White Noise: The Unrealized Effects of *Republican Party of Minnesota v. White* on Judicial Elections*

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Republican Party of Minnesota v. White *(2002) has caused the nation's most powerful legal-advocacy organizations to question the wisdom of electing judges without regulations to help keep judicial candidates above the political fray. Conventional wisdom states that* White *has heightened the politicization of judicial elections by facilitating expensive, below-the-belt exchanges that sharply attenuate the incumbency advantage and threaten the legitimacy of state courts. Our primary assumption is that if* White *has had the presumed effects, we should see measurable changes in key judicial election characteristics: an increased willingness of challengers to enter the electoral arena, decreased electoral support for incumbents, elevated costs of campaigns, and declines in voter participation. Overall, we find no statistically discernable changes in state supreme court or state intermediate appellate court elections on these dimensions, which should help allay the fears of those concerned about judicial elections while encouraging additional empirical research on the judicial selection controversy.*

Few issues on the American political agenda are more divisive or controversial than the practice of electing judges. While a number of the nation's most influential legal-advocacy organizations historically have expressed strong opposition to selecting judges in partisan elections and actively have lobbied to replace them with nonpartisan elections or the Missouri Plan, this opposition recently has intensified into outright condemnation of contestable elections.

In particular, the American Bar Association (ABA), the nation's largest and most powerful interest group actively seeking to alter the process by which state court judges are selected and retained, is convinced that electoral politics has devastating consequences for judges and courts. As a result, the ABA formally advocates replacing all forms of judicial elections with gubernatorial appointment schemes. Additionally, the ABA opposes indirect citizen representation in the appointment process in the form of legislative confirmation because it considers the confirmation process to be dominated by politics, which in their view threatens judicial legitimacy (ABA Commission on the 21st Century Judiciary, 2003:174).

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While the ABA is working to end the practice of electing judges altogether, others are lobbying to replace contestable elections with a revised version of the Missouri Plan.[1] Although acceptance of the Missouri Plan has stalled at the statewide level since 1994,[2] prominent legal figures like retired Supreme Court Justice Sandra Day O'Connor, who has formed the Judicial Selection Initiative, are seeking to revive it.[3]

This latest push against judicial elections has been inspired by recent trends in the conduct of campaigns, especially the skyrocketing costs of supreme court elections and the national visibility achieved by a number of expensive, bare-knuckled contests for the state high court bench. Exacerbating these concerns is the United States Supreme Court's landmark decision *Republican Party of Minnesota* v. *White* (2002). Since June 2002 when the Supreme Court decided *White*, this ruling has received a "blizzard of commentaries on the likelihood of dire consequences flowing from the politicization of state courts" (Gibson, 2008:60) and has contributed mightily to the overriding concern that judicial elections will become nasty political smackdowns that destroy the foundations of state court legitimacy. As the Justice at Stake Campaign asserts:

> . . . [I]ts effects could be momentous: by loosening standards for campaign speech, the *White* decision lit a time bomb that could drive more big money into campaigns, give special interests new powers to pressure judicial candidates, and tempt judicial candidates to pander to special interests or face their wrath. In other words, the *White* decision will accelerate the growing threat to our courts, and to the 86% of America's state judges who must stand for election (Goldberg and Sanchez, 2003:23).

Specifically in *White*, the Supreme Court invalidated on First Amendment grounds "announce clauses" in state codes of judicial conduct that prohibited candidates from announcing their views on legal issues likely to come before their courts.[4] As we discuss in greater detail below, announce clauses and other provisions of state

[1] The Missouri Plan combines initial gubernatorial appointment from a list of candidates suggested by a nominating commission with subsequent retention elections. Currently, fifteen states use nonpartisan elections to staff their high courts, sixteen states use the Missouri Plan (retention elections), and seven states use partisan elections. The remaining twelve states staff their supreme courts through gubernatorial (ten states) or legislative (two states) appointment. Thus, ending contestable elections would alter the selection systems in twenty-two states, and ending elections altogether would change the process in thirty-eight states (for the high court bench).

[2] The last state to adopt the Missouri Plan for choosing supreme court justices was Tennessee, beginning with the 1994 election cycle.

[3] Retired Justice O'Connor and her new Judicial Selection Initiative housed at the University of Denver propose the following plan: 1) two to five qualified candidates are identified for each vacancy by a judicial nomination commission, 2) an appointment is made by the governor from the list of qualified candidates, 3) judicial performance evaluations are conducted toward the end of each term and made publicly available, and 4) the appointed judge appears before voters in a retention election, to be retained for another term or removed from office. Essentially the plan is the traditional Missouri Plan revised to include performance evaluations. Information reported at http://www.du.edu/legalinstitute/judicial_selection.html, last visited June 2, 2010.

[4] Interestingly, Justice O'Connor voted with the Court majority in *White* to overturn the Minnesota campaign-speech restrictions.

codes of judicial conduct were predicated on the ABA Model Code of Judicial Conduct, which expressly was designed to restrict information presumed harmful to the effective operation of courts. Indeed, these restrictions, unique to judicial elections, prevented candidates *by law* from sharing information with voters that routinely would be provided by candidates for nonjudicial office, including their partisan affiliations in states using nonpartisan elections or the Missouri Plan. Among other things, these codes also prohibited judicial candidates from seeking endorsements from political parties, endorsing candidates themselves, or soliciting campaign contributions. In essence, these rules were designed to prevent judges from appearing to be mere "politicians in robes." In 2002, however, the United States Supreme Court invalidated announce clauses, noting that these content-based restrictions were incompatible with the free-speech rights of candidates and the underlying purpose of elections.

The conventional wisdom in contemporary court reform advocacy is that *White* will have disastrous consequences for the state court bench by radically transforming the conduct of elections. The basic argument is that by materially intensifying the politicization of state court elections by removing the restrictions that helped to keep judicial candidates and their campaigns above the political fray, *White* will transform judicial elections into rancorous, below-the-belt exchanges dominated by special interests and other financial high-rollers battling for undue influence in the judiciary (e.g., ABA Commission on the 21st Century Judiciary, 2003; Caufield, 2005, 2007; Goldberg and Sanchez, 2003; Schultz, 2006). In fact, many judicial reform advocates view any actions that remove the protection of the "purple curtain" and cast judges in the same light as other political decision makers as intrinsically undesirable.

Despite the centrality to the contemporary reform movement of these assumptions about the deleterious effects of campaign politics generally and the predictions about the negative effects of *White* specifically, there have been remarkably few empirical tests of the effects of *White* or other aspects of highly competitive judicial elections. As Gibson (2009:1285) has aptly remarked, "[i]t is puzzling that observers are so certain of the consequences of electioneering . . . given that the scientific evidence of such effects is so scant."

In this article, we bring an empirical perspective to this issue by examining a number of fundamental characteristics of judicial elections in the wake of *Republican Party of Minnesota* v. *White* (2002). Specifically, we evaluate state supreme court and state intermediate appellate court elections both before and after *White* for any evidence that these races have changed. Our primary assumption is that if *White* has had the transformative effects generally presumed to have occurred, we should see measurable changes in key characteristics of these races. In fact, the politicization of state court elections should increase the willingness of challengers to take on incumbents, decrease electoral support for incumbents, elevate the costs of campaigns, and change the propensity of the electorate to vote in these elections. In short, we assess *behavioral indicators* of the politicization of state appellate court elections before and after the *White* decision.

Of course, we fully appreciate that *White* may have had effects other than those we examine. Most obviously, *White* may have diminished citizens' perceptions of judicial impartiality by changing the content of campaigns without affecting other fundamental characteristics of these races. Unfortunately, there simply are no publicly available and scientifically reliable post-*White* national surveys that would allow us to test hypotheses about the injurious impact of *White* on individual political attitudes. Instead, we report the results of two landmark studies recently conducted on this topic, both of which document that citizens' positive views of courts do not suffer when voters are exposed to policy pronouncements or attack ads in judicial campaigns.

However, we think it quite reasonable to postulate that if significant changes are to occur in public support for courts, these changes will be premised on observable changes in the basic characteristics of elections. Indeed, this is perhaps the most fundamental tenet of the current body of reform advocacy. Generally speaking, politicized judicial elections will, at a minimum, draw challengers (and quality challengers), produce close calls for incumbents, cost a great deal of money, and alienate voters to the point that they will not participate in the process. Indeed, as a substantial scholarly literature on American elections documents, the primary symptom of citizen disaffection and distrust in government is voter defection, and we expect that these effects would be even more pronounced in judicial elections because of unique presence of normative assumptions of the apolitical nature of judges and courts operating simultaneously.[5] We test these hypotheses below.

EMPIRICAL STUDIES OF JUDICIAL ELECTIONS

Before discussing *White* in detail and laying out our basic research strategy for evaluating the effects of *White*, it is important to note that there are inconsistencies between legal advocacy on the subject of judicial elections and a burgeoning and rapidly developing empirical political science scholarship. Advocacy on the vitally important issue of how to select state court judges unquestionably has been driven by organized interests like the ABA and by the legal academy, both of which rely largely on normative theories of judging and the apolitical nature of the judiciary (Hall, 2009). However, an interesting body of empirical political science scholarship is emerging that casts doubts about the accuracy of some of these fundamental assumptions.

Among other things, although supreme court races have intensified since the 1990s, there is no doubt that competition in these elections has met or exceeded competition for other important national and statewide offices for decades (e.g., Dubois, 1980; Hall 2001a and b, 2009). In fact, Schotland's iconic characterization of judicial elections as "noisier, nastier, costlier" was published over twenty-five years ago

[5] E.g., Ansolabehere et al., 1994. The ABA has asserted that campaigning for judicial office negates fundamental citizen attitudes, including trust and confidence. Thus, entirely consistent with the extensive body of work on executive and legislative elections, we simply seek to identify behavioral manifestations of negative citizen attitudes.

(Schotland, 1985). Nonetheless, as Hall has quipped, there simply is no objective evidence that states hosting competitive high court elections *for decades* are experiencing any crises in their judiciaries (Hall, 2009).

Moreover, voters in state supreme court elections are a far cry from their negative stereotypes. Rather than being alienated by costly aggressive campaigns, voters in state supreme court elections are drawn into the electoral arena primarily by factors that increase the salience of these races and the information available to voters (Baum and Klein, 2007; Dubois, 1980; Hall, 2007; Hall and Bonneau, 2008; Hojnacki and Baum, 1992). In striking contrast to public rhetoric, particularly important as mobilizing agents are partisan elections, the presence of strong challengers, tight margins of victory, and well-financed campaigns (Baum and Klein, 2007; Hall, 2007; Hall and Bonneau, 2008; Streb, Frederick, and LaFrance, 2009).

Similarly, the electorate in state supreme court elections makes fairly sophisticated choices. In elections to the state high court bench, the electorate differentiates challengers who have experience as judges (i.e., quality challengers) from those who do not, preferring quality challengers to those who represent less-qualified alternatives to incumbents (Hall and Bonneau, 2006). Otherwise, electorates vote retrospectively on issues relevant to judges even when partisan labels are not on the ballot (Hall, 2001a) and make specific issue-based choices when enough information is provided in nonpartisan elections (Baum, 1987; Baum and Klein, 2007; Hojnacki and Baum, 1992).

But perhaps most relevant to the *White* decision are Gibson's recent studies of the effects of policy pronouncements and other forms of politicized speech on individual citizen attitudes presumed essential to judicial legitimacy (Gibson, 2008, 2009). In surveys of Kentucky residents in 2006, Gibson failed to uncover any evidence that policy pronouncements diminish individual perceptions of judicial impartiality. Although he was unable to test exactly why this was the case, Gibson speculated that the finding "reflects the sophistication of the American mass public in recognizing that judges do (and perhaps must) make public policy, that on broad policy issues some degree of accountability is desirable, and that the expression of policy views does not prejudice the right of individual litigants to fair and impartial hearings before a court" (Gibson, 2008:72).

Gibson confirmed these findings in a nationwide study conducted in 2007, documenting that neither policy pronouncements nor attack ads diminish citizen perceptions of courts in the states that actually elect judges.[6] As Gibson summarized, "[w]hen judges express their policy views during campaigns for elected judgeships, no harm is

[6] Alternatively, Gibson (2008, 2009) shows that campaign contributions and the appearance of impropriety generated by contributions have the capacity to diminish citizen perceptions of impartiality in courts and in state legislatures. Despite this, Gibson et al.(2011) finds that the *net effects* of elections are still positive. That is, the positive effects of elections outweigh any costs to legitimacy in the eyes of citizens.

done to the institutional legitimacy of courts. Indeed, the data even indicate that policy *promises* have no untoward effects on court legitimacy (Gibson, 2009:129)."[7] Moreover, as in other important American elections, citizens actually expect candidates in judicial elections to make pronouncements (Gibson, 2008).

Given Gibson's findings disconfirming fears about the harmful effects of policy pronouncements and other forms of political speech on judicial legitimacy, and in light of other work showing that voters respond positively to aggressive, well-financed campaigns by participating in these contests at higher rates, we now ask whether other manifestations of *White* might be present in the fundamental characteristics of elections themselves. To begin this exploration, we first turn to a detailed discussion of the *White* decision and then proceed to our empirical tests.

THE ANNOUNCE CLAUSE AND *REPUBLICAN PARTY OF MINNESOTA V. WHITE*

As we just briefly discussed, judicial organizations such as the American Bar Association have long held that judicial elections, if they are to be held, should be distinct from elections for other offices. Because of concerns over the integrity and legitimacy of the bench and to differentiate judicial elections from their legislative and executive counterparts, the ABA established the *Canons of Judicial Ethics* in 1924 and adopted the *Model Code of Judicial Conduct* in 1972, which was amended in 1990 and several times since. Although the focus of both was to provide ethical guidelines for judges, each had provisions related to conduct in elections. For example, the *Pledges and Promises Clause* prohibits a judicial candidate from making "pledges, promises, or commitments" on "cases, controversies, or issues" that may come before the court (ABA, 2007:26). Additionally, among other things, judicial candidates may not endorse candidates for other elections, hold leadership positions in a political party, make contributions to candidates for other offices, seek endorsements from a political organization, or personally solicit or accept campaign contributions unless permitted by law. Moreover, the *Misrepresentation Clause* prohibits judicial candidates from "knowingly, or with reckless disregard for the truth, make[ing] any false or misleading statement" (ABA, 2007:58). The *Model Code of Judicial Conduct* was intended to serve as guidelines for judicial conduct, but many states chose to adopt aspects as part of their formal legal rules.

These provisions were highly controversial because many believed that they were unconstitutional infringements on free speech and assembly. But perhaps the most

[7] Aside from Gibson's landmark research, there are four studies of public confidence in courts, all of which rely on a single survey conducted in 1999 by the National Center for State Courts. Remarkably, the findings are highly inconsistent. Benesh (2006) finds a negative relationship between partisan elections and confidence, Kelleher and Wolak (2007) find no relationship between partisan elections and confidence, Cann and Yates (2008) find a negative relationship between partisan elections and confidence only for the least politically aware, and Wenzel, Bowler, and Lanoue (2003) find a negative relationship between partisan elections and confidence only for the most politically aware. Unfortunately, because these studies refer to "community" courts, it is not at all clear to which courts these findings might apply, and there simply is no way to sort out the mass of inconsistent results.

controversial of all the restrictions was the so-called *Announce Clause*, first established in 1924, which prohibited a judicial candidate from "announc[ing] his or her views on disputed legal or political issues" (*Republican Party of Minnesota v. White*, 2002:768). Indeed, this clause was challenged in court in 1998 by a Minnesota judicial candidate, Greg Wersal, and the state's Republican Party.[8]

Mr. Wersal first ran for a seat on the Minnesota Supreme Court in 1996, and during his campaign he criticized many of the Court's decisions on crime, welfare, and abortion. He also described himself as a strict constructionist. In fact, Wersal's campaign distributed literature charging that "the Minnesota Supreme Court has issued decisions which are marked by their disregard for the Legislature and a lack of common sense." Another piece criticized a Minnesota Supreme Court decision striking down a law restricting welfare benefits, stating that the "it's the Legislature which should set our spending policies" (*Republican Party of Minnesota v. White*, 2002:771, 2533).

In response to Wersal's campaign, a complaint was filed with Minnesota's Lawyers Professional Responsibility Board charging that Wersal violated the state's announce clause. That body dismissed the complaint, but Wersal withdrew from the race fearing that further ethical complaints would affect his ability to practice law. Two years later, Wersal again tried to run for a seat on the state's highest court. He sought an advisory opinion from the Board asking whether it intended to enforce the announce clause. The Board responded that it was unable to answer Wersal's question. Wersal then filed a lawsuit and was supported by amicus briefs from such diverse groups as the American Civil Liberties Union and the U.S. Chamber of Commerce.

The case was first heard by the U.S. District Court for the District of Minnesota and then on appeal by the U.S. Court of Appeals for the Eighth Circuit. In both cases, the courts ruled with the state of Minnesota, finding that the state had a legitimate interest in restricting the speech of judicial candidates to preserve perceptions of judicial impartiality. If a judicial candidate were to declare, for example, that she opposed the expansion of gay rights, then the concern was that a person filing an employment discrimination suit based on sexual orientation would not get a fair hearing—or at least would not be perceived to get a fair hearing—before that candidate once she became a judge. Moreover, the Eighth Circuit explicitly decided that the announce clause did not violate the First Amendment because it did not prohibit general discussion of case law and judicial philosophy (*Republican Party of Minnesota v. White*, 2002: 703).

In 2002 the Supreme Court took the case on appeal from the Eighth Circuit. In the case of *Republican Party of Minnesota v. White*, the Court ruled, in a 5-4 decision, that the announce clause violated a candidate's right to freedom of speech. The

[8] Wersal and the Minnesota GOP also challenged the ban on the use of political party endorsements in judicial elections. However, the Supreme Court chose not to hear the part of the case regarding the prohibition of party endorsements. Interestingly, some candidates in Minnesota now seek (and receive) political party endorsements, especially from the Republican Party.

Eighth Circuit had decided that the announce clause passed constitutional muster even under the standard of strict scrutiny, because it was a narrowly tailored way to preserve the impartiality—or at least the appearance of impartiality—of the state court. The Supreme Court disagreed. Writing for the majority, Justice Scalia stated that the First Amendment does not permit "leaving the principle of elections in place while preventing candidates from discussing what elections are about" (*Republican Party of Minnesota v. White*, 2002:713). He continued by declaring that "[i]t is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign. We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election" (*Republican Party of Minnesota v. White*, 2002:782).[9] In the eyes of the majority, then, judicial elections must be treated similarly to other elections, at least with regard to a candidate's ability to speak openly about public-policy issues on the campaign trail.[10]

The Court minority strongly disagreed, arguing that there is a compelling interest to treat judicial elections differently from elections for other offices. In her dissenting opinion, Justice Ginsberg wrote:

> Legislative and elective officials serve in representative capacities. They are agents of the people; their primary function is to advance the interests of their constituencies. . . . Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. . . . Thus, the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's inability to choose agents who will act at its behest—does not carry over to campaigns for the bench (*Republican Party of Minnesota v. White*, 2002:806).

REACTIONS TO *WHITE* IN THE ADVOCACY COMMUNITY

The ruling in the *White* case was almost universally derided by organizations and individuals already involved in judicial reform. Immediately after the ruling, then ABA president Robert E. Hirshon stated, "This is a bad decision. It will open up a Pandora's box." He continued, "We are now going to have judicial candidates running for office by announcing their position on particular issues. They will know that the voters will evaluate their performance in office on how closely their rulings comport with those positions" (Walsh, 2002:A10). New York State Bar Association president, Lorraine Power Tharp, concurred with Hirshon. "This is going to open up the doors to so many campaign abuses that have been documented around the country," said Tharp. "The public loses its trust and confidence in the judiciary. Judicial campaigns should be conducted with dignity and integrity" (Liptak, 2003:B1).

[9] For a more detailed analysis of the Supreme Court's rationale in *Republican Party of Minnesota v. White,* see Hasen, 2007.

[10] Although the Court only addressed the announce clause, legal observers believed that the door was left open for successful challenges to other judicial canons (see Hasen, 2007). In fact, the lower courts have invalidated other restrictions in subsequent cases.

The belief of many was that *White* would create a "free-for-all" atmosphere in elections. Judicial candidates would now be able to say essentially whatever they wanted about political issues, which, in turn, would send signals to interest groups. Interest groups would then have a clearer idea of whom they should support and be primed to pump significant money toward their preferred candidates. This increased spending would result in negative campaigns in which interest groups and others would frame disfavored candidates in an unflattering light. Moreover, judicial candidates would be inundated with requests to fill out questionnaires similar to those given to candidates for other offices. Indeed, almost immediately after the *White* ruling, interest groups began sending questionnaires to judicial candidates asking them to identify their positions on a variety of hot-button issues, including abortion or same-sex marriage. For example, in 2006 right-to-life groups in Kentucky and North Carolina asked judicial candidates whether they agreed or disagree with the statement, "I believe that *Roe v. Wade* was wrongly decided" (Sample, Jones, and Weiss, 2007:30-31).

Additionally, reform advocates were concerned that the increased importance of campaign spending and the pressure to complete questionnaires might dissuade qualified candidates from running. And all of this, as the story goes, would create the perception of judicial candidates being in the pockets of special interests, threaten judicial independence, undermine due process, and lessen the integrity and legitimacy of state courts.

But perhaps no organization has been as critical of the *White* ruling as Justice at Stake, a legal advocacy organization committed to ending the partisan election of judges, despite their rather disingenuous claims that they do not endorse any particular method of selection (Brandenburg and Caufield, 2009:79, 81). Immediately after the 2002 elections, the first series of elections to be held after *White*, Justice at Stake, along with the Brennan Center for Justice and the National Institute on Money in State Politics, issued a scathing report in which the Supreme Court's ruling in *White* was a particular point of contention. Among other significant claims, Justice at Stake claimed that "the *White* decision will enlarge the multi-million dollar political battles already raging over tort liability, medical malpractice and insurance issues," foster a "return to racial appeals, including the use of code words in special interest ads," and promote "gutter politics" (Goldberg and Sanchez, 2003:24-25).

Of course, professional and legal advocacy organizations were not alone in expressing sharp criticisms of *White* and predicting catastrophic consequences for the judiciary. Many prominent legal scholars also were in this camp. Roy Schotland's response exemplifies the highly negative reactions of the legal academy. Specifically, Schotland wrote that the White "decision will make a change in judicial election campaigns that will downgrade the pool of candidates for the bench, reduce the willingness of good judges to seek reelection, add to the cynical view that judges are merely 'another group of politicians,' and thus directly hurt state courts and indirectly hurt all our courts" (Schotland, 2002:8). David Schultz writes that because of *White*, "the

future of many sleepy judicial elections may look increasingly more nightmarish like Texas" (Schultz, 2006:985). And Rachel Caufield asserts "there was (and is) general agreement [among legal scholars] that *White* is likely to produce longer, more contentious, and more costly judicial campaigns" (Caufield, 2005:636).

Despite these widespread fears about *White* and the dire predictions about the consequences of this decision, we reasonably can question these assertions and treat them as testable hypotheses. From our perspective, the most important question is not really whether one agrees or disagrees with the *White* decision in the abstract but rather whether there is any evidence that the harmful effects of *White* actually are apparent in basic features of judicial elections. We turn now to this inquiry.

EMPIRICALLY ASSESSING THE EFFECTS OF *WHITE*

Our task in this project is important but simple: we seek to examine empirically the consequences of the *White* decision on the fundamental characteristics of state appellate court elections. To do so, we focus on objective measurable features of judicial elections both before and after *White*. Specifically, we seek to identify any changes in rates of contestation, quality challengers, vote shares of incumbents, campaign spending, and citizen participation. If *White* has politicized judicial elections by transforming campaigns into nasty, expensive, competitive brawls, we should see more challengers, more quality challengers, an attenuated incumbency advantage, steep increases in the costs of seeking office, and diminished citizen participation brought about by distrust and negativity toward courts.

To test these hypotheses, we collected data on all state supreme court elections from 1996 through 2008. Because the *White* decision was issued in June of 2002 (after the primaries but before the general elections), it is not at all clear whether the 2002 elections should be coded as pre- or post-*White*. Because of this complication and to avoid incorrect inference, we treat 2002 separately. The benefit of doing this is that we avoid making incorrect assumptions about *White* and also end up with three major election cycles before and after *White* that each include one midterm election cycle and two presidential election cycles. However, we should emphasize that the decision to exclude 2002 from a pre- or post-*White* category does not affect our substantive results in any way except one: partisan races are significantly less competitive post-*White* when 2002 is coded as pre-*White*.

We also gathered data for state intermediate appellate courts from 2000 through 2008.[11] We begin this series in 2000 because of the extraordinary demands of collecting information about these races relative to state high courts and the difficulty of obtaining information systematically across states in earlier years.[12] Because our data

[11] We thank Brian Frederick for his generous contributions to overseeing the data collection for intermediate appellate court elections.

[12] Data collection for intermediate appellate court elections is extremely labor intensive. Streb and Frederick began collecting information in 2000 because this was the first year in which the election results were available electronically consistently across states.

for intermediate appellate court elections cover fewer pre-*White* election cycles, we do not treat the 2002 election cycle separately. Instead, we code 2002 as post-*White* because the general elections took place five months after the decision was issued. However, our substantive conclusions are not affected by this choice; our results hold when 2002 also is counted as pre-*White*. Of course, our conclusions about intermediate appellate courts should be viewed as much more tentative because we do not have the same historical perspective as with high court elections.

Fundamentally, we ask whether state appellate court elections changed after *White*, both overall and, in the case of supreme court elections, separately in partisan and nonpartisan elections. In doing so, we generate statistics for each dimension of interest: contestation (the percentage of elections in which challengers were present), quality challengers (percentage of incumbents who were challenged by a candidate with prior judicial experience), vote shares of incumbents (percentage of the vote won by the incumbent), campaign expenditures (total spending by all candidates for each seat) both in actual dollars and per capita, and citizen participation (ballot roll-off, or the percentage of voters who went to the polls but did not vote in the judicial election). Statistically, we use simple logit and ANOVA tests to identify any statistically significant differences across the time periods (pre-*White*, 2002, and post-*White*) in our analysis.

State Supreme Courts

Electoral Competition: Contestation. Electoral contestation, or the willingness of challengers to enter the electoral arena, is fundamental to judicial elections fulfilling their institutional roles as mechanisms of accountability. After all, in partisan and nonpartisan elections, voters cannot express dissatisfaction with incumbents or remove them from office without alternative candidates, nor can many voters select candidates for open seats that reflect their values if only one candidate is present. However, too much accountability worries opponents of judicial elections. Among other things, contestation interjects the potentially corrosive effects of money, as well as the possibility of attack advertising and other forms of negative campaigning, all of which purportedly have harmful consequences for judges and courts.

In Table 1, we examine rates of contestation in state supreme court elections during the years immediately preceding and immediately after *White*. If the arguments offered by *White* critics are correct about the decision creating a political free-for-all for judges, then we should see higher rates of electoral contestation after *White*. Potential candidates (like Mr. Wersal in Minnesota) are now free to announce their positions on key issues and criticize incumbents or other challengers, and thus have better opportunities to appeal to voters. Interest groups and other political organizations also have incentives to field their own candidates who clearly represent their own interests. Of course, it also could be the case that elections will be *less* contested after *White* because bare-knuckled, no-holds-barred campaigns might turn off potential candidates, as some reform advocates have asserted. Yet, there is no empirical support

Table 1

State Supreme Court Elections Pre- and Post-*White*
(Number of Elections in Parentheses)

	All Elections	Partisan Elections	Nonpartisan Elections
Contestation[a]			
Pre-*White* (96-01)	80.4% (143)	93.3% (60)	71.1% (83)
2002	75.7% (37)	93.3% (15)	63.6% (22)
Post-*White* (03-08)	72.3% (99)	92.3% (39)	64.3% (98)
Quality Challengers[a]			
Pre-*White*	36.4% (99)	44.1% (34)	32.3% (65)
2002	31.0% (29)	45.5% (11)	22.2% (18)
Post-*White*	37.2% (113)	31.3% (32)	39.5% (81)
Competition[b]			
Pre-*White* (96-01)	57.1% (76)	56.3% (32)	57.7% (44)
2002	57.6% (21)	53.9% (10)	61.0% (11)
Post-*White* (03-08)	59.7% (78)	62.7% (30)	57.8% (48)
Total Spending (2008 Dollars)[c]			
Pre-*White* (96-01)	$998,166 (105)	$1,226,406 (50)	$790,675 (55)
2002	$1,006,003 (24)	$992,046 (12)	$1,019,959 (12)
Post-*White* (03-08)	$1,028,133 (88)	$1,492,871 (32)	$762,568 (56)
Per Capita Spending (2008 Dollars)[c]			
Pre-*White* (96-01)	$455 (105)	$473 (50)	$440 (55)
2002	$336 (24)	$280 (12)	$392 (12)
Post-*White* (03-08)	$1,580 (88)	$3,749 (32)	$340 (56)
Ballot Roll-Off[c]			
Pre-*White* (96-01)	16.5% (90)	10.9% (42)	21.4% (48)
2002	7.3% (18)*	5.4% (12)	11.2% (6)*
Post-*White* (03-08)	15.8% (68)	11.9% (29)	18.8% (39)

* = $p < 0.05$

a = all races

b = contested incumbent-challenger races only

c = contested races only, excluding cases where incumbents were defeated in the primary

for either prediction (see Table 1). Average rates of contestation in state supreme court elections have not changed in any statistically meaningful way.[13] Of course, this result is not that surprising given that the trend toward contestation in state supreme court elections began in the early to mid-1990s (Bonneau and Hall, 2003)

Overall, from the perspective of challengers entering the electoral arena, there have been no dramatic transformations in state supreme court elections generally. But what about partisan and nonpartisan elections separately considered? No significant changes have taken place in either election system (see Table 1). In fact, nonpartisan elections are somewhat less likely to be contested post-*White*, though this difference is not statistically significant. All things considered, when it comes to state supreme court elections, the Supreme Court's decision in *White* has had little effect on the entry of challengers into these races (see also Bonneau and Hall, 2009).

Electoral Competition: Quality Challengers. While the rates of contestation have not changed, it could be the case that a different kind of candidate has emerged after *White*. We can see this working in both directions. On the one hand, more-qualified candidates might be more likely to run post-*White* since they think they have a legitimate chance to win an election because they can campaign on their views. On the other hand, as discussed above, this "new style" of campaigning might serve to deter high-quality candidates from entering a contentious electoral environment.

Following Hall and Bonneau (2006), we operationalize a "quality challenger" as someone who has prior judicial experience. Candidates with lower-court experience represent viable alternatives to voters, and Hall and Bonneau found that in supreme court races these candidates perform significantly better than challengers without prior experience.

In Table 1 we compare the percentage of quality challengers both pre- and post-*White*, as well as analyze partisan and nonpartisan elections separately. Just like the results for contestation more generally, there are no differences in quality challengers before and after the *White* case.[14] Apparently, *White* has had no effect on either contestation or the type of contestation.

Electoral Competition: The Vote Shares of Incumbents. Although supreme court elections have not become more competitive by the standard of challengers being drawn into these races in higher proportions or in the type of challengers faced by incumbents, perhaps these elections have become less safe for incumbents seeking reelection simply because challengers, when present, will be able to engage in more vigorous criticisms of incumbents and also be able to explain their own views to voters. Indeed, one of the primary concerns in the judicial reform literature is that politicized speech in campaigns will be used to attack qualified incumbents and unseat them

[13] We ran a simple logit model with contestation as the dependent variable and 2002 and post-*White* as the independent variables. Neither coefficient was statistically significant. Full statistical results are available upon request from the authors.

[14] We ran a simple logit model to ascertain significance.

from office. There is some support in studies of legislative elections for this proposition. Studies have shown that campaigns in which higher levels of information are provided to voters erode the incumbency advantage (e.g., Jacobson, 1999).

Table 1 displays the average percentage of the vote received by incumbents in contested state supreme court elections both before and after *White*.[15] Surprisingly, and in striking contrast to the concerns of judicial reform advocates, if anything elections after *White* appear to be less competitive, although we do not want to make too much of this difference because it is not statistically significant. Even so, the incumbency advantage has not been attenuated in the post-*White* era.

The results in Table 1 for partisan and nonpartisan elections reflect the same overall trends. Interestingly, in partisan elections, state supreme court elections involving incumbents seem to have become less competitive (i.e., vote shares for incumbents have increased) since 2002, although, again, we should be very cautious about drawing inferences about this effect because the difference is not statistically significant.[16]

Given the patterns in both contestation and the electoral performance of incumbents, we conclude that the *White* decision has had no systematic effects on electoral competition in state supreme court races. In fact, if anything *White* may be on the road to producing precisely the *opposite* effects predicted.

Campaign Spending. One of the biggest concerns about judicial elections generally and *White* specifically is that the costs of campaigns will skyrocket with "new-style" campaigns. According to reformers, "[r]ising campaign costs and the use of television airtime to advertise in state supreme court elections are . . . among the most serious and pressing threats to the integrity and legitimacy of American state judiciaries" (Bonneau and Hall, 2009:49).

Given these concerns, we might expect that campaign spending will increase because *White* is predicted to have fundamentally altered the nature of campaigns. Now, instead of running milquetoast advertisements, candidates can take positions on issues and thus have an incentive to make their positions known to voters. Reform advocates also expect interest groups and other financial high rollers to engage in post-*White* campaigns, not only by spending independently of the candidates but also in bankrolling their preferred choices.

As with our examination of electoral competition, we examine campaign spending both overall and separately for partisan and nonpartisan elections. In the same

[15] We examine the difference-of-means for competition, spending, and roll-off using ANOVA. Pre-*White* serves as our omitted baseline category to prevent perfect collinearity. Our results hold if we run a regression instead of an ANOVA. Full statistical results are available from the authors.

[16] Another possible measure of competitiveness or contentiousness is the rancor and tone of campaigns. However, Hall and Bonneau (2009) examine negative advertising and find no significant impact of *White*: races are not more likely to be negative since the decision (though the number of negative ads aired has increased). That is the proportion of races where negative ads are aired has not changed, though in races that have negative ads, they are an increasing proportion of ads in the races (though still far from a majority).

manner, we limit our focus on campaign spending to contested races only. In uncontested races, candidates have little incentive to spend money and, thus, inclusion of these races would bias the results. We also recalculate spending into 2008 dollars to control for inflation over the series.[17]

It appears at first glance as though races overall have become more expensive after *White* (see Table 1). However, the ANOVA results indicate that this difference is not statistically significant. Thus, we can conclude that there has been no meaningful change in average spending in state supreme court elections before and after *White*.[18] The results for spending per capita (total amount of money spent in the race divided by the size of the voting-age population), much like our results for overall spending, show no statistically significant changes in campaign spending after the *White* decision (see Table 1). The reason for this apparent rise in cost per capita has to do with two abnormally high-spending elections in 2004 that occurred in either a district (Illinois) or a state with a small population (West Virginia). These two elections make per capita spending appear to be much higher after *White* than before. Indeed, if we drop those two cases from the analysis, per capita spending in all elections post-*White* falls to $376; for partisan elections, it falls to $444. In both cases, spending falls below pre-*White* levels, consistent with what we see for per capita spending in nonpartisan elections post-*White*. No matter how we look at it, predictions of increased campaign spending post-*White* do not have empirical support.

The same interesting patterns are present in partisan and nonpartisan elections considered separately. On the surface, it appears that the costs of campaigns increased after *White*, at least in partisan elections. However, as with elections generally, none of these observed differences are statistically significant. Claims that *White* has ushered in a new era of big-money politics appear to be incorrect.[19]

Voter Participation. So far, we have looked at the possible consequences of *White* on the candidates and campaigns themselves. We now turn our attention to voters. Perhaps the most universal concern about *White* and competitive elections generally is that highly charged expensive elections will attenuate citizens' positive views of courts, making the public less trusting of judicial institutions. To political scientists, the most obvious symptom of distrust and other forms of political alienation is voter disaffection

[17] At least some of the increases in spending that are documented in the reform literature are related to the failure to control for inflation over a series of elections. When recalculated into constant dollars, many of the dramatic trends reported elsewhere appear to be less significant.

[18] We look at spending by the candidates simply because there is no reliable way to measure independent spending by interest groups across states.

[19] Another claim made by Caufield (2005) is that *White* would result in longer campaigns. Unfortunately, we are not able to assess this claim empirically. It may be that some candidates have begun fundraising and campaigning earlier than they used to. However, this seems to us to be more of a function of preparing for a competitive election than a direct consequence of *White*. Indeed, there is nothing about *White* itself that would lead us to theoretically expect candidates to begin their campaigns sooner. Given that we have already demonstrated that *White* has not led to more competitive or contentious elections, we are skeptical that it has led to longer campaigns, *ceteris parabis*.

(e.g., Ansolabehere et al., 1994). Moreover, if these effects occur, they should be most likely to happen in judicial elections because of the normative expectations unique to these institutions. Judges are supposed to be impartial interpreters of the law, not rough-and-tumble politicians. A judicial candidate whose campaign mirrors that of a candidate for Congress or the state legislature may turn off voters who decide to skip the judicial races. On the other hand, as mentioned earlier in our discussion, political scientists have shown that vigorous campaigns actually have positive consequences by mobilizing voters (e.g., Bonneau and Hall, 2009; Patterson and Caldeira, 1983; Caldeira, Patterson, and Markko, 1985; Dawson and Zinser, 1976) and at least one study finds that people do not appear to be particularly offended by judicial candidates taking policy positions (Gibson, 2009).

To measure voter participation, we follow the well-beaten path in judicial politics research of calculating ballot roll-off for each race.[20] Ballot roll-off measures the percentage of voters who go to the polls for other high-profile offices who do *not* vote in judicial elections.[21] Thus, by this measure, higher values equal lower levels of citizen participation. Using ballot roll-off is standard practice in judicial elections and other less visible nonjudicial elections because the measure recognizes that few voters go to the polls for the principal reason of voting for judge when presidential or gubernatorial elections are on the ballot, a critical concern in multivariate analyses (e.g., Hall, 2007; Bonneau and Hall, 2009; Schaffner, Streb, and Wright, 2001; Wattenberg, McAllister, and Salvanto, 2000; Hall and Bonneau, 2008). We retain this focus so that our results are directly comparable to other studies.

Table 1 addresses the issue of citizen participation by displaying average ballot roll-off both pre- and post-*White* for elections generally and for partisan and nonpartisan elections separately. As the results indicate, voter participation overall appears to have increased slightly after the *White* decision, but this increase is not statistically significant. Although much ink has been spilled warning of the calamitous effects of *White*, few have spoken about any potential positive effects for voters. Here, we find highly tentative evidence that improving voter participation may be one of them. Interestingly, 2002 is notable because this election cycle produced significantly lower ballot roll-off relative to the other periods for reasons that we cannot ascertain in this analysis.

Looking at partisan and nonpartisan elections, we see that voter participation appears to have increased in nonpartisan elections post-*White* but has decreased slightly in partisan elections.[22] That being said, the results are not statistically significant,

[20] See Hall (2007) for a discussion of the history and utility of this measure.

[21] Only supreme court races in which a presidential, gubernatorial, or senatorial election took place concurrently are included in this portion of the analysis. Likewise, we examine only those supreme court contests held during the regular November election cycle. Finally, multimember supreme court elections are removed from the analysis because of the complexities of coding competition and spending in these races.

[22] Notice, however, that voter roll-off is still less in pre-*White* partisan elections than in post-*White* nonpartisan elections. This result is more evidence of the importance of the candidate's party identification as a heuristic.

except for the 2002 election cycle in which voting increased substantially in relation to election cycles immediately before and after 2002. In short, there is no systematic evidence that *White* has either promoted or inhibited voter participation in state supreme court elections.

State Intermediate Appellate Court Elections

Although studies of state supreme court elections are critically important, these elections are only a small percentage of judicial elections overall and differ considerably from their lower-court counterparts. Intermediate appellate court (IAC) elections are contested at significantly lower rates than state supreme court elections (Streb, Frederick, and LaFrance, 2007) and are, on average, less expensive (Frederick and Streb, 2008). Thus, we think it important also to ask whether the *White* decision has affected less visible contests, where we might expect campaigns to matter even more than in important statewide races (see Table 2).[23] As with supreme court elections, IAC races show no statistically significant changes from the pre- to post-*White* period.

Electoral Competition: Contestation, Challenger Quality and Incumbent-Vote Shares. Levels of contestation, challenger quality, and incumbent vote shares were virtually identical pre- and post-*White* (see also Streb, Frederick, and LaFrance 2007; Streb and Frederick, 2009). As mentioned, compared to supreme court elections, IAC elections are much less likely to draw challengers. But when IAC elections are contested, incumbents can expect quite a fight. On average, contested IAC races are more competitive than contested supreme court races (see also Streb, Frederick, and LaFrance, 2007). Even so, as with supreme court elections, the *White* decision has not encouraged more challengers—quality or otherwise—to throw their hats into the ring or made incumbents more electorally vulnerable.

Campaign Spending. Regarding campaign spending, average total spending in IAC races has actually declined since *White*, although the difference is not statistically significant (see also Frederick and Streb, 2008; Streb and Frederick, forthcoming). Additionally, we see these same patterns when costs are calculated on a per capita basis (per 1,000 voting-age population). In contrast to state supreme court elections, IAC elections are substantially less expensive.

Voter Participation. Finally, ballot roll-off in IAC elections has not increased significantly since *White*. While average roll-off is somewhat less after *White*, the difference is not statistically significant. With IAC races, it should not be any surprise that ballot roll-off has not really changed since *White*. The "new style" elections (Hojnacki and Baum, 1992) that have become commonplace at the supreme court level have not trickled down to elections for lower courts. IAC elections, in particular, are still low-information, low-visibility affairs, which makes it difficult for people to participate (Streb, Frederick, and LaFrance, 2009). Even so, the *White* decision certainly has not deterred citizens from participating in IAC contests.

[23] Due to the small number of contested IAC elections pre-*White*, we do not break up the analysis by election type.

In short, just as the hypothesized harmful effects of *White* are absent in state supreme court elections, they also are not evident in intermediate appellate court elections. Generally speaking, *White* appears to be one of the least understood decisions in recent times from the perspective of practical politics.

A NOTE ON MULTIVARIATE TESTS

We should add that some of the results reported above have been confirmed in more sophisticated multivariate models. In state supreme court elections, Hall and Bonneau have documented that neither contestation nor ballot roll-off have been affected by White, *ceteris paribus* (Hall and Bonneau, 2008). In studies of intermediate appellate courts, Streb and Frederick (2009, forthcoming; see also Frederick and Streb, 2008) find the same even when controlling for a variety of institutional, electoral, and candidate characteristics. Contestation, defeat rates, campaign spending, and ballot roll-off are essentially constant pre- and post-*White* at the intermediate appellate court level.

CONCLUSION

Despite the concerns of the legal academy and judicial reform organizations about the effects of *Republican Party of Minnesota* v. *White*, it does not appear that state supreme court elections or state intermediate appellate court elections are manifesting any symptoms of a transformative change. In fact, in both state supreme courts and intermediate appellate courts, we failed to find any statistically significant differences in the fundamental characteristics of these elections after the *White* decision. These findings are quite consistent with other empirical research showing that policy talk and attack advertising do not harm public perceptions of judicial impartiality and legitimacy. Taken together, these findings present a striking challenge to the conventional wisdom about *White*.

Though it seems somewhat odd to be extolling null results, the fact remains that these null results have crucial implications for the controversy currently raging in the American states over the practice of electing judges. In sharp contradiction to the claims of the judicial reform community, the results of this inquiry join a rapidly developing body of empirical work casting doubts about the current claims of a degenerating electoral environment for judges, which in turn has been used to argue against the practice of electing judges itself. In fact, our work suggests that little has changed on the electoral front in the states' appellate courts and certainly calls into question the accuracy of other common understandings surrounding the judicial selection controversy. There may be good reasons to oppose judicial elections, but concerns about the politicized nature of judicial elections post-*White* is not one of them.

Of course, we want to be cautious about offering any definitive conclusions about *White* for two primary reasons. First, there have only been a few election cycles since the *White* decision was announced. It may be the case that six years are not

Table 2
Intermediate Appellate Court Elections Pre- and Post-*White*
(Number of Elections in Parentheses)

	All Elections
Contestation[a]	
Pre-*White* (00-01)	34.0% (159)
Post-*White* (02-08)	36.8% (492)
Quality Challengers[a]	
Pre-*White* (00-01)	32.3% (31)
Post-*White* (02-08)	35.0% (117)
Competition[b]	
Pre-*White* (00-01)	54.7% (32)
Post-*White* (02-08)	54.3% (114)
Total Spending (2008 dollars)[c]	
Pre-*White* (00-01)	$447,711 (47)
Post-*White* (02-08)	$335,364 (125)
Per Capita Spending (2008 dollars)[c]	
Pre-*White* (00-01)	$333 (47)
Post-*White* (02-08)	$243 (125)
Ballot Roll-Off[c]	
Pre-*White* (00-01)	15.6% (39)
Post-*White* (02-08)	13.1% (134)

a = all races
b = contested incumbent-challenger races only
c = contested races only

enough for electoral conditions to have changed to any significant degree. Second, there clearly are aspects of this decision that we have not addressed. For example, we do not know if the mix of campaign contributors has changed, from attorneys and law firms to interest groups and big business. Even so, we believe that if any meaningful transformations have taken place of the nature just described, they would be evident in the fundamental characteristics of the elections themselves, including electoral competition, the costs of campaigns, and whether voters participate. We find no such effects.

In sum, the predictions about the destructive effects of *Republican Party of Minnesota* v. *White* have been overestimated. This intriguing conclusion should help to allay the fears of those concerned with the politics of judicial elections and also should counter any claims that *White* has radically altered the judicial campaigns game. For the other side of the aisle, it would appear that some of the most fundamental assumptions driving the movement against competitive elections lack empirical support. Indeed, it is evident that much more research is needed in order to have a solid foundation for understanding the impact of landmark court decisions on the politics of judicial elections and for making informed choices about the best means for selecting judges. We hope that this project inspires additional work on this critically important subject. **jsj**

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