ARE APPOINTED JUDGES STRATEGIC TOO?

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ABSTRACT

The conventional wisdom among many legal scholars is that judicial independence can best be achieved with an appointive judiciary; judicial elections turn judges into politicians, threatening judicial autonomy. Yet the original supporters of judicial elections successfully eliminated the appointive systems of many states by arguing that judges who owed their jobs to politicians could never be truly independent. Because the judiciary could function as a check and balance on the other governmental branches only if it truly were independent of them, the reformers reasoned that only popular elections could ensure a truly independent judiciary. Using a data set of virtually all state supreme court decisions from 1995–1998, this Article provides empirical support for the reformers' arguments; in many cases, judges seeking reappointment vote even more strategically than judges seeking reelection. My results suggest that, compared to other retention methods, judges facing gubernatorial or legislative reappointment are more likely to vote for litigants from the other government branches. Moreover, judges increasingly favor government litigants as their reappointments approach, which is consistent with the judges voting strategically to avoid reappointment denials from the other branches of government. In contrast, when these judges are in their last term before mandatory retirement, the effects disappear; without retention concerns, these judges are no more likely to vote for government litigants than other judges. My empirical evidence suggests that elective systems are not the only systems that produce bias; appointive systems also threaten judicial independence.

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INTRODUCTION

For almost a century, few debates have been the subject of more legal scholarship than the debate over the election versus appointment of state judges.[1] Much of the debate has centered on the tradeoff between judicial independence and accountability.[2] An independent judiciary is often defined as "one that does not make decisions on the basis of the sorts of political factors (for example, the electoral strength of the people affected by a decision) that would influence and in most cases control the decision were it to be made by a legislative body."[3] The conventional wisdom among lawyers and scholars is that an appointive system can best achieve an independent

1. Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges*, 40 SW. L.J. 31, 31 (1986) ("[I]t is fairly certain that no single subject has consumed as many pages in law reviews . . . over the past fifty years as the subject of judicial selection.").

2. *Id.* at 34.

3. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 875 n.1 (1975).

judiciary.[4] Judicial elections, they argue, turn judges into politicians at the expense of judicial independence. Indeed, based on these arguments, many states' judicial selection systems have evolved away from pure elective systems and toward more hybrid models.

Substantial empirical evidence establishes that retention concerns strongly influence judges facing reelection, making them less independent than judges facing gubernatorial or legislative reappointment.[5] Using a data set of virtually all state supreme court decisions from 1995–98, however, this Article shows empirically that in many types of cases, judges facing reappointment are more likely to vote strategically than judges facing reelection. Although these findings contradict the conventional wisdom, they support the fears of the original proponents of judicial elections. Many of those original reformers feared that an appointive system made judges "the instruments of power . . . registering the mandates of the Legislature, and the edicts of the Governor."[6] My empirical evidence suggests that, in certain types of cases, the reformers may have been right.

The debate over judicial independence is especially important because "more than 90% of the [United States'] judicial business . . . is handled by state courts."[7] Despite the dislike that many academics, elite lawyers, and federal judges have for judicial elections,

4. *See, e.g.*, Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 276 (2002) (discussing problematic aspects of state judicial elections); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694–99 (1995) (investigating the justifications for elected judges in light of constitutionalism); Robert P. Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409, 420–22 (1981); Eugene W. Hickok, Jr., *Judicial Selection: The Political Roots of Advice and Consent*, *in* HENRY J. ABRAHAM ET AL., JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 3, 5 (1990) ("[I]t can be argued that the quality most needed in a judge is the ability to withstand the pressures of public opinion in order to ensure the primacy of the rule of law over the fluctuating politics of the hour."); Ben F. Overton, *Trial Judges and Political Elections: A Time for Re-Examination*, 2 U. FLA. J.L. & PUB. POL'Y 9, 15–17 (1988–89); Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1559–63 (1988).

5. *See infra* text accompanying notes 74–86.

6. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 206 (1993) (quoting CONSTITUTIONAL DEBATES OF 1847, at 462 (Arthur Charles Cole ed., 1919) [hereinafter ILLINOIS CONVENTION OF 1847] (statement of David Davis)).

7. Shirley S. Abrahamson, Chief Justice, Wis. Supreme Court, The Ballot and the Bench, Address at the Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice (Mar. 15, 2000), *in* 76 N.Y.U. L. REV. 973, 976 (2001) (citing Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy*, 2 J.L. & POL. 57, 77 (1985)).

approximately nine in ten of all state court judges face the voters in some type of election.[8]

Justices of the U.S. Supreme Court recently articulated their disdain for judicial elections when the Court reluctantly upheld New York's system for electing judges. In their concurrence, Justices Kennedy and Breyer noted,

> When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence.[9]

They concluded,

> The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.[10]

Likewise, Justices Stevens and Souter agreed with "the broader proposition that the very practice of electing judges is unwise."[11] They regretfully concluded, "The Constitution does not prohibit legislatures from enacting stupid laws."[12]

Despite the deeply rooted conviction that judicial elections are inconsistent with judicial independence, retention concerns should only influence elected judges' voting in the types of cases whose outcomes are important to voters or interest groups. In other types of cases that involve the interests of state governments, however, judges facing gubernatorial or legislative reappointment may feel pressure to vote strategically. Retention by the governor or legislature offers those branches of government direct opportunities to sanction judges

8. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1105 (2007) (citing SHAUNA M. STRICKLAND, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2005: SUPPLEMENT TO EXAMINING THE WORK OF STATE COURTS, 2005, at 91–92 fig.G (2006), *available at* http://www.ncsconline.org/D_Research/csp/2005_files/State%20Court%20Caseload%20Statistics%202005.pdf).

9. N.Y. State Bd. of Elections v. Torres, 128 S. Ct. 791, 803 (2008) (Kennedy, J., joined by Breyer, J., concurring in the judgment).

10. *Id.*

11. *Id.* at 801 (Stevens, J., joined by Souter, J., concurring).

12. *Id.* (quoting Thurgood Marshall, J., United States Supreme Court).

for unpopular rulings. Judges that consistently vote against the interests of the other branches of government may hurt their chances for reappointment. As a result, in many cases, judges seeking reappointment may feel pressure to vote for the interests of the executive or legislative branches. For example, in cases in which the state government or a state agency is a party, judges seeking reappointment may feel pressure to vote in favor of the government litigant. Or, in statutory review cases, reappointed judges may be less likely to overturn existing legislation.

Thus, the strategic voting of state judges may resemble that of legislators. Just as legislators are electorally pressured to consider the relative intensity of their constituents' preferences on different issues,[13] judges might consider the intensity of their constituents' preferences about the outcomes of different cases. As elected judges' primary constituents are the voters, judges facing reelection are more likely to vote consistently with the voters' preferences in cases that the voters care strongly about. Similarly, as appointed judges' constituents are governors or legislatures, judges facing reappointment should vote consistently with the preferences of the other governmental branches in cases in which those branches have a stake.

The Article proceeds as follows. In Part I, I discuss how judicial selection in the states shifted from gubernatorial and legislative appointments to elections as part of the Jacksonian era's championing of popular democracy.[14] The desire to curtail the power of the legislatures and governors clearly motivated the shift from appointed to elected judges. The reforms reflected the sentiment that the judiciary could function as a check and balance on the other governmental branches only if it truly were independent of them. Because the appointive system produced judges that were beholden to politicians for their jobs, the reformers reasoned that the only means to a truly independent judiciary was election by the people.

In Part II, I discuss the independence of judges under different selection and retention systems. Despite the original reformers' confidence that an elected judiciary would be more independent than an appointed one, the reality of judicial elections soon led to a growing distrust of electorates. Trends in judicial elections, including

13. *See generally* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990) (arguing that legislators make decisions in response to perceived preferences of constituents).

14. *See infra* notes 24–29 and accompanying text.

increases in competitiveness and the importance of campaign funds, further threatened judicial independence.

Indeed, substantial empirical evidence establishes that retention concerns influence the voting of judges facing reelection. Many of these empirical studies, however, have focused on the types of cases that matter to voters, such as cases with politically controversial issues or cases between out-of-state businesses and in-state plaintiffs that are voters. It is not surprising that appointed judges would appear to be more independent in these types of cases; the governors or legislatures to whom the appointed judges are beholden often have little or no stake in the case outcomes. In other types of cases in which state governments do have a stake, however, judges seeking reappointment by the governor or legislature may be less independent than their elected counterparts.

In Part III, I examine empirically whether judges facing gubernatorial or legislative reappointment vote strategically in civil cases involving government interests. I use a data set that includes detailed information on virtually every state supreme court case in all fifty states between 1995 and 1998. It includes more than 28,000 cases involving more than 470 justices. The data include variables that reflect case histories, case participants, legal issues, case outcomes, and individual justices' behavior. Using multivariate regression techniques, I test whether judges facing gubernatorial or legislative reappointment are more likely to vote for government litigants than judges under other retention methods.

My results suggest that, compared to other retention methods, judges facing legislative reappointment are more likely to vote for litigants from the executive branch, the legislative branch, and the judicial branch, and for general government litigants. Similarly, judges facing gubernatorial reappointment are more likely to vote for an executive branch litigant and for a general government litigant. Although the magnitudes of the voting differences are not large, they are consistent and statistically significant.

Further estimations are consistent with the hypothesis that judges in appointive systems vote strategically to avoid reappointment denials from the other branches of government. My results reveal that judges facing reappointment are more likely to vote for government litigants as their retention approaches, suggesting that retention concerns are an important influence. My results also show that in gubernatorial reappointment systems, judges

in their last term before mandatory retirement are less likely to vote for government litigants than if they were not retiring. This result suggests that when these judges no longer have retention concerns, they are no more likely to vote for government litigants than other judges.

Despite the evidence that judges facing gubernatorial or legislative reappointment are more likely to vote for government litigants than judges under other systems, I find only weak evidence that these judges are less likely to overturn existing legislation in statutory review cases. The weak results, however, are consistent with a previous study that finds that appointed courts are no less likely to overturn statutes because courts that do not want to overturn the legislation of the other government branches refuse to hear the statutory challenges in the first place.

In Part IV, I discuss the implications of the results. Although numerous legal scholars have observed the flaws in elective systems, this study shows that appointive systems are not without problems. Moreover, whereas some scholars defend elected judges who vote strategically as being "accountable" to the people they represent, strategic voting by appointed judges is harder to defend because it threatens the separation of powers that underlies American democracy. Thus, each system poses its own set of distinct risks that states should consider when evaluating their existing systems or considering reforms.

I. HISTORICAL DEVELOPMENTS IN THE SELECTION AND RETENTION OF STATE JUDGES

Eighty-nine percent of all state court judges face the voters in some type of election.[15] Yet, this method of selection and retention is relatively unique to the American states.[16] In fact, the selection of state judges originally resembled that of the federal judiciary; in all of

15. Schotland, *supra* note 8, at 1105 (citing STRICKLAND, *supra* note 8, at 91–92 fig.G).

16. Exceptions include lower judges in Japan who face retention elections after every ten years of service. David M. O'Brien, *The Politics of Judicial Selection and Appointments in Japan and Ten South and Southeast Asian Countries*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 355, 355 (Kate Malleson & Peter H. Russell eds., 2006). Additionally, supreme court judges in several Latin American countries must stand for reelection before various legislative bodies. LAURIE COLE, CANADIAN FOUND. FOR THE AMERICAS, SUMMIT OF THE AMERICAS FOLLOW-UP SERIES, ACCESS TO JUSTICE AND INDEPENDENCE OF THE JUDICIARY IN THE AMERICAS 8–9 (2002).

the original thirteen states, judges were appointed either by the executive or legislature.[17]

In 1832, however, Mississippi became the first state to elect all of its judges.[18] Beginning with the New York constitutional convention of 1848, every state that entered the union until 1912 had judicial elections.[19] By 1865, twenty-four of the thirty-four states elected their judges.[20]

"Scholars have offered a variety of explanations for the rise of judicial elections."[21] Some have argued that the movement reflected an "emotional commitment to the idea that the people should elect all of their officers."[22] Others have maintained that the reform was purely political, and that the reformers believed that judicial elections were the only way "to replace Whig judges with partisans of their own."[23] Yet others have reasoned that the reformers believed that an elected judiciary would "professionalize the bench and boost its importance."[24]

Although each explanation likely has some truth, it is clear that the shift from appointed to elected judiciaries occurred as part of the Jacksonian era's championing of popular democracy.[25] A core value of Jacksonianism was a distrust of unrepresentative, unaccountable government officers.[26] Convention delegates in many states supported the shift to the popular election of judges because they distrusted state legislatures. Reformers "'denounced the legislature's uncontrolled spending and unwillingness to serve a diverse body of

17. ARTHUR T. VANDERBILT, THE CHALLENGE OF LAW REFORM 14–15 (1955).

18. LARRY C. BERKSON AS UPDATED BY RACHEL CAUFIELD, AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT 1 (2004), *available at* http://www.ajs.org/selection/docs/Berkson.pdf.

19. Nelson, *supra* note 6, at 190.

20. BERKSON & CAUFIELD, *supra* note 18, at 1.

21. Nelson, *supra* note 6, at 190. For a general discussion of these explanations, see *id.*

22. *Id.* at 192–93 (disagreeing with D.B. Eaton and James Willard Hurst that the movement toward elected judges was based on emotion and momentum toward reform (citing D.B. EATON, SHOULD JUDGES BE ELECTED? 4 (New York, Amerman, 1873); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW 140 (1950))).

23. *Id.* at 193 (citing FRANCIS R. AUMANN, CHANGING AMERICAN LEGAL SYSTEMS 187–89 (1940)).

24. *Id.* at 208.

25. *Id.* at 199 (citing Kermit L. Hall, *Constitutional Machinery and Judicial Professionalism: The Careers of Midwestern State Appellate Court Judges, 1861–1899*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 29, 29 (Gerald W. Gawalt ed., 1984)).

26. *Id.* at 222.

economic interests,' and they 'criticized the repeated inability of the judiciary to strike down legislative measures.'"[27] Ultimately, reformers wanted a democratic legislature that was "restrained by a strong independent judiciary."[28] Indeed, during the same conventions that created elected judiciaries, many states restricted legislative powers through other measures as well.[29]

The convention delegates supporting an elected judiciary argued that only popular elections could "insulate the judiciary . . . from the branches that it was supposed to restrain."[30] For example, in the New York constitutional convention, during which participants eventually replaced judicial appointments by the legislature with judicial elections, delegate Charles Ruggles argued that the "appointed judiciary's 'connection with the legislative branch of government' was a great fault because in 'all cases in which the constitutionality of an act of the legislature was drawn in question . . . the point in dispute must necessarily have been prejudged in passing the law.'"[31]

In the Indiana convention, Judge Borden maintained that "until the judiciary was placed 'beyond the control of the other branches of government,' . . . constitutional provisions 'to protect the rights of the people, and to preserve a proper equilibrium between the different departments of the government,' would be mere 'parchment barriers' against legislative or executive encroachments."[32]

Similarly, in Illinois, delegate David Davis claimed that he would "'rather see judges the weather-cocks of public sentiment' than see them 'the instruments of power, . . . registering the mandates of the Legislature, and the edicts of the Governor."[33] Delegates William Archer and Archibald Williams further explained that because "'one object of the judiciary was to protect the people from the other

27. *Id.* at 200 (quoting Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of the Elected Judiciary, 1846–1860*, 45 HISTORIAN 337, 350 (1983)).

28. *Id.*

29. *Id.* at 203. For example, Jackson sought to have U.S. senators and representatives elected directly and to eliminate the electoral college. *Id.*

30. *Id.* at 205.

31. *Id.* (quoting REPORT OF THE DEBATES AND PROCEEDINGS IN THE NEW YORK STATE CONVENTION, FOR THE REVISION OF THE CONSTITUTION 371 (Albany, Albany Argus 1846) [hereinafter NEW YORK DEBATES] (statement of Charles Ruggles)).

32. *Id.* at 205–06 (quoting REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA, 1850, at 1808–09 (Indianapolis, W.B. Burford Print Co. 1850) (statement of Borden, J.)).

33. *Id.* at 206 (quoting ILLINOIS CONVENTION OF 1847, *supra* note 6, at 462 (statement of David Davis)).

branches of the government,' it was necessary that the judiciary was 'above the control of the legislative or executive departments.'"[34]

In addition to reasoning that judges who owed their jobs to politicians could never be truly independent, reformers also believed that appointment by politicians would produce intense cronyism. The appointment process "too often led to the selection of party hacks,"[35] with the judiciary often serving as pleasant pasture for failed but loyal politicians who had lost elections. This political loyalty would further reduce judicial independence and weaken the judiciary's potential to check the power of the other branches of government.

For example, in the Massachusetts convention, delegate Benjamin Butler cautioned about the consequences of cronyism:

> "Put [judges] where the people cannot get at them, . . . surround them with the $400,000,000 of incorporated wealth of the State, put around them a set of partizans, much greater, much more numerous, much more hungry, much more greedy and voracious than are even the partizans of the general government in this State," and one could predict the result.[36]

Delegate Foster Hooper added that cronyism is "aggravated by the fact that 'appointments are often confined to cliques and circles of a few politicians' and 'are frequently made as rewards for party services.'"[37]

"In the Kentucky convention, delegate Squire Turner argued that . . . governors simply chose their favorites for the bench."[38] Similarly, New York delegate "George Patterson disavowed the

34. *Id.* at 218 (quoting ILLINOIS CONVENTION OF 1847, *supra* note 6, at 466 (statement of Archibald Williams); *id.* at 462 (statement of William Archer)).

35. *Id.* at 200 (quoting Kermit L. Hall, *The 'Route to Hell' Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832–1920*, *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 229, 229–30 (David J. Bodenhamer & James W. Ely, Jr., eds., 1983)).

36. *Id.* at 194–95 (quoting 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 788 (Boston, White & Potter 1853) [hereinafter MASSACHUSETTS CONVENTION OF 1853] (statement of Benjamin Butler)).

37. *Id.* at 195 (quoting MASSACHUSETTS CONVENTION OF 1853, *supra* note 36, at 700 (statement of Foster Hooper)).

38. *Id.* (citing REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY, 1849–1850, at 222 (Frankfort, A.G. Hodges & Co. 1849) (statement of Squire Turner)).

'political bench' spawned by the appointive system."[39] In the Illinois convention, David Davis claimed that "if only the federal judiciary had been made elective, . . . the people 'would have chosen judges, instead of broken down politicians.'"[40]

Thus the desire to curtail the power of the legislatures and governors motivated the shift from appointed to elected judges. The reforms reflected the sentiment that the judiciary could function as a check and balance on the other governmental branches only if it truly were independent of them. Because the appointive system produced cronyism and judges that were beholden to politicians for their jobs, the reformers reasoned that the only means to a truly independent judiciary was election by the people.

The reformers were initially delighted when "the incidence of judicial review soared in the second half of the nineteenth century . . . ."[41] The turn of the century, however, brought a growing distrust of electorates, and during the Progressive Era, several states modified their judicial elections. For example, by 1927, twelve states had switched from partisan elections to nonpartisan elections.[42] Other states moved to merit selection plans, under which the governor selects judges from a list of qualified applicants compiled by a bipartisan judicial nominating commission.[43] Once appointed, the judge regularly faces unopposed nonpartisan retention elections.[44]

This long historical evolution has spawned many variations of selection and retention methods. Although in many states the methods of selection and retention are the same, in other states they are different. The following are the combinations that states have chosen:

1. Judges selected through gubernatorial appointment and merit plans are retained through gubernatorial reappointment,

39. *Id.* ("'Whichever party had the governor . . . made their caucus nominations,' [Patterson] warned, 'and that was virtually an appointment.'" (omission in original) (quoting NEW YORK DEBATES, *supra* note 31, at 104) (statement of George Patterson)).

40. *Id.* (quoting ILLINOIS CONVENTION OF 1847, *supra* note 6, at 462 (statement of David Davis)).

41. Kermit Hall, *Judicial Independence and the Majoritarian Difficulty*, *in* THE JUDICIAL BRANCH 60, 66 (Kermit Hall & Kevin McGuire eds., 2005).

42. BERKSON & CAUFIELD, *supra* note 18, at 1.

43. Rachel Paine Caufield, *In the Wake of* White*: How States Are Responding to* Republican Party of Minnesota v. White *and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 628 (2005).

44. Michael R. Dimino, *Judicial Elections Versus Merit Selection: The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 804 (2004).

legislative elections, unopposed retention elections, or reappointment by a judicial nominating commission.

2. Judges selected through legislative appointments are retained through legislative reappointments.
3. Judges who are originally elected in partisan elections are retained through partisan elections or unopposed retention elections.
4. Judges originally elected in nonpartisan elections are retained only through nonpartisan elections.

Table 1 shows each state's methods of selection and retention for the study period 1995–98.[45]

Table 1. Methods of Selection and Retention by State[46]

State	Selection Method for Full Term	Method of Retention	State	Selection Method for Full Term	Method of Retention
Alabama	P	P	Montana	N	N
Alaska	M	R	Nebraska	M	R
Arizona	M	R	Nevada	N	N
Arkansas	P	P	New Hampshire[47]	G	-
California	G	R	New Jersey[48]	G	G
Colorado	M	R	New Mexico	P	P
Connecticut[49]	LA	LA	New York	M	G

45. Although other differences between the selection and retention methods of each state exist, the methods can be grouped into these primary categories.

46. DAVID B. ROTTMAN ET AL., U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION, 1998, at 21–25 tbl.4 (Bureau of Justice Statistics, Bulletin No. NCJ 178932, 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf; Am. Judicature Soc'y, Methods of Judicial Selection, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Feb. 15, 2009). G=gubernatorial appointment or reappointment, P=partisan election or reelection, N=nonpartisan election or reelection, LA=legislative appointment or reappointment, LE=legislative election or reelection, M=merit plan, R=retention election, and J=reappointment by a judicial nominating commission. Table 1 slightly differs from ROTTMAN ET AL., *supra*, for New Hampshire, New Mexico, and Louisiana. An anonymous referee and editor for my earlier publication, Joanna Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. (forthcoming 2009), *available at* http://ssrn.com/abstract=997491, that used this table pointed out the correct classifications for these states that are reported here.

47. In New Hampshire, judges serve until age seventy. ROTTMAN ET AL., *supra* note 46, at 28 tbl.5.

48. In New Jersey, after an initial gubernatorial reappointment, judges serve until age seventy. N.J. CONST. art. VI, § 6, ¶ 6.

Delaware	M	G	North Carolina	P	P
Florida	M	R	North Dakota	N	N
Georgia	N	N	Ohio[50]	N	N
Hawaii	M	J	Oklahoma	M	R
Idaho	N	N	Oregon	N	N
Illinois	P	R	Pennsylvania	P	R
Indiana	M	R	Rhode Island[51]	M	-
Iowa	M	R	South Carolina	LE	LE
Kansas	M	R	South Dakota	M	R
Kentucky	N	N	Tennessee	M	N
Louisiana	P	P	Texas	P	P
Maine	G	G	Utah	M	R
Maryland	M	R	Vermont	M	LE
Massachusetts[52]	M	-	Virginia	LA	LA
Michigan[53]	N	N	Washington	N	N
Minnesota	N	N	West Virginia	P	P
Mississippi	N	N	Wisconsin	N	N
Missouri	M	R	Wyoming	M	R

II. JUDICIAL INDEPENDENCE UNDER DIFFERENT SELECTION AND RETENTION METHODS

A. Elected Judges

Despite the original reformers' confidence that an elected judiciary would be more independent than an appointed one, the reality of judicial elections soon led to a growing distrust of electorates. Ex-President William Howard Taft in 1913 declared that judicial elections were "disgraceful" and "so shocking . . . that we ought to condemn them."[54] Likewise, Professor Roscoe Pound argued that judges should be appointed rather than elected, stating, "Putting

49. In Connecticut, the governor nominates and the legislature appoints. ROTTMAN ET AL., *supra* note 46, at 21 tbl.4, 25 n.2.

50. In Ohio, political parties nominate candidates to run in nonpartisan elections. Am. Judicature Soc'y, *supra* note 46.

51. In Rhode Island, judges have life tenure. ROTTMAN ET AL., *supra* note 46, at 28 tbl.5.

52. In Massachusetts, judges serve until age seventy. *Id.* at 28 n.8.

53. In Michigan, political parties nominate candidates to run in nonpartisan elections. Am. Judicature Soc'y, *supra* note 46.

54. WILLIAM HOWARD TAFT, POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS 194–95 (1913).

courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."[55]

The distrust of judicial elections, however, was moderated by the fact that they used to be "low-key affairs, conducted with civility and dignity,"[56] which were "as exciting as a game of checkers. . . . [p]layed by mail."[57] This all changed in Los Angeles in 1978, however, when a group of deputy district attorneys offered to support any candidate who would run against an unopposed incumbent trial judge, producing a record number of contests and defeated judges.[58] Then, in the 1980s, battles over tort law in Texas produced "unprecedentedly costly, heated races" for its supreme court.[59]

Since then, elections have become more contested and competitive. In 1988, only 33 percent of nonpartisan elections were contested.[60] By 2000, this number had increased to 75 percent.[61] Likewise, 74 percent of partisan elections were contested in 1988.[62] By 2000, this number had grown to 95 percent. [63]

As elections have become more contested, incumbents have found it harder to win. In nonpartisan elections, only 4.3 percent of incumbents were defeated in 1980,[64] but 8 percent of incumbents were defeated in 2000.[65] In partisan elections, 26.3 percent of incumbents were defeated in 1980,[66] whereas the loss rate for incumbents in 2000

55. *Guilty, Your Honour?*, ECONOMIST, July 24, 2004, at 28, 29.

56. Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV 1, 19 (1995).

57. Schotland, *supra* note 8, at 1079 (alteration in original) (quoting William C. Bayne, *Lynchard's Candidacy, Ads Putting Spice into Justice Race*, COM. APPEAL (Memphis), Oct. 29, 2000, at DS1).

58. *Id.* at 1080.

59. *Id.*

60. Chris W. Bonneau & Melinda Gann Hall, *Predicting Challengers in State Supreme Court Elections: Context and the Politics of Institutional Design*, 56 POL. RES. Q. 337, 343 tbl.2 (2003).

61. Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21, 27 tbl.6 (2004).

62. Bonneau & Hall, *supra* note 60, at 343 tbl.2.

63. Bonneau, *supra* note 61, at 27 tbl.6.

64. Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165, 177 tbl.9.4 (Matthew Streb ed., 2007).

65. *Id.*

66. *Id.*

was a stunning 45.5 percent.[67] This rate of defeat is much higher than the rate at which incumbents lose in the U.S House or Senate or in state legislatures.[68]

Following the substantial increase in the competitiveness of judicial elections, campaign spending on these elections has increased dramatically. Between 1990 and 2004, average campaign spending in nonpartisan elections increased by 100 percent, from approximately $300,000 to $600,000.[69] Average spending in partisan elections during this period increased from approximately $425,000 to $1.5 million, an increase of over 250 percent.[70]

The increasing cost of judicial campaigns has made it extremely difficult for candidates to win elections without substantial funding.[71] In 1997–1998, the top campaign fundraiser prevailed in approximately 75 percent of contested state supreme court races, and in 2001–02, the top fundraiser won in 80 percent of the elections.[72]

Many academics, elite lawyers, and judges fear that the increasing contentiousness of judicial elections threatens judicial independence.[73] They argue that the increasing competitiveness of elections has likely heightened the pressure on judges to decide cases strategically.[74] Moreover, with the costs of winning judicial elections increasing dramatically, judges are compelled to rule in ways that help them to obtain campaign funds.

Indeed, several judges have admitted that reelection concerns may influence their judicial rulings. For example, former California

67. *Id.*

68. Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 92 AM. POL. SCI. REV. 315, 319 (2001) ("Although justices are less likely to be challenged than House members, remarkably, on average, justices have a greater risk of being tossed out of office."); Melinda Gann Hall & Chris W. Bonneau, *Does Quality Matter? Challengers in State Supreme Court Election*, 50 AM. J. POL. SCI. REV. 20, 21 (2006).

69. Chris W. Bonneau, *The Dynamics of Campaign Spending in State Supreme Court Elections*, *in* RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS, *supra* note 64, at 59, 63 fig.4.1.

70. *Id.*

71. *See id.* at 62 (noting that the incumbent's percentage of the vote increases in direct proportion to the discrepancy in spending between the candidates but that elections tend to be more competitive when the candidates "spend roughly equivalent amounts of money").

72. *Id.* at 32 & tbl. 11.

73. *See supra* notes 1–2 and accompanying text.

74. *See, e.g.*, Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 430 (1992) ("[J]udges, like legislators, may adopt strategies to maximize their chances for reelection, especially given the demonstrated tendency of judges to act strategically . . . .").

Supreme Court Justice Otto M. Kaus commented, "[T]o this day, I don't know to what extent I was subliminally motivated by the thing you could not forget—that it might do you some good politically to vote one way or the other."[75]

Similarly, in a series of interviews with the members of Louisiana's high court, a liberal justice acknowledged that his

> perception of his constituents was that they clearly preferred the death penalty as a punishment for murder and that they would retaliate against him at election time if the justice did not reflect constituent preferences in this set of judicial decisions . . . [and that] he does not dissent in death penalty cases against an opinion of the court to affirm a defendant's conviction and sentence, expressly because of a perceived voter sanction, in spite of his deeply felt personal preferences to the contrary.[76]

Even Justices of the U.S. Supreme Court have expressed this perspective. After the Court reluctantly upheld on First Amendment grounds New York's system for electing judges, Justices Kennedy and Breyer noted in their concurrence:

> When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence.[77]

Indeed, substantial empirical evidence suggests that reelection concerns do strongly influence judges. Several studies have shown that the behavior of elected judges changes as reelection approaches. For example, evidence suggests that when electoral pressures intensify near the end of their terms, judges deviate from expected

75. Philip Hager, *Kaus Urges Reelection of Embattled Court Justices*, L.A. TIMES, Sept. 28, 1986, at 3 (quoting Otto M. Kaus, J., Cal. Supreme Court); *see also id.* (discussing the influence of elections on judges).

76. Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1120 (1987).

77. N.Y. State Bd. of Elections v. Torres, 128 S. Ct. 791, 803 (2008) (Kennedy, J., joined by Breyer, J., concurring in the judgment).

voting patterns,[78] impose longer criminal sentences,[79] and side with the majority in death penalty cases.[80]

Other studies have found that the method of selection influences judges' voting and that elected judges face greater voting pressures than appointed judges. For example, litigation rates are lower in states in which judges are elected, suggesting that elected judges' political voting reduces uncertainty about court decisions so that more cases settle.[81] Similarly, plaintiffs file more antidiscrimination claims in states that elect judges than in states that appoint judges, suggesting that elected judges have stronger proemployee preferences, inducing more employees to file claims.[82]

Other studies find that the pressure is even greater for judges elected in partisan elections. For example, partisan-elected judges are more likely to redistribute wealth in torts cases from out-of-state businesses to in-state plaintiffs that are voters.[83] Similarly, judges facing partisan elections are less likely to dissent on politically controversial issues[84] and less likely to vote for challengers to a regulatory status quo.[85] Likewise, in a previous study, I found that

78. Hall, *supra* note 76, at 1123 ("Whether voters and opponents are cognizant of the justices' behavior or not, certain justices seem to fear the prospect of electoral sanction and consequently alter their behavior.").

79. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004).

80. *See* Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5, 24 (1995) ("[W]here judges must face voters to retain their positions, state partisan competition exerts a positive influence on support for the death penalty . . . ."); Hall, *supra* note 74, at 431 (discerning a "marked tendency" among liberal justices in Louisiana to disregard personal predilections against imposing the death penalty "to vote in accordance with constituent preferences").

81. F. Andrew Hanssen, *The Effect of Judicial Institutions on Uncertainty and the Rate of Litigation: The Election Versus Appointment of State Judges*, 28 J. LEG. STUD. 205, 232 (1999).

82. Timothy Besley & A. Abigail Payne, *Implementation of Anti-Discrimination Policy: Does Judicial Discretion Matter* 18 (London Sch. of Econ. & Pol. Sci., Research Paper No. PEPP04, 2005), *available at* http://sticerd.lse.ac.uk/dps/pepp/pepp04.pdf.

83. Eric Helland & Alex Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. ECON. REV. 341, 368 (2002); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999).

84. *See* Hall, *supra* note 76, at 1123 ("To avoid singling themselves out for criticism during the re-election process . . . justices may suppress the expression of dissent."); Hall, *supra* note 74, at 442 ("District-based elections . . . influence liberal justices to join conservative majorities in death penalty cases in Texas, North Carolina, Louisiana, and Kentucky.").

85. *See* F. Andrew Hanssen, *Independent Courts and Administrative Agencies: An Empirical Analysis of the States*, 16 J.L. ECON. & ORG. 534, 536–37 (2000) (finding that, in states with appointed judiciaries, administrative agencies tend to employ larger staffs devoted to

judges who must be reelected by Republican voters in partisan elections tend to decide cases in accord with standard Republican policy: they are more likely to vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases and torts cases generally, and against criminals in criminal appeals.[86]

In contrast, one 2009 paper found that public opinion about abortion policy has a stronger effect on judicial decisions in nonpartisan systems than in partisan systems.[87] Moreover, another 2009 paper by Professors Choi, Gulati, and Posner finds only mixed evidence of elected judges responding to political pressure more than appointed judges.[88]

Other recent empirical studies have examined the influence of campaign contributions on judges' case decisions. For example, in an earlier study, I found that contributions from interest groups are associated with increases in the probability that judges will vote for the litigants those interest groups favor.[89] Similarly, other scholars have found a correlation between the sources of a judge's funding and the judge's rulings in arbitration decisions from the Alabama Supreme Court,[90] in tort cases before state supreme courts in Alabama, Kentucky, and Ohio, [91] in cases between two businesses in

protecting regulatory policies from potential challenges because courts review and reverse those policies more frequently than courts in states with elected judges).

86. Shepherd, *supra* note 46 (manuscript at 6).

87. Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. (forthcoming 2009) (manuscript at 53 & fig.2), *available at* http://works.bepress.com/brandice_canes_wrone/1/.

88. Stephen J. Choi, Mitu G. Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, J.L. ECON. & ORG. (forthcoming 2009) (manuscript at 26–27, 31, 36), *available at* http://jleo.oxfordjournals.org/cgi/reprint/ewn023.

89. Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 670–72 & tbls.7–8 (2009).

90. Stephen J. Ware, *Money, Politics, and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 25 J.L. & POL. 645, 660 (1999) (examining arbitration decisions in the Alabama Supreme Court).

91. Eric N. Waltenburg & Charles S. Lopeman, *2000 Tort Decisions and Campaign Dollars*, 28 SOUTHEASTERN POL. REV. 241, 248, 256 (2000) (examining tort cases before state supreme courts in Alabama, Kentucky, and Ohio).

the Texas Supreme Court,[92] and in cases during the Supreme Court of Georgia's 2003 term.[93]

Thus, empirical evidence establishes that retention concerns influence the voting of judges facing reelection. In turn, most scholars conclude that elected judges are less independent than appointed ones, when they define independent judges as those who "do[] not make decisions on the basis of the sorts of political factors (for example, the electoral strength of the people affected by a decision) that would influence, and in most cases control the decision were it to be made by a legislative body."[94] As I discuss in the next Section, however, in cases in which the state government has a stake, judges facing gubernatorial or legislative reappointment might feel more pressure to vote in favor of the government's interest, making them less independent than judges facing reelection.

B. Appointed Judges

Although the evidence strongly suggests that retention concerns influence elected judges' rulings in some cases, the influence is likely limited to the types of cases whose outcomes are important to voters or interest groups. Indeed, many previous empirical studies have focused on the types of cases that matter to voters, such as cases with politically controversial issues or cases between out-of-state businesses and in-state plaintiffs that are voters. It is not surprising that appointed judges would appear to be more independent in these types of cases; the governors or legislatures to whom the appointed judges are beholden often have little or no stake in the case outcomes.

In other types of cases in which state governments do have a stake, however, judges seeking reappointment by the governor or legislature may be less independent than their elected counterparts. The power over judicial retention held by the governor or legislature offers the political branches of government direct opportunities to

92. *See* Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997*, 31 POL. & POL'Y 314, 330 (2003) (showing that when two litigants contribute to justices' campaigns, Texas Supreme Court decisions tend to favor the litigant that contributed more money).

93. Damon M. Cann, Justice for Sale? Campaign Contributions and Judicial Decision Making 16 (Aug. 10, 2006) (unpublished manuscript), *available at* http://ssrn.com/abstract=991364 (examining cases during the Supreme Court of Georgia's 2003 term).

94. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 875 n.1 (1975).

sanction judges for unpopular rulings. Judges who consistently vote against the interests of the other branches of government may hurt their chances for reappointment.

Thus, in many cases, judges seeking reappointment may feel pressure to vote in a way that favors the executive or legislative branches.[95] For example, in cases in which the state government or a state agency is a party, judges seeking reappointment may feel pressure to vote in favor of the government litigant. Or, in statutory review cases, reappointed judges may be less likely to challenge existing legislation.

Studies of Congress recognize that legislators are electorally pressured to consider the relative intensity of their constituents' preferences on different issues.[96] Constituents differ in their intensity for particular preferences, and this intensity affects the likelihood that the constituents will reward or punish the legislators at the polls. Thus, legislators are more likely to vote for a particular issue when that issue is quite important to constituents with a stake in the outcome of the vote and not particularly important to the constituents that have little or no stake.[97]

Similarly, judges might consider the intensity of their constituents' preferences about the outcomes of different cases. As elected judges' primary constituents are the voters, judges facing reelection are more likely to vote consistently with the voters' preferences in cases that the voters care strongly about. Similarly, as appointed judges' constituents are governors or legislatures, judges facing reappointment should vote consistently with the preferences of the other governmental branches in cases in which the other branches have a stake.

Few empirical studies have explored the independence of judges in cases in which the other branches of government have a large stake. Professors Brace, Langer, and Hall "examine all cases decided since *Roe v. Wade* by state supreme courts in which direct challenges

95. For a discussion of other nonpartisan concerns that might influence all judges, regardless of retention method, to vote in favor of government litigants, see, for example, Craig F. Emmert, *An Integrated Case-Related Model of Judicial Decision Making: Explaining State Supreme Court Decisions in Judicial Review Cases*, 54 J. POL. 543, 551 (1992).

96. R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 3 (1990).

97. *Id.* at 129.

to state statutes regulating abortion were [raised]."[98] Their empirical results provide only limited support for the hypothesis that judges facing reappointment are less likely to vote against the interests of the other government branches. Specifically, they find that judges subject to gubernatorial or legislative retention are less likely to hear abortion cases[99] but judges facing reelection are less likely to overturn statutes regulating abortion.[100]

Professor Hanssen indirectly tests whether appointed judges are less likely to rule against state administrative agencies.[101] He studied agency staffing in state utility commissions, insurance commissions, and the public education bureaucracy.[102] He surmises that higher staffing levels in states with appointed judges suggest that agencies feel more threatened by appointed judges, indicating that these judges are both more independent and more likely to rule against the agencies than elected judges.[103]

In the next Part, my empirical model directly tests whether judges seeking gubernatorial or legislative reappointment vote strategically in cases in which the other branches of government have a stake. In this and all empirical analyses of judicial decisionmaking, however, it is important to remember that judges, like most political actors, are constrained in their ability to make decisions solely on the basis of personal preferences or incentives. The most important constraints will likely include the law relevant to each case and the state political environment.

III. EMPIRICAL ANALYSIS

This Part examines empirically whether judges seeking gubernatorial or legislative reappointment decide cases more favorably to the other branches of government than other judges. If judges seeking reappointment routinely rule more favorably for government litigants, my results suggest that either retention concerns or political loyalty are strong influences on these judges.

98. Paul Brace, Melinda Gann Hall & Laura Langer, *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265, 1278 (1999).

99. *Id.* at 1291.

100. *Id.* at 1294.

101. *See* Hanssen, *supra* note 85, at 536.

102. *Id.* at 535.

103. *Id.* at 537–38.

To test the influence of retention methods on judges' voting in civil cases involving state government litigants, I use data from the State Supreme Court Data Project archive. These data include virtually all state supreme court cases in all fifty states from 1995 to 1998.[104] The data include more than 28,000 decisions involving more than 470 individual state supreme court judges. The data include variables that reflect case histories, case participants, legal issues, case outcomes, and individual justices' behavior. I supplemented these data in several ways: with institutional variables that describe aspects of the judicial system of each state, with variables that describe the political affiliations of various groups and people in each state, and with detailed information about each judge's career.

I estimate a multivariate regression equation that measures how individual judges' rulings are related both to the retention method and to other characteristics of the state, the judge, and the case.[105]

A. The Model's Technical Structure

I first introduce the model in symbols, and I provide a brief outline of the variables. In the next Section, I explain the model more fully. The model is

$$(1)\ Prob(GovtLitVote_i=1|x)=\Phi(\beta_0+\beta_1 RetentMethod+\beta_2 Judge+\beta_3 Case+\beta_4 State)$$

GovtLitVote	The probability that the judge votes for the government litigant in case *i*.
RetentMethod	Includes four indicator variables for whether a vote is given by a judge who faces a gubernatorial reappointment, who faces a legislative reappointment, who faces a partisan reelection, who faces a nonpartisan reelection, or who has life tenure.

104. State dockets exceeding two hundred cases in a single year were selected from a random sample of two hundred cases. Typically, case quantities are unaffected due to the limited size of many state supreme court dockets. Paul Brace & Melinda Gann Hall, *State Supreme Court Database Project: Coding Rules* (Feb. 1, 1999), http://www.ruf.rice.edu/~pbrace/statecourt/CodingRules.html.

105. A related analysis with more detailed econometric explanations can be found in Shepherd, *supra* note 46 (manuscript at 14–16).

Judge	Includes two judge-level variables: the party-adjusted surrogate judge ideology (PAJID) measure of judicial ideology, and the number of years the judge has been on the court.
Case	Includes several case-level variables: indicator variables for the other litigant in the case, and indicator variables for the general issue in the case.
State	Includes several state-level variables: the percentage of years since 1960 that each state's legislature was majority Republican, an indicator variable for whether the state has a lower appellate court, and an indicator variable for whether the judges sit en banc.

B. Details of the Model

Equation (1) measures the relationship between judges' voting and the retention method in cases in which the government is a litigant while controlling for many other factors that might also affect voting.

1. *Dependent Variable.* The dependent variable is the probability that the judge votes for the government litigant in each case. I examine four categories of civil government cases: cases in which any branch of the government is a litigant, cases in which a member of the executive branch is a litigant,[106] cases in which a member of the legislative branch is a litigant,[107] and cases in which a member of the judicial branch is a litigant.[108]

In the civil cases, a judge is coded as voting for a litigant in the State Supreme Court Data Project archive if the judge voted to make

106. According to the State Supreme Court Database Project, this litigant could be the governor, the lieutenant governor, the attorney general, the secretary of state, or any administrative agency. Paul Brace & Melinda Gann Hall, *State Supreme Court Database Project*: Codebook 16–17 (Aug. 2005), http://www.ruf.rice.edu/~pbrace/statecourt/Codebook.zip.

107. According to the State Supreme Court Database Project, this litigant could be either house of the state legislature or a legislative commission or committee. *Id.*

108. According to the State Supreme Court Database Project, this litigant could be a judge or court, prosecutor, or a jail, prison, or probation organization. *Id.*

the litigant any better off, regardless of whether the judge voted to reverse a lower court or to change the damage award.

In addition, in a separate model I estimate the probability that the judge votes to overturn a state statute when one is challenged.

2. *Retention Method Variables*. *RetentMethod* includes the five primary variables of interest: a variable that indicates if a vote is given by a judge facing a gubernatorial reappointment, a legislative reappointment, a partisan reelection, a nonpartisan reelection, or if the judge has life tenure. As I have discussed,[109] systems with gubernatorial and legislative reappointment offer the other branches of government direct opportunities to sanction judges for unpopular rulings. Thus, if these judges are acting strategically, they would be the least likely to vote against the interests of the other branches of government.

Judges reelected in partisan and nonpartisan elections might also feel some pressure to vote in favor of the government interests. Reelection concerns might prevent these judges from voting against the preferences of the dominant political coalition within a state, which often controls one or both of the other branches of government. That is, the judges may be motivated to vote in favor of the interests of other political branches to ensure that they have other politicians' support during their reelection. Because the other branches of government cannot directly sanction unpopular rulings as they can under appointive systems, however, judges facing reelection should feel less pressure to vote strategically.

The baseline, or excluded category, includes votes from judges facing unopposed retention elections. These judges are subject to only a yes-or-no vote for retention, and they are rarely defeated.[110] In fact, the most comprehensive study of judicial retention elections finds that only about 1 percent of judges lose retention elections. Thus, the voting of judges under these systems is likely to be more independent

109. *See supra* Part II.B.

110. Larry Aspin, *Trends in Judicial Retention Elections, 1964–1998*, 83 JUDICATURE 79, 79, 80 tbl.1 (1999) (studying ten states from 1964–98 and finding that only 52 of 4,588 judges (1.1 percent) were defeated when they sought retention).

than judges in elective or appointive systems. Judges with permanent tenure should be the most autonomous in their voting.[111]

3. *Control Variables.* My estimation of Equation (1) separates the influence of each factor that is included, allowing me to distinguish the retention method's influence on voting from other influences. Thus, to determine whether the retention method influences voting, it is important to control for as many other factors as possible to ensure that the results are not caused by something other than retention concerns.[112] Ideally, we could quantify and include any factor that was related to voting. In practice, researchers include as many variables as is technically possible given data constraints.

The control variables I include fall into three categories: judge-level variables, case-level variables, and state-level variables. All of these variables should be related to voting. That is, these variables include possible influences on a judge's vote in a particular case: the judge's own characteristics, such as the judge's years on the bench; case characteristics, such as the type of litigants; and state characteristics, such as the conservatism of the state's laws. Unfortunately, one of the most important influences on a judge's voting, the guilt or liability of the parties, is unquantifiable and, therefore, not included as a control variable. Nevertheless, the variables that I do include pick up the marginal influence of these other factors on judges' voting.

The variables in *Judge* control for judge-specific characteristics that may be related to judges' voting. First, I include a measure of the ideological preferences of each judge. For this proxy, I use each judge's party-adjusted surrogate judge ideology measure, or PAJID score. This score is the most common measure of judges' ideology that political science studies use, and it is based on the assumption that judges' ideologies can be best proxied by both their partisan affiliations and the ideologies of their states at the time of their initial

111. For a survey of the literature on motivations of judicial behavior, see Hugo M. Mialon, Paul H. Rubin & Joel L. Schrag, *Judicial Hierarchies and the Rule-Individual Tradeoff*, 15 SUPREME CT. ECON. REV. 3, 5–7 (2007).

112. That is, if a third omitted variable has significant influence on voting and that omitted variable is strongly correlated with retention method, my analysis may erroneously attribute to the retention method variable the relationship between voting and the omitted third variable.

entry in office.[113] Including the PAJID scores allows me to separate the influence of the judges' own ideologies from the influence of retention methods. I also include a variable indicating the length of time in years that the individual judge has served on the court to control for voting changes throughout a judge's career.

The variables in *Case* control for case-level factors that may be related to judges' voting. First, I include two dummy variables that indicate whether the nongovernment litigant in each case is a person or a business. I also include a series of indicator variables signifying the general issue in the case (election issues, First Amendment issues, government regulation issues, practice-of-law issues, public-contract issues, privacy issues, or torts issues involving state governments).

The variables in *State* control for state-level characteristics that may be related to case outcomes. First, I include the percentage of years since 1960 that each state's legislature was majority Republican. I use this variable as a proxy for the conservatism of the states' laws. This control allows me to isolate the influence of the retention method from judges simply applying conservative laws in cases with a government litigant.

I also include variables that indicate whether the states' supreme courts have discretion to grant review (that is, whether they have a lower appellate court) and whether the judges sit en banc. Both of these variables may be relevant to the types of cases that the supreme courts hear and, in turn, to the judges' voting. When supreme courts have discretion to grant review, the litigants do not alone control which appeals the courts hear. Thirty-nine states have lower appellate courts, making review by their supreme courts discretionary. In these courts, the judges may choose to hear cases that give them opportunities to exercise their ideological preferences.[114]

Whether the supreme courts sit en banc may also influence the types of cases that the courts hear. The supreme courts of Alabama,

113. *See* Paul Brace, Laura Langer & Melinda Gann Hall, *Measuring the Preferences of State Supreme Court Judges*, 62 J. POL. 387, 400–04 (2000).

114. Conceivably, litigants could decide to settle after the court has granted review of their case; the granting of review may signal that the court plans to vote ideologically. In a study of civil appeals in forty-six large counties between 2001–2005, however, no litigants withdrew cases after a court of last resort granted review. THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, APPEALS FROM GENERAL CIVIL TRIALS IN 46 LARGE COUNTIES, 2001–2000, at 9 (Bureau of Justice Statistics, Special Report No. NCJ 212979, 2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/agctlc05.pdf.

Connecticut, Delaware, Iowa, Massachusetts, Mississippi, Montana, Nebraska, New Mexico, Virginia, and Washington often do not sit en banc; instead, various subsets of the judges hear each case. The supreme courts of other states may periodically not sit en banc if, for example, a particular judge has a conflict. If the ideologies of the judges on a specific court differ and the litigants do not know which judges will hear their case because the court does not sit en banc, then the litigants cannot, when making settlement decisions, fully anticipate the panel's ideological leaning. In some cases, litigants may not settle cases that they would have settled had they known in advance their judges' identities.

As is standard and appropriate in such an analysis,[115] the equation also includes a set of year-indicator variables[116] that capture national trends and influences that affect all judges but vary over time. The variables correct for the possibility that a change in voting may be due, not to retention method, but to factors that affect all judges, such as trends in conservatism or changes in national laws.[117]

4. *Estimation Method.* Equation (1) is estimated with a maximum likelihood probit model. I present the marginal effects of each retention method variable on the probability of a judge voting for the government litigant. The results tables report the increase in the probability of a judge voting for a government litigant under the particular retention method as compared to the base category (judges facing retention elections), holding the case's other characteristics constant.

In addition, the t-statistics are computed from standard errors clustered by case to correct for possible clustering effects. Clustering effects are a concern because observations may be independent across groups (clusters) but not necessarily within groups.[118] Thus, the standard errors from observations from within the same case may be relatively small compared to standard errors from observations from other cases. Not controlling for possible clustering effects could

115. *See, e.g.*, WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 116–18 (5th ed. 2003).

116. A dummy variable is a yes-or-no indicator with only two possible values, 0 and 1. *Id.* at 116.

117. I am unable to include state-level and judge-level fixed effects because the majority of these variables are perfectly collinear with the retention variables, many of which do not change during the four-year sample period.

118. For the mathematical explanation of clustering effects, see HALBERT WHITE, ASYMPTOTIC THEORY FOR ECONOMETRICIANS 135–36 (1984).

artificially inflate my t-statistics, producing results that incorrectly appear to be statistically significant.

C. Primary Empirical Results

The results support the hypothesis that judges seeking reappointment often vote strategically in cases in which the other branches of government have a stake. Table 2 reports the coefficients and t-statistics for the retention method variables in five separate estimations. The estimations use five different dependent variables: the probability that a judge votes for any government litigant, the probability that a judge votes for an executive branch litigant, the probability that a judge votes for a legislative branch litigant, the probability that a judge votes for a judicial branch litigant, and the probability that a judge declares a state statute unconstitutional. The full results for all variables in the estimation on the probability that a judge votes for any government litigant are reported in the table in Appendix A.

Table 2 indicates the relationship between judges' voting and the retention method variables. In the table, the top number in each cell is the regression coefficient, which indicates the magnitude and direction of the relationship between judges' voting and the retention-method variables. A negative coefficient indicates that a retention method variable reduces the probability that a judge votes for the government litigant. In contrast, a positive coefficient indicates that a retention method variable increases the probability that a judge votes for the government litigant.

In addition, the table reports the t-statistic for each coefficient. In each cell, it is the bottom number, in parentheses. Coefficients with t-statistics equal to or greater than 1.645 are considered statistically significant at the 10 percent level, meaning that there is 90 percent certainty that the coefficient is different from zero. T-statistics equal to or greater than 1.96 indicate statistical significance at the more-certain 5 percent level, and t-statistics equal to or greater than 2.576 indicate statistical significance at the most-certain 1 percent level. Empiricists typically require t-statistics of at least 1.645 to conclude that one variable affects another in the direction indicated by the coefficient. In the table, "*" and "+" indicate significance at the 5 percent and 10 percent levels, respectively.

The results indicate that judges facing gubernatorial reappointment are more likely to vote for an executive branch litigant and for any government litigant.[119] The magnitudes of the marginal effects are statistically significant, but not huge. For example, the results suggest that a judge facing a gubernatorial reappointment, compared to the base category of judges facing unopposed retention elections, is approximately 7 percentage points more likely to vote in favor of the executive branch litigant.

Judges facing legislative reappointment are more likely to vote for litigants from the executive branch, the legislative branch, and the judicial branch, and for general government litigants. Although the executive and judicial branches are not directly responsible for these judges' retention, many cases may involve challenges to the application of the law by either the governor or a judge. In these cases, a vote for the executive or judicial branch that is implementing the law is equivalent to a vote for the legislature.

Table 2. Retention Influences on Judges' Voting for Government Litigants[120]

Retention Method	All Gov't Litigants	Executive Branch Litigant	Legislative Branch Litigant	Judicial Branch Litigant
Gubernatorial Reappointment	0.06+ (1.89)	0.07* (1.97)	-.44 (1.50)	-0.09 (0.58)
Legislative Reappointment	0.09* (3.54)	0.08* (2.35)	0.40* (2.38)	0.25* (3.67)
Partisan Reelection	0.03 (1.36)	0.06* (2.10)	-0.18 (0.93)	-0.03 (0.43)
Nonpartisan Reelection	0.01 (0.58)	0.03 (1.30)	0.10 (0.42)	0.08 (1.60)
Permanent Tenure	-0.04 (1.38)	-0.06 (1.53)	-0.52 (1.48)	-0.02 (0.21)
Number of Obs.	24865	15985	349	3704
Log Likelihood	-14899	-10011	-191.6	-2054.9

119. The statistically significant results for voting for all government litigants, however, are probably largely driven by the statistically significant results for voting for executive branch litigants.

120. Table 2 reports the marginal effects of each retention method variable on the probability of a judge voting for the relevant litigants, based on probit estimates. The other control variables are not reported for brevity. T-statistics are reported in parentheses. The symbols "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.

The results are slightly weaker for judges facing partisan reelections. These judges are more likely to favor only executive branch litigants. This result suggests that partisan elected judges may sometimes vote to win the support of the governor in their next reelection. Indeed, some scholars have argued that support by political party leaders is essential to a judge's victory in many partisan elections.[121]

In contrast, judges facing nonpartisan reelections are not more likely to vote for any government litigant, compared to judges facing unopposed retention elections.

Finally, the coefficients for the probabilities that a judge with permanent tenure votes for any government litigant are all negative, suggesting that these judges are less likely to favor government litigants than judges facing unopposed retention election. The coefficients, however, are all statistically insignificant, preventing meaningful comparisons.

Thus, the results show that judges facing gubernatorial reappointment, legislative reappointment, or partisan reelection are more likely to vote for certain government litigants than judges with life tenure or judges facing nonpartisan reelections or retention elections in merit systems. The results are consistent with the hypothesis that these judges vote strategically in the cases that involve issues important to the government branches that are responsible for or important to their retention.

D. Political Loyalty or Retention Concerns

Appointed judges' voting in favor of government litigants may reflect retention concerns or political loyalty, or both. That is, judges may feel ex ante pressure to vote strategically to avoid reappointment denials from the other branches of government. Alternatively, judges may feel ex post pressure to vote in favor of the other government branches to show loyalty to the politicians who appointed them.

Although both ex ante and ex post concerns may influence judges' voting, I perform several analyses to try to distinguish the relative importance of each effect. First, I reestimate Equation (1) with an additional variable that indicates which states use

121. *See, e.g.*, Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 ALB. L. REV. 713, 717–18 (2005) (looking to New York City as a typical example of how lack of voter interest "vests judicial selection with political party leaders").

gubernatorial appointments for judges' initial terms but then use a different method for retention. California and New Hampshire select and retain judges in this way; no states switch from legislative appointment to another retention method. This estimation can measure how voting for government litigants differs between judges facing gubernatorial reappointment and judges that were originally appointed by the governor but face a different retention method. Table 3 reports the results. The results indicate that, whereas judges facing gubernatorial reappointment are more likely to vote for executive branch litigants and total government litigants (compared to the base category), originally appointed judges that face another retention method are less likely to vote for these litigants (compared to the base category). Although the results for appointed judges that face another retention method are based on judicial voting in only two states, they are consistent with retention concerns exerting a stronger influence than political loyalty on judges facing reappointment.

Table 3. Gubernatorial Appointment versus Gubernatorial Reappointment[122]

Retention Method	All Gov't Litigants	Executive Branch Litigant
Gubernatorial Reappointment	0.06+ (1.89)	0.07+ (1.94)
Original Gubernatorial Appointment	-0.08+ (1.72)	-0.12* (2.02)
Legislative Reappointment	0.09* (3.50)	0.08* (2.28)
Partisan Reelection	0.03 (1.24)	0.06+ (1.92)
Nonpartisan Reelection	0.01 (0.46)	0.02 (1.11)
Permanent Tenure	-0.03 (1.04)	-0.05 (1.21)
Number of Obs.	24865	15985
Log Likelihood	-14892	-10002

122. Table 3 reports the marginal effects of each retention method variable on the probability of a judge voting for the relevant litigants, based on probit estimates. The other control variables are not reported for brevity. T-statistics are reported in parentheses. The symbols "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.

Next, I explore whether judges are more likely to vote for government litigants as their retention approaches. I reestimate Equation (1) with interaction variables between the retention methods and the years to retention.[123] Table 4 reports the results. The coefficients indicate the marginal increase in the probability that a judge from each retention method votes for the government litigant as the judge gets one year closer to retention.

The results suggest that judges facing gubernatorial reappointment, legislative reappointment, and partisan reelections are all more likely to vote for certain government litigants as retention approaches. For example, the probability that a judge facing a gubernatorial reappointment votes for an executive branch litigant increases by 1.6 percent for each year the judge gets closer to retention.

The results imply that judges appear to engage in more strategic voting as retention approaches. This finding is consistent with the hypothesis that retention concerns are an important influence on judges' voting in cases involving government interests; if political loyalty were the only influence on judges' voting, judges' likelihood of voting for government litigants would not increase as retention drew near. If anything, political loyalty should induce judges to more strongly favor government interests earlier in their term, soon after they receive their appointment.

Table 4. Judges' Voting as Retention Approaches[124]

Retention Method * Years to Retention	**All Gov't Litigants**	**Executive Branch Litigant**	**Legislative Branch Litigant**	**Judicial Branch Litigant**	**Declare State Law Unconstitutional**
Gub. Reappt. * Years to Retention	0.016* (3.82)	0.017* (3.52)		-0.01 (0.55)	-0.03* (1.97)

123. The variables are actually the interaction between each retention method and the inverse of the years to retention (as the longest number of years to retention during my sample is twelve, the inverse years to retention is thirteen minus the years to retention). Moreover, the sample is limited to judges that don't have life tenure to compare the impact of approaching retention on judges under different retention methods.

124. Table 4 reports the marginal effects of each retention method variable on the probability of a judge voting for the relevant litigants, based on probit estimates. The other control variables are not reported for brevity. T-statistics are reported in parentheses. The symbols "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.

Leg. Reappt. * Years to Retention	0.01* (3.28)	0.008* (2.20)	0.05* (2.21)	0.03* (3.04)	0.01 (1.31)
Partisan Reelection * Years to Retention	0.005* (2.21)	0.007* (2.36)	-0.006 (0.34)	-0.006 (0.89)	0.003 (0.46)
Nonpartisan Reelect * Years to Retention	-0.0005 (0.31)	0.002 (1.10)	-0.002 (0.10)	-0.0009 (0.20)	0.007 (1.07)
Number of Obs.	13180	8378	184	2094	912
Log Likelihood	-7723	-5069	-97	-1137	-487

Finally, I test whether judges vote differently in their last term before retirement than they do when facing retention. Thirty-seven states have mandatory retirement laws that compel judges to retire sometime between age seventy and seventy-five. By examining how judges vote in their last term before mandatory retirement, I can test whether appointed judges that no longer have retention concerns are still more likely to vote in favor of government litigants.

Table 5 reports the results. It appears that many judges in their last term before mandatory retirement are less likely to vote for government litigants than if they were not retiring. The results suggest that no significant difference in voting exists between the base category and either retiring judges that would have faced gubernatorial reappointment (if they had not retired) and retiring judges that would have faced a partisan reelection (if they had not retired). Retiring judges that would have faced legislative reappointment (if they had not retired), however, are still significantly more likely to vote for government litigants than the base category.

The insignificant results for retiring judges in gubernatorial reappointment systems and partisan reelection systems suggest that, for these judges, retention concerns are the dominant influence on their voting in cases in which the state government has a stake. When these judges no longer have retention concerns, they are no more likely to vote for government litigants than other judges.

The statistically significant results for retiring judges in legislative reappointment systems, however, suggest that retention concerns are not the only influence on these judges. Political loyalty also appears to be a strong influence that continues to affect judges' voting even in their last term before mandatory retirement.

Table 5. Judges in the Last Term before Mandatory Retirement[125]

Retention Method	All Gov't Litigants	Executive Branch Litigant	Judicial Branch Litigant
Gubernatorial Reappointment	0.04 (0.69)	0.05 (0.77)	0.105 (0.85)
Legislative Reappointment	0.11* (3.14)	0.124* (2.68)	-0.02 (0.10)
Partisan Reelection	0.000001 (0.0001)	0.005 (0.07)	0.11 (1.00)
Nonpartisan Reelection	0.03 (0.91)	0.03 (0.67)	0.17 (1.48)
Number of Obs.	2469	1578	299
Log Likelihood	-1409	-956	-110

The results thus suggest that, although retention concerns and political loyalty are both possible influences on judges' voting in cases in which the state government has a stake, for many judges, retention concerns seem to be the most important consideration.

E. Judicial Review under Different Retention Methods

I also explore whether the willingness of judges to declare state statutes unconstitutional differs among retention methods. If judges facing gubernatorial or legislative reappointment are less likely to challenge the legislation of the other governmental branches, this

125. Table 5 reports the marginal effects of each retention method variable on the probability of a judge voting for the relevant litigants, based on probit estimates. The estimation is limited to the sample of judges in their last term of office before mandatory retirement in states that do not have permanent tenure for judges. There were not enough observations for an estimation on the probability of judges voting for legislative branch litigants. The other control variables are not reported for brevity. T-statistics are reported in parentheses. The symbols "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.

would suggest that these judges vote strategically so that the other branches of government will not sanction them for unpopular rulings.

I estimate a new model in which the dependent variable is the probability that the judge votes to overturn a state statute when one is challenged. I test both whether the probability of overturning statutes differs among retention methods and whether the probability of overturning statutes changes as retention approaches.

Table 6 reports the results. The results suggest that no statistically significant difference exists among retention methods in judges' likelihood of overturning statutes. The results do suggest, however, that judges facing gubernatorial reappointment become less likely to overturn statutes as retention approaches; the statistically significant coefficient indicates that each year closer to retention makes a judge facing a gubernatorial reappointment 3 percent less likely to overturn a statute.

Although the results suggest there is no significant difference among judges' likelihood of overturning statutes under different retention methods, other explanations also exist for the weak results. Other factors may also have a stronger influence on judges voting to overturn statutes.[126] Or governors and legislatures may not oppose overturning statutes if the statutes were enacted under different administrations or legislative majorities, and thus one would not expect differences among retention methods. Alternatively, there may be no difference in overturning statutes if there is a selection bias in the cases that the courts hear. Prior evidence suggests that, because courts that do not want to overturn the legislation of the other government branches refuse to hear the statutory challenges in the first place, judges in those courts do not have a lower rate of overturning statutes.[127]

126. For a discussion of other factors, see Brace et al., *supra* note 98, at 1291; *supra* notes 98–100 and accompanying text.

127. For evidence of this effect, see Brace et al., *supra* note 98, at 1291.

Table 6. Retention Influences on Judges' Voting to Overturn State Statutes[128]

Retention Method	**Declare State Law Unconstitutional**	**Retention Method**	**Declare State Law Unconstitutional**
Gubernatorial Reappointment	-0.03 (0.28)	Gub. Reappt. * Years to Retention	-0.03* (1.97)
Legislative Reappointment	0.05 (0.39)	Leg. Reappt. * Years to Retention	0.01 (1.31)
Partisan Reelection	0.05 (0.59)	Partisan Reelection * Years to Retention	0.003 (0.46)
Nonpartisan Reelection	0.13+ (1.84)	Nonpartisan Reelect * Years to Retention	0.007 (1.07)
Permanent Tenure	0.09 (0.74)		
Number of Obs. Log Likelihood	1873 -1064	Number of Obs. Log Likelihood	912 -487

IV. IMPLICATIONS AND CONCLUSIONS

The results of this analysis support the hypothesis that judges facing gubernatorial or legislative reappointment vote strategically to avoid reappointment denials. There are, however, potential weaknesses with this analysis. For instance, the data cannot differentiate between cases in which the other government branches have a large stake in the outcome of the case versus a small stake; only a much more detailed case analysis could provide this information. This analysis is also unable to control for selection bias. That is, there could be significant differences in the types of cases that are appealed to the state supreme courts among different retention methods. Moreover, there are other competing alternative explanations for the patterns observed in the data. For example, the fact that judges facing gubernatorial reappointment are more likely to

128. Table 6 reports the marginal effects of each retention method variable on the probability of a judge voting to overturn state statutes, based on probit estimates. The other control variables are not reported for brevity. T-statistics are reported in parentheses. The symbols "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.

vote for executive branch litigants could be explained by better decisions and rulemaking by governors in states that entrust judicial retention to the executive branch. Alternatively, states with strong executive branches may also have a body of doctrine that is very deferential to the executive branch; the judges may simply be neutrally applying the proexecutive law.

When the results are considered collectively rather than individually, however, the evidence supports the hypothesis that retention concerns influence appointed judges. That judges' strategic voting increases as retention approaches but is almost nonexistent among judges with life tenure or those facing mandatory retirement strongly suggests that retention concerns are an important influence.

The results also suggest that, in many types of cases, judges seeking gubernatorial or legislative reappointment are at least as strategic, and possibly more strategic, than judges facing reelection. Although numerous scholars have argued that elective systems threaten judicial independence, my results suggest that appointive systems also lead to bias in certain types of cases. Moreover, whereas elected judges that vote strategically are defended as being accountable to the people they represent, there is no defendable explanation for appointed judges favoring government litigants. This form of strategic voting by appointed judges threatens the separation of powers that underlies American democracy. Judges who are beholden to politicians for their jobs may be unable to check the power of the other governmental branches.

The distinct risks both elective and appointive systems pose should be considered as states evaluate their existing systems or consider reforms. Numerous previous studies have shown that voters' preferences influence how judges facing reelection vote. Similarly, the preferences of government branches responsible for retaining judges appear to influence how judges facing reappointment vote. The lesson from these studies may be that judicial independence is only possible when judges face no retention concerns. Thus, either permanent tenure systems or merit selection systems that have extremely high retention rates may be the best systems if a state's primary goal is increasing judicial independence.

APPENDIX A: FULL SET OF PRIMARY RESULTS[129]

Retention Method	All Gov't Litigants	Executive Branch Litigant	Legislative Branch Litigant	Judicial Branch Litigant
Gubernatorial Reappointment	0.06+ (1.89)	0.07* (1.97)	-.44 (1.50)	-0.09 (0.58)
Legislative Reappointment	0.09* (3.54)	0.08* (2.35)	0.40* (2.38)	0.25* (3.67)
Partisan Reelection	0.03 (1.36)	0.06* (2.10)	-0.18 (0.93)	-0.03 (0.43)
Nonpartisan Reelection	0.01 (0.58)	0.03 (1.30)	0.10 (0.42)	0.08 (1.60)
Permanent Tenure	-0.04 (1.38)	-0.06 (1.53)	-0.52 (1.48)	-0.02 (0.21)
Other Litigant Is a Person	0.025 (1.22)	0.052* (2.14)	0.20 (1.27)	0.15* (3.10)
Other Litigant Is a Business	-0.038+ (1.69)	-0.013 (0.51)	0.24 (1.18)	-0.21* (2.35)
Judges' PAJID Scores	0.001* (2.90)	0.001 (1.35)	0.007* (2.74)	0.002* (2.25)
Percent Years with Repub. Legis.	0.002* (6.15)	0.0004* (3.74)	0.004 (1.23)	0.0009 (1.20)
Years on Court	-0.0002 (0.38)	0.0004 (0.70)	0.006 (1.18)	0.0015 (1.17)
Lower Appellate Court Indicator	0.012 (0.66)	-0.014 (0.63)	-0.28 (1.15)	0.098+ (1.82)
En Banc Indicator	0.003 (0.19)	0.007 (0.36)	0.10 (0.54)	-0.034 (0.74)

129. Appendix A reports the marginal effect of each retention method variable on the probability of a judge voting for the relevant litigants, based on probit estimates. The indicator variables for year and the general issue in the case are not reported for brevity. T-statistics are reported in parentheses. The symbols "*" and "+" represent significance at the 5 percent and 10 percent levels, respectively.