

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

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Abstract

Various literatures indicate that partisan labels increase the accountability of elected officials. Correspondingly, advocates of nonpartisan elections claim that this procedure helps liberate officials from political influence. These arguments have been prominent in recent debates regarding the selection of judges in U.S. state courts. We suggest, conversely, that on salient issues nonpartisan elections will encourage judges to issue popular decisions, particularly given developments in judicial campaigns. To test this hypothesis, we assemble a dataset that revolves around state supreme courts' decisions on abortion cases between 1980 and 2006. The analysis—which controls for a variety of factors and uses the U.S. Senate as a comparative tool—provides strong support for the hypothesis.

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

Given the significance of party labels, nonpartisan elections would seem likely to present problems for democratic accountability. Yet critics of political parties and machines have enjoyed some success at securing this electoral institution. Twenty-one U.S. states have some form of nonpartisan judicial elections (Berkson and Caufield 2004). Also within the U.S., seventy-five percent of major cities (MacManus and Bullock 2003), many state-level regulatory offices, and the Nebraska legislature utilize the procedure. Furthermore, it is not unique to the U.S.; nonpartisan elections have appeared at various times and levels of government in countries ranging from England to Pakistan to Ghana. Advocates claim that these elections help to elevate “competence” over “politics.” For example, the Progressive reformers, who helped to popularize the procedure in the United States, maintained the institution would enable “statesmen” to replace politicians (Bridges 1997, 29).¹ Recent proponents of nonpartisan judicial elections have similarly argued that they encourage independence from political influence (see e.g., Sheldon and Maule 1997; Atchison, Liebert, and Russell 1999).

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

Numerous policy reports charge that such professionalism or independence—to the extent it is achieved at all—comes at the expense of accountability. For example, a recent report of the Brennan Center for Justice at the New York University School of Law concludes that “nonpartisan elections elevate the importance of name recognition, rather than focusing voters on issues or candidate qualifications,” and that “extremist candidates are likely to fare better under nonpartisan elections” (Goldberg 2003, 1). In an analysis of the (nonpartisan) Nebraska legislature, Rogers (1989, 17) assesses that “recognized partisanship would increase accountability.”² Likewise, a Federalist Society paper surmises that “non-partisan judicial elections do not compare favorably with partisan judicial elections” because the former inhibit voters’ ability to make informed decisions (Debow 2003).

A good deal of scholarship supports the conventional wisdom that partisan labels increase accountability. Various studies indicate that when the labels are absent, voters simply substitute the cue of incumbency (e.g., Dubois 1979a; Schaffner, Streb, and Wright 2001 although cf. Ferejohn 1977 and Ansolabhere et al. Forthcoming). Consistent with this result, Bonneau and Hall (2003) reveal that uncontested state supreme court elections are more frequent in nonpartisan systems. Likewise, turnout is lower (e.g., Dubois 1979b; Epstein, Knight, and Shvetsova 2002). Peterson and Kantor (1977) question the conventional wisdom by providing evidence that the switch from nonpartisan to partisan elections in British localities did not encourage accountability on issues unrelated to class. Yet Peterson and Kantor do not show that

² Nebraska Senator George W. Norris, a leader of the switch to nonpartisan elections, did argue that partisan labels may not be representative of candidates’ positions. However, Norris’s primary argument for nonpartisanship was that it would decrease ideological divisions and increase technical competence, not that it would increase responsiveness to majority opinion (Rogers 1989).

nonpartisan elections necessarily engender accountability; rather, they find that the switch to partisan elections did not increase responsiveness to local opinion because national concerns determined the positions of the parties.

In contrast to the standard view of how partisan labels affect accountability, we argue that under certain conditions it is nonpartisan elections that are more likely to encourage officials to follow majority opinion. Further, we propose that these conditions have held on highly salient or “hot-button” issues in recent decades in U.S. state courts of last resort, which are commonly called state supreme courts.³ After developing these arguments, we test them with a new dataset collected for this purpose. The data encompass every case on abortion policy from the state supreme courts in which judges are selected through contested, statewide elections.

The paper proceeds as follows: section one reviews related work on judicial electoral institutions and campaigns; section two outlines a logical foundation for our argument; section three describes the data and specification; section four presents the results, which include a comparison to the voting behavior of U.S. Senators; and section five concludes by discussing broader implications of the findings.

Judicial Elections and Campaigns

Scholars have amassed a wealth of evidence that institutions pertaining to judicial selection have pronounced effects on judges’ decisions. Much of this work focuses on differences between elected and appointed judges. For example, research suggests elected

³ We do not claim to be the first to stake out this argument, but to the best of our knowledge are the first to test it. As we later discuss, this prediction emerges from the insightful edited volume chapter of Franklin (2002) as well as the formal theory of Canes-Wrone and Shotts (2007).

judges are more likely to cater to public opinion (e.g., Brace and Boyea 2004), overturn state statutes (Langer 2002), and uphold pro-death penalty decisions (Brace and Hall 1997). Additionally, Hanssen (1999) finds elected judges to be more predictable in their decision-making. Other scholarship indicates that term-length affects rulings, with longer terms encouraging rulings that reflect judges' partisan or ideological leanings (Brace and Hall 1997) and less punitive sentencing (Gordon and Huber 2004).

The impact of having nonpartisan versus partisan judicial elections has received less attention.⁴ Tabarrok and Helland (2002) find that average tort awards are higher in states with partisan elections, particularly for cases in which the defendant resides out of state. The literature also indicates that such judicial contests are no more about “professionalism” or “competence” than are partisan ones. For instance, Glick and Emmert (1987) provide evidence that judges selected through nonpartisan elections are *not* more likely to have strong professional or educational credentials. Similarly, Hall (2001) ascertains that nonpartisan elections are influenced by factors akin to those that affect partisan judicial elections, such as the murder rate.

Studies indicate a wide range of factors that can influence judicial contests, but a recurring theme is that these campaigns have become more policy-focused since the 1980s. Judicial campaigns traditionally avoided discussion of candidates' policy positions or past decisions. Over the past several decades, however, interest groups and even sitting judges have made efforts to publicize candidates' positions and records (e.g., Baum 2003; Gibson Forthcoming). Correspondingly, media coverage of the campaigns has increased (e.g., McFadden 1990; Iyengar 2002), and spending by independent interest groups has gone up

⁴ Likewise, less attention has been paid to the impact of retention versus competitive elections, although see Spiller and Vanden Bergh (2003).

dramatically (e.g., Schotland 2003). Much of this spending has been directed towards the sorts of “attack ads” that are common in presidential and legislative races.⁵ Compounding these developments, the U.S. Supreme Court ruled in *Republican Party of Minnesota v. White* (536 U.S. 765 (2002)) that states could not prohibit judicial candidates from announcing their positions (see Schotland 2003 for details).

This “‘new-style’ judicial campaign,” as Hojnacki and Baum (1992) have dubbed it, is associated with greater issue-based voting by the public. Hojnacki and Baum offer support for this perspective by establishing that labor-related issues affected voters’ choices for the Ohio Supreme Court elections in 1986 and 1988. Similarly, Wold and Culver (1987, 438) conclude in a study of the electoral defeat of several California justices that “normal voter indifference to judicial elections can be dispelled by publicizing decisions that arouse attention and hostility.”⁶ Hall (1987) suggests that this electoral environment has not gone unnoticed by judges; in documenting interviews with Louisiana Supreme Court justices, she describes that they fear electoral punishment for dissenting from popular majority rulings.

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

⁵ For research that suggests attack ads tend to focus on salient political issues, see Geer (2006).

⁶ In keeping with these studies, Gibson and Caldeira (2007) provide evidence that citizens know more about courts than is commonly presumed.

Theory

Building on this evidence about judicial campaigns, a couple of recent scholarly pieces have argued that the conventional wisdom about nonpartisan judicial elections is wrong. One of these pieces, Franklin (2006), hypothesizes that the lack of a partisan signal makes judges more susceptible to attacks by interest groups. In Franklin's (2006, 155) words,

“Nonpartisan elections produce judges who are less aligned with partisan ideological conflicts yet who may be more subject to punishment for specific decisions. Such punishment, however, is likely to occur sporadically and unpredictably, making judges potentially even *less* independent because they can't predict which issues are likely to get them into trouble—hence they have to be careful all the time.”

By contrast, in partisan systems, judges can worry less that an individual decision will override voters' perceptions of the judge's leanings.

Recent formal theory by Canes-Wrone and Shotts (2007) helps to identify specific conditions under which nonpartisan elections should encourage political officials to be more responsive to public opinion, or using the author's language, “ideologically rigid” to majority opinion. Five premises are critical. First, voters must learn about elected officials' decisions. The theory thus applies only to relatively salient issues, which in recent judicial campaigns have included abortion, criminal justice, eminent domain, tax policy, and business regulation, among others (e.g., Baum 2003; Thevenot 2006). A second condition is that the electorate may not learn the rationale or details surrounding the decisions. For example, a voter may not know whether an anti-death penalty decision was based on the specific facts of the case or instead a justice's aversion to the death penalty. Third, the theory assumes that ideology can influence an individual's desired policy even independent of the available information. Voters consequently

want to select elected officials who share their leanings, and this (fourth) assumption fits Hojnacki and Baum's (1992) description of voting behavior in new-style judicial races. Fifth, the argument about nonpartisan elections presumes that voters perceive partisan labels signal which candidate is further to the left, and this premise is supported by research on judicial elections (Klein and Baum 2001; Iyengar 2002).⁷

Canes-Wrone and Shotts (2007) as well as Franklin (2006) focus on the incentives produced by general elections, but their arguments are relevant to nomination procedures too. Consider partisan systems with primaries.⁸ As is the case with general elections, primaries have become more focused on judges' positions (Brennan Center for Justice 2006). And in primaries all candidates have the same partisan label, which according to Franklin as well as Canes-Wrone and Shotts should encourage judges to use votes to signal ideological similarity to the electorate. Alternative procedures for partisan nominations, like caucuses, similarly encourage judges to cater to a select portion of the population. Although partisan organizations and their members could obviously choose judicial candidates whose views correspond to the proverbial median voter, this behavior is not commonplace (e.g., Champagne and Cheek 2002).

⁷ The argument about nonpartisan elections derives from solutions to the theory under alternative assumptions about voters' information regarding candidates' preferences. When voters have no information about which candidate is more liberal on an issue other than through the incumbent's decisions, the incumbent typically faces strong incentives to cater to public opinion. If, however, voters know that the incumbent is to the left or right of his challenger then the incumbent has no need to signal her predispositions through policy decisions.

⁸ One state in our database has a nonpartisan general election and partisan primary election. We coded Ohio as nonpartisan. The results are substantively similar when Ohio is excluded from the analysis.

Thus the conventional wisdom about nonpartisan elections may be incorrect because of pressures associated with the nomination process, the general election, or (perhaps most likely) some combination of these influences. The purpose of our empirical analysis is not to distinguish among these possibilities. Rather, we assess the mutual prediction that nonpartisan elections increase the incentives of judges to cater to voters' ideological leanings.

Data, Descriptive Statistics, and Specification

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

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

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

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

[Table 1 about here]

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

Obviously, any study in which state, local, or cross-national variation serves as the primary means of assessing the effects of an institution needs to be concerned that the choice of the institution does not simply reflect something about the cross-sectional unit's "culture" or "preference." In this context, for instance, we want to address the possibility that the states with nonpartisan elections are ones in which the culture encourages all state officials to cater to public opinion on the issue of abortion, or in which the state party organizations encourage less party-line voting independent of the institution of nonpartisan elections. As the analysis proceeds, we will address this issue in a number of ways. In particular, we will assess whether other state-level officials in states with nonpartisan judicial elections vote differently than comparable officials in

states with partisan judicial elections. Also, the main dataset on judicial behavior will be analyzed using panel data methods.

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

Locating the cases was no easy task. While Westlaw has helpful topic-based categories that aim to direct users to relevant cases, conversations with Westlaw personnel confirmed our suspicion that the classification is far from exhaustive. We therefore searched the general database of cases on Westlaw and Lexis for ones in which the design or implementation of abortion policy was a major feature.⁹ After reading through hundreds of cases that mentioned the term abortion but were not centrally about this issue, we came up with 343 lower court decisions that focused on abortion policy, 131 of which were heard on appeal by courts of last resort. All

⁹ Specifically, we utilized the following strategy for searching. First, we included all cases in the Westlaw categories for abortion and also abortion-related cases in the Westlaw category for trespass. Second, we searched the general database for cases with the term “abortion,” excluding ones within the criminal code for “homicide and abortion.” Because many state criminal codes still list abortion within the same classification as homicide, a pure search on the term abortion turns up thousands of homicide cases. (The Westlaw topic code for the homicide category is 110 349 350h 35 96h.) Third, to find wrongful death cases related to abortion policy, we conducted a search with the terms “wrongful death” and “fetus.” Finally, we searched for cases with the phrase “wrongful birth.”

states in Table 1 had cases except for Utah, and all had cases before a supreme court except for Utah and New Mexico.

For every supreme court case we coded each regular justice's vote as pro-choice or pro-life depending on how it affected the likelihood that women in the state would obtain abortions, either directly or by implication. Pro-life rulings decrease the likelihood while pro-choice ones at least weakly increase it. For instance, if the judge voted to allow a minor an abortion without parental notification, we coded the decision as pro-choice. Likewise, a decision is pro-choice if it restricts protesters' activities in the vicinity of abortion clinics. If a judge did not participate in the case, he or she does not have a vote (either in reality or, by consequence, our coding). Also, we do not include the votes of judges temporarily appointed to a court because these judges were not facing reelection. In total the data from the supreme court cases include 905 individual votes or decisions, 61 percent of which were pro-choice. The number of votes is substantial in each of the electoral systems; specifically, 527 are from partisan systems and 378 from nonpartisan ones.

Public Opinion and Descriptive Statistics

To link the judges' votes to state-level public opinion data, we used responses to the CBS-New York Times (NYT) surveys regarding abortion. Research suggests these surveys are an excellent source of state-level opinion data because the organizations utilize randomized dialing and sample a considerable number of citizens in each state over the course of a decade (Erikson, Wright, and McIver 1993). These surveys have asked respondents whether they prefer abortion to be readily available, available under restricted circumstances, or unavailable. Since 1989 the surveys have posed the question, "Which of these comes closest to your view? 1. Abortion should be generally available to those who want it. Or 2. Abortion should be available

but under stricter limits than it is now. Or 3. Abortion should not be permitted?” while earlier surveys asked, “Should abortion be legal as it is now, or legal only in such cases as rape, incest, or to save the life of the mother, or should it not be permitted at all?” We have conducted tests to see whether this change in question wording significantly influenced the responses, and find that it did not.¹⁰

As Erikson, Wright, and McIver (1993) discuss, from year to year the number of respondents in a given state can vary greatly given that any individual survey is designed to capture national opinion; as an example, our data include 144 responses from Oregon in 1992 while only six responses from this state in 1993. The solution recommended by Erikson, Wright, and McIver is to pool over a decade. Across this period the responses are sufficient in number, and sampled in a sufficiently randomized manner, to allow for state-level estimates of opinion. Such an approach is further supported by research that suggests abortion opinion is stable during the period of our analysis (e.g., Brace et al. 2002).¹¹ We consequently pooled together the polls

¹⁰ We regressed affirmative responses to the General Social Survey (GSS) question about whether abortion should ever be permitted on each of the three responses to the CBS-NYT polls according to whether the CBS-NYT responses were based on the earlier (1985-88) or later (post 1988) question wording. (For instance, we regressed the percentage of GSS respondents who favored permitting abortion to the percentage who gave the most liberal response in the CBS-NYT surveys and examined whether this relationship changed with the change in question wording. We proceeded with analogous regressions for each of the other two categories of responses.) Each category of response had a statistically similar relationship to the GSS responses before and after the change in question wording.

¹¹ Some research suggests that responses to the CBS-NYT Times original question wording changed in 1989, due to changes in abortion policy that year, despite the fact that underlying preferences about abortion did not change (Wlezien and Goggin 1993). For this reason, when creating the state-level

conducted after 1995 to measure state-level opinion on abortion for those years. Likewise, we pooled together the 1985 through 1995 polls. No similar surveys were conducted between 1980 and 1984, and so the 1985-1995 responses are used for the small percentage of abortion cases (<10%) that occur during these years. Despite the support in the literature for pooling the opinion data by decade, we have still investigated whether this pooling affects our results. Specifically, by limiting the analysis to observations for which the CBS-NYT surveys contain at least 100 responses for the state in that year, we find that the major results still hold when we measure public opinion using the yearly data [see the *Appendix for Referees* for this and other major alternative specifications].

What sort of abortion opinion did the judges face? The mean and median of the responses in each state provide a sense. Using the coding of the surveys, in which a value of one reflects the most pro-choice response, two the intermediate response that shares with the pro-life movement a desire to restrict abortion more heavily, and three the most pro-life response, the mean response by state and decade ranges from 1.51 to 2.05. The average is 1.83, and the standard deviation 0.12. The median, by contrast, is equal to two in all but one state-era combination. When median-based opinion masks variation that mean-based data illuminate scholars often utilize the latter, and we follow this approach (e.g., Clinton 2006).¹² Specifically, we code a state as having pro-life leanings if the mean response is higher than 1.75, the value if

estimates of public opinion we used only 1989 surveys with the revised question wording. Notably, Wlezien and Goggin's research does not demonstrate similar instability pre-1989.

¹² Caplin and Nalebuff (1991) suggest that a mean voter theorem should guide work on representation more generally because mean opinion on an issue will be a more accurate predictor of vote choice in an electoral context with multiple policy dimensions.

half of the respondents give a pro-choice answer and the other half split between the two pro-life answers. Mean responses with a higher percentage of pro-choice answers reflect a state with pro-choice leanings. Under this coding, states that are consistently pro-life include Arkansas and Wisconsin while Washington is consistently pro-choice. As we will soon discuss, the key substantive findings do not depend upon using the mean response or a particular cutpoint; analysis that utilizes a continuous measure of public opinion supports the major arguments.

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

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

Simple probits suggests this pattern holds even after incorporating a continuous measure of public opinion, such as the percentage of state respondents that want to abolish or further restrict abortion minus the percentage that want to permit it widely. For instance, this effect emerges from a probit in which the dependent variable is the probability of a pro-life decision and the independent variables include this measure of public opinion, the judge's party, and

public opinion interacted according to whether the state had nonpartisan elections.¹³ Appendix Table A presents these results. Rather than focus on them, we want to highlight that the specification is problematic because the independent variables are highly collinear. In particular, the correlations for the main effects and interactions involving public opinion and nonpartisan elections include one above $\rho > 0.9$ and another at $\rho \approx 0.7$. Thus while the results support our hypothesis, we caution that the collinearity could be affecting the signs and significance of the estimates. Likewise, if we substituted the mean state response as the measure of public opinion, the results would support the key arguments but the interaction terms and main effects would involve collinearity of $\rho = 0.99$. For this reason, the main tests do not utilize this sort of specification. However, it is worth noting that the key results receive further support if we simply extend the specification of Appendix Table A to include all of the control variables employed in the main analysis.¹⁴

Specification

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

¹³ The data on a judge's partisan affiliation are from Langer (2002) and are described in the section on control variables. The probit results also hold without this control.

¹⁴ The controls for facts and electoral proximity were naturally transformed so that a higher value made a pro-life decision more likely in expectation. The coefficient for the interaction between *%Pro-Life Supporters* and *Nonpartisan Elections* was 4.856 with a standard error of 2.009, while the coefficient on the main effect of public opinion was -2.293 with a standard error of 1.605.

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

where the political and legal controls are defined as follows.

Justice's party aligned with public opinion. We expect a judge to be more likely to make a popular decision if his or her party's stance on abortion comports with state public opinion on the issue. In other words we expect Democratic justices to be more likely to make a popular decision if the state leans in a pro-choice direction, and Republican justices to be more inclined towards popular decisions if the state leans pro-life. *Justice's party aligned with public opinion* accordingly equals one if the judge is a Democrat and the state leans pro-choice, one if the judge is a Republican and the state leans pro-life, and zero for the alternative matching of these categories. For the one percent of observations in which a judge is unassociated with either major party, we coded the variable as 0.5. The data on partisan affiliation are from Langer (2002), who collected them from sources such as the *American Bench* and local newspapers.¹⁵

Election within two years. This factor equals one if justice *i* faces a contest for reelection within the next two years and zero otherwise. Because the literature indicates that longer terms reduce judicial responsiveness to public opinion, we expect the likelihood of a popular decision to be higher when a judge is soon facing an electoral contest. The cutpoint of two years corresponds to the time-frame suggested by research on legislative responsiveness (e.g., Kuklinski 1978).¹⁶

¹⁵ We have also estimated the model accounting for judge-specific effects. These alternative specifications provide strong support for the main hypothesis.

¹⁶ Another political control we considered was intensity of public opinion. This factor did not alter the major finding regarding nonpartisan elections, and generally had an insignificant effect.

Case categories. Friedman (2006) emphasizes the need for political scientists to “take law seriously” and we make several such efforts. The first controlling for the possibility that judges may be more likely to cater to the electorate’s leanings on certain types of cases. In particular, we include a set of indicators representing categories of cases that have over one hundred votes. These delineated categories, which encompass 84 percent of the data, include *Trespassing and protests*, *Minors*, *Personhood*, and *Wrongful birth*. The first group involves protests and related anti-abortion activity at clinics or doctors’ homes. The second concerns the rights of underage dependents to obtain abortions without parental consent. As the name of the third category suggests, it encompasses cases about the legal definition of “personhood.” These disputes involve whether the death of a specific fetus should be treated similarly to the death of a child or adult. The fourth category, *Wrongful birth*, covers litigation in which a woman claims improper medical diagnosis and/or treatment prevented her from deciding to have an abortion; most of these cases concern genetic testing. The remaining sixteen percent of cases, which make up a residual category *Miscellaneous other cases*, vary greatly. For instance, in *People v. Higuera*, 625 N.W.2d 444 (Mich. 2001), a doctor was charged with illegally performing a late term abortion while in *McKee v. County of Ramsey*, 316 N.W.2d 555 (Minn. 1982), plaintiffs argued they should not be compelled to pay certain taxes if the state funds abortions.

Facts aligned with public opinion. Research suggests that case facts affect judicial decision-making, even at courts of last resort (e.g., Segal 1984; Scheppele 1990). Because these data involve different types of abortion decisions, the relevant set of facts differs according to the type of dispute. To address this issue in a manageable way, we created a variable on case facts for the four major categories of cases. In particular, we drew on existing research, relevant statutes and

laws, and our readings of the cases to assess for each category the most significant fact. *Facts aligned with public opinion* equals one if that fact supports a popular decision and zero otherwise. Thus if the fact encouraged a pro-life decision, the variable equals one if the state leaned pro-life and zero otherwise. The specific fact for each category is:

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

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

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

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

Wrongful birth. In these cases a parent accuses a physician of causing an unwanted birth, one for which the mother would have terminated the pregnancy had the physician not made an error. Specific allegations encompass failing to provide genetic testing, relay results, interpret the results appropriately, or incorrectly performing a procedure. Pro-life groups oppose these claims while pro-choice ones support them on the grounds that pro-life doctors could otherwise willfully withhold information and services. We expect judges to be more likely to reject a wrongful birth claim, and thus to rule in a pro-life direction, if the doctor is accused of merely misinterpreting test results as opposed to not providing available tests, failing to relay the results, or incorrectly performing a procedure. When results are misinterpreted, doctors can hope to find expert witnesses who can claim that the interpretation was reasonable. By contrast, if a test is not given or the results not relayed, judges must rely more heavily on litigants’ statements.¹⁷

In addition to controlling for case facts and type, we considered creating a variable to account for differences in state constitutions. Accordingly, we read each state constitution to look for variation in the issues associated with abortion policy. No major differences were found. Still, the main analysis estimates both basic probit and random effects probit models (the latter of

¹⁷ An alternative approach to accounting for case-specific factors would be to cluster the standard errors by case. Adopting this approach, our main conclusions about nonpartisan elections continue to receive support. Moreover, the case-type indicators and control for facts are no longer significant if the main specification clusters by case.

which allows for different errors in variances across the states). A fixed effects model (which allows for different intercepts across states) would boil down to estimating the impact of the switch to nonpartisan elections in Arkansas because only this state has cases before and after a switch to nonpartisan elections. For this reason, we do not focus on these results but note in passing that analysis of Arkansas does support the major findings; indeed, they receive support even if we limit the analysis to the 58 observations that involve a judge who voted in cases both before and after the switch.¹⁸

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

¹⁸ Estimating a simple probit on these 58 observations yields a coefficient on nonpartisan elections of 1.278 with a standard error of 0.470.

¹⁹ Instruments for the first-stage included whether the lower court was unanimous and whether the lower court decision was aligned with the partisan affiliation of the median member of the supreme court. As expected, supreme court review was more likely when a lower court was split and when the supreme court was ideologically disposed towards overturning the decision. Because the first-stage Heckman equation is aggregated by case, we also ran the main equation at the case-level, using the median values of the judge-level control variables and a case-level analog for *Popular Decision*. The likelihood ratio test

Results

Table 2 presents the results of the four main specifications.

[Table 2 about here]

Column one reports the findings from the basic probit model for the sample on which we have case facts, column two the random effects probit model for this sample, column three the basic probit model for the full sample of cases, and column four the random effects probit model for the full sample. Notably, in all of these specifications, nonpartisan elections are associated with a greater likelihood of a popular judicial decision. In other words, a judge is significantly more likely to vote with the electorate's leanings if he or she faces a nonpartisan election. This effect is consistently significant at conventional levels ($p < 0.05$, two-tailed) and of a nontrivial magnitude. In the sample with case facts, justices in nonpartisan systems are found to be between twelve to thirteen percent more likely to vote with the electorate's predisposition at the means of the independent variables. Without the control for case facts, this estimate ranges from nine (Column 3) to seventeen percent (Column 4).

Overall, these results refute the conventional wisdom that partisan elections encourage more accountability than nonpartisan ones. Across all specifications, the judges in nonpartisan systems are the ones more likely to issue popular decisions. These results suggest that such judges do not rule "above the fray" of politics. Instead, on a salient issue, they appear disposed towards issuing decisions that signal ideological similarity to the electorate's predispositions.

suggests that one cannot reject the independence of the equations . Moreover, even controlling for selection, the impact of nonpartisan elections is consistent with our hypothesis and significant at conventional levels.

The other results in Table 2 generally conform to expectations about judicial behavior. For instance, as predicted the parameter estimates on partisan affiliation suggest that this affiliation has a significant effect on decision-making. Democratic judges are more likely to issue a pro-choice decision and Republican judges a pro-life one. The impact of this effect is comparable to that of the electoral system. Depending on the specification, Democratic judges are found to be between ten to fifteen percent more likely to issue pro-choice decisions (at the means of the independent variables).²⁰

The remaining political variable, which is electoral proximity, also performs largely as expected. Specifically, the results indicate that judges are significantly more likely to make a popular decision when they face an electoral contest within two years. In each specification the magnitude is between nine to ten percent and reasonably significant ($p < 0.05$ two-tailed in the sample without case facts and $p < 0.07$ two-tailed in the sample with case facts), suggesting that judges are nine to ten percent more likely to issue popular decisions in the two years before facing an election. The result comports with Gordon and Huber (2004), which suggests that electoral proximity increases judges' propensity to cater to public opinion.

The findings on the legal variables suggest that judicial decision-making is not entirely political. Indeed, the impact of case facts is at least marginally significant in each specification ($p < 0.1$, two-tailed) and the magnitude is similar to that of electoral proximity (at the means of the independent variables). The case categories, as well, affect decision-making. Most notably,

²⁰ If we analyze the data separately by partisan and nonpartisan systems, we find that the impact of partisan affiliation is greater in the partisan systems. This result suggests that judges in partisan systems may feel greater pressure to appeal to partisan constituencies that control re-nomination processes.

popular decisions are more likely on trespassing cases than other types of abortion cases. Even without the case categories, however, the results on the political variables remain strong.

The results are also robust to the inclusion or exclusion of the random effects. As detailed in Table 2, specification testing indicates that the random effects are jointly significant only in the analysis that does not control for case facts. This robustness to the inclusion of random effects is consistent with the argument that the key findings are not a function of differences in state law or other state-level differences. However, to further address the possibility that state-level differences are driving the results, we analyze whether the patterns observed in Table 2 reoccur if we analyze the abortion-related votes of U.S. Senators from the same set of states.

Voting of U.S. Senators

If the effects of Table 2 were simply a function of state-level characteristics that caused elected officials from states with nonpartisan elections to be more likely to issue popular decisions on abortion policy than officials from states with partisan elections, then we should expect to see similar differences in the voting behavior of U.S. Senators. That is, we would expect Senators from those states with nonpartisan (statewide, contested) judicial elections to be more likely to issue popular decisions than Senators from states with partisan judicial elections. We accordingly collected data on these Senators' roll call decisions. Using Project Vote Smart's key votes on abortion policy, which span 1994 through 2006, we coded whether each Senator's vote was pro-choice or pro-life according to the Project Vote Smart characterization (Project Vote Smart 2007). These data encompass 620 Senators' votes.

By using the public opinion data as in Equation [1], we created the variable *Popular Vote*. We then collected data on each Senator's party affiliation and electoral proximity to

generate analogs to *Justice's Party Aligned with Public Opinion* and *Electoral Proximity*. We could therefore estimate a specification akin to Equation [1] for each Senator s and roll call i :

$$[2] \quad \Pr(\text{Popular Vote}_{si} = 1) = f(\text{State has Nonpartisan Judicial Elections}_{si}, \text{Senator's Party Aligned with Public Opinion}_{si}, \text{Electoral Proximity}_{si}).$$

The coefficient on the variable *State has Nonpartisan Judicial Elections* should pick up any systematic difference in the voting behavior of officials from states with nonpartisan judicial elections versus partisan ones; that is, if the earlier results regarding nonpartisan elections were due to spurious factors such as political culture, the coefficient should be positive and significant. As before, we present the results with and without random effects.

Table 3 describes the results.

[Table 3 about here]

In neither specification are U.S. Senators from states with nonpartisan judicial elections more likely to vote with majority opinion than Senators from states with partisan judicial elections. Regardless of whether the random effects are included, there is no difference in Senators' voting between these types of states. The signs on the coefficients are even negative. In addition, and as expected, party affiliation consistently has a large effect on roll call choices. These findings suggest that the evidence on judicial behavior did not result from the fact that states with nonpartisan judicial elections are different in culture or some other way from states with partisan judicial elections.

Obviously we are not claiming that U.S. Senators and judges face similar incentives. Many have argued, for instance, that party organizations influence the behavior of legislators once they are in office. That being acknowledged, if the states with nonpartisan judicial elections were truly different in ways that are distinct from the institution of nonpartisan elections and that

gave elected officials an incentive to be more responsive to the electorate's leanings, then we should expect some effect on the behavior of Senators. Instead, we observe that Senators from these states are no more likely, if anything less likely, than ones in states with partisan judicial elections to cater to majority opinion on abortion policy.

Discussion and Conclusion

In contrast to the conventional wisdom, we have established that under certain circumstances partisan labels lead to less responsiveness to public opinion. The basis of our evidence comes from a newly assembled dataset of state supreme court decisions involving abortion policy. According to the basic descriptive statistics as well as tests that controlled for a range of political and legal factors, the results show that the justices in nonpartisan systems are more likely to make popular decisions than the justices in partisan systems. These results hold for a variety of econometric specifications. Moreover, according to a comparison to the behavior of U.S. Senators, the results are not a function of differences in state culture.

The findings have at least two levels of implications. First, in terms of judicial reform, the paper indicates that judicial accountability may work differently than scholars and reformers have supposed. Given that nonpartisan judicial elections were originally introduced before the new-style judicial campaign, the conventional wisdom may have developed for valid reasons. However, according to these results, this conventional wisdom is no longer relevant, at least for the sorts of salient issues that make up the new-style judicial campaign.

On a more general level, our results offer insight into the ways that partisan labels can influence representation. Most obviously, the study implies that even outside of the judicial context nonpartisan elections may encourage elected officials to cater to majority opinion.

Whether this is indeed the case is a subject for future research. Another topic for future research concerns variation across issues. Within partisan systems policy issues vary in the extent to which party labels signal candidates' dispositions. Our findings indicate that when the labels do not provide a strong signal, e.g., on an emerging issue, officials might be more likely to cater to majority opinion.

Of course, all of these potential implications are predicated upon a context similar to that examined here. Thus we do not claim that the results necessarily apply to non-salient issues or offices that face different electoral environments. Instead, we merely suggest that the conventional wisdom about the impact of partisan labels is wrong under a set of conditions that are familiar to judicial campaigns in the U.S. today. Other conditions can and should be analyzed with respect to whether the conventional wisdom holds or whether instead if what occurs is the relationship we have established between partisan labels and accountability.

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

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

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

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

	(1)	(2)	(3)	(4)
Nonpartisan election	0.303 (0.124)	0.334 (0.136)	0.218 (0.100)	0.462 (0.201)
Justice's party aligned with public opinion	0.383 (0.107)	0.373 (0.109)	0.344 (0.088)	0.262 (0.097)
Election within two years	0.220 (0.118)	0.225 (0.118)	0.236 (0.094)	0.241 (0.095)
Facts aligned with public opinion	0.198 (0.108)	0.182 (0.110)	---	---
<i>Case category</i>				
Trespassing and protests	0.549 (0.177)	0.550 (0.182)	0.241 (0.144)	0.181 (0.156)
Minors	0.269 (0.186)	0.294 (0.195)	-0.442 (0.148)	-0.493 (0.172)
Personhood	-0.045 (0.173)	-0.040 (0.178)	-0.274 (0.136)	-0.319 (0.146)
Wrongful birth	---	---	-0.338 (0.167)	-0.463 (0.186)
Constant	-0.728 (0.170)	-0.748 (0.183)	-0.157 (0.128)	-0.237 (0.184)
State effects	No	Yes	No	Yes
N	605	605	905	905
Significance of equation	$\chi^2_{[7]}=49.972$ ($p<0.001$)	$\chi^2_{[7]}=46.824$ ($p<0.001$)	$\chi^2_{[7]}=67.993$ ($p<0.001$)	$\chi^2_{[7]}=44.834$ ($p<0.001$)
Significance of state effects	---	$\chi^2_{[1]}=0.151$ ($p<0.309$)	---	$\chi^2_{[1]}=10.298$ ($p=0.001$)

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

Table 3. U.S. Senate Voting in States with Contested, Statewide Judicial Elections

	(1)	(2)
State has nonpartisan judicial election	-0.032 (0.158)	-0.249 (0.295)
Senator's party aligned with public opinion	2.150 (0.137)	2.443 (0.181)
Election within two years	0.178 (0.135)	0.219 (0.140)
Constant	-0.899 (0.165)	-0.922 (0.276)
State effects	No	Yes
N	620	620
Significance of equation	$\chi^2_{[3]}=273.906$ ($p<0.001$)	$\chi^2_{[3]}=184.700$ ($p<0.001$)
Significance of state effects	---	$\chi^2_{[1]}=31.37$ ($p<0.001$)

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

Appendix Table A. Basic Relationship among Pro-life Decisions, Public Opinion, and Judicial Party Affiliation

Nonpartisan election x % Pro-life supporters	1.464 (0.762)
% Pro-life supporters	-0.553 (0.602)
Nonpartisan election	-0.294 (0.236)
Republican justice	0.235 (0.088)
Constant	-0.228 (0.211)
N	905
Significance of equation	$\chi^2_{[5]} = 11.719$ ($p=0.020$)

Note: Dependent variable is $\Pr(\text{Pro-life Decision}_{ij} = 1)$. Standard errors in parentheses. % Pro-life Supporters equals the percentage of state respondents that want to abolish or further restrict abortion minus the percentage that want to permit it widely.