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Contents

Competitiveness in State Supreme Court Elections, 1946–2009

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There has been much debate over changes in state supreme court elections. However, most of the research that debate refers to considers a relatively short timespan. This article reports an analysis of contestation and competitiveness in state supreme court elections for the entire post World War II period. The article considers both primary and general elections (other than retention elections). The central finding of the article is that outside the South there has been surprisingly little change, either in whether incumbents are challenged for reelection or in the competitiveness of the elections that are contested (looking separately at open-seat elections and elections involving incumbents). The analysis suggests that the apparent increase in competitiveness (taken to include the question of whether an incumbent is challenged), at least through 2009, reflects factors other than changes in the nature of campaigns and expenditures on state supreme court elections; specifically, those changes largely result from the end of the one-party South.

I. INTRODUCTION

In this article, I examine one dimension of change in state supreme court elections: competitiveness. Specifically, has the likelihood increased that elections for seats on the various courts will be contested and, for those that are contested, are the elections more likely to be competitive? The issue is relevant for the recurring debate over judicial selection in the states, a debate that is likely to increase in intensity in the wake of the U.S. Supreme

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Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010), a decision that has the potential to produce a flood of corporate expenditures in judicial, as well as other, elections.

There is no doubt that state supreme court elections have changed in some ways. Thanks to reports produced by New York University Law School's Brennan Center (Goldberg et al. 2000, 2004; Goldberg & Sanchez 2004; Sample et al. 2007, 2010:8), we know that spending and advertising in such elections have increased in the aggregate, with candidate fundraising in the decade 2000–2009 more than doubling from $83.3 million in the prior decade to $206.4 million (Sample et al. 2010:8). However, despite fears expressed in the wake of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which struck down key limitations on what candidates for judicial office could say in the course of their campaigns (i.e., bans on announcing positions on legal or political issues), there is no evidence that the tone of advertising in state supreme court elections has undergone broad change. The proportion of elections that feature attack-style ads has remained stable since 2002.[1] The proportion of advertising airings comprised of attack ads has varied since 2000 but shows no particular pattern; the proportion of such ads was actually highest in 2000.[2]

More relevant for the analysis presented in this article is the role of competitiveness and contestation in such elections, and whether competition is a positive or a negative. Democratic theory would lead one to see competitive elections as a good thing because they would be indicative of an active public debate and this is just as true for judicial elections as for elections to other types of public office (see Bonneau & Hall 2009). Ironically, for many observers, increased competition in judicial elections is seen as a negative because it leads candidates to do things (raise money, state positions on issues, attack opponents) that are taken to be incompatible with the judicial role. Thus, for proponents of reform, such as retired U.S. Supreme Court Justice Sandra Day O'Connor, who chairs the O'Connor Judicial Selection Initiative (see Schwartz 2009), increasing levels of competition in elections for judges would be a primary reason to move to alternative systems of judicial selection.[3]

In fact, the evidence regarding increased competition in recent years is mixed. Melinda Gann Hall has examined the question of whether state supreme court incumbents were challenged in elections (both partisan and nonpartisan) over the period 1980 to 2000, and found that the percent challenged grew from about 50 percent at the beginning of the period she examined to 75 percent or more at the end of the period (Hall 2007:171).[4] However, her analysis did not reveal any clear trends in the competitiveness of elections where challengers entered the race or in patterns of competition for open-seat elections (Hall 2007:175–82).[5]

One possible concern regarding Hall's analysis is the relatively short period, 20 years, she examined. It is possible that the starting point for her research, 1980, represented not the end of a period of stability vis-à-vis challenges to incumbents but either just one point on a longer trend of secular change or a low point in what could be something of a cyclical pattern. Similarly, it might be that examining a longer period would show changes in the competitiveness of elections that occurred prior to 1980.[6]

In this article, I present an analysis of the pattern of competition, both contestation and closeness, in judicial elections over a 64-year period, 1946 through 2009. I focus specifically on seats up for election. In the discussion that follows, I examine whether the elections for those seats were contested and how close the elections were. Through this analysis, I seek to answer the closely-related questions of whether elections are more likely to be contested in recent years and whether elections are more likely to be competitive.

II. DATA

For this study I sought to assemble data on every state supreme court election conducted on a partisan or nonpartisan basis since 1946, including primary elections, primary runoffs, and general elections;[7] these elections filled a total of 1,863 seats on state supreme courts.[8] The sources for these data varied from state to state. For recent elections, virtually all the needed information was available online from state election office websites. For earlier elections, some states routinely published detailed election reports, which I was able to obtain from one of several libraries. For other states, the necessary information was provided to me by state election offices. For still other states, the information had been shipped

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[1]Using data on campaign advertising assembled by the Brennan Center for 2002 through 2006, Melinda Gann Hall (2011) found that the proportion of elections featuring attack ads had been fairly stable over the period: 11.1 percent, 16.3 percent, and 10.6 percent; for 2008, the corresponding figure is 11.6 percent.

[2]Based on information appearing in Brennan Center reports or provided to me by staff at the Brennan Center, the percentage of airings that were attack ads for 2000, 2002, 2004, and 2006 are: 38.4 percent, 7.5 percent or 9.9 percent, 22.5 percent, 20.0 percent, and 26.1 percent; the ambiguity for 2002 reflects that the Brennan Center report shows a percentage as well as providing the data themselves, and my calculation from the data (7.5 percent) differs from the summary figure in the report (9.9 percent).

[3]It is worth noting that while the debate is expressed in terms of "judicial elections" generally, the concern has been primarily with state supreme court elections. In fact, as the vast majority of research on judicial elections focuses on state supreme courts, we know much less about elections to lower courts, either in terms of how those elections are conducted (but see Arbour & McKenzie 2010) or about the impact of the selection process on what lower court judges actually do when on the bench (but see Huber & Gordon 2004; Kritzer 2007:462–64).

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[4]Hall also examines retention elections for state supreme court justices, which I omit from my analysis. Aspin (2007) has tracked retention elections, covering both state supreme courts and lower courts, for a set of states back to 1964.

[5]In an earlier article, which examined elections between 1980 and 1994, Hall showed that competitiveness in state supreme court elections was actually fairly similar to the competitiveness in elections for the U.S. House of Representatives (Hall 2001:319)

[6]Dubois (1980:50) provides some data on competitiveness of state supreme court elections for the period 1948–1974. However, his analysis excludes southern states and primary elections. Moreover, it does not control for the presence of an incumbent in the election.

[7]Texas and Oklahoma have separate courts of last resort for criminal and noncriminal cases; for those states, I have included elections for both courts.

[8]If three seats are up for election, for purposes of this article I count that as three elections.

off to state archives, and to obtain the information I sought, it was necessary to arrange to have someone go to the archive and retrieve the information on my behalf. For a few primary elections, I relied on newspaper reports of overall election results.[9]

For those seats with contested primaries but an uncontested general election, I employ information from the primary election. If there are both primary and general elections for a seat, I use as my indicator of closeness the election with the closest vote involving the incumbent (or the victor in the case of an open-seat election).[10] States with multiseat elections in which candidates did not run for specific seats (i.e., if two seats were contested, the top two vote getters win), what I will label "unassigned multiseat elections," raise some specific issues. First, how should one handle the situation where the number of candidates is less than twice the number of seats (i.e., three candidates running for two seats)? In those elections, if there is one fewer candidate than twice the seats, I treat the top vote getter as unopposed; so, for example, if there are three seats and five candidates, one seat is deemed unopposed and two as opposed (with the top vote getter assigned to the unopposed seat). The second issue is how to determine how close the elections are in unassigned, multiseat elections? I adopt the convention of pairing first the highest and lowest vote getters, then the second highest and second lowest, on down. For unassigned multiseat partisan elections, I pair the highest Democrat with the lowest Republican, the highest Republican with the lowest Democrat, and then the middle pair or pairs.[11]

One final issue needs to be noted. Some competition is best described as symbolic rather than real. For example, while through the 1940s, 1950s, and into the 1960s, elections in most of the South were one-party affairs, there were a small number of state supreme court elections in which Republicans did appear on the ballot. To say that such candidates did not stand a chance of winning is an understatement: usually they received less than 15 percent of the vote. More recently, some of the southern states have become essentially one-party Republican in state supreme court elections, but in a number of elections uncontested by Democrats, Libertarians have entered the general election to challenge the Republican candidate; typically, the Libertarians get at most 25 percent of the vote. Because of this phenomenon,[12] I have chosen not to focus simply on contested versus uncontested elections, but to classify elections into five categories: uncontested, symbolically contested (winner received 75–99 percent of the vote), noncompetitive (winner received 60–74 percent), competitive (50–59 percent for the winner),[13] and incumbent defeats;[14] the latter category applies only when there was an incumbent running for reelection.[15]

III. ANALYSIS

The analysis that follows is presented mostly in the form of area graphs, all but one of which divide the vertical space proportionally among the three to five categories being considered. One can think of each graph as representing a series of pie charts or as a stacked bar vertical bar graph that has been run together and smoothed. The advantage of these graphs is that they allow one to quickly see how the distribution among the categories has shifted over time. The disadvantage is that it takes a bit of effort to estimate a specific percentage other than for the category shown at the bottom of the graph. In all the area graphs (except Figure 2), the top-most area (always in light gray) represents the proportion of elections that were uncontested. The solid black area just below the top area represents the proportion of elections that were symbolically contested (the winner received at least 75 percent of the vote). The middle area (shown in white) represents the proportion of noncompetitive elections in which the winner received 60–74 percent of the vote. For elections involving incumbents, the dark gray area at the bottom of the graph represents the proportion of elections in which the incumbent lost, and the medium gray area just above represents the proportion of elections that the incumbent won with less than 60 percent of the vote. For open-seat elections, the bottom area is shown in medium gray and represents the proportion of elections won with less than 60 percent of the vote.[16]

Most state supreme court elections take place in even-numbered years. In a small number of states, some or all such elections are held in odd-numbered years. For purposes of analysis and presentation, I have grouped elections occurring in odd-numbered years with the prior year. For open-seat elections, I have grouped the elections into four-year sets,

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[9]The newspaper reports were usually unofficial and often provided less than complete results. However, given the way I have categorized election results, it is unlikely that complete returns would shift an election from one category to another.

[10]In a handful of elections, the incumbent was defeated in the primary election, and the winner of the primary went on to face opposition in the general election. In those cases, I employed the results of the primary election in my analysis. In partisan election states where the nonincumbent loser in the general election had run in a contested primary election, I ignore the primary results involving the general election loser even if it was closer than the general election.

[11]Undoubtedly, there are other ways that this could be handled. However, given that relatively few states have unassigned, multiseat elections, it is exceedingly unlikely that adopting a different approach would have a significant impact on the results that I report in this article.

[12]In a number of the elections involving what I label "symbolically contested" general elections, there was a much closer primary election, and that primary election is used for the statistical analysis.

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[13]I include in this category elections where the ultimate winner was not the top vote-getter in a first round (usually a primary) but did win the runoff. Some readers might question my categorization, and prefer to limit "competitive" elections to those in which the winner received 55 percent or less of the vote. I have repeated the analysis using that categorization; the broad patterns that I report remain the same.

[14]In computing the percentage, I focus on the top two vote-getters; for example, if there were three candidates in a primary, receiving 45 percent, 40 percent, and 15 percent of the vote, respectively, I take the top two and recomputed the percentage focused on those top candidates. In this case, that percentage would be $45/85 = 52.9\%$. My rationale for this approach is that it is the closeness between the top two candidates that matters to the winner.

[15]One other minor issue concerns retention elections. In this article, I am not examining retention elections. There are two states (Utah and Montana) that have a system of nonpartisan elections with the provision that if an incumbent is not opposed, the election becomes a retention vote. I have treated such elections as unopposed nonpartisan elections.

[16]In computing all these percentages, I focus only on the top two vote-getters.

labeled with the year of the presidential election; hence, the data point for open-seat elections labeled 1948 captures the judicial elections that occurred from 1946 through 1949.

A. Elections Involving Incumbents

Figure 1 shows the overall pattern of contestation and competitiveness in state supreme court elections involving incumbents since 1946. To avoid clutter, Figure 1 and subsequent figures do not show the number of elections on which the percentages reflected in the figures are based; I include this information in Appendix A (Table A1). For some of the figures, the number of elections reflected in a data point is quite small, and those figures need to be treated with caution. One can read Figure 1 by looking at a particular year and estimating the percentage for that year. For example, for 1990, the figure shows that in[17]

- 7 percent of the elections, incumbents lost (dark gray area);
- 26 percent of the elections, incumbents won with less than 60 percent of the vote (medium gray area);
- 15 percent of the elections, incumbents won with 60–74 percent of the vote (white area);

Figure 1:   Contestation and competitiveness, all elections involving incumbents.

lost   50-59%   60-74%   75-99%   unchallenged
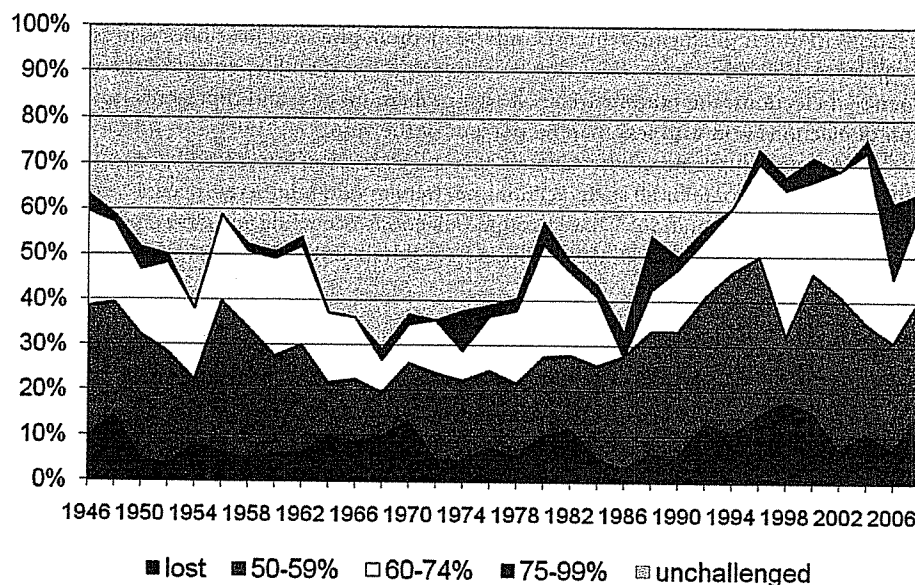
- 2 percent of the elections, incumbents won with 75 percent or more of the vote (black area); and
- 40 percent of the elections, incumbents were unopposed (light gray area).

As the figure shows, there is a lot of year-to-year variation; my interest is in patterns of change of a period of years.

A first point to note is that while Figure 1 shows some are shifts, they are generally relatively subtle as opposed to striking. There is no clear pattern in the likelihood of incumbents being defeated (the bottom-most area shown in dark gray), although arguably there is a slight increase starting around 1988. If one combines elections where incumbents lost with those that I have labeled as competitive (i.e., combine the bottom two areas shown in medium and dark gray), there does appear to be some pattern of increase starting in the 1970s. The graph shows a decrease in the proportion of incumbents who were unchallenged (the top-most area in the figure shown in light gray), but one also sees that there was a period when the likelihood of being unchallenged actually increased, and while the percent unchallenged in the current period is lower than in earlier periods, how much lower depends on what one chooses to use as a baseline.

One obvious question is whether the pattern of change is random or reflects systematic differences. To assess this question, I compared the eight years starting in 1946 (the "early period," $n = 293$) with the eight years ending in 2009 (the "late period," $n = 185$), and I collapsed the first two categories (elections where the incumbent lost and elections where the incumbent received less than 60 percent of the vote) and the last two categories (where the incumbent was unopposed or won with 75 percent or more of the vote).[18] A simple goodness-of-fit (GOF) chi-square test for all elections involving incumbents shows that the difference between the early and late periods is not statistically significant ($\chi^2 = 3.34$, df = 2, $p = 0.188$). One issue with the use of the simple chi-square test is that it assumes that all observations are statistically independent, something that is clearly untrue given that there are multiple elections from a given state. However, the impact of this kind of nonindependence tends to inflate the statistical significance of the tests because the practical effect of such dependence is that one has less information than the test assumes. Hence, when the chi square fails to achieve statistical significance, one can be confident that an adjustment of the clustering of observations within states would not change the conclusion from nonsignificance to statistically significant.[19]

What about the dip in the middle of the period? To assess whether this introduces a statistically significant difference, I created a 10-year "middle" period covering 1966 through 1975; the GOF chi-square test using three periods is statistically significant

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[17]A spreadsheet showing the detail for each of the figures is available at <https://netfiles.umn.edu/users/kritzer/www/research/JELS2010-JudicialElectionFigures.xlsx>.

[18]I also ran the chi-square tests without collapsing the five categories, and the results did not change, although the number of observations in the "incumbent defeated" and "75–99 percent" categories was very small for some of the later figures discussed in the following pages. Generally, where the cell frequencies are low, I also ran Fisher's exact test; the significance levels were virtually identical to what I found for the GOF chi-square test, and hence I do not report the significance levels for Fisher's exact test.

[19]I in fact ran the tests that adjusted for nonindependence for all the tests reported as nonsignificant and the adjusted tests were also nonsignificant.

($\chi^2 = 35.48$, df = 4, $p < 0.001$). To adjust for the nonindependence problem discussed in the previous paragraph, I used Stata to fit a simple multinomial logistic regression model with dummy variables for the late and middle periods (the early period served as the reference category), obtaining robust standard errors with clustering on state, and did a general linear hypothesis test of the four parameters. The resulting Wald test chi square is 25.86 (4 df, $p < 0.001$), confirming that the dip in competition during the period 1966–1975 reflected a statistically significant difference from the early and late period.

The middle period does involve a period of lowered competition, but exactly what accounts for that shift is unclear. One problem with interpreting this overall pattern is that over the 64-year period shown in Figure 1, there have been major changes in the distribution of types of elections. While in the 1940s, the majority of elections were (at least nominally) partisan, by the 2000s, a majority were nonpartisan. Also, as shown in Figure 2a, there has been a substantial decline in the number of elections, although this is largely due to a decline in the number of partisan elections (the bottom area shown in light gray in the figure); the number of nonpartisan elections (the top area show in dark gray in the figure) has remained relatively stable).[20] Figure 2a shows a small group of elections designated as "mixed" (the middle area shown in medium gray); these are elections in Ohio, Michigan, and Arizona where nominations are (or were—Arizona switched to the "merit" system in 1974) made by parties, through primaries in Ohio and Arizona, and at conventions in Michigan. However, while the parties do the nominating, the general election ballot does not show the party affiliation of the candidates. Because of the shifting distribution of election types as shown in Figure 2b (a decreasing proportion are partisan and an increasing proportion are nonpartisan), it is paramount to look separately at partisan and nonpartisan elections to begin to understand the nature of changes in competition and competitiveness that may have occurred. Figure 2b also shows a line tracing the percentage of state supreme court seats without an incumbent running; there appears to be a slight increase over time, with under 20 percent (18.2) up through 1970, rising to about 25 percent (25.4) after 1970.

Figure 3 replicates Figure 1 but for nonpartisan elections only, not including the mixed elections (which group more appropriately with partisan elections given the active and explicit role of parties in the process). Figure 3 shows some decline in the percentage of nonpartisan elections involving an unchallenged incumbent (the top-most area in the graph). However, the decline in unchallenged incumbents is not accompanied by an increase in competitive elections (or incumbent losses); the increase comes in the noncompetitive elections. The difference between the early and late periods does achieve statistical significance (GOF $\chi^2 = 8.48$, $p = 0.014$; Wald $\chi^2 = 7.27$, $p = 0.026$), although the pattern is not particularly strong.

[20]This stability does mask some changes. A number of states that employed nonpartisan elections in 1946 have since switched to "merit" systems for selecting and retaining members of the state supreme court. At the same time, about the same number of states that previously used partisan elections have switched to nonpartisan elections (some formerly partisan election states now use the "merit" system). Figure B1 in Appendix B shows the evolution of selection systems among those states that used partisan, mixed, or nonpartisan elections in 1946.

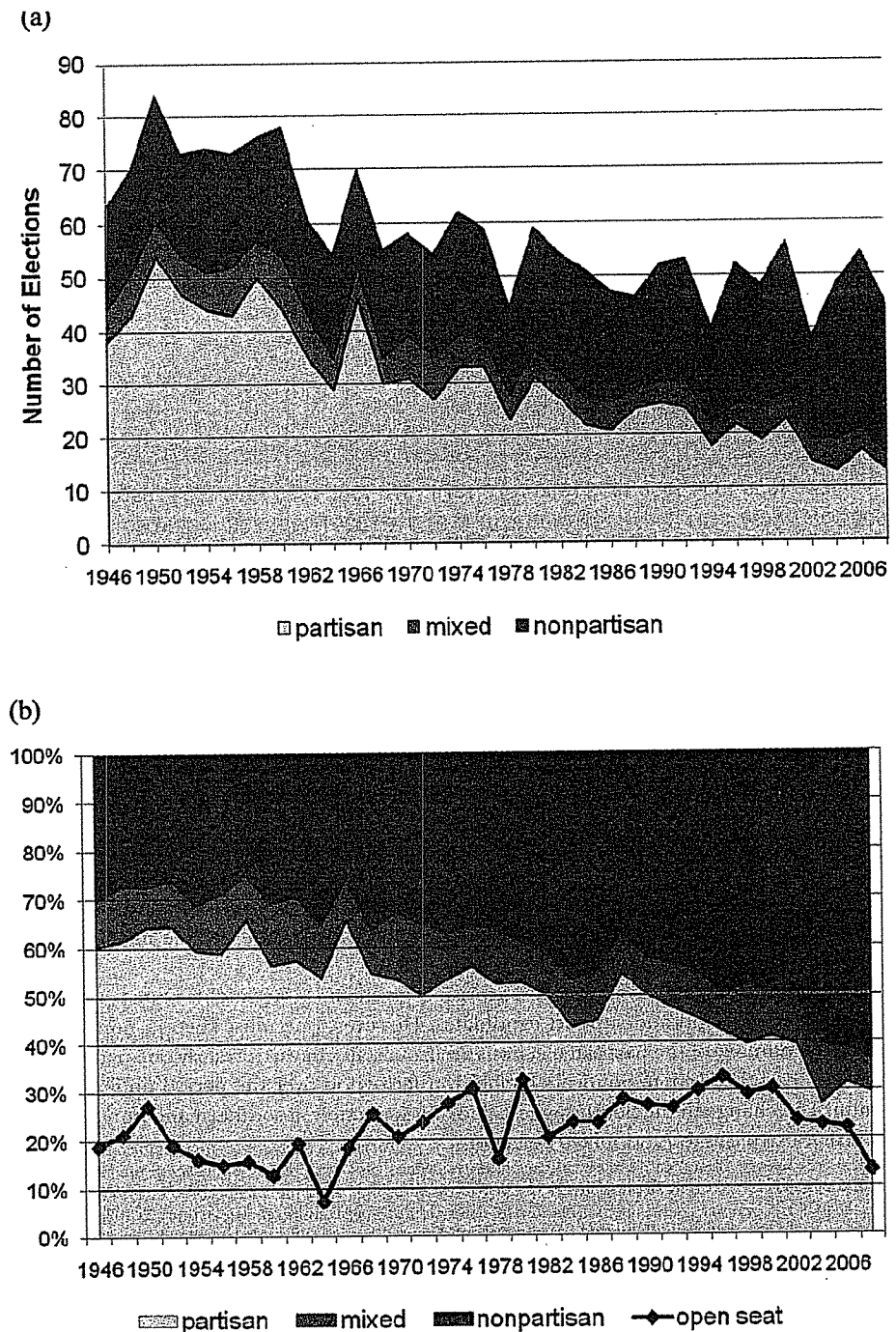*Figure 2:*　Distribution of election types.

(a)

□ partisan　▩ mixed　■ nonpartisan

(b)

▩ partisan　▩ mixed　■ nonpartisan　◆ open seat

Figure 3: Contestation and competitiveness, nonpartisan elections involving incumbents.

■ lost   ■ 50-59%   □ 60-74%   ■ 75-99%   ▨ unchallenged
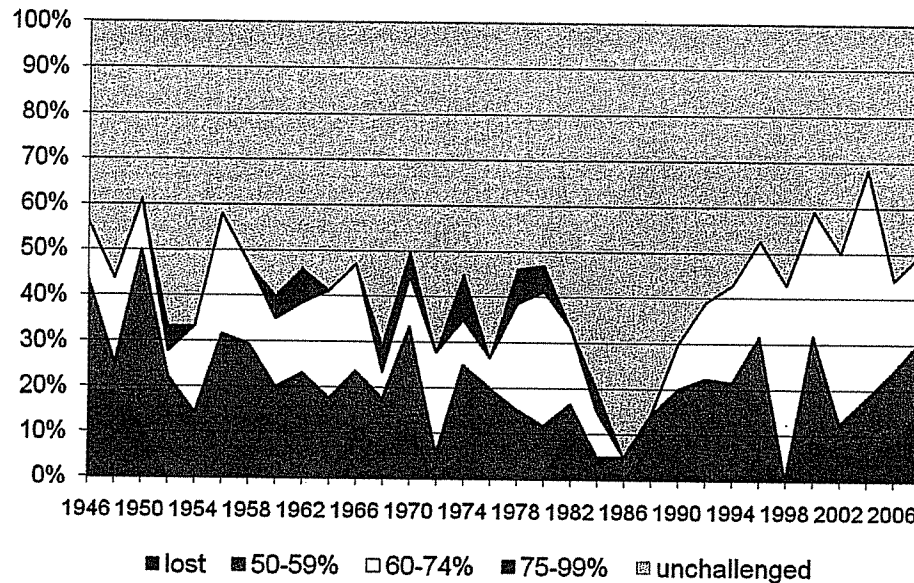
Figure 4: Contestation and competitiveness, partisan and mixed elections involving incumbents.

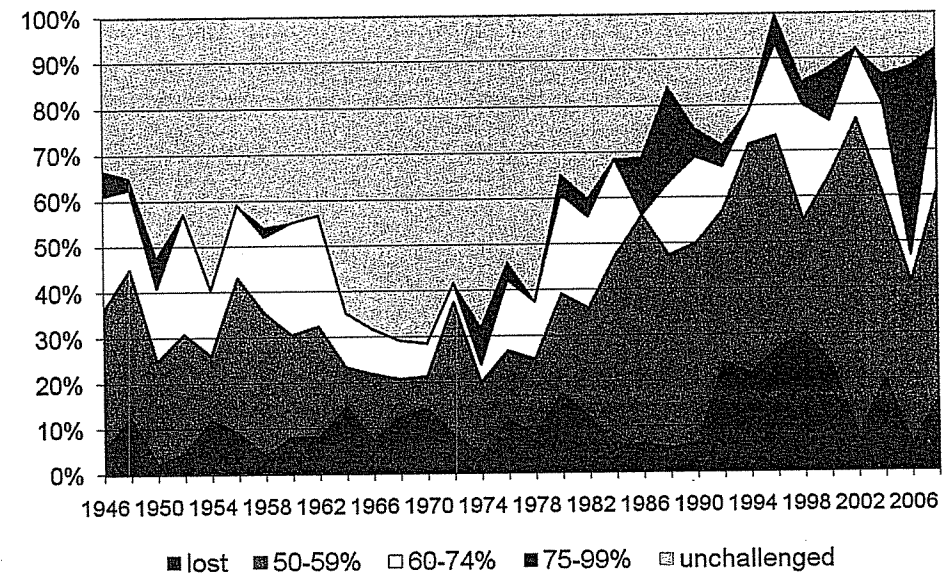■ lost   ■ 50-59%   □ 60-74%   ■ 75-99%   ▨ unchallenged

Figure 4 provides the same information for partisan and mixed elections. Here one sees initially an increase in unchallenged incumbents (the top, light gray area in the figure) into the 1970s followed by a sharp decline with a concomitant increase in competitive elections and incumbent losses (the bottom two areas in dark and medium gray), although competitiveness seems to have declined in the most recent years. Simple GOF chi-square tests, either comparing just early and late periods, or including the middle period 1966–1975,[21] achieve statistical significance ($\chi^2 = 11.02$, $p = 0.004$, comparing early and late; $\chi^2 = 41.86$, $p < 0.001$, comparing three periods), and the Wald test using multinomial logistic regression with clustering is statistically significant for the three-period model ($\chi^2 = 25.12$, $p < 0.001$), but does not quite achieve statistical significance for the two-period model ($\chi^2 = 5.58$, $p < 0.061$). This suggests that understanding the decline in the middle period is important.

Initially, this pattern may seem surprising given that one might expect parties to make an effort to find and support candidates. However, one must keep in mind that a substantial number of the partisan elections are from states in the formerly one-party South and there have been huge political changes in that region over the period under consideration. The change in the South suggests looking separately at southern and nonsouthern states that use partisan (and mixed) elections.

Figure 5 shows the pattern separately by region with the South defined as Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, Tennessee, and Texas.[22] For the South (Figure 5a), there are very substantial changes, both in the decline of unchallenged incumbents (the top area) and in the increase in competitive elections and incumbent losses (the bottom two areas). In the most recent years, there is an increase in symbolic challengers (shown in black just below the top area in light gray that represents the proportion of elections involving unchallenged incumbents).[23] All the statistical tests of differences, both the two- and three-period tests, and both the GOF and Wald tests are

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[21]If one were designating a middle period based purely on Figure 4, one would probably extend it back to start in 1964, and possibly extend it forward to 1979.

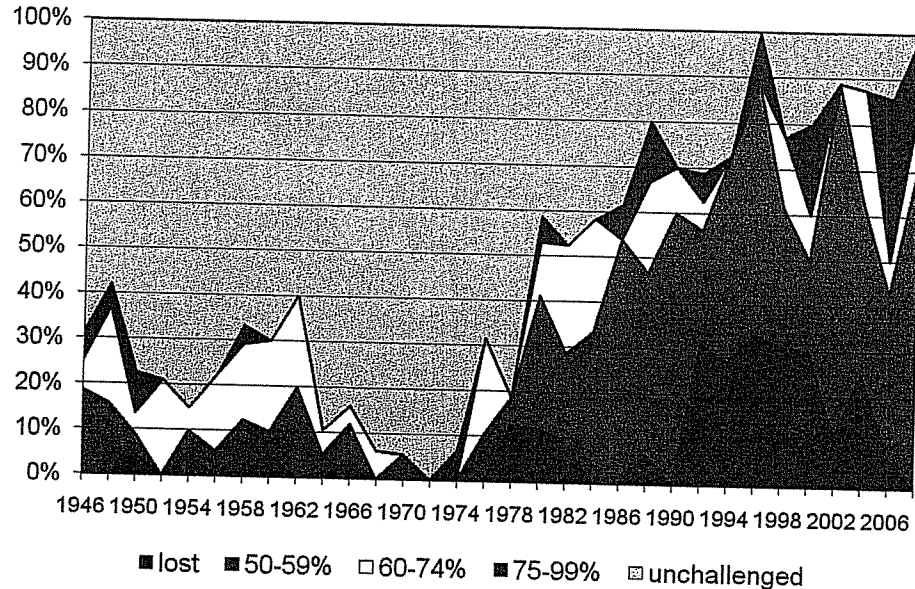[22]For purposes of these figures, I have grouped the border states of Kentucky and Oklahoma with the non-South states; grouping Kentucky (which switched to nonpartisan elections in 1976) and Oklahoma (which switched to the "merit" system starting in 1968) with the southern states makes little or no difference. Virginia and South Carolina are not listed above because they do not use partisan or nonpartisan elections for selecting justices for their supreme courts.

[23]In assessing change in the South, one also has to keep in mind that in the most recent years only Alabama, Louisiana, and Texas retain the partisan election system. Tennessee and Florida have shifted to "merit" systems (in 1994 and 1978, respectively; Florida used nonpartisan elections from 1972 to 1976), and Arkansas (2002), Georgia (1983), Mississippi (1996), and North Carolina (2004) all switched to nonpartisan elections. However, if I drop from Figure 5a the states that abandoned partisan elections prior to 2000 (Florida, Georgia, Mississippi, and Tennessee), the pattern remains unchanged.
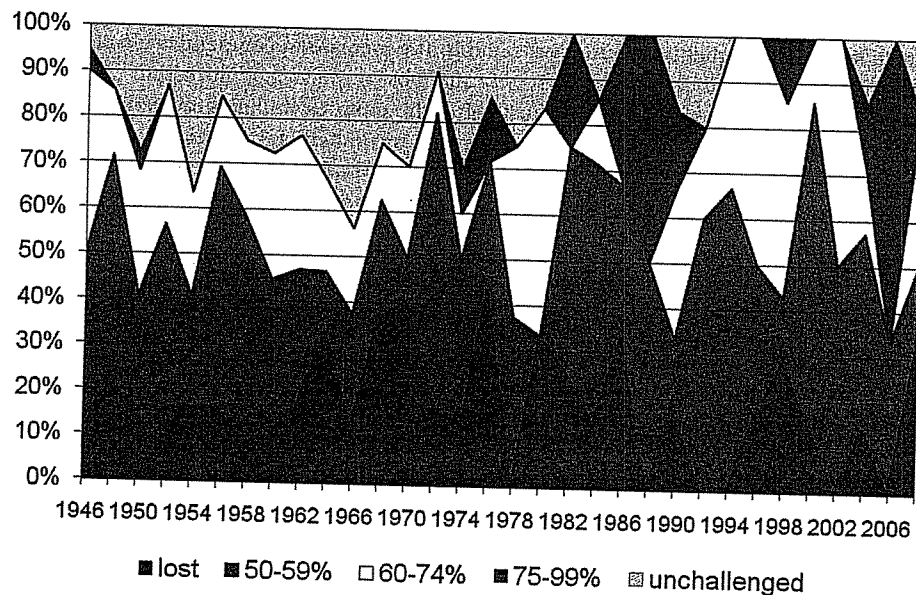
Figure 5: Contestation and competitiveness, partisan elections involving incumbents by region.

(a) Southern States (AL, AR, FL, GA, LA, MS, NC, TN, TX)

■ lost   ■ 50-59%   □ 60-74%   ■ 75-99%   ▨ unchallenged

(b) Non-South States

■ lost   ■ 50-59%   □ 60-74%   ■ 75-99%   ▨ unchallenged

strongly significant.[24] In contrast, in the non-South, there was a decrease in unchallenged incumbent elections (the top-most area) but it occurred prior to 1980; the pattern of competitive elections and incumbent losses shows no pattern of change during the period under consideration. Neither the two-period nor the three-period GOF chi squares approach statistical significance ($\chi^2 = 0.61$, $p = 0.738$; $\chi^2 = 5.40$, $p = 0.248$).[25]

How might one account for the pattern in the South? The initial decline in competition may have been in response to the perceived threat to the southern "way of life" created by legal challenges to segregation that started in the 1950s and peaked in the 1960s. Then, with the increase in competition coming as the South transitioned to a two-party system (see Black 2004:1002–07), elections to the state supreme courts started to become competitive. The marginal decline in the most recent years may be due to the overwhelming dominance of the Republican Party in many southern states. This is, of course, speculative, but it is consistent with the timing of both the drop in competition around the 1964 election between Lyndon Johnson and Barry Goldwater (which came soon after the passage of the landmark 1964 Civil Rights Act), in which southern states felt particularly challenged vis-à-vis maintaining segregation, and with the growth in competition starting around 1980 as the Republican Party began to gain substantial strength in state-level contests in the southern states with the election of Ronald Reagan.

To summarize the pattern of change for elections involving incumbents, the major change is concentrated in southern states with partisan elections. In nonpartisan elections and in partisan (and mixed) elections outside the South, there have been at most relatively modest shifts, largely a decline in the number of uncontested elections. However, that decline has not translated into an increase in competitive elections.

B. *Open-Seat Elections*

As shown in Figure 2b, in most years, well under 30 percent of seats up for election did not have an incumbent seeking to retain his or her position; consequently, there are many fewer open-seat elections for state supreme courts than there are elections involving incumbents. In part, this is the normal pattern of incumbents seeking reelection, but it also reflects the fact that in many states that ostensibly elect the members of the state supreme

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[24]The two- and three-period GOF chi squares are 35.76 and 76.75, respectively; the corresponding Wald chi squares from multinomial logistic regressions with clustering by state are 16.63 and 40.78 (for all four, $p < 0.001$).

[25]Two questions that might be raised about the pattern in Figure 5a are (1) whether it is driven by changes in which states in the South employed partisan elections, and (2) whether it was driven by one or two states. As for the first question, all the states were present for the first two periods, and hence the drop during the middle period does not reflect a change in the states represented in Figure 5a. Arkansas, Florida, Georgia, Mississippi, and Tennessee abandoned partisan elections before the start of the late period; however, restricting the analysis to the remaining states (Alabama, Louisiana, North Carolina, and Texas) produces the same pattern, and the pattern shows statistically significant shifts over time (GOF $\chi^2 = 49.77$, $p < 0.001$). As for the second question, in the late period, Texas provides 26 of the 38 elections, so an obvious question is whether Texas is driving the results. Separate tabulations for Texas and for the other states as a group (Alabama, Louisiana, and North Carolina) show that the pattern holds for both Texas and the other states, and that the pattern of change is statistically significant for both (GOF $\chi^2 = 29.06$, $p < 0.001$ for Texas and GOF $\chi^2 = 27.50$, $p < 0.001$ for the other three states). Note that the sample sizes here were too small to apply the multinomial logistic regression analysis.

Figure 6: Contestation and competitiveness, all open-seat elections, 1946–2009.

■ 50-59%   □ 60-74%   ■ 75-99%   ◻ unchallenged
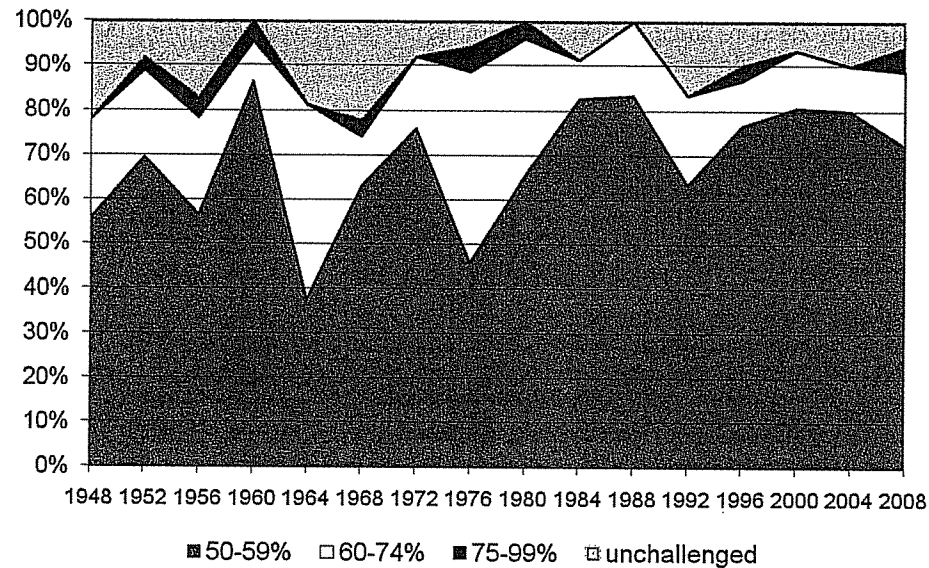
court, midterm vacancies are filled through an appointment process. Cutting the other way are three states (Illinois, New Mexico, and Pennsylvania) that rely on retention elections to retain incumbents, but require a partisan election when a vacancy occurs.[26] During the period in question there were 1,449 elections (seats) involving incumbents, but only 414 open-seat elections, including three in which the incumbent had sought reelection but was not renominated at party nominating conventions.[27] Because of the much smaller number of elections, I have grouped elections into four-year intervals in the following figures; the year shown in the figure includes the two years prior plus the one year after (e.g., 1948 covers elections from 1946 through 1949). Also, because there are by definition no incumbent defeats in such elections, the bottom-most area represents what I have labeled competitive elections (and is still shown in medium gray).

Figure 6 shows the pattern for all open-seat elections. There is a slight increase in the likelihood of the winner receiving less than 60 percent of the vote (the bottom-most area shown in the figure), with that increase coming from both uncontested elections and

noncompetitive elections. There may be a slight dip in the proportion of elections that were competitive during the 1960s. However, comparing the early and late periods does not reveal any statistically significant change (GOF $\chi^2 = 1.80$, $p = 0.406$). As before, we need to look separately at nonpartisan and partisan plus mixed elections.

Figure 7 shows separate patterns for the two broad types of elections. Although the patterns appear to differ, we need to treat those differences with caution because GOF chi-square tests for examining change over time for each of these two subsets generally fail to achieve statistical significance. For nonpartisan elections, while the percentage of elections that are competitive is greater than during the earliest years shown, the period of highest competitiveness appears to be in the middle of the period (about 1970 to the mid, or perhaps early, 1980s). In contrast, in partisan and mixed states, the most recent years show the highest levels of competition and there is a period of lesser competition in the middle years (about 1960 to around 1980).[28] Exactly why the patterns for the two broad types of elections may differ is not obvious, although some of what is going on here could again reflect differences due to partisan elections in the South.

Figure 8 shows partisan and mixed elections separately for southern and nonsouthern states. In both regions, one sees an increase in competitiveness over time. For the nonsouthern states, this increase occurred in the 1980s. In the South, similar to what occurred in elections with incumbents, there was a decline in competitive elections in the 1960s and 1970s compared to the level in the years examined before 1960, with an increase starting in the late 1970s or early 1980s.[29] For the non-South, there is no statistically significant pattern of change. Importantly, every one of the 153 open-seat partisan or mixed elections outside the South during the period was contested. In contrast, 19 of the 142 partisan open-seat elections in the South went uncontested in both primary and general elections.
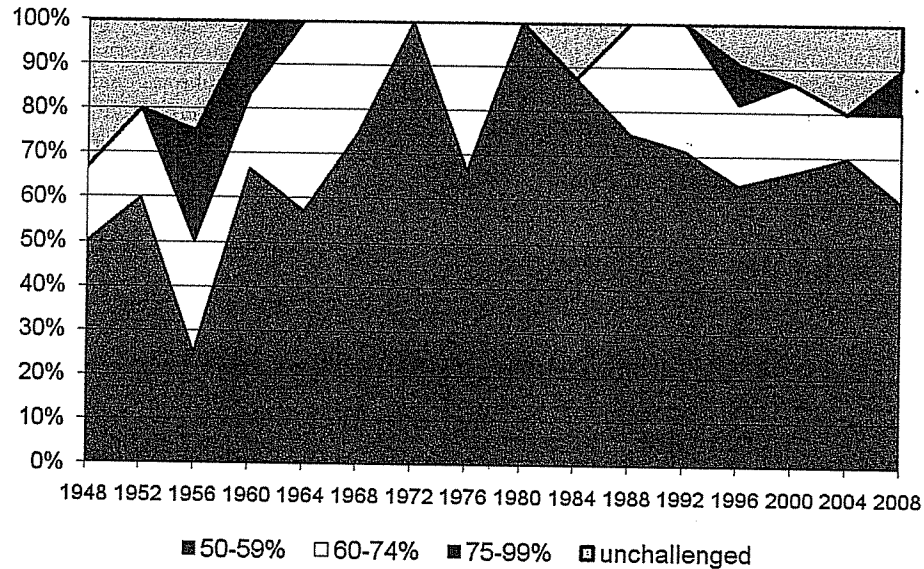
As I noted previously, I believe that the best explanation for what has transpired in the South, and hence the bulk of the change that has occurred in the competitiveness of state supreme court elections, reflects the shift of the southern states from essentially noncompetitive one-party political systems to two-party systems. There is no clear way to "prove" that this is the explanation, but the timing of the shift in patterns in the South seems more consistent with this explanation than the alternatives, and it explains why the bulk of the change occurred in southern states. Figure 9 provides a bit more evidence in support of this explanation. The figure shows two trend lines for partisan elections in the southern states. The gray line (with black markers) shows the percentage of elections that were competitive by my definition (the incumbent lost or the winner obtained less than 60 percent of the vote). The black line (with gray markers) shows the percentage of contested

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[26]In some states requiring such elections, the governor can appoint someone to fill the seat until the election. In a number of cases, the governor appointed someone who pledged not to run in the election, which ensured an open-seat election. In others, the appointee ran for the seat, and I group those elections with elections involving an incumbent.

[27]One of the open-seat elections was a last-minute vacancy that was conducted entirely as a write-in election; it is omitted from the analysis. In two of the elections where incumbents lost at party conventions (both in Tennessee), the party's nominee was unopposed in the subsequent election; those two elections are also omitted from the analysis.

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[28]A GOF chi-square test examining the proportion of partisan and mixed elections that are competitive (the winner received less than 60 percent of the vote) versus noncompetitive or unopposed does achieve statistical significance ($\chi^2 = 6.98$, $p = 0.031$). A Wald test based on a dichotomous logistic regression with clustering on state also achieves statistical significance ($\chi^2 = 9.21$, $p = 0.010$).

[29]Both GOF and Wald chi squares (from a dichotomous logistic regression with clustering on state) achieve statistical significance (GOF $\chi^2 = 8.33$, $p = 0.016$; Wald $\chi^2 = 6.87$, $p = 0.032$).

Figure 7: Contestation and competitiveness, open-seat elections controlling for election type.

(a) Nonpartisan Elections

■ 50-59%   □ 60-74%   ■ 75-99%   ▣ unchallenged

(b) Partisan and Mixed Electons
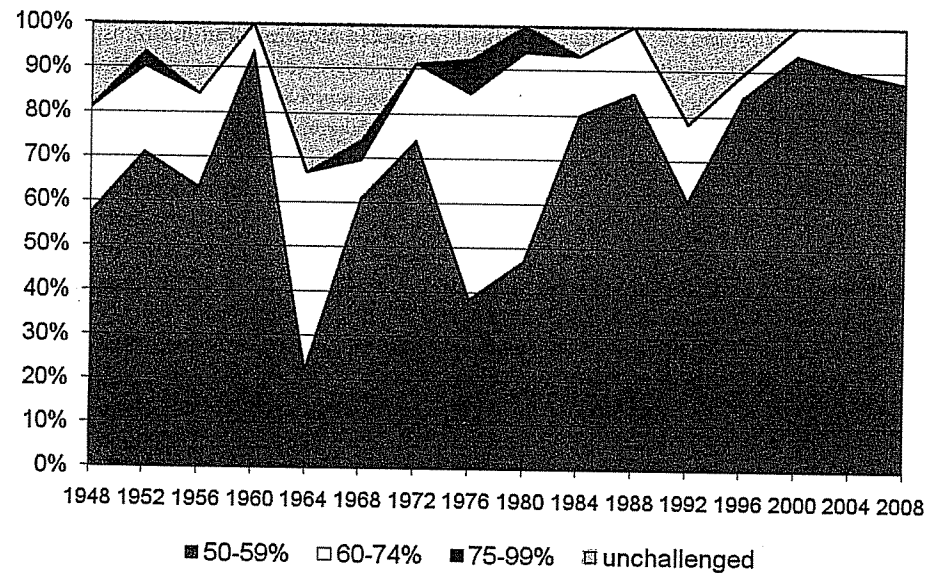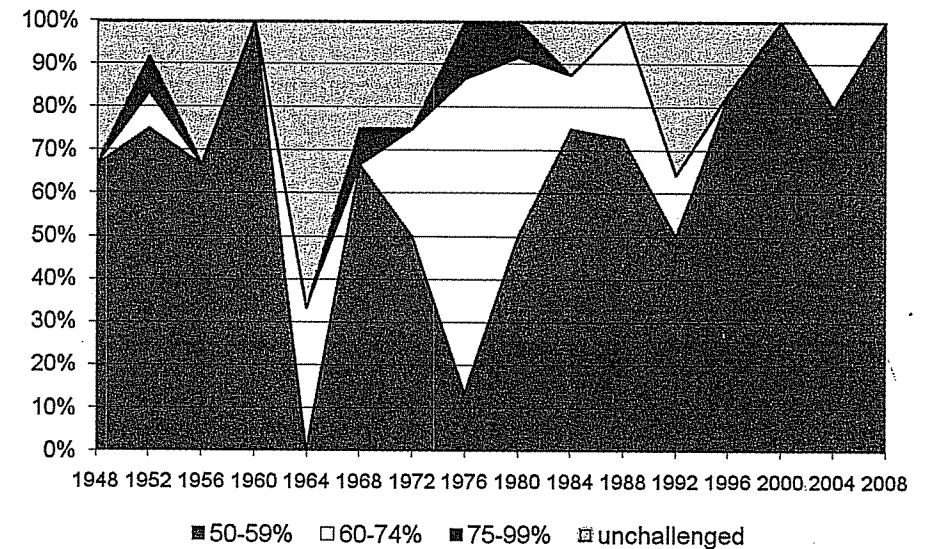

■ 50-59%   □ 60-74%   ■ 75-99%   ▣ unchallenged

Figure 8: Contestation and competitiveness, partisan and mixed open-seat elections controlling for region.
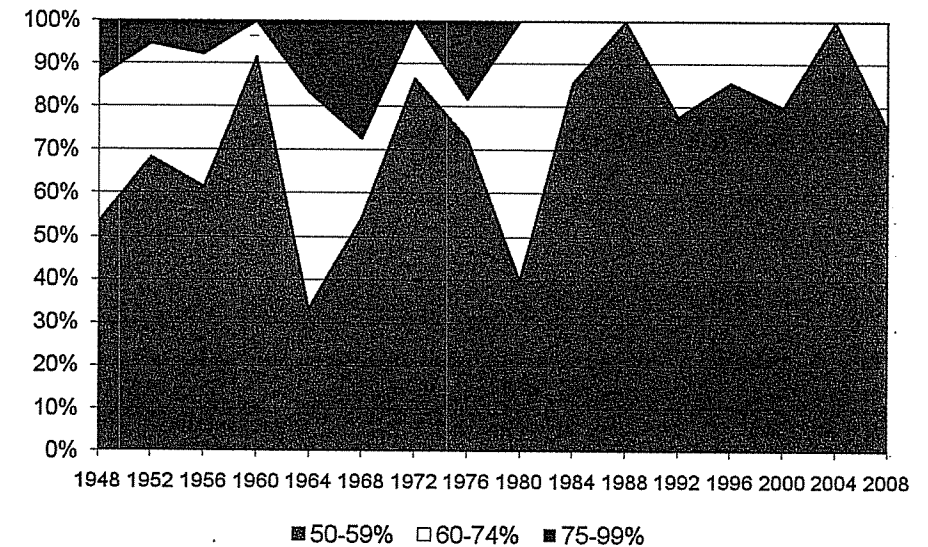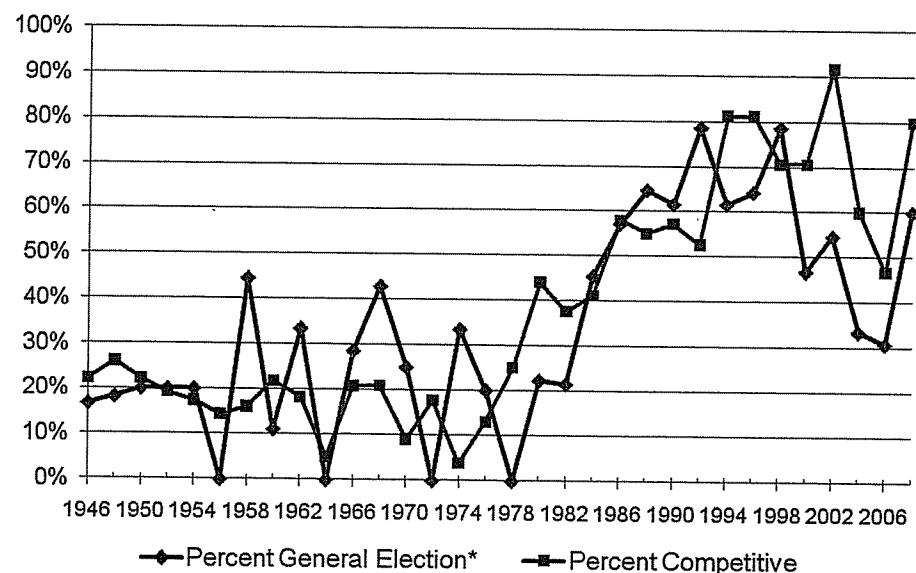
(a) South

■ 50-59%   □ 60-74%   ■ 75-99%   ▣ unchallenged

(b) Non-South

■ 50-59%   □ 60-74%   ■ 75-99%

Figure 9: Competitiveness and contested partisan general elections in southern states.

—♦—Percent General Election*   —■—Percent Competitive

* Percent of contested elections occurring as a general election rather than as a primary election.

elections in which the contest was in the general election (i.e., there was a contested general election and it was closer than the primary election won by the incumbent or eventual winner). The similarity of the two lines is quite strong, and the two series correlate at 0.75. I interpret this strong relationship as indicative that competitiveness in this set of elections was strongly related to two-party competition.

Undoubtedly, there was some increase in expenditures and campaign activity with the emergence of the Republican Party in the South. However, I would argue that those increases were in response to the increased competition rather than being a cause of increased competition. The recent debate has been over whether the sharp increases in expenditures and advertising seen during the last decade have changed the nature of competition in state supreme court elections. In other words, I am arguing that the changes in the South started around 1980 and were internal to the party system rather than reflecting the role of external players such as interest groups that provide campaign funds and run advertisements.[30] As the Republican Party became more successful in the South,

various external actors increased their activities. Importantly, while such actors also increased their involvement in both partisan and nonpartisan elections outside the South, one does not see any evidence that their involvement has led to significant increases in the amount of competition.

IV. Summary and Conclusion

Overall, it is accurate to say that state supreme court elections have become more highly competitive, both in terms of more challenges to incumbents and in terms of a higher proportion of elections falling in what I have defined as the competitive range (including incumbents being defeated). However, that broad pattern hides important variations, and the analysis shows that there are differences if one looks separately at nonpartisan states, partisan and mixed states outside the South, and partisan states in the South.

The strongest pattern revealed by this analysis, other than the marked shift away from using partisan elections, is that much of the change that has occurred has been concentrated in southern states that hold partisan elections for their state supreme courts. In fact, for elections involving incumbents, virtually all the change that has occurred has been in those states; whatever change there has been in contestation and competitiveness in nonpartisan states and in nonsouthern partisan states is minimal at best. For open-seat elections, there is a pattern of increased competition in partisan and mixed elections in both the South and the non-South, although the specific pattern differs slightly; for nonpartisan states, there has actually been, if anything, a decline in the competitiveness of open-seat elections over the last 20 years or so.

Over the last decade, a variety of commentators have argued that judicial elections, particularly those for seats on state supreme courts, have changed as a result of the inflow of substantial sums of money for advertising, either by the candidates' campaigns or as independent expenditures. One can certainly point to specific elections where such advertising appears to have made a difference. A good example is the defeat in April 2008 of Justice Louis Butler, the first African American to serve on the Wisconsin Supreme Court (American Judicature Society 2010:224; Sample et al. 2010:32–33) by state trial judge Michael Gableman. Gableman's campaign ran an advertisement described by the President of the State Bar of Wisconsin as "disgraceful, deliberately misleading [which was] cast in an offensive, race-baiting style to negatively attack Justice Butler's role as a former public defender [by] falsely suggest[ing] that a dangerous criminal was released as a result of Justice Butler's work … " (Basting 2008).[31] This was undoubtedly a nasty election; 53 percent of all the airings of attack advertisements run during 2008 state supreme court

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[30]According to data assembled by the Brennan Center, state supreme court candidates collected about $6 million for the 1989–1990 biennium, and about $9.5 for the 1991–1992 biennium. The next three biennia candidates raised about $21–27 million. The presidential election biennia of 1999–2000, 2003–2004, and 2007–2008 saw amounts around $45 million with the two off-year biennia with amounts on the order of $30 million (Sample et al. 2010:5). Thus, the rise in compeitiveness in the South predates the sharp increases in fundraising (and expenditures) that began to take off in the mid-1990s.

[31]The state judicial commission brought charges against Justice Gableman for actions during his campaign, but ultimately dropped those charges (in July 2010) after the six other members of the Wisconsin Supreme Court split 3–3 on whether his behavior was a violation and how to proceed further with the case. Previously, a three-judge panel had recommended dismissing the case on the grounds that the advertisement had not contained false information (see Patrick Marley, "With Supreme Court Deadlocked, Commission Drops Gableman Ethics Case," *Milwaukee Journal Sentinel*, <http://www.jsonline.com/news/statepolitics/98037184.html>, posted July 8, 2010).

elections were aired in Wisconsin, and 59 percent of the airings of ads during that election were attack ads.[32] However, the larger question is how have the changes to campaigning and expenditures that have occurred affected the election process, and particularly the patterns in election outcomes?[33]

Overall, the analysis presented here does not support the proposition that patterns in *aggregate* election results have changed markedly due to any changes over the last 15–20 years in how state supreme court campaigns are conducted. The major change that one sees in looking over the last 64 years reflects the shift of the South from one-party Democratic to competitive and, in some states, to what in the most recent years has been clear Republican dominance. The remaining changes regarding aggregate election results are relatively small. Thus, leaving aside the broad changes that have occurred in the southern states, the picture that emerges from this analysis is, perhaps surprisingly, one of relative stability.

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[32]These figures were compiled from information in the 2010 Brennan Center report (Sample et al. 2010:86–97).

[33]This is by no means the only question one can ask about increasing prevalence of high-volume television advertising in judicial election campaigns. Another issue, which I do not address, is on the public's view of the courts (see Gibson 2009).