet in this dissertation, I argue that it is essential to focus on the attributes of those given judicial retention power and to recognize that those attributes shape the nature and extent of the influence they will wield.

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