

## Ballot design influences the power of televised attack ads in state supreme court elections.

*Televised attack ads in lower ballot races are a relatively new trend in American politics, leading to concerns from many commentators on their potential effects on democracy. [Melinda Gann Hall](#) takes an in-depth look at attack ads in the context of state supreme court elections. She argues that when incumbent candidates' party labels are removed on ballot papers, attack ads have a much greater effect on their electoral fate.*



One of the most notable trends in United States campaign politics is the rise of televised attack advertising. Going far beyond any traditional measures to promote candidates or draw distinctions among them, these hard-hitting broadcasts have raised concerns from some political scientists and other astute observers that such rancor may have deleterious consequences for representative democracy.

Nowhere are these misgivings being expressed more vociferously than in the context of state judiciaries by the nation's most distinguished court reform organizations and by an almost singular voice in the legal community. Convinced that judges and courts are being jeopardized by the corrosive effects of campaign politics, especially attack advertising calculated to disparage office holders, the American Bar Association (ABA) is advocating that the thirty-eight states currently using elections to staff their state court benches end the practice altogether. This follows decades of advocacy by the ABA and other groups to replace partisan elections with nonpartisan elections or the [Missouri Plan](#), efforts that in many ways were successful. Since the 1960s, eighteen states have changed the means by which they staff their supreme courts, with thirteen jettisoning partisan elections for other selection plans.

In recent research, I evaluated the intersection of televised campaign negativity and formal ballot design in state supreme court elections. Systematic analysis indicates that re-engineering ballots by removing partisan labels has tangible consequences, including rendering some of the most serious concerns about caustic campaigns into self-fulfilling prophecies.

### The Controversy over Campaign Negativity

Among legal pundits and court reform organizations, expensive advertising campaigns replete with mudslinging and other derisive attacks are widely presumed to constitute a serious threat to incumbents. These concerns have been exacerbated by the United States Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, which redefined the rules of campaign engagement. In this landmark case, the Supreme Court invalidated "announce clauses" in state judicial codes of conduct that prevented candidates for judgeships from expressing their views on issues. Although state supreme court elections have been competitive for decades and in some states always have been partisan or issue-based, judicial campaigns in other states prior to *White* were low-information events by design. However, *White* changed the electoral game by opening the door in all states to issue-based discourse, including attack advertising that can be part of aggressive, well-financed campaigns.

Despite the firm belief in the legal community that attack campaigns actually work by reducing electoral support for targeted candidates, empirical scholarship on campaign negativity in congressional and presidential elections largely discounts the effectiveness of attack advertising. But do televised attack campaigns have different consequences for incumbents in judicial elections, in which the integrity, impartiality, and wisdom of judges are being impugned? This is the first effort to explore this intriguing question systematically.

I evaluated 76 supreme court elections from 2002 through 2006 in nineteen states using partisan and nonpartisan elections to staff their highest courts. The advertising data are from the Campaign Media Analysis Group, reported and coded by the Brennan Center for Justice. The primary variables are the vote shares received by

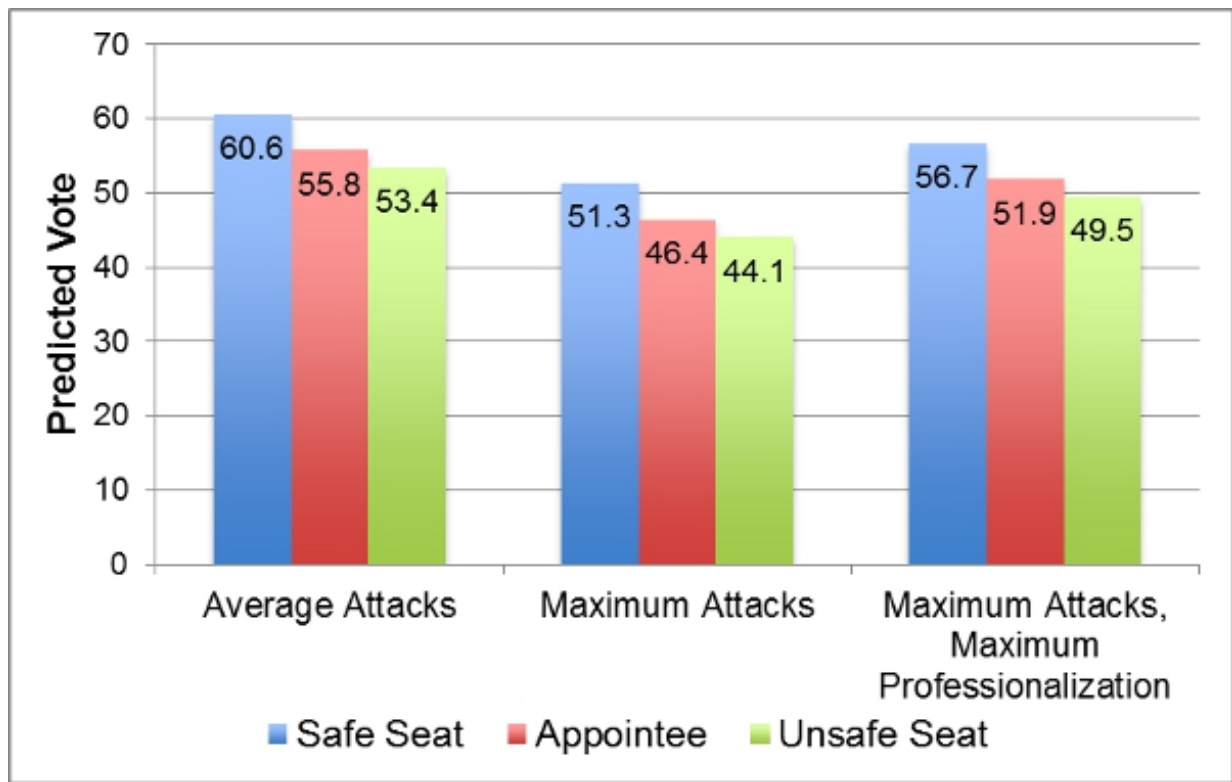
justices seeking reelection and the total number of attacks aired against incumbents. I also included measures of the characteristics of the campaigns (airings of attack, promote and contrast ads, and campaign spending), the candidates (justices in unsafe seats, new appointees, and quality challengers), and the institutional context (competitive courts, professionalization, and partisan ballots).

Concerns about the destructive consequences of negativity on the incumbency advantage are partially well founded. Although partisan ballots insulate supreme court justices from the adverse effects of short-lived events like attack ads, nonpartisan elections do not. In nonpartisan elections, attack advertising significantly reduces vote shares, not because courts are intrinsically different from the other branches but because these judicial elections alter the rules of the game. Without the party cue on ballots, campaign messages constitute much of the information available to voters and thus have greater power to shape electoral fates. These deliberate choices made by states not only define the fundamental rules under which elections operate but also create alternative strategic contingencies that structure the manner in which voters receive and use information and the extent to which incumbents are insulated from external politics.

The professionalization of state supreme courts – another principal institutional feature – helps to offset campaign negativity in both partisan and nonpartisan elections. Professionalization reflects the salary and staff provided to state high courts and the extent to which high-volume routine appeals are removed from their dockets. Professionalization enhances the ability to attract quality members, decide cases more efficiently, and utilize dockets strategically to minimize political controversy, which in turn increases the incumbency advantage.

To illustrate these various effects, Figure 1 reports predicted vote shares for incumbents based on the primary model in the study. In nonpartisan elections in which incumbents face quality challengers in competitive states, and with all other variables at their means including attack airings, the predicted vote is 60.6% for those in safe seats, 55.8% for new appointees, and 53.4% for incumbents in unsafe seats. However, increasing attack airings against incumbents to their maximum value reduces vote shares to, respectively, 51.3%, 46.4%, and 44.1%. Thus, other things being equal, an average attack campaign can result in marginal wins for all but popular experienced incumbents. At their highest levels, these campaigns can produce marginal wins even for popular incumbents and losses for the newly appointed and less popular. As Figure 1 also shows, in the most professionalized courts with competitive seats and quality challengers, the predicted vote in the most prolific attack campaigns in nonpartisan elections rises to 56.7% for popular incumbents, 51.9% for appointees, and 49.5% for marginal justices.

**Figure 1: Predicted Vote Shares for Incumbents at Varying Levels of Attack Airings and Judicial Professionalization**



Other factors can counterbalance televised attacks, including spending by the incumbent. As with campaigns for other offices, some factors shaping the incumbency advantage are within the control of the candidates while others are set into motion long before campaigns begin by the fundamental choices states make about how elections are conducted and institutions designed.

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This article is based on the paper [“Televised Attacks and the Incumbency Advantage in State Supreme Courts”](#) in the *Journal of Law, Economics, and Organization*.

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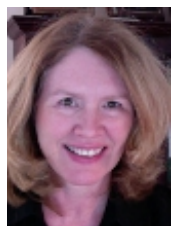
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Melinda Gann Hall is Professor of Political Science at Michigan State University. Professor Hall is a nationally recognized authority on judicial politics and state politics, with particular interests in judicial behavior and judicial elections. Professor Hall is a leading proponent of, and contributor to, infrastructure development in the study of state courts.



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