AN INFORMATION-BASED THEORY OF JUDICIAL ACCOUNTABILITY AND SOCIAL WELFARE

by

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(Under the Direction of Richard L. Vining, Jr.)

ABSTRACT

While public law considers the utility of judicial elections, theoretical scholarship has lacked a rigorous positive theoretical assessment of judicial elections on voter welfare. I specify a game-theoretic model of social welfare amidst judicial review and assess voters' well-being with and without judicial elections. I propose that reduced transparency in the political environment might alleviate many problems associated with judicial elections, particularly pandering behavior, while affording citizens the opportunity of civic engagement. The theoretical results suggest voters can be made best off under non-transparent *elected* institutions for large classes of political environments. Analyzing voters and judges' decision-making in all 50 states from 2001–2010, I find that the "real world" players in my game behave as anticipated in response to a fluid environment of information.

INDEX WORDS: Judicial Elections, Representation, Accountability, Social Welfare

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Dedication

For my mother, without whom this work would not have been possible. And for Henry and Mary Frances.

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Contents

List of Tables

List of Figures

Part I.

Introduction

1. The Elected Judiciary

In vivid contrast to the federal judiciary, thirty-nine American states today use some form of popular election to select or retain their supreme court justices. All but three require judges to receive *at least some* individual's assent for a continued term in office. Only one state (Rhode Island), like its federal counterpart, grants its supreme court justices life tenure. Two additional states (Massachusetts and New Hampshire) grant judges tenure for a single, fixed term, requiring them to retire at a specified age. Table 1.1 summarizes the forms of selection for each of the 52 state supreme courts.[1]

Broadly, state supreme court selection methods can be broken down into three categories. The first are competitive elections. These place more than one candidate for the bench on the ballot. Within this category, there are partisan and nonpartisan competitive elections, where partisan ballots allow judges to affiliate with a party, and nonpartisan ones do not. Opposite competitive elections are those that utilize appointments to choose supreme court justices, which are followed by tenure. Typically, these systems either allow a nonpartisan nominating commission to choose a set of qualified candidates from which members of the executive or legislative departments may choose their preferred candidate, or they use no such commission and leave the decision in the hands of the elected branches. Finally, many states use a hybrid form of selecting and retaining judges. These states use an appointment scheme as mentioned above, but they require incumbent judges to stand from time-to-time

[1] Oklahoma and Texas each have two state courts of last resort—one for civil and one for criminal appeals.

Table 1.1.: Methods for staffing the state high courts

Method	Court of Last Resort
Partisan Election	Alabama, Illinois, Louisiana, Pennsylvania, Texas, West Virginia
Nonpartisan Election	Arkansas, Florida, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, Wisconsin
Popular Retention	Alaska, Arizona, California, Colorado, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, Wyoming
Elite Reappointment	Connecticut, Delaware, Hawaii, Maine, New Jersey, New York, South Carolina, Vermont, Virginia
Tenure	Massachusetts, New Hampshire, Rhode Island

Notes: Data source is the National Center for State Courts. In 2015, the legislative and executive branches of West Virginia opted to change the judiciary's selection method from partisan to nonpartisan competitive elections.

for a non-competitive retention election. This retention may occur among the populace at large who may vote to retain or not retain, or it may happen at the elite level such that the governor or legislature can choose to reappoint or to not reappoint.

The near universal deviation from "life tenure" among state supreme courts is almost certainly the most consequential difference between the state courts and their federal counterparts. By eliminating life tenure, states have shortened the tether of accountability between judges and the electorate. And just as greater competition generates greater fealty to social norms among elected representatives in the legislative or executive departments of the states, so too must judicial elections affect the types of outcomes of the cases they hear. One is merely left to question whether such a change in the judge-voter symbiosis is normatively desirable, when or how.

1.1. The Elected Judiciary in American Politics

Judicial elections have since their inception undergone a sea-change. What began as a progressive reform movement to democratize the judiciary has arguably achieved those very goals. Judicial elections today resemble campaigns for other elected offices where candidates must raise ever-increasing sums of money, flaunt their ideological credentials, and disparage those of their competitors. This trend has led many to question whether it was such a good idea to democratize the judiciary to begin with.

In what follows, I outline the rise of the elected judiciary and its historical development in modern American politics. As state court elections have become more competitive, they came to resemble races for other statewide political offices such as governors. This development has left the professional legal community to question the very legitimacy of the state courts, leading them to call for reforms in selection processes that may afford judges greater judicial independence from outside political pressures. I analyze these critiques and offer my own interpretation of judicial representation in light of attitudinal theories of jurisprudence. I conclude that judicial independence cannot be both a means toward an end and the end itself, and I offer my own interpretation of a "fair" judiciary that relies upon a balancing of interests standard of judicial review.

The Emergence of the Elected Judiciary

The framers of the U.S. Constitution invested judges with electoral immunity and life tenure. Writing in *Federalist* Number 78, Hamilton (1961) argued that judicial tenure in office would protect against judges catering to popular preferences, particularly useful to combat prejudices against minorities,

> those humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which,

> though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor part in the community. (468)

For Hamilton, then, the independence of the judiciary would act as a department of greater reflection than the reactionary forces either in the Congress or Chief Executive. Through its dispassionate reflection, the Third Branch would help citizens to overcome their prior, mistaken information, by observing the more sober reflection of their judges.

Hamilton also expressed confidence that electorally independent judges could prevent biased legislatures from passing immoderate legislation,

> [Independence] operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the court, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. (469)

In this context, judicial independence not only exists to protect minorities through sober reflection but also through strategic deterrence. The elected branches, according to Hamilton, become impelled to engage in good behavior by anticipating future reprimands from the judiciary.

It is worth pointing out, however, that the American states had not universally received this tradition of an independent judiciary. Throughout the history of the American colonies, and then the states under the Articles of Confederation, governments had constituted judicial branches with varying degrees of accountability, and it was with this received, common experience, that the Framers drafted Article III of the Constitution.

At first, the American states followed the lead of their federal counterpart.[2] Until 1830, no state elected their judges (Sheldon and Maule, 1997). State leaders quickly began to change their constitutional tactics, however, with the arrival of the Jacksonian Era. During

[2]This section borrows heavily from the historical development outlined in Streb (2007).

this period, American politics shifted drastically toward democratic populism. Hence, states began to chill toward the concept of an electorally immune judiciary (Streb, 2007). Mississippi became the first state in 1832 to alter its constitution to require all judges be elected (Berkson, 1980). By 1861, more than two-thirds of the states used elections to staff the bench, and between 1846 and 1959, every state granted admission to the Union required elections for nearly all of their judges (Berkson, 1980; Croley, 1995).

But as the states adapted to their newly constituted judiciaries, some professional members of the bar began to criticize the elected courts. First, the elections for judicial office were dominated by machine politics. Under the system of political patronage, judges were selected on the basis of their loyalty to the party, which served only to spread "cronyism and corruption" (Streb, 2007, 9–10) among judges who were "plagued by incompetence" (Croley, 1995). With the oncoming of the Progressive Era in the early twentieth century, characterized by an emphasis on promoting better government for the general welfare, states began once again to tinker with the machinery of justice.

An early and popular means of reform was the nonpartisan ballot. These systems maintained the use of the election but had the effect of removing judges from their direct linkages to the party system and the nominations process (Streb, 2007). But even nonpartisan contests posed important difficulties. First, many had their doubts that the parties had actually disabused themselves of their role in choosing judges (Epstein, Knight and Shvetsova, 2002). Second, nonpartisan elections deprived voters of their most useful cue in casting a ballot (the partisan label) and raised serious questions about whether those votes citizens cast were informed (Streb, 2007). Consequently, reform groups such as the American Judicature Society began pushing for hybrid systems that would blend some of the best qualities of appointment and election systems: the retention election.

The retention scheme would maintain the appointment quality of selecting judges, but it would also allow citizens the opportunity to vote on incumbent judges. These elections would be non-competitive inasmuch as they would feature no alternative on the ballot—voters could merely note their approval or disapproval of the incumbent candidate. Like nonpartisan elections, the retention scheme would forsake the partisan label. Hence, the retention election would give voters little information regarding the candidate's preferences and no alternative to his or her candidacy. Geyh (2003, 55) summarizes the intent of these systems of retention rather baldly:

> Retention elections [were] designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents. Thus, there is no choice to make between competing candidates or viewpoints, no race to follow, no opportunity to pick a new winner, and no political party to support.

At the very least, it was hoped, the plans would insulate incumbents and obviate the posturing problem inherent with judicial accountability (Geyh, 2003). In 1940, Missouri adopted the first retention plan as what is today termed the "Missouri Plan" (Streb, 2007). The plan spread quickly as twenty-four states moved to adopt some variant of the Missouri Plan. Collectively, these schemes are generally referred to as "merit" systems of selection.

The Elected Judiciary Today

Today, only six states continue to use partisan, competitive general elections.[3] The merit selection systems, however, have come to dominate the means of staffing the state high courts of last resort as 50 percent of all state high courts use some form of the merit system. And yet, these schemes, too, have come under scrutiny in recent years. Beginning as early as the 1980s, interest groups began to involve themselves in the selection of state

[3]Nonpartisan elections, however, remain popular with sixteen states continuing to use them. See Table 1.1.

supreme court justices. In 1986, a group of law enforcement interests targeted California Chief Justice Rose Bird and two other colleagues for their dovish voting records in capital cases (Goldberg, 2007). All three lost their retention bids. In the late 1980s and 1990s, commercial interests targeted state supreme courts that were sympathetic to trial lawyers, urging "tort reform" by opposing more liberal justices' (re)election bids.

Hojnacki and Baum (1992) termed the emergent paradigm of this era the "new-style" campaign. The new-style campaign is characterized by greater interest group involvement and greater issue stances among candidates for the bench. The result of the new-style campaign has been to invigorate races for the bench, leading them to resemble their counterparts in the legislative and executive branches. By the 2000s, organized interests, political parties, and candidates for office had all seen the utility in greater campaign activity. In 2000, this behavior was largely confined to states with competitive, particularly partisan, elections (Goldberg, 2007). But by the late 2000s, the trend had even begun to spread to states without opposing candidates on the ballot.

The Iowa Supreme Court is particularly illustrative of the "new-style" campaign. In 2009, the justices of the Iowa Supreme Court decided *Varnum v. Brien*, which unanimously invalidated the state's statutory ban on same-sex marriage.[4] In response, organized interests from outside of the state spent nearly $300,000 in television advertisements urging the state's voters to vote "no" for the retention of the three *Varnum* justices on the 2010 ballot. In the previous state supreme court election, no money had been spent on advertising (or political campaigning in general), and the three incumbents up for retention won by an average of 45 percentage points.[5] By contrast, in 2010, the candidates faced severe criticism for their votes in *Varnum*, faced a harsh media environment, and each lost their retention bid by an average of about 8 percentage points.

[4]See 763 N.W.2d 862.

[5]Source is the Iowa Secretary of State's website available at `https://sos.iowa.gov/`.

Early recognizing the growing role of judicial electioneering, some states attempted to rein in judicial candidates by limiting their speech on the campaign trail.[6] The American Bar Association (ABA) has been most prominent in its lobbying efforts to control campaign behavior among judicial candidates. The ABA first made its foray into judicial campaigns in 1924 with its "Canons of Judicial Ethics." While these guidelines were more suggestions rather than rules, state courts gradually began to codify rules governing judicial speech based upon the recommendations of the ABA. By 1972, the ABA reworked its canons with the "Model Code of Judicial Conduct," which nearly every state immediately codified into law (Hasen, 2007).

The "Model Code" targeted five specific behaviors it wished to prohibit in campaigns for the bench. The first is known as the "announce" clause, which prohibited candidates from declaring their policy position on questions of law (e.g., abortion rights).[7] The second became known as the "pledges or promises" clause, which prohibited candidates from promising voters how they would vote in hypothetical cases. Third, the ABA code prohibited candidates from acting as the head of a political party or other political organization or from soliciting funds on their behalf, and it prohibited candidates from endorsing or opposing other political candidates for office. Fourth, the code prohibited candidates from fundraising but required these individuals to appoint an agent to solicit funds on the candidate's behalf. Fifth, and finally, the "misrepresentation clause" prohibited candidates from knowingly misleading voters as to the record of their opponents (Hasen, 2007).

Writing in the 1830s, Alexis de Tocqueville observed that, "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."[8]

[6] This and the following paragraph rely heavily upon the analysis in Hasen (2007).

[7] The ABA changed this provision to the "commit or appear to commit" clause in 1990 to prohibit statements that indicated a lack of future impartiality among candidates.

[8] Toqueville, Alexis de (1835), *Democracy in America*, Vol. 1, Chapter 8, Ed. J. P. Moyer, Trans. George Lawrence.

And so it was with the provisions of the ABA "Model Code" on judicial conduct. In 1996, Gregory Wersal ran for the Minnesota Supreme Court. Throughout his campaign, "he distributed literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion."[9] A complaint was lodged against Wersal for violating the state's Code of Judicial Conduct.[10] Wersal challenged the fine levied against his campaign as a violation of his First Amendment right to free speech, and the case arrived at the U.S. Supreme Court in the style of *Republican Party of Minnesota v. White* (2002).

At the Supreme Court, the justices decided to limit their analysis solely to the constitutionality of the "announce" clause of the Minnesota Canon. As a prohibition on speech, any government restriction of a fundamental right such as speech must be the least restrictive means of accomplishing a compelling government objective. Writing for a 5–4 Court, Justice Scalia determined that the "announce" clause violated the First Amendment as incorporated through the Fourteenth Amendment of the Constitution. The majority found that, while promoting the image of impartial courts to be a compelling government objective, they did not find that the "announce" clause as written in the Canon to be the least restrictive means of accomplishing that objective.

While the Supreme Court has invalidated at least part of the ABA's "Model Code," a few questions remain regarding the viability of the other four key components. The opinion in *White* raises serious concerns for the constitutional viability of the "pledges or promises" and the "commit or appear to commit" clauses as they relate to essentially the same question. Moreover, in 2014, in a case challenging an Ohio law prohibiting "false statements," a unanimous Supreme Court determined that the case was Article III justiciable.[11] On remand, the trial court judge determined that the law was content-based,

[9]Quoted in *Republican Party of Minnesota v. White*, at 768.
[10]See Minn. Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000).
[11]See *Susan B. Anthony List v. Driehaus* (573 U.S. __ (2014)).

subject to strict scrutiny, and struck down the law having determined that it failed to meet the "least restrictive means" standard of review as it would have the effect of "chilling" political speech.[12] One bright spot in recent years for the ABA's code came in a 2015 Supreme Court's decision, *Williams-Yulee v. Florida Bar*, in which the justices upheld Florida's version of the "solicitation" clause.[13]

In the wake of the Supreme Court's *White* opinion, monied interests have redoubled their efforts at influencing their impact on the ideological makeup of the state courts of last resort. The result is that campaigns for the bench have become "nastier, noisier, and costlier" (Schotland, 1998, 150). From 2000 to 2008, the number of television advertisements aired in all state supreme court contests increased from approximately 22,000 to approximately 60,000 while spending on those advertisements increased from approximately $11 million to approximately $26 million.[14] And while state supreme court campaigns were proliferating, the tones of these campaign advertisements were likewise taking an increasingly shrill pitch as a proportion of total advertising (Hall and Bonneau, 2013).

Compounding all of these problems, the Supreme Court's contentious *Citizens United v. F.E.C.* (2010) decision (invalidating portions of a set of federal proscriptions on campaign donations and corporate speech) promises even further politicization of the state courts to the extent that well-funded political action committees can successfully bundle donations and target incumbents on the bench.[15] The result is today an intense dissatisfaction among the legal community that the judiciary has come too much to represent the other branches of government. Retired United States Supreme Court Justice, Sandra Day O'Connor

[12]See *Susan B. Anthony List v. Ohio Elections Commission* (45 F. Supp. 3d 765).
[13]See 575 U.S. __ (2015).
[14]Figures were gathered by the Brennan Center for Justice as a part of their *Buying Time* series. Reports may be found at `http://www.brennancenter.org/analysis/buying-time-2014`.
[15]See 58 U.S. 310.

(2007), responding to an impending 2008 race for the Pennsylvania Supreme Court, perhaps best summarizes the legal establishment's present frustration over judicial elections,

> [M]otivated interest groups are pouring money into judicial elections in record amounts. Whether or not they succeed in their attempts to sway the voters, these efforts threaten the integrity of judicial selection and compromise public perception of judicial decisions.

Largely left unasked in all this hand-wringing over judicial electioneering, however, is whether the public's perception of the judiciary is even relevant to their well-being. Put differently, what is it about unfettered judicial decision-making that is so good for voters? And why should judicial elections, advertisements, and a robust campaign environment in general have a deleterious effect on the voters when that is the precise format through which politicians to the other branches of government are chosen? Should not the same standards apply across political institutions? If not, why not? In the following section, I consider further the possible goals of the judicial branch of government *vis-á-vis* the well-being of the citizenry. I examine whether judicial independence, accountability, or some mixture therein, may achieve the goals of a democratic system of government.

1.2. Legal Interpretation: Whose Supremacy?

A lack of tenure inherently implies diminished judicial independence. Alternatively, a lack of independence implies greater accountability. The business of courts is to make determinations of law and to establish standards by which its own and other branches may interpret legal standards. "Independence" connotes judicial supremacy in determining the basis of law. "Accountability" connotes the supremacy of some other body with the power to punish recalcitrance. Whether this "other" is the electorate itself or some elite institution might affect legal policies that emerge from judicial review. When judges' decisions become

the basis for their continued employment, an institutional incentive emerges to coerce popular dispositions. Who is to be supreme in determining the rule of law is the foundation over the debate of independence versus accountable judiciaries. Figure 1.1 offers a graphical depiction of judicial independence in light of methods of selection and retention.

As outlined above, the conventional wisdom among legal professionals—and not a few political scientists—has it that electing judges inhibits impartiality, erodes institutional legitimacy, and diminishes voter respect for the courts.[16] Under this framework, a lack of consistency in the law, the perception or reality of favoritism, and the inability for courts to generate obedience to their rulings are evidence that the citizens are not getting an efficient or fair judiciary—that they are being made worse off for a lack of independence.

The members of the state judiciaries themselves appear to share in this skepticism toward robust elections. Justice at Stake, a nonpartisan organization whose purpose is to promote "fair and impartial" state courts, conducted a survey of active judges in 2001 and found that 74% of respondents disfavored competitive elections (those with a challenger on the ticket) and that 79% disfavored advertising for judicial election campaigns.[17] The retired Alabama Supreme Court Chief Justice, Sue Bell Cobb, who first set a national record for campaign fundraising in 2006 and then retired in 2011 rather than face another expensive campaign, summarized her experience in this way,

> I was mortified. And while I was proud of the work I did ...I never quite got over the feeling of being trapped inside a system whose very structure left me feeling disgusted. I assure you: I've never made a decision in a case in which I sided with a party because of a campaign donation. But those of us seeking judicial office sometimes find ourselves doing things that feel awfully unsavory. No one is immune from these pressures. Not even me.[18]

[16] The HBO comedy/news host, John Oliver, even devoted an entire episode to the issue in February 2015, generally excoriating the practice of judicial elections.

[17] Survey results may be found at `http://www.justiceatstake.org/`.

[18] Sue Bell Cobb, "I Was Alabama's Top Judge. I'm Ashamed by What I Had to Do to Get There: How Money is Ruining America's Courts," *Politico Magazine*, April 2015.

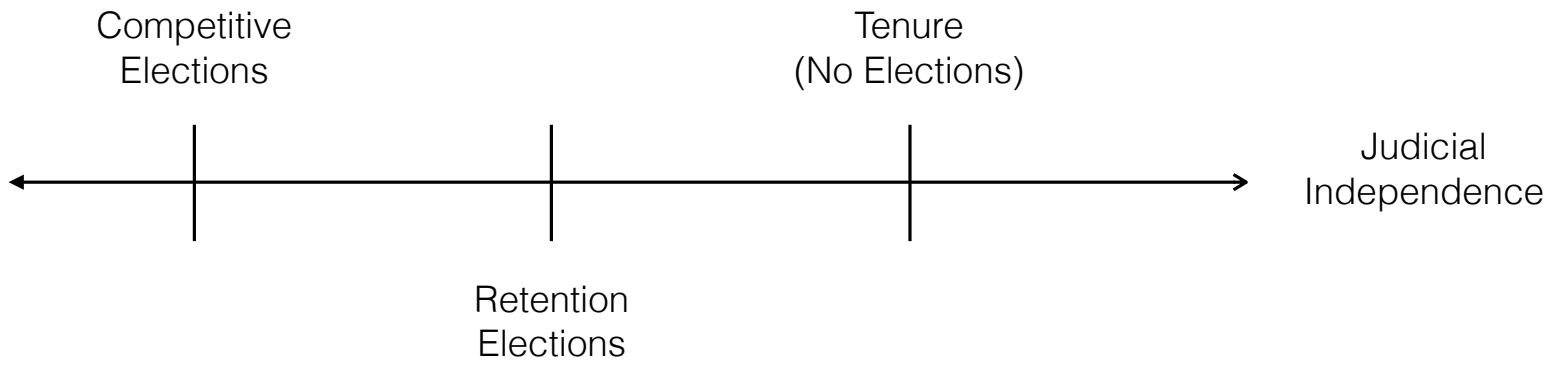

Figure 1.1.: Judicial independence as a function of selection/retention methods

It is, of course, entirely unsurprising that judges dislike the idea of competitive elections.[19] Put simply, robust elections make it more likely incumbent judges will lose their reelection bids (just as it does in the legislative or executive environment). And if judges feel like they have to raise money to promote themselves for office, it is because they do. Failing to engage in electioneering might encourage one's competitors to do so (just like in legislative or executive campaigns).[20] If legislators were afforded a moment of candor, they doubtless would also prefer not to face competitive elections, raise campaign money, or face the overwhelmingly negative space that is the American campaign advertisement. The difference is merely perception: the courts are supposed to be different. They are supposed to be impartial.

Except they aren't. The attitudinal revolution spawned by Pritchett (1948), reaching its apex with Segal and Spaeth (2002), was premised on one theoretical contention: that judges are political beings, just like legislators. An entire theoretical paradigm has emerged around the idea that judges have political preferences, and they wish to see those preferences enacted as public policy (Epstein and Knight, 1998; Maltzman, Spriggs and Wahlbeck, 2000; Murphy, 1964). Judges work within the context of legal precedents, intra-court collegiality, and extra-court constraints such as the separation of powers or public opinion, but they continue to make choices that are most likely to further their ideological ends (Martin and Quinn, 2002).

Democracy and Judicial Review

When judges engage in judicial review, they step into the foray of policy-making. This can be problematic in a democracy—a political system in which the preferences of the

[19] Who among us actually wants to compete for our jobs? Put another way, what tenured university professor would argue against tenure?

[20] This phenomenon is akin to the prisoners' dilemma.

people, the popular sovereign, are presumed supreme. That is to say, independent judges might insist upon certain legal regimes that run afoul of the preferences of the sovereign. Bickel (1962) termed this phenomenon the "counter-majoritarian difficulty." Were judges' opinions that alone—their opinions—we would not be left with this democratic paradox (Pitkin, 1967). But because judges' opinions become the rule of law, we are left to ask how to square judicial independence and review with a proportionate degree of accountability in order to maximize voters' well-being. As members of the state, judges are agents (just like legislators and executives) to the popular sovereign. As such, citizens have a strong claim on checking judicial power when it strays from bedrock principles of the social contract.

Of course, to suppose that there may exist only one set of preferences to characterize "the people" is to ignore fundamental insights from social choice theory (Arrow, 1951). Without restrictions on preferences or feasible policies, there will almost certainly not exist any socially ideal policy (Arrow, 1951; Black, 1958; McKelvey, 1976; Plott, 1967). In reality, reasonable people may disagree over the proper remedy for any number of legal controversies. Voters, recognizing the political nature (and possibilities) of the courts in light of their and their opponents' preferences, prefer to bank on having their own ideologies represented on these tribunals (Hall, 2001). Testifying before the American Bar Association in 2002, attorney James Bopp, Jr. summarized the dilemma accordingly: "[T]he secret is out. . . .Judges in the United States make law and the people in the United States know that" (quoted in American Bar Association, 2003, 17). Once voters understand that judges make policy, they understandably would like a say over the individuals who comprise the courts as they do in the legislature or executive branches. And when they see ideological misbehavior, they would prefer to correct the imbalance between the representative and his principal, the popular sovereign.

Some postulate that judges, as legal technicians, are capable of divining social preferences even when the electorate cannot (Maskin and Tirole, 2004). To this end, judicial independence is important for the reasons outlined by Hamilton (1961). Independence may correct errant citizen beliefs, protect unpopular minorities, legitimate new policies, and promote the general welfare (Black, 1960; Cox, 1995). To a certain extent, this supposition rests on a fairly naïve contention that judges are honest brokers of legal policy. But even honest judges recognize that voters screen candidates based upon their perceived ability to deliver favorable policy. Accordingly, many judges may wish either to transmit or to obfuscate their values to voters to ensure favorable review come election season. And knowing that they must again face reelections sometime in the future, judges continue to send such signals from the bench (Hall, 1987). Judges who signal their preferences to the electorate are said to be engaged in "posturing." Posturing behavior can be problematic when judges intentionally make insincere decisions to achieve reelection or when biased judges behave moderately during election season only to implement more extreme policies following retention.

The prospect for judicial posturing has led many to advocate against elections altogether. Because elections influence votes, judges' independence and impartiality are diminished. But if judges are just as baldly political as the attitudinalists suggest, then why should it matter that their votes are influenced? In the legislative context, we would simply call this better representation and, hence, a more efficient democratic system (Barro, 1973; Ferejohn, 1986). Put another way, if judges are little more than "legislators in robes," why not choose them like legislators?

The reality is that the institution of judicial review pits fundamental goals of any democracy against one another. On the one hand, as agents of the body politic, judges must be accountable to the popular sovereign to at least *some* degree. On the other hand, as

the last refuge for politically unpopular minorities, the judiciary ought to have sufficient insulation from majoritarian prejudices to protect fundamental rights endowed to all citizens such as due process or the equal protection of the laws. To the extent that every citizen likely prefers a "just" outcome, the problem merely rests in determining what that outcome is and who will be supreme in deciding it—the judiciary, the people, or some other political branch? Put differently, whose values will reign supreme?

The problem of value supremacy is even further exacerbated in those cases in which citizens' rights are clearly pitted against one another, leading judges to choose from among them which shall win out. Take the controversial *Snyder v. Phelps* (2011) case for example.[21] Fred Phelps, the pastor of the inflammatory Westboro Baptist Church, organized a protest at a funeral for Matthew Snyder, a Marine who served and died in the Iraq War in 2006. The Westboro Baptist Church picketed the funeral due to their perception that the United States government had become too permissive in its attitudes toward homosexuality. Snyder's father, Albert Snyder, was himself a gay man, and sued Phelps for intentional infliction of emotional distress. The Court, then, had to weigh the rights of Snyder to his privacy and the rights of Phelps to his speech.

Disputes like the *Snyder* case (and countless others) demonstrate that the federal judiciary is inherently confrontational in its assessment of competing values claims. It is a place where the people's core preference—qualities inextricably interwoven within their psychological well-being—are meted out in a contest for ultimate supremacy—where a select tribunal of unelected lawyers choose winners and losers on a massive scale. Suffice it to say, this is an awesome power. In another era, Snyder may well have won his case. But in 2011, the values of the Court determined that freedom of speech, even remarkably offensive speech, trumped an individual's privacy rights. To further complicate things, the

[21] See 562 U.S. 443.

Snyder case had fairly straightforward facts. One man wanted privacy; another wanted speech. But many cases do not have such straightforward implications.

Take *Jackson v. Georgia* for example.[22] In this case, petitioner Jackson, a black man, was convicted of raping a white woman and was sentenced by a jury to death. Many similarly convicted rapists in the nation, however, were not sentenced to die, leaving one to question whether such a sentence was just for Jackson. For his part, Jackson argued that the imposition of death was cruel and unusual under the Eighth and Fourteenth Amendments of the U.S. Constitution, and a badly divided Supreme Court agreed, though they could not agree on a proper rationale for why. Writing for himself, Justice Potter Stewart argued that

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.[23]

Jackson challenged the justices in ways far beyond those issues presented in *Snyder*. A jury of Jackson's peers, performing a Constitutional duty, determined that his crime was sufficient to merit an imposition of death. The Court could not affirmatively divine the values of the jury that sentenced Jackson to die or whether racial animus played a confounding role on the outcome. They found themselves wrestling with the jury's values and their own. Was the jury's right to sentence Jackson proportional to Jackson's rights to a sentence neither cruel nor unusual? Five men on a court sitting nearly 650 miles away from the jury determined that the their values were in fact incorrect. From this

[22]The case was bundled into *Furman v. Georgia*. See 408 U.S. 238 (1972).
[23]Ibid.

perspective, one needs tremendous trust in the values of one's judiciary to surrender social judgment to such an elite body.

Lerner (1967) makes an eloquent argument in what he terms the "republican schoolmaster" hypothesis—that independent courts exist partially to teach citizens in the virtues of republicanism.[24] The legal theorist, Ronald Dworkin, makes a similar case in his argument that constitutional interpretation is fundamentally a process of uncovering the moral principles of the body politic (Dworkin, 1999). "Justice," from this perspective is akin to the Rawlsian "veil of ignorance" (Rawls, 1971) where citizens share a common preference for fair and impartial rules. But because of the "veil," they are unable perfectly to divine the correct or ideal rule. Judges in this framework, are capable of seeing beyond the veil and transmitting to voters what their true preferences are. The rub is that voters are unsure about the veracity of these signals.

Of course, judges are not philosopher-kings, remain human, and are apt to err. What is more, the popular sovereign remains sovereign and is, therefore, entitled to its say over all things public policy. The question then becomes simply this: what strikes the appropriate balance between "independence" and "accountability"? When are society's values correct, and when are they wrong? When should the courts be pressured into falling into line with public opinion, and when should public opinion follow the courts?

These are profoundly difficult questions for a democracy. While legal scholars criticize institutions that diminish "judicial independence," independence for its own sake is fundamentally *not* a public good. Independent judges are perfectly capable of inflicting serious harm upon the body politic without any help from the electorate (*Scott v. Sandford* comes to mind).[25] And while vigorous judicial elections encourage democratic engagement among voters and policies nearer median social preferences, a robust selection of judges is likewise

[24]See Maskin and Tirole (2004) for a similar, formalized, argument.
[25]See 60 U.S. 393 (1857).

not a public good in and of itself if it might have the tendency to suppress individuals' fundamental rights through judges' majoritarian posturing for votes.

1.3. Judicial Politics and Social Welfare

The yardstick for any method of instituting the judiciary should hinge on its capacity to render socially desirable outcomes. Because neither an independent nor an accountable judiciary alone can guarantee fair or just outcomes when deciding legal controversies, a jurisprudence of justice and fairness must look toward outcomes, *not* institutions. An outcome-oriented jurisprudence must first consider what outcomes are socially desirable and only then proceed to ask what types of institutions produce them in light of social preferences among the citizenry and the bench. To do otherwise would put the cart before the horse and risks serious miscarriages in justice. Because the outputs of the judiciary necessarily weigh the rights of minorities and majorities against one another, an outcome-oriented jurisprudence implies a certain "balancing of interests" standard of judicial review. From this perspective, a judge's ability to reach a just outcome depends on his ability to weigh the interests of multiple parties, to identify which party has the greatest interest in securing a favorable outcome, and to weigh that interest against the the interests of other parties to the case.

Two examples might make the case for an outcome-oriented jurisprudence of justice and fairness more clear. Consider again the case of capital punishment. While courts scholars cannot point definitively toward any particular case or judge, qualitative and quantitative research clearly suggests that elected judges are pressured to make popular decisions by a looming election. The late California Supreme Court Justice, Otto Kaus, equated the effect of elections on judges as like standing at your sink to shave with a crocodile sitting in the bathtub. "You keep wondering whether you're letting yourself be influenced, and you

do not know. You do not know yourself that well."[26] At least one member of the Louisiana Supreme Court knew himself well enough to admit that, although he disapproved of the death penalty, he nevertheless joined the majority to uphold sentences of death to avoid backlash from his constituency (Hall, 1987, 1120).

Large-N statistical analyses support the above intuition with respect to capital cases. Brace and Boyea (2008) analyzed death penalty cases from 1995 to 1998. They found that justices in states where public opinion favors the death penalty are approximately 13% more likely than non-elected justices to vote to uphold a sentence of death, all else equal. Canes-Wrone, Clark and Kelly (2014) studied every death penalty case from 1980 to 2006 (over 2000 cases). They found that judges running on partisan tickets in states in which the public favored the death penalty were nearly 40 percentage points more likely to affirm a death sentence than their colleagues in states where public opinion disfavored the death penalty, all else equal. The authors also found that judges who were within two years of their next election were significantly more likely to affirm a death sentence than their colleagues who were not up for election.

The evidence clearly suggests that among petitioners appealing to elected judiciaries, the success or failure of their appeals of a death sentence is partly a function of the proximity of the court's next election and the public's mood over the suitability of death sentences in general. To be sure, meting out justice with one eye toward the polls is the embodiment of arbitrariness and capriciousness—indeed, it is akin to being struck by lightning.[27] It is certainly tempting to walk away from the debate over judicial elections from these findings alone. The arbitrary taking-of-life that these findings insinuate violate nearly every principle of equal protection and due process that Americans hold dear. An independent

[26]Quoted in Dolan, Maura, "Otto Kaus Dies; Former Justice on State High Court," *Los Angeles Times,* 13 January 1996.

[27]See *Furman v. Georgia* (408 U.S. 238, 1972) and *Gregg v. Georgia* (428 U.S. 153, 1976).

judiciary, it would be argued, would not be so tempted to engage in such blatant pandering to popular preferences.[28] An independent judiciary would have the mettle to correct errant voter beliefs through its institutional insulation.

And yet, there are also times when courts become so out of touch with the prevailing thought of the populace that some check on their constitutional authority itself becomes paramount to maintain the spirit of the social contract. Beginning around the beginning of the twentieth century, the U.S. Supreme Court entered into what is now known as the *Lochner* era, so-named for the infamous 1901 decision, *Lochner v. New York*, which declared a constitutional "right to contract."[29] In reality, the right to contract meant the constitutionalization of *laissez-faire* economics and the right of business owners to be free from economic regulation.[30] From 1897 (roughly the beginning of the *Lochner* Court), marked by the *Pollock v. Farmers' Loan and Trust Co.*[31] to 1932 (with the election of Franklin Delano Roosevelt), the Court struck down 27 Acts of Congress, many of which were passed by the newly dominant Progressive Congress to promote fairer commerce and wages.

The *Lochner* Court struck down Progressive health and safety laws, requirements for fair pay, and regulations on commerce and trade, all in the name of "substantive due process" and the right to contract. Figure 1.2 plots the number of Congressional Acts held unconstitutional from the end of the Civil War through the end of World War II.[32] During this period, the Court declared a total of 66 acts of Congress unconstitutional. The *Lochner* Court averaged approximately 1.14 declarations of unconstitutionality per

[28] Empirical evidence suggests that unelected judges are just as capable of pandering, but only to a different audience: an executive who can promote them (Epstein, Landes and Posner, 2013) or reappoint them upon completing a term (Shepherd, 2009).
[29] 198 U.S. 45
[30] See *Lochner v. New York*, Justice Oliver Wendell Holmes, Jr., dissenting.
[31] See 157 U.S. 429.
[32] Source is the Government Printing Office, available at `www.gpo.gov`.

year, but every other Court in this era averaged only 0.46 such declarations—a dramatic difference in judicial engagement with the policies of the elected branches. More specifically, the *Lochner* Era represented a transitional period in American politics when the old regime of the Gilded Age and the robber barons, premised on unfettered market economics, sat on the Supreme Court with life tenure, while an emergent paradigm captured by the Progressives in politicians such as William Jennings Bryan fought for greater protections for average Americans.

But as the nation entered into the Great Depression, economic reality brought itself to bear on the hypocrisy of the right to contract and substantive due process. In a landslide victory over incumbent Herbert Hoover, Franklin Delano Roosevelt assumed the presidency with a clear mandate to coordinate necessary steps for the United States to escape the grips of the Depression. In 1933, Congress passed the National Industrial Recovery Act to promote better wages and "fair competition." The Supreme Court invalidated the Act in 1935 under the Commerce Clause.[33] In 1933, Congress passed the Agricultural Adjustment Act to manage surplus agricultural commodities in the market. In 1936, the Supreme Court invalidated the Act as a violation of the Tenth Amendment.[34] In 1935, Congress passed the Bituminous Coal Conservation Act which was intended to regulate the price of coal and the wages of coal miners. The Supreme Court struck down the Act the following year as a violation of the Commerce Clause.[35] In Roosevelt's first term alone, the Court invalidated twelve major pieces of the New Deal, and in 1935, that number reached seven total acts, a figure never before nor since equalled.

Arguably no Court involvement in the New Deal more concerned the Roosevelt Administration than its review of the "Gold Clause" cases. In response to the global depres-

[33] *See Schechter Poultry Corporation v. United States* (295 U.S. 495) and *Panama Refining Co. v. Ryan* (293 U.S. 388).
[34] See *United States v. Butler* (297 U.S. 1).
[35] See *Carter v. Carter Coal* (298 U.S. 238).

sion, countries around the world abandoned their Gold Standards, exacerbating deflation, bankruptcy, and money hoarding in the United States. From 1933–1934, Congress responded with a series of Acts that effectively took the United States off the Gold Standard, compelling Americans to trade their gold for paper currency, devaluing the worth of gold, and eventually banning outright its use as currency (Magliocca, 2012). The "Gold Clause" cases arrived at the Supreme Court in 1935. The Roosevelt Administration had ample reason to worry that the Court might look disfavorably upon the government's swift departure from the Gold Standard. President Roosevelt believed that an adverse disposition would only further traumatize the national economy. In a radical departure from established norms, Roosevelt prepared a speech in the event of an adverse ruling in which he would announce his intent not to comply with the Court's opinion.

> It is the duty of the Congress and the President to protect the people of the United States to the best of their ability. It is necessary to protect them from the unintended construction of voluntary acts, as well as from intolerable burdens involuntarily imposed. To stand idly by and to permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion would so imperil the economic and political security of this nation that the legislative and executive officers of the Government must look beyond the narrow letter of contractual obligations, so that they may sustain the substance of the promise originally made in accord with the actual intention of the parties.[36]

A bitterly divided Court upheld the validity of each of the Gold Clause cases, but Roosevelt feared more defeats that would further hamper the recovery effort. Unlike nearly every other president before him, Roosevelt had held office for over four years and had yet to make a single appointment to the Court. In 1937, he proposed the now infamous Judicial Procedures Reform Bill, commonly styled the "court-packing plan." The plan called for the addition of one Supreme Court justice for every sitting justice over the age of seventy, increasing the membership of the Court from nine to fifteen.

[36]Quoted in Magliocca (2012) at 1277.

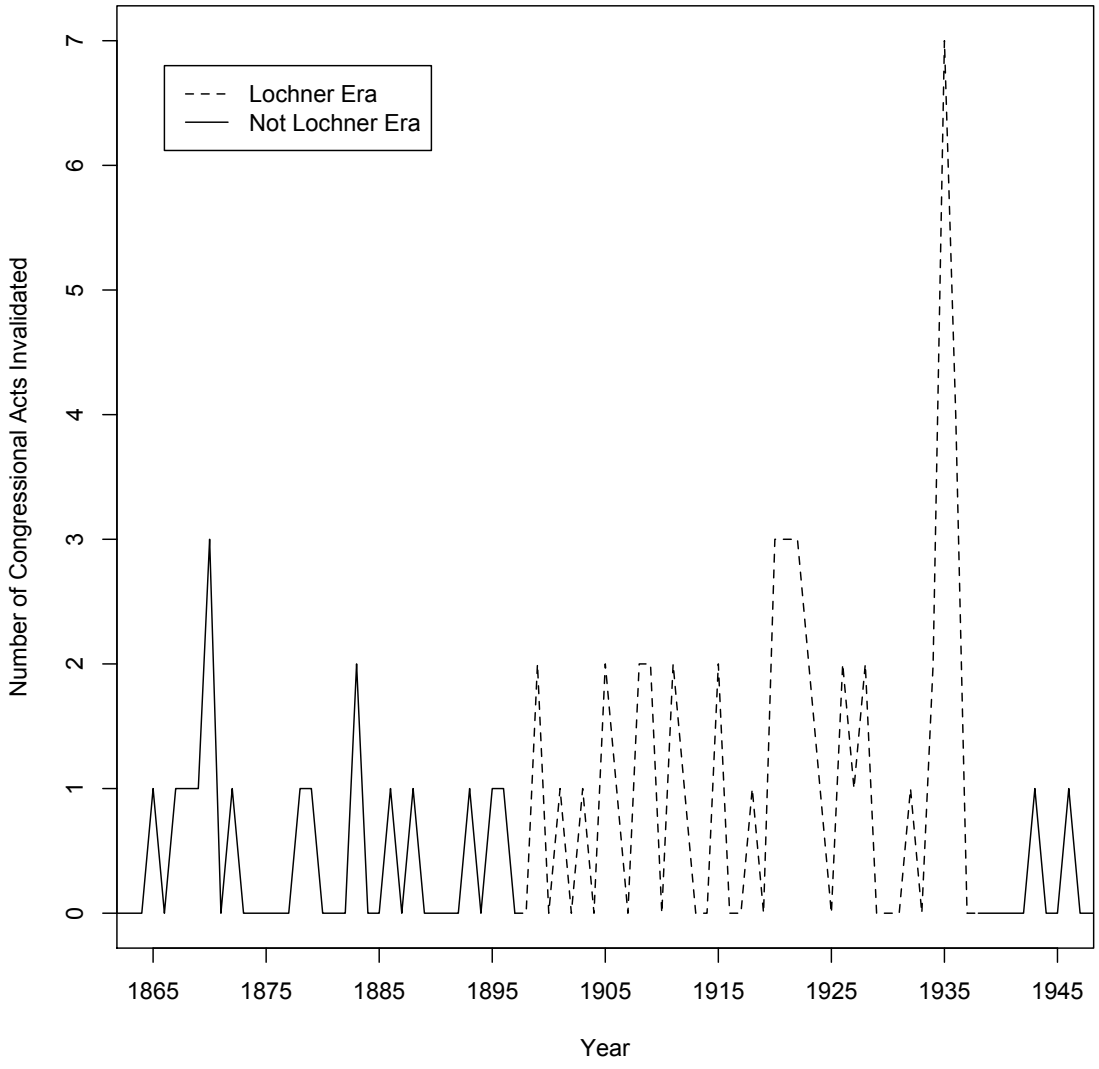

Figure 1.2.: Acts invalidated by the U.S. Supreme Court from 1865–1945.

The Court caved. In 1937, Chief Justice Charles Evans Hughes and Associate Justice Owen Roberts defected to the more liberal bloc of the Court to uphold a state minimum wage law in *West Coast Hotel v. Parrish*, reversing their earlier stance on minimum wage legislation in *Adkins v. Children's Hospital* (1923).[37] The following year, in *United States v. Carolene Products Co.*, Justice Stone signaled in the now famous "footnote number 4" that the Court would begin to show greater deference to economic regulation (using the rational basis test) and focus more upon fundamental freedoms such as speech (using strict scrutiny).[38] In *Wickard v. Filburn* (1942), the Court reevaluated the Agricultural Adjustment Act of 1938 and finally acceded its authority to regulate the national economy through the Commerce Clause.[39]

The Supreme Court's epic and protracted fight with Roosevelt's New Deal policy agenda demonstrates an important point—sometimes the judiciary is *too* independent for the social good. For nearly forty years, the *Lochner* Court fought against prevailing public opinion as to the proper organization between industry and man and whom would serve whom. The values of the judiciary stood on the side of unfettered commerce while the values of the citizenry stood on the side of greater labor protections and market regulations. To be certain, the *Lochner* Court represented a political minority—barons of industry. But unlike the political minorities identified in *Carolene Products* (discrete and insular), these economic interests wielded disproportionate influence over the outcomes of litigation that outweighed the social costs their favorable policies inflicted upon the political majority.

While the appointments process may help to keep justices in line with modern preferences (Dahl, 1957), judges with tenure insure that the courts are an inherently conservative

[37]See 300 U.S. 379 and 261 U.S. 525, respectively.
[38]See 304 U.S. 144 (1938).
[39]See 317 U.S. 111. Recent Supreme Courts, however, have back-tracked on this "new deal," however. During the Rehnquist Court, the justices once again began to strike down Congressional acts under the Commerce Clause. Two important examples were the Violence against Women Act (*U.S. v. Morrison*) and the Gun Free School Zones Act (*U.S. v. Lopez*).

body representing the ideological paradigm of a previous regime. As time wears on, those regimes come evermore into conflict with emergent political ideology. Elections and term limits can help to mitigate this problem by allowing voters occasionally to weigh in on the personnel of the judiciary. But of course, if the emergent political ideology betrays the rights and liberties of the founding contract, the older judicial regime should have the requisite independence to resist that change.

The American states have novelly experimented with different sorts of election and retention mechanisms as a means of achieving just outcomes. Legal scholars generally argue that accountability mechanisms unjustly deprive judges of independence and citizens of the fair and impartial outcomes independence garners. In this analysis, I have drawn a stark counter-narrative to this pessimism toward accountability. Because independence can not be both a means toward an end and the end itself, some other quality must justify independence. I have argued that outcomes are the appropriate unit of analysis from which to start, and that from there, scholars must work backward to a just institutional arrangement. In the next section, I consider how institutional designs may reach these ideal ends.

The Balancing of Interests Standard

The developing tide of opinion in the legal community to reform the state judiciaries grows with the spread of campaign spending for the bench (American Bar Association, 2003). As all types of electoral environments (partisan, nonpartisan, and retention) become more visible to the electorate, the tools reformers used forty years ago to make judges less visible have been undermined by the new-style campaign (Geyh, 2003). But much of the clamoring for reform is underpinned by the presumption that "independence" of judges is in and of itself a social good that confers well-being upon the citizenry. It is not hyperbole to say

that such an outlook places judicial politics and social welfare into a black box. It is the goal of this dissertation to unpack that box and examine its components.

As the above analysis clearly suggests, judicial independence is not in its own right a social good to be conferred upon the citizenry. Independence might result in outcomes that are just and fair just as easily as they might not. To put it yet another way, citizens derive well-being from the *kinds* of choices judges make—not the fact that they made them unfettered from electoral constraints. This work begins with one contention regarding the kinds of choices judges *ought* to make. I rely upon the "balancing of interests" standard of jurisprudence.

A jurisprudence that "balances" social interests is appropriately outcome-oriented for the analysis herein. The balancing of interests standard of judicial review is one that,

> . . .analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests (Aleinikoff, 1987, 945).

A balancing of interests, therefore, implies the power of judges to weigh social values *vis-á-vis* the facts of the case, to determine which are of greater worth, and to determine which party's interests ought to win out.

The balancing standard can trace its intellectual roots back to the legal realism movement and the philosophy promoted by jurists such as Oliver Wendell Holmes, Jr., who recognized the limitations of pure deduction in achieving just ends. Holmes, like other legal realists, believed that law was little more than the gradual accumulation of human experience,

> The life of the law has not been logic; it has been experience. . . .The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics (Holmes, 1881, 1)

From this perspective, then, law is merely a means toward a desired end, and the values of the judge are paramount in determining those ends. Assuming judges are capable of living up to such a task, the result is, by definition, welfare maximizing.

The balancing of interests standard of review began to find its way into constitutional law in the 1930s, and it occurred primarily due to the political excesses of the *Lochner* Court (Aleinikoff, 1987). With the threat of Roosevelt's Court-packing plan, the justices needed to find a new way of interpreting the Constitution that not only maintained their constitutional autonomy but also that would render outcomes capable of placating a hostile Executive department.

The first Supreme Court opinion to use the balancing standard explicitly, came in 1939 in *Scheider v. State of New Jersey.*[40] The case concerned municipal ordinances that banned hand-to-hand distributions of pamphlets in public places. The municipalities argued that such an ordinance was reasonably related to their desire to limit litter, but the appellants argued that their fundamental rights to speech had been infringed by the ordinances. Writing just one year after Stone's "footnote number 4" in *Carolene Products*, Justice Roberts wrote for a unanimous Court in *Schneider* and invalidated the restrictions on pamphleteering.

> And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights (quoted at 161).

Roberts found that the ordinances substantially infringed upon petitioners' speech rights and that their rights to speech fundamentally outweighed the municipalities' interest in clean public spaces. Since the *Schneider* case, the Court has expanded the balancing of interests framework to all sorts of cases ranging from search and seizure, religious expres-

[40]See 308 U.S. 147.

sion, freedom of speech, obscenity, commerce, etc. Throughout the twentieth century, the balancing standard became ubiquitous in Supreme Court constitutional jurisprudence (Aleinikoff, 1987).

The balancing of interests standard is not, however, without its detractors. Critics of the method argue that it is too inconsistent to represent a reliable means of arriving at predictable outcomes. It fails, that is, to explain a consistent and principled approach to constitutional jurisprudence that might guide future legal practitioners (Kahn, 1987). *Stare decisis*, it is argued, helps to coordinate collective problems by reducing the uncertainties of the choices the judiciary will make. By embracing a balancing standard of jurisprudence, judges forfeit a measure of predictability in favor of a judgment that is inherently value-laden. Of course, it is this very flexibility that modern proponents of the "living Constitution" appreciate.[41]

The downside of some more traditional, formal, or even "correct" form of constitutional jurisprudence is that it may yield entirely unsatisfactory results that were nevertheless consistent with precedent or insinuated by extant law. Consider *Plessy v. Ferguson*, the 1896 Court opinion affirming the constitutionality of the "separate but equal" doctrine in racial segregation.[42] Considering Plessy's argument that racial segregation in public transportation violated the Fourteenth Amendment, the Court chose narrowly to interpret the requirements imposed upon the states, which was entirely consistent with their previous Fourteenth Amendment jurisprudence in cases such as *The Slaughterhouse Cases* and the *Civil Rights Cases*.

In the end, there does not exist, perhaps, one unique, ideal form of constitutional jurisprudence. On the one hand, a balancing of interest standard does not bring with it

[41] See *Trop v. Dulles* (1958), in which the Court interpreted the Eighth Amendment's prohibition on "cruel and unusual" punishments in light of the nation's "evolving standards of decency" (101).
[42] See 163 U.S. 537.

the kind of mechanical consistency legal practitioners and political actors might desire in anticipating the decisions of the courts. The benefits of such an approach are undeniable, however. The balancing standard does not attempt to skirt the essentially human endeavor that judging is. Rather, it embraces that very essence into its holistic approach to constitutional law. It has the added potential to arrive at normative desirable ends even when deductive methods of constitutional interpretation might arrive elsewhere.

1.4. Organization of the Dissertation

Critically missing from much of the debate surrounding elected courts are the actual outcomes at which these institutions ought to arrive. Too often, when discussing the (dis)utility of judicial accountability or independence, scholars reach to hackneyed case studies or sensational statistical evidence of vote pandering to justify their preferred method of constituting the courts. This dissertation takes a different approach to the problem of judicial accountability. Essentially, it begins at the end of the feasible analysis—the case outcome—and works backward. It assumes that social utility from constitutional jurisprudence is determined by the relative weighting of social interests by recognizing that in some cases either society's minority or majority faction has more to lose with potentially high stakes than their competitors in case outcomes.

I use the balancing of interests standard to identify socially-preferred case outcomes. This is only one of many possible specifications, and others are encouraged to design new and novel approaches to arrive at perhaps different results. My approach is, of course, a normative standard and one entirely up for debate. Even still, throughout the work, I will use the "balancing of interests" standard as the intellectual lynch-pin of the analysis. By defining *ex ante* the types of outcomes most desirable for a polity, one may then work backward toward the optimal institutional design of the judiciary to achieve those ends.

In Chapter 2, I specify a formal, game theoretic model of judicial accountability and social welfare. I define the socially ideal policy as a weighted balance between a minority and majority faction's interests. I then establish equilibrium behavior in institutions that are either elected or independent. Among those that are elected, I further differentiate those that are visible or not visible to the electorate. This nuance is the first formal analysis into the new-style campaign and represents an important addition to the discipline's understanding of how judicial accountability and visibility might interact to convey (or detract from) social welfare. More specifically, it represents the first unified effort to create a fully specified theoretical paradigm of judge-voter behavior grounded in a purely informational space.

I conclude Chapter 2 by noting that judicial visibility and the informational environment that creates it, has the potential to play a critical role in voter welfare that has gone unaccounted before now. Specifically, voters may have an elected judiciary *and* a non-visible one and receive benefits far beyond those guaranteed either simply by elected or not elected courts. Finally, I conclude from Chapter 2 that there is no such thing as a uniquely socially optimal judicial institution. The types of outcomes that are desirable and the distribution of social preferences are entirely to be credited for giving life to the contextually ideal institution, and that definition is indeed fluid.

Chapters 3 and 4 examine the empirical utility of the propositions outlined in Chapter 2. Specifically, they test the informational hypotheses that relate to judicial posturing and voter support for the judiciary. If real life judges and voters behave like the players in the games in Chapter 2, then we will have meaningful evidence that the normative conclusions derived from the formal propositions have some face validity. To this end, I construct an original dataset from state supreme courts in fifty American states over a span of ten years (2001–2010). These courts are ideal for comparative analysis because of the richness of

the diversity in their institutional selection and retention rules and the robustness of their campaign environments.

From these judicial institutions, I gather data that attempts to capture three key qualities from the formal models. First, I wish to measure the informational environments of the American state supreme courts. I collect data indicative of voters' capacity to cull relevant information relating to the judicial representative. These are principally campaign finance data, political interest group spending and advertising, and newspaper coverage of the state supreme court. From these factors, I generate the first composite score for "judicial visibility" to date. These values are key elements for the overall analysis.

Chapter 3 considers first the behavior of judges in light of their visibility to the electorate. To this end, I measure judges' revealed preferences as a function of their visibility, their ideology, and the ideology of their constituency. I first test a spatial model using all state supreme court justices' votes throughout the period of analysis. I find meaningful evidence that justices' constrain their revealed ideologies to comport with socially desired norms as they become more visible for all types of cases. I then refine the analysis only to salient supreme court cases—death penalty, abortion, and same-sex marriage cases. I find, once again, significant and meaningful evidence that state supreme court justices, particularly those with the most to lose from having their true ideologies observed by voters, constrain their behavior in socially desirable ways. This is clear evidence in favor of the theoretical story being told in Chapter 2.

Chapter 4 next considers the behavior of voters in light of the visibility of their judges and their ability to discern judges preferences in light of their own. To this end, I collect data across the ten years of analysis relating to voter participation in judicial elections, the margins by which they vote for, versus against, the incumbent for office, and their likelihood of supporting a hypothetically controversial court ruling—same-sex marriage.

Once again, I find meaningful evidence that voters respond to informational regimes as indicated by my measure of judicial visibility, which is, once again, indicative of the face validity of the formal insights provided in Chapter 2.

Chapter 5 offers final thoughts on the work presented in this dissertation. Throughout, I promote and find consistent evidence in support of the information-based theory of judicial representation and accountability. Given the quantitative findings in Chapters 3 and 4, I conclude that the positive propositions in Chapter 3 likely carry a fair amount of face validity. That is, there likely does not exist a single, unique institutional means of constituting a judiciary that is welfare superior to other forms of accountability or independence. Either form may be socially desirable given the types of cases courts hear or the way by which social preferences are distributed.

At this point, I pause to reflect once again on the normative implications of these positive and empirical findings in support of the information-based theory of judicial accountability. Assuming one is willing to accept the balancing of interests standard of judicial review, this dissertation offer compelling evidence that neither judicial independence nor accountability alone will reach socially desirable ends. At the very best, it offers some insight as to contexts under which one might be socially desirable to another. To this extent, the informational environment is critical as works as a sliding scale between outright judicial independence and accountability.

Part II.

An Information-Based Theory of Judicial Choice, Legitimacy, and Voter Welfare

2. Judicial Accountability and Voter Welfare

With the emergence of the "new-style" judicial campaign (i.e., Hojnacki and Baum (1992)), decision-making on the bench and campaigns for it have become increasingly visible to the average citizen where campaigns are competitive or when dispositions are salient. Such heightened visibility makes it easier for citizens to participate in the selection and retention of candidates for judicial offices as easily available information allows them to vote for judges who are most aligned with their own political preferences (Bonneau, 2007*a*; Hall, 2007*b*; Hall and Bonneau, 2008, 2013). Nevertheless, such voter engagement comes at the heightened risk that incumbent judiciaries might cater improperly to popular preferences (Hall, 1987; Maskin and Tirole, 2004). Hence, those most concerned over eroding judicial independence have advocated judicial reforms that will limit judges' visibility to the electorate (Geyh, 2003). Nevertheless, little is presently understood about the kind of impact judicial visibility has on society's well-being.[1] Even addressing this shortcoming, however, requires one to specify what values the judiciary ought to promote and the types of goals it ought to strive toward.

[1] A related literature on government transparency in general, however, addresses a similar question. See Fox (2007), for example.

To address these shortcomings, this study envisions the role of the judiciary from a "balancing of interests" framework—that the inherent social value of submitting controversies to the judiciary is to allow an impartial arbiter to mitigate the social losses of any one group at the hands of the state and to prevent the accumulation and abuses of power into the hands of any one selectorate.[2] Using the balancing-of-interests framework as a jumping-off point, we then proceed to craft a positive analysis of the impact judicial visibility has on social welfare. Results suggest that judicial visibility can exacerbate welfare losses once voters and judges become trapped in a prisoners' dilemma-style paradox or when the judiciary lacks substantial popular legitimacy. Nevertheless, results also suggest that judicial visibility should be heightened when the types of disputes courts resolve do not bear a substantial externality on a minority group and when candidates for office become increasingly extreme. Hence, how facillitative judicial visibility may be toward promoting social welfare depends entirely on the types of disputes courts are asked to settle, the likely external impact these dispositions will have on minority factions, and the trust voters place in the court's decisions.

2.1. Judicial Institutions and the Accountability Paradox

The American judiciary places fundamental goals of democracy into conflict with one another. Through the power of judicial review, judges affect public policy, and in courts of last resort, their constitutional interpretations are considered final and binding upon the elected branches (Whittington, 2009).[3] In the federal courts, judges enjoy life tenure and are largely unaccountable for their decisions (Segal and Spaeth, 2002). Because the

[2]By no means are we limited to this definition of social welfare in the context of judicial representation and review. Other social goals might include a stable rule of law, for example—that is, an adherence to precedent and the norms of *stare decisis.*

[3]Hence, judges are "representatives" in the truest sense of the word (Pitkin, 1967).

federal judiciary actively engages in policy-making, and because its members not only make policy according to their ideological preferences (Epstein, Landes and Posner, 2013) but are also not directly accountable for their policies, the federal judiciary is said to be a "counter-majoritarian" institution (Bickel, 1962).[4]

Elections, term limits, and other institutional means of limiting judicial independence combat the counter-majoritarian difficulty by making the courts more accountable to public opinion (Dahl, 1957; Maskin and Tirole, 2004). Hence, judicial accountability might be termed a "democratizing" institution inasmuch as it makes judges more dependent upon the goodwill of the citizenry (Bonneau and Hall, 2009). Nevertheless, accountability is also criticized for its tendency to elicit posturing among judges seeking reelection, particularly in salient issue areas like capital punishment (Brace and Boyea, 2008). In the judiciary, "posturing" might be thought of from a Downsian (1957) perspective such that judges make decisions not with respect to their own preferences but to those of some median (majority) voter.[5] Accountability therefore creates a double-edged sword for democracies: On the one hand, judicial independence might engender more principled adjudication that occasionally reaches counter-majoritarian outcomes; on the other hand, judicial accountability might alleviate the counter-majoritarian difficulty but with the added risk of posturing, sacrificing fairness and impartiality.

Political science scholarship has found considerable evidence that judges respond to accountability's incentives to rule in popular ways. This is true not only in salient "law and order" types of cases (the death penalty, for example (Brace and Boyea, 2008; Canes-Wrone, Clark and Kelly, 2014; Cann and Wilhelm, 2011)), but also with respect to social (same-

[4]The federal courts might be said to be *indirectly* accountable to the public inasmuch as elected official might signal the public's dissatisfaction by filing court-curbing bills (Clark, 2009). Political science has been hard-pressed, however, to disentangle public opinion's effects on the courts. Compare, for example, the findings in McGuire and Stimson (2004) and Giles, Blackstone and Vining (2008).

[5]Indeed, posturing might be thought of as tightening the bonds between principal and agent (Maskin and Tirole, 2004).

sex marriage or abortion, for example (Caldarone, Canes-Wrone and Clark, 2009; Canes-Wrone, Clark and Park, 2012; Hume, 2013)), and even economic issues (tort awards, for example (Helland and Tabarrok, 2002)). Not only are accountable judges likely to respond to institutional incentives to posture, but also this phenomenon appears to be conditional upon the particular style of institutional accountability in each state. Recent theoretical advancements argue that these different selection/retention methods affect voters' access to information over candidates for the bench. The logic goes that by restricting use of the partisan ballot, institutions generate posturing by incentivizing judges to fill in the "informational gap" their institutions created.

What, then, do these informational structures created by accountable judicial institutions look like? Arguably, placing a party label next to a candidate's name is among the most straightforward institutional means of conveying information to voters who may infer a candidate's preferences by the party with which he or she chooses to associate (Hall, 2007*b*; Klein and Baum, 2001; Schaffner and Streb, 2002; Schaffner, Streb and Wright, 2001; Squire and Smith, 1988). Non-partisan elections, however, arguably have the least useful information (Hall, 2007*b*; Canes-Wrone, Clark and Kelly, 2014) since no party affiliation is provided on the ballot, thus requiring voters to use other cues such as candidate or campaign characteristics (gender, or a scandal, for example) to cast their vote (Dubois, 1984; Johnson, Schaefer and McKnight, 1978). Retention elections provide voters with less information than partisan elections but arguably more than nonpartisan elections (Hall, 2007*b*). While voters may not know the party of the candidate for retention, they might know the partisanship of the political elites who appointed the judge and may cue off such information. Finally, reappointment systems produce what might be the greatest accountability as the choice to retain or remove a judge rests in the hands of an elite group of

politicians who are likely highly informed over judicial preferences (Canes-Wrone, Clark and Kelly, 2014; Shepherd, 2009).[6]

Institutional features that provide voters with informational heuristics dramatically improve their participation rates in judicial elections and discourage rolloff (Hall, 2007*b*; Klein and Baum, 2001; Schaffner and Streb, 2002; Schaffner, Streb and Wright, 2001; Squire and Smith, 1988). Informationally rich ballots encourage turnout and discourage rolloff by making voters' choices for which candidate best represents his or her preferences more clear (Hall, 2007*b*; Klein and Baum, 2001; Schaffner and Streb, 2002). Partisan elections have the most straightforward informational heuristic—a party label (Schaffner, Streb and Wright, 2001). Non-partisan elections, meanwhile, arguably have the least useful information (Hall, 2007*b*; Canes-Wrone, Clark and Kelly, 2014) since no party affiliation is provided on the ballot, thus requiring voters to use other cues such as candidate characteristics (gender, or a scandal, for example) to cast their vote (Dubois, 1984; Johnson, Schaefer and McKnight, 1978). Retention elections provide voters with less information than partisan elections but more than nonpartisan elections (Hall, 2007*b*). While voters may not know the party of the candidate for retention, they might know the partisanship of the political elites who appointed the judge and may cue off such information.

Nonetheless, institutional factors alone do not determine the visibility of judges or their policy-making. With the emergence of the "new-style" campaign, issue-based voting and campaigning have heightened judicial visibility, particularly as interest groups have increased their participation in judicial campaigns (Hojnacki and Baum, 1992). Thus, non-institutional factors affecting judicial visibility include the competitiveness of the election (Bonneau, 2005). Competitive elections attract campaign spending, interest group involve-

[6]For example, in recent battles for the New Jersey high court, Republican governor, Chris Christie, has elected not to reappoint ideological opponents, despite widespread condemnation for "politicizing" the court. See Perez-Pena, Richard, "Christie, Shunning Precedent, Drops Justice from Court," *The New York Times,* May 4, 2010 (A22).

ment, and media coverage, all of which alert voters to relevant information regarding where candidates stand on issues important to them (Bonneau, 2007*b*; Caufield, 2007; Hall and Bonneau, 2008; Goldberg, 2007; Iyengar, 2002). Furthermore, due to recent Supreme Court rulings, candidates are now free to "announce" their policy preferences to interested voters, thereby alerting citizens to which candidates most closely share their issue positions (Hall and Bonneau, 2013).

"New-style" judicial campaigns have made running for judge a more salient activity to the electorate, but other scholarly work indicates that during non-election years, voters observe very little of judges' behavior due to a lack of media coverage (Cann and Wilhelm, 2011; Vining and Wilhelm, 2010*a*). Thus it remains an open question in the literature on how constrained electorally accountable judges are during non-election years or for non-salient decision-making, though examinations of voting behavior indicate greater catering to popular preferences as judges approach election years, especially with respect to salient issue areas (Caldarone, Canes-Wrone and Clark, 2009; Canes-Wrone, Clark and Kelly, 2014).

The principle effect of judicial visibility, I argue, is to arm citizens with greater information regarding their agents in the judicial branch and the types of policies they sponsor there. Greater information permits citizens to hold politicians accountable to their preferences. By "accountability," I refer to the degree and manner by which judges are constrained from pursuing their pure policy preferences in favor of more socially popular policies. For example, among states that elect their judges, the mechanism of accountability is clearly the vote and the preferences of the electorate; therefore, one may suppose that judges are "vertically" accountable directly to the people—the source of political sovereignty. For governments that appoint their judges, however (the federal judiciary, for example), accountability is more oblique. To the extent that judges are constrained,

this constraint may be characterized by "horizontal" accountability—oftentimes to its co-equal branches, who are themselves vertically accountable to the electorate. Hence, even among those judiciaries that are not directly accountable to the people, the preferences of that body may exert constraining pressures onto the judiciary, provided its decision-making is sufficiently visible to the voters.[7] Such constraint takes place perhaps directly either through non-compliance or enforcement (e.g., Gely and Spiller, 1992) or through passage of acts reinterpreting previous statutes (Gely and Spiller, 1990), or perhaps indirectly through threats made to the institution's popular legitimacy (Clark, 2009).[8] Threats are even more direct in systems that utilize reappointment as unpopular judges may be constrained through the possibility of failing to achieve reappointment.

In general, better information about politicians' behavior and preferences improves voters' well-being as they are able to screen out and replace biased politicians and as it encourages greater policy responsiveness on the part of representatives (Barro, 1973; Ferejohn, 1986). As such, one suspects that greater government transparency ought to promote social well-being. But in a dynamic, noncooperative setting, rational decision-making among voters may actually inhibit voter welfare as politicians respond strategically to voters' own perceptions and preferences (Ashworth and Bueno de Mesquita, 2014; Fox, 2007; Fox and Van Weelden, 2012; Stasavage, 2007). Thus, my research is also closely tied to a line of literature that examines voters' well-being as a function of institutional transparency or saliency. These studies find that voters are best off with nontransparent governments when the future is relatively valuable, when politicians value office-holding for its own sake, and when the risk of appointing extremists is at its greatest. In contrast to this work, which

[7] In this paper, we emphasize the role of public opinion as manifested directly through elections in constraining judges. Advances in the theoretical model here presented to other forms of constraint through public opinion (horizontally, that is), would be welcome extensions.

[8] For a more complete review of federal court constraints, see Bailey and Maltzman (2011) or Epstein, Landes and Posner (2013).

analyzes the clarity of political behavior and its (exogenous) transmission to the public, I explicitly model citizens' capacity to consume available information as a function of the ease by which their political system makes such information available.[9] Specifically, I am interested in whether citizen consumption of information regarding political behavior is either (individually) rational or (socially) optimal with respect to judicial review, and if the answer to the latter question is "no," I ask what institutional structure(s) better serve social welfare.

2.2. The Model

I study social welfare through judicial institutions over two models—one in which citizens may vote for their judges and one in which judges are vested with electoral independence. I build upon the welfare analyses of Maskin and Tirole (2004), Fox (2007), and Ashworth and Bueno de Mesquita (2014), which stem from the principal-agency and representation literature largely attributable to Barro (1973) and Ferejohn (1986). I model the strategic environment between voters and their political agents—specifically, judges. The analysis deviates from much of this literature by modeling welfare from the perspective of majority *and* minority interests, as opposed to an homogenous electorate or median voter. It uses a balancing of interests standard to define a "socially optimal" policy and uses game theoretic insights to assess deviations from the optimal policy. Finally, it weighs the capacity of institutional transparency (or a lack thereof) amidst electoral politics against outright judicial independence. I find that non-transparent institutions that use elections are oftentimes welfare-preferred to judicial independence to confer welfare upon the citizenry—a marked contrast to extant legal scholarship (e.g., Geyh, 2003), but that these results are

[9]See also Warren (2012), which differs inasmuch as I model auditing strategies endogenously to the theory.

largely dependent upon the preferences of the players and the legitimacy of the minority group's claim for protection.

Players

The game is played between voters and judges, where every player, i, belongs to $N = \{V, J\}$. Let $V = \{L, R\}$ denote the set of voters who comprise society and who are themselves composed of two groups—one that is "left-leaning," and one that is "right-leaning." Throughout the analysis, I assume that L is composed of more voters than R.[10] Therefore, L is said to be a majority group, and R is said to be a minority group. Now let $J = \{I, C\}$ represent the set of judicial candidates, which is composed of incumbents and challengers. Let every judge be one of two "types," $\tau \in \{u, b\}$, where $\tau =$ "u" are said to be "unbiased," and $\tau =$ "b" are said to be "biased." Unbiased judges are those who prefer to apply the appropriate legal rule in any given case. Biased judges prefer to make legal rulings consistent with their own ideology. Let the prior probability that any judge is unbiased be $p \in (0, 1)$, and let $1 - p$ represent the prior probability judges are biased.

Preferences

Each version of the game occurs over two periods, $t \in \{1, 2\}$. Every player has single-peaked and symmetric preferences and is risk-averse. Hence, everyone has a unique ideal point, $\theta_i \in \Re^1$, and players prefer policies closer to that point than farther away. For voters, I add the simple restriction that $\theta_L < \theta_R$. For judges, I require unbiased types to prefer the socially optimal policy $\theta_u = \omega$ (defined below), while biased types can hold any other preference, $\theta_b \in (-\infty, \omega) \cup (\omega, \infty)$. Players share common temporal preferences, $\delta \in (0, 1)$, such that δ denotes players' preferred t_2 utility, and $1 - \delta$ denotes players' preferred t_1

[10] Hence, the median voter belongs to group L.

utility. Summarizing players' utility functions, we get,

$$U_i(a_t) \;\; = \;\; -(1-\delta)(\theta_i - a_1)^2 - \delta(\theta_i - a_2)^2,$$

where $a_t \in \{\theta_u, \theta_b\}$ represents the office-holder's feasible action.

Actions and Sequence of Play

At the beginning of the game, Nature chooses the incumbent's and the challenger's preferences. In each period, whichever J holds office makes some choice of legal policy, a_t.[11] Following J's choice of a_1 policy, Nature randomly chooses whether to reveal J's policy to V or to keep it hidden from voters. If Nature reveals the courts' policy to voters, we suppose it opted for institutional transparency or visibility. If Nature chooses not to reveal the courts' policy, we then say that it opted against institutional transparency or visibility. Let $q \in (0, 1)$ denote the prior probability Nature reveals J's policy to the electorate. Hence, as $q \to 1$, we might say J's decision-making becomes more visible or transparent. But as $q \to 0$, we would say that the judiciary becomes less visible or transparent. If J is electorally accountable, then V may either cast its vote for the incumbent (retain) or for the challenger (defeat), $v \in \{r, d\}$.[12] Whichever is the winner proceeds to select t_2 policy. If J is electorally unaccountable, then the incumbent proceeds directly from choosing t_1 policy to t_2 policy without any feedback from V.

[11] We could, alternatively, model decision-making in an infinite decision space, but this modeling scheme significantly reduces the number of equilibria. Furthermore, even in an infinite policy space, much of the equilibrium analysis revolves around implementing either of the types of judges' most-preferred policies. Therefore, we don't lose much analytical leverage by sticking to the finite typology, but we make the equilibrium analysis far more tractable.

[12] Recall that for any election, faction L is decisive in choosing the winner.

Beliefs and Equilibrium Concept

There are two versions to the game, and I use to equilibrium concepts—one for each game—to examine outcomes. Take the game with judicial independence first (shown in Figure 1). Once Nature chooses the incumbent's preferences, the incumbent proceeds to make decisions under perfect and complete information. There is one challenger, and there is no voter feedback. Thus, I employ backwards induction to find equilibrium play and use subgame perfect Nash equilibria (SPNE) as the solution concept, which provides a unique, pure strategy equilibrium for the game—ideal for my purposes.

Things are less straightforward in the game of judicial accountability (shown in Figure 2). While judges are aware of their own preferences (though not their challenger's), V are unsure whether judges are biased or unbiased.[13] Moreover, unless Nature chooses a transparent judiciary and reveals the incumbent's t_1 policy to the electorate, V is similarly unaware of what policy choice has occurred. Players update their information according to Bayes' Rules whenever possible. Because information is asymmetric and because players update their information according to Bayes' Rule, a perfect Bayesian equilibrium (PBE) is an appropriate equilibrium concept for the analysis herein. A perfect Bayesian equilibrium is characterized by players updating their beliefs according to Bayes' Rule whenever possible, that players' strategies are sequentially rational at every information set, and that their conjectures about other players' behavior are correct in equilibrium.

Summary of the Game

The timeline of the game is as follows:

1. Nature chooses V and J's preferences and the social optimum, ω.

[13] Recall that the prior probability any single judge is unbiased is p.

2. The incumbent judiciary chooses some policy, and Nature chooses whether to reveal that policy to the voters with probability q.

3. Voters update their beliefs appropriately over the incumbent's type of preferences. If and only if the judiciary is electorally accountable, the voters then choose between the incumbent and the challenger where group L is decisive in every election.

4. The winner of the election makes a new choice of legal policy, the game ends, and payoffs accrue.

I provide the extensive forms of the games in Figures 1 and 2. Figure 1 shows the game in which the judiciary is electorally independent. Figure 2 shows the version of the game in which the judiciary is electorally accountable. The extensive forms games are "pruned" inasmuch as dominated strategies are removed, which assists in interpretation.

The Social Welfare Function

One difficulty of many principal-agent models of political representation is that they measure social welfare from the perspective of a median voter or an homogenous electorate (see Ingham, 2015). Hence, these models overlook important insights from social choice theory (i.e., Arrow, 1951). This problem is only exacerbated from the perspective of the judiciary. Because the courts are often the only political institution where minorities have a reasonable chance to secure relief from repressive policies, failing to account for countermajoritarian preferences among the electorate would be a serious misstep to the social welfare analysis.

I address this problem using the balancing of interests framework discussed in Chapter 1. Recall that the balancing of interests standard of judicial review is one that,

> ...analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests (Aleinikoff, 1987, 945).

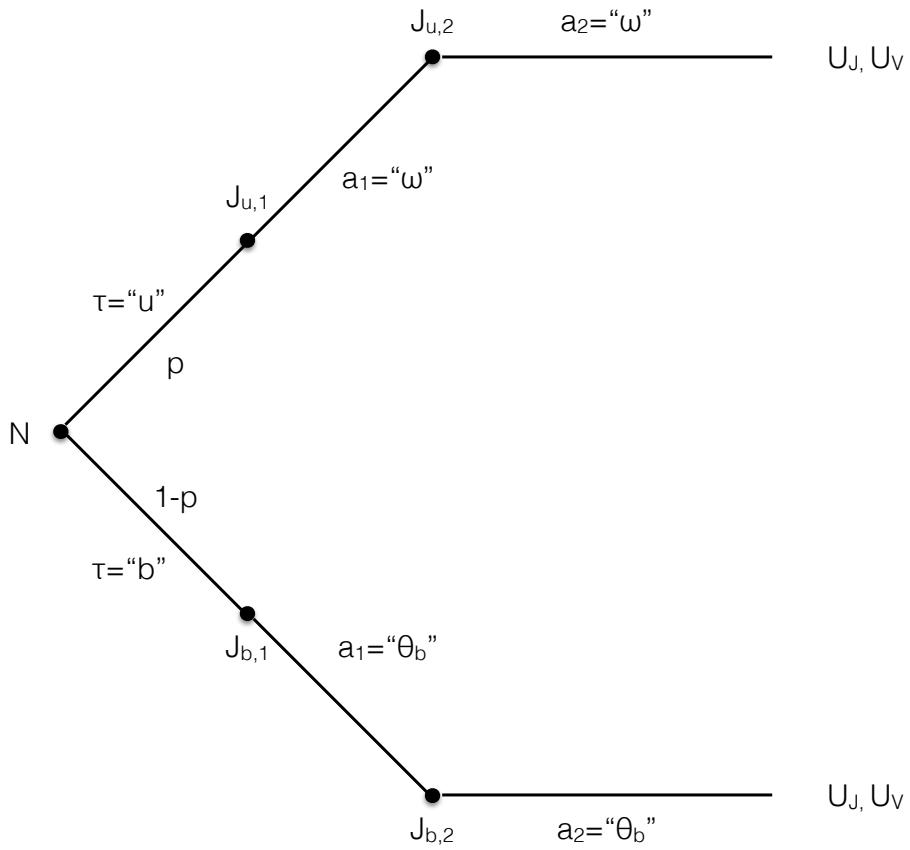

Figure 2.1.: Independent judiciary ("pruned") extensive form game

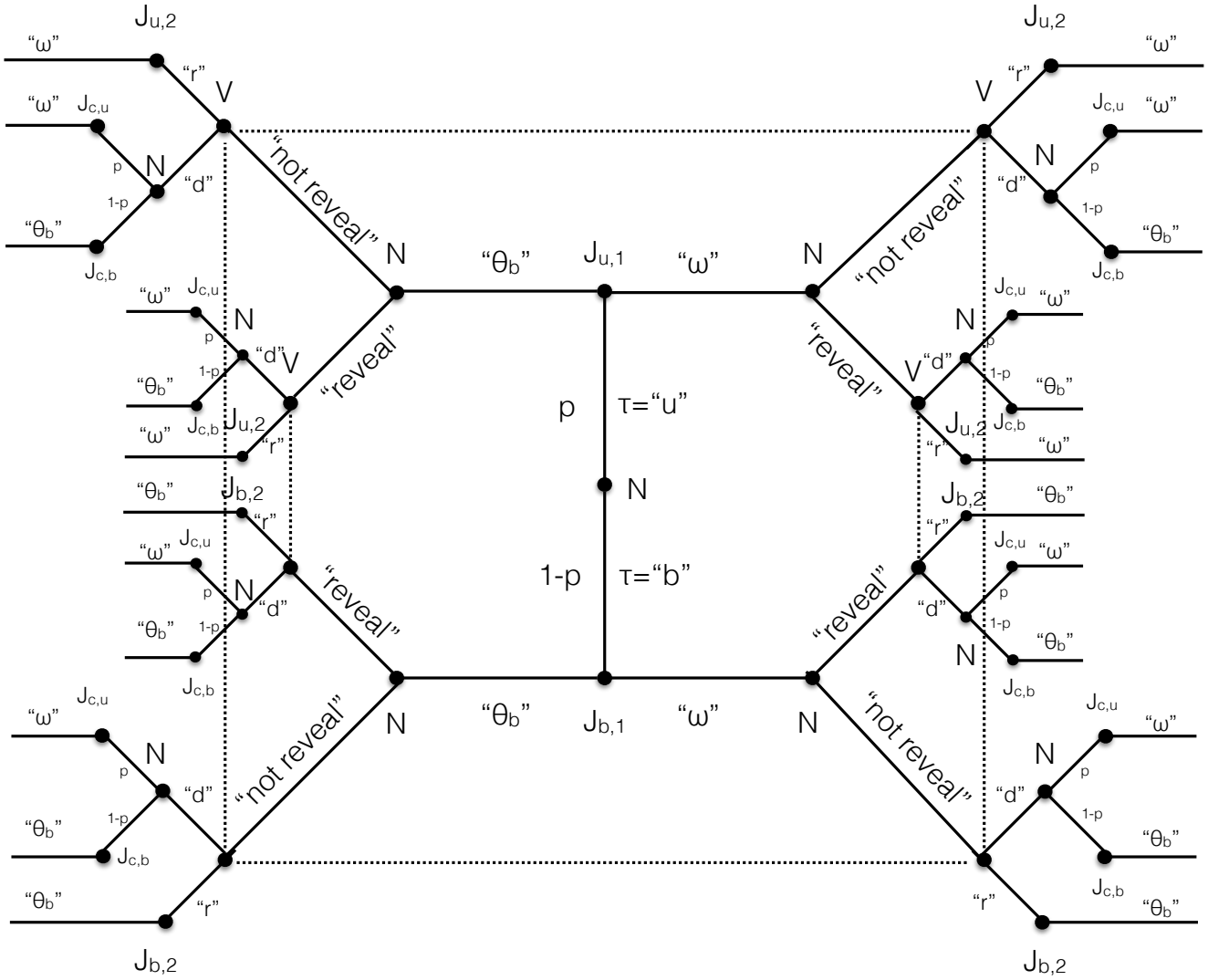

Figure 2.2.: Accountable judiciary ("pruned") extensive form game

A balancing of interests, therefore, implies the power of judges to weigh social values *vis-á-vis* the facts of the case, to determine which are of greater worth, and to determine which party's interests ought to win out.

The balancing of interests framework is well-suited for a social welfare analysis. The balancing standard examines how policies affect litigants' interests and weigh those effects against one another to determine the appropriate legal outcome. This is precisely what the judges in the game herein are engaged in—picking legal rules, a_t, that exist somewhere on a number line among competing social preferences, θ_i. Let us, then, suppose that social welfare is determined by the sum of weighted utility losses to groups L and R such that a socially optimal policy is one that minimizes the losses to either faction. Such a form of adjudication may be said to represent a "balancing of interests" approach.

Suppose, then, that there exists a weighting parameter, $\lambda \in (0, 1)$, that defines the external losses group L suffers as legal policy deviates away from its preferred policy and toward group R's, while $1 - \lambda$ represents the losses suffered by group R. This allows us to analyze social welfare with respect to voters' preferences and the social weight λ places on those preferences through the following weighted utility function,

$$WU_{L,R} \quad = \quad \lambda U_L + (1 - \lambda)U_R.$$

As λ approaches one, the weighted utility function becomes more sensitive to deviations away from the majority group's preferences, θ_L. Alternatively, one might say that as λ approaches one, the losses group R face for having the majority's preferences prevail are not substantial enough to warrant protection under law (protestations against the tax code, for example). Conversely, as λ approaches zero, social welfare becomes sensitive toward policies that deviate from the minority group's preferred outcome (e.g., discriminatory policies that target immutable characteristics such as race). It follows, therefore, that

there exists some socially optimal policy, ω, in what I define as the maximal set,

$$\omega \quad = \quad \max_{a_t} \ \lambda U_L + (1-\lambda) U_R, \tag{2.1}$$

which finds voters' total well-being with respect to legal policy, a_t, in any given period, t.

There are three important properties to note about the socially optimal legal policy, ω, which will aid in the analysis below. First, note that $\omega \in (\theta_L, \theta_R)$. That is to say, the social optimum exists "between" the preferences of the two political groups, L and R.[14] Put differently, if a judge can choose between two policies that L are indifferent to (one on either side of L's ideal point, θ_L), then the definition of ω in Equation 1 requires him to choose the one R strictly prefers. The opposite holds for R's preferences. We might think of this as the Pareto criterion of the socially optimal legal policy. This finding is straightforward due to the monotonic qualities of L and R's utility functions for each period, where each group has single-peaked and symmetric preferences over outcomes, and each strictly prefers outcomes closer to their ideal points.

- *Lemma* 1.*a*: The social optimum exists within the open set between the two social groups' preferences, $\omega \in (\theta_L, \theta_R)$.

Proof. Immediate from the text. □

Second, observe that the socially optimal policy, ω is time-invariant. That is to say, regardless of whichever period J is choosing policies, and independent of players' temporal preferences, δ, the socially optimal policy remains constant. This finding is intuitive when we consider how the weighted utility function behaves in each period, t. Examining social welfare one period at a time, clearly δ remains a constant and cannot affect the value of ω.

- *Lemma* 1.*b*: The social optimum is constant across time, implying that $\omega_1 = \omega_2$.

[14] We needn't be concerned that δ affects the socially optimal policy because it is a constant for all players.

Proof. Differentiate the weighted utility function with respect to a_1,

$$\frac{\partial WU_{L,R}}{\partial a_1} = 2\lambda(1-\delta)(\theta_L - a_1) + 2(1-\lambda)(1-\delta)(\theta_R - a_1).$$

Now set the differentiated equation equal to zero and solve for a_1 in order to maximize it according to Equation 1,

$$\omega_1 = \lambda\theta_L + (1-\lambda)\theta_R.$$

We perform the same steps in finding the socially optimal policy during t_2,

$$\frac{\partial WU_{L,R}}{\partial a_2} = 2\lambda\delta(\theta_L - a_2) + 2(1-\lambda)\delta(\theta_R - a_2).$$

Setting the differentiated equation equal to zero and rearranging to solve for a_2 gives us the socially optimal policy for t_2,

$$\omega_2 = \lambda\theta_L + (1-\lambda)\theta_R.$$

Ergo, $\omega_1 = \omega_2$. □

Third, note that ω is unique inasmuch as there exists only a single element in the maximal set, $\max_a \lambda U_L + (1-\lambda)U_R$. That is, as λ expands and contracts around the groups' preferences, the socially optimal policy shifts between the players' ideal points, but a unique optimum is maintained. This finding is principally due to the results found in Lemmas 1 and 2. The socially optimal policy is not only time-invariant but also subject to the Pareto criterion. Although individual players might be indifferent between two policies, the maximization of the weighted utility function ensures that society as a whole

must prefer one of those policies over another, and this reasoning applies to any pairwise comparison of policies individuals players are indifferent to. In more rigorous terms,

- *Lemma* 1.*c*: The socially optimal policy is the weighted average of voters' ideal points, which yields a unique policy that is socially preferred to all others,

$$\omega \quad = \quad \lambda\theta_L + (1-\lambda)\theta_R.$$

Proof. Differentiate the weighted utility function with respect to any policy, a_t; set that function equal to zero; and rearrange to solve for the optimal a_t,

$$(1-\delta)a_1 + \delta a_2 \quad = \quad \lambda\theta_L + (1-\lambda)\theta_R.$$

Applying the requirement that ω_t remain consistent across all t from Lemma 1.*b*, we get,

$$\omega \quad = \quad \lambda\theta_L + (1-\lambda)\theta_R.$$

Now pick any two real numbers to represent L and R's preferences with the only condition that L's preference be strictly less than R's. Now pick any value of λ. The result is a unique value of ω, which we know from Lemma 1.*a* is Pareto efficient and exists strictly between the two groups' preferences. □

From the above analysis, I can now state the following remark:

- *Remark 1*: The socially optimal policy is Pareto efficient, time-invariant, and unique.

Proof. Follows from Lemmas 1.*a*, 1.*b*, and 1.*c*. □

Finally, I conclude this section by stating the social welfare function, SWF. The SWF uses the technology behind players' individual preferences and the definition of ω to identify the socially optimal policy and then to measure deviations from that policy. Like individual

preferences, the SWF is single-peaked, symmetric, and risk-averse. Hence, the SWF is:

$$-(1-\delta)(\omega - a_1)^2 - \delta(\omega - a_2)^2.$$

2.3. Analysis of Equilibrium Play

Recall that there are two versions of the game. In one, the courts are independent and therefore not subject to voters' approval to stay in office. That is, J is unelected. In the other version of the game, voters get to choose between the incumbent and the challenger following the first period selection of policy, a_1.

Let us begin with the unelected, independent judiciary. As has been noted elsewhere (Maskin and Tirole, 2004), the unelected judiciary has no incentive whatsoever to tailor its decision-making to the preferences of the voters. Hence, the judiciary has a strictly dominant strategy to choose its ideal point in every period, regardless of its type, voters' preferences, the preferences of its challenger, or its temporal preferences. Because the incumbent cannot be removed from office, it maximizes its utility by choosing its ideal point in every period. Hence, the only outcome supportable in equilibrium for an independent judiciary is a pure strategy Bayesian equilibrium in which all types of incumbent judiciary's choose their ideal points in every period.

- *Independence SPNE 1*: The unique subgame perfect Nash equilibrium is for the incumbent to submit a strategy profile in which it plays its most-preferred policy in every period, t.

Proof. Assume the incumbent selects a strategy profile in which it plays its most-preferred policy in each period according to its preferences. Its expected utility is, therefore, 0. Choose any other strategy profile. The incumbent's expected utility from any deviation strategy yields it strictly negative expected utility if it places positive weight on less-

preferred outcomes. Hence, the incumbent does not deviate from the equilibrium strategy. □

Building upon the finding that every type of incumbent selects its most-preferred policy during every period of play, we may now consider voters' *ex ante* social welfare under an independent judiciary, $W_V^I(\omega)$, which is determined solely according to the preferences of the incumbent and the likelihood it is biased against the socially optimal policy,

$$W_V^I(\omega) \quad = \quad -(1-p)(\omega - \theta_b)^2. \tag{2.2}$$

Now let's consider what happens in equilibrium with an elected, accountable judiciary. Beginning at the end of the game tree and working backwards, note that during t_2, the only rationalizable decision for whichever J is in office is to select a policy equal to its own ideal point. Bearing this in mind, there are two conditions we should consider in identifying rational choices among voters and judges during t_1, which concerns the "desirability of bias" in the courts. Clearly, the majority group, L, prefers to elect whichever type of judge will implement t_2 policy-making nearest its own ideal point, θ_L. Let $D_u =\mid \theta_L - \theta_u \mid$ denote the absolute distance between members of group L and the unbiased judge, and let $D_b =\mid \theta_L - \theta_b \mid$ represent the absolute distance between L and the biased type of judge. It follows, then, that members of L prefer to vote for whichever candidate is closer to their own ideal point. If $D_u < D_b$, I suppose that the judiciary is "legitimate" to the extent that the electoral process favors unbiased judges. But if $D_b < D_u$, I suppose the judiciary is "illegitimate" to the extent the electoral process favors biased types of judges.[15] I further restrict p now to favor whichever type of judge the majority prefers, where $p \geq \frac{1}{2}$ when the courts are legitimate, and $p \leq \frac{1}{2}$ when they are not. This is in keeping with works like

[15]The terminology one chooses is altogether trivial.

Maskin and Tirole (2004). The logic holds that, given a choice between two alternatives, the majority party could, if sufficiently uncertain over judicial types, simply resort to the flip of a coin and do no worse than getting their least-preferred outcome no more than half of the time.

A Legitimate Judiciary

I first consider equilibrium play under a "legitimate" judiciary—one in which voters in L prefer unbiased to biased judges. I will focus on two important types of pure strategy PBE from here on. One is a "separating" equilibrium, where different types of incumbent judges send different types of signals to voters, thereby revealing their preferences. The second type of pure strategy PBE I consider is a "pooling" equilibrium where every type of incumbent judge sends the same signal to the voters, thereby hiding, in essence, their preferences from voters. The goal here is to determine what types of strategies emerge in equilibrium and then to compare voter welfare among different types of judicial institutions.[16]

I begin the search for equilibria by considering pure strategy separating (or revealing) PBE. Suppose that voters form the belief (correctly) that incumbents of all types choose their own ideal points during t_1. If Nature chooses institutional transparency and reveals the incumbents' policies to voters, then V will reelect judges who write socially optimal policies, and they will not reelect those who chose biased policies. If Nature opts against institutional transparency or visibility, voters will not be able to update their prior beliefs over the incumbents (p) and hence will weakly prefer to reelect all incumbents (recall that $p \geq \frac{1}{2}$).

Clearly the unbiased type of incumbent cannot profitably deviate from the separation strategy; hence, any strategic defections must occur from the biased type. If the biased

[16]To keep the analysis tractable, I restrict my focus to pure strategy equilibria.

type plays its ideal point, it expects to lose its election if Nature reveals its policy, and it expects to win its reelection if Nature does not reveal its policy. Hence, the biased incumbent's expected utility from playing the separating strategy, $\sigma^*_{b,s}(\theta_b, \theta_b)$ is,

$$U_b(\sigma^*_{b,s}(\theta_b, \theta_b) \mid D_u < D_b) \quad = \quad -\delta qp(\theta_b - \omega)^2,$$

which is the joint probability the incumbent faces a transparent environment *and* loses its seat to an unbiased challenger, conditioned by its preference for future utility and the distance between its own preferences and the social optimum.

Can the biased type of incumbent profitably deviate from breaking the separating equilibrium? Consider the defection strategy in which it plays the social optimum in t_1, $\sigma'_{b,p}(\omega, \theta_b)$. That is, the biased incumbent panders to the majority group's preferences. Upon observing a signal of $a_1 = \omega$, L believes the incumbent is unbiased and reelects it. Hence, the biased incumbent's expected payoff from the deviation (pandering) strategy is,

$$U_b(\sigma'_{b,p}(\omega, \theta_b) \mid D_u < D_b) \quad = \quad -(1-\delta)(\theta_b - \omega)^2,$$

which shows its payoff from the deviation is a penalty for pandering to L's preferences during t_1, but then it is able to maximize its utility after being reelected.

Let $\zeta_1 = 1$ denote the threshold at which the biased incumbent is indifferent between the equilibrium separating and defection (pandering) strategies. Equating the previous two expectations gives the threshold,

$$\zeta_1 \quad \equiv \quad \frac{1-\delta}{\delta pq}.$$

It follows that the biased incumbent weakly prefers the equilibrium separating (revealing) strategy over the defection (pandering) strategy if $\zeta_1 \geq 1$. Likewise, the biased incumbent weakly prefers the pandering (defection) strategy if $\zeta_1 \leq 1$.

Unpacking ζ_1 a bit further, what's driving a biased incumbent's willingness to pander for reelection? Perhaps of greatest interest to this analysis is the role institutional transparency or visibility (q) plays. Examining the partial effect q plays on threshold that makes it rational to pander, we see that $\frac{\partial \zeta_1}{\partial q} < 0$ is clearly negative. This suggests that as the environment becomes increasingly visible for incumbents (as Nature becomes more likely to reveal the incumbent's policy to voters), the pandering threshold is decreasing, all else being equal. Hence, as $q \to 1$, $\zeta_1 \to 0$, increasing the set of parameters at which pandering is a rational choice for the biased incumbent. In words, as the courts become more visible to the voters, the biased judges have more incentives to pander. A similar logic holds with respect to temporal preferences (δ) and the probability the incumbent's successor is an ideological foe (p). As both δ and p increase, it becomes more likely that the biased type of incumbent plays a pandering strategy. This is, of course, altogether to be expected. As the incumbent values the future more, it becomes more willing to sacrifice t_1 utility to secure t_2 payoffs. And as the likelihood the biased incumbent will be replaced with an unbiased challenger increases, the more willing the biased incumbent is to pander for reelection to prevent his challenger from succeeding him.

Hence, the biased incumbent maintains the separating strategy, $\sigma^*_{b,s}(\theta_b, \theta_b \mid D_u < D_B)$, if the judiciary is legitimate and if the electoral environment sufficiently favors revelatory strategies, $\zeta_1 \geq 1$. Recall that the unbiased type of incumbent has no unilateral incentive to deviate from the separating strategy. It follows, then, that a pure strategy separating PBE exists under these conditions. Let SAL denote a pure strategy separating equilibrium when the courts are accountable and legitimate,

- *SAL PBE*: A pure strategy separating equilibrium exists if $D_u \leq D_b$ and $\zeta_1 \geq 1$, where incumbents select their most-preferred policies in t_1, and where voters reelect all incumbents under no transparency and only those incumbents choosing optimal policies under transparency.

Proof. Suppose voters form the belief that incumbent types play their most preferred policies during t_1 with a probability of 1. If Nature fails to reveal their policies, then voters weakly prefer to reelect the incumbent as $p \geq \frac{1}{2}$. If Nature does reveal the incumbents' policies, then upon seeing socially optimal policies, voters believe it is unbiased and re-elect, and upon seeing socially sub-optimal polices, voters believe it is biased and elect its challenger. Clearly the unbiased type of incumbent cannot profitably deviate from such a strategy. If under transparency the biased type deviates, voters believe it to be an unbiased type and reelect it. Hence, the biased type can only profitably deviate from the separating strategy if $\zeta_1 < 1$. □

Suppose the proper conditions exist for players to enter into a SAL PBE. Then we assume that $\zeta_1 \geq 1$. How should we expect voters to benefit from this type of separating (revealing) equilibrium when the judiciary is legitimate and electorally accountable? Let $W_V^A(SAL)$ denote voters' *ex ante* expected welfare from policies played in the separating, accountable, and legitimate equilibrium. We have then,

$$W_V^A(SAL) \quad = \quad -(\omega - \theta_b)^2(1-p)(1-\delta pq), \tag{2.3}$$

which is primarily determined according to the transparency of the judiciary (or, more appropriately, the lack thereof), players' preference for future utility payoffs, and the prior likelihood the incumbent is a biased type of judge.

Now let us consider the possibility of a different kind of PBE—the "pooling" equilibrium. Judicial incumbents can only pool on either an optimal policy or a biased policy. Suppose

voters formed the belief that both types pooled their policy upon the biased signal. I argue that such a pooling strategy cannot be in equilibrium because the unbiased type has no incentive to maintain it. Only the unbiased type of incumbent can profitably deviate from the pooling strategy. Hence, using sequential rationality, if voters observed an off-equilibrium path signal it should form the belief that the incumbent is an unbiased type and reelect it. Thus, the pooling strategy cannot be a PBE.

Suppose, then, that both types of incumbents pool upon the socially optimal policy. Clearly, the unbiased type of incumbent has no unilateral incentive to break the pooling equilibrium. Let $\sigma^*_{b,p}(\omega, \theta_b)$ denote the biased type's equilibrium pooling (pandering) strategy in which it chooses the socially optimal policy in t_1 and its ideal point in t_2. Whatever Nature's decision over institutional transparency, every incumbent is guaranteed reelection to t_2 by maintaining the pooling equilibrium; therefore, the equilibrium favors those who value future over present payoffs. If the biased type of incumbent maintains the pooling (pandering) strategy, it expects utility according to,

$$U_b(\sigma^*_{b,p}(\omega, \theta_b) \mid D_u < D_b) \quad = \quad -(1-\delta)(\theta_b - \omega)^2,$$

which is determined according to the biased incumbent's t_1 policy sacrifices. Now suppose that the biased incumbent defects from the pooling strategy. If Nature reveals the incumbent's biased policy, then upon observing off-equilibrium path signals, voters believe a biased incumbent has sent the signal and make the sequentially rational decision to elect the challenger. If Nature does not reveal the incumbent's policy, it weakly anticipates reelection as $p \geq \frac{1}{2}$. Nevertheless, the defection strategy, $\sigma'_{b,s}(\theta_b, \theta_b)$, maximizes the biased incumbent's t_1 utility,

$$U_b(\sigma'_{b,s}(\theta_b, \theta_b) \mid D_u < D_b) \quad = \quad -\delta q p(\theta_b - \omega)^2,$$

Equating the two expectations gives the point at which the biased incumbent is indifferent between maintaining the pooling (pandering) strategy or defecting (separating) to its ideal point. I find that the biased incumbent will maintain the pure strategy pooling PBE if $\zeta_1 \leq 1$. Let PAL denote a pure strategy pooling equilibrium when the courts are accountable and legitimate,

- *PAL PBE*: A pure strategy pooling equilibrium exists if $D_u < D_b$ and $\zeta_1 \leq 1$, where all incumbents choose the socially optimal policy in t_1 and their most-preferred policies during t_2, and voters reelect every incumbent, regardless of institutional transparency.

Proof. Suppose voters form the belief that every type of incumbent chooses t_1 policy equal to ω with probability equal to one. Regardless of Nature's decision to reveal the judiciary's signal, voters weakly prefer to reelect all incumbents when unable to update their beliefs as $p \geq \frac{1}{2}$, by assumption. In t_2, every type chooses its ideal point sequentially rationally. Thus, the unbiased type of incumbent has no profitable incentive to deviate from the pooling strategy. If the biased type deviates, L believes (correctly) that it is biased and votes for its challenger. Hence, the biased type can only profitably deviate from the pooling strategy if $\zeta_1 > 1$. □

Suppose the proper conditions exist for players to enter into a PAL PBE. Consequently, we assume that $\zeta_1 \leq 1$. How should we expect voters to benefit from this type of pooling (pandering) equilibrium when the judiciary is both legitimate and electorally accountable? Let $W_V^A(PAL)$ denote voters' *ex ante* expected welfare from policies played in the pooling, accountable, and legitimate equilibrium. We have, then,

$$W_V^A(PAL) \quad = \quad -(\omega - \theta_b)^2(1-p)\delta, \tag{2.4}$$

which is quite similar to social welfare under an electorally independent judiciary, with the distinction that the expectation is conditioned by players' preferences for future utility, δ.

To summarize this section I found that ζ_1 demarcated revealing from pandering strategies. When $\zeta_1 \leq 1$, biased incumbents preferred to pander for reelection as the environment became more visible, as they came to care more about future utility, and as the risk their challengers were ideological foes increased. When $\zeta_1 \geq 1$, biased incumbents preferred to reveal their preferences and secure current utility, especially as the institutional environment remained less visible or transparent. Later, I will consider how these institutional features like transparency affect voter welfare. For now, I turn to the illegitimate judiciary.

An Illegitimate Judiciary

Now let's consider how players behave in equilibrium when the courts are said to be "illegitimate." Recall that illegitimate courts are those in which the political environment favors biased outcomes and members of L strictly prefer the policies of biased judges to unbiased judges. ($D_b < D_u$).[17] Just as in the previous section, I will search out separating (revealing) and (pooling) pandering equilibria among the voters and judges.

I begin by searching for separating (revealing) strategies in which both types of incumbents choose their ideal points during t_1. Suppose that voters form the belief that incumbents choose their ideal points during t_1 with probability one. If Nature chooses institutional transparency and reveals the incumbents' policies, voters observing socially optimal policies will believe the incumbent is unbiased and will, therefore, elect its challenger. If, however, voters observe a biased policy, they believe the incumbent is biased and will consequently reelect them. But if Nature does not reveal the incumbents' policies

[17] Also recall that in this section $p \leq \frac{1}{2}$.

(non-transparent), then voters cannot update their prior beliefs; hence, they weakly prefer to reelect every incumbent as $p \leq \frac{1}{2}$.

The biased type of incumbent clearly has no unilateral incentive to deviate from the separating strategy; hence, any strategic defections from the revealing equilibrium must occur from the unbiased type. If the unbiased type plays its ideal point, it expects to lose its election if Nature reveals its policy and to win its reelection if Nature does not. Hence, the unbiased judge's expected utility from the separating strategy, $\sigma^*_{u,s}(\theta_u, \theta_u)$, is

$$U_u(\sigma^*_{u,s}(\theta_u, \theta_u) \mid D_b < D_u) \quad = \quad -\delta q(1-p)(\omega - \theta_b)^2,$$

which is the joint probability that the electoral environment is both visible and favorable toward biased judges, conditioned by the unbiased candidate's temporal preferences and proximity to the biased type of judge. Now consider the unbiased type's prospects from a deviation strategy, $\sigma_{u,p}/(\theta_b, \theta_u)$, where it mimics (pandering) a biased type in t_1. Regardless of whether Nature reveals the unbiased incumbent's choice, it expects to be reelected and only to be punished in t_1 utility. Hence,

$$U_u(\sigma'_{u,p}(\theta_b, \theta_u) \mid D_b < D_u) \quad = \quad -(1-\delta)(\omega - \theta_b)^2,$$

Let $\zeta_2 = 1$ denote the threshold at which the unbiased incumbent is indifferent between the equilibrium separating strategy and defection (pandering) strategies. Equating the previous two expectations gives the threshold,

$$\zeta_2 \quad \equiv \quad \frac{1-\delta}{\delta q(1-p)}.$$

It follows that the unbiased incumbent weakly prefers the equilibrium separating (revealing) strategy of the defection (pandering) strategy if $\zeta_2 \geq 1$. Likewise, the unbiased type weakly prefers the pandering (defection) strategy if $\zeta_2 \leq 1$.

Analyzing ζ_2 yields similar insights gained from ζ_1. The unbiased type becomes more willing to pander for reelection as the environment becomes more transparent or visible (q). That is, as the environment becomes more visible, the set of parameters that support pandering decision-making increases. The same can be said for the incumbent's temporal preferences. As the unbiased incumbent comes to care more for future utility, the more it becomes willing to engage in pandering strategies. The only substantive difference between ζ_2 and ζ_1 is the effect of p. I find that when the judiciary is illegitimate, the unbiased incumbent becomes less willing to pander for reelection as it becomes increasingly more likely an ideological ally will succeed it if removed from office.

Hence, the unbiased incumbent maintains the separating strategy, $\sigma^*_{u,s}(\theta_u, \theta_u \mid D_b < D_u)$, if the judiciary is illegitimate and if the electoral environment sufficiently favors revelatory strategies, $\zeta_2 \geq 1$. Recall that the biased type of incumbent has no unilateral incentive to deviate from the separating strategy. It follows, then, that a pure strategy separating PBE exists under these conditions. Let SAI denote a separating equilibrium when the courts are both accountable and illegitimate,

- *SAI PBE*: A pure strategy separating equilibrium exists if $D_b < D_u$ and $\zeta_2 \geq 1$, where incumbents select their most-preferred policies in t_1, and where voters reelect all incumbents under no transparency and only those incumbents choosing biased policies under transparency.

Proof. Suppose voters form the belief that incumbents play their most-preferred policies during t_1 with a probability of 1. If Nature fails to reveal their policies, then voters weakly prefer to reelect the incumbent as $p \leq \frac{1}{2}$. If Nature does reveal the incumbents' policies, then upon observing socially optimal policies, voters believe the incumbent is unbiased and

vote for their challenger, and upon observing biased policies, voters believe the incumbent is biased and reelects them. Clearly, the biased incumbent cannot profitably deviate from the equilibrium strategy. If under transparency, the unbiased type deviates, voters believe it to be a biased type and reelect it. Hence, the unbiased type can only profitably deviate from the separating strategy if $\zeta_2 < 1$. □

Suppose the proper conditions exist for players to enter into a SAI PBE. Then we assume that $\zeta_2 \geq 1$. How should we expect voters to benefit from this type of separating (revealing) equilibrium when the judiciary is illegitimate and electorally accountable? Let $W_V^A(SAI)$ denote voters' *ex ante* expected welfare from policies played in the separating, accountable, and illegitimate equilibrium. Then we have,

$$W_V^A(SAI) \quad = \quad -(\omega - \theta_b)^2(1-p)(1+\delta pq). \tag{2.5}$$

Note particularly that voter welfare here is decreasing in the political system's transparency or visibility, q.

Now let us consider the possibility for pooling equilibria to exist when the judiciary is illegitimate. Suppose voters formed the belief that both types pool their policies upon the unbiased signal. As before, I argue that this behavior is not supportable in equilibrium under the sequential rationality requirement. Only the biased type has any incentive to deviate toward off-equilibrium path strategies, and should voters observe off-path strategies, they should interpret the incumbent is biased and subsequently reelect it. Thus, the pooling strategy in which both incumbents choose the socially optimal policy cannot be supported as a PBE.

Suppose, then, that both types of incumbents pool upon the biased type of policy. Clearly, the biased type of incumbent has no unilateral incentive to deviate from the pool-

ing equilibrium. Let $\sigma^*_{u,p}(\theta_b, \theta_u)$ denote the unbiased type's equilibrium pooling (pandering) strategy in which it chooses the biased policy in t_1 and its own ideal point, ω, in t_2. Whatever Nature's decision *vis-à-vis* institutional transparency, every incumbent is guaranteed reelection to t_2 by maintaining the pooling equilibrium as $p \leq \frac{1}{2}$, by assumption. Thus, the equilibrium, to the extent it exists, favors those who value future over present utility. If the unbiased type of incumbent maintains the pooling (pandering) strategy, its expected utility is,

$$U_u(\sigma^*_{u,p}(\theta_b, \theta_u) \mid D_b < D_u) \quad = \quad -(1-\delta)(\omega - \theta_b)^2.$$

Now suppose the unbiased type were to deviate toward a defection strategy, $\sigma'_{u,s}(\theta_u, \theta_u)$ such that it plays its most-preferred policy during t_1. If Nature disclosed the unbiased incumbent's choice to voters, members of L would oust the incumbent from office, but if Nature did not reveal its choice, voters would reelect the unbiased incumbent. Its expected utility from the defection strategy, therefore, is,

$$U_u(\sigma'_{u,s}(\theta_u, \theta_u) \mid D_b < D_u) \quad = \quad -\delta q(1-p)(\omega - \theta_b)^2.$$

Equating the two expectations gives the point(s) at which the biased incumbent is indifferent between maintaining the pooling (pandering) strategy or defecting (separating) to its ideal point. I find that the unbiased incumbent will maintain the pure strategy pooling PBE if $\zeta_2 \leq 1$. Let PAI denote a pure strategy pooling equilibrium when the courts are accountable and illegitimate,

- *PAI PBE*: A pure strategy pooling equilibrium exists if $D_b < D_u$ and $\zeta \leq 1$, where all incumbents choose the biased policy in t_1 and their most preferred policies during t_2, and voters reelect every incumbent, regardless of institutional transparency.

Proof. Suppose voters form the belief that every type of incumbent chooses t_1 policy equal to θ_b with probability equal to 1. Regardless of Nature's decision to reveal the judiciary's signal, voters weakly prefer to reelect all incumbents when unable to update their beliefs as $p \leq \frac{1}{2}$, by assumption. In t_2, every type chooses its ideal point sequentially rationally. Thus, the biased type of incumbent has no profitable incentive to deviate from the pooling strategy. If the unbiased type deviates, L believes (correctly) that it is unbiased and votes for its challenger. Hence the unbiased type can only profitably deviate from the pooling strategy if $\zeta_2 > 1$. □

Suppose the proper conditions exist for players to enter into a PAI PBE. Consequently, we assume that $\zeta_2 \leq 1$. How should we expect voters to benefit from this type of pooling (pandering) equilibrium when the judiciary is both accountable and illegitimate? Let $W_V^A(PAI)$ denote voters' *ex ante* expected welfare from policies played in the pooling, accountable, and illegitimate equilibrium. We then have,

$$W_V^A(PAI) \quad = \quad -(\omega - \theta_b)^2(1 - \delta p). \tag{2.6}$$

2.4. Judicial Accountability, Legitimacy, and Social Welfare

Having exhaustively examined all pure strategy equilibria and social welfare according to the judiciary's institutional (1) selection/retention rules, (2) legitimacy, and (3) transparency/visibility, I would now like to draw some general conclusions over what institutional features are welfare-preferred to others. Equations 2 through 6 defined *ex ante* expected social welfare under electorally independent and accountable courts, legitimate and illegitimate courts, leading to pandering and separating equilibria. Table 1 summa-

Table 2.1.: The equilibria conditions

	Legitimate ($p \geq \frac{1}{2}$)	Illegitimate ($p \leq \frac{1}{2}$)
Independent Judiciary		
Pandering	NA	NA
Separating	Any Realization	Any Realization
Accountable Judiciary		
Pandering	Any $\frac{1-\delta}{\delta pq} \leq 1$	Any $\frac{1-\delta}{\delta q(1-p)} \leq 1$
Separating	Any $\frac{1-\delta}{\delta pq} \geq 1$	Any $\frac{1-\delta}{\delta q(1-p)} \geq 1$

Notes: "NA" connotes that the concept does not attain in equilibrium. Equilibria for the independent judiciary are subgame perfect Nash; for the accountable judiciary, they are perfect Bayes.

Table 2.2.: Expected welfare in pure strategy equilibrium

	Legitimate ($p \geq \frac{1}{2}$)	Illegitimate ($p \leq \frac{1}{2}$)
Independent Judiciary		
Pandering	NA	NA
Separating	$-(1-p)(\omega-\theta_b)^2$	$-(1-p)(\omega-\theta_b)^2$
Accountable Judiciary		
Pandering	$-(1-p)(\omega-\theta_b)^2\delta$	$-(1-\delta p)(\omega-\theta_b)^2$
Separating	$-(1-p)(\omega-\theta_b)^2(1-\delta pq)$	$-(1-p)(\omega-\theta_b)^2(1+\delta pq)$

Notes: "NA" connotes that the concept does not attain in equilibrium. Equilibria for the independent judiciary are subgame perfect Nash; for the accountable judiciary, they are perfect Bayes.

rizes the different equilibria described above and their conditions for existence. Table 2 summarizes voters' *ex anate* expected welfare from each equilibrium.

Critics of elected courts overwhelmingly claim that judicial accountability affects decision-making and thereby compromises the courts' impartiality and fairness. These claims clearly, however, fail to state what tangible benefits "judicial independence" confers upon the citizenry. It is all too obvious that within a strategic environments, politicians' behaviors are conditioned upon the voters' expected response. in this chapter, I have attempted to define positively how judicial independence/accountability affects not only equilibrium behavior but also equilibrium voter welfare.

The results from the welfare analysis show that judicial independence is not necessarily welfare-preferred to accountability. Rather, its preferability is conditioned upon whether the courts are legitimate,

- *Proposition 1*: In pure strategies, judicial accountability is welfare-preferred to judicial independence if the courts are "legitimate." Otherwise, judicial independence is welfare-preferred to judicial accountability.

Proof. Suppose that the courts are "legitimate" such that $D_u < D_b$. Then it follows that voters' *ex ante* expected welfare from either the PAL or SAL equilibria are strictly greater than the independent judiciary. This is true if,

$$-(1-p)(\omega-\theta_b)^2\delta \quad > \quad -(1-p)(\omega-\theta_b)^2,$$

which holds if $\delta < 1$ and is true by definition, and also if,

$$-(1-p)(\omega-\theta_b)^2(1-\delta pq) \quad > \quad -(1-p)(\omega-\theta_b)^2,$$

which holds if $\delta pq > 0$, which is also true by definition. Now suppose that the judiciary is "illegitimate" such that $D_b < D_u$. It follows, then, that voters' *ex ante* expected welfare from either the PAI or SAI equilibria are strictly welfare inferior compared to that attained

under an independent judiciary. This is true if, first,

$$-(1-p)(\omega-\theta_b)^2 \;\; > \;\; -(1-\delta p)(\omega-\theta_b)^2,$$

which holds if $\delta < 1$, which is true by definition, and we complete the proof by showing that,

$$-(1-p)(\omega-\theta_b)^2 \;\; > \;\; -(1-p)(\omega-\theta_b)^2(1+\delta pq),$$

which holds if $\delta pq > 0$, which again is true by definition. □

Through Proposition 1, I find that so long as the majority group's preferences are nearer to the social optimum than to the biased candidate, social welfare is strictly superior through judicial accountability and *not* elections. In more general terms, this finding supports the idea that so long as the majority group's preferences (or perhaps so long as the issues implicated by the facts of the case) are sufficiently moderate, then the benefits of avoiding pandering behavior in the courts through outright judicial independence are not enough alone to offset the welfare losses caused by giving biased judges life tenure. Nevertheless, when the majority group is sufficiently biased (or perhaps when the minority group is sufficiently reviled), voters are best off when judges are not incentivized to pander for their retention.

Second, and finally, I find that institutional transparency (or visibility) as manifested through pooling or separating PBE is weakly welfare superior when courts are illegitimate but weakly welfare inferior when courts are legitimate.

- *Proposition 2*: With electorally accountable judiciaries, the pure strategy PBE with legitimate courts is weakly welfare dominated, and the pure strategy PBE with illegitimate courts is weakly welfare dominant.

Proof. Begin with the legitimate courts. Suppose the conditions exist such that players enter into a pure strategy pooling equilibrium. Hence, $\zeta_1 \leq 1$. The outcome is welfare efficient with respect to a separating strategy if,

$$-\delta \quad \geq \quad -(1-\delta pq),$$

which implies that $\zeta_1 \geq 1$. Both conditions can only be met when $\zeta_1 = 1$. Hence, only when the biased incumbent under judicial legitimacy is indifferent between pandering and separating strategies is the pandering strategy at least as good for the public as the revealing strategy. The same holds when examining the welfare-superiority of the separating strategy under judicial legitimacy. Hence, for either pure strategy PBE with judicial legitimacy, the equilibrium strategy provides social welfare that is weakly dominated.

Now consider the illegitimate judiciary. Assume the conditions exist to support a pooling equilibrium ($\zeta_2 \leq 1$). The equilibrium strategy, therefore, is welfare superior to the separating strategy if,

$$-(1-\delta p) \quad \geq \quad -(1-p)(1+\delta pq).$$

Rearranging the inequality, we get $\zeta_2 \leq 1$, which is true by assumption. The same holds when examining the welfare-superiority of the separating strategy under judicial illegitimacy. Hence, for either pure strategy PBE with judicial illegitimacy, the equilibrium outcome is weakly welfare-efficient. □

One interpretation of Proposition 2 is that when the judiciary is legitimate, social welfare would be furthered if voters could see the judiciary's type. Nevertheless, as the political environment becomes more transparent or visible, biased judges become more willing to pander to stay on the bench. And if biased types begin to pander, the social welfare

would be better off if the political system was less visible to prevent so much pandering, and on, and on. Hence, voters and judges are almost stuck in a prisoners' dilemma-style problem where voters are made better off by transparency until such transparency leads to pandering. If that happens, voters would prefer less transparency to prevent so much pandering. But if they are successful in reducing pandering, voters will once again want greater visibility, once again causing more pandering, etc. Interpreting the second-half of Proposition 2, I note that even though every type of PBE is weakly welfare efficient within illegitimate institutions, these are all strictly dominated by judicial independence, as noted in Proposition 1.

2.5. Conclusion

The new-style campaign has brought with it the added risk that judicial institutions have become "too visible" to the average citizen—at least this is a familiar narrative. The analysis presented here suggests a far more subtle and intricate relationship between judicial decision-making, voters' access to this information, and their well-being. In the course of the chapter, I specified a fairly simple game with only minimal restrictions on players preferences and the social welfare function. I argued that judges should take a balancing-of-interests approach to adjudication, favoring no one group over another, and keeping mindful that certain majoritarian or counter-majoritarian decisions can render major negative externalities onto the social welfare function. In the course of the analysis, I found that judicial visibility became welfare inefficient compared to non-visibility when voters and judges became trapped in a prisoners' dilemma-style paradox, possibly evidence of a positive justification for state intervention into the citizen-judge relationship—to mitigate the strategic impasse and promote social welfare. I also found that a lack of popular legitimacy could further justify such state intervention in order to prevent citizens from

acquiring "too much" information over judicial policy-making. Finally, however, we would be mistaken to conclude that the only types of welfare inefficiencies occur due to excessive visibility. Rather, I found that for a substantial class of parameters (specifically those where majority members of society shared preferences near the socially optimal policy) generate the desirability for judicial elections and accountability.

3. Voter Information and Judicial Choice

3.1. Introduction

The "counter-majoritarian difficulty" inherent in judicial review has played a classic foil to theories of democracy, representation, and constitutionalism (Bickel, 1962). In the legislative context, at least, citizens are benefitted from energetic representatives who will defend their interests in deliberative bodies. Consequently, frequent, competitive elections facilitate such representation (Barro, 1973; Ferejohn, 1986). Majoritarianism, from this perspective, is welfare efficient. In the context of the judiciary, however, such a concept of representation, while appealing in its ability to promote democratic accountability, pushes against another democratic norm—the equal protection of the law. Requiring judges to receive majority support to continue in office may produce (through what is known as "posturing" behavior) meaningful losses in social welfare that electorally independent judges may not have produced (Maskin and Tirole, 2004). The institution of electing judges, therefore, may promote the repression of unpopular minorities.[1]

[1]See Alexander Hamilton's *Federalist,* No. 78.

Evidence of judicial posturing—and voters' concomitant willingness to audit recalcitrant judges—has recently become a central justification for electorally independent judicial institutions (Geyh, 2003), and these calls to reform the judiciary have only intensified given the emergence of the so-called "new-style" campaign (i.e., Hojnacki and Baum, 1992).[2] Recent scholarly attention to the voter-judge relationship has relied upon insights from principal-agency theory to investigate judicial fealty to majoritarian preferences and voters' willingness to hold judges' accountable for their choices (Caldarone, Canes-Wrone and Clark, 2009; Canes-Wrone, Clark and Park, 2012; Hall, 2007*b*; Hall and Bonneau, 2008, 2013). This body of work has advanced what may be termed an "informational" theory of the strategic interplay of voter-judge preferences. That is, citizens' ability to hold judges accountable to majoritarian preferences depends on their access to information—their ability to audit deviant behavior and subsequently to punish such deviance either at the polls or through their elected representatives (Brace and Boyea, 2008; Canes-Wrone, Clark and Kelly, 2014).

While examinations of voters' willingness to audit judicial decision-making has begun to incorporate informational hypotheses into their empirical tests, extant analyses of the posturing phenomenon rely almost exclusively upon institutional methods of selection and retention as measures for voters' access to information. For example, empirical evidence suggests that nonpartisan and retention elections produce greater posturing behavior than institutions using partisan contests—which routinely raise and spend the most money among all institutional types—due to the fact that partisan judges may campaign on their label as opposed to their record. Judges without parties do not enjoy such a privilege and therefore posture in salient cases that the public is likely to observe (Caldarone, Canes-Wrone and Clark, 2009; Canes-Wrone, Clark and Park, 2012; Canes-Wrone, Clark and

[2]For an excellent review of the rise of the new-style campaign and the legal community's efforts to reform it, see Canes-Wrone, Clark and Kelly (2014).

Kelly, 2014). In light of recent evidence that unelected, lifetime appointed trial judges on the federal courts engage in similar posturing behavior (in this context, "auditioning" for higher appointments), one might question the wisdom of purely institutional hypotheses of judicial posturing (Epstein, Landes and Posner, 2013).

In this paper, I advance an informational theory of judicial posturing that attempts to go beyond institutions by moving the analysis to the heart of the posturing phenomenon. I argue that an appropriate model of judicial posturing should, first, determine the audience towards whom a judge must posture to garner political favor and, secondly, to gauge the ability of that audience to discover and punish deviance. Using these theoretical insights, I contribute to an ongoing conversation over the efficacy of judicial elections by directly measuring citizen and elite access to judicial preferences and their likelihood to promote posturing behavior. Constructing a dataset that documents campaign fundraising and television advertising among judicial candidates, political parties, and political action committees, in addition to media coverage of court decision-making from six nationally circulated newspapers, I construct latent measures of "judicial visibility" among state supreme courts and justices. Higher visibility measures indicate informationally rich political environments that facilitate audits of judicial preferences. I then estimate judicial posturing to majoritarian preferences, comparing and contrasting institutional versus informational variables.

Analyzing state supreme court decision-making in all types of cases from 2001–2010, I find that institutional variables alone are insufficient to predict posturing behavior. Rather, across all types of judicial institutions that utilize sundry methods of selection and retention, judges' degree of visibility to the electorate significantly constrains their decision-making. Testing a spatial model of revealed preferences, I find that judicial visibility leads incumbent judges to hew to majoritarian preferences, but I also find evidence that certain

institutional features promote accountability to majoritarian preferences. Perhaps most surprisingly, I find that appointed judges are highly sensitive to newspaper coverage of their decision-making, posturing towards majoritarian preferences more than any other group studied with respect to salient types of cases. Further analyzing the propensity of ideological extremists to conceal their deviant preferences, I also examine judges' votes in salient types of cases (abortion, death penalty, and same-sex marriage) and find judicial visibility significantly to promote posturing behavior, particularly among these extremists. Results suggest that judicial posturing scholarship has under-estimated the important and various means (campaign or media-oriented) by which information-based accountability mechanisms constrain judicial choice beyond rote institutionalism.

3.2. Voter Information, Electoral Institutions, and Judicial Choice

Most states use elections (in one form or another) to select or retain at least some of their judges.[3] Judicial elections make clearer a principal-agent link between judges and citizens often more opaque in systems that guarantee life tenure such as the federal judiciary (Maskin and Tirole, 2004). Voting (either through popular elections or through legislative or gubernatorial appointments) gives citizens and policy elites the opportunity to select like-minded judges and to hold them accountable to their preferences.

[3]These systems span the more competitive partisan and nonpartisan varieties (which require candidates to compete for voters' support), to so-called "merit" systems that are non-competitive (where judges are chosen by commissions or policy elites but require voters' assent to continue in office), to the indirect method of "reappointment" (whereby voters take no direct part in judges' selection or retention, but policy elites may choose whether to reappoint judges to the court they currently serve). Massachusetts, New Hampshire, and Rhode Island alone do not require incumbents to face retention (similar to the U.S. judiciary).

In the legislative context, at least, frequent and competitive elections foster energetic representation, which furthers legislators' responsiveness to constituent preferences by counteracting rent-seeking (Barro, 1973; Ferejohn, 1986). Even still, this philosophy of representation may not be a comfortable fit within the context of the judiciary. Traditionally, "judging" has been regarded as a means of ensuring consistency of rules through legal mores such as *stare decisis* and *sua sponte* (Epstein and Knight, 1998), protecting the interests of unpopular minorities (Cox, 1995), or of reducing transactions costs and legal uncertainties (Landes and Posner, 1975). But because the nature of judicial decision-making is not generally concerned with how to divide finite resources or how to provide a public good, how voters and elites evaluate prospective members of the bench likely has far more to do with their perceived policy preferences than anything else (Hall, 2001, 2007*b*; Hall and Bonneau, 2008, 2013).[4] To this end, state judges are largely selected according to the same criteria as federal judges—that is, according to the policies they will likely endorse on the bench (Hall, 2001).

If voter and elite preferences over judicial candidates are sufficiently unidimensional, then judicial selection should largely follow a Downsian model of spatial preferences (Downs, 1957).[5] That is to say, some pivotal set of voters or elites will be decisive in the selection and retention of judicial personnel (e.g., Krehbiel, 2007). In this context, the institutional methods of selection and retention are key because they determine which set of political actors select the makeup of the bench (whether they are policy elites or the electorate writ large). Even still, judges—like other political beings—are self-interested, utility maximizers who desire to promote not only their policy preferences but also to do so in ways that promote

[4]See, however, recent decisions by the Kansas and Washington state supreme courts declaring certain education budgeting provisions unconstitutional on equal protection grounds (319 P.3d 1196 (2014) and 269 P.3d 227 (2012), respectively).

[5]In recent years, political preferences have become overwhelmingly unidimensional in American politics as party identification has intersected with ideology (e.g., Layman and Carsey, 2002; McCarty, Poole and Rosenthal, 2006).

their legal careers (Epstein, Landes and Posner, 2013; George and Epstein, 1992; Posner, 1993). Judicial self-interest and optimal adjudication, however, may pull in opposite directions. If judges are sufficiently self-interested, then the confluence of self-interest and retention campaigns may well produce legal outcomes that undermine the very goals the judiciary is intended to promote. Through posturing behavior, incumbents—particularly ideological extremists—may sacrifice sound policy during a retention bid in order to secure preferable policy at a later period—the result of which is uncertainty and legal favoritism (Ashworth and Bueno de Mesquita, 2014; Maskin and Tirole, 2004).

Searching for empirical evidence of the posturing phenomenon, courts scholars typically use institutional selection and retention methods as their primary starting point. Results offer compelling evidence judges of the nation's state courts of last resort indeed engage in posturing and that such posturing behavior is conditioned by the types of elections they face. This is true not only in salient "law and order" types of cases (the death penalty, for example (Brace and Boyea, 2008; Canes-Wrone, Clark and Kelly, 2014; Cann and Wilhelm, 2011)), but also with respect to social issues (same-sex marriage or abortion, for example (Caldarone, Canes-Wrone and Clark, 2009; Canes-Wrone, Clark and Park, 2012; Hume, 2013)), and even economic issues (tort awards, for example (Helland and Tabarrok, 2002)). State supreme court justices, therefore, appear to respond to some set of incentives structured—at least in part—by institutional selection and retention methods, but it remains less clear why some forms of elections elicit more posturing than others.

On the one hand, elections with partisan labels are associated with greater campaign fundraising than are elections with no partisan label; hence, judges who raise great sums of money (and by implication, partisan-elected judges in particular) may feel great pressure to reward donors once on the bench than their counterparts who rely less upon campaign donations (Helland and Tabarrok, 2002). This kind of posturing may exist with

respect to economic issue areas, but recent scholarship advancing a theory of principal-agency grounded in information availability have come to opposite conclusions (Caldarone, Canes-Wrone and Clark, 2009; Canes-Wrone, Clark and Park, 2012; Canes-Wrone, Clark and Kelly, 2014). They find that certain institutional structures provide pivotal interests varying amounts of information over the preferences of potential candidates for the bench, which may explain why different selection and retention methods elicit varying judicial responses.

How states use elections to choose judges affects their decision-making by providing pivotal decision-makers with varying degrees of information. Arguably, placing a party label next to a candidate's name is among the most straightforward institutional means of conveying information to voters who may infer a candidate's preferences by the party with which he or she chooses to associate (Hall, 2007*b*; Klein and Baum, 2001; Schaffner and Streb, 2002; Schaffner, Streb and Wright, 2001; Squire and Smith, 1988). Non-partisan elections, however, arguably have the least useful information (Hall, 2007*b*; Canes-Wrone, Clark and Kelly, 2014) since no party affiliation is provided on the ballot, thus requiring voters to use other cues such as candidate or campaign characteristics (gender, or a scandal, for example) to cast their vote (Dubois, 1984; Johnson, Schaefer and McKnight, 1978). Finally, retention elections provide voters with less information than partisan elections but arguably more than nonpartisan elections (Hall, 2007*b*). While voters may not know the party of the candidate for retention, they might know the partisanship of the political elites who appointed the judge and may cue off such information.

In a strategic environment where citizens and elites condition their choices among candidates for the bench upon available information, it is only natural that judges condition their choices based upon that same degree of information availability (Ashworth and Bueno de Mesquita, 2014; Fox, 2007). The temptation to posture may become particularly acute

when their decisions are highly visible—in death penalty cases, for example (Hall, 1992).[6] Just as institutional selection methods affect voters' ballot choices, these methods likewise impact adjudicatory behavior.

In recent years, however, the rise of the "new-style" campaign—characterized by greater issue-framing and interest group participation—has underscored the weaknesses in purely institutional theories of judicial choice. Early neo-institutional work established that non-competitive retention campaigns were weaker electoral connections *vis-à-vis* partisan and nonpartisan campaigns because incumbents rarely faced challengers and were even more rarely defeated (e.g., Brace and Hall, 1990, 1993, 1997). Nevertheless, "new-style" judicial campaigns have the potential to turn what were once low-visibility campaigns for the bench into highly salient affairs (Hojnacki and Baum, 1992). This is true of any type of selection method. Consequently, salient campaigns may furthermore beget competitive ones, attracting greater spending, interest group involvement, and media coverage—all of which alert voters and elites to relevant information regarding where candidates stand on issues important to them, which facilitates participation (Bonneau, 2007*b*; Caufield, 2007; Hall and Bonneau, 2008, 2013; Goldberg, 2007; Iyengar, 2002). In short, competitive campaigns equip elites and voters with greater information regarding their candidates for the judiciary (for better or worse) by lowering the costs to information acquisition.

"New-Style" campaigns—characterized by greater competition and a robust information marketplace—encourage citizen participation and scrutiny over their judicial branch. Moreover, incumbent judges may feel this scrutiny as they dispose of their cases. Scholars examining justice-level voting have found an empirical temptation to "posture" for constituents particularly prevalent in jurisdictions that attempt to limit court salience through

[6] As one commentator memorably put it, "A judge may hope that conscience will triumph over retention anxiety, but . . .ignoring the political consequences of visible decisions is 'like ignoring a crocodile in your bathtub'" (Eule, 1993, quoted at 739).

selection and retention methods such as retention or nonpartisan competitions (Caldarone, Canes-Wrone and Clark, 2009; Canes-Wrone, Clark and Park, 2012; Canes-Wrone, Clark and Kelly, 2014). This research has found that incumbents attempt to fill an information gap created by a lack of a party label by posturing toward majoritarian preferences in salient issue areas such as abortion or capital punishment, thus signaling their congruity with their constituents.

Despite the prevalence (and demonstrated effectiveness) of these institutional hypotheses, the development of the "new-style" campaign raises important questions over whether such hypotheses are entirely sufficient to analyze judicial posturing behavior. If vigorous campaigns for the bench animate posturing behavior, then such a dynamic relationship should exist largely independent of institutional selection and retention methods. Indeed, in states that have witnessed greater interest group involvement in retention efforts (Iowa in 2010, for example), ballot rolloff has decreased as has incumbents' margin of the vote-share, suggesting more citizens have sufficient information to cast rational votes, even without partisan heuristics.[7]

Finally, institutional hypotheses alone do not account for the ability of courts to generate information about themselves through potentially salient behavior. Salient decision-making on "hot-button" issues such as capital punishment are more likely to find themselves covered by news outlets than the more day-today dispositions courts render (Vining and Wilhelm, 2010*a*). If media outlets report the decision-making (and presumably) the preferences of a court's personnel, voters and elites can obtain better information over their

[7]In 2008, three Iowa Supreme Court incumbents experienced an average margin of victory of 45 percentage points while fully 37% of voters who cast ballots failed to vote for supreme court retention. Following the Court's controversial 2009 unanimous opinion invalidating the state's statutory ban on same sex marriage, however, special interests spent nearly $300,000 in an effort to defeat three of the majority's members during the 2010 campaign. Each of the three incumbents lost their retentions by an average margin of 4 percentage points, and only 13% of voters casting ballots failed to vote for Supreme Court retention. Election figures are gathered from the Iowa Secretary of State's website: `https://sos.iowa.gov/elections/results/index.html#7` (last accessed 30 August 2015).

judicial agents. Likewise, behavior divorced from adjudication—a scandal, for example—can also find its way through news and media outlets and provide voters with valuable information regarding judges' values and preferences (Johnson, Schaefer and McKnight, 1978). Unless the methods of selecting and retaining judges is correlated with their newsworthiness, scholars are missing out on potentially important means by which judges are held accountable to majoritarian preferences.

3.3. Hypotheses

I argue that a more fully specified model of judicial posturing must directly account for the informational environments in which judges exist. Without doubt, certain institutions promote greater information. Partisan elections, for example, by their very nature, are an electoral institution that convey valuably unique information not present in other types of selection and retention environments. Nevertheless, failing to distinguish a retention campaign that spends hundreds of thousands of dollars to promote or attack a candidate from one with no spending whatsoever might confound empirical analyses of posturing behavior. Likewise, some audiences that are called upon to evaluate prospective members of the bench are likely better qualified to assess judicial preferences than others. Systems using reappointment schemes of retention, for example, allow gubernatorial or legislative elites to choose whether to reappoint an incumbent judge, and these individuals are likely better informed than their constituents regarding the political landscape. Consequently, a visible incumbent seeking the favor of a state governor for reappointment might face a greater temptation to posture than any popularly elected judge.

Moreover, if one is concerned about voters' and elites' capacities to cull information, one should not be restricted to campaign activity. Any type of salient decision-making that results in media coverage that citizens are likely to encounter similarly contributes

to judicial visibility. In 2003, for example, amidst a controversy surrounding a massive granite monument of the biblical Ten Commandments at the Alabama Supreme Court, local and national news outlets regularly chronicled the constitutional crisis at the Court as the chief justice refused to comply with a federal court order to remove the monument. By the time the chief justice was suspended from office (and eventually dismissed), his colleagues found themselves in the awkward position of complying with a fairly unpopular order that the states' residents not only knew of but viewed askance.[8] Given a legal battle of this sort, voters and elites have means of learning about their judicial agents in ways largely unrelated to campaign activities.[9]

I posit that an information-based model of principal-agency, grounded in the spatial theory of voting (e.g. Enelow and Hinich, 1984) can further refine the literature on judicial selection and its effects on posturing behavior. I argue that judges (consciously or otherwise) consider two critical factors in making their posturing choices. First, they must take account of the political actors responsible for their retention. In the state courts of last resort, these individuals are voters who cast ballots or other institutional elites who make appointment decisions such as governors, legislators, or commissioners—separately or jointly. Secondly, incumbent judges must assess the capacity of these individuals either to audit their decision-making or to punish ideological deviance from acceptable policies after performing an audit. The former task relates to discovering the preferences of some pivotal voter; the latter relates to evaluating one's ideological extremism in relation to that voter and the likelihood deviations from that standard will be unearthed and punished. In

[8]See Gettleman, Jeffrey, "Monument is Now out of Sight, but Not out of Mind," *The New York Times,* August 28, 2003 (A14).

[9]Several pivotal players from the Ten Commandments controversy subsequently used the standoff to fuel future political careers. Roy Moore's spokesman, Tom Parker, went on to join the state supreme court as an associate member. Roy Moore used his removal as a platform to run for governor. He lost twice, but as of this writing is currently serving once again as the state's chief justice, having been narrowly elected in 2012. Attorney General Bill Pryor, who initiated Moore's removal as chief justice, later received a federal appointment to the 11th Circuit Court of Appeals.

this context, "posturing" simply refers to a judge's willingness to move in ideological space toward that pivotal political actor. I argue that the ability of pivotal voters and elites to discover deviant judicial decision-making relates to the "visibility" of the judge and the court he or she serves on.

Accordingly, I promote an information-based theory of judicial choice. Specifically, I hypothesize that, holding selection and retention rules constant, judges in visible environments should face greater pressure to posture toward majoritarian preferences.

- *Hypothesis 1*: Regardless of institutional selection or retention methods, judges will engage in greater posturing behavior as they become more visible to some pivotal voting group, all else equal.

Certain institutional features, however, make learning (and punishing) deviations from acceptable social choices easier than others. First, competitive elections generate greater campaign activity so long as at least one of the candidates actively engages in campaign activity (speeches, advertisements, etc.), and scholars have consistently found that greater competition in judicial elections reduces uncertainty and promotes citizen engagement by heightening candidate visibility (Bonneau and Hall, 2009). Hence, I expect that elections that permit more than one individual to campaign for the same supreme court seat (partisan and nonpartisan elections) to engender greater accountability to majoritarian preferences. Moreover, systems that place disproportionate power to retain an incumbent into the hands of policy elites (reappointment systems) should likewise exhibit greater deference to social norms since these pivotal players have greater access to information than average citizens and are in a remarkably strong position to punish ideological deviance.[10]

[10]Note, for example, recent battles for the New Jersey high court as Republican governor, Chris Christie, has elected not to reappoint ideological opponents, despite widespread condemnation for "politicizing" the court. See Perez-Pena, Richard, "Christie, Shunning Precedent, Drops Justice from Court," *The New York Times,* May 4, 2010 (A22).

- *Hypothesis 2*: Institutional retention methods that permit challengers or that place reappointment decisions into the hands of elites will promote greater posturing behavior than other institutional systems (elected or otherwise), all else equal.

Finally, I expect certain types of incumbent judges to engage in more severe posturing behavior than others. If the dangers of information to incumbent judges are that voters or policy-makers will learn the judge's true ideology, then those judges spatially distant to pivotal voting members should feel a greater need to engage in posturing behavior than incumbents with spatial preferences nearer pivotal decision-makers. After all, if a pivotal elite or voter were to audit a judge with similar preferences, the worst he or she could discover is that this judge thinks similarly to him or herself. Hence, in evaluating the likelihood of being audited, more moderate judge's should not need to posture as often or as severely as ideological extremists (those with ideal points located far from pivotal voters or elites) since they have potentially less to lose by the prospect of an audit.

- *Hypothesis 3*: Judges ideologically distant to pivotal voters and elites will posture more heavily as they become more visible, all else equal.

3.4. Empirical Analysis

I test an information-based theory of judicial posturing to majoritarian preferences as a function of judge-court visibility (i.e., the likelihood of an audit) and state supreme court justices' ideological extremism. I first develop a new measure of judge-court visibility for state supreme court justices on 50 state courts of last resort from 2001-2010.[11] I test Hypotheses 1 and 2 by examining judges' revealed ideologies in a given court and year and compare their ideological polarity to an "average" citizen of that state. Hence, I test a spatial model of judicial posturing in light of contemporaneous visibility factors. Previous

[11]I exclude the Texas and Oklahoma courts of criminal appeals due to a lack of data availability for media variables discussed below.

empirical models have not tested a spatial model of posturing directly. Therefore, I further tests Hypotheses 1–3 by replicating previous studies of salient decision-making (death penalty, abortion, and same-sex marriage). I measure the likelihood incumbent justices—as a function of their ideological extremism with respect to "moderate" voters—posture towards "popular" preferences.

Dependent Variable (Spatial Model): To assess a judge's likelihood of posturing towards majoritarian preferences, I first measure the absolute distance between the judge's revealed ideological preferences in a given year and the preferences of the state's "average voter." Recent attempts to gauge state supreme court ideology have generated exciting new opportunities for empirical testing. Bonica and Woodruff (2014) generate a common space among all state supreme court justices using campaign finance and a decision-theoretic model that assesses candidate ideology based upon donations candidates made to other campaigns and the donations their own campaigns accepted from other donors. While this estimation strategy succeeds in creating a common space of judicial preferences (judicial preferences in Alaska can be compared to those in Connecticut, e.g.), the revealed ideologies of the judges are static and do not vary across time. Hence, this measure would be an inappropriate gauge of judicial posturing towards voters' preferences, especially in light of temporal controls such as an incumbent's proximity to an election. A second difficulty in this measure is that many state supreme court justices neither raise nor donate money. Bonica and Woodruff (2014) estimate these individuals' preferences by using the preferences of other state elites, which would also be an inappropriate means of evaluating incumbent justices *revealed* ideological behavior.

Making use of a recent dataset gathered by Hall and Windett (2013), Windett, Harden and Hall (2015) construct a dynamic measure of justices' revealed ideologies based upon their votes in all non-unanimous cases from 1995–2010. This ideal point estimation strategy

is similar to that in Martin and Quinn (2002). It has the benefit of moving over time in order to uncover dynamic tendencies in justices' revealed preferences. One difficulty of this method, however, is that justices' ideal points are not constructed within the same ideological space. That is, a judge's ideology in Ohio cannot be compared to one in Hawaii, but only to the other judges within Ohio. Such a shortcoming is important to this work because my analysis depends on comparing judges' revealed preferences to the preferences of other political players in the "ideological marketplace" (Bonica, 2014). To overcome this difficulty, Windett, Harden and Hall (2015) used a linear mapping function that projects justices' ideal points from their within-court ideological space into the space estimated in Bonica and Woodruff (2014). This allows comparisons not only among judges from different institutions but also among political actors from other institutions who also have ideology scores estimated from campaign finance data (Bonica, 2014).

The theory presented herein predicts that highly visible, vulnerable judges will exhibit more majoritarian behavior than their non-visible counterparts. Therefore, the dependent variable measures the ideological distance between a given judge, in a given year, and the "average" voter. Let $\theta_{j,t}$ denote the revealed preferences of a supreme court justice at some point in time and $\theta_{v,t}$ the preferences of the average voter in his or her state at the same point in time. The (spatial model) dependent variable is measured as:

$$\text{Extremism}_{j,t} \quad = \quad \mid \theta_{j,t} - \theta_{v,t} \mid .$$

To calculate the preferences of voters, I use the median U.S. House representative from that state and year.[12]

[12]Other methods of calculating voter preferences could be to use the median member of that state's upper or lower house or the preferences of the governor. I have no *a priori* reason to suspect using members of the House of Representatives biases my results in any consistent way.

Career Controls: I also account for other, competing claims on justices' ideological development. Using data collected from supreme court biographies, obituaries, and newspaper articles, I determine whether each justice, in a given year, is a "lame duck" ("1" if yes, "0" else). I define a lame duck as anyone who does not run for retention. I do not code those who died during their term as a lame duck because one cannot guess whether they would have run again had they continued in office. As such, I assume they planned to run for reelection. If any error exists with this coding scheme, it will bias results toward the null hypothesis. Nevertheless, among those states with mandatory retirement ages, I am able to code as lame ducks those incumbents who are legally forbidden to run for retention. Finally, I expect that judges who are nearing election, consistent with prior literature, will feel greater pressure to vote in majoritarian ways. Therefore, I control for whether an incumbent, in a given year, is within two years of an election effort ("1" if yes, "0" else).

Institutional Controls: A consistent finding among state supreme court scholarship is that institutional rules of selection and retention color judicial decision-making. Accordingly, I control for the method of retention each judge on the court faces for his or her next election through a series of binary indicators. These include "partisan," "nonpartisan," "retention," "reappointment," and "other" schemes, where "other" denotes states that do not require incumbents to stand for retention. Massachusetts, New Hampshire, and Rhode Island do not use any type of reappointment scheme. Justice on the high court of New Jersey are afforded "tenure" once they have successfully achieved one reappointment. I take these state-level idiosyncrasies into consideration as I coded each judge-year observation.

Measuring State Supreme Court Visibility

State court salience and visibility to the electorate have been sparsely explored. Vining and Wilhelm (2010*a*,*b*) generate a measure of case-level salience, documenting front-page news-

paper coverage of state supreme court opinions from 1995-1998. They explore newspapers with the highest circulation rate in a given state to generate their measure. They found that certain issue areas such as civil rights and liberties, cases with *amicus* participation, capital punishment, or cases with declarations of unconstitutionality were more likely to receive media coverage than not. Subsequent scholarship by Cann and Wilhelm (2011) found further validity to these measures with respect to predicting judicial posturing in light of public opinion. Research by Vining, Wilhelm and Collens (2014) finds that newspaper coverage of death penalty suits choose capital cases with dramatic or sensational elements. Even still, the researchers' studies are somewhat limited with respect to the four years of their span.

It is common practice among studies of state supreme court decision-making to assert that certain legal issues are salient through the research design process itself. Hot-button issues like capital punishment, same-sex marriage, and abortion cases are typically among those selected for study (Brace and Boyea, 2008; Caldarone, Canes-Wrone and Clark, 2009; Canes-Wrone, Clark and Park, 2012; Canes-Wrone, Clark and Kelly, 2014; Cann and Wilhelm, 2011; Hume, 2013). Nevertheless, when one accounts for Vining and Wilhelm's (2010*b*) findings that only about 1.5 percent of state supreme courts' decisions make their way to the front page of a local paper, one must question just how visible even these sorts of cases are.

An alternative to the case-by-case approach is to measure the salience or visibility, not of cases, but of judges and courts. One straightforward means of achieving such a measure—complementary to the case-salience approach in Vining and Wilhelm (2010*b*)—is to analyze a court's aggregate presence in the media. Caldeira and Gibson (1995) use a similar intuition in their examination of court legitimacy in the European Union. The authors asked residents of several European states whether they had "'seen or heard, in the papers,

on the radio, or on the television' anything about the institution," finding support for the hypothesis that high-profile political developments increased citizens' awareness and knowledge of courts (361). Aggregate media coverage of a court, it follows, speaks directly to that institution's visibility to the public, citizens' ability to learn from and about those courts, and their ability to assess that court's policy-making and legitimacy.

Another way one might assess a court's visibility and citizens' knowledge (or potential to attain knowledge) of it is to examine the campaign activity of those candidates seeking election or retention (Bonneau and Hall, 2009; Gibson, 2013). First, and perhaps foremost, when it comes to judicial campaigns, one might say that "money talks." Campaign expenditures—perhaps by candidates themselves (incumbents or challengers), political parties, or by organized interests—manifested via political advertising (or other forms of political speech) gives citizens an opportunity to learn about their candidates for the bench. In fact, analyses of campaign spending finds a powerful relationship between campaign expenditures and citizen participation:

> Whatever one's views of the propriety of judges (and candidates) campaigning and spending money in order to obtain (and retain) their seats, one cannot deny that competitive, vigorous campaigns reduce information costs to voters and provide them with facts about the candidates, both of which increase the likelihood of voting (Hall and Bonneau, 2008, 459).

Secondly, campaign speech itself can lower voters' costs for attaining information about their courts and lead them to participate at greater rates. One of the most prevalent forms of campaign speech in the "new-style" era has been the television advertisement. While one may doubt the ability of a brief television advertisement to convey much relevant information, Iyengar (2002) explains, "Even when the message is delivered in the form of a thirty-second commercial, embellished with musical jingles and eye-catching visuals, viewers manage to acquire new and relevant information about the sponsoring candidate"

(694–5). Hall and Bonneau (2013) further examine the information efficacy of advertising in state supreme court races, asking whether a more liberalized information space brought on by the U.S. Supreme Court's *Republican Party of Minnesota v. White* (2002) decision, even when that information takes nastier tones in the forms of attack advertising, can promote citizen participation in campaigns for the bench.[13] The authors find evidence that campaign speech, even when it takes a negative tone, can inform voters and lead them to participate in the electoral process.

I posit that voters learn about their state supreme court judges according to two key mechanisms—(1) popular media coverage of judge/court behavior and (2) campaign activity that manifests itself through spending and advertising. Note that "spending" and "advertising" are neither mutually exclusive nor exchangeable. Spending may take the form of candidate promotion that is independent of advertising (travel expenses relating to stumping activity, for example). I argue that greater media coverage and campaign spending leads to greater opportunities for citizen engagement and judicial visibility, all else equal. Hence, I gather data relating to newspaper coverage of state supreme courts, fundraising among candidates, parties, and committees, and television advertising among candidates, political parties, and special interest groups.

In contrast to Vining and Wilhelm (2010*b*), I collect data on the most salient state supreme court decisions—those that are included in newspapers with national, as opposed to local, circulations.[14] Local newspaper coverage of state courts is an important means of gauging citizen knowledge of the day-to-day decision-making of their courts. I argue,

[13] 536 U.S. 765.

[14] In the Appendix, I study state supreme court visibility using numerous local newspapers as well national ones. The results are similar to those presented herein, though they also differ in some important ways regarding what I refer to as "media visibility." I argue, however that national coverage is a better predictor of visibility than local coverage because it represents the most salient type of newsworthiness. Put simply, if a state supreme court has garnered the attention of the national press, it has done something more newsworthy (and visible) than had it only attracted the attention of the local press.

however, that judicial visibility is most affected by court behavior salient enough to receive coverage from the nation's largest news outlets.[15] I focus upon the *New York Times*, the *Los Angeles Times*, the *Wall Street Journal*, the *Washington Post*, the *Christian Science Monitor*, and *U.S.A. Today*. This collection approach offers perspectives from both sides of the continent, in addition to differing ideological perspectives. I count the number of times each state supreme court is mentioned in a story in a given year, in a given newspaper.

I also gather court-level data relating to campaign finance for state supreme court campaigns. These data are taken from the National Institute on Money in State Politics (NIMSP).[16] For each state, I record the total amount of money candidates and parties raised during the state's most recent election cycle. For example, during the 2000 campaign, five seats on the Alabama Supreme Court were on the ballot; thirteen candidates ran for those seats; and among all candidates, these individuals raised a total of $12,337,634. Another state election for the Court did not occur until the year 2002; therefore, for 2001 and 2002, Alabama's campaign spending observation is $12.3 million. The NIMSP group collects their data from campaign-finance reports at the state level from filings political parties, private interests, and candidates for state high courts made with the relevant state disclosure agency.

Similarly, I collect judge-level data relating to campaign financing of a judge's bid for a state supreme court seat. Also collected by NIMSP, I code the total amount of money raised in an incumbent justice's previous campaign for office. These data include campaign

[15]Note that I distinguish "court behavior" from adjudicatory behavior. Some judicial behavior does not relate to the cases courts dispose of but nevertheless informs citizens' perception of judicial preferences. For example, the 2003 Ten Commandments controversy at the Alabama Supreme Court (initially) did not pertain to litigation pending before the Court but rather from the inflammatory behavior of the Court's Chief Justice. By the time the Chief Justice was removed from office for failing to obey a federal court order removing the monument, every other justice on the Court had taken a public stance relating to the monument's constitutionality. The series of episodes played out prominently in the media, and voters consequently learned a great deal about their justices' political preferences.

[16]Data are available at `http://www.followthemoney.org/`. Last accessed 22 August 2015.

expenditures both among successful and unsuccessful candidates. The rationale here is that campaign spending, even from one's competitors, may heighten voters' awareness of one's own preferences. This is particularly true among so-called "contrasting" campaign literature that compares one candidate's platform positions to another. As more distinctions are made among the candidates for the bench, the better able voters can identify which best represents their own preferences. Whereas court-level spending indicates how visible each member of a supreme court is as a function of the electioneering of their peers (even among those not currently due for retention), judge-level measures only gauge an individual justice's campaign activity.

Prior scholarship has found television advertising to be a particularly salient means of affecting voter information over judges (Hall and Bonneau, 2013). Accordingly, I gather court-level data relating to television advertising by candidates, parties, and special interests. The Campaign Media Analysis Group (CMAG) collects advertising data for the 75 largest media markets in the United States. I gather these data from the Brennan Center for Justice's "Buying Time" reports, which document media advertising for state supreme court races dating back to the 2000 elections. Because not all advertising spending is created equal, I code both for the amount spent on television advertising in the previous campaign and the total number of advertisements aired. For example, during the 2000 campaign for the Alabama Supreme Court, candidates, parties, and special interests spent approximately $1,300,000 on television advertisements that aired a total of 4,758 times. Another Court election did not occur until 2002; hence, from 2000 to 2001, Alabama's advertising observations are recorded as $1.3 million spent and 4,578 airings.

Where court-level advertising speaks to the costs justices share as a function of each other's campaigns, I additionally code the amount spent (and the total number of advertisements aired) during each individual justice's previous race for the bench. These

data give a more unique snapshot of an individual justice's vulnerability to the electorate. Unfortunately, though, judge-level data are not available from the Brennan Center for Justice's reports for the 2006 election cycle. Hence, I am unable to code judge-level television advertising data for those judges engaged in election/retention campaigns from 2007–2008. Moreover, because data from CMAG only go back to the year 2000, judges whose previous election bids pre-date this cutoff must also be treated as missing. Because of such missingness, I estimate two sets of visibility scores: one that relates to court-level visibility that spans the years 2001–2010, and one that relates to judge-level visibility, which spans 2001–2006 and 2009–2010. While court-level data are more complete, judge-level data are likely better indicators of individuals' ability to audit specific judges' preferences.

Because advertising data from CMAG do not include the Texas and Oklahoma courts of criminal appeals, I exclude these institutions from the analysis. The resulting data set consists of 521 justices from fifty state supreme courts, covering ten years of adjudication. Using the campaign and media indicators described above, I estimate a factor scoring of state supreme court visibility from courts in each of the fifty states from 2001–2010. Using explanatory factor analysis, I generate a composite of court visibility and voters' opportunity to learn about (and potentially audit) their high courts. Data used to construct the visibility measures are contained in Table 3.1.

I use the variables described in Table 3.1 to estimate a composite of judicial visibility. I use explanatory factor analysis to estimate underlying, latent factors that explain the common variance in the state-year data. Factor analysis is appropriate when the variable one intends to measure is "essentially outside of measurement" (Cudeck, 2000, 269), and when the observed data are assumed to be caused by the latent factor. Therefore, I assume that "visibility," as it relates to citizens' ability to cull information relating to

Table 3.1.: Variables used to construct a measure of state supreme court/judge visibility

Variable	Description	Mean	Range
Court-Level (2001–2010)			
Campaign Money	Total money raised by candidates, parties, and committees in state court's previous election	842,300	0 –13.0 M
TV Money	Total money spent on television advertisements during state court's previous election cycle	338,800	0 –760. K
TV Ads	Total number of television advertisements aired during state court's previous election cycle	814	0 –17.8 K
New York Times	Total number of stories mentioning a state high court in previous year	3.86	0 –113
L.A. Times	Total number of stories mentioning a state high court in previous year	6.88	0 –263
Wall Street Journal	Total number of stories mentioning a state high court in previous year	0.48	0 –42
Washington Post	Total number of stories mentioning a state high court in previous year	0.34	0 –11
USA Today	Total number of stories mentioning a state high court in previous year	0.23	0 –10
Christian Sci. Mon.	Total number of stories mentioning a state high court in previous year	0.03	0 –7
Judge-Level (2001–2006, 2009–2010)			
Campaign Money	Total money spent in judge's previous bid for state supreme court	373,800	0 –9.40 M
TV Money	Total money spent in television advertisements in judge's previous bid for state supreme court	131,200	0 –6.82 M
TV Ads	Total number of television advertisements aired in judge's previous bid for state supreme court	297	0 –12.0 K
Court-Level Measures	Each of the "court-level" measures are also included in the estimation of judge-level visibility	—	—

Notes: The symbols, "M" and "K" denote "millions" and "thousands," respectively.

judicial preferences, is an inherently immeasurable variable. Rather, it is evinced by the presence of campaign spending, television advertising, and media coverage.

The results of the factor analysis (court-level) are provided by state and year in Figure 3.1. An analysis of the eigenvalues strongly suggests the presence of two prominent, underlying factors to state court visibility. Turning to the factor loadings, I find that campaign fundraising and advertising are strongly relevant to the first factor, while media coverage among the six newspapers studied are strongly relevant to the second factor. Hence, I label the most dominant factor "campaign visibility" and the second most dominant factor "media visibility." Figure 1 labels the two trend lines according to the type of visibility identified.

Results from the factor analysis comport with received wisdom regarding state supreme court visibility. States well-known for the costs of the elections exhibit the highest amounts of campaign visibility (Alabama, Ohio, and Michigan in particular). Furthermore, observed media salience comports with popular episodes in state supreme court decision-making. The greatest value of "media visibility," for example, comes from Florida in 2001. This is unsurprising given the state high court's participation in the highly controversial dispute over the 2000 presidential election (*Gore v. Harris*[17]). Other salient state court decisions are evinced in the trend line for "media visibility." A spike in 2010 at the Iowa Supreme Court is indicative of the controversy following that institution's invalidation of the state's statutory ban on same-sex marriage (*Varnum v. Brien*[18]). Some spikes in the data do not relate to a court decision whatsoever. For example, a spike in "media visibility" in 2004 in Alabama largely relates to Chief Justice Roy Moore's refusal to remove a granite monument of the biblical Ten Commandments and his subsequent removal from office due to his recalcitrance.

On its face, the results of the factor analysis look somewhat consistent with what may be one's intuition, given institutional methods of selection and retention. Nevertheless, closer

[17]772 So. 2d 1243 (2000)
[18]763 N.W.2d 862 (2009)

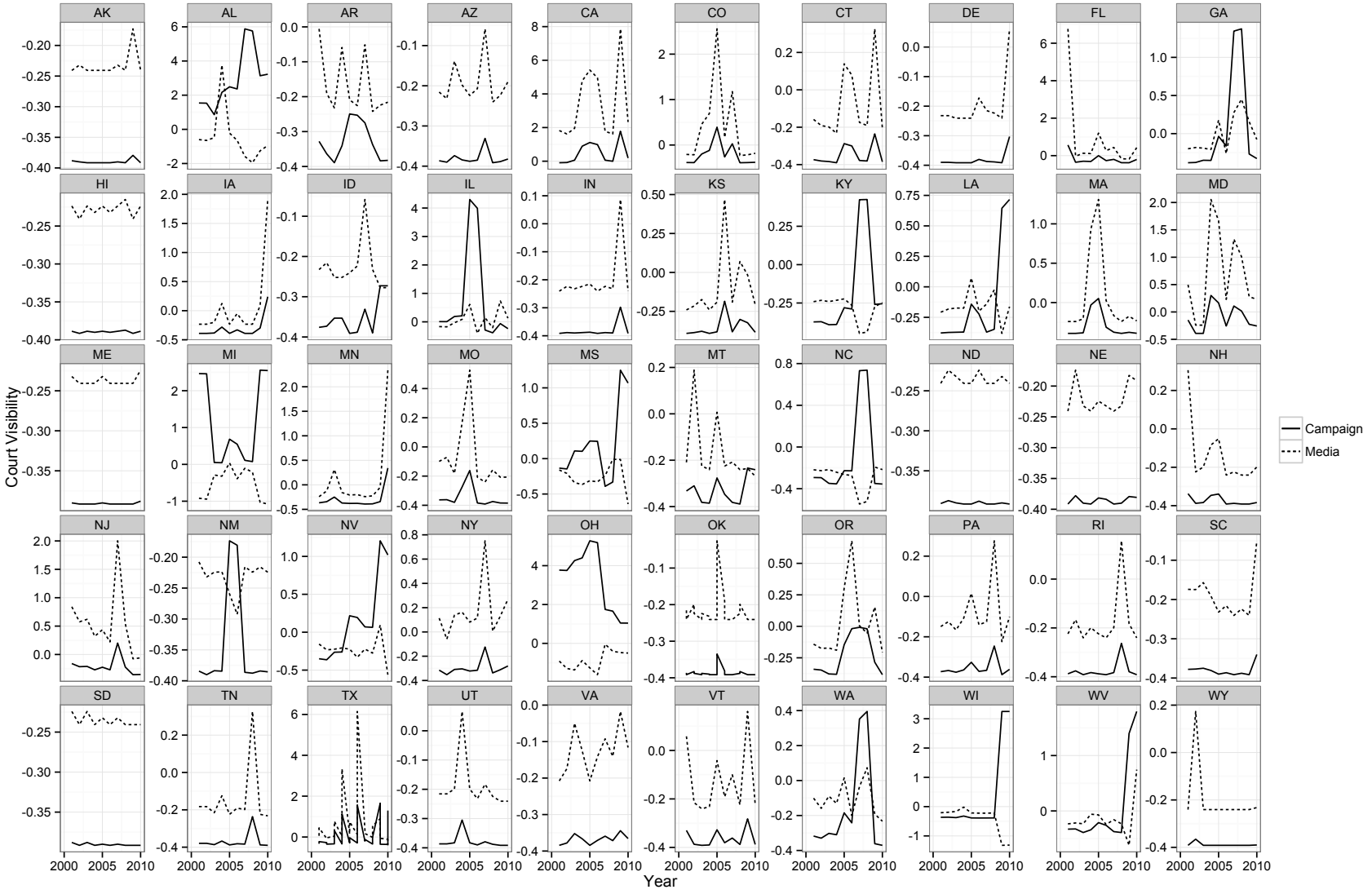

Figure 3.1.: State supreme court visibility

Plotted are the results from a factor analysis of items that contribute to a judge's visibility to voters (2001–2010). These items include campaign fundraising, television advertisements by candidates, parties, and political action committees, and media coverage of court decision-making.

inspection is warranted. Table 3.2 provides Pearson's correlation coefficients that compare institutional methods of retention and that institution's campaign and media visibility. Note that no institutional arrangement is too strongly correlated with the measures of state court "visibility." States using partisan ballots for judicial retention have the strongest relation to "campaign visibility," which is positive but only weakly so. That is, while partisan elections are still among the most visible, the emergent "new-style" campaign prevalent in other types of jurisdictions has blurred the institutional lines of separation. And just as no particular institution is too strongly correlated with its visibility, neither is it very consistent across types of visibility. Institutions using nonpartisan elections bear the starkest example such that they are positively weakly correlated with campaign visibility and negatively weakly correlated with media visibility. Hence, a measure of institutional "visibility" is not simply a rephrasing of "institutionalism," but seems, rather, to tap into something distinct.

Methods

Because the dependent variable (a judge's ideological distance to the average voter) is continuous, I use a least squares estimator to calculate a judge's extremism in a given year. The data are time-series, panel observations and therefore are susceptible to serial autocorrelation and heteroskedasticity in the standard errors for the $\hat{\beta}$ coefficients and random error terms. Nevertheless, because of the high likelihood that a justice's extremism in time t is influenced by his or her extremism in $t-1$, I include the one-period, lagged dependent variable on the right-hand-side of the estimator: $\theta_{j,t-1}$.

Beck and Katz (2011) argue that including the lagged dependent variable on the right-hand-side can control for unit effects (and, hence, ameliorate problems relating to serial autocorrelation). Nevertheless, the lagged dependent variable does not necessarily account

Table 3.2.: Correlation of court visibility to institutional method of retention (2001–2010)

Retention Method	Campaign Visibility	Media Visibility
Partisan	0.25	0.01
Nonpartisan	0.15	-0.18
Retention	-0.17	0.19
Reappointment	-0.16	-0.02
Other	-0.08	-0.02

Notes: Values in the table denote Pearson's correlations.

for contemporaneous effects caused from the panel structure of the data. To additionally control for these effects, I use year-level fixed effects by including indicator variables for each year in the dataset on the right-hand-side. Finally, to account for potential error variance that differs across panels (heteroskedastic error variance), I use a feasible generalized least squares (FGLS) estimator that permits heteroskedasticity in the error term across panels, which results in more efficient $\hat{\beta}$ estimates and corrected standard errors.

Recall that the dependent variable is the judge-year distance between an incumbent's ideology and that of the electorate, which is a function of the court/judge's visibility, career factors, and institutional factors. Formally, I estimate the following FGLS equation:

$$\begin{aligned} \text{Extremism}_{j,t} &= \beta_0 + \beta_1 \text{CampaignVis}_{j,t} + \beta_2 \text{MediaVis}_{j,t} + \\ &\quad \beta_3 \theta_{j,t-1} + \beta_4 \text{Institution}_{j,t} + \\ &\quad \boldsymbol{\zeta} \text{Career Controls}_{j,t} + \boldsymbol{\Omega} \text{Year} + \epsilon_{j,t}, \end{aligned} \tag{3.1}$$

where $\boldsymbol{\zeta}$ and $\boldsymbol{\Omega}$ denote vectors of coefficient estimates for control variables, $\epsilon_{j,t}$ represents the error term, which is distributed normally, and error variance is assumed to differ across panels (i.e., $\sigma_j^2 \neq \sigma_{\sim j}^2$).

3.5. Results

Results from the model specified in Equation 1 are located in Table 3.3, which subdivides results between those using court-level visibility measures versus those using judge-level visibility measures.

Notice first that the results from either measure of "judicial visibility" produces nearly identical results with the exception that the judge-level scores suggest greater posturing effects due to campaign and media visibility.[19] The negative and statistically significant effect campaign and media visibility have on justices' revealed ideologies predicts that, all else equal, as justices become more visible to the electorate, the closer their revealed ideologies hew to majoritarian preferences. These results lend substantial credence to the theoretical underpinnings of Hypothesis 1. That is, judges appear to respond to their informational environments, *ceteris paribus*. But because the variables of interest here are latent measures of "ideology" and "visibility," assigning substantive significance to these predicted effects can be difficult.

While the coefficient on "campaign visibility" seems relatively small, consider its aggregate effect. The least visible judge in the dataset is from the Alaska Supreme Court (visibility score of -0.40), while the most visible judge in the data hails from Ohio (visibility score of 7.12). The difference in these two judges' visibility is approximately 7.5. Hence, the model using judge-level visibility estimates that a judge who moves from the

[19]The fact that the judge-level measures have a greater marginal effect on judicial posturing is consistent with expectations since it is a more direct measure than the court-level visibility scores of citizen knowledge over judicial preferences.

Table 3.3.: Visibility's effects on revealed preferences of judges in fifty state supreme courts (2001–2010)

Variable	Court-Level Visibility	Judge-Level Visibility
Campaign Visibility	-0.010***	-0.016***
	(.002)	(.004)
Media Visibility	-0.004**	-0.008***
	(.002)	(.003)
Lame Duck	-0.002	$7.6E^{-5}$
	(.003)	(.004)
Election (2 Yr.)	0.002	-0.001
	(.003)	(.004)
Partisan	$-4.5E^{-4}$	-0.021**
	(.005)	(.008)
Reappointment	0.024***	0.004
	(.004)	(.006)
Retention	0.012**	0.006
	(.005)	(.005)
Other	0.008	-0.004
	(.006)	(.001)
$\theta_{j,t-1}$	0.911***	0.906***
	(.004)	(.007)
Constant	0.179***	0.175***
	(.004)	(.006)
Year Effects	INCLUDED IN BOTH	
Wald χ^2	$1.3E^5$	$6.1E^4$
Sample Size	3103	1555

Notes: Dependent variable is the judge-year distance between a judge's ideology and his or her state's median U.S. House member. Coefficients are FGLS estimates with standard errors in parentheses. Significance codes (two-tailed) as follows: $p < .001$ (***), $p < .050$ (**), $p < .100$ (*).

least visible to the most visible state supreme courts should exhibit a change in revealed preferences toward the electorate's preferences equal to 0.12 units, according to the scale

established in (Bonica, 2014). To give this interval greater substantive significance, note that it is roughly the same ideological distance between Congressmen John McCain (R–AZ) and Todd Akin (R–MO) during the 112th Congress (2011–2013).[20] Clearly, judges' visibility—as measured by campaign and television spending—is an important means of affecting judges' choices on the court.

Turning to the models' control variables, notice that we are largely incapable of rejecting the null hypotheses relating to career concerns. That is, we are unable to conclude that state supreme court justices temper their revealed ideologies with respect to their electoral proximity or with regard to their choice to run for retention. This is surprising given previous scholarship such as Canes-Wrone, Clark and Park (2012) and Canes-Wrone, Clark and Kelly (2014). Nevertheless these previous studies related to the most salient types of state supreme court adjudication, and we shall find results more consistent with these once this analysis likewise turns to salient cases. I find considerable support, however, that justices' revealed ideology in a given year is overwhelmingly dependent upon their previous year's ideological tendencies.

Courts scholarship has consistently found important institutional effects that color judicial decision-making, but the results in Table 3.3 provide lukewarm support for these previous studies. Hypothesis 2 predicted that competitive institutional systems would generate greater deference to majoritarian preferences.[21] With respect to the model using court-level visibility measures, I find support for this contention in that nonpartisan systems appear to constrain incumbents more than reappointment or retention systems.

[20] John McCain became the right-of-center Republican nominee for the presidency in 2008, while Todd Akin infamously proclaimed in a 2012 race for the U.S. Senate that "legitimate rape" rarely resulted in pregnancy: "If it's a legitimate rape, the female body has ways to try to shut that whole thing down." See Blake, Aaron, "Senate Hopeful Draws Fire for Rape Remark," *The Washington Post,* August 20, 2012, A3.

[21] In an unreported model, I controlled for whether the incumbent faced a challenger in his or her previous election, but the results presented in Table 3.3 did not change meaningfully.

Using judge-level visibility, I find evidence that partisan systems constrain judges more than nonpartisan ones do.[22] I do not find support in the spatial analysis for my contention that reappointment systems constrain justices' revealed ideologies. Rather, these individuals appear to drift away from voters' preferences more than any other institutional type. If incumbents facing reappointments are constrained, therefore, it is not with respect to the universe of their decision-making but with respect to some other types of decisions. I consider salient decision-making below.

Previous studies of judicial posturing have largely restricted their analyses to salient judicial decision-making. This section tested a spatial model of posturing behavior and found substantial support for hypotheses grounded in an informational theory of judicial choice. First, judges made visible by campaign or media coverage are more likely to posture than their peers without such coverage, *independent* of institutional methods of retention. Moreover, judges facing competitive retention campaigns (i.e., races with more than one candidate) appear to be additionally constrained by majoritarian preferences. This finding suggests that there exists a constraining force to running on a multi-candidate ballot that is beyond the measurement strategy contained in my analysis of court and judge "visibility." The estimated amount of posturing I attribute to campaign and media coverage of incumbents is substantively meaningful, but nevertheless slight. I now proceed to an analysis of salient state supreme court decision-making from 2001–2010 by replicating previous analyses of judicial posturing behavior.

[22] In an unreported regression, I subdivided the data by retention methods (thereby taking interaction effect for each independent variable and method of selection) and found that reappointment judges were the only types to exhibit constraint through visibility. I found a robust and significant coefficient, 0.19 ($p < .05$) for "media visibility." Continuing the example from above of a figurative Alaska justice moving to Ohio, this finding suggests she would move a distance in Bonica (2014) space equal to 1.43, which is roughly equivalent to Joseph Biden becoming John McCain.

Salient Judicial Decision-Making

In the previous section, I tested a spatial model of judicial posturing behavior. My strategy, which appears to be facially valid, is nevertheless inconsistent with previous scholarly analyses of posturing behavior (Brace and Boyea, 2008; Caldarone, Canes-Wrone and Clark, 2009; Canes-Wrone, Clark and Park, 2012; Canes-Wrone, Clark and Kelly, 2014; Cann and Wilhelm, 2011; Hume, 2013). In this section, I further probe the utility of an information-based theory of judicial posturing—particularly among ideological extremists—in light of judge and court visibility. I replicate previous studies of salient state supreme court decision-making in death penalty, abortion, and same-sex marriage cases from 2001–2010. The dependent variable in the spatial model was a measure of ideological extremism among incumbent judges, but now I wish to estimate the likelihood that extremists themselves posture in light of a potential audit of their preferences. Hence, I may now evaluate the validity of Hypothesis 3 (whether judicial visibility causes ideological extremists to posture more than moderates).

I collect every death penalty, abortion, and same-sex marriage appeal heard among the fifty state courts of last resort studied above from 2001–2010. To identify the universe of cases, I follow previous research designs (e.g., Canes-Wrone, Clark and Park, 2012), by searching a legal database (LexisNexis) for the keywords, "abortion," "death penalty," and "same sex marriage." For every case, I code whether the court's disposition is "conservative" (1) or "liberal" (0).

In the context of abortion cases, a conservative disposition is such that the court restricts access to abortions (requiring parental consent, e.g.), limits the liability of doctors for failure to advise abortion (given the risk of birth defects, e.g.), or heightens criminal liability for doctors performing abortions. Among death penalty cases, a "conservative" disposition is characterized by a ruling upholding sentences of death, narrowly interpreting

mitigating factors (mental or developmental disorders, e.g.), or broadly construing sentencing enhancement provisions. Among same-sex marriage cases, a "conservative" disposition is characterized by one that limits parties' access to equal marriage or civil union rights, one that limits same-sex couples' equal rights to adoption services, one that limits child support liability among same-sex couples, or those that limit same-sex couples' equal access to labor or tax benefits.

For every case-justice pair, I code whether a given justice's vote is conservative (1) or liberal (0), using the above taxonomy. I wish to estimate the likelihood that a judge postures toward majoritarian preferences. Previous studies that estimate each of the above three issue areas make use of popular polls that measure respondents' feelings about abortion, the death penalty, or same-sex marriage. Such an approach would be unusual in this context, however, given the pooled nature of the dataset. Rather, taken together, voters' feelings toward the death penalty, abortion, and same-sex marriage are indicative of their ideology. Hence, I take the same approach used above—substituting the state's median member of the U.S. House of Representatives as a measure for the "average" voter's preferences.

I am, furthermore, interested in gauging public opinion's impact on the tendency of judges to posture toward majoritarian preferences. Consistent with Caldarone, Canes-Wrone and Clark (2009), I code whether a given justice's vote is "popular" or not, where I define a popular vote as "1" when the vote is conservative and voters lean right or when the vote is liberal and voters lean left, "0" else. I estimate a time-series, panel adjusted logit model that calculates the likelihood of a conservative vote given state supreme court visibility, case facts, in addition to the same career and institutional controls presented above. In total, I identify 922 votes among thirty-nine state supreme courts from 2001–2010. Formally, I estimate the probability a given justice, j, votes popularly in a given case, k:

$$
\begin{aligned}
Pr(\text{Vote}_{j,k} = \text{“Popular”}) \;=\; & \Lambda\big(\beta_0 + \beta_1 \text{Ideology}_{j,k} + \beta_2 \text{Extremism}_{j,k} + \\
& \beta_3 \text{CampaignVis}_{j,k} + \beta_4 \text{MediaVis}_{j,k} + \\
& \beta_5 \text{Extremism}_{j,k} \times \text{Campaign}_{j,k} + \beta_6 \text{Extremism}_{j,k} \times \text{Media}_{j,k} + \\
& \beta_7 \text{Institutions}_{j,k} + \boldsymbol{\zeta} \text{Career Controls}_{j,k} + \boldsymbol{\Omega} \text{Year} + \epsilon_{j,k}\big), \quad (3.2)
\end{aligned}
$$

where Λ denotes the cumulative standard logistic distribution, $\boldsymbol{\zeta}$ and $\boldsymbol{\Omega}$ denote vectors of coefficient estimates for control variables, and $\epsilon_{j,k}$ denotes an error term that is normally distributed and nested by judge, j, and case, k.

The results from the statistical regression are located in Table 3.4, where results are divided between the court-level and judge-level measures as before. Notice first the effect of “campaign” and “media” visibility on the likelihood a given justice casts a popular vote. The main effects on these variables is negative and statistically significant, which is contrary to the hypothesized effect. Nevertheless, Hypothesis 3 argues that judicial sensitivity to visibility factors will be conditioned upon the likely consequences of an audit. To wit, I argued that only extremists had to fear the negative repercussions of an audit; hence I hypothesized that visibility and posturing behavior would be conditioned by ideological extremism. In each of the two models presented, we see precisely this effect at play. As incumbents become both more extreme *and* more visible in the eyes of the media, the probability their vote in a given case is in line with popular preferences is likewise increasing. In fact, the largest marginal effect in Table 3.4 belongs to the multiplicative

Table 3.4.: Visibility and judicial choice in salient types of cases (2001–2010)

Variable	Court-Level Visibility	Judge-Level Visibility
Extremism × Campaign	0.60	-0.85
	(.47)	(.63)
Extremism × Media	1.63***	1.07*
	(.46)	(.63)
Extremism	-0.27*	-0.27
	(.22)	(.33)
Campaign Visibility	-1.00***	-0.35
	(.25)	(.36)
Media Visibility	-0.81***	-0.84**
	(.20)	(.29)
Ideology	0.63***	0.50**
	(.17)	(.24)
Lame Duck	-0.39**	-0.26
	(.18)	(.25)
Election (2 Yr.)	0.12	0.30
	(.18)	(.27)
Abortion	-0.09	-0.65**
	(.22)	(.31)
Gay Marriage	-0.63***	-0.71*
	(.38)	(.37)
Partisan	-0.05	-0.10
	(.32)	(.39)
Reappointment	1.37***	1.06**
	(.35)	(.47)
Retention	-0.30	-0.63*
	(.24)	(.34)
Other	-0.34	—
	(.51)	
Constant	0.15	0.39
	(.41)	(.48)
Year Effects	INCLUDED IN BOTH	
Log-Likelihood	-528.25	-257.52
Sample Size	922	457

Notes: Dependent variable is whether a judge cast a "popular" vote in a given case. Coefficients are logistic regression estimates with standard errors in parentheses. Significance codes (two-tailed) as follows: $p < .001$ (***), $p < .050$ (**), $p < .100$ (*).

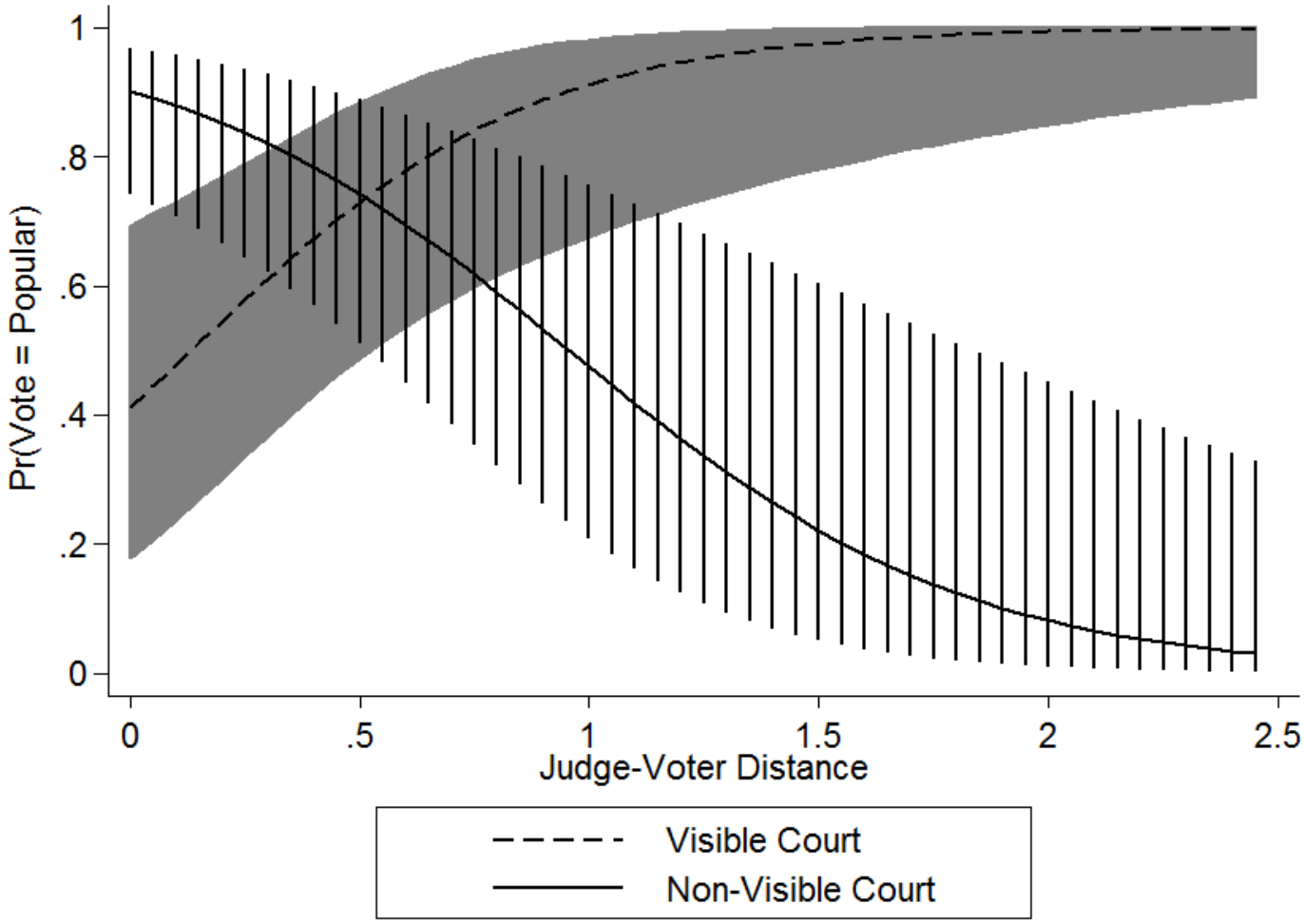

Figure 3.2.: Judicial posturing in salient state supreme court cases

Plotted is the (out-of-sample) predicted probability of a judge casting a "popular" vote in a given case. The solid line denotes a "non-visible" (media) court (one standard deviation left of the mean), and the dashed line represents a "visible" court (one standard deviation to the right of the mean).

term between judicial extremism and media visibility. Figure 3.2 plots this interaction effect.[23]

Figure 3.2 plots the predicted probability (using court-level data) a given justice casts a "popular vote" in a given case. I use out-of-sample predictions to generate the graph. A "visible" court is one with a visibility score one standard deviation greater than "media" visibility's mean, and a "non-visible" court is one with visibility score one standard deviation less than the "media" visibility mean. All other variables are held at their mean (if continuous) or mode (if binary). Shaded regions denote 95% confidence intervals, and the plotted lines represent predicted probabilities. Following the curves in the graph, we see that when incumbent justices are relatively congruent with the citizenry, they are nearly as likely to cast a popular decision when they are visible versus non-visible. But as ideological extremists become more visible to the electorate, they become dramatically more likely to cast popular votes than they would have had they not been visible. For example, at 1.5 standard deviations above the mean of "judge-voter distance," the model predicts that a "visible" judge is approximately 65 percentage points more likely to make a popular decision than a "non-visible" judge. The findings in Figure 3.2 provide dramatic support for Hypothesis 3.

Looking back down the results in Table 3.4, I also find considerable support for Hypothesis 2, which was less clear in the analysis of all state supreme court decisions. Rather, here I find that, more than any other institutional type, incumbents who must face reappointments from their coequal branches are far more likely to cast popular votes. Figure 3.3 plots this effect. All else equal, judges facing reappointment have a more than 80% likelihood of casting a popular vote. Compared to judges who need not face any kind

[23]Results from the court-level model also weakly predict that "extremist" judges are less likely to cast "popular" votes. The interaction effects reported in Table 3.4 and Figure 3.2 give this effect greater substantive and statistical significance, however.

of retention election ("other," at less than 20%), this change in predicted probability denotes drastic posturing behavior. But even as compared to other kinds of competitive and noncompetitive elections, judges facing reappointment are approximately 40 percentage points more likely to cast a popular vote than retention or partisan-elected judges and 15 percentage points more likely to cast a popular vote than nonpartisan judges. Institutional results suggest that—independent of campaign or media presence—different types of electoral institutions continue to supply voters with valuable information. Hypothesis 2 predicted that competitive electoral institutions (partisan and nonpartisan) and elite dominated institutional means of retention (reappointment systems) should exhibit the greatest amount of judicial deference to majoritarian preferences, and Figure 3.3 provides strong support for this contention.

Now note the effect judge-specific factors have on incumbents' likelihood of casting a popular vote. In the previous analysis of all types of cases, I found no evidence that career factors affected incumbents' voting behavior. In salient cases, however, I find that judges who have attained "lame duck" status are significantly less likely to cast popular votes, all else equal (using court-level visibility). This finding comports well with the low predicted probability incumbents in "life tenure" courts make popular decisions, suggesting an important principal-agent relationship. That is, once the electoral tether is severed, state supreme court justices are estimated to make decidedly less popular decisions, all else equal. I remain unable, however to reject the null hypothesis surrounding the possible impact of impending elections, which remains at odds with extant literature. It is possible, however, that once one has controlled for campaign and media factors, the proximity of an election no longer predicts judicial posturing behavior.

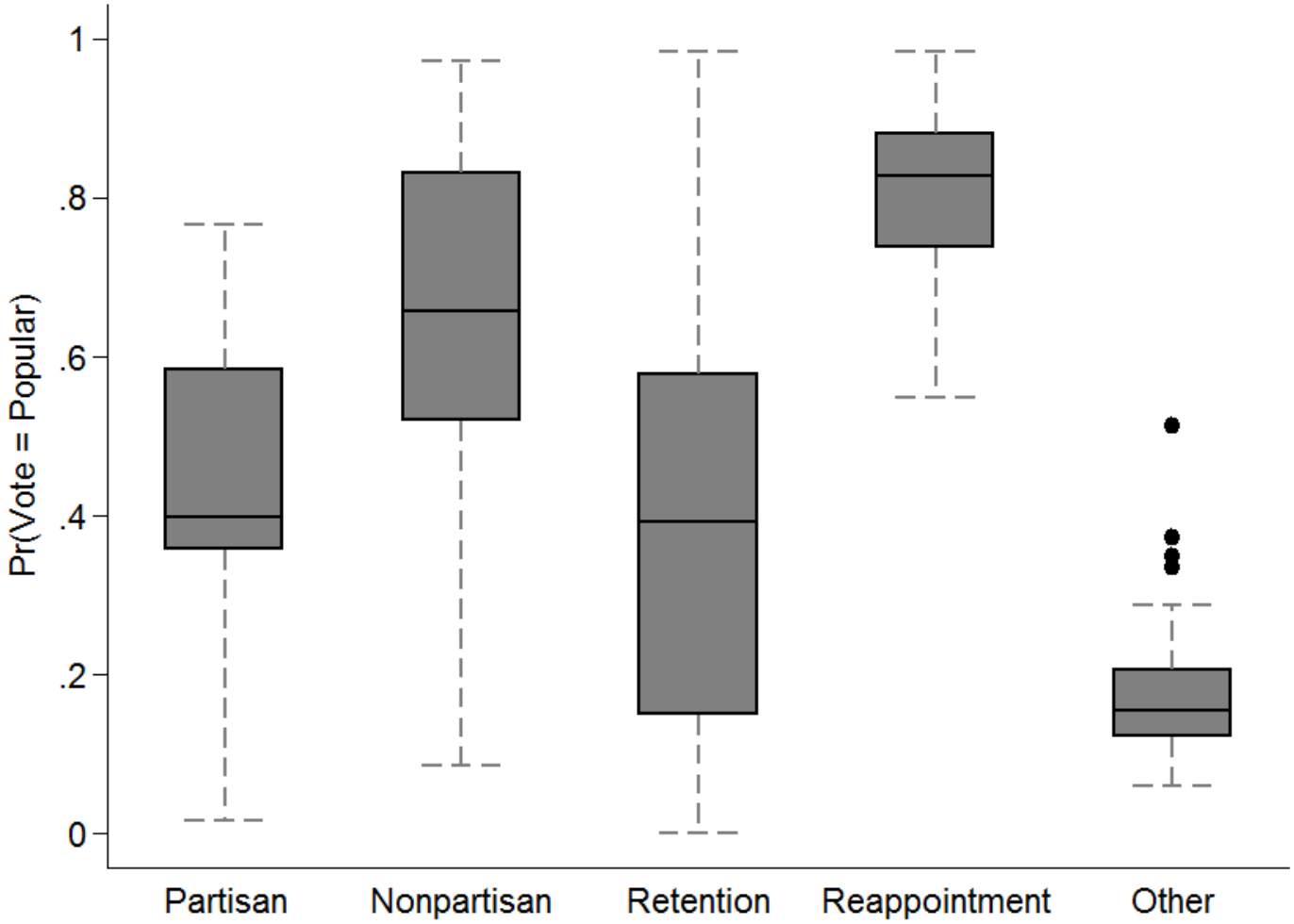

Figure 3.3.: Judicial posturing among ideological extremists

Plotted is the probability that a given judge casts a popular vote in a particular case, where results are plotted against institutional selection and retention procedures.

Finally, I find important case-level effects. First and foremost, judges appear to be quite sensitive to death penalty cases.[24] When using court-level data, I find that same-sex marriage cases garner far more unpopular decisions as compared to death penalty cases. In the judge-level model, both same-sex marriage cases and abortion ones appear less likely to elicit judicial posturing than among the death penalty suits. These are important nuances researchers should consider in future analyses of salient supreme court decision-making.

3.6. Conclusion

The conventional wisdom holds that judicial elections affect legal decision-making and that different means of selecting and retaining judges affect decision-making differently. My results offer some support for that conclusion but questions some of the theoretical underpinnings behind it. I argue that new-style campaigns for the bench have made different states' institutional selection methods increasingly irrelevant. That is, as campaigns for the bench become more salient to the public (and, consequently, more visible), citizens and elites can more easily audit deviant types of incumbents and remove them from the bench if their revealed preferences do not comport with majoritarian ones.

I advance an information-based theory of judicial posturing behavior that is grounded in principal agency and spatial models of strategic choice. I contend that a more properly specified theory of judicial posturing should consider, first, the audience toward whom an incumbent must posture to garner political favor and, secondly, to consider the capacity of that individual to discover and subsequently punish revealed deviance from majoritarian norms. I tested the theoretical underpinnings of the paper's hypothesized contentions by first estimating a spatial model of revealed judicial preferences. I found that campaign and

[24] In unreported regressions, I found that by running Equation 2 across each type of case, only death penalty cases elicited posturing behavior (court-level). Moreover, judges appeared to respond to their campaign visibility in death penalty cases over media visibility.

media factors significantly constrained judges to majoritarian preferences. I also found that contestable elections likewise influenced judicial posturing toward majoritarianism. I then estimated a model of salient decision-making—focusing on death penalty, abortion, and same-sex marriage cases. Once again, I found that justices consider their visibility when making potentially unpopular and salient choices. I additionally found ideological extremists more constrained than their moderate peers. I also concluded that competitive elections and the prospect of reappointment considerably constrained judicial choice.

A major conclusion of this research has been that methods of selection and retention, while important in their own right to understanding posturing behavior, are only a fraction of the story. I argue that a more fully specified model of judicial posturing behavior should use information and contextual political competition as frames through which to analyze posturing. After controlling for the means by which voters and elites acquire information to make rational votes, I find that residual institutional effects are largely confined to the institutions with the greatest likelihood of having their deviant choices audited—those that require reappointments from state elites and those that engender narrower margins of victory. Because legislative and gubernatorial elites are likely highly informed regarding judicial preferences, these very institutions are likely more visible than any type of popular electoral system. Moreover, because competitive elections lead candidates to identify their preferences in relation to their competitors, these types of institutions provide better information than noncompetitive elections. These empirical and theoretical conclusions differ in important and meaningful ways with extant analyses of the posturing phenomenon.

From the perspective of democratic theory, the results presented herein are of considerable normative significance. It is common in the legal community to lament the threat judicial elections (particularly partisan ones) pose to judicial independence. My results question this narrative, however, to the extent that "judicial independence" is not, in and

of itself, a social good. Rather, scholars should be more concerned with the types of outcomes certain courts produce and ask whether those outcomes are socially desirable. To this extent, I argue that judicial "visibility" is of greater significance than institutional selection methods.

Finally, two additional conclusions are important in the context of judicial visibility and institutional selection methods. First, non-elected judges posture for votes more than any other type of judge in my dataset of salient decision-making. Secondly, to the extent that a state can control judicial visibility, it may attempt to steer the course of judicial behavior and citizen welfare. Such a conclusion is not radically different from the perspective reformers in the 1970s took when attempting to implement so-called "merit plans" of selection and retention. That is, elections have the potential to provide for that elusive, optimal degree of accountability in the branch of government typically the least accountable to majoritarian preferences (which is presumably problematic in a democracy where citizen values are supreme), all-the-while fostering a degree of independence by restricting the flow of valuable information regarding judicial preferences. Nevertheless, to the extent that precedents such as *Republican Party of Minnesota v. White* limits governments' ability to control the stream of information, single-term appointments may become the only viable alternative to securing socially desirable legal outcomes.

4. Voter Information and Choice

Chapter 3 considered the behavior of the judiciary, asking whether judges' empirical choices mirrored the predictions made by the formal assumptions in Chapter 2. In this chapter, I turn the analysis onto the other key player in Chapter 2—the voters. In Chapter 2, I concluded that rational voters should respond to informational regimes in their evaluation of the judiciary. This evaluation stemmed both from their belief that the judiciary was acting as an unbiased agent who signaled the optimal legal state, and it stemmed from the choices voters made at the ballot—whether to cast a vote for the incumbent or the challenger. This chapter will first consider voters available information when they vote for judge, analyzing their propensity to turnout and vote whatsoever and their choice once they do so. I then conclude briefly with an analysis of judicial legitimacy with an application to same-sex marriage jurisprudence in the late 2000s.

4.1. Judicial Accountability and Voter Support

Voters' assessment of the judiciary is important to a well-functioning democracy. Voter approval of the Third Branch allows it to engage in judicial review over the actions of its sister branches a an equal part in a system of checks and balances (Rogers, 2001; Vanberg, 2001, 2005). Independence from this vantage point, guarantees the judiciary's ability to correct the excesses of a particular party or faction (Stephenson, 2003, 2004),

which may relate to its role in an interest group perspective (Landes and Posner, 1975) or as a guarantor of fundamental rights (Cox, 1995).

Because the judicial branch has neither the power of the purse nor sword, "but merely judgment," the ability of the courts to affect public policy is largely confined to achieving the accession of others to its judgment (Clark, 2011; Rosenberg, 1991). [1] Such accession may be characterized by obedience to its rulings among other political actors (**?**Whittington, 2009), or it could be characterized by popular accession to the legitimacy of the courts to have the final say in constitutional interpretation (Gibson, 1989).

Critics of an elected bench argue that accountability mechanisms impede the ability of the courts to check other branches and to engage critically in constitutional interpretation (American Bar Association, 2003; Geyh, 2003). First, some in the legal profession fear that elections will inhibit courts' ability to check the excesses of its coequal branches. This fear primarily manifests itself when judges fail to reverse laws that are infringe upon fundamental rights and liberties guaranteed by the Constitution. Indeed, as Chapter 3 demonstrated, ample evidence exists to support the contention that elected judges are less prone to grant appeals by unpopular minorities than their unelected peers (Brace and Boyea, 2008; Canes-Wrone, Clark and Kelly, 2014).

Second, some fear that judicial elections might come to resemble other statewide elections, which may have the effect of limiting courts' capacity to steer against the tide of public opinion in the policies they try to effectuate. Salient elections may garner substantial campaign donations, air numerous and divisive television advertisements, produce campaign speech and behavior that is inconsistent with a culture of impartiality, etc. More concerning still is the involvement of monied interests in state campaigns for the judiciary. The involvement of interest groups in state supreme court campaigns since the late 1980s

[1] Alexander Hamilton, James Madison, and John Jay, *The Federalist*, No. 78.

has resulted in races that are more politicized, more contested, and more narrowly focussed on salient issues the public finds important (abortion, for example) (Hojnacki and Baum, 1992).

Robust elections for the bench, the reasoning goes, demonstrate to voters that judges are just as political as other elected officials. Upon reaching this conclusion, voters should begin to assess their approval or disapproval for judicial policy just as they would legislative policy. Broadly, voter disapproval of the judiciary might take at least one of two forms. First, voters could disagree with the specific policies the courts adopt through their constitutional review. Under this framework, voters might not support a particular opinion of the courts, but they still recognize the judiciary's authority to be the final arbiter on issues of constitutional review (Gibson, 1989).

Second, and potentially more consequential, judicial elections may lead voters to lose their support for the court as an institution as a whole. This is a problem that goes far beyond the outcome in a specific case and strikes at its authority to operate as a constitutional authority whatsoever. Recognizing the potential to lose their institutional legitimacy, judges may, therefore, tailor their opinions toward popular preferences to avoid electoral reprisals or to preserve future legitimacy.

Legal organizations such as the American Bar Association oppose judicial retention elections because they might undermine voters' beliefs that case outcomes are "fair and impartial" (American Bar Association, 2003). Justice at Stake cites polling data finding that nearly 76% of voters believe campaign donations influence case outcomes as evidence that judicial integrity is imperiled by judicial elections.[2] Nevertheless, thorough analyses of voter support for state courts has found contradictory evidence to support the claims made by courts reformers.

[2]Survey results available at `http://www.justiceatstake.org/resources/polls.cfm`. See Chapter 1 for a discussion on the legal organization.

Statistical analyses of voter support for the courts has found that, on the one hand, judicial elections and campaigns themselves do not appear to undermine judicial legitimacy. Rather, a far more nuanced relationship has emerged. Judicial elections may actually strengthen voters' attachment to the courts to the extent that they familiarize voters with the mechanisms of justice (Gibson, 2009, 2013; Olson and Huth, 1998). This is due to the phenomenon termed "positivity bias" (Gibson and Caldeira, 2009). "Positivity bias" holds that when voters are exposed to the underpinnings of the judicial process—through nominations, stumping, etc.—they are exposed to the symbols of justice, and one is not easily disassociated with the other. Proponents of this hypothesis conclude that, "to know courts is to love them" (Gibson and Caldeira, 2009).

From this perspective, greater voter information over their courts ought to translate into greater support them. Caldeira and Gibson (1995) examine judicial legitimacy in the European Union. The authors asked residents of several European states whether they had "'seen or heard, in the papers, on the radio, or on the television' anything about the institution" (361). The authors found that high-profile political developments among the courts generated greater public support for the institutions. From this perspective, information can actually heighten voter support and affinity for the courts.

Standing starkly opposite these claims are the findings among another group of political scientists who argue that judicial elections undermine voters' confidence and trust in the courts as an apolitical, impartial institution (Benesh, 2006; Cann and Yates, 2007; Hume, 2012, 2013). These studies find that elected courts systematically exhibit less than trust among voters than appointed ones because their members behave more like other elected politicians. Greater exposure to the public contributes to the impression that judges are political actors, just as any other elected official. And the less independent the court is, the less legitimate are its opinions (Hume, 2012).

These trust findings may be problematic in light of a parallel literature that looks at state supreme court ballot rolloff (Bonneau and Hall, 2009). A new paradigm has emerged in the study of state court elections that relies upon informational hypotheses of voters' ballot behavior (Bonneau, 2007*b*; Hall, 2007*b*; Hall and Bonneau, 2013; Iyengar, 2002). These studies find that robust campaigning, characterized by spending among parties, candidates, and political action committees, by television advertising, and through partisan labels, informs voters' decisions regarding participation and choice for judge.

These insights may be problematic to conciliate with those surrounding trust if voters' information over their courts is to play a consistent role across both ballot box decisions and institutional trust and legitimacy. On the one hand, information might generate voter engagement with the courts, thereby leading them to participate at higher rates (Bonneau and Hall, 2009) or to afford their courts greater legitimacy (Caldeira and Gibson, 1995). On the other hand, the information voters acquire in this effort may lead them to lose their perception that courts are fair or impartial expositors of the law (Cann and Yates, 2007; Hume, 2012).

Information and Voter Support for the Courts

One shortcoming with the extant literature on voter engagement with the courts is that it has remained so fractured. As a general rule, scholars either study voter participation at the polls, or they study their opinion of the courts as institutions. Missing so far has been a unified theoretical approach to voters' assessments of courts and judges in general.

From the perspective of those interested in ballot behavior, voter information is generally either measured at the level of the institution itself or at the level of the judge running a campaign. Only recently have scholars of voters' ballot behavior begun to look at the structure behind their information. Hence, these studies have recently turned toward the

effects of campaign fundraising and advertising on voter participation at the polls (Hall and Bonneau, 2008, 2013). These studies find that greater campaign expenditures and advertising work as a mobilizing tool for voters, even when the tone is negative (Iyengar, 2002). That is, robust campaigns give voters better information over which to evaluate the candidates for the bench and to cast an informed vote.

Even still, institutional theories of voter engagement with courts remain the predominant means of analyzing the dynamic. This trend can trace its roots back to neo-institutional work that first dis-interred the study of state court politics (Brace and Hall, 1990). More recently, work by Hall (2007*b*) has concluded that certain institutional selection mechanisms inherently offer voters better information than others. Clearly, partisan elections afford voters the best informational heuristic (a party label). Hall (2007) also finds, however, that retention elections afford voters a certain information advantage over nonpartisan elections to the extent that retention campaigns are typically for candidates who were politically appointed to the bench. The reasoning goes that that if voters cannot infer the candidate's preferences from a party label, they can infer it from the label of the party appointing him.

The literature on ballot behavior and voter information has stayed generally ahead of that on judicial legitimacy. Legitimacy hypotheses are almost overwhelmingly modeled in terms institutional mechanisms for selection and retention. This approach has obvious shortcomings, however, to the extent that the "new-style" campaign has blurred the line between different types of selection methods. As all types of campaigns for the bench become more competitive and visible to the electorate, judges of all stripes see their independence diminished—and not just among certain groups. It would therefore be a mistake to treat a retention election with thousands of television advertisements as less visible than a nonpartisan campaign with no such advertisements or perhaps even more than one candidate.

Another consequential distinction between those studies examining voters' information, ballot behavior, and their trust in the courts has been the source of that information. Analyses of ballot behavior look almost exclusively within the campaign environment, but studies on legitimacy have proved willing to extend their purview to the larger informational space provided by media outlets. This piecemeal approach has resulted in a fractured set of expectations regarding the role of voter information over courts, their support for judges in particular, and institutions in general.

Models of voters' interactions with state courts suffer when they cannot model the effects of information directly. While some studies have begun to incorporate television advertising, campaign fundraising, or media coverage of courts into their analyses, an holistic approach to voter information, ballot behavior, and trust in the judiciary has yet to emerge. In this chapter, I model voter information explicitly. I examine ballot rolloff, incumbent margin of victory, and judicial legitimacy in light of judges' and voters' policy-preferences.

4.2. Hypotheses

The literature on voter interactions with American state courts has reached differing and inconclusive outcomes regarding the interaction of voter information and support for the courts. Building on the theoretical analysis from Chapter 2, I begin to untangle some of these complex interactions here. Specifically, I use a spatial paradigm of policy and preferences to motivate theoretical expectations regarding voter support for courts.

The contention that voters prefer politicians ideologically proximate to their own preferences is hardly a unique assertion in American politics (Downs, 1957). But is it fair also to suppose that voters' accession to judicial pronouncements is similarly dependent on such spatial congruity? According to Gibson (1989), it is possible for voters to disagree with a

specific policy of the court while simultaneously recognizing their authority to make that decision.

I argue instead that voters may observe the outcomes of the courts with a degree of uncertainty (Ashworth and Bueno de Mesquita, 2014; Maskin and Tirole, 2004; Stasavage, 2007). Without accurate information, voters may only gain an impression of what the courts have ruled.[3] From this perspective, voters' assessments of the courts rely upon their prior information and the quality of the information they receive to update those prior beliefs.

Take a fairly non-visible judiciary whose opinions are difficult to observe for example. Suppose these justices make some decision on a point of law that is incongruent with public opinion. If the public is incapable of observing the judiciary's choice, then they are likely incapable of refining their prior belief as to the court's trustworthiness or political congruence—and their prior beliefs could be positive or negative. Suppose now that the judiciary is highly visible. Voters may observe the justices' decisions and improve upon their prior beliefs, calculating the likelihood that their initial impression was correct or incorrect in light of this new evidence.

As an example, suppose conservative voters believe their court is likewise conservative but nevertheless observes ideologically incongruent behavior. Were their beliefs over the justices' preferences wrong, or were their own preferences initially wrong and the judges' preferences correct? In all probability, voters are more likely to support seemingly controversial policies if they observe them from their ideological friends as opposed to their foes as they are more likely to reassess their own beliefs in such a scenario.

I hypothesize that information and judge-voter preferences are contextually interacted. First, superior information should result in greater voter engagement with courts.

[3]Empirical evidence suggests that courts may even obfuscate their opinions in cases where they fear reversal or noncompliance (Owens, Wedeking and Wohlfarth, 2013).

- *Hypothesis 1*: Voters will engage with the courts more as they receive more information.

Without better information, voters can do no better than to rely upon their prior information. This could result in abstaining from voting if voters believe the incumbent represents their preferences. This could also result in more ossified beliefs regarding the trustworthiness of the courts if voters cannot update their prior beliefs.

Supposing that information were perfect, voters should simply support judges and policy-making nearest their ideal points. Regardless of their diffuse support for courts, rational voters will prefer to engage in the political process and to support candidates who are more likely to write opinions that are ideologically consistent with the voters'.

- *Hypothesis 2*: Courts ideologically distant to a given voter will enjoy less less support than those nearer that voter, all else equal.

Nevertheless, information is not always perfect, and contextual idiosyncrasies matter in predicting voter support of courts. Due to informational asymmetries, ideologically congruent judges will receive the support of their constituents and not all ideologically incongruent judges will attract the ire of their constituents. Rather, citizens' support of the judiciary is not only dependent upon the (in)congruity between judges' and voters' preferences but also upon the voters' ability to uncover ideological deviance among their courts (i.e., the institution's visibility). Accordingly,

- *Hypothesis 3*: Courts that are visible and ideologically incongruent will enjoy less support than those that are either visible and congruent or non-visible, all else equal.

4.3. Empirical Analysis

In this section, I estimate models of voter support for state supreme courts in light of judge-voter preferences and institutional visibility. I test an informational account of voter

support versus a purely institutional one. To this end, I directly test Hypotheses 1 through 3 above using data from state supreme court elections from 2001–2010 and survey results assessing voter support for controversial policy.

Data

In testing the informational theory of voter support for the courts, I gather data relating to voters' willingness to participate in judicial elections generally, their support for incumbents specifically, and their willingness to accede to potentially controversial legal policies. I then estimate voters' support for the courts in light of their estimation of judge ideology *vis-á-vis* their own preferences and the informational environment that might allow them to observe discrepancies between the two—measured by way of "judicial visibility."

Dependent Variables: I estimate three models concerning voters' support of their state supreme court and its justices. Model 1 examines voters' willingness to engage in judicial elections, and to this end, it directly tests Hypothesis 1 (predicting voter engagement as a function of information). The dependent variable in Model 1 measures voters' willingness to engage in the election whatsoever. Scholars often use "ballot rolloff" as a measure of voter participation where "rolloff" is defined as the proportion of voters who turned out yet nevertheless failed to vote for judicial races. More formally, I define "rolloff," as,

$$\text{"Rolloff"} \quad = \quad 1 - \frac{\#\text{Voters Participating in Judge's Election}}{\#\text{Voters Who Cast a Ballot}}.$$

I gather rolloff data from 2001–2010 for every state using partisan, nonpartisan, and retention elections. These data are available from the secretaries of state. I identify a total of 321 state supreme court elections over this period. I anticipate that as courts become more visible, all things being equal, voters will rolloff at lower rates given their superior

information. I furthermore expect that voters will rolloff at lower rates as the stakes for rolling off increase. That is, as incumbents become increasingly extreme relative to social preferences, and as voters become more aware of this extremism, voters should roll off at lower rates.

Model 2 examines voters' preferences once they have chosen to participate in an election. Accordingly, it is a direct test of Hypothesis 2 (predicting greater support for candidates ideologically congruent with voters). The dependent variable in Model 2, therefore, is a judge's "margin of victory" in a given election, which is the difference between the judge's share of votes and his or her competitor's.[4] More formally, I define "margin of victory" as,

$$\text{"Margin"} \quad = \quad \frac{\#\text{Votes for Judge}}{\#\text{Total Votes in Race}} - \frac{\#\text{Votes for Competitor}}{\#\text{Total Votes in Race}}.$$

I gather data relating to margins of victory from the same sources as those for electoral rolloff.

A justice's margin of victory is immediately indicative of his or her support among the electorate. Consequently, I expect that justices' margin of victory will be increasing in their ideological congruity with the electorate, all things being equal (Hypothesis 2). Even more, however, I suspect that voters' quality of information affects their likelihood of supporting a given candidate. Before a voter can rationally support one alternative over another, she must first arrive at some belief that that alternative has the greatest likelihood of advancing her interests. Hence, I anticipate that judges' margin of victory is also a function of his or her visibility. Non-visible, yet ideologically incongruent judges have less to fear in electoral reprisals for ideological deviance than do visible ones. Therefore,

[4] In a retention election, the incumbent's competitor is not on the ballot. Hence, I measure the difference in the proportion of those voting "retain" versus "not retain."

I expect that voter support will diminish as judges become both ideologically distant *and* visible to the voters (Hypothesis 3).

I conclude the analysis by examining voters' willingness to support potentially controversial policies—the legalization of same-sex marriage. In Model 3, I use data gathered through an experiment by Hume (2012) in 2008 as a party of the Cooperative Congressional Election Study (CCES). Hume performed a survey in which he asked respondents the following: "If the judges in your state legalized same-sex marriage, would you support the decision?" Support is coded as dichotomous, "1" if yes, "0" otherwise. Voters' willingness to support the policy question fits nicely within the framework for legitimacy established by Gibson (2009, 2013) and Gibson, Caldeira and Baird (1998). Legitimacy is indicative of supporting a judicial policy even when one personally disagrees with the wisdom of that opinion. I anticipate that voters will be most likely to support hypothetical policy-positions on same-sex marriage when they believe judges "like themselves" issue the opinions. Hence, voters should express support for same-sex marriage policies as judges become ideologically congruent (Hypotheses 2 and 3), particularly when voters may observe this congruence (Hypothesis 1). I identify 148 usable observations from Hume's (2012) analysis. These are hardly sufficient for a comprehensive analysis of judicial legitimacy; therefore, I remain conservative in interpreting these results and urge future scholars to pursue more public opinion data regarding state supreme court legitimacy.[5]

Key Independent Variables: My theoretical expectations lead me to believe that voters' support for the courts is less dependent on institutional nuances in retention than on their belief that their judges are ideologically congruent with their own preferences. The key independent variables of the analysis, therefore, are the ideological distance between voters and the justices of their state supreme court and the access voters have to that

[5]The small number of observations are particularly problematic in the context of interaction effects.

information. In Models 1 and 2, I measure preferences consistent with those in Chapter 3. Judicial ideology is the dynamic common space score estimated by state supreme court voting data (Windett, Harden and Hall, 2015). Because these ideology scores are measured within the same space as Bonica's (2014) campaign finance database, I use each median member of the U.S. House of Representatives as a state's ideology. The difference between the two indicates a given justice's ideological extremism in a given year, t,

$$\text{“Extremism”}_{j,t} \quad = \quad \mid \theta_{j,t} - \theta_{v,t} \mid .$$

Model 3, is drawn from Hume's (2012) analysis of public support for courts as part of the 2008 CCES. As such, Model 3, uses public opinion data at the level of the individual respondent; therefore, using state-level ideology would be inappropriate. I use respondents' reported partisanship as a measure of their ideology, which is a dichotomously coded "1" if Republican, "0" if Democratic.[6]

Having measured judge and voter preferences, the only missing link is to measure voters' ability to evaluate judicial preferences *vis-á-vis* their own, which I have argued is a function of the justices' visibility to the electorate. To measure institutional visibility, I continue to use those measures derived in the previous chapter from campaign finance, advertising, and newspaper coverage. Recall that the recovered measure identifies two types of relevant visibility: "campaign" and "media" judicial visibility. As institutions become more visible, it becomes easier for voters to uncover ideological deviance. I use these estimates for each of the three models. For Models 1 and 2, I analyze rolloff and margins of victory using both the judge-level and court-level measures (arguably, the judge-level measures are more accurate but also have more missingness among their observations). In Model 3, however,

[6]Those responding "I don't know" or "Independent" are dropped.

I restrict the analysis to court-level visibility as respondents are asked to respond to a decision of the entire court, not those of individual judges (as they are on the ballot).

Other Controls: In Models 1 through 3, I control for an institution's method of retaining its judges. I include a dichotomous variable for each of the three types of institutions permitting citizen input in the membership of their courts (partisan, nonpartisan, and retention). Certain institutional methods of retention convey valuably unique information. Among the three institutions studied here, I expect partisan elections to play the most important informational role in decreasing rolloff, decreasing justices' margins of victory, and either decreasing or increasing voter support for same-sex marriage, contingent on that voter's ideological predispositions. In Model 3, when estimating voters' support for a court legalizing same-sex marriage, I additionally control for whether the respondent supports a constitutional amendment banning same-sex marriage, "1" if yes, "0" otherwise. Table 4.1 summarizes the data used in Models 1 through 3.

Methods

Because the dependent variables in Models 1 and 2 (rolloff and margin of victory, respectively) are continuous, I use a least squares estimator to calculate judicial vulnerability to removal. The data are time-series, panel observations and therefore are susceptible to serial autocorrelation and heteroskedasticity in the standard errors for the $\hat{\beta}$ coefficients and random error terms. To account for potential error variance that differs across panels (heteroskedastic error variance), I use a feasible generalized least squares (FGLS) estimator that permits heteroskedasticity in the error term across panels, which results in more efficient $\hat{\beta}$ estimates and corrected standard errors. Formally, Models 1 and 2 are estimated as follows,

Table 4.1.: Descriptive statistics for variables in Models 1 through 3

Variable	Mean	Std. Dev.	Range
Models 1 & 2			
Ballot Rolloff	0.25	0.17	0.02, 0.99
Margin of Victory	0.34	0.22	0.00, 0.99
Campaign Vis. (Judge)	-0.04	0.90	-0.55, 8.73
Media Vis. (Judge)	0.01	1.10	-0.47, 11.21
Extremism	0.58	0.47	0.00, 2.45
Model 3			
Support SSM Policy	0.45	0.50	0, 1
Republican	0.48	0.50	0, 1
Ideology	-0.04	0.56	-2.20, 1.81
Ban SSM	0.48	0.50	0, 1
Reappointment	0.15	0.36	0,1
All Models			
Campaign Vis. (Court)	-0.05	0.88	-1.01, 6.77
Media Vis. (Court)	0.14	0.68	-0.36, 10.94
Partisan	0.18	0.38	0, 1
Nonpartisan	0.35	0.48	0,1
Retention	0.33	0.47	0,1

Notes: The dependent variable in Model 1 is voter rolloff, in Model 2 is justice margin of victory, and in Model 3 is whether voters support a policy legalizing same-sex marriage.

$$\begin{aligned}\text{Rolloff/Margin}_{j,t} &= \beta_0 + \beta_1 \text{CampaignVis}_{j,t} + \beta_2 \text{MediaVis}_{j,t} + \\ &\quad \beta_3 \text{Extremism}_{j,t} + \beta_4 \text{CampaignVis}_{j,t} \times \text{Extremism}_{j,t} + \\ &\quad \beta_5 \text{MediaVis}_{j,t} \times \text{Extremism}_{j,t} + \boldsymbol{\zeta} \text{Institutions}_{j,t} + \epsilon_{j,t}, \quad (4.1)\end{aligned}$$

where $\boldsymbol{\zeta}$ denotes a vector of coefficient estimates for institutional retention rules, $\epsilon_{j,t}$ represents the error term, which is distributed normally, and error variance is assumed to differ across panels (i.e., $\sigma_j^2 \neq \sigma_{\sim j}^2$).

In Model 3, the dependent variable is dichotomous; hence, I use a logistic regression to estimate the probability a given respondent supports a court opinion legalizing same-sex marriage. The interaction effects among judge-voter ideology and institutional visibility are the key variables in Equation 2. Unlike Models 1 and 2, I cannot directly calculate the ideological distance between voters and judges since the two measures of ideology are not directly comparable. Rather, I use a three-way interaction to gauge the intersection of preferences and visibility. When estimating a three-way interaction, one must additionally calculate each of the possible two-way interactions as well. The reference category is when the respondent is a Democrat. Hence, the three-way interaction term measures the effect of increased visibility and conservatism on the support a Republican would give a court legalizing same-sex marriage. Formally, the regression estimated is,

$$\begin{aligned} Pr(\text{Support}_i = \text{“Yes”}) \;=\; & \Lambda\big(\beta_0 + \beta_1 \text{VoterIdeology}_i + \beta_2 \text{JudgeIdeology}_j + \\ & \beta_3 \text{CampaignVis}_j + \beta_4 \text{MediaVis}_j + \\ & \beta_5 \text{VoterIdeology}_i \times \text{JudgeIdeology}_j \times \text{CampaignVis}_j + \\ & \beta_6 \text{VoterIdeology}_i \times \text{JudgeIdeology}_j \times \text{MediaVis}_j + \\ & \boldsymbol{\zeta} \text{Institutions}_j + \epsilon_i\big), \end{aligned} \tag{4.2}$$

where Λ denotes the cumulative standard logistic distribution and $\boldsymbol{\zeta}$ denotes a vector of coefficient estimates for institutional retention rules, and ϵ_j denotes an error term that is normally distributed and nested by judge, j

4.4. Results

The results from Models 1 through 3 are provided below.

Information and Ballot Engagement

Model 1 considers the informational dynamics that affected voter participation in judicial elections. Specifically, it examined aggregate voter rolloff in state supreme court elections as a function of judge-voter ideology and a fully specified measure of voter information. Failing to cast a vote on a ballot for which one has already paid the costs to complete is arguably a sign that voters do not possess the requisite information to make an informed choice (Hall, 2007*b*) or that the outcome of the race is so predetermined that casting a vote would be an exercise in futility. The results from Model 1 are located in Table 4.2.

The main effects on both campaign and media visibility predict significant reductions in ballot rolloff. To put the effect into perspective, moving from the least to the most visible campaign environment predicts rolloff to decrease by approximately 20 percentage points, all else equal. Similarly, moving from the least to the most visible media environment predicts roll off to decrease by approximately 15 percentage points, all else equal. These results provide compelling evidence that greater judicial visibility provides voters with superior information and significantly promotes participation. What is more, compared to institutional selection methods, information makes significantly better predictions in terms of participation. Partisan elections, for example, are only predicted to increase participation by 3 percentage points over retention elections, all else equal. Nonpartisan elections fail to achieve statistical significance. These results offer compelling evidence in favor of Hypothesis 1, which predicted greater voter engagement in the face of superior information relating to their courts.

Table 4.2.: Voter rolloff in state supreme court elections (2001–2010)

Variable	Court-Level Visibility	Judge-Level Visibility
Campaign Visibility	-0.024***	-0.024***
	(.003)	(.004)
Media Visibility	-0.024***	-0.014*
	(.006)	(.007)
Judge Extremism	-0.019***	-0.023***
	(.002)	(.004)
CampaignVis. × Extremism	-0.023**	-0.021**
	(.008)	(.010)
MediaVis. × Extremism	0.056***	0.026
	(.012)	(.018)
Partisan	0.021***	0.028***
	(.002)	(.007)
Nonpartisan	0.015***	0.009
	(.003)	(.005)
Constant	0.260***	0.271***
	(.003)	(.006)
Wald χ^2	$2.42E^3$	$2.35E^2$
Sample Size	321	236

Notes: Dependent variable is "rolloff." Coefficients are FGLS estimates with standard errors in parentheses. Significance codes (two-tailed) as follows: $p < .001$ (***), $p < .050$ (**), $p < .100$ (*).

I see a similar effect to information and ballot participation on judicial extremism and engagement, though the effect is not as large as information. I find that moving from the most congruent to the most incongruent justice in the sample decreases rolloff by approximately 9 percentage points, all else equal. That is, as incumbents become ever more extreme with respect to citizen preferences, voters become more likely to pay the costs of participation in an effort to select the membership of the bench. These findings offer

preliminary (though not yet sufficient) evidence in favor of Hypothesis 2, which predicted greater voter support for courts given ideological congruity.

The interaction effects on judicial visibility and extremism, though, provide mixed results as to voters' engagement with the courts. Looking first at the multiplicative term between campaign visibility and judicial extremism, we see statistical evidence consistent with Hypothesis 3, which predicted less support as voters became more aware that their judicial agents were ideological outliers. This effect is depicted in Figure 4.1. The figure represents out-of-sample predictions such that each continuous variable is held at its mean, and each binary variable is held at its median. On the x-axis is campaign visibility. The solid line denotes a congruent state supreme court justice, and the dashed line denotes an incongruent justice, are defined as the most and least congruent justices in the dataset. Note that when each type of justice is least visible, voters rolloff at approximately the same rate. But as judges enter into the most visible campaign environment, Model 1 predicts that rolloff among incongruent justices drops to nearly zero, while congruent justices still exhibit a rolloff near 25%, all else equal.

Despite this evidence in favor of Hypothesis 3, we see contrary evidence against it with the positive and statistically significant multiplicative term between media visibility and judicial extremism. This effect suggests that as judges become more visible in the media *and* more ideologically distant to the electorate, voters should engage less with the judiciary. One explanation for these contradictory results could be the type or quality of information voters receive either from campaign or media sources. Journalistic coverage of the courts by its nature should represent a more objective reflection of their work. Stripped of some of its ideological content, media visibility may promote judicial legitimacy to the extent that it exposes citizens to "symbols of justice."

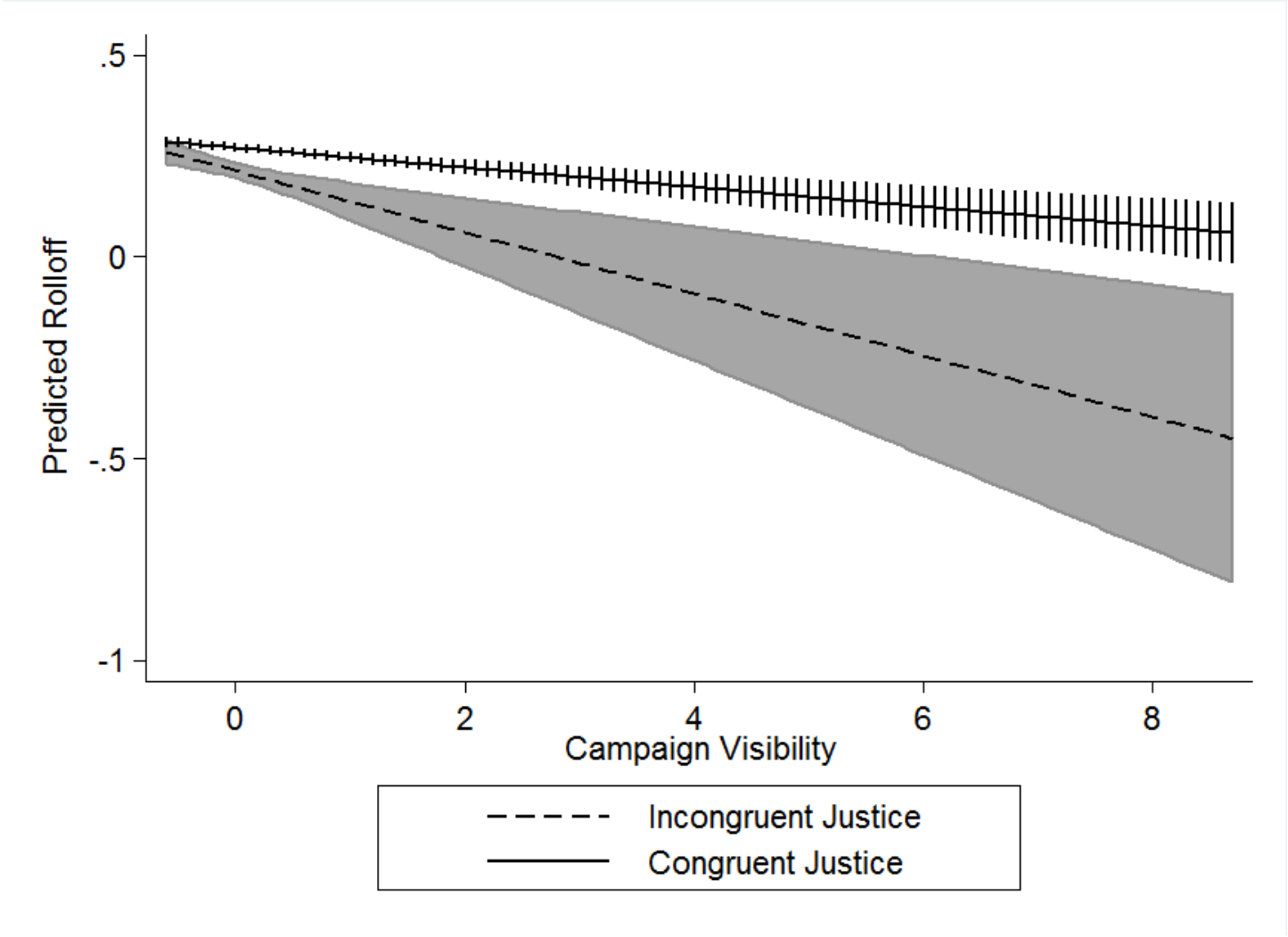

Figure 4.1.: Predicted rolloff in state supreme court elections (2001–2010)

The results from Model 1 are important to the development of the literature on state supreme court elections for at least two reasons. First, a staple of statistical analyses on voter rolloff is that electoral institutions significantly affect voter participation by constructing informational regimes. I find only qualified support for this contention. The results of Model 1 clearly suggest that judicial visibility and voter information are the lynchpin of participation, not the manner of constituting the ballot. Second, analyses of voter participation with state supreme courts regularly is hampered by imprecise measures of political preferences. The added benefit of the results in Model 1 is that we have clear evidence of the exigencies of voting. Not only do voters assess their capacity to cast an informed vote, but they also appear to rationalize the necessity of voting given the status quo on court preferences. We see this phenomenon with the interaction effect between campaign visibility and judicial extremism where voters engage at higher rates as they become more aware that their judicial incumbents have incongruent policy preferences.

Having considered voters' capacity to cull relevant information and to engage in judicial elections, I proceed now to analyze the choices voters make once they have already decided to participate in judicial elections. In Model 2, I examine state supreme court justices' margins of victory over their competitors.[7] Model 2, therefore, gives us an opportunity to test the effects (if any) judicial visibility and judge-voter preferences have on voters' support for judicial candidates at the polls. The results from Model 2 are presented in Table 4.3.

The results from Model 2 are similar to those from Model 1. Looking down Table 4.3, we see that the main effects on campaign and media visibility reduce a justice's margin of victory. Moving from the least to the most visible campaign environment results in a predicted loss in margin of victory of approximately 35 percentage points, all else equal.

[7]With retention elections, this difference is simply that between the share of voters casting "retain" versus "not retain" ballots.

Similarly, moving from the least to the most visible media environment results in a predicted loss of margin of victory of approximately 21 percentage points, all else equal. To the extent that uninformed voters are more inclined to cast ballots for the incumbent, these results provide further evidence in favor of Hypothesis 1 that superior voter information results in greater engagement with the courts.

On its own, judicial extremism results in a modest, yet nevertheless significant, reduction in a judge's margin of victory. Moving from the most congruent to the least congruent judge in the dataset predicts a reduction in his or her margin of victory by approximately 3 percentage points, all else equal. This result provides further evidence in favor of Hypothesis 2, which predicted less voter support for judges who were ideologically incongruent with their own policy preferences.

The interaction effects in Model 2 examine the contextual factors that affect judges' margin of victory given varying levels visibility and extremism, and to this extent, they offer direct tests of Hypothesis 3. Neither of the interaction effects achieve statistical significance using the court-level visibility data, though each do using the judge-level data. But as we saw in Model 1, the predicted effects move in opposite directions for campaign versus media visibility and judicial extremism. As judges become both more extreme ideologically *vis-á-vis* the electorate *and* more visible in the campaign environment, the model predicts that their share of the total vote is decreasing. The effect is plotted in Figure 4.2.

Figure 2 shows a given justice's predicted margin of victory. The plots are out-of-sample predictions such that continuous variables are held constant at their means, and binary variables are held at their modal values. The x-axis denotes a given justice's campaign visibility, and the y-axis show his or her predicted margin of victory. The solid line represents an incongruent justice, and the dashed line represents a congruent one, where the

Table 4.3.: State supreme court justices' margin of victory (2001–2010)

Variable	Court-Level Visibility	Judge-Level Visibility
Campaign Visibility	-0.036***	-0.043***
	(.003)	(.002)
Media Visibility	-0.012**	-0.019***
	(.006)	(.003)
Judge Extremism	0.011**	-0.008***
	(.005)	(.003)
CampaignVis. ×	0.001	-0.005**
Extremism	(.003)	(.002)
MediaVis. ×	0.020	0.035***
Extremism	(.015)	(.010)
Partisan	-0.273***	-0.271***
	(.005)	(.004)
Nonpartisan	-0.190***	-0.181***
	(.003)	(.005)
Constant	0.461***	0.465***
	(.004)	(.003)
Wald χ^2	$9.37E^3$	$2.26E^4$
Sample Size	285	210

Notes: Dependent variable is "margin of victory." Coefficients are FGLS estimates with standard errors in parentheses. Significance codes (two-tailed) as follows: $p < .001$ (***), $p < .050$ (**), $p < .100$ (*).

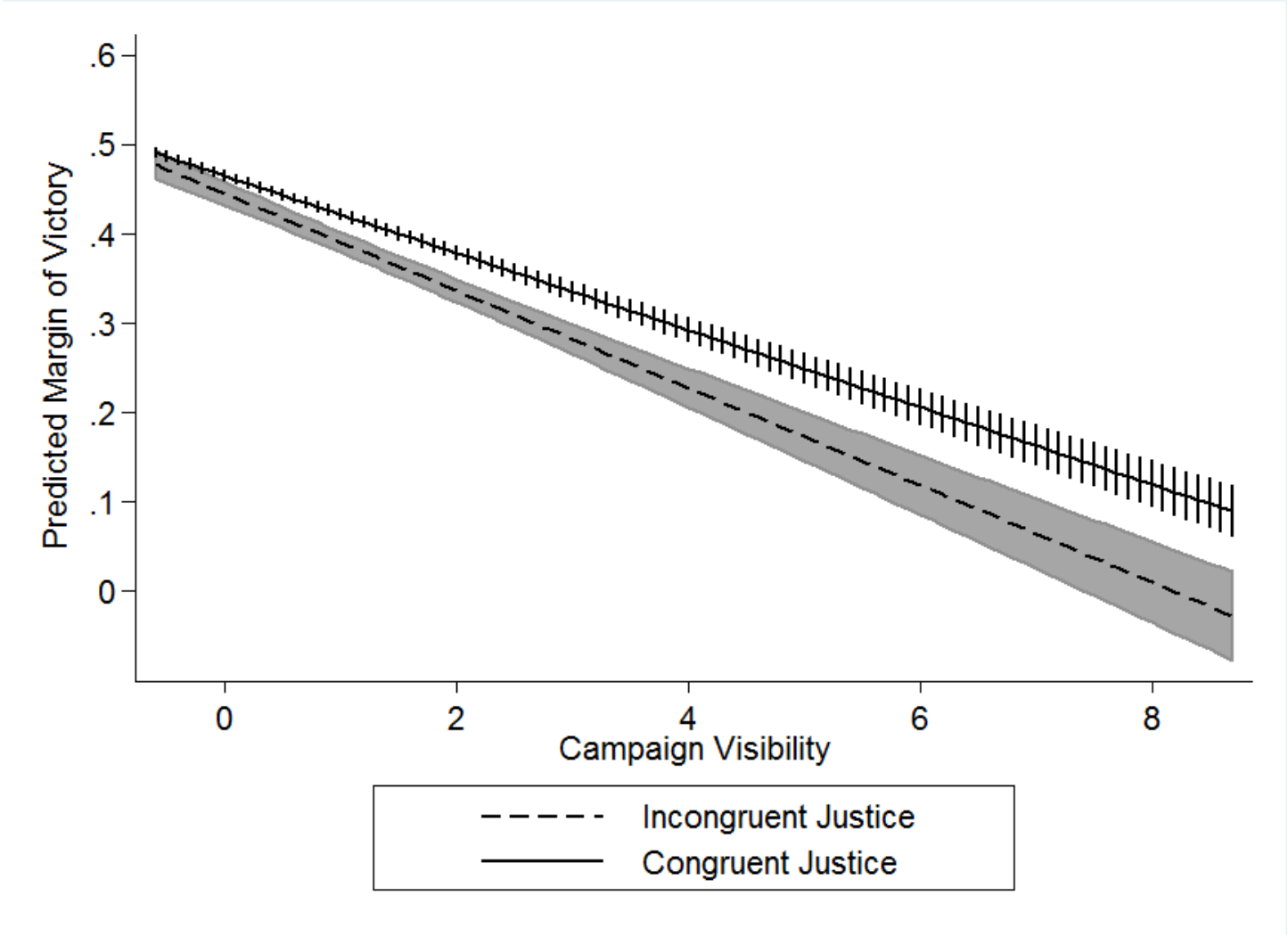

Figure 4.2.: Predicted margin of victory in state supreme court elections (2001–2010)

two distances are the minimum and maximum in the dataset. Note that when justices are at their least visible, each type of justice tends to win by about 50 percentage points. As these individuals move into the most visible campaign environments, however, that margin dwindles toward zero for incongruent justices, though it stays at above 0.1 for congruent ones. This dynamic is entirely consistent with the predictions made in Hypothesis 3, which suggested judicial support was a function of judges' ideological congruity with the electorate and the electorate's capacity to discern the magnitude of that congruity.

The multiplicative term between media visibility and judicial extremism, though, once again give pause to the analysis. While I find that greater campaign visibility and greater judicial extremism diminish judges' vote share, I also find that greater media visibility and greater judicial extremism *increase* judges' vote share. As with Model 2, it is again difficult to say definitively what accounts for this discrepancy. On the one hand, it could be that the value of campaign-based information is superior to that of media-based information. Or, as suggested above, it could also be the case that newspapers, as a function of their efforts in objectivity, simply do not convey the same ideological information that campaign information does.

Such an interpretation would have some precedent within the state courts literature. Baum and Klein (2007) studied two elections to the Ohio state Supreme Court and examined voter rolloff and vote choice as a function of newspaper coverage of the state's high court. They found that greater newspaper coverage led voters to participate at greater rates, but they also found that the greater newspaper coverage did not significantly affect the types of candidates voters chose once they had decided to participate. To the extent that a similar phenomenon is at work in the data used for Models 1 and 2, future work will need to distinguish the types of messages voters receive from campaign versus journalistic sources.

Taken in comparison with institutional retention methods, informational variables perform well in Model 2. The model predicts that partisan elections exhibit 27 percentage points lower margin of victory for a judge than in a retention scheme, all else equal, while nonpartisan elections have an 18 percentage point decrease in margin of victory over retention elections. These results are extremely consistent with previous examinations of justices' electoral fortunes in the states (Bonneau, 2007*b*; Hall, 2007*a*). That is, partisan elections, though competition and partisan heuristics, provide voters the best means of casting an informed vote. Nonpartisan elections, given their competitive nature, are likewise characterized by lower margins of victory but are nevertheless less competitive, on average, than partisan ones. And retention elections, with only one candidate on the ballot and little information relating to his or preferences exhibits overwhelming votes to retain.

Even with these institutional results, however, non stack up to the predictions made by the informational variables in the model. This is an important result for the literature as scholars consider how voters evaluate incumbent judges. To the extent that the "new-style" campaign might blur the lines between certain types of selection methods, predictions made as a function of voter information do not respect the institutional methods of selecting judges. Rather, the results suggest that *any* type of judicial election can be made to have low or high margins of victory so long as politicians, journalists, etc. can affect the informational environment for voters. And because judicial institutions work within strategic environments, the ability of the voters to affect the ideological composition of the courts may not only affect future supreme court policy but also the legitimacy voters are willing to afford that policy at a later date.

Information and Policy Legitimation

Finally, having considered the effects of information and preferences on voter behavior at the ballot box, I turn briefly to the question of judicial legitimacy—specifically, the ability of the state courts to legitimate potentially controversial public policy. In Model 3, I examine voters' willingness to support a hypothetical state supreme court policy legalizing same-sex marriage. The results of the model are located in Table 4.4.

The key variables of interest are the three-way interaction effects among voter preferences, court preferences, and institutional visibility (campaign and media). The three-way interaction effect using campaign visibility fails to achieve statistical significance. Nevertheless, we do observe the three-way interaction using media visibility attain statistical significance. In fact, it is the only statistically significant term in Model 3. I therefore find qualified support for Hypotheses 2 and 3 in the multiplicative term. First, the three-way interaction using media visibility demonstrates that as courts become more visible and more conservative, Republicans become more supportive of policies that legalize same-sex marriage, all else equal. The intuition here is precisely in line with that in Hypothesis 3. While self-identified Republicans are not predicted to support a policy legalizing same-sex marriage from a liberal court, and neither are they prepared to accept such a policy from a court that is non-visible, they *are* willing to accept it from a court they believe to be ideologically aligned with their preferences.

This is an important distinction from the findings in Hume (2012). Hume argued that judicial independence was the lynch-pin to voter support for same-sex marriages. His theoretical story held that more competitive types of elections diminished voters' perception in the fairness of case outcomes. Hence, as courts become less independent, they become less capable of legitimating policies to voters. My findings tell a different story, however. The results from Model 3 find no support for the contention that state methods for selecting

Table 4.4.: Courts' ability to legitimate policy

Variable	Estimate	R.S.E.
Campaign Visibility	15.81	6.12
Media Visibility	3.55	2.65
Judge Ideology	-4.20	6.05
Voter is Republican	-7.93	6.13
Ban SSM	-47.19	31.50
Judge Ideology × CampaignVis.	-16.32	16.05
Judge Ideology × Republican	10.12	10.71
CampaignVis. × Republican	1.45	8.06
Judge Ideology × CampaignVis. × Republican	14.91	20.02
Judge Ideology × MediaVis..	4.29	3.51
MediaVis. × Republican	-26.88	14.83
Judge Ideology × MediaVis. × Republican	24.67**	11.22
Partisan	-47.10	34.78
Nonpartisan	-44.64	32.83
Retention	-42.31	31.20
Constant	52.44	39.02

Notes: Dependent variable is whether respondent supports court's legalization of same-sex marriage. Robust standard errors are clustered on 35 states. $N = 148$. Wald $\chi^2 = 359.78$. Significance codes (two-tailed) as follows: $p < .001$ (***), $p < .050$ (**), $p < .100$ (*).

judges affects voters' willingness to support to controversial policies. Rather, I find that such support can be elicited among any type of studied institution. This is particularly the case for voters most likely disinclined to support such a controversial policy. When

Republicans can observe a decision favoring same-sex marriage from a conservative court, and they are aware that it is a conservative court, they become more likely to accept the decision. This dynamic is precisely the opposite that posed by courts reformers and suggests an important role for voter engagement with the courts and their support for the courts decisions.

It is worth reemphasizing, however, the limited underpinnings upon which these findings are based. Unfortunately, only 148 individuals were identified for the statistical regression, and such a small sample size raises legitimate questions regarding how much one may generalize the findings. These concerns are only amplified by the presence of the multiplicative terms. As scholarship in this field progresses, scholars must find new ways of gauging public opinion of the state supreme courts.

4.5. Conclusion

This chapter has considered effects on citizen support for state supreme courts. Received literature has predominantly promoted an institutional theory of voter support. But with the rise of the "new-style" campaign, increased visibility among state supreme court justices has blurred the lines among the different selection mechanisms. As a result, courts scholars must measure justices' visibility directly rather than rely upon purely institutional methods of retention.

In contrast, I have measured voter support of courts by directly measuring their access to information. First, I estimated a model of voter rolloff—a gauge of citizen information over courts. Second, I estimated a model of state supreme court justices' margins of victory—a measure of their support from the electorate. Finally, I estimated voters' support for a hypothetical court order legalizing same-sex marriage. In each model, I found evidence that voters assess their support for the courts in terms of the information that is available

to them (judicial visibility) and the relative ideological congruity between themselves and their state supreme court justices.

Future research should more closely examine public opinion of the courts. While it is common among polls such as the Cooperative Congressional Election Study to ask respondents about their feelings regarding state institutions, the judiciary is not included in any of these studies. Scholars need reliable public opinion survey data to assess the impact of judicial electioneering on voter confidence in the courts. To the extent that courts rely upon institutional goodwill and legitimacy, and to the extent that this goodwill is eroded in the ways I have suggested herein, then state supreme courts could be in store for a massive decline in their ability to meaningfully engage in the policy-making process.

Part III.

Epilogue

5. Implications of the Informational Environment

Judicial accountability is a supremely controversial innovation of American democracy. This dissertation represents the first attempt to build a holistic and consistent theory of judicial accountability from top to bottom. To this end, it began with one normative claim, built from that claim a positive theory of judicial choice, legitimacy, and voter welfare, and from those equilibria generated empirically testable hypotheses. In this chapter, I review the most important findings of this work, reflect on their implications for public law scholars, normative theorists, public policy scholars, and conclude with suggestions for future research that may build upon this body of work.

5.1. Review

Courts reformers generally, and legal professionals specifically, criticize the institution of popularly selected judges. The conventional wisdom holds that judicial elections engender vote pandering and destroys citizens' confidence in the judiciary. The former problem may relate to the fairness or impartiality of the courts. The latter may relate to their capacity to engage as a check on coequal branches or the popular will. The implication is that judicial elections impede socially desirable ends. Throughout this dissertation, however, I

have argued that judicial independence is not, in and of itself, a social good to be enjoyed by the citizenry. Independent courts are just as capable of reaching deleterious results as are elected ones, as I demonstrated in Chapter 1. Consequently, I have promoted a theory of judicial choice that begins with the ends to be achieved while recognizing the strategic uncertainties faced by voters and judges alike.

To these ends, I began with the contention that normatively desirable legal outcomes depends on judges balancing the interests of parties with disparate political preferences. This starting point is desirable for at least two reasons. First, it fits comfortably within the context of the judiciary as the protector of minority rights, which has been attributed to the Third Branch since the American founding. Courts exist at least in part to guarantee those fundamental rights that are endowed to all citizens by virtue of their common membership in the social compact. But when popular preferences turn against discrete and insular minorities, courts represent one of the last best hopes for such politically marginalized groups.

The balancing of interests standard is appropriate for the analysis of this work also because it has an established and accepted history in American constitutional jurisprudence. The balancing of interests standards emerged following the collapse of the *Lochner* Court and represented an effort by the justices to cede market regulation to the elected branches, moving its purview toward fundamental rights (*Carolene Products*).

Using this balancing of interests standard as a starting point, I proceeded to formalize a strategic judicial environment grounded in principal-agency theory and the spatial model of voting. I then solved for voter welfare given equilibrium behavior by voters and judges across elected and unelected institutions. This model represents a significant improvement upon extant literature inasmuch as it is the first to my knowledge to explicitly model judicial visibility and the rationality of voter auditing.

The formal analysis made critical insights so far missing from courts scholarship. First, I found that voter welfare and judicial selection mechanisms are contextually dependent upon judge and voter preferences, the relative social weighting of minority versus majority rights, judicial visibility, and judicial legitimacy. That is to say, the social utility of judicial institutions is meaningless when divorced from these essential contextual factors. Judicial independence does not, in effect, have a monopoly on its ability to confer social welfare. Critical to this dissertation was the finding that judicial visibility could be used as a mechanism to promote welfare.

I found that judicial elections were welfare suboptimal when voters and judges found themselves in a prisoners' dilemma-style paradox such that voters audited judicial choices out of fear of having an extremist on the bench, and judges postured in anticipation of an audit to avoid being removed from office. Hence, when voters observed too much information and tended to promote judicial posturing, I found that they could be made best off not through judicial independence but by making the judges less visible. This finding, essentially, was that sometimes voters are best off with an uninformed vote than with no vote at all.

I proceeded from the formal analysis to consider whether the players of the model behaved empirically as we would expect if they were playing the game specified. Chapter 3 considered the behavior of state supreme court judges, and Chapter 4 considered that of the voters. Across many different settings, states, and years, I consistently found support for an information-based theory of behavior. Judges appear to consider the preferences of their principals and the capacity of these individuals to punish deviance when choosing to posture. Voters appear to consider the preferences of judges in light of their ability to discern these preferences in determining their support for the judiciary. That is to say, the

players in our formal model appear to behave in reality as we might come to expect given the strategic equilibria identified in Chapter 2.

5.2. Implications for the Discipline

Of perhaps greatest utility to public law scholarship has been this dissertation's development of a direct measure of judicial visibility to the electorate. Such a measure was badly needed insofar as the new-style campaigns of recent years have served to blur the lines between various selection and retention mechanisms in the states. Prior scholarship relied heavily upon institutional selection features solely or on a few indicators such as campaign spending or advertising. This work represents the first effort to put all elements within a common space—campaign spending and television advertising among candidates, parties, and interest groups, numbers of competitors for elected office, and newspaper coverage of state supreme court decision-making. The result is a measure that scholars may find of use as they continue to study the evolving nature of state supreme court politics.

Moving forward with these measures, courts scholars may wish to examine further the determinants of judicial visibility. With respect to campaign visibility, one might suppose that competitive contexts matter such that quality of challenger or authority of the state chief justice might determine how visible candidates, parties, or interest groups choose to make elections. With respect to media visibility, however, a different story is likely at work. It could be that newspaper editors cover courts ideologically similar to their own predilections, or it could be that these individuals respond to case-level factors as proposed by Vining and Wilhelm (2010*a*). Even still, no study has yet to consider the factors that determine national newspaper coverage of state supreme courts.

Perhaps of greatest theoretical significance to the discipline in this work has been its remarkably inconsistent findings relating to the effects judicial selection and retention meth-

ods play in judicial choice and voter support for the courts. The results herein often stand in contradistinction to those in previous analyses that model only judicial methods of selection and retention. One of the biggest difficulties of the literature has been the multifaceted theoretical approaches scholars have taken with respect to judicial institutions. Here and there, researchers posit that judicial elections undermine voters' psychological *perception* of the courts, or sometimes they posit that judicial elections directly affect voters' political *beliefs* about the types of policies the court prefers. Others still assume that certain *types* of elections elicited greater judicial posturing or that certain *types* of elections elicited greater respect for the authority of the courts to pronounce what the law is. The result has been some consistency within some sub-literatures but an overall mess across public law scholarship.

This dissertation took a different approach. By modeling voter information directly, I was able to parse out some of the nuances across different types of judicial selection methods. Oftentimes, I found that doing so resulted in null effects on election methods. Other times I found that election methods played a substantively small role in comparison to information effects.

5.3. Normative Implications

Of terrific importance to this dissertation was that players in the American state courts of last resort appear to behave *as if* they were playing the game specified in Chapter 2. From the perspective of the positive theory, this provides critical support for the formal propositions I identified as a result of those assumptions. What can we conclude from this?

First, if we have buttressed our faith in the results of the formal analysis, then we should subsequently accept that judicial independence is *not* a social good. It may, in the proper context promote welfare, but it may just as easily exacerbate welfare inefficiencies.

From the other side of the coin, the results herein suggest that judicial elections may be a legitimate means of promoting social welfare. To the extent that voter information may lead judges and voters into mutually suboptimal behavior, then the analysis suggests we should look toward the manner by which information is structured in judicial elections.

Of course, it could be the case that one disagrees with the normative claim by which nearly this entire dissertation is organized—that socially just judiciaries ought to balance disparate social interests. While scholars interested in theories of representation scarcely turn their attention toward theories of judicial representation, there are a number of alternative specifications that future normative theorists may wish to consider. First, and perhaps most obviously, future scholars may prefer to model judicial choice and voter welfare in terms of consistency of law and *stare decisis*. Another alternative might be to model judicial representation from the perspective of descriptive representation. That is, voters may not derive value from policy but from the perception that they were judged by someone who resembled themselves and their life's experiences. Others still may want to follow the approach of those such as Maskin and Tirole (2004) and model voters not within distinct factions but merely in disagreement over the truly optimal social policy. These are all viable and worthwhile alternatives, and each would lead to useful insights into the nature of judicial representation—a subject *vastly* understudied.

5.4. Policy Implications

This dissertation has immediate implications as well for those who would tinker with the machinery of justice. The positive analysis in Chapter 2 suggested that voters might be made best off not through judicial independence but through judicial accountability *and* invisibility. States have a number of alternatives at their disposal to achieve these ends, and as the analysis makes clear, they needn't even change the institution of judicial

selection. As the American Bar Association has recommended for years, states may limit candidate speech, campaign finance, their participation in political parties, etc. Any means by which states can prevent judges from transmitting their political preferences to voters can represent a viable means of lessening judicial visibility.

Of course, the new-style campaign will make these efforts more difficult, particularly with respect to limiting the proselytizing of special interests. And while the U.S. Supreme Court's opinion in *Republican Party of Minnesota v. White* clearly suggests a limit to states' ability to curtail judicial electioneering, their more recent opinion in *Williams-Yulee v. Florida Bar* equally suggests that some regulation will be shown deference. Courts scholars and policy innovators will need to keep a close watch on innovations in this respect and the effects they will have on judicial and voter behavior.

5.5. Suggestions for Subsequent Research

This dissertation is hardly the last word on judicial accountability and social welfare. Significant improvements can be made in at least two respects.

First, future scholars may want to consider testing some of the political origins of judicial visibility. States have altered their selection criteria and electioneering rules substantially in the past forty years alone, and little is presently understood as to what political ends these changes may have been in furtherance of. Were party elites hoping to better insulate their policy preferences? Were voters for constitutional amendments legitimately concerned for judicial independence and quality of law? These are important and vastly understood.

Second, the quality of information generated by campaign and media sources remains an open question. In Chapter 3, I came to consistent predictions across different sources of information. But in Chapter 4, I found contradictory evidence regarding the types of behavior different types of information elicited from voters, and it might easily be the case

that this discrepancy was due to the quality of information being transmitted. Future work might model explicitly the political or ideological content of these messages, but such an endeavor is beyond the scope of this project.

Finally, future work must consider more carefully the nature of judicial legitimacy in light of the informational environment. I have used replication data from a previous survey, but these results are quite limited. Exceptionally little research has been done voter trust in courts. Obtaining this information is (theoretically at least) not a difficult proposition. The Congressional Cooperative Election Study already asks respondents to rate their trust in their state executive and legislature. It is but a small task to add an additional question for the other one-third of the state governments. Having these data would immeasurably benefit scholars of the state courts.

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Appendix

State Newspapers and Judicial Visibility

This supplementary Appendix examines state supreme court visibility as a product of local newspaper coverage, in addition to the variables specified in Table 3.1. Recall that I used a factor analysis to examine latent "judicial visibility" and that this was performed at both the court and the judge-level of analysis. For ease of exposition, I will limit the focus here to the court-level of analysis as that is the unit for newspaper coverage used within the body of the dissertation.

To see how local newspaper coverage affects state supreme court visibility, I replicated my study of national newspaper coverage of state supreme courts with as many locally distributed newspapers as possible. While previous scholarly research on state supreme court visibility has considered newspapers that are the most-circulated in a state (Vining and Wilhelm, 2010*a*), other work has found that local newspapers cover their judicial institutions in largely similar fashions (Vining et al., 2010). Hence, I pool data from all types of newspaper sources within the states. My search yielded results from 31 total states. I summarize each of these states in Table *A*.1, along with the newspaper source and the number of years of coverage obtained between 2000 and 2013.

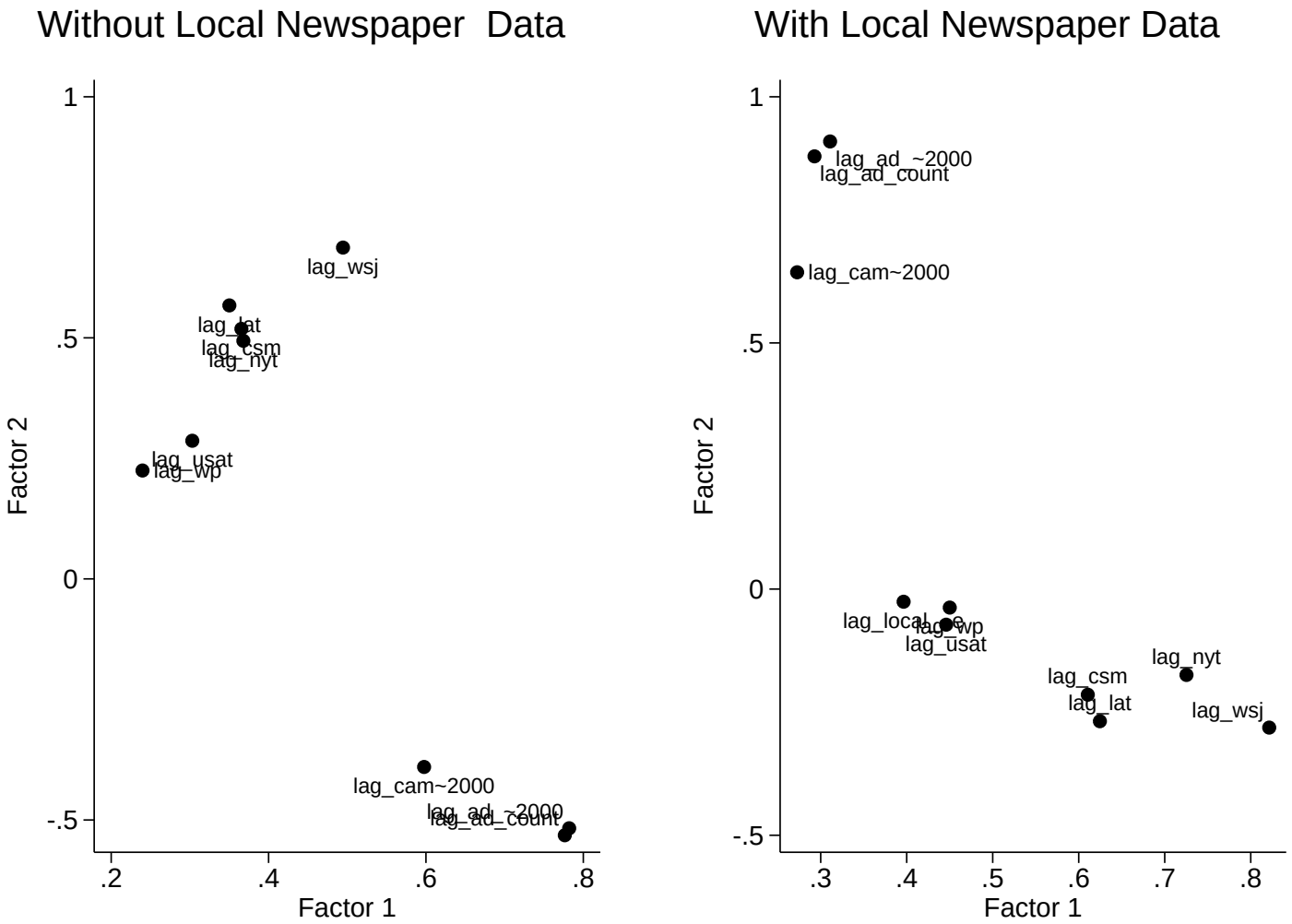
I collected 401 court-year observations from 31 newspapers covering 14 years. Using these data, I re-estimate my court-level measure of state supreme court visibility using campaign spending, advertising, and national news coverage of these institutions. I then re-estimated the factor analysis to calculate "campaign" and "media" visibility. I plot the factor loadings in Figure *A*.1. The left-hand side of the figure shows factor loadings using only national newspaper coverage of state supreme courts ($N = 650$), and the right-hand side of the figure shows the factor loadings that include local newspaper data ($N = 374$). Clearly, wishing to incorporate local newspaper coverage results in substantial losses of usable data. Even still, some valuable insights can be made from the analysis.

Table A.1.: Local newspaper coverage of state supreme courts (2000–2013)

State	Newspaper Source(s)	Years of Coverage
Alaska	*Fairbanks Daily News-Miner*	3
California	*Los Angeles Times*	14
Colorado	*Denver Post*	14
Florida	*Tampa Bay Times*	14
Georgia	*Atlanta Journal Constitution*	14
Idaho	*Idaho Falls Post Register*	14
Illinois	*Chicago Daily Herald*	14
Indiana	*Fort Wayne News Sentinel*	14
Iowa	*Telegraph Herald*	14
Kansas	*Topeka Capital Journal*	14
Maine	*Portland Press Herald*	12
Massachusetts	*Telegram Gazette*	14
Michigan	*South Bend Tribune*	14
Minnesota	*Minnesota Star Tribune*	14
Missouri	*St. Louis Dispatch*	14
Nebraska	*Omaha World Herald*	14
New Mexico	*Santa Fe New Mexican*	14
New York	*New York Times*	14
North Carolina	*Herald Sun*	14
North Dakota	*Bismarck Tribune*	14
Ohio	*Dayton Daily*	14
Oklahoma	*Daily Oklahoman*	14
Rhode Island	*Providence Journal*	14
Texas	*Austin American Statesman*	14
Utah	*Salt Lake Tribune*	14
Vermont	*Brattleboro Reformer*	8
Virginia	*Richmond Times Dispatch*	14
Washington	*Spokesman Review*	14
West Virginia	*Charleston Gazette*	14
Wisconsin	*Capital Times*	14
Wyoming	*Wyoming Tribune Eagle*	14

Notes: $N = 401$.

Figure A.1.: Factor analysis with and without local newspapers



Notes: Each point represents the factor loadings for each variable following factor analysis.

Table A.2.: Difference in measures' means

	Difference
Campaign Visibility	0.09
	(0.05)
Media Visibility	0.04
	(0.05)

Notes: $N = 374$. Standard errors in parentheses. Statistical significance as follows: * ($p < .05$).

Without using local newspaper data, the factor analysis results in two independent and clearly defined factors. Variables relating to political campaigning are clearly clustered together, and variables from national news outlets cluster along another dimension, though less cohesively as compared to the campaigning data. When In include local newspaper data, however, the factor loadings change two interesting ways. First, news sources become the more dominant factor over campaign variables. Second, the factor loadings, while still clearly separated by variable type (campaign versus media) are more spatially proximate to one another. Perhaps most interestingly, the local newspaper coverage variable is located nearest to the campaigning variables of all types of news sources. What effect then, if any, do these differences play on state supreme court visibility.

I gathered the results from the two factor analyses and performed difference of means tests to determine whether the latent factors are statistically distinguishable from each other. I report these results in Table *A*.2. The null hypothesis is that the means are indistinguishable from one another. Across neither set of measures am I able to reject this null hypothesis. I therefore conclude that there is no statistically distinguishable difference between using the visibility measures derived from national newspaper coverage of state supreme courts as compared to those measures derived from local newspaper

coverage of state supreme courts. I nevertheless recognize the limitations of studying so few observations. Hence, I encourage future research into the propensity of local newspapers to cover their state courts of last resort over a longer period and across more states.