

**Partisan Signals and Democratic Accountability:
An Analysis of State Supreme Court Abortion Decisions[^]**

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Abstract

Various literatures indicate partisan labels increase the accountability of elected officials. Correspondingly, advocates of nonpartisan elections claim they help liberate officials from political influences. These arguments have been prominent in recent debates regarding the selection procedures for judges in U.S. state courts. We argue that the conventional wisdom is wrong given developments in judicial campaigns. Based on evidence about these campaigns and recent formal theory, we hypothesize that nonpartisan elections increase judges' propensity to make popular decisions because judges in these systems have greater incentives to signal personal ideology through votes on cases. This hypothesis is tested with a new dataset of state high courts' decisions on abortion cases between 1980 and 2006. The results, which reveal that judges in nonpartisan systems are indeed more likely than ones in partisan systems to make popular decisions, suggest that partisan signals affect accountability differently than the conventional wisdom presumes.

A range of work indicates that partisan labels are critical to democratic accountability. For instance, in the classical Downsian view of elections, a voter chooses among competing parties on the basis of which is closest to his or her ideological preferences (Downs 1957). Likewise, research on political development suggests clear partisan labels are necessary for a healthy democracy (e.g., Sartori 1976; Powell 1982). Studies of mass behavior provide support for this notion that party labels offer a uniquely significant cue to voters; a consistent finding is that candidates' partisan affiliations dominate vote choice, even for highly informed voters (e.g., Converse 1962).

Given this significance of partisan labels, nonpartisan elections would seem likely to present problems for democratic accountability. Yet critics of political parties and machines have enjoyed some success at securing this electoral institution. Twenty-one U.S. states have some form of nonpartisan judicial elections (Berkson and Caufield 2004). Also within the U.S., seventy-five percent of major cities (MacManus and Bullock 2003), many state-level regulatory and administrative offices, and the Nebraska legislature all utilize the procedure. Furthermore, it is not unique to the U.S.; nonpartisan elections have appeared at various times and levels of government in countries ranging from England to Pakistan to Ghana. Advocates claim that these elections help to elevate “competence” over “politics.” For example, the Progressive reformers, who helped to popularize the procedure in the United States, maintained the institution would enable “statesmen” to replace politicians (Bridges 1997, 29).¹ Recent proponents of nonpartisan

¹ As Bridges (1997) discusses, Progressive reformers arguably had political motives rather than “statesmen-like” ones. For similar arguments regarding the motivations of advocates of nonpartisan judicial elections, see Epstein, Knight and Shvetsova (2002).

judicial elections have similarly argued that they encourage independence from political influence (e.g., Champagne 1986; Sheldon and Maule 1997).²

Numerous policy reports charge that such professionalism or independence—to the extent it is achieved at all—comes at the expense of accountability. For example, a recent report of the Brennan Center for Justice at the New York University School of Law concludes that “nonpartisan elections elevate the importance of name recognition, rather than focusing voters on issues or candidate qualifications,” and that “extremist candidates are likely to fare better under nonpartisan elections” (Goldberg 2003, 1). In an analysis of the (nonpartisan) Nebraska legislature, Rogers (1989, 17) assesses that “recognized partisanship would increase accountability.”³ Likewise, a Federalist Society paper surmises that “non-partisan judicial elections do not compare favorably with partisan judicial elections” because the former inhibit voters’ ability to make informed decisions (Debow 2003).

A good deal of scholarship lends support to the conventional wisdom that partisan labels increase accountability. Various studies indicate that when the labels are absent, voters simply substitute the cue of incumbency (e.g., Dubois 1979a; Schaffner, Streb, and Wright 2001).⁴ Consistent with this result, Bonneau and Hall (2003) reveal that uncontested state supreme court

² Atchison, Liebert, and Russell (1999) provide an excellent annotated bibliography on this subject.

³ Nebraska Senator George W. Norris, a leader of the switch to nonpartisan legislative elections, did argue that partisan labels may not be representative of candidates’ positions on specific issues. However, Norris’s primary argument for nonpartisanship was that it would decrease ideological divisions and increase technical competence, not that it would increase responsiveness to majority opinion on ideologically divisive issues (Rogers 1989).

⁴ Although see Ansolabehere et al. (forthcoming) and Ferejohn (1977) for evidence that the cues of party and incumbency do not operate as substitutes.

elections are more frequent in nonpartisan systems. Likewise, turnout is lower in nonpartisan elections (e.g., Dubois 1979b; Epstein, Knight, and Shvetsova 2002). Notably, Peterson and Kantor (1977) question the conventional wisdom by providing evidence that the switch from nonpartisan to partisan elections in British localities did not encourage accountability on issues unrelated to class. Yet Peterson and Kantor do not show that nonpartisan elections necessarily engender accountability; rather, they find that the switch to partisan elections did not increase responsiveness to local opinion in Britain because national rather than local concerns determined the positions of the parties.

In contrast to the conventional wisdom, we argue that under certain conditions nonpartisan elections are more likely than partisan ones to encourage policy makers to cater to majority opinion. In other words, we suggest that partisan labels can reduce a candidate's incentives to support a popular position. Further, we propose that these conditions have held in recent decades in U.S. state courts of last resort, which are typically labeled state supreme courts. After developing these arguments in detail, we test them with a new dataset of state supreme court justices' decisions in abortion cases between 1980 and 2006. The data encompass every case on abortion policy from the state supreme courts in which judges are selected through contested, state-wide elections.

The paper proceeds as follows: section one reviews related work on judicial electoral institutions and campaigns; section two outlines a logical foundation for our argument, which is inspired by recent formal theory; section three describes the data and specification; section four presents the results; and section five concludes by discussing broader implications of the findings.

Research on Judicial Elections and Campaigns

Scholars have amassed a wealth of evidence that institutions pertaining to judicial selection have pronounced effects on judges' decisions. Much of this work focuses on differences between elected and appointed judges. For example, research suggests elected judges are more likely to cater to public opinion (e.g., Brace and Boyea 2004), overturn state statutes (Langer 2002), and issue pro-death penalty decisions (Brace and Hall 1995, 1997). Additionally, Hanssen (1999) finds elected judges to be more predictable in their decision-making. Other scholarship indicates that term length affects rulings, with longer terms encouraging rulings that reflect judges' partisan or ideological leanings (Brace and Hall 1995, 1997) and less punitive sentencing (Gordon and Huber 2004).

The impact of having nonpartisan versus partisan judicial elections has received less attention.⁵ Tabarrok and Helland (2002) find that average tort awards are higher in states with partisan elections, particularly for cases in which the defendant resides out-of-state. The literature also indicates that, contrary to the public expectations of advocates for nonpartisan elections, such judicial contests are no more about "professionalism" or "competence" than are partisan ones. For instance, Glick and Emmert (1987) provide evidence that judges selected through nonpartisan elections are not more likely to have strong professional or educational

⁵ Likewise, less attention has been paid to the impact of retention versus competitive elections, although see Spiller and Vanden Bergh (2003) for theory and evidence that this distinction influences the number of proposed initiatives and referenda that would amend state constitutions.

credentials. Similarly, Hall (2001) ascertains that nonpartisan elections are influenced by factors akin to those that affect partisan judicial elections, such as the murder rate.⁶

While the literature suggests that a wide range of factors like the murder rate can influence judicial contests, a recurring claim is that these campaigns have become more policy-focused since the 1980s. Traditionally, judicial campaigns avoided discussion of candidates' policy positions or behavior on the court. Over the past several decades, however, interest groups and even sitting judges have made efforts to publicize candidates' positions (e.g., Baum 2003; Schotland 2003). Correspondingly, media coverage of the campaigns has increased (e.g., McFadden 1990; Iyengar 2001/2002), and spending by independent interest groups—much of it directed towards advertising candidates' positions—has gone up dramatically (e.g., Schotland 2003).⁷

This “‘new-style’ judicial campaign,” as Hojnacki and Baum (1992) have dubbed it, is associated with greater issue-based voting by the public. Hojnacki and Baum offer support for this perspective by establishing that labor-related issues affected voters' choices for the Ohio Supreme Court elections in 1986 and 1988. Similarly, Wold and Culver (1987, 438) conclude in a study of the electoral defeat of several supreme court justices that “normal voter indifference to judicial elections can be dispelled by publicizing decisions that arouse attention and hostility.” Hall (1987) suggests that this electoral environment has not gone unnoticed by judges; in

⁶ Likewise, Squire and Smith (1988) find that even in formally nonpartisan elections, partisan cues—e.g., learning a candidate's likely partisan affiliation—can influence voters' decisions.

⁷ Compounding these developments, the U.S. Supreme Court issued three rulings in 2002 and 2003 that inhibited the ability of states to limit/prohibit judicial candidates' advertising of their policy positions (see Schotland 2003 for details).

documenting interviews with Louisiana Supreme Court justices, she describes that they fear electoral retribution if they dissent from popular majority rulings on salient issues.

The literature on judicial electoral institutions thus offers at least three reasons to consider the possibility that the distinction between nonpartisan and partisan elections may influence judicial decisions. First, other electoral institutions have significant effects on judicial decisions. Second, professional qualifications do not appear to determine the results of nonpartisan elections any more than partisan ones. And third, voters' perceptions of judges' positions have influenced at least some electoral outcomes.

Logical Underpinnings

Recent formal theory by Canes-Wrone and Shotts (2007, forthcoming) suggests that nonpartisan elections should encourage greater responsiveness to majority opinion. More specifically, the theory indicates that in nonpartisan systems incumbents from all but the most moderate of districts will have an electoral motivation to base policy decisions on majority opinion, regardless of the content of available policy information. By contrast, incumbents in partisan systems will have a greater incentive to ignore majority opinion if it conflicts with the incumbent's policy information; when voters have signals other than policy decisions about candidates' leanings, incumbents will be less pressured to make popular decisions.

The Canes-Wrone and Shotts theory is predicated upon four major premises about campaigns and mass behavior, all of which are relevant to recent judicial elections. First, as is the case in new-style judicial campaigns, voters learn about decisions of elected officials. The theory assumes voters will get information about whether a judge voted pro-business or pro-labor, pro- or anti-death penalty, pro-choice or pro-life. Second and consistent with this type of

categorization, the electorate may not learn the rationale or details surrounding the decisions. Thus a voter may not know whether an anti-death penalty decision was based on the specific facts of the case or instead a justice's aversion to the death penalty.⁸ Third, the theory assumes that ideology can influence an individual's desired policy choice even independent of the available policy information. This is not to say that policy information such as "case facts" is irrelevant. A person could lean pro-death penalty but believe that the case facts did not support such a sentence. However, for a given set of case facts and other information, people may still differ in the degree to which they favor the death penalty. Voters consequently want to select elected officials who share their leanings, and this (fourth) assumption fits Hojnacki and Baum's (1992) description of voting behavior in the new-style judicial races.

The predictions regarding nonpartisan versus partisan elections derive from solutions to the theory under alternative assumptions about voters' information regarding candidates' ideological dispositions. When voters have no information about which candidate is more liberal other than through the incumbent's policy decisions, the incumbent typically faces strong incentives to cater to public opinion. If, however, voters know that the incumbent is to the left or right of his challenger—such as the labels Democrat and Republican intimate—then the incumbent has no need to signal his or her dispositions through policy decisions. Indeed, regardless of the policy signal, a voter will endorse the candidate whose leanings are closest to his or her own.

⁸ Interestingly, the theory suggests that even when voters and politicians have identical policy information, e.g., when voters know all the facts of a case, politicians can still have incentives to cater to majority opinion. However, these incentives occur for a smaller range of district-types than when politicians have private policy information.

The literature on judicial elections supports the contention that partisan labels have a uniquely significant effect on voters' decisions. For instance, Iyengar (2001/2002) argues that voters in partisan systems primarily rely upon partisan cues while voters in nonpartisan systems depend on alternative cues, such as beliefs about which interest groups and public figures support each candidate. Similarly, Klein and Baum (2001) find that partisan information has a distinct impact on voters' decisions, affecting them much more than information about candidates' incumbency status or city of residence.

The Canes-Wrone and Shotts theory does not consider the role of nomination procedures—how a candidate comes to be placed on the ballot—but these procedures should only enhance the difference between nonpartisan and partisan judges' incentives to make popular decisions. Consider partisan systems with primaries.⁹ As with the general elections, primaries have become more focused on judges' ideological positions (Brennan Center for Justice 2006). Thus to the extent that judges fear losing a primary election, they have incentives to appeal to these electorates, which should be more ideologically extreme than the general voting population. Alternative partisan procedures for nomination, like caucuses, arguably serve to exacerbate incentives to cater to a select portion of the population.¹⁰

⁹ A state can have a nonpartisan general election and partisan primary election. One state in our database, Ohio, has such a system. We code Ohio as nonpartisan and have checked to see if the results are contingent on including this state. The results are substantively similar (in significance and magnitude) when Ohio is excluded.

¹⁰ Obviously parties could choose to select nominees who represent the proverbial median voter, as in Downs (1957). However, this behavior does not appear to occur in practice. See Champagne and Cheek (2002) for examples in which parties opposed re-nominating a sitting judge on the basis that his or her decisions did not toe the party line.

In sum, the conventional wisdom about nonpartisan elections may be incorrect because of nomination pressures, for the reasons suggested by recent formal theory on partisan signals, or some combination of these influences. The purpose of our empirical analysis is not to distinguish among these possibilities. Rather, we assess the mutual prediction that nonpartisan elections increase the incentives of judges to cater to voters' ideological leanings.

Data, Descriptive Statistics, and Specification

To examine the impact of nonpartisan elections, we assembled a new dataset of abortion cases decided in the state courts between 1980 and 2006. We focus on abortion for several reasons. First, evidence suggests it can be a prominent issue in the “new-style” judicial campaigns (e.g., Baum 2003; Brennan Center for Justice 2006). Second and correspondingly, rulings on the issue can have significant and readily comprehensible policy implications. State courts decide about the constitutionality of laws regarding parental notification requirements, state funding, and protests at abortion clinics, among other matters. Moreover, for many abortion-related laws the courts serve as a routine arbiter over implementation. More generally, and as Brace, Hall, and Langer (1999) have observed, most policy debates regarding abortion involve state-level politics, and the courts are almost always pulled into the fray.

Finally, abortion is advantageous for study because the major parties have staked out distinct positions. In partisan elections voters can reasonably guess that the Democratic candidate is more pro-choice than the Republican candidate. Previous work suggests that this distinction evolved in the early 1980s due to Ronald Reagan's and other elites' position taking (e.g., Adams 1997). Our decision to use 1980 as the starting point reflects an effort to analyze as long a time

span as possible within an era in which the Republican and Democratic parties have publicized divergent positions.

The data involve state courts of last resort whose judges face contested elections. The limitation to contested electoral systems means that we exclude states with retention elections, whereby a judge is retained if a given percentage of voters support him or her on an uncontested ballot. Excluding these states prevents conflating the impact of retention elections with that of nonpartisan ones. Also, we do not analyze states that have district-based elections for the highest courts because public opinion data are not readily available at the level of judicial district.

Table 1 lists the set of states with a court or courts of last resort satisfying these criteria.

[Table 1 about here]

The table also gives the years in which each state utilized partisan versus nonpartisan elections. Eight of the states had partisan elections at some point between 1980 and 2006 while fourteen had nonpartisan elections. Three of the states—Arkansas, Georgia, and North Carolina—switched from partisan to nonpartisan elections during this period.

To track down cases on abortion policy, we conducted searches on Westlaw and Lexis. In addition to gathering all supreme court cases, we also gathered all cases heard by intermediate appellate courts. In most states the supreme court has discretion over whether to hear a typical appeal, which must be heard earlier by an intermediate appellate court. By designing the dataset to encompass cases that could be appealed, we were able to assess how justices' selection of disputes influenced the findings.

Locating the cases was no easy task. While Westlaw has helpful topic-based categories that aim to direct users to relevant cases, the abortion category excludes a substantial number. Conversations with Westlaw personnel confirmed our suspicion that the classification is not

exhaustive. We therefore searched the general database of cases on Westlaw and Lexis for ones in which the design or implementation of abortion policy was a major feature.¹¹ After reading through hundreds of cases that mentioned the term abortion but were not centrally about this issue, we came up with 343 lower court decisions, 131 of which were heard on appeal by courts of last resort. All states in Table 1 had cases except for Utah, and all had cases before the highest court(s) except for Utah and New Mexico.

For every supreme court case we coded each regular justice's vote as pro-choice or pro-life depending on how it affected the likelihood that women in the state would obtain abortions, either directly or by implication; pro-life rulings decreased the likelihood while pro-choice ones at least weakly increased it. For instance, if the judge voted to allow a minor an abortion without parental notification, we coded the decision as pro-choice. Likewise, a decision was pro-choice if it restricted protesters' activities in the vicinity of abortion clinics. If a judge did not participate in the case, he or she does not have a vote (either in reality or our coding).¹² The data include 905 individual votes or decisions, 61 percent of which were pro-choice. The number of votes is

¹¹ Specifically, we utilized the following strategy for searching. First, we included all cases in the Westlaw categories for abortion and also abortion-related cases in the Westlaw category for trespass. Second, we searched the general database for cases with the term "abortion," excluding ones within the criminal code for "homicide and abortion." Because many state criminal codes still list abortion within the same classification as homicide, a pure search on the term abortion turns up thousands of homicide cases. (The Westlaw topic code for the homicide category is 110 349 350h 35 96h.) Third, to find wrongful death cases related to abortion policy, we conducted a search with the terms "wrongful death" and "fetus." Finally, we searched for cases with the phrase "wrongful birth."

¹² We do not include the votes of judges temporarily appointed to a court because these judges do not face reelection. Such votes comprise less than two percent of those from the cases.

substantial in each of the electoral systems; specifically, 527 are from partisan systems and 378 from nonpartisan ones.

Public Opinion and Descriptive Statistics

To link the judges' votes to state-level public opinion data, we created a time series of responses from CBS-New York Times (NYT) surveys regarding abortion. Research suggests these surveys are an excellent source of state-level opinion data because the organizations utilize randomized dialing and sample a considerable number of citizens in each state over the course of a decade (Erikson, Wright, and McIver 1993). Consequently, the state-level responses are sufficiently random and numerous to use as estimates of state opinion. Since the 1980s, the CBS-NYT surveys have asked respondents whether they prefer abortion to be readily available, available under restricted circumstances, or unavailable. In keeping with developments in policy debates, the specific wording changed in 1990. Surveys prior to 1990 asked, "Should abortion be legal as it is now, or legal only in such cases as rape, incest, or to save the life of the mother, or should it not be permitted at all?" while later surveys posed the question, "Which of these comes closest to your view? 1. Abortion should be generally available to those who want it. Or 2. Abortion should be available but under stricter limits than it is now. Or 3. Abortion should not be permitted?" We have conducted tests to see whether this change in question wording significantly influenced the responses, and found that it did not.¹³

¹³ We regressed affirmative responses to the General Social Survey (GSS) question about whether abortion should ever be permitted on each of the three categories of responses from the CBS-NYT polls according to whether the responses were based on the earlier or later question wording. For each CBS-

We consequently pooled together the polls conducted after 1995 to measure state-level opinion on abortion for those years. Likewise, we pooled together the 1985 through 1995 polls. No similar surveys were conducted between 1980 and 1984, and so the 1985-1995 responses are used for the small percentage of abortion cases (<10%) that occur during these years.

The mean and median of the responses provide a sense of the typical voters across the states. Using the CBS-NYT coding, in which a value of one reflects the most pro-choice response, two the intermediate response that shares with the pro-life movement a desire to restrict abortion more heavily, and three the most pro-life response, the mean response by state and decade ranges from 1.51 to 2.05. The average is 1.83, and the standard deviation 0.12. The median, by contrast, is equal to two in all but one state-era combination. When median-based opinion masks variation that mean-based data illuminate scholars often utilize the latter, and we follow this approach (e.g., Clinton 2006).¹⁴ Specifically, we code a state as having pro-life leanings if the mean response is higher than 1.75, the value if half of the respondents give a pro-choice answer and the other half split between the two pro-life answers. Mean responses with a higher percentage of pro-choice answers reflect a state with pro-choice leanings. Under this coding, states that are consistently pro-life include Alabama, Arkansas, and Wisconsin. By contrast, Idaho, Oregon, and Washington are pro-choice for at least a portion of the data.

NYT category, the responses had a statistically similar relationship to the GSS ones before and after the change in question wording.

¹⁴ Some scholarship suggests that a mean voter theorem should guide work on representation more generally because mean opinion on an issue will be a more accurate predictor of vote choice in an electoral context with multiple policy dimensions (e.g., Caplin and Nalebuff 1991).

With this information about public opinion, we can construct a measure of whether a judge's decision is popular in the sense of corresponding to the state's leanings on abortion. Specifically, *Popular Decision* equals one if the direction of the judge's vote matches the electorate's leanings and zero otherwise. In other words, the variable equals one if the judge issues a pro-life vote in a state that leans pro-life or if the judge issues a pro-choice vote in a state that leans pro-choice.

Comparing the percentage of popular decisions for nonpartisan and partisan systems, the data immediately suggest a pattern consistent with our hypothesis. In the nonpartisan systems, the likelihood of a popular judicial decision is 59 percent. By contrast, this likelihood is 42 percent in the partisan systems. A two-tailed t-test suggests this difference is statistically significant at conventional levels ($p < 0.01$). Justices appear to be more apt to vote in line with popular sentiment when they face a nonpartisan election.

Alternative descriptive statistics indicate that this distinction is not a quirk of the measurement of public opinion. Comparing the percentage of pro-choice votes by Democratic versus Republican justices, we find that this percentage is nearly identical in nonpartisan systems while markedly distinct in partisan ones.¹⁵ Specifically, in nonpartisan systems judges who are affiliated with the Democratic party vote pro-choice only one percentage point more often than do judges affiliated with the Republican party, and this difference is not significant at any conventional level ($p = 0.88$, two-tailed). In partisan systems, however, Democratic judges vote pro-choice seventeen percentage points more often than Republican judges do and this difference is highly significant ($p < 0.01$, two-tailed).

¹⁵ We thank Laura Langer for providing us with her dataset on state supreme court justices' partisan affiliations (Langer 2002).

Of course, these simple t-tests ignore other political factors that could affect judicial decision-making, including ones that could conceivably be correlated with whether an electoral system is nonpartisan. Nor do the descriptive statistics control for legal factors, such as case facts, which could influence decision-making. These issues call for more rigorous analysis.

Specification

The empirical analysis is designed to assess the effect of nonpartisan elections on the probability of a popular judicial decision, controlling for political and legal factors that might also influence judicial decisions. More formally, the focus of the estimation for each case i and justice j is:

$$\Pr(\text{Popular Decision}_{ij} = 1) = f(\text{Nonpartisan election}_i, \text{other political factors}_{ij}, \text{legal factors}_i),$$

where the political and legal controls are defined as follows.

Justice's party aligned with public opinion, Justice's party aligned with public opinion x Nonpartisan election. We expect a judge to be more likely to make a popular decision if his or her party's stance on abortion comports with state public opinion on the issue. In other words we expect Democratic justices to be more likely to make a popular decision if the state leans in a pro-choice direction, and Republican justices to be more inclined towards popular decisions if the state leans pro-life. *Justice's party aligned with public opinion* accordingly equals one if the judge is a Democrat and the state leans pro-choice, one if the judge is a Republican and the state leans pro-life, and zero for the alternative matching of these categories. For the one percent of observations in which a judge is unassociated with either major party, we coded the variable as

0.5. We also include an interaction of *Justice's party aligned with public opinion* with *Nonpartisan election* to allow for the possibility that judges' party affiliation may affect their behavior differently in partisan versus nonpartisan systems. For instance, the arguments about nomination procedures suggest party affiliation may have a greater effect on judicial decisions in partisan systems.¹⁶

Election within two years. This factor equals one if justice *i* faces a contest for reelection within the next two years and zero otherwise. Because the literature indicates that longer terms reduce elected judges' responsiveness to public opinion, we expect the likelihood of a popular decision to be higher when the judge is facing an electoral contest in the near future. The cutoff of two years corresponds to the time-frame suggested by research on legislative and presidential responsiveness (e.g., Kuklinski 1978; Canes-Wrone and Shotts 2004).¹⁷

Case categories. To control for the possibility that judges are more likely to cater to the electorate's leanings on certain types of cases, we include a set of indicators for the four categories that have over one hundred votes. These delineated categories, which encompass 84 percent of the cases, include *Trespassing and protests*, *Minors*, *Personhood*, and *Wrongful birth*.

¹⁶ Exclusion of the interaction term does not affect our major results regarding nonpartisan elections; without the interaction term, the effect of nonpartisan elections remains significant at conventional levels.

¹⁷ We also considered controlling for intensity of public opinion (specifically, the absolute distance between the mean state response and the cutpoint of 1.75, which distinguishes pro-life from pro-choice leaning states). With this control, the impact of nonpartisan elections remained strong and public opinion intensity did not have a significant effect.

The first category involves protests and related anti-abortion activity at clinics or doctors' homes. The second category concerns the rights of underage dependents to obtain abortions without parental consent. As the name of the third category suggests, it encompasses cases about the legal definition of "personhood." The disputes involve whether the death of a specific fetus should be treated similarly to the death of a child or adult. The fourth category, *Wrongful birth*, covers litigation in which a woman claims improper medical diagnosis and/or treatment prevented her from deciding to have an abortion; most of these cases concern genetic testing. Examples from the remaining sixteen percent of cases, which make up a residual category *Miscellaneous other cases*, range greatly. For instance, in *People v. Higuera*, 625 N.W.2d 444 (Mich. 2001), a doctor was charged with illegally performing a late term abortion while in *McKee v. County of Ramsey*, 316 N.W.2d 555 (Minn. 1982), plaintiffs argued they should not be compelled to pay certain taxes if the state funds abortions.

Facts aligned with public opinion. Research suggests that case facts affect judicial decision-making, even at courts of last resort (e.g., Segal 1984; Scheppele 1990). Because our data involve different types of abortion decisions, the relevant set of facts differs according to the type of dispute. In order to address this issue in a manageable way, we created a variable on case facts for the four major categories of cases. We used existing research, relevant statutes and laws, and our readings of the cases to assess for each category the most significant fact. *Facts aligned with public opinion* equals one if that fact supports a popular decision and zero otherwise. Thus if the fact encouraged a pro-life decision, the variable equals one if the state leaned pro-life and zero otherwise. The specific fact for each category is:

Trespassing and protests. In keeping with the literature on search and seizure cases, which suggests the location of an alleged illegal search influences judges' decisions (e.g., Segal 1984), we expect decisions about trespassing and protests to be affected by the location of the alleged offense. Specifically, we expect judges to be more inclined to rule in a pro-choice direction if the protest or trespassing involved activity inside an abortion clinic or at a doctor's home as opposed to outside a clinic.

Minors. The U.S. Supreme Court ruled in *Bellotti v. Baird*, 443 U.S. 622 (1979), that parental notification laws must allow a minor to secure an abortion without parental consent if a court finds her to be sufficiently "mature" and "well-informed" about the procedure. In order to evaluate whether a minor is well-informed, state courts commonly ascertain whether she has received counseling from medical professionals or pro-life organizations. We accordingly expect judges to be more likely to grant a judicial bypass, which waives the need for parental consent, if the minor has consulted a medical professional or pro-life organization.

Personhood. Wrongful death and related statutes prohibit ending the life of a legally-defined person. Accordingly, when a fetus dies, damages or charges consistent with these statutes may be available depending on how the courts define a "legal person." For instance, a parent could sue over the death of a fetus in car crash, claiming that the person at fault should be subject to the penalties associated with wrongful death.

Research suggests that fetal viability is a critical factor in these rulings. As Robertson (1979, 1418) describes, "Viability is what makes the fetus a 'person' within most courts' construction of the wrongful death statutes." Consequently, we expect judges to be more likely to designate a fetus a legal person, and therefore rule in a pro-life manner, when the fetus is viable.

Wrongful birth. In these cases a mother or father accuses a physician of causing an unwanted birth, one for which the mother would have terminated the pregnancy had the physician not made an error. Specific allegations encompass failing to provide genetic testing, relay the results of such testing, interpret the results appropriately, or incorrectly performing an abortion or sterilization. Pro-life groups oppose these claims while pro-choice ones support them on the grounds that pro-life doctors could otherwise willfully withhold information and services. We expect judges to be more likely to reject a wrongful birth claim, and thus to rule in a pro-life direction, if the doctor is accused of merely misinterpreting test results as opposed to not providing available tests, failing to relay the results, or incorrectly performing a procedure. When results are misinterpreted, doctors can hope to find expert witnesses who can claim that the interpretation was reasonable. By contrast, if a test is not given or if the results are not relayed, the court is forced to rely more heavily on the statements of the litigants.

In addition to controlling for case facts, we considered creating a variable to account for differences in state constitutions. Accordingly, we read each state constitution to look for variation in the issues associated with abortion policy. No major differences were found. Still, the main analysis estimates both basic probit and random effects probit models (the latter of which allows for different errors variances across the states). We have also analyzed a fixed effects model (which allows for different intercepts across states), and this estimation produces similarly strong support for the arguments regarding nonpartisan elections. However, because only Arkansas has cases before and after a switch to nonpartisan elections, the fixed effects model simply estimates the impact of the switch in Arkansas; after detailing the results for the

full dataset, we utilize a simple model that shows how Arkansas's switch affected the likelihood justices in that state issued popular decisions.

A final consideration for the estimation regards justices' power of discretionary review (Brace, Hall, and Langer 1999; Langer 2002; Kestelec and Lax 2006). A court motivated by electoral concerns may, for example, wish to avoid particularly controversial cases if a sufficient percentage of justices are soon running for reelection. More generally, the selection of cases may be influenced by factors related to those that influence justices' votes. To account for this possibility, we used the intermediate appellate-level cases to analyze a Heckman selection model in which a first-stage equation predicts the likelihood a supreme court hears a case. These results suggest that one cannot reject the null of no selection bias.¹⁸ Accordingly, the main analysis entails basic probit and random effects probit models.¹⁹

¹⁸ Instruments for the first-stage included whether the lower court was unanimous and whether the lower court decision was aligned with the partisan affiliation of the median member of the supreme court. As expected, supreme court review was more likely when a lower court was split and when the lower court decision was not aligned with the median member of the supreme court (so that the supreme court was ideologically disposed towards overturning the decision). Because the first-stage Heckman equation is aggregated by case, we also ran the main equation at the case-level, using the median values of the judge-level control variables and a case-level analog for *Popular Decision*. The likelihood ratio test suggests that one cannot reject the independence of the equations at $p > 0.9$, $\chi^2_{[1]} = 0.01$. Moreover, even controlling for selection, the impact of nonpartisan elections is consistent with our hypothesis and significant at conventional levels ($p < 0.05$, two-tailed).

¹⁹ We also considered the possibility that the judges' decisions could be correlated within each case. Analyzing probit models with the standard errors clustered by case, nonpartisan elections continued to

Results

Table 2 presents the results of the four main specifications.²⁰

[Table 2 about here]

Column one reports the findings from the basic probit model for the sample on which we have case facts, column two the random effects probit model for this sample, column three the basic probit model for the full sample of cases, and column four the random effects probit model for the full sample. Notably, in all of these specifications, nonpartisan elections are associated with a greater likelihood of a popular judicial decision. In other words, a judge is significantly more likely to vote with the electorate's leanings if he or she faces a nonpartisan election. This effect is consistently significant at conventional levels ($p < 0.05$, two-tailed) and of a nontrivial magnitude. At the means of the independent variables, justices in nonpartisan systems are between sixteen and twenty-two percent more likely to vote with the electorate's predispositions (depending on the specification).²¹

The results regarding justices' partisan affiliations are also consistent with the argument that nonpartisan elections induce greater accountability. The parameter estimates on the main effect *Justice's party aligned with public opinion* and its interaction with *Nonpartisan elections* indicate that a judge's affiliation with a major party has a larger impact on decision-making in

have a significant effect. We also examined multilevel models with random effects for the cases and clustered standard errors at the state-level. Again, our main conclusions about nonpartisan elections held.

²⁰ All analyses were conducted in STATA 9.0.

²¹ The highest estimate of the magnitude is from the basic probit analysis of all observations while the lowest is from the random effects analysis of this sample; the estimates for the sample with case facts suggest a twenty to twenty-one percent increase regardless of whether the random effects are included.

states with partisan elections. In fact, the additive combination of the main effect and interaction term, which reflects the influence of partisan affiliation in states with nonpartisan elections, is statistically indistinguishable from the null of no effect in all of the models ($p > 0.49$). By contrast, the main effect, which reflects the effect of party affiliation in states with partisan elections, is always significant at conventional levels ($p < 0.05$, two-tailed). The magnitude at the means of the independent variables ranges from eighteen to twenty-two percent, a value similar to that for nonpartisan elections.

Because the interaction term reflects not only the difference in how partisan affiliation influences judicial decision making in nonpartisan versus partisan systems but also any differential effect of nonpartisan elections when partisan affiliation is aligned versus unaligned with public opinion, we conducted additional analysis to assess whether this latter potential difference was driving the strong negative effect of the interaction. In particular, we examined the equations of Table 2 for the following four subsets of the data: observations for which justices' party affiliation is not aligned with public opinion, observations for which party affiliation is aligned, observations associated with nonpartisan systems, and observations associated with partisan systems. These tests suggest that the effect of nonpartisan elections is indeed stronger when a justice's party is not aligned with public opinion. At the same time, however, our claims about the differential impact of party affiliation hold regardless of whether the data is examined with an interaction terms, as in Table 2, or instead by splitting the sample in half according to whether the state has nonpartisan or partisan elections.

Overall, these results refute the conventional wisdom that partisan elections encourage more accountability than nonpartisan ones. In the environment of new-style judicial campaigns, judges in nonpartisan systems do not simply rule "above the fray" of politics. Instead, they

appear to try to signal ideological leanings through decisions that align with the electorate's dispositions. Judges in partisan systems, by comparison, seem less disposed towards signaling their leanings through judicial decisions and more inclined to vote along party lines.

The remaining political variable, which is electoral proximity, also influences judicial decisions. Specifically, the results indicate that judges are significantly more likely to make a popular decision when they face an electoral contest within two years. At the means of the independent variables, the impact is between nine and ten percent, implying a justice is nine to ten percent more likely to make a popular decision in the two years preceding an election. This result comports with Gordon and Huber (2004), which suggests that electoral proximity increases judges' likelihood of catering to public opinion.

The findings on the legal variables imply that judicial decision-making is also strongly influenced by nonpolitical factors. Indeed, the impact of case facts is at least marginally significant in each specification ($p < 0.1$, two-tailed) and the magnitude is similar to that of electoral proximity at the means of the independent variables. The case categories, as well, appear to affect decision-making. Most notably, popular decisions are more likely on trespassing cases than other types of abortion cases. Interestingly, if we cluster the standard errors to control for correlation among justices' votes within each case, the effects of the legal variables become insignificant while the political effects, including nonpartisan elections, remain strong. Taken together, the results with and without the clustering indicate that there are certain case-specific factors that affect judicial decision-making. Even controlling for these factors, however, nonpartisan elections have a significant impact.

As detailed in Table 2, specification testing indicates that the random effects, which control for differences across the states, are only significant in the analysis that does not control

for case facts. Moreover, the impact of nonpartisan elections is relatively similar with or without the random effects. Overall, these results indicate that the key findings are not a function of differences in state law or other state-level differences. To further address this issue, however, we analyze judicial decisions in the one state for which we have multiple observations before and after a switch to nonpartisan elections.

Arkansas and the Switch to Nonpartisan Elections

As a final analysis, we investigate whether the decision-making of the Arkansas Supreme Court changed after the state adopted nonpartisan elections in 2000. The data include sixty-three observations from this state, fifty-eight of which involve justices who served both before and after the switch. Because of the relatively small number of observations, we can control only for the justices' partisan affiliations and electoral proximity; nonpartisan elections perfectly predict popular votes in the sample with the case facts, the only category of cases after the switch is *Personhood*, and the interaction between partisanship and nonpartisan elections is collinear with the main effect of partisanship at $\rho=0.9$.

Table 3 presents the results of the “Arkansas Switch” analysis, for all Arkansas observations in addition to those associated with judges who served in the partisan and nonpartisan systems.

[Table 3 about here]

Each analysis indicates that the switch produced exactly the results that the theory, as well as our main results, would predict. Popular decisions are significantly more likely in the nonpartisan system, and despite the small number of observations this difference is statistically significant ($p<0.05$, two-tailed). Furthermore, the magnitude of the effect is even greater than that in the

multi-state analysis. At the means of the independent variables, judges are thirty-eight to thirty-nine percent more likely to make popular decisions under the nonpartisan system.

The results for the sample of judges who served under the partisan and nonpartisan systems suggest that the institutional reform affected individual behavior, not simply the selection of justices. In other words, the findings imply that nonpartisan elections do not merely cause different judges to win office but instead encourage those elected to behave differently than they would under a partisan system. Of course, we do not want to overstate the strength of the Arkansas results, which are based on a relatively small number of observations. Still, the analysis provides further evidence that nonpartisan elections affect judicial decision-making in the ways suggested by the theoretical foundation.

Discussion and Conclusion

In contrast to the conventional wisdom that parties encourage accountability, we have argued that under certain circumstances partisan labels can decrease an elected official's incentives to cater to voters' predispositions. Officials who lack an ability to signal their preferences through a party label can have incentives to signal them through policy decisions, and therefore be more likely to make popular decisions than officials in systems where voters can utilize party labels as a cue. To test this argument we constructed a new dataset of state supreme court abortion decisions. According to the basic descriptive statistics as well as tests that controlled for a range of political and legal factors, the evidence suggested that justices in nonpartisan systems are more likely to make popular decisions than justices in partisan ones. Notably, this result held for a variety of econometric specifications, including panel data and within-state analysis. In addition, the evidence indicated that justices in partisan systems are

more likely to issue party-line decisions; indeed, partisan affiliation had little impact on justices' decisions in nonpartisan systems.

These results have at least two levels of implications. First, in terms of judicial reform, the paper indicates that judicial accountability may work differently than scholars and reformers have supposed. One possible reason for this difference is that the original proponents of nonpartisan elections lived in an era before the “new-style” judicial campaigns. The conventional wisdom may well have developed for valid reasons. Still, given that any such reasons became obsolete some time ago, and given that states continue to consider the benefits of nonpartisan versus partisan elections, it is past time to revise the conventional wisdom.

We would go so far as to suggest it is time to reconsider other conventional wisdom about judicial accountability, such as the premise that retention elections substantially increase judges' independence from public opinion. Campaigns for these elections have also become more issue-focused, and judges have reason to respond to these pressures. Of course, with respect to retention elections we—like the advocates of this institution—are merely speculating. What is needed is theory and testing of the sort presented here, which enables evaluation of the various speculative claims.

On a more general level, our results offer insight into the ways that partisan labels influence representation. Most obviously, the study implies that even outside of the judicial context nonpartisan elections may encourage elected officials to cater to the leanings of the general electorate. Even within partisan systems, however, there is variation across issues in the extent to which party labels provide a strong signal about candidates' dispositions. Our findings suggest that when the labels do not provide a strong signal, e.g., on an emerging issue, officials will be more likely to cater to majority opinion.

Of course, all of these implications are predicated upon the conditions set forth in the theoretical foundations. If, for instance, citizens will never learn anything about an official's behavior, then our analysis is not particularly relevant. Thus we do not claim that the results necessarily apply to countries with limited freedom of the press and few interest groups, such as is often the situation in developing nations. Instead, we merely suggest that the conventional wisdom about the impact of partisan labels is wrong under a set of conditions that are fairly familiar within the context of modern campaigns. Other conditions can and should be analyzed with respect to whether the conventional wisdom holds or whether instead if what holds is the relationship we have established between partisan signals and accountability.

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Table 1. State courts of last resort with contested statewide elections, 1980-2006

State name	Partisan Elections	Nonpartisan Elections
Alabama	1980-2006	---
Arkansas	1980-2000	2001-2006
Georgia	1980-1982	1983-2006
Idaho	---	1980-2006
Michigan	---	1980-2006
Minnesota	---	1980-2006
Montana	---	1980-2006
North Carolina	1980-2003	2004-2006
North Dakota	---	1980-2006
Nevada	---	1980-2006
New Mexico	1980-1988	---
Ohio	---	1980-2006
Oregon	---	1980-2006
Tennessee	1980-1993	---
Texas*	1980-2006	---
Utah	---	1980-1985
Washington	---	1980-2006
Wisconsin	---	1980-2006
West Virginia	1980-2006	---

*Texas has two courts of last resort, one for civil appeals and another for criminal appeals. Our data include cases from both courts.

Table 2. Nonpartisan elections and the probability of a popular judicial decision

Nonpartisan election	0.508 (0.157)	0.543 (0.169)	0.403 (0.123)	0.572 (0.201)
Justice's party aligned with public opinion	0.565 (0.140)	0.559 (0.143)	0.543 (0.117)	0.446 (0.131)
Nonpartisan election x Justice's party aligned with public opinion	-0.460 (0.218)	-0.462 (0.223)	-0.468 (0.179)	-0.399 (0.193)
Election within two years	0.217 (0.118)	0.223 (0.119)	0.242 (0.095)	0.249 (0.095)
Facts aligned with public opinion	0.209 (0.108)	0.197 (0.111)	---	---
<i>Case category</i>				
Trespassing and protests	0.518 (0.176)	0.535 (0.185)	0.207 (0.144)	0.169 (0.155)
Minors	0.226 (0.187)	0.259 (0.200)	-0.502 (0.151)	-0.531 (0.173)
Personhood	-0.067 (0.171)	-0.061 (0.180)	-0.305 (0.136)	-0.337 (0.146)
Wrongful birth	---	---	-0.355 (0.165)	-0.467 (0.185)
Constant	-0.734 (0.172)	-0.821 (0.190)	-0.204 (0.129)	-0.256 (0.180)
State effects	No	Yes	No	Yes
N	605	605	905	905
Significance of equation	$\chi^2_{[8]}=53.845$ ($p<0.001$)	$\chi^2_{[8]}=50.409$ ($p<0.001$)	$\chi^2_{[8]}=73.482$ ($p<0.001$)	$\chi^2_{[8]}=49.892$ ($p<0.001$)
Significance of state effects	---	$\chi^2_{[1]}=0.248$ ($p<0.309$)	---	$\chi^2_{[1]}=7.726$ ($p<0.003$)

Note: Dependent variable is $\Pr(\text{Popular Decision})_{ij} = 1$. Standard errors in parentheses. Omitted case category for sample with case facts is Wrongful Birth and for full sample is Miscellaneous Other Cases.

Table 3. Switch in Arkansas to nonpartisan elections and probability of a popular judicial decision

	All decisions	Decisions of judges serving before and after switch
Nonpartisan election	1.173 (0.452)	1.278 (0.470)
Justice's party aligned with public opinion	-0.058 (0.665)	-0.195 (0.899)
Election within two years	-0.404 (0.494)	-0.757 (0.522)
Constant	-1.072 (0.251)	-1.120 (0.269)
N	63	58
Significance of equation	$\chi^2_{[3]}= 8.434$ ($p<0.034$)	$\chi^2_{[3]}= 11.661$ ($p<0.009$)

Note: Dependent variable is $\text{Pr}(\text{Popular Decision})_{ij} = 1$. Standard errors in parentheses.