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Recommended Citation

Jason J. Czarnezki, Voting and Electoral Politics in the Wisconsin Supreme Court, 87 Marq. L. Rev. 323 (2003), <http://digitalcommons.pace.edu/lawfaculty/899/>.

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VOTING AND ELECTORAL POLITICS IN THE WISCONSIN SUPREME COURT

JASON J. CZARNEZKI*

Is there any such reason for submitting the claims of two candidates for a judgeship to a popular vote? Do we expect or desire that our votes should influence the decisions of a judge?

—From the City of Madison's *Wisconsin Argus*, May 4, 1847.¹

I. INTRODUCTION

In determining the selection method for state supreme court justices, states may attempt to balance the conflicting ideals of judicial independence and accountability.² The debate over which judicial selection process best achieves this balance continuously has been waged.³ Unlike the federal process, which in order to maximize judicial independence contains no electoral mechanisms, the Wisconsin Constitution requires its judiciary to compete for citizen support in nonpartisan elections.⁴ Do these elections undermine judicial independence by affecting the ways justices vote within their institution?⁵ This very question was asked during the Wisconsin's founding 150 years ago, but lingers today without an answer.⁶ The answer,

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1. *Constitutional Principles: V The Judiciary*, WIS. ARGUS (Madison, WI), June 22, 1847 [hereinafter *Constitutional Principles*], reprinted in *THE ATTAINMENT OF STATEHOOD* 34 (Milo M. Quaife ed., 1928).

2. See Shirley Abrahamson, *Speech: The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 977 (2001) (observing that judicial elections have been criticized as being at odds with the concept of judicial independence). For a discussion of judicial selection methods, see Peter D. Webster, *Selection and Retention Methods: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1 (1995).

3. Abrahamson, *supra* note 2, at 973 (noting that the subject of how to select judges is now in its fourth century of debate, and that discussion about the selection of state court judges is often found in academia and the media).

4. See WIS. CONST. art. VII, § 4.

5. This question must be studied empirically to determine if selection procedures produce a different type of judiciary. See Abrahamson, *supra* note 2, at 980 (stating that empirical studies have not sufficiently demonstrated that a certain election method produces a different kind of judiciary).

6. See *infra* Part II.

however, may cause states to re-evaluate their judicial selection methods depending on whether selection methods affect judicial voting in individual cases and may help scholars better understand the forces that exert pressure on judicial decision-making.⁷

This Article examines criminal cases decided by the Wisconsin Supreme Court over a fifteen-year period in an effort to discern whether judicial elections undercut judicial independence by affecting the ways justices vote. Wisconsin was chosen for this study because the state's mix of appointed and elected judges allows a researcher to control for different judicial selection systems.⁸ Specifically, this Article questions whether voting patterns may be affected by a justice's proximity to judicial elections, election margins, and whether a justice was appointed or elected in the initial term, since the governor may appoint a justice to fill a vacancy on the court.

In Part II, this Article provides a historical overview of how judicial selection methods have been chosen in the United States and Wisconsin. Part III examines the literature on responsiveness to the electorate, which forms the basis for the hypotheses regarding the voting behaviors of Wisconsin Supreme Court justices in Part IV. Part V explains the data and research methodology for this study, while Part VI analyzes judicial voting patterns of justices of the Wisconsin Supreme Court and asks whether voting patterns may be affected by proximity to elections, election margins, and appointment versus election in the initial term. Part VII concludes that being appointed (versus elected) in the initial term significantly correlates with a justice's voting for a defendant's claim in that initial term. In contrast, looking at the overall Wisconsin Supreme Court, proximity to election has no significant impact on judicial voting against a defendant's legal claim. However, individual justices do display changes in voting patterns as they near re-election. Part VIII suggests areas for further analysis and future research.

II. A HISTORICAL ACCOUNT OF JUDICIAL SELECTION

The political question of the effects of election on judicial decision-

7. For example, in addition to electoral pressures, judges face the pressures of their personal policy preferences, legal rules, and other factors when making a decision. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* (2002); Jason J. Czarnecki & William K. Ford, *The Phantom Philosophy?* (2003) (working paper on file with authors & Marquette Law Review).

8. Wisconsin Supreme Court vacancies are filled by gubernatorial appointment, and the appointee is required to stand for election to a full term the following spring. However, only one supreme court judicial election can occur each year. As a result, a number of years may pass before an appointed justice must run in an election. See WIS. CONST. art. VII, § 4, cl. 1; see also *infra* note 17.

making has been debated in Wisconsin since its founding. Although the question was first raised in 1847, it has been left unanswered for over 150 years. The framers of the Wisconsin Constitution, in deciding on an elected judiciary, wanted to increase public participation and spark the state's progressive tradition.⁹ The constitutional drafters felt such elections, however, would not hamper judicial independence because judges would be elected by diverse citizens from the state at large.¹⁰

The framers of the U.S. Constitution were not as optimistic. They selected an appointment process for the federal judiciary to maximize judicial independence because the "independence of the [j]udges may be an essential safeguard against the effects of occasional ill humors in the society."¹¹ The framers of the U.S. Constitution were well aware of the dangers of an elected federal judiciary. If popular elections were used, "there would be too great a disposition to consult popularity," and "[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence."¹² Judicial appointment and permanency in office could help ensure the court would be firm¹³ and make decisions solely based on the Constitution and the laws.¹⁴ Election arguably "poison[s] the fountains of justice," as judges need not have electoral face-offs decided by citizens who cannot be anything but deficient in their knowledge of law.¹⁵

In the 1800s, states began to move toward having elected judiciaries rather than relying on appointments by governors or legislatures.¹⁶ The Wisconsin Constitution, preferring direct accountability, provides that the justices of the supreme court be elected to ten-year terms through a state-wide election with only one justice being elected in any one year.¹⁷ The Wisconsin

9. See William R. Moser, *Populism, A Wisconsin Heritage: Its Effect on Judicial Accountability in the State*, 66 MARQ. L. REV. 1, 54-55 (1982).

10. See *infra* text accompanying note 24.

11. THE FEDERALIST No. 78 (Alexander Hamilton).

12. *Id.*

13. THE FEDERALIST Nos. 78, 79 (Alexander Hamilton).

14. THE FEDERALIST No. 78 (Alexander Hamilton).

15. THE FEDERALIST No. 81 (Alexander Hamilton).

16. CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 4 (1998) (noting that over one-half of the twenty-nine states in 1849 used popular elections for judges, and every later state admitted to the Union adopted some form of popular election).

17. WIS. CONST. art. VII, § 4, cl. 1 reads, "The supreme court shall have 7 members who shall be known as justices of the supreme court. Justices shall be elected for 10-year terms of office commencing with the August 1 next succeeding election. Only one justice may be elected in any year." This section of the Wisconsin Constitution has been amended four times (in April 1997, April 1903, April 1889, and November 1877) since its ratification on March 13, 1848 with changes in the length of the term and the number of justices on the court. However, since 1903, justices have been

Constitutional Convention, convened in 1847 to develop a state constitution, engaged in heated debate on the convention floor, in the judiciary committee, and in popular discussion when deciding whether the justices of the supreme court should be appointed by the legislature, appointed by the governor, or elected by the citizens.

Much of the popular press in Wisconsin preferred a system of appointment for the state judiciary, as many thought citizens had a distinct voice via their elected officials, and the governor or senate was best situated to secure judicial selections.¹⁸ The popular press saw no need to submit the claims of two judgeship candidates to a popular vote asking, “Do we expect or desire that our votes should influence the decisions of a judge?”¹⁹

[I]t appears to us that to claim that the popular vote will have no influence upon the official acts of the judge is to admit that nothing can be gained by the elective mode in the only point where improvement is contemplated, leaving the evident advantages which attach to the appointive mode for securing the best selections, with nothing to counterbalance them.²⁰

Yet, an “entirely new system” of choosing judges won out in Wisconsin—the elective system.²¹

The elective system was an experiment that would help define Wisconsin’s populist and progressive tradition. The elective system was intended to minimize the bias of judges appointed by the legislature or governor.²² It was thought that judicial elections force judges to maintain a sense of responsibility to the people.²³ Supporters of the elective system dismissed the concerns regarding judicial politicization and a loss of independence.

[A] sufficient supreme court, chosen from the state at large, who would necessarily have no party ends to subserve in any particular district, who would have no political views or interests in common

subject to ten-year terms on a seven member court, and the Constitution has always provided for judicial elections since Wisconsin became a state in 1848.

18. *Constitutional Principles*, *supra* note 1, at 34.

19. *Id.*

20. *Id.* at 35.

21. *Journal and Debates of the Wisconsin State Constitutional Convention*, Jan. 20, 1948, reprinted in *THE ATTAINMENT OF STATEHOOD*, *supra* note 1, at 652.

22. Appointment by the legislature or governor were alternatives discussed by the judiciary committee at the Constitutional Convention. *See id.* at 214.

23. *Id.* at 640.

with any particular district or portion of the state, how certain, how sure, would be the remedy to the great evil which so many see in the future operation of the election system!²⁴

According to the *Prairie Du Chien Patriot*, the election of judges esteems “a decided improvement upon the formation of the judiciary and an increased confidence in the acts of the people.”²⁵ Judicial election can certainly increase accountability and public participation.

III. JUDICIAL RESPONSIVENESS AND THE ELECTORATE

Do justices, as they near re-election, decide cases on the basis of what their constituents prefer? The answer remains unclear. Much literature discusses the conflict between electoral accountability and judicial independence.²⁶ Early studies and past empirical research on the effects of judicial selection processes consistently found that methods of judicial recruitment did not affect judicial outcomes.²⁷ Recent studies, however, indicate that this conclusion is mistaken and that the motivations for strategic behavior among members of the judiciary are more complex than previously determined.²⁸ Thus, the issue of whether certain judicial selection methods

24. *Id.* at 642.

25. *Virtues on the Constitution*, *PATRIOT* (Prairie Du Chien, Wis.), June 22, 1847, reprinted in *THE ATTAINMENT OF STATEHOOD*, *supra* note 1, at 114.

26. See, e.g., *JUDICIAL REFORM IN THE STATES* (Anthony Champagne & Judith Haydel eds., 1993) (looking at whether interest groups play a key role in political struggles over judicial selection procedures); *SHELDON & MAULE*, *supra* note 16 (focusing on how various judicial recruitment processes influence the resolution of the judicial dilemma of balancing the conflicting demands of objectivity in dispute resolution and accountability to the public in making policy); John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 *JUDICATURE* 81 (1986) (addressing, in case study by California Chief Justice Rose Bird, the conflict between judicial independence and accountability as related to her upcoming election); William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 *JUDICATURE* 338 (1987) (finding, in a study of trial courts in ten states, that three in four voters tend to retain a judge); Nicholas P. Lovrich, Jr. & Charles H. Sheldon, *Voters in Contested, Nonpartisan Judicial Elections: A Responsible Electorate or a Problematic Public?*, 36 *W. POL. Q.* 241 (1983) (questioning how to enhance public knowledgeability in judicial elections and examining how knowledgeability can create conditions that can balance judicial independence and democratic accountability).

27. See, e.g., Burton M. Atkins & Henry R. Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 *AM. POL. Q.* 427 (1974) (finding that selection methods do not affect whether state supreme courts rule in favor of particular types of litigants).

28. See, e.g., DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL SELECTION METHOD ON STATE SUPREME COURT POLICY* 130 (1995) (concluding that the data show “that the conventional wisdom of the 1980s among professional political scientists that selection method has no meaningful impact on judicial policy is mistaken”); Melissa Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 *J. POLITICS* 427, 428 (1992) (arguing that “state supreme court justices act strategically to minimize electoral opposition,” and that “constituency influence in state supreme

promote an independent judiciary remains unresolved.

Elections may undercut judicial independence,²⁹ and elected judges face a majoritarian dilemma—whether they can both be accountable to the electing majority and protective of minority interests.³⁰ Judicial independence is the ability to cast a judicial vote free from the opinions of the electorate, in a fair and impartial manner according to facts and law.³¹ Factors such as levels of voter information, media coverage, and the fear of losing an election may allow justices to vote freely and independently only until the period preceding their election.³² However, previous literature and studies on this issue are far from dispositive on this issue.

A. Responsiveness to the Electorate

Literature on legislative institutions lends strong support to the proposition that the electoral process induces strategic behavior,³³ suggesting that judges decide cases to please voters. Research on the U.S. Congress indicates that legislators vote with perceived constituent preferences on visible issues.³⁴ Studies indicate that the trend of public officials is to become

courts is enhanced by competitive electoral conditions and experience with electoral politics”).

29. Compare John D. Fabian, Note, *The Paradox of Elected Judges: Tensions in the American Judicial System*, 15 GEO. J. LEGAL ETHICS 155, 155 (2001) (asserting that a system of elected judges produces outcomes at odds with the goal of maintaining an independent judiciary that avoids the appearance of impropriety), with Abrahamson, *supra* note 2, at 977 (favoring election of judges because “the elective system can be an educational experience for both the judges and the electorate,” and elections increase citizen understanding of the judiciary and actually promote judicial independence).

30. Abrahamson, *supra* note 2, at 978 (observing that “[e]lected judges pose the majoritarian dilemma: In a government committed to constitutionalism and the protection of rights, how can judges accountable to the electorate, accountable to the majority, safeguard the minority?”). Though, it must be stated that appointed federal judges face a counter-majoritarian dilemma. *Id.* at 979 (asking how, in a democracy, can non-elected federal judges justify overturning legislation adopted by popularly elected officials representing the people’s will).

31. See Abrahamson, *Remarks Before the ABA Commission on Separation of Powers and Judicial Independence*, Washington D.C. (Dec. 13, 1996), reprinted in 12 ST. JOHN’S J. LEGAL COMMENT. 69, 70 (1996).

32. Judges may not be free to do so in the periods directly preceding elections. See Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiative and the Threat of Electoral Reprisal*, 65 U. COLO. L. REV. 733, 738 (1994) (discussing survey results that found that a high percentage of judges felt that “retention elections exert a major influence on their behavior”); see also Wainwright v. Witt, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting) (“When . . . judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous.”).

33. See *infra* notes 34-41 and accompanying text.

34. See, e.g., Larry M. Bartels, *Constituency Opinion and Congressional Policy Making: The Reagan Defense Buildup*, 85 AM. POL. SCI. REV. 457 (1991) (arguing that “[r]epresentatives’ votes on a series of defense budget roll calls in the first year of the Reagan administration’s Pentagon buildup are related to constituency opinions on defense spending during the 1980 election campaign”); Robert S. Erickson, *Constituency Opinion and Congressional Behavior: A*

more consistent with their constituencies on policy matters as re-election approaches.³⁵

One wonders if a parallel can be drawn to state supreme court justices. The tension between accountability and independence of elected judges can be measured and defined by the decisions of individual justices and court majorities.³⁶ Melissa Gann Hall argues that elected judges vote strategically to minimize electoral opposition.³⁷ “[T]o appease their constituencies, [state supreme court] justices who have views contrary to those of the voters and the court majority, and who face competitive electoral conditions will vote with the court majority instead of casting unpopular dissents on politically volatile issues.”³⁸ Daniel Pinello argues that elected judges react to public opinion, while gubernatorial appointed judges are free of this constraint.³⁹ But, Pinello lumps together non-partisan elections with partisan elections in his data. Thus, voting patterns, and his results, may be affected by partisan politics.

However, strategic voting by judges may be unlikely considering evidence

Reexamination of the Miller-Stokes Representation Data, 22 AM. J. POL. SCI., 511 (1978) (suggesting earlier research underestimated the correlation between constituency opinion and congressional behavior); Warren E. Miller & Donald Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45 (1963) (arguing that local constituencies have a measure of control over their representatives).

35. See, e.g., Richard Eiling, *Ideological Change in the U.S. Senate: Time and Electoral Responsiveness*, 7 LEGIS. STUDIES Q. 75 (1982) (examining whether a “senator’s ideological stance changes as a function of time remaining in his term,” and finding that “[p]atterned instability did exist and such shifting was generally in the direction of ideological moderation”); James H. Kuklinski, *Representatives and Elections: A Policy Analysis*, 72 AM. POL. SCI. REV. 165 (1978) (finding that representatives are more responsive to direct public opinion of the final year of a term); Martin Thomas, *Election Proximity and Senatorial Role Call Voting*, 29 AM. J. POL. SCI. 96 (1985) (finding that the “voting behavior of U.S. Senators reveals that many reelection-seeking U.S. Senators deliberately change the ideological tenor of their roll-call voting during the course of their terms,” with a shift ideologically in the direction of their likely opponent); Gerald C. Wright, Jr. & Michael B. Berkman, *Candidates and Policies in the United States Senate Elections*, 80 AM. POL. SCI. REV. 567 (1986) (analyzing 1992 U.S. Senate elections, and demonstrating that “candidates behave as though they believe issues are important to voters . . . and candidates’ issue positions and voters’ evaluations of the president and the economy interact to provide clear patterns of policy effects on Senate election outcomes”).

36. See, e.g., Paul Brace & Melinda Gann Hall, *The Interplay Preferences, Case Facts, Context, and Structure in the Politics of Judicial Choice*, 59 J. POLITICS 1206 (1997) (examining individual votes cast in death penalty decisions by supreme court justices in eight American states from 1983 to 1988); Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RESEARCH Q. 5 (1995) (estimating several models of state supreme court justices’ voting on the death penalty); Hall, *supra* note 28, at 427 (studying the individual justice votes in death penalty cases in four southern state supreme courts).

37. Hall, *supra* note 28, at 428.

38. *Id.*

39. PINELLO, *supra* note 28, at 99 (stating that at least judges who do not face a confirmation vote are free from this constraint).

of low levels of voter information about the judiciary.⁴⁰ Studies, however, have documented that judicial elections do reflect informed judgments by the electorate.⁴¹ The idea of strategic voting may also be undermined because of the non-competitive nature of elections. Studies have documented patterns of incumbent success, low levels of voter information, and poor turnout rates in judicial elections.⁴² Other studies have reached the opposite conclusion. In contrast, judicial elections also have been found to be quite competitive, and low-level participation is not a permeating characteristic of many elections.⁴³ Regardless of the level of security in a position, public officials in an electoral setting often fear the voters.⁴⁴ The opinions of the electorate may, in fact, impact judicial voting. However, low levels of voter information may allow justices to vote freely until the period preceding their election. Thus, judicial independence may be affected by proximity to election. The literature is far from conclusive on the issue.

B. Public Opinion on Crime

Criminal cases were chosen for this analysis of justices' responsiveness to

40. See Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court* 352, 373, in *CONTEMPLATING COURTS* (Lee Epstein, ed., 1995) (finding that citizens are generally unaware of Supreme Court decisions); see also John N. Kessel, *Public Perceptions of the Supreme Court*, 10 *MIDWEST J. POL. SCI.* 167, 172-75 (1966) (revealing the public's lack of understanding about what the court does); Joseph D. Kearney & Howard B. Eisenberg, *The Print Media and Judicial Elections: Some Case Studies from Wisconsin*, 85 *MARQ. L. REV.* 593, 775 (2002) (suggesting that "while a fair amount of information about judicial candidates is made available to voters, that information still seems to lack the educative component needed to overcome the general public ignorance that we have little doubt exists concerning judicial officeholders and judicial elections").

41. See, e.g., Lawrence Baum, *Explaining the Vote in Judicial Elections: The 1984 Ohio Supreme Court Elections*, 40 *W. POL. Q.* 361, 369 (1987) (suggesting that levels of voter information in judicial races "can be sufficiently high to allow meaningful judgments about the candidates"); Lovrich & Sheldon, *supra* note 26, at 246 (finding it encouraging that between 20-40% of survey respondents felt they had enough information to vote for candidates in judicial re-elections).

42. See, e.g., Kenyon N. Griffin & Michael J. Horan, *Merit Retention Elections: What Influences the Voters?*, 63 *JUDICATURE* 78, 80 (1983) (noting that "[a] prominent characteristic of the 1978 judicial retention elections was the rate of voter abstention or non-participation"); Hall & Aspin, *supra* note 26, at 347 (finding that judicial retention elections are generally characterized by low voter turnout).

43. See PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* (1980) (noting that low levels of citizen participation in judicial elections are uncharacteristic in the United States).

44. See JOHN W. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* 62 (2d ed. 1981) (stating that politicians balance the cost of voting against the probability of losing and "opt to vote in an electorally safe way, even though he reasons that the loss of a significant number of votes in the next election really is not at issue"); THOMAS MANN, *UNSAFE AT ANY MARGIN: INTERPRETING CONGRESSIONAL ELECTIONS* 3 (1978) (stating that legislators feel "a pervasive sense of electoral insecurity").

constituents because the public is very interested in crime and criminal sentencing,⁴⁵ and levels of voter information in judicial races are high enough to allow for informed judgments about judicial candidates.⁴⁶ In 1993, 79% of Americans favored or strongly favored more severe sentences for all crimes.⁴⁷ Criminal cases, especially those with a high profile, can instill strong public opinion. From 1980 to 1994, between 79% to 86% of the U.S. citizens felt that courts in their area did not deal harshly enough with criminals.⁴⁸ These strong attitudes about crime can be reflected in attitudes toward the court system. For example, in 1994, Americans blamed the courts and the prison system more than any other institution for the increase in crime in the United States.⁴⁹

In metropolitan Milwaukee, which accounts for nearly 40% of Wisconsin's total population, citizens have strong opinions and attitudes on criminals and sentencing as well.⁵⁰ The majority of residents in the Milwaukee metropolitan area perceive that crime is on the rise across the nation as a whole and within their city.⁵¹ A majority, in dealing with violent criminals, prefers its tax money to go to prisons and punishment.⁵² Seventy percent support longer prison sentences to prevent crime, and a majority supports the death penalty.⁵³

IV. HYPOTHESES

Although judges may vote with actual or conceived voter preferences towards "being tough on crime," the central concern of an elected judge is probably that a case vote will be used against him or her in an upcoming

45. See SHELDON & MAULE, *supra* note 16, at 51 (showing that 67% of Washington state candidates thought the public was interested in their attitudes on sentencing); BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994, 141 tbl.2.2 (1995) (showing that, in 1994, 26-36% of U.S. citizens felt that crime was the most important issue for the government to address).

46. See *supra* note 41 and accompanying text.

47. BUREAU OF JUSTICE STATISTICS, *supra* note 45, at 172 tbl.2.39.

48. *Id.* at 174-75 tbl.2.43.

49. *Id.* at 157 tbl.2.22 (showing that 33% of Americans blamed the courts and prisons for the increase in crime as opposed to home and schools (27%), pop culture and the media (14%), government (12%), and law enforcement (8%)).

50. See, e.g., *Public Perception, Public Safety: Reality and Opinion about Crime in Milwaukee*, Public Policy Forum, Milwaukee, WI (May 1999), available at <http://www.publicpolicyforum.org/josh/pubpercpubsaf.htm> (last visited Dec. 21, 2002).

51. *Id.*

52. *Id.*

53. *Id.* Although a majority supports the death penalty, it should be noted that Wisconsin does not have the death penalty.

election.⁵⁴ Absent a candidate or activist making an issue of the vote, few people may ever find out about it. The judicial worry is not that the judge will violate public opinion, but more precisely, that someone will draw attention to that violation during an election.⁵⁵

Certainly, political issues and judicial voting records become more publicized closer to election. This strongly suggests that researchers would be wise to look at voting patterns near an election because proximity to an upcoming election may promote responsiveness to constituents and promote voting with a court's majority. Similarly, the time elapsed since the last election may also affect the level of responsiveness.⁵⁶

However, strategic voting due to electoral politics may be unrealistic if, in fact, judges experience high levels of incumbent success or any individual judge does not face opposition. There is no reason to fear being removed from office by voters if one never faces strong opposition. If, however, a judge frequently faces strong opponents, resulting in narrow election margins, that judge may be induced to vote strategically. Thus, narrow election margins may promote responsiveness to constituents and voting with a court's majority.

Similarly, electoral experience may make judges more aware of voter preferences and may make judges think more carefully about their constituents when making judicial voting choices. Judges with election experience may have already sought out constituent preferences and public opinion while on the campaign trail. They have also already faced the possibility of losing a race for a judicial position. Hence, the experience of being elected may promote responsiveness to constituents.

The hypothesized form of responsiveness is that an individual justice is less likely to vote for a criminal defendant and more likely to vote in the majority as the justice gets closer to election or has just won a tightly contested election. A judge who is not acting independently would be more likely to vote for the prosecution, as public opinion studies indicate that constituents prefer harsher penalties and convictions for criminal defendants.

The literature on judicial decision-making and legislative voting suggests the following hypotheses about the voting behavior of the elected Wisconsin State Supreme Court:

54. See Abrahamson, *supra* note 2, at 986 (stating that the Chief Justice's sole dissent in a sexual predator case was used against her in the 1999 election campaign and that the advertisement implied that the Chief Justice's presence on the court would allow sexual predators to prey on children).

55. See Franklin & Kosaki, *supra* note 40, at 373 (noting that the public is much more likely to be aware of a decision when the media devotes more media coverage to a case).

56. See *supra* note 35 and accompanying text.

H1: The proximity to an upcoming election promotes responsiveness to constituents.

H2: The time elapsed since the previous election and closeness of that election's vote margin promotes responsiveness to constituents.

H3: The experience of being elected, as opposed to appointed, in the initial term promotes responsiveness to constituents.

H4: The proximity to upcoming election promotes voting with a majority of the court.

H5: Narrow election margins promote responsiveness to constituents.

H6: Narrow election margins promote voting with the majority.

V. DATA AND METHODOLOGY

A. Wisconsin Supreme Court Characteristics

The Wisconsin Supreme Court is composed of seven justices⁵⁷ and sits atop the Wisconsin court system, which also contains four court of appeals districts (with sixteen judges) and lower circuit courts located throughout the state.⁵⁸ The Wisconsin Supreme Court controls its own docket, receiving 1000 petitions for review each year and accepting around 100-120 cases to hear each year.⁵⁹

Since 1996, Shirley Abrahamson has been the Chief Justice of the Wisconsin Supreme Court. The Chief Justice was appointed to the court in 1976 by Democrat Governor Pat Lucey. Of the seven justices on the 2002-03 court, three were appointed by Republican Governor Tommy G. Thompson: Justices Jon Wilcox, David Prosser, Jr., and Diane S. Sykes. Both Justices Wilcox and Prosser were former Republican State Assemblymen, with Prosser serving as Speaker of the Assembly from 1995-96. Justices William A. Bablitch, Ann Walsh Bradley, and N. Patrick Crooks were elected to their first terms on the court. Justice Crooks is a former circuit judge and Justice Bablitch a former Democrat State Senator. Pat Roggensack was elected in April 2003 to replace the retiring Justice Bablitch.

The justices of the Wisconsin Supreme Court are elected to ten-year terms

57. For a history of the Wisconsin Supreme Court and its Justices, see *Portraits of Justice: Wisconsin Supreme Court 1848-1998* (Trina E. Haag, ed., 2d ed. 2002), available at <http://www.wicourts.gov/supreme/pdf/Portraits2ndEd.pdf>.

58. See *Court System Overview*, <http://www.wicourts.gov/global/Overview.html> (last visited May 1, 2003). For more information on the Wisconsin Court system, see <http://www.courts.state.wi.us>.

59. See Wisconsin Supreme Court, *How a Case Moves Through the Courts*, http://www.wicourts.gov/global/How_a_Case.htm (last modified Aug. 20, 2002). It takes three justices to grant a petition for review. *Id.*

in statewide, non-partisan April elections.⁶⁰ Vacancies are filled by gubernatorial appointment,⁶¹ and the appointee is expected to stand for election to a full ten-year term the following spring.⁶² Because the Wisconsin Constitution limits the justices to running one at a time, an appointee who joins the court near the end of another justice's term will be required to wait for an open spring election in which to run.⁶³ For example, Justice Wilcox was appointed to the Wisconsin Supreme Court in 1992 to replace Justice William Callow. However, because of intervening judicial elections, Wilcox was not elected to a full term until 1997.

Wisconsin Supreme Court justices rarely run for election unopposed, regardless of whether they were first elected or appointed to the court. In only five of the seventeen supreme court elections prior to 2000 were justices unopposed. In the last twenty years, the closest margin of victory in an election was that of Justice Steinmetz in 1980 with just over 50% of the vote; the largest margin of victory occurred when Justice Geske garnered 77% of the vote in 1994. Incumbent justices are usually successful, and justices are rarely removed from office. In fact, the last incumbent justice who lost an election, and the only Chief Justice to be unsuccessful in an election bid, was Chief Justice George R. Currie, who was defeated by Robert W. Hansen in 1967.⁶⁴ Justices can also be removed by impeachment,⁶⁵ but only Justice Levi Hubbell, in 1853, has faced an impeachment trial, and he was acquitted.⁶⁶

Although Wisconsin Supreme Court elections can be hotly contested, these elections receive relatively low voter turnout. For example, in November 1999, over 1.7 million Wisconsinites voted in the United States Senate general election, while only 758,965 citizens voted in the April 1999 Wisconsin Supreme Court general election. This low voter turnout is a product of the constitutional rule that judicial elections cannot be on the same ballot as partisan general elections for state or county officers, nor within thirty days before or after such an election.⁶⁷ As a result, the supreme court

60. WIS. CONST. art. VII, § 4, cl. 1.

61. The governor appoints justices for vacancies resulting for any reason, including retirement, death, resignation, or appointment to the federal bench. The governor has complete discretion in picking the replacement justice. There is no judicial committee which compiles a candidate list as in Missouri, and legislative confirmation is not required.

62. WIS. CONST. art. VII, § 9.

63. See, e.g., Kearney & Eisenberg, *supra* note 40, at 601 & n.29.

64. See *Robert W. Hansen*, <http://www.wicourts.gov/supreme/biohistory/whansen.htm> (last visited May 1, 2003).

65. WIS. CONST. art. VII, § 1.

66. See *Levi Hubbell*, <http://www.wicourts.gov/supreme/biohistory/hubbell.htm> (last visited May 1, 2003).

67. WIS. CONST. art. VII, § 9.

election is frequently the only race on the spring ballot or is accompanied by only local races.

B. The Sample of Wisconsin Supreme Court Cases

The data set used to test the hypotheses consists of the 417 criminal case opinions filed by the Wisconsin Supreme Court in the fifteen year period including the 1986-87 through 2000-01 terms.⁶⁸ The data set was created using a LEXIS search of "WI Criminal Cases" in the "Supreme Court of Wisconsin (= COURT)," and it includes cases involving an individual criminal defendant or prisoner.⁶⁹ All attorney or judicial disciplinary cases, medical malpractice cases, mental commitment proceedings, insurance cases, civil suits and "child in need of protection or services" cases were deleted from the over-inclusive data set provided by LEXIS. These cases were deleted because they are not traditional criminal cases involving a criminal defendant or a convicted prisoner. Public opinion data on these traditional criminal cases indicate strong citizen preferences.⁷⁰ Individual justice voting (or non-participation) and the majority voting result were recorded in each case by reading the cases as recorded by Westlaw.⁷¹ These fifteen years include the votes of thirteen justices.⁷² Information regarding the justices' years of service and all election results were retrieved from the *State of Wisconsin Blue Books*.⁷³

C. Individual Justice Characteristics

The voting tendencies of the justices of the Wisconsin Supreme Court during the analyzed terms are summarized in Table 1. As the table indicates, two justices are characterized as "non-conformist," voting for the defendant's claims a majority of the time, and three justices are characterized as "moderate," voting for the defendant's claims over 40% of the time. Eight justices are characterized as "conformist" because they have a tendency to vote against defendants, which conforms to public opinion. This information

68. Here, the fifteen most recent full supreme court terms were analyzed. Ideally, this analysis could include more supreme court terms, and possibly all types of cases in the fifteen year period that could be analyzed by category.

69. LEXIS was used for the initial search because it has a separate criminal cases database.

70. See *supra* Part III.B.

71. Westlaw was used because its search engine also provides information on whether a justice has not participated in a decision.

72. The thirteen justices who cast votes in this fifteen year period include: Shirley Abrahamson, William Bablitch, Ann Walsh Bradley, William Callow, Louis Ceci, N. Patrick Crooks, Roland Day, Janine Geske, Nathan Heffernan, David Prosser, Donald Steinmetz, Diane Sykes, and Jon Wilcox.

73. WISCONSIN LEGISLATIVE REFERENCE BUREAU, THE STATE OF WISCONSIN BLUE BOOKS (1986-2001).

is relevant, as "conformist" justices may not have personal preferences that conflict with the preferences of their constituents.⁷⁴ The two "non-conformist" justices, however, may be in conflict with the preferences of their constituency in criminal cases. Justices who vote in favor of the defendant in criminal cases may be acting in contrast to the preferences of the electors. This may produce voters who are dissatisfied with justices' performances on the court. As a consequence, a justice may have an opponent in his or her re-election bid, possibly resulting in removal from office.

TABLE 1

VOTING TENDENCIES OF THE JUSTICES OF THE WISCONSIN SUPREME COURT: PERCENTAGE OF VOTES IN FAVOR OF DEFENDANTS' CLAIMS IN CRIMINAL CASES

1986-87 TO 2000-01 TERMS

'Non-Conformist' Justices	Total Votes	% for Δ	'Moderate' Justices	Total Votes	% for Δ	'Conformist' Justices	Total Votes	% for Δ
A. Walsh Bradley	189	56.1%	J. Geske	133	45.9%	D. Sykes	61	31.1%
S. Abrahamson	415	54.7%	N. Heffernan	228	43.0%	N. P. Crooks	160	26.3%
			W. Bablitch	414	40.8%	J. Wilcox	256	26.2%
						D. Steinmetz	355	26.1%
						D. Prosser	96	24.0%
						W. Callow	158	22.8%
						R. Day	257	22.6%
						L. Ceci	181	17.7%

D. Methodology and Coding

Table 2 offers a description of the manner in which variables were coded for this analysis. A term has been defined as a ten-year elected term or the first appointed term. This analysis considers only votes and does not consider those cases in which a justice does not participate.

74. The findings, as described in Part VI, could benefit from the addition of an independent variable of political ideology or policy preference to the regression analysis.

TABLE 2

VARIABLE DESCRIPTIONS

Variable	Description
VOTE	= 0 If vote was cast in favor of Defendant's claim = 1 If vote was cast against the Defendant's claim = Missing If justice did not participate in the court's decision
MAJVOTE	= 0 If vote, do not vote with the majority = 1 If vote with the majority = Missing No court majority = Missing If justice did not participate in the court's decision
APPTTERM	= 0 Otherwise = 1 If vote was cast by justice in initial appointed term
FIRSTTERM	= 0 Otherwise = 1 If vote was cast by justice serving in first term
YRSELECT	= Number of years until next election at time of decision
FIRSTONE	= 0 Otherwise = 1 If vote was cast in the first year of a term
FIRSTTWO	= 0 Otherwise = 1 If vote was cast in the first two years of a term
MARGIN	= Percentage of the vote won in the preceding election by justice casting the vote (Unopposed = 100%). = Missing If appointed to the term in which the justice is casting the judicial vote

In testing the hypotheses on strategic behavior by the overall court, the preferred unit of analysis clearly is the vote. Because the dependent variable is dichotomous—when a dissenting vote from a majority decision against a defendant's claim is coded as 0, and a vote with the majority is coded as 1—binary logistic regression was chosen for this analysis.⁷⁵ In order to account for the relationship between the votes of individual justices, all regression analyses control for individual justices in order to account for the fact that

75. Intercooled STATA 7.0 was used to perform the binary logistic regression analyses. For further information on coding and regression of dichotomous and dummy variables, see MELISSA A. HARDY, *REGRESSION WITH DUMMY VARIABLES* (1993). The regression coefficient in a binary logistic regression represents the independent variable's incremental change to the logarithm of the odds of voting. "By taking the antilog of the logistic coefficient" (e^B), one can complete an "arithmetic translation of the additive effects to multiplicative effects in which the dependant variable is a simple odds ratio." *Id.* at 76.

individual votes may not be independently cast.

TABLE 3

DESCRIPTIVE STATISTICS FOR VARIABLES USED IN THE ANALYSIS

Variable	Observations	Mean	Std. Dev.
VOTE	2903	.645	.478
MAJVOTE	2879	.878	.327
APPTTERM	2919	.087	.282
FIRSTTERM	2919	.316	.465
FIRSTONE	2919	.153	.360
FIRSTTWO	2919	.269	.444
MARGIN	2657	74.64	20.98
YRSELECT	2919	4.64	2.93

In testing the hypotheses on strategic voting closer to re-election by individual court members and certain factions of the court,⁷⁶ z-Tests for two samples were used. The z-Test is used to determine the significance of differences between two independent samples—in this study, voting in the initial years of a term versus voting in the last two years of a term. Thus, the two sample z-Tests are used to compare a justice's (or faction's) voting percentage for a defendant's claim in the two years prior to re-election versus the percentage in the early years of an individual justice's (or the individual justices') terms. One can then determine the actual significance of percentage differences between the two voting sets (in other words, is the difference between the percentages real or just due to chance variation?). The two-sample z-statistic, which can be used for percentages, is computed from the sizes, averages, and standard deviations of the two samples.⁷⁷ The applicable z-Tests can be found in Appendices A and B and are summarized in Tables 10 and 11.

VI. FINDINGS

A. Analyzing the Court's Overall Voting Patterns

Being appointed (versus elected) in the initial term has a large and

76. See *infra* Parts VI.B & C.

77. DAVID FREEDMAN, ET AL., STATISTICS 507 (3d ed. 1998).

statistically significant effect on judicial voting for a defendant's claim in the first year. Large electoral margins of victory have a very small effect on the hypothesized direction of increasing the likelihood of voting for a criminal defendant and no statistically significant effect on the likelihood to vote with the court's majority. Much of the hypothesized form of responsiveness, however, is unsupported by the data. The data do not suggest that individual justices will be less likely to vote for a criminal defendant and more likely to vote in the majority as the justice gets closer to election or has just won a tightly contested election. The time elapsed since election also has no significant impact on judicial voting for a defendant's legal claim.

1. Appointment Versus Election in the First Term

Hypothesis Three states that the experience of being elected (as opposed to appointed) in the initial term promotes responsiveness to constituents.⁷⁸ The data show, in Table 4, a statistically significant (and quite interesting) relationship between voting and being appointed in the first term. The data reveal regression coefficients (β) of -0.695 and 0.472 respectively when the vote was regressed on whether the vote was cast in an appointed term (which is always a first term) or in a first term.

TABLE 4

RESULTS OF LOGISTIC REGRESSION FOR HYPOTHESIS #3

	VOTE	e^{β}
APPTTERM	-0.695*** (0.209)	0.499
FIRSTTERM	0.472*** (0.152)	1.603
Observations	2903	
Standard errors in parentheses		
* significant at 10%; ** significant at 5%; *** significant at 1%		

Note: Regression controls for individual justices.⁷⁹

Thus, this logistic regression looks at voting patterns in the first terms by

78. In order to test Hypothesis Three, VOTE was regressed on FIRSTTERM and APPTTERM.

79. All regression analyses in this study control for the fact that every vote is not independent and is fixed by justice. Thus, because judges have individual biases and worldviews (as Tables 10 and 11 may indicate), failure to do so would result in analyzing observations that are not independent (possibly making the standard errors too small and the significance exaggerated) or potentially biasing the sample.

justices who have been elected versus those that have been appointed. The data indicate that justices appointed in the first term are 50.01% ($e^{\beta} = 0.499$) more likely to vote *for* a defendant's claim in the first term versus other terms. However, those justices elected to their first term are 60.3% ($e^{\beta} = 1.603$) more likely to vote *against* a defendant's claim versus other terms. This suggests that Hypothesis Three is correct: The experience of being appointed versus elected in the initial term promotes responsiveness to constituents and affects how a justice votes in his or her initial term on the court.

2. Election Margins and Voting

Hypothesis Five states that election vote margins promote responsiveness to constituents.⁸⁰ The data in Table 5 show an extremely small relationship between voting and election margin ($\beta = -0.008$), which is significant to only 10%. The result is practically insignificant because there is only a very slight change in the odds (0.8%), but the results are essentially confirmed by the other data analyses.⁸¹ By including MARGIN in the testing for Hypothesis One (see Table 6), which shows a statistically significant relationship to 10% as well, the results of Hypotheses Five are confirmed. The data also shows that MARGIN is unrelated to other variables, but is related to how justices vote, as seen in the data from Hypotheses One and Two in which the coefficients, when VOTE is regressed on MARGIN and another variable, are of equal value.

TABLE 5

RESULTS OF LOGISTIC REGRESSION FOR HYPOTHESIS #5

	VOTE	e^{β}
MARGIN	-0.008* (0.004)	0.992
Observations	2647	
Standard errors in parentheses		
* significant at 10%; ** significant at 5%; *** significant at 1%		

Note: Regression controls for individual justices.

80. In order to test Hypothesis Five, VOTE was regressed on MARGIN.

81. See *infra* tbls.6 & 7.

The observed relationship indicates that large vote margins may promote responsiveness to constituents, as measured by increased likelihood to vote for a criminal defendant,⁸² though only in a very small amount of statistical significance. The 0.08% increase in likelihood to vote for a defendant's claim for every one percentage point earned in an election victory is only significant to 10% ($p \leq 0.1$). Thus, in this observed significance level, there is a 10%⁸³ chance of getting a test statistic as extreme as or more extreme than the observed one. Convention in the social sciences, however, states that differences are statistically significant when $p \leq .05$. It had been hypothesized that large margins of victory could allow for more judicial independence in voting for, rather than against, a defendant's claim.

3. Hypotheses Unsupported by the Regression Data

Hypothesis One states that proximity to upcoming election promotes responsiveness to constituents.⁸⁴ The data show an insignificant relationship between voting and the number of years until the next election. This does suggest that Hypothesis One may be incorrect. However, this finding is not conclusive when compared to results that show changes in voting as election nears as a function of previous voting preferences.⁸⁵

Hypothesis Two states that the time elapsed since a previous election and the closeness of that election's vote margin promotes responsiveness to constituents.⁸⁶ The data show an insignificant relationship between voting and being in the first two years of a term. This suggests that Hypothesis Two is incorrect. A short time elapsed since the previous election with a small margin of victory does not promote responsiveness to constituents.

82. This may indicate increased judicial independence with larger victories. *See supra* Part VI.A.

83. Actually 8.7% as $p = 0.087 \leq 0.1$.

84. In order to test Hypothesis One, VOTE was regressed on YRSELECT, MARGIN, and MAJVOTE.

85. *See infra* tbl.11.

86. In order to test Hypothesis Two, VOTE was regressed on MARGIN, MAJVOTE, FIRSTONE, and FIRSTTWO.

TABLE 6**RESULTS OF LOGISTIC REGRESSION FOR HYPOTHESIS #1**

	(1)	(2)	(1)	(2)
	VOTE	VOTE	e ^β	e ^β
YRSELECT	0.003 (0.017)	0.005 (0.018)	1.003	1.005
MARGIN	-0.008* (0.005)	-0.008* (0.005)	0.992	0.992
MAJVOTE		2.012*** (0.147)		7.478
Observations	2647	2625		
Standard errors in parentheses				
* significant at 10%; ** significant at 5%; *** significant at 1%				

Note: Regression controls for individual justices.

TABLE 7**RESULTS OF LOGISTIC REGRESSION FOR HYPOTHESIS #2**

	(1)	(2)	(1)	(2)
	VOTE	VOTE	e ^β	e ^β
FIRSTONE	0.005 (0.141)		1.005	
MARGIN	-0.008 (0.005)	-0.008 (0.005)	0.992	0.992
MAJVOTE	2.012*** (0.147)	2.012*** (0.147)	7.478	7.478
FIRSTTWO		-0.002 (0.113)		0.998
Observations	2625	2625		
Standard errors in parentheses				
* significant at 10%; ** significant at 5%; *** significant at 1%				

Note: Regression controls for individual justices.

Hypothesis Four states that proximity to upcoming elections promotes voting with a majority of the court.⁸⁷ The data show an insignificant relationship between voting and the number of years until the next election. This suggests that Hypothesis Four is incorrect. Proximity to an upcoming election does not influence a justice's tendency to vote with a majority of the court.

TABLE 8

RESULTS OF LOGISTIC REGRESSION FOR HYPOTHESIS #4

	MAJVOTE	e ^β
YRSELECT	-0.014 (0.022)	0.986
Observations	2879	
Standard errors in parentheses		
* significant at 10%; ** significant at 5%; *** significant at 1%		

Note: Regression controls for individual justices.

Hypothesis Six states that narrow election vote margins promote voting with the majority of the court.⁸⁸ The data show an insignificant relationship between election margins and voting with the majority. This suggests that Hypothesis Six is incorrect. Large margins of victory in elections do not promote voting with the court's majority.

TABLE 9

RESULTS OF LOGISTIC REGRESSION FOR HYPOTHESIS #6

	MAJVOTE	e ^β
MARGIN	-0.001 (0.007)	0.999
Observations	2625	
Standard errors in parentheses		
* significant at 10%; ** significant at 5%; *** significant at 1%		

Note: Regression controls for individual justices.

87. In order to test Hypothesis Four, MAJVOTE was regressed on YRSELECT.

88. In order to test Hypothesis Six, MAJVOTE was regressed on MARGIN.

B. Voting Patterns of Individual Justices

In testing whether individual members of the court change their voting patterns as each justice nears re-election, the number of votes against a defendant in the last two years of a term (i.e., two years preceding re-election) were compared to votes from all other years of a term (i.e., initial years of a term) (See Table 10). All cases from the data set in which an individual justice cast a vote were included in this analysis. Justices Bablitch, Callow, Ceci, Day, Geske, Heffernan, and Prosser showed no statistically significant change ($p \geq 0.05$) in their voting in criminal cases. Justices Bradley, Crooks, and Sykes were not considered in this analysis because they have yet to experience voting in the last two years of a term.

TABLE 10

COMPARISON OF INDIVIDUAL JUSTICE VOTING IN INITIAL YEARS OF TERM VERSUS LAST TWO YEARS OF TERM⁸⁹

(Summary of Appendix A)

Justice	Initial Years of Term % Vote Against Defendant	Last Two Years of Term % Vote Against Defendant	% Difference	z-test p-Value (one-tail)
Abrahamson	38.83	60.48	21.65	1.89E-05*
Bablitch	59.68	54.76	-4.92	0.274
Callow	76.34	81.48	5.14	0.303
Ceci	82.91	78.26	-4.65	0.308
Day	79.21	70.91	-8.30	0.112
Geske	53.49	55.32	1.83	0.420
Heffernan	59.34	47.83	-11.51	0.083
Prosser	75.68	76.27	0.59	0.473
Steinmetz	71.54	81.05	9.51	0.027*
Wilcox	76.92	63.93	-12.99	0.028*
*statistically significant ($p \leq .05$)				
Justices Sykes, Bradley, and Crooks have not yet been in the last two years of a term.				

89. The methodology treats years before retirement the same as years before re-election. This choice does not affect the substantive findings. When the data were analyzed, deleting all justices who face only retirement, and not election, during the years included in the study, no changes of magnitude or statistical significance in the findings resulted.

The data show that Justices Abrahamson, Steinmetz, and Wilcox have statistically significant ($p \leq .05$) changes in their voting for or against a defendant's claim. Uniquely, Justice Wilcox voted against a defendant's claim in 12.99% *less* of his votes in the two years preceding election compared to the other votes in the initial years of his term. On the other hand, Justices Abrahamson and Steinmetz are *more* likely to vote against a defendant's claim as they near re-election (defined by looking at the votes in those two years preceding re-election). In the last two years of his terms, Justice Steinmetz voted against a defendant's claim in 9.51% more cases ($p \leq 0.05$). At 21.65% ($p \leq 0.05$), Justice Abrahamson showed a substantial increase in her voting against a defendant's claim in the last two years of her terms.

C. Group Voting Patterns

In testing whether the certain factions of the court (see Table 1) change their voting patterns as the justices in these groups near election or re-election, the percentage of votes against a defendant in the last two years of all terms (i.e. two years preceding re-election) were compared with the percentage from all other years of all terms (i.e. initial years of a term) (See Table 11). All cases from the data set in which an individual justice cast a vote were included in this analysis.

TABLE 11

COMPARISON OF GROUP VOTING IN INITIAL YEARS OF TERM VERSUS LAST TWO YEARS OF TERM

(Summary of Appendix B)

Faction	Initial	Years of	Last Two Years of	% Difference	z-test p-Value (one-tail)
	Term		Term		
	% Vote Against Defendant	% Vote Against Defendant	% Vote Against Defendant		
Conformist	77.22		72.44	-4.78	0.0727
Non- Conformist/Moderate	54.93		62.99	8.06	0.00269

p-value = statistically significant when $p \leq .05$

The data indicate that the "conformist" grouping, comprised of Justices Callow, Ceci, Crooks, Day, Prosser, Sykes, Steinmetz, and Wilcox, did not have a statistically significant change in voting against a defendant as the individual members of the group neared election or re-election. However, the

change of 4.78% fewer cases in which voting against a defendant is significant to only 10% ($p \leq 0.1$).

The “non-conformist/moderate” group consists of Chief Justice Abrahamson, and Justices Bablitch, Bradley, Geske, and Heffernan. The data show that the “non-conformist/moderate” grouping voted against a defendant’s claim in 8.06% more cases in the two years preceding election or re-election of the individual justices that comprise the group. This change is statistically significant ($p \leq .01$).

VII. EVALUATION OF FINDINGS

A. The Wisconsin Supreme Court’s Overall Use of Strategic Voting

Hypothesis Three has been confirmed by the data. The experience of being elected (as opposed to appointed) promotes responsiveness to constituents.⁹⁰ Much of the hypothesized form of responsiveness, however, is unsupported by the data. Proximity to upcoming elections and time elapsed since the previous election does not promote responsiveness to constituents.⁹¹

The data suggest that justices who are appointed to the court are significantly more likely to vote *for* a defendant’s claim in their first term versus all other terms. In fact, those appointed are 50% more likely to do so than they would be in later terms, or if they had been elected to their first term. On the other hand, those justices elected in the first term are over 60% more likely to vote *against* a defendant’s claim in the first term.

This finding suggests that there are serious ramifications to judicial selection methods. It may indicate that justices who have been elected exhibit a strong sense of responsibility to the electorate, especially in the initial term, and that voters generally prefer to elect justices who vote against defendant’s claims.⁹² Meanwhile, appointed judges may feel free to exert more judicial independence in voting, supporting Pinello’s conclusion that elected judges react to public opinion while gubernatorial appointed judges are free of this constraint.⁹³ Appointed judges may be more protective of unpopular interests, like those of criminal defendants, and less accountable to an electorate that prefers judges who are “tough on crime.”⁹⁴ The data are quite strong in this finding of differences in voting patterns among justices appointed versus

90. See *supra* Part VI.A.1.

91. See *supra* tbls.6, 7 & 8.

92. The variable MAJVOTE is highly correlated with VOTE in a positive direction. This means that the court generally votes against a defendant’s claim.

93. See PINELLO, *supra* note 28, at 99; see also *supra* note 39 and accompanying text.

94. See *supra* notes 29-30 and accompanying text.

elected in the first term, and future research should look at judges that have experienced both appointment and election, possibly looking to other states that elect their judiciary, yet fill vacancies via appointment. This study supports recent literature and empirical studies that conclude that elected judiciaries participate in strategic voting.⁹⁵

The confirmation of Hypothesis Three, that the election experience promotes responsiveness to the electorate, is quite revealing, considering that the regression data show that proximity to an upcoming election, time elapsed since previous elections, and the closeness of election margins (i.e., Hypotheses One, Two, and Four) do not promote responsiveness to constituents or voting with the court's majority. These conclusions support earlier research on strategic voting, which suggests that elections do not compromise independence. But, proximity to upcoming election may promote responsiveness by forcing justices to "moderate" their voting patterns.⁹⁶ The differential in "appointed" versus "elected" judicial votes in the first term may also suggest that being elected at all, regardless of other factors, is a major factor in determining voting patterns in any given term.

B. Individual Justices' Use of Strategic Voting

In testing whether an individual member of the court changes his or her voting patterns as he or she nears re-election, the number of votes against a defendant in the last two years of a term (i.e., two years preceding re-election) were compared against votes from all other years of a term (i.e., initial years of a term) (see Table 10). Having concluded that the overall proximity of the justices to election has no significant impact on judicial voting for a defendant's legal claim, some individual justices do seem to display changes in voting patterns as they near re-election. Thus, some justices do display the characteristics of Hypothesis One as the data show that proximity to upcoming election for these justices may promote responsiveness to constituents.

Justices Abrahamson, Wilcox, and Steinmetz all display statistically significant changes in voting patterns in the last two years of terms compared to the votes made in initial years of a term. One could explain that this is because of the close election races of these three justices. All three were elected in a total of six races in which the largest vote percentage received by any one justice was 65%.⁹⁷ Even Abrahamson herself notes that each of her

95. See *supra* note 28 and accompanying text.

96. See *infra* Part VII.C.

97. Abrahamson has percentage points of 65%, 55%, 64%, Wilcox 62%, and Steinmetz 52% and 50%.

elections were “hotly contested.”⁹⁸ However, the results of Table 6 indicate that election margins may not be a factor, even for these justices, as the regression analysis controls for these individual election contests, and there are many tight races among the other justices in the study.

It would be speculative to suggest what factors would contribute to these significant changes among these three justices.⁹⁹ More analysis on each of the individual justices is needed as, for example, Chief Justice Abrahamson, who frequently votes for defendant’s claims (See Table 1), is often the lone dissenter,¹⁰⁰ and she has continued in this manner despite the political nature of the office.¹⁰¹ Thus, one should not be surprised that Justice Abrahamson stated, “My own experience, not surprisingly, supports my views about judicial independence of elected judges.”¹⁰²

Interestingly, Abrahamson favors an elective system because she thinks it will promote independence,¹⁰³ yet she says this very independence grows out of judges meeting with current and future lawyers and litigants during the political process.¹⁰⁴ But, being aware of the threat of compromising independence, could a justice subconsciously be affected by the desires of the electorate? Being affected by the desires of the electorate, even subconsciously, may be inappropriate.¹⁰⁵ On the other hand, should we not expect (or even want) judges to be influenced by the electorate?¹⁰⁶

98. Abrahamson, *supra* note 2, at 975.

99. However, seeking to moderate their voting patterns in the face of election may be a possibility. See *supra* Part VII.C.

100. See, e.g., *State v. Morgan*, 539 N.W.2d 887 (Wis. 1995); *State v. Carpenter*, 541 N.W.2d 105 (Wis. 1995); *State v. Post*, 541 N.W.2d 115 (Wis. 1995); *State v. Davids*, 534 N.W.2d 70 (Wis. 1995); *State v. Messelt*, 518 N.W.2d 232 (Wis. 1994); *State v. West*, 517 N.W.2d 482 (Wis. 1994); *State v. Walkowiak*, 515 N.W.2d 863 (Wis. 1994); *State v. Koch*, 499 N.W.2d 152 (Wis. 1993); *State v. Anderson*, 477 N.W.2d 277 (Wis. 1991) (Heffernan, C.J., dissenting, joined by Abrahamson, J.); *State v. Weber*, 476 N.W.2d 867 (Wis. 1991); *State v. Weber*, 471 N.W.2d 187 (Wis. 1991); *State v. Whitrock*, 468 N.W.2d 696 (Wis. 1991); *State v. Lindh*, 468 N.W.2d 168 (Wis. 1991); *State v. Noll*, 467 N.W.2d 116 (Wis. 1991); *State v. Murdock*, 455 N.W.2d 618 (Wis. 1990); *State v. DeSmidt*, 454 N.W.2d 780 (Wis. 1990); *State v. Seifert*, 454 N.W.2d 346 (Wis. 1990); *State v. Hanson*, 401 N.W.2d 771 (Wis. 1987).

101. Chief Justice Abrahamson has noted this herself, as she was the target of political television advertisements involving criminal cases. See Abrahamson, *supra* note 2, at 975 (noting that her vote in a *Terry* stop case was the target of television ads).

102. Abrahamson, *supra* note 2, at 975 (pointing to *State v. Post*, 541 N.W.2d 115 (Wis. 1995), and *State v. Carpenter*, 541 N.W.2d 105 (Wis. 1995), where, in both, Abrahamson wrote the sole dissent and which are both included in the data set of this paper).

103. *Id.* at 977.

104. *Id.*

105. *Id.* at 984.

106. See *Constitutional Principles*, *supra* note 1, at 34 (“Is there any such reason for submitting the claims of two candidates for a judgeship to a popular vote? Do we expect or desire that our votes should influence the decisions of a judge?”).

Abrahamson insists that an elected judge who is self-confident about decision-making will not be shaped by public opinion because this would violate the fundamental concepts of judging. She believes such an exercise would be futile since judges cannot correctly determine the notorious cases,¹⁰⁷ and it is difficult enough to make good decisions without considering public opinion.¹⁰⁸

Even if individual justices would, consciously or subconsciously, consider the views (perceived or otherwise) of the electorate, the judicial election provisions in Wisconsin may not allow this to have a significant impact on the voting outcomes of the court as a whole.¹⁰⁹ The genius of the Wisconsin Constitution is that no two justices are elected in the same year.¹¹⁰ The Wisconsin Supreme Court justices are elected statewide with only one justice running in any one year.¹¹¹ Thus, this minimizes the affect of any one given justice who faces re-election in the next year (or two justices who will face re-election in the following two years) on the voting outcome in any given year.

C. Do Factions Engage in Strategic Voting?

In testing whether the certain groupings of the court (“conformists” and “non-conformist/moderates”) have a tendency to change their voting patterns as the justices in these groupings near re-election, the data confirms Hypothesis One in respect to the “non-conformist” group of the court.¹¹² Thus, proximity to upcoming election promotes responsiveness to constituents among those justices who otherwise would have a tendency to vote pro-defendant. This differential may be seen among the “non-conformist” group because the group is more likely to have preferences that are in conflict with the preferences of their constituents.¹¹³ The “non-conformist/moderate” group is more likely to vote *against* a defendant’s claim in the two years prior to re-

107. This may suggest that further research should be conducted by looking at only notorious cases. This is more difficult in a state without the death penalty like Wisconsin. But, for example, the data set could be trimmed to include only murder cases, those cases most in the news, or cases that may result in long prison terms.

108. Abrahamson, *supra* note 2, at 984-85.

109. This claim should be empirically tested by looking at the changes in defendant “wins” when certain individual justices change voting patterns (e.g., in later years of term or in appointed terms) versus those periods when they do not.

110. See WIS. CONST. art. VII, § 4, cl. 1.

111. *Id.*

112. This, as well, essentially confirms the previous individual justice analysis, as Justice Abrahamson, considering her number of years on the Court, has a large impact on the voting pattern for the “non-conformist” grouping.

113. This is not necessarily to say personal preferences. The “non-conformist” grouping may have divergent opinions with the majority of the electorate in relation to certain provisions of criminal law.

election. Interestingly, the “conformists” group may become more likely to vote *for* a defendant’s claim closer to election (although $p = 0.07 > 0.05$). This may be because both groupings seek to gain more votes in re-election, and, thus, need to move toward a more moderate and compromising voting pattern in order to pick up votes from citizens of opposing views.¹¹⁴ A more likely story, however, is that usually “non-conformist” justices want to decrease the risk that an opponent will draw attention to a vote that violates public opinion as they near re-election.¹¹⁵ Meanwhile, the fact that “conformist” judges are free from this worry is indicated by a statistically insignificant percentage change in their voting patterns.

One could suggest doing further research to see whether the court is more likely to reach a unanimous decision at certain times, or whether the voting block expands as individual justices near re-election. However, this could not be effectively done when studying the Wisconsin Supreme Court because only one justice can face re-election each year.¹¹⁶ In many ways, this once again acknowledges the effectiveness of the judicial election provision in the Wisconsin Constitution¹¹⁷ because the re-election separation among the justices limits the impact of any one justice on the voting outcome (i.e. no more than one justice would face re-election in the following year). In any case, this analysis suggests that past research on state judiciaries and judicial selection has neglected the necessary step of looking at voting pattern differentials by possible different ideological factions of courts.

VIII. FURTHER ANALYSIS AND POSSIBLE FUTURE RESEARCH

Shortcomings with this type of research can only be alleviated through future research. One could claim that any such results, when looking at criminal cases, may only examine liberal justices responding to a conservative public.¹¹⁸ Future research may seek to look at other forms of response. For example, research could track if the defendant actually wins cases when

114. This behavior of moving towards ideological moderation, or shifting ideological views in the direction of a likely opponent has been shown to happen among legislators. Eiling, *supra* note 35, at 75; Thomas, *supra* note 35, at 96. This also suggests that the regression analysis evaluated in Part VII.A may be benefited from the addition of an independent ideological variable.

115. See *supra* Part IV.

116. In Wisconsin, analysis would have to look at whether justices are more likely to vote with the majority. This paper accomplishes this research as seen in Table 8 regressing MAJVOTE on YRSELECT.

117. See *supra* note 17 and accompanying text.

118. This may be a fair criticism considering the results found in Table 10 and the analysis in Part VI.C. Chief Justice Abrahamson is the only justice on the court who more frequently than not has voted for a defendant’s claim, and who has voted on cases within the last two years of a term.

certain judges are closer to election.¹¹⁹ One could look at tort or discrimination cases. However, it is unclear what issues and specific cases the public knows about and whether the public's lack of knowledge about the courts affects the voting of justices. The justices, after all, may act only upon perceived preferences or not consider public opinion at all. It is quite possible that the public, at least in the justices' perception, does not view the majority of criminal cases, as analyzed here, as important. Future research could consider highly visible criminal cases or cases in which harsh sentences may result.¹²⁰

Notably, the data do not distinguish between a planned retirement versus a loss in re-election as the cause of a justice's exit from the court.¹²¹ Future re-election plans may affect voting patterns. Also, one could take into account whether a justice knows if he or she will be running for re-election unopposed and when a justice becomes aware of any opposition.¹²² Future research could also consider the political parties of the justices or the race of the defendants.

IX. CONCLUSION

In choosing selection methods for state supreme court justices, states may attempt to balance the conflicting ideals of judicial independence and accountability. Unlike the federal process, which contains no electoral mechanisms in order to maximize judicial independence, the Wisconsin Constitution requires its judiciary to vie for citizen support in nonpartisan elections. Do these elections undercut judicial independence by affecting the ways justices vote? In examining all criminal cases decided by the Wisconsin Supreme Court over a fifteen-year period, this Article concludes that being appointed (versus elected) in the initial term has an extremely significant

119. This may confirm the effectiveness of the one supreme court judicial election per year provision in the Wisconsin Constitution. It may also prove interesting to analyze actual voting outcomes in states where members of a supreme court can face election simultaneously.

120. Although the death penalty is not used in Wisconsin, voting patterns in capital cases from other states have indicated that elected judges may follow popular opinion in deciding these cases. See, e.g., Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Election, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817 (1998); Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1806 (2000); 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 (1995); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997).

121. See *supra* note 89.

122. This could be empirically examined by comparing judicial voting patterns both before and after the filing deadline of election papers with the state board of elections.

impact on a justice's voting for a defendant's claim in his or her initial term, suggesting that judicial selection methods impact strategic voting on the court. Ultimately, however, it will prove difficult to answer the fundamental question—which system, elective or appointment, actually promotes a better judiciary? Research may shed light on whether different judicial selection methods produce a different type of judiciary.¹²³

123. See *supra* note 5 and accompanying text.

APPENDICES

In the z-Test tables in all the following appendices, "Variable 1" denotes votes in the initial years of a term, and "Variable 2" denotes votes in the last two years of a term. The mean is the number of times the tool was used divided by the number of observations. The variance is the square of the standard deviation.¹²⁴ Each z value is the number of standard deviations away from the mean where z equals the observed difference minus the expected difference, then divided by the standard error for difference.¹²⁵ The p-value is the observed significance level, which is the chance of getting a test statistic as extreme as or more extreme than the observed one.¹²⁶

Appendix A

z-Test: Two Sample for Means Prosser			z-Test: Two Sample for Means Steinmetz		
	Variable 1	Variable 2		Variable 1	Variable 2
Mean	0.756757	0.762712	Mean	0.715385	0.810526
Known Variance	0.1892	0.1841	Known Variance	0.2044	0.1552
Observations	37	59	Observations	260	95
Hypothesized			Hypothesized		
Mean Difference	0		Mean Difference	0	
Z	-0.065628		Z	-1.934095	
P(Z<=z) one-tail	0.473837		P(Z<=z) one-tail	0.026551	
z Critical one-tail	1.644853		z Critical one-tail	1.644853	
P(Z<=z) two-tail	0.947674		P(Z<=z) two-tail	0.053101	
z Critical two-tail	1.959963		z Critical two-tail	1.959963	

124. HUBERT M. BLALOCK, JR., *SOCIAL STATISTICS*, REVISED 80 (2d ed. 1979). For a detailed explanation of analysis of variance (ANOVA), see GUDMUND R. IVERSEN & HELMUT NORPOTH, *ANALYSIS OF VARIANCE* (2d ed. 1987).

125. FREEDMAN, *supra* note 77, at 524; THOMAS H. WONNACOTT & RONALD J. WONNACOTT, *INTRODUCTORY STATISTICS* 127 (5th ed. 1990).

126. FREEDMAN, *supra* note 77, at 502.

z-Test: Two Sample for Means Geske		
	<i>Variable 1</i>	<i>Variable 2</i>
Mean	0.534884	0.553191
Known Variance	0.2517	0.2525
Observations	86	47
Hypothesized		
Mean Difference	0	
Z	-0.200965	
P(Z<=z) one-tail	0.420363	
z Critical one-tail	1.644853	
P(Z<=z) two-tail	0.840726	
z Critical two-tail	1.959963	

z-Test: Two Sample for Means Wilcox		
	<i>Variable 1</i>	<i>Variable 2</i>
Mean	0.769231	0.639344
Known Variance	0.1784	0.2244
Observations	195	61
Hypothesized		
Mean Difference	0	
Z	1.916414	
P(Z<=z) one-tail	0.027656	
z Critical one-tail	1.644853	
P(Z<=z) two-tail	0.055312	
z Critical two-tail	1.959963	

z-Test: Two Sample for Means Ceci		
	<i>Variable 1</i>	<i>Variable 2</i>
Mean	0.829114	0.782609
Known Variance	0.1426	0.1779
Observations	158	23
Hypothesized		
Mean Difference	0	
Z	0.500394	
P(Z<=z) one-tail	0.308399	
z Critical one-tail	1.644853	
P(Z<=z) two-tail	0.616797	
z Critical two-tail	1.959963	

z-Test: Two Sample for Means Day		
	<i>Variable 1</i>	<i>Variable 2</i>
Mean	0.792079	0.709091
Known Variance	0.1655	0.2101
Observations	202	55
Hypothesized		
Mean Difference	0	
Z	1.218401	
P(Z<=z) one-tail	0.111536	
z Critical one-tail	1.644853	
P(Z<=z) two-tail	0.223072	
z Critical two-tail	1.959963	

z-Test: Two Sample for Means Heffernan		
	Variable 1	Variable 2
Mean	0.593407	0.478261
Known Variance	0.2426	0.2551
Observations	182	46
Hypothesized		
Mean Difference	0	
Z	1.388344	
P(Z<=z) one-tail	0.082516	
z Critical one-tail	1.644853	
P(Z<=z) two-tail	0.165032	
z Critical two-tail	1.959963	

z-Test: Two Sample for Means Abrahamson		
	Variable 1	Variable 2
Mean	0.388316	0.604839
Known Variance	0.2383	0.2409
Observations	291	124
Hypothesized		
Mean Difference	0	
Z	-4.120211	
P(Z<=z) one-tail	1.89E-05	
z Critical one-tail	1.644853	
P(Z<=z) two-tail	3.79E-05	
z Critical two-tail	1.959963	

z-Test: Two Sample for Means Bablitch		
	Variable 1	Variable 2
Mean	0.596774	0.547619
Known Variance	0.2423	0.2538
Observations	372	42
Hypothesized		
Mean Difference	0	
Z	0.600786	
P(Z<=z) one-tail	0.273991	
z Critical one-tail	1.644853	
P(Z<=z) two-tail	0.547983	
z Critical two-tail	1.959963	

z-Test: Two Sample for Means Callow		
	Variable 1	Variable 2
Mean	0.763359	0.807692
Known Variance	0.182	0.1567
Observations	131	27
Hypothesized		
Mean Difference	0	
Z	-0.514802	
P(Z<=z) one-tail	0.303346	
z Critical one-tail	1.644853	
P(Z<=z) two-tail	0.606691	
z Critical two-tail	1.959963	

Appendix B

z-Test: Two Sample for Means		
Conservatives		
	Variable 1	Variable 2
Mean	0.772246	0.7244444
Known Variance	0.1761	0.2005
Observations	944	225
Hypothesized		
Mean Difference	0	
Z	1.456128	
P(Z<=z) one-tail	0.072679	
z Critical one-tail	1.644853	
P(Z<=z) two-tail	0.145357	
z Critical two-tail	1.959963	

z-Test: Two Sample for Means		
Liberals/Moderates		
Combined		
	Variable 1	Variable 2
Mean	0.549275	0.629944
Known Variance	0.2478	0.2338
Observations	1380	354
Hypothesized		
Mean Difference	0	
Z	-2.78329	
P(Z<=z) one-tail	0.002691	
z Critical one-tail	1.644853	
P(Z<=z) two-tail	0.005381	
z Critical two-tail	1.959963	