

TELEVISION ADS IN JUDICIAL CAMPAIGNS

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INTRODUCTION

Judicial campaigns have gone through a dramatic transformation in recent years from low-key, low-budget, and often uncontested affairs to hotly contested, expensive races that often cannot be distinguished from contests for offices in the political branches.¹ The traditional judicial campaign was "about as exciting as a game of checkers. Played by mail."² The judicial candidate would speak to any group willing to hear a dull speech about improving the judiciary or about judicial qualifications. There were hands to shake, bar and newspaper endorsements to obtain, and little else. While there might be some involvement with interest groups, it usually consisted of speeches before a union local or a medical society and perhaps an effort to obtain their endorsements. Assuming the candidate was an incumbent and had avoided scandal or a highly controversial decision, victory was likely. Indeed, most incumbents would not have an opponent. In a retention election, victory was a virtual certainty. If the race was for an open seat, then an attractive name, a good ballot placement, a popular political party affiliation, or perhaps a newspaper or bar association endorsement, were the avenues to election.³

To the extent that there was interest group involvement, it was mostly between competing segments of the bar and even that involvement was low-budget and low-key. However, this traditional approach to judicial elections began to change in the late 1970s when deputy district attorneys in Los Angeles began to encourage opposition to judges they believed were soft on crime. Shortly thereafter, trial lawyers in Texas began to pour money into that state's supreme court races. Before long, money was flowing into judicial races from the defense side in tort suits as well.⁴ Soon big money was going into judicial

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1. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1393 (2001).

2. William C. Bayne, *Lynchard's Candidacy, Ads Putting Spice into Justice Race*, MEMPHIS COMMERCIAL APPEAL, Oct. 29, 2000, at DS1.

3. Champagne, *supra* note 1, at 1393.

4. Mark Hansen, *A Run for the Bench*, A.B.A. J., Oct. 1998, at 69-70; Alexander Wohl,

campaigns in states such as Alabama, California, Kentucky, Michigan, Montana, Ohio, Pennsylvania, Wisconsin, and Illinois.⁵

In this new era of judicial politics, judicial campaigns have become “nastier, noisier, and costlier.”⁶ Television has become the major venue for modern day supreme court campaigns.⁷ The increased fundraising of candidates has, to a great extent, gone into campaign ads on television. Independent expenditures and issue ads by interest groups have also increased and much of that money has also gone into television.⁸ With the average American family’s television tuned in for eight hours per day,⁹ television has become the most effective, albeit expensive, way for judicial candidates to reach voters. To date there has been no empirical study of this use of television in judicial campaigns. This Paper seeks to analyze the television messages of state supreme court candidates in Ohio, Michigan, Alabama, and Mississippi in the 2000 elections. It seeks to determine the themes of judicial campaign ads and the varying messages from candidate—sponsored, party-sponsored, and interest group-sponsored ads.

Justice for Rent, AM. PROSPECT, May 22, 2000, at 34.

5. See Champagne, *supra* note 1, at 1394-1404. By the 2000 elections, at least \$62 million was spent on judicial races. See Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DET. C.L. 849, 850-51.

6. Roy A. Schotland, Comment, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 150 (1998).

7. Television ads did appear in some lower court campaigning as well, but the high expense of these ads made them less frequent in those elections.

8. One of the most significant developments in modern campaigning was the use of independent expenditures. Political action committees and political parties may spend unlimited sums campaigning for or against candidates as long as the committee or party act independently from the candidate’s campaign committee. The model for independent political action committees was the National Conservative Political Action Committee (NCPAC), which spent millions of dollars in pursuit of its moral issue agenda. See Fed. Election Comm’n v. Nat’l Conservative Political Action Comm., 470 U.S. 480 (1985); W. LANCE BENNETT, *THE GOVERNING CRISIS: MEDIA, MONEY, AND MARKETING IN AMERICAN ELECTIONS* 53 (2d ed. 1996).

Many state laws, like federal law, bar corporations and unions from express political advocacy. However, they can engage in “issue advocacy.” That route was of major importance last year, for the first time, in judicial elections. For a discussion of the legal distinction between express advocacy and “issue ads,” a distinction that is more legal than real, see Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 IND. L. REV. 755, 759-61 (2002).

Bradley Smith believes that both “issue ads” and independent expenditures “are the direct result of efforts by citizens to engage in political participation in the face of contribution and spending limits.” See BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF FINANCE REFORM* 175 (2001).

9. BENNETT, *supra* note 8, at 15. Indeed, since the mid-1960s, most Americans rely on television as the primary news source. See SMITH, *supra* note 8, at 173.

I. THE IMPORTANCE OF TELEVISION

One of the best examples of the effectiveness of television in judicial campaigns comes from data gathered regarding the Texas Supreme Court races between 1992 and 2000.¹⁰ On four occasions in the last decade, Republican supreme court candidates were challenged in the primary by candidates with little if any organized support and minimal funding. Yet the insurgent candidates all showed great strength in areas where the established candidate did not run television ads. Of course there may be additional explanations for the strength of established candidates in those geographical areas where ads were shown. For example, perhaps the candidates campaigned harder in those areas or were better organized. Moreover, in some locales candidates may have had stronger name identification than their opponents.¹¹ However, as Table 1 indicates, the strong correlation between television media markets and voting percentages should not be ignored.

One would, of course, expect ads to be purchased in the Dallas-Fort Worth and Houston media markets as these areas represent the state's major urban centers and the source of much Republican voting strength. For example, in the 2000 Republican primary for President, 1,126,757 votes were cast. Thirty percent of those votes came from Dallas, Tarrant, and Harris counties, three of the largest counties (but not the only counties) in the Dallas-Fort Worth and Houston media markets. Likewise, some media markets may be ignored because they contain so few Republican voters.¹² Therefore, major considerations regarding the purchase of television time are clearly cost and the ability to reach potential voters in the Republican primary.¹³ The insurgent candidates did not have the resources to run television ads; only the established candidates did and only in some media markets. It was reasonable to conclude that it was the support received by the established candidates in the areas where they ran television ads that led to their victories.

It is important to note that since the data all relate to the Republican primary, the effect of the political party label is controlled. If one compares the

10. See tbl.1. The data were compiled by Texas' Chief Justice Thomas R. Phillips and by Karl Rove (who served as a campaign consultant to a number of winning judicial candidates) and were presented at the Summit on Improving Judicial Selection on December 8-9, 2000 [hereinafter Phillips & Rove]. For further detailed data, see Roy A. Schotland, *Campaign Finance in Judicial Elections*, 34 LOY. L.A. L. REV. 1489, 1508-12 (2001).

11. Candidates in Texas Supreme Court races are affected by "friends and neighbors" voting where voters tend to cast ballots for candidates from their home county or from neighboring counties. Gregory S. Thielemann, *Local Advantage in Campaign Financing: Friends, Neighbors, and Their Money in Texas Supreme Court Elections*, 55 J. POL. 472 (1993).

12. See Texas Secretary of State, Historical Data, at www.sos.state.tx.us/elections/historical/index.shtml.

13. Telephone Interview with Thomas R. Phillips, Texas Supreme Court Chief Justice (Aug. 15, 2001) (transcript on file with author); Telephone Interview with John Deardourff, media director (Aug. 20, 2001) (transcript on file with author) [hereinafter Deardourff Interview].

percentage difference in votes for the established candidate in those areas where television buys were made versus those media markets where no buys were made, the difference is remarkable.¹⁴ In media markets where the established candidates ran television ads, in terms of vote percentages, they received between twelve percent and 18.5% more votes than in media markets where they did not buy television time.¹⁵

The media markets where these differences were found vary considerably in size, representing huge markets such as Houston and Dallas-Fort Worth to much smaller markets such as Abilene-Sweetwater, Corpus Christi, and Lubbock. Thus, the differences in victory margins between the areas where media buys were made and where they are not was not fully explained by the urbanism of the media markets (though the largest markets, Dallas-Fort Worth and Houston have the most Republican voters and so media buys there were essential). Examination of individual media markets showed a pattern of success for established candidates in areas where ads were purchased.¹⁶ In the four primaries examined in Table 1, there were thirty-eight media markets where the candidate purchased television advertising. The established candidate won at least a majority in thirty-five of those thirty-eight media markets.¹⁷ In thirty-seven media markets, a candidate did not purchase television time and the established candidate won at least a majority in only eleven of those markets.¹⁸

Given the myriad of factors that can explain electoral success, one should be careful to impute victory in these judicial races solely to television ads. On the other hand, the general pattern of high margins of victory in areas where television was used is so powerful that it cannot be ignored.

II. THE NATURE OF THE MEDIUM

Television encourages the use of dramatic and eye-catching political advertisements. In the context of judicial races, such ads include the use of talking trees,¹⁹ exploded tires and overturned vehicles,²⁰ accusations that a candidate is pro-crime (one of the more eye-catching is that the candidate is soft on pedophiles)²¹ and accusations that judges are corrupted by campaign money.²²

14. See tbl.1.

15. *Id.*

16. See Phillips & Rove, *supra* note 10.

17. *Id.*

18. *Id.*

19. Ads used in Michigan included talking trees, one of which was named "Don Oak."

20. The problems with Firestone tires were noted in judicial campaign ads in Michigan and in Alabama.

21. Being "tough on crime" was a campaign theme found in all four states (Alabama, Michigan, Mississippi, and Ohio). Michigan had an ad that stressed a challenger's decision as an intermediate appellate judge that was favorable to a child molester. A similar charge was made against a Wisconsin justice. The grandmother of a murdered child appeared in that ad. See Judith L. Maute, *Selecting Justice in State Courts: The Ballot Box or the Backroom?*, 41 S. TEX. L. REV.

As Ansolabehere, Behr, and Iyengar point out:

More often than not, the victor is the candidate who is best able to condense his or her message into something that the average voter—who is far removed from politics, and usually hates commercials—will remember and care about. Out of necessity, such circumstances force candidates to highlight easily absorbed negative messages about the opponent.²³

The judicial elections of 2000 in the four states studied in this Paper confirmed this theory. Candidates used themes such as crime control, civil justice, and family values to offer voters an appealing message that would attract votes. They also used aspects of their ads as signals of their underlying attitudes and values. Further, they attacked their opponents by portraying them as corrupted by campaign contributions, the tools of special interests, and soft on crime.

Additionally, the 2000 judicial elections saw strong use of television ads by political parties and interest groups. Those ads proved especially hard-hitting and negative. Party and interest group advertisements have a particular advantage in judicial races in taking a negative approach since third party ads are not subject to the restrictions of the Canons of Judicial Ethics. While some candidates for judicial office have publicly requested interest groups to stop campaign efforts on their behalf,²⁴ there is little political incentive to do so. As Ansolabehere and Iyengar point out: “Organized interests seem to have a unique edge in going negative. Attack advertisements from interest groups convey all of the negatives about the candidate who is attacked without the risk of a political backlash against the candidate the group supports.”²⁵

One should not overlook that such advertising campaigns provide a mechanism to attack the opponent while the supported judicial candidate remains above the fray and well within the requirements of the Canons of Judicial Ethics.²⁶ If nothing else, however, television vastly increases the audience to

1197, 1224 n.167 (2000).

22. Commonly, a candidate will allege that the other side is corrupted by campaign money and is the captive of special interests. Such a theme was found in all four states. Some Ohio commercials pushed this theme so hard that the Ohio State Bar Association President spoke out against the commercials. See videotaped comments of Reginald Jackson, President of the Ohio State Bar Association (on file with *Indiana Law Review*).

23. STEPHEN ANSOLABEHHERE ET AL., *THE MEDIA GAME: AMERICAN POLITICS IN THE TELEVISION AGE* 100 (1993).

24. Schotland, *supra* note 5.

25. STEPHEN ANSOLABEHHERE & SHANTO IYENGAR, *GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE* 128 (1996).

26. “In an era of thirty-second television advertisements, interest group advertising can hold considerable sway over the electorate, and the independent expenditures of interest groups can be especially hard-hitting since they are free of ethical constraints.” Anthony Champagne, *Interest Groups and Judicial Elections*, 34 *LOY. L.A. L. REV.* 1391, 1408-09 (2001).

which misleading, questionable, or improper statements may be directed. Because there has been so little research on the use of television in judicial campaigns, as opposed to research on campaigns for other offices, it is important to obtain a more general idea of the nature of judicial television ads.²⁷ Are the types of ads mentioned above characteristic of judicial campaigns? Or, are judicial television ads generally informative to voters? With a better understanding of the nature of judicial television ads, we could better understand this new era in judicial politics.

III. TELEVISION AND JUDICIAL CAMPAIGNS IN 2000 IN ALABAMA, MISSISSIPPI, MICHIGAN, AND OHIO: SIGNALING AND THE THEMES OF CRIME CONTROL, CIVIL JUSTICE AND FAMILY VALUES

With the generosity of the Brennan Center, I was able to obtain transcripts of forty-four judicial campaign ads that were run in Alabama, Michigan, Mississippi, and Ohio in the 2000 elections. These represent the bulk of judicial campaign ads broadcast in seventy-five major media markets in those states during the 2000 campaigns.²⁸ From a variety of other sources, I was able to identify eleven additional ad transcripts.²⁹

Some of the more notable characteristics of the ads are summarized in Table 2. The extent of third party involvement in the airing of ads is especially impressive. Of the fifty-five ads, only twenty-eight were paid for by the

27. The lack of research on judicial television ads is due to the newness of television as a judicial campaign medium. Until recently, limited funds made the use of television for judicial campaigns prohibitive. See Schotland, *supra* note 6, at 150. Paul Carrington writes that “the media blitz exponentially increases the cost of campaigns . . . [H]igh-priced judicial elections are a public disaster. The cost of such campaigns has been doubling almost every biennium so that judicial campaigns are regularly spending millions, much of it on spot advertising on commercial campaigns are regularly spending millions, much of it on spot advertising on commercial television . . .” Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 *LAW & CONTEMP. PROBS.* 79, 112 (1998).

28. Due to statistical coding errors, seven judicial ads that were identified by the ad monitoring system were not provided to the Brennan Center.

29. Three ads not in the Brennan Center compilation were candidate ads from Alabama that can be viewed at <http://www.yourvotealabama.org/adwatch/adsolution>. Two ads, one produced by the Michigan Democratic Party and the other by the Michigan Chamber of Commerce, were noted in Laura Potts, *High Court Race Begins Early with Dueling Ads*, *FREE PRESS* (Detroit), Aug. 17, 2000, at 1, available at http://www.freep.com/news/mich/court17_20000817.htm. Three ads were provided by Professor Roy Schotland of the Georgetown Law Center. They were all Chamber of Commerce ads from Mississippi. One Michigan Republican Party ad was located at <http://www.migop.org>.

Mr. William Quinlan also provided a Michigan Democratic Party ad. A final Michigan Democratic Party ad was mentioned on Associated Press wires on November 1, 2000 at 6:29 p.m. It is unknown how many times these eleven ads were broadcast.

candidates.³⁰ Ten of the ads were aired by the political parties, fourteen were aired by defense interests such as the Chamber of Commerce and other business groups, and three were aired by plaintiffs' lawyers and unions.³¹ The considerable number of ads paid for by third parties is a strong indication of the increased involvement of interest groups in judicial elections. From the perspective of the interest groups, an effort to persuade voters independent of any official statements by the candidate may be desirable since it removes the ad from the ethical restrictions and political accountability that may be placed on a candidate.³²

In discussing political ads, Ansolabehere, Behr, and Iyengar note that "[T]he battle over paid media is fought in 30-second increments."³³ This is certainly the case with televised judicial ads. All but five of the fifty-five commercials surveyed for the article were thirty seconds long and those five were each fifteen seconds in length. With few exceptions, these ads were repeated time and again. That is because for an ad to have impact on an election, it must be shown numerous times, often in prime time.³⁴ Judicial ads are no exception to this standard. The forty-four ads obtained from the Brennan Center were broadcast at least 13,203 times.³⁵ Those that were candidate ads were broadcast 7151 times and the third party ads were broadcast 6052 times. Thus, of the judicial ads for which data are available, forty-six percent of the judicial ads broadcast were not under the control of the candidate or the Canons of Judicial Ethics.

Not all ads received the same degree of repetition. One Mississippi candidate ad was broadcast only three times, while one Ohio Democratic Party ad was broadcast 1695 times and an Ohio Chamber of Commerce ad was broadcast 1159 times. Overall, only six ads were broadcast fewer than fifty times each. Thirteen ads were broadcast between fifty-one and 150 times each; nineteen ads were broadcast between 201 and 450 times each; two between 451 and 600 times each; and only four were broadcast over 900 times.³⁶ One should, however, be cautious in interpreting the importance of mere repetition of ads. In addition to the frequency of ads, other data regarding the ads must be considered to fully understand their value. In particular, data on the media market in which the ad was broadcast, the time period over which the ad was broadcast, and the time slots in which the ad was shown are important. Ads shown in urban areas such as Houston, for example, would have greater impact on potential votes than the same ad shown in the much smaller Abilene-Sweetwater market. Ads shown over a brief time period probably would not be absorbed by the voters as well as an ad broadcast over many days. Similarly, ads shown in some time slots or

30. See tbl.2.

31. *Id.*

32. Champagne, *supra* note 1, at 1408-09.

33. ANSOLABEHRE ET AL., *supra* note 23, at 100.

34. *Id.* at 89.

35. The seven ads not included in the Brennan Center compilation due to coding errors were broadcast a total of 2514 times. See Appendix, *infra*.

36. See *id.*

during certain programs would be far more likely to reach potential voters than at some other slots or programs.³⁷

There were still television ads that followed the traditional model of judicial campaigning—talking about the qualifications and experience of the candidate, not signaling judicial attitudes and values, avoiding discussion of legal issues or cases, and refusing to attack one's opponent. However, those ads were rare. Only eight of the fifty-five ads reflected such a traditional approach to judicial campaigning.³⁸

One thing that is particularly clear about the messages in many of these ads is that the commercials provide signals to voters about the candidates' judicial philosophies.³⁹ Those signals may sometimes be ambiguous. An example is an Alabama commercial in which the candidate and citizens comment on the supreme court candidate's fairness and impartiality. The candidate claims he has "the experience, the reputation, the judicial temperament and also the judicial

37. Deardourff Interview, *supra* note 13.

38. All of these ads were paid for by the candidates as opposed to interest groups. Two of the ads stressed newspaper endorsements. A speaker in one of the ads was a former U.S. senator (and former state supreme court justice). Another ad emphasized that the candidate had been praised by the governor. Still another ad stressed the candidate's father, a recently deceased former supreme court justice. An example of such a traditional ad was a fifteen-second ad aired in Ohio: "His integrity and philosophy have made him one of the most respected judges in Cuyahoga County. Judge **** has real world experience. ****. Honest, fair Ohio values." *O'Donnell Real World Experience*, Ohio, 2000 Election, Candidate Ad.

The aforementioned ad was run by the challenger against Justice Alice Resnick. Resnick was attacked with far more aggressive ads sponsored by the Chamber of Commerce and its affiliates. The Chamber's efforts in the Ohio Supreme Court race cost millions of dollars. Schotland, *supra* note 5. An example of the aggressive nature of the Chamber's ad campaign against Resnick is *Resnick Took from Injury Lawyers*, Ohio, 2000 Election, U.S. Chamber of Commerce.

39. Signaling is not limited to television ads. Some commenters have expressed the concern that signaling of attitudes and values actually represents a candidate's prejudging a case. See, e.g., David Barnhizer, "On The Make": Campaign Funding and the Corrupting of the American Judiciary, 50 CATH. U.L. REV. 361, 388 (2001). Barnhizer mentions reports that

"in one of the Illinois primaries this spring, a Republican Supreme Court justice, S. Louis Rathje, was unseated by a challenger who paid for campaign fliers that were distributed by anti-abortion groups. They described the challenger, Robert R. Thomas, as 'the only endorsed pro-life candidate.'" Judge Rathje warned that the tactic used by Thomas showed that politics were now a full part of judicial elections. Rathje claimed the problem is that: People who have cases in court . . . will have to get used to appearing in front of judges who have already stated their views. "Would you feel more or less comfortable . . . with a judge who has already told you how he is going to rule?" *Id.* (quoting William Glaberson, *State Judges Are Acting More Like Politicians as Challenges Grow*, J. REC. (Oklahoma City), June 23, 2000, available at 2000 WL 14296340) (footnote omitted). Judge Thomas said that the pro-life declaration was simply a statement of his personal views. "It has nothing to do with my even-handed participation in cases." *Id.*

philosophy that suits me well for that job.”⁴⁰ Except for one sentence, the ad is innocuous and does not offer any elaboration of the candidate’s experience, reputation, temperament or philosophy. However, in one sentence the candidate says, “I respect the right to a trial by jury.”⁴¹ On the one hand, the statement may be seen as mere campaign rhetoric. On the other, the candidate is arguably presenting a cue to voters about one of the more important legal issues in Alabama today—the extent to which juries function as decisionmakers.

Other ads are subtle and their meaning less ambiguous, even though they still rely on rather vacuous terms and phrases. For example, one candidate’s ad says, “He does not make policy from the bench [He is] honest, [has] common-sense, conservative.”⁴² The language is general, but it does project the image of a non-activist, conservative judicial philosophy.

While the above-mentioned ad signals certain attitudes and values to voters, many of the ads are much more glaring in discussing judicial values. One candidate ad stressed the candidate’s views on crime control in which the candidate stated, “I think for too long our courts have really emphasized the rights of criminals at the expense of victims.”⁴³ This was followed by an announcer saying, “Supreme Court Justice **** believes in protecting the rights of police officers, victims, and law-abiding citizens. Technicalities or loopholes shouldn’t keep criminals on the street. That is why Justice **** is supported by more than 22,000 Michigan police officers.”⁴⁴ The candidate then commented, “I think police officers are really champions of our society.”⁴⁵ Such a crime control appeal is, to say the least, not unusual. An Alabama Supreme Court candidate ran an ad saying,

Why did the Alabama Fraternal Order of Police endorse Judge **** over **** for Alabama Supreme Court? Because she respects law enforcement. Judge ****. A twenty-year record fighting crime as a prosecutor and judge. A ninety-one percent conviction rate in DUI cases as a district judge. And last year in two tragic cases, Judge **** sentenced two convicted murderers to the death penalty⁴⁶

40. *Woodall Nothing but Fair*, Alabama, 2000 Election, Candidate Ad.

41. *Id.*

42. *O'Donnell Without Fear or Favor*, Ohio, 2000 Election, Candidate Ad.

43. *Taylor Victims' Rights*, Michigan, 2000 Election, Candidate Ad.

44. *Id.* Endorsements by police, state trooper or sheriffs’ organizations are frequently mentioned in ads. In five ads, endorsements by various police organizations were mentioned and in two ads endorsements by both police organizations and prosecutors were mentioned. Finally, in one ad, endorsements by police and teacher organizations were mentioned. No other organizational endorsements were mentioned in any ads except for endorsements by various newspapers. Newspaper endorsements were mentioned in four ads. Newspaper endorsements in ads are considered especially useful since they provide a third party validation of the merits of the candidate. Deardourff Interview, *supra* note 13.

45. *See supra* note 44.

46. *Stuart F.O.P. Endorse*, Alabama, 2000 Election, Candidate Ad.

The ad touched all the buttons. Police liked this candidate. She was a prosecutor and a crime fighter. She was tough on drunk drivers. She was tough enough on crime that she would sentence murderers to death. After seeing the ad, few voters would doubt her views on law and order.

Of the fifty-five television ads surveyed for this Article, twenty-three presented some sort of a crime control message.⁴⁷ However, fifty-two percent (twelve of the twenty-three) of ads with a crime control message were candidate-sponsored ads. One is reminded of Oregon Justice Hans Linde's comment about judicial campaign slogans: "Every judge's campaign slogan, in advertisements and on billboards, is some variation of 'tough on crime.' The liberal candidate is the one who advertises: 'Tough but fair.' Television campaigns have featured judges in their robes slamming shut a prison cell door."⁴⁸

While a crime control message was extremely important in the campaign ads, another major theme of advertising dealt with civil justice issues. Of the fifty-five television ads, twenty-one of the ads offered some sort of treatment of civil justice issues, ranging from a criticism of a justice's dependence on funding from trial lawyers to a discussion of judicial candidates' views on product liability issues. However, while fifty-two percent of the crime control ads were candidate-sponsored, only twenty-four percent (five of twenty-one) of the civil justice ads were. The most frequent and clear-cut treatment of civil justice issues were run in ads by third parties. For example, one ad asked:

Is justice for sale in Ohio? You decide. Since 1994, Justice **** has taken over \$750,000 from personal injury lawyers. Justice **** ruled in favor of trial lawyers who had contributed to her campaign seventy percent of the time. After a union leader and a big contributor complained about a ruling **** made, **** became the only Justice to reverse herself in the case. ****. Is justice for sale?⁴⁹

A Michigan ad dealing with civil justice mentioned that the opposing candidate had "represented the radical Welfare Rights Organization and she's a personal injury lawyer."⁵⁰

One of the most blatant discussions of product liability issues was a Michigan ad:

Should corporations that know they're selling dangerous defective products be held accountable? Michigan Supreme Court Justices **** and **** don't think so. They support a law that makes it harder

47. This includes mention of endorsements by law enforcement and an ad denying that a judge had departed from sentencing guidelines. Mention of being a "tough judge" without a crime-related context or mention of background as a military policeman was not considered by me as being a crime control message.

48. Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1995).

49. *Resnick Is Justice for Sale*, Ohio, 2000 Election, Citizens for a Strong Ohio.

50. *Robinson and Fitzgerald Reverse*, Michigan, 2000 Election, Chamber of Commerce Ad.

to hold corporations accountable for dangerous products. ***** and ****. A law that could hurt families whose loved ones were killed or injured in accidents with Firestone tires. **** **** and ****. Oh no. Republicans who put big corporations and insurance companies ahead of people.⁵¹

Candidate ads also sometimes provided a strong message on civil justice issues. For example, one candidate ad in Michigan stated:

For over twenty years, I have been fighting for Michigan families in our legal system. I've learned that all people ask for is fairness. But today our supreme court is packed with politicians who side time and again with big insurance companies. My opponent has even been willing to ignore the law just to be sure that special interests win. That's wrong. I am ****. 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?⁵²

Notable within the category of ads with a civil justice theme was a recurring charge that the opposing candidate was "for sale" or "sold to business and insurance interests" or to trial lawyers. For example, a third party-funded ad in Alabama that attacked funding by trial lawyers stated:

[Announcer]: If you thought we finally got greedy trial lawyers out of Alabama politics, try again. Alabama trial lawyers are funneling millions of dollars to ****, ****, **** and ****'s campaigns for Supreme Court. And trial lawyers are spending even more to fund new attack ads. We know why trial lawyers are spending that kind of money but why are ****, ****, ****, and **** taking it? Tell Democrats ****, ****, ****, and ****: Get trial lawyer money out of our court.⁵³

One Ohio justice ran a fifteen-second reply and rebuttal ad to Chamber of Commerce ads saying, "I've enforced our laws for your protection. Now a powerful special interest wants to buy your court. We must stop them because we all deserve justice."⁵⁴

The most frequent theme besides crime control and civil justice was family values. Nineteen of the fifty-five ads touched on family values (including religion). An ad for an Alabama candidate for the supreme court had endorsements from people who felt the judge had benefited their children. The judge, who advertised that she was a "Founding Member of Children First Foundation," ran a closing to an ad in which a man said, "You are recognized as

51. *Markman Taylor Young Defective*, Michigan, 2000 Election, Michigan Democratic State Central Committee.

52. *Robinson Fighting for MI Families*, Michigan, 2000 Election, Candidate Ad.

53. *Greedy Trial Lawyers*, Alabama, 2000 Election, Citizens for a Sound Economy.

54. *Resnick Enforced Our Laws*, Ohio, 2000 Election, Candidate Ad.

a young leader who helps create a better future for our children.”⁵⁵ The Michigan Democratic Party praised one candidate in an ad because he “strongly supports working families.”⁵⁶ An Ohio candidate ad stressed that the candidate was a “judge, husband, father, youth soccer coach . . . [and] a state-wide leader in stopping domestic violence.”⁵⁷ Some ads brought religion into the family values theme.⁵⁸ One Mississippi candidate was involved with a child protection program and was also a Baptist deacon.⁵⁹ An Alabama ad mentioned that not only was the candidate a deacon, but he had also been married for thirty years.⁶⁰

The family values theme was sometimes used in conjunction with the crime control theme. Three candidates were said to “protect Michigan families.”⁶¹ Another Michigan ad mentioned that three supreme court candidates are “weak on gun crime” and “wrong for our kids.”⁶² A Mississippi candidate had worked at the Bureau of Narcotics where “she helped punish the drug pushers who victimize our children.”⁶³ The vote for three justices mentioned in a Michigan ad would provide “safer communities for our kids and families.” According to that ad, safer communities is what “justice means.”⁶⁴

Often in the Michigan ads, the family values theme was used in conjunction with the civil justice theme to illustrate how civil justice issues have relevance to the average voter. In a Michigan ad, a candidate combined the civil justice issue with the family values issue saying: “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?”⁶⁵ A Michigan Democratic Party ad used talking trees to accuse three justices of “taking hundreds of thousands in political contributions from the insurance industry and big business” and ruling against families.⁶⁶ That ad was followed by a Michigan Chamber of Commerce ad in which one of the trees, “Don Oak,” lamented his participation in the earlier ad and claimed the justices were not anti-family.⁶⁷ Still another Michigan Democratic Party ad had three justices dancing in a businessman’s pocket and it

55. *Stuart Dear Judge Stuart*, Alabama, 2000 Election, Candidate Ad.

56. *Fitzgerald Frank Kelly Endorsement*, Michigan, 2000 Election, MI Democratic State Committee.

57. *Black Judge Husband Leader 2*, Ohio, 2000 Election, Candidate Ad.

58. Two candidates in Alabama placed considerable stress on a religious issue. One was a judge who advertised that he had fought to display the Ten Commandments in his courtroom against the efforts of liberals and the ACLU. Another candidate’s ad explained that he had represented the judge against the ACLU in the Ten Commandments litigation.

59. *Judge Keith Starrett*, Mississippi, 2000 Election, Chamber of Commerce Ad.

60. See www.yourvotealabama.org/adwatch.

61. *Fitzgerald Frank Kelley*, Michigan, 2000 Election, MI Democratic State Committee.

62. *Fitzgerald Weak on Crime*, Michigan, 2000 Election, MI Republican State Committee.

63. *Cobb Stands up for Us 15*, Mississippi, 2000 Election, Chamber of Commerce.

64. *Taylor Markm as Young Justice*, Michigan, 2000 Election, Candidate Ad.

65. *Robinson Fighting for MI Families*, *supra* note 52.

66. Potts, *supra* note 29.

67. *Id.*

was explained that families never got a fair shake.⁶⁸ Finally, a Michigan Democratic Party ad portrayed two men packing defective baby carriers that were being shipped to Michigan because, “their supreme court makes it almost impossible for anyone to sue if one of their kids gets hurt by one of these [baby carriers]—even if we know they’re dangerous.”⁶⁹

IV. ATTACK AND RESPONSE ADS

A common theme of the television ads was to attack the opponent. Kathleen Hall Jamieson and Karlyn Kohrs Campbell have stressed that a great danger of attack ads, especially if run by a candidate, is that they may discredit the attacking candidate. As a result, they have argued that attack ads were more likely to be sponsored by third parties.⁷⁰ There were a total of seventeen attack ads of the fifty-five surveyed, fifteen of which were run by third parties.

Several of the attack ads went further and explained why the other candidate should be supported. Jamieson has noted that this combination of advocacy and attack is quite effective since it encourages the voter to make distinctions between candidates—both point out the downside of one candidate and why the other candidate should be supported.⁷¹ Of the seventeen attack ads, five combined attack of one candidate with advocacy for another. Often, the attack ads criticized the opposing candidate by name, although one Alabama ad mentioned no names, but criticized the Republicans on the Alabama Supreme Court.⁷²

Attack ads lead directly to response and rebuttal, but response and rebuttal ads were not as frequent as attack ads, and they, like the attack ads, tended to be funded by third parties rather than by the candidate.⁷³ Eight of the ads involved reply and rebuttal, only one of which was funded by a candidate. The Michigan Republican Party ran an ad criticizing an appellate decision by a candidate for the supreme court that involved the sentence of a child molester.⁷⁴ In response, the Michigan Democratic State Committee ran an ad in which the former Michigan attorney general stated: “That ad attacking Judge **** is disgraceful and a complete lie. Judge **** did not impose the sentence mentioned in the ad. I’ve

68. Videotape on file with the *Indiana Law Review*.

69. *Id.*

70. KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, *THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS, AND THE MASS MEDIA* 267 (5th ed. 2000).

71. Kathleen Hall Jamieson, *Doing Well by Doing Good?*, in “STAND BY YOUR AD”: A CONFERENCE ON ISSUE ADVOCACY ADVERTISING 6 (1997).

72. *Firestone and Ford*, Alabama, 2000 Election, Alabama Democratic Party.

73. Jamieson points out that the response and rebuttal to an attack is as old as the Republic, noting that “[A] falsehood that remains uncontradicted for a month, begins to be looked upon as a truth . . . and when the detection at last makes its appearance, it is often as useless as that of the doctor who finds his patient expired.” KATHLEEN HALL JAMIESON, *DIRTY POLITICS* 102 (1993) (citing William Corbett, *Porcupine’s Gazette* (1797)).

74. See www.migop.org.

known **** to be an honest and fearless judge.”⁷⁵ Then the former attorney general⁷⁶ went on to endorse all three Democratic supreme court candidates and added a more general statement about attacks on the candidates: “Don’t believe it when special interest groups use sleaze on these fine people. ****. ****. ****. Supreme court candidates who’ll protect Michigan families.”⁷⁷

The Chamber of Commerce ads that were run in several states provoked strong reply ads from other third parties and a candidate. An example of a response ad that went on the attack was a candidate-sponsored ad in Mississippi that attacked the Chamber of Commerce, the candidate’s opponent, and the alleged attitude of his opponent on civil justice issues.

[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 ****, 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]: Sold. [Announcer]: Send these out-of-state meddlers a clear message that the Mississippi Supreme Court is not for sale. [Announcer 2]: On November 7, vote for the candidate who’s not for sale . . .⁷⁸

The Ohio Democratic Party ran an ad that began as a response ad and later turned to an attack ad:

[Announcer 1]: Why are corporate polluters and a big insurance company spending hundreds of thousands distorting ****’s record?

75. *Fitzgerald Frank Kelley, supra* note 61.

76. The main speakers in most of all the ads were either announcers or candidates. One explanation for the relatively few ads that presented endorsements by public officials is that there are very few officials today with popularity so great that their endorsement would clearly benefit the judicial candidate. *See Deardourff Interview, supra* note 13. However, a former U.S. senator (and former supreme court justice) appeared in one ad, a former state attorney general appeared in two ads, an attorney appeared in three ads, a fellow justice on the court appeared in one ad, and a sheriff appeared in one ad. In one ad, the chief justice’s praise was quoted and the candidate mentioned the names of the two governors who appointed him to offices. One ad mentioned an endorsement by the governor, although the governor was not a speaker in the ad. Another ad was built around the candidate’s father, then deceased, who had previously served on the state’s supreme court. Undoubtedly, there could be significant problems with collegiality on a court where fellow justices endorse the losing candidate.

Chief Justice Springer of the Nevada Supreme Court has written that endorsements by officials such as a state attorney general is a “political alliance” that creates problems of partiality in cases where that official is involved. *See Nevius v. Warden*, 960 P.2d 805, 809 (Nev. 1998) (Springer, C.J., dissenting).

77. *Fitzgerald Frank Kelley, supra* note 61.

78. *Easley Not for Sale*, Mississippi, 2000 Election, Candidate Ad.

[Announcer 2]: Maybe because she's taken on the special interests.
 [Announcer 1]: Stood up for families by exposing Ohio's dilapidated schools. [Announcer 2]: Fought for quality education for all Ohio's children. [Announcer 1]: But in the same landmark court decision, **** said no to education reform and no to our kids. [Announcer 2]: Say no to special interests and no to ****. . . .⁷⁹

The Ohio ad's treatment of decisions was not a rare event. In four ads there was positive mention of decisions and in six ads there was negative mention. A Chamber of Commerce ad run in Ohio displayed an especially strong negative treatment of a decision. The ad stated:

[Announcer]: It was a simple law. A common-sense measure to insure college professors at public universities in Ohio spend more time in the classroom teaching. But Justice **** wrote a majority opinion saying this education accountability law violated the Constitution. ****'s decision stopped the legislature's effort to have instructors spend more time in the classroom. The United States Supreme Court stood up for common sense and overturned ****'s holding in an 8-1 decision so today in Ohio instructors teach and students learn in spite of ****.⁸⁰

Another ad that voiced especially strong criticism of court decisions was run by the Alabama Democratic Party:

[Announcer]: Firestone tires and Ford Explorers. A national tragedy. But it's worse for victims in Alabama. We don't even have the right to confront Ford or Firestone in court. Alabama Firestone victims lost their right to trial by jury. All because our Republican supreme court has ruled that binding arbitration is the only option. Firestone and Ford like it but you shouldn't. On Tuesday, vote against Alabama's Republican supreme court.⁸¹

The effort to use a highly publicized legal issue, such as the safety of Firestone tires, was also used in a Michigan Democratic Party ad:

[Woman]: Should corporations that know they're selling dangerous, defective products be held accountable?

[Man]: Michigan Supreme Court Justices ****, ****, and **** don't think so.

[Woman]: They support a law that makes it harder for people to hold corporations accountable for dangerous products.

[Man]: ****, ****, and ****.

[Woman]: A law that could hurt families whose loved ones were killed or injured in accidents with Firestone tires.

79. It should be noted that the ad discussed Ohio Supreme Court decisions. *Resnick Corporate Polluter*, Ohio, 2000 Election, Ohio Democratic Party Ad.

80. *Resnick College Law*, Ohio, 2000 Election, Chamber of Commerce Ad.

81. *Firestone and Ford*, *supra* note 72.

[Man]: ****, ****, and ****, oh no.

[Woman]: Republicans who put big corporations and insurance companies ahead of people.⁸²

CONCLUSION

One important aspect of the “nastier, noisier, and costlier”⁸³ modern judicial campaign is the widespread use of television in judicial elections. The existing data on judicial campaigns strongly suggest that television is very effective in generating votes for judicial candidates. With television ads, there was widespread signaling by Internet groups, political parties, and often by the candidates themselves of the attitudes and values of judicial candidates. While such campaign tactics have undoubtedly been used prior to the advent of television, they seem more visible and common with the greater involvement of third party interest groups in modern judicial campaigns.

In the sample of television ads examined for this Paper, judicial candidates battled to outdo one another in their tough-on-crime attitudes and their support for and by law enforcement. As Hans Linde explained, such an approach has remarkable political appeal, but one has to wonder about whether judges should so closely align themselves with crime control institutions and attitudes.⁸⁴ Indeed, the Chief Justice of Nevada wrote in a dissenting opinion, “Judges should be judging crime not ‘fighting’ crime.”⁸⁵ While crime control was clearly the most common theme of judicial television ads, civil justice issues and family values were also important themes. The civil justice theme commonly focused on charges of opposing candidates being captives of special interests and accusations that campaign contributions have had a corrupting effect on the opponent. The third theme was one of family values, which emphasized that the candidate was pro-family and holds solid traditional values. In Michigan, the family values theme meant, depending on the sponsor of the ad, that the three Democratic candidates were either “candidates who’ll protect Michigan families” or candidates who were “wrong for our kids.”⁸⁶

The most important aspect of judicial television ads in the 2000 elections was the involvement of third parties. About forty-six percent of the number of broadcasts for which the data were available were broadcasts of third party ads. The involvement of third parties has particularly intensified the battles over civil justice issues and the viciousness of judicial campaigns has clearly increased as a result of their involvement. The third party ads are, unlike candidate ads, not subject to the Canons of Judicial Ethics—and it shows. Of course, while it is clear not all candidates appreciate the support of third parties,⁸⁷ it is also the case

82. *Markman Taylor Young Defective*, *supra* note 51.

83. Schotland, *supra* note 6, at 150.

84. Linde, *supra* note 48, at 2000.

85. *Nevius v. Warden*, 960 P.2d 805, 810 (Nev. 1998) (Springer, C.J., dissenting).

86. *Fitzgerald Frank Kelley*, *supra* note 61; *Fitzgerald Weak on Crime*, *supra* note 62.

87. The Chief Justice of Mississippi, for example, disavowed the third party ads on her behalf

that candidates may benefit from the hard-hitting third party ads and yet avoid political accountability for them.

The use of television to focus on unpopular decisions (or decisions that can be interpreted that way) may cause judges to be more cautious about the electoral consequences of individual decisions. As noted earlier, one Michigan GOP ad focused on a decision by an intermediate appellate judge that upheld a light sentence for a pedophile.⁸⁸ In addition to the focus on one case, the word “pedophile” in large type flashed close to the judge’s name.⁸⁹

With the increasing importance of money and interest groups to the funding and airing of television ads, judicial candidates may well have to appeal more to the support of vastly opposing interests. Alabama Supreme Court races, for example, have been described as “a battleground between business and those who sue them.”⁹⁰ The result is likely to be more extremist appeals by judicial candidates and less moderation in judicial decisions. Unfortunately, the genie is out of the bottle and cannot be put back in.⁹¹ Solutions harkening back to the old, low cost-low media era in judicial campaigns are unrealistic, and the judicial politics of this era will clearly continue to involve television ads such as those discussed in this Paper.

With the widespread involvement of Internet groups and parties in judicial campaigns, along with big money and the use of television, come important issues involving the appropriate limitations on judicial campaign speech. To what extent does the First Amendment allow for restrictions, if any, on this new era in judicial campaigns? The companion Articles in this Symposium will address these questions.

and may have been defeated by a backlash against third party involvement. Schotland, *supra* note 5.

88. See *supra* note 21 and accompanying text.

89. The Michigan GOP response to questions about the “pedophile” label was, “We don’t call him [a pedophile].” See Schotland, *supra* note 5.

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

91. In Pennsylvania’s 2001 supreme court elections, business advocacy groups organized in favor of one candidate, while unions and trial lawyers backed the other candidate. See Brennan Center, *Court Pester E-lert*, Aug. 14, 2001 (summarizing Josh Goldstein & Chris Mondics, *Pro-Business Group Tries to Sway Pennsylvania Supreme Court Appointment*, PHILA. INQUIRER, Aug. 12, 2001, available at 2001 WL 26624197).

Table 1
Television and Texas Supreme Court Election Outcomes

Year	Candidate (Established candidate listed first)	Statewide Vote for Established Candidate	Vote in Media Markets with Television Buys by Established Candidate Only	Vote in Media Markets with No Television Buys
2000	Gonzales Gorman	58% (523,983)	59% (497,611) 41% (345,536)	43.9% (26,372) 56.1% (33,680)
1998	Hankinson Smith	59.42% (290,964)	64.62% (231,045) 35.38% (126,502)	48.67% (26,385) 51.33% (27,829)
1994	Hecht Howell	60.98% (277,522)		47.65% (46,477) 52.35% (51,061)
1992	Enoch Howell	59.94% (371,549)		42.59% (16,957) 57.41% (22,855)

Source: The data were compiled by Texas' Chief Justice Thomas R. Phillips and by Karl Rove and were presented at the Summit on Improving Judicial Selection, December 8-9, 2000. Further detailed data can be found in 34 LOY. L.A. L. REV. 1508-12 (2001).

Table 2
Characteristics of Judicial Campaign Television Ads
(Total ads: 55)

Purchaser of Ads	Candidate: 28 Political Parties: 10 Defense (Business) Interests: 14 Plaintiffs' Attorneys and Unions: 3
Themes of Ads (Some ads have more than one theme)	Traditional Judicial Campaigning: 8 Crime Control: 23 Family Values: 19
Type of Ads	Attack Ads: 17 Reply and Rebuttal Ads: 8
Ads that were Candidate-Sponsored	Traditional Ads: 8 of 8 Crime Control: 12 of 23 Civil Justice: 5 of 21 Family Values: 7 of 19 Attack Ads: 2 of 17 Reply and Rebuttal: 1 of 8

APPENDIX

DATA ON JUDICIAL TELEVISION ADS

State	paid by:	crime cont.	civil justice	traditional	family val.	times shown
AL	AL Dem. Party		yes			139
AL	Candidate			yes		128
AL	Candidate		yes			224
AL	Candidate	yes				304
AL	Candidate			yes		322
AL	Candidate					326
AL	Candidate			yes		347
AL	Candidate			yes		376
AL	Candidate			yes	yes	419
AL	Candidate				yes	Unknown
AL	Candidate				yes	Unknown
AL	Candidate				yes	Unknown
AL	Cit. Sound Eco.		yes			78
MI	Candidate	yes				90
MI	Candidate	yes				110
MI	Candidate		yes		yes	267
MI	Candidate	yes				354
MI	Candidate	yes				364
MI	Candidate	yes	yes			427
MI	Candidate	yes			yes	443
MI	Chamber	yes	yes			82
MI	Chamber		yes		yes	Unknown
MI	MI Dem. Party	yes			yes	11
MI	MI Dem. Party	yes			yes	347
MI	MI Dem. Party		yes		yes	457
MI	MI Dem. Party		yes		yes	Unknown
MI	MI Dem. Party		yes		yes	Unknown
MI	MI Dem. Party		yes		yes	Unknown
MI	MI Dem. Party	yes			yes	206
MI	MI Dem. Party	yes			yes	Unknown
MS	Candidate	yes				3
MS	Candidate	yes	yes			6
MS	Candidate	yes				54
MS	Chamber	yes			yes	22
MS	Chamber	yes			yes	66
MS	Chamber	yes				Unknown
MS	Chamber	yes				Unknown
MS	Chamber	yes				Unknown
OH	Candidate	yes			yes	100
OH	Candidate	yes				106
OH	Candidate			yes		120
OH	Candidate			yes		278

