The Politics of Judicial Opposition

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Abstract:
The study takes a mathematical approach on one of the variables in judicial decision-making. It takes into consideration that state appellate judges are either reelected by voters or reappointed by another governmental branch and sees how seeking a reelection or reappointment influences the decision-making process. Moreover, the author probes into who are the most likely to dissent in important cases: judges seeking reelection or those seeking reappointment.

Rezumat:
Articolul privește dintr-o perspectivă matematică una dintre variabilele modului de deliberare judiciară. Astfel, autorul are în vedere că judecători statali de la instanțele de apel sunt fie realeși de către alegători, fie reconfirmați de către o altă putere în stat și în cadrul articolului analizează cum dorința de a fi reales sau reconfirmat influențează procesul judiciar deliberativ. Mai mult, autorul cercetează ce categorie de judecători este mai probabil să emită opinii separate în cauzele importante: judecătorii care își doresc să fie realeși sau cei care doresc să fie reconfirmați.

Keywords: judicial decision-making, appointed judges, elected judges

Existing studies of judicial decision-making have found that elected judges are more likely to dissent and to oppose judges from the same party. These findings are explained by elected judges having stronger preferences for risk or being more independent. In this paper, I offer an alternative explanation: judges' efforts to be retained should yield different patterns of opposition among judges facing re-election and reappointment. I test my hypothesis using data from four years of state supreme courts decisions. Estimation results from probit models and mixed- effects nested logit models suggest that judges' retention concerns are important influences on their opposition voting. (JEL: K 40, K 41)

1. Introduction

The propensity of judges to either join the majority or dissent is of substantial interest among both legal scholars and scholars of judicial politics. Judges' decisions to take sides on important issues often reveal ideological or personal motivations that influence their voting. Moreover, patterns of consensus and opposition among judges facing different institutional arrangements shed light on the influence of these factors on judicial behavior.

An impressive number of studies in the political science literature have esta-

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blished that various institutional factors influence judges' tendency to dissent (see, e.g., BRACE AND HALL [1990], [1993]; HALL AND BRACE [1989]). The studies consistently find that elected judges dissent more than appointed judges. The authors conclude that selection and retention methods that entail greater risk, like elections, will appeal to people with stronger preferences for risk. These risk-acceptant judges will, in turn, be more likely to diverge from the status quo. Thus, elected judges should exhibit a higher propensity to dissent than appointed judges.

A recent study has further enhanced this literature by establishing that, not only are elected judges more likely to oppose the court majority by dissenting, they are also more likely to oppose judges from their own party (CHOI, GULATI, AND POSNER [2010]). The authors offer their findings as some evidence that elected judges are more independent than appointed judges; elected judges are less influenced by the interests of political parties than appointed judges.

The finding that elected judges are more likely to oppose in-party judges is surprising given the extensive literature on the conflict between judicial elections and independence. If, as several studies assert, judges facing reelection are more influenced by retention concerns than judges facing reappointment, it seems counterintuitive that they would be more likely to oppose judges from the same party. Instead, many might expect that retention concerns would induce elected judges to be extremely loyal to both their political party and their party's interests. Thus, they should be less likely to oppose in-party judges.

However, in this paper, I explain that elected judges' greater propensity to oppose both the court majority and in-party judges can, in fact, be explained by retention concerns. I describe various reasons why judges' rational efforts to be retained ought to yield systematic differences in opposition voting among judges seeking reelection and reappointment. I argue that the influences on elected judges' opposition voting is no different from the influences on their general voting; both are influenced by their desires to be reelected.

To test the relationship between retention concerns and judges' patterns of opposition, I use a dataset of almost every decision in state supreme courts from 1995–1998.[2] The data include more than 28,000 decisions involving more than 470 individual state supreme court justices, and include case outcomes as well as individual judges' votes. The estimation results from both probit models and mixed-effects nested logit models are consistent with judges' retention concerns being important influences on their patterns of opposition. Moreover, only retention concerns, and not judges' innate preferences for risk or impartiality can explain some of the differences in opposition voting among judges from different retention methods.

The paper is organized as follows. In section 2, I explain how retention concerns should lead to systematic differences in the opposition voting among judges seeking reelection and reappointment. I test my hypotheses in several estimations in section 3. I conclude in section 4.

2. Predicting Judicial Opposition

Unlike U.S. federal judges with life tenure, the majority of state appellate judges must be either reelected by the voters or reappointed by another

[2] Technically, New York's highest court is called the Court of Appeals and New York's Supreme Courts are lower courts. Throughout this paper, I refer to the highest court of all states as the state supreme court.

governmental branch. Only Rhode Island offers appellate judges lifetime appointments, and New Hampshire and Massachusetts Supreme Court judges serve until age 70. The other states have chosen a variety of combinations of selection and retention methods that include. Table 1 shows each state's methods of selection and retention for the study period 1995–1998.

Table 1
Methods of Selection and Retention by State

State	Selection method for full term	Method of retention	State	Selection method for full term	Method of retention
Alabama	P	P	Montana	N	N
Alaska	M	R	Nebraska	M	R
Arizona	M	R	Nevada	N	N
Arkansas	P	P	New Hampshire	G	–
California	G	R	New Jersey	G	G
Colorado	M	R	New Mexico	P	R
Connecticut	LA	LA	New York	M	G
Delaware	M	G	North Carolina	P	P
Florida	M	R	North Dakota	N	N
Georgia	N	N	Ohio	N	N
Hawaii	M	J	Oklahoma	M	R
Idaho	N	N	Oregon	N	N
Illinois	P	R	Pennsylvania	P	R
Indiana	M	R	Rhode Island	M	–
Iowa	M	R	South Carolina	LE	LE
Kansas	M	R	South Dakota	M	R
Kentucky	N	N	Tennessee	M	N
Louisiana	P	P	Texas	P	P
Maine	G	G	Utah	M	R
Maryland	M	R	Vermont	M	LE
Massachusetts	M	–	Virginia	LE	LE
Michigan	N	N	Washington	N	N
Minnesota	N	N	West Virginia	P	P
Mississippi	N	N	Wisconsin	N	N
Missouri	M	R	Wyoming	M	R

Source: ROTTMAN et al. [2000], AMERICAN JUDICATURE SOCIETY [2009].
Notes: G = gubernatorial appointment or reappointment, P = partisan election or reelection, N = nonpartisan election or reelection, LA = legislative appointment or reappointment, LE = legislative election or reelection, M = merit plan, R = retention election, and J = reappointment by a judicial nominating commission. In Massachusetts and New Hampshire, judges serve until age seventy. In New Jersey, after an initial gubernatorial reappointment, judges serve until age seventy. In Connecticut, the governor nominates and the legislature appoints. In Michigan and Ohio, political parties nominate candidates to run in nonpartisan elections. In Rhode Island, judges have life tenure.

Retention concerns may lead to different patterns of opposition among judges facing different retention methods. Judges without life tenure may vote strategically if they believe it will help them get reappointed, reelected, or otherwise retained. Indeed, numerous studies have found evidence that is consistent with judges voting strategically in order to be retained. Several studies have shown that the behavior of elected judges changes as reelection approaches. For example, evidence suggests that when electoral pressures intensify near the end of their terms, judges deviate from expected voting patterns (HALL [1987], [1992]), impose longer criminal sentences (HUBER AND GORDON [2004]), and side with the majority in death penalty cases (HALL [1992], BRACE AND HALL [1995]).

Other studies have found that judges elected in partisan elections face greater voting pressures than appointed judges. For example, partisan-elected judges are more likely to redistribute wealth in torts cases from out-of-state businesses to in-state plaintiffs that are voters (HELLAND AND TABARROK [2002], TABARROK AND HELLAND [1999]). Similarly, judges facing partisan elections are less likely to dissent on politically controversial issues (HALL AND BRACE [1996]), and less likely to vote for challengers to a regulatory status quo (HANSSEN [2000]). Likewise, in a previous study, I found that judges who must be reelected by Republican voters in partisan elections tend to decide cases in accord with standard Republican policy: they are more likely to vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases and torts cases generally, and against criminals in criminal appeals (SHEPHERD [2009a]).

Other studies have found evidence that judges facing reappointment also vote strategically. For example, judges subject to gubernatorial or legislative reappointment are less likely to hear abortion cases in which direct challenges to state statutes regulating abortion are raised (BRACE, LANGER, AND HALL[2000]). Similarly, in a recent study I found that compared to other retention methods, judges facing gubernatorial or legislative reappointment are more likely to vote for litigants from the other government branches that are responsible for their retention (SHEPHERD [2009c]).

Thus, a substantial body of empirical evidence suggests that judges may vote strategically in order to be retained. If retention concerns influence judges' voting for particular litigants or judges' willingness to hear certain cases, they may also influence their propensity to dissent or oppose judges from their own party. Although whether a vote is an opposition vote clearly depends on other judges' voting, geographical, and temporal differences in elections among judges on the same court should provide distinct incentives for different judges to cast either supporting or opposing votes. Different judges on the same court face elections in different years, and in many states, judges are elected from different geographical regions.[3]

Thus, at any given time, judges on the same court will face different incentives to vote either with or against the majority of the court or their party.

[3] The geographical basis for supreme court judges' selection is either regional or by district, rather than statewide, in Florida, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Oklahoma, and West Virginia (in South Dakota, the initial selection is by district, but the retention decision is statewide(ROTTMAN et al. [2000]).

Previous political science studies have established that judges facing reelection are more likely to dissent (BRACE AND HALL [1990], [1993]; HALL AND BRACE [1989]). The authors have explained these higher dissent rates as evidence that elected judges have stronger preferences for risk than appointed judges, and thus, are more willing to go out on a limb in their voting. Another recent study has found that elected judges are more likely to oppose judges from their own party (CHOI, GULATI, AND POSNER [2010]), suggesting that these judges might be more independent because they are less influenced by political parties than are appointed judges.

These patterns of opposition can also be explained by judges' rational efforts to be retained. Judges facing reappointment must appeal to politicians from the other government branches in order to be retained. In contrast, judges facing reelection must appeal to voters in order to be retained. As different votes will appeal to different retention groups, different patterns of opposition should also emerge under different retention methods.

Judges that face future gubernatorial or legislative reappointment have the incentive to vote moderately. Both governors and majorities in legislatures can easily lose elections to members of the opposing political party. Because, appointed judges can never be certain of the politics of the government branch that will be responsible for their future retention, they have the incentive to vote moderately in order to appeal to politicians from either political party[4].

The results from my empirical analysis of judges' voting in a variety of case types are consistent with judges' retention concerns being important influences on their patterns of opposition.

By definition, moderates' preferences will typically lie in the middle of the ideological spectrum. Thus, compared to more extreme judges, moderates will be less likely to disagree both with judges from their own party and with moderate judges from opposing parties that may make up the court majority. Therefore moderate judges will be less likely both to dissent and to oppose in-party judges.

Elected judges have very different incentives. As ideological changes in voters do not happen as suddenly as the executive or legislative branches can change power, elected judges do not face the same incentives to vote moderately in order to appeal to future politicians from either party. In contrast, elected judges need to appeal to a small subset of citizens; voter turnout for judicial elections has historically be extremely low; often less than 20% of eligible voters turn out to vote in judicial elections, and an even smaller percent has any familiarity with the judicial candidates when they do vote (GEYH [2003]). To be reelected by these voters, judges need to have name recognition while not gaining infamy for unpopular voting on issues that are

[4] Governors and legislatures may also be more inclined to appoint moderate judges. By appointing moderate judges, they increase the likelihood that future governors and legislatures of either party will reappoint the judges they originally selected. Thus, if governors or legislatures aspire to appoint judges that will have long careers on the bench and great influence on the shaping of the law, they have an incentive to appoint moderate judges. This idea was first described intuitively in LANDES AND POSNER [1975].

particularly salient to the public. To do this, it is important that judges obtain campaign funding while not singling themselves out for criticism on politically controversial issues. These demands should influence elected judges' opposition voting.

Campaign funds are essential for judges that hope to be reelected. Between 1990 and 2004, average campaign spending in nonpartisan elections increased by approximately 100%, from approximately $300,000 to $600,000. Average spending in partisan elections during this period increased from approximately $425,000 to $1.5 million, an increase of over 250% (BONNEAU [2007]).

The increasing cost of judicial campaigns has made it extremely difficult for candidates to win elections without substantial funding. In 2001–2002, the top campaign fundraiser prevailed in approximately 80% of contested state Supreme Court races (BONNEAU [2005]).

Because the cost of winning a judicial election has increased dramatically, judges have the incentive to vote in ways that will help them to obtain campaign funds. Indeed, recent empirical studies have found a relationship between campaign contributions and judges' case decisions. For example, in a recent study, I found that contributions from interest groups are associated with increases in the probability that judges will vote for the litigants those interest groups favor (SHEPHERD [2009b]). Similarly, other scholars have found a correlation between the sources of a judge's funding and the judge's rulings in arbitration decisions from the Alabama Supreme Court (WARE [1999]), in tort cases before state supreme courts in Alabama, Kentucky, and Ohio (WALTENBURG AND LOPEMAN [2000]), in cases between two businesses in the Texas Supreme Court (MCCALL [2003]), and in cases during the Supreme Court of Georgia's 2003 term (CANN [2006]).

As well as influencing the litigants that judges favor, campaign contributions could also influence judges' patterns of opposition. The need to obtain campaign funds may influence judges to oppose decisions that do not favor wealthy interest groups that are potential campaign contributors. For example, a judge may be more likely to dissent when the court majority opposes litigants and issues favored by wealthy interest groups. Similarly, a judge may be more likely to oppose judges from their own party when the other judges are opposing litigants favored by wealthy interest groups. In fact, the interest group rewards may be even higher to judges that go out on a limb with opposition votes that favor the groups' interests.

Two groups are the most important contributors to judicial campaigns. In 2006 state Supreme Court elections, over 65% of contributions came from interest groups that were pro-business groups or lawyers' organizations (SAMPLE, JONES, AND WEISS [2006]). The single largest interest group contributors were pro-business groups, which contributed over 44% of the total campaign funds raised by candidates. Thus, judges may have the strongest incentives to make decisions that favor these groups. I explore this hypothesis in my empirical analysis.

In addition to voting to raise campaign funds, elected judges also have the incentive to not single themselves out for criticism on politically controversial issues. Although voter turnout is typically very low, opposing candidates and interest groups often run attack campaigns based on a judge's voting in isolated cases that can make them infamous among voters. Successful attack campaigns can mobilize greater turnout among voters opposing a judge, or turn otherwise uninformed voters into opponents of a particular judge.

Indeed, campaigns have been

mounted to unseat incumbent judges in Mississippi, Nebraska, Tennessee, Wisconsin, Illinois, California, Georgia, Idaho, Alabama, Michigan, Pennsylvania, and Texas based on their unpopular judicial decisions in isolated cases that involved crime control, victims' rights, abortion, homosexual rights, water rights, school funding, and tort reform (GEYH [2003]). Several of the judges have been unseated over decisions on politically controversial issues, such as California Chief Justice Rose Bird and Tennessee Supreme Court Justice Penny White for their decisions in capital cases. In fact, the loss rate for incumbents in 2000 partisan elections was a stunning 45.5%. This rate of defeat is much higher than the rate at which incumbents lose in the U.S House or Senate or in state legislatures (HALL [2001], HALL AND BONNEAU [2006]).

Thus, elected judges may be reluctant to go out on a limb on politically controversial issues. Indeed, HALL [1987], [1992] found that in the Louisiana Supreme Court, retention concerns result in judges being less likely to dissent on controversial issues of public policy. Judges should also be less likely to oppose judges from their own party on controversial issues; judges' votes in controversial decisions become more difficult to justify when they distinguish themselves by opposing judges from their own party. Thus, judges have the incentive to vote with their party on the limited types of cases that are very salient to the public.

In sum, retention concerns should influence judges facing reappointment to vote moderately and oppose both the court majority and in-party judges less than judge facing reelection. Judges facing reelection should be especially likely to oppose the court majority or judges from their own party when those other coalitions are opposing litigants favored by wealthy interest groups. In contrast, judges facing reelection should be relatively less likely to cast opposing votes on politically controversial issues.

3. Empirical Analysis

I first discuss the data and model used in my estimations. Then I discuss the results of several estimations designed to test the influence of retention concerns on judges' patterns of opposition.

3.1. Data

To test the influence of retention concerns on judges' opposing votes, I use data from the State Supreme Court Data Archive. This data includes an almost universal sample of state Supreme Court cases in all fifty states from 1995 to 1998. The data include more than 28,000 decisions involving more than 470 individual state supreme court justices[5]. The data include variables that reflect case histories, case participants, legal issues, case outcomes, and individual justices' behavior. I supplemented these data with institutional variables that describe aspects of the judicial system of each state, and with detailed information about each judge's background and career.

3.2. Model

To test whether retention concerns influence judges' likelihood of opposing either the court majority or judges from their own party, I estimate a series of both ordinary probit models and mixed-effects nested (hierarchical) logit models. The mixed-effects logit models estimate two

[5] State dockets exceeding 200 cases in a single year are selected from a random sample of 200 cases. Typically, case quantities are unaffected due to the limited size of many state supreme court dockets.

levels of nested groups; the case-specific random effects are nested within state-specific random effects.[6]

I measure the models' dependent variable, an opposing vote, differently in different specifications. An opposing vote can be (1) a dissenting vote, (2) an opposing vote against an author from the same party – that is, a dissenting vote when the majority opinion is authored by an in-party judge or a vote for the majority when the dissent is authored by an in-party judge[7], or (3) an opposing vote against most of the in-party judges – that is, a dissenting vote when most of the in-party judges join the majority, or a vote for the majority when most of the in-party judges dissent.

All estimations include indicator variables for three different retention methods: partisan reelections, nonpartisan reelections, and unopposed retention elections. Thus, the base category in all estimations, when all three of these indicator variables are zero, consists of votes by judges facing gubernatorial reappointment, legislative reappointment, or with permanent tenure.

In addition to the retention variables, the estimations include a series of judge-level, case-level, and state-level variables that might be related to judges' propensity to cast opposing votes. The judge-level variables include a measure of each judge's ideology to control for the relationship between policy preferences and opposition. For this proxy, I use each judge's party-adjusted surrogate judge ideology measure, or PAJID score (BRACE, LANGER, AND HALL [2000]). This is the most common measure of judge's ideology currently used in political science studies, and is based on the assumption that judges' ideologies can be best proxied by both their partisan affiliation and the ideology of their states at the time of their initial accession to office. Including the PAJID scores allows me to separate the influence of the judges' own ideology from the influence of the retention method.

The judge-level variables also include an indicator for whether a particular judge is the chief justice on the court, a variable indicating the length of time in years that the individual judge has served on the court, and a variable indicating the length of time in years until the judge's next retention.[8] These variables control for voting changes throughout a judge's career and term. In later estimations, I include interactions between the retention method and the time until retention.

In addition, all estimations include various case-level variables that may be related to opposition votes. First, I include the number of judges hearing each case, as well as an indicator variable for whether the judges hearing the case were all from the same party. I also include indicator variables for whether a case is a criminal case, a juvenile case, a civil case involving the state government, and a civil case involving private individuals. Thus, the base category is non-adversarial cases, such as cases involving certification and advisory opinions. Finally, I include indicator variables for whether at least one litigant is a business, a person, or a representative of the state government.

Next, I include various state-level characteristics that have been found to be related to opposition votes. First, I

[6] STATA's *xtmelogit* command is used to estimate these models.

[7] This is the measurement used in CHOI, GULATI, AND POSNER [2010].

[8] This variable is actually the reverse of the years to retention (as the longest number of years to retention during my sample is twelve, the inverse years to retention is thirteen minus the years to retention).

include a variable that indicates whether the state has a lower appellate court, and, thus, the court has discretionary review to hear cases. Numerous studies report that the presence of an intermediate appellate court increases dissent rates (GLICK AND PRUET JR. [1986], HALL AND BRACE [1989]), suggesting that discretionary dockets facilitate the expression of dissent.

The state-level variables also include indicator variables for whether a court utilizes a random opinion assignment procedure instead of a discretionary procedure, and whether voting takes place in the order of seniority. Random or rotating opinion assignment procedures prevent judges from being rewarded or sanctioned for their opposition votes, and thus reduce the incentives for consensus (HALL [1985]). In contrast, when opinions are assigned by the chief justice, opportunities for rewards and sanctions emerge. Similarly, when voting takes place in order of seniority, the most senior judges may influence junior judges, reducing the likelihood of their disagreement (HALL [1985]).

I also include the percentage of majority opinions authored by in-party judges in the court each year. This variable controls for the background pool of majority opinions, recognizing that judges that dissent at random will be more likely to oppose their own party if their party authors more of the majority opinions in a given year. Finally, I include the number of times the political party of the governor (or legislature in states utilizing legislative reappointment) has changed since 1960. When the retention groups' political party changes often, judges are less able to predict the party of the governor (or legislature) that will reappoint them. This may induce judges facing reappointment to vote even more moderately and cast even fewer opposing votes.

Moreover, all estimations include year indicators to capture trends in the likelihood of opposition. In the probit estimations, the *t*-statistics are computed from standard errors clustered by state. In the mixed-effects nested logit models, cases are nested within states.

3.3. Results

I present the results of several estimations that test the influence of retention concerns on judges' patterns of opposition. The results are presented in Tables 2–7. Because the raw probit results are difficult to interpret in terms of the probability of a judge casting an opposing vote, I present the marginal effects of each retention method variable on the probability of either a judge dissenting or opposing in-party judges. Thus, the probit results report the increase in the probability of a judge casting an opposing vote under the particular retention method, assuming all of the other variables are equal to the average variables in the sample.

3.3.1. Primary Results

Table 2 reports the primary probit results and Table 3 reports the primary estimation results from mixed-effects nested logit models. The results indicate that judges facing reelection are more likely to both dissent and oppose judges from their own party than are judges facing reappointment. The magnitudes of the marginal effects are reasonable. For example, the probit results suggest that a judge facing a partisan reelection, compared to the base categories, is approximately 8 percentage points more likely to oppose an in-party author.

3.3.2. Patterns of Opposition for Different Case Types

Next, I test whether elected judges' patterns of opposition differ based on the case type. I analyze opposition voting in both cases that involve various

Table 2
Retention Methods and Opposition Voting; Probit Estimations

Variable	Measurement of Opposition Vote		
	Dissenting vote	Opposing vote to in-party author	Opposing vote to most of in-party judges
Partisan reelection	0.07*	0.082*	0.040*
	(0.027)	(0.04)	(0.006)
Nonpartisan reelection	0.06*	0.069*	0.038*
	(0.023)	(0.028)	(0.005)
Retention election	0.04*	0.033+	0.027*
	(0.017)	(0.021)	(0.005)
Years on court	0.001*	−0.0002	0.0009*
	(0.0005)	(0.0007)	(0.0001)
Years to retention (reverse)	−0.002	0.001	−0.0007*
	(0.0001)	(0.002)	(0.0003)
Chief justice	−0.017*	0.010	−0.013*
	(0.005)	(0.007)	(0.002)
PAJID score	0.0006*	0.0001	0.0002*
	(0.0002)	(0.0002)	(0.00005)
Lower appellate court	0.011	−0.014	0.004
	(0.013)	(0.03)	(0.003)
Random opinion assignment	0.008	−0.015	0.008*
	(0.01)	(0.022)	(0.002)
Seniority voting	0.015	0.022	0.005+
	(0.017)	(0.024)	(0.003)
Court size	0.007	0.016*	0.005*
	(0.004)	(0.007)	(0.0009)
Indicator for all in-party judges	−0.034*	−0.048*	−0.034*
	(0.008)	(0.01)	(0.002)
% of majority opinions authored by in-party judges	0.0002	0.0026*	0.0008*
	(0.0001)	(0.0003)	(0.00004)
Times the governor's seat switched parties since 1960	−0.002	0.0015	−0.00009
	(0.003)	(0.004)	(0.0006)
Number of observations	72732	72732	72732
Log likelihood	−17069	−21447	−14445

Note: "*" and "+" represent significance at the 5% and 10% levels, respectively.

Table 3
Retention Methods and Opposition Voting; Mixed-Effects Nested Logit Estimations

Variable	Measurement of Opposition Vote		
	Dissenting vote	Opposing vote to in-party author	Opposing vote to most of in-party judges
Partisan reelection	0.97*	0.58+	0.64+
	(0.20)	(0.32)	(0.33)
Nonpartisan reelection	1.00*	1.39*	0.63*
	(0.18)	(0.32)	(0.28)
Retention election	0.65*	0.077	0.42+
	(0.18)	(0.27)	(0.25)
Years on court	0.030*	0.011*	0.013*
	(0.004)	(0.006)	(0.004)
Years to retention (reverse)	−0.07*	0.033*	−0.055*
	(0.009)	(0.014)	(0.008)
Chief justice	−0.556*	−0.106	−0.36*
	(0.069)	(0.088)	(0.061)
PAJID score	0.010*	−0.0009	−0.006*
	(0.002)	(0.002)	(0.002)
Lower appellate court	0.17	−0.26	0.013
	(0.15)	(0.25)	(0.25)
Random opinion assignment	0.11	−0.877*	0.115
	(0.11)	(0.21)	(0.21)
Seniority voting	0.30*	0.342+	0.194
	(0.11)	(0.19)	(0.213)
Court size	0.12*	0.281*	0.144*
	(0.04)	(0.078)	e(0.07)
Indicator for all in-party judges	−0.85*	−2.35*	−0.877*
	(0.12)	(0.18)	(0.103)
% of majority opinions authored by in-party judges	0.004*	0.11*	0.021*
	(0.001)	(0.002)	(0.001)
Times the governor's seat switched parties since 1960	−0.04	0.221*	−0.064
	(0.027)	(0.049)	(0.05)
Number of observations	72732	72732	72732
Log likelihood	−15724	−11590	−13840

Note: "*" and "+" represent significance at the 5% and 10% levels, respectively.

controversial issues and cases that involve litigants that are often favored by wealthy interest groups. If retention concerns are an important influence on opposition voting, the patterns of opposition should be different among these types of cases.

First, I test whether elected judges' tendencies towards opposition hold in cases involving politically controversial issues that are salient to the public. Table 4 presents the results for cases involving death penalty cases, discrimination cases, first amendment cases, and privacy cases.[9] In general, I find that elected judges are not any more likely to dissent or oppose in-party judges compared to the base categories. These results are consistent with elected judges being reluctant to single themselves out for criticism on politically controversial issues.

Next, I analyze opposition voting for four different case types that often involve either issues that concern interest groups or litigants that are often favored by interest groups: cases between a business and an individual, labor disputes, medical malpractice cases, and torts cases.

For example, pro-business interest groups, the largest contributors to judicial campaigns often have an interest in the outcomes of all of these cases. Similarly, groups hoping to shape general tort law and tort reform are major contributors to judicial campaigns in most states (CHAMPAGNE [2005]). A previous study has found that contributions from interest groups do influence the litigants favored by elected judges in these case types (SHEPHERD [2009b]). Table 5 shows that, compared to the base categories, elected judges are more likely to distinguish themselves in case involving litigants that are often favored by interest groups. To further explore opposition voting when interest group money is at stake, I test whether elected judges' opposition to in-party judges depends on whether the in- party judges are voting against litigants that are typically favored by wealthy interest groups. For example, I test whether elected judges oppose in-party judges more than the base categories when the in-party judges are voting against business litigants or when they are voting for business litigants. I do the same for voting against employer litigants, doctor and hospital litigants, and defendants in torts cases.

Table 6 presents the results from both probit and mixed-effects nested logit estimations that measure opposition voting as an opposing vote against most of the in-party judges[10]. The results from most of the estimations suggest that, compared to the base categories, elected judges are only more likely to oppose in-party judges when the in-party judges are voting against the litigants favored by interest groups. In contrast, when the in-party judges are voting for the litigants typically favored by interest groups, elected judges are, in most cases, no more likely to cast opposing votes than appointed judges. Overall, the results are consistent with there existing a strong relationship between the desires to obtain campaign funding and the opposition voting of elected judges.

3.3.3. Patterns of Opposition as Retention Approaches

Next, I explore whether an approaching retention affects elected judges' opposition of in-party judges. That is, I test whether, as their reelection approaches, judges become even more likely to oppose in-party judges that are voting against the interests of interest groups. I add interaction variables

[9] For brevity, I do not report the results from mixed-effects, nested logit models;the results are similar.

[10] The results from estimations that measure opposition voting in other ways are consistent with those I report here.

Table 4
Opposition Voting in Politically Controversial Issues

Variable	Measurement of Opposition Vote: Dissenting vote	Opposing vote to in-party author	Opposing vote to most of in-party judges
Death Penalty Cases ($n = 3739$)			
Partisan reelection	−0.025	−0.034	−0.022
	(0.04)	(0.04)	(0.03)
Nonpartisan reelection	0.014	−0.015	0.008
	(0.05)	(0.04)	(0.03)
Retention election	−0.012	−0.046	−0.02
	(0.04)	(0.05)	(0.02)
Discrimination Cases ($n = 1169$)			
Partisan reelection	−0.019	0.02	−0.004
	(0.04)	(0.1)	(0.03)
Nonpartisan reelection	0.07^{+}	0.027	0.099^{+}
	(0.05)	(0.08)	(0.05)
Retention election	0.07	0.14*	0.088*
	(0.05)	(0.08)	(0.04)
First Amendment Cases ($n = 802$)			
Partisan reelection	0.04	0.04	0.004
	(0.07)	(0.09)	(0.028)
Nonpartisan reelection	0.039	0.056	0.005
	(0.03)	(0.06)	(0.017)
Retention election	−0.005	0.017	−0.006
	(0.02)	(0.05)	(0.018)
Privacy Cases ($n = 940$)			
Partisan reelection	0.012	0.027	0.044
	(0.08)	(0.07)	(0.042)
Nonpartisan reelection	0.08^{+}	0.012	0.043
	(0.05)	(0.05)	(0.04)
Retention election	0.02	0.048	0.014
	(0.03)	(0.05)	(0.023)

Note: "*" and "+" represent significance at the 5% and 10% levels, respectively.

Table 5
Opposition Voting in Cases Involving Interest Groups' Issues

Variable	Measurement of Opposition Vote: Dissenting vote	Opposing vote to in-party author	Opposing vote to most of in-party judges
Business v. Person Cases ($n = 12728$)			
Partisan reelection	0.07*	0.08*	0.05+
	(0.039)	(0.046)	(0.03)
Nonpartisan reelection	0.08*	0.08*	0.05*
	(0.038)	(0.045)	(0.028)
Retention election	0.05*	0.04+	0.03+
	(0.025)	(0.02)	(0.02)
Labor Cases ($n = 2756$)			
Partisan reelection	0.08+	0.15*	0.08*
	(0.06)	(0.06)	(0.04)
Nonpartisan reelection	0.126*	0.12*	0.09*
	(0.06)	(0.07)	(0.05)
Retention election	0.08*	0.07*	0.05*
	(0.046)	(0.038)	(0.02)
Medical Malpractice Cases ($n = 1143$)			
Partisan reelection	0.08+	0.12+	0.09*
	(0.05)	(0.08)	(0.01)
Nonpartisan reelection	0.11*	0.015	0.09*
	(0.07)	(0.06)	(0.007)
Retention election	0.03	−0.027	0.06*
	(0.04)	(0.05)	(0.015)
Torts Cases ($n = 11452$)			
Partisan reelection	0.058+	0.115*	0.056*
	(0.03)	(0.05)	(0.028)
Nonpartisan reelection	0.06+	0.083*	0.06*
	(0.04)	(0.05)	(0.03)
Retention election	0.033	0.049+	0.033*
	(0.025)	(0.028)	(0.019)

Note: "*" and "+" represent significance at the 5% and 10% levels, respectively.

Table 6
Opposition Voting and Opposing Coalition's Support for Interest Groups

	Opposing Vote to Most of In-Party Judges			
	Results from Probit Estimations		Results from Mixed-Effects Nested Logit Estimations	
Variable	Opposing coalition votes against interest group interests	Opposing coalition votes in favor of interest group interests	Opposing coalition votes against interest group interests	Opposing coalition votes in favor of interest group interests
Business v. Person Cases				
Partisan reelection	0.033+ (0.020)	0.018 (0.023)	1.01* (0.36)	0.77+ (0.43)
Nonpartisan reelection	0.04* (0.017)	0.03 0(0.027)	0.84* (0.31)	0.73* (0.36)
Retention election	0.03+ (0.019)	0.03 (0.024)	0.70* (0.28)	0.91* (0.33)
Labor Cases ($n = 2756$)				
Partisan reelection	0.06* (0.03)	0.03 (0.03)	1.11+ (0.6)	0.67 (0.75)
Nonpartisan reelection	0.06* (0.022)	0.07* (0.04)	1.45* (0.63)	1.1 (0.65)
Retention election	0.03+ (0.02)	0.05* (0.03)	0.65 (0.62)	1.2+ (0.62)
Med. Malpractice Cases				
Partisan reelection	0.11* (0.06)	−0.02 (0.034)	2.04* (1.0)	−0.48 (0.99)
Nonpartisan reelection	0.12* (0.06)	−0.003 (0.036)	2.05* (1.0)	0.22 (0.97)
Retention election	0.07+ (0.04)	−0.03 (0.03)	1.47 (0.93)	−0.79 (0.87)
Torts Cases ($n = 11452$)				
Partisan reelection	0.037+ (0.023)	0.016 (0.029)	0.70* (0.31)	0.69 (0.51)
Nonpartisan reelection	0.036* (0.016)	0.037 (0.03)	0.71* (0.28)	0.65 (0.42)
Retention election	0.025+ (0.016)	0.03 (0.028)	0.49+ (0.26)	0.69+ (0.39)

Note: "*" and "+" represent significance at the 5% and 10% levels, respectively.

between the retention methods and the years to retention to the previous specifications[11]. Table 7 reports the results for estimations that measure opposition voting as an opposing vote against most of the in-party judges.[12]

Table 7
Opposition Voting as Judges' Retention Approaches

Variable	Opposing vote to most of in-party judges
Business v. Person Cases	
Partisan × Yrs. to retention	0.002+
	(0.001)
Nonpartisan × Yrs. to retention	0.0013
	(0.001)
Retention elect × Yrs. to retention	0.0002
	(0.001)
Labor Cases	
Partisan × Yrs. to retention	0.006*
	(0.002)
Nonpartisan × Yrs. to retention	0.005*
	(0.001)
Retention elect × Yrs. to retention	0.0033+
	(0.002)
Medical Malpractice Cases	
Partisan × Yrs. to retention	0.003+
	(0.0016)
Nonpartisan × Yrs. to retention	0.002
	(0.002)
Retention elect × Yrs. to retention	0.003+
	(0.0015)
Torts Cases	
Partisan × Yrs. to retention	0.004*
	(0.013)
Nonpartisan × Yrs. to retention	0.002+
	(0.001)
Retention elect × Yrs. to retention	0.0008
	(0.001)

Note: "*" and "+" represent significance at the 5% and 10% levels, respectively.

[11] The variables are actually the interaction between each retention method and the reverse of the years to retention (as the longest number of years to retention during my sample is twelve, the reverse years to retention is thirteen minus the years to retention)

[12] For brevity, I do not report the results from mixed-effects, nested models; the re- sults are similar.

The coefficients indicate the marginal increase in the probability that a judge from each retention method casts an opposing vote as the judge gets one year closer to retention.

The results suggest that, as retention approaches, judges become more likely to cast opposing votes against coalitions that vote against the litigants typically favored by interest groups. For example, the probability that a judge facing a partisan reelection opposes in-party judges that are voting against business employers in labor cases increases by 0.6% for each year the judge gets closer to retention. The results are slightly weaker for judges facing nonpartisan reelections and unopposed retention elections.

The results imply that judges, and especially judges facing partisan reelections, appear to engage in more strategic opposition voting as retention approaches. This finding is consistent with the hypothesis that retention concerns are an important influence on judges' opposition voting. If innate preferences for risk or impartiality were the only influences on judges' opposition voting, judges' likelihood of opposing in-party judges in these cases should not increase as retention drew near.

4. Conclusion

Existing studies of judicial decision-making have explained elected judges' greater propensity to cast opposing votes as evidence of their stronger preferences for risk or impartiality. In this paper, I explore whether elected judges' retention concerns that are known to influence their general voting could also explain their opposition voting. After explaining how judges' rational efforts to be retained ought to yield systematic differences in opposition voting among judges seeking reelection and reappointment, I test my hypothesis in a series of estimations. The results from my empirical analysis of judges' voting in a variety of case types are consistent with judges' retention concerns being important influences on their patterns of opposition. Moreover, only retention concerns, and not judges' innate preferences for risk or impartiality can explain some of the differences in opposition voting among judges from different retention methods. Elected judges' opposition voting seems to be no different from their general voting; both are influenced by their desires to be reelected.

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