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## Do Judicial Elections Facilitate Popular Constitutionalism; Can They?

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# COLUMBIA LAW REVIEW

## *SIDEBAR*

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### DO JUDICIAL ELECTIONS FACILITATE POPULAR CONSTITUTIONALISM; CAN THEY?

*Nicole Mansker\* & Neal Devins\*\**

Four months ago, Iowa voters tossed out three justices who backed same-sex marriage. Academic and media commentary of the elections largely focused on the related questions of whether judicial elections fundamentally threaten judicial independence and whether constitutional change can be pursued through something less draconian than the ouster of judges. The possibility that judicial elections should be embraced as a vehicle to facilitate constitutional dialogues between voters, elected officials, and judges got no meaningful play in discussions of the Iowa elections. Likewise, there was next to no discussion of whether judicial elections facilitate “popular constitutionalism”—by making fundamental constitutional questions more tangible, more immediate.<sup>1</sup>

The Iowa elections certainly call attention to the need to think about the mechanisms by which voters can constructively engage in popular constitutionalism. Likewise, the advent of the Tea Party (which regularly invoked the Federal Constitution in its call to rein in governmental power) highlights the potential power of social movements in shaping constitutional discourse and, in so doing, highlights the need to—as Larry Kramer put it—consider “what kind of institutions we can construct to make popular constitutionalism work.”<sup>2</sup> For this and many other reasons, David Pozen’s “Judicial Elections as Popular Constitutionalism”<sup>3</sup> is timely and important. Recognizing that a major problem impeding the implementation of popular constitutionalism is the lack of an institutional structure that can foster popular

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1. Popular constitutionalism is the idea that society must move away from the juricentric constitutional culture and allow for the people themselves to assert their authority over the identification and enforcement of constitutional norms. Correspondingly, popular constitutionalism rejects judicial supremacy as breeding citizen passivity, elite rule, constitutional alienation, and judicial overreaching. For an introduction to popular constitutionalism, see generally Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

2. Larry Kramer, Response, 81 *Chi.-Kent L. Rev.* 1173, 1182 (2006).

3. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 *Colum. L. Rev.* 2047 (2010).

constitutionalism in a coherent and beneficial way, Pozen posits that popular constitutionalism has a strong ally in the institution of state judicial elections. In so doing, Pozen seeks a paradigm shift in popular constitutionalism—recognizing that popular constitutionalism cannot be moored to nationwide conversations about the Federal Constitution but, instead, must take into account the profound role that state courts and state constitutions play in shaping our national constitutional discourse. Equally significant, Pozen recognizes that popular constitutionalist discourse must shift focus away from the theoretical question of whether popular constitutionalism is legitimate to the methodological question of institutional design.

Calling judicial elections a “systematic and pervasive mechanism for popular constitutionalism,” Pozen argues that state judicial elections are a “focal point with which to stimulate and structure constitutional deliberation.”<sup>4</sup> His article conceives of judicial elections as vehicles for popular constitutionalism. The basis for this thought experiment is understandable—elections create a dialogue between the people and the courts, make courts and the work of the courts more salient and comprehensible, facilitate discourse, and provide judges with a means to determine the popular will. Moreover, state courts play a major role in interpreting and enforcing the Federal Constitution, and, perhaps more importantly, state courts are often at the cutting edge of recognizing rights that will eventually spill over into the national constitutional discourse. Finally, state judges interested in retaining their seats will take popular opinion into account when deciding cases, and if they do not, elections will force out judges insensitive to the people—presumably to be replaced by judges whose views will be shaped by popular constitutional discourse.

In a recent article, published as part of a University of Pennsylvania Journal of Constitutional Law symposium on the judiciary and the popular will, we discussed just that: the role of public opinion in state supreme court decisionmaking.<sup>5</sup> Though constitutional scholars have discussed for years whether public opinion has any influence on the United States Supreme Court, few scholars have focused their attention on state supreme courts. Like Pozen, we sought to move the discussion of the influence of popular opinion on judicial decisionmaking to the state level. We note that the gap in the literature with respect to state courts is particularly unfortunate given the role state supreme courts play in our constitutional system.<sup>6</sup> Looking to the unique features of state supreme courts, we posit that state supreme court responsiveness to the will of the people is linked to the direct democracy features of the state, including most importantly the selection and retention methods of state supreme court justices. Our research is thus a useful starting point in which to consider the workability of state judicial elections as vehicles

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4. *Id.* at 2050.

5. Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 *U. Pa. J. Const. L.* 455 (2010).

6. See Neal Devins, *How State Supreme Courts Take Consequences into Account*, 62 *Stan. L. Rev.* 1629, 1630–39 (2010) (“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.”).

of popular constitutionalism. We identify different limits than those articulated by Pozen for using judicial elections in this regard.

First, a bit about our research.<sup>7</sup> Our research indicates that most state supreme court justices have the incentive and capacity to take into account potential voter backlash. This is a result of the unique features of state courts that make them more democratically accountable than their federal counterparts. Simply put, state judicial systems are subject to far more checks than the federal judiciary. With the exception of but a few states, state supreme court justices do not serve life terms, the level of docket control that a state supreme court possesses varies widely from virtually total control to no control, and eleven states, either by constitution or statute, authorize or require the state supreme court to give advisory opinions. Initiatives and referendums are in wide use in many states, and eighteen states allow citizens to use the initiative process to amend the state constitution. The constitutions themselves are a point of distinction. The amendability of some state constitutions makes them more like super statutes than like solemn documents of irreducible rights, whereas other state constitutions are of comparable difficulty to amend as the Federal Constitution. Of course, the most significant distinction between state and federal courts is judicial elections. Thirty-nine states subject their state supreme court justices to some form of elections, either retention, partisan or nonpartisan.

After reviewing the distinctly democratic features of state supreme courts, we turned to existing empirical evidence to determine if there was a connection between state supreme court decisionmaking and public opinion. In states with contested elections, state justices, like other politicians, “have a tendency to vote in accordance with perceived constituency preferences on visible issues, simply because the failure to do so is politically dangerous.”<sup>8</sup> Crime and death penalty issues force justices subject to all election types to consider public opinion. However, studies find that state supreme court justices are influenced by their retention constituencies, especially when an election is near.<sup>9</sup>

Based on the existing research, we set out to expand the discussion of the influence of public opinion on state supreme courts. We gathered data on a variety of high salience issues, including abortion, same-sex marriage, school finance, gun control, and crime to determine if there was a link between public opinion and state supreme court decisions. For our analysis, we divided states into four groups: (1) partisan election states, (2) nonpartisan election states, (3) merit plan states, and (4) gubernatorial or legislative appointment states. We found that justices facing partisan elections are more likely to consider public opinion in their decisionmaking. Regardless of retention election method, state supreme court justices generally align with public opinion on

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7. In addition to the research in our recent article published in the *University of Pennsylvania Journal of Constitutional Law*, the following discussion is also drawn from Devins, *supra* note 6.

8. Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 29 *Am. Pol. Q.* 485, 489–90 (1995).

9. Devins & Mansker, *supra* note 5, at 482. Appointed judges responded more often to the will of the legislature and governor than to the will of the people, and judges in their last term before retirement responded less to any sort of political will. *Id.*

high salience issues. However, the retention election method is relevant to the frequency with which state supreme courts decide cases contrary to the popular will. Courts in partisan and nonpartisan election states appear less inclined to hear high salience issues to begin with and less inclined to rule against public opinion when retained through partisan or nonpartisan elections. At the same time, we recognized that there are few issues of such high salience such that the public will be cognizant of the decisions of state supreme court justices. With respect to the low salience issues, the courts have incentive to turn to business interests and campaign donors, especially given the infusion of money into judicial campaigns in recent years. Empirical evidence and anecdotal evidence indicate that justices are sensitive to the business interests that fund their campaigns (in partisan and nonpartisan election states). Indeed, judges themselves recognize that money can influence a judge's decisions both consciously and unconsciously.<sup>10</sup>

In the end, our analysis indicates that state supreme courts *are* influenced by public opinion, at least with respect to high salience issues, and especially if the court is subject to partisan or nonpartisan elections. This is not necessarily the equivalent, however, of positing that judicial elections can facilitate popular constitutionalism.

### I. POPULAR CONSTITUTIONALISM? WELL, WHAT ABOUT THOSE CONSTITUTIONS?

In considering popular constitutionalism, it is important to first look to the constitution itself. State constitutions are much more malleable than the Federal Constitution.<sup>11</sup> The states have adopted in total more than 147 different constitutions. Thirty states have had three or more constitutions in their histories, and Louisiana has had eleven constitutions. State constitutions are regularly amended (Alabama over 800 times), and the procedures for amending are often far more lax than the procedures for amending the Federal Constitution. Furthermore, in eighteen states, citizens can play a direct role in shaping the constitution through the initiative process. The result has been, in some states, constitutions that are more like super statutes that elevate what most would consider to be ordinary law to the status of constitutional law; state constitutions look like super legislation, “not sacred texts.”<sup>12</sup> As Pozen himself points out, “[s]tate constitutions never attained any mythical status.”<sup>13</sup>

The amendability of state constitutions is important to a discussion of popular constitutionalism and state judicial elections. First, it suggests that—irrespective of judicial elections—citizens are already directly involved in shaping constitutional culture through constitutional amendment initiatives and state legislatures are or can be involved in changing the constitutional text to reflect voter preferences. Second, the amendability of state constitutions calls

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10. Brief Amici Curiae of 27 Former Chief Justices and Justices in Support of Petitioners at 5, *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22).

11. See Devins, *supra* note 6, at 1639–44 (examining state constitutions).

12. Lawrence Friedman, *State Constitutions in Historical Perspective*, 496 *Annals Am. Acad. Pol. & Soc. Sci.* 33, 35 (1988).

13. Pozen, *supra* note 3, at 2088.

into question the idea that state constitutions are a separate, higher, more fundamental law than is ordinary law. Correspondingly, provisions in several state constitutions suggest that these constitutions are anything but fundamental law. Examples abound, including an article of the Arkansas constitution devoted to railroads, canals, and turnpikes; a provision of the New York constitution specifying the width of ski trails in the Adirondak Park; and a provision of the Texas constitution governing the use of unmanned teller machines at banks.

In certain respects, popular constitutionalism at the state level becomes just a call for citizen lawmaking, a more democratic society, rather than a call for citizens to actively engage in the creation and enforcement of the type of constitutional norms that animate popular constitutionalism theory. Perhaps more fundamentally, citizens (or their representatives) are well positioned to nullify state judicial decisionmaking.<sup>14</sup> Any interpretation disliked by the people can be remedied through amendments either directly in states with constitutional initiatives or indirectly through the people's representatives. None of this is to say that state constitutions cannot operate as fundamental law—It is often the case that they do, and it is often the case that state court interpretations of state constitutions transform the national constitutional landscape. As noted earlier, state courts sometimes play a critical leadership role in shaping our most fundamental constitutional values. With that said, the different natures of state and federal constitutions must be acknowledged in any state-focused theory of popular constitutionalism.

## II. STATE JUDICIAL ELECTIONS

In thirty-nine states, state supreme court justices are subject to some form of election.<sup>15</sup> Before the mid-1980s, there was little reason to think that state judicial elections held much promise for popular constitutionalism. At that time, elections were seen as “low key affairs[,] [c]onducted with civility and dignity, which were as exciting as a game of checkers . . . [p]layed by mail.”<sup>16</sup> Over the past twenty-five years (and especially in the past several years), “[t]he confluence of broadened freedom for [judicial candidates] to speak out on issues, the increasing importance of state judicial politics, and the infusion of money into judicial campaigns have produced what may be described as the ‘Perfect Storm’ of judicial elections.”<sup>17</sup>

Today, as David Pozen explained in a 2008 *Columbia Law Review* article,<sup>18</sup> state supreme court elections often look similar to the typical partisan election in the legislative and executive branches. Money is playing an ever

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14. Pozen recognizes this; among other things, his article calls attention to various mechanisms by which voters and lawmakers can amend state constitutions—including direct democracy responses to unpopular court rulings. Pozen, *supra* note 3, at 2088–93.

15. Devins & Mansker, *supra* note 5, at 460.

16. Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 *Duke L. J.* 1589, 1602 (2009).

17. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and ‘New-Style’ Judicial Campaigns*, 102 *Am. Pol. Sci. Rev.* 59, 60 (2008).

18. David E. Pozen, *The Irony of Judicial Elections*, 108 *Colum. L. Rev.* 265 (2008).

expanding role in judicial elections—from 2000–2009 more than two and one-half times the amount of money was raised for state supreme court elections than from 1990–1999.<sup>19</sup> Unsurprisingly, expenditures are almost entirely in the fourteen states with partisan and nonpartisan elections. The combination of fewer restraints on judicial candidate speech and the infusion of money into judicial campaigns has resulted in more competitive and contested elections with higher loss rates for judges subject to partisan and nonpartisan elections. As the amount spent on judicial elections has spiked, so has the tenor of negative advertising in such elections.<sup>20</sup> The role of business interests in shaping judicial elections has also spiked, with probusiness interest groups now accounting for 44% of fundraising and 90% of special interest television and advertising.<sup>21</sup>

This transformation in state judicial elections cuts both ways for popular constitutionalists. On the one hand, there is reason to think that state supreme courts have the capacity and incentive to take popular opinion into account—clearly something that cuts in favor of judicial elections and popular constitutionalism. On the other hand, the prospect of meaningful popular constitutionalist discourse is severely limited both by the tendency for voters to consider only a handful of high salience issues and by the pervasive influence of business and out-of-state interests. Unlike Pozen (who thinks that concerns of issue salience and structural issues tied to how judges are elected can be ameliorated),<sup>22</sup> we think that the ability of special interests to capitalize on voter uninterest in low salience issues severely limits the use of state judicial elections as a mechanism to facilitate popular constitutionalism.<sup>23</sup>

#### A. *Judicial Candidate Characteristics and Capacity To Discern Public Opinion*

State supreme court justices are well positioned to discern public opinion and the likelihood of backlash to their decisions.<sup>24</sup> In comparison to their federal counterparts, particularly Justices on the United States Supreme Court, state justices are far more versed in state politics and are more connected to voters, political parties, campaign contributors, and interest groups. State justices are generally well informed regarding the in-state political climate by virtue of their membership in the state and their professional and social interactions. For example, as of 2000, 65.7% of justices were born in the state

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19. Devins & Mansker, *supra* note 5, at 465–67.

20. Devins, *supra* note 6, at 1662.

21. See James Sample et al., *The New Politics of Judicial Elections 2006*, at 7, 18 (2006), available at [http://brennan.3cdn.net/49c18b6cb18960b2f9\\_z6m62gwji.pdf](http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf) (on file with the *Columbia Law Review*).

22. Pozen, *supra* note 3, at 2099 (concluding concerns about efficacy of judicial elections are not necessarily responsive to use of judicial elections as a means to advance popular constitutionalism).

23. This is not to say that contested state judicial elections undermine the legitimacy of state supreme courts. Voters may see elections as legitimating mechanisms—even if they are only personally interested in a handful of high salience issues. Thanks to Jim Gibson for discussing with us his ongoing research on the ways in which judicial elections might legitimate state supreme court decisionmaking.

24. This subsection is drawn from Devins, *supra* note 6, at 1668–71.

in which they serve, and 60.5% received law degrees from schools in the state. Also, 33.1% of justices served as prosecutors at some point in their career, and 15% formerly served as elected officials. Finally, states themselves are much smaller units in which to discern public opinion and voter backlash risks.

Particularly relevant to whether contested judicial elections can facilitate popular constitutionalism is that justices facing contested elections are of a different type or quality than appointed justices and are, thus, more likely to understand the political ramifications of their decisions.<sup>25</sup> Judges subject to contested elections look and act more like politicians. They attend lower-ranked law schools and are more politically connected and overall less well educated than appointed judges. Social psychology tells us that it is a basic human desire to be liked; thus, it is no surprise that judicial candidates facing the electorate have a strong interest in the esteem of the public.<sup>26</sup> It seems clear, then, that state supreme court justices facing contested elections are more attuned to the popular will—a plus factor for the popular constitutionalist—but at the same time, it must be recognized that there are few issues that will trigger the public’s attention.

#### B. *Issue Saliency*

High salience issues such as abortion, the death penalty, and crime are often the subjects of judicial campaigns. Indeed, past judicial elections have taught that justices can be ousted due to their vote in a single case on one of these topics, often a vote portrayed incorrectly or deceptively by the opposition campaign or interest group. State supreme court justices clearly recognize these high salience, high stakes issues. Former California Supreme Court Justice Otto Kaus has 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>27</sup> There are also reports of Georgia and Louisiana justices changing their votes in response to perceived voter sanctions.<sup>28</sup> At first blush, this type of judicial response may seem promising for the prospects of judicial elections as tools for popular constitutionalism. Justices *are* taking into account public opinion and the consequences of ignoring it with respect to these high salience issues.

However, the story is a bit more complicated. Not only did those Georgia and Louisiana justices change their votes, they also admitted to overlooking

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25. Pozen recognizes this when he notes that one of the challenges to judicial elections as vehicles of popular constitutionalism is that elections breed lower quality candidates or money-focused candidates who play favorites with donors, interest groups, political parties, and popular litigants. Pozen, *supra* note 3, at 2099.

26. See Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* 62 (2006) (“[T]he public vote still exists as a well-publicized evaluation, and it can be important to judges’ self-esteem that they secure as positive an evaluation as possible even if they do not fear defeat.”).

27. Paul Reidinger, *The Politics of Judging*, 73 *A.B.A. J.* 52, 58 (1987). It is interesting to note that California Supreme Court justices are subject to retention elections, *not* contested partisan or nonpartisan elections. The pressure of elections, to some degree it seems, is universal.

28. Devins, *supra* note 6, at 1664.



errors in criminal cases, instead passing them on to the federal courts, secured with their lifetime appointments, to make the difficult decisions.<sup>29</sup> Instead of correcting legal errors (often unrelated to constitutional questions), the justices passed on the issues to avoid voter sanction. This indicates that on high salience issues, justices avoid controversy in the name of judicial preservation and, in so doing, simply maintain the status quo. Indeed, our research supports this conclusion. We found state supreme court justices subject to contested elections decided fewer high salience issues than those justices subject to retention elections or appointment schemes. Pozen notes the problem himself, recognizing that backlash to judicial decisions can facilitate popular constitutionalism; it can “sharpen constitutional questions, catalyze political engagement, and ultimately invigorate the popular responsiveness of constitutional law.”<sup>30</sup> If judges are simply avoiding the high salience issues, as research indicates, in order to avoid electoral defeat, instead of facilitating popular constitutionalism, judicial elections may neuter the courts as arbitrators and reduce judicial creativity and courage.

Another concern for popular constitutionalism tied to issue saliency is the nature of the issues that are salient. For the most part, contested judicial elections do not turn on constitutional questions. Questions of judicial character, tort law, and criminal law typically play larger roles in judicial elections than do questions of constitutional law. Moreover, even when constitutional issues are at the forefront of a judicial race (Iowa, for example), voters typically focus their energies on a single issue—rather than participate in a broader conversation about the meaning of far-ranging constitutional values.

Against this backdrop, it is hardly surprising that politically insulated state supreme courts play a path-breaking role, forging new constitutional understandings.<sup>31</sup> On same-sex marriage, no state with partisan or nonpartisan elections has expanded the rights of same-sex couples. Of the seven states that constitutionalized same-sex marriage or civil union, five were from the eleven states that do not make use of judicial elections. Courts subject to elections are seriously hampered in their ability to lead the way in forward thinking and move the direction of future public opinion. Elected judges are thus unlikely to attempt to forge new constitutional understanding, thereby “contribut[ing] nothing distinctive to the ‘discursive formation of popular will upon which democracy is based.’”<sup>32</sup>

### C. *Information and the Public’s Capacity To Engage in Popular Constitutionalism Through Judicial Elections*

The question of voter capacity to constructively engage in popular

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29. *Id.* at 1664.

30. Pozen, *supra* note 3, at 2128–29.

31. For a discussion of the characteristics of path-breaking states, see Devins, *supra* note 6, at 1675–85.

32. Pozen, *supra* note 3, at 2131 (quoting Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 *Calif. L. Rev.* 1027, 1036 (2004)).

constitutional discourse through judicial elections is, of course, central to Pozen's project and our critique of it. In our view, there are significant concerns about popular election of judges, prime among them being whether citizens can select judges and interpret and enforce the constitution in a reasoned and responsible way. Do people have the capacity to achieve the goals of popular constitutionalism given a society apathetic and ignorant in the voting booth? Research shows that the majority of Americans lack basic political comprehension and nearly one third are "political 'know nothings' who possess little or no useful knowledge of politics."<sup>33</sup> Pozen finds such criticisms "inconclusive," reporting that research shows that judicial elections can meet minimal criteria of efficacy (despite the fact that judicial elections lack public dialogue on constitutional interpretation or judicial duty). Pozen insists that "elections generate more regular and robust information about the content of public opinion."<sup>34</sup> Thus, they act as signaling functions as to popular opinion.

Although it is true that competitive elections promote greater public involvement and provide information about public opinion to judicial candidates, the information that judicial elections create (both about judicial candidates for the public and about public opinion for judicial candidates) is often of limited use to advancing popular constitutionalism. Advertising in judicial elections has become more negative, and interest groups are funding advertising focusing only on hot-button issues such as crime and the death penalty, or the personal characteristics of the candidates.<sup>35</sup> Those hot-button issues are likely to rile the public. But the public is rarely signaling anything to the court that the court does not already know with respect to those topics. People generally think criminals should face long sentences, and often the state's public opinion on the death penalty is well known. Yet the portrayal of decisions of justices is often misleading, focusing on one case and distorting facts of that one case.

At the same time, as our research shows, judges in contested elections typically rule in ways that match public opinion—suggesting that judicial elections do hold promise to check state justices on hot-button constitutional questions. The problem, however, is that there are very few constitutionally salient issues and judicial elections rarely invoke any discussion of the constitution. More than that, business interests will often run negative ads concerning crime and judicial character—in an effort to manipulate public opinion and secure the election of probusiness justices. Correspondingly, on constitutionally salient issues like same-sex marriage, out-of-state interest groups often play a defining role in financing negative advertising and

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33. Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 *Iowa L. Rev.* 1287, 1304–05 (2004); see also Pozen, *supra* note 3, at 2093.

34. Pozen, *supra* note 3, at 2120.

35. Probusiness interests fund much of judicial campaigns and especially advertising, yet the focus of the advertising they pay for has nothing to do with business interests. Advertising focuses almost entirely on irrelevant or distorted personal characteristics and high salience issues such as crime.

otherwise seek to shape judicial elections.<sup>36</sup>

In highlighting the role of business interests and out-of-state interest groups, we are not claiming that in-state voters never engage in some type of constitutional dialogue with state justices through judicial elections. They do. The question is at what price and whether, ultimately, the benefits of judicial elections outweigh their costs. In our view, judicial elections as they exist today do not appear to be great tools for the advancement of popular constitutionalism. Judges take into account public opinion in decisionmaking, but the advancement of constitutional dialogue is not part of that intercourse. Instead, judges subject to election avoid controversial decisions and seek to maintain the status quo. Judicial elections are increasingly politicized, costly, and competitive. Furthermore, the issues which trigger any public opinion at all are rarely of a constitutional nature. It seems clear that what competitive judicial elections do is politicize the court and focus on single issues and irrelevant personal characteristics that a popular constitutionalist would not find valuable.

Some of the shortcomings in the ability of judicial elections to serve as a mechanism to facilitate popular constitutionalism can be dealt with through reforms to existing state systems. To his great credit, Pozen both (1) acknowledges the problems associated with judicial elections and how they might impact the advancement of popular constitutionalism, and (2) suggests that judicial elections can be reformed to mitigate only some of these problems and, as such, are “defective vehicles” to facilitate popular constitutionalism. At the same time (and also to his credit), Pozen advances a series of reforms intended to improve judicial elections in ways that advance the goals of popular constitutionalism. Concerns about voter competence and participation in judicial elections are really issues of institutional design, Pozen argues. He states that “[i]t is at least conceivable that an elective system could be engineered to provide sufficiently robust competition, accountability, and debate to excite popular constitutionalists, while also providing sufficiently robust protections for judicial independence and public confidence.”<sup>37</sup> To arouse voter interest in judicial elections, states might try reforms such as permitting political party affiliation by judicial candidates, liberalizing codes of conduct to allow judicial candidates to make pledges on how they will approach certain kinds of cases, disseminating voter information guides on judicial candidates, and holding public events, assemblies, or debates. Pozen argues that, “[i]f campaigns for the bench could be engineered to generate robust information about the candidates and their views, it would become increasingly untenable to insist that voters nonetheless lack the ability to make rational decisions.”<sup>38</sup> States can also enhance recusal rules or apply stricter contribution limits, or increase term lengths to address problems with the

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36. In Iowa, for example, out-of-state interest groups contributed more than in-state groups in seeking to oust justices who ruled in favor of same-sex marriage. Press Release, Brennan Ctr. for Justice, 2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say (Nov. 3, 2010), available at <http://www.brennancenter.org/page/-/Democracy/release-november%202010-110310-final.pdf> (on file with the *Columbia Law Review*).

37. Pozen, *supra* note 3, at 2103.

38. *Id.* at 2098.

influence of donors and interest groups. Nonetheless, recognizing numerous limits in the ability of judicial elections to facilitate popular constitutionalism, Pozen concludes that the ability of reforms to create robust elective systems that facilitate popular constitutionalism is “exceedingly unlikely.”<sup>39</sup>

Pozen deserves a lot of credit for thinking about mechanisms that will facilitate popular constitutionalism through judicial elections. With that said, like Pozen, we are skeptical that such proposals, in fact, will work. Elected judiciaries already take into account the will of the people, but not in a manner conducive to popular constitutionalism. The root problem, we think, is voter interest in either the state or federal constitutions. For reform proposals to work, they must address the lack of constitutional dialogue in judicial elections. In reality, high salience issues, rarely of constitutional tenor, are the subjects of judicial elections. Elections themselves work to politicize the courts. Recusal rules and stricter contribution limits will not stem that tide; they will not change the single issue or irrelevant personal characteristic focus of advertising.

That said, perhaps other state features outside of judicial elections are better suited to advance the popular constitutionalists goals, such as constitutional initiatives and referenda and easy to amend constitutions. Constitutional amendment is the principal mechanism by which states now update their constitutions. With constitutional initiatives voters write and approve the contents of their constitutions and are directly involved in forming and shaping their state’s constitutional culture. These features do not politicize the courts. They do not subject all judicial decisions to voter approval. At the same time, they act as checks on court interpretations of the constitution, and they signal directly to the justices the popular will. Finally, they provide not only a tool for the public to express displeasure with court constitutional decisions, but also a means to overrule such decisions. Given our research on the role of public opinion in state supreme court decisionmaking, we find that, although state supreme courts take into account popular opinion on certain issues, the realities of competitive judicial elections make them unsatisfactory tools to truly facilitate popular constitutionalism’s goals.

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39. *Id.* at 2103.