The Elected Judge

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Many legal scholars and jurists oppose electing judges. Their core criticism against judicial elections is that elected judges are incentivized to avoid issuing unpopular, countermajoritarian decisions in constitutional law cases and thus fail to safeguard minority rights against abuses of the majority. Scholars have described this problem as the elected judges' "majoritarian difficulty." Numerous empirical studies suggest that elected judges do, in fact, fear electoral backlash and allow majoritarian demands to affect their decision-making.

This Article asks whether such fears are warranted. Elected judges should not allow majoritarian pressures to affect their decision-making unless the American public is aware of countermajoritarian decisions and is willing to vote out judges who issue such decisions. Leveraging a series of original survey experiments, this Article first demonstrates that when voters are informed of how judges make decisions, they approve of judges who engage in principled legal analysis even if the judges issue countermajoritarian decisions that do not further the voters' political preferences. The survey results also indicate that voters are less interested in a judge's stance on particular issues and more focused on whether the judge engages in principled legal analysis, disregards public opinion, checks the other branches of government, and exhibits strong ethics, competence, and temperament. The Article then reviews an original dataset of all online news and social media posts concerning judicial elections in the two years following Dobbs v. Jackson Women's Health Organization*, which indicates that despite the extreme polarization of American politics and the increased importance of elected judges, most judicial elections remain low-salience*

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affairs, rarely driven by a judicial candidate's stance on social issues. Thus, being unaware of how judges reach decisions, voters are not likely to use this information to punish judges who issue countermajoritarian decisions.

The Article next analyzes survey responses to offer two reasons why the American public, somewhat counterintuitively, supports judges who issue countermajoritarian decisions that do not advance their political preferences. Although the public expects other elected officials to faithfully represent the preferences of their constituents, it appears that the public recognizes the judiciary as a uniquely countermajoritarian institution that is obligated to disregard public demand. Additionally, the public recognizes that it has other readily accessible, popular means of seeking reform, obviating the need to vote out judges who issue countermajoritarian decisions.

These findings have several implications. First, despite the scholarly criticism of judicial elections, the ills of the majoritarian difficulty may be preventable if judges better understand voting behavior. Second, the results explain why the American public continues to support judicial elections despite the scholarly consensus against judicial elections. From the voters' perspective, judicial elections do not pose a threat to judicial independence because voters rarely pass political judgment on judges through elections but simply view elections as an opportunity to vote out unethical or incompetent judges when warranted. Third, the results highlight how a less entrenched state constitution and relatively easy means of popular reform can provide elected judges the leeway to decide cases without the fear of electoral backlash. Finally, despite the notion that state courts are inferior to federal courts and fail to safeguard minority rights due to majoritarian pressures, the results suggest that state courts can be equally capable as federal courts.

Ultimately, it is entirely within the power of elected judges to issue countermajoritarian opinions based on principled legal analysis without undue concern for public demand.

INTRODUCTION

> *[M]ore sweat and ink have been spent on getting rid of judicial elections than on any other single subject in the history of American law.*[1]

Despite the overwhelming scholarly and judicial consensus against judicial elections, most states continue to elect their judges.[2] And despite the concerted effort by scholars and jurists to abolish judicial elections, by all indications, judicial elections are here to stay as a popular method of selecting and retaining judges.[3] If judicial elections are as detrimental to our system of government as scholars and jurists argue, why does the American public continue to support judicial elections? Are judicial elections as problematic as scholars and jurists claim?

Scholars have long argued that judicial elections are problematic because judges are duty-bound to strike down unconstitutional legislation through judicial review and thereby serve as a countermajoritarian institution providing a check against majority tyranny, but periodic elections incentivize judges to forego their constitutional duty and avoid issuing countermajoritarian decisions in order to retain their office.[4] This problem, commonly referred to as the "majoritarian difficulty," carries profound implications in the area of minority rights. Elected judges[5] seeking reelection

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1. Roy Schotland, Comment, 61 LAW & CONTEMP. PROBS. 149, 150 (1998).

2. *See infra* Section I.A.

3. Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 721 (2010) ("[States] are unlikely to abandon the practice [of electing judges] anytime soon."); JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 28–29 (2012) (noting that surveys show strong public support for selecting or retaining judges through judicial elections); MICHAEL S. KANG & JOANNA SHEPHERD, FREE TO JUDGE: THE POWER OF CAMPAIGN MONEY IN JUDICIAL ELECTIONS 15 (2023) (same); Thomas R. Phillips, *Keynote Address: Electoral Accountability and Judicial Independence*, 64 OHIO ST. L.J. 137, 145 (same).

4. *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694, 789 (1995) (setting forth the majoritarian difficulty and noting that the "desirability of elective judiciaries is therefore open to serious question"); Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 41 (2003); Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1988 (1988); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 44 (2003); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 270 (2008); BRIAN M. BARRY, HOW JUDGES JUDGE: EMPIRICAL INSIGHTS INTO JUDICIAL DECISION-MAKING 238 (2021).

5. References to "elected judges" in this Article include all judges who are subject to a popular election at some point during their tenure on the bench. This term includes all judges who are subject to retention elections and candidate elections, partisan or nonpartisan. However, the

may find it too costly in terms of retaining their seat on the bench to rule against the majority if the majority has enacted legislation that violates a particular minority group's constitutional rights.[6] Elected judges may instead rule in favor of the majority at the expense of vindicating the constitutional rights of a smaller subset of the electorate who will be outvoted at the ballot box.[7] Numerous empirical studies suggest that elected judges succumb to majoritarian pressures, supporting the scholarly consensus that the majoritarian difficulty poses a significant roadblock to judicial independence.[8] Prominent jurists have echoed the concern, openly admitting to acquiescing to public pressure when deciding cases.[9]

This Article empirically examines whether judicial fears of electoral backlash are warranted. Judicial elections have historically been low-salience affairs with little voter interest, and certain interest groups and opinion leaders—such as local bar associations—have had an outsized impact on election outcomes, suggesting little need for judges to be concerned with the voting public.[10] However, many argue that due to the increasing importance of state court judges and the consequent polarization of judicial campaigns,

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Article's findings have greater implications for appellate judges rather than trial judges, and particularly jurists on courts of last resort, because they have a significant lawmaking function. *See* Herbert M. Kritzer, *What Do Americans Want in Their State Judges?*, 105 JUDICATURE, no. 1, 2021, at 48, 49–50 (describing a similar focus in existing legal scholarship).

6. Croley, *supra* note 4, at 694.

7. *Id.* at 740–41 (arguing that the inevitable result of selecting and retaining judges by popular vote is the proliferation of judicial decisions governed by public opinion); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 34 (1989) (arguing that elected judges are susceptible to electoral pressures).

8. *See* Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 169 (2009) (finding that elected judges are more likely to rule in favor of the political party of the sitting governor); *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1116 n.45 (1977) (listing examples of state supreme court justices with life tenure protecting individual rights enshrined in state constitutions); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999) (arguing that elected judges are more likely than appointed judges to award judgments in favor of in-state plaintiffs, who are more likely to vote in and contribute to their judicial elections, and against out-of-state business defendants); Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741, 741 (2013) (noting that elected judges give longer criminal sentences during their reelection year).

9. Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1664 (quoting Paul Reidinger, *The Politics of Judging*, 73 A.B.A. J. 52, 58 (1987)); *see also* Larry T. Aspin & William K. Hall, *Retention Election and Judicial Behavior*, 77 JUDICATURE 306, 312 (1994) (analyzing a survey of elected judges).

10. *See* Pozen, *supra* note 4, at 266; Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1392 (2001).

we are in a "new era" of judicial elections.[11] In this new era, the voting public is supposedly trying to further their policy goals through judicial decisions, and elected judges are incentivized to satisfy the public's policy preferences through their decision-making.[12]

Therefore, assuming that the voting public is engaged in judicial elections in this new era of judicial elections, I first ask whether the American public disapproves of judges who engage in principled legal analysis and issue countermajoritarian decisions against the majority will and whether voters instead prefer that elected judges yield to public demand.[13] If the American public actually prefers that judges issue countermajoritarian decisions despite the prevailing public sentiment, then judges may be miscalculating their need to acquiesce to public demand when deciding cases, and such acquiescence may be counterproductive to their reelection efforts.

Leveraging a series of survey experiments on a sample of American adults, I find that American voters ostensibly prefer that elected judges issue countermajoritarian decisions when the judges' legal analysis dictates that they do so, even if those decisions result in unpopular countermajoritarian outcomes.[14] Despite the scholarly criticism that the public cannot subject its judges to popular elections and, at the same time, expect judges to stay above electoral politics, the public does not disapprove of elected judges who exercise judicial review to issue unpopular, countermajoritarian decisions.[15] Therefore, the public can subject judges to elections and still expect them to stay above electoral politics. Even ardent partisan voters do not strictly prefer a judge who issues decisions in their party's favor, compared to a judge who issues decisions against their party's favor, if the judge abandons his or her judicial philosophy in order to do so. It appears that voters use

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11. Pozen, *supra* note 4, at 267–68 (noting that we are in a "new era of judicial elections" in which mass media plays an important part and salience is at an "all-time high"); *see* Patrick Emery Longan, *Judicial Professionalism in a New Era of Judicial Selection*, 56 MERCER L. REV. 913, 947 (2005); Baum, *supra* note 4, at 16–17 ("Whether or not the proportion of judges who are actually defeated has increased, the growth in issue-based campaigns against incumbents probably has increased the proportion who are defeated on the basis of their decisions."); Renée Lettow Lerner, *From Popular Control to Independence: Reform of the Elected Judiciary in Boss Tweed's New York*, 15 GEO. MASON L. REV. 109, 111 (2007) (noting that judicial elections are increasingly politicized); Marie Hojnacki & Lawrence Baum, *"New Style" Judicial Campaigns and the Voters: Economic Issues and Union Members in Ohio*, 45 W. POL. Q. 921, 921–22 (1992); Frost & Lindquist, *supra* note 3, at 733.

12. *See* sources cited *supra* note 11.

13. *See* Croley, *supra* note 4, at 726 (arguing that judicial elections will lead to decisions governed by public opinion); *see also* Utter, *supra* note 7, at 34 (arguing that elected judges are more susceptible to electoral pressure than appointed judges).

14. *See infra* Section II.B.

15. *See infra* Section III.A.

judicial elections to evaluate a judge's ethics and competence as a countermajoritarian official, rather than to pass political judgment on a judge's past decisions.[16] Thus, although scholars have long feared that elections will cause judges to look to public preferences when making their decisions—and while judges may indeed have acquiesced to public demand for fear of electoral backlash[17]—the public rarely demands acquiescence from elected judges.

These findings are further supported by a comprehensive review of online news articles and social media posts surrounding recent judicial elections. I analyze an original dataset of all online news articles and social media posts concerning judicial elections over a span of two years in the immediate aftermath of *Dobbs v. Jackson Women's Health Organization*, at a time when the U.S. Supreme Court handed control over highly partisan issues such as abortion and voting rights to state courts.[18] The media coverage indicates that despite the extreme polarization and growing importance of state courts in deciding controversial issues, most judicial elections remain low-salience affairs that rarely result in the removal of judges because of their countermajoritarian decisions or their positions on controversial social issues.[19]

I next explore the reasons for this counterintuitive result.[20] Despite the simplicity of assuming that all voters prefer all elected officials—including elected judges—to acquiesce to popular demand, the public treats elected judges differently for two overarching reasons. First, unlike other elected officials, who are expected to be faithful representatives of their constituents, it appears that the public has internalized the norm that the judiciary is a countermajoritarian institution. The public recognizes that the judiciary has been tasked with striking down unconstitutional legislation no matter how popular. Therefore, American voters, including the most partisan segments of the electorate, do not award judges who renege on their constitutional duty and pander to public or partisan demands. Second, the public recognizes that it has other readily accessible means of effectuating reform at the state level through state constitutional amendments, obviating the need to vote out state court judges for issuing countermajoritarian decisions.

These results have profound implications. First, despite the scholarly criticism of judicial elections, the ills of the majoritarian difficulty may be

16. *See infra* Section IV.A.
17. *See, e.g.*, Croley, *supra* note 4, at 694; Shepherd, *supra* note 8, at 169.
18. 597 U.S. 215 (2022).
19. *See infra* Section II.C.
20. *See infra* Part III.

prevented if judges recognize that most voters are not paying attention to judicial elections and may not punish judges for issuing countermajoritarian decisions.[21] Even if the public were to care about elected judges in this new era of judicial elections, elected judges who yield to public demand may be hurting their reelection chances since the public largely disapproves of judges who acquiesce to public demand and favors judges who engage in principled legal analysis without any regard for public demand.[22]

Second, the results explain why the American public overwhelmingly supports judicial elections despite the scholarly consensus against judicial elections.[23] From the voters' perspective, judicial elections provide them the means to remove judges in rare instances of ethical misconduct and incompetence, and they do not otherwise pay significant attention to judicial elections or pass political judgment on past decisions through elections.[24] As a result, voters have no reason to expect judges to fear electoral pressure when deciding cases and no reason to oppose judicial elections that allow them to hold accountable unethical and incompetent judges. Thus, the practical benefit of judicial elections and the perceived absence of any risks that scholars commonly associate with judicial elections appear to motivate popular support for judicial elections.

Third, the results highlight how a less entrenched state constitution and relatively easy means of popular reform can provide elected judges the leeway to decide cases without the fear of electoral backlash.[25] The careful constitutional design that provides popular means of selecting judges and amending the state constitutions allows voters to pursue reform by overriding rather than voting out judges who disagree with them, thereby insulating judges from majoritarian pressure even when subject to electoral review.

Fourth and finally, despite the notion that state courts are inferior to federal courts in safeguarding constitutional rights, the results suggest that state courts could be equally capable of safeguarding constitutional rights if elected judges better understood the determinants of voter behavior in judicial elections.[26]

Part I of this Article provides an overview of the elected judiciary in the United States and introduces the majoritarian difficulty that incentivizes judges to yield to public pressure due to fears of electoral backlash. This Part

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21. *See infra* Section IV.A.
22. *See infra* Figure 10.
23. *See infra* Sections IV.A–B.
24. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 77–78 (1998).
25. *See infra* Section I.C.
26. *See infra* Section IV.D.

also explores existing empirical studies suggesting that elected judges do, in fact, yield to public demand. Part II offers new empirical evidence demonstrating that judicial fears of electoral backlash to countermajoritarian decisions are unfounded. Results from three survey experiments make evident that voters view favorably judges who issue countermajoritarian decisions irrespective of public pressure. This Part also examines media coverage of all judicial elections in the aftermath of *Dobbs* and finds that judicial elections are rarely issue-driven, high-salience affairs, despite the extreme polarization and increasing importance of state courts. This suggests that elected judges need not fear electoral backlash for countermajoritarian decisions. Part III explores the reasons for the counterintuitive finding that the public does not disapprove of elected judges who issue countermajoritarian decisions. This Part theorizes that the public has internalized norms regarding the constitutional role of the judiciary and relies on more feasible means of popular reform to override, rather than vote out, judges. Part IV explores the implications of this Article's empirical findings, which may not only nullify the majoritarian difficulty but also contribute to the scholarly debate on judicial federalism and state constitutional design. Part V concludes.

I. THE ELECTED JUDICIARY AND THE MAJORITARIAN DIFFICULTY

A. The Elected Judiciary

Law schools and legal scholarship tend to focus on the federal judiciary, and rightly so, given the profound ways in which the federal judiciary can shape our lives.[27] In contrast, elected state court judges have received relatively little attention, especially with regard to how the public interacts with the elected judiciary.[28] Scholars are quick to note, for instance, that there is "next to no opinion poll data on voter attitudes towards state supreme court decisions."[29]

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27. Merritt E. McAlister, *White-Collar Courts*, 76 VAND. L. REV. 1155, 1157 (2023) ("Even within Article III courts, we are perhaps obsessively focused on the Supreme Court—often for good reason, given [the] Court's ability to shape our everyday lives in profound ways.").

28. *See* Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 457 (2010) ("Notwithstanding the profound and ever-growing influence of state supreme courts, their decision making receives scant attention from journalists and legal academics.").

29. *Id.*

However, elected judges in state courts issue the overwhelming majority of court decisions in the United States.[30] And the stark difference in caseloads between federal judges and state judges is especially evident in constitutional law. State supreme courts decide approximately 2,000 constitutional law cases every year, whereas the U.S. Supreme Court decides approximately 30 such cases.[31] As Professor Neal Devins points out, the California Supreme Court alone issues more opinions on California state constitutional law than the U.S. Supreme Court issues decisions on federal constitutional law.[32]

In addition to the sheer volume of state court decisions on constitutional law, state courts have become influential in shaping constitutional law in recent years due to the U.S. Supreme Court's jurisprudence.[33] In the aftermath of *Dobbs*,[34] where the Supreme Court effectively returned the issue of abortion rights to state courts,[35] various state supreme courts' interpretation of state constitutional provisions will determine the future of reproductive rights for their constituents.[36] The Supreme Court's under-enforcement of the right to vote in several prominent redistricting cases has similarly resulted in high-stakes litigation surrounding the interpretation of state constitutional provisions on voting rights in state courts.[37]

In light of the growing importance of state courts, particularly with respect to constitutional interpretation, I first briefly review the extent to which states rely on judicial elections to select judges. As an initial matter, no other advanced democracy uses judicial elections to select a significant portion of

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30. *See* Croley, *supra* note 4, at 690; KANG & SHEPHERD, *supra* note 3, at 6 (estimating that more than 90% of all cases are heard in state courts).

31. Devins & Mansker, *supra* note 28, at 456–57.

32. Devins, *supra* note 9, at 1635.

33. *See id.* at 1635–36; KANG & SHEPHERD, *supra* note 3, at 6.

34. 597 U.S. 215 (2022).

35. *See id.* at 302.

36. *See* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 545–46 (2023).

37. *See, e.g.*, Rucho v. Common Cause, 588 U.S. 684, 718 (2019) (holding that claims of partisan gerrymandering present political questions that are beyond the reach of federal courts); Gill v. Whitford, 585 U.S. 48, 54 (2018) (holding that plaintiffs challenging partisan gerrymandering may lack standing in federal court and remanding for further proceedings with additional evidence); League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 825 (Pa. 2018) (invalidating Pennsylvania's congressional district map as the product of unconstitutional partisan gerrymandering under the Pennsylvania Constitution); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 91–94 (2014); KANG & SHEPHERD, *supra* note 3, at 6 ("State courts alone will decide whether partisan gerrymandering is permissible . . . .").

its judges.[38] The origins of this uniquely American system of electing judges can be traced back to the Declaration of Independence, where the Founding Fathers noted as one of their enumerated grievances how King George "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[39] The distaste for appointed judges beholden to the executive subsequently led some newly independent states, such as Vermont and Georgia, to adopt constitutional provisions that allowed for the popular election of judges.[40] In the years following, despite the establishment of an unelected federal judiciary,[41] several states promulgated state constitutional provisions that provided for the direct election of state judges.[42] Over the nineteenth century, additional states started to elect their judges due to concerns about judicial independence vis-à-vis the legislature and rampant party cronyism.[43] On the whole, state constitutions adopted during the time were designed to better enable democratic majorities to check the corrupting influences of elected office,[44] and the decision to subject judges to direct elections reflected that democratic impulse.[45]

Today, forty-three states rely on a system of judicial elections to select or retain their judges.[46] These states vary in their use of elections, with some

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38. Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 431 (2007) (noting that judicial elections are rarely used outside U.S. with minor exceptions); *see also* Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 1996 (1988) (noting that the rest of the world views judicial elections in the U.S. to be "incomprehensible").

39. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

40. *See* VT. CONST. of 1777, ch. II, § 27; George E. Brand, *Selection of Judges—The Fiction of Majority Election*, 34 J. AM. JUDICATURE SOC'Y 136, 136 (1951) (noting that Georgia provided for the popular election of superior court judges as early as 1777).

41. U.S. CONST. art. III, § 1.

42. *See* Brand, *supra* note 40, at 136–37 (discussing the slow but persistent increase in states with provisions for judicial elections).

43. Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 932 (2016); HERBERT M. KRITZER, JUSTICES ON THE BALLOT 30–33 (2015).

44. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 127–96 (1969) (arguing that state constitutions were designed with a healthy distrust of representative government and a corresponding trust in democratic majorities serving as a check on representative institutions); *see also* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 854 (2022) (arguing that state constitutional rights were designed to check wayward government officials and representatives).

45. TARR, *supra* note 24, at 77–78.

46. DAVID ROTTMAN ET AL., CT. STAT. PROJECT, CASELOAD HIGHLIGHTS: JUDICIAL SELECTION 101, at 1 (2006).

states having different ways of electing judges depending on the type of court.[47]

Eighteen states elect some judges through partisan candidate elections: Alabama, Arizona, Arkansas, Connecticut, Illinois, Indiana, Kansas, Louisiana, Maine, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Vermont, and West Virginia.[48] Twenty states, including some states that hold partisan elections, elect some of their judges through nonpartisan candidate elections: Arizona, California, Florida, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Washington, West Virginia, and Wisconsin.[49]

Twenty states, including some of the aforementioned states that hold partisan or nonpartisan elections, hold retention elections: Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Montana, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Wyoming.[50] Retention elections generally take one of two forms. In some states, the retention election system—known as the "Missouri Plan" after the first state that adopted it—requires the governor, sometimes with the help of a nominating commission and legislative

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47. *See* QUALITY JUDGES INITIATIVE, SELECTION & RETENTION OF STATE JUDGES (2015), https://iaals.du.edu/sites/default/files/documents/publications/selection_and_retention_of_state_judges_charts.pdf [https://perma.cc/6V96-D77H] (comparing the methods of selection and retention of judges across various levels of state courts).

48. ALA. CONST. art. VI, §§ 152–153; ARIZ. CONST. art. VI, §§ 37–42; ARK. CONST. amend. 80, §§ 2, 17, 18; CONN. CONST. art. V, §§ 2–4; ILL. CONST. art. VI, § 12; IND. CONST. art. VII, §§ 10–11; KAN. CONST. art. III, §§ 5–6; LA. CONST. art. V, § 22; ME. CONST. art. V, pt. I, §§ 6, 8; MO. CONST. art. V, §§ 25(a), 25(c)(1); N.Y. CONST. art. VI, §§ 2, 6, 13, 15; N.C. CONST. art. IV, § 16; OHIO CONST. art. IV, § 6; PA. CONST. art. V, § 13; S.C. CONST. art. V, §§ 3, 8, 13; TEX. CONST. art. V, §§ 2, 6, 7, 15; VT. CONST. art. II, §§ 32, 34, 50–51; W. VA. CONST. art. VIII, §§ 2, 5, 10.

49. ARIZ. CONST. art. VI, §§ 37–42; CAL. CONST. art. VI, § 16; FLA. CONST. art. V, § 10; GA. CONST. art. V, §§ 6, 11; IDAHO CONST. art. V, § 6; IDAHO CONST. art. VI, § 7; KY. CONST. §§ 122–123; MICH. CONST. art. VI, §§ 8, 12, 16; MINN. CONST. art. VI, § 7; MISS. CONST. art. VI, §§ 145–145B, 153; MONT. CONST. art. VII, § 8; NEV. CONST. art. VI, §§ 3, 3A, 5; N.D. CONST. art. VI, § 7; OHIO CONST. art. IV, § 6; OR. CONST. art. VII, § 1; PA. CONST. art. V, § 13; S.C. CONST. art. V, §§ 3, 8, 13; S.D. CONST. art. V, § 7; WASH. CONST. art. IV, §§ 3, 5; W. VA. CONST. art. VIII, §§ 2, 5, 10; WIS. CONST. art. VII, §§ 4, 7.

50. ALA. CONST. art. IV, §§ 5–6; ARIZ. CONST. art. VI, §§ 37–42; CAL. CONST. art. VI, § 16; COLO. CONST. art. VI, §§ 20, 24–25; FLA. CONST. art. V, § 10; ILL. CONST. art. VI, § 12; IND. CONST. art. VII, §§ 10–11; IOWA CONST. art. V, §§ 15, 17; KAN. CONST. art. III, §§ 5–6; MD. CONST. art. IV, § 3; MO. CONST. art. V, §§ 25(a), 25(c)(1); MONT. CONST. art. VII, § 8; NEB. CONST. art. V, § 21; N.M. CONST. art. VI, § 33; OKLA. CONST. art. VII, §§ 2–4, 9; PA. CONST. art. V, § 13; S.D. CONST. art. V, § 7; TENN. CONST. art. VI, § 3; UTAH CONST. art. VIII, §§ 8–9; WYO. CONST. art. V, § 4.

approval, to initially seat judges on the bench and then have the appointed judges stand for periodic, unopposed retention elections.[51] A judge up for a retention election does not face an opponent but runs on their judicial record, eliminating the possibility of adversarial, personal confrontations between opposing candidates.[52] In the event that an appointed judge loses their retention election, the governor fills the vacancy through the same process.[53] In other retention election states, the public selects judges in a partisan or nonpartisan election, and the elected judges are then subject to an unopposed retention election at the end of their initial term, rather than running in another partisan or nonpartisan election.[54] Finally, only seven states do not elect any judges: Delaware, Hawaii, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Virginia.[55] In these states, governors generally nominate judges, and state legislators confirm the nominated judges.[56]

Therefore, despite the common depiction of the American judiciary as a body of unelected judges, most state judges are subject to periodic elections, and the vast majority of contact Americans have with the judiciary is with elected judges.

B. The Majoritarian Difficulty

Because most judges in the U.S. are elected, they face the unique challenge of having to engage in judicial review of popularly enacted legislation and striking down unconstitutional legislation, while at the same time having to

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51. *Nonpartisan Court Plan*, MO. CTS., https://www.courts.mo.gov/page.jsp?id=297 [https://perma.cc/4EYT-AWT2].

52. B.M. Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1437 (2001).

53. *See* MO. CTS., *supra* note 51.

54. *Retention Election*, BALLOTPEDIA, https://ballotpedia.org/Retention_election [https://perma.cc/EPX8-FXUV].

55. DEL. CONST. art. IV, § 3; HAW. CONST. art. VI, § 3; MASS. CONST. pt. II, ch. II, § 1, art. IX; N.H. CONST. pt. II, art. XLVI; N.J. CONST. art. VI, § 6, para. 1; R.I. CONST. art. X, § 4; VA. CONST. art. VI, § 7.

56. *See Gubernatorial Appointment of Judges*, BALLOTPEDIA, https://ballotpedia.org/Gubernatorial_appointment_of_judges [https://perma.cc/C8E9-QCWZ] (noting that Maine, Massachusetts, New Hampshire, New Jersey, and California use the gubernatorial method of appointment). Massachusetts is somewhat unique in that the Governor's Council, which is composed of eight elected members representing different geographic districts in Massachusetts, confirms judicial appointments, rather than the state legislature. MASS. CONST. pt. II, ch. II, § 1, art. IX.

win over the majority at the ballot box.[57] This conundrum, which Professor Steven Croley describes as the "majoritarian difficulty," is the principal criticism against the elected judiciary and warrants careful discussion—starting with the fundamental role the judiciary plays in our constitutional democracy.[58]

The American system of governance is built on two ideals: democracy and constitutionalism.[59] Democracy, for the purposes of this Article, is "rule by the people" where "all qualified members of the political community" get an equal voice in decision-making.[60] Constitutionalism entails the "protection of the individual and of minorities from democratic governance."[61] Put differently, constitutionalism places a restraint on democracy or simple majoritarian rule by enshrining certain rights in the federal and state constitutions and cordoning off the majority from infringing on certain spheres.[62] The role of the judiciary in a constitutional democracy is to serve as the bulwark for minority rights enshrined in the constitution and a check against the tyranny of the majority through judicial review.[63]

In the context of unelected judges, Professor Alexander Bickel famously set forth the "countermajoritarian difficulty" to explore whether judicial review of popularly enacted legislation by unelected judges can be justified in a government committed to *democracy*.[64] In contrast, the countermajoritarian difficulty is less relevant for elected judges subject to periodic elections. But the fact that these judges are subject to electoral accountability poses a different problem for judicial review because elected judges may be incentivized to avoid countermajoritarian decisions that undermine constitutionalism. Professor Croley's majoritarian difficulty thus explores how elected judges can be justified in a government committed to

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57. *See* Croley, *supra* note 4, at 694 (setting forth the majoritarian difficulty); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing the power of judicial review).

58. *See* Croley, *supra* note 4, at 694.

59. *Id.* at 700.

60. *Id.* at 702.

61. *Id.* at 694.

62. *Id.* at 703–06.

63. *Id.* at 700.

64. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962); *see also* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002); Croley, *supra* note 4, at 694. The debate about the countermajoritarian difficulty has echoes of related debates regarding judicial activism and the role of federal judges in a constitutional democracy. *See* Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 581–82, 610, 615–17 (2007).

constitutionalism.[65] Elected judges seeking reelection may find it too costly in terms of retaining their seat on the bench to rule against the majority if the majority has enacted laws that violate a particular minority group's constitutional rights.[66] Elected judges may eschew principled legal reasoning and instead choose to rule in line with the majority at the expense of vindicating the constitutional rights of smaller subsets of the electorate who may be outvoted at the ballot box.[67] When elected judges choose to do so—that is, choose an interpretation that allows an unconstitutional statute to remain in effect for the sake of winning their reelection, rather than choose the interpretation the judges think is the best reading of the law based on principled legal reasoning—they have undermined the fair application of the law and abdicated their constitutional role of safeguarding minority rights against majority tyranny.[68] Further, to the extent that politically influential interest groups can capture the legislative and executive branches through periodic elections, elected judges will be equally susceptible to such groups and thereby fail to properly check interest group capture.[69]

C. Continuing Objections to Judicial Elections

In tandem with Professor Croley's articulation of the majoritarian difficulty, scholars and jurists have consistently criticized judicial elections.[70] The criticism generally takes two overarching forms. First, scholars have raised concerns about the propriety of judges fundraising and relying on donor support to win elections.[71] Second, along the lines of Professor

65. Croley, *supra* note 4, at 694.

66. Friedman, *supra* note 64, at 208.

67. *See* Croley, *supra* note 4*,* at 727.

68. Frost & Lindquist, *supra* note 3, at 731 (noting how elected judges are incentivized to decide cases in favor of the majority of the electorate).

69. Pozen, *supra* note 4, at 320–21.

70. *See, e.g.*, sources cited *supra* note 4; Frost & Lindquist, *supra* note 3, at 723 (noting how elected judges are incentivized to decide cases in favor of the majority). *But see* CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009) (arguing in favor of judicial elections); MELINDA GANN HALL, ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS 113 (2015) (arguing that campaign advertising in judicial elections has had little electoral impact, especially in partisan judicial elections); Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 627–28 (2004) (arguing that federal judges may not be any more likely to safeguard minority rights than state court judges and suggesting that the majoritarian difficulty may not be a "difficulty").

71. *See, e.g.,* Chemerinsky, *supra* note 4, at 1988; Pozen, *supra* note 4, at 290; Tabarrok & Helland, *supra* note 8, at 160; GIBSON, *supra* note 3, at 2 (noting that judicial elections have

Croley's majoritarian difficulty, scholars have argued that electoral pressure affects judicial decision-making in various cases.[72]

1. Judicial Campaigning and Fundraising

Numerous scholars and jurists have criticized judicial elections because elections require judges to campaign for their next reelection and, in states that hold candidate elections, raise a significant campaign war chest to stave off potential challengers from entering the race.[73] Unsurprisingly, a significant portion of campaign contributions and expenditures come from attorneys who are repeat players incentivized to donate to judicial candidates who may decide their cases.[74] And given the high volume of spending by interested parties, the public may question any correlation, innocent or otherwise, between the donors' campaign spending and the judges' favorable treatment of the donors.[75] The U.S. Supreme Court, for its part, has historically permitted significant campaign spending in judicial elections, requiring judges to recuse themselves in only the most "extraordinary"

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eroded the "very legitimacy of the legal system" because "people come to see law and courts as little more than ordinary political institutions and therefore worthy of their contempt and disrespect"). *See generally* KANG & SHEPHERD, *supra* note 3 (providing an overview of the problems associated with campaign fundraising by elected judges); David Barnhizer, *"On the Make": Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361 (2001); A.B.A. COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 1–2 (2003) [hereinafter ABA REPORT]; Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 281 (2007); Benjamin Woodson, *The Two Opposing Effects of Judicial Elections on Legitimacy Perceptions*, 17 ST. POL. & POL'Y Q. 24, 40 (2017) (finding that electoral accountability can have a positive effect on legitimacy, but "[a]s these election systems become more active and candidates campaign more, the negative effects on legitimacy begin to accumulate").

72. *See, e.g.*, Neuborne, *supra* note 8, at 1128 (listing anecdotal examples to argue that elected judges are less willing to safeguard individual rights than appointed judges); Pozen, *supra* note 4, at 269 (arguing that increases in voter turnout in judicial elections will undermine the capacity of elected judges to safeguard minority rights); Chemerinsky, *supra* note 4, at 1988; Frost & Lindquist, *supra* note 3, at 723.

73. *See* GIBSON, *supra* note 3, at 2; Pozen, *supra* note 4, at 290; Barnhizer, *supra* note 71, at 361.

74. Tabarrack & Helland, *supra* note 8, at 160 (noting that the Florida Bar Association estimates that at least 80% of all campaign contributions for Florida state judges come from lawyers).

75. Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1469–70 (2001).

circumstances in which their impartiality may be called into question.[76] And judges, for their part, often fail to recuse themselves or disclose conflicts of interest arising from campaign contributions.[77]

Further, since the U.S. Supreme Court's decisions, such as *Dobbs*, that have returned high-stakes litigation on social and political issues to state courts, there has been an influx of campaign spending in state judicial elections in an attempt to shape the outcome of polarizing cases on abortion, redistricting, climate change, and more.[78] As an illustrative example, candidates, interest groups, and political parties spent a total of over $100.8 million on state supreme court elections during the 2021–2022 election cycle in the immediate aftermath of the U.S. Supreme Court's *Dobbs* decision.[79] This figure was nearly twice the campaign spending of any prior midterm judicial election cycle after adjusting for inflation.[80] Unsurprisingly, the American Bar Association [] formally recommends that states end judicial elections, citing the "corrosive effect of money on judicial election campaigns."[81]

However, even if we were to assume the likely possibility that there will be no major changes in the Supreme Court's jurisprudence on campaign spending in judicial elections for the foreseeable future, while also assuming that donors will be willing to spend significant sums of money in future judicial elections, relatively modest reforms can still address some of the concerns associated with campaign finance in judicial elections. Most notably, public financing of judicial campaigns could begin to address

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76. Republican Party of Minn. v. White, 536 U.S. 765, 787–88 (2002) (holding that recusals are required only when "extreme" facts involving an "extraordinary" situation undermine the appearance of impartiality and thereby creating a high bar for recusals); *see also* Richard Briffault, *The Supreme Court, Judicial Elections, and Dark Money*, 67 DEPAUL L. REV. 281, 296 (2018) (noting that the Supreme Court used "extraordinary" four times and "extreme" eight times in the opinion); Matthew Kim, *Restoring Public Trust in Elections: An Empirical Study of How Campaign Finance Reform Can Restore Public Trust in Elections*, 12 TEX. A&M L. REV. (forthcoming 2025).

77. *See* Dane Thorley, *The Failure of Judicial Recusal and Disclosure Rules: Evidence from a Field Experiment*, 117 NW. U. L. REV. 1277, 1284 (2023); *see also* Jonathan S. Krasno et al., *Campaign Donations, Judicial Recusal, and Disclosure: A Field Experiment*, 83 J. POL. 1844, 1845 (2021).

78. Douglas Keith, *The Politics of Judicial Elections, 2021–2022*, BRENNAN CTR. FOR JUST. (Jan. 29, 2024), https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2021-2022 [https://perma.cc/U6QD-DLN8].

79. *Id.*

80. *Id.* The figure stands at $91.5 million excluding Pennsylvania's state supreme court election, which is the only state supreme court election in the 2021–2022 election cycle to have taken place before the *Dobbs* decision. *Id.*

81. ABA REPORT, *supra* note 71, at 1–2.

concerns surrounding judicial campaigning and large monetary donations from interested parties.[82] By underwriting judicial campaigns with public funds, judicial candidates would no longer have to rely as significantly on private donations, and the public would have fewer reasons to be concerned about the judiciary's partiality in this regard.[83] While the lack of adequate public funds may pose a problem, public financing of judicial elections is a relatively realistic solution that many states have already implemented in various forms for their judicial elections.[84]

Additionally, Professors Michael Kang and Joanna Shepherd argue that states could limit judges to one term such that once judges are elected, they no longer feel the need to pander to potential donors and secure additional campaign funds to win their next election.[85] I do not endorse one reform proposal over another in this Article. Rather, my argument is that there are multiple, relatively feasible ways to limit the perceived ills of judges campaigning and fundraising, and such perceived ills by themselves do not warrant the end of judicial elections altogether.

2. Empirical Evidence of Judicial Acquiescence to Public Demand

These relatively minor reforms, however, do not solve the larger structural problem—the majoritarian difficulty—associated with judicial elections. Even if all judicial elections were publicly financed and judicial candidates had the necessary campaign funds to run a campaign without relying on private donors, the call to end judicial elections would still be justified if public pressure caused elected judges to decide highly salient constitutional law cases according to public demand while betraying principled legal analysis.

Unfortunately, several empirical studies suggest that elected judges do look to public opinion when deciding cases.[86] Professors Carlos Berdejó and Noam Yuchtman demonstrate that judges who are subject to periodic elections tend to give out harsher criminal penalties closer to their reelection

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82. Geyh, *supra* note 75, at 1481 (arguing that despite the problems associated with public financing of judicial elections, public financing could mitigate some of the disadvantages of private fundraising); *see also* Croley, *supra* note 4, at 692; Woodson, *supra* note 71, at 24.

83. Geyh, *supra* note 75, at 1471.

84. *Id.* at 1473, 1482.

85. KANG & SHEPHERD, *supra* note 3, at 153. *But see id.* (noting, however, that a single term might disincentivize qualified candidates from pursuing a judicial position).

86. Shepherd, *supra* note 8, at 169; Tabarrok & Helland, *supra* note 8, at 186; Berdejó & Yuchtman, *supra* note 8, at 741.

under the assumption that their constituents prefer longer sentences.[87] Additional empirical evidence suggests that elected judges are especially sensitive to electoral pressure when sentencing criminals, and they tend to give out harsher penalties because of the perceived effectiveness of negative campaign ads depicting them as "soft on crime."[88] Criminal sentencing is, therefore, widely considered one of the main areas in which electoral pressure unjustly affects judicial decision-making.[89]

However, criminal sentencing is by no means the only area of the law in which empirical legal scholars have found elected judges yielding to their constituents' preferences.[90] Professors Alexander Tabarrok and Eric Helland show that judges are more likely to award larger tort remedies to in-state citizens, who are more likely to vote in and contribute to their judicial elections, and against out-of-state corporations.[91] Professor Shepherd's study of various business, tort, and criminal law cases reveals that elected judges tend to respond to the partisan preferences of those who will retain them, whether they be the governor or the voting public.[92] Professors Ronald Collins, Peter Galie, and John Kincaid find that judges in states with judicial

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87. Berdejó & Yuchtman, *supra* note 8, at 741.

88. JOANNA SHEPHERD & MICHAEL S. KANG, AM. CONST. SOC'Y, SKEWED JUSTICE: CITIZENS UNITED, TELEVISION ADVERTISING AND STATE SUPREME COURT JUSTICES' DECISIONS IN CRIMINAL CASES 14 (2014), https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Joanna_Shepard_and_Michael_S_Kang_Skewed_Justice_Citizens_United_Television_Advertising_and_State_Supreme_Court_Justices%E2%80%99_Decisions.pdf [https://perma.cc/7HBT-7AAH] (finding that increases in television ads aired during state supreme court elections are associated with state supreme court justices deciding cases against criminal defendants); *see also* Berdejo & Yuchtman, *supra* note 8, at 741.

89. *See, e.g.*, Frost & Lindquist, *supra* note 3, at 749; Berdejó & Yuchtman, *supra* note 8, at 748–49 (finding that crime and sentencing are among the top issues invoked by challengers in Washington state judicial elections). It should be noted that Professors Berdejó and Yuchtman's argument is limited to the context of candidate elections, not retention elections. *See id.* at 741. Nonetheless, other scholars have analyzed the electoral pressures of criminal sentencing in retention districts. Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107, 128–30 (2007); *see also infra* Section IV.A.

90. *See, e.g.*, KRITZER, *supra* note 43, at 69–70 (highlighting that state court decisions friendly to same-sex marriage arose in greater numbers once a majority of the public supported same-sex marriage); Tabarrok & Helland, *supra* note 8, at 186–87; Shepherd, *supra* note 8, at 169–71, 188; Ronald K.L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 PUBLIUS 141, 150–52 (1986).

91. Tabarrok & Helland, *supra* note 8, at 186. The effect appears to be driven in part by the financial resources of in-state donor-attorneys and the need for judges to raise campaign funds. *Id.* at 157 (noting that elected judges are more likely to award damages to in-state plaintiffs because "the realities of campaign financing require judges to seek and accept campaign funding from [in-state] trial lawyers, who uniformly are interested in larger awards").

92. Shepherd, *supra* note 8, at 169, 188.

selection mechanisms that mirror the appointment process of the federal judiciary are more vigorous in protecting individual rights than elected judges, presumably because appointed judges are better insulated from majoritarian pressure than elected judges.[93]

Surveys of former and current elected judges further support the empirical finding that elected judges tend to acquiesce to public demand.[94] One survey by Professors Larry Aspin and William Hall suggests that elected judges feel the need to be "more sensitive to public opinion" and "[a]void controversial cases and rulings."[95] Nearly 60.5% of surveyed judges indicated that the existence of judicial elections altered their behavior on the bench.[96] Along those lines, former California Supreme Court Justice Otto Kaus once remarked, "[t]here's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub."[97] The U.S. Supreme Court has also alluded to the possibility of elections affecting the behavior of judicial candidates. In *Sheppard v. Maxwell*, a highly publicized criminal case in which the judge and prosecutor were judicial candidates in an upcoming election, the Court noted that the judge should have granted a continuance to prevent the election from interfering with the fairness of the trial.[98]

More recently, commentators have argued that judicial elections have transformed from uncompetitive, low-salience affairs in which few people voted or cared to competitive, high-salience affairs with broad public participation.[99] In this new era of judicial elections, voters seek to further their policy goals by electing judges who will decide cases in their favor, and judicial candidates campaign and decide cases with an eye toward public preferences.[100] With the U.S. Supreme Court directing state courts to

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93. Collins et al., *supra* note 90, at 150–52. In a separate study, Brett Gerry examined how state courts and federal courts have applied *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a U.S. Supreme Court decision regarding the Takings Clause. *See generally* Brett C. Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 HARV. J.L. & PUB. POL'Y 233 (1999). Mr. Gerry examined 100 state and 50 federal cases citing *Nollan* and argues that federal courts are no more likely to safeguard constitutional rights than state courts. *Id.* at 238–39, 284.

94. Aspin & Hall, *supra* note 9, at 312.

95. *Id.*

96. *See id.*

97. Devins, *supra* note 9, at 1664 (citation omitted).

98. 384 U.S. 333, 354 n.9 (1966).

99. *See* Pozen, *supra* note 4, at 266–68; *see also* Longan, *supra* note 11, at 947 (proposing ways to address the risks posed by this transformation).

100. Pozen, *supra* note 4, at 300–01.

adjudicate polarizing constitutional law issues, scholars argue that, by all indications, elected judges will increasingly look to public opinion when resolving those issues.[101]

Thus, several scholars and jurists have argued for the end of judicial elections to better safeguard constitutional rights.[102] Justice Sandra Day O'Connor once argued that judicial elections turn judges into "politicians in robes."[103] Professor David Pozen claims that "under many theories of judicial review—including all theories that would assign to the courts a guardian role over individual rights and constitutional values—the majoritarian difficulty should be seen as a devastating flaw in any institutional arrangement that breeds it."[104] He concludes that "wholesale reform" is necessary to "truly curb the majoritarian difficulty and preserve for their courts a guardian role over individual rights and constitutional values."[105] Professors Amanda Frost and Stefanie Lindquist find the majoritarian difficulty especially troubling in constitutional law cases impacting "historically unpopular or disadvantaged groups [who] seek to vindicate their rights to full and equal citizenship."[106] Finally, Professor Erwin Chemerinsky posits that "[t]he entire concept of the rule of law requires that judges decide cases based on their views of the legal merits, not based on what will please voters"—and judicial elections incentivize elected judges to do the exact opposite.[107]

Before continuing, one could nonetheless make an argument for electing judges given that there are equally pressing problems associated with unelected, appointed judges. While appointing state court judges bypasses the majoritarian difficulty, appointed judges are susceptible to pressure from the other branches of government which control their appointment and

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101. *See* Keith, *supra* note 78.

102. *See, e.g.*, Neuborne, *supra* note 8, at 1120–21, 1127–28; MICHAEL KLARMAN, FROM THE CLOSET TO THE ALTER: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 117 (2013) (observing anecdotally that many judges who failed to strike down restrictions on same-sex marriage were elected rather than appointed).

103. Kang & Shepherd, *supra* note 43, at 929 (quoting Annemarie Mannion, *Retired Justice Warns Against "Politicians in Robes*,*"* CHI. TRIB. (May 30, 2013), https://www.chicagotribune.com/2013/05/30/retired-justice-warns-against-politicians-in-robes [https://perma.cc/5NGL-N2FA]); *see also* Sandra Day O'Connor, Opinion, *Justice for Sale: How Special-Interest Money Threatens the Integrity of Our Courts*, WALL ST. J. (Nov. 15, 2007, 12:01 AM), https://www.wsj.com/articles/SB119509262956693711.

104. Pozen, *supra* note 4, at 286, 329–30; *see also id.* at 327 (hypothesizing that "rulings that seek to protect traditionally disadvantaged or despised groups in new ways . . . will be less likely to emerge from elected courts").

105. Pozen, *supra* note 4, at 270.

106. Frost & Lindquist, *supra* note 3, at 747.

107. Chemerinsky, *supra* note 4, at 1988 (emphasis omitted).

retention processes.[108] Professors Lee Epstein and Jack Knight explain that it is only natural for appointed judges who rely on other branches of government for retention to "be attentive to the preferences of the other institutions and the actions they expect them to take."[109] Other empirical studies demonstrate that elected judges are more likely to exercise judicial review than appointed judges.[110] Put differently, judicial appointments hinder judicial independence vis-à-vis other branches of government and chill judicial review. By empowering judges with an independent source of legitimacy—the voting public—judicial elections allow judges to strike down legislative excess without regard to the other branches of government.[111] Regardless, in light of the strong objections to electing judges, an affirmative argument for judicial elections must still address the majoritarian difficulty.

D. Implications of Continued Objections

The continuing objections to judicial elections, particularly in light of the majoritarian difficulty and state courts' apparent inability to adequately safeguard minority rights, have not only spurred calls to end the practice of electing judges but have also caused scholars to rethink the role of state courts vis-à-vis federal courts.

Professor Burt Neuborne argues that state courts subject to majoritarian pressures lack the judicial independence of federal courts, making state courts necessarily inferior to their federal counterparts.[112] Professors Frost and Lindquist are similarly doubtful as to whether state courts can withstand

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108. *See* Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009) (finding no difference in the exercise of judicial review between elected and appointed state supreme court justices, but also finding that appointed justices are increasingly less likely to use judicial review closer to their reappointment date, suggesting that retention politics affects the use of judicial review among appointed judges); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010); LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY 133 (2002).

109. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 139 (1997).

110. *See* sources cited *supra* note 108.

111. KRITZER, *supra* note 43, at 31.

112. Neuborne, *supra* note 8, at 1120–21, 1127–28. This Article makes no comment on Professor Neuborne's other reasons for the preferring federal courts, such as "technical competence" and "psychological set" to safeguard constitutional rights. *See id.* at 1121–27. For those interested, some scholars argue that state courts are on par with federal courts in terms of vindicating individual rights. *See, e.g.*, Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 214 (1983); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 599 (1999); Friedland, *supra* note 70, at 627–28.

majoritarian pressures; they suggest that we should redefine the role of state courts, not as fair arbiters of the law, but rather as majoritarian institutions that allow majority preferences to guide their decision-making.[113] To elaborate, they argue that because state judges are elected and vulnerable to electoral pressure, they should lean into the fact that they are elected officials and incorporate majority preferences into their decision-making rather than engage in a futile attempt to withstand electoral pressure.[114] In their words, state courts should "occupy themselves with what they do best: making common law, developing regulatory policy, interpreting ambiguous state statutes and regulations, and issuing advisory opinions, *with majority preferences guiding their choices*."[115] Meanwhile, Professors Frost and Lindquist envision federal courts stepping in to safeguard individual rights as neutral arbiters of the law.[116] For those purposes, they argue that federal courts should make themselves "more available" through the "discretionary use of supplemental jurisdiction, habeas review, and Supreme Court oversight."[117] They also advise against federal judges inviting state court judges into constitutional law cases through abstention and certification.[118]

Relatedly, Professor Edward Hartnett argues that state courts have become adept at inviting federal review of their decisions on constitutional law issues, thus avoiding the responsibility for issuing countermajoritarian decisions and diverting potential public backlash to federal courts.[119] State supreme courts "pass[] the buck" to the federal judiciary by not issuing decisions based solely on state constitutional rights, over which the state supreme courts would have the final say.[120] Instead, state supreme court justices rely on federal constitutional law, or intentionally leave the constitutional basis for their decisions unclear, so that the U.S. Supreme Court can take up review under the assumption that the state supreme court relied on the U.S. Constitution.[121]

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113. Frost & Lindquist, *supra* note 3, at 727–28.

114. *Id.* at 727.

115. *Id.* (emphasis added). *Contra* Geyh, *supra* note 4, at 63 (arguing that state court judges should not look to majority preferences in shaping common law in part because voters have an "information shortfall" and cannot intelligibly evaluate the decisions made by state court judges).

116. Frost & Lindquist, *supra* note 3, at 727.

117. *Id.*

118. *Id.*

119. Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 983 (1997).

120. *Id.* at 984.

121. Michigan v. Long, 463 U.S. 1032, 1037–45 (1983) (establishing the rule of thumb that if the basis for a state court's decision on constitutional law is unclear, then the U.S. Supreme Court will assume that the state court relied on the U.S. Constitution rather than the state constitution, thus giving the U.S. Supreme Court the power to review the state court decision).

According to Professor Hartnett, state supreme court justices can thereby insulate themselves from electoral pressure by telling their critics that "the federal courts made me do it" if and when the U.S. Supreme Court reverses their decisions.[122] Professor Hartnett further notes that even if the public does not parse state supreme court decisions, as long as state supreme court justices think the public is paying close attention, they will continue to pass the buck on minority rights issues.[123]

Thus, scholars have been increasingly critical of elected judges, questioning their ability to serve as a check against majority tyranny. Many tacitly accept, if not openly advocate for, state court judges ceding their role in protecting individual liberties to federal courts. If the public disapproves of judges who issue countermajoritarian decisions as scholars assume and judges evidently fear, especially in relation to the protection of minority rights, then such a drastic reimagining of the state courts or a dramatic overhaul of the judicial elections may be warranted. If, however, the supposed public backlash to countermajoritarian decisions is not as serious as commonly assumed, then the abdication of minority rights litigation to federal courts and the overhaul of judicial elections may be premature.[124]

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122. Frost & Lindquist, *supra* note 3, at 757.

123. Hartnett, *supra* note 119, at 983.

124. Some have argued that federal courts, specifically the U.S. Supreme Court, are also susceptible to public pressure. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6, 17–18 (1996) (arguing that federal courts have not protected minority rights unless "a majority or near majority of the community has come to deem those rights worthy of protection"); *see also, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 590–614 (1993); Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 263–64 (2010); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1018, 1022–24 (2004); Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 492–94 (1997); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 87–89 (1993). And certain justices may be particularly susceptible to public pressure. *See* Alex Badas, *The Chief Justice and Judicial Legitimacy Evidence*, 42 JUST. SYS. J. 150, 153–55 (2021) (finding that Chief Justices tend to be more influenced by public opinion than Associate Justices); Alyz Mark & Michael A. Zilis, *The Conditional Effectiveness of Legislative Threats: How Court Curbing Alters the Behavior of (Some) Supreme Court Justices*, 72 POL. RSCH. Q. 570, 570–71 (2019) (finding that the Chief Justice and the swing Justice are less likely than their colleagues to invalidate acts of Congress in response to Court curbing measures). However, others have argued that Justices of the U.S. Supreme Court do not yield to public demand. *See* Ben Johnson & Logan Strother, *The Supreme Court's (Surprising?) Indifference to Public Opinion*, 74 POL. RSCH. Q. 18, 18 (2021).

E. Key Assumptions Underlying Judicial Fears

While we have robust empirical evidence consistent with the theory that elected judges are affected by public pressure, acquiesce to perceived public demand at the cost of principled legal reasoning, and avoid issuing countermajoritarian decisions, whether the public actually punishes judges for issuing countermajoritarian decisions is relatively unclear.[125]

As an initial matter, it is unclear if the public actually cares, even in this new era of judicial elections. The pervasive trend of roll-off voting in judicial elections suggests that judicial elections may still be low-salience affairs.[126]

Even if voters do indeed care, it is yet unclear if the public actually punishes judges for issuing countermajoritarian decisions. Most of the scholarship on this issue focuses on the U.S. Supreme Court, as opposed to elected judges. On the one hand, some scholars argue that public support for the judiciary, and in particular the public's long-term support for the U.S. Supreme Court, does not depend on how the justices decide cases.[127] Professor James Gibson, for instance, argues that the U.S. Supreme Court enjoys a deep "reservoir of goodwill" to withstand disagreement with particular case outcomes.[128] Relatedly, many argue that the public's long-

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125. *See* Croley, *supra* note 4, at 730 (acknowledging the need for voter responsiveness for the majoritarian difficulty to pose a problem and arguing that there are more salient judicial elections in which voters actively participate).

126. *See* William K. Hall & Larry T. Aspin, *The Roll-Off Effect in Judicial Retention Elections*, 24 SOC. SCI. J. 415, 415 (1987) (describing roll-off voters as those "who cast ballots in the major partisan race such as president, governor, or U.S. Senator, but who do not cast ballots in the judicial election").

127. James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162, 173 (2015) (finding political ideology does not affect the U.S. Supreme Court's legitimacy); James Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 522 (2007); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992).

128. Gibson, *supra* note 127, at 507; *see also* Gibson & Nelson, *supra* note 127, at 173. Professor Gibson notes, however, that the reservoir can be depleted due to accumulated grievances of repeated decisions with which the public disagrees, as in the case of Black Americans' low opinion of the U.S. Supreme Court. *See* James L. Gibson & Gregory Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120, 1120–22 (1992). Professor Gibson also notes that the Court's legitimacy has been the lowest since the 1930s, and that the persistent loss of legitimacy after *Dobbs* suggests the reservoir is depleted. *See* James L. Gibson, *Losing Legitimacy: The Challenges of the* Dobbs *Ruling to Conventional Legitimacy Theory*, 68 AM. J. POL. SCI. 1041, 1053 (2023) [hereinafter Gibson, *Losing Legitimacy*]; James L. Gibson, *Do the Effects of Unpopular Supreme Court Rulings Linger? The* Dobbs *Decision Rescinding Abortion Rights*, AM. POL. SCI. REV., at 2 (Mar. 22, 2024) [hereinafter Gibson, *Rulings Linger*], https://www.cambridge.org/core/services/aop-cambridge-core/content/

term perception of the courts or their legitimacy is built on whether judges use fair process, demonstrate impartiality, engage in principled legal reasoning, and remain above partisan preferences.[129] Based on this conventional view centered around procedural justice, the public may be unaffected by individual case outcomes and focus on whether judges have engaged in principled decision-making. Thus, the public may even approve of judges who disregard public pressure in favor of principled legal reasoning, even if it results in outcomes with which the public disagrees.[130]

On the other hand, some scholars argue that the public's short- and long-term support for the judiciary is based on partisan ideology and level of agreement with individual case outcomes.[131] Perhaps most notably,

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view/84EAF07B2310A764AA9CBE5F9E62D50C/S0003055424000169a.pdf/do-the-effects-of-unpopular-supreme-court-rulings-linger-the-dobbs-decision-rescinding-abortion-rights.pdf [https://perma.cc/EG7B-7ENZ].

129. *See, e.g.*, Gibson, *supra* note 127, at 532; RONALD DWORKIN, JUSTICE IN ROBES 36–48 (2006); Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2263 (2019); Jack M. Balkin, *The Use that the Future Makes of the Past: John Marshall's Greatness and Its Lessons for Today's Supreme Court Justices*, 43 WM. & MARY L. REV. 1321, 1335 (2002); Gillian Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 377, 379 (2020); James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles Do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMPIRICAL LEGAL STUD. 592, 593–95 (2017); Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCH. 597, 597 (2006); James R. Zink et al., *Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions*, 71 J. POL. 909, 910 (finding that the public is more likely to accept U.S. Supreme Court decisions that are unanimous and follow precedent because those types of decisions signal "impartial and neutral decision-making"); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 626–27 (1991) ("[T]he legitimacy of the U.S. Supreme Court is based on the belief that it makes decisions in fair ways, not on agreement with its decisions."). *See generally* JAMES GIBSON & GREGORY CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE (2009).

130. *See* Gibson & Nelson, *supra* note 129, at 612–15.

131. *See, e.g.*, Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013) (finding that political ideology and case outcomes affect the Supreme Court's legitimacy); Dan Simon & Nicholas Scurich, *The Effect of Legal Expert Commentary on Lay Judgments of Judicial Decision Making*, 10 J. EMPIRICAL LEGAL STUD. 797, 797–98 (2013); Stephen D. Ansolabehere & Ariel White, *Policy, Politics, and Public Attitudes Toward the Supreme Court*, 48 AM. POL. RSCH. 365, 373 (2020) ("[W]hen individuals evaluate the [U.S.] Supreme Court, they appear to rely on their beliefs about whether the Court agrees with them on key recent cases and on their own partisanship."); Neil Malhotra & Stephen Jessee, *Ideological Proximity and Support for the Supreme Court*, 36. POL. BEHAV. 817, 817 (2014) (same); Stephen Nicholson & Thomas Hansford, *Partisans in Robes: Party Cues and Public Acceptance of Supreme Court*

Professors Brandon Bartels and Christopher Johnston, two proponents of this policy-based view, find that people's ideological beliefs shape their assessment of the U.S. Supreme Court's legitimacy.[132] According to their findings, the public disapproves of judges who issue countermajoritarian decisions and prefers judges who acquiesce to public demand.[133] Meanwhile, Professors Logan Strother and Shana Kushner Gadarian find that one's level of agreement with the policy outcomes of U.S. Supreme Court decisions—and not necessarily partisanship and ideology—shapes willingness to oppose Court curbing measures.[134] However, as noted above, these studies focus on the U.S. Supreme Court rather than elected judges.

One study by Professors Charles Crabtree and Michael Nelson begins to explore this question in the context of elected judges by asking whether their survey respondents are less likely to approve of elected judges who strike down legislation relative to judges who uphold the same legislation.[135] They find that survey respondents are less likely to approve of judges who strike down legislation.[136] While this initial finding about the popularity of judicial review is insightful, their study is less relevant for my purposes because it does not present respondents with the prototypical case involving the majoritarian difficulty.[137]

In the prototypical case implicating the majoritarian difficulty, judges exercising judicial review have two choices: (1) defy majority preferences and allow their principled legal analysis to prevail; or (2) abandon their principled legal analysis and allow majority preferences to prevail. Critically, the majoritarian difficulty does not arise when the judge's principled legal analysis coincides with majority preferences and the judge upholds the

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Decisions, 58 AM. J. POL. SCI. 620, 620 (2014) (same); Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 403 (2015) (same); Logan Strother & Shana Kushner Gadarian, *Public Perceptions of the Supreme Court: How Policy Disagreement Affects Legitimacy*, 20 FORUM 87, 89 (2022) (finding that policy preferences affect public approval and legitimacy of the U.S. Supreme Court); Miles T. Armaly, *Loyalty over Fairness: Acceptance of Unfair Supreme Court Procedures*, 74 POL. RSCH. Q. 927, 927–28 (2021) (finding that individuals do not disapprove of unfair U.S. Supreme Court procedures when their group benefits from the impropriety).

132. Bartels & Johnston, *supra* note 131, at 184.

133. *Id.*

134. Strother & Gadarian, *supra* note 131, at 89. Still others suggest that a judge's judicial philosophy may shape public acceptance of court decisions. *See* Cristopher N. Krewson & Ryan J. Owens, *Judicial Philosophy and the Public's Support for Courts*, 76 POL. RSCH. Q. 944 (2023).

135. *See* Charles Crabtree & Michael J. Nelson, *Judging Judicial Review in the American States*, 19 STATE POL. & POL'Y Q. 287, 295–97 (2019).

136. *Id.*

137. *Id.* at 287.

legislation. The majoritarian difficulty emerges only when a judge's legal analysis leads to an outcome that is contrary to majority preferences—that is, the judge determines that the legislation is unconstitutional despite popular support for the legislation.[138] Because Professors Crabtree and Nelson do not set forth the costs of opting to uphold the legislation to their survey respondents—namely, that the judge would have to abandon his or her principled legal reasoning—and thereby choose not to present the majoritarian difficulty to their survey respondents, respondents were free to assume that the hypothetical judge's legal analysis coincided with the final outcome of the case and that the judge did not need to abandon their legal analysis to strike down or uphold the legislation. In this vacuum of information in which the elected judge's principled legal analysis coincides with the outcome of the case, it is perhaps not surprising that the public prefers the legislation to stay in place rather than be stricken down. Thus, their study, while helpful in exploring other important questions about judicial review by elected judges, reveals little about which path the public would prefer judges to take when faced with the majoritarian difficulty.

In a different study, Professor Herbert Kritzer finds that survey respondents prefer that elected appellate court judges be "active in community organizations" and "understand community preferences," but he concludes that it is unclear if such preferences about a judge's engagement or understanding of their community translate to a preference that judges decide cases in favor of the majority sentiment.[139]

In short, whether the public actually disapproves of judges who issue countermajoritarian opinions remains an open question.

II. PUBLIC EXPECTATIONS OF ELECTED JUDGES

Judges fear electoral backlash for countermajoritarian decisions, and this part explores whether such fears are warranted. I use two different empirical methods to explore voter preferences. First, under the working assumption that voters care about judicial elections in this new era, I analyze a series of survey experiments that provide respondents varying information about judicial behavior to estimate the impact of judicial behavior on rates of public approval. Second, I analyze all online news and social media posts regarding judicial elections in the two years following *Dobbs* to identify any judicial

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138. Croley, *supra* note 4, at 694, 789 (setting forth the majoritarian difficulty and noting that the "desirability of elective judiciaries is therefore open to serious question").

139. Kritzer, *supra* note 5, at 57–58.

elections that capture the public's attention and ascertain the determinants of voter behavior in recent elections.

A. Survey Research Methodology

In order to better understand voter behavior in judicial elections, I first conducted three public opinion survey experiments involving a sample of 1,442 American adults. Each respondent participated in only one experiment, and each experiment randomly assigned survey respondents to one of several treatments in the form of a hypothetical news article. The news articles that described state supreme court justices adopting a different approach to decide a hypothetical case involving a constitutional challenge to a popular legislative action. By using randomized treatment assignment, I was able to identify the causal effect of the state supreme court's jurisprudence on public approval of state supreme justices without any endogenous variables affecting both the court's jurisprudence and the public's approval.[140]

The treatments in the first experiment—Treatments 1A, 1B, 1C, and 1D—presented a hypothetical involving a state supreme court in the distant future and only limited information about the hypothetical case. All respondents were told that the state supreme court had before it a case involving a constitutional challenge to a state law. Respondents were told that there was widespread public support for the law despite the constitutional questions it raised and that the justices had privately concluded that the law was unconstitutional, thereby setting up the prototypical majoritarian difficulty. Respondents were then informed that striking down the law could cause widespread public dissatisfaction and defy the wishes of the voters who had voted for the justices in the past. At the same time, the hypothetical also reminded respondents of the justices' duty to faithfully and impartially interpret the state constitution.[141] By presenting both sides of the elected

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140. Survey research methodology is well-established in legal scholarship and the social sciences. *See, e.g.*, Donald B. Rubin, *Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies*, 6 J. EDUC. PSYCH. 688, 688–701 (1974); *see also, e.g.*, Matthew D. Kim, *Redesigning Restorative Justice for Criminal Justice Reform*, 88 TENN. L. REV. 947, 947 (2022) (relying on survey research methods); Matthew Kim, *For Appearance's Sake: An Empirical Study of Public Perceptions of Ethical Dilemmas in the Legal Profession*, 83 OHIO ST. L.J. 529, 583–91 (2022) (same); Matthew D. Kim, *Exclusionary Rule and Judicial Integrity: An Empirical Study of Public Perceptions of the Exclusionary Rule*, 87 MO. L. REV. 1061, 1074 (2022) (same).

141. The survey design mirrors that of similar studies examining public opinion. *See* sources cited *supra* note 140.

justices' predicament, the survey was designed to avoid tilting the results in favor of one side over the other.[142]

After presenting the costs and benefits of the potential choices the justices could make, respondents were randomly assigned to receive one of the following treatments. In Treatment 1A, respondents were informed that the prevailing majority of the state supreme court justices had disregarded widespread public support for the law and issued a countermajoritarian decision, based solely on the justices' legal analysis, which effectively upended the will of the majority that had been expressed through the law.

In Treatment 1B, respondents were informed that the prevailing majority of justices had switched their votes to issue a decision that was not supported by their traditional legal analyses. Treatment 1B made clear that the justices did not expressly abandon their traditional legal analysis because of potential electoral backlash or even due to public pressure. Rather, Treatment 1B stated that although the justices had privately thought that the statute was unconstitutional, their published decision was contrary to their initial legal analysis. This treatment reflected the reality that state supreme court justices rarely abandon the veneer of impartial legal analysis expressly citing public pressure even when they acquiesce to public pressure.[143] Instead, the treatment mirrored journalistic accounts of numerous high profile cases that divulge the deliberation process of justices.[144] These media accounts often reveal how the justices "switch" their votes and align themselves with the prevailing public sentiment at the expense of principled legal reasoning, even

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142. To the extent that any skeptical readers believe that reminding respondents of the justices' duty tilts the result, they should view the following empirical findings as the effect of reminding or educating voters of the role of the elected judiciary on their stated preferences.

143. This is not always the case, however. The U.S. Supreme Court has expressly cited public pressure as a part of their reasoning in the past. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) ("[T]he Court . . . cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy[,] . . . in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").

144. *See, e.g.*, Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law [https://perma.cc/4Z76-NTUA] (noting Chief Justice Roberts's "switch" in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)); Joan Biskupic, *The Inside Story of How John Roberts Negotiated to Save Obamacare*, CNN (Mar. 25, 2019, 4:35 PM), https://www.cnn.com/2019/03/21/politics/john-roberts-obamacare-the-chief/index.html [https://perma.cc/7GC7-HLLA] (similarly noting Chief Justice Roberts's "switch" over the course of the justices' deliberations); *see also* Badas, *supra* note 124, at 160 ("Likewise, in *Department of Commerce v. New York*[, 588 U.S. 752 (2019),] it has been reported that Chief Justice Roberts initially voted to allow the Trump administration to ask a citizenship question on the 2020 census and then switched his vote to disallow it after considering how such a decision might influence the Court's image among the public." (citation omitted)).

though the published opinions do not cite public pressure as the reason for their switch.[145]

For instance, Chief Justice John Roberts's "switch" in *National Federation of Independent Business v. Sebelius*[146] was widely attributed to his concern about public backlash.[147] According to multiple media outlets shortly after the decision, Chief Justice Roberts had initially sided with the Supreme Court's four conservative justices to strike down a key part of the Affordable Care Act but later changed his vote to uphold the bulk of the law alongside the four liberal justices.[148] Joan Biskupic, a renowned journalist for CNN and Supreme Court analyst, reported:

> Roberts' moves behind the scenes were as extraordinary as his ruling. He changed course multiple times. He was part of the majority of justices who initially voted in a private conference to strike down the individual insurance mandate—the heart of the law—but he also voted to uphold an expansion of Medicaid for people near the poverty line.
>
> Two months later, Roberts had shifted on both.
>
> . . . .
>
> . . . Perhaps he had worries about his own legitimacy and legacy, intertwined with concerns about the legitimacy and legacy of the court. . . .
>
> Viewed only through a judicial lens, his moves were not consistent, and his legal arguments were not entirely coherent.[149]

Such media reporting about the inner workings of the justices' deliberations and apparent acquiescence to public pressure provides the basis for this treatment condition.[150] Notably, it is not essential whether such reporting is actually true; as long as such reports exist, the experimental treatment reflects the reality in which the public forms its opinion of the

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145. *See* Crawford*, supra* note 144; Biskupic*, supra* note 144. Vote switching is sometimes referred to as "vote fluidity." *See* Saul Brenner, *Fluidity on the Supreme Court: 1956–1967*, 26 AM. J. POL. SCI. 388, 388 (1982).

146. 567 U.S. 519 (2012).

147. *See* Crawford, *supra* note 144; Biskupic, *supra* note 144.

148. Crawford, *supra* note 144; Biskupic, *supra* note 144.

149. Biskupic, *supra* note 144.

150. In addition to media accounts of modern vote switching, scholars have explored historical vote switching, suggesting that vote switching is not uncommon during deliberations and may be spurred by a number of factors. *See* Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 582–85 (1996).

judiciary. As an important side note, even an appointed justice with life tenure is seemingly susceptible to public pressure, supporting aforementioned studies that appointed jurists are susceptible to external pressures and challenging the notion that elected judges are inferior to appointed judges in safeguarding minority rights due to their susceptibility to public pressure.[151]

In Treatment 1C, respondents were informed that the prevailing majority of state supreme court justices had sidestepped the merits of the case and dismissed the suit by raising procedural concerns, thus allowing the legislation to remain in effect in accordance with majority preferences. This treatment reflected the fact that in most states the state supreme court has discretionary jurisdiction over some cases implicating the constitutionality of state statutes and can decline to hear such cases, much like the U.S. Supreme Court.[152] Put differently, most state supreme courts can use their "passive virtues"—a term coined by Professor Bickel in the context of the U.S. Supreme Court to describe justiciability doctrines like standing, mootness, and the political question doctrine—to avoid controversial issues.[153] Scholars have long advocated for the U.S. Supreme Court to use its passive virtues to garner public approval by avoiding cases that would contravene majority preferences if decided on the merits,[154] but Professor Ben Johnson notes that the U.S. Supreme Court has used passive virtues to instead seek out controversial cases.[155] In the context of state courts, Professor Laura Langer argues that elected judges routinely avoid cases that would compel them to

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151. *See supra* Section I.C.2.

152. *See State Court Structures*, CT. STAT. PROJECT, https://cspbr.azurewebsites.net (filtering by "COLR By Permission," "COLR by Permission/IAC By Right," and "COLR and IAC by Permission" yields many of the states that allow for discretionary jurisdiction); *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844–76 (2001).

153. Alexander M. Bickel, *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 40 (1961).

154. *See, e.g.*, *id.*; Cass R. Sunstein, *Kavanaugh Confirmation Won't Affect Supreme Court's Legitimacy*, BLOOMBERG (Sept. 30, 2018, 8:00 AM), https://www.bloomberg.com/view/articles/2018-09-30/kavanaugh-confirmation-won-t-affect-supreme-court-s-legitimacy [https://perma.cc/P54B-6YFQ]; Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 993 (2008). *See generally* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1 (2010).

155. Ben Johnson, *The Active Vices*, 74 ALA. L. REV. 917, 918 (2023) (noting that the U.S. Supreme Court has exercised its discretion not to avoid controversial cases but to intentionally seek them out). *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023) (describing how the U.S. Supreme Court has used its emergency docket to issue rulings on controversial cases without public hearings and without explanation rather than using procedural means to avoid such cases).

strike down legislation by failing to docket such cases.[156] Of course, some state supreme courts cannot exercise passive virtues to avoid controversial cases because they do not have discretionary jurisdiction over at least some cases concerning the constitutionality of state statutes.[157] The general rule of thumb is that larger states with intermediate appeals courts have discretionary jurisdiction over such cases while smaller states without intermediate courts have mandatory jurisdiction, but with several exceptions.[158] In any event, given the significant number of states that allow discretionary jurisdiction in cases implicating the constitutionality of state statutes, and considering scholarly arguments supporting the use of passive virtues to safeguard public support without justices having to abandon principled legal analysis, Treatment 1C estimates public approval or disapproval of such exercises of judicial discretion.[159]

In Treatment 1D, respondents were informed that the majority of justices had authored a countermajoritarian opinion that was based on their initial legal analyses but in a minimalist manner. The opinion's precedential impact was limited as the opinion confined the court's holding to the specific facts of the case, effectively allowing the majority will to prevail in most other instances implicating the law. This treatment was motivated by numerous scholars and jurists calling for minimalism in judicial opinions.[160] For instance, Professor Cass Sunstein argues that courts should issue narrow holdings or minimalist decisions when they expect an adverse public

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156. LANGER, *supra* note 108, at 127 ("Instead of serving as a countermajoritarian institution, when the issue resonates most with other branches of government, state supreme court justices avoid getting involved in the first place.").

157. *See* CT. STAT. PROJECT, *supra* note 152 (filtering by "COLR By Right" yields many of the states that have mandatory jurisdiction).

158. Devins, *supra* note 9, at 1650.

159. It should be noted that in eleven states, the legislature and executive can seek advisory opinions about the constitutionality of state legislation from state supreme courts, unlike the U.S. Supreme Court, which cannot issue advisory opinions. Devins & Mansker, *supra* note 28, at 457. Some state supreme court justices can still choose not to issue advisory opinions depending on the type of case. *Id.* at 461. For brevity, this Article does not delve into public opinion on advisory opinions.

160. *See, e.g.*, Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 177–78 (2007); Richard M. Re, *Should Gradualism Have Prevailed in* Dobbs*?*, *in* LEE BOLLINGER & GEOFFREY STONE, ROE V. DOBBS (2023) (expounding on the benefits of gradualism); Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 444 (2000) (questioning the court-centered model of constitutional interpretation); Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1349 (2010) (advocating for "judicial statesmanship"); *cf.* Caprice L. Roberts, *Judicial Fidelity*, 51 PEPP. L. REV. 1, 66 (2024) (advocating for incremental judicial reforms to avoid political backlash).

reaction.[161] He suggests that "[i]n rare but important cases, it is appropriate for judges . . . to rule narrowly and shallowly" if judges can thereby preserve their public standing.[162] Professors Robert Post and Reva Siegel similarly argue that judges should exercise judicial restraint when issuing countermajoritarian decisions.[163] The crux of their argument is that incremental countermajoritarian decisions that result in only small changes to existing doctrine will allow judges to maintain their public standing while not completely disregarding their judicial philosophy.[164] Justice Brett Kavanaugh has alluded to the minimalist approach, subscribing to the "avoid-chaos principle of judging."[165] Given the minimalist approach advocated by scholars and jurists, my experiment included this fourth and final treatment to test whether the public approves of elected judges who take this approach when confronted with the majoritarian difficulty. The Appendix reproduces the survey text and questionnaire.[166]

By not specifying the area of the law and the partisan implications of the case, the first experiment adopted a Rawlsian approach that forced a veil of ignorance on the respondents.[167] The purpose of this experiment was to estimate the effect of elected judges' decision to acquiesce to public demand or exercise judicial restraint in light of public pressure in a setting where respondents were unaffected by the particularities of any specific court, the partisan leaning of the court, or any specific issue area, and thereby yield findings with greater generalizability. In other words, the experiment forced respondents to focus solely on the elected justice's jurisprudence rather than whether respondents supported a particular justice or whether the cause respondents personally supported had prevailed.[168]

Unfortunately, this Rawlsian approach is not without its drawbacks: there may be reduced external validity since the effect of a judge's jurisprudence on public opinion is implicated only in highly salient cases where the public

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161. Sunstein, *supra* note 160, at 211–12.

162. *Id.* at 178.

163. Post & Siegel, *supra* note 160, at 444; *see also* Post, *supra* note 160, at 1349.

164. *See* Post & Siegel, *supra* note 160, at 444.

165. Edward B. Foley, Opinion, *Supreme Court 'Faithless Electors' Ruling Aims to Stabilize the Election, but Will It Work?*, POCONO REC. (July 7, 2020), https://www.poconorecord.com/story/news/politics/elections/2020/07/07/opinion-supreme-court-faithless-electors-ruling-aims-to-stabilize-election-but-will-it-work/42254223 [https://perma.cc/RK8N-7EDL].

166. *See infra* Appendix B, C.

167. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971) (discussing how sitting behind a veil of ignorance can make people more objective when considering how societies should operate).

168. *See* Rebecca L. Brown & Andrew D. Martin, *Rhetoric and Reality: Testing the Harm of Campaign Spending*, 90 N.Y.U. L. REV. 1066, 1080 (2015) (adopting a similar approach).

has more information and where partisanship may play a greater role in shaping the public's perception of the judge. To partially address this drawback, treatments in the second experiment—Treatments 2A, 2B, 2C, and 2D—presented a hypothetical involving the state supreme court deciding a highly politicized case. Diverging from the Rawlsian framework of the first experiment, this experiment allowed respondents to incorporate their partisan preferences and measured how such preferences affected their perception of justices who either chose to acquiesce to public pressure or disregard public pressure. In effect, this framework accounted for the studies suggesting that Americans' view of the judiciary is shaped by whether their side of the political aisle "won."[169]

As for the issue area, the second experiment used a hypothetical partisan gerrymandering case. All respondents in the second experiment read a hypothetical loosely based on several recent state supreme court cases overturning legislative maps for violating voting rights provisions in state constitutions.[170] Respondents were told that there was widespread support for a legislative map drawn by a Republican-majority state legislature that the justices had privately determined to be unconstitutional.[171] As for the treatment conditions themselves, each treatment condition mirrored the treatments of the first experiment. Treatment 2A informed respondents that the justices did not acquiesce to public demand, resulting in a liberal "win." Treatment 2B informed respondents that the justices acquiesced to public demand, resulting in a conservative "win." Treatment 2C informed respondents that the justices exercised their passive virtues, allowing for a conservative "win." And finally, Treatment 2D informed respondents that the justices issued a minimalist opinion, allowing most of the map to stand, effectively resulting in a limited conservative "win."

I selected partisan gerrymandering as the hypothetical issue area because it is a highly salient issue that implicates voting rights of minority groups who could be outvoted at the ballot box, which is highly pertinent to the majoritarian difficulty. In addition, this issue directly implicates partisan sentiments, which incentivized respondents to react to the hypothetical court decision according to their partisan leanings.[172] The inherently partisan nature

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169. *See supra* note 131 and accompanying text.

170. *See, e.g.*, Clarke v. Wis. Elections Comm'n, 998 N.W.2d 370 (Wis. 2024); Common Cause v. Lewis, 834 S.E.2d 425 (N.C. 2019); League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018).

171. *See infra* Appendix B.

172. *See generally* MICHAEL F. SALAMONE, PERCEPTIONS OF A POLARIZED COURT: HOW DIVISION AMONG JUSTICES SHAPES THE SUPREME COURT'S PUBLIC IMAGE 121–22 (2018)

of election litigation meant that it was the most difficult test to observe members of the public—especially the side of the political aisle that stood to lose from the justices' principled legal analysis—approve of the elected judiciary for engaging in principled legal analysis. Thus, any positive effect observed from the justices engaging in principled legal analysis relative to behaving strategically would be a conservative estimate that persisted even after taking into account the public's partisan commitments. Put differently, partisan gerrymandering offered the most difficult test to observe a statistically significant result in favor of principled legal analysis. Moreover, state courts appear to be the battleground for partisan gerrymandering cases for the foreseeable future due to the U.S. Supreme Court's jurisprudence, thus making the issue especially relevant for elected judges.[173]

Next, I conducted a third experiment because it was possible that respondents on one side of the political aisle (e.g., conservatives) only cared about whether their side of the political aisle "won," while respondents on the other side of the political aisle (e.g., liberals) cared about whether elected judges were deciding cases in a principled manner, regardless of whether their side of the aisle "won" or "lost."[174] The concern was that differences in public approval observed in the second experiment were not caused by the justices' decision but by the particularities of one's political ideology—for example, conservatives only caring about winning and liberals only caring about proper procedure. Thus, the third experiment served as a foil to the second experiment, and respondents were told that there was widespread support for a legislative map drawn by a Democratic-majority state legislature that the justices had privately determined to be unconstitutional, rather than a map drawn by a Republican-majority state legislature.[175] Treatment 3A informed respondents that the justices did not acquiesce to public demand in the gerrymandering case, but unlike Treatment 2A, respondents in Treatment 3A were told that the justices' decision not to switch their votes resulted in a conservative "win," rather than a liberal "win" because Democrats had drawn the map. Treatment 3B informed respondents that the justices acquiesced to public demand, resulting in a liberal, not a conservative, "win." Treatment 3C informed respondents that the justices exercised their passive virtues, and the decision resulted in a liberal "win."

(exploring how issue salience and political divisiveness can influence how any particular case shapes public opinion of the U.S. Supreme Court).

173. *See supra* notes 33–37 and accompanying text.

174. Bartels & Johnston, *supra* note 131, at 194 (finding partisan differences in approval for the U.S. Supreme Court); *see also* Kathryn Haglin et al., *Ideology and Specific Support for the Supreme Court*, 74 POL. RSCH. Q. 955, 960 (2021).

175. *See* Bartels & Johnston, *supra* note 131, at 194; Haglin et al., *supra* note 174, at 960.

Finally, Treatment 3D informed respondents that the justices issued a minimalist opinion and that the decision resulted in a limited liberal "win." If the results from the third experiment coincided with the results from the second, it would demonstrate that the observed effects were not limited to one side of the political aisle.[176]

Because word choice can affect survey responses, some further clarifications are necessary. First, the vignettes did not criticize the justices for deciding the case in whatever manner that they did. Instead, the vignettes presented the tradeoffs behind the justices' decisions, minimizing the risk of a Hawthorne effect.[177] As noted above, the treatment conditions also did not have the justices expressly state that they were acquiescing to public demand or exercising judicial restraint because of public opinion since judges often strive to maintain the appearance of principled legal analysis even when journalistic accounts reveal the opposite.[178] This allowed for a harder test in which it would be more difficult to detect strategic behavior having a statistically significant negative effect on public approval.

As for outcome measures, the surveys relied on established methods of measuring public approval of judges and courts.[179] First, the surveys asked three separate questions about the respondents' approval of the justices, modeled after existing studies and the Gallup polls, answered on a Likert scale.[180] The three questions were: (1) "would you support or oppose efforts

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176. *Cf.* Benjamin Woodson, *Politicization and the Two Modes of Evaluating Judicial Decisions*, 3 J.L. & CTS. 193, 198 (2015) ("If the main hypothesis is confirmed across multiple study designs, it cannot be a fluke of one particular design choice.").

177. *See generally* McCarney et al., *The Hawthorne Effect: A Randomised, Controlled Trial*, 7 BMC MED. RSCH. METHODOLOGY 1, 1 (2007) (describing the Hawthorne Effect, a phenomenon where individuals alter their behavior in response to being studied and, in the setting of public opinion surveys, try to give the researcher his or her desired result by deducing the researcher's objective through the survey text).

178. *See, e.g.*, Crawford, *supra* note 144; Biskupic, *supra* note 144.

179. *See, e.g.*, Christopher Johnston & Brandon Bartels, *Sensationalism and Sobriety: Differential Media Exposure and Attitudes Toward American Courts*, 74 PUB. OP. Q. 260, 278 (2010); Crabtree & Nelson, *supra* note 135, at 298; James L. Gibson et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RSCH. Q. 187, 187 (2005); James L. Gibson et al., *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC'Y REV. 837, 837 (2014); Stephen P. Nicholson & Thomas G. Hansford, *Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions*, 58 AM. J. POL. SCI. 620, 620 (2014).

180. *See, e.g.*, Brandon Bartels & Eric Kramon, *All the President's Justices? The Impact of Presidential Copartisanship on Supreme Court Job Approval*, 66 AM. J. POL. SCI. 171, 175 (2022); Johnston & Bartels, *supra* note 179, at 278; Haglin et al., *supra* note 174, at 961–62; Crabtree & Nelson, *supra* note 135, at 298. I did not include a few questions that are sometimes asked to estimate short-term approval because they did not pertain to willingness to reelect the

to reelect the [State Name] Supreme Court justices who decided this case in their next reelection"; (2) "how do you feel about the way the [State Name] Supreme Court is handling its job"; and (3) "how do you feel about the way the justices on the [State Name] Supreme Court decided the case."[181] The answers to the three questions were then combined to form a single composite score measuring short-term approval, which corresponds to what the existing literature refers to as "specific support."[182]

Second, the surveys measured state supreme courts' legitimacy or the public's long-term support for state supreme courts, which the existing literature refers to as diffuse support.[183] For this second metric, respondents were asked to indicate their level of agreement with five statements about the state supreme court itself rather than the justices.[184] The responses were then combined to form a single composite score measuring legitimacy.[185] Because there is a debate in public opinion scholarship regarding the best way to measure legitimacy,[186] I conducted robustness checks leaving off some of the statements and arrived at the same overall findings presented below.

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judges but rather respondents' willingness to overturn the case outcome through extra-judicial means. *See* Crabtree & Nelson, *supra* note 135, at 298. In addition, including those questions about overturning case outcomes through extra-judicial means would have primed respondents to answer along those terms when asking why they were willing to reelect the judges, resulting in a Hawthorne effect when analyzing the causal mechanisms for their reasoning. *See infra* Section III.B. Also, it should be noted that New York's highest court is not named the "Supreme Court" and jurists on that court are not referred to as "justices." As such, the survey text was modified to reflect the correct court and title for respondents from New York. Additionally, some states have slightly different names for their highest court, but contain the word "supreme," such as the West Virginia Supreme Court of Appeals and the Massachusetts Supreme Judicial Court. No changes were made for respondents from those states since the word "supreme" and the indication that the court was the state's "highest court" removed any source of confusion. *See* Kritzer, *supra* note 5, at 51 n.19 (adopting a similar approach).

181. *See infra* Appendix C.

182. *See* Johnston & Bartels, *supra* note 179, at 266.

183. *See id.*, at 265–66; Crabtree & Nelson, *supra* note 135, at 297–99.

184. *See* Bartels & Johnston, *supra* note 131, at 189; James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 358 (2003).

185. *See* James L. Gibson, *"New-Style" Judicial Campaigns and the Legitimacy of State High Courts*, 71 J. POL. 1285, 1292–93 (2009); James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 66 (2008).

186. *See* Gibson et al., *supra* note 184, at 358 (analyzing various questions to measure legitimacy); *see also* BRANDON L. BARTELS & CHRISTOPHER D. JOHNSTON, CURBING THE COURT 7, 22 (2020) (advocating for other formulations of legitimacy focusing on one's willingness to oppose court-curbing measures). Professors Gibson and Nelson have suggested that two of the five commonly used statements "are more closely connected with specific than diffuse support." Gibson & Nelson, *supra* note 127, at 165; *see also* Gibson, *supra* note 127, at 519 (removing

Since the objective of this Article is to ascertain the impact of countermajoritarian decisions on respondents' willingness to reelect justices, rather than the impact of countermajoritarian decisions on the legitimacy of the judiciary as an institution, I focus on approval rather than legitimacy. Specific support or approval of the justices has direct relevance to their reelection chances, while institutional legitimacy speaks to the public's willingness or unwillingness to curb how courts operate, which is not the primary motivation of elected judges seeking reelection.[187] Furthermore, a focus on approval is worthwhile because studies show that high approval is positively associated with the U.S. Supreme Court's willingness to invalidate acts of Congress, and if approval has a similar effect on state supreme courts' willingness to invalidate acts of state legislatures, approval is more pertinent to the majoritarian difficulty.[188]

Next, the surveys asked all respondents which factors they felt were important when evaluating judicial candidates more generally. For instance, the surveys measured whether the respondents considered the candidates' ethics, competence, and temperament, in addition to their record of engaging in principled legal analysis, acquiescing to public demand, checking the other branches of government, being tough on crime, and safeguarding minority rights.[189] Finally, the surveys collected several standard demographic variables to be used as covariates.[190] In terms of survey administration, the surveys were fielded on CloudResearch's survey platform between June 4

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these two statements while adding a different statement about limiting the Court's jurisdiction). But here, removing one or both statements in question and recreating the score without those statements as robustness checks does not result in any meaningful differences.

187. *See* Crabtree & Nelson, *supra* note 135, at 297 (similarly focusing on a formulation of specific support, rather than diffuse support, for elected judges).

188. *See, e.g.*, Tom Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 971 (2009); Alison Merrill et al., *Confidence and Constraint: Public Opinion, Judicial Independence, and the Roberts Court*, 54 WASH. U. J.L. & POL'Y 209, 209 (2017); James R. Rogers & Joseph Daniel Ura, *A Majoritarian Basis for Judicial Countermajoritarianism*, 32 J. THEORETICAL POL. 435, 451 (2020). In addition, specific support is important to the extent that it shapes diffuse support. *See* Gibson, *supra* note 127, at 515; Gibson & Nelson, *supra* note 127, at 164.

189. *See* Kritzer, *supra* note 5, at 53 (asking similar questions in a survey of American adults); GIBSON, *supra* note 3, at 93–96 (asking similar questions in a survey of Kentucky voters).

190. The covariates are balanced across most of the variables as one would expect under random treatment assignment. The covariate balance tables are provided in the Appendix. *See infra* Appendix A, Tables A.1–3. However, education and income are not balanced across the treatments for the second experiment, and respondents whose race is categorized as "other" is not balanced across the treatments for the third experiment. *See infra* Appendix A, Tables A.2–3. Nonetheless, controlling for the covariates does not result in a meaningful difference in the overall results. *See infra* Appendix A, Tables A.4–5, A.7.

and June 5, 2024.[191] In total, the surveys involved 1,442 U.S. adult respondents. The surveys included attention-check questions to screen disingenuous respondents.[192]

Finally, to partially address the concern that all survey respondents took the surveys in an artificial setting, each treatment condition was presented as an online news article to mimic how people receive news about judicial candidates in real life.[193] By mimicking news media, the survey design was intended to create a suspension of disbelief and elicit responses that mirrored respondents' actual responses.[194] Another possibility was the use of campaign ads, as opposed to news articles. However, campaign ads, despite their volume and perceived effectiveness among judges, are rarely effective in shaping outcomes in recent judicial elections.[195] While it is unclear if this trend will continue, in the new era of judicial elections in which voters are supposedly paying greater attention, news media and clippings of media reports, which can be amplified by reposting or "sharing" on social media

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191. CloudResearch provides quality-controlled respondents for survey research. *See The Gold Standard for Data Quality Protection in Online Surveys*, CLOUDRESEARCH (Feb. 23, 2024, 2:15 PM), https://cloudresearch.com/products/sentry-data-quality-validation-online [https://perma.cc/H9EG-RDB8].

192. Only 11 out of 1,442 respondents—less than 1%—failed the attention check questions. Excluding those who failed the attention check questions did not meaningfully alter the results.

193. *See infra* Appendix B; Joseph D. Kearney & Howard B. Eisenberg, *The Print Media and Judicial Elections: Some Case Studies from Wisconsin*, 85 MARQ. L. REV. 593, 596 (2002) (finding that in Wisconsin state judicial elections, "print media generally supply the most extensive coverage of judicial elections, as assessed on the basis of scope and depth of coverage").

194. *See* Justin Wedeking & Michael Zilis, *Disagreeable Rhetoric and the Prospect of Public Opposition: Opinion Moderation on the U.S. Supreme Court*, 71 POL. RSCH. Q. 380, 381 (2018); Charles Franklin & Liane Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751 (1989). *See generally* James N. Druckman & Arthur Lupia, *Mind, Will, and Choice*, *in* THE OXFORD HANDBOOK ON CONTEXTUAL POLITICAL ANALYSIS 97 (Charles Tilly & Robert E. Goodwin eds., 2006) (for a discussion of the importance of context in the study of political choice).

195. *See* HALL, *supra* note 70, at 113 (arguing that campaign advertising in judicial elections have had little electoral impact, especially in partisan judicial elections); Barbara J. Pariente & F. James Robinson, Jr., *A New Era for Judicial Retention Elections: The Rise of and Defense Against Unfair Political Attacks*, 68 FLA. L. REV. 1529, 1529, 1534 (noting that campaign ads have been successful in defeating a judicial candidate only once in modern judicial elections); Michael Wines, *Republicans Win Key State Supreme Court Races in North Carolina and Ohio*, N.Y. TIMES (Nov. 9, 2022, 5:49 PM), https://www.nytimes.com/live/2022/11/08/us/election-midterms/state-supreme-courts-midterm-elections (noting the perceived effectiveness of campaign ads in recent elections); SHEPHERD & KANG, *supra* note 88, at 13 ("What is more, judicial candidates may want to do what they can to decide cases in ways that do not leave them vulnerable to campaign attacks through negative TV ads.").

sites, should be at least one significant source of information for attentive voters.[196]

Relatedly, the fact that survey respondents were provided information that they may not usually seek out before a judicial election does not invalidate the study design. Rather, studies have shown that survey respondents who are provided such information are similar to the subsample of the electorate who are "political taste-makers within their social networks and broader communities," meaning they are the type of people who are likely to vote in and shape election outcomes.[197] Further, assuming we are indeed in the new era of judicial elections, the expectation is that some voters are exposed to, if not actively seeking out, similar news reporting.[198] And to the extent that public opinion of the judiciary is mediated by the opinions of political elites, such as legal commentators and journalists, my methodology imitates the theorized mediated pathways.[199] Thus, at the very least, my survey design tests the influence of legal commentators and journalists on the public perceptions of elected judges.

B. Public Opinion Data on Judicial Elections

The Article now discusses the results from the surveys, which are consistent across all three experiments. Full regression models and robustness checks are reproduced in the Appendix.[200]

1. Experiment 1

The first experiment examined whether decisions made by a hypothetical state supreme court with no ties to the current composition of any existing state supreme court in a generic case affected the public's approval of state supreme court justices. As the figure below demonstrates, respondents in the control condition, Treatment 1A, who read that the justices disregarded public opinion and followed their usual legal analysis at the risk of public

196. *See generally* SALAMONE, *supra* note 172, at 12–15 (exploring the impact of newspaper reporting on public perceptions of the judiciary). Also, as noted *infra* Section II.C, despite the increases in money spent on campaign ads, the public does not appear to be responding to campaign ads given the lack of significant social media coverage of judicial elections in recent years. Nonetheless, a future study could examine the effect of campaign ads in judicial elections on voter behavior.

197. Crabtree & Nelson, *supra* note 135, at 295.

198. This Article also separately challenges this working assumption. *See infra* Section II.C.

199. *See* Simon & Scurich, *supra* note 131, at 809.

200. *See infra* Appendix A, Tables A.4–8.

disapproval, averaged 60.47% on the approval index, which measures short-term support for the justices.[201] In comparison, respondents in Treatment 1B, who read that the justices acquiesced to public demand, averaged 37.93% on the approval index.[202] Respondents in Treatment 1C, who read that the justices exercised their passive virtues and dismissed the case on procedural grounds, averaged 36.79%.[203] Finally, respondents in Treatment 1D, who read that the justices exercised judicial restraint and issued a minimalist opinion, averaged 59.16%.[204]

As such, there is strong evidence that acquiescing to public pressure or exercising passive virtues to dismiss cases on procedural grounds significantly decreases, rather than increases, public approval of the justices by about 22.54% and 23.35%, respectively ($t = 6.43$, $p < 0.0000$; $t = 7.31$, $p < 0.0000$), compared to engaging in principled legal analysis.[205] Meanwhile, issuing a minimalist opinion neither increases nor decreases the approval ($t = 0.42$, $p < 0.6775$), compared to engaging in principled legal analysis.[206]

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201. *See infra* Figure 1.

202. *See infra* Figure 1.

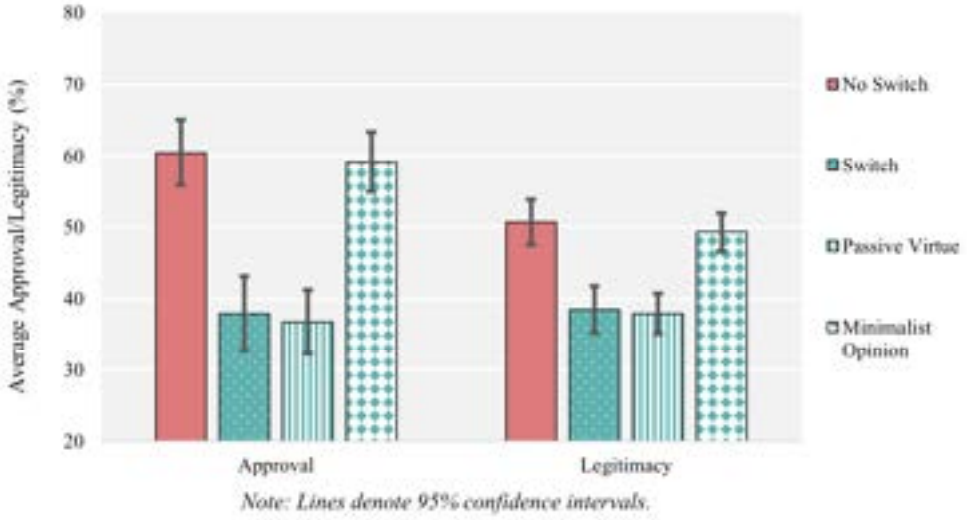
203. *See infra* Figure 1.

204. *See infra* Figure 1.

205. *See infra* Appendix A, Table A.4. Given random treatment assignment and large sample sizes, *t*-tests yield an unbiased estimate of the true effect. The Appendix, however, includes regression models that control for standard demographic characteristics, and other attitudinal variables established in the literature. As noted before, the results do not materially differ when controlling for these variables. *See infra* Appendix A, Tables A.4–5 & A.7. Additionally, the sample was slightly more liberal than the average American. Using post-stratification weights so that the sample of survey respondents reflects the U.S. population does not result in any meaningful difference for this result and all results hereinafter unless otherwise noted. It should be noted, however, that using weighted regressions may result in covariate imbalance for regression analysis. *See, e.g.*, Annie Franco et al., *Developing Standards for Post-Hoc Weighting in Population-Based Survey Experiments*, 4 J. EXPERIMENTAL POL. SCI. 161, 163 (2017); Andrew Gelman, *Struggles with Survey Weighting and Regression Modeling*, 22 STAT. SCI. 153, 163 (2007). As such, weighted samples were used only as robustness checks for regression analysis, not as the main models for analysis.

206. *See infra* Appendix A, Table A.4.

Figure 1. Survey Results for Experiment 1
(Generic Case with No Partisan Implications)



Thus, strategic behavior that panders to public opinion costs the justices significant approval. Meanwhile, exercising judicial restraint, while not decreasing public approval, does not increase approval either, thus offering no clear advantage in terms of public approval while requiring justices to incur a high personal cost of deviating from their usual legal analysis.[207]

Although the primary focus of the Article is on short-term approval of justices, which shapes voting behavior, as opposed to long-term legitimacy of the state supreme court as an institution, the results for short-term approval are replicated for long-term legitimacy. Respondents in Treatment 1A averaged 50.69% on the legitimacy index.[208] In comparison, respondents in Treatments 1B, 1C, and 1D averaged 38.50%, 37.93%, and 49.32%, respectively.[209] The differences in the legitimacy index between the control and Treatments 1B and 1C were 12.19% and 12.76%, respectively, which were both statistically significant ($t = 5.29$, $p < 0.0000$; $t = 5.94$, $p < 0.0000$).[210] The difference between the control and Treatment 1D was

207. *See* Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 824 (2023) (noting both the self-interested and institutional motives underlying a judge's use of personal precedent).

208. *See supra* Figure 1.

209. *See supra* Figure 1.

210. *See infra* Appendix A, Table A.4.

1.38%, which was not statistically significant ($t = 0.66$, $p < 0.5090$).[211] As such, strategic behavior by state supreme court justices appears to undermine the long-term legitimacy of state supreme courts while minimalist opinions do not affect long-term legitimacy relative to principled legal reasoning.

2. Experiment 2

The second experiment examined how decisions in cases with partisan implications affect public approval for state supreme court justices. As the figure below demonstrates, respondents in the control condition, Treatment 2A, who read that the justices disregarded public opinion and followed their usual legal analysis, averaged 69.44% on the approval index.[212] In comparison, respondents in Treatment 2B, who read that the justices acquiesced to public demand, averaged 34.50% on the approval index.[213] Respondents in Treatment 2C, who read that the justices exercised their passive virtues, averaged 37.16%.[214] Respondents in Treatment 2D, who read that the justices exercised judicial restraint, averaged 66.30%.[215] Therefore, as before, there is strong evidence that acquiescing to public pressure or exercising passive virtues to dismiss cases significantly decreases public approval of state supreme court justices by 34.94% and 32.28%, respectively ($t = 10.08$, $p < 0.0000$; $t = 10.20$, $p < 0.0000$).[216] In addition, the difference between the control and Treatment 2D was 3.14%, which is not statistically significant ($t = 1.00$, $p < 0.3175$).[217]

Next, the treatment conditions affected long-term legitimacy in a similar manner. Respondents in Treatment 2A averaged 55.74% on the legitimacy index.[218] In comparison, respondents in Treatments 2B, 2C, and 2D averaged 35.50%, 40.17%, and 53.27%, respectively.[219] The differences in the legitimacy index between the control and Treatments 2B and 2C were 20.23% and 15.57%, respectively, which were both statistically significant ($t = 9.80$, $p < 0.0000$; $t = 7.50$, $p < 0.0000$).[220] The difference between the control and Treatment 2D was 2.46%, which was not statistically significant

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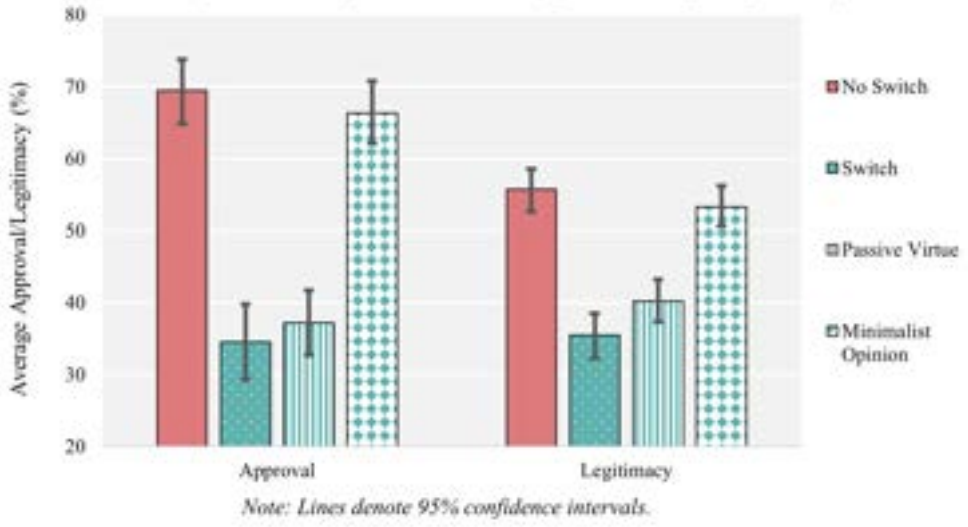
211. *See infra* Appendix A, Table A.4.
212. *See infra* Figure 2.
213. *See infra* Figure 2.
214. *See infra* Figure 2.
215. *See infra* Figure 2.
216. *See infra* Appendix A, Table A.5.
217. *See infra* Appendix A, Table A.5.
218. *See infra* Figure 2.
219. *See infra* Figure 2.
220. *See infra* Appendix A, Table A.5.

(t = 1.20, p < 0.2322).[221] As such, it appears, once again, that strategic behavior that panders to public opinion costs significant short- and long-term support. Meanwhile, exercising judicial restraint neither decreases nor increases public support.

Figure 2. Survey Results for Experiment 2
(Gerrymandering Case with Map Favoring Rep. Party)



As previewed above, an added feature of the second experiment was that it included specific details about the hypothetical case, namely that the state supreme court decision had partisan implications.[222] This added feature, intended to situate respondents in a more realistic setting, as opposed to the Rawlsian vacuum of information provided in the first experiment, allowed me to analyze whether respondents' political ideology affected their view of state supreme court justices, identify which respondents were driving the demonstrated negative effects of the justices' strategic behavior, and also detect which respondents, if any, preferred that justices engage in strategic behavior in a manner that benefitted their political party.[223]

Focusing on the differences in the short-term approval index, I use interaction terms that interact the treatment condition with the respondents'

221. *See infra* Appendix A, Table A.5.
222. *See supra* Section II.A.
223. *See supra* Section II.A.

political ideology.[224] For the statistically inclined reader, I provide figures in the Appendix plotting the marginal effects of political ideology after relaxing the linear interaction effect assumption using a Gaussian kernel estimator for all of my interaction effect analysis.[225] The results are not substantively different from any of the results presented below.

Under the control condition, Treatment 2A, the losing side, in this case the conservatives, viewed the justices approvingly, much like the prevailing side, in this case the liberals.[226] This result, depicted by the mostly level dashed (red) line in Figure 3, indicates that partisanship does not dictate short-term approval for justices when the justices engage in principled legal analysis.[227] I should emphasize that there was no meaningful difference in the level of approval between the most ardent conservative, on the left side of Figure 3, and the most ardent liberal, on the right side of Figure 3.[228] That is, conservatives approved of justices who issued a decision detrimental to the Republican Party as long as the justices engaged in principled legal analysis to arrive at that result.

Meanwhile, in Treatment 2B, when the justices strategically acquiesced to public demand and decided in favor of the Republican Party, partisanship mattered. Conservatives were more approving of the justices than liberals, as seen by the decreasing solid (blue) line.[229] As respondents became more liberal, they were more likely to disapprove of the justices who acquiesced to public demand and ruled in favor of the Republican Party rather than engaging in principled legal analysis. Thus, acquiescing to public demand decreases public approval of state supreme court justices overall by causing the losing side, in this case liberals, to disapprove of the justices' decision-making.

The key comparison for the purposes of this Article, however, is whether approval ratings after the justices acquiesced to public demand, depicted by the solid (blue) line, are higher than the approval ratings after the justices engaged in principled legal analysis, depicted by the dashed (red) line, at any

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224. *See infra* Appendix A, Table A.6. Running the analysis using long-term legitimacy yields the same substantive findings. Results using long-term legitimacy have been omitted for brevity because the focus of this Article is on short-term approval of the judges themselves rather than the court as an institution. *See supra* Section II.A.

225. *See infra* Appendix A, Figures A.1–2. *See generally* Jens Hainmueller et al., *How Much Should We Trust Estimates from Multiplicative Interaction Models? Simple Tools to Improve Empirical Practice*, 27 POL. ANALYSIS 163, 163, 173–75 (2019) (outlining the use of kernel estimators to uncover marginal effects).

226. *See infra* Figure 3.

227. *See infra* Figure 3.

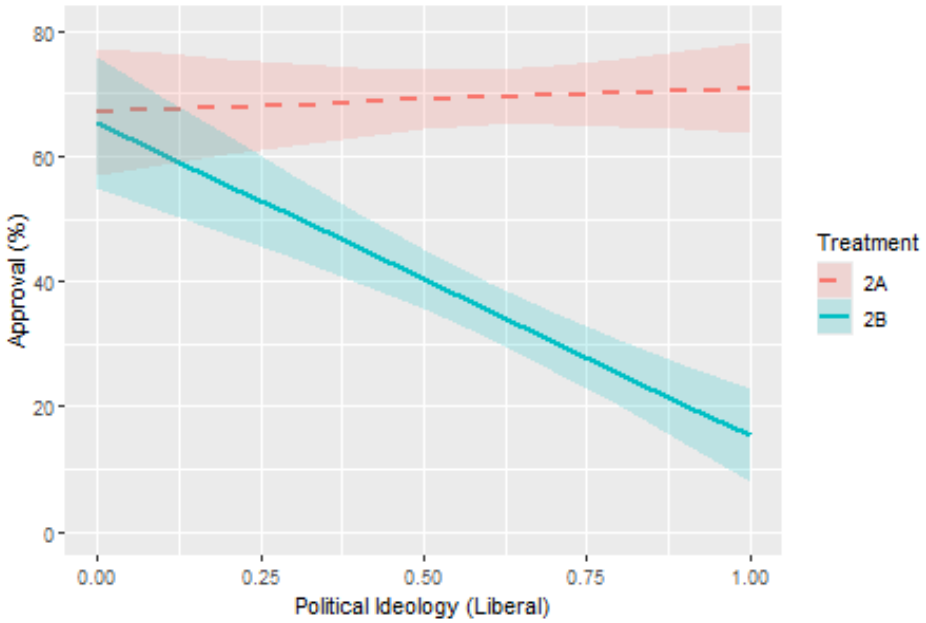
228. *See infra* Figure 3.

229. *See infra* Figure 3.

point along the political spectrum, which would indicate that strategically acquiescing to public demand may help appeal to certain segments of the electorate. In this experiment, the critical question is whether conservatives were willing to credit the justices for acquiescing to public demand in favor of the Republican Party more than conservatives were willing to credit the justices for following their usual legal analysis to the detriment of the Republican Party. If conservatives did so, then it would suggest that the justices' acquiescence to public pressure could be partly justified because it could attract more votes from the conservative segment of the electorate. However, as shown on the left side of Figure 3 and as alluded to above, even the most ardent conservative was not more likely to approve of the justices when they eschewed principled legal analysis and decided in favor of the Republican Party compared to when the justices engaged in principled legal analysis to the detriment of the Republican Party.[230] In other words, acquiescing to public demand while betraying one's judicial philosophy does not bolster the justices' public standing because conservatives will not look upon the justices more approvingly. This point bears repeating. Conservatives do not view justices who decide in favor of the Republican Party at the expense of principled legal analysis more approvingly than justices who engage in principled legal analysis and decide against the Republican Party. Overall, these results indicate that strategically acquiescing to public demand does not increase public approval because those on the losing side will understandably view the justices disapprovingly and those on the prevailing side will not credit the justices sufficiently for the justices' acquiescence even if it benefits their side of the political aisle.

230. *See infra* Figure 3.

Figure 3. Survey Results for Experiment 2 (2A v. 2B) with Interaction Effects



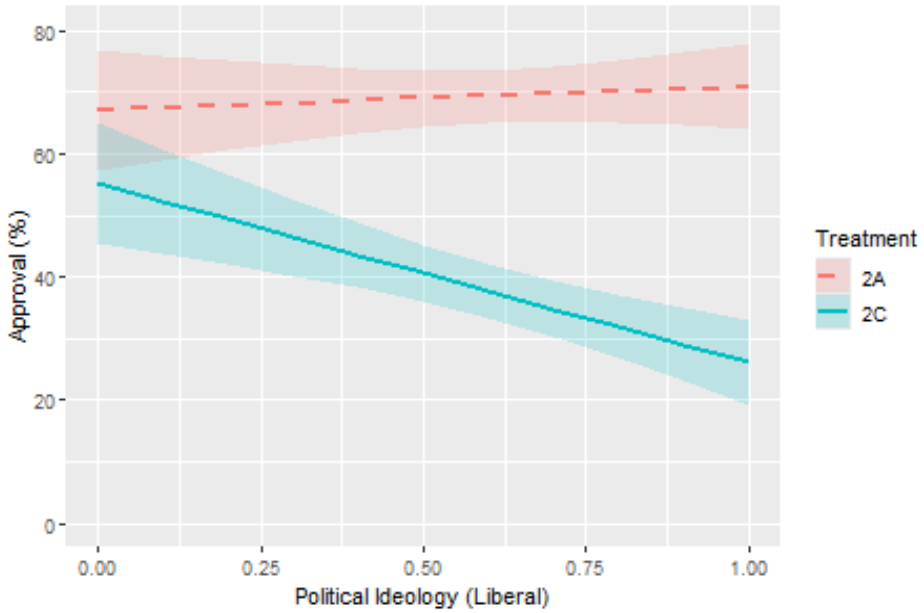
Note: The shaded areas denote 95% confidence intervals.

I arrive at a similar conclusion when the justices exercise their passive virtues. In Treatment 2C, when the justices exercised their passive virtues and allowed the lower court's ruling to stand in accordance with the prevailing public sentiment, the public viewed the justices more disapprovingly relative to the control condition of the justices engaging in principled legal analysis.[231] Breaking down the respondents by partisan ideology, it is evident that liberals understandably viewed the justices more disapprovingly for exercising their passive virtues and reaching a result that favored the Republican Party than if the justices had engaged in principled legal analysis.[232] However, conservatives still did not view the justices more favorably for deciding in the Republican Party's favor relative to if the justices had engaged in principled legal analysis to the detriment of the Republican Party, as seen on the left side of Figure 4.[233] Thus, exercising passive virtues does not bolster the justices' public standing because those on the losing side will view the justices disapprovingly while those on the prevailing side will not credit the

231. *See supra* Figure 2.
232. *See infra* Figure 4.
233. *See infra* Figure 4.

justices sufficiently for strategically exercising passive virtues, even if it benefits their side of the political aisle.

Figure 4. Survey Results for Experiment 2 (2A v. 2C) with Interaction Effects

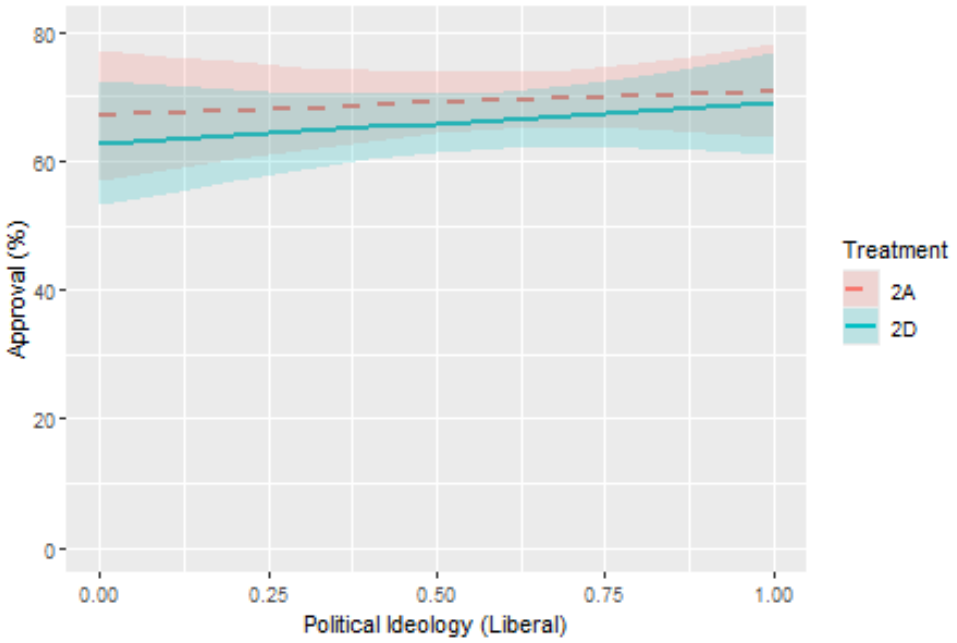


Note: The shaded areas denote 95% confidence intervals.

Finally, turning to Treatment 3D, where the justices exercised judicial restraint and issued a minimalist opinion, the overall result noted above was that such strategic behavior made no statistically significant difference to short-term approval of the justices.[234] That result is further explained by the fact that no one along the entire political spectrum viewed the justices more approvingly when the justices issued a minimalist decision relative to when the justices engaged in principled legal analysis.[235] These results indicate that exercising judicial restraint by issuing a minimalist opinion does not bolster the justices' public standing any more than committing to principled legal analysis at any point along the political spectrum, leaving little incentive for the justices to diverge from their usual legal analysis.

234. *See supra* Figure 2.
235. *See infra* Figure 5.

Figure 5. Survey Results for Experiment 2 (2A v. 2D) with Interaction Effects



Note: The shaded areas denote 95% confidence intervals.

3. Experiment 3

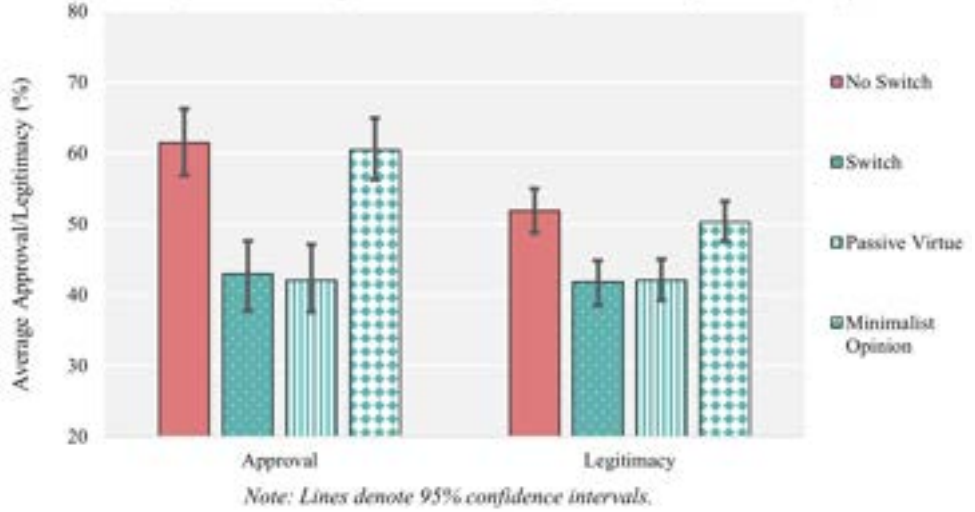
The third experiment also examined how decisions in cases with partisan implications affect public approval of state supreme court justices, and the results here mirror the results from the second experiment, confirming my empirical findings thus far.

As the figure below demonstrates, respondents in the control condition, Treatment 3A, who read that the justices disregarded public opinion and followed their usual legal analysis, averaged 61.45% on the approval index.[236] In comparison, respondents in Treatment 3B, who read that the justices acquiesced to public demand, averaged 42.92%.[237] Respondents in Treatment 3C, who read that the justices exercised their passive virtues, averaged 42.01%.[238] Respondents in Treatment 3D, who read that the justices exercised judicial restraint, averaged 60.39%.[239] Therefore, as before, there is strong evidence that acquiescing to public demand or exercising passive virtues

236. *See infra* Figure 6.
237. *See infra* Figure 6.
238. *See infra* Figure 6.
239. *See infra* Figure 6.

significantly decreases public approval of state supreme court justices by 18.54% and 19.45%, respectively (t = 5.50, p < 0.0000; t = 5.53, p < 0.0000).[240] The difference between the control and Treatment 3D was 1.07%, which was not statistically significant (t = 0.32, p < 0.7471), similar to the results from the first and second experiments.[241]

Figure 6. Survey Results for Experiment 3 (Gerrymandering Case with Map Favoring Dem. Party)



Next, the treatment conditions affected long-term legitimacy in a similar manner as before. Respondents in Treatment 3A averaged 51.87% on the legitimacy index.[242] In comparison, respondents in Treatments 3B, 3C, and 3D averaged 41.83%, 42.05%, and 50.23%, respectively.[243] The differences in the legitimacy index between the control and Treatments 3B and 3C were 10.03% and 9.82%, respectively, which were statistically significant (t = 4.65, p < 0.0000; t = 4.55, p < 0.0000).[244] The difference between the control and Treatment 3D was 1.64%, which was not statistically significant (t = 0.77, p < 0.4432).[245] As before, strategic behavior that panders to public opinion costs the justices significant short- and long-term public support.

240. *See infra* Appendix A, Table A.7.
241. *See infra* Appendix A, Table A.7.
242. *See supra* Figure 6.
243. *See supra* Figure 6.
244. *See infra* Appendix A, Table A.7.
245. *See infra* Appendix A, Table A.7.

Meanwhile, exercising judicial restraint, while not decreasing public support, does not increase support either.

The third experiment also included specific details about the hypothetical case, namely that the state supreme court decision had partisan implications, much like the second experiment, allowing me to explore interaction effects.[246] As noted above, I provide figures in the Appendix plotting the marginal effects of political ideology after relaxing the linear interaction effect assumption using a Gaussian kernel estimator for this experiment as well.[247]

Focusing on the differences in the short-term approval index,[248] under the control condition, Treatment 3A, the losing side, in this case the liberals, viewed the justices approvingly, much like the prevailing side, in this case the conservatives.[249] This result, depicted by the mostly even dashed (red) line in Figure 7, again indicates that partisanship does not dictate the short-term approval for justices when the justices engage in principled legal analysis.[250] In Treatment 3B, when the justices acquiesced to the prevailing public sentiment, liberals were marginally—though not significantly—more approving of the justices than conservatives, as seen by the solid (blue) line.[251]

As noted above, however, the key comparison for the purposes of this Article is whether approval ratings after the justices acquiesced to public demand, depicted by the solid (blue) line, are higher than the approval ratings after the justices engaged in principled legal analysis, depicted by the dashed (red) line, at any point along the political spectrum. In this case, the question is whether liberals were willing to credit the justices for acquiescing to public demand and reaching a result in favor of the Democratic Party more than liberals are willing to credit the justices for following their usual legal analysis and reaching a result to the detriment of the Democratic Party. As shown on the right side of Figure 7, even the most ardent liberal was not more likely to approve of the justices when they acquiesced to public demand and reached a result favoring the Democratic Party compared to when the justices followed principled legal analysis to the detriment of the Democratic Party.[252]

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246. *See supra* Section II.A.

247. *See infra* Appendix A, Figure A.2.

248. *See infra* Appendix A, Table A.8. Running the analysis using long-term legitimacy yields the same substantive findings. As noted before, results using long-term legitimacy have been omitted for brevity because the focus of this Article is on short-term approval of the judges themselves rather than the court as an institution. *See supra* Section II.A.

249. *See infra* Figure 7.

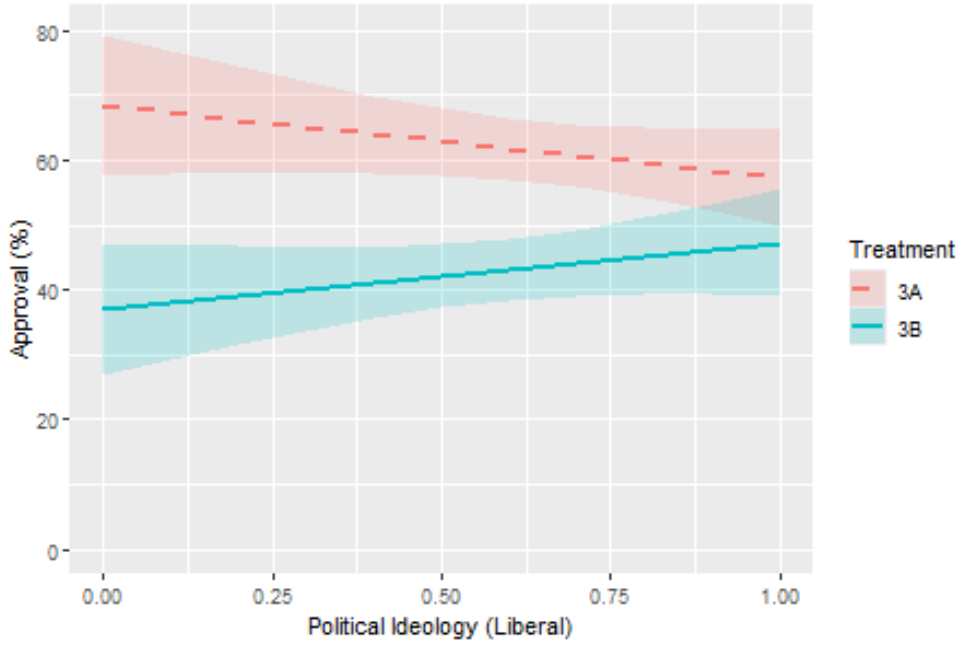
250. *See infra* Figure 7.

251. *Compare supra* Figure 3, *with infra* Figure 7.

252. *See infra* Figure 7.

This point also bears repeating. Liberals do not view justices who acquiesce to public demand and decide in favor of the Democratic Party more favorably than justices who engage in principled legal analysis and decide against the Democratic Party.

Figure 7. Survey Results for Experiment 3 (3A v. 3B) with Interaction Effects

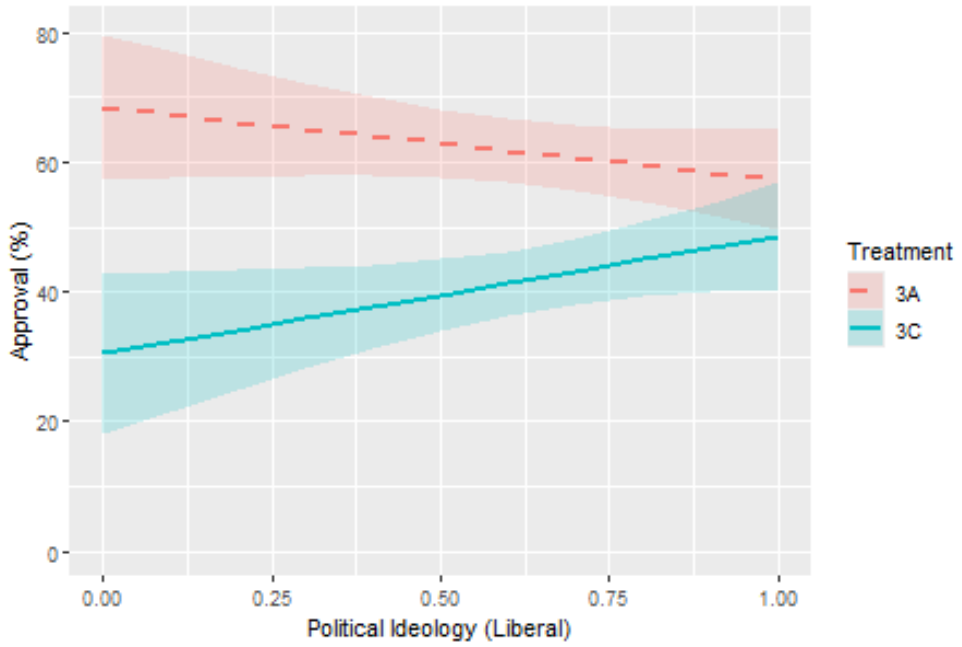


Note: The shaded areas denote 95% confidence intervals

In Treatment 3C, when the justices exercised their passive virtues and allowed the lower court's ruling to stand in accordance with the prevailing sentiment and in favor of the Democratic Party, liberals were more approving of the justices than conservatives.[253] The increasing solid (blue) line in the next figure depicts this result.[254] However, liberals still did not view the justices who exercised their passive virtues in favor of the Democratic Party more approvingly than justices who had instead engaged in principled legal analysis to the detriment of the Democratic Party, confirming the corresponding result from the second experiment.[255]

253. *See infra* Figure 8.
254. *See infra* Figure 8.
255. *See supra* Figure 4; *infra* Figure 8.

Figure 8. Survey Results for Experiment 3 (3A v. 3C) with Interaction Effects

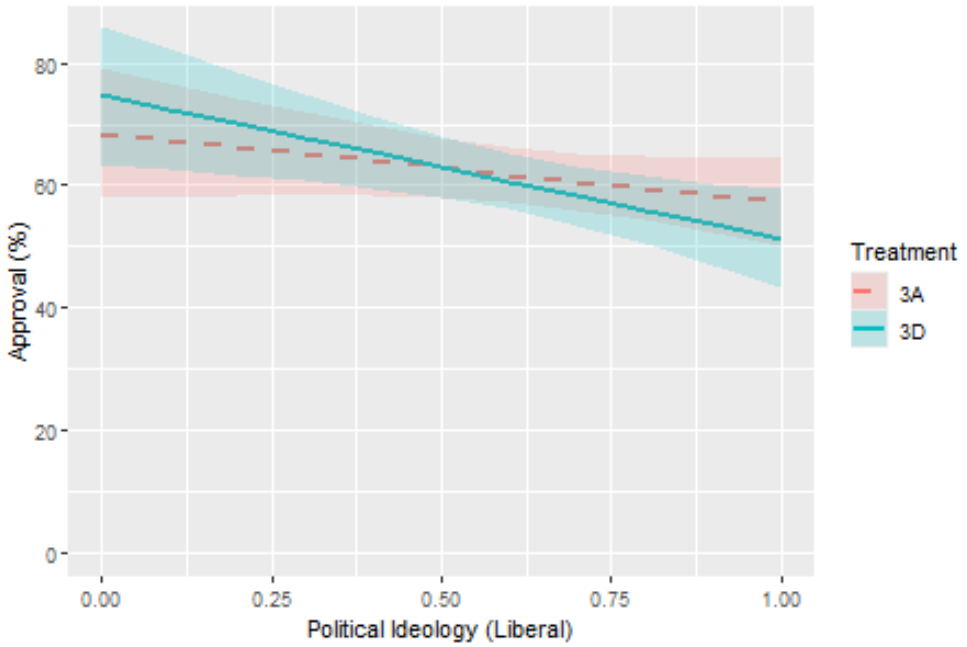


Note: The shaded areas denote 95% confidence intervals.

Finally, turning to Treatment 3D, where the justices exercised judicial restraint and issued a minimalist opinion, the overall result noted above was that such strategic behavior made no statistically significant difference to short-term approval.[256] That result is further explained by the fact that no one along the entire political spectrum viewed the justices more approvingly when the justices issued a minimalist decision relative to when the justices engaged in principled legal analysis.[257] As before, these results indicate that exercising judicial restraint by issuing a minimalist opinion does not bolster the justices' public standing any more than engaging in principled legal analysis.

256. *See supra* Figure 6.
257. *See infra* Figure 9.

Figure 9. Survey Results for Experiment 3 (3A v. 3D) with Interaction Effects



Note: The shaded areas denote 95% confidence intervals.

A final review of the effect of the justices' decision-making on public approval is in order. In short, under no circumstance do the justices benefit more by acquiescing to public demand and avoiding countermajoritarian decisions compared to engaging in principled legal analysis and issuing countermajoritarian decisions. No matter the partisan ideology of different segments of the public whom the justices wish to win over through their jurisprudence, principled legal analysis garners as much, and oftentimes more, public approval as any type of strategic acquiescence intended to avoid issuing a countermajoritarian decision. This is because those who lose out on the justices' strategic behavior understandably view the justices' decision disapprovingly, while those who benefit from the strategic behavior remain unmoved by the justices' decision, even if the decision ultimately benefits their political party.[258] Even at the outer fringes of the political spectrum, the most conservative voters and the most liberal voters, on average, do not strictly prefer that justices behave strategically in their parties' favor rather than engage in principled legal analysis to their parties' detriment.

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258. *See supra* Figures 3–5, 7–9.

Situating these results in the scholarly debate about public perceptions of the judiciary, my findings help refine existing studies about the effect of case outcomes and partisanship on public support. While case outcomes and partisanship do affect public approval as many argue,[259] that effect is conditional on whether the state supreme court has acted in a procedurally unfair manner. If the state supreme court eschews principled legal reasoning and panders to public demand, then case outcomes and partisan loyalties shape public approval. If the state supreme court engages in principled legal reasoning, then case outcomes and partisan loyalties do not dictate public approval. Thus, both sides of the debate are correct. Procedural justice theories are right to the extent that the public's approval of state supreme courts is based on whether the justices are making decisions in a fair and just manner; but if the justices are not, then policy-based theories that emphasize partisan preferences and ideology are right since individual agreement with case outcomes determines the level of approval.[260]

Additionally, my results with respect to legitimacy or diffuse support is surprising given the significant body of scholarship on public opinion of the U.S. Supreme Court, which finds that individual case outcomes do not affect the Court's legitimacy.[261] My findings suggest state supreme courts do not enjoy the same degree of diffuse support as the U.S. Supreme Court such that even a single case may result in a significant drop in legitimacy. It is possible, however, that the observed reduction in legitimacy based on a single displeasing case is temporary. Professors Jeffery Mondak and Shannon Smithey's "value-based regeneration" hypothesis suggests that even when a single displeasing decision undermines public support for the U.S. Supreme Court, support will recover over time due to the common perception of a link between the Court and basic democratic values.[262] It is possible, therefore,

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259. *See supra* notes 131–34 and accompanying text.

260. *See* Woodson, *supra* note 176, at 210–11 (finding that the public's perception of the process judges use to make decisions changes the degree to which partisan preferences shape the public's level of acceptance).

261. *See, e.g.*, Gibson, *supra* note 127, at 515. However, Professors Bartels and Johnston find that individual cases can affect the U.S. Supreme Court's legitimacy. *See* Bartels & Johnston, *supra* note 131, at 194. Professor Gibson notes *Dobbs* may be a single case that has reduced the Supreme Court's legitimacy but suggests that the case may be the proverbial straw that broke the camel's back to the extent that it was the final case in a series of displeasing decisions. Gibson, *Losing Legitimacy*, *supra* note 128, at 1041, 1053.

262. Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1114–15 (1997). *But see* Gibson, *Rulings Linger*, *supra* note 128, at 2 (finding that the erosion of the U.S. Supreme Court's legitimacy after *Dobbs* has persisted).

that the drop in public support of state supreme courts observed here as a result of a single displeasing case is similarly temporary.[263]

4. Factors Shaping Voting Behavior

These results naturally lead us to ask, if voters do not approve of judges who acquiesce to public demand in highly salient cases, then what do voters care about when electing judges? Other than deciding cases based on principled legal analysis in accordance with one's judicial philosophy, are there other factors that voters consider when electing judges?

As noted above, to explore what factors determine voting behavior, the surveys asked all respondents a series of questions to estimate the importance of various factors when electing judges. The figure below summarizes the overall results.[264] As an important side note, the sample was weighed using iterative proportional fitting—more commonly referred to as "raking"—so that the sample reflected the nationally representative sample in terms of age, race, gender, and political ideology.[265] The responses were also converted to a percentage scale for ease of interpretation.

As expected, whether a judge engages in principled legal analysis (84.80%) is far more important than whether a judge considers public opinion (35.67%), confirming the results of the three survey experiments.[266] Relatedly, whether a judicial candidate capably checks the other branches of government (82.73%) is of relatively high importance, similar to whether a

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263. Given the focus of this Article on judicial behavior based on public approval, as opposed to institutional legitimacy, I do not explore this avenue further.

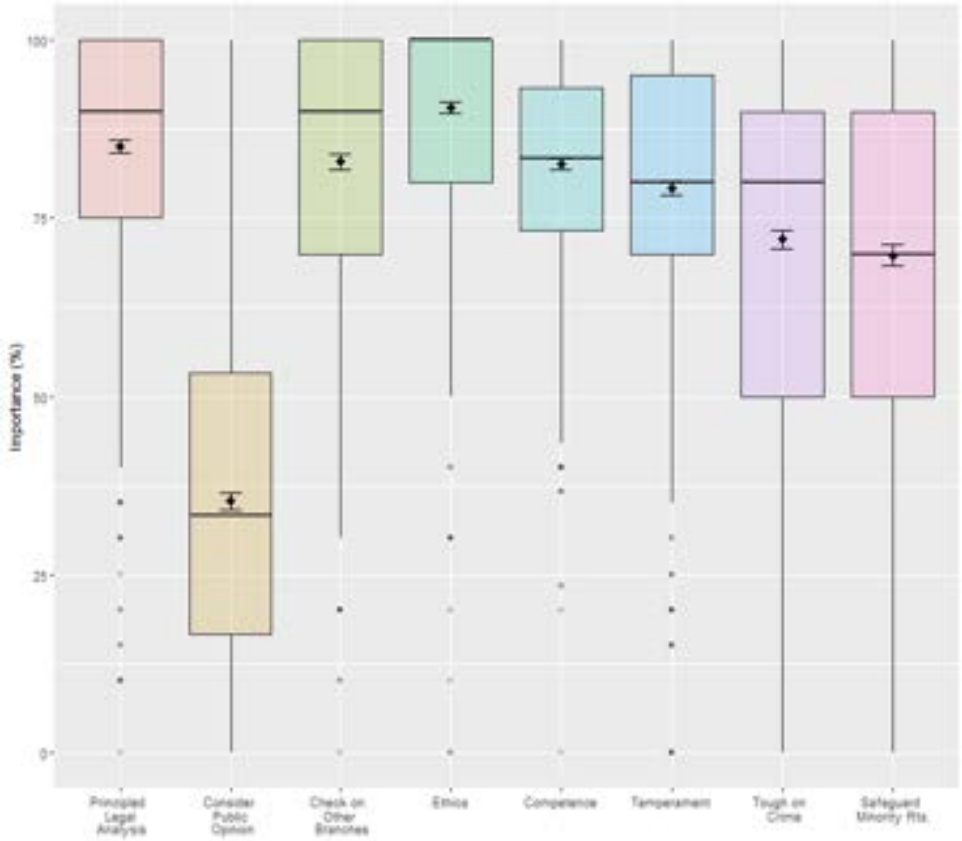
264. *See infra* Figure 10.

265. *See generally* Michael P. Battaglia et al., *Practical Considerations in Raking Survey Data*, 2 SURV. PRAC., no. 5, 2009, at 1. These particular results, however, should be taken with a grain of salt given that raking cannot fully correct for the fact that respondents are drawn from an opt-in sample. Using the unweighted sample results in no meaningful difference in the results other than the importance of the judicial candidates' stance on being tough on crime and safeguarding minority rights. The unweighted sample suggests that respondents valued whether a judicial candidate was willing to safeguard minority rights more than whether the candidate was tough on crime. The Appendix produces the unweighted results, further supporting my point that a candidate's record of crime is not the decisive issue that candidates often assume. *See infra* Appendix A, Figure A.3. Using raking to correct for the fact that the sample is slightly more liberal than the American population, there is no meaningful difference between the two factors. *See infra* Figure 10. Meanwhile, as noted previously, the use of raking or other post-stratification weights is discouraged for regression analysis and is, therefore, not used in other parts of the Article that rely on regression analyses except as robustness checks. *See supra* note 205. Using post-stratification weights as robustness checks results in no meaningful difference for the Article's regression analyses.

266. *See infra* Figure 10.

judge engages in principled legal analysis.[267] In addition, judicial ethics (90.49%), competence (82.37%), and temperament (79.32%) each play an important role in determining voter preferences.[268]

Figure 10. Box and Whisker Plot of Weighted Voting Factors



Note: The box and whisker plot displays the minimum, lower quartile, median, upper quartile, and maximum weighted responses, which have been converted to percentage points. The interquartile range ("IQR"), represented by the box, captures the middle 50% of the responses. The whiskers extend to the smallest and largest values within 1.5 times the IQR. Any points outside the IQR are outliers depicted by dots. The weighted means and their confidence intervals are depicted by the black diamonds and accompanying lines.

267. *See infra* Figure 10.
268. *See infra* Figure 10.

Meanwhile, a judge's stance on specific issues, such as being tough on crime (70.15%) or safeguarding minority rights (70.67%), is significantly less important than the aforementioned factors of high importance.[269] That is, a judge's willingness to be tough on crime or safeguard minority rights is less important than the judge's record of engaging in principled legal analysis, checking the other branches of government, and exhibiting strong ethics, competence, and temperament. And overall, the difference between being tough on crime and safeguarding minority rights is not statistically significant ($t = 0.52$, $p < 0.6010$), suggesting that judges are unnecessarily preoccupied with appearing to be tough on crime rather than safeguarding minority rights.[270]

C. Media Coverage of Judicial Elections

Next, to test whether judicial elections are high-salience affairs inviting greater media coverage and broad public participation in this new era of judicial elections, I compiled all online media coverage of judicial elections for two years after the Court's decision in *Dobbs* from June 28, 2022, to June 27, 2024.[271] Given the influx of campaign spending and the increasing importance of state court judges in deciding polarizing partisan issues in the wake of *Dobbs*, a review of all online media coverage of judicial elections since *Dobbs* provided an opportunity to help determine whether judicial elections are now more salient events, identify which judicial elections have captured the public's attention, and analyze factors that may shape voter behavior in such elections.

In terms of methodology, I collected all online media coverage of judicial elections using a media aggregation tool known as Brandwatch, which is available in the Atlas Lab at the University of Florida College of Journalism and Communications.[272] In brief, Brandwatch scrapes news stories from all online news media websites, such as *Fox News*, *CNN*, and *The New York Times*, as well as any posts on popular social media platforms and forums, such as X (formerly Twitter), Facebook, and Tumblr, thereby providing a

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269. *See supra* Figure 10.

270. *See supra* Figure 10.

271. *Dobbs* was issued on June 24, 2022. 597 U.S. 215 (2022).

272. *See generally Tools and Technology*, UNIV. FLA. COLL. JOURNALISM & COMMC'NS: ATLAS LAB, https://wwwtest.jou.ufl.edu/atlas-lab-technology [https://perma.cc/3HP2-2WQ2]. For further description of the scraping methodology used by Brandwatch, see Itai Himelboim et al., *Integrating Network Clustering Analysis and Computational Methods to Understand Communication with and About Brands: Opportunities and Challenges*, 53 J. ADVERT. 296 (2022).

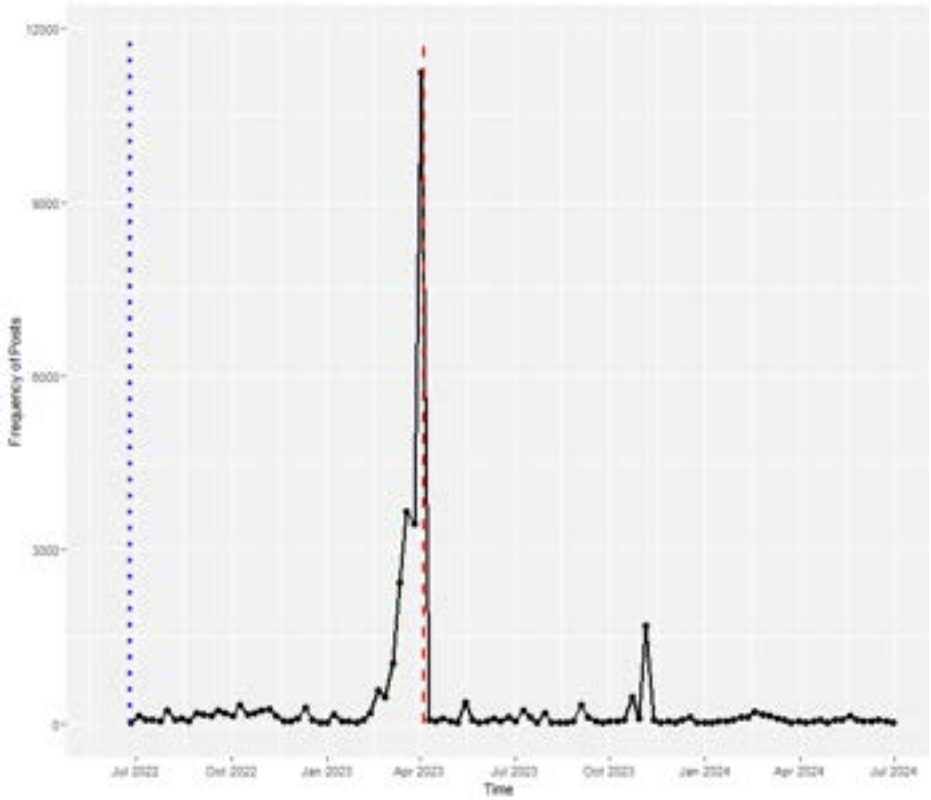
sense of how significant or "viral" a particular event was in the public's consciousness. To compile the relevant media coverage, a targeted query collected all media coverage in the U.S. that used any variation of the terms "vote for," "vote against," "elect," "reelect," "retain," "judge," or "justice," while omitting any posts discussing the U.S. Supreme Court justices, who are not pertinent to judicial elections.[273] The query yielded a total of 41,116 articles and posts. A timeline of the results is shown in the figure below.[274] Only one judicial election captured the American public's attention: the 2023 Wisconsin Supreme Court election.[275]

273. The search query omitted prominent sports figures such as Major League Baseball ("MLB") players Aaron Judge and Rafael Marchán, who otherwise would have appeared in the search results because they were popular candidates for MLB awards that depended on fan voting. The search query also omitted the words "judge overturns election," "election oversight," and "Trump" since those words would have yielded impertinent results related to the oversight of the U.S. presidential election.

274. *See infra* Figure 11.

275. The only other possible election that drew even a little media attention was the Pennsylvania state Supreme Court election on November 7, 2023, but the attention it received is dwarfed by the attention surrounding the Wisconsin election. *See infra* Figure 11.

Figure 11. Frequency Distribution of Media Coverage of State Court Elections in the Two Years Following the *Dobbs* Decision



Note: The vertical dotted line indicates the date Dobbs *was issued—June 24, 2022. The vertical dashed line indicates the date of the Wisconsin Supreme Court election—April 4, 2023.*

The 2023 Wisconsin Supreme Court election featured the incumbent, Justice Daniel Kelly, against the challenger, now-Justice Janet Protasiewicz.[276] The election took place on April 4, 2023, and Justice Protasiewicz emerged as the eventual winner.[277] Like many state supreme court elections during the two-year period, the Wisconsin election had the potential to determine the future of reproductive rights and partisan gerrymandering in the state by shaping the makeup of the state supreme

276. Reid J. Epstein, *Liberal Wins Wisconsin Court Race, in Victory for Abortion Rights Backers*, N.Y. TIMES (Apr. 4, 2023), https://www.nytimes.com/2023/04/04/us/politics/wisconsin-supreme-court-protasiewicz.html.

277. *Id.*

court.[278] The online news media and social media coverage of the election depicted a partisan battle between the conservative Justice Kelly and the liberal Justice Protasiewicz.[279] This framing obviously runs counter to my survey results indicating that voters are less interested in a judicial candidate's stance on particular issues and more interested in the candidate's record of engaging in principled legal analysis, disregarding public opinion, checking the other branches of government, and exhibiting strong ethics, competence, and temperament.

However, it is important to recognize how unusual the Wisconsin election actually was compared to all the other judicial elections during the period in question. Critically, no other judicial election in the two-year period generated significant attention.[280] Taken as a whole, the compilation of all online news media coverage reveals that an overwhelming majority of judicial elections are still low-salience affairs.[281] In fact, there were a total of eighty-six seats on state supreme courts up for election during the two-year period following *Dobbs*, and only one captured the public's attention.[282] Furthermore, only four seats switched party affiliations, and the other three races drew little media attention.[283]

One possible reason the Wisconsin election drew so much attention (when other judicial elections have not) is because Wisconsin holds off-cycle elections for its supreme court justices, whereas most other states hold

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278. *See id.*

279. *See id.*

280. *See supra* Figure 10.

281. *See supra* Figure 10.

282. *See State Supreme Court Elections, 2022*, BALLOTPEDIA, https://ballotpedia.org/State_supreme_court_elections,_2022 [https://perma.cc/65RY-E5VT]; *State Supreme Court Elections, 2023*, BALLOTPEDIA, https://ballotpedia.org/State_supreme_court_elections,_2023 [https://perma.cc/R389-TFMP].

283. Apart from the well-publicized Wisconsin election, two of the seat-flipping elections were in North Carolina, with Richard Dietz defeating Lucy Inman, and Trey Allen defeating Sam Ervin IV. Hannah Schonenbaum, *Republicans Retake Control of North Carolina Supreme Court*, ASSOCIATED PRESS (Nov. 9, 2022, 10:59 AM), https://apnews.com/article/north-carolina-state-courts-supreme-court-government-and-politics-176517442f012865f93d56e9c2827755 [https://perma.cc/YCM2-FMQA]. The other election was in Illinois, in which Mary Kay O'Brien defeated Michael Burke. John Garcia, *Democrats Elizabeth Rochford, Mary Kay O'Brien Declare Victory in Illinois Supreme Court Races*, ABC NEWS (Nov. 9, 2022), https://abc7chicago.com/illinois-supreme-court-justices-ballot-judges/12434220 [https://perma.cc/ZLR2-QUC9]. It should be noted that the percentage of defeated state supreme court justices in this two-year span was 4.7%, which is a slight uptick from the 1.7% of state supreme court justices defeated in decades past—though the uptick is not substantively significant given the small number of justices who were defeated. *See* Devins & Mansker, *supra* note 28, at 465 (noting that only 1.7% of state supreme court justices were defeated in retention elections between 1990 and 2000).

elections for their supreme court justices alongside other candidates for office.[284] With other statewide legislative and executive offices capturing the majority of the public's attention in other on-cycle judicial elections, there was little attention given to judicial candidates, allowing judicial elections to remain in relative obscurity in those states. Alternatively, it is possible that Justice Protasiewicz's comments during her campaign about how she would decide cases related to abortion and redistricting—considered by some to be a violation of the state judicial code—attracted an unusual amount of media attention; without such atypical candidate statements, the election could have been another low-salience affair.[285] Thus, despite some suggestions that judicial elections are becoming more partisan and that donors are spending more money,[286] an overwhelming majority of judicial elections still fail to generate significant traditional news media coverage or social media interest, indicating not only voter disinterest but also little need for most judges to fear public backlash for countermajoritarian decisions.

The lack of significant traditional news media coverage and social media interest, despite increases in campaign spending and the elevated importance of state courts, indicates that the American public's interest in judicial elections remains a distant priority, giving judges the leeway to decide cases according to their usual legal analysis without fear of electoral backlash.[287] The lack of social media attention also suggests the ineffectiveness of campaign ads for judicial candidates in capturing the public's attention. And if voters take an interest in judicial elections, then my surveys suggest that a judge's record of engaging in principled legal analysis, disregarding public opinion, checking the other branches of government, and exhibiting strong ethics, competence, and temperament should be the driving factors most of the time, rather than the judge's stance on particular issues.

It is possible, of course, that the lack of attention is because judges have acquiesced to public demand, and if judges were to not acquiesce to public demand, then attention would increase. However, with each decision on

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284. *See* Matt Cohen, *Consequential State Elections to Watch In 2025*, DEMOCRACY DOCKET (Dec. 12, 2024), https://www.democracydocket.com/analysis/consequential-state-elections-to-watch-in-2025 [https://perma.cc/6QSE-S43M] (describing upcoming off-cycle state elections, including Wisconsin's 2023 supreme court judicial election).

285. Scott Bauer, *Complaints over Campaign Comments by Wisconsin Supreme Court Justice Are Dismissed*, ASSOCIATED PRESS (Sept. 6, 2023), https://apnews.com/article/wisconsin-supreme-court-impeach-865fadb85762b0039490f218da3b8db8 [https://perma.cc/QP6X-ZFXC].

286. *See* Baum, *supra* note 4, at 16–17; Lerner, *supra* note 11, at 111; Pozen, *supra* note 4, at 267–68; Frost & Lindquist, *supra* note 3, at 733.

287. *See* Keith, *supra* note 78 (describing significant campaign spending in recent state supreme court elections).

controversial social issues, there will likely be a significant contingent of voters who will be displeased no matter how a judge decides. And yet judges who have decided such cases during the period in question do not appear to have generated significant media interest, again suggesting that voters appear to be focusing their attention elsewhere, namely elections for other political offices as opposed to judicial elections.[288]

Whether the trend of low-salience judicial elections will continue in the long term is unclear. As noted above, there have been significant increases in campaign spending in judicial elections, and the 2023 Wisconsin Supreme Court election provides one, albeit unique, instance of a salient, issue-driven judicial election.[289] However, as Professor Kritzer notes, the increased campaign spending in judicial elections is still relatively modest when compared to the growth in campaign spending in other elections.[290] In fact, the increased spending in judicial elections appears to be a byproduct of increased spending in all elections and relatively minor compared to the significant growth in campaign spending in other partisan elections for legislators and executive officers.[291]

Nevertheless, even if more judicial elections become highly partisan and issue-driven and voters begin to pay more attention, changing the landscape of judicial elections nationwide, the important takeaway from the survey experiments is that judges, once elected, may still pay a significant cost if they betray their judicial philosophy to follow shifting political winds. That is, if judges are elected in salient, issue-driven elections and voters prefer certain policy outcomes contrary to the outcomes dictated by the judges' principled legal analysis, then the surveys, which took place in the same politicized environment post-*Dobbs*, demonstrate that judges still have a strong reason to use principled legal analysis and issue countermajoritarian decisions without regard to the prevailing public sentiment.[292] Media reports of acquiescence to public preferences that are made more visible in such

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288. *See infra* Section III.B (discussing at least one case in which the public disagreed with the outcome of a controversial case, still reelected the justices who decided the case, and instead overturned the decision through a constitutional amendment).

289. *See* Keith, *supra* note 78.

290. KRITZER, *supra* note 43, at 135–37.

291. *Id.*; *see also id.* at 129 (arguing that when "controlling for the type of election that is used, there has been relatively little net change since the 1940s in terms of whether incumbents in state supreme court elections face competition or defeat, or whether open elections involve highly competitive races" and noting that after "[l]eaving aside the broad changes that have occurred in the southern states, the picture that emerges from this analysis [of judicial elections in the U.S. as a whole] is, perhaps surprisingly, one of relative stability").

292. *See supra* Section II.A. As previously noted, the surveys took place within two years of the *Dobbs* decision.

issue-driven elections will undermine an acquiescing judge's reelection efforts. Incidentally, an effective strategy for a judicial candidate's opponent in such an election may be to highlight the judge's acquiescence, if any, as opposed to their stance on social issues.

III. EXPLANATIONS FOR PUBLIC EXPECTATIONS

The empirical findings reveal that the American public, somewhat counterintuitively, approves of judges who decide cases according to their judicial philosophy, even if such decision-making results in outcomes with which the public disagrees. This next Part explores the reasons why the public behaves in such a manner.

A. Norm Internalization

A review of the respondents' open-ended responses explaining their reasoning demonstrates that this behavior is driven primarily by the public's recognition that the judiciary occupies a fundamentally different role compared to other elected representatives. The public appears to have internalized the norm that judges, even though they are elected, are supposed to be faithful to the state constitution rather than to the people who elected them. The public appreciates the unique responsibility of the judiciary, as the recognized experts in the law, to adjudicate the constitutionality of statutes. Moreover, this norm appears to have prevailed despite the divisiveness of modern American politics.[293]

For instance, one respondent noted their disapproval of the state supreme court justices' decision to acquiesce to public demand, stating that "the case should have been decided according to the law, regardless of how the public would react to the judgment. [J]udges are supposed to apply the law fairly and accurately and not take political results into consideration. [T]hey should be judges and not just political hacks."[294] In fact, this theme of a judge's duty to impartially interpret the constitution was the respondents' modal explanation for their reasoning: "The job of the court is to rule on whether things are constitutional or not[;] they are not supposed to get involved with

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293. This finding is in line with scholarship suggesting that the public has a relatively sophisticated understanding of our system of governance and appreciates the unique role of the judiciary. *See* Gibson, *supra* note 127, at 507, 532 (noting the public's "relatively sophisticated understanding" of our system of government and the role of courts, albeit before the increasing divisiveness of modern American politics).

294. Survey Reply, Respondent #7 (on file with author).

the popular opinion or politics in general. I am disappointed in their inability to do the job they were elected to do."[295] Similarly, another respondent explained their disapproval by highlighting the role of the judiciary: "Their primary sworn duty is to uphold the State and U.S. Constitution. That is what they are elected to do, not to cave to public pressure or ensure that they are reelected. Therefore, this decision blatantly violates their oath of office and the basic tenets of judicial responsibility."[296] On the flip side, a respondent who read that the justices were not swayed by public opinion stated approvingly, "I think they did their jobs as they were supposed to do. They are not supposed to be swayed by public opinion but must uphold the law[,] and that is what they did in this case."[297]

A related theme in the open-ended responses explaining some respondents' disapproval of justices who acquiesced to public opinion was the belief that the justices were appealing to the public in order to secure reelection. One respondent noted, "The people elected these judges to uphold the law. In this story, it is the complete opposite—as these judges are basing their decision on public opinion/the majority. It seems the judges may be doing this to [safeguard] their position."[298] Another respondent explained, "If a law is unconstitutional based on legal analysis and precedent, the justices should have deemed the law unconstitutional. However, in this instance, the justices were swayed by public opinion and by the fear of losing their jobs come their next election."[299] The treatment conditions did not mention that the justices were facing an upcoming reelection, which meant that respondents were independently making the connection between the justices' acquiescence to public demand and the justices' reelection concerns. These unprompted connections make evident that the public dislikes judges who pander to the electorate for the sake of their reelection, and these results further demonstrate how the constitutional role of judges is deeply ingrained in the American psyche.

Additionally, respondents who read that the justices exercised passive virtues to avoid hearing the case on procedural grounds explained their disapproval by noting that the exercise of passive virtues appeared to be a bad faith attempt by the justices to appease public demand by sidestepping their constitutional duty to decide cases on the merits. As one respondent reasoned, "If a law was determined to be unconstitutional by the justices, then they

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295. Survey Reply, Respondent #25 (on file with author).
296. Survey Reply, Respondent #1204 (on file with author).
297. Survey Reply, Respondent #50 (on file with author).
298. Survey Reply, Respondent #30 (on file with author).
299. Survey Reply, Respondent #66 (on file with author).

[should] have ruled it as so. The fact that they chose to dismiss the case tells me that they care more about the opinion of the public rather than making valid decisions."[300] Other respondents who received the passive virtues treatment similarly reasoned that the justices appeared to be more concerned about winning their next reelection than fulfilling their constitutional duty. "They didn't make a decision. They were more worried about their reelection than they were about following the law."[301] Another respondent commented, "[t]hey did not decide on the case[;] they merely refused to acknowledge it due to their anticipated re-election campaigns. Had they had the courage to enforce the constitution and take the case on, I would have more respect for them. They simply just passed the buck."[302] These explanations again demonstrate the deep internalization of the norm that judges should be deciding cases, not avoiding them or otherwise appeasing public opinion.

Thus, while the American public may demand other elected officials to faithfully represent the will of the people, it does not expect nor demand to the same degree that judges do the same. While partisan ideologies do result in some differences in cases with political implications as explained above, the gains in approval from partisan winners are not large enough to offset the significant loss of support along the rest of the political spectrum because the public expects judges to serve as a check on the will of the people, sometimes issuing unpopular decisions. Thus, despite what judges evidently assume about the public, it is when judges fail to engage in principled legal analysis and instead try to appease public demand at the expense of principled legal reasoning that the public disapproves of judges.

B. Alternative Means of Reform

The open-ended responses also consistently raised a second reason for why the public approved of judges issuing countermajoritarian decisions, even if it resulted in decisions with which the public disagreed. Respondents recognized that there were relatively easier alternative means of reform—state constitutional amendments—which meant that the public did not need elected judges to acquiesce to public demand in order to achieve their desired policy outcomes.

For instance, several respondents spoke of the ease with which state constitutions could be amended. "The ruling should abide by the state constitution. If the public disagrees with the constitution[,] then [it] should be

300. Survey Reply, Respondent #94 (on file with author).
301. Survey Reply, Respondent #108 (on file with author).
302. Survey Reply, Respondent #380 (on file with author).

change[d]. The Texas constitution is changed quite frequently. The job of the [Texas] Supreme Court is not bowing to public opinion."[303] Another respondent explained, "[The justices'] one duty is to interpret and uphold the constitution, and they failed to do so, worrying more about public opinion and re-election. If public opinion isn't in agreement, the constitution should be amended."[304] Similarly, one respondent noted, "The court's job is to uphold the state's constitution, not do what is popular in the moment. If the ruling is that unpopular[,] the public has the right to amend the constitution so it better reflects their wishes."[305] Yet another respondent stated, "The state constitution is the law[,] and if the judges and people of the state don't agree with it, then the constitution needs to be changed."[306] Another respondent who read that the justices engaged in principled legal analysis spoke approvingly of the justices' decision, noting the possibility of other avenues of reform:

> [I] can understand the desire to allow legislature [sic] that the general public feels favorably about, considering they are essentially public servants of democracy. But I also support the decision to ultimately align with the constitution. [I]f something in or about the constitution needs to be changed then that should be done through and by the proper avenues.[307]

In short, a recurring theme throughout the responses was the possibility of state constitutional amendments, which obviated the public's need to effectuate change through favorable judicial rulings. This finding makes sense considering the frequency of state constitutional amendments. Many states have popular referenda and ballot initiatives that enable constitutional amendments through direct democracy. The fifty state constitutions have together been amended more than 7,400 times.[308] In comparison, the U.S. Constitution has been amended only seventeen times since the Bill of Rights was ratified.[309] Furthermore, only three of the seventeen amendments overruled U.S. Supreme Court decisions while state constitutional amendments frequently overrule or preempt state supreme court decisions.[310] In the words of Professor Devins, state constitutions have the appearance of "super legislation" and not "sacred texts" given the relative ease with which

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303. Survey Reply, Respondent #581 (on file with author).
304. Survey Reply, Respondent #1260 (on file with author).
305. Survey Reply, Respondent #829 (on file with author).
306. Survey Reply, Respondent #837 (on file with author).
307. Survey Reply, Respondent #514 (on file with author).
308. Devins & Mansker, *supra* note 28, at 459–60.
309. *Id.*
310. *Id.* at 460.

they can be amended through popular demand.[311] Relatedly, Professor Jonathan Marshfield argues that frequent state constitutional amendments, or "amendomania," is an unsurprising manifestation of the people correcting errant state court opinions in accordance with state constitutional design.[312] Thus, from the perspective of the public, given the availability of alternative avenues to correct court decisions with which it disagrees, the public does not need to insist that judges issue majoritarian decisions or vote out judges who fail to do so.[313]

As an illustrative example, in 2006, the Missouri Supreme Court held in *Weinschenk v. State* that a state law requiring voters to have photo identification violated the state constitution's equal protection clause.[314] Although the decision was highly unpopular among Missouri voters, who had advocated for the legislature to pass the legislation, they did not vote out the five active jurists who had issued the per curiam decision—Chief Justice Michael A. Wolff and Judges Ronnie L. White, Laura Denvir Stith, Richard B. Teitelman, and Nancy Steffen Rahmeyer.[315] In fact, all of the jurists who sought a retention election afterward won their retention bids, and the voters instead turned their attention to a constitutional amendment through a ballot

311. Devins, *supra* note 9, at 1642. Professor Devins further notes that on select issues, such as the death penalty and same-sex marriage, voters and lawmakers often pursue constitutional change to overturn judicial decision-making. *Id.* at 1666. It should be noted that judges in states where voters can more easily push through constitutional amendments may be incentivized to be more attentive to public demand for fear of being overruled through constitutional amendments than in states with harder-to-amend constitutions. *See* Devins & Mansker, *supra* note 28, at 471. However, the results of this Article suggest that even in such states, judges should not yield to public demand and attempts to do so may backfire. *See infra* Section IV.C.

312. Marshfield, *supra* note 44, at 926–27 ("[T]he amendomania that characterizes contemporary state constitutional politics might be a natural continuation of state constitutional design. Rather than indicating dysfunction, it might indicate that state constitutional rights are functioning exactly as designed."); *see also* John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 984 (2007) (noting that state constitutional amendments have often been adopted in response to court decisions).

313. Marshfield, *supra* note 44, at 927.

314. 203 S.W.3d 201, 221–22 (Mo. 2006).

315. In Missouri, only the Chief Justice is referred to as "Chief Justice" while the other jurists are referred to as "Judges." *See* MO. CONST. art. V, §§ 2, 8. Senior Judge Charles Blakey Blackmar sat by designation in the case and was not up for reelection as an active judge. Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1, 34 n.195 (2016). Missouri Court of Appeals Judge Nancy Steffen Rahmeyer also sat by designation and was not a member of the Missouri Supreme Court. *Id.* Judge Stephen N. Limbaugh Jr. filed the lone dissent. *Weinschenk*, 203 S.W.3d at 222.

initiative.[316] On November 8, 2016, Missouri voters overwhelmingly approved Amendment 6, which amended the state constitution to require voter identification to cast a ballot, effectively overruling the Missouri Supreme Court decision.[317]

Furthermore, the survey respondents' implicit reliance on alternative means to reform, as opposed to insistence on majoritarian decisions, also makes sense when considering the fact that in many retention election states, when judges lose their reelection campaigns, voters cannot guarantee the investiture of a judge who will decide cases in the manner that they want. In states where the governor appoints a new judge whenever there is a vacancy, the public cannot be assured that the newly appointed judge will decide cases in a manner that reflects public preferences.[318] Thus, the difficulty of effectuating change through judicial elections and the ease with which the public can bring about change through direct democracy decrease the public's need to insist on majoritarian decisions. In sum, the open-ended responses focusing on other relatively easy means of enacting reform explain why judges have little reason to fear public demand when deciding cases.

Finally, it should be noted that it is relatively difficult to amend the U.S. Constitution and state courts are also tasked with protecting federal constitutional rights. One might argue that voters do not have an easy way to secure their federal constitutional rights if elected state judges decide against their policy preferences with respect to federal constitutional issues; such voters might then take out their frustration on elected judges based on their decisions regarding federal constitutional rights. However, the U.S. Constitution is meant to be the floor for rights and liberties, and those dissatisfied with an elected judge's interpretation of the U.S. Constitution and subsequent lack of sufficient civil liberties protections can amend and have

316. The two judges who pursued a retention election both won their reelection bids. Judge Stith won her subsequent retention election in 2014. *See* Judge Laura Denvir Stith, MO. CTS., https://www.courts.mo.gov/page.jsp?id=183 [https://perma.cc/R9LC-7MES]. Judge Rahmeyer also won her retention election in 2014. *See* Nancy Steffen Rahmeyer, BALLOTPEDIA, https://ballotpedia.org/Nancy_Steffen_Rahmeyer#cite_note-3 [https://perma.cc/D9TL-YHFC]. Chief Justice Wolff retired from the bench. *See* Judge Michael A. Wolff, MO. CTS., https://www.courts.mo.gov/page.jsp?id=131635 [https://perma.cc/A2UW-P677]. Judge White was nominated to the U.S. District Court for the Eastern District of Missouri. *See* Ronnie L. White, BALLOTPEDIA, https://ballotpedia.org/Ronnie_L._White [https://perma.cc/6KPX-U4N7]. Judge Teitelman passed away before his subsequent retention election, which he would not have been eligible for anyway due to the mandatory retirement age. *See* Judge Richard B. Teitelman, MO. CTS., https://www.courts.mo.gov/page.jsp?id=132414 [https://perma.cc/NLQ4-CQWM].

317. Election Results, Sec'y of State of Mo., at 42 (Dec. 7, 2017), https://www.sos.mo.gov/CMSImages/ElectionResultsStatistics/2016GeneralElection.pdf [https://perma.cc/VN7K-HM8Y].

318. *See* Geyh, *supra* note 75, at 1472–73.

amended their state constitutions to better secure their desired rights and liberties through state constitutional provisions, rather than trying to defeat the judge at the ballot box, again stressing the importance of easily amendable state constitutions.[319]

IV. IMPLICATIONS FOR THE ELECTED JUDICIARY

A. The Preventable Majoritarian Difficulty

These findings have several far-reaching implications. First, judicial elections still appear to be, for the most part, low-salience affairs. Second, even if voters pay attention, voters do not appear to be using judicial elections to evaluate judges based on whether the judges decided cases according to the voters' preferences; voters instead seem to focus on other factors such as principled legal analysis, willingness to check the other branches of government, ethics, competence, and temperament, so judges should not simply yield to majority preferences when deciding cases.

The majoritarian difficulty, to be clear, does not assume that the public will punish judges for issuing countermajoritarian decisions. Rather, the majoritarian difficulty assumes that judges *act as if* the public will punish judges for issuing countermajoritarian decisions. While empirical studies demonstrate that judges have done so in the past—and may be further incentivized to do so in the new era of judicial elections—this Article's findings demonstrate that judges have little reason to do so. Most elections are low-salience affairs, attracting little attention and thereby obviating the need for judges to be unduly concerned with public backlash.[320] Moreover, even when exposed to news articles of salient cases, voters appear to prefer that judges engage in principled legal analysis. Even the most partisan segments of the electorate who would benefit from judges acquiescing to their demands do not strictly prefer that judges acquiesce. Put differently, the fact that judges sometimes yield to public opinion or consider public opinion in their rulings is built on a false assumption about voter behavior. And if more elected judges recognized that the voting public might not punish judges for issuing countermajoritarian decisions, the majoritarian difficulty may be preventable.

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319. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503–04 (1977) (explaining how vigorous, self-conscious state constitutionalism can expand rights and liberties beyond the floor established by the U.S. Constitution).

320. *See supra* Section II.C.

Also, as noted above, much of the empirical scholarship on judicial behavior focuses on elected judges' tendency to be tough on crime to appeal to voters.[321] However, my analysis regarding the determinants of voter behavior shows that while being tough on crime is a somewhat important characteristic among voters, averaging 79.15% on a scale from 0% to 100%, that figure is statistically indistinguishable from the importance of safeguarding minority rights, which averaged 70.67% on the same scale.[322] The lack of any meaningful difference is especially notable because being tough on crime often comes at the cost of safeguarding minority rights, and at least in the abstract, the public values the safeguarding of minority rights as much as being tough on crime.

Furthermore, a judge's stance on criminal sentencing and safeguarding minority rights is far less important than other characteristics, such as their record of engaging in principled legal analysis or checking other branches of government, as well as personal characteristics commonly associated with judging, such as strong ethics, competence, and temperament.[323] While future research using nationally representative samples could further highlight the importance of a judge's stance on other issue areas or how interest groups' focus on criminal sentencing could be affecting judges' false perceptions of voter interest, these findings shed light on how judges may be unnecessarily focusing on crime or other controversial issue areas as bellwethers driving voter behavior.[324]

As an important side note, the tendency of elected judges to favor lengthy criminal sentences appears to be driven by the partisan debate about crime and the possibility of opposing candidates posturing to capitalize on any leniency.[325] Professor Shepherd, for instance, finds that the effects of electoral pressures on judicial decision-making are significantly weaker in nonpartisan elections in which there are no partisan labels.[326] The fact that the effect of electoral pressure on criminal sentences is smaller in nonpartisan elections is not surprising since partisan politics have been shown to drive both sides of the political aisle to be tough on crime.[327] More recently, election observers

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321. Berdejó & Yuchtman, *supra* note 8, at 741; *see also* Shepherd, *supra* note 8, at 169.

322. *See supra* Figure 10.

323. *See supra* Figure 10.

324. *See* Champagne, *supra* note 10, at 1393–405.

325. *See* Berdejó & Yuchtman, *supra* note 8, at 741–42.

326. Shepherd, *supra* note 8, at 171. Professor Shepherd also finds that the effect is inconsistent in retention elections where there is no opposing candidate. *Id.*

327. Anna Gunderson, *Who Punishes More? Partisanship, Punitive Policies, and the Puzzle of Democratic Governors*, 75 POL. RSCH. Q. 3, 5 (2022) (noting that partisan politics drive both

reported that partisan campaign ads had little impact in nonpartisan judicial elections in 2022 despite increased campaign spending.[328] These findings suggest that nonpartisan judicial elections may be preferable to partisan judicial elections in curbing judicial fears of electoral backlash.

Relatedly, Professors Berdejó and Yuchtman's argument about biases in sentencing during a judge's reelection season is limited to candidate elections and inapplicable to retention elections.[329] Others have shown that the effect of public opinion on criminal sentencing that Professors Berdejó and Yuchtman find is significantly weaker in retention elections compared to candidate elections.[330] These weaker results appear to be driven by the fact that retention elections are less likely to be closely contested compared to candidate elections given the lack of an opposing candidate to marshal votes against an incumbent.[331] As such, judges in retention elections are less likely to feel the pressure to cede to electoral pressures than judges in candidate elections.

Thus, removing partisan labels and holding retention elections should shield judicial candidates from partisan politics and allow them to campaign on their record of principled legal analysis and willingness to check other branches of government, as well as their ethics, competence, and

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sides of the political aisle to try to appear tough on crime); *see also* Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1415 (2001) (noting the advantages and disadvantages of partisan judicial elections and ultimately raising serious concerns about the involvement of political parties in judicial elections).

328. Wines, *supra* note 195; *see also* HALL, *supra* note 70, at 110.

329. Berdejó & Yuchtman, *supra* note 8, at 741.

330. *See* Gordon & Huber, *supra* note 89, at 128; *see also* Devins, *supra* note 9, at 1693 (noting that judges in contested elections treat potential public backlash to their decisions differently than judges who do not face contested elections). It should be noted that some have debated whether nonpartisan elections allow for greater judicial independence than partisan elections because nonpartisan elections incentivize judges to yield to public opinion in the subset of issues that attract more attention from interest groups. *See* KRITZER, *supra* note 43, at 3–4 (providing an overview of the conflicting arguments); Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 57–58.

331. *See* Devins, *supra* note 9, at 1661 (noting the electoral success of incumbents in nonpartisan retention elections relative to incumbents in other types of judicial elections). However, at least one jurist, former Oregon Supreme Court Justice Hans Linde, suggests that retention elections may exacerbate the majoritarian difficulty compared to partisan or nonpartisan candidate elections because retention elections focus the voters' attention on the incumbent judge's record. *See* Pozen, *supra* note 4, at 283 n.79. This view is contradicted by the significant empirical evidence and theoretical arguments to the contrary noted above. *See* Devins, *supra* note 9, at 1661.

temperament, rather than their record on criminal sentencing.[332] In short, although my survey results show that voters may not always be driven by a judge's record on crime, to the extent that judges remain wary of appearing too soft on crime, the demonstrated biases in criminal sentencing can also be mitigated through the type of judicial election.[333]

In conclusion, my empirical results suggest that judicial acquiescence to public demand—which has been documented in criminal sentencing and other areas of the law while also spurring significant scholarly debate about the majoritarian difficulty—arises from a misunderstanding about voter interest and voting preferences. Making judges better aware of this aspect of voting behavior may help resolve the majoritarian difficulty.[334]

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332. *See* Dann & Hansen, *supra* note 52, at 1437–38. There is, of course, anecdotal evidence to the contrary, such as the oft-cited defeat of three California Supreme Court Justices in their 1986 retention elections, which is often attributed to the justices' low rates of affirmative death penalty cases. *See* Canes-Wrone & Clark, *supra* note 330, at 35. However, such evidence is just that—anecdotal. The empirical evidence suggests that, on average, retention elections mitigate the effect of electoral pressures on judicial decision-making relative to partisan elections. *See* Shepherd, *supra* note 8, at 188.

333. Gordon & Huber, *supra* note 87, at 128–31; *see* Geyh, *supra* note 75, at 1472–73.

334. I should emphasize that I do not mean to minimize the demonstrated biases in judicial decision-making in criminal sentencing and other areas of the law. Indeed, evidence that elected judges are influenced by electoral concerns in criminal sentencing is troubling. My point, rather, is that these biases are built on a false assumption about voter behavior, and a better understanding of voter behavior and relatively modest reforms can help address these concerns.

As a final footnote on this matter, I offer anecdotal evidence that some judges claim to disregard public demand. I conducted semi-structured interviews with several former elected judges who agreed to speak with me under the condition of anonymity. I conducted semi-structured interviews as opposed to surveying judges because interviews can overcome poor response rates often associated with surveys administered to judges. In addition, interviews are better suited to explore complex attitudes, values, beliefs, and motives. *See, e.g.*, K. Louise Barriball & Alison While, *Collecting Data Using a Semi-Structured Interview: A Discussion Paper*, 19 J. ADV. NURSING 328, 329 (1994) (outlining the benefits of semi-structured interviews); Silvia E. Rabionet, *How I Learned to Design and Conduct Semi-Structured Interviews: An Ongoing and Continuous Journey*, 16 QUALITATIVE REP. 563 (2011) (same). The interviewed judges have no interest in seeking an elected judgeship and were relatively open to speaking freely. When asked what they believe voters are concerned with, they opined that voters, if they care at all, are concerned with the judge's personal characteristics—ethics, competence, and temperament—rather than the judge's record on certain issues. The judges also insisted that public demand never guided their decision-making. While some may doubt the veracity of their responses—since some may believe consideration of public opinion is improper under any circumstances and judges would be unwilling to admit to it even under the condition of anonymity—other jurists have openly admitted to considering public opinion as noted above, suggesting that some judges are candid about their consideration of public pressure. *See* Devins, *supra* note 9, at 1664. In any event, even if they were candid with me, the interviewed judges are likely in the minority given the wealth of empirical studies demonstrating significant biases in

B. Public Support for Judicial Elections

My empirical results also explain why the public is so consistent in its support for judicial elections as a method of selecting and retaining judges. As stated at the outset, there is consistent, high public support for judicial elections despite the concerted efforts of prominent scholars and jurists who oppose judicial elections.[335] The persistent support for judicial elections is curious considering the public's simultaneous disinterest in actually voting in judicial elections.[336] Professor Charles Geyh notes that "despite the overwhelming popularity of judicial elections on a conceptual level, it is not uncommon to find that 80% or more of eligible voters fail to vote in judicial elections."[337]

My empirical findings suggest that voters use elections to evaluate whether a judge has the necessary qualities to be a great judge, not whether a judge has issued opinions with which they agree. Thus, public support for judicial elections appears to be a manifestation of the age-old desire among American voters to check the corrupting influences of elected office and to ensure an ethical and competent state bench as originally intended in many state constitutions.[338] While the elected judiciary has apparently failed to recognize this axiom of voter behavior and has instead been influenced by misperceptions about public demand, from the perspective of voters, they have little reason to suspect the judiciary to be overly concerned about whether the public supports or opposes the outcome of judicial decisions given their approach to judicial elections. That is, for voters, judicial elections continue to serve their original democratic purpose with little risk of a judge being tempted to acquiesce to public demand since the voters themselves do not vote based on the outcome of particular judicial decisions.

Meanwhile, voter disinterest—a testament to the elected judiciary's lack of major lapses in ethics, competence, and temperament—keeps the public from updating its beliefs about whether the judiciary yields to public demand at the expense of principled legal analysis. In short, voters are unaware of the judiciary's tendency to acquiesce to public demand due to most judges' strong ethics, competence, and temperament, which reduces the need for voter engagement; and unaware of such tendencies, voters continue to

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favor of perceived public demand. I nonetheless note the interviews here to highlight and recognize a sizable portion of dedicated state court judges who may not be influenced by public pressure.

335. *See supra* note 3 and accompanying text.

336. Geyh, *supra* note 4, at 53.

337. *Id.*

338. *See* TARR, *supra* note 24, at 77–78.

support judicial elections because elections allow them to vote out the rare judge who does not possess the right qualities.[339]

C. State Constitutional Structure

Next, the finding that the public prefers judges who engage in principled legal analysis because there are relatively easier alternative means to enact desired reforms highlights the benefits of less entrenched constitutions that have liberal amendment rules.

Many state constitutions were adopted with the express purpose of ensuring greater popular sovereignty.[340] As noted above, some scholars have therefore argued that elected judges should be more responsive to public opinion, expressly taking into consideration public demand as elected institutions.[341] However, the democratic impulse in state constitutions is reflected not only in the constitutional provisions that establish judicial elections but also in liberal amendment rules that subject state constitutional provisions to a popular vote. My findings reveal a key symbiosis between these two types of constitutional provisions.

Under the constitutional design of most state constitutions, the majoritarian difficulty need not arise, partly because the public's appetite for reform can be appeased through relatively easy means of reform, allowing judges to avoid the brunt of public backlash for countermajoritarian decisions. In other words, liberal amendment rules that allow the public to amend state constitutions through direct democracy permit judges to fulfill their constitutional role without fear of electoral reprisal since the public can further its objectives through other easier means. Therefore, it appears that the careful constitutional structure of most state constitutions helps resolve the majoritarian difficulty. This result also implies that the majoritarian difficulty is more likely to pose a problem in states that have rigorous amendment rules that make the path to reform through direct democracy more difficult. In those states, judges may be more justified in assuming that the public will disapprove of judges for countermajoritarian decisions because it has fewer means to enact its desired reforms.

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339. Public disinterest in judicial elections has also kept the public from accurately signaling their preferences to judges, so judges seeking reelection continue to avoid issuing countermajoritarian decisions under the belief that the public prefers such behavior.

340. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 869 (2021) ("Every state constitution but New York's includes an express commitment to popular sovereignty. The most common formulation declares that 'all political power is inherent in the people.'" (footnotes omitted)).

341. *See* Frost & Lindquist, *supra* note 3, at 727.

This finding challenges the conventional narrative that liberal amendment rules will restrain state courts' judicial review because judges are supposedly more likely to fear being overruled through a constitutional amendment.[342] More liberal amendment rules should restrain judges only if voters disapprove of judges who issue countermajoritarian decisions that are later overruled by a constitutional amendment. And as my empirical findings suggest, the public may not evaluate the performance of judges based on their willingness to acquiesce to the public or their stance on particular issue areas, but rather on their principled legal analysis and personal qualities.[343] Judges, therefore, may not need to fear liberal amendment rules or the public overruling their decisions through a popular referendum.

D. Judicial Federalism

My empirical results also lead us to revisit a significant body of scholarship on judicial federalism. As noted above, the traditional narrative suggests that there is a significant disparity between federal and state courts in terms of their willingness to safeguard minority rights and that federal courts should use procedural means to cordon off state judges from deciding constitutional issues by refraining from abstention and certification of constitutional issues.[344] Scholars argue that federal courts should also make themselves more available through supplemental jurisdiction, habeas review, and U.S. Supreme Court oversight.[345] Others note a trend among state supreme courts to pass the buck on difficult constitutional questions to the federal judiciary by obfuscating whether their decisions are based on the state constitution or the U.S. Constitution.[346] Still, others note that civil liberties lawyers tend to avoid state courts, deprive state court judges of the opportunity to decide and learn from constitutional law cases, and further widen the level of competence between state and federal courts on such issues.[347]

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342. *See* John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1961 (2003) (noting that the U.S. Supreme Court has "little fear of correction by constitutional amendment" due to the rigidity of the U.S. Constitution). *But see* Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. REV. 55, 56 (2018) (noting a curvilinear relationship between amendment frequency and judicial activism where, at a certain point, amendment frequency can lead to greater judicial activism).

343. *See supra* Figure 10.

344. *See* Pozen, *supra* note 4, at 286, 329–330; Neuborne, *supra* note 8, at 1129; Frost & Lindquist, *supra* note 3, at 727.

345. Frost & Lindquist, *supra* note 3, at 727.

346. Hartnett, *supra* note 119, at 983.

347. *See* Neuborne, *supra* note 8, at 1129.

However, putting aside the fact that there is little voter interest in judicial elections, my empirical results offer an additional reason for why state court judges should refrain from considering majority preferences when deciding cases and why they too are expected to adequately safeguard minority rights.[348] According to my survey results, the public, when informed of pertinent salient cases, may not disapprove of elected judges who issue decisions with which the public disagrees and may not punish judges for such decisions. Therefore, if elected judges recognize this aspect of voter behavior, elected judges can and should address constitutional law cases without regard to public opinion, and there is no need for federal courts to be the only forum to safeguard constitutional rights.

Civil liberties litigants need not fear state courts, and over time, elected state court judges should attain the level of competence to decide difficult constitutional issues, if they have not already. Additionally, looking forward, as important constitutional law cases are increasingly funneled to state courts due to the U.S. Supreme Court's recent jurisprudence, state court judges should acquire greater expertise and sensitivity to constitutional law cases anyway, further closing the perceived competency gap between the state and federal judiciaries on these matters.[349] Lastly, deference to federal courts on constitutional matters results in a significant waste of institutional resources in state courts. And considering the relative paucity of cases the U.S. Supreme Court takes on each year, to have state court judges avoid such cases under the assumption that the public will disapprove of countermajoritarian decisions may stunt the development of state constitutional law while wasting significant institutional resources.

At the same time, my findings lend support to existing research on how state courts, despite their perceived inferiority, could be fertile ground for expanding constitutional rights.[350] As noted, while U.S. Supreme Court doctrine sets the floor for constitutional rights, state courts can expand constitutional rights through their interpretation of state constitutional provisions.[351] Since the U.S. Supreme Court's review of state constitutional interpretation is rare, state courts have the opportunity to expand rights and

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348. *See* Geyh, *supra* note 4, at 63 (arguing that state court judges should not look to majority preferences in shaping common law in part because voters have an "information shortfall" and cannot intelligibly evaluate the decisions made by state court judges).

349. *See* Neuborne, *supra* note 8, at 1129 (arguing that if litigants brought more constitutional law cases to state courts, elected judges would "develop an enhanced sense of institutional responsibility for the enforcement of constitutional rights").

350. Solimine & Walker, *supra* note 112, at 213–15; Rubenstein, *supra* note 112, at 599–600.

351. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2125–26 (2010).

liberties through their constitutional law docket.[352] In fact, some scholars have argued that the U.S. Supreme Court and federal courts have not lived up to their billing as the "countermajoritarian hero" and have not protected minority rights unless "a majority or near majority of the community has come to deem those rights worthy of protection."[353] Rather, individual rights cases litigated in state courts were once the "path-breakers" that paved the way for landmark U.S. Supreme Court decisions expanding constitutional rights in the past.[354]

By providing some evidence that the public will not punish elected judges for issuing controversial decisions and instead reward them for doing so, my empirical findings suggest that state courts can assume that mantle once again at a pivotal time when the U.S. Supreme Court has made state courts the new battleground for critical constitutional law cases.

V. CONCLUSION

Elected judges, despite being elected, are not partisan representatives. They are not chosen to represent the views of the electorate. Instead, they have a duty to impartially apply the law irrespective of partisan interests, public clamor, or fear of public criticism.[355] Judicial elections have long been criticized because they have undermined the ability of judges to do exactly that due to judicial fears of electoral backlash.[356] Fears of increasing polarization have fueled concerns about judges looking to public opinion when deciding cases. However, this Article shows that judicial elections are still low-salience affairs; and even when voters are informed of salient cases, they may not strictly prefer judges who acquiesce to public demand.[357]

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352. *See id.*; Brennan, *supra* note 319, at 489 (advocating for vigorous, self-conscious state constitutionalism in which state courts expand rights and liberties beyond the floor established by federal courts based on the U.S. Constitution).

353. Klarman, *supra* note 124, at 6; *see also* Friedman, *supra* note 124, at 590–614; Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 286–88 (1957); Rubenstein, *supra* note 112, at 599, 619.

354. Devins, *supra* note 9, at 1636; James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1032–54 (2003); *see also* Friedland, *supra* note 70, at 627–28; Gerry, *supra* note 93, at 238–39, 285–86.

355. *See* MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR ASS'N 2020) ("A judge shall perform the duties of judicial office impartially, competently, and diligently."); CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (U.S. COURTS 2019) ("A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.").

356. *See supra* Section I.B.

357. *See supra* Section II.B.

Instead, to the extent that they care, voters ostensibly prefer judges who will apply the law regardless of public pressure, check the other branches of government, and exhibit strong ethics, competence, and temperament.[358]

Unfortunately, some elected judges have acquiesced to public pressure or passed the buck on difficult constitutional law cases to federal courts, largely unaware of the potential backlash to acquiescing to public opinion.[359] This need not be the case, as this Article's empirical findings suggest that even the most partisan voters—who nonetheless benefit from judicial acquiescence to public pressure—may not sufficiently credit judges for deciding cases in favor of their side of the political aisle if that decision is not the result of principled legal analysis.

In closing, Justice William Brennan once argued that state courts can play an important role in providing constitutional protections beyond those required by the U.S. Supreme Court's interpretation of the federal constitution.[360] He challenged elected judges to "step into the breach" and become the "font of individual liberties."[361] This Article seeks to provide a modest source of comfort for the dedicated elected judges who decide to boldly step into that breach irrespective of public pressure.

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358. *See supra* Section II.B.4.
359. *See supra* Section I.C.2.
360. Brennan, *supra* note 319, at 491, 503.
361. *Id.*

APPENDIX A: TABLES AND REGRESSION MODELS

Table A.1. Covariate Balance Table for Experiment 1 (Generic Case with No Partisan Implications)

Treatments	1A	1B	1C	1D	*p*
Observations	121	120	118	117	-
Political Ideology (Liberal)	0.61 (0.29)	0.65 (0.30)	0.59 (0.30)	0.62 (0.29)	0.56
Age	41.88 (15.22)	44.17 (15.46)	41.34 (14.47)	42.49 (14.96)	0.50
Gender (Female)	0.59 (0.49)	0.48 (0.50)	0.56 (0.50)	0.56 (0.50)	0.40
Education	0.64 (0.24)	0.63 (0.20)	0.64 (0.20)	0.63 (0.21)	0.91
Income	0.57 (0.30)	0.51 (0.30)	0.60 (0.28)	0.55 (0.30)	0.15
Party ID (Democrat)	0.61 (0.28)	0.64 (0.32)	0.61 (0.29)	0.63 (0.30)	0.84
Political Involvement	0.19 (0.28)	0.25 (0.30)	0.21 (0.28)	0.15 (0.25)	0.05
Media Exposure	0.68 (0.37)	0.72 (0.32)	0.65 (0.37)	0.61 (0.37)	0.13
General Knowledge	0.83 (0.22)	0.83 (0.23)	0.78 (0.25)	0.82 (0.23)	0.25
Race: Non-Hispanic White	0.64 (0.48)	0.62 (0.49)	0.63 (0.48)	0.62 (0.49)	0.98
Race: Hispanic	0.09 (0.29)	0.12 (0.33)	0.12 (0.33)	0.17 (0.38)	0.33
Race: African American	0.16 (0.37)	0.19 (0.39)	0.15 (0.35)	0.14 (0.35)	0.70
Race: Asian	0.05 (0.22)	0.04 (0.20)	0.08 (0.27)	0.03 (0.18)	0.49
Race: Other	0.06 (0.24)	0.03 (0.16)	0.03 (0.16)	0.04 (0.20)	0.49

Table A.2. Covariate Balance Table for Experiment 2 (Gerrymandering Case with Map Favoring Rep. Party)

Treatments	2A	2B	2C	2D	*p*
Observations	122	120	120	124	-
Political Ideology (Liberal)	0.61 (0.30)	0.62 (0.29)	0.62 (0.30)	0.57 (0.29)	0.51
Age	43.49 (15.36)	45.38 (14.71)	43.89 (15.67)	45.06 (14.94)	0.73
Gender (Female)	0.62 (0.49)	0.58 (0.50)	0.58 (0.50)	0.64 (0.48)	0.71
Education	0.62 (0.25)	0.59 (0.22)	0.64 (0.20)	0.67 (0.22)	0.03
Income	0.48 (0.31)	0.53 (0.30)	0.57 (0.29)	0.62 (0.31)	<0.01
Party ID (Democrat)	0.59 (0.29)	0.64 (0.26)	0.61 (0.31)	0.59 (0.28)	0.50
Political Involvement	0.24 (0.32)	0.22 (0.32)	0.25 (0.31)	0.22 (0.28)	0.88
Media Exposure	0.63 (0.37)	0.72 (0.37)	0.69 (0.36)	0.68 (0.39)	0.31
General Knowledge	0.81 (0.25)	0.80 (0.25)	0.82 (0.21)	0.81 (0.26)	0.93
Race: Non-Hispanic White	0.68 (0.47)	0.73 (0.44)	0.63 (0.49)	0.65 (0.48)	0.32
Race: Hispanic	0.07 (0.26)	0.07 (0.25)	0.13 (0.33)	0.10 (0.30)	0.37
Race: African American	0.17 (0.37)	0.12 (0.33)	0.12 (0.32)	0.14 (0.35)	0.71
Race: Asian	0.05 (0.22)	0.06 (0.24)	0.07 (0.25)	0.05 (0.22)	0.92
Race: Other	0.03 (0.16)	0.02 (0.13)	0.06 (0.24)	0.07 (0.25)	0.15

Table A.3. Covariate Balance Table for Experiment 3 (Gerrymandering Case with Map Favoring Dem. Party)

Treatments	3A	3B	3C	3D	*p*
Observations	121	120	118	121	-
Political Ideology (Liberal)	0.63	0.57	0.64	0.61	0.32
	(0.30)	(0.30)	(0.27)	(0.27)	
Age	42.22	40.70	43.34	44.07	0.33
	(13.78)	(15.15)	(15.53)	(15.50)	
Gender (Female)	0.57	0.51	0.57	0.55	0.75
	(0.50)	(0.50)	(0.50)	(0.50)	
Education	0.61	0.62	0.67	0.64	0.15
	(0.23)	(0.22)	(0.22)	(0.23)	
Income	0.54	0.58)	0.57	0.55	0.69
	(0.29)	(0.29)	(0.32)	(0.32)	
Party ID (Democrat)	0.62	0.58	0.64	0.61	0.42
	(0.31)	(0.27)	(0.27)	(0.27)	
Political Involvement	0.16	0.20	0.21	0.25	0.09
	(0.24)	(0.28)	(0.26)	(0.31)	
Media Exposure	0.64	0.61	0.69	0.67	0.29
	(0.35)	(0.34)	(0.34)	(0.36)	
General Knowledge	0.79	0.83	0.85	0.84	0.17
	(0.23)	(0.21)	(0.20)	(0.22)	
Race: Non-Hispanic White	0.56	0.57	0.63	0.66	0.34
	(0.50)	(0.50)	(0.48)	(0.48)	
Race: Hispanic	0.08	0.12	0.09	0.11	0.74
	(0.28)	(0.33)	(0.28)	(0.31)	
Race: African American	0.20	0.19	0.21	0.15	0.69
	(0.40)	(0.39)	(0.41)	(0.36)	
Race: Asian	0.07	0.10	0.04	0.07	0.35
	(0.25)	(0.30)	(0.20)	(0.25)	
Race: Other	0.09	0.02	0.03	0.02	0.01
	(0.29)	(0.13)	(0.18)	(0.13)	

Table A.4. OLS Regression Results for Experiment 1 (Generic Case with No Partisan Implications)

	Approval:		*Legitimacy:*	
	(1)	(2)	(3)	(4)
Treatment 1B	−0.225***	−0.230***	−0.122***	−0.121***
	(0.033)	(0.034)	(0.021)	(0.021)
Treatment 1C	−0.237***	−0.242***	−0.128***	−0.128***
	(0.033)	(0.033)	(0.021)	(0.021)
Treatment 1D	−0.013	−0.025	−0.014	−0.021
	(0.033)	(0.033)	(0.021)	(0.021)
Political Ideology (Liberal)		0.081		0.018
		(0.084)		(0.053)
Age		−0.0003		−0.001
		(0.001)		(0.001)
Gender (Female)		−0.024		0.010
		(0.025)		(0.016)
Education		−0.035		−0.020
		(0.059)		(0.037)
Income		−0.048		−0.027
		(0.043)		(0.028)
Political Involvement		−0.037		−0.038
		(0.047)		(0.030)
Race: African American		−0.027		−0.006
		(0.035)		(0.022)
Race: Asian		0.066		0.018
		(0.056)		(0.035)
Race: Hispanic		−0.009		−0.014
		(0.038)		(0.024)
Race: Other		0.091		0.059
		(0.063)		(0.040)
Media Exposure		−0.005		−0.015
		(0.036)		(0.023)
Constant	0.605***	0.693***	0.507***	0.566***
	(0.023)	(0.080)	(0.015)	(0.051)
Observations	476	469	476	469
R^2	0.164	0.207	0.114	0.192
Adjusted R^2	0.158	0.172	0.109	0.156
Residual Std. Error	0.255 (df = 472)	0.253 (df = 448)	0.165 (df = 472)	0.161 (df = 448)

Note: *p<0.1; **p<0.05; ***p<0.01

The reference group for the treatment is Treatment 1A. The reference group for race is White. The dependent variables (i.e., approval and legitimacy) were measured using several ordinal scale questions that were converted to percentage points. Due to the lack of space, not all the covariates used in Models 2 and 4 are shown above.

Table A.5. OLS Regression Results for Experiment 2 (Gerrymandering Case with Map Favoring Rep. Party)

	Approval:		*Legitimacy:*	
	(1)	(2)	(3)	(4)
Treatment 2B	−0.349***	−0.350***	−0.202***	−0.198***
	(0.033)	(0.034)	(0.021)	(0.021)
Treatment 2C	−0.323***	−0.331***	−0.156***	−0.158***
	(0.033)	(0.034)	(0.021)	(0.021)
Treatment 2D	−0.031	−0.053	−0.025	−0.037*
	(0.033)	(0.034)	(0.021)	(0.021)
Political Ideology (Liberal)		−0.208***		−0.079*
		(0.072)		(0.044)
Age		0.0001		−0.0004
		(0.001)		(0.001)
Gender (Female)		0.030		0.010
		(0.026)		(0.016)
Education		−0.037		−0.028
		(0.060)		(0.037)
Income		0.041		0.033
		(0.042)		(0.026)
Political Involvement		−0.025		−0.037
		(0.043)		(0.026)
Race: African American		−0.030		−0.007
		(0.037)		(0.023)
Race: Asian		−0.018		−0.045
		(0.054)		(0.034)
Race: Hispanic		0.018		0.011
		(0.043)		(0.026)
Race: Other		0.086		−0.012
		(0.061)		(0.037)
Media Exposure		−0.008		−0.027
		(0.038)		(0.023)
Constant	0.694***	0.740***	0.557***	0.613***
	(0.023)	(0.072)	(0.015)	(0.045)
Observations	486	480	486	480
R^2	0.279	0.322	0.216	0.292
Adjusted R^2	0.275	0.293	0.211	0.261
Residual Std. Error	0.260 (df = 482)	0.257 (df = 459)	0.163 (df = 482)	0.158 (df = 459)

Note: *p<0.1; **p<0.05; ***p<0.01

The reference group for the treatment is Treatment 2A. The reference group for race is White. The dependent variables (i.e., approval and legitimacy) were measured using several ordinal scale questions that were converted to percentage points. Due to the lack of space, not all the covariates used in Models 2 and 4 are shown above.

Table A.6. OLS Regression Results with Interaction Effects for Experiment 2 (Gerrymandering Case with Map Favoring Rep. Party)

	Dependent Variable: Approval		
	2A v. 2B	2A v. 2C	2A v. 2D
	(1)	(2)	(3)
Treatment 2B	−0.018		
	(0.080)		
Treatment 2C		−0.127*	
		(0.077)	
Treatment 2D			−0.086
			(0.072)
Political Ideology (Liberal)	0.037	−0.012	0.008
	(0.130)	(0.121)	(0.119)
Age	0.001	0.0004	0.001
	(0.001)	(0.001)	(0.001)
Gender (Female)	0.032	0.021	0.025
	(0.036)	(0.034)	(0.034)
Education	0.019	−0.004	−0.093
	(0.085)	(0.078)	(0.072)
Income	−0.004	0.027	0.055
	(0.059)	(0.057)	(0.055)
Political Involvement	−0.013	−0.057	−0.052
	(0.062)	(0.060)	(0.060)
Race: African American	−0.040	−0.056	−0.055
	(0.050)	(0.048)	(0.047)
Race: Asian	0.002	−0.044	−0.133*
	(0.082)	(0.072)	(0.078)
Race: Hispanic	0.027	0.014	−0.028
	(0.068)	(0.054)	(0.058)
Race: Other	0.048	0.170**	0.074
	(0.119)	(0.084)	(0.077)
Media Exposure	−0.061	0.019	−0.014
	(0.055)	(0.052)	(0.051)
2B x Political Ideology (Liberal)	−0.526***		
	(0.116)		
2C x Political Ideology (Liberal)		−0.347***	
		(0.111)	
2D x Political Ideology (Liberal)			0.064
			(0.110)
Constant	0.567***	0.543***	0.512***
	(0.104)	(0.105)	(0.098)
Observations	240	238	242
R^2	0.427	0.389	0.139
Adjusted R^2	0.378	0.336	0.065
Residual Std. Error	0.253 (df = 220)	0.241 (df = 218)	0.239 (df = 222)
Note:			*p<0.1; **p<0.05; ***p<0.01

The reference group for the treatment is Treatment 2A. The reference group for race is White. The dependent variable (i.e., approval) was measured using an ordinal scale question that was converted to percentage points. Due to the lack of space, not all the covariates are shown above.

Table A.7. OLS Regression Results for Experiment 3 (Gerrymandering Case with Map Favoring Dem. Party)

	Approval:		*Legitimacy:*	
	(1)	(2)	(3)	(4)
Treatment 3B	−0.185***	−0.192***	−0.100***	−0.098***
	(0.034)	(0.035)	(0.021)	(0.022)
Treatment 3C	−0.195***	−0.203***	−0.098***	−0.095***
	(0.034)	(0.035)	(0.021)	(0.021)
Treatment 3D	−0.011	−0.016	−0.016	−0.014
	(0.034)	(0.035)	(0.021)	(0.021)
Political Ideology (Liberal)		−0.029		−0.018
		(0.080)		(0.050)
Age		−0.00002		−0.001
		(0.001)		(0.001)
Gender (Female)		−0.021		0.007
		(0.026)		(0.016)
Education		0.031		0.014
		(0.061)		(0.038)
Income		−0.021		−0.007
		(0.045)		(0.028)
Political Involvement		−0.033		−0.023
		(0.048)		(0.030)
Race: African American		0.024		0.011
		(0.034)		(0.021)
Race: Asian		−0.009		0.022
		(0.050)		(0.031)
Race: Hispanic		−0.039		−0.030
		(0.043)		(0.026)
Race: Other		−0.064		−0.024
		(0.064)		(0.040)
Media Exposure		−0.002		−0.0001
		(0.039)		(0.024)
Constant	0.615***	0.524***	0.519***	0.500***
	(0.024)	(0.080)	(0.015)	(0.049)
Observations	480	474	480	474
R^2	0.111	0.148	0.072	0.136
Adjusted R^2	0.105	0.110	0.066	0.098
Residual Std. Error	0.263 (df = 476)	0.262 (df = 453)	0.165 (df = 476)	0.162 (df = 453)

Note: *p<0.1; **p<0.05; ***p<0.01

The reference group for the treatment is Treatment 3A. The reference group for race is White. The dependent variables (i.e., approval and legitimacy) were measured using several ordinal scale questions that were converted to percentage points. Due to the lack of space, not all the covariates used in Models 2 and 4 are shown above.

Table A.8. OLS Regression Results with Interaction Effects for Experiment 3 (Gerrymandering Case with Map Favoring Dem. Party)

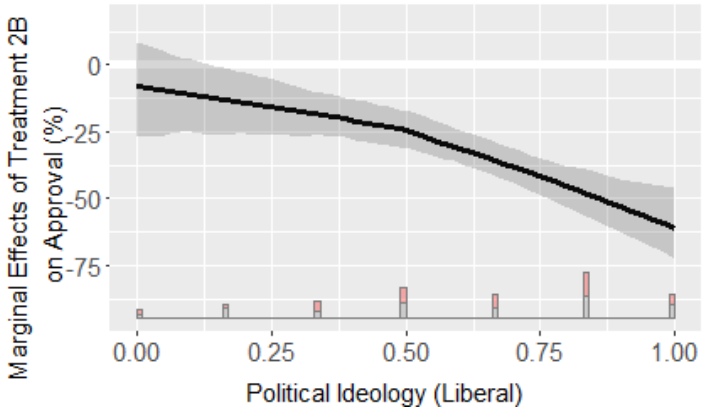
	Dependent Variable: Approval		
	3A v. 3B	3A v. 3C	3A v. 3D
	(1)	(2)	(3)
Treatment 3B	−0.312***		
	(0.082)		
Treatment 3C		−0.373***	
		(0.087)	
Treatment 3D			0.051
			(0.081)
Political Ideology (Liberal)	−0.075	−0.134	−0.081
	(0.144)	(0.142)	(0.132)
Age	0.001	0.001	0.001
	(0.002)	(0.001)	(0.001)
Gender (Female)	−0.048	−0.032	−0.023
	(0.038)	(0.038)	(0.036)
Education	0.130	0.088	0.144*
	(0.086)	(0.091)	(0.085)
Income	−0.057	−0.034	−0.148**
	(0.066)	(0.068)	(0.062)
Political Involvement	0.069	−0.058	0.019
	(0.069)	(0.078)	(0.065)
Race: African American	0.018	0.078	−0.030
	(0.051)	(0.049)	(0.047)
Race: Asian	0.007	0.096	0.044
	(0.067)	(0.081)	(0.070)
Race: Hispanic	−0.014	0.059	−0.042
	(0.064)	(0.068)	(0.059)
Race: Other	−0.003	0.034	−0.110
	(0.081)	(0.077)	(0.078)
Media Exposure	−0.068	−0.034	0.027
	(0.055)	(0.058)	(0.052)
3B x Political Ideology (Liberal)	0.198		
	(0.124)		
3C x Political Ideology (Liberal)		0.278**	
		(0.127)	
3D x Political Ideology (Liberal)			−0.138
			(0.120)
Constant	0.604***	0.499***	0.504***
	(0.124)	(0.116)	(0.106)
Observations	237	237	240
R^2	0.160	0.199	0.124
Adjusted R^2	0.086	0.129	0.048
Residual Std. Error	0.264 (df = 217)	0.269 (df = 217)	0.250 (df = 220)

Note: *p<0.1; **p<0.05; ***p<0.01

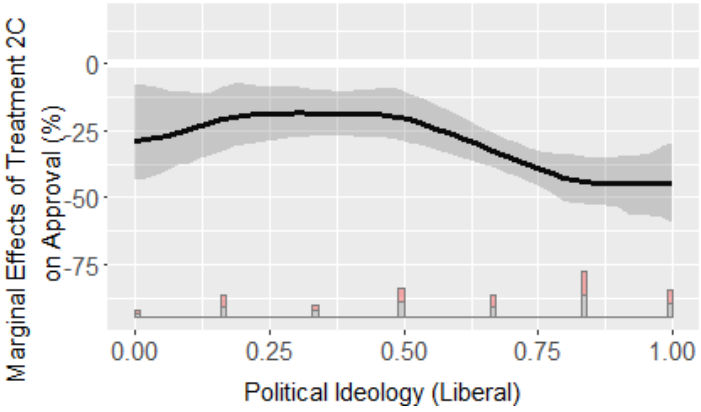
The reference group for the treatment is Treatment 3A. The reference group for race is White. The dependent variable (i.e., approval) was measured using an ordinal scale question that was converted to percentage points. Due to the lack of space, not all the covariates are shown above.

Figure A.1. Marginal Effects of Partisan Preferences in Experiment 2 (Gerrymandering Case with Map Favoring Rep. Party)

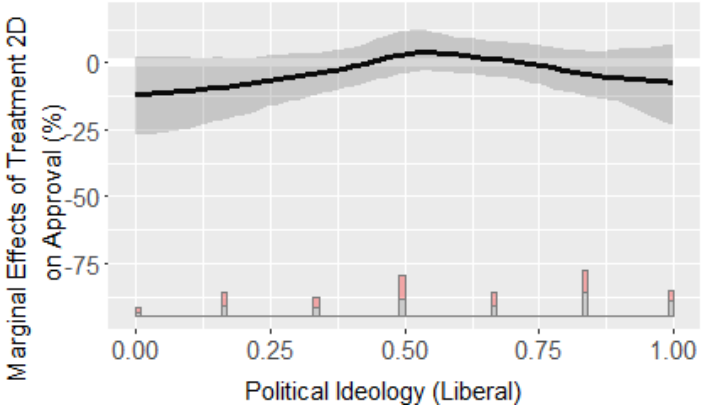
Results for 2A v. 2B



Results for 2A v. 2C



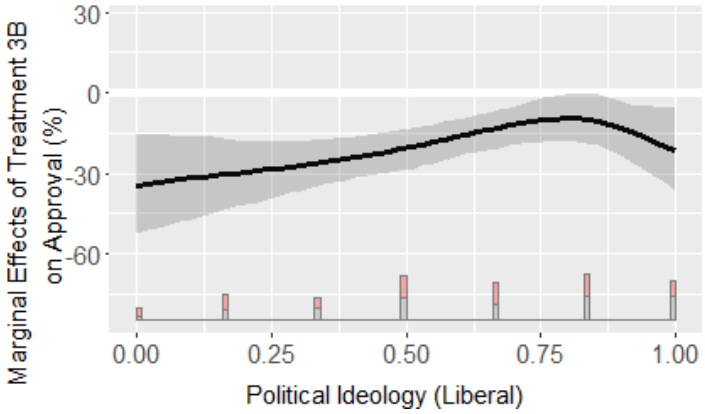
Results for 2A v. 2D



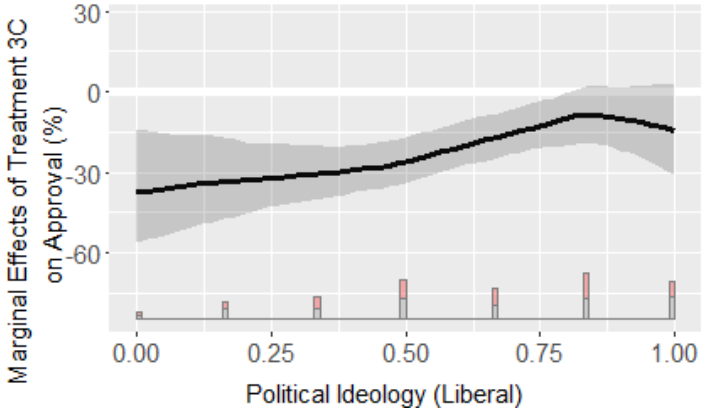
Note: The shaded areas denote 95% confidence intervals. The marginal effects depicted here uses a Gaussian kernel estimator to relax the linearity assumption. The reference group for the treatment is Treatment 2A.

Figure A.2. Marginal Effects of Partisan Preferences in Experiment 3 (Gerrymandering Case with Map Favoring Dem. Party)

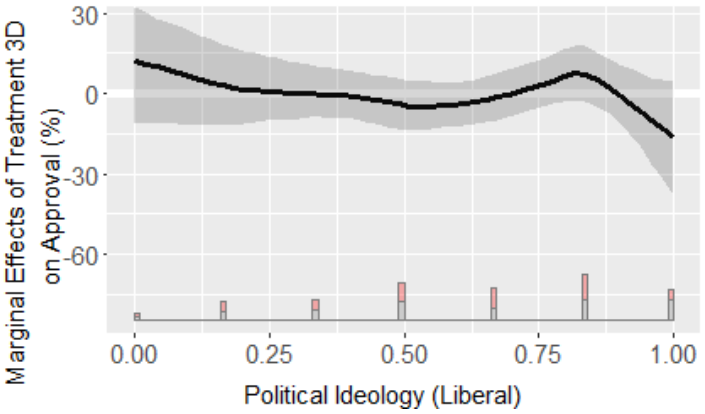
Results for 3A v. 3B



Results for 3A v. 3C

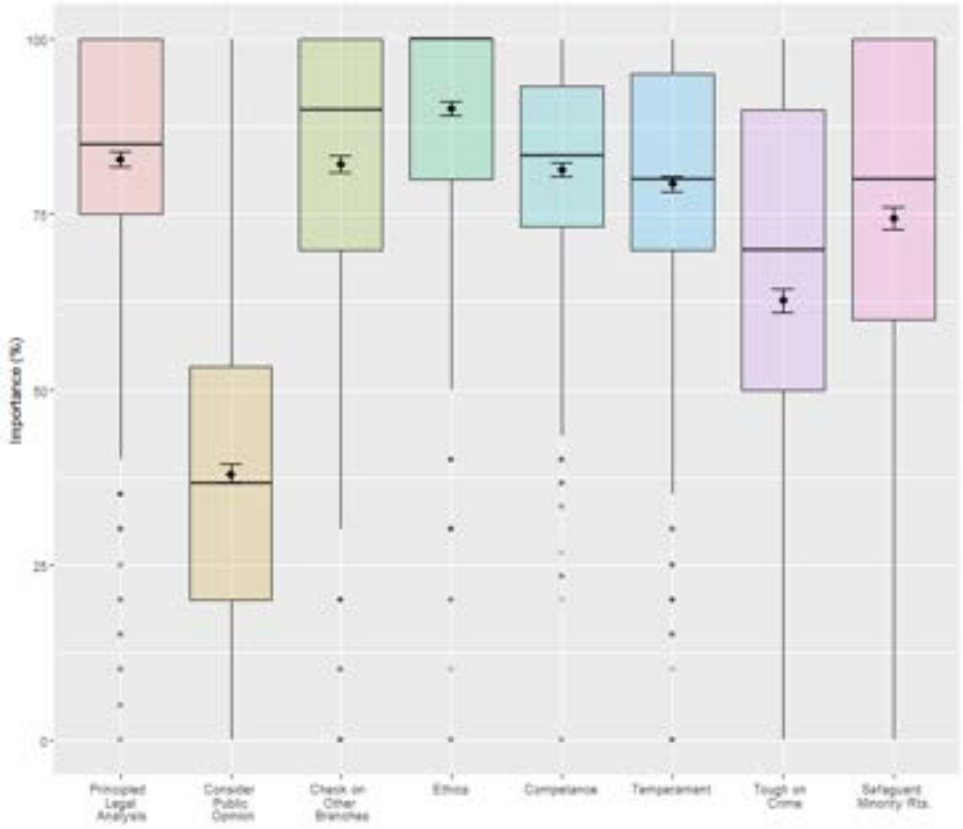


Results for 3A v. 3D



Note: The shaded areas denote 95% confidence intervals. The marginal effects depicted here uses a Gaussian kernel estimator to relax the linearity assumption. The reference group for the treatment is Treatment 3A.

Figure A.3. Box and Whisker Plot of Unweighted Voting Factors



Note: The box and whisker plot displays the minimum, lower quartile, median, upper quartile, and maximum unweighted responses, which have been converted to percentage points. The interquartile range ("IQR"), represented by the box, captures the middle 50% of the responses. The whiskers extend to the smallest and largest values within 1.5 times the IQR. Any points outside the IQR are outliers depicted by dots. The unweighted means and their confidence intervals are depicted by the black diamonds and accompanying lines.

APPENDIX B: SURVEY TEXT

The survey text was modified to match each respondent's state of residence. A figure of a courtroom and miscellaneous formatting, which consistently appeared in every treatment, were omitted for brevity.[362]

Treatment 1A

[STATE] Supreme Court Defies Public Opinion

The [STATE] Supreme Court justices' landmark ruling declares a controversial law unconstitutional despite widespread public support for the law.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a law passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the law is unconstitutional behind closed doors. However there is widespread public support for the law.

On the one hand, because of strong public support for the law, declaring the law unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the law unconstitutional would also defy the wishes of the people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether [STATE]'s laws abide by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

Despite public support for the law, the majority of justices on the [STATE] Supreme Court ultimately announced that the law is unconstitutional. Their published decision is consistent with their prior legal analysis but contrary to public opinion.

Treatment 1B

[STATE] Supreme Court Sides with Public Opinion

The [STATE] Supreme Court justices' landmark ruling declares a controversial law constitutional despite the justices' prior legal analysis to the contrary.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a law passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the law is unconstitutional behind closed doors. However there is widespread public support for the law.

On the one hand, because of strong public support for the law, declaring the law unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the law unconstitutional would also defy the wishes of the people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether [STATE]'s laws abide by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

Despite their legal analysis, the majority of justices on the [STATE] Supreme Court ultimately announced that the law is constitutional. Their published decision is consistent with public opinion but contrary to their prior legal analysis.

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362. Significant aspects of the justices' duties draw on the Code of Conduct for U.S. Federal Judges and the American Bar Association's Model Code of Judicial Conduct. *See* CODE OF CONDUCT FOR U.S. JUDGES Canon 3, *supra* note 355 ("A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism."); MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR. ASS'N 2020) ("A judge shall perform the duties of judicial office impartially, competently, and diligently.").

Treatment 1C

[STATE] Supreme Court Avoids Controversy

The [STATE] Supreme Court justices' landmark ruling dismisses the constitutional challenge, allowing the controversial law to stand amid widespread public support for the law.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a law passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the law is unconstitutional behind closed doors. However there is widespread public support for the law.

On the one hand, because of strong public support for the law, declaring the law unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the law unconstitutional would also defy the wishes of the people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether [STATE]'s laws abide by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

The majority of justices on the [STATE] Supreme Court ultimately announced that the case did not meet procedural requirements and dismissed the case, rather than deciding whether the law is unconstitutional. As a result, the [STATE] Supreme Court avoided having to decide the case, and the law will remain in effect in accordance with public opinion.

Treatment 1D

[STATE] Supreme Court Strikes a Balance

The [STATE] Supreme Court justices' landmark ruling declares a controversial law unconstitutional in a narrow decision with little precedential value.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a law passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the law is unconstitutional behind closed doors. However there is widespread public support for the law.

On the one hand, because of strong public support for the law, declaring the law unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the law unconstitutional would also defy the wishes of the people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether [STATE]'s laws abide by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

Despite public support for the law, the majority of justices on the [STATE] Supreme Court ultimately announced that the law is unconstitutional. However, their published decision made clear that this was a unique case with little precedential value and that only a small part of the law was unconstitutional. Most of the law will remain in effect in accordance with public opinion.

Treatment 2A

[STATE] Supreme Court Defies Public Opinion

The [STATE] Supreme Court justices' landmark ruling declares a controversial legislative map unconstitutional despite widespread public support for the legislative map.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a legislative map passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution. Those challenging the legislative map argue that the map divides voting districts to give one political party, the Republican Party, an unfair advantage.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the legislative map is unconstitutional behind closed doors. However there is widespread public support for the map, among both liberals and conservatives, but especially among conservatives.

On the one hand, because of strong public support for the legislative map, declaring the map unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the map unconstitutional would also defy the wishes of people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether this legislative map abides by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

Despite public support for the legislative map, the majority of justices on the [STATE] Supreme Court ultimately announced that the legislative map is unconstitutional. Their published decision is consistent with their prior legal analysis but contrary to public opinion, especially among conservatives.

Treatment 2B

[STATE] Supreme Court Sides with Public Opinion

The [STATE] Supreme Court justices' landmark ruling declares a controversial legislative map constitutional despite the justices' prior legal analysis to the contrary.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a legislative map passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution. Those challenging the legislative map argue that the map divides voting districts to give one political party, the Republican Party, an unfair advantage.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the legislative map is unconstitutional behind closed doors. However there is widespread public support for the map, among both liberals and conservatives, but especially among conservatives.

On the one hand, because of strong public support for the legislative map, declaring the map unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the map unconstitutional would also defy the wishes of people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether this legislative map abides by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

Despite their legal analysis, the majority of justices on the [STATE] Supreme Court ultimately announced that the legislative map is constitutional. Their published decision is consistent with public opinion, especially among conservatives, but contrary to their prior legal analysis.

Treatment 2C

[STATE] Supreme Court Avoids Controversy

The [STATE] Supreme Court justices' landmark ruling dismisses the constitutional challenge, allowing the controversial legislative map to stand amid widespread public support for the legislative map.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a legislative map passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution. Those challenging the legislative map argue that the map divides voting districts to give one political party, the Republican Party, an unfair advantage.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the legislative map is unconstitutional behind closed doors. However there is widespread public support for the map, among both liberals and conservatives, but especially among conservatives.

On the one hand, because of strong public support for the legislative map, declaring the map unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the map unconstitutional would also defy the wishes of people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether this legislative map abides by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

The majority of justices on the [STATE] Supreme Court ultimately announced that the case did not meet procedural requirements and dismissed the case, rather than deciding that the legislative map is unconstitutional. As a result, the [STATE] Supreme Court avoided having to decide the case, and the legislative map will remain in effect in accordance with public opinion, especially among conservatives.

Treatment 2D

[STATE] Supreme Court Strikes a Balance

The [STATE] Supreme Court justices' landmark ruling declares a controversial legislative map unconstitutional in a narrow decision with little precedential value.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a legislative map passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution. Those challenging the legislative map argue that the map divides voting districts to give one political party, the Republican Party, an unfair advantage.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the legislative map is unconstitutional behind closed doors. However there is widespread public support for the map, among both liberals and conservatives, but especially among conservatives.

On the one hand, because of strong public support for the legislative map, declaring the map unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the map unconstitutional would also defy the wishes of people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether this legislative map abides by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

Despite public support for the legislative map, the majority of justices on the [STATE] Supreme Court ultimately announced that the legislative map is unconstitutional. However, their published decision made clear that this was a unique case with little precedential value and that only a small part of the legislative map was unconstitutional. Most of the legislative map will remain in effect in accordance with public opinion, especially among conservatives.

Treatment 3A

[STATE] Supreme Court Defies Public Opinion

The [STATE] Supreme Court justices' landmark ruling declares a controversial legislative map unconstitutional despite widespread public support for the legislative map.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a legislative map passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution. Those challenging the legislative map argue that the map divides voting districts to give one political party, the Democratic Party, an unfair advantage.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the legislative map is unconstitutional behind closed doors. However, there is widespread public support for the legislative map, among both liberals and conservatives, but especially among liberals.

On the one hand, because of strong public support for the legislative map, declaring the map unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the map unconstitutional would also defy the wishes of the people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether this legislative map abides by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

Despite public support for the legislative map, the majority of justices on the [STATE] Supreme Court ultimately announced that the legislative map is unconstitutional. Their published decision is consistent with their prior legal analysis but contrary to public opinion, especially among liberals.

Treatment 3B

[STATE] Supreme Court Sides with Public Opinion

The [STATE] Supreme Court justices' landmark ruling declares a controversial legislative map constitutional despite the justices' prior legal analysis to the contrary.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a legislative map passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution. Those challenging the legislative map argue that the map divides voting districts to give one political party, the Democratic Party, an unfair advantage.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the legislative map is unconstitutional behind closed doors. However, there is widespread public support for the legislative map, among both liberals and conservatives, but especially among liberals.

On the one hand, because of strong public support for the legislative map, declaring the map unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the map unconstitutional would also defy the wishes of the people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether this legislative map abides by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

Despite their legal analysis, the majority of justices on the [STATE] Supreme Court ultimately announced that the legislative map is constitutional. Their published decision is consistent with public opinion, especially among liberals, but contrary to their prior legal analysis.

Treatment 3C

[STATE] Supreme Court Avoids Controversy

The [STATE] Supreme Court justices' landmark ruling dismisses the constitutional challenge, allowing the controversial legislative map to stand amid widespread public support for the legislative map.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a legislative map passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution. Those challenging the legislative map argue that the map divides voting districts to give one political party, the Democratic Party, an unfair advantage.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the legislative map is unconstitutional behind closed doors. However, there is widespread public support for the legislative map, among both liberals and conservatives, but especially among liberals.

On the one hand, because of strong public support for the legislative map, declaring the map unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the map unconstitutional would also defy the wishes of the people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether this legislative map abides by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

The majority of justices on the [STATE] Supreme Court ultimately announced that the case did not meet procedural requirements and dismissed the case, rather than deciding that the legislative map is unconstitutional. As a result, the [STATE] Supreme Court avoided having to decide the case, and the legislative map will remain in effect in accordance with public opinion, especially among liberals.

Treatment 3D

[STATE] Supreme Court Strikes a Balance

The [STATE] Supreme Court justices' landmark ruling declares a controversial legislative map unconstitutional in a narrow decision with little precedential value.

The [STATE] Supreme Court has been deliberating a controversial case that could have far-reaching implications. The [STATE] Supreme Court is [STATE]'s highest court, and justices on the [STATE] Supreme Court must stand for reelection every few years. This case centers around a legislative map passed by the [STATE] State Legislature several years ago, which was recently challenged as unconstitutional under the [STATE] State Constitution. Those challenging the legislative map argue that the map divides voting districts to give one political party, the Democratic Party, an unfair advantage.

According to multiple sources, the majority of justices on the [STATE] Supreme Court, following their usual legal analysis, had privately determined that the legislative map is unconstitutional behind closed doors. However, there is widespread public support for the legislative map, among both liberals and conservatives, but especially among liberals.

On the one hand, because of strong public support for the legislative map, declaring the map unconstitutional could cause widespread public dissatisfaction and civil disobedience. Declaring the map unconstitutional would also defy the wishes of the people who voted for the justices in the past.

On the other hand, the justices have a duty to fairly and impartially interpret the [STATE] State Constitution and decide whether this legislative map abides by the [STATE] State Constitution. The justices should not be swayed by partisan interests, public clamor, or fear of criticism.

Despite public support for the legislative map, the majority of justices on the [STATE] Supreme Court ultimately announced that the legislative map is unconstitutional. However, their published decision made clear that this was a unique case with little precedential value and that only a small part of the legislative map was unconstitutional. Most of the legislative map will remain in effect in accordance with public opinion, especially among liberals.

APPENDIX C: SURVEY QUESTIONNAIRE

Measures of Approval and Legitimacy

Assuming all the facts in the news article are true, would you support or oppose efforts to reelect the [State Name] Supreme Court justices who decided this case in their next reelection?[363]

- Strongly support
- Somewhat support
- Neither support nor oppose
- Somewhat oppose
- Strongly oppose

Assuming all the facts in the news article are true, how do you feel about the way the [State Name] Supreme Court is handling its job (0 = *very poor job*; 10 = *very good job*)?[364]

Assuming all the facts in the news article are true, how do you feel about the way the justices on the [State Name] Supreme Court decided the case (0 = *very poor job*; 10 = *very good job*)?[365]

Assuming all the facts in the news article are true, please indicate how strongly you agree or disagree with the following statements (0 = *strongly disagree*; 10 = *strongly agree*).[366]

1. The [State Name] Supreme Court gets too mixed up in politics.
2. The [State Name] Supreme Court favors some groups more than others.
3. The [State Name] Supreme Court can usually be trusted to make decisions that are right for the state as a whole.
4. The [State Name] Supreme Court operates in the best interests of the people.
5. It might be better to do away with the [State Name] Supreme Court altogether.

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363. *See* Crabtree & Nelson, *supra* note 135, at 289.
364. *See* Johnston & Bartels, *supra* note 179, at 278.
365. *See id.*
366. *See* Bartels & Johnston, *supra* note 131, at 189.

Please explain your reasoning in a few sentences.

Voting Factor Questions

Generally speaking, when evaluating judicial candidates in a judicial election, how important are the following characteristics (0 = *not important at all*; 10 = *very important*)?[367]

1. Resists political pressure when deciding cases
2. Strictly follows the law
3. Decides cases based on political party affiliations
4. Decides cases the way the majority of the people wants
5. Understands community preferences
6. Serves as a check on other branches of government
7. Reputation for integrity / high ethical standards
8. Substantial experience practicing in the courtroom
9. Deep legal knowledge
10. Reputation for deciding cases in a timely and efficient manner
11. Reputation as a good listener
12. Reputation for patience and courtesy for those in the courtroom
13. Reputation for being tough on crime
14. Reputation for protecting minority rights

367. *See* Kritzer, *supra* note 5, at 53 (asking similar questions in a survey of American adults); GIBSON, *supra* note 3, at 93–96 (asking similar questions in a survey of Kentucky voters).

Issue Proximity Questions

[Experiments 2 & 3 only] Do you agree or disagree with the "one-person, one-vote" rule—the rule that one person's voting power should be roughly equal to everyone else within the same state?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

General Knowledge Questions

Which issue was under consideration in *Roe v. Wade*?[368]

- Abortion
- Immigration
- Segregation
- Capital punishment
- Don't know

Which of the following guarantees due process under the law?[369]

- Articles of Confederation
- Bill of Rights
- Federalist Papers
- Declaration of Independence
- Don't know

How many U.S. senators serve in the U.S. Senate?[370]

- 50
- 100
- 102
- 435
- Don't know

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368. *See* Todd Donovan & Shaun Bowler, *To Know It Is to Loath It: Perceptions of Campaign Finance and Attitudes About Congress*, 47 AM. POL. RSCH. 951, 958 (2018).

369. *See id.*

370. *See id.*

Select Demographic Questions

Which best describes your ideological leanings?

- Very liberal
- Liberal
- Somewhat liberal
- Neutral
- Somewhat conservative
- Conservative
- Very conservative

How regularly do you read or watch the news for more than 10 minutes per day?

- Rarely
- Once a week
- A few times a week
- Daily