JUDICIAL INDEPENDENCE AND NONPARTISAN ELECTIONS*

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This Article argues against the conventional wisdom about nonpartisan judicial elections. In contrast to the claims of policy advocates and the scholarly literature, we suggest that nonpartisan elections do not necessarily encourage greater judicial independence than partisan elections. Instead, nonpartisan elections create the incentive for judges to cater to public opinion, and this pressure is particularly strong for the types of issues that attract attention from interest groups, the media, and voters. After developing this argument, we support it with new empirical evidence. Specifically, we examine patterns of judicial decisions on abortion-related cases heard by state courts of last resort between 1980 and 2006. Analyzing nearly 600 decisions from sixteen states, we demonstrate that public opinion about abortion policy affects judicial decisions in nonpartisan systems, while no such relationship exists in states with partisan elections. Accordingly, this Article suggests that in states with nonpartisan elections, public opinion plays an underappreciated role in the courtroom.

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> *I think it's sad for the judiciary and the constitutional form of government, because special interest groups have been targeting judges around the nation. The independence of the judiciary is one-third of your system of checks and balances, and when you reject that, you're rejecting a substantial portion of your protection under the Constitution.*
>
> —Nevada Supreme Court Justice Nancy Becker, after losing a nonpartisan election[1]

> *For states that retain contested judicial elections as a means to select or reselect judges, all such elections should be non-partisan and conducted in a non-partisan manner.*
>
> —Official policy of the American Bar Association[2]

INTRODUCTION

As these quotes attest, the subject of judicial selection remains a major policy issue. In keeping with this importance, a good deal of legal scholarship considers how different procedures for selection affect *judicial independence*,[3] which is commonly defined as the ability of judges to issue decisions without fearing negative political consequences.[4] Research suggests this ability encourages societal

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1. Jane Ann Morrison, *Losers Can Look to God or Other Outside Forces to Explain Election Results*, LAS VEGAS REV.-J., Nov, 9, 2006, at 1B.

2. AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY app. A, at 4 (2003), *available at* http://www.abanet.org/judind/jeopardy/pdf/report.pdf.

3. *See, e.g.*, Amy B. Atchison et al., *Judicial Independence and Judicial Accountability: A Selected Bibliography*, 72 S. CAL. L. REV. 723 (1999); Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 31 (1986) ("[N]o single subject has consumed as many pages in law reviews and law-related publications over the past fifty years as the subject of judicial selection."); James L. Gibson, *Judicial Institutions*, *in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 514, 528–30 (R.A.W. Rhodes et al. eds., 2006) (discussing this research agenda and issues that remain insufficiently addressed).

4. *See, e.g.*, Charles M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares?*, *in* JUDICIAL INDEPENDENCE AT THE

benefits such as civil liberties and economic growth.[5] Because independence eliminates a judge's need to fear politically motivated punishments, the property is inherently at variance with judicial accountability. Indeed, in contrast to the notion of independence, accountability requires the public to have an important role in selecting and monitoring judges.[6]

This inherent tension between these concepts has not prevented Americans from seeking them simultaneously. As Professor James Gibson summarizes, "[T]he American people . . . seem to want both independence and accountability from their courts."[7] Accordingly, reformers throughout U.S. history have struggled to balance the goals of independence and accountability. Indeed, the states have extensively experimented with various procedures for judicial selection and retention. Current procedures encompass partisan elections, nonpartisan elections, retention elections, appointment by a judicial nominating commission, and appointment by the governor, among other practices.[8] Over time, scholars and other observers have generated conventional wisdom about the extent to which each of these procedures encourages

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CROSSROADS: AN INTERDISCIPLINARY APPROACH 134, 138–40 (Stephen B. Burbank & Barry Friedman eds., 2002); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 696 (1995); Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate*, 39 U. TOL. L. REV. 551, 559 (2008).

5. *See, e.g.*, Cameron, *supra* note 4, at 142–43 (describing several studies of the relationship between judicial independence and economic growth); Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445, 445 (2004) (establishing a relationship between judicial independence and political freedom as well as between judicial independence and economic freedom).

6. *See* Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, *supra* note 4, at 9, 14–16 (noting that, while judicial independence and judicial accountability may not be mutually exclusive, an inherent tension exists between these concepts); Gibson, *supra* note 3, at 528 (arguing that judicial "independence and accountability are locked in zero-sum tension with each other").

7. Gibson, *supra* note 3, at 528.

8. The term *nonpartisan elections* conventionally refers to competitive elections in which neither candidate's partisan affiliation is placed on the ballot. Retention elections, in which incumbent judges do not face any opponent, also are nonpartisan in that the incumbents' parties are not listed on the ballot; however, the term *nonpartisan elections* typically does not refer to retention elections. For verification of these conventions and a full list of procedures for initial selection and reselection, see AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2007), *available at* http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf; F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 443 (2004).

judicial independence.[9] Notably, this conventional wisdom is based largely on reasoning that has not been subject to empirical analysis of judicial decisions.[10]

In this Article, we challenge a major component of the conventional wisdom, which is that nonpartisan elections engender more judicial independence than partisan elections do. As highlighted by the quotation at the beginning of this Article, the American Bar Association (ABA) has recently endorsed policies based on this presumption.[11] Retired Supreme Court Justice Sandra Day O'Connor has similarly recommended nonpartisan elections over partisan ones on these grounds.[12] These endorsements cannot be faulted in isolation, as they follow the tenor of the existing scholarly literature.[13] However, we will establish that the conventional wisdom is at least partially mistaken. In particular, we will contend that nonpartisan elections encourage judges to be responsive to public opinion. Most significantly, we will provide empirical evidence that supports this argument.

The logic of our argument derives from the informational environment that voters face in different types of electoral systems. In partisan systems, voters know a candidate's partisan affiliation, which they can presume will correlate at some level with a judge's philosophy and ideological leanings.[14] Nonpartisan elections, by comparison,

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9. *See, e.g.*, Daniel Berkowitz & Karen Clay, *The Effect of Judicial Independence on the Courts: Evidence from the American States*, 35 J. LEGAL STUD. 399, 416–17 (2006); Lee Epstein et al., *Selecting Selection Systems*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, *supra* note 4, at 191, 207–08; AM. BAR ASS'N, *supra* note 2, app. A, at 4.

10. *See* Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 315 (2001) ("[T]he premises underlying the three election systems [of partisan, nonpartisan, and retention elections] have not been subjected to scientific scrutiny, although they have guided the choices of state governments in recent decades."); Saphire & Moke, *supra* note 4, at 552 (arguing that legal scholarship and policy reformers should employ "empirical evidence to move the judicial selection debate outside its traditional ideological parameters"). *But see id.* at 578–83 (conducting empirical analysis that compares the tort decisions of judges facing retention elections with the decisions of judges facing other types of elections).

11. AM. BAR ASS'N, *supra* note 2, app. A, at 4.

12. Sandra Day O'Connor, Op-Ed., *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25 ("The first step that a state like Pennsylvania can take to reverse this trend is replace the partisan election of its judges with a merit-selection system, or at least with a nonpartisan system in which the candidates do not affiliate with political parties.").

13. *See, e.g.*, Berkowitz & Clay, *supra* note 9, at 416–17; Epstein et al., *supra* note 9, at 207–08; Hanssen, *supra* note 8, at 460–61.

14. David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL. RES. Q. 709, 719–20 (2001) (discussing the effect of partisan labels on voting behavior); *see also* Shanto Iyengar, *The Effects of Media-*

provide no such cue.[15] As a consequence, in nonpartisan systems interest groups and others can more easily shape voters' perceptions of a judge by publicizing isolated rulings.

After detailing this argument and how developments in judicial campaigns relate to it, we analyze data on the decisions of judges who serve on the highest state appellate courts. These data concern an issue, abortion, which has been prominent in recent judicial campaigns. Specifically, we examine abortion-related decisions from 1980 through 2006 in states with partisan or nonpartisan elections for the state court of last resort or "state supreme court."[16] The analysis begins with basic summary statistics and proceeds to regression analysis. In each type of empirical test, the results suggest that public opinion has a larger effect on judges facing nonpartisan elections than judges facing partisan ones.

The remainder of the Article is organized into five major Parts. Parts I and II provide background for understanding the debate about selection procedures in the context of modern judicial campaigns. Part I supplies a historical overview of judicial selection in the states, emphasizing the desire of reformers to increase judicial independence. Part II describes trends in judicial campaigns. Part III lays out the key theoretical argument. Background on the data takes up Part IV, and Part V details the empirical evidence. The Article concludes by considering implications of the findings for the debate over judicial selection.

I. HISTORICAL OVERVIEW OF JUDICIAL SELECTION

The history of judicial selection in the states is one of repeated attempts by reformers to increase the institutional independence and prestige of the judiciary. Initially, in the half-century following the founding of the United States, state constitutions gave the most democratic branch of the government—state legislatures—a good deal

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Based Campaigns on Candidate and Voter Behavior: Implications for Judicial Elections, 35 IND. L. REV. 691, 693 (2002) ("[I]in the case of partisan elections . . . voters rely on their party affiliations on the assumption that the candidate of their party is more responsive to their preferences.").

15. *See, e.g.*, Peter D. Webster, *Selection and Retention of Judges: Is there One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 25–26 (1995) (noting that nonpartisan elections, by removing partisan political considerations from the electoral process, limit the information available to voters); Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 461 (1993) (commenting that nonpartisan elections lead to a more representative judiciary but limit the knowledge of voters).

16. We recognize that some of these state courts of last resort, such as the New York Court of Appeals, have names that do not include the term *supreme court*. However, scholars and policy makers commonly refer to these entities collectively as *state supreme courts*. We follow this practice.

of control over the courts.[17] In particular, legislatures possessed extensive removal powers and substantial control over the appointments process.[18] Judicial elections, which were by default partisan, first appeared in Georgia in 1812 for lower court judges;[19] in 1836, Mississippi became the first state to elect supreme-court justices.[20]

It is tempting to view the advent of judicial elections as simply one of the many reforms by which Jacksonian Democrats hoped to increase popular control of government.[21] However, this view would understate the role of the legal profession, which regarded these elections as a way to increase the independence and prestige of the judiciary.[22] Indeed, legal scholar Kermit Hall goes so far a to claim, "The rise of popular, partisan election of appellate judges is best understood as an essentially thoughtful response by constitutionally moderate lawyers and judges in the Whig, Democratic, and Republican parties."[23] Under the original system, the courts were practically agents of the legislatures. Post-reform judges, meanwhile, could count on separate bases of political support. Moreover, the adoption of elections was generally accompanied by other procedures that supported judicial independence, such as lengthier terms and greater protection from removal by the legislature.[24]

During the latter half of the nineteenth century, however, partisan elections did not produce a good deal of judicial independence or prestige. The rise of political machines combined with partisan

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17. Hanssen, *supra* note 8, at 441–45 (observing that state legislatures had substantial control over the courts during the postcolonial period).

18. *Id.* at 441–43; *see also* Larry C. Berkson, *Judicial Selection in the United States: A Special Report*, 64 JUDICATURE 176, 176 (1980) (documenting the various procedures across the states in the postcolonial era).

19. Berkson, *supra* note 18, at 176.

20. *Id.*

21. Indeed, some reformers were concerned with reducing the influence of special interests, particularly property owners. *See* James E. Lozier, *The Missouri Plan a/k/a Merit Selection: Is It the Best Solution for Selecting Michigan's Judges?*, 75 MICH. B.J. 918, 918–19 (1996).

22. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920*, 1984 AM. B. FOUND. RES. J. 345, 347–48; Hanssen, *supra* note 8, at 441 (noting that the reform was intended to make judges independent of the legislature by giving them "a power base of their own, through popular elections").

23. Hall, *supra* note 22, at 347–48; *see also* Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 203 (1993) ("Hall is correct that the reformers who backed the elective judiciary intended to check legislatures, but he is wrong to suggest that they identified legislatures with popular majorities. Indeed, the delegates wanted to check legislatures precisely because the legislatures were *not* reliably majoritarian.").

24. Hanssen, *supra* note 8, at 446–48.

elections meant that judges were beholden to parties and their associated special interests.[25] Within this context, the legal profession and Progressive reformers came to support nonpartisan elections as a superior means of obtaining judicial independence and legitimacy.[26] The expectation was that nonpartisan elections, by insulating judges from ordinary political pressures, would encourage them to behave more like statesmen and less like politicians.[27] Correspondingly, the Progressives and other reformers hoped that factors such as professional qualifications and other merit-based criteria would become central to judicial contests.[28]

As with the introduction of partisan elections, the role of the legal profession in supporting the creation of nonpartisan elections should be underscored. In fact, this reform helped spur the creation of bar associations. As economist Andrew Hanssen observes, "The first formal bar associations were established during [the late nineteenth and early twentieth centuries], galvanized by opposition to the power over state courts exercised by party machines."[29] The most famous of these associations, the ABA, advocated strongly against partisan elections upon its founding in 1878.[30] North Dakota began utilizing nonpartisan elections for state supreme-court justices in 1910,[31] and other states quickly followed suit. California and Ohio adopted the procedure in

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25. Samuel Latham Grimes, "*Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?*, 76 N.C. L. REV. 2266, 2273 (1998) ("Political machines soon gained control of the judicial selection process. Citizens came to view the judiciary as corrupt, incompetent, and controlled by special interests."); *see also* Berkson, *supra* note 18, at 177–78 (noting the role of political parties in selecting judicial candidates during this period).

26. Hanssen, *supra* note 8, at 448–51; *see also* AMY BRIDGES, MORNING GLORIES: MUNICIPAL REFORM IN THE SOUTHWEST 72–73 (1997) (discussing the push by Progressives for nonpartisan elections in various types of political offices); Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 429 (2006) ("While nonpartisan elections were a part of the progressive movement, eliminating partisan elections was also a goal of the reformers who sought to end the dominance of political machines in major cities and in many states.").

27. *See* Hanssen, *supra* note 8, at 449; *see also* Epstein et al., *supra* note 9, at 198–99 (discussing scholarship that suggests reformers hoped to increase judicial independence by adopting nonpartisan elections). *But cf.* Epstein et al., *supra* note 9, at 214–17 (emphasizing that reformers often are driven by self-interested political motivations).

28. Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 LAW & SOC'Y REV. 579, 580 (1972).

29. Hanssen, *supra* note 8, at 449–50.

30. *Id.* at 450.

31. *Id.* at 434.

1911, and within the next four years, twelve additional states employed nonpartisan elections to select members of the state supreme court.[32]

Scholars generally agree that the implementation of nonpartisan elections reduced voters' dependence on party cues, but at the same time, suggest that the change did not cause voters to seek out statesmen. To the contrary, many contend that the reform severely limited voters' ability to make reasoned decisions. For instance, Samuel Grimes maintains that "the electorate was more uninformed than ever about judicial candidates."[33] The elections decreased turnout and increased roll-off for judicial contests (whereby a voter fails to mark his or her ballot for a particular contest).[34] Additionally, the role of parties in the selection process remained strong: party leaders still routinely selected the candidates to be placed on the ballot.[35] Voters were then in the position of choosing between partisan candidates without the benefit of partisan labels.

Merit selection was designed to minimize these problems and, correspondingly, to further the professionalism of the judiciary. In 1906, legal scholar Roscoe Pound famously argued in a speech to the ABA that "traditional respect for the Bench" had been destroyed by electoral procedures that had forced judges to become politicians.[36] Pound went on to cofound the American Judicature Society in 1913 with the hope that the organization would develop a new and better selection procedure.[37] Another cofounder, Alfred B. Kales, a professor at Northwestern Law School, soon drafted what is commonly known as the "merit plan" or "Missouri plan."[38] Under this procedure, a judicial nominating commission selects candidates who are put forward to an elected official (under Kales's plan, the chief justice, but as the plan has been implemented, this official is commonly the governor).[39] That official selects a judge from the commission's list, and, within a specified period, the judge faces an initial retention election followed

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32. *See id.* at 455.

33. Grimes, *supra* note 25, at 2273; *see also* Hall, *supra* note 22, at 357 ("At the very least these reforms seem to have prompted voter apathy by eliminating the best means of identifying candidates—party affiliation.").

34. *See* Hall, *supra* note 22, at 356–62.

35. *See, e.g.*, Berkson, *supra* note 18, at 177 ("New candidates for judgeships were regularly selected by party leaders and thrust upon an unknowledgeable electorate, which, without the guidance of party labels, was not able to make reasoned choices."); Grimes, *supra* note 25, at 2273 (observing that when states adopted nonpartisan elections between 1870 and 1930, parties still controlled the selection of candidates).

36. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUDICATURE SOC'Y 178, 186 (1937).

37. Hanssen, *supra* note 8, at 451–52.

38. Epstein et al., *supra* note 9, at 199.

39. *Id.*

by regularly scheduled retention elections.[40] Missouri became the first state to adopt this type of plan in 1940.[41]

Currently, nonpartisan elections and the merit or Missouri plan are the most popular procedures for selecting (and reselecting) state supreme-court justices.[42] However, a variety of other methods remain, including partisan elections, appointment by the governor and/or legislature, and hybrids of the most common procedures.[43] Moreover, states that change procedures do not always adopt the merit plan. For instance, since 2000, both Arkansas and North Carolina have switched from partisan to nonpartisan elections.[44]

With this diversity in mind, the ABA now offers a large number of recommendations, approved by the House of Delegates in 2003, which compare common types of selection procedures.[45] As the quote at the outset of this Article highlights, these recommendations explicitly rank nonpartisan elections over partisan ones. The accompanying commentary by then ABA president Alfred P. Carlton, Jr.[46] justifies this ranking by suggesting that the former should produce more judicial independence than the latter.[47] Scholarship in law and political science offers a similar ranking of how the procedures affect judicial independence.[48]

In sum, nonpartisan elections remain an important type of procedure for judicial selection in the state supreme courts. The conventional wisdom—which harks back to arguments and evidence from the turn of the century—suggests that such elections should increase judicial independence and, correspondingly, reduce judges' accountability to voters by comparison to partisan elections. Regardless whether one believes democratic accountability is a desirable feature of

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40. *Id.* at 199–200.

41. *Id.* at 200.

42. *See* AM. JUDICATURE SOC'Y, *supra* note 8.

43. For instance, in Pennsylvania, judges initially face a partisan election but retain their positions through retention elections. *See* Hanssen, *supra* note 8, at 443.

44. *See* AM. JUDICATURE SOC'Y, *supra* note 8.

45. AM. BAR ASS'N, *supra* note 2, app. A, at 4.

46. Unlike the text of the recommendations, which represents official ABA policy, the supplementary commentary by the ABA president does not necessarily reflect the official position of the association.

47. *Id.* at 77 ("The net effect [of partisan elections] is to further blur, if not obliterate, the distinction between judges and other elected officials in the public's mind by conveying the impression that the decision making of judges, like that of legislators and governors, is driven by allegiance to party, rather than to law. It is therefore unsurprising that many of the most extreme examples of independence-threatening election-related behavior have occurred in states that select their judges in either openly partisan elections or elections that are nonpartisan in name only.").

48. *See* sources cited *supra* note 13.

a judiciary, then, the notion that nonpartisan elections might actually increase such accountability is at odds with long-held beliefs. Nevertheless, in the next Part, we will argue that recent developments in judicial campaigns should provoke significant rethinking.

II. TRENDS IN JUDICIAL CAMPAIGNS

Historically, judicial elections were considered "low information" contests in which the electorate's knowledge was significantly less than that in presidential or congressional races.[49] In general, in low-information elections, voters approach the ballot box without a clear understanding of each candidate's qualifications or policy positions (outside of party affiliation, if any is listed on the ballot), and media coverage of the contest is low.[50] Accordingly, issues were not a central part of traditional judicial contests. Voters may have known a candidate's name, or in the case of partisan elections his or her party affiliation, but little else.[51] The hope of Progressives and other reformers had been that professional qualifications, experience, and other merit-based criteria would become central as states moved from partisan elections to nonpartisan procedures.[52] However, these hopes turned out to be in vain; numerous studies have found that judges selected through nonpartisan contests do not have significantly better qualifications than judges selected through partisan elections.[53] Yet at

49. Philip L. Dubois, *The Significance of Voting Cues in State Supreme Court Elections*, 13 L. & SOC'Y REV. 757, 759 (1979) (observing that judicial electorates lack the information possessed by voters in presidential and congressional races); *see also* John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 53 (2002) (noting that judicial elections tend to be "low-information affairs").

50. *See* John E. Mueller, *Choosing Among 133 Candidates*, 34 PUB. OPINION Q. 395, 402 (1970) (discussing the fact that judicial elections tend to involve "minimal information"). *See generally* Gary C. Bryne & J. Kristian Pueschel, *But Who Should I Vote for for County Coroner?*, 36 J. POL. 778, 778 (1974) (observing the lack of information that voters have about many low-profile elected officials).

51. *See, e.g.*, *How Much Do Voters Know or Care About Judicial Candidates?*, 38 JUDICATURE 141, 141–42 (1955) (finding that only 30 percent of voters could name a judge they had voted for within ten days of a judicial election); Mary L. Volcansek, *An Exploration of the Judicial Election Process*, 34 W. POL. Q. 572, 572 (1981) (describing that previous studies suggest voters know little about judicial candidates).

52. *See* Canon, *supra* note 28, at 580.

53. *See, e.g.*, Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 231–33 (1987) (observing that judges in partisan systems are more likely to come from prestigious law schools and to have more experience than judges in nonpartisan systems); Hall, *supra* note 10, at 316 (discussing evidence that "the

least until recently, one could argue that voters' lack of attention to candidate merit was merely one component of a low-information campaign.

This is no longer the case. Recent trends in judicial campaigns have significantly altered the political landscape in which judicial elections take place: interest groups now publicize judicial candidates' positions and decisions in "attack ads" and other sorts of advertising, the media covers these campaigns more heavily, and judges themselves are more apt to publicize their records and policy positions. Compounding these trends is an influx of money that has enabled campaigns to use advertisements and travel to publicize candidates' views and records. In short, judicial campaigns have become more issue based and therefore more similar to legislative or executive campaigns. Professors Marie Hojnacki and Lawrence Baum have dubbed this set of developments the "new-style" judicial campaign.[54]

In this Part, we discuss the new-style judicial campaign in detail. The first Section discusses general changes in judicial campaigns while the second Section considers legal developments pertaining to judges' ability to advertise their positions. In the subsequent Part, we argue that these trends have undermined the intended purpose of nonpartisan election reform.

A. The Rise of Issue-Based Judicial Campaigns

The rise of issue-based campaigns in judicial contests has been widely documented and decried in previous scholarship.[55] Four interrelated trends characterize the development. First, interest groups have begun to play a greater role in state-level judicial contests. In a manner that is comparable to the widely documented increase in the involvement of interest groups in federal judicial appointments,[56] state

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professional credentials (e.g., prestige of legal education, legal and judicial experience) of judges are quite similar, regardless of the method of selection").

54. Lawrence Baum & Marie Hojnacki, *"New-Style" Judicial Campaigns and the Voters: Economic Issues and Union Members in Ohio*, 45 W. POL. Q. 921, 921 (1992).

55. *See, e.g.*, PATRICK M. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 77–111 (1990) (discussing issue-based campaign activity in modern judicial campaigns); Iyengar, *supra* note 14, at 695 (describing the increased use of television and radio advertisements that describe judges' policy positions); Roy Schotland, *Proposed Legislation on Judicial Election Campaign Finance*, 64 OHIO ST. L.J. 127, 128 (2003) (noting the use of "issue ads" in judicial campaigns).

56. *See, e.g.*, LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 101–02 (2005) (discussing the growing importance of special-interest groups in the confirmation of United States Supreme Court justices);

judicial elections have witnessed a dramatic change in the role played by organized interest groups.[57] These groups routinely publicize judges' records through mass mailings,[58] and moreover, are central to two other changes that have fostered issue-based judicial campaigns: namely, the growing importance of political advertisements and the increased cost of running for office.

Judicial elections now involve much more political advertising than they did during decades in which most states adopted nonpartisan elections.[59] Central to this development has been the use of attack ads that criticize the other candidate.[60] Typically, these ads try to focus voters' attention on a specific substantive issue along with a candidate's

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Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: The Rise of Organized Conflict in the Politics of Federal Judgeships*, *in* CONTEMPLATING COURTS 44, 46–59 (Lee Epstein ed., 1995) (documenting the role of special-interest groups from the nineteenth century through the Clinton administration).

57. *See, e.g.*, Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 33 (2003) ("What has caused the growth of interest-group participation in judicial campaigns? The key factor is probably contagion: when some groups seemed to achieve success in defeating judges, other groups on the same side of interest-group conflicts picked up the idea."); *Call to Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353, 1354 (2001) (arguing that the increased role of special interests in judicial contests "present[s] a particularly grave and immediate threat").

58. *See, e.g.*, Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1104 (2006) (discussing "inflammatory mass mailings" about a decision by Tennessee Supreme Court Justice Penny White); Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 197 (1996) ("In the age of thirty-second campaign commercials and mass mailings, any decision can be twisted to meet an opponent's political ends.").

59. Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 671–74 (2002) (documenting the rise and significance of television advertising in judicial campaigns); *see also* Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 IND. L. REV. 755, 755–56 (2002) (describing interest-group expenditures on television advertising during the state supreme-court elections of 2000).

60. *See* Marie A. Failinger, *Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 462 (2005) ("[T]he direction of television advertising is toward 'hard-hitting and negative' ads, particularly those that are put out by third-party interest groups, since their candidate does not suffer any backlash from their negativity."); Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 626 (2004) (noting that the majority of third-party advertisements in the 2000 state supreme-court elections included attacks on candidates); Lindsay E. Lippman, Note, Republican Party of Minnesota v. White: *The End of Judicial Election Reform?*, 13 CORNELL J.L. & PUB. POL'Y 137, 146 (2003) (noting that special-interest groups are the primary force behind television attack ads on judicial candidates).

record on that issue.[61] Related to this trend is the fact that judicial campaigns have become increasingly expensive.[62] For instance, a recent contest for the Wisconsin Supreme Court involved nearly $6 million of spending.[63] Thus, in addition to the fact that judges may face attack ads that highlight isolated decisions or statements, the need for campaign financing can create pressure for judicial candidates to state their positions on various issues of importance to the sources of campaign contributions.[64]

Finally, the media has contributed to the rise of issue-based judicial campaigns. The media has covered judicial elections in greater detail over time, and in doing so, has provided voters with information about candidates' statements and positions.[65] For instance, the *Seattle Times* has devoted front-page coverage to endorsements by interest groups such as the National Abortion Rights Action League.[66] Overall, these interconnected changes to judicial contests—the increased involvement of interest groups, growth in political advertising, greater importance of campaign spending, and increased media scrutiny—have increased the electoral significance of judges' records on hot-button issues.[67]

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61. *See* Failinger, *supra* note 60, at 462–64 (discussing numerous examples of single-issue advertisements); Ryan L. Souders, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 550 (2006) ("Television advertisements that often distort candidates' views in short, thirty-second blurbs have become the weapons of choice in high-stakes state supreme court races.").

62. Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1080–81 (2007) (detailing the average expense of judicial campaigns over time); *see also* Nathan Richard Wildermann, Case Note, *Bought Elections*: Republican Party of Minnesota v. White, 11 GEO. MASON L. REV. 765, 769 (2003) ("The cost of running a campaign for the judiciary has increased at an alarming rate over the past two decades.").

63. Steven Walters & Stacy Forster, *Doyle Campaign Fund Tops $1 Million*, MILWAUKEE J. SENTINEL, July 22, 2008, at B3.

64. *See* Randall T. Shepard, *Electing Judges and the Impact on Judicial Independence*, 42 TENN. B.J. 22, 24 (2006) (describing the increasing pressure on judges to state their positions in response to interest-group questionnaires).

65. *See, e.g.*, Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 931 (2002) ("As judicial elections have become high profile, media coverage has also increased, and scrutiny has become more intense."); Iyengar, *supra* note 14, at 692 (observing that judicial campaigns will attempt to attract "free" media).

66. *See* Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1418 n.67 (2003).

67. Separately, some research has argued that issue-based campaigns are a natural consequence of the fact that judges have become more central to policy making over time. *See* Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 M.S.U.-D.C.L. L. REV. 849, 851 ("A primary catalyst of change in

1. ABORTION POLITICS IN JUDICIAL CAMPAIGNS

In this new-style campaign that is focused on candidates' positions, abortion is a prominent issue.[68] For instance, the Sunday before the Idaho Supreme Court elections in May 2000, the group Concerned Citizens for Family Values took out newspaper advertisements that stated, "Will partial birth abortion and same-sex marriage become legal in Idaho? Perhaps so if liberal Supreme Court Justice Cathy Silak remains on the Idaho Supreme Court."[69] Likewise, during a 2006 campaign for the Kentucky Supreme Court, a television advertisement for candidate David Barbour criticized the incumbent justice, Janet Stumbo, by claiming, "Janet Stumbo's opinion was, there's no criminal liability for killing an unborn child."[70] These advertisements complement groups' efforts to pressure judges to answer questionnaires that ask about abortion policy so that groups can advertise the responses (or lack thereof) in voter-education materials.[71] For instance, the questionnaires of North Carolina Right to Life and Kentucky Right to Life have asked judicial candidates whether they "believe that *Roe v. Wade* was wrongly decided."[72]

Above and beyond the activity of interest groups, judicial candidates themselves often advertise whether they are pro-life or pro-choice. For example, in a 2006 contest for the Alabama Supreme Court, Chief Justice Drayton Nabers made his pro-life leanings a part of the campaign. He stated in a paid advertisement, "I'm pro-life. Abortion on demand is a tragedy, and the liberal judicial opinions that

judicial elections has been the courts' increasingly prominent role in high-visibility policy matters such as abortion, gun control, the death penalty, and school vouchers.").

68. *See* Baum, *supra* note 57, at 36; Steve Ford, Op-Ed., *Mind Made Up—He's a Conservative*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 10, 2002, at A30; *Hot-Button Issues Pose Threat to Judicial Retention, Bar Leaders Told*, METROPOLITAN NEWS ENTERPRISE (Los Angeles, Cal.), Jan. 13, 1998, at 4; *Prosecutors' Group Praises Justices*, ASSOCIATED PRESS ST. & LOCAL WIRE, Sept. 23, 1998.

69. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1402 (2001).

70. Press Release, Kentucky Judicial Campaign Conduct Committee, Committee Finds Judge's Ad Misrepresents Opponent's Record (Oct. 27, 2006), *available at* http://www.judicialcampaignconduct.org/committees/Electronic%20Committee%20Files/KY%20misc/kjccchome.pdf.

71. *See* Cynthia Canary & Bert Brandenburg, Editorial, *Grilling By Interest Groups Puts Judges on the Hot Seat*, CHI. SUN-TIMES, Jan. 27, 2006, at 39; Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at A1.

72. *See* JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 30 (2007), *available at* http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf.

support it are wrong."[73] Similarly proactive in stating his position was Pennsylvania Supreme Court Justice Max Baer, who declared in his 2003 race that he was "pro-choice and proud of it."[74]

2. OTHER POLICY ISSUES

Abortion is hardly the only issue in the new-style campaign, however. For instance, the death penalty is a textbook example of such a hot-button issue.[75] Indeed, the most well-known example of judges losing reelection involves the simultaneous ouster of three California Supreme Court justices, including Chief Justice Rose Bird, in a 1986 campaign that focused squarely on death-penalty decisions.[76] Business and regulatory issues have also played prominently in judicial races over the past several decades.[77]

Two anecdotes serve to illustrate the importance of issue-based campaigns on a range of issues. The first involves former Nevada Supreme Court Justice Nancy Becker, whose quote at the beginning of this Article laments that "special interest groups have been targeting judges around the nation."[78] In her 2006 race for reelection, Justice

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73. Ruth Marcus, *Will the Attack Ads Come to Order?; Judicial Elections Just Keep Getting Pricier and Stinkier*, PITTSBURGH POST-GAZETTE, June 3, 2007, at H-3.

74. Robert Barnes, *Judicial Races Now Rife with Politics: Corporate Funds Help Fuel Change*, WASH. POST, Oct. 28, 2007, at A1.

75. *See, e.g.*, *Harris v. Alabama*, 513 U.S. 504, 520 (1995) (Stevens, J., dissenting) (noting that a high-profile issue such as the death penalty may cause elected state judges to be too responsive to public opinion); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 769 (1995) (discussing the need for judges facing reelection to embrace public opinion about the death penalty); Richard R.W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 611 (2002) ("When up for re-election, most judges simply cannot afford to ignore popular sentiment about the death penalty."); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1120–23 (1987) (observing a relationship between a judge's electoral calendar and sentencing behavior); Phyllis Williams Kotey, *Public Financing for Non-Partisan Judicial Campaigns: Protecting Judicial Independence While Ensuring Judicial Impartiality*, 38 AKRON L. REV. 597, 603–06 (2005) (discussing the role of death-penalty cases in heated state supreme-court elections in Tennessee and Texas).

76. John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 349–50 (1987) (documenting the salience of death-penalty decisions in the 1986 election).

77. *See* Hojnacki & Baum, *supra* note 54, at 923–24 (documenting the importance of business and union organizations in judicial elections); Robert Ankeny, *Business Hears a Call to Action in Judicial Races*, CRAIN'S DETROIT BUS., June 8, 1998, at 27.

78. Morrison, *supra* note 1.

Becker faced attack ads and editorials that criticized her for particular decisions, most significantly her vote in *Guinn v. Legislature of Nevada*.[79] Becker had voted with the majority to negate the requirement that tax increases receive support from two-thirds of the legislature.[80] At the same time, she received criticism for her vote in *Nevadans for Nevada v. Beers*,[81] which involved an eminent domain taking in Las Vegas.[82] Becker lost in the face of these attack ads.

A second instance involves West Virginia. In 2004, Warren McGraw, a judge on the West Virginia Supreme Court of Appeals, lost a heated reelection bid to Brent Benjamin.[83] The campaign against McGraw highlighted a decision in which he was in the majority that allowed probation for someone convicted of first-degree sexual assault.[84] A group called And For the Sake of the Kids ran numerous ads about this decision in a television market that was by no means inexpensive, as it encompassed the Washington, D.C. market.[85] The ads were largely financed by Don Blankenship, chief executive of a major coal company that was facing cases expected to come before the West Virginia Supreme Court of Appeals.[86] Even though Blankenship's purposes presumably involved cases related to his company, he was able to use McGraw's record on the hot-button issue of crime to affect the outcome of the election.

As these examples highlight, new-style judicial campaigns encompass various issues. Heated judicial contests have revolved around social policies such as abortion and criminal sentencing, as well as economic issues such as eminent domain and tax policy. This Section has described how such issues have become central to judicial

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79. 71 P.3d 1269 (Nev. 2003). For further details on the criticism received by Justice Becker, see Morrison, *supra* note 1; *Nancy Becker Faces Voters*, LAS VEGAS REV.-J., Sept. 22, 2006, at 8B; Vin Suprynowicz, *November's Election a Chance to Hose Out the Servants' Quarters*, LAS VEGAS REV.-J., Oct. 1, 2006, at 1D; Carri Geer Thevenot, *Supreme Court's Becker Falls to Saitta: Douglas Retains Seat*, LAS VEGAS REV.-J., Nov. 8, 2006, at 5B.

80. *See Nancy Becker Faces Voters*, *supra* note 79.

81. 142 P.3d 339 (Nev. 2006).

82. *See* Thevenot, *supra* note 79. Particularly in the wake of *Kelo v. New London*, 545 U.S. 469 (2005), eminent domain has become a particularly salient issue for voters and their approval of the courts.

83. *See* Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, WASH. POST, Nov. 4, 2004, at A15.

84. *See* Jennifer Bundy, *Judge Dismisses McGraw Libel Lawsuit: Ruling Says Ads Were Not Defamatory Because They Were True*, CHARLESTON DAILY MAIL (W. Va), July 26, 2005, at 6A. The decision was from *State v. Arbaugh*, 595 S.E.2d 289 (W. Va. 2004).

85. *See* Morello, *supra* note 83.

86. *Id.*

campaigns over many decades. In recent years, however, this development has become even more pronounced given legal developments regarding the ability of states to regulate the speech of judicial candidates.

B. Legal Developments Regarding Speech in Judicial Campaigns

Recent developments in the types of speech in which judicial candidates can legally engage have exacerbated the tendency for judicial campaigns to be no different than campaigns for other offices. Traditionally, the canons of judicial ethics precluded a judicial candidate or judge from discussing her views on issues that could come before her. The ABA promulgated this view in its Model Code of Judicial Conduct,[87] and states with elected judges generally adopted statutes that served this goal.[88] These announce clauses, as they are known, surpassed the standard limitations on speech for candidates to other types of elective office.[89] Until recently the federal courts by and large allowed states to enforce these restrictions on judicial speech.[90]

This changed in 2002 with the landmark ruling *Republican Party of Minnesota v. White*,[91] in which the Supreme Court of the United

87. MODEL CODE OF JUDICIAL CONDUCT § 4 (2007). The ABA first adopted a code of judicial ethics in 1924. In 1972, it promulgated the Model Code, which was later updated in 1992 out of concerns about the constitutionality of some of its provisions. For a fuller discussion, see Alexandrea Haskell Young, *The First Chink in the Armor? The Constitutionality of State Laws Burdening Judicial Candidates After* Republican Party of Minnesota v. White, 77 S. CAL. L. REV. 433, 435–36 (2004).

88. *See* Young, *supra* note 87, at 435–36.

89. Peter Gregory Juetten, Case Note, *Should They Stay or Should They Go: The Implications of* Republican Party of Minnesota v. White *on Restrictions of Speech During Judicial Election Campaigns*, 56 ARK. L. REV. 677, 684–87 (2003) (describing how states used to regulate speech by judicial candidates more strictly than that by candidates for legislative or executive offices).

90. *See, e.g.*, *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142–46 (3d Cir. 1991) (determining that regulation limiting judicial candidates' ability to announce their views on specific issues does not inherently violate the First Amendment); *Morial v. Judiciary Comm'n*, 565 F.2d 295, 306–07 (5th Cir. 1977) (ruling that requiring a judge to resign before announcing policy positions does not violate the First Amendment); *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1098 (N.D. Fla. 1990) (determining that prohibiting judges from discussing political issues is not sufficiently narrow); *Ackerson v. Ky. Judicial Ret. & Removal Comm'n*, 776 F. Supp. 309, 313–15 (W.D. Ky. 1991) (determining that a state may regulate campaign pledges on issues likely to come before the court); *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69, 75–76 (S.D. Ohio 1984) (ruling that a prohibition against judges making campaign statements does not violate the First Amendment). *But see Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 227–30 (7th Cir. 1993) (ruling that the regulation of campaign speech in judicial contests violates the First Amendment).

91. 536 U.S. 765 (2002).

States held unconstitutional state laws that prohibit a judicial candidate from "announc[ing] his or her views on disputed legal or political issues."[92] The case originated with the desire of a candidate for the Minnesota Supreme Court, Gregory F. Wersal, to state his opposition to rulings of that court without violating the announce clause of Minnesota.[93] The majority in *White* refused to say explicitly whether limitations on free speech in judicial elections should be identical to those regarding elections for legislative or executive office, although the majority decision suggests that judicial races are not substantially different from other types.[94] The dissenters, by contrast, would have drawn a bright line between elections for judges and other sorts of government offices.[95] Since *White*, the lower courts have struggled to determine whether judicial campaigns should look like legislative elections, and at least one court has concluded that they should.[96]

These legal developments highlight an important shift in the nature of judicial elections; judges, who at one time were forbidden from stating their positions on important political and legal issues, increasingly can and do run on these positions. Seen in this light, reform from partisan to nonpartisan selection methods, while previously intended to remove political influence from the selection of judges, may not serve its intended purpose. In particular, we will argue that in the context of these legal developments as well as the broader changes in judicial campaigns predating *White*, nonpartisan judicial elections have important political pressures of their own.

III. CHALLENGING THE CONVENTIONAL WISDOM

The issue-based judicial campaigns that we described in Part II are not centered on the details of cases or rulings. Legal precedent, judicial philosophy, and case facts are not ideal material for attack ads or sound bites on the evening news. What voters learn from these sources is that

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92. *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

93. *See* Christopher Rapp, *The Will of the People, the Independence of the Judiciary, and Free Speech in Judicial Elections After* Republican Party of Minnesota v. White, 21 J.L. & POL. 103, 120 (2005). These rulings included ones on abortion as well as crime and welfare. *Id.*

94. *Id.* at 124.

95. *White*, 536 U.S. at 803 (Stevens, J., dissenting) ("The disposition of this case on the flawed premise that the criteria for the election to judicial office should mirror the rules applicable to political elections is profoundly misguided."). *See generally* Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 319–20 (2003) (discussing Justice Stevens's and Ginsburg's dissents).

96. *Weaver v. Bonner*, 309 F.3d 1312, 1320–21 (11th Cir. 2002).

a candidate is disposed towards the death penalty or against it, that he is pro-life or pro-choice, probusiness or prolabor.[97] In this context, candidates face pressure to issue decisions that comport with voters' predispositions. Notably, this will be the case even if voters actually prefer judges who care about legal precedent, who have judicial philosophies that promote impartiality, and who are attentive to case facts. Because the structure and financing of a new-style campaign does not revolve around this sort of information, electoral choices will not be based on these matters. A voter simply learns whether a candidate seems disposed towards issuing decisions that comport with his or her policy dispositions.[98]

Of course, this sort of campaign occurs not only in nonpartisan judicial elections but in partisan ones too. Yet in partisan elections, voters learn candidates' partisan affiliations from the ballot, and scholars have found this information to be the most significant determinant of electoral behavior. As Professor Lawrence Baum notes,

> The great majority of voters have positive or negative attitudes toward the two major parties, and most identify with one party or the other. Even in presidential contests, in which most voters know a good deal about the candidates, voters' attitudes toward the parties are a powerful influence on their choices. As the volume of other information declines, party identification is likely to become increasingly important as a basis for choices between candidates. In judicial contests conducted with a partisan ballot, attitudes toward the parties are almost surely the chief determinant of the vote.[99]

Other research, too, has found that party has a uniquely significant effect on voters' decisions.[100] Voters who consider themselves Democrats will tend to vote for the Democratic candidate, and those who align with the Republicans for the Republican candidate.

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97. *See* Iyengar, *supra* note 14, at 694–96 (arguing that advertising shapes the agenda and frames the information voters have about candidates). In many ways, this trend is similar to that in modern presidential or congressional campaigns, where voters learn small pieces of information from advertising and sound bites. *See*, *e.g.*, TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY 209–36 (2001) (documenting experimental evidence about the effect of sound-bite information on voters' opinions about candidates).

98. For a formal model that analyzes these incentives, see Brandice Canes-Wrone & Kenneth W. Shotts, *When Do Elections Encourage Ideological Rigidity?*, 101 AM. POL. SCI. REV. 273, 276 (2007).

99. Baum, *supra* note 57, at 24–25.

100. *See* sources cited *supra* note 14.

Consequently, judges facing partisan elections will be under less pressure than judges facing nonpartisan ones to issue decisions that comport with public opinion.[101] In states with partisan elections, voters' decisions will largely be determined by partisanship.[102] Regardless of what a Democratic (or Republican) judge does, he will be unlikely to secure the votes of those affiliated with the Republican (or Democratic) Party. In a state with nonpartisan elections, however, a liberal judge could more easily gain the support of Republican voters by issuing decisions that comport with their preferences. After all, when these voters enter the ballot booth, they will not see any sort of partisan label attached to the judge. Moreover, and critically, the challenger will also not have a partisan label attached. For all the voters can surmise from the ballot, the challenger could be more liberal or more conservative than the incumbent.

Consider, for example, a partisan judicial election in a conservative state. If a Republican incumbent judge makes a pro-choice decision, then when the conservative voters are confronted with that information, the judge's identification with the Republican Party may be sufficient to outweigh the pro-choice decision. Voters may say to themselves, "Well, yes, this decision is pro-choice, but we know this judge is a conservative. Perhaps there is a good reason for this one decision, but even if not, then we think he is still more likely to cast pro-life votes than his Democratic opponent." However, consider that same judge in a nonpartisan state. That judge, if he makes a pro-choice decision, will be interpreted as more likely to cast pro-choice votes than his opponent. Making a pro-life or pro-choice decision, then, can have significant electoral consequences for a judge in a nonpartisan system.

In sum, we argue that in the context of the new-style judicial campaign, conveying a particular policy position is very important for judges who do not have a party label that can easily summarize and describe their preferences to voters. This pressure should particularly apply to issues that are relatively salient and/or with which voters have some familiarity. On these sorts of policy areas, a decision that is out of line with public opinion—even though the decision may be grounded in reason and legal precedent—may be the death knell for a candidate. Consequently, contrary to the received wisdom about nonpartisan elections, judges facing this type of election will be more responsive to

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101. While this argument challenges the conventional wisdom, we do not claim to be the first to recognize this possibility. *See, e.g.*, Charles H. Franklin, *Behavioral Factors Affecting Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, *supra* note 4, at 148, 152–55 (noting this possibility, but not testing for it).

102. *See* sources cited *supra* note 14.

public opinion than their counterparts who face partisan elections. In the next Part, we describe the data we gathered to test this assertion.

IV. DATA

We evaluated our claims through an examination of abortion cases decided by state courts of last resort between 1980 and 2006. As already discussed in Part II, the issue of abortion is commonly central to judicial campaigns.[103] This importance should not be surprising, given that views about abortion play an integral role in the nomination and confirmation politics of the federal judiciary;[104] just as Supreme Court decisions such as *Roe v. Wade*,[105] *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[106] and *Gonzales v. Carhart*[107] represent important *causes célèbres* for abortion activists, at the state level, too, the courts have had a significant effect on abortion policy. They have affected the rights of minors to obtain abortions,[108] interpreted state and local laws about antiabortion protests,[109] and ruled on the capacity of low-income women to receive state-funded abortions,[110] among other things. Moreover, on issues such as parental notification, where state laws allow for judicial exceptions, the courts are in charge of refereeing disputes.[111]

The issue of abortion is also advantageous for study because the two major political parties have clearly staked out divergent positions. Beginning with Ronald Reagan's presidential campaign in 1980, the Democratic and Republican Parties began to separate into pro-life and pro-choice camps. In the aftermath of *Roe*, it took awhile for the

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103. *See* sources cited *supra* note 68.

104. *See, e.g.*, JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 221–27 (2007) (arguing that the use of a litmus test on a candidate's position on abortion is a central issue in federal judicial nominations).

105. 410 U.S. 113 (1973).

106. 505 U.S. 833 (1992).

107. 550 U.S. 124 (2007); *see also Stenberg v. Carhart*, 530 U.S. 914 (2000).

108. *E.g.*, *Planned Parenthood Ass'n of Nashville, Inc. v. McWherter*, 817 S.W.2d 13, 14 (Tenn. 1991) (determining whether minors could obtain an abortion without parental consent).

109. *E.g.*, *Operation Rescue-National v. Planned Parenthood*, 975 S.W.2d 546, 561 (Tex. 1998) (ruling on the extent to which buffer zones between an abortion clinic and antiabortion protests restrict protestors' freedom of expression).

110. *E.g.*, *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 255 (Tex. 2002) (ruling on whether the state must provide Medicaid funding for abortions).

111. *E.g.*, *Ex parte Anonymous*, 808 So. 2d 1025, 1026 (Ala. 2001) (addressing a judicial bypass for a particular minor to receive an abortion without parental consent).

political parties to organize around the abortion issue and to stake out clear positions. By the culmination of Reagan's presidency, this organization and alignment had firmly taken place.[112]

A. Courts

To construct the dataset, we first identified the set of states that had partisan and/or nonpartisan competitive statewide judicial elections for the highest appellate court at any point between 1980 and 2006. We excluded states in which a nonpartisan or partisan election is combined with other types of procedures; thus, for instance, the data do not include Pennsylvania, where judges initially face a partisan election but then in subsequent terms face retention elections.[113] Only courts with statewide elections are included because the available public-opinion data is at the statewide level.[114] We therefore do not examine Kentucky, Louisiana, or Oklahoma, which all had district-based elections for their courts of last resort during this period.

Even with these restrictions, we have data from a large number of states. Eight had partisan elections and fourteen had nonpartisan elections during at least some of these years. The states with partisan elections include Alabama, Arkansas, Georgia, North Carolina, New Mexico, Tennessee, Texas,[115] and West Virginia.[116] Three of them—Arkansas, Georgia and North Carolina—changed their judicial selection method during this period to nonpartisan elections.[117] This switch went into effect in 2001 in Arkansas, in 1983 in Georgia, and in 2004 in North Carolina.[118] Two other states that had partisan judicial elections in 1980 had switched to alternative electoral procedures by 2006.[119] Tennessee began employing a version of the merit plan in 1994, and in 1989 New Mexico implemented a procedure that combines merit

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112. *See, e.g.*, Greg D. Adams, *Abortion: Evidence of an Issue Evolution*, 41 AM. J. POL. SCI. 718, 731–33 tbl.1 (1997) (documenting the increased correlation between voters' preferences about abortion and choice for president during the 1980s).

113. Hanssen, *supra* note 8, at 443.

114. *See infra* Part IV.C.

115. Texas has two courts of last resort, the Supreme Court (for civil cases) and the Court of Criminal Appeals. *See* Courts.state.tx.us, Court Structure of Texas, http://www.courts.state.tx.us (last visited Feb. 14, 2009). Our data encompass both courts.

116. *See* Hanssen, *supra* note 8, at 442–43 tbl.1.

117. Judicialselection.us, History of Reform Efforts: Formal Changes Since Inception, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state= (last visited Feb. 14, 2009).

118 *See id.*

119 *See id.*

selection, partisan elections, and retention elections.[120] Therefore, our data contain Tennessee cases only through 1993 and New Mexico cases through 1988. The remaining states, all of which had nonpartisan elections, include Idaho, Michigan, Minnesota, Montana, North Dakota, Nevada, Ohio, Oregon, Utah, Washington, and Wisconsin.[121] These states retained the procedure throughout the years of the data with the exception of Utah, which switched to the merit plan after 1985.[122] Except for the aforementioned states of Arkansas, Georgia, and North Carolina, most of the states with competitive nonpartisan elections adopted the procedure in the first half of the twentieth century.[123]

B. Cases

To assemble the dataset, we searched for cases related to the policy issue of abortion from the courts of last resort described in the previous Section. We first utilized the Westlaw headnotes, perusing all cases under the category "abortion." Second, because the headnotes are in general not exhaustive, we conducted a text-based search on the term *abortion*, excluding cases within the code for "homicide and abortion" given that these cases generally involve non-abortion-related homicides (the term *abortion* simply appears because the state criminal codes for homicide have remained "homicide and abortion" even in the aftermath of *Roe*). Third, we conducted searches for cases involving the terms *wrongful death* and *fetus*, or the phrase *wrongful birth*. Finally, to ensure that we had not missed any litigation related to trespassing or protests, we collected all cases that were under the Westlaw headnote "trespass" and included the term *abortion*. We then read all of these potentially relevant cases to determine which were indeed abortion-related.

In order to generate consistent sets of case facts, we limited the data to the four most common types of disputes that we uncovered. Because an integral part of the analysis is estimating the influence of public opinion beyond the facts of a given case, we wanted to be able to control for the factual and doctrinal context.[124] These four case types

120. *See id.*

121. *See id.*

122 *See id.*

123. *See* Hanssen, *supra* note 8, at 442–43 tbl.1 (documenting the dates in which each state adopted nonpartisan elections).

124. The goal is to avoid the problem identified in Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 262 (2006) ("One would surely think that if any interdisciplinary project were appropriate, it would be the marriage of legal theory and the positive study of judicial behavior. Yet, reflecting an almost pathological skepticism

can be summarized by the labels "Trespass," "Minors," "Wrongful Birth," and "Personhood" claims.[125] The first category involves charges of trespass, disturbing the peace, and related crimes, as well as contempt citations issued against antiabortion protestors at clinics or hospitals that perform abortions.[126] "Minors" cases concern issues surrounding parental-notification laws. Most of these cases entail requests for a judicial bypass that allows a particular minor to obtain an abortion without parental consent.[127] The "Wrongful Birth" cases, meanwhile, involve the doctrine that regards physicians' actions surrounding prenatal tests for defects and diseases.[128] Plaintiffs in such suits claim that a doctor's actions—for example, failing to give or report the results of a prenatal test—prevented them from choosing to have an abortion.[129] Finally, "Personhood" cases involve claims on behalf of fetuses; the cases, most of which entail charges of wrongful death, focus on whether a fetus constitutes a legally defined person.[130] Other types of cases that we uncovered involve a wide range of issues,

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that law matters, positive scholars of courts and judicial behavior simply fail to take law and legal institutions seriously.").

125. Richard P. Caldarone et al., *Partisan Signals and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions*, 71 J. POL. (forthcoming 2009) analyzes a wider range of abortion-related cases in a regression that does not control for case facts (and utilizes a different dependent variable). More generally, that paper focuses on debates in the political-science literature rather than legal scholarship.

126. *See, e.g.*, *City of Helena v. Lewis*, 860 P.2d 698, 699 (Mont. 1993) (involving a trespassing charge against Lewis and others for blocking the entranceway to an abortion clinic); *State v. Franck*, 499 N.W.2d 108, 109 (N.D. 1993) (describing Franck's disobeying of an injunction that forbid certain types of protests within 100 feet of an abortion clinic).

127. *See, e.g.*, *Ex parte Anonymous*, 808 So. 2d 1025, 1025 (Ala. 2001) (addressing a situation where a minor petitioned the Alabama Supreme Court for a judicial bypass to obtain an abortion without parental consent); *In re Jane Doe 1*, 566 N.E.2d 1181, 1182 (Ohio 1990) (ruling that the petitioner should not be granted a judicial bypass to receive an abortion without parental consent).

128. *See, e.g.*, *Blake v. Cruz*, 698 P.2d 315, 316 (Idaho 1984) (dealing with whether the Idaho Supreme Court would recognize a cause of action for wrongful birth with regard to the plaintiff's son, who was born with rubella); *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs., Inc.*, 844 N.E.2d 1160, 1162 (Ohio 2006) (discussing whether Ohio recognizes a special cause of action for wrongful birth, above and beyond regular medical-malpractice charges).

129. *See, e.g.*, *Blake v. Cruz*, 698 P.2d 315, 316 (Idaho 1984) (addressing a wrongful birth suit against a doctor that failed to test for rubella); *Schirmer v. Mt. Auburn Obstetrics & Gynecologic Assocs., Inc.*, 844 N.E.2d 1160, 1163 (Ohio 2006) (illustrating a case in which the plaintiffs maintained that the physicians "negligently performed and interpreted the diagnostic tests").

130. *See, e.g.*, *State ex rel. Atkinson v. Wilson*, 332 S.E.2d 807, 807–08 (W. Va. 1984) (addressing whether a person can be charged with murder for the death of another's unborn child).

including the rights of citizens to avoid paying taxes when the state funds abortions[131] and the legality of late-term abortions.[132]

For all cases in the dataset, we have identified each judge who sat and how that judge voted. Specifically, we created the variable "Pro-Life Vote," which is coded as 1 if the judge voted in a pro-life direction and 0 otherwise. A vote is considered pro-life if it decreases, either directly or indirectly, the ability to obtain a legal abortion in that state. Such a coding characterizes each decision in the way that an interest group would characterize it in campaign advertisements and materials.[133] Thus, for instance, a vote in favor of restricting antiabortion protestors' ability to demonstrate outside a physician's home would be considered pro-choice. Likewise, a vote to deny a minor a judicial bypass to obtain an abortion without parental consent would be considered pro-life. We exclude from the analysis judges who are not regular members of the state supreme court and are therefore not subject to the same sorts of electoral pressures.[134] This process yielded a total of 597 judge votes across eighty-five cases in sixteen states.[135] Forty-one percent of the votes were coded as pro-life, and 59 percent as pro-choice. In the analyses below, this variable will serve as the primary dependent variable.

C. Public Opinion

To assemble state-level data on public opinion, we put together a dataset of all CBS-New York Times polls about abortion. The polls, which have been asked regularly since 1985, ask whether a respondent would like abortion to be (1) widely available; (2) available, but under

131. *See, e.g.*, *McKee v. County of Ramsey*, 316 N.W.2d 555, 556 (Minn. 1982) (dealing with an argument by plaintiffs that they should not be compelled to pay certain taxes if the state funds abortions).

132. *See, e.g.*, *People v. Higuera*, 625 N.W.2d 444, 447 (Mich. 2001) (dealing with a doctor who was charged with illegally performing a late-term abortion).

133. *See, e.g.*, Souders, *supra* note 61, at 550 ("Television advertisements that often distort candidates' views in short, thirty-second blurbs have become the weapons of choice in high-stakes state supreme court races."); *see also* sources cited *supra* note 97.

134. While the Supreme Court of the United States does not appoint temporary justices when a regular justice is unavailable, state supreme courts regularly do so. *See, e.g.*, Howard J. Bashman, *Avoiding Recusal-Based Tie Votes at the U.S. Supreme Court*, LAW.COM, March 4, 2008, http://www.law.com/jsp/article.jsp?id=1204544938947.

135. The supreme courts of Nevada, New Mexico, and Utah had no cases that fit our criteria during this period, which is why we searched for cases in nineteen states but have data from only sixteen of them.

greater restrictions than it is now; or (3) not available at all.[136] As is standard in the use of the CBS-New York Times polls to measure state-level public opinion, we pooled the polls across ten-year spans.[137] In particular, the post-1995 polls are pooled to estimate public opinion between 1996 and 2006, while the 1985–95 polls are pooled to estimate opinion pre-1996.[138]

The variable "Pro-Life Public-Opinion Differential" measures the difference between pro-life and pro-choice opinion in each state. Specifically, the variable equals the percentage of respondents who respond that they do not want abortion to be available at all, plus the percentage who wish to further restrict abortion, minus the percentage that would like abortion to be generally available. In general, public opinion was more pro-life than pro-choice during this period in the states of our data. There are some states that, during some years, are more pro-choice than pro-life, but these are the exception rather than the rule. Thus, the variable is almost always positive. In fact, for the states with partisan judicial elections, "Pro-Life Public-Opinion Differential" is always positive; in these states the average pro-life margin was 33 percent, with a minimum of 14 and a maximum of 47 percent. By comparison, the average pro-life margin for states with nonpartisan elections is only 18 percent. Moreover, in some of these states more respondents favored a pro-choice position than a pro-life one. Thus, the minimum of "Pro-Life Public-Opinion Differential" is -16, while the maximum is 46 percent.

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136. Public-opinion surveys conducted before 1990 used the following question: "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?" Survey by CBS News/New York Times, Sept. 17–20, 1989 [USCBSNYT.092889.R15], *available at* http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html. Surveys conducted after 1990 used 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?" Survey by CBS News/New York Times, May 31–June 3, 1996 [USCBSNYT.060796.R87], *available at* http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html. See Caldarone et al., *supra* note 125, for evidence that the change in question wording does not affect the survey responses.

137. Such pooling is standard because the number of responses per state is not sufficient in each year to comprise a state-level sample. The approach was pioneered in ROBERT S. ERIKSON ET AL., STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES 29–30 (1993).

138. In order to ensure that the results are not compromised by the fact that the surveys begin in 1985, we have also conducted the analysis without the cases from 1980 to 1984. These results are substantively similar to those presented.

D. Other Variables

Because we expect judges' votes to be influenced by a variety of factors, including legal ones, the regression analysis includes a number of control variables. First, we considered a judge's partisan affiliation. A good deal of legal scholarship demonstrates that judges' policy preferences can be an important determinant of their voting decisions.[139] The Democratic and Republican Parties have staked out very clear and consistent positions on the abortion issue,[140] so we would expect Democratic judges to be more likely to hold pro-choice views than Republican ones.[141] Therefore, we expect that, *ceteris paribus*, Democrats will be less likely to cast a pro-life vote than Republicans. The variable "Republican Judge" captures this partisan differential, equaling 1 if the judge is a Republican and 0 if the judge is a Democrat.[142] In the data, 55 percent of the votes were cast by Democratic judges, and 44 percent by Republican judges.[143]

Second, we controlled for electoral proximity, by which we mean the number of years until a judge faces an electoral contest. As an

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139. *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156 (1998); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 302 (2004). Also, considerable attention has been paid to this notion by political scientists. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86–100 (2002) (describing the basic "attitudinal model," which claims that judges' personal policy preferences affect their decisions).

140. *See* Adams, *supra* note 112, at 721–27 (describing the process by which the Republican and Democratic Parties, at both the elite and mass public level, became affiliated with the pro-life and pro-choice positions, respectively).

141. Moreover, in the states with partisan systems, judges are commonly selected through partisan-based nomination procedures such as primaries or conventions, and may therefore have additional incentives to vote the party line. Two of the states with nonpartisan systems—Ohio and Michigan—also have partisan-based nomination procedures despite the fact that the general election is nonpartisan. In Ohio, the justices face partisan primaries, *see* OHIO REV. CODE ANN. § 3518.08, 3505.03 (2008), and in Michigan, judges are initially nominated via party conventions or a nominating petition. *See* MICH. COMP. LAWS § 392 (2008). Removing these states from the analysis does not alter the key results.

142. The data on judges' partisan affiliation are from Laura Langer, *Multiple Actors and Competing Risks: State Supreme Court Justices and the Policymaking (Unmaking) Game of Judicial Review*, National Science Foundation CAREER Grant, SES-0092187 (2006), *available at* http://www.u.arizona.edu/~llanger/NSFNatural CourtsData.htm. If the judge was not affiliated with either major party, we eliminated him from the analysis presented. However, we have also conducted the analysis assigning such a judge a 0.5 for the partisanship variable, and received substantively similar results.

143. Notably, the key results hold even if this variable is excluded from the analysis.

electoral contest nears, one may expect that a judge would be more sensitive to public opinion. For instance, some research suggests that electoral proximity affects sentencing, with (elected) judges becoming more punitive as an election nears.[144] Likewise, research on judges as well as other elected officials suggests that they become more responsive to public opinion in the two years before reelection.[145] Notably, justices on a particular state supreme court do not generally face reelection at the same time, so on a given case different justices will face different electoral horizons.[146] We accordingly created a variable, "Electoral Proximity," which reflects the way in which a judge's electoral horizon should affect his likelihood of voting pro-life. The variable equals +1 if the judge is facing reelection within two years and the state leans pro-life, -1 if the judge is facing reelection within two years and the state leans pro-choice, and otherwise 0. Accordingly, if judges are more likely to cast votes on the basis of public opinion when an election is within two years, the effect of the variable should be positive (i.e., judges should be most likely to cast pro-life votes when their district is pro-life and they face reelection within two years, and least likely to cast pro-life when their district leans pro-choice and they face reelection within two years). The coding

144. *See, e.g.*, Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004) ("We provide evidence that judges become significantly more punitive the closer they are to standing for reelection. In Pennsylvania, for the time period and crimes we analyze, we can attribute more than two thousand years of additional incarceration to this dynamic. This may imply judges sentence too harshly near elections, or too leniently early in their terms.").

145. For evidence on judges, see Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 487 (1995). For evidence on elected officials, see Brandice Canes-Wrone & Kenneth W. Shotts, *The Conditional Nature of Presidential Responsiveness to Public Opinion*, 48 AM. J. POL. SCI. 690, 690 (2004); James H. Kuklinski, *Representativeness and Elections: A Policy Analysis*, 72 AM. POL. SCI. REV. 165, 166 (1978).

146. Because state supreme-court judges have staggered terms, it is almost always the case that some judge is facing reelection within the next two years on a given court. *See, e.g.*, Elizabeth F. Colombo, *The New Southpaws: The Turning of the Nevada Supreme Court's Criminal Decisions*, 66 ALB. L. REV. 907, 907 (discussing the staggering of terms on the Nevada Supreme Court); Jown W. Reed, *Judicial Selection in Michigan: Time for Change?*, 75 MICH. B.J. 902, 902 (1996) (discussing the staggering of terms on the Michigan Supreme Court); Julie F. Siegel, *High Court Studies: The Supreme Court of Texas from 1989-1998: Independence Determined by Six-Year Terms*, 62 ALB. L. REV. 1649, 1649 (1999) (discussing the staggering of terms on the Supreme Court of Texas). Therefore, it would be nearly impossible for these courts to avoid controversial cases anytime a judge faces reelection in the next two years.

classifies a state as pro-life or pro-choice according to the responses to the public-opinion survey.[147]

The third type of control variable concerns the fact patterns presented in each case. In particular, we considered the following fact patterns for the four different types of cases:

(1) Trespass cases: In keeping with general trespass jurisprudence as well as abortion-specific case law, we considered the most important fact in these cases to be the location of the alleged infraction.[148] Trespass cases generally involve protests in and around abortion clinics, and occasionally at a doctor's personal residence.[149] We identified the location of the protest and expect that a judge should be more likely to rule against abortion protestors (and thus in a pro-choice direction) when the trespass occurs *inside* an abortion clinic or at a doctor's private residence, as opposed to outside a medical facility that performs abortions.

(2) Minors cases: In *Bellotti v. Baird*,[150] the Supreme Court of the United States held that a state must provide for a judicial bypass of a parental-notification requirement.[151] In general, states must allow for a bypass if the minor is sufficiently mature and well informed to make the decision without parental guidance, or if she can clearly establish that the abortion would be in her best interests.[152] The federal courts have continued to invalidate parental-notification laws that are overly burdensome on a minor seeking an abortion on the grounds that such laws do not pass constitutional muster.[153] Accordingly, for all "Minors" cases, we determined whether the minor seeking a judicial bypass has

147. In particular, a state leans pro-life if the mean response is higher than the value from half of the respondents leaning pro-choice (response 1) and the other half equally dividing between the pro-life options (responses 2 and 3). Accordingly, a state is coded as leaning pro-life if the mean response to the survey is greater than the cutpoint of 0.5*1+0.25*2+.25*3=1.75. Utilizing alternative cutpoints, such as whether at least 50 percent of the respondents offer a pro-life response, does not substantially alter the key results about the effects of nonpartisan elections.

148. *See, e.g.*, Arlene D. Boxerman, *The Use of the Necessity Defense by Abortion Clinic Protesters*, 81 J. CRIM. L. & CRIMINOLOGY 677, 697–99 (1990) (describing judicial rejection of the necessity defense in abortion trespass cases and arguing antiabortion protests are generally on good ground if they restrict their protests to public spaces); Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 468–70 (2006) (describing the importance of place in abortion clinic trespass claims).

149. *See, e.g.*, *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993) (involving picketing at the home of a doctor who performs abortions).

150. 443 U.S. 622 (1979).

151. *Id.* at 643–44.

152. *Id.*

153. *See, e.g.*, *Akron Ctr. for Reprod. Health v. Slaby*, 854 F.2d 852, 854 (6th Cir. 1988).

sought information about the health and physical consequences of an abortion from a health-care professional or pro-life organization. If she has not, then we expect a judge will be less disposed towards granting a judicial bypass (and therefore more likely to vote in a pro-life direction).

(3) Wrongful Birth cases: A wrongful-birth claim arises when a mother gives birth and asserts she would have terminated the pregnancy save for a health-care professional's error.[154] The claim may be that the health-care professional simply misinterpreted results. Alternatively, it may be that a doctor failed to provide a test, relay results, or correctly perform a procedure. In general, defendants are in a better position if they simply misinterpreted the result of a test because, in this circumstance, they can call on expert witnesses to support their actions; by contrast, the failure to provide a test, relay results, or correctly perform a procedure is less subject to interpretation.[155] In each wrongful-birth case, we identify the physician error cited by the plaintiff. We expect that a judge will be more likely to cast a vote against a wrongful-birth claim (and therefore vote pro-life) when a physician is accused of merely misinterpreting test results; likewise, we expect judges to be more likely to cast a vote to sustain a wrongful-birth claim (and thus vote pro-choice) when the physician is accused of failing to provide a test or relay results, or of incorrectly performing a procedure.

(4) Personhood cases: Personhood claims are generally based on wrongful-death statutes, which turn on whether the life of a legally defined person has been terminated. In the context of abortion, the courts have commonly used the concept of fetal viability as a method

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154. *See, e.g.*, Elizabeth A. Ackmann, *Prenatal Testing Gone Awry: The Birth of a Conflict of Ethics and Liability*, 2 IND. HEALTH L. REV. 199, 204 (2005) ("Another prominent fetal tort is wrongful birth, in which parents sue based on the theory they would have aborted the child had they known the child would be born with genetic abnormalities that would seriously affect his/her quality of life."); James Bopp, Jr. et al., *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 DUQ. L. REV. 461, 461 (1989) ("A wrongful birth action is brought by parents seeking damages for the birth of a 'defective' child. The parents allege that they would have aborted the child if the defendants, health care personnel, had properly advised them of the risks of birth defects.").

155. *See, e.g.*, Bopp et al., *supra* note 154, at 485 ("[T]he wrongful birth cause of action . . . creates a financial incentive for physicians to recommend amniocentesis and genetic screening in borderline cases, and in possibly most or all cases for the particular 'cautious' physician. The incentive is simply to avoid liability and, where there may be no liability, to avoid the costs of frivolous litigation."); Sonia Mateu Suter, *The Routinization of Prenatal Testing*, 28 AM. J.L. & MED. 233, 251 (2002) ("If a [health-care] provider persuades a patient to undergo testing, she reduces the chance of wrongful birth liability.").

for determining whether a fetus is a person as defined by these statutes.[156] We therefore identified whether the fetus at the center of a personhood case was viable according to medical wisdom at the time of the case.[157] We expected that a judge will be more likely to support a personhood claim (i.e., vote pro-life) if the fetus was viable.

Using all of these case facts, we generated the variable "Facts Pro-Life." The variable is coded 1 if the fact pattern supports a pro-life decision (as detailed above) and 0 if the fact pattern supports a pro-choice decision. Naturally, we expect judges to be more likely to issue pro-life decisions when the fact patterns can readily be used to justify such a decision. Interestingly, the fact patterns support a pro-life decision in 54 percent of the observations; thus, according to our data, the cases that make it to the state supreme courts appear to be evenly balanced between those in which the facts support a pro-choice decision and those in which the facts support a pro-life decision. Notably, the primary findings regarding nonpartisan elections hold regardless whether this variable is included in the analysis.

Finally, in addition to coding facts for each of the case types, we created variables for the case types themselves. These variables allow for systematic differences, that is, different underlying probabilities, of a pro-life decision in each category of case. Because different bodies of law control the substantive issues raised by the various categories of abortion cases, one may expect that certain types of cases may be more or less likely to result in a pro-life decision. Accordingly, we include a "dummy" variable or indicator for each type of case. For instance, we have a variable "Trespass" that equals 1 if the case relates to trespassing or protests, and 0 if the case concerns another category. Likewise, we coded similar variables for "Minors," "Personhood," and "Wrongful Birth." Trespass cases constituted 27 percent of the observations, Minors cases 28 percent, Personhood cases 32 percent, and Wrongful Birth cases 13 percent of the observations.

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156. *See* Horace B. Robertson, Jr., *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1418 ("Viability is what makes the fetus a 'person' within most courts' construction of the wrongful death statutes."); Jonathan Dyer Stanley, Note, *Fetal Surgery and Wrongful Death Actions on Behalf of the Unborn: An Argument for a Social Standard*, 56 VAND. L. REV. 1523, 1551 (2003) ("Courts have commended viability as a sensible standard in wrongful death law because of the supposed legal significance of the point where the fetus is able to exist separately outside of the womb.").

157. We define *viable fetus* as one that is more than six months old, and *nonviable fetus* as one that is less than six months old. In the data there are no cases of fetuses close to this stage of development.

V. RESULTS

A. Descriptive Statistics

As a preliminary analysis, we considered the raw difference in justices' votes in partisan versus nonpartisan systems. To do so, we used the responses to the public-opinion polls to differentiate between states that lean pro-choice and those that lean pro-life. We then defined a judge's vote to be "aligned with public opinion" if the judge issues a pro-choice decision in a state that leans pro-choice or issues a pro-life decision in a state that leans pro-life.[158] These raw data indicated that judges' votes in nonpartisan states are significantly more likely to be aligned with public opinion than judges' votes in partisan states. Overall, in partisan states 41 percent of the votes cast by judges in abortion cases were aligned with public opinion, compared with 56 percent of the votes in nonpartisan states. This difference of fifteen percentage points is statistically significant ($t = -3.55$, $p < 0.01$, two-tailed).

Figure 1 shows the breakdown by state. More specifically, the figure identifies the proportion of judicial decisions that are aligned with public opinion in nonpartisan systems versus partisan ones. The circles represent the nonpartisan systems, while the triangles represent partisan systems. Arkansas, which implemented nonpartisan elections in 2001,[159] appears twice because the data include cases under each system.[160]

158. See *supra* note 147 for how states are classified as leaning pro-life versus pro-choice.

159. ARK. CONST. amend. 80, § 18(A) (going into effect July 1, 2001).

160. For the two other states that switched to nonpartisan elections over this period, we do not have cases from each type of system. All of the Georgia cases were decided when the state had nonpartisan elections, and all of the North Carolina cases were decided when the state had partisan elections.

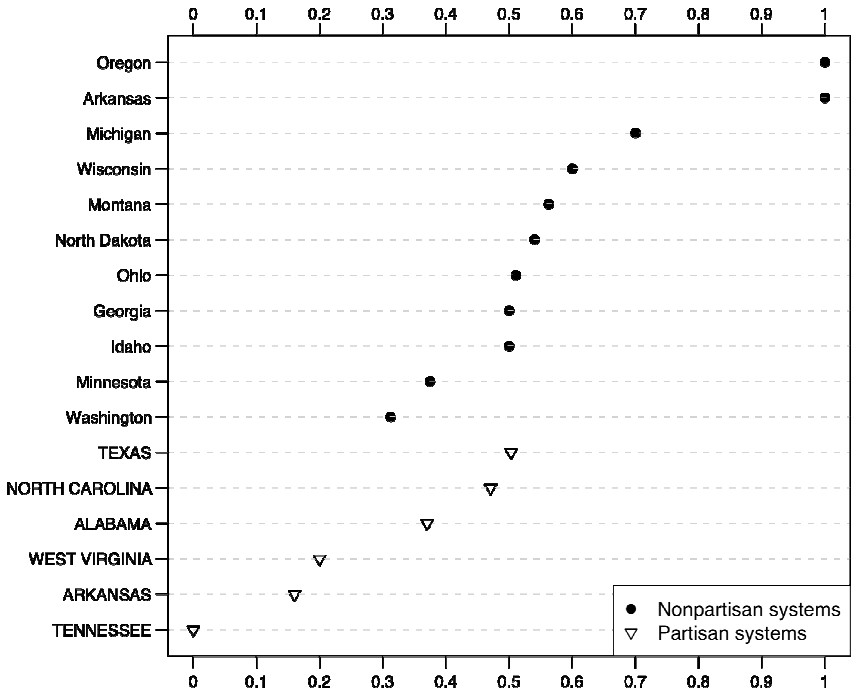

Figure 1 – Proportion of votes that are aligned with public opinion in nonpartisan versus partisan systems

As Figure 1 shows, the overall difference between judicial decisions in nonpartisan versus partisan systems does not appear to be a quirk of one or two outliers that are unrepresentative of the rest of the data. Rather, for most pairings of a nonpartisan versus partisan system, the former has a higher percentage of popular decisions. Indeed, as the figure suggests should be the case, even if we eliminate the three most extreme cases—Tennessee, Oregon, and Arkansas when it has nonpartisan elections—in a comparison of the systems, the raw data still indicate there is a significant difference, with judges in nonpartisan systems being more likely to issue popular decisions ($t=2.731$; $p<0.01$, two-tailed).

The next step in our empirical analysis was to make use of the continuous nature of the public-opinion data by comparing the relationship between gradual changes in public opinion (e.g., a change from 10 to 11 percent in the variable "Pro-Life Public-Opinion Differential") and the judges' decisions in partisan versus nonpartisan systems. Figure 2 plots the probability of a pro-life decision against "Pro-Life Public-Opinion Differential," which, as previously defined, reflects the difference between pro-life and pro-choice opinion in the

state during that time.[161] The short vertical lines at the top and bottom depict individual judges' votes in each case. The lines in the center of the figures portray the probability of a pro-life decision at each value of "Pro-Life Public-Opinion Differential" (in the raw data, given all of the observations).[162] The left-hand panel concerns partisan electoral systems, while the right-hand panel concerns nonpartisan ones.

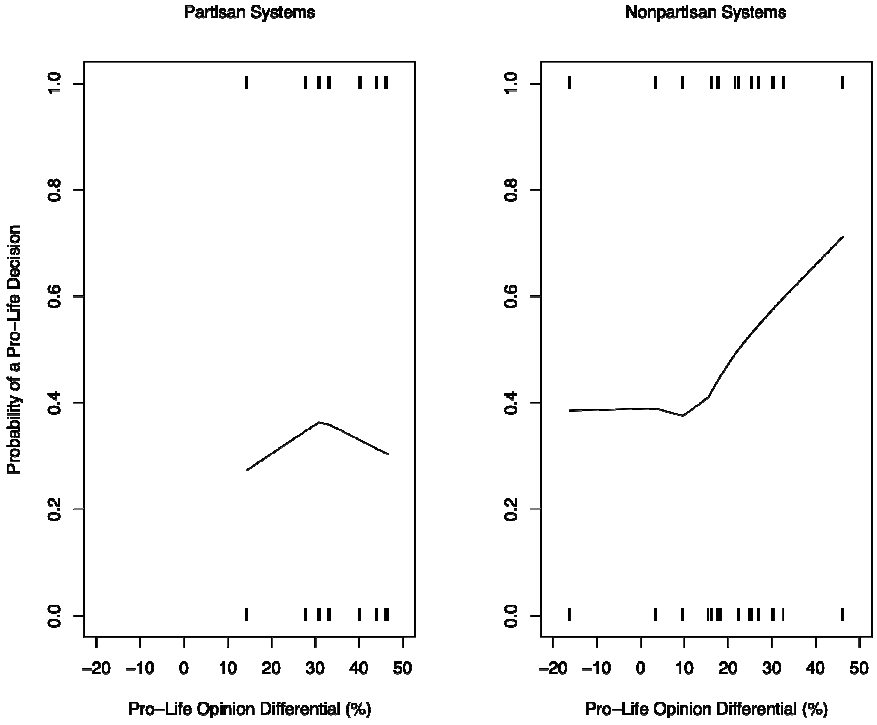

Figure 2 – Probability of a pro-life decision in partisan and nonpartisan systems as a function of public opinion

Clearly, the patterns that emerge from these data are quite distinct across the electoral systems. In particular, there does not appear to be a strong relationship between public opinion and the probability of a pro-life vote in states with partisan elections, but there is a strong, positive relationship in states with nonpartisan ones. In particular, the raw data suggest that as public opinion in states with nonpartisan systems becomes increasingly pro-life, judges cast more votes in a pro-life

161. *See supra* Part IV.C.

162. In particular, the lines are loess (locally weighted smoothed regression) estimators, with the bandwidth set to 1. Shorter bandwidths do not substantially affect the pattern. For a discussion of loess estimators, see WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 457–59 (5th ed. 2002).

direction. The raw data, then, provided some initial support for our claim that judges facing nonpartisan elections will be more responsive to public opinion than judges facing partisan elections.

Of course, one might expect other factors to influence the probability that a judge votes in a pro-life direction. In the next Section, we consider the potentially confounding factors described previously in Part IV.D. Before proceeding to that analysis, however, we present a final, more basic comparison that incorporates one such factor: a judge's partisan affiliation.[163] Figure 3 evaluates whether this potential difference affects the basic relationships we observed in the earlier figures, using the same methodology that was used in Figure 2. In the left-hand panel, we again have the partisan systems; in the right-hand panel, nonpartisan systems. In this figure, however, we divide judges between Republicans and Democrats. The solid lines show Republican judges; the dotted lines, Democratic judges.

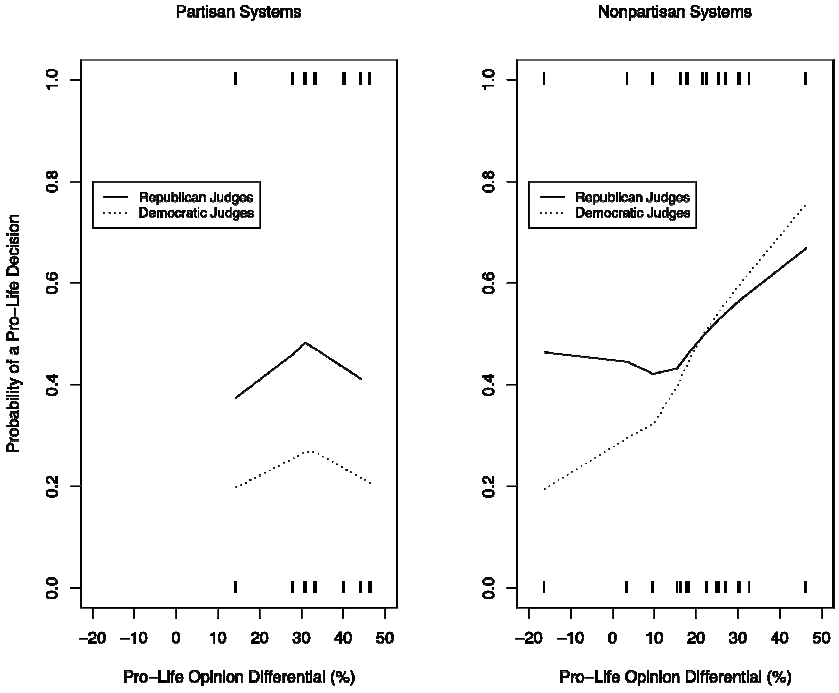

Figure 3 – Relationship between public opinion and votes in partisan and nonpartisan systems by Democratic versus Republican judges

The results are again striking. The first point to notice is that, in partisan states, Democratic judges respond to public opinion the same

163. See *supra* note 142 for a description of the data on judges' partisan affiliation.

way Republican judges do, although Democrats are overall less likely (about 20 percent less likely) to vote in a pro-life direction. The right-hand panel, by comparison, shows a very different relationship. When the absolute difference between those who lean pro-life and those leaning pro-choice is no more than twenty percentage points, then Democrats are less likely than Republicans to cast a pro-life vote. However, as public opinion becomes increasingly pro-life, Democratic judges respond much more sharply to public opinion. Indeed, once public opinion is sufficiently pro-life, the figures illustrate that Democratic judges are actually more likely than their Republican counterparts to make a pro-life decision (although from a statistical standpoint, this difference is not significant in that Republican and Democratic judges are approximately equally likely to cast a pro-life decision). Figure 3 thus provides further support for the argument that judges in states with nonpartisan elections will have stronger incentives than judges in partisan systems to make decisions that align with public opinion.

As strong and suggestive as these relationships are, however, there are many confounding factors that may be driving the patterns we observe in Figures 1 through 3. In order to control for such factors, we now proceed to a multivariate regression analysis.

B. Regression Analysis

The regression analysis considers the probability that a judge will cast a vote in a pro-life direction as a function of public opinion, controlling for all of the factors described in Part IV.D. Because the dependent variable takes on only the values 1 or 0, we followed standard practice by estimating the relationship as a probit equation.[164] In probit models, the effects of the variables need to be interpreted at specific values. As is standard, we interpreted these values at the means of the independent variables. In particular, the marginal effects reflect how a marginal change in each factor would affect the probability of a

164. In particular, we estimate a probit model for each case i and judge j as follows: $\Pr(\textit{Vote Prolife}_{ij} = 1) = \theta(\beta_0 + \beta_1 \textit{Opinion Differential}_i * \textit{Nonpartisan System}_i + \beta_2 \textit{Opinion Differential}_i * \textit{Partisan System}_i + \beta_3 \textit{Nonpartisan System}_i + \beta_4 \textit{Facts Prolife}_i + \beta_5 \textit{Republican Judge}_j + \beta_6 \textit{Electoral Proximity}_{ij} + \beta_7 \textit{Trespass Category}_i + \beta_8 \textit{Minors Category}_i + \beta_9 \textit{Wrongful Birth Category}_i + \varepsilon_{ji})$, where θ is an error term. For an introduction to probit models, see PETER KENNEDY, A GUIDE TO ECONOMETRICS 264–68 (5th ed. 2003). The coefficients β_1 and β_2 capture the effects of public opinion in a partisan and nonpartisan system, respectively, on judicial decisions. The variable "Nonpartisan System," which equals 1 if the judge faces nonpartisan elections and 0 if he faces partisan elections, is included separately as a main effect (for which the coefficient is β_3) to account for any direct impact that the type of system might have on the likelihood of a pro-life decision.

pro-life decision at the means of the independent variables. The results of this analysis are reported in Table 1. The center column reports the coefficients and standard errors, and right-hand column the marginal effects (at the means of the independent variables).

Table 1 – Relationship between public opinion and judges' votes in partisan versus nonpartisan systems

	Probit Coefficient (Standard Error)	Marginal Effect
Opinion Differential * Partisan System	-0.915 (0.805)	-0.373
Opinion Differential * Nonpartisan System	1.404** (0.656)	0.519
Nonpartisan System	-0.137 (0.287)	-0.050
Facts Pro-Life	0.378** (0.124)	0.142
Republican Judge	0.227** (0.110)	0.088
Electoral Proximity	0.233** (0.112)	0.094
Case categories		
Trespass	0.367** (0.150)	0.127
Minors	0.675** (0.170)	0.257
Wrongful Birth	0.099 (0.193)	0.030
Constant	-0.500 (0.311)	-----
N	597	
Wald-χ^2	44.42**	

Notes: ** signifies $p<0.05$, two-tailed. The dependent variable is the probability that the judge makes a pro-life decision.

These results demonstrate that, even controlling for myriad factors related to each case and judge, nonpartisan elections encourage judges to be responsive to public opinion. The coefficient on "Opinion Differential * Nonpartisan System" is positive and significant, suggesting that as opinion in a state with nonpartisan elections becomes increasingly pro-life, the justices are increasingly likely to issue pro-life decisions. For instance, a ten-percentage-point shift in public opinion in

a pro-choice direction alters the likelihood of a pro-choice decision by 5 percentage points. In the partisan systems, by contrast, change in opinion appears to have no effect on judicial behavior; this lack of any influence is reflected by the insignificant effect of the coefficient on "Opinion Differential * Partisan System." That coefficient is even negative, but because the effect does not approach conventional levels of significance, we do not make much of that sign.

To better assess the substantive implications of the effects of public opinion, we calculated the predicted probability of a pro-life decision at a range of initial values of public opinion for both nonpartisan and partisan systems.[165] Figure 4 illustrates these predicted probabilities, which show how the effects of public opinion differ between the systems. In particular, the line for the nonpartisan systems highlights that as the margin of pro-life versus pro-choice opinion increases, an individual judge—holding his partisanship, the facts of the case, the type of the case, and electoral proximity all constant—is more likely to cast a pro-life vote. By comparison, for states with partisan elections, to the extent that judicial behavior changes at all it appears to be moving *against* public opinion; the simulated probabilities in Figure 4 show a slight downward trend. However, the results from the multivariate model suggest that any such movement is not statistically significant, and the large variance in the predicted probabilities similarly suggests that the downward movement is not significantly different from there being no impact on public opinion.

165. In particular, we simulated the predicted probability of a pro-life decision once at each level of the pro-life opinion differential from -20 percent through 50 percent at 0.1 percent intervals. To estimate the predicted probabilities, we used the CLARIFY software. *See* Gary King et al., *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347, 348 (2000).

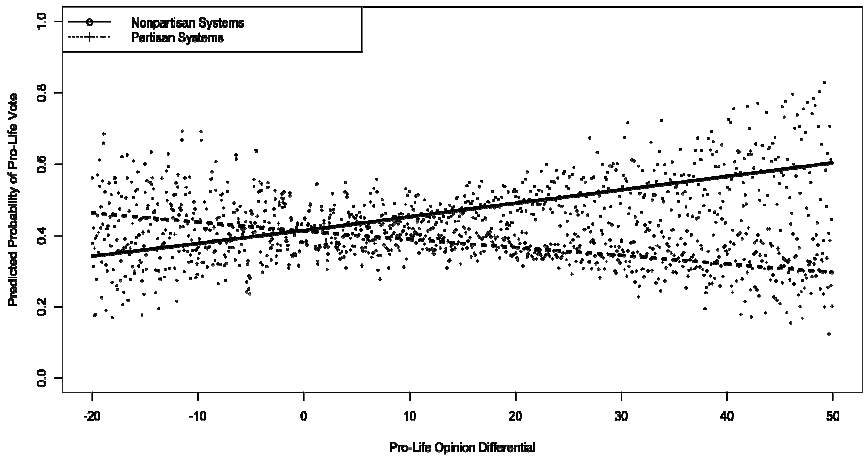

Figure 4 – Estimated relationship between public opinion and probability of a pro-life vote in partisan and nonpartisan states

In sum, the results involving public opinion strongly support our hypothesized effect of nonpartisan elections. The evidence demonstrates that judges facing these elections are more responsive to variation in public opinion than judges facing partisan ones. This finding is contrary to the effect of nonpartisan elections widely espoused by advocates of judicial-election reform.[166] Indeed, as we have emphasized, the conventional wisdom has been that nonpartisan elections insulate judges from pressure to cater to political forces.[167]

There are several other findings from the multivariate analysis worth discussing. First, the effect of the variable "Facts Pro-Life" is, as anticipated, statistically significant and positive. This result demonstrates that independent of various electoral or political influences, judges are responsive to the facts of a given case. For instance, consider a case about trespassing on the property of abortion clinics. The estimates suggest that even controlling for public opinion, judges are more likely to rule in favor of abortion protestors if they have not entered the clinic.

Second, the coefficient on the variable "Republican Judge" is positive and statistically significant, indicating that judges who affiliate with the Republican Party are more likely to cast a pro-life vote than judges who affiliate with the Democratic Party. Given that considerable scholarship in law and political science has argued judges' preferences influence their votes,[168] this result is not surprising. More interesting,

166. *See* source cited *supra* notes 2 & 12.
167. *See* source cited *supra* note 13.
168. *See* sources cited *supra* note 139.

arguably, is that the marginal effects suggest the partisanship of the judge has less of an impact on decisions than do the fact patterns presented by the case. At the means of the independent variables, Republican judges are 10 percent more likely to issue a pro-life decision, while the major facts of a case affects the probability of a pro-life decision by 15 percent. This comparison suggests that legal considerations play a more substantial role than judicial ideology in judicial decision making.

Also as expected, electoral proximity affects the likelihood that a judge votes in a pro-life direction. According to the parameter estimates associated with "Electoral Proximity," public opinion has an additional effect on a judge's vote when the judge faces reelection within the next two years. The positive and statistically significant coefficient indicates that a judge is more likely to cast a pro-life vote when he will face an electoral contest within the next two years and the state leans pro-life; likewise, if the state leans pro-choice, then a judge is more likely to cast a pro-choice vote when he faces reelection within two years. This finding comports with other results in the literature concerning the effect of electoral proximity on judicial decision making.[169]

Finally, the findings indicate some types of cases are more or less likely to result in pro-choice votes than others. The effects reported in Table 2 for Trespass, Minors, and Wrongful Birth cases allow us to make comparisons between each of those types of cases and with Personhood cases, which are the excluded category in the analysis.[170] In particular, the Trespass and Minors categories look different from the Personhood and Wrongful Birth cases. The positive and statistically significant coefficients associated with the estimates on the first two categories indicate that these types of cases are more likely to result in pro-life votes than are cases regarding personhood claims. Furthermore, the statistically insignificant coefficient associated with the Wrongful Birth estimate suggests that there is no statistical difference in the probability of a pro-life vote between a case that concerns a wrongful-birth claim and one that concerns a personhood claim.

The greater likelihood of pro-life decisions in the Trespass and Minors types of cases arguably fits with differences in federal common law. Cases involving trespassing and protests often focus heavily on

169. *See, e.g.*, Hall, *supra* note 145; Huber & Gordon, *supra* note 144.

170. In order to estimate the effects of individual case types, it is necessary to exclude one dummy variable from the regression. *See* KENNEDY, *supra* note 164, at 249. We have chosen to exclude Personhood cases, which is an entirely arbitrary decision. The choice of which category is excluded does not affect the substantive findings of the regression analysis in any way.

antiabortion protestors' rights under the First Amendment.[171] For cases that involve minors, the Supreme Court of the United States, in *Bellotti v. Baird*,[172] allowed that states may require minors to obtain parental permission for an abortion except under the conditions discussed in Section IV.D; thus, unless a minor satisfies these conditions, federal common law permits that a bypass may be denied.[173] By comparison, for Personhood cases, the federal courts have tended to limit the legal standing of fetuses and thereby the position favored by pro-choice advocates. As attorney Lori Mans discusses, the federal courts have historically allowed "a limited basis for the legal standing of a fetus in general tort law."[174] The federal courts have also leaned pro-choice in wrongful-birth cases, particularly those that involve disabled children.[175] Therefore, to the extent that state judges feel bound by federal precedent, the differences across case types are unsurprising. Moreover, it is worth emphasizing that regardless of the source of the differences across case types, Table 1 establishes that the results regarding nonpartisan elections hold even after accounting for these differences.

Overall, then, the analysis provides strong evidence for the claim that judges in nonpartisan systems are more responsive to public opinion than judges in partisan systems. First, the raw data show that there is a positive relationship between how pro-life the public leans and the probability that a judge will cast a pro-life vote in a nonpartisan electoral system, while there does not appear to be any such relationship in partisan electoral systems. Second, the results of the

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171. *See, e.g.*, Alice Clapman, Note, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts to Protect Abortion Patients and Staff*, 112 YALE L.J. 1545, 1573 (2003) (noting with respect to abortion-related protests that "courts often assume . . . that most offensive and even harmful speech must be protected so as to avoid chilling other, desirable speech").

172. 443 U.S. 622 (1979).

173. *Id.* at 625, 651.

174. Lori K. Mans, Note, *Liability for the Death of a Fetus: Fetal Rights or Women's Rights?*, 15 U. FLA. J.L. & PUB. POL'Y 295, 306 (2004).

175. Michael T. Murtaugh, *Wrongful Birth: The Courts' Dilemma in Determining a Remedy for a "Blessed Event,"* 27 PACE L. REV. 241, 258 (2007) ("When the child is born normal and healthy, the courts have engaged in discussions of the 'blessings' and 'benefits' of parenthood, and have allowed those concepts either to abrogate the plaintiff's claim or reduce an award of damages for rearing. However, if the wrongfully born infant is born with a congenital defect, courts have generally rejected these arguments."). Others have argued that the federal courts generally defer to state law on these cases. *See, e.g.*, Thomas A. Warnock, Comment, *Scientific Advancements: Will Technology Make the Unpopular Wrongful Birth/Life Causes of Action Extinct?*, 19 TEMP. ENVTL. L. & TECH. J. 173, 174 (2001) ("[T]he federal courts who presided over these [wrongful-birth and wrongful-life] cases applied state law because 'wrongful birth' and 'wrongful life' are state claims.").

multivariate regression model demonstrate that this relationship remains even after controlling for myriad factors that affect judicial decisions. Moreover, according to these findings, the impact of public opinion in nonpartisan systems is both substantively meaningful and statistically significant. The data analysis therefore provides strong and direct support that conventional thinking about the relationship between judicial independence and nonpartisan elections needs to be revised.

C. Nonpartisan Elections and Abortion Law

These findings have significant implications for those wishing to reform judicial selection. Before discussing the implications broadly, however, we describe them in the context of a single policy area. The goal here is less to focus on particular legal and policy developments—which are admittedly interesting in their own right—but rather to emphasize the ways in which the conventional thinking about judicial selection is misguided. Because our data concern abortion-related cases, we focus on this policy area.

Court watchers have widely interpreted the recent ruling in *Gonzales v. Carhart*,[176] which upheld the Partial Birth Abortion Ban Act of 2003,[177] to suggest that the Supreme Court is now more willing to allow restrictions on abortion.[178] Indeed, even before this case, many presumed that Justice Alito's replacement of Justice O'Connor would move the Court in a pro-life direction.[179] In *Stenberg v. Carhart*,[180]

176. 550 U.S. 124 (2007).

177. *Id.* at 133.

178. *See, e.g.*, Robert Barnes, *High Court Upholds Curb on Abortion: 5-4 Vote Affirms Ban on "Partial-Birth" Procedure*, WASH. POST, Apr. 19, 2007, at A1 ("[*Gonzales*] marked an unmistakable shift [in the court]."); Linda Greenhouse, *In Reversal of Course, Justices, 5-4, Back Ban on Abortion Method*, N.Y. TIMES, Apr. 19, 2007, at A1 ("[*Gonzales*] has broader implications for abortion regulations generally, indicating a change in the court's balancing of the various interests involved in the abortion debate."). Separately, Nancy Keenan, President of the National Abortion Rights Action League (NARAL) responded to the decision by stating that the Court "has given anti-choice state lawmakers the green light to open the flood gates and launch additional attacks on safe, legal abortion, without any regard for women's health." Press Release, NARAL, Supreme Court Decision Marks Setback for Women's Health and Privacy (Apr. 18, 2007), *available at* http://www.prochoiceamerica.org/news/press-releases/2007/pr04182007_scotus.html.

179. *E.g.*, Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. LAW & POL. 301, 304–05 (2006); Michael J. Gerhardt, *What's Old Is New Again*, 86 B.U. L. REV. 1267, 1273–74 (2006); Peter A. Meyers & Joshua Osborne-Klein, *Trading the Privacy Right: Justice Alito's Dangerous Reasoning on Privacy Rights*, 5 SEATTLE J. SOC. JUST. 373, 398–401 (2006).

180. 530 U.S. 914 (2000).

which struck down a Nebraska law allowing for partial-birth abortion,[181] O'Connor cast the decisive vote, joining Justices Stephen Breyer, Ruth Bader Ginsburg, David Souter, and John Paul Stevens.[182] The remaining four justices—Anthony Kennedy, William Rehnquist, Antonin Scalia, and Clarence Thomas—voted to uphold the Nebraska law.[183] Most experts presume that Justice Alito (along with Chief Justice John Roberts, who replaced Rehnquist) would have sided with the minority in that case, and will in general be more disposed than O'Connor to allow states to restrict abortion.[184]

It therefore seems reasonable to assume that state legislatures and governors will pass further restrictions. As South Carolina State Senator Kevin Bryant noted after *Gonzales* was handed down, "We may also look down the road and end up seeing some other procedures that should be restricted too."[185] These new restrictions will likely engender abortion-related litigation that will make its way to the state supreme courts. Accordingly, the state courts will remain at least as important as they traditionally have been in the realm of abortion law, and probably more important than they have been for decades.

Within this context, our analysis of state supreme courts provides insight into likely developments in abortion law across the different types of judicial systems. Most critically, the findings suggest nonpartisan elections will not insulate state supreme-court justices from political pressure on the issue of abortion. These judges will face greater incentives than ones in partisan systems to be responsive to the leanings of the general electorate. In fact, abortion law could change more dramatically in a pro-life-leaning state that has nonpartisan judicial elections (e.g., Minnesota) than in a different pro-life-leaning state that has partisan judicial elections, particularly if the latter tends to elect Democratic judges (e.g., West Virginia).

Moreover, among states with nonpartisan elections, the results suggest that judges' votes on case dispositions will be more sensitive to public opinion the more heavily the public leans in a pro-life versus pro-choice direction. Thus, the shift in the Supreme Court should have larger ramifications for a state like Arkansas than Minnesota, which leans pro-life to a lesser extent than Arkansas. Likewise, in a state like Washington, where the public leans in a pro-choice direction, judges are likely to be resistant to new restrictions on abortion. Of course, we

181. *Id.* at 921–22.

182 *Id.* at 918–19.

183. *See id.*

184. *See* sources cited *supra* note 179.

185. Kirk Johnson, *New State Push to Restrict Abortions May Follow Ruling*, N.Y. TIMES, Apr. 20, 2007, at A18.

are not claiming that public opinion will be the only factor affecting judges' decisions. Case facts, the doctrine surrounding particular types of cases, as well as other factors will also be influential. However, where nonpartisan elections are the rule, public opinion will exercise a previously underappreciated influence on the likelihood that new statutes and referenda are upheld.

CONCLUSION

The results we have reported here provide considerable evidence for reconsidering the conventional wisdom associated on the relationship between nonpartisan elections and judicial independence. As we have detailed above, the transition from partisan to nonpartisan elections for judicial offices was traditionally championed by advocates of insulating judges from political pressure. Partisan elections, it was held, created undue political influence in the judicial process. Nonpartisan elections, by contrast, would help insulate judges from political pressures.

Nonpartisan selection may very well have initially served that purpose. We have argued, however, that in the current era—where judges campaign on issue-based platforms, are criticized by interest groups and challengers for past decisions, and are able to speak more freely about their positions on contested legal and political issues—the effect of nonpartisan elections is different. In particular, they induce judges to be more responsive to popular opinion on hot-button or salient issues. While in both partisan and nonpartisan systems voters' impressions of a judge will be affected by the way his record is characterized by interest groups and the media, in nonpartisan systems this characterization is not balanced with a partisan label that appears on the ballot. This absence of a partisan label creates an additional incentive for judges in the new-style campaign to signal their policy positions through decisions.

The hypothesized effect is strongly borne out by the data. Our analysis shows a very clear pattern of judicial responsiveness to public opinion in states with nonpartisan judicial elections and a corresponding lack of responsiveness in states with partisan elections. In the former, judges become increasingly likely to issue pro-life decisions as public opinion moves in a pro-life direction. In states with partisan elections, however, patterns of judicial decision making remain stable as public opinion about abortion changes. Clearly, these results run against the received wisdom and the very reason that nonpartisan reforms were initially pursued.

Of course, we do not wish to claim that partisan elections are ideal from the perspective of encouraging judicial independence. Judges

selected through partisan primaries face their own set of pressures, such as a need to cater to partisan constituencies. Rather, we want to point out that nonpartisan elections have their own set of political pressures. Reformers accordingly need to consider the way in which these and other procedures will operate within the context of modern judicial campaigns rather than simply assuming the pre-new-style judicial campaign conventional wisdom is correct.

Indeed, this analysis suggests that more hard evidence is needed on the ways in which various electoral procedures operate in the context of new-style judicial campaigns. For instance, while we have focused on nonpartisan elections in which incumbents face challengers, it seems reasonable to ask whether retention elections, which also occur without partisan labels being attached to judges, may produce similar incentives. The conventional wisdom about retention elections, that they serve to insulate judges from political pressures, also developed prior to the context of new-style judicial campaigns. Yet in an era in which judges' policy leanings are increasingly important to voters and advertised to them, even retention elections may have unexpected and perverse effects on judicial independence. The findings presented here suggest that future research on this question would be beneficial.

In general, our analysis emphasizes the need for hard evidence about the impact of various selection-related procedures. Policy recommendations that lack such evidence may ultimately have paradoxical consequences. As we have shown, nonpartisan elections have different effects than originally intended. Indeed, in states with nonpartisan elections, the public plays a hidden but significant role in the courtroom.