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A Perfect Storm:
How Speech and Spending are Politicizing State Supreme Courts

Department *of* Political Science

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How Speech and Spending are Politicizing State Supreme Courts

Submitted to the Department of Political Science of Allegheny College in partial fulfillment of the requirements for the degree of Bachelor of Arts.

I hereby recognize and pledge to fulfill my responsibilities as defined in the Honor Code and to maintain the integrity of both myself and the College community as a whole.

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An Introduction to Judicial Elections

"There's no playbook for this." Campaign director Brain Nemoir struggled to grasp the realities of the election outcome (Marley, Stein, & Bergquist, 2011). Two candidates in a statewide race had received $400,000 in public funding after agreeing to forego fundraising (Marley et al., 2011). Special-interest groups spent an additional $3.6 million, primarily on televised ads (Brennan Center, 2011). Voter turnout was 68% higher than expected based on past similar elections (Gilbert, 2011). Almost a full day after polls closed, 100% of the votes had been counted and the challenger emerged with a 0.013% margin of victory over the incumbent with over thirteen years of experience. When results were released, the state immediately began planning for a statewide recount, costing taxpayers up to $1 million (Marley et al., 2011).

The election was not for a federal office, a governorship, or a seat on the state legislature. It was for a position on the Wisconsin Supreme Court, a position now caught in a perfect storm of politicization.

Leading up to Election Day, there were few indications that the 2011 Supreme Court race would become so heated. Only six weeks earlier, incumbent Justice David Prosser won the primary with 55% of the vote and challenger Assistant Attorney General JoAnne Kloppenburg came in second with 25% (Wisconsin Government Accountability Board, 2011).

Based on past races, the state predicted 20% voter turnout, but approximately 1.5 million voters, 34%, made their way to the polls (Gilbert, 2011). In fact, voter turnout for this judicial election was comparable to the 2008 presidential primary, in which 1,524,360 voters participated (Wisconsin State Elections Board, 2008). Gilbert suggests another perspective for the significant voter turnout: "the share of eligible voters who turned out in a spring judicial election in

Wisconsin equaled or exceeded the share of eligible voters who turned out in races for governor last fall in New York, Tennessee, Texas and Utah" (2011). With such a slim margin of victory, a statewide recount is likely to begin a week after the election (Marley et al., 2011).

As a judicial race, different aspects of the election must be taken into account. First, challengers have won against incumbent Justices only five times since the creation of the Supreme Court in 1852 (Marley et al., 2011). Kloppenburg's possible victory is highly unusual. Second, as the race took place in the spring of an odd year, citizens were not voting for any kind of federal office, but rather demonstrated the specific interest in voting for a judicial candidate (Gilbert, 2011). Third, as a nonpartisan election, the ballot did not label candidates with party affiliations, despite markedly partisan discussion and campaigning (Brennan Center, 2011). The contested seat on the Court will preserve the conservative majority or swing to a more liberal ideology, and the future of Republican Governor Scott Walker's collective bargaining measure hangs is uncertain.

Mike McCabe, executive director of the Wisconsin Democracy Campaign, stated after the election, "It looked like this was going to be a relatively sleepy affair [in which] the incumbent was going to coast to victory. […] But everything changed about seven or eight weeks ago when all hell broke loose in Wisconsin and almost instantly this race became a referendum on [Governor] Scott Walker – and a dogfight" (Vogel, 2011).

How did we get here? Previously, judicial elections were low profile, low-cost events, but several of these characteristics have changed in the last decade. Judicial elections have become more politicized due to changes in campaign speech regulation and high levels of candidate fundraising and independent expenditures. Such developments have also led to increased competition, media coverage, and voter participation. This project will examine the

attitudinal and institutional changes in the landscape of judicial elections, their consequences for today's elections, and a projection for the future of judicial selection. Given the variance of selection methods, and the wide range of speech and spending effects on judicial races, no solution will fit all states. However, reform proposals including public financing and stricter campaign disclosure regulations will be discussed. Judicial elections have become more political due to changes in campaign speech and spending regulations. While competition is marginally affected, speech and spending have led to better voter information, decreased ballot roll-off and increased participation. Spending enables speech enables viable elections, but the question remains whether elections are the ideal way of choosing judges.

Terms of Engagement

Each U.S. state's constitution provides for three branches of government, mirrored to the federal system: a governor, legislature, and judiciary. Each state's judiciary is organized by a hierarchical system, wherein the low courts hear the basic trials and indictments, middle courts hear appeals, and the highest court is the last resort for an appeal. . This project focuses exclusively on the highest court in each state. Forty-five state courts of last resort are called "Supreme Court"; while Maryland and New York call their highest courts "Court of Appeals," Maine and Massachusetts call theirs "Supreme Judicial Court," and West Virginia dubs its court "Supreme Court of Appeals." For simplicity, reference to state courts or state supreme courts means the courts of last resort in each state's government, unless noted otherwise. Additionally, Oklahoma and Texas have two courts of last resort each, one for civil matters and one for criminal matters. Only the civil courts from these states will be used for analysis in this project.

It is often difficult to collect standardized data on these elections as judicial selection methods vary across and within states, and have different election date cycles. Considering this

complexity with the previously held notion of unimportance state judicial positions, it is not surprising judicial elections received so little attention.

Each state's constitution delineates the selection method for choosing members of the judiciary. States may choose to select their judiciary by a number of methods, the most popular of which are gubernatorial appointment, and partisan, non-partisan and retention elections. Gubernatorial appointments may be a unilateral decision, may result from a nominating committee, or may require state legislature confirmation. Partisan elections require incumbent judges and judicial candidates to stand for election after receiving political party nomination, and the party's identifier follows the candidate's name on the ballot. Usually only the two major parties participate in partisan elections. Non-partisan elections also require judges and candidates to campaign, but do not require political party backing, nor does a party identifier follow the candidate's name on the ballot. Candidate names are usually listed in alphabetical order. After much debate and dissatisfaction with these methods, Missouri developed a hybrid system. Supreme court justices are first appointed to office and after a set amount of time, stand for a retention election in which voters answer the question "Should Justice Smith remain in office?" with a "yes" or "no" vote. If the judge receives the threshold amount of votes (usually 50%, although Illinois retention elections require 60%), he remains in office. If he fails to receive the minimum amount of votes, he is removed from office and the governor appoints another judge in his place. Table i.1 lists the selection methods of states which election their Supreme Court justices.

Table i.1 – Judicial Selection Methods for States that Elect Supreme Court Justices			
	Partisan Election	Non-partisan Election	Appointment, Followed by Retention Election
States	Alabama Illinois Louisiana New Mexico Pennsylvania Texas West Virginia	Arkansas Georgia Idaho Kentucky Michigan* Minnesota Mississippi Montana Nevada North Carolina North Dakota Ohio** Oregon Washington Wisconsin	Alaska Arizona California Colorado Florida Indiana Iowa Kansas Maryland Missouri Nebraska Oklahoma South Dakota Tennessee Utah Wyoming
*Michigan candidates are nominated by a political party and compete in a non-partisan election. **Ohio candidates compete in a partisan primary election and a non-partisan general election. Source: American Judicature Society, 2010.			

Supreme courts are composed of five, seven, or nine sitting justices, who serve terms varying from one year to life (American Judicial Selection, 2010). Many states stagger their election years in order to maintain some consistency on the court when members leave office. When discussing spending trends over a decade, it is crucial to note that courts with more members or shorter terms of office will have more frequent elections, and may likely have a higher rate of spending than a smaller court that serves longer terms. For this reason, per-candidate or per-election averages are provided when possible in order to control for this fluctuation.

The Evolution of Judicial Elections

In the *Federalist Papers*, "Alexander Hamilton was quite clear that if a judge were forced to run for reelection, judicial independence—and hence the judiciary itself—would be

threatened" (Streb, 2007, p. 8). All judicial positions were filled by gubernatorial appointment from 1789 until 1832, when Mississippi amended the state constitution to require popular elections for all state judges (Sheldon & Maule, 1997, p. 4). Although unusual in the U.S., the idea of judicial elections was not revolutionary. "In the Declaration of Independence, Jefferson accused King George of having 'made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their salaries'" (Streb, 2007, p. 9). New York followed Mississippi's example in 1846 with little debate in the state legislature (Berkson, 1980, p. 176). By 1861, 24 of 34 states selected judges by popular election (Berkson, 1980, p. 176). Judicial election became the norm, as each new state admitted between 1846 and 1959 elected some or all of its judges (Berkson, 1980, p. 176).

Several scholars offer reasons for the increased acceptance of state Supreme Court elections and the developing belief that judges should be responsive to and held accountable by their jurisdictions (Zaccari, 2004, p. 140). One theory is that the U.S. Supreme Court's controversial decision in *Marbury* v. *Madison* (1803) sparked concerns of judicial activism (Croley, 1995, p. 715). Reformers proposed changing judicial selection method to popular election for six-year terms (Haynes, 1944, p. 93). Haynes claims that President Thomas Jefferson's criticism of the *Marbury* Court "contributed materially to distrust of the judiciary, and to the idea that popular election of judges for short terms was feasible and desirable" (1944, p. 93).

Generally, Jacksonian democracy is credited with the trend, as "not electing state judges was considered to be undemocratic, and the Jacksonian era was dominated by beliefs in expanded suffrage and popular control of elected officials" (Streb, 2007, p. 9). However, as many other officials at the time, elected judges soon became controlled by machine politics and

"by the early twentieth century, elective judiciaries were increasingly viewed as plagued by incompetence and corruption" (Croley, 1995, p. 722). In 1906, Roscoe Pound has argued that judicial elections had "almost destroyed the traditional respect for the bench" (Cady & Phelps, 2008, p. 352, quoting R. Pound).

The Progressive movement began to advocate a new judicial selection reform. Supported by the American Bar Association and the American Judicature Society, reformers advocated nonpartisan elections in order to eliminate party control (Streb, 2007, p. 9). Nonpartisan elections debuted in Illinois in 1873, and twelve states had switched to this selection method by 1927 (Sheldon & Maule, 1997, p. 4). However, critics doubted the effectiveness of nonpartisan elections, as they decreased the amount of voter information available. Party affiliation is often the cheapest voting cue available to voters, and without the label, voters may make their decision based on less preferable information "such as ballot position or name recognition" (Maute, 2000, p. 1206). For this reason, three states reverted to partisan elections by 1927 (Cheek and Champagne, Political Party Affiliation).

As a solution, the American Judicature Society proposed retention elections: a combination of appointment and election systems. "The idea behind retention elections was to combine judicial independence (judges would not have to run against an opponent) with judicial accountability (they would still face the possibility of being removed from office if they had ruled against the wishes of the people)" (Streb, 2007, p. 10). Missouri was the first state to adopt this plan in 1940. However, even retention schemes are not immune to politicization, massive spending and uncivil campaigning, as evident by Iowa's 2010 elections.[1]

[1] See Chapter 1 for more details.

Changing Landscapes

Despite the controversy and reforms of judicial selection in the nineteenth century, judicial elections were still seen as insignificant, because the state courts themselves were insignificant. The first reason was attitudinal: a public and scholarly perception that judicial elections were not important. Deference to federal precedents and a lack of high-profile cases put state judges in the backseat. The second reason was institutional; previously, judicial candidates were extremely limited regarding campaign speech. In 1924, the American Bar Association (ABA) set standards for judicial candidates. Judicial candidates were prohibited from "announcing" their personal views during an election, "promising" a particular outcome, or "committing to a particular view." Judicial candidates were also restricted from certain political activities, including direct solicitation of campaign contributions. With limited topics to discuss and limited opportunities to obtain funds to broadcast discussion, judicial campaigns became quiet affairs.

However, both the attitudinal and institutional reasons for previously little attention paid to judicial elections are changing, leading to increased interest in judicial elections. Federal courts have more frequently deferred to states and allowed state courts of last appeal to make important policy decisions. "Supreme court dockets have experienced a proliferation of controversial cases with broad policy implications, perhaps because of rising lower court caseloads and the power of discretionary review now held by most state high courts" (Bonneau & Hall, 2008, 459). The trend of federal government bodies passing power to states has not only enhanced state power but also led to "New Judicial Federalism, in which the protection of individual rights is being based on state constitutions rather than the U.S. Constitution"

(Bonneau & Hall, 2008, p. 459).[2] In the wake of New Judicial Federalism, state judges are deciding constitutional issues ranging from same-sex marriage to capital punishment, and consequently receiving more media coverage for controversial decisions. As opposed to pushing issues through state legislatures, New Judicial Federalism allows state courts to affect public policy immediately and effectively, with little chance of reversal. As a result, interest groups have become more interested in state courts, finding that influencing public policy may be more effective when channeled through the courts rather than the legislature (Bonneau & Hall, 2008, p. 459). However, New Judicial Federalism has also led to concerns that a handful of judges can make decisions for millions of citizens without ever being voted into office.

The institutional limits of judicial elections are also changing because of the U.S. Supreme Court's decision in *Republican Party of Minnesota* v. *White* (2002). The *White* Court held that Minnesota's "announce clause" violated the First Amendment. The decision has led to a series of deregulations in judicial elections, allowing candidates to engage in political activity, speak openly about their views and contrast with other candidates (Caufield, 2007, p. 54). In other states, judicial elections are becoming more politicized, even if code was not formally revised. Additionally, as state courts become more influential, more money has been flooding into judicial elections (Sample, 2010, p. 5). Although *White* may have been a result of precipitating changes in judicial elections over the last few decades, the decision effectively signaled a governmental blessing of the politicization of judicial elections.

Judicial elections have since gained more media coverage and visibility in the public sphere (Sample, 2010, p. 67). Advocates of judicial elections argue that this development is a boon to democracy, because more voters are aware of, informed about and participating in

[2] Friedman and Baron (2001) define New Judicial Federalism as state courts using other state and federal authorities to decide state constitutional issues, citing *Baker* v. *State* (744 A.2d 864, Vt. 1999) as the landmark case.

judicial elections (Bonneau & Hall, 2009, p. 21). Conversely, opponents of judicial elections argue that the elimination of campaign speech limits only makes judicial candidates more politicized, especially if candidates are affiliated with a specific party platform through partisan elections. However, advocates of elections argue that non-partisan popular elections receive very low voter turnouts, which allow a few to make an important decision for many. Additionally, without the party label as a voting indicator, voters are left to make selections using less helpful information such as name recognition (Bonneau & Hall, 2009, p. 8).

Both sides of the debate can argue issues of accountability, independence, and democracy. On one hand, elections prevent a corrupt or overly active judiciary from reigning unchecked and they allow judges to rule in favor of the public good rather than the private interests that may have appointed him (Bonneau & Hall, 2009, p. 9). Additionally, higher voter involvement may indicate a more viable democracy, which may demonstrate better governance (Bonneau & Hall, 2009, p. 2). Conversely, judges who made unpopular decisions regarding desegregation and same-sex marriage may not have made those decisions if they were elected.[3] Additionally, if one believes that the Framers intended judges to be independent of politics, it is reasonable to fear partisan, interest group, and corporate influence; moreover, democracy may be better served by an appointed judge as he can represent the public will rather than the private interest to which he may be indebted (Goldberg, 2003, p. 2).

Judicial elections are changing. On one hand, perhaps judicial candidates should not be held to any special requirements from which executive and legislative candidates are exempt. As

[3] For example, the justices who serve on the Massachusetts Supreme Judicial Court are appointed by the governor for life terms. In 2003, this court ruled that the State's same-sex marriage ban violated the Massachusetts Constitution in *Goodridge* v. *Department of Public Health* (Mass. 2003). In contrast, the California Supreme Court justices are subject to retention elections. A year prior to the next retention election, these judges upheld California's same-sex marriage ban in *Strauss* v. *Horton* (Cali. 2009). This example is obviously ignoring the technical and legal specific of each case; it is merely to suggest that judges who must face voters at the polls may be reluctant to issue unpopular decisions.

Scalia argues in *White* (2002), the "complete separation" of the judiciary does not suit the United States where judges may "make law themselves [or] set aside the laws enacted by the legislature" (p. 18). "Not only do state-court judges possess the power to "make" common law, but they have the immense power to shape the States' constitutions as well" (*White*, 2002, p. 18).

Perhaps supporters who argue that the judiciary should be above politics must re-examine that assumption within the framework of our democracy while considering what society deems to be legitimate. Polls in some states indicate that the public supports public financing of judicial elections, while other states are considering adopting appointment or merit plans to replace popular elections (Justice at Stake [JAS], "National," 2009). Campaign spending in the last decade has been at historically high levels, nearly double what candidates spent a decade ago (National Institute on Money in State Elections [NIMSE], 2010). Speech and spending go hand in hand. Campaign speech is ineffective without fundraising and fundraising is unnecessary without freedom of political speech. Current changes in both aspects have led to increased politicization of state supreme courts, including negativity, competitiveness, and voter turnout.

Chapter One will explore case studies of several significant recent races and how they foreshadow the future of judicial elections. Chapter Two will delve into *Republican Party of Minnesota* v. *White* (2002), in which the U.S. Supreme Court effectively deregulated campaign speech regulations for judicial candidates and incumbent judges. Chapter Three examines the facts of candidate fundraising, and the implications of these trends. Chapter Four analyzes the intersection of these issues and their effects on their elections, including competitiveness and voter turnout trends. Looking towards the future, this project considers proposed reform options and future research possibilities.

Chapter 1

Through the Looking Glass, Three Case Studies

A judge's predicament of deciding controversial cases when running for re-election is "like finding a crocodile in your bathtub when you go to shave in the morning," said former California Supreme Court Justice Otto Kaus. "You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving" (Uelemen, 2007, p. 1133). Since Kaus retired from office in 1985, the trend of politicization in judicial elections has only dramatically increased. State supreme courts have also become more visible, and these campaigns have become "noisier, nastier, and costlier" (Schotland, 2007, p. 1077).

The cases below explore multiple aspects of judicial campaigning. When comparing elections, one must consider the year, type of election, and competition level, among other factors. The election year signals political climate, significant events, and the other offices are running for election during the year. For example, voter turnout and campaign spending varies between presidential election years, midterm election years, and odd years.[4] The election type signals the partisan nature of the election, the increased need for voter information in the case of non-partisan elections (Maute, 2000, p. 1206), or the inherent lack of a challenger in a retention election. Competition level will affect campaigning, as fundraising is affected by whether an election is unopposed, between an incumbent and a challenger, or between two challengers.

In West Virginia's 2004 partisan election, Justice Warren McGraw was targeted by a businessman with deep pockets. His challenger's victory led to a U.S. Supreme Court case detailing recusal requirements for judges who have accepted campaign contributions (*Caperton* v. *Massey*, 2009).

[4] See Chapter 3 for further information.

Wisconsin's 2008 non-partisan election focused on campaign speech, as challenger judge Michael Gableman financed television ads attacking his opponent. An independent commission filed a complaint against Gableman for misrepresentative advertising, a breach of the Wisconsin judicial code of conduct (*Wisconsin Judicial Commission* v. *Gableman*, Wisc. 2008).

Interest groups dominated Iowa's 2010 retention election. Following a unanimous Iowa Supreme Court decision legalizing same-sex marriage, conservative organizations campaigned for the defeat of the three judges who happened to be up for retention that election year. The campaign witnessed a surge of out-of-state money and get-out-the-vote efforts. Voters sent a "shot across the bow" to judges (Barr, 2011) and demonstrated that they will be held accountable. It is clear that even retention elections – once thought of as the most insulated form of judicial election – have also become politicized.

Big Spending, Supreme Consequences

One of the most well known judicial elections in recent history is Warren McGraw's re-election campaign for Chief Justice of West Virginia Supreme Court of Appeals in 2004. Warren McGraw had been involved in state politics since 1968. After time as a member of the House of Delegates, the State Senate, and as Lieutenant Governor, McGraw was elected to the Supreme Court of Appeals in 1998 and became Chief Justice in 2001.

In July 2003, the cover of *Forbes* featured a judge with a target on his back. The cover story exposed the U.S. Chamber of Commerce for contributing to state Supreme Court judicial races in order to construct courts more favorable to business interests (Lenzner, 2003). In November 2004, another article detailed Karl Rove's plan to shift state courts to the right by aiding the Chamber's targeting incumbent judges and supporting business-friendly challengers

(Dunham & Gleckman, 2004). McGraw was targeted for his earlier pro-labor politics while serving in state senate and for his pro-labor decisions as a judge (Karst, 2010, p. 636). As president of state senate (1980-1984), "he led the campaign for a coal-severance tax, imposed on all coal mined in the state, with proceeds mostly going to counties where the coal was mined" (Karst, 2010, p. 636, citing Wetterich, p. 3A). This tax was detrimental to profits of West Virginia coal companies that viewed it as a liberal policy favoring laborers and unions.

McGraw first had to defeat Democratic challenger Jim Rowe in the primary. However, Republican Brent Benjamin, a lawyer, proved McGraw's most serious challenger. The campaign became so heated, that the West Virginia Bar asked candidates to tone it down. Breaking the trend of quiet judicial elections with little media attention, "the campaign became notorious nationwide for its bitter tone, no-holds-barred attacks, and extraordinarily high spending" (Sample, 2010, p. 55).

Benjamin's primary financial supporter, President of Massey Coal Company Don Blankenship, received a substantial amount of media attention. At the time, Harman Mining Corp. was suing Massey for breach of contract and fraudulent misrepresentation; the jury in the case had already awarded Harman $50 million in damages. Massey started filing papers for appeal at the State Supreme Court just before the 2004 election.

Don Blankenship spent approximately $3 million campaigning for McGraw's opponent, Brent Benjamin. Blankenship's contributions amounted to 60% of Benjamin's total campaign spending (Sample, 2010, p. 56). He funded a positive campaign for Benjamin, an attack campaign on McGraw, and $2.5 million went to a 527 organization called 'And For the Sake of the Kids' (AFSK). AFSK's mission was to defeat McGraw, and achieved this goal by running television ads that accused McGraw of freeing an incarcerated child molester. Although this

statement is true on its face, the televised ads ignore several legal details of the case, as well as the fact that McGraw was merely part of the 3-2 majority that reversed a sentence for an incarcerated sex offender.[5]

These ads depicted McGraw as "radical," "dangerous" and accused him of being "soft on crime." The suggestion for the uninformed public was enough to galvanize voters to vote for Blankenship's chosen candidate, Brent Benjamin. McGraw was unable to recover from the negative advertising. After decades of public service, McGraw was voted out of office. He lost to Benjamin, 47% to 53%.

A mere two years later, Blankenship's company, Massey Coal, appeared before the West Virginia Supreme Court of Appeals as the defendant, standing to lose $77 million after interest compounded on the original verdict award of $50 million to Harman Mining. Despite calls that the current Chief Justice Brent Benjamin recuse himself because of Blankenship's contributions to his 2004 campaign, he not only participated in the case but also cast the deciding vote in a 3-2 decision in favor of Massey (*Caperton* v. *Massey*, 2009).

The owner of Harman Mining, Hugh Caperton, appealed to the United States Supreme Court, arguing that Benjamin should have recused himself as he had a conflict of interest in the case. The Supreme Court decided that the issue of judges refusing to withdraw from cases involving major campaign contributors was ripe for review and granted *certiorari*.[6] The

[5] McGraw had joined a 3-2 majority that reversed Tony Arbaugh's sentence. A former victim of molestation himself, Arbaugh was sentenced to thirty-five years for a molestation conviction at age fifteen. Arbaugh was released on probation and was later charged with possession of drugs and weapons, as well as domestic violence. See Stempel, 2010; Bailey, 2004; Charleston Gazette, 2004.

[6] Three other cases regarding a judge's refusal to withdraw from a case involving a major campaign contributor had petitioned for Supreme Court clarification but were denied *certiorari*. See *Avery* v. *State Farm Mutual Auto Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied* 126 S. Ct. 1470 (2006); *Consol. Rail Corp.* v. *Wightman*, 715 N.E.2d 546 (Ohio 1999), *cert. denied* 529 U.S. 1012 (2000); *Texaco Inc.* v. *Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. 1987), *cert. denied* 485 U.S. 994 (1988).

McGraw-Benjamin story was not yet finished, and had successfully moved the issue of judicial recusal to a national stage.

As stated by Caperton's attorney, former Solicitor General Theodore B. Olson, "The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today. A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge" (Nyden, 2008, P1A).

In *Caperton* v. *Massey* (2009), the Supreme Court ruled that judges should recuse themselves when they are biased or there may be an appearance of bias. Interestingly, many amicus briefs were entered on *Caperton*'s behalf, from both ends of the partisan spectrum. The wide variety of sources and organizations condemned Benjamin's refusal to recuse himself indicated a consensus in support of Caperton. Notable briefs range from PepsiCo, Wal-Mart, Intel, and Committee for Economic Development, to American Bar Association, Brennan Center for Justice, 27 former state Supreme Court Chief Justices and Justices, and the Conference of Chief Justices. Notably, the Conference of Chief Justices was mentioned ten times during the Supreme Court arguments, as they argued that "Under certain circumstances, the Constitution may require the disqualification of a judge in a particular matter because of extraordinarily out-of-line campaign support from a source that has a substantial stake in the proceedings" (Chief Justices Brief, 2009).

Indeed, after such an array of support, "the only truly alarming thing about [the] decision was that it was not unanimous. The case drew an unusual array of friend-of-court briefs from across the political spectrum, and such an extreme case about an ethical matter that should transcend ideology should have united all nine justices" (*New York Times*, 2009, p. A26).

Caperton's decision returned a surprisingly divided vote. In a 5-4 decision, the Supreme Court held that the due process clause of the Fourteenth Amendment required Justice Benjamin to recuse himself from participating in the case involving Massey, due to the significant campaign contributions that he received (*Caperton*, 2009, p. 2257). Writing for the majority, Justice Kennedy argued the situation "posed a risk of actual bias" due to Benjamin's "direct, personal, substantial, pecuniary interest" in the case (*Caperton*, 2009, p. 2259). Importantly, the majority often conflated Blankenship's contributions to Benjamin and his expenditures through AFSK. Justice Stevens argues that the Court intentionally conflated these figures, "[realizing] that some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes" (*Citizens United* v. *Federal Elections Commission*, 2010, p. 968). In opposition, the minority argued that the Court's opinion was too vague and may cause unnecessary recusals (*Caperton*, 2009, p. 2267).

The aforementioned example not only invigorated public interest in judicial elections within West Virginia but also became a catalyst for change in other states. Following *Caperton*, polls show that citizens are more concerned about campaign finance influencing judicial impartiality. "According to a 2008 survey, over 67% of West Virginians doubted that Justice Benjamin would be fair and impartial in considering the case before him, even if he claimed otherwise" (Sample, 2010, p. 56). In response, former West Virginia Governor Joe Manchin authorized a public financing system for future state Supreme Court elections.

"The Truth, the Whole Truth, and Nothing but the Truth…"

In 2008, an incumbent judge in Wisconsin was unseated for the first time in 41 years. Justice Louis Butler lost to challenger Michael Gableman after the state witnessed over $3 million in negative campaigning and interest group involvement (Sample, 2010, p. 32). The campaign was noted for its vitriolic ads, as Gableman's campaign conflated Butler's judicial obligations and his former duties as a public defender. The campaign took a racial turn, as Gableman's campaign ran a television ad similar to George Bush's 1988 "Willie Horton" ad (Newsweek, 2008, p.). Butler, the only black justice on Wisconsin's Supreme Court, was visually compared to a black rapist. The screen displayed their faces together while a narrator read the text below.

Figure 1.1. Butler on left, Mitchell on right.
Source: Fact Check, 2008.

> "Unbelievable. Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman. It's not true. Judge, District Attorney Michael Gableman has committed his life to locking up criminals to keep families safe. Putting child molesters behind bars for over a hundred years. Louis Butler worked to put criminals on the street. Like Reuben Lee Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child. Can Wisconsin families feel safe with Louis Butler on the Supreme Court?"[7]

[7] This ad is available for viewing at Coyle, 2009.

The independent Judicial Campaign Integrity Committee called the ad's use of race "highly offensive and deliberately misleading (*Newsweek*, 2008). Butler lost the election, 48.5% to 51.2% (Wisconsin State Elections Board, 2008).

After Gableman won the election, the Wisconsin Judicial Commission filed a complaint about the advertisement, arguing that he had misrepresented his opponent with the portion: "Butler found a loophole. Mitchell went on to molest another child" (*Wisconsin Judicial Commission* v. *Gableman*, "Complaint," 2008). In 1985, Butler was assigned to Mitchell's case as a public defender, and after Mitchell's conviction, Butler argued before an appellate panel that the jury had been unfairly prejudiced because the victim's age had been admitted into evidence. Although the panel ordered a re-trial, Wisconsin's Supreme Court found that "the error was not sufficiently prejudicial to have denied Mitchell's right to a fair trial and affirmed his conviction" (*Judicial Commission*, 2008, "Complaint"). Butler had no more interaction with Mitchell, who served his sentence until 1992. Mitchell was convicted of raping another child three years after his release (Coyle, 2009)

James Alexander, Counsel to the Judicial Commission, argues that "The advertisement is carefully crafted to consolidate four statements that are, arguably, literally true into one lie. […] When the sentences are viewed in context and given their ordinary meaning, they convey a false message concerning the conduct of Louis Butler, causing the viewers to question the safety of Wisconsin families if Louis Butler is re-elected to the Wisconsin Supreme Court" (Coyle, 2009). Alexander argues that the lie constitutes a violation of Wisconsin's misrepresentation rule, as Gableman "knowingly, or with reckless disregard of the statement's truth or falsity,

[misrepresented] the identity, qualifications, present position or other fact concerning the candidate or an opponent" (Coyle, 2009).[8]

Wisconsin's Judicial Commission filed a statement declaring, "Gableman's ad does extreme violence to the public's confidence in the integrity of Wisconsin's judicial system" by conflating "four sentences into one lie" (Marley, 2009a). Gableman defended himself on First Amendment grounds, arguing that every statement in the ad was "literally true" and that "the court can't punish him for what it may believe the ad implied" (Marley, 2009a). Furthermore, Gableman argues that the misrepresentations clause is in violation of the First and Fourteenth Amendments due to its overbroad and vague construction (*Wisconsin Judicial Commission* v. *Gableman*, 2008, "Answer Affirmative Defenses and Counterclaims").

The Judicial Conduct Panel that heard the complaint against Gableman was comprised of three lower court judges, in accordance with Wisconsin Statute § 757.87(3). The panel unanimously decided that the complaint should be dismissed. "Two judges said the ad was misleading but did not include outright lies; the other said the ad lied but that the court couldn't regulate political speech under the First Amendment" (Marley, 2009b). After the panel's recommendation, the Wisconsin Supreme Court heard the case. The court was deadlocked, with three justices believing that Gableman lied about Butler and three justices arguing that the case be dismissed. As the burden of proof fell to the Wisconsin Judicial Commission, which had failed to establish "clear, satisfactory, and convincing" evidence, the complaint against Gableman was dismissed.[9] Although the Gableman complaint will never make it to the U.S.

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[8] Wisconsin Code of Judicial Conduct, 60.06(3)(c): A candidate for a judicial office shall not knowingly or with reckless disregard for the statement's truth or falsity misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent. A candidate for judicial office should not knowingly make representations that, although true, are misleading, or knowingly make statements that are likely to confuse the public with respect to the proper role of judges and lawyers in the American adversary system.

[9] For the Wisconsin Supreme Court concurrences and dissents, see *Wisconsin Judicial Commission* v. *Gableman*, 30 Jun 2010, 2010 WI 62; *Wisconsin Judicial Commission* v. *Gableman*, 30 Jun 2010, 2010 WI 61.

Supreme Court to clarify misrepresentation clauses in judicial conduct codes, the effects of the vitriolic campaign are still being felt years later. Gableman actively endorsed Justice David Prosser in the 2011 election, a race in the spotlight for its partisan nature and attack ads. Gableman's successful use of misrepresentative campaigning may start a new trend for judicial elections.

Wedded Interests

Incumbent judges in retention elections enjoy extraordinarily high re-election rates. This is because the ordinary incumbent advantage that most politicians enjoy is compounded by the fact that retention elections are unopposed. In a majority of state judicial selection systems, a judge only needs to win a majority of votes to remain in office. If the judge does not achieve the retention threshold of the votes, he is removed from office, and another judge is installed by either appointment or election. Between 1990 and 2008, only four of 287 justices were unseated nationwide, 1.39% (Washington University in St. Louis, 2010). In other words, incumbent judges running for retention enjoy a 98.6% incumbent advantage, and on average, judges are retained with a strong 'yes' vote of 70.9% (Washington University in St. Louis, 2010). In Iowa specifically, every judge participating in a retention election has been retained since 1962, when the appointment and retention system was adopted.

However, the 2010 retention elections marked a clear departure from this norm. Iowan justices serve staggered eight-year terms. In 2010, three of the seven judges of the Iowa Supreme Court were due for a retention election: Marsha K. Ternus (Chief Justice, serving since 1993), Michael J. Streit (serving since 2001) and David L. Baker (appointed in 2008). On Election Day 2010, all three were removed from office.

As stated before, judicial elections are traditionally low visibility events, retention elections even more so. However, these judges were brought into the spotlight by National Organization for Marriage (NOM), a conservative interest group working to repeal the recognition of same-sex marriage and prevent other states from advancing pro-same-sex marriage agendas. NOM contributed substantial funding to an in-state organization called Iowa for Freedom (IFF). Bob Vander Plaats, who had unsuccessfully campaigned for the Republican gubernatorial nomination, spearheaded IFF's efforts. IFF led the actual campaign and voter mobilization efforts against the justices, acting to prevent judicial activism and work towards the restoration of a same-sex marriage ban. IFF's efforts and the result of the election demonstrate that the politicization of state supreme courts has even trickled down to states that follow the Missouri Plan, which were meant to provide the most insulation from public whims while also holding judges accountable.

In April 2009, the Iowa Supreme Court unanimously decided in *Varnum v. Brien* (Iowa 2009) that the state's statute defining marriage as only between heterosexual couples violated the Iowa Constitution. *Varnum* legalized same-sex marriage within the state, becoming the third state to do so. The decision received a mixed reaction at the time, as illustrated by the poll results below.

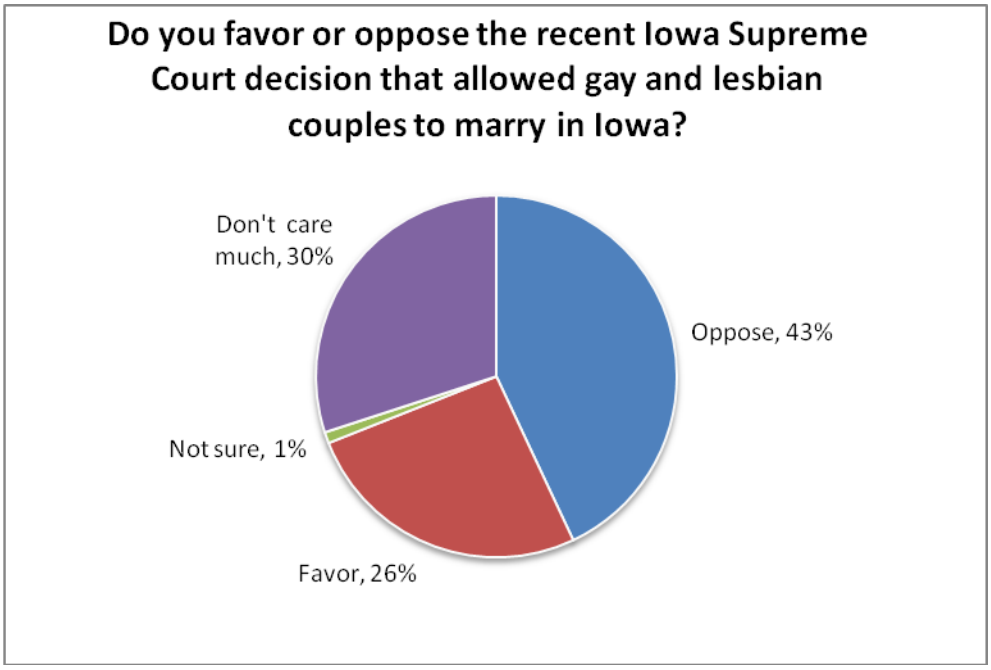


Figure 1.2. Souce: *Des Moines Register*, 2009.

However, in the same 2009 poll, a majority of voters said they would not base their retention vote of Supreme Court justices on the *Varnum* decision alone.

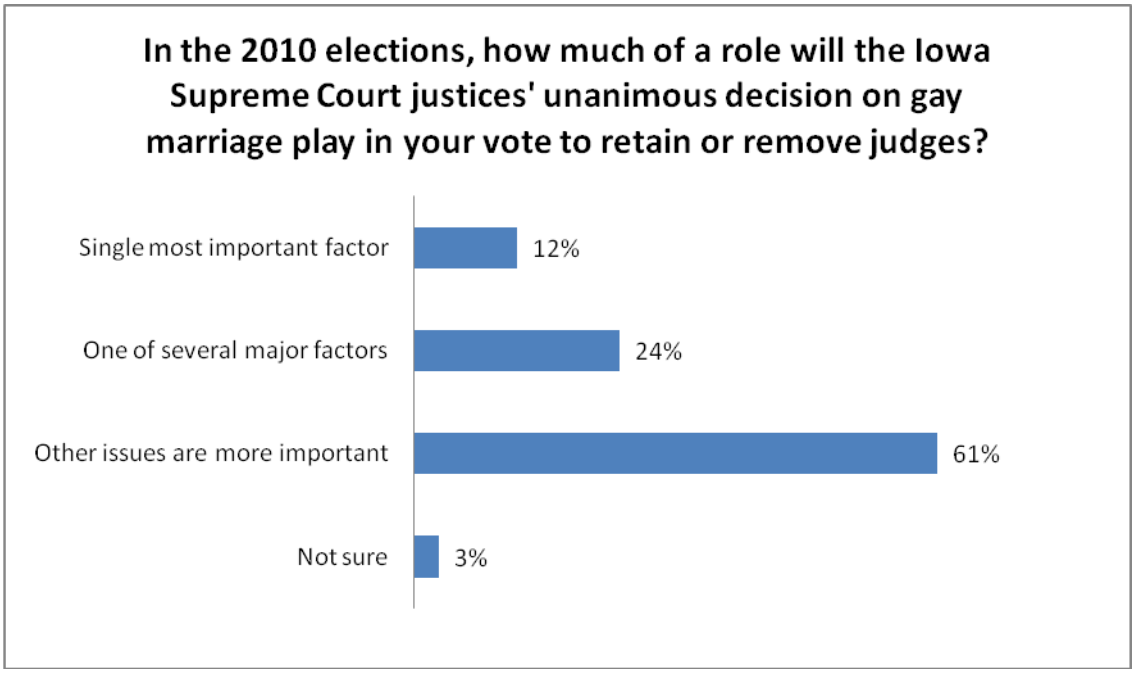


Figure 1.3. Source: *Des Moines Register*, 2009.

A year after *Varnum*, voters were asked what they wanted their representatives to focus on during a legislative period which was shortened due to 2010 budget cuts. In a February 2010 poll, Iowans ranked texting while driving more urgent and more deserving of the Legislature's limited time than same-sex marriage (*Des Moines Register*, 2010).

Despite the apparent voter apathy, Vander Platts ran a well-organized and well-funded campaign against the judges, arguing that they were too liberal and had been engaged in judicial activism. The organization was able to convince donors and voters that the Court's actions were wrong and mobilized citizens to vote 'no' against the judges.

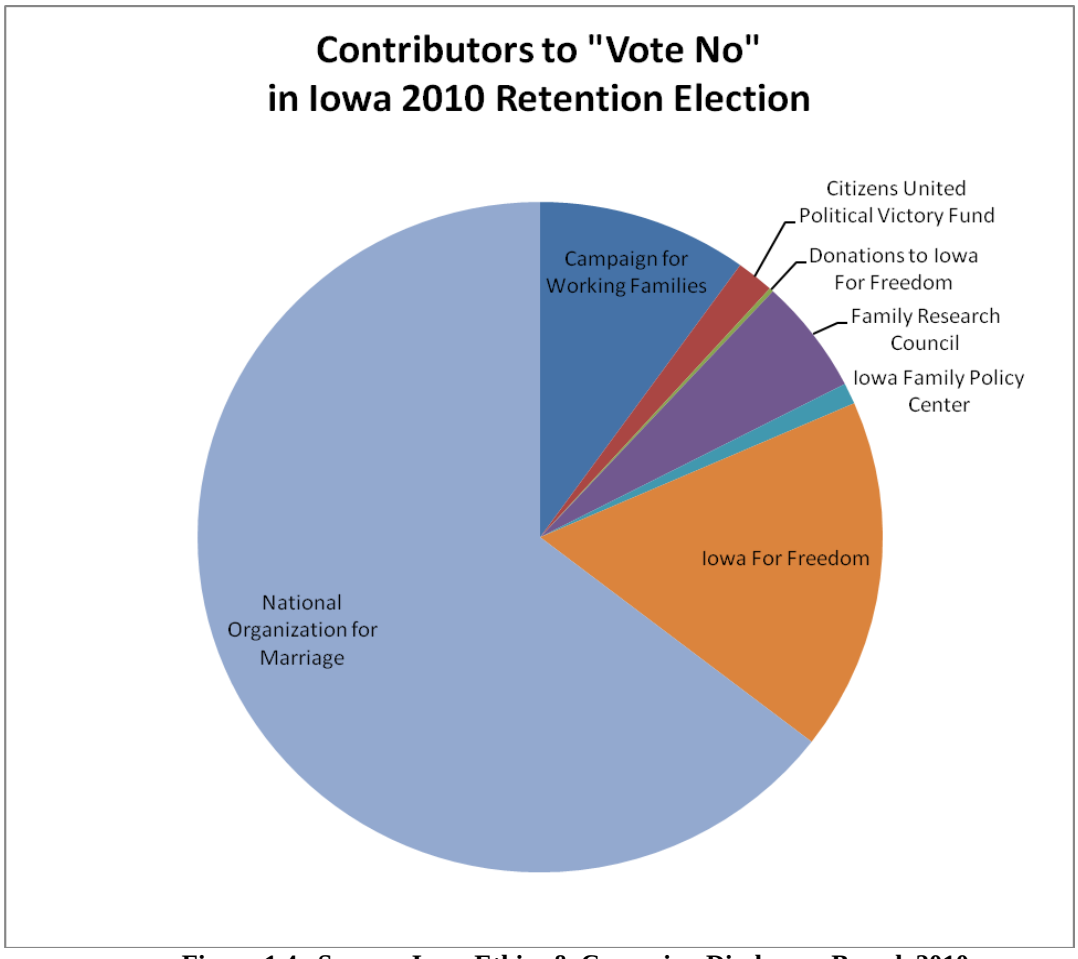


Figure 1.4. Source: Iowa Ethics & Campaign Disclosure Board, 2010.

Affirmative campaigns were developed too late to help the justices. Two former lieutenant governors, Republican Joy Corning (1991-99) and Democrat Sally Pederson (1999-

2007) formed the non-partisan organization called Justice, Not Politics (JNP) in response to the efforts of IFF and NOM. Leading up to the 2010 election, JNP focused on campaigning citizens to vote "yes" for the justices (Henderson, 2010). Despite relatively successful fundraising efforts, JNP could not keep up with the earlier and more ideological efforts of IFF and NOM.

Table 1.1. Contributions to Iowa's 2010 Supreme Court Retention Election.

Opposing retention	Amount
Campaign for Working Families	$100,000
Citizens United Political Victory Fund	$17,822.55
Donations to Iowa For Freedom	$2,000
Family Research Council	$55,996.63
Iowa Family Policy Center	$10,178.20
Iowa For Freedom	$171,225.54
National Organization for Marriage	$650,627.95
Total	**$1,007,850.87**
Supporting retention	Amount
Fair Courts for Us	**$423,766.35**

Source: Iowa Ethics & Campaign Disclosure Board, 2010.

Each justice received only about 45% of affirmative retention votes. Failing to meet the threshold of votes, the justices were forced to leave office December 31, 2010.

Because retention elections are not contested, there was no opposition campaign and incumbent judges often put forth very little time, money and other resources towards a positive campaign for themselves. It is well worth noting that these incumbent judges undertook little to no campaigning efforts, despite the massive campaign waged against them. This may be interpreted as judicial integrity or just keeping with tradition. Judges running in future retention elections may have to work harder to prove their worth on the bench.

Some scholars argue that the Iowa example proves that elections keep judges accountable. Minnesota Representative and 2012 GOP presidential-hopeful Michele Bachmann

recently lauded the actions of Iowa voters in a speech, praising "conservatives with sending a 'shot across the bow' to judges throughout the country" (Barr, 2011).

However, some scholars feel that this election has caused irreparable damage to judicial confidence. How can elected judges make decisions without an eye to public perception? Judges may be forced to choose between public support and what they believe is the right, legal decision. Justice, Not Politics is now focused on preserving the Iowan judicial selection method and citizen education about the virtues of the system.

With three of the seven seats now empty, the governor has the responsibility of appointing judges to the Iowa Supreme Court. However, the incumbent Democratic governor, Chet Culver, also lost his re-election bid to Republican challenger Terry Branstad, 43.3% to 52.9%. After consulting with the Iowa Judicial Nominating Commission, Branstad replaced the ousted justices with Edward Mansfield of the Iowa Court of Appeals, Bruce Zager who serves as a district court judge, and Thomas Waterman, a private attorney. In an appeal to the dissatisfied voters who rejected Ternus, Streit and Baker, Branstad stated that his selections will "faithfully interpret the laws and Constitution, and respect the separation of powers" (Boshart, 2011).

During the process of campaign disclosure, it became apparent that Thomas Waterman had contributed $7,500 to Branstad's gubernatorial campaign and $250 to the unsuccessful Attorney General campaign of Brenna Findley, who was later assigned as legal counsel for Branstad's administration and interviewed the judicial nominees. Waterman defends his actions by arguing that he merely wanted to encourage Branstad to run, and that there were no Supreme Court vacancies at the time of his contribution (AP, 2011, *Omaha World-Herald*). In the face of criticism, Branstad stated that private citizens have a right to contribute to the political process,

and that the contribution will not influence his decision (*Des Moines Register*, 2011). The three new justices and current Justice David Wiggins will face a retention election in 2012.

The actions of IFF have raised the expectation or created the opportunity that a more conservative court will reverse the same-sex marriage ruling. However, such a reversal would severely damage the legitimacy of the court system due to the idea that judges merely interpret – rather than create – the law. Bob Vander Plaats, the leader of NOM's campaign against the rejected Iowa justices, is now focused on reforming Iowa's judicial selection system to have initial elections of justices. He believes that citizens who oppose the *Varnum* decision will continue to campaign for the removal of the other four justices who supported the decision (Duffelmeyer, 2010). University of Iowa professor Timothy Hagle disagrees, pointing to the 2010 conservative swing, which was national in scope but most likely temporary. Hagle believes the 2009 *Varnum* decision will become more acceptable over time, and NOM's well-organized campaign may not benefit from the same leadership during future elections. In short, Hagle argues that Justice Wiggins will not be rejected as the justices were in 2010; voters "may be opposed to it personally and in favor of a constitutional amendment, but I don't think it's going to generate that enthusiasm" (Duffelmeyer, 2010). Seeing as a majority of Iowans have not noticed a change in their life due to the legalization of same-sex marriages, Hagle's hypothesis is most likely correct.

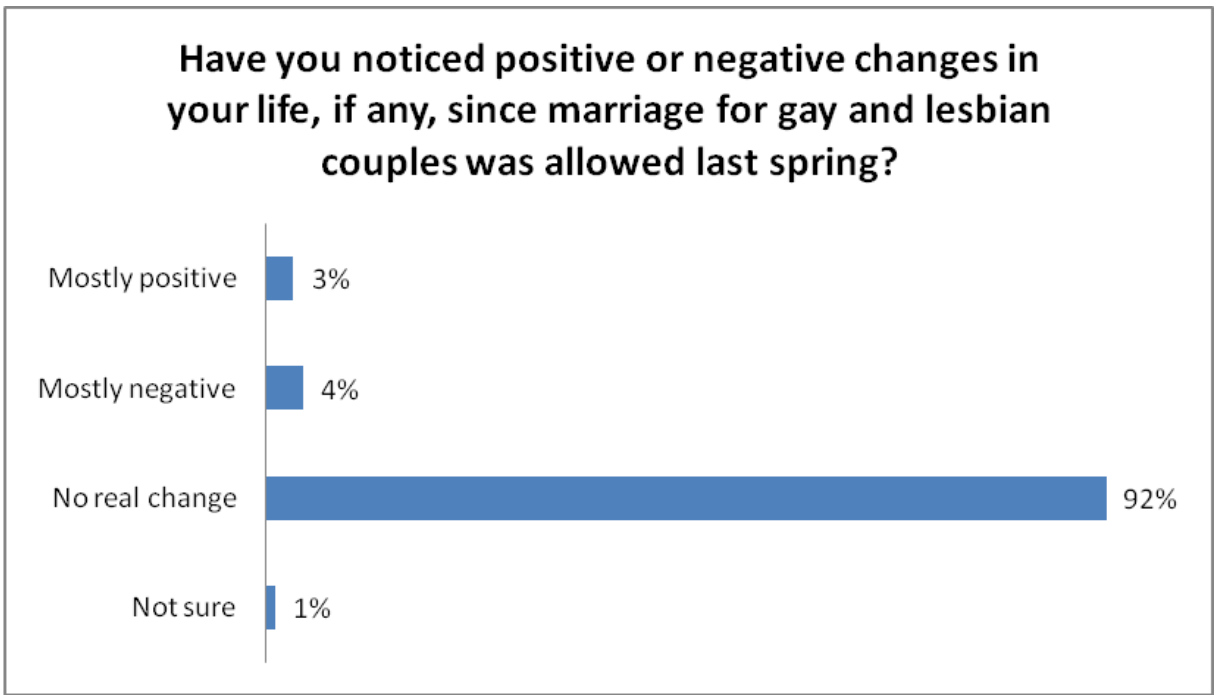


Figure 1.5. Source: *Des Moines Register*, 2009.

Former Republican National Committee member Steve Roberts, an attorney from Des Moines, also believes that the three remaining justices facing retention election in 2016 will most likely be safe from anti-*Varnum* sentiment (Duffelmeyer, 2010).

Additionally the judges will most likely be safe from legislative impeachment. In a 2011 poll, 43% of respondents who voted in the 2010 election voted to retain all three judges and 49% voted to reject all three judges (20/20 Insight, 2011). However, when asked if these same voters believed the remaining four justices should be impeached, 54% opposed impeachment compared to 36% support for it. When the interviewer defined the standard for impeachment under the Iowa Constitution ("misdemeanors or malfeasance"), 63% responded that the justices were not impeachable, compared to 17% who said they were (20/20 Insight, 2011).

Voters and officials including Tim Albrecht of Branstad's administration have discussed proposing a constitutional amendment banning same-sex marriage (similar to Proposition 8, approved in California during the 2008 election). On February 1, 2011, the Republican-

controlled Iowa House passed a constitutional ban on same-sex marriage, 62-37. However, the amendment must also pass the Senate, which is currently controlled by Democrats. Not only is the bill expected to receive little support, but also Senate Majority Leader Mike Gronstal has pledged to block the vote (Hancock, 2011). At the time of writing, the Senate has not voted on the amendment. If it succeeds, it must be passed by both houses a second time in 2013 in order to be placed on the next electoral ballot (Hancock, 2011).

Aftershocks

As will be explained further in forthcoming chapters, recent years have witnessed changes in speech and spending regulations that have dramatically altered the tone and tenor of judicial elections. West Virginia's experience with out-of-control spending actually led to less campaign finance regulation (as *Caperton* provided the basis for *Citizens United,* 2010). Wisconsin's 2008 experience with misrepresentative speech and negative campaigning was rightfully reported by the independent Election Commission, but six judges – three on the panel and three on the Supreme Court – chose to ignore the precedent Gableman may have set for future races and the deleterious effects such campaigning would have on the public perception of the judiciary. Iowa judges were penalized for joining opinions that protected minorities from public opinion (*Varnum* v. *Brien,* Iowa 2009). In the future, even a judge who faces retention elections will consider his job security before attaching his name to a possibly unpopular decision.

The examples of elections above may become the new norm of judicial races, threatening civility and impartiality, ultimately leading to an ethically compromised judiciary and a diminishing public perception of the judicial system's legitimacy (Sample, 2010). Others

suggest that the harmful effects may be outweighed by the benefits of competitive races, more political participation and a more democratic system (Bonneau & Hall, 2008). Regardless of normative preference, it is impossible to ignore the politicizing trend of judicial elections in the twenty-first century.

Chapter 2

The *White* Court Deregulates Campaign Speech

As explained in the Introduction, judicial elections have historically been tame events, with little spending, little voter information and low visibility. One of several explanations is the fact that judicial candidates were previously unable to offer information to voters due to strict regulations on campaign speech, recommended by the American Bar Association and enforced by individual state laws. However, *Republican Party of Minnesota* v. *White* (2002) marked a new direction in judicial elections by striking down a state law that had previously prohibited judicial candidates from announcing their views on legal issues during campaigns. *White* has increased and improved information available to voters, and while some argue that the change has strengthened the value of the judicial democratic election, the deregulation has also led to some unsavory campaigning by candidates who seek the bench.

"Speak Now or Forever Hold Your Peace"

During the first century of judicial elections, neither candidates nor incumbent judges faced campaign speech restrictions. They were free to discuss disputed legal and political issues, as well as party affiliations. However, judicial elections were not immune to the clean sweep of the Progressive period. In the early twentieth century, "elected judiciaries increasingly came to be viewed as incompetent and corrupt, and criticism of partisan judicial elections mounted" (*White*, 2002, p. 4, O'Connor dissenting). Progressives advocated reformation of the contemporary partisan judicial election system. In a 1906 speech to the American Bar Association, future dean of Harvard Law School, Roscoe Pound warned professionals that

"compelling judges to become politicians, in many jurisdictions, has almost destroyed the traditional respect for the bench" (Cady & Phelps, 2008, p. 352, quoting R. Pound).

In response, the American Bar Association adopted a Canon of Judicial Ethics in 1924. Within the Canon, the ABA proscribed certain behaviors on the campaign trail, including the "announce clause" which became the issue in *White*. The Announce Clause stated, "A candidate for judicial position ... should not announce in advance his conclusions of law on disputed issues to secure class support" (American Bar Association, 1924, p. 7). States are not bound to the ABA's recommendations and are free to adopt or adapt the canons as they see fit. As of *White* in 2002, 26 of the 31 states that select judges by election had adopted some version of candidate-speech restrictions similar to the "announce clause."[10]

Mum in Minnesota

Since Minnesota's admission to the Union in 1858, the state's judges have been selected by popular elections (Minnesota Constitution, 1858). These elections have been nonpartisan since 1912, an effect of the Progressive period. Since 1974, the "announce clause" of the Minnesota Supreme Court Canon of Judicial Conduct has prohibited judicial candidates and incumbent judges from announcing his or her views on disputed legal or political issues. This regulation was based on Canon 7(B) of the 1972 American Bar Association Model Code of Judicial Conduct and promulgated by the Minnesota Supreme Court. Violators could be penalized with probation, suspension without pay, disbarment, civil penalties, censure and removal from office.

[10] States without campaign speech restrictions similar to the announce clauses include Idaho (Code of Judicial Conduct, Canon 7, 2001); Michigan (Code of Judicial Conduct, Canon 7, 2002); North Carolina (Code of Judicial Conduct, Canon 7, 2001); Oregon (Code of Judicial Conduct, Rule 4-102, 2002). Except Idaho, each state has adopted a version of the pledge or promise clause. Alabama only restricts campaign speech for "pending litigation" issues, Canon of Judicial Ethics 7(B)(1)(c) (2002).

In 1996, attorney Gregory Wersal campaigned for associate justice of the Minnesota Supreme Court. While campaigning, he distributed literature criticizing the court's former decisions. The criticism spanned evidence law, legislative conflicts, and following US Supreme Court precedent regarding abortion regulations. The Office of Lawyers Professional Responsibility received a complaint about Wersal's campaign literature. He later withdrew his candidacy to protect his legal career. An investigation by the Minnesota Lawyers Professional Responsibility Board concluded that Wersal had not violated the announce clause and therefore he did not deserve disciplinary measures. Moreover, the Lawyers Board was unsure that the announce clause could be constitutionally enforced anyway, and the complaint was dismissed (*White*, 2002, p. 2).

Wersal decided to campaign again during the 1998 election and, seeking to avoid the possibility of future sanctions, he sought an advisory opinion from the Board. The Board indicated that it did not anticipate adverse action against him and again expressed doubt that the clause could be enforced. However, the Board could not offer Wersal a guarantee because the members did not know the content of the announcements that he planned to make (*White*, 2002, p. 3).

Wersal filed suit against the Minnesota Board of Judicial Standards, seeking an injunction against enforcing the announce clause after arguing that the clause violated the First Amendment. "Other plaintiffs in the suit, including the Minnesota Republican Party, alleged that, because the clause kept Wersal from announcing his views, they were unable to learn those views and support or oppose his candidacy accordingly" (*White*, 2002, p. 770). The District Court and US Court of Appeals for the Eighth Circuit found that the clause did not violate the First Amendment (*White*, 1999, 2001).

Supreme Court Strikes Down Minnesota's "Announce" Clause

In a heated 5-4 decision, the United States Supreme Court found that Minnesota's "announce clause" violated the First Amendment. Writing for the Court, Justice Scalia argued that the "announce clause" prohibited speech based on its content. Scalia also argued that the First Amendment is meant to protect and promote democratic values. Restricting a candidate from speaking about his or her beliefs and qualifications for elected office burdens the core of First Amendment freedoms.

The majority examined the "announce clause" under the strict scrutiny test, under which legislation must be narrowly tailored to serve a compelling state interest.[11] The Court found that the announce clause failed both parts of the test, as it was neither narrowly tailored nor serving a compelling state interest.

The Court sought to define the meaning of the text of the "announce clause": "a candidate for judicial office shall not 'announce his or her views on disputed legal or political issues' " (Minnesota Code of Judicial Conduct, 2002). The "announce clause" did not extend to promising to decide cases a certain way, as both the ABA Code and the Minnesota Code of Judicial Conduct included separate "promise" and "pledge" clauses. Rather, the "announce clause" was limited to describing the candidate's current views on issues.

Based on the test articulated in *Eu* v. *San Francisco County Democratic Central Committee* (1989, p. 222), the Court analyzed Minnesota's "announce clause" to determine if it was narrowly tailored. The Court found it "plain that the clause is not narrowly tailored […] indeed, the clause is barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues" (*White*,

[11] Scalia cites *Eu* v. *San Francisco County Democratic Central Committee* (1989, p. 222) as the basis of this test.

2002, p. 10). Respondents argued that the restriction only affected speech on issues likely to come before the court; however, Scalia found fault with this logic, as most issues that would matter to voters would be in the proper jurisdiction of the state court. Additionally, "there is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction" (*Buckley* v. *Illinois Judicial Inquiry Board*, 1993, p. 229).

However, respondents argued that criticism of past decisions was not allowed if the candidate stated he was also against the principle of *stare decisis*, or following legal precedents of past decisions (*White,* 2002, p. 6). Given the respondents' clarifications, the Court interpreted the "announce clause" to prohibit "a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions--and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*" (*White,* 2002, p. 765).

Respondents also tried to narrow the clause by allowing general philosophical discussions of case law, but as Scalia pointed out, legal jargon such as "strict constructionist" means little to voters (*White,* 2002, p. 6). Although petitioners alleged a violation of freedom of speech, respondents argued that even with this speech restriction, candidates were free to discuss many topics such as character, education, work ethics and "how [he] would handle administrative duties if elected" (*White,* 2002, p. 8). The Judicial Board went so far as to print a preapproved list of questions that judicial candidates may answer, including "how the candidate feels about cameras in the courtroom, how he would go about reducing the caseload, how the costs of judicial administration can be reduced, and how he proposes to ensure that minorities and women are treated more fairly by the court system" (*White,* 2002, p. 774, quoting Minnesota

State Bar Association Judicial Elections Task Force Report & Recommendations, App. C, June 19, 1997). The Court remained unconvinced that these examples would provide sufficient information for voters.

The Court next examined the "announce clause" to determine whether it served a compelling state interest. Minnesota argued that the state interest served by the announce clause was twofold, the reality and the impartiality of the state judiciary. The state offered several definitions of impartiality, but each failed. Respondents argued in favor of their government interests as protecting the due process rights of litigants under the 14th Amendment and preserving public confidence in the judiciary. However, the Court found that impartiality "may well be an interest served by the 'announce clause,' but it was not a *compelling* state interest, as strict scrutiny requires" (*White*, 2002, p. 11, emphasis in original).

Scalia explained that impartiality is the lack of bias regarding a party, rather than an issue, and distinguished between impartiality among parties and open-mindedness regarding issues (*White*, 2002, p. 10). A judge applies the law through his lens and applies his perspective on certain issues that require value judgments. He may have longstanding views on that issue, but his decision is not a result of bias for or against a particular party.

Additionally, as judicial candidates must be educated and experienced in the field of law, Scalia argued that it "is virtually impossible, and hardly desirable, to find a judge who does not have preconceptions about the law" (*Laird* v. *Tatum*, 1972, p. 835).

The Court also rejected the pursuit of impartiality and its appearance as the announce clause at issue is too under-inclusive to preserve open-mindedness (*City of Ladue* v. *Gilleo*, 1994, p. 52-53). Scalia pointed out that judges often vocalize an opinion on a disputed legal issue or a previously decided case during their career. It is very probable that a judicial

candidate would have already "announced" his or her view on a disputed issue in a previous legal decision, especially as the Minnesota Constitution requires legal and judicial experience before campaigning for a Supreme Court seat. This may have occurred in a judicial capacity – for example, if a judge issues a decision restricting worker compensation claims, a corporation may assume the judge is more supportive of employers. Alternatively, the candidate may have announced his or her view in a book or lecture, extrajudicial activities that both the ABA and the Minnesota Code of Judicial Conduct encourage (*White*, 2002, p. 13). Therefore, speech during a campaign represents a relatively small portion of the public speech that a judge may engage in over the history of his or her career. Contradicting this previous stance is most likely just as undesirable for potential candidates as is contradicting explicit campaign speech with a later decision. Additionally, voters have access to these decisions, so a judge's prior expressed views should not affect the impartiality of the judiciary or the appearance thereof. Scalia emphasized his argument of under-inclusivity by pointing out that while a judge may make a public statement about his views on same-sex marriage one day, the announce clause would prohibit him from making a similar statement the next day if he declared his candidacy for re-election (*White*, 2002, p. 13-14).

Minnesota argued that judicial campaign speech is "traditionally" limited. As the Court ruled in *McIntyre* v. *Ohio Elections Commission*, "a universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional" (1995, p. 375-377). Yet the restrictions on judicial campaign speech are neither universal nor long-standing, as they only came into effect in 1924 by way of the ABA's normative recommendations and only 26 states have such regulations in effect (*White*, 2002, p.

19-21). As such, the argument that the "announce clause" was universally and long-established failed to justify the burden on First Amendment rights of free speech.

Finally, Scalia argued that Minnesota must be consistent. Scalia's main point was that "there is an obvious tension between the article of Minnesota's popularly approved constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announce clause which places most subjects of interest to the voters off limits" (*White*, 2002, p. 787). Following previous jurisprudence, Scalia continued to state, "The First Amendment does not permit Minnesota to leave the principle of elections in place while preventing candidates from discussing what the elections are about" (*White*, 2002, p. 766).

Scalia strongly denounced the arguments of the dissenting minority as conflating their disapproval of judicial elections with the regulation at hand. He wrote, "The notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head" (*White*, 2002, p. 781). Scalia argued that elected officials have the right to express themselves, especially when communicating information to voters, for debating candidate qualifications is "at the core of our electoral process and of the First Amendment freedoms," not at the edges (*Eu*, 1989, p. 222-223).

Concurring Opinions

Associate Justice O'Connor concurred with Scalia's opinion, arguing that other states have insulated their judges from politics by using appointment or retention systems. As Minnesota decided to retain its contested popular election system, "the State has voluntarily taken on the risks to judicial bias described above. […] If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly

electing judges" (*White*, 2002, p. 792, O'Connor concurring). Justice O'Connor's concurring opinion acknowledged the desirable goal of impartial judges, as well as the awareness of elected judges that the public may disagree with some outcomes of the judicial process that may affect their reelection campaigns. However, Scalia correctly noted that these arguments are outside the bounds of the current issue.

Meanwhile, Justice Kennedy's concurring opinion acknowledged the importance of judicial integrity and the complexity of the judicial process, as well as the guidance that judicial conduct standards offer. "The State of Minnesota no doubt was concerned, as many citizens and thoughtful commentators are concerned, that judicial campaigns in an age of frenetic fundraising and mass media may foster disrespect for the legal system" (*White*, 2002, p. 794, Kennedy concurring).

However, Kennedy likened the announce clause to the Sedition Act of 1798 and the Court's decision in *New York Times Co.* v. *Sullivan* (1964, p. 274). In Kennedy's view, governmental restrictions on political speech "abridge the freedom of speech --not because the state interest is insufficiently compelling, but simply because content-based restrictions on political speech are expressly and positively forbidden by the First Amendment" (*White*, 2002, p. 795, Kennedy concurring).

Kennedy agreed with Scalia's contention that Minnesota cannot both elect their judiciary and restrict campaign speech. Instead, Kennedy suggested, "democracy and free speech are their own correctives" (*White*, 2002, p. 795, Kennedy concurring). He claimed that other attorneys, academics, the media and interest groups might use their own freedom of speech to protest unethical or inaccurate claims made by judicial candidates.

Kennedy also argued that effective campaigning – by either judicial or legislative candidates – would reach uninterested and uninformed voters, thereby strengthening democracy (*White*, 2002, p. 4, Kennedy concurring). Kennedy showed polite deference to states that choose to elect their judiciary, as he asserted, states maintain this right and many elected judges do not deserve the harsh condemnation delivered by the dissenting opinions.

Dissenting Opinions

The dissenting minority of the Court took more issue with the legitimacy of judicial elections rather than the campaign speech restriction at hand. Ginsburg enthusiastically condemned judicial elections, asserting her preference for an independent judiciary. Ginsburg made a valid point that although Minnesota decided to allow judicial elections, the state sought to maintain judicial integrity by designating elections as nonpartisan and limiting campaign speech. She argued that the policy-making potential of judges does not change the import of their intended independent role. Scalia offered the counterpoint that the idea of an independent judiciary does not square in America where "state-court judges possess the power to "make" common law, [and] they have the immense power to shape the States' constitutions as well" (*Baker* v. *State*, 1999).[12] In addition, Ginsburg argued that judges will be tempted by self-interest if unprotected by the "announce clause." Ginsburg supported the "announce clause" as an elected judge is put in a difficult position when ruling on an issue on which he had previously announced his view. She argued that the judge would have a "direct, personal, substantial, and pecuniary interest" in ruling consistently with his previously announced view, in order to reduce the risk that he will be "voted off the bench and thereby lose [his] salary and emoluments" (*White*, 2002, p. 814, Ginsburg dissenting).

[12] *Baker* legalized same-sex civil unions in Vermont, a precipitating factor to the wave of New Judicial Federalism.

However, this risk would exist in any election scenario, regardless of speech restrictions. The same principle applies to the interests of impartiality and appearance of impartiality in the public eye. Ginsburg's argument rested on the assumption that the public's faith in the judiciary diminishes when a candidate promises a certain judicial result if elected – but the "promise clause" is not at issue here (*White*, 2002, p. 4). Even if she was mistakenly referring to the contended but less intrusive "announce clause," Scalia's argument that judicial candidates most likely issued prior opinions on similar topics still stands.

Justice Stevens also wrote a dissenting opinion, arguing that a judge who announces his views during a campaign will be more reluctant to contradict them on the bench. However, Scalia took pains to highlight the differences between the "announce clause" and the "promise clause."

Legal Analysis and Lingering Questions

Importantly, Wersal was never sanctioned under the announce clause for his campaign statements. When considering the lack of actual damages, it is puzzling why the Supreme Court granted this case *certiorari*. Technically, Wersal lacked 'standing' in the case. Wersal's literature touched on disputed issues, but the Judicial Board decided that candidates could criticize past judicial decisions. The Lawyers Board's refusal to discipline Wersal had informally put his literature outside the reach of the "announce clause" before the US Supreme Court ruled the clause unconstitutional. However, the Supreme Court may have chosen to hear the case due to the strict attention that must be given to claims of First Amendment violations.

Scalia's arguments are sound, and he accurately perceives that the dissenting minority conflated the legitimacy and desirability of judicial elections with the specific regulation at issue.

Additionally, the minority, especially Stevens, assumed that a candidate's ability to discuss his views would completely replace a discussion of his qualifications for office. His argument was flawed as the conversation is not zero-sum, and as Kennedy pointed out, others would use First Amendment freedoms to discuss relevant issues fully.

Ginsburg based her argument on the due process clause of the 14th Amendment despite Scalia's counterpoint that the 14th Amendment has coexisted with judicial elections since its creation. According to Scalia, elected judges must always consider a possible disagreement with their constituents, regardless of whether they have announced their views beforehand. Scalia reduced Ginsburg's argument to a condemnation of judicial elections in general, thereby discrediting her argument opposing the "announce clause."

Despite the apparent conflation of issues in the minority, Scalia's own argument was not flawless. In an *ad hominem* attack against the ABA, he disregarded their reasoning or history for recommending nonpartisan or retention elections, as well as their recommended Model of Judicial Conduct. He accuses them of bias, calling them "longstanding opponent of elections," as if the ABA's opposition to elections is unwarranted or lacking logical and substantive reason (*White*, 2002, p. 21).

One counterpoint is that campaign speech differs from this previously and widely available public speech as it is more accessible to and directed at voters, during a time when voters are paying most attention to candidates. In this way, one might think that the "time, place and manner" restrictions that apply to First Amendment protection of free speech may apply to this kind of campaign speech. However, constructing such a restriction must be content-neutral, narrowly drawn, serving a significant government interest and leaving open alternative channels of communication. Thus, the application of this loophole may prove impossible, as not only

would alternative channels of communication be unavailable, but also Scalia has already established that the stated government interest is not compelling.

Side Effects May Include…

Scalia was clear to state that *White* decision only decided the constitutionality of Minnesota's announce clause, and did not touch upon the "pledge and promise clause," as it still stands. However, many states began revising their codes for judicial conduct following this announcement. Post-*White*, twenty-four states have reevaluated their own judicial campaign speech standards, hoping to avoid a potential lawsuit.[13] Some states have clarified their codes' "announce clause" to fit the standard presented in *White*, some have abolished these clauses, and some have eliminated judicial campaign speech regulations altogether. "*White*'s sweeping language led to the examination of other ethical restrictions upon certain kinds of judicial speech" (Sparling, 2007, p. 73). Even the ABA has revised its Code. In February 2007, the ABA released their revised code in reaction to the *White* decision, "The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges" (Harrison, 2007).

For example, in Georgia, a guideline that proscribed judicial candidates from using or participating "in communication which he knows is false, fraudulent, misleading, deceptive, or misrepresentative" was struck down (*Weaver* v. *Bonner*, 2002). The United States Court of Appeals Eleventh Circuit did not find the guideline narrowly tailored, based on the strict scrutiny test and the importance of judicial speech as emphasized in *White*.

Two years later, the Mississippi Supreme Court held a restriction on extrajudicial speech in a non-judicial setting unconstitutional. Regardless of the benefit that may grow from public

[13] These states include Alabama, Arkansas, California, Georgia, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, North Carolina, North Dakota, Pennsylvania, Ohio, Oregon, Texas, and Washington.

perception of judicial impartiality, Mississippi Supreme Court reasoned that by lifting this restriction, citizens would be better able to know who was judging them and effectively "spot the crocodiles" (*Mississippi Commission on Judicial Performance* v. *Wilkerson*, Miss. 2004, p. 1016). Sparling argues that *White* was "the catalyst for the invalidation of other rules of ethical conduct, which sought to sustain public confidence in an impartial judiciary by restricting speech and actions of judges and judicial candidates" (2007, p. 61).

Each set of actions is gradually leading to an increasingly political state of judicial elections (Caufield, 2007, p. 40). Removing content-based speech restrictions allows both candidates and outside interest groups to wage complex, issue-driven campaigns. *White* did not attempt to address the legitimacy or desirability of judicial elections as opposed to appointment systems; the Court's majority merely held Minnesota's announce clause in violation of the First Amendment. The Court's logic is convincing, and although Scalia fails to address the effect that speech deregulation will have on future elections, concurring opinions by O'Connor and Kennedy acknowledge the political affect of the Court's decision. The *White* decision has already affected state courts, but the full extent is not yet determined and must be considered with other conditions that are changing the direction of judicial elections as a subject of further study.

Statistical analysis of competitive races has suggested that the *White* variable is not statistically significant as far as attracting more challengers to judicial races. Authors Bonneau and Hall write that their study indicates "that races are not more likely to be contested after the *White* decision…. the decision did not have the dramatic impact purported, at least from the perspective of the propensity of challengers to take on incumbents" (Bonneau & Hall, 2008, p. 466).

However, it would be a mistake to conflate a lack of increased competition with the presence of civil campaigning. Developing research strongly suggests that by removing campaign speech regulations, the *White* Court has affected speech, media, and incivility during campaigns.

Table 2.1 below is replicated from Rachel Caufield's study of campaign speech after several states revised their judicial conduct codes in response to *White*. Caufield categorizes states into "broad" and "narrow" interpretations, based on whether and how the state revised its judicial code of conduct following *White*. A state is classified as "broad" if the state supreme court or state commission voluntary issued a statement that other speech restrictions would be held unconstitutional or amended the code to eliminate restrictions (Caufield, 2007, p. 42). In contrast, states that "issued any advisory opinion or ruling arguing that existing speech restrictions were permissible under *White*" were classified as narrow (Caufield, 2007, p. 42). As seen below, although the difference in attack ads is insignificant, the difference in contrast ads is drastic.

Table 2.1 – Tone of Judicial Ads in 2004, by Interpretation of *White*

Interpretation	States	Average percentage of ads promoting a candidate	Average percentage of ads attacking the opposing candidate	Average percentage of ads contrasting candidates
Broad	Georgia, Michigan, Oregon	45.4	8.6	46.0
Narrow	Alabama, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, Nevada, New Mexico, North Carolina, Ohio, Washington	86.0	8.2	16.5

Source: Caufield, *Running for Judge*, 2007, p. 51.

However, Caufield's analysis of which issues judges are more likely to discuss post-*White* seems to indicate that judicial candidates under a broad selection are actually more likely to discuss traditional qualifications and less likely to criticize past decisions.

Table 2.3 – Percentage of ad airings using issues or themes, by interpretation, 2004								
Interpretation	State	Traditional	Civil Justice	Criminal Justice	Special Interests	Criticism of decisions	Family values	Attack ad (No theme)
Broad	Georgia, Michigan, Oregon	57.4	54.1	24.7	8.5	8.6	27.1	0.0
Narrow	Alabama, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, Nevada, New Mexico, North Carolina, Ohio, Washington	29.2	19.7	33.6	5.4	9.2	25.1	1.4
Source: Caufield, *Running for Judge*, 2007, p. 53.								

At first, Caufield's results seem counter-intuitive. Post-*White*, judicial elections were expected to become more negative and topic-based, especially in states that interpreted the case broadly and revised their code accordingly. However, Caufield's further breakdown of the ads reveals a clearer picture of the effects of *White* in the short term. Table 2.3 indicates a trend of attack ads for criminal justice, special interest and *stare decisis* issues for both groups of states. It is also important to note that ads are more likely to promote traditional qualities in states with a narrow interpretation of *White* (40.3% compared to 8.7% for states with broad interpretations), and ads are more likely to promote a criminal justice record in states with a broad interpretation of *White* (91.3% compared to 23.2%).

Table 2.3 – Percentage of ad airings using issues or themes, by tone and interpretation, 2004								
Interpretation	Tone	Traditional	Civil Justice	Criminal Justice	Special Interests	Criticism of decisions	Family values	Attack ad (No theme)
Broad	Promote	8.7	9.2	91.3	0.0	0.0	68.2	0.0
	Attack	0.0	0.0	99.0	99.0	100.0	1.0	0.0
	Contrast	100.0	0.0	0.0	0.0	0.0	0.0	0.0
Narrow	Promote	40.3	11.4	23.2	0.1	2.8	39.1	0.0
	Attack	0.0	65.7	57.0	38.1	63.9	6.9	0.1
	Contrast	49.2	42.8	12.6	30.2	20.3	15.9	0.2
*****Percentages may exceed 100% if an ad has multiple characteristics. Source: Caufield, *Running for Judge*, 2007, p. 54.								

Caufield concludes that states that have revised their judicial conduct codes using a broad interpretation of *White* will see more issue-based than traditional discussion. Regardless of one's opinion of the proper balance between judicial accountability and independence, this data suggests that judicial elections are poised to become more political.

Long-Term Consequences

Advocates for the changes in campaign speech regulation praise Scalia's logic in *White* and his point that "state-court judges possess the power to "make" common law" (*Baker* v. *State*, 1999). Sparling calls elected judges "political beings in form and function" (2007, p. 61). However, there is also an inherent danger in allowing this political freedom. Sparling argues that by creating incentives and pressures for judicial candidates to discuss disputed legal issues, *White* "dramatically redefines basic conceptions of the judge and the judicial function" (2007, p.72). This redefinition is witnessed in four ways. First, the candidates engage in more political speech and conduct. Second, *White* acknowledges the political considerations of judicial selection and the judicial process. Although this may seem like an obvious consideration, judges have historically attempted to hold themselves above politics, and interpret the law as a superior and clearly understood set of guidelines, rather than admitting that human perspective and bias

play a role in the judicial process. Therefore, acknowledging the political considerations of selection methods is a significant new direction in the United States judicial system. Third, the changed speech regulations also acknowledge a judicial candidate's pre-existing preferences and notions regarding legal and social issues. Fourth, by granting the public the right to know a judicial candidate's opinions on any topic, political considerations are infused into the judicial process. As stated earlier, judges are no longer "apolitical or objective arbiters of law," they are just additional politicians (Sparling, 2007, p.73).

These regulations may help in the long run, as incumbent judges can fairly represent their record rather than be defenseless to attack ads from special interest groups (JAS, "Judges," 2001). Democratic elections require electoral information to make informed decisions, and even negative campaigns have helped to accomplish this goal in legislative and executive campaigns. However, the question remains unanswered whether the judicial role is or should be inherently different than the legislative and executive roles. While the dissenting minority argued that *White* is a move towards more politicized judicial elections, Scalia wrote that *White* serves to "neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office" (*White,* 2002, p. 783). Still, the possible negative effects on the public perception of the judiciary are undesirable. The most significant data missing from this analysis is how the changed speech regulations have affected public perceptions of the courts. Despite vast quantitative research on other factors, data for this purpose – a rather central question given the normative debate over judicial selection methods – is yet unseen.

Chapter 3

Buying Votes and Buying Decisions

"I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race." -- Ohio Supreme Court Justice Paul Pfeifer[14]

As Ohio Supreme Court Justice Paul Pfeifer said regarding judicial elections, "Everyone interested in contributing has very specific interests. They mean to be buying a vote" (Liptak, 2006). Pfeifer is among many judges and legal scholars who believe that the recent explosion of campaign spending in judicial elections is damaging the reputation and appearance of the independent judiciary. Chief Justice of the Texas Supreme Court Wallace Jefferson also warns about the "day of reckoning." "When you appear before a court, you ask how much your lawyer gave to the judge's campaign. If the opposing counsel gave more, you are cynical" (Jefferson, 2009).

Arguments opposing judicial elections often include:

- Private donations are overwhelmed. Individuals who are not able to contribute *significant* sums of money often have less effect than corporations and organizations that amass and contribute larger sums of money (Sample, 2010, p. 9).
- Escalating prices affect everyone. If large corporations increase their campaign contributions, plaintiffs' lawyers and organized labor unions must attempt to match these sums, and vice versa. Both sides lock into a fundraising arms race (JAS, "Business, 2007).

[14] Liptak, 2006.

- Less qualified candidates, or less competitive elections. Well-qualified candidates may not receive the funding they need or may be outspent by less qualified candidates who have political or business connections. Alternatively, well-qualified candidates may not want to go through the hassle of fundraising, which requires not only time away from their previous occupation but also involves heavy media scrutiny.
- Unfavorable opinion of the judiciary. Even if there is no actual conflict of interest, public opinion can be swayed by campaign contributions.

However, others believe that increased campaign spending can be beneficial to the system. At the least, these advocates stress that on average, judicial candidates still raise and spend far less money than legislative or executive candidates do. Bonneau and Hall (2008) highlight several benefits, including:

- More opportunities for incumbent judges or judicial candidates to advertise their views or defend themselves from criticism.
- Campaign spending allows opportunities for actual campaigning, rather than relying on a likeable name or a party cue for a voter to vote affirmatively.
- Voters are more aware and informed about their choices. Voter education plays a fundamental role in the democratic system.
- Lower ballot roll-off, as citizens cast votes for "down ballot" candidates. The higher the voting rate for the judge, the more legitimate the result as more votes represent more citizen choices.
- Higher participation in elections, leading to an overall better judicial system based on judicial accountability.

- More open system, because candidates can mobilize voters rather than rely on political connections to secure an appointment.

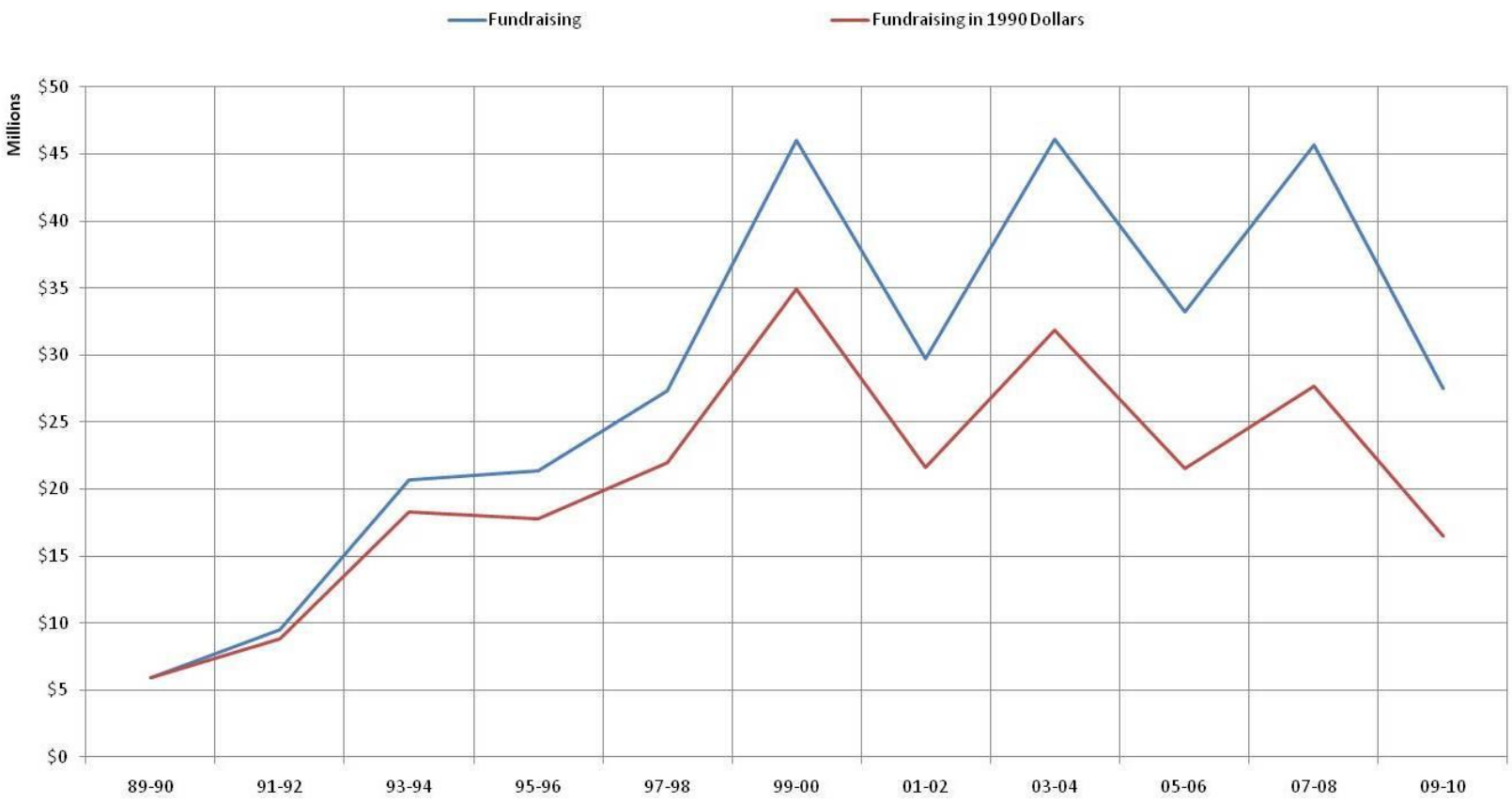
National Overview

Before analyzing the merits of increased fundraising, it is imperative to examine the extent of increased spending. Table 3.1 lists fundraising amounts over time, in nominal and real amounts. Figure 3.1 illustrates this change over time graphically. There has been a substantial increase in spending compared to the increase in the consumer price index. While the inflation rate from 1989 to 2008 is 39.3%, fundraising increased 366% from 1989-1990 to 2007-2008 (National Institute on Money in State Politics [NIMSP], 2010). Overall decade candidate fundraising increased by 89% (NIMSP, 2010). Between the 1997-1998 cycle and the 1999-2000 cycle alone, fundraising in real dollars increased by 59%.

Table 1. State Supreme Court Fundraising, 1989-2008

Election Cycle	Fundraising	Fundraising in 1990 Dollars
1989 – 1990	$5,935,367.00	$5,935,367.00
1991 – 1992	$9,502,350.00	$8,852,153.56
1993 – 1994	$20,728,646.00	$18,280,931.39
1995 – 1996	$21,378,007.00	$17,808,193.21
1997 – 1998	$27,359,316.00	$21,937,807.37
Decade Total	**$84,903,686.00**	**$72,814,452.53**
1999 – 2000	$45,997,238.00	$34,911,957.07
2001 – 2002	$29,738,006.00	$21,605,099.41
2003 – 2004	$46,108,547.00	$31,902,525.64
2005 – 2006	$33,238,379.00	$21,548,889.56
2007 – 2008	$45,650,435.00	$27,712,163.11
Decade Total	**$200,732,605.00**	**$137,680,634.79**

*Judicial election cycles are typically grouped with the odd year first as few states hold elections in odd years and they indicate the build-up to the national election cycle.
**2009-2010 election cycle is not calculated here to ensure consistent decade calculation. 2009-2010 amounts are $27,550,966.00 and $16,513,775.22 (1990 dollars).
(Source: National Institute on Money in State Politics.)



*Figures do not include non-contribution income, interest income, public funding, loan repayment, refunds or reimbursments or non-party spending.

** Of 38 states with judicial elections, 26 states experienced candidate fundraising since 1989. These states are reflected here. They include Alabama, Alaska, Arkansas, California, Florida, Georgia, Idaho, Illinois, Kentucy, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, New Mexico, Nevada, Ohio, Oregon, Pennsylvania, South Dakota, South Dakota, texas, Washington, Wisconsin, West Virginia.

Figure 3.1. Source: National Institute on Money in State Politics.

In the last twenty years, candidate fundraising has increased dramatically. NIMSP reports that in the 1989-90 cycle, candidates fundraised $5.9 million, but by 1995-96, that number had increased to $21.4 million (or $17.8 million in 1990 dollars). Continuing its upward surge in the 1999-2000 cycle, judicial candidate fundraising reached its peak with $45.9 million ($34.8 in 1990 dollars). The 2000s have witnessed steady spending, averaging $36.4 million per election cycle (an average of $23.8 million in 1990 dollars; NIMSP, 2010). However, it is important to note that this increase in spending is not occurring in all states, or in each kind of election. Twelve of the 38 states that hold judicial elections experienced no candidate fundraising in the last ten years, all of which hold only retention elections. Four additional states experienced less than $100,000 in candidate fundraising over the course of the decade; three of these states hold retention elections and one holds non-partisan elections. The varying spending trends will be explored later in this chapter.

Reforms, Amendments and Surprise Rulings

The Federal Election Campaign Act of 1971 was Congress' first attempt at controlling federal campaign contribution disclosure. In 1974, despite President Gerald Ford's veto, Congress passed significant amendments that created the Federal Election Commission and legally limited campaign contributions from individuals. Politicians including former Senator James Buckley (Conservative Party-NY) challenged the amendments in court under the First and Fifth Amendments, listing former Secretary of the Senate Francis Valeo as the primary defendant. In 1976, the U.S. Supreme Court granted *certiorari* to the first case of many regarding campaign contributions (*Buckley* v. *Valeo*, 424 U.S. 1, 1976).

In January 1976, the Court returned a *per curiam* decision – a *per curiam* decision is usually brief and reflects the opinion of the Court through collective and anonymous action, although Justices may issue signed concurring and dissenting opinions. In *Buckley*, the *per curiam* opinion issued was unusually lengthy with the eight participating Justices joining (Justice John Paul Stevens did not participate due to his appointment in December 1975). Chief Justice Warren Burger, Justices Byron White, Thurgood Marshall, Harry Blackmun and William Rehnquist each issued special concurring opinions in which they dissented in part.

Together, the opinions served to expand the traditional interpretation of First Amendment rights of free speech and association to include including campaign contributions. The Court upheld the amendment's provisions on individual contributions, disclosure and reporting requirements and public financing. However, they found the limits for campaign expenditure, independent expenditures by individuals or groups, and candidate expenditures benefitting his own campaign unconstitutional (*Buckley*, 1976). As the appellants had filed under the First and Fifth Amendments, the Court examined the amendments under the strict scrutiny test, which requires legislation to be narrowly tailored to serve a compelling government interest. The Court found that there was no compelling government interest to justify the severe restriction on political speech (*Buckley*, 1976).

Buckley set the precedent of protecting campaign contributions from individuals and organizations. As the Supreme Court continued to expand the right to contribute to political campaigns, the Court eventually granted these same rights to corporations in *Citizens United* v. *Federal Election Commission*, 588 U.S. ___, 2010).

Buckley influenced both election institutions and individual campaigns. Although *Buckley* was a federal case and the Federal Election Campaign Act was a federal measure, these

developments substantially influenced state elections as well. The Fourteenth Amendment requires states to recognize all rights and privileges granted to citizens by the federal government – states may choose to expand these rights but never restrict. Therefore, any state requirements in place limiting contributions or expenditures must be reconsidered with *Buckley* in mind, and include campaign contributions as an expression of free speech and association and adjust their election systems accordingly. Although *Buckley* was decided in 1976, decades passed before the political aftershocks of self-funded candidates and special-interest-group expenditures began affecting judicial elections. With the combination of *White* and New Judicial Federalism, courts have finally been thrown in the midst of the perfect storm of politicization.

Like a Good Neighbor, State Farm spends $1.3 million on a judicial candidate

Illinois' 2004 Supreme Court campaign not only set the record for the most expensive two-candidate judicial election in United States history, but the total "was almost identical to the combined estimate of the amount raised for all races nationally just 12 years earlier" (Sample, 2010, p. 16). Illinois Appellate Judge Gordon Maag and then-circuit Judge Lloyd Karmeier collectively raised $9.3 million, primarily from corporations and plaintiffs' lawyers (NIMSP, 2010). Importantly, the race was not statewide, but only open to 1.3 million residents in the rural Fifth District (U.S. Census, 2010). In other words, candidates fundraised approximately $7.15 per citizen.

As shown in Table 3.2, the 2004 campaign contributions were an anomaly for Illinois Supreme Court races.

Table 3.2 – Illinois Supreme Court Campaign Finance, 1990 – 2010.

Year	Total spending	Spending per district	Spending per candidate	Winner Average	Districts	Candidates
1990	$1,380,391	$460,130	$125,490	$197,863	3	11
1992	$1,949,704	$649,901	$114,688	$314,261	3	17
1994	$0	$0	$0	$0	1	1
1996	$0	$0	$0	$0	0	0
1998	$0	$0	$0	$0	0	0
2000	$8,274,624	$2,068,656	$689,552	$1,021,074	4	12
2002	$2,075,522	$1,037,761	$518,881	$996,359	2	4
2004	$9,366,085	$9,366,085	$4,683,043	$4,802,119	1	2
2006	$1,248	$0	$0	$0	0	0
2008	$1,154,470	$1,154,470	$1,154,470	$1,154,470	1	1
2010	$2,746,479	$915,493	$686,620	$1,360,246	3	4

*Dollar amounts in stated year value.
**In 1994, one justice ran for retention and reported no fundraising. There were no elections in 1996 and 1998. In 2006, one justice who was not running raised $1,248.
(Source: National Institute on Money in State Politics.)

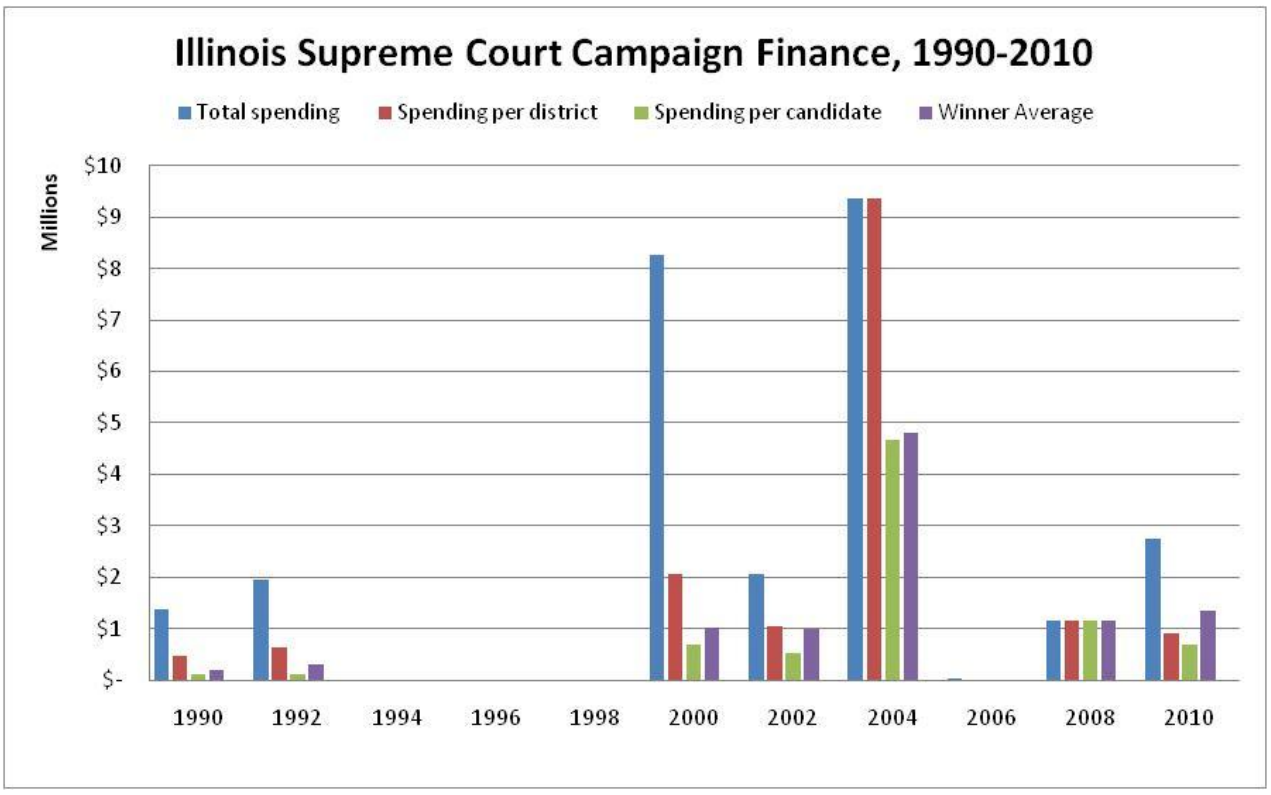


Figure 3.2. Source: National Institute on Money in State Politics.

Figure 3.2 illustrates that although Illinois' 2000 race also witnessed extraordinary spending (nearly $8.3 million), this total was split among twelve candidates competing for four seats. Average candidate fundraising in 2000 totaled just under $700,000 each, in contrast to average candidate fundraising of over $4.6 million each in 2004.

Karmeier won the election, 54% to 46%, after raising over $4.8 million for his own campaign. He later stated to reporters: "[$9.3 million] is obscene for a judicial race. What does it gain people? How can anyone have faith in the system?" (O'Connor, 2008, p. 46). However, the controversy did not end on Election Day. In May 2003, the Illinois Supreme Court had heard oral arguments for *Avery* v. *State Farm Mutual Automobile Ins. Co.* (Ill. 2001), a class-action lawsuit against State Farm for breach of contract and consumer fraud, but was left as pending throughout the 2004 election.

State Farm Insurance and its affiliates contributed over $1.3 million to Karmeier's campaign. Karmeier also received more than $2 million from the U.S. and Illinois Chambers of Commerce, $515,000 from the American Tort Reform Association and other contributions from additional insurance and medical providers. Meanwhile, Maag received his primary support from plaintiffs' lawyers and the Democratic Party.

Although Karmeier called these amounts "obscene" after winning the election, he refused calls for his recusal in *Avery* (Sample, 2010, p. 57). In August 2005, Karmeier cast the decisive vote in a 4-3 decision to reverse the $1.05 billion verdict of breach of claims against State Farm (835 N.E.2d 801, Ill. 2005). Avery petitioned the U.S. Supreme Court for review, arguing that the Fourteenth Amendment's Due Process Clause had been violated by Karmeier's involvement (Petition for *Certiorari*, 05-842, 2005). In March 2006, the Supreme Court denied *certiorari*

(126 S. Ct. 1470, 2006).[15] Although the case had been settled legally, critics continue to speak out against Karmeier. "The juxtaposition of gigantic campaign contributions and favorable judgments for contributors creates a haze of suspicion over the highest court in Illinois…. Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt over every vote he casts in a business case" (*St. Louis Post-Dispatch,* 2005, p. B8).

Mileage May Vary

Not all judicial elections are created equally. There were 434 judicial elections in the past decade with 780 judicial candidates or incumbent judges. 621 candidates raised money for their campaign. Given the sheer mass of information within each state, it is a challenge to find accurate and complete data. The National Institute on Money in State Politics offers reliable data on judicial campaign fundraising; however, even their records are not all-inclusive. All amounts regarding candidate spending herein exclude party spending, non-contribution income, interest income, public funding, repayment of loans, refunds, reimbursements, contributions collected in years other than election years or independent expenditures.

Different types of elections can expect to raise vastly different sums of funds.

[15] However, recusal standards were later addressed by the U.S. Supreme Court in *Caperton* v. *Massey* (2009, p. 2252), discussed in Chapter 1.

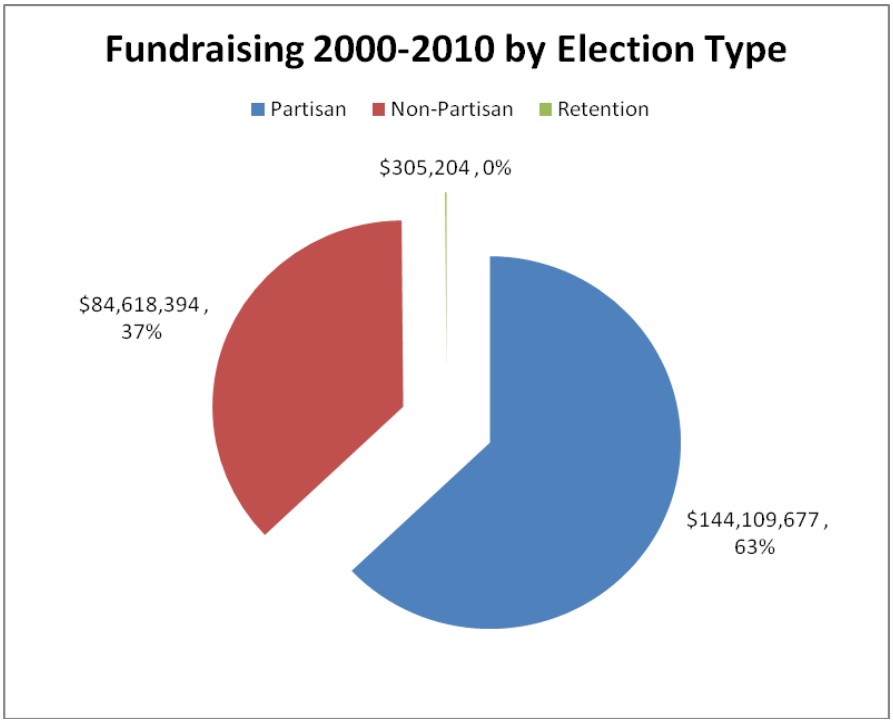


Figure 3.3. Source: National Institute on Money in State Politics.

Partisan elections, criticized as the most political of selection methods, experience more candidate fundraising than either non-partisan elections or retention elections (NIMSP, 2010). 63% of candidate fundraising from 2000-2010 was in the eight partisan-election states (of 38, or 21% of, states that elect judges). Partisan elections dwarf non-partisan and retention elections in both total and average fundraising per race.

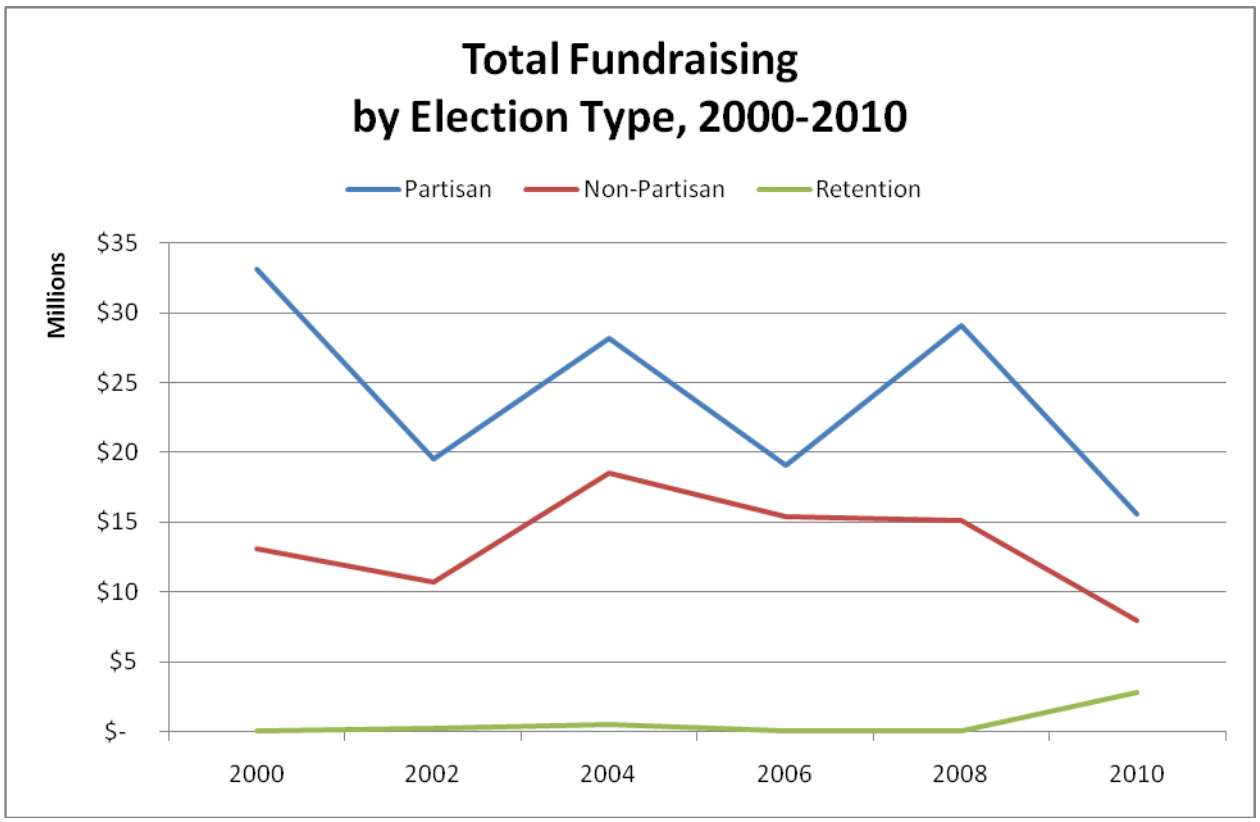


Figure 3.4. Source: National Institute on Money in State Politics.

However, as Figure 3.4 illustrates, partisan spending is not consistent. While the other two kinds of elections show steady trends, partisan elections fluctuate dramatically, increasing 50% or more in presidential election years.

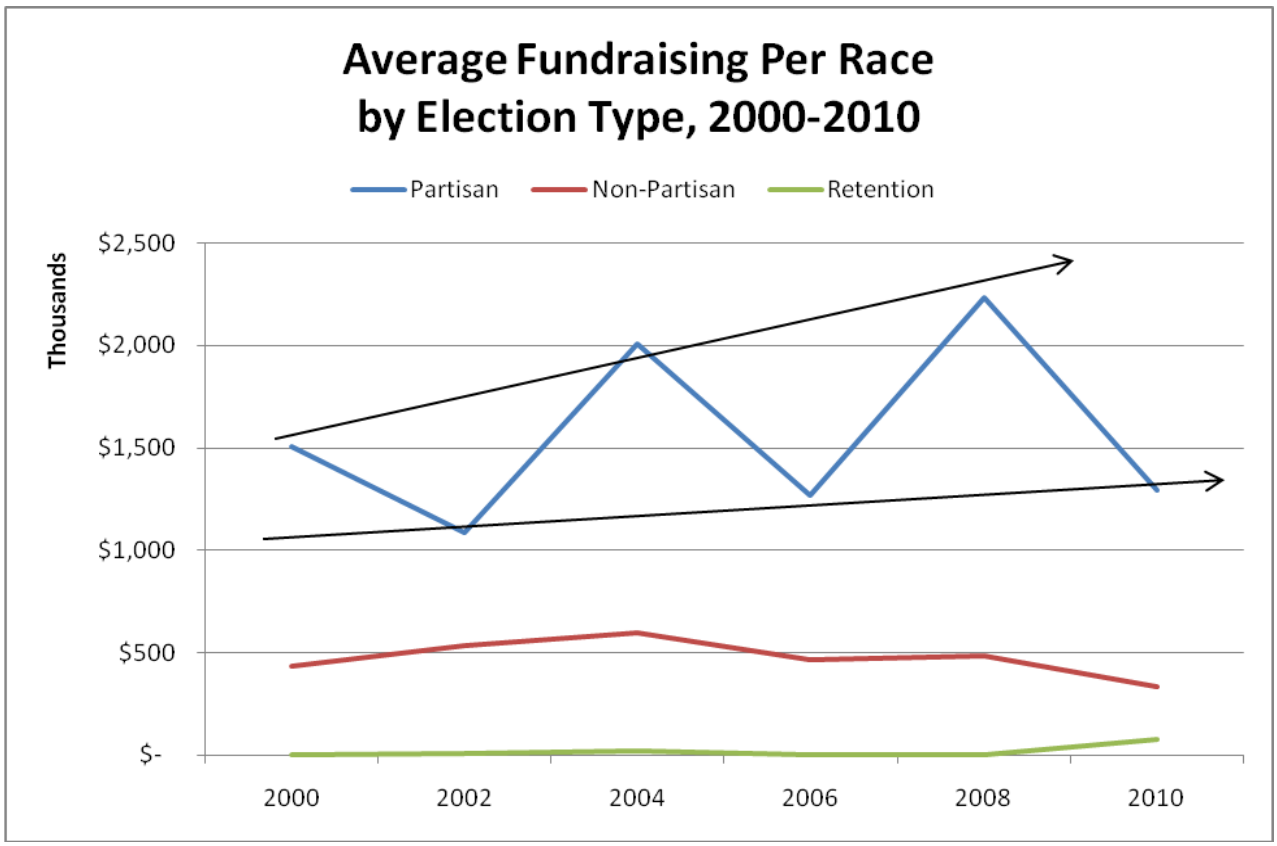


Figure 3.5. Source: National Institute on Money in State Politics.

When total spending is divided by the number of open seats, or races, in a given year, sorted by type, the result is more suited to expectations. Retention elections fundraising remains very low, despite a slight spike in 2010. Of 37 retention elections in 2010, only one candidate raised funds: Illinois Supreme Court Justice Thomas Kilbride raised $2.8 million for an unopposed campaign. Non-partisan elections seem to have decreasing trend. And as the black arrows indicate, there is a general upward trend with partisan elections, regardless of presidential or mid-term election year. In contrast, the general upward trend is not a satisfying explanation for why fundraising has so much variance in certain years. Table 3.3 attempts to explore partisan elections in the last decade further to determine why spending in certain years was so much higher.

Table 3.3 – Partisan elections by candidates, competitiveness and fundraising, 1999-2000				
Year	Open seats	Candidates	Candidates / Seats	Fundraising totals
1999-2000	22	59	2.68	$33,156,912
2001-2002	18	50	2.78	$19,570,173
2003-2004	14	39	2.78	$28,147,808
2005-2006	15	36	2.40	$19,049,668
2007-2008	13	35	2.69	$29,077,007
2009-2010	12	38	3.16	$15,537,562
Source: National Institute on Money in State Politics.				

The table above poses a conundrum. Candidate fundraising totals vary between presidential and mid-term years by as much as 50% from one cycle to the next. With the exception of the 1999-2000 cycle, there are generally no more elections in presidential election years than in mid-term election years. Additionally, partisan elections experience a relatively steady ratio of candidates competing in each election, ranging from 2.4 to 3.16 candidates per seat, for a mean of 2.75. Therefore, fundraising is most likely linked to the higher voter turnout in presidential turnout years. To decrease ballot roll-off, candidates engage in campaigns that are more expensive in order to reach a wider audience. In contrast, during mid-term election years, citizens most likely to vote are typically more educated and informed. Judicial candidates may need to campaign less when they are only convincing voters about their qualifications, without also including why voting for judicial offices are important.

This project examines spending by category more in Chapter Four, based on competition level. However, it does not eliminate elections in states that impose public financing schemes. According to *Buckley* v. *Valeo* (1976), candidates must be allowed to opt out of public funding, and given the effort that fundraising requires, it is reasonable to assume that a judge would only choose to opt out of public funding if he believed he could raise more money privately.

Based on this section's data, it is very likely that 2010 is yet another mid-term year in which candidates campaign and fundraise less. 2012 should see the return of expensive campaigns, perhaps even on the same scale as 2000.

Show Me the Money

ABA's Model Code of Judicial Conduct prohibits direct solicitation of funds by incumbent judges or judicial candidates; many states have adopted this provision in their own election system. This is intended to protect the integrity of the system, but often causes more problems because judges cannot properly finance their campaign and may resort to reliance on independent groups.

In states where direct solicitation is not prohibited, judges have raised extraordinary amounts. One recent example comes from the 2009 election in Pennsylvania, where a judge rode the wave of voter-discontent about high campaign costs and attacked her opponent for fundraising, despite raising a similar amount herself. Republican Joan Orie Melvin accused Democrat Jack Panella of basing his judicial decisions on campaign contributions. Judge Panella raised $2,706,137, breaking the state record for individual fundraising, which had previously been set by Justice Seamus McCaffery in 2007 at $2.3 million. Approximately $1.2 million of Panella's donations came from the Philadelphia Trial Lawyers Association (Sample, 2010, p. 22). At a Pennsylvania Press Club luncheon, Melvin said, "Is it pay-to-play? Is it justice for sale? I don't know, but it sure sounds suspect" (Associated Press, 2009). Melvin suggested that the Supreme Court cap donations to prevent influenced judicial decisions. However, Panella's spokesperson quickly noted that Melvin had also broken the previous state record by raising $2,479,507, including $1.4 million from the state Republican Party. "If she's announcing to the world that that kind of money is corrupting her, then she shouldn't be running," said Panella's spokesperson (Associated Press, 2009). However, the suggestion of money influencing the

judicial process was still enough for voters. Judge Panella lost to Melvin, 46.8% to 53.2% (Sample, 2010, p. 22).

In *Decade of Change*, Sample describes "super spenders," contributors whose donation amounts far surpass the average and set them in a separate class. "When the 29 elections in the past decade in Alabama, Ohio, Pennsylvania, Illinois, Texas, Michigan, Mississippi, Wisconsin, Nevada, and West Virginia are taken together, the top five super spenders from each election – 145 in all – spent an average of $473,000 apiece. By contrast, the remaining donors averaged $850. Excluding self-financing candidates, the 145 super spenders accounted for just over 40% of all campaign cash in the 29 elections" (Sample, 2010, p. 9). The super spender expenditures total $68,683,472, compared to the 116,600 other participating donors (including candidates) totaling only $99,187,112 (Sample, 2010, p. 9). In fact, five super spenders amount to more than 50% of all campaign spending in nine elections (Sample, 2010, p. 9). With this massive amount of spending, a few wealthy individuals and organizations are overwhelming the contributions of thousands of citizens.

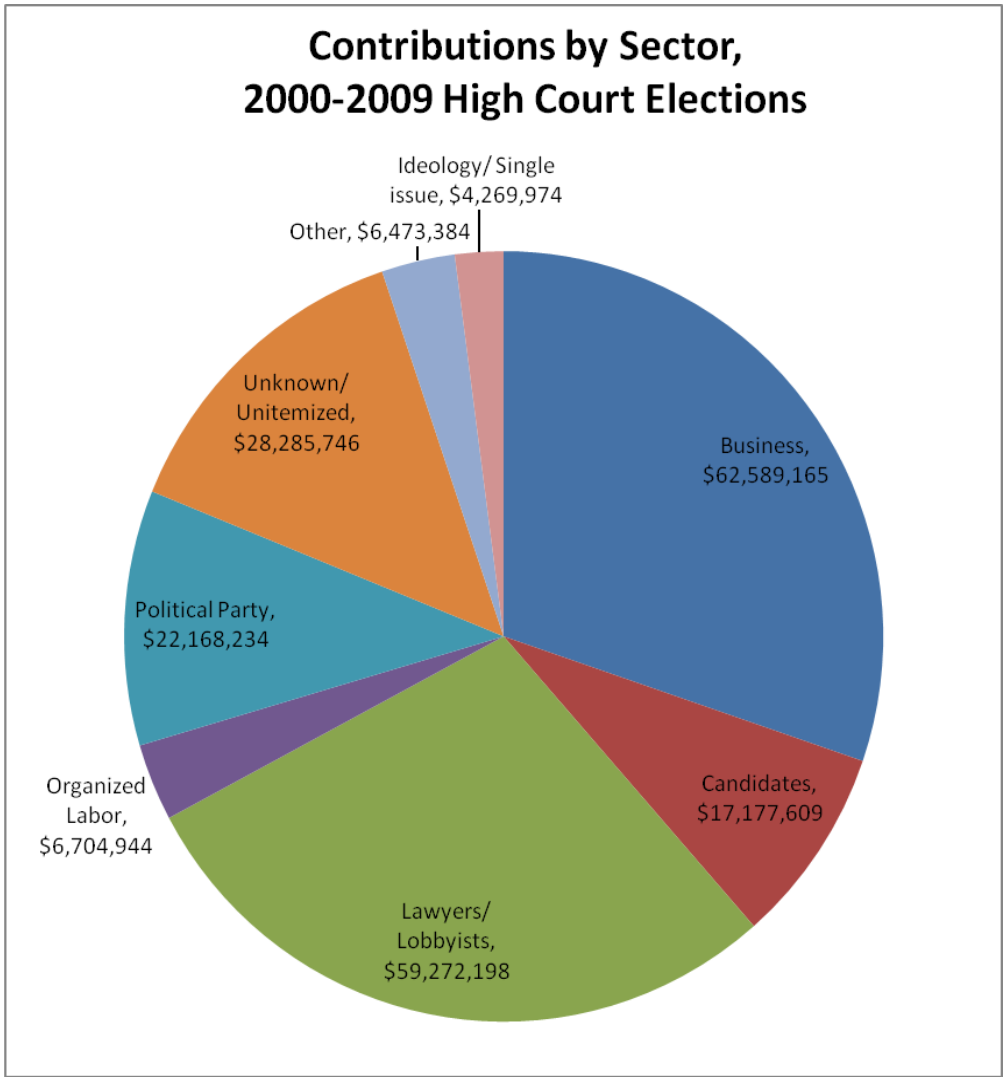


Figure 3.6. Source: Sample et al., 2010.

As Sample (2010) demonstrates, the battle over tort reform, jury awards and product liability standards escalated as pro-business and plaintiffs' lawyers and labor unions attempted to contribute more funds than the other to judicial candidates (p. 8).

Independent Expenditures

Interest groups, or so-called 527 organizations, are becoming more powerful and more involved in politics. These groups are tax-exempt and politically motivated, acting

independently or as "subcontractors" for political parties (Skinner, 2007, p. 11). Interest groups have more access and flexibility with campaign spending, as their "soft money loophole" provides a tremendous fund-raising opportunity for organizations and individuals. While the Bipartisan Campaign Reform Act (BCRA, 2002) mandates that organizations use hard money for "express advocacy," organizations registered under Section 527 are allowed to raise unlimited funds from individuals to promote voter education and turnout.

The Supreme Court declared independent expenditures from individuals and groups unlimited (*Buckley* v. *Valeo*, 1976) just as the number of issue-based campaigns increased. Organizations and individuals have filtered their contributions through these independent expenditures as a way to influence elections with 'soft money.' National groups have also become more involved in state elections. Perhaps the most well-known example of this is the U.S. Chamber of Commerce, which decided to "step up its involvement in Supreme Court elections, by allocating up to $10 million to as many as seven states where the Chamber said plaintiffs' lawyers had too much influence" (Sample, 2010, p. 14). The Chamber's strategy of "unprecedented amounts of money" was effective, and chosen candidates began to win elections by the end of 2002 (Lenzner & Miller, 2003). The influx of special-interest contributions, and the ensuing media coverage of judges accepting such contributions, "fed voter cynicism and fueled campaign-trail accusations that judges were beholden to their election backers" (Sample, 2010, p. 14).

Citizens United v. *Federal Election Commission* (2010) may have opened the door for additional independent expenditures, as the U.S. Supreme Court held that corporate funds can be used for political broadcasts under the First Amendment's protection The decision will affect state elections as well, including judicial campaigns (Hasen, 2010, p. 611). States have already

changed or are considering a change to their election rules to reflect compliance with the ruling (Sullivan & Adams, 2010).

In light of recent U.S. Supreme Court cases, independent expenditures especially will become more significant. As one Ohio AFL-CIO official stated, "We figured out a long time ago that it's easier to elect seven judges than to elect 132 legislators" (Heagarty, 2002, p. 20). Corporations and organizations now have more means to influence elections in such a way. To make matters worse, disclosure regulations are not strict enough because they do not encapsulate the full picture of campaign spending. For example, NIMSP lists the total judicial campaign contributions in West Virginia in 2004 as $2,838,905 (2010). The campaign run by And For The Sake Of The Kids attacking incumbent Justice Warren McGraw does not count in these official figures, although contributions from Don Blankenship alone towards AFSK exceed the state's fundraising total. Another example again comes from Iowa's 2010 retention race, as Iowa For Freedom, National Organization for Marriage, and other conservative groups raised nearly $1 million and pro-retention groups raised almost $800,000 (Iowa Ethics, 2010).

With the rise of 527 organizations, critics of judicial elections claim that independent expenditures by special interest groups will distort the democratic process and harm the integrity of the judicial selection method. However, 527s are comprised of individuals who have the right to free association, and may simply choose to engage in political participation through an organization rather than as an individual. Although an election result does not guarantee a particular policy or judicial outcome, the public perception of an unbiased judiciary is an interest worth protecting (*White*, 2002, p. 2, Kennedy concurring). As Bonneau and Hall point out, the question is to whom the justices should be beholden: the public whim of general voters or the

private policies of the governor or legislature (2009, p. 9). Such a normative question cannot be answered here.

One benefit to the 527s is that they often serve to mobilize voters through fundraisers, volunteerism and get-out-the-vote efforts. Increased political participation is a boon to our democratic system, as a more active electorate gives our choices more legitimacy (Bonneau & Hall, 2009, p. 2). As candidates may have limited resources for fundraising and little opportunity for expressing their views, the involvement in 527s in judicial elections may have positive results.

Justice for Sale?

Recusal standards for judges vary by state, and may be subjective, inconsistent, ambiguous or unenforceable. Taking a step towards a clearer standard, the U.S. Supreme Court's opinion in *Caperton* v. *Massey* (2009) recently addressed the issue of recusal standards for judges who have benefited from campaign contributions. Writing for the 5-4 majority, Justice Kennedy wrote, "There is a serious risk of actual bias […] when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent" (*Caperton*, 2009, p. 14). However, it is virtually impossible for every judge who receives a contribution from a party who appears before his court to recuse himself. "Many judges said contributions were so common that recusal would wreak havoc on the system. The standard in the Ohio Supreme Court, its chief justice, Thomas J. Moyer, said, is to recuse only if 'sitting on the case is going to be perceived as just totally unfair'" (Liptak, 2006). Additionally,

the problems with increased campaign spending in judicial elections are not wholly resolved by *Caperton*, as they are not wholly caused by previously subjective recusal standards.

Even judges are showing concern at the increasing costs of campaigning and the flood of money from special interest sources. The Conference of Chief Justices, representing 57 chief justices from every state and territory, entered an amicus brief to the U.S. Supreme Court on behalf of Hugh Caperton, in *Caperton* v. *Massey* (2009). "As judicial election campaigns have become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled" (*Caperton*, Brief, Conference of Chief Justices, 2008). The Supreme Court seemed to hear these fears when deciding *Caperton*'s issue of judicial recusal, as Kennedy wrote, "Just as no man is allowed to be a judge in his own case, similar fears of bias can arise when – without the other parties' consent – a man chooses the judge in his own cause" (*Caperton*, 2009, p. 16). The Justice at Stake Campaign (an anti-judicial-election interest group) surveyed state Supreme Court justices, appellate judges and trial judges in 2001. When asked if campaign donations influence judicial decisions, 9% of state supreme court justices surveyed said that contributions had "a great deal of influence" on decisions, while 26% responded "some influence," 10% reported "just a little influence" and 28% said "no influence at all," with 28% not responding. The affirmative responses of the supreme court justices is higher than the total affirmative responses, as only 4% of total judges responded "a great deal," 22% "some," 20% "little," 36% "no influence," and 18% without responses (JAS, "Judges," 2001). This result suggests that Supreme Court justices feel particularly compromised by campaign contributions.

Votes for Sale?

Despite those who rally against it, increased campaign spending has been shown to increase political participation in judicial elections, regardless of whether the increase is overall or per capita (Bonneau & Hall, 2009, p. 44). Judicial races usually experience lower voter turnout than the office higher up on the ballot due to a phenomena Bonneau and Hall call "ballot roll-off." Ballot roll-off is the term for voters drawn to the polls to vote for a major candidate, such as a president, governor, or legislative representative, and fail to cast a vote for the offices listed lower on the ballot such as local offices and judicial positions. Roll-off is generally blamed on lack of voter information and interest, both of which could be resolved with increased campaign materials and voter outreach. Roll-off varies widely over the states and the years, ranging from 65.13% to 1.58% (Bonneau & Hall, 2009, p. 25).

Electoral competition also plays a part in roll-off and voter education. Unopposed races are unlikely to have much fundraising or campaigning, leading to very little voter information; competitive races experience a more heated debate over qualifications and values, from which voters may learn. Despite the well-documented incumbent advantage, especially for judicial incumbents, substantial spending by challengers relative to incumbent fundraising can chip away at the incumbent advantage, although the incumbent generally has access to a larger war chest. "As the literature suggests, campaign spending is an effective way for candidates to publicize themselves and their views on relevant issues, which in turn mobilizes voters and influences their choices. [...] One of the most fundamental reasons voters choose not to participate in elections is the lack of information about the candidates" (Bonneau & Hall, 2008, p. 459). In empirical studies, Bonneau and Hall found that campaign spending has a statistically significant affect on ballot roll-off (2008, p. 466). A 1% increase in spending yields a 0.018% decrease in ballot roll-

off (p. 466). However, this effect is less significant in partisan statewide or non-partisan district races; the primary issue with ballot roll-off occurs in non-partisan statewide elections and partisan district races.

Bottom Line

Increased campaign spending leads to increased political participation, which is ideal as "elections generally are one of the most powerful legitimacy-conferring institutions in American democracy and should serve to balance if not counteract other negative features associated with campaigns" (Bonneau & Hall, 2009, p. 2). Again, the reasons why judicial elections began include a fear of judicial activism and the development of Jacksonian democracy, both of which stem from a popular desire for responsive and accountable judges (Zaccari, 2004, p. 140). As Scalia argued in *White*, "the First Amendment does not permit […] the principle of elections […] while preventing candidates from discussing what the elections are about" (*White*, 2002, p. 766). Spending allows candidates to broadcast campaign speech; restricting these outlets renders an election less meaningful. As candidate spending increases voter information and decreases ballot roll-off, more citizens are represented in the choice of their judges. "Contrary to conventional wisdom about the deleterious effects of money in judicial elections, that by stimulating mass participation and giving voters greater ownership in the outcomes of these races, expensive campaigns strengthen the critical linkage between citizens and the bench and enhance the quality of democracy" (Bonneau & Hall, 2008, p.457).

While the statistical work is enlightening and provides a more even playing field for the debate over judicial elections, Bonneau and Hall admit that they cannot provide answers for the normative question of the propriety of judicial elections. "We cannot speak directly to the issue

of whether citizen participation enhances positive short-term and long-term perceptions of courts, or whether the positive effects of aggressive spending in judicial campaigns can outweigh any negative consequences of contested elections and heated campaigns" (2008, p. 468).

Chapter 4

Today in the Courts, Competition and Reform

The 2012 election will not only be significant for the presidency, but also for number of state supreme courts. The trends in campaign speech and spending are likely to increase, and the apparent media outrage and public confusion are likely to continue (Goldberg, 2003, p. 1). In April 2011, Wisconsin voters effectively used a judicial election as a battleground for public policy and a "referendum on [Governor] Scott Walker" (Marley et. al, 2011). The effects of speech and spending deregulation must be examined together in order to see the full picture.

Speaking

As explored earlier, the U.S. Supreme Court's decision in *White* (2002) and subsequent state revisions to their judicial conduct codes have changed the nature of campaign speech in judicial elections. Allowing judges to 'announce' their views on issues moves the traditional style of campaigning from character-based elections and towards issue-based elections (Caufield, 2007, p. 54). In a 2001 survey of nearly 188 state Supreme Court justices, 43% reported satisfaction with the conduct and tone of judicial campaigns and 39% reported dissatisfaction (JAS, "Judges," 2001). However, when the same justices were asked if the conduct and tone of judicial campaigns had improved or diminished in the past five years (1996-2001, the period with the largest real increase in fundraising), only 8% said that the situation was better, while 20% said it was the same and 54% said that conduct and tone was worse (JAS, "Judges," 2001).

As McGraw suggests in *The Last Campaign*, it may be inappropriate to discuss certain issues in a public forum, such as the child molestation case that provided fodder to And For The Sake of the Kids (Ewing, 2007). AFSK over-simplified McGraw's case and sold it to the masses in short snippets.

> "Supreme Court Justice Warren McGraw voted to release child rapist Tony Arbaugh from prison. Worse, McGraw agreed to let this convicted child rapist work as a janitor, in a West Virginia school. Letting a child rapist go free? To work in our schools? That's radical Supreme Court Justice Warren McGraw. Warren McGraw – too soft on crime. Too dangerous for our kids."

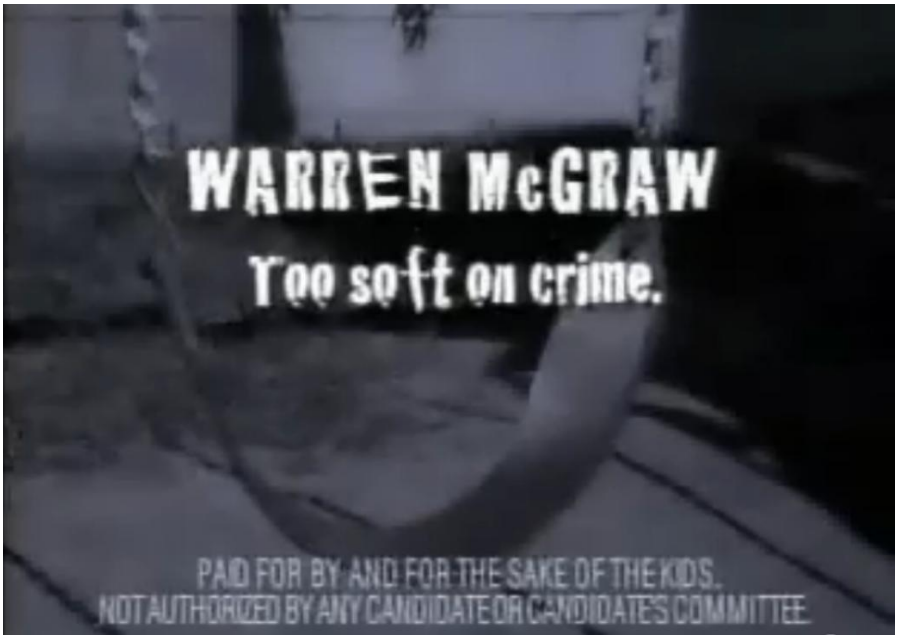


Figure 4.1. Source: FairCourtsPage.

The ad is entirely in an ominous black and white, panning empty schoolrooms and barren playgrounds. In this case and possibly many others, it may be too difficult to explain some issues in a 30-second campaign commercial. State Supreme Court judges are almost evenly divided about the propriety of television ads to broadcast a candidate's qualifications, with 40% supporting television ads and 43% opposing (Justice at Stake, "Judges," 2001). Judicial views on subjects such as *stare decisis* and legislative deference are not accessible to voters the way that government spending and public policy is accessible (*White*, 2002, p. 6-7).

Despite these arguments, the changed regulations for campaign speech may not have entirely negative effects. Incumbent judges and judicial candidates can better attest to their qualifications for office and why they are a better choice than their opponent. Judges and candidates can also better defend themselves from attack ads and negative media reports. 75%

of state supreme court justices report being criticized by the media, public officials, judicial candidates, political parties or state or national special interest group; compared to only 50% of appeals judges and 54% of lower court or trial judges (JAS, "Judges," 2001). State Supreme Court justices report being criticized for a range of issues, including criminal decisions, civil decisions, personal life, ideology, partisanship, and special interest group connections (JAS, "Judges," 2001). Despite the criticism, 70% of state Supreme Court justices surveyed responded that they "held back or felt restrained in responding to criticism" (JAS, "Judges," 2001). When pollsters asked the state supreme court justice why he restrained his response to criticism, 62% blamed the state code of judicial conduct and 49% reported a "personal believe that judges should not respond;" other answers include the "criticism wasn't worthy of a response" (36%), "concern about media coverage" (11%), "lack of effective response" (9%), "reluctance to take on special interest group or other public official" (8%), "supporters responded on my behalf" (10%), and "lack of money" (1%) (totals exceed 100% as justices were allowed to select up to two choices each; JAS, "Judges," 2001).

However, in the same survey, 47% of supreme court judges reported a belief that their state's code of judicial conduct "prevents judges from adequately responding to unfair or misleading criticism of decisions" (45% responded no; JAS, "Judges," 2001). When asked how they felt about the restrictions within the state's Code of Judicial Conduct, 56% of state supreme court justice believed that their state's code contained "the right amount and type," while only 14% believed that there were too many restrictions and 4% replied too few (JAS, "Judges," 2001).

These results are surprising and somewhat contradictory. Although 62% of justices blame their state's code of judicial conduct for restraining the response to criticism and 47%

believed that the code "prevents judges from adequately responding" to critics, a whopping 56% of justices reported satisfaction with their state code's restrictions. Of note, this survey was completed before the *White* decision was released, and thus before substantial revisions to state codes of judicial conduct in regards to the "announce clause" and often the "promise and pledge clauses" as well. However, there is a lack of post-*White* surveys of judges on the propriety of response to criticism and restrictiveness of state codes. *White*'s decision may have alleviated the concern of justices who felt restrained in responding to criticism.

On the voter side, Bonneau and Hall have demonstrated that *White* has not affected the competitiveness of elections (2009, p. 41). However, increased opportunity for campaign speech increases opportunities for voter information and education. Looser speech regulations give candidates more reasons to fundraise and donors more reasons to contribute, as funds can be used to express views rather than broadcast personality traits.

Spending

Although some states have seen an increasing trend, not all have. 12 of 38 states experienced no spending at all in the last decade, and four additional states had less than $100,000 for the decade and three additional experienced less than $1,000,000 (NIMSP, 2010). The majority of the spending trends are happening in a few very competitive states, with highly visible elections and very interested contributors. For example, All State's collective contributions of nearly $1.8 million for Lloyd Karmeier's 2004 race in Illinois' fifth district is a result of a high profile case and notoriously high jury awards in the area. However, this is not indicative of all races. From 1999-2010, 167 candidates in the last decade have raised $5,000 or less for their campaign, 159 of which raised none at all (NIMSP, 2010). In addition to the 12

states that had no fundraising in judicial elections, and additional 13 states experienced decreased funding over the course of the decade, as the average fundraising per candidate in 2000 exceeds both figures for average fundraising in 2008 (a similar election in a presidential year) and 2010 (the most recent election). Overall, of 38 states with judicial elections, 25 experienced steady or decreased spending and 13 experienced increased spending. Examining each of the election years in each state over the decade, it is a surprisingly even distribution, and fundraising totals hardly suggest a spending "explosion" (Sample, 2010, p.).

Again, this spending is not only by state but also by election type. Partisan elections are by far the most expensive of judicial elections, as candidates dip into partisan coffers and attempt to lobby each side. Spending varies drastically depending on whether the election occurs during a presidential election year or a mid-term election year. Non-partisan elections are typically viewed as the escape from partisan elections, allowing judges to shed some of their political life and act as the 'independent' judiciary that some desire. However, this can sometimes backfire due to low voter information in judicial elections. When the voter cue of party affiliation is not available, voters must take cues from less informative sources, such as name recognition, gender, or ballot position. Therefore, non-partisan elections also see a substantial attempt at candidate fundraising, as candidates attempt to provide information and increase voter name recognition. As retention elections are unopposed, they rarely experience much candidate fundraising, but this trend has been changing in the last decade (NIMSP, 2010).

There is some concern that the increased importance of campaign fundraising may crowd out more qualified candidates as candidates who can fund their own campaigns or are very well connected have the upper hand. Additionally, as judges continue to fundraise extensively, the campaign season may become longer and more expensive. However, judicial fundraising is still

substantially less than the fundraising for other state offices, despite typically longer terms (up to 12 years) and more immediate power (as five to nine justices decide a case rather than dozens of legislators).

Most importantly, as Bonneau and Hall have shown, a 1% in campaign spending leads to 0.018% decrease in ballot roll-off. Increased campaign spending increases candidate opportunities for advertising and get-out-the-vote efforts (2009, p. 44).

Competition… because it is a Race!

The competitiveness of each election affects candidate speech, fundraising, and voter turnout, and should not be ignored when examining the changes in judicial elections. Due to the volume of data, this project is not able to control for candidate quality, media attention, or salient issues. Herein, competition is figured as the number of candidates competing per open seat in a state's election year. For simplicity, this project refers to

[Candidates/Seats (per election year)]

as a "competitive score." Thus, an unopposed or retention election would have a score of 1; two candidates per seat would have a score of 2, and so on. A higher score indicates more candidates competing per seat.

In the past decade, of 38 states with judicial elections, there were 236 total possible 'election years,' when a judicial election was scheduled or expected.[16] 33 election years had no election, due to staggered terms. As a result, there were 203 active election years in 38 states from 2000-2010. 44 of these were partisan elections, 80 of these were non-partisan, and 79 were retention. 434 seats were open, and 780 candidates competed for these seats over the course of

[16] All figures used in the competition section for election years, open seats, participating candidates, election type and candidate fundraising is available at National Institute on Money in State Politics.

the decade. Competitive scores for election years range from 1 to 5, with a mean of 1.74. After controlling for retention elections as they cannot be contested, the mean increases to 2.22.

In Figure 4.2, the trend of competitive elections is interesting and does not quite match expectations. Controlling for retention elections, the number of unopposed races for partisan and non-partisan races increased over the course of the decade. Two-candidate races remained somewhat steady, while the number of three-candidate races decreased, presumably to give way to four- and five-candidate races. Although this appears to be the case in 2002 and 2004, it fails to explain the decreased rate in 2006, 2008 and 2010, where the number of four- and five-candidate races does not make up for the decrease in three-candidate races. If anything, 2006-2010 is when the number of one- and two-candidate races increase, as unopposed races dwarf others in 2006 and two-candidate races are most common in 2008 and 2010. The cause of this variance is unclear, but the trends of competitive elections over the decade seem to suggest that neither *White* nor the "spending explosion" have damaged the judicial election system beyond repair. However, it is important to note that the objective analysis below can examine neither the quality of candidates nor the public perceptions of the judiciary.

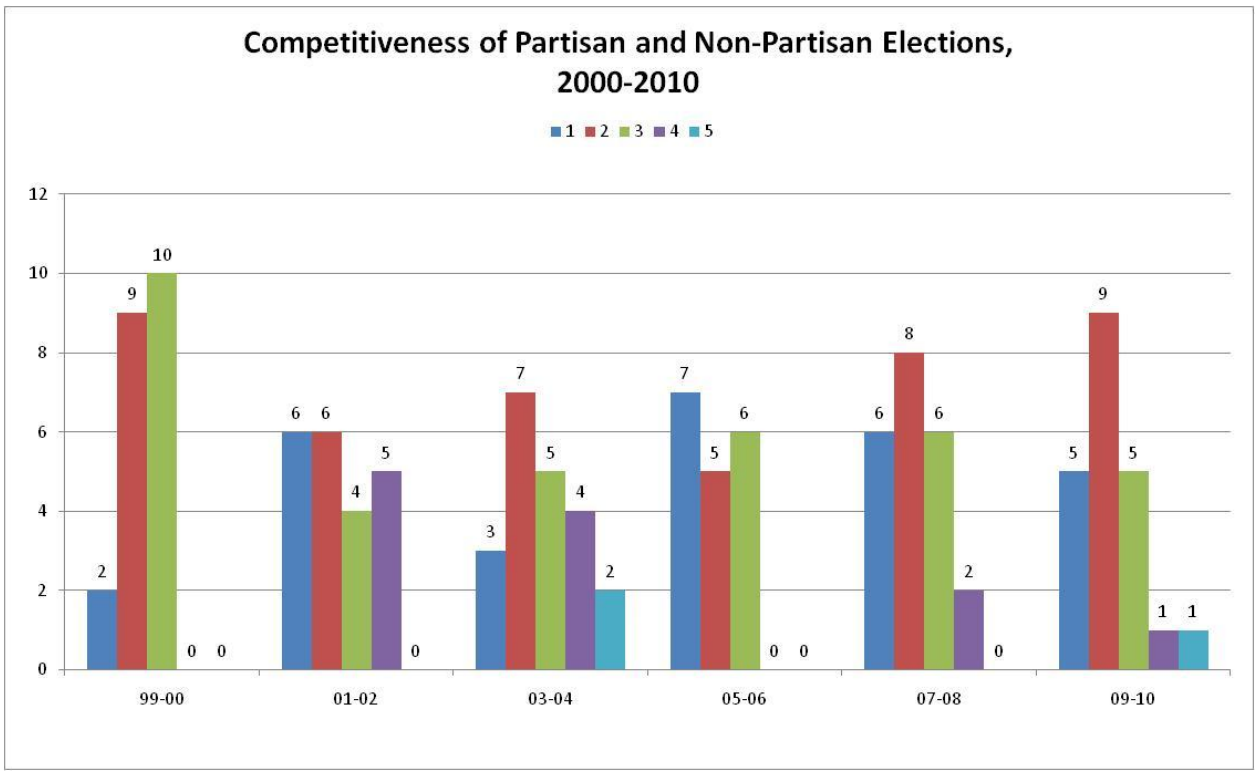


Figure 4.2. Source: National Institute on Money in State Politics.

To examine competition further, it is worth looking at charts of competitive elections by election type. See Figures 4.3 and 4.4.

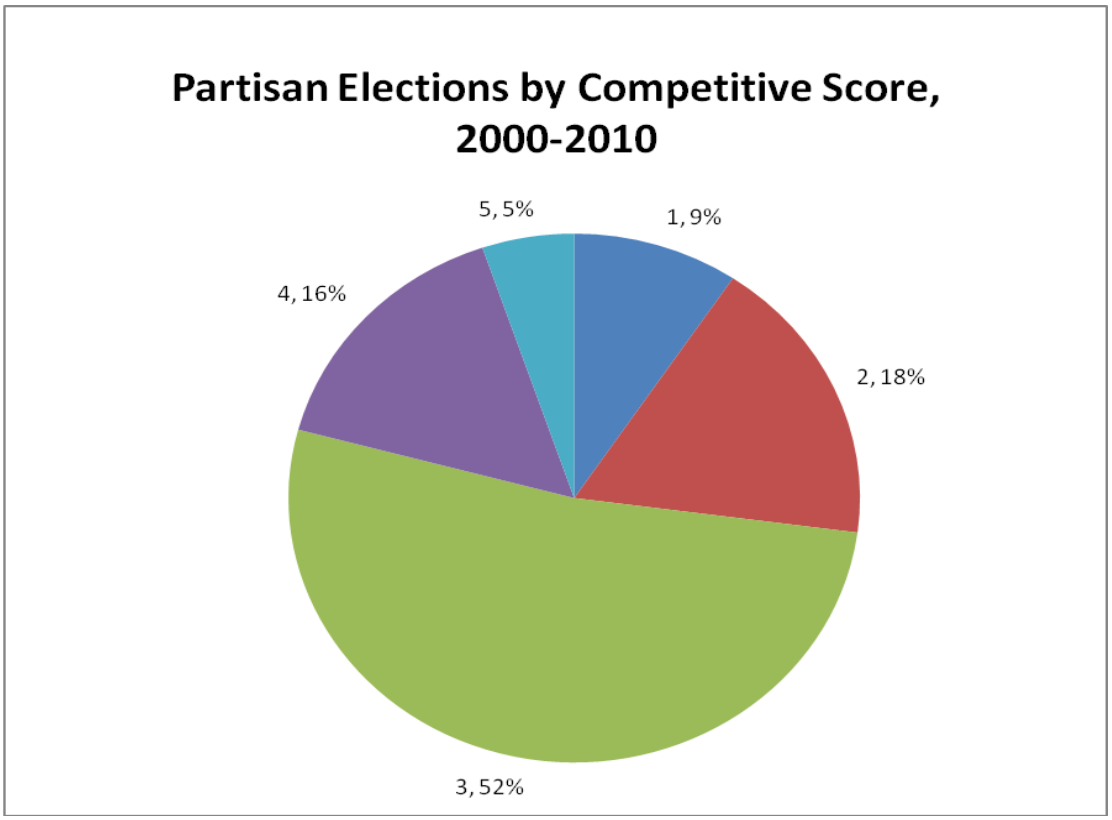


Figure 4.3. Source: National Institute on Money in State Politics.

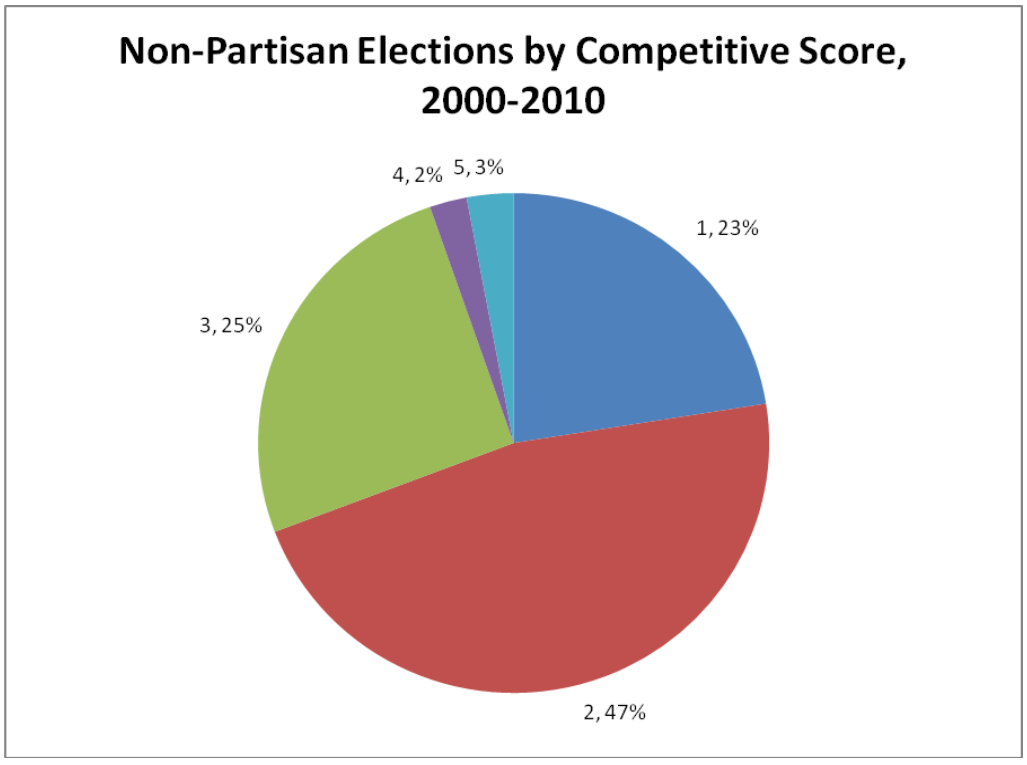
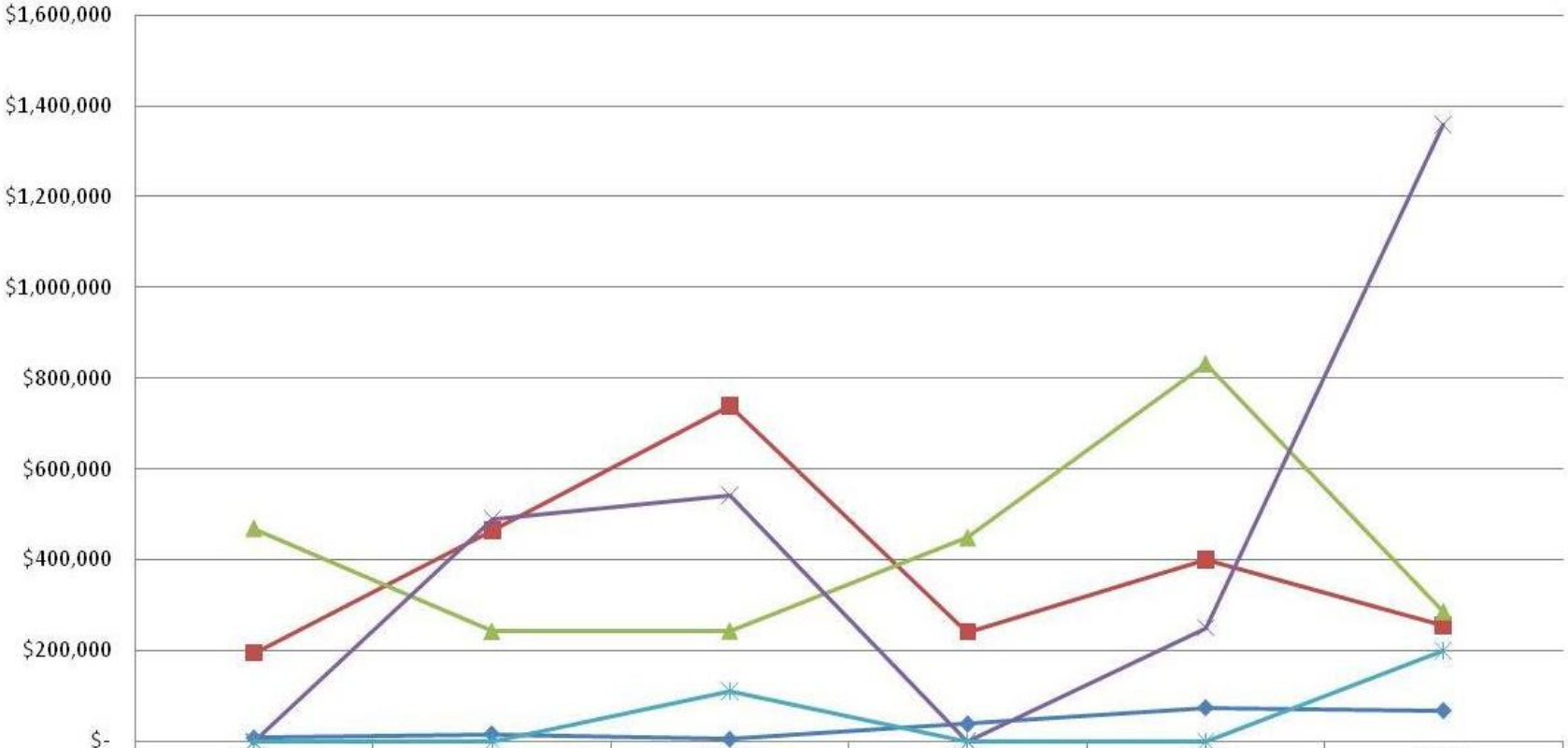


Figure 4.4. Source: National Institute on Money in State Politics.

From these charts, it is clear that the majority of high-competition races were partisan, as partisan races were twice as likely to experience three-candidate races, eight times as likely to experience four-candidate races, and slightly more five-candidate races. Conversely, non-partisan races in the last decade were unopposed nearly a quarter of the time, while partisan races were unopposed only 9%. While it is true that non-partisan races allow judges to escape some of the politics of partisan elections, their advantages are still unclear. Less competitive elections decrease the quality of the office held and democracy as a whole, and as already covered, non-partisan elections decrease information available to voters, leading to increased ballot roll-off (Bonneau & Hall, 2009, p. 44).

The intersection of competitiveness and fundraising is illuminated in Figure 4.5, below.

Average Per Candidate Fundraising By Competitive Score, 2000-2010



	99-00	01-02	03-04	05-06	07-08	09-10
1	$7,474.97	$16,143.76	$4,456.66	$38,651.58	$75,056.19	$68,660.86
2	$195,100.54	$465,733.59	$738,899.29	$241,326.20	$400,987.90	$256,287.04
3	$469,344.85	$242,194.94	$243,517.43	$448,502.43	$831,777.60	$285,720.25
4	$-	$490,591.65	$542,630.89	$-	$250,716.17	$1,358,691.50
5	$-	$-	$109,612.75	$-	$-	$199,549.87

Figure 4.5. Source: National Institute on Money in State Politics.

Figure 4.5 includes retention elections, as judicial candidates up for retention sometimes fundraise. Although retention fundraising over the decade exceeded $3.6 million, the sum is less than some individual partisan races experience. However, such fundraising is significant for an election type in which voters have no given choice beyond simply "yes" or "no." Retention fundraising averages $21,427 per candidate, including candidates who did not fundraise. For this reason, retention elections were included in Figure 4.5. As candidate fundraising totals per election cycle per competitive score are standardized by determining the average fundraising per candidate, the picture becomes clearer. Unopposed elections have become more expensive, although the figures are dwarfed by competitive elections. The two-candidate fundraising trend seems to follow the partisan pattern, peaking in presidential years. This is to be expected because partisan elections are two candidates between the two major parties. Although three-candidate races seem to have decreased in 2002 and 2004, it seems that three-candidate races only decreased to give way to four-candidate races, and that they switched places in 2008. The extreme spike in average fundraising for 2010 four-candidate races is due to the record-breaking partisan election in Pennsylvania in 2009, where two candidates raised $2.4 and $2.7 million. Perhaps most surprising are the two average amounts for five-candidate races, in which average candidate fundraising barely exceeds fundraising for retention elections. These figures are a result of only three five-candidate elections:

Table 4.1 – Five-Candidate Election Years

State	Year	Type	Seats	Candidates	Fundraising	Per Candidate
NC	2004	Non-Partisan	2	10	$1,269,333	$126,933.30
WA	2004	Non-Partisan	3	14	$1,361,373	$97,240.93
TX	2010	Partisan	3	15	$2,993,248	$199,549.87

Table 1. Source: National Institute on Money in State Politics.

As Bonneau and Hall suggest, there may be a 'saturation' point with competition, where each candidate's ability to fundraise is limited by the surplus of other viable candidates and interested

donors (2009, p. 66). This may be the explanation for the low per-candidate spending in elections with many candidates. Perhaps the reason why this does not affect four-candidate races is because of the partisan primary and general election systems, naturally allowing four candidates to compete.

Perceptions and Preferences

The strength of the judicial system lies in its legitimacy. The U.S. government is founded on the citizens' collective efficacy that they are responsibly and responsively represented by the officials they choose. In any state, and especially in a state where judges stand for election, faith in the judicial system is necessary, faith that the judges will interpret and apply our laws in a fair and just manner. Academics and politicians tend to fall in one of two camps – those emphasizing independence and those emphasizing accountability.

Advocating for judicial independence, opponents of judicial elections argue that a judge who must stand for a vote before an electorate is necessarily politically compromised, and unable to fairly and justly interpret laws without an eye to the next election. These opponents prefer gubernatorial appointments from a nominating committee, followed by the Missouri Plan (appointment and retention election), followed by nonpartisan elections; partisan elections are most despised.

Advocating for judicial accountability, supporters of judicial elections argue that especially in the wake of New Judicial Federalism, state courts are increasingly responsible for public policy decisions. As such, they should be held democratically accountable to the electorate as any other politician. Supporters prefer any election system that maximizes voter information; partisan and non-partisan elections are preferred to appointment and retention

schemes. Bonneau and Hall argue that appointment schemes merely change the name of the group to which judges are beholden (2009).

As judicial elections experience more campaigning, competition and controversy, the media increasingly discusses the propriety of elections. The *appearance* of corruption is just as detrimental to public trust of the courts as actual corruption. However, a question: how much of the current appearance of corruption is due to anti-election academic efforts to publicize the corruptive and politicizing effects of elections? When asked to comment on his campaign contributors, Ohio Supreme Court Justice Terrence O'Donnell offered a terse, prepared statement to the *New York Times*:

> "Any effort to link judicial campaign contributions received by a judicial campaign committee for major media advertising to case outcomes is misleading and erodes public confidence in the judiciary. […] A judge may fairly and impartially consider matters despite receipt of the campaign contribution by the campaign committee" (Liptak, 2006).

Reformation

Following *Caperton*, polls show that citizens are more concerned about campaign finance influencing judicial impartiality. In response, former West Virginia Governor Joe Manchin has authorized a public financing system for state Supreme Court elections. A 2010 survey of 600 West Virginia residents revealed that 37% believe that campaign contributions have a "great deal" of influence on judicial decisions and 41% believe that contributions have "some" influence (JAS, "West Virginia," 2010). Reflecting on the incidents following Brent Benjamin's ascension to the Supreme Court and the ensuing *Caperton* debacle, the pollsters asked residents

if receiving contributions from individuals and groups that may appear before the court is a problem. 25% reported that such contributions pose a "very serious" problem, while 43% responded that it was a "serious" problem, 18% said "not that serious," 8% said "not a serious problem at all" and 8% refused answer (JAS, "West Virginia," 2010). West Virginia and Wisconsin have recently enacted public financing systems for judicial candidates; both states will be highly scrutinized this season due to the *Caperton* debacle and the collective bargaining protests, respectively. Other states have taken action: Minnesota has banned competitive elections and Michigan has created a panel to determine if judges should recuse themselves in cases involving a potential conflict of interest.

National polls indicate that the public supports public financing of judicial elections, while other states are considering adopting appointment or merit plans to replace popular elections. A 2009 survey of 500 people demonstrated that 68% of respondents would doubt a judge's impartiality if a party before the judge had contributed $50,000 or more to his campaign (JAS, "National," 2009). In a 2010 poll of 1,004 people, when asked if campaign contributions influenced judicial decisions, 36% of respondents believed that contributions had a "great deal of influence," 35% said "some influence," 14% reported "only a little influence," and 9% stated "no influence at all (JAS, "Quorum," 2010).

Business leaders also show similar concern for judicial contributions. A 2007 Zogby survey of 200 U.S. business leaders demonstrated that 79% of respondents believe that campaign contributions influence judicial decisions (Justice at Stake & Committee for Economic Development, "Business," 2007). More surprisingly, the survey demonstrated a stronger response to the recusal issue than the individual voter survey. When asked if a judge should rule on a case in which a party has financially contributed to his campaign, 97% respondents believed

that the judge should recuse himself. On the topic of reform proposals, 73% support public financing for judicial elections and 71% support the idea of a nominating committee and gubernatorial appointment for judicial selection (JAS & CED, "Business," 2007).

What's Ahead?

There is no singular consensus on the issue – although that is not a surprise, the surprise comes from the demographics of each group. There seem to be two opposing trends insofar as support for judicial elections. The first is academic: legal scholars and academics are spending vast resources to prove the evils of judicial elections. The media tends to jump on this bandwagon as academic writing is more published and more easily adapted into a news story, with the added bonus of sensationalism as scholars predict the collapse of our judicial system due to big spenders. The second trend is popular: average citizens and voters tend to support elections. Bonneau and Hall are singular as they manage to bridge these groups. They point out that the move was made towards judicial elections because appointments led to corrupt and beholden judges (2009, p. 2). Bonneau and Hall ask why states that have elected judges since their formation should abandon their system now, claiming that the threat of private corruption is still high and the promise of popular accountability is still desirable (2009). And while some may argue that the causes of corruption (party machines and the spoils system) have disappeared, there seems to be no need to change systems again. Opponents argue that judges will not uphold the law fairly and justly if they are elected, always casting a vote with one eye towards the next election. However, with the help of *White*-deregulation and the media, voters can become aware of judges who are improperly applying the law and vote them out of office at the next election, rather than hoping a governor will select a replacement.

Now that the trends have been recognized, the next question is what the new trends will do for democracy and judicial elections. Both *White* and increased spending will lead to better voter information. As Justice Scalia wrote in *White*, an election system without election speech or the financial resources to broadcast such speech is an incomplete election (2002, p. 21). The question of independent or accountable judges will remain, as some choose to view judges differently than other political offices. However, especially as New Judicial Federalism advances, judges are responsible for more policy decisions, and the reasons for treating them differently than other decision-makers become less clear.

Conclusion

Objects in the Mirror May Be Closer than They Appear

"As the guardians of this state's judicial system, we should be helping our citizens to spot the crocodiles."[17]

A Road Map

Judicial elections have been caught in a perfect storm. First, *Buckley* v. *Valeo* (1976) expressly stated that candidate contributions and independent expenditures must be unlimited. After *Baker* v. *State* (1999), state courts began to embrace New Judicial Federalism and the power that it offered. State courts could determine the fit of challenged legislation or regulation within their state, rather than defer to a national court. *Republican Party* v. *White* (2002) effectively deregulated campaign speech for judicial candidates and incumbent judges. Even states which still utilize "promise" and "pledge" clauses are likely to continue to be challenged, and such a challenge would not survive in a federal court after the firm *White* decision. Since 2004, West Virginia, Illinois, and Pennsylvania – among many others – have had individuals and organizations contribution millions to their campaigns, raising the suspicions of many who worry that justice will soon be a matter of who contributes the most. In 2010, Iowa voters penalized justices for an unpopular decision that protected minority rights (*Varnum* v. *Brien*, 2009). And only a few days before printing this project, the 2011 Wisconsin election demonstrated the extent of politicization in a non-partisan election, during an off-year, with a heavily favored incumbent. Voters, corporations, and special-interest groups must now realize that state supreme courts are both vulnerable in elections and powerful in policy.

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[17] *Mississippi Commission on Judicial Performance* v. *Wilkerson* (2004, para. 43).

Detours

Although this project attempts to examine many aspects of judicial elections, much research is still needed. Given the vastness of the data and the particularity of each state's selection method, much more time for research is required in order to conduct a more thorough analysis of high spending, high competition, negative campaigning, voter turnout, and significant political events. Statistical analysis was not used due to many unreported variables that would have added bias to the results, although this could be resolved with more access to data.

The most limiting aspect of this project was the lack of comprehensive public opinion poll regarding perceptions of the judiciary. The debate over preferred traits, independence or accountable, will continue to use generalizations and biased data[18] unless such an effort is undertaken. The survey should focus on five aspects: preferred and real characteristics of the judiciary; the availability and accessibility of voter information; the perceived propriety of campaign "announcements" and "promises"; the perceived propriety of campaign spending, especially by corporations and 527s, and expectations of recusal; and the respondent's state of residence. The state of residence is crucial, as data could be sorted by election type, judicial terms, incumbent rates, and political subculture just as easily as many surveys are sorted by gender, race and age. The state identifier could also be used to examine or eliminate outliers; for example, the 2004 elections in West Virginia (leading to *Caperton*, 2009) and Illinois (leading to *Avery*, Ill. 2005) have undoubtedly affected the residents' opinions on campaign spending to an extent not known in Massachusetts or North Dakota. That study would allow more definitive conclusions to be drawn regarding the propriety of judicial elections and the need or desire for reform measures.

[18] For example, neither the Justice at Stake Campaign nor the Brennan Center cannot do such a study for these groups advocate the elimination of judicial elections. An academic or governmental institution must do the study.

Recommended Navigation

As this project has shown, judicial elections are extremely complicated due to the variance across and within states. It is difficult to aggregate these states and make a policy recommendation, as there is no one size fits all.

However, given the data available, three paths may be appropriate. Former U.S. Supreme Court Justice Louis Brandeis wrote nearly eighty years ago: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" (*New State Ice Company* v. *Liebmann*, 1932, p. 311). Brandeis' summation of the potentials of our federalist system became popular and better known by the phrase: "laboratories of democracy" (Schram, 1998). Perhaps as Brandeis suggested, we should allow states to be the laboratories of democracy and fully test the systems before making ideological decisions.

One path will be for the 16 retention states. The states should take great lengths to ensure the insulation of its judges from the political process. This can be accomplished by controlling spending. First, judges may not privately raise funds for any reason. Second, states will create an independent Election Oversight Committee,[19] with which a judge may file a petition if he is criticized by a challenger, official, or media outlet. Once the Committee reviews the petition and the criticism in question, they may disburse a small block grant to the judge in order to respond to the criticism. However, the judge's response will be carefully monitored by the Committee. If sparring continues, the Committee will handle the situation on a case-by-case basis. Third, any organization that creates a televised ad (or YouTube ad) to support or oppose retention must disclose all expenditures to the Election Oversight Committee. Ads need not use the "magic

[19] Some states already have these committees or have formed them under different names. All states should institute these committees to ensure that campaigning is accurate and ethical.

words." This measure will keep interest groups in check. Fourth, individuals, organizations, and corporations whose primary residence/headquarters is out of state are expressly forbidden from contributing or spending in the election. *Buckley* was a federal case. A New York resident cannot vote in Iowa and none of his rights are violated; he should not be allowed to contribute to an election in Iowa. Although these regulations will increase the administrative burden of elections, the protection of judicial impartiality is a superior benefit.

Another path is for the states that often see very competitive, very expensive races: specifically, Alabama, Illinois, Pennsylvania, Texas, and Ohio but possibly more depending on the dynamics of current trends. First, public funding will be offered for all candidates up to a threshold amount. *Buckley* requires that candidates are able to opt out of public funding schemes if they choose to express their First Amendment rights differently. However, courts have approved contribution limits for candidates who opt out of public funding. For example, each candidate in a general election may be granted $500,000. If he chooses to opt out of this funding and privately raise funds, he may not be able to collect the big donations from Chamber of Commerce, plaintiff's lawyers, and interest groups. Instead, there is a contribution cap so that no donor can contribute more than $1,000, for example. This will prevent extreme influence from "super spenders." This will also develop more competitive elections, as the incumbent advantage will be lessened if all candidates have the same amount of funds. Second, states will create independent Election Oversight Committees, which will oversee all campaigning and issue warnings or fines to candidates who engage in negative campaigning. As with retention states, the third and fourth proposals include campaign disclosure from any source which creates an ad and a prohibition against out-of-state individual and entity contributions.

A third path is available for those states that experience moderate fundraising and moderate competition. These states should also create independent Election Oversight Committees, maintain stricter campaign disclosure and prohibit out-of-state contributions. However, this is where the public perception survey would help to guide policy makers. States must determine which path is most appropriate for their subculture.

* * *

Since this project has been in its revision stage, the Wisconsin race has already taken a new turn. Over 14,000 votes have been 'found' in Brookfield, Illinois, granting incumbent Prosser a new 7,582 vote margin over Kloppenburg (Stein, Walker, & Glauber, 2011). The margin is over 0.5% of the vote, so Kloppenburg would not qualify for a free recount but would have to pay $5 per ward if she chose to challenge (Stein et. al, 2011). Kloppenburg supporters are deeply suspicious of the thousands of votes that appeared days after the election results were reported. Wisconsin state representative Peter Barca has proposed an independent investigation of a "serious breach of election procedure" (Stein et. al, 2011). There have been other changes in election results in other counties across Wisconsin, but none nearly as significant for the margin of victory as Brookfield's find. All eyes are on Wisconsin's election results right now, as they may very well determine the fate of Governor Scott Walker's collective bargaining measure.

Wisconsin's 2011 race clearly demonstrates that judicial elections have become more politicized, due to campaign speech deregulation and looser campaign finance rules, conditions that have opened the door to special-interest group involvement and political decisions handed down from the bench. We must learn as much as possible about judicial elections in order to make effective and efficient policies decisions. We must watch this race – and all races, all courts – closely, for they shape U.S. policy on a daily basis.

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Appendix A: State Supreme Court Election Data, 1999-2010

State	Year	Fundraising	Type	Candidate	Seats	Score
AK	2000	$ 72,391.00	Retention	3	3	1
AK	2002	$ -	Retention	1	1	1
AK	2004	$ -	None	0	0	0
AK	2006	$ -	None	0	0	0
AK	2008	$ -	Retention	1	1	1
AK	2010	$ -	Retention	1	1	1
AL	2000	$ 12,368,005.00	Partisan	13	5	3
AL	2002	$ 2,923,344.00	Partisan	4	1	4
AL	2004	$ 7,690,494.00	Partisan	11	3	4
AL	2006	$ 13,506,840.00	Partisan	15	5	3
AL	2008	$ 4,477,033.00	Partisan	2	1	2
AL	2010	$ 2,956,819.00	Partisan	9	3	3
AR	2000	$ 411,705.00	Partisan	5	2	3
AR	2002	$ 16,295.00	Non-Partisan	1	1	1
AR	2004	$ 976,795.00	Non-Partisan	5	2	3
AR	2006	$ 440,987.00	Non-Partisan	6	4	2
AR	2008	$ 86,635.00	Non-Partisan	2	2	1
AR	2010	$ 1,957,823.00	Non-Partisan	6	2	3
AZ	2000	$ -	Retention	3	3	1
AZ	2002	$ -	None	0	0	0
AZ	2004	$ -	Retention	3	3	1
AZ	2006	$ -	Retention	2	2	1
AZ	2008	$ -	Retention	1	1	1
AZ	2010	$ -	Retention	1	1	1
CA	2000	$ -	None	0	0	0
CA	2002	$ 225,298.00	Retention	3	3	1
CA	2004	$ -	None	0	0	0
CA	2006	$ -	Retention	2	2	1
CA	2008	$ -	None	0	0	0
CA	2010	$ -	Retention	3	3	1
CO	2000	$ -	Retention	4	4	1
CO	2002	$ -	Retention	1	1	1
CO	2004	$ -	None	0	0	0
CO	2006	$ -	None	0	0	0
CO	2008	$ -	Retention	2	2	1
CO	2010	$ -	Retention	3	3	1
FL	2000	$ 7,500.00	Retention	3	3	1
FL	2002	$ -	Retention	2	2	1
FL	2004	$ -	Retention	2	2	1

FL	2006	$ -	Retention	3	3	1
FL	2008	$ -	Retention	1	1	1
FL	2010	$ -	Retention	4	4	1
GA	2000	$ 38,888.00	Non-Partisan	3	3	1
GA	2002	$ 721,709.00	Non-Partisan	6	3	2
GA	2004	$ 818,201.00	Non-Partisan	2	1	2
GA	2006	$ 1,794,017.00	Non-Partisan	5	4	1
GA	2008	$ 395,006.00	Non-Partisan	2	2	1
GA	2010	$ 588,251.00	Non-Partisan	3	1	3
IA	2000	$ -	Retention	2	2	1
IA	2002	$ -	Retention	2	2	1
IA	2004	$ -	Retention	3	3	1
IA	2006	$ -	None	0	0	0
IA	2008	$ -	Retention	3	3	1
IA	2010	$ -	Retention	3	3	1
ID	2000	$ 298,546.00	Non-Partisan	2	1	2
ID	2002	$ 76,909.00	Non-Partisan	3	2	2
ID	2004	$ 8,550.00	Non-Partisan	2	2	1
ID	2006	$ -	Non-Partisan	1	1	1
ID	2008	$ 243,190.00	Non-Partisan	3	2	2
ID	2010	$ 162,148.00	Non-Partisan	3	2	2
IL	2000	$ 8,274,624.00	Partisan	12	4	3
IL	2002	$ 2,705,522.00	Partisan	4	1	4
IL	2004	$ 9,367,057.00	Partisan	2	1	2
IL	2006	$ -	None	0	0	0
IL	2008	$ 1,154,470.00	Partisan	1	1	1
IL	2010	$ 2,790,137.00	Retention	4	4	1
IN	2000	$ -	None	0	0	0
IN	2002	$ -	Retention	1	1	1
IN	2004	$ -	None	0	0	0
IN	2006	$ -	Retention	1	1	1
IN	2008	$ -	Retention	3	3	1
IN	2010	$ -	Retention	0	0	0
KS	2000	$ -	Retention	2	2	1
KS	2002	$ -	Retention	1	1	1
KS	2004	$ -	Retention	4	4	1
KS	2006	$ -	Retention	1	1	1
KS	2008	$ -	Retention	2	2	1
KS	2010	$ -	Retention	4	4	1
KY	2000	$ 389,834.00	Non-Partisan	2	1	2
KY	2002	$ -	Retention	1	1	1
KY	2004	$ 478,633.00	Retention	2	2	1

KY	2006	$ 2,121,795.00	Non-Partisan	10	5	2
KY	2008	$ 630,301.00	Non-Partisan	4	3	1
KY	2010	$ 20,249.00	Non-Partisan	1	1	1
LA	2000	$ 127,895.00	Partisan	1	1	1
LA	2001	$ 2,873,841.00	Partisan	4	1	4
LA	2002	$ 132,102.00	Partisan	1	1	1
LA	2004	$ 904,303.00	Partisan	2	1	2
LA	2006	$ -	Partisan	2	2	1
LA	2008	$ 3,689,492.00	Partisan	5	2	3
LA	2009	$ 1,365,030.00	Partisan	2	1	2
LA	2010	$ 137,031.00	Partisan	1	1	1
MD	2000	$ -	Retention	1	1	1
MD	2002	$ -	Retention	3	3	1
MD	2004	$ -	None	0	0	0
MD	2006	$ -	Retention	2	2	1
MD	2008	$ -	None	0	0	0
MD	2010	$ -	Retention	2	2	1
MI	2000	$ 6,766,911.00	Partisan	9	3	3
MI	2002	$ 964,887.00	Partisan	7	2	4
MI	2004	$ 1,503,938.00	Partisan	5	2	3
MI	2006	$ 1,072,528.00	Partisan	5	2	3
MI	2008	$ 2,634,851.00	Partisan	3	1	3
MI	2010	$ 2,344,471.00	Partisan	5	2	3
MN	2000	$ 528,703.00	Non-Partisan	8	4	2
MN	2002	$ 91,889.00	Non-Partisan	3	1	3
MN	2004	$ 120,693.00	Non-Partisan	4	3	1
MN	2006	$ 200.00	Non-Partisan	1	1	1
MN	2008	$ 196,402.00	Non-Partisan	7	2	4
MN	2010	$ 152,803.00	Non-Partisan	5	2	3
MO	2000	$ -	Retention	1	1	1
MO	2002	$ -	Retention	1	1	1
MO	2004	$ -	Retention	1	1	1
MO	2006	$ -	Retention	3	3	1
MO	2008	$ -	None	0	0	0
MO	2010	$ -	Retention	1	1	1
MS	2000	$ 3,418,551.00	Non-Partisan	9	4	2
MS	2002	$ 1,816,014.00	Non-Partisan	4	1	4
MS	2004	$ 2,563,520.00	Non-Partisan	12	4	3
MS	2006	$ -	None	0	0	0
MS	2008	$ 2,976,446.00	Non-Partisan	9	4	2
MS	2010	$ 5,000.00	Non-Partisan	1	1	1
MT	2000	$ 1,162,277.00	Non-Partisan	6	2	3

MT	2002	$ 131,673.00	Non-Partisan	3	2	2
MT	2004	$ 879,482.00	Non-Partisan	5	2	3
MT	2006	$ 53,108.00	Retention	2	2	1
MT	2008	$ 341,159.00	Non-Partisan	3	2	2
MT	2010	$ 108,060.00	Non-Partisan	3	2	2
NC	2000	$ 2,057,360.00	Partisan	5	2	3
NC	2002	$ 808,936.00	Partisan	6	2	3
NC	2004	$ 1,269,333.00	Non-Partisan	10	2	5
NC	2006	$ 2,772,828.00	Non-Partisan	11	4	3
NC	2008	$ 669,900.00	Non-Partisan	2	1	2
NC	2010	$ 415,611.00	Non-Partisan	2	1	2
ND	2000	$ 13,925.00	Non-Partisan	2	1	2
ND	2002	$ -	Non-Partisan	1	1	1
ND	2004	$ -	Non-Partisan	1	1	1
ND	2006	$ -	Non-Partisan	1	1	1
ND	2008	$ -	Non-Partisan	2	2	1
ND	2010	$ -	Non-Partisan	1	1	1
NE	2000	$ -	Retention	2	2	1
NE	2002	$ -	Retention	2	2	1
NE	2004	$ -	Retention	3	3	1
NE	2006	$ -	Retention	2	2	1
NE	2008	$ -	Retention	1	1	1
NE	2010	$ -	Retention	4	4	1
NM	2000	$ -	Retention	1	1	1
NM	2002	$ 91,031.00	Partisan	4	3	1
NM	2004	$ 466,949.00	Partisan	2	1	2
NM	2006	$ 6,606.00	Retention	1	1	1
NM	2008	$ 51,805.00	Retention	2	2	1
NM	2010	$ -	Retention	2	2	1
NV	2000	$ 564,014.00	Non-Partisan	5	3	2
NV	2002	$ 773,583.00	Non-Partisan	3	2	2
NV	2004	$ 3,086,410.00	Non-Partisan	10	3	3
NV	2006	$ 2,274,655.00	Non-Partisan	8	3	3
NV	2008	$ 3,135,214.00	Non-Partisan	6	2	3
NV	2010	$ -	Non-Partisan	2	2	1
OH	2000	$ 3,339,411.00	Non-Partisan	5	2	3
OH	2002	$ 6,241,933.00	Non-Partisan	4	2	2
OH	2004	$ 6,341,659.00	Non-Partisan	8	4	2
OH	2006	$ 2,807,353.00	Non-Partisan	6	2	3
OH	2008	$ 2,454,097.00	Non-Partisan	4	2	2
OH	2010	$ 2,889,405.00	Non-Partisan	5	3	2
OK	2000	$ -	Retention	4	4	1

OK	2002	$ -	Retention	4	4	1
OK	2004	$ -	Retention	2	2	1
OK	2006	$ -	Retention	5	5	1
OK	2008	$ -	Retention	3	3	1
OK	2010	$ -	Retention	2	2	1
OR	2000	$ 655,203.00	Non-Partisan	7	3	2
OR	2002	$ 43,259.00	Non-Partisan	1	1	1
OR	2004	$ 305,721.00	Non-Partisan	5	3	2
OR	2006	$ 1,413,335.00	Non-Partisan	5	3	2
OR	2008	$ 8,525.00	Non-Partisan	2	2	1
OR	2010	$ 101,947.00	Non-Partisan	3	2	2
PA	1999	$ -	Retention	2	2	1
PA	2001	$ 2,300,332.00	Partisan	3	2	2
PA	2003	$ 3,369,505.00	Partisan	8	2	4
PA	2005	$ 947,964.00	Partisan	2	1	2
PA	2007	$ 9,498,758.00	Partisan	8	3	3
PA	2009	$ 5,434,766.00	Partisan	4	1	4
SD	2000	$ -	None	0	0	0
SD	2002	$ -	None	0	0	0
SD	2004	$ -	None	0	0	0
SD	2006	$ 15.00	Retention	5	5	1
SD	2008	$ -	None	0	0	0
SD	2010	$ -	None	0	0	0
TN	2000	$ -	None	0	0	0
TN	2002	$ -	None	0	0	0
TN	2004	$ -	None	0	0	0
TN	2006	$ -	Retention	3	3	1
TN	2008	$ -	Retention	2	2	1
TN	2010	$ -	Retention	1	1	1
TX	2000	$ 1,773,879.00	Partisan	9	3	3
TX	2002	$ 6,770,178.00	Partisan	17	5	3
TX	2004	$ 2,006,657.00	Partisan	5	3	2
TX	2006	$ 3,522,336.00	Partisan	12	5	2
TX	2008	$ 4,316,489.00	Partisan	11	3	4
TX	2010	$ 2,993,248.00	Partisan	15	3	5
UT	2000	$ -	None	0	0	0
UT	2002	$ -	None	0	0	0
UT	2004	$ -	Retention	3	3	1
UT	2006	$ -	Retention	2	2	1
UT	2008	$ -	None	0	0	0
UT	2010	$ -	None	0	0	0
WA	2000	$ 955,573.00	Non-Partisan	13	4	3

WA	2002	$ 805,820.00	Non-Partisan	9	3	3
WA	2004	$ 1,361,373.00	Non-Partisan	14	3	5
WA	2006	$ 1,784,927.00	Non-Partisan	9	3	3
WA	2008	$ 424,800.00	Non-Partisan	6	3	2
WA	2010	$ 751,662.00	Non-Partisan	5	3	2
WI	1999	$ 1,309,001.00	Non-Partisan	2	1	2
WI	2000	$ 431,144.00	Non-Partisan	2	1	2
WI	2001	$ 24,759.00	Non-Partisan	1	1	1
WI	2002	$ -	None	0	0	0
WI	2003	$ 752,130.00	Non-Partisan	4	1	4
WI	2004	$ -	None	0	0	0
WI	2005	$ 1,330.00	Non-Partisan	1	1	1
WI	2006	$ (2,978.00)	Non-Partisan	1	1	1
WI	2007	$ 2,689,099.00	Non-Partisan	3	1	3
WI	2008	$ 844,000.00	Non-Partisan	2	1	2
WI	2009	$ 819,690.00	Non-Partisan	2	1	2
WI	2010	$ -	None	0	0	0
WV	2000	$ 1,376,533.00	Partisan	5	2	3
WV	2002	$ -	None	0	0	0
WV	2004	$ 2,838,905.00	Partisan	4	1	4
WV	2006	$ -	None	0	0	0
WV	2008	$ 3,305,914.00	Partisan	5	2	3
WV	2010	$ 306,197.00	Partisan	2	1	2
WY	2000	$ -	Retention	1	1	1
WY	2002	$ -	Retention	2	2	1
WY	2004	$ -	Retention	1	1	1
WY	2006	$ -	Retention	2	2	1
WY	2008	$ -	Retention	1	1	1
WY	2010	$ -	Retention	2	2	1

Source: National Institute on Money in State Politics.

Appendix B: State Decade Profiles, 1999-2010

State	funds	Open Seats	Candidates	Comp. Score	Term Length	Members	Type
AK	$ 72,391.00	6	6	1	10	5	Retention
AL	$ 43,922,535.00	18	54	3	6	9	Partisan
AR	$ 3,890,240.00	13	25	2	8	7	Non-Partisan
AZ	$ -	10	10	1	6	5	Retention
CA	$ 225,298.00	8	8	1	12	7	Retention
CO	$ -	10	10	1	10	7	Retention
FL	$ 7,500.00	15	15	1	6	7	Retention
GA	$ 4,356,072.00	14	21	2	6	7	Non-Partisan
IA	$ -	13	13	1	8	7	Retention
ID	$ 789,343.00	10	14	1	6	5	Non-Partisan
IL	$ 24,291,810.00	11	23	2	10	7	Partisan
IN	$ -	5	5	1	10	5	Retention
KS	$ -	14	14	1	6	7	Retention
KY	$ 3,640,812.00	12	20	2	8	7	Non-Partisan
LA	$ 9,229,694.00	10	18	2	10	7	Partisan
MD	$ -	8	8	1	10	7	Retention
MI	$ 15,287,586.00	12	34	3	8	7	Partisan
MN	$ 1,090,690.00	13	28	2	6	7	Non-Partisan
MO	$ -	7	7	1	12	7	Retention
MS	$ 10,779,531.00	14	35	3	8	9	Non-Partisan
MT	$ 2,675,759.00	12	22	2	8	7	Non-Partisan
NC	$ 7,993,968.00	12	36	3	8	7	Non-Partisan
ND	$ 13,925.00	7	8	1	10	5	Non-Partisan
NE	$ -	14	14	1	6	7	Retention
NM	$ 616,391.00	10	12	1	8	5	Partisan
NV	$ 9,833,876.00	15	34	2	6	7	Non-Partisan
OH	$ 24,073,858.00	15	32	2	6	7	Non-Partisan
OK	$ -	20	20	1	6	9	Retention
OR	$ 2,527,990.00	14	23	2	6	7	Non-Partisan
PA	$ 21,551,325.00	11	27	2	10	7	Partisan
SD	$ 15.00	5	5	1	8	5	Retention
TN	$ -	6	6	1	8	5	Retention
TX	$ 21,382,787.00	22	69	3	6	9	Partisan
UT	$ -	5	5	1	10	5	Retention
WA	$ 6,084,155.00	19	56	3	6	9	Non-Partisan
WI	$ 6,868,175.00	9	18	2	10	7	Non-Partisan
WV	$ 7,827,549.00	6	16	3	12	5	Partisan
WY	$ -	9	9	1	8	5	Retention