

4-1-1997

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“HIGH COURT WRONGLY ELECTED”: A PUBLIC CHOICE MODEL OF JUDGING AND ITS IMPLICATIONS FOR THE VOTING RIGHTS ACT

RICHARD L. HASEN*

The debate over how judges should be selected and retained has pitted judicial accountability, ostensibly promoted by judicial elections, against judicial independence, ostensibly promoted by judicial appointment. Using the tools of public choice theory, Professor Richard Hasen argues in this article that judicial accountability has proven to be an elusive goal for most judicial selection systems, and that judicial independence depends not so much on the method of initial selection but rather upon the length of judicial tenure—the longer the tenure, the more independent the judiciary. The article then applies the public choice model of judging to consider two issues at the intersection of the Voting Rights Act (VRA) and the states’ interest in choosing their judicial selection mechanisms. First, states defending the practice of electing judges from multimember districts against a claim of minority vote dilution under section 2 of the VRA have argued that judicial independence requires maintaining a “linkage” between a judge’s territorial jurisdiction and its electoral base. These states claim that a move to single-member judicial subdistricts would create the appearance and actuality of bias by judges in favor of subdistrict voters. The public choice model reveals that maintaining a system of multimember judicial districts will not foster greater judicial independence because little reason exists to believe judges selected from subdistricts will favor subdistrict voters or that voters will believe judges will do so. Second, the VRA appears to bar some states from moving to a system of lifetime judicial appointments. Here, the public choice model reveals that a system of lifetime judicial appointments could foster greater judicial independence, particularly for judges

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on the states' highest courts. Moreover, the position of minorities appears no worse under an appointive system compared to a judicial election system. Accordingly, Professor Hasen suggests that Congress should amend the VRA, if necessary, so that courts in appropriate circumstances may allow those states otherwise barred by the VRA from doing so to move to a system of lifetime judicial appointments.

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INTRODUCTION

A recent *Chicago Sun-Times* headline, "High Court Wrongly Elected,"¹ suggested an insightful ambiguity. On one hand, it suggested there was something wrong with the *process* by which members of the Illinois Supreme Court were elected. Vote fraud?

1. Tim Novak & Jon Schmid, *High Court Wrongly Elected: Improper Districts Could Bring Appeals*, CHI. SUN-TIMES, Feb. 22, 1996, at 1.

Illegal campaign contributions? (Certainly neither could be possible in a state containing Chicago.) On the other hand, the headline suggested that electing judges was *itself* wrongful. Perhaps the article would contend that judicial appointment or some other judicial selection mechanism was a better way to choose judges.

As it turned out, the story raised a procedural problem with the election of justices for the Illinois Supreme Court, namely that the Illinois legislature's failure to redraw electoral districts for judicial elections violated the state constitution.² But just a few weeks later, a *Chicago Tribune* story made the second argument, that Illinois should switch from judicial elections to appointment of judges under the "Missouri plan."³

The debate over whether and how judges should be elected is neither new⁴ nor confined to the state of Illinois.⁵ The debate pits judicial accountability, ostensibly promoted by judicial elections, against judicial independence, ostensibly promoted by judicial appointment. Using the tools of public choice theory, Part I of this

2. See *id.*; see also ILL. CONST. art. VI, § 2 (requiring that the four Illinois Supreme Court justices elected from outside Cook County be elected from districts of "substantially equal population").

3. See Ken Armstrong, *Judicial Hopefuls Take Civic Liberties: Some Doctor Names, Résumés to Try to Win*, CHI. TRIB., Mar. 7, 1996, at 1. Under the plan proposed by the American Judicature Society, a seven member (nominally) non-partisan nominating commission proposes a list of two to five nominees for judicial appointments. See Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 15, app. B. at 100 (1994). The governor chooses one of the nominees for a judicial appointment. See *id.* at 15. Then, appointed judges either run in an uncontested retention election or are considered for retention by the nonpartisan commission. See *id.* app. B at 105. See generally *id.* at 4-14 (discussing role of American Judicature Society in promoting "merit selection"). Throughout this article I use the term "Missouri plan" (where the system first was instituted) rather than the value-laden term "merit selection."

4. Many studies trace the evolution of judicial selection mechanisms in the United States, from Alexander Hamilton's arguments in Federalist No. 78 favoring life tenure of federal judges, to the shift to judicial elections in the Jacksonian era, to the rise of the Missouri plan. Among the better historical surveys are MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, *JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES* 15-41, 75-98 (1988) and Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345; see also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714-25 (1995) (tracing rise of elective judiciaries in the states); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104 (1976) (tracing history of independent judiciary in the American colonies). At last count, 39 states elected at least some of their judges. See SARA MATHIAS, *ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION REFORMS* 6 (1990); see also *id.* at 141-45 (summarizing each state's judicial selection mechanisms).

5. See *infra* notes 28 and 91 (describing the variety of judicial selection mechanisms used in the United States).

Article argues that the debate has presented policymakers and the public with a false choice. Judicial accountability has proven to be an elusive goal for most judicial selection systems, and judicial independence depends not so much on the method of initial selection but rather upon the length of judicial tenure; the longer the tenure, the more independent the judiciary.

The issue of judicial selection mechanisms⁶ has taken on new urgency since 1991, when the Supreme Court held that judicial elections are subject to sections 2⁷ and 5⁸ of the Voting Rights Act (VRA).⁹ Indeed, at least fifteen of the thirty-nine states holding judicial elections have faced VRA challenges.¹⁰ More litigation surely will follow as minority plaintiffs challenge voting plans for judicial elections under section 2 of the VRA and as covered jurisdictions attempt to gain preclearance for a change in voting procedures involving judicial elections under section 5 of the VRA. Part II of this Article uses the public choice model of judging developed in Part I to consider two issues surrounding the tension between a state's interest in choosing its judicial selection mechanism and the goals of the VRA in insuring minority political representation. First, states defending the practice of electing judges at-large or from multimember districts against a claim of minority vote dilution under section 2 have argued that judicial independence requires maintaining the "linkage" between a judge's territorial jurisdiction and its electoral base; these states claim that a move to single-member judicial subdistricts would create the appearance and actuality of bias by judges in favor of subdistrict voters. Second, states involved in section 2 litigation or subject to section 5 preclearance may be barred from moving to a system of lifetime judicial appointments.

Regarding the first issue, the public choice model reveals that maintaining a system of multimember judicial districts will not foster

6. For brevity's sake, I refer to "judicial selection mechanisms" rather than the more accurate, but wordier, "judicial selection and retention mechanisms." In fact, the public choice model reveals that the mechanism of judicial retention is more important than the mechanism of initial judicial selection. See *infra* Part I.D.

7. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (1994). Following convention, I refer to this statute in the text as "section 2."

8. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1994). Again following convention, I refer to this statute in the text as "section 5."

9. See *Houston Lawyers' Ass'n v. Texas*, 501 U.S. 419, 425-28 (1991); *Chisom v. Roemer*, 501 U.S. 380, 403-04 (1991); *Clark v. Roemer*, 500 U.S. 646, 652-60 (1991).

10. By August 1995, plaintiffs had brought section 2 challenges to judicial elections in 15 states. For a summary of these cases, see Anna M. Scruggs et al., *Recent Voting Rights Act Challenges to Judicial Elections*, 79 JUDICATURE 34 (1995).

greater judicial independence than a system of single-member subdistricts because little reason exists to believe judges elected from subdistricts will favor subdistrict voters or that voters will believe judges will do so. Accordingly, courts should not give credence to the argument. Regarding the second issue, the public choice model reveals that a system of lifetime judicial appointments could foster greater judicial independence, particularly for judges on the states' highest courts. Moreover, the position of minorities appears no worse under an appointive system compared to a judicial election system. Accordingly, Congress should amend the VRA, if necessary, so that courts in appropriate circumstances may allow those states otherwise barred by the VRA from doing so to move to a system of lifetime judicial appointments.

I. A PUBLIC CHOICE MODEL OF JUDGING

A. *Introduction: Judges as Self-Interested Political Actors*

The intuition behind the age-old debate over judicial selection mechanisms is that judges, like most people, act in their self-interest much of the time. For example, an elected judge who desires reelection will not decide cases, at least not publicly, using the flip of a coin, even though it would increase the judge's leisure time to do so; voters expect judges to apply the law in a non-arbitrary manner, and a judge who acts arbitrarily runs the risk of losing the next election. The idea that judicial elections promote accountability flows from this fundamental assumption of judicial self-interest.

This Part develops a public choice model of judging, revealing a more complex view of judicial motivation and a better understanding of when and how judicial selection mechanisms matter. Public choice theory uses that same intuition described above about self-interest in the political arena, but applies it rigorously through the use of economic methodology.¹¹ Economic methodology assumes rational utility maximization, that is, individuals in pursuit of self-interest seek to maximize their expected utility.¹² Just as economists posit

11. Public choice theory is "the application of economics to political science." DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW & PUBLIC CHOICE* 7 (1991) (quoting DENNIS C. MUELLER, *PUBLIC CHOICE* II 1 (1989)). For a general introduction, see Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1, 8-18 (1996).

12. See Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 394 (1990); see also *id. passim* (arguing that consumers often fail to act consistently with predictions of economic

that business firms seek to maximize profits, public choice theorists posit that political actors seek to maximize particular objectives; for example, legislators seek to maximize votes.¹³

Public choice theory has two positive branches: social choice theory, which evaluates various preference aggregation mechanisms, and interest group theory, which focuses on incentives facing actors in the political market.¹⁴ Though some public choice scholars have examined the interaction of judges and social choice theory, and in particular the coherence and stability of appellate court voting rules,¹⁵ I am concerned here with the interaction of judges and interest group theory: In other words, what do judges maximize and what does this tell us about the relative merits of judicial selection systems?

Perhaps surprisingly, the literature on judicial utility maximization is poorly developed. Judge Posner has called the failure to explain judicial behavior in economic terms "a mystery that is also an embarrassment."¹⁶ He attempted to rectify the failure in *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*.¹⁷ As the title of his article suggests, Posner argues that income and leisure are primary components in a judicial utility function.¹⁸ Posner further assumes "that trying to change the world plays no role in [the judge's utility] function."¹⁹ Instead, judges gain utility from the consumption value of voting.²⁰

Differing with Posner, other public choice theorists have followed the judicial behavior school of political science²¹ by assuming

theory).

13. See Hasen, *supra* note 11, at 10.

14. The theory also has a normative branch, which advocates political reform to promote overall social wealth regardless of its distribution, or Kaldor-Hicks efficiency. See *id.* at 8. The normative branch is irrelevant to the arguments in this Article.

15. Some of these scholars have focused on the application of Arrow's Theorem to judicial decisionmaking. For a recent exchange on the subject among Professors John M. Rogers, Maxwell Stearns, David G. Post, and Steven C. Salop, see Colloquium, *Appellate Court Voting Rules*, 49 VAND. L. REV. 993 (1996).

16. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993).

17. *Id.* Posner published a revised version of the article in chapter three of RICHARD A. POSNER, *OVERCOMING LAW* 109 (1995).

18. See Posner, *supra* note 16, at 2, 31-39 (setting forth model).

19. *Id.* at 3.

20. See *id.*; see also *infra* notes 103-13 and accompanying text (discussing the consumption model of voting).

21. For the leading work in political science, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993) (stating that the attitudinal model "holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices"); see also McNoll-gast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*,

"that judges are primarily motivated by a desire to impose their normative views, beliefs, and mores on the society in which they live."²²

68 S. CAL. L. REV. 1631, 1636 n.10 (1995) (noting that the public choice approach (what the authors term "positive political theory") to judicial behavior "is related to attitudinal perspective, which holds that Supreme Court Justices vote their 'attitudes,' a concept close in spirit to the justice preferences in our model"). Political scientists have begun to question the broad applicability of the attitudinal model of judicial decisionmaking. For example, Melinda Gann Hall and Paul Brace contend:

The attitudinal model as explicated in the U.S. Supreme Court is simplistic and incomplete as a general explanation for appellate court decisionmaking because of the unique configuration of institutional arrangements that give rise to the decisional patterns within the Court and because of the model's inattention to the relative influence of preferences and case facts in alternative settings.

Melinda Gann Hall & Paul Brace, *Justices' Responses to Case Facts: An Interactive Model*, 24 AM. POL. Q. 237, 238 (1996).

22. Erin O'Hara, *Social Constraint or Implicit Collusion: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 738 (1993). O'Hara limits her model to appellate judges, *see id.*, but she does not differentiate between the goals of life-tenured appellate judges and appellate judges who must seek reelection or reappointment. O'Hara does suggest that life tenure avoids the unraveling or end-game problems that may lead judges to avoid following precedent. *See id.* at 774-75.

Like O'Hara, other public choice analysts generally posit that judges act, at least in significant part, to impose their views on society. *See* Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6:2 J.L. ECON. & ORG. 263, 267 (1990) ("We assume . . . that the Court's preferences are essentially ideologically based."); Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130 (1980) (arguing that "district court judges maximize a utility function that includes as arguments 'judicial discretion' [] and wealth"); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL. STUD. 627, 631 (1994) (stating that lifetime tenure "makes judges more likely to further their own self-interest by pursuing nonmonetary interests such as increasing leisure (reduction in workload), discretionary power to select which cases to consider, increased influence, and reputation within the legal community"); McNollgast, *supra* note 21, at 1646 (stating that a court acts "to maximize its own preferences or ideology"); Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63, 67 (1994) (arguing a judge "wishes to create precedents in new areas of law that will be obeyed by other judges"); Gordon Tullock, *Public Decisions as Public Goods*, 79 J. POL. ECON. 913, 914 (1971) ("I would think that judges are, to a considerable extent, affected by their personal preferences . . ."); *see also* Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decisionmaking*, 23 J. ECON. BEHAV. & ORG. 31, 38 (1994) (stating that a judge's utility function depends upon the judge's private preferences over the outcome of a case and the reputation she establishes among her peers). *But see* Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129 (1983) (positing that "self-interested judges seek prestige"); Bruce H. Kobayashi & John R. Lott, *Judicial Reputation and the Efficiency of the Common Law passim* (unpublished manuscript on file with the author) (also positing prestige model).

Even Posner has expressed the view in his earlier writings that judges maximize imposition of their values on others. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 534 (4th ed. 1992) ("A possibility more consistent with the normal assumptions of economic analysis is that judges seek to impose their personal preferences and values on society."); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 887 (1975) [hereinafter Landes & Posner, *Independent Judiciary*] (stating that a judge decides a case a certain way "not because it

This assumption, though recently challenged empirically,²³ seems a sensible one to include in constructing a judicial utility function, at least of life-tenured judges. Indeed, the assumption turns out to be more plausible than Posner's consumption model of voting, for reasons explained in Part I.D below.

Posner and the other public choice theorists have focused explicitly or implicitly on federal appellate judges, who are appointed for life.²⁴ No public choice theorist has considered in any detail how a judicial utility function would differ for judges attaining (and, more

will get him something else but because he derives personal satisfaction from preferring one party to the lawsuit over the other or one policy over another"); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 272 (1976) (stating that "the independent judge derives utility by imposing his policy preferences on the community"); see also Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 982-84 (1995) (contrasting Posner's earlier and later models of judicial behavior).

For an argument that public choice theory explains little about judicial behavior, see Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 839 (describing the public choice theory of judging as "description, and rather bland description at that, without expose"); see also Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1970-71 (1991) (finding "unsatisfying" a public choice explanation for a Delaware Supreme Court judicial decision in a major corporate law case).

23. See Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995). The authors explain that a great deal of the political science literature has found "a pattern . . . of Democratic judges being more liberal than Republican judges." *Id.* at 261; see also *id.* at 260-61 nn. 6-9 (citing relevant literature). But they point out that that literature focuses almost exclusively on appellate judges, and they contend that for a number of reasons such a focus may skew the results. See *id.* at 263-64. These authors instead analyzed a set of federal civil rights cases filed in three federal districts, see *id.* at 265, and found no difference between the way Republican and Democratic judges decide such cases. See *id.* at 281. They note, however, that

[their] initially surprising results can be reconciled with prior findings. In the mass of cases that are filed, even civil rights and prisoner cases, the law—not the judge—dominates the outcome[. . .]. In the select few cases that are appealed or lead to published opinions, individual judges have a greater role in shaping outcomes.

Id.

24. See, e.g., Posner, *supra* note 16, at 4. Judge Posner qualified his focus on federal appellate judges with the following caveat:

I have focused on the federal judiciary but the approach can and should be extended to elected judges, to Continental European judges, to jurors, and to legislators. For example, my analysis predicts that judges elected for a term work harder than appointed judges and also that they are less inclined to follow precedent because they are more responsive to the current balance of political power, hence less "independent."

Id. at 40-41; see also Cooter, *supra* note 22, at 128 ("The election of judges raises problems in mathematical politics which I cannot address in this paper."); O'Hara, *supra* note 22, at 738 (focusing on federal judges).

important, retaining) office through different judicial selection mechanisms.²⁵ I remedy that gap here, demonstrating that the incentives facing judges under different judicial selection systems should lead to different case outcomes in a small subset of cases.

Following Posner, the best place to start in explaining what judges maximize is to compare judges to other actors that economists have studied successfully. Posner compared federal appellate judges to the managers of a nonprofit enterprise, to voters, and to theatrical spectators.²⁶ Though this may be a good starting place for discussing life-tenured federal appellate judges, it is inadequate for modeling other types of judges. Judges who run for reelection are best analogized to vote-maximizing politicians, particularly to those politicians running for low-salience office. Judges who must stand for reappointment by a governor, legislature, or another appointing authority are best analogized to bureaucrats who depend upon elected politicians for survival. Only judges who are elected or appointed for a life term (or at least a long, indefinite term) fit the Posner model, with some important adjustments explained below.

B. Judicial Elections: Judges as Vote-Maximizing Politicians

Elected judges are in many ways indistinguishable from other politicians.²⁷ In jurisdictions holding partisan judicial elections, judges must gain the party's nomination, and often seek the local party's endorsement.²⁸ In both partisan and non-partisan elections,

25. In an unpublished paper, Spiller and VandenBergh contrast judges elected in competitive judicial elections to judges standing in retention elections, finding that the latter have slightly more discretion in judicial decisionmaking. Pablo T. Spiller & Richard G. VandenBergh, *A Positive Theory of State Supreme Court Decision Making* 20-22 (n.d.) (unpublished paper on file with the author). The authors assume that an elected judge desires to be reelected and makes decisions to further that goal, *see id.* at 8, and they note that this goal differs from Spiller's assumption in an earlier paper that U.S. Supreme Court preferences reflect the ideology of the court, *see id.* at 11 n.34. The authors do not discuss how this divergence in judicial goals could affect the outcome of judicial decisions.

26. *See* Posner, *supra* note 16, at 3.

27. *But cf.* Cass, *supra* note 22, at 969 n.95 (asserting that elected judges are "at most a very small step" away from the prototype of federal appointed judges).

28. I have attempted to classify judicial selection mechanisms used by states into categories here and *infra* note 91.

Nine states use partisan elections for choosing their highest ranking judges. *See* COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* 1994-95, at 190-92 tbl.4.4 (1994) [hereinafter *BOOK OF THE STATES*]. These states are: Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Tennessee (except intermediate appellate judges), Texas, and West Virginia. *See id.* tbl.4.4. In addition, New York elects all of its judges, except the judges serving on its highest court, through partisan elections. *See id.* at 191

judges (or their surrogates²⁹) often must solicit campaign contributions and run a campaign. Even judges standing for retention elections sometimes must raise large sums to support retention.³⁰ Although ethical canons restrict campaigning by judicial candidates in some significant ways,³¹ judicial elections otherwise resemble contests for elected office. Even judges running unopposed in retention elections must garner at least 50% of the vote; in Illinois retention elections, judges must garner 60% of the vote.³²

Given the similarities between judges and other elected officials, analogizing elected judges to other politicians running for election makes sense. Fortunately, public choice theorists have developed a model of politicians, that of the vote maximizer. Although politicians, like all people, have a utility function consisting of a number of elements, including maximization of income (or wealth) and leisure, the public choice model posits that, unlike most people, politicians are primarily "vote-maximizers" who wish to get elected and remain

tbl.4.4. Another thirteen states use (at least nominally) nonpartisan elections. *See id.* at 190-92 tbl.4.4. These states are: Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin. *See id.* at 190-92 tbl.4.4. Note that some nominally partisan elections may have partisan undertones. *See* Croley, *supra* note 4, at 735-37 n.143 (author notes surprise when judicial candidates at a county convention in Michigan were introduced by or mentioned their party affiliations, despite Michigan's system of nonpartisan judicial elections.)

Like Kurt Scheuerman, I rely upon data provided in *The Book of the States*, but Scheuerman used an earlier version of the book and classified some states differently than I do. *See* Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459, 459-64 (1993). As Scheuerman notes: "Classifying judicial selection mechanisms into distinct categories is difficult because many states utilize various combinations and permutations of these systems." *Id.* at 459 n.2.

29. The Model Code of Judicial Conduct prohibits a candidate from personally soliciting or accepting campaign contributions; the candidate must establish a committee to handle all aspects of campaign finance. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) (1990).

30. Among the most expensive retention elections was the 1986 contest involving Former Chief Justice Rose Bird of the California Supreme Court, and two of her supreme court colleagues, Cruz Reynoso and Joseph Grodin. For a discussion of this election, see *infra* notes 62-64 and accompanying text.

31. *See infra* note 55 and accompanying text.

32. *See* ILL. CONST. art. VI, § 12(d) (imposing three-fifths retention requirement in Illinois judicial retention elections); William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 344 (1987) [hereinafter Hall & Aspin, *Judicial Retention Elections*]. Looking at Illinois retention elections, Aspin and Hall found that "judges who received far more than 60 percent 'yes' votes in their last retention election were just as likely to campaign as judges who were very close to the 60 percent threshold," and they concluded that it is "highly questionable whether the threshold is at all responsible" for whether a judge in Illinois decides to actively campaign in retention elections. Larry T. Aspin & William K. Hall, *Campaigning for Retention in Illinois*, 80 JUDICATURE 84, 85 (1996).

in office.³³ Election and reelection translates into utility gained by the politician in terms of power, popularity, the ability to impose values, or some combination of these benefits.³⁴

Generally speaking, politicians attempt to maximize their votes by selling access, influence, or positions on legislation to different interest groups.³⁵ Interest groups pay for access, influence, or positions on legislation by promising to deliver votes, directly or indirectly, and by providing campaign contributions that allow politicians to advertise for additional votes.³⁶ Politicians will accept campaign contributions and other assistance from interest groups until the marginal cost in votes of taking another contribution is equal to the marginal benefit. One significant cost of accepting contributions is the cost of appearing corrupt: A politician may lose votes if she is seen as selling influence or positions on legislation to interest groups.³⁷

The vote-maximizing politician model, however, applies with some important qualifications to politicians running in elections for a low-visibility office like county coroner, which political scientists term "low-salience" elections.³⁸ Rational voters generally fail to invest in information about electoral candidates, and instead rely upon free information acquired fortuitously while pursuing other activities.³⁹ In low-salience races, voters are unlikely to acquire much free information about any of the candidates. Faced with little or no information about candidates in these races, some voters simply fail to

33. For one of the earlier statements positing vote maximization, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 11 (1957) (assuming that "primary goal" of government in democratic society is reelection).

34. See FARBER & FRICKEY, *supra* note 11, at 22 ("A legislator who is not reelected loses all the other possible benefits flowing from office.").

35. See Kenneth C. Smurzynski, Note, *Modeling Campaign Contributions: The Market for Access and Its Implications for Regulation*, 80 GEO. L.J. 1891, 1892-93 (1992). I develop the arguments in this paragraph more fully in Hasen, *supra* note 11, at 10-12.

36. See MUELLER, *supra* note 11, at 464.

37. See Richard L. Hasen, *An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence*, 14 CARDOZO L. REV. 1311, 1329 (1993).

38. For the classic study of low-salience elections, see Gary C. Byrne & J. Kristian Pueschel, *But Who Should I Vote for For County Coroner?*, 36 J. POL. 778 (1974).

39. See DOWNS, *supra* note 33, at 221-25, 245; see also Croley, *supra* note 4, at 731 ("[V]oters have traditionally had very little incentive to gather information about judicial candidates."); Harold W. Elder, *Property Rights Structures and Criminal Courts: An Analysis of State Criminal Courts*, 7 INT'L REV. L. & ECON. 21, 22 (1987) (finding that "voters have little incentive to invest in information gathering and will generally rely on the low-cost information provided by the electoral process itself").

vote in these races.⁴⁰ Other voters rely upon voting cues, including partisan affiliation,⁴¹ gender,⁴² ethnic surnames,⁴³ occupation,⁴⁴ and even use of a nickname.⁴⁵ Still others vote for an incumbent (or vote "yes" in a retention election) if they have a positive view of the political system generally, or vote against the incumbent (or vote "no" in a retention election) if they have a negative view of the political system generally.⁴⁶ In practice, most incumbents for low-salience of-

40. See Hall & Aspin, *Judicial Retention Elections*, *supra* note 32, at 346-47. ("The average rolloff (i.e., the percentage of voters who cast ballots for the lead partisan office on the ballot, but fail to vote in the judicial retention election) is 36.2 per cent for the 1,864 elections [studied].") Rolloff tends to be greatest in retention elections, less in non-partisan competitive elections, and the least in partisan elections. See PHILIP L. DUBOIS, *FROM BALLOT TO BENCH* 48 tbl.2 (1980).

Matsusaka has provided a plausible theory that could explain this rolloff: Voters have a taste for *informed* voting, and they fail to vote when they feel they do not have enough information to make an informed choice. See John G. Matsusaka, *Explaining Voter Turnout Patterns: An Information Theory*, 84 PUB. CHOICE 91, 92-93 (1995). Examining the matter empirically, Griffin and Horan found a correlation between low levels of information and increased levels of abstention. See Kenyon N. Griffin & Michael J. Horan, *Patterns of Voting Behavior in Judicial Retention Elections for Supreme Court Justices in Wyoming*, 67 JUDICATURE 68, 72 (1983); see also Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28, 33 (1989) (making similar findings).

41. See Anthony Champagne & Greg Thielemann, *Awareness of Trial Court Judges*, 74 JUDICATURE 271, 276 (1994) ("[L]acking other information, it appears that voters will use party as an imperfect voting cue."). This cue sometimes has validity. See Lawrence Baum, *Voters' Information in Judicial Elections: The 1986 Contests for the Ohio Supreme Court*, 77 KY. L. J. 645, 650 (1989); Hall & Brace, *supra* note 21, at 253 ("Democrats are significantly less likely than Republicans to uphold death sentences."). But in effectively one-party states, the cue is useless in choosing a judicial candidate. See Champagne & Thielemann, *supra*, at 278.

42. In California, male candidates had an 8% advantage over female candidates. See Byrne & Pueschel, *supra* note 38, at 783.

43. Candidates with a Scandinavian surname had a 24% advantage over candidates with other ethnic names. See *id.* at 782. In contrast, candidates with an Italian surname had a 39% disadvantage over candidates with other ethnic names. See *id.*

44. See *id.* at 781. The authors found that a candidate leaving blank the occupational designation section on the ballot is at a 39% disadvantage. Occupations increasing the expected vote were: professor (74% increase), incumbent (47% increase), engineer (21% increase), and lawyer (16% increase). Occupations decreasing the expected vote were: stockbroker (13% loss), doctor, dentist, life insurance salesman (14% loss each), housewife (20% loss), salesman (22% loss), and real estate broker (24% loss). See *id.* at 781-82. Along similar lines, Dubois found that labeling oneself with a "judicial label" (like "superior court judge" or "incumbent") is a decided electoral advantage. See Philip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 L. & SOC'Y REV. 395, 404-05, 420-22 (1984).

45. Candidates who use a nickname have a 79% advantage over those who do not. See Byrne & Pueschel, *supra* note 38, at 783. Nicknames "included any name in quotes or brackets or any name not a derivative of a proper name." See *id.* at 783 n.3.

46. See Larry T. Aspin & William K. Hall, *Political Trust and Judicial Retention Elec-*

fices are reelected.⁴⁷

Given this environment, the strategy of a vote-maximizing politician running for a low-salience office depends upon whether she is an incumbent or a challenger. To the extent that a majority of voters has a positive view of the political system, the rational strategy for an incumbent is simply to lay low. Absent a strong challenger, the incumbent stands to gain little by raising a large amount of campaign contributions and running a high-visibility campaign. Challengers, on the other hand, have a strong incentive to raise campaign contributions, first to raise the profile of the electoral race (that is, to make the judicial election high-salience), and then to convince the voters that the challenger is the preferred candidate.⁴⁸ Given the importance of voting cues in these races, rational vote-maximizing incumbents and challengers have incentives in appropriate cases to gain a party nomination,⁴⁹ switch parties,⁵⁰ change their names,⁵¹ or list a "good" occupation on the ballot.⁵²

tions, 9 L. & POL'Y 451, 461 (1987) ("[P]olitical trust and the mean affirmative vote in retention elections are positively related in the period from 1964 to 1984.").

47. In judicial retention elections, which are among the lowest salience elections, *see infra* notes 53-54, nearly 99% of judges seeking retention have been retained. *See* Robert C. Luskin et al., *How Minority Judges Fare in Retention Elections*, 77 JUDICATURE 316, 318 (1994) (citing Hall & Aspin, *Judicial Retention Elections*, *supra* note 32). Hall and Aspin calculated the mean percentage affirmative vote in retention elections at 77.2%. *See* Hall & Aspin, *Judicial Retention Elections*, *supra* note 32, at 343.

48. Alternatively, challengers may choose to run in low-salience elections when an incumbent has resigned or retired.

49. Until recently, the Cook County, Illinois Democratic Party apparently charged assessments of up to \$8,500 per judicial candidate (even if the judge was running unopposed) for a party endorsement. *See* Marlene Arnold Nicholson & Norman Nicholson, *Funding Judicial Campaigns in Illinois*, 77 JUDICATURE 294, 298-99 (1994). Illinois law now prohibits this practice. *See id.* at 299.

50. *See* Champagne & Thielemann, *supra* note 41, at 276 (noting party-switching of Democratic judges to the Republican party following Republican party victories).

51. People *do* change their names to run for office. Consider this account from the *Chicago Tribune*:

In Cook County, where voters often know little about the dozens of judicial candidates, some candidates have adopted Irish names.

And in 1994, two years after voters seemed inclined to prefer female candidates, Arthur Janura ran as A. Laurin Janura and Gregory Rusniak as G. Carmen Rusniak.

This year, one candidate has listed his name as Gerald "COP" Zansitis. It's not trickery, he said. He is a part-time Homewood police officer.

Armstrong, *supra* note 3, at 1; *see also* DUBOIS, *supra* note 40, at 83-89 (recounting numerous cases of voter misidentification of judicial candidates with similar names).

52. *See* Joseph R. Cerrell, *Running for Judge: How Non-partisan?*, CAMPAIGNS & ELECS., May 1996, at 34, 35 ("[A] sitting Superior Court judge listed herself as 'incumbent' on the ballot. She lost a close contest. Experts agreed that she could have won if she had listed herself as 'judge.'").

This analysis applies to most judicial races, which tend to be low-salience.⁵³ Retention elections are especially low-salience because no competitor exists who has an incentive to raise the profile of the election.⁵⁴ Even in judicial elections with two or more competitors, ethics rules make it difficult for a judicial challenger to raise the profile of an election by arguing that a particular case was wrongly decided, or by promising to decide future cases a particular way. The only kinds of promises that may be made by judicial candidates are promises to act with honesty and integrity.⁵⁵

53. See DUBOIS, *supra* note 40, at 244 ("Judicial elections are admittedly . . . low-salience electoral events."). The data on lack of voter information about judicial elections are overwhelming. A recent report by the American Judicature Association summarized the findings of the social science studies on the subject:

- Only 14.2% of Lubbock, Texas, voters in a 1979 general election could identify a single judicial candidate on the ballot immediately after voting.
- Less than one-fifth of responding voters registered in Washington and Oregon felt they had adequate information to vote in the 1982 primary elections: 35.2% reported that they had no information at all about judicial candidates and another 44.3% felt they had inadequate information to reach an informed decision.
- In 1980 Wyoming Supreme Court retention elections, 23.8% of the voters surveyed did not know why they voted for or against a candidate, 9.7% saw no reason not to vote as they did, and 13.65% of those who voted for retention simply had not heard anything bad about the judge.
- In a nationwide survey, few registered voters could correctly answer a questionnaire about the roles of different levels of judges, the differences between civil and criminal courts, and the relationship between the state and federal judiciaries.

MATHIAS, *supra* note 4, at 17 (footnotes omitted). Distributing a voter pamphlet describing judicial candidates appears to be one of the best ways to increase voter knowledge. See Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Contested, Non-partisan Judicial Elections: A Responsible [sic] Electorate or a Problematic Public*, 36 W. POL. Q. 241, 253 (1983). See generally Nicholas P. Lovrich & Charles H. Sheldon, *Voters in Judicial Elections: An Attentive Public or An Uninformed Electorate?*, 9 JUST. SYS. J. 23, 23-39 (1984) (making similar findings).

54. Indeed, retention elections were *intended* to be low-salience. See Susan B. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210, 233 (1980) (observing that retention elections "were designed to allow qualified judges to serve long terms with only a modest amount of direct accountability. Indeed, those who developed the concept preferred life tenure, but they acquiesced to political realities and allowed the public an opportunity to remove judges in extreme circumstances.").

55. For a summary of the restrictions on judicial candidates, see PATRICK M. MCFADDEN, *ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS* (1990). Since the publication of this book, the American Bar Association has amended its Model Code of Judicial Conduct to allow for greater discussion of political issues by judges. See MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d) (1990). However, the Code still prohibits a judge or judicial candidate from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" or from making "statements that commit or appear to commit the

An incumbent judge who expects a low-salience race need not worry about public opinion in deciding most cases; she can safely "vote her values" most of the time.⁵⁶ Only occasionally will a judge face an issue of substantial public importance that has the potential to transform the judicial race from low-salience to high-salience. A rational strategy for an elected judge facing such a case is to postpone deciding the case until after an election, or to duck a difficult issue by using a procedural tool to avoid decision.⁵⁷ On that rare occasion

candidate with respect to cases, controversies or issues that are likely to come before the court." *Id.*

56. See Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 72 (1989) (arguing that given low voter awareness and turnout for judicial elections, "we should not expect judge-made tort law, or choice of law, to be much driven by interest group pressures"). I discuss later in this section empirical evidence supporting my claim. At this point, however, I should note two possible objections to the idea that judges do not "vote their values" much of the time. First, judges tend to respect precedent. Respect for precedent itself, however, could be a value of the judge, something the judge places ahead of ideological preferences. In addition, O'Hara has noted a number of strategic reasons why judges who wish to impose their values on society may rationally choose to follow precedent. See O'Hara, *supra* note 22, *passim* (explaining judges' decisions whether to respect precedent as a prisoners' dilemma tournament). Second, a judge may be reluctant to vote her values in a case involving the construction of a statute because the legislature could overrule the judge. See Gely & Spiller, *supra* note 22, *passim*; Spiller & VandenBergh, *supra* note 25, *passim*. These arguments, however, merely point out that a judge votes her values within institutional constraints. For the same reason, a judge will not impose the death penalty against a defendant who committed a crime not subject in that jurisdiction to the death penalty, even if the judge believes the defendant deserves the penalty for that crime. More importantly, institutional constraints, like respect for precedent, exist across judicial selection mechanisms; therefore, the extent to which these factors influence the ability of judges to vote their values is independent of whether judges are elected or appointed, as well as independent of the length of the judicial term.

57. Sometimes a judge will miscalculate the importance of a particular case or the preferences of a majority of voters. The case of California Superior Court Judge Joyce A. Karlin is an example. Karlin imposed a voluntary manslaughter sentence of five years probation on a Korean grocer who fatally shot an African-American teenage girl. Some irate voters organized a campaign to defeat Karlin, but despite the voters' success in creating a high-salience race, the judge was still reelected. See Croley, *supra* note 4, at 739-40. Croley points to the case as an illustration of "the political pressures to which lower court judges are sometimes subjected," but he admits that "[e]lectoral pressures and the judicial reactions they precipitate may be virtually impossible to capture empirically." *Id.* at 740. I do not deny that there are instances in which trial court judges decide cases in response to real or perceived electoral pressure, but, contrary to Croley, there is no reason to believe this is more than the extremely rare case.

Judges being considered for appointment to a higher judicial office also have an incentive to delay issuing controversial decisions. Newspaper articles suggested that then appellate court judge and now Justice Clarence Thomas delayed issuing a controversial decision on the constitutionality of FCC gender preferences until after Thomas's Senate confirmation hearings for his current post on the Supreme Court. See Garry Sturgess, *Senate Mulls Thomas' Controversial Case; Draft Opinion Would Overturn FCC Ruling on Gender Preferences*, LEGAL TIMES, Sep. 30, 1991, at 1.

where an elected judge must decide such a case on the merits, the judge is likely to follow the preference of the majority of voters, to the extent that majority preferences are known to the judge. As the late California Supreme Court Justice Otto Kaus remarked, "ignoring the political consequences of visible decisions is 'like ignoring a crocodile in your bathtub.'" ⁵⁸ Moreover, elected judges have an incentive to avoid deciding a low-salience case in a way that makes the case high-salience. ⁵⁹

High-salience judicial elections are most likely to occur in elections for positions on the highest court in a jurisdiction, though very few high-salience elections occur even at this level of the judiciary. ⁶⁰ Generally speaking, judges sitting on the highest court in a jurisdiction make the most visible and important decisions, in part because their decisions bind everyone in the entire jurisdiction. Another reason elections to the highest state courts are more likely to become high-salience than elections to lower courts is that high courts routinely make decisions affecting the wealth of organized groups with relatively few members, such as insurance companies and the plaintiffs' bar. These small organized groups can overcome collective

58. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1583 (1990) (quoting Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1987, at 52, 58); see also Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2004 (1988) (Oregon Supreme Court Justice, authoring the article and quoting, "if you cannot cope with the crocodile, get out of the bathtub"); Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2057 (1988) ("There are judges willing to be a crocodile meal for the sake of principle, and Justice Kaus has always given the strongest of indications of being one of them.").

59. Cf. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 267-68 (1990) (arguing an analogous point with regard to Congressional action and stating that legislators "are especially responsive to inattentive publics when they are asked to decide about an issue for which the group costs could become visible and traceable if Congress enacted the wrong policy").

60. Although Croley suggests that judicial elections may be increasing in salience, see Croley, *supra* note 4, at 735, empirical evidence suggests that low-salience remains the norm for judicial elections, including elections to state high courts. In a nationwide survey of retention elections from 1980 to 1990, 100% of intermediate appellate court judges and 98.2% of state supreme court justices were retained in office. See Luskin et al., *supra* note 47, at 319-20. Champagne and Thielemann, examining a recent Texas election, found that "[o]nly one judge, embroiled in a controversy that received national publicity, had office recognition from over one-quarter of registered voters. Some judges, even a state supreme court justice, had almost no office recognition." Champagne & Thielemann, *supra* note 41, at 276. When a judge loses a retention election, it is still major news. See, e.g., John Gibeaut, *Taking Aim*, A.B.A. J., Nov. 1996, at 50, 53-54 (commenting on defeat of Tennessee Supreme Court Justice Penny J. White in retention election); *Sending Judges A Message*, WALL ST. J., Nov. 18, 1996, at A12 (commenting on defeat of Nebraska Supreme Court Justice David Lanphier in retention election).

action problems and raise campaign contributions to increase the salience and influence the outcome of high court judicial elections.⁶¹ For example, in 1986 retention elections in California, business and insurance interests made large campaign contributions to oust Chief Justice Rose Bird, who was known for her pro-consumer and pro-tenant decisions.⁶² Significantly, the groups used advertisements not to point out Bird's anti-business decisions, but rather to point out her opposition to the death penalty, a punishment supported by a majority of Californians.⁶³ In a parallel manner, campaign contributions supporting Bird and her allies on the court did not come primarily from death penalty opponents, but from plaintiffs' lawyers working on contingent fees, "the interest of whose clients had been advanced by the tort decisions of the court and whose financial interest had been advanced accordingly."⁶⁴

Nothing better illustrates the idea that groups with much at stake in high state courts' decisions attempt to influence the outcome of judicial elections than the 1986 race for the Texas Supreme Court. In that race, lawyers for both sides in the multi-billion dollar Texas-Pennzoil dispute contributed heavily to campaigns for competing candidates for the Texas Supreme Court elections before the court ruled upon whether to hear an appeal of their dispute.⁶⁵ Throughout the United States, "[c]ontributions by lawyers and law firms repre-

61. For a summary of some of the more controversial campaign contributions in judicial elections, see MATHIAS, *supra* note 4, at 47.

62. See Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1986 (1988) ("The media campaign against the justices received heavy contributions from big business interests that were angry with the court's decisions protecting consumers', tenants', and employees' rights.").

63. See *id.* at 1987 ("The California election was not the occasion for serious public discussions about legal doctrines or the proper role of the court. . . . Instead, the issues were trivialized so that the failure of the court to carry out the execution of convicted murderers was taken as irrebuttable evidence of judicial incompetence."); see also Gerald F. Uelman, *Commentary: Are We Reprising a Finale or an Overture?*, 61 S. CAL. L. REV. 2069, 2070 (1988) ("The [1986 California retention] election reflected frustration on one issue—the death penalty."). That is not to say that the death penalty was the only issue any voter considered. See J. Clark Kelso & Brigitte A. Bass, *The Victims' Bill of Rights: Where Did It Come From and How Much Did It Do?*, 23 PAC. L.J. 843, 858 (1992) (describing a series of non-capital criminal cases decided by the court as having "the effect of damaging the credibility of the Supreme Court of California in criminal matters, at least in the eyes of a large segment of California's population").

64. Thompson, *supra* note 58, at 2038 (noting that plaintiffs' lawyers and their organizations contributed a total of \$735,000 to the campaigns of the three justices).

65. See Gerald Uelman, *Disqualification of Judges for Campaign Support or Opposition*, 3 GEO. J. LEGAL ETHICS 419, 422 (1990) ("In the 1986 Texas Supreme Court races, lawyers for Pennzoil contributed \$315,000 to five justices, while lawyers for Texaco contributed \$72,700 to the same five justices.").

sent the largest share of contributions to judicial campaign coffers."⁶⁶

Empirical evidence demonstrates that elected judges tend to follow majority voter preferences in deciding high-salience cases. Professor Melinda Hall found that judges sitting on the highest state courts and subject to reelection tend to decide at least one class of visible and important cases—death penalty cases—consistent with majority voter preference favoring the punishment, even when the individual judges oppose the death penalty for ideological reasons.⁶⁷ Hall's study of decisionmaking on the Louisiana Supreme Court contains evidence that at least one justice voted to uphold the death penalty in some cases because of fear of losing the next election despite ideological opposition to the penalty.⁶⁸ In another study of the supreme courts in four conservative states holding judicial elections, Hall found that "district-based elections, close margins of victory, approaching the end of a term, and certain types of electoral experiences increase the probability that justices will uphold death sentences initially imposed by trial courts."⁶⁹

Paul Brace and his co-authors uncovered similar voting patterns

66. *Id.* at 421; see also Philip L. Dubois, *Financing Trial Court Elections: Who Contributes to California Judicial Campaigns?*, 70 JUDICATURE 8, 12 (1986) (finding that lawyers contributed 39.2% of the primary dollars and 32.4% of the available runoff funds to judicial candidates for California superior court judgeships in the 1980 race); Nicholson & Nicholson, *supra* note 49, at 297 (noting that attorneys were the largest single source of funds for Illinois judicial campaigns). Putting aside free-rider problems, it certainly appears rational for lawyers to contribute to judicial campaigns. First, lawyers on average have the most knowledge about judges. If a taste for informed voting exists, see *supra* note 40, a taste for informed contributing probably exists as well. Because lawyers are the most informed about judges, they would be most likely to make contributions. More importantly, lawyers "tend to view [campaign] contributions [to judges] as a form of insurance. They can't afford not to be contributors." Gerald F. Uelman, *Essay, Supreme Court Retention Elections in California*, 28 SANTA CLARA L. REV. 333, 352 (1988). Uelman's argument echoes Fred McChesney's observation that legislators can often extract payments from interest groups in exchange for not taking away the groups' ability to capture rents from the state. See Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 102-03 (1987).

67. See Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1120-21 (1987).

68. See *id.* However, Hall's study found that two other "liberal" judges dissented as often in death penalty cases as they did generally in all criminal cases. See *id.* at 1121.

69. Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 497-98 (1995) [hereinafter Hall, *Justices*]; see also Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 438-39 (1992) (making similar findings). Elected judges also may be very reluctant to act against the voters' will concerning ballot measures. See Eule, *supra* note 58, at 1581. However, recent court decisions like the Colorado Supreme Court's decision in *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *aff'd*, 116 S. Ct. 1620 (1996), striking down an anti-gay rights initiative, suggest otherwise.

when state supreme court judges dealt with another high-salience issue, abortion.⁷⁰ They found that judges with life tenure were significantly more likely to overturn state abortion statutes than elected judges, at least when the governor and a majority of the state legislature were from the same political party.⁷¹ In addition, judges chosen in competitive elections were significantly less likely to overturn abortion statutes than judges facing retention elections,⁷² probably because in competitive elections a challenger might use the judge's abortion decision to raise the judicial campaign into a high-salience one.

Unfortunately, I am aware of no empirical studies examining whether elected judges tend to follow majority voter preferences in *low-salience* cases as well. I would expect a study of such cases, such as a study of routine commercial disputes, to show no statistically significant difference between how elected judges and life-tenured judges decide such cases or between how judges elected in competitive elections and those standing for retention elections decide such cases. Because such studies do not exist, I cannot entirely discount the possibility that some judges may misperceive the salience of many low-salience cases, and then follow majority preferences in these cases as well.

This evidence presents a far more complex picture of an elected judge's decisionmaking criteria than the model of the "accountable" elected judge usually presented in literature arguing for judicial elections. According to Philip L. Dubois, a staunch defender of partisan judicial elections, judges are accountable when four conditions are met: First, the electorate must be able to pass judgment upon the performance of elected officials at regular and periodic intervals. Second, the electorate must be provided with the opportunity to express a choice between opposing candidates; in expressing dissatisfaction with the performance of an incumbent, an alternative choice must be available. Third, the voters must be able to identify officials with the policies they have made and, concurrently, to know in a general way what kinds of policies the challenger can be expected to promote once in office. Finally, those who win public office by election must behave "in accordance with their pre-election atti-

70. See Paul Brace et al., *Judicial Choice and the Politics of Abortion: Institutions, Context and the Autonomy of Courts* 11-14 (unpublished paper prepared for delivery at the 1996 Annual Meeting of the American Political Science Association, August 29-September 1, 1996) (on file with author).

71. See *id.* at 13.

72. See *id.*

tudes. . . . If voters prefer the more conservative candidate but if, once elected, he behaves as his more liberal opponent would have, the electorate has been deceived in its efforts to exercise control of policies."⁷³

Despite Dubois' claims to the contrary,⁷⁴ empirical evidence mostly confirms that in low-salience judicial races—which form the overwhelming majority of judicial races—the third criterion of judicial accountability is not met. Specifically, voters cannot identify judges with the policies they make or the alternative policies of challengers (in those states without retention elections).⁷⁵ Dubois limits his claim of accountability to partisan judicial elections, arguing that the partisan cue substitutes for specific knowledge of judicial policies.⁷⁶ But the evidence strongly suggests that the partisan identification of a judge often is a poor indicator of a judge's voting record.⁷⁷ And even Dubois does not argue that nonpartisan or retention elections meet his requirements for judicial accountability.

Whether judicial accountability exists in the rarer high-salience judicial races is a more complicated question. When a judicial race has become high-salience because of the public's focus on a particular issue or set of issues, such as the death penalty, judges appear to be subject to majoritarian pressures and therefore to meet Dubois' four accountability requirements.⁷⁸ Though it may be "unseemly" for a

73. DUBOIS, *supra* note 40, at 32 (quoting John L. Sullivan & Robert E. O'Connor, *Electoral Choice and Popular Control of Public Policy: The Case of the 1966 House Elections*, 66 AM. POL. SCI. REV. 1256, 1257 (1972)).

74. See Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 41-42 (Special Issue, May 1986) (arguing that partisan elections ensure judicial accountability).

75. See *supra* note 53 (summarizing social science literature describing lack of voter knowledge about judicial candidates).

76. See Dubois, *supra* note 74, at 41-42.

77. See *supra* note 23 (stating that party identification of federal district court judges is a poor predictor of votes in civil rights cases); see also Champagne & Thielemann, *supra* note 41, at 278 (noting that in effectively one-party states, party identification is useless to determine a judge's ideological position); *id.* at 276 (finding that judges in some states engage in party-switching).

78. The extent to which judges decide death penalty cases in line with majority sentiments may raise constitutional concerns. See *Baldwin v. Alabama*, 472 U.S. 372, 397 (1985) (Stevens, J., dissenting) (noting that elected judges may feel pressures to uphold a jury's recommendation to impose the death penalty, and this pressure is impermissible in determining whether the penalty should be imposed). For a more general argument that judicial elections inherently lead to unconstitutional results, see Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 202-16 (1996). See also Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 498 n.164 (1986) ("[T]he Fourteenth Amendment's due process clause should today be con-

judge to decide a high-profile case in a manner inconsistent with her values but consistent with majoritarian pressures,⁷⁹ that is precisely the incentive created by the popular reelection of judges.

However, when a judicial race becomes high-salience because of the campaign contributions of small, organized groups, accountability may not be achieved. Suppose in the California case that a majority of voters disagreed with Justice Bird's position on the death penalty but agreed with her pro-consumer, pro-tenant decisions. Does a majority vote against Bird in a race that focused only on the death penalty issue and not on the other issues signify an accountable judiciary or one subject to the influence of small groups? In high-salience, well-funded judicial races, will judges vote their values, be subject to majority pressure, or feel compelled to vote consistently with the preferences of their largest campaign contributors? In such cases, Dubois' fourth accountability criterion may not be met because judges may not behave in accordance with their pre-election promises to behave impartially.⁸⁰

strued to incorporate by reference [to state judges] the standards of judicial independence imposed by Article III upon the federal judiciary."); Wiener, *supra*, at 202-03 ("Since due process requires a neutral adjudicator and an individualized, participatory adjudication, and since judicial elections create a substantial risk that these requirements will not be met, elected judiciaries do not pass constitutional muster."). For an argument that elected judiciaries threaten commitments to constitutionalism and the rule of law, see Croley, *supra* note 4, at 788.

79. See Croley, *supra* note 4, at 696 n.22 (exploring the intuition that judicial elections are "unseemly").

80. Moreover, if judicial election outcomes in high-salience elections are determined (or at least influenced) by campaign contributions of the wealthy or of lawyers appearing before their judge-contributees, the problem of unequal access to justice arises as well. Whether campaign contributions to elected officials generally should be barred or limited on egalitarian grounds is a topic beyond the scope of this article. For a recent argument in favor of the idea, see Hasen, *supra* note 11, at 14-18. For a recent argument against this idea, see Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1077-81 (1996). But the ability of individuals or groups to influence judicial elections with campaign contributions remains especially problematic. Although some normative political theorists accept the idea that legislative outcomes may be influenced by campaign contributions, virtually no one thinks judicial outcomes should be so influenced: Instead, the professed norm is equal justice under law. In fact, a substantial body of scholarship explores judicial conflicts-of-interest stemming from campaign contributions. See, e.g., Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839 (1994); Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57 (1985); Stuart Banner, Note, *Disqualifying Elected Judges From Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 (1988); Bradley A. Siciliano, Note, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217 (1991). For a look at the recent phenomenon of political action committee involvement in judicial campaigns, see Anthony Champagne & Kyle

In sum, the public choice model of judging reveals that elected judges will be accountable only in rare circumstances.⁸¹ In low-salience races, which comprise an overwhelming majority of judicial elections, voters receive no reliable cues to inform their choices about judicial candidates, and judicial incumbents rarely have incentives to supply such information. Therefore, these judges may vote their values, that is, act independently, most of the time. In some high-salience races, judges are accountable to the extent that their most visible decisions will tend to reflect majority preferences. In other high-salience races, judicial decisions may reflect the interests of campaign contributors rather than the interests of a majority of voters.

C. Judicial Reappointments: Judges as Bureaucrats

Judges who need not stand for reelection differ from the vote-maximizing judges described above in their strategies for political survival, but not in their goals. Specifically, judges standing for reappointment still maximize some utility function containing an income (or wealth) and leisure component, along with a desire for prestige, popularity, power, or some combination of these attributes. But rather than achieving these goals by maximizing votes, judges who stand for reappointment achieve these goals by maximizing their chances for reappointment.

Reappointment-maximizing judges look very much like bureaucrats, particularly political appointees,⁸² who depend upon elected politicians for survival. William Niskanen first developed a public choice model of the bureaucracy, arguing that bureaucrats seek to maximize the size of their agency's budgets.⁸³ Niskanen's theory posited that "[s]enior bureaucrats maximized budgets because the opportunities for promotion and higher salaries, as well as for greater prestige and power, depended on the size and growth of their agencies. Bureaucrats were able to accomplish their objective because

Cheek, *PACs and Judicial Politics in Texas*, 80 JUDICATURE 26 (1996) and Traci V. Reid, *PAC Participation in North Carolina Supreme Court Elections*, 80 JUDICATURE 21 (1996).

81. For a non-economic argument reaching the same conclusions, see Scheuerman, *supra* note 28, at 476-82.

82. I mean here to contrast "political appointees" with "senior career civil servants," who are not reappointed with each new administration and who have various civil service protections. See RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY* 160 (1994) (discussing the two types of bureaucrats).

83. See WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 114 (1971).

they controlled the information used by the Congress in deciding agency appropriations."⁸⁴ Niskanen's model, when applied to judges, suggests that judges would decide cases in ways that expand the need for additional court resources, such as by creating new causes of action, expanding existing causes of action, or creating uncertainties in the law.

Further research on bureaucracy, however, has shown Niskanen's model to be empirically questionable⁸⁵ and inadequate to explain all bureaucratic behavior.⁸⁶ Contrary to Niskanen's model, bureaucrats' preferences drive some policy outcomes. Johnson and Libecap note that bureaucrats "often administer policies regarding the environment, health care, and defense, and people hold intense preferences about what the government's role in these areas should be."⁸⁷ Bureaucrats act consistently with their preferences to the extent they have autonomy from the authorities who control the bureaucrats' continued employment. The amount of autonomy that a bureaucrat-agent has from her politician-principals depends upon the number of principals and the extent to which bureaucrats have more information than their principals about the effects of bureaucratic decisions.⁸⁸

Johnson and Libecap studied federal career bureaucrats who possess a great deal of autonomy from the executive branch and Congress. The authors attribute this autonomy to the large number of principals, informational asymmetries between federal bureaucrats and the executive and legislative branches, and the protections of the civil service system, as strengthened by a strong union.⁸⁹ Accordingly,

84. JOHNSON & LIBECAP, *supra* note 82, at 163 (footnote omitted).

85. *See id.* at 163-66 (summarizing their evidence against hypothesis).

86. Faced with empirical data showing only a weak link between bureaucratic salaries and the level and growth of the bureau's budget, Niskanen modified his model so that bureaucrats seek to maximize the size of their discretionary budget, "defined as the difference between the total budget and the minimum cost of producing the output expected by the political authorities." William A. Niskanen, *A Reflection on Bureaucracy and Representative Government*, in *THE BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE* 13, 18 (André Blais & Stéphane Dion eds., 1991). Because this surplus may not be diverted to personal income, it is divided between the bureaucrats and political authorities through additional staff, capital, and perquisites for the bureaucrats, and additional spending to serve the interests of the political review authorities. *See id.* at 19.

87. JOHNSON & LIBECAP, *supra* note 82, at 167.

88. *See, e.g., id.* at 169 ("[T]he principal/agent problem encountered within the federal bureaucracy is a complex one. Voters, as the principals, are heterogeneous with conflicting political objectives, and the supervisors of their agents, the president and the Congress, have unclear political property rights over the bureaucracy.").

89. *See id.* at 167-71.

such federal bureaucrats have many opportunities to act consistently with their preferences. However, Professor Calvert and his co-authors have posited that even federal bureaucrats have less discretion when the executive and legislative branches care a great deal about policy outcomes from the agency.⁹⁰ In other words, discretion is sometimes limited when high-salience issues arise.

Like bureaucrats, many judges have intense preferences on policy issues, and some desire to vote their values in deciding cases. That desire, however, is tempered by the possibility of being denied reappointment. Judges will deviate from voting their values when they expect voting those values to diminish the chances of reappointment.

The likelihood that a judge standing for reappointment will deviate from voting her values depends in part upon the number of reappointing authorities. Judges whose reappointment decision is made by a legislature or governor alone⁹¹ have an incentive to decide

90. See Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 589-90 (1989); see also CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION *passim* (1995) (examining federal judiciary as self-interested bureaucracy).

91. Fourteen states use a Missouri plan in which the governor chooses judicial candidates for the highest ranking judicial office from a list submitted to her by a nominally independent commission; judges then run unopposed in retention elections. See BOOK OF THE STATES, *supra* note 28, at 190-92 tbl.4.4. These states are: Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Utah, and Wyoming. See *id.* tbl.4.4. In addition, New Mexico's governor chooses judicial candidates based on commission recommendations, but the candidates later run in contested, partisan elections. See *id.* at 191 tbl.4.4. Each of these states should be considered *elective* states for purposes of the public choice analysis, because the *renewal* decision depends upon a judgment by the voters.

In addition, eight states have appointment schemes in which the governor appoints judicial candidates with confirmation from another body. See *id.* at 190-92 tbl.4.4. In three states, California, Massachusetts, and New Hampshire, the governor must consult or obtain approval from an outside commission. See *id.* at 190-91 tbl.4.4. In the other five states, Delaware, Hawaii, New Jersey, Maine, and Vermont, Senate confirmation is required. See *id.* at 190-92 tbl.4.4. In addition, Senate confirmation is required for gubernatorial nominations to New York's highest court. See *id.* at 191 tbl.4.4. Finally, four states provide for legislative appointment of judges: Connecticut, Rhode Island, South Carolina, and Virginia. See *id.* at 190-91 tbl.4.4. In Connecticut, the legislature chooses from among candidates submitted by the governor exclusively from candidates submitted by a commission. See *id.* at 190 tbl.4.4.

Regarding renewal, California has retention elections for its appellate judges, and superior court judges stand for reelection in a nonpartisan race unless unopposed (in which case they are automatically reelected). See MATHIAS, *supra* note 4, at 144-45. In Massachusetts and New Hampshire, all judges serve until age 70; in Rhode Island, judges have life tenure. See *id.* In Connecticut, Delaware, New Jersey, and Maine, the governor reappoints judges subject to legislative approval. See *id.* In Hawaii, a commission determines if judges are reappointed. See *id.* In South Carolina, Vermont, and Virginia, the

cases in ways favorable to the reappointing body. But the incentive is only a weak one because judges, like bureaucrats, have an information advantage over their reappointing principals, who may be unable or unwilling to effectively monitor whether judges usually decide cases in a way consistent with the principal's wishes.⁹² Still, the greater the importance of the judge's position (such as serving on the state's highest court) or of the case before the judge, the more likely the principal will engage in effective monitoring. Therefore, judge-agents are unlikely to decide high-salience cases in a manner adverse to their principals, for the same reason that vote-maximizing judges are unlikely to decide high-salience cases in a manner adverse to the voters or to their political benefactors.

Judges whose reappointment decision depends upon agreement of two or more bodies should have even greater autonomy than judges whose reappointment depends upon the one branch of government alone. Judicial outcomes, like bureaucratic outcomes, are less predictable in an environment containing two principals with sometimes competing goals. Specifically, a judge is more likely to vote her values when the values of the judge's principals are in conflict. Because it is difficult to predict a judge's values, judicial outcomes are often indeterminate.⁹³ Similarly, judges on higher courts should have less discretion to decide cases in ways that deviate from executive or legislative preferences than trial court judges be-

legislature reappoints judges. *See id.* In no state does the governor alone determine reappointment.

To summarize, 38 states use popular elections (retention or otherwise) for judicial renewal, of which 23 states use partisan or nonpartisan competitive elections (assuming New York is included, *see supra* note 28), 14 use retention elections under the Missouri plan, and California uses a hybrid plan. One state, Hawaii, leaves the renewal decision to a commission; four states leave the renewal decision to the legislature; four states use a combination of gubernatorial and legislative renewal, and three states (Massachusetts, New Hampshire, and Rhode Island) do not renew judges.

92. Here, I have assumed away the fact that legislatures are not unitary rational actors, but instead are collective bodies comprised of legislators whose interests are often at odds with one another. To the extent there is divergence of opinion within a single body, the principal-judge relationship will look more like the situation described below involving multiple principals.

93. That public choice theory predicts an indeterminate result in this context provides an answer to Gordon's question regarding why the Delaware Supreme Court decided a major corporate law case the way it did. *See Gordon, supra* note 22, at 1970-71. Reappointment in Delaware depends upon the actions of both the governor and legislature. *See BOOK OF THE STATES, supra* note 28, at 190. Professor Pam Karlan observes that judicial decisions under these circumstances also might be indeterminate because judges, in their desire to please competing principals or future appointing authorities, could seek out the muddy middle. Electronic Mail from Pam Karlan, Professor of Law at the University of Virginia, to Richard Hasen (Sept. 30, 1996) (on file with author).

cause governors and legislators care more about the policy decisions made by judges on higher courts.

In general, judges standing for reappointment appear to have about as much autonomy from their principals as judges standing for reelection. Most judicial decisions will be low-salience for the reappointing body. In rare cases in the lower courts, and somewhat more frequently on the higher courts, judicial decisions will attract the attention of the reappointing body. When this occurs, and when a judge believes she can correctly predict the preferences of the reappointing body, the judge is likely to vote consistently with that body's preferences rather than with her own values when the two conflict.

Regarding high-salience issues, the Brace study found that judges subject to legislative or gubernatorial reappointment were less likely than judges standing for reelection to review abortion cases under their discretionary review powers,⁹⁴ but once judges standing for reappointment decided these cases, "legislative/gubernatorial retention procedures do not exert a significantly appreciable effect on justices' decisions to overturn [abortion] statutes."⁹⁵

D. Life-Tenured Judges: Judges as Posners?

As Parts I.B and I.C demonstrate, judicial behavior depends not so much upon the *initial* method of judicial selection as much as upon judicial *renewal* mechanisms. Judges who stand for reelection have incentives to decide cases in certain ways depending upon whether the judge is running in a low-salience or high-salience election. Similarly, judges considered for reappointment have a certain amount of discretion in deciding cases, but that discretion is weakened when one authority has the power to appoint, or when the judge is in an important judicial position or is deciding an important judicial case. Under both renewal mechanisms, the more important the judicial position or the higher the profile of the case, the less likely it is that the judge will act independently by voting her values.

This conclusion, however, ignores the critical issue of the time-frame for renewal. In general, the longer the term before a judge stands for reelection or reappointment, the greater the amount of judicial independence. When a judge decides a case at the beginning of a long term, she can discount the expected cost of voting her val-

94. See Brace et al., *supra* note 70, at 10-11.

95. *Id.* at 13. The authors note that this result is "not surprising, given that the influence of this [legislative/gubernatorial retention] procedure at the agenda setting stage effectively winnows out all but a small handful of cases." *Id.*

ues that may be in conflict with the voters or appointing authorities by the likelihood that the importance of the issue will fade over the time before renewal.⁹⁶ On the other hand, the closer it is to the renewal period, the less likely a judge will vote values that conflict with the values of voters or appointing authorities. The Brace study found that judges standing for reappointment became more likely to hear a challenge to an abortion statute under the court's discretionary powers as the length of the judicial term increased.⁹⁷

Taken to its logical extreme, the best way to assure judicial independence is to extend the term of judges indefinitely, as done in the federal system that provides life tenure for Article III judges except in cases of egregiously bad conduct, like criminal activity.⁹⁸ When judicial tenure is secure, a judge does not need to deviate from voting her values to continue holding office. The Brace study confirms that life tenure is positively correlated with a judge's willingness to overturn abortion statutes.⁹⁹ Indeed, the only time a life-tenured judge is likely to deviate from voting her values is when she believes doing so would increase her chances of promotion to a higher judicial office or another position or when she expects some personal financial gain.

Though these factors could influence an occasional case, they should have little impact overall on judicial decisions. First, in most cases, the chances of being promoted are low;¹⁰⁰ second, the chances are extremely slim that a judge's particular decision will affect the likelihood of promotion.¹⁰¹ Only when a judge decides a high-profile

96. See Hall, *Justices*, *supra* note 69, at 498 (voting against the death penalty on state supreme courts is to some extent negatively correlated with the end of the judicial term). As Eule notes, "[t]he ability to ignore the crocodile doubtless depends on how long before you have to take a bath." Eule, *supra* note 58, at 1583 n.361.

97. See Brace et al., *supra* note 70, at 11. Surprisingly, the authors found no evidence that term length mattered to judges standing for reelection. See *id.* at 12.

98. See Posner, *supra* note 16, at 4 ("Article III of the Constitution erects such a high hurdle to removing a federal judge from office that pretty much the only thing that will get him removed is criminal activity."). Alternatively, the best way to assure judicial dependence on reelecting or reappointing authorities is to shorten judicial terms.

99. See Brace et al., *supra* note 70, at 13.

100. For an argument to the contrary regarding federal district court judges, see Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT'L REV. L. & ECON. 13, 16 (1992) and Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission*, 7 J.L. ECON. & ORG. 183, 188-89 (1991). But see Higgins & Rubin, *supra* note 22, at 137 (finding in empirical study possibility of promotion not a good predictor of judicial decisionmaking).

101. See Posner, *supra* note 16, at 5. Though rare, a couple of recent instances suggest federal judges have bowed to political pressure. Federal District Court Judge Harold Baer, Jr. reversed a decision regarding the admissibility of evidence in a criminal case after the issue became embroiled in the 1996 presidential race. He then decided to re-

case is there any likelihood that the decision will affect the probability of promotion. As for financial gain, well-enforced bribery and conflict-of-interest laws with onerous penalties will deter most of these opportunities.¹⁰²

Why would a life-tenured judge vote her values rather than, say, delegate the responsibility for deciding cases (as opposed to merely writing opinions) to a law clerk, or, for that matter, decide cases using the flip of a coin or a Ouija board? Posner's answer to this question is unsatisfactory. Posner analogizes judges to individuals voting in national elections, noting that many individuals vote in elections even though voting is not compulsory and the chances of affecting the result of many elections is "vanishingly close to zero."¹⁰³ From this fact, Posner argues that "voting is a valued consumption activity of many people"¹⁰⁴ and "judges are constantly voting,"¹⁰⁵ thereby gaining utility.

Although Posner notes that the chances of a judge affecting the outcome of a case are much higher than the chances of an individual's vote affecting the outcome of an election,¹⁰⁶ he fails to recognize the implications of this difference for his model, suggesting that

[t]he pure utility of voting, when one's vote is highly unlikely to have any effect, is different from the "power trip" aspect of voting. Most economic analyses of judicial behavior have been concerned with judges' power—not as a source of deference or as the garnish on voting, as I am using it here, but as a source of satisfaction, or even of exhilaration, akin to that experienced by creative people. Artists make works of art that sometimes change sensibility; judges make decisions that sometimes change social or

move himself from the case. See Don Van Natta, Jr., *Judge Baer Takes Himself Off Drug Case*, N.Y. TIMES, May 17, 1996, at B1. In addition, United States Court of Appeals for the Third Circuit Judge H. Lee Sarokin stated in his resignation letter to President Clinton that he resigned from the court as a response to Republican political attacks on his record. The resignation came just a few weeks after the judge requested to transfer his offices from Newark to California. "That has led at least some judges to question whether political attacks are the real reason Judge Sarokin decided to resign." *Judge Sarokin's Retreat*, N.Y. TIMES, June 7, 1996, at A30.

102. The absence of well-enforced laws should lead some wealth-maximizing judges to decide some cases to maximize financial gain, as demonstrated by Chicago's Operation Greylord, which led to the conviction of 15 judges on bribery and related charges. For a retrospective, see Abdon M. Pallasch, *Greylord's Lawyers and Judges Confront Life After the Law*, CHI. LAW., Sept. 1995, at 13.

103. Posner, *supra* note 16, at 16.

104. *Id.*

105. *Id.*

106. See *id.* ("A judge's vote sometimes decides the outcome of a case . . .").

business practices. Artists impose their aesthetic vision on society; judges impose their political vision on society. . . . My theory abstracts from these issues. . . . It thus is applicable to judges, I believe the majority, even on the Supreme Court, who have no great interest in changing (or resisting change in) law or society although they do obtain satisfaction from casting votes that are not merely symbolic expressions, but count.¹⁰⁷

Nothing logically prevents Posner from relying upon the consumption model of voting to explain life-tenured judicial voting. However, the consumption model of voting has proven to be extremely problematic for public choice theory, pointed to by some scholars as evidence that economic models are useless to explain political phenomena.¹⁰⁸ But the argument that life-tenured federal judges vote their values is in fact *easier* to fit into an economic model.

According to the most accepted public choice model of voting, an individual votes rather than abstains whenever the costs of voting are exceeded by the sum of the psychic benefits of voting and the benefits the voter obtains by the election of the voter's preferred candidate (or the voter's preference on a ballot initiative) multiplied by the probability that the voter will cast the decisive ballot in the election.¹⁰⁹ Recognizing that in most elections the probability of casting a decisive ballot is close to zero,¹¹⁰ the equation reduces to the

107. *Id.* at 17-18 (footnotes omitted).

108. See DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* 47-71 (1994); Raymond E. Wolfinger, *The Rational Citizen Faces Election Day or What Rational Choice Theorists Don't Tell You about American Elections*, in *ELECTIONS AT HOME AND ABROAD* 71, 71 (M. Kent Jennings & Thomas E. Mann eds., 1994) ("The inescapable conclusion is that rational choice theory is inherently unsuited to illuminating voter turnout."). For a detailed examination of rational choice models of voting, and for the development of an alternative norms-based model, see Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2138-64 (1996).

109. More formally, the voter decides to vote rather than abstain from voting whenever $pB - C + D > 0$, where B is "the differential benefit, in utiles, that an individual voter receives from the success of his more preferred candidate over his less preferred one," p is the probability a citizen by voting will bring about B , where $0 < p < 1$, C is the cost to the individual of the act of voting, and D is the utility of other psychic benefits of voting, including "satisfaction from compliance with the ethic of voting." William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 28 (1968).

110. Riker and Ordeshook estimate the value for p in an American presidential election "as $p = 10^{-8}$, and my rough calculations indicate my chances of determining who becomes President are of about [the] same order of magnitude as my chances of being killed driving to the polls—hardly a profitable venture." Paul E. Meehl, *The Selfish Voter Paradox and the Thrown-Away Vote Argument*, 71 AM. POL. SCI. REV. 11, 11 (1977) (footnotes omitted).

expression that people vote when the psychic benefits of voting exceed the costs. This, in turn, demonstrates the consumption value of voting. The model rightfully has been criticized as a tautology;¹¹¹ the expression can explain neither who votes, nor why the number of people voting changes over time.¹¹²

We know citizens sometimes don't vote, but judges rarely fail to vote. The model presented above easily explains the difference: The case for rational judicial voting is much stronger than the case for rational consumer voting. For judicial voting, the probability of casting a decisive ballot is high: for trial court judges, the probability is 1, putting aside the possibility of reversal; for appellate judges, the probability will be some non-negligible fraction between 0 and 1, depending upon how many other judges sit on a panel deciding the case. So long as the benefit of voting for a particular outcome (or what I have termed here a judge "voting her values") is a non-trivial number, the probability of casting the decisive ballot is generally sufficiently high to render it rational for a judge to vote, and particularly to vote her values, in order to gain the desired outcome.¹¹³ The case for a judge voting her values is even stronger because of the lack of a secret ballot on judicial panels. On a three-judge panel, for example, a judge who knows the votes of the two other members and knows the likelihood of affecting the votes of the other two members easily can calculate the probability of casting a decisive ballot.

111. See BRIAN M. BARRY, *SOCIOLOGISTS, ECONOMISTS & DEMOCRACY* 16 (1970) (arguing that Riker and Ordeshook's analysis "does not leave any scope for an economic model to come between the premises and the phenomenon to be explained. Instead, the question shifts back to: 'Why do some people have this kind of motivation more strongly than others?'").

112. See Hasen, *supra* note 108, at 2141-43.

113. Momentarily putting aside the *D* term, see *supra* note 109, a judge votes because $pB > C$. Though Posner missed the point, his colleague at the University of Chicago and on the Seventh Circuit, Judge Frank Easterbrook, did not. As Easterbrook explained in a recent case:

Because no single person's vote affects the outcome of a plebiscite, the voters do not invest heavily in information; rational ignorance is the order of the day Professional legislators not only have more time to brush up on the facts but also more reason to do so, because votes in a smaller assembly are more likely to be dispositive.

Marusic Liquors, Inc. v. Daley, 55 F.3d 258, 262 (7th Cir. 1995). Like legislators, votes in small judicial panels are more likely to be dispositive.

Posner may also be correct that some judges vote because *D*, the psychic benefits of voting, are higher among judges than in the general population. This provides one possible explanation for why judges bother to dissent rather than not vote. Another possible explanation for dissents, however, is that judges hope to influence future cases through their dissents; that is, judges use dissents to vote their values.

E. Conclusion

The public choice analysis of judging demonstrates the unreliability of the common wisdom that judicial elections promote judicial accountability and judicial appointments promote judicial independence. In fact, most judges can vote their values, that is, act independently, most of the time, whether they are elected or appointed. Occasionally a high-salience case will lead a trial court judge subject to reelection or reappointment to deviate from voting her values in order to curry favor with voters or the appointing authorities, but those cases are rare.

Judges sitting on higher level courts are more likely to make decisions in high-salience cases than lower court judges. Sometimes, for reasons explained above, high court judges will not vote their values, but instead will be subject to majoritarian pressures or pressures from the reappointing body. At other times, elected high court judges may decide certain cases consonant with the values of their campaign contributor-principals rather than their own values or the values of a majority of voters. Lengthening judicial terms, whether judges eventually stand for reelection or reappointment, removes some of the disincentives for judges to vote their values, and lifetime judicial tenure removes nearly all disincentives for judges to vote their values.

Using this public choice model of judging, and particularly the insights on when judges should be expected to act independently and not to do so, I turn my attention in Part II to examining judicial elections under the Voting Rights Act and to how the public choice model resolves two important VRA issues.

II. USING PUBLIC CHOICE THEORY TO RESOLVE CONFLICTS BETWEEN STATE INTERESTS IN JUDICIAL SELECTION MECHANISMS AND THE VOTING RIGHTS ACT

A. Introduction: Judicial Elections and the Voting Rights Act

States have experimented with various judicial selection mechanisms since the early days of the Republic.¹¹⁴ But the ability of states to continue such experimentation has changed since 1991, when the Supreme Court unequivocally held that judicial elections are subject to the Voting Rights Act.¹¹⁵ On the one hand, suits brought under section 2 of the VRA have *forced* a number of states to restructure

114. See *supra* note 4 and accompanying text.

115. See *infra* notes 130, 192-95 and accompanying text.

their judicial selection mechanisms.¹¹⁶ On the other hand, section 5 of the VRA, which requires that jurisdictions with a history of racial discrimination (so-called "covered jurisdictions") submit proposed changes to their judicial election plans to preclearance by a court or the Attorney General of the United States, may have *deterred* some states from restructuring their judicial selection mechanisms.¹¹⁷

Using the public choice model of judging developed in Part I, this Part considers two issues illustrating the tension between each state's interest in choosing its judicial selection mechanisms and the VRA goals of assuring equal political participation by minority groups.¹¹⁸ First, states have defended the practice of electing judges from multimember districts against a claim of minority vote dilution under section 2 by arguing that judicial independence requires maintaining the "linkage" between a judge's territorial jurisdiction and its electoral base; according to these states, a move to single-member judicial subdistricts would create the appearance and actuality of bias by judges in favor of subdistrict voters. Second, states involved in section 2 litigation or subject to preclearance under section 5 may be precluded from moving to a system of lifetime judicial appointments.

Striking the appropriate balance between the goals of federalism and the VRA when both interests are strong and in direct conflict is exceedingly difficult. Regarding the first question, however, the model shows that a state's legitimate interest in preserving judicial independence is *not* furthered by maintaining multimember judicial districts. Accordingly, courts should reject the linkage argument and apply the VRA with full force.

The second question requires a much more difficult balancing: A state with an interest in fostering judicial independence, particularly among its higher court judges, may achieve that goal through

116. See *infra* Parts II.B and II.C.2.

117. See *infra* Part II.C.3.

118. Because of the limited focus of this article, I can safely ignore much of the morass surrounding interpretation of precisely what constitutes a section 2 violation. Thus, it is not necessary to delve here into the detailed legislative history of the original VRA or of the significant 1982 amendments. Nor need I consider here the serious and important debate over whether the amended VRA in general constitutes good legislation. For an attack from the right on section 2 and the VRA generally, see ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS passim* (1987). For an attack from the left, see LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY passim* (1994). For a discussion of the many thorny issues surrounding interpretation of section 2, and a good bibliography, see DANIEL HAYS LOWENSTEIN, *ELECTION LAW: CASES AND MATERIALS* 183-207 (1995). The brief description of the amended section 2 which follows will suffice to explain the issues discussed in this Article.

lifetime judicial appointment. Fortunately, the model shows that a move to judicial appointment often will not adversely affect the VRA's goals of assuring adequate minority representation. For this reason, Congress should amend the VRA, if necessary, to allow courts in appropriate circumstances to approve a state's plan to move to lifetime judicial appointment.

B. Section 2 Vote Dilution and the State's Spurious Interest in "Linkage"

Section 2 of the VRA provides that states and political subdivisions may not impose voting qualifications, prerequisites to voting, or a standard, practice, or procedure "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a designated language minority group]." ¹¹⁹ A minority plaintiff establishes such a violation

if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members [of a protected class of citizens] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. ¹²⁰

A minority plaintiff need not prove that the jurisdiction enacted a voting practice or procedure with an intent to discriminate against the minority plaintiffs. The Supreme Court in *Mobile v. Bolden* ¹²¹ interpreted the original section 2 to require proof of such intent, but Congress amended section 2 to eliminate the intent requirement ¹²² and to replace it with a "results test": ¹²³ Section 2 is violated so long as the practice or procedure results in the dilution of minority voting power. ¹²⁴

119. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(a) (1994). Designated language minority groups are listed in *id.* § 1973b(f)(2).

120. *Id.* § 1973(b).

121. 446 U.S. 55 (1980) (plurality opinion).

122. See *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986); S. REP. NO. 97-417, at 15-16 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 192-93. The intent requirement still applies to claims of constitutional vote dilution. On constitutional vote dilution, see *infra* note 124.

123. The Senate Report listed "typical factors" that might be probative of a section 2 violation. See S. REP. NO. 97-417, at 28-29, reprinted in 1982 U.S.C.C.A.N. at 206-07; see also *Gingles*, 478 U.S. at 36 n.4, 43-44 (describing Congressional intent to "dispositively reject[] the position of the plurality" in *Mobile v. Bolden*).

124. "Dilution . . . occurs when the votes of some identifiable group count for less than the votes of other voters. Dilution can occur because of malapportionment, the use of at-large elections, or gerrymandering that 'cracks' or 'packs' a group's voting strength into a

A simple example illustrates a typical section 2 vote dilution challenge to a multimember districting scheme. Suppose a city council has five members, and every voter in the city may vote for candidates to fill all five positions, thus forming an "at-large" electoral system. African-Americans make up 30% of the city population, but no candidates preferred by a majority of African-Americans have ever been elected to the city council. African-Americans may bring a section 2 vote dilution suit, claiming that had the city been divided into five separate districts with carefully drawn district lines, African-Americans would have had enough voting power to elect at least one of their preferred candidates.

In *Thornburg v. Gingles*,¹²⁵ the Supreme Court set forth a three-prong threshold test for determining whether a multimember dis-

suboptimal number of districts." Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 289 (1996) (footnotes omitted). Although parts of section 2 appear to endorse a right to proportional representation of minority interests, other language in the section explicitly negates such a right. As part of a compromise engineered by Senator Bob Dole during the 1982 amendment process, see THERNSTROM, *supra* note 118, at 135-36, section 2 states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

Constitutional vote dilution challenges to judicial elections also differ in a significant way from constitutional vote dilution challenges of other elections. In *Wells v. Edwards*, 409 U.S. 1095 (1973) (mem.), *aff'd* 347 F. Supp. 453 (M.D. La. 1972), the Supreme Court summarily affirmed a three-judge court which rejected the idea that the one-person, one-vote Equal Protection Clause principle mandating that "[a voter has a] right to have his own vote given as much weight, as far as practicable, as that of any other voter," *Hadley v. Junior College Dist.*, 397 U.S. 50, 52 (1970), applies to judicial elections. For an argument that "courts extend the application of the one-person, one-vote standard to judicial elections when such elections are challenged on grounds of racial discrimination," see Andrew S. Marovitz, Note, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination*, 98 YALE L.J. 1193, 1195-96 (1989). Given the *Wells* case, determining whether section 2 vote dilution has occurred in judicial elections is difficult. The Supreme Court noted this difficulty but found it irrelevant in determining whether section 2 applies to judicial elections: "Even if serious problems lie ahead in applying the 'totality of circumstances' standard described in § 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991). *But cf.* *Martin v. Mabus*, 700 F. Supp. 327, 332 (S.D. Miss. 1988) (stating that although the one-person, one-vote doctrine is not applicable to judicial districts, "general equity requires that population variance should be minimized between sub-districts"); Robert B. McDuff, *Judicial Elections and the Voting Rights Act*, 38 LOY. L. REV. 931, 973 (1993) ("Although the one-person, one-vote rule is not an independent requirement . . . it is a tool by which courts easily have measured what they view to be the potential for undiluted minority voting strength."); Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, 62 U. CIN. L. REV. 823, 842-49 (1994) (arguing that the one-person, one-vote standard is "not essential" for evaluating claim of vote dilution in judicial election scheme).

125. 478 U.S. 30 (1986).

tricting scheme,¹²⁶ like the one in my example, constitutes vote dilution in violation of section 2:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . to defeat the minority's preferred candidate.¹²⁷

If plaintiffs meet the threshold test, the court must examine the "totality of circumstances" to determine if impermissible vote dilution has occurred.¹²⁸ These circumstances include any history of voting-related discrimination in the jurisdiction, the use of racial appeals in political campaigns, and the extent to which minority group members bear the effects of past discrimination in other areas which hinder their ability to participate effectively in the political process.¹²⁹

Since the Supreme Court held in 1991 that section 2 applies to judicial elections,¹³⁰ such cases generally have followed the pattern of section 2 litigation described above. Courts have required proof of the three *Gingles* threshold factors as an initial requirement to challenge a judicial election scheme,¹³¹ and, if plaintiffs meet the

126. The Court declined to address whether the amended section 2 permits other vote dilution claims brought by minority plaintiffs and, if so, the standards that should pertain to them. See *id.* at 46 n.12. In *Grove v. Emison*, 507 U.S. 25, 40 (1993), the Court held that the *Gingles* test applies to claims of vote dilution in single-member districts.

127. *Gingles*, 478 U.S. at 50-51 (footnotes omitted). For an argument that this threshold test violates the "Dole compromise" prohibiting the requirement of proportional representation, see Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 657-59 (1993).

128. See *Johnson v. De Grandy*, 512 U.S. 997, 1011-12 (1994).

129. See *Gingles*, 478 U.S. at 44-45.

130. See *Chisom v. Roemer*, 501 U.S. 380, 384 (1991). For a history of this issue before *Chisom*, see Slabach, *supra* note 124, at 833-34. On the same day the Court decided *Chisom*, it also decided *Houston Lawyers' Ass'n v. Texas*, 501 U.S. 419 (1991). In that case, the Court rejected an argument that section 2 does not apply to trial judges because they occupy "single-member offices." *Id.* at 426. For a critical discussion of the single-member office theory, see Pamela S. Karlan, *Undoing the Right Thing: Single Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1 (1991). See also Richard Saks, Note, *Redemption or Exemption?: Racial Discrimination in Judicial Elections Under the Voting Rights Act*, 66 CHI.-KENT L. REV. 245, 285-96 (1990) (arguing against theory's application to judicial elections).

131. See, e.g., *Concerned Citizens for Equality v. McDonald*, 63 F.3d 413, 416 (5th Cir. 1995) (affirming district court dismissal of case challenging judicial election system for

threshold, they must prove vote dilution under a totality of circumstances.¹³²

Courts, however, have modified the totality of circumstances test for judicial elections. In particular, two circuits have held that a state has a substantial interest in maintaining a "linkage" between a trial judge's electorate and its jurisdiction, and that "[t]his substantial state interest may be overcome only by evidence that amounts to substantial proof of racial dilution. Otherwise, the at-large election of district court judges does not violate § 2."¹³³ In support of modifying the totality of circumstances test for judicial elections, these courts pointed to a dictum in *Houston Lawyers' Association v. Texas*,¹³⁴ in which the Supreme Court noted that

the State's interest in maintaining an electoral system—in these cases, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters—is a legitimate factor to be considered by courts among the "totality of circumstances" in determining

failure to meet the first prong of the *Gingles* test).

132. See, e.g., *Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1148 & n.2 (5th Cir. 1993) (failing to reach totality of circumstances inquiry in plaintiffs' challenge to judicial election plan because plaintiffs failed to first meet the *Gingles* criteria).

133. *League of United Latin Am. Citizens v. Clements* (LULAC IV), 999 F.2d 831, 868 (5th Cir. 1993) (en banc); see also *Cousin v. McWherter*, 46 F.3d 568, 576-77 (6th Cir. 1995) (holding that state has substantial interest in electing judges from an at-large jurisdiction and remanding to district court with instructions to weigh state's interest against evidence bearing on factors of vote dilution). A district court recently followed these courts' lead, in a case currently on appeal. See *Milwaukee Branch of NAACP v. Thompson*, 935 F. Supp. 1419, 1430-31 (E.D. Wis. 1996). In addition, the Court of Appeals for the Eleventh Circuit has held that although the linkage may be of limited relevance in determining if vote dilution has occurred, it "plays a major role in our consideration of the remedies" proposed as alternatives to the challenged electoral schemes. *Nipper v. Smith*, 39 F.3d 1494, 1542 (11th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1795 (1995).

These courts also have questioned whether the appropriate benchmark for measuring vote dilution in judicial election cases is the percentage of attorneys eligible to run for judicial office who are minority group members or the percentage of the voting-age population in a given district who are minority group members. The Fifth Circuit held that the percentage of eligible attorneys is relevant. See LULAC IV, 999 F.2d at 837. The Eleventh Circuit rejected the approach. See *Nipper v. Smith*, 1 F.3d at 1183, rev'd on other grounds, 39 F.3d 1494 (11th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1795 (1995). For a detailed analysis and argument against the eligible attorneys standard, see John S. Wills, Comment, *Statistical Pools and Electoral Success in Vote-Dilution Cases*, 1995 U. CHI. LEGAL F. 527 (1995); see also McDuff, *supra* note 124, at 970 ("The argument that the low number of minority judges is caused by the low number of minority attorneys, rather than the election systems, finds little support in the evidence."). But see *infra* notes 218-24 and accompanying text (noting empirical evidence supporting such a claim).

134. 501 U.S. 419 (1991).

whether a § 2 violation has occurred.¹³⁵

Commentators have argued that the *Houston Lawyers' Association* dictum should not be followed because it constitutes a misreading of the amended section 2. They contend that the state's interest should be irrelevant in determining whether minorities have been deprived of an equal opportunity to participate in the political process and to elect representatives of their choice.¹³⁶ This argument appears consistent with section 2's express language describing a violation, which fails to address state interests that could trump that right.¹³⁷

Even if courts ignore the commentators and continue to consider the state's linkage interest in the totality of circumstances, public choice concerns should compel them to give the interest little weight. To understand why, consider the Fifth Circuit's articulation of Texas's alleged linkage interest:

The electoral bases of district judges are linked to the area over which they exercise primary jurisdiction. This linkage has been in place throughout the 143 year history of judicial elections in Texas. By making coterminous the electoral and jurisdictional bases of trial courts, Texas advances the effectiveness of its courts by balancing the virtues of accountability with the need for independence. The state attempts to maintain the fact and appearance of judicial fairness that are central to the judicial task, in part, by insuring that judges remain accountable to the range of people within their jurisdiction. A broad base diminishes the semblance of bias and favoritism towards the parochial interests of a narrow constituency. Appearances are critical because "the very *perception* of impropriety and unfairness undermines the moral authority of the courts." . . . The sys-

135. *Id.* at 426-27.

136. See Slabach, *supra* note 124, at 864-65; see also McDuff, *supra* note 124, at 960 ("[S]tate interests should be considered not during the liability portion of a judicial districting case but at the remedy phase."); Brenda Wright, *The Bench and the Ballot: Applying the Protections of the Voting Rights Act to Judicial Elections*, 19 FLA. ST. U. L. REV. 669, 682 (1992) ("Permitting state interests to trump a showing of vote dilution not only is inconsistent with specific provisions of the Senate Report but also would directly undermine the primary purpose behind the 1982 amendment of Section 2."); Kirsten Lundgaard Izatt, Note, *The Voting Rights Act and Judicial Elections: Accommodating the Interests of States Without Compromising the Goals of the Act*, 1996 U. ILL. L. REV. 229, 252 (arguing against considering state interests until the remedy stage). Even the court in *Nipper* recognized the "minimal relevance" of state interests in determining if vote dilution has occurred. See *Nipper*, 39 F.3d at 1542.

137. See *supra* text accompanying note 120 (setting forth section 2's relevant language).

temic incentives of subdistricting are those of ward politics, and would "diminish the appearance if not fact of its judicial independence—a core element of a judicial office."¹³⁸

Similarly, the Eleventh Circuit, in rejecting a subdistricting remedy for judicial elections in Florida, noted that "[t]he implementation of subdistricts would increase the potential for 'home cooking' by creating a smaller electorate and thereby placing added pressure on elected judges to favor constituents—especially as election time approaches."¹³⁹

Despite the conjecture of the Fifth and Eleventh Circuits, a public choice analysis provides no evidence that trial court judges elected from smaller subdistricts would tend to engage in "home cooking," that is, to favor subdistrict voters, in deciding cases. Almost all trial court elections are low-salience events, so little reason exists to indicate that voters would obtain information regarding whether trial judges have favored constituents appearing before them. Because subdistricts usually will encompass large areas with thousands of people, the chances of a voter fortuitously learning that the local trial judge is engaged in home cooking is minuscule. Even if a voter learns that another voter prevailed in the trial judge's court against someone outside the district, such information does not necessarily indicate home cooking: How is a voter to evaluate whether the judge has made a biased decision rather than one based on the merits of the case?

Perhaps more importantly, voters would have little incentive to vote for a judge if they *knew* she was deciding cases in favor of subdistrict voters. Unless a voter expects that she (or perhaps a family member or close friend) was likely to have business before the subdistrict trial judge in particular, a voter may look with disfavor on home cooking. Furthermore, to the extent that a voter has family or friends outside the subdistrict who may appear with court business before the judge, the voter is more likely to prefer an impartial judiciary that does not engage in home cooking.¹⁴⁰

138. *LULAC IV*, 999 F.2d at 869 (internal citations omitted).

139. *Nipper*, 39 F.3d at 1544.

140. Though many people may be expected to have friends and family outside the subdistrict, many fewer would be expected to have friends outside the state. Because home cooking that favors *state* residents over *out-of-state* residents could be in the self-interest of some elected judges, federal law provides for removal of cases involving citizens of different states to federal court. See 28 U.S.C. § 1332 (1994), amended by Act of October 19, 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (1996) (to be codified at 28 U.S.C. § 1332) (diversity jurisdiction); *id.* § 1441 (1994) (removal). But the need for diversity jurisdiction to counter local bias even on the *state* level has been challenged for

Because voters generally will not learn about a judge engaging in home cooking, and because they would not be likely to prefer home cooking even if they learned of it, rational judges hoping for reelection have little reason to engage in the practice. In fact, if voters do learn of the practice, a judge who engages in it may appear less than impartial and for that reason may lose votes.¹⁴¹ Put simply, no real danger to judicial independence arises from the creation of smaller subdistricts.

That leaves the matter of the "appearance" or "semblance" of bias stemming from the practice of judicial subdistricting.¹⁴² The concern here is similarly misguided. The elections of trial court judges are not alone in their status as low-salience events; court business, decisionmaking, trials, and structure are low-salience as well.¹⁴³ To imagine that voters will lose confidence in the independence of the judiciary if it decouples territorial jurisdiction and the electoral base is to have an overactive imagination. Nothing is "substantial"¹⁴⁴ about this asserted state interest, especially in a state like Texas, which condones campaign contributions from lawyers and lawyer and industry PACs to the very judges hearing their clients' cases.¹⁴⁵ Given this more serious appearance of bias, Texas's concern over "linkage" appears unjustified.

The size of districts used for electing trial court judges should have no effect on judicial independence; judges elected at-large or in subdistricts will be free to vote their values most of the time and the latter will have little reason to engage in home cooking. However, jurisdictions may take other steps to increase or decrease judicial independence. In particular, lengthening the judicial term will increase independence while shortening it will decrease independence, particularly for higher court judges. The question arises, then, whether jurisdictions wishing to increase judicial independence should be allowed to increase the judicial term indefinitely, and, for reasons explained below, couple that with initial appointment. Part II.C considers such a change.

quite some time. See David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 5-8 (1968).

141. See *supra* text accompanying note 37 (noting that it is rational for vote maximizers to avoid the appearance of corruption).

142. *LULAC IV*, 999 F.2d at 869.

143. See MATHIAS, *supra* note 4, at 17 (citing study showing widespread voter ignorance about how the court system works).

144. *LULAC IV*, 999 F.2d at 868.

145. See *supra* notes 65, 80 and accompanying text.

C. Lifetime Judicial Appointment and the VRA

1. Introduction

Part I explained that jurisdictions wishing to promote the goal of judicial independence, particularly the independence of judges on the jurisdiction's highest court, who are most likely to be involved in high-salience elections, should move to lengthen judicial terms or to grant judges life tenure. This goal would not contradict the requirements of the VRA so long as the lifetime judges were chosen through elections that otherwise comply with the VRA.

However, jurisdictions that wish to move to life tenure of judges may want to choose their judges initially through an appointment process, rather than an election. In terms of judicial independence, the choice does not matter,¹⁴⁶ but it may affect the quality and competence of judicial candidates. Unlike voters, who have an incentive to remain ignorant about judicial candidates,¹⁴⁷ governors and legislators have a rational incentive to investigate judicial appointees's suitability to the office. An out-of-control life-tenured judge (compared to a judge appointed for a shorter term) will reflect poorly on an appointing authority who seeks reelection.¹⁴⁸

For this reason, state officials possess a legitimate and strong interest in preferring that life-tenured judges initially be appointed rather than elected.¹⁴⁹ Indeed, it should come as no surprise that no

146. See *supra* Part I.D.

147. See *supra* note 39 and accompanying text.

148. See *supra* note 101 (recounting Republican attempt to use President Clinton's judicial appointment of Judge Baer to argue that Clinton exercised poor judgment in choosing judicial candidates).

149. The separate public choice question of why vote-maximizing legislators rationally would choose an independent judiciary over a judiciary subject to periodic renewal remains. This issue has spawned its own literature, beginning with Landes and Posner, who argued that legislatures may favor an independent judiciary because it performs a crucial role in enforcing contracts between interest groups and legislatures. See Landes & Posner, *Independent Judiciary*, *supra* note 22, at 894. Further research has refined this hypothesis. See Gary M. Anderson et al., *On the Incentives of Judges to Enforce Legislative Wealth Transfers*, 32 J.L. & ECON. 215, 226 (1989) (finding evidence that judges are rewarded with higher salaries for judicial independence); J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722 (1994) (finding that legislatures prefer independent judiciaries only "where they rate (i) the likelihood of continued electoral government high and (ii) the likelihood of their continued victory low"). But see Gordon, *supra* note 22, at 1968 n.136 (arguing that evidence of Anderson and his co-authors is unconvincing because judicial salaries cannot be individually set and a prisoners' dilemma may arise).

In any case, a change in judicial selection mechanisms must be accomplished by a popular, not legislative, vote in many states, and voters may not always support the plan.

American jurisdiction couples life tenure with judicial elections.¹⁵⁰ Nor does any state rest the power to decide upon judicial appointment for life in a single politician, like the governor. In the states providing for life tenure of judges or something close to it—Rhode Island, Massachusetts, New Hampshire, and New Jersey—more than one individual controls the decision.¹⁵¹ The same is true of the federal system of appointing life-tenured judges.¹⁵² Similarly, no state gives one individual, such as the governor, the sole power to determine judicial reappointment.¹⁵³

Though the concept of lifetime judicial appointment hardly is controversial by itself, the matter becomes controversial when the jurisdiction wishing to move to lifetime appointment has had its judicial election system declared in violation of section 2 of the VRA, or is subject to administrative preclearance under section 5 of the VRA. Part II.C.2 explains that states may not be able to implement a system of lifetime judicial appointments after a court has determined that the state's current method for electing judges results in section 2 vote dilution and argues that section 2 should be amended if necessary to allow states to do so. Part II.C.3 similarly explains that covered jurisdictions may not be able to obtain section 5 preclearance for a move to lifetime judicial appointments, and that Congress should amend section 5 if necessary to allow such a move in appropriate circumstances.

2. Lifetime Judicial Appointment May Be an Impermissible Section 2 "Remedy"

To understand why a state involved in section 2 litigation may be barred from instituting a system of lifetime judicial appointment, some background on section 2 remedies is necessary. Once a court has determined that a jurisdiction's electoral plan has resulted in minority vote dilution, the state must be given an opportunity to propose a remedial plan before the court imposes a remedy.¹⁵⁴ In section 2 litigation involving multimember districts, as in the example

Voters in some states have rejected a change from judicial elections to the Missouri plan. See Philip L. Dubois, *Voter Responses to Court Reform: Merit Judicial Selection on the Ballot*, 73 JUDICATURE 238 (1990).

150. See Croley, *supra* note 4, at 725-26.

151. See *supra* note 91 and accompanying text.

152. See U.S. CONST. art. II, § 2 (stating that President chooses judges with the advice and consent of the Senate).

153. See *supra* note 91 and accompanying text.

154. See *Upham v. Seamon*, 456 U.S. 37, 41 (1982).

above,¹⁵⁵ the state and the plaintiffs often will present alternative plans redrawing district lines using only single-member districts. In redrawing the district lines, the state must present a plan creating sufficient districts in which minority populations constitute a majority of the district's members (so-called "majority-minority" districts¹⁵⁶) so that the minority's vote is no longer "diluted" under the *Gingles* criteria.

In the last few years, however, Supreme Court cases holding that use of race as a "predominant factor" in redistricting violates the Equal Protection Clause of the United States Constitution have called this approach into question.¹⁵⁷ Constitutional constraints on one end and section 2 requirements on the other have put a squeeze on courts attempting to use redistricting to remedy vote dilution.¹⁵⁸

155. See *supra* text accompanying notes 125-29.

156. Some in the civil rights community refer to these districts as "black opportunity districts." See Linda Greenhouse, *Court Hears Arguments on Race in Redistricting*, N.Y. TIMES, Dec. 6, 1995, at B11. But see *id.* ("What are 'black opportunity' districts?" Justice Scalia demanded. 'You can call them motherhood-apple pie districts if you like, but you'll be insulting my intelligence every time you do it. Can't you give them unemotive terminology?'") (quoting Justice Scalia's response to a Texas special assistant attorney general's use of the term in oral argument in *Shaw v. Hunt*, 117 S. Ct. 43 (1996)).

157. See *Miller v. Johnson*, 115 S. Ct. 2475, 2494 (1995). The Supreme Court's most recent pronouncement in the area has not significantly eliminated the confusion surrounding the extent race may or must be taken into account in redistricting. In *Bush v. Vera*, 116 S. Ct. 1941 (1996), the Justices filed six separate opinions, including a separate concurring opinion by Justice O'Connor, who also wrote the opinion announcing the judgment of the Court.

158. The Supreme Court is considering this issue in *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995), review granted *sub nom.* Abrams v. Johnson, 116 S. Ct. 1823 (U.S. May 20, 1996) (No. 95-1425), and review granted *sub nom.* United States v. Johnson, 116 S. Ct. 1823 (U.S. May 20, 1996) (No. 95-1460). The cases also put a squeeze on legislators engaged in redistricting who hope to avoid a court challenge to the redistricting plan under either the Constitution or section 2. See Karlan, *supra* note 124, at 306-10. Karlan explains:

If [jurisdictions] do not draw majority-black districts in most areas with substantial black populations, they will both find it difficult to obtain preclearance [under section 5] and, if they do, will face traditional section 2 lawsuits. But if they do draw those districts, they will find themselves embroiled in wrongful districting litigation.

Id. at 310. Justice O'Connor's separate concurring opinion in *Bush v. Vera*, 116 S. Ct. 1941 (1996), along with the opinions of the four dissenting justices, has alleviated the squeeze placed on legislators by suggesting that compliance with section 2 is a compelling interest justifying race-based districting. See *id.* at 1968 (O'Connor, J., concurring); *id.* at 1989 (Stevens, J., dissenting) ("The plurality begins with the perfectly obvious assumption[] that a State has a compelling interest in complying with § 2 of the Voting Rights Act."); *id.* at 2007 (Souter, J., dissenting) (stating that Justice O'Connor's separate opinion on this point "virtually insulate[s] the Voting Rights Act from jeopardy under *Shaw* as such"). The plaintiffs nonetheless lost in *Bush v. Vera* because Justice O'Connor, along with four other justices, held that the districts were not narrowly tailored to meet the

Faced with these problems, some commentators have advocated employing novel voting methods as remedies that would not require a change from at-large voting or multimember districts. For example, under cumulative voting,

[v]oters receive as many votes to cast as there are seats to fill; voters then may distribute these multiple votes among candidates in any way they prefer. Thus, voters may "plump" all their votes on one candidate—the strategy of choice for minority groups with intense preferences for a particular candidate—or give one vote each to several candidates. . . . If the voters in a sufficiently large minority group concentrate all their votes on the same candidate, they can assure that candidate's election regardless of how other voters, including a majority of voters, cast their ballots.¹⁵⁹

These novel voting methods have enjoyed support from some scholars,¹⁶⁰ and cumulative voting has been instituted as a means of settling section 2 litigation in Maryland and Alabama.¹⁶¹ However, the Fourth Circuit held that it was an abuse of discretion for a district court to impose cumulative voting as a remedy for a section 2 violation without giving the county an opportunity to submit a single-member district plan remedy,¹⁶² and Justice Thomas described these

(assumed) compelling interest of complying with section 2. *See id.* at 1961 ("These characteristics [of the districts] defeat any claim that the districts are narrowly tailored to serve the State's interest in avoiding liability under § 2."); *id.* at 1974 (Thomas, J., concurring in the judgment) ("[T]he State's redistricting attempts were not narrowly tailored to achieve its asserted interest.").

159. Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 254. Along similar lines, the authors assert that limited voting

works by giving voters fewer votes to cast than the total number of seats at issue. Thus, if five seats on a city council are to be filled, voters throughout the city might each be permitted to cast only two votes. The effect of limiting each voter to two votes is to prevent the same majority from dominating each and every seat. Well-organized minority groups that are sufficiently large are thereby enabled to control the outcome of at least one seat.

Id. at 253.

160. *See, e.g.*, GUINIER, *supra* note 118, at 99-101 (supporting cumulative voting, or "interest representation"); Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 435-41 (1995) (supporting alternative voting); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 223-36 (1989) (supporting limited voting and cumulative voting).

161. *See* LOWENSTEIN, *supra* note 118, at 199.

162. *See* *Cane v. Worcester County*, 35 F.3d 921, 923, 927 (4th Cir. 1994). After the case was remanded, the district court again mandated cumulative voting as a remedy. *See Cane v. Worcester County*, 874 F. Supp. 687, 693-94 (D. Md.), *rev'd*, 59 F.3d 165 (4th Cir.

novel voting methods as unwelcome "radical departures from the electoral systems with which we are most familiar."¹⁶³ Moreover, these novel voting methods may not be used for elections to the United States House of Representatives, which by statute must be conducted in single-member districts.¹⁶⁴ For these reasons, novel voting methods have not been implemented widely to remedy section 2 vote dilution.

Subdistricting and novel voting methods also are available to remedy vote dilution in judicial elections, but, as with non-judicial elections, courts have been reluctant to use either method.¹⁶⁵ This raises the possibility of using judicial appointment as a remedy. Unlike other remedies, however, appointment hardly looks like a *remedy* for a claim of vote dilution: It is indeed odd to say that the

1995) (unpublished table decision). On appeal, all parties urged that the cumulative voting scheme imposed by the district court be rejected, and the court of appeals agreed. See *Cane v. Worcester County*, 59 F.3d 165 (4th Cir. 1995) (unpublished table decision), *cert. dismissed in part*, 116 S. Ct. 980, and *cert. denied*, 116 S. Ct. 2546 (1996). The unpublished Fourth Circuit opinion is available in Westlaw, Nos. 95-112, 95-1688, 1995 WL 371008 (4th Cir. June 16, 1995).

163. *Holder v. Hall*, 512 U.S. 874, 910 (1994) (Thomas, J., concurring in the judgment).

164. See 2 U.S.C. § 2c (1994).

165. See *supra* Part II.B (discussing courts' reluctance to allow subdistricting on grounds that it threatens judicial independence). Courts have shown similar hostility toward use of novel voting methods in judicial election vote dilution cases. In *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988), the district court rejected a limited voting scheme to remedy a vote dilution claim involving judicial elections on grounds that "limited voting is experimental and contrary to most election laws of Mississippi and the policy contained therein. It is also contrary to most general concepts of a democratic two-party system." *Id.* at 337; see also *Nipper v. Smith*, 39 F.3d 1494, 1545-46 (11th Cir. 1994) (en banc) (rejecting cumulative voting as an appropriate remedy for vote dilution in Florida's judicial system), *cert. denied*, 115 S. Ct. 1795 (1995); *League of United Latin Am. Citizens v. Clements (LULAC IV)*, 999 F.2d 831, 876 (5th Cir. 1993) (rejecting cumulative and limited voting remedies to vote dilution caused by at-large voting on the curious grounds that the mechanisms "are not 'remedies' for the particular structural problem that the plaintiffs have chosen to attack"). But see *Cousin v. Sundquist*, No. 1:90-CV 339, slip op. at 12-13 (E.D. Tenn. July 3, 1996) (imposing cumulative voting in judicial elections); Thomas P. Prehoditch, *The Voting Rights Act and Judicial Selection Litigation: An Evaluation of Remedial Options*, 11 REV. LITIG. 523, 564-67 (1992) (advocating limited voting as remedy for vote dilution in judicial elections); Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 YALE L. & POL'Y REV. 354, 354-69 (1991) (advocating limited voting and cumulative voting for judicial elections); Ronald W. Chapman, Comment, *Judicial Roulette: Alternatives to Single-Member Districts as a Legal and Political Solution to Voting-Rights Challenges to At-Large Judicial Elections*, 48 SMU L. REV. 457, 469-72 (1995) (discussing benefits of cumulative voting in judicial elections); Shawn Fremstad, Note, *State Judicial Elections and the Voting Rights Act: Defining the Proper Remedial Scheme*, 76 MINN. L. REV. 101, 124-25 (1991) (advocating cumulative voting and limited voting for trial court elections and subdistricting for appellate court elections); Mona Hymel, Note, *Judicial Electoral Systems: Foreign Democracies Provide Solutions*, 27 TEX. INT'L L.J. 447, 460 (1992) (advocating limited voting for judicial elections).

cure for the dilution of some people's votes is to take away *everyone's* right to vote, and an appointment remedy rarely has been proposed outside the judicial election context.¹⁶⁶ But appointment historically has been a permissible alternative to the election of judges, and the Supreme Court itself suggested in *Chisom v. Roemer* that Louisiana could extricate itself from VRA requirements by switching from judicial elections to judicial appointment.¹⁶⁷

No court has decided whether a court may impose lifetime judicial appointment as a section 2 remedy. One court recently noted in dicta that a judicial appointment remedy might be foreclosed on grounds that "[j]udicial nominating commissions and the appointment process in general remove any choice from the voters," and that removing power to elect judges "would trample the longstanding value the State places on electing all of its public officials."¹⁶⁸ In addi-

166. For an instance outside the judicial context in which a court approved a section 2 settlement that included the temporary appointment of an official, see *Dillard v. Crenshaw County*, 748 F. Supp. 819 (M.D. Ala. 1990), wherein the court noted:

Admittedly, the court was troubled initially by the fact that the settlement provides that a black commissioner shall be appointed rather than that black voters would elect someone of their own choosing. However, the provision requiring the appointment of three commissioners, including a black commissioner, is a temporary measure, which will last only until 1992 when single-member districts can be created. The court is of the opinion that this requirement is fair under the special circumstances presented.

Id. at 824.

167. See *Chisom v. Roemer*, 501 U.S. 380, 401 (1991). The Court explained:

Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed, and, in that way, it could enable its judges to be indifferent to popular opinion. The reasons why Louisiana has chosen otherwise are precisely the reasons why it is appropriate for § 2, as well as § 5, of the Voting Rights Act to continue to apply to its judicial elections.

Id.

My argument here is limited to judges, but perhaps it could be extended to other positions that are sometimes subject to election and sometimes to appointment. For example, it could be applied to state attorneys general, who, like judges, sometimes are expected to act independently rather than to be accountable to the public. But it would not apply to legislators, for whom periodic accountability is considered a necessity.

168. *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1296 n.24 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996). McDuff argues that "a federal court hearing a judicial elections case has no power itself to impose merit selection or some other form of judicial appointment as a remedy" because "the court is required to adhere to state policy as much as possible while still curing the violation," and many state laws require competitive elections. McDuff, *supra* note 124, at 978. This comment, though correct, does not consider whether judicial appointment could be used as a remedy when a state changes its law to allow it.

Though skeptical of the argument, Wright notes that dicta in the Supreme Court's decision in *Chisom*, 501 U.S. at 401, could be interpreted to allow a jurisdiction to move

tion, two courts have held that a court may not approve a hybrid appointment/election plan in which the governor appoints a judge from a list of persons nominated by a commission, with those nominated later running in retention elections.¹⁶⁹

In *Brooks v. State Board of Elections*,¹⁷⁰ a federal district court rejected the proposed settlement of a vote dilution challenge to Georgia's system of electing judges that would have imposed an appointment plan featuring numerical goals for appointment of African-American judges.¹⁷¹ The court held that the plan violated Georgia law in a number of ways,¹⁷² and that the numerical quota in the plan violated the Equal Protection Clause of the Fourteenth Amendment.¹⁷³

Similarly, in *White v. Alabama*,¹⁷⁴ the Eleventh Circuit rejected a proposed settlement remedy to counter vote dilution caused by Alabama's at-large system for electing appellate judges. Under the

from judicial elections to a pure appointive scheme similar to those used for selecting federal judges. See Wright, *supra* note 136, at 689; see also *id.* at 689-90 (citing H.R. REP. NO. 97-227, at 18 (1981), stating that "shifts from elective to appointive office" may violate section 2).

169. Retention elections are subject to section 2, see, e.g., *Bradley v. Indiana State Election Bd.*, 797 F. Supp. 694, 696-98 (S.D. Ind. 1992), but the initial nomination and appointment processes to choose those judges later to stand for retention election are not. See *Bradley v. Work*, 916 F. Supp. 1446, 1453-55 (S.D. Ind. 1996); see also *Williams v. State Bd. of Elections*, 696 F. Supp. 1563, 1568-69 (N.D. Ill. 1988) (stating that plaintiffs cannot challenge system of appointive judges under section 2). But cf. *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1357 (4th Cir. 1989) (refusing to decide whether Virginia's choice of an appointive system over an elective scheme for selecting school board members was subject to section 2).

170. 848 F. Supp. 1548 (S.D. Ga. 1994), *appeal dismissed*, 59 F.3d 1114 (11th Cir. 1995).

171. See *id.* at 1551. Under the proposed settlement:

(1) the Governor will hereafter appoint all judges in Georgia; (2) appointed judges will thereafter be subject only to retention elections; (3) by the end of 1994 there will be at least twenty-five black superior court judges and five additional blacks will be appointed to either the state court or the superior court; (4) in order to realize these numerical requirements, a new category of judgeships, "State Assignment Superior Court Judgeships" may be created and filled by black candidates to serve by assignment in any of the State's judicial circuits; and (5) any disputes that arise under this system in the future will be overseen by [a senior federal district court judge].

Id.

172. See *id.* at 1564-69.

173. See *id.* at 1569-77. The Eleventh Circuit dismissed the parties' joint appeal as moot in 1995, because the governor had failed to appoint the requisite number of African-American judges by the end of 1994, and therefore he had not satisfied the proposed settlement's third condition. See *Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114, 1118 (11th Cir. 1995).

174. 74 F.3d 1058 (11th Cir. 1996).

settlement, Alabama would have created new appellate judgeships to be appointed by a commission composed in part of members of the plaintiff class. The number of additional judgeships to be created depended on the number of African-Americans elected to the court through Alabama's usual election process. Appointed judges would stand in a retention election after six years.¹⁷⁵ In rejecting the settlement that had been approved by the district court, the court of appeals held:

A judicial remedy fashioned under section 2 must . . . enhance the ability of the plaintiffs to *elect* their candidates of choice. Any remedy that has the effect of eliminating this essential element of choice is invalid, for it contravenes the spirit and purpose of the [Voting Rights] Act. A remedy such as the one fashioned in this case, calling for the appointment of judges to posts which, under state law, are to be filled by election, effectively nullifies voting power and contravenes the stated objectives of section 2.

In short, the district court has employed the Voting Rights Act to usurp voting power from the very minority which, under the Act, is entitled to wield it. Such a practice can hardly be condoned. We have repeatedly insisted that the Act guarantees the right to *elect* representatives. The will of the people is expressed through elections, not by commissions created to divine their preferences for them. We "find[] a certain irony in using the Voting Rights Act to *deny* citizens the right to select public officials of their choice."¹⁷⁶

Commentators similarly have expressed skepticism about using appointment to remedy vote dilution in judicial elections.¹⁷⁷ Presag-

175. For details of the plan, see the district court opinion, *White v. Alabama*, 867 F. Supp. 1519, 1531-33 (M.D. Ala. 1994), *vacated and remanded*, 74 F.3d 1058 (11th Cir. 1996).

176. *White*, 74 F.3d at 1069-70 (citations and footnotes omitted). The court also held that the proposed settlement was impermissible because the district court "lacked the authority to require Alabama to increase the size of its appellate courts," *id.* at 1072, and it rejected the argument that the settlement should be approved because it constituted a "consent decree" rather than a final judgment. *See id.* at 1073. The court did not reach the question whether the proposed remedy would violate the Equal Protection Clause by setting aside race-based seats on Alabama's appellate courts. *See id.* at 1071 n.42. The court distinguished more typical Missouri plans, intimating that such plans might be acceptable remedies for a section 2 violation. *See id.* at 1070-71.

177. *See, e.g.,* Prehoditch, *supra* note 165, at 559 ("[S]ome evidence exists that [judicial] appointment does not remedy the problem the Voting Rights Act was designed to address."); Fremstad, *supra* note 165, at 128 (suggesting that "the change to an appointive system may not pass muster under Section[] 2"); Izatt, *supra* note 136, at 260

ing the language of the *White* opinion, attorney Robert McDuff stated in 1993 that "there is something rather sinister about removing the power to vote for judges at the very time litigation under the Voting Rights Act promises that minority citizens will finally have their fair share of that power."¹⁷⁸ Speaking more directly to the statutory language, McDuff argued that appointive systems would not satisfy "the key objective of section 2 of the Voting Rights Act, which is to increase the opportunity of minority voters to elect candidates of *their* choice, not the choice of a Governor."¹⁷⁹ McDuff suggested that a jurisdiction in which vote dilution has occurred may move to judicial appointment only "[y]ears later, after a fair election system has been instituted and a state's judiciary is well integrated."¹⁸⁰

Frederick Slabach, in contrast, does not believe a move to judicial appointment would be *per se* invalid; instead, he argues that if plaintiffs can show under the totality of circumstances that "minorities do not have an equal opportunity to participate in the political process and to elect representatives of their choice, the shift from elected to appointed judges would violate the substantive provisions of section 2."¹⁸¹ Appointment would be permissible "only if minority voters have the same opportunity to elect the appointing authority that they had under the election scheme."¹⁸²

Though most judicial and scholarly authorities suggest that a

(noting that "a change to an appointment system may not be a realistic option for states"); see also Chapman, *supra* note 165, at 476 ("[B]ecause of this potential for a lack of minority representation, merit-selection plans which include a retention election would be subject to suits under Section 2 of the Voting Rights Act.").

178. McDuff, *supra* note 124, at 978.

179. *Id.* at 979.

180. *Id.* at 981.

181. Slabach, *supra* note 124, at 876.

182. *Id.* at 877. Brenda Wright points out the credibility problem of such a change: If an election system is eliminated in favor of an appointive system in response to litigation under Section 2, a jurisdiction will face the difficult task of explaining why such a change was made just at the moment when the election system was about to be opened to meaningful participation by minority voters.

Wright, *supra* note 136, at 689.

Slabach apparently believes that any appointment scheme failing to utilize direct, district-based elections of the appointing authority would be impermissible:

A change to appointment by a state-wide elected official would dilute minority voting strength if multiple judicial offices are filled by election from majority black districts. For example, if a majority white state elects twenty district court judges from majority black districts and eighty from majority white districts, a change to gubernatorial appointment would dilute minority voting strength because blacks do not constitute a majority of the vote in the gubernatorial election.

Slabach, *supra* note 124, at 880.

move to a lifetime appointment system would be impermissible as a section 2 remedy, this is not a foregone conclusion. Importantly, none of the cases discussed above involved a state that had amended its law during litigation to allow for judicial appointment. As noted above, the Eleventh Circuit has held that a state's interest in its judicial selection mechanisms should be considered at the remedy stage of a section 2 case.¹⁸³ Once a state articulates an interest in promoting judicial independence, even during litigation, it should be entitled to some weight, provided that the state can prove the proposed change in the judicial selection mechanism actually furthers the permissible state goal of judicial independence, as a move to lifetime appointment would do in this case.

In addition, the *Brooks* and *White* cases were complicated by proposed appointment systems including possibly unconstitutional racial quotas or targets.¹⁸⁴ A move to lifetime appointment eliminating these features would remove the possible constitutional problems, though it could make it more difficult for a state to show that the appointment plan will *remedy* minority vote dilution.

More fundamentally, the language of section 2 does not guarantee anyone a right to elect representatives, even though courts and commentators suggest otherwise.¹⁸⁵ Instead, it applies only when the "political processes leading to nomination or election . . . are not *equally open*" to protected minority groups "in that [their] members have *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice."¹⁸⁶ One may fashion a strong textual argument that section 2 requires *comparing* minority voting power with majority voting power. A move to lifetime judicial appointment would not violate section 2 so read, because minority voting power would not be *comparatively* diminished.

If this interpretation is correct, a state's move to lifetime judicial

183. See *Nipper v. Smith*, 39 F.3d 1494, 1542 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1795 (1995).

184. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491 (1989) (plurality opinion).

185. As Slabach argues:

The state may argue that a shift from an elected judiciary to an appointed one would provide minorities an opportunity to elect representatives of their choice equal to that of the majority—that is, no opportunity to elect. Such an argument misses the mark. Under a vote-dilution analysis, the fact that the state dilutes the votes of the minority is not negated by the fact that it dilutes the votes of the majority at the same time.

Slabach, *supra* note 124, at 876 n.324.

186. 42 U.S.C. § 1973(b) (1994) (emphasis added).

appointment would not violate section 2, and therefore such a move should be a permissible remedy for a section 2 violation. Of course, if the state wishes to move to lifetime judicial appointment with an *intention* to discriminate against minority voters, the conduct would still be open to a constitutional equal protection challenge.

Should courts and commentators continue to view a move to lifetime judicial appointment as an impermissible remedy for a section 2 violation, Congress should amend section 2 to allow such a move, particularly because, as shown in the next subpart, minorities appear to fare as well under judicial appointment systems as under elective systems.

3. Section 5 Preclearance May Be Denied for a Covered Jurisdiction's Move to Lifetime Judicial Appointments

Section 4 of the VRA¹⁸⁷ lists certain "covered" jurisdictions that have had a history of discrimination against particular minority voters.¹⁸⁸ Under section 5, these covered jurisdictions cannot enforce any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless they either obtain administrative preclearance from the Attorney General of the United States¹⁸⁹ or a declaratory judgment from a three-judge court of the United States District Court for the District of Columbia declaring that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote" on account of race,

187. Voting Rights Act of 1965 § 4, 42 U.S.C. § 1973b(b) (1994).

188. See *id.* As the court in *Arizona v. Reno*, 887 F. Supp. 318 (D.D.C. 1995), recently explained:

Congress enacted the Voting Rights Act to rid the country of racial discrimination in voting. The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been the most flagrant. Section 5 of the Act imposes strict oversight on those states and jurisdictions that as recently as 1964 used the most overtly discriminatory tests and devices to prevent minorities from fully participating in the electoral process. By freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory, Congress intended to ensure that gains in minority political participation were not eroded through the establishment of new discriminatory procedures and techniques. Under section 5, it is the state or political subdivision thereof that bears the burden of proving that its change did not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

Id. at 320 (citations and internal quotations omitted).

189. See 42 U.S.C. § 1973c (1994). If the Attorney General fails to object within 60 days after submission of the change, the state may enforce the change. See *id.* If the Attorney General objects, the state may seek preclearance from the United States District Court for the District of Columbia in a *de novo* proceeding. See *id.*

color, or membership in a language minority group.¹⁹⁰

Just a few weeks before the Supreme Court held in *Chisom v. Roemer*¹⁹¹ that section 2 applied to judicial elections, the Court in *Clark v. Roemer*¹⁹² made clear that section 5 also applied to such elections.¹⁹³ Moreover, in *Bunton v. Patterson*,¹⁹⁴ among the first section 5 cases decided by the Supreme Court, the Court held that a covered jurisdiction's change from an election of a government official to appointment must be precleared under section 5.¹⁹⁵ Thus, the courts have made clear that a covered jurisdiction wishing to change from judicial elections to lifetime judicial appointments must obtain preclearance from the Attorney General or the three-judge court; the open question is whether preclearance should be granted for such a change.

Neither the District Court for the District of Columbia nor the Supreme Court has yet decided whether a covered jurisdiction's requested change to a judicial appointment system should be precleared on grounds that it has neither a discriminatory purpose

190. See *id.* The Attorney General must apply the same standard in making that determination. See 28 C.F.R. § 51.55(a) (1996). In addition, 28 C.F.R. § 51.55(b)(2) provides that the Attorney General should withhold preclearance under section 5 if the change would violate the amended section 2, but two three-judge panels for the United States District Court for the District of Columbia have held that this regulation interpreting section 5 preclearance standards misreads section 5. See *Bossier Parish Sch. Bd. v. Reno*, 907 F. Supp. 434, 443-44 (D.D.C. 1995); *Georgia v. Reno*, 881 F. Supp. 7, 14 (D.D.C. 1995), *aff'd sub nom. Brooks v. Georgia*, 116 S. Ct. 663 (1995) (mem.). The Supreme Court noted probable jurisdiction in *Bossier* to consider the issue. See 116 S. Ct. 1874 (1996).

191. 501 U.S. 380 (1991).

192. 500 U.S. 646 (1991).

193. See *id.* at 653 ("The District Court maintained that the applicability of § 5 to judges was uncertain until our summary affirmance in *Brooks v. Georgia State Board of Elections*. But in *Haith v. Martin* [477 U.S. 901 (1986)], we issued a summary affirmance of a decision holding that § 5 applied to judges." (citations omitted)). For a more detailed history of application of section 5 to judicial elections before *Clark*, see Slabach, *supra* note 124, at 830-33.

194. *Bunton* was a companion case to *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); see also *Presley v. Etowah County Comm'n*, 502 U.S. 491, 503 (1992) (reaffirming that section 5 applies to changes "affecting the creation or abolition of an elective office").

195. See *Allen*, 393 U.S. at 569-70. The Court noted:

In [*Bunton*] an important county officer in certain counties was made appointive instead of elective. The power of a citizen's vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters. Such a change could be made either with or without a discriminatory purpose or effect; however, the purpose of § 5 was to submit such changes to scrutiny.

Id.

nor effect.¹⁹⁶ Determining whether a discriminatory purpose exists " 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' " ¹⁹⁷ "It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." ¹⁹⁸ Whether a change to lifetime judicial appointment would violate the purpose prong necessarily depends upon the motive behind the change.¹⁹⁹ A covered jurisdiction that proposes a change to judicial appointment in order to prevent minorities from choosing their preferred judicial candidates would violate the discriminatory purpose prong of section 5 as well as the Equal Protection Clause of the Fourteenth Amendment.²⁰⁰

But what of covered jurisdictions that wish to move to lifetime judicial appointment in the absence of a discriminatory purpose?

196. Some may read dicta in *Chisom v. Roemer*, 501 U.S. 380, 401 (1991), as suggesting preclearance is not necessary for a change to judicial appointment. See *supra* note 168 and accompanying text (referencing dicta and discussing analogous argument regarding effect of dicta on section 2). However, commentators agree that this reading of *Chisom* is incorrect. See McDuff, *supra* note 124, at 980; Wright, *supra* note 136, at 689.

Three-judge district courts anywhere in the United States have jurisdiction to consider whether a state has made an electoral change without receiving preclearance in violation of section 5 and to grant appropriate interim relief. See *Allen*, 393 U.S. at 557-60. In *Brooks v. State Bd. of Elections*, 838 F. Supp. 601, 608 (S.D. Ga. 1993), the court refused to allow use of judicial appointments as an interim remedy pending approval of a settlement plan. (As noted above, see *supra* notes 168-69 and accompanying text, the Eleventh Circuit considering the section 2 portion of this case later refused to approve this settlement.) The Supreme Court recently held that a three-judge district court convened to determine whether preclearance of judicial elections is required may not order a state to conduct judicial elections as an interim remedy under the election plan that has not yet been precleared. See *Lopez v. Monterey County*, 117 S. Ct. 340, 348 (1996).

197. *Arizona v. Reno*, 887 F. Supp. 318, 322 (D.D.C. 1995), *appeal dismissed*, 116 S. Ct. 1037 (1996) (quoting *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Such evidence includes, but is not limited to:

any disparate impact the state's action has on protected minority groups; the historical background of the challenged decision; the specific sequence of events leading up to that decision; any legislative or administrative history; any departure from the normal procedural sequence; and any evidence that the decisionmaker ignored factors it has considered important or controlling when making similar decisions in the past.

Id.

198. *New York v. United States*, 874 F. Supp. 394, 399 (D.D.C. 1994) (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)).

199. In *New York v. United States*, the court rejected the argument that section 2's requirements must be read into the discriminatory purpose prong of the section 5 test. See *id.* at 398-400; see also *infra* note 202 (noting that courts rejected a similar argument regarding the discriminatory effect prong).

200. See *supra* note 122 (noting intent standard for proving constitutional vote dilution).

Such jurisdictions still must prove an absence of a discriminatory "effect." The Supreme Court has stated that a voting procedure change has a discriminatory effect when it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."²⁰¹ "If the position of minority voters is no worse under the new scheme than it was under the old scheme, then the proposed change is entitled to preclearance under section 5."²⁰² Three decades of Supreme Court authority indicate that discriminatory effect is measured solely in terms of "the effective exercise of the electoral franchise."²⁰³ As Justice O'Connor observed recently in *Bush v. Vera*: "Nonretrogression . . . mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."²⁰⁴

A three-judge panel from the District of Columbia recently explained how to determine whether a move from an elective to appointive system violates the effects prong of section 5. In *Texas v. United States*,²⁰⁵ the court held that the effects prong of section 5 requires comparing the power of minority voters to choose candidates under the electoral system with the power of minority voters to choose the appointing authorities under the appointment system, and finding retrogression when minority voting power so measured decreases.²⁰⁶ This analysis suggests that a move from district-based judicial elections to gubernatorial appointment (where the governor is elected at-large) could be found to be retrogressive under section 5

201. *Beer v. United States*, 425 U.S. 130, 140 (1976). Recently, the Justice Department argued that "even a non-retrogressive change cannot be approved under section 5 if that change violates the results test of section 2 of the Act." *Arizona v. Reno*, 887 F. Supp. at 320-321; see also Slabach, *supra* note 124, at 874 (same); *supra* note 190 (discussing challenge to Justice Department regulation making same argument). However, all three-judge district courts for the District of Columbia considering the issue uniformly have rejected the argument. See, e.g., *Bossier Parish Sch. Bd. v. Reno*, 907 F. Supp. 434, 443-44 (D.D.C. 1995) (rejecting the Justice Department's argument and citing two other courts also rejecting it). The Supreme Court is considering *Bossier* this term. See 116 S. Ct. 1874 (1996).

202. *New York v. United States*, 874 F. Supp. at 397; see also *id.* at 401 ("[T]here is absolutely no requirement that proposed changes to voting laws place minority voters in a *better* position relative to the existing system.").

203. *Miller v. Johnson*, 115 S. Ct. 2475, 2483 (1995); accord *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983); *Beer*, 425 U.S. at 141.

204. *Bush v. Vera*, 116 S. Ct. 1941, 1950 (1996) (O'Connor, J., concurring).

205. 866 F. Supp. 20 (D.D.C. 1994).

206. See *id.* at 27-28; see also *County Council of Sumter County S.C. v. United States*, 555 F. Supp. 694, 705 (D.D.C. 1983) (stating that a move from an appointive system to an elective one may be retrogressive, depending on the results minorities would achieve under each system).

in jurisdictions with existing majority-minority districts used to select judges. For this reason, the Attorney General or court likely would find a discriminatory effect under any lifetime judicial appointment plan in which minorities do not have the same voting strength over the appointive body that they had over the prior judicial elections.

However, retrogression arguably is a poor test to apply to determine discriminatory effect in cases involving a move from an elective to an appointive system because retrogression does not measure well whether minority members are really "no worse" under the new appointive scheme. Instead, we might ask the broader, non-mechanical question whether a move to an appointive system truly has a discriminatory effect on minority voters. This broader test would not *mandate* striking down all appointive plans that use gubernatorial or other appointment systems using smaller appointive bodies. Instead, it would allow the court to consider the position of minorities before and after a move to appointment by looking at the whole picture. If this test is applied, many moves to a lifetime judicial appointment system could be precleared.²⁰⁷

Empirical evidence demonstrates that, generally speaking, a system of lifetime judicial appointments would *not* hurt minority interests. Consider first the number of minority judges chosen under both elective and appointive systems. A 1993 study conducted by the American Judicature Society found that 58% of African-American appellate judges initially were selected by appointment,²⁰⁸ while only 26% were chosen through popular election.²⁰⁹ Interestingly, African-American appellate judges were able to obtain the most relative success through the Missouri plan, despite the overwhelming lack of minority representation on judicial nominating commissions.²¹⁰ The

207. Here, I imagine life tenure only for newly-selected judges. Current judges would continue to serve out their term, and then would stand for consideration under the new system awarding life tenure. Any automatic grandfathering-in of existing judges could, in many jurisdictions, lock in existing racial and ethnic disparities in the judiciary.

208. See American Judicature Soc'y, *African-American Judges Currently Serving on State Courts of Last Resort and Intermediate Appellate Courts 1* (Jan. 1993) (unpublished study on file with the author). Of those African-American appellate judges, 32% of the total were chosen through the Missouri plan, 20% of the total through gubernatorial appointment, and 6% through legislative appointment. See *id.*

209. See *id.* Of those, 11% of the total were chosen through partisan elections and 15% of the total through nonpartisan elections. See *id.* The remainder of African-American appellate judges were chosen by some other mechanism, like court appointment to fill a vacancy. See *id.* at 2 n.2.

210. See Goldschmidt, *supra* note 3, at 66-68. Goldschmidt notes that the American Judicature Society has amended its model provisions to require consideration of diversity issues in the formation of appointment commissions, and some states even have laws re-

most comprehensive study of the racial composition of the judiciary, conducted in 1985, concluded that "[a] higher percentage of women and minorities achieved judicial office through an appointment process, either Executive Appointment (17.9%) or Merit Selection (17.1%), than an elective process, whether Judicial Election (11.7%), Partisan Election (11.2%), Nonpartisan Election (9.4%) or Legislative Election (6.9%)."²¹¹ The study also found that African-Americans made up 3.8% of state court judges (using both election and appointment systems) and 7% of the federal judiciary (which relies solely on life-tenured appointment).²¹² Hispanics made up 1.2%

quiring a specified number of minority members on the commissions. See *id.* at 68 (citing *AJS Model Provisions* and various state laws). Criticism of the Missouri plan as preventing ethnic politics dates back to at least 1948, when Judge James Garrett Wallace wrote a song entitled "The Old Missouri Plan," whose second stanza reads:

*Oh, the Old Missouri Plan,
Oh, the Old Missouri Plan,
It won't be served with sauerkraut nor sauce Italian.
There'll be no corned beef and cabbage,
And spaghetti they will ban;
There'll be no such dish
As gefilte fish
On the Old Missouri Plan.*

FUND FOR MODERN COURTS, THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS 66 (1985) (reprinting entire song).

211. FUND FOR MODERN COURTS, *supra* note 210, at 65. The percentage attributable to legislative election (6.9%) is particularly disheartening, especially considering that two of the four states using legislative election, South Carolina and Virginia, have substantial African-American populations. The 1985 study reveals that the commitment of the executive branch to minority judicial appointments is an important factor in determining the number of such appointments. The data suggest that executives should have input in the appointment process, or that supermajority requirements might be necessary to encourage log-rolling. They also suggest that courts should not allow a move to judicial appointments by those states with a poor history of appointing minorities to other appointive positions. I discuss these points below.

Though the data discuss gender as well, I focus here only on the position of minority judicial candidates and not the position of women judicial candidates. No doubt, women have been underrepresented in the judiciary under all of the judicial selection mechanisms. See Karen L. Tokarz, *Women Judges and Merit Selection Under the Missouri Plan*, 64 WASH. U. L.Q. 903, 949 (1986) (noting that women fare poorly under the Missouri plan). Conducting a study of African-American, Hispanic, and female representation in state judiciaries, Alozie concluded that the problems facing women in attaining judgeships differ from the problems of racial and ethnic minorities and should be considered a different field of study. See Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCI. Q. 315, 324 (1990). More directly for the scope of this article, women cannot bring suit under the VRA because they are not members of a protected class. See 42 U.S.C. § 1973(a) (1994) (extending protection only to those discriminated against on the basis of race, color, or membership in a designated language minority group).

212. See FUND FOR MODERN COURTS, *supra* note 210, at 13.

of state court judges and 3.1% of the federal judiciary.²¹³ At that time, African-Americans constituted 11.7% of the U.S. population²¹⁴ and (in 1980) 2.7% of the attorneys in the U.S.²¹⁵ Hispanics constituted 6.4% of the U.S. population²¹⁶ and (in 1980) 1.8% of the attorneys.²¹⁷

These data do not necessarily indicate that judicial appointment leads to a *greater* number of minority judges than is attained through judicial elections. Using a multivariate statistical analysis of the data from the same 1985 study, Professor Nicholas O. Alozie concluded that judicial selection systems did *not* significantly contribute to explaining the percentage of African-American judges.²¹⁸ Judicial selection systems were not a good predictor of the number of African-American judges; instead, the best predictor of the number of African-American judges in a state was the percentage of African-American lawyers in the state.²¹⁹ Alozie also found a strong correlation of the proportion of Hispanic lawyers in the state with the number of Hispanic judgeships.²²⁰

Alozie determined that African-Americans fare about equally well under election and appointment methods. However, he also found that "the higher the Hispanic share of votes [in judicial elections], the more likely Hispanics are to be represented on the judiciary in partisan election jurisdictions."²²¹ Alozie concluded that

213. *See id.*

214. *See id.* at 10.

215. *See id.* at 11.

216. *See id.* at 10.

217. *See id.* at 11.

218. *See* Nicholas O. Alozie, *Black Representation on State Judiciaries*, 69 SOC. SCI. Q. 979, 984 (1988).

219. *See id.* at 985.

220. *See* Alozie, *supra* note 211, at 318.

221. *Id.* at 323. Alozie goes on to explain why this effect may exist with Hispanics but not African-Americans:

It is conceivable that this variation in the effects of black and Hispanic voters stems from name identification. Champagne (1986) suggested that, absent all other information about specific judicial candidates, the uninformed voter in a voting booth leans toward party affiliation and the ethnicity of the candidate, which is suggested by the candidate's name. Ethnic voters, on the average, can recognize Hispanic names on election ballots (e.g., Raul Gonzalez for the Texas Supreme Court). There is no way of knowing if other candidates are black or white. For blacks wishing to vote along ethnic lines, then, prior knowledge of the ethnicity of candidates on the ballot becomes fundamental.

Id. This explanation may not be correct, however. A recent study demonstrates not only that Hispanic voters were best able to identify the ethnicity of Hispanic judicial candidates, but also that African-American voters were best able to identify the ethnicity of African-American judicial candidates. *See* Champagne & Thielemann, *supra* note 41, at

this difference could lead Hispanics to advocate partisan judicial elections and African-Americans to oppose such elections.²²² Although he recognized that each group could “rationally choose to pursue different policy alternatives in their attempts to increase their representation on state judiciaries,” Alozie concluded that in the final analysis, judicial selection systems did not influence significantly the amount of minority representation on the bench.²²³ If forced to choose one priority, Alozie suggested, “the major goal for both groups might well be to increase their respective shares of states’ lawyers.”²²⁴

The data measuring whether judicial appointment leads to more minority judges than election systems are subject to some important caveats. First, the number of minority judges who could be elected may be *understated* in some studies. Many judicial elections have been held in jurisdictions in which their minority votes have been diluted under the *Gingles* standard. A proper comparison would be the rate of minorities appointed under appointive systems versus the number of minorities elected from “undiluted” districts—but such data are unavailable. Some people suspect that judicial elections conducted using newly drawn subdistricts would lead to more minority judges than would be appointed under such a system.²²⁵

On the other hand, the ability of minorities to get elected through judicial elections may be *overstated*. Many minority judges

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Alozie also found that “whatever inducement the Hispanic vote may be on governors’ willingness to appoint Hispanics to the judiciary, it does not seem to be a significant factor in explaining interstate differentials in Hispanics’ share of state judgeships.” Alozie, *supra* note 211, at 320.

222. See Alozie, *supra* note 211, at 323-24.

223. *Id.* at 324.

224. *Id.*

225. “Several studies indicated that at-large electoral systems account for the inequity of black representation on governing bodies . . . [B]lack representation is significantly greater in cities with hybrid and district election systems . . .” Barbara Luck Graham, *Do Judicial Selection Systems Matter? A Study of Black Representation on State Courts*, 18 AM. POL. Q. 316, 320 (1990); see also Luskin et al., *supra* note 47, at 319 (speculating that single-member district judicial elections would increase minority representation). The authors found that minority underrepresentation in merit plan jurisdictions is explained by the nomination process, not the retention process: 98.8% of white judges, 98.9% of black judges, and 95.7% of the Hispanic judges were retained. See *id.* at 320.

Illinois’ recent experience with legislation creating new subdistricts (including two majority-Hispanic districts) is expected to more than double the number of Hispanic judges. For this reason, bar associations representing minorities in Illinois have opposed moving to the Missouri plan for choosing judges. See David Bailey, *Most Judicial Primary Winners Passed Bar Muster, Complaints Aside*, CHI. DAILY L. BULL., Apr. 27, 1996, at 3, 11.

in jurisdictions using judicial elections have come to the bench through an interim appointment, and have been reelected because of their incumbency status and *in spite of* their race.²²⁶ In fact, 40% of all judges in states using partisan elections and 66% of judges in states using nonpartisan elections were initially appointed.²²⁷ Professor Barbara Graham suggests in her statistical analysis that when taking both formal and informal judicial selection methods into account, appointment "increases black representation on the bench, whereas election decreases it."²²⁸

A larger problem with the analysis above is that it assumes the mere election of minority judges satisfies minority interests. Lani Guinier has argued that electing African-Americans is important for reflecting "the group consciousness, group history, and group perspective of a disadvantaged and stigmatized minority," but it is "a limited empowerment tool."²²⁹

After examining a number of assumptions upon which the theory of "Black Electoral Success" has been built, Guinier concludes that "a system that gives everyone an equal chance of having their political preferences *physically represented* is inadequate. A fair system of political representation would provide mechanisms to ensure that disadvantaged and stigmatized minority groups also have a *fair chance* to have their policy preferences *satisfied*."²³⁰

Perhaps, then, a better question to ask in considering whether minorities are better off with an election versus an appointment system for choosing judges is whether judges chosen through lifetime judicial appointment are more likely to support minority interests on

226. "[W]hile fifty-five percent of minority judgeships were listed as elective, seventy-seven percent of African-American jurists surveyed were initially appointed to the bench, often to fill a judicial vacancy." Goldschmidt, *supra* note 3, at 65 (citing MICHAEL D. SMITH, RACE VERSUS ROBE: THE DILEMMA OF BLACK JUDGES 60 (1983)). For a study of the election of former Florida Supreme Court Justice (and now Eleventh Circuit Judge) Joseph Hackett, the first African-American since Reconstruction elected to a statewide office in the South, see Burton Atkins et al., *State Supreme Court Elections: The Significance of Racial Cues*, 12 AM. POL. Q. 211, 211 (1984). The authors attribute Hackett's electoral success to his incumbency status gained through initial appointment to the bench, and note that he faced a marginal loss of support in white precincts because of his race. See *id.* at 221.

227. See Scheuerman, *supra* note 28, at 476 (citing JEROME R. CORSI, JUDICIAL POLITICS: AN INTRODUCTION 110 (1984)).

228. Graham, *supra* note 225, at 331. Graham notes that the "depression effect of elections on black judicial recruitment might be explained by at-large judicial districts." *Id.*

229. GUINIER, *supra* note 118, at 58.

230. *Id.* at 70.

the bench than those standing for election. Certainly lifetime appointed federal judges have done much more than state judges (the vast majority of whom stand for some kind of reelection or reappointment²³¹) in protecting minority rights. After all, lifetime federal judges are the ones who have enforced the VRA, school desegregation orders, and the like.²³² However, too many differences exist between federal life-tenured judges and state judges to conclude summarily that life tenure itself promotes greater concern for minorities.

I do not think firm conclusions can be drawn suggesting that a move to life tenure coupled with appointment *inevitably* will be better for minority interests. But public choice theory may suggest a reason life-tenured judges may now tend to support minority interests. As Part I explained, lifetime judges have every incentive to vote their values. Attitudes toward minorities have changed dramatically in the last few decades;²³³ many new non-minority judges will be more sympathetic to minority interests. Not all appointed judges will be sympathetic, however, and evidence demonstrates that "whites and blacks [still] differ considerably in their views regarding the appropriate measures for achieving equality and integration."²³⁴

For this reason, promoting minority interests requires that minorities get appointed to the bench in increasing numbers. To the extent that minorities tend to have similar values on average stemming from their communities of interest²³⁵ (putting aside the occasional Clarence Thomas²³⁶), the analysis suggests that the ap-

231. See *supra* note 91 (listing only three states, Rhode Island, Massachusetts, and New Hampshire, in which judges have life tenure or something close to it).

232. A noted law professor and civil rights litigator expressed his preference for litigating in federal court, in part because federal judges "are as insulated from majoritarian pressures as is functionally possible," while state trial judges "on the other hand, generally [are] elected for a fixed term, rendering them vulnerable to majoritarian pressure." Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127-28 (1977). Neuborne reconsiders his position in Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797 (1995).

233. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1056 (1995) (citing social science literature demonstrating changing attitudes).

234. *Id.* at 1056-57; see also *id.* at 1057 n.216 (citing social science literature showing these attitudes).

235. For a critical look at the assumption that "[b]lack elected officials will intuitively understand the positions favored by their black constituents," see GUINIER, *supra* note 118, at 67, 66-69.

236. "Uncle Tom. Lawn jockey. Traitor. Sellout. Handkerchief-head. Those are just a few of the terms black folks have used to describe Supreme Court Justice Clarence Thomas." Gregory Kane, *Thomas Foes Silent About Marshall*, BALTIMORE SUN, Dec. 15,

pointment of more minority judges will lead to more judges who vote minority values. Although Guinier's concerns for the lack of power of minority legislators²³⁷ in a white-dominated legislature is well-grounded in some states, this concern applies less to judges because trial judges decide the outcome of most cases alone, and are infrequently reversed by appellate courts. Furthermore, because appellate court judges sit in collegial panels of three judges or more, minority appellate judges on average have a greater say in collective decisionmaking than minority legislators.

Given that the appointment of minority judges does matter, and given that even some non-minority judges may vote their values consonant with minority interests, the final question is whether rational vote-maximizing governors or legislators will appoint judges who support minority interests. Certainly not all will. But to the extent the VRA redistributes political power in the legislative branch to ensure undiluted minority voting strength, and to the extent the legislative branch has formal or informal input into the appointment process, pressure to appoint some minority candidates should exist. One has difficulty imagining any state granting the governor sole power over lifetime appointment of judges;²³⁸ therefore, governors and legislators likely will make decisions on life-tenured judicial candidates together. As the VRA continues to improve the representative quality of legislatures, we can expect more minority judges and judges whose values align with minority interests to be chosen for positions with life tenure.

To be sure, not all legislators will be inclined to appoint or approve judicial candidates likely to vote their values consistent with minority preferences. Indeed, one might ask why minorities would be expected to have greater influence over legislators choosing candidates for lifetime judicial appointment than they have had in influencing legislators to change from a system of judicial elections that has resulted in minority vote dilution. The answer, I believe, lies in the force of inertia. Legislators may be reluctant to alter a judicial

1996, at 1B. In a 1994 poll of African-Americans, 40% said they thought Thomas represented their views very well or somewhat well, compared to 44% who said he represented their views little or not at all. See *Overlooked*, THE HOTLINE, Aug. 26, 1994, at 2. Other African-American personalities or groups received the following "very well" or "somewhat well" percentages: Jesse Jackson, 76%; NAACP, 71%; Black leaders in Congress, 61%; Colin Powell, 46%; Louis Farrakhan, 33%; Ben Chavis, 32%, "Gangsta" rappers, 13%. See *id.*

237. See *supra* text accompanying note 230.

238. See *supra* note 91 and accompanying text (noting that no state gives the governor alone to power to reappoint judges).

selection mechanism, or any other structure of government that is already in place, for reasons wholly unrelated to race. In contrast, once legislators must choose life-tenured judges, they will be more open to political pressure concerning who the judges should be and the appropriate racial composition of the state judiciary.

One way of addressing a Guinier-like concern that majority white legislatures will block minority judicial appointments is to impose supermajority voting requirements for the appointment of all life-tenured judges. Such requirements will lead to increased log-rolling, whereby white and minority legislators will trade votes for judicial candidates to ensure the election of the candidates each group of legislators prefers.²³⁹ A supermajority requirement also seems sensible given the independence conferred upon a lifetime appointee.

In sum, if the discriminatory effects prong is read broadly, many moves to lifetime judicial appointment should be precleared. However, if courts apply a mechanical retrogression test in this area, many such changes could be barred. If courts or the Attorney General block such moves under the retrogression test, Congress should amend section 5 to give the Attorney General and courts the power to approve a state's proposed move to lifetime judicial appointments in appropriate circumstances. Among the factors a court should consider in determining whether to grant section 5 preclearance are:

- the extent to which the plan actually promotes judicial independence. The state has a stronger argument that elections affect the independence of higher court judges compared to trial court judges. A court should consider any evidence the state can present that judges have not acted independently under the state's judicial selection system.
- whether the proposed method of initial appointment is likely to lead to the appointment of minorities and minority-preferred candidates to judgeships. Particularly important is the question of how these candidates will fare compared to how they fared under the former method of judicial elections. A court should consider whether the governor and the legislature have appointed minorities and other minority-preferred candidates to other appointive offices in the state.

239. On the other hand, log-rolling may occur without supermajority requirements, and "supermajority rules might actually *impede* such a strategy by denying progressive majorities the ability to overcome the resistance of a conservative, or even racist, minority." Pamela S. Karlan, *Democracy and Dis-Appointment*, 93 MICH. L. REV. 1273, 1287 (1995) (book review).

- the state's motivation for advocating a change. A state should be concerned about judicial independence. States should not be permitted to make such a change for the purpose of discriminating against minority voters.²⁴⁰

Nothing in this proposed change to the VRA should weaken the other important protections under the Act.²⁴¹ Moreover, nothing in the proposed change would prevent states that wished to continue electing their judges from doing so. They simply must conduct their elections in compliance with the VRA. If complying with both the VRA and the United States Constitution remains difficult,²⁴² however, a move to a judicial appointment system could become a palatable choice for jurisdictions whose judicial election systems are open to challenge under section 2.

CONCLUSION

A better understanding of how judicial selection mechanisms affect judicial decisionmaking is important to a number of areas in the law. This Article examined how the public choice model of judging illuminates the apparent clash between state interests in their judicial selection mechanisms and the advancement of minority political representation under the Voting Rights Act. The model may help answer other questions as well, such as whether judges should be protected by the Age Discrimination in Employment Act²⁴³ and whether campaign contributions to judges should be limited or barred in particular circumstances.²⁴⁴ But these questions are for another day.

The model also refocuses the debate over judicial selection mechanisms beyond the simple election-accountability/appointment-independence dichotomy. The extent to which judges deviate from judicial independence depends upon term length and the salience of the judicial race. Though the model does not purport to resolve the

240. This conduct also runs afoul of the Equal Protection Clause of the Fourteenth Amendment. *See supra* notes 124, 200 and accompanying text.

241. Of course, an attempt to make any change in the VRA could have the unintended consequence of opening up the legislation to additional changes, some of which could endanger the important protections the Act provides. " 'If I know anything about Congress,' Benjamin Hooks, [former] executive director of the NAACP, said in 1981, 'once they start tinkering with something, we do not know how far it will go.' " THERNSTROM, *supra* note 118, at 79.

242. *See supra* notes 157-58 and accompanying text.

243. *See Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) (holding that judges are not subject to the ADEA).

244. *See supra* note 80 and accompanying text (citing literature on campaign finance in judicial elections).

policy debate over independence versus accountability as the appropriate judicial model, it suggests methods by which reformers favoring either policy may best achieve their ends.

