Introduction

The United States is all but unique in using popular elections to choose and/or retain judges. Not all states use elections, and the states that do vary widely in the specifics of their electoral arrangements. Moreover, the use of elections has been controversial from the start. Judges are supposed to be independent, and elections are the archetypical method of making public officials accountable. Ironically, the initial adoption of popular elections was at least in part intended to *increase* judicial independence, in this case independence from the elected officials who selected judges (Hall 1984a; Shugerman 2012). However, it quickly became apparent that elections introduced their own tensions in the independence versus accountability equation.

What role should politics play in the selection and retention of judges? In her concurring opinion in *Republican Party of Minnesota v. White*,[1] Justice Sandra Day O'Connor observed, "Minnesota has chosen to select its judges through contested popular elections … 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." Since stepping down from the Supreme Court, Justice O'Connor has been a prominent advocate for abandoning both partisan and nonpartisan elections as methods for selecting and retaining state judge (see, for example, O'Connor 2010).

At least since 2000, there has been a sharp increase in political activity surrounding some elections for state supreme court justices (Glaberson 2000a; Sample et al. 2010b).[2] The amount of money being raised by candidates in

[1] 536 U.S. 765, 792 (2002).

[2] There is much less focus on lower level state courts. However, recent analyses of elections for intermediate courts of appeals at the state level (Frederick and Streb 2008; Streb et al. 2007) suggest that there has not been any significant change, nor does there appear to have been an increase, in contestation in elections for trial court judgeships (Nelson 2011).

some elections has skyrocketed. Television advertising has increased. Interest groups have been active players both as direct contributors and through independent advertising and activities. In one of the most extreme examples, an election for a seat on the Supreme Court of Appeals of West Virginia led to a 5-4 U.S. Supreme Court ruling that it is a violation of due process for a justice to sit on a case involving a major contributor to his or her campaign.[3] Whether the increased political activity, and the use of judicial elections more generally, is a positive or a negative for the courts is a matter of debate (Bonneau and Hall 2009; Brandenburg and Caufield 2009; Geyh 2003; Gibson 2008a, 2009; Gibson et al. 2011; Hall 2011).

While I will discuss the implications of the changes that have occurred for judicial elections and judicial selection more generally, that is not the primary focus of this book. Rather, the central questions are:

- What has changed?
- Where have those changes occurred and where have they not occurred?

What explains why change has occurred in some places but not others? To answer these questions, I examine the patterns in state supreme court elections across the United States. Unlike most contemporary studies of supreme court elections that have focused on the last 20–30 years, most of my analysis covers the entire period since the end of World War II, and for some discussions traces judicial elections in particular states back to their beginning in order to better understand contemporary patterns and the nature of change, or lack or change, that has occurred.

Central to the story that I tell here is that changes have occurred in some states but not in others – at least not yet. This leads to the question of what explains the changes that have occurred? My answer to this question is twofold. First, what we are seeing in state supreme court elections is part of larger changes that have occurred in American politics: the demise of the one-party Democratic South (Cohn 2014), the broad increase in political polarization (Hare and Poole 2014), and sharp increases in spending on elections by ideological and economic interest groups. However, these factors do not account for why change has occurred in some places and not in others, and this leads to the second part of my answer: when courts become involved in highly

[3] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). The election involved the defeat of an incumbent by a candidate who had received an "extraordinary amount from, and through the efforts of, the board chairman and principal officer" (Justice Kennedy's phrase) of Massey Coal. At the time, Massey was appealing a $50 million judgment for "fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations," and while the case was not yet before the Supreme Court of Appeals, it was clearly headed that way.

controversial issues or issues impacting major economic interests, it should not be surprising that there is a strong political response that gets played out in the arena of judicial selection and retention. Importantly, as observed by Alan Tarr, there has been an "increasing involvement of courts, particularly in recent decades, in addressing issues with far-reaching policy consequences" (Tarr 2003:6).

In Chapter 1 I present the contrasting cases of Minnesota and Wisconsin which serve to illustrate both the presence and absence of change and the key factor accounting for that presence and absence. While early in the first third of the twentieth century Minnesota had a period of sharp conflict in elections for the state supreme court, the period since World War II has seen little conflict or rancor in those elections. Wisconsin is almost the mirror image. Until the mid- to late 1990s, Wisconsin was the archetypical nonpartisan state with regard to its supreme court, both in terms of electoral politics (Adamany and Dubois 1976) and decision patterns (Adamany 1969). In recent years Wisconsin has become the poster child for conflict and rancor both in the court itself and at the polls (Basting 2008; Corriher 2013; Sample et al. 2010b:32–33). I argue that the difference between the two states reflects the Wisconsin court deciding controversial issues related to tort (injury) law while the Minnesota court has avoided deciding, or not been placed in the position of having to decide, the kinds of issues that have led to a political backlash against a state supreme court or its justices.

In Chapter 2 I discuss the history of the use of elections to select and retain supreme court justices. I reiterate the findings of scholarship that, ironically, the shift from executive appointment to election was motivated in significant part by a desire to *reduce* the influence of politics and increase judicial independence. This happened at a time before voters were asked to complete an official ballot, what is known as the Australian ballot; the result was to give great power to parties in most states. This power flowed from the absence of primary elections as a means of choosing a party's candidates for office and from the absence of official ballots. Each party would choose its candidates and then print ballots listing those candidates, including judicial candidates, which the party's supporters would then deposit in the ballot box. As Chapter 1 discusses, this practice was not universal in judicial elections; Wisconsin structured its judicial elections in a way that served to limit party influence, and those elections developed a strong tradition of nonpartisanship. The adoption of the Australian ballot made possible the development of formally nonpartisan elections which began to be adopted in the early part of the twentieth century, and still later states began to adopt a system employing retention elections in which voters essentially give a thumbs up or a thumbs down as

to whether a judge should continue in office. The second part of Chapter 2 provides a detailed discussion of the myriad variations in the election systems used for state supreme courts.

Chapter 3 answers the question of why we should care about how state supreme court justices are selected. That is, does the method of selection matter, and if so how? I consider three broad questions in this chapter, drawing heavily on extant studies but also adding several original analyses. The first question is whether the method of selection affects the public's view of their state supreme court. A subsidiary question is whether the election process, particularly the presence of negative advertising , has negative consequences for public support of the court. The second question is whether the method of selection has any direct or indirect effects on the decisions state supreme courts make; for this discussion I focus on the kinds of issues that seem to mobilize voters and interest groups: capital punishment and crime more generally, abortion, same-sex marriage, and torts. The third question examined is whether the need for candidates in judicial elections to raise money to run their campaigns has an impact on the decisions they make on the court; specifically, is there any evidence that campaign contributions lead justices, consciously or unconsciously, to favor parties and interests who were the source of those contributions? Importantly, this does not mean simply that justices vote in a way their contributors would favor because the causal relationship may run from voting (or expected voting) to contributions rather than from contributions to voting; sorting out the causal direction is both crucial and extremely difficult, and as I will show we lack a good answer one way or the other.

The next four chapters are the core of my original analysis. Chapter 4 looks at whether since 1946 state supreme court elections have increased in the likelihood of being contested and in the degree of competitiveness; the chapter includes retention elections focusing on the percentage voting in favor of retention. Chapter 5 examines changes in spending and television advertising; this chapter covers a more limited period due to the absence of systematic data prior to 1990 regarding contributions and prior to1999 regarding television advertising. Chapters 6 and 7 look at whether state supreme court elections have become more "political" in the sense of whether voting patterns fall along a partisan (party) dimension. Chapter 6 looks at this for statewide elections since 1946, both those conducted on a partisan basis and elections that do not explicitly identify candidates with a political party, and Chapter 7 examines voting patterns in all statewide retention elections, going back to the first such election in California in 1936. Chapters 6 and 7 include a combination of statistical analysis and discussion of specific elections that illustrate the underlying factors driving particular patterns.

As noted, the core data for the analysis in the following chapters cover all state supreme court elections since 1946 in states using partisan, nonpartisan, and what I label hybrid (party nominates but general election ballot is nonpartisan) elections, plus all state supreme court retention elections since the first such election in California in 1936. For both statewide and district elections, I have compiled information on the vote totals for both primary and general elections, including runoffs where they occurred. For statewide elections, I have compiled county-level vote totals for virtually all contested general elections and for nonpartisan primaries in the several states where a candidate winning a majority in the primary does not have to stand in the subsequent general election.[4] These data have been compiled from published state reports, state archives, and online sources.[5] As noted previously, the data money and advertising employed in Chapter 5 cover a shorter period; the data used in that chapter were assembled from a variety of sources that are detailed in the chapter.

In the final chapter I reprise the main findings of my analyses and reiterate my argument that much of the change that has occurred in state supreme court elections either reflects broader political changes or flows from the kinds of issues that contemporary state supreme courts have to confront. I then turn to a consideration of what changes might be considered in our systems for selecting and retaining state supreme court justices. Rather than limiting my discussion to the various systems now in use among the states, I look beyond the United States and describe two systems used for selecting judges in many other countries. Using elements of what other countries do, I go on to propose several changes that would preserve some role for the electorate, but potentially improve the selection process; I do not argue that these changes would eliminate politics from selection or retention, but some might serve to tamp down some aspects of politics as currently played out in judicial elections. I conclude with a bit of pessimism about the prospects that any of the changes I suggest will come about, and argue that a possible change that could serve to reduce some of the current patterns decried by critics of judicial elections is a return to partisan elections, although with some specific limitations – there

[4] For two elections, the county-level information is lost to history; I have also omitted a third election which was conducted entirely on a write-in basis.

[5] The original sources in some cases presented problems because the county-level figures occasionally did not add to the statewide totals. In some cases, there was what appeared to be a clear error in a county-level figure which when modified summed to the total. More often, it was not possible to resolve the inconsistency, and I retained the reported county-level figures for any analysis involving the county-level data and retained the state-level totals for analysis involving state-level data.

is some evidence, albeit very limited, that citizens would prefer partisan elections of judges over any of the other systems currently in use!

A NOTE ON THE GRAPHS

The story and analysis that I present in this book is told in significant part through the use of graphs showing changing patterns over time. Ideally the graphs would all appear in color. Alas, the world of publishing is not yet ideal and economic realities dictated that the graphs be published in black and white. However, I have prepared color versions of all of the statistical graphs and have made those available electronically at http://z.umn.edu/sscelections. My hope is to also include on that website versions of many of those graphs updated to include later elections; versions covering elections through 2014 should be available at the time this book appears in print.[6]

[6] Some of the updated graphs for Chapters 6 and 7 will show slight differences for 2014 from the version of the graphs based on the book. Those differences reflect the recomputation of some correlations that in the updated version could use the average of 2010 and 2014 gubernatorial election patterns.

1

A Tale of Two States

The kinds of changes in state supreme court elections that have been described by those who would change current systems of selection and retention are far from a universal development. This is clearly illustrated by the two neighboring states of Wisconsin and Minnesota: while Wisconsin has seen substantial changes, Minnesota has not. These two states have important similarities in terms of political culture, largely sharing what Daniel Elazar labeled a "moralistic political culture" (Elazar 1966:89–92, 97). They are two of the Midwestern states that have had generally liberal politics over the last fifty years, with Minnesota supporting the Republican presidential candidate only one time in the fourteen elections between 1960 and 2012, and Wisconsin supporting the Republican candidate five times in those same fourteen elections. One difference between the two states is in their economies; both have strong agricultural sectors, but Minnesota's industrial base has been more technology-oriented while Wisconsin was more dependent on heavy manufacturing. As a result, Wisconsin has been more affected by the exit of heavy industry to nonunion states and to overseas locations. However, it is unclear why this economic difference would be reflected in the different patterns found in elections for the two states' supreme courts. Thus, an intriguing puzzle is why these two neighbors have taken such different paths vis-à-vis state supreme court elections over the last fifteen to twenty years. The answer to that puzzle, I argue, is found in significant part in the kinds of decisions the courts have been called on to make, or were expected to make, in recent years. Thus, the stories of Wisconsin and Minnesota that follow illustrate the phenomena that this book addresses.

THE WISCONSIN STORY

The Battle of 2011

The winter of 2011 was a time of political turmoil in Madison, Wisconsin. In the 2010 election, Wisconsin voters had given the Republican Party control of both houses of the state legislature and also elected a Republican to be governor. Governor Scott Walker and the Republican majorities in the legislature set out to make major changes in how the state did business, and sharply reducing the power of government employees was at or near the top of their agenda. A bill to limit the rights of government employee unions to bargain on behalf of their members led the Democrats in the state senate to flee the state in order to deprive the Republican majority of the quorum needed to vote on budget-related matters. After almost three weeks of inaction, the Republican majority hurriedly pushed through a bill in the absence of the Democrats that imposed many of the restrictions but which they claimed did not fall into the category of a budget issue and hence had a lesser requirement for a quorum in the state senate. Several lawsuits followed in an effort to block the bill on grounds that its passage violated procedural requirements. A trial judge hearing one of the suits issued an injunction to prevent the bill from going into effect until the courts had decided the issue.[1]

All of this was taking place as the time for the spring nonpartisan elections in Wisconsin was approaching. The spring elections are when Wisconsin voters elect local government officials, school boards, and judges, all on nonpartisan ballots. In April 2011, Wisconsin Supreme Court justice David Prosser was running for reelection. Justice Prosser had been appointed to the Wisconsin Supreme Court in 1998 by Republican governor Tommy Thompson to fill a vacancy created by the resignation of Justice Janine Geske (a previous Thompson appointee). At the time of his appointment to the court, David Prosser was a well-known political figure in the state. He was a member of the state assembly from 1979 to 1996, serving as minority leader for six of those years and assembly speaker for two years. He relinquished his seat in the assembly in 1996 to run unsuccessfully for the U.S. House of Representatives. A month after Prosser lost the 1996 election, Governor Thompson appointed him to the Wisconsin Tax Appeals Commission, where he was serving at the time of his appointment to the Wisconsin Supreme Court.

[1] The Wisconsin Supreme Court later voted 4-3 to reverse the trial court's injunction order; *State of Wisconsin ex rel. Ismael R. Ozanne v. Jeff Fitzgerald et al.*, 798 N.W.2d 436 (Wis. 2011). Three years later, in July 2014, the court upheld the validity of the law in a 5-2 vote; *Madison Teachers, Inc., et al. v. Scott Walker et al.*, 2014 WI 99.

Wisconsin justices serve ten-year terms, and when someone is appointed by the governor to fill a mid-term vacancy,[2] the new justice is required to stand for election for a full ten-year term at the next April election in which no other election for the court, either a justice completing a ten-year term standing for reelection or an open seat election, is to take place.[3] Because of other supreme court elections,[4] Justice Prosser did not come before the voters until 2001, more than two years after his initial appointment; in that election he was unopposed. Going into the 2011 election, the expectation was that Justice Prosser would be easily reelected regardless of what opposition he faced. Three people decided to challenge Prosser, which necessitated a primary election in February.[5] Of the approximately 420,000 voters casting ballots in the supreme court primary, 55 percent voted for Justice Prosser; his closest competitor in the primary received only 25 percent of the vote. However, unlike some states with nonpartisan supreme court elections (e.g., Washington and Oregon), in Wisconsin winning an absolute majority in the primary does not end the contest; consequently Prosser had to face the runner-up from the primary, longtime assistant state attorney general JoAnne Kloppenburg, in April.[6]

Just two days after the February 15 primary election, the Democrats in the state senate decamped to Illinois. Protesters opposed to the Republican plan to limit the bargaining rights of state employees filled the streets in Madison.

[2] Between 1946 and 2013, 21 of the 36 justices who joined the court were appointed to fill vacancies; throughout the history of the court (starting in 1853 when the modern court came into operation), 47 of 76 justices were initially appointed (three of the 29 elected justices were the initial members of the court).

[3] If the vacancy occurs between December 1 and the April election the next spring, the appointee does not stand for election until the following April or later. For example, if the vacancy occurs on December 15, 2015, and there is no other justice standing for election in April 2016, the appointee would not stand for election until at least April 2017 (and it could be several years later).

[4] There is never more than one seat on the Wisconsin Supreme Court on the ballot in an election.

[5] Candidates for the April election had to file nominating petitions by January 4, 2011, well before the controversy over state employee bargaining rights had heated up. There was some speculation that the interest in challenging Prosser came from the fact that there had been significant interpersonal conflict on the court (see http://www.wuwm.com/programs/news/view_news.php?articleid=7770, last visited May 11, 2011). In fact, during the spring election cycle, it was revealed that in one particularly heated conference (during the discussion of whether to discipline a member of the court for actions during that member's election campaign), Justice Prosser called Chief Justice Shirley Abrahamson a "bitch" and threatened "to destroy" her (http://www.jsonline.com/news/statepolitics/118310479.html, last visited May 11, 2011).

[6] The other two candidates in the primary were a Madison attorney, Joel Winnig, and Marla Stephens, who was the director of the appellate division in the state public defender's office. Having a primary in a supreme court election where an incumbent was running was unusual, as was having four candidates running in the primary (although there have been as many as seven candidates when the election was for an open seat).

Anger at the Republican legislature and governor mounted. Even before the legislation was passed and the court challenges were filed, opponents of Governor Walker and the Republican legislative majorities were looking for ways to express their outrage. David Prosser – sitting justice, member of the conservative majority on the state supreme court,[7] former Republican legislator, and presumed ally of Governor Walker – was an obvious target given the approaching April election. Moreover, the Wisconsin Supreme Court had what many saw as a 4-3 division between conservatives and liberals, and defeating Prosser would flip the majority to the liberal side, which could be important in challenges to the bills pending in the legislature.[8]

Not surprisingly, the election campaign was intense. Both candidates opted for public funding, and each received about $400,000. However, it was the outside groups that spent the big bucks, more than $3.5 million.[9] The advertising was extensive, with a total of almost 11,000 airings, 58.5 percent of which were attack ads.[10] The campaigns and their supporters also spent substantial amounts in time and effort to get voters to the polls.

Turnout for the election broke all records for a state supreme court election, exceeding even those that had coincided with a presidential primary. About 1.5 million Wisconsinites voted despite the absence of any other statewide offices on the ballot; the previous two elections, one of which had also been contentious, had turnouts of 800,000 and 830,000. What in January was expected to be a walk in the park for Justice Prosser turned out to be a very close election. Initial results indicated that Justice Prosser had lost by less than 250 votes, but the discovery of a large number of unreported votes in one heavily Republican county gave him a victory by more than 7,000 votes; a recount confirmed Justice Prosser's reelection. Moreover, as shown in Figure 1.1,[11] the

[7] That conservative majority came into existence in 2008 when Circuit Court judge Michael Gableman defeated Justice Louis Butler (the first African American to serve on the court, who had been appointed to the court in 2004 by Democratic governor James Doyle).

[8] Two members of the court, Chief Justice Shirley Abrahamson and Justice Ann Walsh Bradley, were clearly on the liberal side; however, the third member associated with the liberal side, Justice Patrick Crooks, was less clearly a part of the liberal bloc. In fact, in the ultimate decision on the validity of the law limiting government employee unions, known as Act 10, Justice Crooks sided with the conservatives, producing a 5-2 vote; *Madison Teachers, Inc., et al. v. Scott Walker et al.*, 2014 WI 99.

[9] See http://www.brennancenter.org/content/resource/judicial_public_financing_in_wisconsin_2011 (last visited August 23, 2012).

[10] It is worth noting that the number of ad airings in Wisconsin was even higher in the 2008 election in which Michael Gableman defeated incumbent Louis Butler. In that election there were almost 12,000 airings, 58.1 percent of which were attack ads.

[11] Color versions of this and all other figures (except Figure 2.2) can be accessed at http://z.umn.edu/sscelections. Versions of the figures updated for later elections can also be found on that site.