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# INTEREST GROUPS AND JUDICIAL ELECTIONS

*Anthony Champagne\**

## I. INTRODUCTION

Interest groups have, of course, long had a role in judicial elections (or, for that matter, judicial appointments). Interest groups provide necessary funding for elective judges to reach voters. They are also intermediaries between judicial candidates and voters in the sense that they assist candidates in communicating with, and in mobilizing, voters. Interest groups can also provide important cues to voters about the attitudes and values of judicial candidates. In a recent superior court race in California, for example, one candidate obtained the endorsements of the Sacramento County Deputy Sheriff's Association and the Sacramento Police Officers' Association.<sup>1</sup> If a voter knew nothing else about the candidate—for example, did not know that the candidate had been a police officer for fourteen years or a prosecutor for fifteen years—those endorsements would provide a hint that the candidate was viewed as being pro-law enforcement. In states where the parties are not heavily involved in judicial elections, interest groups become crucial in providing cues to voters about the attitudes and values of judicial candidates and in mobilizing voters for the elections.

Although interest groups are often discussed in a pejorative manner, they are essential to the functioning of a pluralist

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1. These endorsements (along with other interest group endorsements) are found in Gary Delsohn, *Spending, Integrity Hot Issues in Judge Race*, SACRAMENTO BEE, Sept. 10, 2000, at B1.

democracy. Political scientists Theodore Lowi and Benjamin Ginsberg define interest groups simply as “a group of individuals and organizations that share a common set of goals and have joined together . . . to persuade the government to adopt policies that will help them.”<sup>2</sup> Although interest groups are ordinarily examined in the context of legislative politics, interest groups have a role in all branches of government including the judicial branch.

The earliest texts on interest groups recognize that they attempt to influence courts. Interest groups do so for at least three reasons: (1) they believe they need to balance the views of other groups; (2) they wish to convince jurists to adopt their views as law; and (3) they wish to cut losses in the event they fail to persuade the executive or legislative branches to adopt their viewpoints.<sup>3</sup>

There have been several changes regarding interest group involvement in judicial elections. Interest groups are increasingly national in scope. Additionally, the number of interest groups and the amounts of money and other resources contributed by these groups to judicial candidates have vastly increased. In 1968 the *Encyclopedia of Associations* counted 10,300 interest groups; in 1988 it counted 20,600.<sup>4</sup> During World War II there were 500 registered lobbyists in Washington; today there are 25,000.<sup>5</sup> The number of political action committees registered with the federal government grew from 608 in 1974 to over 2500 in 1980 to about 4000 in 1994.<sup>6</sup> And something else has changed. As judicial races have become more competitive, campaign costs have risen dramatically. Judicial candidates need the substantial resources offered by interest groups to win.

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2. THEODORE J. LOWI & BENJAMIN GINSBERG, *AMERICAN GOVERNMENT: FREEDOM AND POWER* 307 (6th ed. 2000).

3. See Jackson Williams, *Irreconcilable Principles: Law, Politics, and the Illinois Supreme Court*, 18 N. ILL. U. L. REV. 267, 296 (1998) (paraphrasing Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639 (1993)). Epstein provides a bibliography of works on interest groups and the law in LEE EPSTEIN ET AL., *PUBLIC INTEREST LAW* (1992).

4. See G. Calvin MacKenzie, *The Revolution Nobody Wanted*, *TIMES LITERARY SUPPLEMENT*, Oct. 13, 2000, at 12 (citing the *Encyclopedia of Associations*).

5. See *id.*

6. See JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* 22, 24 (3d ed. 1997); MacKenzie, *supra* note 4.

Interest groups today often draw no distinction between achieving their goals through the courts or through the political process. The result can be an unhealthy dependence between judicial candidates and interest groups where interest groups back judicial candidates to secure their political agendas and candidates rely on interest group backing to achieve and to retain judicial office. For some analysts of judicial politics, this new 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.<sup>7</sup>

## II. THE OLD JUDICIAL POLITICS

The old style of judicial campaign was a low budget affair where the judicial candidate spoke to any group willing to hear a dull speech about improving the judiciary or about judicial qualifications. There were numerous hands to shake, bar and newspaper endorsements to obtain, and that was about it. Judicial candidates might address some interest groups—a union local or a medical society, for example—and might even obtain their endorsements. If the candidate was an incumbent who had avoided scandal or attack for a highly visible, controversial decision, victory was likely. Indeed, such a candidate would not likely have an opponent. And, for an incumbent in a retention election, victory was virtually guaranteed. For an open seat, if the judicial candidate had an attractive name, a popular political party affiliation, or a good ballot placement and perhaps a newspaper or bar association endorsement, the candidate had a good chance to be elected.

To the extent that there was interest group involvement in judicial races, it was activity by competing segments of the bar. For civil court judgeships, trial lawyers might oppose a candidate supported by the civil defense bar; for criminal courts, prosecutors might

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7. See American Friends Service Committee-Northeast Ohio Office and Ohio Religious Leaders for Campaign Finance Reform, Ohio Supreme Justice for Sale (Jan. 2000) (unpublished manuscript, on file with Loyola of Los Angeles Law Review); see also Texans for Public Justice, *Payola Justice: How Texas Supreme Court Justices Raise Money from Court Litigants*, at <http://www.tpj.org/reports/payola/summary.html> (last visited Feb. 21, 2001).

support a candidate opposed by the criminal defense bar. However, even this interest group involvement was low budget and low key.

### III. THE NEW JUDICIAL POLITICS

By the late 1970s and early 1980s, however, there began to be indications that the nature of judicial elections was changing. In 1978, deputy district attorneys in Los Angeles encouraged opposition to judges they believed were soft on crime.<sup>8</sup> Shortly afterward, trial lawyers in Texas began pouring money into Texas Supreme Court races, and that money was soon followed by money from civil defense interests.<sup>9</sup> The changes did not happen at the same time in all states, but in some places judicial campaigns became more competitive and more expensive. Initially, competing segments of the bar became more involved in judicial races—primarily through campaign contributions that were increasingly needed by judicial candidates for the advertising necessary for competitive campaigns.<sup>10</sup>

The press began to take note of the pitched battles, especially in races for the Texas Supreme Court, that were occurring between the trial lawyers and civil defense bars.<sup>11</sup> However, that state seemed an anomaly. In 1980, its judicial races for the Supreme Court were the first in the million-dollar range and then it was the first state that faced numerous defeats for incumbent judges at all court levels.<sup>12</sup>

Large campaign contributions and grass roots campaigning by interest groups in judicial elections were soon not unusual. Rather than Texas judicial elections being an anomaly, it was actually the

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8. See Alexander Wohl, *Justice for Rent*, AM. PROSPECT, May 22, 2000, at 34.

9. See Mark Hansen, *A Run for the Bench*, A.B.A. J., Oct. 1998, at 69-70.

10. See Aaron Chambers, *How High the Bar?*, ILL. ISSUES, Oct. 2000, available at <http://illinoisissues.uis.edu/bar.htm>.

11. See Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misrepresentations About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817 (1998).

12. The million-dollar campaign in 1980, however, was mostly self-funded by a wealthy incumbent seeking election. See Walt Borges & Mary Hull, *Bullock Puts Plan on a Fast Track*, TEX. LAW., Dec. 5, 1994, at 4. It was in 1984 that the first million-dollar campaign actually happened with nonself-funded dollars. It was a race for chief justice where one candidate raised about \$1.4 million. See Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 150 (1988).

harbinger of things to come in other states. In 1986 the retention elections in California heated up. With capital punishment as a major issue, three California justices were defeated in a multimillion dollar retention election battle.<sup>13</sup> Time and again, death penalty cases would, as in California in 1986, prove the lightning rod in judicial elections. In North Carolina in 1986 and in 1990, the chief justice was attacked for his voting to reverse a handful of death sentences. As he described a campaign,

Some of the campaign debate got really grizzly. My opponents would bring up all the times I had dissented in cases involving the imposition of the death penalty, and I had to come back and demonstrate all the times I had concurred in cases sustaining the death penalty. So, it emerged into a battle of statistics.<sup>14</sup>

In Ohio there were also hotly contested, expensive contests for the state supreme court that involved plaintiff-defense interests.<sup>15</sup> Alabama soon began to receive media attention for the costly battles between trial lawyers and civil defense interests in Alabama Supreme Court elections. One scholar described Alabama as "a battleground between businesses and those who sue them."<sup>16</sup> That battle, he wrote, "is often fought in elections for the Supreme Court of Alabama."<sup>17</sup> In the 1994 Supreme Court elections, a rancorous battle occurred where trial lawyers and business groups backed opposing candidates for the five seats that were up for election.<sup>18</sup> A precipitating factor in this battle was a 1993 Alabama Supreme Court decision<sup>19</sup> that had declared unconstitutional a package of tort reform legislation. The result was a continuation of the trial lawyer-business interest battles every two years as seats came up for election.

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13. See Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 198-99 (1996).

14. *Id.* at 199 n.92.

15. See *id.* at 198.

16. Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656 (1999).

17. *Id.* at 657.

18. See *id.*

19. See *Henderson ex rel. Hartsfield v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993).

Between 1986 and 1996, the cost of running for the Alabama Supreme Court rose 776% and one journalist described the races as changing from “low-key races” to “expensive mud-wrestling contests.”<sup>20</sup>

While there is greater diversity in interest group involvement in judicial races than plaintiff-defense interests and crime control interests, those interests have proven to be the most involved in judicial elections in most states. Trial lawyers and unions on the one hand, and civil defense lawyers, business groups, and professional groups on the other, battle in judicial campaigns on civil law issues. In the criminal law, a judge worries about being branded “soft on crime.” As former Justice Hans Linde of the Oregon Supreme Court put it,

Every judge’s campaign slogan, in advertisements and on billboards, is some variation of “tough on crime.” The liberal candidate is the one who advertises: “Tough but fair.” Television campaigns have featured judges in their robes slamming shut a prison cell door. . . . Most judges may see themselves as umpires between the state and the citizen, but many citizens regard judges as part of law enforcement, and plenty of candidates will offer themselves for that role. A conscientious judge who imposes less than the maximum possible sentence in cases evoking public outrage invites a bidding war with future opponents.<sup>21</sup>

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20. Ware, *supra* note 16, at 659 (quoting Shiela Kaplan, *The Very Best Judges That Money Can Buy*, U.S. NEWS & WORLD REP., Nov. 29, 1999, at 35).

21. Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000-01 (1988). Melinda Hall found that reelection concerns have influenced liberal justices to join conservative majorities in death penalty cases in four states. See Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427 (1992). Earlier studies found no statistically significant relationship between judicial selection methods of judicial decisions in the treatment given governmental, criminal, corporate, or “underdog” litigants. See Williams, *supra* note 3, at 296-97. However, a recent study found that awards in cases with out-of-state defendants are much higher in states with partisan elected judges than in states with other systems of selection. See Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186-87 (2000).

## IV. IT'S NOT JUST TEXAS (OR ALABAMA)

By the early 1990s, a look at judicial politics in the states shows that interest groups were taking a more active role in judicial elections in numerous states.<sup>22</sup> Region of the country made no difference, population of the states made no difference, and it even made no difference if the judges were elected in partisan or nonpartisan elections. And, although retention elections rarely result in the defeat of a judge, there have been notable exceptions.<sup>23</sup>

Former Federal Judge and Congressman Abner Mikva, commenting on the 2000 Illinois Supreme Court elections, noted that in Illinois judicial elections, "every special interest in the state—the insurance, the defense bar, everybody—is in there with big bucks to promote their candidates."<sup>24</sup> Three candidates for the Illinois Supreme Court spent more than \$1 million each and another spent almost that much.<sup>25</sup> On an inflation-adjusted basis, these million dollar campaigns tied the previous record in 1992, when \$580,000 was spent.<sup>26</sup>

Ohio has long faced intense interest group involvement in its judicial races, especially between business groups and the civil defense bar on the one hand and trial lawyers and unions on the other. The increased battling between these interests in Ohio has led to large increases in the costs of judicial elections. In 1980 the race for chief justice of the Ohio high court cost \$100,000; six years later the race

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22. Perhaps because of the intense media attention to Texas' and Alabama's judicial politics, there has been an inaccurate assumption that interest group activity is the greatest in those two states. For example, in 1998 one scholar, discussing the role of interest groups in judicial elections, claimed, "[b]ut in at least two states, Alabama and Texas, where judges are chosen in partisan elections, it is widely known that interest groups have taken to campaigning for and against judicial candidates much as they do in elections for offices in the so-called political branches of government." Williams, *supra* note 3, at 294.

23. See Bright, *supra* note 11, at 847-48 (citing a Tennessee Supreme Court election where a justice was defeated after a surprise attack).

24. Mark Schauerte, *Fund-raising for Supreme Court Primaries Breaks Records*, CHI. LAW., Mar. 2000, at 10.

25. See Chambers, *supra* note 10, at 14, 15.

26. See *id.* The \$580,000 spent in 1982 would equate to slightly over \$1,000,000 in the year 2000. A readily accessible multiplier for the consumer price index is available at <http://stats.bls.gov/cpihome.htm> (last visited Feb. 21, 2001).



cost \$2.8 million.<sup>27</sup> This pattern of civil defense interests backing one candidate and plaintiffs' interests the other, along with large campaign costs, continued in the 2000 supreme court elections.<sup>28</sup> Indeed, the Ohio elections have been so high profile that it was one of four states chosen by the Constitution Project of Washington, D.C. to conduct extensive voter education efforts on court races.<sup>29</sup> The other three states, also with hotly contested court battles having extensive interest group involvement, primarily from competing civil defense and plaintiffs' interests, are Alabama, Illinois, and Michigan.<sup>30</sup> All four of these states' judicial elections were explicitly targeted for business activity by the U.S. Chamber of Commerce.<sup>31</sup>

Illustrative of the national links among interest groups involved in judicial elections is the creation of Michigan's M-Law, a pro-business organization that spends money for advertising and other public outreach in an effort to influence Michigan judicial elections.<sup>32</sup> The Michigan Chamber of Commerce, the Michigan State Medical Society, and several Michigan trade associations created M-Law in the 1990s. However, also involved in its creation was a Washington, D.C. based organization, the American Tort Reform Association, a national pro-business interest group. Borrowing from earlier efforts in Oklahoma, M-Law has published evaluations of both the Michigan Supreme Court and the Court of Appeals to determine the extent to which the judges reflect pro-business values.<sup>33</sup> M-Law has also been significantly involved in making independent expenditures and has run noncandidate-specific education ads on television and on radio that highlighted such things as the

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27. See Hansen, *supra* note 9, at 69.

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

29. See James Bradshaw, *Watchdog Group Sets Its Sights on Ohio Supreme Court Race: Some Say Special Interests Having Too Much Influence*, COLUMBUS DISPATCH, Sept. 6, 2000, at 4B.

30. See Bradshaw, *supra* note 29; John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections* 1, 17 (unpublished paper, on file with *Loyola of Los Angeles Law Review*).

31. See Echeverria, *supra* note 30, at 17.

32. See Michigan Lawsuit Abuse Watch, at <http://www.mlaw.org/whowere.htm> (last visited Mar. 15, 2001).

33. See Robert Ankeny, *Consumer Groups, Trial Lawyers Upset Over Evaluations*, CRAIN'S DETROIT BUS., Nov. 2, 1998, at 44.

contributions of trial lawyers to judicial campaigns.<sup>34</sup> In the 1996 elections, M-Law spent over \$311,000 on television ads and \$46,000 on radio advertising.<sup>35</sup> M-Law is, of course, only a small part of the overall battle between competing interests in Michigan's judicial elections. However, it does show several important developments in interest group politics: (1) interest groups are no longer just local organizations, but sometimes have national connections; (2) techniques developed in one state in judicial elections may be quickly taken up and used in other states, such as judicial evaluations by interest groups; and (3) independent expenditures by interest groups can be both large and influential in affecting judicial elections. Indeed, the continuing nationalization of state judicial elections is further shown by the U.S. Chamber of Commerce's recent efforts through the Institute for Legal Reform to support the election of pro-business judges in Alabama, Illinois, Michigan, Mississippi, and Ohio.<sup>36</sup> The goal is both to make direct campaign contributions and to pay for issue advertising.<sup>37</sup> The evaluations of judges in terms of their pro- or anti-business judicial behavior that began in Oklahoma have now been used in not only Michigan, but also in Louisiana and Mississippi.<sup>38</sup>

Nor are interest group activities limited to the largest states or to tort law. In Mississippi in 1992, a justice was defeated in the Democratic primary by an opponent who "ran as a 'law and order candidate' with the support of the Mississippi Prosecutors Association."<sup>39</sup> A concurring opinion of the justice, one consistent with U.S. Supreme Court precedent, was used to attack the justice for his view that the Constitution did not permit the death penalty for rape where no loss of life had occurred.<sup>40</sup> The justice was also attacked, as claimed by his opponents, for believing that "a defendant who 'shot an unarmed pizza delivery boy in cold-blood' had not committed a

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34. See Echeverria, *supra* note 30, at 54-62.

35. See *id.* at 55.

36. See *id.* at 17.

37. See *id.*

38. See *id.* at 11.

39. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 316 (1997).

40. See *id.* at 316-18.

crime serious enough to warrant the death penalty.”<sup>41</sup> Actually, he had wanted to remand the case for a new sentencing hearing.<sup>42</sup> Two years earlier, another Mississippi justice was defeated for being “soft on crime” and the successful challenger in that race as well had the support of the Mississippi Prosecutor’s Association.<sup>43</sup>

While no Oklahoma judge has lost a retention election, there has been a pattern of lower percentages of favorable votes for judges. In 1986 the Oklahoma District Attorneys Association opposed a Court of Criminal Appeals judge because of a perception that he opposed the death penalty.<sup>44</sup> In 1996 Citizens for Judicial Review, an organization created by a Tulsa public relations firm with ties to conservative interests, spent \$150,000 on election eve ads and news releases in opposition to a Court of Civil Appeals judge in a retention election.<sup>45</sup> In 1997 the public relations firm created Oklahomans for Judicial Excellence that claimed support from fifty-two associations and corporations.<sup>46</sup> In 1998 this organization spent \$250,000 on Oklahoma judicial elections and prepared “scorecard” ratings of judges, and the Christian Coalition distributed 1.4 million of these ratings.<sup>47</sup> The activities of Oklahomans for Judicial Excellence were said to have “stricken fear into the judiciary.”<sup>48</sup>

In Tennessee a supreme court justice was defeated in a retention election in part because of the opposition of the Republican Party and of Republican leaders, but also because of interest group opposition. Six weeks prior to the retention vote, the headline of a Nashville newspaper read “Court Finds Rape, Murder of Elderly Virgin Not Cruel. Tennessee Conservative Union Says ‘Just Say No to Justice White.’” The court had unanimously agreed with the appellate court that the defendant in this case was entitled to a new sentencing

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41. *Id.* at 318.

42. *See id.*

43. *See* 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, 764-65 (1995).

44. *See* Robert Darcy, *Conflict and Reform: Oklahoma Judicial Elections 1907-1998*, 26 OKLA. CITY U. L. REV. (forthcoming Aug. 2001).

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

hearing.<sup>49</sup> Three justices, including the defeated justice, commented that the evidence was insufficient to show an aggravating circumstance beyond a reasonable doubt as required by state law. That case, however, became the mechanism for interest group and political party efforts to make the justice the first in Tennessee to ever be defeated in a retention election. A mailing sent by the Tennessee Conservative Union opened with a description of the crimes of Richard Odom:

78 year-old Ethel Johnson lay dying in a pool of blood.  
Stabbed in the heart, lungs, and liver, she fought back as  
best she could.

Her hands were sliced to ribbons as she tried to push the  
knife away.

And then she was raped.

Savagely . . . .

. . .

But her murderer won't be getting the punishment that he  
deserves.

Thanks to Penny White.<sup>50</sup>

Interestingly, there was heavy use of faxes by Justice White's opponents, showing not only adaptability to new technology by interest groups involved in judicial elections, but also the use of a far less expensive communications medium than mail. Another justice listed as a top target of groups that opposed Justice White announced the year after White's defeat that he would not seek another term.<sup>51</sup>

Recent judicial campaigns in Nevada, a nonpartisan election state, have been less visible. Casino and gambling interests have great influence in Nevada's judicial elections. A few years ago, one Nevada justice received \$80,000 in contributions from these interests.<sup>52</sup> In 1998 two members of the Nevada Supreme Court received nearly half their contributions from casino interests, and individual

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49. See *State v. Odom*, 928 S.W.2d 18, 21 (Tenn. 1996).

50. Bright, *supra* note 39, at 313.

51. See Bright, *supra* note 11, at 849 n.195.

52. See Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, THE NATION, Jan. 26, 1998, available at <http://past.thenation.com/1998/980126.htm>.

casinos were the judicial candidates' largest contributors.<sup>53</sup> It should not be surprising that gambling interests have a major role in Nevada elections, of course, any more than the coal industry in West Virginia, a partisan election state.<sup>54</sup>

In Idaho's May 2000 supreme court elections, a justice was defeated by a combination of factors. The justice authored a decision that upheld a federal reserved water rights claim in three wilderness areas.<sup>55</sup> That decision became a focal point in the election contest. Although officially nonpartisan, the two opposing candidates' parties were easily determinable - much like Ohio and Michigan. The Democratic incumbent had been appointed by a Democratic governor, had married into a well-known Democratic family, and had been involved in liberal causes.<sup>56</sup> The Republican challenger launched his campaign by speaking at a Republican Party fund-raising banquet and was endorsed by state Republican Party leaders.<sup>57</sup> The Democratic incumbent's main interest group support was the Idaho Trial Lawyers Association; the Republican challenger's support included resource and agricultural interests as well as the Idaho Christian Coalition.<sup>58</sup> Substantial independent expenditures were involved including a push poll against the incumbent that appears to have been funded by a South Carolina group.<sup>59</sup> One political action committee, the Concerned Citizens for Family Values, ran full-page newspaper ads on the Sunday prior to the election that proclaimed, "Will partial birth abortion and same-sex marriage become legal in Idaho? Perhaps so if liberal Supreme Court Justice Cathy Silak remains on the Idaho Supreme Court."<sup>60</sup> Other ads were run by gun advocates that

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53. See Shannon Davis, *Courting the Casinos: Judicial Elections in Las Vegas and Nevada*, Center for Investigative Reporting, at <http://www.muckraker.org/stories/991123-justice/cs-nevada.html> (last visited Feb. 21, 2001).

54. See Kaplan & Davidson, *supra* note 52.

55. See *In re SRBA*, 1999 Ida. LEXIS 119 (1999).

56. Echeverria, *supra* note 30, at 21.

57. See *id.* at 24, 27.

58. See *id.* at 24.

59. See *id.* at 30.

60. See *id.* at 31.

suggested the justice would support gun registration. The justice was defeated by sixty percent of the vote.<sup>61</sup>

In Wisconsin, one study of supreme court elections in the past ten years found that the money for the races came overwhelmingly from a small number of contributors, most of whom were lawyers and lobbyists with a small number of large law firms. Recent spending for chief justice of the Wisconsin Supreme Court came to \$1.3 million, twice the spending record set two years earlier and ten times the spending of a campaign twenty years earlier.<sup>62</sup>

#### V. IT IS NOT JUST STATE SUPREME COURTS

Nor are expensive judicial campaigns fueled at least in part by interest group contributions limited to the states' highest courts. From 1976 to 1994 the median amount of money spent by a candidate for the superior court in California increased twenty-three fold—from about \$3000 to \$70,000. It is likely that one trial court race in Sacramento this year will cost a total of \$750,000, and although much of that money is self-funded by one of the candidates, substantial amounts will also have to be raised from other interests such as attorneys who may well appear before the court.<sup>63</sup> Las Vegas trial court judges receive contributions from casino interests as do other local elected officials.<sup>64</sup> In the Lackawanna County, Pennsylvania Court of Common Pleas in 1995, the candidates in the general election for one seat spent \$1 million. In 1997 the three top candidates in the primary election for that county court spent over \$600,000, more than the total spent by the eight successful candidates for the superior court, a statewide office.<sup>65</sup>

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61. *See id.* at 19-33.

62. *See Wohl, supra* note 8.

63. *See* Marjie Lundstrom, *No Ethical Missteps, Pair Running for Judge Insist*, SACRAMENTO BEE, Sept. 10, 2000, available at [http://www.sacbee.com/voices/news/old/old.voices04\\_20000910.html](http://www.sacbee.com/voices/news/old/old.voices04_20000910.html).

64. *See* Kaplan & Davidson, *supra* note 52.

65. A.B.A. REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, PT. 2, at 83 (1998).

## VI. INTEREST GROUP ACTIVITIES OTHER THAN CAMPAIGN CONTRIBUTIONS

While the extent of interest group activity in judicial races may only involve making campaign contributions to judicial campaigns, some groups play other roles. Some interest groups may make independent expenditures that benefit candidates for judicial office. These contributions are not reported in judicial candidates' contribution statements and neither the funds nor the advertising it buys are in control of the candidate. From the candidate's perspective, such independent expenditures may not always be desirable since, for example, it may lead to advertising that goes "off-message" from the image the candidate would like to project. In the race for chief justice of North Carolina in 1986, for example, Citizens for a Conservative Court began running ads and holding demonstrations on courthouse steps in opposition to the challenger to the chief justice. The incumbent wrote of the organization's tactics,

Some of their tactics . . . were offensive, and I asked them to discontinue them, but as they were in no way associated with my campaign, I had no means of controlling them. I have no idea whether their tactics had an overall positive or negative impact on the election results, but I know that they offended a large number of people. I also was unable effectively to dissociate myself from their tactics in the minds of some people, even after the election was over. A significant negative effect of their work was that some of the people whose financial support I had counted upon were influenced to make their contributions to the CCC instead of directly to my campaign . . . .<sup>66</sup>

In Ohio in the 2000 elections, one issue advocacy group spent nearly \$3 million. The group, Citizens for a Strong Ohio, describes itself as dedicated to educating the public about the state supreme court elections. As an issue advocacy group, it is exempt from disclosure requirements and from contribution limits.<sup>67</sup> However,

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66. E-mail from Rhoda Billings to Anthony Champagne, (Oct. 16, 2000) (on file with author).

67. See William Hershey & Mike Wagner, *Group Files Complaint About Anti-Resnick Ads*, DAYTON DAILY NEWS, Oct. 18, 2000, at 1A.

Common Cause of Ohio has recently filed a complaint that the group should be considered a political action committee, and therefore subject to disclosure requirements and contribution limits, because it is attempting to influence the outcome of the supreme court elections.<sup>68</sup>

## VII. IDEOLOGICAL INTERESTS ARE INVOLVED

The various segments of the bar and the clients they represent remain the leading interests involved in judicial elections. However, other interests do get involved, often mobilized by a "hot-button" issue with which the court has dealt. In 1996, for example, in Nebraska a supreme court justice was defeated in a retention election because he became a target of a \$200,000 campaign by those opposed to the court's rejection of term limits for elected officials.<sup>69</sup> The justice had authored a unanimous opinion holding the term limits initiative invalid because it did not comply with a constitutional amendment that increased the number of signatures required to put the measure on the ballot.<sup>70</sup> The justice received only thirty-two percent favorable votes in the retention election.<sup>71</sup>

In 1990 the chief justice of Florida had to raise \$300,000 to retain his seat against anti-abortion groups that sought to defeat him.<sup>72</sup> In 1992 anti-abortion groups challenged another justice who was also opposed by prosecutors and police organizations for her dissenting opinion in a death penalty case.<sup>73</sup>

In 1996 a district judge in Utah received only a fifty-one percent favorable vote after he was opposed by women's and gay rights groups who campaigned against him on the grounds that he was soft on crimes against the two groups.<sup>74</sup> In Utah only one judge has ever

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68. *See id.*

69. *See* Hansen, *supra* note 9, at 68, 70.

70. *See* Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1134 (1997).

71. *See id.*

72. *See id.* at 1140.

73. *See id.*

74. *See* Stephen Hunt, *Judicial Elections Offer Few Thrills but Get Job Done*, SALT LAKE TRIB., Oct. 15, 2000, at A1, available at [http://www.sltrib.com/2000/oct/10152000/nation\\_w/33478.htm](http://www.sltrib.com/2000/oct/10152000/nation_w/33478.htm).



been defeated in a retention election and generally judges receive favorable votes in the eighty percent range.<sup>75</sup>

In 1998 a coalition of anti-abortion groups announced a \$2 million campaign to defeat two California Supreme Court justices in retention elections.<sup>76</sup> Though the coalition never surfaced, justices were forced to raise money in an effort to fend off the threatened challenge.<sup>77</sup> The executive director of the Christian Coalition of Florida considers judicial elections to be "the next hot-button issue" for his group.<sup>78</sup> In Alabama the Christian Coalition recently surveyed judicial candidates prior to making endorsements. According to the Judicial Inquiry Commission, some of the questions called for the candidate to comment on issues likely to come before a judge or "embroiled the judicial candidate in political debate."<sup>79</sup>

One recent study of environmental issues in judicial elections recommends that environmental groups become involved in judicial elections by devoting time and resources to state judicial races and by educating their members and the public about the effects of judicial decisions on the environment. The study also recommends that environmental groups borrow from the business community and prepare evaluations of judges because, it is argued, "if the judicial selection process remains a political process, and if that process has direct and important implications for environmental policy, it is entirely appropriate for environmental groups to help voters educate themselves about the consequences of their choices in the voting booth."<sup>80</sup>

One recent comprehensive study of judicial elections in Pennsylvania strongly suggests that economic interests, however, seem to overwhelmingly dominate financial contributions to judicial races. Of \$3,129,783 contributed by PACs and law firms to thirty-five Pennsylvania Supreme Court candidates from 1979 to 1997, only eighteen groups were labeled "ideological" groups, and they

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75. *See id.*

76. *See Hansen, supra* note 9, at 69.

77. *See id.*

78. Kaplan & Davidson, *supra* note 52.

79. *Politics and Judges*, BIRMINGHAM NEWS, Sept. 13, 2000, available at <http://www.al.com/news/birmingham/Sep2000/13-politics.html>.

80. Echeverria, *supra* note 30, at 74-75.

contributed only \$25,053.<sup>81</sup> In contrast, groups categorized as “business” groups gave \$2.5 million and consisted of 290 PACs and firms.<sup>82</sup> Four hundred eighty labor PACs gave about \$527,000.<sup>83</sup> However, a focus on financial contributions of ideological groups underestimates their importance, since these groups can provide volunteers for campaigns and most importantly mobilize their supporters to cast votes at the polls.

### VIII. SO WHAT?

One can, of course, identify cases that raise concerns about the entanglement of interest groups and judges. In Louisiana, for example, a federal court addressed a challenge to rules that reduced the ability of law student legal clinics to practice in state courts.<sup>84</sup> Business groups had strongly opposed the activities of the Tulane Environmental Law Clinic and had written the court to express their opposition.<sup>85</sup> Business groups had also contributed substantial sums to supreme court candidates.<sup>86</sup> Although the court dismissed the plaintiffs’ complaint, the judge noted the “close temporal relationship between the business community’s expression of outrage and the subsequent changes” in court rules.<sup>87</sup> Wrote the judge, “[I]n Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary.”<sup>88</sup>

The public in many states favors the election of judges and would not support an appointive system. However, there are indications that the new judicial politics has resulted in a decline in the appearance of justice in state courts. A recent national survey of public

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81. See James Eisenstein, *Financing Pennsylvania’s Supreme Court Candidates*, 84 JUDICATURE 10, 17 (2000).

82. See *id.*

83. See *id.*

84. See *S. Christian Leadership Conference v. Sup. Ct. of La.*, 61 F. Supp. 2d 499 (E.D. La. 1999).

85. See *id.* at 501.

86. See Mark Kozlowski, *The Soul of an Elected Judge*, LEGAL TIMES, Aug. 9, 1999, at 15, available at [http://www.brennancenter.org/presscenter/oped\\_1999\\_0809.html](http://www.brennancenter.org/presscenter/oped_1999_0809.html).

87. *Id.*

88. *Id.*

opinion and the court system found that eighty-one percent of respondents believed that “[j]udges’ decisions are influenced by political considerations.”<sup>89</sup> Seventy-eight percent believe “[e]lected judges are influenced by having to raise campaign funds.”<sup>90</sup> These national survey findings are supported by state surveys. In Texas, eighty-three percent of respondents thought judges were influenced by contributions in their decisions.<sup>91</sup> A Pennsylvania poll showed that eighty-eight percent thought judicial decisions were influenced by contributions made to judicial campaigns.<sup>92</sup> An Ohio poll found that ninety percent of Ohioans believed political contributions affected judicial decisions.<sup>93</sup> A Washington poll found that seventy-six percent of the respondents believed judges were influenced by political decisions and sixty-six percent by having to raise campaign funds.<sup>94</sup>

Interest groups will vigorously proclaim their goal of ensuring a level playing field in the courts and promoting fairness, but the public senses otherwise. The result is what appears to be a widespread belief that the new judicial politics introduces bias and unfairness into the state courts.

Yet the evidence points to continued expansion of interest group activity in judicial elections. There has already been a vast expansion of interest group involvement, a nationalization of that activity, and a recent call in an academic paper for a further expansion of interest group activity.<sup>95</sup> Additionally, it is clear that interest groups do have an impact on judicial races. In an era of thirty-second television advertisements, interest group advertising can hold considerable sway over the electorate, and the independent expenditures of

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89. Nat’l Ctr. For State Courts, *How the Public Views the State Courts*, presented at the National Conference on Public Trust and Confidence in the Justice System (May 14, 1999), at 41-42.

90. *Id.*

91. See Chief Justice Tom Phillips, *State of the Judiciary*, available at <http://www.tomphillips.com/state.htm> (Mar. 29, 1999).

92. See ELLEN MATTLEMAN KAPLAN, BLUEPRINT FOR THE FUTURE OF JUDICIAL SELECTION REFORM 2 (1999).

93. See A.B.A. REPORT, *supra* note 65, at 123.

94. See David B. Koch, *Futures Trading in Judicial Elections*, WASH. ST. BAR NEWS (June 2000), available at <http://www.wsba.org/barnews/2000/09/koch.htm>.

95. See Echeverria, *supra* note 30, at 74-75.

interest groups can be especially hard-hitting since they are free of ethical constraints. The result will be more and more interest group involvement in judicial elections in the future.

