Representation in State Supreme Courts: Evidence From the Terminal Term

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Abstract

This research capitalizes on the theoretical foundations of the American elections and judicial politics literatures and the natural experiment created by mandatory retirement provisions to assess the nature of the electoral connection in state supreme courts and how changes in institutional context can modify the decisional propensities of political elites and reshape their fundamental roles. Specifically, this work demonstrates that mandatory retirement obviates the representative function by disconnecting the underlying causal mechanism through which public preferences are translated into judicial votes: conditions of electoral vulnerability that elevate the risk of electoral censure. These conclusions are derived from models that examine relationships between measures of electoral insecurity and the willingness to cast unpopular votes by justices with, and without, reelection goals. Results provide significant support for the impact of electoral politics on judicial voting but not for the term-limited. In this regard, state supreme courts and legislatures bear a striking resemblance. From a different perspective, the observed congruence between judicial votes and citizen preferences is not simply a coincidence of preferences or the mere presence of elections but rather also reflects a strategy of responsiveness specific to individual members.

Understanding linkages between citizens and government, particularly the connections brought about by the powerful force of elections, is fundamental to a science of politics. Central to this enterprise are institutional arrangements and other contextual contingencies that enhance or obviate the representative function and shape the impact of electoral politics in American democracy.

Classic studies of Congress (e.g., Mayhew 1974; Miller and Stokes 1963) and recent work on state legislatures (e.g., Gay 2007; Hogan 2008) have established that the threat of electoral reprisal induces members who wish to retain their seats to take constituency preferences into account when casting votes on controversial issues. However, certain circumstances sever this connection, including lame-duck status derived from voluntary retirement, electoral defeat, progressive ambition, and term limits (e.g., Carey et al. 2006; Cooper and Richardson 2006; Jenkins and Nokken 2011). Essentially terminal terms break the "electoral shackles" (Rothenberg and Sanders 2000, 316) and produce a "Burkean shift" (Carey et al. 2006, 105) in elite behavior wherein members vote sincerely rather than strategically to appease constituencies.[1] Moreover, these concepts about legislatures also appear to describe term-limited governors and their economic and fiscal policies (Alt, Bueno de Mesquita, and Rose 2011).

In this project, I extend the focus on democratic politics and the role of institutions and other contextual forces in shaping the representative function to state supreme courts and mandatory retirement provisions. Specifically, I use mandatory retirement provisions as an analytical device to examine *how* electoral politics forges a connection between public preferences and judicial votes. The fundamental argument is that electoral vulnerability is the key to the linkage between citizen preferences and the

bench. When reelection is a goal, the effects of electoral insecurity are observable, producing strategic votes that comport with constituency preferences. However, in terminal terms, these effects are sharply attenuated. In short, popular judicial decisions are the product of reelection goals and threat conditions in the external environment rather than a simple coincidence of preferences or the mere presence of elections.

Arguably, the states' highest courts are the most enigmatic of all American political institutions. Although state supreme courts lack an explicitly representative function and are insulted by normative expectations of independence and counter-majoritarianism, the vast majority of state supreme court justices must face voters regularly to retain their seats in elections that are at least as competitive as elections for many other offices in the United States.[2] Moreover, these justices decide controversial cases within a significant range of alternative institutional settings and political contexts that have the potential to amplify or diminish external forces influencing individual and collective decisions, including pressures from the electoral arena. Finally, extant research has demonstrated that elections affect choices in state supreme courts, including enhancing the congruence between constituency preferences and judicial votes. Specifically, the impact of public preferences, whether measured as state ideology (e.g., Brace and Hall 1997; Brace, Hall, and Langer 2001) or as aggregate opinion on specific issues (e.g., Brace and Boyea 2008) is stronger when justices are elected.

In this project, I capitalize on the strong theoretical foundations of the American elections and judicial politics literatures and the natural experiment created by mandatory retirement provisions to assess whether state supreme court justices in their terminal terms have a greater tendency than their counterparts to cast unpopular votes, *ceteris*

paribus. In doing so, I evaluate the underlying causal mechanism that serves to translate public preferences into judicial votes: conditions of electoral vulnerability that raise the threat of electoral censure. In this inquiry, which estimates models of judicial choice on the issue of the death penalty, mandatory retirement provisions are expected to figure prominently in the justices' votes by shaping their goals and the extent to which external politics are relevant.

The primary data source for this inquiry is the State Supreme Court Data Project, which contains over 8,000 individual death penalty votes in elected state supreme courts from 1995 through 1998.[3] The death penalty is appropriate for this inquiry for two critical reasons. First, in its most basic political form, capital punishment in the United States is a game of electoral politics in state judiciaries. Most state supreme courts (thirty-one of thirty-eight) reviewing death cases during this period were elected.[4] In fact, elected justices cast 94.5% of all death penalty votes from 1995 though 1998, just as states using election schemes to staff their highest courts housed 95.5% of the nation's death row population in 1996 (Bureau of Justice Statistics 1997, 6).

Second, from an analytical perspective, an intriguing group of case studies suggests that justices deciding death penalty cases may act strategically to avoid electoral sanction (e.g. Hall 1987, 1992, 1995). Indeed, capital punishment is a highly salient issue, with strong public support that spanned the nation and transcended the partisan divide in the 1990s (Norrander 2000, 181).[5] Thus, if we are to evaluate whether mandatory retirement attenuates the representative function, representational behavior must be present in the first place. In this regard, the death penalty, like mandatory retirement, is an excellent analytical device for hypothesis testing.

The theoretical implications of this inquiry are significant. Through the lens of democratic theory and the science of judging, ascertaining how and to what extent electoral politics penetrates courts is essential for developing theories of judicial choice that accurately reflect the complex task of balancing democratic pressures with other important goals, including the desire to craft judicial decisions that comport with personal preferences.[6] Moreover, through systematic comparisons of justices with alternative goals operating in different strategic environments, political scientists can gain considerable insight into the underlying causal mechanisms of the representative function. Is the link between citizens and the bench simply the result of elections *per se*, or is representation a more complicated function of electoral vulnerability and reelection goals that together produce popular decisions?

Looking beyond the judiciary, this inquiry will provide valuable insight into the generalizability of extant theories of elite behavior derived largely from Congress, especially theories conceptualizing representation as responsiveness to public sentiment brought about by electoral threat and disrupted by circumstances like term limits. With regard to the electoral connection, state supreme courts may closely resemble legislatures, despite obvious differences in their functions.

In fact, state supreme courts may be the quintessential democratic institutions. State supreme courts are closely connected to state electorates by competitive elections and by federalism that leaves criminal law largely to the states, especially as the United States Supreme Court retrenches from its supervisory role by shrinking its docket. Moreover, with death penalty cases, the justices lack any measure of agenda control that would allow them to sidestep this controversial topic. In the American states, death

penalty cases proceed automatically on appeal from trial courts to state supreme courts, and the justices must review these cases knowing that their choices may become the next hot-button issues in reelection campaigns. Indeed, rough-and-tumble elections, combined with the inability to avoid position-taking in politically salient cases, may constitute some of the most favorable conditions under which we are likely to see constituency effects and their subsequent diminution when electoral goals and the impact of electoral politics are altered by terminal terms.

On the Politics of State Supreme Courts

Perhaps the biggest obstacle to understanding the electoral connection in state supreme courts is the widely held yet inaccurate perception that until recently state supreme court elections have been sleepy affairs with an extraordinary incumbency advantage. Although the intensity of these races has increased since the 1990s (Bonneau 2007; Hall 2007a), competition in supreme court elections has met or exceeded competition for other important offices for decades, including the United States House of Representatives, perhaps the nation's most representative institution by formal design.

In fact, state supreme court justices may have a great deal to fear from voters, especially in partisan elections. Consider Dubois' (1980) study of twenty-five non-Southern states from 1948 through 1974. In this epic work, Dubois (1980, 50) reports that defeat rates were 19.0% in partisan elections and 7.5% in nonpartisan elections. The corresponding defeat rate in the House was 8.2% (Abramson, Aldrich, and Rohde 2008).[7] These statistics are comparable to those reported by Hall (2001a, 319) for all states from 1980 through 1995, during which defeat rates averaged 18.8% in partisan elections and

8.6% in nonpartisan elections. The defeat rate for the House during this period was 6.5% (Hall 2001a, 319). Likewise, partisan and nonpartisan elections were won by 55% of the vote or less in, respectively, 35.6% and 25.4% of the races (Hall 2001a, 318).

These facts were not unfamiliar to an astute group of political observers in the 1980s. Schotland's (1985, 78) iconic and oft-cited characterization of judicial elections as becoming "noisier, nastier, and costlier" was an observation offered about the 1970s and early 1980s. Indeed, after the 1986 and 1988 Ohio Supreme Court races, Hojnacki and Baum (1992, 944) described as "increasingly common" the "new style" campaigns that make "candidates and issues far more visible than in the average judicial contest." Even in the popular press, a *Los Angeles Times* editorial (Chen 1988, 1) written in the aftermath of the 1986 defeats of three California Supreme Court justices observed that "… judges increasingly are being forced to hit the campaign trail – to raise huge sums of money … generating countless free-spending judicial campaigns all over the country." Thus, competitive state supreme court elections are not new, and justices in the 1990s (the period covered by this study) were not impervious to electoral censure.

Empirical Studies of State Supreme Court Elections

While descriptive statistics are informative, much more compelling are scientific studies of key aspects of state supreme court elections, including the propensity for citizens to vote and their subsequent choices. The consistent story, derived mostly from studies of elections held from the 1980s through 2000, is that supreme court elections work a lot like other important elections. These studies stand in stark contradistinction to the conventional wisdom, based largely on anecdotal evidence, that voters "know nothing

and care less" (Dubois 1980, 36), are plagued by "ignorance, apathy, and incapacity" (Geyh 2003, 63); are "only slightly affected" by close contests (Adamany and Dubois 1976, 743), and attach "limited importance to the work of the judicial branch of government" and thus do not vote (National Center for State Courts 2002, 38).

As empirical research has demonstrated, voter apathy is not inherent in state supreme court elections (e.g., Baum and Klein 2007; Hall 2007b; Hall and Bonneau 2008). Instead, citizen participation is driven primarily by factors that increase the salience of these races and provide information to voters (Baum and Klein 2007; Hall 2007b; Hojnacki and Baum 1992). Particularly effective as mobilizing agents are partisan elections, quality challengers, tight margins of victory, and big spending (Baum and Klein 2007; Hall 2007b; Hall and Bonneau 2008).

Similarly, the electorate in state supreme court elections makes fairly sophisticated choices. Overall, voters show a distinct preference for quality challengers, or challengers who already are judges (Bonneau 2007; Hall and Bonneau 2006). Otherwise, electorates vote retrospectively on issues relevant to judges even when partisan labels are not on the ballot (Hall 2001a) and make specific issue-based choices when enough information is provided in nonpartisan elections (Baum 1987; Baum and Klein 2007; Hojnacki and Baum 1992; Rock and Baum 2010).

Constituent Influence in State Supreme Court Decision Making

One of the most abiding themes in empirical scholarship on state supreme courts is that elections play a significant role in judicial choice. Indeed, research has established that various aspects of electoral politics influence justices' votes on the death penalty

(e.g., Brace and Hall 1995, 1997; Hall 1987, 1992, 1995; Hall and Brace 1994, 1996; Traut and Emmert 1998), criminal cases (e.g., Savchak and Barghothi 2007), civil litigation between "haves" and "have-nots" (Brace and Hall 2001), and abortion (e.g., Caldarone, Canes-Wrone, and Clark 2009). Elections also affect, among other things, docket composition (e.g., Brace and Hall 2001; Brace, Hall, and Langer 2001; Langer 2002), judicial review (Brace, Hall, and Langer 2001; Langer 2002), and adherence to precedent (Comparato and McClurg 2007; Hoekstra 2005).

As empirical research strongly suggests, state supreme court justices are not the mechanical appliers of law conceptualized by normative legal theory but instead are strategic actors deciding cases within a complicated environment of countervailing forces. Regarding democratic pressures, judicial elections interact with specific circumstances in the political environment, making these forces more or less relevant to the justices' choices (e.g., Brace and Hall 1995, 1997). Most importantly for this inquiry, elections enhance the impact of public preferences, bringing about decisions that comport with citizen ideology (e.g., Brace and Hall 1997, 2001; Savchak and Barghothi 2007) and public opinion (Brace and Boyea 2008; Caldarone, Canes-Wrone, and Clark 2009).

While previous research on state supreme courts is impressive, the studies of individual-level choice nonetheless have two limitations. First, virtually all were based on small numbers of states and data from the 1980s. Even Brace and Hall's (1997) path-breaking work on the death penalty included only eight states, and Hall's (1995) most complete study included only four states. Thus, we do not know to what extent these studies are generalizable across states or whether they can stand the test of time.

Second, although the State Supreme Court Data Project has enhanced

opportunities for scholars, studies using this valuable resource have been restricted to single election systems (e.g., Savchak and Barghothi 2007) or have included electoral variables non-specific to the justices or state supreme courts (e.g., Brace and Boyea 2008). Instead, the focus has been on distinguishing *between* elected and appointed courts using dummy variables, which provides limited opportunities to unravel the underlying causal mechanisms of the electoral connection.

In fact, scholars have missed an outstanding opportunity for comparative inquiry into *how* the politics of elections affects the decisions of the individual justices. In order to gain leverage on this question, it is vital to distinguish between institutional and individual incentives, including each justice's electoral strength. Indeed, this more nuanced approach was taken by Hall (1987, 1992, 1995), who argued consistently with the legislative politics literature that electoral vulnerability creates the specific conditions under which justices are likely to vote strategically to minimize electoral opposition. In other words, the electoral incentive is particularly pressing on those most likely to suffer electoral sanction. Hall (2001b) later extended this logic to voluntary retirements, finding that electoral insecurity promotes decisions to opt out rather than seek reelection, a finding consistent with studies of the U.S. House (e.g., Groseclose and Krehbiel 1994).

In the models below, I distinguish the system-wide effects of partisan, nonpartisan, and retention elections using dummy variables. Additionally, I examine the interactions between mandatory retirement and various conceptually and statistically independent conditions of electoral vulnerability. Overall, the primary means through which mandatory retirement should affect individual votes is by lessening the impact of the very factors that encourage justices to cast popular votes in the first place.

Thus, the models systematically compare justices who do, and do not, have reelection goals and who are operating in climates of varying electoral intensities. If mandatory retirement provisions condition the impact of various independent aspects of electoral vulnerability, this study will add to the evidence that elections play a significant role in elected judiciaries. More importantly, this study will provide new insights into the underlying causal mechanism for accountability. Justices in elected courts may have some incentive to adopt a representational posture relative to their appointed colleagues or their colleagues in retention elections. However, popular decisions more accurately may be a function of individuals being on shaky ground with voters, intense electoral climates overall, and possible retaliation from the other branches of government.[8]

Mandatory Retirement in State Supreme Courts

Compulsory retirement laws were an integral part of the judicial reform movement that swept the American states in the 1960s, bringing extraordinary change over a period of several decades in the way state court systems were organized, staffed, and managed. Inefficient and confusing jurisdictional arrangements, severe docket overloads, and significant delays in case processing were among the serious problems confronting state courts well into the 1960s (Hall 1999).

In response to obvious challenges facing state courts, the American states invested significantly in reorganizing their judiciaries in order to alleviate a host of management problems and address concerns about the delivery of justice. Among other reforms, many states consolidated their trial courts, established intermediate appellate courts, and adopted mandatory retirement laws. Through a wide variety of organizational changes,

many states transformed their judiciaries into highly professional institutions (Hall 1999).

As with most political reforms, the states differed in their approach to mandatory retirement. Overall, thirty-two states opted to limit supreme court careers. Most typical is the requirement that justices depart the bench at age 70 but some states merely require election before the age of 70. A few states set the compulsory retirement age at 72 or 75.

When viewed in conjunction with term lengths and the lack of progressive ambition in state supreme courts, mandatory retirement provisions take on an interesting new dimension. Because terms of office in state high courts range from four to twelve years, justices as young as 58 in some states can be term-limited. Moreover, state supreme courts represent the highest rung on the career ladder for most judges. In fact, in the State Supreme Court Data Project, 29% of all death penalty votes were cast by justices who were age 65 or older, and the oldest justice in the dataset is 86.

Although the states did not enact mandatory retirement provisions to shape the judges' decisions, reforms nonetheless fundamentally alter the day-to-day operating environments of courts. Specifically, compulsory retirement laws changed the opportunity and incentive structures in state supreme courts. In fact, state supreme court justices in their terminal terms may not feel the constraints of electoral politics at all and thus may be quite willing to cast unpopular votes.

Importantly for this project, mandatory retirement provisions span the range of selection systems operating in the states. Table 1 illustrates this by categorizing the states according to the method used to select supreme courts and by indicating which states have compulsory retirement laws. As Table 1 shows, most of the thirty-eight states opting for elections also have mandatory retirement. In fact, six of the eleven partisan states, six

of the twelve nonpartisan states, and eleven of the fifteen retention states set maximum age restrictions for justices. Considered in this context, the potential impact of mandatory retirement laws on the electoral connection is considerable.

(Table 1 Goes About Here)

In fact, a simple cross-tab of mandatory retirement and votes on the death penalty supports the case for a more sophisticated inquiry. Overall, from 1995 through 1998, justices who were not term-limited voted for death penalty reversals 23.8% of the time. However, justices in their terminal terms cast liberal votes in these controversial cases 34.3% of the time. This difference merits further investigation.

Conceptual Framework and Research Design

In this study, I conceptualize individual votes on the death penalty as a trade-off between competing goals: the desire to have one's own ideological preferences reflected in the institution's decisions and the goal to retain office. Generally, features of electoral politics specific to the individual, the court, and the state will be the primary mechanisms through which public preferences are translated into judicial votes. Moreover, the linkage between electoral politics and votes will be conditioned by mandatory retirement.

As mentioned, I use the State Supreme Court Data Project (SSCDP) for most of the variables in the analysis. This dataset, generated largely through grants from the National Science Foundation, includes the decisions (and individual votes) of all state supreme courts from 1995 through 1998, as well as information about the cases and the justices.[9] Though unprecedented in scope, the SSCDP does not include the justices' individual electoral circumstances. I added these to the dataset, as defined below.

Model Specification

For proper model specification, I rely upon an influential body of work (e.g., Brace and Hall 1995, 1997; Hall 1987, 1992, 1995; Hall and Brace 1994, 1996) that has identified case-specific, personal, and contextual forces affecting whether justices in state supreme courts cast liberal votes in death penalty cases. Starting with the dependent variable, I code *Vote* as 1 if the individual justice votes to overturn a death sentence in each case (a liberal vote), and 0 otherwise (a conservative vote). On the death penalty, liberal votes have the potential to place the justices in electoral peril by giving ammunition to political opponents and by angering voters.

Legal Factors. Regarding the independent variables, among the most powerful influences on state supreme court decisions are the laws governing the dispute. While justices may be strategic actors, their explicit charge requires attention to applicable law. In death penalty litigation, especially important are statutory aggravating factors. In some of the earliest work on the death penalty, Brace and Hall (1995, 1997; Hall and Brace 1994, 1996) documented that capital murder cases involving rape, robbery, kidnapping, and child victims are more likely to result in votes to uphold death sentences. To capture these effects, I generate an additive index (*Aggravating Factors*) ranging from 0 to 4.

Similarly, the complexity of each appeal should affect the propensity to cast liberal votes in death penalty cases. Cases that throw in the proverbial kitchen sink may be less meritorious than focused appeals (Brace and Boyea 2008). Thus, I measure the number of issues raised on appeal (*Legal Complexity*), with the expectation that substantively succinct appeals improve the likelihood of reversal, *ceteris paribus*.

In death penalty cases, two additional case-related factors merit evaluation. First is representation by public defenders. The negative stereotype is that private counsel are more competent than public defenders, who are overburdened with huge caseloads and lack incentives to invest in their cases and clients. Thus, appeals in which defendants are represented by public counsel may be more likely to result in reversal. A dummy variable (*Public Defender*) identifies these cases.

Additionally, race may be a factor in death penalty cases. Critics charge that racism influences the process, creating disparities between black and white defendants and tainting trials with biases manifested in a variety of ways. To test for this possibility, I include a variable (*Race*) to identify cases in which any issue of race was raised on appeal. Assertions of racial bias should promote liberal votes, other things considered.

Justices' Personal Traits. In addition to case-related factors, various traits of the justices themselves should figure prominently in their votes. The primary focus is on *Mandatory Retirement,* which distinguishes between justices who are in their terminal terms because of compulsory retirement laws and justices who are not. Of particular importance in this regard is disentangling the effects of mandatory retirement from the effects of age. Obviously, justices in terminal terms are older than their colleagues. Studies (e.g., Brace and Hall 1997; Hall and Brace 1994) have shown that older justices who were socialized during the Warren Court era or its immediate aftermath may vote differently than their colleagues. In order to control for this possibility, I include a dummy variable, *Retirement Age,* to distinguish any possible cohort effects from the effects of mandatory retirement. Because justices as young as 60 are in terminal terms in the dataset, I code this variable

as 1 if the justice is 60 or older, and 0 otherwise.

Also relevant are the justices' ideological preferences, measured using Brace, Langer, and Hall (2000) PAJID scores. *Ideological Preferences* range from 0 (most conservative) to 100 (most liberal) and is a measure widely acknowledged to outperform partisan identification and other available alternatives.

State Contextual Climates. Another integral component of judicial choice is the political climate surrounding each state supreme court, including the specific election format used for the high court bench (e.g., Hall 1995, Brace and Hall 1997). Thus, the models include *Nonpartisan Election* and *Partisan Election*, with retention elections serving as the omitted baseline category. Generally, nonpartisan and partisan elections should diminish the likelihood of liberal votes relative to retention elections.

Also important is *Citizen Ideology*, measured using the updated Erikson, Wright, and McIver (2006) scores. Citizen ideology represents opinions aggregated across issues and reflects the overall climate of public preferences in each state. In state supreme courts, citizen ideology has been shown to influence the types of cases docketed (e.g., Brace and Hall 2001; Brace, Hall, and Langer 1999) and the justices' votes on numerous issues, including civil cases involving power asymmetric relationships between litigants (Brace and Hall 2001), judicial review of restrictive abortion statutes (Brace, Hall, and Langer 1999), and capital punishment (Brace and Hall 1997). Thus, this study predicts that votes to overturn death sentences will be more likely in more liberal states even though the states have endorsed capital punishment. Also as mentioned, public opinion was strongly supportive of the death penalty at this time, even in states without capital

punishment. Thus, public opinion was entirely unidirectional at this time.

However, because of the importance of citizen preferences, I also estimate the model using the Brace et al. (2002) public opinion measure on capital punishment as an alternative to state ideology. These results are reported in the Appendix and clearly show that the substantive results and conclusions about representational politics are not biased by how public preferences are measured. The results also show that once the electoral context is modeled, public opinion no longer predicts voting behavior in elected courts.

The Electoral Context. In state supreme courts, the electoral context should be critical. Various aspects of electoral vulnerability should connect the individual justices to their constituencies, and mandatory retirement provisions should condition these effects. As extant research indicates (Hall 1987, 1992, 1995), there are three distinct components of electoral insecurity: unsafe seats for specific justices, electorally competitive supreme courts generally, and unified partisan control of state government indicating the extent to which opposition from the other branches of government is possible.[10] Thus, I include these three indicators, and interact each with mandatory retirement. Overall, electorally vulnerable justices who are most threatened by the dangers of electoral politics should vote to uphold death sentences except when the electoral incentive is removed by terminal terms.

Specifically, I include a variable (*Unsafe Seat*) to distinguish between justices who narrowly won their last elections by 55% of the vote or less from those with more broad-based electoral support (e.g., Bonneau 2007; Dubois 1980; Hall 2001a).[11] This variable is coded as dichotomous rather than continuous because of an anticipated

threshold effect rather than a linear association. Theoretically, the effect of the change in electoral margin from 55% to 70%, for example, should differ from a 70% to 85% shift.

Similarly, I include Hall's (2007b) measure that characterizes supreme court electoral competition in each state. As Hall has documented (Hall 2001a, 2007b), the states vary considerably in average margins of victory for supreme court candidates. States with typically competitive races (*Competitive Court*) should be more likely to produce conservative death penalty votes. Interestingly, competition is not unique to partisan and nonpartisan elections. Margins of approval can be quite narrow in retention elections, and if ranked by this standard numerous retention election states are more competitive than partisan and nonpartisan states (Hall 2001a, 2007a).

Along these lines, I take into account partisan control of government. *Unified Republican Government* raises the likelihood of overt criticism and political retaliation from the legislative and executive branches of government for liberal death penalty votes. This measure is especially important as a gauge on the current electoral climate. As mentioned, state supreme court terms can extend up to twelve years, and considerable changes can occur in electoral preferences over such a significant period of time.

Finally, I include time-point dummy variables in the model, to control for any temporal effects in the data. The model includes dummy variables for 1995, 1996, and 1997, with 1998 omitted as the baseline category.

Because the dependent variable (*Vote*) is dichotomous, I use probit to estimate the models. Furthermore, I use robust variance estimators clustered on state, which are robust to assumptions about within-group (i.e., state) correlation. Table 2 contains a complete list of all of the variables included in the model and their exact measurement.

(Table 2 Goes About Here)

Results

Table 3 displays the results of estimating an individual-level model of voting on the death penalty in state supreme courts from 1995 through 1998. Overall, the model is statistically significant and includes a number of intriguing findings that confirm the primary hypothesis.

(Table 3 Goes About Here)

Immediately apparent are the effects of mandatory retirement provisions on electoral pressures in state supreme courts. Indeed, the results show in a simple yet convincing fashion that the impact of various aspects of electoral vulnerability that serve to link citizens to the bench are contingent on the electoral incentive being present in state supreme courts.[12]

Looking more specifically at the electoral context, the impact of all three sources of electoral vulnerability – unsafe seats for specific justices, competitive supreme court elections, and unified Republican government – are conditioned by mandatory retirement. The marginal probabilities reported in Table 3 reveal the substantive power of these effects. Unsafe seats for justices who not in their terminal terms decrease the probability of a liberal vote by almost 4% while unsafe seats for lame-duck justices increase the probability by 16%. Similarly, competitive courts for justices who are not term-limited reduce the likelihood of a liberal vote by 17% while the same factor during the terminal term increases the probability by 7%. Finally, unified Republican governments reduce liberal votes for those with reelection prospects by 8.5% but increase it by 11% for the

term-limited.

These results make a great deal of intuitive sense. Electorally vulnerable justices are likely to be less compatible with their constituencies, which means on the issue of the death penalty that these justices are less supportive of capital punishment than the voters who selected them. Thus, when the democratic incentive is removed, these justices are more likely to vote sincerely and thus overturn death sentences.

Similarly, a variety of case-specific features affect the propensity to cast liberal votes. Aggravating factors representing some of the most heinous crimes are associated with votes to uphold death sentences. Of course, this is precisely what aggravating factors in death penalty statutes are designed to do. In fact, the strongest substantive impact is case-related. Complex cases (from least to most complex) increase the likelihood of a liberal vote by 34%, a finding consistent with Brace and Boyea (2008).

However, public defenders and claims of racial bias are not statistically significant. It could be that supreme court justices do not view public defenders through the lens of pejorative stereotypes or the fact that in reality there are few differences between public defenders and private counsel in death penalty litigation. Regarding race, the effects may be more subtle than what can be tested here or are absent altogether.

Regarding the justices' personal traits, and as empirical research predicts, the justices' ideological preferences are reflected in their votes. Increasing ideology scores from most to least conservative raises the likelihood of a liberal vote by almost 10%. Along these lines, justices who are of retirement age but are not term-limited are more likely to cast liberal votes, *ceteris paribus*. However, the effect is rather modest.

The context of state politics is important in state supreme courts. As Table 3

shows, nonpartisan elections reduce the likelihood of liberal votes by 6.2% relative to retention elections, the omitted baseline category. However, justices who must face voters in partisan elections are not statistically different from those in retention elections, although coefficient is negative. These results comport well with recent work (Calderone, Canes-Wrone, and Clark 2009) showing that justices in nonpartisan elections are *more* likely than justices in partisan elections to make popular decisions on abortion.

Table 3 also indicates that citizen ideology matters a great deal. Moving from least to most liberal increases the likelihood of a liberal vote by almost 14%. In states with the death penalty and where citizens definitively favor the punishment, liberal ideologies can mitigate the effects of capital punishment politics.

Finally, none of the temporal variables is statistically significant. There do not appear to be any temporal effects in the model.

To place in stark relief the results in Table 3, I calculated predicted probabilities of liberal votes for various combinations of the most theoretically significant variables. Figure 1 displays these results graphically, showing the predicted probabilities of liberal justices in conservative states casting liberal death penalty votes under various conditions of electoral vulnerability. Specifically, the comparison groups are justices who are under the age of 60, justices who are 60 and older and are eligible for additional service, and justices who are 60 and older in their terminal terms because of mandatory retirement provisions. These results lead to an immediate conclusion: electoral pressures penetrate courts only when reelection remains a goal. Otherwise, liberal justices in conservative states disregard constituency pressures and pursue their own ideological agendas. Alternatively, various forms of electoral competition strongly shape the representative

function in death penalty litigation as long as reelection is possible.

(Figure 1 Goes About Here)

The effects of removing the electoral incentive are pronounced. Under only one condition of vulnerability (unified Republican government), the predicted probability of justices under the age of 60 casting a liberal vote is 0.18. For justices who are over the age of 60 but not terminal, the probability increases slightly to 0.22, and for the term-limited rises to 0.28. However, when competitive courts are added to the mix, predicted probabilities decline for both age cohorts eligible for continued service but increase for justices in terminal terms. When all three conditions of electoral vulnerability are included, the differences across age cohorts and electoral circumstances are pronounced. In short, liberal justices in conservative states can face extraordinary electoral pressure to cast conservative votes; however, mandatory retirement attenuates these effects.

The Appendix also reveals some intriguing results. When the model in Table 3 is estimated using public opinion as an alternative measure of public preferences, public opinion is not significant. However, this does not contradict the pathbreaking Brace and Boyea (2008) finding that elected justices respond to public opinion. Brace and Boyea (2008) defined elected justices as those in partisan, nonpartisan, and retention elections and then investigated differences *between* elected and appointed courts. This study shows that *within* elected courts, the exact mechanisms promoting this linking are particular to the individual and political context and can be modified by institutional features like mandatory retirement. This nuance has tremendous import for understanding the electoral connection in state supreme courts and the specific mechanisms promoting

representational politics on the issue of the death penalty. In short, this study illustrates the underlying causal connection expertly shown by Brace and Boyea (2008).

Conclusion

This paper provides intriguing and rigorous new evidence that mandatory retirement provisions and their abrogation of the electoral incentive facilitate ideological shirking in state supreme courts and fundamentally reshape the representative function. While electorally insecure justices are more likely to make popular decisions on the issue of the death penalty when reelection is a concern, justices in terminal terms are more likely to cast unpopular votes even under the most threatening circumstances.

More importantly, this research provides the most direct systematic evidence to date about the nature of the electoral connection in state supreme courts, or the question *how* various aspects of electoral politics influence judicial votes. In this study, the natural experiment created by mandatory retirement provisions allows us to observe the impact of variables that threaten incumbents when reelection goals are, and are not, present. These results support the contention that electoral vulnerability is the key to the representative function in state supreme courts. Indeed, the effects of electoral insecurity are readily observable when reelection goals are present but dissipate when reelection is precluded. In this regard, this study moves the scientific literature considerably beyond simple dichotomies of elected versus appointed courts as far as understanding democratic pressures on state supreme courts. In fact, the linkage between citizens and the bench is complex and is conditioned by various institutional arrangements that make reelection goals and various conditions of democratic politics more or less important to individual

members. In short, both institutional and personal incentives in the electoral context drive popular decisions in state supreme courts.

In this regard, there are striking similarities between state supreme courts and American legislatures. The results in this project are consistent with theories of legislative representation that posit a strong link between specific electoral circumstances and the representative function, as well as theoretical precepts linking the ability of institutional contingencies like term limits to alter these connections.

Of course, the actual impact of mandatory retirement on case outcomes and public policy will depend on the number of justices affected at any one time and the ideological divisions on the court. In a relatively consensual court, mandatory retirement may have little or no effect on the disposition of cases. However, in closely divided courts, or in courts where several members are in terminal terms simultaneously, vote shifts could have dramatic consequences. In fact, these types of rules resulting in terminal terms could be far more significant in state high courts than in other institutions because state supreme courts range in size from only five to nine members.

Finally, the implications of this study for normative accounts of judicial behavior merit comment. The fact that democratic pressures penetrate courts logically can be construed as an affront to the rule of law and fundamental due process. Scholars reasonably might argue that appellate review should never be influenced by voter preferences or the justices' personal desire to retain office, especially in capital cases where judicial votes represent life or death choices. Indeed, interpreting these results as evidence for ending the practice of electing judges altogether comports well with traditional theories of the judiciary in American politics.

Remarkably, the opposite construction of these findings also is plausible. In cases lacking reversible error, electoral pressures may prevent justices from disregarding the law and imposing their own preferences that contradict the findings of juries and trial judges. In fact, the death penalty *is* law, and judicial independence was never defined normatively as judges simply voting as they wish. Geyh (2008, 86) expertly describes the delicate balance necessary "… to ensure that judges are independent enough to follow the facts and law without fear or favor, but not so independent as to disregard the facts or law to the detriment of the rule of law and public confidence in the courts." In short, we cannot necessarily assume that public preferences subvert the rule of law, or that judges' unchecked preferences are less dangerous than the threat of majority tyranny. Caution is essential when drawing normative conclusions from these findings, especially given the fact that we cannot ascertain what the objectively correct decisions are in these models.

Appendix

An Electoral Model of State Supreme Court Justices' Votes to Overturn Death Sentences, 1995-1998, with Public Opinion (Probit with Robust Standard Errors Clustered on State)

	Coefficient	Robust Std. Error	z	P>|z|
Legal Factors				
Aggravating factors	- 0.1361	0.0579	- 2.35	0.019
Legal complexity	- 0.0681	0.0146	- 4.66	0.000
Public Defender	0.1617	0.0838	1.93	0.054
Race	- 0.0863	0.2107	- 0.41	0.682
Justices' Personal Traits				
Mandatory retirement	- 0.2748	0.0636	- 4.32	0.000
Retirement age	0.1459	0.0765	1.91	0.057
Ideological preferences	0.0049	0.0018	2.73	0.006
State contextual climate				
Nonpartisan election	- 0.2676	0.0893	- 3.00	0.003
Partisan election	- 0.1043	0.0759	- 1.38	0.169
Public opinion	0.7283	1.0989	0.66	0.507
Electoral context				
Unsafe seat x Mandatory retirement	0.4529	0.1510	3.00	0.003
Unsafe seat	- 0.1860	0.0736	- 2.53	0.012
Competitive court x Mandatory retirement	0.2503	0.1048	2.39	0.017
Competitive court	- 0.4469	0.0848	- 5.27	0.000
Unified Republican govt x Mandatory retirement	0.3005	0.1822	1.65	0.099
Unified Republican govt	- 0.2121	0.0621	- 3.41	0.001
Temporal controls				
1995	0.0211	0.1128	0.19	0.851
1996	0.0248	0.0899	0.28	0.783
1997	- 0.0709	0.0926	- 0.77	0.444
Constant	- 0.6471	0.8204	- 0.79	0.430

Dependant variable = *Vote* to overturn a death sentence
Number of observations = 7547
Number of clusters = 25
Wald chi2(19) = 2154.23
Prob > chi2 = 0.0000

Endnotes

[1] This proposition about state legislative term limits is not without contradiction. Wright (2007) failed to identify any shifts in roll call voting by term-limited legislators.

[2] States use three election formats to select supreme court justices: partisan, nonpartisan, and retention. Following standard practice, states are coded by method of reselection rather than initial selection in the analysis.

[3] Of thirty-eight states authorizing the death penalty in the 1990s, twenty-seven are included in this analysis. In seven states, supreme court justices are appointed. Otherwise, in two elected states (KS, NM), there were no death cases, and in another two states (NE, WY) missing data result in exclusion (but only 40 votes, or < 0.005 of the total votes).

[4] Appointed high courts in death penalty states are CT, DE, NH, NJ, NY, SC, and VA. From 1995-1998, only 483 of 8,798 votes, or 5.5%, were cast by justices in these states.

[5] Norrander (2000, 781) shows that the least supportive of the fifty states in the 1990s still favored capital punishment by 61%.

[6] Studies consistently find that state supreme court justices' preferences are a primary determinant of their votes. Typically, judicial choice is conceptualized as the product of individual preferences and external constraints, including law and electoral politics (e.g., Brace and Hall 1997; Hall and Brace 1996; Langer 2002; Savchak and Barghothi 2007).

[7] Abramson, Aldrich, and Rohde (2008) report defeat rates for 1954-1974.

[8] Establishing that legislators, who *should* respond to voters, actually *do* has been a substantial enterprise in political science. However, supreme courts have received scant attention and cannot be assumed to resemble legislatures. Among other things, judges are

supposed to remain above politics, lack an explicit representative function, and operate within three different types electoral systems varying in numerous ways.

[9] Detailed information about the SSCDP, including the dataset and codebook, is available at http://www.ruf.rice.edu/~pbrace/statecourt. The data in this paper were drawn from a preliminary version of the Project and were converted from the court- to individual-level by Frederick Wood. We ran extensive tests to check the accuracy of the transformations and to ensure that the cases being examined are, in fact, death penalty cases. This supplemental dataset will be posted online upon publication of this work.

[10] The three measures of electoral vulnerability are independent both conceptually and statistically. *Unsafe seat* measures electoral support for a specific justice, *Competitive court* measures average competition for supreme court seats generally, and *Unified Republican govt* measures the likelihood of retaliation for liberal votes. Bivariate corrections are: *Unsafe seat* and *Competitive court* = 0.24; *Unsafe seat* and *Unified Republican govt* = 0.02; and *Competitive court* and *Unified Republican* govt = -0.00.

[11] During the period in this study, 2.2% of incumbents were defeated in retention elections (Hall 2007a) and six retention states are below average relative to all elective states in electoral support for incumbents (Hall 2007b).

[12] As a robustness check, when the model in Table 3 is estimated without the interactions, all variables perform consistently except that mandatory retirement, supreme court competition, and unified Republican government lose significance. Thus, not taking into account the conditional relationships would lead to erroneous inferences.

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Table 1

Mandatory Retirement and Methods for Selecting State Supreme Court Justices

Partisan Elections	Nonpartisan Elections	Missouri Plan (Retention Elections)	Gubernatorial Appointment	Legislative Appointment
Alabama	***Georgia***	***Alaska***	***Connecticut***	Rhode Island
Arkansas	Idaho	***Arizona***	Delaware***	***South Carolina***
Illinois*	Kentucky	California	***Hawaii*****	***Virginia***
Louisiana	***Michigan****	***Colorado***	Maine	
Mississippi	***Minnesota***	***Florida***	***Massachusetts*****	
New Mexico	Montana	***Indiana***	***New Hampshire***	
North Carolina	Nevada	***Iowa***	***New Jersey***	
Pennsylvania*	North Dakota	***Kansas***	***New York***	
Tennessee	***Ohio****	***Maryland***	***Vermont*****	
Texas	***Oregon***	***Missouri***		
West Virginia	***Washington***	Nebraska		
	Wisconsin	Oklahoma		
		South Dakota		
		Utah		
		Wyoming		
(*n* = 11)	(*n* = 12)	(*n* = 15)	(*n* = 9)	(*n* = 3)

*Retention elections after initial partisan election
**Partisan caucus or primaries
***Governor's choices limited to list provided by the Judicial Nominating Commission

States with mandatory retirement provisions are in bold and italicized.

Sources: Council of State Governments, *Book of the States* (1997); and National Center for State Courts, *Survey of State Judicial Fringe Benefits, Second Edition* (1996)

Table 2

Variable Descriptions for an Electoral Model of Voting in State Supreme Court Death Penalty Cases

Variable		Variable Description
Dependent Variable		
Vote	=	1 if the vote is to overturn a death sentence 0 otherwise
Independent Variables		
Legal Factors		
Aggravating factors	=	composite index measuring aggravating factors and victim characteristics, (rape, robbery, kidnapping, and child victims); ranging from 0 to 4
Legal complexity	=	measure of the number of legal issues raised and decided on appeal
Public Defender	=	1 if the defendant was represented by public counsel 0 otherwise
Race	=	1 if any issue of race was raised on appeal 0 otherwise
Justices' Personal Traits		
Mandatory retirement	=	1 if the justice casting the vote is in a terminal term because of mandatory retirement laws 0 otherwise
Retirement age	=	1 if the justice casting the vote is age 60 and over 0 otherwise
Ideological preferences	=	Brace, Langer, and Hall (2000) PAJID measure of the justices' preferences ranging from 0 (most conservative) to 100 (most liberal)

Sate Contextual Climate

Nonpartisan election	=	1 if the state uses nonpartisan elections to select justices 0 otherwise
Partisan election	=	1 if the state uses partisan elections to select justices 0 otherwise
Citizen ideology	=	Erikson, Wright, and McIver (2006) measure of state liberalism, based on an aggregation of CBS News/*New York Times* polls from 1996 through 2003 and ranging from -100 (most conservative) to 0 (most liberal)
Public opinion	=	Brace et al. (2002) measure of public support for capital punishment

Electoral Context

Unsafe Seat	=	1 if the justice won his / her previous election with 55 % of the vote or less 0 otherwise
Competitive court	=	Hall (2007b) measure of supreme court election competitiveness based on average winning margins; coded 1 if above average and 0 otherwise
Unified Republican government	=	1 if the state legislature and statehouse are controlled by Republicans 0 otherwise

Temporal Controls

1995, 1996, or 1997	=	1 if the vote was cast during each respective year 0 otherwise

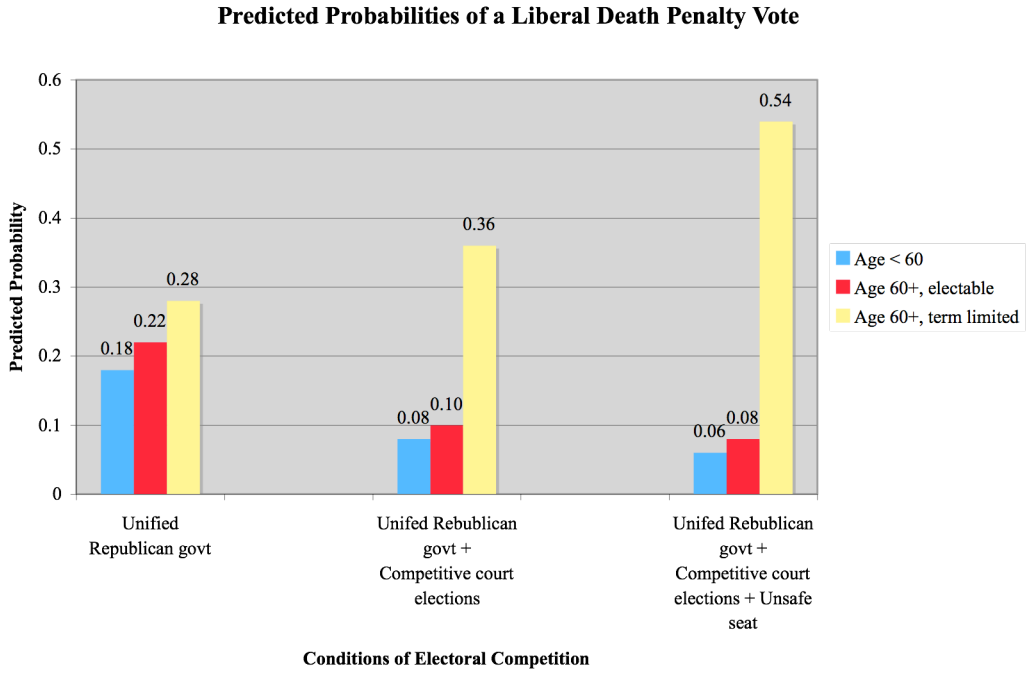
Table 3

An Electoral Model of State Supreme Court Justices' Votes to Overturn Death Sentences, 1995-1998 (Probit with Robust Standard Errors Clustered on State)

	Coefficient	Robust Std. Error	z	P>|z|	Δ P
Legal Factors					
Aggravating factors	- 0.1447	0.0563	- 2.57	0.010	- 11.7%
Legal complexity	- 0.0714	0.0140	- 5.08	0.000	- 34.1%
Public Defender	0.0920	0.0805	1.14	0.253	----
Race	- 0.0459	0.2069	- 0.22	0.824	----
Justices' Personal Traits					
Mandatory retirement	- 0.2916	0.0771	- 3.78	0.000	- 8.1%
Retirement age	0.1398	0.0622	2.25	0.025	4.3%
Ideological preferences	0.0035	0.0015	2.24	0.025	9.9%
State contextual climate					
Nonpartisan election	- 0.2163	0.0715	- 3.03	0.002	- 6.2%
Partisan election	- 0.0999	0.0664	- 1.51	0.132	----
Citizen ideology	0.0165	0.0056	2.95	0.003	13.8%
Electoral context					
Unsafe seat x Mandatory retirement	0.4640	0.1632	2.84	0.004	16.1%
Unsafe seat	- 0.1285	0.0536	- 2.40	0.017	- 3.9%
Competitive court x Mandatory retirement	0.2289	0.1130	2.03	0.043	7.4%
Competitive court	- 0.5055	0.0835	- 6.05	0.000	- 17.1%
Unified Republican govt x Mandatory retirement	0.3295	0.1688	1.95	0.051	11.1%
Unified Republican govt	- 0.3013	0.0637	- 4.73	0.000	- 8.5%
Temporal controls					
1995	0.0383	0.1070	0.36	0.720	----
1996	0.0857	0.0913	0.94	0.348	----
1997	- 0.0402	0.0962	- 0.42	0.676	----
Constant	0.2719	0.2177	1.25	0.212	

Dependant variable = *Vote* to overturn a death sentence
Number of observations = 7840
Number of clusters = 27
Wald chi2(19) = 1716.09
Prob > chi2 = 0.0000

Figure 1*



* Predicted probabilities are for liberal justices in conservative states and were generated using the probit model in Table 3 and CLARIFY. Liberal justices are those whose PAJID scores (Brace, Langer, and Hall 2000) are one standard deviation above the mean. Conservative states are those with Erikson, Wright, and McIver (2006) ideology scores one standard deviation below the mean.