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## Judging Judicial Elections

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## JUDGING JUDICIAL ELECTIONS

Michael S. Kang\*  
Joanna M. Shepherd\*\*

ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS. BY *Melinda Gann Hall*. Stanford: Stanford University Press. 2015. Pp. xvi, 244. \$27.95.

### INTRODUCTION

Melinda Gann Hall's<sup>1</sup> new book *Attacking Judges: How Campaign Advertising Influences State Supreme Court Elections* suggests what seems impossible to many of us—a powerful defense of today's partisan judicial elections. As judicial races hit new levels of campaign spending and television advertising, there has been a flood of criticism about the increasing partisanship, negativity, and role of money. In view of the “corrosive effect of money on judicial election campaigns” and “attack advertising,” the American Bar Association (ABA) recommends against judicial elections, which are currently used to select roughly 90 percent of state judges.<sup>2</sup> Justice O'Connor, who has championed judicial-election reform since her retirement from the Supreme Court, warns that “there are many who think of judges as politicians in robes” and agrees “[i]n many states, that's what they are.”<sup>3</sup> Melinda Gann Hall, a political scientist and authority on judicial behavior, sets out in her book to challenge some of these claims.

Without question, *Attacking Judges* is an important empirical assessment of the new style of judicial elections, right at a moment when such assessments are most needed. Hall brings together data on election results and television advertising in state supreme court races from 2002 to 2008, purporting to buck the popular imagination about attack advertising in judicial elections. Hall argues that attack advertising in state supreme court elections

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3. Annemarie Mannion, *Retired Justice Warns Against “Politicians in Robes”*, CHI. TRIB. (May 30, 2013) (quoting Justice Sandra Day O'Connor), [http://articles.chicagotribune.com/2013-05-30/news/chi-retired-justice-warns-against-politicians-in-rob-20130530\\_1\\_o-connor-bias-judges](http://articles.chicagotribune.com/2013-05-30/news/chi-retired-justice-warns-against-politicians-in-rob-20130530_1_o-connor-bias-judges) [<http://perma.cc/E8LE-PMFF>].

has little of the electoral impact that critics of judicial elections fear. Attack advertising reduces incumbents' vote share in nonpartisan elections, but it has no statistically significant effect on incumbents' vote share in partisan elections (p. 113). What is more, Hall shows that attack advertising improves voter participation in state supreme court elections, at least in nonpartisan races (p. 157). Voters in nonpartisan elections do not have partisan cues about how to vote, but attack advertising motivates them to vote against incumbents targeted by those ads and effectively increases voter participation in state supreme court contests (p. 161).

Although the book's empirical findings are immensely valuable, we nonetheless believe the book misses the overarching critique against the current state of judicial elections. A basic suggestion underlying the analysis is that judges perform a similar function of democratic representation as their elected counterparts in the legislative and executive branches. Hall minimizes worries about attack advertising in judicial elections in part because her work demonstrates the "remarkable similarities between state supreme court elections and elections to other important offices in the United States" (p. 126). But it is these remarkable similarities that are, in a nutshell, exactly what critics see as the problem with judicial elections. *Attacking Judges* does not rebut Justice O'Connor's indictment of elected judges as politicians in robes; it actually might substantiate them.

Electoral and campaign-finance pressures that lead judges to sensitivity about voter response and to act more like partisan politicians bending toward public opinion are precisely the concerns about today's "new style of free-for-all judicial elections."<sup>4</sup> In our view, Hall's findings reinforce the intensity of this concern, at least when her findings are combined with our own. We recently released, as part of an American Constitution Society (ACS) report, an empirical study of campaign advertising and state supreme court decisionmaking in criminal appeals.<sup>5</sup> Our study examined the general relationship between television campaign advertising and judicial decisionmaking. We found that the more television ads aired during state supreme court judicial elections in a state, the less likely justices are to vote in favor of criminal defendants.

We extend our earlier study here by exploring the empirical relationship between attack advertising and judicial decisionmaking. We demonstrate that judges apparently respond to the threat of attack advertising in just the way that critics of judicial elections fear. Television attack ads, which often vilify judges for casting votes in favor of criminal defendants, are associated with an increase in judicial hostility to criminal defendants in state supreme court appeals. Even if attack advertising does not reduce judges' reelection rates, our findings offer a worrisome explanation for this result and depict a

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4. JAMES L. GIBSON, *ELECTING JUDGES 2* (2012).

5. JOANNA SHEPHERD & MICHAEL S. KANG, *SKewed JUSTICE: CITIZENS UNITED*, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases (2014), <http://skewedjustice.org/> [<http://perma.cc/CS6C-BEDW>].

considerably bleaker picture of judicial elections. Our findings here, in combination with previous work, suggest that judges might feel pressure to preempt electoral vulnerabilities on the critical issue of criminal law as campaign spending and attack advertising run higher.<sup>6</sup>

If judges win reelection at least in part because they appease public opinion by biasing themselves against criminal defendants, then we think there is less cause for relief than *Attacking Judges* perhaps implies. Of course, elected state judges bring their own judicial philosophy and political values to the bench, which influence their decisionmaking in virtually every case, including criminal ones. The problem is, at least for critics of today's judicial elections, judges are institutionally charged with a countermajoritarian function distinct from other elected officials. Unlike other elected politicians, judges are expected *not* to shift their positions according to the public response and their reelection prospects in quite the same way.

A normative endorsement of judicial elections based on *Attacking Judges* thus would be motivated less by the book's empirical findings than fixed at the outset by an initial premise that judicial elections should work just like elections for other elected politicians. In our view, once *Attacking Judges* is coupled with our own work, the resulting empirical picture actually may cut against the case for judicial elections more than it supports it.

Part I introduces *Attacking Judges* and presents the great strength of the book: its rich empirical findings about attack advertising in state supreme court elections. Part II, though, explains that the book's findings tell us less normatively about attack advertising than it might seem. Part II details the scholarly literature on judicial decisionmaking in criminal law and suggests that attack advertising might affect judges even when it does not change election outcomes like critics fear. Finally, Part III presents our new empirical analysis of attack advertising's relationship to state supreme court decisionmaking in criminal appeals and shows how decisions become more hostile to criminal defendants as attack advertising increases.

## I. ATTACKING JUDGES

Historically speaking, Americans have never been happy with any method of judicial selection for very long.<sup>7</sup> In the early years of the nation,

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6. Our analysis here, as in earlier work, does not attempt to disentangle the selection and biasing effects of television advertising on judicial decisionmaking. See Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 So. CAL. L. REV. 1239, 1245–46 (2013) (describing similar selection and biasing effects for campaign contributions); Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 72, 102–06 (2011) (same). The association between attack ads and judicial hostility toward criminal defendants could occur because attack ads are disproportionately aimed at more lenient judges, resulting in more judges with a tough-on-crime attitude winning elections. Alternatively, the threat of future attack ads could bias sitting judges into voting against criminal defendants in an effort to prevent future ads. Regardless of the causal pathway, attack ads appear to produce harsher outcomes for criminal defendants.

7. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1672 (2015) (“The desirability of

state judges were selected to the bench exclusively by legislative or gubernatorial appointment. Judicial elections, almost unique to the United States as a comparative matter, were a later innovation. Over the nineteenth century, judicial selection at the state level gradually evolved away from appointment as the public began to worry about judicial independence under legislative processes rife with party cronyism. Reformers successfully shifted judicial selection toward popular election under a theory that today's critics of judicial elections would find surprising: that elections would actually make the judiciary *less* political, dependent on voters rather than partisan legislatures.<sup>8</sup>

Judicial elections, though, would prove disappointing in time as well. Judicial selection in the United States continued a cycle of reform and public disillusionment into the twentieth century. Familiar debates about judicial independence and accountability recurred, only this time about partisan judicial elections that proved quite political themselves. State practices splintered across disparate electoral approaches, including judicial recall, nonpartisan elections, and merit selection. Today, thirty-nine states still elect their trial or appellate judges such that roughly nine out of ten state judges face election to keep their jobs.<sup>9</sup> Fifteen states choose their state supreme court justices by nonpartisan election, and seven do so by partisan judicial election, while twelve states forgo elections and appoint their state supreme court justices (p. 37). The remaining sixteen states have adopted merit selection, a hybrid method that gained steam during the twentieth century before seeming to peter out recently (pp. 36–37, 41). Merit selection combines initial appointment with retention elections in which sitting judges must win voter approval by an unopposed up-or-down vote to stay in office (pp. 37–38).

It is safe to say that the legal community has again cycled back to widespread criticism and consternation about judicial elections.<sup>10</sup> Hall begins *Attacking Judges* by underscoring that “[n]owhere are these misgivings being expressed more vociferously than in the context of state judiciaries by the nation’s most distinguished court reform organizations and an almost singular voice in the legal community” (p. 1). The ABA formally recommends that states abolish contested judicial elections and adopt merit selection of judges.<sup>11</sup> It explains that “[j]udges have a responsibility to know and impartially apply the law to the facts of the case at hand. In important ways, today’s judicial elections often undermine judges’ ability to perform this essential role.”<sup>12</sup> Justice O’Connor has energetically campaigned for judicial-

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judicial elections is a question that has sparked disagreement for more than 200 years . . .”).

8. See generally G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES 44–51 (2012).

9. See *id.* at 70.

10. See Bert Brandenburg & Rachel Paine Caufield, *Ardent Advocates*, 93 JUDICATURE 78, 78 (2009); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43–44, 49 (2003).

11. See AM. BAR ASS’N COAL. FOR JUSTICE, JUDICIAL SELECTION 2, 9 (2008).

12. *Id.* at 8.

election reform since retiring from the Supreme Court and has opined about judicial elections: “They’re awful. I hate them.”<sup>13</sup>

Hall challenges critical portrayals of judicial elections in *Attacking Judges*. First, Hall builds off other political scientists’ work and contests the claim that judicial elections have become more competitive over the last decade (pp. 45–53). She traces an increase in the competitiveness and partisanship of judicial elections back to the 1980s, which suggests no recent surge in politicization.<sup>14</sup> Hall has long been a leader of what Lee Epstein once dubbed the “assault on the ass[au]lters of judicial elections,”<sup>15</sup> conducted mainly by political scientists whose work depicts judicial elections more positively than popular and scholarly criticism has.<sup>16</sup> Although Hall is careful to underscore that she does not “seek to present or constitute an argument for or against the practice of electing judges,” in *Attacking Judges* she continues what has effectively been a career-long empirical defense of judicial elections (p. xvi).

Although today’s criticism of judicial elections spans many fronts, *Attacking Judges* focuses on the phenomenon of attack advertising. Attack advertising is negative television advertising that criticizes an opposing judicial candidate, as distinct from other types of more positive ads that merely promote or contrast candidates. While Hall argues total campaign spending, intensity, and competitiveness in judicial elections have plateaued since the 1980s, she basically agrees that television campaign advertising, particularly from outside interest groups, has noticeably increased over recent years (pp. 74, 77, 90). The 2002 U.S. Supreme Court decision *Republican Party of Minnesota v. White* struck down ethical restrictions on judicial campaigning<sup>17</sup> and is widely seen as a watershed in escalating the tone and intensity of judicial elections. As discussed, Hall insists that judicial elections have not grown more competitive, nor has campaign spending increased dramatically, since *White*.<sup>18</sup> Nonetheless, Hall concedes that *White* marked an important change in the style of judicial elections, if not their intensity. She

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13. James Podgers, *O'Connor on Judicial Elections: 'They're Awful. I Hate Them,'* ABA J. (May 9, 2009) (quoting Justice Sandra Day O'Connor), [http://www.abajournal.com/news/article/oconnor\\_chemerinsky\\_sound\\_warnings\\_at\\_aba\\_conference\\_about\\_the\\_dangers\\_of\\_s/](http://www.abajournal.com/news/article/oconnor_chemerinsky_sound_warnings_at_aba_conference_about_the_dangers_of_s/) [<http://perma.cc/5DXC-6CX4>].

14. See pp. 41, 47, 56.

15. See Lee Epstein, *Electoral Benefits: The Assault on the Assaulters [sic] of Judicial Elections*, 96 JUDICATURE 218, 218–19 (2013).

16. See *id.* at 219.

17. 536 U.S. 765 (2002).

18. On this point, *Attacking Judges* is an important update to earlier scholarship arguing that *White* represented a critical turning point for judicial elections. However, if *Attacking Judges* shows little escalation of campaigning and spending since *White*, we think this discussion needs even further updating today after *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Our earlier work found that *Citizens United* might have had an even more dramatic effect on judicial elections. *Citizens United* changed campaign finance law by striking down prohibitions on corporate and union electioneering and further freeing up outside groups to engage in independent expenditures that are increasingly prevalent in judicial campaigns. We found that states with bans on corporate- and union-funded electioneering struck down by *Citizens United* featured the largest shifts in judicial decisionmaking against criminal

explains that “*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.”<sup>19</sup>

The numbers seem to substantiate this point. Since 2002, the year of the *White* decision, the percentage of contested judicial races with television advertising and attack advertising has scaled up. Only 42.9% of contested judicial races featured television advertising in 2002 (p. 74). This number jumped up to 68.4% in 2004 and then held steady at 64.9% and 72.4% in 2006 and 2008, respectively.<sup>20</sup> Attack advertising in particular occurred in 17.9% of contested races during 2002, but this number jumped up to 28.9% in 2004, before settling at 21.6% in 2006 and 20.7% in 2008 (p. 75). So, more contested races featured television advertising after 2002, and attack advertising constituted a greater proportion of total airings, growing from 7.6% in 2002 to 25.4% in 2004 and then 19.4% and 22.9% in 2006 and 2008, respectively (p. 79).

Hall presents the most comprehensive empirical investigation of attack advertising in judicial elections to date, consolidating data on television advertising and state supreme court elections from 2002 to 2008.<sup>21</sup> Although there has been a renaissance of scholarship on judicial behavior, Hall’s focus here is a little different because she analyzes attack advertising’s impact on electoral outcomes rather than how the electoral process affects judges. That is, Hall studies judicial elections as a subject in their own right and chooses certain electoral outcomes as her dependent variables. Specifically, Hall asks two basic questions in a book chock-full of empirical findings: First, how does attack advertising affect election results, most importantly whether incumbent judges win reelection? Second, how does attack advertising affect voter participation in judicial elections? These questions cut to the heart of contemporary criticism of judicial elections. The claimed swells in spending, campaign intensity, and partisanship all manifest themselves in attack advertising against judicial candidates and its effects.

So, if attack advertising has increased in judicial elections, does it make a difference? For her first question, Hall finds that “the impact of attack advertising on the electoral performance of incumbents depends on the type of election in which these ads appear” (p. 113). Using content coding of campaign ads by Campaign Media Analysis Group and controlling for other

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defendants following the decision, while states without such bans in the first place showed little or no effect. See SHEPHERD & KANG, *supra* note 5. In other words, *Citizens United* might prove to be an important pivot for judicial elections, even if *White* was not.

19. P. 2; see also GIBSON, *supra* note 4, at 2 (“The confluence of broadened freedom for judges to speak out on issues, the increasing importance of state judicial policies, and the infusion of money into judicial campaigns have produced what may be described as the ‘perfect storm’ of judicial elections.”).

20. P. 74. Sixty-one percent of all contested races in 2010 and 62 percent in 2012 had television advertising. HERBERT M. KRITZER, JUSTICES ON THE BALLOT 165 (2015).

21. Hall relies on content coding of campaign advertising from Campaign Media Analysis Group, in conjunction with the Brennan Center for Justice, Justice at Stake Campaign, and the National Institute on Money in State Politics. P. 102.

things, Hall finds that attack advertising against incumbent judges in state supreme court elections reduces the likelihood of reelection only in *nonpartisan* elections (p. 113). By contrast, attack advertising against incumbent judges in partisan elections appears actually to *increase* their chances of reelection (pp. 112–14). This asymmetric effect of attack advertising across election type occurs only for attacks on incumbent judges. For its part, attack advertising against challengers falls short of having a statistically significant effect in both partisan and nonpartisan elections (p. 114).

Next, Hall answers her second question: whether attack advertising reduces voter participation in judicial elections. Contrary to popular expectation, she finds that attack advertising actually *increases* voting in state supreme court races, but again, only for nonpartisan elections (p. 151). For these judicial elections, Hall looks at ballot roll-off, which represents the degree to which voters who show up to vote actually fail to complete their ballots and do not register a vote on the judicial contests lower down on the ballot (pp. 137–38). Because overall voter turnout is unlikely to be motivated by less-publicized judicial races, ballot roll-off is a better indicator of voter interest and motivation in the judicial races on the ballot than turnout.<sup>22</sup> Hall finds that ballot roll-off for state supreme court elections increases with the amount of attack advertising for nonpartisan races, but not for partisan ones.

The finding of significant results on both questions only for nonpartisan elections is noteworthy because of what it tells us about the nature of judicial elections. Party affiliation provides information about judicial candidates in partisan elections and serves as a critical heuristic cue for voters. As a result, voters tend to rely on party affiliation to guide their voting without necessarily being swayed in the expected direction by attack advertising. Indeed, attack advertising simply seems to mobilize partisan voters in partisan elections, consistent with the larger literature on negative ads. But the informational cue of party affiliation is absent in nonpartisan judicial elections. Voters in nonpartisan elections are more reliant on the campaign environment for information and are therefore more influenced by attack advertising. More attack advertising against incumbent judges fills the informational gap in nonpartisan elections by providing more potential reasons to vote against the incumbent judges. Increasing amounts of attack advertising offer greater motivation to cast a vote on otherwise less-publicized, down-ballot races and thus encourages voters to participate.

Judicial elections appear to operate now, as Hall concludes, a lot like elections for other political offices (pp. 5, 126, 168, 180). Hall's findings for judicial elections mirror well-established findings from political science about American elections for legislative and executive offices. Voters in those

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22. Melinda Gann Hall, *Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives*, 69 J. POL. 1147, 1149 (2007); William K. Hall & Larry T. Aspin, *The Roll-Off Effect in Judicial Retention Elections*, 24 Soc. Sci. J. 415 (1987); see Matthew J. Streb et al., *Voter Rolloff in a Low-Information Context: Evidence from Intermediate Appellate Court Elections*, 37 AM. POL. RES. 644 (2009).



elections rely heavily on party affiliation to direct their vote choices.<sup>23</sup> For this reason, attack advertising in partisan elections appears not to have powerful effects on voters who are already committed one way or the other by their partisan loyalties. What is more, despite common suspicions that attack advertising demobilizes voters, empirical evidence from legislative and executive elections, at least partisan ones, suggests that attack advertising mobilizes voters and actually increases turnout.<sup>24</sup> So too in judicial elections as in other elections.<sup>25</sup>

It has only been recently, though, that television outreach, attack advertising, and campaign spending by outside groups in judicial elections were sufficiently salient for us to notice these similar dynamics in judicial races. As Hall acknowledges, “[i]n recent decades, this debate has risen to a fever pitch as televised campaign advertising and various forms of issue-based discourse have become institutionalized and as the costs of seeking office have escalated” (p. 25). From the 2001–2002 election cycle to the 2011–2012 cycle, independent expenditures in judicial elections have increased from \$2.7 million to over \$24 million,<sup>26</sup> and television campaign spending has increased from \$9.9 million to almost \$34 million.<sup>27</sup> Attack advertising tends not to be run by the candidates themselves but instead by their campaign proxies. As a consequence, increases in independent spending have quickly translated into increases in attack advertising as well.<sup>28</sup>

These spending increases in judicial elections have conspired to make judicial elections resemble other elections and have brought to the fore the similar influences of party and attack advertising on voters. Hall’s work helps solidify this empirical reality about judicial elections today. Party matters a lot for voters and candidates in these new-style judicial elections, just

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23. See BERNARD R. BERELSON ET AL., *VOTING 14–16* (1954); ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER 120–21* (1960).

24. See pp. 129–31.

25. P. 161. It is important to acknowledge that television advertising in judicial elections as a general matter appears to have less influence on election outcomes than one might guess. Attack advertising itself constitutes only a small fraction of all campaign advertising in judicial races. Less than a quarter of contested judicial races contain any attack advertising and even in those races with television advertisements, attack advertising constitutes less than a quarter of all ads. P. 75. What is more, attack advertising against challengers does not have a statistically significant effect in partisan or nonpartisan judicial races. Pp. 110–14.

Finally, among other types of campaign advertisements, only advertising that attacks incumbents seems to have a statistically significant effect on vote share in Hall’s analysis. P. 110. Other types of advertisements, such as those promoting challengers or contrasting the candidates, appear to have uncertain effects. P. 114.

26. ALICIA BANNON ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2011–12* 5 (Laurie Kinney & Peter Hardin eds., 2013), <http://www.brennancenter.org/publication/new-politics-judicial-elections-2011-12> [<http://perma.cc/M7X5-ZQC9>].

27. *Id.* at 20.

28. See ADAM SKAGGS ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2009–10* 13 (Charles Hall ed., 2011), <http://www.brennancenter.org/publication/new-politics-judicial-elections-2009-10> [<http://perma.cc/L5QY-KDBZ>].

as it does in other types of high-stakes elections (p. 162). Partisanship certainly shapes partisan judicial elections in which voters rely mainly on party identification to choose among candidates. By contrast, nonpartisan judicial elections remove the party cue from the ballot and make voters more sensitive to attack advertising in terms of vote choice and participation. Hall hammers home the point that any assessment of judicial elections should be grounded in empirical reality, ideally substantiated by cutting-edge social science rather than anecdotal conjecture (pp. 179–81). On this point, Hall is surely right and delivers an empirical contribution that clarifies how judicial elections seem to play out with respect to a controversial matter.

An irony from *Attacking Judges* is that Hall's findings and conclusions echo critics of judicial elections in at least one fundamental respect: they agree that judicial elections today resemble elections for other offices when it comes to partisanship and attack advertising. In this respect, *Attacking Judges* helps set the terms of the debate between defenders and critics of judicial elections. All can agree that judicial campaigns today feature increasing amounts of outside spending and television advertising; partisanship is playing an important role in many judicial elections; and judicial elections are becoming more like other types of elections as a result.<sup>29</sup> Anyone interested in assessing how well judicial elections work and what, if anything, should be done to reform them must confront this empirical reality.

The important overarching question here is normative: What should we think of judicial elections, depicted as they are in *Attacking Judges*? For Hall, the answer is a positive one because, based on her findings, she suggests partisan judicial elections work pretty well, or at least they work as should be expected by design. Since voters are guided heavily by partisanship, attack advertising does not have the damaging effects on incumbent vote share or participation that critics of judicial elections fear. Attack advertising reduces vote share against sitting judges only in nonpartisan elections and has a positive effect on voter participation. In Hall's view, partisan judicial elections operate just like other elections in these respects, which she regards as a comforting assurance. As she summarizes, “[p]artisan state supreme court elections in many respects resemble their legislative and executive counterparts and present a striking challenge to the notion that this new era of intense televised campaigning necessarily threatens incumbents or weakens the participatory proclivities of the electorate” (p. 5).

*Attacking Judges* is an important book because it clarifies empirical realities about judicial elections, but it wobbles a bit on this normative question. If *Attacking Judges* is convincing in its portrayal of voter behavior in judicial elections, it is less helpful with what we should think about those realities. As we develop in the next Part, a proper normative assessment of judicial elections requires an understanding of more than simply how voters choose

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29. See *supra* note 25 and accompanying text.

and how judicial elections operate. More importantly, a normative assessment requires empirical understanding of how the resulting electoral pressures influence elected judges in their official decisionmaking on the bench when the next election looms on the horizon.

## II. JUDICIAL DECISIONMAKING UNDER ELECTORAL PRESSURE

For all its strengths, *Attacking Judges* delivers less than it seems about attack advertising in judicial elections as a normative matter. As we explained, Hall establishes that attack advertising affects voters in judicial elections much the same way it does in elections for other types of offices. Her findings, though, speak to attack advertising's effects on voters, and not at all to its effects on elected judges and their decisionmaking once on the bench. Without knowing more about attack advertising's influence on judges, we do not know enough about the perceived incentives for elected judges and how judicial elections encourage them to do their jobs more or less well.

For critics of judicial elections, the resemblance between judicial elections and those for other political office is cause for worry, not relief. In this sense, *Attacking Judges* undercuts some empirical claims by critics of judicial elections but may miss the crux of the overarching case against today's judicial elections. The crux of this case is not so much that incumbents lose too often, or simply that voters become disillusioned with the judiciary. To be fair, these are common claims lodged against judicial elections (pp. 1, 98–99, 102, 131–32, 174), and *Attacking Judges* helps undercut them. But critics' normative anxiety about judicial elections is deeper and more troubling. A basic premise of criticism against judicial elections is that they pressure elected judges to worry too much about winning reelection and compromise their decisionmaking in the process.<sup>30</sup>

The worry is therefore that judges might bias their decisions precisely because judicial elections are so much like elections for other types of office. Regardless of attack advertising's actual effect on voters, judges still might worry about the prospect of attack advertising against them in the next election and therefore approach their jobs and decide cases differently to preempt those attacks. Judges still might cater more to their perceived reelection chances than the interests of impartial justice in their most salient judicial decisions. They might, for instance, shy away from decisions in favor of unpopular litigants or other actions that might provide fodder for hot-button attack advertising against them.

If judges were just like other types of elected officials, then Hall would be on stronger ground in a defense of attack advertising in judicial elections. The usual point of elections is to impose accountability on representatives who will have compelling incentives to monitor and reflect public opinion if

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30. E.g., Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997) (analogizing reelection concerns to a crocodile in your bathtub that you cannot ignore).

they want to keep their jobs. The normative complication in judicial elections is what Pam Karlan calls “the distinctive post-election role played by judges.”<sup>31</sup> Judges, unlike other elected officials, are expected to attend impartially to the facts and law of the case and serve a countermajoritarian, rather than representative, function as the law requires.<sup>32</sup> As the Supreme Court itself explained, “public opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment.”<sup>33</sup> Judges, at least in this sense, “are not politicians, even when they come to the bench by way of the ballot.”<sup>34</sup> Based on this premise, the Court recently upheld election-speech restrictions on judicial candidates that would be obviously unconstitutional under the First Amendment if applied to candidates for other offices.<sup>35</sup>

Hall alludes to this conception of the judicial role in *Attacking Judges* but is implicitly dismissive of it.<sup>36</sup> She acknowledges only in passing that judges “do not serve as democratic representatives,” and the notion has little impact on her normative conclusions about her empirical findings (p. 166). Hall may simply echo many other political scientists who scoff at the idea that judges serve any distinct role other than to pursue their constituents’ and their own policy preferences. To be sure, even among lawyers and law professors, we are all realists now. We know that judges have policy preferences and “make law” in an important sense, rather than simply administering a self-executing body of rules to each case’s facts.

Without a doubt as well, the very notion of judicial elections creates tension on a robust conception of a distinctive role for judges. Mounds of research already have shown that judges are quite sensitive to their reappointment incentives and cater to the preferences of whoever holds the power of reappointment over them.<sup>37</sup> But the usual problem with elected

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31. Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 81 (2009).

32. See generally Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (providing background on the interplay between judicial elections, majoritarian principles, and impartial adjudication).

33. *Chisom v. Roemer*, 501 U.S. 380, 400 (1991).

34. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015).

35. *Id.*

36. See pp. 131–32.

37. See Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5, 24 (1995) (finding that judges facing reelection are more likely to uphold death sentences); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 442 (1992) (finding that judges nearing reelection are influenced to deviate from earlier voting patterns); Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 345–46 (2002) (suggesting judges may be biased in favor of home-state litigants who will vote on their reelection); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004) (finding that as their reelection approaches, judges impose longer criminal sentences); Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169 (2009) (finding that the judicial decisions of partisan judges conform to the preferences of whoever will decide

judges, as critics of judicial elections would put it, is not that judges are responsive at all to political incentives, but that they are excessively so.<sup>38</sup> Judges who know which way their decisions should swing to improve their chances of reelection face increasing incentives to outdo one another in a competitive arms-race dynamic among candidates. This basic dynamic of elections applies to judges just as well as everybody else. But if judicial elections play out *exactly* as other types of elections do, then this is the very reason why critics oppose using elections for judicial selection in the first place

Along these lines, even a hardened realist ought to be troubled by evidence that judges vary their decisions in areas like criminal justice to advance their reelection interests. For instance, empirical research on judicial decisionmaking finds that judges sentence criminal defendants more harshly as concerns about their own reelections become more salient. Gregory Huber and Sanford Gordon found that Pennsylvania trial judges imposed longer sentences, controlling for other important factors, when the judge's next retention election was imminent, and this influence of election proximity accounted for roughly 6 percent of total sentence time during the period of study.<sup>39</sup> A later study by Huber and Gordon found similar results for Kansas judges but also discovered that judges running in partisan elections were even more punitive. Judges in partisan elections were more likely to sentence prison time than judges facing retention elections, and they imposed a sentence of a half year more on average than retention judges.<sup>40</sup> Carlos Berdejó and Noam Yuchtman likewise found that judges' sentencing became more punitive as the next election approached such that a sentence handed down just before the next election averaged 6.8 months longer than the sentence for the same crime at the beginning of the judge's term.<sup>41</sup> This effect, though, disappeared for retiring judges during their lame-duck term when they did not have to worry about the next election.<sup>42</sup> This work and

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whether those particular judges retain their jobs for another term, whether that decisionmaker is the governor, legislature, or the voters); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 158 (1999) (finding that judges facing partisan elections are more likely to redistribute wealth in torts cases from out-of-state businesses to home-state plaintiffs).

38. See Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 618–21 (2014) (formalizing the trade-off between judicial independence and responsiveness).

39. Huber & Gordon, *supra* note 37, at 255–56.

40. Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107, 128–30 (2007).

41. Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741, 748 (2013).

42. See *id.* at 752; Brandice Canes-Wrone et al., *Judicial Selection and Death Penalty Decisions*, 108 AM. POL. SCI. REV. 23, 30, 35 (2014).

other studies, including ones by Hall herself, suggest that judges modify important decisions to appease voters and improve their personal prospects in an upcoming election, particularly as it approaches.<sup>43</sup>

If judges are so influenced by the specter of the next election, they might similarly be affected by the prospect of attack advertising against them in the next campaign. Judges might reasonably believe that attack advertising against them will hurt their reelection chances, or at least make reelection more costly even if they eventually prevail. Judges who are already worried about their reelection prospects as a general matter could worry that attack advertising may make their reelection prospects less certain.<sup>44</sup> Concerns about attack advertising in the future might motivate judges to be wary about making controversial decisions that could be targeted in attack ads.

Studying attack advertising's effects on judges is a straightforward theoretical extension of the aforementioned work on sentencing. Short of this in the past, we found that *overall* levels of campaign advertising appeared to have just such an effect on judicial decisionmaking in an earlier study, released as a report for the ACS.<sup>45</sup> We combined individual-level data on state supreme court justices with our new coding of 3,100 criminal appeals decided by state supreme courts from 2008 to 2013 across thirty-two states. We then merged these data with data from the Brennan Center for Justice's *Buying Time* project on television campaign advertisements in state supreme court elections over the same period in those states. This combined dataset allowed us to investigate the empirical relationship between campaign advertising and judicial voting by state supreme court justices in criminal cases they decided.

Controlling for other considerations, our ACS study found that as the amount of campaign advertising in supreme court races increased in a state, the less likely justices in that state were to vote in favor of criminal defendants in criminal cases.<sup>46</sup> In other words, as the volume of campaigning in a state's supreme court elections went up, judicial decisions appeared to be less sympathetic to criminal defendants by a statistically significant margin

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43. Hall, *supra* note 37, at 442–44; see also Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360, 370 (2008); 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, 1223 (1997); Claire S. H. Lim, *Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Court Judges*, 103 AM. ECON. REV. 1360, 1361 (2013); Elisha Carol Savchak & A.J. Barghothi, *The Influence of Appointment and Retention Constituencies: Testing Strategies of Judicial Decisionmaking*, 7 ST. POL. & POL'Y Q. 394, 406–08 (2007).

44. Of course, there might be a few attentive judges running in partisan elections who read *Attacking Judges* and relax about the prospect of attack advertising against them. But it is safe to assume that elected judges, like other elected officials, worry about reelection even when it seems secure. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 315 (1994) (finding that judges adjust their behavior in response to reelection concerns even when the probability of defeat is low).

45. SHEPHERD & KANG, *supra* note 5.

46. *Id.*

even controlling for ideology, party, and other predictors of judicial decisionmaking. We found that this effect was stronger for Republican decisionmaking than Democratic decisionmaking, in spite of the fact that Republican justices were already less sympathetic to criminal defendants in the first place, thus further increasing the partisan spread across justices' votes.<sup>47</sup>

The next step is to focus on attack advertising and see if it similarly affects subsequent judicial decisionmaking. In the next Part, we carry out this empirical analysis of attack advertising on elected state judges' decisions in criminal cases. Coupling our work here with Hall's offers a fuller view of attack advertising's impact on not just the outcomes of judicial elections, but on how elected judges perform their duties and make decisions on the bench.

### III. ATTACK ADVERTISING'S EFFECT ON CRIMINAL APPEALS DECISIONS

We extend our earlier study and, using the same data on attack advertising as *Attacking Judges*, look specifically at attack advertising's effect on judicial decisionmaking in criminal cases. Like our earlier ACS study, we examined judicial decisionmaking in almost 3,100 criminal appeals decided by state supreme courts.<sup>48</sup> We focused on cases involving violent crimes as defined by the FBI's Uniform Crime Reporting Program: murder, robbery, violent aggravated assault, and rape and other sex Crimes.<sup>49</sup> The cases were randomly selected from state supreme court published opinions from 2008 to 2013 from thirty-two states.<sup>50</sup> The coded data included individual votes

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47. *Id.*

48. Following the literature on judicial decisions, a vote for a criminal defendant is defined as any vote that improves the defendant's position—whether it is overturning any part of a criminal conviction or reducing a defendant's sentence. In addition, we collected data on the offense for which the defendant was convicted, the number of victims involved in the crime, and whether any victims were juveniles. We supplemented these data both with institutional variables that describe aspects of the judicial system of each state and also with information about each judge's career. We merged our data with data from the Brennan Center for Justice, Buying Time project. Since 2000, the Brennan Center has collected all available televised state supreme court campaign ads that were aired in states holding supreme court elections. From the Brennan Center data, we compiled the number of negative television ads aired during each judicial election from 2008 to 2013 by summing the number of ads that were critical of a candidate and the number of ads that promoted one candidate while criticizing another.

49. See FED. BUREAU OF INVESTIGATION, NATIONAL INCIDENT-BASED REPORTING SYSTEM USER MANUAL 134 (2013), <https://www.fbi.gov/about-us/cjis/ucr/user-manuals> [<https://perma.cc/X83E-THAQ>] (defining violent crime).

50. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, Wisconsin. The researchers coded cases from the highest court of criminal appeals in Texas and Oklahoma because the supreme courts in those states do not hear criminal appeals.

from over 470 justices and reports of whether the justice, sitting as a member of a multi-judge appellate panel, voted for the criminal defendant on appeal.<sup>51</sup>

We focus on state supreme court decisions on criminal appeals for two main reasons. First, criminal law is substantively important and a major electoral focus for voters and judges alike. As we have described, judges become harsher in their criminal law decisionmaking as election concerns become more salient. They appear to know intuitively that reelection for incumbent judges depends significantly on the prevailing crime rate<sup>52</sup> and that their criminal law decisions are the most common target of negative campaign advertising.<sup>53</sup> Indeed, attack ads often take aim at a judge's vote in one or a handful of criminal cases, asserting that the judge "fought to protect sexual predators," is "sympathetic to rapists," or agreed to release "child rapists" and other convicted offenders.<sup>54</sup> Accordingly, as we explained earlier, judges appear to alter their decisionmaking in criminal cases to such a degree that even a defender of judicial elections agrees "the evidence that judges consider their likelihood of reelection when making judicial decisions is pretty persuasive."<sup>55</sup>

Second, criminal law lends itself to a clearer inference of judicial biasing than other areas of law. Not only do judges adjust their criminal law decisions as reelection looms over them, they adjust their decisions almost exclusively in a punitive direction against criminal defendants. Voters will rarely punish judges for being too tough on convicted criminals, but lenient decisions are subject to subsequent campaign attacks and potential voter anger. As Huber and Gordon explain, "In the context of criminal justice, fire alarms when sounded will almost always correspond to perceived instances of *underpunishment*, not *overpunishment*."<sup>56</sup> For this reason, most judges become significantly more punitive when reelection concerns grow salient,

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51. All coding went through a two-step quality control process; ultimately, over 25 percent of the cases were coded by at least two researchers to confirm reliability.

52. See Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 704 (2006); Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 322–24 (2001).

53. See SKAGGS ET AL., *supra* note 28, at 13–20; Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 763 (1995); Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 684 (2002) ("[C]rime control was clearly the most common theme of judicial television ads . . .").

54. SHEPHERD & KANG, *supra* note 5.

55. CHRIS W. BONNEAU, A SURVEY OF EMPIRICAL EVIDENCE CONCERNING JUDICIAL ELECTIONS 8 (2012), <http://www.fed-soc.org/publications/detail/a-survey-of-empirical-evidence-concerning-judicial-elections> [<http://perma.cc/A72Y-ASWW>].

56. Huber & Gordon, *supra* note 37, at 249; see also Champagne, *supra* note 53, at 684 (explaining in a study of judicial campaign ads that "judicial candidates battled to outdo one another in their tough-on-crime attitudes and their support for and by law enforcement").



but virtually no judges become more lenient, even in very liberal jurisdictions.<sup>57</sup>

Some argue that these more punitive decisions should be unobjectionable if election pressures are simply forcing lenient judges to do their jobs better and impose harsher decisions that are more consistent with the law.<sup>58</sup> But the overwhelming degree to which judges bias their decisions in a punitive direction belies this possibility. Absent incredibly robust ideological assumptions, it is hard to imagine that virtually all judges are imposing such lax sentencing such that all correction ought to occur toward the more punitive. That is, if election pressure simply forced judges to set aside ideological whim and follow the law more diligently, then we should see correction from conservative judges in a lenient direction as well. Instead, as Huber and Gordon summarize, “all judges, even the most punitive, increase their sentences as reelection nears.”<sup>59</sup> This unidirectional bias toward more punitive decisions suggests that judges, consciously or not, adjust their decisions from what they would otherwise hold as correct outcomes under the law to preempt campaign attacks against them.

To explore this dynamic further, we estimate the relationship between television attack ads and state supreme court justices’ likelihood of voting against criminal defendants in appeals cases in our dataset. We assume that the number of attack ads that have run recently in state supreme court races influences the average expectation about the intensity of attack advertising that a sitting supreme court justice might face. We use two different measures of television attack advertising: the number of attack ads that aired in the most recent supreme court election in each state, and the average number of attack ads that aired in the two most recent election cycles in each state. Of 24 states that aired television campaign ads during state supreme court elections between 2008 and 2013, 18 states aired attack ads. The average number of attack ads aired during each election cycles in these states was 1,660; the minimum was 30 and the maximum was 9,310.

All estimations include a series of judge-level, case-level, and state-level variables to control for other factors that might be related to the justices’ voting. Estimations include the justices’ political party affiliation to control for the role of ideology on justices’ voting in criminal appeals. Case-level variables include the crime for which the defendant was convicted (murder,

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57. See, e.g., Huber & Gordon, *supra* note 37, at 258 (“[O]ur finding is not attributable to bidirectional convergence with a preponderance of lenient judges.”).

58. See BONNEAU, *supra* note 55, at 8; James L. Gibson, *Electing Judges: Future Research and the Normative Debate About Judicial Elections*, 96 JUDICATURE 223, 227–28 (2013).

59. Huber & Gordon, *supra* note 37, at 258; see also KRITZER, *supra* note 20, at 63 (summarizing death penalty decisions by trial courts by explaining that “the overall pattern here strongly suggests that judges facing reelection are attuned to the risks of being labeled soft on crime by a potential opponent”); Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1039–42 (finding that Alabama judges who overrode jury recommendations on death sentences in a punitive direction actually became even more punitive in the two years before their next election).

aggravated assault, rape, robbery), the number of victims, and whether any of the victims were children.

Our case-level variables also include a measure of the underlying strength of the case. This control variable is important because some cases are so strong (or weak) that justices will vote for or against the criminal defendant regardless of their ideological predisposition or the influence of television ads. For a measure of case strength, we first estimate how many of the justices hearing a case would be predicted to vote for the defendant based on all other state-level and case-level variables we describe. The difference between this predicted number and the actual number of justices voting for the criminal defendant provides a measure of case strength—the more justices voting for the defendant compared to the predicted number, the stronger the defendant’s case.<sup>60</sup>

State-level variables include indicators for the retention method for state supreme court justices to measure whether the method of reelection or reappointment affects judicial voting. All estimations also include state indicators to capture systematic differences in the criminal appeals process or systematic differences in tough-on-crime attitudes across states. Estimations also include year-fixed effects to control for general trends in television ads or national trends in tough-on-crime attitudes. We estimate a series of ordinary probit models with t-statistics computed from standard errors clustered by case. Because the raw probit results are difficult to interpret, however, we present the marginal effects of each variable on the probability of a justice voting for the criminal defendant.

In short, we find a statistically significant relationship between attack advertising and hostility to appeals by criminal defendants in state supreme courts. The more attack advertisements aired for supreme court elections in the state, the less likely the respective court’s justices are to vote for criminal defendants in appellate cases. The results are statistically significant across both measures of attack advertising and in estimations that alter the specification across various combinations of control variables, ensuring robustness.

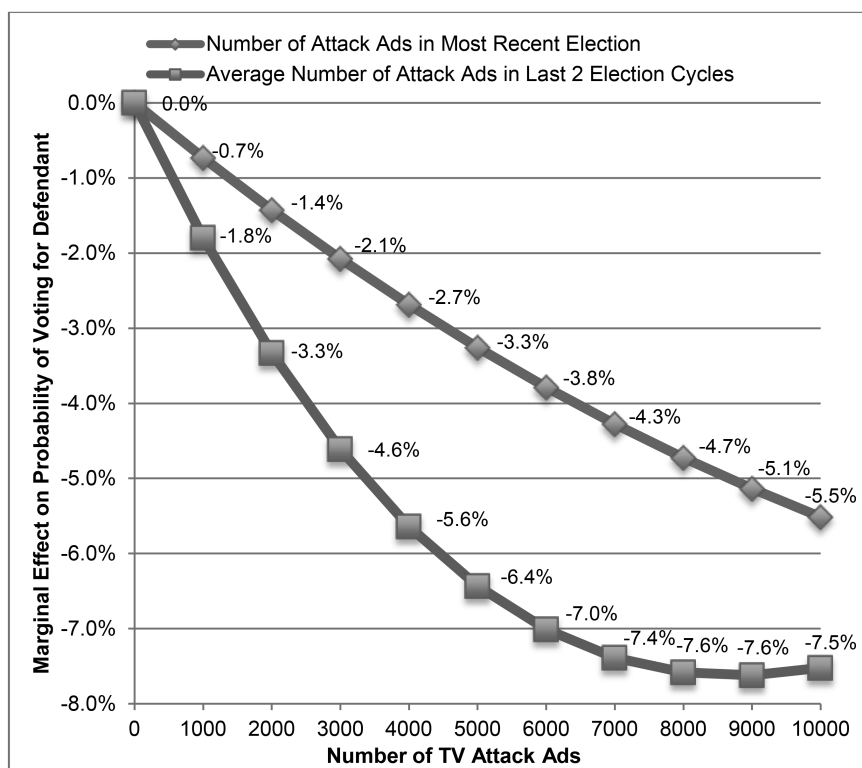
To illustrate the magnitude of our results in an intuitive way, Figure 1 maps the relationship between the number of attack ads aired and justices’ likelihood of voting for criminal defendants. Figure 1 reports, for different numbers of attack ads, the associated decrease in the justices’ probability of voting for the criminal defendant if attack ads increased by 100%, holding all other variables at their mean value. That is, as results from the estimation on the average number of attack ads in the last two election cycles, Figure 1 shows that in a state that aired only 2,000 ads, a doubling of airings would

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60. Suppose that the model predicts that, based on all other control variables, 3 of the 5 other justices would vote for the defendant. If 4 of the other justices actually vote for the defendant, our case-strength variable would indicate a stronger than average case for the defendant. In contrast, if only 1 of the other justices voted for the defendant instead of the predicted 3, our case strength variable would indicate that the case was very weak.

be associated with a 3.3% reduction in justices' voting for criminal defendants. As the number of airings increases, however, the marginal effect of an increase in attack ads grows. In a state with 6,000 ads, a doubling of airings would be associated with a 7% reduction in justices' voting for criminal defendants.

FIGURE 1 THE RELATIONSHIP BETWEEN TELEVISED ATTACK ADS AND VOTING FOR CRIMINAL DEFENDANTS<sup>61</sup>



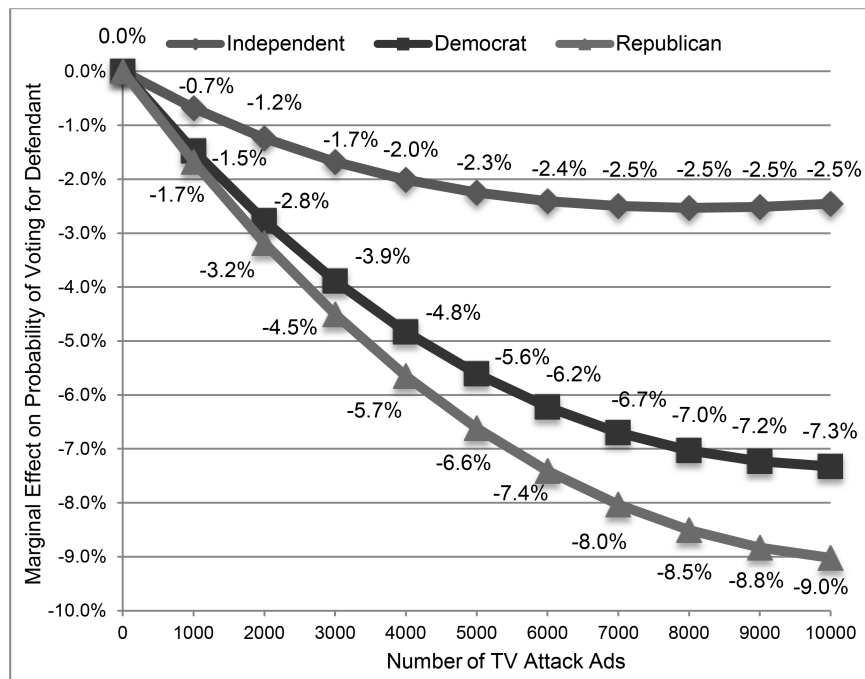
We also explore whether the relationship between television attack advertising and justices' voting for criminal defendants varies across political party. As a baseline, Republican justices are, on average, slightly less likely to vote for criminal defendants than other justices; in our sample, Republican justices voted for the defendant in 27% of cases but Democratic justices voted for defendants in 31% of cases. But our analysis indicates that attack advertising exacerbates this difference.

Figure 2 graphs the relationship between attack ads and justices' voting for criminal defendants across different political parties, reported from estimations using the average number of attack advertisements in the last two

61. The figure reports the marginal effect on the probability of voting for criminal defendants for a proportional change in the number of television attack ads, evaluated at different numbers of television ads and holding all other variables at their mean.

election cycles. The results reveal that, while attack ads are correlated with decreases in voting for criminal defendants across all parties, the relationship is more pronounced for Republican justices. For example, in a state with 6,000 attack ads, a doubling of ads would be associated with a 2.4% reduction in independent justices' voting for criminal defendants, a 6.2% reduction in Democratic justices' voting for criminal defendants, and a 7.4% reduction in Republican justices' voting for criminal defendants. Even starting from different baselines, the average effect of campaign ads on judicial voting is larger for Republicans than for either Democrats or independents.

FIGURE 2 THE RELATIONSHIP BETWEEN TV ATTACK ADS AND VOTING FOR CRIMINAL DEFENDANTS ACROSS POLITICAL PARTIES<sup>62</sup>



Our analysis therefore indicates that attack advertising is associated with more punitive state supreme court decisionmaking against criminal defendants. Building off the existing literature on judicial behavior and criminal law, it appears that attack advertising might increase justices' anxiety about reelection or otherwise encourage them to preempt campaign attacks by being tougher on crime, usually the most salient issue in judicial elections.

62. The figure reports the marginal effect on the probability of voting for criminal defendants for a proportional change in the number of attack ads, evaluated at different numbers of ads and holding all other variables at their mean, for judges from different political parties. In Figure 2, the number of attack ads is measured as the average number of ads in the last two election cycles.

Unlike Hall's findings in *Attacking Judges*, we did not find significant differences between partisan and nonpartisan states. That is, we found that attack advertising was related to a greater likelihood of judicial decisions against criminal defendants in both partisan and nonpartisan states. We report this specific finding only tentatively, though, because the smaller number of cases in each subcategory gives us pause about concluding that the type of election does not make a difference here.

Our overall results suggest that judicial decisions *are* related to the intensity of the judicial campaign environment as reflected by attack advertising. The new style of judicial elections—with higher-profile campaigning, more outside-group involvement, and more attack advertising—may produce important influences on the judiciary that critics have claimed and decried. This may be the result, notwithstanding Hall's findings that attack advertising hurts incumbents only in nonpartisan elections and tends to increase voter participation in judicial elections. Part of the story might be that judges still are worried about reelection and play it safe by becoming tougher on criminal defendants, even if attack advertising has less electoral impact than some critics believe. Judges may be even more worried when attack advertising excites the public with salient appeals and actually boosts voter participation in nonpartisan judicial elections.<sup>63</sup>

Perhaps our findings are not worrisome because judges are simply responding to political incentives akin to those for other officials elected in other types of contested elections. But the claim that judicial elections operate like legislative elections is largely nonresponsive to the usual criticism of today's judicial elections. Indeed, critics of judicial elections advocate reforms to make them less like other elections, more insulated from electoral pressures and campaign spending. Of course, the fundamental ambivalence of judicial elections is to blame, with its cross purposes of democratic accountability and judicial objectivity.<sup>64</sup> A normative shortcoming of *Attacking Judges*, though, is that it does not properly credit the critics' perspective from one side of that ambivalence, mentioning only fleetingly that judges "traditionally have been shrouded in myths of politically neutral decision making and deeply instilled notions about the tightly constraining force of law" (p. 166). As a partial result, *Attacking Judges* lacks even greater normative relevance for current debates about judicial elections and cuts against the case for judicial elections more than Hall suspects.

#### CONCLUSION

*Attacking Judges* concludes by celebrating the central importance of empirical research to normative debate and identifies itself as a "powerful testament to the value of theoretically driven comparative state research for

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63. Again, our goal here is less to test specifically whether judges bias their decisions with retention in mind than to test more generally whether attack advertising affects judicial decisions through selection, biasing, or other means. See *supra* note 6. But we believe earlier work on judicial behavior and criminal decisions suggests that biasing is at least part of the story.

64. See generally TARR, *supra* note 8.

exploring competing theoretical frameworks and for testing vital propositions” (p. 179). We could not agree more about the usefulness of empirical work in substantiating normative claims about judicial elections and other areas of law. In this spirit, *Attacking Judges* undercuts the claims of critics of judicial elections who argue that advertising demobilizes the electorate; that voters possess no substantive basis for voting on judicial candidates; and that attack advertising perniciously compromises incumbents’ reelection prospects.

The overarching portrayal of judicial elections that emerges from the book, however, is closer to critical depictions than one would guess. The book also shows that televised attack advertising and outside-group involvement has increased since *White*; that attack advertising hurts incumbents just as expected in nonpartisan elections; and that party-motivated voting in partisan elections mitigates attack advertising’s effects only by encouraging judicial races to resemble legislative and executive contests. As a result, criticisms that judicial elections have become higher profile, feature more attack advertising by outside groups, and in the end, seem more like other types of partisan elections for representative office, are generally consistent with *Attacking Judges*. The book forces us to confront all these freshly-confirmed realities about today’s judicial elections.

Of course, it is tempting to conclude from *Attacking Judges* that concerns about attack advertising are simply overblown, but our own research suggests otherwise. In a study of judicial elections and decisions from 2008 to 2013, we find reason to worry that the intense campaigning associated with attack advertising influences judicial decisionmaking on important, politically-salient cases. We discover a significant relationship between attack advertising and state supreme court decisionmaking against criminal defendants in both partisan and nonpartisan states. In other words, even if *Attacking Judges* is right that attack advertising has less impact on voters than critics imagine, attack advertising still may exert the political pressures on elected judges and judicial decisionmaking that critics would predict. Electoral pressures in judicial elections therefore work just as one might expect in any other kind of election.