

2012

The History of Minnesota's Judicial Elections: A Description and Analysis of the Changes in Judicial Election Laws and Their Effect on the Competitiveness of Minnesota's Judicial Elections

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Bluebook Citation

Jesse Sater, Note, *The History of Minnesota's Judicial Elections: A Description and Analysis of the Changes in Judicial Election Laws and Their Effect on the Competitiveness of Minnesota's Judicial Elections*, 10 U. St. Thomas L.J. 367 (2012).

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NOTE

THE HISTORY OF MINNESOTA'S JUDICIAL ELECTIONS: A DESCRIPTION AND ANALYSIS OF THE CHANGES IN JUDICIAL ELECTION LAWS AND THEIR EFFECT ON THE COMPETITIVENESS OF MINNESOTA'S JUDICIAL ELECTIONS

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INTRODUCTION

The elective franchise is the most fundamental principle of the American governmental system. Our nation was founded on the notion that the governed ought to have a right to choose those who are to govern. In 1787, fifty-five delegates drafted a Constitution that established the federal government of the United States of America, which consists of three branches: the executive, the legislative, and the judicial. The Constitution provided for the selection of the leaders and members of each of the branches. Interestingly, only the members of the legislative branch and the president and vice-president of the executive branch were to be elected. The federal judiciary was to be exclusively comprised of justices and judges appointed for life by the President.

Lifetime appointments are the antitheses of elective franchise. But the role of the judge is decidedly different from that of the members of the legislative and executive branches; the judge is to conduct his responsibilities completely independent from, rather than according to, the influence of popular opinion.¹ Thus, the motivation behind the lifetime appointment of federal judges was to “provide judges sufficient security to allow them to

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1. See *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992).

rule with their consciences and according to the Constitution, rather than to bow to political notions.”²

The Minnesota Constitutional Convention delegates faced the same difficult task of determining how the judges were to be selected. Seventy years after the Federal Constitutional Convention, the constitution of the state of Minnesota was drafted.³ After considerable debate,⁴ the delegates ultimately decided to incorporate elective franchise into Minnesota’s process for judicial selection.⁵ Over the last 155 years, there were numerous changes to Minnesota’s judiciary and process of judicial election. There have also been many calls for a complete replacement of the judicial selection process.⁶

Although there has been a great deal of commentary on the benefits and drawbacks regarding different methods of judicial selection, there has not been an in-depth analysis of the changes to and results of Minnesota’s judicial elections. This paper seeks to fill that void through the collection, reporting, and analysis of Minnesota’s judicial election results from the last 155 years.⁷ It will show that Minnesota’s judicial elections have become increasingly less competitive over time, with few exceptions.

Part I of this paper describes the initial framework of judicial elections established by the Minnesota Constitution. Part II examines the twelve major changes in Minnesota’s judiciary and method of judicial selection from 1858 to the present. For purposes of this paper, competitiveness is determined by the rate of contested elections (an increase in this rate indicates increased competitiveness) and the rate of incumbent success (a decrease in this rate indicates increased competitiveness). Part III outlines the materials used, omissions, methods of interpretation, and summary of the data. Part IV describes the overall trend in the relative competitiveness of Minnesota’s judicial elections over time. In addition, this part examines data trends in relation to the time periods before and after the twelve major changes. The paper concludes by arguing that Minnesota’s judicial elections will continue to respond to changes in law and that, if the current trend

2. *Id.*

3. WILLIAM E. LASS, *MINNESOTA: A HISTORY* 124–25 (2000).

4. *See* FRANCIS H. SMITH, *THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION* 493–509 (1857).

5. MINN. CONST. of 1857 art. VI, § 3.

6. The most popular being some embodiment of a merit selection and retention plan. *See, e.g.*, Laura Benson, Comment, *The Minnesota Judicial Selection Process: Rejecting Judicial Elections in Favor of a Merit Plan*, 19 WM. MITCHELL L. REV. 765 (1993); CITIZENS COMMISSION FOR THE PRESERVATION OF AN IMPARTIAL JUDICIARY: FINAL REPORT AND RECOMMENDATIONS 1 (2007); George W. Soule, *Election Law: The Threats of Partisanship to Minnesota’s Judicial Elections*, 34 WM. MITCHELL L. REV. 701 (2008).

7. Minnesota’s historical judicial election results have been collected and compiled into a Microsoft Excel workbook that is on file with the author [hereinafter “Election Results”].

of increasing partisanship continues, Minnesota's judicial elections will become increasingly competitive, whether that is desired or not.⁸

I. THE BEGINNING FRAMEWORK FOR JUDICIAL ELECTIONS IN MINNESOTA

Prior to 1858, during Minnesota's status as a territory, the Minnesota Organic Act provided that the territory of Minnesota would have three justices, one chief justice, and two associate justices.⁹ The justices were appointed to four-year terms¹⁰ by the President and were confirmed by the Senate.¹¹ The territory of Minnesota was divided into three districts with one justice assigned to each district.¹²

On February 26, 1857, Congress passed an enabling act that provided the voters of the Territory of Minnesota with the option of becoming a state.¹³ The voters elected delegates to a constitutional convention that met in July of 1857.¹⁴ There were insurmountable disagreements between the Republican and Democratic delegates, however, which caused the convention to be split into separate Democratic and Republican conventions, with each claiming to be the Minnesota Constitutional Convention.¹⁵ Each convention drafted its own constitution, but eventually, the two conventions formed a compromise committee that reconciled the differences between the two constitutions and wrote agreed-upon language into each convention's draft.¹⁶ These constitutions laid out the basic framework for judicial elections that largely survives today.

The constitution provided for the creation of a supreme court comprised of a chief justice and two associate justices.¹⁷ The Minnesota Supreme Court was, and remains today, Minnesota's court of last resort.¹⁸ The number of associate justices could be increased to four through a two-thirds

8. Note that this paper does not advocate for or against competitive judicial elections, nor any other method of judicial selection.

9. Organic Act, ch. 121, 9 Stat. 403, § 9 (1849).

10. *Id.* at § 9.

11. *Id.* at § 11.

12. *Id.* at § 9.

13. LASS, *supra* note 3, at 124.

14. *Id.*

15. *Id.*

16. *Id.* at 125.

17. MINN. CONST. of 1857 art. VI, § 2. Note the use of the singular "constitution." Although the delegates from both parties refused to sign and adopt a constitution signed by delegates from the other party, the two constitutions contain no substantive differences in meaning or interpretation. Thus, for the sake of simplicity, I use the singular "constitution." *Minnesota's Constitution(s)*, MINNESOTA HISTORICAL SOCIETY, <http://www.mnhs.org/library/constitution/index.html> (last visited Nov. 5, 2012).

18. *Id.*; MINN. CONST. art. VI, § 2.

vote of the legislature.¹⁹ The justices of the Minnesota Supreme Court were to be elected²⁰ by the voters of the state to seven-year terms.²¹

The constitution also created six judicial districts each requiring a district judge.²² The district courts were, and remain today, Minnesota's primary trial courts.²³ The legislature was permitted to change the number of judicial districts when expedient.²⁴ The district court judges were also to be elected by the voters of the state to seven-year terms.²⁵ Finally, if any judicial office became vacant prior to the expiration of an elected term, the governor filled the office with an appointee until a successor was chosen in an election occurring more than thirty days after the vacancy was created.²⁶ This structure of judicial election and gubernatorial appointment upon vacancy is the foundation on which Minnesota's judiciary has been built.

II. BUILDING ON THE FOUNDATION: THE DEVELOPMENT OF JUDICIAL ELECTIONS IN MINNESOTA

Although the basic framework of judicial election and gubernatorial appointment upon vacancy endures today, the next 155 years brought a great deal of change to the judicial selection process. These changes came through constitutional amendments, the enactment and amendment of statutes, and case law. I will discuss each of the twelve significant changes in

19. MINN. CONST. of 1857 art. VI, § 2. But, the number of associate justices has been changed a number of times before being set at the current number of six. See Act of Mar. 7, 1881, ch. 141, 1881 Minn. Laws 184 (increasing the number of associate justices to four); Act of Mar. 12, 1913, ch. 62, 1913 Minn. Laws 53, 53–54 (creating two supreme court commissioners who had essentially the same role as an associate justice); Act of Mar. 9, 1929, ch. 430, § 1, 1929 Minn. Laws 676, 676–77 (abolishing the position of Supreme Court Commissioner through its enactment and increasing the number of associate justices to six); Act of Apr. 18, 1955, ch. 881, 1955 Minn. Laws 1550, 1550–1553 (providing for a constitutional amendment that would increase the maximum number of associate justices from six to eight); Act of May 24, 1973, ch. 726, 1973 Minn. Laws 2133, 2133–2134 (setting the number of associate justices at eight); Act of Mar. 22, 1982, ch. 501, § 16, 1982 Minn. Laws 576 (reducing the number of associate justices from eight to six).

20. As previously mentioned, there was considerable debate on whether the judiciary should be appointed or elected during the Democratic Constitutional Convention. See SMITH, *supra* note 4, at 493–509 (reporting the various arguments made by the Democratic Minnesota Constitutional Convention delegates for and against both appointment and election of judges).

21. MINN. CONST. of 1857 art. VI, § 3. For a few other possible explanations of why the delegates settled on judicial elections as the method of selecting our judiciary, see Douglas A. Hedin, *Forward to Report of the Committee on Judicial Elections*, MINNESOTA LEGAL HISTORY PROJECT 1, 3 (Douglas A. Hedin ed., last updated Apr. 2, 2010), http://www.minnesotalegalhistoryproject.org/assets/Report%20%20Comm.%20Jud.%20Elections%20_1904_.pdf (discussing the popularity of judicial elections as the method of judicial selection among other states who had recently drafted their state constitutions and the public's disapproval of the United States Supreme Court decision in *Dred Scott v. Sanford*).

22. MINN. CONST. of 1857 art. VI, § 4.

23. *Id.* at § 5; *Id.* at § 3.

24. *Id.* at § 12.

25. *Id.* at § 4.

26. *Id.* at § 10.

the following chronological order: (1) the change from seven- to six-year terms in 1883, (2) the adoption of the Australian Ballot in 1889, (3) the advent of primaries in 1912, (4) the move to nonpartisan judicial elections in 1912, (5) the establishment of alleys in 1949, (6) the implementation of incumbency designation in 1949, (7) the lengthening of the appointed term in 1956, (8) the creation of the Board on Judicial Standards in 1971, (9) the creation of the court of appeals in 1983, (10) the explosion in number of district court seats between 1983–87, (11) the creation of the Minnesota Commission on Judicial Selection in 1990, and (12) the *Republican Party v. White* decisions in 2002 and 2005.²⁷

A. *Changing the Length of Elected Judicial Terms — 1883*

The elected term of judicial offices was originally set at seven years in an attempt to distinguish the judicial role from the more traditional, elected political offices that were open for election either every two or four years.²⁸ The reasoning behind this decision was that electing judges to seven, as opposed to six, year terms would eliminate much of the partisan nature of elections and create a more independent judiciary.²⁹

Although an independent judiciary was undeniably an important objective, setting the judicial term at seven years did little to meet that objective. It is a simple mathematical fact that judicial elections, occurring every seven years, will occasionally be held in the same election year as the (more) partisan elections. Furthermore, judicial elections occur even more often if judicial appointments and the required elections occurring more than thirty days³⁰ after vacancy are taken into account. For example, a judge facing election for a third consecutive term would face election fourteen years after his initial election. This election may coincide with the election of the governor and lieutenant governor that occurs every four years, and would coincide with the election of the Minnesota state senators and Minnesota state representatives that occurs every two years.³¹ Additionally, the political parties were essentially in control of elections during the time; altering the length of judicial terms did nothing to change this.³² The foolishness of this reasoning was quickly discovered, and a constitutional

27. This list was generated through significant research and review of Minnesota law regarding judicial elections with the direction and assistance of Pat Diamond, Minnesota Second Judicial District Judge, and Paul Scoggin, Managing Attorney at the Hennepin County Attorney's Office.

28. *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992).

29. *See id.*

30. *But see* Act of Apr. 15, 1955, ch. 881, 1955 Minn. Laws 1552 (increasing the minimum time of appointment to one year).

31. MINN. CONST. OF 1857 art. IV, § 24 & art. V, § 3.

32. *See infra* at Part II. B (discussing the various strategies employed by political parties in their efforts to control the political process).

amendment was passed in 1883 reducing the length of judicial terms from seven to six years.³³

B. *The Adoption of the Australian Ballot — 1889*

The most significant difference between present-day judicial elections and the electoral foundation established at the time of statehood was the lack of state-printed ballots. At the time of statehood it was customary for political parties to pre-print ballots on party-colored paper that indicated selections along party lines.³⁴ The political parties would distribute these ballots to voters and then the voters would submit the ballot at the polling place.³⁵ Voters would typically obtain a ballot from incessant ticket peddlers associated with the political parties just outside of the polling place.³⁶ The peddlers would then watch the voters to ensure that they submitted the “right” ballot.³⁷

The Minnesota legislature helped perpetuate this method of electing officials through its failure to impose any meaningful requirements on the appearance of ballots.³⁸ Even more, this lack of regulation invited political parties to exploit voters’ inattentiveness by printing counterfeits of the opposing party’s ballots that looked identical to the authentic ballots, except they removed the names of the opposing party’s nominations and substituted those of the counterfeiting party.³⁹ The use of party-printed ballots facilitated the parties’ intimidation and corruption practices, including the practice of “buying” votes.⁴⁰

In an effort to eliminate the party control and fraud that had infested Minnesota’s elections, the Minnesota legislature adopted the Australian Ballot (more commonly known as the “secret ballot”) in 1889, which is still in use today.⁴¹ The newly enacted statute required that all ballots were to be printed on plain white paper at the direction of the state auditor and distributed to the county auditors.⁴² The ballots included the names of all candi-

33. Act of Mar. 1, 1883, ch. 3, 1883 Minn. Laws 8.

34. See ELDON COBB EVANS, *A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES* 6 (1917).

35. *Id.* at 9–10.

36. *Id.*

37. *Id.*

38. Act of Feb. 24, 1860, ch. 18, § 10, 1860 Minn. Laws 151 (requiring that ballots only need be paper tickets containing the written or printed full or partial names of the persons for whom the elector intends to vote). *But see* Act of Mar. 12, 1878, ch. 84, § 6, 1878 Minn. Laws 134 (requiring that ballots be printed on plain white paper).

39. EVANS, *supra* note 34, at 7.

40. *Id.* at 11, 21. See also Clarence J. Hein, *The Adoption of Minnesota’s Direct Primary Law*, MINNESOTA HISTORY, Dec. 1957, at 341–42 (indicating that these practices were occurring in Minnesota).

41. Act of Apr. 24, 1889, ch. 3, § 23 1889 Minn. Laws. 19. See EVANS, *supra* note 34, at 27. MINN. STAT. § 204B.36 (2010).

42. Act of Apr. 24, 1889, ch. 3, §§ 14, 17, 1889 Minn. Laws 16–17.

dates nominated for a state office and were designed to be indistinguishable from all of the other state-printed ballots.⁴³ The Australian Ballot enabled voters to mark their choices on the ballot in secret, thereby eliminating much of the political parties' control.⁴⁴

C. *The Advent of Primaries — 1912*

Even though the Australian Ballot alleviated many of the problems that were present in Minnesota's elections, significant problems continued to exist in the way nominees were selected and placed onto the ballot.⁴⁵ Before the advent of direct primaries, candidates were nominated at party conventions and caucuses.⁴⁶ There was a great deal of power to be gained by attaining office, and as a result these nominating conventions and caucuses were notorious for fraud and corruption.⁴⁷ It was not uncommon for politicians to buy votes.⁴⁸ Party leaders would also restrict the opportunity to vote so that only their henchmen were permitted to vote.⁴⁹

To help combat these practices, the Minnesota legislature introduced direct primaries for the national House of Representatives, state legislature, all county, and most city officials in 1901.⁵⁰ The nomination of state officials, including judges, remained with party caucuses and conventions until 1912 when the legislature passed a comprehensive primary election statute.⁵¹

Primaries eliminated the abuses present in nomination conventions and party caucuses by requiring that town, city, and village clerks give at least fifteen days' posted notice of the time and place of the primary election, and the offices for which candidates were to be nominated.⁵² By having notice of the primary election, all eligible voters had the opportunity to participate in the primary election if they chose to do so. Additionally, because the Australian Ballot was mandatory in all elections, including the newly created primary elections,⁵³ the practice of buying votes for nomination elections could not have survived the advent of direct primaries.⁵⁴

43. *Id.* at § 14.

44. EVANS, *supra* note 34, at v, 21–24.

45. Hein, *supra* note 40, at 341.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 341–42. *But see id.* at 344 (describing a law passed in 1899 requiring a primary election in Hennepin County for city, county, judicial, legislative, and congressional offices).

51. Act of June 19, 1912, ch. 2, sec. 181, § 1, 1912 Minn. Laws 4, 4. This statute did not apply to offices of towns, villages, or cities of the “third and fourth class” nor to school, library, or park board members in cities of less than 100,000 inhabitants. *Id.*

52. *Id.*

53. Act of Apr. 24, 1889, ch. 3, § 23, 1889 Minn. Laws 19.

54. *See* EVANS, *supra* note 34, at 21 (“[The Australian Ballot] would diminish or prevent the growing evil or bribery by removing the knowledge of whether it had been successful.”).

D. *The Move to Nonpartisan Judicial Elections — 1912*

A judge's impartiality and ability to decide cases in accordance with law, rather than personal opinion or political pressure, are essential to his role.⁵⁵ As espoused in *Peterson v. Stafford*, the notion behind nonpartisan judicial elections was a desire to remove judges from the influence of popular opinion and party politics.⁵⁶ Generally, nonpartisan judicial elections were said to insulate judges from the political pressures that were imposed by the political machines during the early 1900s.⁵⁷ The progressive platform, led by Theodore Roosevelt, championed the dismantling of these political machines⁵⁸ and was widely supported in Minnesota's 1912 elections.⁵⁹

In 1912, the same year the direct primaries were expanded to all state offices, the Minnesota legislature mandated that all judicial elections, primary and general, were to be nonpartisan.⁶⁰ Both the primary and general election ballots for judges were distinct and separate from the partisan ballots, and were designated as "non-partisan" ballots.⁶¹ These statutes not only removed party designation from the ballot, but also mandated that no candidate would be required or permitted to declare party affiliation.⁶²

Interestingly, the move to nonpartisan judicial elections severely limited the applicability of the newly-implemented primary elections for judicial office.⁶³ A primary election for a judicial seat would only be held if there were more than two nominees for the seat.⁶⁴ If there was more than one seat open in a judicial district, a primary would only be held if there was double the number of candidates as there were seats up for election.⁶⁵ If there were two candidates for a single seat or no more than twice the

55. *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992).

56. *See id.* at 422.

57. Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 1 WIS. L. REV. 21, 26–27 (2009).

58. John T. Woolley and Gerhard Peters, *Progressive Party Platform of 1912*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29617#axzz1HT6jZb8x> (last visited Mar. 23, 2011).

59. John T. Woolley and Gerhard Peters, *Election of 1912*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1912> (last visited Mar. 23, 2011).

60. Act of June 19, 1912, ch. 2, sec. 182, § 2, 1912 Minn. Laws 4, 4–5. The desire for a nonpartisan judiciary was present as early as 1904. *Report of the Committee on Judicial Elections*, PROCEEDINGS OF THE MINNESOTA STATE BAR ASSOCIATION, 1904 67–69, available at http://www.minnesotalegalhistoryproject.org/assets/Report%20%20Comm.%20Jud.%20Elections%20_1904_.pdf (last updated Apr. 2, 2010).

61. Act of June 19, 1912, ch. 2, sec. 182, § 2, 1912 Minn. Laws 4, 4–5.

62. *Id.*

63. For a possible explanation of this paradox, see *Report of the Committee on Judicial Elections*, PROCEEDINGS OF THE MINNESOTA STATE BAR ASSOCIATION, 1904 67–69, available at http://www.minnesotalegalhistoryproject.org/assets/Report%20%20Comm.%20Jud.%20Elections%20_1904_.pdf (last updated Apr. 2, 2010).

64. Act of June 19, 1912, ch. 2, sec. 182, § 2, 1912 Minn. Laws 4, 4–5.

65. *Id.*

number of candidates as there were open seats in a judicial district, then all the candidates would be placed onto the general election ballot without conducting a primary.⁶⁶

E. The Establishment of Alleys — 1949

Without any major changes to the method by which Minnesota selected its judges in roughly thirty years, the Minnesota Judicial Council appointed a committee to review the judiciary article of the Minnesota Constitution in 1941 to offer proposals that would help modernize the judiciary.⁶⁷ The Minnesota Judicial Council created the Committee on the Unification of the Courts and chose Minnesota Supreme Court Justice Charles Loring as its chairman.⁶⁸ In its report, submitted in 1942, the committee claimed that Minnesota's method of selecting judges was unsatisfactory and that judges' tenures were too short.⁶⁹

The committee suggested the adoption of an entirely different method of judicial selection, which was sponsored by the American Bar Association, known as the Missouri Plan.⁷⁰ Under the Missouri Plan, a nonpartisan committee submits three names to the governor and then the governor appoints one of the three nominees to the bench.⁷¹ After the judge serves a predetermined term, the judge's name is submitted to the electorate on the question of retention.⁷² If a majority of the electorate vote in the affirmative, the judge would serve another term.⁷³ If the majority of the electorate votes in the negative, the process would begin anew.⁷⁴

The Minnesota Judicial Council did not receive the committee's proposals well,⁷⁵ and no action was taken on the proposals until 1947 when the legislature created the Minnesota Constitutional Commission.⁷⁶ The commission's Judiciary Committee submitted a preliminary report on its proposals, including a tentative draft of suggested amendments to the judiciary article of the constitution, to the legislature for comments in 1948.⁷⁷

66. *Id.* This is simply the result of a mathematical equation. If there were two seats open for election, there would need to be at least four candidates before a primary would be held.

67. Maynard E. Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815, 815 (1955).

68. *Id.*

69. *Id.*

70. *Id.* at 838.

71. *Id.*

72. *Id.*

73. Maynard E. Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815, 838 (1955).

74. *Id.*

75. *Id.* at 816.

76. Judiciary Committee of the Minnesota Constitutional Commission, *Preliminary Report on the Revision of the Judiciary Article of the Minnesota State Constitution*, 32 MINN. L. REV. 458, 458 (1948) [hereinafter "*Preliminary Report*"].

77. *Id.* at 458–59.

The Judiciary Committee's preliminary report retained the option for the legislature to adopt the Missouri Plan.⁷⁸ Its final report, however, set forth a slightly modified Missouri Plan option.⁷⁹ Rather than submitting the appointed judge's name to the electorate on the question of retention, the proposed amendment would require an open election after a judge's initial appointment.⁸⁰ The Judiciary Committee maintained that the typical *modus operandi* of judicial selection in Minnesota was gubernatorial appointment followed by election of the appointed judge; their revision of the Missouri Plan provided this method with a "formal legal basis."⁸¹

In addition to suggesting the adoption of the Missouri Plan, the Judiciary Committee's report suggested implementing an "alley system" of judicial election.⁸² An alley system would require that a candidate for judge must select a specific judicial seat for which he is a candidate,⁸³ thus eliminating the chance that a judge is ousted against the electorate's intentions. The Judiciary Committee opined that the current open system was undesirable because it did not ensure that each judge "stand[s] or fall[s] on the basis of his own record."⁸⁴ The alley system provided that insurance.

Even though the Judiciary Committee's final report was more conservative than the Loring Committee's, the draft of the constitution submitted by the Constitutional Commission, which included the Judiciary Committee's draft of the judiciary article, failed to receive the necessary support for passage in the legislature.⁸⁵ Although the vast majority of the Judiciary Committee's suggestions were not adopted, the suggestion of implementing an alley system was not lost. The legislature chose to implement an alley system through statute rather than constitutional amendment. In 1949, the legislature enacted a statute establishing the alley system for all judicial elections occurring after April 25, 1949.⁸⁶

F. *The Implementation of Incumbency Designation — 1949*

Although the designation of incumbency status on the ballot was not mentioned in the Judiciary Committee's report,⁸⁷ the legislature included such a provision in the 1949 statute.⁸⁸ For all judicial elections occurring

78. *Id.* at 466.

79. *See* Pirsig, *supra* note 67, at 838.

80. *Id.*

81. *Preliminary Report*, *supra* note 76, at 466. The Judiciary Committee's observation that the typical *modus operandi* in Minnesota was gubernatorial appointment followed by election of the appointed judge was correct. *See* Election Results.

82. Pirsig, *supra* note 67, at 839.

83. *Id.*

84. *Preliminary Report*, *supra* note 76, at 466.

85. Pirsig, *supra* note 67, at 816–17. Although, the lack of support was likely in response to provisions aside from those drafted by the Judiciary Committee. *See id.* at 817.

86. Act of Apr. 25, 1949, ch. 690, § 1, 1949 Minn. Laws 1237.

87. *See generally Preliminary Report*, *supra* note 76.

88. Act of Apr. 25, 1949, ch. 690, § 1, 1949 Minn. Laws 1237.

after April 25, 1949, any judge who ran to succeed himself was to have the word “incumbent” printed after his name on the ballot.⁸⁹ The legislature made this change so voters would be informed as to the candidates who were running and which, if any, candidate presently held the position.⁹⁰ Many non-incumbent candidates have disputed the legality of this provision however and contend that incumbency designation gives the incumbent an unfair advantage.⁹¹

G. *The Lengthening of the Appointed Term — 1956*

Another recommendation made by the 1947 Judiciary Committee was the extension of the appointed term of a judge from a minimum of thirty days to a minimum of one year after the judge is appointed to fill a vacancy.⁹² This suggestion was made to avoid the complexities that occur when a vacancy occurs after the primary election, but more than thirty days before the general election.⁹³ Additionally, the extended term would have provided the electorate a better opportunity to evaluate the appointed judge before voting for or against said judge.⁹⁴ But again, the legislature did not adopt the Constitutional Commission’s draft.⁹⁵

Despite that failure, the Minnesota State Bar Association began where the Constitutional Commission left off and used the commission’s draft of the constitution as its starting point.⁹⁶ The state bar association made changes to the commission’s draft, including the elimination of the Missouri Plan option, before submitting the draft to the legislature in 1955.⁹⁷ The legislature adopted the state bar association’s draft for submission to the electorate,⁹⁸ which included the extension of the appointed term.⁹⁹ In 1956, the constitution was ultimately amended to extend an appointed judge’s minimum term to one year.¹⁰⁰

This change has consistently resulted in judges tendering their resignations or submitting their retirement petitions at a time in the election cycle that gives the governor an opportunity to appoint a succeeding judge, rather than open the seat to an imminent election.¹⁰¹ This gave the newly ap-

89. *Id.*

90. *Gustafson v. Holm*, 44 N.W.2d 443, 447 (Minn. 1950).

91. *Id.*; *Peterson v. Stafford*, 490 N.W.2d 418, 419 (Minn. 1992); *Clark v. Pawlenty*, 755 N.W.2d 293, 298 (Minn. 2008).

92. *Preliminary Report*, *supra* note 76, at 467.

93. *Id.*

94. *Id.*

95. *See supra* Part II. E.

96. *Pirsig*, *supra* note 67, at 817.

97. *Id.* at 838.

98. *Id.* at 817.

99. *Id.* at 839.

100. Act of Apr. 18, 1955, ch. 881, 1955 Minn. Laws 1553.

101. MARY JANE MORRISON, *THE MINNESOTA STATE CONSTITUTION* 199 (2002).

pointed judge the benefit of increased name recognition and incumbency designation at the next election.¹⁰²

H. The Creation of the Board on Judicial Standards — 1971

The 1947 Judiciary Committee made one final recommendation in its report, a mandate on the legislature to create an administrative council tasked with the facilitation of the internal operations of the judiciary.¹⁰³ The council was to be comprised of the chief justice of the Minnesota Supreme Court, a representative from the public, a representative from the legal profession, and one representative from each of the different types of Minnesota's courts.¹⁰⁴ Again, this recommendation was not adopted by the legislature in 1947, but it was eventually adopted in 1956.¹⁰⁵ Furthermore, the recommendation was completely silent on the "rules of practice, procedure, and evidence for all the courts."¹⁰⁶

This left the courts without guidance and regulation, aside from the inherent judicial power of the Minnesota Supreme Court given by the Minnesota Constitution,¹⁰⁷ until 1971. In that year, the legislature approved an amendment to the Minnesota Constitution granting the legislature the power to provide for the "retirement, removal, or other discipline of any judge who is disabled, incompetent or guilty of conduct prejudicial to the administration of justice."¹⁰⁸ Additionally, through concurrent legislation, the legislature created the Commission (later changed to "Board") on Judicial Standards to review the conduct and competence of Minnesota's judges.¹⁰⁹

The Board on Judicial Standards (the "Board") is an independent state agency that reviews all complaints of misconduct or wrongdoing against Minnesota's judges.¹¹⁰ Currently, the Board consists of one judge of the court of appeals, three trial judges, two lawyers, and four citizens.¹¹¹ The

102. *Id.*

103. G. Theodore Mitau, *Constitutional Change by Amendment: Recommendations of the Minnesota Constitutional Commission in Ten Years' Perspective*, 44 MINN. L. REV. 461, 472 (1960).

104. *Id.* Note that at this time the Minnesota Court of Appeals had not yet been created.

105. *Id.* at 473–74.

106. *Id.* at 474.

107. MORRISON, *supra* note 101, at 201.

108. Act of June 7, 1971, ch. 957, 1971 Minn. Laws 2030, 2032.

109. Act of June 7, 1971, ch. 909, 1971 Minn. Laws 1862. Because the Constitution had yet to be amended as provided by the Act of June 7, 1971, ch. 957, 1971 Minn. Laws 2030, the Commission on Judicial Standards did not have authority over district judges or supreme court justices. *Id.* Ultimately, the amendment was adopted, and the Board on Judicial Standards was granted authority over all judges. See MINN. STAT. §§ 490A.01, 490A.02, & 490A.03 (2006).

110. *Mission*, MINNESOTA BOARD ON JUDICIAL STANDARDS, <http://www.bjs.state.mn.us/body.html> (last visited Apr. 21, 2011).

111. *Board Members*, MINNESOTA BOARD ON JUDICIAL STANDARDS, <http://www.bjs.state.mn.us/body.html> (last visited Apr. 21, 2011). At inception, the board consisted of one judge of the district court, one judge of a municipal court, one judge of the probate court, two lawyers, and four citizens. Act of June 7, 1971, ch. 909, *supra* note 108, at § 1.

Minnesota Supreme Court dictates both what the Board's powers are, and what rules and regulations the Board enforces.¹¹² The Board investigates allegations of judicial misconduct, applies both Minnesota statutes and the Code of Judicial Conduct in reviewing complaints, and either privately disciplines judges or submits a recommendation to the supreme court for censure, suspension, or removal.¹¹³

I. *The Creation of the Court of Appeals — 1982*

Beginning in the late 1950s, the Minnesota Supreme Court was having difficulty keeping up with its administrative duties and the increasing number of appeals filed.¹¹⁴ The number of appeals filed increased by over 700 percent from 1957 to 1982.¹¹⁵ In an effort to more efficiently handle the increasing number of appeals, the Minnesota Supreme Court was expanded from seven to nine members,¹¹⁶ and the court began limiting oral arguments, hearing cases in five member panels, and more frequently adjudging cases through summary dispositions.¹¹⁷

These efforts proved insufficient and in 1966, the Minnesota Citizens Conference to Improve the Administration of Justice advocated for the creation of an intermediate court of appeals.¹¹⁸ With the support of the Minnesota State Bar Association, the Minnesota Judicial Council proposed a constitutional amendment for the creation of an intermediate court of appeals in 1968.¹¹⁹ The proposal was met with skepticism¹²⁰ and failed to secure sufficient support until almost fifteen years later.¹²¹ In the fall of 1982, the Minnesota electorate amended the Minnesota Constitution to provide for an intermediate court of appeals.¹²²

112. See MINN. STAT. § 490A.02, at subd. 7; MINNESOTA BOARD ON JUDICIAL STANDARDS, ANNUAL REPORT 2006, at 4 (2007).

113. MINNESOTA BOARD ON JUDICIAL STANDARDS, *supra* note 112, at 3–4.

114. MINNESOTA STATE BAR ASSOCIATION, FOR THE RECORD: 150 YEARS OF LAW & LAWYERS IN MINNESOTA 160 (Wood R. Foster, Jr. & Marvin R. Anderson, eds. 1999) [hereinafter MINNESOTA STATE BAR ASSOCIATION].

115. *Id.*

116. Act of May 24, 1973, ch. 726, 1973 Minn. Laws, 2133, 2133–34.

117. Jennifer K. Anderson, *Comments the Minnesota Court of Appeals: A Court Without Precedent?*, 19 WM. MITCHELL L. REV. 743, 745 (1993).

118. MINNESOTA STATE BAR ASSOCIATION, *supra* note 114, at 160.

119. *Id.* It is worth noting that the Minnesota Judicial Council first publicly recommended the creation of an intermediate court of appeals in 1942. Harriet Lansing, *Symposium: The Twenty-Fifth Anniversary of the Minnesota Court of Appeals*, 35 WM. MITCHELL L. REV. 1244, 1245 (2009).

120. See generally Carl Norberg, *Some Second and Third Thoughts on an Intermediate Court of Appeals*, 7 WM. MITCHELL L. REV. 93, 107 (1981) (noting doubts as to whether the introduction of intermediate courts promoted the simplification of filing an appeal rather than filing an appeal with the state's high court as the law previously allowed).

121. MINNESOTA STATE BAR ASSOCIATION, *supra* note 114, at 163.

122. *Id.*

At its inception, the court of appeals was comprised of only twelve judges who were appointed by recently-elected Governor Perpich in two six-judge segments.¹²³ The first segment of six judges faced election in 1984 and the second segment in 1986.¹²⁴

J. The Explosion in Number of District Court Seats — 1983–87

The Minnesota Supreme Court was not alone in its difficulty keeping up; the Minnesota district courts were struggling under the same burden of an ever-increasing number of cases in the 1960s.¹²⁵ The district courts were overextended to such a point that in 1971 the legislature adopted the County Court Act, giving probate courts jurisdiction over misdemeanor and family law cases.¹²⁶ Even this drastic change failed to relieve the pressure, so the legislature began pursuing a completely unified trial court whereby the county court system would be eliminated.¹²⁷

Some of the groundwork had already been laid in 1957 with the reduction in number of judicial districts from nineteen to fourteen,¹²⁸ and again in 1959 with further reduction to the present number of ten judicial districts.¹²⁹ The path to unification of the county court¹³⁰ and district court resumed in 1972 when Chief Justice Robert Sheran employed the National Center for State Courts to conduct a survey of Minnesota's trial courts.¹³¹ The surveys, published in 1974, noted that there were problems with conflict over resources and accessibility in a two-tiered trial court.¹³² It was the combination of these problems and a legislative action to equalize judicial salaries¹³³ that culminated in the passage of a voluntary court unification act.¹³⁴ Under the voluntary act, if a majority of district court judges and county court judges in a given district elected to unify, the district would become unified one year after filing for voluntary unification with the secretary of state.¹³⁵

The voluntary plan proved unpopular; only the Tenth Judicial District had elected to unify by 1984.¹³⁶ Yet, shortly thereafter, the county court

123. *Id.* at 164.

124. Election Results, *supra* note 7.

125. MINNESOTA STATE BAR ASSOCIATION, *supra* note 114, at 170–71.

126. *Id.* at 171.

127. Robert J. Sheran & Douglas K. Amdahl, *Minnesota Judicial System: Twenty-Five Years of Radical Change*, 26 *HAMLIN L. REV.* 219, 228 (2003).

128. Act of May 2, 1957, ch. 14, § 1, subd. 1, 1957 Minn. Laws 1st Spec. Sess. 1829.

129. Act of May 2, 1957, ch. 14, § 2, subd. 2, 1957 Minn. Laws 1st Spec. Sess. 1829.

130. Sheran & Amdahl, *supra* note 127, at 228.

131. MINNESOTA STATE BAR ASSOCIATION, *supra* note 114, at 171.

132. *Id.*

133. *Id.* at 172.

134. Act of Mar. 12, 1982, ch. 398, 1982 Minn. Laws 225. Note, however, that the second and fourth judicial district probate judges were made district judges by this act. *Id.* at § 1, subd. 3.

135. *Id.* at § 8.

136. MINNESOTA STATE BAR ASSOCIATION, *supra* note 114, at 173.

judges had persuaded the legislature that mandatory unification was necessary.¹³⁷ With the threat of mandatory unification before them, the Second, Third, Fourth, and Seventh Judicial Districts unified voluntarily.¹³⁸ The remaining half of judicial districts had unified by 1987.¹³⁹ Ultimately, the complete unification of the judicial districts increased the number of district court judges from 72 in 1980 to 217 in 1987, a threefold increase.¹⁴⁰

K. *The Creation of the Minnesota Commission on Judicial Selection — 1990*

With the increase in the number of district court seats, Minnesota's governors needed a system to help them efficiently make suitable appointments to the bench. Even before the drastic increase of district court seats, Governors Al Quie (1978–82) and Rudy Perpich (1983–91) used self-created “commissions to assist them in choosing judges.”¹⁴¹ They did so amidst campaigning by the Minnesota State Bar Association and citizens' groups calling for an “independent commission to screen judicial candidates based on merit.”¹⁴² Although Governor Perpich made an effort to appease these lobbyists, his appointments were considered “excessively political.”¹⁴³ Partly in response to these political appointments, the legislature passed the Elections and Ethics Reform Act of 1990, which created the Minnesota Commission on Judicial Selection (the “Commission”).¹⁴⁴

The Commission is comprised of forty-nine members: seven at-large appointments from the governor, two at-large appointments from the Minnesota Supreme Court, and both the governor and the Minnesota Supreme Court each select two district court judges from each of the ten judicial districts.¹⁴⁵ The Commission fields applications for an open district court judgeship and makes three to five recommendations to the governor,¹⁴⁶ considering each applicant's: “integrity, maturity, health if job related, judicial temperament, diligence, legal knowledge, ability and experience, and community service.”¹⁴⁷ For each vacancy, thirteen members of the Com-

137. *Id.*

138. *Id.*

139. *Id.* at 174.

140. Soule, *supra* note 6, at 704–05.

141. MINNESOTA STATE BAR ASSOCIATION, *supra* note 114, at 178.

142. Soule, *supra* note 6, at 705.

143. *Id.*

144. Elections and Ethics Reform Act of 1990, ch. 608, art. 8, § 1, subd. 2, 1990 Minn. Laws 2791.

145. *Id.* at subd. 2.

146. *Id.* at art. 8, § 1, subd. 7, 11. It is important to note that the Commission only makes recommendations to fill *district court* vacancies; it is not involved in court of appeals or Supreme Court appointments. *See id.* at art. 8, § 1, subd. 1. However, governors often create a “Commission-like committee[] to screen candidates for the court of appeals and supreme court.” Soule, *supra* note 6, at 707.

147. Elections and Ethics Reform Act of 1990, ch. 608, art. 8, § 1, subd. 8.

mission, comprised of the nine at-large members and the four members from the district in which the vacancy occurred, evaluate the candidates and make recommendations to the governor.¹⁴⁸ Notably, the governor is not required to choose from the Commission's recommendations or from the applicant pool at all;¹⁴⁹ the governor has sole constitutional authority to make judicial appointments.¹⁵⁰ Even so, governors have very rarely declined to select their appointments from the Commission's recommendations.¹⁵¹ The Commission has played an important role in controlling what could be an intensely political process by keeping both Minnesota's governors and the public informed about district court judicial appointments.¹⁵²

L. *The Republican Party v. White Decisions* — 2002 & 2005

Aside from judicial elections becoming nonpartisan in 1912, none of the changes detailed herein created such a substantial change in public perception of Minnesota's judicial elections as the 2002 United States Supreme Court case *Republican Party of Minnesota v. White*.¹⁵³ In 1996, Gregory Wersal ran for associate justice of the Minnesota Supreme Court.¹⁵⁴ During his campaign, Wersal distributed various campaign materials that criticized past Minnesota Supreme Court decisions on issues relating to crime, welfare, and abortion.¹⁵⁵ In response to Wersal's conduct, a complaint was filed against Wersal with the Office of Lawyers Professional Responsibility—the office tasked with investigating and prosecuting ethical violations committed by lawyer candidates for judicial office.¹⁵⁶ The complaint alleged that by distributing the materials, Wersal violated the Code of Judicial Conduct's Announce Clause, a clause stating that a "candidate for judicial office shall not announce his or her views on disputed legal or political issues."¹⁵⁷ The Office of Lawyers Professional Responsibility dismissed the portion of the complaint alleging Wersal's violation of the Announce Clause because the office suspected that the Announce Clause was uncon-

148. *Id.* at subd. 2, 3.

149. *Id.* at subd. 11.

150. MINN. CONST. art. VI, § 8.

151. Soule, *supra* note 6, at 706. To my knowledge, only former Governors Arne Carlson and Tim Pawlenty made district court appointments outside of the Commission on Judicial Selection's nominations. MINNESOTA STATE BAR ASSOCIATION, *supra* note 113, at 179 ("[A]ll but one of Governor Carlson's appointments to the district court were individuals nominated by the Judicial Merit Selection Commission."). Tom Scheck, *Pawlenty defends latest judicial pick, denies cronyism*, MPRNEWS (Dec. 22, 2010), <http://minnesota.publicradio.org/display/web/2010/12/22/pawlenty-judicial-pick/> ("Pawlenty disregarded the judicial screening process when he picked [Jamie] Anderson.").

152. *See* Soule, *supra* note 6, at 706–07.

153. 536 U.S. 765 (2002).

154. *Id.* at 768.

155. *Id.*

156. *Id.* at 768–69.

157. *Id.* at 770 (internal quotes omitted) (quoting MINN. CODE OF JUDICIAL CONDUCT, CANON 5(A)(3)(d)(i) (2002)).

stitutional given the First Amendment's right to freedom of speech.¹⁵⁸ Regardless, Wersal withdrew his candidacy out of fear that the ethics complaints may adversely affect his license to practice law.¹⁵⁹

Wersal ran for associate justice of the Minnesota Supreme Court again in 1998.¹⁶⁰ Early in his candidacy, Wersal sought an advisory opinion from the Minnesota Lawyers Professional Responsibility Board on whether the Board would enforce the Announce Clause given its doubts as to its constitutionality.¹⁶¹ The Board refused to respond directly to Wersal's request and only informed Wersal that it could not respond without a list of the announcements he wished to make.¹⁶² Thereafter, Wersal filed suit seeking "a declaration that the announce clause violates the First Amendment and an injunction against its enforcement."¹⁶³ After both the Minnesota District Court and the Eighth Circuit Court of Appeals ruled against Wersal, he appealed to the United States Supreme Court.¹⁶⁴

The United States Supreme Court ruled in favor of Wersal and reversed the Eighth Circuit Court of Appeals. The Court reviewed the Announce Clause with strict scrutiny as the clause restricted Wersal's fundamental First Amendment right to free speech.¹⁶⁵ The lawyers board argued that the compelling state interests sought by the Announce Clause were the preservation of the appearance and impartiality of the state judiciary.¹⁶⁶ The Court determined that the Announce Clause was exceedingly under inclusive and therefore, not narrowly tailored to serve these interests, compelling or not.¹⁶⁷

In response to the United States Supreme Court's ruling, the Minnesota Supreme Court revised the Code of Judicial Conduct by "delet[ing] the Announce Clause, clarif[y]ing the Pledges and Promises Clause, and amend[ing] the prohibition on candidate misrepresentations by banning false campaign statements only if they were made knowingly, or with reckless disregard for the truth."¹⁶⁸ The Minnesota Supreme Court also added a provision requiring a judge or candidate for judicial office to recuse himself if he makes a public statement committing to one side of an issue in the proceeding or the controversy in the proceeding.¹⁶⁹

158. *Id.* at 769.

159. *Republican Party of Minn. v. White*, 536 U.S. 765, 769 (2002).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 769–70.

164. *Id.* at 770.

165. *White*, 536 U.S. at 774 (2002).

166. *Id.* at 775.

167. *Id.* at 783, 784 n.12.

168. Soule, *supra* note 6, at 713 (internal quotations omitted) (quoting Order *In re* Amendment of the Code of Judicial Conduct, No. C4-85-697 (Sept. 14, 2004)).

169. *Id.*

This did not end the Republican Party of Minnesota's efforts in eliminating restrictions on judicial candidates' partisanship activity.¹⁷⁰ The party secured another victory in the Eighth Circuit Court of Appeals in 2005, when the court further confined the reach of the Minnesota Code of Judicial Conduct by striking down the Partisan-Activities Clause and the Solicitation Clause.¹⁷¹ Judicial candidates could now identify themselves as members of a political party, attend or speak at political gatherings, and seek, accept, or use political party endorsements.¹⁷² In regard to the court's ruling on the Solicitation Clause, candidates were now permitted to speak to large groups and sign campaign letters.¹⁷³

III. MATERIALS, OMISSIONS, METHODS, AND SUMMARY OF THE DATA

A. *Materials and Sources Used*

A variety of sources were used to determine: (1) what judicial seats were up for election; (2) which candidates were running for a seat up for election; (3) whether an incumbent ran in the election; (4) whether the incumbent won the election; and, if available, (5) what percentage of the votes each candidate received.¹⁷⁴

Minnesota's judicial election results over the last 153 years have been compiled and reported in a number of locations. At each election precinct the votes were counted,¹⁷⁵ and the vote totals for each candidate or ballot question were reported on "summary statements."¹⁷⁶ Summary statements and their predecessors, from 1858 to 1962, have been microfilmed by the Minnesota Historical Society and can be found at the Minnesota Historical Society Library on microfilm call number "SAM 66." This collection is incomplete, however, and there is no practical way to determine whether documents expected to be included are missing or nonexistent.

Additionally, beginning in 1891 and through 1976, Minnesota's judicial election results were reported in the Minnesota Legislative Manual, which is prepared by the secretary of state's office every two years.¹⁷⁷ Because of the difficulty in determining the completeness of the microfilmed

170. *Id.* at 715.

171. *Republican Party of Minn. v. White*, 416 F. 3d 738 (8th Cir. 2005); David Schultz, *Minnesota Republican Party v. White and the Future of State Judicial Selection*, 69 ALB. L. REV. 985, 999 (2006).

172. Soule, *supra* note 6, 714–16.

173. *Id.* at 712.

174. See DOUGLAS A. HEDIN, RESULTS OF ELECTIONS OF JUSTICES TO THE MINNESOTA SUPREME COURT 1857–2010 1 (Oct. 10, 2010), available at <http://www.minnesotalegalhistoryproject.org/assets/Election%20Results%201858-2010.pdf>.

175. See MINN. STAT. § 204C.21 subd. 1 for the current statute regulating the counting of votes. (2010).

176. *Id.*

177. 2009–2010 *Legislative Manual (Blue Book)*, OFFICE OF THE MINNESOTA SECRETARY OF STATE, <http://www.sos.state.mn.us/index.aspx?page=1486> (last visited May 19, 2011).

collection of summary statements, I used the Minnesota Legislative Manual's reported results for the years that they were available.

As mentioned, after 1978 the Minnesota Legislative Manual inexplicably fails to continue reporting the results of judicial elections. Thus, for the period of 1976 to 1996, I resorted to reviewing the actual summary statements from each precinct, which have been compiled by county and retained by the Minnesota Historical Society. Finally, the results of judicial elections which occurred from 1998 through 2012 are available online at the Minnesota Secretary of State's website.¹⁷⁸

B. Omissions from the Data

Notably, there are a few significant omissions from the data. First, judicial election results from the Second Judicial District for the 1982, 1984, 1986, and 1996 elections are missing from the Minnesota Historical Society's collection. I contacted the Minnesota Secretary of State's office and the Ramsey County Elections office in an effort to locate the missing results. Neither office has retained the results nor could either office offer any assistance in locating the missing results. Consequently, the results from these elections are not reflected in the data. Second, judicial election results from the Fourth Judicial District for the 1984, 1986, 1988, 1990, and 1996 elections were also missing from the Minnesota Historical Society's collection. Again, neither Minnesota Secretary of State's office nor the Hennepin County's Elections Division had retained the results and could not offer any assistance in locating the missing results. The results from these elections are not reflected in the data.

Finally, I did not collect any data on the election results for county court judicial seats. There are two reasons for omitting the county court election results. First, collecting the data for county court elections would have been exceedingly time consuming in comparison to the already laborious task of collecting the district court results. During the time the county courts existed there were only ten judicial districts, as compared to the eighty-seven Minnesota counties. Compiling the county court results would have required reviewing all eighty-seven counties' summary statements for each election year. Second, county courts were only in existence for sixteen years, from 1971 to 1987.¹⁷⁹ Given the exceptional amount of time and effort required to retrieve the county court election results and the relatively small number of elections that occurred in the sixteen years of the county court's existence, the county court election results are not included in the data.

178. *Election Results and Statistics*, OFFICE OF THE MINNESOTA SECRETARY OF STATE, <http://www.sos.state.mn.us/index.aspx?page=137> (last visited May 19, 2011).

179. See MINNESOTA STATE BAR ASSOCIATION, *supra* note 114, at 171, 174.

C. *Methods of Construing the Data*

The drawback to using the aforementioned sources is that prior to the establishment of the alley system and the implementation of incumbency designation in 1949, there was no way to determine which candidate won an election and which candidate, if any, was an incumbent. This problem was further complicated by the fact that a candidate may have been appointed to a judicial seat in between elections. To rectify these issues, I used the Minnesota Legislative Manuals' lists of presently sitting judges. To determine which judges were incumbents, I referenced the list in the legislative manual for the year prior to the relevant election to establish which judges held office prior to that election.¹⁸⁰ To determine which candidate won a given election, I referenced the list in the legislative manual for the year subsequent to the relevant election and established which candidate held office following that election.¹⁸¹

Another complication was determining whether an incumbent won a contested election. This may seem straightforward, but prior to the establishment of the alley system it was up for interpretation. For example, if there were two judicial seats up for election and there was an incumbent and two non-incumbent candidates, and the incumbent won, was it the incumbent or non-incumbent that defeated the challenger? For purposes of this data, the incumbent was treated as having won the contested election. I chose this interpretation because the incumbent could only retain his seat by obtaining a sufficient number of votes.¹⁸² Thus, the incumbent had the potential of losing his seat and the data should reflect that fact.

D. *Summary of the Data*

For each election year, I calculated the: (1) total number of elections, (2) total number of contested elections, (3) total number of uncontested elections, (4) total number of contested elections in which an incumbent was not a candidate, (5) percentage of contested elections in which an incumbent was a candidate and won, (6) percentage of uncontested elections,

180. If the list of sitting judges did not include the name(s) of a candidate, then I attempted to employ various other sources to establish whether a judge was an incumbent. If I was unable to definitively establish that a candidate was an incumbent, the election was treated as an open election. Thus, it is possible, although likely quite rare, that some elections that were reported as open did in fact have an incumbent candidate.

181. There was only one election in which I was unable to definitively determine which candidate won the election through other sources. In the 1994 election for Fifth District Judge for the seat of which Dennis J. Seitz had been elected, neither Dennis J. Seitz nor his challenger, Doug Merritt, was listed as a sitting judge in the subsequent legislative manual. I conducted a search in LexisNexis for all Minnesota cases in which "Merritt" was a judge. The search did not procure any results. Consequently, Dennis J. Seitz was treated as the winner of the election for purposes of the data.

182. Of course "a sufficient number of votes" was dependent on how many seats were up for election and how many candidates there were, i.e., if there were three open seats and five candidates, the incumbent must obtain at least the third highest number of votes.

and (7) percentage of contested elections in which an incumbent was not a candidate.

I calculated these values because they indicate the relative competitiveness of judicial elections. Additionally, these yearly values can be combined with other surrounding years' values to determine the relative competitiveness of judicial elections in a given time period. This allows for comparisons between the time periods before and after the twelve major changes described above.

The summary of the data for each of the seven aforementioned values is reported in Table 1:

TABLE 1

Total Number of Elections	2265
Total Number of Contested Elections	515
Total Number of Uncontested Elections	1750
Total Number of Contested Elections in Which an Incumbent was not a Candidate	77
Percentage of Contested Elections in Which an Incumbent was a Candidate and Won	86.5%
Percentage of Contested Elections in Which an Incumbent was a Candidate and Lost	13.5%
Percentage of Uncontested Elections	77.3%
Percentage of Contested Elections in Which an Incumbent was not a Candidate	15.0%

Summary of Minnesota Judicial Election Results

So, in the 2265 elections reviewed for this paper¹⁸³ a potential candidate for judge had, on average, an 85% chance of facing an incumbent in a judicial election, and if he faced an incumbent, there was only a 13.5% chance of defeating him.

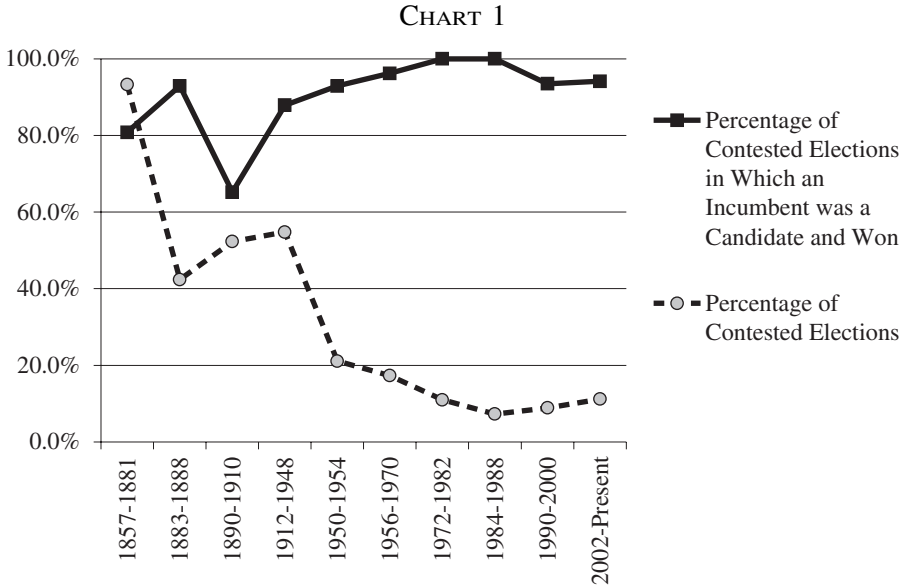
IV. OVERALL DATA TRENDS AND DATA TRENDS IN RELATION TO THE TWELVE MAJOR CHANGES¹⁸⁴

A. Overall Data Trends

The overall rates of contested elections and incumbent success are reported in Chart 1:

183. See *supra* Part III. B (noting the omissions disclosed).

184. The election results include a detailed history and compilation of the data used to calculate the rates of contested elections and incumbent success.



Rates of Contested Elections and Incumbent Success Over Time and Reported in Relation to Time Periods¹⁸⁵ That Correspond to the Twelve Major Changes

As Chart 1 indicates, Minnesota's judicial elections have become less competitive over time, except for the time periods after the adoption of the Australian Ballot, the creation of the Commission on Judicial Selection, and the *Republican Party v. White* decisions. The three most drastic changes occurred after the elective term was decreased, the Australian Ballot was adopted, and the advent of primaries and nonpartisan elections. Fascinatingly, the competitiveness of Minnesota's judicial elections has remained relatively stable over the last sixty-three years, as compared to the state's first ninety-one years of judicial elections. Over the last twenty-three years, however, we have seen a slight increase in the competitiveness in Minnesota's judicial elections after thirty-four straight years of decreasing competitiveness.

B. Data Trends in Relation to the Twelve Major Changes

1. The Beginning: 1857–81¹⁸⁶

Prior to the process established by the Minnesota Constitution and before any changes in the system, there were thirty seats up for election, twenty-eight of which were contested. Of the twenty-eight contested elections, incumbents ran in twenty-six and had a success rate of 80.8%.

185. See *infra* Part IV. B. 1–10.

186. There were thirty seats up for election and ten elections in this period.

2. *The Decrease in the Length of the Elected Judicial Term: 1883–88*¹⁸⁷

After the length of the elected judicial term was decreased from seven to six years and until 1888, the rate of contested elections drastically decreased from 93.3% to 42.4%. Additionally, the rate of incumbent success saw an increase from 80.8% to 92.9%.

3. *The Adoption of the Australian Ballot: 1890–1910*¹⁸⁸

The judicial elections occurring after the adoption of the Australian Ballot until 1910 show a marked decrease in the rate of incumbent success, from 92.9% to 65.2%. The rate of contested elections saw a less significant change, from 42.4% to 52.3%.

4. *The Advent of Primaries and the Move to Nonpartisan Elections: 1912–48*

Following the advent of primaries and the move to nonpartisan judicial elections until 1948, the rate of incumbent success rebounded to 87.9% from 65.2%. The rate of contested elections saw little change, increasing from 52.3% to 54.8%.

5. *The Establishment of Alleys and the Implementation of Incumbency Designation: 1950–54*¹⁸⁹

Judicial elections occurring after the establishment of alleys and the implementation of incumbency designation until 1954 saw another drastic decrease in the rate of contested elections, from 54.8% to 21.1%. This drastic change in the rate of contested elections was accompanied by a less significant change in the rate of incumbent success, from 87.9% to 92.9%.

6. *The Lengthening of the Appointed Term: 1956–70*¹⁹⁰

After the lengthening of the appointed term and until 1970, the rate of incumbent success only slightly increased, from 92.9% to 96.2%. While the rate of contested elections saw a small decrease, from 21.1% to 17.3%.

7. *The Creation of the Board on Judicial Standards: 1972–82*¹⁹¹

The judicial elections subsequent to the creation of the Board on Judicial Standards and until 1982 represent the first period in which the incum-

187. There were thirty-three seats up for election and four elections during this period.

188. There were 155 seats up for election and eleven elections during this period.

189. There were seventy-one seats up for election and three elections during this period.

190. There were 202 seats up for election and eight elections during this period.

191. There were 145 seats up for election and six elections during this period. The 1982 election results from the Second Judicial District are omitted. See *supra* Part III. B.

bent success rate was 100%, a slight increase from the rate of 96.2% in 1956–1970. But the rate of contested elections continued to decline from 17.3% to 11.0%.

8. *The Creation of the Court of Appeals and the Explosion in Number of District Court Seats: 1984–88*¹⁹²

Following the creation of the court of appeals and the explosion in number of district court seats, and until 1988, incumbents continued to enjoy a 100% success rate. Again, the rate of contested elections continued to decline from 11.0% to 7.3%.

9. *The Creation of the Commission on Judicial Selection: 1990–2000*¹⁹³

The judicial elections subsequent to the creation of the Commission on Judicial Selection through 2000 ended the 100% incumbent success rate, with only 93.5% of incumbents winning contested elections. For the first time since the 1912–1948 time period, the rate of contested elections increased from 7.3% to 9.4%.

10. *The Republican Party v. White Decisions: 2002–Present*¹⁹⁴

Finally, the judicial elections subsequent to the two *Republican v. White* cases through the present saw only a slight change in the rates of incumbent success and contested elections. The incumbent success rate saw a very slight increase from 93.5% to 94.1%. The rate of contested elections continued to slightly increase from 9.4% to 11.8%.

CONCLUSION

The debate on the best method of judicial selection has persisted for over 150 years in the state of Minnesota. The Minnesota Constitutional Convention delegates chose to implement an elective method of selecting its judges. Then, over the next 155 years came twelve major changes to Minnesota's judicial elections, with each change having a distinct effect on the competitiveness of Minnesota's judicial elections. Over time, the competitiveness of Minnesota's judicial elections has progressively declined, with few exceptions. Notably, the decline in competitiveness correlated with the limitation of party influence on judicial elections. The thirty-four

192. There were 151 seats up for election and three elections during this period. The 1984 and 1986 election results from the Second Judicial District and the 1984, 1986, 1988, and 1990 election results from the Fourth Judicial District are omitted. *See supra* Part III. B.

193. There were 489 seats up for election and six elections during this period. The 1996 election results from the Second and Fourth Judicial Districts are omitted from the data. *See supra* Part III. B.

194. There were 617 seats up for election and six elections during this period.

year decline was followed by a slight increase in the rate of competitiveness. This increase in competitiveness is due, at least in part, to the relatively recent *Republican Party v. White* decisions, which enabled partisanship to creep back into Minnesota's judicial elections.

This paper outlined twelve major changes to Minnesota's judicial elections and summarized the results of the elections following these changes. The background and data found in this paper provide a foundation for further research on the bona fide effects that changes in law have on the election of judges. It is likely that the law on Minnesota's judicial elections will continue to evolve, as will the judicial elections themselves.

For example, in January 2010, the United States Supreme Court held that corporations have a right protected by the First Amendment to support or oppose candidates for election.¹⁹⁵ Because there have been only two Minnesota judicial elections that occurred after the *Citizens United v. Federal Election Commission* decision, this paper did not attempt to provide an analysis of the effect of this decision on Minnesota's judicial elections. But *Citizens United v. FEC* represents further potential for Minnesota's judicial elections to become increasingly more political, and accordingly, more competitive. With the current trend of (re)politicizing Minnesota's judicial elections in full force, will Minnesota's method of judicial selection continue to promote the selection of impartial judges? Hopefully this paper will help to enlighten those who seek the answer to that question.¹⁹⁶

195. See *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 899–900 (2010) (explaining that First Amendment protection has been extended to corporations by explicit holdings in the context of political speech).

196. Please note that my use of the male pronoun throughout this paper is solely for the sake of simplicity and is not meant to indicate any gender bias.