

William & Mary Law School

William & Mary Law School Scholarship Repository

Faculty Publications

Faculty and Deans

Summer 2019

State Constitutionalism in the Age of Party Polarization

Neal Devins

William & Mary Law School, nedeви@wm.edu

Follow this and additional works at: <https://scholarship.law.wm.edu/facpubs>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Judges Commons](#), and the [State and Local Government Law Commons](#)

Repository Citation

Devins, Neal, "State Constitutionalism in the Age of Party Polarization" (2019). *Faculty Publications*. 1994.
<https://scholarship.law.wm.edu/facpubs/1994>

Copyright c 2019 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/facpubs>

**STATE CONSTITUTIONALISM IN THE AGE OF PARTY
POLARIZATION**

*Neal Devins**

TABLE OF CONTENTS

I. INTRODUCTION	1130
II. THE GRAVITATIONAL PULL OF FEDERAL NORMS.....	1134
<i>A. Democratic Controls</i>	1134
<i>B. The Pull of Federal Supremacy</i>	1142
III. THE IMPACT OF PARTY POLARIZATION	1147
<i>A. The Rise of Party Polarization</i>	1148
<i>B. Party Polarization's Impact on State Supreme Court Decision-</i> <i>Making</i>	1152
1. Federal Norms.....	1153
2. Backlash Risks	1158
3. The Rise of Shared Preferences Among State Courts and Elected State Officials	1162
IV. STATE CONSTITUTIONALISM IN THE AGE OF PARTY POLARIZATION.....	1165
V. CONCLUSION	1174

* Sandra Day O'Connor Professor of Law and Professor of Government, William & Mary Law School. This Article is based on remarks delivered at the 30th Annual State Constitutional Law Lecture at Rutgers Law School on February 9, 2019. Thanks so much to Bob Williams for inviting me to give the lecture and commenting on a draft of this paper; thanks also to the faculty and students who attended the lecture, especially Alan Tarr who also provided useful feedback on this article. Thanks to Jeff Sutton for setting the stage for this Article by his exceptional advocacy on behalf of state constitutionalism. Finally, thanks to my research assistants Abigail Stephens, Louise Ellen and the amazing Matt Strauser; Matt's research and writing on the issues related to this Article sharpened my thinking and served as a roadmap for the issues discussed in this paper.

I. INTRODUCTION

Today, perhaps more than ever before, state supreme courts will have ample opportunity to be rights innovators. If President Trump is to be believed, the federal courts are increasingly populated by Trump judges who will not expand individual rights through interpretations of the Federal Constitution.¹ Indeed, with at least two Trump appointees—Neil Gorsuch and Brett Kavanaugh—already on the U.S. Supreme Court, there is every reason to think that the Court will restrict rights protections. Moreover, with a record-setting pace to appoint and confirm lower federal court judges,² there is increasing reason to think that lower federal courts will not advance individual rights interests either.

In the pages that follow, I will tackle the question of whether state supreme courts will fill in gaps left open by federal courts' interpretations of the U.S. Constitution. In today's hyper-polarized world, the question of what state courts are and are not willing to do is stunningly important. In the 29th Annual State Constitutional Law Lecture at Rutgers Law School, Sixth Circuit Judge Jeffery Sutton embraced the promise of state constitutionalism by calling on both advocates and state court judges to play a leadership role in advancing individual rights through interpretations of state constitutions.³ In part, my Article is a response to Judge Sutton. And while I do not disagree with Judge Sutton's thoughtful rendering of what state courts have done and what state courts are

1. It may be, however, that today's Supreme Court is (as Justice Elena Kagan put it) "weaponizing" the First Amendment and other individual rights protections. Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html>. In other words, the Court might interpret individual rights protections to advance conservative but not progressive interests.

2. See Carrie Johnson, *Trump's Judicial Appointments Were Confirmed at a Historic Pace in 2018*, NAT'L PUB. RADIO (Jan. 2, 2019, 5:00 AM), <https://www.npr.org/2019/01/02/681208228/trumps-judicial-appointments-were-confirmed-at-historic-pace-in-2018>; Asher Stockler, *Trump Judicial Appointments Reach Milestone, Over 150 Judges Confirmed with One Year Left to Go*, NEWSWEEK (Sept. 14, 2019), <https://www.newsweek.com/trump-judicial-appointments-150-senate-1459295>.

3. Jeffrey S. Sutton, *The Enduring Salience of State Constitutional Law*, 70 RUTGERS U. L. REV. 791, 796 (2019). For recent embraces of state constitutionalism by state supreme court justices (one by a liberal justice who sees state courts as separate spheres of constitutional authority and one by a conservative justice critical of the Roberts Court's reluctance to embrace conservative causes through interpretations of constitutional liberties), see Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1315 (2017); Clint Bolick, *State Constitutions: Freedom's Frontier*, 2016 CATO SUP. CT. REV. 15, 19 (2016–17).

capable of doing, I will focus my energies on the roadblocks before state courts—roadblocks that make me skeptical that today’s state courts will fill the void the U.S. Supreme Court is likely to leave.

To make his point about the promise of state constitutionalism, Judge Sutton presented a hypothetical where a basketball player has the opportunity to take two foul shots but only takes one.⁴ Judge Sutton said the failure of lawyers to advance both state and federal constitutional claims was analogous to the basketball player’s failure to take both foul shots.⁵ Moreover, he said that the corresponding failure of state court judges to independently interpret their constitutions was similarly shortsighted.⁶

No doubt, this plea for both advocates and judges to see state constitutional law as a vital pathway makes great sense. Indeed, at his Supreme Court confirmation hearing, then-Judge Kavanaugh repeatedly praised Judge Sutton and his book, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, on which Judge Sutton based his 2018 State Constitutional Law Lecture.⁷ Here are two examples: in response to questioning from Senate Judiciary Committee Chair Chuck Grassley, Judge Kavanaugh referenced “a new book [by Judge Jeff Sutton] about using state constitutions to help protect your individual liberties and rights too.”⁸ More telling is Judge Kavanaugh’s response to Senator Jeff Flake’s questioning about precedent: Judge Kavanaugh spoke of *51 Imperfect Solutions* as “a great book about how state constitutions can, and state constitutional law and state statutes can enhance protections of individual liberty, even beyond what the Supreme Court has interpreted the Federal Constitution to be.”⁹

This call for state courts to step up to the plate echoes what may be the most important article ever written on state constitutionalism. In 1977, U.S. Supreme Court Justice (and former New Jersey Supreme Court Justice) William Brennan published *State Constitutions and the*

4. Sutton, *supra* note 3, at 792–93.

5. *Id.* at 793.

6. *Id.*

7. *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 1*, C-SPAN (Sept. 5, 2018), <https://www.c-span.org/video/?449705-1/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-1>; see JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (2018).

8. *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 1*, *supra* note 7, at 27:14.

9. *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 4*, at 1:05:10, C-SPAN (Sept. 5, 2018), <https://www.c-span.org/video/?449705-14/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-4&start=3831>.

Protection of Individual Rights.¹⁰ Bemoaning the U.S. Supreme Court's increasing conservatism, Brennan called on state court judges and justices to pick up the slack and recognize rights claims that would no longer be recognized by the U.S. Supreme Court.¹¹ Celebrating the New Jersey Supreme Court and other state courts that "have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they found unconvincing," Brennan sought to put "to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights."¹²

Judge Sutton and now Justice Kavanaugh have both embraced the Justice Brennan article when calling upon state courts to independently interpret their state constitutions.¹³ Unlike Justice Brennan, who saw state courts as a second best option,¹⁴ Judge Sutton and Justice Kavanaugh extoll our system of federalism¹⁵ when calling for state courts to fill the void that they and other federal court judges will leave open.¹⁶

For reasons I will now detail, I am skeptical that there will be a renaissance of state constitutionalism in the age of party polarization. In particular, I will argue that—on matters where the U.S. Supreme Court has limited the reach of individual rights protections—state supreme

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

11. *Id.* at 502–04.

12. *Id.* at 500–01.

13. SUTTON, *supra* note 7, at 99 ("What was true in 1977 appears to be just as true in 2018."); *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 4*, *supra* note 9.

14. See Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 429–30 (1988). For a forthright acknowledgement that nationalists look to state constitutions only when federal courts will not provide nationwide relief, see Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1696 (2010).

15. Judge Sutton, for example, talks about "honor[ing] the original design of the federalist system." Sutton, *supra* note 3, at 795. In his thoughtful review of Judge Sutton's book, California Supreme Court Justice Goodwin Liu distinguishes Judge Sutton's embrace of federalism from Justice Brennan's embrace of "individual rights maximalism." Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1365 (2019) ("Judge Sutton's concerns . . . are primarily structural and focus on the process by which individual rights take shape in our diverse democracy."). For a discussion of Justice Kavanaugh's embrace of state constitutionalism in our federalist system, see *supra* notes 7–9.

16. I do not mean to be making a backhanded compliment. Judge Sutton's and Justice Kavanaugh's interpretations may be correct. Moreover, some progressives have also joined the call for state courts to engage in "progressive federalism" and fill the gap left open by the U.S. Supreme Court. See, e.g., Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY: J. IDEAS (2012), <https://democracyjournal.org/magazine/24/a-new-progressive-federalism/>; Sam Wang, *If the Supreme Court Won't Prevent Gerrymandering, Who Will?*, N.Y. TIMES (July 13, 2019), <https://www.nytimes.com/2019/07/13/opinion/sunday/partisan-gerrymandering.html>.

courts are unlikely to fill the void by interpreting their constitutions more broadly than the U.S. Supreme Court interprets the Federal Constitution.¹⁷ That is not to say that the U.S. Supreme Court will always rule against individual rights for plaintiffs,¹⁸ but that state supreme courts will rarely use their state constitutions to buck U.S. Supreme Court decision-making. In part, state courts are subject to the “gravitational pull” of federal norms¹⁹—an outgrowth of judicial elections and other democratic checks on state supreme courts. More than that, unlike 1977 (when Justice Brennan published his article), political polarization stands in the way of state experimentation. National interest groups and a growing homogeneity in both red and blue states stand as a barrier to state court innovation.²⁰

My Article will be divided into three parts. First, in Part II, I will discuss the implications of democratic checks on state judges and the gravitational pull of federal norms. Second, in Part III, I will examine the ramifications of party polarization on state court innovation. In so doing, I will explain why the very forces that speak to the need for state court innovation cut against the likelihood of the states actually innovating. Third, in Part IV, I will call attention to what would appear to be counterexamples to my claims—2017–19 state court rulings invalidating or enjoining state districting laws and abortion restrictions in Alaska, Florida, Iowa, Kansas, North Carolina, and Pennsylvania.²¹ These Trump-era decisions certainly underscore that state courts will sometimes invoke state constitutions to invalidate state laws and expand rights protections. Upon closer examination however, these decisions highlight backlash risks and the ultimate futility of looking to state

17. State supreme courts, of course, will render important constitutional rulings on matters, like affirmative rights, where state constitutions provide individual rights protections that have no federal constitutional analog. *See infra* text accompanying notes 69–71. My focus, instead, is national matters—where the U.S. Supreme Court could interpret the Federal Constitution to provide for the protection of individual rights.

18. *See* Liptak, *supra* note 1 (noting that the Roberts Court has advanced conservative legal policy goals by expanding the boundaries of the First Amendment).

19. This phrase plays off of Scott Dodson in *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016).

20. *See infra* Section III.B.

21. My focus is state supreme courts, not lower state courts. With the exception of North Carolina (a lower court ruling that was not appealed), Part Four considers only state supreme court rulings. *See* Michael Wines & Richard Fausset, *North Carolina's Legislative Maps Are Thrown Out by State Court Panel*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/us/north-carolina-gerrymander-unconstitutional.html>. I include North Carolina in Part Four because the state supreme court figured prominently in the decision not to appeal. *See infra* text accompanying note 276.

courts to buck the state political establishment and, in so doing, fill whatever void may be left by the U.S. Supreme Court.²²

II. THE GRAVITATIONAL PULL OF FEDERAL NORMS

State supreme courts always operate at a disadvantage. In part, state courts are subject to democratic controls and other structural limits. These limitations accentuate backlash risks and make state court judges cautious when interpreting state law.²³ More than that, state courts and state laws are often seen as a poor cousin to federal courts and federal laws. This dominance of federal norms casts a shadow from which state courts cannot readily escape.

A. Democratic Controls

State supreme court justices are typically subject to some type of election and certainly lack life tenure; are often compelled to hear state constitutional challenges to state law; and their decisions are often subject to override by way of voter referendum or legislative override.²⁴ Ten years ago, I wrote a paper examining the nexus between these democratic controls and the willingness of state supreme courts to expand rights protections.²⁵ In particular, I identified the characteristics of seven state supreme courts willing to issue path-breaking individual rights decisions, focusing on same-sex marriage.²⁶ Decided between 1993 and 2009 (when public opinion was in flux but always opposed to same-sex marriage),²⁷ these cases presented state supreme courts with an opportunity to be in the vanguard of rights-expanding decision-making. Four state supreme courts mandated same-sex marriage (Massachusetts,

22. Part Four will also discuss 2017–19 decisions by the Washington Supreme Court (invalidating state death penalty legislation) and by the Arizona Supreme Court (providing religious liberty protections to businesses who refuse to provide custom services to same-sex weddings). These two cases call attention to the willingness of state justices to back the prevailing preferences of the state political establishment when confronted with either outdated legislation or local initiatives that are out-of-step with statewide preferences.

23. See Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1227–28, 1227 n.39 (2012). The concern of this paper is state constitutional law as an alternative to federal constitutional law, but democratic accountability is also relevant to state statutory law.

24. Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1644–49, 1666–67, 1686 (2010).

25. *Id.* at 1632–34.

26. *Id.* at 1675–91.

27. See *Attitudes on Same-Sex Marriage*, PEW RESEARCH CENTER (May 14, 2019), <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

California, Connecticut, Iowa); two mandated civil union protections (Vermont, New Jersey); one (Hawai'i) said that bans on same-sex marriage were subject to strict scrutiny review but intervening political developments prevented the court from issuing a definitive ruling.²⁸

In making sense of why these courts acted to protect the rights of same-sex couples (while many other state supreme courts ducked the issue entirely or backed the state ban), I discovered that pathbreaking courts were far more politically insulated than most state courts.²⁹ In other words, there was less backlash risk in these states because of both the norms of judicial independence and, more importantly, the structural protections afforded state supreme court justices and state court decision-making.³⁰ I also discovered that elected officials and voters in these states were more supportive of same-sex unions than elected officials and voters in other states.³¹ In other words, the willingness of a state court to question the state marriage ban appeared highly correlated to backlash risks.³²

More than anything, judicial selection and retention influence state justices. Thirty-eight states mandate that state supreme court justices are subject to some kind of election.³³ Twenty mandate contested elections where justices serve specified terms of office; eighteen make use of retention elections (where justices are typically appointed by the governor who chooses from a list of names compiled by a state commission).³⁴ Needless to say, judges take election risks into account.

28. Devins, *supra* note 24, at 1675. Specifically, Hawai'i lawmakers enacted domestic partnership legislation in 1997 and Hawai'i voters amended the state constitution to forbid same-sex marriage in 1998. David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 20 (2000).

29. Devins, *supra* note 24, at 1678.

30. *Id.* at 1679–83. The proponents of same-sex marriage were all aware of the tenure and selection processes for state justices; their litigation strategy focused on states with structural protections for state justices. ROBERT J. HUME, *COURTHOUSE DEMOCRACY AND MINORITY RIGHTS: SAME-SEX MARRIAGE IN THE STATES 7–8* (2013); see also Mary L. Bonnao, *Equality and the Impossible—State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481 (2016).

31. Devins, *supra* note 24, at 1679–83. Relatedly, state courts are sometimes empowered to strike down laws that have fallen out of favor with state voters and the officials they elect. Sean Beienburg & Paul Frymer, *The People Against Themselves: Rethinking Popular Constitutionalism*, 41 L. & SOC. INQUIRY 241, 257–58 (2016). In this way, courts subject to democratic checks may sometimes invalidate unpopular laws. See *id.*

32. This is not to say that the legal policy view of these or other courts was not also critical to determining whether there is a state constitutional right to same-sex marriage.

33. Devins, *supra* note 24, at 1648.

34. For an inventory of judicial selection and retention schemes (in 2010), see Devins, *supra* note 24, at 1644–49. For a thoughtful accounting of changes in state judicial elections over time (and the complicated dance between judicial independence and accountability),

“[L]ike all policymakers in a democracy, [state supreme court justices] must retain their posts in order to achieve their policy goals.”³⁵

With regard to same-sex marriage, none of the seven pathbreaking state supreme courts come from the twenty-one states where justices run in a contested election.³⁶ Two of the seven (California and Iowa) come from the eighteen states that make use of retention elections; one of these two (Iowa) is obligated to hear constitutional challenges to state laws.³⁷ Even more telling, five of these seven state supreme courts are among the eleven states where supreme court justices neither run in contested elections nor retention elections.³⁸ These five states are Massachusetts, Connecticut, Vermont, New Jersey, and Hawai'i.³⁹ Two of these state supreme courts are among the four states where state justices are not subject to reelection or reappointment, and Hawai'i is the only state where judicial reappointment is made by a judicial commission.⁴⁰

Moreover, before 2008, there was little risk of electoral defeat in retention elections. From 1990 to 2000, 1.7% of state justices were defeated in retention elections;⁴¹ from 1994 to 2006, judges lost retention elections around 1% of the time.⁴² No doubt, Iowa Supreme Court Justices thought there was little to no retention risk when ruling in favor of same-sex marriage in April 2009. Earlier in 2009, state lawmakers refused to vote on a proposed state constitutional ban on same-sex marriage (a proposal that was also opposed by Iowa's Democratic governor, Chet Culver).⁴³ Perhaps more significantly, no Iowa Justice

see G. ALAN TARR, *WITHOUT FEAR OR FAVOR* 63–66 (2012). For discussion of recent changes in judicial selection/retention, see *infra* text Section III.B.2.

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

36. Devins, *supra* note 24, at 1676.

37. *Id.* at 1676–78.

38. *Id.* at 1676.

39. *Id.*

40. *Id.* The New Jersey scheme allows the governor to reappoint after an initial term of seven years; state justices can then serve without voter or gubernatorial check until they reach the age of 70. N.J. CONST. art. 6, § 6, para. 3.

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

42. Larry Aspin, *Judicial Retention Election Trends: 1964–2006*, 90 JUDICATURE 208, 210 (2007).

43. Monica Davey, *Same-Sex Ruling Belies the Staid Image of Iowa: Using 'Live and Let Live' as a Legal Term*, N.Y. TIMES, Apr. 25, 2009, at 14. In California, the state's political establishment had also signaled limited support for same-sex marriage. See Kate Folmar, *Governor Supports Gay Rights, but Won't Assign Same-Sex Marriage Bill*, THE MERCURY NEWS (Mar. 7, 2007, 9:47 PM), <https://www.mercurynews.com/2007/03/07/governor-supports-gay-rights-but-wont-sign-same-sex-marriage-bill/>. Legislation legalizing same-sex marriage was enacted by the state legislature in 2005 only to be vetoed by California

had ever been ousted in a retention vote.⁴⁴ Think again; thanks to out-of-state political interests who spent heavily to oust three Iowa Supreme Court Justices in 2010 retention votes, the heretofore politically insulated Iowa Supreme Court became the politically vulnerable Iowa Supreme Court.⁴⁵

The risk of electoral defeat—while most important—is not the only reason that state supreme courts calibrate their decision-making by taking into account backlash risks. Unlike federal constitutional rulings (which are next to impossible to nullify through legislation or constitutional amendment), state constitutional rulings are far easier to negate. Only one of the founding states (Massachusetts) has its original constitution and more than thirty states have had multiple constitutions.⁴⁶ Voters too can strike against state supreme court decisions they dislike; twenty-five states allow for voters to amend their constitutions through initiatives.⁴⁷ In all fifty states, lawmakers can propose state constitutional amendments.⁴⁸ Assuming that state supreme court justices seek to maximize their legal policy preferences, the risk of constitutional override is clearly something to take into account.⁴⁹

Governor Arnold Schwarzenegger; Schwarzenegger—who ran as a pro-gay rights Republican—said that the issue should be settled by the California Supreme Court. *Id.* More generally, judges expanded marriage rights to same-sex couples in a way that “usually aligned with public opinion.” John B. Kestel, *Judicial Federalism and Representation*, 6 J.L. & CTS. 51, 72 (2018).

44. See Mallory Simon, *Iowa Voters Oust Justices Who Made Same-Sex Marriage Legal*, CNN (Nov. 3, 2010), <http://www.cnn.com/2010/POLITICS/11/03/iowa.judges/index.html>.

45. See A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <https://www.nytimes.com/2010/11/04/us/politics/04judges.html>. For an insightful analysis of this decision, see generally David E. Pozen, *What Happened in Iowa?*, 111 COLUM. L. REV. (SIDEBAR) 90, 90–91 (2011). For additional discussion, see *infra* text accompanying notes 197–200.

46. See Donald A. 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).

47. See DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES* 24–25 (2004); M. DANE WATERS, *THE INITIATIVE AND REFERENDUM ALMANAC* 13 n.1 (2d ed. 2018).

48. WATERS, *supra* note 47. For a discussion of how voter and lawmaker amendments constrain state courts, see JOHN DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* 13, 111 (2018). For an example of a state supreme court opinion explicitly recognizing these risks (as constraining state court innovation in cases where the U.S. Supreme Court rules narrowly), see *State v. Hunt*, 91 N.J. 338, 345–46 (1982).

49. With regard to the U.S. Supreme Court, Lee Epstein and Jack Knight have advanced the so-called external strategic actor model. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 9–10 (1998). That model suggests that justices will push their

On same-sex marriage, the seven pathbreaker state supreme courts generally faced little risk of voters or legislators nullifying their constitutional rulings.⁵⁰ Of the seven states, only California and Massachusetts allow for voters to place constitutional amendments on the ballots.⁵¹ Massachusetts, however, requires state lawmakers to support the placing of an initiative on the ballot in two consecutive sessions.⁵² Perhaps for this reason, Massachusetts has the eighth lowest constitutional amendment rate of all states.⁵³

Of the five pathbreaking states that do not allow for initiatives, Hawai'i is the only one with a high constitutional amendment rate (a rate of 2.56, which is the sixth highest).⁵⁴ The other four have low amendment rates and hard to amend constitutions.⁵⁵ Iowa has tied for the fifth lowest amendment rate;⁵⁶ legislature-proposed amendments in Iowa must be considered in two successive sessions.⁵⁷ Connecticut has a three-fourth supermajority vote requirement in each house; Vermont only allows amendments once every four years and requires super-majority approval in consecutive legislative sessions; and New Jersey requires super-majority approval in one session or majority approval in consecutive sessions.⁵⁸

Significantly, the two states with either voter initiatives (California) or high constitutional amendment rates (Hawai'i) both nullified their state supreme court rulings through constitutional amendment.⁵⁹ One of the two with retention elections (Iowa) ousted three Iowa Supreme Court Justices.⁶⁰ There is little question that state supreme court justices have good reason to take backlash risks into account. Even though the seven pathbreaking state supreme courts were more politically insulated than most state supreme courts, the fact that three of these seven fell prey to either electoral defeat or amendment override is telling. For this very

preferences as far as they can without risking counterproductive backlash. *Id.* There is no reason to think that state justices would not do the same. Indeed, state backlash risks are much greater and, as such, the Epstein-Knight model is more sensibly applied to state supreme courts than to the U.S. Supreme Court. *See also* Lutz, *supra* note 46.

50. *See* Devins, *supra* note 24, at 1676.

51. *Id.* at 1677.

52. *Id.*

53. *Id.*

54. Lutz, *supra* note 46.

55. *Id.*

56. *Id.*

57. Devins, *supra* note 24, at 1677.

58. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES 14–15 tbl.1.2 (2009); *id.* at 1641 n.55, 1678.

59. *See* Devins, *supra* note 24, at 1681–83.

60. *See* Pozen, *supra* note 45, at 90.

reason, most state supreme courts are reluctant to play a pathbreaking role.

Correspondingly, a substantial number of state supreme courts “lockstep” their interpretations of state constitutional provisions to U.S. Supreme Court interpretations of the Federal Constitution.⁶¹ After all, there is no better way to obviate electoral risks and insulate your decision-making than to claim that there is no independent state voice in interpreting state constitutional provisions. “Similarly, it is far easier for a state judge to tell voters that her opinion follows the reasoning of the Supreme Court than to try to explain why she diverged.”⁶²

Several state supreme courts are further limited because they are obligated to hear all state constitutional challenges to state law. Unlike the U.S. Supreme Court, some state courts cannot exercise the so-called “passive virtues” and delay consideration of politically knotty cases.⁶³ On same-sex marriage, state supreme courts in Iowa, Vermont, and New Jersey had no choice but to resolve legal challenges to the state ban.⁶⁴ Perhaps for this reason, the Vermont and New Jersey Supreme Courts did not establish a right to same-sex marriage—opting, instead, to mandate that the state recognize either civil unions or same-sex marriage.⁶⁵ Indeed the Vermont Supreme Court 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.”⁶⁶

In addition to docket control limits, several state supreme courts are subject to requirements that essentially compel them to actively participate in the policy process.⁶⁷ Some state courts must issue advisory opinions regarding the constitutionality of state law; some state courts

61. For a good summary of the various ways that state courts lockstep, see Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-By-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1505–27 (2005). For an examination of the various reasons state courts copy federal constitutional doctrine, see James A. Gardner, *State Constitutional Rights as Resistance to National Power*, 91 GEO. L.J. 1003, 1058–64 (2003). For a critique of lockstepping, see Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 174–78 (2009).

62. Dodson, *supra* note 19, at 741.

63. Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1834–40 (2001) (providing a discussion of the “passive virtues” and state courts). The classic defense of this practice can be found in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 169–70 (2nd ed. 1986).

64. Devins, *supra* note 24, at 1678.

65. *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006); *Baker v. State*, 744 A.2d 864, 887, 889 (Vt. 1999).

66. *Baker*, 744 A.2d at 888. For a more detailed statement by Vermont Chief Justice Jeffrey Amestoy, see Bonnauo, *supra* note 30, at 1509.

67. Devins, *supra* note 24, 1649.

cannot make use of standing-to-sue limitations to avoid politically controversial cases; and some state courts adhere to the state action or separation of powers doctrine that thrust them into such political disputes.⁶⁸ State court policymaking is also fueled by state constitutional provisions providing for positive rights, including welfare rights and affirmative rights to education.⁶⁹ These positive rights provisions have no analog in the Federal Constitution and cannot be lockstepped; they must be given effect through state court interpretations. For example, state supreme courts must give meaning to state constitutional provisions that treat education as a fundamental right and sometimes speak of the state's obligation to provide a "high quality system of free public schools."⁷⁰ Likewise, state courts have no choice but to interpret state constitutional demands that elections be "free and equal" or "free and open."⁷¹ Furthermore, "[c]ontrary to the limited, interstitial role played by federal courts," state courts often serve as "principal lawgivers within their jurisdictions through the evolution and application of the common law."⁷² State judges, for example, set policy in highly charged fields like tort law.⁷³

Unable to avoid politically charged disputes, state judges are necessarily cautious—especially in states where democratic checks make them and their decisions politically vulnerable. In today's polarized world, state courts must still confront the inherent limits that already constrain them. This, of course, is not to say that state courts do not play an important role shaping constitutional values through pathbreaking interpretations of state constitutional provisions. They certainly do and

68. *Id.* at 1650–52.

69. See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 2–3 (2013); Helen Heshkoff, "Just Words": *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1522–23 (2010). In addition to explicit protections for positive rights, state constitutions contain "provisions [that] materially differ from analogous federal protections in their text, purpose, or history." Liu, *supra* note 3, at 1313. State courts, for example, have interpreted free exercise provisions to be more protective of religious liberty and antiestablishment provisions as erecting a higher wall of church-state separation. *Id.*

70. FL. CONST. art. IX, § 1(a). See generally Jeffrey A. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963 (2008) (discussing a state supreme court's role in education funding cases).

71. See Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 103 (2014).

72. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1256 (1978).

73. Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 821, 852–3 (1994).

Judge Sutton is right to highlight some of those decisions.⁷⁴ Nonetheless, as this Section makes clear, backlash risks are real and limit state court activism.

Also shedding light on this phenomenon is the response of state courts and state voters to Justice Brennan's 1977 call for state courts to fill the void increasingly left open by the U.S. Supreme Court.⁷⁵ Following publication of the Brennan article, some state courts jumped into the abyss—bucking public opinion and expanding the scope of individual rights protections to, for example, those either accused or convicted of a crime.⁷⁶ Voters and legislators struck back, however. In California, anti-death penalty justices were voted out in 1986 retention elections;⁷⁷ in Florida, the state amended its constitution in 1983 to mandate “lockstepping” in search and seizure cases.⁷⁸ State supreme courts learned their lesson; there was a noticeable uptick in lockstepping and the willingness of state justices to expand rights protections abated.⁷⁹

In the age of party polarization, the lesson of the 1980s backlash is striking. Judicial elections are no longer “sleepy . . . affairs.”⁸⁰ Instead, party polarization both exacerbates backlash risks and otherwise makes it less likely that state courts will disagree with the legal policy judgments embedded in state laws.⁸¹ Part III will address polarization's impact on state constitutional law. For the balance of this Section, I will examine why it is that federal norms (and federal court decisions) dominate state norms—further complicating the pursuit of state constitutionalism.

74. See SUTTON, *supra* note 7, at 58–62.

75. See Brennan, *supra* note 10, at 489.

76. See James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 362–63 (2016).

77. Claire Machado, *Did the Politicization of the Supreme Court Start in California?*, BERKELEY POL. REV. (Jan. 28, 2019), <https://bpr.berkeley.edu/2019/01/28/did-the-politicalization-of-the-supreme-court-start-in-california/>.

78. Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's “Forced Linkage” Amendment*, 39 U. FLA. L. REV. 653, 654 (1987).

79. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788–89 (1992). Similarly, Dan Rodriguez observed that Justice Brennan's article, ultimately, was of little practical import. Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 271 (1998). At the same time, as Judge Sutton appropriately highlights in his book, state supreme courts played a figural role in the Supreme Court's 1961 adoption of the exclusionary rule in *Mapp v. Ohio*. See SUTTON, *supra* note 7, at 42–62.

80. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266–67 (2008) (citations omitted).

81. See *id.* at 279–90 (discussing the issue of the “majoritarian difficulty,” whereby judges who are accountable to a majority of the electorate may struggle to uphold constitutional principles that are disfavored by the public).

B. *The Pull of Federal Supremacy*

The mitigating influence of backlash risks almost certainly explains the prevalence of lockstepping and the reluctance of state supreme courts to play a pathbreaking role on individual rights. Beyond these inherent limits of an election-driven state supreme court system, “[w]hen Americans speak of ‘constitutional law,’ they invariably mean the U.S. Constitution and the substantial body of federal judicial decisions construing it.”⁸² Indeed, state court justices, state attorneys general, private sector lawyers, and law schools treat federal law as supreme—so much so that state claims are denigrated, not celebrated.⁸³ This is Judge Sutton’s quite legitimate beef with the legal system, and he is quite right in seeing it as one of the reasons state constitutionalism has not achieved the lofty status it deserves.⁸⁴

Judge Sutton points in particular to the failure of lawyers to raise state constitutional arguments.⁸⁵ Relatedly, Judge Sutton links this failure to legal educators who are generally uninterested in state constitutional law as a subject to teach or to write scholarly articles on.⁸⁶ As far as lawyers, Justice David Souter echoed Judge Sutton’s lament.⁸⁷ When sitting as a Justice on the New Hampshire Supreme Court, Souter observed that attorneys sometimes relied exclusively on federal constitutional law and did not even brief state law claims.⁸⁸ Without arguments made and briefs filed, state judges lacked the tools needed to develop an independent body of state constitutional law. For Souter, the doctrine requires “developed advocacy from those who bring the cases.”⁸⁹ And while some (most notably Jim Gardner) think that lawyers have ample incentives to pursue plausible state constitutional arguments,⁹⁰ it is nonetheless true that legal practice and the norms of the legal profession cut against the pursuit of state constitutional arguments.

82. JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 23 (2005).

83. National political parties could be added to this list of culprits. Most notably, national political parties have long contributed to the nationalization of state laws. James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 39–41 (2013).

84. Sutton, *supra* note 3, at 793–95.

85. *Id.* at 793.

86. *Id.* at 793–94.

87. *State v. Bradberry*, 522 A.2d 1380, 1388–89 (N.H. 1986) (Souter, J., concurring).

88. *Id.*

89. *Id.* at 1389.

90. See GARDNER, *supra* note 82, at 24.

Law schools and law professors play a significant role here.⁹¹ What law students learn and what scholarly communities consider worthwhile set a frame for state judges and the attorneys who practice before them. Relatedly, the relative status of jobs in the legal profession is partially determined by measures established by legal educators, so the development of state law suffers if law students come to understand that federal court clerkships and federal court practice is high status as compared to state clerkships and practice.⁹² On this score, law schools are woefully delinquent. The required constitutional law class does not consider state developments at all.⁹³ Most law schools do not offer a separate law school class on state constitutional law, especially elite law schools that establish trends that other law schools emulate.⁹⁴ Of the twenty-four law schools offering a survey course in state constitutional law, not one was rated within the top fifteen by U.S. News and World Report.⁹⁵ Commenting on this failure, Sandy Levinson bemoaned that legal educators treat “state governments established by these constitutions [as dealing with] mere trivialities” or raising “no interesting interpretive issues of the kind that obsess legal academics.”⁹⁶ And while Sandy sees these claims as “laughably—and sometimes tragically—false,” he also recognizes that the subordinate status of state constitutions in the law school world is deeply engrained.⁹⁷

Law schools may be public enemy number one for wrongly subordinating state supreme court decision-making, but state supreme courts have also contributed to this state of affairs. Aside from moderating their decision-making to avoid political attack, state supreme courts have arguably undermined their own status in two distinctive

91. Sutton, *supra* note 61, at 166.

92. *Id.* at 171.

93. *Id.* at 166. At most (and this is what I do when teaching about same-sex sodomy and same-sex marriage), law professors might make brief mention of antecedent state developments that informed the U.S. Supreme Court or, alternatively, explain what state courts did to limit the reach of a decision through rights-expanding interpretation of state constitutions. I suspect that the half hour I dedicate to state developments (in a class that meets for close to fifty hours) is more than most constitutional law professors.

94. *Id.* at 167–67.

95. *Id.* Things have changed slightly since Judge Sutton made that observation in 2009. Judge Sutton, for example, often teaches a state constitutional law class in the January session at the Harvard Law School.

96. Sanford Levinson, *Courts as Participants in “Dialogue”: A View from American States*, 59 U. KAN. L. REV. 791, 798 (2011).

97. *Id.* Of course, there are important exceptions, and the annual constitutional law lecture at Rutgers and its related state constitutional law symposium issue of the *Rutgers University Law Review* is one of those exceptions. Relatedly, Rutgers’ historic commitment to state constitutional law through such wonderful scholars as Bob Williams and Alan Tarr sets Rutgers apart.

ways. First, state supreme courts have done little to develop state constitutional law into a vibrant field by engaging in a debate about the modalities of interpretation that state courts should use when interpreting state constitutions.⁹⁸ This failure to, among other things, prune state-specific sources (the text and history of their state constitutions) has resulted in a failure to “develop a coherent discourse of state constitutional law.”⁹⁹ Second, state supreme courts often lockstep their interpretations to federal courts because of the perceived superiority of federal court interpretations.¹⁰⁰ “Federal law is [seen as] prestigious, pervasive, and highly visible It is no wonder then that state actors are drawn to it.”¹⁰¹ Correspondingly, “the Supreme Court commands a level of gravitas that seems to generate an expectation of following absent compelling reason for deviation.”¹⁰²

There are other villains too. As Scott Dodson put it, “Today, in virtually every legal position, state-focused lawyers look to move *up* to federal focused positions.”¹⁰³ Here is a list of culprits: state supreme court justices, state attorneys general and solicitors general, and law firms.

State supreme court justices aspire to be federal court judges and not the other way around. Aside from job security (life tenure), better pay, and better benefits, “the federal judicial system is generally seen as more prestigious.”¹⁰⁴ Indeed, a 2017 study of 925 lateral moves from state to federal and federal to state judiciaries found that 911 (98.5%) of the lateral moves were from state to federal.¹⁰⁵ As might be expected, there is a very long list of state judges and justices joining the U.S. Supreme

98. See Gardner, *supra* note 79, at 781–84.

99. *Id.* at 764. For a competing view, see Paul Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1155–56 (1993). See also Liu, *supra* note 3 (arguing that distinctive interpretive methodologies are beside the point and that “the crucial point is that state courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions *independently*”).

100. For an argument that federal court interpretations are, in fact, better, see Bert Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121–24 (1977). About a decade later, Burt Neuborne retreated when delivering the Rutgers Law Journal State Constitutional Law Lecture—arguing that state courts were well positioned to enforce positive rights. See Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989). For another competing perspective, see SUTTON, *supra* note 7, at 8–10.

101. Dodson, *supra* note 19 at 739. This is not to say that state judges would prefer a different legal regime but feel compelled to lockstep. Instead, the most likely explanation is that “state judges adopt the Supreme Court’s approach because they like it and think that it does a perfectly adequate job of protecting the liberty in question.” Gardner, *supra* note 61, at 1059; see also Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PA. ST. L. REV. 783 (2011).

102. Dodson, *supra* note 19, at 741.

103. *Id.* at 739.

104. Jonathan R. Nash, *Judicial Laterals*, 70 VAND. L. REV. 1911, 1912–13 (2017).

105. *Id.* at 1927.

Court (including Justices Oliver Wendall Holmes, Benjamin Cardozo, William Brennan, Sandra Day O'Connor, and David Souter) or federal courts of appeal (four of Donald Trump's short listers for the U.S. Supreme Court—Allison Eid, David Stras, Don Willett, and Jane Larsen—were state supreme court justices who, instead, were “promoted” to federal courts of appeal).¹⁰⁶ More telling, federal judicial nominees whose nominations are stalled sometimes accept the “consolation prize” of becoming a state justice—this is how various news outlets described Goodwin Liu's 2011 appointment to the California Supreme Court (after senate Republicans blocked his Ninth Circuit appointment).¹⁰⁷

State attorneys general and solicitors general increasingly seek fame through the pursuit of high stakes, high visibility federal court litigation. In recent years, Republican and Democratic attorneys general increasingly participate in litigation targeting the opposition party president (Republican attorneys general suing Barack Obama and Democratic attorneys general suing Donald Trump).¹⁰⁸ For their part, state solicitors general are the principal lawyers in these and other federal court lawsuits. Following their stint as state solicitors general, these lawyers often seek to lead federal appellate practice groups, teach federal law subjects at law schools, or become a federal court judge or other federal official. Examples abound. In Texas, Solicitors General Ted Cruz and James Ho led federal appellate practice groups at Texas offices of national law firms before becoming, respectively, a United States

106. Jessica Estepa, *The 25 People Most Likely to Replace Anthony Kennedy on the Supreme Court*, USA TODAY (June 27, 2018, 3:13 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2018/06/27/supreme-court-justice-shortlist/739221002/>; Chuck Grassley, *A Historic Year for the Federal Judiciary*, NAT'L REV. (Jan. 6, 2017, 9:00 AM), <https://www.nationalreview.com/2017/01/trump-judicial-appointments-supreme-court-justice-neil-gorsuch-federal-bench-senate-advice-consent/>; see also BARRY J. MCMILLION, CONG. RESEARCH SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE 10–11 (2018).

107. Nathan Koppel, *He's Back! Goodwin Liu Nominated to California Supreme Court*, THE WALL STREET J.: L. BLOG (Jul. 26, 2011, 4:18 PM), <https://blogs.wsj.com/law/2011/07/26/hes-back-goodwin-liu-nominated-to-california-supreme-court/>; Emil Guillermo, *With Goodwin Liu, Asian Americans Now the Majority on California's Highest Court – But Is Diversity the Winner?*, ASIAN AM. LEGAL DEF. & EDUC. FUND: BLOG (Sept. 1, 2011), <https://www.aaldef.org/blog/with-goodwin-liu-asian-americans-now-the-majority-on-californias-highest-court-but-is-diversity-the/>; David Lat, *A Conservative's Worst Nightmare: Justice Goodwin Liu?*, ABOVE L. (Jul. 26, 2011, 1:31 PM), <https://abovethelaw.com/2011/07/a-conservatives-worst-nightmare-justice-goodwin-liu/>.

108. See Maureen Groppe, *Multistate Lawsuits Against Trump in 2 Years Exceed Those Against Obama, Bush in 8 Years*, USA TODAY (Apr. 10, 2019), <https://www.usatoday.com/story/news/politics/2019/04/10/donald-trump-sued-more-often-democratic-attorneys-general/3143366002/>.

Senator and a federal court of appeals judge.¹⁰⁹ Other solicitors general who either led or were prominent members of federal appellate practice groups before becoming federal appellate court judges (or being nominated to be a federal appellate judge) include Kevin Newsom (Alabama, who now sits on the Eleventh Circuit), Caitlin Halligan (New York, who was nominated to the D.C. Circuit), Eric Murphy (Ohio, who now sits on the Sixth Circuit), and Jeff Sutton (Ohio, who now sits on the Sixth Circuit).¹¹⁰

Law firms certainly value federal law ahead of state law. Top law school graduates seeking jobs at top law firms are most interested in federal practice and federal judicial clerkships.¹¹¹ National law firms seeking both to recruit these graduates and to represent large corporate clients can demonstrate their bona fides as an elite law firm by establishing federal appellate practice groups.¹¹² State law practice, even practice before state supreme courts, lacks the panache of federal court practice, and the websites of national law firms rarely call attention to significant state matters in which their firms participate.

The gravitational pull of federal norms is pervasive. Notwithstanding the purported benefits of a federalist system, where states serve as laboratories of innovation,¹¹³ state supreme court justices and the

109. See *James C. Ho*, WIKIPEDIA, https://en.wikipedia.org/wiki/James_C._Ho (last visited Oct. 15, 2019); *Ted Cruz*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ted_Cruz#Return_to_private_practice (last visited Oct. 15, 2019).

110. See *Caitlin Halligan*, WIKIPEDIA, https://en.wikipedia.org/wiki/Caitlin_Halligan (last visited Oct. 15, 2019); *Former Jones Day Lawyers Chad Readler, Eric E. Murphy Confirmed to U.S. Sixth Circuit Seats*, JONES DAY (Mar. 2019), <https://www.jonesday.com/en/news/2019/03/chad-readler-eric-murphy-sixth-circuit>; *Jeffrey Sutton*, WIKIPEDIA, https://en.wikipedia.org/wiki/Jeffrey_Sutton (last visited Oct. 15, 2019); *Kevin Newsom*, WIKIPEDIA, https://en.wikipedia.org/wiki/Kevin_Newsom (last visited Oct. 15, 2019).

111. See Nicholas Alexiou, *To Clerk or Not to Clerk. . . It's Actually Not Much of a Question*, ABOVE L. (June 7, 2018), <https://abovethelaw.com/2018/06/to-clerk-or-not-to-clerk-its-actually-not-much-of-a-question/>. Correspondingly, top firms recruit top students by providing opportunities to work on glitzy politically salient federal court litigation. Cf. Annie Correal, *Why Big Law Is Taking on Trump over Immigration*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/nyregion/president-trump-immigration-law-firms.html>.

112. Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1964–65 (2016). Indeed, the Gibson, Dunn, & Crutcher Law Firm secured Walmart as a client because of the prestige associated with its federal appellate shop. See Joan Biskupic et al., *At America's Court of Last Resort, A Handful of Lawyers Now Dominates the Docket*, REUTERS (Dec. 8, 2014, 10:30 AM), <https://www.reuters.com/investigates/special-report/scotus>.

113. Judge Sutton invokes the “laboratories” metaphor in explaining how there should be a dialogue between state and federal courts in shaping constitutional meaning. Sutton, *supra* note 3, at 797. Joseph Blocher made a somewhat similar argument, advocating that federal courts should look to state court interpretations of analogous constitutional

lawyers who practice before them prefer federal norms and federal practice. As Judge Sutton rightfully laments, following federal norms and federal practices comes at a cost. Most notably, “following can mar the reputation of states as coequal sovereigns in a federalist system.”¹¹⁴ Nonetheless, following is pervasive and likely to continue. As I will now discuss, the gravitational pull of federal norms is also a byproduct of party polarization. The more people identify with a defined party agenda, the more national party norms define state and local politics.

III. THE IMPACT OF PARTY POLARIZATION

Party polarization exacerbates the gravitational pull of federal norms. As noted at the start of this Article, polarization—at least with Donald Trump as President and Republicans in control of the Senate—creates opportunities for state justices to fill the void and expand individual rights protections. A Supreme Court dominated by Republican appointees is likely to leave a wide berth for rights-expanding state courts—at least with respect to progressive legal policy goals.¹¹⁵ Correspondingly, there is little prospect of the federal executive or Congress pursuing rights-expanding policies. On the other hand, party polarization makes it less likely that state courts will actually fill that void. In part, there will be fewer cases where the legal policy preferences of state supreme courts will be out of sync with state laws subject to constitutional attack. Specifically, with the increasing alignment of ideology and party identity, red and blue state courts are likely to agree with red and blue state legislatures.¹¹⁶ Polarization has also ushered in the so-called era of McPolitics, or the nationalization and homogenization of American political issues.¹¹⁷ In so doing, polarization has shifted the

provisions (with reference but not limited to gun rights). Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 363–64 (2011).

114. Dodson, *supra* note 19, at 706.

115. This is not to say that the Roberts Supreme Court is hostile to all rights claims. As noted earlier, the Court has expanded First Amendment rights of religious interests, corporations, and opponents of campaign finance restrictions. See Liptak, *supra* note 1. See generally TIMOTHY ZICK, *THE FIRST AMENDMENT IN THE TRUMP ERA* (2019). The Roberts Court also seems poised to expand Second Amendment protections. James Phillips & John Yoo, *Finally, The Supreme Court Is Taking Up Gun Rights Again*, L.A. TIMES (Jan. 27, 2019, 3:15 AM), <https://www.latimes.com/opinion/op-ed/la-oe-phillips-yoo-guns-court-20190127-story.html>.

116. See Adam Bonica & Michael J. Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J.L. ECON. & ORG. 472, 487 (2014).

117. See DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED* 21 (2018); Yascha Mounk, *The Rise of McPolitics*, THE NEW YORKER (June 25, 2018), <https://www.newyorker.com/magazine/2018/07/02/the-rise-of-mcpolitics>.

focus away from state actors and state politics towards national actors. For example, state attorneys general have little interest in advancing state constitutional arguments when national policy issues can be pursued in federal court.¹¹⁸ Finally, there is also greater risk of political backlash.¹¹⁹ National interest groups are more apt to attack state supreme court justices. State political actors too are more likely to take action against state courts that break rank with party preferences.

A. *The Rise of Party Polarization*

In this age of party polarization, elected officials at both the federal and state level tend to vote as distinctive ideological blocks and do not cross party lines.¹²⁰ More generally, Republicans and Democrats see themselves as members of rival factions—a phenomenon reinforced by social networks and media outlets.¹²¹ Today's ideological divide is profound and pervasive; the ideological gap in today's Congress is greater than at any time in the nation's history.¹²²

Today's divide has its roots in the 1980 election of Ronald Reagan.¹²³ Throughout the New Deal and Great Society eras, the parties were not divided.¹²⁴ In 1968, for example, George Wallace justified his third-party run for president by saying “there was not a ‘dime’s worth of difference’ between the [Republicans and Democrats].”¹²⁵ In other words, today's ideological divide was largely nonexistent when Justice Brennan made his 1977 plea for a revival of state constitutionalism. At that time, there was virtually no gap in the median liberal-conservative scores of the two parties: there were northern liberal Rockefeller Republicans and

118. For a good overview of state attorney general policymaking, see generally PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 198–202* (2015). For additional discussion, see *infra* text accompanying notes 159–83.

119. See *infra* Section III.B.2.

120. NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 107–10* (2019).

121. See *id.* at 107.

122. *Id.* at 105–10.

123. *Id.* at 105.

124. *Id.*

125. Richard Pearson, *Ex-Gov. George C. Wallace Dies at 79*, WASH. POST (Sept. 14, 1998), https://www.washingtonpost.com/archive/politics/1998/09/14/ex-gov-george-c-wallace-dies-at-79/813dc676-3c32-4973-867e-24ebfcf44715/?noredirect=on&utm_term=.0eb06be66915.

conservative Southern Democrats.¹²⁶ There were also moderates in both parties.¹²⁷

Following Ronald Reagan's victory in 1980, the moderate to liberal wing of the Republican Party began to dissipate.¹²⁸ Also, there has been a broader partisan sorting among voters, which has pushed both Republican and Democratic members of Congress toward more extreme positions.¹²⁹ Growing extremism among party activists and campaign contributors exerts a similar push.¹³⁰ Further fueling these partisan flames, computer-driven districting has helped produce high proportions of safe seats in both federal and state legislatures, in turn giving candidates an incentive to appeal primarily to partisans who vote in primaries.¹³¹ By 2012, with the growth of the Tea Party, strong partisans had replaced remaining moderates.¹³²

The polarization that is so evident among elected officials has also permeated the public. "Republicans and Democrats increasingly dislike, even loathe, their opponents."¹³³ In 1980, voters gave their own party a seventy-two and the opposing party a forty-five on a one-hundred-point scale; in 2012, the opposing party had fallen to thirty.¹³⁴ Polling data from 2010 showed 49% of Republicans and 33% of Democrats said they would be unhappy if an immediate family member were to marry someone from the opposition party (as compared to 5% of Republicans and 4% of

126. DEVINS & BAUM, *supra* note 120, at 105.

127. See STEVEN S. SMITH & GERALD GAMM, *THE DYNAMICS OF PARTY GOVERNMENT IN CONGRESS IN CONGRESS RECONSIDERED* 147 fig.7-2, 151 fig.7-4 (Lawrence C. Dodd & Bruce Oppenheimer eds., 9th ed. 2009); SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* 23–28 (2008).

128. Reagan sought to appeal to conservative Southern Democrats by drawing an ideological line separating Republicans from Democrats on issues like race, abortion, and religion. On the role of civil rights in all this, see Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 278–97 (2011).

129. *Id.* at 278–80.

130. *Id.* at 298–99.

131. See Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 428–31 (2004).

132. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 322. For example, the advent of the Tea Party is credited with the strongly conservative Ted Cruz replacing moderate Kay Bailey Hutchinson in the U.S. Senate. *Id.*

133. Shanto Iyengar et al., *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPINION Q. 405, 405 (2012).

134. Erza Klein & Alvin Chang, *Political Identity Is Fair Game for Hatred: How Republicans and Democrats Discriminate*, VOX (Dec. 7, 2015, 8:00 AM), <https://www.vox.com/2015/12/7/9790764/partisan-discrimination>.

Democrats in 1960).¹³⁵ Perhaps more telling, 2017 research revealed that “Americans are less likely to have the kind of interpersonal contact across party lines that can dampen harsh beliefs about each other. Neighborhoods, workplaces, households and even online dating lives have become politically homogeneous.”¹³⁶

In today’s news media, the proliferation of cable television, the internet, and the blogosphere has transformed public discourse. As a result, “it is much easier than it once was to select media consistent with one’s ideology and to avoid a source whose message is opposed.”¹³⁷ Correspondingly, national news now dominates; viewers and readers rarely turn to local news outlets or local newspapers.¹³⁸ When Justice Brennan made his 1977 appeal to state supreme courts, moderate-to-liberal television and newspapers dominated public discourse.¹³⁹ In the age of party polarization, news that does not reinforce preexisting views is deemed “fake news.”

At the state level, polarization has grown over time—even though the advent of red and blue states is largely a recent phenomenon.¹⁴⁰ Consider, for example, abortion. Before 1990, there was no party divergence between self-identified Republican and Democrats on abortion.¹⁴¹ Reviews of the General Social Surveys data show that Democrats and Republicans held generally similar views at that time; in fact, respondents who identified as Republican were more likely to identify as pro-choice from 1972–87.¹⁴² 1965–80 data likewise revealed that party affiliation was a bad predictor of abortion attitudes; instead, the best predictor was one’s level of education.¹⁴³ When Justice Brennan made his

135. Cass R. Sunstein, *Partyism Now Trumps Racism*, BLOOMBERG (Sept. 22, 2014, 8:03 AM), <https://www.bloomberg.com/opinion/articles/2014-09-22/partyism-now-trumps-racism>.

136. Emily Badger & Niraj Chokshi, *How We Became Bitter Political Enemies*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/upshot/how-we-became-bitter-political-enemies.html>.

137. KATHLEEN HALL JAMIESON & JOSEPH N. CAPELLA, ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT 216 (2008).

138. See Dan Hopkins, *All Politics Is National Because All Media Is National*, FIVETHIRTYEIGHT (June 6, 2018, 1:36 PM), <https://fivethirtyeight.com/features/all-politics-is-national-because-all-media-is-national/>.

139. Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1543 (2010).

140. On the growth of polarization, see Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546–50 (2011).

141. Greg D. Adams, *Abortion: Evidence of an Issue Evolution*, 41 AM. J. POL. SCI. 718, 724 (1997).

142. *Id.*

143. Donald Granberg & Beth Wellsman Granberg, *Abortion Attitudes, 1965–1980: Trends and Determinants*, 12 FAM. PLAN. PERSP. 250, 254, 258 (1980).

1977 plea to state courts, he was appealing to the dominant elite culture of which both Democrats and Republicans were a part. At that time, several studies pointed to a gap between elite and popular opinion on civil rights and liberties: “Social learning, insofar as it affects support for civil liberties, is likely to be greater among the influentials (that is, political elites) of the society than among the mass public.”¹⁴⁴

State abortion politics backs up this account. From 1973–89, thirty-three states passed anti-abortion measures: the states that enacted the most legislation included Illinois, North Dakota, Pennsylvania and Utah; some of the states most supportive of *Roe* included Arkansas, Kansas, New Hampshire.¹⁴⁵ Before 1990, moreover, there was broad consensus among more than two-thirds of the American people and most state lawmakers that waiting periods, informed consent, parental notification, and some type of abortion facilities regulations were appropriate.¹⁴⁶ When the U.S. Supreme Court approved such provisions in its 1992 *Planned Parenthood v. Casey* decision, the Court was effectively validating a package of laws that became a template for state lawmakers over the next several years.¹⁴⁷ By 2010, however, there was no longer a consensus and Republican and Democratic voters reflected national party divisions on abortion.¹⁴⁸ Correspondingly, there was now a sharp policy divide between red and blue states.¹⁴⁹

The fissure was such that blue and red state lawmakers each pushed extreme versions of dominant party views. Blue states like Rhode Island, New York, Maryland, and Massachusetts have either passed or are pursuing legislation to remove abortion restrictions or protect abortion access.¹⁵⁰ In New York, state lawmakers lifted a ban on most abortions

144. HERBERT MCCLOSKEY & ALIDA BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES 233 (1983); see also Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661, 684–86 (2013).

145. Glen Halva-Neubauer, *Abortion Policy in the Post-Webster Age*, 20 PUBLIUS 27, 32–40 (1990).

146. See Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1328 (2009).

147. 502 U.S. 1056 (1992); see Devins, *supra* note 146, at 1335–36.

148. See Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 969–72 (2016).

149. For an insightful treatment of differences between red and blue state values, see NAOMI CAHN & JUNE CARBORNE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 1, 2, 62–63 (2011).

150. See Anna North, *Roe v. Wade Is at Risk, but Abortion Rights Groups See Opportunities for Gains*, VOX (Jan. 24, 2019), <https://www.vox.com/2019/1/22/18186582/abortion-new-york-laws-2019-roe-wade>; Sabrina Tavernise, “The Time is Now”: States Are

after 24 weeks.¹⁵¹ For their part, red state lawmakers enacted increasingly draconian restrictions. These laws included mandatory ultrasounds, laws prohibiting abortions after a fetal heartbeat is detectable, laws mandating that abortion providers have hospital admitting privileges, and laws requiring that abortion clinics also be ambulatory surgical facilities.¹⁵² From January to May 2019, seven states passed heartbeat laws (effectively banning abortion after six to eight weeks of pregnancy) and Alabama banned all abortions.¹⁵³ In Part IV, I will discuss and evaluate recent state supreme court decision-making on abortion. At this point, I want to flag the obvious—most of us live in a red/blue state world where the political establishments and voters of red and blue states are increasingly homogeneous and increasingly willing to push the agenda of their party:

B. Party Polarization's Impact on State Supreme Court Decision-Making

Let me turn now to my key claims as to why state supreme courts are less apt to be pathbreakers in the age of party polarization. First, in this era of McPolitics, the gravitational pull of federal norms is stronger now than ever before. All politics is now national and, correspondingly, there is more interest in federal than state courts. Second, polarization exacerbates backlash risks. National interest groups, for example, are increasingly involved in state judicial elections and in prodding legislatures to adjust judicial selection and retention schemes. Third, red and blue state supreme court justices are likely to agree with red and blue state lawmakers and governors. In other words, there are fewer states now than before where the legal policy preferences of state supreme courts vary from elected officials. Those purple states are certainly important but the number of states likely to disapprove of elected government decision-making is smaller now than ever before.

Rushing to Restrict Abortion, or to Protect It, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/us/abortion-laws-2019.html>.

151. Tom Precious, *Long Stalled Abortion Bill Passes in New York Legislature*, BUFFALO NEWS (Jan. 22, 2019), <https://buffalonews.com/2019/01/22/long-stalled-abortion-bill-passes-new-york-legislature/>.

152. Devins, *supra* note 148, at 969, 976, 977 n.231.

153. Tavernise, *supra* note 150; Mitch Smith, *Missouri Governor Signs Law Outlawing Abortion After Eight Weeks*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/us/missouri-abortion-law.html>.

1. Federal Norms

The gravitational pull of federal norms is stronger now than ever before. State officials and voters increasingly situate state politics against the broader backdrop of national politics. Democratic and Republican candidates offer essentially the same political platform with little variation based on local preferences.¹⁵⁴ In recent years, “[v]oters in state races are driven by their national partisan identity.”¹⁵⁵ The results in gubernatorial elections have begun mirroring presidential elections, and votes for state legislators have increasingly become expressions of “voter preferences about national elections.”¹⁵⁶ In a 2018 advertisement for New York State Senate primary races, the actor Edie Falco was enlisted to encourage voters to elect Democrats so that New York State could pass protective legislation to “resist Trump’s agenda.”¹⁵⁷ Correspondingly, state constitutional arguments hold less appeal—even when they can be enlisted to advance national legal policy objectives.

Two anecdotes from my home state, Virginia, vividly illustrate this point. In January 2018, I attended the State of the State Address of just-elected Virginia Governor Ralph Northam. I had never listened to—let alone attended—a State of the State Address, and so I anticipated that the speech would be Virginia-focused. My expectations could not have been further off the mark. The principal targets of the Governor’s address were national in nature—the Affordable Care Act, gun control, abortion, and a slew of reforms to either expand voting rights or make it easier to register to vote or cast an absentee ballot.¹⁵⁸ It is only slightly hyperbolic to say that the Governor’s speech was so unmoored to Virginia-specific issues that it could have been delivered in any state or on Capitol Hill.

The second anecdote is far more important (at least for this paper). In January 2014, Virginia Attorney General Mark Herring announced that he would not defend the state ban on same-sex marriage and, instead, would argue in court that the law violated the Federal Constitution. For Herring, “[t]oo many times” Virginia had been on the

154. See Mounk, *supra* note 117.

155. Jessica Bulman-Pozen, *States of the Union*, HARV. L. REV. BLOG (Oct. 17, 2018), <https://blog.harvardlawreview.org/states-of-the-union/>.

156. David N. Schleicher, *Federalism Is in a Bad State*, HARV. L. REV. BLOG (Oct. 12, 2018), <https://blog.harvardlawreview.org/federalism-is-in-a-bad-state/>; Dan Hopkins, *All Politics Is Presidential*, FIVETHIRTYEIGHT (Mar. 17, 2014), <https://fivethirtyeight.com/features/all-politics-is-presidential/>.

157. Bulman-Pozen, *supra* note 155.

158. COMMONWEALTH OF VIRGINIA ADDRESS OF GOVERNOR RALPH S. NORTHAM, THE STATE OF THE COMMONWEALTH ADDRESS TO THE JOINT ASSEMBLY, S. Doc. No. 1C, at 5, 7–8 (2018).

“wrong side” of justice on civil rights matters.¹⁵⁹ “It is time for the commonwealth to be on the right side of history.”¹⁶⁰ This nationalistic rhetoric is striking. Herring did not consider the possibility that the state ban violated the Virginia Constitution or otherwise reference state law concerns. Correspondingly, when formally changing the state’s legal position in ongoing federal court litigation, Herring referenced his oath to support “the Constitution of the United States” and his related conclusion that “he is not duty bound to defend” state law at variance with “his independent constitutional judgment” of the Federal Constitution.¹⁶¹ His filing did not reference a related statutory provision allowing the Governor to step in for the Attorney General and defend state law when the Attorney General certifies that “there is a conflict of interests or that he is unable to render certain legal services.”¹⁶²

Herring’s seeming indifference to the potential relevance of state law typifies state attorney general behavior on the duty to defend issue. In 2015, Sai Prakash and I published an article on state attorney general refusals to defend state law in court.¹⁶³ Sai and I found that refusals to defend were increasingly tied to federal, not state, constitutional arguments.¹⁶⁴ Of the twelve state attorneys general who refused to defend state bans on same-sex marriage, only one (New Mexico) explicitly relied on state constitutional arguments.¹⁶⁵ The fact that the right to same-sex marriage was earlier propelled by state supreme court interpretations of state constitutions did not matter.¹⁶⁶ State attorneys general were playing on a national stage, making national arguments. Indeed, the related fight over the power of state attorneys general to refuse to defend was likewise framed in absolutist, nationalistic terms. The Republican Attorney General Association argued that claims—like

159. Timothy Williams & Trip Gabriel, *Virginia’s New Attorney General Opposes Ban on Gay Marriage*, N.Y. TIMES (Jan. 23, 2014), <https://www.nytimes.com/2014/01/24/us/new-virginia-attorney-general-drops-defense-of-gay-marriage-ban.html>.

160. *Id.*

161. Memorandum of Defendant Janet M. Rainey in Support of Change in Legal Position at 1–2, *Bostic v. Rainey*, No. 2:13-cv-00395 (E.D.V.A. Jan. 23, 2014).

162. VA. CODE ANN. § 2.2–510 (West 2014); see Rainey, *supra* note 161.

163. Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2102 (2015).

164. See *id.* app. II at 2178–87.

165. *Greigo v. Oliver*, 316 P.3d 865, 889 (N.M. 2013); Devins & Prakash, *supra* note 163, at 2139.

166. Nine of these twelve cases were filed in federal court. Devins & Prakash, *supra* note 163, at 2139. Nonetheless, state attorneys general could still have asserted that the law was unconstitutional on state constitutional grounds. *Id.* at 2116–18. For a related argument, see Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178 (1984) (arguing that state courts should initially address state law claims before considering federal law claims).

Herring's— that state attorneys general could refuse to defend based on independent analysis were “inappropriate” and “unprecedented.”¹⁶⁷ For their part, Democratic attorneys general argued that gauging the constitutionality of state law and refusing to defend “is something that’s appropriate for an attorney general to do.”¹⁶⁸ Neither side made any effort to delve deeply into the specific language of state statutes and state constitutional provisions.¹⁶⁹

This failure to take state law into account is striking but understandable. Attorneys general are politically ambitious and—like other politicians—have incentive to win favor with voters, donors, and party leaders.¹⁷⁰ Indeed, forty-three are popularly elected and 37% of attorneys general subsequently run for higher office, such as governor (26%) or senator (10%).¹⁷¹ These attorneys general use high profile litigation to enhance future political prospects.¹⁷² In today’s era of hyperpolarized politics and the related convergence of federal and state politics, it is to be expected that Democratic and Republican attorneys general would embrace high profile nationally-oriented litigation to

167. Tal Kopan, *GOP AGs: Holder ‘Inappropriate’*, POLITICO (Feb. 25, 2014, 4:21 PM), <https://www.politico.com/story/2014/02/eric-holder-republican-state-attorneys-general-103940>.

168. Matt Apuzzo, *Holder Sees Way to Curb Bans on Gay Marriage*, N.Y. TIMES (Feb. 24, 2014), <https://www.nytimes.com/2014/02/25/us/holder-says-state-attorneys-general-dont-have-to-defend-gay-marriage-bans.html>.

169. For reasons that Sai and I detail, specific state law provisions define the scope of attorney general autonomy (not the largely ceremonial oath that all attorneys general take to support and defend the federal and state constitutions). See Devins & Prakash, *supra* note 163, at 2130–34.

170. In today’s era of McPolitics, the gravitational pull of federal norms is such that state lawmakers frequently enact model legislation that is being pursued by like-minded lawmakers in other states. See Model Politics, AM. LEGIS. EXCHANGE COUNCIL, <http://www.aled.org/model/policy> (last visited Sept. 18, 2019). In some instances (abortion most notably), Democrats and Republicans embrace competing model legislation. Compare Molly Jackman, *ALEC’s Influence over Lawmaking in State Legislatures*, BROOKINGS (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/>, with Kenneth P. Vogel, *Democrats Create ALEC-Killer*, POLITICO (Nov. 9, 2014, 9:55 PM), <https://www.politico.com/story/2014/11/democrats-create-an-alec-killer-112733>. For many Republicans, this legislation is designed to tee up a federal constitutional case—so that state lawmakers are thinking more about federal than state constitutional issues. Jenny Jarvie, *Conservative States Enact Abortion Bans in Hope of Overturning Roe vs. Wade*, L.A. TIMES (May 11, 2019, 6:37 PM), <https://www.latimes.com/nation/la-na-abortion-bans-states-roe-wade-supreme-court-20190511-story.html>.

171. Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policymaking Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597, 599, 604 (2009); William N. Thompson, *Should We Elect or Appoint State Government Executives? Some New Data Concerning State Attorneys General*, 8 AM. REV. PUB. ADMIN. REV. 17, 17, 30 (1974).

172. See Provost, *supra* note 171, at 612.

enhance their status among their constituents and also bolster future political prospects.¹⁷³ The same-sex marriage litigation is an illustration of this, as are efforts by competing coalitions of Republican and Democratic attorneys general to challenge opposition party presidents. Republican attorneys general famously sued the Obama Administration over the Affordable Care Act and the President's immigration initiatives.¹⁷⁴ For their part, Democratic attorneys general have pursued (as of April 2019) seventy-one lawsuits against the Trump administration, regarding sanctuary cities, the Emoluments Clause, the Affordable Care Act, the President's immigration initiatives, and much more.¹⁷⁵

Two other phenomena explain why state attorneys general are not pursuing important state constitutional cases in state court. One is the growth of nationwide Democratic and Republican Attorney General Associations; the other is the rise of state solicitors general.¹⁷⁶ The Democratic Attorneys General Association ("DAGA") website and aggressive emailing campaigns both emphasize their efforts to undo Trump and the necessity of contributing to DAGA to achieve that objective.¹⁷⁷ For its part, the Republican Attorneys General Association touts its role in advancing Trump policies and seeks funds to elect Republican attorneys general for that purpose.¹⁷⁸ Specifically: "Republican AGs are actively working with the administration to restore the rule of law and correct other previous unconstitutional overreaches."¹⁷⁹

173. For this very reason, state attorneys general have not sought to advance their legal policy objectives through their "common law" power to file lawsuits in state court alleging that state law violates state constitutional provisions. See Devins & Prakash, *supra* note 163, 2125–26 (discussing state attorneys general common law power); see also *State ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1230 (Colo. 2003).

174. Emma Platoff, *Texas and 6 Other States Sue to End DACA*, TEX. TRIBUNE (May 1, 2018), <https://www.texastribune.org/2018/05/01/texas-and-six-other-states-sue-end-daca/>; Mattie Quinn, *Does the Obamacare Case Represent a New Norm for States?*, GOVERNING (Jan. 22, 2019), <https://www.governing.com/topics/health-human-services/gov-obamacare-lawsuit-state-attorney-general.html>.

175. Maureen Groppe, *Multistate Lawsuits Against Trump in 2 Years Exceed Those Against Obama, Bush in 8 Years*, USA TODAY (Apr. 10, 2019), <https://www.usatoday.com/story/news/politics/2019/04/10/donald-trump-sued-more-often-democratic-attorneys-general/3143366002/>.

176. On the rise of state solicitors general, see Banks Miller, *Describing the State Solicitors General*, 93 JUDICATURE 238, 242–43 (May–June 2010).

177. See *Democratic AGs Continue to Stand up to Trump and Protect the People and the Environment*, DEMOCRATIC ATTORNEYS GEN. ASSOCIATION, <https://democraticags.org/dem-ags-last-24hrs-aug/> (last visited Sept. 18, 2019).

178. *About RAGA*, REPUBLICAN ATT'YS GEN. ASS'N, <https://www.republicanags.com/about/> (last visited Sept. 18, 2019).

179. *Id.*

The nationalization of attorneys general, including the push towards high visibility federal court litigation, has also been fueled by the rise of state solicitors general. Before 1987, eight states had solicitors general; by 2001, the number had risen to twenty-four; today, thirty-nine states have solicitors general.¹⁸⁰ Most state solicitors general have clerked for federal court judges, with several having clerked for U.S. Supreme Court Justices; some are law professors and some come from large firm appellate practices.¹⁸¹ Perhaps more importantly, after serving a stint as state solicitor generals, these lawyers typically focus their energies on federal appellate practice—some practice in large firms (often heading federal appellate groups), some return to the academy, and some go on to federal judgeships.¹⁸² Prominent members of this club (all of whom are now federal appeals judges or U.S. Senators and all of whom have argued before the U.S. Supreme Court when state solicitors general) include Jeff Sutton, Eric Murphy, James Ho, Ted Cruz, and Kevin Newsom.¹⁸³

The professional ambitions of state solicitors general revolve around high visibility federal court litigation. These appellate specialists typically have a federal law background and pursue federal law careers after their stint as state solicitor general. They are drawn to the position specifically because it promises them the opportunity to participate in high visibility federal court litigation, including the regular filing of briefs and (for several) the presentation of oral arguments before the U.S. Supreme Court. State solicitors general, for example, litigated challenges to Obama and Trump immigration initiatives as well as the legality of the U.S. citizen question on the Census.¹⁸⁴

For state officials and voters, all politics is national. The increasing focus on federal litigation is certainly tied to this phenomena, especially state lawsuits challenging or defending presidential initiatives (for the President stands at the epicenter of all that is national). This pattern

180. See James R. Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model*, 3 J. APP. PRAC. & PROCESS 534, 534 (2001); Miller, *supra* note 176, at 238; The Federalist Society, *The Role of State Solicitors General [POLICYbrief]*, at 2:40, YOUTUBE (May 2, 2018), <https://www.youtube.com/watch?v=OCFD5Rucl3s>.

181. See Miller, *supra* note 176, at 239.

182. See *id.* at 241.

183. See Eric Murphy, BALLOTPEDIA, https://ballotpedia.org/Eric_Murphy (last visited Sept. 18, 2019); James Ho, BALLOTPEDIA, https://ballotpedia.org/James_Ho (last visited Sept. 18, 2019); Jeffrey Sutton, BALLOTPEDIA, https://ballotpedia.org/Jeffrey_Sutton (last visited Sept. 18, 2019); Kevin Newsom, BALLOTPEDIA, https://ballotpedia.org/Kevin_Newsom (last visited Sept. 18, 2019); Ted Cruz, BALLOTPEDIA, https://ballotpedia.org/Ted_Cruz (last visited Sept. 18, 2019).

184. See Platoff, *supra* note 174; Adam Liptak, *On Census Citizenship Question, Supreme Court's Conservatives Appear United*, N.Y. TIMES (Apr. 23, 2019), <https://www.nytimes.com/2019/04/23/us/politics/supreme-court-census-citizenship.html>.

shows no sign of abating and until then the focus of interest groups, state attorneys and solicitors general, and all others are tied to federal law. State constitutional law is diminished, if not irrelevant; for what happens in one state can inform other states and (theoretically) the U.S. Supreme Court.¹⁸⁵

2. Backlash Risks

The increasing prominence of federal law and federal norms has also shifted the focus of state law developments. The decisions of state supreme courts and, relatedly, the election of state justices is now looked at through a national prism. For example, as is true of elections for other state officials, state judicial elections have become microcosms of national elections. Correspondingly, national interest groups are increasingly important players in state judicial elections.¹⁸⁶ For their part, state justices turn to out-of-state interests for campaign contributions and, not surprisingly, these contributions are linked to rulings that back the views of campaign contributors.¹⁸⁷ State justices, moreover, are both increasingly interested in national legal policy when running for office and increasingly aware of the risks of upsetting national interest groups.

“[E]lected state judges ignore powerful political pressures at their peril. They need to be—and likely are in reality—more closely attuned to the connection between legal judgments and political ramifications.”¹⁸⁸ Starting in the 1990s, contested judicial elections began to reflect “the rise in campaign spending, interest group activity, partisan rancor, and political speech.”¹⁸⁹ This “radicalization of judicial elections has increased the expected penalty to the judge who contravenes the majority will.”¹⁹⁰ In today’s hyper-polarized world, state politics is national politics. Most

185. On the influence of state courts on the U.S. Supreme Court, see Sutton, *supra* note 3, at 796–97. On the interface between state supreme courts, see Neal Devins, *Same-Sex Marriage and the New Judicial Federalism: Why State Courts Should Not Consider Out-of-State Backlash*, in *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS* 81, 83 (James A. Gardner & Jim Rossi eds., 2010).

186. See, e.g., Pozen, *supra* note 45, at 93; ALICIA BANNON ET AL., WHO PAYS FOR JUDICIAL RACES?: THE POLITICS OF JUDICIAL ELECTIONS 2015–16, at 8 (2017), https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf.

187. See Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 102 (2011).

188. Daniel B. Rodriguez, *Change that Matters: An Essay on State Constitutional Development*, 115 PA. ST. L. REV. 1073, 1074 (2011).

189. Pozen, *supra* note 80, at 307; see also Pozen, *supra* note 45, at 93–94.

190. Pozen, *supra* note 80, at 327.

campaign contributions now come from outside candidates' districts.¹⁹¹ Correspondingly, state judicial elections turn more on national issues, and national interest groups are more directly involved in backing favored or attacking disfavored judicial candidates.

In states with contested elections, candidates overtly embrace national party politics in order to gain advantage with nationally oriented voters. For instance, a 2012 Republican candidate for the Texas Supreme Court, Don Willet, ran an advertisement touting himself as “the judicial remedy to Obamacare.”¹⁹² In 2018, a Democratic candidate for the Michigan Supreme Court, Sam Bagenstos, enlisted Elizabeth Warren to campaign for him and promised voters he would resist the Trump agenda.¹⁹³ Likewise in 2018, the Democratic candidate for Wisconsin Supreme Court, Rebecca Dallet, both ran advertisements directly attacking President Trump and received high profile endorsements from Eric Holder and Joe Biden.¹⁹⁴ Her Republican opponent, Michael Scernock, received support from Americans for Prosperity.¹⁹⁵

This nationalizing of state judicial politics often cuts against expansive state court interpretations of state constitutions. State supreme court justices are particularly wary of running afoul of national interest groups on national issues. One of those issues is expanding the boundaries of individual rights protections beyond the U.S. Supreme Court. Voters and interest groups will not draw a line separating state from federal decision-making; instead, they will pay attention to the bottom line, and that bottom line—in today's era of McPolitics—is set by

191. Harry Stevens & Alexi McMammond, *Most Campaign Contributions Come from Outside Candidates' Districts*, AXIOS, <https://www.axios.com/house-campaign-contributions-outside-money-f776be9e-f74b-4834-8ff4-ae30df1f7c61.html> (last updated Aug. 28, 2018).

192. See Alicia Bannon, *Rethinking Judicial Selection in State Courts*, BRENNAN CTR. FOR JUST. 1, 11 (2016), https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf. Willet's appeal to national politics paid off in many ways, including a 2017 Fifth Circuit nomination by President Trump and making then-candidate Trump's 2016 short list of potential Supreme Court nominees. See Edith Roberts, *Potential Nominee Profile: Don Willet*, SCOTUS BLOG (June 29, 2018), <https://www.scotusblog.com/2018/06/potential-nominee-profile-don-willet/>.

193. See *Endorsements*, SAMUEL BAGENSTOS FOR MICHIGAN SUP. CT., <https://www.bagenstosforjustice.com/endorsements> (last visited Sept. 13, 2019).

194. Monica Davey, *Liberal Judge Wins Wisconsin Supreme Court Seat*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/wisconsin-election-supreme-court.html>; Ed Kilgore, *Wisconsin's Supreme Court Election Is Going to Be a Barnburner*, N.Y. MAG. (Apr. 1, 2018), <http://nymag.com/intelligencer/2018/04/wis-supreme-court-election-is-going-to-be-a-barnburner.html>; *Judge Rebecca Dallet: Standing up for Your Rights*, YOUTUBE, (Jan. 29, 2018), <https://www.youtube.com/watch?v=T5j05Ha2UqY&feature=youtu.be>.

195. See Kilgore, *supra* note 194.

U.S. Supreme Court interpretations of the Federal Constitution. Consequently, unless state voters and the state political establishment back rights-expanding decision-making,¹⁹⁶ state supreme court justices have reason to steer clear of controversy.

The 2010 ousting of three Iowa Supreme Court Justices for their same-sex marriage votes highlights the role of national interest groups and the related need for state justices to see state voter opinion as tied both to these groups and the national policy positions of Democrats and Republicans. As discussed, the Iowa political establishment did not resist the same-sex marriage ruling and not one Iowa justice had ever been unseated in a retention election.¹⁹⁷ However, the Family Research Council, the American Families Association, Citizens United, and the National Organization for Marriage wanted to send a message to Iowa and courts beyond.¹⁹⁸ As David Pozen wrote: “The campaign was conservative in its resistance to judicial creativity and legal change. . . . Its goal was to homogenize U.S. constitutional practice by bringing an outlier state back into line with the prevailing sociolegal norm.”¹⁹⁹ In other words (and in direct contravention to Judge Sutton’s claims about state courts as laboratories), “certain types of constitutional competition within states can depress constitutional competition among states.”²⁰⁰

Recent studies regarding the impact of national groups on judicial elections and recent state efforts to limit merit selection plans are particularly instructive here. These studies call attention to the role of outside money in state judicial elections.²⁰¹ Lawyer groups, lobbyists, and business interests, for example, invested several millions of dollars in 2015 state supreme court races in Pennsylvania and a 2016 state supreme court race in North Carolina.²⁰² These studies also highlight growing backlash risks for state justices who provide for rights

196. In today’s hyper-polarized political environment, federalism has arguably morphed into a way for the out party to hide out in states while it is out of power nationally. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1089–93 (2014). In states where the out party dominates, state voters and state political leaders may sometimes look to state courts to play a leadership role. *Id.* In the age of party polarization, where Republicans now control the White House and the Senate for example, blue state Democrats might sometimes look to state courts to advance the out-party political agenda. This arguably happened in Washington State when the state supreme court abolished the death penalty. See *infra* text accompanying notes 236–39. Thanks to Jim Gardner for making this point to me.

197. See *supra* text accompanying note 44.

198. Pozen, *supra* note 45, at 98 n.43.

199. *Id.* at 98.

200. *Id.*

201. See, e.g., BANNON ET AL., *supra* note 186, at 14; Bannan, *supra* note 192.

202. See BANNON ET AL., *supra* note 186, at 11–12, 14–15, 18.

protections beyond those protected by U.S. Supreme Court interpretations of the Federal Constitution.²⁰³ In today's polarized world, retention races are increasingly contested, and state officials are willing to rethink structural protections afforded state justices. A 2017 study by the Brennan Center argued that national groups spent over \$20 million on television advertisements in the 2015–16 elections cycle, funding 73% of negative television ads.²⁰⁴ According to research by Michael Kang and Joanna Shepherd, these attack ads have impacted judicial decisions, most notably, leading to a hostility to criminal defendants in state supreme court appeals decisions.²⁰⁵

State legislatures—sometimes in conjunction with national interest groups—are also taking steps to subject judges to greater political controls through structural reforms. Following the 2016 Democratic takeover of the North Carolina governorship, outgoing governor, Pat McCrory, approved fundamental changes to state judicial elections.²⁰⁶ In an effort to bolster Republican control of the state supreme court, the Legislature approved a measure that returns partisan primaries to elections for the state's supreme court.²⁰⁷ According to the Brennan Center, over the course of 2018, eighteen states considered sixty bills “that would have politicized or undermined the independence of state courts.”²⁰⁸ These bills would make judicial selection more partisan, weaken or eliminate judicial nominating commissions, shield certain legislative action from judicial review, alter judicial term lengths, and change the size of the courts.²⁰⁹ Perhaps most significant (for state supreme courts), several states are seeking to limit merit selection plans in order to make state supreme courts more responsive to the state's political establishment.²¹⁰ These selection plans are intended to depoliticize judicial selections by having state bar associations play a critical role in identifying judges, including state supreme court

203. See *supra* text accompanying notes 73–74.

204. See BANNON ET AL., *supra* note 186, at 32, 35.

205. Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 930 (2016).

206. See Ann Blythe, *NC Lawmakers Create Partisan Election Process for Courts that Review their Laws*, NEWS & OBSERVER (Dec. 16, 2016), <https://www.newsobserver.com/news/politics-government/state-politics/article121449157.html>.

207. See *id.*

208. *Legislative Assaults on State Courts – 2019*, BRENNAN CTR. FOR JUST. (Feb. 11, 2019), <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2019>.

209. *Id.*

210. *Id.*

justices.²¹¹ In 2017 and 2018, proposals have been made to do away with merit selection in six of the sixteen states with merit plans; two other states with merit plans have seen proposals allowing for legislative review of judicial decisions and stripping the state courts of jurisdiction in school finance cases.²¹² In May 2019, Iowa changed its judicial selection law in the wake of Republican complaints about the Iowa Supreme Court finding a right to abortion in the Iowa Constitution.²¹³

Against this backdrop, it is little wonder that state supreme court justices would be careful not to run afoul of either national interest group preferences or the national agenda of whichever political party controls the state. In today's polarized age, partisan attacks—particularly by out-of-state interests—are more likely than ever before: In today's polarized age, state judicial candidates increasingly turn to out-of-state money. In today's polarized age, there is little incentive to push constitutional boundaries beyond those recognized by the U.S. Supreme Court; lockstepping, instead, may prove the best way to obviate potential political risks.

3. The Rise of Shared Preferences Among State Courts and Elected State Officials

Party polarization results in less issue space for state courts to expand their constitutions to protect individual rights. In both red and blue states, there is likely to be agreement among all political leaders—the governor, attorney general, and state legislature. In these states, state supreme court justices are likely to come from the dominant political party and likely to agree with the political establishment.

There will be exceptions as the state political establishment may act in ways that are overtly unconstitutional or the state may make use of a merit selection plan that results in bar groups playing a meaningful role

211. *Id.* For a critique of these claims about bar association neutrality, see Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675 (2009).

212. See *Legislative Assault on State Courts – 2018*, BRENNAN CTR. FOR JUST. (Feb. 7, 2018), <https://www.brennancenter.org/analysis/legislative-assaults-state-courts-2018>.

213. See *infra* text accompanying notes 260–61. See generally Katarina Sostaric, *Iowa Governor Signs Judicial Selection Changes into Law*, IOWA PUBLIC RADIO (May 8, 2019), <https://www.iowapublicradio.org/post/iowa-governor-signs-judicial-selection-changes-law#stream/0>. For a discussion of a similar but failed effort in Oklahoma (following a state supreme court ruling on abortion), see Joseph P. Williams, *Judicial Reforms Aim at Making Courts More Partisan, Less Powerful*, U.S. NEWS (Feb. 14, 2018), <https://www.usnews.com/news/politics/articles/2018-02-14/judicial-reforms-aim-at-making-courts-more-partisan-less-powerful>.

in the selection of state supreme court justices.²¹⁴ Nonetheless, especially with respect to the twenty-two states that select justices through competitive elections, state courts and state political actors are likely to be in sync.²¹⁵ A 2014 study by Adam Bonica and Michael J. Woodruff backs up this commonsense proposition: “[S]tate Supreme Courts exhibit a pattern of ideological sorting similar to trends that have been noted elsewhere in American politics. As the population of justices polarized across states over the past two decades, individual state courts became more homogeneous.”²¹⁶ In other words, state supreme court justices in polarized times tend to converge on the dominant ideology of other political actors.

In a less polarized time, the red-blue state divide would be less consequential and less prevalent. It would be less consequential because party identity and ideology would not be aligned; instead, Republicans and Democrats would each be represented in all ideological niches. It would be less prevalent for the same reason—conservative voters would support conservative Democrats and liberal voters would back liberal Republicans. Before 2008, most states had divided government (where the governor and the two houses of the state legislature were not all of the same party).²¹⁷ Leading up to the 2012 election, there were thirty-three states where Democrats or Republicans controlled the state’s legislative and executive branches; in 2018, there were thirty-six such states.²¹⁸ As states become more polarized, it has become increasingly unlikely for a state’s legislative and executive branches to have different philosophical outlooks.²¹⁹

214. For further discussion of the relevance of merit selection plans creating a disjunction between the state judiciary and the state political establishment, see *supra* text accompanying notes 210–13.

215. Bonica & Woodruff, *supra* note 116.

216. *Id.*

217. See Geoff Pallay, *Who Runs the States?*, BALLOTPEDIA 8–9 (May 2013), https://cdn.ballotpedia.org/images/c/ca/WhoRunstheStates_Part1_Partisanship.pdf.

218. See *Gubernatorial and Legislative Party Control of State Government*, BALLOTPEDIA, https://ballotpedia.org/Gubernatorial_and_legislative_party_control_of_state_government (last visited Sept. 18, 2019).

219. Louisiana and Maryland are notable exceptions to this increasingly dominant pattern. See Erin Cox, *Maryland Gov. Larry Hogan Backs Gun-Control Measures, Money for School Security*, BALTIMORE SUN (Feb. 28, 2018), <https://www.baltimoresun.com/politics/bs-md-gun-control-proposals-20180227-story.html>; Lydia Saad, *Conservative-Leaning States Drop from 44 to 39*, GALLUP (Feb. 6, 2018), <https://news.gallup.com/poll/226730/conservative-leaning-states-drop.aspx>. Moreover, it is sometimes the case that a state with divided government is either a red or a blue state because the values of one or the other party are dominant. In 2019, for example, red state Louisiana has an avidly pro-life Democratic governor and blue state Maryland has a pro-choice, pro-gun control Republican governor. Tyler Bridges, *Anti-Abortion Stance Puts Louisiana Gov. John Bel Edwards at*

In the age of party polarization, however, there will be fairly few cases in red and blue states where the state supreme court and the dominant political coalition will be out of sync with each other. With the notable exception of state supreme court justices appointed through a merit selection process,²²⁰ red and blue state justices will likely reflect state political norms. In these states, there will be few cases where state supreme courts will want to slap down the dominant political party through expansive interpretations of state constitutions. In states where voters favor the expansion of rights, state lawmakers are likely to enact and the governor likely to sign rights-expanding legislation—so that state supreme courts will have fewer opportunities to fill the void in these states.²²¹ In states where voters do not want to expand rights, there will be an opportunity for the state courts to act but—in politically homogeneous states—elected judges are likely to agree with the prevailing political wisdom.

Today, the states where there is likely to be a disjunction between the legal policy preferences of state supreme court justices and state lawmakers and governors are purple states—states where the supreme court reflects the political beliefs of one party and where state lawmakers and governors are from the opposition party.²²² In my 2015 paper with Sai Prakash on state attorney general refusals to defend state law, we examined a similar phenomenon involving same-sex marriage.²²³ Controversies over state attorney general refusals to defend came from twelve purple states.²²⁴ “In deep red and blue states,” we wrote, “the risks of controversy are mitigated by the fact that one party dominates the

Odds with Much of Democratic Base, THE ADVOCATE (June 1, 2019, 8:48 PM), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_d970cbd0-8486-11e9-bb8a-cf565198aa1f.html; Cox, *supra* note 219; see Maureen Shaw, *Maryland Governor Takes Atypical GOP Approach to Reproductive Rights*, REWIRE NEWS (Apr. 26, 2017), <https://rewire.news/article/2017/04/26/maryland-governor-takes-atypical-gop-approach-reproductive-rights/>.

220. For a discussion on the important role that merit selection plays in explaining those instances where state supreme courts reject prevailing state political norms, see *supra* Section III.B.2.

221. See GARY MONCRIEF & PEVERILL SQUIRE, *WHY STATES MATTER: AN INTRODUCTION TO STATE POLITICS* 97–98 (2013). On rare occasions, state supreme courts will invalidate laws that have fallen out of favor with the dominant state political establishment. For an examination of recent instances where state supreme courts invalidated legislation disfavored by the state political establishment, see *infra* text accompanying notes 256–84.

222. This definition of purple state fits this Article but is not the classic definition—where the focus is a mismatch between either lawmakers and the governor or a mismatch between the two houses of the state legislature. See Devins & Prakash, *supra* note 163, at 2106, 2152.

223. *Id.* at 2102.

224. *Id.* at 2141.

political branch[es]. . . . On same-sex marriage, blue states either voluntarily repealed prohibitions on same-sex marriage or acquiesced to court orders striking down the same-sex marriage bans. Because red state voters generally back these bans, their elected politicians tend to support them as well.”²²⁵

In addition to purple state justices, justices appointed through merit selection plans sometimes disagree with the state political establishment. By empowering state bar groups in judicial selection, these plans seek to insulate state justices from politics and often place a premium on a nominee’s reputation among the state’s legal elite.²²⁶ At the same time, state bars in red and blue states tend to reflect the prevailing legal policy views of elected officials.²²⁷ In other words, even in states with merit selection plans, policy disagreements are most likely to occur in purple states.²²⁸

For state supreme court justices in merit selection and/or purple states, there is great risk in ruling against the political branches.²²⁹ State supreme court justices, for reasons discussed, are reluctant to take this risk. Sometimes they do, of course. In Part IV, I will examine some recent examples—particularly with respect to Trump-era rulings on abortion and districting. For reasons I will now detail, these rulings are not counterexamples to the claims made in this Article. They highlight both that purple state justices (typically appointed through a merit selection plan) are the ones most likely to rule against elected government; they also highlight that victories in state supreme courts are often pyrrhic. State officials can seek to undermine these rulings or otherwise subject state justices to democratic controls; this is particularly true with respect to the sixteen states that make use of merit selection plans.

IV. STATE CONSTITUTIONALISM IN THE AGE OF PARTY POLARIZATION

Since the 2016 election of Donald Trump, state supreme courts have issued important state constitutional rulings protecting individual rights, including decisions suspending the death penalty

225. *Id.* at 2152–53.

226. TARR, *supra* note 34, at 63–65.

227. See Adam Bonica et al., *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277, 298 (2016).

228. See *infra* text accompanying notes 248–56 (highlighting the relevance of merit selection plans to the willingness of four state supreme courts to recognize abortion rights and strike down state abortion regulations).

229. On same-sex marriage, for example, ten of the twelve judges were subject to contested (two) or retention (eight) election in states where attorneys general refused to defend. See Devins & Prakash, *supra* note 163, at 2151–53, app. II at 2178–87.

(Washington),²³⁰ recognizing the free speech rights of businesses (Arizona),²³¹ repudiating partisan gerrymandering (Pennsylvania),²³² and rejecting state abortion regulations (Alaska, Florida, Iowa, and Kansas).²³³ A panel of North Carolina court judges also repudiated partisan gerrymandering in September 2019 and that decision was not appealed “probably because the North Carolina Supreme Court has a 6-1 Democratic majority.”²³⁴ These decisions call attention to the continuing importance of state supreme courts. Upon closer examination, however, they also reinforce the central claims of this article. Specifically, these decisions either ratified dominant state political norms (where there were next-to-no backlash risks), were made by purple state justices whose political leanings did not match state lawmakers, or were made by justices appointed in a merit-selection plan (often chosen by purple state governors whose political leanings were at variance with the state legislatures). Moreover, these decisions call attention to the risks state justices face when they negate elected government preferences. In Washington and Arizona, the state supreme court reinforced dominant statewide political preferences. In all other states but North Carolina, elected officials took aim at these decisions—making changes to the rules governing state judicial selection/retention, appointing new justices whose political leanings better matched the views of elected officials, pursuing constitutional amendment overrides, and threatening impeachment proceedings. In North Carolina, legislative retribution seemed futile in the face of a just-elected Democratic governor and 2015–16 legislative battles (where a Republican governor worked with Republican lawmakers to preemptively neuter future Democratic control of the state supreme court).²³⁵ In short, 2017–19 rulings underscore the

230. *State v. Gregory*, 427 P.3d 621, 626–27, 642 (Wash. 2018).

231. *Brush & Nib Studio, LC v. City of Phoenix*, No. CV-18-0176-PR (Ariz. Sept. 16, 2019).

232. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018).

233. See *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 988 (Alaska 2019); *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1247 (Fla. 2017); *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 212 (Iowa 2018); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 502 (Kan. 2019).

234. Mark Joseph Stern, *Elena Kagan's Blueprint to End Partisan Gerrymandering*, SLATE (Sept. 4, 2019), <https://slate.com/news-and-politics/2019/09/partisan-gerrymander-kagan-state-courts.html>. The September 2019 decision applied to state, not congressional, districts. On October 28, 2019, the same panel struck down North Carolina's congressional districting as an unconstitutional partisan gerrymander under the state constitution. See Michael Wines, *State Court Bars Using North Carolina House Map in 2020 Elections*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/28/us/north-carolina-gerrymander-maps.html>.

235. See *infra* text accompanying notes 273–74.

limits of state supreme courts filling in gaps left open by the U.S. Supreme Court.

The Washington Supreme Court faced no backlash risks when declaring the state death penalty unconstitutional in October 2018. Like 2005–15 property rights reforms in nearly every state (following the U.S. Supreme Court’s ruling in *Kelo v. City of New London*), state courts are unrestrained when they have the backing of the public and state officials.²³⁶ Washington too was ripe for death penalty reform. National support for the death penalty was at an all-time low in 2016; in Washington State a July 2018 poll found 24% support for the death penalty as compared to 69% support for life imprisonment or other alternative.²³⁷ In 2014, Washington Governor Jay Inslee imposed a moratorium on capital punishment.²³⁸ And while death penalty legislation remained on the books, the decision to suspend was both politically popular and did not change the status quo.²³⁹

The Arizona Supreme Court too faced no backlash risks when limiting the reach of a Phoenix anti-discrimination ordinance. Concluding that state constitutional protections for freedom of speech extend to businesses who refuse to sell customized wedding invitations to same-sex couples,²⁴⁰ the court backed dominant Republican party preferences—preferences formally embraced by Arizona in 2017 U.S. Supreme Court filings.²⁴¹ In Arizona, the Republican party has controlled

236. From 2005–15, forty-four states enacted legislation or amended their state constitutions in response to the Supreme Court’s eminent domain decision, *Kelo v. City of New London*, 545 U.S. 469 (2005). See Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J.F. 82, 84 (2015). Seven states with statutory changes imposed additional protections and state supreme courts increased protections against takings for private use in three of the six states that did not change state law. *Id.* at 88. These state court decisions undoubtedly reflected widespread public and elected official disapproval of *Kelo*—even in those states that did not amend their eminent domain laws.

237. DEATH PENALTY INFO. CTR., *Poll: Washington State Voters Overwhelmingly Prefer Life Sentences to Death Penalty* (July 17, 2018), <https://deathpenaltyinfo.org/news/poll-washington-state-voters-overwhelmingly-prefer-life-sentences-to-death-penalty>.

238. Mark Berman, *Washington Supreme Court Strikes Down State’s Death Penalty*, WASH. POST (Oct. 11, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/10/11/washington-supreme-court-strikes-down-states-death-penalty-saying-it-is-arbitrary-and-racially-biased/?utm_term=.07f021132c21.

239. See *State v. Gregory*, 427 P.3d 621, 627 (Wash. 2018).

240. *Brush & Nib Studio, LC v. City of Phoenix*, No. CV-18-0176-PR, slip op. at 4 (Ariz. Sept. 16, 2019).

241. Arizona was one of eighteen Republican states to join an amicus brief arguing in a near-identical case that bakers had a right under the Federal Constitution to refuse to bake a cake for a same-sex wedding. See Brief for the States of Texas et al. as Amici Curiae in Support of Petitioners, *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111). The Trump Department of Justice also backed this position. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece*

the governorship and both houses of the state legislature since 2009;²⁴² all seven justices on the state supreme court were appointed by Republican governors.²⁴³ On LGBTQ issues, liberal education reformers came into tension with a state law that bans schools from promoting a “homosexual life-style,” a law supported by state Republicans.²⁴⁴ Against this backdrop, the state supreme court risked very little by embracing a broad view of expressive freedom.

Unlike decisions ratifying popular or elected official preferences, state supreme courts in Alaska, Florida, Iowa, Kansas, North Carolina, and Pennsylvania faced hostile legislatures or governors. Their decisions invalidating abortion restrictions and legislature-drawn voting prompted state lawmakers and governors to strike back. In today’s hyper-polarized world, these backlash risks were predictable. It was also predictable that the state supreme courts that were willing to risk political retaliation would come from these states. Alaska, Kansas, and Pennsylvania are three of the fourteen purple states where the same political party does not control the two houses of the state legislature and state governor.²⁴⁵ Iowa and Florida, while now controlled by Republicans, often elect Democratic governors, and justices named by these governors figured prominently in the abortion rulings by the Iowa and Florida Supreme Courts.²⁴⁶ Moreover, state justices were appointed through judicial nominating commissions in Kansas, Alaska, Iowa, and Florida (four of the thirty-four states with such commissions, with Alaska and Kansas being two purple states with such plans).²⁴⁷

Relatedly and most significantly, the legal policy views of the state court were out of sync with elected officials. In today’s polarized age, Republicans at the federal and state level back abortion restrictions and the power of states to engage in partisan redistricting; Democrats do

Cakeshop v. Colorado Civil Rights Comm’n, 138 S. Ct. 1719 (2018) (No. 16-111). By ruling for the baker on alternative grounds, the U.S. Supreme Court did not resolve the case’s First Amendment claim—thereby paving the way for state supreme courts to address this issue on state constitutional grounds.

242. *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas (last visited Sept. 17, 2019).

243. *Arizona Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Arizona_Supreme_Court (last visited Oct. 5, 2019).

244. See Mariana Dale, *Arizona Law Leaves Schools Struggling to Navigate LGBTQ Issues*, NPR (Feb. 24, 2019), <https://www.npr.org/2019/02/24/696572968/arizona-law-leaves-schools-struggling-to-navigate-lgbtq-issues>.

245. See *State Government Trifectas*, *supra* note 242.

246. See *infra* notes 255–56.

247. See *Methods of Judicial Selection*, NAT’L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state= (last visited Oct. 31, 2019); see also *State Government Trifectas*, *supra* note 242.

not.²⁴⁸ In each of these cases, the state supreme court rejected the legal policy preferences of either Republican lawmakers and/or governors.²⁴⁹ With the exception of Alaska, Democrats or Democratic appointees played a critical role in all of these decisions.²⁵⁰ The Alaska Supreme Court is now dominated by Republican appointees, although Democratic appointees played a critical role in earlier related holdings that arguably constrained the 2019 Alaska Court.²⁵¹ In Pennsylvania (where state supreme court justices are elected in partisan elections), five of the seven who ruled on the Republican legislature's districting map were Democrats.²⁵² In North Carolina (where state supreme court justices had been elected in nonpartisan elections up until 2016 and are now subject to partisan elections), six of the seven justices are now Democrats.²⁵³ In Kansas, four of the seven justices who ruled in the abortion case were Democratic appointees.²⁵⁴ In Iowa, a Democratic governor appointed two of the seven state justices who decided the abortion case.²⁵⁵ In the Florida abortion case, five of the seven justices were appointed by a Democrat (if you count the three appointments of Republican-turned-Democrat Charlie Crist).²⁵⁶

248. For a detailing of state polarization on abortion, see Neal Devins, *Rethinking Judicial Minimalism*, 69 VAND. L. REV. 935, 962–82 (2016).

249. See *infra* text accompanying notes 258–82.

250. *Id.*

251. In Alaska, Republican governors appointed four of the five current justices. *Alaska Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Alaska_Supreme_Court (last visited Sept. 18, 2019). Nonetheless, earlier Democratic appointees arguably played a figural role in the 2019 Alaska decision. The 2019 decision reaffirms a 2001 Alaska Supreme Court ruling on this question. See *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984 (Alaska 2019) (citing *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001)). At the time of the 2001 decision, three of the five justices were appointees of Democratic Governor Tony Knowles. See *List of Justices of the Alaska Supreme Court*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_Justices_of_the_Alaska_Supreme_Court (last visited Oct. 15, 2019).

252. *Pennsylvania Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Pennsylvania_Supreme_Court (last visited Sept. 18, 2019); see *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

253. *Supreme Court of North Carolina*, BALLOTPEDIA, https://ballotpedia.org/Supreme_Court_of_North_Carolina (last visited Oct. 5, 2019); see Stern, *supra* note 234.

254. *Kansas Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Kansas_Supreme_Court (last visited Sept. 18, 2019); see *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 502 (Kan. 2019).

255. *Iowa Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Iowa_Supreme_Court (last visited Sept. 18, 2019); see *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 212 (Iowa 2018).

256. *Florida Supreme Court*, BALLOTPEDIA, https://ballotpedia.org/Florida_Supreme_Court (last visited Sept. 18, 2019). Democrat Governor Lawton Chiles appointed two of the seven and Governor Crist appointed three of the seven. *Id.*; see also *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1247 (Fla. 2017).

In today's polarized age, moreover, there are fewer and fewer purple states²⁵⁷—so that there will be fewer and fewer state supreme courts with a mix of Democrat and Republican justices. More than that, the political backlash following these decisions highlights the risks of such counter majoritarian decisions. On abortion, for example, three of the four states (Alaska, Florida, Iowa) who ruled in favor of abortion rights suffered severe political setbacks.²⁵⁸ The exception was Kansas—where the state's Democratic governor used her veto power to defend (at least for now) the state supreme court from political attack.²⁵⁹

In Iowa and Florida—two formerly purple states that are now red states—legislative reforms and gubernatorial appointments have resulted in a rightward shift of the state supreme court. Iowa, in particular, highlights the risks of bucking the dominant political party. Specifically, Iowa lawmakers responded to the state supreme court's June 2018 decision invalidating a seventy-two hour waiting period for a woman seeking an abortion by changing the judicial selection process from a merit selection plan where lawyers and the senior justice on the Iowa Supreme Court dominated the nominating commission.²⁶⁰ By jettisoning this system in favor of a system where the governor appoints a majority of the nominating commission, Iowa's Republican Governor Kim Reynolds was able to “transform[] the Iowa Supreme Court from one that leaned liberal to a solidly conservative body.”²⁶¹

257. See *State Government Trifectas*, *supra* note 242.

258. See *infra* text accompanying notes 260–69.

259. John Hanna, *Kansas Lawmakers Fail to Override Governor's Abortion "Reversal" Veto*, PBS NEWSHOUR (May 1, 2019), <https://www.pbs.org/newshour/nation/kansas-lawmakers-fail-to-override-governors-abortion-reversal-veto>. For additional discussion, see Johnathan Shorman, *Abortion Opponents Say They'll Wait Until 2020 to Seek to Change Kansas Constitution*, WICHITA EAGLE (May 2, 2019), <https://www.kansas.com/news/politics-government/article229942719.html>.

260. Planned Parenthood of the Heartland v. Reynolds *ex rel.* State, 915 N.W.2d 206, 212, 246 (Iowa 2018); see also Katarina Sostaric, *Iowa Governor Signs Judicial Selection Changes into Law*, IOWA PUBLIC RADIO (May 8, 2019), <https://www.iowapublicradio.org/post/iowa-governor-signs-judicial-selection-changes-law#stream/0>. Iowa lawmakers also debated an amendment to the state constitution that would have nullified the court's decision. See Marisa Endicott, *Iowa's Supreme Court Protected Gay Marriage and Abortion Rights—and Republican Lawmakers Are out for Payback*, MOTHER JONES (Apr. 8, 2019), <https://www.motherjones.com/politics/2019/04/iowas-supreme-court-protected-gay-marriage-and-abortion-rights-and-republican-lawmakers-are-out-for-payback/>.

261. David Pitt, *Iowa Supreme Court Takes a Right Turn under Gov. Reynolds*, ASSOCIATED PRESS (July 3, 2019), <https://www.apnews.com/357e55b3c4ca4432b8a460521f9034ff>; see also Stephen Gruber-Miller, *Kim Reynolds Signs Bill Giving Governors More Power over Iowa Supreme Court Selection*, DES MOINES REG. (May 8, 2019, 4:04 PM), <https://www.desmoinesregister.com/story/news/politics/2019/05/08/kim-reynolds-signs-changes-giving-governors-more-power-over-iowa-supreme-appeals-court-selection/1142445001/>.

Judicial selection also figured prominently in Florida's response to a February 2017 decision blocking a law that required a woman seeking an abortion to wait at least twenty-four hours after her meeting with her doctor.²⁶² In January 2019, Florida's newly elected Governor Ron DeSantis—who had campaigned both against the state supreme court and abortion rights in 2018²⁶³—promised to fill three seats on the Florida Supreme Court with “appointees [who] will interpret the law, be willing to reverse bad precedent and not legislate from the bench.”²⁶⁴ Governor DeSantis favorably referenced the Federalist Society and U.S. Supreme Court Justice Clarence Thomas as models of judicial decision-making.²⁶⁵ By April 2019, Governor DeSantis's three picks began overruling earlier state supreme court rulings and, in so doing, ushering a new era of conservative judicial decision-making.²⁶⁶

In Alaska, the state's governor used his budgetary item veto power to take aim at the state supreme court for a February 2019 ruling that the state constitution's equal protection clause does not allow the state legislature to restrict Medicaid funding to “medically necessary” abortions.²⁶⁷ In July 2019, pro-life Governor Michael Dunleavy responded by reducing the state supreme court budget by \$335,000, the same amount that the state spends on elective abortions.²⁶⁸ Dunleavy noted in his veto message that “[t]he legislative and executive branch are opposed

262. See *Gainesville Woman Care, LLC v. State*, 210 So.3d 1243, 1264–65 (Fla. 2017).

263. See Alexandra Glorioso, *Putnam and DeSantis Vow to Sign Abortion-Ban Law If Elected*, POLITICO (June 28, 2018), <https://www.politico.com/states/florida/story/2018/06/28/putnam-and-desantis-vow-to-sign-abortion-ban-law-if-elected-494539>.

264. Ron DeSantis, *DeSantis: Environment, Education, and Economy Are Among My Top Priorities*, ORLANDO SENTINEL (Jan. 4, 2019), <https://www.orlandosentinel.com/opinion/os-op-ron-desantis-florida-governor-priorities-inauguration-20190104-story.html>; see also John Lucas, *DeSantis's State Supreme Court Appointments Cause Concern for Abortion Rights Groups and Others*, CAPITOLIST (Jan. 14, 2019), <http://thecapitolist.com/desantis-state-supreme-court-appointments-cause-concern-for-abortion-rights-groups-and-others/>.

265. See Lloyd Dunkelberger, *DeSantis Vows to Get Busy Fast, Make His First Supreme Court Appointment Wednesday*, SUNSHINE ST. NEWS (Jan. 8, 2019, 6:00 AM), <http://www.sunshinestatenews.com/story/desantis-vows-get-busy-fast-make-his-first-supreme-court-appointment-wednesday>.

266. See John Kennedy, *DeSantis Appoints Third Florida Supreme Court Justice, Completing Conservative Makeover*, HERALD-TRIB. (Jan. 22, 2019, 6:14 PM), <https://www.heraldtribune.com/news/20190122/desantis-appoints-third-florida-supreme-court-justice-completing-conservative-makeover>; see also Jim Saunders, *Reversals Show New Day on the Supreme Court*, SUNSHINE ST. NEWS (Apr. 20, 2019, 7:30 AM), <http://www.sunshinestatenews.com/story/reversals-show-new-day-supreme-court>.

267. See *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 988 (Alaska 2019).

268. Ethan Millman, *Abortion Rulings in Alaska Prompt Governor to Cut Court Funding*, WALL ST. J. (July 19, 2019, 10:29 AM), <https://www.wsj.com/articles/alaska-governor-cuts-court-funding-in-response-to-abortion-rulings-11563546556>.

to state funded elective abortions The only branch of government that insists on state funded elective abortions is the Supreme Court.”²⁶⁹

In Kansas, the state legislature failed in its efforts to override an April 2019 decision rejecting a state ban on the most commonly used procedure for second trimester abortions.²⁷⁰ The decision was widely condemned by state lawmakers, prompting legislative approval of new abortion restrictions and talk of a constitutional amendment.²⁷¹ However, Democratic Governor Laura Kelly vetoed the abortion bill and the Republican legislature fell two votes short of overriding the veto.²⁷² Republican legislative leaders then decided to wait a year to build the required two-thirds support for the amendment in each house of the Kansas Legislature. Unlike Florida, Alaska, and Iowa, the Kansas Supreme Court has thus far been protected by divided government.

North Carolina courts too may now be protected by divided government. In the immediate aftermath of the 2016 gubernatorial election of Democrat Roy Cooper, however, North Carolina courts were under attack. Before Cooper was sworn in, the Republican legislature and then-Republican Governor Pat McCrory worked in tandem to change judicial selection and retention methods in ways that would favor Republican interests.²⁷³ For example, following the success of Democrats in nonpartisan judicial elections, legislation was enacted in 2016 to mandate partisan elections of state supreme court justices.²⁷⁴ Before Republicans could reap the intended windfall of partisan elections, a panel of state trial judges ruled in September 2019 that the state’s legislative districting scheme was unconstitutional under the state constitution.²⁷⁵ Republican lawmakers acquiesced to this ruling rather

269. *Id.* Republican lawmakers also proposed cutting court funding and amending the Alaska Constitution to abolish abortion rights under the state constitution. See John Aronno, *Lawmakers Add Anti-Abortion Amendment to Budget and Advocate for Adoption as an Alternative*, ANCHORAGE PRESS (Apr. 9, 2019), https://www.anchoragepress.com/news/lawmakers-add-anti-abortion-amendment-to-budget-and-advocate-for/article_28f61cb8-5b25-11e9-9ad8-3fa3d6a685dc.html.

270. See *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019).

271. See Hanna, *supra* note 259.

272. *Id.*; see Shorman, *supra* note 259.

273. Mark Joseph Stern, *North Carolina Republicans’ Legislative Coup Is an Attack on Democracy*, SLATE (Dec. 15, 2016), <https://slate.com/human-interest/2016/12/north-carolina-legislative-coup-an-attack-on-democracy.html>; see also Ari Berman, *Courts Keep Thwarting North Carolina Republicans. So They’re Trying to Remake the Courts.*, MOTHER JONES (Jan. 23, 2018), <https://www.motherjones.com/politics/2018/01/courts-keep-thwarting-north-carolina-republicans-so-theyre-trying-to-remake-the-courts/>.

274. See Stern, *supra* note 273.

275. *Common Cause v. Lewis*, 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *13–14 (N.C. Super. Sept. 3, 2019). This Superior Court decision applied to the districting of the state legislature. *Id.* On September 27, 2019, a related state constitutional lawsuit was filed

than appeal to the overwhelmingly (6 to 1) Democratic state supreme court;²⁷⁶ Republican lawmakers apparently thought they would better advance their interests by redrawing state districts.²⁷⁷ And for good reason—in 2018, Democrats on the state supreme court signaled their disapproval of Republican lawmaker efforts to shape judicial selection;²⁷⁸ lawmakers, moreover, were unlikely to find some new way to constitutionally punish the justices (especially with a Democratic governor who had already sought to stop earlier Republican attacks on the court).²⁷⁹

In Pennsylvania, the state supreme court has also persevered against political attack. In January 2018, the court dealt a body blow to state Republicans by declaring that the state's congressional districting scheme violated the "free and equal elections clause" of the state constitution.²⁸⁰ Following the decision, Republican lawmakers considered launching an effort to impeach the Democratic justices that rejected the lawmakers' districting plan.²⁸¹ Instead, the state Senate approved

challenging North Carolina's congressional districts. Amy Gardner, *Holder-Affiliated Group Launches New Challenge to Partisan Gerrymandering in North Carolina*, WASH. POST (Sept. 27, 2019), https://www.washingtonpost.com/politics/holder-affiliated-group-launches-new-challenge-to-partisan-gerrymandering-in-north-carolina/2019/09/26/c7574b5a-e0a1-11e9-8dc8-498eabc129a0_story.html.

276. See Will Doran, *Judge Orders Transparency for New NC Maps, Citing "Highly Improbable" GOP Assurances*, RALEIGH NEWS & OBSERVERS (Sept. 4, 2019), <https://www.newsobserver.com/news/politics-government/article234707272.html>.

277. The same is true of North Carolina lawmakers' response to an October 2018 panel decision invalidating the state's map for congressional districts. Rather than appeal to the North Carolina Supreme Court, lawmakers set about to redraw district lines in a way that honored the court ruling while still favoring Republican candidates. Gary Robertson, *North Carolina Lawmakers Redraw State's Congressional Map*, CHARLOTTE OBSERVER (Nov. 15, 2019, 7:19 PM), <https://www.charlotteobserver.com/news/nation-world/national/article237391154.html>. Lawsuit plaintiffs, however, cried foul and asked the panel to throw out the new map. See *id.*

278. Democrats on the state supreme court had earlier backed the state's Democratic governor in his efforts to neuter Republican lawmaker efforts to concentrate power in the state legislature. See Mark Joseph Stern, *North Carolina Supreme Court Strikes down GOP Attempt to Control Elections Board*, SLATE (Jan. 26, 2018), <https://slate.com/news-and-politics/2018/01/north-carolina-supreme-court-strikes-down-gop-elections-board-power-grab.html>.

279. Craig Jarvis & Anne Blythe, *Veto Override Means Voters Will Know Judges' Party Affiliation*, RALEIGH NEWS & OBSERVERS (Mar. 23, 2017), <https://www.newsobserver.com/news/politics-government/state-politics/article140327188.html>.

280. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 818 (Pa. 2018). For a thoroughgoing analysis of how state constitutions can be used to challenge partisan gerrymandering (with an extended discussion of Pennsylvania), see Samuel S.-H. Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, U. PA. L. REV. 18–19 (2019).

281. Charlie May, *Pennsylvania Republicans Want to Impeach Supreme Court Justices that Killed Their Gerrymander Scheme*, SALON (Feb. 6, 2018, 3:51 PM), <https://www.salon.com/2018/02/06/pennsylvania-republicans-want-to-impeach-supreme-court-justices-that-killed-their-gerrymander-scheme/>

legislation in June 2018 to create judicial districts that would elect state judges—an effort to mitigate the power of large cities (Pittsburgh, Philadelphia) that typically support Democratic judicial candidates.²⁸² That bill was not enacted but, in May 2019, the Judiciary Committee of the Pennsylvania House approved a similar bill.²⁸³

Were Pennsylvania to approve this legislation, three of the five state supreme courts that battled elected officials will have seen basic changes to the judicial selection process (Iowa) and/or to the role of ideology in judicial appointments (Iowa and Florida). Alaska too saw its state supreme court's budget slashed and the Kansas Legislature both enacted a repeal bill and, when that bill was vetoed, came within one vote of overriding the veto. These backlash risks obviously cut against state supreme courts upsetting elected government preferences. In the age of party polarization, moreover, the legal policy views of state justices are increasingly in-sync with elected official preferences. Thirty-six states are now controlled by one or the other political party;²⁸⁴ in these states, elected judges and gubernatorial appointees will inevitably reflect dominant political values. Even in merit selection states (where governors choose from finalists identified by a nominating commission), governors will gravitate to the candidate that best advances the political values of the governor's party (and nominating commissions are likely to both reflect and be sensitive to the dominant political culture).²⁸⁵

V. CONCLUSION

“Justice Brennan’s 1977 paean to judicial federalism” struck a chord.²⁸⁶ More than forty years later, as California Supreme Court

www.salon.com/2018/02/06/pennsylvania-republicans-want-to-impeach-supreme-court-justices-that-killed-their-gerrymander-scheme/.

282. S.B. 22, 2017 Leg., Reg. (Pa. 2017); see Staff and Wire, *Pennsylvania Senate Votes to Change the Way Judges Are Elected*, THE MORNING CALL (June 13, 2018, 2:40 PM), <http://www.mcall.com/news/nationworld/pennsylvania/capitol-ideas/mc-nws-pennsylvania-judge-s-elections-20180613-story.html>.

283. See John Baer, *The Legislature Is Again Courting Changes for Pa. Courts*, PHILA. INQUIRER (May 14, 2019, 4:19 PM), <https://www.inquirer.com/opinion/john-baer-courts-reform-diamond-legislature-20190514.html>.

284. *State Government Trifectas*, *supra* note 242.

285. The elite legal establishment in red and blue states is likely to reflect elite values in that state. Over the past two decades, Democrat and Republican elites have become more and more polarized. See NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 2–3, 5, 121 (2019). This polarization has impacted the community of lawyers who both become judges and have social connections to judges. *Id.* at 45–48, 145–46, 148. It is hard to imagine that this polarization will not also spill over to the community of elite lawyers who serve on judicial nominating commissions.

286. Liu, *supra* note 15, at 1365.

Justice Goodwin Liu observed, “[w]e may be at a similar moment.”²⁸⁷ In the age of party polarization, “the changing composition and increasingly conservative tilt of the U.S. Supreme Court” will create numerous opportunities for state supreme courts to fill gaps in individual rights protections.²⁸⁸ Unlike the modest revival in state constitutionalism triggered by the Brennan article,²⁸⁹ however, I am skeptical that there will be a revival of state constitutionalism in the age of party polarization. The gravitational pull of federal norms is strong and party polarization makes that gravitational pull even stronger. Today, all politics is national and federal courts and federal norms are more important now than ever before. Perhaps more importantly, state supreme court decision-making is now situated in the political agenda of national political parties and interest groups; voters and state legislatures, in turn, are more willing to check state supreme court justices. In deep red and deep blue states, moreover, lawmakers, governors, voters, and state supreme court justices are likely to agree with each other—so much so that there will be fewer occasions where the legal policy preferences of state justices are out of sync with elected official preferences.

None of this is to say that state supreme courts will not issue important state constitutional rulings, some of which will expand individual rights protections. With state supreme courts deciding around 2,000 state constitutional cases each year,²⁹⁰ there is little question that state supreme courts sometimes make a difference. Some state constitutions have individual rights protections or affirmative rights that are not in the Federal Constitution; state courts will be called upon to give effect to these provisions. Sometimes (as was true with the *Kelo* property rights decision) a U.S. Supreme Court ruling will be out-of-sync with prevailing voter and elected official preferences.²⁹¹ Sometimes a

287. *Id.*

288. *Id.*

289. According to Dan Rodriguez, Justice Brennan’s article was “avowedly strategic” and the “renaissance of state constitutional law” that Brennan called for has been “rather modest” in its contributions. Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 271 (1998); see also Gardner, *supra* note 79, at 762–64; Ann Lousin, *Justice Brennan’s Call to Arms—What Has Happened Since 1977?*, 77 OHIO ST. L.J. 387 (2016).

290. “State supreme courts decide more than ten thousand cases each year, roughly twenty percent of which involve state constitutional issues.” Devins, *supra* note 24, at 1635.

291. See Berliner, *supra* note 236, at 88.

state supreme court will feel the benefits of expanding rights outweigh the risks of electoral defeat.²⁹²

Nonetheless, I am far more pessimistic than optimistic. For the reasons detailed in this Article, state supreme courts are likely to back, not buck, the U.S. Supreme Court—sometimes because they agree, sometimes because it is the path of least resistance, and sometimes to preserve their jobs. In the age of party polarization, the U.S. Supreme Court and federal norms seem more supreme than ever.

292. This is particularly true in states where state supreme courts are politically insulated and in purple states where state justices' legal policy views diverge from other state officials. See *supra* text accompanying notes 25–32, 222–25.