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POLITICAL PARTIES AND JUDICIAL ELECTIONS

*Anthony Champagne**

I. INTRODUCTION

"I was elected in 1916 because Woodrow Wilson kept us out of war—I was defeated in 1920 because Woodrow Wilson hadn't kept us out of war."¹ So claimed Judge Fred Williams of the Missouri Supreme Court long ago.² As early as 1821, Justice Joseph Story argued against a perceived trend toward elective judiciaries; and in 1906, Roscoe Pound said elective judiciaries were undermining judicial legitimacy.³ Later, in 1913, William Howard Taft argued that the remedy of nonpartisan elections actually made the problem of elective judiciaries worse. He believed it would allow unqualified candidates who lacked the support of their political parties to get elected.⁴

While political party involvement in judicial elections has long had its detractors, there are positive statements that can be made. For example, political parties may provide campaign workers for judicial candidates. They can also help provide campaign funding. In fact, according to the September 2000 campaign reports made in the Alabama chief justice's race, the largest donor to the Democratic

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1. PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 7 (1980) [hereinafter DUBOIS, *FROM BALLOT TO BENCH*].

2. *See id.* at 258 n.12.

3. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 723 (1995).

4. *See id.* at 724.

candidate for chief justice was the Democratic Party.⁵ Most importantly, the party label provides a significant political asset for candidates in low visibility races such as judicial races. And for voters, the party label is a crucial source of information. 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.⁶

The party label provides a clue to the attitudes and values of judges and ultimately to how they might decide questions of public policy that are presented in their courts. One recent analysis of 140 articles written on the link between judges' party affiliations and performance on the bench confirmed that "party is a dependable measure of ideology on modern American courts."⁷ Party affiliation, however, as an indicator of judicial ideology is not uniform across the states. 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 party affiliation of the justices and their votes in favor or against claimants, but the correlation was less than that found in Michigan. Adamany believed differences in partisanship of judicial campaigns in the two states, and thus

5. See Stan Bailey, *Moore's War Chest Doubles Yates*, BIRMINGHAM NEWS, Sept. 26, 2000, available at <http://www.al.com/news/birmingham/Sep2000/26-e422646b.html>. A spokesman for the Alabama Citizens for a Sound Economy, a pro-business organization, claims that trial lawyers will give about two million dollars to the State Democratic Executive Committee and about one million of that sum will go to judges. See Stan Bailey, *Bench Hopefuls Get Lawyers' Donations*, BIRMINGHAM NEWS, Oct. 6, 2000.

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

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

differences in the states' political cultures, explained the discrepancies in the correlations.⁸ Another study of partisan voting on eight state courts concluded: "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."⁹

Of course, just as there is value in party label voting, there is also a downside. Highly qualified judicial candidates can be defeated simply because, in a particular election year, they bear the wrong party label. After Republican straight ticket voting led to the defeat of nineteen Democratic judges in Harris County (Houston), Texas and led to 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."¹⁰ Similarly, while the parties can help provide funding for judicial campaigns, in some places funding arrangements are the reverse. Judges are required to contribute money to their party in order to secure the party's endorsement in the general election.¹¹ Such endorsement payments have been made in New

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

9. DUBOIS, FROM BALLOT TO BENCH, *supra* note 1, at 148.

10. 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).

11. See Scott D. Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 196 (1996). The Cook County Democratic Party requires all slated candidates, including judicial candidates, to contribute money for printing and mailing campaign literature. See Aaron Chambers, *How High the Bar?*, ILL. ISSUES 14, 19 (2000), available at <http://illinoisissues.uis.edu/bar.html>. Marlene Arnold Nicholson and Bradley Scott Weiss found that Republican judicial candidates also gave money to party committees in Cook County. They believed, "The standard sums given by partisan judicial candidates appear to be assessments that are necessary for obtaining a place on the party slates." Marlene A. Nicholson & Bradley S. Weiss, *Funding Judicial Campaigns in the Circuit Court of Cook County*, 70 JUDICATURE 17, 24 (1986). In 1982, the Brooklyn Democratic Party chairman rejected an offer from the Republican Party to endorse seven Democratic candidates running for newly created judicial seats. The offer was declined because a cross-endorsement would have eliminated the incentive for the candidates to fund raise and campaign for the rest of the ticket. Without cross-

York City; Cook County, Illinois; Philadelphia; Delaware County, Pennsylvania; and no doubt in many other jurisdictions. The extent of political party contributions to judicial campaigns is limited in some regions of the country. A study of thirty-five competitive Pennsylvania Supreme Court elections from 1979-1997 found that only 3.1% of contributions over fifty dollars came from political party committees.¹²

In addition, sometimes the parties routinely expect a high level of party loyalty from their judicial nominees. In the 1970s, for example, when the Supreme Court of Michigan decided a state redistricting case favoring the Republican Party, the Democratic chief justice was denied nomination for the 1976 election. The state bar, however, rallied to support him, and he won the reelection as an independent.¹³

In the early 1990s, the Illinois Supreme Court first rejected a redistricting plan favorable to Republicans by a four to three party line vote. After some minor changes were made in the plan, one of the Democratic justices switched sides and voted with the three Republican justices to uphold the plan. A Democratic legislator alleged that the Democratic justice's vote change had been for political reasons, but the court rejected the legislator's allegations. One justice, however, dissented. He acknowledged that party line voting occurred in political cases, and he pointed out that the Democratic justice who had switched his vote had plans to run for the Illinois Supreme Court in 1992 as a Republican.¹⁴

Party label is also an imperfect indicator of the ideology of judicial candidates. In states that have moved from one party's control to the other's control, judges often switch parties in order to retain their offices. The attitudes and values of the judges do not change—only the party label.

endorsement, funds raised by the judicial candidates would be diverted to the Brooklyn Democratic organization campaign for use by all Democratic candidates. See Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 65 (1985).

12. See James Eisenstein, *Financing Pennsylvania's Supreme Court Candidates*, 84 JUDICATURE 10, 15 (2000).

13. See Wiener, *supra* note 11, at 196.

14. See Jackson Williams, *Irreconcilable Principles: Law, Politics, and the Illinois Supreme Court*, 18 N. ILL. U. L. REV. 267, 285-87 (1998).

Indeed, Philip Dubois' highly regarded book, *From Ballot to Bench*, published in 1980, is the classic defense of partisan elections and the importance of parties as an indication of the values of judges. Dubois excluded the South from his analysis because the Republican Party was then so insignificant in most Southern states that 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.

Voters can best use party affiliations as a predictor of the attitudes and values of judges when appellate court elections are involved. It is there that major policy questions are more likely to be decided than in trial courts, where more routine legal issues will be handled.

Keeping in mind that parties can and do play an important and even positive role in funding judicial elections, mobilizing voters, and providing cues or hints to voters about the policy preferences of judicial candidates, there are nevertheless some serious concerns about some of the involvement of parties in judicial elections. The problems of partisanship that led to the creation of nonpartisan and "Missouri Plan" systems of judicial selection are still with us.¹⁵

II. PARTISAN ELECTIONS: JUST WHAT THE NAME SAYS

Of the seventeen states with partisan judicial elections, five are Southern and until recently were one-party Democratic states.¹⁶ At least for those five states, the judges were Democrats, and if there was any real competition in the judicial races, it was in the Demo-

15. See generally, Michael Wallace, *The Case for Partisan Judicial Elections*, at <http://www.fed-soc.org/judiciaelections.html> (last visited Feb. 22, 2001) (discussing problems that eventually led to the creation of the Missouri Plan where a panel of lawyers and lay persons suggest appointments for judicial vacancies to the governor).

16. 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. However, Michigan, Ohio, and Idaho should be added to that list. While these three states have a nonpartisan 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.

cratic primary. Republican challenges were hopeless and exceedingly rare. That began to change in the South during the 1970s and 1980s when the Republican Party rapidly gained strength. The experience of partisan elections in North Carolina is illustrative.¹⁷ Appellate and general jurisdiction judges were elected statewide and were usually initially appointed to the bench by Democratic governors. The expectation was that incumbent judges would time their resignations or retirements at some point during their terms so that the governor could appoint a successor. However, as the Republican Party gained strength and elected governors in 1972, 1984, and 1988, the path to a judgeship became less clear. Incumbent Democratic judges began to retire at the end of their terms in greater numbers and the Democratic legislature began to create judgeships that were filled by election rather than appointment when Republican governors were in office.¹⁸

By 1986, there were strong partisan battles for the state supreme court. These battles were joined by interest groups, such as the Citizens for a Conservative Court, that ran advertisements critical of one of the justice's decisions in capital murder cases and sponsored news conferences with families of murder victims who condemned the justice's decisions. And the stridency of the 1986 elections continued. In 1990, the Republican state chairman made television advertisements criticizing the Democratic court for being soft on crime and unduly supportive of civil plaintiffs. The Republican governor joined the chairman.¹⁹ Partisanship had come to judicial elections in North Carolina as it came to the rest of the South that for years had actually had nonpartisan elections under the façade of a partisan system.

In partisan elections, judicial candidates run under a party label. The effect in competitive races is that low visibility races such as judicial races benefit (or suffer) from voting for candidates at the top of the ticket. In Texas, Democratic judicial candidates clearly benefited in 1982 from the popularity of Democratic U.S. Senator Lloyd

17. See James C. Drennan, *Judicial Reform in North Carolina*, in JUDICIAL REFORM IN THE STATES 19, 27 (Anthony Champagne & Judith Haydel eds., 1993) [hereinafter Drennan, *Judicial Reform*].

18. See *id.* at 27.

19. See *id.* at 19-49

Bentsen. Furthermore, in 1984, Republican judicial candidates benefited from the presidential candidacy of Ronald Reagan.²⁰

It is the party label rather than the ability of the judicial candidate that often determines the outcome of an election. In 1994, for example, the former chairman of the state Republican Party called on Republicans to take control of the Texas Court of Criminal Appeals after the reversal of a capital conviction. The Democratic incumbent was a conservative former prosecutor who had served on the court for twelve years. He had support from both prosecutors and the criminal defense bar. His Republican opponent campaigned in favor of greater use of the death penalty, greater use of the harmless error doctrine, and sanctions for attorneys who file frivolous appeals especially in death penalty cases. He had misrepresented his background, his experience, his record, and had almost no criminal law experience. The Republican won with 54% of the vote in large part because in statewide elections, Texas has become a one-party Republican state.²¹ The judge subsequently ran into legal difficulties related to scalping University of Texas football game tickets and, after a considerable period of indecisiveness, decided not to seek reelection in 2000.

Missouri continues to have partisan judicial elections in most of the state, although it is known for the "Missouri Plan."²² One trial court judge there switched from the Democratic to the Republican Party and issued a press release that included an exceptionally ugly partisan appeal:

The truth is that I have noticed in recent years that the Democrat party places far too much emphasis on representing minorities such as homosexuals, people who don't want to work, and people with a skin that's any color but white. Their reverse-discriminatory quotas and affirmative

20. See L. Douglas Kiel et al., *Two-Party Competition and Trial Court Elections in Texas*, 77 JUDICATURE 290 (1994).

21. See Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 847 (1998).

22. See ABA REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS PART TWO, 76 n.13 (1998). As of 1997, forty of Missouri's forty-five circuits chose judges by partisan election.

action, in the work place as well as in schools and colleges, are repugnant to me. . . . I believe the time has come for us to place much more emphasis and concern on the hard-working taxpayers in this country. . . . That majority groups of our citizens seem to have been virtually forgotten by the Democrat party.²³

But regardless of the press release, it is the same judge with simply a different party label.

III. PARTISAN NONPARTISAN ELECTIONS

One study of California judicial elections noted:

Even in the context of nonpartisan elections, however, voters have always been able to rely upon partisan cues regarding candidates for nonpartisan offices. Even if political parties did not formally endorse candidates, voters could look for guidance to other individuals or organizations with recognized partisan leanings. . . . In addition, state and local governmental officials with well-known political affiliations sometimes endorsed candidates for nonpartisan office (including judicial offices). . . . In short, the practical differences between a technically nonpartisan election and partisan election may be more imagined or perceived than real.²⁴

Still, in spite of the author's belief that absent partisan cues on the ballot the voter in California can easily obtain information about the partisan affiliation of judicial candidates, the absence of those ballot cues at least complicates the search for information on partisan affiliations.

In Ohio's highly partisan supreme court elections last year, an all out battle took place. Democratic candidates were supported by trial lawyers and labor unions, Republicans by business interests. Much of the spending in the race was independent spending by interest groups, which means that campaigning was not restricted by the

23. Bright, *supra* note 21, at 850.

24. J. Clark Kelso, *Judicial Elections: Practices and Trends*, 11-12, at http://www.mcgeorge.edu/judicial_elec_prac.html (last visited Feb. 21, 2001).

*Canons of Judicial Ethics*²⁵ and thus the campaigning was especially intense and focused on the groups' political agendas.²⁶

Michigan has nonpartisan ballots, but like Ohio, it has very partisan judicial races. In the 2000 Michigan elections, the Republican Party aired a television commercial against a Democratic nominee for the supreme court that criticized the candidate's role in a decision involving the sentence of a man convicted of molesting a seven-year-old girl. The advertisement depicted the Democratic nominee as soft on crime because he voted to uphold a reduced sentence in the case, despite the offender's lengthy criminal history. The original script said the candidate, then an appellate judge, "gave that repeat pedophile less than the minimum sentence, just a slap on the wrist."²⁷ Several television station executives objected to the word "gave" because the original sentence was handed down by a trial court judge. A revised script said the candidate "let that repeat pedophile off with"²⁸ Democrats also objected to the GOP ad's mention of two other Democratic court nominees who were not involved in the case, though Republicans responded that there was no suggestion in the ad that the other two candidates were involved.²⁹ The GOP ad has developed a reputation "as one of the most brutal attacks ever launched in a Michigan judicial campaign."³⁰

The Minnesota Republican Party has recently voted to endorse candidates for the state appeals court and for the state supreme court.

25. See *Alex v. County of L.A.*, 35 Cal. App. 3d 994, 1002, 111 Cal. Rptr. 285, 290 (1973); see also CAL. CODE JUD. ETHICS, Canon 7 (2000) ("A Judge should not engage in political activity except to the extent necessary to obtain or retain judicial office through the elective process.").

26. See, e.g., Spencer Hunt, *Judicial Races Stretch Ethics: Ads, Agendas Tarnishing Impartiality*, CINCINNATI ENQUIRER, (Sep. 24, 2000), http://www.enquirer.com/editions/2000/09/24/loc_judicial_races.html (reporting that supreme court chief justices from 15 states planned to meet to discuss campaign reform because of intensity and misleading aspects of recent judicial campaigns).

27. Dawson Bell, *TV Ad Attacking Judge Draws Fire*, DETROIT FREE PRESS, Sept. 27, 2000, http://www.freep.com/news/politics/court27_20000927.html.

28. *Id.*

29. See *id.*

30. *Id.*

One prominent Republican described the effort as a way to end what he called "judicial tyranny."³¹

IV. RETENTION ELECTIONS

Though the 1986 defeat of three California Supreme Court justices in retention elections are ascribed to the activities of interest groups such as Crime Victims for Court Reform, there was also a high level of partisan activity. Republican legislative incumbents campaigned against the three justices, but only some Democratic incumbents from safe districts supported them.³² The Republican governor, having already announced opposition to the Democratic chief justice because of her votes in capital cases, publicly warned the two associate justices on the court who were also up for retention that he would oppose their retention unless they voted to uphold more death sentences.³³ The effects of such a retention battle can fuel opposition to other judges and, of course, it can also induce judges to pause and consider political implications of their decisions in controversial cases. One Democratic California justice, speaking of his vote in a controversial 1982 decision shortly before his retention election later commented: "I decided the case the way I saw it. But to this day, I don't know to what extent I was subliminally motivated by the thing you could not forget—that it might do you some good politically to vote one way or the other."³⁴

In Tennessee, judges cannot run partisan races in appellate court retention elections; but in Justice Penny White's retention election, the Republican Party sent voters a message with the party's name and logo saying: "If you support capital punishment, vote NO [sic] on Penny White."³⁵ In early voting, the Republican governor

31. Brennan Ctr. for Justice at N.Y.U. Sch. of Law, *Reducing Injudiciousness in Judicial Elections*, July, 2000, at http://www.brennancenter.org/resources/resources_act_injudic.html.

32. See John H. Culver & John T. Wold, *Judicial Reform in California*, in *JUDICIAL REFORM IN THE STATES* 139, 155 (Anthony Champagne & Judith Haydel eds., 1993).

33. See Bright & Keenan, *supra* note 10, at 760-61.

34. Culver & Wold, *supra* note 32, at 156 (quoting high court Justice Otto Kaus).

35. Symposium, *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM.

commented that he had voted "no" on White's retention since she "did not share the views of the average Tennessean."³⁶ That was followed by similar statements by both of Tennessee's Republican senators.³⁷

V. THERE IS SOMETHING HAPPENING HERE;
WHAT IT IS, IS INCREASINGLY CLEAR

Partisanship in judicial elections is nothing new. Political parties jockeying for power in the selection of state court judges is an ancient political rite. After all, the main goal of the parties is to gain and hold offices and that includes judicial offices. However, there is a new level of partisanship in many judicial elections. It is not limited to partisan election systems, but can be found in nonpartisan systems and in retention elections as well. Part of that new partisanship may be reflected by the enhanced competitiveness of the political parties. Certainly that is true in the South where there has been a dramatic rise in the fortunes of the Republican Party over the past twenty years. The result is that in the 1980s and 1990s, the sleepy affairs that used to pass for judicial elections in the South became pitched battles between the Democratic and Republican candidates.

It is important to note that modern partisanship in judicial elections is not limited to the party supplying workers, or funds, or even the all-important party label to candidates. There is a viciousness, a stridency to many modern day judicial elections that goes beyond routine maneuvering by the parties for greater representation on the bench. Judicial candidates are faced with hard-hitting, bitter attacks being waged by partisans using the mass media.

The mass media is becoming the way to reach voters. No longer can one successfully campaign for judicial office by speaking at civic clubs, shaking hands, and garnering a few newspaper and bar endorsements. One immediate effect of reaching voters in judicial elections is that costs increase dramatically because judicial candidates must advertise to reach voters through newspapers, radio, and,

HUM. RTS. L. REV. 123, 140 (1999) (quoting Penny White) [hereinafter, *Breaking the Most Vulnerable Branch*].

36. *Id.* at 139.

37. *See id.* at 139-40 (quoting Penny White speaking of her retention election).

most expensively, television. And for expensive media such as television, the message must be brief. That requires focusing on simple themes that are attractive to voters. The result is that often the most effective mass media advertising focuses on “hot-button” issues that have strong voter affect.³⁸ The late California Supreme Court Justice Otto Kaus called these issues the “crocodiles in the bathtub.”³⁹ They are the issues that most judges must deal with, but which can be effectively turned against the judge in a short, simple media message.⁴⁰ Such issues are crime, capital punishment, abortion, and voter initiatives such as term limits.⁴¹ All it takes in this era of mass media

38. See LAWRENCE R. JACOBS & ROBERT Y. SHAPIRO, POLITICIANS DON'T PANDER: POLITICAL MANIPULATION AND THE LOSS OF DEMOCRATIC RESPONSIVENESS 49 (2000).

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

40. See *id.*

41. See *id.* at 1133-35; see also Brennan Ctr. for Justice at N.Y.U. Sch. of Law, *supra* note 31. Examples of these sorts of judicial campaigns are prevalent, and they can be found in the summaries of news reports on state judicial elections that are available on the Brennan Center for Justice Web site. See www.Brennancenter.org/presscenter/presscenter.html. Among recent reports is a Cincinnati Post article reporting that an Ohio Supreme Court race is damaging the public's opinion of the judiciary. Mark Kozlowski of the Brennan Center is quoted as saying that as judicial races become TV ads and attack ads and more like Congressional campaigns, people will become more cynical of judges. See also Editorial, *Once More, With Feeling*, CINCINNATI POST, Nov. 13, 2000, available at <http://www.cincypost.com/opinion/2000/edita111300.html>. Richard Grossman, a Syracuse attorney claims that judges are pledging to be “tough on crime” in spite of rules prohibiting candidates from “making pledges or promises of conduct in office other than impartiality.” Editorial, *Impeachment and Disciplining of Judges*, SYRACUSE POST, Feb. 1, 2001, <http://brennancenter.org/presscenter/presscenter.html>. The Detroit Free Press reported that a Michigan Supreme Court justice might file a libel suit over a Democratic Party flyer distributed at a NAACP dinner that accused him of believing that the *Brown* decision was wrong. See Hugh McDiarmid, *Flyer on Judge Leads to Ugly Partisan Spat*, DETROIT FREE PRESS, May 11, 2000, http://www.freep.com/news/politics/hugh11_000511.html. A Columbus Dispatch article reported that an Ohio Supreme Court candidate had hinted as to how he would decide school funding and civil suit settlement limits. See James Bradshaw, *Court Candidate Hints at Stand on Issues*, THE COLUMBUS DISPATCH, Sept. 20, 2000, at 5C. The Atlanta Journal-Constitution reported that in 1998 a Supreme Court candidate ran ads claiming his opponent approved of same-sex marriages and called the electric chair “silly.” The candi-

politics is for a judge to do something—almost anything—such as an apparent low bail for a murderer or reversal of a death sentence on appeal. A ten second media message can turn that decision into a charge of coddling criminals that could ruin the judge's career.⁴²

In judicial races, the parties will often cooperate with interest groups in presenting a message about that particular judicial campaign. After all, in a race in which an interest group is, for example, supporting a Democratic incumbent judge, the interest group is a political asset to both the incumbent judge and the Democratic Party. Some interest groups may also develop long-term working relationships with a particular political party. For example, organized labor has traditionally been aligned with the Democratic Party, as have trial lawyers.⁴³ Business groups are often aligned with the Republican Party.⁴⁴ In some states in recent years, the Christian Coalition has been aligned with the Republican Party.⁴⁵ The result of the long-term intimate ties between the parties and certain interest groups is that their goals and objectives mesh.⁴⁶ In Texas, for example, it would be difficult, though not impossible, for a candidate opposed by trial lawyers to get the nomination of the Democratic Party for the Texas Supreme Court. Conversely, a judicial candidate known as

date successfully sued the Georgia Judicial Qualifications Commission over its prohibition against false and misleading statements by judicial candidates. See Bill Rankin, *Election '98*, ATLANTA J. CONST., July 17, 1998, at 5D; Bill Rankin, *Opponent Misreading View on Same-Sex Unions*, ATLANTA J. CONST., July 18, 1998, at <http://stacks.ajc.com/cgi-bin/display.cgi?id=3a99b4935be8Mpqaweb1P11010&doc=results.html>. The Raleigh News-Observer editorialized against "mudslinging and attack advertising" in judicial elections. *Judicial Mud*, RALEIGH NEWS-OBSERVER, Aug. 28, 2000, <http://www.newsobserver.com>. Moreover, the St. Petersburg Times decried the transformation of the nation's judicial elections into "bruising political battles." Editorial, *When Judicial Campaigns Go Bad*, ST. PETERSBURG TIMES, Sept. 10, 2000, at 2D, available at <http://pqasb.pqarchiver.com/sptimes>.

42. See Uelmen, *supra* note 39, at 1136-37.

43. See, e.g., Ann Devroy, *Clinton Leans Left on Bias Rules: Speech Energizes Liberal Loyalists*, CHI. SUN-TIMES, July 20, 1995, at A22.

44. See, e.g., David Nitkin, *You Can Count on State Tax Cut: Times Are Good, So GOP Leaders Want to Give You a Break. But Should Florida Be Saving Instead?*, ORLANDO SENTINEL, Mar. 1, 1999, at A1.

45. See, e.g., Kurt Erickson, *Christian Coalition Chairman Seeks Bipartisanship*, THE PANTAGRAPH, June 21, 2000, at A3.

46. JEFFREY M. BERRY, THE INTEREST GROUP SOCIETY 44-54 (3d ed. 1997).

having pro-choice views would have trouble getting the Republican nomination. In fact, two Republican judges on a Texas intermediate appellate court were recently rebuked by delegates at the Republican State Convention because of their decision to overturn a sodomy conviction. This action angered religious conservatives in the party.⁴⁷ Although the judges are Republicans, the delegates opposed their reelection and placed language in the party platform attacking "activist judges who use their power to usurp the will of the people."⁴⁸ Thus, interest group politics in the states affect party politics that in turn have an influence on who becomes a judge. Those interest groups with influence in the party are going to want their party's candidate to be sympathetic to their objectives, and, to get their support, the judicial candidate is going to have to show that he or she is friendly to the goals of the group.

Where the interest groups' goals become one party's goals and the opposing interest groups' goals become those of the opposing party, the stage is set for the strident, bitter judicial election campaigns that have been seen in numerous states such as Texas, Alabama, Michigan, and Ohio. There is little room for moderation in races that pit labor-backed Democrats against business-backed Republicans; trial lawyer-supported Democrats against physician-supported Republicans or pro-life Republicans against pro-choice Democrats. An example of such a tie between interest groups, political parties, and the judiciary is suggested by a string of decisions by the Cook County, Illinois judiciary in 1996 that declared parts of the 1995 Illinois tort reform law unconstitutional.⁴⁹ Cook County's bench was a bastion for Democrats, and both the judges and the party were strongly backed by trial lawyers whose goals were contrary to the Republican legislature's efforts for tort reform.⁵⁰

The parties have also become more ideologically separate in America. One study of the political feelings of voters shows that

47. See Julie Mason, *Bizarre Double Standard Permeates State GOP Convention*, THE HOUSTON CHRON., June 25, 2000, at A32.

48. People for the American Way, *Right-Wing Attacks on Judicial Independence in the States in 2000*, Sept. 25, 2000 at 5, available at <http://www.pfaw.org/issues/right/rww/rww.000925.shtml>.

49. See Williams, *supra* note 14, at 313-14.

50. See *id.*

while the general public's feelings about "liberals" and "conservatives" has remained fairly stable from 1964 to 1994 with a slightly more favorable response to "conservatives," Democratic Party and Republican Party partisans were quite different.⁵¹ Strong partisans make up about one-third of the electorate and are most likely to vote and to participate in party activities. Strong Republicans tend to have much more favorable feelings toward "conservatives," and strong Democrats have much more favorable feelings toward "liberals."⁵²

These long-term trends have several important implications for judicial races. The greater ideological divide among the parties suggests that campaigns between the competing parties, including judicial campaigns, will be more bitter and hard fought. Further, issues that are ideological "hot buttons" will prove increasingly effective in mobilizing the activists of both parties. Since judicial candidates must find ways to mobilize the strong partisans of their respective parties to succeed in elections, some candidates will approach the line, and possibly cross the line, of unethical political appeals. If the Christian Coalition is important to the party, what better way of building a strong base of support in the party than doing an act such as posting the "Ten Commandments" in the courtroom?⁵³ If prosecutors and victims' rights groups are powerful in another county's politics, an effective way of building support might be to act as one judge did when he taped a picture of Judge Roy Bean's hanging saloon on the front of his bench with his name superimposed over Judge Bean's and referred to the high court's judges as "liberal bastards" and "idiots."⁵⁴ Logically, these, and numerous other examples of grandstanding and political rhetoric, can generate publicity and support and, thus, aid a party's nomination and election of its candidate.

VI. CONCLUSION

The role of political parties in judicial elections has long been criticized and reforms such as nonpartisan elections and retention

51. See JACOBS & SHAPIRO, *supra* note 38, at 35.

52. See *id.*

53. See Bright, *supra* note 21, at 833.

54. See Bright & Keenan, *supra* note 10, at 813.

elections were designed to restrict the influence of the parties. Nevertheless, political parties retain a major role in all judicial elections. However, that role is not all bad. The parties do perform valuable functions in judicial elections, such as providing campaign workers, funds, and the party label to judicial candidates. No doubt it is the utility of the parties in these elections that explains the persistence of parties even in the face of anti-party reforms.

However, parties do have negative effects in judicial races. These effects are especially noticeable when highly qualified judges are defeated simply because they had the wrong party label in a year when a presidential nominee of the opposing party was unusually popular—hence, Judge Williams’ explanation of his defeat eighty years ago in connection with the Warren Harding landslide.⁵⁵

There appears to be a new level of partisanship in many judicial races. One explanation for this greater and more vicious partisanship is that the parties in some states have become more competitive. In the South, that competitiveness has come about in the past two decades as the Republican Party has become a major force in the region.⁵⁶ Another explanation for the new partisanship is the increased reliance on mass media for campaigning in judicial races. The nature of mass media campaigns is to attempt to saturate the media market with a simple message. For judicial races, that means that a successful media strategy is to use “attack ads” to focus on “hot-button” issues such as capital punishment, abortion, or crime.

Additionally, the parties in some states are closely aligned with competing interest groups. That entanglement of parties and interest groups leads the parties to adopt the groups’ goals as their own. The result is a wider gulf between viewpoints of the two parties and the candidates of those parties. Since neither the independent expenditures of the parties nor their interest group allies are restricted by ethical constraints, their use of “hot-button” issues in the media can be particularly strident.

55. See *Warren G. Harding, Twenty-Ninth President 1921-1923*, at <http://www.whitehouse.gov/history/presidents/wh29.html> (last visited Mar. 15, 2001). In 1920, Harding received 60.4% of the popular vote to Democrat James Cox’s 34.2%.

56. See Drennan, *Judicial Reform*, *supra* note 17, at 184-85.

Finally, there are increasing ideological differences between strong partisans of the two parties. The greater the gulf between the third of the population who are the most likely party activists and the most likely voters, the more ideologically extreme will campaigns become—including judicial campaigns. Moreover, more judicial candidates will be inclined to adopt ideologically extreme positions to appeal to the strong partisans and the interest groups allied with that party.

