VOTER RESPONSE TO SALIENT JUDICIAL DECISIONS IN RETENTION ELECTIONS

Forthcoming, *Law and Social Inquiry*

Allison P. Harris
auh323@psu.edu

ABSTRACT

Even at their most salient, judicial retention elections do not increase turnout on Election Day. However, those who vote often participate in judicial retention races at higher levels than usual following salient judicial decisions. I use a series of difference-in-differences analyses to estimate the effect of the Iowa Supreme Court's legalization of same-sex marriage on the subsequent retention races. I find that retention race participation was higher than we would have otherwise expected after the decision. Scholars often cite the infrequence with which justices are removed as evidence of justices' relative independence from voters in retention elections; but the overwhelming retention of these justices does not mean they are independent from voters. Increases in the number of ballots cast in these races is perhaps more important than increases in negative votes when it comes to judicial independence, because each vote is an evaluation of the justices, whether positive or negative.

INTRODUCTION

Does the public respond to important political decisions when the only recourse for accountability is a low-interest retention election? Judges in many states at various levels of the judiciary run in nonpartisan uncontested retention elections to retain their seats on the bench, and scholars have noted two important characteristics of retention elections: (1) voter participation is usually lower in these elections than it is in contested nonpartisan and partisan judicial elections, and (2) it is very rare for voters not to retain judges in these elections (Schaffner, Streb, and Wright 2001; Hall 2007; Bonneau and Hall 2009). Scholars conclude that judges who are retained in retention elections are more independent from voters than their peers who run in contested and partisan elections (Bonneau and Hall 2009).

Despite the common conclusions about judicial independence in retention elections, there have been retention elections in which judges have lost their seats, voters have cast a higher proportion of negative votes than is usual, or there has been an especially strong partisan nature to the race (see Aspin 2010; Kritzer 2015). Participation in retention elections has also been increasing over time (Aspin 2010). The goal of this paper is to explain the extent to which voters respond to salient judicial decisions in state supreme court retention elections.

The 2010 Iowa Supreme Court judicial retention race is an especially useful case through which to evaluate the motivating question. In 2009 the Iowa Supreme Court legalized same-sex marriage with its *Varnum v. Brien* decision, holding that the limitation of marriage to opposite-sex couples is a violation of the state constitution's equal protection clause (Cain 2009). In the subsequent general election, three of the justices involved in the unanimous decision ran in the uncontested nonpartisan statewide judicial retention race, and Iowans did not retain any of them. This was the first time Iowa voters had voted against the retention of a state supreme court

justice,[1] and, at that point, only the sixth time (since 1964) voters in any state with a similarly appointed and retained supreme court had failed to retain one or more of their justices (Aspin 2007, n12).

Iowa's 2010 election presented an ideal opportunity for voter response in a judicial retention race. Same-sex marriage was an especially divisive issue, with public opinion estimates of support for same-sex marriage in Iowa prior to *Varnum* ranging from 25 to 42 percent (Lax and Phillips 2009; Kreitzer, Hamilton, and Tolbert 2014; Kastellec 2018), and the decision led to a battle over the constitution in the state legislature (Clopton and Peters 2013). Interest groups also devoted extensive resources to encouraging Iowans to vote in the race and to vote against the justices running for retention; they created the state's first commercials about a supreme court retention race (Clopton and Peters 2013; Skaggs et al. 2010).

Scholars have linked previous state supreme court justice retention losses to voters' reactions to justices' decisions, and in many cases scholars credit special interest groups' efforts for mobilizing voters (Latzer 1996; Clopton and Peters 2013). However, this research is often descriptive, unable to estimate the electoral effect of the judicial decision(s) in question with the chosen method of analysis, or concerned with understanding which voters shaped the electoral outcome rather than estimating the outcome itself.[2] The analyses included in this article attempt to address this gap in the literature. Using voting and demographic data from twelve other states with appointed state supreme court justices who must run in end-of-term statewide nonpartisan uncontested retention races, I employ a series of difference-in-differences analyses to compare electoral outcomes before and after a salient retention race to those outcomes we might expect in the absence of that salience.[3]

In the Iowa case, I find that contrary to some media reports and state officials' speculation, there is little evidence to suggest that 2010 general election turnout was higher than should have been expected in response to *Varnum*, but the decision did lead to the justices' defeat. Perhaps, most interestingly, the number of votes cast in the judicial retention race was especially high, and I provide convincing evidence that *Varnum* led to this increase in participation. Even the controversial nature of *Varnum* and the campaigning that followed did not increase turnout in Iowa's 2010 general election. Rather, *Varnum* and the related mobilization that followed appear to have led those who vote to vote further down the ballot. Following the analysis of Iowa's 2010 election, I turn to elections that followed periods of salient judicial decisions in other states. In these examples, too, I find that general election turnout does not increase, but participation in judicial retention races is higher than we would have expected otherwise.

Taken together, the findings in this paper offer important insight into judicial independence in retention elections. If lack of voter participation in judicial elections is a mark of judicial independence, then judges who run in retention elections are usually independent from electoral pressures; but this independence is not as consistent as previous scholarship suggests. Previous scholars' reliance on the rarity with which justices are not retained and low average levels of participation in retention elections as evidence of judicial independence obscures important variations in voter participation in retention elections across states and years. Inasmuch as voters act as a check on elected judges' behavior,[4] understanding participatory shifts in judicial retention races must be at least as important as understanding shifts in negative vote shares, regardless of whether judges are retained.

In the sections that follow, I review the scholarship to which this project contributes, and I provide a brief overview of the circumstances surrounding Iowa's 2010 supreme court retention race. I then present the data and analyses of Iowa's 2010 election. Next is a discussion of the generalizability of these findings and analyses of supreme court retention race participation in other states, followed by the conclusion.

VOTING IN JUDICIAL RETENTION ELECTIONS

Appointed judges are generally accountable to whichever branch of government (executive or legislative) they rely on for appointment and reappointment (Bonneau and Hall 2009).[5] Citizens can hold elected judges accountable with their votes. However, most of the factors driving voter participation in judicial elections are associated with partisan and competitive, rather than retention elections (Bonneau and Hall 2009).

Nonpartisan uncontested judicial retention elections occur in many states for a variety of types of courts. However, they are especially common in states, like Iowa, that have adopted the Missouri Plan, also referred to as merit selection, for the selection and retention of judges. Judges in states and districts that follow the Missouri Plan are selected from a list of candidates prepared by a nominating commission and appointed once (usually by the governor); they run in a retention race within roughly one year of appointment, and then must run for retention at the end of each term (state supreme court term lengths vary from six to twelve years). During an election, voters can either vote "yes" to retain a judge in office, or "no" against retention.

Ballot roll-off—the proportion of voters who vote in the top ballot race but not in a lower ballot item— in retention elections is generally higher than in other types of judicial elections, and the proportion of positive votes in retention elections is typically high with relatively little variation; in fact, scholars have identified the suppressive forces of nonpartisan- and retention-

style elections on participation when compared with traditional competitive elections (Schaffner, Streb, and Wright 2001; Hall 2007; Bonneau and Hall 2009). Bonneau and Hall (2009) conclude that, following their initial appointment, judges in Missouri Plan states are independent from the nominating branch, and the frequency with which these judges are easily retained insulates them from the electoral pressures that their counterparts who participate in competitive elections face.

Kritzer (2015) shows, however, that despite many proponents' claims, retention elections are not devoid of politics, and that highly partisan retention elections are associated with higher percentages of votes against judicial retention. Aspin (2010, 2016), though he acknowledges that judges are still overwhelmingly retained and that he does not expect this to change, identifies a fairly steady decrease in ballot roll-off (with some fluctuation) in retention elections from 1964 through 2014.

Scholarship concerned with judges' accountability to voters (through their behavior) as opposed to voters' ability to punish judges with their votes finds some evidence to suggest that judges who run in retention elections are responsive to public opinion when rendering decisions, especially when it comes to salient issues. These scholars have shown that supreme court justices who run in retention elections may resemble their counterparts who run in nonpartisan competitive elections in this respect. Though the evidence is stronger for nonpartisan than retention elections, the lack of party labels on ballots means that voters focus on judges' past decisions, and, knowing they will be evaluated based on their decisions, justices consider the public's preferences when rendering decisions, especially on hot-button issues (Canes-Wrone, Clark, and Park 2012; Canes-Wrone, Clark, and Kelly 2014).

I hypothesize that although judicial retention races generally have low levels of voter participation compared to competitive elections and, therefore, more limited potential to punish

or reward judicial behavior, in elections following salient judicial decisions, voters may respond and participate in state supreme court retention races at higher levels than we would otherwise expect. This electoral response decreases the extent to which we can think of judges who run in retention elections as independent from voters, regardless of whether any particular judge is retained. However, salient decisions will not increase general election turnout and bring more voters to the polls than we should expect, keeping judges, like other elected officials, independent from those who would not have turned out.

VARNUM AND ITS AFTERMATH

Varnum is the perfect case with which to identify voter response in retention elections. It was a high-visibility decision about which many citizens were likely aware due to the issue involved (same-sex marriage) and the series of events that occurred between the decision and the 2010 election. *Varnum* was followed by a battle between the parties in both state legislative bodies over amending the state constitution's definition of marriage (Buller 2011; Clopton and Peters 2013). Bob Vander Plaats, in a bid to win the 2010 Republican gubernatorial nomination, made overturning *Varnum* "the centerpiece of his campaign," and though he did not win the nomination, he launched a campaign against the justices, founding the group Iowa for Freedom (Clopton and Peters 2013, 322).

Presidential candidates shared their opinions on same-sex marriage nationally and in Iowa, increasing the visibility of the issue (Clopton and Peters 2013). And, for the first time ever, Iowans saw television ads about the supreme court retention race. American Family Action, Inc. and the National Organization for Marriage each spent over one hundred thousand dollars for 319 ad spots targeting the *Varnum* decision and in support of conservative family values (Skaggs et al. 2010). In total, groups and individuals opposing same-sex marriage and the justices'

retention spent close to one million dollars, much more than those in favor of the decision (Aspin 2010; Clopton and Peters 2013).[6]

Iowa's published 2010 election results show the unusually high levels of participation and negative votes in the judicial retention race. On the other hand, general election turnout increased from 48.1 percent in Iowa's 2006 midterm election to what some reports claimed was record high turnout at 49.9 percent in 2010; these reports listed *Varnum* as a key factor in the supposed increase in turnout, which largely benefited Republicans (Clayworth 2010).

In the next section, following a discussion of the data and method of analysis, I evaluate the media claim that *Varnum* led to record-high turnout in Iowa's 2010 general election. I then turn to analyses of the retention race results to evaluate the hypothesis that Iowa voters responded to *Varnum* in the supreme court judicial retention race, specifically. I then consider responses to judicial decisions in other states to consider the generalizability of Iowa's post-*Varnum* election. Again, I find that while this salience does not increase general election turnout, those who vote participate in retention races at higher levels than we would expect otherwise.

DATA AND ANALYSES

The analyses in this section investigate three different electoral outcomes. First, I evaluate the media claim that there was record-level turnout in Iowa's 2010 general election. Next, I turn to outcomes related to the judicial retention race: negative votes and retention race participation.

If the legalization of same-sex marriage did elicit an electoral response and lead to failed retention bids for three justices, the effects should be visible in voters' participation in the retention race specifically, rather than the election in general. I conduct an analysis of negative votes in Iowa's 2010 supreme court retention race to identify whether *Varnum* did, in fact, lead to

the justices' defeat. However, negative votes are only one type of electoral response, and an increase in negative votes only captures the responses of those voters voting *against* retention. I conduct an analysis of voter participation in the 2010 supreme court retention race to identify whether there was a more general response to the legalization of same-sex marriage regardless of voters' choices. Following the analyses of Iowans' response to *Varnum* in the state's 2010 supreme court judicial retention race, I conduct analyses of voter participation in state supreme court retention races in three other states to understand the generalizability of the main results better.

Methodological Approach

In the analyses that follow I evaluate the hypotheses that *Varnum* had an effect on electoral outcomes in the 2010 election. To provide convincing evidence in support of the hypotheses that the court decision increased negative votes and participation in the subsequent retention race rather than potential random fluctuations in voting patterns, the analyses estimate the electoral outcomes that we might have expected in the absence of *Varnum*—in a counterfactual Iowa—and compare them to the actual 2010 outcomes. To do this, I conduct a series of difference-in-differences analyses of the electoral outcomes of interest.

The difference-in-differences design compares changes in Iowa voters' participation after *Varnum* with changes in voter participation in other states at the same time. With this approach, Iowa is the "treated" unit among the group of comparison states, and the election after the Iowa Supreme Court's legalization of same-sex marriage (the treatment) is the post-treatment period. I compare the differences in electoral outcomes before and after the treatment in Iowa with those in other states with supreme court judicial retention races. Inherent in this method of analysis is

an assumption that that any observed effect is actually a response to *Varnum* and not something else that happened prior to the election.

I conduct these difference-in-difference analyses in two ways. One approach uses regression analysis, incorporating state and year fixed effects[7] to control for unobserved differences across states and years that could affect electoral outcomes (such unobserved differences might include the organization of a state's trial and appellate court systems, the requirements for running for judgeship, etc.). The difference-in-differences estimate, in this case, is the coefficient of a binary interaction term indicating the state of Iowa and the election after the *Varnum* decision. The estimate measures the extent to which the difference in Iowa's electoral outcomes pre- and post-*Varnum* is different from the average differences in the electoral outcomes of the comparison states pre- and post-*Varnum*.

The second approach assigns varying weights to the individual comparison states to create a counterfactual or synthetic control (synthetic Iowa).[8] The weights are selected such that the synthetic control matches the treated state as well as possible with respect to the values of the voting predictor variables included in the analysis that are most important for predicting the outcome in the pre-treatment period (Abadie, Diamond, and Hainmueller 2010, 498).[9] The state weights for the synthetic control are then used to generate the electoral outcome that we would expect in Iowa in the absence of the treatment (*Varnum*). If the synthetic control matches the treated state in the pre-treatment period, then the effect of *Varnum* is the difference between the electoral outcome in Iowa and the electoral outcome in synthetic Iowa. If the synthetic control is not a good match for the treated state prior to treatment, then it is difficult to make any inference about perceived differences between the two after treatment using a synthetic control.

Data

The data for the analyses consist of state-level election results and predictors of voter

turnout from 1984 through 2012 for Iowa and the twelve other states[10] that follow the Missouri

Plan for the selection and retention of state supreme court justices, where the entire state (rather

than individual districts) votes on each justice's retention, and where judicial retention races are

held during the general election.[11] Therefore, Iowa and the states to which I compare it have

populations that did not elect justices to their initial appointments and that have the same

opportunities to retain or remove supreme court justices during general elections. The covariates

include state-level data on residents' income and other economic factors, race, level of education,

religious adherence, and partisanship.[12]

I estimate *Varnum*'s effect on three different outcome variables: general election voter

turnout, state supreme court judicial retention race "no" votes, and participation in the retention

race. I measure general election turnout as the percentage of the voting eligible population (VEP)

that voted in the top-ballot race (McDonald 2014).[13] As the top left panel of Figure 1 shows,

Iowa experiences relatively high turnout, with the third highest mean turnout in the group of

states from 1984 through 2008.

[Insert Figure 1 about here]

There does not appear to be much change in general election turnout in Iowa's 2010

election. The top left panel of Figure 2 presents general election turnout for the thirteen states in

the 2010 general election (after *Varnum*), and turnout in Iowa is still among the highest compared

to the other states. On the other hand, the percentage of "no" votes in the state's 2010 retention

race increased a great deal compared to Iowa's mean percentage of "no" votes from 1984

through 2008 and compared to the other states (see top right panels of Figures 1 and 2).

[Insert Figure 2 about here]

Participation in Iowa's state supreme court judicial retention race, measured as the percentage of the VEP casting a vote in the supreme court retention race, also appears to change quite a bit from its mean level after the *Varnum* decision (see bottom left panels of Figures 1 and 2). Iowans turn out in general elections, but they typically do not participate at comparable levels in the state supreme court judicial retention race; this changed in 2010. The difference-in-differences analyses that follow measure the change in how different Iowa is from the other states prior to *Varnum* and how different Iowa is from the other states after *Varnum*.

Turnout in Iowa's 2010 Election

As a first step to identifying electoral response to *Varnum*, I evaluate the media claim that the decision increased turnout among Iowans in the 2010 general election. To do this, I construct a counterfactual, synthetic Iowa, whose supreme court did *not* legalize same-sex marriage in 2009, and then compare 2010 general election turnout in synthetic Iowa to Iowa's actual general election turnout in 2010. An effective synthetic control will match the outcome variable values of the treated unit prior to the intervention such that any difference between the two after that can be attributed to that intervention (in this case, the *Varnum* decision).

General election turnout in synthetic Iowa is a fairly good match for that in Iowa prior to *Varnum*, and it follows the same overall trend with higher levels in presidential election years (see Figure 3). Synthetic Iowa in Figure 3 is a combination of Colorado, South Dakota, Wyoming, and Utah, which received weights of 0.697, 0.196, 0.105, and 0.002 respectively. The most important state-level voter turnout predictors for generating these state weights are the Republican vote share, poverty rate, and the Catholic adherence rate.

[Insert Figure 3 about here]

Turnout in Iowa is slightly higher than in the synthetic control for most of this period, which is not surprising since, as Figure 1 shows, average turnout in Iowa is among the highest in the comparison state pool. However, turnout in synthetic Iowa—a weighted combination of the comparison states—is a much closer match to turnout in Iowa than the unadjusted mean turnout of all the comparison states prior to *Varnum*. The vertical line at 2008 marks the last election prior to the *Varnum* decision, and turnout in synthetic Iowa is essentially a perfect match for real Iowa after that. This result suggests that neither *Varnum* nor other factors leading up to the 2010 election had any significant impact on voter turnout.[14] This result also suggests that media claims of record-high turnout in Iowa's 2010 general election were overstated, and that even a court decision as salient and controversial as the legalization of same-sex marriage does not bring additional voters to the polls. Additional details about the construction synthetic Iowa are included in the appendix.

Even if this analysis generated a visible and significant gap between turnout in Iowa and synthetic Iowa post-*Varnum*, we could not conclude that the decision was the cause. It would be very difficult to identify the effect of a court case on overall general election turnout; if the analysis produced a significant result, it would be challenging to distinguish whether it was the result of the legalization of same-sex marriage or another event that occurred before the 2010 election like the contentious gubernatorial campaign, for example.

Politicians who referenced *Varnum* in their campaigns, and the interest group advertisements that ran in support of conservative family values, all encouraged Iowans to remove the justices from office with their votes in the 2010 judicial retention race (Clopton and Peters 2013; Skaggs et al. 2010). The remaining analyses in this section attempt to identify voter response to the justices' decision in outcomes related to the retention race specifically.

"No" Votes in the Supreme Court Judicial Retention Race

For justices to lose their seats in a retention election, citizens have to cast votes in that race, and there have to be more "no" votes than "yes" votes. This rarely happens, and it had never happened in an Iowa Supreme Court election prior to 2010. This is why so many people, including legal scholars and members of the media, were fascinated with the outcome of the election and what it said about voters' ability to punish judges and hold them accountable for their behavior. In this section, I evaluate the claim that *Varnum* led to the justices' defeat.

In a judicial retention race in any state, voters see a question similar to the following on their ballots: "Shall the following judges be retained in office?"[15] Then, they can select "yes" or "no" for each justice or judge up for retention that year. Typically, about twenty-three to twenty-five percent of Iowans voting in the supreme court retention race vote "no."[16] In 2010 however, fifty-four percent of the votes in the supreme court retention race were "no" votes.

Constructing a synthetic control is very useful method by which to identify *Varnum*'s effect on negative votes in the 2010 judicial retention race. With respect to the percentage of people voting against state supreme court justices, synthetic Iowa is a combination of Arizona, Utah, Oklahoma, California, Indiana, and South Dakota, and these states receive weights of 0.474, 0.327, 0.084, 0.069, 0.043, and 0.003, respectively. The most important predictors for generating a synthetic Iowa in this case are participation in the judicial retention race, the percentage of the population that is black, and the religious adherence rate.

As Figure 4 shows, "no" votes in synthetic Iowa are a good match for those in Iowa prior to the 2010 election. The relatively close match between the two prior to the legalization of same-sex marriage allows for the ability to estimate the difference between the two in the 2010 election and make an inference about *Varnum*'s effect. The vertical line at the year 2008

separates pre- and post-*Varnum* elections. The synthetic control does such a good job here that

the gaps between real and synthetic Iowa with respect to "no" votes in this period are relatively

small, especially when compared to the gap between the two post-*Varnum*.[17] Placebo tests also

suggest that this result is not the product of chance.[18]

[Insert Figure 4 about here]

The results of this analysis support the hypothesis that *Varnum* did lead to the three

justices' 2010 retention election loss. However, vote choice is just one way that voters might

respond to a salient judicial decision in a retention race, and vote choice only captures the

response of those voters who do not support justices' retention. Voters in favor of retention might

also respond to salient decisions, but analyses of "no" votes alone fail to capture fully the

responses of both sets of voters. The next subsection investigates the broader response, with an

analysis of voter participation in Iowa's 2010 supreme court judicial retention race.

Participation in the Supreme Court Retention Race

Varnum led to significantly more negative votes than any previous supreme court

retention race, but it did not bring more voters to the polls in the general election. How else

might it have changed participation in Iowa's 2010 election? In 2010, Iowa voters paid attention

to a ballot item they often skip—the state supreme court judicial retention race.

To provide some context as to how *Varnum* changed voters' behavior in 2010, Figure 1

shows that although general election turnout in Iowa is generally high, participation in supreme

court retention races (percentage of the VEP casting a vote in the supreme court retention race) is

relatively low compared to other Missouri Plan states. This phenomenon is referred to as ballot

roll-off; many Iowa voters vote in the top ballot item but *roll off* the ballot without voting in the

retention race. In 2010 however, supreme court retention race participation in Iowa was among the highest of all the comparison states (see Figure 2).

Three of the justices involved in the unanimous *Varnum* decision ran for retention in 2010, and another of the justices involved in the decision ran for retention in 2012. The analyses in this subsection include data through the 2012 election to assess *Varnum*'s impact on both of the supreme court retention elections following the decision. The synthetic control of supreme court retention race participation in Iowa is a combination of Indiana, Kansas, Wyoming, Utah, and South Dakota, which receive weights of 0.644, 0.196, 0.103, 0.029, and 0.027, respectively. The most important factors for constructing this synthetic control are the poverty rate, the homeownership rate, and the Mormon adherence rate.

Figure 5 plots supreme court retention race participation in Iowa and synthetic Iowa from 1984 through 2012. The trend in retention race participation in synthetic Iowa matches that in real Iowa fairly well prior to *Varnum*. Except for the 1992 and 2004 elections, retention race participation in Iowa is either lower than or about the same as participation in synthetic Iowa. This is not surprising, because Iowa experiences low participation in its supreme court races compared to the other states in the sample (see Figure 1), which means that, for many years, no combination of comparison states can generate levels of retention race participation as low as those in Iowa.

[Insert Figure 5 about here]

Figure 5 does show a post-*Varnum* gap between retention race participation in Iowa and synthetic Iowa after the 2008 election, which is good evidence in support of the hypothesis that *Varnum* increased participation in the race. Retention race participation in Iowa in 2010 and 2012 are higher than in synthetic Iowa even though retention race participation in synthetic Iowa is

higher than actual participation in the state throughout the pre-*Varnum* period. Although the post-*Varnum* gap between Iowa and synthetic Iowa is larger than any of the gaps between the two in the pre-*Varnum* period, some of the gaps in the pre-*Varnum* period are larger than is ideal for inferential purposes.

Unlike the synthetic control, which relies on the weighted average of a sample of states for comparison, difference-in-differences regression compares the change in Iowa's retention race participation after *Varnum* with the average change in other states at the same time. This approach provides additional support for the suggestive evidence in Figure 5. Figure 6 shows supreme court retention race participation in Iowa and the mean of retention race participation in the comparison states from 1984 through 2012. Both lines follow the same trend over time—higher participation in presidential election years—and until the 2010 election, retention race participation in Iowa is lower than the average of the comparison states. The trend changes in 2010 when participation in Iowa is higher than it was in the 2008 presidential election and higher than the average of the comparison states. Retention race participation remains higher in Iowa than in the comparison states in 2012.

[Insert Figure 6 about here]

The difference-in-differences estimate captures the change in the trend in comparison with the other states after 2008. Table 1 shows results of the model, which includes state and year fixed effects. The difference-in-differences estimate is the coefficient for the interaction of the Iowa indicator variable and the 2010 indicator variable (IA x 10), which suggests that retention race participation in Iowa's 2010 election was twelve percentage points higher than should have been expected when compared with participation in previous years and in the comparison states. More specifically, the coefficient means that the difference between participation in Iowa and

average participation in the comparison states in 2010 is twelve percentage points greater than it was on average prior to the 2010 election. This estimate is robust to various model specifications, remaining substantively and statistically significant (p < 0.01).

[Insert Table 1 about here]

The results included in this subsection support the hypothesis that the legalization of same-sex marriage led to an electoral response in the subsequent election. *Varnum* encouraged voters to cast ballots in the supreme court retention race at a higher rate than usual.[19] Same-sex marriage was an extremely salient issue across the states prior to *Obergefell v. Hodges*, and there was an influx of money and media attention devoted to the 2010 Iowa supreme court retention race unlike anything the state had previously experienced.

If a state supreme decision ever had the chance of increasing general election turnout, it was during the 2010 election after *Varnum*. However, even though the intense campaigning and mobilization around the decision may have increased participation in the race, they did not bring more people to the polls, suggesting that a salient judicial decision can increase participation in retention races, but not election turnout. In the section that follows, I present results from analyses of supreme court retention race participation following salient decisions in other states. In these examples, as well, general election turnout does not increase, but participation in the judicial retention race does.

BEYOND *VARNUM:* ELECTORAL RESPONSE IN RETENTION ELECTIONS

It is the increase in retention race participation, in addition to the removal of three state supreme court justices, that makes the Iowa case an interesting addition to debates about voter participation and judicial independence in judicial retention elections. The increases in negative retention votes in the Iowa case and the cases that follow suggest that voters who voted in those

retention elections responded negatively to justices' controversial behavior; but most voters do not vote in judicial retention races. So, an increase in negative votes unaccompanied by a shift in participation might mean that only the most engaged voters—those casting ballots in a typically low salience retention race—respond to salient judicial decisions, and it is possible that those engaged voters might be more inclined to respond negatively than other voters.

Low levels of participation in judicial retention elections is a mark of judges' independence from voters; and understanding the types of participatory responses that result from court behavior is crucially important to understanding judicial independence since both positive and negative votes, especially in the wake of controversial decisions, express public evaluation of judicial behavior. Therefore, throughout this section, I am specifically interested in retention race participation.

Kritzer identifies particularly partisan judicial elections using partisan correlations which he measures as "the correlations between the county-level percentage voting to oust the justice and the county-level vote for the Republican candidate for governor" (Kritzer 2015, 203). I use these partisan correlations to identify supreme court retention races in Missouri Plan states that are likely to have followed salient court decisions that have the potential to drive shifts in electoral participation.[20] The subsections that follow include brief overviews of the circumstances surrounding the partisan retention races in Colorado (2010), Alaska (2000), and a race in Wyoming (1992) that was contentious, but not particularly partisan. While retention race participation was higher than should have been expected in each of the elections discussed below, general election turnout was not. The results suggest that, as in Iowa, judicial decisions can encourage voters to participate in the retention race, but they cannot bring more voters to the polls on Election Day.[21]

Colorado 2010

Prior to the 2010 retention race, Colorado justices received criticism for a series of decisions about such issues as property rights, taxes, and congressional redistricting (Kritzer 2015; Aspin 2010; Cardona 2010). According to Kritzer (2015), the Colorado retention race was the most partisan of all supreme court retention races in 2010. However, even this particularly partisan race did not increase turnout in Colorado's general election; but, as in Iowa, participation in the supreme court retention race was higher than would otherwise have been expected.

There were no retention races on Colorado's ballot in 2006 or 2008, so I generate the difference-in-differences estimate using regression analysis rather than a synthetic control, which would have to recreate the results of retention races that did not occur for comparison. The coefficient of the difference-in-differences estimator, in the first column of Table 2 suggests that there was an electoral response to the justices' salient behavior. More specifically, retention race participation was five percentage points higher than the level of participation that would have been expected when compared with previous years and the comparison states.[22]

[Insert Table 2 about here]

Alaska 2000

Prior to the 2000 supreme court retention race, conservative groups mobilized voters against Justice Dana Fabe for previously ruling that a hospital that accepted money from the federal and state governments "could not interfere with a woman's right to choose an abortion" (Kritzer 2015; Queary 2000). The second column of Table 2 includes the results of a regression model of participation in Alaska's 2000 supreme court judicial retention race. Because Alaska has either the highest or second highest retention race participation of all states in the comparison

pool for the entire period, no combination of the states can be used to make a synthetic control that replicates retention race participation in Alaska. The coefficient of the difference-in-differences estimator for the 2000 retention race, which is statistically significant at conventional levels, suggests that Justice Fabe's decisions led to a five percentage-point increase in retention race participation that year compared to what we would have expected otherwise, but there was no effect on general election turnout.

Wyoming 1992

Opponents campaigned to unseat Justice Walter Urbigkit in 1992, because they felt his decisions were soft on crime (Kritzer 2015). Justice Urbigkit was not retained that year, but there was no particularly partisan pattern to the results of the race (Kritzer 2015).

Figure 7 plots retention race participation in Wyoming and synthetic Wyoming from 1984 through 1998. Retention race participation in synthetic Wyoming is a good match for the real Wyoming through the 1990 election. There is a large gap between the two in the 1992 election when voters did not retain Urbigkit, suggesting that the mobilization and salience of his race led to an approximately seven percentage-point increase in retention race participation compared to what we would have expected in the absence of controversy around Justice Urbigkit's decisions prior to the election.

[Insert Figure 7 about here]

Overall, the examples in this section show that the relationship between *Varnum* and participation identified in Iowa's 2010 election is not limited to that example. Those who vote do respond to salient judicial decisions in nonpartisan judicial retention races; but this salience, even following such a controversial decision as *Varnum,* does not appear to be enough to increase overall turnout in the general election.

CONCLUSION

The results of the analyses in this paper suggest that voters do respond to salient judicial decisions in supreme court retention elections. However, we should not expect even the most controversial decisions to bring additional voters to the polls. Rather, the findings suggest that in response to these decisions, those who vote, will vote further down their ballots and participate in the judicial retention race.

The findings suggest that justices who run in retention elections might not be as independent from voters as scholarship relying on the rarity of failed retention bids and low negative vote shares as evidence of these justices' relative independence generally concludes. Justices were only removed in the examples from Iowa and Wyoming included in this paper, but voters in Alaska and Colorado also increased their participation in supreme court retention races. This does not mean that justices in Alaska and Colorado are more independent than those in Iowa and Wyoming. Voters responded in both sets of examples, but in Alaska and Colorado, the yes votes outnumbered the no votes.

A strength of the findings presented in this paper is their robustness to various model specifications. Building upon knowledge that scholars have developed in the field of judicial elections, these analyses improve our understanding of electoral response in typically low-interest judicial retention races. The analyses in this paper convincingly identify changes in electoral outcomes in retention races following salient judicial decisions when compared with the outcomes we would have expected using previous years and other states for comparison.

However, these analyses require the assumption that any observed effect is actually in response to judges' decisions and not something else that happened in any of these states prior to the elections in question, including high-profile campaigns for national or state legislative

offices. The inclusion of analyses of supreme court retention races in multiple states inspires confidence in the results. Additionally, ballot roll-off in presidential election years is quite similar to ballot roll-off in midterm elections (Aspin 2016), suggesting that even high profile national elections create little change in retention race participation as a proportion of general election turnout.

High-profile campaigns against judges running for retention, like the one in Iowa in 2010, are not the norm; and most campaigns will not achieve their goal of removing judges from the bench (Aspin 2016). But justice removal is not the only reason we should be interested in campaigns against retention and shifts in retention race results. If voters are the only ones who can punish or reward Missouri Plan judges after appointment, then it is important to understand the factors related to shifts in participation in these races. The results of analyses presented in this article suggest that we need to take greater care in evaluating the extent to which judges who run in retention elections are independent from voters. Voters do respond to salient decisions and mobilization in retention races. Even if the judges running in these elections are ultimately retained, because more of the voters cast yes votes than no votes, they are not as independent from voters as opponents of retention elections often argue.
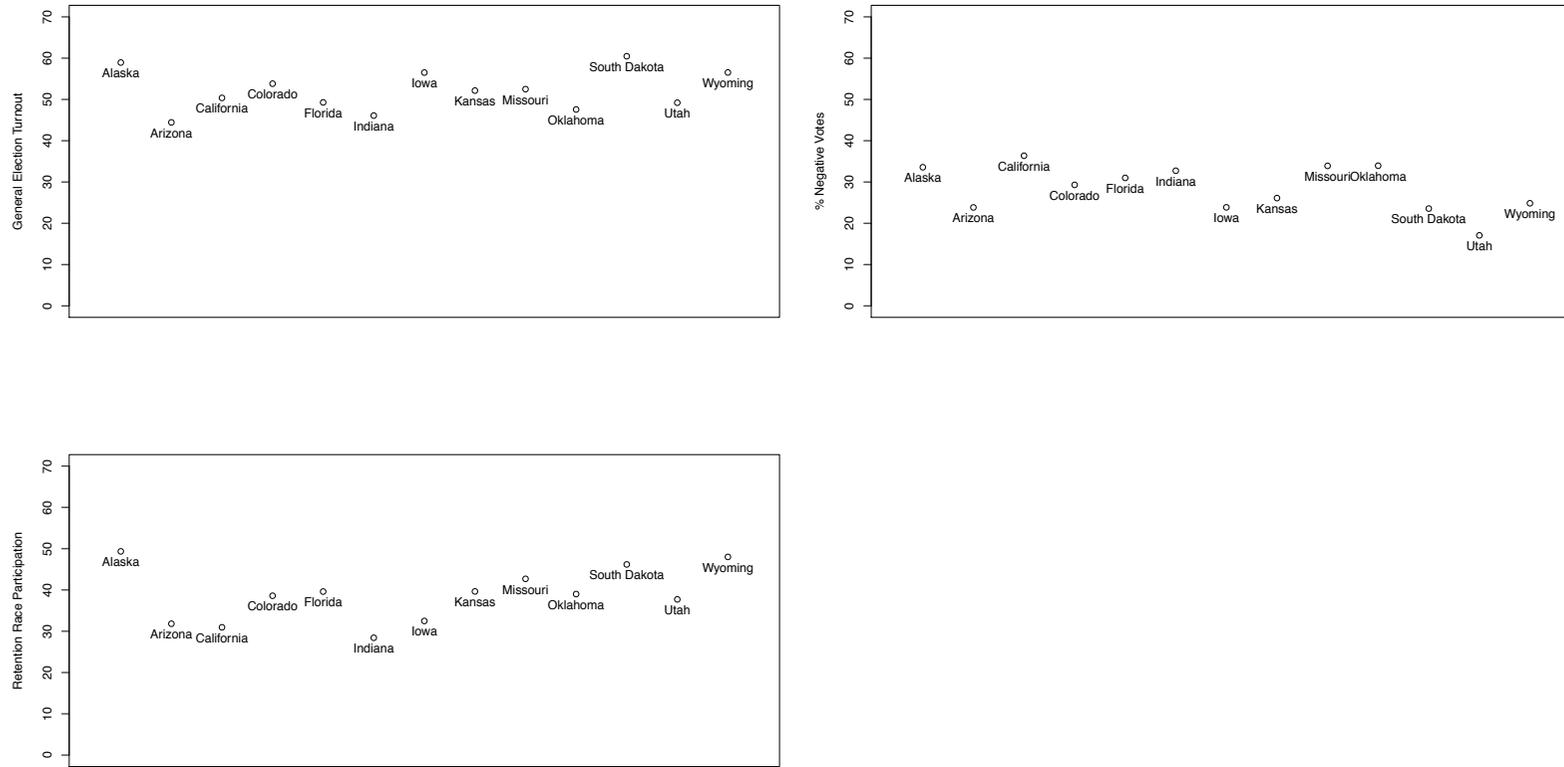
Figures

Figure 1. Heterogeneity of Outcomes across States: 1984-2008.

Graphs present mean levels of outcome variables for each state from 1984 through 2008. Top left: general election turnout; top right: judicial

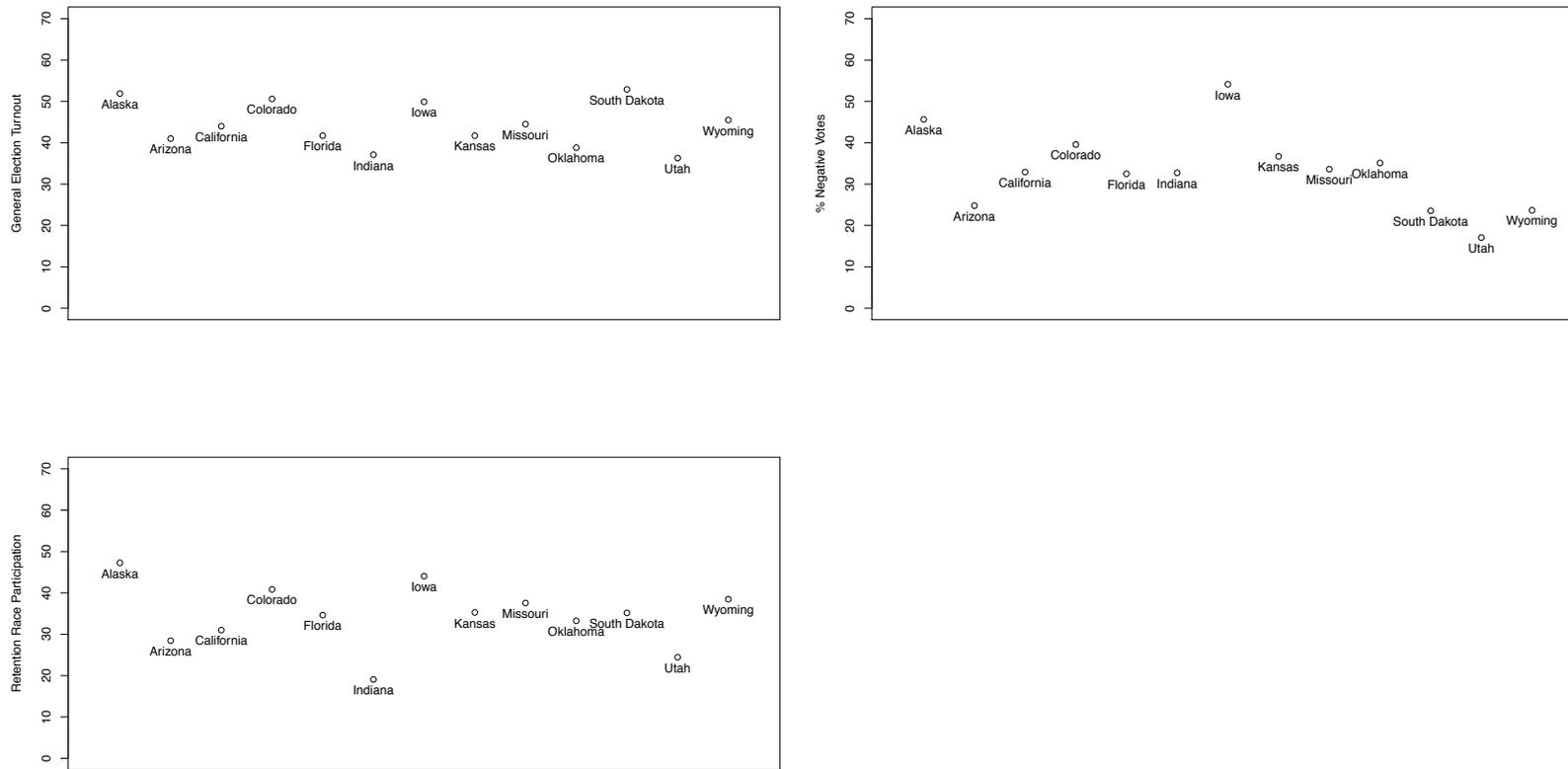retention race "no" votes; bottom left: judicial retention race participation.

Figure 2. Heterogeneity of Outcomes across States: 2010.

Graphs present mean levels of the outcome variables for each state in 2010 (which includes 13 general elections). Top left: general election turnout; top right: judicial retention race "no" votes; bottom left: judicial retention race participation.
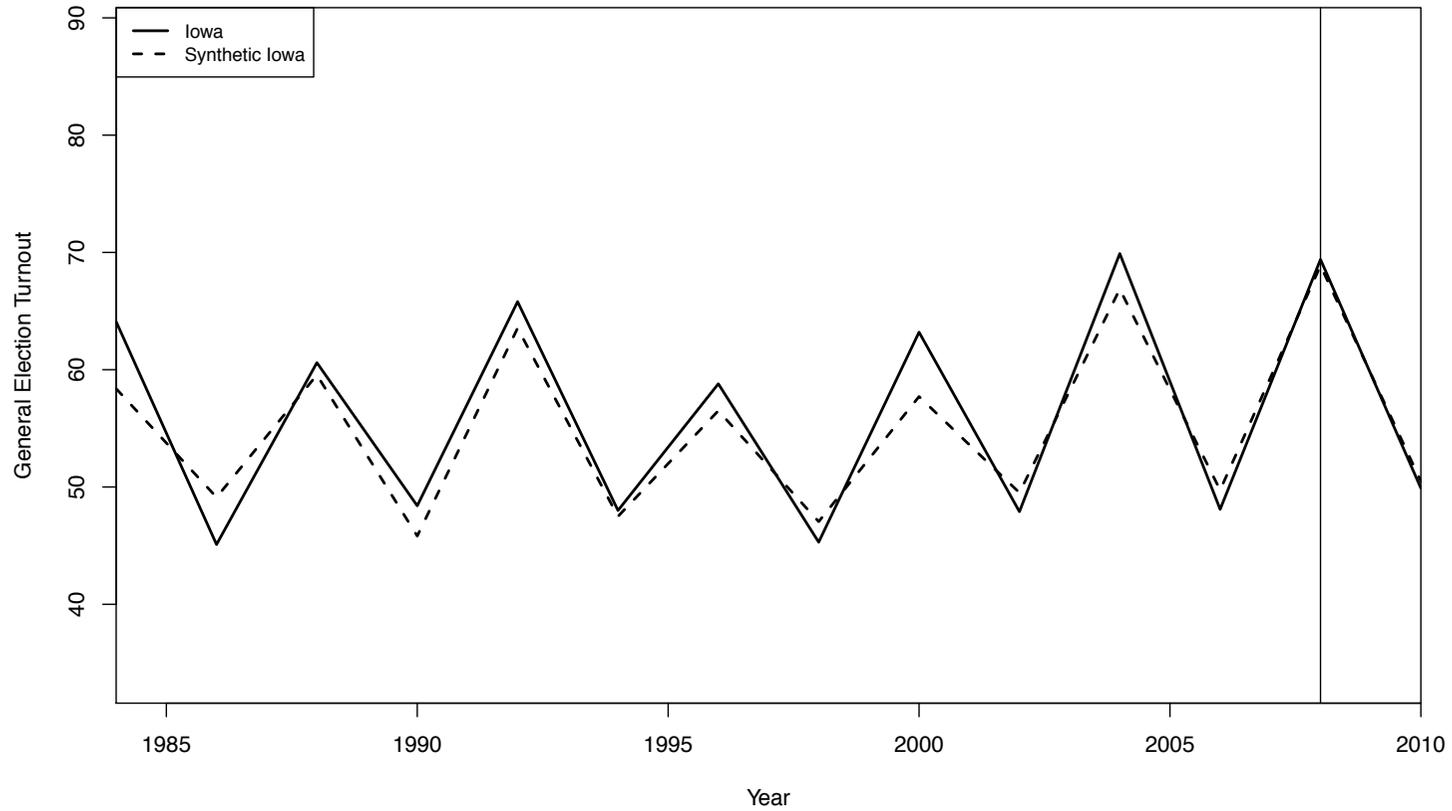
Figure 3. Turnout in Iowa v. Synthetic Iowa: 1984-2010.

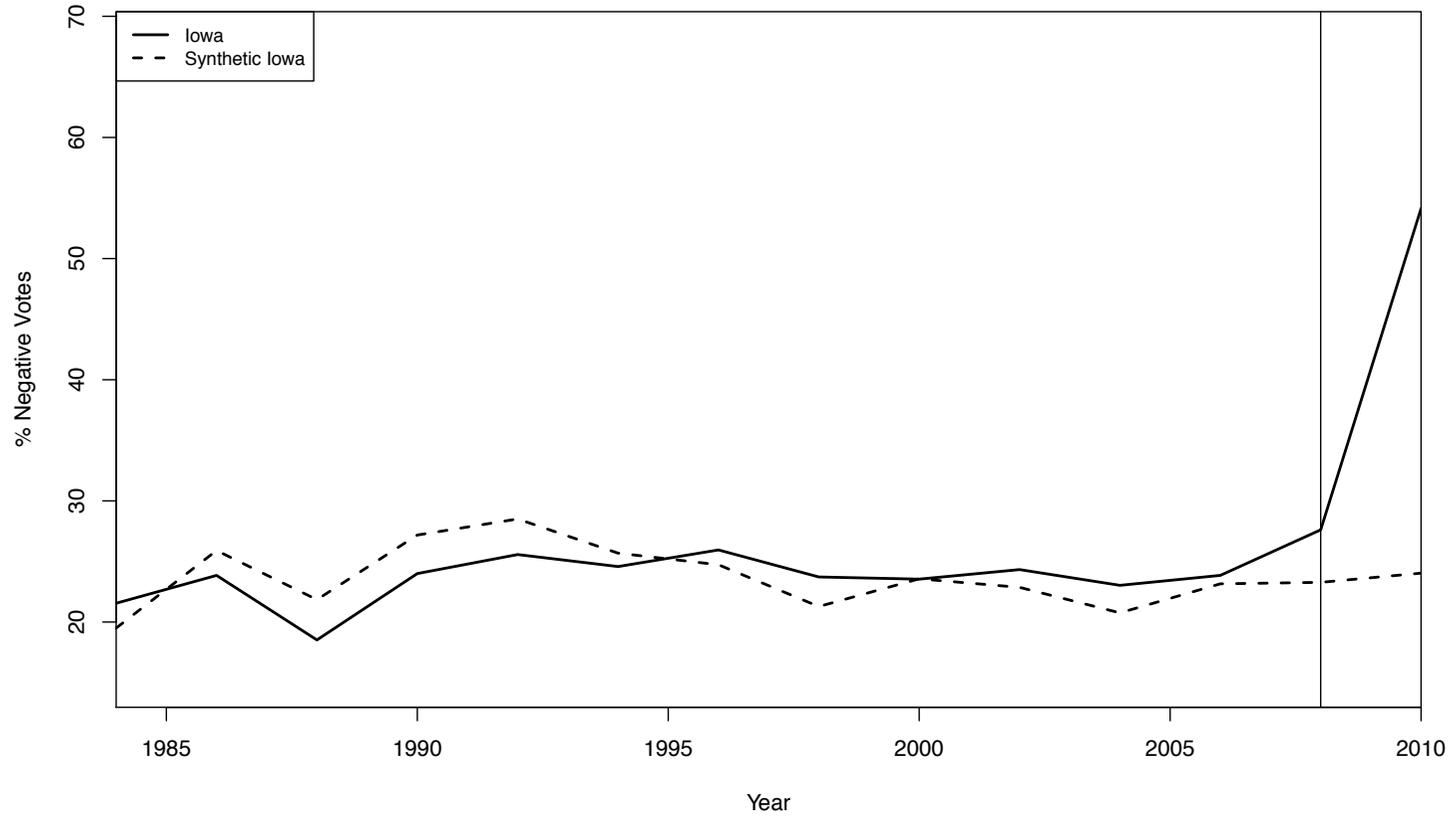Note: Vertical line at 2008 election prior to *Varnum* decision.

Figure 4. Judicial Retention Race "No" Votes in Iowa v. Synthetic Iowa: 1984-2010.

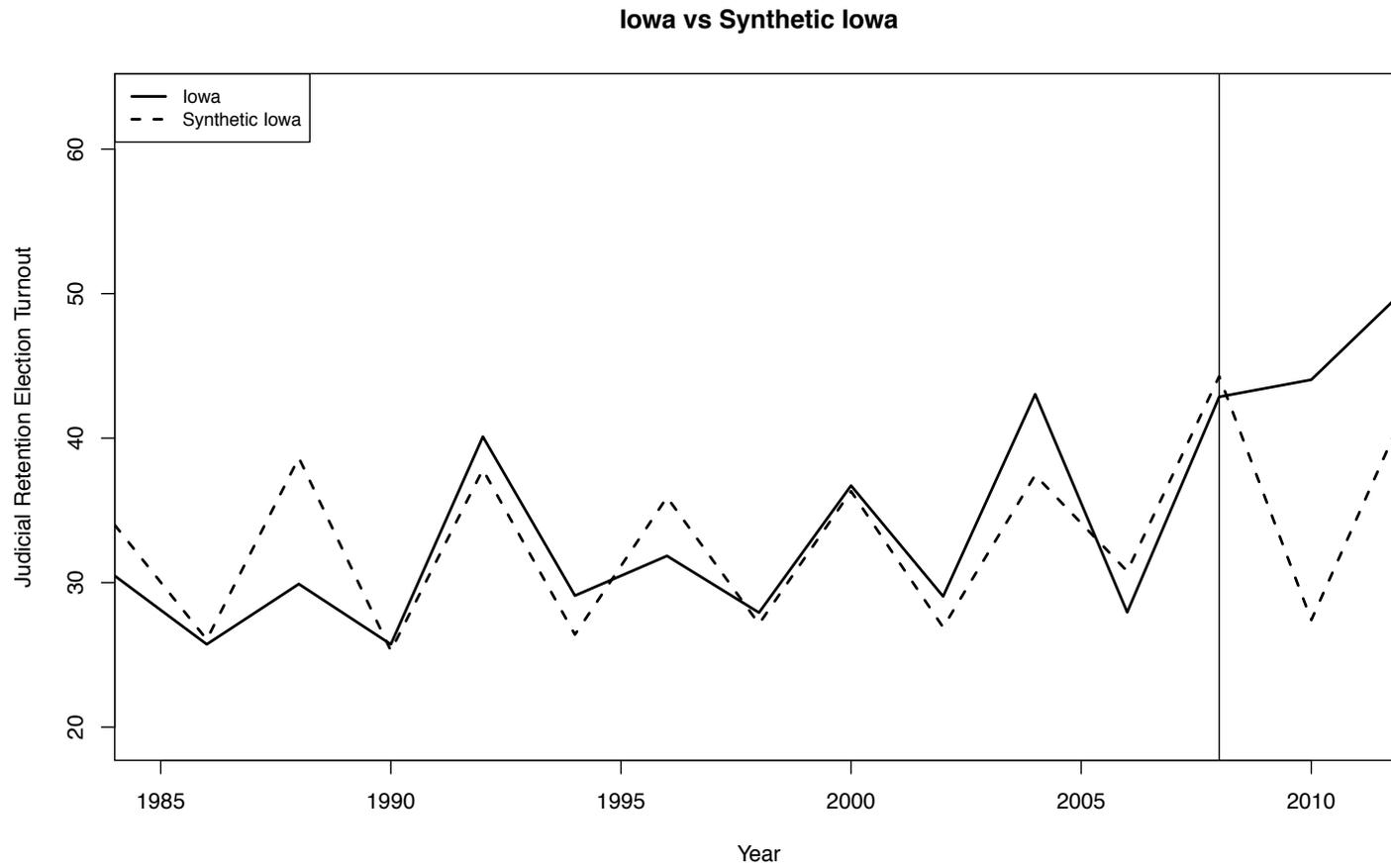Note: Vertical line at 2008 election prior to *Varnum* decision.

Figure 5. Judicial Retention Race Participation in Iowa v. Synthetic Iowa: 1984-2010.

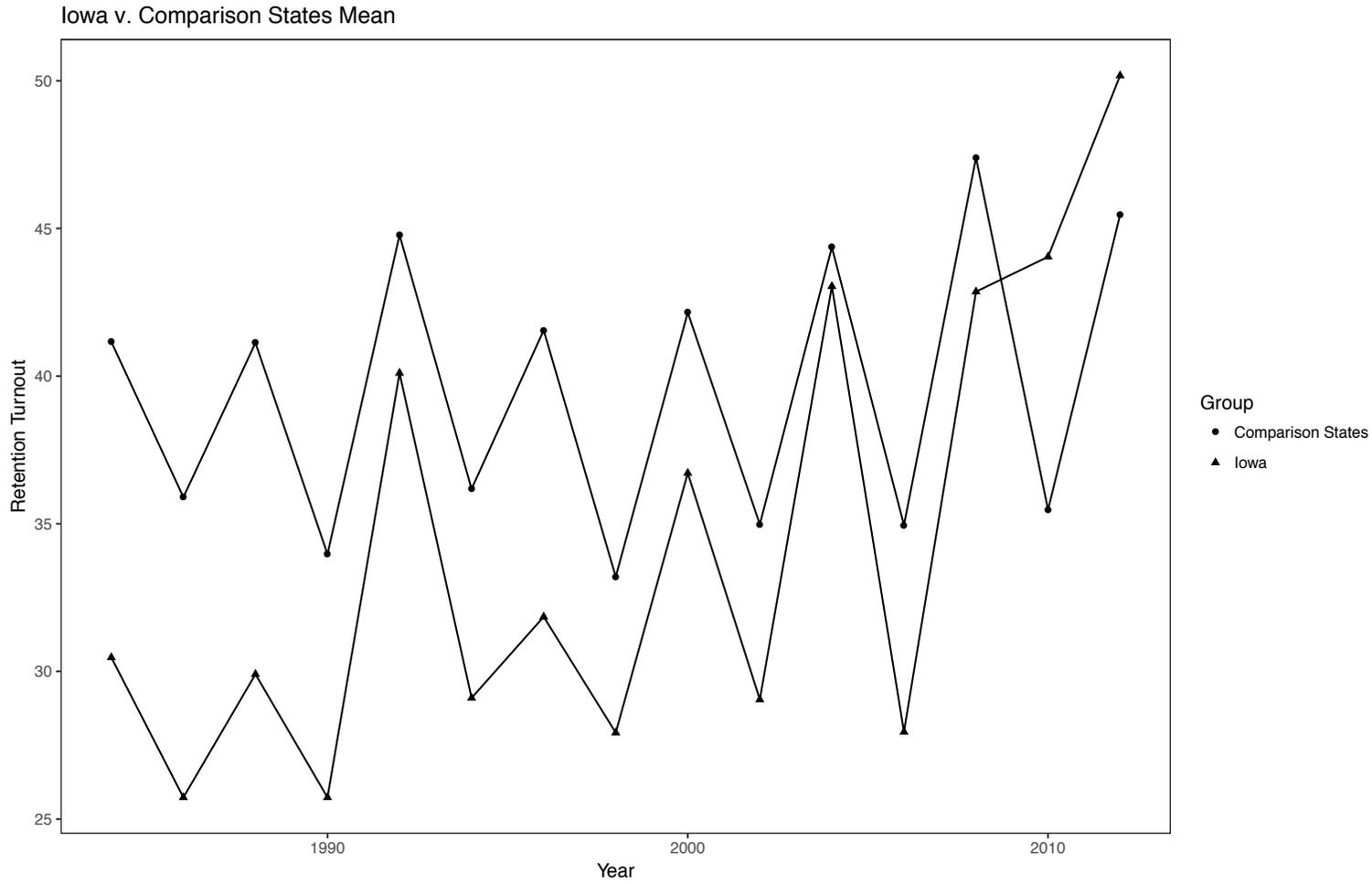Note: Vertical line at 2008 election prior to *Varnum* decision.

Figure 6. Judicial Retention Race Participation in Iowa Compared to Comparison States Mean: 1984-2012.
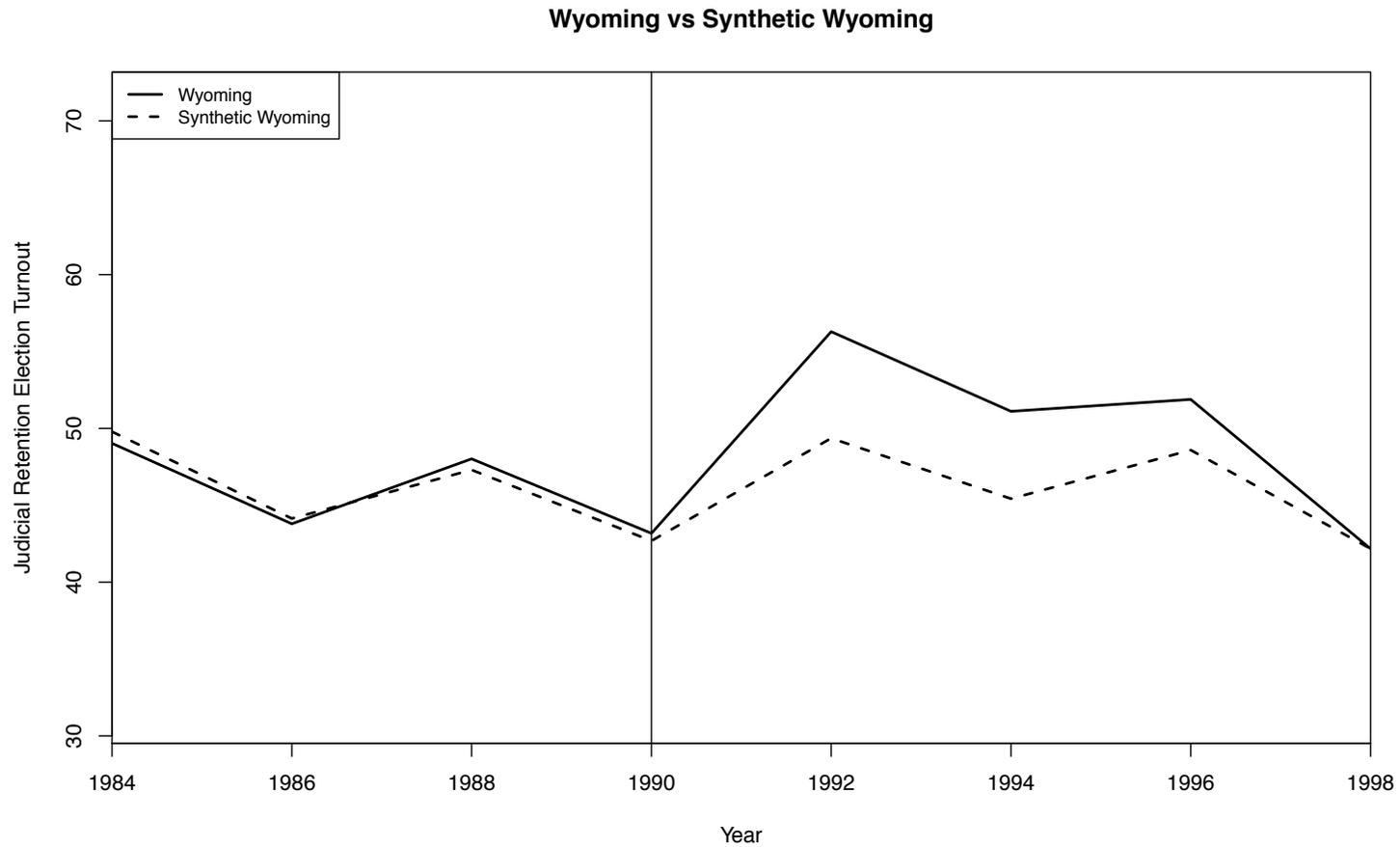
Wyoming vs Synthetic Wyoming

Figure 7. Judicial Retention Race Participation in Wyoming v. Synthetic Wyoming: 1984-1998.

Note: Vertical line at 1990 election prior to salient decisions.

Tables

Table 1. Retention Race Participation in Iowa

	(1)
VARIABLES	IA 2010
IA x 10	12.12***
	(1.832)
Rep. Vote Share	0.0174
	(0.0275)
Pop. in Thousands	0.000205
	(0.000375)
Pct. White	0.162
	(0.204)
Pct. Black	1.814**
	(0.616)
Pct. Hispanic	-0.0751
	(0.435)
Poverty Rate	-0.179
	(0.198)
Home Ownership Rate	0.192
	(0.149)
Pct. Urban	-0.232
	(0.373)
Pct. Some College	1.109**
	(0.450)

Med. Inc. in Thousands	-0.332*
	(0.178)
Unemployment Rate	-0.208
	(0.364)
Constant	11.54
	(19.72)
Observations	195
Number of state	13
R-squared	0.680
State FE	YES
Year FE	YES

Robust standard errors in parentheses

*** p < 0.01, ** p < 0.05, * p < 0.1

Table 2. Retention Race Participation in Alaska and Colorado

	(1)	(2)
	CO 2010	AK 2000
CO x 2010	**5.452****	
	(2.242)	
AK x 2000		**4.999****
		(1.931)
AK x 2010		
Rep. Vote Share	0.0212	0.0194
	(0.0292)	(0.0292)
Population (Thousands)	0.000557*	0.000580**
	(0.000283)	(0.000256)
Pct. White	0.294	0.515
	(0.510)	(0.404)
Pct. Black	2.220	2.537*
	(1.256)	(1.383)
Pct. Hispanic	-0.246	-0.0125
	(0.423)	(0.425)
Poverty Rate	-0.290	-0.309*
	(0.181)	(0.173)
Home Ownership Rate	0.0790	-0.0123
	(0.178)	(0.180)
Pct. Urban	-0.321	-0.347

	(0.352)	(0.353)
Pct. Some College	0.827*	1.255***
	(0.415)	(0.394)
Med. Income (Thousands)	-0.251	-0.192
	(0.144)	(0.140)
Unemployment Rate	-0.256	-0.285
	(0.329)	(0.365)
Constant	15.41	-7.244
	(30.72)	(21.68)
Observations	182	182
R-squared	0.660	0.663
Number of state	13	13
State FE	YES	YES
Year FE	YES	YES

Robust standard errors in parentheses

*** p < 0.01, ** p < 0.05, * p < 0.1

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[1] Since adopting merit selection in 1962 and prior to the results of the 2010 state supreme court retention election, only four lower-court judges had failed to receive enough votes for retention in Iowa (Clopton and Peters 2013, 321).

[2] Clopton and Peters (2013) make a significant contribution to understanding voter response to *Varnum* with a county-level analysis of the 2010 Iowa Supreme Court retention election identifying the county-level population characteristics that were most influential in removing the three justices from their seats.

[3] See appendix for more details on the methodological approach used in the paper— difference-in-differences. Comparison states: Alaska, Arizona, California, Colorado, Florida, Indiana, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming

[4] Regardless of one's own opinion of how judges *should* be selected and retained.

[5] Only Massachusetts, New Jersey, and Rhode Island appoint supreme court justices for life.

[6] The justices increased their appearances as the election became more contentious, but, as usual, they declined to raise money for the race (Clopton and Peters 2013, 323), and none of the justices received direct donations to support their retention (Bonica 2013).

[7] Fixed effects are incorporated by adding a dummy variable for each state and one for each year. The regression line will, therefore, have a different intercept for each state.

[8] Fowler (2013), for example, uses both approaches for estimating the impact of voter turnout in Australia.

[9] For more information on this approach and the Synth package see Abadie, Diamond and Hainmueller (2010, 2011). More details on how the approach is applied in this paper, specifically, are included in the appendix.

[10] Data and sources are described in detail in the appendix. All calculations use the votes for the first listed state supreme court judicial retention candidate on the ballot. Average mid-term or average presidential election pre-treatment retention election votes are used in years when there is no retention election in one or more of the states in the sample. Comparison states: Alaska, Arizona, California, Colorado, Florida, Indiana, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming

[11] See American Bar Association (2015) for information on judicial selection methods in the states.

[12] Ideally the analyses in this paper would have included measures for voter mobilization, such as campaign spending and the number of advertisements aired. However, such data do not exist over time for Iowa, as the 2010 election marked the first televised advertisements about a supreme court election, and none of the justices raised campaign funds. Candidates for other offices and interest groups did spend money on and raise awareness about the retention election (see Clopton and Peters 2013; Bonica 2013).

[13] The top ballot race is the president in presidential election years, and usually either a US senate or gubernatorial race during years in which there is no presidential election.

[14] Results of the difference-in-differences regression analysis of turnout also failed to show a significant change in voter turnout after the legalization of same-sex marriage.

[15] This is how the question appeared in the Winfield Township ballot in 2010. Winfield Township is in Scott County, Iowa.

[16] Although 21.5 and 18.5 percent of retention election participants voted "no" in 1984 and 1988 respectively.

[17] A graph of the gaps between Iowa and synthetic Iowa for the entire period is included in the appendix.

[18] Placebo tests are used to identify whether similar results to those obtained from an analysis (the no-votes analysis, in this example), might be generated simply due to chance. Placebo tests for the no-votes analysis involved generating synthetic controls of no-votes for each of the comparison states. None of these synthetic controls were as different from the actual negative votes in the states as synthetic Iowa was from Iowa. Figures for each of these analyses are included in the appendix. Difference-in-differences regression analysis supports this result as well.

[19] Placebo tests did not yield significant results, providing further support for the findings presented here. Placebo tests consisted of running regressions with different states or years identified as the treated unit or treatment period, respectively.

[20] See Kritzer (2015) for partisan correlations.

[21] The 2010 supreme court retention races in Florida and Alaska were also especially partisan, according to Kritzer's (2015) correlations, but participation did not increase in these races, suggesting that the courts may have lacked the level of salience present in the other examples.

[22] There were no supreme court retention races in Colorado in 2006 or 2008. For all analyses in this paper, I substitute the mean retention race participation from previous presidential or midterm election years when there is no state supreme court retention race.