1 Attacking Judges

Another Dimension of Campaign Negativity in American Politics

ONE OF THE MOST NOTABLE AND WORRISOME TRENDS IN contemporary American campaign politics is the rise of televised attack advertising. Going far beyond traditional measures to promote candidates or draw distinctions among them, these nasty, below-the-belt campaigns have raised concerns from some political scientists and other astute observers that such rancor may have deleterious consequences for representative democracy. Stated effectively by West (2010: 70), attack ads in contemporary democracy are thought by many to be "the electronic equivalent of the plague."

Nowhere are these misgivings being expressed more vociferously than in the context of state judiciaries by the nation's most distinguished court reform organizations and an almost singular voice in the legal community.[1] Convinced that judges and courts "are being jeopardized by the corrosive effects of money in judicial election campaigns" and by "attack advertising calculated to persuade a majority of the electorate that incumbent judges should be removed from office," the American Bar Association (2003: 102)[2] now is advocating that the thirty-eight states currently using elections[3] to staff their state court benches end the practice altogether.[4] Taking a somewhat more moderate stance is retired U.S. Supreme Court Justice Sandra Day O'Connor, who in an extraordinary level of political activism during a post-Court career, is vigorously campaigning against contestable elections.[5] These high-profile actors are merely the tip of the iceberg of the opposition to judicial elections

in their contemporary form among legal practitioners, legal scholars, and the interest groups who serve them.

Driving this movement to alter state judicial selection practices are two recent transformations in state supreme court election campaigns. First is the emergence of television campaign advertising on a nationwide scale beginning in 2002 (e.g., Brandenburg and Schotland 2008; Goldberg et al. 2005; Sample, Jones, and Weiss 2007). Although information about the scope and content of campaign advertising was not gathered in any systematic way before the Brennan Center for Justice and the University of Wisconsin Advertising Project began to capture and code televised advertising in state supreme court elections in 2000, these messages have become the norm in contested elections across the nation over the past decade and now play a central role in many judicial elections.[6]

Second are fundamental revisions in the rules of campaign engagement brought about by the U.S. Supreme Court's decision in *Republican Party of Minnesota* v. *White* (2002). In this landmark case, the Supreme Court invalidated "announce clauses" in state judicial codes of conduct that prevented candidates for judgeships from expressing their views on disputed legal or political issues. Although state supreme court elections have been competitive for decades (e.g., Dubois 1980; M. G. Hall 2001a, 2007a, 2011; Kritzer 2011, forthcoming) and in some states always have been "political" in tone (e.g., Dubois 1980; K. Hall 1984, 2005; M. G. Hall 2001a, 2007a, 2011; Kritzer 2011), judicial campaigns in other states prior to *White* were issue-free, low-information events by design. However, *White* changed the electoral game by opening the door in all states to issue-based discourse, including attack advertising that can be part of aggressive, well-financed campaigns.[7]

These recent developments only exacerbated criticisms that initially began to heighten in the 1980s as judicial elections were becoming "noisier, nastier, and costlier" (Schotland 1985: 78), trends that inspired a "blizzard of commentary" (Gibson 2008: 60) and a multitude of law review articles over the past several decades about "why judicial elections stink" (Geyh 2003: 43). But as Gibson (2009: 1285) aptly observed, "It is puzzling that observers are so certain of the consequences of electioneering . . . given that the scientific evidence of such effects is so scant." Indeed, while empirical scholarship on state supreme courts and judicial behavior within these institutions is advanced and complex,[8] few studies have investigated the exact nature of these campaigns or their effects on judges, courts, and state citizenries.[9]

This project helps to address this deficiency by taking a theoretically grounded empirical look at the effects of television advertising, including harsh attacks targeting incumbents, on two key aspects of state supreme court elections: the vote shares of justices seeking reelection and the propensity of the electorate to vote. As will be discussed in considerable detail in the following chapters, a burgeoning body of political science scholarship has investigated whether campaign negativity has harmful effects on candidate preference and citizen participation in legislative and executive elections, in response to rather alarming predictions about the toxic consequences of televised attacks. In this project, I examine these contentions within the context of state supreme courts.

As a prelude to this analysis, I provide an empirical description of state supreme court elections over the past several decades, with an emphasis on trends in the competitiveness of these races. In this regard, I test the hypothesis that the *White* decision and other aspects of highly competitive campaigns have altered key features of state supreme court elections in recent years. Similarly, I describe televised advertising in state supreme court elections, including the content, scope, and sponsors of attacks and other issue-based appeals. As with campaign politics generally, legal scholars and judicial reform advocates are deeply skeptical of the capacity for campaigns to provide meaningful information about candidates. As Brandenburg and Schotland (2008: 1241–1242) opine, "Unfortunately, TV ads are as likely to educate voters about judicial qualifications as they are to provide nutritional information about french fries." This study provides a systematic examination of this contention.

Generally, there are two compelling reasons to think that the concerns expressed by the American Bar Association, other reform organizations, and the legal academy about negativity in judicial elections may be merited. First, the legitimacy of judges may depend to some extent on an image of impartiality (e.g., Gibson 2008, 2009). Thus, negative advertising explicitly designed to disparage judges and their choices may have especially adverse effects in judicial elections. Second, many states do not list the partisan affiliations of judicial candidates on the ballot, thereby removing the most valuable heuristic in American elections. In these races, campaign messages, including scathing and repeated attacks, may constitute much of the information available to voters and thus may be a strong force in shaping the electoral fates of incumbents and the willingness of citizens to vote.

Alternatively, a theoretically sophisticated body of political science scholarship on campaign negativity in congressional and presidential elections predicts neutral or positive effects of these controversial messages. Though certainly not without contradiction (e.g., Ansolabehere et al. 1994; Ansolabehere and Iyengar 1995; Fridkin and Kenney 2011; Kahn and Kenney 1999), empirical evidence largely discounts the effectiveness of attack advertising in swaying voters (e.g., Lau et al. 1999; Lau, Sigelman, and Rovner 2007) or demobilizing the electorate (e.g., Brooks and Geer 2007; Finkel and Geer 1998; Jackson and Carsey 2007). In fact, quite a few studies (e.g., Finkel and Geer 1998; Jackson and Carsey 2007; Lau and Pomper 2001) show that negative ads *increase* voter turnout in some races.

Though currently lacking assessments of the direct effects of televised campaign messages in these races, empirical scholarship on state supreme courts likewise has documented that rather than being alienated by aggressive campaigns, the electorate is mobilized to vote by the very factors that intensify these races, especially partisan elections, hotly contested seats, and over-the-top spending (e.g., Baum and Klein 2007; Bonneau and M. G. Hall 2009; M. G. Hall 2007b; M. G. Hall and Bonneau 2008, 2013; Hojnacki and Baum 1992; Klein and Baum 2001). Generally, extant scholarship has failed to identify any observable behavioral manifestations of a disaffected electorate stemming from highly contentious races, at least in the form of the willingness to vote.

In short, a deep disjunction is evidenced between the assumptions underlying legal advocacy and much of the empirical evidence generated in studies of elections, including state supreme court elections. To bridge this gap, this research evaluates these two competing perspectives by capitalizing on the solid theoretical foundations of the scholarship on U.S. campaigns and elections and the analytical leverage of comparative research designs. Specifically, I examine all supreme court elections from 2002 through 2008 in the twenty-two states using partisan and nonpartisan elections to staff their highest courts. Although this study will provide a wealth of information about state supreme court elections and the campaigns of incumbents and challengers, five primary sets of questions are explored:

1. How competitive are state supreme court elections, and have the fundamental features of these races been transformed in the post-*White* era?

2. What is the exact nature and extent of televised campaign broadcasting?
3. Does the tone of broadcast advertising sway voters about candidates?
4. Does campaign negativity dampen citizen participation?
5. Are any impacts of campaign advertising contingent on the presence or absence of partisan ballots?

The Comparative Advantage of State Supreme Court Elections

State supreme court elections present an outstanding opportunity for systematic comparative inquiry into the question of how political institutions shape the impact of campaigns and mass electoral behavior, two of the discipline's most abiding concerns. Across the states, both partisan and nonpartisan ballots are used in supreme court elections, reflecting institutional variation that typically does not exist for other national or statewide offices in the United States. Likewise, judicial elections are low-salience, low-information events relative to many other important elections, including presidential, senatorial, and gubernatorial races. Assessing the effects of attack advertising and other campaign messages in these alternative contexts using single models that control for the wide range of other forces affecting elections can provide much needed insight into the role played by institutional arrangements and other contextual forces in democratic politics. This seems especially important given the relative inattention in the scientific literature to nonpartisan elections, despite their widespread use in many state and local elections across the nation (Schaffner, Streb, and Wright 2001).

As the results of this analysis will show, although the political controversy over electing judges is enormously complex and largely normative, the theoretical and empirical story about the impact of negativity in judicial campaigns is straightforward. Partisan state supreme court elections in many respects resemble their legislative and executive counterparts and present a striking challenge to the notion that this new era of intense televised campaigning necessarily threatens incumbents or weakens the participatory proclivities of the electorate. Generally speaking, partisan ballots and other institutional arrangements insulate supreme court justices and state citizenries from any adverse effects of short-lived events like televised attack ads.

However, when partisan labels are removed from ballots, campaigns have pronounced consequences. On the positive side, attack advertising and other factors related to aggressive competition increase voter participation in nonpartisan elections. In fact, in nonpartisan and partisan state supreme court elections, there is no evidence whatsoever that attack advertising is a demobilizing force.

On the negative side from the perspective of the advocacy literature,[10] attack advertising serves to attenuate the incumbency advantage in nonpartisan elections. Although nonpartisan elections were adopted as a reform to insulate judges from external political events, removing partisan labels creates a strategic contingency within which some of the most damaging consequences of negative advertising can manifest. In short, nonpartisan elections render some of the most serious concerns about caustic campaigns into self-fulfilling prophecies.

A theoretical perspective drawn from neoinstitutionalism explains these results.[11] Nonpartisan judicial elections are influenced to a greater extent by hard-fought campaigns not because courts are intrinsically different from the other branches but because nonpartisan elections alter the rules of the game. These deliberate choices made by states about selection and retention mechanisms not only define the fundamental rules under which elections operate but also create alternative strategic contingencies that structure the manner in which voters receive and use information and the extent to which incumbents are insulated from external political forces. With regard to legal advocacy, court reformers are partially right about the harmful effects of negativity but for the wrong reasons. Through the lens of political science, those predicting the pernicious effects of negativity (e.g., Ansolabehere et al. 1994; Ansolabehere and Iyengar 1995) missed the institutions and the processes to which their arguments best apply.

The implications of this inquiry are significant. Understanding linkages between citizens and government is basic to a science of politics. By assessing judicial elections comparatively with a focus on the exact nature of the campaign messages broadcast to voters, this analysis helps to improve the current state of knowledge about judicial elections while facilitating the development of theory that captures the realities of these contests. Through the lens of democratic theory and the science of judging, ascertaining how citizens are drawn into the electoral arena and how voters select among candidates is essential for building theories of judicial choice that accurately reflect the

complex task of balancing pressures from democratic processes with norms of judicial independence. Looking beyond the judiciary, this study helps to refine existing accounts of electoral politics, particularly with respect to ways in which institutional arrangements, especially the presence or absence of partisan ballots, shape citizen behavior.

The Practical Politics of Judicial Selection

From a practical perspective, this work helps to inform the debate about how best to select judges. Since 1960, twelve states have abandoned partisan elections for selecting their highest courts in favor of gubernatorial appointment plans, nonpartisan elections, or the Missouri Plan, which combines initial executive appointment with subsequent retention elections.[12] Another six states jettisoned nonpartisan elections for the Missouri Plan. In addition to the current claims about the harmful effects of campaign politics, reform advocates have asserted for decades that partisan elections are highly undesirable and should be replaced with other selection schemes.

Especially central to the initial case against partisan elections but still mentioned in the contemporary debate is the claim that judicial elections fail to achieve their goal of accountability, evidenced in part by purportedly incompetent voters and a widespread lack of participation.[13] The conventional wisdom (e.g., Dubois 1980; Schotland 1985), based largely on anecdotal evidence, is that voters "know nothing and care less" (Dubois 1980: 36), are plagued by "ignorance, apathy, and incapacity" (Geyh 2003: 63), are "only slightly affected" by close contests (Adamany and Dubois 1976: 743), and attach "limited importance to the work of the judicial branch of government" and thus decline to vote (National Center for State Courts 2002: 38). Geyh (2003: 76) summarizes the overall argument succinctly: "Judicial elections promote accountability so poorly that the minimal gains they engender on that score are offset by the losses to independence they cause."

These serious contentions formed one of the early cornerstones of the campaign against partisan judicial elections that began in earnest in the 1960s, long before attack advertising and other aspects of electioneering were a principal focus. However, these assertions have been shown to be overdrawn. Voters in state supreme court elections are not incapable of making informed, candidate-centered choices about the professional qualifications of judicial contenders. Previous studies of supreme court elections have demonstrated

that state electorates prefer quality challengers to nonquality challengers (i.e., challengers who are judges rather than attorneys who lack judicial experience) (Bonneau and Cann 2011; Bonneau and M. G. Hall 2009; M. G. Hall 2001a; M. G. Hall and Bonneau 2006). Likewise, state electorates vote on issues relevant to judges even when partisan labels are not on the ballot (e.g., Baum 1987; M. G. Hall 2001a; Hojnacki and Baum 1992). Thus, the inability of state electorates to draw substantive distinctions between candidates or make issue-based choices has been exaggerated.

On the propensity to vote, studies of a wide array of political offices in the United States, including state supreme courts, document that citizen participation in elections is variable yet predictable. Among other things, voter turnout is influenced by the formal rules governing the conduct of elections and other regular features of these races (e.g., Baum and Klein 2007; Bonneau and M. G. Hall 2009; Dubois 1980; M. G. Hall 2007b; M. G. Hall and Bonneau 2008, 2013). Stated differently, serious deficiencies in citizen interest and involvement in elections are not intractable. Specifically with regard to judicial reform, eliminating partisan elections, which has been a long-standing and somewhat successfully achieved goal of the judicial reform movement, has had the unintended consequence of inhibiting voting in judicial elections (e.g., Bonneau and M. G. Hall 2009; Dubois 1980; M. G. Hall 2007b; M. G. Hall and Bonneau 2006, 2013), thus making criticisms about low citizen involvement in these races another self-fulfilling prophecy.

Whether these patterns have been altered by aggressive campaigns and televised advertising in the post-*White* era remains to be seen.[14] Thus, new empirical tests of some of the fundamental premises underlying judicial reform are essential. Beyond the judicial selection controversy, scientific research is critical for sorting out apprehensions about the harsh consequences of attack advertising from the realities of how these messages actually affect (or fail to influence) the justices, their courts, and state citizenries. As Geer (2006: 2) effectively summarizes and recommends:

> Worries about negativity lie at the very center of concerns about the health of our electoral system and whether that system promotes a process that can be thought of as democratic. These are serious concerns that warrant serious attention. The problem is that we are all too quick to criticize the system and wring our hands over the ill effects of negativity. We need to pause, reconsider starting

assumptions, and marshal systematic data that will allow us to assess more fully theses fears and concerns.

In short, science should inform any intelligent discussions of televised campaign negativity and the controversy over electing judges, including public policy decisions about which selection systems should be used to select and retain the state court bench.[15]

The Rising Profile of State Supreme Courts

Perhaps the best starting point for understanding state supreme court elections, including the impact of televised campaign politics on incumbent vote shares and citizen participation, is appreciating the power and function of state judiciaries. In the United States, state courts process staggering caseloads that collectively constitute about 98 percent of the nation's litigation (M. G. Hall 2013). The sheer volume of cases processed by state courts and the number of people actually involved in, or directly affected by, this litigation is considerable. Similarly, these conflicts span virtually the entire spectrum of human conflict endemic to personal, social, economic, and political intercourse. William J. Brennan (1966), a justice on the New Jersey Supreme Court prior to his appointment to the U.S. Supreme Court, observed that state courts actually are more important than federal courts because state courts resolve problems most directly relevant to citizens' day-to-day lives. Marriage and divorce, child support and child custody, tenant–landlord disputes, debt collection, the redistribution of estates, and other such matters, although seemingly mundane, are precisely the types of cases ordinary Americans are likely to be litigating and the types of disputes that will have an immediate and lasting impact on their lives.

Of course, not all cases brought to state courts entail such ostensibly routine matters as divorce or debt collection. State courts also decide some of the most salient and publicly visible issues on the American political agenda, generating heated debates and provoking accusations from political opponents and other dissatisfied parties of "judicial activism" and "legislating from the bench." These cases range from serious crimes to disputes over hot-button policy issues with far-reaching consequences. In recent years, for example, state courts have helped to define the law of same-sex marriage, access to abortion, the right to die, stem cell research, medical marijuana, voter

identification requirements, tort liability, and affirmative action. Similarly, state courts play a vital role in interpreting and applying federal law, including federal constitutional law governing state felony prosecutions and a wide range of other types of disputes.[16]

From the perspective of state government, the power of state courts to thwart the will of the other branches of state government and to stand in direct contradistinction to the dominant political alliance is considerable. Through the power of judicial review, state courts, especially state supreme courts, decide some of the most significant and divisive issues of state politics and in doing so help to define the success or failure of legislative and executive agendas. These controversial cases can place state courts squarely into political conflict with the legislative and executive branches, requiring judges to act as countermajoritarian agents. Of course, governors and state legislatures can retaliate through such means as refusing to raise judges' salaries, altering court jurisdictions, and using subsequent legislation and state constitutional amendments to attack courts publicly and undo their rulings. Thus, when state courts are on the opposite side of the political fence from the other major players in state government, high political drama can quickly follow.[17]

In the vast majority of these various types of cases, state courts act relatively independently of the federal courts. Numerous areas of law remain largely within the purview of the states, including criminal law, education, and family law. Moreover, state court decisions are subject to review by the U.S. Supreme Court only when matters of federal law are involved or implicated. Decisions governed exclusively by state law are immune to federal scrutiny. However, even when cases can be appealed to the nation's highest court, the chances are remote of any particular case landing on the U.S. Supreme Court's docket. In the 2011 term (October 2011 through September 2012), which was not particularly distinctive relative to other terms, the Supreme Court decided only seventy-eight cases with full signed opinions and another fifty to sixty cases with per curiam opinions.[18] The majority of these cases came from the federal courts.

In short, state courts are major players in litigation in the United States, and state supreme courts, which sit at the apex of state judiciaries, have a great deal of power to shape law and policy. Overall, state supreme courts directly influence the lives of millions of people while setting the parameters of acceptable action by state governments. Most of these justices, who have tre-

mendous influence over the distribution of wealth and power in the United States, are elected.

Particularly intriguing in recent decades is the rising profile of state supreme courts and the selection processes that surround these institutions. Explanations commonly cited to explain this trend include the polarization of the electorate, the decline of one-party domination in some states, the proliferation of single-issue groups, and the growing reliance in some states on state constitutions to expand civil rights and liberties beyond the lower limits set by the federal constitution and federal courts.

Fundamental changes in institutional design also have played a major role in this transformation, especially the fairly rapid diffusion of intermediate appellate courts starting in the 1960s (see, e.g., American Bar Association Commission on the 21st Century Judiciary 2003; M. G. Hall 1999). Intermediate appellate courts are designed to improve the capacity and efficiency of state judiciaries by handling the vast majority of appeals from the trial courts, leaving state supreme courts with the discretion to choose only the most significant cases for their dockets. In other words, intermediate appellate courts help to free state supreme courts from the drudgery of overburdened, highly routine caseloads, thereby elevating the policy-making role of state supreme courts while providing better opportunities to develop innovative solutions to the problems embodied in the cases. These two-tiered appellate structures produce complex and interesting dockets for state supreme courts but also increase the controversy surrounding these institutions, attracting sharper attention to, and scrutiny of, the justices' decisions.

At the beginning of the 1960s, only fourteen states had intermediate appellate courts (M. G. Hall 1999), but now all but ten states (Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, Wyoming) have these hard-working institutions.[19] A two-tiered appellate structure is not necessary in states with small populations and low litigation rates.[20]

Some observers describe these trends in the heightened power of courts, both in the United States and abroad, as the "judicialization" of politics, wherein crucial societal interests are ever more frequently decided by courts rather than the other branches of government. But regardless of the label one prefers, state supreme courts and judicial elections have moved to the forefront of American political discourse.