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TORT REFORM AND JUDICIAL SELECTION

Anthony Champagne*

I. INTRODUCTION

In 1988, unhappy with the pro-plaintiff tinge of the Texas Supreme Court, business interests and professional groups decided to take a major role in Texas Supreme Court races. The 1988 Supreme Court elections saw two-thirds of the Court up for grabs and a chance in one election to set the tone of tort law at least until 1990 and possibly for years to come. As one might expect, a plaintiff-defense conflict emerged in the Supreme Court races. The 1988 elections were the most expensive in Texas history. The twelve general election candidates for the court were able to raise $10,092,955 in direct contributions. Factoring primary opponents into the calculation, $10,374,442 was raised by all candidates for the court that year and another $1.4 million was contributed to a plaintiffs' lawyer-funded independent PAC. One third of the money raised by the candidates came from fifty law firms plus the Texas Medical Association.¹

The efforts of business and professional groups succeeded, and continued to succeed in subsequent elections. By the mid-1990s, one Texas appellate judge, Phil Hardberger, wrote that the victory over plaintiffs was complete:

With this new Court, previous expansions of the law were stopped, then rolled backwards. Jury verdicts became highly suspect and were frequently overturned for a variety of ever-expanding reasons. Legal tools of “no duty,” “no proximate cause,” “no evidence,” “insufficient evidence,”

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1. See generally Anthony Champagne, Campaign Contributions in Texas Supreme Court Races, 17 CRIME, LAW & SOC. CHANGE 91 (1992) (providing an examination of campaign contributions in the 1988 Texas judicial elections).
“unreliable experts,” “unqualified experts,” and “junk science” wiped out many jury verdicts. Damages, too, did not go unnoticed. Juries’ assessments were wiped out by increasingly harsher standards for mental anguish and punitive damages. Summary judgments took on a new life, preventing a large number of cases from ever reaching a jury. Statutes of limitations, particularly in medical cases, were interpreted much more narrowly, adding to the number of summary judgments.\(^2\)

If in the 1980s, Texas was an anomaly in that its judicial elections were unusually expensive and highly competitive in contrast to elsewhere in the country, soon it became clear that the Texas situation was a harbinger of things to come in many states that held judicial elections.\(^3\)

Alabama judicial races became increasingly politicized in the 1980s and 1990s, largely because of the controversy over tort reform. The state legislature passed a tort reform package in 1987. The Alabama Supreme Court declared many of its provisions unconstitutional by the early 1990s. The size of jury verdicts led many to perceive Alabama as a “tort hell.”\(^4\) The situation made judicial races more significant for the economic interests battling over the shape of tort law, and between 1986 and 1996 expenditures by supreme court candidates grew by 776%.\(^5\) Alabama, according to


\(^3\) “Since the advent of its new judicial politics, Texas has been a bellwether for emerging trends in other states with elected judiciaries.” Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 937 (2002). At a legislative conference in Washington, D.C. in 1994, the American Tort Reform Association (ATRA) stated that since substantial tort reform legislation had been enacted in Texas, Mississippi, North Dakota, Arizona, and Michigan in 1993, the next step was to work on judicial elections. In 1998 ATRA’s general counsel, concerned over the number of tort reforms that state courts were striking down, said that since amending state constitutions and enacting federal legislation were not viable options, the only alternative was to influence judicial elections. Center for Justice & Democracy, *How Big Business Attacks our Judges and Threatens the Independence of our Judiciary*, www.centerjd.org/private/mythbuster/MB_big_bus_attacks_judges.htm.


\(^5\) American Judicature Society, *Alabama, Judicial Selection in the States*,
one scholar, is “a battleground between businesses and those who sue them” and that battle “is often fought in elections for the Supreme Court of Alabama.”

Angry over medical malpractice jury awards and medical liability insurance premiums, in 2001 Pennsylvania doctors backed the Republican candidate who had been rated in a study as 100% in favor of the health care industry, compared to the Democratic opponent who was rated as 30% in favor. Speaking to physicians, the Republican candidate stressed his recognition of a medical liability crisis in the state and how something needed to be done about it. The candidate also emphasized to physicians that he was opposed to shifting venue to Philadelphia where medical malpractice jury verdicts had been higher than elsewhere in the state.

In Ohio millions of dollars were spent in the 2004 state supreme court elections. Indeed, two candidates in the Democratic primary for one open seat spent a record $670,000. The money came from unions and trial lawyers on one side and business interests on the other. In considerable part, that money reflected the importance of the Ohio Supreme Court in deciding issues of school funding, tort reform, workers’ compensation, and taxing and spending issues.

In 2000, 2002, and 2004, Mississippi Supreme Court elections were a battleground over tort reform. As the U.S. Chamber of Commerce ranked Mississippi’s courts as the worst in the nation in terms of fairness to business, business interests pumped millions into the state’s supreme court races in order to try to elect a pro-business majority. Indeed, a position paper prepared for the Chamber in 2002 claimed that “meaningful [tort] reform is unlikely unless and until the justices elected to the Supreme Court by the plaintiffs’ bar

www.ajs.org/js/AL.htm.

8. Id.
10. Id.
11. Id.
are replaced by the voters.” At the same time, trial lawyers are battling on the other side in Mississippi’s judicial battleground. The president-elect of the Mississippi Trial Lawyer Association noted that “[t]rial lawyers here don’t want to see this state overrun by big business.”

Major tort reform legislation was signed in Mississippi in the summer of 2004 that caps pain and suffering damage awards at $1 million in most lawsuits and $500,000 in medical malpractice cases. It caps punitive damage awards based on the defendant’s net worth, provides protection for “innocent sellers” of faulty products, and provides protection for property owners where contractors on the property are hurt while working on the property, but should have known of the danger. For tort reformers, the battle has now shifted to the election of Mississippi Supreme Court justices who will decide the constitutionality of this legislation as well as interpret and apply the law’s provisions.

The phenomenon of “ nastier, noisier and costlier” competitive judicial elections has not occurred in all states, and in some states it has occurred earlier than in others, but it is widespread. Much of the new politics of judicial elections revolves around the battles over tort reform. This new era in judicial selection poses enormous challenges to the independence of judges and to the need to avoid the selling of justice in the states. We now turn to the emergence of this new judicial politics.

II. THE NEW JUDICIAL POLITICS

For many years, judicial elections tended to be low key affairs. Candidates for judicial office would campaign largely on their

13. Id.
14. Id.
16. Id.
18. Schotland wrote, “The greatest current threat to judicial independence is the increasing politicization of judicial elections. They are becoming nastier, noisier, and costlier.” Roy Schotland, Comment, 61 LAW & CONTEMP. PROBS. 149, 150 (1988).
qualifications and experience. They would seek to win bar polls and would use them in their campaigns if they were successful. They would visit newspaper editorial boards and try to obtain newspaper endorsements. And, they would give a few speeches before bar groups, civic groups, unions, and local medical societies. The campaigns of that era were inexpensive, low visibility, and low key.19

In 1978, judicial campaigns entered a new era, however, when deputy district attorneys in Los Angeles campaigned against judges they believed were soft on crime. Soon campaigns for the Texas Supreme Court heated up and became expensive pitched battles between plaintiffs' lawyers on one side and business interests and lawyers representing the defense in tort cases on the other. Then hard fought judicial campaigns began to be waged in other states such as California, North Carolina, Ohio, and Alabama.20

In this new era of judicial elections, the hardest fought races have tended to be in states with partisan elected judges. Tough battles have also occurred in nonpartisan states, however, and even in some retention elections, and as judicial elections have heated up in the states, confirmation battles for federal judicial appointments have also become much tougher.

At the national level, in the aftermath of the judicial activism of the Supreme Court of the 1950s and 1960s and highly controversial decisions such as Roe v. Wade,21 interest groups and the political parties now see federal judgeships as a way to exert great influence over public policy. With an increasing number of organized interest groups and with parties more polarized ideologically than in earlier years, battles over judicial confirmations have simply become another arena for control over the public policy agenda. Additionally, the vast expansion of media coverage of national politics now discourages private political arrangements that once led to compromises and avoided open battles over judicial appointments.22

20. Id. at 1394–96 (2001).
21. 410 U.S. 113 (1973) (the controversial abortion decision).
22. See generally MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS (1994) (a superb treatment of
The battles over federal judgeships are exacerbated when government is divided—when one party controls the Presidency and the other controls the Senate. Even when the same party controls both the Presidency and the Senate, the President no longer has as easy a time gaining confirmation for judicial nominees due to the close party division in the modern Senate.

Since much of tort law is state law, however, the battles over federal judges have tended to center on other issues and the interest groups concerned with federal judges have tended to be different from the economic interests concerned with state judges. That may change, of course, if, for example, Bush Administration proposals to federalize parts of tort law are successful. Currently, however, much of the battle over the selection of federal judges is removed from the tort reform struggles. It is state judge selection that produces the major battles between economic interests that are concerned with a state’s tort law.

Tort reform has become a major political issue in the states. The issue is being fought not only in state legislatures but also in state supreme courts. The major adversaries in these battles are trial lawyers and unions, on one side, who tend to promote the candidacies of plaintiff-friendly judges; and business interests, defense lawyers in civil cases, and professional groups such as physicians on the other side. The latter support the candidacies of judges favorable to the defense in tort cases. In this battle for control of state courts, Democrats tend toward the plaintiff-friendly side in tort cases, and Republicans tend to favor the defense side. As a result, the interest group battles over the courts also reflect battles between the political parties for control of the courts. While there are, of course, issues other than tort law that can be important in state judicial races, much of the money contributed in judicial races tends to be given by those interested in the shape of tort law.

Another issue that has had a major role in judicial elections is criminal justice. At times, victims’ rights groups have joined with prosecutors to support judicial candidates they believe will be tough on crime. In such situations, criminal defense lawyers often support

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the opposing candidate.\textsuperscript{24} It is common for all candidates to claim some variation of crime toughness, however, due to the popularity of judicial candidates who are perceived as tough on crime.\textsuperscript{25}

It is also common, when crime is a major judicial campaign theme, for the campaign issue to be backed by interests concerned with tort reform. The reason is simply that a crime theme resonates better with voters than does a tort reform issue. Thus, groups with a tort law agenda may promote issues relating to crime because this may excite and mobilize their supporters in ways that tort reform does not.\textsuperscript{26}

Regardless of the theme, however, the most notable development in judicial elections over the past twenty years has been harder fought battles over the selection of judges.

\section*{III. The Battles}

In 1986, three California Supreme Court Justices were defeated in an expensive retention election battle.\textsuperscript{27} Their defeats are often ascribed to the activities of interest groups such as Crime Victims for Court Reform.\textsuperscript{28} There was also much partisan activity, however. The Republican governor announced his opposition to the Democratic chief justice because of her votes in capital cases that were unfavorable to the death penalty.\textsuperscript{29} He publicly warned the two associate justices that he would also oppose their retention unless they voted to uphold more death penalty cases.\textsuperscript{30} In 1996, Tennessee Supreme Court Justice Penny White was also defeated in a retention election because of opposition from leading Republicans and conservatives who opposed her views on the death penalty, and because they thought her generally soft on crime.\textsuperscript{31}

\begin{thebibliography}{9}
\bibitem{24} Champagne, \textit{supra} note 19, at 1393–94, 1399–1401.
\bibitem{26} Interestingly, a number of television ads in the 2000 state supreme court elections were sponsored by the U.S. Chamber of Commerce and yet stressed crime control themes. \textit{See} Anthony Champagne, \textit{Television Ads in Judicial Campaigns}, 35 IND. L. REV. 669, 688–89 (2002).
\bibitem{27} Champagne, \textit{supra} note 23, at 1420.
\bibitem{28} \textit{Id.}
\bibitem{29} \textit{Id.}
\bibitem{30} \textit{Id.}
\bibitem{31} \textit{Id.} at 1420–21.
\end{thebibliography}
moreover, Judge David Lanphier became the first Nebraska Supreme Court judge to be defeated in a retention election.\textsuperscript{32} His defeat was the result of a series of decisions that redefined the state’s second-degree murder statute, and that resulted in the vacating of several murder convictions.\textsuperscript{33} He was also the target of well-funded opposition—amounting to roughly $200,000—because of his decisions unfavorable to Nebraska term limits.\textsuperscript{34} In spite of such notable instances of defeats of incumbent judges in retention elections, such defeats remain rare. Even so, well-funded interest group opposition can defeat judges in elections that are generally not known for large campaign expenditures.

The line between partisan and nonpartisan elections is sometimes blurry, but nonpartisan judicial elections have also seen an influx of money, interest group, and political party involvement. In Mississippi, for example, the Chamber of Commerce has spent enormous sums on television commercials that supported their pro-business candidates for the Mississippi Supreme Court.\textsuperscript{35} In elections in the 1990s, the Mississippi Prosecutors’ Association wielded great influence in the state’s supreme court elections.\textsuperscript{36} In Nevada, casino interests are heavily involved in the state’s nonpartisan judicial elections.\textsuperscript{37} Idaho’s nonpartisan supreme court elections have become quite contentious in recent years.\textsuperscript{38} A recent race for chief justice of the nonpartisan Wisconsin Supreme Court came to $1.3 million.\textsuperscript{39} That was twice the spending record set two years previously and ten times the spending of an average campaign twenty years earlier.\textsuperscript{40}

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 52–54.
\item \textsuperscript{36} Champagne, \textit{supra} note 19, at 1399.
\item \textsuperscript{37} \textit{Id.} at 1401–02.
\item \textsuperscript{38} \textit{Id.} at 1402.
\item \textsuperscript{39} \textit{Id.} at 1403.
\item \textsuperscript{40} \textit{Id.}
\end{itemize}
Clearly, nonpartisan judicial elections have seen a massive upswing in politics, parties, interest groups, and campaign costs in recent years. Nevertheless, the real increase in the political intensity of judicial campaigns has come in partisan judicial elections. One of the reasons that partisan judicial elections have been the most intensely contested is that many partisan election states are in the South. Judgeships in Southern states have become hard fought as a result of the shift of Southern Democrats to the Republican Party.\textsuperscript{41}

There are other reasons why partisan elections are more hotly contested. In truly nonpartisan states, judges are somewhat removed from the jockeying for power between the political parties. In partisan states, however, judgeships are among the prizes of successful election campaigns—prizes of political conflict over which the competing parties battle. Additionally, since judges run with party labels, judicial candidates in partisan states are affected more by votes for or against candidates at the top of the ticket. A popular candidate for President, Senator, or Governor can have political coattails for less visible candidates, such as judicial candidates whose offices are further down on the ballot. As a result, in some partisan judicial elections, there have been “party sweeps” where popular top-of-the-ticket candidates have swept judges of the opposing party out of office and elected judges of a popular candidate’s party for no other reason than that the judges shared the popular candidate’s party affiliation.\textsuperscript{42}

Perhaps most importantly, in an era of increased polarization of the political parties, the economic interests of those involved in the tort reform battles are adopted by the political parties. Thus, the interests of union and trial lawyers typically are reflected by the Democratic Party\textsuperscript{43} and the interests of business and professionals are reflected by the Republican Party.\textsuperscript{44} The result is that these economic interests can draw on the political resources of the parties and the ability of the parties to mobilize voters in order to pursue their economic goals.

What is clear is that although the new politics of judicial selection can be found in nonpartisan and merit selection systems,\textsuperscript{41} Champagne, \textit{supra} note 23, at 1415–16.\textsuperscript{42} Champagne & Cheek, \textit{supra} note 3, at 918.\textsuperscript{43} Champagne, \textit{supra} note 23, at 1423.\textsuperscript{44} \textit{Id.}
partisan election systems are the "money magnets" in this new era.\textsuperscript{45} In Illinois, for example, voters initially select judges in partisan elections, and then judges run in retention elections. Candidates in the partisan contest in 2002 raised \$1.9 million, while an incumbent was reelected in what the Brennan Center described as a retention election that was cost-free.\textsuperscript{46} A similar system exists in New Mexico.\textsuperscript{47} In 2002 no money was raised in two retention elections, while candidates raised \$91,000 in a partisan contest.\textsuperscript{48}

One study of state judicial selection provides important data on just how hotly contested partisan elections have become in comparison to other judicial selection systems. As Table 1 points out, Melissa Gann Hall found not only that partisan election systems lead to far more judicial election contests than other systems for electing judges, but also that judges in partisan election states are far more likely to be defeated.\textsuperscript{49}

\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
Table 1
Percentage of State Supreme Court Incumbents Challenged and Defeated by Type of Election From 1980–1994

<table>
<thead>
<tr>
<th></th>
<th>Retention Election</th>
<th>Nonpartisan Election</th>
<th>Partisan Election</th>
</tr>
</thead>
<tbody>
<tr>
<td>% Challenged</td>
<td>NA</td>
<td>44.2</td>
<td>61.1</td>
</tr>
<tr>
<td>% Defeated</td>
<td>1.7</td>
<td>8.6</td>
<td>18.8</td>
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Indeed, one of the greatest criticisms of partisan elections is that voters tend to know little about judicial candidates, and so they vote on the basis of party affiliation rather than for the candidate who is most experienced, most qualified, or most able to be a judge.\(^5^0\) Since partisan judicial elections tend to be the most hotly contested elections, more money tends to be contributed in these judicial elections than in other forms of judicial elections. That money tends to come from lawyers, litigants, and interest groups concerned with the outcomes of litigation.\(^5^1\) The result is a fear that there is too much dependency between judges and those with an interest in the outcomes of cases.\(^5^2\)

Some of that money is not subject to disclosure rules. In an earlier, less competitive era in judicial politics, judicial candidates raised little money. Now, however, judicial candidates in some states can have campaigns involving hundreds of thousands or even millions of dollars.\(^5^3\) If the money is given to the judicial candidate’s campaign fund, at least the donors are reported so that it is possible to learn who is supporting judicial candidates and the amount of that

51. Id. at 933.
52. Id.
support. In just the past few years, however, it has become popular in some states for interest groups to mount campaigns that are independent of the judicial candidate’s campaign. These independent campaigns are often called “issue advocacy” efforts or “educational campaigns.”

The important aspect of these campaigns is that they generally are not subject to state disclosure laws. It is thus difficult to identify the sources and amounts of support for judicial candidates. In addition to avoiding campaign disclosure laws, these independent campaigns are free from the ethical constraints imposed by the states’ codes of judicial conduct that apply to judicial candidates’ campaigns. As a result, for example, statements about pending or likely future cases may be made in independent campaign ads that would be ethically improper if made in a candidate-funded campaign ad.

One of the criticisms of judicial elections has been that voters are often unaware of judicial candidates’ views. This lack of knowledge is partly a result of the fact that most judicial races are relatively low visibility in comparison to elections for other offices. Another reason for the lack of voter knowledge is because judicial candidates have been restricted in what they may say in a campaign. In order to maintain judicial objectivity, states have limited judicial candidate speech in various ways through codes of judicial conduct. These restrictions on judicial candidate speech have led to a series of recent court cases that have great potential to increase the level of controversy in judicial campaigns.

IV. THE COURTS AND THE CODES

One such limitation has been to ban judicial candidates from announcing their views on controversial issues. Recently, in Republican Party of Minnesota v. White (2002), the U.S. Supreme Court struck down that particular ban as an unconstitutional restriction on freedom of speech. On the one hand, the elimination of that ban allows voters to learn more about judicial candidates’

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54. Id.
55. Id. at 756.
56. Id. at 766.
58. Id.
views. On the other, judicial candidates now have a greater ability to curry the favor of voters and interest groups by announcing views in campaigns that practically amount to pre-judging cases. This decision may exacerbate the problems with judicial campaigns, making them even nastier contests with candidates vying for interest group support by announcing their views regarding future cases. Such concerns have led a reform group, the Constitution Project, to work with several bar and civic groups in an effort to maintain quality control over judicial candidates by asking candidates to sign commitments to maintain decorum in their campaigns.\(^{59}\)

*Republican Party of Minnesota v. White* has not been the only court decision addressing codes restricting judicial campaign speech. Several courts have held that prohibitions on misleading statements in the codes violate the First Amendment. In a Michigan case, *In re Chmura*,\(^{60}\) for example, the state’s Judicial Tenure Commission held that a judicial candidate’s strategy had been to “wage a ‘brass knuckles’ campaign” to retain judicial office.\(^{61}\) It determined that the candidate had even violated a revised canon in the Code of Judicial Conduct providing that a judicial candidate “should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false.”\(^{62}\)

That provision of the code had been revised due to First Amendment considerations from a prohibition against “false, fraudulent, deceptive, and misleading” statements.\(^{63}\) In a further modification of the canon, the Michigan Supreme Court held that judicial campaign speech “that can be reasonably interpreted as communicating hyperbole, epithet, or parody is protected” under the canon.\(^{64}\) It further held that the expression of opinion is protected under the canons “as long as it does not contain probably false factual connotations.”\(^{65}\)


\(^{61}\) *Id.* at 526.

\(^{62}\) *Id.* at 519.

\(^{63}\) *In re Chmura*, 464 Mich. 58, 61 (2001).

\(^{64}\) *Id.* at 93.

\(^{65}\) *Id.*
Under *In re Chmura*, if judicial campaign speech does set forth objectively factual matters, the court should analyze that speech to determine if it is literally true. Literal truth does not violate the canon. Even an untrue statement may be insufficient to show a violation of the canon, however. The court must examine the communication as a whole to determine if "the substance, the gist, the sting" of the communication is true in spite of the false statement. If the court then determines that there has indeed been a false public communication, it inquires as to whether the communication was made knowingly or with reckless disregard of the truth. This Michigan Supreme Court decision effectively eviscerated the canon against false statements and opened judicial campaigns to a level of controversy approaching those for the political branches of government.

A federal court of appeals in *Weaver v. Bonner* recently struck down a Georgia canon that was virtually identical to the one the Michigan Supreme Court declared unconstitutional. In 1998, George Weaver ran for election to the Georgia Supreme Court and was defeated by the incumbent. During his campaign, he distributed a brochure that characterized his opponent as wishing to "require the State to license same-sex marriages." He also claimed his opponent "has referred to traditional moral standards as 'pathetic and disgraceful.'" He stated, further, that his opponent had referred to the electric chair as 'silly'. The words "THE DEATH PENALTY" were published in an adjacent column.

The Special Committee on Judicial Election Campaign Intervention found this brochure to be "false, misleading, and deceptive" in violation of Georgia’s Code of Judicial Conduct. Weaver revised his brochure, but the revised version contained similar charges about his opponent's views. Weaver and his

66. *Id.*
67. *Id.*
68. 309 F.3d 1312 (11th Cir. 2002).
69. *Id.*
70. *Id.* at 1316.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 1316–17.
campaign committee then aired a television advertisement that included the following content:

(1) The narrator states: “What does Justice Sears stand for? Same sex marriage.” This statement is made while a graphic shows: “Same Sex Marriage.”

(2) The narrator states: “She’s questioned the constitutionality of laws prohibiting sex with children under fourteen.” This statement is made while a graphic shows: “Questioned Laws Protecting Our Children.”

(3) The narrator states: “And she called the electric chair silly.” This statement is made while a graphic shows: “Called Electric Chair Silly.”

The Special Committee concluded that the television advertisement violated its previous cease and desist order regarding the first brochure. It issued a public statement to the media that Weaver had “intentionally and blatantly” violated the original cease and desist request and deliberately engaged in “unethical, unfair, false and intentionally deceptive” campaign practices.

In the court challenge to the Special Committee’s actions, the federal court of appeals held that while Georgia had a compelling interest in “preserving the integrity, impartiality, and independence of the judiciary” and “ensuring the integrity of the electoral process and protecting voters from confusion and undue influence,” the canon that Weaver had violated was not narrowly tailored. Restrictions on the speech of judicial candidates, the court said, “must be limited to false statements that are made with actual knowledge of falsity or with reckless disregard as to whether the statement is false.” A restriction on negligently made false statements would not meet the narrowly tailored test and there would be a violation of the First Amendment.

Still another canon provision prohibited judicial candidates from personally soliciting campaign contributions and personally soliciting publicly stated support, although it did allow the

76. Id. at 1317.
77. Id.
78. Id.
79. Id. at 1319.
80. Id.
81. Id. at 1319–20.
candidate's election committee to engage in such activities. 82 The court held that the ban on personal solicitation by judicial candidates chilled a candidate's speech while "hardly advancing the state's interest in judicial impartiality at all." 83 Interestingly the court reasoned that judicial campaigns were akin to other political campaigns. "We agree," it explained, "that the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns." 84

Although a federal district court decision that blocked enforcement of New York's rules regulating the off-the-bench conduct of the state's judges was overturned on appeal, 85 confusion reigns over the constitutionality of New York's Code of Judicial Conduct. 86 Judge Thomas Spargo drew national attention when he joined a demonstration by Republicans in Florida during the contested 2000 presidential election. 87 He was also charged with giving a keynote speech at an upstate Conservative Party dinner and with courting voters with coupons for free doughnuts, coffee, and gasoline when he ran for town court justice in 1999. 88

The federal judge held that a conduct code that prohibited an elected judge or judicial candidate from participating in politics was "not narrowly tailored to serve a state's interest in an independent judiciary." 89 The federal judge added that provisions of the code such as the one requiring judges to "uphold the integrity and independence of the judiciary" were too vague to be meaningful. 90 The federal judge wrote, "How would anyone know that handing out donuts would constitute a failure to uphold the integrity and

82. Id. at 1322.
83. Id. at 1323.
84. Id. at 1321.
85. Spargo v. N.Y. State Comm'n, 351 F.3d 65 (2d Cir. 2003).
87. Spargo v. N.Y. State Comm'n, 244 F. Supp. 2d 72, 80 (N.D.N.Y. 2003).
88. Id. at 79.
89. Id. at 89.
90. Id. at 90.
independence of the judiciary while serving cake would not?" The appellate court reversed on procedural federal abstention grounds rather than ruling on the merits. One effect of this reversal is the continuation of confusion over the constitutionality of Code restrictions.

As a result of such decisions that question the existing Codes of Judicial Conduct and that weaken restrictions on judicial campaign speech, judicial campaigns that have become “nastier, noisier and costlier” are likely to at least become even more so. Put in the context of modern judicial campaigns in many states, successful challenges to the Codes fuel the existing judicial campaign fires.

V. WHAT IS HAPPENING OUT THERE?

A. The 2000 Elections

In the 2000 elections, judicial politics went wild. This was especially true in Mississippi, Alabama, Ohio and Michigan. Independent expenditures became major factors in all four of these states—and while many of the candidate-funded campaign efforts could not be counted as pure, the independent expenditures by political parties and interest groups were more like hard fought campaigns for legislative offices.

In Alabama, battles over tort law played a significant role in supreme court races, along with the issues of crime and religion. One television ad, for example, had a business group telling voters, “If you thought we finally got greedy trial lawyers out of Alabama politics, try again.” The business group claimed that trial lawyers were funding four campaigns for the state supreme court and that it was time to tell those candidates, “Democrats [Laird, England, Cook and Yates]: Get trial lawyer money out of our court.” An Alabama

91. Id. at 91.
92. Spargo v. N.Y. State Comm’n, 351 F.3d 65 (2d Cir. 2003).
93. Zeidman, supra note 86, at 795–96, especially n.25.
94. Schotland, supra note 18, at 150.
95. Though the campaigns were less intense, other states saw significant interest group involvement. E.g., Daniel C. Vock, Outside Voices Taking Role in Judicial Races, CHIC. DAILY L. BULL., Nov. 7, 2000, at 1.
96. Citizens for a Sound Economy, Greedy Trial Lawyers, quoted in Champagne, supra note 26, at 679 (Alabama, 2000 Election).
97. Id.
Democratic Party ad blamed Alabama’s Republican Supreme Court for forcing arbitration on victims of “Firestone tires and Ford Explorers.”98 “Firestone and Ford like it,” the ad claimed, “but you shouldn’t.”99 According to the Democratic Party-funded ad, the way to resolve the problems was, of course, to “vote against Alabama’s Republican supreme court.”100

In neighboring Mississippi, the U.S. Chamber of Commerce spent about $958,000 on television “issue” ads in behalf of the Chief Justice, two other incumbents, and one challenger.101 Two trial lawyer-funded political action committees spent about $312,000 opposing the ads.102 The chief justice and her challenger even asked the Chamber to stop running the ads, but the Chamber refused.103 That ad campaign by the Chamber may have defeated the fifteen-year incumbent Chief Justice, whose campaign was marred by allegations of intervention by outsiders.104

An example of how the Chamber’s activities provoked a reaction in the state—a reaction not very favorable to the image of the state’s judiciary—relates to a candidate-sponsored ad by Chuck Easley.

[Auctioneer]: I’ve got 300, now 320... [.]” [Announcer]: A Washington D.C. special interest group has already pumped a half million dollars into TV ads backing its candidates for the Mississippi Supreme Court. They know their candidates, like [Lenore Prather], are more likely to listen when the HMOs and big drug companies need a favor. The secretary of state has asked the attorney general to investigate these questionable expenditures. Do they think justice is up for sale here? [Auctioneer [One]: Sold. [Announcer]: Send these out-of-state meddlers a clear message that the Mississippi Supreme Court is not for sale.

99. Id.
100. Id.
102. Id.
103. Id.
104. Id. at 878.
[Announcer Two]: On November 7, vote for the candidate who's not for sale[, Chuck Easley]."\textsuperscript{105}

In Ohio, non-candidate expenditures amounted to more than $8 million.\textsuperscript{106} One of the toughest battles was over the reelection of Democratic Justice Alice Resnick. Resnick had trial lawyer and union support and was strongly opposed by the Chamber of Commerce. Among other attack ads, the Chamber ran an ad that backfired and contributed to her election victory.\textsuperscript{107} In the ad, Lady Justice peeked underneath a blindfold as special interest money tipped the scales of justice. An announcer then claimed that Resnick ruled 70\% of the time in favor of trial lawyers who had given her more than $750,000 since 1994.\textsuperscript{108} The announcer concluded, "[Alice Resnick]. Is justice for sale?"\textsuperscript{109}

In reaction to the anti-Resnick ads, the Ohio Democratic Party responded in kind.

[Announcer One]: Why are corporate polluters and a big insurance company spending hundreds of thousands distorting [Justice Alice Robie Resnick]'s record[?] [Announcer Two]: Maybe because she's taken on the special interests. [Announcer One]: Stood up for families by exposing Ohio's dilapidated schools. [Announcer Two]: Fought for quality education for all Ohio's children. [Announcer One]: But in the same landmark decision, [Debra Cook] said no to education reform and no to our kids. Announcer [Two]: Say no to special interests and no to [Debra Cook. Announcer [One]: Alice Robie Resnick and Tim Black for the Ohio Supreme Court.\textsuperscript{110}

Nor did the 2000 judicial races spell the end of these "nastier, noisier, and costlier" elections.\textsuperscript{111} The U.S. Chamber of Commerce and its affiliated state organizations, the most active of the interest

\textsuperscript{105} Easley Not for Sale, quoted in Champagne, supra note 26, at 682 (Mississippi, 2000 Election).
\textsuperscript{106} Schotland, supra note 35, at 875.
\textsuperscript{107} Id. at 872.
\textsuperscript{108} Citizens for a Strong Ohio, Resnick Is Justice for Sale, quoted in Champagne, supra note 26, at 678 (Ohio, 2000 Election).
\textsuperscript{109} Id.
\textsuperscript{110} Ohio Democratic Party, Resnick Corporate Polluter, quoted in Champagne, supra note 26, at 682–83 (Ohio, 2000 Election).
\textsuperscript{111} See Schotland, supra note 18, at 150.
groups involved in the 2000 state supreme court races, expressed pleasure with its successes; twelve of the fifteen candidates it supported won election.

B. The 2002 Elections

In 2002, there was some drop-off in the amounts of money spent in judicial campaigns, but the spending remained substantial. One source estimated that candidates raised $16.9 million nationwide by November 7, 2002, and another estimated television expenditures in nine states at $8.4 million. Those numbers may be low, since the latter source also estimated that four candidates and four interest groups spent $5.6 million just on airtime in the Ohio Supreme Court elections alone. In Mississippi, judicial television ads cost nearly four times more in 2002 than they did in 2000. There were more independent interest groups involved in the 2002 races than in the 2000 races. Moreover, more states saw reliance on television ads in 2002 judicial races than in 2000. One article estimated that the Chamber of Commerce spent $100 million between 2000 and 2003 on judicial campaigns, although this amount seems quite high, as does its mid-2003 prediction that the Chamber would spend $50 million by the the end of 2003. The Chamber had, however, by

113. Id. at 756–57, n.10 (citing an April 2001 U.S. Chamber announcement); Katherine Rizzo, Chamber Ads Failed in Ohio, Worked Elsewhere, ASSOCIATED PRESS NEWSWIRE, Nov. 8, 2000.
114. Id.
116. Goldberg & Sanchez, supra note 45, at 8.
118. Id.
120. Id.
this time been involved in twenty-four judicial elections in eight states, and the candidates it supported have won twenty-one of those races.\textsuperscript{122}

In 2002, an Alabama candidate for the state supreme court ran an ad explaining that his opponent had taken money from trial lawyers and had supported Al Gore over George W. Bush in 2000.\textsuperscript{123} In still another ad, the candidate let voters know that he “stood up to attacks by liberal trial lawyers.”\textsuperscript{124} In an Idaho ad, a candidate derided his opponent as “very liberal,” stated that the opponent received support from leading trial lawyers in the state, and pointed out such transgressions by the opponent as voting to hand Idaho water over to federal bureaucrats and supporting court-imposed tax increases.\textsuperscript{125}

One of the more ironic ads in 2002 was a Chamber of Commerce sponsored ad in the Michigan Supreme Court race that deplored the negative effects of special interest group influence on the Supreme Court. The ad told voters that Justices Weaver and Young had changed things for the better.\textsuperscript{126} One of the more peculiar ads presented a long list of special interest contributors to an opponent and then superimposed the opponent’s image on the body of a cow that was stamped “approved” by corporations.\textsuperscript{127}

A third party ad in Ohio promised that two candidates for the supreme court would “put the court back on the side of workers and families” and that the candidates would “hold large corporations accountable for wrongdoing.”\textsuperscript{128} Another third party ad in the Ohio

\textsuperscript{122} Id.


\textsuperscript{124} Keeping His Promise (candidate ad, Alabama, 2002 election), www.brennancenter.org/programs/downloads/buyingtime_2002/AL_See_Keping_His_Promise.pdf.


\textsuperscript{126} Michigan Chamber of Commerce, Weaver & Young Common Sense (Michigan, 2002 election), at www.brennancenter.org/programs/downloads/buyingtime_2002/MI_MICC_Weaver_&_Young_Common_Sense.pdf.

\textsuperscript{127} Dickinson Special Interests (candidate ad, Mississippi, 2002 election), at www.brennancenter.org/programs/downloads/buyingtime_2002/MS_McRae_Dickinson_Special_Interests.pdf.

\textsuperscript{128} Citizens for an Independent Court, Black on Our Side
races discussed a class action suit involving DES, a drug that was supposed to prevent miscarriages. The daughters of women who took this drug developed cancer, however. As the ad presented various maternal images, the announcer noted, "Eve Stratton said she had sympathy for the victims, but she gave sanctuary to the big drug companies." In a morbid play on words, the announcer concluded, "Eve Stratton’s ruling is a miscarriage of justice."

Another third party ad showed an empty doctor’s office and a forlorn couple with no doctor. Describing the candidate’s views on tort reform, the narrator noted, "Justice Evelyn Stratton’s record shows that she understands the need to stop lawsuit abuse." Another ad presented two lawyers discussing hypothetical suits regarding a hubcap thief whose hand was rolled over by a car and a dog dying when it was put in the microwave. An image of the candidate came on screen, then the ad stated that frivolous lawsuits cost “your family” $2,500 a year, and that the candidate “protects your family by fighting lawsuit abuse.”

C. The 2004 Elections

The 2004 supreme court elections parallel those of 2000 and 2002. By early October, 2004 judicial campaign spending in state supreme court elections had almost reached the $5 million mark and there were television ads running in ten states in those races.

There were intense state supreme court battles involving tort reform in Illinois, Alabama, Ohio, and West Virginia.

130. Id.
134. Id.
In an Illinois ad sponsored by the Citizens for Karmeier, Judge Lloyd Karmeier stated that "The medical malpractice crisis is a problem for everyone in southern Illinois. Doctors are going to continue to leave unless there are some changes made." Karmeier then added, "If it's a frivolous lawsuit, courts should help weed those out. Courts should be part of the solution." An announcer then noted that Karmeier was a former prosecutor "who presided over St. Claire's first successful death penalty case in the modern era." The ad, of course, leaves little doubt about Karmeier's views on medical malpractice and crime control.

The Illinois State Chamber of Commerce ran an ad that pictured sharks feeding. An announcer stated, "Like sharks in a feeding frenzy, predatory trial lawyers have made Illinois one of the worst states in the country for lawsuit abuse. Personal injury lawyers are driving doctors out of state. Businesses are afraid to bring jobs to Illinois because our courts are out of control, and lawsuits cost an average family over $3,000 a year. Our courts are in crisis and it's time for a change, because sharks in fancy suits are getting rich at our expense."

In West Virginia an ad portrayed a card game, and an announcer stated, "Some very powerful people are trying to cut the deck against working families. Big insurance companies, out of state corporations, and the Chamber of Commerce are spending over a million dollars to buy a seat on the West Virginia Supreme Court. They're betting Jim Rowe will rule in their favor as a member of the state's highest court. Don't let the chamber and their big buck friends stack the deck against your family."

Interestingly, tort reform interests do not always stress tort reform in their advertising for judicial candidates. One study of

136. Id.
137. Id.
television ads in judicial campaigns in the 2000 elections found that all five of the Chamber of Commerce sponsored television ads that were examined in the Mississippi supreme court elections stressed crime control and two of those five ads also stressed family values, but none stressed civil justice issues.140

Of the fifty five ads examined in this study, twenty one stressed civil justice issues, but one third of those ads also stressed family values in an effort to show average voters how civil justice issues have relevance to them.141 As an example, in one Michigan ad a candidate explained, "I want to change the supreme court and give our families a fair shake, because where does it say that only the rich and powerful deserve justice?"142 Even the notorious Michigan Democratic Party ad that had three justices dancing in a businessman's pocket also explained that families never got a fair shake.143

D. Observations

The meshing of the civil justice issue with the family values theme is important, of course. Ads must reach voters and it seems likely that family values probably resonate with more voters than most tort reform issues. The ads often signal the commitment of candidates to positions they will take as justices, however.144 Of course it is probably desirable for anyone running for judge to have a point of view on important issues such as civil justice issues. It is more debatable whether these viewpoints should be advertised with millions of dollars provided by the interests that share those viewpoints—especially when candidates need those millions to gain office. Indeed, there is an unhealthy dependency between contemporary judicial candidates and those who fund them.

140. Champagne, supra note 26, at 688.
141. Id. at 688–89.
144. Champagne, supra note 26, at 676.
VI. THE EFFECT OF MONEY ON THE INDEPENDENCE OF JUDGES AND
THE PERCEPTION OF JUDICIAL IMPARTIALITY

There is increasing evidence that money affects the outcomes of judicial elections. Goldberg and Sanchez’s report on the 2002 judicial elections concluded:

Since 1993, winners have outraised losers by a margin of $91 million to $53 million. Indeed, among candidates who raised funds, the average and median raised has climbed steadily during the last three election cycles. With few exceptions, money means victory. In 2001-02, the top fundraiser prevailed in 20 out of 25 contested Supreme Court races. In 1999-2000, 30 out of 42 top fundraisers won; in 1997-98 the top fundraiser won 23 of 31 races.145

Much of that money is going into television advertising. One study of judicial television advertising in 2002 in Alabama, Idaho, Illinois, Michigan, Mississippi, Nevada, Ohio, Texas, and Washington estimated that over $8.4 million was spent on judicial campaign ads.146 The study also found that in the 2002 judicial elections, the candidate with the most television ads was most likely to win the election.147

Television ads ran in eleven state supreme court races in 2002.148 In nine of these races, “the candidate with the most combined spending on TV ads—the candidate’s and supportive ads from interest groups—won the election.”149 In one of the other two races, the winning candidate spent less on airtime than his opponents, but purchased more time spots. In the other of the two races, only a little less than $27,000 was spent on ads.150

These findings regarding the importance of television ads in judicial campaigns are consistent with those of former Chief Justice Tom Phillips of the Texas Supreme Court.151 Phillips found that

145. GOLDBERG & SANCHEZ, supra note 45, at 15.
146. Id. at 8.
147. Id. at 9.
148. Id.
149. Id.
150. Id.
151. Then-Chief Justice Thomas R. Philips’ findings were based upon data compiled by himself and by Karl Rove, who served as a campaign consultant to a number of winning judicial candidates. The data were presented at the Summit on Improving Judicial Selection on December 8–9, 2000. For detailed
candidates with little, if any, organized support and minimal funding challenged Republican supreme court candidates in primaries on four occasions. Based on data from Texas Supreme Court races between 1992 and 2000, Phillips determined that in areas where the established candidates did not run television ads, these insurgent candidates all showed great strength. In areas where the established candidates did run television ads, they did well. The established candidates won majorities in thirty-five of the thirty-eight media markets where they purchased television advertising. In the thirty-seven media markets where established candidates did not purchase television time, they won in only eleven of the markets.

Money buys advertising, which provides name recognition, which secures votes. Yet what is the effect of big money and intense judicial campaigns on the impartiality of the judiciary? The data yield only anecdotal, and not definitive, answers to this question, but there are disturbing signs. For example, in Mississippi recusal motions against state supreme court justices are on the rise. The Executive Director of the Mississippi Commission on Judicial Performance has noted that litigants' claims that judicial impartiality is compromised by campaign contributions are "a natural by-product of campaigns; they have become so costly and more organized." In Louisiana a federal court addressed a challenge to rules promulgated by the Louisiana Supreme Court that reduced the ability of law student legal clinics to practice in state courts. In that case, business groups opposed the activities of the Tulane Environmental Law Clinic, had written the state supreme court to express their opposition, and had contributed substantial sums to supreme court

152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
158. Id.
candidates.¹⁶⁰ The federal court complaint was dismissed, but the federal judge noted the "close temporal relationship between the business community's expressions of outrage and the subsequent changes" in court rules.¹⁶¹ The judge added, "[I]n Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary."¹⁶²

Moreover, there have been studies that have identified positive correlations between campaign contributions and judicial decisions favorable to contributor interests. One report on Texas, for example, noted:

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.¹⁶³

One Ohio Supreme Court case illustrates a troublesome episode involving campaign contributions to judges. This was a suit for damages against Conrail, for an accident that killed 16-year-old Michelle Wightman, who was hit by a train when she drove onto a grade crossing despite closed gates and flashing lights.¹⁶⁴ The extensive proceedings involved three trials: a jury trial for compensatory damages, a bench trial for punitive damages, and then after an appeal, a jury trial for punitive damages.¹⁶⁵ There then followed another appeal, followed by a final appeal in the Ohio Supreme Court. To synopsize, the Ohio Supreme Court agreed to

¹⁶² Id.
¹⁶⁵ Wightman, 715 N.E.2d at 549.
hear an appeal by both sides after the second jury awarded punitive damages of $25 million, reduced by the trial judge to $15 million.\textsuperscript{166}

The plaintiff was represented by Murray & Murray, a firm that includes nine members of the Murray family.\textsuperscript{167} Before the Ohio Supreme Court agreed on February 18, 1998 to hear the appeal, Murray & Murray, nine Murrays in the firm, and seven Murray spouses made campaign contributions to two Justices.\textsuperscript{168} Each contribution complied with the relevant legal limit on contributions.\textsuperscript{169} Those Justices ran for reelection in November, and according to their post-election campaign finance reports, the Murray contributions turned out to total 4.4\% of one Justice's total, and 4.7\% of the other's.\textsuperscript{170} These contributions were, for each Justice, among the largest they received.\textsuperscript{171}

Both Justices participated in the oral argument on November 10, 1998.\textsuperscript{172} They filed campaign finance reports in December, and in January 1999 Conrail filed a motion seeking the recusal of each Justice.\textsuperscript{173} In October 1999, without the Court or either of those Justices addressing that motion, the Court decided in favor of the plaintiffs.\textsuperscript{174} Conrail subsequently relied upon these facts in seeking \textit{certiorari} in the U.S. Supreme Court, but they were turned down.\textsuperscript{175} Big money in judicial races raises questions about judicial impartiality.

Public opinion poll data also suggests the conduct of modern judicial elections affects how courts are perceived. According to a 1999 National Center for State Courts poll, seventy eight percent of Americans believe that "elected judges are influenced by having to raise campaign funds."\textsuperscript{176} In a Texas survey, nearly eighty percent of

\begin{itemize}
\item \textsuperscript{166} \textit{Id.} at 557.
\item \textsuperscript{167} Schotland, \textit{supra} note 151, at 1503.
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Id.}
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} \textit{Id.} at 1504; Consolidated Rail Corp. v. Wightman, 529 U.S. 1012 (2000).
\item \textsuperscript{176} See Charles Lewis, The Center for Public Integrity, \textit{Judiciary Should Let Sunshine In To Reduce Public Skepticism}, www.publicintegrity.org/report.aspx?aid=301(for poll results).
\end{itemize}
lawyers believed that campaign contributions had at least some influence on judges, and forty eight percent of judges thought campaign contributions exerted at least some influence on decisions!

It is important to keep in mind how hard-hitting, bitter, partisan attacks and efforts to control the bench impact modern judicial elections. For one thing, no longer can a candidate campaign in the more competitive states by speaking at civic clubs, shaking hands, and garnering a few newspaper and bar endorsements. Increasingly, today's judicial candidates reach voters through the mass media. An immediate effect of the new role of the mass media upon judicial elections is a substantial increase in costs, a result of the need to advertise in newspapers, on the radio, and, most expensive and most important, on television.

For expensive media such as television, the message must be brief. This requires a focus 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. The late California Supreme Court Justice Otto Kaus called these issues the "crocodiles in the bathtub." 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. Such issues relate to crime, capital punishment, abortion, child abuse, and voter initiatives such as term limits.

All it takes in this era of mass media politics is for a judge to do something—almost anything—such as to set apparently low bail for a murderer, or to reverse a death sentence on appeal. A thirty second media message can then turn that decision into a charge of coddling criminals that could ruin the judge's career. Judges who wish to continue being judges to some extent have to be fearful of those

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178. Id.
180. See Uelmen, supra note 32, at 1133.
181. Id. at 1133–37.
“crocodiles in the bathtub.” They constitute a factor that, of course, damages judicial impartiality.\textsuperscript{182}

In judicial races, political parties often will cooperate with an interest group in presenting a message about a particular judicial candidate. Some interest groups may even 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.\textsuperscript{183} Business groups are often aligned with the Republican Party.\textsuperscript{184}

The result of the long-term intimate ties between the parties and certain interest groups is that their goals and objectives mesh.\textsuperscript{185} Thus, interest group politics in the states affect party politics, which in turn influence who becomes a judge. Those interest groups with influence in the party will want their party’s candidate to be sympathetic to their objectives, and, to secure their support, judicial candidates will have to show that they are friendly to the goals of the group.

The alignment of opposing parties with opposing interest groups is a recipe for the “nastier, noisier, and costlier”\textsuperscript{186} judicial campaigns seen in many states in recent years. Moderation in judicial candidates becomes unacceptable since the opposing parties and interest groups want to support and fund candidates who reflect their views. Thus, in the states where supreme courts have become battlegrounds, one commonly sees business and the insurance defense bar behind a candidate reflecting their views on tort law. That candidate will, of course, commonly be opposed by a labor union and trial lawyer backed candidate who signals alignment with their strong pro-plaintiff philosophy.

\textsuperscript{182} Justice Otto Kaus made the point well when he spoke of his vote in a controversial 1982 decision shortly before his retention election. He said, “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.” John H. Culver & John T. Wold, Judicial Reform In California, in JUDICIAL REFORM IN THE STATES 139, 156 (1993).

\textsuperscript{183} Champagne, supra note 23, at 1423.

\textsuperscript{184} Id.

\textsuperscript{185} Id.

\textsuperscript{186} Schotland, supra note 18, at 150.
According to an old political adage, "You dance with the one who brung you." That adage must govern the behavior of judges elected in the new era of judicial politics. If the judges do not reflect the values of the interests that donated huge sums to elect them, where will those judges find money and political support in succeeding elections? There may be many problems with modern judicial elections, but one of the most disturbing must be the loss of moderation and impartiality in judicial candidates.

VII. WHAT CAN BE DONE? SYSTEMIC CHANGE VERSUS INCREMENTAL CHANGE

In spite of the problems with partisan, and sometimes nonpartisan, judicial elections, they have remained major systems of judicial selection. Forty percent [40%] of state appellate judges face partisan elections for their initial terms, and thirteen percent [13%] face nonpartisan elections.187 Forty-three percent [43%] of state trial judges face partisan elections for their initial terms, and thirty-three percent [33%] face nonpartisan elections.188

One reason for this is that major political changes are almost always difficult. Groups that benefit from partisan elections will continue to support them.189 The political parties, for example, at least as long as they are successful in a state, will tend to continue to support partisan election of judges. So will key interest groups that are successful in electing their candidates in a state, and incumbent judges who gained their offices through partisan politics.

Another reason for the persistence of partisan election of judges is that in the absence of other information about the attitudes and values of judicial candidates, voters can use the candidate’s party affiliation as a crude cue to a judge’s ideology—the judge’s liberalism or conservatism. Voters may reasonably infer that Democratic judicial candidates tend to be more “liberal” than do Republican judicial candidates. Of course, while that is not the case in every judicial election, it is enough of a pattern that voters, absent

188. Id.
other information, can and do rely on party labels.  

One of the criticisms of nonpartisan elections, in fact, is that voters have no cue at all to ideology and so will vote without knowledge of a candidate. They may rely even more than voters in partisan elections on aspects such as the attractiveness of a candidate's name. Freer judicial campaign speech might reduce voter reliance on such cues to candidates' views as party affiliation, but it may also add to the danger that judicial candidates will behave more like legislators, stating their policy preferences and soliciting public support.

Until recently, judicial reformers tended to promote merit selection as the best system for selecting judges. In the process reformers downplayed the flaws of that system. Reformers often saw partisan election as the least desirable system, ignoring research that showed notable similarities between merit-selected judges and partisan elected judges. The usefulness of the party cue to voters, moreover, was often overlooked in states where nonpartisan election was viable and merit selection was not possible.

Recently, however, some advocates of judicial reform have recognized that judicial elections—even partisan judicial elections—are here to stay. That recognition has led some judicial reformers to adopt a new reform strategy. They have argued that rather than moving toward merit selection, it would be more appropriate to strive toward incremental judicial reforms that are more achievable. Many of the recommendations of the National Summit on Improving Judicial Selection, for example, would improve judicial selection incrementally rather than fashioning major changes. Simply lengthening the terms of judges, for example, would reduce the

190. The classic work showing the importance of party as a voting cue in judicial elections is PHILLIP DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980).
192. One very thoughtful and contemporary study based on empirical research in New York City concludes with such a call for systemic change. See Zeidman, supra note 86, at 836.
194. Id.
number of judicial elections, thus reducing the role that money, parties and interest groups play in judicial campaigns. Judges appointed to fill vacancies on the bench commonly can only serve briefly before they then must run for office. Often they may only run for the time left in the unexpired term to which they have been appointed. Simply lengthening the time that judges appointed to mid-term vacancies serve before an election, and allowing them to serve a full term before a second election, could reduce the number of elections and therefore the number of battles for control of a court.

Similarly, the role of money in judicial races could be better managed. There might be public funding of judicial campaigns; rapid filing and disclosure of campaign contributions, perhaps through the Internet; and reasonable limitations on campaign contributions to judicial candidates. The state could provide voter information pamphlets to make voters more aware of judicial candidates. The cost of these pamphlets could be greatly reduced by free mailing privileges. Moreover, civic organizations and the bar could monitor judicial campaign conduct and try to discourage inappropriate campaign tactics and advertisements. If the incremental approach to judicial selection reform is winning ground, perhaps this is due to the recognition that many states are unwilling to change their systems of judicial elections. Incremental reform may at least reduce some of the more glaring problems with these increasingly nasty, noisy, and costly modern judicial elections.