



# Stanford Law Review

## HOW STATE SUPREME COURTS TAKE CONSEQUENCES INTO ACCOUNT: TOWARD A STATE-CENTERED UNDERSTANDING OF STATE CONSTITUTIONALISM

Neal Devins

# HOW STATE SUPREME COURTS TAKE CONSEQUENCES INTO ACCOUNT: TOWARD A STATE-CENTERED UNDERSTANDING OF STATE CONSTITUTIONALISM

Neal Devins\*

INTRODUCTION.....	1630
I. WHY STATE-CENTERED CONSTITUTIONALISM? .....	1634
A. <i>State Constitutionalism and the Pursuit of National Constitutional Values</i> .....	1635
B. <i>A Quick Tour of State Constitutions</i> .....	1639
1. <i>The scope, length, and method of revising state constitutions</i> .....	1640
2. <i>Judicial selection and retention</i> .....	1644
3. <i>The docket of state supreme courts</i> .....	1649
4. <i>The state character of state constitutions</i> .....	1652
II. DO STATE SUPREME COURT JUSTICES TAKE CONSEQUENCES INTO ACCOUNT?.....	1654
A. <i>The Political Science Models</i> .....	1656
B. <i>Consequentialism and State Supreme Courts</i> .....	1659
1. <i>Incentives</i> .....	1659
2. <i>Capacity</i> .....	1668
C. <i>Wrapping Up</i> .....	1671
III. TAKING CONSEQUENCES INTO ACCOUNT: LESSONS FROM SAME-SEX MARRIAGE.....	1674
A. <i>Same-Sex Marriage and the Characteristics of Path-Breaking Courts</i> ....	1675
1. <i>State constitutional systems</i> .....	1676
2. <i>State political norms</i> .....	1679
3. <i>Reputation and other motives</i> .....	1683

---

\* Goodrich Professor of Law and Professor of Government, College of William and Mary. Thanks to Larry Baum, Bruce Cain, Jim Gardner, and Hans Linde for commenting on an earlier version of this Article. I also benefited from conversations with Gene Flango, Mark Gaber, Tom Ginsburg, Paul Hellyer, Vicki Jackson, Andy Koppelman, Dave Pozen, and David Rottman. Thanks, finally, to my dedicated, talented, and tolerant research assistants Amanda Christensen, Ed Finn, Nicole Mansker, and Mary Rude.

D. <i>How State Courts Can Look to National Trends and the Experiences of Other States</i> .....	1685
CONCLUSION.....	1691

## INTRODUCTION

The year is 1993 and the Hawaii Supreme Court has just declared—as a matter of state constitutional law—that the state prohibition of same-sex marriage constitutes gender discrimination.<sup>1</sup> Within a few years, thirty-five states enacted laws prohibiting the recognition of same-sex marriages and Congress, responding “to a very particular development in the State of Hawaii,”<sup>2</sup> enacted the Defense of Marriage Act.<sup>3</sup> In Hawaii, voters overwhelmingly approved a state constitutional amendment authorizing the legislative prohibition of same-sex marriage.<sup>4</sup> For Bill Eskridge, the Hawaii decision was disastrous, “provok[ing] the biggest antigay backlash since the McCarthy era.”<sup>5</sup> For Andy Koppelman, however, Hawaii “put the issue of same-sex marriage on the national agenda” and, in so doing, “was a triumph for gays.”<sup>6</sup>

Fast forward to 2003 and the Massachusetts Supreme Court’s ruling that, under the Massachusetts Constitution, same-sex couples have a right to marry.<sup>7</sup> Throughout the nation, Republicans seized upon this issue, using it to bolster their prospects in the 2004 elections. President Bush called for a constitutional amendment banning same-sex marriage; congressional leaders pushed both for that amendment and for legislation stripping federal courts of jurisdiction in same-sex marriage cases; state officials backed constitutional amendment proposals in thirteen states.<sup>8</sup> And while there is some dispute about whether the same-sex marriage issue was decisive in President Bush’s reelection or in

1. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The Hawaii Supreme Court specifically held that the statute was a sex-based classification subject to the strict scrutiny test under the Equal Protection Clause, and remanded the case to the trial court for a determination of whether the statute was justified by compelling state interests.

2. H.R. REP. NO. 104-664, at 2 (1996).

3. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

4. *Election 98—Voters In 4 States Turn Back Gay Rights Initiatives—Referendums Against Same-Sex Marriages Win in Alaska and Hawaii*, MILWAUKEE J. SENTINEL, Nov. 5, 1998, at A6. For additional discussion of the interplay of social and political forces following the Hawaii decision, see *infra* text accompanying notes 287-90.

5. WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 26 (2002).

6. ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 150 (2002).

7. *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003).

8. See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 460, 463, 466, 477 n.330 (2005). For additional discussion of out-of-state and national political developments following the Massachusetts decision, see *id.* at 459-72.

Republican victories in Congress,<sup>9</sup> there is little question that the Massachusetts decision did not sit well with a majority of Americans—as revealed both in public opinion polls and in voter approval of all thirteen same-sex marriage ban proposals.<sup>10</sup> In Massachusetts, however, same-sex marriage carried the day—not only did 2004 efforts to derail the court’s decision fail, Massachusetts voters rewarded opponents of a proposed constitutional ban on same-sex marriage (reelecting all opponents while ousting some proponents of the ban).<sup>11</sup>

Both the popular press and academic commentators largely ignored the fact that Massachusetts voters stood behind the same-sex marriage decision. Mike Klarman discussed only out-of-state “backlash” in his assessment of the decision; Gerry Rosenberg said the decision, “perhaps more than any other modern case, highlights the folly of Progressives turning to litigation in the face of legislative hostility”; Jeff Rosen said that the decision “created a dramatic backlash,” linking out-of-state events to “national opinion polls” disapproving of same-sex marriage.<sup>12</sup> Judge J. Harvie Wilkinson also lamented the proliferation of constitutional amendments that followed in the wake of the Massachusetts decision, claiming that constitutions should be “articulations of fundamental rather than positive law” and that the amendment craze that followed the Massachusetts decision exemplified the “overconstitutionalization” of state constitutions.<sup>13</sup>

---

9. Tonja Jacobi, for example, has argued that Republican victories in 2004 should not be linked to the Massachusetts decision. Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 LAW & SEXUALITY 11, 41-52 (2006).

10. Public opinion poll data is discussed in Patrick J. Egan et al., *Gay Rights, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 234 (Nathaniel Persily et al. eds., 2008). Same-sex marriage bans are discussed in Klarman, *supra* note 8, at 459-72. For a competing argument about the linkage between the Massachusetts decision and state initiatives, see Jacobi, *supra* note 9, at 29-33.

11. See Jacobi, *supra* note 9, at 39-41. For additional discussion, see *infra* text accompanying notes 315-19; see also Tonja Jacobi, *How Massachusetts Got Gay Marriage: The Intersection of Popular Opinion, Legislative Action, and Judicial Power*, 15 J. CONTEMP. LEGAL ISSUES 219 (2006).

12. JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH* 111 (2006); Klarman, *supra* note 8, at 459-72 (cataloguing out-of-state backlash); Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 812 (2006) (“The result of these judicial victories has been nothing short of disastrous for the right to same-sex marriage.”). Other articles discussing national backlash include Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493 (2006); Kenneth K. Hsu, *Why the Politics of Marriage Matter: Evaluating Legal and Strategic Approaches on Both Sides of the Debate on Same-Sex Marriage*, 20 BYU J. PUB. L. 275 (2006); Mary Ellen Rayment, Comment, *Goodridge v. Department of Public Health: The Wrong Step at the Wrong Time for Same-Sex Marriages*, 82 DENV. U. L. REV. 109 (2004).

13. J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What’s a Constitution For?*, 56 DUKE L.J. 545, 573-78 (2006).

Reactions to the Massachusetts and Hawaii decisions are diverse in many respects. At the same time, the most visible academic and popular commentary about the political impact of these decisions focused on national concerns. National measures of what constitutions should look like and what consequences matter have been deployed in leading law review and popular press assessments of these decisions.<sup>14</sup> The idea that out-of-state backlash might be a poor metric for judging state court decision-making has not been a focal point of leading academic commentary. The idea that state constitutional systems are fundamentally different from each other has played next to no role in assessments of these and other same-sex marriage decisions.

Even though it is understandable that national publications would focus on questions of nationwide concern,<sup>15</sup> there is a baseline problem when it comes to academic commentary about the consequences of state court decision-making. State supreme court justices have jurisdiction over a single state, not the entire nation. They are experts in the law and politics of their state.<sup>16</sup> That is not to say that they cannot learn from the experiences of other states, nor is it to say that they do not care about their national reputation or about whether their decisions will advance favored policies throughout the country.<sup>17</sup> At the same time, there is a striking disconnect between commentary about the consequences of state supreme court decision-making and the actual jurisdiction and expertise of state courts. Along the same lines, critiques of the length and sweep of state constitutions often employ a baseline that is moored to the Federal Constitution.<sup>18</sup> The fact that each state is somewhat autonomous and that state constitutions may reflect distinctive political, historical, and cultural moments is sometimes lost in this analysis.

In the pages that follow, I will advance a state-centered understanding of state constitutionalism. My focus will be on consequences, that is, the incentives and expertise of state supreme court justices to think about the consequences of their decisions. My analysis, in part, will draw on a rich,

---

14. See *supra* notes 5-8, 12-13 and accompanying text. In this Symposium, Erwin Chemerinsky makes use of nationalistic measures to assess “[t]he story of marriage equality” and, in so doing, calls for the U.S. Supreme Court to fill the breach on this issue—establishing a nationwide right to same-sex marriage. Erwin Chemerinsky, Essay, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1695 (2010). There are two notable exceptions to the backlash commentators (both political scientists): Tonja Jacobi and Tom Keck. See Jacobi, *supra* note 11; Jacobi, *supra* note 9; Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC’Y REV. 151 (2009).

15. By way of contrast, regional law reviews have published state-focused pieces about these cases. For example, the Hawaii and Vermont Law Reviews published symposium issues to discuss their respective state supreme court decisions on same-sex marriage. See Symposium, *Same-Sex Marriage: The Debate in Hawai‘i and the Nation*, 22 U. HAW. L. REV. 1 (2000); Symposium, *Vermont Civil Unions*, 25 VT. L. REV. 1 (2000).

16. For additional discussion, see *infra* text accompanying notes 218-32.

17. For additional discussion, see *infra* text accompanying notes 236-37.

18. See Wilkinson, *supra* note 13, at 574.

nuanced literature about whether and when courts should take backlash risks into account. Like the above-described scholarship on same-sex marriage, this scholarship is largely nationalistic in focus. It either deals explicitly with the U.S. Supreme Court or makes use of theoretical and empirical models which assume life tenure for judges, a difficult-to-amend constitution, the availability of justiciability-based avoidance techniques, and a large information problem for judges determining whether there will be outrage and what the consequences of that outrage will be.<sup>19</sup> Indeed, with the very important exception of state court responses to judicial election risks,<sup>20</sup> legal academics and political scientists are yet to grapple with, among other things, the question of whether state supreme courts should make use of certiorari denials to steer clear of politically controversial topics and whether state supreme courts should take into account the potential nullification of their decisions through a constitutional amendment.<sup>21</sup>

In this Article, I will provide a preliminary assessment of what consequences state supreme court justices are likely to take into account. I will also consider the ways in which a state supreme court justice can take out-of-state consequences into account. By focusing on the implementation of state court decisions and the reputation of state supreme courts,<sup>22</sup> I will not comment on whether state courts should engage in doctrinal percolation—that is, the practice of one state court looking to another state court’s interpretation of analogous constitutional provisions. Likewise, by looking to the ways that state supreme court justices interface with other political actors and voters, I will not address the methodological question of whether state courts should rely on state-specific sources (the text and history of their state constitutions) and, in so doing, “develop a coherent discourse of state constitutional law.”<sup>23</sup>

---

19. This is true, for example, of Cass Sunstein’s fine article about whether judges should consider backlash risks. See Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007). Indeed, that article’s discussion of same-sex marriage explicitly considers the prospect of a federal constitutional amendment that might override a U.S. Supreme Court decision. See *id.* at 162-75.

20. For additional discussion, see *infra* text accompanying notes 162-202.

21. The question of whether state courts should employ justiciability barriers to avoid politically knotty issues is explored in Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (highlighting differences between state and federal systems in arguing that state courts should not look to federal court norms but, instead, should develop a less constraining, more state-specific approach toward justiciability limits).

22. For reasons I will detail in Part II, my consideration of a state supreme court justice’s interest in his or her personal reputation and the reputation of his or her court is somewhat at variance with the dominant political science models.

23. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 764 (1992). This question has dominated much of the discourse over state constitutionalism. For a survey of this literature, see Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont’s State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73, 106-22 (2001).

My analysis will proceed in three parts. Part I will explain why academics often look to nationalistic norms in assessing state supreme court decision-making and why it is that state constitutions are fundamentally different from the Federal Constitution and from each other. Part I will also explain how it is that states borrow both from each other and from the Federal Constitution. Consequently, although state constitutional provisions cannot simply be lumped together into some unified view of state constitutionalism, states are part of a national system and, as such, can learn from each other in important ways. Part I will also pave the way for subsequent discussion of whether state supreme courts should take implementation concerns into account—looking at provisions of state constitutions governing direct democracy, judicial elections, and the power of state courts to sidestep issues by denying certiorari.

Part II will shift the focus to the question of whether state courts have either the incentive or the capacity to be consequentialists. After providing a brief overview of the dominant political science models governing U.S. Supreme Court decision-making, Part II will sort out what those models suggest about state supreme court decision-making. In so doing, Part II will examine whether state supreme court justices are likely to take account of judicial elections, ballot initiatives, and other implementation concerns (including out-of-state backlash). Part II, moreover, will assess the capacity of state supreme courts to assess backlash risks. Throughout this discussion, I will call attention to the ways that states are different from each other but can learn from each other. In particular, fundamental differences in state constitutional systems and state norms highlight profound differences in backlash risks; at the same time, state justices can look to the experiences of other states in assessing in-state backlash risks.

Part III will link Parts I and II by considering the ways that state supreme court justices can assess in-state backlash risks by looking to the unique features of their own constitution, to the political norms of their states, and to the experiences of other states. The focus will be a case study on same-sex marriage. Initially, I will highlight how state courts, in fact, take into account both the design of their constitution and in-state political norms. I will then explain how state supreme court justices can also assess potential in-state backlash risks by considering the experiences of other states. Part III therefore highlights how state supreme courts are at once distinctive and part of a nationwide system and, in so doing, shows how state-centered constitutionalism can facilitate the shaping of constitutional values throughout the country.

## I. WHY STATE-CENTERED CONSTITUTIONALISM?

State constitutions are widely varied but also part of a national system in which states borrow from each other and the national Constitution. In this way, state supreme courts need to be sensitive both to their autonomy (as

independent states with distinctive constitutional traditions) and to their interconnectedness (as part of a national system in which states learn from each other). In this Part, I will sketch out how it is that states are at once different and connected—highlighting some of the basic differences among state constitutions and differences between state and federal constitutional systems. Before sketching out similarities and differences among state constitutions, I will provide an explanation of sorts for why it is that legal academics often look at state constitutional issues in nationalistic terms.

### A. *State Constitutionalism and the Pursuit of National Constitutional Values*

Over the past thirty years, state courts have eclipsed the U.S. Supreme Court in shaping the meaning of constitutional values, both in their home states and throughout the nation. State supreme courts decide more than ten thousand cases each year,<sup>24</sup> roughly twenty percent of which involve state constitutional issues.<sup>25</sup> The U.S. Supreme Court, by contrast, now issues around seventy-five decisions a year, around forty percent of which involve constitutional issues.<sup>26</sup> To put these numbers into sharper focus, the California Supreme Court now issues more opinions about state constitutional law than the U.S. Supreme Court issues decisions about federal constitutional law.<sup>27</sup>

Beyond the staggering disparity in the volume of constitutional law decisions, state supreme court decision-making increasingly defines the meaning of constitutional rights throughout the country. In particular, because state supreme courts speak the last word about the meaning of state constitutional law,<sup>28</sup> state courts may use their constitutions to provide

---

24. See G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 1 (1988). Some of these decisions are unsigned; there are approximately 8,000 signed opinions each year. This guesstimate is based on information found in the Court Statistics Project of the National Center for State Courts (where forty-three states, the District of Columbia, and Puerto Rico reported issuing around 7,500 signed opinions in recent years). See Nat'l Ctr. for State Courts, Research: Court Statistics Project, [http://www.ncsconline.org/D\\_Research/csp/CSP\\_Main\\_Page.html](http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html) (last visited May 1, 2010) (reporting number of signed opinions by state at tbl.17).

25. Gardner, *supra* note 23, at 780 (extrapolating from a sample of seven states).

26. For information on the number of cases decided by the U.S. Supreme Court, see U.S. Courts, Judicial Business of the United States Courts, <http://www.uscourts.gov/judbususc/judbus.html> (last visited May 1, 2010) (listing Supreme Court docket information per year at tbl.A-1). For information on the number of constitutional cases, see Richard A. Posner, *Forward: A Political Court*, 119 HARV. L. REV. 31, 37-38 (2005).

27. In 2005, for example, the California Supreme Court issued thirty-seven opinions dealing with state constitutional issues. This was found by performing a Westlaw search with the parameters (TO(92) HE(CONSTITUTION! UNCONSTITUTIONAL!)) & (CO(HIGH) & DA(2005)), and counting the cases that had state constitutional law questions. In 2005, the U.S. Supreme Court issued thirty opinions dealing with federal constitutional issues. *The Statistics*, 119 HARV. L. REV. 415, 430 tbl.3 (2005).

28. The U.S. Supreme Court put it this way: states have the “sovereign right to adopt in



constitutional protections above the floor set by the U.S. Supreme Court. State supreme courts have done so in numerous settings, rejecting U.S. Supreme Court rulings on school finance, disparate impact proofs of discrimination, voter registration laws, abortion funding, religious liberty protections, takings, same-sex sodomy, and a host of criminal procedure protections.<sup>29</sup> State supreme courts have also been path-breakers, paving the way for Supreme Court decisions expanding constitutional protections. Examples include the exclusionary rule, anti-miscegenation, same-sex sodomy, and racially motivated peremptory challenges.<sup>30</sup> State supreme courts, moreover, are not subject to the same constraints as are federal courts—including state action, Article III justiciability limits, and the prohibition against creating positive rights.<sup>31</sup>

The volume and import of state supreme court decision-making is truly awesome. At the same time, state constitutionalism remains in the shadow of the U.S. Supreme Court and the Federal Constitution. As already noted, academic commentary about state constitutionalism frequently has a nationalistic cast (especially as it pertains to the penchant of leading academics to focus on out-of-state, not in-state, consequences).<sup>32</sup> And while increasing

---

[their] own Constitution individual liberties more expansive than those conferred by the Federal Constitution,” *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980), and, as such, “a state court is entirely free to read its own State’s constitution more broadly than this Court reads the Federal Constitution,” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982); *see also* *Michigan v. Long*, 463 U.S. 1032 (1983) (federal courts cannot question state court judgments in cases implicating both federal and state claims so long as there are adequate and independent state grounds supporting the judgment).

29. In discussing this phenomenon, Robert Williams quipped: “Tallies are periodically made and updated of the numbers of cases in which state courts have, under their own constitutions, recognized rights beyond those [that the U.S. Supreme Court recognizes when interpreting] the Federal Constitution. Most of us have stopped counting.” Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1017 (1997) (footnote omitted).

30. The nexus between state and U.S. Supreme Court rulings is discussed in James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1032-54 (2003). This practice has been constrained in recent years—as the U.S. Supreme Court is less apt to nationalize constitutional protections and, in so doing, borrow from the states.

31. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (positive rights); Hershkoff, *supra* note 21 (justiciability); Robert F. Williams, *Juristocracy in the American States?*, 65 MD. L. REV. 68, 72-73 (2006) (state action).

32. *See supra* text accompanying notes 5-6, 12-13. In making this point, I do not mean to denigrate the important work of many academics who have written thoughtfully about state constitutionalism. Throughout this Article, I will cite some of this work. My point, instead, is that state constitutionalism deserves an even higher profile, that leading law reviews should regularly publish articles about state constitutionalism, and that the legal academy should see state constitutional law as an important subject of curriculum and scholarship. *See infra* text accompanying note 45 (discussing paucity of state constitutional law courses); *see also infra* text accompanying notes 65-66 (discussing how the frequent

recognition of the interconnection between the U.S. Supreme Court's shrinking docket and the increasing import of state supreme court decision-making has prompted several well done studies of the impact of judicial elections on state supreme court decision-making and legitimacy,<sup>33</sup> academics are yet to explore a range of critically important issues about the legitimacy and political accountability of state supreme court decision-making.<sup>34</sup> In understanding this gap between the obvious importance of state constitutionalism and academic and popular press commentary, two interrelated phenomena are at play—one is the interface between the U.S. Supreme Court and state supreme courts; the second concerns the dearth of courses on state constitutional law at most law schools, especially elite law schools.

To start, state supreme court authority to independently interpret state constitutions is, in significant respects, moored to U.S. Supreme Court interpretations of the Federal Constitution. In particular, if the U.S. Supreme Court expansively interprets the individual rights guarantees of the Federal Constitution, there will be fewer opportunities for state courts to independently interpret their constitutions. State supreme courts, for example, cannot hold that *Miranda* warnings are not required under their respective constitutions.

During the “heyday of the Warren Court,” the “Supreme Court took such complete control of the field that state judges could sit back in the conviction that their part was simply to await the next landmark decision.”<sup>35</sup> At that time, more than half of the Court's constitutional docket involved appeals from state court decisions.<sup>36</sup> That percentage had declined to about thirty percent in the 1990s.<sup>37</sup> Equally significant, over time the Court—rather than follow the

---

amendment and replacement of state constitutions contributes to the second-class status of state constitutionalism).

33. Politicized judicial elections are not simply about state constitutionalism, for state supreme courts have had enormous impact through tort reform and other common law initiatives. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59 (2008). For additional discussion about the role of judicial elections on state court decision-making, see *infra* notes 192-202 and accompanying text.

34. There is next to no scholarship on voter awareness of state supreme court decisions, on the ways in which state court justices interact with lawmakers and other constituencies, on the likelihood that state supreme court decisions are subject to override, and, correspondingly, on the ways in which state court justices think about potential overrides in their decision-making. Likewise, there are only a handful of studies regarding the legitimacy of state courts. See James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?* 6 n.7 (Stanford Pub. Law Working Paper No. 1491289, 2009), available at <http://ssrn.com/abstract=1491289>.

35. Robert Welsh & Ronald K.L. Collins, *Taking State Constitutions Seriously*, CENTER MAG., Sept.-Oct. 1981, at 6, 6 (internal quotation marks omitted).

36. Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J. L. & PUB. POL'Y 233, 256 n.78 (1999).

37. *Id.* Today, the Court hears even fewer appeals from state courts. For example, in

Warren Court's lead by nationalizing rights—was embracing doctrinal formulas that favored state actors. When Justice William Brennan famously called for state courts to “be the guardians of our liberties,” he was responding to the Burger Court's increasing deference to the states and, with it, the contraction of federal rights and remedies.<sup>38</sup> For Brennan, by providing protections “extending beyond those required by the Supreme Court's interpretation of federal law,” state courts would “step into the breach” and become the “font of individual liberties” that the Supreme Court had been during the Warren Court era.<sup>39</sup>

Starting in the 1970s, state supreme courts began to heed Justice Brennan's call.<sup>40</sup> “Initially, this reliance on state constitutions was occasional and largely reactive—an attempt by a few courts to extend greater protection to individual liberties than was available under the Burger Court interpretations . . . .”<sup>41</sup> Between 1977 and 1986, there were two-hundred such interpretations; by 1988, there were four-hundred such interpretations.<sup>42</sup> Today, state courts throughout the nation regularly look to their constitutions to expand civil liberty protections—a practice that Justice Brennan called “the most important development in constitutional jurisprudence of our times.”<sup>43</sup> Nevertheless, state courts are typically judged against a nationalistic benchmark—filling the breach, rather than an independent, alternative source of constitutional meaning. Under this view, state courts operate in the shadow of Supreme Court

2005, eleven of the Court's seventy-eight decisions involved constitutional appeals from state court decisions (which is about fourteen percent). *The Statistics*, *supra* note 27, at 429-30 tbl.3.

38. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

39. *Id.* at 491, 503; *see also* Chemerinsky, *supra* note 14, at 1697 (“In every area where I would like to see state constitutional rights develop, I would much prefer to see it accomplished under the United States Constitution if possible. . . . If the goal cannot be accomplished via the United States Constitution, then state constitutional law is a great back-up plan.”).

40. Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 592 (2007).

41. G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 841 (1991) [hereinafter Tarr, *State Constitutional Interpretation*]; *see also* G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS 63 (1994) [hereinafter Tarr, *New Judicial Federalism*] (depicting increasing reliance on state constitutions as new).

42. Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 11-12 (1993).

43. William J. Brennan, Jr., *Color-Blind, Creed-Blind, Status-Blind, Sex-Blind*, 14 HUM. RTS. 30, 37 (1987); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) (applauding state courts that have broadly interpreted state constitutional provisions to protect individual rights). Alan Tarr, however, saw this increasing recognition of new constitutional rights as a paradigm shift in the development of state constitutional law. *See* Tarr, *New Judicial Federalism*, *supra* note 41, at 78.

decision-making.

The state's "poor cousin" reputation—at least among legal academics—is also fueled by law school norms. State constitutional law is not part of the academic culture of most American law schools,<sup>44</sup> especially the nation's leading law schools. In the 2007-2008 academic year, no school ranked in the top fifteen offered such a course, and only one of the top twenty law schools offered a course in state constitutional law.<sup>45</sup>

### B. *A Quick Tour of State Constitutions*

The origins and content of state constitutions are highly varied and complex, emerging from a "jagged history of state political development and constitution-formation over the lifespan of the American republic."<sup>46</sup> At the same time, there is a great deal of overlap in state constitutions. For example, knowing that Congress would have to approve their constitutions, later-admitted states would borrow from earlier state constitutions and the Federal Constitution.<sup>47</sup> Indeed, as Lawrence Friedman observed, "States sometimes copied material blindly. It is hard to imagine, for example, that Iowa in 1857 really needed a clause on quartering of soldiers in private homes in time of peace."<sup>48</sup> For the balance of this Part, I will provide a quick tour of similarities

---

44. There are notable exceptions. Starting in 1988, the *Rutgers Law Journal* has published an annual symposium on state constitutionalism. See Robert F. Williams & Earl M. Maltz, *Introduction*, 20 RUTGERS L.J. 877, 878 (1989) (announcing that the 1988 Rutgers symposium would be the "first in an annual series of *Rutgers Law Journal* issues on state constitutional law").

45. See Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 166-67 (2009); see also Lawrence Friedman & Charles H. Baron, *Baker v. State and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125, 156-57 (2001) (encouraging law schools to expand offerings in state constitutional law). When looking at all law schools, approximately twenty-five of the nation's two-hundred law schools offer a survey course in state constitutional law and another seventeen offer a state-specific version of the course. See Sutton, *supra*, at 166 (the calculations of twenty-five and seventeen are based on averaging the numbers cited by Judge Sutton). On February 4, 2010, the Conference of Chief Justices of state supreme courts approved a resolution both noting that state constitutionalism is not explored in "the overwhelming majority" of constitutional law courses and "encourag[ing] all law schools to offer a course on state constitutional law." Conference of Chief Justices Resolution 1 (Feb. 4, 2010) (on file with author).

46. Daniel B. Rodriguez, *State Constitutionalism and the Scope of Judicial Review*, in DUAL ENFORCEMENT OF CONSTITUTIONAL NORMS (Jim Gardner & Jim Rossi eds., forthcoming) (manuscript at 2, on file with author).

47. Similarities among state constitutions are also tied to the need for "the framers of a state constitution [to] operate within the context defined by the United States Constitution: thus, they must write a document that is appropriate to the federal system created by that national document." Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS 27, 27 (1982).

48. Lawrence Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 37 (1988); see also James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in*

and differences among state constitutions.

In so doing, I will make three principal points that will lay the foundation for Parts II and III of this Article. First, state constitutions are fundamentally different than the Federal Constitution. Second, state constitutions can be dramatically different from each other. Some constitutions, particularly early constitutions, look very much like the Federal Constitution; other constitutions seem less majestic—with provisions that seem more like a detailed statute than a statement of higher law. Third, notwithstanding these differences, it is undoubtedly true that state constitutions borrow from each other and from the Federal Constitution.

### 1. *The scope, length, and method of revising state constitutions*

State constitutions vary dramatically in their methods of revision and in their inclusion of so-called super-legislation; that is, provisions that look like ordinary statutes but have, for some political reason, “been upgraded from the statute books to constitutional status.”<sup>49</sup> The question of how regional identity and history figure into the look of state constitutions will be explored later in this Part. At this point, I want to highlight some basic differences between the U.S. Constitution and the constitutions of most (but not all) states.

To start, state constitutions are much more malleable than the U.S. Constitution. Only one of the founding states (Massachusetts) has its original constitution; more than thirty states have had multiple constitutions; and most states have adopted three or more constitutions (with Louisiana having adopted eleven).<sup>50</sup> States have held 233 constitutional conventions, and have collectively adopted 147 different constitutions and more than 7,000 constitutional amendments (with Alabama having amended its constitution more than 800 times).<sup>51</sup> Over the past thirty years, however, only one state

---

*Constitutional Argument*, 76 TEX. L. REV. 1219, 1228 (1998) (arguing that state constitutions are not unique in important respects, and highlighting how even Confederate states “viewed their constitutions as . . . parallel instantiations of a set of universal constitutional principles common to all American constitutions”).

49. Friedman, *supra* note 48, at 36.

50. 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).

51. See JOHN DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 8-11 (2006) (discussing the number of conventions and dramatic differences among states—with some holding only one and others holding as many as ten or more); THE BOOK OF THE STATES 2009 12 tbl.1.1 (2009); Gerald Benjamin, *Constitutional Amendment and Revision, in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 177, 180, 192-94 (G. Alan Tarr & Robert F. Williams eds., 2006) (noting the number of constitutions as well as dramatic differences among states in ways that conventions are structured and how broad or limited the conventions’ powers are); G. Alan Tarr, *Introduction to STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, supra*, at 1, 2 (noting the number of amendments). For a quick general overview, see Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections*

(Georgia) has adopted a new constitution and two-thirds of all states have constitutions that are more than a hundred years old.<sup>52</sup> In other words, the principal mechanism by which states now update their constitutions is the amendment process—initiated either through the state legislature or through voters in one of the twenty-four states that allow for some kind of direct-democracy measures.<sup>53</sup> There is significant variance among states in the requirements both of legislature and voter-initiated constitutional amendments.<sup>54</sup> For example, before sending legislature-proposed constitutional amendments to the voters for ratification, eleven states require the consideration of constitutional proposals in two separate legislative sessions and twenty-seven states impose some type of supermajority vote by the state legislature.<sup>55</sup> Voter ratification rules also vary, with seven states requiring something other than a simple majority vote.<sup>56</sup> There is also significant variation among direct-democracy states concerning the procedures to get an initiative on the ballot.<sup>57</sup> Furthermore, some states place subject matter restrictions and super-majority voting requirements along with other procedural requirements that restrict the use of the initiative process.<sup>58</sup>

Differences between the U.S. Constitution and state constitutions abound. With most states having three different constitutions and more than a hundred constitutional amendments, state constitutions tend to be much more detail-oriented than the Federal Constitution. In fact, state constitutions are, on average, nearly four times longer than the Federal Constitution, and some state

---

*on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1519-22 (2009).

52. ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES 80 (2d ed. 2006); Cain & Noll, *supra* note 51, at 1520 (citing Benjamin, *supra* note 51, at 196; Tarr, *supra* note 51, at 3); see also Robert F. Williams, *Should the Oregon Constitution Be Revised, and If So, How Should It Be Accomplished?*, 87 OR. L. REV. 867, 901 (2008) (acknowledging that, since 1960, “conventions seem to have lost their *legitimacy* in the public mind”).

53. DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES 25 (2004).

54. See DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 38-39 (1984). In Parts II and III of this Article I will talk more about how differences in amendment schemes impact state court decision-making.

55. COUNCIL OF STATE GOV'TS, *supra* note 51, at 14 tbl.1.2. Twenty-seven states require either a three-fifths (nine states) or two-thirds (eighteen states) vote; four states (Oregon, South Carolina, Tennessee, and Vermont) make use of hybrid schemes involving both majority and super-majority votes. *Id.* Three of the twenty-nine states with super-majority requirements (Connecticut, Hawaii, and New Jersey) also allow for a majority vote in two successive sessions. *Id.*

56. *Id.* at 16.

57. For a listing of requirements to get a constitutional initiative on the ballot and passed, see *id.* at 16 tbl.1.3. Of particular note, eighteen states have an initial signature requirement based on some percentage (ranging from three to fifteen percent) of votes for governor or all candidates for governor in the last election. See *id.*

58. See KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 36-37 (2009).

Constitutions are close to ten times as long as the U.S. Constitution.<sup>59</sup> The Alabama Constitution, for example, is close to 350,000 words long, with hundreds of amendments.<sup>60</sup> And while Alabama is an extreme case, state constitutions cover a broader range of subjects and provide greater details of what the government can and cannot do than does the Federal Constitution.<sup>61</sup>

State constitutions often look like super legislation, “not sacred texts.”<sup>62</sup> For those who think the Federal “Constitution is the standard by which we understand and judge other constitutions,”<sup>63</sup> the specificity—even silliness—of some state constitutional provisions is cause for alarm and disdain. Examples include the Arkansas Constitution (which “devotes an entire article to railroads, canals, and turnpikes”), the Idaho Constitution (which “devotes one to livestock”), the New York Constitution (“specifying the width of ski trails in the Adirondack Park”), the California Constitution (identifying “which taxes are to be assessed on golf courses”), the Texas Constitution (allowing for the use of unmanned teller machines at banks), and the Tennessee Constitution (which, in 1796, “fixed the governor’s salary at \$750”).<sup>64</sup>

“This apparently haphazard lumping together of the fundamental and the prosaic in a single document,” Alan Tarr observed, “has prevented many scholars from taking state constitutions seriously.”<sup>65</sup> Judge Wilkinson, for example, minced no words when complaining about the frequency with which states amend constitutions and, correspondingly, the degree of detail in many state constitutions. He insists that the inclusion of “essentially statutory provisions” in state constitutions “risk[s] trivializing them” and that states need to operate within the framework of “American constitutionalism” and, in so doing, to recognize that constitutions, unlike statutes, are “articulations of fundamental rather than positive law.”<sup>66</sup> Whatever one thinks of the normative desirability of a broadly framed or highly specific constitution,<sup>67</sup> Judge

59. Albert L. Sturm, *The Development of American State Constitutions*, 12 *PUBLIUS* 57, 74 & n.57 (1982).

60. H. Bailey Thomson, *Constitutional Reform in Alabama: A Long Time in Coming*, in 1 *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY*, *supra* note 51, at 113, 114.

61. Gardner, *supra* note 23, at 818-19.

62. Friedman, *supra* note 48, at 35.

63. Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 *NW. U. L. REV.* 74, 74 (1989). Professor Rose was not embracing this view; she was criticizing it.

64. Friedman, *supra* note 48, at 36 (Tennessee); Gardner, *supra* note 23, at 819 (New York, California, Texas); Wilkinson, *supra* note 13, at 572 (Arkansas and Idaho).

65. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 2 (1998).

66. Wilkinson, *supra* note 13, at 574.

67. The question of whether it is normatively desirable for state constitutions to be as lengthy as they are is beyond the scope of this paper. Some commentators caution that the practice of some states to load their constitutions up with more and more amendments comes at a cost. *See* Cain & Noll, *supra* note 51, at 1542-43 (noting that “the cumulative effects of separately adopted policy initiatives [through the amendment process] can substantially alter a state government’s powers and capacities in ways that might not be foreseen by voters

Wilkinson's claim that the lodestar of American constitutionalism is a broadly framed minimalist document is incorrect. The lack of detail in the U.S. Constitution speaks more to constitutionalism at a moment in time (when constitutional drafters understood constitutions to be "great outlines" that avoid legislation-like specifics)<sup>68</sup> than it does to American constitutionalism (which recognizes significant state autonomy in the crafting of its constitution).<sup>69</sup>

On this point, I think it useful to highlight the time-bound quality of various mechanisms by which state constitutions can be reinvented, either through a constitutional convention or through legislative or voter-initiated amendments. Most of the original revolutionary-era state constitutions imposed severe limits on constitutional amendments—requiring votes from consecutive legislative sessions, requiring super-majority votes, or specifying that amendments could be introduced through constitutional conventions only.<sup>70</sup> During the twentieth century, constitutional amendments became the principal vehicle for constitutional change.<sup>71</sup> One of the principal drives in this shift towards constitutional amendments were Progressive era (1890s through 1920s) efforts to both push for the approval of direct-democracy measures and pursue a range of economic, political, and social reforms by amending state constitutions.<sup>72</sup> From 1898 to 1918, twenty states had amended their constitutions to allow for voter initiatives.<sup>73</sup>

---

when each particular measure is passed"). On the other hand, it is also possible that "*state constitutions should contain more institutions and policy content*" and, in so doing, become an "important mechanism of state government [operations]." Christopher W. Hammons, *State Constitutional Reform: Is it Necessary?*, 64 ALB. L. REV. 1327, 1343, 1345 (2001); see also Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short Framework-Oriented Constitutions*, 93 AM. POL. SCI. REV. 837 (1999) (arguing that the "relationship among content, length, and durability" in state constitutions "refutes the assumption that the design of the national constitution is necessarily superior").

68. See Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth Century West*, 25 RUTGERS L.J. 945, 964-65 (1994) (discussing practices of early state constitution drafters and contrasting their values to the values of the drafters of the 1849 California Constitution); *id.* at 958 (quoting *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.)).

69. The U.S. Constitution does not even mandate that states have constitutions, let alone dictate the degree of detail or generality in state constitutions.

70. See DINAN, *supra* note 51, at 42-47.

71. See, e.g., Williams, *supra* note 52, at 902 (noting that, in the states in which they are permitted, voter initiatives are generally perceived as more legitimate than conventions); see also Cain & Noll, *supra* note 51, at 1520, 1523 (highlighting both recent trends and calling attention to the comparative ease of amending state constitutions).

72. See STEVEN L. PIOTT, *GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA* 1-2 (2003) (tracing the origins of the national debate on voter initiatives). For an excellent treatment of the acrimonious relationship between progressives and state courts, see WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994). Progressives also pursued social change by pushing for reforms through legislature-initiated constitutional amendments.

73. See JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC*



The fact that states often act in tandem is hardly surprising. State constitutionalism reflects larger social and political forces throughout the nation. At the same time, state practices are extremely varied. The rise of direct democracy was at once a nationwide phenomenon, but also a phenomenon that took hold in only half the states (and at two different moments in time).<sup>74</sup> Moreover, the ease with which state constitutions can be modified suggests that the dynamic between state supreme courts, state officials, and voters is fundamentally different than the constitutional dialogues which take place between the U.S. Supreme Court, elected officials, and voters over the meaning of the U.S. Constitution.<sup>75</sup>

## 2. *Judicial selection and retention*

Judicial selection and retention also highlights differences between state and federal systems and among state systems, related differences in the political accountability of state supreme court justices, and the role of historical trends in establishing state practices. Table 1 details some of the differences between state systems over time, charting both the rise of judicial elections and the presence of numerous appointment and retention schemes.<sup>76</sup> In addition to these differences, there are dramatic differences in the terms of office among state supreme court justices. Most justices serve specified terms (three, four, six, eight, ten, twelve years), although some states specify either mandatory retirement ages or life tenure.<sup>77</sup> Some states, moreover, make use of judicial selection commissions (either to formally reappoint or assess performances) or ask incumbent justices to formally reapply to either the governor or some nominating commission.<sup>78</sup> There are other differences as well.<sup>79</sup>

---

POLICY, AND AMERICAN DEMOCRACY 4 (2004). A second wave of direct democracy reforms were pursued in the late 1960s and early 1970s, reflecting the dramatic increase in government distrust. See MAGLEBY, *supra* note 54, at 15. Twenty-three of the twenty-four states that allow for voter initiatives approved such initiatives in one of these two periods.

74. It is also noteworthy that most direct democracy states are west of the Mississippi River. For an explanation of this phenomenon, see MILLER, *supra* note 58, at 37. See also *infra* notes 111, 134 (discussing whether regional differences contribute to different state constitutional structures).

75. For additional discussion, see *infra* notes 203-05, 254-66.

76. For a somewhat similar table, see F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 435 (2004). See also DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, DEP'T OF JUSTICE, STATE COURT ORGANIZATION 2004, at 25-27 tbl.4 (2004) (listing the ways in which each state selects its state supreme court justices).

77. See AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2009). The most common term lengths after an initial election are six years (ten states), eight years (six states), ten years (four states), and twelve years (one state). *Id.*

78. *Id.*

79. Some states, for example, have shorter initial terms followed by longer terms or

**Table 1: Judicial Appointment and Retention Schemes**

Retention Method	State	Current Appointment Method (year switched)	Original Method (year joined the union)
<b>Retention Election</b>	Pennsylvania	Partisan (1850)	Leg. (1787)
	Maryland	Merit plan (1976) <sup>80</sup>	Gov. (1788)
	Indiana	Merit plan (1968) <sup>81</sup>	Gov. (1816)
	Illinois	Partisan (1971) <sup>82</sup>	Leg. (1818)
	Missouri	Merit plan (1940) <sup>83</sup>	Gov. (1821)
	Florida	Merit plan (1972) <sup>84</sup>	Leg. (1845)
	Iowa	Merit plan (1962) <sup>85</sup>	Leg. (1846)
	California	Gov. (1934) <sup>86</sup>	Partisan (1850)
	Kansas	Merit plan (1958)	Partisan (1861)
	Nebraska	Merit plan (1962) <sup>87</sup>	Partisan (1867)
	Colorado	Merit plan (1966)	Partisan (1876)
	South Dakota	Merit plan (1981) <sup>88</sup>	Partisan (1889)
	Wyoming	Merit plan (1973) <sup>89</sup>	Partisan (1890)
	Utah	Merit plan (1967) <sup>90</sup>	Partisan (1896)
	Oklahoma	Merit plan (1967)	Partisan (1907)
Arizona	Merit plan (1974)	Nonpartisan (1912)	

---

make use of special commissions to approve gubernatorial nominations. *Id.*

80. Maryland switched to partisan elections in 1851 and then nonpartisan elections in 1952. Hanssen, *supra* note 76, at 442-43 tbl.1.

81. Indiana switched to partisan elections in 1851. *Id.*

82. Illinois switched to partisan elections in 1848. *Id.*

83. MO. CONST. art. 5, § 25(c)(1). Missouri switched to partisan elections in 1850. Hanssen, *supra* note 76, at 442-43 tbl.1.

84. Florida switched to partisan elections in 1887. *Id.*

85. Iowa switched to partisan elections in 1857. *Id.*

86. California switched to nonpartisan elections in 1911. *Id.*

87. Nebraska switched to nonpartisan elections in 1913. *Id.*

88. South Dakota switched to nonpartisan elections in 1916. *Id.*

89. Wyoming switched to nonpartisan elections in 1915. *Id.*

90. Utah switched to nonpartisan elections in 1952. *Id.*

	New Mexico <sup>91</sup>	Gov. w/ comm'n. (1989)	Partisan (1912)
	Alaska	Merit plan	Merit plan (1959)
<b>Nonpartisan Election</b>	Georgia	Nonpartisan (1984) <sup>92</sup>	Leg. (1788)
	North Carolina	Nonpartisan (2002) <sup>93</sup>	Leg. (1789)
	Kentucky	Nonpartisan (1968) <sup>94</sup>	Gov. (1792)
	Tennessee	Gov. w/ comm'n. (1971) <sup>95</sup>	Leg. (1976)
	Ohio	Nonpartisan (1911) <sup>96</sup>	Leg. (1803)
	Mississippi	Nonpartisan (1994) <sup>97</sup>	Leg. (1817)
	Arkansas	Nonpartisan (2000) <sup>98</sup>	Leg. (1836)
	Michigan	Nonpartisan (1943) <sup>99</sup>	Gov. (1837)
	Wisconsin	Nonpartisan (1914)	Partisan (1848)
	Minnesota	Nonpartisan (1912)	Partisan (1958)
	Oregon	Nonpartisan (1932)	Partisan (1859)
	Nevada	Nonpartisan (1915)	Partisan (1864)
	Montana	Nonpartisan (1935)	Partisan (1889)
North Dakota	Nonpartisan (1910)	Partisan (1889)	

91. Once appointed, a judge must run in the next partisan election and, thereafter, be subject to retention or rejection on a nonpartisan ballot. N.M. CONST. art. 6, § 35.

92. Georgia switched to partisan elections in 1896. Hanssen, *supra* note 76, at 442-43 tbl.1.

93. N.C. GEN. STAT. § 163-322 (2009). North Carolina switched to partisan elections in 1868. Hanssen, *supra* note 76, at 442-43 tbl.1.

94. Kentucky switched to partisan elections in 1850. Hanssen, *supra* note 76, at 442-43 tbl.1.

95. TENN. CODE ANN. § 17-4-112 (2009). Tennessee switched to partisan elections in 1853 and nonpartisan elections in 1952. Hanssen, *supra* note 76, at 442-43 tbl.1. It first did away with partisan elections in favor of retention elections in 1971. Supreme court justices were removed from the plan in 1974 but added back in 1994. Brian T. Fitzpatrick, *Election As Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 481 (2008).

96. Ohio switched to partisan elections in 1851. Hanssen, *supra* note 76, at 442-43 tbl.1.

97. See Lenore L. Prather, *Judicial Selection: What Is Right for Mississippi?*, 21 MISS. C. L. REV. 199, 204 (2002). Mississippi switched to governor appointment in 1868 and partisan elections in 1914. Hanssen, *supra* note 76, at 442-43 tbl.1.

98. ARK. CODE ANN. § 7-10-102 (2010). Arkansas switched to partisan elections in 1874. See Hanssen, *supra* note 76, at 442-43 tbl.1.

99. Michigan switched to partisan elections in 1850. See Hanssen, *supra* note 76, at 442-43 tbl.1.

	Washington	Nonpartisan (1912)	Partisan (1889)
	Idaho	Nonpartisan (1935)	Partisan (1890)
<b>Partisan Election</b>	Louisiana	Partisan (1904) <sup>100</sup>	Gov. (1812)
	Alabama	Partisan (1867)	Leg. (1819)
	Texas	Partisan (1876)	Gov. (1845)
	West Virginia	Partisan	Partisan (1863)
<b>Governor</b>	Delaware	Gov. w/ leg. consent (1989)	Gov. (1787)
	New York	Gov. w/ comm'n. (1978) <sup>101</sup>	Gov. (1788)
	Maine	Gov.	Gov. (1820)
<b>Legislative Election</b>	South Carolina	Leg.	Leg. (1788)
	Vermont	Gov. w/ comm'n. (1984)	Leg. (1791)
<b>Legislative Appointment</b>	Connecticut	Gov. w/ comm'n. (1987) <sup>102</sup>	Leg. (1788)
	Virginia	Leg.	Leg. (1788)
<b>Judicial Nominating Committee</b>	Hawaii	Merit plan	Merit plan (1959)
<b>Judges serve until age 70</b>	New Jersey <sup>103</sup>	Gov.	Gov. (1787)
	New Hampshire	Gov.	Gov. (1788)
	Massachusetts	Gov.	Gov. (1788)
<b>Life Tenure</b>	Rhode Island	Leg. w/ comm'n.	Leg. (1790)

Key: Gov.=appointment by governor; Gov. w/ comm'n.=appointment by governor from list assembled by a nominating commission; Leg.=appointment by legislature; Merit plan=merit plan appointment; Nonpartisan=nonpartisan election; Partisan=partisan election

Note: In some cases of governor with commission, the legislature does the actual appointment of the person chosen by the governor from the names provided to him by the commission.

100. LA. CONST. art. V, §4; Am. Judicature Soc'y, Judicial Selection in the States, [www.judicialselection.us/judicial\\_selection/index.cfm?state=LA](http://www.judicialselection.us/judicial_selection/index.cfm?state=LA) (last visited Apr. 15, 2009).

101. New York switched to partisan elections in 1847. *See* Hanssen, *supra* note 76, at 442-43 tbl.1.

102. Connecticut switched to governor appointment in 1952. *Id.*

103. In New Jersey, justices serve an initial term of seven years. The governor then chooses whether to nominate them for tenure. If he does, and the nomination is confirmed by the senate, the justice may serve until age seventy with no additional retention requirements. N.J. CONST. art. 6, § 6.

Notwithstanding important differences among states, judicial selection and retention procedures often track larger historical trends.<sup>104</sup> Before 1832, all states made use of either legislative appointments, gubernatorial appointments, or shared legislative-gubernatorial appointments.<sup>105</sup> From 1846 to 1912, every state that entered the union made use of some type of electoral scheme (and some states switched from judicial appointments to elections).<sup>106</sup> Finally, starting around the early 1900s, bar organizations pushed for so-called merit plans—so that initial nominations would run through a nominating commission and retention decisions would be made through retention election (where the sitting justice runs unopposed, and will retain her seat unless a majority of voters oppose the retention).<sup>107</sup> From 1940 to 1989, twenty states embraced some version of the merit plan.<sup>108</sup>

Today, judicial elections figure into the appointment or retention of supreme court justices in thirty-eight states (around half of which are contested elections), and only one state constitution (Rhode Island) provides for life tenure.<sup>109</sup> Needless to say, state supreme court justices are accountable to voters and political parties in ways that federal court judges would find unimaginable.<sup>110</sup> This is especially true in southern states, where partisan

104. For an analysis of why some but not other states responded to these trends, see generally Hanssen, *supra* note 76. See also Lee Epstein et al., *Selecting Selection Systems*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS 192 (S.B. Burbank & Barry Friedman eds., 2002) (arguing that the design of judicial selection systems is tied to the political objectives of lawmakers).

105. Rather than support judicial independence, however, the first state constitutions “put state courts very much under the thumb of state legislatures,” specifying some legislative role in the appointment of judges and granting legislatures substantial power to reappoint or remove judges. Hanssen, *supra* note 76, at 441-45; see also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714 (1995).

106. Caleb Nelson, *A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190 (1993). Nelson provides a useful history of judicial selection systems in early America. See also Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1061 (2010) (noting that rise of judicial elections from 1844 to 1853 was intended to facilitate countermajoritarian judicial review of state practices).

107. See Hanssen, *supra* note 76, at 451-53.

108. *Id.* at 456.

109. See AM. JUDICATURE SOC’Y, *supra* note 77, at 4-11; see also tbl.1 (detailing retention schemes in all 50 states). Indeed, roughly ninety percent of state judges face some type of popular election. See Roy A. Schotland, *New Challenges to States’ Judicial Selection*, 95 GEO. L.J. 1077, 1105 app. 2 (2007); Shugerman, *supra* note 105, at 1063. On the ever-increasing trend for state judicial elections to be contested, see *infra* notes 165-81 and accompanying text.

110. It is also noteworthy that—in non-election states—appointed judges interested in legislative or gubernatorial reappointment also have incentive to act strategically (and, as such, take into account partisan factors associated with winning reappointment). See Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1589 (2009).

elections still dominate.<sup>111</sup> In Part II, I will consider the ramifications of all this, focusing both on whether state justices should take election/reappointment risks into account and which election/reappointment schemes, in fact, pose meaningful risks.

### 3. *The docket of state supreme courts*

State supreme courts have no choice but to actively participate in the policy process. Unlike federal courts, state courts are constrained in their ability to make use of the so-called “passive virtues,” that is, the use of state action limitations, justiciability barriers, and (for the Supreme Court) certiorari denials to steer clear of politically divisive issues.<sup>112</sup> Unlike federal courts, moreover, state courts are common law courts and, as such, have policy-making jurisdiction over a wide range of subjects.<sup>113</sup> Consequently, although most state supreme courts retain substantial discretion over which cases to hear,<sup>114</sup> state courts have fewer tools available to extricate themselves from the political thicket. Correspondingly, state courts have greater opportunities to play an activist role in shaping state policymaking—a fact not lost on interest groups whose campaign contributions and lobbying efforts impact judicial elections and some reappointment schemes.<sup>115</sup>

State practices vary considerably, especially with respect to state supreme

---

111. On regional differences, see Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 230 (1987); Hanssen, *supra* note 76, at 453-57. In addition to regional differences, state selection systems also track differences both between agricultural and industrial states and between densely populated and rural states. See Victor Eugene Flango & Craig R. Ducat, *What Difference Does Method of Judicial Selection Make?: Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 37-39 (1979).

112. The classic defense of this practice can be found in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986). For a discussion of the “passive virtues” and state courts, see Paul Brace, Melinda Gann Hall, & Laura Langer, *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265 (1999); Hershkoff, *supra* note 21; see also Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms*, in DUAL ENFORCEMENT OF CONSTITUTIONAL NORMS, *supra* note 46 (noting state court practices of extending constitutional rights to the private sector).

113. See Hans Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1256 (1978).

114. For an excellent (albeit slightly dated) overview of state court caseload, including state supreme court control over their dockets, see Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978). For additional discussion, see *infra* notes 116-21.

115. See Gibson, *supra* note 33 (linking increasing politicization of judicial election to state supreme court policymaking); Michael Solimine & Rafael Gely, *Federal and State Judicial Selection in an Interest Group Perspective*, 74 MO. L. REV. 531 (2009). For a defense of state court recognition of positive rights, see Hershkoff, *supra* note 31.

court authority to hear cases through grants of certiorari or to sua sponte remove a case from a lower state court.<sup>116</sup> The rule of thumb is that medium-sized and larger states with intermediate appeals courts have significant discretion to select cases for review; low-population states with no lower appeals courts have no discretion.<sup>117</sup> There are, however, a gazillion exceptions to this rule of thumb—so that substantial discretion is a far cry from the near plenary discretion that the U.S. Supreme Court has over which cases it will hear. Moreover, some state courts have the power to intervene in cases before there is a formal appeal. Consider, for example, state supreme court decisions establishing rights to same-sex marriage or civil unions. In Vermont, there is no intermediate appeals court and, consequently, the state supreme court had no choice but to hear the appeal; in New Jersey and Iowa, the state supreme courts are obligated to consider constitutional challenges to state law and<sup>118</sup> consequently, had no choice but to hear the appeals (although the Iowa Supreme Court has authority to hear appeals directly from a trial court—which they did in this case);<sup>119</sup> in Hawaii, California, and Massachusetts, the state supreme courts granted certiorari (although, in Massachusetts, the Court acted on a request for a direct review of a trial court decision); in Connecticut, the state supreme court sua sponte transferred the appeal from the appellate court to itself.<sup>120</sup>

State practices in same-sex marriage cases make clear that state supreme court discretion to use certiorari denials is highly variable, as is the power of state supreme courts to bypass intermediate courts of appeals. For courts that must hear all appeals and courts that cannot turn down constitutional challenges

---

116. The Court Statistics Project of the National Center for State Courts runs a useful website which identifies the mandatory and discretionary jurisdiction of each state supreme court. See Nat'l Ctr. for State Courts, Court Statistics Project [nscsconline.org/D\\_Research/Ct\\_Struct/Index.html](http://nscsconline.org/D_Research/Ct_Struct/Index.html) (last visited May 1, 2010). This website reveals considerable variations among states. It also reveals that many states have Byzantine systems—whereby, for example, some but not all civil and criminal cases are subject to either mandatory or discretionary review.

117. See Kagan, *supra* note 114, at 984-85. It is also noteworthy that the interest groups—most notably the American Judicature Society and American Bar Association—that pushed for merit selection/retention plans also pushed for state supreme court control over their dockets. *Id.* at 980-81. During the height of the Warren Court (the early 1960s), these interest groups “helped build a reform-minded climate of opinion,” spurring state lawmakers to approve of increasing supreme court discretion and, with it, emboldening state supreme courts to use docket control to identify cases that would allow them to speak more broadly about important legal questions. See *id.* at 981-84.

118. N.J. CONST. art. IV, § 2, cl. 2.

119. IOWA CODE ANN. § 602.4102 (West 2010).

120. See IOWA CODE § 602.4102 (2009); VT. STATE ANN. tit. 4, § 2 (2009); *In re Marriage Cases*, 183 P.3d 384, 405 (Cal. 2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 415 n.11 (Conn. 2008); *Baehr v. Lewin*, 852 P.2d 44, 52 (Haw. 1993); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 951 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 205 (N.J. 2006). For additional discussion, see *infra* note 267.

to state laws, there was no opportunity to opt out of this political thicket.<sup>121</sup> State courts, moreover, “undertake a wider range of functions than do federal courts in terms of advice-giving, administration, and policy-making.”<sup>122</sup> The constitutions of eight states and statutes in three others authorize governors or legislators to seek advisory opinions (with some permitting and others mandating issuance, subject, of course, to a range of state-specific requirements).<sup>123</sup> And while some state courts adhere to U.S. Supreme Court justiciability doctrine, several states veer from it in one or another respect.<sup>124</sup> For example, state courts frequently entertain “disputes between state or local officials when federal courts would dismiss comparable cases for lack of ‘standing’ or ‘ripeness.’”<sup>125</sup> Likewise, lawmakers may challenge gubernatorial vetoes and, more generally, state courts often resolve disputes between lawmakers and executive officials.<sup>126</sup>

State courts, moreover, are not always bound by state action limitations and, more generally, state courts play an active policymaking role in ways that would be unimaginable for federal courts. Some state courts adhere to U.S. Supreme Court norms governing state action and others do not—reflecting, in part, variations in state constitutions themselves (some but not all of which contain state action limitations).<sup>127</sup> More fundamentally, “while federal constitutional law is cabined by the text of the Constitution, state courts move seamlessly between the common law and state constitutional law, the shifting

---

121. Another variation in state court practices is intended to limit judicial review of state government decision-making, namely, the requirement (now valid in only North Dakota and Nebraska) that a super-majority of justices support the exercise of judicial review. See John Dinan, *Foreword: Court-Constraining Constitutional Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 985-86 (2007). For additional discussion of state supreme court jurisdiction (including the obligation of many state courts to hear constitutional challenges), see Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. REV. 1451, 1457 (2009).

122. Hershkoff, *supra* note 21, at 1841.

123. *Id.* at 1845-46; Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207, 254-56 (1997) (noting, for example, that some states mandate advisory opinions only on death penalty issues, some mandate advisory opinions on constitutional issues, and some specify that the constitutional question affect the duties of the requesting authority).

124. See Topf, *supra* note 123, at 254-56.

125. Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Difference!*, 46 WM. & MARY L. REV. 1273, 1275 (2005); see also Christine M. Durham, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1605 (2001) (noting that several state constitutions contain provisions specifically providing for judicial review of legislative and gubernatorial action).

126. See Linde, *supra* note 125, at 1275. Several state courts often depart from the federal court model when deciding whether a dispute is moot or whether a case presents political questions. See Hershkoff, *supra* note 21, at 1859-67.

127. See John Devlin, *Constructing an Alternative to “State Action” as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819, 822-23 (1990).



ground at times barely perceptible.”<sup>128</sup> For example, state courts are sometimes called upon to adapt constitutional norms in nongovernmental settings. Private and public law may overlap (as in, for example, tort actions grounded in privacy rights or free speech protections that may limit the rights of property owners) so that state courts elaborate on constitutional values in exercising their common law powers.<sup>129</sup>

State court policymaking is also fueled by state constitutional provisions providing for positive rights. Twelve state constitutions guarantee welfare rights, and other state constitutions include affirmative rights to education and just compensation.<sup>130</sup> And while state courts are reluctant to expansively interpret such provisions,<sup>131</sup> the existence of litigation over their reach places state courts in the middle of highly contested policy disputes. Furthermore, “[c]ontrary to the limited, interstitial role played by the federal courts,” state courts often serve as “principal lawgivers within their jurisdictions through the evolution and application of the common law.”<sup>132</sup> State judges, for example, set policy in highly charged fields like tort law.<sup>133</sup>

#### 4. *The state character of state constitutions*

Up to this point, I have focused my attention on differences between state constitutions and the Federal Constitution and the varied character of state constitutions. In so doing, I have called attention to the need for state supreme courts to see their constitutional schemes as fundamentally different from the federal system and from each other. To a much lesser extent, I have suggested that, notwithstanding these variances, there is a great deal that state constitutions share both with each other and the Federal Constitution. For example, there are significant regional differences: direct democracy states are concentrated in the West; contested elections typically take place in the South and Midwest; and minimalist constitutions that largely follow the federal model

---

128. Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 15 (1995) (footnote omitted).

129. For a discussion of these examples and their broader ramifications, see Hershkoff, *supra* note 21.

130. See Hershkoff, *supra* note 31, at 1135. Indeed, as Helen Hershkoff notes in her contribution to this Symposium, “every state constitution . . . contains some explicit commitment to positive rights.” Helen Hershkoff, “*Just Words*”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1523 (2010).

131. See Hershkoff, *supra* note 31, at 1182 (identifying state protections of positive rights and expressing disappointment in the failure of state courts to give significant independent meaning to positive rights).

132. Sager, *supra* note 113, at 1256.

133. See Hans A. Linde, *Courts and Torts: “Public Policy” Without Public Politics?*, 28 VAL. U. L. REV. 821 (1994); see also Kaye, *supra* note 128, at 7 (noting some common law powers of state courts).

are typically in New England.<sup>134</sup> Also, state constitution writing is very much tied to historical moments; for example, New England constitutions resemble the Federal Constitution because they were written around the same time, and constitution writing during the Progressive era reflected Progressive values.<sup>135</sup> For the balance of this Part, I want to connect these dots in ways that will frame the rest of this Article. In particular, I want to highlight why I think that state supreme courts can learn from each other while, at the same time, maintaining their autonomy as independent sovereigns with somewhat competing constitutional traditions.

Let me start by distinguishing my project from the extant literature on state constitutionalism, particularly the divide over whether state constitutions are meaningfully tied to a state's character or tradition. Those who see state constitutionalism as a distinctive enterprise, most notably state supreme court justices, embrace "the diversity that federalism allows," emphasize that states "espouse cultural values distinctively their own," and call attention to "the vast differences in culture, politics, experience, education, and economic status" between states and the framers of the U.S. Constitution.<sup>136</sup> Critics of this view, while recognizing basic differences among state constitutional texts, argue that state constitutions do not reflect a particular state's character and that, in fact, we merely have fifty highly varied and almost random collections of constitutional provisions.<sup>137</sup> More than that, critics contend that the best explanation for varying state practices is the simple fact that state constitutions

---

134. See Miller, *supra* note 58, at 37 (showing that all western states are direct democracy states and that nearly all direct democracy states are west of the Mississippi River); *supra* tbl.1 (highlighting judicial selection systems, including the prevalence of contested elections in the South and Midwest); *supra* notes 68-70 (discussing revolutionary-era state constitutions, many of which were in New England); see also Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835, 839-44 (1997) (tracking regional patterns among state constitutional provisions and state supreme court references to other state practices).

135. See *supra* notes 70-73.

136. Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1 EMERGING ISSUES ST. CONST. L. 17, 19 (1988); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 423 (1987); Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 932 (1993); Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239, 244 (Bradley D. McGraw ed., 1985); see also Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L. J. 951, 966 (1982) (arguing that "differences in our state constitutions are not accidents of draftsmanship . . . [but rather] reflect differences in our traditions").

137. The most prominent critic of state-based constitutionalism is Jim Gardner, whose work has prompted some of the defenses of state-based constitutionalism cited above. Two exemplary pieces are Gardner, *supra* note 23 and Gardner, *supra* note 30. Critiques of Gardner include Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1160-63 (1993) and Linde, *supra* note 136. For additional commentary on Gardner, see *Fifth Annual Issue on State Constitutional Law*, 24 RUTGERS L.J. 907 (1993).

were written at different moments in time and, as such, varying state practices have a nationalistic cast, reflecting political trends that cut across all states.<sup>138</sup>

For reasons I will now explain, there is a way to simultaneously embrace the seemingly competing ideas that state constitutions are both reflections of larger national political moments and fundamentally distinctive. This can be done by shifting the focus of the inquiry away from the methodological question of how best to interpret state constitutions and towards the implementation of a state court's preferred doctrine. In doing so, the debate over whether state constitutionalism is truly distinctive gives way to obvious differences in state constitutional structures. For state supreme court justices who care about the consequences of their decisions (whether personal consequences like reelection or policy consequences concerning the implementation of their rulings), these differences in state systems are hugely important. At the same time, just as states look to each other and to larger national trends in sorting out the details of their constitutional systems, state supreme court justices can look to the experiences of other states in assessing these consequences. On high-salience issues like the death penalty, same-sex marriage, and the restructuring of school finance, for example, the experiences of one state may inform another state supreme court of potential implementation or backlash risks.<sup>139</sup>

By calling attention to how state constitutional systems are both different from each other and connected to national trends, this Part lays the groundwork for a state-centered approach to state constitutionalism which, at the same time, takes into account the experiences of other states and larger national trends. Parts II and III of this Article will carry this theme forward. In Part II, I will discuss whether state supreme courts have the capacity to assess consequences and identify which consequences state supreme court justices might deem relevant to their decision-making. In Part III, I will make the lessons of Part II more concrete, focusing on the on-the-ground facts of same-sex marriage.

## II. DO STATE SUPREME COURT JUSTICES TAKE CONSEQUENCES INTO ACCOUNT?

State supreme court rulings sometimes trigger a backlash comprised of “[i]ntense and sustained public disapproval[] accompanied by aggressive steps to resist that ruling and to remove its legal force.”<sup>140</sup> That backlash might occur

---

138. This claim is widely shared. See Friedman, *supra* note 48; Nelson, *supra* note 106; Rodriguez, *supra* note 46; see also Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389 (1998) (noting the fluidity of state constitutions and, in doing so, rejecting the idea that state constitutions reflect a distinctive state culture).

139. Parts II and III will provide additional details of the political dynamics surrounding state supreme court decision-making.

140. Cass R. Sunstein, *Backlash's Travels*, 42 HARV. C.R.-C.L. L. REV. 435, 435

within the state (for example, in the nullification of state supreme court recognition of same-sex marriage in Hawaii and California, and the ouster of state supreme court justices who voted against the death penalty in California and Tennessee).<sup>141</sup> That backlash might occur in other states or even in the federal government (as in the nation-wide campaign against same-sex marriage that followed the rulings of the Hawaii and Massachusetts Supreme Courts).<sup>142</sup> Two questions remain: (1) Do state justices attend to public outrage?; and (2) Do they have the capacity to assess either in-state or nationwide consequences? In answering these questions, we must pay attention to the ways in which state constitutional systems allow voters and/or elected officials to resist state court rulings, the capacity of state supreme court justices to assess consequences, and the views of state supreme court justices on which, if any, consequences warrant their engagement in strategic behavior (instead of simply their votes for their preferred legal policy positions).

This Part will address these issues and, in doing so, provide a preliminary answer to the question of whether state courts take consequences into account.<sup>143</sup> In doing so, I will argue that both backlash risks and the capacity of state justices to assess in-state consequences vary dramatically from state to state—thus reflecting dramatic differences in state constitutional systems. At the same time, justices in most states have the incentive and capacity to take into account in-state backlash risks. With respect to out-of-state backlash, however, state supreme court justices do not have the capacity to assess backlash risks across the nation. Further complicating matters, different justices will value different consequences in varying ways—some but not others will care about national backlash; some but not others will care about a constitutional amendment nullifying their ruling; and some but not others will care about their reputation with state officials; academic and media elites; and bar and other interest groups.

The point of the discussion above is that state courts cannot be lumped together; instead, there are different state systems, different degrees of knowledge about those systems, and different preferences among justices in each of those systems. Notwithstanding these variations, state supreme courts can look to the experiences of other states in understanding the risks of some type of in-state backlash. When justices in other states lose reelection because of their rulings on the death penalty or when the decisions of other state courts

---

(2007).

141. See *infra* notes 188-91 (addressing judicial elections); *infra* notes 287-90 (addressing Hawaii); *infra* notes 324-26 (addressing California).

142. See *supra* notes 1-13.

143. The consequences on which I focus are tied to the judicial role vis-à-vis other actors, including elected officials, the public, and interest groups. This broader issue of pragmatism (i.e., whether court rulings serve the public good) is beyond the scope of this Article. For additional discussion of judicial pragmatism, see generally RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

on same-sex marriage are overridden by constitutional amendments, there is good reason for a justice to think about whether there are comparable risks in her state.

My analysis will proceed in three parts. First, I will provide a quick tour of the dominant political science models governing U.S. Supreme Court decision-making. Because there is no comparable literature on state supreme court decision-making,<sup>144</sup> I will look to the U.S. Supreme Court literature to identify the types of questions that must be asked in assessing whether state supreme courts are likely to take consequences into account. Second, I will discuss the types of risks that state supreme courts face, the ability of state justices to assess these risks, and the competing motivations of state justices when weighing these risks. Third, I will wrap up by highlighting (once again) that state court systems are fundamentally different from each other but that state supreme courts can nonetheless better assess risks by looking to the experiences of other states.

### A. *The Political Science Models*

The dominant political science models posit that U.S. Supreme Court Justices are principally interested in pursuing favored policies. The attitudinal model assumes that judges vote “reflexively in each case; that is, they cast their votes based solely on their individual reactions to the facts and legal issues presented, rather than by considering, in addition, how other judges or institutions are likely to react to the decision.”<sup>145</sup> A second model, the strategic model, contends that judges account for the reactions of others when advancing their legal or policy preferences.<sup>146</sup> A Supreme Court Justice, for example, might take implementation concerns, including potential resistance from either elected officials or the American people, into account.<sup>147</sup> A third model, the new institutionalism, emphasizes that Supreme Court Justices strategically pursue both “institutional” and “ideological” preferences.<sup>148</sup> Accordingly, the

---

144. Although there is an extensive literature on the impact of judicial elections on state court decision-making, there is no literature that discusses generally the various types of consequences that state courts might confront, nor is there a literature that meaningfully assesses the capacity of state supreme court justices to assess consequences.

145. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 591 (2003). See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

146. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 12 (1998) (explaining that “[t]o say that a justice acts strategically is to say that she realizes that her success or failure depends on the preferences of other actors and the actions she expects them to take”).

147. See *id.* (explaining that the Supreme Court considers possible elected government backlash); William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169 (1996) (explaining that the Court accounts for public opinion).

148. Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political*

Court cannot lose sight of its responsibility to “maintain a distinctive and valued presence in the political system” by advancing some “vision of the special functions that [it] should perform.”<sup>149</sup> In recent years, some legal scholars and political scientists have challenged the premise of these models, contending that Justices are not simply single-minded maximizers of legal and/or policy preferences. Employing social psychology literature and pointing to the fundamental desire to be liked or respected by other people, these scholars claim that Supreme Court Justices—while very much interested in the pursuit of favored policies—are also interested in winning favor with audiences they care about (including other judges, bar groups, legal academics, and media elites).<sup>150</sup>

The deep divisions between political science models largely wash away when these models are transported to the state supreme courts. In particular, all of these models would support state supreme court justices paying attention to certain types of consequences. Consider, for example, the divide between the strategic and attitudinal models over whether backlash risks ever warrant the casting of votes that deviate from the Justices’ sincere ideological attitudes and values. In arguing against consequential decision-making, the attitudinal model assumes that the Court controls its caseload, that its members are life tenured and therefore lack electoral or political accountability, that elected officials are unlikely to overrule Court decisions (statutory as well as constitutional), and that the Justices are often uncertain about legislative preferences.<sup>151</sup> Most state supreme courts, however, lack the political insulation of the U.S. Supreme Court. As discussed in Part I, thirty-eight states have some form of judicial elections, nearly all states have significantly less docket control than the U.S. Supreme Court, and eighteen states give voters the right to amend state constitutions through the initiative process. Furthermore, the relationship between state courts and lawmakers is completely different than at the federal level. Against this backdrop, even under the attitudinal model, state supreme

---

*Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 783 (1996).

149. Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 85 (Cornell W. Clayton & Howard Gillman eds., 1999). More generally, the new institutionalism thinks that Supreme Court Justices care about legal as well as policy goals. See generally SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES, *supra*.

150. For two prominent examples of scholarship addressing the psychological motivations of Supreme Court Justices and, in doing so, critiquing the dominant political science models, see LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 9-24 (2006); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 615-17 (2000).

151. See SEGAL & SPAETH, *supra* note 145, at 92-93; Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 42 (1997). Indeed, Segal and Spaeth recognize that “the absence of these factors may hinder the personal policy-making capabilities of lower court judges or judges in other political systems.” SEGAL & SPAETH, *supra* note 145, at 92-93.

court justices “who wish to see their personal preferences translated into public policy” will often have incentive to take into account the possibility of legislative or voter backlash (especially justices in states subject to popular election).<sup>152</sup>

The prospect of public outrage is also salient to the new institutionalist and social psychology models. Lacking the power of the purse and the sword, New Institutionalists emphasize that a judge’s power “rests on the willingness of the public, and the political actors accountable to it, to respect his independence and the decrees of the court.”<sup>153</sup> Under this view, “[i]f the Court is concerned about its own place in the constitutional order, and wants to maintain its legitimacy and power, it might take account of outrage as a method of self-preservation.”<sup>154</sup> The New Institutionalists make this point in the context of the politically insulated U.S. Supreme Court, a court whose legitimacy is rarely challenged by the public or elected officials.<sup>155</sup> Needless to say, whatever one thinks of the saliency of this claim as applied to the U.S. Supreme Court,<sup>156</sup> the vast majority of state supreme courts lack similar protections and are far more vulnerable to challenges to their legitimacy.<sup>157</sup>

By emphasizing that supreme court justices have both psychological as well as policy motivations, the social psychology model anticipates that judges

152. Paul Brace, Melinda Gann Hall & Laura Langer, *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265, 1271 (1999) (arguing that political scientists should assume that state court justices are “rational, utility maximizing individuals”). For additional discussion, see *infra* notes 192-97.

153. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 261 (2005).

154. Sunstein, *supra* note 19, at 172.

155. On widespread support for the Supreme Court’s institutional legitimacy, see Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 650-60 (1992); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 358-59 (2003). On Congress’s support for the Court, see Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337 (2006).

156. Cass Sunstein, while noting legitimacy concerns, think that these risks are only a small part of the picture because the Court’s authority has proved stable over time. Sunstein, *supra* note 19, at 172; see also SEGAL & SPAETH, *supra* note 145, at 424-29.

157. Most visibly, judges in thirty-eight states are subject to some type of election scheme. Some of these schemes involve contested elections and, with them, interest group funding and negative campaigning. See Gibson, *supra* note 33, at 59-62. Empirical evidence about such campaigns suggest that a reservoir of good will remains that state supreme courts enjoy but that state court justices have good reason to be concerned about judicial elections damaging their courts’ legitimacies. See *id.* at 72; James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest and Judicial Impartiality: Can the Legitimacy of Courts be Rescued by Recusals?* (CELS 2009 4th Annual Conference on Empirical Legal Studies Paper, 2009) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1428723](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428723). For one example of state justices expressly raising legitimacy concerns in the context of fundraising for judicial elections, see *infra* note 197. For a sustained analysis of the relationship between judicial elections and state court legitimacy, see David Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008).

think about consequences. For politically insulated U.S. Supreme Court Justices, there is reason to think that Justices care about their standing with fellow jurists, media and academic elites, and interest groups who share their values.<sup>158</sup> Most state supreme court justices are entangled with voters and elected officials and, consequently, have much different points of reference than U.S. Supreme Court Justices. For reasons that I will soon discuss,<sup>159</sup> the political and social contacts of state supreme court justices shape both their ability to assess consequences and their interest in taking consequences into account.

State courts are far more vulnerable to political influence than are federal courts—so much so that all political science models used to describe supreme court decision-making anticipate that state supreme court justices would take consequences into account.<sup>160</sup> Differences between state systems, however, suggest that there will be significant variance in how consequences are taken into account. Differences in the preferences of state supreme court justices (e.g., variations in the intensity of their commitment to a particular policy outcome or competing conceptions of the judicial role) also point to variances in how consequences will be weighed. For the balance of this Part, I will consider the ways that consequential analysis may play out in different states.

## B. *Consequentialism and State Supreme Courts*

In understanding how state supreme court justices will take consequences into account, I will now look at the varying incentives and capacities of state supreme court justices. This discussion will highlight why most state justices have the incentive and capacity to take account of consequences. It will also underscore fundamental differences among state systems and call attention to the ways that state courts can learn from each other.

### 1. *Incentives*

All political science models assume that the primary motivation of each U.S. Supreme Court Justice is the advancement of that Justice's preferred legal policy vision. When transferred to the state supreme court context, state supreme court justices would be most concerned about: (1) removal from office; (2) overturning of their decisions through a constitutional amendment or

---

158. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, GEO. L. J. (forthcoming 2010).

159. See *infra* notes 161-210 and accompanying text.

160. This Article takes no position on which political science model best explains judicial behavior. Since all models support some form of consequential analysis by state supreme court justices (with the possible exception of the few states whose courts are politically insulated), the balance of this Part will focus on identifying consequences that may be salient to the various political science models.



legislative enactment; and (3) lack of enforcement of their opinions due to lack of political will.<sup>161</sup> Any of these three consequences of their decisions might spill over to cast doubt on the court's legitimacy and thus further undermine the court's power to bind elected officials or voters through judicial edicts.

The most draconian of these consequences is removal from office. Public officials in electoral settings, even those with so-called safe seats, often fear electoral defeat.<sup>162</sup> Public officials subject to reappointment likewise take steps to curry favor with the reappointing body.<sup>163</sup> In other words, "like all policymakers in a democracy, [state supreme court justices] must retain their posts in order to achieve their policy goals."<sup>164</sup>

Retention schemes, as already noted, vary dramatically from state to state, as does the term length for state supreme court justices.<sup>165</sup> In four states, supreme court justices either have life tenure or serve until the age of seventy;<sup>166</sup> in all other states, justices are subject to some type of regular retention decision—principally elections (thirty-eight states) but also gubernatorial (three states), legislative (four states), or judicial (one state) reappointment.<sup>167</sup> In assessing potential backlash risks for their decisions, state supreme court justices can look to statistics about the risks of losing their seats under varying retention schemes, to data about the changing nature of judicial retention politics, and, of course, to their own experiences and the experiences of their colleagues in seeking reappointment or reelection. This data reveals that the face of judicial elections has been transformed since the mid-1980s. Before that time, 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>168</sup> Over the past twenty-five years (and especially in the

161. This list is extrapolated from arguments set forth in Sunstein, *supra* note 19, at 171-72.

162. This is one of the foundational assumptions of political scientists who study congressional motivations. See MORRIS P. FIORINA, REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES (1974); JOHN KINGDON, CONGRESSMEN'S VOTING DECISIONS (2d ed. 1981). 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).

163. See Shepherd, *supra* note 110.

164. 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).

165. See *supra* notes 76-111 and accompanying text.

166. Those states are Massachusetts, New Hampshire, Rhode Island, and New Jersey (although in New Jersey, justices must be reappointed by the governor once in order to serve a term that ends when they turn seventy years old). See *supra* tbl.1.

167. See *id.*

168. Shepherd, *supra* note 110, at 1602 (quoting Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 Fla. St. U. L. Rev. 1, 19 (1995), and Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1079-80 (2007)) (alterations in original).

past several years), “[t]he confluence of broadened freedom for [judicial candidates] to speak out on issues, the increasing importance of state judicial policies, and the infusion of money into judicial campaigns have produced what may be described as the ‘Perfect Storm’ of judicial elections.”<sup>169</sup>

Not surprisingly, justices in states with partisan retention schemes are more vulnerable to losing their seats than are justices in other states. In 2008, for example, there were fifty-nine elections for state supreme courts—twenty retention elections (with no opposing candidate), twenty-six contested elections, and thirteen uncontested elections. All justices in retention elections retained their seats, while six of twenty-six (or twenty-three percent) lost their seats in contested elections.<sup>170</sup> This 2008 retention election data—suggesting extremely limited election risks—conforms with past practices. From 1990-2000, three of 177 state supreme court justices (or 1.7 percent) were defeated in retention elections,<sup>171</sup> and 1964-2006 data suggests that judges in retention election states lose about one percent of the time.<sup>172</sup> In sharp contrast, 2008 data reveals a dramatic spike in electoral defeats in contested races, especially in nonpartisan elections (where there is no party identification on the ballot). From 1990 to 2000, 8.3 percent (compared to twenty-three percent in 2008) of justices lost their seats in contested elections. Incumbent state supreme court justices in statewide partisan elections were ousted in twenty-nine percent of all 1990-2000 contests; justices seeking reelection in nonpartisan contests won ninety-nine percent of 1990-2000 contests.<sup>173</sup> In 2008, four (and arguably five) of the six state supreme court justices who lost their seats came from states with nonpartisan elections.<sup>174</sup>

Combusting with reelection risks, state supreme court justices are under increasing pressure to raise significant funds to run for reelection.<sup>175</sup> In part,

---

169. Gibson, *supra* note 33, at 60.

170. David Rottman, *Judicial Elections in 2008*, in COUNCIL OF STATE GOV'TS, *supra* note 51, at 290, 303-04. If one accounts for the thirteen uncontested elections, six of thirty-nine justices (or fifteen percent) lost their seats in states that allow for contested elections.

171. Chris W. Bonneau, *Electoral Verdicts: Incumbent Defeats in State Supreme Court Elections*, 33 AM. POL. RES. 818, 825 (2005).

172. See Larry Aspin, *Judicial Retention Election Trends: 1964-2006*, 90 JUDICATURE 208, 210 (2007); see also Savchak & Barghothi, *supra* note 164, at 395 (noting that, from 1964 to 1990, only fifty-two of 4,588 judges lost retention elections).

173. Bonneau, *supra* note 171, at 834.

174. Rottman, *supra* note 170, at 303-04. One of the defeated justices hailed from Michigan, a state in which candidates are nominated by political parties but the voting ballot does not specify party affiliation.

175. See generally RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS (Matthew J. Streb ed., 2007). Furthermore, because increased spending on judicial elections leads to higher levels of voting, there is good reason to think that state justices will feel ever-increasing pressure to raise funds to stave off election challenges. See Melinda Gann Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 AM. J. POL. SCI. 457 (2008).

increasing fundraising is tied to the simple fact that there are more contested elections than ever before. In 1984, two-thirds of state supreme court justices ran unopposed in nonpartisan elections.<sup>176</sup> By 2000, three-fourths of nonpartisan elections were contested.<sup>177</sup> For partisan races, the number of justices running unopposed declined from twenty-six percent in 1988 to five percent in 2000.<sup>178</sup> Increasing fundraising is also tied to the fact that state supreme court races increasingly feature attack ads and significant interest group involvement.<sup>179</sup> For contested state supreme court races (partisan and nonpartisan elections), the average total expenditure in 2000 was \$600,000, up from \$400,000 in 1990.<sup>180</sup> In partisan races, the average total was \$1.5 million.<sup>181</sup> By 2004, \$24 million was spent on state supreme court races, an increase of almost twenty percent from 2000.<sup>182</sup> This trend has continued—with noticeable spikes of both negative ads and television ads in 2006 races.<sup>183</sup> Pro-business interest groups are at the center of the change, now accounting for approximately forty-five percent of all fundraising and ninety percent of special interest television advertising.<sup>184</sup>

Punctuating these national trends, state supreme court justices have either experienced or witnessed judicial elections that resulted in the outright transformation of entire state supreme courts. On high salience issues

176. See Joanna Shepherd, *The Business of Judicial Elections* 9-11 (Oct. 2009) (unpublished manuscript, on file with author) (citing Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21 (2004) and Chris W. Bonneau & Melinda Gann Hall, *Predicting Challengers in State Supreme Court Elections: Context and the Politics of Institutional Design*, 56 POL. RES. Q. 337 (2003)).

177. See Shepherd, *supra* note 110, at 1602.

178. *Id.*

179. For an important series of news stories calling attention to increasing politicization of state supreme court races, see Adam Liptak, *Judges Mix with Politics*, N.Y. TIMES, Feb. 22, 2003, at B1; Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at 11; Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at A1.

180. 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, 566 (2008).

181. Shepherd, *supra* note 110, at 1603.

182. Gibson, *supra* note 33, at 60.

183. See JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006*, at 8 (2006), available at [brennan.3cdn.net/49c18b6cb18960b2f9\\_z6m62gwji.pdf](http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf) (explaining negative ads); Rottman, *supra* note 170, at 290 (explaining spending on television ads). The intensity and partisanship of judicial elections was spurred on by numerous developments, most notably the increasing recognition of the importance of state supreme courts and a 2002 U.S. Supreme Court decision, *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), recognizing that candidates for judicial elections have free speech rights to make policy statements during their campaigns. See Gibson, *supra* note 33, at 59.

184. SAMPLE ET AL., *supra* note 183, at 18-19. 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).

(especially abortion, the death penalty, and search and seizure),<sup>185</sup> justices are well aware that opposition groups might target them for politically unpopular rulings and often take electoral risks into account.<sup>186</sup> Indeed, governors have publicly denounced justices (even those justices whom they appointed themselves) for their votes in capital cases and have pushed for their ouster in retention elections.<sup>187</sup> In 1986, three California Supreme Court justices lost retention elections because of their votes in opposition to the death penalty.<sup>188</sup> Likewise, opposition to Texas Supreme Court tort reform decisions prompted a backlash in the late 1980s that resulted in defeat—in partisan elections—of plaintiff-friendly justices.<sup>189</sup> In 2008, three Mississippi Supreme Court justices lost nonpartisan elections.<sup>190</sup> Other states in which justices were ousted because of their votes include Idaho, Tennessee, and Nevada.<sup>191</sup>

---

185. Campaigns to unseat incumbent judges have focused on a broad range of issues, including crime control, abortion, victims' rights, tort reform, homosexual rights, school funding, and abortion. See Charles Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 49-50 (2003). States that have had contested elections over these issues include Mississippi, Nebraska, Tennessee, Wisconsin, Illinois, California, Georgia, Idaho, Alabama, Michigan, Pennsylvania, and Texas. See *id.*

186. See 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, 760-65, 784-92 (1995) (giving multiple examples of opposition groups targeting sitting justices for politically unpopular death penalty votes); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1120 (1987) [hereinafter Hall, *Constituent Influence*] (noting that state supreme court justices perceive death penalty cases as the most likely to be reported on by the media and the most focused on by opponents in judicial elections); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 431 (1992) [hereinafter Hall, *Electoral Politics*] (showing the statistically significant relationship between judicial election systems and the willingness of liberal justices to vote with conservative majority on death issues); see also Brace et. al, *supra* note 152, at 1291-94 (noting that justices subject to competitive election are less likely to hear abortion cases and more likely to uphold state regulations).

187. Justices themselves admit to engaging in strategic behavior in capital cases. See Bright & Keenan, *supra* note 186, at 787, 799.

188. See Croley, *supra* note 105, at 737. After the replacement of these three justices, the California Supreme Court became known for its affirmance in capital cases with a five-year affirmance rate of ninety-seven percent—one of the highest in the nation. See Bright & Keenan, *supra* note 186, at 761. By way of contrast, the Massachusetts Supreme Judicial Court ignored a voter-approved constitutional amendment to reinstate the death penalty (after the state supreme court found that the state constitution forbids the death penalty). Justices on the Massachusetts court could pursue their preferred legal policy position because they are not subject to any type of reelection or reappointment. For additional discussion of the Massachusetts court, see *infra* notes 300, 303.

189. KYLE CHEEK & ANTHONY CHAMPAGNE, JUDICIAL POLITICS IN TEXAS: PARTISANSHIP, MONEY, AND POLITICS IN STATE COURTS 40-43 (2005).

190. COUNCIL OF STATE GOV'TS, *supra* note 51, at 286 (2009); Chandler Clay, *What a Year for Elections*, MISS. BUS. J., Dec. 22, 2008, at 14.

191. See Bronson D. Bills, *A Penny for the Court's Thoughts? The High Price of Judicial Elections*, 3 NW. J.L. & SOC. POL'Y 29, 32 (2008) (discussing 2006 defeat of Nevada Supreme Court Justice Nancy Becker due to her vote in a civil tax case); Steven B. Bright,

There is ample empirical and anecdotal evidence demonstrating that justices, “regardless of how safe their positions are[,] . . . often fear voters.”<sup>192</sup> Consider, for example, the following statements by state supreme court justices: Former California Supreme Court Justice Otto Kaus remarked 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>193</sup> On criminal justice issues, justices on both the Georgia and Louisiana Supreme Court admitted to engaging in strategic behavior to stave off electoral defeat. The Louisiana justice “[d[id] not dissent in death penalty cases against an opinion of the court to affirm a defendant’s conviction and sentence, expressly because of a perceived voter sanction, in spite of his deeply felt personal preferences to the contrary.”<sup>194</sup> The Georgia justice, after admitting to overlooking errors in criminal cases and leaving it to the federal courts to remedy those mistakes through habeas corpus petitions, remarked that federal judges “have lifetime appointments. Let them make the hard decisions.”<sup>195</sup> Perhaps more telling, 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>196</sup> a coalition of twenty-seven former chief

---

*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 her vote in a capital case); Schotland, *supra* note 109, at 883-84 (discussing 2000 defeat of Idaho Supreme Court Justice Cathy Silak due to her decision in an environmental law case). In addition to electoral defeats, some state justices have been thwarted in their efforts to seek federal appellate court nominations because of controversial votes cast on death penalty cases. See Robyn Blumner, *Dole’s Slap at the ‘Purest Jurist,’* ST. PETERSBURG TIMES, Apr. 28, 1996, at 1D (discussing Sen. Bob Dole’s attack on Clinton’s appointment of Rosemary Barkett, former Chief Justice of the Florida Supreme Court and current Eleventh Circuit Court of Appeals Judge); Bright, *supra*, at 315-17, 319 (discussing attack ads and resistance to Barkett for her dissent in one death penalty decision out of over 3000 opinions during her eight years on the Florida Supreme Court).

192. Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 488 (1995) (listing studies); see also DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY 130 (1995) (discussing way in which selection methods “significantly affect judicial policy”); Melinda Gann Hall, *Competition as Accountability in State Supreme Court Elections*, in RUNNING FOR JUDGE, *supra* note 175, at 167 (noting that justices subject to reelection are risk-averse); Valerie Hoekstra, *Competing Constraints: State Court Responses to Supreme Court Decisions on Legislation on Wages and Hours*, 58 POL. RES. Q. 317 (2005) (showing that justices set aside policy preferences in order to maintain their seats); Joanna Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169, 175 (2009) (listing studies of the effect of retention politics on judges’ decisions).

193. Paul Reiding, *The Politics of Judging*, 73 A.B.A. J. 52, 58 (1987).

194. Hall, *Constituent Influence*, *supra* note 186, at 1120.

195. Bright & Keenan, *supra* note 186, at 799.

196. 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

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>197</sup>

Empirical studies likewise support the linkage between judicial elections (including fundraising) and state supreme court decision-making. Not surprisingly, the strongest results were found when analyzing justices facing partisan reelections.<sup>198</sup> This is especially true of justices rendering decisions near the time of an election.<sup>199</sup> Elected justices, moreover, are less prone to dissent in cases where their views vary from voter preferences.<sup>200</sup> Indeed, recognizing the increasing need of raising campaign funds, elected justices (especially in states with contested elections) will often vote with business and other interest groups who help fund their reelection efforts.<sup>201</sup> Finally, even state justices who are subject to reappointment (not reelection) adjust their

---

to 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).

197. Brief for Twenty-seven Former Chief Justices as Amici Curiae in Support of Petitioners at 6, *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.* A competing brief was filed by ten current and former state court justices. That brief focused on the presumption of judicial integrity. Brief for Ten Current and Former Chief Justices and Justices as Amici Curiae in Support of Respondent, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22).

198. Shepherd, *supra* note 192, at 188.

199. See Savchak & Barghothi, *supra* note 164, at 400, 405-06.

200. Hall, *Constituent Influence*, *supra* note 186, at 1122-23; Hall, *Electoral Politics*, *supra* note 186, at 438-39 (noting that liberal justices do not dissent in death cases when reelection looms or when their most recent electoral victory was by a narrow margin).

201. See Shepherd, *supra* note 176, at 19-21. For other studies demonstrating a linkage between campaign contributions and state supreme court decision-making, see Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL’Y Q. 281 (2007) (finding correlation between campaign contributions and judicial decisions on Georgia Supreme Court); 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) (looking at civil cases involving two business litigants); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 646 (1999) (finding a “remarkably close correlation between a justice’s votes on arbitration cases and his or her source of campaign funds”); see also Brief of Brennan Center for Justice at NYU School of Law et al. as Amici Curiae in Support of Petitioners, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), 2009 WL 45972, at \*14 (noting, among other studies, a study of the Texas Supreme Court which showed that petitioners who had donated more than \$250,000 were ten times more likely than noncontributors to have a petition for discretionary review granted).

decision-making to conform to the preferences of the appointing body.<sup>202</sup>

Like retention risks (which vary considerably depending on the type of retention scheme and length of term), the risk of popular or lawmaker invalidation of state supreme court decision-making varies significantly from state to state. Consider, for example, the twenty-four states that allow for direct democracy overrides of state court decision-making. The number of voter initiatives has dramatically increased since 1970.<sup>203</sup> Five of the twenty-four states, however, have highly restrictive rules that severely limit the number of initiatives, whereas the five strongest initiative states adopted half of all initiatives (a large enough proportion that some of these states have developed “sophisticated network[s] of specialized professionals to assist initiative proponents.”).<sup>204</sup> More generally, as discussed in Part I, significant differences in the procedures and customs of states noticeably impact the willingness and ability of state lawmakers to send constitutional amendments out to the voters for approval (not to mention differences in whether a majority or supermajority vote is required).<sup>205</sup>

These variances in state procedures and practices highlight the need to recognize differences among states (with the exception of the national trend for state lawmakers and voters to pursue constitutional change through the amendment process).<sup>206</sup> At the same time, national patterns are highly salient in states which have seen an upsurge in amendments and in states with easy-to-amend constitutions.<sup>207</sup> More than that, on select issues (most notably the death penalty and same-sex marriage), state supreme court justices are aware of the propensity of voters and lawmakers to pursue constitutional change either to override or preempt judicial decision-making.<sup>208</sup> State justices subject to reelection—especially in the nineteen states that have contested elections—

202. See Shepherd, *supra* note 110 (noting that justices seeking reappointment are more likely to favor government positions than justices who do not seek reappointment).

203. See MILLER, *supra* note 58, at 46-50.

204. *Id.* at 53. For additional discussion, see *id.* at 50-55.

205. See *supra* notes 50-58.

206. See Cain & Noll, *supra* note 51, at 1520; *supra* note 52.

207. See generally MILLER, *supra* note 58, at 50-52 (noting trends in direct-democracy states, including dramatic upswing of direct democracy measures); Cain & Noll, *supra* note 51, at 1521-25 (discussing hyper-amendability of state constitutions).

208. See MILLER, *supra* note 58, at 198-215; see also *supra* notes 1-13, 188; *infra* notes 324-28. Another example is a 2002 Florida constitutional amendment forbidding the Florida Supreme Court from recognizing broader search and seizure protections than those recognized by U.S. Supreme Court interpretations of the federal Constitution. FLA. CONST. art. 1, § 12. This amendment was a reaction to the Florida court’s expansive understanding of search and seizure protections. See AM. BAR ASS’N, JUSTICE IN JEOPARDY, REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 35 (2003) (noting that prior to the amendment, the Florida Supreme Court interpreted the state search and seizure clause, in eighty percent of cases, to grant broader rights than granted under U.S. Supreme Court interpretations of the federal search and seizure clause whereas after the amendment, the Florida Supreme Court granted broader rights in only eighteen percent of cases).

must also take into account the possibility that an initiative battle over a state court ruling will provide fodder for those who would want to oust the justice in her next judicial election.<sup>209</sup>

For similar reasons, state supreme court justices might also consider the possibility that their decisions go unenforced for lack of political will.<sup>210</sup> After all, there is nothing to be gained by rendering a decision which does not tangibly advance favored policies but, instead, casts doubt on the court's authority. For example, public and elected government resistance to school finance rulings in New Jersey and Vermont both undercut the efficacy of those rulings and drew negative attention to those state supreme courts.<sup>211</sup> In states with judicial elections, politically controversial rulings that spark elected government non-acquiescence might spill over into judicial election campaigns.

The prospect of voters or elected officials ignoring or nullifying (through a constitutional amendment) state supreme court rulings and/or punishing state justices by ousting them from office also ties to the docket control powers of state supreme courts. Several state courts, as noted in Part I, cannot make aggressive use of the "passive virtues" of certiorari denials, state action limitations, or justiciability requirements (which, among other things, limit lawmaker standing and prohibit advisory opinions).<sup>212</sup> Needless to say, there is greater opportunity for political retaliation in states without meaningful docket control limits, as the court cannot steer clear of knotty political controversies. In Florida, for example, the state supreme court is required to issue advisory opinions about the constitutionality of proposed initiatives.<sup>213</sup> In several states, state supreme courts have no choice but to hear constitutional challenges to state laws.<sup>214</sup> In twelve states, state supreme courts must give meaning to state constitutional provisions containing affirmative rights to welfare, education, or

---

209. See Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1147-49 (1997).

210. For a discussion of whether state courts have the capacity to assess such risks, see *infra* notes 218-32 and accompanying text.

211. Stanley H. Friedelbaum, *Educational Issues and Judicial Oversight*, 41 ALB. L. REV. 1091, 1096-97 (2008) (describing reactions to the New Jersey Supreme Court ruling on school financing in *Abbott v. Burke*); Aaron J. Saiger, *Constitutional Partnership and the States*, 73 FORDHAM L. REV. 1439, 1460-61 (2005) (describing reactions to the Vermont Supreme Court's ruling in a school finance case and the legislative response). It should be noted, however, that the Vermont and New Jersey Supreme Courts are politically insulated—so that some of the backlash risks discussed in this Part are less salient to justices on those courts. For additional discussion, see *infra* notes 249-50, 261-65, and accompanying text.

212. See *supra* notes 112-33 and accompanying text.

213. FLA. CONST. art. IV, § 10.

214. See Eisenberg & Miller, *supra* note 121, at 1457 (noting that one of the "[c]ommon categories of cases that receive mandatory [state supreme court] jurisdiction include . . . cases invalidating a state statute on constitutional grounds").



just compensation.<sup>215</sup>

There is little question that state supreme court justices face a much more complex political landscape than do the Justices on the U.S. Supreme Court. There is also little question that backlash risks vary tremendously from state to state. In other words, state supreme courts must look to both their constitutional system and their political norms in assessing consequential risks.<sup>216</sup> At the same time, state justices can also look to national trends and the experiences of other states in assessing the likelihood that they will be subject to some type of backlash risk. Before turning to the question of whether state justices have the capacity to assess such risks, I would like to make one final comment about the types of risks that state supreme court justices face. The authority of state supreme courts, like that of the U.S. Supreme Court, is tied to their “legitimacy, a product of the substance and perception that shows itself in the people’s [and their representatives] acceptance of the Judiciary.”<sup>217</sup> Unlike the politically isolated U.S. Supreme Court, however, most state supreme courts run significant legitimacy risks—as contested judicial elections, constitutional amendment fights, and limited docket control power throws state justices in the middle of political fights that the U.S. Supreme Court would never confront or could easily avoid. And while legitimacy risks vary from state to state (depending on the degree of political protection afforded state supreme court justices and their decision-making), state courts have frequent occasion to think about the legitimacy consequences of their rulings.

## 2. *Capacity*

The fact that state supreme court justices have incentive to be consequentialist does not, by itself, support consequential decision-making. The question remains whether state court justices can discern the necessary information to adjust their voting in order to maintain office, to not be overruled, and to receive enforcement of their judicial decisions. Political scientists and legal academics studying U.S. Supreme Court decision-making criticize strategic decision-making for precisely this reason, arguing that there

---

215. See *supra* notes 130-31.

216. For example, states which make frequent use of direct democracy mechanisms have weak political parties and strong interest groups. Miller, *supra* note 58, at 51. For additional discussion, see *infra* notes 248-328 and accompanying text (highlighting role of constitutional systems and political norms in same-sex marriage cases).

217. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992). Like the U.S. Supreme Court, state supreme courts lack the powers of the purse and sword and, consequently, must pay attention to their perceived legitimacy with both the public and state officeholders. On the linkage between the U.S. Supreme Court’s legitimacy and public acceptance of judicial edicts, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 370, 375 (2009); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 *DUKE L.J.* 703, 715 (1994).

is an information shortfall in assessing consequences, making the determination of the level of outrage that will result speculative at best, if not a “shot in the dark.”<sup>218</sup> For reasons I will now detail, there is strong support for thinking that state court justices are equipped to make well-educated guesses about potential backlash risks in their home state (as opposed to nationwide backlash risks, for which they have no special expertise).

First, state judges are far better positioned than federal judges to weigh the costs and benefits of potential backlash. “[S]tate 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 understanding how well or badly it works.”<sup>219</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>220</sup> and are “generally closer to the public, to the legal institutions and environments within the state, and to the public policy process.”<sup>221</sup> In understanding the reasons for this difference, it is important to consider the backgrounds of state justices, the ways in which state justices learn about the values and norms of state voters and officials, and the various ways in which state justices find themselves in the middle of state politics.

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 goings-on from numerous sources, and is generally well-informed with respect to the in-state political climate.<sup>222</sup> As of 2000, 65.7 percent of state supreme court justices were born in the state in which they serve and 60.5 percent received their law degrees from a school in that state.<sup>223</sup> Also, 33.1 percent of state justices served as prosecutors at some point in their careers, and

---

218. Sunstein, *supra* note 19, at 176; see also SEGAL & SPAETH, *supra* note 145, at 424-29. For additional discussion, see generally Sunstein, *supra* note 19 (identifying other critiques of judicial consequentialism, most notably, the idea that consequentialism is inappropriate to the judicial role to apply the law in same neutral way).

219. 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).

220. Linde, *supra* note 125, at 1286.

221. Hershkoff, *supra* note 31, at 1168 (quoting Chief Judge Judith S. Kaye of the New York Court of Appeals).

222. With respect to professional interactions, for example, former Oregon Supreme Court Justice Hans Linde noted that state justices work both formally and informally with state lawmakers on law reform projects. Linde, *supra* note 125, at 1286-87; see also Hans A. Linde, *Observations of a State Court Judge*, in JUDGES AND LEGISLATORS: TOWARDS INSTITUTIONAL COMITY 117 (Robert A. Katzmann ed., 1988).

223. Chris W. Bonneau, *The Composition of State Supreme Courts 2000*, 85 JUDICATURE 26, 28-29 (2001).

fifteen percent formerly served as elected officials (especially in states with judicial elections).<sup>224</sup> All of these factors lead to a better informed and connected judiciary.<sup>225</sup> The numbers vary from state to state; thus state supreme courts will display varying degrees of knowledge about state happenings and traditions.<sup>226</sup>

State supreme court justices, moreover, are better equipped to assess backlash risks than U.S. Supreme Court Justices because states are much smaller (and more knowable political units) and because state courts often find themselves in the middle of political disputes.<sup>227</sup> Lawmaker standing (including litigation between lawmakers and the governor), advisory opinions, common law lawmaking, positive rights, and other similar issues inevitably inject state supreme courts into the state lawmaking process.<sup>228</sup> And while there are important differences among state constitutional systems, most state supreme courts are active participants in the state policymaking apparatus. More than that, all state courts rely on “highly contested state, and sometimes county, budgets for funding their facilities, operations, and personnel,” something that further sensitizes state justices to in-state politics.<sup>229</sup>

Most state supreme court justices, finally, are well versed in state politics because of their direct connections to interest groups, political parties, and voters. In direct democracy states, 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>230</sup> Far more telling,

---

224. *Id.* at 28; *see also* Linde, *supra* note 125, at 1286.

225. On this point, a simple comparison of state justices to the politically insulated U.S. Supreme Court is telling. “Of the justices appointed [to the U.S. Supreme Court] from 1969 to 2005, only Sandra Day O’Connor had run for office, and only William Rehnquist held a political position at the time of appointment.” Baum, *supra* note 150, at 67. In addition, while state supreme court justices’ careers require (to varying degrees) a certain level of public support, “[f]ew [United States Supreme Court] justices have career ambitions that would be furthered by public support.” *Id.* at 63.

226. Some state supreme courts were comprised entirely of natives of the state, while some courts had no members who were natives (based on 2000 data). *See* Bonneau, *supra* note 223, at 30 tbl.2. The amount of prior elected office experience of high courts also varies, ranging from one state (South Carolina) in which all members in 2000 had prior elected experience to twenty-five states where no members had such experience. *See id.*

227. U.S. Supreme Court Justices typically rely on media coverage, party briefs, and amicus briefs to assess the preferences of other actors. *See* Epstein & Knight, *supra* note 146, at 145-46. State court justices, for reasons detailed in this Subpart, both have access to better sources of information and are better positioned to assess that information.

228. *See supra* notes 113-33; *see also* Linde, *supra* note 222, at 117-19 (detailing ways that state judges are engaged in and aware of state politics).

229. Linde, *supra* note 125, at 1286-87; *see also* Linde, *supra* note 222, at 119 (noting how court administrators work with state judges in proposing legislative measures relating to the state judicial system).

230. *See supra* note 213 (explaining justices’ issuance of advisory opinions); *see also* Miller, *supra* note 58, at 101-22 (detailing trends in judicial review of state initiatives); Uelman, *supra* note 209, at 1148 (noting “unique risk” of judicial invalidation of initiatives).

in states with judicial elections, state supreme court justices reach out to voters (sometimes by openly taking positions on contested policy questions), raise money from interest groups, and sometimes run as candidates for political parties (or otherwise have close ties to political parties).<sup>231</sup> Needless to say, there is tremendous variation—so that justices who run in partisan elections are much more connected to state politics than, say, justices appointed through some merit plan and subject to retention elections.<sup>232</sup> At the same time, state justices typically know more about state politics because they are subject to electoral checks in ways unimaginable to federal court judges.

No doubt, state supreme court justices are much better equipped to assess consequences than their federal court counterparts. And while state justices cannot perfectly anticipate what consequences will follow from their decisions, they are positioned to make well-educated guesses about potential backlash risks in many of the high visibility cases that they decide. This is true in all states and especially true in states that subject their justices to electoral checks and/or limit the docket control of state supreme courts. With that said, state court justices lack expertise about other state systems—so that the information shortfall that limits U.S. Supreme Court Justices likewise limits state court justices interested in gauging nationwide consequences.

### C. *Wrapping Up*

State supreme court justices are, for the most part, able and motivated to make well-informed predictions about the consequences of their decisions. Dramatic differences between state systems, state politics, and the personal preferences of state court justices will define the propensity of different courts and different justices on the same court to take account of the reactions of elected government, voters, political parties, interest groups, and elites. No doubt, politically insulated courts can push doctrinal preferences in ways that politically exposed courts cannot—especially justices who must win increasingly costly and contested elections.

Outside of retention risks, however, it is difficult to measure the precise influence of other types of consequences.<sup>233</sup> Some justices, for example, will have intense policy preferences. Unless there is strong evidence that a ruling will prove futile or counterproductive (by, for example, setting in motion the

---

because “the machinery of the political campaign that led to the enactment of the initiative will simply be redeployed against the offending judges”).

231. *See supra* notes 169-84.

232. Nonetheless, the political beliefs of judicial candidates play an important role in merit selections. *See* Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 *MO. L. REV.* 675, 675-76 (2009).

233. *See supra* notes 198-202 (noting empirical studies linking state supreme court decision-making to retention risks); *supra* note 34 (noting dearth of empirical studies on backlash risks—outside of elections—on state supreme courts).

approval of a constitutional amendment),<sup>234</sup> these justices may only take account of retention risks. These justices, moreover, will likely discount such risks if they serve in states that use retention elections (where, aside from the death penalty, there are few issues that are likely to prompt severe voter backlash).<sup>235</sup> Justices with weaker policy preferences will take into account a broader spectrum of backlash risks. Furthermore, justices with comparatively weak policy preferences are likely to take fewer retention or amendment override risks.

In addition to the intensity of their policy preferences and the degree of their political insulation, state justices may also be motivated by their personal reputations (in and/or outside the state) and the reputations of their courts as leading state supreme courts.<sup>236</sup> Some state justices may aim for their ruling to advance their policy objectives throughout the country, while others will be interested primarily in whether their decisions will stick inside their state borders. Some state justices will also care about how their rulings will affect their relationships with social networks that they value. Depending on the retention system employed and other features of their state constitutional systems, state justices will have varying degrees of personal and professional contact with elected officials, political parties, bar and other interest groups, and media and academic elites.<sup>237</sup>

All of this is to say that it is impossible to draw hard and fast conclusions about how state justices will, in fact, take consequences into account. Again, differences in state systems and the preferences of individual justices will define which consequences are salient to state supreme court justices. Correspondingly, differences in state systems are also relevant in assessing the capacity of state justices to take account of consequences. Some state justices are regular players in the state political process (because of election schemes,

---

234. The frequency with which state supreme court rulings are nullified by constitutional amendments has not been studied in any systematic way. Likewise, the question of whether state justices take amendment-override risks into account is yet to be examined in any meaningful way. For additional discussion, *see infra* notes 307, 321-27 and accompanying text (discussing relevance of state constitutional amendments on same-sex marriage to state court decision-making).

235. On the nexus between the death penalty and judicial behavior, see Bright & Keenan, *supra* note 186; Hall, *supra* note 194; *see also supra* note 188 (discussing role of death penalty in California retention elections).

236. The reputation of state supreme courts is typically measured by the frequency with which their decisions are cited by other courts. *See* Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 186 (1985). Over time, some courts gain reputations for being pathbreakers, a reputation that becomes a norm affecting the willingness of subsequent courts in the same state to continue to operate as pathbreakers. *See* TARR & PORTER, *supra* note 24, at 237 (noting the reputations of the Alabama, Ohio, and New Jersey Supreme Courts).

237. On the relevance of reference groups to judicial decision-making, *see generally* Baum, *supra* note 150 (contending that justices have psychological as well as policy motivations).

docket control limits, and so forth) and are likely to know more about potential consequences than are justices in states with comparatively little exposure to the state political apparatus.

Notwithstanding all these variations, it is clear that the capacity of state supreme court justices does not extend to national consequences. State justices have no special knowledge about politics in other states and any guess they would make about the extra-territorial consequences of their decisions would be little more than a “shot in the dark.”<sup>238</sup> In other words, even if state justices care about the nationwide pursuit of their favored policies or about enhancing their reputations with out-of-state audiences,<sup>239</sup> there is little reason for state courts to affirmatively pursue national objectives when interpreting their constitutions. On same-sex marriage, for example, the Hawaii Supreme Court could not have anticipated that the enactment of state and federal “defense of marriage” statutes would follow in the wake of its same-sex marriage decision.<sup>240</sup> At that time, same-sex marriage was not on the national radar screen, so any prediction of out-of-state consequences would have been highly speculative. Likewise, even though the Massachusetts Supreme Court had reason to know that its same-sex marriage decision would spark political controversy, the court could not anticipate all of the out-of-state effects of its ruling. Indeed, it is still an open question whether either of these decisions, in fact, impeded the national goal of same-sex marriage.<sup>241</sup>

In saying that state justices do not have the capacity to assess nationwide backlash, I do not mean to suggest that state courts operate in isolation.<sup>242</sup> If interest groups (especially national interest groups) seek to oust judges or pursue constitutional reforms in one state, there is no reason to think those groups will not seek to countermand similar decision-making in other states. And if these efforts either fail or are not pursued in the first instance, state courts may have reason to think that they have greater room for experimentation. Separate and apart from direct repeal efforts, state courts may

---

238. Sunstein, *supra* note 19, at 176 (referencing the potential information shortfall of U.S. Supreme Court Justices).

239. These audiences include media, academics, justices in other states, and national interest groups. See Baum, *supra* note 150, at 23-24.

240. See *supra* notes 2-3 and accompanying text.

241. Tonja Jacobi, for example, argues that the Massachusetts decision did not meaningfully impact same-sex marriage in other states. See Jacobi, *supra* note 9, at 41-53. The Massachusetts court’s formal recognition of same-sex marriage—rather than civil unions—may have advanced the long-term goal of out-of-state recognition of same-sex marriage, however. See Keck, *supra* note 14, at 162-64 (noting that *Goodridge* helped mobilize supporters of same-sex marriage). For competing perspectives on whether the Hawaii decision advanced the national goal of same-sex marriage, compare ESKRIDGE, *supra* note 5, with KOPPLEMAN, *supra* note 6.

242. Portions of this paragraph will also appear in my forthcoming book chapter: Neal Devins, *Same-Sex Marriage and the New Judicial Federalism*, in *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW 11* (James Gardner & Jim Rossi eds., forthcoming).

see whether those subject to a court order follow it or, alternatively, resist the ruling by either dragging their feet or ignoring the ruling altogether. If there is some type of nonacquiescence, it may make sense to pursue a different remedial strategy. Perhaps more significant, it may be that a remedy effectively advances its policy objectives.

State courts are both independent and part of a national system. A state-centered approach to state constitutionalism recognizes their independence. In particular, state supreme court justices have the incentive and capacity to take in-state but not nationwide consequences into account. When assessing consequences, moreover, state justices can look to the distinctive attributes of their constitutional system as well as the norms and values of state voters and office-holders. At the same time, just as state constitutions reflect larger national trends, state courts can learn from other states both in identifying potential backlash risks and in assessing whether those risks are likely to happen to them. In Part III, I will discuss state court experiences with same-sex marriage and, in so doing, carry this point forward in two ways. First, I will call attention to differences in state constitutional systems, explaining why politically insulated courts are likely to pursue hot button legal policy initiatives. Second, I will discuss some of the ways that state courts can look to other state experiences in assessing potential backlash risks.

### III. TAKING CONSEQUENCES INTO ACCOUNT: LESSONS FROM SAME-SEX MARRIAGE

In Parts I and II of this Article, I explained why state constitutional systems are widely varied but still connected to other states. When assessing backlash risks, state justices must look to the distinctive features of their constitution and the political norms of their state. At the same time, state justices can look to the constitutions and experiences of other states in gauging these consequences.<sup>243</sup> In this Part, I will carry this discussion forward. By looking at the characteristics of state supreme courts that were willing to play a path-breaking role on same-sex marriage,<sup>244</sup> I will call attention to the ways that state politics,

---

243. Further complicating things, state justices do not share the same legal policy objectives and, consequently, may weigh consequences differently. *See supra* notes 211-37 and accompanying text. With respect to U.S. Supreme Court Justices, there is good reason to think that Justices with comparatively weak legal policy preferences are more willing to moderate their decision-making than Justices with intense policy preferences. *See* Neal Devins & Will Federspiel, *The Supreme Court, Social Psychology, and Group Formation, in THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING* 85, 85-86 (David Klein & Gregory Mitchell eds., 2010).

244. I have chosen to use same-sex marriage as a case study because it demonstrates particularly well the ability of state courts to take consequences into account. In the case of same-sex marriage, the consequences of judicial decisions are at once noticeable to the general public and discernable by state courts in other jurisdictions. Thus, it is possible to assess whether state courts, in fact, take consequences into account, and whether politically

state constitutional systems, and judicial values converge in explaining judicial behavior.<sup>245</sup> Furthermore, by examining the ways that those state courts could have looked to the experiences of other states in assessing backlash and other implementation risks, I will argue that path-breaking state courts can learn from each other and thereby engage in a national conversation about constitutional rights.

#### A. *Same-Sex Marriage and the Characteristics of Path-Breaking Courts*

From 1993 to 2009, seven state supreme courts interpreted their constitutions to provide expansive protections to same-sex couples.<sup>246</sup> Four of these states mandated same-sex marriage (Massachusetts, California, Connecticut, Iowa); two mandated marriage or civil union protections (Vermont, New Jersey); one said that it would apply strict scrutiny review in assessing the state ban on same-sex marriage (Hawaii).<sup>247</sup> In understanding these decisions, several factors are at play. The legal policy views of these courts are undoubtedly the most important but so are state constitutional

---

insulated courts are more likely to play a path-breaking role than democratically accountable courts. Furthermore, the ever-changing political dynamic of same-sex marriage makes it a particularly good case study to examine the mechanisms by which state courts can look to the experiences of other states in assessing potential in-state backlash risks.

245. Path-breaking state courts were not the only ones to rule on same-sex marriage. In 2006, the highest courts in Washington and New York ruled against same-sex couples. In Washington, the court granted direct review of the trial court's decision. *Andersen v. King County*, 138 P.3d 963 (Wash. 2006). In New York, the court granted certiorari (having turned down a cert petition in 2005). *Hebel v. West*, 837 N.Y.S.2d 1 (2006); see *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006). These decisions are certainly an important part of the story of same-sex marriage, as are constitutional amendments outlawing same-sex marriage in several states. At the same time, these decisions do not speak to the ways that state courts take backlash risks into account when deciding cases. Rather, the actions of both courts suggest that these courts had legal policy preferences to uphold existing state law. In Washington (a state which makes use of nonpartisan elections), the court, rather than grant direct review from the trial court, could have held back to see if the court of appeals would have upheld the state statute. In New York (a state that uses gubernatorial appointments and reappointments), the lower courts had ruled against same-sex marriage. If the courts disagreed with those decisions, they would not have used their docket control power to issue a binding constitutional decision against their preferred legal policy position.

246. Though it ruled against same-sex couples in *Hernandez* in 2006, the New York Court of Appeals found in 2009 that government benefits should be extended to same-sex couples legally married out-of-state (with three of the seven judges concluding that same-sex marriages legally performed in other states should be recognized in New York). See *Danny Hakim, Gay Spouses Due Benefits in the State, Court Finds*, N.Y. TIMES, Nov. 20, 2009, at A29.

247. For the states mandating same-sex marriage, see *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *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).



systems, state political norms, and the reputation of several of these courts as path-breakers.

### 1. *State constitutional systems*

The most salient characteristic shared by all seven courts is their retention schemes. None of the seven make use of contested judicial elections.<sup>248</sup> Five are among the eleven states whose justices need not run for reelection. Two (Massachusetts, New Jersey) are among the four states whose justices are not subject to reelection or reappointment;<sup>249</sup> two (Vermont, Connecticut) are from the six states who make use of a legislative or gubernatorial reappointments;<sup>250</sup> one (Hawaii) is the only state that makes use of a judicial commission to reappoint justices. The remaining two (California, Iowa) are from states that make use of retention elections—elections where incumbent justices win around ninety-nine percent of the time.<sup>251</sup>

With limited-to-no reelection pressure,<sup>252</sup> state supreme courts that have played a path-breaking role on same-sex marriage have far more discretion to vote their legal policy preferences than justices from states subject to significant reelection pressure.<sup>253</sup> Moreover, with the notable exception of

248. With respect to judicial appointments, two states make use of merit plan appointments (Hawaii, Iowa), four use gubernatorial appointments (California, New Jersey, Massachusetts, Vermont), and one uses legislative appointment (Connecticut). *See supra* tbl.1. While these appointment schemes call attention to the political insulation of these courts, I will focus on retention schemes (since judicial behavior is moored to retention, not appointment, plans).

249. 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* tbl.1.

250. *See id.*

251. *See supra* notes 171-72 (retention election statistics). I do not mean to argue that there are no electoral risks in retention elections. State justices who vote against death penalty verdicts, for example, run retention election risks. *See Croley, supra* note 105, at 737 & n.144 (discussing the defeat of California justices in a retention election because of their votes in death penalty cases).

252. In states with retention elections, state courts must avoid decisions that are fundamentally out-of-step with core values of a majority of voters. *See Croley, supra* note 188 (discussing ouster of California Supreme Court justices because of their death penalty votes). In the case of same-sex marriage, however, voters in the two path-breaking states that made use of retention elections (California, Iowa) were generally supportive of marriage reform. *See infra* notes 279 (Iowa), 282 (California). Indeed, since justices serve twelve-year terms in California and eight-year terms in Iowa, there was good reason for justices in these states to think that a majority of voters would support same-sex marriage by the time they were up for reelection. *See AM. JUDICATURE SOC'Y, supra* note 77, at 4, 6; *infra* note 279 (noting trajectory of voter support for same-sex marriage).

253. In sharp contrast, “[e]lected judges generally lack the job security, the moral stature, and the professional self-conception to defy entrenched norms or strongly held preferences about constitutional meaning.” David E. Pozen, *Judicial Elections as Popular Constitutionalism*, COLUM. L. REV. (forthcoming) (manuscript at 73, on file with author).

California, there is comparatively little risk of voters or legislators nullifying the constitutional rulings of these courts.<sup>254</sup> In all other states, a constitutional amendment override would require supermajority support and/or majority support over a sustained period of time.<sup>255</sup> Consequently, unless their rulings deviate from voter and lawmaker preferences in some significant way, path-breaker states (excepting California) are unlikely to face significant constitutional amendment override pressure. The constitutional schemes and practices of path-breaker states support this conclusion.

Of the seven path-breaker states, only California and Massachusetts allow voters to place constitutional amendment proposals on the ballot.<sup>256</sup> For legislature-sponsored amendments only two (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>257</sup> Iowa and Massachusetts, however, are two of twelve states that require consideration of legislature-proposed constitutional amendments in two successive sessions.<sup>258</sup> Iowa's constitutional amendment rate of .36 amendments per year is tied with Rhode Island as the fifth lowest of all states; Massachusetts' rate of .55 is eighth lowest.<sup>259</sup> Of the original Revolutionary-era states, Massachusetts is the only one that has its original constitution and has the lowest amendment rate among states that have had only one Constitution.<sup>260</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>261</sup> Connecticut has a three-fourths supermajority vote requirement in each house in one session or a majority vote

According to a group of state court judges, “[t]he goal, if you are standing for reelection, is to avoid scrutiny. The goal in getting elected is to avoid negative attention, to be invisible.” *A Conversation with Judge Richard A. Posner*, 58 DUKE L.J. 1807, 1822 (2009).

254. Over the past fifty years, California has approved more direct democracy initiatives than any other state. Miller, *supra* note 58, at 50. Its constitutional amendment rate of 4.2 amendments per year is third only to Alabama and South Carolina. See Lutz, *supra* note 50, at 248-49.

255. See *infra* notes 257-65.

256. 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. This hardly ever occurs as Massachusetts has an especially low constitutional amendment rate. See Lutz, *supra* note 50, at 248-49.

257. COUNCIL OF STATE GOV'TS, *supra* note 51, at 14 tbl.1.2.

258. *Id.*

259. Lutz, *supra* note 50, at 248-49.

260. *Id.*

261. See *id.* Vermont has an amendment rate of .25 per year (second lowest); Connecticut's amendment rate of .96 is well below the 2.9 mean but is around the median of all states.

in each of two sessions (with an intervening election between the two sessions).<sup>262</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>263</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>264</sup> New Jersey similarly requires a three-fifths super-majority vote (of all members) in one session or a majority vote in two sessions.<sup>265</sup> All in all, path-breaker states are among the most politically insulated states in the nation. Justices on these courts have less reason to fear either the loss of their seats or the nullification of their constitutional rulings. The fact that the constitutional rulings of the Hawaii and California Supreme Courts were overridden does not negate this conclusion. The Hawaii ruling was dramatically out-of-step with voter preferences (nearly two-thirds opposed same-sex marriage at the time of the decision).<sup>266</sup> California's voter initiative scheme makes it an outlier among path-breaker states.

In addition to override and retention risks, the ability of state supreme court justices to control their docket impacts on whether a state court will play a path-breaker role. States without docket control, as discussed in Part II, are more likely to take backlash risks into account. By the same token, state supreme courts that reach out to decide an issue likely have strong policy or reputation preferences and/or anticipate limited backlash risks. In Part I, I highlighted significant differences in the docket control power of path-breaking states. Three of these 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>267</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. The third state without docket control, Iowa, did find for same-sex marriage but there was majority support (sixty percent) for overturning the existing marriage law.<sup>268</sup> States with docket control, most notably California and Massachusetts, have strong reputations for playing a path-breaking role on individual rights

---

262. COUNCIL OF STATE GOV'TS, *supra* note 51, at 14-15 tbl.1.2.

263. *Id.*

264. *Id.*

265. *Id.*

266. Linda Hosek, *Residents Draw the Line on Some Gay Rights*, HONOLULU STAR-BULL., Apr. 24, 1991, at A-4.

267. *See supra* note 120.

268. *See Erin Jordan, About 6 in 10 Iowans Back Same-Sex Unions, Poll Finds*, DES MOINES REG., Nov. 26, 2008, at 4B.

questions (something I will soon discuss).<sup>269</sup> Correspondingly, state courts with docket control that fear political backlash are apt to exercise their discretion to steer clear of the same-sex marriage issue. Arizona, for example, is one of the leading direct democracy states and its supreme court denied certiorari to a same-sex petition in 2004.<sup>270</sup>

The specific features of state constitutional systems have undoubtedly figured into the willingness of state supreme courts to play a path-breaking role on same-sex marriage.<sup>271</sup> State supreme court justices, it would appear, have taken backlash risks into account. No state with contested elections has played a path-breaking role; only one state with voter-initiated ballot initiatives has played a path-breaking role. Docket control also seems a factor, as states with mandatory dockets act more cautiously than states with discretionary dockets.

## 2. *State political norms*

When assessing potential backlash risks to judicial recognition of same-sex marriage, state supreme courts must also look to the political norms of their state. Those norms include both past practices (the willingness of voters and elected officials to countermand state supreme courts for politically unpopular rulings) and the contemporaneous views of voters, interest groups, and elected officials on the propriety of court-ordered same-sex marriage (or civil unions). For reasons I will now detail, all state courts except Hawaii operated within these norms.

Four of the seven path-breaker states (California, Connecticut, Iowa, and New Jersey) had reason to know that state officials would either back or acquiesce to their rulings. In California, state lawmakers had twice approved same-sex marriage legislation.<sup>272</sup> And while Governor Schwarzenegger vetoed that bill, the governor also declared that he would “fight” against efforts to constitutionally prohibit same-sex marriage.<sup>273</sup> In Connecticut, 2005 legislation

---

269. See *infra* notes 300-303.

270. *Standhardt v. Superior Court*, 77 P.3d 451, 451 (Ariz. Ct. App. 2003), *rev. denied*, 2004 Ariz. LEXIS 62. On Arizona’s status as one of the five leading direct democracy states, see Miller, *supra* note 58, at 50-51.

271. By highlighting variations among state constitutional systems and their impact on state supreme court decision-making, this Article serves as an addendum to another article in this Symposium, Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583 (2010). Ginsburg and Posner, by calling attention to the ways in which federal constitutions establish a baseline from which states can experiment, do a wonderful job in explaining both why state constitutions are far more likely to be amended than federal constitutions and why state constitutional rights are less deeply entrenched than federal constitutional rights. At the same time, Ginsburg and Posner do not meaningfully consider how variations among state constitutional systems also speak to amendment rates and the entrenchment of rights.

272. Haley Davies, *Legislature Oks Same-Sex Marriage Bill*, S.F. CHRON., Sept. 8, 2007, at B1.

273. Matthew Yi, *Governor Against Amendment to Ban Gay Marriage*, SFGATE, Apr.

approved civil unions for gay couples.<sup>274</sup> At that time, many lawmakers said “that their support for civil unions was less a defensive act against a potential court ruling than the obvious next step for a state with a fifteen-year history of expanding gay rights.”<sup>275</sup> In Iowa, state lawmakers refused to act on a proposal to amend the Iowa constitution to forbid same-sex marriage, a proposal that was also opposed by Governor Chet Culver.<sup>276</sup> In New Jersey, 2004 legislation granted same-sex couples most of the same financial and legal benefits as married couples and “[s]ince the late 1960s, New Jersey has been a pioneer on gay rights” by decriminalizing sodomy, prohibiting workplace discrimination, and granting legal right to non-biological parents in same-sex families.<sup>277</sup>

Courts in most path-breaker states were also buoyed by public opinion polls. With the exception of Vermont and Hawaii, voters did not oppose judicially mandated same-sex marriage or civil unions. In Connecticut, seventy-two percent supported, at a minimum, same-sex unions at the time of the court’s October 2008 opinion.<sup>278</sup> In Iowa, sixty percent supported either same-sex marriage or civil unions.<sup>279</sup> In Massachusetts, opinion polls taken just before the court’s decision revealed that Massachusetts residents supported same-sex marriage fifty to forty-four percent.<sup>280</sup> In New Jersey, fifty percent

12, 2008, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/04/12/MNKK104D39.DTL>. For their part, mayors of Los Angeles, San Diego, and San Francisco all backed same-sex marriage. Jessica Garrison et al., *Gay Marriage Vote Is Too Close to Call*, L.A. TIMES, Nov. 5, 2008, at A1.

274. CONN. GEN. STAT. § 46b-38nn (2009); William Yardley, *In Connecticut, Shifting Ground on Gay Civil Unions*, N.Y. TIMES, Mar. 7, 2005, at B5.

275. William Yardley, *Connecticut Approves Civil Unions For Gays*, N.Y. TIMES, Apr. 21, 2005 at B5.

276. Jason Clayworth & Jennifer Jacobs, *Lawmakers Take Sides on Marriage*, DES MOINES REG., Feb. 10, 2008, at A1; Jonathan Roos, *Culver Backs Law Banning Gay Marriage*, DES MOINES REG., Sept. 5, 2007, at B3.

277. Andrew Bruck, *Equality in the Garden State: Litigation and Social Activism in the Struggle for Marriage Equality*, 2 HARV. L. & POL’Y REV. 419, 424 (2008); Jonathan Schuppe, *N.J. Senate Approves Domestic Partners Bill*, STAR-LEDGER (NEW JERSEY), Jan. 9, 2004, at 1.

278. *Connecticut Voters Like Gov Rell, but Not Tax Hike, Quinnipiac University Poll Finds; Voters Mixed on Gay Marriage, Civil Unions*, QUINNIPIAC U., Feb. 15, 2007, <http://www.quinnipiac.edu/x1296.xml?ReleaseID=1017> (noting a February 2007 poll that found thirty-nine percent of Connecticut voters supporting gay marriage and another thirty-three percent in favor of allowing gays to form civil unions). But the court agreed to hear the case at a time when it knew that Connecticut voters were evenly split on same-sex marriage. See Yardley, *supra* note 274 (reporting the results of a 2005 poll that fifty percent opposed gay marriage and forty-five percent supported it).

279. See Jordan, *supra* note 268; see also 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>. And while a majority did not support same-sex marriage, younger Iowans strongly supported same-sex marriage. See *id.* For additional discussion, see *infra* note 332.

280. Frank Phillips, *Support for Gay Marriage Mass. Poll Finds Half in Favor*, BOSTON GLOBE, Apr. 8, 2003, at A1 (citing a Boston Globe/WBZ-TV poll).

supported same-sex marriage and sixty-five percent supported civil unions at the time of the decision.<sup>281</sup> In California, registered voters supported same sex marriage by a fifty-one to forty-two percent margin at the time of the court's May 2008 decision.<sup>282</sup>

In Hawaii and Vermont, however, state supreme courts were backed neither by voters nor elected officials. In Vermont, an opinion poll taken shortly before the Court's 1999 decision revealed that voters, by a fifty-six to thirty-three percent margin, supported a constitutional amendment proposal to "keep Vermont's definition of marriage as the union of one man and one woman."<sup>283</sup> At that time, more than a third of the House of Representatives had announced support for amending state law to forbid same-sex marriage.<sup>284</sup> Because it had no choice but to hear the case, however, the Vermont court was ultimately forced to choose between upholding or nullifying the existing ban on same-sex marriage.<sup>285</sup> Against this backdrop, it is little wonder that the court would issue a minimalist opinion that invalidated the statute while leaving the choice of same-sex marriage or civil unions to state lawmakers.<sup>286</sup>

The actions of the Hawaii court are harder to understand. While Hawaii has broad privacy laws and a history of tolerance,<sup>287</sup> its constitutional amendment rate of 2.56 is sixth highest.<sup>288</sup> Consequently, with two-thirds of Hawaii voters opposed to same-sex marriage, the prospect of a constitutional amendment override was real and foreseeable.<sup>289</sup> More to the point, the Hawaii court risked a constitutional amendment override both by agreeing to hear the case and by demanding that the state satisfy strict review rather than signaling its willingness to consider domestic partnership or civil union legislation.<sup>290</sup>

---

281. Press Release, Eagleton Inst. of Politics, Rutgers-Eagleton Poll: New Jerseyans Now Support Gay Civil Unions by 2-1 (Jun. 23, 2006).

282. Bill Ainsworth, *51 Percent Support Same-Sex Marriage*, SAN DIEGO UNION-TRIB., May 28, 2008, at A-1.

283. Press Release, Take It to the People, Support for Traditional Marriage Remains Strong in Vermont (Dec. 16, 1999). This opinion poll was taken by an advocacy group opposed to same-sex marriage. With that said, the negative reaction of Vermonters to the court's decision backs up those poll results. See Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 148, 183-221 (2000).

284. See Gil Kujovich, *An Essay on the Passive Virtue of Baker v. State*, 25 VT. L. REV. 93, 103 (2000). In other respects, the Vermont legislature was friendly to same-sex initiatives. Three years before the Vermont Supreme Court decision, the state legislature amended its adoption statute to allow for adoption by the "partner of a parent." See *id.* at 102.

285. For an explanation of why the court could not duck the constitutional issue through a creative interpretation of the Vermont marriage statute, see *id.* at 102-03.

286. For additional discussion, see *infra* notes 298-99, 307-11, and accompanying text.

287. See Linda Hosek, *Isles May Be First for Gay Marriage*, HONOLULU STAR-BULL., Apr. 24, 1991, at A-1.

288. Lutz, *supra* note 50, at 248-49.

289. See *supra* note 264 (noting procedures for amending Hawaii's constitution).

290. Before Hawaii voters approved the marriage amendment in 1998, Hawaii

The California Supreme Court also had reason to know that its decision might prompt a constitutional amendment override. Indeed, the campaign to amend the California Constitution to forbid same-sex marriage began months before the court's May 2008 decision.<sup>291</sup> But unlike the Hawaii court, the California court was clearly working within political norms. The state's political establishment said it would back the court, and the court's ruling matched public opinion polls.<sup>292</sup> Furthermore, even though the same-sex marriage ruling invalidated a 2000 voter initiative specifying that "[o]nly marriage between a man and a woman is valid or recognized in California,"<sup>293</sup> the state supreme court has frequently functioned as "a strong check on the California initiative process"—invalidating initiatives at a higher rate than any other state supreme court.<sup>294</sup> Needless to say, following voter approval of the override amendment, the political landscape and with it, state political norms, had changed. In particular, following past court practice,<sup>295</sup> the justices approved the override initiative (rather than make judicial retention elections the only available democratic outlet for voters to express their disagreement with the court).<sup>296</sup> State political norms undoubtedly play an important part in state supreme court decision-making. State courts must look both to the distinctive features of their constitutional systems and to in-state politics when sorting out whether a decision may trigger a backlash. Not surprisingly, path-breaking state supreme courts on the same-sex marriage issue have come from states where voters and/or political leaders were generally supportive of expanding state marriage law protections to same-sex couples. The notable exceptions were Vermont and Hawaii. In Vermont, the court had no choice but to issue a decision and consequently issued a minimalist ruling that sought to advance the justices' legal policy preferences without triggering a

---

lawmakers enacted domestic partnership legislation in 1997, making clear that a less dramatic decision would have been acceptable to Hawaii lawmakers and voters. For a detailed treatment of the Hawaii marriage amendment and related domestic partner legislation, see David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, U. HAW. L. REV. 19, 22 (2000).

291. Lisa Leff, *Same-Sex Marriage Amendment Sought*, OAKLAND TRIB., Feb. 15, 2008.

292. See sources cited *supra* notes 272-273, 282.

293. CAL. FAM. CODE § 308.5 (2000).

294. MILLER, *supra* note 58, at 109.

295. The obvious point of reference here is *People v. Frierson*, 599 P.2d 587 (Cal. 1979). *Frierson* approved Proposition 17, a 1972 initiative approved in response to the California Supreme Court's 1972 invalidation (on state constitutional grounds) of the death penalty. See MILLER, *supra* note 58, at 200-05. Indeed, since California approved the initiative process in 1911, the California Supreme Court has only twice concluded that the proposed initiative was so sweeping as to constitute an impermissible revision—not an amendment—to the state constitution. See Bob Egelko, *Prop. 8 Issue Hinges on Who Must Decide—Judges or Voters*, S.F. CHRON., Nov. 19, 2008, at B1.

296. *Strauss v. Horton*, 46 Cal. 4th 364 (2009) (holding valid Proposition 8's change to the constitution defining marriage as between a man and a woman).

counterproductive backlash. In Hawaii, the court simply miscalculated or ignored backlash risks. In Subpart B of this Part, I will extend this analysis further—considering whether out-of-state developments helped inform state courts of potential backlash risks.

### 3. *Reputation and other motives*

Up until now, this Part has viewed state supreme courts as single entities, not taking into account differences in the values and motivations of individual justices. More than that, the only consequences I have considered are retention risks and constitutional amendment overrides. Different justices, however, have different, sometimes competing, priorities—including, for example, the choice of advancing their court's reputation as a path-breaker court or, alternatively, avoiding political conflict with voters and elected officials.<sup>297</sup> In other words, some of these courts—while paying attention both to their constitutional systems and to political norms—could have pushed harder or less hard. Courts could have found for same-sex marriage, not civil unions, or vice versa; courts with docket power could have deferred a decision.

The most vivid example of this phenomenon is the 1999 Vermont Supreme Court decision in *Baker*. In explaining its decision to leave it to the state legislature to decide whether to enact same-sex marriage or civil union legislation, the majority openly discussed its fear of a potential in-state backlash, noting that “[w]hen a democracy is in moral flux . . . [j]udicial answers . . . may be counterproductive even if they are right.”<sup>298</sup> In sharp contrast, the dissenting justices thought they should issue a definitive ruling even if the “subject is controversial . . . [or] the outcome may be deeply

---

297. In same-sex marriage cases, majority and dissenting justices did square off on the respective roles of courts and legislatures—with justices pushing for same-sex marriage arguing that the court's “role is to stand as a bulwark of a constitution that limits the power of government to oppress minorities,” *Lewis v. Harris*, 908 A.2d 196, 231 (N.J. 2006), and justices defending existing marriage statutes condemning “a bare majority of this court, not satisfied with the pace of democratic change . . . [substituting] its own social policy views for those expressed by the People themselves,” *In re Marriage Cases*, 183 P.3d 384, 457 (Cal. 2008) (Baxter, J., concurring and dissenting). Another measure of the salience of reputational concerns are interviews that California Chief Justice Ronald George gave about the same-sex marriage decision. For example, George told the LOS ANGELES TIMES that the decision “weighed [more] heavily” than any other case he decided, that “there are times when doing the right thing means not playing it safe,” and that he was “so glad” that oral arguments were televised.” Marcia Dolan, *Same-Sex Case Weighed on Chief Justice*, L.A. TIMES, May 18, 2008, at A1, A32 (quoting George). Commenting on the decision and George's role in the case, law professor Gerald Uelman spoke of George's sensitivity to “how this will be perceived” and his recognition “that this more than any other thing he does as chief justice will define his legacy.” *Id.* at A32 (quoting Uelman).

298. *Baker v. State*, 744 A.2d 864, 888 (Vt. 1999) (quoting Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 101 (1996)).



offensive to the strongly held beliefs of many of our citizens.”<sup>299</sup>

Disagreement among justices is also tied to conflicting views about whether their court should cultivate a reputation of being a path-breaker. In particular, most path-breaker courts (California, Massachusetts, New Jersey, and Iowa) have well-deserved reputations for being leading state courts, especially with respect to the expansion of individual rights protections.<sup>300</sup> Some but not all justices on these courts may have a personal interest in maintaining this reputation, and with it, their status as path-breakers on individual rights issues.<sup>301</sup> Indeed, the majority opinion of the California Supreme Court proudly referenced its “landmark [1948] decision” overturning the state’s ban on interracial marriage, noting that the decision, “although rendered by a deeply divided court, is a judicial opinion whose legitimacy and constitutional soundness are by now universally recognized.”<sup>302</sup> Reputational concerns may also have been at play in Massachusetts. Chief Justice Margaret Marshall has strong personal connections to media and academic elites, connections that may have influenced her determination to find a constitutional right to same-sex marriage and to cite foreign law sources in her opinion.<sup>303</sup>

Whether or not reputational concerns meaningfully contributed to the

299. *Id.* at 912 (Johnson, J., concurring in part and dissenting in part). In making this point, the dissenters pointed to the state court’s mandatory jurisdiction—arguing that the Vermont Constitution anticipates judicial review of all legislative decision-making. *Id.* For a competing view, see *supra* text accompanying notes 267-68 (suggesting that courts without docket power are less apt to take political risks).

300. On the California court, see Jake Dear & Edward W. Jessen, “*Followed Rates*” and *Leading State Cases, 1940-2005*, 41 U.C. DAVIS. L. REV. 683 (2007); on the Massachusetts court, see SEAN O. HOGAN, *THE JUDICIAL BRANCH OF STATE GOVERNMENT: PEOPLE, PROCESS, AND POLITICS* 282-83 (2006); on the California and Massachusetts courts, see Alan Rogers, *State Constitutionalism and the Death Penalty*, 20 J. POL’Y HIST. 143 (2008); on the New Jersey court, see TARR & PORTER, *supra* note 24, at 237; on the New Jersey and Massachusetts courts, see Henry R. Glick, *Judicial Innovation and Policy Re-Invention: State Supreme Courts and the Right to Die*, 45 W. POL. Q. 71 (1992); on the Iowa court, see Rex Laird, *Iowa Court Typically Ahead on Civil Rights*, DES MOINES REG., Dec. 9, 2008, at A9.

301. See *supra* notes 150, 158 and accompanying text (discussing social psychology model of judicial decision-making).

302. *In re Marriage Cases*, 183 P.3d at 399, cited in Joanna Grossman & Linda McClain, *The California Supreme Court Rules in Favor of Marriage for Same-Sex Couples: Why Domestic Partnerships Are Not Enough*, FINDLAW, May 27, 2008, <http://writ.news.findlaw.com/grossman/20080527.html>.

303. Chief Justice Marshall’s ties to the legal academy and her interest in having state courts cite foreign law are underscored by her 2004 Brennan Lecture at New York University School of Law. See Margaret H. Marshall, Chief Justice, Supreme Judicial Court of Mass., William J. Brennan, Jr. Lecture on State Courts and Social Justice, “*Wise Parents Do Not Hesitate to Learn from Their Children*”: *Interpreting State Constitutions in an Age of Global Jurisprudence* (Feb. 9, 2004), in 79 N.Y.U. L. REV. 1633 (2004). With respect to media elites, Chief Justice Marshall has, at a minimum, some social contact with journalists by virtue of her marriage to former NEW YORK TIMES columnist and U.S. Supreme Court correspondent Anthony Lewis.

outcomes in Massachusetts or California, it is undoubtedly true that the reputations of Massachusetts and California as path-breaking states informed the personal predilections of the individual justices who sit on these courts. More to the point, state supreme courts operate within the boundaries of state constitutional systems and state political norms (including the reputation of state courts). The fact that different justices on these courts accord different weights to backlash risks and to personal and institutional reputation does not negate the defining role that state systems and norms play in state supreme court decision-making. Indeed, path-breaking states share one or all of the following characteristics: political insulation, political norms supporting the invalidation of existing marriage laws, and the reputation for being a leading court on civil rights and liberties.

*D. How State Courts Can Look to National Trends and the Experiences of Other States*<sup>304</sup>

State supreme courts operate within boundaries set by their state constitutions and state political norms. In assessing backlash risks, however, state courts need not operate in a vacuum. State justices may be able to look to the experiences of other states in assessing in-state backlash risks. In this way, state courts can simultaneously focus their energies on in-state backlash risks while also looking beyond their borders and, in so doing, participate in a nationwide dialogue over the meaning of core constitutional values.

With regard to same-sex marriage, there is little question that state justices knew about some out-of-state developments. And while it is impossible to measure the impact of these developments on state court decision-making,<sup>305</sup> out-of-state developments certainly should have figured into the calculus of state courts. In explaining why I think this is so, I will focus my attention on court decisions in Vermont (1999), Massachusetts (2003), New Jersey (2006),

---

304. This Subpart addresses themes that will also be explored in my forthcoming book chapter, *Same-Sex Marriage and the New Judicial Federalism*, Devins, *supra* note 242, at 13-34. That book chapter provides a more detailed look at the on-the-ground facts confronting several state courts deciding same-sex marriage cases.

305. The Vermont Supreme Court explicitly referenced post-Hawaii developments in its decision. *See Baker v. State*, 744 A.2d 864, 888, 904 n.7 (Vt. 1999) (“Judicial authority is not, however, the ultimate source of constitutional authority. Within our constitutional framework, the people are the final arbiters of what law governs us; they retain the power to amend our fundamental law. If the people of Vermont wish to overturn a constitutionally based decision, as happened in Alaska and Hawaii, they may do so.”). Other courts have referenced the passionate debate over same-sex marriage. *See In re Marriage Cases*, 183 P.3d at 399 (noting that the court was “aware, of course, that very strongly held differences of opinion exist” on same-sex marriage); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008) (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)); *Goodridge*, 798 N.E.2d at 948 (noting “deep-seated religious, moral, and ethical convictions” over same-sex marriage).

California (2008), and Iowa (2009).<sup>306</sup>

The Vermont court, as already noted, explicitly referenced backlash fears. The court, moreover, pointed to the “instructive” lesson of Hawaii—specifically, the “state constitutional amendment overturn[ing] [the] same-sex marriage decision.”<sup>307</sup> The Hawaii experience was also relevant for a host of reasons not mentioned in the court’s opinion. The Hawaii constitutional amendment fight was financed, in part, by out-of-state interest groups.<sup>308</sup> These and other interest groups also pushed for the enactment of federal and state Defense of Marriage Acts.<sup>309</sup> So when the Vermont Supreme Court received seventeen amicus briefs from national interest groups,<sup>310</sup> the justices had reason to know that a decision validating same-sex marriage would prompt these groups into action.

By taking out-of-state backlash into account, the Vermont court sought to mitigate potential in-state backlash—returning the issue to the legislature and declaring that civil union legislation would satisfy its ruling. The Vermont court proved to be prescient. After state lawmakers heeded the call to enact legislation, state voters made clear that they vehemently disagreed with the court’s ruling (suggesting that a more sweeping ruling might have triggered an intense backlash). The fall 2000 statewide elections were “conducted in significant part as a referendum on civil unions” and sixteen incumbent legislators who backed civil unions were unseated, shifting control of the state house from Democrats to Republicans.<sup>311</sup>

Four years later, the Massachusetts court could look to Vermont in assessing the possibility of lawmakers being ousted from office in an effort to approve a constitutional amendment banning same-sex marriage. The court could also look to the role of out-of-state interest groups in Vermont and elsewhere as “hundreds of [interest] groups” had signed onto amicus briefs in the Massachusetts case, including “Catholic, Protestant fundamentalist, and

---

306. Hawaii was the first court to rule on the issue and, consequently, could not look to the experiences of other states. The Connecticut Supreme Court ruling was one of a spate of 2008-2009 rulings, and any points I would make about Connecticut can be made by discussing Iowa, the last (for now) of these rulings.

307. *Baker*, 744 A.2d at 888. The court also noted that Alaska voters had constitutionally banned same-sex marriage in the wake of a “trial court decision in favor of same-sex marriage.” *Id.*

308. Elaine Herscher, *Ballot Test for Gay Marriage in Alaska*, *Hawaii*, S.F. CHRON., Oct. 26, 1998, at A1.

309. Carolyn Lochhead, *GOP Bill Targets Same-Sex Marriages: Measure Would Affect Benefits, Recognition*, S.F. CHRON., May 9, 1996, at A1.

310. *Baker*, 744 A.2d at 866-67.

311. ESKRIDGE, *supra* note 5, at 81; GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 346 (2d ed. 2008); Keck, *supra* note 14, at 162 (recognizing electoral defeats but calling attention to Vermont voters’ support for numerous Democratic supporters of civil unions, including the governor who signed the bill).

Orthodox Jewish groups.”<sup>312</sup> Finally, the volatility of same-sex marriage was underscored by the response of national interest groups to the U.S. Supreme court’s June 2003 decision in *Lawrence v. Texas*, outlawing anti-sodomy statutes.<sup>313</sup> *Lawrence* fueled public repudiations of same-sex marriage by the Southern Baptist Convention and the U.S. Convention of Catholic Bishops; it resulted in same-sex marriage becoming the defining issue for social conservatives; and it contributed to an increase in public opposition to same-sex marriage at the very time the Massachusetts court was set to rule on the issue.<sup>314</sup>

Knowing that then-Massachusetts Governor Mitt Romney and several state lawmakers promised to pursue a constitutional ban on same-sex marriage if the court found a right to same-sex marriage,<sup>315</sup> these out-of-state developments should have sounded an alarm for the court.<sup>316</sup> Perhaps for this reason, the court sought to mitigate backlash risks both by delaying its ruling and—instead of immediately establishing a right to same-sex marriage—remanding the case to the legislature for 180 days.<sup>317</sup> The court’s efforts paid off, as the constitutional amendment override effort never got off the ground and some incumbent lawmakers opposed to same-sex marriage lost their seats.<sup>318</sup>

Outside of Massachusetts, the court’s 2003 decision helped spur a nationwide campaign against same-sex marriage. Thirteen states approved amendment bans in 2004, and some commentators claimed that the same-sex marriage issue helped propel the 2004 candidacies of George W. Bush and

---

312. Kathleen Burge, *SJC Puts Off a Decision on Gay Marriage*, BOSTON GLOBE, July 15, 2003, at A1; Kathleen Burge, *SJC to Weigh Arguments on Gay Marriage*, BOSTON GLOBE, Mar. 2, 2003, at A1.

313. Klarman, *supra* note 8, at 459-60 (discussing how the Moral Majority, the Family Research Council, and others began to address same-sex marriage in response to *Lawrence*).

314. See Klarman, *supra* note 8, at 460; Jeffrey A. Rosen, *The Next Culture War*, in *A YEAR AT THE SUPREME COURT* 73, 74-77 (Neal Devins & Davison M. Douglas eds., 2004); see also Esther Kaplan, *The Religious Right’s Sense of Siege Is Fueling a Resurgence*, NATION, July 5, 2004, at 33; Mary Leonard, *Gay Marriage Stirs Conservatives Again: Right Wing Braces for Mass. Ruling*, BOSTON GLOBE, Sept. 28, 2003, at A1.

315. See *National Briefing New England: Massachusetts: Same-Sex Marriage Ban*, N.Y. TIMES, Mar. 7, 2003, at A22; Frank Phillips, *Romney’s Stance on Civil Unions Draws Fire: Activists Accuse Governor of “Flip-Flopping” on Issue*, BOSTON GLOBE, Feb. 23, 2005, at A1.

316. For a competing perspective on the period between the Vermont and Massachusetts decisions (highlighting ways in which there was increasing support for same-sex unions), see Keck, *supra* note 14, at 161 tbl.1.

317. For a detailed assessment of these and other strategic steps undertaken by the Massachusetts court, see Jacobi, *supra* note 9.

318. In noting that the court sought to mitigate the impact of its ruling, I do not mean to suggest that the court, in fact, took out-of-state experiences into account. For reasons detailed earlier, it may be that Chief Justice Marshall and other members of the court were especially interested in advancing both the court’s legal policy preferences and its reputation as a leading court on civil rights matters. See *supra* notes 188, 300, 303.

other Republicans.<sup>319</sup> In this way, the decision was a visible signal to other state courts that constitutionalizing same-sex marriage was a high-stakes gambit.

Enter the New Jersey Supreme Court, which ruled on the same-sex marriage issue in 2006. The political protections afforded the New Jersey court as well as the state's political climate set the stage for the New Jersey court to find for same sex-marriage and, in so doing, to reinforce its image as a powerful, path-breaking court.<sup>320</sup> The court's four-to-three decision to instead find for civil unions (and leave it to the legislature to legalize same-sex marriage) may have been informed by the spate of constitutional amendments that followed the Massachusetts decision.<sup>321</sup> Not surprisingly, there was no backlash in New Jersey, including "no apparent electoral spillover, either locally or nationally."<sup>322</sup> In Arizona, for example, voters (two weeks after the New Jersey decision) turned down a proposed initiative to outlaw same-sex marriage.<sup>323</sup>

Two years later, the California Supreme Court entered the fray. At this point, enough state courts had ruled on same-sex marriage that the court could discern both a range of judicial approaches to the same-sex marriage issue and a range of responses from state voters and lawmakers. On the one hand, the flurry of constitutional amendments passed after the Massachusetts decision called attention to the risks of a potential amendment override. On the other hand, the ability of both the Massachusetts and the New Jersey courts to invalidate state marriage laws with limited in-state backlash signaled the possibility of the California court successfully mandating same-sex marriage. Also, the trajectory of public opinion and state action pointed to increasing voter support of (or at least acquiescence to) same-sex marriage.<sup>324</sup> In choosing whether to take account of developments in other states (and which developments), the California court was undoubtedly influenced by its longstanding reputation as a path-breaker and the fact that the state's domestic

---

319. See Klarman, *supra* note 8, at 464-70; James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4. For competing commentary, see Keck, *supra* note 14, at 161-64 (noting that the ruling also spurred gay rights activists and same-sex couples into action); cf. Jacobi, *supra* note 11 (questioning backlash claims on other grounds). For additional commentary about the impact of the court's decision, see *supra* notes 7-14 and accompanying text.

320. See sources cited *supra* notes 277, 281, 300; see also Bruck, *supra* note 277, at 424-25 (noting that the state is renowned for a weak legislature and strong judiciary).

321. The fact that the New Jersey court could not deny certiorari and find for same-sex marriage at a later date may have also impacted its decision. See *supra* text accompanying note 120.

322. Keck, *supra* note 14, at 164.

323. Sonya Geis, *New Tactic in Fighting Marriage Initiatives—Opponents Cite Effects on Straight Couples*, WASH. POST, Nov. 20, 2006, at A3.

324. On changing public opinion, see Patrick J. Egan et al., *Gay Rights, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY*, *supra* note 10, at 234; Keck, *supra* note 14, at 156.

partnership law already provided protections “comparable to the status designated as ‘civil unions’” (so that a constitutional amendment override would be less consequential in California than in a state that did not provide civil union protections).<sup>325</sup> Consequently, rather than play it safe by denying certiorari and waiting for an even more favorable in-state political climate, the California court discounted the risk of a constitutional amendment override.

In November 2008, California voters backed a constitutional amendment overriding the decision.<sup>326</sup> On the same day, voters enacted anti-same-sex marriage amendments in Arizona and Florida, as well as an Arkansas ballot measure barring unmarried couples from fostering or adopting children.<sup>327</sup> At around the same time, however, developments in other states and across the nation cut in favor of same-sex marriage. In May 2008, New York Governor David Patterson issued a directive requiring that all state agencies recognize same-sex marriages performed in other jurisdictions.<sup>328</sup> In October 2008, the Connecticut Supreme Court ruled in favor of same-sex marriage—a decision backed by state lawmakers and voters.<sup>329</sup> In March and April 2009, lawmakers in Vermont approved the legalization of same-sex marriage, and lawmakers in New Hampshire were actively considering same-sex legislation.<sup>330</sup> Moreover, national opinion polls showed increasing voter support for same-sex marriage, prompting the Republican Party to rethink its campaign against same-sex marriage.<sup>331</sup>

In April 2009, the Iowa Supreme Court issued its same-sex marriage decision. The court did not reference any of these out-of-state developments in its ruling and it is unclear what role, if any, these developments played in the justices’ decision-making. With increasing public support for same-sex marriage in Iowa, a constitutional amendment process that would have delayed any vote on same-sex marriage until November 2012, and the rejection of same-sex constitutional amendments by lawmakers in earlier sessions, it is possible that the Iowa court did not consider out-of-state developments.<sup>332</sup>

---

325. *In re Marriage Cases*, 183 P.3d 384, 398 n.2 (Cal. 2008).

326. Jesse McKinley & Laurie Goodstein, *Bans in Three States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

327. Keck, *supra* note 14, at 165.

328. Jeremy W. Peters, *New York Backs Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A1.

329. *See supra* text accompanying notes 274-75, 278.

330. *See* Abby Goodnough, *New Hampshire Senate Narrowly Approves New Version of Same-Sex Marriage Bill*, N.Y. TIMES, Apr. 29, 2009, at A16; Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1; Abby Goodnough, *Vermont Senate Panel Approves Same-Sex Marriage Bill*, N.Y. TIMES, Mar. 21, 2009, at A13.

331. *See* Adam Nagourney, *Signs G.O.P. Is Rethinking Stance on Gay Marriage*, N.Y. TIMES, Apr. 30, 2009, at A4 (noting changing poll numbers on gay marriage around time of Iowa decision).

332. *See* Monica Davey, *Gay Couples in Iowa Win Right to Wed*, N.Y. TIMES, Apr. 4,

Alternatively, the Iowa court may have thought that the absence of in-state backlash in Connecticut, New Jersey, and Massachusetts was especially salient—given the strong traditions of judicial independence and practical barriers to constitutional amendments in Iowa and these other path-breaker states.

Whether or not the Iowa court looked to the experiences of other state courts (or other out-of-state evidence) about the sustainability of its same-sex marriage ruling, it is clear that the Iowa court was far better positioned to assess backlash risks than, say, the Hawaii court in 1993 or the Vermont court in 1999. The Iowa court could look at the experiences of the other state courts and related out-of-state developments when assessing in-state backlash risks. The Hawaii court was operating on a blank slate and the Vermont court could only look to what had happened in Hawaii (including the responses of other states and the federal government to the Hawaii decision). All of this highlights a rather obvious point: over time, as more and more state courts confront an issue, other states can see how previous decisions play out and better assess potential backlash and implementation risks.

Same-sex marriage, of course, is an unusual case, as the volume of state constitutional amendments, proposed federal legislation, and news coverage sets it apart from nearly all other issues that state courts rule on. At the same time, there is no reason to think that state courts cannot look to the experiences of other states in assessing a range of backlash risks, especially potential implementation problems. Given the paucity of national press coverage of state supreme-court decision-making,<sup>333</sup> the principal source for this information will be the briefs filed by litigants and amici.<sup>334</sup>

On this point, state constitutional challenges to school finance schemes (an issue which has spanned more than thirty-five years and involved most state supreme courts) are instructive. In recent years, state supreme courts and the parties appearing before them have paid increasing attention to the experiences of other states. Briefs and decisions in Colorado (2008), Connecticut (2007), Kansas (2006), Nebraska (2007), and New York (2006) explicitly reference the

---

2009, at A1; sources cited *supra* note 276.

333. See F. Dennis Hale, *Newspaper Coverage Limited for State Supreme Court Cases*, 27 NEWSPAPER RES. J. 6, 12 & tbl.2 (2006) (finding that sixteen percent of state supreme court decisions receive substantial news coverage). Indeed, state supreme court justices have expressed concern about public ignorance of their decisions, agreeing in the spring of 2009 to back an initiative sponsored by the National Center for State Courts and the William & Mary Law School to find ways to improve public awareness of state supreme court decision-making. Conference of Chief Justices, Resolution 1: In Support of the State Supreme Court Initiative Proposed by the National Center for State Courts and the William & Mary Law School (Jan. 28, 2009), available at <http://www.nacmnet.org/news/1-InSupportoftheStateSupremeCourtInitiative.pdf>.

334. This tracks U.S. Supreme Court practices. See EPSTEIN & KNIGHT, *supra* note 146, at 146-47.

implementation experiences of other states.<sup>335</sup> For some courts, these experiences have cut against intervention; for other courts, these experiences have been instructive in crafting remedies.<sup>336</sup> This is to be expected: State constitutional systems and state political norms are extremely varied. What is right for one state is not necessarily right for any other state. At the same time, for reasons detailed in this Subpart, the experiences of other states can inform state court decision-making—even if different courts make use of the same information to reach different conclusions about implementation and backlash risks.

Let me close this Subpart with what may seem a cliché: “The life of the law has not been logic: it has been experience.”<sup>337</sup> State courts should look first and foremost to their own traditions and experiences in assessing potential backlash risks. At the same time, state courts can learn much from the experiences of other states—looking to those experiences to better inform their understanding of potential in-state consequences. In this way, state courts can participate in a nationwide dialogue about fundamental constitutional issues while still focusing on that which they know best—their home state.

#### CONCLUSION

Throughout this Article, I have called attention to the ways that state courts are at once widely varied and part of a national system. In Parts I and II, I explained how state constitutional systems differ tremendously from state to state and, correspondingly, that state justices have the incentive and capacity to take account of in-state, not nationwide, backlash risks. In this way, Parts I and II made the case for a state-centered approach to state constitutionalism (and, in so doing, operated as a critique of academics that make use of national measures to assess both state constitutional systems and state court decisions). Yet Parts I and II also discussed how state courts could participate in a nationwide dialogue with each other over the meaning of core constitutional values. Specifically, state constitutional systems borrow from each other and from the Federal Constitution, and reflect larger historical trends. And state court justices can look to the experiences of other state courts in assessing

---

335. See Memorandum from Amanda Christensen to Neal Devins, School Finance (Nov. 30, 2009) (on file with author).

336. Compare *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 182-83 (Neb. 2007) (throwing case out on justiciability grounds because of failure of courts in other states to successfully resolve school funding disputes), with Telephone interview with Michael A. Rebell, Executive Dir., Campaign for Educ. Equity, Columbia Univ., (Mar. 30, 2009) (describing his argument in *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50 (N.Y. 2006), in which he urged supreme court justices to look to the experiences of other states in assessing workable remedies for New York) (notes on file with author).

337. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover Publications 1991) (1881).



backlash risks. Part III made the lessons of Parts I and II concrete by looking at the on-the-ground facts of path-breaking state court decision-making on same-sex-marriage. In particular, path-breaking court decision-making is very much tied to the distinctive features of both state constitutional systems and state political norms. At the same time, path-breaking courts can look to the experiences of other courts and national trends in assessing in-state backlash risks.

By focusing on the incentives and capacity of state courts to take account of in-state consequences, this Article has also sought to shift the debate over state constitutionalism towards the implementation of state court decision-making. The question of how state courts can maintain their essential autonomy while learning from each other speaks as much to the consequences of state court decision-making as it does to the legal reasoning of state courts. Indeed, unlike the debate over whether there is or should be a coherent theory of state constitutional interpretation, it seems likely that many (if not most) state court justices take consequences into account. Correspondingly, by recognizing that state justices have expertise about their own constitutional systems and political norms, this Article has explained why state courts are well equipped to take account of in-state consequences—so that their voice in the national conversation about constitutional values is informed by that which they have expertise to speak on. Out-of-state experiences should figure into this calculus (as state courts can look to the experiences of other states when assessing in-state backlash risks); but potential nationwide backlash should not figure into this decision (as anticipating out-of-state consequences would be a shot in the dark).<sup>338</sup>

Two final comments: First, this Article should be seen for what it is—a preliminary assessment of why it is that consequence-based state-centered constitutionalism is a sensible way to carry forward the conversation about the ways in which state courts speak to each other and the nation. There is much work to be done. Empirical studies need to be conducted about the impact of both docket control and state constitutional amendment procedures on state court decision-making. Other case studies need to be done—to make clear the linkage between state court decision-making and a state's constitutional system and political norms. Finally, the mechanisms by which state courts can learn about salient out-of-state experiences need to be pursued in greater detail. On this point, my hope is that litigants and amici will recognize the importance of out-of-state consequences to state court decision-making and, consequently, that state supreme court briefs will alert state court justices to potentially relevant out-of-state consequences.

---

338. State justices, although well positioned to assess in-state consequences, lack expertise in assessing nationwide consequences *ex ante*. See *supra* Part II.B.2. More than that, as revealed by conflicting accounts of the out-of-state consequences of same-sex marriage decision-making, it is hard to assess long-term national consequences *ex post*. See *supra* text accompanying notes 5-6 (Hawaii), 12-13 (Massachusetts).

Second, dramatic changes in the financing and salience of state judicial elections inevitably call attention to the importance of consequences to state court decision-making (especially given the U.S. Supreme Court's increasingly hands-off approach to state decision-making). Correspondingly, it is important to recognize that "state constitutional law is less circumscribed by legal norms and more defined by political coalition-building and mobilization."<sup>339</sup> Whatever one thinks about the desirability of such overtly politicized constitutional discourse,<sup>340</sup> it is nonetheless true that state justices running in contested races will be under intense pressure to act like other politicians seeking reelection.<sup>341</sup> For much the same reason, it is important to recognize that the backlash calculations of justices in states with contested elections are likely to be very different than the calculations of justices in other states, especially states that do not make use of elections. All of this is to say that the issues discussed in this Article are of increasing national import—but that the examination of these issues must recognize fundamental differences among state systems.

---

339. Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 875 (1999) (arguing that state judges no longer unilaterally determine the meaning of state constitutional provisions but, instead, share that responsibility with voters).

340. In particular, the academic debates over both constitutional dialogues (between branches of the federal government) and popular constitutionalism (between the people and other parts of government) have received some but not much attention in the literature. Given the increasing importance of state constitutionalism, there should be increasing attention to transporting to the state court context these debates over the respective roles of elected officials and voters in shaping constitutions.

341. For additional discussion, see Pozen, *supra* note 157 (noting, among other things, that there is an inverse relationship between judicial elections achieving legitimacy as elections and the costs of judicial elections to both the courts' legitimacy and the judiciary's distinctive role in our system of government).

