

## PUBLIC OPINION AND STATE SUPREME COURTS

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Most state supreme court justices have no choice but to take into account “The Will of the People.” In thirty-eight states, justices stand for reelection; in eighteen states, voters can overturn state supreme court decisions by amending their constitutions through the initiative process; many state supreme courts cannot steer away from controversy by refusing to hear politically charged cases.<sup>1</sup> But how does democratic accountability influence state court decision making? On the one hand, state justices subject to election almost certainly take into account the risk of electoral defeat. At the same time, these justices must also reach out to individuals whose interests may not align with the popular will, most notably campaign contributors.

In the pages that follow, we will advance a preliminary, common-sense argument about the role of public opinion in state supreme court decision making. First, we will argue that public opinion is far more salient to justices subject to contested judicial elections than to justices who are more politically insulated. For this very reason, path-breaking state courts—state courts that take the lead in extending rights and defining the bounds of the law<sup>2</sup>—are subject to fewer democratic controls than state courts that steer away from political controversy. Second, the mass public is generally uninterested in politics (especially state supreme court decision making) and, consequently, there are a limited number of high-salience issues in which the justices have strong incentive to take voter backlash into account. Third (and correspondingly), state justices—especially those subject

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1 See Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1639–53 (2010) (discussing the various aspects of state constitutions and state courts that engender a greater responsiveness to public opinion).

2 See, e.g., *id.* at 1674–85 (discussing path-breaking state supreme courts in the area of gay marriage and specifically noting that the state supreme courts that have ruled on the issue and extended marriage to homosexual couples have fewer democratic checks).

to contested elections—are likely to take into account the views of campaign contributors and interest groups that run television ads.

In making these points, we do not mean to suggest that state justices are not principally interested in advancing their vision of good legal policy. Moreover, state justices may also be attentive to their reputation with state officials, elites (journalists and academics), and the mass public. As it turns out, the structure of state judicial systems figures prominently in this calculation. Justices who run in contested elections, like other politicians, personally value their reputation with the mass public much more than justices who sit on politically insulated courts.<sup>3</sup>

Our essay will be divided into three parts. Part I will provide a quick tour of the ways in which state judicial systems are subject to one or another form of democratic control. Part I will also highlight the increasing importance of judicial elections to state supreme court justices. Part II will discuss how state justices are well positioned to take political consequences into account and, more generally, how the values and aspirations of state supreme court justices may be tied to the characteristics of their judicial system. Parts I and II, moreover, will lay out the basic facts which back up our claim that the salience of public opinion is tied both to differences in state judicial systems and to the electoral significance of a particular issue. Part III will discuss the evidence we have gathered about the influence of public opinion and campaign contributions on state supreme court decision making. Overall, the evidence backs up our central claims, including our claim that politically insulated state supreme courts are likely to play a path-breaking role on highly charged political controversies.

Before turning to Part I, two observations: one about the importance of our project and one about the limits of the empirical evidence that backs up our conclusions. First, the relationship between public opinion and state supreme court decision making is tremendously important.<sup>4</sup> State supreme courts have eclipsed the U.S. Supreme Court in shaping the meaning of constitutional values. State supreme courts decide around 2,000 constitutional law cases each

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<sup>3</sup> For an analogous argument (from which we will draw), see generally Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010) (arguing that justices on politically insulated courts, like the U.S. Supreme Court, are especially interested in their reputation among one or another elite audience).

<sup>4</sup> Of course, the relationship between public opinion and U.S. Supreme Court decision making is tremendously important. Witness, for example, the very fine papers published in this Symposium and Barry Friedman's excellent book, *THE WILL OF THE PEOPLE* (2009).

year; the U.S. Supreme Court decides around thirty.<sup>5</sup> More significantly, state supreme courts sometimes interpret their constitutions to provide protections above the floor set by the U.S. Supreme Court. Examples include abortion, gay rights, takings, religious liberty, and a host of criminal procedure protections.<sup>6</sup> Second, as we will explain in Part III, there is very little available information about the relationship between public opinion and state supreme court decision making. Notwithstanding the profound and ever-growing influence of state supreme courts, their decision making receives scant attention from journalists and legal academics.<sup>7</sup> For example, there is limited newspaper coverage of state court decisions and next to no opinion poll data on voter attitudes towards state supreme court decisions. Consequently, the analysis in this essay should be seen for what it is—a preliminary attempt to discuss the relationship between state supreme court decision making and public opinion.

### I. DEMOCRATIC CHECKS ON STATE JUDICIAL SYSTEMS

State supreme courts are far more vulnerable to political influence than are federal courts.<sup>8</sup> With the exception of Rhode Island, state justices do not have life tenure (although justices in Massachusetts and New Hampshire serve until seventy and are not subject to reelection or reappointment).<sup>9</sup> Many state supreme courts cannot use standing to sue, certiorari denials, or other “passive virtues” to extricate themselves from politically controversial cases; indeed, the constitutions or statutes of eleven states authorize state lawmakers or governors to seek advisory opinions from state supreme courts.<sup>10</sup> Fi-

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<sup>5</sup> Devins, *supra* note 1, at 1635.

<sup>6</sup> *See id.* at 1636.

<sup>7</sup> For this very reason, the Conference of State Chief Justices has called for law schools to teach courses in state constitutional law and embraced a State Supreme Court Initiative designed to encourage news coverage and academic commentary of state supreme court decision-making. Conference of Chief Justices Resolution 1 (Feb. 4, 2010) (on file with author). Likewise, recognizing real limits in available data on state judicial elections, Washington University in St. Louis is sponsoring the State Judicial Election Initiative. *The Judicial Elections Data Initiative*, WASH. UNIV. ST. LOUIS, <http://jedi.wustl.edu/>.

<sup>8</sup> *See infra* notes 69–78 and accompanying text.

<sup>9</sup> In New Jersey, state justices are subject to gubernatorial reappointment but then serve until they are seventy. Before 2010, reappointment was fairly routine. In May 2010, however, Governor Christopher Christie refused to reappoint a sitting Justice so that he could appoint someone “who he said would show the restraint that was missing from the court.” Richard Perez-Pena, *Christie, Shunning Precedent, Drops Justice from Court*, N.Y. TIMES, May 4, 2010, at A22.

<sup>10</sup> *See generally* Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (discussing the differences that exist between

nally, state constitutions are far easier to amend than the Federal Constitution, with some state constitutions authorizing constitutional amendment by citizen initiative.

Differences between state constitutional systems and the federal system are so dramatic that the models political scientists employ to discuss the relationship between the U.S. Supreme Court and the American people have no application to democratically accountable state systems. Consider, for example, the argument that Supreme Court Justices simply vote their policy preferences and need not take into account public or lawmaker backlash. Political scientists who make this argument point to life tenure, docket control, and the near-impossibility of amending the Constitution to override a Court ruling.<sup>11</sup> Most state supreme court justices are without any of these protections and, consequently, state justices are apt to take backlash risks into account.

At the same time, there are dramatic differences among state courts. There is a wide range of appointment and retention schemes, mechanisms for amending state constitutions are highly varied, and docket control is dramatically different among the states. In other words, some state justices are especially vulnerable to democratic checks and others are protected from most types of political retaliation.

The balance of this Part will provide a quick tour of how state systems vary from each other, with particular emphasis on judicial elections.<sup>12</sup> The ramifications of all this will be considered at the end of the Part. In particular, we will explain why democratically accountable state justices have reason to take voter backlash into account on high-salience issues, why these same justices also need to reach out to campaign contributors, and why politically insulated justices can nevertheless pursue significant social change through expansive interpretations of state constitutional provisions.

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state courts that “draw heavily from federal justiciability principles” and those that “diverge from Article III doctrine by offering advisory opinions, resolving moot disputes, and deciding political questions”).

11 See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 92–93 (2002) (“The Supreme Court’s rules and structures . . . give life-tenured justices enormous latitude to reach decisions based on their personal policy preferences.”).

12 Some of the discussion in this Part is drawn from Devins, *supra* note 1, at 1640–52 (providing an overview of how states revise their constitutions, select and retain judges, and decide what stays on the docket).

### A. State Constitutions and Their Amendability

The first key feature that likely influences state supreme court accountability is the state constitution. State constitutions range in size from 8,000 words (similar to the size of the U.S. Constitution) to 200,000 words.<sup>13</sup> The states have had 145 constitutions,<sup>14</sup> and the procedures for amending the states' constitutions vary.<sup>15</sup> All told, the fifty state constitutions have been amended more than 7,400 times.<sup>16</sup> In

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<sup>13</sup> Paul Brace & Kellie Sims Butler, *New Perspectives for the Comparative Study of the Judiciary: The State Supreme Court Project*, 22 JUST. SYS. J. 243, 244 (2001).

<sup>14</sup> See Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 888 (1999). Louisiana has had the most constitutions in its history as a state, with a total of eleven. JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 27 (2005). Georgia has had ten constitutions, South Carolina, seven, and Alabama, Florida, and Virginia have each had six. THE COUNCIL OF STATE GOV'TS, *THE BOOK OF STATES* 12 tbl.1.1 (2009).

<sup>15</sup> For example, twelve states require consideration of legislature-proposed constitutional amendments in two, separate sessions. See THE COUNCIL OF STATE GOV'TS, *supra* note 14, at 14–15 tbl.1.2 (Delaware, Indiana, Iowa, Massachusetts, Nevada, New York, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin). Another three states require some type of supermajority vote in one session *or* a majority vote in two successive legislative sessions (Connecticut, Hawaii, New Jersey). *Id.* In order to get an amendment on the ballot in Connecticut, it must get a three-fourths vote in each house of the legislature in one session *or* a majority vote in each house in two sessions between which an election has intervened. *Id.* Hawaii requires a two-thirds vote in each house in one session *or* a majority vote in each house in two sessions. *Id.* New Jersey requires three-fifths of all members of each house at one session *or* a majority of all members of each house for two successive sessions. *Id.* When the constitutional amendment is voted on in the legislative sessions, seventeen states require only a majority vote of legislators for the amendment to be sent for ratification (Arizona, Arkansas, Indiana, Iowa, Massachusetts, Minnesota, Missouri, Nevada, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Virginia, and Wisconsin), nine states require a three-fifths vote (Alabama, Florida, Illinois, Kentucky, Maryland, Nebraska, New Hampshire, North Carolina, and Ohio), and eighteen states require a two-thirds vote (Alaska, California, Colorado, Delaware, Georgia, Idaho, Kansas, Louisiana, Maine, Michigan, Mississippi, Montana, South Carolina, Texas, Utah, Washington, West Virginia, and Wyoming). *Id.*

The following states have slightly different requirements: Oregon (majority vote to amend the constitution and two-thirds vote to revise it), South Carolina (two-thirds majority of members of each house for first passage, and majority of members of each house after popular ratification), Tennessee (majority of members elected to both houses for first passage, and two-thirds of members elected to both houses for second passage), and Vermont (two-thirds vote in the state Senate, majority vote in the state House for first passage, then a majority of both houses for second passage, but as of 1974, amendments may be submitted only every four years). *Id.* When the amendments go for voter ratification, the vast majority of states simply require a majority vote of the electorate to pass the amendment. *Id.*

<sup>16</sup> THE COUNCIL OF STATE GOV'TS, *supra* note 14, at 12 tbl.1.1. Topping the list, Alabama's constitution has been amended more than 800 times. *Id.* As another example, California's constitution has been amended 518 times as of Jan. 1, 2009. *Id.*; see also GARDNER,

comparison, “[o]f more than 5,000 proposed amendments to the U.S. Constitution, only seventeen have been approved since the Bill of Rights and only three amendments explicitly overruled decisions of the U.S. Supreme Court.”<sup>17</sup>

Notably, in eighteen states, voters can make use of an initiative process to amend their state’s constitution.<sup>18</sup> From 1898 to 1995, voters in seventeen states considered 732 constitutional amendment initiatives, approving 223 of them.<sup>19</sup> Of the 223 constitutional amendment measures passed before 1995, twenty-one were ratified in the 1970s, rising to thirty-three in the 1980s, and rising even further to forty-two in the period from 1991 to 1995.<sup>20</sup> Since the 1970s, “citizens have used the initiative process more frequently and across a greater number of states than at any other time.”<sup>21</sup> Initiative use increased four-fold during this period; in the 1950s and 1960s, an average of four initiatives were passed each year; in the 1990s and 2000s, an average of seventeen initiatives have been enacted each year.<sup>22</sup> Voter initiatives have been used to create law on a broad range of topics including education, the environment, government reform, health, and family law.<sup>23</sup>

### B. Docket Control

Docket control also likely influences state supreme court accountability to the voting public and campaign contributors. The U.S. Supreme Court has virtually total discretion in the cases it hears. This is not so for most state supreme courts. Six states have virtually no control over their dockets, six others have near total control, and the

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*supra* note 14, at 27 (noting that the South Carolina and Texas constitutions have been amended more than 400 times each).

17 Neal Devins, *Same-Sex Marriage and the New Judicial Federalism: Why State Courts Should Not Consider Out-of-State Backlash* in NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS 81 (James A. Gardner & Jim Rossi eds., 2010).

18 THE COUNCIL OF STATE GOV'TS, *supra* note 14, at 16 tbl.1.3. State practices vary considerably. Some states have subject matter restrictions and supermajority voting requirements along with other procedural requirements that restrict the use of the initiative process. KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 36–37 (2009). There is also significant variation among direct-democracy states concerning the procedures to get an initiative on the ballot. See THE COUNCIL OF STATE GOV'TS, *supra* note 14, at 16 tbl.1.3.

19 See LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 235 (4th ed. 2006).

20 See FISHER & DEVINS, *supra* note 19, at 235.

21 MILLER, *supra* note 18, at 46.

22 *Id.* at 42 fig.2.1.

23 MILLER, *supra* note 18, at 55–65.

remaining states span the space in between the two extremes.<sup>24</sup> For example, most medium-sized and larger states have significant (but not plenary) control over which cases they will hear, while supreme courts in states without intermediate appellate courts have no choice but to hear appeals.<sup>25</sup> Several states also require their supreme courts to hear all constitutional challenges to state law,<sup>26</sup> and in ten states, the state supreme court may, and in certain circumstances must, give advisory opinions—a function completely forbidden for federal courts.<sup>27</sup> State courts, moreover, frequently entertain “disputes between state or local officials when federal courts would dismiss comparable cases for lack of standing or ripeness.”<sup>28</sup>

These and other limits on docket control mean that some state courts cannot make use of the “passive virtues” (certiorari denials, findings of no jurisdiction) to extricate themselves from politically complex cases.<sup>29</sup> Initiatives, for example, are often subject to pre-election review by the state courts, in some cases due to mandatory requirements of the state’s initiative process, and in other cases due to opponent challenges.<sup>30</sup> Pre-election reviews mainly focus on procedural sufficiency, such as the number of required signatures, the title of the initiative, and its summary.<sup>31</sup> Pre-election substantive challenges are significantly fewer, but “[i]n Arkansas, Oklahoma, Missouri, Montana, Nebraska, and Utah, courts will consider facial constitutional challenges to initiatives before the election, and, in Florida, the state constitution mandates this form of pre-election review.”<sup>32</sup>

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24 SHAUNA M. STRICKLAND ET AL., COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS 16–67 (2007), available at [http://www.ncsconline.org/D\\_research/CSP/2007\\_files/State%20Court%20Caseload%20Statistics%202007.pdf](http://www.ncsconline.org/D_research/CSP/2007_files/State%20Court%20Caseload%20Statistics%202007.pdf) (providing graphical charts of each state’s court structure).

25 Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 984–85 (1978).

26 See Devins, *supra* note 1, at 1650 (discussing state court practices and same-sex marriage litigation).

27 Brace & Butler, *supra* note 13, at 248 tbl.1.

28 Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*, 46 WM. & MARY L. REV. 1273, 1275 (2005) (internal quotations omitted).

29 For the classic defense of the “passive virtues,” see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

30 MILLER, *supra* note 18, at 98–99.

31 *Id.* at 99.

32 *Id.*

### C. *Judicial Selection and Retention*

State supreme court justices are selected and retained through varying methods that put the justices in thirty-nine states before voters in partisan, non-partisan, and retention elections.<sup>33</sup> In total, 89% of state supreme court justices face voters—“43 [%] face retention elections, 20[%] face nonpartisan elections, and 26[%] face partisan elections.”<sup>34</sup>

Although there are numerous ways to categorize the method of selection and retention for state supreme court justices,<sup>35</sup> we have organized states into four groups: partisan election, nonpartisan election, merit plan, and gubernatorial/legislative appointment.<sup>36</sup> In states with gubernatorial or legislative appointment, the governor or legislature selects the justice, usually from a list of names provided by a nominating committee. Non-partisan elections place judges on the ballot without a party label, whereas partisan elections require judges to run under a party label. In merit plan states, judges are appointed by a merit selection board and face retention elections in which there are no opposing candidates; voters are simply asked to vote “yes” or “no” on whether to retain the judge.<sup>37</sup> Table 1, below, lists the initial

33 David Rottman, *Judicial Elections in 2008*, in COUNCIL OF STATE GOV'TS, *supra* note 14, at 290.

34 *Id.*

35 *Id.* (claiming that due to the slight variations among the states' selection and retention systems, there are sixteen distinct selection/retention schemes). Most sources will group the states more generally into four or five schemes.

36 See *infra* Table 1. Table 2, *infra*, is grouped into five categories: partisan election, non-partisan election, merit plan, gubernatorial/legislative appointment, and serve to age seventy/life. The gubernatorial/legislative appointment category from Table 1 is divided into two categories for Table 2: those states that require reappointment by governor or legislature and those for which once state supreme court justices are initially selected, they serve until age 70 or life terms, more akin to the federal bench. Also, merit plan in Table 1 becomes retention election in Table 2, as merit plan states use retention elections for reappointment of their judges. See *supra* note 20 and accompanying text.

37 Rottman, *supra* note 33, at 290. Under the Missouri Plan, or merit selection, judges were selected by a judicial committee who evaluated the candidates and passed on names to the governor to choose an appointment. See Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 729 (2002). After serving a short period of time (almost like a probation period), the appointed judge's name was placed on the election ballot in which voters were asked to vote “yes” or “no” on whether to retain the judge. See RICHARD A. POSNER, *HOW JUDGES THINK* 139 (2009). No other person ran against the judge, and the judge did not run under any partisan affiliation. Reddick, *supra* at 729. If voters voted to retain the judge, the judge served a full term on the bench. Rottman, *supra* note 33, at 294–95 tbl.5.1. At the end of the term, the judge again faced a retention election. If approved, he or she served another term, but if not retained, the process started over again—the judicial committee would form and suggest candidates for the governor to appoint. Current variations on the Missouri Plan model are numerous.



selection method for each state's supreme court justices. Table 2 provides a list of retention methods.

TABLE 1:  
INITIAL SELECTION METHOD

| Partisan Election | Non-partisan Election | Merit Plan | Governor / Legislature |
|-------------------|-----------------------|------------|------------------------|
| Alabama           | Arkansas              | Alaska     | California             |
| Illinois          | Georgia               | Arizona    | Connecticut            |
| Louisiana         | Idaho                 | Colorado   | Delaware               |
| Pennsylvania      | Kentucky              | Florida    | Maine                  |
| Texas             | Michigan              | Hawaii     | Massachusetts          |
| West Virginia     | Minnesota             | Indiana    | New                    |
|                   | Mississippi           | Iowa       | Hampshire              |
|                   | Montana               | Kansas     | New Jersey             |
|                   | Nevada                | Maryland   | New Mexico             |
|                   | North Carolina        | Missouri   | New York               |
|                   | North Dakota          | Nebraska   | Rhode Island           |
|                   | Ohio                  | Oklahoma   | South Carolina         |
|                   | Oregon                | South      | Tennessee              |
|                   | Washington            | Dakota     | Vermont                |
|                   | Wisconsin             | Utah       | Virginia               |
|                   |                       | Wyoming    |                        |

TABLE 2:  
RETENTION METHOD

| Partisan Election                                 | Non-partisan Election  | Retention Election  | Governor/ Legislature   | Serve to Age 70 or Life                                      |
|---|--|---|---|--|
| Alabama<br>Louisiana<br>Texas<br>West<br>Virginia | Arkansas<br>Georgia<br>Idaho<br>Kentucky<br>Michigan<br>Minnesota<br>Mississippi<br>Montana<br>Nevada<br>North Carolina<br>North Dakota<br>Ohio<br>Oregon<br>Washington<br>Wisconsin | Alaska<br>Arizona<br>California<br>Colorado<br>Florida<br>Illinois<br>Indiana<br>Iowa<br>Kansas<br>Maryland<br>Missouri<br>Nebraska<br>New Mexico<br>Oklahoma<br>Pennsylvania<br>South Dakota<br>Tennessee<br>Utah<br>Wyoming | Connecticut<br>Delaware<br>Hawaii<br>Maine<br>New York<br>South Carolina<br>Vermont<br>Virginia | Massachusetts<br>New Hampshire<br>New Jersey<br>Rhode Island |

Before the late 1980s, judicial elections were seen as “low key affairs, conducted with civility and dignity,’ which were ‘as exciting as a game of checkers. . . . [p]layed by mail.’”<sup>38</sup> Today, judicial elections are more contested and competitive<sup>39</sup> than ever, and money is playing

<sup>38</sup> Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1602 (2009) (alteration in original) (quoting Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1079 (2007)).

<sup>39</sup> See Brace & Butler, *supra* note 13, at 244 (“[J]udicial elections are more competitive than commonly believed.”).

an increasing role.<sup>40</sup> Data shows that while only 33% of nonpartisan elections were contested in 1988, by 2000, 75% of nonpartisan elections were contested.<sup>41</sup> Similarly, 74% of partisan elections were contested in 1988, but by 2000, that number had risen to 95%.<sup>42</sup> In contested incumbent partisan and nonpartisan elections, incumbent judges seeking reelection have an 8.3% chance of losing, and an incumbent in a partisan election has a substantially higher chance of losing than an incumbent in a nonpartisan election.<sup>43</sup> In 2000, incumbents in partisan elections were defeated in 45.5% of elections.<sup>44</sup> This rate of defeat is much higher than for incumbents running for reelection to the U.S. House, U.S. Senate, and state governorships.<sup>45</sup> In comparison to contested elections, however, retention elections see a far smaller percentage of losses because judges facing retention elections are unopposed. Between 1990 and 2000, only 3 of 177 (1.7%) state supreme court justices were defeated in retention elections,<sup>46</sup> and 1964–2006 data suggests that judges in retention election states lose about 1% of the time.<sup>47</sup> Finally, tenure data for appointed judges show these judges to be more secure in their positions than elected judges.<sup>48</sup>

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40 See Sherrilyn A. Ifill, *Through the Lens of Diversity: The Fight for Judicial Elections After Republican Party of Minnesota v. White*, 10 Mich. J. Race & L. 55, 93 (2004).

41 See Shepherd, *supra* note 38, at 1602.

42 *Id.*

43 Chris W. Bonnaeu, *Electoral Verdicts: Incumbent Defeats in State Supreme Courts*, 33 AM. POL. RES. 818, 834, 835 tbl.5 (2005).

44 Shepherd, *supra* note 38, at 1602–03.

45 See Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate*, 39 U. TOL. L. REV. 551, 568 (2008); see also Shepherd, *supra* note 38, at 1603.

46 See Larry Aspin, *Judicial Retention Election Trends 1964–2006*, 90 JUDICATURE 208, 210 (2007), available at [http://www.ajs.org/ajs/publications/Judicature\\_PDFs/905/aspin\\_905.pdf](http://www.ajs.org/ajs/publications/Judicature_PDFs/905/aspin_905.pdf) (containing a ten state survey of retention elections current up to 2006, showing that between 1964 and 2006, of the 6,306 judges in the ten states subject to retention elections, only fifty-six judges lost their retention elections and fifty-one of the fifty-six judges defeated were trial court judges; thus, only five of the judges who lost retention elections were on state appellate courts); Bonnaeu, *supra* note 43, at 825 (stating that approximately 1.7% of state supreme court justices lose retention elections—a number consistent with the 1% loss rate of *all* state court judges facing retention elections).

47 *Id.* The loss rate of 1% was calculated by dividing the number of judges who lost retention elections by the total number of judges who faced retention elections in the Aspin study. See *id.* A total of fifty-six judges out of 6,306 lost retention elections, which is approximately 1%.

48 Tenure data grants credence to the notion that state supreme court justices have great incentive to be attuned to the public by revealing that “on average, reappointed judges serve 27 percent longer terms than reelected judges” and “reappointed judges are retained at a higher rate than reelected judges.” Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169, 181–82 (2009).

Today, state supreme court elections—especially contested partisan and nonpartisan races—increasingly involve the mudslinging and attack ads common to other contested political races.<sup>49</sup> Consider, for example, the 2008 Mississippi Supreme Court elections, where four justices faced contested nonpartisan reelection bids. Mud came from challengers, incumbents, and third parties alike. Justice Easley accused his challenger of being a “deadbeat dad,”<sup>50</sup> and Justice Oliver Diaz, Jr. was the focus of third-party attack ads alleging he voted “for baby killers, and the murderer of an elderly woman.”<sup>51</sup> In the end, three of four high court justices would lose their seats to challengers, including the Chief Justice.<sup>52</sup> All told, nearly three million dollars were spent on just these four Mississippi Supreme Court races.<sup>53</sup>

The Mississippi case does not stand alone. Candidates and interest groups increasingly espouse their beliefs on contested issues.<sup>54</sup> Here are two more examples of this phenomenon: a 2006 Washington ad focused on the candidate and “far right extremists” “so extreme they want to gut protections for our clean air and water. They oppose stem cell research and a woman’s right to choose.”<sup>55</sup> Also in 2006, Alabama’s Chief Justice Drayton Nabers was attacked for allowing a convicted murderer off death row because of “Foreign Law [and] unratified UN Treaties.”<sup>56</sup>

The nastiness of today’s races as well as dramatic increases in the number of contested races is tied to several factors. Judicial decision making is more salient today than ever before, especially considering the declining docket of the U.S. Supreme Court and the increasing deference the Court gives to state decision making.<sup>57</sup> More than that,

49 See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 307 (2008).

50 Raheem Dawodu, *In Mississippi, Three Justices Sent Packing*, GAVEL GRAB (Nov. 6, 2008), <http://www.gavelgrab.org/?p=697>.

51 Don Culpepper, *Supreme Court Candidates React to Third Party Negative Ads*, WLOX (Oct. 30, 2008), [http://www.wlox.com/Global/story.asp?S=9269467&nav=menu40\\_2](http://www.wlox.com/Global/story.asp?S=9269467&nav=menu40_2).

52 See Dawodu, *supra* note 50.

53 Nat’l Inst. on Money in State Politics, *National Overview Map* (2008), FOLLOWTHEMONEY (May 28, 2010), <http://www.followthemoney.org/database/nationalview.phtml?l=0&f=J&y=2008&abbr=0> [hereinafter FOLLOWTHEMONEY 2008] (comparing contributions to high court candidates’ campaigns by dollar amount and state for 2008).

54 See Pozen, *supra* note 49, at 300–01 (“Judicial candidates increasingly invoke their beliefs on abortion, same-sex marriage, tort reform, and other controversial issues; if they do not do so, interest groups may try to ferret them out through questionnaires.”).

55 FairCourtsPage, *2000–2006 Selected State Supreme Court Ads*, YOUTUBE (Feb. 20, 2009), [http://www.youtube.com/watch?v=MbdBM\\_XCycv&feature=related](http://www.youtube.com/watch?v=MbdBM_XCycv&feature=related).

56 *Id.*

57 See Devins, *supra* note 1, at 1635–39 (discussing the increase in state supreme court decisions which involve constitutional issues, the deference the U.S. Supreme Court gives

a 2002 U.S. Supreme Court decision, *Republican Party of Minnesota v. White*, invalidated on First Amendment grounds a law that prohibited judicial candidates from taking positions on issues that might come before them.<sup>58</sup> Finally, and perhaps most significantly, there has been a dramatic infusion of money into judicial campaigns—so much so that state supreme court justices are under increasing pressure to raise significant funds for reelection.<sup>59</sup>

The correlation between the highest fundraiser in judicial campaigns for state high courts and the winner of the election “has exceeded 80 percent” since 2000.<sup>60</sup> From 2000 through 2009, \$206.4 million was raised for judicial campaigns.<sup>61</sup> This is almost two and one-half times the amount raised for state supreme court campaigns the previous decade (which was \$83.3 million from 1990–1999).<sup>62</sup> Although most judicial campaigns did not reach the millions until 2000, when candidates and third parties spent over \$45 million on

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such decisions, and the resulting disparity between the U.S. Supreme Court and state supreme court decisions which concern issues of constitutional law).

58 536 U.S. 765, 788 (2002).

59 For these very reasons, efforts at reforming or ridding states of judicial elections have recently been attempted or passed in a few states through both ballot initiatives and legislative action. See Fredreka Schouten, *States Act to Revise Judicial Selection: Influence Worries Rise as Money Floods Races*, USA TODAY, Mar. 31, 2010, at 1A. West Virginia and Wisconsin have adopted public financing systems for judicial elections since December of 2009. *Id.* Minnesota had a bill before the legislature that would allow voters to amend the state constitution to ban competitive elections and replace them with gubernatorial appointment and merit retention elections. *Id.* Nevada has a constitutional ballot initiative going before voters in November to permit gubernatorial appointment of judges. *Id.* Finally, Michigan’s Supreme Court adopted rules in November that permit the court to decide if a member should recuse himself or herself due to a potential conflict of interest. *Id.*

Additionally, former U.S. Supreme Court Justice Sandra Day O’Connor has made it her personal cause to abolish judicial elections. See Sandra Day O’Connor, Op-Ed., *Take Justice off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9. Recently, she became Chairwoman of the newly created O’Connor Judicial Selection Initiative, sponsored by the Institute for the Advancement of the American Legal System at the University of Denver, which will “encourag[e] state initiatives to scrap direct judicial elections.” John Schwartz, *Effort Begun to Abolish the Election of Judges*, N.Y. TIMES, Dec. 24, 2009, at A12; see also O’Connor Judicial Selection Initiative, *Genesis of the Initiative*, INST. ADVANCEMENT AM. LEGAL SYS., [http://www.du.edu/legalinstitute/judicial\\_selection.html](http://www.du.edu/legalinstitute/judicial_selection.html) (last visited Nov. 14, 2010). Justice Ruth Bader Ginsburg, too, has voiced her belief that states should abandon judicial elections, stating in March of 2010, “If there’s a reform I would make, it would be that.” Robert Barnes, *Ginsburg Would Forbid Judicial Elections*, WASH. POST, Mar. 12, 2010, at A2.

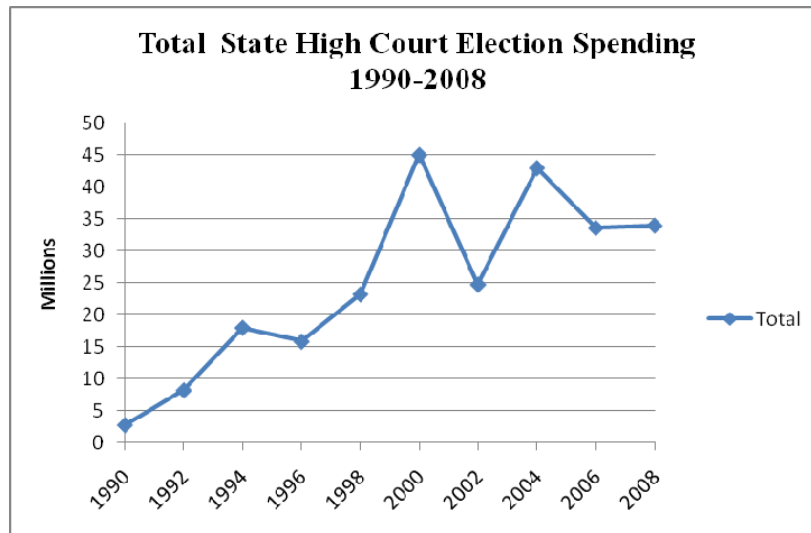
60 JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 20 (2006), [http://www.justiceatstake.org/media/cms/NewPoliticssofJudicialElections2006\\_D2A2449B77CDA.pdf](http://www.justiceatstake.org/media/cms/NewPoliticssofJudicialElections2006_D2A2449B77CDA.pdf).

61 Schouten, *supra* note 59.

62 *Id.*

state supreme court judicial elections,<sup>63</sup> some races reached into the millions as early as 1986.<sup>64</sup> Graph 1 below shows the overall trend of state supreme court election spending for the past two decades.<sup>65</sup>

GRAPH 1



Despite some variance, the trend is clearly toward increased spending. Pro-business interest groups are at the center of the change in the nature of state supreme court elections; they now account for approximately 44% of all fundraising and 90% of special

<sup>63</sup> Nat'l Inst. on Money in State Politics, *National Overview Map (2000)*, FOLLOWTHEMONEY, <http://www.followthemoney.org/database/nationalview.phtml?l=0&f=j&y=2000&abbr=0> (last visited Nov.14, 2010) [hereinafter FOLLOWTHEMONEY 2000] (comparing contributions to high court candidates' campaigns by dollar amount and state for 2000).

<sup>64</sup> The 1986 retention election of California Supreme Court Justices Cruz Reynoso, Joseph Grodin, and Chief Justice Rose Bird was a contentious battle in which Bird, Grodin, and Reynoso spent \$4.5 million while the campaign against them spent over \$7 million. See Miller, *supra* note 18, at 212–13 (discussing the ouster of three California Supreme Court justices in a retention election due to continuous reversal of death sentences in death penalty appeals). Pennsylvania experienced a high-court million-dollar election as early as 1989. *Campaign Contributors and the Pennsylvania Supreme Court*, AM. JUDICATURE SOC'Y 1 (2010), <http://www.ajs.org/selection/jnc/docs/AJS-PAstudy3-18-10.pdf> (noting that the two candidates raised \$2.5 million in the single 1989 Supreme Court race in Pennsylvania, a state in which justices are initially elected in partisan elections).

<sup>65</sup> Graph 1 is based on data for even-year elections. The vast majority of states with judicial elections hold them in even years, while only Pennsylvania and Wisconsin consistently hold odd-year elections. All data for the graph was obtained from the National Institute on Money in State Politics website, <http://www.followthemoney.org>.

interest television advertising.<sup>66</sup> For example, in 2005 and 2006, 44% of campaign donations came from business interests, while 21% came from lawyers.<sup>67</sup>

Expenditures have been almost entirely in the fourteen states with partisan and nonpartisan state supreme court elections.<sup>68</sup> This is hardly surprising; justices in the twenty-four states with retention elections win around 99% of the time, and, consequently, there are relatively few issues of sufficient salience to pose electoral risks to these justices.<sup>69</sup> For this reason, the pressure to seek out campaign contributions is very much tied to the retention system employed. We will now consider how these state-to-state differences might affect justices and, more generally, the potential pressure justices feel to take into account the views of either voters or campaign contributors.

#### D. Ramifications

To start, state supreme court justices, “like all policymakers in a democracy, . . . must retain their posts in order to achieve their policy goals.”<sup>70</sup> In the thirty-eight states where justices stand for some type of reelection, “[t]he institutional design creates a direct incentive for judges to consider public opinion in rendering their decisions.”<sup>71</sup> State supreme court justices are not passive, disconnected actors when it comes to elections; like any politician, they are motivated and

66 SAMPLE ET AL., *supra* note 60, at 7, 18 (explaining percent contribution to negative ads and percent contribution to overall fundraising). For additional discussion of interest group influences, see Clive S. Thomas et al., *Interest Groups and State Court Elections: A New Era and Its Challenges*, 87 JUDICATURE 135 (2003).

67 Ifill, *supra* note 40, at 93–94 (noting how judicial campaign expenditures have “skyrocket[ed]” and are “the most accurate predictor of the outcome of supreme court judicial races”); SAMPLE ET AL., *supra* note 60, at 18 (breaking down the contributions to state supreme court candidates’ 2005–2006 campaigns by donor type); *see also* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2264–65 (2009) (overturning the affirmation of a \$50 million jury verdict where one of three affirming judges had been elected as the result of a \$3 million dollar campaign contribution from the CEO of the defendant corporation).

68 *See* FOLLOWTHEMONEY 2008, *supra* note 53, (comparing contributions to high court candidates’ campaigns by dollar amount and state for 2008); FOLLOWTHEMONEY 2000, *supra* note 63 (comparing contributions to high court candidates’ campaigns by dollar amount and state for 2000).

69 *See infra* notes 117–30 and accompanying text (discussing studies of judicial votes in death penalty cases and noting how death penalty decisions of justices are among the few issues highly salient to the public).

70 Elisha Carol Savchak & A.J. Barghothi, *The Influence of Appointment and Retention Constituencies: Testing Strategies of Judicial Decisionmaking*, 7 ST. POL. & POL’Y Q. 394, 396 (2007).

71 Bradley W. Joondeph, *The Many Meanings of “Politics” in Judicial Decision Making*, 77 UMKC L. REV. 347, 365 (2008).

willing to exert great effort to maintain their seats.<sup>72</sup> Needless to say, electoral pressures are especially strong in the fourteen states with contested elections. In these states, justices have a strong incentive to follow public opinion on politically salient issues.<sup>73</sup> More generally, these justices are likely to steer clear of political controversy.<sup>74</sup>

In states that make use of retention elections (where sitting justices almost always win), there are fewer electoral risks. At the same time, these justices may well take public opinion into account—at least with respect to a handful of highly salient issues.<sup>75</sup> After all, public officials in electoral settings, even those with safe seats, often fear electoral defeat.<sup>76</sup> State supreme court justices are no exception. For justices subject to reappointment, public opinion is less salient; what would matter is their relationship with the branch responsible for their reappointment.<sup>77</sup>

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72 See Savchak & Barghothi, *supra* note 70, at 396 (stating that “[b]ecause most state supreme court judges are at the pinnacle of their legal careers in terms of prestige and their substantial ability to shape policy, they are likely motivated to please their retention constituencies”).

73 High-salience issues include abortion, the death penalty, search and seizure, victims’ rights, tort reform, and gay rights. All of these issues have figured in efforts to unseat sitting justices in contested judicial elections. See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 49–50 (2003) (noting various nationwide judicial races where interest groups opposed judges’ reelection campaigns by calling attention to their previous opinions on controversial matters).

74 Docket control limits, however, may make it impossible to deny certiorari or otherwise avoid a politically divisive issue. See *supra* notes 24–31 and accompanying text.

75 See *infra* notes 125–30 and accompanying text (discussing examples—most notably, the death penalty—of Justices losing their seats in retention elections). In 2010, three Iowa Supreme Court Justices lost retention bids, presumably because they voted to overturn the state ban on same-sex marriage. See A.G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES, Nov. 3, 2010, available at <http://www.nytimes.com/2010/11/03/us/politics/03judges.html>. For reasons discussed *infra* note 141 and accompanying text, these Justices took electoral risks by bucking public opinion on same sex marriage.

76 This is one of the foundational assumptions of political scientists who study congressional motivations. See generally MORRIS P. FIORINA, REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES (1974) (evaluating candidates’ behavior in various constituency conditions in light of their motivation to seek reelection); JOHN W. KINGDON, CONGRESSMEN’S VOTING DECISIONS (2d ed. 1981) (studying how members of the House of Representatives make voting decisions). On the issue of why lawmakers—even in safe districts—increasingly focus their attention on reelection concerns, see Neal Devins, *The Academic Expert Before Congress: Observations and Lessons From Bill Van Alstyne’s Testimony*, 54 DUKE L.J. 1525, 1538–39 (2005) (discussing how the growing partisanship of elections results in campaigning lawmakers spending less time legislating and more time dealing with reelection and constituents).

77 See Shepherd, *supra* note 38, at 1607–08 (“The power over judicial retention held by the governor or legislature offers the political branches of government direct opportunities to sanction judges for unpopular rulings. Judges who consistently vote against the inter-



In addition to retention risks, state justices might take public opinion into account if they thought there was a link between public opinion and the possible nullification of their decisions through constitutional amendments or, alternatively, perceived that elected officials would be unwilling to implement a decision of which the public disapproves.<sup>78</sup> For example, justices might be more attentive to public opinion in states with direct democracy initiatives than in states with hard-to-amend constitutions.

In the fourteen states with contested judicial elections, moreover, justices must also take account of the views of campaign contributors and party leaders (at least in the four states that make use of partisan election schemes).<sup>79</sup> On issues where these contributors have an economic stake, for example, state justices would have incentive to act in ways that do not disappoint contributors. This is especially true of issues that are of low political salience. Voters are not likely to know or care about these issues.<sup>80</sup>

Against this backdrop, one would expect significant variations among state justices. On socially divisive issues, politically insulated justices would be more apt to be legal policy entrepreneurs than justices who run substantial risks of either losing reelection or having their decisions overturned by a constitutional amendment or legislation. In other words, justices subject to significant voter and lawmaker checks would likely embrace politically popular positions or, alternatively, steer clear of divisive issues (assuming docket control). Moreover, justices in states with contested elections would likely take into account the views of campaign contributors—especially on low-salience issues.

Part III of this paper will discuss the evidence we have gathered about state practices and, in so doing, provide support for the above

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ests of the other branches of government may hurt their chances for reappointment.”). For further discussion, see *infra* note 124.

78 All political science models assume that the primary motivation of U.S. Supreme Court Justices is the advancement of their preferred legal policy vision. Consequently, political scientists who think that the Court is vulnerable to electoral backlash argue that the Justices will act strategically by taking the risk of political reprisal into account. See Friedman, *supra* note 4, at 370–74 (discussing instances where the Court backed public opinion because of actual or anticipated electoral backlash). See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (arguing that U.S. Supreme Court Justices take numerous factors into account in deciding cases).

79 In addition to these four states (Alabama, Louisiana, Texas, West Virginia), two other states (Michigan, Ohio) make use of electoral systems in which party officials play a prominent role. Interview with David Rottman, Principal Court Research Consultant, Nat'l Ctr. for State Courts (Mar. 30, 2010).

80 For additional discussion, see *infra* note 126 and accompanying text.

claims. Before turning to this evidence, Part II will provide additional details about the capacity of state justices to assess the risks of voter or lawmaker reprisals and, more generally, how the legal policy preferences of state justices are often linked to the degree of democratic accountability in their state's judicial system.

## II. STATE SUPREME COURT JUSTICES AND THEIR AUDIENCES<sup>81</sup>

By highlighting differences among state constitutional systems, Part I suggested that justices subject to democratic controls (especially justices in states with contested elections) are more likely to take voter attitudes into account than are politically insulated justices. This section will extend this point in two ways. First, by making use of social psychology, we will argue that justices who run for election, especially contested elections, are more likely to care about their reputations among the mass public than are politically insulated justices. Second, by looking at state justices' knowledge of in-state political conditions, we will argue that state justices subject to democratic controls are more likely to understand the political ramifications of their decisions. At the same time, because voters are generally unaware of state supreme court decision making, the risks of being voted out of office or having a decision negated by voter attitudes are generally limited to a small number of politically salient cases.

### A. *Social Psychology, the Mass Public, and Judicial Attitudes Towards Public Opinion.*

In understanding judicial motivation, the dominant political science models focus on the U.S. Supreme Court and assume that U.S. Supreme Court Justices are interested in making good law, good policy, or some combination of the two.<sup>82</sup> Some political scientists argue that the Justices need not take public opinion into account, pointing both to life tenure and the numerous roadblocks that stand in the way of elected government reprisals.<sup>83</sup> Others, however, claim that the Justices—lacking the powers of purse and sword—are deeply concerned with their legitimacy and, with it, the willingness of other parts of government to implement their decisions. As a result, the

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<sup>81</sup> The title of this section plays off of LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

<sup>82</sup> See Baum & Devins, *supra* note 3, at 1529–32 (“Whether they seek to make good law, good policy, or some combination of the two, [political science] scholars think that Justices devote themselves to those ends.”).

<sup>83</sup> See generally SEGAL & SPAETH, *supra* note 44.

Justices will take care not to issue decisions that significantly diverge from public opinion.<sup>84</sup>

This divide among political scientists largely washes away when transported to the state supreme court context. Most state justices stand for reelection and many state constitutions are easy to amend. In other words, for reasons noted in Part I, most state justices will have strong incentives to take voter attitudes into account (although there will be significant variance, depending on the type of reelection scheme and the availability of other democratic checks on judicial decision making).

Separate from the risk of political reprisal, to what extent, if at all, do justices care about the esteem of the voting public and other groups, most notably, social and political elites? Social psychology theory emphasizes the basic human desire to be liked and respected, suggesting that justices—in addition to pursuing favored legal policies—will also take into account their relationships with other justices as well as power, prestige, reputation, self-respect, and the satisfaction that people seek in a job.<sup>85</sup> In particular, social psychology calls attention to the fact that people want most to be liked and respected by those to whom they are personally close and to people with whom they identify. For justices on politically insulated courts, like the U.S. Supreme Court and a handful of state courts, social psychology suggests that these justices will be especially interested in winning favor with elites, including bar groups, legal academics, and journalists. Empirical evidence supports this claim (at least with respect to politically insulated U.S. Supreme Court Justices): U.S. Supreme Court Justices are political and social elites who travel in social and professional networks dominated by elites and, consequently, care more about elite attitudes than the views of the mass public.<sup>86</sup>

What, then, of state justices who must seek reelection, especially justices in the fourteen states that have contested elections? “On average,” as Larry Baum notes, “lawyers who are willing to face the elec-

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84 See EPSTEIN & KNIGHT, *supra* note 78, at 157–59 (“Because they operate within the greater social and political context of the society as a whole, the justices also must attend to those informal rules that reflect dominant societal beliefs about the rule of law in general and the role of the Supreme Court in particular—the norms of legitimacy.”); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606–07 (2003) (asserting that judicial decision making is often consistent with popular opinion).

85 This proposition and much of this paragraph is drawn from Baum & Devins, *supra* note 3, at 1537.

86 See Baum & Devins, *supra* note 3, at 1546–79. No scholar, to the best of our knowledge, has yet to examine the question of whether state justices on politically insulated courts are more interested in the views of elites than the views of the general public.

torate as judicial candidates have a relatively strong interest in the esteem of the mass public.”<sup>87</sup> Through formal and informal campaigning, these justices have significant contact with the electorate, contact that strengthens their “sense of links with the public” and, in turn, strengthens their desire to be validated by the public through a successful reelection bid.<sup>88</sup>

Empirical evidence backs up the social psychology model—at least with respect to the idea that judges who are subject to contested elections look and act “more like politicians and less like [politically disinterested] professionals.”<sup>89</sup> These justices “are more likely to have gone to a lower-rank law school. They are . . . more politically involved, more locally connected, more temporary, and less well educated than appointed judges.”<sup>90</sup>

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<sup>87</sup> BAUM, *supra* note 84, at 62.

<sup>88</sup> *Id.*

<sup>89</sup> Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290, 327 (2008).

<sup>90</sup> *Id.* (evaluating state supreme court judges in 1998, 1999, and 2000 and noting that 70% of state supreme court judges in partisan election states attended an in-state law school with an average US News ranking of 57.9; in contrast, only 33% of appointed state supreme court judges attended in-state law schools, and the schools that they attended had an average ranking of 32.3). This observation is bolstered by the cross-over among the branches at the state level—that is, judges who were former politicians or prosecutors. See Chris W. Bonneau, *The Composition of State Supreme Courts 2000*, 85 JUDICATURE 26, 28 tbl.1 (2001) (illustrating the background characteristics of state supreme court justices). Partisan and nonpartisan election states boast more judges with prior prosecutorial experience and prior political electoral experience. *Id.* at 30 tbl.2.

Analyzing data about all state supreme court justices on the bench in 2000, in the six states with initial selection partisan judicial elections, *all* six states had high courts with at least one-third of its members having prior prosecutorial experience, and four of six states had benches with at least 50% of its members with prior prosecutorial experience. *Id.* Nonpartisan election states boasted fourteen of fifteen states with at least one supreme court judge with prior electoral experience, nine states with three or more judges with such experience, and four states with at least half of its court members with prior electoral experience. *Id.* Prosecutorial experience gives a judge or judicial candidate great name recognition in his race for office. As expected, merit plan states and gubernatorial/legislative selection states see fewer judges with prosecutorial experience. The fifteen merit plan states included thirteen states with at least one member with prior experience, but only four states with at least three members with prior electoral experience. *Id.* The drop off was even greater in gubernatorial/legislative appointment states, where eleven of fourteen states had at least one member, but only one state (Massachusetts) had three or more (and it was three) justices with prior electoral experience. *Id.* (The data was calculated by using Table 2 in the Bonneau piece and cross-referencing that with the number of justices on each state supreme court. For example, if there are nine justices on the state high court, and the percentage of justices on that court who have prior prosecutorial experience is 33% in the Bonneau table, then that means three justices have prosecutorial experience.)

Comparatively, individuals who run in judicial elections have different personality types than those individuals who are appointed to the bench. Like other politicians, justices in the fourteen states with contested elections are likely to have a strong “interest in popularity as an end in itself.”<sup>91</sup> In other states, justices are less likely to value the esteem of the voting public. This is especially true of justices who are not subject to reelection or reappointment. In other words, as suggested in Part I, there will be significant variation among state supreme court justices in their attitudes towards the voting public and, more generally, public opinion.

*B. Judicial Capacity, Voter Knowledge, and the Incentives to Take Account of Public Opinion.*

Unlike the U.S. Supreme Court, where assessments of backlash risks are often a “shot in the dark,”<sup>92</sup> state justices (in states with contested elections) are well versed in state politics because of their direct connections to political parties, voters, campaign contributors, and interest groups.<sup>93</sup> Yet, even in states without contested elections, state justices typically know a great deal about state politics. Most state supreme courts, as discussed in Part I, are subject to significant democratic checks (and sometimes cannot steer clear of political

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Courts with justices with prior electoral experience are even more telling as to the type of person who runs in a judicial election. In legislative and gubernatorial election states, six of fourteen courts had at least one member with prior electoral experience, and four of those six had *only one* member with electoral experience. *Id.* Interestingly, South Carolina boasted a court with 100% of justices having prior electoral experience. *Id.* In South Carolina, state supreme court justices are selected by the legislature. Perhaps the legislature was selecting from its own members. Merit plan states had only three state high courts with justices with prior electoral experience: Kansas (one), Missouri (two), and Utah (one). *Id.*; see THE COUNCIL OF STATE GOV'TS, *supra* note 14, at 294 tbl.5.1 (listing the number of justices on each high court). In contrast, twelve of fifteen nonpartisan judicial election states had at least one member with electoral experience, and five, or one-third, of states had three or more such members. Bonneau, *supra*, at 28 tbl.1. In Mississippi and Nevada, more than half of the courts' members had prior electoral experience. *Id.* Similarly, five of six partisan election states had at least one member with prior electoral experience. *Id.* Alabama's Supreme Court had four of its nine members with prior electoral experience, which perhaps better explains their contentious and antagonistic elections—the judges are used to that type of election from their political days. *Id.*

<sup>91</sup> See BAUM, *supra* note 81, at 62.

<sup>92</sup> Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 176 (2007).

<sup>93</sup> See *supra* notes 87–90 and accompanying text; *infra* notes 95–99 and accompanying text. Correspondingly, many of these justices formerly served as elected officials and have longstanding ties to state voters and the state's political establishment. See *supra* note 90; *infra* notes 95–99.

controversy because of limits on their docket control). In direct democracy states, for example, state justices may render advisory opinions about the legality of initiatives, decide legal challenges to initiatives, and sometimes have their handiwork overturned by initiatives.<sup>94</sup>

More generally, “state judges are systematically exposed to and experienced in the legal institutions of their states,” they “spend their professional lives dealing with state legislation and administrative regulation,” and “[t]hey are much more likely than are their federal counterparts to know or be able to learn readily what is out there, how it came to be, and how well or badly it works.”<sup>95</sup> State supreme court justices echo this sentiment, noting that “state courts are closer to politics than their federal colleagues, whether . . . elected or appointed”<sup>96</sup> and are “generally closer to the public, to the legal institutions and environments within the state, and to the public policy process.”<sup>97</sup> A state supreme court justice is almost certainly a long-time resident of her state, presumably reads state newspapers, likely sits and lives in the state capitol, has professional and social interactions with state officials, hears about state officials, hears about goings-on from numerous sources, and is generally well-informed with respect to the in-state political climate.<sup>98</sup> As of 2000, 65.7% of state supreme court justices were born in the state in which they serve, and 60.5% received their law degrees from a school in that state.<sup>99</sup>

Needless to say, there is tremendous variation among state justices’ knowledge of and interest in state politics and voter opinion. More than that, the incentive of state justices to take account of voter attitudes is tied to voter awareness of state court decision making. On a handful of high-salience issues, as we will discuss in Part III, justices subject to election—even retention elections—have incentive to take public opinion into account. As a prime example, justices have lost retention bids because of perceived resistance to the death penalty.<sup>100</sup>

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94 See MILLER, *supra* note 18, at 101–22.

95 Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norm and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 976 (1985).

96 Linde, *supra* note 28, at 1286.

97 Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1168 (1999) (quoting Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 56 (1988)).

98 See Hans A. Linde, *Observations of a State Court Judge*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 117 (Robert A. Katzmann ed., 1988).

99 Bonneau, *supra* note 90, at 28.

100 See *infra* notes 128–30 and accompanying text.

Outside of criminal justice, abortion, same-sex marriage, and a few other issues, there is little reason to think that the public is aware of state supreme court decision making. There is extremely limited newspaper coverage of state court decision making and, as we will discuss in Part III, there are next to no opinion polls about either state court decisions or the issues before state supreme courts.<sup>101</sup> Indeed, the public is generally unaware of judicial decision making.<sup>102</sup> This is especially true of business issues, as public awareness is largely limited to divisive social issues.<sup>103</sup>

### C. Summary

Most state supreme court justices have the incentive and capacity to take into account potential voter backlash (whether it be electoral defeat, direct democracy override, or voter approval of a constitutional amendment proposal). There are, however, a limited number of high-salience issues likely to trigger such a backlash. Nevertheless, justices subject to some form of reelection are likely to be risk averse and, consequently, will steer clear of issues that arguably run reelection risks. This is especially true for justices in states that make use of contested elections. These elections are more contested than ever before, including significant expenditures on negative campaign ads.

In addition to electoral risks, some state justices are likely to care about public opinion because they have strong personal interests in the esteem of the mass public. This is especially true of justices who participate in contested races. Many of these justices previously served as elected officials and are strongly interested in strengthening their links with the public. On the other hand, justices appointed through a judicial commission or some other merit plan are more likely to identify with lawyer groups, judges, and other elites. Likewise, justices who are not subject to reappointment (because they serve until they are seventy or have life tenure) are more likely to identify with elites than with the mass public.

Variations in state systems suggest that politically insulated justices will be less interested in public opinion than elite opinion and more willing to play a path-breaking role on socially divisive issues. For example, justices in states with hard-to-amend constitutions are more

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<sup>101</sup> See *infra* note 104.

<sup>102</sup> For example, the great majority of U.S. Supreme Court decisions receive little attention in the mass media and are unknown to the mass public. For a summary of this data, see Friedman, *supra* note 84, at 2620–23. See also Baum & Devins, *supra* note 3, at 1548–51.

<sup>103</sup> See Baum & Devins, *supra* note 3, at 1549–50.

likely to play a leadership role on social issues than justices subject to direct-democracy initiatives. At the other extreme, justices subject to contested elections will be both sensitive to public opinion and risk averse, especially with respect to high-salience issues. These justices, moreover, are under increasing pressure to raise campaign contributions and, consequently, are likely to take into account the views of business constituencies—especially on low-salience economic issues. Justices subject to retention election (where justices win 99% of the time) will pay limited attention to public opinion. On the death penalty, abortion, and other issues where there is some risk of voter retaliation, justices subject to retention election are likely to be attentive to public opinion. On most issues, however, these justices are not likely to pay much attention to public opinion, especially if they were appointed under a merit plan (so that they will personally identify with lawyer groups and other judges). Finally, justices subject to gubernatorial or legislative reappointment are likely to pay attention to the policy preferences of the reappointing body—something that will likely but not necessarily track public opinion.

In the next Part, we will test these claims by looking at existing empirical evidence (including evidence we collected for this paper) about the sensitivity of state supreme court justices to public opinion. We will consider the import of differences in state systems, the salience of the issue, and the role of campaign contributors and other economic interests. As we will now explain, the evidence matches our claims (but is far too limited to be seen as definitive in any way).

### III. ANALYZING THE EVIDENCE

In Parts I and II, we suggested the following: (1) Public opinion will matter to some but not all justices. In states with contested elections, justices will follow the public's lead on high-salience issues. In states with retention elections, public opinion will be of limited relevance. In states where justices are subject to reappointment, the opinion of the reappointing body—not public opinion—will matter. Likewise, public opinion will play a role in states where justices are not subject to reappointment. (2) In states with contested elections, justices need to raise significant funds and are otherwise vulnerable to privately funded negative advertising. Consequently, the views of campaign contributors and other economic interests are likely to influence judicial behavior in these states. This is especially true on low-salience issues. (3) States subject to significant democratic checks are not likely to make path-breaking decisions on divisive social is-



sues; justices in politically insulated states are more likely to issue pathbreaking decisions.

We will now examine each of these propositions in this Part. In part, we will make use of existing studies. In part, we will supplement these studies by seeking to match public opinion poll data with state supreme court decision making on a few high-salience issues. Before turning to our findings, a few words about the state of the literature and the limitations of our study are in order. To start, little data exists regarding state public opinion of state supreme courts, issues, or decisions, or the effects of public opinion on state supreme courts.<sup>104</sup> The research that has been done largely focuses on criminal law, especially capital punishment.<sup>105</sup> Research has also been done on whether state supreme courts favor business interests, especially the linkage between campaign contributions and state supreme court decision making.<sup>106</sup> Finally, there is some research on whether path-

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<sup>104</sup> Public opinion research has largely focused on the U.S. Supreme Court. Other papers in this symposium highlight some of this research as do Friedman, *supra* note 4, and PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008). This is not to say that no efforts have been made to gather data about state courts in general or state supreme courts in particular. The largest state supreme court data collection undertaking—the State Supreme Court Data Project—headed by Paul Brace and Melinda Gann Hall, gathered the state supreme court decisions of all fifty states during court sessions from 1995 through 1998, as well as the biographical data of all justices who were on the bench during that period. See State Supreme Court Data Project, *Project Overview*, RICE U., <http://www.ruf.rice.edu/~pbrace/statecourt/> (last visited Nov. 14, 2010). This database has allowed for a great deal of research on state supreme courts; however, at this point the data set is twelve years old and thus dated. Other studies have gathered data on specific state supreme courts or specific issues and are thus more targeted and limited. See, e.g., Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (focusing on the Ohio Supreme Court and the effect of justices accepting campaign contributions from parties before the court or groups filing supporting briefs).

Data collection on fifty state supreme courts is clearly a massive undertaking, but likely a necessary one to gain further insight on state supreme court decision making, particularly the influence of public opinion on decision making (not to mention the need for public opinion surveys and data collection related to state supreme court issues and rulings). Given that most law and most constitutional decisions are made at the state level, the data void is particularly unfortunate. The limitations on this preliminary analysis are numerous, but cannot be helped given the unavailability of data.

<sup>105</sup> See *infra* notes 125–28 and accompanying text (discussing some of this research). In explaining their focus on death cases, researchers have noted the availability of data on public opinion about the death penalty and, consequently, that it is the “most reasonable place to look for linkage.” Paul Brace & Brent Boyea, *State Supreme Court Decision-Making: A Re-Evaluation of the Electoral Connection* 6 (2004) (presented at the 2004 annual meeting of the American Political Science Association) (on file with authors).

<sup>106</sup> See *infra* notes 144–60 and accompanying text.

breaking state supreme courts are politically insulated<sup>107</sup> and on the propensity of justices subject to gubernatorial or legislative reappointment to back up the policy views of the reappointing body.<sup>108</sup>

One aim of this paper is to start to fill a gap in the currently available research, looking at the potential linkage between state supreme court decision making and public opinion on high-salience issues outside criminal justice. We focused on a few high-salience issues that were likely to have both public opinion polls and state supreme court cases on point.

#### A. Methodology

First we searched for available public opinion polls for states, dividing them into groups by retention election method. We searched for public opinion on abortion, education (particularly school funding), gay marriage/civil unions, eminent domain, medical marijuana, gun control, and immigration.<sup>109</sup> Then, using keyword searches in Westlaw and Lexis Nexis state supreme court databases and state news databases, we searched for state supreme court cases on these topics. Cases were matched to public opinion only if the issue of the case and the topic of the public opinion were sufficiently correlated, meaning of or relating to the same topic or sufficiently close that a reasonable inference could logically relate the case to the public opinion. This was done for each grouping of states such that searches were performed on virtually all states within each group. This admittedly unscientific approach, which represents just the first step in gathering data given limited resources and time, was performed with sufficient scope to cover nearly every state such that basic conclusions can be carefully drawn from this cursory analysis.

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<sup>107</sup> See Devins, *supra* note 1, at 1674–84 (discussing state court considerations in deciding same-sex marriage).

<sup>108</sup> See generally Shepherd, *supra* note 38 (arguing that judges seeking reappointment “vote . . . strategically” as much or more than elected judges).

<sup>109</sup> Again, these topics were picked because of their often contentious nature and knowledge of the existence of at least some case law and/or public opinion on each topic. For example, equalizing public school funding has been a big topic in states since the U.S. Supreme Court’s decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 24 (1972), in which the Court held that the right to an equal education is not a fundamental right under the U.S. Constitution. Similarly, there are constant litigation and public opinion polls on same-sex marriage and civil unions. Eminent domain has been a hot topic since the Court’s ruling in *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (holding that the City of New London’s redevelopment plan, promising to bring economic growth and new jobs to the plighted area, qualified as constitutionally permissible “public use” under the Fifth Amendment).

### B. *Limitations*

Limitations of this analysis are numerous. Regression models are not used. The analysis does not account for potentially relevant factors that could explain the below-stated outcomes, such as the ideology of the state supreme court justices. Importantly, because of the dearth of systematic reporting of state public opinion and state supreme court opinions, the public opinion poll data used does not always directly correlate with the state supreme court opinions.<sup>110</sup> Public opinion polls do not necessarily predate the high court case, either.<sup>111</sup> Finally, the amount of available data is limited by the availability of state public opinion, by the issues that have come before the state high courts, and by the overlap between these two sets.

Despite these limitations, we believe the public opinion polls are a useful tool for analysis based on our above discussion of features that would seem to make state supreme courts more democratically accountable to the public—particularly the greater knowledge base of a state supreme court justice about state opinion by virtue of being a member of the state and being actively involved in multiple areas of state government and life.<sup>112</sup> Thus, we take a cautious first step in comparing public opinion with state supreme court decision making.

### C. *Public Opinion and State Supreme Court Decision Making: Existing Studies*

With close to 90% of state supreme court justices facing some type of retention election,<sup>113</sup> it is to be expected that public opinion will directly influence state court decision making (either the substance of a decision or—in states with docket control—the decision whether to hear a case). In states with contested elections, state justices, like other politicians, “have a tendency to vote in accordance with perceived constituency preferences on visible issues, simply because the

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110 For example, a state poll about support for same-sex marriage may be used to indicate public opinion about same-sex parentage and adoption when a case on the latter comes before the state high court.

111 Public opinion polls predating the relevant state supreme court opinion are obviously optimal, as they indicate a known public sentiment in existence *before* the court’s ruling. This makes it more likely that the court is aware of the public sentiment and can knowingly choose to act or not act in accordance with it.

112 See *supra* notes 89–99 and accompanying text (discussing the characteristics of state supreme court justices).

113 See Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1105 app. 2 (2007).

failure to do so is politically dangerous.”<sup>114</sup> Indeed, elected officials and judges alike fear challenge and defeat even when there is little to no chance of it occurring.<sup>115</sup> “[R]egardless of how safe their positions are, public officials in an electoral setting often fear the voters.”<sup>116</sup>

Evidence on the role of public opinion focuses on the impact of judicial elections. Studies show that particular issues, such as crime and the death penalty, get judges subject to all election types (partisan, nonpartisan, and retention) to consider public opinion. In a famous statement about the effect of judicial elections, former California Supreme Court Justice Otto Kaus stated that “[t]here’s no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.”<sup>117</sup>

An eight-state study of state supreme court death penalty cases analyzing, among other things, age of justices, term length, ideologies, and case facts, similarly determined that competition in states with partisan and non-partisan ballots encourage conservative voting patterns for justices who otherwise might vote to overturn death sentences.<sup>118</sup> A different study focusing on death penalty cases in four state supreme courts found a statistically significant relationship between the process for electing judges and voting of liberal justices with the conservative majority in death penalty cases.<sup>119</sup>

Moreover, a study by Elisha Savchak and A.J. Barghothi found that there was “overwhelming evidence of the constraining effect of retention mechanisms” and concluded, unsurprisingly, that judges are more influenced by those who must retain them than those who

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114 Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 489 (1995).

115 Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 165, 167 (Matthew J. Streb ed., 2007) (noting that from 1980–2000, although only 5.6% of House of Representatives incumbents running for reelection were defeated, House members facing reelection continued to employ numerous strategies to secure votes).

116 See Hall, *supra* note 114, at 488.

117 Paul Reidinger, *The Politics of Judging*, 73 A.B.A.J. 52, 58 (1997).

118 Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206, 1221–23 (1997).

119 See Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 431 (1992) (describing a Louisiana case study that found that liberal justices were more likely to disregard their personal preferences and vote according to constituent preferences when facing reelection). The four state supreme courts studied were the Texas Criminal Court of Appeals, the North Carolina Supreme Court, the Louisiana Supreme Court, and the Kentucky Supreme Court. *Id.* at 434.

place them on the bench.<sup>120</sup> Using a very large data set covering fifteen states with retention elections, examining *all* criminal cases (not just death penalty cases), and controlling for judge ideology, Savchak and Barghothi found that state supreme court judges are influenced by their retention constituencies, but more so near the end of their term when their retention election is near.<sup>121</sup> A study by Joanna Shepherd unsurprisingly found the strongest results with judges facing partisan reelection, with results substantially weaker for judges retained through non-partisan or retention election.<sup>122</sup> Appointed judges, on the other hand, responded far less to the will of the electorate and more to the will of the governor or legislature that appointed them.<sup>123</sup> Finally, as would be expected, studies show that judges in their last term before mandatory retirement, and thus accountable to no one, responded less to political will of any sort than other judges.<sup>124</sup>

Of course, public opinion can only influence those issues of which the public actually is aware and on which it has formed an opinion. Indeed, the reason that political scientists have focused their energy on the death penalty and other criminal justice issues is tied to the salience of these issues with voters.<sup>125</sup> In Georgia (a state with contested elections), a state “Supreme Court justice acknowledged that the elected justices of that court may have overlooked errors, leaving

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<sup>120</sup> Savchak & Barghothi, *supra* note 70, at 396.

<sup>121</sup> *Id.* at 400, 405.

<sup>122</sup> Shepherd, *supra* note 48, at 171.

<sup>123</sup> *Id.* at 192.

<sup>124</sup> *Id.* at 190, 192. Shepherd’s study also indicates that judge voting changes immediately after election of a governor from the opposite party than previously held office, suggesting that judges use the governor’s party affiliation as a proxy for the retention agent/voter’s preferences. *Id.* at 193. For one of the most recent writings on the death penalty, see Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360, 360 (2008) (“On the highly salient issue of the death penalty, mass opinion and the institution of electing judges systematically influence court composition and judge behavior.”). See also Paul Brace & Brent D. Boyea, *Judicial Selection Methods and Capital Punishment in the American States*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS, *supra* note 115, at 188–89 [hereinafter Brace & Boyea, *Judicial Selection Methods*]; Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 791–92 (1995) (“As a result of the increasing prominence of the death penalty in judicial elections as well as other campaigns for public office, judges are well aware of the consequences to their careers of unpopular decisions in capital cases.”).

<sup>125</sup> See Brace & Boyea, *Judicial Selection Methods*, *supra* note 124, at 188–89 (suggesting that the issue of capital punishment is ideally situated to test the effect of public opinion on judicial decision making because it is a highly visible controversy that receives extensive media coverage).

federal courts to remedy them via habeas corpus, because “[federal judges] have lifetime appointments. Let them make the hard decisions.”<sup>126</sup> Even in retention states, a justice’s vote in capital cases can be used to turn “retention elections. . . into partisan contests.”<sup>127</sup> In Colorado, the state’s governor led the charge to have voters remove one of his appointees based on that justice’s votes in capital cases.<sup>128</sup> In California, three justices lost retention elections in 1986 because of their votes in opposition to the death penalty,<sup>129</sup> and in Tennessee, Justice Penny White lost her retention election in 1996 due to (perhaps false) depictions of her vote in a capital case.<sup>130</sup>

*D. Public Opinion and State Supreme Court Decision Making: A Step Beyond Criminal Justice Issues*

Outside of criminal justice issues, there is good reason to think both that state justices take account of public opinion and that the more electorally accountable justices are far more interested in public opinion than are politically insulated justices. In researching this question, we were able to match public opinion to state supreme court decisions in a total of twenty-seven instances ranging across topics such as abortion, same-sex marriage, gun control, education, eminent domain, immigration, and Indian gaming. States are grouped by their retention election method,<sup>131</sup> with each state’s judicial selec-

<sup>126</sup> Bright & Keenan, *supra* note 124, at 799 (alteration in original) (quoting Katie Wood, *Not Just a Rubber Stamp Anymore*, FULTON CNTY. DAILY REP. (Ga.), Jan. 25, 1993, at 1, 5).

<sup>127</sup> James C. Foster, *The Interplay of Legitimacy, Elections, and Crocodiles in the Bathtub: Making Sense of Politicization of Oregon’s Appellate Courts*, 39 WILLAMETTE L. REV. 1313, 1333–34 (2003) (quoting Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 326 (2001)).

<sup>128</sup> Bright & Keenan, *supra* note 124, at 786.

<sup>129</sup> See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 737 (1995) (“The 1986 electoral defeat of three justices of the California Supreme Court, largely in response to their positions on the constitutionality of the death penalty, is a clear example of how elected judges are increasingly accountable to electoral majorities.”).

<sup>130</sup> See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 314–15 (1997) (discussing defeat of Tennessee Supreme Court Justice Penny White due to the Republican Party’s portrayal of her vote in a capital case as indicia of an anti-death penalty position).

<sup>131</sup> We use retention election method instead of the states’ initial selection method because we are interested in determining whether judges who face contested elections on a continuing basis are more democratically accountable. For example, although Pennsylvania has partisan elections for the initial selection of state supreme court judges, retention elections are done as though a merit plan state. THE COUNCIL OF STATE GOV’TS, *supra* note 14, at 303 (listing both initial selection and retention selection methods for all fifty states). While there is still likely to be some level of public pressure on these judges,

tion method represented by at least one data point. A table of the data sets used for this analysis is located in the Appendix. There is one data point for partisan election states, five data points for non-partisan election states, ten points for merit plan states that make use of retention elections, and eleven points for gubernatorial/legislative appointment states. It is interesting to note the lack of data points for partisan states. The one data point available is consistent with our expectations, and so too, the lack of data is also consistent with our expectation that partisan states would be more cautious and make fewer rulings on high-salience issues. And, because there is no public opinion on low-salience issues, there is no data in that area to compare either. Partisan states appear to be flying under the radar of public opinion, either matching state public opinion or artfully avoiding decisions that will stir the masses. Perhaps for the same reason, there is a limited amount of available data for nonpartisan judicial election states.<sup>132</sup>

Nonpartisan states followed public opinion in four (arguably five) out of five available cases, on topics of same-sex marriage, medical marijuana, and eminent domain.<sup>133</sup> Washington's 2010 decision on medical marijuana is the only one that arguably does not follow public opinion. By ruling that a 1998 voter initiative only provided an af-

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judges facing this type of retention election lose their seats less than 1% of the time. See Joanna Shepherd, *The Business of Judicial Elections* (Oct. 2009) (unpublished manuscript), available at [http://www.law.uchicago.edu/files/files/shepherd\\_business\\_ofelections\\_octdraft.pdf](http://www.law.uchicago.edu/files/files/shepherd_business_ofelections_octdraft.pdf) (noting that judges' voting in cases involving business interests in states where they are initially selected in partisan elections but retained through retention elections more closely resembles that of judges who face retention elections).

<sup>132</sup> This may be a function of the manner in which data was gathered for this paper. Research assistants were asked to search for public opinion and supreme court cases on the following topics: gay marriage, abortion, education, eminent domain, medical marijuana, gun control, immigration, crime (generally, and to the exclusion of the death penalty), and miscellaneous. It also may be that there was available public opinion data or an available state supreme court case, but either they did not align closely enough for comparison, or both items did not exist on the same topic.

<sup>133</sup> Ohio followed public opinion in an eminent domain decision—not surprisingly given the national rejection of the U.S. Supreme Court's decision in *Kelo v. City of New London* in 2005. 545 U.S. 469, 490 (2005) (holding that the use of eminent domain for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment's Takings Clause). Both local and national outrage over that decision likely put Ohio's Supreme Court on notice of the overwhelming rejection of the idea that government could take private property for economic development. See Joyce Howard Price, *Drawing the Line on Eminent Domain: States Rush to Counter Court Ruling*, WASH. TIMES, Oct. 9, 2005, at A1 (noting national rejection of *Kelo* and legislation proposed or introduced in 30 states, including Ohio, to curb or restrict eminent domain powers); Correy E. Stephenson, *States Battle High Court Takings Case*, LAW. WKLY. USA, Aug. 15, 2005 (describing public outcry and state legislative activity in response to the *Kelo* decision).

firmative defense to users of medical marijuana in state court proceedings, the Washington Supreme Court rejected arguments that police did not have probable cause to search the home of an individual with a document purporting to authorize his use of marijuana.<sup>134</sup>

In narrowing the scope of the medical marijuana initiative, the Court arguably did not back public opinion. At the same time, the Court followed the generally accepted understanding of what the initiative allowed (so, perhaps, the Court was following voter intent)<sup>135</sup> and the marijuana user in question had more than two pounds of marijuana as well as scales and other drug paraphernalia (suggesting that he was not the type of individual whom voters sought to protect through the initiative).<sup>136</sup>

In retention election states, decisions followed public opinion in six of ten cases. Two cases where public opinion was not followed took place in Alaska and Iowa. Alaska's Supreme Court struck down a law requiring parental consent for minors before obtaining an abortion—a law heavily supported by the state population (80% in favor).<sup>137</sup> The court held that the law unconstitutionally restricted a minor's right to privacy, a right given to minors under the state constitution.<sup>138</sup> Though against public opinion, the decision was consistent with the court's precedent over the past ten years,<sup>139</sup> which has upheld a minor's privacy right while explicitly stating that a valid law could be implemented "which ensures that parents are notified so

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134 State v. Fry, 228 P.3d 1, 5 (Wash. 2010) (noting that authorization to use marijuana does not make the act of possessing and using marijuana noncriminal or negate any elements of the charged offense).

135 See WASH. CITIZENS FOR MED. RIGHTS, THE WASHINGTON STATE MEDICAL MARIJUANA ACT: A GUIDE FOR PATIENTS AND PHYSICIANS (1999), <http://www.eventure.com/i692/Pages/brochure.html> (explaining the Act's goal of providing exemption from criminal penalties for the use of medical marijuana).

136 Fry, 228 P.3d at 3. Three months after its Fry ruling, the Washington Supreme Court agreed to hear an appeal by the ACLU involving a medical marijuana claimant who lost her job because she lawfully consumed marijuana at her house for medicinal purposes. See Press Release, ACLU of Wash., State Supreme Court to Review Firing of Medical Marijuana Patient (Apr. 2, 2010), <http://www.aclu-wa.org/news/state-supreme-court-review-firing-medical-marijuana-patient>. This case, unlike Fry, presents the Court with a sympathetic plaintiff and, as such, will be a much better measure of whether the Washington Supreme Court is willing to risk voter backlash by narrowly interpreting the medical marijuana initiative.

137 Lieutenant Governor Loren Leman Called on Alaska Supreme Court to End an Eight-Year Delay in Implementing Law to Protect Parental Rights, STATES NEWS SERV., Apr. 13, 2005.

138 State v. Planned Parenthood of Alaska (Planned Parenthood II), 171 P.3d 577, 582 (Alaska 2007).

139 See State v. Planned Parenthood of Alaska (Planned Parenthood I), 35 P.3d 30, 41 (Alaska 2001) (recognizing that fundamental reproductive rights include the right to an abortion).



that they can be engaged in their daughters' important decisions in these matters."<sup>140</sup>

Iowa's Supreme Court struck down as unconstitutional a law that limited marriage to one man and one woman, despite lack of support for gay marriage at the time of the decision (30.4% in favor of gay marriage).<sup>141</sup> Iowa, though selecting its judges through nonpartisan elections initially, retains judges through retention elections, similar to Pennsylvania.<sup>142</sup> Pennsylvania was responsible for the two other cases decided by merit plan states that did not align with public opinion, one of which held that workers compensation was available to illegal aliens despite strong support (70–80%) against granting more rights for illegal aliens.<sup>143</sup>

Given the available data, we can see that all in all, regardless of the method of retention for state supreme court justices, on high-profile issues such as same-sex marriage, gun control, and abortion, among others, the courts generally align with public opinion. That said, it is relatively clear that the retention method is relevant to the frequency that state courts decide cases contrary to popular public opinion. States where judges are appointed by the governor or legislature and serve long terms (to age seventy or life) had a high rate of ruling against public opinion. Nonpartisan elected justices voted in line with public opinion in at least 80% of cases used in this preliminary analysis. The limited amount of data for state courts using partisan

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<sup>140</sup> *Planned Parenthood II*, 171 P.3d at 579.

<sup>141</sup> For further discussion of the Iowa Supreme Court's decision and the role of the public, see Devins, *supra* note 1, at 1680 (2010) (contending that the political climate in Iowa was much more tolerant of same-sex marriage than opinion poll data suggests). In 2010, three of these Justices lost retention bid, presumably because of their votes on same-sex marriage. See *supra* note 75. In making sense of this electoral defeat, public opinion on same-sex marriage is highly salient. Other factors at play included the role of out-of-state interests in funding this electoral campaign (something that could have been anticipated by Iowa Justices) and the nation-wide anti-incumbent malaise in 2010 (something that could not have been anticipated). For additional discussion, see Devins, *supra* note 17, at 88–102 (discussing role of national interests in resisting state court efforts to legalize same-sex marriage). See also Sandy Adkins, *Anti-Incumbent Mood Extends to Court-Related Elections*, Nat'l Ctr. for State Courts, News Release, Nov. 3, 2010, available at <http://www.ncsc.org/newsroom/news-releases/2010/election-roundup.aspx> (noting anti-incumbency sentiment in 2010 elections).

<sup>142</sup> See THE COUNCIL OF STATE GOV'TS, *supra* note 14, at 303 tbl.5.6.

<sup>143</sup> See *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 810 A.2d 99, 109 (Pa. 2002) (upholding an award for an unauthorized alien under the Workers' Compensation Act). Public opinion found 72% of Pennsylvanians supported stricter immigration laws, and 82% opposed granting drivers' licenses to illegal aliens. See *Pennsylvania*, FED'N AM. IMMIGR. REFORM, [http://www.fairus.org/site/PageServer?pagename=research\\_polldataPA](http://www.fairus.org/site/PageServer?pagename=research_polldataPA) (last visited Nov. 14, 2010) (reporting the results of a poll asking likely voters in Pennsylvania their views on immigration issues).

and nonpartisan election schemes is consistent with the expectancy that those courts would prove more democratically accountable to the public than courts with merit plan and appointed justices. Furthermore, the limited data for nonpartisan, and particularly partisan selection states, may suggest that those courts are less inclined to hear high-salience cases in the first place, and second, less inclined to rule against the public if the retention method is another partisan or nonpartisan election.

Finally, appointed courts appear even less likely to follow public opinion than would be expected given that judges do not face voters for retention of their seats. Merit selection courts aligned with public opinion 60% of the time, while appointed state supreme courts paralleled public opinion in only 64% of cases. These two types of courts were expected to be less accountable to the public than partisan and nonpartisan selection courts, and there is reason to believe this is true given the higher number of high-salience cases heard in each of these types of courts. Resolving a higher number of visible cases increases the possibility of greater media attention and scrutiny, including criticism for the court and its justices. We would expect justices subject to partisan and nonpartisan elections to avoid this attention, or seek it only when ruling in support of public opinion. The overall data here indicates possible support for this expectancy. However, further research is necessary.

*E. Money, Judicial Elections, and State Supreme Court Decision Making: Low-Salience Issues and Business Interests*

Given the dearth of public opinion data on state supreme court decisions for high-salience issues, it is no surprise that there is virtually no public opinion on low-salience issues that come before state supreme courts. However, the void in public opinion does not mean state supreme court justices are not influenced by outside forces when it comes to low-salience issues. Quite the contrary, empirical and anecdotal evidence back up the commonsense claim that state justices who run in contested elections are sensitive to the business interests that fund their campaigns and run television ads. To start, judges themselves recognize the role of money and its influence on both elections and court decisions: in *Caperton v. A.T. Massey Coal Co.*, a 2009 U.S. Supreme Court decision about the influence of campaign contributions on state supreme court decision making,<sup>144</sup> a coa-

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<sup>144</sup> The precise issue before the Court was whether a state justice needed to recuse himself from a case in which one of the parties had made significant campaign contributions to

lition of twenty-seven former chief justices filed an amicus brief stating that “[s]ubstantial financial support of a judicial candidate—whether contributions to the judge’s campaign committee or independent expenditures—can influence a judge’s future decisions, both consciously and unconsciously.”<sup>145</sup> One Ohio Supreme Court justice was quoted as saying that he “never felt so much like a hooker down by the bus station in any race [he has] ever been in as [he] did in a judicial race.”<sup>146</sup> On the more empirical end, a 2002 survey of 2,428 state court judges done by Justice at Stake reported that almost half of the judges surveyed thought campaign contributions influenced decisions.<sup>147</sup>

Reports on the Texas, Ohio, Alabama, and Georgia Supreme Courts also call attention to the influence of donations on decisions. A study of the Texas Supreme Court revealed that petitioners to the court who had donated \$250,000 or more were *ten times* more likely than a non-contributor to have a petition for discretionary review granted.<sup>148</sup> A second study of the Texas Court (focusing on 1994–1997 rulings) also concluded that “decisions follow dollars.”<sup>149</sup> The study found that when contributions from plaintiffs and their lawyers

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the justice. By a five to four vote, the Supreme Court concluded that recusal was required, noting that “there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.” *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263–64 (2009).

<sup>145</sup> Brief of 27 Former Chief Justices and Justices as Amici Curiae Supporting Petitioners at 5, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22). The brief also claimed that justices, as humans, were “fundamentally incapable of complete impartiality and indifference” and that there are some cases where a judge cannot recognize her own bias. *Id.* at 6. *But cf.* Brief of Ten Current and Former Chief Justices and Justices as Amici Curiae Supporting Respondents, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22) (showing there is a presumption, both in the public and in rulings by the United States Supreme Court, of judicial integrity).

<sup>146</sup> See Liptak & Roberts, *supra* note 104 (quoting Justice Paul E. Pfeifer of the Ohio Supreme Court). Prior to being elected to the bench in 1992, Pfeifer served “one term in the [Ohio] House of Representatives and four terms in the [Ohio] Senate.” *Paul E. Pfeifer, Justice*, OHIO JUD. CENTER, <http://www.ohiojudicialcenter.gov/pfeifer.asp> (last visited Nov. 14, 2010).

<sup>147</sup> Liptak & Roberts, *supra* note 104.

<sup>148</sup> Brief of The Brennan Center for Justice at NYU School of Law et al. as Amici Curiae Supporting Petitioners, *Caperton v. A.T. Massey Coal Co.* at 14, 129 S. Ct. 2252 (2009) (No. 08-22) (citing *Pay to Play: How Big Money Buys Access to the Texas Supreme Court*, TEXANS FOR PUBLIC JUSTICE 10 (2001), <http://info.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf>).

<sup>149</sup> Madhavi McCall, *The Politics of Judicial Elections: The Influence of Campaign Contributions on the Voting Patterns of Texas Supreme Court Justices, 1994–1997*, 31 POL. & POL’Y 314, 315 (2003).

exceeded contributions from defendant's lawyers, there was an increased probability of a vote for plaintiff: "[w]hen the plaintiff contributes more than the defendant, the probability of a vote for the plaintiff doubles," but when all four parties contribute (parties and lawyers), justices vote consistently with their preferences.<sup>150</sup> A similar study of the Georgia Supreme Court in 2003 found that in those cases where the conservative side contributed more than the liberal attorneys, the conservative side won; while when liberal attorneys contributed more, their side won 65% of the time.<sup>151</sup>

A twelve-year study of Ohio Supreme Court Justices found justices voting in favor of parties who had made campaign contributions 70% of the time.<sup>152</sup> One justice voted in favor of his contributors 91% of the time<sup>153</sup> and, in 2006, the *New York Times* reported that all justices in the majority of a 4-3 class action lawsuit had received campaign contributions from the defendant companies and that all justices in the dissent had accepted campaign contributions from lawyers for the plaintiff.<sup>154</sup> A 2001 study of the Alabama Supreme Court looked at 106 arbitration decisions between 1995 and 1999 and found a "remarkably close correlation between a justice's votes on arbitration cases and his or her source of campaign funds."<sup>155</sup> Justices funded by plaintiff's lawyers opposed arbitration, while those funded by business supported arbitration—the correlation "pervades the entire area of the law."<sup>156</sup>

Finally, two studies done by Joanna Shepherd also found a business influence on judicial elections. She found that in 2004, a donation of \$100,000 to a judge in a partisan election system increased the

<sup>150</sup> *Id.* at 326. Breaking this down into numbers: plaintiffs are six times more likely to get a justice's vote when the contribution exceeds the defendants' (62% versus 10% chance). *Id.* at 328. Plaintiffs are seven times more likely to win if the plaintiff's lawyer contributed more to the justice than defendant's lawyers (56.6% versus 7.5%). *Id.* "Indeed, plaintiffs are rarely victorious absent contributions. . . ." *Id.* The study also finds that a justice is more likely to vote for a plaintiff if an election is imminent. *Id.* at 329.

<sup>151</sup> Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 281, 287 (2007).

<sup>152</sup> Brief of The Brennan Center for Justice at NYU School of Law et al. as Amici Curiae, *supra* note 148, at 15 (citing Liptak & Roberts, *supra* note 104). The Brennan Center also reported that "[i]n a written survey of 2,428 state lower, appellate, and Supreme Court judges, almost half (46 percent) of the judges surveyed indicated a belief that campaign contributions to judges influence decisions." *Id.* at 18.

<sup>153</sup> Liptak & Roberts, *supra* note 104.

<sup>154</sup> *Id.*

<sup>155</sup> Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 646 (1999).

<sup>156</sup> *Id.* at 662.

business' chances of winning by 69% in a products liability case.<sup>157</sup> Her more recent study of the influence of business interests on state supreme courts found that a judge facing partisan reelection was 23% more likely to vote in favor of the business litigant in a tort case and 14% more likely in a contract case.<sup>158</sup> Shepherd also reports that the U.S. Chamber of Commerce spent over \$100 million on judicial election campaigns between 2000 and 2003, and that between 2000 and 2004, the Chamber of Commerce was successful in getting its candidate—all pro-business judges—elected in thirty-six of forty elections.<sup>159</sup>

In highlighting the success of business interests in advancing their agendas, Shepherd and others make two related points that reinforce our claims about public opinion and state court decision making. First, justices may be especially influenced by business interests in rulings on low-salience issues such as contracts and arbitration. Second, business interests—when taking out their own advertisements—often emphasize crime and other high-salience issues.<sup>160</sup> In this way, business interests recognize that the nexus between public opinion and judicial decision making is largely limited to a handful of high-salience issues.

*F. The Characteristics of Path-Breaking State Supreme Courts: Lessons from Same-Sex Marriage*<sup>161</sup>

States that make use of contested elections, as noted above, provided us with very few data points about the linkage of public opinion on high-salience issues and state court decision making. This suggests that these state supreme courts steer away from divisive social issues. Another measure of this phenomenon is to look at the characteristics of state supreme courts that have played a path-breaking role on a high-salience issue. As we will now explain, an examination of state supreme court decision making on same-sex marriage reveals that politically insulated courts are apt to play a path-breaking role.

From 1993 to 2009, seven state supreme courts interpreted their constitutions to provide expansive protections to same-sex couples. Four of these states mandated same-sex marriage (Massachusetts, Cal-

<sup>157</sup> Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 670 (2008).

<sup>158</sup> Shepherd, *supra* note 131, at 22.

<sup>159</sup> *Id.* at 13.

<sup>160</sup> *Id.* at 14.

<sup>161</sup> This subpart is drawn from Devins, *supra* note 1, at 1674–84. One of us, Neal Devins, is now researching the characteristics of path-breaking courts on a broader range of issues. This research is in too preliminary a state to be included in this essay.

ifornia, Connecticut, and Iowa); two mandated marriage or civil union protections (Vermont and New Jersey); one said that it would apply strict scrutiny review in assessing the state ban on same-sex marriage (Hawaii).<sup>162</sup> The most salient characteristic shared by all seven courts is their retention schemes. None of the seven make use of contested judicial elections.<sup>163</sup> Five are among the eleven states whose justices need not run for reelection: two (Massachusetts and New Jersey) are among the four states whose justices are not subject to reelection or reappointment;<sup>164</sup> two (Vermont and Connecticut) are from the six states that make use of a legislative or gubernatorial reappointments;<sup>165</sup> one (Hawaii) is the only state that makes use of a judicial commission to reappoint justices. The remaining two (California and Iowa) are states that make use of retention elections—elections where incumbent justices win around 99% of the time.<sup>166</sup>

Of the seven path-breaking states, only California and Massachusetts allow voters to place constitutional amendment proposals on the ballot.<sup>167</sup> For legislature-sponsored amendments, only two states (Iowa and Massachusetts) allow for an amendment to be sent to the voters with only majority (as opposed to supermajority) support from state lawmakers.<sup>168</sup> Iowa and Massachusetts, however, are two of twelve states that require consideration of legislature-proposed constitutional amendments in two successive sessions.<sup>169</sup> Iowa's constitu-

162 For the states mandating same-sex marriage, see *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). For the states mandating civil unions, see *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999). For Hawaii's decision to apply strict scrutiny, see *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

163 With respect to judicial appointments, two states make use of merit plan appointments (Hawaii and Iowa); four use gubernatorial appointments (California, New Jersey, Massachusetts, and Vermont); and one uses legislative appointment (Connecticut). See *supra* Table 1.

164 In Massachusetts, justices serve until they are seventy. In New Jersey, justices are subject to an initial gubernatorial reappointment and then serve until they are seventy. See *supra* note 9.

165 See *supra* note 9.

166 See *id.*

167 John F. Cooper, *The Citizen Initiative Petition to Amend State Constitutions: A Concept Whose Time Has Passed, or a Vigorous Component of Participatory Democracy at the State Level?*, 28 N.M. L. REV. 227, 227 n.2 (1998). For California's rules, see CAL. CONST. art. 18, §§ 3–4. Massachusetts allows voters to submit direct democracy initiatives to the state legislature for approval. To reach the ballot, the initiative must be approved by fifty of the state's two hundred lawmakers in two consecutive sessions. MASS. CONST. art. 48, §§ 4–5.

168 THE COUNCIL OF STATE GOV'TS, *supra* note 14, at 14–15 tbl.1.2.

169 *Id.*

tional amendment rate of 0.36 amendments per year is the fifth lowest of all states; Massachusetts' rate of 0.55 is eighth lowest.<sup>170</sup>

Vermont and Connecticut have low constitutional amendment rates and impose particularly onerous requirements on lawmakers who want to put constitutional amendments on the ballot.<sup>171</sup> Connecticut requires a three-fourths supermajority vote in each house in one session or a majority vote in each of two sessions (with an intervening election between the two sessions).<sup>172</sup> Vermont only allows amendments to be introduced once every four years, requires that amendments be passed in two consecutive legislative sessions, and requires a two-thirds supermajority vote in the state senate for passage in the initial legislative session.<sup>173</sup> New Jersey and Hawaii also place meaningful limits on constitutional amendment proposals. Hawaii requires either a two-thirds supermajority vote in one session or a majority vote in two sessions.<sup>174</sup> New Jersey similarly requires a three-fifths supermajority vote (of all members) in one session or a majority vote in two sessions.<sup>175</sup> All in all, path-breaker states are among the most politically insulated states in the nation.

In addition to override and retention risks, the ability of state supreme court justices to control their dockets impacts whether a state court will play a path-breaker role. States without docket control, as discussed in Part I, are more likely to take backlash risks into account. On same-sex marriage, three path-breaking states (Vermont, New Jersey, Iowa) had no choice but to hear constitutional challenges to state law; the other four had discretion (although each of those states made use of somewhat different procedures).<sup>176</sup> Against this backdrop, it is not surprising that the two states (Vermont, New Jersey) that took middle ground positions—finding for civil unions, not same-sex marriage—were among the three states without docket control.<sup>177</sup>

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<sup>170</sup> See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 248–49 (Sanford Levinson ed., 1995).

<sup>171</sup> See *id.* Vermont has an amendment rate of 0.25 per year (second lowest); Connecticut's amendment rate of 0.96 is well below the 2.9 mean but is around the median of all states.

<sup>172</sup> *THE COUNCIL OF STATE GOV'TS*, *supra* note 14, at 14–15 tbl.1.2.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See *supra* note 162 and accompanying text.

<sup>177</sup> In Iowa, state court justices risked electoral defeat by finding for same-sex marriage, not civil union. For additional discussion, see *supra* notes 75 and 141.

The specific features of state constitutional systems seem to have played a key role in state supreme court decision making on same-sex marriage. Politically insulated states are more willing to play a path-breaking role and, in so doing, more likely to put the views of media and academic elites ahead of the mass public. With that said, as one of us has written elsewhere, elected officials and voters were more supportive of extending marriage protections to same-sex couples in path-breaking states than in most other states.<sup>178</sup> Moreover, while we think state experiences with same-sex marriage are instructive in understanding the nexus between democratic accountability and the propensity of state supreme courts to either back or buck public opinion, we recognize that too much should not be read into a single case study.

#### IV. CONCLUSION

State supreme court justices are subject to democratic checks unimaginable to federal court judges. Some of these checks cut in favor of state court justices taking public opinion into account (either by ruling in ways consistent with voter preferences or steering clear of controversy by refusing to hear certain cases). The most notable of these “pro-voter” checks are judicial elections and direct-democracy initiatives. At the same time, public awareness of state supreme court decision making is scant, and, consequently, there are relatively few issues in which voters will punish justices for their decisions. More than that, justices in the fourteen states with contested elections are under increasing pressure to rule in ways that favor business interests, especially campaign contributors, on low-salience economic issues that matter to business constituencies but not voters.

The ways in which voters and business interests will impact state justices is also tied to the unique structure of each state constitutional system. In part, differences in retention schemes, docket control, and the procedures to amend state law call attention to the potential political vulnerability of justices (either to lose their seat outright or to have their decision overturned by lawmakers or voters). Differences in state systems are also relevant because they speak to the types of individuals who serve on state supreme courts. Justices who run in contested races look and think more like politicians and personally

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<sup>178</sup> See Devins, *supra* note 1, at 1679–83 (discussing legislative action pertaining to marriage protections for same-sex couples in California, Connecticut, Iowa, and New Jersey and public support for judicially mandated same-sex marriage or civil unions in all path-breaking states other than Vermont and Hawaii).



value the public validation that comes with electoral victory; justices who are not subject to contentious reappointment or reelection battles look more like legal professionals and are more likely to value their reputation among elites (bar groups, other judges, academics, and the media).

Evidence on state supreme court decision making backs up these claims, although the evidence is too limited to reach definitive conclusions. Studies on the role of public opinion in state supreme court decision making have largely focused on criminal issues, especially the death penalty. Studies on the role of business interests have been limited to a handful of states and have not been systematic. In this essay, we have supplemented existing studies on public opinion, but only in a limited way. This essay, in other words, is but the first step, and a cautious one at that, given the limited data. Considering both the increasing national importance of state court decision making and the increasing politicization and cost of state judicial elections, the questions we address become all the more urgent. In the words of Justice Kennedy, “We weren’t talking about this [thirty] years ago because we didn’t have money in [judicial] elections. Money in elections presents us with a tremendous challenge, a tremendous problem, and we are remiss if we don’t at once address it and correct it.”<sup>179</sup> Further data and research are necessary to determine how state supreme courts—the courts of last resort for the states, and the functional courts of last resort ultimately for many—are influenced by public opinion and campaign contributor interests.

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<sup>179</sup> Bill Moyers Journal, (PBS television broadcast Feb. 19, 2010), available at <http://www.pbs.org/moyers/journal/02192010/transcript1.html> (replaying a statement made by Justice Kennedy during the original airing of the PBS program *Frontline: Justice for Sale* on Nov. 23, 1999). An interesting statement in light of Kennedy’s recent deciding vote in *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

## APPENDIX

| State  | Retention Method                     | Issue             | Public Opinion   | Case                                  | Matches Public Opinion? |
|--------|--------------------------------------|-------------------|--|---------------------------------------|-------------------------|
| Hawaii | Gubernatorial Appointment/Commission | Medical Marijuana | <p>May 2000—60% support passage of law making medical marijuana legal<sup>180</sup></p> <p>Feb. 2000—77% favor state legislature passing law to allow seriously ill patients to use marijuana for medical purposes if approved by medical doctor</p> <p>1998—63% support use of marijuana for medicinal purposes</p> | <i>State v. Mallan</i> <sup>181</sup> | Yes                     |

<sup>180</sup> Lynda Arakawa, *Medical Marijuana Has Public Support*, HONOLULU ADVERTISER, May 16, 2000, at 1A.

<sup>181</sup> 950 P.2d 178 (Haw. 1998) (holding that there is no fundamental right to possess and use marijuana for recreational purposes and stating that the issue of medical marijuana was not before the court).

| State  | Retention Method                     | Issue       | Public Opinion   | Case  | Matches Public Opinion? |
|--------|--------------------------------------|-------------|--|---|-------------------------|
| Hawaii | Gubernatorial Appointment/Commission | Gun Control | 1999—six in ten support outright ban on handguns, and only one in six support an open carry law <sup>182</sup> | <i>State v. Mendoza</i> <sup>183</sup>                  | Yes                     |
| Maine  | Gubernatorial Appointment/Commission | Gun Control | 2009—88% favor background checks at gun shows <sup>184</sup><br><br>2006—47% own gun in household              | <i>Doe v. Portland Housing Authority</i> <sup>185</sup> | No                      |

<sup>182</sup> Ken Kobayashi, *Handgun Ban Has Majority Support*, HONOLULU ADVERTISER, Nov. 14, 1999, at 1A. Hawaii has strict gun laws, including registration, fingerprinting, and mandatory background checks. See HAW. REV. STAT. § 134-2 (2009) (stating the various requirements for obtaining a permit to acquire a firearm); see also Mary Simms, *How Difficult Is It to Buy a Gun in Hawaii?*, HAWAII NEWS NOW, <http://www.hawaiinewsnow.com/Global/story.asp?S=6385267> (describing the various steps needed for the purchase of a firearm, including taking a training test and waiting for a background check).

<sup>183</sup> 920 P.2d 357 (Haw. 1996) (holding that the firearm permit law in question does not violate the right to bear arms under the Hawaii Constitution).

<sup>184</sup> Kevin Miller, *The Legal Landscape: Gun Control Bills in Maine Face Tough Challenges*, BANGOR DAILY NEWS (Me.), Nov. 19, 2009, at A1. In 1987, Maine amended its constitution to make it more favorable to gun ownership. *Id.* The constitution previously stated that citizens had the right “to keep and bear arms for the common defense.” *Id.* (internal quotation marks omitted). In amended form, the constitution now provides that “every citizen has a right to keep and bear arms and this right shall never be questioned.” ME. CONST. art. I, § 16.

<sup>185</sup> 656 A.2d 1200, 1202 (Me. 1995) (holding that state law prohibited municipalities from enacting stricter gun control laws than the state).

| State    | Retention Method                       | Issue       | Public Opinion  | Case  | Matches Public Opinion? |
|----------|--|-------------|---|---|-------------------------|
| New York | Gubernatorial Appointment / Commission | Gun Control | 2000—72% say controlling gun ownership is more important than upholding the right to bear arms <sup>186</sup>                                     | <i>Hamilton v. Berretta U.S.A. Corp.</i> <sup>187</sup><br><br><i>People v. Brown</i> <sup>188</sup>                              | No                      |
| New York | Gubernatorial Appointment / Commission | Education   | 2004—61% backed additional funding of \$5.6 billion for education<br><br>2001—60% say state spending on New York City schools should be increased | <i>Campaign for Fiscal Equity v. State</i> <sup>189</sup><br><br><i>Campaign for Fiscal Equity v. State</i> (2006) <sup>190</sup> | Yes                     |

<sup>186</sup> *Gore Has Big Lead in New York Presidential Race*, QUINNIPIAC U. (Apr. 6, 2000), <http://www.quinnipiac.edu/x1318.xml?ReleaseID=606>.

<sup>187</sup> 750 N.E.2d 1055, 1059, 1061–62 (N.Y. 2001) (holding that handgun manufacturers do not owe a duty to exercise reasonable care in their marketing and distributing to people injured by their illegally obtained handguns).

<sup>188</sup> 788 N.E.2d 1030, 1033 (N.Y. 2003) (discussing first and second degree criminal sale of a firearm statute).

<sup>189</sup> 801 N.E.2d 326, 343, 348 (N.Y. 2003) (holding that state failed to fulfill the constitutional mandate to provide sound, basic education and directing state to implement reform in 13-year lawsuit over whether under-funded schools violated state constitution).

<sup>190</sup> 861 N.E.2d 50, 58–59 (N.Y. 2006) (upholding the allocation of money issued for the reforms).

| State      | Retention Method             | Issue       | Public Opinion  | Case                                 | Matches Public Opinion? |
|------------|------------------------------|-------------|---|--------------------------------------|-------------------------|
| New Jersey | Gubernatorial to age seventy | Gun Control | 1999—71% say controlling guns more important than protecting gun owners' rights, and 52% support complete ban on handgun sales <sup>191</sup> | <i>State v. Smith</i> <sup>192</sup> | Yes                     |
| New Jersey | Gubernatorial to age seventy | Education   | 1998—52% support greater funding of poor school districts, and 41% support vouchers <sup>193</sup>  | <i>Abbot v. Burke</i> <sup>194</sup> | Yes                     |

<sup>191</sup> *Parents Should Be Told of Girl's Abortion*, QUINNIPIAC U. (June 10, 1999), <http://www.quinnipiac.edu/x1299.xml?ReleaseID=699>.

<sup>192</sup> 963 A.2d 281, 289 (N.J. 2009) (holding that prosecutors need not prove a criminal knowingly possessed a defaced gun as long as gun was actually defaced).

<sup>193</sup> *New Jersey Voters Want Limits on Abortion*, QUINNIPIAC U. (Mar. 5, 1998), <http://www.quinnipiac.edu/x1299.xml?ReleaseID=761>.

<sup>194</sup> 710 A.2d 450, 474 (N.J. 1998) (holding that school funding plan was unconstitutional as applied to special needs districts because it failed to satisfy the thorough and efficient education clause of the New Jersey Constitution and ordering remedial relief).

| State         | Retention Method             | Issue                        | Public Opinion  | Case   | Matches Public Opinion? |
|---------------|------------------------------|------------------------------|---|--|-------------------------|
| New Jersey    | Gubernatorial to age seventy | Abortion—parental notice law | 73% of voters support parental notice before minors can have abortion <sup>195</sup>  | <i>Planned Parenthood of Central New Jersey v. Farmer</i> <sup>196</sup>   | No                      |
| New Hampshire | Gubernatorial to age seventy | Education                    | 2001—45% said education funding most important issue<br><br>2008—10% said education funding was most important issue <sup>197</sup> | <i>Claremont School District v. Governor</i> (2002) <sup>198</sup><br><br><i>Claremont School District v. Governor</i> (1997) <sup>199</sup> | Yes                     |

<sup>195</sup> *New Jersey Voters Split on Abortion Limits*, QUINNIPIAC U. (Dec. 7, 2000), <http://www.quinnipiac.edu/x1299.xml?ReleaseID=587>.

<sup>196</sup> 762 A.2d 620, 621 (N.J. 2000) (holding the Parental Notice for Abortion Act as unconstitutional under equal protection principles).

<sup>197</sup> Andrew E. Smith, *WMUR/Granite State Poll*, U.N.H. SURVEY CENTER, 6 (Sept. 25 2008), available at [http://www.unh.edu/survey-center/news/pdf/gsp2008\\_fall\\_govapp92508.pdf](http://www.unh.edu/survey-center/news/pdf/gsp2008_fall_govapp92508.pdf).

<sup>198</sup> 794 A.2d 744, 759 (N.H. 2002) (reasoning that existing scheme to finance education had deficiencies that were inconsistent with the state's constitutional duty to provide adequate education).

<sup>199</sup> 703 A.2d 1353, 1360 (N.H. 1997) (holding that the system for financing schools was disproportionate and unreasonable within the meaning of the constitutional provision requiring proportional and reasonable tax assessment, and that state-funded, constitutionally adequate public elementary and secondary education is a fundamental right).

| State        | Retention Method           | Issue       | Public Opinion  | Case   | Matches Public Opinion? |
|--------------|----------------------------|-------------|---|--|-------------------------|
| Rhode Island | Gubernatorial/ Life Tenure | Gun Control | Gun ownership in state amongst lowest in nation at 13.3 % <sup>200</sup>  | <i>Mosby v. Devine</i> <sup>201</sup>              | Yes                     |
| Rhode Island | Gubernatorial/ Life Tenure | Education   | 2001—general assembly should increase state funding for public schools by a lot, 49%, a little, 29%, not at all, 8%, don't know, 14% <sup>202</sup> | <i>City of Pawtucket v. Sundlun</i> <sup>203</sup> | No                      |

<sup>200</sup> Press Release, Violence Pol'y Ctr., States with Higher Gun Ownership and Weak Gun Laws Lead Nation in Gun Death (May 6, 2009), <http://www.vpc.org/press/0905gundeath.htm>.

<sup>201</sup> 851 A.2d 1031, 1039–40, 1044, 1051 (R.I. 2004) (holding that the state constitutional right to bear arms, though military in context, extends to individuals, but the legislature has the ability to reasonably regulate that right by not granting a hearing for a denial of a firearm license).

<sup>202</sup> *Providence Residents Say Public Schools Are Moving in Right Direction*, BROWN U. NEWS SERV. (Feb. 13, 2001), [www.brown.edu/Departments/Taubman\\_Center/polls/00-080.html](http://www.brown.edu/Departments/Taubman_Center/polls/00-080.html).

<sup>203</sup> 662 A.2d 40, 42, 55 (R.I. 1995) (holding that the state method of school funding was constitutional and did not violate the education clause or equal protection provision of the state constitution, and that the education clause did not confer a right or guarantee of receiving an “equal, adequate and meaningful education”).

| State      | Retention Method | Issue             | Public Opinion  | Case   | Matches Public Opinion? |
|------------|------------------|-------------------|---|--|-------------------------|
| Alabama    | Partisan         | Gay Marriage      | 2005—54% strongly support amendment to prohibit gay marriage <sup>204</sup>                     | <i>Ex parte H.H.</i> <sup>205</sup><br><br><i>Ex parte J.M.F.</i> <sup>206</sup> | Yes                     |
| Georgia    | Non-Partisan     | Same-Sex Marriage | 2004—50% of Georgia voters oppose any form of recognition for homosexual couples <sup>207</sup> | <i>Perdue v. Kelly</i> <sup>208</sup>  | Yes                     |
| Washington | Non-Partisan     | Medical Marijuana | 1998—Medical Marijuana approved by voter initiative   | <i>State v. Fry</i> <sup>209</sup>   | No                      |

<sup>204</sup> Press Release, Ctr. for Governmental Servs. at Auburn Univ., Attitudes About Same-sex Marriage Amendment, (Feb. 9, 2005), [http://www.askalabama.org/press\\_releases/february2005/Logo%20Study%20Vol%20No%20Marriage%20Amendment%20Winter%202005.pdf](http://www.askalabama.org/press_releases/february2005/Logo%20Study%20Vol%20No%20Marriage%20Amendment%20Winter%202005.pdf).

<sup>205</sup> 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring specially) (“[H]omosexual conduct of a parent . . . creates a strong presumption of unfitness. . . . Alabama expressly does not recognize same-sex marriages or domestic partnerships. Homosexual conduct is . . . a violation of the laws of nature and of nature’s God . . .”).

<sup>206</sup> 730 So. 2d 1190, 1196 (Ala. 1998) (stating that homosexual relationships are “neither legal in this state, nor moral in the eyes of most of its citizens.” (quoting *Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (internal quotation marks omitted))).

<sup>207</sup> *Exit Poll: Few Georgia Voters Support Gay Marriage*, ASSOCIATED PRESS, Mar. 3, 2004, available at <http://new.accessnorthga.com/detail.php?n=175090&c=2>.

<sup>208</sup> 632 S.E. 2d 110 (Ga. 2006) (reinstating voter-approved ban on gay marriage previously struck down by county court).

<sup>209</sup> 228 P.3d 1, 7–8 (Wash. 2010) (“[A]n authorized user of medical marijuana will have an affirmative defense only if he or she shows full compliance with the Act. However, an affirmative defense does not negate probable cause for a search in the case, conducted with a valid warrant. . . . [The defendant] could not avail himself of the compassionate use defense because his claimed health conditions did not qualify under the Act.”).



| State  | Retention Method | Issue             | Public Opinion  | Case  | Matches Public Opinion? |
|--------|------------------|-------------------|---|---|-------------------------|
| Ohio   | Non-Partisan     | Eminent Domain    | 2007—82% of voters oppose using eminent domain to take property for economic development, and 50% say government has abused eminent domain in the past <sup>210</sup> | <i>Norwood v. Horney</i> <sup>211</sup>   | Yes                     |
| Oregon | Non-Partisan     | Same-sex Marriage | 2004—state constitutional amendment banning same-sex marriage passed with 57% support   | In 2005, the Oregon Supreme Court nullified 3,000 same-sex marriages <sup>212</sup> | Yes                     |

<sup>210</sup> Press Release, Quinnipiac Univ., Ohio Gov's Approval up as Voters Get to Know Him (Mar. 21, 2007), <http://www.quinnipiac.edu/x1322.xml?ReleaseId=1028&ss=print>.

<sup>211</sup> 853 N.E.2d 1115, 1145–46 (Ohio 2006) (holding that economic or financial benefit alone is insufficient to satisfy the public use requirement of the takings clause in Ohio's state constitution).

<sup>212</sup> *Almanac*, CHI. TRIB., Apr. 14, 2009, at 19.

| State     | Retention Method | Issue             | Public Opinion   | Case  | Matches Public Opinion? |
|-----------|------------------|-------------------|--|---|-------------------------|
| Wisconsin | Non-Partisan     | Same-sex Marriage | 2006—39.4% approve of gay marriage, 58.7% approve of civil unions <sup>213</sup> | In 2009, the Wisconsin Supreme Court held domestic partner registry does not violate the state constitutional amendment banning gay marriage <sup>214</sup> | Yes                     |

<sup>213</sup> Press Release, Univ. of Wis. Survey Ctr., Badger Poll No. 22, Release No. 3: Same-sex Marriage, Unions, and Referendum (July 17, 2006), [http://www.uwsc.wisc.edu/BP22PressRelease\\_Death\\_Samesex.pdf](http://www.uwsc.wisc.edu/BP22PressRelease_Death_Samesex.pdf).

<sup>214</sup> Arthur Zettel, Letter to the Editor, *Gays Pushing Their Beliefs on Everyone*, THE SHEBOYGAN PRESS (Sheboygan, Wis.), Nov. 20, 2009, at A05.

| State      | Retention Method | Issue                            | Public Opinion   | Case                                  | Matches Public Opinion? |
|------------|------------------|----------------------------------|--|---------------------------------------|-------------------------|
| California | Merit Plan       | Medical Marijuana <sup>215</sup> | 2004—74% supported legalizing marijuana for medical use under a doctor's supervision<br><br>1996—56% supported legalized marijuana for medical use under doctor supervision <sup>216</sup> | <i>People v. Kelly</i> <sup>217</sup> | Yes                     |

<sup>215</sup> This came up as a voter-initiated ballot measure in 1996 and passed 56% to 44%. The Field Poll's *Record in Measuring Statewide Ballot Propositions in California (1994–Present)*, FIELD POLL, <http://www.field.com/fieldpoll/propositions.html> (last visited Nov. 14, 2010).

<sup>216</sup> See Press Release, The Field Poll, Strong Support for Implementation of Prop. 215, the State's Medical Marijuana Law (Jan. 30, 2004), <http://www.field.com/fieldpollonline/subscribers/Rls2105.pdf>.

<sup>217</sup> 222 P.3d 186, 209–11 (Cal. 2010) (striking down law placing limits on the amount of medical marijuana a patient may legally possess and stating that only voters can change amendments added to the state constitution through the initiative process); see also Thadeus Greenon, *State Court Ruling Shoots Down Medical Marijuana Restrictions*, TIMES STANDARD (Eureka, Cal.), Jan. 22, 2010, [http://www.times-standard.com/ci\\_14245511](http://www.times-standard.com/ci_14245511).

| State   | Retention Method | Issue             | Public Opinion  | Case   | Matches Public Opinion? |
|---------|------------------|-------------------|---|--|-------------------------|
| Arizona | Merit Plan       | Indian Gaming     | 1999—69% favor reservation casinos in the state and 75% favor renewal of Indian gaming compacts <sup>218</sup>  | <i>Salt River Pima-Maricopa Indian Cmty v. Hult</i> <sup>219</sup>   | Yes                     |
| Arizona | Merit Plan       | Same-sex Marriage | 2004—60% opposed allowing same-sex couples to marry; 49% opposed to the state recognizing a same-sex marriage that is performed in another state <sup>220</sup> | In 2004, the Arizona Supreme Court refused to hear a case challenging the denial of a gay couple's application for a marriage license <sup>221</sup> | Yes                     |
| Alaska  | Merit Plan       | Abor-             | 2005—80%  | <i>State v.</i>  | No                      |

<sup>218</sup> Betty Beard, *Indian Gaming Support Strong in State, Survey Says*, ARIZ. REPUBLIC, Oct. 30, 1999, at 5B.

<sup>219</sup> 945 P.2d 818, 826 (Ariz. 1997) (resolving dispute over gaming contract in favor of tribe).

<sup>220</sup> *Recent State Polls on Same-Sex Marriage & Civil Unions*, NAT'L GAY & LESBIAN TASK FORCE, 2 (May 6, 2005), <http://www.thetaskforce.org/downloads/reports/reports/May2005StatePolls.pdf>.

<sup>221</sup> Michael Kiefer, *Same-Sex Marriage Ban Intact in Arizona; High Court Refuses to Consider Appeal*, ARIZ. REPUBLIC, May 26, 2004, at 1A.

| State   | Retention Method | Issue                        | Public Opinion  | Case   | Matches Public Opinion? |
|---------|------------------|------------------------------|---|--|-------------------------|
|         |                  | tion—<br>Parental<br>Consent | support<br>abortion pa-<br>rental con-<br>sent law <sup>222</sup>   | <i>Planned<br/>Parent-<br/>hood of<br/>Alaska</i> <sup>223</sup> |                         |
| Florida | Merit Plan       | Educa-<br>tion               | 2006—37%<br>agree, 52%<br>disagree,<br>and 12%<br>not sure<br>that giving<br>vouchers to<br>students in<br>poorly per-<br>forming<br>schools so<br>they can at-<br>tend private<br>schools is a<br>good use of<br>public edu-<br>cation<br>funds <sup>224</sup> | <i>Bush v.<br/>Holmes</i> <sup>225</sup>                         | Yes                     |
| Iowa    | Merit Plan       | Same-                        | 2009—   | <i>Varnum v.</i>   | No                      |

<sup>222</sup> Lieutenant Governor Loren Leman Called on Alaska Supreme Court to End an Eight-Year Delay in Implementing Law To Protect Parental Rights, *supra* note 137.

<sup>223</sup> 171 P.3d 577, 585 (Alaska 2007) (holding parental consent law unconstitutional).

<sup>224</sup> Catherine Dolinski & William March, *Poll Shows Education Is Concern Locally*, TAMPA TRIB., May 31, 2006, at 1.

<sup>225</sup> 919 So. 2d 392, 398 (Fla. 2006) (vouchers that allowed students at failing public schools to attend private schools held unconstitutional).

| State             | Retention Method | Issue                      | Public Opinion  | Case   | Matches Public Opinion? |
|-------------------|------------------|----------------------------|---|--|-------------------------|
|                   |                  | sex Mar-<br>Mar-<br>riage  | 30.4% fa-<br>vored ruling<br>that would<br>allow same-<br>sex mar-<br>riage <sup>226</sup>  | <i>Brien</i> <sup>227</sup>  |                         |
| Pennsyl-<br>vania | Merit Plan       | Immi-<br>gration           | 2007—72 %<br>favor stricter<br>immigration<br>laws<br><br>2008—82%<br>oppose<br>granting<br>drivers' li-<br>censes to<br>illegal<br>aliens <sup>228</sup> | <i>Reinforced<br/>Earth Co.<br/>v. Workers'<br/>Compensa-<br/>tion Ap-<br/>peal<br/>Board</i> <sup>229</sup>       | No                      |
| Pennsyl-<br>vania | Merit Plan       | Same-<br>sex Mar-<br>riage | 2004—63%<br>oppose<br>same-sex<br>marriage,<br>50% oppose<br>civil un-<br>ions <sup>230</sup>   | <i>T.B. v.<br/>L.R.M.</i> <sup>231</sup><br><br><i>Devlin v.<br/>City of<br/>Philadel-<br/>phia</i> <sup>232</sup> | No                      |

<sup>226</sup> Jason Hancock, *Same-Sex Marriage Opponents Face Uphill Fight in Iowa*, IOWA INDEP., Apr. 3, 2009, <http://iowaindependent.com/13558/same-sex-marriage-opponents-face-uphill-fight-in-iowa>.

<sup>227</sup> 763 N.W.2d 862, 906 (Iowa 2009) (declaring unconstitutional a state statute limiting marriage to a man and a woman).

<sup>228</sup> *Pennsylvania*, *supra* note 143 (reporting polls).

<sup>229</sup> 810 A.2d 99, 106 (Pa. 2002) (holding that illegal aliens are eligible for workers' compensation).

<sup>230</sup> Press Release, Quinnipiac Univ., Leave Gay Marriage to States, Not U.S. Constitution, Pennsylvania Voters Tell Quinnipiac University Poll; But Voters Oppose Gay Marriage 2-1 (Mar. 18, 2004), <http://www.quinnipiac.edu/x1327.xml?ReleaseID=300&ss=print>.

<sup>231</sup> 786 A.2d 913, 918–19 (Pa. 2001) (stating that the nature of the relationship between a mother and her girlfriend was irrelevant to whether the girlfriend stood *in loco parentis* to child and holding that girlfriend had standing to seek partial custody of child under doctrine of *in loco parentis*).

<sup>232</sup> *Id.*

| State     | Retention Method | Issue     | Public Opinion  | Case  | Matches Public Opinion? |
|-----------|------------------|-----------|---|---|-------------------------|
| Tennessee | Merit Plan       | Education | 1992—73.2% agreed with lower court ruling to equalize school funding <sup>233</sup>             | <i>Tennessee Small School Systems v. McWhorter</i> <sup>234</sup> | Yes                     |
| Maryland  | Merit Plan       | Abortion  | 1992—62% of voters approved referendum that liberalized Maryland's abortion laws <sup>235</sup> | <i>Kelly v. Vote Know Coalition of Maryland</i> <sup>236</sup>    | Yes                     |

<sup>232</sup> 862 A.2d 1234, 1243 (Pa. 2004) (upholding city's extension of employment benefits to life partners and stating that even though city had designated a life partnership as a marital status, the city had not legislated in the area of marriage).

<sup>233</sup> Univ. of Tenn. Soc. Sci. Research Inst., Tennessee Poll (Mar. 2, 1992) (unpublished survey) (on file with author).

<sup>234</sup> 851 S.W.2d 139, 140–41 (Tenn. 1993) (holding that the state constitution requires free public schools that afford substantially equal educational opportunities to all students and finding that that state school funding program violated equal protection).

<sup>235</sup> Todd Spangler, *Abortion Measure Decisive Winner*, WASH. TIMES, Nov. 4, 1992, at B1.

<sup>236</sup> 626 A.2d 959, 966 (Md. 1993) (rejecting anti-abortion group challenge to referendum).