

Dr. Matthias S. Fifka\*

## Party and Interest Group Involvement in U.S. Judicial Elections

### Abstract

In 2004, a race for a seat on the Illinois Supreme Court cost \$9.3 million, which exceeded the expenditures made in 18 U.S. Senate races in the same year. Overall, candidates for state Supreme Courts spent \$47 million on their campaigns in 2004, and parties and interest groups invested another \$12 million to influence the electoral outcome. In the following paper it is argued that judicial elections in the United States have become increasingly similar to political elections and that money is a crucial determinant for winning a judicial election. It is also argued that the increasing dependence of judges on campaign contributions severely endangers judicial impartiality. When making decisions on the bench judges now more than ever not only have to take into consideration the facts presented, but also the will of their supporters.

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\* *Dr. Matthias S. Fifka* is assistant professor for American and International Politics at the Friedrich-Alexander-Universität Erlangen-Nürnberg. He has published numerous articles and books on interest groups and the political process in the United States.

## I. Introduction

The mere idea of “judicial elections” may sound somewhat odd to the European ear because it is uncommon in the Old World that judges are elected directly by the citizens. Even in Great Britain, whose common-law system was one of the foundations the American legal system was built upon, judges are appointed by authorities, in most cases the Queen herself.<sup>1</sup> In the United States, the President also has the authority to appoint judges with the consent of the Senate. However, this nomination and confirmation process only applies to judges for federal courts. Aside from the federal court system, each individual state has its own court system and the right to select the judges for its courts in whatever manner it deems proper.

Most of the states have a three-level court system. On the lowest level, so-called “circuit” or “district courts” can be found, followed by “Courts of Appeals” and the state Supreme Court as highest court.<sup>2</sup> As judicial selection method, 38 out of 50 states apply some form of election. Eight states<sup>3</sup> hold partisan elections, in which candidates are nominated by the parties and run under their banner. In fifteen states,<sup>4</sup> judges are elected in nonpartisan contests, where parties are – at least officially – not involved in the nomination process. Finally, nineteen states<sup>5</sup> hold so-called “retention elections” in which it is decided whether a judge retains his office or not. That means that the office-holder – referred to as “incumbent” – solely faces an up-or-down vote with no opponent. Retention elections are held for candidates who want to serve subsequent terms, usually periods of four to five years, after they have first come into office through partisan elections or appointment. Overall, eighty-six per cent of America’s judges must stand for election.<sup>6</sup>

The election of judges can be regarded ambiguously because an election usually is preceded by an election campaign that costs money. Potential candidates might not have the necessary financial means to finance a campaign and, thus, turn to supporters who can provide the needed monetary assistance. Supporters can now appear in

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- 1 For a full description of the judicial appointment process in Great Britain see Department for Constitutional Affairs. Appointments, <http://www.dca.gov.uk/appointments.htm> [December 2, 2005].
  - 2 Some states (e.g. New Hampshire or Montana) only have a two-level-system, while other states even have four (e.g. Pennsylvania or Mississippi) or five different court levels (e.g. Tennessee or Kentucky). Detailed information on the court-system of the individual states is provided by the American Judicature Society, Judicial Selection Methods, [http://www.ajs.org/selection/sel\\_state-select-map.asp](http://www.ajs.org/selection/sel_state-select-map.asp) [December 2, 2005].
  - 3 Alabama, Illinois, Louisiana, New Mexico, New York, Pennsylvania, Texas, West Virginia.
  - 4 Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Washington, Wisconsin.
  - 5 Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Wyoming.
  - 6 *Deborah Goldberg/Samantha Sanchez*, The New Politics of Judicial Elections 2002, 3, <http://www.justicestake.org/files/NewPoliticsReport2002.pdf> [December 8, 2005].

the forms of wealthy individuals, interest groups, or – especially in states which hold partisan elections – political parties. If a group or party was successful in helping a candidate into office, the respective candidate might certainly feel obliged to his supporters and make decisions in their favor. Looking at it from the group's or party's viewpoint, the judge will even be expected to make decisions beneficial for his prior supporters because they expect a "return on investment". Therefore, state judicial elections seem to endanger the "independence of the judges" which *Alexander Hamilton* had already advocated in the *Federalist Papers* in 1788 in order "to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves ..."<sup>7</sup>.

The purpose of this paper is to examine how and to what extent parties and interest groups are involved in state judicial elections in the United States. Following a brief overview of the historical development of party and interest group engagement in judicial elections, their motivation for influencing judicial elections will be discussed. Afterwards, recent contribution trends, which could be observed in the 2002 and 2004 state Supreme Court elections, will be analyzed in depth. In a first step, the amount and structure of contributions to judicial candidates are examined. In a second step, it is analyzed how these campaign donations are used. Here, special attention is placed on expenditures for television advertisements, which have increased substantially over the last years in judicial campaigns. In a third step, it is examined to what degree campaign contributions in general and television advertisements in specific are crucial for the outcome of the election and if candidates who spent large amounts on their campaigns emerge victorious more frequently than candidates who only had smaller funds available. Based upon this analysis, an answer to the question, whether the "independence of the judges" is imperiled in the individual states, will be offered. Finally, an outlook on the future development of judicial elections and potential reforms to safeguard judicial independence are discussed.

## II. The Historical Development of Party and Interest Group Involvement in State Judicial Elections

State judicial elections have not attracted the attention of either the public or of interest groups and parties for a long time, while, throughout the 20<sup>th</sup> century, nominations of judges for federal courts, in particular for the U.S. Supreme Court, usually have received substantial press coverage and likewise generated attempts to influence the presidential nomination and senatorial confirmation process. Already in 1930, labor unions and the liberal press successfully put fierce pressure upon the Senate to reject *Herbert Hoover's* conservative nominee to the Supreme Court, *John J. Parker*.

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7 *Alexander Hamilton/John Jay/James Madison*, The *Federalist Papers*, 1961, 469.

In 1968, two liberal appointees by *Lyndon B. Johnson* – *Abe Fortas*<sup>8</sup> and *Homer Thornberry* – faced a similar destiny, when the Senate denied their nomination after having been lobbied by conservative interest groups.<sup>9</sup> Probably the most controversial nomination to the US Supreme Court was the one of *Robert Bork*, nominated by *Ronald Reagan* in 1987. According to *DeGregorio* and *Rosotti*, at least 147 interest groups were actively lobbying in the nomination process,<sup>10</sup> 86 of them testified before Congress, and so did 46 law professors.<sup>11</sup> *Bork's* nomination was finally rejected with a 42 to 58 vote in the Senate.

In contrast to the federal appointment process, state judicial elections were “political backwaters,”<sup>12</sup> which did not generate larger public attention until the 1980s. The candidates spoke to a few groups willing to hear them and the speeches given dealt with possible improvements of the judiciary and had no political or ideological content. Consequently, open-seat races, which are characterized by the absence of an incumbent seeking reelection, were usually won by the candidate who had the most attractive name, a good ballot placement or had managed to win the endorsement of a newspaper or a lawyer's association. For an incumbent seeking reelection or facing a retention election, victory was almost guaranteed, if he had avoided scandals or attacks for highly controversial decisions.<sup>13</sup>

The character of state judicial elections as “political backwaters” changed with the beginning of the 1980s and more and more elections became battlegrounds with high financial involvement. This development did not occur simultaneously throughout the US, but first took hold in states where the candidates are nominated by parties, especially in Texas, Alabama, Illinois and Pennsylvania. In 1980, Texas was the first state where campaign spending on judicial races for the state Supreme Court fell in the million-dollar range. However, at this point of time the races were mostly funded by wealthy candidates themselves. Nevertheless, only four years later, the first campaign which was not self-funded and cost more than one million dollars took place, when a candidate for the position of chief justice raised about \$ 1.4 million.<sup>14</sup> Before long, the dramatic increase of campaign spending and growing financial involvement by parties and interest groups could be observed in other states as well. In Pennsylva-

8 *Abe Fortas* already was associate justice at the U.S. Supreme Court. *Lyndon B. Johnson* had nominated him for Chief Justice, which was rejected.

9 *Kay L. Schlozman/John T. Tierney*, *Organized Interests and American Democracy*, 1986, 362.

10 *Jack E. Rosotti/Christine DeGregorio*, *Resources, Attitudes and Strategies: Interest Groups in the Bork Confirmation Process*, *American Review of Politics* 15 (Spring 1994), 1–19.

11 *Karen O'Connor*, *Lobbying the Justices or Lobbying for Justice? The Role of Organized Interests in the Judicial Process*, in: *Paul S. Herrnson/Ronald G. Shaiko/Clyde Wilcox* (eds), *The Interest Group Connection*, Ronald G. Shaiko and Clyde Wilcox, 2005, 319.

12 *Robert S. Greenberger*, *Supreme Court to Decide on Judicial Candidates' Speech*, *Wall Street Journal*, March 12, 2002, A28.

13 *Anthony Champagne*, *Interest Groups and Judicial Elections*, *Loyola of Los Angeles Law Review* 34 (2001), 1393.

14 *Anthony Champagne*, *Judicial Reform in Texas*, *Judicature* 72 (1998), 146–150.

nia, the cost of the average Supreme Court race increased 159 percent between 1987 and 1997; in Illinois, it even rose by 776 percent in the period from 1986 to 1996.<sup>15</sup>

Rising campaign costs soon were not only limited to states which hold partisan judicial elections. In states with non-partisan elections, interest groups instead of parties took the role as major campaign financiers. In Wisconsin, for example, contributions to judicial candidates rose by 784 percent from 1979 to 1997.<sup>16</sup> Due to the input of money by interest groups and parties, the race for chief justice of the Ohio high court cost \$2.8 million in 1986, whereas six years earlier it had only cost \$100,000.<sup>17</sup> Even retention elections, which had not been attracting engagement by groups or parties in the past, as it was almost impossible to defeat the incumbent judge, saw growing financial involvement by outsiders.

The question that arises is why this significant increase of party and interest group involvement and the respective rise of campaign spending have occurred during the last twenty years. It is no recent development that interest groups enter the judicial arena to pursue their interests. Already in the 1950s and 60s, interest groups, who had a weaker standing with the executive and legislative branch or could not afford wide-range lobbying efforts, resorted to courts to pursue their aims. The "trendsetters" for this development were the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP), which had only very limited access to Congress and the administration, and therefore began to advocate the cause of less privileged groups<sup>18</sup> by going to court. This strategy was taken up by environmental and consumer groups in the 70s, and later followed by conservative groups and associations with primarily economic interests. *Epstein* observed in 1985 that "[l]ike their liberal counterparts, conservatives have entered the judicial arena with increasing regularity to achieve their goals [...]. The courts are increasingly being asked to mediate competing group claims, rather than claims simply between two parties ..."<sup>19</sup>.

As courts became increasingly important for the transmission of interests, many groups began to realize that it might not only be beneficial for them to go to court in the first place, but also to influence the composition of the courts. State courts obviously provided an ideal platform for enacting influence, since most states hold judicial elections in which interest groups could directly get engaged, while influence upon the federal nomination process could only be enacted in a more indirect form.

Moreover, state courts are in many respects of high importance for a variety of groups, since they are "the final decision makers on most issues of commercial, prop-

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15 *Sheila Kaplan*, The Very Best Judges that Money Can Buy, U.S. News and World Report, November 29, 1999, 35.

16 *Ibid.*

17 *Mark Hansen*, A Run for the Bench, American Bar Association Journal, Oct. 1998, 69 quoted in *Champagne* (fn. 13), 1398.

18 While the NAACP focuses on improving the situation for African Americans, the ACLU also takes position on behalf of other ethnic groups, native Americans, homosexuals, women, disabled and poor people.

19 *Lee Epstein*, *Conservatives in Court*, 1985, xii.

erty, family, inheritance, tort and criminal law [...],<sup>20</sup>. State courts decide an overwhelming portion of cases initiated in the United States. In 2004, for instance, 387,200 cases were filed in federal courts,<sup>21</sup> compared to approximately 110 million<sup>22</sup> in state courts nationwide. Commercial and tort law cases and appeals to them make up a substantial number of the cases tried in state courts and are of substantial interest to many groups and organizations. The list of automobile manufacturers, airlines, tobacco corporations and other companies which have been fined several million dollars in punitive damage cases and class action suits is endless. Just recently, in December 2005, Wal-Mart was ordered to pay \$ 57 million in general and \$ 115 million in punitive damages to 116,000 current and former employees who sued the retail giant in a class action suit for not having been allowed appropriate lunch breaks.<sup>23</sup> Between 1988 and 1998, such class action filings increased by 338 percent in federal courts, while the increase in state courts was more than 1,000 percent.<sup>24</sup> According to industry experts interviewed by the *Los Angeles Times*, tobacco corporations alone spent \$ 600 million in legal fees yearly to defend themselves in lawsuits.<sup>25</sup> Corporations and business associations thus have come to realize that the best way to prevent such blows is to help business-friendly judges into office. In 2000, the Chamber of Commerce as the largest business association in the U.S. has spent more than \$ 10 million on campaigns of judicial candidates.<sup>26</sup> In these "judicial election battles" business is usually joined by hospitals and doctors because they frequently have to pay high damages awarded to the plaintiffs in medical-malpractice suits. On the other side of the trenches, a coalition between labor unions, consumer protection groups and trial lawyers, who represent the plaintiffs and can make large amounts of money in the lawsuits because they usually receive a share of the damages awarded,<sup>27</sup> can be found.

20 James W. Meeker, *State Supreme Court Litigants and Their Disputes*, 1986, 3.

21 U.S. Courts, *Judicial Caseload Indicators*, <http://www.uscourts.gov/caseload2005/front/mar05toc.pdf> [12 December 2005]. The number mentioned here does not include cases filed at U.S. Bankruptcy Courts.

22 This number is an estimate calculated according to numbers provided by the Bureau of Justice Statistics, <http://www.ojp.usdoj.gov/bjs/>, and U.S. Courts, <http://www.uscourts.gov>. In 1996, Neubauer estimated that 94 million cases were filed in state courts in the US. David Neubauer, *Judicial Process – Law, Courts, and Politics in the United States*, 1996, 183.

23 Lisa Alcala Klug, *Jury Rules Wal-Mart Must Pay \$ 172 Million Over Meal Breaks*, *The New York Times*, December 23, 2005, A22.

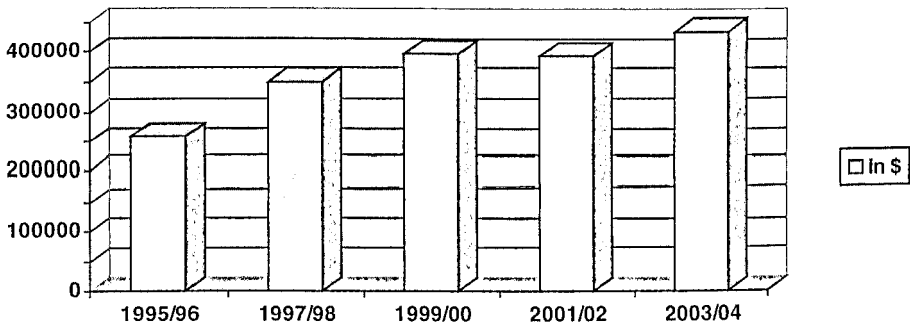
24 The Federalist Society, *Analysis: Class Action Litigation*, A Federalist Society Survey, *Class Action Watch* 1(1999), 3.

25 Henry Weinstein, *Attack Waged on Fees Anti-Tobacco Attorneys Received*, *Los Angeles Times*, March 15, 2001, C24.

26 William Glaberson, *U.S. Chamber Will Promote Business Views in Court Races*, *The New York Times*, October 22, 2000, A24.

27 In 2001, a group of trial lawyers who represented 22 states and Puerto Rico in lawsuits against the tobacco industry were awarded about \$ 12 billion in fees. Weinstein (fn. 25).

Figure 1: *Average Candidate Fundraising in State Supreme Court Elections, 1995–2004*



Source: Own illustration; numbers taken from Goldberg et al. (fn. 32), 16.

Parties also hold a high stake in judicial elections, not just because they are often strongly linked to certain interest groups – the Republicans are closely connected with several business associations, while Democrats have strong ties to unions and trial lawyers –, but because they have become aware of the courts’ “ever-increasing role as policymakers in the political process.”<sup>28</sup> Due to the significance of state courts in state politics, parties have expanded their activities in width and are no longer only active in those states where they are responsible for the nomination of candidates, but also in states where non-partisan elections are held. In fact, party involvement in theoretically non-partisan elections has become so intense, that “the practical differences between a technically nonpartisan election and partisan election may be more imagined or perceived than real.”<sup>29</sup> Additionally, parties have also increased their activities in depth and have begun to support candidates financially on a larger scale than they did in the past. The “cost explosion” of judicial campaigns was also fostered by the adoption of more elaborate and more expensive campaign techniques from congressional or presidential elections, such as the use of electronic media, which will be examined in detail in the following section.

### III. The Financial Dimension of the 2002 and 2004 State Supreme Court Elections

In recent years, the development of ever-increasing costs for judicial campaigns has come to no halt. In the 2004 election cycle,<sup>30</sup> all candidates for state Supreme

28 *Ibid.*

29 J. Clark Kelso, *Judicial Elections: Practices and Trends*, 18, [http://www.mcgeorge.edu/government\\_law\\_and\\_policy/publications/ccglp\\_pubs\\_judicial\\_elections\\_practices\\_and\\_trends\\_pdf.PDF](http://www.mcgeorge.edu/government_law_and_policy/publications/ccglp_pubs_judicial_elections_practices_and_trends_pdf.PDF) [December 4, 2005].

30 An election cycle always comprises a period of two years from the previous to the current election. The 2004 election cycle, e. g., started after the election in the fall of 2002 and lasted until the elections in fall 2004.

Courts<sup>31</sup> combined raised over \$ 46.8 million. In the past three cycles (2000, 2002, 2004) such candidates collected \$ 123 million overall, whereas in the previous three election cycles (1994, 1996, 1998) they had only raised \$ 73.5 million.<sup>32</sup> For the third successive election cycle, at least 10 candidates have raised \$ 1 million or more for their election campaigns. In fact, 37 state Supreme Court candidates crossed this symbolic threshold from 1999 until 2004, almost doubling the 19 who broke that barrier between 1993 and 1998.<sup>33</sup> The increasing costs of campaigns for state Supreme Courts are reflected in the average amount of funds raised by the individual candidates, as shown in Figure 1. From the 1996 election cycle until the 2004 cycle, the average sum collected by a candidate for a Supreme Court seat has increased by almost \$ 200,000. Candidates are increasingly dependent on outside contributors such as business associations, unions, lawyers and political parties.

Figure 2: *Source of Contributions to Candidates in the 2002 and 2004 Supreme Court Elections*

	2002		2004	
	Amount in mio. \$	Percent	Amount in mio. \$	Percent
<b>Business</b>	8.4	29 %	15.8	34 %
<b>Unions</b>	0.7	2 %	0.9	2 %
<b>Lawyers</b>	10.7	37 %	11.7	25 %
<b>Parties</b>	2.8	10 %	6.7	14 %
<b>Candidates</b>	2.3	8 %	1.8	4 %
<b>Other</b>	4.1	14 %	10.1	21 %
<b>Total</b>	29.0	100 %	47.0	100 %

Source: Own illustration; numbers provided by the Brennan Center for Justice.

As Figure 2 shows, aside from the fact that total contributions have risen substantially, especially business associations and parties have strengthened their financial efforts to influence the outcome of judicial elections, while unions and lawyers have approximately maintained their level of support, regarding absolute numbers. For the first time since judicial campaign contributions have been recorded, donations by business associations exceeded those made by lawyers in 2004.<sup>34</sup> Business associations directed their donations foremost to candidates in states and districts, which are known for awarding high sums in class action and punitive damages suits, in order to bring business-friendly judges to the bench there. These states and districts are published annually by the U.S. Chamber Institute for Legal Reform. For many years, Mississippi,

31 It must be remarked that state judicial elections certainly do not only consist of elections to the supreme courts in the different states, but also of elections to lower state courts. However, the analysis in this paper focuses exclusively on Supreme Court elections.

32 *Deborah Goldberg et al.*, *The New Politics of Judicial Elections 2004*, vii, [http://www.justice-atstake.org/files/ NewPoliticsReport2004.pdf](http://www.justice-atstake.org/files/NewPoliticsReport2004.pdf) [December 8, 2005].

33 *Ibid.*, 14.

34 *Goldberg et al.* (fn. 32), 24.



Alabama, Illinois, California, West Virginia and Louisiana have been top-ranked among the states where the largest amounts are awarded to the plaintiffs.<sup>35</sup>

It is not surprising that in four of these six states – Alabama, Illinois, West Virginia and Louisiana – judges are selected in partisan elections, which offer vast possibilities for influencing the electoral outcome. In 2004, the U.S. Chamber of Commerce as the leading business association focused its attention on an election in Illinois' Fifth Judicial District where a seat on the Illinois Supreme Court was at stake. The Fifth Judicial District is located in Madison County, which has become known as "judicial hellhole" and "Mad County,"<sup>36</sup> because of its reputation for "taking on cases other courts refuse, and not holding back when it comes to the penalties."<sup>37</sup> Therefore, trial lawyers, who handle class action and punitive damage suits for the plaintiffs, try to bring their cases before a court in Madison County, where prospects for winning large sums are bright. As a consequence, more asbestos and medical-malpractice cases as well as tobacco suits have been filed in Madison County than anywhere else in the U.S.<sup>38</sup> In March 2003, a Madison County circuit judge ordered Philip Morris to pay \$ 10.1 billion in a class action suit brought against the tobacco giant for giving misleading information on the negative effects of "light" cigarettes.<sup>39</sup> The case was appealed and passed on to the Illinois Supreme Court, which is one of the main reasons why the business side wanted to bring another business-friendly judge to the Supreme Court bench while the case was still pending. The other major reason is that the respective Supreme Court justices wield large influence when it comes to filling vacancies on lower courts in the district where they come from and, thus, can install "pro-business" judges.

All in all, the Supreme Court race in Illinois' Fifth Judicial District turned out to be the most expensive court race in American history and it is a prime example of how parties and interest groups are able to enact substantial influence. On one side, the traditional coalition of business associations and the Republican Party campaigned for the conservative candidate, *Lloyd Karmeier*, while Democrats, trial lawyers and unions lined up behind his opponent *Gordon Maag*. Being financially supported by such wealthy donors, the two candidates raised and spent a total of \$ 9.3 million, which exceeded the expenditures made in 18 U.S. Senate races in the same year. The major contribution to *Karmeier* came from the U.S. Chamber of Commerce which gave \$ 2.3 million through the Illinois Republican Party. *Gordon Maag* received \$ 2.8 million from the Democratic Party of Illinois with a large share of that amount having been raised by the Association of Trial Lawyers of America (ATLA). *Maag* received an additional \$ 1.2 million from the Justice For All PAC, a political action

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35 The different surveys are available at Institute for Legal Reform, <http://www.instituteforlegalreform.com/harris/pdf/> [December 18, 2005].

36 United States: It's a Mad, Mad World, *The Economist* 374, January 8, 2005, 42.

37 *Ibid.*

38 *Ibid.*

39 *Pat Gauen*, Judiciary's ethics lost in Supreme Court race, *St. Louis Post-Dispatch*, November 8, 2004, A2.

committee (PAC)<sup>40</sup> that had been established by the ATLA and several unions. On election day, the business community and the Republicans emerged victorious when *Karmeier* won against *Maag* with a 55–45 percent result at the polls.<sup>41</sup> Shortly afterwards, their large investment paid off when the Illinois Supreme Court overturned the \$ 10.1 billion verdict against Philip Morris in December 2005.<sup>42</sup>

However, economic or monetary interests are not the only driving force behind increasing campaign costs in judicial races. Social controversies such as stem cell research, abortion, gay marriage or affirmative action bring into play liberal and conservative citizen groups. On the left side of the spectrum, along with mostly Democrats, a coalition of women's, gay and civil rights groups – the Alliance for Justice and People for the American Way being among the more prominent ones – can be found, while Christian Right and conservative groups, such as the Christian Coalition, the American Conservative Union, and the Committee for Justice, form their ideological opponents.<sup>43</sup> Although these groups cannot yet offer the financial support to candidates that groups with an economic focus are able to provide, they insert themselves into the elections with no less vigor. Citizen groups, no matter if liberal or conservative, try to pressure candidates into publicly stating what their position on socially controversial issues is. In states where law forbids judicial candidates to make such statements, citizen groups have successfully challenged the existing statutes. In Kentucky, for example, the conservative Family Trust Foundation filed a lawsuit against a provision that prohibited candidates from making statements which could commit them to decisions they might have to make when elected to the bench.<sup>44</sup> Candidates often have to give in to the pressure enacted by interest groups in order not to lose financial support and, therefore, state their positions, or even see it as a chance to cater to the opinion and sentiments of the majority within their electorate. In 2003, *Max Baer* openly campaigned as a “pro-choice Democrat” to win a seat on the Pennsylvania Supreme Court.<sup>45</sup> As Pennsylvania holds partisan elections, at least the fact that he campaigned as a Democrat is not surprising, but even in states which hold non-partisan elections, candidates have readily taken up the “party label” to convey a certain position to the voters. In North Carolina, where candidates are not nominated by parties, candidate *John Tyson* portrayed himself as “your conservative Republican candidate” who “believes marriage is a sacred union of a man and woman [...] that all

40 “Political Action Committee” is a popular term for a political committee organized for the purpose of raising and spending money to elect and defeat candidates.

41 *Gauen* (fn. 39).

42 *Ann Knef*, Philip Morris cleared of \$ 10.1 billion verdict, *The Madison St. Clair Record*, December 15, 2005, online edition, <http://www.madisonrecord.com/news/newsvew.asp?c= 171 731> [December 12, 2006].

43 *Mike France/Lorraine Woellert*, Battle Over The Courts, *Business Week*, Iss. 3901, September 27, 2004. Full text available at: [http://www.businessweek.com/magazine/content/04\\_39/b3901001\\_mz001.htm](http://www.businessweek.com/magazine/content/04_39/b3901001_mz001.htm) [December 6, 2005].

44 *Beth Musgrave*, Judicial Hopefuls Can Talk On Issues, *Lexington Herald-Leader*, February 29, 2004. Full text available at Justice at Stake, <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf> [December 11, 2005].

45 *Goldberg et al.* (fn. 32), 29.

life is valuable and unique” and that “the death penalty is appropriate for violent murderers.”<sup>46</sup>

### 1. Television Advertisements as Campaign Medium

Parties and interest groups, no matter whether their goals are of an economic or social nature, have discovered that television is a most effective medium for advocating the candidates they support. In addition to the \$45.2 million in contributions, parties and interest groups spent another \$12.0 million on television advertisements. The Democratic Party spent \$2.8 million for advertisements, whereas the Republicans “only” came up with \$1.8 million, but business and medical groups outspent trial lawyers and unions by \$5.7 to \$1.7 million.<sup>47</sup> Often, interest groups try to act in the background, so that the candidates they support are not associated with “special interests”. In 2004, a group called “Voters Education Commission” poured \$1.4 million in advertisements into an election for the Washington Supreme Court, but from where the group’s funds originated remained unknown. Only after the state’s Public Disclosure Commission filed a lawsuit requesting detailed financial information, the Chamber of Commerce as sole financier of the “Voters Education Commission” was revealed.<sup>48</sup> In West Virginia, Republican Supreme Court candidate *Brent Benjamin* profited from advertisements worth \$3.6 million sponsored by a group named “And For The Sake Of The Kids”. To some surprise, it later turned out that most of that amount did not come from child-friendly contributors, but from *Don Blankenship*, the Chief Executive Officer of coal giant Massey Energy Corporation, who gave \$2.4 million out of his personal pocket.<sup>49</sup> Again, it was not by coincidence that the business side focused on a Supreme Court race in West Virginia, as it is one of the states where the largest damages are constantly awarded to plaintiffs who sue corporations. Trial lawyers and unions are equally aware of that fact and campaigned heavily, and so West Virginia turned out to be the state in the nation where the most television advertisements were financed by interest groups in 2004. Of the 10,440 spots financed by interest groups in State Supreme Court elections throughout the U.S., 3,829 were aired in West Virginia.<sup>50</sup>

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46 Quoted from *ibid.*, 30.

47 *Ibid.*, 8.

48 *Steve Inskeep*, U.S. Chamber of Commerce becomes a powerful and often secret force in election campaigns, National Public Radio, October 7, 2004.

49 *Louis Jacobson*, State Supreme Court Races Get Nastier, Costlier, Roll Call, October 21, 2004, [http://www.rollcall.com/issues/50\\_44/outthere/7175-1.html](http://www.rollcall.com/issues/50_44/outthere/7175-1.html) [December 19, 2005].

50 *Goldberg et al.* (fn. 32), 6.

Figure 3: *Number of Television Advertisements by State in the Election Cycles, 2000–2004*

	Alab.	Arkan.	Georgia	Idaho	Illinois	Kent.	Louis.	Mich.	Miss.	Total
2000	4,758	–	–	–	–	–	–	5,763	218	10,739
2002	3,594	–	–	133	1,473	–	–	1,030	1,479	7,709
2004	9,377	242	453	–	7,500	205	315	1,512	1,479	21,083
Total	17,729	242	453	133	8,973	205	315	8,305	3,176	39,351

	Nevada	N. Mex.	N. C.	Ohio	Oregon	Texas	Wash.	W. Virg.	Total	Overall
2000	–	–	–	11,907	–	–	–	–	11,907	22,646
2002	233	–	–	13,105	–	555	37	–	13,930	21,639
2004	867	326	284	14,139	181	–	273	5,096	21,166	42,249
Total	1,100	326	284	39,151	181	555	310	5,096	47,003	88,595

Source: Own illustration; taken from Goldberg et al., *The New Politics of Judicial Elections 2004*, 16.

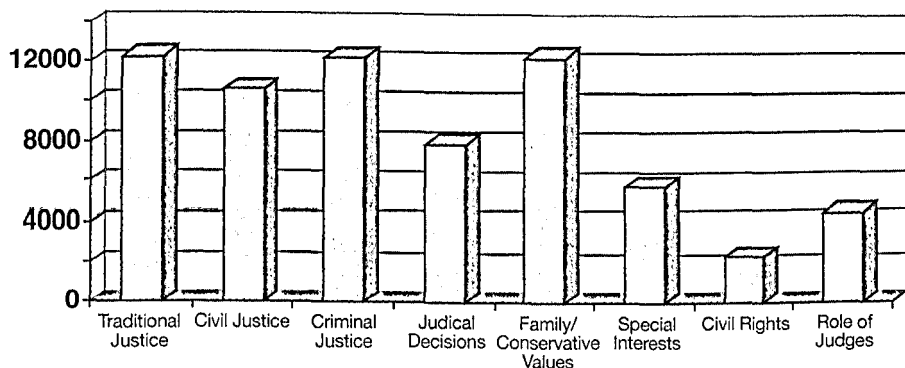
Overall, the use of television advertisements, which could not be seen in judicial elections only some years ago, has risen dramatically nationwide, as the following analysis of 17 states that hold either partisan or non-partisan judicial elections shows.<sup>51</sup> Figure 3 shows that the number of television advertisements aired in 2004 almost doubled compared to the two previous election cycles. The number of states, where TV ads were used in judicial campaigns, also increased dramatically. In 2000, TV ads were only used in judicial campaigns in four of the 17 states that were analyzed, while in 2002 the number rose to nine, and in 2004 to 15 states. The statement made above, that differences between partisan and non-partisan elections have basically vanished, is reinforced by the number of television advertisements aired in 2004. Of the 17 states in the analysis, six hold partisan judicial elections, equaling 35.3 percent. The total number of TV ads aired in states with partisan elections augments to 32,994, or 37.2 percent of the overall total of 88,595.

It is remarkable that television advertisements are not predominantly financed by parties and interest groups. The candidates themselves have realized how important the “air war” is for winning the election. While parties and interest groups spent a combined \$ 12.0 million on advertisements, the Supreme Court candidates made expenditures totaling \$ 12.4 million for promoting their candidacy on TV.

2. Content of Television Advertisements

Television advertisements launched in judicial campaigns usually do not deal with a wide range of issues, but generally revolve around eight topics which can be identified.

51 While 23 states hold either partisan or non-partisan elections, the analysis only includes states where television advertisements were aired at least once in one of the three election cycles considered.

Figure 4: *Topics of TV advertisements in 2004 Supreme Court Elections*

Source: Own illustration; numbers taken from *Goldberg et al.* (fn. 32), 11.

It is interesting to note that some of the issues mentioned are almost exclusively used in so called “attack ads” on opponents in the election. To promote one’s candidacy does not automatically mean that advertisements aired for that purpose solely shed a positive light on a candidate. Especially parties and interest groups resort to “negative” instead of “positive campaigning” and try to discredit the opposing candidate. Personal attacks below the waist line on opposing candidates have become the norm rather than the exception in judicial races. In 2004, 52 percent of all ads paid for by interest groups and even 54 percent of all ads paid for by parties were negative in content and attacked the opposing candidate.<sup>52</sup> Most of these “attack ads” are built on the topics “family values”, “special interests”, “criminal justice” and “judicial decisions”. The latter two are often linked with each other and former decisions the opposing candidate made are used for portraying him as being soft on crime, no matter whether the candidate is liberal or conservative. Usually, the decisions are heavily distorted or only quoted partly in the advertisements. In the crucial race in Illinois between Republican *Lloyd Karmeier* and Democrat *Gordon Maag*, the Democratic Party of Illinois portrayed *Karmeier* as being soft on crime by running the following spot:

“[Announcer]: He used candy to lure the children into the house. Once inside, the three children were sexually molested. A four-year old girl raped. Her brothers – sodomized [sic]. A Belleville man was arrested and convicted for the crime after trying to develop pictures of the abuse. Despite prosecutor’s objections, Judge Lloyd Karmeier gave him probation, saying “The court should grant leniency ...” Another case where Karmeier let a violent criminal out into the community. Lloyd Karmeier – the wrong choice for Supreme Court.”<sup>53</sup>

*Karmeier* had, in fact, sentenced a man named *Bryan Watters*, who was diagnosed severely mentally retarded, to probation, but only after an appeals court had asked

52 *Goldberg et al.* (fn. 32), 10.

53 Quoted from Brennan Center for Justice at NYU School of Law, *Buying Time* 2004, [http://www.brennancenter.org/programs/downloads/buyingtime\\_2004/STSUPCT\\_IL\\_DPIL\\_KARMEIER\\_CHILDREN.pdf](http://www.brennancenter.org/programs/downloads/buyingtime_2004/STSUPCT_IL_DPIL_KARMEIER_CHILDREN.pdf) [December 11, 2005].

*Karmeier* to reverse the six-year sentence he had originally imposed. In its decision, the appeals court had explicitly suggested probation as appropriate punishment.

Despite ethical and honorable conduct usually associated with the judiciary, advertisements sometimes not only attack the opposing candidate for his record, but are designed in such a way that the opponent seems to be the criminal himself. In West Virginia, Republican candidate *Brent Benjamin* paid for an ad directed against Democratic incumbent *Warren McGraw* which opened with the words: "According to the prosecutors, he sexually molested multiple West Virginia children. One only four years old."<sup>54</sup> If one does not listen carefully, the impression is kept alive throughout half the ad, that Judge *McGraw* was actually the one who molested the children, not the criminal.

"Family" and "Conservative Values" are other issues that are often used for attacking candidates. Especially liberal candidates or those affiliated or connected with the Democrats are frequent targets of "attack ads" launched by conservative groups or the Republicans. In the West Virginia race between *McGraw* and *Benjamin*, a whole series of television advertisements paid for by the ominous "And For The Sake Of Our Kids" group ended with the words: "The choice is clear, McGraw, a radical liberal. Brent Benjamin, experienced lawyer, family man, active in church, trusted conservative. Please vote Brent Benjamin for Supreme Court."<sup>55</sup> The pressure resulting from being labeled as "liberal" and, thus, not caring about family values, has caused even Democratic judicial candidates in the north to portray themselves as stout conservatives. In Illinois, the Democratic Party financed a spot in which the announcer praised the party's candidate *Maag* as "a conservative, [who is] pretty traditional on a lot of issues". *Maag* himself declared at the end of the advertisement: "I believe in the values of a traditional family. [...] I'll protect conservative values on the Illinois Supreme Court."<sup>56</sup>

Finally, another subject used for "negative campaigning" is to portray the opposing candidate as being bought and bribed by special interest groups. The aim clearly is to suggest that the targeted candidate does not care about the public as a whole, but solely about small privileged segments of society. The following advertisement, which was directed against three candidates in Alabama and sponsored by the Alabama Civil Justice Reform Committee illustrates how this type of ads is designed:

"[Announcer]: Just when you thought we got trial lawyer money out of Alabama politics, it snuck back in. Over the last few days trial lawyers have pumped nearly a million dollars into the judicial campaigns of Pam Baschab, Jerry Stokes, and Tom Parker. Baschab, Stokes, and Parker waited until the last minute to take their trial lawyer money hoping you wouldn't find out. Ask Pam Baschab, Jerry Stokes, and Tom Parker, is trial lawyer money really good for the Alabama Supreme Court?"<sup>57</sup>

54 Quoted from *ibid.*, [http://www.brennancenter.org/programs/downloads/buyingtime\\_2004/STSUPCT\\_WV\\_BENJAMIN\\_MCGRAW\\_DENOUNCEMENT.pdf](http://www.brennancenter.org/programs/downloads/buyingtime_2004/STSUPCT_WV_BENJAMIN_MCGRAW_DENOUNCEMENT.pdf) [December 11, 2005].

55 Quoted from *ibid.*, [http://www.brennancenter.org/programs/downloads/buyingtime\\_2004/STSUPCT\\_WV\\_SOTK\\_MCGRAW\\_CLEAR\\_DIFFERENCES.pdf](http://www.brennancenter.org/programs/downloads/buyingtime_2004/STSUPCT_WV_SOTK_MCGRAW_CLEAR_DIFFERENCES.pdf) [December 11, 2005].

56 Quoted from *ibid.*, [http://www.brennancenter.org/programs/downloads/buyingtime\\_2004/STSUPCT\\_IL\\_DPIL\\_MAAG\\_ARMY\\_RANGER.pdf](http://www.brennancenter.org/programs/downloads/buyingtime_2004/STSUPCT_IL_DPIL_MAAG_ARMY_RANGER.pdf) [December 11, 2005].

57 Quoted from *ibid.*, [http://www.brennancenter.org/programs/downloads/buyingtime\\_2004/STSUPCT\\_AL\\_ALCJR\\_TRIAL\\_LAWYER\\_MONEY.pdf](http://www.brennancenter.org/programs/downloads/buyingtime_2004/STSUPCT_AL_ALCJR_TRIAL_LAWYER_MONEY.pdf) [December 11, 2005].

These attacks, which usually have some substance to them, are the reason why big contributors often try to remain in the background. When it became public that *Don Blankenship*, the head of Massey Energy, had donated two million dollars to Republican candidate *Brent Benjamin*, the West Virginia Consumers for Justice immediately launched an “attack ad” drawing on that contribution: “Out-of-state corporate bosses [Massey is registered in Virginia] are spending millions supporting Brent Benjamin. The head of one company [the picture and name of Don Blankenship are shown], convicted of contaminating West Virginia’s drinking water is spending almost \$2 million to support Benjamin after having eliminated the jobs and health insurance benefits of hundreds of West Virginia families.”<sup>58</sup> Due to the intensive use of television advertisements and the large amounts of money involved, the question arises, how campaign expenditures in general, and television advertisements in specific, influence the outcome of elections.

#### IV. “Spending and Winning” in the 2004 State Supreme Court Elections

Not only because of the negative content of vicious “attack ads”, judicial elections increasingly resemble congressional or presidential races. Developments and determinants of political races can also be observed in judicial elections. In the 2004 congressional elections, 97.7 percent of the 435 races for the House of Representatives and 88.2 percent of the 34 races for a Senate seat were won by the candidate who spent more money than the opponent.<sup>59</sup> The ratio is similar in state Supreme Court elections, where 85.3 percent of 34 contested elections were won by the candidate who had received the highest contributions.<sup>60</sup> Just as in political races, Supreme Court elections are not always “real contests” because the incumbent often enjoys large advantages and, therefore, no promising challengers can be found. Incumbents not only profit from a higher name recognition among the constituents, they also outperform the challengers when it comes to collecting checks. Of the 30 top-fundraising candidates, only four were challengers, and no challenger crossed the \$1 million mark. As incumbents are hard to beat, open-seat races, where no incumbent is up for election, usually draw the highest contributions. In fact, in 2004, 15 of the 30 top-fundraisers were competing for open seats, with the top five collectively raising almost \$15 million in their quest for a state Supreme Court seat.<sup>61</sup> Overall, the 43 winners who raised money collected roughly \$27 million, while the losers – including those in primary elections – raised \$19 million.

58 Quoted from *ibid*, *Buying Time 2004*, [http://www.brennancenter.org/programs/downloads/buyingtime\\_2004/STSUPCT\\_WV\\_WVCJ\\_WHO\\_IS\\_BENJAMIN\\_2.pdf](http://www.brennancenter.org/programs/downloads/buyingtime_2004/STSUPCT_WV_WVCJ_WHO_IS_BENJAMIN_2.pdf) [December 11, 2005].

59 Center for Responsive Politics, *2004 Election Overview*, <http://www.opensecrets.org/overview/bigspenders.asp?Display=A&Memb=S&Sort=D> [December 13, 2005].

60 Data gathered from The Institute on Money in State Politics, *Judicial Elections*, <http://www.followthemoney.org/index.phtml> [December 13, 2005].

61 *Goldberg et al.* (fn. 32), 22.

Evidently, contributions are crucial for winning judicial elections, which is why the "cost" of winning has constantly increased. While the average amount raised by winning candidates was \$450,689 in 2002, it increased by 45 percent to \$651,586 in 2004.<sup>62</sup> Expensive television advertisements, which have become a necessity for electoral success, are the major reason for rising campaign costs. The relation between "winning" and "support through TV ads" is as striking as the general relation between "winning" and "spending". Of the 34 State Supreme Court races, where TV ads were used as a campaign medium, 29 were won by the candidate who had the largest airtime support. It has become almost impossible to win an election without having run a profound campaign on television. In 2004, a total of \$24.4 million was spent on TV ads by parties, interest groups and candidates, more than doubling the previous record of \$10.6 million set in 2000. Nowadays, the average candidate uses 25 percent of his funds for purchasing airtime.

## V. Judicial Elections and Judicial Independence

It would not be appropriate to "demonize" judicial elections in general as a threat to judicial independence and an impartial judiciary. One could argue that the idea of electing judges is admirably democratic: If the people who make and enforce laws are elected, why should those who interpret the laws not be elected as well? Moreover, it could be pointed out that the federal judicial nomination and confirmation process is also subject to the influence of party politics and outside forces such as interest groups. The current confirmation process of U.S. Supreme Court nominee *Samuel Alito*, who is to fill the crucial vacancy left after *Sandra Day O'Connor's* retirement, is another prime example of how party and group interests clash during the federal appointment process.

Although the federal process of selecting judges is anything else than free of party and interest group influences, it still guarantees judicial independence and impartiality to a higher degree than judicial elections mainly because of two reasons. Firstly, the involvement of two branches – the executive and the legislative – provides a balance between diverging interests, especially in times of divided government, when the president and the majority in both houses of Congress come from different parties. Even when government is "unified" and one party controls the White House and Congress, like the Republicans do at the moment, a presidential nominee is not automatically approved by the Senate. Usually, the diverging interests within a party prevent the party from being fully lined up behind a candidate. And even in times of strong party identification and deep lines between the parties in the Senate, the minority party has the possibility to block the confirmation of a judge or justice through a "filibuster"<sup>63</sup>, as long as it has at least 40 seats. Currently, in the nomina-

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62 *Ibid.*, 14.

63 U.S. Senators may speak as long as they want during debates. A „filibuster“ is the term used for a debate in the Senate which is extended on purpose in order to prevent a vote from being



tion process of *Samuel Alito*, all 55 Republican senators are likely to vote for his confirmation, but it is just as likely that at least 40 of the 45 Democrats will stop it by "filibustering". Therefore, it is difficult to install candidates with views that are considered too "radical" and compromises have to be reached. Secondly, the appointment of federal judges for lifetime renders them fairly immune to outside influence, because they do not have to worry about reelection and, thus, do not have to cater to the interests of potential campaign supporters.

An election leaves parties and interest groups with stronger possibilities to influence the composition of courts than the nomination process does, although party and interest group involvement can also have its positive sides. Parties and groups can provide information about the candidates which the voters otherwise might not have. Even the nomination of judicial candidates by parties can be beneficial, because the party label is a helpful source of information for the voters as *Philip Dubois* has noted: "[V]oter's 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."<sup>64</sup> An analysis of 84 articles about the relation between judges' party affiliation and their decisions conducted by *Daniel Pinello* has shown that party affiliation is a safe indicator for the ideological content of the decisions made by the respective judges.<sup>65</sup> Moreover, parties and interest groups alike can provide necessary funding for elective judges to conduct campaigns and communicate with voters.<sup>66</sup> This can provide a fair chance for a less fortunate candidate facing a wealthy challenger who is able to finance his campaign by using his private fortune.

However, in recent years contributions by parties and interest groups have reached a level that must lead to serious concern about state judicial elections. Interest groups and parties do not draw a distinction anymore between pursuing their aims through the political process or through the courts, and large donations seem to provide a powerful instrument to bring judges to the bench who are likely to rule in their supporters' favor. The fact that 85.3 percent of all contested elections for state Supreme Courts in 2004 were won by the candidate who had the largest funds available undoubtedly shows the importance of money for winning judicial elections. Any serious contender can hardly be successful without a large "war chest" and therefore is dependent on wealthy donors. Parties and interest groups are willing to make these

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taken. A debate can only be ended previously with a two-thirds majority, which is difficult to obtain („cloture“).

64 *Philip Dubois*, Accountability, Independence, and the Selection of State Judges: The Role of Popular Elections, *Southwestern Law Journal* 40 (1986), 44.

65 *Daniel Pinello*, Linking Party to Judicial Ideology in American Courts: A Meta-Analysis, *Justice System Journal* 20 (1999). A full version of the article is available at: <http://www.danpinello.com/Meta-Analysisis.htm>.

66 *Champagne* (fn. 13), 1391.

large contributions because there is a high chance that their investments will pay off once their favorite candidate has ascended to the bench or kept his seat there. As *Pinello's* study has indicated, parties and interest groups can be fairly sure that their "protégée" will rule in their favor. It is of little importance whether the newly elected or reelected judge decides in his supporters' favor out of a feeling of thankfulness, out of personal convictions, which usually reflect the ones of the supporters, or because of securing support again in the following election, the consequence for the party or group which did not succeed in bringing its candidate to the bench is the same: a considerably weaker position before the respective court and a higher chance to lose when it comes down to a trial.

The immediate influence of contributions on judges' decisions is not only an assumption or probability. Judges themselves do not deny that interest groups and parties are able to put a certain pressure upon them and that they are in a way dependent on their donations. In a poll of 2,428 judges conducted by the Justice at Stake Campaign in 2001 and 2002, only 36 percent of the respondents answered that campaign contributions have "no influence at all" on their decisions, which is the answer one would expect from an independent and impartial judge. However, 48 percent of all judges admitted that they felt a "great deal" of pressure to raise money during campaigns, and 46 percent stated that campaign contributions influence decisions.<sup>67</sup>

As one might expect, the importance of contributions also varies according to the level upon which the elections are taking place. State Supreme Court elections are more expensive than elections to appellate and lower courts, thus, 63 percent of the Supreme Court justices that were polled answered that they feel "a great deal" of pressure to raise money, while "only" 58 percent of the appellate and 46 percent of the lower judges did so. Simultaneously, the influence of donations was considered to be highest in state Supreme Courts. Only 28 percent of the respondents believed that donations have no influence on Supreme Court decisions, whereas the number rose to 32 percent for appellate and 36 percent for lower courts.<sup>68</sup>

According to the survey, the judges themselves seem to be aware of the inherent dangers of judicial elections. Less than 20 percent of the respondents overall believe that judges should be elected in non-partisan or partisan elections. Almost 50 percent believe that judicial posts should be filled by "merit selection". Merit selection usually is a three-step process. In a first step, a committee prepares a list of qualified candidates, from which the chief executive – the president, governor, or mayor – makes his pick, which has to be confirmed by the Senate. Merit selection is usually followed by a retention election, where the voters have a choice to determine their judicial officers after they have served for some time on the court.

The participation of voters has originally been the reason for introducing judicial elections. In the wake of the "Progressive Movement", which called for more in-

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67 Justice at Stake Campaign, State Judges Frequency Questionnaire, <http://faircourts.org/files/JASJudgesSurveyResults.pdf> [December 2, 2005].

68 *Ibid.*

vovement of the citizens in government at the beginning of the 20<sup>th</sup> century, many states abandoned appointment in favor of election, especially because the appointment process was dominated by party machines and personal connections. Nowadays, the new “determinants” of judicial elections are not much different, as parties and wealthy interest groups more or less decide the outcome of the elections through their contributions. Judicial elections have more than ever become a mechanism for the transmission of interests of parties and financially well-to-do groups.

### 1. The Future Development of Judicial Elections

Currently, there is almost nothing which would indicate that the trends observable during the last years will come to a halt in the near future. Campaign costs and financial involvement of parties and interest groups will continue to increase, more television advertisements will be aired and the language used in the campaigns, which is hardly becoming the conduct associated with judiciary, will be of an even more vicious and attacking nature in the future. In the Justice at Stake Campaign survey, 44 percent of the judges polled stated that they are dissatisfied with the tone and conduct of judicial candidates, and 55 percent believe that tone and conduct have gotten worse over the past five years.<sup>69</sup> One may speak of a “politicization” of judicial elections, because – aside from the substantial need to raise money – the same polarization and aggressiveness which are part of presidential and congressional races have begun to seep into the branch of government that *Hamilton* strongly desired to be immune to “those ill humors”<sup>70</sup>.

A U.S. Supreme Court decision made in 2002 “will surely help to speed up the politicisation of judicial elections”<sup>71</sup>. In *Republican Party of Minnesota vs. White*<sup>72</sup>, the Supreme Court declared a Minnesota statute as unconstitutional, because in the eyes of the court it infringed on a judicial candidate’s right of free speech as provided by the first amendment.<sup>73</sup> The Minnesota regulation in question prohibited judicial candidates to “identify themselves as members of political organizations, “make speeches on behalf of a political organization”, “attend political gatherings”, “make pledges or promises of conduct in office”, or “announce his or her views on a disputed legal or political issue”.<sup>74</sup> Many states where judicial elections are held had imposed regulations of judicial conduct, which are usually based on recommendations

69 Justice at Stake Campaign (fn. 67).

70 *Hamilton/Jay/Madison* (fn. 7), 469.

71 United States: My judge is a party animal, *The Economist* 374, January 1, 2005, 32.

72 *Republican Party of Minnesota vs. White* (01 521) 536 U.S.765 (2002).

73 The „White Decision“ shows similarities to the 1976 Supreme Court decision in *Buckley vs. Valeo* (424 U.S. 1), in which the U.S. high court struck down regulations that prohibited candidates in political elections to spend unlimited amounts on their campaigns and regulations that prohibited independent groups to spend unlimitedly to voice their opinion in elections.

74 *Minnesota Code of Judicial Conduct*, <http://www.state.mn.us/cbranch/judstnds/canon2.html> [December 10, 2005].

by the American Bar Association<sup>75</sup>, on the candidates in order to safeguard judicial independence and impartiality to at least a certain degree. Now, candidates are allowed to speak out on whatever issue they wish and to state their position on controversial issues to attract voters. Therefore, it is no wonder that television advertisements are increasingly being used in judicial campaigns as they provide a perfect platform for transmitting the candidate's views to the voters. After the precedence set by the Supreme Court, many groups have successfully filed suit against similar provisions in other states already, e. g. Kentucky and California, which means that television campaigns and "attack ads" will spread to more states.

*Republican Party of Minnesota vs. White* was one of the many narrow 5–4 decisions in recent years, and Justice Sandra Day O'Connor, the "swing vote" on the U.S. Supreme Court, once again cast the deciding vote. She concurred with the majority, but felt the need to write a separate opinion to "express [her] concerns about judicial elections generally," fearing that "campaign donations may leave judges feeling indebted to certain parties or interest groups".<sup>76</sup> As argued above, this seems to be a perfectly appropriate assessment of the current dilemma in State judicial elections, and the question arises, if measures could be introduced to counter the influence of money on the electoral outcome.

## 2. Potential Reform of Judicial Elections

Suggestions for reforms to insulate state courts from political and interest group pressure can come in many forms and sizes. Generally, one can differentiate between efforts that lead to more public education and citizen involvement, which shall not be discussed here further, and new rules and regulations enacted by the states.

A first government-driven step for reform could be the enactment of disclosure laws. In the past, many groups were able to "anonymously dump [...] millions of dollars into campaigns for the bench"<sup>77</sup>, because campaign regulations in most states did not require them to disclose their donors. In 2000, a group called "Citizens for a Strong Ohio" declined to disclose the names of its contributors who had supported its \$4 million campaign against an incumbent Supreme Court justice. On the federal level, the Bipartisan Campaign Reform Act of 2002 (BCRA) made disclosure mandatory for all groups that pay for television advertisements which expressly call<sup>78</sup> for the election or defeat of a congressional or presidential candidate. While the BCRA only aimed at political candidates, it could also become important in judicial elections. In 2003, the constitutionality of this campaign finance law was challenged by

75 The American Bar Association is a voluntary association of lawyers that currently has approximately 400,000 members. Among the non-controversial activities of the ABA are the accreditation of law schools and the development of ethical standards for lawyers.

76 Justice Sandra Day O'Connor, Concurring Opinion to *Republican Party of Minnesota vs. White*, 1. Full text available at: [http://www.law.cornell.edu/supct/pdf/01\\_521P.ZC](http://www.law.cornell.edu/supct/pdf/01_521P.ZC).

77 Goldberg et al. (fn. 32), 36.

78 That means that the spot has to mention the candidate's name and words like "vote for", "elect", "support", "Cast your ballot for", etc.

several groups and politicians, but the Supreme Court upheld all relevant requirements of the BCRA in the decision *McConnell vs. Federal Election Commission*<sup>79</sup>. This opens the door for individual states to enact similar laws, also applying to judicial elections. Such disclosure laws would certainly not limit the amounts that can be spent in judicial campaigns by candidates, parties, and groups, but the voters could obtain much better information about who is backing the candidates.

A second, and more far-reaching step, would be to introduce contribution limits. Still, many states have not enacted legislation on how much money judicial candidates can accept from contributors. Whereas amendments to the Federal Election Campaign Act of 1971 (FECA) already introduced such regulation for federal political candidates in 1974, there simply was no need to do the same for state judicial candidates until recently. Due to the “cost explosion” in judicial campaigns, limits on contributions to candidates could provide an effective instrument to reduce the large sums spent. However, one must also admit that contribution limits would not be a panacea to reduce judicial campaign spending overall. While the limits would affect the amounts of money that can be given directly to candidates, parties and interest groups still could spend unlimited amounts for television or radio advertisements. It is unlikely that this unlimited “independent spending” will be interfered with because in its 1976 decision in *Buckley vs. Valeo*<sup>80</sup> the Supreme Court had already declared limitations on independent expenditures by individuals and groups to be unconstitutional as they restrict the right of free speech guaranteed by the first amendment.

Another measure to reduce campaign spending and especially the pressure for judicial candidates to raise money is the introduction of public campaign financing as we know it from presidential elections. Candidates are provided with public funds for campaigning, but are not allowed to raise money otherwise, once they have accepted public funding. To qualify for public funds, a candidate must meet certain criteria, such as filing a declaration of intent to participate in the election and he must have raised a certain amount in small donations from citizens – large donations by PACs or groups do not count – to further prove his seriousness. Such a system is especially helpful because it reduces the immediate dependence of a candidate on wealthy donors. Some states have successfully introduced a public funding system already. In North Carolina, for example, contributions by interest groups to Supreme Court candidates have dropped roughly two thirds from 2002 to 2004. The system also encounters widespread acceptance by judges and citizens. 14 out of the 16 eligible judicial candidates in North Carolina accepted public funding and thereby gave up the possibility of collecting large contributions from interest groups.<sup>81</sup> Moreover, 75 percent of voters in North Carolina favored the public funding system over traditional fundraising.<sup>82</sup> Again, public funding is no guarantee for reduced campaign spending

79 *McConnell vs. Federal Election Commission* (02–1674) 540 U.S. 93 (2003).

80 *Buckley vs. Valeo* 424 U.S. 1 (1976).

81 *Goldberg et al.* (fn. 32), 39.

82 Voters Believe Money Influences Courts, U.S. Newswire, June 28, 2005.

overall, because candidates cannot be forced to accept public funding. Thus, a trend observable in presidential elections might also begin in judicial elections. Once candidates begin to opt out of the public funding system because they are able to raise more money by accepting contributions from parties, groups and individuals, other candidates also have to deny public funding and raise money the traditional way in order to stay competitive.

The most far-reaching and also most promising step to stop the dangerous developments in state judicial elections is to fill judicial positions through nomination or merit selection and a following confirmation through a legislative body. In the traditional nomination process, the respective executive official is fully free to select a judicial nominee. When the concept of "merit selection" is strictly applied, he has to choose from a list made by an independent commission that has screened potential candidates and evaluated their professional conduct and experience. Judicial candidates could then be appointed for lifetime, similar to federal judges, or the selection process could be repeated after certain periods. As this appointment procedure does not allow civic participation, sixteen states hold retention elections where voters have the possibility of denying a judge another term of office. These retention elections again demonstrate the dilemma of judicial elections. While they enable more citizen involvement in the democratic process, they are subject to the influence of powerful interest groups. However, financial engagement in retention elections is not nearly as attractive for parties and interest groups as in judicial elections with two or more contenders, because they do not know who the next appointee is going to be in case that the incumbent was denied another term in office. The introduction of appointment and/or retention elections may seem promising, but the introduction of such a system is just as difficult. In most states a change of the judicial selection method would require an amendment to the state's constitution, which is difficult to obtain. Many interest groups and politicians, who regard judicial elections as instruments of enacting influence, would most likely put up fierce resistance against such legislative proposals.

Despite some possibilities for reform, it is unlikely that the current trend of rising campaign costs as well as increasing involvement by parties and interest groups can effectively be stopped. Even contribution limits or public funding, which are easier to introduce than changes to the states' constitutions, do not offer bright perspectives because candidates and their supporters will always find ways to put their financial resources to work for their cause. Ironically enough, Justices *Sandra Day O'Connor* and *John Paul Stevens*, who wrote the 5–4 majority opinion in *McConnell vs. Federal Election Commission*, had to concede that "[m]oney, like water, will always find an outlet", only to add with resignation – when looking at campaign finance – that the "problems [which] will arise [...] are concerns for another day."<sup>83</sup>

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83 *McConnell vs. Federal Election Commission* (fn. 79), p. 118.