Public Reasoning, Publication, and Institutional Change in State Supreme Courts

by

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DEDICATION

For my dad, uncle, granny, and granddaddy, all of whom began this journey with me but were unable to see me complete it. But I know they would be proud.

And for my mom, who is my rock and my world.

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ABSTRACT

This dissertation comprises three papers on decision-making in state supreme courts, exploring how institutional structures—particularly, methods for selecting judges—affect court outputs and how those outputs, in turn, influence variation in court structures across states.

The first paper analyzes the extent to which judges publicly justify their decisions. Using opinions from eight elected state supreme courts between 1995 and 2006, it is apparent that the extent of public reasoning in opinions follows a concave function across authors' terms, indicating that judges may choose dispositions strategically. Immediately after an election, judges act as free agents, deciding cases according to sincere preferences, but shortly before an election they must mimic constituents' preferences. At either of these points, the necessity to justify decisions is lowest. Mid-term, however, when judges shift from being free agents to being electorally bound, they must increasingly justify decisions that are at odds with constituents' preferences.

The second paper examines how the interplay of elections and ideology influences whether elected judges publish their written opinions. Analysis of Montana Supreme Court cases between 1998 and 2009 demonstrates that publication is sensitive to judges' electoral considerations. More conservative panels become more willing to publish unanimous conservative opinions as elections approach, and less likely to publish non-unanimous liberal opinions; the reverse is true for more liberal panels.

The final paper argues that variation in judge selection methods across state supreme courts is best understood as an equilibrium reflecting efficiency considerations by special interest groups seeking to achieve favorable rulings. A simple model demonstrates that interest groups' expectations about the ideological preferences of state officials and electorates can prompt groups to campaign for changing selection methods. A loss of agency between elector and elected is shown to benefit special interests—groups can exploit this agency loss by changing courts' selection methods. Analysis of a novel dataset of bills introduced in state legislatures produces support for this proposition. These findings suggest, in contrast to assertions by reformers, that appointive selection systems are just as susceptible to interest group influence as are elective systems.

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Public Reasoning in State Supreme Court Opinions

Paper Abstract

This paper considers various theories to explain variation in the amount of public reasoning by state supreme court judges. Using longitudinal data of opinions written during the terms of elected state supreme court judges in a sample of eight states from 1995 to 2006, I show that the extent of reasoning for decisions in majority opinions is a concave function across the term of the author. In contrast to existing theories which would predict a monotonic relation, I argue that this curvilinear pattern in public reasoning relative to the electoral connection indicates that judges are choosing dispositions strategically. Immediately after an election, they act as free agents, deciding cases according to their sincere preferences, but shortly before an election they must mimic constituents' preferences—in either case, the necessity to justify decisions is lowest at these points in their terms. It is mid-term when they are shifting from being a free agent to being electorally bound that they must explain apparent inconsistencies in outcomes across similar cases.

1.1 Introduction

State supreme court judges make decisions that have profound implications on individuals and policy. To ensure that these decisions are not arbitrary, we require judges to justify their decisions, provide legal arguments, and to do

so publicly in the form of written opinions. Given that there are no formal rules requiring a particular amount of public reasoning, it bears asking what mechanism induces judges to vary the amount of reasons they provide. This question speaks to the nature of the public good for which these officials are responsible: bodies of state law. Given that the contours of state law are negotiated in the majority opinions issued by state supreme court judges, the extent of reasoning can narrow or expand both the grounds for the holding in a case as well as its potential application through dicta. Thus, the mechanism by which these judges are compelled to limit or elaborate their justifications can have a significant impact on state law.

To better understand why state supreme court judges vary the extent of public reasoning for their decisions, this article assesses several theories that attempt to account for such variation. For one, a normative argument about deliberative expectations, as developed by Pasquino and Ferejohn (2003, 2004), posits that the extent of public reasoning required of an institution's public officials is inversely related to it's democratic connection—that is, officials in institutions most insulated from the prerogatives of the people are most expected to justify their actions if those actions are to be considered legitimate. On the other hand, there are more 'practical' explanations to consider, particularly those that appreciate that state supreme court judges are political, often act strategically, and are likely influenced by resource constraints. While the design of an institution might impart different degrees of legitimacy, the institution might entail externalities that facilitate or undercut the degree of public reasoning for which judges are capable. Further, judges themselves can

act within the design of their institution to improve their political capital, which likewise might determine how much they justify their decisions.

In particular, when electoral concerns enter this equation, judges might have an incentive to alter their behavior to attain reelection. Accordingly, they may limit or expound on the reasons for their decisions to satisfy electoral calculations. Likewise, resource demands might not be comparable across institutions, such that judges selected in one manner might have less time to devote to public reasoning than those selected in another. Finally, it is possible that variation in public reasoning is a second order effect of other considerations. In particular, judges might select dispositions in cases to ensure retention, especially if they must face some form of reelection. Given a particular disposition, the timing in the electoral cycle, and constituent preferences, a judge might need to provide more explanation for her decision or she might feel secure abbreviating the justification.

This paper will further discuss these arguments as explanations for variations in the amount of public reasoning by state supreme court judges. The standard method in studies comparing state supreme courts is to pit one selection method against another through some form of cross-section, controlling for potential confounding influences. One goal of this paper is to underscore the shortcomings of such an approach. As will be shown, it can be quite difficult, given theories with equivalent predicted outcomes, to distinguish the better explanation from a cross-section. Further, in the context of elections and their influence on political actors, cross-sections that compare elected institutions to non-elected institutions tend to black-box the electoral connection, treating its

influence as a monolithic, all-or-nothing effect. Doing so can mask more complex behavior by judges across often-lengthy elected terms.

To adjudicate between the potential explanations above, I exploit temporal variation in the electoral connection using longitudinal data of opinions issued from 1995 to 2006 by elected judges from eight states. I not only show that the cross-sectional analysis of the various theories discussed fails to appreciate variations in the behavior of elected judges across their terms, but I also suggest that the best explanation for the non-monotonic pattern in the data is one in which judges strategically alter their amount of public deliberation as well as case dispositions as elections approach.

1.2 Public Reasoning, Democratic Legitimacy, and Judicial Selection Methods

Public reasoning, or what Pasquino and Ferejohn (2004) term "external deliberation," is essential to any democratic state. As Cohen (1997, 1998) explains, participants in democratic politics understand each other to be free, equal, and reasonable. However, these participants also have conflicting views, and information on which they base those views is likely to be asymmetrically distributed. The inevitable result is a community of equals differing in their views on how to best ensure the common good. This creates a problem, since carrying out any political decision would entail an arbitrary exertion of power by one citizen or group of citizens over another citizen, who in a democracy, by definition, is otherwise equal. Given these considerations, Manin (2005) ex-

plains that the ideal for a legitimate decision in democratic politics is unanimity. However, the impracticality of this ideal precludes its use in real-world political decision-making. And, whereas the will of the majority is often perceived as the most workable alternative, it cannot be considered *a priori* legitimate in a true democracy since it nonetheless entails the unjustified coercion of a minority.

Rawls (1995) describes the condition by which this hurdle might be overcome: "Our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy"(217). Deliberation facilitates this necessary condition through "its essential role in pooling dispersed, private information"(Cohen 1998, 198), thus providing explanations that ensure power is exercised in accordance with the fundamental laws accepted by the whole community, even if everyone does not agree on a particular decision (Cohen 1998; Rawls 1995). As such, deliberation justifies the otherwise arbitrary exercise of power in a community of equals. In essence, it allows the application of majority rule while remaining substantively consistent with the democratic ideal of unanimity. Indeed, Manin (2005) states, "[B]etween the rational object of universal agreement and the arbitrary lies the domain of the reasonable and the justifiable"(363). And he further adds, "[t]he theory of deliberation offers only an imperfect method for making the decision process as reasonable as possible"(1987, 363).

The purpose of public discussion, however, need not simply be a means to achieve some democratic ends. Many of the same theorists posit that the

intrinsic worth of deliberation in democratic politics is just as valuable as the decision that deliberation might hope to achieve, if not more so. Manin (2005) notes, "The procedure preceding the decision is a condition for legitimacy, which is just as necessary as the majority principle"(360). Indeed, the mere act of providing public reasons by the party exercising power tends to give substantive validity to the expression of that power, regardless of whether the reasoning itself has merit. As Cohen (1998) explains, by providing "shared reasons" to justify political power, deliberation "itself expresses the full and equal membership of all in the sovereign body responsible for authorizing the exercise of that power, and establishes the common reason and will of that body"(222). This concept of deliberation is consistent with the classic treatise by Elster (1997) in which the democratic processes, as exemplified in the ancient forum, are lauded over the selfish outcomes sought in the market. Public reasoning is considered just because, as a process, it is democratic in nature and thus it extends justice to the institutions in which it is practiced. The deliberative process, in essence, provides a moral legitimacy to authority in a democracy.

This concern with moral legitimacy is of particular import to the notion of deliberation discussed in this paper—that is, deliberation as an essential element in the legitimacy of judicial authority. The precarious nature of judicial authority in a democratic system is an age-old concern. In the American context, the discussion is most often related back to Alexander Hamilton's characterization of the judiciary in *Federalist No. 78* as the "weakest branch," having "neither FORCE nor WILL but merely judgment"(1788, 464). Yet this characterization of judicial authority is limited in its contemporary application. In contrast, Fallon

(2005) offers a more nuanced argument on the place of the courts' authority in today's political culture, making a keen distinction between three intertwined threads of judicial legitimacy: legal, sociological, and moral. While each of these forms of legitimacy reenforces the others, Fallon gives less weight to the importance of first two forms as they relate to contemporary controversies about the proper powers granted to the courts. For one, he argues that it is somewhat naive to believe that the correctness of a decision weighs greatly in concerns on the courts' authority, particularly since there is both too much disagreement among legal elites as to any "correct" interpretation and too few informed citizens in the mass public to warrant a sustained appeal to legal illegitimacy. As for the sociological aspect, Fallon notes that the institutional place of the court is firmly anchored in today's American political culture and that its authority is somewhat a *fait accompli*. Even if one disagrees with a particular ruling, few would argue that the court, under the current understanding of judicial authority, does not have the power to consider such issues or that its decisions are meaningless. Indeed, in the end, most would likely acquiesce to a judicial decision even if it is of the most repugnant nature—simply put, there are scarce few rulings that would instigate mass revolt in the body politic in contemporary political culture.

Rather, current discussions on judicial legitimacy focus more on what the courts *ought* to decide, such that the legitimacy of the courts exists within a particular spectrum of actions that citizens in democratic politics agree are morally permissible. Fallon (2005) nicely portrays this point, which is a central concern of this paper: "In the face of controversy about the legal scope of

judicial power, it is often a live and searching question whether it is morally legitimate for a court to substitute its judgment for that reached by another, often more democratically accountable, institution"(1839). Indeed, these normative concerns about legitimacy, judicial independence, and accountability foster the innovation of state legislators in designing methods by which state supreme court judges are selected to the bench, with each state seeking a balance between what will protect the legitimacy of its judicial institutions and what is politically practical. Given that state judges, particularly state supreme court judges, have substantial impact over state policy and its citizenry, institutional designers are often wary to cede such power to these judges without some degree of accountability. In general, that accountability is achieved through some form of democratic participation in the selection process. While the particulars of the balance struck in each state can be quite nuanced, the methods of judicial selection can roughly be grouped into four categories based on their degree of democratic participation: partisan election, nonpartisan election, appointment with a retention election, and appointment.[1] The current distribution of states by selection method is captured in Table 1.1.

1.3 Variation in Public Reasoning Relative to Selection

As discussed in the previous section, public reasoning is closely tied to the concepts democratic legitimacy and accountability, particularly for a political

[1] The purported rationales for the adoption of each method are discussed and debated in numerous sources (see, among others, Berkson 1980; Carrington 1998; Champagne and Haydel 1993; Dubois 1986; Epstein, Knight, and Shvetsova 2002; Shuman and Champagne 1997; Stumpf and Culver 1992; Winters 1968).

Table 1.1: Methods of Selecting State Supreme Court Justices (2004)

Appointment (12)	Appt./Retention Election (16)	Non-Partisan Elections (15)	Partisan Elections (7)
Connecticut	Alaska	Arkansas	Alabama
Delaware	Arizona	Georgia	Illinois
Hawaii	California	Idaho	Louisiana
Maine	Colorado	Kentucky	New Mexico
Massachusetts	Florida	Michigan	Pennsylvania
New Hampshire	Indiana	Minnesota	Texas
New Jersey	Iowa	Mississippi	West Virginia
New York	Kansas	Montana	
Rhode Island	Maryland	Nevada	
South Carolina	Missouri	North Carolina	
Vermont	Nebraska	North Dakota	
Virginia	Oklahoma	Ohio	
	South Dakota	Oregon	
	Tennessee	Washington	
	Utah	Wisconsin	
	Wyoming		

Source: *State Court Organization: 2004* (Rottman and Strickland 2006); *Judicial Selection in the States* (American Judicature Society 2007)

institution or branch that is envisioned to be impartial (or independent) in its judgements. Further, in designing and amending their judicial institutions, states have struggled to balance these notions of accountability and independence, resulting in a motley array of methods for selecting their supreme court judges. As the degree of democratic participation is the central component in the variation across selection methods that achieves (or, at least, attempts to achieve) this balance between accountability and independence, it stands to reason that the degree of public reasoning by the judges selected by these different methods might also vary.

We can test this conjecture by comparing the degree of public reasoning relative to the degree of democratic participation. Most simply, we can sepa-

rate states into groups of those that initially select their supreme court judges through election and those that initially appoint the judges. As published opinions are the distinguishing feature by which courts publicly justify their decisions, they are the unit of analysis. The length of the opinions (or, more specifically, the number of words in the opinion) is used to convey the extent of public reasoning, relying on the reasonable assumption that more words entails more public reasoning. Words in the majority opinion and its footnotes are included in the counts.[2]

Table 1.2 reports the mean and median number of words in the 6,716 authored and per curium majority opinions written by state supreme courts in 2004.[3] It is clear that judges selected initially by election write substantially

[2] This approach, of course, measures the quantity and not the quality of the deliberation. Obviously, quality is an important component in the democratic deliberation, but it is also more difficult to measure. As such, for the purpose of this paper, I will limit my analysis to quantity, and any results should be interpreted with this caveat in mind.

[3] The units of analysis, state supreme court opinions, were collected from LexisNexis and coded using a textual analysis computer script written by the author. Since the documents that states report to LexisNexis as "opinions" are not always the same across states (and, indeed, not always the same across different years by the same state), a suitable coding definition of "opinion" for this analysis is the following: any published, regular majority opinion that is not an order, that has an author, and that has an OPINION section in the LexisNexis document. By this coding definition, 6,716 opinions across the 50 states were identified for this 2004 cross-section. All opinions were identified in LexisNexis searching on "supreme court AND NOT decision without published opinion" in the state supreme court case database for each particular state for the relevant year(s). This search proved best to identify all of the appropriate opinions in a state and to reduce the number of "inappropriate" materials across states in a first cut. This process created an initial pool of 27,610 "opinions" for the 2004 cross-section. The computer script, written in Perl, was then run on all of these opinions, first cleaning the OPINION section of extraneous information added by LexisNexis or the court reporter (such as page indicators and the actual words "footnotes" and "end of footnotes"), then identifying case descriptive information (i.e., case name, reference number, opinion author, disposition, date issued, relevant terms, number of dissenting and concurring opinions, etc.) and criteria to cull "inappropriate opinions" (i.e., notice of an unpublished or summary opinion and various indicators that the "opinion" is actually an order), and then counting the number of words in the OPINION section of the document. By limiting the word count to the OPINION section, this excludes from the count extraneous words in the case descriptive information, headnotes added by either LexisNexis or the court reporter, and

Table 1.2: Word Counts by Selection Method for All 2004 States

	All Opinions			
	Mean	Median	Stand. Dev.	N
***ELECTION**$_i$*	3224.67	2503	3023.62	3503
***APPOINTMENT**$_i$*	4260.02	3288	4313.43	3213
	Non-Death Penalty Opinions			
	Mean	Median	Stand. Dev.	N
***ELECTION**$_i$*	3016.31	2443	2511.64	3362
***APPOINTMENT**$_i$*	4000.11	3230	3542.36	3079

Note: States grouped in selection categories defined in Table 1, with 'Election' being those states with initial selection by partisan or nonpartisan election, and 'Appointment' being those states with initial selection by appointment, regardless if they are followed by a retention election. For both 'all opinions' and 'non-death penalty opinions,' a Kruskal-Wallis equality-of-populations rank test indicates at a 99.99-level of confidence that the samples by selection category are not from the same population (χ^2 is 212.193 for 'all opinions' and 220.923 for 'non-death penalty opinions').

shorter opinions than judges who are initially appointed. The top panel indicates that, in a comparison of all these opinions, elected judges write opinions that average about 1,000 fewer words than those opinions written by their appointed colleagues. The bottom panel drops death penalty cases from this sample.[4] These cases are exceptional, as their long length is somewhat pre-

additional opinions in the case (such as dissents or concurrences). Finally, using indicators from the script to identify and delete decisions that were clearly unpublished documents, the remaining pool consisted of 26,332 orders and full opinions. The sample of 6,716 opinions for the 2004 cross-section are those in this pool remaining after culling the original pool of LexisNexis collected "opinions" to best conform to the coding definition of appropriate opinions. Opinions were culled for the following reasons: they had no single author (not including per curium opinions), they were summary opinions, the NOTICE field (if present) contained the word ORDER or indicated that the opinion was not for publication, the OPINION delimiter in the document was followed by the line ORDER, the text under OPINION somewhere contained the uppercase word ORDER *and* the opinion was less than 500 words, or the text under OPINION somewhere contained an apparent signature (indicated as either "/s/" or "s/") which orders often contain *and* the opinion was less than 100 words.

[4] These cases listed either "death penalty," "death sentence," or "sentence of death" in the CORE TERM field of the LexisNexis document. To ensure that cases that involved death

determined for endogenous reasons; and, if capital punishment is more likely in states with a particular selection method, including them might confound any findings.[5] However, given that the difference in opinion length is almost identical when death penalty cases are excluded, it seems the effect of selection method on opinion length is not an artifact of this type of case. Likewise, it is reasonable to assume that the effect is probably not confounded by any other type of case as well, since the extreme salience of the death penalty is likely the critical factor extending the length of these opinions, and there are few (if any) other legal issues that would be more salient. Finally, note that regardless of whether the pool includes death penalty cases, a Kruskal-Wallis equality-of-populations rank test indicates at 99.99-level of confidence that the samples by selection method are not from the same population (χ^2 is 212.193 for 'all opinions' and 220.923 for 'non-death penalty opinions').

It is also possible that institutional features of the courts could predetermine the length of opinions. Efficiency constraints might undercut the ability of judges to provide reasons for decision reached. Greater case loads per judge

sentences were not overlooked in the CORE TERM field by this coding, the remainder of the cases not meeting this first criteria were then individually hand checked if the PRIOR HISTORY, OVERVIEW, or OUTCOME fields contained either "of death," "death sentence," "sentenced to death," "death penalty," or "capital sentence." Ideally, direct or mandatory appeals would be separated from post-conviction, non-mandatory appeals, as the former tends to be much longer than the latter. Unfortunately, such coding proved intractable for this study.

[5] These decisions are singled out for a number of reasons. For one, all states with capital punishment require that the state supreme court automatically review these convictions. And while some other legal matters require mandatory review, such requirements vary across issues and states (Rottman and Strickland 2006). Even for these other legal issues that may entail direct review, it is not clear that they would necessitate a longer opinion—indeed, the fact that their mandatory review is inconsistent across states leads one to suspect that their salience, even if present in one state, is nonetheless capricious in general. Other legal issues also undoubtedly lack the same gravity as the death penalty, such that this singular issue may induce justices to be overly prodigious in their justification for reasons unrelated to any concern about accountability.

could necessitate shorter opinions; conversely, the presence of an intermediate appellate court might ameliorate this pressure. Likewise, characteristics of the majority opinions themselves might require longer opinions for reasons not obviously related to legitimacy concerns. In particular, the presence of dissenting or concurring opinions might prompt majority opinion writers to address issues they otherwise would not have. These confounding influences might inhibit the ability to discern independent variation across the two types of initial selection.

To address these concerns, Table 1.3 presents estimates from a simple OLS regression using the 2004 opinions, with the number of words in the majority opinion as the dependent variable, controlling for the potential confounding influence of these other variables. Robust standard errors clustered on states are used given the hierarchical nature of the data.[6] As is clear, the method of selecting judges still has a substantial independent effect on the length of majority opinions. State supreme courts with initially elected judges average opinions that are about 1,100 words shorter than opinions by appointed judges,

[6] The variable $DEATH\text{-}PEN_i$ is a dummy variable for those cases in which the death penalty was an apparent issue in the case. $NUM\text{-}DIS_i$ and $NUM\text{-}CONC_i$ control for the number of dissenting and concurring opinions, respectively, and include regular dissenting or concurring opinions as well as "in-part" dissenting or concurring opinions. It is expected that the coefficients for both variables will be positive and significant. The variable $CASELOAD_i$ measures the number of 2004 disposed mandatory cases and discretionary petitions in the state in which the opinion was written divided by the number of justices on that bench. IAC_i is a dichotomous variable, indicating the presence of an intermediate appellate court. Since the intuition is that more institutional constraints inhibit a judge's true degree of deliberation, one would expect a negative coefficient on $CASELOAD_i$ but a positive coefficient for IAC_i, reasoning that more cases to oversee per judge mean less time to devote to a particular opinion and that the presence of a lower appellate court mitigates the workflow, freeing the judge to deliberate as she pleases. 2004 caseload and lower appellate court information was obtained from *State Court Caseload Statistics, 2004* (Strickland 2006). Oklahoma and Wyoming did not report data for 2004 so 1998 and 2003 data, respectively, are used for these states. Further Oklahoma and Texas have separate supreme courts for criminal and civil cases. As such, there are 52 courts in this cross-section of the 50 states.

Table 1.3: OLS Estimates for Number of Words in Majority Opinion (2004)

INIT-ELECTED$_i$	-1194.38***
	(419.75)
DEATH-PEN$_i$	5290.4***
	(932.62)
NUMDIS$_i$	1109.8***
	(219.80)
NUMCONC$_i$	1022.7***
	(169.73)
CASELOAD$_i$	.413
	(1.244)
IAC$_i$	414.94
	(411.20)
Constant	3355.8***
	(394.58)
F-Statistic	20.53***
R^2	.1432
N	6,716

*** p ≤ .01 (two-tailed)

Note: Dependent variable is number of words in majority opinion. Initial selection coded as either election (partisan or nonpartisan) or apppointment (appointment with retention or full appointment). Coefficients reported with robust standard errors clustered on state in parentheses.

and the coefficient is statistically significant at greater than a 99.9% level of confidence.[7]

[7] The coefficients on the other independent variables, except per capita caseload and intermediate appellate court, are in the expected direction and highly significant. The coefficient on the presence of an intermediate court is in the expected positive direction, but when errors are clustered on states, it loses its statistical significance. Per capita caseload is not in the right direction, but it is not significant (regardless of the structure of the error term). This is likely a selection issue—that is, courts with smaller caseloads probably have them because they decided in the past to establish intermediate appellate courts to handle the additional caseload.

Thus, this 2004 cross-section of state supreme court majority opinions indicates that the extent that judges provide justification for their decisions does indeed vary relative to the initial method by which they are selected. It is, however, left to better understand the mechanism driving this variation. The next section will walk through several explanations to account for this variation in public reasoning across the different selection methods.

1.4 Explaining Variation in Public Reasoning

1.4.1 Deliberative Expectations

The conjectures by Pasquino and Ferejohn (2003, 2004, also see Ferejohn 2006) on "deliberative expectations" for democratic institutions stem from the brief observations by John Rawls in *Political Liberalism* (1995) concerning the asymmetric necessity for deliberation by the courts in a constitutional democracy compared to that required of the executive or legislature. Unlike the other two branches, Rawls maintains that the courts, especially a supreme court, are bound to give public reasons for its decisions based on the constitution and its relation to statutes and precedent. Indeed, he asserts that it is "the only branch of government that is visibly on its face the creature of that reason and of that reason alone"(1995, 235). This implicit necessity for public reason in justifying its actions relative to the more democratic branches is evident, although less noticed, in Hamilton's same argument on judicial legitimacy as cited above, in which he explains, "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGEMENT, the consequence

would equally be the substitution of their pleasure to that of the legislative body"(1788, 467).

Pasquino and Ferejohn (2003, 2004) translate this necessity for public reasoning to an expectation, such that the courts are expected by free, equal, and rational citizens to establish through sufficiently reasoned justifications for their exercise of power. While efficient coordination of parties affected by a judicial decision is also a purpose of providing public reasons, the authors underscore the special intrinsic value of the public reasoning in judicial opinions. Pasquino and Ferejohn (2003) explain that if opinions are

> rooted in (constitutional or moral) principles that in some way underlie democratic government or that are presupposed by a democratic people, judicial reasons can still be seen as indirectly or transitively democratic. Judicial opinions and decisions are, in this respect, the working out of democratic principles in new circumstances and particularities of specific cases (24).

Yet the theoretical contribution of Pasquino and Ferejohn is a bit more fundamental, in that they establish a general theory about the relationship between deliberative expectations for institutions in democratic politics and the electoral connection by which the members of that institution were selected. Ferejohn (2006) explains that the deliberative expectation for an institution seems inversely correlated to its closeness to the people. Hence, appointed justices, especially those with life tenures, are expected in a democracy to be the most explicit in their reasoning, issuing written, reasoned opinions that give moral weight to their non-majoritarian decisions. On the other hand, there is much less moral obligation for legislators to explain their votes. They may only be compelled to do so on votes on the most controversial issues as it is

understood that these officials will be held accountable for said votes come the next election. Along this spectrum of deliberative expectations, agencies are located somewhere between the bench and the capitol, for whereas they, like justices, are appointed, these officials nonetheless follow the electoral fortune of the executive and thus are likely to be replaced when the political winds change. It is therefore not surprising that an agency action might be accompanied by an official report or that directors are summoned periodically to testify before the legislature, thereby bridging the gap between their authority and their democratic legitimacy. Citizens, as Ferejohn explains, bear no expectation for deliberation in this model; citizens vote, and they need not give a reason for how they cast their ballot.

Given the variation in the democratic connection in the selection of state supreme court judges, this theory of deliberative expectations is readily applicable to variation in public reasoning across states. State supreme courts with a greater democratic connection will be less expected to justify their decisions. As such, the findings from the 2004 cross-section support the Pasquino-Ferejohn thesis: legitimacy considerations compel appointed judges to provide greater public justification for their decisions, as compared to elected judges, and thus their opinions tend to be longer.

1.4.2 Electoral Incentives and Disincentives

The deliberative expectations story is largely normative; it is driven by the relative degree of some democratic ethos characterizing a particular institution. Judges are not strategic; their behavior is sincere, conforming to the norm

precipitated on their institution by its particular democratic proximity. It is possible, however, that judges are reacting strategically to electoral incentives, or lack thereof. According to theories of democratic representation, citizens can exert control over officials by making them accountable. Periodic elections ensure that officials act in the best interest of those they represent, for if the officials do not, they can be removed from office. Evaluation of performance is retrospective and the mechanism of control is the vote (Manin, Przeworski, and Stokes 1999). This deviates little from the role that accountability plays in the story above about deliberative expectations, in which accountability is a chief determinant of the democratic connectedness of an institution. The electoral incentive explanation diverges from the deliberative expectation story regarding the actions of the elected officials, which are assumed to be strategic in the former. Knowing the electoral consequence of not representing the preferences of their constituents, officials anticipate retrospective voting. This expectation creates an incentive for officials to conform their behavior in a manner that will ensure electoral victory. Further, when information is asymmetrical—such that officials have access to information that voters do not—and when the preferences of officials do not align with those of constituents, officials also have an incentive to manipulate the information itself to their electoral advantage (Ferejohn 1986; Maravall 1999; Maskin and Tirole 2004; Sappington 1991). Variation in deliberation observed across institutions might, in fact, be the result of manipulation by officials anticipating the performance assessment at the next election. Likewise, the degree of manipulation might correlate with the relative strength of popular control inherent to a particular institution.

That information held by judges is asymmetrical relative to that of voters is an understatement. Legal reasoning is an acquired skill that is doubtlessly difficult to understand by many in the general public. Therefore, assuming judicial information is asymmetrical, two general patterns in the degree of deliberation might emerge across institutions if indeed judges anticipate retrospective voting and vary their behavior according to the popular control inherent to the selection mechanism. On the one hand, judges may respond by providing more information as the popular control of the selection mechanism increases, such that voters with greater leverage on their electoral fortunes have more information to make the appropriate informed decision. This may particularly be the case when the decisions of judges do not neatly align with the preferences of the electorate, such as the release of an apparently guilty party on a technicality or a ruling that favors big business. As Maravall (1999) explains, "the incumbent will not try to influence the policy preferences of citizens, but to survive the costs of unpopular policies at election time through justification and compensations"(177). A judge more sensitive to the retrospective assessment of her decision in a particular case come election day may be more likely to plead her cause in the opinion of that case. Of course, according to this conjecture, the expected degree of deliberation across selection mechanisms will be the reverse of that predicted by the deliberative expectations thesis and observed in the cross-section, with judges initially selected through elections being the more deliberative than those who are initially appointed.

On the other hand, it is also possible that the electoral incentive will induce a strategic judge to obfuscate if, indeed, information is asymmetrical and can be

manipulated. This dynamic is akin to that discussed by Morris (2001), where an agent may have an incentive to suppress information if future reputational costs are significant, and by Sappington (1991), where negligible monitoring induces an agent to understate her private information to avoid penalties from the principal. Maravall (1999) adds that manipulation of information in this manner—"preventing a critical dimension of politics from emerging in the public realm"—might be done with actions or non-actions, whereby non-actions "refer to the exclusion of potential issues from the political agenda, knowing that public opinion would force them to take unwanted decisions"(172). In terms of supreme court selection mechanisms, judges facing elections may feel more compelled than their appointed brethren to limit the fodder on which they can be challenged in an election campaign and, thereby, increase "non-actions" in their deliberation. While not necessarily providing inaccurate information, judges under tighter popular control might nonetheless have an incentive not to provide extensive details in their opinion about a particular case if doing so might adversely affect their vote share on election day. Again, this conjecture is particularly relevant if the judge has a judicial philosophy that is less palatable to her constituents. Greater justification in her opinion might entail costly equivocation that could pull the holding further away from her preferred policy outcome. Unlike the electoral incentive to provide more information, however, an incentive to obfuscate predicts relative degrees of public reasoning across selection methods that should mimic those expected under the Pasquino-Ferejohn theory of deliberative expectations. That is, judges with relatively high disincentives to justify their decisions (i.e., those facing elections) will write shorter

opinions; whereas those for which such electoral incentives are least applicable (i.e., appointed judges) will have greater freedom to elaborate on their legal reasoning in a particular case.[8] Thus, as posited by this electoral disincentive explanation, the results from Tables 1.2 and 1.3 could indicate calculations to limit electoral damage control opinion length rather than any concerns about democratic legitimacy.

1.4.3 Quality, Productivity, and Resources

Other theories that might explain this variation in public reasoning entail more 'practical' aspects of being a judge under the different selection methods. One explanation highlights the differences in the types of judges selected through election versus appointment. In a recent study, Choi, Gulati, and Posner (2010) use citations and number of opinions to compare quality and productivity, respectively, across selection methods. Pooling all 1997-1999 state supreme court opinions, the authors find that judges in appointive states are of a higher quality, as they receive more out-of-state citations, but that elected judges are more productive, as they write more opinions. They explain these results by the fact that while appointed systems are more likely to attract professionals concerned about their legacy as legal experts, elected systems are more likely to attract politicians concerned about satisfying voters as expeditiously as possible. If this is true, the extent of public reasoning by judges might be a function of the characteristics of the judges selected through the different kinds of insti-

[8] I distinguish between the two expected outcomes driven by electoral incentives by referring to the conjecture that judges will provide greater information as the "electoral incentive theory" and the conjecture positing a suppression of information as the "electoral disincentive theory."

tutions, rather than some characteristic imputed on the judges by the nature of the institution, as implied by the deliberative expectations thesis. Accordingly, the results from the 2004 cross-section in Tables 1.2 and 1.3 could be read to support the conclusions by Choi, Gulati, and Posner (2010): appointed judges, as professionals, present thoroughly reasoned legal arguments, leading to longer opinions; but elected judges, as politicians, want voters to view them as productive public servants with high case turnover, which necessitates shorter opinions.

Finally, as various scholarship explains (in particular, see Posner (1993)), judges have extensive constraints on the amount of time they can devote to activities related to judging. As a matter of resources, judges running for election might simply have less time to devote to writing opinions. The opportunity costs for appointed judges to devote to ruminating about their decisions must be considerably less than those of their elected colleagues who must campaign, fundraise, and solicit votes. As such the earlier cross-section could be picking up this asymmetry in time constraints across the selection methods.

1.4.4 Strategic Dispositions

The above explanations assume that judges are behaving sincerely relative to their dispositions in cases, regardless as to whether they strategically vary their public reasoning. However, consider that judges are strategic in both their public reasoning and their dispositions relative to the electoral connection. Several cross-sectional studies have demonstrated that court outputs often vary given the presence or absence of elections in the selection process of the judges,

including the likelihood of dissenting opinions (Brace and Hall 1990); size of tort awards (Tabarrok and Helland 1999); decisions on judicial review cases (Langer 2002); and votes on capital punishment cases (Brace and Boyea 2008). Further, as noted above, Huber and Gordon (2004) demonstrate with prison terms that decisions by elected judges are sensitive to the electoral calendar, showing that temporal variation of the democratic connection can directly influence judicial outputs.

Since the outcome of a case could affect the amount of public reasoning, state supreme court judges might alter the amount of justification in their opinions given the nature of the case disposition, which is itself conditioned on the temporal proximity of elections during their terms. In particular, elected judges should act as free agents immediately after an election, deciding cases according to their sincere preferences, but shortly before the next election they must mimic constituent preferences in their dispositions—in either case, the necessity to justify decisions is lowest at these points in their terms. It is mid-term when they are shifting from being a free agent to being electorally bound in terms of case disposition that they must provide more reasons for their apparent inconsistencies in outcomes across similar cases.

Note that it is unclear whether the findings in the above 2004 cross-sectional analysis reflect this dynamic. In aggregate, elected judges might decide more cases according to either their own preferences or their constituents, thus providing more occasions to write shorter opinions as compared to appointed judges, who might be consistently writing longer opinions. But this explanation is *ad hoc*, suffering from the inability of the cross-section to appreciate nuanced

variation of the democratic connection within selection methods. In particular, the cross-sectional analysis assumes the effect of the electoral connection is monolithic—that elections create a uniform effect on public reasoning that is simply absent in appointive systems. Such an assumption neglects the possibility that the electoral cycle has a more dynamic effect on the deliberative behavior of judges. It is possible that variation of the electoral cycle creates different incentives for judges to justify their decisions. Indeed, it would be surprising if the mechanism creating variation in public reasoning across judicial selection methods is zero-sum—that the mere presence of an election distinguishes these judges from appointed judges, but that that effect is constant across the electoral cycle.

Thus, to evaluate the validity of the strategic dispositions thesis relative to the other competing explanations for variation in judges' public reasoning, the remainder of this article uses a longitudinal technique to supplement the cross-section comparison of selection mechanisms. This method is similar to that used by Huber and Gordon (2004, and also Gordon and Huber 2007), in which as noted above the authors assessed variation in severity of sentences as judges approached election. In those studies, the authors found that prison sentences by judges increase as elections approach. In this longitudinal analysis, I will evaluate the degree of public reasoning by state supreme court judges relative to the amount of time to the next election—or rather, the amount of a particular judge's term remaining until the next expected election. In essence, the amount of inter-institutional variation in "democratic connectedness" assessed in the cross-sectional analysis is converted into intra-institutional variation.

1.5 Exploiting Temporal Variation and Longitudinal Hypotheses

By introducing temporal variation of the democratic connection we can further assess the validity of these competing theories as well as explore the possibility that judges' calculations about how public reasoning is more complicated than a cross-section can reveal. All the theories discussed above imply a monotonic relationship if we were to think of the longitudinal effect of the electoral connection *within* those selection methods with some form of election. For instance, given an impending election, we should expect judges to provide fewer public reasons as their term progresses if the Pasquino-Ferejohn thesis on deliberative expectations is correct. Legitimacy considerations should ebb as an election nears, since the inverse relationship between accountability and deliberation implies that less time to the next expression of popular will necessitate fewer public reasons to justify their exercise of authority.

The electoral incentive story would see a monotonic increase in public reasoning by the judges as elections approach, while the electoral disincentive story would see a monotonic decrease. For the former, we should see judges giving more reasons to demonstrate legal acumen to garner votes; for the latter, we should see judges hiding that reasoning to limit damage of unpopular decisions come election day. For the professional/politician theory of Choi, Gulati, and Posner (2010), we should also expect a monotonic decrease in words per opinion as elections approach if elected judges are attempting to maximize case turnover—more cases to pad an electoral resume likely means less time to devote

to the reasoning behind any given decision. Similarly, the resource constraint theory would entail a decrease in public reasons as an election approaches, given that writing time would have to be sacrificed to pursue electoral activities.

Clearly, if we observe a monotonically increasing function in public reasoning across judges' terms, we can reject all but the electoral incentive hypothesis to explain judges' behavior relative to within-system variation of the democratic connection. Note that while the cross-section results do not support the incentive story, it is possible that electoral incentives force elected judges to provide more public reasons as an election approaches to justify unpopular decisions, but that elected judges write shorter opinions than appointed judges in general. If the incentive story is confirmed in the longitudinal analysis, we might conclude that competing theories are required to explain both cross and within variation of public reasoning by state supreme court judges.

It is also possible that the relationship between the time until the next election and the quantity of public reasoning is non-monotonic, as is predicted by the strategic dispositions story. If true, elected judges would be writing their shortest opinions immediately after and before elections; thus, the extent of public reasoning in an opinion should be a concave function across the term of the author of that opinion. The first two columns of Table 1.4 capture the expectations for these various hypotheses, noting the predicted function for the amount of public reasons provided by state supreme court judges across their terms, given that they expect to face reelection.

Table 1.4: Expectations for Longitudinal Analysis of Majority Opinion Words Relative to Time Elapsed in Term of Opinion Author

		Expected Variable Signs		
Hypothesis	**Expected Function**	*NEXT-ELECTION$_i$*	*NEAREST-ELECTION$_i$*	*REMAIN-PER$_i$/ REMAIN-PER$_i^2$*
Deliberative Expectations	Decreasing	+	NA	+/+
Electoral Incentives	Increasing	-	NA	-/-
Electoral Disincentives	Decreasing	+	NA	+/+
Professional/Politician	Decreasing	+	NA	+/+
Resource Constraints	Decreasing	+	NA	+/+
Strategic Dispositions	Concave	NA	+	+/-

Note: The variables count down to the next or nearest election so signs are in opposite direction of functions.

1.6 Longitudinal Data and Models

For this longitudinal analysis, all 1995 to 2006 opinions from select state supreme courts are linked with the amount of time remaining in the term of its author. To make the data collection tractable and to be representative of all election types, two states for each of the three types of selection mechanisms with some form of election were selected at random. Arizona and Iowa are used for appointment with retention elections; Minnesota and Oregon for nonpartisan elections; and Alabama and New Mexico for partisan elections. Further, in 2001 and 2004, Arkansas and North Carolina, respectively, changed their methods selecting supreme court justices from partisan elections to nonpartisan elections.[9] Given their uniqueness during this time period, Arkansas and North Carolina are also included in an effort to be as representative as possible of the variants of election states, including those that transition from one form of

[9] Pursuant to popular adoption of Amendment 80 to the Arkansas State Constitution and the 2002 Judicial Campaign Reform Act in North Carolina.

selection to another.

Data collection for the 1995-2006 opinions in the eight states used in the longitudinal analysis followed the same coding procedure used in the cross section discussed above, creating a sample of 12,600 opinions.[10] In the longitudinal analysis, the author of the opinion is now critical. The location of the author in her term relative to the prior or coming election creates the democratic variation to evaluate against deliberative outputs. Term information (including date of initial selection, length of term, expectation of next election, and date of departure) was identified for all permanent justices in the eight states who had terms spanning some point of the time period analyzed.

The OLS model for the longitudinal component will have two versions to check for robustness, each with a different coding and technical setup of the electoral counter that will represent the main independent variable of interest. The first version builds the theoretical definitions of democratic proximity into the coding of this variable, either counting down months until the next election

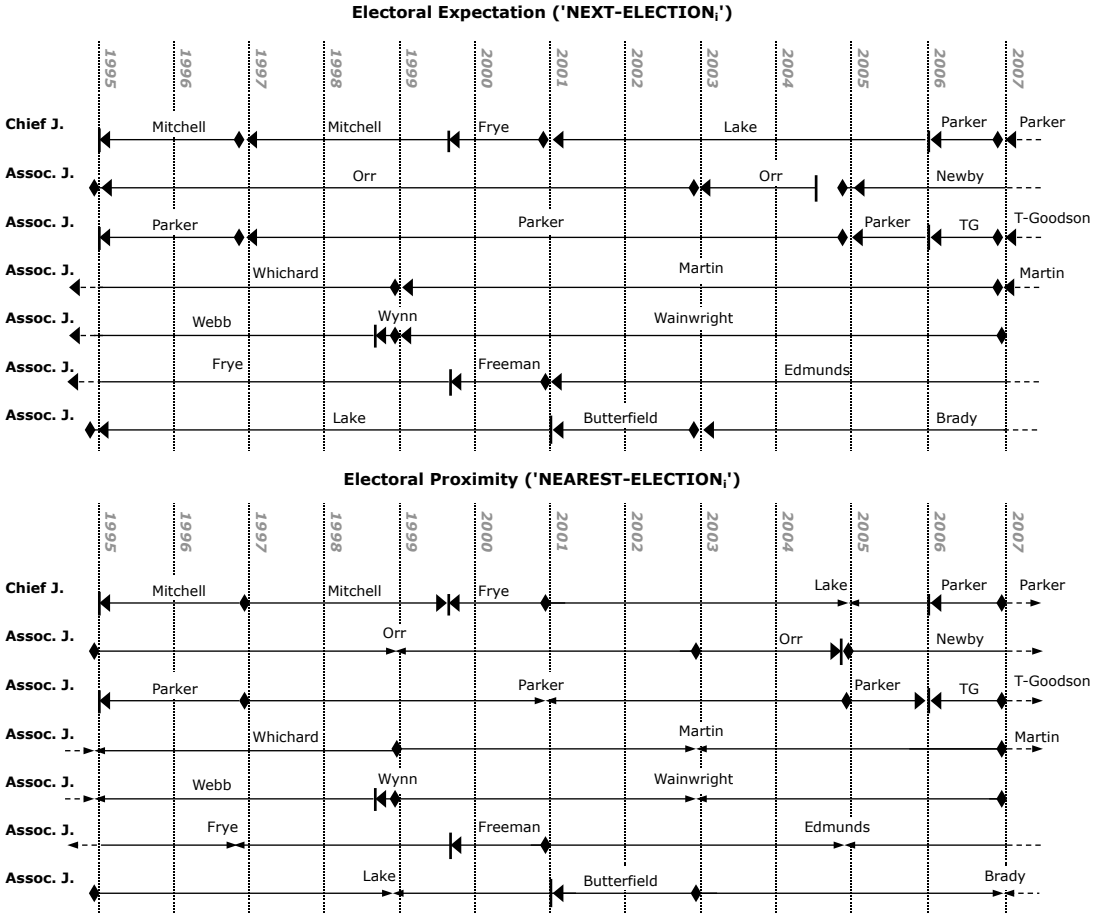
[10] The initial LexisNexis search created a pool of 40,370 "opinions" for the longitudinal analysis. As with the cross-sectional analysis, this pool was culled for unpublished opinions and other documents that did not meet the coding definition of "opinion" (e.g., orders and opinions without authors). In addition, opinions were also dropped for the longitudinal analysis if they were written by a temporary justice, a retired justice, or an Arkansas State Supreme Court justice that was appointed, as these justices have no possible electoral incentive and thus the theories do not speak to the motivations of their degree of deliberation. Appointed justices in Arkansas are prohibited from succeeding themselves, either by reappointment or election. Finally, while per curium opinions are included in the cross-sectional analysis, they are excluded from the longitudinal section. Since the longitudinal analysis explores the direct relationship between judges and public reasoning in the opinion, there is no clearly appropriate method to link per curium opinions to the electoral calendar. Across the eight states, these per curium opinions constitute 2,769 (17.9 percent) of the otherwise "appropriate" 1995 to 2006 opinions. Whereas these opinions might be exploited by electorally vulnerable justices to evade direct culpability of unpopular decisions, it is not clear that this dynamic is the case. This possibility is explored in further detail in the Appendix, in which potential bias from excluding these cases is shown not to be an issue.

(per the monotonic theories) or counting months to or from the nearest election (per the strategic dispositions theory, which is predicted to be curvilinear) for the author of the majority opinion. The "next" or "nearest" election is the nearest expected election, which assumes that anyone who is elected or appointed has the initial and continued intention of fulfilling her term.[11]

This setup is demonstrated for the North Carolina justices in Figure 1.1. The top portion depicts the counter appropriate to the theories in which the judges decide cases sincerely but vary their amount of public reasoning monotonically as election day approaches. Here, the counter simply counts down the number of months from the previous election or appointment to the next expected election, with reelected (and newly elected) justices restarting (or starting) their counts in the subsequent December (and new justices picking up the count in January when they take the bench). The bottom portion depicts the counter appropriate to the strategic disposition theory, which predicts a concave relationship between the time elapsed in the majority opinion author's term and the extent of public reasoning in the opinion. For those justices elected to a specific eight-year term, the month count from the prior election and to the subsequent election peaks at the 48th month, with November election months being the two nadirs. For those justices appointed to fill a vacancy, the months count down to the subsequent election. For those justices re-elected to the same seat, the count "rebounds" in

[11] This assumption is quite strong, as some judges know in advance that they will be leaving the bench prior to the end of their elected term. For example, some states require judges to leave the bench when they turn a certain age. Others might know years in advance that they will not seek reelection. For these justices, the upcoming election should not influence the length of their opinion. However, without this specific information about those justices that left before the end of their term, the assumption is necessary. Future research should attempt to distinguish these justices, as not doing so might bias findings.

Figure 1.1: Term Counters for North Carolina State Supreme Court Justices (1995-2006)



Key

—— Term in analysis period
- - - Cont. term outside analysis period
♦ Election
← Counting direction to/from election (end of term)
← Counting direction to/from election (during term)
| Premature end to elected term

Terms Spanning 1995-2006

Brady: Jan 03-Dec 10 (Nov 10)
Butterfield: Feb 01-Dec 02 (Nov 02)*
Edmunds: Jan 01-Dec 08 (Nov 08)
Freeman: Sept 99-Dec 00 (Nov 00)*
Frye: Jan 93-Sept 99 (Nov 00); *Sept 99-Dec 00 (Nov 00)**
Lake: Jan 95-Dec 00 (Nov 02); *Jan 01-Jan 06 (Nov 08)*
Martin: Jan 99-Dec 06 (Nov 06); Jan 07-Dec 14 (Nov 14)
Mitchell: *Jan 95-Dec 96 (Nov 96)**; *Jan 97-Sept 99 (Nov 04)*
Newby: Jan 05-Dec 12 (Nov 12)
Orr: Jan 95-Dec 02 (Nov 02); Jan 03-July 04 (Nov 10)
Parker: Jan 95-Dec 96 (Nov 96)*; Jan 97-Dec 04 (Nov 04); Jan 05-Dec 05 (Nov 12); *Jan 06-Dec 06 (Nov 06)*; Jan 07-Dec 14 (Nov 14)*
Timmons-Goodson: Jan 06-Dec 06 (Nov 06); Jan 07-Dec 14 (Nov 14)*
Wainwright: Jan 99-Dec 06 (Nov 06)
Whichard: Jan 91-Dec 98 (Nov 98)
Webb: Jan 91-Sept 98 (Nov 98)
Wynn: Oct 98-Dec 98 (Nov 98)*

** Appointed term*
Term as Chief Justice in italics
Next expected election for term in parentheses

the December after the November reelection; otherwise newly elected justices pick up the count in January.[12] The terms spanning 1995 to 2006 for all eight states are listed in Table 1.5.[13]

In this month-counter version of the longitudinal model, the coefficients are estimated using OLS with the following setups:

$$\begin{aligned}\text{WORDS}_i = {} & \beta_0 + \beta_1(\text{NEXT-ELECTION}_i) + \beta_2(\text{DEATH-PEN}_i) + \beta_3(\text{NUM-DIS}_i) \\ & + \beta_4(\text{NUM-CONC}_i) + \beta_5(\text{CASELOAD}_i) + \beta_{6-12}(\text{State-Dummies}_i) \\ & + \beta_{13-116}(\text{Author-Dummies}_i) + u_i\end{aligned}$$

$$\begin{aligned}\text{WORDS}_i = {} & \beta_0 + \beta_1(\text{NEAREST-ELECTION}_i) + \beta_2(\text{DEATH-PEN}_i) + \beta_3(\text{NUM-DIS}_i) \\ & + \beta_4(\text{NUM-CONC}_i) + \beta_5(\text{CASELOAD}_i) + \beta_{6-12}(\text{State-Dummies}_i) \\ & + \beta_{13-116}(\text{Author-Dummies}_i) + u_i\end{aligned}$$

where the continuous dependent variable $WORDS_i$ is a function of a constant, β_0, a matrix of relevant covariates, and a stochastic error term, u_i, in which i represents a given majority opinion in the sample. The dependent variable $WORDS_i$ indicates the number of words in opinion i. $DEATH\text{-}PEN_i$, $NUM\text{-}DIS_i$, $NUM\text{-}CONC_i$, and $CASELOAD_i$ are also similar to the cross-sectional analysis.[14]

[12] For those justices leaving the court after a November election, either due to defeat or not seeking reelection, the subsequent lame-duck December is coded as the furthest number of months possible for that state—for example, in North Carolina, 49 months for the 'nearest election' setup or 96 months for the 'next election' setup. The intuition for this coding is that these justices no longer serve under the weight of popular approval from a past or upcoming election; thus their decisions might not reflect the democratic connection required of deliberative expectations in the theoretical model.

[13] I compiled term, service, and election information for judges in the eight states by cross-referencing numerous sources including the respective court Web pages, secretary of state and board of elections Web pages, state blue books, press releases, newspaper and magazine articles, and several nonprofit organizations' Web pages and resources.

[14] Caseload data for 1994-2005 are collected from *State Court Caseload Statistics, 2004*

IAC_i is not used in this setup because all eight of these states have intermediate courts of appeal.

The variable $NEXT\text{-}ELECTION_i$ is the number of month until the next upcoming election for the author of majority opinion i and $NEAREST\text{-}ELECTION_i$ is the number of months to or from the nearest election for the author. The electoral incentive hypothesis predicts that $NEXT\text{-}ELECTION_i$ will be negative. The strategic dispositions hypothesis predicts that $NEAREST\text{-}ELECTION_i$ will be positive. Given that the structure of the predicted relationship is built into the coding of $NEXT\text{-}ELECTION_i$ and $NEAREST\text{-}ELECTION_i$, there is no comparable prediction for the concave strategic dispositions hypothesis and the monotonic hypotheses, respectively. Indeed, if there is an latent concave or monotonic function in the number of opinion words relative to the term of the author, only one of these variables should be insignificant, as that 'true' structure in the data would negate both from being significant. Finally, since the data are grouped in panels, dummy variables for seven of the states are included to control for fixed effects within states; Alabama is excluded as the baseline group of comparison. And, given that some judges are likely to more verbose than others, dummies are used to control for fixed effects by the 117 authors in the dataset; 13 authors are dropped to avoid collinearity.

The second version of the longitudinal model does not presuppose the nature

(Strickland 2006) and *State Court Caseload Statistics, 2005* (Strickland, Bromage, and Raftery 2007). Data for particular years for some states were either not reported or incomplete. If possible, the average of the immediate prior and subsequent years were reported; otherwise the entry of the most adjacent year was reported. Caseload information was not yet available for 2006 when this analysis was conducted, so 2005 data were reported for this year. Since total caseload within a state does not change dramatically from year to year and since a per capita statistic is calculated from the total caseload information, any effect of the missing data for this variable should be quite minor.

Table 1.5: State Supreme Court Justice Terms Spanning 1995 to 2006

Alabama (6-year elected term)

Almon: Jan 93-Dec 98 (Nov 98)
Bolin: Jan 05-Dec 10 (Nov 10)
J. Brown: Jan 99-Dec 04 (Nov 04)
Butts: Jan 95-Mar 98 (Nov 00)
Cook: Jan 95-Dec 00 (Nov 00)
England: Aug 99-Dec 00 (Nov 00)*
Harwood: Jan 01-Dec 06 (Nov 06)
Hooper: *Oct 95-Dec 00 (Nov 00)*
Hornsby: *Jan 95-Oct 95 (Nov 00)*1
Houston: Jan 93-Dec 98 (Nov 98); Jan 99-Dec 04 (Nov 04)
Ingram: Jan 91-Dec 96 (Nov 96)
Johnstone: Jan 99-Dec 04 (Nov 04)
M. Kennedy: Jan 95-Jun 99 (Nov 00)
Lyons: Mat 98-Dec 00 (Nov 00)*; Jan 01-Dec 06 (Nov 06)
Maddox: Jan 95-Dec 00 (Nov 00)
Moore: *Jan 01-Dec 06 (Nov 06)*
Nabers: Jun 04-Dec 06 (Nov 06)*
T. Parker: Jan 05-Dec 10 (Nov 10)
See: Jan 97-Dec 02 (Nov 02); Jan 03-Dec 08 (Nov 08)
Shores: Jan 93-Dec 98 (Nov 98)
P. Smith: Jan 05-Dec 10 (Nov 10)
Stuart: Jan 01-Dec 06 (Nov 06)
Woodall: Jan 01-Dec 06 (Nov 06)

Arkansas (8-year elected term)

Arnold: *Jan 97-Dec 03 (Nov 04)*
R. Brown: Jan 91-Dec 98 (Nov 98); Jan 98-Dec 06 (Nov 06)
Corbin: Jan 91-Dec 98 (Nov 98); Jan 98-Dec 06 (Nov 06)
Dickey: Jan 04-Dec 04**; Jan 05-Dec 06**
Dudley: Jan 89-Dec 96 (Nov 96)
Glaze: Jan 95-Dec 02 (Nov 02); Jan 03-Dec 10 (Dec 10)
Gunter: Jan 05-Dec 12 (Nov 12)
Hannah: Jan 01-Dec 04 (Nov 08); *Jan 05-Dec 12 (Nov 12)*
Holt: *Jan 93-Aug 95 (Nov 00)*
Imber: Jan 97-Dec 04 (Nov 04); Jan 05-Dec 12 (Nov 12)
Jesson: Sept 95-Dec 96**
Newbern: Jan 93-Dec 00 (Dec 98)
Roaf: Jan 95-Dec 96**
L. Smith: Jan 99-Dec 00**
Thornton: Jan 97-Dec 04 (Nov 04)

Arizona (2-year (at least) appointed term/6-year retention term)

Bales: Sept 05-Dec 08 (Nov 08)*
Berch: April 02-Dec 04 (Nov 04)*; Jan 05-Dec 10 (Nov 10)
Corcoran: Jan 93-Jan 96 (Nov 98)
Feldman: Jan 91-Dec 96 (Nov 96)[2]; Jan 97-Dec 02 (Nov 02)
Hurwitz: Mar 03-Dec 06 (Nov 06)*
C. Jones: April 96-Dec 98 (Nov 98)*; Jan 99-Dec 04 (Nov 04)[3]; Jan 05-Dec 10 (Nov 10)[3]
Martone: Jan 95-Dec 00 (Nov 00); Jan 01-Jan 02 (Nov 06)
Moeller: Jan 91-Dec 96 (Nov 96); Jan 97-Dec 02 (Nov 02)
McGregor: Feb 98-Dec 00 (Nov 00)*; Jan 01-Dec 06 (Nov 06)[4]
Ryan: May 02-Dec 04 (Nov 04)*; Jan 05-Dec 10 (Nov 10)
Zlaket: Jan 95-Dec 00 (Nov 00)[5]; Jan 01-Dec 06 (Nov 06)[5]

Iowa (1-year (at least) appointed term/8-year retention term)

Andreasen: Jan 91-Sept 98 (Nov 98)
Cady: Oct 98-Dec 00 (Nov 00)*; Jan 01-Dec 08 (Nov 08)
Carter: Jan 93-Dec 00 (Nov 00); Jan 01-Oct 06 (Nov 08)
Harris: Jan 91-Dec 98 (Nov 98); Jan 99-June 99 (Nov 06)
Hecht: Oct 06-Dec 06 (Nov 06)*
Larson: Jan 89-Dec 96 (Nov 96); Jan 97-Dec 04 (Nov 04); Jan 05-Dec 12 (Nov 12)
Lavorato: Jan 89-Dec 96 (Nov 96); Jan 97-Dec 04 (Nov 04)[6]; Jan 05-Sept 06 (Nov 12)
McGiverin: *Jan 89-Dec 96 (Nov 96); Jan 97-Nov 00 (Nov 04)*
Neuman: Jan 89-Dec 96 (Nov 96); Jan 97-July 03 (Nov 04)
Snell: Jan 89-Dec 96 (Nov 96); Jan 97-Aug 01 (Nov 04)
Streit: Aug 01-Dec 02 (Nov 02)*; Jan 03-Dec 10 (Nov 10)
Ternus: Jan 95-Dec 02 (Nov 02): Jan 03-Dec 10 (Nov 10)[7]
Wiggins: Oct 03-Dec 04 (Nov 04)*; Jan 05-Dec 12 (Nov 12)

Minnesota (6-year elected term)

G.B. Anderson: Oct 04-Dec 06 (Nov 06)*
P. Anderson: July 94-Dec 96 (Nov 96)*; Jan 97-Dec 02 (Nov 02); Jan 03-Dec 08 (Nov 08)
R. Anderson: Sept 98-Dec 00 (Nov 00)*; Jan 01-Dec 05 (Nov 06); *Jan 06-Dec 08 (Nov 08)**
Blatz: Nov 96-Jan 98 (Nov 98)*; *Feb 98-Dec 00 (Nov 00)*; Jan 01-Jan 06 (Nov 06)*
Coyne: Jan 91-Oct 96 (Nov 96)
Gardebring: Jan 93-June 98 (Nov 98)
Gilbert: Jan 98-Dec 00 (Nov 00)*; Jan 01-Aug 04 (Nov 06)
Gildea: Jan 06-Dec 08 (Nov 08)*
Hanson: Aug 02-Dec 04 (Nov 04)*; Jan 05-Dec 10 (Nov 10)
Keith: *Jan 93-Jan 98 (Nov 98)*
Lancaster: Sept 98-Dec 00 (Nov 00)*; Jan 01-June 02 (Nov 02)
Meyer: June 02-Dec 04 (Nov 04)*; Jan 05-Dec 10 (Nov 10)
Page: Jan 93-Dec 98 (Nov 98); Jan 99-Dec 04 (Nov 04); Jan 05-Dec 10 (Nov 10)
Stringer: Sept 94-Dec 96 (Nov 96)*; Jan 97-Aug 02 (Nov 02)
Tomljanovich: Jan 93-Aug 98 (Nov 98)

New Mexico (8-year elected term)

Baca: Jan 89-Dec 96 (Nov 96)[8]; Jan 97-July 02 (Nov 04)
Bosson: Dec 02-Dec 04 (Nov 04)*; Jan 05-Dec 12 (Nov 12)[9]
Chavez: Mar 03-Dec 04 (Nov 04)*; Jan 05-Dec 06 (Nov 06)
Franchini: Jan 91-Dec 98 (Nov 98)[10]; Jan 99-Dec 02 (Nov 06)
Frost: Jan 93-May 96 (Nov 00)
P. Kennedy: Sept 02-Dec 02 (Nov 04)*
Maes: Dec 98-Dec 02 (Nov 02); Jan 03-Dec 10 (Nov 10)[11]
McKinnon: Jun 96-Dec 96 (Nov 96)*; April 97-Dec 98 (Nov 98)*
Minzner: Nov 94-Dec 96 (Nov 96)*; Jan 97-Dec 02 (Nov 02)[12]; Jan 03-Dec 10 (Nov 10)
Ransom: Jan 95-Feb 97 (Nov 02)
Serna: Dec 96-Dec00 (Nov 00); Jan 01-Dec 08 (Nov 08)[13]

North Carolina (8-year elected term)

Brady: Jan 03-Dec 10 (Nov 10)
Butterfield: Feb 01-Dec 02 (Nov 02)*
Edmunds: Jan 01-Dec 08 (Nov 08)
Freeman: Sept 99-Dec 00 (Nov 00)*
Frye: Jan 93-Sept 99 (Nov 00); *Sept 99-Dec 00 (Nov 00)**
Lake: Jan 95-Dec 00 (Nov 02); *Jan 01-Jan 06 (Nov 08)*
Martin: Jan 99-Dec 06 (Nov 06); Jan 07-Dec 14 (Nov 14)
Mitchell: *Jan 95-Dec 96 (Nov 96)**; *Jan 97-Sept 99 (Nov 04)*
Newby: Jan 05-Dec 12 (Nov 12)
Orr: Jan 95-Dec 02 (Nov 02); Jan 03-July 04 (Nov 10)
Parker: Jan 95-Dec 96 (Nov 96)*; Jan 97-Dec 04 (Nov 04); Jan 05-Dec 05 (Nov 12); *Jan 06-Dec 06 (Nov 06)**
Timmons-Goodson: Jan 06-Dec 06 (Nov 06)*
Wainwright: Jan 99-Dec 06 (Nov 06)
Whichard: Jan 91-Dec 98 (Nov 98)
Webb: Jan 91-Sept 98 (Nov 98)
Wynn: Oct 98-Dec 98 (Nov 98)*

Oregon (6-year elected term)

Balmer: Sept 01-Dec 02 (Nov 02)*; Jan 03-Dec 08 (Nov 08)
Carson: *Jan 95-Dec 00 (Nov 00)*; Jan 01-Dec 06 (Nov 06)[14]
Durham: Jan 95-Dec 00 (Nov 00); Jan 01-Dec 06 (Nov 06)
De Muniz: Jan 01-Dec 06 (Nov 06)[15]
Fadeley: Jan 95-Feb 98 (Nov 00)
Gillette: Jan 93-Dec 98 (Nov 98); Jan 99-Dec 04 (Nov 04); Jan 05-Dec 10 (Nov 10)
Graber: Jan 93-April 98 (Nov 98)
Kistler: Aug 03-Dec 04 (Nov 04)*; Jan 05-Dec 10 (Nov 10)
Kulongoski: Jan 97-June 01 (Nov 02)
Leeson: Feb 98-Dec 98 (Nov 98)*; Jan 99-Feb 03 (Nov 04)
Riggs: Oct 98-Dec 98 (Nov 98)*; Jan 99-Dec 04 (Nov 04); Jan 05-Sept 06 (Nov 10)
Unis: Jan 91-June 96 (Nov 96)
Van Hoomissen: Jan 95-Dec 00 (Nov 00)

Term as chief justice in italics (if entire term only).

Next expected election for term in parentheses.

** Appointed term.*
*** Appointed Arkansas justices not included in longitudinal analysis since they cannot run for reelection at the end of their appointed term.*

[1] Hornsby contested extremely slim victory by Hooper until October, when election results were finally certified. Had he won, he would have had the same electoral expectations as Hooper.

[2] Feldman was CJ in this term from Jan 92 to Dec 96.

[3] Jones was CJ in these terms from Jan 02 to Jun 05.

[4] McGregor was CJ in this term from Jun 05 to Dec 06.

[5] Zlaket was CJ in these terms from Jan 97 to Dec 01.

[6] Lavorato was CJ in this term from Dec 00 to Dec 04.

[7] Ternus was CJ in this term from Oct 96 to Dec 10.

[8] Baca was CJ in this term from Jan 95 to Dec 96.

[9] Bosson was CJ in this term from Jan 05 to Dec 06.

[10] Franchin was CJ in this term from Jan 97 to Dec 98.

[11] Maes was CJ in this term from Jan 03 to Dec 04.

[12] Minzner was CJ in this term from Jan 99 to Dec 00.

[13] Serna was CJ in this term from Jan 01 to Dec 02.

[14] Carson was CJ in this term from Jan 01 to Dec 05.

[15] De Muniz was CJ in this term from Jan 06 to Dec 06.

of democratic proximity in the actual coding. Instead, the percent of a full term remaining until the next expected election is used as the main independent variable of interest and the structural models above are adjusted to distinguish the various theories in a single equation, principally by adding a quadratic term to capture the potential concave relationship predicted by the strategic dispositions hypothesis. Accordingly, the new equation to be estimated is the following:

$$\begin{aligned}\text{WORDS}_i = \beta_0 &+ \beta_1(\text{REMAIN-PER}_i) + \beta_2(\text{REMAIN-PER}_i)^2 + \beta_3(\text{DEATH-PEN}_i) + \\ &\beta_4(\text{NUM-DIS}_i) + \beta_5(\text{NUM-CONC}_i) + \beta_6(\text{CASELOAD}_i) + \beta_{7-13}(\text{State-Dummies}_i) \\ &+ \beta_{14-117}(\text{Author-Dummies}_i) + u_i\end{aligned}$$

Essentially, this setup takes the number of months until the next election used in the prior longitudinal version above and transforms it into a percentage of an entire term remaining until the next election, $REMAIN\text{-}PER_i$.[15]

It is expected that the coefficient for this variable will be negative and significant if the electoral incentive theory is valid but positive and significant if any of the other monotonic hypotheses are valid. The quadratic of this variable distinguishes the unique pattern expected of judges under the strategic

[15] By using the entire term as the dividend, the percentage can be best compared across states with varying term length and across justices selected to the bench by different routes. For example, consider two judges, one appointed two years prior to the next election and another appointed only six months prior. It is assumed that a given percentage should indicate a similar degree of public reasoning by these two justices. However, if the number of months on the bench is used as the dividend, such a setup would expect the same amount of public reasoning at one year until the next election for the first judge and three months for the second judge—that is, at 50 percent of the terms remaining. This expectation is, of course, not consistent with the theoretical setup. However, if an entire possible term is used as the dividend, both judges would be expected to provide the same amount of reasons at, for example, five percent of possible six-year terms since they will both be expecting their next elections in just fewer than four months.

dispositions hypothesis from that expected under the monotonic hypotheses. If correct, the concavity in the amount of public reasoning induced by an upcoming election should be captured by the quadratic of the $REMAIN\text{-}PER_i$ variable, as judges would be writing more come the middle of their term to justify inconsistencies as they transition from their sincere case dispositions to those favored by constituents, but then providing fewer reasons as the percent of their term remaining decreases, since the dispositions would become uniformly consistent with electorate preferences and require less justification. As such, if the strategic dispositions theory is valid, not only should the coefficient on the quadratic be negative and significant, but also the coefficient on $REMAIN\text{-}PER_i$ should be positive and significant. On the other hand, if any of the other theories are correct, then the quadratic term should be in the same direction as $REMAIN\text{-}PER_i$ since the monotonocity of these functions discounts a diminishing or increasing effect of the electoral proximity term on the amount of public reasoning in opinions. The right columns in Table 1.4 summarize the expected signs of the variables used to test the longitudinal hypotheses.

1.7 Longitudinal Results

The results presented in Table 1.6 provide strong support for the strategic dispositions theory. Models 1-3 in the table present the estimated coefficients from the above equations that use either one of the two month counters or percentages to identify the temporal location in the term of the opinion author relative to her next or nearest election. For the month counters, the negative coefficient on the linear month counter used in Model 1 supports the electoral

Table 1.6: Longitudinal OLS Models for Number of Words in Majority Opinion Using Opinion Author Term Information (1995-2006)

	Model 1	Model 2	Model 3
***NEXT-ELECTION**$_i$*	-.853	-	-
	(2.021)	-	-
***NEAREST-ELECTION**$_i$*	-	4.322***	-
	-	(1.128)	-
***REMAIN-PER**$_i$*	-	-	5.166
	-	-	(2.903)
***REMAIN-PER**$_i^2$*	-	-	-.060**
	-	-	(.021)
***DEATH-PEN**$_i$*	3555.9**	3561.1**	3556.9**
	(1175.35)	(1175.8)	(1176.1)
***NUM-DIS**$_i$*	300.28	300.01	300.92
	(189.03)	(189.15)	(188.63)
***NUM-CONC**$_i$*	727.15***	730.73***	727.34***
	(104.10)	(104.98)	(104.53)
***CASELOAD**$_i$*	-3.116	-3.091	-3.099
	(2.941)	(2.935)	(2.902)
***State-Dummies**$_i$*[a]			
***Author-Dummies**$_i$*[a]			
Constant	3003.4***	3087.5***	3062.8***
	(593.85)	(680.8)	(688.41)
F-Statistic[b]	-	-	-
R^2	.2795	.2791	.2794
N	12,600	12,600	12,600

* p ≤ .10; ** p ≤ .05; *** p ≤ .01 (two-tailed)

Note: Dependent variable is number of words in opinion. Coefficients reported with robust standard errors clustered on states in parentheses.

[a] State and author fixed effects not reported. Available from author on request.

[b] Given the clustering structure of the error term, Stata is unwilling to report the F-statistic so to not be misleading. For reference, if Models 1-3 are run with regular standard errors, the F-statistics for the models are 41.67, 41.74, and 41.37, respectively, and all are statistically significant at greater than a 99.9-percent level of confidence.

incentive thesis but the effect is nowhere near statistical significance and thus cannot be distinguished from zero. However, if the strategic dispositions hypothesis is correct, this finding is expected. Again, hard-coding a monotonic

relation into $NEXT\text{-}ELECTION_i$ negates finding any effect from this variable if the underlying function of words in the majority opinion, relative to the location in the term of the author when the opinion was released, is curvilinear. The positive and highly significant coefficient on $NEAREST\text{-}ELECTION_i$ in Model 2 confirms this assertion, as the operationalization of this variable effectively hard-coded a concave function across the term of the opinion author. Accordingly, the coefficient on $NEAREST\text{-}ELECTION_i$ indicates that each month further from the nearest election correlates with about four additional words in an opinion, which is statistically significant at a 99-percent level of confidence. In a state such as North Carolina with eight-year terms, an opinion written at the midpoint of the author's terms would average almost 205 words longer than an opinion released just prior to or after an election. Considering just these first two models, the strategic dispositions hypothesis is clearly a better explanation of state supreme court judges' behavior as it relates to public reasoning.

The third model reinforces this conclusion. If any of the monotonic theses were a good explanation, then the increasing or decreasing monotonic relation between remaining time in authors' terms and degree of deliberation would require that judges write their longest opinions shortly after taking the bench or shortly before election. The results presented in Model 3 clearly do not demonstrate this relationship. In accordance with the predictions of the strategic disposition hypothesis, the model detects a concave curvilinear relationship—that is, justices are most publicly deliberative closer to the middle of their terms rather than immediately before and after elections. The positive coefficient on $REMAIN\text{-}PER_i$ indicates that opinions get longer as authors' back away tempo-

rally from an impending election (although, the coefficient is just shy of traditional levels of statistical significance with a two-tailed p-value of .118). But the quadratic term, being both negative and significant, indicates that judges' incentive to write longer opinions marginally decreases as the amount of time left in their term increases, and eventually the general positive relationship reverses. The effect of electoral proximity on the amount of public reasoning peaks when the author has 43.05 percent of her term remaining.[16] At this point, the opinion would be about 111 words longer than had it been written directly before her upcoming election, all things else being equal.

Again, this non-monotonic effect is hard to explain relative to the electoral connection unless you assume that judges are choosing dispositions strategically. All of the monotonic theories assume that judges are deciding cases sincerely but altering their public justification of those decisions, given either electoral costs of unpopular decisions or limits on resources needed to justify the decisions. Clearly, the curvilinear nature in the length of opinions across the author's term indicates that the effect of the electoral incentive on judges' behavior is more nuanced than just increasing or decreasing the information they make public as an election draws near. While I do not directly test for changes in case dispositions, no other facet of an opinion or a case would seem to have such a systematic effect on opinion content, especially since court structure and the presence of competing opinions have been taken into account.[17]

[16] Calculated as $|5.166/(2 * .060)|$.

[17] The residuals for the longitudinal models follow a similar pattern as that of the cross-section: their variance appears largely uniform but expands somewhat for the longest opinions. Likewise, the residuals are normally distributed up until the longest opinions.

1.8 Implications and Conclusion

Of course, the results of this longitudinal analysis are preliminary. While the sample of states is as representative as possible given constraints for this study, it is possible that these states are unrepresentative of the general trends for elected judges on state supreme courts. Future research can easily address this possibility by collecting the cases from the remaining state supreme courts selected by some form of election. Or if such data collection is prohibitive, it might prove useful to maintain a small sample but to better select states through some form of matching. Indeed, it might be useful to abandon states altogether and match individual judges across states based on some set of shared characteristics.

On the other hand, the sample of eight states used in this study might actually be representative enough to demonstrate a clear trend in the data, but the results presented here might nonetheless be biased by omitted variables—for example, selection method, political or legal culture, electoral competitiveness, region, or ideological departure between the bench and the electorate. Indeed, for the last listed consideration, it seems quite reasonable that judges of a different ideological stripe than their electorates may be more sensitive to electoral pressures than those in states with benches that more closely reflect the ideological makeup of their voters. Future work will want to control for these potential confounders either in the same (or a better matched) small sample of states or the entire population of states that select judges through election.

Finally, it would be preferable to measure dispositions directly, but this is difficult as it requires knowing much more information about the thousands of

cases in the sample, including the disposition itself and what that disposition means relative to other cases and to some status quo. However, if the dispositions can be collected and coded, it might be possible to evaluate the variance in the types of dispositions across terms. Assuming that the cases coming from lower courts are random draws from the same distribution across a supreme court judge's term, we might expect that the variance in dispositions, if the story positing strategic dispositions is true, would be lowest earlier and later in the term and greatest during the middle of the term.

Irrespective of these caveats, the longitudinal results provide strong support for a story in which elected judges, to satisfy their constituents, strategically alter both the amount of public reasons to justify their decisions and the nature of those decisions themselves.

1.9 Paper I Appendix

1.9.1 Selection Effects

The results reported in this paper support the assertion that the degree of public reasoning by supreme court justices is tied to their method of selection not only alters the amount of justification for their decision-making, but also appears to affect case outcomes. However, these results could be biased by the definition of "opinion" used in the analysis. It is possible that by discarding orders in the cross-sectional analysis and orders and per curium opinions in the longitudinal analysis, the sample of opinions selects out efforts by judges to avoid public reasoning, either by using short (or even wordless) orders or unsigned opinions. If the workload in states where we expect the greatest public reasoning is generally being dispatched by order, the above results would not reflect this behavior in the length of opinions. Of course, it is also possible that judges in states for which our theory expects the least amount of public reasoning avoid public reasoning both by writing shorter opinions *and* by using orders. If this were true, the above results would be biased but would reflect a conservative estimate of the true effect of deliberative expectations, and thus we could conclude that results speak to the correct effect of the democratic connection on judicial outputs but that the true effect is even stronger than the estimates produced here demonstrate.

Using a Heckman (1976) selection model, we can attempt to control for this potential bias in the above results. Doing so will determine if the process for selecting "opinions" from the initial sample into the reduced sample (as

detailed in footnote 3) undercuts the initial effects of the main explanatory variables observed by just using the reduced sample.[18] To identify the selection equation for the cross-section, the median tenure of the bench and the court's professionalization rank is used, whereas the median number of months for the judges on the bench at the time of the opinion is used for the longitudinal analysis.[19] The idea here is that these variables should help explain which opinions are selected into the non-order sample for the cross-section or the non-order and non-per curium sample for the longitudinal analysis, but they should not have an independent effect on the actual length of the opinion once they are selected into the reduced sample.[20] For both the cross-section and longitudinal models, we should expect that judges serving together longer would be more comfortable dispatching decisions through orders or unsigned opinions, such that there should be a negative coefficient on these variables in their respective

[18] This solution does not address the possibility that judges could be using unpublished opinions to avoid public reasoning. As Keele et al. (2009) recently found in their analysis of litigation challenging the U.S. Forest Service, ignoring unpublished opinions can overlook important strategic behavior by judges. Unfortunately, as the original LexisNexis search for this project attempted to avoid unpublished opinions to reduce the number of documents downloaded, it would be much more difficult to recover the population of these documents. Future work should further investigate differences in public reasoning across these two types of opinion. However, if the results in the following models do not show problematic selection bias on the earlier findings, it seems reasonable that accounting for unpublished opinions would likely produce similar substantive results.

[19] Both $PROF\text{-}DOCKET_i$ and $MED\text{-}TENURE_i$, used in the 2004 cross-sectional selection equation, are taken from Lindquist (2007). $PROF\text{-}DOCKET_i$ ranks states according to the professionalization index developed by Squire (2007), which includes indicators of pay, staff resources, and docket control. $MED\text{-}TENURE_i$ is the 2004 median tenure length in years for each state supreme court and is derived from Langer (2006). $MED\text{-}SERVICE_i$, used in the longitudinal selection equation, is the median number of months of service for those justices sitting when the opinion was released. Start years for judges who began their service prior to the terms detailed in Table 1.5 were collected from Langer (2006).

[20] None of these variables have a statistically significant effect when they are included in the non-Heckman regression models detailed in the previous section, using robust standard errors clustered on state.

selection equation—that is, the longer judges serve together, the less likely that they will need to issue an authored opinion. For the cross-section, greater docket control should allow a court to dispatch more of its business through orders—thus a state with greater professionalization should be less likely to have opinions in the final sample. Since the professionalization rank increases in number as docket control decreases, the coefficient is expected to be positive.[21]

Tables 1.7 and 1.8 report the estimated coefficients using the Heckman selection setup and robust standard errors clustered on states for all models. The cross-section estimates, taking possible selection into account, are reported in Table 1.7. Note that both variables used to identify the selection equation are in the expected direction; and while professionalization of the court has a highly significant effect, the median tenure of the judges is not statistically significant in this cross section. Otherwise, the results indicate that while there was likely selection into the reduced sample of non-order opinions (i.e., rho is statistically significant), this effect does not undercut the earlier findings. It appears that any selection due to the use of orders moderated the estimated difference in public reasoning by elected and appointed judges. Opinions written by judges in states selected under partisan election systems are clearly much shorter than those written by fully appointed judges. Judges that are initially elected, all things being equal, average opinions that are 1,300 words shorter than those written by their initially appointed colleagues; and this difference is statistically significant at greater than a 99.9-percent level of confidence. Given the

[21] The selection equation for the cross-section also includes the variables for death penalty and the number of dissenting and concurring opinions, whereas the selection equation for the longitudinal model also includes these variables in addition to those for caseload and state fixed effects

Table 1.7: OLS Estimates with Selection for Number of Words in Majority Opinion (2004)

	Outcome Eq.	Selection Eq.
***INIT-ELECTED**$_i$*	-1261.8***	-
	(412.06)	-
***PROF-DOCKET**$_i$*	-	.058***
	-	(.009)
***MED-TENURE**$_i$*	-	-.045
	-	(.042)
***DEATH-PEN**$_i$*	4729.0***	2.018***
	(921.19)	(.476)
***NUMDIS**$_i$*	674.77**	1.321***
	(281.39)	(.184)
***NUMCONC**$_i$*	661.79***	1.261***
	(223.57)	(.191)
***CASELOAD**$_i$*	1.346	-
	(1.361)	-
***IAC**$_i$*	629.31	-
	(404.98)	-
Constant	3743.5***	-1.307***
	(421.33)	(.367)
ρ	-.238***	
	(.084)	
Wald χ^2	82.22***	
N	26,332	
N (Censored)	19,616	
N (Uncensored)	6,716	

** p ≤ .05; *** p ≤ .01 (two-tailed)

Note: Dependent variable is number of words in opinion. Iinitial selection coded as either election (partisan or nonpartisan) or apppointment (appointment with retention or full appointment). Coefficients reported with robust standard errors clustered on state in parentheses.

significance of the selection effect, it seems reasonable to assert that those judges who write shorter opinions as a result of their selection method, also make use of orders in a similar manner.

Table 1.8: Longitudinal OLS Models with Selection for Number of Words in Majority Opinion Using Opinion Author Term Information (1995-2006)

	Model 1: Outcome Eq.	Model 1: Selection Eq.	Model 2: Outcome Eq.	Model 2: Selection Eq.	Model 3: Outcome Eq.	Model 3: Selection Eq.
***NEXT-ELECTION**$_i$*	-.921	-	-	-	-	-
	(2.077)	-	-	-	-	-
***NEAREST-ELECTION**$_i$*	-	-	4.233***	-	-	-
	-	-	(1.159)	-	-	-
***REMAIN-PER**$_i$*	-	-	-	-	4.983*	-
	-	-	-	-	(3.046)	-
***REMAIN-PER**$_i^2$*	-	-	-	-	-.058***	-
	-	-	-	-	(.022)	-
***MED-SERVICE**$_i$*	-	-.005*	-	-.005*	-	-.005*
	-	(.003)	-	(.003)	-	(.003)
***DEATH-PEN**$_i$*	3113.0***	1.891**	3116.9***	1.891**	3113.4***	1.891**
	(752.89)	(.812)	(754.89)	(.810)	(754.86)	(.811)
***NUM-DIS**$_i$*	45.561	.929***	44.542	.929***	45.472	.929***
	(342.04)	(.323)	(342.36)	(.323)	(342.29)	(.323)
***NUM-CONC**$_i$*	538.42**	.746***	541.34**	.746***	538.29**	.746***
	(229.63)	(.257)	(229.18)	(.257)	(229.03)	(.257)
***CASELOAD**$_i$*	-3.205	.001	-3.180	.001	-3.188	.001
	(3.226)	(.002)	(3.215)	(.002)	(3.181)	(.002)
***State-Dummies**$_i$*[a]						
***Author-Dummies**$_i$*[a]						
Constant	3030.9***	.234	3145.9***	.234	3059.3***	.234
	(978.08)	(.161)	(1003.8)	(.161)	(1020.3)	(.161)
ρ	-.261		-.262		-.256	
	(.211)		(.210)		(.197)	
Wald χ^2 [b]	-		-		-	
N	32,156		32,156		32,156	
N (Censored)	19,556		19,556		19,556	
N (Uncensored)	12,600		12,600		12,600	

* p ≤ .10; ** p ≤ .05; *** p ≤ .01 (two-tailed)

Note: Dependent variable is number of words in opinion. Coefficients reported with robust standard errors clustered on states in parentheses.

[a] State and author fixed effects not reported. Available from author on request.

[b] Given the clustering structure of the error term, Stata is unwilling to report the χ2-statistic so to not be misleading. For reference, if Models 1-3 are run with regular standard errors, the χ2-statistics for the models are 4841.56, 4849.22, and 4848.85, respectively, and all are statistically significant at greater than a 99.9-percent level of confidence.

The findings in the longitudinal analysis are also robust to any potential selection effects from discarding orders and per curium opinions in the reduced sample. There is some evidence of selection by discarding orders and per curium opinions (i.e., median service is significant in the selection equation and the size

of the coefficients on the electoral variables are slightly attenuated), but the effect is quite minor (i.e., rho is shy of statistical significance). Regardless, the strategic dispositions theory still fits the data much better than an explanation asserting a monotonic effect: both the nearest election variable (Model 2) and the variables capturing the quadratic effect in the authors' term (Model 3) are in the expected direction and are either statistically significant or highly so, whereas the month counter to the next election (Model 1) is nowhere near statistical significance. Thus, it is clear that the concavity in the degree of public reasoning by judges during their tenure is exceeding important in understanding variation in the degree of public reasoning on state supreme courts.

PAPER II

State Supreme Court Opinion Publication in the Context of Ideology and Electoral Incentives

Paper Abstract

State and federal judges do not publish all of their decisions. In the federal courts, most opinions are unpublished and have no effect on precedent, raising concerns that publication could be used to shape the law for ideological or political ends. While the literature on opinion publication has found little evidence of strategic publication, almost all scholarship has focused on the federal courts. As most judges on state supreme courts must face some form of election, the electoral connection could have a distinct effect on publication. To test this possibility, I analyze all authored opinions by the Montana Supreme Court from 1998 to 2009 and find that both ideology and electoral incentives condition the likelihood of publication. Further, using just the criminal cases in the dataset to identify the ideological direction of decisions, I find that the interaction of ideology, the electoral calendar, and the degree of unanimity is particularly important in the decision to publish given a particular disposition. Whereas more conservative panels are more willing to publish unanimous conservative opinions as elections approach, such panels are less likely to publish non-unanimous liberal opinions when an election is imminent. This analysis provides evidence that elected judges publish strategically, a finding that has generally eluded literature on publication by federal judges, which might be due to the absence of electoral incentives in their retention.

2.1 Introduction

Almost all scholarship on judicial decision-making is based on published opinions. Judges, however, do not publish all of their decisions. In the federal courts, less than 20% of all decisions are published. Until very recently, lawyers and judges were prohibited from citing these decisions as precedent, and thus they had no bearing on the law.[1] Given the common-law nature of American jurisprudence, publication (or lack thereof) can shape what is considered law in this country. Guidelines in each circuit establish criteria for non-publication of decisions. Although they vary by circuit, the general implication is that unpublished opinions should be limited to trivial cases—those in which there is no question of law, little public interest value, and the outcome would be the same regardless of the presiding judge or panel of judges.

In the decades since the institutionalization of unpublished opinions, critics have questioned the efficacy of these guidelines, noting that ultimately the decision on publication is left to the discretion of the judge or panel hearing the case, or even just the author of the majority opinion, and thus publication could be susceptible to abuse. Scholars analyzing this possibility have found that judges do often depart from the guidelines when deciding not to publish a decision. A general conclusion reached by many of these scholars is that unpublished opinions often are not limited to trivial cases. Further, several studies demonstrate that not only do certain case characteristics affect the likelihood of publication, but also that the likelihood is sensitive to which judge or judges are

[1] While the Supreme Court has amended the Federal Rules of Appellate Procedure to allow citation of unpublished opinions, their precedential value is still unclear.

hearing the case. Thus, at a minimum, particular types of judges appear to use non-publication for reasons that depart from the parameters set by publication guidelines.

Of course, this scholarship focuses solely on the publication decisions of federal judges. Many state judges, who also often have the discretion not to publish decisions, face a phenomenon totally foreign to the federal courts: elections. It is possible that the electoral connection affects the propensity of state judges to publish their opinions. It is this proposition that this paper will investigate by focusing on the publication decision of elected state judges. No empirical scholarship exists that analyzes the use of unpublished decisions relative to electoral influences, which is somewhat surprising given the ubiquitous concerns about their potential abuse in the literature on the federal courts. In the larger scholarship on judicial accountability, the politicalization of selecting judges to state courts, especially by partisan and nonpartisan elections, is often vilified for its potential to undermine the legitimacy of American jurisprudence. The compound considerations that judges on elected courts must face in making judicial policy—that is, the desire to craft their state's body of law through precedent according to certain legal norms or ideological proclivities *and* the need to be reelected—would seem greater cause for concern in terms of potential abuse than that ascribed to federal judges.

Using all authored opinions issued by the Montana Supreme Court from 1998 to 2009, I show that the electoral cycle, ideology, and outcomes are important factors in elected judges' publication decisions. As many studies find at the federal level, the population of published and unpublished opinions in Montana are

quite dissimilar, such that studying published opinions alone might produce biased results about judicial behavior. Most cases with dissents and appeals that are vacated or reversed are published, and published opinions are more likely to be written and decided by the more liberal judges on the bench. However, consistent with findings on federal opinion publication, a non-negligible amount of dissents and reversed or vacated decisions are also unpublished, posing normative questions in a system based on precedent. In terms of the electoral connection, opinions are more likely to be published as elections approach and when more seats are in play in the next election, indicating that judges might use publication in much the same way that other elected officials inform voters about their policy positions and job performance as they campaign for reelection. And while liberal judges in Montana are generally more likely to publish, appreciating the ideological direction of case outcomes reveals that judges ideology interacts with the temporal proximity of the next election to determine publication. In addition, it appears that agreement over these outcomes factors into the publication calculus. Whereas more conservative panels are more willing to publish unanimous conservative opinions as elections approach, such panels are less likely to publish non-unanimous liberal opinions when an election is imminent.

2.2 Publication in the American Courts

To frame expectations about the use of unpublished decisions in the states, it is necessary to survey the status of these opinions in the federal courts, primarily because the literature on publication deals almost exclusively on the behavior

of federal judges. Indeed, the advent of unpublished opinions in American jurisprudence began in earnest at the federal level when in the 1960s the Judicial Conference of the United States suggested that district and appeals courts "authorize the publication of only those opinions which are of general precedential value" (Administrative Office of the United States Courts 1964, 11). This shift away from publishing all decisions was the result of an exponential growth in the federal docket. Lawyers, courts, and legal libraries were overwhelmed managing and analyzing the torrent of opinions that added nothing to the understanding of the law, either because the cases themselves were trivial or because the opinions themselves were indistinguishable from earlier decisions (Joiner 1972). Since opinion writing is generally the judge's task that requires the greatest time commitment, judges complained that the uptick in caseload limited their ability to write fully developed opinions (England and McMahon 1977). In the 1970s, circuits were asked to prepare guidelines for limited publication, with the caveat that unpublished opinions should not be citable as precedent (Administrative Office of the United States Courts 1972; Joiner 1972; Advisory Council on Appellate Justice 1973).[2] The effect of this shift on federal judicial outputs has been nothing short of a revolution: in its own annual audit of its caseload, the Administrative Office of the United States Courts (2010) reported in 2009 that 83.2% of the opinions or orders filed terminating cases on the merits were unpublished.[3] States, for the most part, followed the example of the

[2] For a more complete history of the genesis and growth of unpublished opinions in the federal courts, see generally Reynolds and Richman (1981); Stienstra (1985); Songer (1990); Martineau (1994).

[3] The rate of publication varies by type of decision; regardless, the norm is not to publish decisions. Of the 10,808 written, signed opinions, only 42.5% were published. This rate plummets for the 18,168 decisions that were written and reasoned but unsigned and for the 1,184

federal courts, limiting publication in their appellate courts in response to a similar torrent of new litigation, particularly to deal with a substantial increase in 'meritless' appeals (Schanker and Owens 2010). As in the federal courts, the use of unpublished opinions and decisions without any opinions has expanded dramatically over time (Marvell 1989).

Regardless of the level of the court, standards for publication generally suggest that courts only publish opinions that establish new law, alter existing law, resolve a conflict in authority, or involve a legal issue of compelling public interest; however, the decision for publication is left to the judge or panel of judges hearing the case (Advisory Council on Appellate Justice 1973; Beyler 1989). Critics of unpublished opinions caution that such discretion might lead to abuse, since unpublished opinions have no precedential value, at least at the federal level.[4] Judges, it is argued, could use unpublished decisions to shape the law, avoid public deliberation on troublesome legal issues, or avoid reversal by higher courts, such that publication of some opinions may be made for strategic considerations not generally accepted as appropriate by legal practitioners or in accord with established standards for publication (Reynolds and Richman 1981;

decisions that were written, unsigned, and without comment or reason, with the rate of publication being only 2.4% for the former and 1.3% for the latter. The overall rate of publication also varies substantially by circuit, but again the norm is that a majority of decisions on the merits are not published. The D.C. Circuit publishes the most decisions at 41.5%, followed by the Seventh Circuit at 40.9%. The Fourth and Eleventh Circuits published the least in this timeframe, with overall publication rates of 6.3% and 9%, respectively (Administrative Office of the United States Courts 2010).

[4] States vary significantly in the degree of precedential value they afford unpublished opinions, ranging from those that allow citation of these opinions as precedent to those states that absolutely prohibit citation of unpublished opinions. Others are located between these extremes, allowing citation to unpublished opinions for their so-called 'persuasive value.' And, a few states do not use unpublished opinions at all (Barnett 2003). Montana, the opinions of which will be analyzed in this paper, does not allow citation of unpublished opinions as precedent.

Merritt and Brudney 2001; Law 2005).[5] The late Judge Richard Arnold (1999) of the Eighth Circuit Court of Appeals, likely the most prominent and outspoken critic of unpublished opinions, gave credence to this potential for strategic publication in explaining how these opinions might affect the judicial decision making process:

> If, for example, a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, wish to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser. (I don't say that judges are actually doing this—only that the temptation exists.) Or if, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug. Again, I'm not saying that this has ever occurred in any particular case, but a system that encourages this sort of behavior, or is at least open to it, has to be subject to question in any world in which judges are human beings (223).[6]

Other judges have made similar, if not more revealing, statements confirming

[5] Indeed, most scholarship on unpublished opinions is found in law journals and tends to pit such arguments about strategic publication against efficiency arguments. Merritt and Brudney (2001) provide a list of some articles on both sides of this debate in footnotes 5 and 6.

[6] Judge Arnold authored the majority opinion in *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), which held that the procedural rule for the Eighth Circuit limiting the precedential value of unpublished opinions was unconstitutional under Article III of the U.S. Constitution. As in academic circles, however, federal judges have been divided over the use of unpublished opinions. The Ninth Circuit, in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), upheld the constitutionality of non-precedential status for these opinions. In 2006, the Supreme Court partially addressed this conflict by amending the Federal Rules of Appellate Procedure. Rule 32.1 now forbids federal courts from prohibiting citation of unpublished opinions decided after January 2007; however, the precedential value of these opinions remains unclear. See Weisgerber (2009), generally, for a more detailed account of changes in the 'no-cite regime' for unpublished opinions in the federal courts.

that the decision about publication can be used by judges unhappy with the particular case outcome to avoid its impact on precedent. As Judge Patricia Wald (1995), formerly of the D.C. Circuit Court of Appeals, explains, "I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent. We do occasionally sweep troublesome issues under the rug, though most will not stay put for long" (1374). In courts in which dissenters have discretion over publication, there is evidence that the decision not to publish is sometimes also made strategically, as Judge Philip Nichols (1986), formally of the U.S. Court of Appeals for the Federal Circuit, explains, "If dissenting myself, I would never so insist: it would result in making the decision I objected to precedential instead of nonprecedential, under Rule 18, and I would be 'bound' by it afterwards" (925).

A small empirical literature has attempted to map the extent such strategic behavior, or at least behavior that does not conform to established standards, exists in the use of unpublished opinions in the federal courts. The research designs in these studies generally follow one or a combination of three paths: analyzing unpublished opinions by a court to determine if they exhibit characteristics that stray from guidelines on publication; comparing all published opinions to unpublished opinions issued by a court to map differences in these two populations; and looking at the publication rates of particular judges, panels of judges, or circuits to determine if the decision to publish is uniform across

various determinants.[7] The general assumption behind all of these avenues of analysis, and which is often explicitly stated in some circuits' publication standards, is that unpublished opinions should be limited to trivial cases, which involve no questions about law and that would hypothetically entail high consensus on outcomes across different judges, both vertically and horizontally in the federal judicial hierarchy. As such, reversals and dissents should be virtually non-existent in unpublished opinions, and the characteristics of the judges deciding the case should not correlate either with outcomes in these cases or with the decision not to publish. While the sample of analysis in these studies varies greatly, an overarching consensus (with some exceptions) tends to be that unpublished opinions are not necessarily trivial decisions that conform to accepted standards for non-publication. Further, some studies identify determinants for publication that suggest strategic considerations.

One of the common findings in these studies is that unpublished opinions are not nearly as consensual as would be expected. Songer (1988), taking a random sample of published U.S. Courts of Appeals opinions reviewing district court decisions in criminal, antitrust, and labor cases, found that the majority of appellate reversals were actually unpublished decisions by district judges. Further, the appellate reversal rates of published and unpublished district court opinions in anti-trust and labor cases were statistically indistinguishable; and while the reversal rate in criminal cases by appellate courts was higher in published opinions, the rate of reversals of unpublished district opinions in this type of case was still relatively high (i.e., 22.3%). In addition, the rate of dissent by

[7] The analysis that follows in this paper uses a combination of all three paths.

the appellate courts in cases that were published by district court judges was not statistically different from the rate in those cases that were not published by district court judges. Songer, Smith, and Sheehan (1989) and Songer (1990), comparing all of one year's published and unpublished appellate opinions in several circuits, reinforce these earlier findings. Looking at all labor law appellate decisions between 1986 and 1993, Merritt and Brudney (2001) estimated that about 8% of all unpublished decisions entailed some disagreement, and they state that about one in every fourteen unpublished opinions reversed the National Labor Relations Board. Reynolds and Richman (1981) found that about one in every seven unpublished opinions by the courts of appeals for 1978-79 did not affirm the lower court. Accordingly, it appears that judges are willing to deviate from the accepted norms established for publication in some cases, as not all unpublished opinions reflect consensus.

Various characteristics of the judge or judges hearing a case, including age, tenure, previous employment, having held elected office, quality of legal education, and prominence in the legal field, have also been shown to affect the propensity for publication (Merritt and Brudney 2001; Taha 2004). The influence of ideology in judges' publication calculus has been more difficult to nail down. In terms of outcomes in unpublished opinions, Songers and coauthors consistently found that voting at the appellate level followed ideological expectations. Courts of appeals judges appointed by Democratic presidents (or panels with majorities appointed by Democratic presidents) were more likely than Republican appointees (or Republican-majority panels) to vote for a liberal outcome (Songer 1988; Songer, Smith, and Sheehan 1989; Songer 1990).

Likewise, Merritt and Brudney (2001) show that disagreement in unpublished opinions also follows the expected ideological preferences of the judges. Law (2005) reviewed all asylum cases filed in the Ninth Circuit from 1992 to 2001 and found that ideology influenced outcomes in both published and unpublished decisions. Compared to majority-Republican panels, majority-Democratic panels were 2.7 times more likely to rule for the asylum seeker in unpublished cases. On the other hand, Keele et al. (2009), analyzing all 1989 to 2002 federal district and appellate opinions in U.S. Forest Service land management cases, only found ideological voting in published opinions at the appellate level but not in unpublished opinions at either level.

Accordingly, aside from the Keele et al. (2009) study, it appears that there is a good deal of evidence that ideology disagreement infects unpublished opinions. However, such findings testify more to the fact that judges are deviating from established guidelines for the types of decisions that should be published (i.e., not publishing decisions in which there is clearly non-trivial disagreement among different types of judges) rather than demonstrate that judges are publishing strategically based on ideology. Indeed, none of the heretofore-mentioned studies find strong evidence in this regard. Merritt and Brudney (2001) found that panels with more Democratic appointments were no more likely to publish cases with liberal outcomes nor were they more likely to not publish cases with conservative outcomes. Law (2005) found that Democratic- and Republican-majority panels were equally likely to publish decisions with liberal outcomes, and the degree of panel homogeneity also had no effect on publication. However, Law did find that some judges appeared to vote more ideologically in published

cases compared to unpublished cases, indicating that they might be changing their votes to avoid publication when the panel reaches an undesirable outcome. In his study of the 293 district court cases concerning the constitutionality of the federal sentencing guidelines, Taha (2004) also did not find that the party of the appointing president affected whether a judge was more likely to publish a decision. One finding did indicate a general ideological proclivity regarding publication, but it was in an unexpected direction. Songer, Smith, and Sheehan (1989) found that majority-Republican panels were much more likely to publish their liberal decisions than their Democratic-majority counterparts. Seemingly puzzled by this finding, they suggest one explanation: "Republican judges feel obligated to clarify their reasoning in a decision that is not reflective of their ideological background" (983). Swenson (2004), looking at a random sample of 1996 federal appellate opinions across several circuits, also did not find evidence that the decision to publish publication was based on a preferred ideological outcome in the case. However, the author did find that panels were more likely to publish opinions with liberal outcomes than those with conservative outcomes. She notes, "One explanation for this is that liberal decisions are more inherently interesting, even to conservative judges, and serve as a 'cue' for publication" (136).

Empirical literature on publication decisions by state courts is almost nonexistent, and the few studies that do exist are generally limited in scope and application.[8] An exception is Beyler (1989), which analyzed the degree to which

[8] For example, one study by Dow and McNeese (2003) examined 59 execution cases across six states, and simply concluded that all states in the survey except Texas routinely published the appeals in these cases.

judges in three states used unpublished opinions and found that the rate of non-publication was positively correlated with judges' productivity. Further, having legal experts analyze the unpublished opinions filed in the Appellate Court of Illinois in 1984, the author found that 15% of these decisions should have been published as they contained valuable precedent. And comparing the unpublished to published decisions, he found that unpublished opinions were more likely to be shorter and affirm the lower court; and whereas published opinions were more likely to involve some area of civil law, unpublished opinions were more likely to involve criminal law. Finally, while reversals were more likely to be published (comprising 26% of this population), there was still a non-trivial number of reversals that were not published (comprising 13% of this population). This study, however, did not focus on the politics of the publication decision; thus, it did little to delve into the possibility of strategic publication, let alone such decisions might be made on the basis ideological or electoral considerations. As such, the analysis presented here truly breaks ground in the literature on opinion publication.

2.3 State Supreme Courts, Electoral Incentives, and Publication

As noted in the introduction, the dearth of scholarship examining unpublished opinions in state courts is somewhat surprising. Concerns expressed in the federal literature about strategic publication are just as relevant to states that deny unpublished opinions precedential value. In addition, the electoral

connection, totally absent in the federal context, could fundamentally change the calculus of state judges deciding on whether to publish. Indeed, the strategic behavior expected from federal judges but not found in the analyses discussed above might well be uncovered at the state level, where retention is an issue and is decided by the whims of popular preferences.

The notion that electoral incentives condition the behavior of judges is well supported in the literature on elected judiciaries. Several cross-sectional studies have demonstrated that court outputs often vary given the presence or absence of election in the selection process of the judges, including outcomes in sex discrimination cases (Gryski, Main, and Dixon 1986); the likelihood of dissenting opinions (Brace and Hall 1990; Boyea 2010; Shepherd 2010); votes on capital punishment cases (Brace and Hall 1995, 1997; Brace and Boyea 2008); size of tort awards (Tabarrok and Helland 1999); voting behavior related to 'have' versus 'have not' issues (Brace and Hall 2001); decisions on judicial review cases (Langer 2002, 2003); court responses to search and seizure precedent (Comparato and McClurg 2007); and quality of opinion writing and productivity (Choi, Gulati, and Posner 2010). Shepherd (2009a,b) cites evidence of state supreme court judges voting strategically relative to ideology in order to be reappointed or reelected. Further, as Huber and Gordon (2004, and also Gordon and Huber 2007) demonstrate with the length of prison terms handed out by judges, temporal variation in the electoral connection can also directly influence judicial outputs. In these two studies, the authors found that prison sentences by judges increase as elections approach.

The theoretical mechanisms behind the electoral incentives are well estab-

lished and fairly straightforward. According to theories of democratic representation, periodic elections ensure that officials are accountable to the citizens they represent. If officials do not conform to the popular will, they can be removed from office. Evaluation of performance is retrospective and the mechanism of control is the vote (Manin, Przeworski, and Stokes 1999). Officials anticipate retrospective voting and thus condition their behavior in a manner that will ensure electoral victory. In terms of opinion publication, the behavior in question entails information provided by the official. When that information is asymmetrical—such that officials have access to information that voters do not—and when the preferences of officials do not align with those of constituents, officials have an incentive to manipulate the information itself to their electoral advantage (Ferejohn 1986; Maravall 1999; Maskin and Tirole 2004; Sappington 1991). In the judicial context, manipulation of information might still occur even if constituent and representative preferences align. Elected judges might feel constrained by statutes and/or precedent to reach an outcome in a particular case that is adverse to their preferences and that of their constituents, and thus officials manipulate information about the case to limit electoral fallout. Given the evidence cited above that the amount of time until election conditions the behavior of judges, it would not be surprising that variation in the manipulation of information would also follow the electoral calendar. It is an assumption of this paper that publication provides a vehicle by which judges can manipulate information constituents use to evaluate their job performance; thus, it is expected that publication will vary relative to the electoral calendar.

Variation in publication might materialize in a number of forms. As elections

approach, judges might feel compelled to provide voters with more information and to make it easily accessible. Compared to several decades ago before the widespread use of electronic reporting, unpublished opinions are now more easily attained. However, this is not the case in all states. The quality of information is also different in unpublished versus published opinions, especially in states that prohibit citation of unpublished decisions as precedent. Under a 'no-cite' regime, these opinions need not be as polished, the details of the case and reasoning behind the decision are less developed, and they are generally shorter, since these decisions in no way shape the law of the state (Marvell 1989). Given their relative brevity and diminished legal status, one would not be surprised if they received less attention in the local press, and thus have less utility to judges' reelection efforts.

Indeed, publication might essentially function in the same manner as other campaign information by lowering voter uncertainty about the policy positions of judges, which Álvarez (1999) notes is directly influenced by "the costs to voters of gathering, processing, and utilizing information; the attachment of the voters to the political system and their exposure to information, and the flow of information during a campaign" (206). As such, judges might opt to publish an opinion when they otherwise would not if they hope to facilitate the flow of information to constituents, either directly or through intermediary court observers who provide voters with appraisals of judges' decisions (e.g., local media or interest groups). Further, since publication provides more opportunity for justification, judges that are more sensitive to retrospective voting—because their decisions do not neatly align with constituent preferences—might be more

likely to publish to ensure that voters are properly informed about the facts of the case. As Maravall (1999) explains, "the incumbent will not try to influence the policy preferences of citizens, but to survive the costs of unpopular policies at election time through justification and compensations" (177). If this dynamic is applicable to publication, we should observe a greater propensity of judges to publish decisions as election day approaches, and can establish a general hypothesis about the effect of electoral incentive on publication:

> **Hypothesis 1:** As election day approaches, elected judges will be more likely to designate opinions be published rather than unpublished.

As much of the federal literature suggests, ideology might also be important in the decision to publish. It is possible that liberal judges publish more than conservative judges, or vice versa; and this effect might be independent of the electoral calendar. Given the underlying ideological preferences of the electorate in a state, one side of the ideological spectrum might generally perceive greater value in publishing; thus these judges might be more likely to publish regardless of the time until the next election. As the preferences of the electorate vary by state, it is difficult to establish an *a priori* expectation about the directionality of this dynamic. But a statically significant coefficient would indicate that either liberals or conservatives in a particular state have a greater incentive to publish. Thus, assuming that electorate preferences affect judges' behavior as a function of their own ideology, a general hypothesis can be stated that sidesteps any prior knowledge of the ideological preferences of a particular state's electorate:

> **Hypothesis 2:** The likelihood that elected judges will designate

opinions be published rather than unpublished will vary relative to judges' ideology.

However, the electoral influence of ideology on publication might be contingent on the electoral calendar. That is, if judges of a particular ideological type are influenced by electorate preferences, this effect might be more intense as they approach an election. If this is the case, then the interaction of the electoral calendar and judges' ideology will be statistically significant.

Hypothesis 3: The likelihood that elected judges will designate opinions be published rather than unpublished will vary relative to judges' ideology, and this effect will increase as elections approach.

Note that the above hypotheses are made irrespective of case dispositions. If judges are using opinions to campaign, it would not be surprising if judges are more willing to publish a particular ideological type of decision as elections approach, and that this dynamic be contingent on their own ideology. Conservatives might be more inclined to publish decisions in which the court was tough on criminals, while liberals might want to publish decisions in which they ruled in favor of the 'have nots.' Likewise, if a particular decision poses a potential liability to reelection, judges might opt not to publish, calculating that doing so will limit its accessibility or interest (given its reduced legal status). This strategy might be particularly attractive to those judges constrained by precedent to reach a particular outcome but feel that the decision will not be electorally popular. If the decision does receive unwanted attention, they can argue that it should be ignored since it has no bearing on state law. As unpublished opinions are abbreviated, providing limited information about cases and rationale for

decisions—sometimes only providing the disposition—they are more ambiguous expressions of both judges' positions on that matter and how that particular case relates to law in the state. Such ambiguity increases voters' uncertainty about judges position, which as Álvarez (1999) explains, should force those voters to rely less on policy issues in their retrospective evaluation and more on candidate characteristics.

Since these confounding dynamics would likely be conditional on the type of case and the ideological direction of decisions in those types of cases, it is helpful to isolate a particular type of case to evaluate publication decisions relative to those dispositions. Thus, to test the above hypotheses, the analysis that follows will first use all authored majority opinions issued by the Montana Supreme Court, where the judges are elected through nonpartisan elections, and then isolate a subset of these cases of a particular type (i.e., criminal cases) to test the hypotheses relative to the ideological direction of dispositions.

2.4 The Montana Supreme Court

2.4.1 Publication in Montana

Opinions issued by the Montana Supreme Court from 1998 to 2009 are used to test the hypotheses that judges vary their publication decisions as a function of electoral and ideological considerations. Concentrating on one state has the advantage of minimizing institutional idiosyncrasies in states' rules and practices for opinion writing and reporting. In particular, unpublished opinions and orders are generally not treated by court clerks in the same manner as authored,

published opinions and the reporting of these decisions varies by states. Some states issue unpublished opinions in computer databases alongside published opinions. Others do not. Further, some state supreme courts likely use orders where others would use unpublished opinions. This has clearly been the trend in the federal court system, as demonstrated in the data provided by Gulati and McCauliff (1998). While looking at a particular state holds these reporting practices constant, the generalizability of any findings in the study are clearly reduced, and this caveat must be kept in mind in evaluating the results.

Montana was selected for a number of reasons. In particular, judges on its supreme court are elected through non-partisan elections, which allows for analysis of publication relative to the electoral calendar, while avoiding the potential confounding influence of party politics. In addition, Montana functions under a strict 'no-cite' regime, such that unpublished opinions and orders can not be cited for their precedential value. Thus, even though the accessibility of these opinions has become less onerous with the proliferation of electronic reporting, the distinction of publication still has significant legal importance. In December 1997, the court ordered that non-citable opinions be clearly marked as such beginning the following January. Accordingly, starting in 1998, an 'N' in the case citation clearly denotes authored unpublished opinions, easily distinguishing them from the published opinions that shape state precedent.[9] Finally, unlike most states that issue unpublished opinions, the author signs these opinions in Montana, which allows for assessing any author effects in publication.

The process by which the Montana Supreme Court designates opinions as

[9] The 'N' in the citation for signed opinions was used to code unpublished, authored opinions for the analysis that follows.

unpublished is entwined with its procedures for considering oral arguments, disposing of trivial appeals through summary orders or memorandum opinions, and case assignment to panels, all of which are done in conjunction with a weekly Tuesday conference and stipulated in the court's "Internal Operating Rules" (Clerk of the Montana Supreme Court 2006). It is thus helpful to review the relevant procedures to understand the constraints under which decisions about publication and ultimately the disposition are reached. Key decisions are made by the panel of judges hearing the case, which can be a subset of five of the seven judges or the entire bench sitting *en banc*. Montana is one of only a handful of states with supreme courts that decide cases in panels. After judges receive briefs, the chief judge assigns a panel for each case at least one week prior to the next Tuesday conference. Panel assignment is on a rotational basis, with all judges hearing an equal number of cases. The panel is composed of five of the seven judges of the court.

At the Tuesday conference, which is attended by all seven judges, each case is discussed by the members of the court on that panel, first deciding whether the case requires oral arguments and, if not, the type of opinion that the case submitted on briefs will receive. The standards for an unpublished opinion read as follows:

> If an appeal presents no constitutional issues, no issues of first impression, does not establish new precedent or modify existing precedent, or, in the opinion of the Court, would otherwise not be of future guidance for citation purposes to the citizens of Montana, the bench, or the bar, the Court may classify that appeal as one for a noncitable opinion. The decision for the case will provide the ultimate disposition without a detailed statement of facts or law. The decision shall not be citeable as precedent but shall be filed as

a public document with the clerk (Section I.3(c))

It is these opinions that are denoted with an 'N' in their state citation.[10] By Section VII.8 of the operating rules, 'A full written opinion shall be prepared unless the Court shall determine the disposition shall be by order or by memorandum opinion.' Thus, while unpublished opinions are *technically* similar to published opinions, as they are authored, have legal arguments and reasoning for the disposition, and dissents and concurrences are recorded in the text of the opinion, they are *legally* distinct in terms of precedent.

If the court determines that the case can be decided on briefs alone, the panel takes a tentative vote on the merits at the Tuesday conference. If at least four of the panel members agree on an outcome, the chief justice assigns a member of the panel to write the opinion. If there is not a consensus of four panel members, the case will be discussed *en banc* at the next Tuesday conference. Following oral arguments, which are heard *en banc*, the panel meets in another conference to vote on the merits of that case, and once four justices agree to a tentative disposition, the chief judge assigns an opinion writer. If the chief judge is not sitting on a particular case, then 'the member of the Court with the shortest time to serve shall be the acting chief justice for that case' (Section VII.3). Judges not on the case panel can attend this conference. All opinions are circulated to all judges regardless if they are members of the case panel. Opinion votes are finalized in a Thursday conference following the circulation

[10] The court also has the option of deciding a case through order or memorandum opinion, either reversing or affirming the lower court under certain conditions. The court must unanimously agree to this option, but a majority vote is only required for the disposition. The court can also summarily dismiss appeals that are 'deemed frivolous,' but the criteria and voting procedures for designating these cases are not clear.

of a majority draft.

2.4.2 Data for Hypotheses

All Montana Supreme Court decisions or 'documents' for 1998 to 2009 were downloaded from LexisNexis and coded using a textual analysis computer script written in Perl by the author.[11] After deleting inappropriate duplicates, the sample contained documents for 6,322 cases, comprised of 3,039 cases with published opinions, 1,277 cases with unpublished opinions, and 2,006 cases with either orders or decisions without opinions.[12] The script collected descriptive information from each case document including the case name, citation, docket number, date of decision, number of words in the majority opinion, judges hearing the case, author of the majority opinion, concurring and dissenting votes by judges, and the disposition in the case.

As discussed above, electoral incentives are hypothesized to generally make judges more likely to publish their opinions as the time to election day decreases. To test this theory, I first regress the decision that the opinion for the case not be unpublished on an indicator for electoral proximity, using a probit link function. Given that this decision is made by the panel hearing the case, it is necessary that the variable measuring electoral distance speaks to its collective

[11] The designation 'document' is that of LexisNexis, and entails all case opinions released for a given decision by the court. As such, a document might only be a court order enforcing its decision on a matter or a decision without an opinion, such that the document simply provides basic citation information about the case and the outcome reached by the court. However, if the court elects to use a published or unpublished opinion in the case, the document would contain the majority opinion, any separate opinions, and potentially an order.

[12] Given that the Montana Supreme Court is composed of seven judges, this averages to 3.01 documents per judge per month for the first category of cases, 1.27 documents for the second category, and 1.99 documents for the third category.

effect on that group. Judges on the Montana Supreme Court serve staggered eight-year terms. The terms for judges sitting on the Montana from 1998 to 2009 are listed in Table 2.1, including expected reelection years.[13] These data were converted into temporal 'counters' for each judge, counting down until the next election. For each panel hearing a particular case, a summary variable was then constructed, indicating the temporal proximity of the next election.[14] Thus, $Next\ Election_i$ measures the median number of months until the next election among the judges on the panel hearing the particular case. The variable can be interpreted as the number of months until the next election for at least half the panel. Because the dependent variable is whether the opinion is unpublished, I expect the coefficient to be positive if judges are publishing more decisions as election approaches and negative if they choose to publish fewer. Note that by using the median number of months until the next election, this measure both captures the temporal variation in the electoral connection and weights the approaching election according to its magnitude as a mechanism of potential turnover on the bench. Lower number of median months until the next election indicates that more judges are up for election. The robustness of

[13] Term, service, and election information for judges were compiled from numerous sources including the Montana Supreme Court Web page, the Montana secretary of state and board of elections Web page, various online biographies, and newspaper and magazine articles.

[14] With two exceptions, counters count down until the next mandated election for that judge (or the seat). Judges Gray and Trieweiler ran against each other for chief justice in November 2000. Chief Justice Turnage announced his eventual departure in March 1999. That same month, both judges announced their candidacies for the vacancy. Thus, after Gray and Trieweiler are re-elected in 1998, their counters begin counting down to November 2006, but beginning in April 1999, their counters switch to counting to November 2000. Gray's counter resets to an eight year term after she is elected chief judge, while Trieweiler's previous counter counting down to November 2006 resumes after his defeat. The December of the four judges who retired after a November election is coded as 95 months, the furtherest number of months from election in an eight year term.

Table 2.1: Montana Supreme Court Judges (1998-2009)

	Service on Court	Chief Justice	Excpected Re-elections	Ideology
Patricia O. Cotter	Jan. 2001-	-	2008; 2016	-0.96519
Karla Gray	April 1991*- Dec. 2008	Jan. 2001- Dec. 2008	1992; 1998; 2006 (2000)[a]; 2008	0.30243
William Hunt	Jan. 1985- Dec. 2000	-	1992	-0.83929
W. William Leaphart	Jan. 1995- Dec. 2010	-	2002; 2010	-0.83310
Brian Morris	Jan. 2005-	-	2012	-0.78408
James C. Nelson	May 1993*-	-	1996; 2004; 2012	-0.90561
James Regnier	Jan. 1997- Dec. 2004	-	2004	-0.84838
James A. Rice	Feb. 2001*-	-	2002; 2006; 2014	0.59281
Terry Trieweiler	Jan. 1991- April 2003	-	1998 (1992)[a]; 2006 (2000)[a]	-1.10440
Jean Turnage	Jan. 1985- Dec. 2000	Jan. 1985- Dec. 2000	1992; 2000	0.63245
John Warner	May 2003*- Dec. 2009	-	2004; 2006; 2014	-0.45262
Michael McGrath	Jan. 2009-	Jan. 2009-	2016	-

*Appointed.

[a] Gray and Trieweiler ran against each other for chief justice in 2000. In 1992, Trieweiler ran against and was defeated by Turnage for chief judge, but that election had no effect on the counters in this analysis.

this dynamic can be assessed directly by regressing the publication decision on a count variable for the number of seats being contested in the next election, $No.\ Seats\ Next\ Election_i$. A negative coefficient on this variable would be consistent with a positive coefficient on the month counter as it would indicate that the more seats up for election entails a lower probability that the authored majority opinion will not be published, as opposed to published.

To test the second hypothesis, $Panel\ Conservativeness_i$ is included in these two models to control for the independent effect of judges' ideology on the publication decision. This variable, which is increasing in conservativeness of the panel median, is constructed from ideological estimates based on campaign finance data collected by Adam Bonica. Starting from data used to estimate ideal points for federal elected officials, the ideal points for Montana elected officials are obtained using 'bridge contributors' in both the federal and state level.[15] An alternative measure, commonly used in research on state supreme courts, is the party adjusted judge ideology (PAJID) scores developed by Brace, Langer, and Hall (2000), which are based on interest group ratings of each state's congregational delegation adjusted by the partisan affiliation of the judge. It is not entirely clear what these measures are capturing, as they tend to be poor predictors of votes in cases. Using the MCMCirt1d (Markov Chain Monte Carlo for One Dimensional Item Response Theory Model) function in the MCMCpack developed by Martin, Quinn, and Par (2009), ideal point parameters for Montana judges were estimated using voting patterns in all non-unanimous decisions from 1990 to 2008. The rank order correlation of these MCMC estimates to PAJID scores for the judges sitting from 1998 to 2008 is only .0789, while the correlation to the campaign finance estimates is .6519. Thus, the estimates used in this study are better approximates for the ideology of the judges, as compared to PAJID scores. The ideology of all Montana Supreme judges on the bench from 1998 to 2008 are listed in the final column of Table 2.1.[16] If the coefficient

[15] For more information on this technique see Bonica and Woodruff (2011); however, unlike the scores used in that paper, these scores are not scaled by concurrences and dissents. Rather these scores are based solely on the campaign finance data.

[16] During the time period of this study, Judge Jean Turnage was the most conservative

on *Panel Conservativeness*$_i$ is positive, it indicates that the likelihood an authored majority opinion will be unpublished, as opposed to published, increases as the median of the panel becomes more conservative. However, as hypothesis 3 conjectures that the effect of ideology is contingent on the electoral calendar, these first two models are re-estimated with an interaction of panel ideology and the election variable. A significant coefficient on this variable would indicated that the effect of ideology is contingent on the temporal location of panel in the electoral calendar or the number of seats up for the next election, depending on the model.

As also noted above, these dynamics might be contingent on the type of case before the court and the ideological nature of the case disposition. To get a bead on how case dispositions play into the publication calculus, it is necessary to determine the ideological direction of decisions. Unfortunately, it is not feasible to extract this information from the text of the case using a computer script, and the large number of cases makes hand-coding impractical. However, by making some assumptions, this information can be deduced about a subset of cases, namely those with 'State v.' in their title. Cases in which the state brings action against another party are likely criminal proceedings. As Montana has no intermediate appeals court, any appeal to its supreme court from a trial court must necessarily follow a conviction, as it is unconstitutional

at .6324495 and Judge Terry Trierweiler was the most liberal at -1.104398. Chief Justice McGrath, who joined the bench in 2009, is not included in these estimates as campaign contribution data from his election are not yet available, so the ideological medians for 2009 are calculated without including him. Further, if a lower court or retired judge was sitting in place of a recused or absent Supreme Court judge, the ideological measure for the panel hearing the case was calculated using only those supreme court judges on that panel.

for the state to appeal an acquittal.[17] In the time period of this study, 1,441 of the authored opinions began 'State v.,' of which 1,077 were published and 364 were unpublished.[18] Following standard coding procedures for criminal case outcomes, a liberal decision by the Montana Supreme Court would reverse or vacate the conviction, while a conservative decision would affirm it.

While the expectation is that the court is more likely to publish reversals and not publish affirmances, there is no reason to believe that the publication rate of these dispositions should vary relative to the electoral calendar or the ideological preferences of the panel unless, of course, publication is influenced by these factors. Thus, to determine whether the hypothesized dynamics of publication are conditional on the type of case or the ideological direction of the case disposition, the publication decision is regressed on the electoral count variable, panel ideology, and their interaction on the entire pool of criminal cases and then for each type of outcome.

2.4.3 Comparing Published and Unpublished Opinions

Before testing the hypotheses, it is useful to compare some general characteristics of the unpublished opinions relative to the published opinions. Tables 2.2 and 2.3 compare the means for several measurable features of all authored opinions and the subset of criminal cases discussed above, testing for significant differences.

Published opinions are likely to be longer than unpublished opinions. As was

[17] The Fifth Amendment of the U.S. Constitution prohibits the government from appealing an acquittal, as established in *Kepner v. United States*, 195 U.S. 100 (1904).

[18] Forty-four of these opinions were excluded from the analysis (32 published and 12 unpublished), because the disposition was neither coded as being affirmed or reversed/vacated.

Table 2.2: Comparison of Means for Published and Unpublished Authored Opinions in All Montana Supreme Court Cases (1998-2009)

	Published Authored Opinions *Mean*	Unpublished Authored Opinions *Mean*	*Difference*
	All Cases (n = 4,311)		
	(n = 3,039)	(n = 1,272)	
Majority Length	3131.7	1566.2	1565.5***
			(60.2)
Non-Unanimous	.220	.040	.180***
			(.012)
No. Dissents	.415	.066	.349***
			(.026)
Reverse/Vacate	.347	.088	.259***
			(.014)
Affirm	.609	.883	-.273***
			(.015)
En Banc	.240	.024	.216***
			(.012)
Author Conservativeness	-.539	-.463	-.076***
			(.020)
Panel Conservativeness	-.785	-.774	-.011**
			(.005)
Bench Conservativeness	-.820	-.817	-.004***
			(.001)

* $p \leq .10$; ** $p \leq .05$; *** $p \leq .01$ (two-tailed)

Note: Robust standard errors in parentheses. The null hypothesis is that the difference between the two group means is zero.

the case in the federal courts, judges on the Montana Supreme Court would be expected to expend more time and effort writing an opinion if it has precedential value. The fact that other judges, lawyers, and the public in Montana will look to these opinions to understand the laws of the state requires that the high court be as deliberate as possible in explaining the facts of the case and the reasons for the decision reached. $Majority\ Length_i$ measures the number of words in the majority opinion for the case. Indeed, the means reported in both

tables indicate that published opinions are significantly longer than unpublished opinions, averaging nearly 1,600 more words. Clearly, precedent induces judges to be more deliberative in justifying their decisions. Taking away that incentive entails terser reasoning, likely because the decision only has direct value to the parties involved in the case. This trend is consistent with unpublished opinions in the federal courts.

Disagreement in unpublished opinions is a ubiquitous concern in the federal literature on publication. Given that unpublished opinions are assumed to dispose of straightforward legal issues and concern no questions of law, it is asserted that these cases should entail a high degree of horizontal and vertical consensus among judges in the judicial hierarchy. That is, the theoretical justification that these opinions can be segregated from precedential decisions in an otherwise common law judicial system is that these cases are trivial and their disposition should be largely uncontroversial, such that judges hearing the case as well as judges on courts below and above the court hearing the case would agree as to the outcome. Unpublished opinions should therefore generally be unanimous and affirm the lower courts. Given the procedures in Montana, this logic would also mean that opinions issued in cases heard *en banc* should be published.[19] Similarly, judge characteristics should have no relation to the pub-

[19] Besides requiring an *en banc* discussion of the case if four judges on the case panel cannot reach a tentative outcome at the Tuesday meeting, the "Internal Operating Rules" for the Montana Supreme Court require *en banc* consideration in "all cases in which the accused shall have been sentenced to death, cases in which a bona fide challenge is made to the constitutionality of a statute, cases involving a question certified to the Court by another court pursuant to Rule 44, Montana Rules of Appellate Procedure, and such cases as shall be determined by two or more justices to require a hearing *en banc*" (Section IV.1). Like cases in which judges disagree as to outcome, it is difficult to imagine how these latter types of cases would meet the criteria for unpublished designation.

Table 2.3: Comparison of Means for Published and Unpublished Authored Opinions in Montana Supreme Court Criminal Cases (1998-2009)

	Published Authored Opinions *Mean*	Unpublished Authored Opinions *Mean*	*Difference*
	Criminal Cases (n = 1,397)		
	(n = 1,045)	(n = 352)	
Majority Length	2965.2	1413.8	1551.4***
			(110.2)
Non-Unanimous	.192	.048	.144***
			(.022)
No. Dissents	.348	.082	.266***
			(.046)
Reverse/Vacate	.309	.068	.241***
			(.026)
Affirm	.691	.932	-.241***
			(.026)
En Banc	.210	.023	.188***
			(.022)
Author Conservativeness	-.493	-.425	-.068*
			(.038)
Panel Conservativeness	-.781	-.777	-.004
			(.008)
Bench Conservativeness	-.819	-.814	-.005***
			(.002)

* $p \leq .10$; ** $p \leq .05$; *** $p \leq .01$ (two-tailed)
Note: Robust standard errors in parentheses. The null hypothesis is that the difference between the two group means is zero.

lication decision. In particular, authors, panels, or benches of a given ideological stripe should be no more likely to issue published opinions than unpublished ones.

To assess the degree of consensus in the two populations of signed Montana Supreme Court opinions, a number of measures are relevant. $Non-Unanimous_i$ is dichotomous, indicating whether there were any dissents in the case. Similarly,

$No.\ Dissents_i$ records the number of dissents.[20] The variable $En\ Banc_i$ is a dichotomous measure of whether the case was decided by the entire bench or a panel of five judges. The variables $Affirm_i$ and $Reverse/Vacate_i$ are dichotomous indicators if the Montana Supreme Court fully affirmed the lower court decision or, rather, if it reversed or vacated some portion of the decision on appeal.[21]

The comparison of means in Tables 2.2 indicate that, like the federal courts, published opinions by the Montana Supreme Court are much less likely to be unanimous than unpublished opinions. Whereas publication entails a 22% likelihood of dissent, judges disagree in only 4% of unpublished opinions. Likewise, on average, published opinions have .349 more dissents than unpublished opinions.[22] Looking at disagreements about law in the Montana judicial hierarchy, the same trend is evident—most appeals for which the supreme court disagrees with the outcome reached by the lower court are published, but unpublished opinions are not devoid of vertical disagreement. While 35% of published opinions reversed or vacated lower court decisions, only 9% of unpublished opinions did so. The comparison of means presented in Table 2.3 for just criminal cases

[20] Votes in each case were coded as dissents if the judge dissented either in full, in part, or joined another opinion doing so. The rationale for including 'in-part' dissents in this measure is that such dissents entail disagreement in the outcome reached by the majority.

[21] These dispositions were collected from the OUTCOME or DISPOSITION sections (if they existed for the particular LexisNexis case document), the introductory paragraphs of the document, or the final lines of the majority opinion, as the location of this information in the document can vary across time and the type of decision (i.e., full opinion, memorandum opinion, or order).

[22] Although not reported in Table 2.2, looking at just the 720 non-unanimous opinions (669 published and 51 unpublished), the difference in the number of dissents per opinions (i.e., 1.883 versus 1.647, respectively) is smaller than in the entire population of opinions. This difference of .236 dissents is just barely statistically significant at traditional levels of confidence ($p = .1033$).

echos the trends in the larger pool. Of the 1,045 published opinions in criminal cases, 19% are not unanimous and 31% reversed or vacated the lower court decision. Of the 352 unpublished opinions in criminal cases, 5% are not unanimous and 7% reversed or vacated the lower court decision. In both cases, the difference between published and unpublished opinions were statistically significant.

This dynamic is understandable given the criteria for non-publication in Montana. Disagreement about the law entails issues on which the Montana bar needs guidance and that are likely to be of public interest; thus, these cases with disagreement are more likely to have published opinions. The fact that published opinions are much likely to be heard by the full court than unpublished opinions (i.e., 24% versus 2%, respectively) reflects this point. Disagreement among members of a panel assigned to a case, according to the internal operating rules of the court, can trigger the court to hear the case *en banc*. Thus, it is not surprising that *en banc* decisions are more likely to be published than not. However, not all cases with dissents, appeals that are reversed or vacated, or heard *en banc* are published—a trend that has raised normative eyebrows in the federal literature. Reynolds and Richman (1981) and Merritt and Brudney (2001) argue that these opinions, particularly those with separate opinions and reversals, should all be published as not doing so limits the corrective function of the appeals process, inhibits the ability of the court minority to restrain the majority in its decision, and undermines precedent as these cases, by definition, are controversial on some point of law and need to published to resolve that conflict. In the larger sample of all cases with unpublished, authored opinions, an equality of proportions test indicates that we can reject hypotheses that the

proportions of dissents or reversals are zero at greater than a 99.9% degree of confidence. This is true for the criminal cases with unpublished opinions as well.

Merritt and Brudney (2001) were particularly concerned about their finding that some judicial characteristics entail a greater propensity for some judges to publish their opinions. They state, "If these judges and courts also differ on their substantive results, as much research suggests, then the shape of precedent will be affected by seemingly neutral publication decisions (120)." However, they caution that "this pattern does not mean that judges or courts make strategic decision to manipulate precedent by publishing more or less of their opinions. Instead, judges and court may genuinely hold different attitudes toward the importance of publication. If those attitudes correlate on judicial outcomes, however, then apparently neutral publication decisions will affect the direction of published precedents (120)." Comparing all published and unpublished opinions in Montana, it is apparent that ideology has an effect on publication.

Author Conservativeness$_i$, *Panel Conservativeness*$_i$, and *Bench Conservativeness*$_i$ measure the ideology of the majority opinion author, the ideological median of the panel deciding the case, and the ideological median of the bench, respectively, increasing in conservativeness. Across all of these indicators in the larger pool of cases, published opinions are associated with more liberal judges. Echoing the caution of (Merritt and Brudney 2001), this finding does not necessarily imply that the judges are publishing strategically relative to ideology, particularly because these results are not linked to outcomes. However, if we use the subset of criminal cases, there may be a warning signal that

ideological outcomes play into the publication calculus. Note in Tables 2.3 that there is no statistical difference in the ideology of panels deciding published and unpublished criminal cases. This finding is irrespective of outcome. It is somewhat more revealing to look at this dynamic relative to the disposition. Isolating the sample to only affirmed criminal cases (i.e., conservative outcomes), there is no statistically significant difference in panel ideology for published and unpublished opinions. However, the difference is negative and statistically significant ($p = .0188$, two-tailed) for criminal cases that were vacated or reversed (i.e., liberal outcomes). In other words, whereas liberals are generally more likely than conservatives to publish in the larger population of cases, this pattern breaks down when the type of case and direction of the disposition are isolated. Conservatives appear more willing to publish conservative decisions than they are to publish liberal decisions in criminal cases; or vice-versa, liberals might be less willing to publish conservative decision than liberal decisions in criminal cases. However, given the electoral volatility of liberal criminal dispositions, the former dynamic seems a more plausible interpretation. Of course, this finding must be taken with a grain of salt, for the 12 years in this analysis, there are only 24 unpublished opinions for criminal cases in which the supreme court reversed or vacated a decision of a lower court. Regardless, there is evidence that ideology does at least factor in the publication decision, and there is a non-trivial number of unpublished dissents and decisions reverse or vacate the lower court, both of which could be evidence of strategic use of publication. It remains to be seen if the electoral calendar factors into the publication calculus.

2.5 Testing the Electoral and Ideological Hypotheses

Table 2.4 presents probit coefficients for direct tests of the electoral and ideological hypotheses using the variables and data discussed above. The positive coefficient on the month counter in the first column of Table 2.4 speaks to the validity of the first two hypotheses. As an election gets closer for a majority of the panel, it is more likely that a decision will be published, regardless of the ideology of the panel. This finding compliments the observations of Taha (2004) and Judge Wald (1995) that previously elected federal judges are more inclined to publish than their colleagues, being motivated to publicly convince the bar and the public that they are moving the law in the correct direction. It is thus logical that elected judges are likewise motivated to advertise their impact on the law as the election itself gets closer, essentially using publication to campaign. While the effect is statistically significant at the 90% level of confidence, the substantive effect is not particularly dramatic.[23] Moving temporally towards an election from the maximum distance in the sample (i.e., 88 months), entails a 5.5% decrease in the likelihood that an authored opinion will not be published. The magnitude of this effect is likely mitigated by the inclusion of all types of cases in this sample. It is possible that different areas of law induce different behavior about publication. However, in general, Montana Supreme Court judges appear to be making more information available to voters as elections approach. The results in the second column support the underly-

[23] As the substantive effect of probit coefficients is not readily apparent, discrete change in the predicted probability of an unpublished opinion was computed for the variables in the first two columns of Table 2.4, moving the variable of interest from its minimum to maximum value while holding the other variable constant. These substantive effects are discussed herein.

Table 2.4: Likelihood Montana Supreme Court Does Not Publish Authored Majority Opinion (1998-2009)

Next Election	.002*	-	.001	-
	(.001)		(.007)	
No. Seats Next Election	-	-.253***	-	.027
		(.043)		(.247)
Panel Conservativeness	.336**	.450***	.372	-.361
	(.147)	(.148)	(.391)	(.715)
Panel Conservativeness X	-	-	-.001	-
Next Election			(.009)	
Panel Conservativeness X	-	-	-	.364
No. Seats Next Election				(.316)
Constant	-.358***	.334**	-.329	-.294
	(.128)	(.154)	(.313)	(.562)
N	4,310	4,310	4,310	4,310
Wald χ^2	8.40**	40.74***	8.40**	41.09***
Pseudo R^2	.002	.008	.002	.009

* $p \leq .10$; ** $p \leq .05$; *** $p \leq .01$ (two-tailed)

Note: Probit coefficients reported with robust standard errors in parentheses. Dependent variable is whether the authored majority opinion is designated *not* to be published.

ing premise of this argument but do so with a different measure for capturing variation in the electoral calendar. Using the number of seats being contested in the next election, the importance of the impending election can be directly assessed. If the approach of the next election motivates judges to publish, then greater potential for a sizable turnover on the bench should also increase the likelihood that judges will publish. And indeed, the results indicate as much. The more seats up for election decreases the likelihood that an authored opinion will not be published—or, rather, increases the likelihood that it will be published. More specifically, when three seats are being contested in an upcoming election, as opposed to just one, there is a 17.5% increase in the probability that an authored opinion will be published.

These first two columns of results also indicate, consistent with the comparison of published and unpublished opinions above, that the more liberal the panel, the more likely that the opinion will be published. The substantive effect of moving from the most conservative to most liberal panels in the sample is similar in both models, with a 19.7% and 26.7% increase in the likelihood that an opinion will be published, respectively. Without dispositions to assess the behavior of the judges relative to their ideology, it is difficult to ascertain from these results alone *why* more liberal panels are more likely to publish across all types of cases and disposition. However, note that introducing the interactions into the first two models, as reported in the final two columns of Table 2.4, reduces the effect of all variables to random noise. It is possible that the interaction has different signs depending on the outcome in the case. That is, if more liberal panels are more likely to publish liberal outcomes, but less likely to publish conservative outcomes, as an election approaches (and vice versa for conservative panels), then these two effects would cancel each other out. It will thus be helpful to test the subset of criminal cases, for which the directionality of the disposition can be ascertained, to better understand the publication decision process by different ideological types of judges relative to the electoral connection. The results for this subset of cases will indeed demonstrate that the ideological nature of the disposition does, in fact, condition judges' decisions to publish and that the electoral calendar intensifies this calculation.

Table 2.5 presents the probit coefficients from regressing the decision to designate a criminal case opinion as unpublished on the number of months until the next election for a majority of the panel, controlling for the median

Table 2.5: Likelihood Montana Supreme Court Does Not Publish Authored Majority Opinion in Criminal Cases (1998-2009)

	All Criminal Cases	Affirmed Dispositions	Reversed/ Vacated Dispositions
Next Election	.031**	.033**	.030
	(.015)	(.016)	(.040)
Panel Conservativeness	-1.440*	-1.999**	.112
	(.852)	(.933)	(1.973)
Panel Conservativeness X	.036**	.039**	.042
Next Election	(.018)	(.020)	(.051)
Constant	-1.930***	-2.163***	-1.311
	(.688)	(.753)	(1.570)
N	1,396	1,049	347
Wald χ^2	5.74	5.20	5.17
Pseudo R^2	.004	.004	.029

* $p \leq .10$; ** $p \leq .05$; *** $p \leq .01$ (two-tailed)

Note: Probit coefficients reported with robust standard errors in parentheses. Dependent variable is whether the authored majority opinion is designated *not* to be published.

ideology of the panel and its interaction with the month counter. The first column presents the coefficients for all criminal cases, while the second and third columns present coefficients for just conservative or liberal outcomes (i.e., cases in which the court affirmed the lower court or reversed or vacated the lower court's decision), respectively. Looking across the three columns, it is clear that the effects detected in the entire sample of criminal cases are being driven by those cases with conservative dispositions, as the direction of signs and their statistical significance in the larger pool of all cases are echoed in these conservative disposition cases but not in those cases with liberal dispositions. Thus, it is worth focusing on the opinions with affirmed dispositions.

Concerning these conservative decisions, the statistically significant positive

coefficient supports hypothesis 1, as it indicates that relatively moderate panels are more willing to publish as a majority of the panel deciding these cases approach an election. The results also indicate that more-conservative judges appear to be using these opinions to campaign for reelection, whereas more-liberal judges are much less likely to take advantage of the potential electoral value of these conservative outcomes. The statistically significant negative coefficient on the panel conservativeness indicates that at the time of election, the more conservative the panel, the more likely that it will opt to publish these opinions, thus supporting hypothesis 2. Indeed, simulating predicted probabilities reveals that this effect can be quite substantial. At the time of election, there is a 61% likelihood that the most liberal panel in this sample of cases will publish these conservative decisions, but the likelihood that the most conservative panel will publish is slightly greater than 95%.[24]

The positive coefficient on the interaction indicates that as the panel approaches an election temporally, the greater propensity of more-conservative panels to publish these conservative opinions increases relative to more-liberal panels. This dynamic is illustrated in Figures 2.1 and 2.2, which simulate predicted probabilities of non-publication for the most liberal and most conservative panels in this sample of cases, respectively, relative to the median number of months until the next election for the panel judges. Figure 2.3 explicitly illus-

[24] Note that the median ideology of the most liberal panel in this sample is -.9353985, whereas the most conservative panel is -.075097. As most of the judges on the Montana Supreme Court are relatively liberal in this time period, there are no panels in this sample of cases with a majority of 'conservative judges' (i.e., those judges with positive ideology scores). Regardless, the results still speak to the differences in publication outcomes given the increasing conservative ideological makeup of the panel, either by adding 'conservative judges' or given the relative conservativeness of 'liberal judges' (i.e., those judges with negative ideology scores).

Figure 2.1: Predicted Probability of Unpublished Opinion by Most Liberal Panel Relative to Electoral Calendar, for Montana Supreme Court Criminal Cases with Conservative Outcomes (1998-2009)

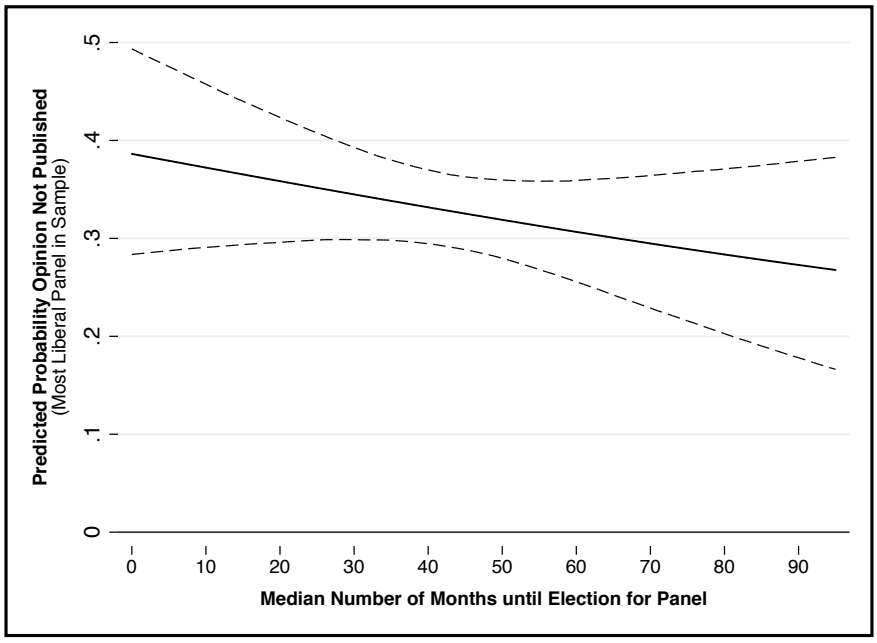


Figure 2.2: Predicted Probability of Unpublished Opinion by Most Conservative Panel Relative to Electoral Calendar, for Montana Supreme Court Criminal Cases with Conservative Outcomes (1998-2009)

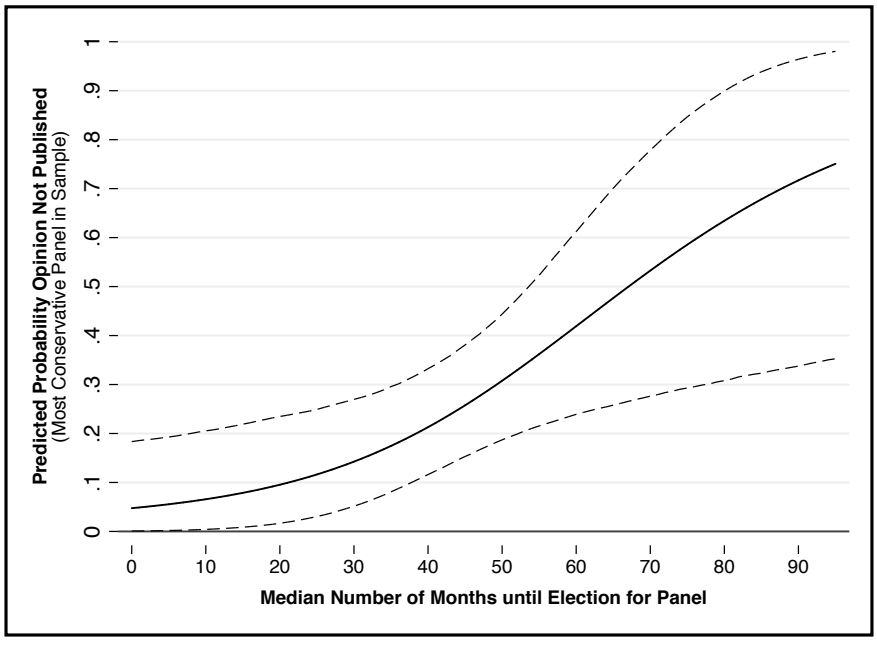
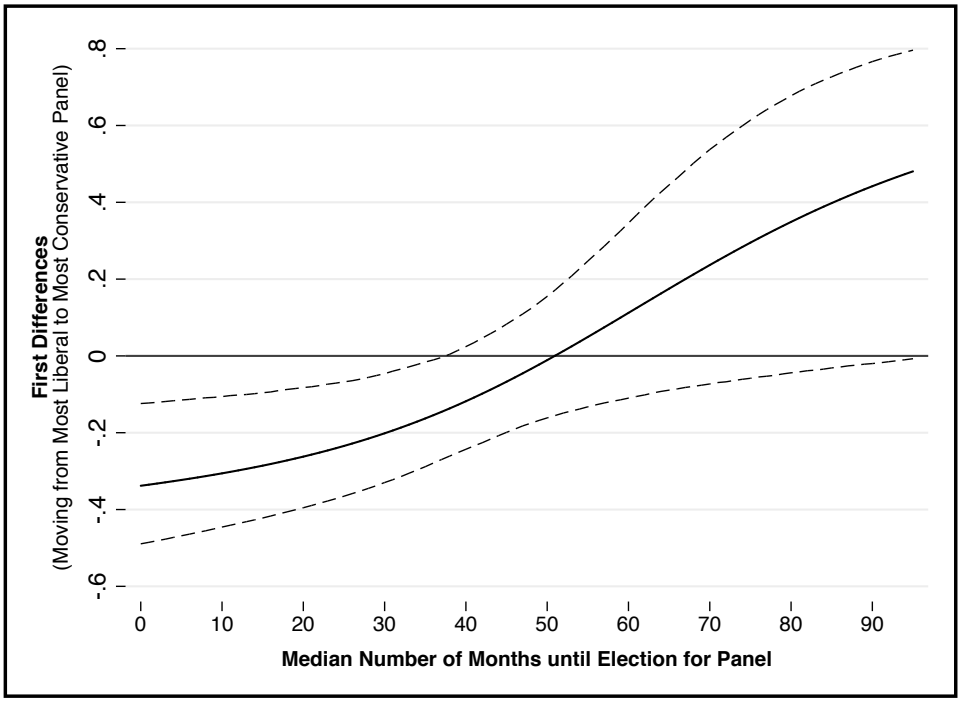


Figure 2.3: First Differences for Likelihood of Unpublished Opinion Relative to Electoral Calendar, Moving from Most Liberal to Most Conservative Panel, in Montana Supreme Court Criminal Cases with Conservative Outcomes (1998-2009)



trates the extent that publication rates differ for these two ideological types of panels relative to the electoral calendar, mapping the first differences of moving from the most liberal to most conservative panel in a particular month prior to election. For all three graphs, the dotted lines indicated the 90% confidence intervals for the probabilities. Note the divergence as the two types of panels approach elections. The likelihoods that a panel will not publish these conservative opinions at 48 months prior to election are simulated to be 32% for the most liberal panel and 28.9% for the most conservative panel. As is shown in Figure 2.3, this difference is not statistically different from zero. However, as at least half the panel gets closer to election, this divergence substantially

increases and does become statistically significant. If half the panel of judges is actually in the month of their re-election (i.e., the median number of months until election for the panel is zero), there is a 38.6% chance that the most liberal panel would not publish one of these conservative opinions but only a 4.9% chance that the most conservative panel would not publish it. And, as is clearly apparent from the moderate slope in Figure 2.1 and dramatic one in Figure 2.2, the more conservative judges are driving this result. Thus, in addition to providing support for hypothesis 3, these results provide evidence that elected judges (or, at least the more conservative judges) use publication strategically as a means to campaign for reelection.

The question remains: why don't electoral or ideological incentives affect the likelihood that criminal cases reversing or vacating lower court decisions will be published? Note that this type of case is likely the most problematic for an elected judge, as its outcome entails risk of being labeled 'soft on crime' in a campaign. Thus, any elected judge, regardless of their ideological stripe would be weary of advertising such outcomes by publishing the decision. On the other hand, these cases entail disagreement in the judicial hierarchy about law in the state, given that the decision of the lower court is somehow rebuked, either by being reversed or vacated. As such, this is just the type of case that the court's internal operating rules singles out as requiring publication. And, indeed, as was seen in the comparison of published and unpublished decisions above, these cases are much more likely to be published. Thus, for reasons unrelated to ideology or the electoral calendar, this type of opinion is inherently more likely to be published. However, as the earlier comparison of means also revealed,

there is a statistically significant number of reversed or vacated decisions that is not published. For some reason, judges are deciding to publish some of these decisions but not others. As this type of case is electorally problematic given the nature of the outcome (i.e., these cases are decided in favor of the criminal), it might be useful for better understanding this publication decision to separate those cases in this volatile subset of criminal cases that are clear-cut from those that are more contentious as to outcome. One can imagine that such a case in this subset, in which the outcome of the lower court was so egregious that both liberal and conservative judges agree that it should be reversed or vacated (e.g., if the lower court judge refused to allow submission of DNA evidence known to prove the appellant's innocence), would be less of an electoral liability than one in which the supreme court judges deciding the case disagree about the proper outcome. Accordingly, the publication decision for these two types of liberal-outcome criminal cases might be different as well, and that decision might vary based on the electoral calendar and/or ideology of the panel hearing the case.

To separate these two types of criminal cases with liberal outcomes, instances of dissent among supreme court judges can be exploited. In particular, an indicator for non-unanimity can be included in the previous estimation and interacted with those variables. Table 2.6 re-estimates the models from the previous table, controlling for instances of non-unanimity and its interaction with the other variables. Disagreement in outcomes clearly does not affect the dynamics of the affirmed decisions, as introducing the new variables has no effect on the results presented in Table 2.5. However, this is not true for the cases with liberal outcomes. Looking at instances of non-unanimity clearly helps

Table 2.6: Likelihood that Montana Supreme Court Does Not Publish Authored Majority Opinion in Criminal Cases (1998-2009), Controlling for Non-Unanimity and Its Interactions

	All Criminal Cases	Affirmed Dispositions	Reversed/ Vacated Dispositions
Next Election	.040***	.034**	.079*
	(.015)	(.016)	(.042)
Panel Conservativeness	-2.143***	-2.098**	-2.850
	(.853)	(.934)	(2.249)
Panel Conservativeness X	.047***	.040**	.098*
Next Election	(.018)	(.020)	(.053)
Non-unanimous	4.172*	.266	9.360***
	(2.365)	(5.082)	(2.551)
Non-unanimous X	-.087	-.015	-.278***
Next Election	(.066)	(.103)	(.091)
Non-unanimous X	6.128**	1.604	11.143***
Panel Conservativeness	(2.977)	(6.301)	(3.257)
Non-unanimous X Next Election	-.105	-.025	-.321***
X Panel Conservativeness	(.083)	(.129)	(.110)
Constant	-2.395***	-2.174***	-3.756**
	(.689)	(.754)	(1.794)
N	1,396	1,049	347
Wald χ^2	50.94***	27.95***	27.76***
Pseudo R^2	.040	.025	.074

* $p \leq .10$; ** $p \leq .05$; *** $p \leq .01$ (two-tailed)

Note: Probit coefficients reported with robust standard errors in parentheses. Dependent variable is whether the authored majority opinion is designated *not* to be published.

understand the dynamics concerning publication in these electorally problematic cases.[25] The statistically significant positive coefficients on the election variable and its interaction with ideology indicates that moderate panels are more willing to publish unanimous liberal decisions as elections approach—that is, relative to

[25] Interpretation of these results are made with the caveat that instances of unpublished opinions are rare in the criminal cases with liberal outcomes, particularly for the non-unanimous decisions. In the sample of 347 criminal cases with liberal outcomes, there are only 24 instances of non-publication, of which 19 are unanimous and 5 are non-unanimous.

the non-unanimous liberal decisions. But these are the electorally 'safer' liberal-outcome cases, since everyone on the panel agrees as to its disposition, so it is not surprising that they would be the ones that get published. However, the fact that panel ideology is not statistically significant indicates that unanimity itself does not guarantee electoral cover for liberal decisions in criminal cases; and, thus, it appears that neither more-conservative nor more-liberal panels feel totally comfortable publishing these decisions.

The non-unanimous decisions appear to be much more volatile electorally. Judges apparently do distinguish non-unanimous decisions in these cases with liberal outcomes from the more clear-cut unanimous decisions, as the coefficient on this variable and its interactions are statistically significant at greater than a 99% level of confidence. The large positive coefficient on the non-unanimous variable indicates that moderate panels are more likely to publish these opinions only when an election is not imminent. This effect is slightly mitigated as the panel approaches election, which is evident by the negative coefficient on non-unanimity's interaction with the electoral variable. The large positive coefficient on interacting non-unanimity with panel ideology indicates that the likelihood that these liberal opinions will not be published at the time of election increases as the panel becomes more conservative. The negative sign on the interaction of all of the base variables indicates that this last effect also increases as the panel approaches an election. In other words, assuming a liberal disposition in a criminal case, panels are much less likely to publish the opinion if there is disagreement as to the outcome, and this effect increases as half the panel approaches election and becomes more conservative.

Such a finding is not surprising from a political standpoint. These decisions not only reverse or vacate criminal convictions, but that decision is also not clear cut, as there is disagreement on the state's highest court as to whether such an outcome is proper. These types of cases are fodder for special interest groups looking to unseat an ideological adversary. Judges calculate that by not publishing these types of decisions they can limit the electoral liability they pose, with conservative panels becoming less likely to publish them as elections approach and liberal panels generally being only willing to publish them when re-election is distant. While such a strategy might be politically expedient, the normative appropriateness of making decision about publication relative to electoral prospects is less evident, as the decision ultimately affects what is state law.

2.6 Conclusion

Part of the intrigue of state courts to judicial scholars is the electoral connection that exists in the selection of many of their judges. The debate continues as to whether impartial justice is possible when judges are directly responsible to constituents for the decisions they make on the bench. Likewise, students of the federal courts have questioned the wisdom of unpublished opinions in a common law system, in which the law and the fidelity to it is defined by a consistent body of legal precedent. If unpublished opinions are not subject to this internal constraint, it is feared that a second-tier body of law will arise that will both be susceptible to strategic decision-making by judges and could undermine the institution of *stare decisis*. This article looks at the intersec-

tion of these two normative questions, probing whether judicial elections pose a distinct wrinkle in the continuing debate—that has largely been limited to the federal judiciary—as to the wisdom of segregating judicial decision-making into two classes. Given concerns in the federal literature that judges might use publication strategically to achieve ideological ends, introducing elections, even nonpartisan elections, into this debate would likely only stoke such fears. While the scholars have found only limited evidence of strategic publication by federal judges, the analysis presented here suggests that elected judges might be more likely than their appointed federal peers to publish opinions that craft precedent favorable to a particular ideology.

At a minimum, the above findings reinforce the conclusion by Keele et al. (2009) that published opinions are not a representative sample of the judges' decisions, either because judges select cases for publication in a nonrandom manner or because they decide cases differently contingent on publication. Particularly in terms of the former dynamic, it is obvious that the guidelines for designation of an unpublished authored opinion in Montana are highly influential in the makeup of these two populations. Almost all cases with dissents and vacated or reversed decisions appealed to the Montana Supreme Court from lower courts are published. However, fidelity to publication norms does not appear absolute, as judicial discretion is clearly exercised by deciding not to publish some cases in which some disagreement over the law exists, either in the Montana judicial hierarchy or among judges on the high court. Such discretion does not necessarily imply strategic publication, but the fact that published decision are more likely to come from more liberal panels and written by more

liberal authors is cause for concern that publication might be used at times as a questionable means to ideological or political ends.

This conclusion is reinforced by the results of this analysis showing that publication itself is sensitive to the electoral calendar, ideology, and outcomes. In general, an opinion written by the Montana Supreme Court is more likely to be published as elections approach for most judges on the panel deciding the case, when more seats are in play in the next election, and as that panel becomes more liberal. Using just the criminal cases, it is evident that the ideological direction of the case disposition can greatly influence the decision to publish. More conservative panels are more willing to publish unanimous conservative decisions. And while panels in general are more willing to publish conservative decisions as elections approach, this effect increases as the panel deciding the case becomes more conservative. When a liberal decision in a criminal case is unanimous, panels are more willing to publish these as elections approach, but panel ideology has little bearing on this decision, likely because these are the clear-cut cases that are particularly useful tools for correcting the errors of the lower courts. The more divisive non-unanimous decision are a different story. In general, panels become less likely to publish these at the time of an election, and this is particularly true as the panel becomes more conservative. As the panel approaches an impending election this dynamic increases, both in general and as a function of the ideology of the panel.

Obviously, these results are preliminary, but they warrant greater attention to the intersection of elections, ideology, and publication that has to date been ignored in scholarship on unpublished opinions. Further research will want to

expand analysis to states beyond Montana, particularly those that have alternative forms of selection and function under different rules for the citation of unpublished opinions. In addition, the analysis presented here surveyed all decisions with full opinions, but it might be the case that judges also use orders to not only avoid precedent but to hide the details of cases from the constituents, as orders and memoranda decision are essentially devoid of any details except the case name, the date released, and the disposition. In Montana, the threshold for using an order is higher than an unpublished authored opinion (i.e., unanimity for its use and, generally, unanimity in outcome), but given that unpublished opinions appear sensitive to ideology and the electoral calendar, it is possible that orders also figure in this calculus.[26] Finally, future research will also want to look at publication in state courts relative to outcomes in areas of the law other than criminal cases. While it is difficult to distinguish the area of law using electronic coding, it might be possible to use the CORE TERMS field in the LexisNexis document to create propensity scores for different areas of law based on the presence of certain terms. But aside from potential insights that future research might provide, the research presented here demonstrates that there are definite interesting questions to be answered in state judicial politics regarding publication. In particular, this analysis indicates that dividing opinions into two classes is not a benign institution resistant to political or ideological considerations, and that precedent will reflect these calculations, either intentionally or not.

[26] Obviously, it would be much more difficult to ascertain causal factors for these cases given the near-complete lack of information about these cases in the released document. In Montana, for instance, the panel members assigned to the case are not available. But it might be possible to get access to these decisions in the onsite files of the court.

PAPER III

Special Interests and Institutional Change in State Supreme Courts

Paper Abstract

I argue that variation in methods across states for selecting state supreme court justices is best understood as an equilibrium reflecting efficiency considerations by special interest groups seeking to achieve favorable rulings. I develop a simple heuristic model showing how an interest groups expectations about the ideological preferences of a states officials and electorate can prompt the group to campaign to change the states selection method. The model shows that a loss of agency between elector and elected can benefit special interests, such that interest groups, depending on their ideological preferences, may have an incentive to exploit this agency loss by changing court selection methods. Using a novel dataset of bills introduced in state legislatures, I find support for this proposition. I argue that these findings suggest, in contrast to assertions by reformers, that appointive selection systems are just as susceptible to interest group influence as are elective systems.

3.1 Introduction

Scholars have long sought to explain the cross-state variation in the methods for selecting state supreme court judges. Unlike the federal level, in which all

judges are appointed, some states appoint individuals to their highest courts, while others elect them or have some hybrid of these two extremes. Existing scholarship examining this institutional variation has attributed it to national historic trends or has simply black-boxed the process producing the variation and, instead, focused on phenomena that the variation induces. Recently, however, some scholars (Epstein, Knight, and Shvetsova (2002)) have noted that these traditional explanations are unpersuasive, particularly because these accounts fail to explain why some states adopt new selection methods but other states do not. While some studies have offered promising political explanations, they are primarily built on the behavior of actors within state government. These studies often neglect the potential importance of actors operating outside government, even though 'outside actors,' such as interest groups, play a prominent role in anecdotal accounts of campaigns to change selection methods.

Reformers, in fact, have long raised concerns about the intervention of these particular outside actors in the actual selection process, particularly in regard to popular elections. Special interest groups have significant financial stakes in the outcomes of cases heard before these courts; thus, they invest substantial sums to elect judges more likely to rule in their favor. This precarious intermingling of overt electoral politics and judicial decision making is an easy target for those advocating the ideal of an impartial bench. Even former Justice Sandra Day O'Connor, in the wake of the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), removing federal and state restrictions on corporate expenditures in candidate elections, expressed concern that a torrent of unrestricted interest group money into these races

could greatly undermine the independence of the judiciary. She predicted that judicial elections could simply become contests between interest groups seeking to stock these benches with friendly justices: "We can anticipate that labor unions and trial lawyers, for instance, might have the financial means to win one particular state judicial election. And maybe tobacco firms and energy companies have enough to win the next one" (Liptak 2010).

Reformers often advocate moving to more-appointive selection systems that will supposedly insulate judges from the deleterious reach of interest groups. Institutional change to state judicial systems, however, does not occur in a political vacuum. Given their high stakes in case outcomes, interest groups undoubtedly would expend significant resources to block movement away from their preferred selection method. Likewise, if special interests already dominate the judicial selection process in a state, any successful movement to another selection method would likely require their support. If this is true, the distribution of selection methods across states should be understood as an equilibrium, reflecting the preferences of these important outside actors. A change to an appointive selection method does not necessarily imply an ebb in interest group influence in the judicial selection process.

To this end, I propose a political explanation for the distribution of supreme court selection methods across states that incorporates the preferences and actions of interest groups. I describe a simple formal model that illustrates how these groups, given their expectations about states' political and ideological tendencies, determine which selection method will best achieve favorable rulings and whether it is in the groups' interest to support (or resist) institutional

change. The model suggests that special interests will seek institutional change when the preferences of states' officials and electorates begin to diverge, since exploiting this agency loss may better satisfy their own efficiency considerations, whether financial or ideological. I then test this model using a novel dataset consisting of all state legislation introduced from 1996 to 2008 proposing changes to supreme court selection methods. The empirical results support the model finding that agency loss can motivate an interest group to lobby for a different selection method. Finally, I conclude with a discussion as to how this new explanation relates to the larger debate about judicial elections and campaign financing of these races.

3.2 Background

3.2.1 Selection Methods and Historic Trends

The avenues for selecting justices to supreme court benches are multifaceted and vary substantially across states. In general, the methods can be grouped into four categories based on the extent of democratic participation that each permits: partisan election, nonpartisan election, appointment with a retention election, and appointment without any form of election. The current distribution of states by selection method is captured in Table 3.1.

Numerous scholars have documented the various periods in which groups of states adopted new selection trends (see, among others, Berkson 1980; Carrington 1998; Champagne and Haydel 1993; Dubois 1986; Shuman and Champagne 1997; Stumpf and Culver 1992; Winters 1968). Epstein, Knight, and Shvetsova

Table 3.1: Methods of Selecting State Supreme Court Justices (2004)

Appointment (12)	Appt./Retention Election (16)	Non-Partisan Elections (15)	Partisan Elections (7)
Connecticut	Alaska	Arkansas	Alabama
Delaware	Arizona	Georgia	Illinois
Hawaii	California	Idaho	Louisiana
Maine	Colorado	Kentucky	New Mexico
Massachusetts	Florida	Michigan	Pennsylvania
New Hampshire	Indiana	Minnesota	Texas
New Jersey	Iowa	Mississippi	West Virginia
New York	Kansas	Montana	
Rhode Island	Maryland	Nevada	
South Carolina	Missouri	North Carolina	
Vermont	Nebraska	North Dakota	
Virginia	Oklahoma	Ohio	
	South Dakota	Oregon	
	Tennessee	Washington	
	Utah	Wisconsin	
	Wyoming		

Source: *State Court Organization: 2004* (Rottman and Strickland 2006); *Judicial Selection in the States* (American Judicature Society 2007)

(2002) point out that the standard account entails "reformers" drawing on contemporary political thought to achieve a better balance between political accountability and judicial independence. This account generally starts with the original American selection method, gubernatorial or legislative appointment. which some states replaced with partisan elections during the era of Jacksonian populism, thus making judges directly accountable to state electorates. Progressive Era reforms follow, in which various states adopted nonpartisan elections to liberate state judiciaries from the corruptive sway of party bosses. The story concludes with a final push to purge politics from judicial selection by instituting merit (or "Missouri") plans. In this selection method, the governor or legislature appoints the judge (often with the advice of a vetting commission),

who serves for an initial tenure but then must occasionally stand for retention in a noncompetitive, nonpartisan election. Basically, appointment with retention by election seeks to split the difference between the extremes of appointment and election, capturing an essence of direct democratic legitimacy while still maintaining some degree of independence.

3.2.2 Strategic Adoption

Epstein, Knight, and Shvetsova (2002) and Hanssen (2004a) note that this standard tale of changing selection methods, in which state innovation follows historical forces or macro-political trends, is unsatisfying. For one, the story lacks rigorous empirical analysis; the historical evidence cited is often anecdotal and heavily recycled from source to source. Further, the historical trend story fails to explain why some states adopted the innovation and others did not. Finally, this account abstracts away from the political basis of institutional change. As these authors explain, choices about court structure are "strategic choices of the relevant political actors and reflect those actors' relative influence, preferences, and beliefs at the moment when the new institution is introduced"(214). In other words, the structural variation across states is not random. Given the ever-present uncertainty of politics, actors decide whether to adopt an institutional innovation, or even revert to a more traditional model, based on their expectation that such a system will provide the greatest utility in the future.

Along these lines, actors may support a particular selection method to achieve specific political or policy outcomes. Indeed, numerous studies have documented the effect of selection method on such outcomes as minority repre-

sentation on the bench (Glick and Emmert 1987); the likelihood of dissenting opinions (Brace and Hall 1990); responsiveness to constituents (Hall 1992); rates of litigation (Hanssen 1999); size of tort awards (Tabarrok and Helland 1999); electoral performance of incumbents (Hall 2001a); voluntary retirements (Hall 2001b); decisions on judicial review cases (Langer 2002); the severity of sentences (Gordon and Huber 2007); and votes on capital punishment cases (Brace and Boyea 2008). Assuming political actors are strategic in their intentions when designing state selection methods, it is possible that this variation in policy outcomes is, in fact, anticipated by policy makers at the point of institutional design.

Scholarship has begun to look to strategic behavior to explain the adoption of one selection method over another. The handful of such studies, including Epstein, Knight, and Shvetsova (2002), focus on the intentions of incumbent politicians to create the most suitable degree of judicial independence given their own political intentions, either making courts more subservient to their own preferences or protecting judges from the influence of rival politicians (see Berkowitz and Clay 2006; Hanssen 2004a,b). Hanssen (2004b) is unique in that he models these considerations. Hanssen bases his model on a two-period game used by Maskin and Tirole (2004), balancing accountability and independence in designing institutions that maximize social welfare. Hanssen, however, looks at the tradeoffs between policy durability associated with an independent judiciary and policy control associated with a judiciary that is responsive to inter-branch checks. He finds that incumbents, as forward thinkers in the uncertain arena of politics, will more likely create selection mechanisms with

greater inter-institutional independence when they are likely to lose power and the replacing official will likely be ideologically distant.

These accounts, however, do not speak to the influence of special interests in the design of state judicial institutions. It is clear that interest groups have a substantial stake in state judicial politics. As will be shown in the following section, these groups invest substantial financial resources in state selection processes, particularly in the form of campaign contributions in judicial elections, and anecdotal evidence from various states demonstrates that these groups can be interested in ballot campaigns to change judicial selection methods. The reason for special interest group involvement in the selection of state judges is quite evident: the decisions made by these courts can have substantial impact on the fortunes of their members, especially when those members are businesses. A telling statistic is the number of *amicus* briefs filed in state courts by the National Chamber Litigation Center (NCLC), the law firm of the U.S. Chamber of Commerce that litigates on behalf of its members and that bills itself as the "voice of business in the courts." Of the 125 cases in 2007 wherein the NCLC filed amicus briefs in every level of the judiciary and before regulatory agencies, 48 were in cases before state courts, of which 37 were before states' highest courts (National Chamber Litigation Center 2007, 2008).[1] Clearly, interest groups have a vested interest in favorable rulings by state courts. Given that they are willing to invest substantial time and money both in litigating cases before these courts and in selecting friendly judges to decide the cases,

[1] The 2008 figures were similar: the NCLC filed 36 such briefs in state appellate courts (29 before states' highest courts) of the 120 total cases it filed as party-plantiff, intervenor, or *amicus curiae*.

it would be surprising if these groups were not key players in the politics of designing the institutions wherein these decisions are made.

3.2.3 Interest Groups and Selection Methods

For the most part, however, existing scholarship dealing with special interests and the selection of judges has largely ignored the involvement of these groups in efforts to change the methods of selection in states. Rather, scholars tend to focus on the influence of these groups within particular selection systems.

In particular, much recent attention has been on the explosion of special interest money in judicial campaigns over the last decade, especially in states with partisan and nonpartisan elections (see, generally, Goldberg 2007). Studies in this vein often point to a noticeable change in the tactics of business and medical interests to stem liability penalties in tort litigation as a critical catalyst fueling this trend in judicial campaign financing.[2] Failing to institute tort reform in various states, due either to an unsympathetic legislature unwilling to enact legislation or to a liberal state supreme court striking down such legislation, business interests have begun to invest in massive campaigns to elect sympathetic judges (O'Reilly 2004, 2005; Champagne and Cheek 2002).[3]

[2] A myriad of interests fall under the rubric of groups seeking to reduce tort litigation. For the sake of brevity, I will refer to all of these as "business interests" since the groups seeking this end are all businesses (in some manner) interested in reducing the financial loss of such litigation to their organizations.

[3] Another factor often cited for this recent explosion of special interest money in judicial elections is the change in the rules for conducting these races that followed the Supreme Court decision *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), in which ethical restrictions on the ability of judicial candidates to "announce" their positions on issues were found unconstitutional (Caufield 2007; Gibson 2008; Goldberg 2007; Goldberger 2003). Until *White*, judicial codes of ethics prohibited judicial candidates from discussing specific issues in campaigns for fear that doing so would undercut the public's perception of an impartial judiciary. As such, judicial candidates were incapable of countering attacks from special

A 2003 *Forbes* article chronicled the unabashed efforts of big business interests, led by the U.S. Chamber of Commerce, to repopulate state benches, stating that these interests are "waging a secret election-campaign war on judges who favor plaintiffs in tort cases" (Lenzner and Miller 2003). One such campaign in Ohio in 2000 entailed a daunting $5 million effort by the Chamber and other business groups, which primarily sought to unseat one Ohio State Supreme Court justice. In response, a scholar noted that "virtually every state candidate is on notice that if, after election, his or her rulings stray too far from the agenda of the U.S. Chamber of Commerce, or any other equally well-funded interest group, the judge runs the risk of provoking an aggressive campaign in opposition to his or her re-election"(Goldberger 2003, 14).

Business interests, however, have not been guaranteed the balance of power in competitive states. For instance, while the Chamber spent record amounts in the 2000 Ohio election, it ultimately came up short; voters apparently rejected the Chamber's heavy-handed attack ads and retained the justice (Goldberger 2003). This suggests that popular sentiment (and, potentially, the efforts of trial attorney associations) may help counteract the lopsided resources of big business. Indeed, this may explain why in spite of the resources that economic interest groups can bring to bear in these campaigns, judges continue to award large tort settlements against large out-of-state corporations. In their cross-sectional analysis of tort awards across selection methods, Tabarrok and Helland (1999) find that judges facing partisan and nonpartisan elections are more likely

interest groups. Scholars agree that the decision in *White* lessened these constraints, and the expectation is that having done so will further politicize these races, at least to the degree that judges will feel more comfortable responding to information meant to unseat them.

than their colleagues in appointed or merit plan systems to award higher awards to plaintiffs if the defendant is located out-of-state. Such results suggests that elected judges might find it beneficial to pander to voter preferences.

Scholarship has also noted that the influence of special interests is exacerbated by voter apathy regarding judicial elections. Low voter knowledge about these elections and, accordingly, low voter participation in them has been extensively documented (see Adamany and Dubois 1976; Carbon 1980; Dubois 1979, 1986; Franklin 2002; Hall 2001a, 2007; Klein and Baum 2001; Glick 1978; Griffin and Horan 1979, 1983; McKnight, Schaefer, and Johnson 1978). These studies often underscore the fact that knowledge and participation are lowest in nonpartisan and, especially, retention elections, attributing voter attrition in the former to the lack of cues otherwise provided by partisan labels and in the latter to the noncompetitive nature of the contest. This dearth of voter participation in retention elections has two effects that are noteworthy for this paper. On the one hand, judges in states with merit plans are almost always retained and, thus, virtually have life tenures (Carbon 1980; Griffin and Horan 1983). On the other, it also creates an environment that is extremely susceptible to the influence of a well-financed interest group (see Dann and Hansen 2001; Goldberg 2007; Goldberger 2003; Reid 1999). As Franklin (2002) explains, "Nonpartisan judicial elections make it harder for voters to anchor their vote choice to their preferences and make it more likely they will cast votes in response to messages sent during the campaign, often from independent groups"(155). Indeed, the promise of a "virtual life tenure" in retention systems is jeopardized by the efforts of interest groups: "Inevitably, the outcome of such a 'plebiscite,' it is

concluded, will result in a top-heavy majority in favor of retention—subject only to the possibility that some special interest group might mount enough of a campaign against a judge to provide the decisive element in a low-turnout, majority 'no' vote" (Griffin and Horan 1979, 79). In the past two decades, retention judges have witnessed the truth of this assertion in several spectacular retention elections, in which supposedly safe judges were blindsided by multi-million dollar campaigns financed by interest groups to unseat them (Dann and Hansen 2001; Reid 1999). In other words, the supposed "life tenure" of judges in retention systems is apparently contingent on the intentions and actions of interest groups in particular elections.

The above literature provides valuable intuitions about the behavior of interest groups within particular systems, but it says little as to how these groups view one selection method relative to another, let alone their motivations to change selection systems. Indeed, very little scholarship exists that systematically investigates the effect of interest group preferences on the variation of selection methods across states.[4]

Anecdotal evidence, however, suggests that interest groups weigh the cost of electing friendly judges against the probability that the state officials who would appoint judges will remain sympathetic to their preferences. Consider a recent example. A group called Minnesotans for Impartial Courts, with substantial

[4] One noted exception, Hanssen (2002), asserts that state bar associations campaign to adopt merit plans to further their interests. Commissions that recommend "qualified" candidates to the governor or legislature are often populated by the local bar. He also argues that greater independence from electoral reprisal increases the amount of litigation because the "law" is less predictable when interpreted by justices who are not tethered to electoral preferences. The author finds support for this latter argument in the greater number of legal filings in merit plan states.

contributions from businesses, formed to lobby in support of a proposed change from nonpartisan judicial elections to a merit plan. As the president of the group explained, "Frankly, law firms and businesses are supporting us in part because if they don't, they know that they might be writing significant checks in perpetuity to every judicial candidate running for office" (*Minnesota Lawyer* 2008).

This anecdote speaks implicitly to group calculations about expending resources on institutional changes. Assuming interest groups have an expectation that friendly judges will be appointed, there is a clear financial incentive to invest in changing selection systems if the cost of doing so is lower than the long term cost of electing friendly judges. This appears to have been the case for businesses contributing to the campaign in Minnesota. That these groups were willing to spend money on elections in the first place indicates they had some expectation that their contributions would elect friendly judges, and that the value of such contributions was lower than the potential cost incurred by judicial decisions made by unfriendly elected judges. If it is assumed that judicial decisions made by unfriendly elected judges are as costly to businesses as those decisions made by unfriendly appointed judges, the groups in Minnesota would not spend money to change the selection system unless they had some certainty that they could influence the appointment process. Otherwise, these groups would be paying to create a new selection system that would make them strictly worse off, since the cost incurred by judicial decisions made by unfriendly appointed judges would be higher than cost of electing friendly judges. That these groups did invest in the change is a clear indication that they expected

to have significant control over appointments in the new system, and that the change will ultimately be beneficial to their long-term bottom line. Thus, the actual momentum to abandon an elective system might be a function of the financial considerations of interest groups, rather than the efforts by reformers to insulate courts from these groups.

Other anecdotal evidence points to interest groups assessing different selection methods relative to changes in voters' preferences. Consider the tradeoffs that business interests face between systems in the perennial campaign to change Texas from partisan elections to a merit plan (see Champagne 1988, 1993; Champagne and Cheek 2002; Shuman and Champagne 1997). Tort defense interests have funneled significant sums into PAC organizations campaigning to reform the system and plaintiff interests have worked in opposition to these efforts. As Champagne (1993) explains, until the late 1980s, plaintiff interests dominated the bench because defense interests could not compete with the sizable campaign funds that plaintiff groups could invest from large settlements to elect anti-business judges to the Texas Supreme Court. Defense interests thus looked to a merit plan as the best solution to avoid the electoral results that continually returned anti-business justices to the bench. While business interests could not guarantee that the governor would be sympathetic to their interests, this alternative was preferable to a judiciary wholly beholden to plaintiffs. Champagne (1993) describes how the calculus changed in the 1988 elections when four of five Republican candidates backed by the Texas Medical Association beat sitting justices, such that the new bench had a defense-oriented majority. As Champagne (1993) explains, "Now that Republicans can be elected to the Court (something

that had not happened since Reconstruction) and now that defense-justices were in the majority, enthusiasm for merit selection seemed to wane"(103). In sum, when the electorate seemed firmly in the corner of plaintiffs, business interests looked to a more elite selection method to exploit potential slack in the responsiveness by politicians to the anti-business sentiments of their electorate. However, as the underlying sentiments of the electorate changed, becoming less responsive to anti-business interests, the values across selection systems shifted in Texas. Accordingly, as business interests found they could convince voters to elect defense-minded justices, their zeal to invest in a change to an appointed system faded.

These anecdotes underscore the importance of considering the implications of institutional design when evaluating the influence of interest groups in selecting state supreme court judges. Again, this is in contrast to the tendency in much of the literature, particularly that by reform-minded scholars, to evaluate selection methods relative to the observed behavior of interest groups and judges within those systems, as though the actions of these actors were independent of the possibility that states could move to alternative selection methods. In effect, these accounts could be missing the forest for the trees, as one method of selecting judges is not necessarily less free of interest group influence than another if these groups' participation in the initial institutional design is taken into account.

In particular, the distribution of selection methods across states (or, at least, the maintenance of the status quo distribution) may reflect the equilibrium result of interest groups' preferences for particular selection methods, given their

expectations about changes in the ideological sympathies of states' politicians, judges, and voters. If a group has some confidence that the appointing authority in a state will remain sympathetic to its preferences in the future, it will likely prefer one of the elite selection methods (i.e., the merit plan or full appointment). Not only might it be easier to convince the handful of sympathetic politicians to appoint a judge they expect will favor the group's interests, but in the event that a judge does stray, it will likely prove easier (and cheaper) to unseat the bad apple than to replace a judge in a system with nonpartisan or partisan elections. On the other hand, if the group is less certain that current and future state politicians will champion their cause, it might find its interests better served through popular elections, where enough money invested in a campaign (as long as the group avoids a backlash from voters) might be the best way to ensure a sympathetic bench.

The next section develops a simple heuristic model to better understand these motivations, analyzing interest group expenditures to change a state's selection method relative to the various parameters discussed above. The approach is similar to that of Hanssen (2004b), Maskin and Tirole (2004), and Tridimas (2005), who look at judicial independence. This model, however, emphasizes the decisions of an outside group to control the political outcomes of an institution. A key result is that a divergence in preferences between the electorate and elected officials is a necessary condition for change in a state's selection method, making it worthwhile to interest groups to move from one system to another.[5] If interest groups were certain that elected officials would

[5] Divergence of preferences between a state's non-judicial elected officials and voters in judicial elections might occur for a number of reasons. Given lower voter participation in

always appoint judges that mimicked the preferences of the electorate, or that the electorate would always elect judges that elected officials would otherwise appoint, interest groups should be indifferent to selection methods, simply preferring the one that is cheapest. As will be shown in the empirical section, the persistent wellspring of state legislation for changing to both more elite *and* more popular judicial selection methods indicates that this is not the case.

3.3 A Simple Model of State Judicial Selection Politics

3.3.1 Primitives

The model presented here entails an interest group, assumed to be "pro-business," deciding how much to invest in a campaign to change the method of selecting supreme court justices in a particular state.[6] To keep the model

judicial elections relative to other state-wide elections (often via ballot roll-off), the electorate in the former might not be the same as that in the latter. Likewise, low voter knowledge and interest concerning judicial elections might have a selection effect: voters in these elections are likely better informed and, thus, might have different preferences than other voters in a state's electorate. Voter preferences for judges might be different from their preferences for governors or legislators, such that these potential appointers might select judges that would otherwise not have been elected. Finally, states that elect judges by district might elect judges with preferences different from those of officials elected in state-wide races. Conversely, assuming appointment authority is given to the legislature, the aggregated preferences across legislative districts might not precisely map onto the preferences of voters selecting judges in state-wide elections.

[6] This game is applicable to any special interest group concerned about court decisions that affect its financial interests, particularly decisions regarding awards in tort litigation and constitutional review of tort reform legislation. These groups could be from either side of the ideological spectrum—that is, either "pro-business," including medical practices, corporations, insurance companies, trade associations favoring tort reform, and chambers of commerce, or "anti-business," including trial lawyer associations and consumer protection groups. For convenience of notation and discussion, however, I assume that the group in the model is pro-business. Anti-business groups would make the same considerations, but assess sympathies of the state's electorate and officials relative to their interests. The model assumes that competing groups act independently of each other. While this might seem a heroic assumption, the empirical analysis that follows complements this assumption by only looking

simple, the interest group only considers two potential selection methods, s. These methods will establish either an appointed court, A, or an elected court, E, such that $s = \{A, E\}$.[7]

There are two kinds of actors in this game: g, the interest group, and j^s, a representative median judge that would sit on the state supreme court if the judiciary were selected under a given method, s. As will be discussed below, only the decisions of g and j^E are relevant to the model.[8] The interest group cares about its utility function given a state's selection system:

$$U_g(s) = b(d_j) - \tau_s \tag{3.1}$$

where $b(\cdot)$ is the benefit the group receives from the decision, d_j, of the court's median justice, j^s, and τ_s is an exogenously set cost required to produce pro-business decisions under the given selection system. In general, $d_j = \{PB, AB\}$; that is, the median justice can either decide a case in a pro-business manner (i.e., upholding the constitutionality of state tort reform legislation or reversing

at bill introductions in state legislatures. Since the expectation is that nothing will come of the bill, as most die in committee, the initial decision to lobby a legislator to introduce a bill is likely made without much concern that an opposing bill will be introduced or that the potential referendum campaign will be opposed by a competing group. Nonetheless, future research should address this issue, since groups might invest more (or less) in the initial effort to lobby legislators if they have an expectation that a bill will be passed and that a competing group will form in a referendum campaign.

[7] An intuitive interpretation of this bifurcate construction is the distinction between initial appointment requirements—that is, full appointment and merit plan systems versus nonpartisan and partisan election systems. Of course, in the real world, interest groups could also seek change *within* these two more general groups (i.e., from partisan to nonpartisan elections) or skip intervening systems (i.e., from partisan elections to full appointment). Again, these nuances will be put aside for future research.

[8] To reduce clutter, whenever the generic j^s is subscripted (i.e., to indicate the decision of a generic median judge), I will drop the s superscript. If a particular selection method is referenced, the appropriate superscript will be used.

a large jury award in a liability suit) or in an anti-business manner (i.e., striking down the reform statute or upholding the award). However, only the choice of j^E is of consequence, as it is assumed that there is no agency loss between j^A and appointing officials. For simplicity, I normalize $b(PB)$ to 1 and $b(AB)$ to 0. Finally, since overhead costs are minor in appointed systems relative to those in elected systems (i.e., contributions for competitive judicial campaigns), I assume $\tau_A = 0$ but $\tau_E > 0$.

In the game, the interest group invests some amount of money $c \geqslant 0$ on a ballot measure to change the selection method.[9] If $c = 0$, the interest group has decided not to campaign to change the system. Let $\Pr(s_{t+1} \neq s_t) = p(c)$, such that $p(c)$ is the probability given group expenditures that the state changes its selection method from the current system s_t to the alternative system s_{t+1}. I assume that $p(c)$ is symmetric with respect to s_t, and that it is an increasing function but decreasing at a marginal rate—that is, $p'(c) > 0$ and $p''(c) < 0$.[10] The interest group ultimately maximizes the following expected utility given a

[9] Such an investment might entail lobbying expenses, contributions to legislators willing to introduce legislation beginning a referendum process, costs for instigating a ballot initiative, or campaign expenses to convince state voters to adopt the change. I package all of these investments as "campaign costs" to change the selection method.

[10] This assumption is reasonable since an interest group, unless it were acting strategically, would not finance a ballot measure if it did not think that doing so would improve the chances of the measure's adoption. Consequently, I assume that the intentions of the interest group in financing the measure are sincere. Further, the marginal return for such a campaign would likely be greatest at lower levels of expenditures given the relatively lower *ex ante* knowledge of voters about such measures, such that any information is enough to affect the outcome. But this effect would fade at higher contributions, since the least-informed voters will already have been convinced and more-informed or ideological voters will become increasingly more expensive to sway.

level of expenditure:

$$\mathbb{E}[U_g^{s_{t+1}}(c)] = p(c)\mathbb{E}[U_g(s_{t+1})] + (1 - p(c))\mathbb{E}[U_g(s_t)] - c \tag{3.2}$$

where $U_g^{s_{t+1}}(c)$ is the utility the interest group receives from a change to the alternative system given some expenditure spent to do so and the right-hand side of the equation is a weighted probability of the utilities the group expects for the alternative and current systems minus the given expenditure it decides to spend to change from the latter to the former. Consequently, I consider the expected utility from each of the two selection systems.

The appointment subgame is relatively simple. The interest group observes parameter α, which is a probability that the political environment in the state (and, therefore, the elected officials that appoint the court) will remain pro-business in the next period. This probability is exogenously determined and it is assumed that pro-business elected officials will accurately appoint pro-business justices who will decide cases favoring the interest group. Essentially, this means that $\alpha = \Pr(d_{j^A} = PB)$; that is, it is also the group's degree of certainty that an appointed median justice will make pro-business decisions.

In the election subgame, the median justice j^E must decide $d_j = \{PB, AB\}$. The median justice wants to retain her seat but also might have an innate ideological bias (or legal understanding) that can affect her decision to either favor or disfavor the interest group. Consequently, j^E has the following utility function:

$$U_{j^E}(d_j) = \begin{cases} v(r) + \lambda & \text{if } d_j = PB \\ v(r) - \lambda & \text{if } d_j = AB \end{cases} \tag{3.3}$$

where the realized value from retaining office $v(\cdot) = \{0, 1\}$ corresponds to whether the justice wins reelection $r = \{0, 1\}$, and $-1 \leqslant \lambda \leqslant 1$ is a parameter measuring the innate pro-business tendency of the justice independent of her reelection prospects. Whereas $\lambda = 1$ implies a totally ideological judge intent on ruling in favor of business, $\lambda = -1$ implies a judge intent on ruling against business, and $\lambda = 0$ would be a judge only concerned about reelection.[11] Adopting the basic intuitions of Mayhew (1974), I assume that elected state supreme court judges, as politicians, care about retaining office above ideology, such that $U_{j^E}(v(r)) > U_{j^E}(\lambda)$.

In deciding a case, j^E must consider the need to pander to her electorate with pro-consumer (or anti-business) decisions relative to the ability of the interest group to convince ambivalent voters to vote against the anti-business candidate (or for the pro-business candidate). Let $m = \{AB, \neg AB\}$ indicate whether a majority of the electorate is either staunchly anti-business or ambivalent to anti-business issues (including anti-business decisions by the state supreme court). If $m = AB$, a majority of the electorate wants to redistribute the wealth of the interest group, such that a justice, regardless of her ideology, must rule against business to retain her seat. On the other hand, if $m = \neg AB$, a majority of the electorate either has no interest in redistributing wealth or has insufficient knowledge to make an informed decision on the matter and, thus, can easily be persuaded by the interest group to unseat an anti-business candidate (or reelect a pro-business candidate). The consequences to r based on d_{j^E} given m are as

[11] As implied above, λ could be interpreted as an innate tendency of the judge to "understand" the law as either favoring business or not. I will refer to λ in terms of ideology but the alternative interpretation should be kept in mind.

follows:

$$r = \begin{cases} 1 \begin{cases} \text{if } (d_{j^E} = PB \mid m = \neg AB) \\ \text{if } (d_{j^E} = AB \mid m = AB) \end{cases} \\ 0 \begin{cases} \text{if } (d_{j^E} = PB \mid m = AB) \\ \text{if } (d_{j^E} = AB \mid m = \neg AB) \end{cases} \end{cases} \tag{3.4}$$

Finally, let $q = \Pr(m = \neg AB)$ be the probability that a majority of the electorate m is ambivalent about anti-business decisions. It is important to note that q also indicates the influence of the interest group over the result of the election since the electorate can (and will) be convinced to vote according to the preferences of the interest group if $m = \neg AB$.

3.3.2 Solving for Optimal Expenditures

As all information in the game is known to both players and the players make choices sequentially, I can solve for the unique subgame perfect equilibrium. I begin by solving the game for the state of the world in which interest group g considers changing from an elected court to an appointed court. The implications of the findings for the other possible state are then discussed—that is, where g considers changing from appointed to elected, maximizing its expected utility with respect to c.

Solving by backwards induction, I consider the two subgames. Again, $\mathbb{E}[U_g(A)]$ is straightforward, as it is assumed that $\tau_A = 0$. Further, as there is no agency loss between the appointing officials and justices, the value of the judge's decision to the group (i.e., $b(PB) = 1$ and $b(AB) = 0$) relates directly to α (g's certainty that the state's politicians will favor its interests in the next period).

As such,

$$\mathbb{E}[U_g(A)] = 1(\alpha) + 0(1-\alpha) = \alpha \tag{3.5}$$

In the election subgame, g can only get a positive payoff if $d_{j^E} = PB$. As such, the interest group calculates the value of q that makes the justice indifferent between deciding a case in favor of business and deciding against it—that is,

$$\mathbb{E}[U_{j^E} \mid d_{j^E} = PB] = \mathbb{E}[U_{j^E} \mid d_{j^E} = AB] \tag{3.6}$$

Using the utility structure from (3.3) and substituting in payoffs from (3.4), this indifference condition becomes

$$q(1+\lambda) + (1-q)(0+\lambda) = q(0-\lambda) + (1-q)(1-\lambda) \tag{3.7}$$

Solving for q,

$$q = \frac{1}{2} - \lambda \tag{3.8}$$

Let q^* equal the right-hand side of this equation and be the critical value of q of interest to g, such that if the actual value of q is greater than q^*, then $d_{j^E} = PB$; but if it is less than q^*, $d_{j^E} = AB$. Note that the right hand side of (3.8) implies that at certain values of λ (i.e., $\lambda < -\frac{1}{2}$ and $\lambda > \frac{1}{2}$) the judge becomes ideologically obstinate, such that she is indifferent to the preferences of the electorate or the strength of the interest group and only retains her seat if her ideological disposition is aligned (or, at least, does not conflict) with that of the electorate. However, by the above assumption that $U_{j^E}(v(r)) > U_{j^E}(\lambda)$, these values are irrational. Thus, the actual λ in this solution must be $-\frac{1}{2} \leqslant \lambda \leqslant \frac{1}{2}$.

Finally, to finish this subgame, let $\beta = \Pr(q > q^* \mid \lambda)$. Thus,

$$\mathbb{E}[U_g(E)] = (1 - \tau_E)(\beta) + (0 - \tau_E)(1 - \beta) = \beta - \tau_E \tag{3.9}$$

I can now solve for the optimal value of c, the expenditure of the interest group to change the selection method from election to appointment. Substituting the results from (3.5) and (3.9) into the group's expected utility,

$$\mathbb{E}[U_g^A(c)] = p(c)\alpha + (1 - p(c))(\beta - \tau_E) - c \tag{3.10}$$

Differentiating $\mathbb{E}[U_g^A(c)]$ with respect to c and equating it to zero, produces the group's first order condition:

$$p'(c) = \frac{1}{\alpha - (\beta - \tau_E)} \tag{3.11}$$

Taking the inverse, the optimal value of c (call it c^*) thus is

$$c^* = max \left\{ 0, \left[p' \left(\frac{1}{\alpha - (\beta - \tau_E)} \right) \right]^{-1} \right\} \tag{3.12}$$

Given that $p(c)$ is a concave increasing function, the right-hand-side function in the above equation (and thus c^*) must be positive but decreasing in its arguments at a marginally increasing rate. Having identified the optimal function of expenditures by the interest group to change a state's selection method from elected to appointed, I now turn to the comparative statics.

3.3.3 Comparative Statics

Manipulating the component arguments in the right-hand side of equation (3.12) while holding the other arguments constant illustrates the relationship between political and financial considerations in each system and the decision of the interest group to seek change across these institutions. Of particular interest are the effects of changes in α, τ_E, λ, q, and β on expenditures. The first order conditions of c^* with respect to these parameters are as follows:

$$c^{*'}(\alpha) > 0 \tag{3.13}$$

$$c^{*'}(\tau_E) > 0 \tag{3.14}$$

$$c^{*'}(\lambda) < 0 \tag{3.15}$$

$$c^{*'}(q) < 0 \tag{3.16}$$

$$c^{*'}(\beta) < 0 \tag{3.17}$$

Intuitively, these results make sense. For example, as equation (3.13) indicates, the more certainty a pro-business group has that a state's governor and legislature will favor business interests for the foreseeable future, the more likely it will be to invest in change to an appointed system.

Changes to the parameters in the election subgame are also reasonable. Most obviously, as seen in (3.14), increases in the cost of electing pro-business judges, τ_E, will begin making an appointed system more attractive *ceteris paribus*. The last three equations speak either to the influence that a business interest has over the state's electorate or to the innate pro-business ideology of a represen-

tative median justice. When a judge is more likely *ex ante* to rule in favor of a pro-business interest group, equation (3.15) confirms that it becomes less necessary, all things being equal, for the interest group to invest in a change to an appointed system. This is due to the fact that as λ increases, the threshold q^* by which an anti-business electorate could exert power begins to drop, making it more likely that the interest group will be able to determine the outcome of an upcoming judicial election by convincing ambivalent voters to reelect or unseat the judge. Further, if one were to make the reasonable assumption that it is cheaper to reelect pro-business judges than it is to unseat anti-business judges, higher values of λ would make an elected system even more attractive, holding all other parameters constant. Of course, as the proportion of the electorate that is indifferent to anti-business court decisions—that is, q itself—increases, it becomes more likely that information (or misinformation) from the interest group can affect the decisions of voters in the upcoming election.

But aside from direct campaign expenditures to populate the bench with friendly judges, a pro-business group will also want to retain an elected system if it is certain that it can intimidate sitting non-recalcitrant judges to hand down favorable rulings through the threat of expending such resources to elect friendly judges. Again, this calculus shifts when the electorate's ideology becomes more hostile to business interests, as it both becomes more expensive to convince voters to elect pro-business judges *and* judges who are innately less likely to side with business will feel electorally more secure ruling against the group, which ultimately will begin to undermine the business interest's bottom line. If such is the case, the group will begin to see an appointed system as more

efficient. So, regardless of which actually changes, increases in either λ or q will *ceteris paribus* make the elected system more attractive and thus reduce the expenditures of the special interest to abandon the status quo; the reverse is true when either of these parameters decrease. The combined effect of these arguments in (3.15) and (3.16) are captured and confirmed in the decreasing first order condition in (3.17).

Another interesting way of looking at the above results is to think about the relationship of two critical parameters across selection systems, α and q. Considered separately, these parameters speak to the respective sentiments of the politicians and voters in a state, but considered relative to each other, they provide insight into the degree of effective representation in the state and its effect on which selection method will be preferable to the interest group.

Consider $\delta = \alpha - q$, or the extent of divergence in the preferences of elected officials in the state from those of the electorate. Essentially, δ is the degree of agency loss in the state, at least in the policy dimension of interest to the group. A positive δ entails elected officials who are more pro-business than their constituents; whereas the opposite is true when δ is negative. Substituting $\alpha = \delta + q$ into equation (3.12), the nonmonotonic first order condition with respect to this agency loss is

$$c^{*'}(\delta) > 0, \text{given } \alpha > q \tag{3.18}$$

$$c^{*'}(\delta) < 0, \text{given } \alpha < q \tag{3.19}$$

When a state's electorate is less antagonistic to business interests than are its

political leaders, the interest group will be more likely to turn to the masses to achieve its ends concerning the court. But as the politicians of a state become more pro-business relative to their electorate, the interest group will expend more resources to adopt a selection method that will end-run popular sentiment. This result shows that a loss of agency between elector and elected plays into the hands of special interests, as simply alternating court selection methods could open a door to more favorable judicial outcomes, an option that would not be possible given an anti-business electorate and responsive politicians.

Finally, note that an interest group considering a change from an appointive system to an elective system would face a similar tradeoff between the benefits of the two systems. However, the effect of the arguments would have the opposite effect. In other words, assume that a campaign by an interest group to change the selection method from election to appointment was successful as a result of its expenditures. If that same interest group considered an immediate change back to an elected system, it would face the following optimal expenditure function:

$$c^* = max\left\{0, \left[p'\left(\frac{1}{(\beta - \tau_E) - \alpha}\right)\right]^{-1}\right\} \tag{3.20}$$

such that the same arguments that compelled its contributions to the initial change would inhibit them in this subsequent proposed change. Only a change in the component arguments could upset the new equilibrium. As such, the model not only predicts systematic stability given a schedule of arguments, but it also suggests the effect of these arguments regardless of the status quo institution.

This will be helpful in applying the model to empirical analysis. Likewise, I reiterate that these arguments are applicable to "anti-business" groups as well. These groups would simply make the above considerations relative to the sympathies of the state's electorate and officials to their interests.

3.4 Testing the Model

3.4.1 Sample and Variables

The predictions of this model are somewhat difficult to evaluate directly. Laws requiring interest groups to report campaign contributions for ballot measures vary greatly by state, as do the procedures by which these contributions are made public. But even if transparency were not an issue, it would be insufficient to simply track money flowing into the coffers of organizations campaigning for selection-changing ballot measures, as such proposals rarely make it to the ballot. Indeed, since 1996, there has not been a single popular initiative to change the selection method of a state's supreme court judges (Initiative and Referendum Institute 2009). Voters in several states have encountered referenda on ballots, but these were conditional on prior legislation passed in state legislatures. Looking only at the money associated with campaigns around these referred measures would introduce unacceptable selection bias—groups interested in changing the selection method likely invest money earlier in the legislative process, lobbying state legislators to introduce legislation and donating to their reelection campaigns. Unfortunately, like campaign contributions, laws requiring lobbyist disclosures vary by state, and these laws are likely less enforced and

the data collected less reliable, relative to their federal counterparts. As such, it is not feasible to simply follow the money.

This analysis will therefore evaluate state legislation that would change the selection method. For the same reason that only looking at ballot measures would entail unacceptable selection bias, it is necessary to look beyond enacted legislation since a failure to enact introduced legislation might be due to reasons unrelated to interest group lobbying efforts. And while these bills are likely introduced for reasons other than special interest lobbying, it also reasonable to assume that if a group is interested in changing the selection method, it will find at least one receptive state legislator to introduce legislation, especially since the relative cost of a bill introduction is low. It is then reasonable to assert that if an interest group lobbies to change the selection method, we should see bills introduced in a state legislature. Thus a critical necessary condition required for the model's predictions—that legislation changing the selection method must first be introduced—can be evaluated relative to factors in the state that would induce interest groups to seek such a change.[12]

[12] This rationale does not speak to the possibility that groups might have a prior expectation that enactment is so unlikely that they would not be willing to pay the minimal cost to introduce the bill. For the meantime, I will just assume that the cost of getting a bill introduced is so small that even the smallest probability of a bill gaining legislative traction will warrant action.

Also, this research strategy departs from the school of literature positing that the diversity and density of interest groups in state politics affect policy outcomes (see, especially, Gray and Lowery (1996), Gray et al. (2004), and Monogan, Gray, and Lowery (2009). These factors might be relevant in many areas of state policymaking. However, several caveats preclude their use in this analysis. This literature asserts that interest group density and diversity help overcome popular resistance to overtly ideological policies such as welfare, abortion, taxation, etc. While groups interested in changing states' selection methods might have ideological motives, legislation proposing these changes does not have an obvious ideological tenor. Further, there is much evidence (some cited throughout this paper) of national organizations (e.g., the U.S. Chamber of Commerce) intervening in judicial elections or demonstrating interest in the structure of state courts. As such, it is unclear that the number or diversity of interested

Accordingly, relevant bill introductions (i.e., those proposing to change the *entire* court from its current selection method to a new one, based on the four selection categories identified in Table 3.1) were identified in the LexisNexis Total Research System for 1996 to 2008.[13] This process created a sample of 272 *original* bill introductions in 35 states; the breakdown by state, year, and direction is summarized in Table 3.2.[14] Some states create new bills (i.e., new bill

groups within the state would be sufficient to explain changes to particular states' selection methods. Finally, there is no evidence that these factors entail a necessary condition for the *introduction* of a bill proposing a change of selection methods. Indeed, the frequency of such bill introductions in some states seems to indicate that the transactional costs for such introductions are relatively minor, such that one well funded interest group could have significant influence over these introductions. It is possible that *passage* of these bills requires a certain density or diversity of relevant interests to overcome low information or interest by legislators or voters. Again, however, given the necessity to use bill introductions rather than instances of passage, it is not readily apparent that these factors are relevant for this part of the legislative process, especially for such legislation that is not overtly ideological. Indeed, interest group activity is not explicitly included in the main empirical models that will follow. As such, I underscore that this analysis is only meant to inductively test implications of the formal model by evaluating one critical necessary condition for its real-world application—that relevant legislation will be introduced given changes to underlying political conditions in states.

[13] Searches were first conducted in the "State Net Bill Tracking, Combined Archive," pulling bills with variations and extensions of the words 'elect,' 'select,' and 'appoint' throughout a particular record that also had the words 'supreme court,' 'court of appeals,' 'appeals court,' or 'appellate.' Bills identified as potentially applicable to the analysis (determined by its description in the 'synopsis' field) were then looked up and read using the "State Net Bill Text, Combined Archive." A new search using the same parameters from the bill tracking search was then started anew in the "State Net Bill Text, Combined Archive." Bills not identified in the above bill-tracking searches were culled, reading the full text of those bills with potentially applicable synopses. For good measure, a final search in both archives was run on the terms 'judicial article' or 'judiciary article' in the event that legislation was summarized as simply revising the judiciary article of the state's constitution. Because 1996 is the first year that both archives have full records from all states, it was used as the first year for possible introduction in the sample. Note that some bills introduced in 1996 have bill numbers starting '1995,' given the biennial sessions of some legislatures. These bills are included in the sample, as the year of introduction is the parameter of interest in this analysis. Likewise, the year of other bills in the sample are coded relative to their date of introduction, regardless of the year in the number of the bill. The list of relevant bills are available from the author upon request.

[14] If enactment of one bill was contingent on the passage of another bill (likely a constitutional amendment requiring popular approval), the two bills were coded as one under the initial bill number.

numbers) to amend active pieces of legislation, while other states amend active legislation by introducing new versions of the bill (e.g., 'pre-filed,' 'introduced,' 'engrossed,' 'revised,' or 'substituted') under the same bill number. To compare introductions across these different procedures, the dependent variable in this analysis is simply whether the state legislature in a given year introduced at least one bill to change the initial selection method for its state supreme court. Further, since some states could introduce legislation to move the court selection method in a more popular direction, a more elite direction, or both, two versions of the model are estimated, one for each possible direction of change. Depending on the direction of the introduction, those states with a totally appointed court or those using partisan election are removed from the relevant model, as those states could not change to a more elite or popular system, respectively.

It is also worth discussing the operationalization of the measurable parameters in the above comparative statics.[15] The innate ideology of the median justice is captured using the "party adjusted judge ideology score" (PAJID) for state supreme court justices as estimated by Brace, Langer, and Hall (2000).[16]

[15] The parameter τ_E (i.e., the cost an interest group pays to elect sympathetic judges) is not included in the empirical model. While campaign expenditures might seem a reasonable proxy, these data can only be collected for states that currently elect judges. For states with appointment, it is not obvious how to measure the amount an interest group would expect to pay if the state were to transition to an elected bench. Future research might incorporate assumptions based on regional expenditures or matching on state characteristics to address this component of the comparative statics.

[16] Because PAJID is a static measure based on the ideology of the appointing officials or the election returns at the time the judge took the bench, it is likely a better measure than one based on the judge's decisions while on the bench, as the behavior of the elected judge is determined endogenously in the formal model. For 1996-2005, the estimated PAJID for the median justice is used. Because the most recent measures for this variable are not yet available, the 2005 estimates are simply carried forward for 2006-08. Because significant turnover on any given bench is rare from one year to the next, as most states have staggered terms, this work-around should not substantially bias the results of the analysis.

Table 3.2: Bill Introductions to Change State Supreme Court Selection, by Bill Type, State, and Year (1996-2008)

Bill Introductions toward More Popular Selection

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	Total
Arizona	1								1					2
Colorado		1												1
Connecticut		1												1
Florida			2			2								4
Georgia										1				1
Hawaii		1								1				2
Indiana				1				1						2
Kansas										2				2
Mississippi		1					3	5	5	6	2	2	2	26
Missouri									1					1
Montana*										1				1
New Jersey		2	1		1		1	1	3		3		3	15
New York										1				1
South Carolina	2	1		2		3		1		1		1		11
Tennessee			2	3	2			1	2	8	2	6		26
Virginia				1										1

Bill Introductions toward More Elite Selection

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	Total
Alabama	2	2	1	2	2	3	1		2	2	2	2	5	26
Arizona	1													1
Arkansas*		2		3										5
Florida						1	3	1						5
Idaho			1					1						2
Illinois	3	1								1				5
Indiana										1				1
Kansas											1			1
Kentucky*	1		1											2
Louisiana		3		4		1		2	1					11
Michigan				1		1			1					3
Minnesota									1				3	4
Mississippi	1	4	2	1	1	4	3	4	5	4	1	2	3	35
Missouri												1		1
Nevada*												1		1
New Mexico			1											1
North Carolina		1	2	1		4		1		3		1		13
North Dakota*		1												1
Ohio								1		1				2
Oregon*						1								1
Pennsylvania													1	1
Texas*		5		4		5		5		2		2		23
Washington												1		1
West Virginia	1	1			3		1	1	3	4	5	4	5	28
Wisconsin				1										1

Note: The list of actual bills available from author upon request.
*States with biennial legislatures at some point during the period of analysis. Kentucky began holding annual legislative sessions in 2001 (National Conference of State Legislatures 2010).

Electorate preferences are measured by the proportion of the state's two-party vote for the Republican candidate in the previous presidential election (using a linear imputation for the intervening years); it indicates the likelihood that conservative judges will be elected in the state.[17] The proportion of Republican seats in the state legislature (averaged across the two chambers) and a dummy for Republican governors will measure the degree of conservatism of the state's politicians, and thus the probability that conservative judges will be appointed.[18]

Finally, the most interesting result from the comparative statics, agency loss, is measured as the difference between the proportions of Republicans in the legislature and the Republican presidential vote share. The theoretical model conditions the effect of agency loss on the ideological preferences of the electorate

[17] Data for presidential election returns were taken from Leip (2009). Presidential vote share is likely the most straightforward and readily available indicator of state-wide ideological preferences; and given that it is observed every four years, it also speaks to how interest groups might *perceive* ideological change in state electorates over time. I say "perceive" because the presidential vote share in a particular state for a given election is affected by factors not necessarily related to actual changes in the electorate's ideology, such as candidate valence, economic conditions, etc. However, a state going from red to blue from one election to the next would nonetheless create a strong perception among interested observers that the state's electorate had moved in a more liberal direction. States' Republican two-party presidential vote shares are highly correlated with the Berry et al. (1998) citizen ideology scores, measured as increasing in 'liberalness,' with a correlation coefficient of -.8082, which is statistically significant at greater than a 99.9 percent level of confidence.

[18] These data come from Klarner (2003) for 1996-2007 and the Web sites of the National Governors Association and the National Conference of State Legislatures for 2008. The partisan makeup of the legislature is a good immediate indicator of what is possible from a state's government in terms of policy and institutional design. Although dynamic measures of state elite and popular ideology exist (in particular, Berry et al. (1998)), it is uncertain that these measures are on a comparable scale, which is necessary to construct the agency loss measure. Further, since the components are indirect measures, relying on interest group measures of congressional delegations as proxies, it is also uncertain if such measures speak more to the decisions of national representatives on national policy than to the behavior of law makers in the state. The Republican proportion of the legislature is also highly correlated with the Berry et al. institutional ideology scores (increasing in 'liberalness') with a coefficient of -0.6267, which is statistically significant at greater than a 99.9 percent level of confidence.

relative to those of its elected officials. As such, I use an absolute measure of agency loss but condition it on whether the electorate or state officials is more conservative (proxied by party). Therefore, in the empirical equations analyzing the effect of agency loss, its absolute value is interacted with indicators capturing the direction of the agency loss.[19]

The formal model separates the independent effect of the various parameters from that of agency loss, which is a combination of some of those parameters. As such, each of the two directional equations (i.e., those for popular- versus elite-direction bill introductions) are each tested separately using the component parameters or agency loss. Equations (3.21) and (3.22) model the probability that state i in year t will introduce a bill to change the selection method of its supreme court judges as a function of variables discussed above, with the first equation incorporating the independent effects of the parameters and the second using their combination to demonstrate the effect of agency loss.

$$\begin{aligned}\Pr(Introduction_{it}) = \Phi\ (&\alpha + \beta_1\, Elite\ Conservatism_{it} \\ &+ \beta_2\, Popular\ Conservatism_{it} \\ &+ \beta_3\, Republican\ Governor_{it} \\ &+ \beta_4\, Median\ Judge\ Liberalism_{it} \\ &+ \beta_5\, Appt/Retention\ Election_{it} \\ &+ \beta_6\, Nonpartisan\ Election_{it} + e_{it}) \qquad (3.21)\end{aligned}$$

[19] Note, however, that the operationalization of agency loss does not directly incorporate the party or ideology of the governor, as it is not obvious if the effect of that office would be multiplicative or conditional on the ideology of the legislature. However, in the empirical models that incorporate agency loss, the party of the governor will be included as a control.

$$
\begin{aligned}
\Pr(Introduction_{it}) \;=\; & \Phi\,(\alpha + \beta_1\, Absolute\ Agency\ Loss \\
& \qquad \text{x}\ Greater\ Elite\ Conservatism_{it} \\
& + \beta_2\, Absolute\ Agency\ Loss \\
& \qquad \text{x}\ Greater\ Popular\ Conservatism_{it} \\
& + \beta_3\, Republican\ Governor_{it} \\
& + \beta_4\, Median\ Judge\ Liberalism_{it} \\
& + \beta_5\, Appt/Retention\ Election_{it} \\
& + \beta_6\, Nonpartisan\ Election_{it} + e_{it}) \qquad (3.22)
\end{aligned}
$$

Two dummy variables are also included for the two 'middle' selection methods (i.e., appointment with retention elections and nonpartisan election) to control for the starting method for a particular state in a given year.[20]

It is also important to note that the formal model speaks to either business groups *or* more liberal interest groups (e.g., trial lawyer associations or consumer interest groups) seeking to change state selection methods. As such, expectations about parameter arguments are conditional on the direction of the type of bill introductions (i.e. elite versus popular) and the ideological preferences of state electorates and political officials *relative* to the type of interest group. For instance, a conservative interest group is predicted to be more likely to seek change toward a more popular selection system only when the electorate in the state is more conservative than elected officials, whereas a liberal interest

[20] The base categories are partisan election in the elite-direction model and appointment in the popular-direction model, as those states currently functioning under the fourth category (i.e., appointment or partisan election, respectively) are not included in that particular estimation of the model.

group would seek such change only when officials are more conservative. Likewise, a liberal interest group will be more likely to seek change toward a more elite selection system only when officials in the state are more liberal than the electorate, whereas again a conservative interest group would seek such change only when the arguments are reversed. Table 3.3 lists the expected signs for parameters to be estimated by the above equations, relative to the direction of the bill introduction and type of interest group.

3.4.2 Empirical Results

Before a more rigorous test of the central thesis in this analysis—that interest groups will exploit a state's agency loss to change its selection method—it is interesting to first look at some supplemental findings about the preferences of American businesses relative to state court systems. From 2002 to 2008, the Institute for Legal Reform at the U.S. Chamber of Commerce has released annual rankings of state liability systems (Institute for Legal Reform 2010). These rankings are based on survey responses by the counsel of its member companies. Table 3.4 shows the fifteen states ranked lowest (as averaged across the available reports) for their overall liability system as well as for their judges' competence and impartiality, two revealing components of this measure. These components speak directly to the perceptions (and, indirectly, to the preferences) of individuals with substantial investment in securing favorable rulings in state legal systems. It is reasonable to assume that the low-ranked states are those in which businesses have the most incentive to reform (presumably by changing the selection method in the state, if possible). It is telling that from

Table 3.3: Expected Coefficient Signs in Estimated Models, by Interest Group Type and Direction of Bill Introduction

	Conservative Interest Group		Liberal Interest Group	
	Elite-Direction Introductions	*Popular-Direction Introductions*	*Elite-Direction Introductions*	*Popular-Direction Introductions*
Elite Conservatism (α)	+	-	-	+
Popular Conservatism (q)	-	+	+	-
Absolute Agency Loss (δ); α>q	+	-	-	+
Absolute Agency Loss (δ); q>α	-	+	+	-
Republican Governor	+	-	-	+
Median Judge Liberalism (λ)	+	+	-	-

1996 to 2008, all but two of these states introduced legislation to change their selection methods, and that the lowest ranked states are among those states that introduced the most legislation for such change. Indeed, a cursory search of state lobbyist activity by the Institute for Legal Reform in the available records of the National Institute on Money in State Politics (2010) shows that the only states in which the group has reported lobbying are Florida (2007-09), Louisiana (2006-07, 2009), Mississippi (2007), and West Virginia (2007). While these records are limited and likely incomplete for even the 2006-09 period, they nonetheless demonstrate an actual link from the 'problematic' states listed in Table 3.4 to the lobbying actions of the Chamber and to bill introductions in state legislatures, as these states are among those with the highest number of introductions.

Of course, it could be argued that this relationship simply reflects the logical response of interested groups and legislators looking to fix broken tort systems.

Table 3.4: States Ranked Lowest in U.S. Chamber of Commerce's "Lawsuit Climate" Reports (2002-08)

Judge Competence		Judge Impartiality		Overall Liability System Rank	
California	(35.7)	Nevada	(36.4)	Missouri	(34.7)
Nevada	(36.4)	Florida	(37.3)	Rhode Island	(34.7)
Kentucky	(36.6)	California	(38.1)	Montana	(38.3)
Montana	(38.4)	Rhode Island	(38.1)	Florida	(38.4)
Florida	(39.1)	Montana	(40.4)	New Mexico	(38.7)
New Mexico	(39.6)	New Mexico	(40.6)	South Carolina	(40.7)
South Carolina	(41.0)	Arkansas	(40.9)	Arkansas	(41.4)
Hawaii	(41.4)	Hawaii	(41.0)	Hawaii	(42.3)
Illinois	(42.7)	South Carolina	(41.3)	Illinois	(42.7)
Arkansas	(43.1)	Illinois	(43.9)	Texas	(44.1)
Texas	(44.0)	Texas	(45.1)	California	(44.7)
Alabama	(47.6)	Alabama	(47.0)	Alabama	(47.6)
Louisiana	(48.3)	Louisiana	(48.4)	Louisiana	(47.7)
West Virginia	(48.9)	Mississippi	(49.1)	Mississippi	(49.3)
Mississippi	(49.3)	West Virginia	(49.1)	West Virginia	(49.4)

Note: Average rank across annual reports (2002-08) reported in paratheses (Institute for Legal Reform 2010).

However, this retort does not explain why these rankings are so highly correlated with the agency loss measure. Using ordered probit to assess this relationship, it is clear that the two measures are not statistically independent. Table 3.5 reports the unstandardized and standardized ordered probit coefficients, using the three rankings as dependent variables and absolute agency loss (omitting the directionality indicators) as the independent variable.[21] It is clear that agency loss is closely related to the perception that businesses have of a state's liability system and its judges. Indeed, looking at the standardized coefficients, which report the change in the dependent variable associated with one standard deviation change in the independent variable, every increase of two standard deviations in absolute agency loss is associated with a drop in rank for the

[21] The rankings are lagged one year because the surveys were conducted at the end of the previous year or at the very beginning of the year on the report. There are thus 343 observations given each state-year from 2001 to 2007, dropping Nebraska due to its nonpartisan unicameral legislature.

Table 3.5: Ordered Probit Estimates for Effect of Agency Loss on State's "Lawsuit Climate" Rank by U.S. Chamber of Commerce (2001-07)

	Judge Competence Ranking	*Judge Impartiality Ranking*	*Overall Liability System Ranking*
Absolute Agency Loss (δ)	6.501 [.512]***	6.178 [.487]***	6.535 [.515]***
	(.726)	(.732)	(.727)
Cut Points (1-49)	-	-	-
N	343	343	343
Wald χ2	80.19***	71.22***	80.86***
Pseudo R2	.029	.026	.029

* p ≤ .10; ** p ≤ .05; *** p ≤ .01 (two-tailed)

Note: Unstandardized coefficients reported with standardized coefficients in brackets, with robust standard errors in parentheses below. Dependent variable is the best-to-worst ranking of states by the the Institute for Legal Reform at the U.S. Chamber of Commerce in their annual "Lawsuit Climate" report. Rankings are lagged one year. Positive coefficients indicate that greater agency loss is associated with a lower rank. Standardized coefficients indicate the change in rank associated with one standard deviation change in agency loss. Cutpoints not reported but available on request.

state. In other words, the state legal systems that business interests would most like to change are generally those with greater agency loss.

While these findings suggest that businesses are indeed interested in the legal systems of those states of particular relevance to the model and analysis in this paper, it is left to determine if agency loss is associated with legislative action to change state selection methods. Further, it is unclear if the above findings have any bearing on the behavior of more liberal interest groups, such as consumer interest groups or trial lawyer associations. Looking at the correlates of related bill introductions, as reported in Tables 3.6 and 3.7, should shed light on these questions.

Table 3.6 reports the probit estimates for equations (3.21) and (3.22) using only those bill introductions that would move a state's selection method in a

Table 3.6: Probit Estimates for Introductions of State Legislation Moving Selection of Supreme Court to a More 'Popular' Method (1996-2008)

	Model 1	*Model 2*
Popular-Direction Bill Introductions		
Elite Conservatism (α)	-2.048 [-.257]***	-
	(.724)	-
Popular Conservatism (q)	3.800 [.277]***	-
	(1.541)	-
Republican Governor	-.093 [-.014]	-.080 [-.112]
	(.162)	(.161)
Median Judge Liberalism (λ)	-.010 [-.132]*	-.014 [-.201]***
	(.006)	(.004)
Absolute Agency Loss (δ); α>q	-	-2.198 [-.069]
	-	(2.179)
Absolute Agency Loss (δ); q>α	-	2.174 [.160]**
	-	(1.042)
Nonpartisan Election	-.784 [-.094]***	-.681 [-.085]***
	(.219)	(.205)
Appt/Retention Election	-.599 [-.082]***	-.472 [-.066]**
	(.244)	(.220)
Constant	-1.350	-.327
	(.845)	(.313)
N	502	502
Wald $\chi 2$	25.09***	26.38***
Pseudo R2	.068	.063

* p ≤ .10; ** p ≤ .05; *** p ≤ .01 (two-tailed)

Note: Unstandardized probit coefficients reported with first differences in brackets and robust standard errors in parentheses below. Dependent variable is whether the state in the given year introduced a bill to change the selection method of the state supreme court in a popular direction.

more popular direction. These results provide strong evidence that popular-direction introductions are driven by conservative interests. Looking at the effect of conservative preferences in state electorates and by state officials, as modeled by equation (3.21), the results show that as Republican politicians in states gain more leverage in legislatures, the likelihood that a popular-direction

bill will be introduced plummets, whereas the opposite is true when general, conservative sentiment in states' electorates increases. Given the difficulty of interpreting substantive effects of probit coefficients directly, the brackets in the table report first difference effects. In the case of legislative control, moving from the state-year in the sample with the lowest proportion of Republican legislature seats to the highest entails a drop of almost .26 in the probability of introduction; whereas looking at electorate ideology, the first difference effect is an increase of about .28. And while the negative sign of the governor dummy is as expected if we think conservative interests are indeed lobbying for popular-direction legislation, it should not be too surprising that it is statistically insignificant. If a state's electorate is conservative enough to ensure consistent victories in judicial elections, conservative groups likely would be tempted to move to a more popular means of selecting the court regardless of the party of this official.[22]

These findings about popular-direction introductions are reinforced by the estimates using equation (3.22), which incorporates agency loss. However, there

[22] The negative coefficient on the median judge is somewhat puzzling. Because this measure is increasing in the liberalness of the justice, the statistically significant negative measure implies that a more liberal court makes popular-direction bill introductions less likely, which does not complement an interpretation that conservative interests influence these introductions. However, from a quick glance at Table 3.1, it is apparent that most states with elite selection methods (i.e., purely appointed and merit-plan systems) are generally more liberal than those states with purely elected selection methods. As most states in a given year introduce no legislation, these results could be reflecting this ideologically lopsided inertia. If equation (3.22) is retooled to include interactions of the median judge's ideology with the selection methods (not shown), the coefficient on the interaction term for those systems of appointment with retention elections is highly significant and positive, indicating that the effect is greatly attenuated in these states relative to pure appointment states. Indeed the magnitude of this interaction coefficient offsets the independent effect of the median judge, such that the net effect of the court's ideology on popular-direction bill introductions, conditioned on the current selection system, is basically zero.

is a slight nuance. While the directions of the signs are as expected (at least, for a story about conservative-driven introductions), the negative coefficient for absolute agency loss in state-years in which policymakers are more conservative than their constituents falls short of statistical significance. On the other hand, in state-years in which the conservative proportion of the electorate is greater than the proportion of conservatives in the legislature, the statistically significant positive coefficient on absolute agency loss demonstrates a clear push to introduce legislation for more popular judicial selection. Moving from the least to most agency loss in the state-years with more conservative electorates, the probability that this type of bill will be introduced increases by about .16. In sum, these findings suggest that conservative interest groups are willing to exploit the representational slack in states when preferences of the electorate indicate a greater likelihood that conservative judges can be elected, but given the same degree of agency loss in states with more conservative elected officials, interest groups are more ambivalent about protecting the current selection method.

While interpretation of the estimates for elite-direction introductions presented in Table 3.7 is less clean-cut than that for the popular-direction estimates, there is nonetheless a clear indication that greater agency loss in states induces motivated interests to lobby for more elite selection methods. Probit estimates for equation (3.21) suggest that liberal interests play an important role in these elite-direction bill introductions. Both variables for the ideological preferences of state electorates and officials have coefficient signs that support this conclusion, and those coefficients are statistically significant at greater than a 99-percent level of confidence. Moving from state-years with the smallest to

Table 3.7: Probit Estimates for Introductions of State Legislation Moving Supreme Court Selection to a More 'Elite' Method (1996-2008)

	Model 1	*Model 2*
Elite-Direction Bill Introductions		
Elite Conservatism (α)	-2.691 [-.431]***	-
	(.670)	-
Popular Conservatism (q)	4.794 [.403]***	-
	(1.541)	-
Republican Governor	.317 [.068]**	.244 [.051]
	(.162)	(.168)
Median Judge Liberalism (λ)	.005 [.110]	.001 [.016]
	(.008)	(.005)
Absolute Agency Loss (δ); α>q	-	3.866 [.228]*
	-	(2.101)
Absolute Agency Loss (δ); q>α	-	5.767 [.633]***
	-	(1.080)
Nonpartisan Election	-.554 [-.109]***	-.507 [-.098]***
	(.186)	(.193)
Appt/Retention Election	-1.449 [-.296]***	-1.301 [-.261]***
	(.244)	(.219)
Constant	-1.839	-1.032***
	(1.148)	(.369)
N	437	437
Wald χ2	70.45***	85.11***
Pseudo R2	.241	.266

* p ≤ .10; ** p ≤ .05; *** p ≤ .01 (two-tailed)

Note: Unstandardized probit coefficients reported with first differences in brackets and robust standard errors in parentheses below. Dependent variable is whether the state in the given year introduced a bill to change the selection method of the state supreme court in an elite direction.

the largest proportions of Republican legislators entails about a .43 decrease in the likelihood that an elite-direction bill will be introduced, but moving from the state-years with the smallest to the largest proportions of the electorate favoring the Republican presidential candidate, there is a dramatic increase of about .40 in the likelihood of such bill introductions. These findings indicate that liberal interest groups are apparently much more willing to lobby for a

more-elite selection method upon seeing a larger proportion of liberal state policymakers (and, thus, potential appointers), and these groups are more likely to retain a more-popular selection method the more states' electorates are liberal (or Democratic).

However, there is some indication that conservative interests also influence elite-direction bill introductions. First, note that the coefficient for Republican governors is positive in the estimates of both equations (3.21) and (3.22). While the coefficient of the second equation falls just short of conventional levels of statistical significance, there is nonetheless indication that Republican governors increase the likelihood for elite-direction legislation. Perhaps conservative groups are only willing to risk a more-elite selection method if they know that the official who will likely have the final say in the appointment process is sympathetic to their interests. On the other hand, liberal groups might be less interested in the current sitting governor, knowing that a nominating commission will likely be part of any new appointment system and that this group will control the list of potential appointees presented to the governor. Because the legislature will have a strong hand in designing this commission, with the potential of making these officials responsive to that branch (especially the upper house) and the state bar, it is not surprising that liberal interests would be more attentive to legislative (rather than gubernatorial) preferences when considering a more-elite selection method.[23]

[23] In contrast to my expectations about the republican governor variable, it is possible that the positive coefficients are picking up the preferences of states' general electorates and, thus, the probability that conservative judges will be elected in state-wide elections. If liberal interest groups have no hope that friendly judges can be elected, they may prefer elite selection if the legislature is more liberal (or Democratic) than the state-wide electorate, especially if these groups have some expectation that the selection procedure will be responsive to a more-

Finally, turning to estimates concerning agency loss from equation (3.22), we see further evidence of influence from both types of interests in elite-direction bill introductions. Regardless of the direction of the agency loss, there is a statistically significant increase in the likelihood that elite-direction legislation will be introduced as agency loss increases, although the effect, if we think these introductions are being influenced by interest groups, is slightly greater on the part of liberal interests. Specifically, moving from the highest to lowest degree of agency loss in the sample, there is a positive difference of about .23 in the probability of introduction in states with legislatures that are more conservative than their electorates, whereas the positive difference in probability is about .63 for states with more liberal legislatures. In sum, these results support an assertion that interests are indeed exploiting the representative slack in states when their electorates become less likely to elect sympathetic judges. Further, this manipulation of agency loss is apparently coming from both ends of the ideological spectrum.

Accordingly, the key prediction of the model—that interest groups will exploit a state's agency loss to change its selection method—is supported in the data presented here. Regardless of the direction of the potential change, the above analysis shows that increased slack between states' elected officials and their electorates is closely related to efforts to enact new systems of selecting supreme court judges. The one significant divergence between the formal model and the data entails the proclivity with which groups exploit agency loss rela-

liberal state bar or the legislature itself (e.g., selection by legislative election or gubernatorial selection contingent on confirmation by the upper house). Such a dynamic would support the supposition that elite-direction introductions are being driven mainly by more-liberal interests.

tive to the direction of change. That is, evidence suggests that while conservative interests are linked to changing selection methods in both more-popular or more-elite directions, liberal interests are only linked to moving systems toward more-elite methods.[24] Although speculative, this could be due to greater difficulty in selling a liberal judicial agenda to voters. Because crime issues are often used as incendiary proxies in election campaigns challenging liberal justices and because "soft on crime" can be a weighty liability regardless of the electorate's ideology, liberal interest groups might not find it worthwhile to switch to a more-popular selection method even when the electorate is more liberal than the officials in the state. Agency loss is therefore important regardless of the type of enactment, but whether an interest group exploits it given a particular direction of change might be contingent on the ideology of that group.[25]

3.5 Discussion

The above model and the empirical findings support the hypothesis that the distribution of selection methods across states can be understood in part as the result of strategic calculations made by interest groups to create a well-crafted equilibrium for achieving favorable rulings by state courts. These findings raise questions about whether some solutions proposed by reformers to insulate the

[24] This latter finding is consistent with Hanssen (2002) finding showing that state bar associations played a significant role in the actual adoption of merit-plan systems.

[25] Another significant difference between the formal and empirical models is the fact that the ideology of the median justice on the court does not seem to have an independent effect on the likelihood for moving to another selection method. However, note that the formal model speaks to the *innate* ideology of the justices. It may be the case that the measure used in this analysis, especially for the elected judges, does not adequately capture this aspect of the justices' ideology.

judicial selection process from interest group influence miss the mark.

The concerns noted in the introduction by former Justice O'Connor concerning judicial elections are not unusual. In recent years, there has been a clear uptick in scholarly and mainstream focus on the confluence of special interest influence and state judicial elections. In particular, attention has focused on the potential for bias by elected judges receiving campaign funds from parties appearing before them. Last year's Supreme Court decision, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), which found it to be constitutionally problematic for an elected state supreme court justice in West Virginia to sit in judgement of a major donor to his election campaign fund, seemed to justify long-circulated critiques that elected benches threaten the notion of impartial justice.

Commentators often suggest abandoning judicial elections for more appointive systems as the best strategy to ensure judicial independence. However, concerns about the disproportional negative influences of elected benches on state judicial outputs relative to those expected from appointed judiciaries might be overstated. The negative externalities that interest groups pose to judicial independence might be as problematic in states with elite selection as they are in states with more-popular methods, but only in states with initially elected benches is this politicization readily visible.

Consider campaign contributions by interest groups. While special interest money flowing into campaigns to elect supreme court judges has increased substantially in recent years, the distribution is highly skewed across the different types of elections. Examining dollars per judicial candidate in campaigns for

these seats, interest group contributions in states with partisan elections outpace those in states with nonpartisan elections; but more importantly, both partisan and nonpartisan contributions tower far above the relatively miniscule contributions from interest groups in states with retention elections (Goldberg 2007). For example, according to the National Institute for Money in State Politics, the average amount of campaign contributions raised per candidate in the 2003-04 election cycle was $783 thousand in states with initial selection by partisan election and $233 thousand in states with initial selection by nonpartisan election; but nothing was collected by each of the 22 candidates seeking to retain their seats in merit plan states. This disparity persisted for the 2005-06 and 2007-08 election cycles, with an almost total absence of contributions to candidates facing retention elections in states with merit plan selection (National Institute for Money in State Politics 2008).[26] While these amounts include individual as well as interest group contributions, it is reasonable to assume that interest groups are providing a large share of these resources given the relatively low level of interest these contests provide the general public.[27]

At first blush, one might think that this apparent lack of interest in retention elections is due to the extraordinarily low visibility of these elections. However, herein lies the puzzle. It is precisely the low level of public knowledge about the issues and candidates in retention elections that might make the incumbents in

[26] These figures reflect the grouping of states by their selection system as shown in Table 3.1. In some states with initial selection by partisan and nonpartisan election, judges face retention elections. Only in these states do retention elections attract contributions. For instance, in 2008, one judge in Pennsylvania raised $628 thousand, while another in Illinois collected nearly $1.2 million, even though neither candidate faced a challenger on the ballot.

[27] As Goldberg (2007) notes, candidate fundraising correlates with interest group participation in these races, and that, from 1990 to 2000, businesses and lawyers were responsible for about half of the money collected by state supreme court candidates.

these races vulnerable to a group intent on unseating them. Indeed, for this reason, the more spectacular and most successful campaigns to unseat incumbent judges have been in retention elections. These incumbents lack partisan labels to help insulate them if they are targeted. And given the low level of information about these judges and these races, any negative information can be enough to get the small number of citizens informed about these elections to shift preferences. As such, these elections should be extremely attractive targets for special interest money—both from those groups targeting unfriendly judges and from those groups looking to protect friendly judges. The question is then: why have they not become such targets?

One possible explanation is that judges in retention states anticipate their vulnerability and simply adjust their decisions according to the preferences of those groups that might lead a campaign to unseat them. Of course, such a judiciary and its outputs are clearly not free of interest group politics; we simply do not observe the causal link given that this dynamic is driven solely by a credible threat of potential retaliation. But even if we accept the validity of this explanation, it nonetheless is incomplete. For if special interest money were all-powerful, why have these groups not just changed the selection mechanism in those states with partisan and non-partisan systems to retention election systems to save money from both unnecessary campaign expenditures and unfavorable court settlements?

The theory and data presented here provide another, more complete, explanation. I have argued that a particular system of selecting justices may be more favorable to an interest group given certain political conditions in a

state, such that the distribution of methods across states can be understood as an equilibrium that reflects these calculations. To that end, the disparity of group contributions across election systems can also be understood as the endogenous result of these choices. In states with elite selection (either through pure appointment or appointment followed by a retention election), groups have some certainty that the state's political environment will remain favorable to their interests and, consequently, that elected officials can be expected to provide sympathetic judicial appointments. Groups need only invest in the initial appointment decision—by way of a campaign contribution to the governor or lobbying the legislature to create a nominating commission of sympathetic officials, for example—or to occasionally unseat a wayward justice that somehow slipped through the cracks. Conversely, states with partisan or nonpartisan systems are those in which the political environment is such that groups are less certain that elected officials will make appointments to their liking. The groups are willing to invest substantial funds to elect a bench that they would otherwise not see appointed. As such, it is not necessarily the exogenous characteristics of the system that determine how much special interest groups spend in particular judicial elections; rather, it is the endogenous decisions about which system best suits their needs that determines how much the groups will be required to spend.

3.6 Conclusion

Scholars have noted the need to look at the strategic political considerations in the design of state supreme courts, including the methods by which judges

are selected. While there have been a few exceptions, there has yet to be extensive work in this regard. This paper seeks to contribute to these nascent efforts by exploring an initial roadmap of the tradeoffs faced by special interest groups when considering a campaign to change the selection method in a state. The model in this paper explicitly captures various intuitions in the literature about how interests profit under one judicial institution relative to another, and how changes in political and ideological parameters can shift this balance. And the findings of this model are supported in the empirical evidence presented. In the end, the paper proposes an alternative explanation for the variation of selection methods across states and for the curious dearth of campaign contributions flowing into retention elections. These outcomes might well be the result of endogenous institutional choices by interest groups to create a system of selection methods across states that maximizes their bottom lines, whether financial or ideological.

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