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FINANCING OHIO SUPREME COURT ELECTIONS 1992-2002: CAMPAIGN FINANCE AND JUDICIAL SELECTION

Nancy Marion,^{*1} Rick Farmer^{*2} and Todd Moore^{*3}

I. INTRODUCTION

The 2000 Ohio Supreme Court election renewed interest in judicial selection reform.¹ The election was noted for interest group issue advocacy and undisclosed campaign spending.² Advocacy groups spent millions attempting to unseat incumbent Justice Alice Robie Resnick, leaving the impression that Ohio justice is controlled by special interests

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1. Ohio's history concerning judicial selection reform is lengthy. Numerous attempts have been made to change Ohio's semi-partisan method; the most common approach has been merit selection. The Ohio League of Women Voters challenged an early attempt to reform the method in 1938. Further attempts between 1953 and 1979 argued for merit selection method reform. See Richard J. Reubel, Note, *Judicial Selection and Tenure—The Merit Plan in Ohio*, 42 U. CIN. L. REV. 255, 263 (1973); KATHLEEN BARBER, *Selection of Ohio Appellate Judges: A Case Study in Invisible Politics*, in POLITICAL BEHAVIOR AND PUBLIC ISSUES IN OHIO 222-26 (John J. Gargan & James G. Coke eds., Kent State Univ. Press 1972); CHARLES H. SHELDON & LINDA S. MAULE, *CHOOSING JUSTICE* (Washington State Univ. Press 1997). Merit selection reemerged in 1997 as a ballot initiative sponsored by the Ohio League of Women Voters and the Ohio State Bar Association; Issue 3, the ballot initiative was defeated by a 2:1 margin. See JOHN FELICE, JOHN KILWEIN, & ELIOT SLOTNICK, *Judicial Reform in Ohio*, in JUDICIAL REFORM IN THE STATES 55, 65 (Anthony Champagne & Judith Haydel eds., Univ. Press of America 1993).

2. See DEBORAH GOLDBERG & SAMANTHA SANCHEZ, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2002*, 15, 33 (Bert Brandenburg, ed., Brennan Center for Justice, Justice at Stake Campaign) (Mar. 2004).

and trial lawyers.³ The uses of negative campaigning and issue advocacy seemed to confirm suspicions that the Ohio Supreme Court had become dependent on campaign contributions from those with cases before the court. After the election, legal academics and public interest organizations began discussing changes to Ohio's semi-partisan system.⁴ Legal scholarship focused on the appearance of corruption and loss of judicial independence, and public interest organizations began discussing merit selection and campaign finance reform.⁵

Ohio's semi-partisan method is unique in that it elects state Supreme Court justices within both partisan and non-partisan electoral contexts.⁶ Candidates campaign during primaries openly displaying their partisanship, but during the general election candidates' partisanship is removed and candidates cannot announce their party affiliation. Mixing both partisan and nonpartisan contexts represents an

3. Stephen Dyer, et al., *Dirty Ads Tarnish Judicial Campaigns*, AKRON BEACON J., Nov. 25, 2002, at A1. See also Kara Baker, *Comment Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Supreme Court*, 35 AKRON L. REV. 159, 160-66 (2001).

4. See, e.g., Baker, *supra* note 3, at 177-81; David Barnhizer, *On the Make: Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 406, 422-23 (2001); Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 485-87 (2002); Jonathan Entin, *Judicial Selection and Political Culture*, 30 CAP. U. L. REV. 523, 557 (2002); Roy A. Schotland, *Financing Judicial Elections, 2002: Change and Challenge*, 2001 L. REV. M.S.U. - D.C.L. 849, 869-76 (2001) [hereinafter SCHOTLAND 2001]; Roy A. Schotland, *Comment on Professor Carrington's Article, 'The Independence and Democratic Accountability of the Supreme Court of Ohio,'* 30 CAP. U. L. REV. 489 (2002) [hereinafter SCHOTLAND 2002]; Roy A. Schotland, *Symposium: Selection of State Appellate Judges: Political Party Affiliation in Partisan and Nonpartisan Judicial Elections: To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1398 (2003) [hereinafter SCHOTLAND 2003]; Michael E. Solimine, *The False Promise of Judicial Elections in Ohio*, 30 CAP. U. L. REV. 559, 562 (2002).

5. See *supra* note 4 (providing examples of such legal scholarship). Public interest organizations interested in reforming Ohio's judicial selection processes and campaign finance include: The American Judicature Society at <http://www.ajs.org/selection/index.asp>; The Brennan Center for Law and Policy at <http://www.brennancenter.org>; The Ray C. Bliss Institute of Applied Politics, University of Akron at <http://www.uakron.edu/bliss>; Justice at Stake Campaign at <http://www.faircourts.org>; Judicial Impartiality: The Next Steps at <http://www.thenextsteps.org>; Ohio League of Woman Voters at <http://www.lwvohio.org/map.htm>; Ohio Citizen Action at <http://www.ohiocitizen.org/moneypolitics/mp.html>; Ohio State Bar Association at <http://www.ohiobar.org>; The John Glenn Institute for Public Service & Public Policy, Ohio State University at <http://www.gleeninstitute.org>. These organizations provide information concerning Ohio's history of judicial selection reform and offer policy alternatives to the semi-partisan system. The websites have links to policy papers, money and politics databases, and other campaign finance and state court election reform efforts.

6. Anthony Champagne & Judith Haydel, *JUDICIAL REFORM IN THE STATES* (Univ. Press of America 1993). See also Philip L. Dubois, *FROM BALLOT TO BENCH* (Univ. of Austin Press 1980); Henry R. Glick, *COURTS, POLITICS, AND JUSTICE* (McGraw-Hill 1998); Sheldon & Maule, *supra* note 1.

attempt to remove partisanship and corruption.⁷ Additionally, the semi-partisan system theoretically serves to balance the demands of popular democracy against the court's independence.⁸

However, recent legal scholarship has argued that the semi-partisan system no longer ensures this balance.⁹ Scholars are concerned the court can no longer remain objective, arguing judicial elections have become similar to legislative campaigns.¹⁰ Elections require judicial candidates to engage in fundraising, seek voter approval and address political issues before the court. Scholars argue elections place inappropriate demands on the court by having candidates seek campaign contributions from individuals and interest groups that may later expect the court to rule based on prior campaign contributions.¹¹ In short, many of these scholars argue the semi-partisan method has failed to isolate the court from the demands of popular elections.¹² Reforming the semi-partisan method is viewed as a necessary step to ensure the court's independence and impartiality.¹³

7. Kathleen L. Barber, *Ohio Judicial Elections: Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762, 767-68 (1971). See also Laurence Baum & Mark Kemper, *The Ohio Judiciary*, in OHIO POLITICS 283-302 (Alexander Lamis, ed., Kent State Univ. Press 1994); CHARLES S. LOPEMAN, *THE ACTIVIST ADVOCATE: POLICY MAKING IN STATE SUPREME COURTS* 62 (Praeger 1999); Kathleen L. Barber, *Judicial Politics in Ohio*, in GOVERNMENT AND POLITICS IN OHIO 90-92 (Carl Leiber, ed., Univ. Press of America 1984); ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 126-127 (Yale Univ. Press 1988).

8. See PATRICK M. MCFADDEN, *ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS* 5-8 (American Judicature Society 1990).

9. See Baker, *supra* note 3, at 168-75; Solimine, *supra* note 4, at 560-61, 571-73.

10. See Research and Policy Comm., Center for Economic Development, *JUSTICE FOR HIRE: IMPROVING JUDICIAL SELECTION*, 11-12 (2002), available at http://www.ced.org/docs/report/report_judicial.pdf [hereinafter JUSTICE FOR HIRE]. See also Doug Oplinger, *Supreme Court Races Less Dirty, Still Feisty*, AKRON BEACON J., Oct. 11, 2004, at A1.

11. See Barnhizer, *supra* note 4, at 364-66; SCHOTLAND 2001, *supra* note 4, at 851, 857.

12. See Barnhizer, *supra* note 4, at 364-66; SCHOTLAND 2001, *supra* note 4, at 851, 857.

13. See Carrington & Long, *supra* note 4, at 471, 482. The terms 'independence' and 'impartiality' are used with imprecision. *Id.* The U.S. Supreme Court has discussed the vague nature of these terms within *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). According to Alexander Hamilton, "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution." THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed. 1961). Here Hamilton used the term within a separation of powers context. *Id.* But Hamilton later used the term within a different context. When he argued: "[i]f, then, the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachment, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges. . . ." *Id.* at 469.

Hamilton also commented on judicial impartiality, attempting to persuade New York that life tenure on the court provides impartiality:

To avoid arbitrary discretion in the courts, it is indispensable that they [judges] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . [t]he records of those precedents

must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them. . . . [A] temporary duration in office will naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench

Id. at 471.

Reading the passage, contradictory interpretations of judicial impartiality emerge. Hamilton attempts to persuade that both judges and the court are impartial. THE FEDERALIST NO. 78, at 471. The United States Supreme Court recently argued that the term ‘judicial impartiality’ is overly broad and uncertain. *See White*, 536 U.S. 765, 775-780 (2002). Justice Scalia argued the term was ambiguous as a justification for limiting speech, stating that the various meanings of impartiality include: (1) the lack of bias for or against either party to the proceeding; (2) lack of preconception in favor of or against a particular view; or (3) open-mindedness. *Id.* at 775, 777-78. This laborious passage concerning the terms “judicial independence and impartiality” is intended to demonstrate the misuse of the terms and why the terms obfuscate the judicial selection debate.

See also Bradley Link, Note, *Had Enough in Ohio? Time to Reform Ohio’s Judicial Selection Process*, 51 CLEV. ST. L. REV. 123 (2004). Link argues that “[o]ur legal system rests on the fundamental idea that judges will serve as independent and un-biased arbiters of the law. Unfortunately, the current model for selecting judges in Ohio through non-partisan elections falls far short of the mark. . . .” *Id.* at 124. Link also argues the semi-partisan system has several “pitfalls”. According to Link:

Our system of electing judges has several negative effects: (1) election of judges gives the appearance that the judiciary will be unable to act with the independence and impartiality necessary for the proper; (2) election of judges undermines the public confidence in the judiciary; and (3) election of judges may discourage qualified candidates from seeking the bench.

Id. at 126. Link concluded that “Ohio needs to make the radical change to an appointive method of selecting judges. . .to shore up public confidence in the judiciary and ensure the integrity and impartiality of the courts.” *Id.* at 152.

See also Jeffery W. Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35 (2003). Stempel’s article does not critique semi-partisan elections specifically. However, the article argues against judicial elections and calls for judicial selection reform. According to Stempel:

When the judiciary is chosen through rough-and-tumble elections, we have hyperdemocracy that has become cancerous and perhaps metastasized so as to infect the judiciary adversely in ways beyond the selection process itself. Although my metaphor is perhaps hyperbolic, is it instructive and, in my view correct. With so much electioneering over so many offices which voters know so little, we have created a status quo that consumes public resources wastefully (e.g. more money spent on election administration and verification; more money spent on media, much of it merely negative rather than informative) for relatively little improvement in civic virtue.

Id. at 50.

See also David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws, and the First Amendment*, 72 U. CIN. L. REV. 1 (2003). Goldberger argues that “[t]he widespread use of judicial elections to select state court judges continues to create a serious tension between our respect for elections as preferred mechanism to select our state court judges and our desire to have judges who are sufficiently removed from politics to be fair and impartial decisionmakers.” *Id.* at 1.

See also Lawrence Baum, *Perspectives on Judicial Independence: Judicial Elections and Judicial Independence: The Voter’s Perspective*, 64 OHIO ST. L.J. 13 (2003). Baum’s research addresses voter perception of judicial independence. He argues state court elections have remained relatively low information level campaigns, stating that, “[I]acking much information, voters

Numerous publications and policy discussions have focused on the perceived failures of Ohio's semi-partisan system and campaign finance law.¹⁴ For example, Ohio State University's John Glenn Institute for Public Service and Public Policy, while not arguing explicitly that interest group contributions undermine the court, does support judicial selection reform due to fears that interest group issue-advocacy campaigns threaten judicial independence and impartiality.¹⁵ In addition, The Brennan Center for Justice, Justice at Stake Campaign, Bliss Institute of Applied Politics, Ohio League of Women Voters, Ohio State Bar Association and Ohio Chief Justice Thomas Moyer assembled a judicial conference, "Judicial Impartiality: The Next Steps," addressing

frequently decline to choose between judicial candidates. When they do make a choice, they base that choice on the scraps of information they do hold, primarily information they glean from the ballot." *Id.* at 38. Baum also suggests that state supreme court races have departed somewhat from the low-information model with the rise of issue campaigns in supreme court elections:

The proportion of judicial contests that depart from the low-information model surely has increased over the last two decades. . . . it has been concentrated at the state supreme court level. . . . Has judicial independence declined? For state supreme court justices, almost certainly it has. Justices are now more likely to face strong opposition campaigns that are based in large part on their judicial votes and opinions. . . .

Id. at 39. Baum concludes by arguing that the perception that judicial independence is threatened is an exaggeration: "the effect of this trend on judges' *perceptions* of their independence undoubtedly is substantial. Large-scale campaigns against incumbent judges that achieve success or come close to it are vivid events. Like other vivid events, they are likely to be exaggerated by observers. . . ." *Id.* at 39.

14. According to the ABA Justice in Jeopardy report, elections are creating a contributions "arms race." American Bar Association, Justice in Jeopardy: Report of the American Bar Association Commission on the Twenty-First Century Judiciary 79 (2003) available at http://www.abanet.org/barserv/library/n/judiciary_and_the_courts/4543.pdf [hereinafter ABA REPORT]. According to the report, justices become dependent on campaign contributions from those who contribute—thereby destroying the courts' independence and impartiality. *Id.* at 15-16. The report argues judicial candidates solicit contributions from individuals and interest groups who have issues before the court creating the appearance of impropriety. *Id.* at Appendix A, p. 24. The nonprofit Center for Economic Development (CED) argues justices sell their decisions, depicting "Justice for Hire" and picturing dollar signs above the court. JUSTICE FOR HIRE, *supra* note 10. The report argues, ". . . elections are an inappropriate and detrimental method of selecting judges." *Id.* at 4. The CED report concludes rising campaign costs are making justices dependent on interest group contributions. *Id.* at 6.

15. See Deborah Merritt, *Judicial Campaign Reform Deserves Public Support*, The John Glenn Institute for Public Service and Public Policy, Press Release, January, 13 (2004), available at http://www.thenextsteps.org/judicial_reform.pdf. Merritt, an Ohio State law professor, wrote the press release for the Institute stating the Institute's concerns with interest group issue advocacy and judicial selection reform. According to Merritt:

Recent judicial elections are not what the framers of the [Ohio] 1851 constitution had in mind. In the 2000 Supreme Court race, a secretly funded 'issue-advocacy' organization ran unfair ads . . . and alleg[ed] . . . judicial votes were for sale. . . . Public confidence in the judiciary has fallen[,] . . . voters believe judges are tied to campaign contributors, and qualified candidates don't want to subject themselves to malicious attacks.

Id. at 1.

options for regulating campaign contributions and judicial elections.¹⁶ Recently, national attention addressing state judicial selection and campaign finance reform has criticized elections as a means of ensuring judicial independence.¹⁷ The American Bar Association (ABA) *Justice in Jeopardy* report criticizes elections as a means of judicial selection, arguing elections produce highly politicized political environments that are contrary to the nature of judicial office.¹⁸ The ABA argues that courts are unique within the separate branches of government and that courts are assumed non-political institutions.¹⁹ It supports replacing elections with a commission-based appointive method that removes the court from the political process.²⁰ Ohio lawmakers have noted the ABA proposals and have begun drafting legislation that will alter Ohio's semi-partisan system.²¹

Much of the debate concerning judicial selection reform rests on assumptions about money.²² But little is known about the precise way

16. See *Judicial Independence and Impartiality: The Next Steps, A Progress Report* (2004), available at <http://www.thenextsteps.org/NextStepsProgressReport.pdf> (addressing policy options for regulating campaign contributions and judicial selection reform). The report calls for several judicial selection and campaign finance related reforms, including extended supreme court terms, changing judicial qualifications, judicial compensation, campaign finance disclosure and voter education guides. *Id.* at 3-6.

17. GOLDBERG & SANCHEZ, *supra* note 2, at 5.

18. ABA REPORT, *supra* note 14, at 24.

19. ABA REPORT, *supra* note 14, at 18-19.

20. The ABA has long advocated merit selection methods. See ABA REPORT, *supra* note 14, at v. The most recent ABA recommendation suggests gubernatorial appointment. *Id.* The ABA argues gubernatorial appointment will bring the most qualified gubernatorial candidates to the bench and improve the quality of courts. *Id.* at 52. Empirical studies demonstrate judicial selection methods do not determine the quality of judicial candidates or quality of decisions produced by courts. According to Melinda Gann Hall:

Empirical research on the effects of judicial selection processes has been quite consistent in finding that methods of judicial recruitment do not affect either the quality of the bench or judicial outcomes. Earlier studies, as well as more recent work, all determine that background characteristics of judges are similar regardless of method of judicial selection. Likewise, studies demonstrate selection methods do not affect the tendency for state supreme courts to rule in favor of particular categories of litigants. Based on the evidence to date, the conclusion reasonably could be drawn that selection mechanisms simply do not have much of an impact on the operation of state judiciaries.

Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 428 (1992).

21. Following the 2000 election, several bills were introduced to change issue advocacy campaigns, including The Taft-Blackwell Campaign Finance Reform Bill (S.B. 10, 2003) and "Electioneering Communications," S.B. 214 and Sub. S.B. 214 (2003-2004).

22. Ohio's judicial selection debate concerns two competing selection theories. The public good theory argues elections do not ensure democratic accountability. See DAVID W. ADAMANY & GEORGE E. AGREE, *POLITICAL MONEY* (Baltimore, MD: Johns Hopkins Univ. Press 1975); OWEN M. FISS, *THE IRONY OF FREE SPEECH* (Harvard Univ. Press 1996); Edward Foley, *Equal-Dollars-*

Ohio Supreme Court elections are financed. While numerous studies address the semi-partisan system as an electoral method, few studies address campaign finance specifically.²³ To date there has been little academic research on judicial campaign finance in Ohio. The current research examines many assumptions underlying Ohio's method of judicial selection and related campaign finance system.

II. BACKGROUND

A. Explaining Semi-Partisan Electoral Outcomes

The semi-partisan method employed in Ohio is known for producing partisan campaigning.²⁴ Electoral outcomes can be explained as partisan contests conducted through the activities of candidates, political parties and interest groups. Political science literature recognizes political parties, interest groups, incumbency, candidate

Per-Voter: A Constitutional Principle of Campaign Finance, 94 COLUM. L. REV. 1204 (1994); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CAL. L. REV. 1 (1996); Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEXAS L. REV. 1627 (1999); Bert Neuborne, *Is Money Different?*, 77 TEX. L. REV. 1609 (1999); Jamin Raskin & Jon Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE LAW & POL. REV. 273 (1993); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994). This view contends elections undermine democratic accountability by bringing money into the political process; money undermines democratic equality; unequal policy reflects the views of elites. The constitutional rights view argues elections provide democratic accountability by promoting speech within the First Amendment. See, e.g., Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, at A 17; Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L. J. 45 (1997); Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition of a Soft Money Ban*, 24 J. LEGIS. 179-200 (1998); Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & POL'Y 1 (1999); BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM (Princeton Univ. Press 2001). This view argues campaign finance reform limits speech by limiting contributions; regulating money regulates political expression. The Ohio reform debate adheres to public good theory: critics argue semi-partisan elections create expensive general election campaigns, increase interest group activity and threaten judicial independence and impartiality.

23. DUBOIS, *supra* note 6, at 242-43. See also Phillip L. DuBois, *Penny for Your Thoughts? Campaign Spending in Trail Court Elections, 1976-1982*, 39 W. POL. Q. 265, 266 (1986); Mary L. Volcansek, *An Exploration of the Judicial Election Process*, 34 W. POL. Q. 572, 577 (1981); Susan Welch & Timothy Bledsoe, *The Partisan Consequences of Nonpartisan Elections and the Changing Nature of Urban Politics*, 30 AM. J. POL. SCI. 128, 128 (1986).

24. See Barber, *supra* note 7, at 774, 783-84; BAUM & KEMPER, *supra* note 7, at 288; Welch & Bledsoe, *supra* note 23; Melinda Gann Hall, *State Judicial Politics: Rules, Structures, and the Political Game*, AMERICAN STATE AND LOCAL POLITICS 114-139 (Ronald E. Weber & Paul Brace, eds.) (Chatham House Publishers 1999).

quality and money as explanatory variables affecting electoral outcomes.²⁵ These will all be examined here.

B. Political Parties

Political parties affect electoral outcomes by influencing the amount of information voters have about the candidates. Political parties educate voters about judicial candidates' partisanship through voter slate cards and related campaign brochures.²⁶ Party campaign literature increases partisan awareness and information levels about judicial candidates by making party identification an information cue that helps voters choose within the semi-partisan method.²⁷

Political parties also influence electoral outcomes through campaign contributions and related campaign expenditures.²⁸ Political parties provide campaign contributions to judicial candidates and are noted for campaign expenditures through television media, get-out-the-vote activities and direct mail.²⁹ Previous scholarship is limited concerning how political parties contribute to judicial candidates within different electoral contexts.³⁰

C. Interest Groups

In recent years, issue concerns such as education and tort reform have brought interest groups into judicial elections.³¹ However, interest

25. See Laurence Baum, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas*, 66 JUDICATURE 420 (1983) [hereinafter BAUM 1983]; Lawrence Baum, *Explaining the Vote in Judicial Elections: The 1984 Ohio Supreme Court Elections*, 40 W. POL. Q., 361, 367 (1987) [hereinafter BAUM 1987].

26. See, e.g., JOHN F. BIBBY, *POLITICS, PARTIES, AND ELECTIONS IN AMERICA* (4th ed. Wadsworth 2000); DANIEL M. SHEA & MICHAEL JOHN BURTON, *CAMPAIGN CRAFT: THE STRATEGIES, TACTICS, AND ART OF POLITICAL CAMPAIGN MANAGEMENT* (Praeger 2001); FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE* (Yale Univ. Press 1992).

27. See, e.g., Marie Hojanacki & Lawrence Baum, "New Style" *Judicial Campaigns and the Voters: Economic Issues and Union Members in Ohio*, 45 W. POL. Q. 921, 944 (1992); Peverill Squire & Eric R.A.N. Smith, *The Effect of Partisan Information on Voters in Nonpartisan Elections*, 50 J. POL. 169, 171 (1988). See also BAUM 1983, *supra* note 25, at 427-29; BAUM 1987, *supra* note 25, at 365, 368.

28. See MALCOLM E. JEWELL & SARAH M. MOREHOUSE, *POLITICAL PARTIES AND ELECTIONS IN AMERICAN STATES* (CQ Press 2001). See also MICHAEL J. MALBIN & THOMAS L. GAIS, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* (The Rockefeller Institute Press 1998); Shea & Burton, *supra* note 26.

29. See DUBOIS, *supra* note 6, at 40; MALBIN & GAIS, *supra* note 28.

30. See MALBIN & GAIS, *supra* note 28, at 105-109.

31. Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206 (1997). See also Hojanacki & Baum, *supra* note 27, at 921. According to Baum, "[e]lectoral campaigns for judgeships. . . typically have

groups have a more lengthy history of campaigning on behalf of judicial candidates.³² Interest groups support candidates that share an organization's partisan and ideological perspectives: Republican interest groups generally represent business, agriculture and medicine; Democratic interest groups generally represent labor, education and public interest advocacy.³³ Interest groups affect electoral outcomes by endorsing judicial candidates and participating in direct mail and television media campaigns. Political science literature demonstrates that interest group campaigning increases voter information levels much like the effects of political parties; the partisan information voters learn through interest group literature increases voters' partisan awareness of judicial candidates.³⁴

Interest groups also affect electoral outcomes by contributing campaign funds to judicial candidates.³⁵ Interest groups actively raise and contribute campaign funds within the semi-partisan system.³⁶ Critics argue interest group contributions threaten the court's impartiality and claim candidates' campaigns are funded disproportionately through interest group contributions.³⁷ Empirical

been small in scale, low-key, and devoid of issue content. Over the past decade, however, an increasing number of campaigns have diverged from this traditional pattern. . . ." *Id.* He added that "judicial elections feature substantial campaigns and significant attention from the mass media. Further, candidates and other participants are increasingly willing to inject policy issues into campaigns. This new development is what we have come to call 'new-style' judicial contests." *Id.* at 922 (internal citations omitted).

32. See JUSTICE FOR HIRE, *supra* note 10, at 17-20; ABA REPORT, *supra* note 14, at 18.

33. See JEFFERY M. BERRY, THE INTEREST GROUP SOCIETY 136-137 (2d ed. 1997). See also BAUM & KEMPER, *supra* note 7, at 292.

34. See BERRY, *supra* note 33, at 105-110; Brace & Hall, *supra* note 31, at 1213-16; JOHN R. WRIGHT, INTEREST GROUPS AND CONGRESS: LOBBYING, CONTRIBUTIONS, AND INFLUENCE 90-91 (Allyn and Bacon 1996).

35. MALBIN & GAIS, *supra* note 28, at 77-103.

36. BAUM & KEMPER, *supra* note 7, at 299.

37. SCHOTLAND 2001, *supra* note 4, at 880. Judicial scholar Roy A. Schotland is particularly critical of Ohio elections. Schotland contends receiving contributions from interest groups that have interests before the court, undermines the courts impartiality. See *id.* Schotland reasons elections make justices dependent on campaign contributions: contributions mean justices have to appeal to those giving the contributions; the process weakens impartiality. *Id.* According to Schotland, "[t]he judge's obligation is completely at odds with seeking the support of organized groups that have clear goals for what they want government to do or refrain from doing." *Id.* at 860.

Other scholars have made more aggressive claims concerning campaign contributions. Cleveland-Marshall law professor David Barnhizer argues the corruption of courts is deliberate, stating that "[t]he corruption of the judiciary includes deliberate judicial wrongdoing in exchange for financial contributions. . . . [It] involves subtle judicial behavior shaped to fit contributors' agendas. . . . [E]ven if judicial corruption through decisions that favor special interest is not empirically demonstrable. . . ." Barnhizer, *supra* note 4, at 366. Barnhizer adds that, "[o]ne consequence of the rising cost of judicial elections and the amassing of large pools of campaign

research is limited concerning how interest groups contribute to judicial candidates within different electoral contexts.³⁸

D. Incumbency

Perhaps the most notable characteristic within the semi-partisan system is the effect of incumbency. Political science research consistently finds incumbency produces an electoral advantage.³⁹ Incumbents rarely lose under the semi-partisan system even when faced with competitive challenger campaigns.⁴⁰ This is because incumbency often provides voters with partisan information cues based on previous vote choice.⁴¹

Previous scholarship has also noted that incumbents consistently outspend challengers.⁴² Because incumbents rarely lose and have established a judicial record, incumbents easily attract campaign contributions.⁴³ Critics argue incumbents excessively campaign to raise

funds by special interests is that many judicial candidates are consciously and unconsciously selling their votes on issues . . . [, and] candidates are willing to provide what the donors want in exchange for their money." *Id.* at 364.

Professor Paul Carrington argues contributions and the role of interest group campaigning undermines the Court's independence and accountability. Carrington & Long, *supra* note 4, at 472-73. According to Carrington:

The Supreme Court of Ohio . . . is in a crisis resulting from an unseemly flood of money into statewide judicial election campaigns The expensiveness of media campaigns has the dramatic effect of forcing not only judicial candidates but sitting judges hoping for re-election to seek and accumulate large campaign war chests. Often lawyers and litigants who are likely to appear before the judge constitute large proportions of the contributions. . . .

Id. at 455, 474. Carrington later commented that, "[a]t best, campaign fundraising by judicial candidates is unseemly and degrading. At worst, it tempts those with an interest in a state's law to try to buy a high court." *Id.* at 474.

38. See e.g. BAUM & KEMPER, *supra* note 7, at 303-330 (demonstrating the lack of empirical data on interest group influence on judicial campaigns by way of an entire chapter devoted to lobbying and interests that does not refer to the judiciary once).

39. See, e.g., Barber, *supra* note 7, at 768; BAUM 1983, *supra* note 25, at 422-23; BAUM & KEMPER, *supra* note 7, at 288; CARL LIEBERMAN, GOVERNMENT AND POLITICS IN OHIO (Univ. Press of America 1984).

40. BAUM 1983, *supra* note 25. See also BAUM 1987, *supra* note 25.

41. See BAUM 1983, *supra* note 25; BAUM 1987, *supra* note 25; Hojanacki & Baum, *supra* note 27.

42. See GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS, 105-110 (Yale Univ. Press 1980) [hereinafter JACOBSON 1980]; Gary Jacobson, *The Effects of Campaign Spending in House Elections: New Evidence for Old Arguments*, 34 AM. J. POL. SCI. 334 [hereinafter EFFECTS OF CAMPAIGN SPENDING]; Robert K. Goidel & Donald A. Gross, *Reconsidering the 'Myths and Realities' of Campaign Finance Reform*, 21 LEG. STUDIES Q. 129 (1996); Donald Philip Green & Jonathon S. Krasno, *Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending In House Elections*, 32 AM. J. POL. SCI. 884 (1988).

43. See JACOBSON 1980, *supra* note 42, at 113 (noting the incumbent advantage as manifested

campaign funds under the semi-partisan system and argue incumbents are dependent on interest group contributions.⁴⁴ Literature is limited concerning how the semi-partisan method affects incumbents' fundraising demands.

E. Candidate Quality

Political science research demonstrates that candidate quality affects electoral outcomes by increasing electoral competition.⁴⁵ The semi-partisan method generally produces quality candidates for the court.⁴⁶ Candidate quality is often a measure of previous experience and accomplishment; moreover, quality candidates attract media attention and interest group endorsements.⁴⁷

Candidate quality is also recognized to affect interest group and political party behavior. Challengers demonstrating an ability to raise campaign contributions generally attract interest group and political party contributions.⁴⁸ Critics argue the semi-partisan method discourages quality challengers, claiming the most qualified candidates do not run because of the demands of fundraising.⁴⁹ Political science literature has found that candidate quality affects challengers' ability to raise campaign funds.⁵⁰ Yet, previous literature is limited concerning how candidate quality affects electoral competitiveness within the semi-partisan system.

F. Money

Political science literature consistently finds that money does not win elections.⁵¹ However, the perception persists despite decades of campaign finance research. Political science scholarship demonstrates that when money is used as an explanatory variable, the relationship is relatively weak in explaining electoral outcomes.⁵² Instead, other

in Congressional elections).

44. See Barnhizer, *supra* note 4, at 378, 392; SCHOTLAND 2001, *supra* note 4, at 890-93.

45. See JACOBSON 1980, *supra* note 42, at 106; Green & Krasno, *supra* note 42, at 891, 898.

46. See BAUM & KEMPER, *supra* note 7, at 285; LIEBERMAN, *supra* note 39, at 90.

47. See BAUM & KEMPER, *supra* note 7, at 285-87.

48. BAUM & KEMPER, *supra* note 7, at 287. See also DUBOIS, *supra* note 6, at 6-8.

49. See, e.g., Solimine, *supra* note 4, at 568-69.

50. See, e.g., DUBOIS, *supra* note 6, at 6-19; JACOBSON 1980, *supra* note 42, at 106.

51. See, e.g., ANTHONY CORRADO, ET AL., CAMPAIGN FINANCE REFORM: A SOURCEBOOK (Brookings Institution Press 1997); ANTHONY CORRADO, CAMPAIGN FINANCE REFORM (The Century Foundation Press 2000); ANTHONY CORRADO, ET AL., INSIDE THE CAMPAIGN FINANCE BATTLE (Brookings Institution Press 2003).

52. See generally, Jacobson, *supra* note 42, at 105-6; Green & Krasno, *supra* note 42, at 884-

explanatory variables such as incumbency and party affiliation are more predictive within the semi-partisan system.⁵³

Yet there is no other explanatory variable that is so widely discussed and so inadequately explained within judicial selection reform as money.⁵⁴ Critics are concerned that judicial campaign costs are increasing judicial candidates' reliance on interest group contributions.⁵⁵ Previous research is limited concerning campaign contributions to judicial candidates from individuals, interest groups and political parties and how campaign expenditures affect semi-partisan electoral outcomes.

G. Current Study

The current study examines Ohio's semi-partisan judicial electoral system by evaluating contributions and expenditures data. The research describes and explains the effects of money and how judicial campaign finance operates within the semi-partisan system during the 1992–2002 Ohio Supreme Court elections.⁵⁶ It examines incumbent and challenger contribution patterns; contributions from individuals, interest groups and political parties; and candidates' expenditures within incumbent, challenger and open seat electoral contexts. The study also evaluates the effects of candidate quality, interest group endorsements, and bar ratings within the semi-partisan system during the 1982 – 2002 elections.⁵⁷

5; and Goidel & Gross, *supra* note 42, at 142-5. The campaign finance literature finds that, once candidates reach a competitive spending threshold, money becomes less predictive in explaining electoral outcomes. See Jacobson, *supra* note 42, at 105. This idea is fundamental to understanding the campaign finance literature. When candidates are competitive, other campaign-related factors (e.g. incumbency, candidate quality) become more predictive. But, as Jacobson argues, independent variables such as candidate quality and incumbency often become "mutually reinforcing variables." See Jacobson, *supra* note 43, at 106.

53. See Robert S. Erikson & Thomas Palfrey, *Campaign Spending and Incumbency: An Alternative Simultaneous Equations Approach*, 60 J. POL. 355 (1998); JACOBSON 1980, *supra* note 42, at 136-62; EFFECTS OF CAMPAIGN SPENDING, *supra* note 42, at 357; Green & Krasno, *supra* note 42, at 884-85.

54. See Carrington & Long, *supra* note 4, at 474; MCFADDEN, *supra* note 8, at 25-27; SCHOTLAND 2001, *supra* note 4; SCHOTLAND 2002, *supra* note 4; SCHOTLAND 2003, *supra* note 4.

55. See ABA Report, *supra* note 14, at 22-25.

56. The contributions and expenditures data represents elections for Associate Justice and does not include data for Chief Justice.

57. The research incorporates two different data sets: (1) campaign contributions and expenditures data obtained through the Ohio Secretary of State (1992-2002); and (2) interest group endorsement data from the labor union AFSCME and candidate quality data from the Ohio State Bar Association ratings (1982-2002). The campaign contribution and expenditure data is not complete from the Ohio Secretary of State and therefore earlier data could not be obtained in electronic data form. Using the AFSCME and Ohio Bar Association ratings were readily available and used as a preliminary analysis of the effects of interest group endorsements and bar ratings as explanatory variables. The current research uses descriptive statistics which limits the predictive

The current research addresses campaign finance questions commonly affirmed within judicial selection literature. The most persistent questions concern the effects of semi-partisan elections on judicial candidates, the effects of contributions from individuals, interest groups and political parties and the effects of judicial candidates' campaign expenditures. The study uses descriptive statistics to evaluate current assumptions underlying the judicial selection debate.⁵⁸

H. Data Collection

The contribution and expenditure data used within the current research were collected using public records filed with the Ohio Secretary of State. The contribution and expenditure data represent twelve Ohio Supreme Court races during the period of 1992-2002 within incumbent, challenger and open seat electoral contexts. General election vote totals were also obtained through the Ohio Secretary of State's election archive.

Currently, independent expenditures by interest groups and parties are not reported to the Secretary of State's office. The use of independent expenditures in the 2000 campaign heightened concern over judicial independence and reinforced public perceptions that campaign contributions from interest groups unduly influences the court.⁵⁹ Unfortunately, independent expenditures cannot be analyzed here due to the lack of available data.

Candidate quality data were provided by the Ohio Bar Association, which rated judicial candidates using scaled measures of judicial qualifications from highly qualified to unqualified. Interest group endorsements were collected through the American Federation of State,

qualities of the data. Future studies may incorporate interest group endorsements and bar ratings into regression models.

58. This research uses an inductive research design and descriptive statistics. The purpose of descriptive statistics is to formulate generalizations by describing and explaining political events. Descriptive statistics will help clarify the judicial selection debate by demonstrating how contributions and expenditures operate within Ohio Supreme Court elections. According to Sidney Verba, et. al:

Description and explanation both depend upon rules of scientific inference. . . . There are several fundamental aspects of scientific description. One is that it involves inference: part of the descriptive task is to infer information about unobserved facts from the facts we have observed. Another aspect involves distinguishing between that which is systematic about the observed facts and that which is nonsystematic.

Gary King, et al., *Designing Social Inquiry: Scientific Inference in Qualitative Research* 34 (Princeton Univ. Press 1994).

59. See Barnhizer, *supra* note 4, at 364; Carrington & Long, *supra* note 4, at 479; SCHOTLAND 2003, *supra* note 4, at 1423.

County and Municipal Employees (AFSCME). These endorsements are used to evaluate the effect of interest group support within the semi-partisan method. Party affiliation, AFSCME endorsements, ABA ratings and incumbency data are examined through twenty-six Ohio Supreme Court elections from 1982-2002.

III. DATA ANALYSIS

A. Incumbents' Time Raising Campaign Contributions

The semi-partisan method has been criticized as placing excessive fundraising burdens on judicial candidates.⁶⁰ The data in Table 1 display incumbents' contributions during 1992-2002. The contribution data represent total yearly contributions. The data reveal that incumbent justices do not raise contributions during non-election years. Justice Resnick and Justice Pfeifer are the only exceptions to these findings. Only Justice Resnick raised significant money in the year prior to the election.

	RESNICK	DOUGLAS	SWEENEY	PFEIFER	COOK	STRATTON
1992	123					
1993	91					
1994	732,002					
1995	5,914					
1996	1,927	441,582				
1997	1,667	226	50	29,885		
1998	999		536,554	575,847		
1999	245,964			27,713	68,475	
2000	238,610			17,664	919,702	
2001	9,897			11,891		154
2002	3,903			4,569		1,901,801

Note: Incumbent Re-election years are in bold print.

Note: Incumbents were re-elected in every election from 1992-2002.

60. Those concerned with judicial selection often characterize elections as discouraging judicial candidates from running for office. A common argument is qualified judicial candidates do not run because of the fundraising demands of running for office. See, e.g., Link, *supra* note 13, at 131-2; Stempel, *supra* note 13, at 48-9.

B. Challengers' Time Raising Campaign Contributions

Challengers also allocate limited time to raising campaign contributions. In other words, challengers do not raise money during non-election years. The data in Table 2 represent total yearly contributions raised by challengers. The data reveal challengers' contributions are increasing since the 2000 elections. Prior to 2000, the highest contributions raised were \$276,196; since 2000, challengers have raised over \$1 million. The data reveal challengers' campaign contributions are representative of the ability of challengers to win within the semi-partisan system.

	HARPER	SIKORA	POWELL	SUSTER	BLACK	ODONNELL	BURNSIDE
1992							
1993							
1994	249900						
1995							
1996		34803					
1997		325					
1998			260322	276196			
1999			188	9492	405	7111	
2000					694394	1016426	
2001							
2002							1193733

C. Open Seat Candidates' Time Raising Campaign Contributions

Previous scholarship demonstrates that contributions increase within open seat electoral contexts.⁶¹ The data reveal open seat candidates do not raise campaign contributions during non-election years. Data in Table 3 represent total campaign contributions within open seat electoral contexts. Parties, interest groups and other contributors are perhaps more willing to participate in open seat elections because the elections are perceived as competitive. The data

61. According to election scholar Daniel Shea, "[o]pen-seat elections tend to offer a more even footing than those in which the incumbent wins, . . . many open seats are considered toss-ups." Shea & Burton, *supra* note 26, at 31. Jacobson feels that "[e]lections for open seats are typically much more competitive than those between incumbents and challengers." JACOBSON 1980, *supra* note 42, at 106.

reveal the semi-partisan system becomes more competitive within open seat electoral contexts.

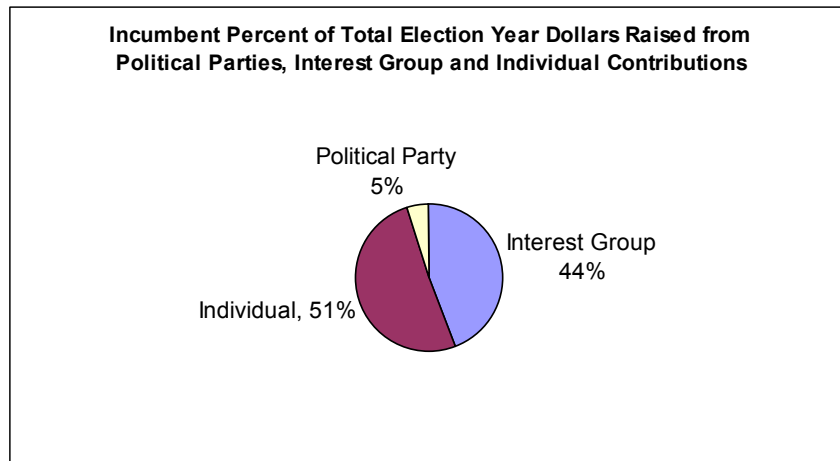
	SWEENEY	PFEIFFER	COOK	HAFFEY	STRATTON	BETTMAN	BLACK	OCONNOR
1992	642,063	572,440						
1993								
1994			518,943	288,920				
1995								
1996					483,119	442,256		
1997								
1998								
1999								
2000								
2001								
2002							1,300,410	1,777,617

D. Incumbent Contributions: Interest Groups, Individuals and Political Parties

Despite the common perception that incumbent justices are disproportionately dependent on interest group contributions, Table 4 and Figure 1 reveal that incumbents are not receiving a greater percentage of money from interest groups. The data reveal that incumbents receive 51 percent of campaign contributions from individuals; interest group contributions represent 44 percent of campaign contributions; and political parties represent 5 percent of campaign contributions during the 1992-2002 elections. The negligible 5 percent contributed by political parties is surprisingly low considering political parties' aggressive fundraising activities. The low party amount may represent incumbents' abilities to raise contributions from individuals and interest groups.

Table 4: Re-Election Year Contributions to Incumbents						
			Total Raised	Groups	Individuals	Party
D	RESNICK	1994	\$732,002	31%	52%	17%
R	DOUGLAS	1996	\$441,582	40%	60%	0%
D	SWEENEY	1998	\$536,554	46%	54%	0%
R	PFEIFER	1998	\$575,847	46%	54%	0%
R	COOK	2000	\$919,702	58%	33%	8%
D	RESNICK	2000	\$484,574	58%	42%	0%
R	STRATTON	2002	\$1,901,801	29%	63%	8%
AVERAGE				0.44	0.51	0.05

Figure 1: Incumbent Percent of Total Election Year Dollars Raised from Political Parties, Interest Groups and Individual Contributions

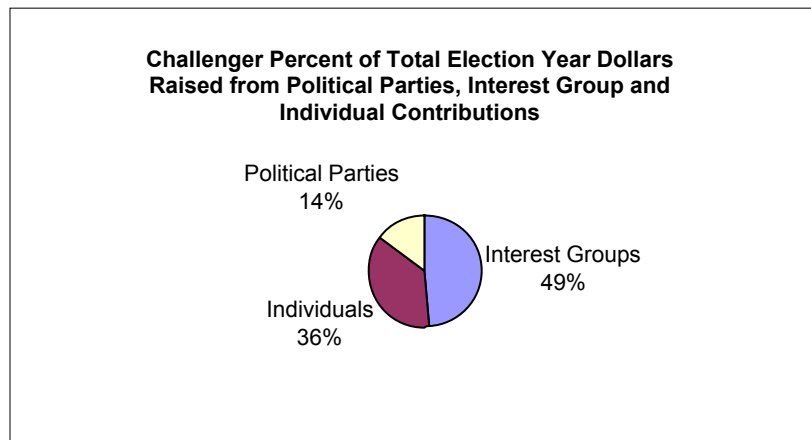


E. Challenger Contributions: Interest Groups, Individuals and Political Parties

The contribution patterns for challengers and incumbents are similar. But challengers are more likely to receive contributions from interest groups and individuals. Political parties, on the other hand, are the least likely contributors to challengers within the semi-partisan system. The data in Table 5 represent challenger contributions during 1994-2002 elections. The data reveal interest group contributions represent 49 percent of challenger campaign contributions, individual contributions represent 36 percent of challenger campaign contributions and political party contributions represent 14 percent of challenger campaign contributions.

			Total Raised	Groups	Individuals	Party
R	HARPER	1994	\$24,990	54%	12%	34%
D	SIKORA	1996	\$34,803	62%	34%	3%
R	POWELL	1998	\$260,322	42%	39%	19%
D	SUSTER	1998	\$276,196	49%	51%	0%
D	BLACK	2000	\$694,394	53%	47%	0%
R	ODONNELL	2000	\$1,016,426	41%	26%	33%
D	BURNSIDE	2002	\$1,193,733	43%	43%	14%
AVERAGE				0.49	0.36	0.14

Figure 2: Challenger Percent of Total Election Year Dollars Raised from Political Parties, Interest Groups and Individual Contributions



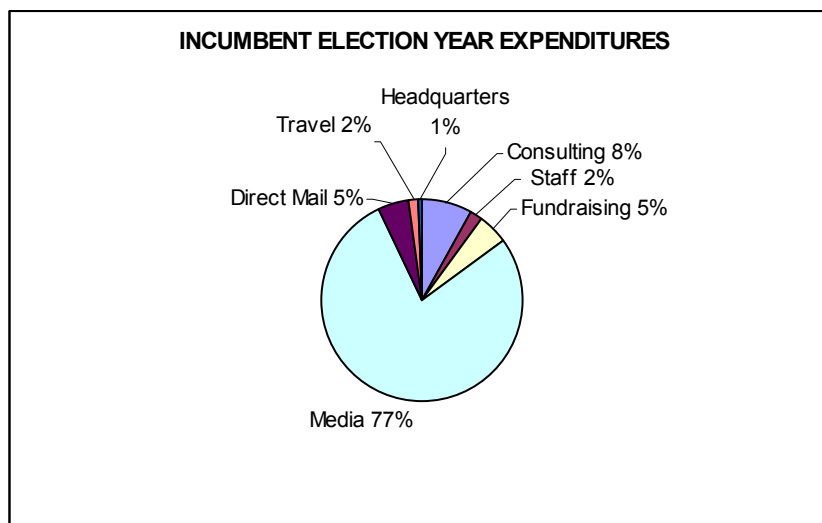
F. Campaign Spending: Incumbent Categorized Expenditures

Table 6 displays total expenditures by incumbents and the percentage of the vote that incumbents received. Every incumbent won re-election during the 1994-2002 elections. The expenditure data reveal that campaign costs did not escalate until the 2002 elections, contradicting the perception that the 2000 campaign increased campaign costs. Incumbents during 1994-2002 spent an average of \$670,000, and were re-elected with 60 percent of the vote.

Categorized expenditures in Figure 3 reveal the percentages spent on various campaign services during 1994-2002 elections. Incumbents allocated 78 percent of their campaign budgets to media advertising, 13 percent to consultant services and the remaining expenditures to direct mail and staff. Incumbent expenditure data reveal that Ohio Supreme Court elections are professionally conducted campaigns using professional campaign services, meaning that incumbent justices hire professional fundraising, speech writing, polling and media services.⁶²

62. Election scholarship has discussed judicial campaigns' increasing reliance on media and campaign consultants. Shea argues campaign professionalism has created consultant-centered campaigns. Shea & Burton, *supra* note 26, at 12. He feels that consultant-centered campaigns are distinct by three characteristics: new players (professional consultants replaced party activists); new incentives (specialized skill within direct mail, strategy, media, fundraising); and new resources (ability to raise money outside party contributions). *Id.* According to Shea, "campaigns are now

Table 6: Incumbent Total Expenditures and Percentage of the Vote			
	INCUMBENTS	Total Expenditures	%Vote
1994	RESNICK	\$543,017	59
1996	DOUGLAS	\$366,557	66
1998	SWEENEY	\$484,280	62
1998	PFEIFFER	\$512,461	71
2000	COOK	\$645,542	52
2000	RESNICK	\$559,367	57
2002	STRATTON	\$1,704,379	55
AVERAGE		\$687,943	60

Figure 3: Incumbents Expenditures Categorized

staffed by people who know the strategies, tactics, and art of political management, . . . everything from fund-raising activities, to direct mail, to television advertising, to grassroots activities is now coordinated by well paid campaign consulting firms.” *Id.*

G. Campaign Spending: Challenger Categorized Expenditures

Challenger expenditure data in Table 7 reveal that challengers' campaign expenditures are escalating. During the 1994 election, Democratic challenger Harper spent only \$9,845. Democratic challengers continued spending small amounts until the 2000 election where Democratic challenger Black outspent Republican incumbent Cook (\$676,409 - \$645,542); Black still lost the election. Challengers during 1994-2002 spent an average \$415,726 and received approximately 40 percent of the vote. The significance here is that challenger expenditures are becoming more competitive.⁶³

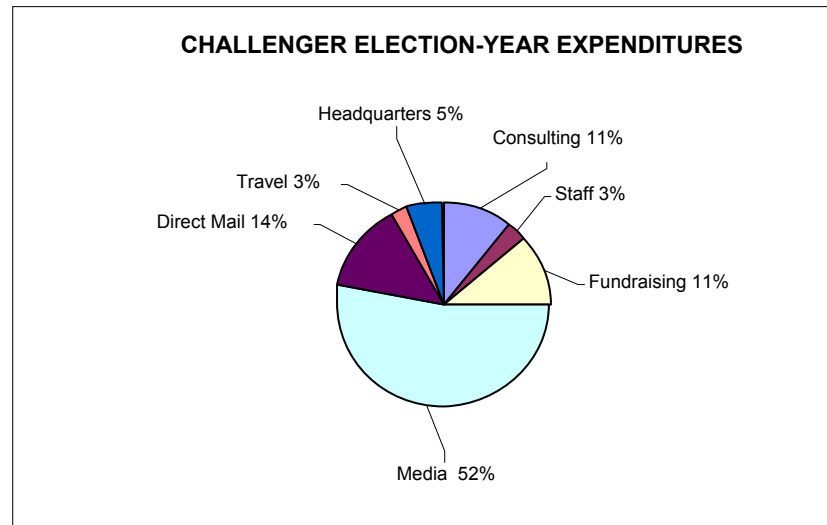
Categorized expenditure data in Figure 4 reveal the percentages spent by challengers on campaign services. Challengers allocated 52 percent of their campaign budgets to media advertising, 14 percent to direct mail, 22 percent to campaign consultants and fundraising, 15 percent to headquarters and staff and the remaining expenditures to travel expenses. Challenger expenditure data reveal challenger campaigns are professionally conducted and increasingly reliant on professional fundraising, speech writing, polling and media services.

63. According to campaign finance scholar Gary Jacobson, "[t]he most important factor affecting how much money non-incumbents can raise is their perceived probability of winning. Sure losers do not attract campaign contributions. . . . [C]andidates must convince the elites who provide campaign funds that they have a chance to win. . . ." JACOBSON 1980, *supra* note 42, at 105-6. Jacobson argues:

Another important variable, one that interacts strongly with the probability of election (as well as the availability of funds) is quality of the candidate Good candidates attract financial support; the availability of money attracts good candidates. The consequence is a triad of mutually reinforcing variables: quality of candidate, probability of victory, and availability of campaign funds.

Id. at 106. The current research demonstrates Jacobson's theory: candidates are becoming more competitive because the candidates are perceived as winners, which increases contribution and expenditures levels.

Table 7: Challenger Total Expenditures and Percentage of the Vote			
	CHALLENGER	Total Expenditures	% Vote
1994	HARPER	\$9,845	41
1996	SIKORA	\$30,670	34
1998	POWELL	\$158,961	38
1998	SUSTER	\$248,306	29
2000	BLACK	\$676,409	48
2000	ODONNELL	\$619,594	43
2002	BURNSIDE	\$1,166,298	45
AVERAGE		\$415,726	40

Figure 4: Challenger Expenditures Categorized

H. Electoral Context and Candidate Quality

Critics commonly argue election costs are escalating within the semi-partisan system.⁶⁴ The data in Table 8 display aggregate election-year expenditures. The data reveal increased election costs have varied according to electoral context and candidate quality. Incumbent contexts with weak challengers produce lower aggregate election-year expenditures; incumbent contexts with strong challengers produce higher aggregate election-year expenditures. During the 1994 and 1996 elections, challengers were non-competitive, spending less than 50 percent of the incumbents' total expenditures. As a result, aggregate election year expenditures were low. During the 2000 election, challenger quality improved, with challengers outspending incumbents. Furthermore, during the 2002 election, challenger competitiveness increased, as challengers spent 50 percent more than their incumbent counterparts.

Aggregate election year expenditures also increase within open seat electoral contexts. During the 1992 election, aggregate election-year expenditures increased as a result of candidate quality, though spending more than one's opponent did not necessarily guarantee victory (e.g. Patton outspent Pfeifer and lost). During the 2002 election, increased aggregate election-year expenditures reflected increased candidate competitiveness. Election costs are escalating, but the costs are a consequence of increased candidate expenditures and increasingly well-funded challengers.⁶⁵

64. See ABA REPORT, *supra* note 14, at 22.

65. The current research demonstrates that escalating costs vary according to electoral context and candidate quality. The methodology within the current research relies on descriptive statistics using aggregate election expenditures within different electoral contexts. The current approach differs from previous judicial selection literature by explaining the variation and increased levels of election spending.

The question as to what methodology to employ is important for future research concerning judicial campaign finance. Caution must be given as to comparing open seat and incumbent campaign contexts. For example, comparing the costs of campaigning during the 1980s to current standards is misleading: the dollars are not adjusted for inflation, the dollars are compared across electoral contexts (i.e. open seats and incumbent contexts), and the dollars do not explain the increased professionalization of court elections. See Goidel & Gross, *supra* note 42, at 142-45; Hojanacki & Baum, *supra* note 27, at 921. Skim the reform literature and it does not take long to come across a comparison of money. See *supra* notes 9-14 and accompanying text (discussing the reform literature). Take for example, Bradley Link's comment that, "[h]ere in Ohio, the campaign for the Chief Justice seat increased over \$2.5 million dollars from \$100 thousand in 1980. . . ." Link, *supra* note 13, (referring to an American Bar Association report on 'Judicial Independence, Public Financing of Judicial Campaigns, available at <http://www.abanet.org/judind/pdf/commissionreport4-03.pdf>). See generally Jacobson, *supra* note 42; Green & Krasno, *supra* note 42; and Goidel & Gross, *supra* note 42 (research providing a summary of campaign finance measures and methods).

Table 8: Electoral Context and Candidate Quality					
	Seat 1		Seat 2		AGGREGATE
1992	PFEIFER (O)	PATTON (O)	SWEENEY (O)	PAINTER (O)	
	\$516,476	\$650,145	\$419,283	\$310,976	\$1,896,880
1994	RESNICK (I)	HARPER (C)	COOK (O)	HAFHEY (O)	
	\$543,017	\$9,845	\$264,921	\$173,229	\$991,012
1996	DOUGLAS (I)	SIKORA (C)	STRATTON (O)	BETTMAN (O)	
	\$366,557	\$30,670	\$103,044	\$378,354	\$878,625
1998	SWEENEY (I)	POWELL (C)	PFEIFFER (I)	SUSTER (C)	
	\$484,280	\$158,961	\$512,461	\$248,306	\$1,404,008
2000	COOK (I)	BLACK (C)	RESNICK (I)	ODONNELL (C)	
	\$645,542	\$676,409	\$559,367	\$619,594	\$2,500,912
2002	STRATTON (I)	BURNSIDE (C)	OCONNOR (O)	BLACK (O)	
	\$1,704,379	\$1,166,298	\$1,602,565	\$1,306,396	\$5,779,638

Critics use aggregate data to compare costs associated with advocacy campaigns. *See, e.g.,* GOLDBERG & SANCHEZ, *supra* note 2, at 10. Advocacy campaign costs appear to increase when looking generally at advocacy costs. However, the comparisons do not account for electoral context and candidate quality. Comparing advocacy campaigns within incumbent and open seat elections creates a contextual fallacy. Future methods must account for the variation that exists within the semi-partisan system. Generalizations without attention to election context create misunderstanding within the judicial selection debate.

IV. EXPLANATORY VARIABLES AND DESCRIPTIVE STATISTICS 1982-2002

The current research has used candidate political party affiliation, interest group endorsements, incumbency, quality and expenditures as explanatory variables within the semi-partisan elections. The current research relies on descriptive statistics, but future research might model electoral outcomes using multivariate analysis. With future research in mind, this short section provides descriptive statistics addressing electoral outcomes during the 1982-2002 elections. The list also provides relevant statistics concerning Ohio's judicial selection debate.

Political parties: of the twenty-six races for the Ohio Supreme Court since 1982, the Republican candidates won sixteen times or 62 percent of the time.

Interest group endorsements: of the twenty-six races for the Ohio Supreme Court since 1982, candidates who received AFSCME endorsements won fifteen times or 58 percent of the time.

Ohio Bar Association ratings: of the twenty-six races for the Ohio Supreme Court, candidates that received higher bar association ratings won eleven times or 79 percent of the time.⁶⁶

Incumbency: of the nineteen incumbents seeking reelection for the Ohio Supreme Court since 1982, the incumbent candidate won seventeen times or 89 percent of the time.

Semi-partisan selection method: of the nineteen incumbents seeking reelection for the Ohio Supreme Court since 1982, the election result was closer than 60:40 or 68 percent of the time.

Open seats: of the seven open seats for the Ohio Supreme Court since 1982, the election result was closer than 60:40 or 86 percent of the time

V. DISCUSSION

The current study is a descriptive analysis of campaign contributions and expenditures within Ohio's semi-partisan system. The data support previous scholarship concerning incumbency and political

66. According to the Ohio State Bar Association Rating method, judicial candidates are rated "Highly Qualified," "Recommended," and "Qualified, But Not Recommended." *OSBA Announces Supreme Court Candidate Ratings for the November 2004 General Election*, available at <http://www.ohiobar.org/pubs/insideosba/?articleid=222> (last visited Apr. 16, 2004). The superior rating of "Highly Qualified" is awarded to candidates receiving favorable votes from 75 percent of the commission members; the rating "Recommended" is awarded to candidates receiving at least 60 percent of votes from the commission; and "Qualified, But Not Recommended" is awarded to candidates who fail to receive 60 percent of votes from commission members. *Id.*

party effects: incumbents receive on average 60 percent of the vote,⁶⁷ and the semi-partisan system favors Republican candidates, who currently hold a 6:1 advantage on the court.⁶⁸ The data contradict campaign finance concerns. The results demonstrate the semi-partisan method does not place inappropriate fundraising demands on judicial candidates.⁶⁹ Both incumbents and challengers allocate limited time toward fundraising in non-election years.⁷⁰ Additionally, during an incumbent's six-year term, he or she will spend roughly one year raising campaign contributions.⁷¹

These data do not support the current understanding of candidate campaign finance; the campaign finance system does not discourage qualified judicial candidates. These results indicate that challengers often raise competitive campaign contributions, outspend incumbents and lose elections.⁷² Additionally, judicial candidates' contributions are not disproportionately obtained through interest group donors.⁷³ Both incumbents and challengers raise the majority of contributions from individuals and interest groups.⁷⁴ Both receive the least amount of campaign contributions from political parties.⁷⁵

Finally, campaign costs are increasing, but as a consequence of challenger competitiveness. During the 1994-2002 elections, the average incumbent campaign cost \$687,943;⁷⁶ challengers' campaigns cost an averaged \$415,726.⁷⁷ Recent campaigns have cost \$1.5 million.⁷⁸ Nonetheless, the semi-partisan method continues to produce competitive elections despite the successes of incumbent candidates.⁷⁹

67. See *supra* Table 6 and Figure 2.

68. See *supra* Table 4.

69. See *supra* Table 4 and Figure 1; Table 5 and Figure 2.

70. See *supra* Table 1 and Table 3.

71. See *supra* Table 4.

72. See *supra* Table 6 and Table 7.

73. See *supra* Table 4 and Figure 1; Table 5 and Figure 2.

74. *Id.*

75. *Id.*

76. See *supra* Table 4 (noting that incumbents receive 95 percent of their contributions from individuals and interest groups, while challengers receive 85 percent of their contributions from individuals and interest groups).

77. See *supra* Table 5 (illustrating that incumbents receive 5 percent of their contributions from political parties, where challengers receive 14 percent from political parties).

78. See *supra* Tables 4-7 (showing the expenditures for candidates for judicial office in the elections held since 2000).

79. See *supra* Table 6 and Table 7 (noting the percentages each candidate, whether an incumbent, challenger, or a candidate vying for an open seat, has garnered).

VI. CONCLUSION

The current research demonstrates the variation that exists within the semi-partisan system. During the 1992-2002 elections, wide variations existed between incumbents' and challengers' contributions and expenditure patterns. There are clear differences between Democrats and Republicans within the semi-partisan system: Republicans win under the Ohio semi-partisan system regardless of campaign spending. This finding supports previous semi-partisan scholarship. However, the data confirm that semi-partisan elections are predictive. When explanatory variables are combined (particularly incumbency and partisanship), electoral outcomes make sense. While the reform effort is quickly proceeding within Ohio,⁸⁰ the empirical data necessary to support the changes has not kept pace. The current research suggests approaching reform with data to support common assumptions concerning judicial campaign finance and judicial selection.

Critics have offered numerous proposals that alter semi-partisan elections, but they may overstate the case for reform. Those examining the data cannot claim that semi-partisan elections are not threatened by interest group money or that money undermines the judiciary. However, the data do describe and explain how money operates within the semi-partisan system. Additionally, the data do not support the ABA's characterization of judicial elections.⁸¹ The semi-partisan system produces highly qualified candidates and increasingly competitive elections. Finally, the ABA makes assertions about independent expenditures and issue advocacy. These questions are beyond the data, but there are reasons to question their effects. The precise effects of independent expenditures and issue advocacy have not been explained because data are lacking.

80. See *supra* note 21 and accompanying text (stating that Ohio is currently entertaining a bill to change the judicial selection process).

81. What is now occurring in Ohio is similar to the debate after *Buckley v. Valeo*, 424 U.S. 1 (1976). Philosophic differences emerged within the post-*Buckley* research. One side viewed campaign finance reform as a public good: this side argues for regulating speech within the First Amendment; contribution limits are seen as advancing an important governmental interest in preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. See generally *Buckley*, 424 U.S. 1 (1976); *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982). The other side views campaign finance reform as threatening speech rights within the First Amendment; regulations limit political speech and hinder the democratic process; regulating speech is seen to violate core political speech: "[T]he very purpose of the First Amendment is to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." See *McConnell v. Federal Election Commission*, 540 U.S. 93, 265 (2003) (Thomas, J. dissenting).

Those interested in campaign finance and judicial selection, regardless of their perspectives, will be challenged by recent changes in constitutional law. Ohio's semi-partisan system will be affected by the recent U.S. Supreme Court rulings in *Republican Party of Minnesota v. White* and *McConnell v. Federal Election Commission*.⁸² The ruling in *White* alters semi-partisan elections by removing ethical canons that restrict candidates' campaign behavior; as a result, semi-partisan elections may become more politicized under the ruling.⁸³ *McConnell*

82. See *White*, 536 U.S. 765; *McConnell*, 540 U.S. 93. The U.S. Supreme Court held in *Republican Party of Minn. v. White* that the Minnesota Supreme Court's canon on judicial conduct prohibiting judicial candidates from announcing disputed legal or political issues violated the First Amendment. *White*, 536 U.S. at 788. The Minnesota Supreme Court canon, the "announce clause," unconstitutionally prescribed the context of judicial candidates speech during the course of the election. *Id.* The clause prohibited (1) judicial candidates from announcing views on "nonfanciful legal questions," and (2) prohibited speech based on its content (e.g. speech about judicial qualifications). *Id.* The Court applied the strict scrutiny test, which requires respondents to prove the clause is narrowly tailored to serve a compelling state interest. According to Justice Scalia, "the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues set our First Amendment jurisprudence on its head. We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election." *Id.* at 781.

The U.S. Supreme Court held in *McConnell v. Federal Election Commission* that the Congressional Bipartisan Campaign Finance Reform Act (BCRA) regulating soft money and issue advocacy was constitutional under the First Amendment. *McConnell*, 540 U.S. at 224. The Court held the provisions advanced the important governmental interest in preventing both actual corruption and the appearance of corruption. *Id.* at 154. The Court applied the strict scrutiny test and argued the BCRA was narrowly tailored and served a compelling governmental interest in bringing soft money contributions and issue advocacy campaigns under the province of Federal Election Campaign Act (FECA) 1971. *Id.* at 114-224.

83. The implications of *White* and the 2004 Ohio Supreme Court election are as follows: during the election, Cuyahoga County GOP Chairman James Trakas filed grievance charges with the Ohio Supreme Court's Disciplinary Counsel, arguing Democratic candidate Judge William O'Neill's campaign literature violated three provisions of the Ohio Code of Judicial Conduct: Canon 7(B)(3)(b) which provides that "after the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party." O'Neill v. Coughlan, No. 1:04CV1612 at 1 (N.D. Ohio Sept. 14, 2004) available at http://www.sconet.state.oh.us/Judicial_Candidates/fed_lit_canon7/Aldrich_Decision_091404.pdf. See also OHIO CODE OF JUDICIAL CONDUCT, § 7(B)(3)(b) (2004) available at <http://www.sconet.state.oh.us/Rules/conduct>. Canon 7(D)(2), which states that judicial campaign materials and ads may not "use the term 'judge' when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves." *Id.* at § 7(D)(2). Canon 7(B)(1) requires that "judges and judicial candidates shall maintain the dignity appropriate to judicial office." *Id.* at § 7(B)(1). Judge O'Neill's campaign literature identified his political party affiliation as Democrat, referenced his judicial experience as a judge for the Court of Appeals for the Eleventh District, and referenced his campaign theme "Money and Judges Don't Mix." O'Neill, No. 1:04CV1612 at 2. Judge O'Neill argued the canons violated judicial candidate's First Amendment speech and expression rights under *White*. *Id.* at 8-12. The United States District Court for the Northern District of Ohio provided preliminary injunctive relief allowing O'Neill's campaign literature to proceed without sanction. *Id.* at 23-24. The District Court argued the canons facially violate constitutional speech and expression clauses under *White*. *Id.* at 12, 23.

allows legislatures to regulate campaign conduct by regulating the timing of campaign ads prior to elections and allows legislatures to write disclosure laws regulating independent expenditures and issue advocacy.⁸⁴ These cases provide the legal and analytical framework for future challenges to the semi-partisan system.

Elections, although imperfect, provide a means of democratic accountability; policy change and representation; and reflect evolving issue concerns. The semi-partisan method occupies a unique place within Ohio's political culture and is representative of Ohio's competitive politics. Future reforms should recognize Ohio's political culture and competitiveness, strengthen semi-partisan elections and secure judicial choice.

84. See *McConnell*, 540 U.S. at 219-23.