

# New-Style Campaigns in State Supreme Court Retention Elections

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## Abstract

Scholarly research finds that partisan, hard-fought, expensive, and churlish state supreme court campaigns increase voter participation and their support for challenger candidates. These insights, however, are drawn nearly exclusively from competitive state supreme court elections. Little is known about voter behavior in uncompetitive retention elections. Traditionally, these races are not salient to the public given that incumbents raise and spend little-to-no money, and campaigns, parties, and political action committees air few (if any) advertisements. Since 2010, however, such behavior has become more commonplace. I assess voter participation and incumbent performance in 178 state supreme court retention elections from 2002 to 2014. I find that expensive, churlish retention elections are likely to increase voter turnout and to hurt incumbents' efforts to win retention.

## Keywords

judicial politics, judicial elections, voting behavior, political behavior, campaigns, interest groups and elections

## Introduction

In 2008, approximately 38.6% of the 1.5 million Iowans who turned out to cast a ballot in the presidential election between Barack Obama and John McCain abstained from voting for or against a state supreme court justice. The three incumbents on the ballot won their retention elections with an average of 72.1% of the vote. Just two years later, in the 2010 midterms, that rate of abstention plummeted to 13.2%—a 41% increase in voter participation—and the three incumbents facing retention in this cycle all lost

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with an average of 45.3% support—a 37% decline.<sup>1</sup> What happened? In 2009, the Iowa Supreme Court decided a highly controversial case, *Varnum v. Brien*, which invalidated the state’s statutory ban on same-sex marriage.<sup>2</sup> The court’s nullification of the law, which was popular among voters, drew opposition from conservative groups and led special interests to spend nearly \$300,000 on attack advertisements that urged voters to “hold activist judges accountable” for their votes in *Varnum*.<sup>3</sup> The three *Varnum* justices, whose institution had never before witnessed such a concerted effort to mobilize voters, declined to defend themselves from these attacks or to proselytize their candidacies.<sup>4</sup>

The 2010 elections in Iowa offer a vivid, if heretofore uncommon, example of how “nasty, noisy, costly” opposition efforts can affect traditionally inconspicuous retention elections (Schotland 1998). Scholarly research finds that partisan, expensive, and even churlish campaigns for the bench educate and animate voters, leading to more competitive elections (Bonneau and Hall 2009; M. G. Hall 2007; 2015; M. G. Hall and Bonneau 2006; 2008; 2013; Iyengar 2002; Klein and Baum 2001; Schaffner, Streb, and Wright 2001; Schaffner and Streb 2002). But such campaigns are not often associated with retention elections where incumbents routinely win with more than 70% of the vote (Kritzer 2015). They are more commonly found among competitive elections in which multiple candidates jockey for the same seat on a court. By comparison, little is known about voter participation or incumbent performance in retention elections that are more expensive and churlish. Without salient information, voters are often left to cue off of other, usually less controversial, factors such as candidates’ names (Dubois 1980), qualifications (Gill 2017), or even in their overall trust in government (Aspin 2006).

Historically, judges standing for retention seldom campaign, raise significant sums, or advertise their candidacies (Aspin et al. 2000). But in recent years, the retention election has become more competitive and more expensive, and incumbents have garnered more opposition from grassroots organizations along with well-heeled political action committees (PACs) (Aspin 2017; Kritzer 2015; May 2012). To this end, retention elections have slowly begun to resemble competitive judicial elections, and the transformation they are currently undergoing much resembles the rise of the so-called “new-style” campaign that emerged among competitive judicial elections in the late 1990s and early 2000s (i.e., Hojnacki and Baum 1992). In this research, I consider these recent changes among retention elections. I examine the nascence of the new-style retention election, along with its payoffs for voter participation and the incumbency advantage in state supreme court contests.

I conclude that the year 2010 was an important turning point for judicial retention elections, largely due to the rise of the Tea Party movement. The 2010 midterm elections featured broad public backlash against incumbents, fueled in no small part by grassroots disaffection and a well-coordinated effort among conservative organizations to win elections up and down the ticket (Klumpp, Mialon, and Williams 2016; Williamson, Skocpol, and Coggin 2011). This agita, coupled and arguably encouraged by a reformed campaign environment featuring greater political advertising by special interests, all combined to make judicial retention elections more participatory and

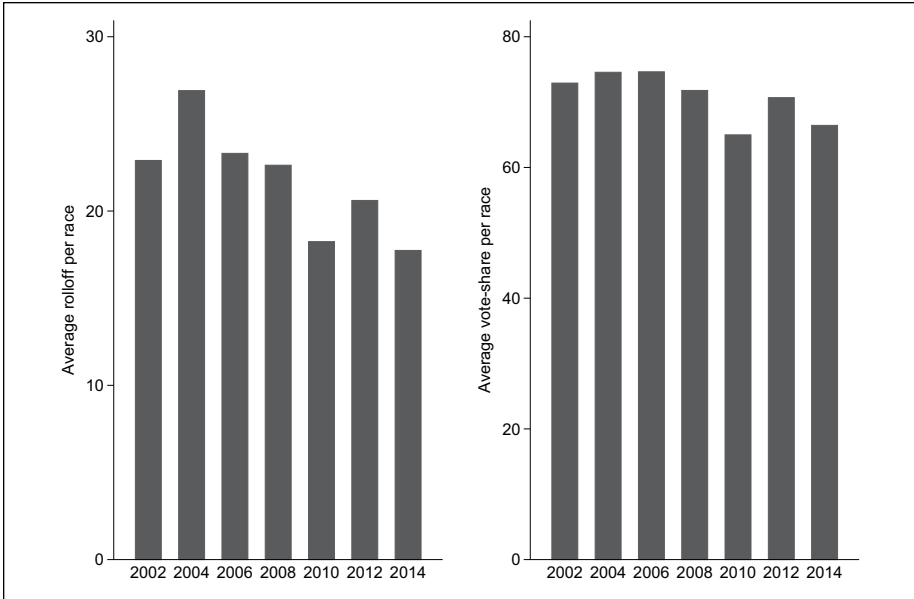
competitive. Simply put, when retention elections become more expensive, salient, and even nasty, voters are more likely to participate, just as in other types of judicial elections. And unless incumbents counter opposition efforts with their own campaigns—something retention-eligible candidates are not generally accustomed to—they are more likely to lose voter support. To the extent that judicial reform advocates often frame their support for merit selection in terms of retaining incumbents and discouraging the specter of judicial campaigning, fundraising, and position-taking (e.g., Geyh 2003), new-style retention elections appear to undermine these objectives.

## Retention Elections and the New-Style Campaign

Judicial elections are commonplace in American politics.<sup>5</sup> While the federal government has not altered its method of picking judges since the Constitution's ratification, states have experimented liberally with their judiciaries (e.g., Epstein, Knight, and Shvetsova 2002; Goelzhauser 2016; Streb 2007). Different types of institutions promote varying degrees of accountability (Canes-Wrone, Clark, and Kelly 2014).<sup>6</sup> One of the most strident forms of judicial accountability has proven to be the partisan election (M. G. Hall 1987). Scholars disagree on why, exactly, states abandoned elite appointments and chose to implement partisan judicial elections. The standard account holds that partisan elections were the logical conclusion to many of the populist reforms favored by Jacksonian Democrats (e.g., Sturm 1982), though others argue that direct elections were designed to make judges more independent of appointing elites (K. L. Hall 1983).<sup>7</sup>

By the early 1900s, many progressives concluded that partisan elections had failed to promote judicial independence. Indeed, many believed that party machines such as Boss Tweed's Tammany Hall had corrupted the judiciary and robbed it of its independence (Lerner 2007; Schaffner, Streb, and Wright 2001). During the Progressive Era, states reformed their courts. First, they adopted the nonpartisan election. Like its predecessor, the nonpartisan election features multiple candidates for a position on the bench, but these contests strip party labels from the ballot.<sup>8</sup> For many Progressives, however, the elimination of the party label alone was insufficient. Reform advocates argued that the popular selection of judges should be done away with altogether because voters are not sufficiently well-informed to choose judges and that, even without party labels, political machines continued to dominate the selection process (Kales 1914).

In place of popular elections, reform advocates during the early twentieth century favored what has come to be known as "merit selection."<sup>9</sup> Generally speaking, merit selection is a combination of judicial selection and accountability mechanisms whereby elites (with the advice of nomination commissions) appoint judges to their initial terms of office, after which they must stand before the public in a "retention election" (Goelzhauser 2018). Missouri became the first state to adopt merit selection for its entire state judiciary in 1940, and merit selection proliferated widely beginning in the 1960s (Goelzhauser 2016). According to the National Center for State Courts,



**Figure 1.** Voter rolloff and incumbent support in state supreme court retention elections (2002–2014).

16 states currently use a form of merit selection with the retention election. Retention elections are unlike competitive partisan or nonpartisan elections because individuals cannot challenge incumbents. Rather, voters may only choose whether a judge can serve an additional term and plays no role in selecting his or her replacement if the answer is “no.” While retention elections are predominantly associated with states that use merit selection, they are also to be found in a handful of states using competitive elections as well. According to the National Center for State Courts, Illinois, New Mexico, and Pennsylvania each use competitive elections to choose their supreme court justices and retention elections to hold them accountable. In Montana, a nonpartisan election state, justices who fail to attract a challenger at the end of their terms must stand for retention.

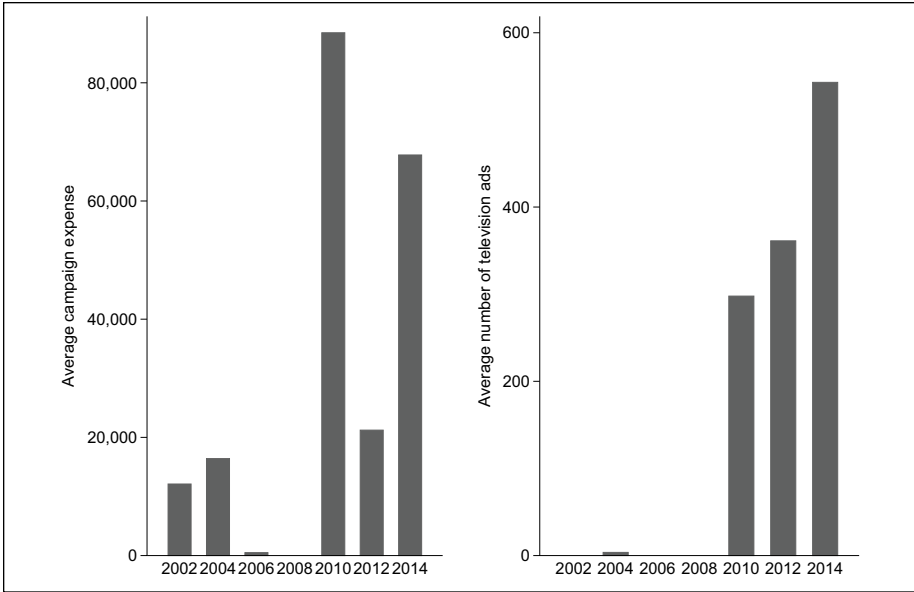
While merit selection does not afford judges the same level of independence compared with institutions in which judges enjoy life tenure, the retention election has proven a weaker form of accountability compared with competitive judicial elections (Geyh 2003; M. G. Hall 2007). In the years since merit selection has gained in popularity, judges have fared exceptionally well in their retention bids (Aspin et al. 2000; Kritzer 2015). Incumbents often earn more than 70% support from voters, and in recent years, more than 20% of voters who turn out to the polls often choose not even to participate in these contests (see Figure 1). That voter interest and participation in retention elections is lacking is intuitive. Scholarly research shows that judicial elections are more participatory and competitive when voters have information relating to

the positions and qualifications of their candidates—information that is often lacking in retention elections.

Voters learn about their candidates for the bench from a variety of sources, but scholarly research finds that competitive and even churlish campaigns enhance voter participation and competition. Importantly, voters are more likely to learn about candidates when their campaigns are more expensive and better advertised (Bonneau and Hall 2009; M. G. Hall 2007; 2015; M. G. Hall and Bonneau 2006; 2008; 2013). Beginning in the early 1990s and culminating around the mid-2000s, competitive state supreme court elections became more expensive, and candidates, political parties, and PACs invested much more in campaign advertising (M. G. Hall 2015; Kritzer 2015). Some termed this the “new-style” judicial campaign (Hojnacki and Baum 1992). New-style campaigns often emphasize judges’ ideological, rather than professional, qualifications. Much of this trend originated among outside interest groups interested in electing judges who would rule narrowly in civil liabilities cases, though much of the tone of these campaigns emphasized issues such as crime and social values.

Compared with competitive judicial elections, voters have few opportunities to learn about candidates standing for retention. Among the highly salient factors law and courts scholars have identified as spurring voter participation and election competition, retention elections have few. To begin, there are no party labels—one of the principal heuristics on which voters depend (Dubois 1980; M. G. Hall 2007; Klein and Baum 2001; Schaffner and Streb 2002). And retention elections are the only types of judicial contests that forbid challengers. Without challengers, incumbents have little incentive to raise or spend campaign money. From 2002 to 2009, 87 out of 94 state supreme court justices standing for retention spent no money whatsoever for their retention campaigns (see Figure 2).<sup>10</sup> And in only two of these retention elections were any television advertisements aired, each of which occurred during the 2005 Pennsylvania election cycle. Without these salient sources of information, voters in retention elections are often left to cue off of other, less informative heuristics such as a candidate’s name or performance evaluation (Dubois 1980; Gill 2017; Kritzer 2015).<sup>11</sup>

Taking a closer look at the seven retention elections between 2002 and 2009 that had any money spent or television advertisements aired, a couple of trends emerge. First, six of these seven contests occurred in states that use competitive judicial elections to select their justices—four from Montana and two from Pennsylvania. Therefore, much of the money being spent in these retention elections can be interpreted as an outgrowth of a state’s broader culture of electing judges in competitive and at times expensive elections. Indeed, among the four justices from Montana who stood for retention during this period, none faced any serious opposition, and the average candidate spent just under \$10,000 on campaign-related expenses. The most expensive campaign was by Justice James Rice who in 2002 spent approximately \$17,000 on promotional materials (such as billboards) and travel (such as gasoline and lodging). The average Montana justice facing retention during this period won 82.1% of the vote, and voter rolloff was approximately 13.8% on average.



**Figure 2.** Campaign expense and television advertising in state supreme court retention elections (2002–2014).

In three of the seven retention elections between 2002 and 2009 that witnessed campaign spending or television advertising, candidates faced opposition efforts by outside groups. These efforts led justices to spend considerable sums of money to retain their seats. The first of these occurred in California when Justice Kathryn Werdegar sought retention in 2002. Werdegar garnered opposition from a pair of conservative organizations over her vote to invalidate a law that required parental consent for minors looking to obtain an abortion (Kravetz 2002). The California ProLife Council spent approximately \$1,400 on mailers to urge nonretention—a fairly minimal opposition effort. In response, the Planned Parenthood Affiliates of California Action Fund spent more than \$6,000 on mailers supporting Werdegar, and Werdegar’s own campaign spent more than \$110,000 on mailers. Of the three California Supreme Court justices facing retention in 2002, rolloff was nearly identical in Werdegar’s election compared with the other two justices, and Werdegar actually won her retention with more support than her colleagues did.<sup>12</sup>

Pennsylvania provides the starkest example of an organized opposition effort that not only captured voters’ attention but also cost a state supreme court justice his seat. In 2005, Russell Nigro, a Democrat, and Sandra Schultz Newman, a Republican, faced bitter retention elections due to voter backlash over a recent pay raise the state legislature had approved for office-holders (Erdley 2005).<sup>13</sup> In what would come to resemble a proto-Tea Party wave of backlash, voters organized behind conservative grassroots organizations such as PACleanSweep, talk radio hosts, and an Internet campaign to

oust Nigro and Schultz from office (Panian 2005). Interestingly, according to campaign finance records, PACleanSweep spent less than \$9,000 on mailers, signs, postage, and so on, and no television advertisements were aired against either candidate. Nigro and Schultz each spent hundreds of thousands of dollars to support themselves. Nigro aired 643 television advertisements in support of his retention, and Schultz aired 73—an unthinkable act of self-preservation in a state in which no appellate judge had ever lost a retention election (Erdley 2005). In the end, Nigro's efforts came up just short as he only garnered 49.0% of the vote. Schultz hung on to win with 54.1% support.

Prior to 2010, the vast majority of judicial retention elections featured no spending or advertising, and among the few that did, only a handful could plausibly be termed *competitive*. Since 2010, however, judicial retention elections have become much more expensive and far better-advertised (see Figure 2). From 2010 to 2014, approximately 31% of all state supreme court retention elections featured either some form of judicial spending or television advertising. During this span, the average state supreme court retention candidate spent nearly \$57,000—a 407% increase compared with campaigns between 2002 and 2009. Furthermore, between 2010 and 2014, the average state supreme court retention campaign had approximately 400 television advertisements aired either in support or opposition of a candidate for retention—a 5,166% increase compared with the period from 2002 to 2009 when the average campaign had seven such advertisements aired. Finally, approximately 28.6% of all the television advertisements aired during this period were attack advertisements.

Clearly, the retention election became more expensive and salient to the average voter beginning around 2010. Indeed, it began to resemble the new-style election traditionally associated with competitive judicial elections. But what explains this sudden shift in the electoral environment? Further examining the states that exhibited expensive or well-advertised elections, we see similar trends from the previous period. To begin, between 2010 and 2014, justices spent money on their retention campaigns in only nine contests, and these races were clustered in three states where judges are initially chosen by competitive elections.<sup>14</sup> Nevertheless, we see that 18 of the 22 retention elections between 2010 and 2014 that featured television advertising occurred in states that use merit selection. Indeed, 40% of all merit selection states holding retention elections during this period witnessed some form of television advertising.<sup>15</sup>

Closer analysis of the opposition campaigns to justices' retention efforts reveal two broad trends that contributed to make the year 2010 an inflection point for the retention election. First, conservative groups, many affiliated with the Tea Party movement, organized opposition efforts against incumbent justices with more liberal voting records. In Alaska, the conservative organization, Alaskans for Judicial Reform, opposed Dana Fabe's retention largely due to her voting record on abortion rights and aired 30 television advertisements urging nonretention.<sup>16</sup> Fabe chose not to counter this opposition effort and won with only 54.7% of the vote.<sup>17</sup> That same year, a conservative group in Colorado, Clear the Bench, opposed the retention of three supreme court justices.<sup>18</sup> Like Fabe, these justices declined to defend themselves, but unlike in Alaska, the state bar association aired more than 1,000 television advertisements

promoting the justices' retentions—they won with an average of 60.7% of the vote. Two years later in Oklahoma, the state's Chamber of Commerce issued critical judicial evaluation scores for four supreme court justices.<sup>19</sup> Like Colorado, the state bar association intervened with television advertisements supporting the justices—they won with an average of 66.4% support.

The opposition identified in Alaska, Colorado, and Oklahoma came from conservative organizations generally opposed to large tort awards. These antiretention campaigns, however, never materialized into broad-based efforts to oust incumbents, and to the extent that justices or their supporters countered opposition, antiretention campaigns had little effect. But not only were judges facing greater opposition during this period, that opposition was also better funded and coordinated, oftentimes by well-heeled outside interest groups. In Florida's 2012 retention elections, for example, three justices—each of which were appointed by Democrats—faced considerable opposition from the state Republican Party and conservative PACs such as Americans for Prosperity, ostensibly for their decision to remove a ballot provision relating to health care (Klas 2012). The opposition campaign eventually waned as Americans for Prosperity shifted its attention to the state's presidential contest, and the three justices and their supporters dwarfed opponents' fundraising efforts.<sup>20</sup>

A nearly identical story played itself out in Tennessee during the state's 2014 elections. Three justices, all appointed by Democrats, faced an opposition campaign spear-headed by the state's Republican lieutenant governor and several conservative PACs including the Republican State Leadership Committee and the Tennessee Forum. Unlike in Florida, the opposition effort was sustained, and opponents aired nearly 2,000 attack advertisements against the justices. The justices responded with their own campaign organization, Tennesseans for Fair Courts. They raised a combined \$2.7 million and aired an average of 2,511 television advertisements supporting their retention. Each won, though the opposition campaigns diminished their margins of victory.<sup>21</sup>

From the preceding analysis, it seems clear that much of the backlash to state supreme court justices seeking retention from 2010 to 2014 came from conservative politicians and special interests responding to broad public disaffection either to political institutions generally or to court decisions specifically. Some of these antiretention campaigns simply reflected a grassroots backlash to court outcomes. For example, in Pennsylvania's 2013 elections, judges faced backlash from Tea Party groups over the stalled implementation of the Republican-backed voter identification law.<sup>22</sup> Some of these campaigns featured aggressive and expensive attempts to unseat justices, many of which were funded by outside interest groups such as Americans for Prosperity. While some justices successfully blunted these efforts by mounting their own offensives, others chose not to defend themselves and risked nonretention.

Without a doubt, the perfect storm of voter backlash, Tea Party activism, and special interest participation, occurred in the three Iowa retention elections following the court's decision in *Varnum*, which effectively legalized same-sex marriage. Bob Vander Plaats, a socially conservative candidate for governor, used the case as one of his primary campaign issues as he urged the public to vote "no" on the three justices'



retention elections. Numerous out-of-state special interests joined in the campaign, including Citizens United, the Family Research Council, and the National Organization for Marriage (Pettys 2010). Furthermore, these organizations invested heavily in attack advertisements, blasting the justices' votes in *Varnum* and labeling them as "activist" judges. For their part, the three *Varnum* justices neither raised nor spent any money on their defense. Nevertheless, some of the traditional cleavages we have come to expect in these races presented themselves. For example, the state's bar and trial lawyers associations lined up in opposition to business interests to support the justices. Nevertheless, their efforts were dwarfed compared with the opposition given that they aired no television advertisements, and were out-spent by a margin of nearly two-to-one (Pettys 2010). All three *Varnum* justices lost their retention bids with an average of 45.3% of the vote.<sup>23</sup>

## Theory and Hypotheses

The preceding analysis of state supreme court retention elections illustrates a few trends. Prior to 2010, candidates for retention rarely faced serious opposition, spent exceptionally little money, and aired virtually no television advertisements. To the extent that any such behavior occurred, it was largely among institutions that use competitive elections to select their justices. Nevertheless, 2010 was pivotal for retention elections. Conservative grassroots and special interest organizations coordinated sophisticated antiretention campaigns. Much of this agenda reflected a broader sense of disaffection with American politics and paralleled the rise of the Tea Party movement. Others were motivated by specific backlash to judicial decisions such as abortion or same-sex marriage, though the analysis makes clear that much of the underlying opposition to state supreme court justices hinged on civil liabilities. Unlike the period before 2010, much of the opposition afterward came from special interest groups such as Citizens United and Americans for Prosperity who funded television attack advertisements in states like Florida, making these elections nastier than those from before. All of this evidence suggests that the new-style campaign gained a foothold in retention elections beginning around 2010.

The previous analysis also suggests that the new-style campaign attracted greater voter interest, much of it in opposition to incumbents. A close reading of law and courts scholarship demonstrates that these conclusions are highly consistent with findings among competitive judicial elections. To begin, a wealth of evidence shows that expensive campaigns inform voters over how to maximize their utility at the polls. When candidates, political parties, or special interests spend money on an election, they do so to spread their campaign messages using billboards, robocalls, yard signs, and so on. These messages alert voters to the partisan or ideological payoffs that attend their feasible choices and encourage them to participate (e.g., Bonneau and Hall 2009; M. G. Hall and Bonneau 2008). Because retention elections are characteristically devoid of useful information (such as a party label or a quality challenger), they are often associated with poor rates of voter participation (M. G. Hall 2007). Therefore, to the extent that expensive campaigns can help to fill this

informational void, I expect that more expensive retention elections should exhibit greater rates of voter participation.

Scholarly research shows that not only are expensive campaigns informative, but so too are those that feature television advertising (M. G. Hall 2015; M. G. Hall and Bonneau 2013; Iyengar 2002). Television advertising is a salient means of reaching a large number of voters compared with a stump speech or a billboard, for example. Advertisements can provide voters with short, sensational messages that capture their attention and set the agenda for a campaign (Anasolabehere and Iyengar 1995; Iyengar 2002; Patterson and McClure 1976). While research suggests that television advertisements promoting or contrasting one candidate or another can increase voter participation, a body of literature shows that attack advertisements in particular are critical sources of voter information (Geer 2006; M. G. Hall 2015; M. G. Hall and Bonneau 2013).<sup>24</sup> As M. G. Hall (2015) explains,

[N]egative advertising improves the quantity and quality of information available to voters while better highlighting the differences between candidates. Negativity also enhances the degree to which citizens become interested and invested in election outcomes . . . (130, internal citations omitted)

Because attack advertising is more likely to contain issue-oriented messages compared with those promoting the professional or ethical traits of a candidate, they are more likely to educate and stimulate voters (Geer 2006; Jackson and Carsey 2007; West 2010). Simply put, attack advertisements make it easier for voters to know what kinds of policies a candidate is likely to support if they win their election.

Current scholarship also leads me to suspect that the new-style retention election will have important repercussions for the incumbency advantage most retention-eligible justices enjoy. Among competitive judicial elections, quality challengers cut into an incumbent's advantage, especially as they are able to raise and spend greater sums of money to support that challenge (Bonneau 2005; 2007; Bonneau and Cann 2011; M. G. Hall and Bonneau 2006). Retention elections, however, do not have challengers in the traditional sense. Rather, justices standing for retention are opposed, if at all, by outside organizations such as politicians, grassroots organizations, or special interest groups (Aspin 2017). These opposition efforts cannot support a specific candidate to replace an incumbent, but they can advocate for an incumbent's removal from the bench. I argue that these opposition campaigns work much the same way among retention elections as they do for challengers in competitive judicial elections. Opposition campaigns are likely to coordinate their efforts against vulnerable incumbents, and as their efforts become increasingly sophisticated, expensive, and salient, I suspect that incumbents' vote-shares will be decreasing.

As in other electoral environments, however, incumbent judges need not passively withstand the onslaught of an organized opposition effort. Rather, they can raise money for their campaigns, spend it on promotional materials, refute claims made by the opposition, go on speaking tours, and so on.<sup>25</sup> Indeed, research finds that when incumbents counter opposition campaigns, they are able to limit some of the damages

inflicted by those efforts (e.g., *Bonneau 2005; Bonneau and Cann 2011*). Nevertheless, robust incumbent spending could also be a signal that an incumbent is at risk of losing an election to a well-coordinated challenge (i.e., *Jacobson 1978*). When challengers are able to raise large amounts of money, they are better able to gain name recognition and a constituency, which means that they are better able to cut into an incumbent's advantage. If incumbents raise and spend greater sums of money because they face well-organized opposition efforts, then more expensive campaigns should be associated with lower incumbent vote-shares. Therefore, I expect that incumbents' vote-shares in retention elections will be decreasing as they spend more money, provided they face an organized opposition effort.

As with other scholarly research, I suspect that incumbents' vote-shares will be decreasing when opposition campaigns invest in television advertisements urging their nonretention. *M. G. Hall (2015)* shows that in judicial elections, attack advertisements against incumbents are most effective in states that prohibit partisan labels.<sup>26</sup> Partisan labels are an invaluable asset to voters whose information over judicial candidates' preferences is oftentimes minimal (e.g., *M. G. Hall 2007; Klein and Baum 2001; Schaffner and Streb 2002*). But in their absence, voters are left to cue off of whatever other information they have before them. In the case of an attack advertisement, that information is largely negative. Because retention elections are nonpartisan, I, therefore, anticipate that negative campaign messages will reduce the share of the vote incumbents win.

In competitive judicial contests, voters receive cross-cutting messages from multiple candidates. In a two-person race, for example, each could air advertisements that promote their candidacies and disparage their opponent's. Retention elections work a little differently, however. Because there are no formal challengers to an incumbent's retention bid, opposition efforts generally come from other politicians, grassroots organizations, or special interest groups. Therefore, when retention candidates decide to air television advertisements, these messages are almost uniformly intended to promote their own candidacies rather than to disparage another's. *M. G. Hall (2015)* finds that incumbents can improve their performance if they air advertisements that promote themselves, especially if they out-advertise their opposition. Nevertheless, promotional advertisements do not carry the clear policy implications presented by attack advertising, and *M. G. Hall (2015)* consistently finds that the benefit incumbents receive from promotional advertisements is blunted by opponents' attacks. Even still, I suspect that among incumbents seeking retention, advertisements promoting their candidacies will increase their vote-share.

## Data and Methodology

I study the role of the new-style campaign in state supreme court retention elections. I examine how increasingly expensive, salient, and churlish campaigns affect voter participation and incumbent performance in state supreme court retention elections. I identify 178 retention elections that occurred in 19 state supreme courts spanning the years 2002 to 2014.<sup>27</sup> Included in this figure is every retention election in both the 15

states that use merit selection in addition to the four states that use competitive elections to choose judges and retention elections to hold them accountable. In this section, I summarize the data I use to test my theoretical expectations, along with the statistical methods I employ to do so.

### *Dependent Variables*

Voter participation is the first outcome variable of interest. I follow standard practices and define participation in judicial elections as “Rolloff” (Bonneau and Hall 2009; Dubois 1980; M. G. Hall 2015). Rolloff is defined as the percentage of voters who turned out to the polls during a given election but who failed to vote on a given ballot item. As rolloff increases, voter participation decreases. From 2002 to 2014, rolloff was high among retention elections (approximately 21%). An incumbent’s “Vote-Share” is the second outcome variable of interest. Because retention elections give voters the option either to retain an incumbent or not, I measure incumbent vote-share as the percentage of individuals participating in a state supreme court justice’s retention election who voted to retain. Traditionally, incumbents do well in retention elections (more than 70% support). Indeed, only four candidates lost their retention bids between 2002 and 2014.<sup>28</sup> I gathered rolloff and vote-share data from state secretaries of state websites.

### *Campaign Expense and Advertising*

As incumbent judges raise and spend more money, they are better able to promote their candidacies or counter opposition campaigns. I, therefore, collect the total amount of money a state supreme court incumbent spent on his or her retention effort (“Campaign Expense”). I gathered these data by reading through each state supreme court justice’s expenditure reports on file with their state secretary of state’s office. I examined every line-item in the expense reports and tallied the total amount of money a candidate spent on campaign-related expenses such as radio or television advertising, printing, or consulting. To account for inflation in the U.S. dollar, I then adjusted every campaign expense figure into 2016 dollars.<sup>29</sup> Furthermore, because running for judge is simply more expensive in some states compared with others (either due to geography or to the expense of an ad-buy), I divide an incumbent’s campaign expenditures by her state’s total population.<sup>30</sup> Finally, as is common practice, I logged each justice’s campaign expenditures to account for the diminishing returns additional money can have on voter information or interest in a given contest.

Television advertising is an especially salient means either of advocating or attacking one’s candidacy for a state court of last resort. I first control for the total number of television advertisements (“Television Ads”) aired in a given race. Then, because I suspect that voter participation and incumbent success are conditioned by the specific tone of an advertisement, I disaggregate advertisements into the total number either supporting (“Promote Ads”) or attacking (“Attack Ads”) an incumbent.<sup>31</sup> All data relating to television advertising were gathered from the Brennan Center for Justice’s

biennial series on judicial elections, *Buying Time*.<sup>32</sup> As with each justice's campaign expenditures, I log all variables relating to television advertising.

### *Opposition Campaigns*

I suspect that organized opposition campaigns will not only result in greater voter participation in state supreme court retention elections but also that this effort will come at the expense of an incumbent's vote-share. I therefore measure whether an incumbent justice faced an organized opposition campaign ("Opposition Campaign") that challenged her retention, "1" if yes, "0" otherwise. To code this variable, I turned to media reports about each of the 178 retention elections under analysis. Using LexisNexis, I searched the Associated Press's State and Local Wire using the names of each retention eligible candidate, along with the court for which they were running.<sup>33</sup> I then content analyzed every story published within three months leading up to their retention efforts and observed whether any article made reference to an antiretention campaign against that justice.<sup>34</sup> If any article mentioned an organized effort to oppose a state supreme court justice's retention, I coded that election as having been "opposed."<sup>35</sup>

I find that 34 retention elections between 2002 and 2014 attracted organized opposition campaigns. Of note, 29 of these 34 challenges (85.3%) occurred between 2010 and 2014.<sup>36</sup> As a check on the reliability of this measure, I cross-referenced the 29 retention elections I identified as having garnered an opposition campaign between 2010 and 2014 with a similar list compiled by Aspin (2017). In total, 25 of the 29 retention elections I identify as having an opposition campaign appear in Aspin (2017); four of the elections I identify do not appear in his database, while three of the elections he identifies do not appear in mine.<sup>37</sup> Finally, because I suspect that incumbent campaign spending will have a multiplicative effect with an opposition campaign, I include an interaction effect between "Campaign Expense" and "Opposition Effort."

### *Other Controls*

Current research leads me to believe that a few additional variables are important for voter information and incumbent performance in state supreme court elections. First, I include a dummy variable for each contest relating to whether a candidate ran in a discrete, geographic district compared with statewide or at-large ("District"). Most retention elections occur statewide; however, judicial elections within geographic districts have been affiliated with greater rates of participation (Bonneau and Hall 2009, 43). Second, I control for an election's timing. Specifically, I include dummy variables for whether a retention election took place during a midterm ("Midterm") year (as opposed to a presidential election) and whether an election occurred during a primary ("Primary") as opposed to during a general. Midterm and primary elections are often associated with higher rates of participation by individuals who are more interested and engaged in elections.

Next, I control for a justice's incumbency status. Clearly, every justice standing for retention is an incumbent, but if an individual has never stood for retention before, voters could be more likely to take an interest—possibly a critical one—in their retention efforts. Therefore, I include a dummy variable for whether a justice is facing her first election as an incumbent (“Never Retained”). Finally, I include a measure of a state supreme court's professionalism (“Professionalism”), measured by Squire (2008). Because more professional courts have more control over their dockets, they are better able to insulate themselves from controversy and can, therefore, stave off challenges to their incumbency (Brace and Hall 2001; M. G. Hall 2015). Squire's (2008) measure of professionalism has a range of 0 (*least professional*) to 1 (*most professional*). As courts become more professional, voter participation should fall, and incumbent success should rise. All variables, their coding schemes, and descriptive statistics are presented in Table 1.<sup>38</sup>

### Estimation Technique

Both outcome variables of interest (“Rolloff” and “Vote-Share”) are measured as percentages. Therefore, linear regression models are appropriate statistical estimators. Nevertheless, because observations are nested within states, error variance is likely correlated within these panels. Multilevel (or hierarchical) modeling is an appropriate method of addressing such a constraint (Gelman and Hill 2007). Therefore, in the multilevel linear regression models presented in the following, individual elections are grouped within their respective states. Likelihood ratio tests strongly reject the null hypothesis that hierarchical models do not fit the data any better than ordinary least squares estimates. Because I suspect that the year 2010 was an inflection point for state supreme court retention election, I include a fixed effect for that point in time (“Year 2010”), which measures whether a retention election occurred during or after the year 2010, “1” if yes, “0” otherwise.<sup>39</sup>

### New-Style Campaigns and Retention Participation

First, I assess my theoretical expectations vis-à-vis the new-style campaign and voter participation in retention elections. The results from the hierarchical linear regressions are presented in Table 2. I separate the results into two sets of models—one that controls for the total number of television advertisements aired in a retention election and another that controls for the tone of these advertisements. In the tables that follow, entries under the heading,  $\hat{\beta}$  represents partial slope coefficient estimates,  $\hat{\sigma}_{\hat{\beta}}$  are standard errors, and  $\Delta Y_i$  represents the change in the linear prediction for a given variable. For continuous variables, this represents a change from one standard deviation less than the mean to one standard deviation greater than the mean, and for dichotomous variables, this represents a change from zero to one. I also present parameters stemming from the multilevel models such that  $\hat{\beta}_0$  denotes the mean of the state-level intercepts;  $\hat{\sigma}_{\hat{\beta}_0}$  denotes variance at the state-level, and  $\hat{\sigma}_{u_i}$  denotes variance at the election level.

**Table 1.** Descriptions of Variables Used in Statistical Analysis.

Variable name	Description of variable	M (SD)
Roll-off	The percentage of voters who turned out to the polls but failed to cast a vote in a judicial election	21.41 (8.83)
Vote-Share	The percentage of the vote an incumbent received in favor of retention	70.55 (7.97)
Campaign Expense	Amount of money incumbent spent on her campaign, per capita, in 2016 dollars, logged	-3.30 (4.20)
Television Ads	Count of the number of all television advertisements aired in a judicial election, logged	-3.09 (3.89)
Attack Ads	Count of the number of all attack advertisements aired in a judicial election, logged	-3.99 (2.55)
Promote Ads	Count of the number of all promote advertisements aired in a judicial election, logged	-3.45 (3.46)
Opposition Effort	Dummy variable equal to "1" if justice faced an organized opposition effort, "0" otherwise	0.19 (0.39)
District	Dummy variable equal to "1" if a justice ran within a discrete, geographic district, "0" otherwise	0.20 (0.40)
Midterm	Dummy variable equal to "1" if a justice ran during a presidential midterm year, "0" otherwise	0.65 (0.48)
Primary	Dummy variable equal to "1" if a justice ran in an early election that decides winners, "0" otherwise	0.05 (0.22)
Never Retained	Dummy variable equal to "1" if an incumbent was temporarily appointed to her seat, "0" otherwise	0.42 (0.50)
Professionalism	Squire's (2008) measure of judicial professionalism, scaled 0 ( <i>least professional</i> ) to 1 ( <i>most</i> )	0.56 (0.17)
Year 2010	Dummy variable equal to "1" if year is greater than or equal to 2010, "0" otherwise	0.47 (0.50)

Note. The unit of analysis is an individual supreme court race in a given state and year.

Beginning with Model 1 in Table 2, we see that as judicial retention elections become more expensive and better-advertised, voters are, all things being equal, less likely to roll-off at the polls, as hypothesized. These results are consistent with received wisdom that expensive, salient campaigns inform the public about which vote best represents their preferences and equips them to participate in the electoral process. Taking a closer look at the tone contained in these television advertisements,

**Table 2.** Voter Rolloff in Retention Elections (2002–2014).

	Model 1			Model 2		
	$\hat{\beta}$	$\hat{\sigma}_{\hat{\beta}}$	$\Delta \hat{Y}_i$	$\hat{\beta}$	$\hat{\sigma}_{\hat{\beta}}$	$\Delta \hat{Y}_i$
Campaign Expense	-0.27*	0.12	-1.47	0.05	0.12	<i>n.s.</i>
Television Ads	-0.53*	0.12	-2.84	—	—	—
Attack Ads	—	—	—	-1.26*	0.16	-3.89
Promote Ads	—	—	—	-0.09	0.11	<i>n.s.</i>
Opposition Campaign	-1.84*	1.12	-1.84	-1.27	1.00	<i>n.s.</i>
District	0.89	4.19	<i>n.s.</i>	0.99	4.43	<i>n.s.</i>
Midterm	-1.53*	0.70	-1.53	-0.54	0.65	<i>n.s.</i>
Primary	-4.93	6.87	<i>n.s.</i>	-3.41	7.29	<i>n.s.</i>
Never Retained	-0.14	0.64	<i>n.s.</i>	-0.26	0.58	<i>n.s.</i>
Professionalism	6.56	9.87	<i>n.s.</i>	6.58	10.46	<i>n.s.</i>
Year 2010	-3.36*	0.69	-3.36	-3.55*	0.62	-3.55
$\hat{\beta}_0$	18.6*	5.89	—	15.51*	6.24	—
$\hat{\sigma}_{\hat{\beta}_0}$	39.9*	13.2	—	45.50*	15.68	—
$\hat{\sigma}_{\hat{u}_i}$	14.5*	1.68	—	11.69*	1.35	—
Wald $\chi^2$		164.47*			238.53*	
Log Likelihood		-491.65			-476.22	
N		168			168	

Notes. The dependent variable is voter rolloff. Table entries are multilevel linear regression coefficient estimates with errors grouped on each state court. Standard errors in parentheses.

\* $p < .05$  (one-tailed).

we see from Model 2 of Table 2 that attack advertisements are principally responsible for driving voter participation in these retention elections.<sup>40</sup> As judicial retention elections become nastier, all things being equal, voters get a better sense over whether a vote to retain an incumbent serves their political interests. These results are highly similar to those presented in M. G. Hall (2015), who finds that attack advertising is most likely to animate the electorate in nonpartisan elections given the lack of a partisan heuristic.

The results from Table 2 also confirm that judicial elections became more participatory beginning around 2010. The variable, “Year 2010” is negative and statistically significant, as hypothesized. All things being equal, judicial retention elections between 2010 and 2014 had approximately 3.5 percentage points lower rolloff than during the period 2002 to 2009. This is due to the fact that outside groups such as grassroots Tea Party organizations and PACs such as Americans for Prosperity began challenging incumbents at a greater rate. Indeed, according to at least one of the models presented in Table 2, the presence of an opposition campaign—even holding the expense and tone of a contest constant—encouraged greater participation. According to Model 1 of Table 2, judicial retention elections with an opposition campaign had approximately 1.8 percentage points lower rolloff than a contest without such



**Table 3.** Incumbent Vote-Share in Retention Elections (2002–2014).

	Model 1			Model 2		
	$\hat{\beta}$	$\hat{\sigma}_{\hat{\beta}}$	$\Delta \hat{Y}_i$	$\hat{\beta}$	$\hat{\sigma}_{\hat{\beta}}$	$\Delta \hat{Y}_i$
Campaign Expense	-0.02	0.11	<i>n.s.</i>	0.28*	0.11	1.53
Television Ads	-0.45*	0.11	-2.40	—	—	—
Attack Ads	—	—	—	-1.37*	0.14	-4.25
Promote Ads	—	—	—	0.04	0.10	<i>n.s.</i>
Opposition Campaign	-6.48*	1.05	-6.48	-5.52*	0.85	-5.52
District	4.85	3.44	<i>n.s.</i>	6.85	4.56	<i>n.s.</i>
Midterm	-2.96*	0.67	-2.96	-1.93*	0.56	-1.93
Primary	-0.50	5.59	<i>n.s.</i>	-0.06	7.45	<i>n.s.</i>
Never Retained	0.37	0.62	<i>n.s.</i>	0.26	0.51	<i>n.s.</i>
Professionalism	7.36	6.11	<i>n.s.</i>	20.78*	6.36	6.98
Year 2010	-2.21*	0.64	-2.21	-2.42*	0.53	-2.42
$\hat{\beta}_0$	69.1*	3.87	—	57.37*	4.19	—
$\hat{\sigma}_{\hat{\beta}_0}$	26.9*	11.64	—	49.97*	23.15	—
$\hat{\sigma}_{\hat{u}_i}$	13.9*	1.61	—	9.28*	1.10	—
Wald $\chi^2$		264.27*			465.72*	
Log Likelihood		-514.03			-486.98	
N		178			178	

Notes. The dependent variable is incumbent vote-share. Table entries are multilevel linear regression coefficient estimates with errors grouped on each state court. Standard errors in parentheses.

\* $p < .05$  (one-tailed).

involvement, all things being equal. These results suggest that coordinated opposition campaigns in retention elections work in much the same way that quality challengers do in competitive judicial elections.

### New-Style Campaigns and the Incumbency Advantage

We have seen, thus far, that the new-style judicial campaign, only really present since 2010 in retention election states, is likely to generate voter knowledge and interest in a retention election sufficient to enhance participation. In this section, I consider what effect, if any, these new-style campaigns have on incumbent success. I hypothesized that greater amounts of money, in addition to advertisements promoting the qualifications of an incumbent, were likely to lead to better incumbent performance (especially in the absence of an organized opposition effort) but that attack advertising was likely to harm their vote-shares. I present the first set of results relating to incumbent performance in Table 3.

Beginning with Model 1, we see that television advertising, all things being equal, is negatively associated with incumbents' vote shares. Nevertheless, some of these advertisements are in favor of a justice and some against. Looking at the disaggregated

figures in Model 2 of Table 3, we see straightaway that attack advertisements are responsible for cutting into incumbents' vote-shares, as hypothesized. Interestingly, and counter to expectations, we fail to discern any positive effect for advertisements that promote the candidacy of an incumbent. As others have observed, attack advertisements are often more salient to voters than are promotional advertisements and may better frame ideological alternatives for individuals compared with television messages that stress less sensational features such as professional qualifications.

We might suspect that incumbents could better raise their profile among voters by running a more expensive campaign in which they promote themselves for retention. At the very least, they could spend more to counter negative portrayals of their candidacies by outside interests. While "Campaign Expense" fails to reject the null hypothesis in Model 1 of Table 3, we see from Model 2 that as incumbents spend greater sums of money on their retention efforts, voters are more apt to support their candidacies, all things being equal. Yet one might counter that retention-eligible justices would not be spending increasing sums of money on their retention efforts unless they were rationally responding to a plausible threat of nonretention. If such were the case, then we should expect greater campaign expenditures to be associated with *lower* vote shares compared with those who spend little-to-no campaign money.

Earlier, I argued that retention eligible justices are most likely to lose vote-shares in light of increasing campaign expenditures provided that they are facing an organized opposition to their incumbency. Otherwise, one would expect their self-promotion to be, in the aggregate, beneficial. To test this conditional hypothesis, I again estimated multilevel linear models, this time with an interaction effect between an incumbent's campaign expense and the presence or absence of an organized opposition campaign. I present these results in Table 4. The coefficient on "Campaign Expense" shows the predicted effect of incumbent spending on incumbent vote-share when there is no opposition urging nonretention. The coefficient on "Opposition Campaign" shows the predicted effect of an opposition campaign on an incumbent's vote-share when an incumbent spends no money. And the interaction term shows the effect of incumbent spending on her vote-share when there is an organized opposition effort against her. Because interaction effects can be difficult to interpret, I also present these results graphically in Figure 3.

We see from the interaction effect in Model 1 of Table 4, as presented in Figure 3, that as incumbents spend increasing amounts of money on their reelection efforts, provided that there is no organized opposition to their incumbency, that such efforts are associated with an increasing share of the vote. According to Figure 3, when an incumbent justice with no opposition spends no money ( $-4.6$  on the  $x$ -axis), she is predicted to win approximately 73% of the vote. And when she spends approximately \$10,000 in a state the size of Missouri ( $7.4$  on the  $x$ -axis), she is expected to increase her vote share to slightly better than 75%, all else equal.<sup>41</sup> But when state supreme court justices face organized challenges to their retention, increasingly expensive races presage a downturn in their election day returns. A justice with an opposition campaign who spends no money is expected to win approximately 67% of the vote. But an opposed justice who spends the equivalent of \$10,000 in a state the size of Missouri is expected to earn

**Table 4.** Opposition to Incumbents in Retention Elections (2002–2014).

	Model 1			Model 2		
	$\hat{\beta}$	$\hat{\sigma}_{\hat{\beta}}$	$\Delta\hat{Y}_i$	$\hat{\beta}$	$\hat{\sigma}_{\hat{\beta}}$	$\Delta\hat{Y}_i$
Campaign Expense	0.28*	0.16	1.08	0.43*	0.14	2.10
Opposition Campaign	-7.93*	1.18	-7.93	-6.43*	1.00	-6.43
Campaign $\times$ Opposition	-0.47*	0.18	-0.97	-0.26	0.16	<i>n.s.</i>
Television Ads	-0.41*	0.11	-2.22	—	—	—
Attack Ads	—	—	—	-1.32*	0.15	-4.10
Promote Ads	—	—	—	0.07	0.10	<i>n.s.</i>
District	5.01	3.20	<i>n.s.</i>	6.70	4.22	<i>n.s.</i>
Midterm	-2.98*	0.66	-2.98	-1.95*	0.56	-1.95
Primary	0.72	5.23	<i>n.s.</i>	0.84	6.90	<i>n.s.</i>
Never Retained	0.33	0.62	<i>n.s.</i>	0.25	0.51	<i>n.s.</i>
Professionalism	4.15	5.88	<i>n.s.</i>	16.59*	6.30	5.64
Year 2010	-2.47*	0.65	-2.47	-2.57*	0.54	-2.57
$\hat{\beta}_0$	72.38*	3.81	—	60.75*	4.24	—
$\hat{\sigma}_{\hat{\beta}_0}$	23.17*	9.42	—	42.55*	19.93	—
$\hat{\sigma}_{\hat{u}_i}$	13.65*	1.56	—	9.30*	1.10	—
Wald $\chi^2$		277.15*			466.35*	
Log Likelihood		-510.93			-485.70	
N		178			178	

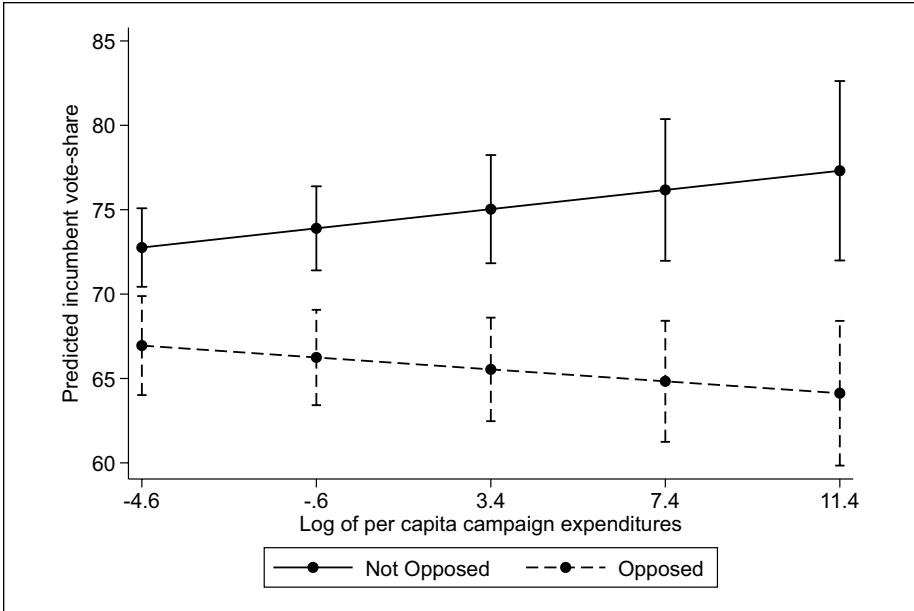
Notes. The dependent variable is incumbent vote-share. Table entries are multilevel linear regression coefficient estimates with errors grouped on each state court. Standard errors in parentheses. \* $p < .05$  (one-tailed).

closer to 65% support, all else equal. Even still, the interaction effect in Model 2 of Table 4 (where we control for the tone of television advertisements) fails to reject the null hypothesis, despite the fact that the  $p$  value for this coefficient is equal to .051.

Results from Tables 3 and 4 not only support the hypotheses that elections with organized opposition, attack advertising, and robust campaign spending hinder incumbents’ electoral fortunes, but we also see that the year 2010, even when accounting for salient electioneering, is associated with poorer incumbent performance. All things being equal, incumbents between the years 2010 and 2014 earned approximately 2.5 percentage points less than their peers did between 2002 and 2009. This is good evidence once again that 2010 represented a turning point for judicial retention elections given broad public dissatisfaction with government institutions and a general disinclination to reelect incumbents.

### Other Controls

I conclude this section with a discussion of the other control variables presented in Tables 2 through 4. First, note that midterm elections are, in at least one of the models



**Figure 3.** Predicted incumbent vote share given campaign expenditures and opposition efforts, with 95% confidence intervals.

presented in Table 2, associated with greater rates of participation (approximately 1.5 percentage points greater than in presidential elections), and this increased rate of voter engagement costs incumbents approximately 2 to 3 percentage points, depending on which model we consider. These results are consistent with the proposition that a more highly motivated, informed, and ideological group of voters participate in off-year elections. In none of the models estimated was voter participation or incumbent support dependent on whether justices were chosen from geographic districts, during primary elections, or if it was their first time seeking retention.

These findings are somewhat at odds with previous analyses of competitive judicial elections. Oftentimes, primary elections, like midterms, attract a more informed and ideological class of voters. Furthermore, elections featuring new appointees or incumbents in geographic districts attract more high quality challengers. It may simply be that without these challengers, voters in retention elections are unable to learn much about politically incongruent justices seeking another term of office. Finally, I note that in at least two of the models estimated, institutional professionalism is associated with greater job security for incumbents. This finding is consistent with previous accounts such as Brace and Hall (2001) who find that more professional institutions are better able to control their dockets such that they avoid contentious cases and high quality challenges to their incumbency.

## Discussion

Courts reformers have staked a considerable proportion of their agenda on the capacity of merit selection and the retention election to insulate incumbents from electoral pressures (e.g., American Bar Association 2003; Geyh 2003). The results of this analysis show how that agenda may be imperiled by the recent introduction of new-style retention campaigns. Prior to 2010, few incumbents raised any money for their reelection efforts, and even fewer of these campaigns featured any television advertising by candidates, political parties, or outside interest groups. Since 2010, however, this practice has become more commonplace. The results have had important repercussions not only for voter engagement in these elections but also for incumbents' ability to retain their seats. My analysis of the new-style campaign in state supreme court retention elections is, therefore, highly consistent with previous scholarly examinations of the new-style campaign, voter engagement, and judicial accountability (i.e., Bonneau and Hall 2009; M. G. Hall 2015).

Chief among the factors this study has found to promote greater democratic engagement and accountability of incumbents in state supreme court retention elections is the attack advertisement. Attack advertisements are a uniquely salient—and controversial—means of influencing voters. Critics of judicial elections have argued that attack advertising threatens the impartiality, independence, and legitimacy of the courts (e.g., Goldberg 2007). I find, however, that attack advertising makes voters' choices between a "yes" or "no" retention vote more clear given that these signals contain more issue-oriented messages than do more banal advertisements such as those promoting incumbents' qualifications. This is especially true among retention elections given that there are no party labels and no challenger candidates to more readily distinguish themselves from an incumbent. The effect of attack advertising in retention elections, therefore, is highly similar to those found among nonpartisan state supreme court elections (i.e., M. G. Hall 2015).

I also found that opposition campaigns to state supreme court justices' retention bids work much like quality challenges to incumbents in partisan or nonpartisan elections. Formally, every retention election is uncontested, but unlike most competitive elections in which uncontested incumbents win by default, retention-eligible justices can lose their seats if a sufficient number of voters favor replacing them. I found that well-organized opposition campaigns from grassroots and special interest groups can generate voter turnout and diminish the incumbency advantage most state supreme court justices facing retention enjoy. I found that these opposition efforts increased dramatically beginning in 2010, were primarily advanced by conservative organizations, and paralleled the broader Tea Party phenomenon that originated during the 2010 midterm elections. Furthermore, I found that retention-eligible justices who counter these opposition campaigns are apt to spend more money doing so, and such campaign environments are associated with lower vote shares for incumbents. By contrast, when incumbents face no organized opposition, I found that increased spending actually increases their vote-shares as there is little negative messaging surrounding their retention bids.

While 2010 appears to have been a turning point for the retention election, a few questions remain. First, will this be a sustained and permanent trend, or are we likely to see reversals in the near future? Kritzer (2015) demonstrates that new-style campaign gathered steam among competitive state supreme court elections during the 1990s and early 2000s but has largely tapered off since then. This is partly because many southern judiciaries remained under the control of Democrats during this period who favored large, punitive tort awards in civil liabilities cases. Today, most of the southern bench has realigned and represents Republican interests, which may help to explain why the new-style campaign abetted in many of these states. As the previous analysis made clear, much of the organized opposition to retention-eligible justices stemmed from their perceived hostility to business interests. But unlike the case of the South, organizations such as Americans for Prosperity and Citizens United were largely unsuccessful in removing their targeted justices. Whether groups such as these will continue in their efforts to reform the bench, and whether they have any greater success, remains to be seen.

Law and courts scholarship, however, shows that opposition campaigns need not oust incumbents to have a substantive effect on policy-making on state high courts. Incumbents need only believe that they face a credible chance at losing their elections to spend more campaign money during elections or to cater to public preferences while sitting for cases. For example, Cann and Wilhelm (2011) find that electorally accountable justices are more likely to pander to majoritarian preferences in death penalty cases when newspapers cover their decisions. Furthermore, recent scholarship shows that states in which party labels are not on the ballot encourage greater pandering still among electorally accountable justices (e.g., Caldarone, Canes-Wrone, and Clark 2009; Canes-Wrone, Clark, and Kelly 2014). All of these scholarly findings have critical implications for merit selection if the new-style election is here to stay. Judicial reform advocates such as the American Bar Association favor merit selection because they believe they insulate judges from the vicissitudes of partisan politics. The results from this and other research suggest that their intuition may be flawed. Without a party label, judges facing organized and increasingly routine opposition campaigns are not only more likely to pander for their reelection but are also more likely to lose if their opponents invest in salient attack advertising.

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### **Notes**

1. Iowa election data were gathered from the Iowa Secretary of State's website.
2. 763 N.W.2d 862

3. Spending data and quote are taken from the Brennan Center for Justice's biennial series on state supreme court campaigns, *Buying Time*. The 2010 reports can be found at [goo.gl/wyRN2b](http://goo.gl/wyRN2b) (last visited January 27, 2018).
4. According to Kritzer (2015, 127), between 1980 and 2000, Iowa judges, on average, won more than 80% of the public's support to retain their seats. Aspin (2006) credits declining public trust in American political institutions with growing public dissatisfaction among judicial incumbents, particularly during the 1970s.
5. This analysis of judicial selection methods relies heavily on research by Goelzhauser (2016, 15–34), who provides a lengthy consideration of the subject.
6. Generally speaking, states have favored stricter accountability mechanisms when controlled by a homogenous majority party and when there was less uncertainty about the outcomes judges would come to (Epstein, Knight, and Shvetsova 2002; Hanssen 2004).
7. The logic here is that appointing elites might choose unqualified individuals, cronies, for example, who would be beholden to their benefactors as opposed to the popular sovereign.
8. While nonpartisan elections encourage less democratic engagement with the courts (e.g., Bonneau and Hall 2009), some argue that they promote less judicial independence of the electorate. The rationale here holds that without party labels on which to rely, judges must establish their ideological bona fides using their votes and, therefore, are incentivized to pander for reelection more than a judge with a party label (e.g., Canes-Wrone, Clark, and Kelly 2014).
9. Goelzhauser (2016) traces the intellectual origins of merit selection back to a speech Roscoe Pound delivered to the American Bar Association in 1906 (Pound 1906). In it, Pound (1906) argued that the politicization of the bench contributed to the public's waning support for courts. As a cofounder of the American Judicature Society, Pound, along with other prominent reform advocates, became an early proponent for the use of merit selection.
10. This figure is calculated from campaign expense reports state secretaries of state make available on their websites.
11. For example, voters might recognize a candidate's name because they are part of a prominent political family in their state, or they might attempt to infer their political orientation based on a candidate's perceived race or gender. Judicial performance evaluations give voters information about judges' professional qualifications for the bench, and most make recommendations as to whether voters should retain an incumbent judge. According to the Institute for the Advancement of the American Legal System ([goo.gl/D1ZpA8](http://goo.gl/D1ZpA8)), only six states issue these evaluations to voters before a retention election, and research by Gill (2017) suggests that voters cue off of only the most negative evaluations.
12. Rolloff in Werdegar's election was 31.9%, while the other two justices averaged a rolloff of 33.0%. Werdegar's vote-share was 74.1%, while her colleagues averaged 72.1%.
13. The legislature passed the pay raises earlier that year. While judges were among those who benefitted from pay raises, the Pennsylvania Supreme Court had nothing to do with passing them. Nevertheless, because Pennsylvania's legislators were not up for election in 2005, voters expressed their anger at the only office-holders who were.
14. They hailed from Illinois (two), Montana (one), and Pennsylvania (three). The remaining three justices were all from Tennessee and faced considerable opposition during their 2014 retention efforts (discussed later).
15. These states were Alaska, Colorado, Florida, Iowa, Oklahoma, and Tennessee.
16. Faber had been opposed in her 2000 retention election for the same reasons and by the same group. One of its leaders at that time, Fritz Pettyjohn, a former Republican state legislator and

- radio talk show host, claims that opposition in 2010 also stemmed from doctors' organizations seeking to limit malpractice damages (Pettyjohn, correspondence with author, June 20, 2018).
17. The average Alaska Supreme Court justice from 2002 to 2014 (excluding Fabe) won retention with 64.5% support.
  18. Much of Clear the Bench's dissatisfaction with the Colorado judiciary stems from their decisions relating to punitive tort awards.
  19. As in other states, the chamber opposed justices who they viewed as friendly to punitive tort awards.
  20. According to Klas (2012), Americans for Prosperity spent approximately \$155,000 to oppose the justices who in turn raised a combined \$5.1 million dollars in their own support. The justices won retention with an average of 67.6% of the vote.
  21. The average vote-share for these justices was 56.7%.
  22. The opposition campaign, however, never moved beyond the grassroots level (Dooling 2013). Justices were also concerned that a government shutdown would affect their retention efforts (Ward and McNulty 2013).
  23. In 2012, an additional *Varnum* justice stood for retention. While conservative organizations opposed his retention too, the opposition campaign aired significantly fewer attack advertisements, and he managed to win retention with 54.5% support.
  24. Political science scholarship, however, has not always coalesced around this conclusion (i.e., Anasolabehere and Iyengar 1995).
  25. This, of course, is not to suggest that the only reason incumbents raise and spend money is in response to challenger activity. Rather, incumbents who sense they are weak, possibly due to a controversial opinion, may intend to shore up their support by engaging in similar types of campaign activity.
  26. As M. G. Hall (2015, 101) puts it, the party label, "shields incumbents from the vicissitudes of short-term political events."
  27. These states (and the number of contests they held) are as follows: Alaska (5), Arizona (10), California (11), Colorado (9), Florida (14), Iowa (14), Illinois (6), Indiana (7), Kansas (14), Missouri (10), Montana (7), Nebraska (9), New Mexico (1), Oklahoma (23), Pennsylvania (5), South Dakota (7), Tennessee (9), Utah (8), and Wyoming (9). The Oklahoma Court of Criminal Appeals is not a member of this dataset.
  28. These were Russell Nigro of Pennsylvania (2005) and the three *Varnum* justices from Iowa's 2010 elections—David Baker, Michael Streit, and Marsha Ternus.
  29. To do so, I used the "Inflation Calculator" available from the U.S. Bureau of Labor Statistics, available at [goo.gl/ifnCrR](http://goo.gl/ifnCrR) (last accessed July 1, 2018).
  30. It is common practice among recent scholarly articles and books to adjust campaign expenditures to the population of a state so as to make cross-state observations more comparable (e.g., M. G. Hall 2015). Furthermore, scholarly research demonstrates that results stemming from total spending and per capita spending are highly similar (e.g., Bonneau and Hall 2009). I gathered state population data from the U.S. Census Bureau, available at [goo.gl/3DaWS4](http://goo.gl/3DaWS4) (last accessed 1 July 2018).
  31. M. G. Hall (2015) also controls for the number of advertisements that "contrast" two or more candidates. No such advertisements were aired in any of the races under analysis—unsurprising given that there was only one candidate in each retention election.
  32. These data are retrievable from the following website: [goo.gl/mMnzGi](http://goo.gl/mMnzGi).
  33. The Associated Press's State and Local Wire relies on local reporters, located within its 143 bureaus in all 50 states, in addition to Associated Press-affiliated newspapers and broadcasters, to provide it with daily news coverage of local politics.



34. This data-collection process is highly similar to that outlined in Schaffner and Diascro (2007).
35. In the online appendix, I provide a comprehensive list of every opposition effort to a state supreme court justice facing retention between 2002 and 2014, the source and scope of that opposition, and the nature of the justice's response, if any.
36. A simple cross-tabulation shows that this relationship is highly statistically significant rendering , , and .
37. Three of the four retention elections I identify as having been opposed, which Aspin (2017) does not, occurred in Oklahoma in 2014, and an additional one occurred in Pennsylvania in 2013. Each of the three retention elections Aspin (2017) identifies as opposed that I do not occurred in Arizona (one in 2012 and two in 2014).
38. Recent work by Gill (2017) finds that critical judicial performance evaluations may detract from incumbent support in judicial retention elections. According to the Institute for the Advancement of the American Legal System, only six states issue these evaluations to voters before a retention election. These are Alaska, Arizona, Colorado, Missouri, New Mexico, and Utah. I gathered every available judicial performance evaluation for the 38 state supreme court justices seeking retention under analysis. For each of these individuals, the recommendation was to retain the justice. As a robustness check on the results presented in the following, I included the lowest judicial performance scores these individuals earned for the 32 contests in which they were reported. The results were statistically significant but signed in the *opposite* direction as one would anticipate. Therefore, to avoid unnecessary micronumerosity, I omitted this variable from the statistical models presented in the following.
39. Because the statistical models contain observations both from states that use merit selection along with those that use competitive elections, it may be that elections in these competitive states exhibit greater rates of participation or competition. As a robustness check, I present additional statistical models in the supplementary online appendix that isolate these contests. The results show that merit selection states are highly susceptible to the attack advertisement—just as they are in the broader class of retention elections. Nevertheless, because merit selection contests are generally less expensive and feature slightly less aggressive opposition campaigns, candidate spending and outside opposition efforts play an attenuated roll when it comes to voter rolloff compared with retention elections in other types of states.
40. Recall that unlike competitive judicial elections, retention elections during the period of analysis had attack advertisements directed solely at incumbents.
41. Missouri has approximately six million residents. Therefore, dividing \$10,000 by 6 yields a per capita expense of \$1,666, and taking the log of this figure gives 7.4.

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