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978-1-107-09086-6 - *Justices on the Ballot: Continuity and Change in State Supreme Court Elections*

Herbert M. Kritzer

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## JUSTICES ON THE BALLOT

*Justices on the Ballot* addresses two central questions in the study of judicial elections: How have state supreme court elections changed since World War II? And, what explains the changes that have occurred? To answer these questions, Herbert M. Kritzer takes the broadest scope of any study to date, investigating every state supreme court election between 1946 and 2013. Through an analysis of voting returns, campaign contributions and expenditures, television advertising, and illustrative case studies, he shows that elections have become less politicized than commonly believed. Rather, the changes that have occurred reflect broader trends in American politics, as well as increased involvement of state supreme courts in hot-button issues.

Herbert M. Kritzer is the Marvin J. Sonosky Chair of Law and Public Policy at the University of Minnesota Law School. Over the last thirty-five years he has conducted research on the American civil justice system relating to contingency fee legal practice, scientific evidence, and alternative forms of representation, among many other topics. He is the author of six books, including most recently *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (2004).

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# Justices on the Ballot

CONTINUITY AND CHANGE IN STATE  
SUPREME COURT ELECTIONS

**HERBERT M. KRITZER**

University of Minnesota Law School



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## Preface and Acknowledgments

Soon after I started teaching at the University of Wisconsin in 1977, I began tracking state supreme court elections in Wisconsin. In particular I tracked the partisan patterns in voting in those elections using the method of correlating the county-level vote for supreme court candidates with the county-level vote for governor, a method that was an important part of Philip Dubois' 1980 book, *From Bench to Ballot: Judicial Elections and the Quest for Accountability*. I was attracted to this method in part because it resembled an approach I had seen used by the late Frank Munger, with whom I studied as a graduate student in political science at the University of North Carolina at Chapel Hill; Frank's interest was in political parties, and he used county-level correlations across consecutive gubernatorial elections as a means for identifying when state-level shifts in partisan alignments had occurred. My own purpose in tracking partisan patterns in Wisconsin supreme court elections was primarily as a basis for discussing supreme court elections in a course on the American judicial system that I regularly taught during my thirty-year tenure at the University of Wisconsin.

The idea of moving beyond Wisconsin arose when I was invited by Steve Landsman to present a paper at the 2006 Clifford Symposium on Tort Law and Social Policy. The theme of the 2006 symposium was "Is the Rule of Law Waning in America." I proposed to prepare a paper on judicial selection ("Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century"), a large part of which focused on state supreme court elections. For that paper I assembled county-level data for eight states in addition to Wisconsin going back to 1946. After completing that paper, I decided to extend the project to include all states using partisan, nonpartisan, or hybrid elections for the state's supreme court (what in New York is called the Court of Appeals) at any time starting from 1946, and I began assembling county-level data for all statewide general elections and certain

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primary elections. I eventually decided to include retention elections as well, and because only two states, California and Missouri, had state supreme court retention elections prior to 1946, I included all such elections starting with the first one in California in 1936.

While assembling the Wisconsin data had been easy because the county-level election returns were (and are) always published in the *Wisconsin Blue Book*, assembling the data for the analysis presented in this book, covering all states using elections for their state supreme courts between 1946 and 2013, proved to be a significant, and at times frustrating, undertaking. For many states the information is readily available online or in published form (e.g., in state “blue books,” “legislative manuals,” and the like); however, for others the information is to be found only in archives or in local newspapers that could be obtained only on microfilm via interlibrary loan.

I received tremendous assistance in this endeavor from reference librarians and interlibrary loan staff at the University of Wisconsin Law Library, the William Mitchell College of Law Library, and the University of Minnesota Law Library (particularly Suzanne Thorpe and Mary Rumsey). A number of individuals in state election offices were extremely helpful and responsive, as were a number of scholars who provided me with data from their states and/or answered questions about possible sources for their states.

Historical data on gubernatorial elections through 1990 were obtained from the Interuniversity Consortium for Political and Social Research (ICPSR Studies No. 1 and No. 13). Gubernatorial election data from later years came either from election websites maintained by the various states or from the *CQ Press Voting and Elections Collection*.

Many people assisted over the decade I worked on this project. I would particularly like to thank Jess Clayton, who worked as a project assistant for me at the University of Wisconsin in the early stages of this research, and Elise Larson and SungGeun Kim, who provided research assistance in the latter stages of the project at the University of Minnesota Law School.

Melinda Gann Hall and Larry Aspin generously provided me information on state supreme court retention elections; the Judicial Elections Data Initiative based at Washington University St. Louis (Andrew Martin, Principal Investigator) was also a source of information on retention elections. As noted above, I received assistance from scholars in several states in obtaining election data for those states: Anne Bloom (California), Richard Brisbin (West Virginia), Charles Bullock (Georgia), Kevin McGuire (North Carolina), and Nancy Reichman (Colorado).

Adam Skaggs at the Brennan Center provided me with spreadsheets containing data on advertising in 2006, 2008, and 2010; Melinda Gann Hall made

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available similar data from 2002 and 2004 (Melinda also generously shared with me draft chapters of her book, *Going Negative*); Eeva Moore at Justice at Stake made available data for 1999, 2003, 2007, and 2009; Ken Goldstein made available video of some advertisements from the files of CMAG; Travis Rideout shared materials obtained by the Wisconsin Advertising Project for the 2000, 2002, and 2010 elections.

Denise Roth Barber at the National Institute on Money in State Politics provided me with candidate-level data on contributions to those running for state supreme court. David Rottman at the National Center for State Courts made available public opinion survey data collected for the National Center in 1999 and 2009. Peter Knapp at William Mitchell College of Law shared with me information he had compiled on decision patterns for the Minnesota Supreme Court.

Many others generously took the time to answer questions; these persons include Kathleen Barber, Larry Baum, William Blake, Chris Bonneau, Walter Borges, Paul Brace, Brad Canon, Anthony Champagne, John Culver, Philip Dubois, James Ely, Charles Epp, James Gibson, Gwladys Gilleron, Daniel Guenther, Robert Howard, Steve Landsman, Stefanie Lindquist, Yann Marguet, David Neubauer, Malia Reddick, John Scheb, and John Voelker. I am sure there are others and to those I offer my thanks and my apologies for not listing them here.

A decision by the then editors of *Law & Society Review*, Jon Goldberg-Hiller and David Johnson, to reject a paper due to its length led me to realize that it was time to turn the materials I had gathered and the papers I had written into a book. Without their decision I would probably still be trying to spin out articles rather than turning the materials into what I hope readers find to be a coherent whole.

I received helpful comments at a number of conferences where I presented parts of the analyses that became elements of the book. Melinda Gann Hall read and commented on many of the draft chapters, and then read the entire completed manuscript, providing many insightful comments. Charles Myers, the director of the University Press of Kansas, read portions of the manuscript even though the book was not under consideration at the Press, and made some very helpful suggestions for revisions. Many helpful suggestions also came from the reviewers from Cambridge University Press. John Berger, my editor at Cambridge, has been very helpful during the revision process. My friend Carolyn Fuller proofread the entire draft manuscript prior to submission for review.

I want to also acknowledge support I received over a period of many years from the University of Wisconsin Graduate School, the University of

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Wisconsin Political Science Department, William Mitchell College of Law, the University of Minnesota Law School, and the family of Marvin J. Sonosky whose generosity to the University of Minnesota Law School endowed the chair that I currently hold.

Finally . . . “Once in love with Amy, always in love with Amy . . .” My beloved wife of forty-five years, Amelia Howe Kritzer, has been my joy and support as I’ve worked on this project, and the many other projects I’ve undertaken during my forty-plus years as a member of the academy.