

**POLARIZATION, NATIONALIZATION, AND THE
CONSTITUTIONAL POLITICS OF RECENT STATE
SUPREME COURT ELECTIONS**

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INTRODUCTION

It is hardly novel to observe that elections for state supreme court seats have, over time, become noisier, more salient and expensive affairs—that is, more like other elections. There is an expansive law review literature exploring this trend,¹ and plenty of advocates for reform in light of it.² True, some empirical scholars have sensibly warned against overstating the notion that judicial elections have morphed into ordinary

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1. See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 267 n.8 (2008); Alicia Bannon, *Judicial Elections After Citizens United*, 67 DEPAUL L. REV. 169, 172–73 (2018); Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 934–37 (2016) (reviewing MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* (2015)).

2. See, e.g., Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO STATE L.J. 43 (2003); ALICIA BANNON, BRENNAN CTR. FOR JUST., *CHOOSING STATE JUDGES: A PLAN FOR REFORM* (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf [https://perma.cc/AX3B-BYEV]; AM. BAR ASS’N COMM’N ON THE 21ST CENTURY JUDICIARY, *JUSTICE IN JEOPARDY* 89–109 (2003); AM. COLL. OF TRIAL LAWS., *WHITE PAPER ON JUDICIAL ELECTIONS* 4 (2011), https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/actl_white_paper_on_judicial_elections.pdf?sfvrsn=59bc4f68_4 [https://perma.cc/SB69-6WGU].

elections.³ Among other things, the distinctiveness of judicial elections is reflected in the common phenomenon of ballot roll-off, in which a substantial segment of the electorate chooses to vote in other races and then skips the judicial election altogether.⁴ Still, there is little dispute that, in the aggregate, judicial elections have changed over time and are not the obscure electoral afterthoughts that they were once perceived to be.⁵

State supreme court elections now bear some significant earmarks of non-judicial elections. For example, just as general political spending has ballooned in recent years, so too has aggregate spending in state supreme court judicial elections—more than doubling the roughly \$38 million from 2009 to 2010 to nearly \$98 million from 2019 to 2020.⁶ A wide array of interest groups with high stakes in the outcome—including economic interests aggressively pursuing tort reform⁷—have become regular participants in many races for high court seats.⁸ And judicial candidates were freed, if they so chose, to campaign more like other candidates when the Supreme Court decided *Republican Party v. White*.⁹ *White* struck down, on First Amendment grounds, state-imposed ethical restraints that could, practically, make elections for state supreme courts look more like Supreme Court nomination hearings, where candidates notoriously give content-free, evasive answers to questions.¹⁰

3. See, e.g., HERBERT M. KRITZER, JUSTICES ON THE BALLOT: CONTINUITY AND CHANGE IN STATE SUPREME COURT ELECTIONS 169, 238–39 (2015); Lawrence Baum, *Supreme Court Elections: How Much They Have Changed, Why They Changed, and What Difference It Makes*, 42 L. & SOC. INQUIRY 900, 916–17 (2017).

4. Melinda Gann Hall, *Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives*, 69 J. POL. 1147, 1149–50 (2007); Herbert M. Kritzer, *Roll-Off in State Court Elections: The Impact of the Straight-Ticket Voting Option*, J.L. & CTS. 409, 410–11 (2016).

5. See Pozen, *supra* note 1, at 266 (describing judicial elections as traditionally “sleepy” and “low key” affairs).

6. See ADAM SKAGGS, MARIA DA SILVA, LINDA CASEY & CHARLES HALL, BRENNAN CTR. FOR JUST., THE NEW POLITICS OF JUDICIAL ELECTIONS 2009–10, at 5 (2011) (estimating total spending to be \$38.4 million in 2009–2010); DOUGLAS KEITH & ERIC VELASCO, BRENNAN CTR. FOR JUST., THE POLITICS OF JUDICIAL ELECTIONS, 2019–20, at 3 (2022) (estimating total spending on state supreme court elections to be \$97,948,870 in 2019–20).

7. Anthony Champagne, *Tort Reform and Judicial Selection*, 38 LOY. L.A. L. REV. 1483, 1488 (2005).

8. See KRITZER, *supra* note 3, at 133–34 (discussing increased involvement of outside groups in judicial elections); KEITH & VELASCO, *supra* note 6, at 2 (finding record spending by interest groups in the 2019–20 election cycle).

9. 536 U.S. 765, 788 (2002).

10. See Richard Brust, *No More Kabuki Confirmations*, 95 A.B.A. J. 39, 39–40 (2009); David A. Yalof, *Confirmation Obfuscation: Supreme Court Confirmation Politics in a Conservative Era*, 44 STUD. L., POL., & SOC’Y 141, 143 (2008) (noting that confirmation hearings “tend to feature well-rehearsed Supreme Court nominees offering proverbial seminars in the art of dodging, ducking and otherwise avoiding Senators’ inquiries”).

Moreover, and of special interest to me in this Essay, state supreme court races have become more polarized by partisanship and more nationalized. That is, vote choice for judicial candidates has become increasingly correlated with gubernatorial and presidential vote choice.¹¹ Interestingly, this is true even in nominally nonpartisan elections, where voters are, by design, denied the partisan cue.¹² Relatedly, as the potential policy and political impact of state supreme court decisions has become clearer to political actors over time, and the strategic allure of capturing control over a small court versus a large legislature becomes more apparent, state supreme courts in many states have aligned with the governing regimes in their states.¹³ In their recent book, James Gibson and Michael Nelson deftly explore this dynamic, identifying, among other things, the correlation between one-party control of the political branches and the same party holding a majority on the supreme court in that state.¹⁴ They conclude that selecting judges through elections offers states a way to “keep all of their institutions on the same partisan page.”¹⁵

Add to this general context of increasing partisan polarization the explosive force of the Supreme Court’s recent decision in *Dobbs v. Jackson Women’s Health Organization*.¹⁶ By overruling *Roe v. Wade*¹⁷ and *Planned Parenthood v. Casey*,¹⁸ the Supreme Court returned to the states an issue that is almost uniquely salient among constitutional

11. Herbert M. Kritzer, *Polarization and Partisanship in State Supreme Court Elections*, 105 JUDICATURE 65, 67–69 (describing patterns of partisan correlation between state supreme court elections and gubernatorial elections); Aaron Weinschenk, Mandi Baker, Zoe Betancourt, Vanessa Depies, Nathan Erck, Quinne Herolt, Amanda Loehrke, Cameron Makurat, Hannah Malmberg, Clarice Martell, Jared Novitzke, Bradley Riddle, Tara Sellen, Leah Tauferner & Emily Zilliox, *Have State Supreme Court Elections Nationalized?*, 41 JUST. SYS. J. 313, 320 (2020) (describing correlations between results in state supreme court races and presidential elections).

12. See Kritzer, *supra* note 11, at 65–66 (noting that levels of partisan voting have increased even in nonpartisan judicial elections); Emily Rock & Lawrence Baum, *The Impact of High-Visibility Contests for U.S. State Court Judgeships: Partisan Voting in Nonpartisan Elections*, 10 STATE POL. & POL’Y Q. 368, 389 (2010) (finding that nonpartisan elections featuring more spending and media coverage increase partisan voting).

13. JAMES L. GIBSON & MICHAEL J. NELSON, JUDGING INEQUALITY: STATE SUPREME COURTS AND THE INEQUALITY CRISIS, 16–17 (2021) (arguing that the “dawn of hypercompetitive judicial elections arguably began in the 1980s” and linking it to the realization by “southern conservatives” that “it is much easier to obtain a majority on a court—where one only needs to capture four seats on a seven-member court” than a majority of a legislature). I return to the issue of one-party control in the next section. See *infra* Section I.A.

14. GIBSON & NELSON, *supra* note 13, at 186–92.

15. *Id.* at 192.

16. 142 S. Ct. 2228 (2022).

17. 410 U.S. 113 (1973).

18. 505 U.S. 833 (1992).

questions and is more politically polarized than ever in public opinion.¹⁹ That means the states—including state constitutions and state supreme courts—will be highly visible spheres of contestation, as became quickly apparent after the *Dobbs* decision.²⁰ While *Dobbs* is in some respects *sui generis*, the abortion issue is not the only topic drawing more attention to state supreme courts. In the relatively recent past, state supreme courts were pivotal in laying the groundwork for national marriage equality,²¹ and have, more recently, been making news with high-profile decisions about partisan gerrymandering and other election law issues.²² Given the intense polarization on abortion and election law, we might expect state supreme court elections in the post-*Dobbs* environment to become even more shaped by partisan dynamics.²³

All of these factors make state supreme court elections an increasingly contested and consequential point of intersection between law and politics. Elections have the capacity to engage voters more directly with constitutional law and legal institutions than anything on the federal level. At the same time, as *Dobbs* illustrates, what happens on the federal level can profoundly affect and shape these elections. With this context in mind, I will explore the question of what increasingly polarized and nationalized recent state supreme court elections look like and, more specifically, how partisanship shapes the electoral environment in court campaigns. My aim will be to generate a textured picture of how the increasing polarization and nationalization of these

19. See Michael Hout, Stuart Perrett & Sarah K. Cowan, *Stasis and Sorting of Americans' Abortion Opinions: Political Polarization Added to Religious and Other Differences*, 8 *SOCIUS* 1, 6 (2022) (finding that opinions on abortion are polarized by party and that “political divisions on abortion opinion have continued to grow in recent years”).

20. Amy Schoenfeld Walker, Jason Kao & Marco Hernandez, *Where Abortion Is on the Ballot*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/politics/midterms-abortion-access.html> [https://perma.cc/QX4E-VJTC] (Sept. 8, 2022); Nate Cohn, *Kansas Result Suggests 4 Out of 5 States Would Back Abortion Rights in Similar Vote*, N.Y. TIMES (Aug. 4, 2022), <https://www.nytimes.com/2022/08/04/upshot/kansas-abortion-vote-analysis.html> [https://perma.cc/93L6-Q87B] (noting large majority voting to preserve abortion rights); Zach Montellaro & Shia Kapos, *Redistricting, Abortion Supercharge State Supreme Court Races*, POLITICO (Aug. 17, 2022, 4:30 AM), <https://www.politico.com/news/2022/08/17/state-supreme-court-elections-00051412> [https://perma.cc/48TJ-6KY2].

21. Jane S. Schacter, *What Marriage Equality Can Tell Us About Popular Constitutionalism (and Vice-Versa)*, 52 *HOUS. L. REV.* 1147, 1156–59 (2015).

22. See, e.g., *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018) (striking down redistricting plan under state constitution); *N.C. State Conference of NAACP v. Moore*, No. 261A18-3 (N.C. Aug. 19, 2022) (ordering that a racially gerrymandered state legislature lacks authority to propose constitutional amendments). See generally Joshua A. Douglas, *State Judges and the Right to Vote*, 77 *OHIO STATE L.J.* 1 (2016) (examining role of state courts in a range of voting disputes).

23. Montellaro & Kapos, *supra* note 20.

elections affects the flow of information to the electorate. To do this, I have looked at the 230 state supreme court elections that were held from 2016 to 2021 and distilled salient points.

In Section I, I first review how competitive these elections have been, and then offer examples of the kinds of partisan frames and partisan-tinged information flowing to voters in numerous elections, including those that are formally nonpartisan. In Section II, I briefly consider some important questions raised by the data, focusing on the normative value of nonpartisan elections, how the character of contemporary elections may affect judicial legitimacy, and the links between constitutional law and politics in the state and federal domains.

I. SUPREME COURT RACES BETWEEN 2016 AND 2021

A. Overview of the Landscape

It is important to acknowledge at the outset that the category “judicial elections” is unhelpfully broad. There are significant distinctions in the form that elections take in different states. The state supreme court elections held from 2016 to 2021 can be usefully divided into four principal categories. First, seven states used partisan elections, in which candidates are identified by party on the ballot.²⁴ Second, Ohio joined this group in 2022, but during the time period studied here, it, along with Michigan, formed a second group of semi-partisan states in which political parties nominate the candidates but, once chosen, the nominees run without any partisan identification on the ballot.²⁵ Third, thirteen states used nonpartisan elections, in which the candidates are not identified by party at all.²⁶ Finally, twenty states use retention elections, in which the voters are simply asked whether to retain the incumbent and

24. Alabama, Illinois, Louisiana, New Mexico, North Carolina, Pennsylvania, and Texas. *Partisan Election of Judges*, BALLOTPEDIA (last visited Aug. 23, 2022), https://ballotpedia.org/Partisan_election_of_judges [https://perma.cc/GKF2-WE8Y]. Ohio now appears on this list because of its current policy, but it did not switch to fully partisan elections until 2022. OHIO REV. CODE. § 3505.03(F) (LexisNexis 2022) (amending Ohio law to require candidates for Ohio’s Supreme Court and Court of Appeals to designate their political affiliation on the general election ballot).

25. Michigan. *Michigan Method (State Supreme Court Selection)*, BALLOTPEDIA (last visited Oct. 21, 2022), [https://ballotpedia.org/Michigan_method_\(state_supreme_court_selection\)](https://ballotpedia.org/Michigan_method_(state_supreme_court_selection)) [https://perma.cc/7KSQ-YVWN]. Through 2021, this was designated as the “Michigan-Ohio method.” *See id.*

26. Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Dakota, Oregon, Washington, West Virginia, and Wisconsin. *Nonpartisan Election of Judges*, BALLOTPEDIA (last visited Oct. 21, 2022), https://ballotpedia.org/Nonpartisan_election_of_judges [https://perma.cc/XZD4-GLLJ].

there is no opponent.²⁷ Another kind of difference in electoral architecture cuts across these categories: while most states elect supreme court justices statewide, eight states split their supreme courts into districts and elect justices from each.²⁸

B. Competitiveness in the 2016 to 2021 Elections

The results of the elections discussed here are collected in Appendix A (all races), Appendix B (single-digit races), and Appendix C (retention races). The three appendices are posted on a dedicated website.²⁹

The first important item to note in reviewing Appendix A is that, in most of these races, the outcome was lopsided. This is especially true for incumbents—but not exclusively. In the partisan, semi-partisan and nonpartisan races in which an incumbent ran for re-election, the incumbent won 96 of those 107 races (89%).³⁰ Incumbents were even more likely to win in retention elections, where no opponent appears on the ballot.³¹ Between 2016 to 2021, there were 89 recall elections in a total of 21 states.³² As Appendix C reflects, all but one justice was

27. California, Alaska, Arizona, Utah, Wyoming, South Dakota, Nebraska, Colorado, Kansas, Oklahoma, Iowa, Missouri, Indiana, Tennessee, Florida, and Maryland allow for initial gubernatorial appointment of justices, followed by retention elections for additional terms. *See Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/judicial-selection-map> [https://perma.cc/43Q3-6NX2] (last visited Aug. 30, 2022). In New Mexico, the governor fills vacancies by appointment, and that judge must later win a partisan election before seeking additional terms in retention elections. *Id.* In Pennsylvania and Illinois, justices initially compete in partisan elections, and the elected justice may then seek additional terms through a retention election. *Id.* In Montana, justices are initially elected through nonpartisan elections and may seek additional terms through retention elections only if they are unopposed. *Id.* *See* KRITZER, *supra* note 3, at 205 tbl.7.1 (tracking the number of states using some version of retention election).

28. Illinois, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Oklahoma, and South Dakota. Jed Handelsman Shugerman, *Countering Gerrymandered Courts*, 122 COLUM. L. REV. F. 18, 20 (2022). As Shugerman notes, this system introduces the possibility that state courts can be gerrymandered.

29. *See* Appendices A–C, <https://guides.law.stanford.edu/schacter/polarization/wisrev> [https://perma.cc/94KD-MZJG]. Appendix A collects all races between 2016 and 2021 and identifies, for each one, the type of election; whether the winner had an opponent; whether an incumbent was defeated; and the winner’s and loser’s vote share. Appendix B collects all races decided by single digits and identifies the winner’s and loser’s vote share. Appendix C collects all retention elections and notes how the justice in each race was initially selected, along with the percentage of voters supporting retention.

30. *See* Appendix A, *supra* note 29.

31. *See* Appendix A, *supra* note 29.

32. *See* Appendix C, *supra* note 29.

retained³³—a nearly 99% success rate.³⁴ The lone exception was Thomas Kilbride, who was not retained in Illinois in 2020 after being targeted by interests aligned with the Republican Party.³⁵ Notably, Kilbride received support from a robust 56.5% majority, but fell short of the 60% required by state law.³⁶

The high degree of incumbent success in all categories of state supreme court elections is unsurprising, given the well-established incumbency advantage in non-judicial races. Interestingly, some data suggests that judicial incumbents have a somewhat lower re-election rate than incumbent legislative and executive candidates.³⁷ In the races studied here, however, the rate was high. Appendix A also reflects that incumbents often drew no challenger; in 46 of the 107 partisan, semi-partisan or nonpartisan elections—about 43%—the incumbent ran unopposed, making the election functionally more like a retention election.³⁸ And in retention elections alone, broken out in Appendix C, not only did every incumbent but one prevail, but 79 of 89—nearly 89% of all retention elections—saw 60% or more of the electorate favoring retention.³⁹ Thus, taken as a group, state supreme court elections in this period were typically not competitive.

Appendix B lists the exceptions to the rule: close—or at least closer—races. If we define “close” generously—as a race decided by a single-digit margin—38 of 230 these elections, or approximately 17%, meet that criterion.⁴⁰ But that category includes many races where the victor had an 8- or 9-point lead. If we instead employ a more restrictive definition of a close election and look at races decided by 5% or less, the number is smaller—18 of 230 elections, or about 8%, meet this definition.⁴¹

A few observations about the states that appear in Appendix B because they had at least one race decided by single digits: First, states

33. See Appendix C, *supra* note 29.

34. See Appendix C, *supra* note 29.

35. Jerry Nowicki, *Thomas Kilbride Falls Short in Battle for Supreme Court Retention*, JOURNAL STAR (Nov. 3, 2020, 10:15 PM), <https://www.pjstar.com/story/news/politics/elections/2020/11/04/thomas-kilbride-falls-short-in-battle-for-supreme-court-retention/42984491> [https://perma.cc/P7VB-9J28] (noting that the anti-retention campaign had been “backed by fiscal conservatives, including Illinois’ wealthiest person Ken Griffin, founder of the hedge fund Citadel, and Richard Uihlein, who are aligned with business interests and the Illinois GOP”).

36. See Appendix C, *supra* note 29.

37. Chris W. Bonneau, *Electoral Verdicts: Incumbent Defeats in State Supreme Court Elections*, 33 AM. POL. RSCH. 818, 823 (2005) (examining data from 1990–2000).

38. See Appendix A, *supra* note 29.

39. See Appendix C, *supra* note 29.

40. See Appendix B, *supra* note 29.

41. See Appendix B, *supra* note 29.

that formally allow for partisanship somewhere in the process are overrepresented in this group. Recall that, between 2016 and 2021, only seven states used partisan elections,⁴² and two additional states—Michigan and Ohio—used a partisan primary to select nominees, who then ran as nominally nonpartisan.⁴³ These nine combined states account for 67 of the 230 state supreme court elections from 2016 to 2021⁴⁴—roughly 30%—yet races in these states account for nearly two-thirds — 25 of 38—of the races decided by single digits, and more than half the races decided by 5% or less (11 of 18).⁴⁵ So, at a minimum, there is at least some correlation between formally incorporating partisanship somewhere in the election process, and a more competitive race. Second, one clue about the relatively limited number of close elections overall is that a majority of the races comprising the 230 total races listed in Appendix A took place in states in which one political party is dominant. In our contemporary politics, one-party dominance of the political branches in the states is no rarity. Indeed, looking across all 50 states, heading into the 2020 elections, one party held the “trifecta” of controlling both houses of the legislature and the governorship in 36 states.⁴⁶ If we look not at all 50 states, but only at states that use some form of election for the state supreme court—that is, only the states listed

42. Alabama, Illinois, Louisiana, New Mexico, North Carolina, Pennsylvania, and Texas. *See* Appendix A, *supra* note 29.

43. *See supra* notes 24–25 and accompanying text (discussing the 2022 change in Ohio’s system, and the Michigan-Ohio method of combining nonpartisan general elections with a partisan nominating process).

44. *See* Appendix A, *supra* note 29.

45. *See* Appendix B, *supra* note 29. Note that the 18-races figure includes the 2020 retention election in Illinois, in which Thomas Kilbride lost his seat. Although the retention race was technically nonpartisan, the state uses partisan elections and, as discussed in notes 35-36 and accompanying text, the retention race itself was saturated with partisanship.

46. *See 2020 State & Legislative Partisan Composition*, NAT’L CONF. STATE LEGISLATURES (April 1, 2020), https://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2020_April%201.pdf [<https://perma.cc/6SLP-SRR8>]. The fifteen states with a Democratic trifecta as of April 2020 were California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Virginia, and Washington. The twenty-one states with a Republican trifecta as of that time were Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. *Id.* Nebraska, which has a unicameral legislature that is formally nonpartisan, is not included in this total, though another analysis calls the state a Republican trifecta. *See State Partisanship*, BALLOTPEDIA, 7–9 (June 2020), https://ballotpedia.org/Ballotpedia_Courts:_State_Partisanship/PDF_Version [<https://perma.cc/J7DR-MKXU>].

on Appendix A—most of those 38 states also had a trifecta in 2020. Only 10 of the states in Appendix A had divided government.⁴⁷

Intuitively, the relative prevalence of one-party control in states would suggest some decrease in competitive elections, and that intuition is supported by both prior research and certain data points from the 2016 to 2021 elections explored here. Based on a large data set of state supreme court elections, for example, Herbert Kritzer found that one-party dominance in the political branches of a state's government is correlated with less competitive supreme court elections.⁴⁸ And in the 2016 to 2021 elections, it is noteworthy that some three-quarters of the elections listed in Appendix A—168 of the total 230 elections—took place in states that had a trifecta as of spring 2020.⁴⁹

Moreover, in a study that matched trifecta with the party controlling the supreme court, almost all the states that use some form of judicial election and had trifectas *also* had a supreme court with a majority of justices affiliated with the same party at that time.⁵⁰ The frequency of partisan and ideological congruence of this kind,⁵¹ in other words, is at the very least consistent with the relative lack of competitive elections reflected in Appendix A.⁵² So, although noncompetitive races are typically less likely to generate extensive campaign activity of the kind I will review in the next Section, that does not mean that partisanship and polarization are not relevant. It likely means, instead, that partisan control of states is part of what *makes* these elections noncompetitive.

It is worth emphasizing the “part of” in that sentence. There are undoubtedly other explanations for the relative paucity of close races in the data set. Recall the frequency of ballot roll-off,⁵³ which reflects reduced voter interest in judicial elections. This is especially likely the case for retention elections, which make up more than one-third of all the races in Appendix A. In the absence of an opponent, it is simply harder to generate voter interest. Occasionally, retention elections can draw public attention. Well-known, historical examples include the

47. Of the states listed in Appendix A, *supra* note 29, the ten with divided government as of April 2020 were Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, North Carolina, Pennsylvania, and Wisconsin. *See 2020 State & Legislative Partisan Composition, supra* note 46.

48. Kritzer, *supra* note 11, at 73.

49. *See* Appendix A, *supra* note 29.

50. *See State Partisanship, supra* note 46.

51. For a study using a large database of state supreme court decisions and finding ideological concurrence, see GIBSON & NELSON, *supra* note 13, at 193 (based on analysis of 6,000 cases relating to equality between 1990–2015 “we find that state supreme courts infrequently depart from the ideological preferences of the governing coalition in the state”).

52. *See supra* notes 37–40 and accompanying text.

53. *See supra* note 4 and accompanying text.

organized campaign to oppose the retention of California Supreme Court justices based on their hostility to the death penalty or to the more recent campaign to oppose the retention of Iowa Supreme Court justices who had issued an early ruling in favor of same-sex marriage.⁵⁴ Similarly, and illustrated in the elections reviewed here, when an organized set of interests sees the possibility of political advantage in opposing a retention, as a Republican-allied group did in opposing Thomas Kilbride in Illinois, retention can draw public attention.⁵⁵ Much of the time, however, those elections do not capture the attention of a significant part of the electorate and that is likely part of what explains why so few of the races studied here were close.

C. Partisan Signals in State Supreme Court Races

I turn now to a closer look at how partisan polarization and nationalization are reflected in judicial elections. Given that only a handful of states use partisan elections, there is an initial puzzle about why there is nevertheless evidence of rising partisanship and nationalization. Without the partisan cue that typically guides voting decisions for elected officials,⁵⁶ voters cannot vote a straight party ticket and must learn about candidates' partisan identification elsewhere. How do they get this information?

Sometimes there are straightforward indicators, such as prior appointment by a governor to fill a vacancy⁵⁷ or the fact that the candidate held elected office before running for the court.⁵⁸ To the extent that voters

54. KRITZER, *supra* note 3, at 203–04.

55. *See* Nowicki, *supra* note 35.

56. For leading discussions of the power of partisanship and the partisan cue in shaping voting decisions, see ANGUS CAMPBELL, PHILIP E. CONVERSE, WARREN E. MILLER & DONALD E. STOKES, *THE AMERICAN VOTER* (1976); Larry M. Bartels, *Beyond the Running Tally: Partisan Bias in Political Perceptions*, 24 *POL. BEHAV.* 117 (2002); Jeffrey J. Mondak, *Public Opinion and Heuristic Processing of Source Cues*, 15 *POL. BEHAV.* 167 (1993).

57. *See, e.g., Washington Supreme Court Elections, 2020*, BALLOTPEDIA, https://ballotpedia.org/Washington_Supreme_Court_elections_2020 [<https://perma.cc/L2W6-Z5RA>] (last visited Oct. 30, 2022) (describing how Raquel Montoya-Lewis faced voters in the 2020 Washington Supreme Court election after being appointed by Democratic Governor Inslee in 2019); *Minnesota Supreme Court Elections, 2020*, BALLOTPEDIA, https://ballotpedia.org/Minnesota_Supreme_Court_elections_2020 [<https://perma.cc/3UMR-2HT8>] (last visited Oct. 30, 2022) (describing how Paul Thissen faced voters in the 2020 Minnesota Supreme Court election after being appointed by Democratic Governor Dayton in 2018); *Charlie Bethel*, BALLOTPEDIA, https://ballotpedia.org/Charlie_Bethel [<https://perma.cc/5S9H-9DQY>] (last visited Oct. 30, 2022) (describing how Charlie Bethel faced voters in the 2020 Georgia Supreme Court election after being appointed by Republican Governor Deal in 2018).

58. For example, in 2020, Georgia, Kentucky, Minnesota, Nevada, and West Virginia all saw former state legislators run for supreme court seats. *See Georgia*

are aware of these facts, they can provide partisan information. But candidates typically do more to send partisan signals.

The most striking evidence of partisan cueing is how candidates—especially those on the right—are described, or describe themselves, to voters. Advertisements are a central source of these descriptions, but interviews, candidate websites, and other sources can also contain these characterizations. A prime example of partisan cueing comes in the numerous ads for right-leaning candidates that called the candidate “conservative,”⁵⁹ “the most conservative Christian candidate that I have ever known,”⁶⁰ “a constitutional conservative,”⁶¹ a “pro-life Christian, fiscal conservative,”⁶² or a “conservative Republican.”⁶³ All these

Supreme Court Elections, 2020, BALLOTPEdia,
https://ballotpedia.org/Georgia_Supreme_Court_elections_2020
[\[https://perma.cc/5KMY-N88D\]](https://perma.cc/5KMY-N88D) (last visited Oct. 30, 2022) (noting that Charlie Bethel, an incumbent running for re-election to the Georgia court, was a former Republican state senator and his opponent, Beth Baskin, was a former Republican state representative);
Chris Harris (Kentucky), BALLOTPEdia,
[https://ballotpedia.org/Chris_Harris_\(Kentucky\)](https://ballotpedia.org/Chris_Harris_(Kentucky)) [\[https://perma.cc/4EQQ-H8EF\]](https://perma.cc/4EQQ-H8EF) (last visited Oct. 21, 2022) (noting that Chris Harris, a candidate for Kentucky’s Supreme Court 7th District, was a former Democratic state representative); *Minnesota Supreme Court Elections, 2020*, *supra* note 57 (noting that Paul Thissen, the incumbent running for re-election in Minnesota, was a former Democratic state representative); *Ozzie Fumo*, BALLOTPEdia, https://ballotpedia.org/Ozzie_Fumo [\[https://perma.cc/HUZ9-ZH7F\]](https://perma.cc/HUZ9-ZH7F) (last visited Oct. 30, 2022) (noting that Ozzie Fumo, a candidate for Nevada Supreme Court, was a former Democratic member of the Nevada State Assembly); *Tim Armstead*, BALLOTPEdia, https://ballotpedia.org/Tim_Armstead [\[https://perma.cc/DGW2-F8QK\]](https://perma.cc/DGW2-F8QK) (last visited Oct. 30, 2022) (noting that Tim Armstead, an incumbent running for re-election in West Virginia, was a former Republican state representative); *William Wooton*, BALLOTPEdia, https://ballotpedia.org/William_Wooton [\[https://perma.cc/WLF8-D3SS\]](https://perma.cc/WLF8-D3SS) (last visited Oct. 30, 2022) (noting that William Wooton, a candidate for West Virginia’s Supreme Court, was a former Democratic state representative).

59. *Buying Time 2016—Mississippi*, BRENNAN CTR. FOR JUST. (May 30, 2017), <https://www.brennancenter.org/our-work/research-reports/buying-time-2016-mississippi> [\[https://perma.cc/B4J9-8DSD\]](https://perma.cc/B4J9-8DSD) (characterizing the kind of judge candidate Griffis will be by showing pictures of Barack Obama and Hillary Clinton, who are said to be seeking control of the U.S. Supreme Court).

60. *Buying Time 2018—Arkansas*, BRENNAN CTR. FOR JUST. (May 1, 2018), <https://www.brennancenter.org/our-work/research-reports/buying-time-2018-arkansas> [\[https://perma.cc/A4S9-UKE6\]](https://perma.cc/A4S9-UKE6) (introducing candidate Sterling and noting that he shares the “conservative agenda” of President Donald Trump and Governor Asa Hutchinson).

61. *Buying Time 2019—Kentucky*, BRENNAN CTR. FOR JUST. (Nov. 4, 2019), <https://www.brennancenter.org/our-work/research-reports/buying-time-2019-kentucky> [\[https://perma.cc/NVL6-XUV4\]](https://perma.cc/NVL6-XUV4) (describing the type of judge that Whitney Westerfield will be).

62. *Id.* (candidate Nickell describing what kind of justice he will be).

63. *See, e.g., Buying Time 2016—Ohio*, BRENNAN CTR. FOR JUST. (May 30, 2017), <https://www.brennancenter.org/our-work/research-reports/buying-time-2016-ohio> [\[https://perma.cc/4V8N-MVFU\]](https://perma.cc/4V8N-MVFU) (describing an ad which refers to candidate Pat Fischer as a “conservative Republican”).

examples come from nonpartisan or semi-partisan states. Unsurprisingly, partisan elections also feature similar candidate descriptions,⁶⁴ as well as similar cues of the kinds I address below. I focus, however, on nonpartisan and semi-partisan races because those are the ones in which partisan identification is otherwise absent in the general election.

Sometimes these pointed descriptions of candidates as “conservative” appear in ads run by the campaigns themselves; in others, it is an independent or party group running the ad. From the voters’ perspective, however, the source of the ad is less important than its content. In any event, it is not uncommon for candidates in nonpartisan states to describe themselves in these terms.⁶⁵

I did not find a precise rhetorical equivalent on the left, but progressive justices found ways to signal their partisan affiliation. Perhaps most evocatively, several ads used former President Donald Trump as a foil. In Wisconsin’s 2018 election, for example, an ad for candidate Rebecca Dallet asserted that Trump had “attacked our civil rights and our values,” and promised to “protect[] our rights and defend[]

64. See, e.g., *Buying Time 2016—Louisiana*, BRENNAN CTR. FOR JUST. (May 30, 2017), <https://www.brennancenter.org/our-work/research-reports/buying-time-2016-louisiana> [<https://perma.cc/H8W5-J386>] (describing an ad supporting candidate Genovese which says that Louisiana lives by “strong and sound, conservative values” and that Genovese shares these values).

65. See Jimmie E. Gates, *What You Need to Know About the Mississippi Supreme Court Races*, MISS. CLARION LEDGER (Oct. 8, 2020, 9:00 PM), <https://www.clarionledger.com/story/news/politics/2020/10/09/what-you-need-to-know-about-mississippi-supreme-court-races/3637837001> [<https://perma.cc/83JJ-3R2U>] (providing 2020 candidate Kenny Griffis’s positioning as “a constitutional conservative with a dedication to fairness and the rule of law”); Andrew DeMillo, *State Supreme Court Battles Mirror the Fight Over Kavanaugh*, AP NEWS (Oct. 2, 2018), <https://apnews.com/article/nc-state-wire-north-america-donald-trump-wv-state-wire-ap-top-news-c28cce58096e42d7af978019be3a955b> [<https://perma.cc/JK3C-SZYD>] (reporting a statement from David Sterling, a 2018 candidate for Arkansas Supreme Court, as saying that he would not denounce third-party attack ads against his opponent because he was “running as a constitutional conservative” and didn’t want “to put [him]self in a position of having to tell them what they can and can’t say”); David Ferrara, *High-Dollar Nevada Supreme Court Races Underway*, LAS VEGAS REV.-J. (Oct. 20, 2018, 11:40 AM), <https://www.reviewjournal.com/news/politics-and-government/nevada/high-dollar-nevada-supreme-court-races-underway> [<https://perma.cc/ZER3-2PY3>] (describing Matthew Harter, a 2018 candidate for Nevada Supreme Court, who self-identifies as a “conservative” and a “textualist”); Andrew Wolfson, *Self-Described Christian Conservative Wins Seat on Kentucky Supreme Court*, LOUISVILLE COURIER J. (Nov. 4, 2020, 6:07 PM), <https://www.courier-journal.com/story/news/politics/elections/kentucky/2020/11/04/kentucky-supreme-court-robert-conley-defeats-chris-harris-election/6075946002> [<https://perma.cc/A5RD-SWCK>] (describing how Robert Conley, a candidate for Kentucky’s Supreme Court in 2020, told voters in a campaign survey that his “Christian, conservative values guide [his] life”).

our values.”⁶⁶ Two years later, candidate Jill Karofsky ran an ad in Wisconsin showing a clip of Donald Trump endorsing her opponent and accusing the opponent of corruption.⁶⁷ In Michigan’s 2018 election, candidate Megan Cavanagh used Trump’s image in an ad, but connected it to the asserted need to keep politics out of the court.⁶⁸ She also ran an ad showing the contentious confirmation hearings for Brett Kavanaugh’s nomination and said, “with chaos in those courts, Michigan deserves a steady hand.”⁶⁹

Beyond acting as a foil in ads, elected officials often feature prominently through endorsements. They represent a major source of partisan cues across all categories of elections. Especially in the context of our polarized politics, these cues effectively communicate to voters where a candidate’s leanings are likely to be. And they are sometimes unobvious. Perhaps no recent election featured more salient endorsements than the 2020 race between candidates Karofsky and Daniel Kelly in Wisconsin. That election was notable in featuring ultra-high-profile counter-endorsements by Biden and Trump, respectively, in a state pivotal to the 2020 presidential election. Biden touted Karofsky for knowing that “every decision has a real impact on individuals and families across Wisconsin” and warned that “[t]he stakes are too high for Wisconsin workers and families to have Scott Walker and Donald Trump’s handpicked choice on the bench for the next decade,” while Trump tweeted that “Justice Kelly has been doing a terrific job upholding the Rule of Law and defending your #2A. Tough on Crime, Loves our Military and our Vets. He has my Complete Endorsement!”⁷⁰ Other high-profile elected officials jumped into the same race with partisan-tinged endorsements. Senator Bernie Sanders, for example, touted the importance of judges who “know that women have the right to control their own bodies, that workers have the right to bargain for better wages, that same-sex marriage is a right, and that addressing the gun violence

66. *Buying Time 2018—Wisconsin*, BRENNAN CTR. FOR JUST. (Jan. 23, 2018), <https://www.brennancenter.org/our-work/research-reports/buying-time-2018-wisconsin> [https://perma.cc/C7YY-WKVK].

67. *Id.*

68. *Buying Time 2018—Michigan*, BRENNAN CTR. FOR JUST. (Oct. 8, 2018), <https://www.brennancenter.org/our-work/research-reports/buying-time-2018-michigan> [https://perma.cc/3BV7-UP8C].

69. *Id.*

70. *Wisconsin Supreme Court Elections, 2020*, BALLOTPEdia, https://ballotpedia.org/Wisconsin_Supreme_Court_elections_2020 [https://perma.cc/VH4G-XMH3] (last visited Oct. 30, 2020); Bill Glauber, *Joe Biden Endorses Jill Karofsky for State Supreme Court While Donald Trump Reaffirms Backing of Daniel Kelly*, MILWAUKEE J. SENTINEL, <https://www.jsonline.com/story/news/politics/elections/2020/04/03/joe-biden-endorses-jill-karofsky-wisconsin-supreme-court-race/2945893001> [https://perma.cc/3Z2D-MJDH] (Apr. 4, 2020, 4:48 PM).

epidemic in this country is one of the most critical issues of this generation,” while Senator Ron Johnson called Kelly a “conservative justice” and former Governor Scott Walker branded Karofsky a “liberal activist.”⁷¹ In the context of 2020 politics, that kind of proxy battle effectively eliminated any meaningful nonpartisanship from the election.

No doubt the 2020 presidential race in Wisconsin made the judicial race more visible and hotly contested, but endorsements by elected officials were common in other nominally nonpartisan elections as well. For example, Senator Tom Cotton of Arkansas called candidate Barbara Webb his “fellow conservative,” and Representative Bennie Thompson of Mississippi placed candidate Latrice Westbrook on his widely circulated “sample ballot,” along with the Biden-Harris ticket.⁷²

Elected officials were not the only ones to endorse. Interest groups were actively engaged in many elections and also provided potent ideological and partisan cues. They also frequently provided financial support and independent spending, but consistent with my focus on the information flow to voters, I focus here on endorsements. For example, even before *Dobbs* thrust the abortion question to the forefront, it was common for interest groups on both sides of the abortion debate to issue endorsements, including in nonpartisan states.⁷³ State right-to-life groups endorsed candidates in multiple races.⁷⁴ Similarly, right-to-choose groups

71. Maija Inveiss, *Bernie Sanders Endorses Judge Jill Karofsky for Wisconsin Supreme Court*, CHANNEL 3000, <https://www.channel3000.com/bernie-sanders-endorses-judge-jill-karofsky-for-wisconsin-supreme-court> [https://perma.cc/KX5J-RZJZ] (Apr. 2, 2020, 9:43 AM); Daniel Kelly (@JusticeDanKelly), TWITTER (Apr. 4, 2020, 8:51 AM), <https://twitter.com/JusticeDanKelly/status/1246435157298548737> [https://perma.cc/MDE3-QPWV] (sharing Senator Johnson’s video endorsement of “conservative justice” Kelly, which also warned about Democrats “trying to overturn well-established law”); Daniel Kelly (@JusticeDanKelly), TWITTER (Mar. 29, 2020, 1:32 PM), <https://twitter.com/JusticeDanKelly/status/1244331722348658689> [https://perma.cc/TR8Y-V4MC] (sharing Governor Walker’s video endorsement of Kelly, which highlighted Kelly’s commitment to “staying firm to the constitution,” in contrast to his “liberal, activist” opponent).

72. *Notes from the Campaign Trail: Cotton Urges Support for Webb in Supreme Court Race*, TALK BUS. & POL. (Feb. 12, 2020, 8:51 PM), <https://talkbusiness.net/2020/02/notes-from-the-campaign-trail-cotton-urges-support-for-webb-in-supreme-court-race> [https://perma.cc/9YD5-XNLW]; Frank Corder, *Donors, Endorsements Tell the Story of Griffis, Westbrook MS Supreme Court Race*, Y’ALL POLITICS (Oct. 30, 2020), <https://yallpolitics.com/2020/10/30/donors-endorsements-tell-the-story-of-griffis-westbrook-ms-supreme-court-race> [https://perma.cc/M7TH-FV5U] (noting endorsement in Thompson’s “sample ballot”).

73. See *infra* notes 74–76.

74. See, e.g., Dave Mistich, *Meet the Candidates for West Virginia Supreme Court Division 2: Douglas, Raynes, Tabit, Wooton*, W. VA. PUB. BROAD. (June 2, 2020, 4:22 PM), <https://www.wvpublic.org/news/2020-06-02/meet-the-candidates-for-west-virginia-supreme-court-division-2-douglas-raynes-tabit-wooton> [https://perma.cc/D95M-EVDL] (noting that Kristina Raynes was endorsed by West Virginians for Life); *Wisconsin Right to Life PAC Endorses Brian Hagedorn for*

endorsed in several races.⁷⁵ Sometimes, there were multiple interest-group endorsements that, when combined, intensified the partisan signal by amplifying the ideological leanings of a candidate. One example is a candidate receiving an endorsement from a pro-life group and the National Rifle Association or a state-level analogue.⁷⁶

Cultural issues were by no means the only ones that produced endorsements. States play the key policymaking role in various areas of economic activity, including the long-contested issue of tort reform.⁷⁷ As could be predicted, economic interest groups also regularly weigh in on races. On the progressive side, labor groups, including the AFL-CIO and teachers' associations, endorsed candidates in multiple races.⁷⁸ On the

Wisconsin Supreme Court, WIS. RIGHT TO LIFE (Mar. 7, 2019), <https://wisconsinrighttolife.org/wrtl-news/2019/03/07/wisconsin-right-to-life-pac-endorsements-brian-hagedorn-for-wisconsin-supreme-court> [https://perma.cc/QU2C-JTCN] (noting that Wisconsin Right to Life endorses Brian Hagedorn and emphasizing their desire to find judges who will not “create law that will favor pro-abortion activists and legislators”); *Tao Receives Two Endorsements*, MESQUITE LOCAL NEWS (Sept. 24, 2018), <https://mesquitelocalnews.com/2018/09/24/tao-receives-two-endorsements> [https://perma.cc/Z8ST-YVJ9] (noting that Jerry Tao had been endorsed by Nevada Right to Life); Betsy Z. Russell, *McKenzie Releases Endorsements; Court Candidates to Debate Fri. Night on Statewide TV*, SPOKESMAN-REV. (May 5, 2016), <https://www.spokesman.com/blogs/boise/2016/may/05/mckenzie-releases-endorsements-court-candidates-debate-fri-night-statewide-tv> [https://perma.cc/QET7-YZB4] (noting that candidate Curt McKenzie had been endorsed by Idaho Chooses Life).

75. See, e.g., *Washington Supreme Court Elections, 2016*, BALLOTPEdia, https://ballotpedia.org/Washington_Supreme_Court_elections,_2016 [https://ballotpedia.org/Washington_Supreme_Court_elections,_2016, archived at <https://perma.cc/J8SZ-LLEN>] (last visited Oct. 30, 2022) (noting that NARAL Pro-Choice Washington had endorsed both Mary Yu and Charlie Wiggins); *Planned Parenthood Spends \$120,000 to Help WI Supreme Court Nominee Lisa Neubauer*, TMJ4 (Mar. 20, 2019, 7:57 PM), <https://www.tmj4.com/news/local-news/planned-parenthood-spends-120-000-to-help-wi-supreme-court-nominee-lisa-neubauer> [https://perma.cc/2EPP-TG3A].

76. See, e.g., Wolfson, *supra* note 65 (noting that Kentucky candidate Robert Conley was endorsed by both the NRA and Kentucky Right to Life); *Tao Receives Two Endorsements*, *supra* note 74 (noting that Jerry Tao had been endorsed by the NRA and Nevada Right to Life).

77. Champagne, *supra* note 7, at 1488.

78. See, e.g., Brad McElhinny, *Supreme Court Choices Include Circuit Judge, Family Court Judge, Prosecutor and Longtime Legislator*, METRONews (May 24, 2020, 8:00 AM), <https://wvmetronews.com/2020/05/24/supreme-court-choices-include-circuit-judge-family-court-judge-prosecutor-and-longtime-legislator> [https://perma.cc/H5HB-XSZQ] (noting that West Virginia Supreme Court candidate Joanna Tabit received the AFL-CIO's endorsement in 2020); *Wisconsin Supreme Court Elections*, *supra* note 70 (noting that Wisconsin Supreme Court candidate Jill Karofsky was endorsed by the AFL-CIO and the American Federation of Local Teachers in 2020); Riley Snyder, *Supreme Court Hopefuls Compare Judicial Approaches, Philosophy at Candidate Forum*, NEV. INDEP. (Oct. 2, 2018, 2:00 AM), <https://thenevadaindependent.com/article/supreme-court-hopefuls-compare-judicial-approaches-philosophy-at-candidate-forum> [https://perma.cc/7NMD-ZLNT] (noting that

conservative side, industry groups and the Chamber of Commerce or its local analogue came in to support candidates.⁷⁹

These kinds of messages and endorsements are familiar parts of ordinary political campaigns and elections, and it is striking to see them in judicial campaigns for that reason. But the elections reviewed here also featured partisan signals that pertained specifically to law and courts. To be sure, candidates often made anodyne statements about the rule of law and impartiality. But recognizable partisan signals were abundant here as well. The most consistent example I found was the very common refrain among right leaning candidates that they would not “legislate from the bench.” Examples are legion, but the basic concept is effectively captured by candidate Jerry Tao in Nevada, who said during a video interview that judges “are elected to interpret the law and the constitution, not to impose our views of the law on people—not to legislate from the bench is the saying everyone uses.”⁸⁰ Sometimes the phrase is joined with a more pointed partisan reference, as when Mississippi Supreme Court candidate Brady said, “we need conservative Christians on the court who will fairly apply the law to facts and not legislate from the bench.”⁸¹ Whatever the particular verbiage, the concept is somewhat ubiquitous on the right,⁸² and is freighted with familiar

Nevada Supreme Court candidate Elissa Cadish was endorsed by the AFL-CIO and the Nevada State Education Association in 2018).

79. Press Release, Georgia Chamber, Georgia Chamber Endorses Incumbent Justices Bethel and Warren (Apr. 30, 2020), <https://www.gachamber.com/georgia-chamber-endorses-incumbent-justices-bethel-and-warren> [<https://perma.cc/93BV-57Z3>] (noting in a press statement that “[t]hese incumbents have a strong record and understand the importance of taking an impartial approach to interpreting laws that have far reaching implications for our member businesses as a whole”); Press Release, Jamie Mara, Director of Public Relations, Dairy Business Association, Dairy Group Endorses Michael Screnock for Wisconsin Supreme Court (Mar. 15, 2018), <https://www.dairyforward.com/news/news.asp?id=391037> [<https://perma.cc/F8ND-US3U>] (endorsing candidate Michael Screnock because he is “fiercely dedicated to applying the laws as they are written” and Wisconsin needs “justices who don’t seek to legislate from the bench or attempt to influence policy”); Chris Dickerson, *State Chamber PAC Endorses Walker for Supreme Court*, W. VA. REC. (Mar. 1, 2016), <https://wvrecord.com/stories/510698252-state-chamber-pac-endorses-walker-for-supreme-court> [<https://perma.cc/Q9RN-EVVE>] (endorsing candidate Beth Walker, highlighting her “extensive legal experience”).

80. Victor Joecks, *Tao Details His Judicial Philosophy*, LAS VEGAS REV.-J. (Oct. 25, 2018, 10:19 AM), <https://www.reviewjournal.com/opinion/opinion-columns/victor-joecks/tao-details-his-judicial-philosophy> [<https://perma.cc/5385-6YQD>].

81. Alex Holloway, *Supreme Court Race Heads to Runoff*, DISPATCH (Nov. 9, 2016), <https://cdispatch.com/news/2016-11-09/supreme-court-race-heads-to-runoff> [<https://perma.cc/4UPL-W5S6>] (quoting 2016 Mississippi Supreme Court candidate John Brady).

82. See, e.g., Gates, *supra* note 65 (“[O]n the Supreme Court, I’ve focused on applying the law, not legislating from the bench, because that’s what all Mississippians deserve.”); Kelly: *Beware of Judges Looking to Legislate from the Bench*, NBC15 (July

partisan coding from years of use by Republicans in debates about federal judicial appointments.⁸³

There is less rhetorical consistency among left-leaning candidates, and indeed, on the federal level, progressives similarly lack a signature phrase to counter the familiar conservative derision of “legislation from the bench.”⁸⁴ Probably the closest thing in the recent state elections is the invocation by several progressive candidates of “access to justice” as an animating value, especially when it is paired with references to groups traditionally disadvantaged in the court system, or to the need to treat people with “dignity” and “respect.”⁸⁵ In light of our contemporary

9, 2019, 1:34 PM), <https://www.nbc15.com/content/news/Kelly-Beware-of-judges-looking-to-legislate-from-bench-512481772.html> [https://perma.cc/N8S5-U7LA] (discussing how 2020 Wisconsin Supreme Court candidate Daniel Kelly warned voters at a lunch sponsored by the Pax Americana Institute “to beware of judges who can’t explain why they shouldn’t legislate from the bench” and promised that he would “go on interpreting laws as they’re written”); Jason Stein, *Sauk County Judge with Ties to Gov. Scott Walker Running for Wisconsin Supreme Court*, MILWAUKEE J. SENTINEL, <https://www.jsonline.com/story/news/politics/2017/06/16/sauk-county-judge-running-wisconsin-supreme-court/402930001> [https://perma.cc/TYJ8-GT4G] (June 16, 2017, 7:40 PM) (quoting a press statement given by 2018 candidate Michael Screnock in which he declared “it is the role of a judge to say what the law is and not what it should be. Judges should not legislate from the bench”); Holloway, *supra* note 81 (quoting 2016 Mississippi Supreme Court candidate John Brady as saying that “we need conservative Christians on the court who will fairly apply the law to facts and not legislate from the bench”).

83. Jane S. Schacter, *Putting the Politics of “Judicial Activism” in Historical Perspective*, 2017 SUP. CT. REV. 209, 217 n.46.

84. See Simon Lazarus, *Hertz or Avis? Progressives’ Quest to Reclaim the Constitution and the Courts*, 72 OHIO STATE L.J. 1201, 1214 (2011) (“[W]hile real-world conservative advocates, politicians, and judges never missed an opportunity to trumpet their fealty to the ‘original’ Constitution, the Framers’ intent, ‘strict construction,’ and ‘judges who do not legislate from the bench,’ their real-world progressive adversaries . . . steered clear of discussing, let alone embracing, any overarching constitutional vision or philosophy.”).

85. See, e.g., *Paul Thissen*, BALLOTPEDIA, https://ballotpedia.org/Paul_Thissen [https://perma.cc/WB8H-66SB] (last visited Oct. 30, 2022) (describing key messages of Thissen’s 2020 campaign for Minnesota Supreme Court, including his belief that “[t]oo many people, especially poor people, people of color and people in rural areas, do not have the same access to justice as other Minnesotans” and his promise to be “fiercely committed to changing that reality”); Lewis Kamb, *Newly Appointed Justices Draw Challengers in Washington State Supreme Court Election*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/politics/newly-appointed-justices-draw-challengers-in-washington-supreme-court-races> [https://perma.cc/S92S-UCGX] (Oct. 19, 2020, 11:20 AM) (describing a statement from 2020 Washington Supreme Court candidate Raquel Montoya-Lewis that she viewed “racial inequity and access to the courts as the biggest challenges facing the justice system”); Joanna Tabit, *Candidate for Justice of the W. Va. Supreme Court of Appeals*, WCHSTV (Mar. 16, 2020), <https://wchstv.com/news/know-your-candidates/joanna-tabit-candidate-for-justice-of-the-wva-supreme-court-of-appeals> [https://perma.cc/RKX8-JJNY] (describing a statement from 2020 candidate Joanna Tabit in which she emphasized her belief that the West Virginia Supreme Court “should

politics, communicating concern for disadvantaged groups can be a partisan signal in its own right.

Candidates also yoked a partisan signal to their rhetoric about law and courts by identifying a United States Supreme Court Justice whom they admired. This was sometimes asked of them and sometimes volunteered. Justice Scalia got several mentions⁸⁶ but Justices Thomas,⁸⁷

be understandable, convenient, timely and affordable to all persons so that everyone will have access to justice and the court system,” and that “the court should respect the dignity of every person, regardless of race, class, gender, sexual orientation, or any other defining characteristic”); Joyce Lupiani, *Elissa Cadish Defeats Jerry Tao for Supreme Court Seat*, KTNV, <https://www.ktnv.com/news/elissa-cadish-defeats-jerry-tao-for-supreme-court-seat> [<https://perma.cc/B46B-LJNJ>] (Sept. 23, 2020, 6:09 PM) (noting that 2018 Nevada Supreme Court candidate Lidia Stiglitch was “known for her concern about access to justice for those who lack an attorney”); *Bridget Mary McCormack*, BALLOTPEDIA, https://ballotpedia.org/Bridget_Mary_McCormack [<https://perma.cc/3KD8-N3W3>] (last visited Oct. 30, 2022) (reflecting that Bridget McCormack, a Democratically-affiliated candidate for the Michigan Supreme Court, used a survey to emphasize her message that “courts belong to the people; they must be accessible to all, treat people with dignity and respect and be transparent”).

86. *Kris Raynes*, BALLOTPEDIA, https://ballotpedia.org/Kris_Raynes [<https://perma.cc/Q7YB-8DBJ>] (last visited Oct. 30, 2022) (providing survey statements by 2020 West Virginia Supreme Court candidate Kris Raynes, who noted in a survey that “Antonin Scalia is [her] judicial role model”); Bruce Schreiner, *Ky. Supreme Court Candidates Offer Starkly Different Resumes*, WFPL (Oct. 21, 2019), <https://wfpl.org/ky-supreme-court-candidates-offer-starkly-different-resumes> [<https://perma.cc/X968-8W65>] (characterizing the views of both candidates for the 2019 Kentucky Supreme Court, Whitney Westerfield and Christopher Nickell, as “the constitutional vision espoused by Scalia”); *Buying Time 2019—Louisiana*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/buying-time-2019-louisiana> [<https://perma.cc/Z9DF-7ENC>] (Nov. 19, 2019) (describing how 2019 Louisiana Supreme Court candidate Hans Liljeberg ran an advertisement saying that he studied under Justice Scalia); Patrick Marley, *Neubauer Questions Whether Hagedorn Can Be Fair, as He Calls Her Attacks ‘Shameful’ at State Supreme Court Debate*, MILWAUKEE J. SENTINEL, <https://www.jsonline.com/story/news/politics/elections/2019/03/15/neubauer-asks-whether-hagedorn-can-fair-he-calls-attacks-shameful/3177087002> [<https://perma.cc/6Q3M-QVEY>] (Mar. 16, 2019, 1:35 PM) (noting Wisconsin Supreme Court candidate Brian Hagedorn’s professional admiration for the judicial philosophy of Justice Scalia, along with Justices Gorsuch and Thomas); BJ Lutz, *Judicial Philosophy, Partisanship at Heart of Supreme Court Debate*, WISN 12, <https://www.wisn.com/article/judicial-philosophy-partisanship-at-heart-of-supreme-court-debate/6331474> [<https://perma.cc/6GLB-TWE4>] (Mar. 15, 2016, 11:00 PM) (noting Wisconsin Supreme Court candidate Rebecca Bradley’s praise for Justice Scalia as someone who “always followed the law, even if he personally disagreed with the law or the outcome of the case”).

87. Marley, *supra* note 86; *see also* Patrick Marley, *Election 2016: Rebecca Bradley, JoAnne Kloppenburg Signal Political Leanings*, MILWAUKEE J. SENTINEL (Mar. 27, 2016, 11:00 PM), <https://www.jsonline.com/story/news/politics/elections/2016/03/28/election-2016-rebecca-bradley-joanne-kloppenburger-signal-political-leanings/84939128> [<https://perma.cc/6ZP6-8WMW>] (reporting that 2016 Wisconsin Supreme Court candidate Rebecca Bradley named Justices Thomas and Alito as judges she admired).

Gorsuch,⁸⁸ Alito,⁸⁹ Sotomayor,⁹⁰ Ginsburg,⁹¹ and Roberts,⁹² for example, also earned shout outs. In the wake of *Dobbs*, we might expect to see Justice Alito soon rise on this list in future elections. These mentions can provide efficient cues, albeit most efficacious for the segment of the electorate that is familiar with the Supreme Court.

Finally, there are many instances of candidates using past judicial decisions as a basis for attacking an opponent. Past decisions in criminal cases are an especially fertile source and can be deployed by both right- and left-leaning candidates.⁹³ But past decisions about election law,⁹⁴

88. Marley, *supra* note 86; see also John Moritz, *Contest for Spot on Arkansas Supreme Court Low-Key*, ARK. DEMOCRAT GAZETTE (Feb. 16, 2020, 9:19 AM), <https://www.arkansasonline.com/news/2020/feb/16/contest-for-spot-on-high-court-low-key--1/?news-politics> [<https://perma.cc/KD2W-TE54>] (reporting that 2020 candidate for Arkansas Supreme Court, Barbara Webb, picked Justice Gorsuch as her “judicial doppelganger”).

89. Marley, *supra* note 86.

90. Steven Gonzalez, *BALLOTPEDIA*, https://ballotpedia.org/Steven_Gonzalez [<https://perma.cc/28WD-4CZG>] (last visited Oct. 30, 2022) (showing that, in a survey response, 2018 Washington Supreme Court candidate Steven Gonzalez named Justice Sotomayor as someone whose “character and clear thinking” he admired); Marley, *supra* note 87 (reporting that, in a candidate forum, 2016 Wisconsin Supreme Court candidate JoAnne Kloppenburg aligned herself with Justices Sotomayor and Ginsburg “because they are trailblazers for women who want to follow in their footsteps as lawyers and as judges and because they do appear to share my view of the Constitution as protecting individual rights and promoting a more equal society”).

91. Marley, *supra* note 87.

92. Moritz, *supra* note 88 (reporting that 2020 candidate for Arkansas Supreme Court, Morgan Welch, picked Chief Justice Roberts as his “judicial doppelganger”).

93. See, e.g., Andrew Wolfson, *A Kentucky Supreme Court Candidate Has Been Reprimanded for Misconduct*, COURIER J., <https://www.courier-journal.com/story/news/2020/09/11/kentucky-supreme-court-candidate-robert-conley-sanctioned-angry-outburst/3463628001> [<https://perma.cc/P89P-RZUK>] (Sept. 11, 2020, 11:44 PM) (discussing how a 2020 candidate for Kentucky Supreme Court, Robert Conley, was sanctioned by the Judicial Conduct Commission for jailing a man for contempt of court without conducting a hearing); Patrick Marley, *Rebecca Dallet and Michael Screnock Rip Each Other Over Sentencing in Supreme Court Race*, MILWAUKEE J. SENTINEL, <https://www.jsonline.com/story/news/politics/2018/03/19/rebecca-dallet-rips-michael-srenock-sentences-experience-wisconsin-supreme-court-ad/437320002> [<https://perma.cc/9U73-JLKD>] (Mar. 26, 2018, 11:40 AM) (discussing how, in the 2018 Wisconsin race, Rebecca Dallet launched an attack ad criticizing opponent Michael Screnock for “let[ting] a child predator walk without time” and for giving a rapist of an underage girl an eight-month sentence, and noting that Screnock’s campaign retaliated with a statement referencing Dallet’s “shocking” decision to give a man convicted of attempted sexual abuse of a child only two years in prison).

94. Riley Beggin, *Michigan’s Republican Black-Sheep Justice Is Winning Some Unlikely Allies*, BRIDGE MICH. (Oct. 16, 2018), <https://www.bridgemi.com/michigan-government/michigans-republican-black-sheep-justice-winning-some-unlikely-allies> [<https://perma.cc/F55Y-ET89>] (noting that Republican-nominated Justice Elizabeth Clement was ostracized and critiqued by her own party in the 2018 Michigan Supreme Court race, in part due to her vote in a

abortion,⁹⁵ public lands,⁹⁶ and school finance⁹⁷ also provided fodder that relates to politically salient issues and has a partisan valence, as did general claims about a candidate being a judge who was too favorable in the past to ideological fellow travelers.⁹⁸

II. IMPLICATIONS

The principal objective of this Essay has been to shine a light on the ways that polarization and nationalization have seeped into state supreme court races and shaped the information voters receive. As we have seen, partisanship is commonly reflected in the rhetoric, framing, and familiar

gerrymandering case that sided with Democratic judges and allowed a redistricting ballot proposal to go before voters).

95. In the 2020 Ohio Supreme Court race, incumbent Sharon Kennedy faced criticism for speaking at a Greater Toledo Right to Life event in 2017, shortly before she heard a case against a Toledo abortion clinic and joined the majority in ruling that the clinic had to stop performing abortions. See Karen Kasler, *Ohio Supreme Court Candidates Square Off on Issues, Ethics*, STATEHOUSE NEWS BUREAU (Oct. 13, 2020, 11:40 PM), <https://www.stateneews.org/government-politics/2020-10-13/ohio-supreme-court-candidates-square-off-on-issues-ethics> [<https://perma.cc/6LHH-NUQB>].

96. In the 2020 race for Montana Supreme Court, incumbent Laurie McKinnon was criticized by her opponent, Mike Black, for dissenting opinions she authored in cases related to public land access. Addie Slanger, *Justice and Challenger Square Off in State Supreme Court Race*, MONT. FREE PRESS (Oct. 15, 2020), <https://montanafreepress.org/2020/10/15/justice-and-challenger-square-off-in-state-supreme-court-race> [<https://perma.cc/R46V-NG38>].

97. In 2016, all three incumbents up for re-election to the Washington Supreme Court faced challengers, in part due to their role in deciding a controversial school funding case. *Washington Supreme Court Elections, 2016*, *supra* note 75; see also Opinion, *The Times Recommends Mary Yu for State Supreme Court Position 1*, SEATTLE TIMES (Aug. 19, 2016, 5:12 PM), <https://www.seattletimes.com/opinion/editorials/the-times-recommends-mary-yu-for-state-supreme-court-position-1> [<https://perma.cc/C334-5MVG>] (quoting one challenger, David DeWolf, who said he was running partly because of the court's "lack of judgment" and activist approach in the school funding case).

98. See Ruth Conniff, *Supreme Court Candidates Differentiate Themselves in Heated First Debate*, WIS. EXAM'R (Nov. 20, 2019, 2:52 PM), <https://wisconsinexaminer.com/2019/11/20/supreme-court-candidates-differentiate-themselves-in-heated-first-debate> [<https://perma.cc/DF4F-B47W>] (covering the 2020 Wisconsin Supreme Court race and quoting Jill Karofsky as declaring, "I find it amazing that we have a justice on the Supreme Court who has been supported by right-wing special interests . . . and every time he's made a decision on the Court he's made it in favor of those groups"); Brad McElhinny, *Voters Get One Shot at Three Supreme Court Races in Extraordinary Circumstances*, METRO NEWS (May 17, 2020, 11:54 AM), <https://wvmetronews.com/2020/05/17/voters-get-one-shot-at-three-supreme-court-races-under-extraordinary-circumstances> [<https://perma.cc/8G3A-PG8T>] (reporting that Richard Neely, a 2020 candidate for the West Virginia Supreme Court, criticized his opponent and the other incumbent justices for not being "particularly fair" and for "stretch[ing] the law to arrive at ridiculously conservative results"); Marley, *supra* note 86 (reporting that, in a debate for the 2019 Wisconsin Supreme Court race, Jill Neubauer questioned whether opponent Brian Hagedorn could be trusted as impartial after blogging "extensively" about his conservative views and working for Scott Walker).

trappings of judicial elections—even nominally nonpartisan ones. While limitations of space do not permit me to delve deeply into what might flow from seeing judicial elections in this light, I close with a few points that focus on the implications for law and legal institutions.

First, there are significant questions about the use of nonpartisan elections. Presumably, nonpartisan elections are chosen as a way to bolster the relative autonomy of law from politics based on the belief that an apolitical court will be more committed to the rule of law, or at least more likely to be perceived as such. But the fact that many of these elections turn out to be chock full of partisan signals is at odds with the policy objective that favors nonpartisanship. To some degree, of course, the very choice to involve the electorate in selecting supreme court justices embeds some element of politics in the domain of state courts, even if a nonpartisan model is used. Still, what we have seen casts considerable doubt on the efficacy of that design choice and there is, at the very least, a question of whether openly giving the voters the partisan cue would be better than denying it in nonpartisan contests.⁹⁹ Undoubtedly, some voters would want that cue as the most efficient shortcut in deciding how to vote, especially given the nationalization of constitutional politics we have seen. But surely that is a complex institutional question that deserves careful study. To say that nominally nonpartisan elections have a lot of partisanship in them does not necessarily mean that switching to openly partisan elections is the right course. That policy choice would implicate many factors, tradeoffs, and consequences, both intended and unintended. Moreover, the very pervasiveness of partisanship explored here suggests little confidence that anything other than pure partisan advantage would drive such a shift. And, a move to partisan elections would be particularly problematic if paired with a departure from statewide elections in favor of splitting the state into districts. That change would open the door to just the kind of partisan gerrymandering that has driven extreme polarization,¹⁰⁰ and would eliminate the voters' ability to speak on a statewide basis, as they do in the case of ballot initiatives and elections for governor and the United State senators.

Second, and very much related to the first point, the material reviewed here raises the question of whether polarization, nationalization, and the associated partisan messages that voters are receiving in many supreme court elections undermine the judicial legitimacy of the state courts in the eyes of voters. Here again, however, complexity is the order of the day. How should legitimacy be understood

99. For an argument to replace nonpartisan with partisan elections, see Melinda Gann Hall, *Partisanship, Interest Groups, and Attack Advertising in the Post-White Era, Or Why Nonpartisan Judicial Elections Really Do Stink*, 31 J.L. & POL. 429 (2016).

100. See Shugerman, *supra* note 28.

in this context? From a lawyerly perspective, legitimacy might be seen as a belief that courts are acting with autonomy and policy neutrality. On that view, the rise of polarization and nationalization in judicial elections would, by absorbing courts into our ordinary politics, threaten legitimacy. But to the degree that voters believe that elections, and their ability to participate in selecting judges, allow for voters' views to be represented on the court and for some accountability by judges, then elections can be seen to boost legitimacy.

It is no easy task, however, to pin down the answer to two related questions: (1) whether voters think that judicial elections undermine perceived judicial legitimacy; and (2) whether voters see judges as making decisions based on ideology (legal realism) or neutral legal methods (legal formalism). Beliefs that legal realism on the part of elected judges do or should drive decision making would seem relevant to beliefs about legitimacy, though the former belief could cut in different directions as to the latter. Scholarly research has not yielded clean, categorical answers to these questions. For example, based on his research studying Kentucky elections, James Gibson found that citizens have a nuanced view of the judicial role that recognizes some degree of policymaking as inherent in it; while, on net, campaigning for judicial office enhanced legitimacy, certain kinds of campaign activity that cast judges as just another politician could undermine that view.¹⁰¹ By contrast, Sara Benesh cautioned against drawing broad conclusions from Kentucky alone and raised other methodological questions about Gibson's findings.¹⁰² Her own research suggests that elections can decrease public confidence in courts.¹⁰³ Damon Cann and Jeff Yates did a deep dive on public views and reported a *mélange* of attitudes.¹⁰⁴ For example, they found that there was some evidence, though not without question, that the use of contested partisan, semi-partisan or nonpartisan elections was associated with lower average legitimacy levels than the use of retention elections or appointments.¹⁰⁵ But they also found a strong positive relationship between levels of knowledge about courts and perceptions of legitimacy, along with stronger perceptions of legitimacy to the extent respondents agreed with the state supreme court's

101. JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 134–36 (2012).

102. Sara C. Benesh, *Judicial Elections: Directions in the Study of Institutional Legitimacy*, 96 JUDICATURE 204, 207 (2013).

103. Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 704 (2006).

104. *See generally* DAMON M. CANN & JEFF YATES, THESE ESTIMABLE COURTS: UNDERSTANDING PUBLIC PERCEPTIONS OF STATE JUDICIAL INSTITUTIONS AND LEGAL POLICY-MAKING (2016).

105. *Id.* at 44.

decisions.¹⁰⁶ And they, like Gibson, found that most respondents perceive state courts to use a mix of ideological and formal methods to decide cases, with a sizable chunk thinking ideology was dominant.¹⁰⁷ But there was no association between that belief in realism and the mode of judicial selection.¹⁰⁸ All of this leaves the legitimacy question in doubt. And, as the degree of polarization and nationalization in our broader politics seem to intensify at warp speed, public attitudes may have changed even in the years since all this work was done.

Third and finally, the kinds of messages that circulate in these campaigns show the interrelatedness of constitutional law and politics at the state and federal levels. The very idea of nationalizing state supreme court elections captures how national forces shape what goes on at the state level, and the examples collected here reflect how rhetoric, ads, political endorsements, and the like embody that nationalization. As this Essay goes to press, we are already seeing the multiple ways that the Supreme Court's *Dobbs* decision is affecting state elections. Even before *Dobbs* was decided, the 2016 to 2021 elections featured endorsements by pro-life and pro-choice groups and, sometimes, candidate statements of their position on the issue. But the Supreme Court's blockbuster decision dramatically increased the salience of the issue and set the agenda in many state supreme court elections around the country, as well as in state ballot initiatives.¹⁰⁹ For some citizens, it may have brought a new understanding that there *was* a state constitution that might have something to say on abortion.

Dobbs nicely illustrates how the dynamic can operate in the opposite direction, as well. That is, what state courts and state voters do with the abortion issue can induce federal reactions and shape the federal constitutional law and politics of abortion. One-party red and blue states will, predictably, react to *Dobbs* in polarized ways, and national partisan interests will be broadly aligned with what goes on in these states.¹¹⁰ Some of the responses to what states do will play out in the congressional arena, others in the federal courts. One example is that there are going to be complex questions implicating the extraterritorial power of states to criminalize abortion.¹¹¹ Some states will be aggressive, and state

106. *Id.* at 39, 48–52.

107. *Id.* at 61.

108. *Id.* at 72.

109. See Walker, Kao & Hernandez *supra* note 20; Montellaro & Kapos, *supra* note 20.

110. On this phenomenon, see generally JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY (2022); DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED (2018).

111. See David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript at 28–30)

supreme courts are going to issue pivotal decisions on that point. Those decisions will tee up the issues for the Supreme Court and a possible legislative response by Congress.

A second example relates to fetal personhood, a legal concept that some pro-life activists, legislators, and lawyers want to establish.¹¹² What happens with this issue in the states will likely involve state courts at some point, and may catalyze responses in Congress and the federal courts. Indeed, a petition for certiorari in a case seeking to establish fetal personhood was filed just a few months after *Dobbs* was decided.¹¹³ The developments around that controversial issue will likely exemplify the dynamic interaction between the state and federal constitutional politics of abortion.

A final example relates to possible state supreme court decisions protecting the right to choose. Perhaps some of those cases will be reasoned in terms of equality, as opposed to liberty, and open a new constitutional framing of the issue. In turn, that framing may influence congressional attempts to codify abortion protections in the short term and, longer term, a future Supreme Court decision that revisits the result, if not the reasoning, in *Dobbs*.¹¹⁴ And such decisions and changed reasoning in support of abortion rights may one day become grist for future national political campaigns and judicial nominations. In sum, the nationalization of constitutional politics reflected in state supreme court elections is part of a larger convergence that allows state-level activity to prompt federal responses. Although I have focused on how national themes shape state elections, the arrow runs in the other direction, as well.

CONCLUSION

The polarization and nationalization explored here raise a host of questions meriting further research. While I have focused on the descriptive dimension, the fact that national political dynamics seem to have taken hold in state judicial elections ought to promote renewed normative attention and study. Particularly salient questions relate to possible reforms of the judicial election system and to the effects of

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032931 [<https://perma.cc/7A9L-2M9N>].

112. Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes*, N.Y. TIMES, <https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html> [<https://perma.cc/D6U8-A5FW>] (Aug. 30, 2022).

113. Petition for Writ of Certiorari, *Doe v. McKee, sub nom. Benson v. McKee*, 273 A.3d 121 (R.I. 2022).

114. On the possibility of state constitutional law modeling for the Supreme Court, see JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 178–79, 207–08 (2018).

elections on public perceptions of judicial legitimacy. Neither of these topics is new. I have discussed important contributions to the literature. But because our politics are changing quickly, with hyper-polarization and pervasive hostility and division escalating, these are dynamic questions that require ongoing study. Given the ubiquity of these political dynamics, it is not obvious that appointive systems would not *also* reflect them in some respect. Indeed, these dynamics are apparent in the sharp recent drop in public trust in the United States Supreme Court.¹¹⁵ Still, in studying the range of approaches to judicial selection, and any link between those approaches and perceptions of legitimacy, it is vital that the analysis keep up with our rapidly evolving contemporary political circumstances.

115. Sarah Elbeshbishi, *Gallup Poll Finds Trust in Supreme Court at Historic Low, Down 20 Points in Two Years*, USA TODAY, <https://www.usatoday.com/story/news/politics/2022/09/29/supreme-court-approval-trust-all-time-low-gallup-poll/8125842001> [<https://perma.cc/2HWD-7XTE>] (Oct. 3, 2022, 11:22 AM) (noting pronounced drop in approval of the Supreme Court, along with a partisan divide in public perceptions).

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