

## Costly Court Race Points to a Politicized Future for Judicial Elections

A crucial election for Wisconsin's Supreme Court has drawn tens of millions of dollars in spending, turning an officially nonpartisan contest into a bare-knuckle political fight.



By Reid J. Epstein

March 28, 2023

5 MIN READ

MADISON, Wis. — It is a judicial election like no other in American history.

Thirty million dollars and counting has poured into the campaign for a swing seat on Wisconsin's Supreme Court, with TV ads swamping the airwaves. The candidates leave no illusions that they would be neutral on the court. And the race will decide not only the future of abortion rights in Wisconsin, but the battleground state's political direction.

Yet in other ways, the contest resembles an obscure local election: There are no bus tours or big rallies. Out-of-state political stars are nowhere to be found. Retail politicking is limited to small gatherings at bars that are not advertised to the public in advance.

The result is a campaign — officially nonpartisan but positively awash in partisanship — that swirls together the old and new ways of judicial politics in America, and that offers a preview of what might be to come. It is the latest evidence, after the contentious recent confirmation battles and pitched decisions on the U.S. Supreme Court, that judges increasingly viewed as political are starting to openly act political as well.

Officials in both parties believe the Wisconsin race could lead to a sea change in how State Supreme Court races are contested in the 21 other states where high court justices are elected, injecting never-before-seen amounts of money, politicization and voter interest.

“If you elect a candidate who is focusing on politics and agenda and values, that's going to reward that behavior, and it will just repeat,” said Shelley Grogan, a state appellate court judge in Wisconsin who is backing Daniel Kelly, the conservative candidate for the Supreme Court, and plotting a future high court run of her own.

Judge Grogan was alluding to the fact that Justice Kelly's liberal rival, Janet Protasiewicz, has been far more open about her political views, seeking to turn the April 4 general election into a single-issue referendum on abortion, which is now illegal in Wisconsin. And she appears to have the advantage, with a lead in private polling and a major fund-raising and advertising edge.

Justice Kelly, who served for four years on the court before being ousted in a 2020 election, has a long conservative record and endorsements from Wisconsin's largest anti-abortion groups. But he has centered his campaign on the argument that he is not a political actor and will decide cases solely based on the Wisconsin Constitution, a message that even some conservatives worry is less compelling than Democrats' pleas to protect abortion rights.

Judge Protasiewicz, a Milwaukee County judge, has emphasized her support for liberal issues and her opposition to conservative policies. She is, she says, sharing her values without explicitly stating how she would rule on particular cases.

But few are fooled. During their lone debate last week, Judge Protasiewicz barely bothered to disguise how she would rule on the state's 1849 abortion ban, a challenge to which is expected to reach the Wisconsin Supreme Court this year.

Sarah Godlewski, a Democrat who was appointed this month as Wisconsin's secretary of state, said last week at a stop in Green Bay that “when we're talking about abortion, when we're talking about reproductive freedom, we're going to be able to win on these messages.”





Whoever wins will earn a 10-year term and be the deciding vote on a four-to-three majority on the court, which is likely to rule on voting issues before and during the 2024 presidential election. If Judge Protasiewicz wins, Democrats are certain to challenge the state's gerrymandered legislative maps — and during the campaign, she has called them “rigged.”

The Protasiewicz strategy is to pound away on advertising to energize Democrats while depressing Republican support.

“For the typical voter, 90 percent of what they learn about this election is probably going to wind up being from campaign ads,” said Ben Wikler, the chairman of the state Democratic Party.

Virtually all of the state's Democratic players are united behind Judge Protasiewicz's campaign — with some notable exceptions.

In Milwaukee, the Black community organizing group BLOC, which formed in 2017, has refused to back Judge Protasiewicz because she sentenced the son of one of the group's leaders to 20 years in prison for a 2019 hit-and-run crash that killed 6- and 4-year-old sisters.

“It's obviously not ideal, as it is for all the marbles,” said Angela Lang, BLOC's executive director. “But it is one that I have to stand in. I would not force folks who have had family members locked up by her to be put in the position of supporting her.”

Wisconsin Republicans face more familiar divisions.

Some conservative voters have been turned off by the torrent of negative ads about Justice Kelly, said Matt Batzel, the Wisconsin-based executive director of American Majority Action, a conservative grass-roots training group.

Mr. Batzel's canvassers, who typically focus on conservative homes, found that in a suburban Milwaukee State Senate district that is also holding a special election on April 4, two-thirds of people who said abortion was their top issue in the race said they were in favor of abortion rights.

“‘Let's interpret the Constitution as written and follow the rule of law' hasn't historically motivated that many people,” Mr. Batzel said.



Daniel Kelly, the conservative candidate, has centered his campaign on the argument that he is not a political actor, a message that even some conservatives worry is less compelling than Democrats' pleas to protect abortion rights. Jamie Kelter Davis for The New York Times

During the debate, Justice Kelly insisted he had not made up his mind on how he would rule on the challenge to the 1849 law.

“Dan is such a purist that he doesn't want to appear to be a politician,” said David Prosser, a conservative former justice on the court.

Republican legislative leaders in Wisconsin, aware that abortion rights are a potent motivator for Democrats, have sought to create some exceptions to the 1849 law, but the effort has made little headway.

“The Republican Party should have passed an abortion bill and put it on the governor's desk a long time ago,” said Van Mobley, the Republican village president of Thiensville, who was the first Wisconsin elected official to endorse Donald J. Trump's 2016 campaign. “They still haven't. So I don't think that that's very helpful to create a climate for us.”

Justice Kelly's biggest hurdle may be the financial disparity — which is the result of campaign finance rules written by Wisconsin Republicans in 2015.

Before then, the state provided modest public funding for statewide judicial campaigns and capped the amount of money candidates for any office could receive from the state parties.

But that year, Gov. Scott Walker and the Republican-led Legislature passed a law allowing individual donors to give unlimited amounts to the state parties and allowing the state parties to transfer unlimited sums directly to candidates.

This, combined with the fund-raising acumen Mr. Wikler brought for Democrats when he became party chairman in 2019, has put Republicans at a significant financial disadvantage in races where their billionaire donors do not underwrite candidates.

Republicans now find themselves bemoaning the spending imbalance that has allowed Judge Protasiewicz to broadcast more than \$10 million in television ads while Justice Kelly has spent less than \$500,000 on them.

Judge Grogan lamented that Republicans did not have access to the national fund-raising network that has propped up the Protasiewicz campaign. But she declined to say whether it had been a mistake for Republicans and Mr. Walker to lift the cap on contributions to state parties, and would not offer an opinion about whether donors should be allowed to make unlimited contributions.

“What we should not let money do in the state of Wisconsin is buy a seat on any court,” Judge Grogan said. “Outside money should not buy a seat on a Wisconsin court. The voters in Wisconsin should decide.”

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A version of this article appears in print on , Section A, Page 1 of the New York edition with the headline: As Money Pours Into Court Race, Wisconsin Looms as Bellwether