

2002

The Cycle of Judicial Elections: Texas as a Case Study

Anthony Champagne

Kyle Cheek

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Judges Commons](#)

Recommended Citation

Anthony Champagne and Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 Fordham Urb. L.J. 907 (2002).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol29/iss3/7>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE CYCLE OF JUDICIAL ELECTIONS: TEXAS AS A CASE STUDY

*Anthony Champagne and Kyle Cheek**

I. INTRODUCTION

A. Background on Judicial Elections

Unlike the federal model of judicial selection, the model for the selection of state judges has undergone significant change throughout American history.¹ Until the mid-1800s, state judicial selection generally adhered to the federal model, emphasizing the appointment of judges. Typically, judges were selected by gubernatorial appointment coupled with confirmation by a special commission or the legislature; in some cases, judges were appointed directly by the state legislature.² The emergence of Jacksonian egalitarian democratic ideals in the nineteenth century brought about a growing belief that judges, like other public officials, should be accountable to the voting public.³ As that ideal gained acceptance among reformers, states began moving away from legislative and gubernatorial appointment and toward the selection of judges by popular election. In 1832, Mississippi became the first state to provide for the selection of its judges by popular election. New York followed in 1846. For the next sixty-five years, every new state to enter the Union provided for some or all of its judges to be chosen by popular election.⁴

* Anthony Champagne is a professor in the School of Social Sciences at the University of Texas at Dallas. He specializes in law and public policy. Kyle Cheek is an adjunct faculty member at Texas Christian University.

1. See MARY L. VOLCANSEK & JACQUELINE L. LAFON, *JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES* (1988) for a full treatment of judicial selection practices in the United States.

2. PHILLIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 3 (1980).

3. Burton M. Atkins, *Judicial Elections: What the Evidence Shows*, 50 *FLA. B. J.* 152 (1976).

The concept of an elected judiciary emerged during the Jacksonian era as part of a larger movement aimed at democratizing the political process in America. It was spearheaded by reformers who contended that the concept of an elitist judiciary . . . did not square with the ideology of a government under popular control.

Id.

4. DUBOIS, *supra* note 2.

When popular judicial election began in Mississippi and New York, judges typically ran on partisan ballots, campaigning alongside their fellow party candidates. In the latter part of the nineteenth century, however, Progressive reformers grew increasingly concerned with the influence of party bosses, who often gave judicial nominations to the party faithful, instead of the most qualified candidates.⁵ To quell judicial selection by party leaders, reformers pressed for nonpartisan judicial elections.⁶ In the closing decades of the 1800s, the legal profession also responded to the extraordinary influence of parties over judicial selection. Lawyers began organizing bar associations largely to promote judicial selection based on qualifications rather than party patronage.⁷

In the mid-twentieth century, reformers began advocating the "Missouri Plan," which removed the initial selection of judges from popular control but retained the Jacksonian ideal of electoral accountability.⁸ Under this plan, judges are appointed by a governor from a list prepared by a judicial nominating committee. The judges appointed under this plan then run in periodic, uncontested "retention" elections where voters are allowed to determine whether the judge remains in office.⁹

Contested elections, however, have not been eliminated. Thirty-nine states still select some judges through popular election, and eleven states select their supreme court justices in partisan elections.¹⁰ In spite of the Missouri Plan's initial popularity, the wave of reform that accompanied its early years has waned. Judicial elections are now the norm and their weaknesses require wholesale reform. A clear understanding of judicial elections will shed light on how to improve the process of selecting judges. This Article focuses on Texas, whose history often foreshadows the experience of other states.

5. *Id.* at 4.

6. *Id.*

7. *Id.*

8. RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 7-9* (1969).

9. *Id.*

10. AM. JUDICATURE SOC'Y, *JUDICIAL SELECTION METHODS IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS* (2000), available at <http://www.ajs.org>; Roy Schotland, *Personal Views*, 34 *LOY. L.A. L. REV.* 1361, 1362, 1365 (2001).

B. The Case of Texas

In its first five years of statehood, Texas was a microcosm of the early national experience with state judicial selection. Initially, judges were appointed by the governor and approved by the Texas senate.¹¹ Then, in 1850, the influence of Jacksonian Democracy led to the adoption of judicial selection by popular election.¹² Under Reconstruction, Texas returned to the gubernatorial appointment of judges.¹³ However, largely in response to abuses of the gubernatorial appointment power during Reconstruction, Texas included a provision in its current constitution, adopted in 1876, for the selection of judges by popular election.¹⁴ While the Texas constitution does not require that judicial candidates run on partisan ballots, Texas election law encourages judicial candidates to run as party nominees.¹⁵

Although Texan judicial elections are conducted by partisan ballot, the first 100 years of judicial elections reflected the dominance of one party in Texas. Judicial races were seldom contested, and when a contested race was run, incumbent judges were typically secure.¹⁶ One study of judicial selection in Texas found that from 1952 through 1962, death, resignation, or retirement was more likely to end judicial tenure than electoral defeat.¹⁷ During the era of one-party politics, contested elections seldom occurred in the general election. Instead, challengers were more likely to appear in the Democratic primary. Texas' provision for gubernatorial appointments to fill mid-term vacancies also became an important means of ascending the bench. Mid-term resignation was common among judges, allowing the governor to name a replacement.¹⁸ Judges initially appointed by the governor then enjoyed the benefit

11. Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 55 (1986).

12. *Id.*

13. *Id.*

14. TEX. CONST. art. V, § 7.

15. Susan Douglass, *Selection and Discipline of State Judges in Texas*, 14 Hous. L. REV. 672, 674-75 (1977).

16. Bancroft Henderson & T.C. Sinclair, *The Selection of Judges in Texas*, 5 Hous. L. REV. 430, 430-98 (1968).

17. Only 5% of all trial judges and 7% of appellate judges suffered electoral defeat between 1952 and 1962, while retirement or resignation accounted for 41% of all changes in judicial office during that time. *Id.* at 441.

18. "Of all judges who served during the period 1940-1962, a total of 66 percent were appointed. Just how meaningful appointments were is shown by reference to the period 1952-1962 for which primary election statistics were available. In the first election following appointment, 86.2 percent of the judges were unopposed and only 4 percent were defeated." *Id.* at 442.

of incumbency when facing election for the first time. This arrangement was so common in the first 100 years of the 1876 constitution that one study concluded that the Texas judicial selection system was primarily appointive.¹⁹

Only in the 1970s, with a newly emerged two-party political landscape, did meaningful contests for judicial election begin to occur. Starting with district court races in urban areas, Republican candidates began breaking the century-long Democratic stranglehold.²⁰ As competitive partisan contests became more common, campaigns standardized, with perhaps the most important developments being the new role of parties and the escalating cost of judicial races.

II. CHANGE FROM OLD JUDICIAL POLITICS TO THE NEW PLAINTIFF-DEFENSE WARS

As in other states that elect judges,²¹ judicial elections in Texas were not always contested.²² Traditionally, Texas justices, like most elected officials in the state, were conservative Democrats. One journalist aptly described the pre-1978 supreme court as follows:

[J]ustices' names seldom appeared in the press and were known only to the legal community. Most justices had been judges in the lower courts; a few had served in the Legislature. At election time, sitting justices almost never drew opposition. Some justices resigned before the end of their terms, enabling their replacements to be named by the governor and to run as incumbents. In the event that an open seat was actually contested, the decisive factor in the race was the State Bar poll, which was the key to newspaper endorsements and the support of courthouse politicians.

In effect, the legal and political establishment begat generations of justices who reflected the assumption of their progenitors that preservation of a "good bidness climate" is the highest aim of government. Part of that climate was a legal system in which oil com-

19. *Id.*

20. Champagne, *supra* note 11, at 53-117.

21. Election is a common method for selecting judges in the United States. Thirty-nine states have some judicial elections. Of the nation's 1243 state appellate judges, 47% are appointed for their initial terms, 40% face partisan elections, and 13% face nonpartisan elections. Of the nation's 8489 general jurisdiction state trial judges, 24% are appointed for initial terms, 43% face partisan elections, and 33% face nonpartisan elections. Schotland, *supra* note 10.

22. Roy Schotland, *Statement of Roy A. Schotland before the Joint Select Committee on the Judiciary of the Texas Legislature Austin, Texas, March 25, 1988*, 72 JUDICATURE 154 (1988).

panies, hospitals, insurers, and other enterprises didn't have to live in constant fear of lawsuits.²³

Judicial elections were sleepy, low-key affairs that resulted in the election of pro-civil defense Democratic judges. This did not change until the late 1970s. At that time, a remarkable event in the history of the Texas judiciary occurred: an unknown lawyer named Don Yarbrough ran for the Texas Supreme Court and won. Not only was Yarbrough an unknown, but numerous ethical complaints had been filed against him, and he ran against a highly respected incumbent who had won the state bar poll by a 90% margin. Yarbrough served only a few months before criminal charges and the threat of legislative removal led to his resignation.

How did he win the election? Yarbrough was a well-known political name in Texas, and voters probably confused him with either the long-time U.S. senator, Ralph Yarborough, or with another Don Yarbrough, who had twice run for governor.²⁴ Regardless, this episode proved that literally anyone could be elected to the Texas Supreme Court, if they had a popular name.²⁵

Name identification might occur naturally, as with Yarbrough, but it can also be bought. Around the same time Yarbrough lucked into his judgeship, plaintiffs' lawyers began pouring significant amounts of money into Texas Supreme Court campaigns in an attempt to elect justices with pro-plaintiff philosophies. For example, in 1982, a good election year for Democrats because popular Democratic Senator Lloyd Bentsen headed the ticket, a highly successful San Antonio plaintiffs' lawyer and one of his wealthiest and most litigious clients, Clinton Manges, poured \$350,000 into three supreme court races; two of their candidates were elected.²⁶

23. Paul Burka, *Heads, We Win, Tails, You Lose*, TEX. MONTHLY, May 1987, at 138, 139.

24. *Id.*; Champagne, *supra* note 11, at 101. Prior to Yarbrough's election in 1976, a state bar grievance committee had filed a disbarment suit against him alleging fifty-three violations. Later, twenty more allegations were added. Tape recordings of Yarbrough's plans to murder and mutilate enemies did not result in indictments, but Yarbrough was indicted and convicted for aggravated perjury in reference to a forged automobile title. Yarbrough eventually resigned from the court and gave up his law license in 1977. This extraordinary story is told in Paul Holder, *That's Yarbrough—Spelled with One "O": A Study of Judicial Misbehavior in Texas*, in PRAC. TEX. POL. 447-53 (Eugene Jones et al eds., 1980).

25. A similar situation occurred in 1978, when a little known plaintiffs' lawyer named Robert Campbell made his try for the Texas Supreme Court, running against an incumbent judge. The previous fall, University of Texas running back Earl Campbell had won the Heisman Trophy. Burka, *supra* note 23, at 139.

26. Ken Case, *Blind Justice*, TEX. MONTHLY, May 1987, at 136, 138.

By 1983, justices with significant backing from the plaintiffs' bar gained a majority on the Texas Supreme Court.²⁷ With the election of a pro-plaintiffs' court, Texas tort law began moving in the plaintiffs' direction—a move that would damage the court's reputation. In *Manges v. Guerra*, for example, a jury found that Clinton Manges, acting as the manager of mineral leases on 70,000 acres of the Guerra family's land, had violated his obligations to the Guerras. The jury relieved Manges of his manager position and awarded the Guerras \$382,000 in actual damages and \$500,000 in exemplary damages.²⁸ The intermediate appellate court upheld the verdict, and appeal was taken to the Texas Supreme Court.²⁹ Manges hired Pat Maloney, Sr. to represent him before the supreme court.

The case was assigned to Justice C.L. Ray, who had received substantial campaign contributions from Manges and Maloney. Ray initially proposed an opinion supporting Manges. When the court rejected that opinion, Ray tried again. Two justices eventually recused themselves, one having been sued by Manges over a campaign statement he had made, and the other having received \$100,000 in campaign money from Manges and Maloney. With those recusals, the vote was 4-3 for Manges and for reversal of the lower court. Then, the chief justice ruled that five votes were required for reversal. Justice Robertson, one of the justices who had recused himself, immediately changed his recusal to a vote in favor of reversal.³⁰ The attorney for the Guerras filed a motion for a rehearing and asked that Justices Kilgarlin, Robertson and Ray recuse themselves.³¹ All three justices had received significant campaign money from Manges and Maloney. This was only the beginning of a major supreme court scandal.

In 1984, Justice Ray told a litigant that his case was a tough one and that if he did not win that case, he would win the next.³² Justice Ray then discussed the court's deliberations and told the litigant he would see what could be done back in Austin.

27. TEXANS FOR PUB. JUSTICE, PAYOLA JUSTICE: HOW TEXAS SUPREME COURT JUSTICES RAISE MONEY FROM COURT LITIGANTS (1998), <http://www.tpj.org/reports/payola/intro.html>.

28. *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984).

29. *Id.* at 181.

30. *Id.* at 185.

31. Motion for Recusal of Justice C.L. Ray, *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1983) (No. C-771); Motion for Recusal of Justices Ted Z. Robertson and William W. Kilgarlin, *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1983) (No. C-771).

32. Eugene H. Methvin, *Justice for Sale*, READER'S DIG., May, 1998, at 131.

Additionally, in 1985, at the request of Pat Maloney, Sr., Justice Ray attempted to transfer two cases from one court of appeals to another. Those scandals ultimately led to a public reprimand of Justice Ray³³ and the public admonition of Ray and another justice, William Kilgarlin.³⁴

The prestige and integrity of the court continued to crumble. Around the same time as the Justice Ray incidents, the court refused to review an \$11 billion judgment against Texaco, as large campaign contributions flowed into the court's campaign coffers from both Texaco lawyers and the plaintiff and plaintiffs' attorneys.³⁵

Confronted with a crisis on the court, in 1986 Chief Justice John Hill proposed merit selection of judges in Texas and offered himself as the leader of a movement for judicial reform.³⁶ Rebellion against Hill's leadership ensued, as did unprecedented intra-court conflict.³⁷ Fifteen months after proposing merit selection, and only

33. STATE COMM'N ON JUDICIAL CONDUCT, FINDINGS, CONCLUSIONS AND PUBLIC REPRIMAND RELATING TO CERTAIN ACTIVITIES OF JUSTICE C.L. RAY OF THE SUPREME COURT OF TEXAS (1987). Ray was disciplined for apparent favoritism in the transfer of cases, for the improper receipt of air transportation, for the receipt and consideration of ex parte communication, for the improper solicitation of funds, for the ex parte disclosure of confidential information to a litigant, and for the initiation of an ex parte private communication. Sadly, the timing of the release of the findings was terrible, occurring when Ray was caring for his terminally ill daughter. Robert Elder, Jr., *Sanctions Spark More Feuding*, TEX. LAW., June 15, 1987, at 17.

34. STATE COMM'N ON JUDICIAL CONDUCT, FINDINGS, CONCLUSION AND PUBLIC ADMONISHMENT RELATING TO CERTAIN ACTIVITIES OF JUSTICE WILLIAM KILGARLIN OF THE SUPREME COURT OF TEXAS (1987). Two of Justice Kilgarlin's briefing attorneys had accepted a weekend trip to San Antonio from Pat Maloney, Jr., a member of a well-known plaintiffs' firm. Kilgarlin was admonished to "make certain in the future that all staff working under him be required to observe the standards of fidelity and diligence that apply to him." Kilgarlin was also "admonished that solicitation of funds by a judge to prosecute a suit against a former attorney who had testified before the House Committee is violative of the Code of Judicial Conduct." Interestingly, Justice Kilgarlin blamed the sanction on the civil defense bar. Robert Elder wrote, "Kilgarlin placed the blame for the sanctions on Larry Thompson, who in 1985 formed the Supreme Court Justice Committee. Thompson has said the group was set up to counter the success of the plaintiffs' bar. . . . Kilgarlin called the pro-defense committee '19 lawyers who hate my guts' and said 'one of the expressed purposes of that group was to create a scandal involving me.'" Elder Jr., *supra* note 33, at 15.

35. "Lawyers representing Pennzoil contributed, from 1984 to early this year, more than \$355,000 to the nine Supreme Court justices sitting today. . . . Lawyers representing Texaco have also been contributors, but they have given far less." Thomas Petzinger, Jr. & Caleb Solomon, *Texaco Case Spotlights Questions on Integrity of the Courts in Texas*, WALL ST. J., Nov. 4, 1987, at 1.

36. Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 152 (1988).

37. *Id.* at 151-52.

half-way through his six year term, Hill resigned from the court. His replacement, appointed by a Republican governor, was Tom Phillips, a Houston trial judge and a Republican. When Hill used Phillips' swearing-in ceremony to plead for merit selection of judges, Justice Robert Campbell resigned, supposedly to campaign against Hill's reforms.³⁸

The result of the scandal and Hill's reform movement was not only unprecedented conflict within the Texas Supreme Court, but also an opening wedge for Republican penetration. By 1988, it was time for a counter-attack by civil defense forces. For the 1988 elections, two-thirds of the Court's seats were vacant. Associate Justice Ted Z. Robertson chose to run against Phillips for the position of chief justice.³⁹ Justice Kilgarlin, admonished by the State Commission on Judicial Conduct, was challenged by Nathan Hecht, a Republican.⁴⁰ Democratic incumbent Raul Gonzalez was challenged by Republican Charles Ben Howell.⁴¹ A new appointee to the court, Republican Barbara Culver, was challenged by Democrat Jack Hightower. New appointee Republican Eugene Cook was challenged by Democrat Karl Bayer. Finally, there was a battle over an open seat between Democrat Lloyd Doggett and Republican Paul Murphy.⁴² It was the political equivalent of war between plaintiffs' and civil defense interests.⁴³

The twelve major candidates for the Texas Supreme Court raised a total of \$10,092,955.⁴⁴ A political action committee funded by trial lawyers raised another \$1.4 million for television commercials and "get-out-the-vote" campaigns. Several of the races were clearly split between candidates funded by plaintiffs' lawyers and candidates funded by civil defense interests. That was especially true of the race for chief justice where incumbent Phillips raised slightly over \$1 million and Robertson raised nearly \$1.9 million. Other heavily funded races between plaintiff- and civil defense-backed candidates included the Kilgarlin-Hecht race where Kilgarlin raised over \$2 million to Hecht's \$650,000 and the Doggett-

38. *Id.* at 158.

39. Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races*, 17 CRIM. L. & SOC. CHANGE 91, 95 (1992).

40. *Id.* at 98.

41. *Id.* at 97.

42. *Id.*

43. *Id.* at 95.

44. *Id.* at 99.

Murphy race, where Doggett raised about \$660,000 to Murphy's \$438,000.⁴⁵

Angered by the pro-plaintiff tinge of the court's decisions, the Texas Medical Association was heavily involved in the 1988 supreme court elections. Its political action committee gave over \$181,000 in direct contributions and encouraged individual doctors to give at least \$250,000 more.⁴⁶

The great advantage of the Republican candidates was that they could campaign against the plaintiff-backed candidates as reformers bringing integrity back to the court. Indeed, Chief Justice Phillips headed a bipartisan "clean slate" of candidates who were opposed to incumbent Democrats backed by trial lawyers.⁴⁷ The "reform" platform, together with financial backing of civil defense interests and increasing Republican Party strength, led to the defeat of all the plaintiff-backed incumbents. The only pro-plaintiff justice elected was Lloyd Doggett, a non-incumbent who had run for an open seat. Democrat Raul Gonzalez won, but he was backed by civil defense interests against a largely unfunded Republican. Democrat Hightower, a moderate, defeated an incumbent Republican who had angered the Medical Association by opposing medical malpractice caps. Republicans Phillips, Hecht and Cook won, with Phillips and Hecht defeating the most heavily funded plaintiff-backed Democrats. The result was the beginning of the Republican domination of the court.⁴⁸ Another effect was that civil defense interests learned that they could beat heavily funded plaintiff-backed candidates such as Kilgarlin and Robertson in head-on battles. The election of 1988 was the beginning of the end of the pro-plaintiff court of the 1980s.

The last gasp of the plaintiff-civil defense wars came in 1994 when pro-civil defense Democratic Justice Raul Gonzalez was up for reelection. Gonzalez was challenged in the Democratic primary by Rene Haas, a trial lawyer financed by trial lawyers, in one of the most vicious judicial campaigns in Texas history. Trial lawyers made a clear effort to defeat a conservative Democrat who strongly supported civil defense interests.⁴⁹ The primary campaign turned into the most expensive judicial race in history. Candidate

45. *Id.* at 97.

46. *Id.* at 99.

47. *Id.* at 94-96.

48. *Id.* at 96-99.

49. Walt Borges, *Gonzalez-Haas Fight Pushes Others Aside*, TEX. LAW., Mar. 14, 1994, at 1.

expenditures totaled \$4,490,000.⁵⁰ Gonzalez won the run-off primary against Haas, causing the Republican candidate to withdraw from the race, and effectively giving the office to Gonzalez.

After the Gonzalez-Haas race, trial lawyers no longer mounted serious campaigns for the Texas Supreme Court because, no matter how much they spent, their candidates lost. Some trial lawyer contributions went to lower courts that seemed vulnerable to plaintiff-backed campaigns, but the big battle over the Texas Supreme Court was over.⁵¹

Great plaintiff-defense battles for judicial positions are not unique to Texas. Similar fights have occurred in other states such as Alabama⁵² and Ohio.⁵³ Indeed, some of the most common conflicts in judicial elections are between plaintiff and civil defense interests.

A. Party Competition

Political parties play an important role in judicial elections. Whether elections are partisan, nonpartisan, or retention elections, political parties provide workers and funding. In fact, according to the September 2000 campaign reports for the Alabama chief justice race, the largest donor to the Democratic candidate for chief justice was the Democratic Party.⁵⁴ The party label provides a signifi-

50. The Haas-Gonzalez primary election just barely holds the record for judicial campaign expenditure. Roy Schotland, *Financing Judicial Elections, 2000: Change and Challenge* 2001 L. REV. M.S.U.-D.C. L. 1, 14 (forthcoming 2001).

51. The 1994 San Antonio Court of Appeals race was one of the earliest examples of trial lawyers contributing substantially to court of appeals races. In that race, five plaintiffs' firms kept the court from becoming Republican while Democrats were badly beaten in other parts of the state. The five firms contributed over \$366,000 directly and through their PACs, and they raised another \$254,000 from other personal injury lawyers. Those five firms contributed nearly 37% of the Democratic candidates' total funds. All four Democratic incumbents for the San Antonio court of appeals won, in contrast to the defeat of ten of the eleven Democratic incumbents running for other courts of appeals in the state. Democrats running for the San Antonio Court of Appeals raised twice as much money as the average candidate in a Texas appellate race in 1994. Mark Ballard & Amy Boardman, *5 Firms Swung 4th Court Races*, TEX. LAW., Mar. 20, 1995, at 1.

52. Alabama has been described as "a battleground between businesses and those who sue them." That battle, one scholar wrote, "is often fought in elections for the Supreme Court of Alabama." Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656-57 (1999).

53. Catherine Candisky, *High Court Races, Once Dignified, Now Down, Dirty*, COLUMBUS DISPATCH, Nov. 1, 2000, at 1A.

54. Stan Bailey, *Moore's War Chest Doubles Yates*, BIRMINGHAM NEWS, Sept. 26, 2000. A spokesman for the Alabama Citizens for a Sound Economy, a pro-business organization, claims that trial lawyers will give about 2 million dollars to the State Democratic Executive Committee and about 1 million of that sum will go to judges.

cant political asset for candidates in low visibility judicial races. Further, the party label is a crucial source of information for voters. As Professor Philip Dubois wrote:

[V]oters' reliance on the partisan label choices is, in a very real sense, a rational act. This is no less true in judicial elections. . . . Thus, research has repeatedly demonstrated that where the partisan cue is available, judicial voters will rely upon it. The availability of the party label both prompts voters to exercise a choice, thereby increasing the percentage of the eligible electorate participating in the election, and results in the expression in the aggregate of the voters' preferences for the direction of judicial policy.⁵⁵

The party label provides insight into the attitudes and values of judges and hints at how they will decide questions of public policy. One recent analysis of 140 articles discussing the link between party affiliation and performance on the bench confirmed that "party is a dependable measure of ideology on modern American courts."⁵⁶ Nationally, party affiliation is not a uniform indicator of judicial ideology. In a study of workers' compensation appeals decided by the Wisconsin Supreme Court over a ten year period, David Adamany found some correlation between the justices' party affiliation and their votes with respect to claimants, but the correlation was less than that found in Michigan.⁵⁷ Adamany believes that differences in the partisanship of judicial campaigns, and thus differences in the states' political cultures, explain the discrepancies in the correlations.⁵⁸ Another study of partisan voting in eight state courts reaches the following conclusions: "Where judges are selected in highly partisan circumstances and depend upon a highly partisan constituency for continuance in office, they may act in ways which will cultivate support for that constituency, that is, exhibit partisan voting tendencies in their judicial decision-making."⁵⁹

See also Stan Bailey, *Bench Hopefuls Get Lawyers' Donations*, BIRMINGHAM NEWS, Oct. 6, 2000.

55. Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31, 44 (1986).

56. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999).

57. David W. Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57 (1969).

58. *Id.*

59. DUBOIS, *supra* note 2, at 148.

Of course, while partisan voting has its value, there is a downside. Highly qualified judicial candidates can be defeated simply because they bear the wrong party label.⁶⁰ After Republican straight ticket voting led to the defeat of nineteen Democratic judges in Harris County, Houston, Texas and Republican victories in forty-one of forty-two contested judicial races, one law school dean commented, “[I]f Bozo the Clown had been running as a Republican against any Democrat, he would have had a chance.”⁶¹

Parties expect extreme loyalty from their judicial nominees. In the 1970s, for example, when the Supreme Court of Michigan decided a state redistricting case in favor of the Republican Party, the Democratic chief justice was denied nomination for the 1976 election.⁶² The state bar, however, rallied to support him, and he won re-election as an independent.⁶³

Texas judges have long been expected to tow the party line. Two Republican judges on an intermediate appellate court were recently rebuked by delegates at the Republican State Convention because of their decision to overturn a sodomy conviction, which angered religious conservatives in the party.⁶⁴ Although the judges were Republicans, the delegates opposed their re-election and placed language in the party platform attacking “activist judges who use their power to usurp the will of the people.”⁶⁵

Philip Dubois’ highly regarded 1980 book, *From Ballot to Bench*, is the classic defense of partisan elections and heralds the importance of party affiliation as an indication of judges’ values. Dubois excluded the South from his analysis because, at the time, the Republican Party was insignificant in most Southern states and a study of party competition there would have been futile. In recent years, however, the Republican Party has shown such growth in the South that partisanship has become especially important in the study of Southern judicial elections.

60. Anthony Champagne, *Political Parties and Judicial Elections*, 34 *LOY. L.A. L. REV.* 1411 (2001).

61. 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.* 760, 780 (1995).

62. Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 *HARV. C.R.-C.L. L. REV.* 187, 196 (1996).

63. *Id.*

64. Julie Mason, *Bizarre Double Standard Permeates State GOP Convention*, *Hous. CHRON.*, June 25, 2000, at A32.

65. Right-Wing Attacks on Judicial Independence in the States in 2000, Right Wing Watch Online (People for the American Way), Sept. 25, 2000, at www.pfaw.org.

Voters can best use party affiliation as a predictor of the attitudes and values of judges in appellate court elections. It is in appellate courts that major policy questions are decided, not in trial courts, where more routine legal issues are handled.

Texas, like many Southern states, was once a one-party state. Real electoral competition in judicial races was found only in Democratic primaries, and there was little competition in those primaries when a candidate had the political advantage of incumbency.⁶⁶ In 1978, however, Bill Clements, the first Republican elected governor since the end of Reconstruction, was elected. He began appointing Republicans to open and new judicial seats, giving Republicans the advantage of incumbency.⁶⁷ The Republican Party began to rapidly gain strength, possibly due to Ronald Reagan's enormous popularity. In 1984 in particular, Ronald Reagan was so popular in Texas that he garnered nearly 64% of the two-party vote for President. His strength affected races far down the ballot, including those for the major trial courts in Texas. That year, Democrats challenged four Republican incumbents; all four Republican incumbents won. In contrast, there were sixteen races where Democratic incumbents were challenged by Republicans, and only three of the Democratic incumbents won.⁶⁸ A Democratic nominee was no longer guaranteed election. Indeed, in some counties (initially Dallas), the Republican Party gained such strength in the early 1980s that there was a massive movement of trial court judges from the Democratic to the Republican Party.⁶⁹ Soon, the only Democrat who could win election to Dallas County

66. Of the seventeen states with partisan judicial elections, five are Southern. Until twenty to thirty years ago all five were one-party Democratic states. The states with partisan judicial elections are Alabama, Arkansas, Illinois, Indiana, Kansas, Louisiana, Missouri, New Mexico, New York, North Carolina, Pennsylvania, Tennessee, Texas and West Virginia. Michigan, Ohio, and Idaho, however, should be added to that list. While these three states have a non-partisan ballot, judicial candidates run as partisan candidates. The five Southern states on this list that were once one-party Democratic states are Alabama, Arkansas, Louisiana, North Carolina, and Texas. Champagne, *supra* note 60, at 1415 n.16.

67. Many of those early Republican appointees were defeated in their first bid for reelection after being appointed by Governor Clements. In 1982, a strong Democratic year in Texas, every one of the twenty-three incumbent judges who was defeated was a Clements appointee facing his first election after appointment. Champagne, *supra* note 11, at 66.

68. L. Douglas Kiel, Carole Funk & Anthony Champagne, *Two-Party Competition and Trial Court Elections in Texas*, 77 JUDICATURE 290, 291 (1994).

69. Champagne, *supra* note 11 at 79.

trial courts was Ron Chapman, a judge who shared the same name as the most popular radio disk jockey in the area.⁷⁰

The Republican onslaught in statewide elections mounted more slowly but was just as overwhelming. None of the eighteen judges elected statewide in Texas is a Democrat, and in the 2000 elections, no Democrat ran for any of the three open seats on the Texas Supreme Court. There are, of course, some counties and regions in Texas—the Rio Grande Valley, for example—where Democrats are successful. However, the move from one-party Democratic dominance to substantial one-party Republican dominance was rapid, taking less than twenty years.

B. Interest Group Politics

Interest groups play a significant role in judicial elections. They provide potential judges with the funding needed to reach voters and assist candidates in mobilizing voters. Interest groups also provide voters with important cues about the attitudes and values of judicial candidates in states where the parties are not heavily involved in judicial elections. For example, in a recent superior court race in California, one candidate obtained the endorsements of the Sacramento County Deputy Sheriff's Association and the Sacramento Police Officers' Association.⁷¹ If a voter did not know that the candidate had been a police officer and a prosecutor, such endorsements would provide a hint that the candidate was pro-law enforcement.

Interest group involvement in judicial elections has changed in several ways. Interest groups are increasingly national in scope, and the number of groups and the amount of money they contribute have vastly increased. In 1968, there were 10,300 interest groups; in 1988, 20,600.⁷² During World War II there were 500 registered lobbyists in Washington; today there are 25,000.⁷³ The number of political action committees registered with the federal government grew from 608 in 1974 to about 4000 in 1994.⁷⁴ As judicial races become increasingly competitive, campaign costs rise

70. Anthony Champagne & Greg Thielemann, *Awareness of Trial Court Judges*, 74 JUDICATURE 271, 272 (1991).

71. Gary Delsohn, *Spending, Integrity Hot Issues in Judge Race*, SACRAMENTO BEE, Sept. 10, 2000, at B1.

72. G. Calvin MacKenzie, *The Revolution Nobody Wanted*, N.Y. TIMES (Literary Supplement), Oct. 13, 2000, at 12.

73. *Id.*

74. JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* 22, 24 (Longman 1997) (1989); MacKenzie, *supra* note 72.

dramatically. Judicial candidates now need the substantial resources of interest groups to win elections.

For some analysts, interest group involvement in judicial politics is more than unhealthy; it challenges the appearance of judicial impartiality. Some analysts go further and suggest that judges are becoming "captives" of influential interest groups.⁷⁵

In Texas, as elsewhere,⁷⁶ most interest group involvement in judicial races involves economic as opposed to ideological interests. Traditionally, the main interest groups in judicial elections are the competing plaintiff and civil defense segments of the bar. In states where unions are powerful, unions will often align with plaintiffs' lawyers in backing pro-plaintiff judicial candidates.⁷⁷ In Texas, plaintiffs' lawyers provide the main support for plaintiff-oriented judges due to the comparative weakness of unions. Civil defense lawyers and firms are aligned with business and professional interests. One of the main reasons for the success of Republicans and moderate-to-conservative Democrats in the 1988 Texas Supreme Court elections was the strong involvement of the Texas Medical Association (TMA). Not only did the TMA contribute substantial sums of money to its slate of candidates, but it also encouraged individual doctors to contribute money. The Association created a grass-roots campaign through which Texas physicians actively campaigned for the TMA slate.⁷⁸

75. NORTHEAST OHIO AM. FRIENDS SERV. COMM., OHIO SUPREME COURT JUSTICE FOR SALE (2000), www.afsc.net; see also TEXANS FOR PUB. JUSTICE, *supra* note 27.

76. One recent study of judicial elections in Pennsylvania strongly suggests that economic interests overwhelmingly dominate financial contributions to judicial races. Of the \$3,129,783 contributed by PACs and law firms to thirty-five Pennsylvania supreme court candidates from 1979 to 1997, only eighteen contributing groups were labeled "ideological," and they contributed only \$25,053. In contrast, groups categorized as "business" groups gave \$2.5 million and consisted of 290 PACs and law firms. Four hundred labor PACs gave about \$527,000. James Eisenstein, *Financing Pennsylvania's Supreme Court Candidates*, 84 JUDICATURE 10, 17 (2000).

77. One newspaper article described the political battle lines in judicial elections as follows:

This ugly transformation of judicial politics has come as some of the nation's most divisive disputes have come before the courts. State Supreme Courts now decide the future of school funding; policies affecting guns, tobacco and the environment; and the rules that make it easy, or difficult, to sue corporations and doctors for damages. With such enormous stakes, the battle lines are stark: Trial lawyers and unions seek judges who will side with individuals and embrace new legal theories. Businesses want judges who'll protect them and the status quo.

Campaign Contributions Corrupt Judicial Races, USA TODAY, Sept. 1, 2000, at 16A.

78. Champagne, *supra* note 39, at 99.

One study of seven Texas Supreme Court Justices' campaign contributions provided a good indication of the campaign contributions of interest groups with economic concerns. That study found that the political action committees and executives of fifty corporations contributed 15% of the money raised by the seven justices. The study also found that the family of the head of a major tort reform group gave \$60,000 to the justices and that 9% of the justices' money came from the political action committees of thirty trade groups, including the Texas Society of CPAs, the Texas Medical Association, the Texas Association of Realtors, the Texas Association of Defense Counsel, and the Texas Restaurant Association.⁷⁹

In 1995, the TMA's involvement in Texas Supreme Court races created a major ethical issue for the court. Dr. Bernard Bradley had a large malpractice judgment awarded against him which the TMA found grossly unfair. Dr. Bradley became the catalytic factor needed to encourage physicians to actively participate in judicial races and back TMA-endorsed candidates. The Texas Medical Association produced a videotape about the Bradley case and used it to encourage doctors to back its candidates for the court. Ultimately, the Bradley case came before the Texas Supreme Court and one of the issues considered was whether justices who appeared in the videotape and who were endorsed by the TMA should recuse themselves from hearing the case. One justice, who did not appear in the videotape, recused himself in disgust over the inappropriateness of the TMA's deep involvement in the judicial election and its emphasis on reversing the verdict against Dr. Bradley.⁸⁰ His protest, however, was to no avail. The remaining eight justices participated in the decision and reversed the Bradley ver-

79. TEXANS FOR PUB. JUSTICE, *supra* note 27.

80. Justice Bob Gammage recused himself. He wrote:

The problem is the perception created by a nineteen-minute video produced by TEX-PAC, the political action committee of the Texas Medical Association. A parody of Star Wars entitled Court Wars III, the video was intended to garner support for TEX-PAC's favored candidates for the Texas Supreme Court in the 1992 general election. By analogizing the Texas Trial Lawyer's Association to Darth Vader's evil empire and a "bipartisan coalition of medicine, business, agriculture and industry" to the champions of "fairness, impartiality and reform," the video sought to persuade viewers that the election of certain candidates to the Texas Supreme Court was important in their professional and personal lives. The video urged physicians not only to contribute money, but also to "conduct grass roots efforts . . . from . . . slate cards to office displays, voter information materials and handouts, to sample letters to communicate with your patients, colleagues and friends, to signature-styled newspaper ads. . . ."

dict. One even wrote a reply to the justice's recusal in which he tried to justify the participation of those justices who had appeared in the videotape.⁸¹

Texas has had more than its share of troublesome cases where interest groups have appeared to compromise the independence of judges. For example, in Houston, Texas, victims' rights groups have frequently aligned with prosecuting attorneys to elect judges who are tough on crime. Thus, judges, well aware that their political futures may hang on their image as law and order judges, sometimes appear to pander to the crime control interests. One judge, for example, taped a picture of Judge Roy Bean's hanging saloon on the front of his bench, superimposed his image over Judge Bean's, and referred to the high court judges as "liberal bastards" and "idiots."⁸²

In an effort to drive home the importance of the Court races, the video goes beyond general statements to focus on the consequences of one particular medical malpractice case. Pointing to this case, the narrator alleges that "[a]n unjust legal system that punishes the innocent, along with the guilty, still flourishes in Texas, and medicine will always be a prime target." The defendant doctor is described as being "faced with bankruptcy, all for coming to the rescue of a patient in desperate need of his help." This "tragic situation" is called "a classic exercise in Texas justice where no good deed goes unpunished." Although a similar situation could "happen anytime in any place," the doctor is not without hope, as "[he] has a Supreme Court he can appeal to, if we prevail in November. Without that, he would have no chance, and his career would be ruined as a practicing physician. . . ."

I believe that (1) where a person or entity has sought to engender support, financial or otherwise, for a judicial candidate or group of candidates, and (2) where that effort is made through a medium which is intended to be widely circulated, and (3) where that effort ties the success of the person's or entity's chosen candidate or candidates to the probable result in a pending or impending case, a judge should recuse from participation in that case. . . ."

Rogers v. Bradley, 909 S.W.2d 872, 873-74 (Tex. 1995).

81. Justice Craig Enoch wrote:

. . . I am not critical of those who raise money for and campaign on behalf of judicial candidates. Those parties should be commended for their involvement in the political process. The vice lies rather in the Texas judicial selection system, which places intolerable tensions between the process by which judges are chosen and the obligations they must discharge once in office. . . . To establish recusal as proper under the facts of this case would seriously jeopardize their ability to perform the duties of their office. For candidates and their supporters alike, the fine line of conducting a campaign which draws public interest and attention without eroding public confidence in judicial neutrality is hard to hew.

Id. at 884.

82. 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. 760, 813 (1995).

C. The Role of Money

Judicial elections, especially competitive ones, require a great deal of money. The 1980 judicial campaign was the first million dollar campaign in Texas and was primarily self-funded by individual judicial candidates.⁸³ In 1984, Texas had its first million-dollar campaign that was not self-funded, and for several years afterward, million-dollar campaigns were fairly commonplace.⁸⁴ Table 1⁸⁵ provides data on campaign contributions in competitive Texas Supreme Court races from 1980 to 1998. It shows that on average, candidates needed considerably more than \$1 million to win election from 1984 to 1996. Indeed, even the average campaign treasury of Democratic and Republican candidates generally totaled more than \$1 million during that time.

Campaign expenses generally dropped for most candidates in the 1996 election cycle, and further dropped in 1998. In the 2000 elections,⁸⁶ no Democrat opposed any of the three incumbent Republicans running in Texas Supreme Court elections. One incumbent spent less than \$100,000 on her campaign. She had no primary opponent and her only opponent in the general election was a Libertarian candidate who spent nothing. Another incumbent spent nearly \$320,000. He had token opposition in the Republican primary and opposition in the general election from a Libertarian and a Green Party candidate, both of whom spent nothing. The third Republican incumbent was the first Latino to run for the Texas Supreme Court in a Republican primary. Perhaps due to the uncertainty inherent in being the first Latino, he spent nearly \$800,000. His primary opponent spent less than

83. The wealthy candidate in the 1980 campaign was Will Garwood. He had been appointed to the Texas Supreme Court by Republican Governor Bill Clements and ran as the Republican nominee against C.L. Ray, a Democrat and intermediate appellate judge who received substantial trial lawyer backing.

84. John Hill, a former Texas secretary of state, former attorney general, and unsuccessful Democratic candidate for the governorship in 1978 (defeated by Republican Bill Clements), successfully ran for the chief justiceship in 1984 with a campaign treasury of over \$1.4 million. His Republican opponent, John Bates, was not well known and had only about \$12,000 in contributions. Bates was able, however, to garner about 46% of the vote, probably because he ran as a Republican with Ronald Reagan at the top of the ticket. Champagne, *supra* note 11, at 91.

85. Kyle Cheek & Anthony Champagne, *Money in Texas Supreme Court elections: 1980-1998*, 84 JUDICATURE 20, 22 (July/Aug. 2000) (The data in this article has been readjusted from 1998 to 2001 dollars).

86. Expenditures reported for the 2000 election are in 2000 dollars (unadjusted for inflation). Schotland, *supra* note 50, at 30.

\$5,000, and a Libertarian general election opponent spent nothing.⁸⁷

As the days of real competition in statewide races came to an end, so did the days of big money Texas Supreme Court elections. Still, substantial campaign funds remain, perhaps because of occasional competition in Republican primaries. Further, the mere existence of campaign funds wards off opposition and provides protection for the incumbent against surprise electoral attack. In Texas, an incumbent Republican running for re-election for the supreme court has many potential donors who are more than willing to give to the candidate viewed as an obvious winner.

In the 1980s, plaintiff-oriented Democrats running for the Texas Supreme Court received their funding predominantly from trial lawyers. Today, civil defense-oriented judges get their money from civil defense interests. One study of campaign funding for seven civil defense-oriented justices from 1994 to 1997 found that 42% of the \$9.2 million raised by these justices came from parties and lawyers with cases before the court, or who were at least "closely linked" to such cases. Political action committees and executives of fifty corporations gave another 15%, and 9% of the money came from thirty trade groups. The sources of the remaining funds were not identified.⁸⁸ Clearly, substantial funds come from those with interests in the outcome of litigation before the court.

Negative publicity for the court (related to the large amount of campaign money raised for supreme court elections; the Texaco-Pennzoil case; the campaign contributions associated with that case; and the scandal involving Justice C.L. Ray) has led to major campaign fund-raising reform. Reform came in the form of the 1995 Judicial Campaign Finance Act,⁸⁹ which sets up contribution limits for judicial candidates. The limits are quite generous and vary from one court level to another. For the Texas Supreme Court, campaign contributions are limited to \$5,000 from an individual per election.⁹⁰ One may argue that the law has been effective in that single lawyers or small groups of lawyers no longer provide almost all of a judicial candidate's funding, as was occasionally true in the 1980s. Such funding, however, came from a handful of wealthy plaintiffs' lawyers, supporting Democratic can-

87. Gonzales won the primary by a huge margin of 59%. Still, his primary victory margin was less than the other incumbent Republican who had a primary opponent.

88. TEXANS FOR PUB. JUSTICE, *supra* note 27.

89. *Id.*

90. TEX. ELEC. CODE § 253.155 (1999)

didates. As Texas became Republican that funding dried up. Now the money comes from large civil defense firms, businesses, and trade groups, where funding is more dispersed.

Occasionally, substantial sums are still spent on lower court races. For example, in 2000, an incumbent Democrat on the first court of appeals spent nearly \$681,000 and lost the general election. In Harris County (Houston), one trial court election saw over \$918,000 spent despite no opposition in the general election. All the money was spent in the Republican primary and primary runoff election, the incumbent Republican spending \$633,000 of that sum.⁹¹ In other words, as campaign funds and spending drop for Texas Supreme Court races, some appellate and trial court races are getting more expensive.

III. THE CONTINUING (AND LARGELY IGNORED) PROBLEMS

A. The Name Game

Judicial campaigns can be expensive and hard fought, but they remain low-visibility races where voters are often unfamiliar with the candidates. Unfamiliarity makes a party label all the more important. If a contested office has low visibility, voters will often use the party affiliations of the candidates as a cue to the candidates' values and vote accordingly.

Of course, in party primaries all candidates for an office have the same party affiliation, so party label is not a voting cue. And in general elections, some voters will rely more on name recognition than party label in casting their ballots.⁹² One reason yard signs are commonly used by judicial candidates is that they are an inexpensive advertising mechanism. Of course, the yard sign rarely states more than the candidate's name and potential office, but it helps make the judicial candidate's name a familiar one.

Perhaps the most famous instance of name familiarity (and voter name confusion) was the election of Don Yarbrough to the Texas Supreme Court.⁹³ But there have been numerous other instances of name familiarity assisting candidates. In recent years, a number of judges were elected with names that have considerable appeal to

91. Schotland, *supra* note 50, at 30.

92. Texas political strategist George Christian said the following with respect to the name identification issue: "People don't pay much attention to Supreme Court races. All they pay attention to in Supreme Court races is a name." Virginia Ellis, *Familiar Names, Big Money Win High Court Races*, DALLAS TIMES HERALD, May 5, 1986, at 8A.

93. *Supra* text accompanying notes 24-25.

Texas voters, such as Sam Houston Clinton, Ira Sam Houston, John Marshall, and Sam Bass. Former Texas Supreme Court Chief Justice Joe Greenhill believes that he gained votes in Dallas because of the well-known Greenhill School, though he had no connection with it. Former Chief Justice Robert Calvert believes that he benefited from having the same name as the long-time state comptroller, whose name appeared on all state warrants. He also thinks that he benefited from an advertising campaign for Calvert's Whiskey that was in use during one of his election campaigns. The newspaper ad campaign read "Switch to Calvert."⁹⁴

One study of Dallas County voters' recognition of the names of Texan political figures found high recognition for U.S. Senator Lloyd Bentsen and Dallas Mayor Annette Strauss. Texas Supreme Court Justice Raul Gonzalez had moderately high name recognition, as did a trial court judge involved in a case with such a high profile that it became the subject of a movie.⁹⁵ Another trial court judge, with moderately high name recognition, was the subject of a nationwide controversy over remarks he made about gay murder victims. But one trial court judge, Ron Chapman, had name recognition almost as high as Senator Bentsen's and Mayor Strauss'. When voters were asked to recall the "public office" that Ron Chapman held, the overwhelming response was "disk jockey." Judge Ron Chapman shared the same name as the most popular radio personality in Dallas County. The voter recognition that he got from that name probably explained why Chapman was the last Democrat in Dallas County to win election to trial court.⁹⁶

Selection based on name recognition is a potential problem in judicial races because judicial candidates have low visibility and are not near the top of the ticket. Some states are enhancing voter awareness of judicial candidates by providing voter information pamphlets containing basic background information on the candidates. Indeed, studies have found that voters tend to use voter information pamphlets as their main source of information about judicial candidates.⁹⁷ Texas, however, provides no voter information pamphlets to its voters despite efforts to pass legislation re-

94. Champagne, *supra* note 11 at 100-102.

95. Anthony Champagne & Greg Thielemann, *Awareness of Trial Court Judges*, 74 JUDICATURE 271, 272 (1991) (Judge Larry Baraka, a Republican who ran unopposed for a second term in 1988, figured prominently in publicity about the release of Randall Dale Adams. The movie "The Thin Blue Line" is about Adams.).

96. *Id.* at 274

97. Thomas R. Phillips, *State of the Judiciary 77th Legislature* (Feb. 13, 2001), app. E, <http://www.tomphillips.com>. The appendix is a report by Charles H. Sheldon and

quiring it to do so. Cost is the concern. Two years ago, when it became clear that cost considerations would prevent voter information pamphlets in Texas, legislation was passed to provide candidate information over the Internet, since Internet pamphlets would be essentially cost-free. That legislation, however, was vetoed by then Governor George W. Bush, who indicated that he did not believe the government should provide candidate information to voters.⁹⁸

B. Minority Representation

Only about 8% of Texas judges are Latino, and less than 3% are African-American.⁹⁹ In contrast, 12% of Texas' population is African-American and 29% is Latino.¹⁰⁰ These low numbers invite several interpretations. One is that white voters dominate counties and larger judicial districts and vote against minority judicial candidates. Civil rights organizations representing Latino and African-Americans have argued that in order for minorities to get elected to office, smaller judicial districts must be cut so that minority voters may comprise a majority.¹⁰¹ Alternatively, it is argued that minority candidates, like minority voters, tend to be Democrats at a time when Republicans increasingly win Texan judicial races. Thus, it is party affiliation, not race or ethnicity, that prevents mi-

Nicholas P. Lovrich entitled *Preliminary Report on Judicial Voters in King and Spokane County 1996 Judicial Elections*.

98. Steve Brewer & Kathy Walt, *Bush Vetoes Public-Defense Bill, Oks Health-Care Fee Negotiations*, HOUSTON CHRON., June 22, 1999, § 1, at 1. A little-noticed bill passed the Texas legislature that could have greatly affect name-game judicial politics. The bill required that candidates for the two statewide elected courts, the Texas Supreme Court and the Court of Criminal Appeals (the highest court in Texas for criminal cases), submit the signatures of 500 registered voters with at least 100 signatures coming from each of five senatorial districts along with a \$3,000 filing fee to get a candidate's name on the party primary election ballot. The bill's sponsor hoped that this would require people to have rather broad support in order to run for the state's two highest courts. Thus, a candidate could not run because, in the words of the bill's sponsor, "they have a happy name." Mary Alice Robbins, *Special Report: Legislative Review 2001*, TEX. LAW., June 4, 2001, at 19. However, the bill was vetoed by Governor Rick Perry.

99. Thomas R. Phillips, State of the Judiciary 76th Legislature, March 29, 1999, <http://www.altonline.com/clients/chief/state.htm>.

100. BENJAMIN GINSBERG ET AL., *WE THE PEOPLE: AN INTRODUCTION TO AMERICAN POLITICS* 808 (3d ed., Texas ed. 2001).

101. The president of an African-American bar organization in Dallas County, for example, claimed that countywide judicial elections impede the ability of African-Americans to get elected to judgeships. Christy Hoppe & Lori Stahl, *New Plan for Electing State's Judges Sought Democrats, Minorities Who are Upset with Ruling Vow to Fashion Strategy*, DALLAS MORNING NEWS, Jan. 20, 1994, at 23A.

norities from being elected to judgeships.¹⁰² It is also argued that there are few minority judges because there are few minority lawyers (with the exception of justices of the peace and county judges, Texas judges must be lawyers).¹⁰³

Low minority representation has elicited federal litigation, but in 1993 the Fifth Circuit held that party affiliation, not minority status, explained the low number of minority judicial candidates.¹⁰⁴ As a result, civil rights lawyers failed in their efforts to reduce the size of Texas judicial districts.

IV. THE FAILURE OF JUDICIAL REFORM

For fifty years reformers have discussed the need to change the way Texas selects its judges, but little has changed. Many interests play a part in the selection of judges, and thus far it has been impossible to put together a coalition of interests strong enough to spark change. The political parties, for example, have a strong interest in the way judges are selected since judicial offices are offices that party activists seek, and are only available under a party label. A nonpartisan system of selecting judges, such as a merit selection or appointive system, would reduce the political parties' role in the process. Given its current dominance, the Texas Republican Party is not going to give up or reduce its role in selecting judges.¹⁰⁵

Incumbent judges are also interested in the selection of judges, and they too are satisfied with the present system. After all, it got them into office. An alternative system may not work so well. Incumbents know they can succeed in a partisan election system, but success is less clear under an alternative.¹⁰⁶

Civil rights groups argue that to elect more minority judges you must have smaller districts. But this would reduce Republican Party strength and is therefore resisted. The Republican Party suc-

102. Bob Driegert, chairman of the Dallas County Republican Party, argued that minorities win judicial elections when they run as Republicans. He also argued that countywide elections are beneficial to the Republican Party in Dallas County since the Republican Party is the majority party there. With countywide elections, the Republicans can win all offices; with smaller districts, Republicans, he argued, cannot sweep county elections. The issue of countywide vs. smaller judicial districts, he argued, is "more of a partisan issue than a minority-equity issue." *Id.* at 27A.

103. *League of United Latin Am. Citizens Council v. Clements*, 999 F.2d 831, 865-66 (5th Cir. 1993).

104. *Id.* at 859.

105. Anthony Champagne, *Judicial Selection in Texas: Democracy's Deadlock*, in *TEXAS POLITICS: A READER* 88, 95-96, 101 (Anthony Champagne & Edward J. Harp- ham eds., 2d ed. 1998).

106. *Id.* at 98.

ceeds county-wide, but will have greater difficulty securing smaller, minority districts. Among minority interests, there is dispute over how small judicial districts should be. African-American leaders would prefer to elect judges in places like Harris (Houston) and Dallas Counties in county commissioners precincts, which would create an African-American dominated district in 25% of the county. But such division does nothing for Latino interests, which would need considerably smaller districts to constitute a majority.¹⁰⁷ The business community has felt uncomfortable with very small districts, fearing that they will lead to the election of pro-plaintiff judges in some areas.¹⁰⁸

Similarly, there is concern that a move to an appointive system would vastly increase the power of the governor. Not only is a strong governor contrary to Texas political tradition, but a strong governor today will increase the power of a conservative, Republican chief executive. Therefore a change to an appointive system will not sit well with many Democrats and trial lawyers.¹⁰⁹

The number and diversity of interests concerned with judicial selection has prevented change. A change inducing coalition must be especially strong, because most changes will require a constitutional amendment. An amendment requires strong legislative support, as well as sufficient popular support to carry a majority in a state-wide election. It is unlikely, therefore, that the Texas system of judicial selection will change. There has been major scandal; civil rights litigation; turnover in the power of the political parties; outrageous special interest contributions; resignation of supreme court justices (including the chief justice); and one reform proposal after another; yet change has not occurred, and, it seems reasonable to conclude, is unlikely to occur. Like the Judicial Campaign Finance Act—the only major reform in the selection of Texas judges—change must come from within the current system of partisan election.

V. TEXAS JUDICIAL POLITICS NOW AND ITS LESSONS FOR JUDICIAL ELECTIONS ELSEWHERE

A. The Effects of New Judicial Politics

One of the chief criticisms leveled against the popular election of judges is that the integrity of courts suffers when judicial candi-

107. *Id.* at 97-98, 101, 103.

108. *Id.* at 99.

109. *Id.* at 95-96.

dates are forced to engage in campaign politics.¹¹⁰ That criticism predates the American experience with judicial selection. Edmund Burke offered the following observation on an elected judiciary in his commentary on the French Revolution:

[E]lective, temporary, local judges . . . exercising their dependent functions in a narrow society, must be the worst of all tribunals. In them it will be vain to look for any appearance of justice towards strangers, towards the obnoxious rich, towards the minority of routed parties, towards all those who in the election have supported unsuccessful candidates. It will be impossible to keep the new tribunals clear of the worst spirit of faction.¹¹¹

The experience with elected state judiciaries has not been as dire as Burke predicted. However, the chief concerns remain the same in Texas as elsewhere: elected judges are overly responsive to electoral pressures;¹¹² they do not administer justice impartially; and public confidence in the judiciary's legitimacy suffers as a result. The integrity of the courts is heightened when judges are perceived as impartial and not beholden to interests whose cases they may be called upon to hear.¹¹³

Given the potential for electoral politics to create the appearance of undue influence on judicial decisions, it is not surprising that one of the chief effects of the new judicial politics in Texas has been heightened media attention with respect to the state judiciary. As judicial elections have become high profile, media coverage has also increased, and scrutiny has become more intense.¹¹⁴ On December 6, 1987, that scrutiny landed Texas' judicial elections in the national spotlight. Texas was shaken when the national television

110. See WATSON & DOWNING, *supra* note 8, for a discussion of the concerns that led to the initial popularity of the Missouri Plan.

111. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 223 (Anchor Books ed., 1973) (1790).

112. Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 427-46 (discussing evidence indicating that elected state supreme court justices may be more likely to rule in favor of the death penalty when facing an upcoming election).

113. When presented with survey results showing that in Texas 83% of the public, 79% of lawyers, and 48% of judges think that campaign contributions affect judicial decisions, U.S. Supreme Court Justice Anthony Kennedy said, "This is serious because the law commands allegiance only if it commands respect. It commands respect only if the public thinks the judges are neutral." Pete Slover, *Lawsuit Challenges Texas' System of Electing Judges*, DALLAS MORNING NEWS, Apr. 4, 2000, at 21A.

114. *E.g.*, Mary Flood, *Justice Still for Sale? Clock Is Ticking on the Answer*, WALL ST. J., June 24, 1998, at T1; Richard Woodbury, *Is Texas Justice for Sale?*, TIME, Jan. 11, 1988, at 74.

news program *60 Minutes* featured the Texas Supreme Court in a story titled "Is Justice for Sale?" The program questioned whether Texas judges were being exposed to undue influence by deep pocket interests contributing heavily to candidates friendly to their views. Current Chief Justice Tom Phillips concedes that the story "had a tremendous impact on Texas judicial politics,"¹¹⁵ while his predecessor, John Hill, has argued that the "news reports only reflect a growing belief among many citizens of Texas that [the] state's legal system no longer dispenses evenhanded justice."¹¹⁶

Eleven years after *60 Minutes* brought Texas' judicial politics to national attention, Texas was again cast into the national spotlight. On November 10, 1998, two days before election Tuesday, *60 Minutes* revisited judicial selection in Texas and concluded that the judicial politics of 1987 were still pervasive. All that had changed, according to the story, was the primary source of campaign contributions.¹¹⁷ Where trial lawyers had contributed the lion's share of money to judicial candidates in the 1980s, defense interests had become the primary contributors by 1998. Former Chief Justice John Hill, who had resigned from the Texas Supreme Court in 1987 to pursue judicial selection reform, defended the Texas judiciary in the second *60 Minutes* story. He conceded, however, that efforts at judicial selection reform since the first story were insufficient and that further reforms were needed. Current Chief Justice Tom Phillips, an advocate of replacing partisan judicial elections with a merit appointment-type system, also concedes that, although some reform has occurred, "much more needs to be done."¹¹⁸ In his first State of the Judiciary Address following the *60 Minutes* story, he renewed his call for judicial selection reform, noting that "[t]he current judicial selection system has long since outlived its usefulness."¹¹⁹

In the years between *60 Minutes* stories, government watchdog groups began focusing on the electoral politics pervasive in Texas' judicial races. They most often pointed to the appearance of compromised fairness raised by a system that requires judges to campaign with funds donated by interests with cases before the state's courts. Early efforts focused on the sources of contributions to

115. *Id.*

116. John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Selection*, 40 BAYLOR L. REV. 339, 342 (1988).

117. Flood, *supra* note 114.

118. *Id.*

119. Thomas R. Phillips, State of the Judiciary Address, 76th Leg. (1999), <http://www.tomphillips.com/state76.htm>.

Texas Supreme Court candidates,¹²⁰ showing that high court races in the 1980s and early 1990s tended to pit plaintiff and civil defense-backed candidates against one another. Since then, Texans for Public Justice has issued two reports probing the link between the decisions of Texan Supreme Court justices and the donors contributing to their campaigns.¹²¹ The first report to examine the link between donations and court decisions, *Payola Justice*, concluded that

while the faces and ideologies of the justices and their paymasters has changed[,] justices continue to take enormous amounts of money from litigants who bring cases before the court. The fact that the parties who finance the justices' campaigns repeatedly reappear on the court's docket documents the extent to which justice is still for sale in the Texas Supreme Court.¹²²

In a later report,¹²³ Texans for Public Justice examined the correlation between donations and the acceptance of cases for review by the Texas Supreme Court. Although charges of a direct connection were tempered,¹²⁴ the report emphasized a higher case acceptance rate for law firms that contributed heavily to the campaigns of the high court justices, suggesting that campaign donations at least provide an entrée to the court's docket.¹²⁵ Chief Justice Tom Phillips responded, however, that the report failed to prove that campaign

120. TEXANS FOR PUB. JUSTICE, CHECKS AND IMBALANCES: HOW TEXAS COURT JUSTICES RAISED \$11 MILLION (2000), <http://www.tpj.org/reports/checks/toc.html>.

121. TEXANS FOR PUB. JUSTICE, *supra* note 27; TEXANS FOR PUB. JUSTICE, PAY TO PLAY (2001) [hereinafter TEXANS FOR PUB. JUSTICE, PAY TO PLAY], available at <http://www.tpj.org/reports/paytoplay/index.htm>.

122. TEXANS FOR PUB. JUSTICE, *supra* note 27.

123. TEXANS FOR PUB. JUSTICE, PAY TO PLAY, *supra* note 121.

124. Although the study conceded the difficulties of determining a cause and effect relationship between campaign donations and judicial decisions, the director of Texans for Public Justice argued that "[t]he appearance that there is a cause-and-effect is undeniable. Money seems to get you in the front door." Pete Slover, *Group Alleges Supreme Court Favors Donors*, DALLAS MORNING NEWS, Apr. 25, 2001, at 23A. However, see Roy Schotland, Kyle Cheek & Anthony Champagne, *Estimating the Relationship Between Campaign Donations and Judicial Decisions* (unpublished manuscript, on file with the Fordham Urban Law Journal), for a discussion of the methodological difficulties associated with attempts to establish a causal relationship between campaign donations and judicial decisions. Schotland, Cheek, and Champagne conclude that it is not only extremely difficult to isolate a causal relationship between donations and decisions, but that such an approach to the analysis of judicial campaign finance obscures the more important question of how much influence campaign finance exerts on electoral success in judicial elections.

125. TEXANS FOR PUB. JUSTICE, PAY TO PLAY, *supra* note 121, found that petitions for review from large contributors were 7.5 times as likely to be accepted as those from non-contributors.

donations had any effect on the acceptance of cases for review, noting that large donor firms likely handle more cases of the types the Supreme Court deems worth resolving.¹²⁶

Perhaps more important than the links between campaign donations and Texas court decisions is the simple fact that Texas judicial selection remains at the center of media attention. The first *60 Minutes* story, rather than prompting serious reform, seems to only encourage harsher more constant criticisms of Texas courts. Reluctance to reform judicial elections, combined with the perception of bias created by the present judicial campaign finance system, increases the likelihood that Texas' process for selecting judges will remain the focus of attention.

B. Perception of the Courts

The new judicial politics in Texas—replete with scandal, the embarrassing election of an unqualified supreme court justice, the appearance of impropriety raised by large campaign contributions, and the attention of the national media and interest groups—might be expected to have eroded public confidence in the courts. Largely in response to these concerns, Texas' Office of Court Administration commissioned a survey of the Texas public as well as of the Texas legal profession to determine public perception of the Texas judiciary.¹²⁷ The results were generally positive, although they reveal concern about the fairness of the Texas judicial system.

Over 50% of respondents expressed either a somewhat positive or very positive overall impression of the Texas judiciary.¹²⁸ Sixty-nine percent of respondents believe that Texas' courts in general are somewhat or very honest and ethical,¹²⁹ while 77% believe the

126. Citing another rationale for the high acceptance rate of large-donor firms, Chief Justice Phillips said, "Considering the amounts of money they charge, I'd be surprised if they didn't get good results." Slover, *supra* note 113, at 28A.

127. SUPREME COURT OF TEX., TEX. OFFICE OF COURT ADMIN. & STATE BAR OF TEX., PUBLIC TRUST & CONFIDENCE IN THE COURTS AND THE LEGAL PROFESSION IN TEXAS: SUMMARY REPORT (1998), available at <http://www.courts.state.tx.us/public/info>. The survey questioned 1215 adult Texans about their impressions of the state's courts. Several of the survey questions focused on the overall perception of Texas courts and whether race, gender, or socio-economic status plays any role in the treatment of litigants in court. The survey also asked respondents whether campaign contributions influence court decisions as well as what method of judicial selection most Texans prefer. The sample size of 1215 adults is sufficient to ensure, with 95% confidence, that the sample results are within 2.8% of the true percentage that would be determined by surveying the entire population of Texans.

128. *Id.* at 4.

129. *Id.* at 5.

same of the Texas Supreme Court.¹³⁰ Seventy-three percent of respondents believe that “judges and court personnel are courteous and respectful to the public.”¹³¹ The same percentage believe that they would be treated fairly “if they had a case pending in a Texas court.”¹³²

Despite a positive overall impression of the Texas courts, the survey reveals concern about court fairness in four general areas: gender, race, socio-economic status, and judicial campaign finance. With respect to gender, only 50% of respondents agreed that men and women are treated alike in Texas courts, while 62% believed that there are too few female judges in Texas. Texans expressed even greater concern about fairness with regard to race. Only 41% reported that “the courts treat all people alike regardless of race,” and 55% believe that there are too few minority judges.¹³³

Texans’ greatest concern, however, is the influence of money in Texas courts: both the effects of socio-economic status on fairness and court access and the effects of campaign contributions on judicial decisions. Only 21% of Texans agree that “the courts treat poor and wealthy people alike,” while 69% do not believe that court costs and fees are affordable.¹³⁴ Texans’ concern about the effects of campaign contributions on judicial decisions is even greater. When asked whether judges in Texas are influenced by campaign donations, 83% agreed that campaign contributions influence judicial decisions.¹³⁵

Texans seem generally to hold the state’s courts in high regard, but are dissatisfied with court composition and distrust the role of money in the judicial process. In spite of Texans’ overall belief that race, gender, socio-economic status and campaign finance are all problematic issues for Texas’ court system, an overwhelming majority of Texans expressed a desire to retain the current elective method of judicial selection.¹³⁶ This reluctance to embrace wholesale reform of the state’s judicial selection method strongly suggests that the only realistic way to reform Texas elections is within the context of the current election system.

130. *Id.*

131. *Id.* at 4.

132. *Id.* at 5.

133. *Id.* at 6.

134. *Id.* at 8.

135. *Id.* at 6.

136. Seventy percent of survey respondents “believed that judges should be elected by the people” while only 20% preferred gubernatorial appointment with retention elections. *Id.* at 8.

In a survey designed to gauge the legal profession's view of Texas courts, judges and lawyers expressed moderately consistent opinions about the courts and judicial selection. Both tend to have a positive view of the Texas courts,¹³⁷ but both also reported some degree of inequity based on race, gender, or socio-economic status. Fifty-one percent of judges do not believe that Texas courts are racially biased¹³⁸ and 56% did not report gender bias.¹³⁹ However, only 42% of responding judges reported equal treatment of the poor and wealthy.¹⁴⁰ Among lawyers, 42% reported the courts to be free of racial bias¹⁴¹ while 37% reported no gender bias.¹⁴² However, only 19% of lawyers feel that the poor and wealthy are treated equally in Texas' courts.¹⁴³

The opinions of judges and lawyers tend to diverge with regard to judicial campaign finance. Judges are nearly evenly split over the influence of campaign donations on court decisions, with 48% reporting at least some donation influence.¹⁴⁴ In contrast, nearly 80% of lawyers believe that campaign contributions have at least some influence on judges.¹⁴⁵ Judges and lawyers tend to agree, however, in their preferred judicial selection method. Fifty-two percent of judges and 42% of lawyers indicated a preference for judicial election, albeit on a nonpartisan basis.¹⁴⁶ In contrast, there was equal, though substantially weaker, support among judges for partisan elections and gubernatorial appointment systems, each preferred by only 21% of responding judges.¹⁴⁷ Among attorneys, gubernatorial appointment with retention elections ranked a close second as the preferred method of judicial selection at 35%,¹⁴⁸ while partisan election was supported by only 11%.¹⁴⁹ Both judges

137. Eighty-five percent of judges and 63% of lawyers held either a somewhat or very high impression of the Texas courts. SUPREME COURT OF TEX., STATE BAR OF TEX. & TEX. OFFICE OF COURT ADMIN., THE COURTS AND THE LEGAL PROFESSION IN TEXAS: THE INSIDER'S PERSPECTIVE: A SURVEY OF JUDGES, COURT PERSONNEL, AND ATTORNEYS 2 (1999), available at <http://www.courts.state.tx.us/publicinfo>.

138. *Id.* at 4.

139. *Id.*

140. *Id.*

141. *Id.* at 5.

142. *Id.*

143. *Id.*

144. Judges in local trial courts, minority judges, and rural judges were more likely to indicate that campaign donations have at least some influence on decisions. *Id.*

145. *Id.*

146. *Id.* at 6.

147. *Id.*

148. *Id.*

149. *Id.*

and attorneys agree that judicial selection ranks as one of the most important issues facing Texas' court system, with judges ranking judicial selection as the feature they would most like to change about the Texas courts.¹⁵⁰ One could conclude that limited reform efforts would find support, since both judges and Texans seem concerned. Clearly, though, Texans are not ready to give up judicial elections, and any reforms that occur will have to take place within the context of a popularly elected judiciary.

VI. TEXAS JUDICIAL POLITICS NOW AND ITS LESSONS FOR JUDICIAL ELECTIONS ELSEWHERE

Since the advent of its new judicial politics, Texas has been a bellwether for emerging trends in other states with elected judiciaries. In just over two decades, the Texas experience has completed a full cycle of change. It went from staid, one-party affairs dominated by initial appointment to the bench, to an era of true two-party competition in judicial contests. Then it moved back in the direction of one-party dominance. The course of judicial election politics in Texas has produced valuable lessons for other states.

The most telling lesson from Texas' recent experience with judicial selection is that those interests most affected by court decisions are willing to exert a great deal of influence to attempt to shape the composition of state courts. It is at best misguided to argue that deep pocket interests are attempting to buy decisions from individual judges. It is, however, equally naïve to suggest that those who stand to lose the most in the courtroom will stand idly by, acquiescent to the philosophical makeup of the courts.

In states with elective modes of judicial selection, campaign finance is the easiest way to influence court composition. As long as the perception exists that money buys electoral advantage, deep pocket interests will donate heavily to their favored candidates. And even in the absence of real competition in a judicial race, there will be those who will continue to contribute, if for no other reason than to show their support for one judicial philosophy over another. On the other hand, as long as judges are elected, they will feel compelled to accept campaign contributions, even from those who have interests before their court. For judicial candidates who face no real competition in an election, a large campaign treasury may indicate to future challengers that they face a formidable task. Even in an electoral environment dominated by one political party,

150. *Id.* at 8.

a large campaign war chest may serve to stave off primary challengers. This is true whether those challengers pose a real threat or are simply viewed as an inconvenience to the incumbent.

Money, though it clouds judicial integrity, is not the fundamental problem in judicial elections. Money enters judicial politics because of name-familiarity. Judicial races are typically low-profile affairs, and candidates for the bench seldom enjoy much name recognition among voters.¹⁵¹ To make themselves known, judicial candidates must spend money. In local trial court elections in densely populated urban areas, this may still entail garnering recognition among tens of thousands of potential voters. In statewide elections, the problem is magnified. Without other effective means of garnering votes, judicial candidates face little choice but to raise large amounts in campaign contributions and then to spend money on name-recognition.

Party affiliation, of course, provides a critical cue for many voters.¹⁵² Even in the absence of party labels on general election ballots, candidates may enjoy partisan identification from their party's primary election.¹⁵³ When judicial candidates are removed from nomination via party primary, parties may still prove invaluable to a candidate's campaign through substantial campaign funding. In states with real two-party competition, party affiliation may focus independent voters.¹⁵⁴ In non-partisan races, substantial funding is even more important, as judicial candidates have no party name on which to rely.¹⁵⁵ In one-party states, non-partisan elections present the opportunity for opposing economic interests to wage expensive campaigns to secure the election of their favored candidates, since no candidate is guaranteed electoral victory on the basis of party alone. Expensive judicial races, even if only a symptom of a deeper problem, are not likely to fade from the judicial landscape without broad, serious campaign finance reform.

Texas' expensive judicial races exemplify the deep institutional damage that can result from money's influence. When fierce bat-

151. Champagne & Thielemann, *supra* note 95, at 271-76.

152. DUBOIS, *supra* note 2.

153. Kathleen L. Barber, *Ohio Judicial Elections: Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762, 762-789 (1971).

154. For a discussion of the importance of money in securing the votes of those not guided by party labels, see Kyle Cheek, *The Bench, the Bar and the Political Economy of Justice: Texas Supreme Court Races, 1980-1994* (1996) (unpublished dissertation in The University of Texas at Dallas Library).

155. California provides a good example. In three 1986 non-partisan, uncontested retention elections for the Supreme Court, the record amount of \$11,400,000 in 1986 dollars was spent. Schotland, *supra* note 50, at 13 n.55.

ties are waged between opposing interests to influence court composition, the public is likely to stop believing courts are impartial. Rather, it will likely think that judges are beholden to the interests that won them election. In extreme cases, the new judicial politics may result not just in the appearance of impropriety, but in real judicial misconduct. While episodes like the public discipline of two Texas Supreme Court justices are infrequent, their existence only adds to the public sense that the electoral selection system renders justice to those able to gain influence by contributing to judges' campaigns.

Because judicial reform invariably impacts some interests adversely, the prospect of meaningful changes in bench ascension is fraught with formidable problems. In fact, an important lesson from the Texas experience is that reform is best pursued in incremental steps. Wholesale reform efforts pose major threats to established interests, but incremental reform will temper the severity of that threat, making reform easier to accomplish. Even in the wake of scandal and national scrutiny of the Texas judiciary in the late 1980s, wholesale reform efforts were never a serious prospect.¹⁵⁶ However, the same circumstances that led to calls for wholesale reform in Texas were the basis for later incremental changes in judicial campaign finance.

A final lesson that should be taken from Texas' experience with judicial selection is that voters can be profoundly committed to selecting their judges in popular elections. Despite criticisms of popular judicial elections in Texas; national attention on perceived improprieties; public mistrust of judicial campaign finance; and low voter knowledge of judicial candidates, Texans still hold fast to voting for judges. This, coupled with the other difficulties of reform, makes it unlikely that Texas will abandon its elective process for selecting judges. It also serves to heighten the importance of incremental reform efforts.

In short, Texas' history of judicial elections vividly illustrates many of the oft-repeated criticisms of the popular selection of judges. Perhaps more importantly, Texas' experience with judicial selection offers important lessons to other states on how to deal with the difficulties inherent in judicial elections. Certainly, no other state wants to experience with its courts what Texas did in the 1980s. However, close attention to the Texas experience pro-

156. Champagne, *supra* note 36, at 146-59.

vides, at the very least, an outline for other states to consider as they find themselves entering the new era of judicial election politics.