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JUDICIAL ELECTIONS IN THE 2010s

*Herbert M. Kritzer**

INTRODUCTION

In my book *Justices on the Ballot: Continuity and Change in State Supreme Court Elections*, I examined patterns in state supreme court elections from 1946 through 2012 with some footnotes updating through 2014.¹ In the book I discussed patterns of contestation and competition, patterns of partisanship in voting, television advertising (starting in 1999), and campaign contributions (starting in 1990). I found surprisingly little change in contestation and competition other than in southern states, a mixed pattern of change in partisanship in voting, an increase in the volume of television advertising but a stable pattern in the tone of that advertising (which differed sharply from advertising in presidential, congressional, and gubernatorial elections), and an increase in campaign contributions. In this Article, I will update my analysis to include the 2013 through 2016 elections and use the updated data to compare the patterns of the 2010s to earlier periods.

As a preliminary matter, one should ask why we care about how judges are selected and retained? There are two primary reasons. First, how judges are selected and retained may influence the decisions the judges make. Decisions can be affected based on who is selected and retained or by the effects of the selection/retention process itself. By the latter, I mean that judges' decisions may be influenced by the goal of insuring their retention by whoever controls retention, whether that be voters or elected officials. Alternatively, if some form of election is used, judges' decisions may be influenced by financial backers, either past or potential. There is no question that those selected for judicial positions impact the decisions courts make, as prominently illustrated by conflict over selections to the Supreme

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1. HERBERT M. KRITZER, *JUSTICES ON THE BALLOT: CONTINUITY AND CHANGE IN STATE SUPREME COURT ELECTIONS* (2015).

Court of the United States. However, evidence of the impact of retention concerns or more direct financial effects on judicial decisions are surprisingly limited.²

The second primary reason one might care about the manner of judicial selection and retention is concerns regarding the legitimacy of the courts and the decisions they render. Critics of judicial elections assert that electing judges leads to the public viewing judges as just another kind of politician, which lowers the public's esteem for the courts.³ There is no evidence that the use of judicial elections decreases public support for the courts;⁴ if anything, the reverse may be true.⁵ A second view is that the need for judicial candidates to raise money decreases support for the courts.⁶ However, while the public does express concern about the role of money in judicial elections, there is no evidence that this concern translates into a decrease in general support for the courts. One might also hypothesize that the increasing role of advertising, and the appearance of substantial negative advertising in judicial elections, decreases public support for the courts.⁷ However, there are no available data that would allow one to look at even the short run impacts of negative advertising on public support.⁸

An additional concern may be whether voters are able to make intelligent choices in judicial elections. This problem arises because judicial elections seldom garner significant news coverage, which means that information about candidates is usually scarce. Partisan elections

2. For a review of the literature on the impact of retention processes on judicial decision-making, see Herbert M. Kritzer, *Impact of Judicial Elections on Judicial Decisions*, 12 ANN. REV. L. & SOC. SCI. 353 (2016).

3. See, e.g., Sandra Day O'Connor, *Take Justice Off the Ballot*, N.Y. TIMES, May 22, 2010; Sandra Day O'Connor, *Justice for Sale: How Special-Interest Money Threatens the Integrity of Our Courts*, WALL ST. J., Nov. 15, 2007.

4. See Kritzer, *supra* note 1, at 53–59.

5. JAMES L. GIBSON, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGN ON JUDICIAL LEGITIMACY* 107 (2012).

6. *Id.* at 28, 53.

7. Hall examined the impact of negative advertising on both turnout and voting in state supreme court elections. MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* (2014). Hall found that turnout was higher when there had been negative advertising. *Id.* at 147–59. She found no effect of negative advertising directed at challengers on the support they received, but she did find some effect of negative advertising on support for the incumbent, but the nature of that effect depended on the ballot form that was used. Negative advertising decreased support for incumbents running on a nonpartisan ballot, but actually increased support for incumbents running on a partisan ballot. *Id.* at 110–20.

8. I sought unsuccessfully to locate any pair of state-level surveys with data on support for state courts generally or the state supreme court where between the two surveys there had been a state supreme court election with significant negative advertising.

provide some useful information, and some states do indicate whether a candidate is an incumbent. Beyond that, voters often rely on cues based on the candidates' names, looking for names they recognize or that are ethnically familiar. Sometimes voters think they recognize a name, but it turns out to be someone else. This happened prominently in Texas in 1976 when a candidate named Don B. Yarbrough defeated the establishment-backed candidate in the Democratic primary, and was subsequently elected because there was no Republican candidate in the general election. Voters evidently confused Yarbrough with Yarborough; Don H. Yarborough had been a candidate for governor in several elections and Ralph Yarborough had been a U.S. Senator. Not long after taking office, Justice Yarbrough was forced to resign and was later sentenced to prison after being convicted of bribery (for conduct prior to becoming a justice).⁹ As discussed below, the outcomes of several recent elections resulting in incumbents being defeated may be partly explained by name cues.

There were two changes in methods of selecting and/or retaining state supreme court justices between 2010 and 2016. West Virginia changed the electoral system used for state supreme court justices, switching from a partisan ballot to a nonpartisan ballot starting in 2016.¹⁰ Those nonpartisan elections take place at the time of the party primaries and the candidate with the most votes is the winner, even if that candidate received well under 50 percent of the vote.¹¹ In the 2016 election, the winner received only 39.6 percent of the vote.¹² Tennessee changed the procedure for appointing justices to the court, but continues to use retention elections.¹³ North Carolina changed from a partisan to a nonpartisan system effective in 2004 as part of the Judicial Campaign Reform Act passed in 2002.¹⁴ In 2015, the state legislature attempted to change to retention elections. However, that

9. See Paul Holder, *That's Yarborough—Spelled with One "O": A Study of Judicial Misbehavior in Texas*, in *PRACTICING TEXAS POLITICS* (Eugene. W. Jones et al. eds., 1984).

10. See Stephanie Wilmes, *West Virginia Moves to Nonpartisan Judicial Elections in 2016*, *WILLIAM & MARY ELEC. L. BLOG* (Nov. 2, 2015), <http://electls.blogs.wm.edu/2015/11/02/west-virginia-moves-to-nonpartisan-judicial-elections-in-2016/>.

11. See *West Virginia Judicial Elections*, *BALLOTPEdia*, https://ballotpedia.org/West_Virginia_judicial_elections (last visited Dec. 20, 2017).

12. I believe that this makes West Virginia the only state using nonpartisan elections that rely on a plurality system to determine the election winner; all other nonpartisan states have primaries. Note that this does not include the two states with party nominations and nonpartisan general election ballots (Ohio and Michigan).

13. See *Tennessee Judicial Selection, Amendment 2*, *BALLOTPEdia*, [https://ballotpedia.org/Tennessee_Judicial_Selection_Amendment_2_\(2014\)](https://ballotpedia.org/Tennessee_Judicial_Selection_Amendment_2_(2014)) (last visited Dec. 20, 2017).

14. See *History of Reform Efforts: North Carolina*, *NAT'L CTR. FOR STATE COURTS*, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=NC (last visited Dec. 20, 2017).

move was struck down by a three-judge trial court panel.¹⁵ The North Carolina Supreme Court divided three to three on the appeal, thus letting the lower court decision stand.¹⁶

Concerns about judicial elections were heightened by what occurred in Iowa in 2010. In 2009, the Iowa Supreme Court issued a unanimous decision legalizing same-sex marriage.¹⁷ In 2010, three justices of that court were standing for retention on a “yes-no” ballot. Opponents of same-sex marriage launched a campaign to vote “no” on the retention of these three justices, and all three were defeated with 54–55 percent of the electorate voting against their retention.¹⁸ The defeat of these three justices constitute twenty-five percent of all state supreme court justices who have lost retention elections since the first such election in 1936.¹⁹ In fact, two elections—Iowa in 2010 and California in 1986—account for half of all defeats of state supreme court justices standing for retention on a “yes-no” ballot.²⁰

OVERCOMING INCUMBENCY IN THE 2015–16 ELECTION CYCLE

The defeat of sitting justices can be viewed as emblematic of the issues with the use of popular elections. In the most recent election cycle, 2015–16, three incumbents were defeated. Since 2010, a total of twelve candidates standing on partisan or nonpartisan ballots have been defeated. However, a careful examination of those twelve elections suggests the defeats do not necessarily reflect either of the two major concerns regarding judicial elections, but may reflect concerns about the role of cues such as name recognition.

In the 2015–16 cycle the three defeated incumbents were Brent Benjamin (West Virginia), Lawrence Meyers (Texas Court of Criminal Appeals), and Correale Stevens (Pennsylvania).²¹ There were unique

15. See Matthew Burns, *Divided Supreme Court Means no Retention Elections in NC for Now*, WRAL, May 6, 2016, <http://www.wral.com/divided-supreme-court-means-no-retention-elections-in-nc-for-now/15687681/>.

16. The justice who was to stand for election in 2016 had to recuse himself. *Id.*

17. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

18. See David E. Pozen, *What Happened in Iowa?*, 111 COLUM. L. REV. SIDEBAR 90 (2011).

19. There has been a total of 800 state supreme court retention elections through 2016; two additional elections took place in 2017. This figure includes retention elections for the Oklahoma Court of Criminal Appeals which is the court of last resort for criminal cases in that state. Also included are retention elections in Utah (1968–1984) and Montana (starting 1974) when an uncontested nonpartisan election defaulted to a retention format. See *History of Reform Efforts*, NAT'L CTR. FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state (last visited Mar. 21, 2017).

20. *Id.*

21. See *State Judicial Elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/State_judicial_elections_2016 (last visited Dec. 22, 2017).

circumstances surrounding each of these candidates that help explain why they were defeated.

In 2004, the election of Brent Benjamin, a Republican, (the first Republican elected to West Virginia's highest court in more than 80 years) was very controversial because Benjamin was financially backed by Don Blankenship whose coal company had a case pending before the West Virginia Supreme Court of Appeals. Blankenship apparently feared that the Democratic incumbent would side with the opposing party in the pending case.²² Benjamin's refusal to recuse himself from that case led to the U.S. Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.*²³ In the 2016 election, Benjamin lost to Beth Walker in West Virginia's first nonpartisan supreme court election, coming in fourth out of five candidates in the plurality election held at the time of a presidential primary. Walker, rather than the Republican incumbent, had the backing of more than \$3 million in campaign spending by political action committees funded by Republicans and pro-business groups.²⁴

Robert Edmunds was narrowly elected to the North Carolina Court in 2000 in a partisan election and was narrowly re-elected in 2008 in a nonpartisan election.²⁵ In 2016, he was to be the beneficiary of the switch to a retention election format passed by the legislature in 2015, but as discussed above, that was struck down. Edmunds lost by almost ten percentage points to Michael Morgan, an African-American trial judge from the Raleigh area.²⁶ While a Democrat also managed to narrowly defeat the incumbent Republican governor in the face of Trump carrying North Carolina in the presidential election by 3.6 percentage points,²⁷ the magnitude of Edmunds' loss probably reflects a quirk in the structure of the 2016 judicial elections in North Carolina.

While the attempt by the North Carolina legislature to change the North Carolina Supreme Court election failed, two changes were

22. See generally LAWRENCE LERNER, *THE PRICE OF JUSTICE: A TRUE STORY OF GREED AND CORRUPTION* (2013). The case also served as the basis for a John Grisham novel. JOHN GRISHAM, *THE APPEAL* (2008).

23. 556 U.S. 868 (2009).

24. See Phil Kabler, *Beth Walker Wins WV Supreme Court Race; Ousts Benjamin*, CHARLESTON GAZETTE-MAIL, May 10, 2016, https://www.wvgazette.com/news/cops_and_courts/beth-walker-wins-wv-supreme-court-race-ousts-benjamin/article_6f86382b-f7d4-5eab-8a09-d402b0ad1acd.html.

25. North Carolina switched to nonpartisan elections for its appellate courts starting with the 2004 election. See *History of Reform Efforts: North Carolina*, *supra* note 14.

26. See *Michael R. Morgan*, BALLOTPEdia, https://ballotpedia.org/Michael_R._Morgan (last visited Mar. 14, 2017).

27. See *North Carolina Results*, N.Y. TIMES: ELECTION 2016, (Nov. 8, 2016) <https://www.nytimes.com/elections/results/north-carolina>.

made to the structure of the statewide court of appeals elections for which five seats were on the 2016 ballot. The first change required that candidates for the court of appeals “at the time of filing the notice of candidacy[,] . . . indicate on the notice of candidacy the political party recognized under Article 9 of this Chapter with which that candidate is affiliated or any unaffiliated status.”²⁸ The ballot for the Court of Appeals would then include this party affiliation information. If there were more than two candidates, a blanket primary—sometimes called a “jungle” primary—would be held in which all candidates regardless of party run against each other;²⁹ with the top two candidates going on to the general election.³⁰ The second change, which was probably intended specifically to help one of the Republican candidates, involved how the order of listing on the ballot was determined. Previously, the order in which candidates were listed on the ballot was decided randomly by a drawing of lots by the state board of elections.³¹ Under the new law “Candidates registered with political parties that reflect at least five percent of statewide voter registration, according to the most recent statistical report published by the state board of elections, [are listed] in alphabetical order by party beginning with the party whose nominee for Governor received the most votes in the most recent gubernatorial election and in alphabetical order within the party.”³²

This change favored Republican candidates in the upcoming court of appeals election because being listed first tends to increase a candidate’s vote in low profile elections such as those for most judgeships.³³ More specifically, the change favored administrative law judge Philip E. Berger, Jr. (a Republican) who was running against incumbent judge Linda Stephens (a Democrat). Prior to the bill’s passage, the random drawing would have had Stephens appearing first; under the new law Berger would appear first. Although it was Philip Berger, JUNIOR. who was running for the Court of Appeals, Philip Berger,

28. H.B. 8, 2015 Gen. Assemb., Reg. Sess. (N.C. 2015).

29. The only other state using this system for at least some judicial elections is Louisiana which adopted blanket primaries in 1977. Kritzer, *supra* note 1, at 40 n.15.

30. See Mark Binker, *Bill Requires Court of Appeals Candidates to List Parties*, WRAL, Sept. 29, 2015, <http://www.wral.com/bill-requires-court-of-appeals-candidates-to-list-parties/14935703/>.

31. Michael Gordon, *Court Observer-Partisan Name Change Could Decide Court Race*, CHARLOTTE OBSERVER, July 2016, <http://infoweb.newsbank.com.ezp1.lib.umn.edu/resources/doc/nb/news/15E7D5F4F813C620?p=AWNB>.

32. S.B. 667, 2016 Gen. Assemb., Reg. Sess. (N.C. 2016).

33. Jonathan G.S. Koppell & Jennifer A. Steen, *The Effects of Ballot Position on Election Outcomes*, 66 J. POL. 267 (2004); David Brockington, *A Low Information Theory of Ballot Position Effect*, 25 POL. BEHAV. 1 (2003); Marc Meredith & Yuval Salant, *On the Causes and Consequences of Ballot Order Effects*, 35 POL. BEHAV. 175 (2013).

SENIOR, was the Republican leader in the North Carolina state senate, and has been described by some as “North Carolina’s most powerful politician.”³⁴

Edmunds’ defeat was probably an unintended consequence of the changes to the Court of Appeals election ballots. Because of those changes, in the five statewide Court of Appeals elections, the Republican candidates were listed first with the candidates’ party affiliation indicated on the ballot. The ballot for the supreme court did not list the candidates’ party affiliation, nor did the method of determining the order in which candidates were listed on the ballot; the random draw for the Supreme Court election put Morgan’s name first.³⁵ This likely produced at least some confusion at the polls with voters thinking that first-listed Morgan was the Republican candidate on the supreme court ballot because the first-listed candidates for the five court of appeals elections were all labeled as Republicans—all five of those Republicans won, including Berger who defeated the Democratic incumbent.³⁶ Morgan also benefited from any advantage that can come from being listed first on ballots for obscure offices.

Lawrence Meyers had been elected to the Texas Court of Criminal Appeals in 1992 as a Republican, and had been re-elected three times. Prior to the 2014 election he switched to the Democratic Party and ran unsuccessfully for the Texas Supreme Court. In 2016, he ran for reelection to the Court of Criminal Appeals as a Democrat and lost to the Republican candidate, Mary Lou Keele, receiving only 40 percent of the vote. His loss was unsurprising given that Texans last elected a Democrat to statewide office in 1994.³⁷

Incumbency Leading Up to the 2015–16 Elections

Is this type of pattern peculiar to the 2015–16 cycle? The answer to that question is no. Looking closely at the other nine elections start-

34. Emily Cadei, *North Carolina’s Most Powerful Politician Paints the State Red*, DAILY DOSE, May 13, 2015, <http://www.ozy.com/provocateurs/north-carolinas-most-powerful-politician-paints-the-state-red/40942>; Michael Gordon, *GOP Headed Toward 5-Seat Sweep in State Appeal Court Races*, RALEIGH NEWS & OBSERVER, Nov. 8, 2016, <http://www.newsobserver.com/news/politics-government/election/article113431613.html>.

35. See John Hood, *Spotlight Now Turns to State Courts*, ROXBORO COURIER-TIMES, Dec. 31, 2016, <http://infoweb.newsbank.com.ezp1.lib.umn.edu/resources/doc/nb/news/161A7EB77A9A9BF8?p=AWNB>.

36. *North Carolina Judicial Elections, 2016*, BALLOTEDIA, https://ballotpedia.org/North_Carolina_judicial_elections,_2016 (last visited Dec. 22, 2017).

37. Dave Montgomery, *Fort Worth’s Meyers: Last Democrat Standing Statewide in Texas*, FT. WORTH STAR-TELEGRAM, Oct. 22, 2016, <http://www.star-telegram.com/news/politics-government/state-politics/article109973222.html>.

ing in 2010 that resulted in incumbent defeats, one finds individualized circumstances that largely account for most of the election outcomes.

Charles Malone, who had been appointed chief justice of the Alabama Supreme Court in August 2011, was defeated by former, and may I say “infamous,” chief justice Roy Moore in the 2012 Republican primary. Malone had never run statewide; at the time of his appointment to the supreme court, he was serving as chief of staff for the governor, having previously been a trial judge in Tuscaloosa County. Malone faced two challengers in the Republican Primary, Moore and trial judge Charles Graddick who twice (1978 and 1982) had been elected as the state’s attorney general and had run in the 1986 Democratic primary for governor.³⁸ Moore had run statewide three times previously, winning an open-seat election for Chief Justice in 2000 and then running twice unsuccessfully in the Republican primary for governor, most recently in 2010.³⁹ In his previous term as Chief Justice, Moore had gained substantial notoriety by being removed from office in 2003 (two years into his term) after refusing to obey a federal court order to remove a Ten Commandments monument he had arranged to have placed in the court building. Because of the notoriety he earned through the Ten Commandments controversy, and his three previous runs in statewide elections, he would have had significant name recognition unlike the incumbent, and substantially greater name recognition than Graddick who had not run statewide for 16 years.⁴⁰ Moreover, Moore’s stance on the Ten Commandments helped him secure wide support among evangelical voters,⁴¹ and his willingness to defy the federal court order probably enhanced his standing with other conservative Alabamans.

Alton Davis was appointed to the Michigan Supreme Court approximately two months before the 2010 election after the sudden resignation of Elizabeth Weaver. Weaver was sharply critical of members of

38. Graddick actually won the Democratic runoff with a margin of about 10,000 votes, but Democratic Party invalidated his victory on the grounds that he had violated a party rule by encouraging Republicans to vote in the Democratic primary; the party then nominated the man Graddick had defeated as its candidate. Graddick switched parties before running for the Supreme Court. See *Charles Graddick*, WIKIPEDIA, https://en.wikipedia.org/wiki/Charles_Graddick (last visited Dec. 22, 2017).

39. See *Roy Moore*, BALLOTPEDIA, https://ballotpedia.org/Roy_Moore (last visited Dec. 22, 2017).

40. In fact, Moore came in third in the Republican primary, about a percentage point behind Graddick. *Alabama Judicial Elections, 2012*, BALLOTPEDIA, https://ballotpedia.org/Alabama_judicial_elections_2012 (last visited Dec. 22, 2017).

41. See Dana Beyerle, *Charles Malone Reflects on Tenure as Chief Justice of Alabama*, TUSCALOOSA NEWS, Jan. 13, 2013, <http://www.tuscaloosaneews.com/news/20130113/charles-malone-reflects-on-tenure-as-chief-justice-of-alabama>. The 2012 primary also included a third candidate,

the court and who those other members had sought to censure. Davis had little name recognition, and came in third in a two-seat election after the Republican Party invested a significant amount of money to generate name recognition of its two candidates (presumably as part of an effort to defeat Weaver).⁴²

Robert Hunter was appointed to the North Carolina Supreme Court just two months before the 2014 election.⁴³ Prior to his appointment he was a member of the Court of Appeals and had been running against Court of Appeals Judge Sam Ervin IV, for what was expected to be an open seat on the Supreme Court. Martin lost to Ervin, who had run unsuccessfully for the Supreme Court in 2012. Almost certainly, Ervin benefited from name recognition, both from his prior run for the court and from being the namesake of his grandfather, the late Senator Sam Ervin, Jr.⁴⁴

David Medina was appointed to the Texas Supreme Court in 2004 and then elected to a full, six-year term in 2006. In 2012, he lost the Republican runoff to John Devine, even though he won more votes than Devine in the primary and was backed by the party establishment. Devine presented himself as a Tea Party candidate and had been a staunch anti-abortion activist. Medina was attacked on ethics grounds in connection with arson of the judge's home,⁴⁵ for which the justice and his wife had been indicted. The charges were dismissed by the Harris County district attorney, which produced public outrage from members of the grand jury.⁴⁶ Medina may also have been handicapped by his Hispanic name.⁴⁷

42. Peter Luke, *Incumbency Not a Lock in 2010 Michigan Supreme Court Election*, MLIVE (Nov. 2, 2010), http://www.mlive.com/politics/index.ssf/2010/11/incumbency_no_longer_a_supreme_1.html.

43. Four seats on the North Carolina Supreme Court were up for election in 2014 in what was a nonpartisan election; however, because of various developments in North Carolina, partisan groups were particularly active in attempting to influence the outcome of those elections, and in three of the four elections the candidates had links to the Republican and Democratic parties.

44. Anne Blythe, *Partisan Groups Have Keen Interest in Non-Partisan NC Supreme Court Races*, CHARLOTTE OBSERVER, Oct. 24, 2014, <http://www.charlotteobserver.com/news/politics-government/article9205892.html>.

45. Ralph Blumenthal, *Texas Supreme Court Justice Is Embroiled in an Arson Case*, N.Y. TIMES, Jan. 18, 2008, <http://www.nytimes.com/2008/01/18/us/18texas.html>.

46. Brian Rogers, *DA's Office Tosses Indictments Against Texas Justice, Wife*, HOUSTON CHRONICAL, Jan. 17, 2008, <http://www.chron.com/news/houston-texas/article/DA-s-office-tosses-indictments-against-Texas-1781181.php>.

47. Morgan Smith, *High Court Judge Faces Tough Run-Off*, N.Y. TIMES, July 12, 2012, <http://www.nytimes.com/2012/07/13/us/david-medina-an-incumbent-justice-faces-a-tough-runoff.html>.

Richard Sanders, who had previously won three elections to the Washington Supreme Court, lost to Charles Wiggins in 2010.⁴⁸ Sanders was a libertarian with strong anti-abortion views,⁴⁹ and had long been a controversial member of the court.⁵⁰ Immediately after his initial swearing in 1995, Sanders participated in an anti-abortion rally. This led to a recommendation that he be reprimanded for violating the canon of ethics, but the Washington Supreme Court declined to issue that reprimand. In 2006, Sanders voted with the Court's majority upholding Washington's ban on same-sex marriage. Sanders ran for an open seat in 2012 and lost.

The other three defeats of incumbents occurred in Ohio. First, in 2010, Eric Brown, who had been appointed chief justice in April of that year after the death of the sitting chief justice, lost to Maureen O'Connor, who was a sitting associate justice having won elections in 2002 and 2008. O'Connor had previously served as lieutenant governor. Second, in 2012, Yvette Brown, who had been appointed to the court to fill the vacancy created by the election in 2010 of Associate Justice O'Connor to the position of chief justice, lost to Sharon Kennedy. Third, in 2012, Robert Cupp, who had previously been elected in 2006 to an open seat, lost to William O'Neill. O'Neill had run unsuccessfully for the court twice before and unsuccessfully twice (as a Democrat) for Congress.

It might seem noteworthy that two of the three defeats involved candidates with the last name "Brown." However, numerous general elections for the Ohio Supreme Court in the last 50 years have involved a candidate named "Brown"; fourteen by my count, including one election that was *Brown v. Brown*.

I asked Professor Lawrence Baum, a longtime member of the Department of Political Science at Ohio State University, who has fol-

48. Wiggins survived "all-out effort to deny" him another term in the 2016 election, receiving about 58 percent of the vote. The campaign was backed by a group of billionaires, including Bill Gates. Steve Miletich, *Charlie Wiggins Retains Supreme Court Seat Despite Campaign to Oust Him*, SEATTLE TIMES, Nov. 8, 2016, <http://www.seattletimes.com/seattle-news/politics/washington-state-supreme-court-charlie-wiggins-dave-larson/>.

49. One of the dimensions of partisan conflict in the nonpartisan supreme court elections in Washington was land use policy. Kritzer, *supra* note 1, at 201. Sanders had been a land-use attorney who represented property owners. Barbara A. Serrano, *Pekelis Knocked Off Bench After Six Months – Sanders Takes Property-Rights Road to Victory in Heated Race*, SEATTLE TIMES, Nov. 8, 1995, <http://community.seattletimes.nwsourc.com/archive/?date=19951108&slug=2151342>.

50. For an analysis of why Sanders lost, see Eli Sanders, *How Justice Richard B. Sanders Lost it*, STRANGER: SLOG (Nov. 10, 2010), <http://www.thestranger.com/slog/archives/2010/11/10/how-justice-richard-b-sanders-lost-it>.

lowed supreme court elections in Ohio for many years, if he could shed additional information on these three Ohio elections:⁵¹

Eric Brown's greatest asset was his last name. He had been a trial judge in Franklin County (Columbus), and he had served as chief justice for only six months at the time of the 2010 election. Maureen O'Connor did have high name recognition, probably due more to her service as lieutenant governor than to her sitting on the supreme court. She also had the advantages of an Irish name and higher spending than Brown. And 2010 was a very good year for Republicans in Ohio. Yvette McGee Brown also lacked statewide name recognition. She did have the advantage of serving on the supreme court for nearly two years, and she was a rare Democratic candidate who actually outspent her opponent—though not by an enormous margin. Her opponent had no name recognition either, but she had the advantage of a name that was both Irish and Kennedy.

William O'Neill was the most interesting. He undoubtedly had some name recognition from serving on a court of appeals and from his supreme court races. But he was working as a registered nurse when he was elected to the supreme court. As in the 2006 campaign, he refused to take campaign contributions, and he was outspent by more than 100-1. He was hit with a negative ad on criminal justice. And 2012 wasn't an especially good Democratic year at the supreme court level; not only did Brown lose, but the third Democrat candidate, Skindell, lost more than 2-1 to Justice O'Donnell. So how did O'Neill win? Despite serving for a full term, Cupp probably wasn't known much better than O'Neill. And O'Neill undoubtedly benefited from the Irish name and specifically from the O' name, shared by two members of the court. (In 2004 and 2006 that was neutralized by his running against O'Donnell).

This detailed discussion of the defeats of sitting supreme court justices makes clear that one cannot simply view such defeats as an indicator of problems with the use of judicial elections or as representing challenges to judicial independence. In most of the twelve elections described above, there were reasons for the incumbents' defeat, and in half of these elections the incumbent was standing for the first time after being appointed to fill a vacancy. The discussion above also suggests name recognition might play an important role, particularly in the absence of party cues on the ballot,⁵² and possibly incumbency

51. Email from Lawrence Baum, Professor of Law, Ohio State University, to author (Mar. 31, 2017 EST) (on file with author). In my initial inquiry to him, I raised the "Brown" issue; on that issue, he commented, "On the name Brown, my sense is that it's not so much voter fatigue but that it no longer confers much advantage—except in Franklin County [Columbus], perhaps, where we have a half dozen Browns on the bench." *Id.*

52. The absence of party cues applies both in nonpartisan elections and in party primaries in which all candidates are of the same party.

indicators. Michigan is the only nonpartisan (actually hybrid) state that saw one or more incumbents lose since 2010 where there is an indication of incumbency on the ballot.⁵³

Money

Reliable data on campaign spending for all sources of such spending are not available, except for a few states where there are public or private efforts to collect that information. The National Institute on Money in State Politics's (NIMSP) website, FollowTheMoney.org, provides useful information on contributions made to candidates and their committees starting in 1990. There is also information on spending by candidates, parties, and outside groups on television advertising starting in 1999, mostly assembled by the Brennan Center at New York University using data collected by the Campaign Media Analysis Group (CMAG).⁵⁴ The state of Washington requires candidates, parties, and outside groups to report campaign-related spending, and provides tools to download the information from a website.⁵⁵ Private groups in Wisconsin and Michigan assemble and publish information on campaign spending by candidates and other groups; their information goes back a variable numbers of years.

In this Section, I will look at these various sources to assess whether there is any pattern of significant change starting in 2010. Note that all dollar figures have been inflation-adjusted to 2016 dollars. The presentation that follows is based largely on simple graphs.

Contributions to Candidates

Figure 1 shows the pattern for the data collected over time by NIMSP. For purposes of this figure, contributions to candidates running unopposed, including all candidates in retention elections, were omitted. Also omitted were contributions in multi-seat elections (i.e., where candidates run for two or more seats with the top candidates winning those seats). The two dashed lines show mean (short-dashed line) and median (long-dashed) amounts per seat using the scale shown on the left. The solid line shows the total contributions using the scale shown on the right. One important caveat is the NIMSP data collection improved through the 1990s, which means that some of

53. Kritzer, *supra* note 1, at 48.

54. Some the data on television advertising was provided to me by Melinda Gann Hall; the rest is from the Brennan Center. All of the data was originally collected by CMAG.

55. Queries to extract the data from the PDC website can be run at PUBLIC DISCLOSURE COMMISSION, http://web.pdc.wa.gov/MvcQuerySystem/Candidate/jud_candidates (last visited Mar. 27, 2017).

the increase during that decade reflects data quality rather than actual changes in contributions. Looking at figures since 2000, the medians remain roughly constant with a slight rise starting in 2010, but then a sharp drop in 2016. The best description of both the total and mean lines is that they tend to show a pattern of decline since 2000.

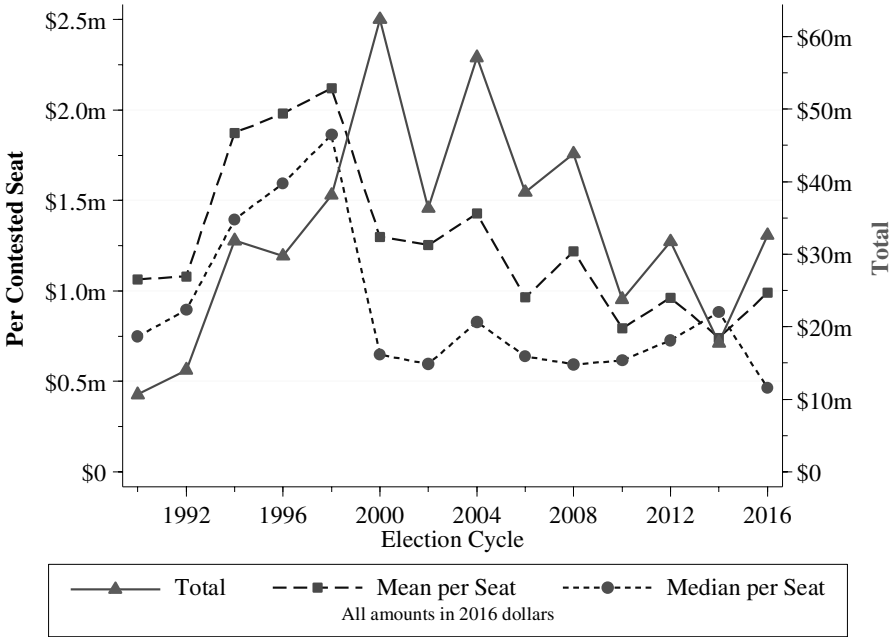


Figure 1: Contributions to Supreme Court Candidate, 1990-2016

What happens if one controls for the type of election, partisan or nonpartisan? One challenge with this question is how to treat the “hybrid” elections in Ohio and Michigan that use nonpartisan ballots, but have candidates nominated by parties?⁵⁶ Preliminary examination of the campaign contribution data make it clear that for this purpose the “hybrid” elections group best with the partisan elections. Figure 2 shows the separate patterns for partisan and nonpartisan elections. This figure makes it clear that the variation over time comes largely in the partisan and hybrid elections, and that the pattern tends toward a decline in all three measures since 2010, and possibly prior to 2010. However, this may mean that campaign money for nonpartisan elections has long flowed through outside groups rather than through candidate committees while there has been a shift of money from candidate committees to outside groups and parties in partisan and

56. See Michael J. Nelson et al., *OH, MI: A Note on Empirical Examinations of Judicial Elections*, 13 STATE POL. & POL’Y Q. 495 (2013).

hybrid elections. Unfortunately, there is no good way to sort this out with the data that are currently available, either from NIMSP or other sources.

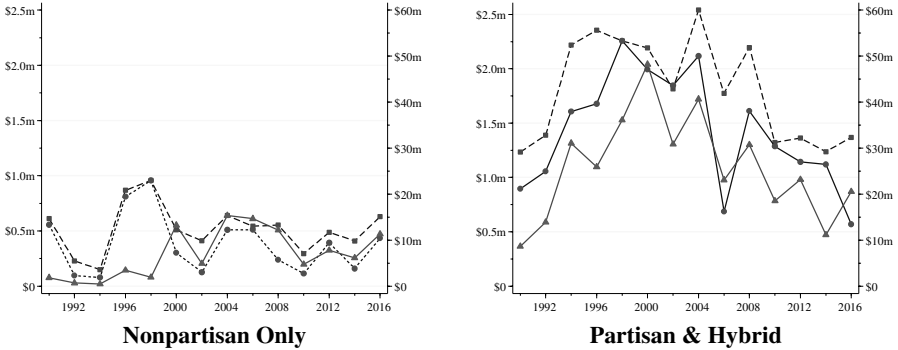


Figure 2: Campaign Contributions Controlling for Election Types

Expenditures on Television Advertising

The data assembled by the Brennan Center from information collected by CMAG provide one illustration of outside group expenditures. CMAG has a system in place to automatically monitor broadcast television advertising. Importantly, the CMAG system does not generally capture advertising that appears only on cable television. Using information on the market, the time of broadcast, and the length of the ad, CMAG produces an estimate of expenditures based on standard advertising rates. These rates do not take into account discounts that might be offered for early buys and/or large quantity buys nor do they account for premium rates that might be charged as the amount of ad space becomes limited in the latter part of an election cycle. Despite these limitations, the information does provide a picture of spending on television advertising. In this Section, I look only at expenditures by different sources. One additional caveat regarding the advertising data: only starting in 2007 did CMAG’s system capture advertising in all 210 media markets; between 2002 and 2006 CMAG covered the 100 largest markets and prior to 2002 only the 75 largest markets. However, as it turns out, most states using elections for the state supreme court are covered by at least one market in the top 75.⁵⁷

57. The states using elections not covered by at least one market in the top 75 are Mississippi, Idaho, South Dakota, North Dakota, Alaska, West Virginia, and Wyoming; of these, only Mississippi was in the top 100. An additional issue can arise in states using districts (Illinois, Louisiana, Maryland, and Nebraska); I have not attempted to identify districts within those states lacking coverage by one of the top 75 or 100 media markets.

Figure 3 shows both the level of spending (left) and the relative distribution of spending (right) over time. The level of spending is greater in the non-presidential-year cycle because there are more seats up for election in those years. Taking that cyclical effect into account and the increasing number of media markets covered, there is no indication of a pattern of increase in expenditures over the nine election cycles—if anything, there may have been a decrease. What has changed is a shift in spending from the candidates to outside groups and parties.

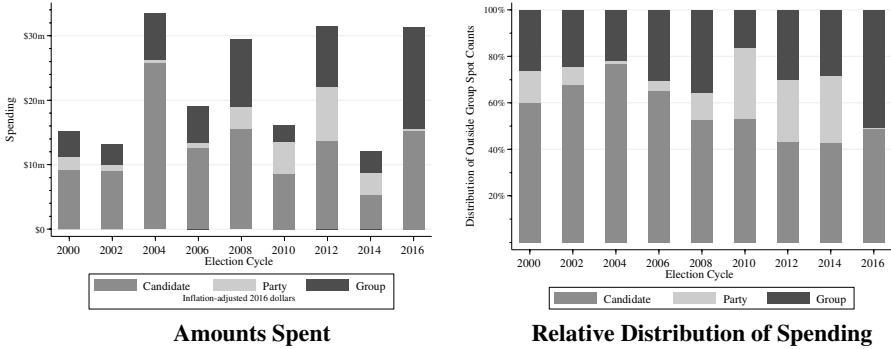


Figure 3: Expenditures on Television Advertising, 1999-2016

I previously showed that there was a sharp difference in candidate contribution patterns depending on whether the election was conducted on an entirely nonpartisan basis as compared to partisan and hybrid elections. Figure 4 shows that this is also true for the amounts expended on television advertising. It also appears from Figure 4 that spending on television by outside groups is more prominent in nonpartisan elections than in partisan and hybrid elections, even if outside groups are combined with parties for the latter. This can be seen even more clearly in Figure 5 which shows the relative distribution of expenditures by candidates, parties, and outside groups controlling for the type of election.

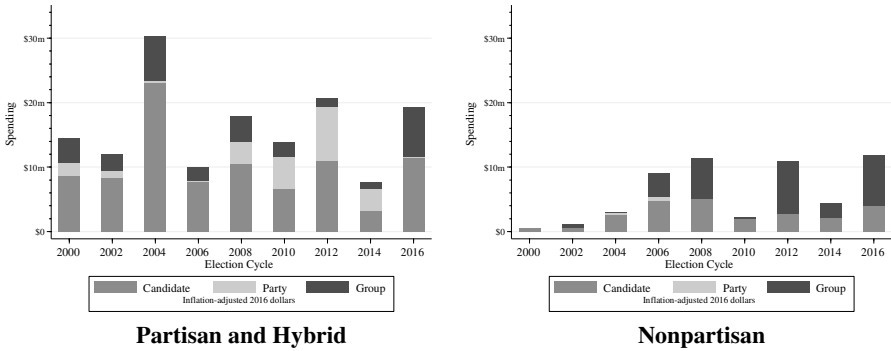


Figure 4: Television Expenditures, Controlling for Type of Election

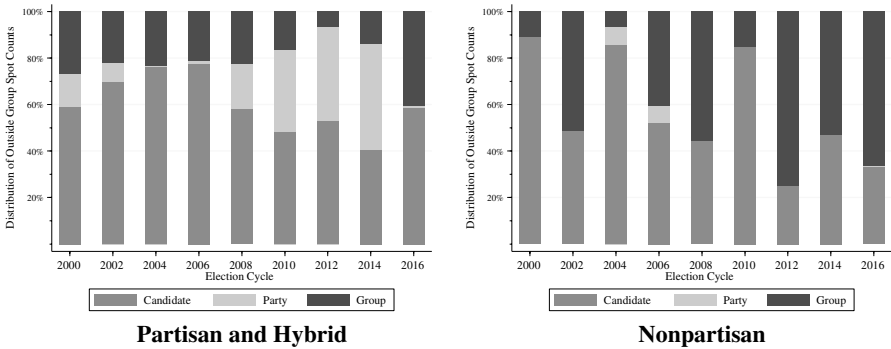


Figure 5: Relative Expenditures by Source, Controlling for Type of Election

Spending, and by whom, is only part of the television advertising equation. This Article will again discuss television advertising after considering several other issues to evaluate the nature of the advertising and how that varies by source and type of election.

Expenditures in States Collecting Information on Outside Groups Spending

As noted above, three states collect information on expenditures by other sources in addition to candidates. In Washington, both candidates and outside groups must report expenditures to the Washington Public Disclosure Commission (PDC). The PDC data can be downloaded from the PDC website, and covers 2000 through 2016.⁵⁸ In Michigan, the Michigan Campaign Finance Network (MCFN) seeks to collect data on candidate expenditures, outside group expenditures, and what it labels “TV electioneering” advertising. The latter captures advertising that technically does not urge voters to support a

58. See PUBLIC DISCLOSURE COMMISSION, <https://www.pdc.wa.gov/> (last visited Mar. 25, 2017).

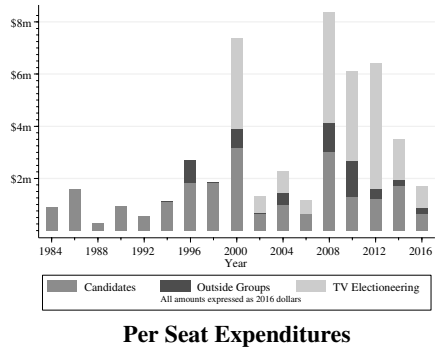
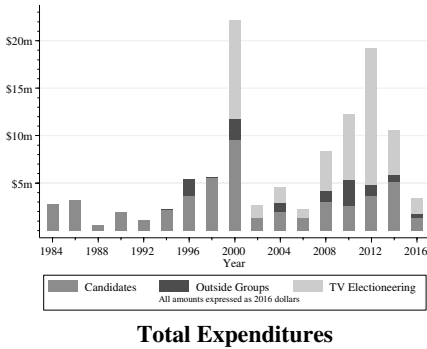
particular candidate and hence is technically not campaign advertising. Summary information going back to 1984 is posted on MCFN's website.⁵⁹ Data on campaign expenditures in Wisconsin have been collected by the Wisconsin Democracy Campaign (WDC).⁶⁰ Except for Wisconsin, where there is never more than one election at a time for the state supreme court, some variation in expenditures may reflect the number of seats being contested. Hence, the figures that follow for Michigan and Washington show both overall spending and spending per seat for each election year. As with the other data on campaign contributions and expenditures, all figures have been adjusted to 2016 dollars.

Figure 6 shows the patterns for Michigan. Two points are evident in this figure. First, expenditures have not increased through the current decade. In fact, the last two elections have witnessed a decline in expenditures. Second, the relative role of expenditures by the candidates themselves has varied over the decade, some years constituting about half of the moneys spent, but other years constituting a much smaller percentage. This is essentially the same as what was seen in the prior decade, when there appears to have been a significant shift to spending by parties and outside groups in the form of electioneering advertisements.

Figure 7 shows the patterns in Washington using the PDC data. The data summarized in the figure exclude expenditures by candidates who ran unopposed. There has been considerable year-to-year variation in expenditures in Washington, and while there are some years where the expenditure level was very high, there is no clear trend of increase or decrease. Moreover, there is no clear trend or pattern as to the share of spending made by outside groups. In most years, such groups are entirely absent, and in only two election years, 2006 and 2016, did outside group spending constitute half or more of what was expended in the campaign.

59. See *Michigan Supreme Court*, MICHIGAN CAMPAIGN FINANCE NETWORK, <http://mcfn.org/MS1984-2016> (last visited Mar. 25, 2017). The figures for 2016 were provided to me in advance of their posting by MCFN's executive director. Email from Craig Mauger, Exec. Dir., Michigan Campaign Finance Network, to author (Mar. 14, 2017) (on file with author).

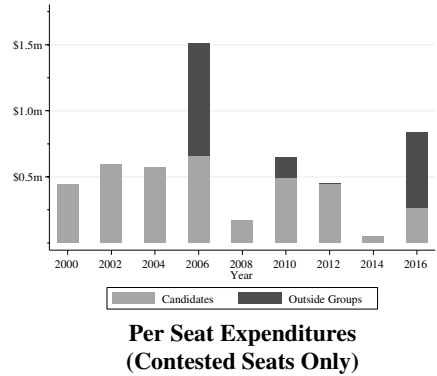
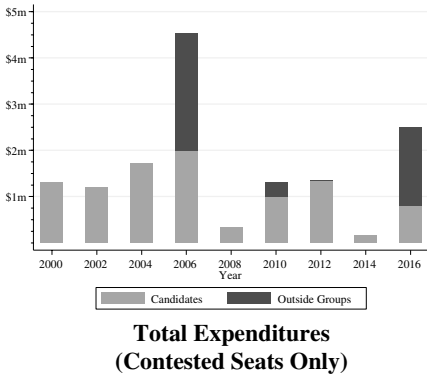
60. See WISCONSIN DEMOCRACY CAMPAIGN, <http://www.wisdc.org/> (last visited Mar. 25, 2017).



Total Expenditures

Per Seat Expenditures

Figure 6: Michigan Campaign Finance Network Data, 1984-2016



Total Expenditures (Contested Seats Only)

Per Seat Expenditures (Contested Seats Only)

Figure 7: Washington Public Disclosure Commission Data, 2000-2016

Figure 8 shows the patterns in Wisconsin using the WDC data. As with Washington, there is considerable election-to-election variation. There were five contested elections between 2000 and 2009, and four since 2010. The patterns in the current decade are similar to the patterns in the latter half of the previous decade. Two elections in the earlier period witnessed total spending (in 2016 dollars) on the order of \$7 million, while there has been only one election since 2010 with this level of spending. The relative role of candidate and interest group spending in the latter part of the previous decade and the current decade are similar, although it does vary from election to election.

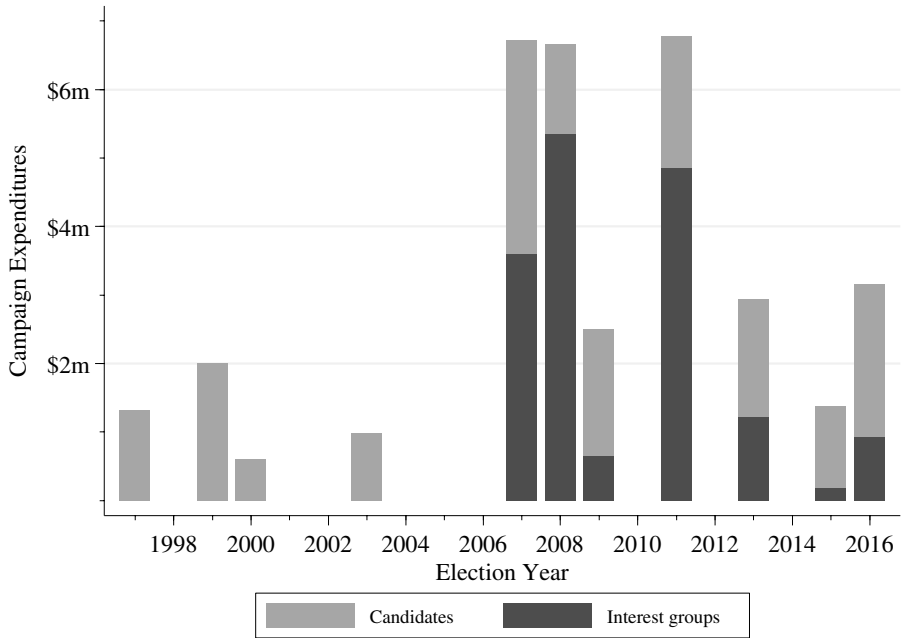


Figure 8: Wisconsin Democracy Campaign Data, 1997-2016

CONTESTATION AND COMPETITIVENESS

In *Justices on the Ballot*, I showed that most of the change in contestation and competitiveness in judicial elections between 1946 and 2012 came in the southern states,⁶¹ almost certainly reflecting the major political changes taking place in that region. Has anything happened in the current decade that would alter that analysis? The next series of figures address that question.

Partisan, Nonpartisan, and Hybrid Elections

Figure 9 shows, by decade, the percentage of seats that were uncontested. The solid line shows the pattern for all seats, with the two broken lines showing the separate patterns for southern (long-dashed) and non-southern states (short-dashed). Both overall and in the two regions, the percentage of uncontested seats has actually increased in the current decade. Moreover, the figure shows that during the middle decades shown in the figure, the percentage of non-south seats

61. Kritzer, *supra* note 1, at 108–13; see also Herbert M. Kritzer, *Competitiveness in State Supreme Court Elections, 1946-2009*, 8 J. EMPIRICAL LEG. ST. 237 (2011). For a state-level analysis of contestation and competition through 2015, see Herbert M. Kritzer, *Contestation and Competitiveness in State Supreme Court Elections, 1946–2015*, in JUDICIAL ELECTIONS IN THE 21ST CENTURY (Chris W. Bonneau & Melinda G. Hall eds., 2017).

that went uncontested increased slightly, while at the same time the percentage uncontested in the South dropped sharply.

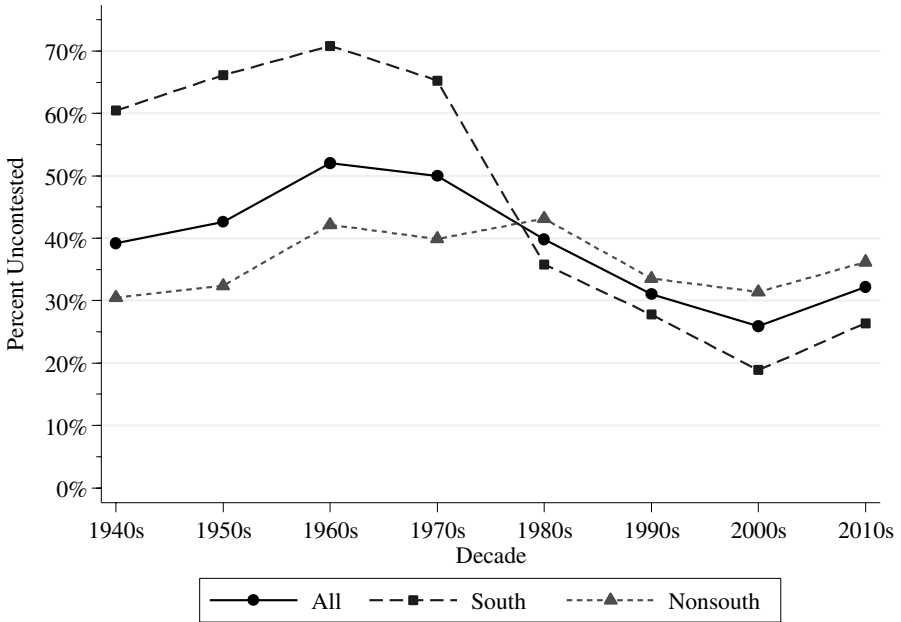
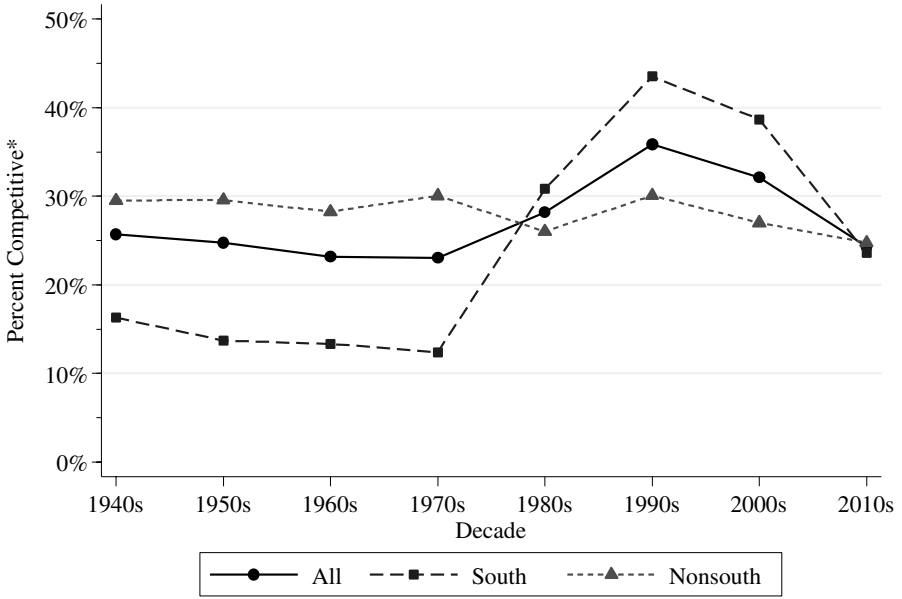


Figure 9: Percentage of Seats Uncontested by Decade

A second question one can ask is what percentage of seats produced competitive elections?⁶² A common indicator of whether an election is competitive is whether the winner (in a two-candidate contest⁶³) received less than fifty-five percent of the vote. Figure 10 plots this by decade, again showing both the overall pattern and the pattern separately by region. The percentage competitive outside the South has varied relatively little over the entire period, including the current decade. In the South, there was a sharp increase in the percentage of seats that were competitive during the period of political realignment from one-party Democratic to essentially one-party Republican. This peaked in the 1990s before dropping, so that in the current decade there is no difference in the percentage of seats competitive in the two regions.

62. Where there were primaries as well as a general election (or a primary and a run-off), I focused on the election involving the incumbent or the winner of an open seat that was the closest (or in which the incumbent lost).

63. Where there were more than two candidates I computed percentages based on the top two candidates only.



*Competitive defined as incumbent losing or winner receiving less than 55%

Figure 10: Percentage of Seats Competitive by Decade

Retention and Judicial Independence

One of the major concerns expressed about the use of elections for judicial retention is that the threat of losing an election compromises a judge’s ability to act independently. This leads to the question of whether there has been any recent change in the likelihood of incumbents losing their seats. Figure 11 addresses this question and shows a pattern similar to that in Figure 10: little change outside the South and an increase in incumbent defeats during realignment in the South with a peak in the 1990s, but then dropping back so that in the current decade there is little difference between the regions. Note that neither this figure, nor Figure 10, includes retention elections. Including those elections would not alter the picture because a very small percentage of incumbents lose retention elections and a relatively small percentage receive a “yes-vote” percentage of less than fifty-five percent. I look at those elections in separate figures.

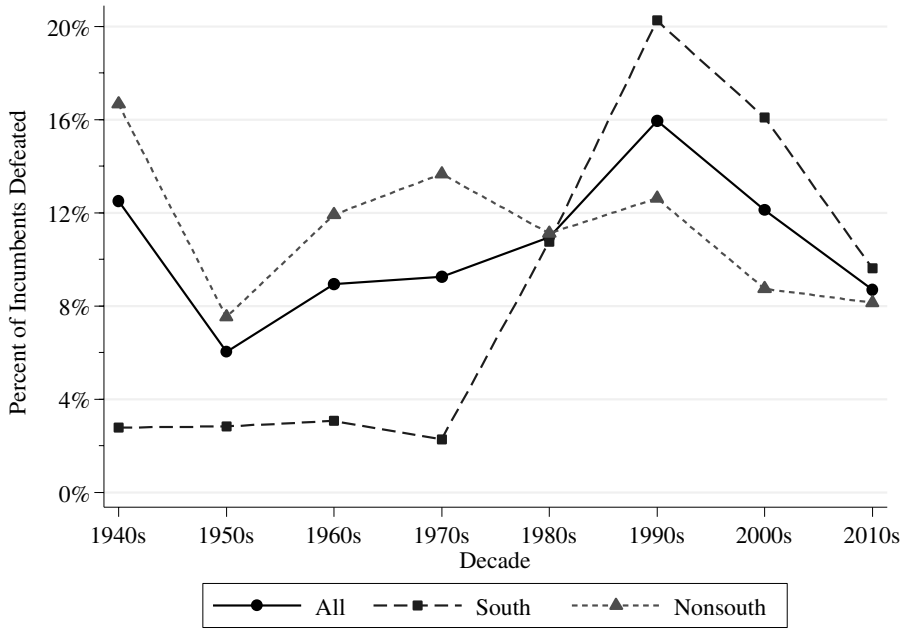


Figure 11: Percentage of Incumbents Defeated by Decade

Retention Elections

The current decade began with the defeat of three justices in Iowa in the wake of the Iowa Supreme Court’s decision to strike down the state’s ban on same-sex marriage.⁶⁴ Did this event mark a significant shift in the pattern of voting in retention elections? I do not include a plot showing the percentage of incumbents defeated by decade because only twelve incumbents, out of 800 who have run in retention elections, have failed to be retained in office. There are two relevant questions here for retention elections: (1) how has the percentage of yes-votes varied over time and (2) how has the percentage of elections that were “competitive” varied over time. By “competitive,” I mean the incumbent failing to be retained by a margin of five percentage points, which translates into a fifty-five percent yes-vote in all states except Illinois and New Mexico which require a sixty percent and a fifty-seven percent yes-vote respectively. For these two states, I use sixty-five percent and sixty-two percent as the thresholds for “competitive.”

64. Between 2010 and 2014, another two-dozen state supreme court justices were opposed for retention by one or more interest groups, but whether this represents an increase is unclear. See Larry T. Aspin, *Judicial Retention Elections*, in *JUDICIAL ELECTIONS IN THE 21ST CENTURY* at 106–15 (Chris W. Bonneau & Melinda Gann Hall eds., 2017).

Figure 12 plots both the average yes-vote and the percentage within the five-percentage-point threshold. The figure shows that the average percentage voting yes declined steadily through the 1990s, increased slightly in the 2000s, and returned to the 1990s level in the current decade. However, there does appear to be an increase in the percentage of elections falling in the competitive range in the current decade.

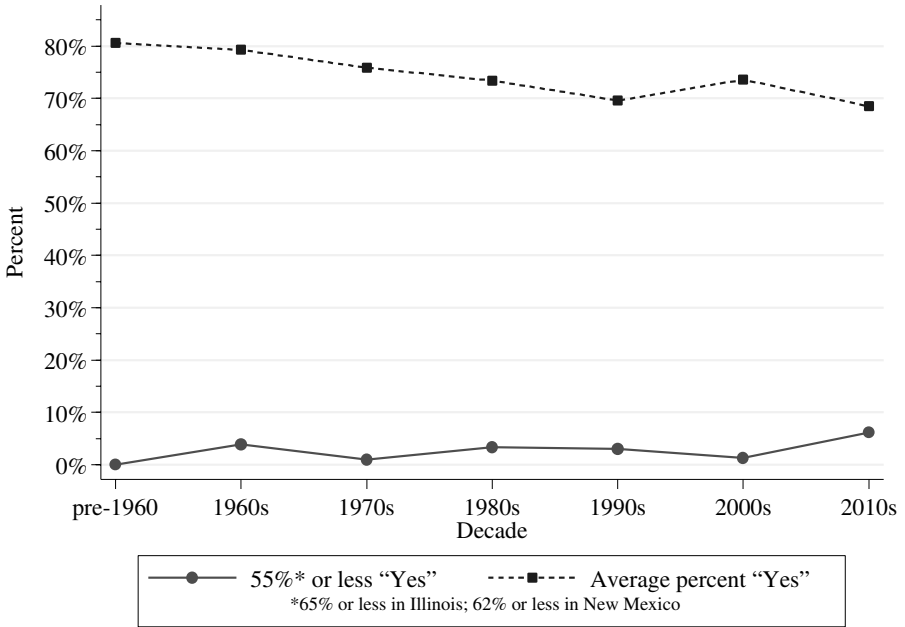


Figure 12: Yes-vote Percentages in Retention Elections by Decade

Figure 13 shows the small changes that have occurred more clearly by using different scaling for the two lines. The scale for average percentage voting yes is shown on the left vertical axis with the scale for the percentage competitive on the right vertical axis. This figure makes clear the jump in the percentage of retention elections in which the incumbent received less than fifty-five percent. However, while that percentage roughly doubled, the increase was from about three percent to six percent.

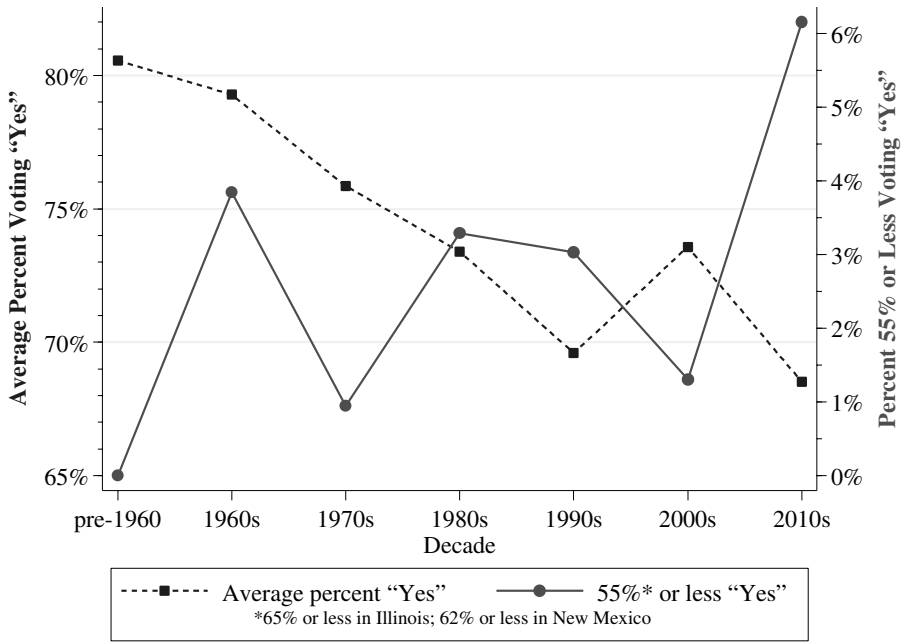


Figure 13: Yes-vote Percentages in Retention Elections by Decade, An Alternate View

Patterns of Partisanship in State Supreme Court Elections

A third feature of judicial elections is partisanship. This is particularly interesting given that most judicial elections today are conducted on a basis that does not include a formal role for parties, either in nonpartisan elections or retention elections. One would expect that elections conducted with candidates identified on the ballot with one party or the other would produce partisan voting patterns. That might be true to a lesser extent when the parties have been formally involved in nominating candidates and thus have a stake in making voters aware of the candidates’ partisan backgrounds, even if there are no party labels on the general election ballot. However, the goal of nonpartisan and retention elections is specifically to remove the role of party in these elections. In *Justices on the Ballot* I showed that by 2012 partisan patterns had become common in nonpartisan elections in many states and that this was true to a lesser extent in retention elections.⁶⁵ What, if anything, has changed during the current decade?

I assess partisan voting patterns using a method focused on aggregate voting patterns. In an ideal world, one would use individual-level

65. Kritzer, *supra* note 1, at 186–98.

data to assess the rule of partisanship but such data are not available over time.⁶⁶ My approach focuses on county-level results and relies on what I label “partisan correlations.” Specifically, I correlate the percentage voting a particular way in the judicial election with the two-party percentage voting Democratic in the gubernatorial election. When the judicial election and gubernatorial election do not coincide, I use the average from the preceding and succeeding gubernatorial elections.⁶⁷ Partisan correlations in elections other than retention elections generally run between zero and one, although in elections where voters are systematically confused about a candidate’s partisan background, correlation can be less than zero. This does happen occasionally in Ohio and Michigan due to the hybrid system used in those states.⁶⁸

In retention elections, there is no reason to expect the direction of the correlation to be the same in all states. This is most obvious in states using retention elections for subsequent terms after a justice is initially elected in a partisan election, which is the case in Illinois, New Mexico, and Pennsylvania. In a state where justices are appointed mostly by Republican governors, one might expect counties that vote heavily Republican to be more supportive of retention than counties that lean more toward the Democratic Party. Where appointments are largely controlled by the Democratic Party, the pattern might be the reverse.⁶⁹ For retention elections, it is the fact of partisan patterns

66. A recent book provides an examination of partisanship using individual data, but the analysis in that book is limited to the 2010 and 2012 elections. CHRIS W. BONNEAU & DAMON M. CANN, *VOTERS’ VERDICTS: CITIZENS, CAMPAIGNS, AND INSTITUTIONS IN STATE SUPREME COURT ELECTIONS* (2015). There are also earlier studies using individual data to assess partisan voting patterns in a single state. See Lawrence Baum, *Explaining the Vote in Judicial Elections: The 1984 Ohio Supreme Court Elections*, 40 WESTERN POL. Q. 361 (1987); Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, in RUNNING FOR JUDGE: THE RISING POLITICAL FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS (Matthew J. Streb ed., 2007); David Klein & Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, 54 POL. RES. Q. 709 (2001); Emily Rock & Lawrence Baum, *The Impact of High-Visibility Contests for U.S. State Court Judgeships: Partisan Voting in Nonpartisan Elections*, 10 ST. POL. & POL’Y Q. 368 (2010).

67. When the judicial election is not halfway between two gubernatorial election, I weigh the two gubernatorial results so that the closer election counts more heavily than the later election. There are a number of other complications in computing these correlations which are detailed in *Justices on the Ballot*. Kritzer, *supra* note 1, at 178–79.

68. It can also happen in fully nonpartisan states. For example, in Wisconsin the Democratic leader of the state senate, William Bablitch, resigned to run for an open seat on the Wisconsin Supreme Court in 1983; the partisan correlation in that election was -.17. However, in my analysis I have not attempted to identify partisan backgrounds of candidates in nonpartisan states, and hence I have effectively used the absolute value of the partisan correlation in cases such as in Wisconsin in 1983.

69. In *Justices on the Ballot*, I explore patterns of change in individual states using retention ballots. Kritzer, *supra* note 1, at 215–25. California represents an example of a sharp shift in the

that is of interest not the direction of any such patterns that might exist. Consequently, for retention elections, I use the absolute value of the partisan correlation in my analysis.

Partisan, Nonpartisan, and Hybrid Elections

Figure 14 shows the average partisan correlation by decade separately for partisan elections (solid line), hybrid elections (long-dashed line), and nonpartisan elections (short-dashed line). As one would expect, partisan elections produce very strong partisan patterns and vary little over time. For both hybrid and nonpartisan elections, one sees an increasing pattern of partisanship starting after the 1970s. In the two hybrid election states (Michigan and Ohio) there is no further increase in partisanship in the current decade, but partisanship has continued to increase in the nonpartisan election states. This increase in the nonpartisan states reflects both further increases in partisanship in Montana, Washington, and Wisconsin where partisanship had been increasing during the previous two decades, and in Minnesota where partisanship had been minimal. Partisanship also increased in the two states that switched to nonpartisan elections in the prior decade, although it had already been quite high in North Carolina. Idaho, North Dakota, and Oregon did show a drop in average partisanship in the current decade, but those states had a total of only six contested elections during the period compared to thirty-seven in the states where the average partisanship increased.⁷⁰

direction of partisanship in these elections, going from Republican counties more likely to support retention through about 1960 to Democratic counties being more supportive of retention.

70. The two other states using nonpartisan elections are Georgia and Nevada. Georgia had only one election in the current decade and the partisan correlation for that election was identical to the average correlation for the prior decade (.55). Nevada has not had a contested election in this decade.

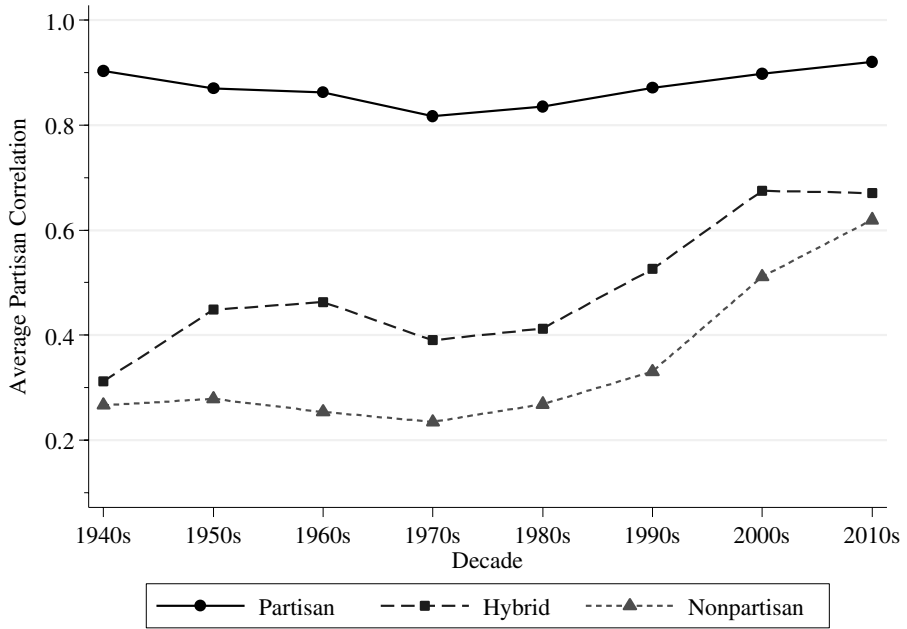


Figure 14: Changing Degree of Partisanship in Partisan, Nonpartisan and Hybrid Elections

Minnesota is particularly notable. In *Justices on the Ballot*, I argued that Minnesota had avoided partisanship because the Minnesota Supreme Court had not decided any cases that tend to provoke partisan and interest group responses (death penalty, abortion, same-sex marriage, land use policy).⁷¹ Prior to 2010, the average correlation in each election year exceeded .29 only once (.43 in 1956). In the last four election years, the average correlations have been .61, .52, .63, and .65. What accounts for this shift? It does not reflect a sudden increase in controversial cases that have produced campaigns to defeat incumbents. There was no television advertising in Minnesota Supreme Court elections between 2000 and 2016. Most likely it reflects two things. First, in several of the recent elections, the candidates have obtained endorsements from the Republican Party. In some of these elections, or other elections, one of the candidates had established a reputation of being on the conservative side of the political spectrum. However, there were also fairly high partisan correlations in some elections where neither factor seemed to be present. It is worth noting that in every case, Republican-leaning counties tended to lean toward the challenger while Democratic-leaning counties were more supportive of the incumbent. This cannot be explained by who ap-

71. Kritzer, *supra* note 1, at 27–28.

pointed the incumbent because the pattern held for both those appointed by Republican governors and those appointed by Democratic governors. This held true for Alan Page, who is one of only two Minnesota Supreme Court justices to initially gain office by election in the last fifty years.

Retention Elections

One of my findings in *Justices on the Ballot* was that there were partisan patterns in voting in retention elections in many states.⁷² Figure 15 shows the average absolute partisan correlation by state across the decades starting with the 1960s. I have excluded the earlier decades because prior to 1960 only California (starting in 1936) and Missouri (starting in 1942) employed retention elections. The figure shows two measures of the absolute partisan correlation: the average and the percentage of the correlations exceeding .5. There is a pattern of slow increase in both the mean absolute partisan correlation and the percentage of absolute partisan correlations exceeding .5 in the three decades after the 1970s. The mean absolute correlation increased from 0.24 in the 1960s and 1970s to 0.29 in the 2000s. The percentage of absolute partisan correlations exceeding .5 increased from about 6.6 percent in the 1970s to 17.2 percent in the 2000s which is about what the percentage was in the 1960s (17.8 percent). Both the average and the percentage exceeding .5 shot up in the current decade. The mean correlation increased by almost half to 0.42 and the percentage exceeding .5 more than doubled going from 17.1 percent to 42.6 percent.

In seven states (Alaska, California, Colorado, Florida, Iowa, Kansas, and Tennessee) the mean absolute correlation increased by .2 or more. Another six states had lesser increases. Five states did have a decline, with the decline exceeding .2 in two states (Indiana and Utah).⁷³ As for the frequency of retention elections with absolute partisan correlations exceeding 0.5, Iowa, Kansas, Tennessee, and Wyoming went from no history of having such elections to 40 percent or more elections evidencing partisan patterns of this level. Sharp jumps also occurred in Alaska, Colorado, and Florida. In Alaska, California, and South Dakota, every retention election in the current decade produced an absolute partisan correlation exceeding .5. Only two states, Alaska and Utah, declined on this measure. Clearly, partisanship is now a more important part of voting in retention elections than it is in

72. *Id.* at 203–25.

73. Partisan correlations cannot be computed for retention elections in Illinois and Maryland because those states use districts; this is also true for all but the chief justice in Nebraska.

nonpartisan elections. The obvious question is why, something I will return to in the conclusion.

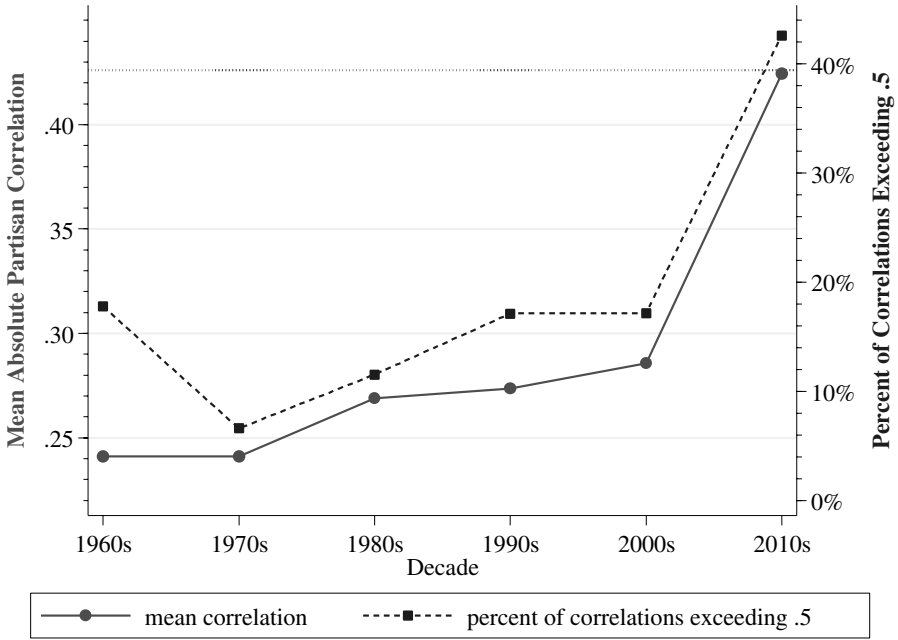


Figure 15: Changing Degree of Partisanship in Retention Elections

Television Advertising

In a previous Section I examined patterns of spending on television advertising. In this Section I turn to the content of that advertising.⁷⁴ This could be assessed either in terms of the amount expended or the number of ad airings; both measures show the same patterns and for simplicity I will use only one measure—number of airings. The advertising data again come from CMAG, and it is important to keep in mind that only since 2007 has CMAG captured all 210 media markets; the 75 largest markets were captured prior to 2002, and the 100 largest between 2002 and 2006. The analysis of ad content focuses on the tone of each ad. The coding labeled each advertisement as *promoting* one or more candidates, *attacking* one or more candidates, or *comparing* candidates. Advertisements in the *comparing* category will typi-

74. For another recent analysis of ad airings drawing on the same data, see Melinda Gann Hall & Matthew J. Zalewski, *Campaigning for the High Court Bench*, in *JUDICIAL ELECTIONS IN THE 21ST CENTURY* (Chris W. Bonneau & Melinda Gann Hall eds., 2017).

cally criticize or attack one candidate and then promote the favored candidate.⁷⁵

Figure 16 shows advertising volume by tone and shows a pattern of increase through 2006. Undoubtedly this partly reflects the increased coverage of markets by CMAG. Since 2006, there is a clear cyclical pattern. For “promote” ads the pattern is very consistent, hitting about 45,000 airings in cycles corresponding to presidential elections, and dropping to 30,000 or less in off-year cycles. Contrast ads show a similar cycle although the highs and lows are less consistent. There is no cyclical pattern for attack ads, although for most election cycles there are 10,000 or fewer airings of attack ads. The exceptions are in the 2008 and 2016 cycles when there were about 15,000 attack ad airings.

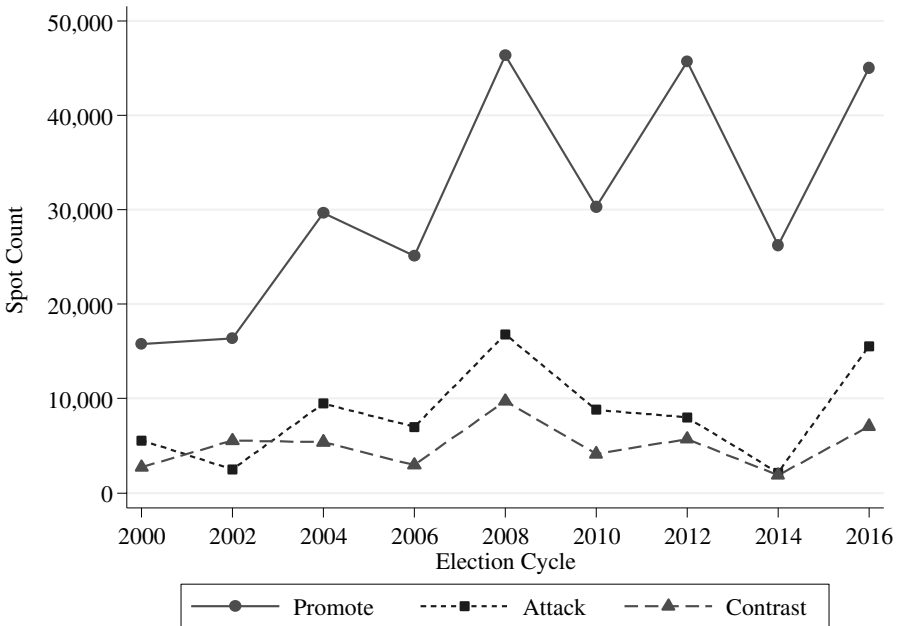


Figure 16: Advertising Volume by Tone

It is evident in Figure 16 that promote ads predominate. Figure 17 makes this even clearer. Promote ads constitute more than sixty percent of all airings in all election cycles. Attack ads never constitute even a quarter of the airings. The 2016 election cycle saw a jump in the proportion of attack ads compared to the prior two or three cycles. However, comparing the current decade to the previous one, there is

75. Some of the coded information on advertising was provided to me by Melinda Gann Hall; I coded the other ads into one of the three categories.

no indication that the proportion of attack ads has increased—if anything, it has decreased. The average percentages in the current and previous decade are 16.0 and 19.5 percent respectively.

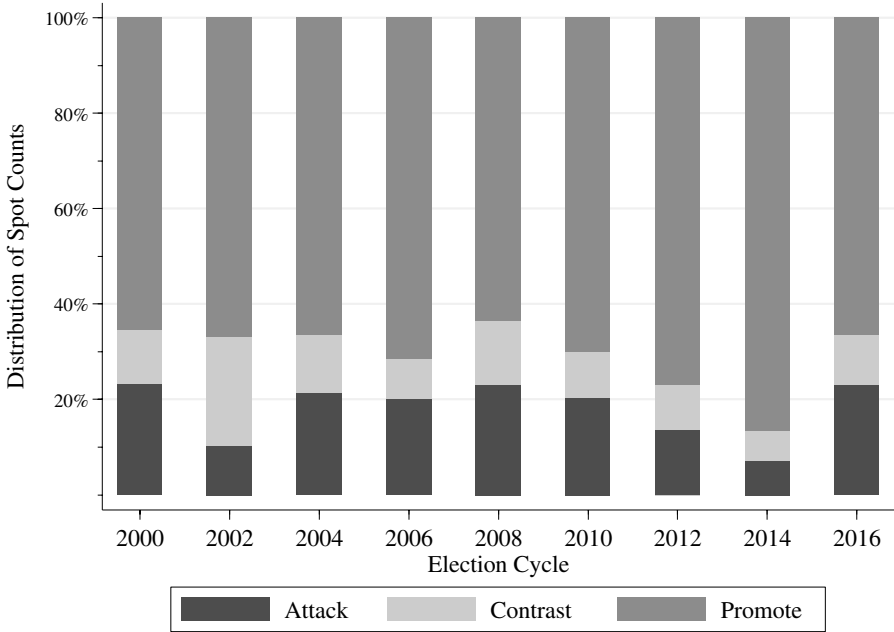


Figure 17: Relative Share of Advertising by Tone

The cyclical pattern shown in Figure 16 reflects, in part, differences in the number of elections that occur in off-year and presidential elections. Because the variability in terms and rules regarding when an appointee must first face the electorate, there is significant variation in the number of seats up in different election cycles. Moreover, large numbers of seats go uncontested which further increases the variability in the number of elections for which one might expect to see television advertising. Figure 18 shows ad airings per contested seat; the left panel shows this figure per all contested seats and the right panel limits the analysis to elections where there was some television advertising. The cyclical patterns for promote and contrast ads are softened by adjusting for the number of seats involved, but the overall picture does not change.

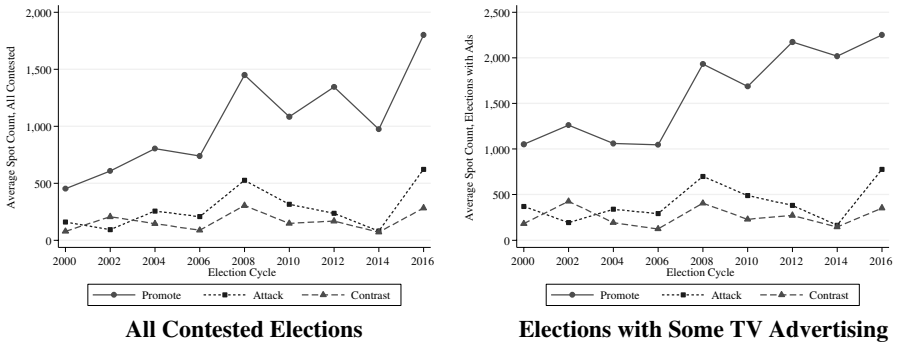


Figure 18: Advertising Volume Per Seat by Tone

The Tone of Advertising

Does the tone of advertising vary depending on the election format? I limit this question to partisan, nonpartisan, and hybrid elections because advertising in retention elections has been too intermittent for analysis. Figure 19 shows the distribution of tone for each of the three election formats for each election cycle. In the current decade, ads with negative content have been most likely to appear in nonpartisan elections. In the prior decade, there was little difference in the use of negative advertising depending on the election format. Figure 5 might provide a clue as to why there is this difference: nonpartisan elections draw a larger share of advertising dollars from outside groups and such groups might have been more focused on nonpartisan elections in recent years.

Figure 20 shows the distribution of tone separately for candidates, parties, and outside groups. Quite clearly, advertising sponsored by the candidates or their committees is largely positive in tone. The attack and contrast advertising is coming more from outside groups, and parties are particularly important in sponsoring contrast ads. Figure 21 shows a simplified combination of election type and sponsor, collapsing outside groups and parties into a single category. Across all three types of elections, candidate advertising is mostly positive in the form of “promote” ads, and when it takes a more critical tone it is more often in the form of contrast ads than as attack ads. Group and party advertising is more likely to have a negative element regardless of election type; this negative element more often takes the form of an attack ad, rather than a contrast ad. As for any shift in the current decade, the only one that seems evident is a decline in negative advertising in hybrid elections, but that most likely reflects the specifics of the contests in Ohio and Michigan in the last several cycles rather than any fundamental change.

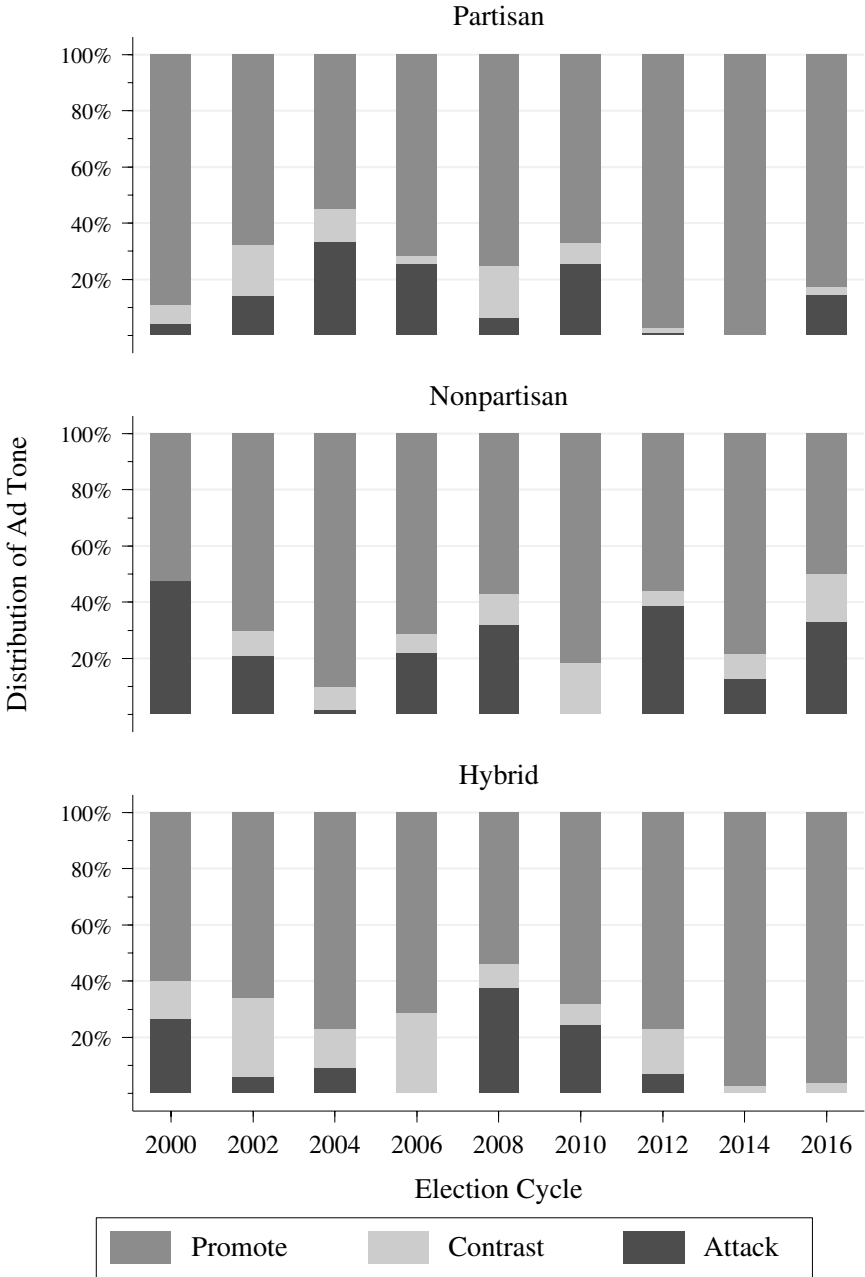


Figure 19: Tone of Television Advertising by Election Format

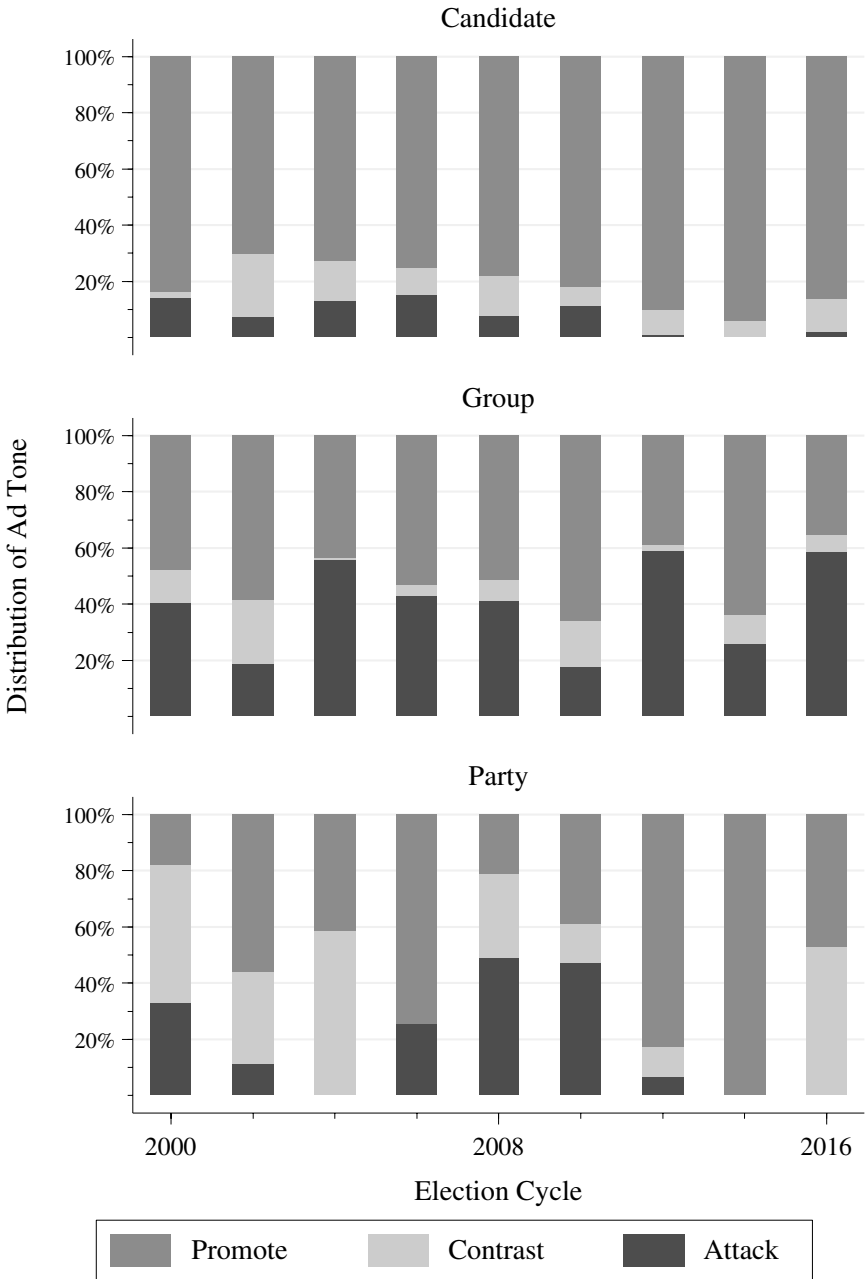


Figure 20: Tone of Television Advertising by Sponsor

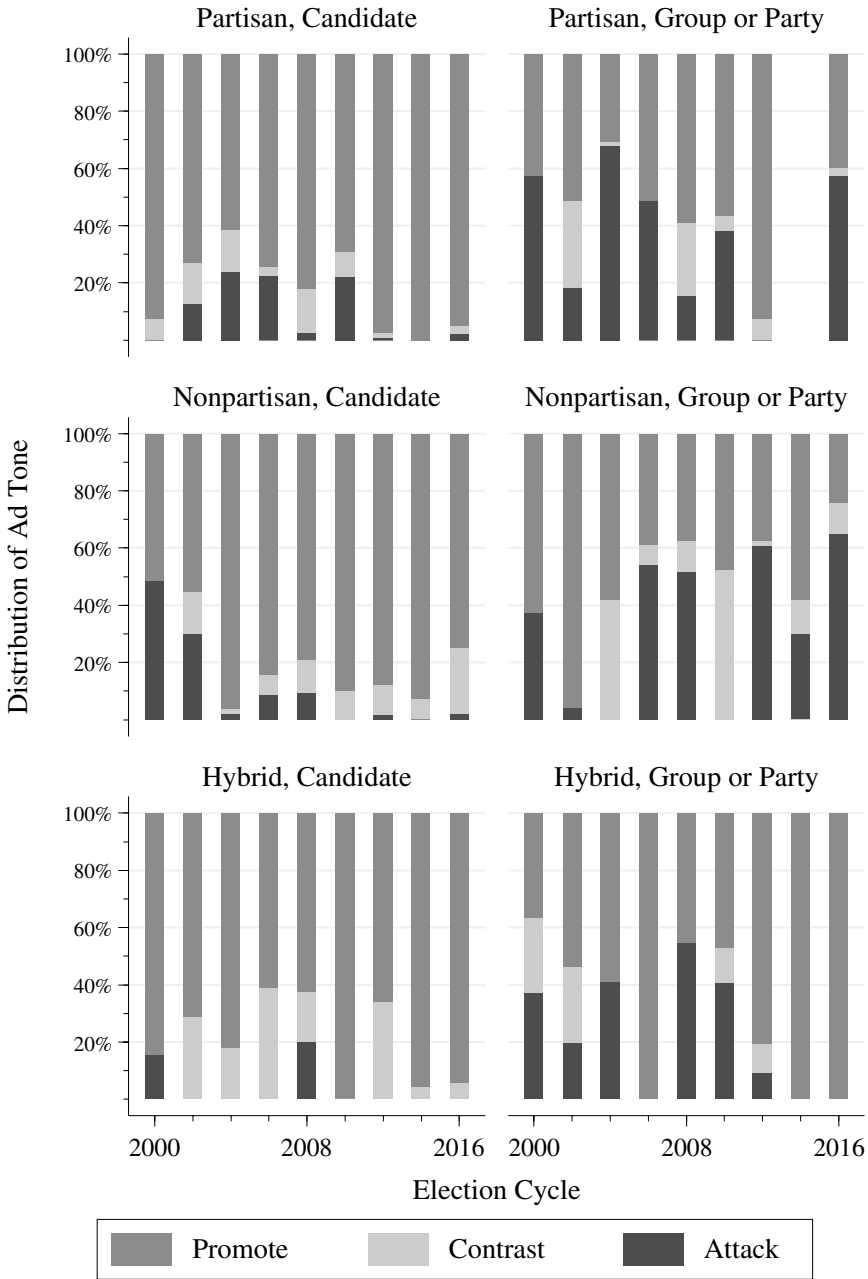


Figure 21: Tone of Television Advertising by Election Type and Sponsor

SUMMARY AND CONCLUSION

The goal of the article has been to assess what changes have occurred in patterns of state supreme court elections in the period

2010–16 compared to the previous six and a half decades. I have examined patterns of campaign contributions and expenditures (starting in the 1980s or 1990s), contestation and competitiveness, partisanship, and television advertising (starting with the 1999-2000 election cycle).

Even though the current decade began with the startling defeat of three Iowa justices in the 2010 retention election, there has been surprisingly little change in the current decade: campaign contributions and expenditures have been stable (or possibly declined slightly); contestation and competition has, if anything, seen a very slight decline, with the exception that there has been an increase in the proportion of retention elections in which the incumbent has received less than a fifty-five percent yes-vote; and the volume and tone of television advertising has been steady.

The one area that appears to have changed is partisanship. As one would expect, partisanship in elections conducted on a partisan basis has always been high and continues to be so. Before 2010, there was a pattern of increasing partisanship in the two states with a hybrid format, but that leveled off in the current decade. The change has been an increase in partisan voting patterns in nonpartisan and retention elections, both of which are intended to be nonpartisan.

Partisanship in voting patterns in nonpartisan elections began increasing in the 1980s, and has steadily increased since that time, with the decade average of the partisan correlation more than doubling from .27 in the 1980s to .62 in the current decade.⁷⁶ While, the biggest jump in that average occurred between the 1990s and the 2000s (.33 to .51), the jump from the 2000s to the 2010s was still sizeable (.51 to .62). Retention elections had experienced a very gradual increase in partisanship (as measured by the absolute partisan correlation) starting after the 1970s, going from .24 in the 1960s and 1970s to .29 in the 2000s. However, there was a big jump in the current decade, from .29 to .42. As detailed above, the increase occurred in most states using retention elections, and was substantial, exceeding .2, in seven states.

What accounts for the sharp increase in partisanship in these elections that were supposed to be insulated from such party politics? In some states, Iowa stands out, the increase almost certainly reflects controversial decisions. However, that cannot account for the broad pattern of increase. A more general explanation is likely that this increase is part and parcel of the broader polarization that has been occurring in American politics. Voters may be looking for any hints

76. The decade averages in nonpartisan elections for the 1940s through the 1980s ranged between .23 and .28; the overall average for that period was .26.

that serve as partisan cues and may be acting upon those cues. In reality, most justices in nonpartisan and retention states can in some way be linked to a party. That may be by their own prior political activity (such as which party they initially ran for or prior candidacies for political office),⁷⁷ by whom they were initially appointed, or by having a name that might be in some way identifiable with a political party. In this age of heightened political polarization, enough voters may be looking for whatever cue they can find, which is illustrated by the level of partisanship in state supreme court elections.

The growth in partisanship in these supposedly nonpartisan elections also raises questions about the use of these kinds of selection and retention methods as a means of avoiding partisanship. In some states, the degree of partisanship in retention or nonpartisan elections is as high as in partisan elections, although on average the level of partisanship is still much higher in partisan elections. This might lead to the view that elections should be abandoned entirely in order to avoid partisanship, but one only need look at the federal appointment process to see that appointment by elected officials can be, and often is, just as partisan as partisan elections. While one can imagine mechanisms that would avoid the kind of partisanship evident today,⁷⁸ it is hard to imagine a reality in which such a mechanism would actually be adopted in the U.S., given both the public preference for elections and politicians' desire to control judicial appointments, both to serve as patronage and to advance their preferred policy goals.

77. As noted previously, Illinois, New Mexico, and Pennsylvania require candidates to run in a partisan election for an initial term on the state supreme court with subsequent retention for additional terms through retention elections.

78. Kritzer, *supra* note 1, at 244–64.

