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THE SELECTION AND RETENTION OF JUDGES IN TEXAS

by

Anthony Champagne

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I. INTRODUCTION

A. Purpose of the Research

Judicial selection has been the subject of a long-standing debate both in Texas and in other states. Much of that debate is emotionally charged or based on personal experiences. The purpose of this paper is to offer an empirical analysis of the present system of judicial selection in Texas. The paper will explore what is actually happening within the Texas system and, where appropriate, will draw comparisons and contrasts with studies of other systems of selection in other states.

Prior to exploring Texas’ court structure and contemporary Texas judicial selection, a brief overview of the state’s past experiences with judicial selection will be offered. A short discussion of the major systems of judicial selection will then be presented. In this way, a context will be provided for the analysis of Texas’ system.
B. Overview of the Texas Experience

A diagram of the structure of the Texas judicial system is presented in Figure 1. This paper will be primarily concerned with the district courts, the courts of appeals, and the two statewide courts, especially the Texas Supreme Court.

The Texas Constitution provides for the election of most of the state's judges. However, the governor appoints district and appellate judges to vacant positions. County courts at law judges and justices of the peace are also elected; vacant positions are filled through appointment by the county commissioners' court. Municipal judges may either be appointed or elected depending on the city charter or ordinance.¹

Judges were not always elected officials in Texas. When Texas first became a state, judges were appointed by the governor with consent of the Texas Senate. Five years later, in 1850, the influence of Jacksonian Democracy led to the introduction of judicial elections in Texas.²

During Reconstruction, gubernatorial appointment of judges was reinstated. The Reconstruction Constitution of 1869 was replaced in 1876 by the current Texas Constitution, which requires election of judges. The 1876 Constitution greatly limited the powers of the governor and was a reaction to the powers exercised by Governor E.J. Davis under the 1869 Constitution.³ Under the 1869 Constitution, not only did the governor have the power to appoint judges, but he also appointed mayors, district attorneys, public weighers, and city aldermen. This appointment power was so extensive that it included 10,000 state officials.⁴

Since early in this century, the popularity of partisan election of judges has waned outside of the South.⁵ Since the South was until recently a one-party Democratic region, partisan election meant that competition for judicial offices, if it occurred at all, occurred within the Democratic Party. Increasingly, Texas, along with much of the South, is experiencing the growth of the Republican Party. Along with that growth comes competition for judicial offices during the regular election.

The debate over the desirability of retaining the current system of judicial selection in Texas, however, precedes the growth of the Republican Party in the state. Proposals for constitutional amendments to change the system of selection have been made frequently.⁶ In 1974 the Constitutional Revision Commission offered two judicial selection proposals: one for a system based

³. Id. at 677.
⁵. COMPENDIUM, supra note 1, at 3-4, 14.
⁶. Dickson, Perspectives on Judicial Reform in Texas: View From the Bench, 2 PUB.
FIGURE 1
COURT STRUCTURE OF TEXAS
January 1, 1985

SUPREME COURT
(1 Court - 9 Justices)

Jurisdiction:
* Final appellate jurisdiction in civil and juvenile cases.

COURT OF CRIMINAL APPEALS
(1 Court - 9 Judges)

Jurisdiction:
* Final appellate jurisdiction in criminal cases.

CIVIL APPEALS

COURT OF APPEAL
(14 Courts - 79 Justices)

Jurisdiction:
* Intermediate appeals from trial courts in their respective supreme judicial districts.

CRIMINAL APPEALS

DISTRICT LEVEL COURTS
(367 Courts)

DISTRICT COURTS (357)

Jurisdiction:
* Original jurisdiction in civil actions over $500, divorce, title to land, contested elections, and contested probate matters.
* Original jurisdiction in felony criminal matters.
* Juvenile matters.

CRIMINAL DISTRICT COURTS (10)

Jurisdiction:
* Same as other district courts, but to give preference to criminal cases.

COUNTY-LEVEL COURTS
(386 Courts)

CONSTITUTIONAL COUNTY COURTS (254)

Jurisdiction:
* Original jurisdiction in civil actions between $200 and $1,000.
* Probate (contested matters transferred to District Court).
* Exclusive original jurisdiction over misdemeanors with fine greater than $200 or jail sentence (except where there is a Criminal District Court).
* Appeals de novo from lower courts.

COUNTY COURTS AT LAW (121)

Jurisdiction:
* Limited jurisdiction over civil matters, most under $5,000.
* Limited jurisdiction over criminal matters.
* Appeals de novo from lower courts.

PROBATE COURTS (11)

Jurisdiction:
* Limited probate matters.

MUNICIPAL COURTS
(838 Courts - 1003 Judges)

Jurisdiction:
* Criminal misdemeanors with fine less than $200.
* Exclusive jurisdiction over municipal ordinance violations.

JUSTICE OF THE PEACE COURTS
(968 Courts)

Jurisdiction:
* Civil actions under $500.
* Small claims.
* Criminal misdemeanors with fine less than $200.
* Preliminary hearings.

Source: Select Committee on The Judiciary, Final Report and Recommendations To The 69th Legislature (Austin: State of Texas, undated), Appendix I.
on the Missouri plan and the other for nonpartisan election of judges. Those proposals were rejected, and over the next four legislative sessions at least fifteen unsuccessful proposals were offered favoring either the Missouri plan or nonpartisan election.\footnote{7
Select Committee on Judicial Selection, Interim Report to the 68th Texas Legislature 35 (1982); Texas Constitutional Revision Commission, A New Constitution for Texas: Text, Explanation, Commentary 114-117 (1973).}

The following section will explore the major systems of judicial selection. An assessment will then be made of the current operation of the system of partisan election of judges in Texas.

II. THE MAJOR SYSTEMS OF JUDICIAL SELECTION

A. The Variety of Ways Judges are Selected

There are numerous ways to select judges. So many methods of judicial selection exist that hardly any two states have identical systems.\footnote{8
Compendium, supra note 1, at 6.} Most states have hybrid systems in which some judges will be chosen under one method and judges at another level of the court system will be chosen by a completely different method. Some states also have different methods for filling vacancies than exist for selection at the beginning of a judicial term of office.\footnote{9
Id. at 6, 49-179.}

If a general classification scheme is developed for the methods of judicial selection, it is possible to identify four major types of selection: (1) appointment; (2) commission selection; (3) nonpartisan election; and (4) partisan election. Within each of these general categories are numerous variations. For example, judges may be appointed by the governor, by the legislature, or by sitting judges.\footnote{10
Id. at 3-7.}

A state's choice of a system of judicial selection may be explained in large part by historical trends. States that rely on appointive systems often continued that practice from their colonial or Revolutionary War practices. The original thirteen states tend to stress appointive systems. Eastern and Southern states, the states most affected by the Jacksonian pressures for popular reforms, continue to stress partisan election of judges. Nonpartisan elections were adopted largely by those Western and Midwestern states that were just entering the Union in the latter part of the nineteenth and early part of the twentieth centuries. It was during this time period that Populist and Progressive movements were sweeping the country. Commission selection gained support by stressing the professionalization of the judiciary and by gaining the support of lawyers' professional associations. It is commission selection that has slowly made inroads against all of the other systems of judicial selection.\footnote{11
A discussion of all of the variations in selection mechanisms and their strengths and weaknesses is beyond the scope of this research; however, the remainder of this section will offer a brief assessment of the four major systems of judicial selection and some of the variations upon those systems.

1. Appointment of Judges. As Table 1 shows, appointment is used for the selection of all or most judges in seven states. It is also used for the selection of all federal judges. Three states—Maine, New Jersey, and Rhode Island—follow the national model in which the chief executive nominates and the senate confirms a judicial candidate. Three states—Connecticut, South Carolina, and Virginia—have a system of legislative appointment to most courts. In New Hampshire, a five member elected council confirms the governor's nominee.12

The advantage of the appointment process is, depending on one's ideology, also its weakness. That is, the system promotes judicial independence by having no substantial check on the judge after the confirmation process. The judge's accountability to the public occurs only indirectly through the electoral responsiveness of the appointing and confirming officers.13 Judicial accountability is a matter of degree. It is quite simply the extent to which the people directly choose their judges. Obviously, for such a choice to be meaningful, it must be an informed choice. Judicial independence is at the opposite end of the continuum from judicial accountability. Judicial independence is the extent to which the judiciary is removed from the voting process. A system of judicial appointment maximizes judicial independence. These definitions of accountability and independence exclude any ethical or moral connotations that are sometimes associated with the two terms.

The characteristics of judicial appointees are determined by the appointing officer, who may be concerned with merit, friendship, party loyalty, or ideological purity.14 At least for the United States Supreme Court, there is some evidence that the appointment process has worked reasonably well in selecting excellent judges. In June 1970, 65 law school deans and professors of law, history, and political science evaluated the performance of 96 justices who had served on the Supreme Court from 1789-1969. The classification scheme is, of course, a highly subjective one; however, 12 justices were rated "Great;" 15 "Near Great," 55 "Average," 6 "Below Average," and only 8 were rated as "Failures."15

In order to discourage emphasis on political concerns at the expense of merit, the American Bar Association (ABA) has a standing committee that rates federal judicial nominees as "well qualified," "qualified," or "not qualified." The ratings are subjective evaluations based on the judicial candidate's reputation, age, health, legal experience, and temperament. The ABA

12. COMPENDIUM, supra note 1, at 6.
15. The evaluation is published in H. ABRAHAM, supra note 14, at 289-90.
Table 1
Systems of Judicial Selection Within the States
1980

<table>
<thead>
<tr>
<th>Appointment</th>
<th>Commission Selection</th>
<th>Partisan Election</th>
<th>Nonpartisan Election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>Alaska</td>
<td>Alabama</td>
<td>California</td>
</tr>
<tr>
<td>Maine</td>
<td>Arizona</td>
<td>Arkansas</td>
<td>Florida</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Colorado</td>
<td>Georgia</td>
<td>Idaho</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Delaware</td>
<td>Illinois</td>
<td>Kentucky</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Hawaii</td>
<td>Indiana</td>
<td>Louisiana</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Iowa</td>
<td>Mississippi</td>
<td>Michigan</td>
</tr>
<tr>
<td>Virginia</td>
<td>Kansas</td>
<td>New Mexico</td>
<td>Minnesota</td>
</tr>
<tr>
<td></td>
<td>Maryland</td>
<td>New York</td>
<td>Montana</td>
</tr>
<tr>
<td></td>
<td>Massachusetts</td>
<td>North Carolina</td>
<td>Nevada</td>
</tr>
<tr>
<td></td>
<td>Missouri</td>
<td>Pennsylvania</td>
<td>North Dakota</td>
</tr>
<tr>
<td></td>
<td>Nebraska</td>
<td>Tennessee</td>
<td>Ohio</td>
</tr>
<tr>
<td></td>
<td>Vermont</td>
<td>Texas</td>
<td>Oklahoma</td>
</tr>
<tr>
<td></td>
<td>Wyoming</td>
<td>West Virginia</td>
<td>Oregon</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>South Dakota</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Utah</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Washington</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Wisconsin</td>
</tr>
</tbody>
</table>

Classification is based upon the system of selection used for initial selection of the largest number of judges within each state.


has had some influence in the appointment process; however, a President can successfully override most efforts to prevent the confirmation of a nominee who is rated “not qualified.”

It seems likely that presidents have a reasonably good notion of the ideologies of the people whom they appoint to the bench. The Reagan Administration has made particularly strong efforts to discern the beliefs of prospective judicial nominees by inquiring about the candidate’s views on pressing social issues. At least at the federal level, the appointment process can be used by a chief executive to mold a political agenda.

Perhaps the most innovative development in the appointment process in recent years was the Carter plan for the selection of federal judges. Through an executive order, President Carter established a series of advisory panels that were collectively called the United States Circuit Judge Nominating Commission. Senators were encouraged to establish similar commissions in their states for the recruitment of federal district judges. The purpose of these panels was to promote appointments based on merit and to enhance the pool of eligible nominees, particularly the pool of minorities and

women.  

The panels have been criticized by some for their strong political makeup. Though differences existed among the circuits, one scholar found that overall the circuit judge panels were weighted with Democrats, lawyers, and Carter campaign workers. They have also been criticized for having unduly rigid screening standards. Yet the panels have also been praised for “bringing an element of substantial reform to a process characterized for years by politics and patronage.”

It is possible to compare some of the characteristics of the Carter plan judges with traditionally appointed judges since not all senators used the Carter plan for district judges. According to one scholar’s research, based upon a personal data questionnaire that was required from all judicial nominees prior to Judiciary Committee confirmation hearings, there was a tendency for the Carter plan to produce more nonwhite and female judges than the traditional appointment process. Nearly 40% of the Carter plan nominees were nonwhite and/or female compared to about 26% of the nominees from the traditional process. There was no relationship between Carter plan nominees and graduation from elite law schools or receipt of law school honors compared to traditional nominees. There was a tendency for Carter plan nominees to be graduates of out-of-state law schools compared to traditional nominees—35.2% compared to 18.2%. Perhaps these statistics suggest that Carter plan appointees tended to be less parochial than traditional appointees.

Research has found that panel nominees were just as likely as traditional nominees to give speeches, get involved in political campaigns, and be candidates for office. Contrary to the conventional wisdom, panel procedures did not create a greater likelihood that nominees would be apolitical.

Additionally, research has shown that the legal practices of panel nominees and traditionally appointed nominees proved to be very similar. The only difference in legal careers of panel versus traditional nominees was a slight tendency for panel nominees to have greater involvement in criminal and trial litigation.

As one scholar has concluded, rather than dramatically changing the types of people who are recruited to the federal bench, the strength of the Carter plan was to open up the selection process to a much greater number of potential nominees than would exist under the traditional appointment system.

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23. Id. at 232.
24. Id. at 234.
25. Id. at 237.
2. Commission Selection. There are two basic kinds of commission selection plans. One is the Missouri plan, in which a commission composed of lawyers, judges, and lay people prepares a list of possible judicial nominees for the governor. The governor's appointee must be selected from the list. After a period of time, often one year, the judge then runs for office in a retention election. In such an election, the judge has no opponent. The voters are asked to vote “yes” or “no” on whether the judge should be retained in office. If the judge is retained, the judge will serve a specified term before facing another retention election.\(^{26}\)

The California plan is the second major type of commission selection system. With the California plan, rather than preparing a list of prospective judicial nominees, the Commission on Judicial Appointments has veto power over the governor's nominee.\(^{27}\) Compared to the Missouri plan, the main criticism of the California plan is that it may be more difficult for a commission to reject the choice of the governor than it would be to present the governor with names from which a choice must be made.\(^{28}\)

Both types of commission plans check the appointment power of the governor and reflect a compromise between the goals of selection of judges by the public and independence from the voting process. Theoretically, judges appointed under commission plans are not as subject to public opinion as they would be if they were regular participants in partisan political contests. Yet the retention election offers some degree of electoral accountability over judges. It is also argued that partisan considerations are lessened by commission selection and that the use of commission selection enhances the concern for the appointment of able individuals to the bench.

Although commission selection has been adopted for the initial selection of all or most judges in thirteen states, scholars have identified both problems and possible problems with the operation of this system. As will be noted in the section on the quality of judges, measurement of judicial quality is a very subjective process that is not easily subject to empirical study. However, one such subjective comparison of lawyers' ratings of Missouri plan judges with partisan elected judges did find that the Missouri plan lessened the likelihood of the most poorly rated judges being selected. On the other hand, it did not produce the highest rated judges.\(^{29}\)

Partisan considerations remain in the selection of judges under commission plans. An analysis of the first twenty-five years of the Missouri plan showed that governors tended to appoint members of their own party. The commission members, with the knowledge that the person would never be appointed, often placed an opposing party member on their list of prospective nominees. It was also found that commission members would rig the list of prospective nominees to achieve their political or personal goals. Additionally, campaigns for lawyer members on the commission reflected deep-

\(^{26}\) Compendium, supra note 1, at 4-6; Douglas, supra note 2, at 683-87.
\(^{27}\) H. Abraham, supra note 13, at 37.
\(^{28}\) Id.
rooted tensions between plaintiff and defense bars. Though the plaintiff's bar fared reasonably well in getting its members on the commissions that are responsible for trial judges, the commission for appellate selection tended to have little representation from the plaintiff's bar.\textsuperscript{30}

The retention election may promote electoral accountability; however, this is open to question. Only one judge in Missouri's long experience with the Missouri plan was defeated in a retention election.\textsuperscript{31} Nationwide, of all retention elections in the election years of 1972, 1974, 1976, and 1978, 1.6% of judges were not retained.\textsuperscript{32} This low percentage may indicate either overwhelming satisfaction with the judges selected under the commission system, or it may indicate that retention elections are little more than "rubber-stamp" approvals of judges. A study of the 33 judges who were not retained in the four election years from 1972-1978 suggests that, for most of those judges, defeats did involve issues related to judicial merit. Questions of judicial competence were involved in 13 of the races; debates over judicial philosophy in 13; concerns over judicial conduct in 12 races and judicial temperament in 11. Controversial decisions were issues in 6 races; criminal activity by the judge in 5; and public scandals in 5. Matters relating to local politics were involved in 4 races and miscellaneous issues in 7. The number of issues adds up to more than 33 because most of the races involved more than one issue.\textsuperscript{33}

The retention election offers some degree of judicial accountability to the voters. For example, a slightly larger percentage of judges were defeated nation-wide in retention elections in the 1970s than were defeated through the election process in Texas in 1956.\textsuperscript{34} However, the 1970s retention election nation-wide led to a defeat rate for judges that was about one-third of the defeat rate for judges in Texas in the period 1952-1962.\textsuperscript{35} That electoral accountability is somewhat retained creates a possibility that special interest groups will control low voter participation judicial elections and that judges will become dependent on special interests for retention election campaign funding.\textsuperscript{36}

Rather than taking the "politics" out of judicial selection, the main strength of the commission plan for the selection of judges is that it does provide a check on the appointment power of a governor.

\textsuperscript{30} Id. at 101-198.
\textsuperscript{31} S. CARBON & L. BERKSON, JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES 23 (1980).
\textsuperscript{32} Id. at 21.
\textsuperscript{33} Id. at 26-27.
\textsuperscript{34} Henderson & Sinclair, supra note 14, at 441.
\textsuperscript{35} Id.
\textsuperscript{36} Voter participation in retention elections is low. In the first 25 years of the Missouri plan, only one Missouri judge was not retained. That judge lost the retention election for a variety of reasons, but those reasons included the opposition of a newspaper and a public utility. See Watson, Judging the Judges, 53 JUDICATURE 283, 289 n.5, 290 (1970). Well organized New Right groups have been responsible for the strong attack on California Chief Justice Rose Bird, and those groups may succeed in defeating her in a retention election. See Jenkins, The Trouble with Rose Bird, TWA AMBASSADOR, Nov. 1985, at 68 passim.
3. Nonpartisan Election. Nonpartisan elections reflect a somewhat different compromise between the goals of independence from the voting process and electoral accountability than does commission selection. Theoretically, nonpartisan elections remove judicial elections from party politics, thus allowing candidates to be other than party loyalists or bound to party factions. Ideally, ballots in nonpartisan elections are cast on the basis of candidate merit rather than on the basis of party affiliation. A nonpartisan ballot would avoid candidates being elected or defeated because of straight party voting or because of the popularity of the candidate at the top of the party ticket. In some states, nonpartisan judicial elections are scheduled in off-years to further reduce the danger that party politics will influence judicial election outcomes.37

Nonpartisan elections are often more partisan than they are purported to be. This problem with nonpartisan elections is illustrated by Ohio. Judicial elections in Ohio are nonpartisan; however, the candidates in the election run in the party primaries. The results of this system are similar to the party involvement that one finds in partisan elections. In some states, parties support candidates even though the judicial candidates do not run under a party label.38

Where campaigns more closely reflect the goal of nonpartisanship, voters can face a dearth of information about the candidates since the candidates cannot rely on the party and party workers to inform voters. Absent the party label, candidates may have to expend large sums in order to reach voters. Therefore, nonpartisan campaigns can become very expensive.39 If one believes that high voter turnout is desirable for elections, nonpartisan elections create still another problem. It has been shown that the greater the effort to remove judicial candidates from partisan politics, the smaller the extent of voter participation. One study, for example, found that off-year elections produced dramatically lower voter turnout than regular election year turnout.40

Like commission selection, it goes too far to claim that nonpartisan selection takes the politics out of judicial selection; however, it does make the party affiliation of the judge a less important determinant of the election outcome. Studies of nonpartisan selection of judges in Oregon and Washington suggest that, with such materials as a state-published voter’s guide mailed to every voter in the state, it is possible for voters to be informed at least where the nonpartisan elections are in relatively small judicial

38. Adamany and Dubois provide two examples of nonpartisan judicial elections with strong partisan overtones. Even Wisconsin, described by Adamany and Dubois as “a truly nonpartisan system,” had clearly identifiable Republican and Democratic candidates pitted against one another in three of eight supreme court elections in the 1960s. Adamany & Dubois, Electing State Judges, 1976 Wis. L. REV. 731, 757, 760.
40. P. Dubois, supra note 37, at 41.
districts.\footnote{41}  

4. Partisan Election. The partisan election of judges is used in thirteen states for the initial selection of all or most of those states' judges. Partisan election of judges developed under the influence of Jacksonian Democracy, and, at one time, it was the most prominent system of judicial selection. At the beginning of the Civil War, for example, 24 of the 34 states provided for the election of judges. Partisan election began to decline in popularity during the last third of the nineteenth century when there was an increasing dissatisfaction with the influence of political machines in the selection of judges.\footnote{42}  

What is perceived to be the major strength of partisan election of judges to some is, to others, its greatest weakness. Partisan election subjects judges to the electoral process. Proponents of partisan elections argue that judges should be subject to the ballot since that insures that judges will be accountable to the people. The opponents of partisan election argue that judges should not represent a constituency, but should instead be independent of the popular will. Additionally, opponents of the plan suggest that, even if it is agreed that electoral accountability is a desirable goal, voters lack sufficient knowledge of or interest in judicial elections to hold judges accountable. In contrast, the proponents of partisan judicial selection argue that political party affiliation provides an important cue to voters who may not have great awareness of the judicial candidates. Party affiliation, it is argued, can provide information about candidates that allows voters reasonably to support or oppose candidates.\footnote{43}  

The bulk of the remainder of the paper will concern this last form of judicial selection, the partisan election of judges. Although the issue of selection of judges by the public versus independence from the voting process is a subjective area and cannot be indisputably documented in this or any empirical study, the research can shed light on how partisan election of judges is working in Texas. It can also assess the degree to which the current system achieves the goal of judicial accountability to the public. Before discussing judicial selection in Texas, however, the question of differences in judicial decisions across the systems of selection should be addressed.  

\textbf{B. Comparisons of Judicial Decisions by Judges Selected Under the Various Systems}  

One study examined the decisions of the fifty state supreme courts and found no significant relationships between the system of judicial selection and the success of various categories of appellants.\footnote{44} Another study com-
pared elected and appointed state supreme court justices. Although differences in the success of several categories of litigants were found, those differences were not significant.  

In 1934 California changed its system for selecting its appellate bench. The change was from popular election to the California plan. A study of the effects of that change indicated that there were few differences between the decisions of judges who served under an elective system and the decisions of judges who were selected after 1934 under the California plan. Overall, prior to 1934, 48% of the California Supreme Court's cases were decided in a "liberal" direction; after 1934, 47% of the Court's cases were decided in a "liberal" direction.

One study, however, has suggested that different judicial selection systems produce different outcomes. The study compared judicial sentencing decisions and willingness to grant probation in Pittsburgh and in Minneapolis. Pittsburgh has a system of partisan election of judges; Minneapolis has nonpartisan election of judges. The Minneapolis judges were more likely both to impose lengthy sentences and to deny probation than were the Pittsburgh judges. The difference in decisions was ascribed to differences in the personal characteristics of the judges. Pittsburgh judges were more likely to come from families of modest incomes and to be from ethnic and religious minority groups; Minneapolis judges were more likely to have middle class, Northern European, white, Protestant origins. The author suggested that the partisan elective system produced judges with the Pittsburgh judges' characteristics; the Minneapolis judges were produced by a nonpartisan system. The study is of two cities only, and there may be cultural differences between the two cities that explain the differences found; however, it is the major study that points to judicial selection systems to explain significant differences in outcomes of cases.

Section VI, on the quality of judges, will discuss the limited and inconclusive evidence that points to differences in the characteristics and quality of judges selected under the various systems of selection. The next section, however, will examine the Texas system of selection.

III. Judicial Selection in Texas

A. Appointments to the Bench

Though Texas has a system of partisan election for the selection of judges, the governor appoints district court and higher level judges to fill vacant judicial posts. The result is that judges in Texas have tended to obtain their judicial seats initially through appointment. Table 2 examines the years 1962 and 1984 to illustrate the significance of appointment as a method of judicial selection in Texas. In 1962, 57% of trial court judges initially ob-

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tained their positions through appointment, and 67% did so in 1984. Fifty percent of appellate court judges initially obtained their positions through appointment in 1962, and 51% did so in 1984. During the period 1940-1962, 66% of all judges obtained their positions through appointment. In 1984, 63% of all judges were initially appointed to their positions.

Table 2

Percentage of Judges Obtaining Their Position Initially Through Appointment

<table>
<thead>
<tr>
<th>Year</th>
<th>Trial Courts</th>
<th>Appellate Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1962</td>
<td>57%</td>
<td>50%</td>
</tr>
<tr>
<td>1984</td>
<td>67%</td>
<td>51%</td>
</tr>
</tbody>
</table>


Appointees have the advantage of incumbency in the party primary and in the general election. When Texas was a one party state, the appointed judges were fairly secure after appointment. The likelihood of defeat in the general election was nonexistent, and the likelihood of defeat in the Democratic Party primary was only four percent. Only 13.8% of judges were opposed in the first primary following appointment. Once a judge cleared the hurdle of initial election, the chances of defeat in the Democratic Party primary became even more miniscule.

In 1978 Texas elected its first Republican governor since Reconstruction. The effect of William Clements' election was to reshape the politics of judicial appointment. As a Republican governor, he tended to appoint Republicans to the bench. However, it was quickly discovered that Republican appointees in traditionally Democratic areas faced far greater electoral risks than did previously appointed judges. Every one of the 23 incumbent judges who were defeated in 1982 was a Clements appointee who was facing the first election after appointment. In 1982 a Democrat, Mark White, was elected governor. His Democratic appointees have experienced electoral uncertainty in the increasingly Republican areas, especially in and near Dallas and Harris counties. Of the 16 incumbent judges who were defeated in 1984, all were Democrats, and 10 were Governor White's appointees who were facing that crucial first election after appointment. These findings suggest that


49. Id. at 441-42.

50. Calculated from election statistics available from the Texas Secretary of State; appointment files in the Secretary of State's office; and appointment information found in Annual Report, supra note 1, and earlier reports published in 1981, 1982, and 1983. That
defeated incumbent judges tend to be those in early stages of their judicial careers. It is after having been appointed that incumbent Texas judges are most politically vulnerable.

B. Judicial Elections

1. Party Primaries. Judges face the greatest electoral risk in the first election after appointment; however, they must be subject to a party primary prior to that election. According to the data, there is only a low risk of defeat in the party primary. Table 3 presents data on the 1956 Democratic primary, combines data on Democratic primaries from 1940-1962, and compares those figures with the 1980, 1982, and 1984 primaries. The table clearly shows that defeat of incumbents, or even a challenge to incumbents in the primaries, is a rarity. As was the case when Texas was a one party state, often only one candidate seeks nomination for a judicial post even when there is no incumbent.\(^{51}\)

2. Increased General Election Challenges and Incumbent Defeats. A major change in recent years, and the quality that makes the Texas system of judicial selection vastly different from earlier periods, is the competitiveness of the political parties in judicial elections. In 1968 two University of Houston professors, Bancroft Henderson and T.C. Sinclair, surveyed lawyers and judges in Texas. The survey tried to determine which factors would "always disqualify" a person for the bench. Having an "unsuccessful law practice" was the major disqualifying factor, followed closely by being "known as a Republican." Other disqualifying factors, including being a liberal, lacking political activity, being partisan, being a plaintiff's lawyer, and being a big firm lawyer, ranked far lower in the minds of Texas lawyers and judges.\(^{52}\)

In 1978 the Republican Party began mounting numerous challenges for judicial posts. Table 4 notes that, from the 1978 election through the 1984 election, between 26% and 38% of appellate court races were contested. Between 14% and 26% of district court races were contested. The number of challenges and the strength of the Republican Party in the state was a new force in state politics. At the judicial level in 1978, the Republican Party threat was a cause for concern among Democratic incumbents, but the success of the Republican effort to defeat Democratic incumbents was exceedingly limited. Though some incumbents may have chosen not to run to avoid possible defeat at the polls, only three incumbent judges were defeated—one at the district level and two at the appellate level. All of these judges were in the Dallas County area.\(^{53}\)

\(^{51}\) Henderson & Sinclair, supra note 14, at 442.

\(^{52}\) Id. at 468.

\(^{53}\) For a discussion of this first major show of Republican strength in Texas judicial races, see Blow, GOP Comes Up All Smiles After Judgeship Victories, Dallas Morning News, Nov. 9, 1978, at 61A, col. 3.
<table>
<thead>
<tr>
<th>Year and Party</th>
<th>% of Party Primaries with Opposition (%) # of Primaries</th>
<th>% of Incumbents Defeated in Party Primary (%) # of Incumbents</th>
<th>% of Party Primaries with Opposition (%) # of Primaries</th>
<th>% of Incumbents Defeated in Party Primary (%) # of Incumbents</th>
<th>% of Party Primaries with Opposition (%) # of Primaries</th>
<th>% of Incumbents Defeated in Party Primary (%) # of Incumbents</th>
</tr>
</thead>
<tbody>
<tr>
<td>1956 (Dem.)</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>14%</td>
<td>1.4%</td>
</tr>
<tr>
<td>1952-62 (Dem.)</td>
<td>—</td>
<td>4.9%</td>
<td>—</td>
<td>6.6%</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>1980 (Dem.)</td>
<td>17%</td>
<td>0%</td>
<td>28%</td>
<td>8%</td>
<td>14%</td>
<td>2%</td>
</tr>
<tr>
<td>1980 (Rep.)</td>
<td>10%</td>
<td>0%</td>
<td>33%</td>
<td>0%</td>
<td>16%</td>
<td>0%</td>
</tr>
<tr>
<td>1982 (Dem.)</td>
<td>12%</td>
<td>4%</td>
<td>33%</td>
<td>8%</td>
<td>23%</td>
<td>5%</td>
</tr>
<tr>
<td>1982 (Rep.)</td>
<td>16%</td>
<td>4%</td>
<td>9%</td>
<td>0%</td>
<td>14%</td>
<td>3%</td>
</tr>
<tr>
<td>1984 (Dem.)</td>
<td>16%</td>
<td>1%</td>
<td>29%</td>
<td>0%</td>
<td>18%</td>
<td>1%</td>
</tr>
<tr>
<td>1984 (Rep.)</td>
<td>19%</td>
<td>0%</td>
<td>11%</td>
<td>50%</td>
<td>18%</td>
<td>9%</td>
</tr>
</tbody>
</table>

1. District Judges = District and Criminal District.
2. Appellate Judges = Courts of Appeal, Supreme Court, Court of Criminal Appeal.
3. All Judges = Sum of District Judges and Appellate Judges.
4. All percentages from this point on are rounded.
5. A lack of a central depository for 1982 Democratic Primary data limits the number of Democratic district court primaries studied to all multi-county district court Primaries; All criminal district court primaries; and Dallas County, Travis County, Harris County, and Tarrant County district court primaries.

Sources: Henderson & Sinclair, *The Selection of Judges in Texas*, 5 Hous. L. Rev. 430, 441 (1968); Texas Secretary of State; Texas Office of Court Administration; 1982-83 *Texas Almanac*; *Dallas Morning News*; *Houston Post*; *Ft. Worth Star-Telegram*; and *Austin American Statesman*. 
Table 4
Contested Elections Over Time

<table>
<thead>
<tr>
<th>Year</th>
<th>% of Contested Judicial Elections and Total # of Judicial Elections</th>
<th>% of Contested Appellate Elections and Total # of Appellate Elections</th>
<th>% of Contested District Court Elections and Total # of District Elections</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>14% in (182)</td>
<td>26% in (27)</td>
<td>12% in (155)</td>
</tr>
<tr>
<td>1980</td>
<td>24% in (173)</td>
<td>38% in (32)</td>
<td>21% in (141)</td>
</tr>
<tr>
<td>1982</td>
<td>26% in (277)</td>
<td>30% in (53)</td>
<td>25% in (224)</td>
</tr>
<tr>
<td>1984</td>
<td>18% in (194)</td>
<td>32% in (28)</td>
<td>16% in (166)</td>
</tr>
</tbody>
</table>

1Total Judicial Elections is the sum of Appellate Court Elections and District Court Elections.
2Appellate Courts are the Texas Supreme Court, Court of Criminal Appeals, and Courts of Appeal.
3District Courts are State District Courts and Criminal District Courts.

Sources: 1978 data are from, Texas House of Representatives, Report of the Select Committee on Judicial Selection, 67th Legislature 101 (1982). Election return data available at the office of the Texas Secretary of State indicates some inaccuracies in the Select Committee’s 1980 and 1982 data. While the differences do not change the overall implications of the Table, I have used my calculations based on the data from the Secretary of State’s office for 1980 and 1982. Data for 1984 were obtained from the Texas Office of Court Administration. The Select Committee Report shows 164 judicial elections in 1980 in which 29% of the candidates were opposed: 36% of 132 district judges and 38% of 32 appeals judges were opposed. In 1982 the Report shows 34% of 271 judges opposed: 30% of 218 district judges and 47% of 53 appellate judges.

With a Republican governor and the strong role that gubernatorial appointment plays in the judicial selection system, it was possible to appoint Republican judges. Additionally, with the pattern of Texas’ support for Republican Presidential candidates and a tendency for a strong candidate at the top of the ticket to have a coattail effect on the rest of the ticket, the judicial elections of 1980 became quite competitive. Table 5 notes, for example, that 10 incumbent district judges and 4 appellate judges were defeated in 1980. Table 6 notes that 4 of 13 Democratic incumbents were defeated in 1980, as were 10 of 19 Republican judges. Of the 7 contested seats in which no incumbent was running, 4 were won by Democrats. What is important to note is that Republicans were able to win elections in Texas and to maintain 47% of their challenged appointed judges while defeating 31% of the Democratic incumbent judges whom they challenged. In contested races in which the Democrats did not have the advantage of incumbency, Republicans won 43% of election contests.

In 1980 it should be recalled that Republican strength was aided by the strong showing of Ronald Reagan in his race against Jimmy Carter. In 1980
Table 5

Election Defeats of Incumbent Texas Judges

<table>
<thead>
<tr>
<th>Year</th>
<th>District Judges Defeated</th>
<th>Appellate Judges Defeated</th>
</tr>
</thead>
<tbody>
<tr>
<td>1952-62</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1978</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>1980</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>1982</td>
<td>13</td>
<td>10</td>
</tr>
<tr>
<td>1984</td>
<td>12</td>
<td>4</td>
</tr>
</tbody>
</table>

Sources: Henderson & Sinclair, *The Selection of Judges in Texas*, 5 HOUS. L. REV. 430, 441 n. 20, (1968); Texas Secretary of State; and Texas Office of Court Administration.

Table 6


<table>
<thead>
<tr>
<th></th>
<th>1980</th>
<th>1982</th>
<th>1984</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of Contested Elections with Democratic Incumbents Running and Winning</td>
<td>69%</td>
<td>100%</td>
<td>20%</td>
</tr>
<tr>
<td></td>
<td>(9 of 13 elections)</td>
<td>(15 of 15 elections)</td>
<td>(4 of 20 elections)</td>
</tr>
<tr>
<td>% of Contested Elections with Republican Incumbents Running and Winning</td>
<td>47%</td>
<td>41%</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>(9 of 19 elections)</td>
<td>(16 of 39 elections)</td>
<td>(5 of 5 elections)</td>
</tr>
<tr>
<td>% of Contested Elections without Incumbents and with Democrats Winning</td>
<td>57%</td>
<td>65%</td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>(4 of 7 elections)</td>
<td>(11 of 17 elections)</td>
<td>(1 of 10 elections)</td>
</tr>
<tr>
<td>Top of Ballot % of 2-Party Vote</td>
<td>57.2%</td>
<td>59.1%</td>
<td>64.1%</td>
</tr>
<tr>
<td></td>
<td>(Ronald Reagan)</td>
<td>(Lloyd Bentsen)</td>
<td>(Ronald Reagan)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>53.7%</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(Mark White)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>59%</td>
<td>(William Hobby)</td>
</tr>
</tbody>
</table>

Sources: Texas Secretary of State and Texas Office of Court Administration.

Reagan garnered 57.2% of Texas’ two-party presidential vote, thus providing a strong boost for Republican judicial candidates. In 1982 the Republicans did not have the advantage of Ronald Reagan. Instead, they were faced with the problem of a close race between Republican Governor Bill Clements and his Democratic opponent Mark White—a race that White won with 53.7% of the two-party vote. Additionally, at the top of the ticket was a race between a very strong incumbent Democratic senator, Lloyd Bentsen, and his lesser known Republican opponent, Dallas area congressman Jim Collins. Bentsen won 59.1% of the two-party vote. This time there seemed to be a coattail effect benefiting Democrats. Lower on the ticket the Repub-
lican challenges were weak or nonexistent, while the Democratic candidate for lieutenant governor, Bill Hobby, was strong enough that he could have produced a coattail effect for Democratic candidates listed below him on the ballot. Hobby won 59% of the two-party vote. All 15 Democrats who were incumbents running for re-election in a contested election won. Only 16 Republican judges in 39 contested elections won. Where there were contested elections and no incumbents, the Democrats improved their margin of victory by 8 percentage points over 1980 and won in 65% of the elections.

Contrary to 1982, 1984 was a banner year for Republicans in Texas. Ronald Reagan's percentage of the two-party vote was an astounding 64.1% and that margin of victory had tremendous impact further down the ticket. Four of the 20 Democratic incumbents were reelected. Additionally, where there was a contested election and no incumbent, only one out of 10 Democrats won. Without campaigning, one Republican candidate for district judge in Harris County won office in 1984 even though the campaign and election were held while she was in Europe. Her Democratic incumbent opponent campaigned, spent $40,000-$50,000, and was defeated by 30,000 votes.55

What appears to have developed in Texas judicial elections is that in non-presidential election years, Democratic candidates are likely to win; however, Democratic losses occur when voting for the national Republican ticket impacts voting for Democratic candidates for state office. That pattern is striking in Harris County, as Table 7 points out. In Dallas County the picture is most dim for Democrats in presidential election years. Overall, Republicans gained momentum in 1980, did less well without President Reagan's coattails in 1982, and crushed the Democrats in judicial elections in 1984.

3. **Straight Party Voting and its Effect on Judicial Elections.** After the 1984 elections, Lance Tarrance determined that 25% of the voters cast a straight Democratic Party ticket, and 22% cast a straight Republican ticket.56 While the difference in percentage points is not great, that difference does provide Democratic judicial candidates in state elections with a slight advantage over Republican judicial candidates. To illustrate the importance of even a three percentage point advantage in straight party voting, the 1984 race for Chief Justice of the Texas Supreme Court can be examined.

The Democratic candidate, John Hill, received 54.2% of the vote or 2,733,318 votes. His opponent, Republican candidate John Bates, received 45.8% or 2,309,293 votes. The straight party vote accounted for almost 1,261,000 of Hill's votes and about 1,109,000 of Bates' votes. If the straight party vote had been turned the other way, with 25% of the voters casting a straight Republican ticket and 22% voting a straight Democratic ticket, Bates would have gotten over 150,000 more votes and Hill over 150,000 fewer. Hill would have won a very close election with a margin of about

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56. See infra text Table 8.
Table 7
Comparison of 1980, 1982, and 1984 Judicial Elections For District and Court of Appeal Judges in Dallas¹ and Harris² Counties

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>% of contested</td>
<td>40%</td>
<td>100%</td>
<td>0%</td>
<td>86%</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Elections with</td>
<td>(2 of 5 elections)</td>
<td>(6 of 6 elections)</td>
<td>(0 of 8 elections)</td>
<td>(6 of 7 elections)</td>
<td>(3 of 3 elections)</td>
<td>(0 of 8 elections)</td>
</tr>
<tr>
<td>Democratic Incumbents Running and Winning</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% of Contested</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>75%</td>
<td>29%</td>
<td>100%</td>
</tr>
<tr>
<td>Elections with</td>
<td>(2 of 2 elections)</td>
<td>(6 of 6 elections)</td>
<td>(2 of 2 elections)</td>
<td>(3 of 4 elections)</td>
<td>(5 of 17 elections)</td>
<td>(3 of 3 elections)</td>
</tr>
<tr>
<td>Republican Incumbents Running and Winning</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% of Contested</td>
<td>—</td>
<td>0%</td>
<td>0%</td>
<td>33%</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>Elections with</td>
<td>(0 elections)</td>
<td>(0 of 6 elections)</td>
<td>(0 of 2 elections)</td>
<td>(1 of 3 elections)</td>
<td>(5 of 5 elections)</td>
<td>(4 of 4 elections)</td>
</tr>
<tr>
<td>No Incumbents and Democrats Winning</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Top of Ballot %</td>
<td>61.7% (Ronald Reagan)</td>
<td>50.8% (Lloyd Bentsen)</td>
<td>66.6% (Ronald Reagan)</td>
<td>60.3% (Ronald Reagan)</td>
<td>58% (Lloyd Bentsen)</td>
<td>61.6% (Ronald Reagan)</td>
</tr>
<tr>
<td>of 2-Party Vote</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

¹Dallas County Court of Appeal = 5th Court of Appeal.
²Harris County Courts of Appeal = 1st and 14th Courts of Appeal.

Sources: Texas Secretary of State and Texas Office of Court Administration.
120,000 votes instead of slightly over 424,000. If there had been a five percent difference in straight party voting in favor of the Republicans, Bates would have won the election. That five percent difference is only one percent more than the actual difference in straight party voting in Harris County. It is five percent less than the actual difference in straight party voting in Dallas County.

Table 8 shows that the pattern of straight party voting is not uniform throughout the state. Far more voters in Dallas County cast a straight Republican ticket than cast a straight Democratic ticket. In Harris County as well, Republican straight party voting was higher than was Democratic straight party voting. Republican straight party voting in both Dallas and Harris County was greater in 1984 than in 1982. Democratic straight party voting in Dallas and Harris counties was far lower in 1984 than it was in 1982.

Table 8
Straight Party Voting\(^1\) in Texas
(1982-1984)

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Statewide</td>
<td>—</td>
<td>25%</td>
<td>—</td>
<td>22%</td>
</tr>
<tr>
<td>Dallas County</td>
<td>30%</td>
<td>29%</td>
<td>21%</td>
<td>31%</td>
</tr>
<tr>
<td>Harris County</td>
<td>30%</td>
<td>18%</td>
<td>24%</td>
<td>28%</td>
</tr>
</tbody>
</table>

\(^1\)Party Voting as a Percentage of Total Votes Cast.


The effect of straight party voting on candidate success can be considerable when the disparity between the straight party vote for the two parties widens. Table 9 shows that the difference in straight party voting between the two parties forces the minority party candidate aggressively to pursue independent voters. A particularly strong straight party vote in favor of one party can make it almost impossible for a judicial candidate to make up the difference with independent voters. For example, in Dallas County in 1984 a Democratic judicial candidate would have had to capture 60.6% of the independent voters in order to win election by a margin of 50.1%. On the other hand, for a Republican judicial candidate to win, one would have only to gain the votes of 39.8% of the independent voters. Even in Harris County, Democratic judicial candidates in 1984 needed 54.4% of the independent voters to win. A Republican in Harris County needed only 46% of independent voters to win.

If a Democratic judicial candidate had run in the non-presidential campaign year of 1982, chances of victory would have been far greater. In Harris County, Democratic judicial candidates would have needed only 38.7% of the independent voters to win, compared to an almost unattainable Republican need for 61.7% of the independent voters. In Dallas County, the contest would have almost been an even fight with Democratic candidates
<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Statewide</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>25%</td>
<td>22%</td>
<td>47.4%</td>
<td>53%</td>
</tr>
<tr>
<td>Harris County</td>
<td>30%</td>
<td>18%</td>
<td>38.7%</td>
<td>61.7%</td>
<td>24%</td>
<td>28%</td>
<td>54.4%</td>
<td>46%</td>
</tr>
<tr>
<td>Dallas County</td>
<td>30%</td>
<td>29%</td>
<td>49%</td>
<td>51.5%</td>
<td>21%</td>
<td>31%</td>
<td>60.6%</td>
<td>39.8%</td>
</tr>
</tbody>
</table>

1The Independent Vote Needed for Victory is calculated by the formula Independent Vote Needed = Straight Party A Vote + [(100 − Straight Party B Vote) − Straight Party A Vote] × 50.1. Independent Voters are those voters not voting a straight party ticket.

needing 49% of the independent voters and Republican candidates needing 51.5%.

Voters are not limited to voting for a straight party ticket or voting totally independent, however. Many voters will split-ticket vote, but will lean strongly toward one party. Party affiliation should be particularly influential when low interest elections, such as judicial elections, are involved. The Lance Tarrance data, which is examined above, does not examine these strong party identifiers among split-ticket voters. However, the Texas Poll in 1984 does provide information on these voters that indicates how important political party affiliation can be in judicial elections. The Texas Poll measures persons' responses to questions rather than their actual voting behavior as the Lance Tarrance data did. Additionally, the sample of respondents is too small to break down into areas within the state. The poll, compared to the Lance Tarrance data, overestimates straight Republican voting and underestimates straight Democratic voting. With these cautions in mind, however, 16% of the poll respondents stated that although they did not vote a straight ticket, they voted "mostly Republican." Ten percent voted "mostly Democratic." Only 17% of the Texas Poll respondents claimed to vote without leaning toward one party or the other. The body of fully independent voters that would be most open to campaign efforts by judicial candidates is quite small.

4. "Close" vs. "Landslide" Elections. Table 10 examines the degree of competitiveness in judicial elections over the past three election cycles. Political scientists have classified elections as "landslide" and "close" elections. "Landslide" elections are those in which there is a clear choice by the voters. "Close" elections are those separated by only a relatively small percentage of votes and in which the elections could reasonably be assumed to have gone either way. As a rule of thumb, political scientists have defined "close" elections as those in which the victory margin is five percent or less. "Landslide" elections are those in which the victory margin is over five percent. Using this definition, nearly three-fifths of appellate court elections and two-thirds of district court elections were "close." Such a large number of "close" judicial elections means that either a small increase in straight party voting for one party, mostly straight party voting for one party, or a good coattail effect can create victory for candidates.

It should be noted that the bulk of judicial contests since 1980 have been very fickle affairs in which anyone could win depending on the year in which the candidate runs, the popularity of the candidate at the top of the ticket, or the propensity of voters to vote straight party tickets.

5. Location of Incumbent Defeats. Contested judicial elections have been

57. Adamany & Dubois, supra note 38, at 775.
58. Telephone interview with James Dyer, Director of the Texas Poll, Texas A & M University (October 9, 1985).
Table 10

Landslide vs. Close Judicial Elections

<table>
<thead>
<tr>
<th></th>
<th>Landslide</th>
<th></th>
<th>Close</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Appeal</td>
<td>District</td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1982</td>
<td>0</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>1984</td>
<td>5</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Party</td>
<td>Totals</td>
<td>5</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Total Judges</td>
<td>13</td>
<td>38</td>
</tr>
</tbody>
</table>

1Landslide elections are those where the margin of victory is greater than 5%. Close elections are those with less than a 5% margin of victory.
3Dem. = Victorious Democratic judicial candidates.
4Includes one Democratic judicial candidate who defeated a Republican appointed judge who ran as a write-in candidate.

Sources: Election data from the Texas Secretary of State and Texas Office of Court Administration.

frequent since 1978. In regular elections, defeats of incumbent judges have moved from being nonexistent to a 1980-1984 average of 12 per election for district judges and 6 per election for appellate judges. Yet, only a few counties in Texas have actually experienced a contested district court judicial election in which an incumbent was defeated. Figure 2 shows the counties in which at least one district judge was defeated in 1980, 1982, or 1984. There are 254 counties in Texas. As of January 1, 1985, there were 367 district courts. Yet, during three election cycles, only 13 counties experienced defeats of incumbent district judges. Four of those counties were in two-county judicial districts. Most of those counties defeated one or two newly appointed Republican district judges in 1982. Nine of the counties that defeated incumbents are among the twenty most densely populated in the state, and six (Dallas, Harris, Tarrant, Bexar, Galveston, and El Paso counties) are the six most densely populated counties.⁶⁰

Only half of the courts of appeals in Texas have had incumbents defeated. As Table 11 notes, the courts of appeals in which incumbents have been most frequently defeated have been the two courts in Houston and the court in Dallas. Eleven of the seventeen defeated courts of appeals judges have been from those three courts.

Dallas and Harris counties are the two most densely populated in Texas and are also by far the most likely to defeat incumbent judges. Such a pattern should not be surprising. Urban areas are often less politically stable than more rural areas and are inclined to reject historically established patterns, such as Democratic Party voting or voting for incumbent judges.⁶¹

⁶¹. Glenn Robinson describes the state's new urban politics in this way: "Important developments in Texas politics have accompanied the dramatic transformations of the state's major cities into sprawling, economically dynamic, self-sustaining conurbations. What were once regional commercial centers dependent on the economy of the rural hinterland are today
FIGURE 2

Counties in which at least one Incumbent District Judge was Defeated in 1980, 1982 or 1984

Counties:
- Dallas 7D
- Harris 8D;7R
- Bexar 2R
- Tarrant 2R
- El Paso 1R
- Nueces 2R
- McLennan 1R
- Cameron, Willacy 2R
- Galveston 1R
- Harrison 1R
- Stephens, Young 1R

Legend: [ = Multi-County District

Sources: Texas Secretary of State and Texas Office of Court Administration

Indeed, in the high migration areas of Dallas and Harris counties, it is difficult, if not impossible, for significant numbers of voters to know the incumbents. In rural areas, it is probable that voters have some knowledge of judges, if not a long-standing familiarity with them or their families. The number of voters in some rural districts is small enough that a judge can meet most voters in the county over a term. In fact, it would be possible to meet them several times merely by being active in religious organizations, being a club member, making oneself available for speeches and banquets, and attending weddings, funerals, and homecomings.62


62. The political value of a small, rural constituency is pointed out in A. CHAMPAGNE, CONGRESSMAN SAM RAYBURN (1984).
Table 11
Courts of Appeals and Incumbent Defeats in 1980, 1982, or 1984

<table>
<thead>
<tr>
<th>Court #</th>
<th>Primary Seat</th>
<th>Incumbents Defeated</th>
<th>No Incumbents Defeated</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Houston</td>
<td>3 R; 1 D</td>
<td>6</td>
</tr>
<tr>
<td>2</td>
<td>Ft. Worth</td>
<td>2 R</td>
<td>7</td>
</tr>
<tr>
<td>3</td>
<td>Austin</td>
<td>1 R</td>
<td>8</td>
</tr>
<tr>
<td>4</td>
<td>San Antonio</td>
<td>2 R</td>
<td>9</td>
</tr>
<tr>
<td>5</td>
<td>Dallas</td>
<td>4 D</td>
<td>11</td>
</tr>
<tr>
<td>10</td>
<td>Waco</td>
<td>1 R</td>
<td>12</td>
</tr>
<tr>
<td>14</td>
<td>Houston</td>
<td>3 R</td>
<td>13</td>
</tr>
</tbody>
</table>

TOTAL: 12 R; 5 D

1Primary Seat is the most common location in which the court hears cases.
2R= Republican Party Affiliation of Defeated Judge; D= Democratic Party Affiliation of Defeated Judge.

Sources: Texas Secretary of State; Texas Office of Court Administration.

A judge can use the office to influence voters by calling larger than necessary numbers of citizens for jury duty and then being lenient in granting excuses and dismissing the unnecessary jurors. Such a practice allows the judge to meet large numbers of voters, speak to them, and often earn their gratitude by excusing them from duty.

When there are small numbers of voters in a judicial district, contact with the electorate is a relatively easy task. Some judicial districts in Texas have small voting populations. For example, in Cherokee County 8,182 people voted in the 1980 election for one district judge who was an incumbent. In Rusk County 7,198 people voted for an incumbent in an uncontested race. In Corvell County 6,454 voted for an incumbent in an uncontested race, and 4,225 people voted in the district that includes Baylor, Cottle, King, and Knox Counties. In 1984 in Medina, Real, and Uvalde Counties, in a contested race with an incumbent, less than 17,000 votes were cast, and in Borden and Scurry Counties, in a contested race without an incumbent, less than 7,000 votes were cast.

On the other hand, in the urban, highly mobile environments of Dallas and Harris counties, judges have an impossible task in contacting even a majority of voters over a term in office. In 1980, for example, in an uncontested Harris County district court race with an incumbent, over 185,000 people voted. In an uncontested criminal district court race in Dallas County, over 220,000 people voted for the incumbent. In contested elections in Dallas and Harris County, votes of 400,000 to 700,000 are common. A few races in Harris County in 1984 had over 760,000 votes cast. In urban areas, a judge, even one with long tenure, can easily be an unknown to a large, mobile voting population. Judicial anonymity is enhanced by the sheer number of judicial candidates on the ballot in urban areas.
In 1982, for example, a Harris County voter would have faced a ballot that contained three Supreme Court races, three Court of Criminal Appeals races, twelve courts of appeals races, thirty-seven district court races, four county civil court at law races, ten county criminal court races, and three county probate court races. Voters would have also faced precinct level justice of the peace races. Of the county level courts or higher, one Supreme Court race and one Court of Criminal Appeals race was contested. There were eight contested courts of appeals races and seventeen contested district court races. At the county court level, two contested elections were for county civil court at law and five for county criminal court.

In 1984 in Dallas County, voters faced three State Supreme Court elections, one of which was contested; three Court of Criminal Appeals elections, one of which was contested; four contested courts of appeals elections; and eight contested district court elections.

The informed Harris County voter who in 1982 wished to vote in all judicial elections from county-level to state-wide courts would have had to know 106 judicial candidates. That number excludes candidates in the party primaries and only includes candidates in the general election. The informed Dallas County voter in 1984 who wished to vote only in contested judicial races during the general election would have had to know 28 candidates. Faced with such a number of choices and limited knowledge of judges, it should not be surprising that political party affiliation is often the determining factor in elections.

6. Party Switching and Texas Judges. The transformation of Texas into a two-party state has affected the party affiliations of judges. From 1980 through July 24, 1985, according to the Texas Republican Party, thirteen district and appellate judges changed from the Democratic to the Republican Party; eleven county court judges switched; and five justices of the peace changed parties.63

The Republican Party list shows that every party switch on an appellate court was in the Fifth District, which primarily serves Dallas County. Every party switch of a county court judge was in Dallas County. Along with party switching by district court judges in Dallas County, a district court judge in Denton County switched to the Republican Party. There were justices of the peace who switched parties in Bexar, Brazoria, Rockwell, Neuces, and Taylor counties. Dallas County, however, has been the core county for party switching by judges. Perhaps that pattern in Dallas is explained by the county's recent voting patterns. In 1984 Republicans won all eight of the contested judicial races, defeating five Democratic incumbents. Judge Don Koons, who switched to the Republican Party in early 1985, described his reasons for switching: "I ran as a Democrat in 1982," he said. "It was a long, tough year, but we won. On the other hand, it cost a lot more money and time away from the bench to run as a Democrat. The work

63. Republican Party of Texas, Texas Switcher's List as of July 24, 1985 (mimeographed list).
suffers some, and you've got to be always hustling money."\textsuperscript{64}

The early 1985 party switches included three of the judges rated most highly in the Dallas bar's judicial evaluation.\textsuperscript{65} However, with heavy Republican voting in Dallas County and very heavy straight party Republican voting, survival as a judge probably means survival as a Republican judge. When District Judge Richard Mays switched in August 1985, he described the political realities: "My political philosophy about general things has nothing to do with me [sic] being a judge. That's not the reason I'm switching parties. The reason I'm switching is that to be a judge in Dallas County you need to be a Republican."\textsuperscript{66} As of early February 1985, 58 of the 69 judges in Dallas County were Republicans. With the switch of Richard Mays in August 1985, 32 of the 36 district judges in Dallas County were Republicans. Interestingly, Dallas County had no Republican judges before 1978.\textsuperscript{67}

Party switching among the judiciary has occurred where there has been rapid growth of the Republican Party into an overwhelmingly dominant party. That kind of growth has occurred in Dallas County.\textsuperscript{68} In at least one case, however, a Republican judicial candidate ventured onto stronger Democratic political terrain and met with failure as a Republican, but success with a party switch to the Democratic label. That candidate was Jim Brady, who was elected in 1982 to the twenty-four county court of appeals that has Austin as its primary seat. He was elected as a Democrat with no Republican opposition. In 1980 Brady ran as a Republican for the Texas Supreme Court and suffered a landslide defeat in those same twenty-four counties that overwhelmingly supported him two years later.\textsuperscript{69}

Low voter interest elections, such as judicial elections, force a reliance on party labels in voting. For a judge to survive politically, it is necessary to be affiliated with the party that receives the overwhelming majority of votes. If judges are to be accountable to the electorate, such a reliance on party labels may be proper, but that assumes that party affiliation is a proxy for competence as a judge or an indication of the policy positions of the judge.

7. The Future of Judicial Elections in Texas. It may be argued that the political instability of the judiciary has been centered in Dallas and in Harris counties. Most other counties in Texas have not had incumbent judges defeated. Rural counties in Texas have largely remained untouched by growth

\textsuperscript{64} Merida, 3 Judges Seem Set on Switch to the GOP, Dallas Morning News, Feb. 8, 1985, at 25A, col. 5.

\textsuperscript{65} DALLAS BAR ASSOCIATION, RESULTS JUDICIAL EVALUATION POLL (Oct. 1983). This evaluation gave a 90\% overall performance rating to one of the three judges and 92\% ratings to the other two.

\textsuperscript{66} Brown, Democratic Judge Switches to GOP, Dallas Times Herald, Aug. 2, 1985, at 20A, col. 2.

\textsuperscript{67} Blow, supra note 53.

\textsuperscript{68} Barta, Heat on Democrats to Switch, Dallas Morning News, Feb. 11, 1985, at 19A, col. 3.

of the Republican Party. Other than judicial districts within Dallas and Harris counties and courts of appeals with primary seats in those counties, there have been few general election races resulting in incumbent judges' defeats. One can go further and argue that party competition outside of Dallas and Harris counties is so rare that there are virtually no Republican judges. Table 12 shows that all Republican courts of appeals judges are from the courts of appeals based in Dallas and Harris County; 69% of Republican district judges are from those two counties; and 80% of Republican county level judges are from the two counties. The political party instability of the judiciary in Dallas County, it can be argued, may well be on the verge of slowing down. For the most part, Democratic judges have either been swept out of office or changed their party affiliation. As a result, Dallas County, one may argue, is approaching party stability within the judiciary as it approaches an all-Republican judiciary. Harris County is still intensely competitive; thus, it could be argued that the major problem of political instability within the judicial branch is now in the Houston area.

These arguments, however, overlook the likelihood that Democratic governors will appoint Democrats to judicial vacancies in Dallas County, rekindling the pattern of incumbent defeats in the next election. More importantly, there are indications that the pattern of incumbent defeats first experienced in Dallas and Harris Counties will spread. It goes well beyond the data to claim that Texas is moving from being a one-party Democratic state to being a one-party Republican state; however, there are strong indications that it is moving toward being a two-party state. The core of Republican strength may be Dallas or Houston, but the Republican Party is rapidly expanding. An examination of offices now held by Republicans reveals that Texas has a Republican United States Senator and ten Republican United States Congressmen, six of whom do not represent Dallas or Harris Counties. Texas has three Republican district attorneys, none of whom represents Dallas or Harris Counties. There are six state senators who are Republicans. Three of those state senators do not have districts in Dallas or Harris Counties. There are 52 Republicans in the Texas House of Representatives, and 32 of them do not represent Dallas or Harris Counties. If one looks at county offices, there are 56 counties in Texas that have at least one Republican officeholder at the precinct or county-wide level. The core of Republican strength may be Dallas and Houston; however, the Republican Party is rapidly expanding all across the state.

The strongest indication of the growth of a two-party system in Texas is probably the poll data in Table 13, which shows the increase in the number of Texans who claim a Republican Party affiliation and, conversely, the decrease in number of Texans who claim a Democratic affiliation. In 1952 only 6% of Texans claimed a Republican affiliation, and only 14% did so in 1972. However, in 1985 33% of Texans claimed to be Republicans. In 1952 66% of Texans claimed to be Democrats, and in 1972 57% made that claim.

70. REPUBLICAN PARTY OF TEXAS, OFFICIAL LEADERSHIP DIRECTORY (1985).
Table 12
Republican Judicial Officeholders
June 1, 1985

<table>
<thead>
<tr>
<th>Officeholders</th>
<th># of Republican in Dallas County Area</th>
<th># of Republican in Harris County Area</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeal Courts 1</td>
<td>15</td>
<td>11</td>
</tr>
<tr>
<td>District Courts 2</td>
<td>72</td>
<td>31</td>
</tr>
<tr>
<td>County Courts 3</td>
<td>29</td>
<td>18</td>
</tr>
</tbody>
</table>

1 Includes the Texas Supreme Court; Courts of Appeal; Court of Criminal Appeals.
2 District Courts; Criminal District.
3 County Courts-At-Law; County Criminal Court; Probate Court; County Criminal Courts of Appeal.
4 Dallas County Area = 5th Courts of Appeal.
5 Harris County Area = 1st and 14th Courts of Appeal.

Source: Republican Party of Texas, Official Leadership Directory (June 1, 1985).

Table 13
Texas Poll
The Growth of a Two Party Texas

<table>
<thead>
<tr>
<th>Year</th>
<th>% of Texans Claiming Democratic Affiliation</th>
<th>% of Texans Claiming Republican Affiliation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1952</td>
<td>66%</td>
<td>6%</td>
</tr>
<tr>
<td>1972</td>
<td>57%</td>
<td>14%</td>
</tr>
<tr>
<td>1983-1984</td>
<td>39%</td>
<td>23%</td>
</tr>
<tr>
<td>1985</td>
<td>34%</td>
<td>33%</td>
</tr>
</tbody>
</table>


In 1985 only 34% did so. Such data suggest that the pattern of incumbent defeats in Dallas and Harris Counties can become a statewide pattern.

C. Summary

Though the Texas method of judicial selection is ostensibly elective, a majority of judges initially attain their positions through appointment. When Texas was a one-party state, the only challenge that judges faced was the Democratic party primary. The threat to the incumbent was a minimal one. There have been no dramatic changes in the appointment process or the Democratic party primary. In 1978, however, the Republican Party began mounting numerous challenges in the general election. Also, in 1978 William Clements, a Republican, was elected governor, and thus the judicial appointment power moved into Republican hands.

In 1980 the new pattern of general election challenges led to the defeat of
14 incumbent district or appellate judges. In 1982, 23 judges were defeated. In 1984, 16 judges were defeated. The partisan affiliation of the defeated judges was a reflection of the top of the ticket vote in all three election years. This suggests that the coattail of Ronald Reagan in 1980, of Lloyd Bentsen, Mark White, and William Hobby in 1982, and of Ronald Reagan in 1984 had a dramatic effect on who won contested judicial elections. The pattern associated with incumbent defeats was, as might be expected, particularly evident in the state's two most populous counties, Dallas and Harris Counties. Incumbent judges were, in contrast, least likely to be defeated in the most rural parts of the state.

The increase in the proportion of straight party voters has also had a strong effect on judicial election outcomes. As the disparity in the percentage of straight party voters increases, it becomes more difficult for minority party judicial candidates to win elections. In 1984, for example, a Democratic candidate for a judgeship in Dallas County would have had to get 60.6% of the independent vote to win. This figure ignores the fact suggested by the Texas Poll that many of those "independent" voters actually leaned toward the Republican Party.

The majority of district court and courts of appeals contested elections have been separated by five percent of the vote or less. Such elections are close enough to suggest that either candidate could reasonably have won the election. It also suggests that judicial victories may often be determined by no more than the year in which a candidate runs or the coattails of the candidates at the top of the ticket.

The defeat of incumbent judges is not spread evenly throughout the state. The state's most urban counties are the ones where successful judicial election challenges to incumbents tend to be located. Those counties are also the counties that have the most populous judicial districts with the largest number of judicial candidates running for office. It is probably particularly difficult for judges to develop ties with a majority of the voters in such districts, making their positions in these districts tenuous.

Without ties to the electorate, it should not be surprising that voters in urban areas place strong reliance upon the party affiliation of judicial candidates. Judges who are members of the minority party in these districts must switch parties to survive. Democratic judges switching to the Republican Party has been most common in Dallas County because Dallas County has been consistently Republican-leaning in recent years.

It seems likely that the Republican Party will continue to grow in Texas. As it does, it appears that the competitiveness of judicial elections will increase. As Texas moves toward becoming a viable two-party state, turnover due to defeats in the regular election will increase.

A number of factors in the judicial selection process have been examined in this section. A factor of special importance for judicial selection in Texas is explored in the next section: the role of money in the judicial selection process.
IV. Campaign Contributions

A. Amounts Raised for Judicial Campaigns

According to campaign reports in the office of the Secretary of State, the average contributions for all candidates for the Texas Supreme Court between 1982 and 1984 came to nearly $340,000.71 A donation of only a few thousand dollars represents a substantial portion of the total amount likely to be raised by a candidate. In recent years, candidates for the Texas Supreme Court have received large campaign contributions. The largest contributions have come from Clinton Manges, a South Texas rancher and oil man. According to newspaper accounts, some of his contributions to judicial candidates have amounted to $100,000 or more. One unsuccessful Supreme Court candidate received $200,000 from Clinton Manges. This accounted for over 90% of the candidate's contributions. A successful Supreme Court candidate received about 33% of his total campaign contributions from Mr. Manges.72 Other donors have also made large contributions to judicial candidates. A survey of reports filed with the Secretary of State shows some Supreme Court candidates received single donations of $10,000 or more from a single donor. Several large donors are lawyers who contributed to candidates in both 1982 and 1984, according to the Secretary of State's office.

Some district and courts of appeals judges have received single contributions in the $10,000 to $15,000 range. The costly races are, of course, the contested races. On the other hand, a rural Democratic district judge in northeast Texas had no primary opponent and no election opponent. He paid his own filing fee, accepted no campaign contributions, and had no campaign expenditures. Similarly, a Republican judge in Collin County had no primary or election opponent and received no contributions. A colleague of that judge, also a Republican with no primary or election opponent, received only one contribution greater than $50. Costly judicial campaigns are not limited to contested partisan elections.73 States like California, which have commission selection and which hold retention elections, have been experiencing increased judicial election costs. At least one of California's retention elections at the Supreme Court level is likely in 1986 to go beyond contribution levels for Texas Supreme Court races.74

An examination of four Texas Supreme Court candidate contribution

71. See infra text Table 14.
72. Newspaper comments on these contributions include, Asker, '82 Supreme Court Races Signal End of Era, Assert Winners, Losers, Houston Post, May 3, 1982, at 5D, col. 3; Kilday, Judicial Race Donations Spark Call for Reform, Dallas Times Herald, May 10, 1982, at 3D, col. 4.
statements in the period from 1982 to 1984 indicates that no more than six percent of single donations were for more than $2,000. Some of those large contributions were multiple donations from the same donor, from a firm associated with a large donor, or from a relative of a large donor. In three of the four races, only three percent of the donations were for more than $2,000. Although multiple small donations by one donor also occurred, eighty-two percent to ninety-four percent of the single donations in the four races were for $500 or less.

Table 14 shows the range of total contributions and average total campaign contributions for candidates for the Texas Supreme Court. Table 15 shows the range of total contributions and average total contributions for contested elections for the courts of appeals, Dallas County district courts, and a small number of contested district court elections in counties other than Dallas. Contested primaries with an uncontested election are not reported in Table 15; however, campaign contribution reports in the Secretary of State’s office indicate that such races can sometimes be comparable in total contributions to a contested election. In the 1982 Democratic primary, for example, one court of appeals judge raised over $88,000, only to lose the primary run-off to an opponent who raised nearly $30,000 and who spent over $47,000.

As Table 15 notes, it is still possible to be elected in a contested election as a district judge with total campaign contributions of less than $10,000. However, the average total contributions to successful district judicial candidates in Dallas County in 1982 was over $44,000. In 1984 it was nearly $53,000. The small sample of “other” counties shows a great range in contributions, with some 1982 races having relatively large total contributions and the few 1984 races being low contribution races.

The average total campaign contributions in the “other” county category was over $22,000 in 1982 and over $6,000 in 1984. Courts of appeals races averaged over $30,000 in 1982 and over $43,000 in 1984. Winning candidates’ total contributions averaged over $34,000 in 1982 and over $28,000 in 1984.

The 1982-1984 average for all Supreme Court candidates in primaries and in general elections was over $338,000; for winning candidates it was over $570,000. It should be noted that the range of contributions in all races is very great, even for a district judgeship within the same county. In Dallas County for example, one Republican won with contributions of about $2,300, another with contributions of about $200,000. Yet both defeated Democratic incumbents.

There can be ethical questions for both lawyers and judges regarding contributing and receiving campaign contributions from potential litigants and lawyers. In some highly publicized cases, the receipt of large contributions has led lawyers to try to disqualify judges from sitting in cases in which contributors are involved. Attorneys for Texaco, for example, argued that the first district judge assigned to the multi-billion dollar suit between Texaco and Pennzoil should be disqualified from hearing the case because he
### Table 14

**Total Contributions for Texas Supreme Court Primary and General Election Campaigns (1982 and 1984)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Lowest Contribution For All Candidates</th>
<th>Mean Contribution For All Candidates</th>
<th>Highest Contribution For All Candidates</th>
<th>Lowest Contribution For Winning Candidates</th>
<th>Mean Contribution For Winning Candidates</th>
<th>Highest Contribution For Winning Candidates</th>
</tr>
</thead>
<tbody>
<tr>
<td>1982² (3 positions)</td>
<td>9,198</td>
<td>240,426</td>
<td>637,910</td>
<td>252,183</td>
<td>272,189³</td>
<td>301,153</td>
</tr>
<tr>
<td>1984⁴ (3 positions)</td>
<td>3,284</td>
<td>435,577</td>
<td>1,421,080</td>
<td>140,617</td>
<td>868,526⁵</td>
<td>1,421,080</td>
</tr>
<tr>
<td>Total 1982-1984</td>
<td>3,284</td>
<td>338,002</td>
<td>1,421,080</td>
<td>140,617</td>
<td>570,357</td>
<td>1,421,080</td>
</tr>
</tbody>
</table>

¹Campaign contributions are those reported from 1981-1983 and 1983-1985. Some contributions may actually be used in later campaigns than the campaign within the reporting cycle.

²Candidates are John Barron (D), Ted Robertson (D), and John Bates (R); James Denton (D) and William Kilgarlin (D); Charles Barrow (D) and Woodrow Wilson Bean (D). Denton and Barrow were incumbents.

³Though James Denton won the Democratic primary, he died prior to the election. He was replaced as the party nominee by William Kilgarlin, his primary opponent, who was elected unopposed in the November, 1982 general election. For purposes of this table, Denton is counted as a “winning” candidate.

⁴Candidates are John Hill (D), Sears McGee (D), and John Bates (R); Franklin Spears (D); C.L. Ray (D), Shelby Sharpe (D), and Texas Ward (D). Spears and Ray were incumbents.

⁵Spears had the smallest contributions of a winning candidate, but he was unopposed in both the Democratic primary and the election.

Sources: Texas Secretary of State
Table 15  
Total Campaign Contributions in Contested Judicial Elections  
(1982 and 1984)"\(^1\)

<table>
<thead>
<tr>
<th></th>
<th>LOWEST CONTRIBUTION FOR ALL CANDIDATES</th>
<th>MEAN CONTRIBUTION FOR ALL CANDIDATES</th>
<th>HIGHEST CONTRIBUTION FOR ALL CANDIDATES</th>
<th>LOWEST CONTRIBUTION FOR WINNING CANDIDATES</th>
<th>MEAN CONTRIBUTION FOR WINNING CANDIDATES</th>
<th>HIGHEST CONTRIBUTION FOR WINNING CANDIDATES</th>
</tr>
</thead>
</table>
| 1982 Courts of Appeal  
(14 races)\(^2\) | 2,037                                   | 30,244                               | 67,134                                   | 4,685                                       | 34,490                                   | 67,134                                     |
| Dallas County District Courts  
(17 races) | 250                                     | 37,006                               | 144,746                                  | 3,135                                       | 44,083                                   | 144,746                                    |
| “Other” District Courts  
(4 races)\(^3\) | 9,028                                   | 25,481                               | 48,771                                   | 9,028                                       | 22,106                                   | 46,830                                     |
| 1984 Courts of Appeal  
(7 races) | 3,832                                   | 43,397                               | 164,520                                  | 3,832                                       | 28,381                                   | 80,394                                     |
| Dallas County District Courts  
(8 races) | 2,315                                   | 45,582                               | 205,823                                  | 2,315                                       | 52,757                                   | 205,823                                    |
| “Other” District Courts  
(2 races) | 2,250                                   | 5,039                                | 9,116                                    | 3,750                                       | 6,433                                    | 9,116                                      |

\(^1\)Campaign contributions are those reported from 1981-1983 and 1983-1985. Some contributions may actually be used in later campaigns than the campaign within the reporting cycle.

\(^2\)Two campaign reports were so illegible that they are excluded from the analysis.

\(^3\)One campaign report was never completed and filed by the judicial candidate and it is excluded from the analysis. The rural districts are as follows. 1982: Cameron, Willacy; Wichita (filed with the Secretary of State although not required by law); Armstrong, Potter, Randall; Bowie, Cass. 1984: Medina, Real, Uvalde; and Borden, Scurry.

Source: Texas Secretary of State
received a $10,000 contribution from one of Pennzoil's lawyers. Another example of an effort to disqualify judges involved a case in which attorneys argued before the Supreme Court that three justices should be disqualified because they had received large contributions from the opposing party in the case, Clinton Manges. Press reports have claimed that one court of appeals judge is under investigation for asking a district court judge to give a continuance to a litigant who had contributed $10,000 to the court of appeals judge. However, in Texas, receipt of campaign contributions from a party in a case is not in itself grounds for disqualification of a judge. It is possible for there to be an appearance of impropriety with judges receiving contributions from lawyers and with lawyers contributing money to judicial campaigns. However, taken by itself, receipt of campaign money is not viewed as sufficient evidence of bias by a judge. Additionally, it is not considered unethical for lawyers to donate money to judicial campaigns.

It costs money—a lot of it—to run for statewide or urban offices in Texas. Because Texas is a large state with great inflow of population, high mobility in urban areas, a large number of media markets, and vast distances, the cost of campaigning is necessarily high. To establish name identification in an urban area or in a statewide race requires vast sums of money. Although contributions for credible candidates are sizable, the state's size makes it difficult for statewide judicial candidates to mount their campaigns. Consider Texas Supreme Court races: candidates in these races receive roughly the same range of contributions as recent Texas Congressional races. Congressional candidates, however, run in an area that is about \( \frac{1}{27} \) the population of the area in which a Texas Supreme Court justice must run.

### B. Who Gives and Why

Raising money for judicial races is not an easy job. Unlike a Congressional position, a judgeship has low visibility. Few people other than lawyers, potential litigants, and a few special interest groups with strong legal interests are concerned enough with a judicial election to contribute money. The need for money to reach voters is critical; however, the number of people who are sufficiently interested in judicial elections to contribute money is relatively small. In such cases, large donors are a necessity for the judicial candidate. One illustration of the crucial role of large contributors is the
campaign contribution list of one justice who, from 1983 through 1984, received $1,043,879 in contributions to his campaign. The list of campaign contributors is 195 pages long. Yet, 76 contributors gave slightly over one-half of the justice's campaign fund. Many of those 76 donors were related to one another or were affiliated with the same law firm. Such a case suggests that judicial candidates can be extremely dependent on contributions from a very small number of people.

Although self-funding still occurs even in high level judicial races, it is rare that a candidate can personally fund a campaign. Though the vast majority of donations are under $500, large contributions are often necessary to cover the costs of a serious race. It is ethically questionable for judges to be so dependent on lawyers and litigants for their support. Judges or prospective judicial candidates often feel uncomfortable about soliciting money from persons who may appear in their courtrooms. Similarly, attorneys can be intimidated by a request for funds from a judge.\textsuperscript{80} The appearance of such funding is suspect, particularly in the eyes of those who are opposed to the elective system. However, the real problem for judicial candidates is an insufficient base of contributors.\textsuperscript{81}

If one views the judicial selection process as one in which judges are to be held accountable by voters, unsatisfactory judicial decisions can lead to punishment at the polls. A judge whose rulings are adverse to the interests of litigants, to specific lawyers, or to certain segments of the bar can expect those persons or groups to work against the judge's reelection. Hostile rulings will lead to contributions designed to defeat the sitting judge. In one Texas city, for example, after a court of appeals judge ruled against an attorney and his clients in a $3,000,000 slander case, the attorney recruited and financed a justice of the peace who proceeded to defeat the eighteen-year judicial veteran. The attorney "agrees that . . . judges now realize that he will back politically what he believes in legally." The attorney stated, "I think that message has gotten across pretty substantially . . . We have a pretty good court now . . . . We seem to have their undivided attention."\textsuperscript{82}

Some efforts have been made to shape Texas law by electing judges who are believed to be sympathetic to particular interests. This has occurred, in particular, in Texas Supreme Court elections.\textsuperscript{83} There is a perception that the Texas Supreme Court has wrought dramatic changes in tort law.\textsuperscript{84}

\begin{footnotes}
\textsuperscript{80} For a discussion of the ethics of judicial campaign finance see Schotland, \textit{supra} note 73, at 90-96, 155-61.
\textsuperscript{81} That problem leads to a related problem: too little money available to mount viable campaigns. The latter problem has been noted by \textit{id.} at 95. On the effects that campaign funding can have on the appearance of fairness see Kilday, \textit{Texas Justice Scolded}, Dallas Times Herald, Feb. 7, 1986, col. 6.
\textsuperscript{82} Fish, \textit{Flashy Lawyer Dabbles in Politics For Fun}, Dallas Morning News, May 9, 1982, 1AA, col. 3.
\textsuperscript{83} J. May & N. Goldman, The Texas Supreme Court: Bar Politics as a Variable in Judicial Decision Making and in Judicial Politics, Paper Presented at the Annual Meeting of the Southern Political Science Association 1, 5-7 (Nov. 2, 1984).
\textsuperscript{84} \textit{id.} at 6; S. Stevens, \textit{supra} note 55, at 14-15; Kilday, \textit{High Court Campaigns Targeted}, Dallas Times Herald, Oct. 27, 1985, 1A, col. 1.
\end{footnotes}
According to The University of Texas professors Janice May and Nathan Goldman, those changes have been variously described as a victory for liberals against conservatives or as a victory for plaintiffs and plaintiffs' lawyers against defense lawyers and business interests such as insurance companies.85

Lawyers who represent individual litigants in suits against insurance companies are known as personal injury plaintiff's lawyers. Based on information in the office of the Secretary of State, large donor plaintiffs' lawyers are centered in San Antonio, Corpus Christi, and Houston. In each locale, they have contributed $10,000, $20,000, or more to several candidates who are alleged to be liberal or pro-plaintiff. Some analysts say that insurance defense lawyers, or lawyers who represent insurance companies, have tended to back candidates who are alleged to be conservative or pro-defense.86

Since the contingent fee system allows lawyers to share in damage awards, it is perceived by some to be an incentive for personal injury plaintiffs' lawyers to back candidates whom they believe to be sympathetic to the expansion of damage awards. On the other hand, although insurance defense lawyers have contributed heavily to judicial campaigns, they lack that direct financial stake in a candidate's success.87 However, the business community, particularly insurance companies and professionals, such as physicians, do have a direct financial stake in damage awards. Recently, in response to perceived electoral successes of the personal injury plaintiffs' bar, segments of the business community and the medical profession have begun efforts to support Supreme Court candidates who are less inclined to expand damage awards than are some incumbents. The Texas Supreme Court Justice Committee, a statewide organization to oppose allegedly plaintiff-oriented justices, has recently been founded and reportedly has begun serious fundraising efforts.88

C. The Relationship Between Campaign Contributions and Electoral Success

It is clear that money is a crucial part of judicial elections in Texas. During the 1982 and 1984 elections, records show that with the exception of James Denton's Democratic Party primary victory, the best financed Texas Supreme Court candidate consistently won office. One should be careful not to overemphasize the importance of money, however, for it may not be the cause of candidate victory. In fact, the perception that a candidate is a "winner" may be the cause of the candidate receiving the most campaign money. Although a certain amount is needed to be a viable candidate, factors other than money are important for candidate success.89

86. Id.; Schotland, supra note 73, at 61.
88. Kilday, supra note 84.
89. Schotland notes that in some states contributions clearly tend to go to winners since donations are made after the election. Schotland, supra note 73, at 118 n.159. That money is
Additional factors that are associated with victory include campaign skills of the candidate, incumbency of the candidate, and the candidate's name. James Denton won the Democratic primary for the Texas Supreme Court although he had less funding than his opponent. Denton, however, was an incumbent and a hard campaigner. He had an opponent, William Kilgarlin, who has the disadvantage of a name that was hard to pronounce.\textsuperscript{90}

Political party affiliation is also a major factor that is associated with candidate success. John Bates, in 1984, received nearly 46% of the votes in his race against John Hill even though Bates had roughly $12,000 in contributions in the 1983 to 1985 reporting period and Hill had over $1,400,000. Additionally, Hill was a former attorney general and a former gubernatorial candidate. Bates was not well known politically, but Bates was a Republican in a Republican year in Texas.

Table 16 notes that at the court of appeals level, there is virtually no relationship between winning and the amount of money raised by the candidate. Although there is a stronger relationship between winning and having the most contributions in Dallas County, being a Republican or being an incumbent are also explanations for candidate success. A Republican Party affiliation in Dallas County may be particularly important for a judicial candidate's victory since Dallas is a strong Republican bastion. In such a situation, a Republican affiliation can prove far more crucial for victory than a large amount of campaign money.

\textbf{D. Summary}

Financial contributions are not the sole reason for the success of judicial candidates. Financial contributions, however, are important enough in judicial elections that interests within the electorate can use their power to finance campaigns to play a significant role in promoting judicial candidacies. Political scientists believe that interest groups compete in politics. This competition will lead to varying patterns of political victories and defeats for the groups. It will also result in changing coalitions among those groups as there is a continual struggle for power. Overall, the goal of that competition is to win political victories that will achieve the interest groups' goals. Ordinarily, political scientists think that the process of competition among interests for elective offices is characteristic of the legislative process. Extending this theory to the judiciary, one can assert that judicial elections involve a struggle between competing interests in society. Among the primary actors in that struggle would be competing factions of the bar.

Theoretically, elections allow knowledgeable voters to make informed choices between competing interests. The next section will explore the extent to which judicial elections achieve this ideal.

only a factor, but not the factor, associated with candidate success is noted by Volcansek, \textit{Money or Name? A Sectional Analysis of Judicial Elections}, 8 JUST. SYS. J. 46 (1983).

\textsuperscript{90} Asker, supra note 72.
Table 16
Candidate Contribution Levels and Candidate Success
in Judicial Elections
(1982-1984)

<table>
<thead>
<tr>
<th></th>
<th>% of Candidates With Highest Contributions Who Won</th>
<th>% of Winning Candidates Who Were Incumbents</th>
<th>% of Winning Candidates Who Were Republicans</th>
</tr>
</thead>
<tbody>
<tr>
<td>Courts of Appeals(^1)</td>
<td>47% ((19))</td>
<td>16%(^3) ((19))</td>
<td>47%(^4) ((19))</td>
</tr>
<tr>
<td>Dallas County(^2)</td>
<td>68% ((25))</td>
<td>52%(^5) ((25))</td>
<td>76%(^6) ((25))</td>
</tr>
<tr>
<td>Five Rural Counties(^2)</td>
<td>40% ((5))</td>
<td>60%(^7) ((5))</td>
<td>20%(^8) ((5))</td>
</tr>
</tbody>
</table>

\(^1\) Two campaign reports were so illegible that two elections are excluded from the analysis.

\(^2\) The counties are: Cameron, Willacy; Wichita; Armstrong, Potter, Randall; Bowie, Cass; Borden and Scurry.

\(^3\) Two judges were incumbents and had the highest contribution levels in their races.

\(^4\) Two judges were Republicans (incumbents) and had the highest contribution levels in their races.

\(^5\) Eleven of the incumbents had the highest contribution levels in their races.

\(^6\) Twelve Republicans had the highest contribution levels in their races.

\(^7\) One incumbent had the highest contribution level in his race.

\(^8\) One Republican had the highest contribution level in his race.

Source: Calculated from data obtained from Texas Secretary of State and Texas Office of Court Administration.

V. VOTING FOR JUDGES

If the public desires judges to be accountable to the electorate, then voters must make a rational choice between candidates. This choice can be a judgment on the qualifications or policy positions of judicial candidates. For such a choice to be based on reason, voters must assess judicial candidates in one of two ways: (1) voters must have personal knowledge or information about the judicial candidates; or (2) voters must have some external cue about the candidates that allows voters to choose without personal knowledge about specific candidates. If voters do not have knowledge of candidates or useful cues as to the candidates' qualifications or positions, they will use other means by which they can make ballot choices. Voters will respond to candidates' public relations techniques or rely on name identification or the name attractiveness of candidates.

This section will first examine voter knowledge of judicial candidates and then examine voter cues about candidates where there is no specific knowledge of candidates. Finally, there will be a discussion of public relations techniques and other means for making ballot choices, such as voting on the basis of candidates' names.
A. Voter Knowledge

Although the evidence on voter knowledge of judicial candidates is mixed, most studies show a lack of knowledge by voters. Table 17 presents the results of a poll taken in New York in 1954. Hardly anyone could recall the name of the chief justice of New York's highest court, a respected jurist who was endorsed by both the Democratic and Republican parties. In instances in which voters could name candidates for whom they had voted, the candidates were exceptionally visible personalities. However, recall of any judicial candidate's name was unusual. Most voters admitted that they either did not pay attention to judicial elections or simply voted party label. Another study found that even when an intense campaign battle was being fought for the Wisconsin Supreme Court in 1964-65, only 46% of the electorate knew that judges were elected in Wisconsin; only 30% knew which of two candidates was an incumbent; and only 9% could remember anything substantive about the state Supreme Court election that was held a few months before the survey. Only 15% of voters knew the political parties to which the candidates belonged. This low percentage may be due to the fact that Wisconsin judicial elections are nonpartisan.91

In Oregon, on the other hand, researchers found that those who actually voted for judicial candidates were able to identify them. A large proportion of Oregon voters could correctly identify at least one circuit court candidate.

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All four judicial candidates were identified by 11% of the sample; 16% could identify three candidates; 21% could identify two candidates; and 34% of voters identified one candidate. Only 5% of voters could identify none correctly, and only 13% gave no answer.

The Oregon election was nonpartisan and off-year. Theoretically, such an election should be one with little voter awareness of the candidates. However, it is useful to note that only 8% of the Oregon voters felt that they had no information on judicial candidates, whereas 58% felt that they did not have enough information. Of the sample of voters, 32% felt that they had enough information to vote, and 2% felt that they had more than enough information to vote.

The Oregon Secretary of State distributes a candidate information book to every voter in the state. This book is the primary source of information for Oregon voters in judicial elections. Organizations in Texas, such as the League of Women Voters, do make candidate information material available on request by voters; however, every registered voter does not automatically receive the information. If a state-funded candidate information book has led to awareness of judicial candidates by Oregon voters, perhaps such a resource would prove valuable to Texas voters.

The same researchers studied Washington judicial elections and had similar findings. Again, the state provided a voter information booklet, although not in time for primary elections as Oregon did. Nevertheless, even with Oregon's pre-primary voter information booklet, it should be noted that 64% of voters felt that they still had insufficient information.

The only published study of voter knowledge about judicial elections in Texas was done in Lubbock at four polling places during the 1976 election. This study is not based on a sample that would make it comparable to contemporary Dallas and Harris Counties with their highly competitive, partisan judicial campaigns. It is a valuable study, however, in that it examines the Texas experience with judicial elections in a less urban population center where judicial campaigns are not yet highly competitive. Although one may argue that the study was done before Texas judicial elections were partisan, it is also the case that the study was done when one judicial election resulted in far greater media coverage of judicial elections than is normally the case even for partisan elections. This election involved the candidacy of Don Yarbrough for the Texas Supreme Court. Only 14.5% of the sample could recall the name of one candidate for the Texas Supreme Court or Court of Criminal Appeals. The county and district court races were uncontested. No scandal was associated with those races as was the case with the Yarbrough race. Only 2.5% of the sample could name county candidates, and only 4.9% could name district court candidates. In contrast, 43.7% of the voters could recall one candidate in the United States Senate race, and over 50% could recall one in the United States House of Representatives race.

Don Yarbrough was pitted against two write-in candidates in the general

election. He had had a Democratic primary opponent who was the over-
whelming choice of the State Bar's preferential poll. Prior to or at the time
of his election, he was the target of at least fifteen law suits. Two weeks
before the general election, he was the subject of a disbarment suit, which
alleged law violations and professional misconduct. Media attention for this
race was very high. Nevertheless, 75.2% of the sample of voters were un-
aware of the Yarbrough controversy.

Interestingly, 55.8% of the Lubbock sample indicated that they had voted
in a judicial election or that they would vote when they entered the polling
place. Nearly 68% supported the election of judges, but 85.8% could not
recall the name of one judicial candidate. Oregon voters could identify judi-
cial candidates and felt that they had some knowledge of candidates. In
Texas, although knowledge of judicial candidates increased when voters re-
ceived information on candidates from legal sources, only 7.9% reported
receiving information from any legal source.93

Most research supports the view that voters are uninformed about judicial
candidates. There is no direct evidence on voter knowledge of highly com-
petitive partisan elections in Texas. The conclusion that can be drawn from
the available evidence, however, is that judicial elections tend to have low
voter interest.94

It may be that voters can make judgments about judicial candidates even
though they know little or nothing about the candidates.95 The following
subsection examines this issue and, in particular, focuses on party affiliation
and ethnicity as cues that aid voter choices.

B. Cues About Judicial Voting Absent Information
About Specific Judicial Candidates

Two major cues that uninformed voters have in the voting booth are:
(1) the candidate's political party affiliation; and (2) the ethnicity of the can-
didate, which is suggested by the candidate's name. There are also several
other cues, such as place on the ballot, gender of the candidate, and the use
of nicknames on the ballot. It is possible that some of these cues allow an
uninformed voter to make a meaningful choice among candidates. Such a
choice can be a choice between judicial policies, or it can be a symbolic polit-
ical choice. If the choice is a symbolic political choice, the voter may decide
that the important decision is to place as many people of a certain party or
ethnicity or gender as possible on the bench. If such a symbolic political
choice is made by the voter, then party voting, ethnic voting, or gender vot-
ing become ends in themselves.96 Often judges are appointed at least in part
due to party affiliation, ethnicity, or gender. When such appointments are

93. Johnson, Shaeffer & McKnight, The Salience of Judicial Candidates and Elections, 59
94. Adamany & Dubois, supra note 38, at 775, have written, "Supreme Court contests
have low visibility and it is unlikely that voters know much about judicial candidates."
95. Id.
96. This point is noted by P. DUBOIS, supra note 37, at 81. See S. NAGEL, supra note 45,
at 215-17.
made, they often are symbolic political choices by governors or presidents and are aimed at providing rewards to key groups. Thus, party affiliation, ethnicity, or gender related appointments tend to reflect the same choices as voters who choose judges for symbolic reasons. Some believe that it is valuable for certain interests or groups to be represented on the bench regardless of the judges' policy choices. However, it is usually argued that at least party affiliation provides a cue to voters about the judicial policy choices that judges will make.

Several studies have correlated political party affiliation and judicial decision-making. Those studies have found differences between the judicial decisions of Democratic and Republican judges. The relationship between political party affiliations and judicial decisions on the Michigan Supreme Court was examined by one scholar. He concentrated on workman's compensation cases decided between 1958 and 1960 and found a pattern of Democratic-Republican divisions in non-unanimous decisions. However, the Michigan Supreme Court was known for its partisan nature. A similar study of workman's compensation decisions by the Wisconsin Supreme Court, a court with a far less partisan reputation than the Michigan court, found that party affiliations of justices were less useful in explaining Wisconsin's court decisions than was the case with the Michigan court. Additionally, there was a much higher degree of unanimity on the Wisconsin Supreme Court than there was on the Michigan Supreme Court. Wisconsin's proportion of cases that were not unanimous was only 12% compared to 46% in Michigan.

All workman's compensation appeals decided by the New York Court of Appeals from 1914 to 1967 were examined in one study. With the exception of one twelve-year period, judges' party affiliations had only a slight relationship to judges' decisions. One study of partisan divisions on five state supreme courts found that 32 of the 47 Democratic justices voted for the worker more than their court's average in workman's compensation cases. Only 12 of 51 Republicans did so. However, the researcher cautioned that other areas of law probably would not reflect as much of a partisan division. It was also noted that the five courts studied were not representative of all state supreme courts.

Another study examined the decisions of state supreme court justices who

97. See, e.g., the comments of President Carter and Senator Edward Kennedy in, Slotnick, Reforms in Judicial Selection: Will They Affect the Senate's Role? (pt. 2), 64 JUDICATURE 114, 115-16 (1980).
98. Adaman & Dubois, supra note 38, at 775.
102. Stecher, supra note 100, at 145.
104. Stecher, supra note 100, at 177-78.
in 1955 sat on bipartisan courts. It was found that Democratic judges tended to be more "liberal" than the average for their court, and Republican judges tended to be more "conservative." There was a statistically significant relationship between being a Democrat and: (1) tending to be for the defense in criminal cases; (2) being for the administrative agency in business regulation cases; (3) supporting the claimant in unemployment compensation cases; (4) favoring the defendant on claims of constitutional violations in criminal cases; (5) supporting the government in tax cases; (6) being for the tenant in landlord-tenant cases; (7) favoring the consumer in consumer sales cases; (8) supporting the injured party in motor vehicle accident cases; and (9) favoring the employee in workman's compensation cases.\textsuperscript{105}

Another study used statistical techniques to measure the extent of the variance in judicial decision-making that was attributed to political party affiliation. In no category did political party explain more than 10% of the variance in judicial decisions.\textsuperscript{106} One survey of this research reported, "Bowen, too, found that party affiliation was the most valuable item in explaining the differences among judges, but it was still not a powerful predictor of votes. 'A final inescapable conclusion,' he wrote, 'about the explanatory power of the sociological background characteristics of these judges is that they are generally not very helpful.'"\textsuperscript{107}

In the early 1970s a re-examination of the 1955 data on state supreme court justices was done. It was found that political party explained 7% of the variance in judicial decisions in criminal cases and 14% of the variance in economic cases. By statistically controlling for the effect of attitudes, organizational memberships, previous occupation of the judge, education, age, and town in which the judge practiced, it was possible to increase the percentage of the variance of judicial decisions explained to 11% in criminal cases and 44% in economic cases.\textsuperscript{108} The 44% figure is a most impressive one. Of course, voters are unable to control for the effects of other variables when they cast their ballots. Instead, a voter with no cue to voting except party would have to rely upon the uncontrolled relationship between party affiliation and liberalism/conservatism in judicial decisions. Thus, a voter relying on party alone could vote in such a way that only 7% of the variance in judicial decisions in criminal cases and only 14% of the variance in economic cases could be reduced.

Another statistical analysis was one of the relationship between political party affiliation and the decisional behavior of judges on the federal courts of appeals. Political party explained 9.2% of the variance in criminal procedure cases; 13.3% of the variance in civil liberties cases; 17.7% of labor decisions; 7% of private economic cases; 4% in cases relating to governmental fiscal matters; 14.3% in cases involving injured persons; 9.9% of

\textsuperscript{105} Nagel, Political Party Affiliation and Judges' Decisions, 55 AM. POL. SCI. REV. 843 passim (1961).
\textsuperscript{107} W. Murphy & J. Tanenhaus, The Study of Public Law 107 (1972).
\textsuperscript{108} S. Nagel, supra note 45, at 244-45.
political liberalism cases; 4.9% of judicial activism cases; and .4% of dissent behavior. The article concluded, "These findings lend some slight encouragement to backgrounds-behavior research at the aggregate level." 109

Although these and other studies tend to find a statistically significant relationship between political party and judicial decisions, most studies show that the relationship is not strong. Democrats show a tendency to be more "liberal" in their decisions than are Republicans; however, as a cue for voters, judges' party affiliations have limited value. 110

Additionally, it should be noted that the studies of the relationship between political party affiliation and judicial voting behavior are not based on Texas studies. The studies treat the Democratic Party as the liberal party and the Republican Party as the conservative party. As Janice May and Nathan Goldman have pointed out, although the Texas Republican Party may be a conservative party, the Texas Democratic Party contains both liberal and conservative factions. The result is that the ideological divisions between the two parties in Texas is likely to be more blurred than it would be in many of the states. 111 The Texas Poll asked Democrats and Republicans to identify themselves as liberals or conservatives. Of the Democrats, 26% identified themselves as liberals; 30% called themselves conservatives; and the remainder identified themselves as moderates. Only 12% of Republicans identified themselves as liberals; 54% as conservatives; and the rest as moderates. 112 If the ideology of judicial candidates is much like that of voters who express a party preference, party affiliation currently does not provide a good cue to Texas voters that Democratic judicial candidates are liberal candidates. On the other hand, it does provide a fairly good cue that Republican judicial candidates are conservative candidates. As Texas moves more toward becoming a two-party state, perhaps the ideological differences between the two parties may become more distinct, and the limited relationship found between party affiliation and judicial decisions will be more applicable to the state's judiciary.

As a cue, identifying the ethnicity of a candidate by a surname is at best an uncertain effort. Very limited research has been done on the relationship between the ethnicity of a judge, as determined by the surname, and the judge's policy positions. One study, for example, used judges' names to divide them into "Part non-British ancestry vs. only British" ancestry. Such a division would be similar to a voter casting a ballot for or against a candidate with an Anglo-Saxon name. Yet, it was found that there was only a .09 correlation between having part non-British ancestry and being a liberal in

110. Correlations between party affiliations and judicial decisions tend to be low enough that political party affiliations seem to be a poor predictor of judicial policy positions. In Texas political party affiliations may be particularly poor cues to judicial policy positions. See J. May & N. Goldman, supra note 83, at 1.
111. Id.
judicial decisions in criminal justice cases. There was only a .01 correlation between being part non-British ancestry and being a liberal in judicial decisions in economic cases. These correlations are very low. It should be noted that the studies to date of the relationship between minority ethnicity, such as having an Hispanic surname, and judicial decisions are too limited to be conclusive.

The gender of judicial candidates can sometimes be determined by the judge's name. However, the number of women has been so limited that statistical studies relating gender to judicial behavior have been inconclusive.

C. Issueless Campaigns and Public Relations Techniques

To attract votes, a judicial candidate in an urban area faces a difficult task. Straight party voters usually cannot be totally excluded from a judicial campaign effort. The candidate cannot distinguish the straight party voter from the independent voter, except to exclude voting precincts that contain many straight party voters from such things as campaign mailings. Somehow, the candidate must attract those independent voters.

Judicial candidates are hindered far more than other candidates for office. Unlike a candidate for the legislative and executive branches, the judicial candidate cannot ethically discuss issues that may come before his or her court. Instead, the candidate must rely on some vague claim of being the "best qualified." Proof of qualifications is usually doubtful at best: years of judicial experience or legal experience; law school from which the candidate graduated; family status; veteran status; organizational memberships; newspaper and interest group endorsements; and perhaps bar poll or evaluation ratings are usually the extent of a judicial candidate's efforts to inform the public. If any differences among candidates can be identified, it will be in the bar poll; however, now all judicial districts in Texas have a bar poll. Even with that poll, it is unclear how the poll should be interpreted. It is possible that the poll is little more than a popularity rating by lawyers. There are a few Texas bar associations with judicial evaluations; however, the non-incumbent candidate is probably not evaluated since he is probably not yet a judge. If the poll or evaluation does reflect poorly on the candidate, that person can always campaign as the opponent of the establishment bar or argue that as "one of the people" the candidate is being persecuted by the establishment.

There are exceptions to issueless judicial campaigns in Texas. In 1980 one

113. S. Nagel, supra note 45, at 245.
114. In 1970 only one percent of the American judiciary was female; in 1979 only four percent of judges were women. See Slotnick, Gender, Affirmative Action, and Recruitment to the Federal Bench, 14 Golden Gate 519, 524 (1984). In an overview of research on differences in decision-making by white male judges compared to black or to female judges, Slotnick states: "At bottom, the literature on non-traditional judges has been quite exploratory, limited in scope, and somewhat inconclusive." Slotnick, The Paths to the Federal Bench: Gender, Race and Judicial Recruitment Variation, 67 Judicature 370, 374 (1984).
116. E.g., Henderson & Sinclair, supra note 14, at 450. For a contemporary example of
candidate for a Houston area court of appeals seat, for example, campaigned
in favor of school prayer, lower taxes, individual rights, and non-interference
of government in private matters. He also spoke out against pornography,
abortion on demand, and unjust legal technicalities.117 Recent races for the
Texas Supreme Court have placed stress on the wealth of one justice,118 the
"... little regard for the average person" of another justice,119 and the
alleged plaintiff or defense bias of several candidates and incumbent
justices.120

Far more common in these issueless campaigns are vague statements that
have little to do with the judge's position or statements that are open to a
number of interpretations. One candidate for a court of appeals position, for
example, had an advertisement claiming that he was "A judge who will sup-
port not hinder law enforcement;[a] judge deeply concerned about child
abuse and the horde of unpaid child support orders; and [a] judge opposed to
liberal interpretation who will read the law as it was written."121

Judges can sometimes attract the attention of voters with public relations
techniques. One successful judicial candidate in 1978 campaigned in a used
fire truck.122 Often slogans or appeals designed to catch the public eye can
work. One successful judicial candidate campaigned against a black female
incumbent judge by running advertisements that referred to her as the "af-
firmative action" candidate.123 Another candidate ran with the motto: "Ex-
perience, Quality and Availability." He noted his years of experience on the
bench and his opponent's youth, funding, and lack of trial experience. He
added that he was a deacon in his church, a Sunday School teacher, an ac-
tive worker in the Boy Scouts, a Silver Beaver award winner, and a World
War II veteran. He also claimed active involvement in Veterans of Foreign
Wars, the American Legion, and Disabled Veterans.124 Another district
court candidate's advertisement not only noted the judicial candidate's legal
experience, but contained the slogan: "Independent thinking people want
their independent rights preserved."125 The right combination of imagery is
crucial to a candidate who is in a campaign in which public interest is low
and discussion of issues raises ethical problems.

D. Names and Name Identification

Another way that candidates try to appeal to voters is through name iden-
tification. Some candidates are blessed with politically appealing names,
such as Judge Sam Houston Clinton, Judge Ira Sam Houston, Judge John

such an argument, see McGonigle, Vaughan Fares Best, Howell Worst in Judge Ratings, Dallas
117. S. Stevens, supra note 55, at 10.
118. Id. at 11.
119. Id. at 10.
120. J. May & N. Goldman, supra note 83, at 6-7.
122. Blow, supra note 53.
Marshall, or Judge Sam Bass. If one is not born with an attractive name, it can sometimes be created by listing a nickname on the ballot and running as "Bill" instead of "William," "Bob" instead of "Robert," or "Joe" instead of "Joseph." In California primary voting for Democratic and Republican Party leaders, it was found that candidates with nicknames on the ballot had a 79% advantage over candidates without nicknames.  

Some judges have established name identification with the voters by having held previous offices, such as Justice Price Daniel or Chief Justice John Hill. Others can rely on being the namesake of famous Texas political figures, such as Judge Martin Dies. Still others benefit from having a name that is similar to another well known person or institution. Chief Justice Joe Greenhill believed that he gained votes in Dallas because of the well-known Greenhill School even though he has no relationship to the school. Similarly, he believed that the candidacy of a person named Greenwood in the Houston area gained Greenhill votes that were intended for Greenwood.  

Chief Justice Robert Calvert felt that there were two major reasons for his victory in his earliest Supreme Court races: (1) that his name was almost identical to Comptroller Robert Calvert, a long-time Texas officeholder whose name appeared on all state warrants; and (2) that Calvert's Whiskey advertising campaigns included newspaper advertising that said "Switch to Calvert."

The judge in Dallas County with the highest name recognition is Ron Chapman, also the name of a popular local radio personality. Perhaps the most famous instance of voter name confusion was the successful effort of Don Yarbrough to win a seat on the Texas Supreme Court. His name was apparently confused with the well-known gubernatorial candidate Don Yarbrough, or possibly with the long-time Texas senator, Ralph Yarborough. The result was that Don Yarbrough defeated a respected judge even though Yarbrough was the subject of numerous lawsuits and a disbarment proceeding.  

At times a name can create political difficulties for a judge. It was widely believed that Judge Charles Dally's name was a political liability since voters would identify the name with judicial delay. When Dallas County Criminal Court Judge Tom Price decided to run for a judgeship in 1974, one of the reasons that he chose to oppose Judge Carl Friedlander was because the judge's name was a difficult one. Similarly, one of the state's most respected judges, St. John Garwood, was nearly defeated by a candidate

127. Interview with Justice Joe Greenhill, in Austin, Texas (Oct. 16, 1985).  
129. McGonigle, supra note 115.  
132. McGonigle, supra note 115.
whose name, Jefferson Smith, was more folksy and who had developed name identification with voters by his frequent tries for office. St. John Garwood, on the other hand, almost was defeated because of his aristocratic sounding name.\textsuperscript{133} William Kilgarlin believed that having an unusual name hurt him in his Supreme Court race against James Denton.\textsuperscript{134}

Judicial names can also be important in establishing the ethnic identity of voters who, with little other information about the candidate, will vote for or against the ethnic group represented by the name. A study of primary voting for party leaders in California found that in those low voter knowledge races, a Scandinavian name offers a 24% political advantage over all other names, an English name a 3% advantage, a Spanish name an 11% disadvantage, a Jewish name a 14% disadvantage, and an Italian name a 39% disadvantage.\textsuperscript{135} The distribution of advantages and disadvantages would likely be different in Texas, but the study does show that ethnicity of one's surname can be a powerful determinant of political success or failure.

At times a candidate can participate in a case with sufficient news potential to affect voters, though such cases are probably rare. To get voters to remember a name may require a candidate to plaster an area with yard signs, bill boards, bumper stickers, and television and radio commercials. A jingle is often useful to create name recall among voters. Rarely do these advertisements provide much information other than a name and office. The hope is that voters will remember the name and vote for the candidate.

With only general and often subjective information on qualifications, little or no information on a candidate's issue positions, and only limited information on candidates such as name identification, it should not be surprising that party affiliation is often a major cue to voters in judicial elections. Even if there is an effort to inform voters, limited funds make it difficult to promote a serious voter education campaign. Emphasis on name identification and party identification becomes necessary because of costs associated with more sophisticated efforts. The lack of a serious voter education campaign is suggested by the Dallas County experience, where a judicial candidate is considered to have run a substantial informational campaign if mailings are sent to 100 of the county's 411 voting precincts.\textsuperscript{136}

\textsuperscript{133} St. John Garwood described this race as follows: "This writer had the interesting experience, in one of his elections following his appointment to the Supreme Court, of losing over two-thirds of the state's 254 counties to a retired school teacher with a law license who was not even listed as a lawyer in his local telephone directory. He had probably never tried a contested case above justice court level, but he had previously (but unsuccessfully) run for the offices of State Superintendent of Public Instruction and Railroad Commissioner and he had an appealing name. Except for the writer's home base being Houston, he would have served perhaps the shortest Supreme Court term in Texas history." Garwood, \textit{Judicial Revision—An Argument for the Merit Plan for Judicial Selection and Tenure}, 5 \textit{Tex. Tech. L. Rev.} 1, 14 (1973).

\textsuperscript{134} Asker, supra note 72.

\textsuperscript{135} Byrne & Pueschel, supra note 126, at 782.

\textsuperscript{136} McGonigle, supra note 115.
E. Possible Other Cues

The party primary offers even less information to the voter than the regular election since all candidates in the primary have the same party affiliation. A study of 500 party central committee elections for the Democratic and Republican parties in California between 1948 and 1970 suggests that there are several important determinants of successful campaigns for obscure offices. The study is not directly comparable to Texas judicial offices since party offices may possibly be more obscure than judicial offices. Additionally, the occupation of candidates can be listed on the California ballot for party offices; however, an occupational listing would be, for the most part, irrelevant for judicial offices since most judicial candidates would be lawyers. Even so, the study offers some excellent insights into how people vote in low interest elections absent party affiliation listings. In this way, it is somewhat similar to primary elections for judges in Texas.

The study found that certain occupational listings gave candidates an advantage over other listings or over non-listings of occupations. Although most of these occupational listings are irrelevant to this research, one occupational listing is “incumbent.” That listing gives candidates a 47% advantage over those without the “incumbent” listing. It has been suggested that Texas judges be identified as incumbents on the election ballot. If this is done, it would have an impact on election results. At least judges on courts with relatively uncontroversial duties will likely have an electoral advantage. In elections without partisan labels, the advantage would likely be great. However, it may be that some courts, such as the Texas Court of Criminal Appeals, perform duties unpopular enough that the “incumbent” label could be an electoral disadvantage for the judge.

Contrary to extensive earlier research, the California study found that first place on the ballot does not give candidates an electoral advantage. However, where there are several candidates, those below the first place on the ballot, but not at the bottom or near bottom places on the ballot, are likely to suffer some disadvantage. The importance of ethnicity of surnames and of the use of nicknames was noted earlier. Additionally, male candidates were found to have an 8% political advantage over female candidates.137

F. Summary

Available evidence suggests that voter knowledge of judicial candidates tends to be low. Additionally, party affiliations of judicial candidates and the ethnicity of those candidates are limited substitutes for specific knowledge about judicial elections. In low interest elections, votes based on public relations techniques, name attractiveness, and name identification became substitutes for voter policy choices.

This section has suggested that it is unlikely that voters know much about

137. Byrne & Pueschel, supra note 126, at 778 passim. The major study that did find that the first place on the ballot provided an electoral advantage is H. BAIN & D. HECOCK, BALLOT POSITION AND VOTER’S CHOICE (1957).
candidates' policy choices. Additionally, given limited knowledge of judicial candidates, it is unlikely that voters can make judgments about the quality or competence of judicial candidates. The next section more fully explores the problems associated with an evaluation of the quality of judges. It also explores the major means through which voters receive evaluations of judicial quality.

VI. THE QUALITY OF JUDGES

A. Judicial Quality: A Subjective Concept

The measurement of judicial quality is an exceedingly difficult and subjective process. The result is that there is no widely accepted measure of quality that is applied to state judges.\footnote{138} Using subjective ratings by the Missouri bar, Table 18 shows that the bar gave fewer low overall ratings to Missouri plan judges than they did to elective judges. If faith can be placed in these subjective ratings of judges by members of the bar, elective judges have a far greater range in quality than Missouri plan judges. The very limited data suggest that the Missouri plan eliminates the poorest quality judges, but it does not produce the highest quality judges.\footnote{139}

<table>
<thead>
<tr>
<th></th>
<th>Highest Quartile Ranking</th>
<th>Lowest Quartile Ranking</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Statewide</td>
<td>St. Louis County</td>
</tr>
<tr>
<td>Commission</td>
<td></td>
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</tr>
<tr>
<td>Selected Judges</td>
<td>23% (31)</td>
<td>10% (31)</td>
</tr>
<tr>
<td></td>
<td>21% (14)</td>
<td>0% (14)</td>
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<tr>
<td>Elective Judges</td>
<td>34% (53)</td>
<td>26% (53)</td>
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<tr>
<td></td>
<td>33% (18)</td>
<td>22% (18)</td>
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When efforts have been made to quantify notions of judicial "quality" in order to compare the effects of the various systems of judicial selection, more precise indices of quality have been so doubtful that they seem of little use. Some differences have been found between elective judges and commission selected judges in terms of whether the judges selected were born within the state; whether they received a legal education within the state; and whether they had prior political experience.\footnote{140} The extent to which these three background characteristics relate to quality, however, is open to debate. One study showed that most of the differences in the characteristics of judges were related to region of the country as opposed to the system of selection. For example, although it is true that partisan election produces dramatically

\footnote{138} P. DuBois, supra note 37, at 13-17.  
\footnote{139} See supra text Table 18.  
more Democratic than Republican judges, it is because partisan election states are concentrated in the South, which has traditionally been a Democratic region.\footnote{141} It has been shown that there were virtually no differences in the age, birthplace, education, political experience, or prior judicial service of judges in Missouri who were rated by lawyers as “superior” compared to judges rated as “inferior”.\footnote{142} The result is that “[t]he qualifications and qualities essential to a ‘good’ judge are vague and uncertain; needless to say, choosing the ‘best qualified’ individuals to sit on the judiciary is a problematic endeavor.”\footnote{143}

\section*{B. A Representative Judiciary}

Some persons will consider a judiciary that is representative of the population to be one aspect of a quality judiciary. Thus, one important question relating to the characteristics of judges is: which method of judicial selection results in a bench that is most representative of the population?

In overwhelming numbers, America’s trial judges tend to be white males.\footnote{144} That nationwide pattern is also the pattern in Texas. Only one Hispanic has served on the Texas Supreme Court. Since Reconstruction no blacks have served.\footnote{145} One black male was elected in 1984 to a district court position in Dallas County. There were newspaper reports that his victory was due to his Republican affiliation and voter ignorance of his race.\footnote{146} In 1980 a black female was appointed to a district court position, but was defeated in her first election bid by a Republican opponent who labeled her the “affirmative action candidate.”\footnote{147} Some reports suggest that the state’s one Hispanic justice, appointed to his position by Governor White, may have election difficulties because of his Hispanic surname.\footnote{148} Nevertheless, Texas minorities can now be elected to judgeships.\footnote{149} Several judges with Hispanic surnames, for example, have been elected in South Texas in recent elections.

Some research suggests that there is a relationship between judicial selection method and opportunities for minorities to become judges. For example, one study noted that 97.8\% of the commissioners in commission selection systems were white. That statistic supports the charge that the commissions are not representative of society-at-large and may not be able to

\begin{footnotes}
\item[143] P. Dubois, supra note 37, at 17.
\item[146] Tatum, Politics and Justice, Dallas Morning News, Nov. 9, 1984, at 20A, col. 3.
\item[147] Calhoun, supra note 123.
\item[148] S. Stevens, supra note 55, at 6-7.
\item[149] The percentage of blacks elected to any offices in Texas, however, has so far been low. Although 11\% of the state’s population is black, 1.1\% of Texas’ 24,757 elected officials are black. See Merida, supra note 145.
\end{footnotes}
produce a representative judiciary.\textsuperscript{150}

Evidence is far from conclusive, however, that one system of selection will necessarily lead to less minority representation in the judiciary than will another system. Although there may be localities where one system has been successful in producing a representative judiciary, no system is clearly the most successful overall in recruiting blacks and women. One survey of the 18 black judges who served on state or District of Columbia appellate benches in 1977 found that 6 served in partisan election states; 3 served in nonpartisan election states; 5 in commission selection states; and 4 served in the District of Columbia where judges are appointed. A 1973 survey of 167 black judges found that 37\% were elected; 33\% appointed; and 30\% were initially appointed to a vacancy and then elected. Illinois, New York, and Pennsylvania are responsible for about 40\% of all black trial judges. Each of these states is a partisan election state; however, it is not known whether these black judges tended to be elected initially or to be appointed to vacancies.\textsuperscript{151}

With respect to the selection of female judges, the results are also inconclusive. In 1977 there were 9 women serving on state courts of last resort. Of those 9 women, 5 were chosen in states with elective systems; 3 in states with appointive systems; and 1 in a Missouri plan state. Of the 21 women who were then serving on intermediate appellate courts, 10 served in states with elective systems; 7 served in states (or the District of Columbia) where judges are appointed; and 4 served in Missouri plan states.\textsuperscript{152}

Another study compared elected judges with those appointed to the California Superior Court from 1959 to 1977. The elected judges were elected on nonpartisan ballots; appointed judges were selected to fill mid-term vacancies. Elected judges were only slightly more likely to be female and nonwhite than were appointed judges. Of the elected judges, 6.7\% were female and 9.1\% were nonwhite; 2.7\% of the appointed judges were female and 3.7\% were nonwhite. As the author of the study noted, "The differences between the two methods are obviously not large, however, and the limited access of women and ethnic minorities to the judiciary seems to be more a function of the homogeneous composition of the legal profession than the mode of judicial selection."\textsuperscript{153}

C. American Bar Association Efforts

The American Bar Association does try to determine if judicial nominees for federal courts are qualified, but some would say that effort is too subjec-

\textsuperscript{151} Flango & Ducat, supra note 11, at 30.
\textsuperscript{152} Id.
\textsuperscript{153} Dubois, The Influence of Selection System on the Characteristics of a Trial Court Bench: The Case of California, 8 Just. Sys. J. 59, 63-65 (1983). One survey of the literature which examined the various types of judicial selection systems concluded that neither sex nor race clearly distinguishes among judges selected under each of the selection systems. See id. at 33.
tive and biased in favor of the established bar.\textsuperscript{154} It also applies only to judicial nominees, and no attempt is made to continue those evaluations at other points in the judges' careers. The process attempts to evaluate judicial candidates' maturity, competence, experience, integrity, and ability to perform judicial duties.

There is a statistical relationship between low ABA ratings and each of the following: activity in a political party, legislative experience, and executive branch experience. Lack of trial experience, lack of judicial experience, and lack of publication of books or articles also correlate with low ABA ratings.\textsuperscript{155} One scholar has noted that "the most relevant practicing lawyer experience is trial work . . ." and that "an even more relevant form of experience from the point of view of technical competence might be prior judicial experience."\textsuperscript{156} Texas judges at the district court level and higher do tend to obtain judicial experience in low level courts.\textsuperscript{157}

Caution must be exercised, however, in claiming that prior judicial experience is a necessary or sufficient measure of quality. It was previously noted that in Missouri there was no relationship between bar ratings of judges and the judges' prior judicial service. One of the lowest rated district court judges in Dallas County bar polls and judicial evaluations had over twenty years of judicial experience. Additionally, one study which examined the characteristics of U.S. Supreme Court justices found that only 12\% of justices with judicial experience were considered "great," but 41\% of justices without judicial experience were ranked as "great."\textsuperscript{158} When 100 federal district judges were ranked and given an "ability score" based on the percentage of cases that were appealed, the percentage of appeals that resulted in reversals, and the percentage of cases that were reversed, it was found that 65\% of the above average "ability score" judges had no prior judicial experience, but only 43\% of those judges with prior judicial experience had above average "ability scores."\textsuperscript{159}

Claims of experience, competence, maturity, ability, and, most importantly, integrity must be evaluated if there are to be meaningful grounds upon which judicial selection is made. In some states those evaluation efforts are made by judicial selection commissions. In Texas the assumption has been that the evaluations could be made by voters, although the voters' evaluation efforts might be aided by endorsements from media and interest

\textsuperscript{154} H. ABRAHAM, supra note 13, at 27.
\textsuperscript{155} S. NAGEL, supra note 45, at 226-27.
\textsuperscript{156} Id. at 228.
\textsuperscript{157} Henderson and Sinclair note that 48.9\% of the appellate judges in their study moved directly to their posts from district judgeships. A total of 57.8\% of appellate judges had at one time been district judges. Of the district judges, 10.2\% had been county court at law judges and 14.7\% had been county judges (in Texas, county judges are largely administrative positions with some judicial responsibilities). See Henderson & Sinclair, supra note 14, at 489-90. As of March 1984, 58\% of appellate judges originally came to their courts from lower courts. Of the 364 district and criminal district judges, 28\% had at one time served as a judge on a lower court. Calculated from, 1983 ANNUAL REPORT, supra note 1, at 10.
\textsuperscript{158} S. NAGEL, supra note 45, at 193.
\textsuperscript{159} Id. at 195.
groups. The objectivity of media and interest group endorsements, however, is open to question. The endorsements can reflect the biases of the media or group rather than being a judgment upon the competence of a judicial candidate.\textsuperscript{160} Some voters do rely upon such endorsements. A Roper poll of the 1954 New York judicial election found that 21\% of the voters relied on newspaper recommendations. Only the party affiliation of the candidate got a higher response with 39\% of the voters relying on party affiliation in their voting.\textsuperscript{161}

In Texas bar polls have long been prized by judicial candidates as a measure of competence that can be presented to voters.\textsuperscript{162} More recently, nonpartisan citizen committees on judicial qualifications and judicial evaluations reflect efforts to provide additional measures of judicial quality. Because of the importance of committees on judicial qualifications, judicial evaluations, and bar polls, the remainder of this section will be devoted to examining these quality assessing devices.

\textbf{D. Committees For A Qualified Judiciary}

Within Texas the Committee for a Qualified Judiciary in Dallas County has since 1982 evaluated the qualifications of judicial candidates for statewide office, the court of appeals that serves Dallas County and vicinity, and Dallas County judicial offices. It is based on the American Bar Association model for evaluating federal judicial nominees. A similar effort in Harris County began in 1984. These committees are composed of lawyers and lay people. They are nonpartisan and exist solely to evaluate judicial candidates.

Similar committees exist in other states and have operated with varying success. All of these efforts are in response to a perceived need to provide voters with information on judicial candidates that may aid them in casting informed votes.\textsuperscript{163}

In 1982 the Dallas Committee appears to have experienced some success in electing candidates that it endorsed. Only one of its endorsed candidates, a Democrat, was defeated by an unendorsed opponent. There were fourteen district court races in which the Committee made a single endorsement of a candidate. Of its seven Democratic endorsements, six won, although all of those six candidates were incumbents.

The Committee's success in 1984 is more open to doubt. The Committee endorsed two Democrats on the Fifth Court of Appeals, but did not endorse the Republican opponent. The two Democrats lost. The Committee also endorsed two criminal district court judges who were Democrats, and both were defeated. It was only the Committee's Republican endorsements who were successful.

\textsuperscript{160}. Henderson and Sinclair, however, suggest a tendency for newspapers to ally themselves with the bar associations. See Henderson & Sinclair, \textit{supra} note 14, at 449.

\textsuperscript{161}. S. NAGEL, \textit{supra} note 45, at 215.


\textsuperscript{163}. Schotland, \textit{supra} note 73, at 96-104.
The Harris County committee began endorsing candidates in 1984. In Harris County the judicial qualifications committee issued eleven singular endorsements of candidates for the First and Fourteenth Courts of Appeals and Harris County District Courts. In three district court races the endorsements were not exclusive, but instead both Democratic and Republican candidates were determined to be qualified. Of the eleven exclusive committee endorsements, only four candidates won. Those four were the committee's only Republican endorsements. The seven Democrats who were endorsed included six incumbents, and all were defeated in the Reagan landslide.

The Dallas and Harris County committees do not provide an explanation of why a candidate is "qualified" or not, nor do they rank one candidate as more qualified than another when two candidates are endorsed for the same office. As a result, only limited information is provided to voters. At least one Republican judicial candidate in Dallas County has accused the Committee of having a Democratic bias.\textsuperscript{164} Thus, it seems possible to campaign against the Committee should a candidate fail to win its endorsement.

\textbf{E. Bar Polls}

Most of the larger bar associations in Texas publish bar polls. Results of these polls are often used by judicial candidates in their advertising.\textsuperscript{165} Those who lose bar polls, however, will either ignore the results in their advertising or campaign as a candidate "of the people" rather than as a candidate "of the legal establishment."\textsuperscript{166}

Houston's 1982 preference poll, with one exception, endorsed every incumbent running for office in courts of appeals races and district court races. The one incumbent not preferred by the bar lost, but 11 of 19 incumbents preferred by the bar were defeated. Where no incumbents were involved, the bar poll's preferences were more successful. In only one of five races was the poll's choice defeated; however, that choice was the poll's only Republican choice. Not all bar preference polls are such poor predictors of the behavior of the electorate. The 1982 Dallas Bar Association poll could have been used to predict accurately 17 of 18 courts of appeals and district court races in the Dallas area. Every one of the 12 incumbents was preferred in the Dallas poll.

Although bar polls may be useful for campaign purposes and may be relied upon to a degree by voters, it is unclear what bar polls mean. It may be argued that attorneys have insufficient information to rank judges or that the ballots are not cast solely on judgments of judicial competency. Rather than providing a measure of the quality of judges, they seem to be bar popularity polls that often exhibit a strong bias toward incumbents.\textsuperscript{167}

\textsuperscript{164} See the judicial candidate's advertisement in the Dallas Morning News, Nov. 1, 1982, at 11A, col. 3.
\textsuperscript{165} See, e.g., the judicial candidate's advertisement in the Dallas Times Herald, Nov. 4, 1984, at 7E, col. 4.
\textsuperscript{166} Henderson & Sinclair, \textit{supra} note 14, at 450.
\textsuperscript{167} P. Dubois, \textit{supra} note 37, at 68.
F. Judicial Evaluations

Some bar associations have attempted to evaluate the performance of judges by asking lawyers who claim personal knowledge to score the judges along such dimensions as: proper application of the law; courtesy and attentiveness; impartiality; efficient use of attorney's time; and diligence. It may be argued that such evaluations place great trust in the objectivity of the attorneys evaluating the judges. Yet, with the possible exception of the two committees in Dallas and Harris Counties, in Texas there is no more widely available effort to provide voters with an evaluation of qualifications of judges. The League of Women Voter's guides provide facts, but not evaluations. These evaluations by the bar may be criticized in that only sitting judges' qualifications are evaluated. Unless an open election attracts the candidacies of sitting judges, or unless the opponent of an incumbent is a sitting judge, only partial information on a judicial race is provided to voters.

The extent to which voters rely on judicial evaluations is doubtful. Table 19 divided judicial evaluations in Harris and Dallas counties into three categories: high, medium, and low categories. It was then determined whether there was a relationship between a judge's evaluation score and victory in the election following the evaluation. High scoring judges won re-election 66% of the time; however, 50% of medium and low scoring judges also won re-election. On two occasions, two sitting judges were competing in the same races. In one of those races, a low scoring judge ran against a high scoring judge; the low scoring judge won the election. In the other case, a medium scoring judge ran against a high scoring judge; the medium scoring judge won.

G. Summary

At best, efforts to determine the quality of judges are subjective processes.
Judicial qualifications committees, bar polls, and judicial evaluations are all subject to criticisms. Of these three major efforts, bar polls do not even explicitly assess the quality of judges. Based on the results of the elections, none of these efforts can claim much success in influencing Texas voters in recent elections.

VII. ACCOUNTABILITY VS. INDEPENDENCE

The diversity of systems of judicial selection reflects the uncertainty and ambiguity that society feels over the role of judges within the political process. Figure 3 suggests that the four major systems of judicial selection fit along a continuum that ranges from judicial accountability, where judges are directly responsible to voters through the election process, to judicial independence from the voting process. The partisan election system, such as is found in Texas, theoretically prefers electoral accountability over independence from the electorate; a purely appointive system, on the other hand, opts for independence over accountability. Nonpartisan election attempts to retain the value of voter accountability while trying to remove judicial elections from the partisanship that is typically found in the electoral process. Commission selection plans stress independence, but make some effort to insure electoral accountability through retention elections.

The key to the debate over judicial selection lies in the priority given to these core values of accountability and independence. The literature on judicial selection is clear that there is no proof that one system will produce the “best” judges.168 The literature is also clear that no system will remove political judgments from the selection of judges, although the arenas in which those political judgments are exercised will be different as will the decision makers.

Although one of the arguments in favor of commission selection is that the commission system will produce the “best” judges, empirical support for this claim is lacking. It may be that research has overemphasized Missouri as the state in which commission selection is studied. Other commission selection states may provide better examples of the effect of the Missouri plan. Yet, even if the state of Missouri is not the best example of the plan in

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operation, the failures of commission selection in Missouri to produce a nonpolitical selection system and to produce the "best" judges suggest that the selection system alone does not produce a quality judiciary. The key to the success of any system of selection may be the interaction between the system of selection and the political culture of the state. As an extreme example of this point, no selection system in Huey Long's Louisiana would have produced a judiciary that was apolitical and selected solely on the basis of professional qualifications. The interaction between selection system and political culture is a fluid one because states continually change. Thus, a system of selection may perform well in securing first-rate judges at one time and fail in that effort at a later time.

Perhaps it is unfortunate that the best and most detailed study of commission selection is based on Missouri. Arguably, it may be a study of one of the worst examples of the plan; however, other research in general confirms the Missouri findings that partisan criteria play a major role even with commission selection of judges.169

One of the fundamental problems in determining which plan produces the "best" judges is that there is no readily measurable definition of what the "best" judges are. When commissioners in 15 commission selection jurisdictions were asked to identify those characteristics that are important in judicial selection, the 52 responses dealt mostly with "vague notions that the commissioners generally try to apply to candidates" rather than "practical, workable measures which can meaningfully differentiate among judicial nominees."170

Qualities desired in judges tend to deal with temperament, neutrality, and ability. However, as one scholar noted in reference to these generally highly subjective criteria, "... these general standards or qualifications are practically unverifiable since they are nearly impossible to translate into measurable or distinguishable evaluations that can accurately screen potential nominees."171

Rather than deal with vague concepts like temperament, intellectual ability, or courtesy, social scientists tend to rely on readily available and easily quantifiable information on judges like birthplace, education, political background, and judicial experience. As previously noted, whether these judicial characteristics measure the quality of judges is open to debate. More importantly, the findings do not show that one selection system produces judges with significantly different or superior background characteristics than other selection systems. As one scholar has noted:

None of these differences [in background characteristics] is very great but it is most important that the variations which are presented do not follow a recruitment system pattern. We might draw two conclusions from this research. First, the Missouri Plan does not consistently pro-

170. Id. at 520-21.
171. Id. at 523.
duce obviously superior judges in terms of quality education, cosmopolitan backgrounds, previous judicial experience or non-partisan careers. Indeed, not only are the judges not decidedly [sic] superior in this regard, but they often appear indistinguishable from the others. Second, the studies suggest that regional, cultural, or individual state factors are more important in explaining who become judges.\textsuperscript{172}

Of course, because differences in the quality of judges under the various systems of selection have not been found does not mean that differences do not exist. It may be that the characteristics of good judges are simply too difficult to define clearly or measure adequately. For the present, however, it does not seem fruitful to argue that changes in the Texas system of selection will necessarily produce better judges or that changes will de-politicize the judiciary.

It may prove more useful to examine judicial selection from a perspective other than one that stresses the relationship between judicial selection system and judicial quality. An alternative perspective, one frequently discussed in the literature on judicial selection, stresses two key questions: (1) to what extent does partisan election of judges in Texas achieve the goal of an electorally accountable judiciary? and, (2) should electoral accountability actually be the primary goal in selecting judges?\textsuperscript{173}

Keeping in mind that judicial accountability requires that the people have information upon which a choice among judicial candidates can be made, what currently are the characteristics of judicial selection in Texas? Those characteristics, also summarized in Table 20 along with suggestions for improvements and alternatives to the system, include the following. First, frequent challenges are being made to incumbents. Defeats of incumbents are occurring. Voter decisions are often based on party affiliation, ethnicity, and name identification, none of which seems likely to be related to judicial competence. Second, lengthy ballots exist in urban areas. This leads to an increasing number of voter choices in elections that are of low interest to voters. Third, election outcomes are often dependent on coattail and straight party voting, although party affiliation is only mildly related to judicial decisional behavior. Fourth, expensive judicial campaigns exist. The contributor base of judicial campaigns is narrow. Such a pattern of campaign finance can create reliance on large donors for campaign funding. Yet, even with expensive campaigns and large donations, judicial campaign treasuries can rarely support widespread voter education efforts. Finally, there are inadequate or ineffectual mechanisms to inform voters regarding judicial candidates.

Choices involving the extent to which judges should be subject to the electoral process are value judgments. This paper can only point out that partisan election as it currently operates in Texas is not achieving its goal of

\textsuperscript{172} Id. at 527.

\textsuperscript{173} Among the scholars who have used the concepts of accountability and independence in order to evaluate judicial selection systems are P. Dubois, supra note 37; S. Nagel, supra note 45; Adamany & Dubois, supra note 38; Ladinsky & Silver, supra note 91; Lovrich & Sheldon, supra note 92.
Table 20
The Systems of Judicial Selection: Problems and Possible Solutions

<table>
<thead>
<tr>
<th>Problems</th>
<th>Possible Solutions</th>
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<tbody>
<tr>
<td>If the Goal is Electoral Accountability in Texas</td>
<td>If the Goal is to Move More Toward Electoral Independence in Texas</td>
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<tr>
<td>Voter decisions unrelated to judicial competence</td>
<td>Broad based evaluation of candidates</td>
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<tr>
<td>Overly lengthy judicial ballots</td>
<td>Judicial redistricting</td>
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<td>Voter decisions unrelated to judicial decisional behavior</td>
<td>Either reduction of party label dependency or increasing candidate responsibility for promoting the party platform</td>
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<td>Freedom for candidates to discuss issues</td>
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<td>Expensive campaigns and reliance on large donors</td>
<td>State funding of campaigns coupled with restrictions on campaign contribution amounts</td>
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<tr>
<td>Inadequate or ineffectual means of informing voters</td>
<td>State provided voter information</td>
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<tr>
<td>Problems</td>
<td>Possible Solutions</td>
</tr>
<tr>
<td>Appointive systems have little check on the appointing power</td>
<td>Only control over bad appointments is election of executives interested in creating a superb judiciary</td>
</tr>
<tr>
<td>Nonpartisan elections are sometimes in reality very partisan</td>
<td>Legislation needs to remove partisanship from the process</td>
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<tr>
<td>Nonpartisan elections can leave voters in an information void</td>
<td>The state will have to provide information to voters in nonpartisan elections</td>
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<tr>
<td>Nonpartisan elections can be expensive</td>
<td>State provided campaign funding</td>
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<tr>
<td>Commission selection may not adequately represent all segments of the bar</td>
<td>Require by law that all segments of the bar be represented on the commission</td>
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<tr>
<td>Commission decisions are subject to manipulation</td>
<td>Require by law that appointing power be dispersed among several officials</td>
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electoral accountability. Voters lack sufficient information to make the informed decisions that are needed to make choices among judicial candidates. Some may conclude that the failure to achieve electoral accountability should lead not simply to efforts to reform the partisan election system, but to a complete reconsideration of the goals desired from a system of judicial selection. If independence from the electoral process is then chosen over accountability, one of the other alternatives to the current system of judicial selection should be adopted. If independence from the electoral process is the only goal desired, appointment should be adopted. If greater independence from the electoral process is desired without totally abandoning the electoral accountability goal, then commission selection or nonpartisan election should be adopted.

If the choice is to move toward independence from the electoral process as the goal of the Texas judicial system, several points can be drawn from the literature. These points may be useful in designing an alternative system of judicial selection.

First, the basic problem of an appointive system of judicial selection is the limited check on the appointing power. If a chief executive has a good relationship with key senators, it can be nearly impossible to prevent the appointment of even the weakest judge. An executive can make judicial appointments to reward friends or to develop a political agenda and that executive can give little attention to any considerations of judicial quality. Depending on the character and concerns of the executive, the appointive system can create a superb or a disappointing judiciary. If the choice is to move toward independence from the electoral process as the goal of the Texas judicial system, several points can be drawn from the literature. These points may be useful in designing an alternative system of judicial selection.

Second, nonpartisan elections that are truly independent of political parties (and not all nonpartisan elections are) may leave voters with no cues with which judges can be selected. If the costs of judicial campaigns are of concern to voters, nonpartisan elections may prove even more expensive since the absence of party labels will require more money to reach voters than under a partisan election system. Nonpartisan elections may require state funding of judicial campaigns. Indeed, the fundamental problem with nonpartisan election is that it can leave voters in an information vacuum regarding judicial candidates. This may lead to uninformed balloting or even the domination of nonpartisan elections by well organized special interest groups. Efforts need to be made to ensure that the voters' needs for information about judicial candidates are met, perhaps, through such things as voter information packets furnished by the state.

Third, commission selection has three problems: (1) the representativeness of the commission; (2) the manipulation of the commission; and (3) the manipulation of the retention election. In reference to the representativeness

174. As Henry Abraham notes, Presidential appointments to the Supreme Court have been based on: (1) merit; (2) friendship; (3) representation of interests; and (4) ideology. Presidents weigh these concerns in different ways. See H. ABRAHAM, supra note 14, at 54-63.

175. Dubois notes that voters in nonpartisan judicial elections are left with little information upon which to make a voting decision. In such circumstances, many voters choose not to vote. See P. DUBOIS, supra note 37, at 93. Low information-low participation elections seem fertile ground for domination by special interest groups.
of the commission, the major study of the Missouri plan found that the defense bar tended to dominate appellate level judicial selection commissions. This domination was not so great that there was evidence of a defense bias among judges; indeed, persons with strong plaintiff or defense orientations tended to be excluded from consideration for judgeships. However, an important segment of the bar was inadequately represented on the commissions. Structurally, Texas might consider designing commission membership to ensure adequate representation of the diverse interests within the bar.

The commission has also been subject to manipulation by governors and possibly judicial members. Although few would deny the executive's or the judiciary's interest in being represented on the commission, gubernatorial or judicial domination of the commission destroys its independent role. The structure of the commission might be designed to ensure against executive or judicial domination.\textsuperscript{176}

Finally, the retention election can become a tool of special interests to defeat incumbent judges in what is typically the type of judicial election that has the lowest voter turnout. Retention elections can also be very expensive so that campaign finance can prove to be as troublesome for judges as it is in partisan elections.\textsuperscript{177} The value of the retention election needs to be carefully weighed against the risks that it poses for campaign finance ethics, manipulation by special interests, and its effect upon judicial independence.

In conclusion, this research has focused on the patterns of judicial selection in Texas. Clearly, the patterns are in response to changes in the electorate. Demographics play a role as population shifts to urban areas; technology plays a role as we have increased access to instant media communication; expectations play a role as the voters determine what they desire from the judiciary.

Judicial selection is a mirror image of our goals for the system of justice that we expect. To be sure, the subject is a complex one—one that is difficult to document and even more difficult to develop for public dialogue due to the emotionally charged atmosphere surrounding it. However, the purpose of this research has been: (1) to examine past and present judicial selection in Texas; (2) to provide empirical data; and (3) to explore some of the major alternative systems of judicial selection. It is hoped that the research and analysis will provide a basis of information upon which individuals can make informed decisions as to the most productive and effective method of judicial selection for our state. It is up to the public to determine which system fits Texas.


\textsuperscript{177} See Schotland, \textit{supra} note 73, at 59-60. \textit{But see} P. Dubois, \textit{supra} note 79, which suggests that, at least at the trial court level in California, campaign finance is not as serious a problem as Schotland suggests.
SOME SUGGESTIONS BY THE AUTHOR REGARDING ACCOUNTABILITY

It may be that society accepts the goal of accountability for judges without recognizing its meaning like the voters in the study in Lubbock who did not know anything about the judges for whom they were voting, but liked the idea of voting for them.\(^{178}\) If one accepts the idea of partisan election, however, one must also accept the idea that judges are a part of the political process. Such a belief is a legitimate one; however, it must be recognized that in accepting it there is an implicit rejection of the Hamiltonian notion that the judiciary should be independent of the electoral process.

If the choice is to achieve an electorally accountable judiciary, several things seem to the author to be useful to an effort to move toward that goal. First, judicial candidates have to be free to discuss judicial issues. Voters should not be expected to choose their judges without having information about candidates' judicial philosophies.

Second, evaluations of judicial candidates need to be more broadly based. The Committee for a Qualified Judiciary might be a model to be applied on a statewide basis. Ideally, such evaluations would provide information to voters that would aid them in making an informed choice. The evaluating organization might even elaborate upon its reasons for recommending candidates in order to expand the knowledge base for voters. Unfortunately, costs of such a statewide effort may be prohibitive.

Third, the state should provide information about candidates to voters. It is worth noting that in both Oregon and Washington, the Secretary of State sends information on all candidates to every registered voter in the state. That information is relied upon by voters in casting judicial ballots, and voters in those two states are far more knowledgeable about judicial elections than has been typically found in other states.\(^{179}\)

Fourth, the long ballot and large number of contested judicial races discourage informed voter decision making. Though gerrymandering of judicial districts is a real danger, dramatic redefinitions of judicial boundaries to smaller units and a reduction in the number of judges voted upon by urban voters are required. One voter with over eighty judicial votes, as now occurs in Harris County, is numerically the equivalent of the voter casting ballots for all of the Texas Senate and nearly one-third of the Texas House!

Finally, if there are concerns over campaign finance, restrictions on donations would have to be coupled with state funding for judicial campaigns in order to inform voters adequately. Many of these suggestions may seem radical or expensive or both. Yet all of these efforts would aid the people in making informed choices among judicial candidates. It may be that these efforts to inform voters about judges will not work in huge landslide elections such as Reagan's 1984 victory, but these efforts can at least enhance the voters' opportunities to make informed choices.

\(^{178}\) Johnson, Shaeffer & McKnight, supra note 93, at 376.

\(^{179}\) Sheldon & Lovrich, supra note 41, at 235 passim.