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## Appointed and Advantaged: How Interim Vacancies Shape State Courts

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State courts, which hear more than 95 percent of all cases,<sup>1</sup> make decisions that shape virtually every aspect of people's lives — from marriage rights, to healthcare access, to school funding. Despite the importance of state courts, most people know very little about who sits on them and how these judges reach the bench.

The practice of filling interim vacancies, which occur when judges leave the bench before completing their full term (often because of retirement, resignation, or death), is one aspect of judicial selection that is particularly under-scrutinized. All states, even those that use judicial elections, appoint judges to fill these unoccupied seats. The seemingly small decision of who takes an interim seat can have significant long-term consequences for the composition of the judiciary given the major advantages incumbents enjoy in subsequent elections. When opposed on the ballot, incumbents tend to fare better than challengers, due in part to their name recognition, experience on the job, and greater success in fundraising.<sup>2</sup> Of course, when incumbents run unopposed, they are guaranteed an extended tenure on the bench.

This analysis considers the long-term effects interim appointments have on the judiciary, especially in states that use elections for subsequent terms on the bench, and the frequency with which states use interim appointments in practice.

We analyzed information on sitting state supreme court justices' paths to the bench in all 50 states, as of August 2016.<sup>3</sup> We collected data identifying how each justice came to the bench, the reselection method used for any subsequent terms, and basic demographic information. For candidates who have participated in elections, we also collected information on whether they were opposed. Because we only included sitting justices, excluded from the data are former justices who were appointed and then didn't seek a subsequent term or who lost their election.

Key findings include:

- In the 22 states that use contested elections to choose supreme court justices, nearly half of sitting justices — 45.1 percent — were initially appointed.

- In three election states — Georgia, Minnesota, and North Dakota — every sitting supreme court justice was initially appointed, while in three others — Pennsylvania, Louisiana, and West Virginia — no judge was initially appointed.
- Nationwide, including states that only use appointments, 73.9 percent of sitting justices were initially appointed, with the remaining 26.1 percent initially elected to the bench.
- In contested election states, over one-third of justices who were initially appointed were unopposed in their first election, and 29 percent have never been opposed.

Previous studies have examined interim selection on state supreme courts, most recently looking at data from contested election states from 1964-2004.<sup>4</sup> Since 2000, however, the landscape of judicial selection has changed dramatically. The process has become more politicized and elections, when they occur, are more expensive.<sup>5</sup> Updated data makes it possible to assess the pathways to the bench in this new electoral environment. This analysis also extends beyond past studies by including data on the reselection pathways for interim appointees, illustrating the long-term consequences interim appointments can have.

The data reveals a disconnect in many states between the formal system of judicial selection and practice. If a state chooses to elect judges in order to forward certain goals, such as public accountability or democratic input, the regular use of interim appointments raises questions about whether its system is, in fact, serving these purposes.

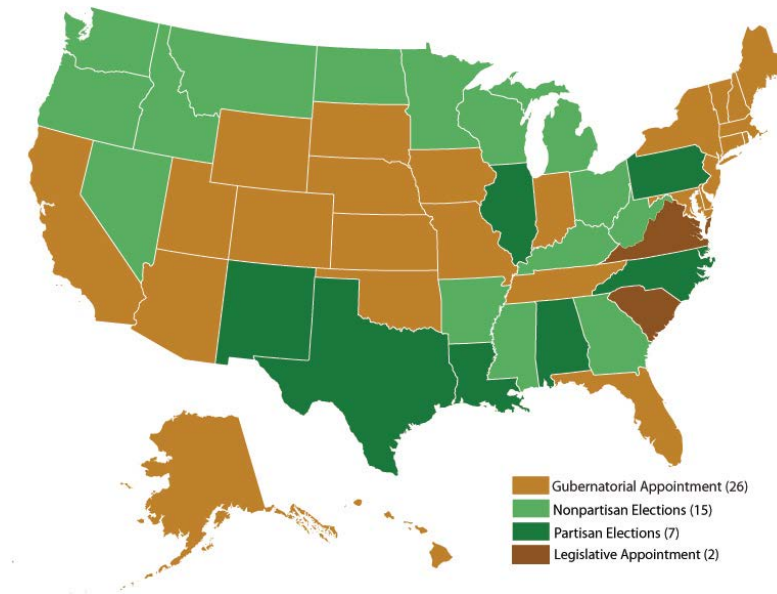
Additionally, the data reveals how crucial appointments are to nearly all states' selection systems. States committed to selecting a high-quality and diverse bench should therefore focus on structuring their interim selection process to meet these goals.

## **While States Utilize a Variety of Judicial Selection Systems, All States Use Appointments to Fill Interim Vacancies**

There is significant variety in how states choose their high court judges. Twenty-two states use contested elections to select supreme court justices for full terms. Of these, the vast majority hold nonpartisan elections,<sup>6</sup> in which party labels do not appear on the ballot. A handful of states utilize partisan elections,<sup>7</sup> in which party labels do appear.

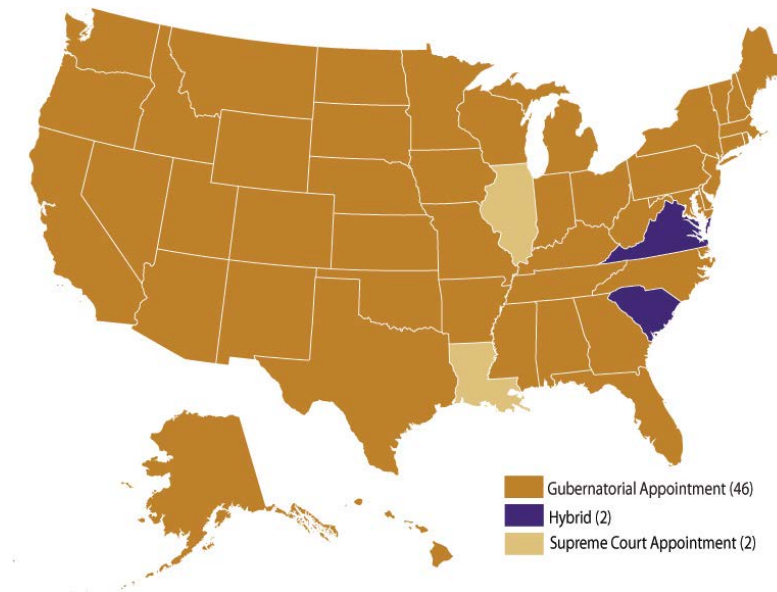
The remaining 28 states all appoint their high court judges to their first full term. In 26 states, the governor leads the process<sup>8</sup> and in two states, the legislature<sup>9</sup> is in charge of appointment. Of these appointment states, all but two use a judicial nominating commission to assist with selection.<sup>10</sup> These commissions help recruit and evaluate candidates for judicial office and ultimately make recommendations to the appointing authority. For subsequent terms, these states use a variety of methods to reselect judges, but the most common is through retention elections, in which sitting judges run in unopposed “yes-or-no” elections.<sup>11</sup>

## Judicial Selection for Full Terms



In contrast, *all* states use some form of appointment to fill interim vacancies on their high courts. The vast majority of states — 46 — grant the governor the power to appoint judges to interim vacancies, often with the assistance of a judicial nominating commission.<sup>12</sup> This is the case in 20 out of the 22 states that use contested elections. Illinois and Louisiana are the outlier election states, in which the remaining supreme court justices are empowered to fill interim vacancies. Louisiana’s system is also unusual in that a justice appointed to an interim seat cannot subsequently run for election.

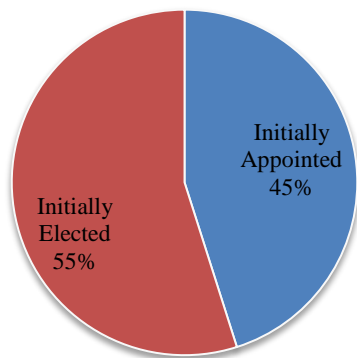
## Judicial Selection for Interim Terms



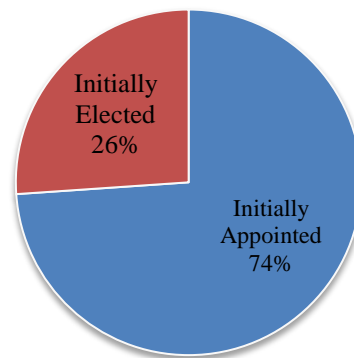
## Nearly Half of Supreme Court Justices in “Election States,” and Almost Three-Quarters of Justices Nationwide, Were Initially Appointed

Almost half of all sitting supreme court justices in “contested election” states were initially appointed to the bench. Of the 153 justices in contested election states, 45.1 percent — 69 justices — were initially appointed. Only 54.9 percent — 84 justices — first obtained their seats through an election. Indeed, even fewer of these justices were actually initially selected by the voters in a competitive process as eight justices were unopposed in the election that first placed them on the bench. Nationwide, 73.9 percent of the 322 sitting supreme court justices were initially appointed, while 26.1 percent of justices were initially elected.

**Percentage of Justices Initially Appointed in Election States**

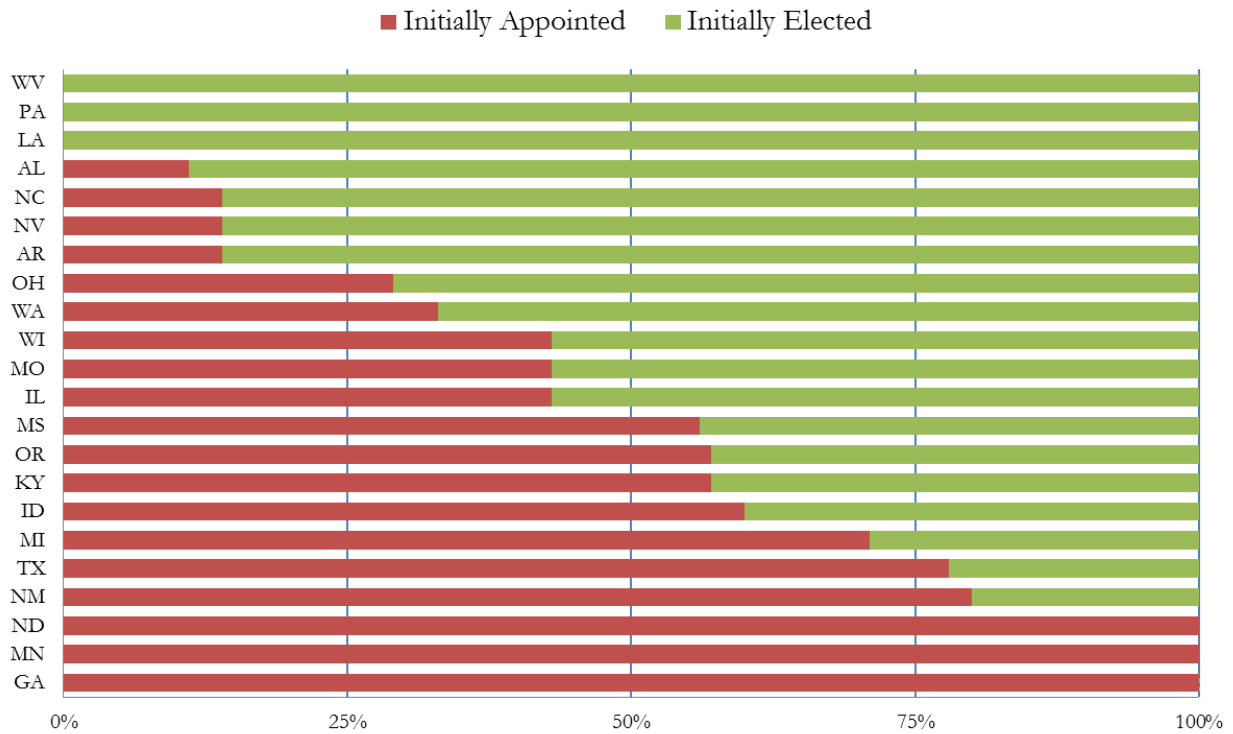


**Percentage of Justices Initially Appointed Nationwide**



While about half of justices in contested election states were initially appointed, the frequency with which each state utilizes interim appointments varies enormously. In Pennsylvania, Louisiana, and West Virginia, all justices were initially elected to the high court. None was initially appointed. In Georgia, Minnesota, and North Dakota, in comparison, all justices were initially appointed to interim vacancies. No justice on those courts first came to the bench through an election. There are various reasons why some states have so many interim vacancies to fill.<sup>13</sup> In some, such as Georgia, mandatory retirement ages that force judges off the court mid-term seem to play an important role.<sup>14</sup> In others, there is evidence that justices may step down mid-term for strategic reasons — such as to allow a current governor to fill the seat or to diversify the court.<sup>15</sup> Scholars in previous studies have further hypothesized that interim appointments are more likely in states that have both nonpartisan elections and stable partisan control of the governorship.<sup>16</sup>

## Use of Interim Appointment by State



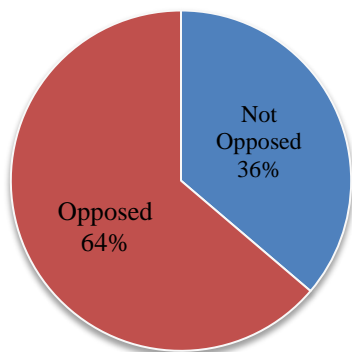
These findings are similar to those made by Holmes and Emrey, who considered interim appointments in contested election states from 1964-2004. They found that more than half — 52 percent — of supreme court justices in elective states were initially appointed, compared to our finding of nearly half — 45 percent — of current supreme court justices, indicating that elections are somewhat more common now than in the past.<sup>17</sup> Holmes and Emrey also found great variation between states in their use of interim appointments, stating “[a]t one extreme, only 18 percent of judges in Pennsylvania were appointed (with 82 percent being elected) to the bench” and “[o]n the other end of the scale, Georgia (91 percent) and Minnesota (92 percent) had the largest percentage of judges appointed to the bench.”<sup>18</sup>

### Interim Appointments Can Impact the Composition of the Judiciary Long After the End of the Interim Term

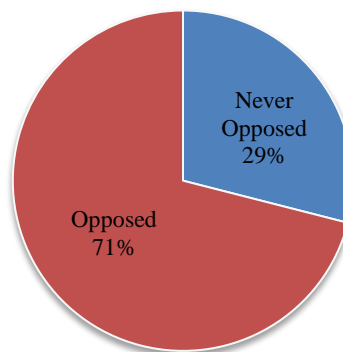
Interim appointment decisions can have an impact far beyond the conclusion of the interim term itself. Obtaining a vacant spot through an interim appointment can assist a justice in securing subsequent terms in two important ways. First, as scholars have repeatedly found, incumbents rarely lose their seats to challengers.<sup>19</sup> For example, Melinda Hall found in her 2001 study of every state supreme court election from 1980 through 1998 that incumbents won their elections almost 92 percent of the time.<sup>20</sup> However, it is worth noting that while incumbents overall enjoy an advantage over challengers, some research indicates that black and Latino incumbents are less likely than white incumbents to be elected to subsequent terms on the bench,<sup>21</sup> suggesting that they may receive less of an advantage from an interim appointment.

Second, judges who are initially appointed are regularly unopposed in subsequent elections, thus ensuring their continued tenure on the bench. Thirty-six percent of sitting justices who were first appointed to fill interim vacancies ran unopposed in their first election. Indeed, nearly one-third of sitting justices that came to the bench through an initial appointment have never run in a contested election. Of the 69 justices in contested election states who were initially appointed, 20 justices — 29 percent — have never faced opposition in a subsequent election.

**Percentage of Interim Appointees Unopposed in First Election**



**Percentage of Interim Appointees Never Opposed**



As a result, a number of justices in contested election states have been on the bench for years — in some cases even decades — without ever being selected by voters. Of the sitting justices that have never been opposed in an election, the median length of a term is 15 years.

The frequency of unopposed races also varies greatly between states. In five states, all the appointed justices faced opposition in their subsequent races (Michigan, North Carolina, West Virginia, Wisconsin, and Texas), and in two, none of the initially appointed sitting justices has ever been opposed (New Mexico and Oregon). Georgia’s bench, composed exclusively of justices who were initially appointed, also includes the two sitting justices with the longest unopposed tenure. Georgia’s Presiding Justice P. Harris Hines has been on the bench for more than 20 years — since 1995 — and has run in four elections without ever being opposed. Georgia’s Chief Justice Hugh P. Thomson has been on the bench since 1994 and has run in three elections, each of which was uncontested.

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While there is great variation between state systems of judicial selection, all states use a form of appointment to fill interim vacancies. This analysis, relying on data from all sitting state supreme court justices as of August 2016, reveals the substantial impact interim appointments have on the composition of the judiciary, particularly in election states. Nearly half of state supreme court justices in contested election states reach the bench through an interim appointment. And once appointed, these justices enjoy significant advantages should they seek additional terms. Not only do incumbents tend to fare better than challengers in contested elections, but incumbents are regularly unopposed.

These findings should inform states' assessments of their judicial selection methods. First, supporters of judicial elections often argue that they forward values such as public accountability and democratic legitimacy. However, the prevalence of interim appointments in many states raises questions about the extent to which elections actually serve these values. Second, they indicate that the process for filling interim appointments should be a central focus of any reform efforts given the lasting impact they have on the composition of the judiciary.

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<sup>1</sup> SCOTT GREYTAK, ALICIA BANNON, ALLYSE FALCE & LINDA CASEY, *BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013-14*, at 1-2 (Laurie Kinney, ed. 2015) [hereinafter *BANKROLLING THE BENCH*], available at <https://www.brennancenter.org/publication/bankrolling-bench-new-politics-judicial-elections>.

<sup>2</sup> See Chris W. Bonneau, *Vacancies on the Bench: Open-Seat Elections for State Supreme Courts*, 27 JUST. SYS. J. 143, 144 (2006) (“We know that state supreme court incumbents, like legislative incumbents, are likely to be successful in their bids for reelection and retention. Indeed, about 85 percent of incumbents who stand for reelection in partisan or nonpartisan elections retain their seats, and the reelection rate for judges in retention elections is over 98 percent.”); see also Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. R. 315, 323 (2001).

<sup>3</sup> We gathered the list of current state supreme court justices from the official websites of each state and the information about their selection, including dates, from Ballotpedia, available at <https://ballotpedia.org/>.

<sup>4</sup> Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments*, 27 JUST. SYS. J. 1, 2 (2006); see also James Herndon, *Appointment as a Means of Initial Accession to Elective State Courts of Last Resort*, 38 N.D. L. REV. 60, 63-64 (1962).

<sup>5</sup> See ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, *RETHINKING JUDICIAL SELECTION IN STATE COURTS* 1-2 (2016), available at [http://www.brennancenter.org/sites/default/files/publications/Rethinking\\_Judicial\\_Selection\\_State\\_Courts.pdf](http://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf); *BANKROLLING THE BENCH*, *supra* note 1, at 1; MICHELE L. JAWANDO & BILLY CORRIHER, CTR. FOR AM. PROGRESS, *MORE MONEY, MORE PROBLEMS* 7 (2015), available at <https://www.americanprogress.org/issues/courts/reports/2015/10/26/124022/more-money-more-problems/>.

<sup>6</sup> *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUSTICE, <http://judicialselectionmap.brennancenter.org/> (last visited May 3, 2017) (Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, West Virginia, and Wisconsin).

<sup>7</sup> *Id.* (Alabama, Illinois, Louisiana, New Mexico, North Carolina, Pennsylvania, and Texas).

<sup>8</sup> *Id.* (Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, and Wyoming).

<sup>9</sup> *Id.* (Virginia and South Carolina).

<sup>10</sup> *Id.* (Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Wyoming).

<sup>11</sup> *Id.*



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<sup>12</sup> *Id.* (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming).

<sup>13</sup> Holmes & Emrey, *supra* note 4, at 2 (“A few studies, however, have gone beyond this generalization and attempted to explain in part why some states are more likely to have a greater percentage of interim appointments than are others.”).

<sup>14</sup> See, e.g., Greg Bluestein, *Georgia’s Governor’s Influence On State’s Judiciary Set to Expand*, ATLANTIC J. CONST. (May 2, 2016), <http://www.myajc.com/news/state--regional-govt--politics/georgia-governor-influence-state-judiciary-set-expand/iAG6PGXGhF9GohtiBAMcvK/>; Rhonda Cook, *Gov. Deal Considers 13 for 3 Seats on Georgia Supreme Courts*, ATLANTIC J. CONST. (Oct. 3, 2016), <http://www.myajc.com/news/local/gov-deal-considers-for-seats-georgia-supreme-court/2p9yfaxxQSpa1mAwwDHvKL/>; see also Mary Ellen Klas, *With Four Justices Retiring, Control of State Supreme Court Could Become Election Issue For Next Governor*, MIAMI HERALD (Dec. 21, 2103), <http://www.miamiherald.com/news/state/article1958714.html>.

<sup>15</sup> See, e.g., Todd A. Curry & Mark S. Hurwitz, *Strategic Retirements of Elected and Appointed Justices in State Supreme Courts: A Hazard Model Approach*, 78 J. Pol. 1061, 1072 (2016); Jolly A. Emrey & Lisa M. Holmes, *Leaving the State Bench: Strategic Departure Decisions of State Court Judges* 14 (Annual Meeting of the Midwest Political Science Association, Apr. 3, 2008); Holmes & Emrey, *supra* note 4, at 7; Abby Simons, *Dayton’s Appointments Increase Diversity Among Minnesota Judges*, STAR TRIB. (July 14, 2014), <http://www.startribune.com/dayton-s-appointments-increase-diversity-among-minnesota-judges/267061141/>.

<sup>16</sup> Holmes & Emrey, *supra* note 4, at 2 (“A few studies, however, have gone beyond this generalization and attempted to explain in part why some states are more likely to have a greater percentage of interim appointments than are others. For example, Herndon (1962) found that 55.8 percent of judges on the courts of last resort in elective states from 1948 to 1957 were initially appointed, but he also found a wide variation in the proportion of interim appointments between states. To explain this variation, he concluded that states with nonpartisan elections to the judiciary and stable partisan control of the governorship are most likely to see large numbers of judges appointed to the bench.”).

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., Hall, *supra* note 2, at 319; GARY JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS (4th ed. 1997); JAWANDO & CORRIHER, *supra* note 5, at 7.

<sup>20</sup> Hall, *supra* note 2, at 319 (“As the table reveals, justices in state courts of last resort on average are reasonably secure, especially in retention elections, in which the likelihood of defeat is quite low. Overall, among 541 incumbents seeking reelection, only 45 (8.3%) were ousted by voters.”).

<sup>21</sup> See JAWANDO & CORRIHER, *supra* note 5, at 7.