Center for American Progress

LEGAL PROGRESS

ISTOCK/SPKCHROME

Campaign Finance Laws Fail as Corporate Money Floods Judicial Races

Billy Corriher January 2013

Center for American Progress

LEGAL PROGRESS

Campaign Finance Laws Fail as Corporate Money Floods Judicial Races

Billy Corriher January 2013

Contents

Introduction and summary

The steep rise in campaign contributions for judicial elections has been well documented. Candidates in state supreme court races raised around $211 million from 2000 to 2009—two and a half times more than in the previous decade. But the 2012 elections saw spending records shattered as the unlimited campaign cash unleashed by *Citizens United* and other federal court cases funded billions of dollars in independent expenditures. A record $29.7 million was spent on television ads in state supreme court races this year, and more than half of this money came in the form of independent expenditures, according to Justice at Stake and the Brennan Center for Justice, two groups that track money in judicial elections.[1]

This flood of campaign cash came from corporations, lawyers, and others with a stake in how these courts rule. Even in ostensibly nonpartisan races, political parties spent millions of dollars on candidates for courts currently considering lawsuits over redistricting maps. These perceived conflicts of interest will further erode public confidence in an impartial judiciary, which is already at an alarming low.[2]

The Center for American Progress has compiled its recent reports describing the distorting influence of campaign cash and suggesting policy solutions to mitigate these problems. The first report, "Million Dollar Judges," highlights several 2012 judicial elections illustrating how campaign finance laws have broken down in the face of unlimited independent spending. The next report, "Big Business Taking Over State Supreme Courts," takes a broader view and illustrates how campaign cash has affected judges and the law over the past two decades. This compilation includes the text of the latter report and a summary of the data from its appendix.

The compilation concludes with a series of reports on different policies that could help mitigate the influence of corporate campaign cash in judicial elections. These reports are intended for advocates or legislators who want to ensure that our justice system works for everyone, not just for those with enough money to donate. Each report is prefaced by a one-page summary. Endnotes and citations are available in the longer versions that follow the summaries.

Endnotes

1 Brennan Center for Justice and Justice at Stake, "New Data Shows Judicial Election Ad Spending Breaks Record at $29.7 million," Press release, December 17, 2012, available at http://www.brennancenter.org/content/resource/new_data_shows_judicial_election_ad_spending_breaks_record_at_29.7_million.

2 A 2010 poll from Justice at Stake found that 71 percent of respondents said that they "believe campaign expenditures have a significant impact on courtroom decisions." Justice at Stake, "Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions," Press release, September 8, 2010, available at http://www.justiceatstake.org/newsroom/press_releases.cfm/9810_solid_bipartisan_majorities_believe_judges_influenced_by_campaign_contributions?show=news&newsID=8722. A 2009 Gallup/*USA Today* poll found that 89 percent of respondents said they "believe the influence of campaign contributions on judges' rulings is a problem." Joan Biskupic, "Supreme Court Case with the feel of a best seller," *USA Today*, February 16, 2009, available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

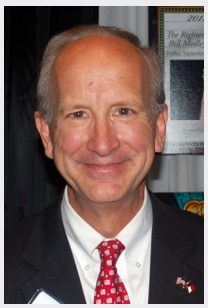
The Million Dollar Judges of 2012

Originally published: January 15, 2013

Summary

Independent spending wreaked havoc on judicial elections and tested campaign finance laws in 2012, as interest groups evaded contribution limits and spent millions to elect their preferred judges. The Center for American Progress collected information on all judges who won elections in 2012 while raising roughly $1 million or more, as well as those who had more than $1 million spent on their behalf by independent groups.[1] The campaigns of the "million dollar judges of 2012" demonstrate that independent spending plays an increasingly crucial role. Unless states implement reforms, even more money will flood judicial races, and the influence that corporations and special interests exercise over judges will continue unabated.

Justice Paul Newby, North Carolina Supreme Court



Newby

North Carolina Supreme Court Justice Paul Newby was re-elected with the help of more than $2.5 million in independent spending.[2] The state's public financing program—long a model for states seeking to keep money out of judicial races—was overwhelmed by money from interest groups like the state Chamber of Commerce and Americans for Prosperity, a group affiliated with the billionaire industrialist Koch brothers. North Carolina tobacco companies chipped in hundreds of thousands of dollars after they benefited from a 2009 ruling,[3] authored by Newby, in a dispute with tobacco farmers.

The largest donation by far was the more than $1 million from the Republican State Leadership Committee, a group that helped the state's Republican legislature draft its recent redistricting maps.[4] Civil rights groups filed a lawsuit alleging that the map disenfranchises minority voters, and the case is currently before the state supreme court.[5] This money was instrumental in keeping a 4-3 conservative majority on the bench. North Carolina's ethics rules say that a judge should not hear a case if his or

Markman

Zahra

McCormack

Willett

her "impartiality might reasonably be questioned,"[6] but Justice Newby will hear the redistricting case despite the fact that he was re-elected thanks to millions of dollars from Republican groups that have a stake in the outcome.[7]

Justices Stephen Markman, Brian Zahra, and Bridget McCormack, Michigan Supreme Court

Justices Stephen Markman and Brian Zahra, both conservatives, each raised around $800,000 for their re-election bids, but according to the Michigan Campaign Finance Network, the undisclosed independent spending was several times that figure. The state Republican Party spent $4.5 million on ads for Justices Markman and Zahra, as well as an unsuccessful high court candidate, without disclosing the source of any of that money.[8] Of the spending which was reported, the Michigan Association of Realtors spent $400,000 on ads for the conservative candidates after they joined a 2011 opinion that made it easier for mortgage companies to foreclose on homeowners.[9]

Justice Bridget Mary McCormack won a seat on the Michigan Supreme Court after the Democratic Party spent $5 million in undisclosed spending on ads supporting her and two other candidates.[10] Her campaign collected more than $600,000 with the help of large donations from unions.[11]

Justice Don Willett, Texas Supreme Court

The Texas Supreme Court is composed entirely of conservative Republicans, and Justice Don Willett cruised to re-election, raising $1.7 million for a primary contest. This hefty sum includes almost $100,000 from energy companies and large contributions from the industry's top law firms.[12] Justice Willett has received more than $250,000 from energy companies over the years, according to the National Institute on Money in State Politics. [13]

Justice Willett has never met an oil company litigant that he did not like. The Texas Supreme Court ruled in 2007 that contract employees, such as oil-rig workers, cannot sue their employers for on-the-job injuries.[14] For years the energy industry had unsuccessfully lobbied the state legislature for such a change.[15] In a 2008 lawsuit involving hydraulic fracturing, or "fracking," Justice Willett blatantly invoked policy reasons in ruling for the energy company: "Open-ended liability

threatens to inflict grave and unmitigable harm, ensuring that much of our State's undeveloped energy supplies would stay that way—undeveloped … Amid soaring demand and sagging supply, Texas common law must accommodate cutting-edge technologies able to extract untold reserves from unconventional fields."[16]

Justice Mary Jane Theis, Illinois Supreme Court

Theis

Justice Mary Jane Theis of the Illinois Supreme Court easily won the race for chief justice in the general election. Like Justice Willett in Texas, however, she faced a primary challenge and raised around $1.5 million, with more than $400,000 of her campaign funds coming from lawyers.[17] Justice Theis also received $18,500 from public-sector unions,[18] including a chapter of the American Federation of State, County, and Municipal Employees, which fought the closure of certain state facilities in a case before the high court. Justice Theis dissented from a recent Illinois Supreme Court ruling against the union.[19] Her primary campaign also benefited from nearly $200,000 in independent spending from Personal PAC, Inc., a group supporting reproductive health care for women.[20]

Justice Josiah Coleman, Mississippi Supreme Court

Coleman

Justice Josiah Coleman won a seat on the Mississippi Supreme Court with roughly $1 million in independent spending. Nearly half of that money came from a shadowy Virginia-based organization, the Law Enforcement Alliance of America.[21] The group has been active in judicial races across the country, and although it refuses to disclose its donors,[22] it has been associated with the National Rifle Association and the U.S. Chamber of Commerce.[23] The remainder of the independent spending came from Improve Mississippi PAC, which received large donations from corporate-funded groups, including national tort reform advocates and political action committees representing the insurance, finance, and energy industries.[24]

Justice Sharon Kennedy, Ohio Supreme Court

Kennedy

Despite a rare "not recommended" rating by the Ohio State Bar Association,[25] Justice Sharon Kennedy defeated an incumbent justice for a seat on the state supreme court. Kennedy was aided by campaign donations from energy companies and the insurance industry, as well as independent spending by the Ohio

Lewis

Pariente

Quince

Republican Party.[26] Her campaign reported raising more than $950,000, including hundreds of thousands of dollars from the state Republican Party, corporate interest groups, and law firms that appear before the court.[27]

Justices Fred R. Lewis, Barbara Pariente, and Peggy Quince, Florida Supreme Court

Facing an unprecedented multimillion dollar opposition campaign, three Florida Supreme Court Justices raised half a million dollars each and benefited from $3.3 million in spending by an independent group. A group called "Defend Justice from Politics" spent millions of dollars to defend the three candidates in the 2012 retention election, and it received most of its money from Florida attorneys.[28] The campaign against keeping the justices on the bench was funded by the state Republican Party and pro-corporate groups like the Koch brothers' Americans for Prosperity.[29]

Endnotes

1 A candidate in West Virginia spent more than $1 million, but she spent her own money instead of raising campaign funds. "Candidate Summary: Davis, Robin Jean," available at http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=135003 (last accessed January 2013). Three candidates for the Florida Supreme Court raised around half a million dollars each, and an outside group spent $1.4 million on their behalf, for an average amount that is just under $1 million. Brennan Center for Justice, "2012 judicial campaign spending exceeds 13 million, surpasses 2010 spending," Press release, October 26, 2012, available at http://www.brennancenter.org/content/resource/2012_judicial_campaign_spending_exceeds_13_million_surpasses_2010_spending/.

2 Craig Jarvis, "More than $2.5 million raised so far by outside groups in state Supreme Court race," News Observer, October 30, 2012, available at http://www.newsobserver.com/2012/10/30/2450677/more-than-25-million-raised-so.html.

3 North Carolina v. Phillip Morris USA, Inc., No. 2A05-4 (N.C. Nov. 6, 2009) (unpublished decision), available at http://www.aoc.state.nc.us/www/public/sc/opinions/2009/pdf/2-05-4-4.pdf.

4 North Carolina Department of State, "48-Hour Notice: Justice for All NC," November 5, 2012, available at http://www.app.sboe.state.nc.us/webapps/cf_rpt_search_org/cf_report_image.aspx?DID=158228.

5 Lynn Bonner and Anne Blythe, "NC Supreme Court: Newby can participate in redistricting case," News Observer, December 17, 2012, available at http://www.newsobserver.com/2012/12/17/2550986/nc-supreme-court-newby-can-participate.html.

6 N.C. Code of Judicial Conduct Canon 3(C)(1).

7 Bonner and Blythe, "NC Supreme Court: Newby can participate in redistricting case."

8 Michigan Campaign Finance Network, "Unreported Michigan Supreme Court Television Advertising, 2012 Election Cycle" (2012), available at http://www.mcfn.org/pdfs/reports/MSC_TV.pdf.

9 Residential Funding Co. v. Saurman, 805 N.W.2d 183 (Mich. 2011).

10 Michigan Campaign Finance Network, "Unreported Michigan Supreme Court Television Advertising, 2012 Election Cycle."

11 Michigan Department of State, "Post-General CS, Bridget Mary McCormack for Justice," December 6, 2012.

12 "Candidate Summary: Willett, Don," available at http://www.followthemoney.org/database/uniquecandidate.phtml?uc=138954 (last accessed January 2013).

13 Ibid.

14 Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433 (Tex. 2009).

15 Lee Nichols, "Justice and Worker Safety," Austin Chronicle, Dec. 21, 2007, available at http://www.austinchronicle.com/news/2007-12-21/574169/.

16 Coastal Oil and Gas Corp., v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008).

17 "Candidate Summary: Theis, Mary Jane," available at http://www.followthemoney.org/database/StateGlance/candidate.phtml?c=136591 (last accessed January 2013).

18 Ibid.

19 Supervisory Order, Weems v. Appellate Court, Fifth District and American Federation of State, County, and Municipal Employees, No. 115240 (Ill. Dec. 11, 2012), available at http://www.state.il.us/court/supremecourt/Announce/2012/121112_2.pdf.

20 "Uncoordinated Spending: Uncoordinated spending for the 2012 running of 1ST SUPREME - FITZGERALD VACANCY," available at http://illinoissunshine.org/sunshine/uncoordinatedSpendingSearch.php?year=2012&office=1ST+SUPREME+-+FITZGERALD+VACANCY (last accessed December 2012).

21 This figure is based on Legal Progress' analysis of Kantar Media's CMAG data. The Law Enforcement Alliance of America spent an estimated $449,160 on television ads in this race, and the Improve Mississippi PAC spent an estimated $626,000 in this race.

22 In re Law Enforcement Alliance of America, Inc., NO. 03-11-00634-CV, 2011 Tex. App. Lexis 9656 (Tex. App. Dec. 9, 2011).

23 "Known Funders of: Law Enforcement Alliance of America (LEAA)," available at http://www.stealthpacs.org/funder.cfm?Org_ID=175#4 (last accessed December 2012).

24 This figure is based on Legal Progress' analysis of Kantar Media's CMAG data. The Improve Mississippi PAC spent an estimated $626,000, for a total of $1.07 million.

25 "Ohio court hopeful gets lowest rating," Toledo Blade, June 7, 2012, available at http://www.toledoblade.com/Courts/2012/06/07/Ohio-court-hopeful-gets-lowest-rating.html.

26 "Buying Time 2012—Ohio," available at http://www.brennancenter.org/content/resource/buying_time2012_ohio.

27 Contribution information for Justice Kennedy's campaign is available through the Ohio Department of State's online campaign finance database. See: "Contributions Search," available at http://www2.sos.state.oh.us/pls/cfonline/f?p=119:2:0::NO:2::.

28 Florida Department of State and Defend Justice from Politics, "Campaign Finance Activity; IRS Form 8872, Post-General Election Report," December 6, 2012.

29 "GOP's Unwarranted Assault," Miami Herald, October 7, 2012, available at http://www.miamiherald.com/2012/10/07/3036417/gops-unwarranted-assault.html.

Big Business Taking over State Supreme Courts

Originally published: August 2012

Introduction and summary

In state courts across our country, corporate special interests are donating money to the campaigns of judges who interpret the law in a manner that benefits their contributors rather than citizens seeking justice. Americans are starting to wake up to this danger, according to recent polls, and are worried that individuals without money to contribute may not receive a fair hearing in state courts. In a recent poll 89 percent of respondents said they "believe the influence of campaign contributions on judges' rulings is a problem."[1]

Judges swear an oath that they will answer to the law, not campaign contributors. If a person is wronged, he or she can hope to find impartial justice in a court, where everyone—rich or poor, weak or powerful—is equal in the eyes of the law. But this principle is less and less true with each passing judicial election.

Thirty-eight states elect their high court judges,[2] and enormous amounts of money are pouring into judges' campaign war chests. Fueled by money from corporate interests and lobbyists, spending on judicial campaigns has exploded in the last two decades. In 1990 candidates for state supreme courts only raised around $3 million, but by the mid-1990s, campaigns were raking in more than five times that amount, fueled by extremely costly races in Alabama and Texas.[3] The 2000 race saw high-court candidates raise more than $45 million.[4]

Since then, corporate America's influence over the judiciary has grown. The U.S. Chamber of Commerce, in particular, has become a powerful player in judicial races. From 2001 to 2003 its preferred candidates won 21 of 24 elections.[5] According to data from the National Institute on Money in State Politics, the chamber spent more than $1 million to aid the 2006 campaigns of two Ohio Supreme Court justices,[6]

and in the most recent high court election in Alabama, money from the state's chamber accounted for 40 percent of all campaign contributions.[7]

Corporate interest groups are finding more ways to circumvent disclosure rules and limits on campaign contributions. Spending by independent groups (not officially affiliated with the candidates) has increased dramatically, surpassing high court candidates' spending in 2008.[8] According to Justice at Stake, more than 90 percent of special interest TV ads in 2006 were paid for by pro-business interest groups.[9] Conservative groups spent $8.9 million in high court elections in 2010, compared to just $2.5 million from progressive groups.[10] These spending figures are incomplete because the disclosure rules for outside spending vary, so the source of the money in state court elections is often hard to discern.

The public can expect even more money to flood this year's judicial elections. Since the 2010 U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*, corporations, unions, and individuals are now free from limits on campaign spending.[11] North Carolina is the only state with a robust public financing system for judicial elections, and it is also the first state to see a super political action committee, or super PAC—an entity spawned by *Citizens United* that allows for unlimited campaign spending—established to support a pro-corporate judge in this year's election.[12] The U.S. Supreme Court has also made it harder for public financing systems to remain viable by ruling that "matching" funds, distributed to publicly funded candidates when their opponents' spending exceeds a certain level, are a violation of free speech rights.[13]

If recent history is any guide, the trends are ominous for individuals suing corporations. The states that have seen the most money in judicial elections now have supreme courts that are dominated by pro-corporate judges. The Appendix to this report lists all high court rulings on cases where an individual sues a corporation from 1992 to 2010 in the six states that have seen the most judicial campaign cash in that time period—Alabama, Texas, Ohio, Pennsylvania, Illinois, and Michigan. The data includes 403 cases from 2000 to 2010, and in those cases the courts ruled in favor of corporations 71 percent of the time.[14] The high courts that have seen the most campaign spending are much more likely to rule in favor of big businesses and against individuals who have been injured, scammed, or subjected to discrimination.

With money playing such a large role in judicial elections, the interest groups with the most money increasingly have an advantage. In courtrooms across our country, big corporations and other special interests are tilting the playing field in their

favor. Many Americans perceive our government and corporate institutions as interdependent components of a system in which powerful elites play by a different set of rules than ordinary citizens. Some feel that only those donating money can play a role in governing. The cozy relationship between government and big business has become increasingly clear in our judicial elections.

This report discusses how the soaring cost of judicial elections led to state supreme court decisions that favor corporate litigants over individuals seeking to hold them accountable. The report provides illustrations from six states—Alabama, Texas, Ohio, Nevada, Wisconsin, and Michigan—of how corporate interest groups that desire a certain outcome have donated money to judges, and the same judges have then interpreted the law in a manner that achieves their corporate donors' desired outcome.

For some states, the report discusses how, after an influx of money from corporate interest groups, judges have abruptly changed the law by overruling recent precedent. In Ohio, for example, the insurance industry donated money to judges who then voted to overturn recent cases that the industry disfavored. In other states, such as Texas, the corporate-funded high court has interpreted the law to reach certain results that the state legislature rejected. This judicial policymaking by the Texas court has resulted in case law that favors energy companies funding the judges' campaigns.

This problem is spreading to states that have never before seen expensive judicial races, such as Wisconsin, where independent spending by interest groups overwhelmed the state's public financing system in the 2011 election. This trend is threatening a fundamental aspect of our democracy: the right of Americans to a fair trial. When judges operate like politicians, those who lack political influence cannot expect fairness.

The vast majority of legal disputes in the United States —95 percent—are settled in state courts.[15] Those who have been harmed by an unsafe product or an on-the-job injury would most likely look to state courts for justice. With judges backed by big business taking over our courts, are there any remaining institutions that can hold powerful corporations accountable?

Americans will have a harder time using the courts to force employers and manufacturers not to cut back on safety to save money. Consumers will face steeper hurdles in holding accountable banks, payday lenders, and credit card companies

that treat them unfairly. Millions of Americans have recently found themselves in state court for foreclosure proceedings. How would one of these struggling homeowners feel if the judges hearing the case had accepted campaign funds from big banks? Ordinary Americans cannot expect to get the same access to justice as special interests that donate millions to judges' campaigns.

The explosion of money in judicial elections has led Americans to experience a crisis of confidence in their judiciary. According to a 2011 poll, 90 percent of those surveyed said judges should recuse themselves from cases involving campaign contributors,[16] but recusal is extremely rare.

A party to a lawsuit in West Virginia repeatedly asked a state supreme court justice to recuse himself after an executive with the opposing party, a coal company, spent more than $3 million through an independent entity to support the judge's election. The judge refused and cast the deciding vote overturning a $50 million verdict against the coal company.[17] In 2009 the U.S. Supreme Court ruled the judge should have recused himself. The court noted that the executive's contribution was three times more than the spending by the justice's own campaign. The U.S. Supreme Court stated, "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when … a man chooses the judge in his own cause."[18]

Even judges are alarmed at the growing influence of money on courts. A 2002 survey found that 84 percent of state judges are concerned about interest groups spending money on judicial campaigns.[19] The Wisconsin Supreme Court recently warned of an inherent risk "that the public may inaccurately perceive a justice as beholden to individuals or groups that contribute to his or her campaign."[20] Justice Paul Pfeifer, a Republican on the Ohio Supreme Court, has criticized the money flowing into his state's judicial campaigns. "Everyone interested in contributing has very specific interests," Pfeifer said. "They mean to be buying a vote. … whether they succeed or not, it's hard to say."[21]

Before the flood of corporate money began, media reports focused on judges being influenced by campaign donations from trial lawyers with cases pending before them.[22] Corporate interests were concerned that donations from trial lawyers resulted in courts that favored individuals suing corporations. Businesses that were the frequent target of lawsuits, such as insurance and tobacco companies, pushed legislation to limit litigation.[23] This phenomenon also spurred big business to enter the fray of judicial politics.[24]

As this report shows, this effort has been very successful. Even if the practice of trial lawyers donating to judicial campaign to influence judges was a problem, the corporate interests have more than compensated for any perceived disadvantage they faced. Donations from corporate America are now overwhelming donations from trial lawyers, labor unions, and groups that support progressive judicial candidates.[25]

Some press reports and academic studies on this subject emphasize that a correlation between donations and a judge's rulings does not necessarily prove that the donations caused the judge to rule a certain way. Former Ohio Chief Justice Thomas Moyer, a supporter of public financing and tough recusal rules, suggested that interest groups donate based on "voting patterns" of the judges, not to influence a vote in a particular case.[26] In other words, some argue special interests are donating to obtain a judge with a certain philosophy, not a result in a particular case. This distinction, however, misses the point.

Wealthy special interests should not be able to shape the law, whether through buying a vote or buying a certain judicial philosophy. In the pages that follow, the report details how this is happening in six important states and presents a few recommendations to address this problem. To prevent the appearance of corruption, states can implement strong recusal rules to ensure parties before the court do not donate money to judicial campaigns to influence specific cases. State legislatures also should pass strong disclosure rules, so that citizens know who is funding political ads for judges.

Big business is tightening its grip on our courts. Instead of serving as a last resort for Americans seeking justice, judges are bending the law to satisfy the concerns of their corporate donors.

Alabama

Consumers kicked out of court by state judges funded by big business

In May 2009 Kimberly White borrowed $1,700 from Alabama Title Loans, offering her car as collateral. She made two interest payments—the equivalent of a 300 percent annual interest rate—each time she rolled over the monthly loan. She then paid off the loan and got her title back. Alabama Title Loans nevertheless repossessed her car a few months later. As she handed the tow-truck driver

the documentation of her repayment, she claims he pushed the gas and nearly ran over her. She grabbed the door of the truck, and a passenger allegedly pulled her inside, forcing her into the backseat. She sued the driver and the lender for assault and wrongful repossession. White produced evidence suggesting the lender forged her signature on a loan agreement.[27]

White will never see her day in court. In July 2011 the Alabama Supreme Court reversed the trial court's and held that an arbitration clause in her contracts with the lender remained in effect, even after the loan was paid off.[28] White was forced to arbitrate her claims.

The Alabama judiciary has become a crucial battleground in a political war between big business and consumers. Big business is winning, and ordinary citizens like White are the casualties. The data in the Appendix include 73 rulings from 1998 to 2010 in which the Alabama Supreme Court ruled on whether to compel arbitration. In 52 of those cases, the court sided with defendants seeking to compel arbitration. Binding arbitration clauses have proliferated in consumer transactions. Anyone who owns a cell phone, credit card, or a home has almost certainly signed a contract with such a clause.[29]

Due to a quirk in Alabama law, a disproportionate number of the court's arbitration cases involve buyers of used cars and manufactured homes (trailers).[30] The use of arbitration clauses in these transactions has exploded. Since 2000, when auto dealers and mobile home manufacturers donated $600,000 to judicial candidates,[31] these interest groups have spent an enormous amount of money on Alabama's judicial races. The same judges who received this money have voted to limit consumers' right to a jury trial.

Many argue that arbitration is inherently biased toward corporate defendants, because the arbitrators do not get paid unless corporations choose to use their services.[32] A study of one discredited arbitration firm's decisions in California revealed that it ruled against consumers in 94 percent of its cases.[33] Corporations, which usually favor arbitration over litigation in consumer cases,[34] have spent enormous sums of money to elect pro-corporate judges to the Alabama Supreme Court, and they have undoubtedly benefited from the court's increasing willingness to force consumers into arbitration.

Elections for the Alabama Supreme Court have been overrun by money from corporate political action committees, the Alabama affiliate of the U.S. Chamber of

Commerce, and corporate-funded groups supporting "tort reform." In recent years these elections have been among the most expensive in the country. At a time when Alabama's per capita income was $30,000,[35] candidates in the 2006 race spent $13.5 million.[36] That figure amounts to nearly half of all the money spent on high court races nationwide in 2006.[37] In the most recent election, money from Alabama's Chamber of Commerce constituted 40 percent of all campaign contributions.[38]

With one exception,[39] the Alabama Supreme Court is now composed entirely of judges whose campaigns were funded by big business, and the court is increasingly inclined to rule for powerful businesses over ordinary citizens.[40] Alabama courts once had a reputation for resisting arbitration and sticking up for consumers. The U.S. Supreme Court, starting in the 1980s, expanded the scope of the Federal Arbitration Act to require state courts to honor arbitration clauses.[41] The U.S. Supreme Court repeatedly threw out state consumer protection laws that limited the reach of arbitration clauses.[42] The Alabama high court resisted these efforts for years, leading the U.S. Supreme Court to overrule it twice.[43]

The corporate money started flowing to the Alabama judiciary in the mid-1990s, when Karl Rove orchestrated the campaigns of several judicial candidates.[44] Candidates in the 2000 race spent an astonishing $12 million, far more than any other state. The Alabama chapter of the Chamber of Commerce donated $1.7 million to the pro-corporate candidates.[45] A study of the court's decisions between 1995 and 1999 concluded that, after conservatives obtained a majority in 1998, arbitration law began to tilt sharply against consumers. The study found a "remarkably close correlation" between a justice's votes in favor of arbitration and campaign donations from big business.[46] The court in 2000 abruptly reversed course on the issue of whether a warranty claim under a federal statute is subject to arbitration.[47] The court also lowered the standard for proving that a consumer agreed to arbitration.[48]

Judging by the high court's recent arbitration cases, it is hard to deny that corporate campaign contributions have been a good investment. In the last two years, the court's docket has included 13 cases in which it reviewed a lower court's decision on sending a case to arbitration, and it has only ruled to reject arbitration four times.[49]

By expanding the reach of mandatory arbitration clauses, the court has closed the courthouse doors to more and more consumers. Thomas Keith, consumer advocacy director for Alabama Legal Services, said binding arbitration is "terrible for consumers." The trend toward arbitration has made it harder for consumers to find legal help. "There's not a private lawyer in town that will take a used car case," Keith said.[50]

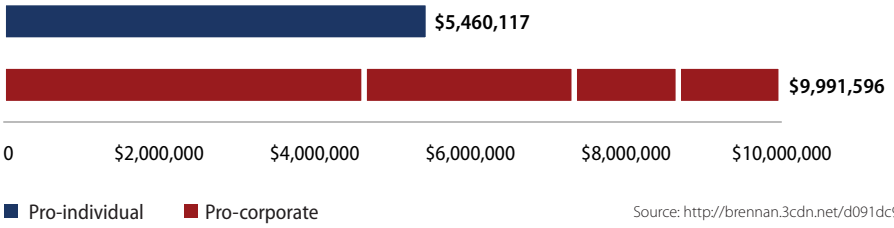
The auto dealers are already jumping in to support candidates in this year's judicial election, having contributed more to one justice than any other group of donors.[51] Chief Justice Charles Malone received money from auto dealers while considering a case in which the court ultimately granted an arbitrator broad authority to decide whether a valid arbitration agreement even existed.[52] The dissenting judge argued there was no "legal basis" for the decision. The majority opinion was written by Malone, who received $35,000 from the auto dealer PACs for his recent primary campaign.[53] Malone ended up losing the primary election to a socially conservative judge.[54]

Other judges have issued similar warnings about the U.S. Supreme Court's broad interpretation of the Federal Arbitration Act. In a 1994 concurrence Montana Supreme Court Justice Terry Triewieler said federal judges' preference for arbitration as a remedy for "crowded dockets" demonstrates a "total lack of consideration for the rights of individuals." Triewieler said the broad interpretations of the Federal Arbitration Act "permit a few major corporations to draft contracts regarding their relationship with others that immunizes them from accountability under the laws of the states where they do business."[55] Consumer advocate Paul Bland says the increasing use of arbitration benefits the wealthiest and most powerful in our society.[56] "The move towards arbitration is a move towards an economy that starts to resemble 'The Hunger Games,'" Bland said.[57]

The Alabama Supreme Court's recent arbitration decisions have made it harder for consumers to hold accountable payday lenders, used car dealers, and other unscrupulous businesses. The impact is greatest on low-income consumers and less-educated citizens who might not understand the fine print. A 2008 survey revealed that 48 percent of low-income Alabamans surveyed said they experienced a legal problem in the past year, and nearly half of those legal problems involved consumer issues.[58]

These same citizens, however, are now at a real disadvantage in Alabama courts. Companies that rip off consumers have enormous amounts of money to spend influencing the judiciary. Alabamans can only hope state legislators will curb the influence of money on judicial elections. Federal regulators could soon ban arbitration clauses in some contracts.[59] Until then, Alabama consumers can expect little protection from their judicial system.

Top spenders, 2000–09	Candidate contributions	Independent expenditures	Total
Alabama Democratic Party	$5,460,117	$0	$5,460,117
Business Council of Alabama	$4,633,534	$0	$4,633,534
Alabama Civil Justice Reform Committee	$2,474,405	$224,663	$2,699,568
American Taxpayers Alliance	$0	$1,337,244	$1,337,244
Lawsuit Reform PAC of Alabama	$1,321,250	$0	$1,321,250



Source: http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpgv.pdf

Texas

Court shields oil company donors from liability for worker injuries

When Jose Herrera arrived for work at the Citgo refinery in Corpus Christi on February 22, 2008, he had no idea it would be his last day on the job. Herrera suffered a horrific accident. He was trapped in a safety harness while 550-degree petroleum poured all over his body for several minutes.[60] Herrera survived with severe burns and permanent injuries. His wife stated, "We can't hug him because he hurts all over. … he can't hug me or hug my little boy."[61] But because of a recent Texas Supreme Court ruling, he cannot sue his employer for negligence.

After receiving millions in campaign cash from the oil industry, the justices on the Texas Supreme Court ruled that contract employees cannot sue their employers for on-the-job injuries. Their remedies are limited to workers' compensation. Herrera says workers' compensation only offers, at most, a few thousand dollars per month. His medical bills alone exceeded $200,000 in the three years after the accident, and Herrera will receive no compensation for the unimaginable amount of pain he has endured.[62]

The oil industry makes widespread use of contract workers,[63] and it spent years lobbying the state legislature to include contract employees in the workers'

compensation system, which permits employers to insulate themselves from liability for on-the-job injuries by purchasing workers' compensation insurance. The legislature voted to reject this idea several times.[64] The Texas Supreme Court, in a 2007 case, gave the industry what the legislature would not, holding that contract employees are covered by workers' compensation.[65]

ASSOCIATED PRESS PHOTO/JACK PLUNKETT

Jose Herrera, a burned survivor of the February 2008 Citgo crude oil blast in Corpus Christi, Texas, attends a Capitol press conference on liability lawsuits on April 28, 2008. Herrera encouraged lawmakers to undo a Texas Supreme Court ruling that could prevent injured workers from filing lawsuits.

In the six years before the decision, the justices had accepted more than $700,000 from energy companies.[66] Justice Don Willett, the author of the opinion, had received almost $200,000 from the industry, more than any other justice.[67] These campaign donations may have been well worth it, given the money these companies could save in settlements with injured employees.

The oil-and-gas industry employs many people in Texas, and it is among the largest donors to candidates for the Texas Supreme Court. In recent years the court's decisions have favored employers over injured employees. The Appendix to this report includes 18 cases in which an injured employee sued his employer or its insurer for injuries sustained on the job, and the court ruled for the employer in 14 of those cases.[68]

The 2007 decision on contract employees was harshly criticized for expanding the law in a manner that was repeatedly rejected by the legislature. The high court, relenting to public pressure, reheard the case but reached the same conclusion.[69] A dissenting judge charged the majority with making "a policy choice we are not at liberty to make."

The court faced similar criticism in a dissent from a recent case abolishing a common law claim for injured workers. In 1988 the high court established a claim that allowed injured workers to sue insurance companies for unjustifiably refusing to pay claims.[70] The legislature overhauled the workers' compensation system the next year and it considered abolishing the claim but chose to adopt other reforms instead. The court nevertheless ruled that the reforms made the common law claim unnecessary, and the dissent charged the majority with "replacing the Legislature's judgment with its own."[71]

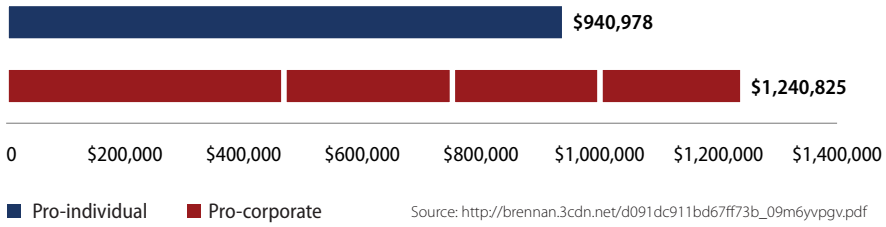
The court in 2008 was faced with a lawsuit involving hydraulic fracturing, or "fracking." While the majority declined to rule on whether fracking can give rise to a trespass lawsuit, Justice Willett's concurring opinion invoked policy reasons for insisting the court should have completely foreclosed a right to sue for fracking. "Our fast-growing State confronts fast-growing energy needs, and Texas can ill afford its finite resources, or its law, to remain stuck in the ground," Willett stated. "Open-ended liability threatens to inflict grave and unmitigable harm, ensuring that much of our State's undeveloped energy supplies would stay that way—undeveloped."[72]

The Texas Supreme Court has a history of campaign cash scandals. In the late 1980s a "60 Minutes" news segment—"Justice for Sale"—criticized the justices' acceptance of campaign funds from plaintiffs' trial lawyers with cases before the court. Corporate interests organized in the wake of the scandal and by the mid-1990s the court was dominated by judges funded by big business, lobbyists, and corporate lawyers.[73] A study of these justices' voting behaviors found that they favored corporate defendants in lawsuits against them, but plaintiffs could improve their luck with the court by donating to the justices' campaigns. The study found the success rate for plaintiffs contributing money was "more than double" the success rate for plaintiffs in general.[74]

One of the justices from that era, Priscilla Owen, was nominated to the Fifth Circuit by President George W. Bush in 2005, bringing to light some unseemly campaign contributions. After her campaign accepted tens of thousands of dollars in donations from the formerly high-flying Enron Corp., Owen wrote an opinion that reduced the corporation's taxes and denied a local school district additional revenue.[75] Enron was very generous to pro-corporate candidates for the high court, donating hundreds of thousands of dollars in the mid-1990s. During this period the court accepted two out of three petitions from Enron, ruling in its favor both times,[76] and rejected all three petitions from parties opposing the company.[77]

After Enron went bankrupt in 2001 and several of its executives were sentenced to jail time, other energy corporations picked up where it left off. Oil-and-gas companies, as well as the law firms that represent them, are among the largest donors to the Texas Supreme Court. The court very rarely rules against its benefactors. The data in the Appendix includes eight cases in which the named defendant is an energy company, and the court ruled for the defendants in all of those cases.[78] The employees of these companies work in dangerous settings, in close proximity to combustible materials. If they are injured, they will have a hard time holding their employers accountable in courts with close ties to oil companies.[79]

Top spenders, 2000–09	Candidate contributions	Independent expenditures	Total
Texas Democratic Party	$36,000	$904,978	$940,978
Vinson & Elkins	$467,768	$0	$467,768
Texans for Lawsuit Reform	$284,045	$0	$284,045
Haynes & Boone	$248,464	$0	$248,464
Fulbright & Jaworski	$240,848	$0	$240,848



Source: http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpgv.pdf

Ohio

Insurers take no risks with state supreme court

Ohio has seen some of the most expensive judicial races in the country, with high court candidates raising more than $25 million from 2000 to 2010. The surge in donations was fueled by money from corporations and insurance companies. As the money flowed in, the court abruptly reversed course on a range of issues to rule in favor of big business. *The New York Times* published an article in 2006 on the court's tendency to rule in favor of campaign contributors. The newspaper compared cases issued between 1994 and 2006 with interest groups donating to the judges' campaigns. The article concluded that the justices "voted in favor of contributors 70 percent of the time," with one judge, Justice Terrence O'Donnell, voting for his contributors in 91 percent of the cases.[80] When judges vote in favor of donors, citizens without money to donate face a real disadvantage in court.

The insurance industry began giving generously to pro-corporate candidates after several rulings against insurance companies in the late 1990s,[81] including a 1999 decision that expanded employers' uninsured motorist coverage to include employees who were not on the job.[82] Ohio judicial elections had long been among the most expensive in the country, but both the 2002 and 2004 races saw candidates spending $6 million—double the amount spent in the 2000 election.[83]

In 2004 the insurance industry gave candidates for the Ohio Supreme Court more than $650,000 and donated around $1 million to an independent group running ads that helped two pro-corporate candidates win their seats.[84]

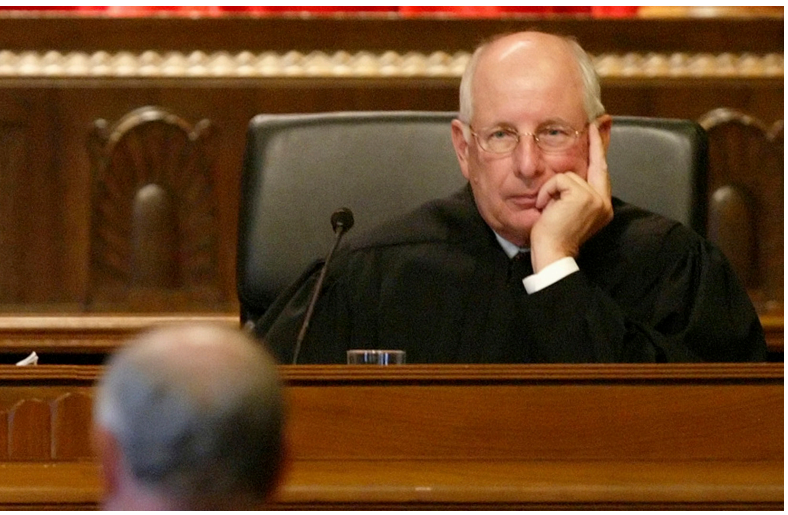
The court in 2003 overturned the 1999 decision on employers' uninsured motorist coverage that spurred the insurance industry to donate to judicial candidates,[85] but the moneyed interests didn't stop there. The 2006 campaigns of Justices O'Donnell and Robert Cupp were aided by $1.3 million from an affiliate of the Ohio Chamber of Commerce.[86] The Ohio Supreme Court is now dominated by judges that favor corporations and insurance companies. The data in the Appendix include 36 cases from 2003 to 2010, and the high court ruled for the insurance companies or other corporate defendants in all but four of them.[87] Since the corporate-funded justices took over, the court has abruptly overruled recent precedent to rule in favor of insurance companies. The court is a tough venue for injured plaintiffs.

The Barbee family of Lorain County, Ohio, learned that the hard way. The family was a party to a 2011 case stemming from injuries they suffered while on vacation. The Barbees were traveling through Wisconsin when two cars collided while traveling in the opposite direction. The cars careened over the median and struck the Barbees' vehicles, killing one of the other drivers and seriously injuring the Barbees. The family sought to claim benefits from its uninsured motorist policy with Nationwide Insurance. The Barbees first sued the other drivers and recovered 30 percent of their losses. Their policy said Nationwide would not pay any claims until other insurance payments were "exhausted," so the Barbees did not file an uninsured motorist claim with Nationwide until the first suit concluded, though it did notify the company of a potential claim.[88]

The Ohio Supreme Court threw out the Barbees' lawsuit, relying on another provision of the insurance policy that required claimants to bring suit within three years. The court said the two provisions did not make the policy ambiguous. A dissenting judge argued the three-year deadline should have been tolled while the other claims were pursued: "Insurance companies are extremely resourceful at collecting premiums and exceedingly reluctant to pay claims—even when an accident is known to them and the claim is meritorious."[89] Nationwide has contributed more money to the 2012 candidates than any other donor so far.[90]

The court has issued several recent decisions that limit the liability of employers, which are likely to have any judgments against them paid by insurance companies. The court in 2010 issued two rulings that severely curtailed the right to

sue an employer for on-the-job injuries.[91] The cases upheld a law saying that an injured employee can only sue if his or her employer actually *intended* to injure the employee. This 2005 statute was the legislature's third attempt to limit lawsuits against employers in this manner, but the other two statutes were ruled unconstitutional. With a new pro-insurance lineup at the court, the third time was the charm. Justice Paul Pfeifer dissented and argued that the legislature's previous statutes are "as distinguishable from the current version as a pig with lipstick is distinguishable from a pig without."[92]



ASSOCIATED PRESS PHOTO/WILL SHILLING
Ohio Justice Paul Pfeifer listens to oral arguments in the Ohio Supreme Court in Columbus, Ohio. Pfeifer is often the loan dissenter to the increasingly pro-corpoarte decisions of the Ohio Supreme Court.

In 2008 the Ohio Supreme Court upheld a statute that threw out a widow's lawsuit against her husband's employer for his death from asbestos poisoning. The bill applied retroactively and required certain medical evidence, which was no longer available since the employee was deceased. The Ohio constitution says the state legislature "shall have no power to pass retroactive laws," but the court upheld the statute anyway.[93] The defendants and their attorneys donated more than $25,000 to Justices Stratton and O'Connor while the case was pending.[94]

Perhaps the most drastic example of the abrupt shift in the court's jurisprudence was a young woman's lawsuit against the makers of the Ortho Evra Birth Control Patch. The plaintiff alleged the drug caused blood clots, but the Ohio Supreme Court limited the remedy available to her by upholding a "tort reform" statute that capped punitive and noneconomic damages. The 2005 statute was, in the court's words, "similar in language and purpose" to previous laws. The other statutes had been thrown out for violating several provisions of the Ohio constitution, most recently in 1999.[95]

Justice Pfeifer, in dissent, said the majority "paid mere lip service" to the right to a jury trial, which includes the right to have a jury assess damages. "Under this court's reasoning, there is nothing in the Ohio Constitution to restrain the General Assembly from limiting noneconomic damages to $1," Pfeifer argued. He added:

> *I believe that the Constitution of Ohio is the fundamental document that protects all Ohioans, not just those with the most lobbying power. … today is a day of fulfilled expectations for insurance companies and manufacturers of defective, dan-*

gerous, or toxic products that cause injury to someone in Ohio. But this is a sad day for our Constitution and this court. And this is a tragic day for Ohioans, who no longer have any assurance that their Constitution protects the rights they cherish.[96]

In recent years Justice Pfeifer has often been the lone dissenter to the increasingly pro-corporate decisions of the Ohio Supreme Court,[97] and he is a sharp critic of the system that brought Ohioans this court. In the *New York Times* piece, Pfeifer stated, "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race."[98]

Judge Bill O'Neill has unsuccessfully run for a seat on the court several times, while refusing to raise money from anyone: "Do you want your case decided by a judge who took hundreds of dollars from the opposing lawyer at a cocktail party?"[99] As in most states the responsibility for policing the court's ethics falls to the justices themselves, but the *New York Times* article found it was extremely rare for the justices to recuse themselves in cases involving campaign donors.[100] One recent candidate proposed mandatory recusal rules,[101] but he lost to Justice O'Connor's million-dollar campaign.

Nevada

Casinos stack the deck in state supreme court

The casino and tourism industries have long wielded enormous influence in Nevada's state government, and the courts are no exception. Companies affiliated with MGM Resorts International have donated more than $150,000 to the current justices over the years.[102] Casinos are among the biggest players in a system the *Los Angeles Times* described as "a good-old-boy culture of cronyism and chumminess that accepted conflicts of interest as 'business as usual.'" In a 2006 article on corruption in Nevada courts, the newspaper noted that one judge was kicked out of office after the ethics commission found that he told an attorney that "he was f---ed because he hadn't contributed while others had."[103]

In recent years the casino and tourism industries have sometimes found themselves in court to fight attempts to tax them. The state faced a huge budget deficit in 2003, and because of a constitutional requirement that a supermajority (two-thirds) of the state legislature approve any increase in tax revenue, the state could not fund its schools. The high court ruled the supermajority requirement was trumped by the

legislature's constitutional duty to fund schools, and it allowed legislators to approve a tax increase on big businesses and casinos with an ordinary majority vote.[104]

The decision engendered controversy as many accused the court of ignoring the legislative requirements laid out in the state constitution. Conservatives threatened the justices with a recall election.[105] Spending on Nevada Supreme Court races skyrocketed. Candidates in 2004 spent more than $3 million—three times the amount spent in the previous election.[106] In 2006 donations from casinos accounted for $300,000 of the $2 million raised by candidates for the Nevada Supreme Court.[107] MGM casinos gave the candidates $120,000 that year.[108] Almost all of the justices involved in the 2003 decision, many of whom had served for decades, were replaced by 2006. The new court quietly overruled the 2003 decision and reimposed the supermajority requirement for tax increases, even when it interfered with the constitutional duty to adequately fund schools.[109]

ASSOCIATED PRESS PHOTO/KIN CHEUNG

Las Vegas casino mogul Steve Wynn's companies have donated thousands to Nevada judges who support big tax breaks for casinos.

Nevada citizens, free from the legislature's supermajority requirement, have recently sponsored referenda that would generate revenue from gaming, tourism, and other sources to fund the state's neglected education system. In 2008 the state supreme court threw out two initiatives that would have transferred money from promoting tourism to funding education. The court ruled that even though proponents had relied on signature forms provided by the state, the forms did not include some information required by state law.[110] The court also held that state taxes do not apply to meals that are "comped" by casinos unless the patrons gave something for the meals.[111] This decision was overruled by the state tax agency, which found that customers could only receive the meals if they spent money on gaming, but an appeal to the state supreme court is expected.[112]

Casino money began pouring into Nevada Supreme Court elections after the 2003 decision allowing a tax bill to circumvent the supermajority requirement, and since then the high court has issued several decisions that result in casinos avoiding taxes that would fund the state's broken education system. Nevada's education system is poorly funded,[113] and its tax system is one of the most regressive in the nation.[114] The Progressive Leadership Alliance of Nevada, a social justice group, is hoping to place a

referendum on the 2014 ballot that would increase revenue from wealthy Nevadans, as well as the hotel, gaming, and mining industries. The group notes that the state's current tax on mining allows for a slew of deductible expenses, resulting in two gold mines that "report zero taxable values during years when they have produced gold worth a half billion dollars or more."[115]

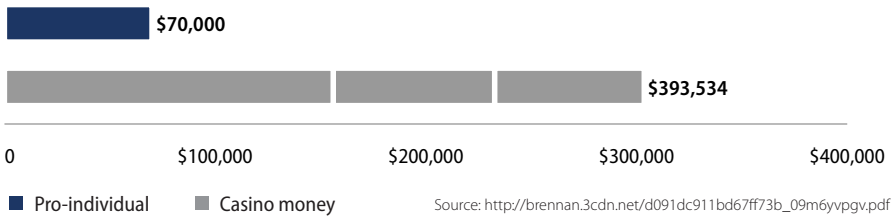
In recent years casinos have challenged similar revenue initiatives in court, and they are funding the campaigns of judges who rule on the lawsuits.[116] Proponents of these initiatives lack the same political influence as the wealthy casino executives. Casino mogul Steve Wynn has been at the forefront of the opposition,[117] and his companies have donated thousands to Nevada judges.[118]

Wynn has also found himself embroiled in a bitter labor dispute with his employees. His casinos instituted a policy requiring its dealers to share tips with managers, and the dealers organized a union to fight back.[119] The Nevada Commissioner of Labor ruled in 2010 that the policy did not violate state labor laws.[120] Last November a state court disagreed, but the high court is expected to review the decision.[121]

Of the current members of the court, only Justice Nancy Saitta has not received campaign contributions from casinos. Saitta was, however, featured in the 2006 *Los Angeles Times* article on corruption in Nevada courts. Describing one of Saitt's fundraisers, the *Times* said, "All 55 lawyers of law firms giving $500 or more had cases assigned to her courtroom or pending before her." One firm with a product liability case pending before her held a fundraiser that netted the judge $20,000, and Saitta had ruled in the firm's favor at least four times in the 60 days before the fundraiser.[122]

The exposé did not deter the justice. Saitta raised $43,000—almost all of it from lawyers—in 2008, even though she did not face reelection until this year. In December 2009 the justices adopted a new Code of Judicial Conduct, which says they will recuse themselves if their "impartiality might reasonably be questioned," but they rejected two proposals to specify when campaign contributions require recusal.[123] Even after the *Los Angeles Times* illustrated how campaign money corrupts justice, 68 percent of Nevada voters rejected a 2010 referendum to have the governor appoint judges and spare them from the dirty business of politics.[124]

Top spenders, 2000–09	Candidate contributions	Independent expenditures	Total
MGM Mirage	$156,000	$0	$156,000
Boyd Gaming	$90,000	$0	$90,000
Station Casinos	$76,534	$0	$76,534
Coast Hotels & Casinos	$71,000	$0	$71,000
Mainor Eglet Cottle	$70,000	$0	$70,000



Source: http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpgv.pdf

Wisconsin

Corporate-funded judges shut ordinary Wisconsinites out of civic participation

In recent years Wisconsin politics has been characterized by bitter partisanship and divisiveness. The Wisconsin Supreme Court is no exception. Justice Ann Walsh Bradley says the high court is "in the crossfire of the battle being fought between special interest groups." Bradley argues the big money pouring into recent elections has led to "hyperpartisanship" on the bench. The court has seen acrimonious infighting and several ethics investigations. Justice David Prosser is accused of putting Bradley in a chokehold,[125] and he has admitted referring to another colleague as a "total bitch."[126]

This rancorous atmosphere grew worse after an expensive 2011 election, which was widely viewed as a referendum on Gov. Scott Walker's antiunion policies.[127] Gov. Walker's anti-collective bargaining law generated vehement opposition from organized labor. The bill nearly eliminated public employees' collective bargaining rights and strangled their unions by limiting the collection of dues.[128] Pro-labor activists occupied the statehouse for weeks. Outraged Democrats fled the state to avoid a quorum after the governor asked police to force them to the legislature.[129]

To circumvent quorum requirements, Republicans carved out a separate bill for the collective bargaining provisions. Just after 4:00 p.m. on March 9, 2011, Republicans announced a 6:00 p.m. meeting on the revised bill.[130] Given the short notice the media and the public were not sure what was taking place. The stakes were enormous but Republicans essentially passed this controversial bill out of the public eye. Afterward, both sides turned their attention to the Wisconsin high court, pouring money into the race for the open seat. The high court was narrowly divided along ideological lines and it was expected to rule on the constitutionality of the bill.

It seems the justices may have seen this coming. In 2007 the entire court signed a letter calling for public financing for high court candidates, warning that "the public may inaccurately perceive a justice as beholden to individuals or groups that contribute to his or her campaign."[131] The legislature complied by passing the Impartial Justice Act in 2009, which provided public financing for candidates who collected a certain amount in small private donations. But even with public financing, the 2011 election saw ads funded by "independent" special interest groups flooding the airwaves.

ASSOCIATED PRESS PHOTO/JOHN HART
Wisconsin Supreme Court Justice David Prosser poses a question during a hearing to consider whether the state court should exercise jurisdiction over matters relating to the passage of 2011 Wis. Act 10, commonly referred to as the budget repair bill, on June 6, 2011. The controversial bill largely eliminates the collective bargaining rights of public employees.

The candidates raised a few hundred thousand dollars, mostly from public financing. Special interest groups, however, spent at least $3.5 million on television ads.[132] Prosser was supported by more than $2 million from big business groups, the Tea Party of Wisconsin, and the Wisconsin Club for Growth. Nearly half of this money came from Citizens for a Strong America, a shadowy group affiliated with the Koch brothers' Americans for Prosperity.[133] The group ran misleading attack ads against Wisconsin Assistant State Attorney General JoAnne Kloppenburg, Prosser's opponent. Kloppenburg was supported by more than $1 million from groups affiliated with Wisconsin labor unions.[134] Prosser held onto his seat by a razor-thin margin.

The corporate interests supporting Prosser cheered when the court's conservative majority upheld Walker's anti-collective bargaining law in the wake of the election.[135] A trial court had blocked the law because legislators violated the state's Open Meetings Law, which requires 24-hour notice of legislative meetings.

(Legislators posted a notice less than two hours before the meeting.) In upholding the statute, the high court characterized the Open Meetings Law as a rule of legislative procedure and deferred to the legislature.[136]

The majority completely abdicated its responsibility to ensure the public can participate in the legislative process. In her dissent Chief Justice Shirley Abrahamson said the Open Meetings Law implicates the public's constitutional right to access legislative proceedings, and she argued the majority's reasoning was "clearly disingenuous, based on disinformation." Prosser's opinion concurring with the majority, while insisting the court must be above politics, went to great lengths to describe "the turbulent political times that presently consume Wisconsin."[137]

The court's pro-corporate majority has also acted to ensure wealthy special interests can drown out the voices of ordinary citizens in the judicial arena. The court voted—along ideological lines—to weaken its recusal rule and adopt the standard suggested by the Wisconsin Realtors Association and Wisconsin's Manufacturers and Commerce,[138] a group which donated nearly $1 million to support Prosser's reelection in 2011.[139] The new rule states that campaign donations can never be the sole basis for recusal. In dissent, Justice Bradley expressed alarm that judges' campaigns can now ask parties before the court for campaign contributions. "Judges must be perceived as beyond price," Bradley stated. She criticized the majority for adopting "word-for-word the script of special interests that may want to sway the results of future judicial campaigns."[140] The court seems intent on making it easier for big money to influence the judiciary, at the expense of litigants without vast resources.

The pro-corporate majority emerged after a vicious 2008 election in which a circuit court judge, Michael Gableman, defeated incumbent Justice Louis Butler. After Justice Butler voted to expand liability for manufacturers of lead paint, big business spent millions to defeat him by running racially tinged ads that featured ominous and frightening images of criminals. Justice Gableman was charged with ethics violations for a TV spot that charged that Justice Butler had "found a loophole" which allowed a child rapist to go free and assault another child.[141] Justice Butler, the first black justice on the high court, protested that he represented the defendant as a public defender and that he actually lost the case. The defendant only raped another child after serving his sentence.

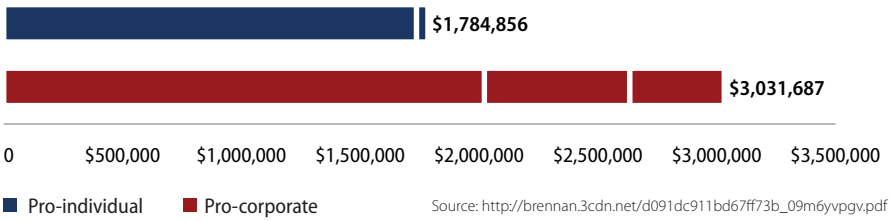
Justice Gableman has been criticized for accepting more than $10,000 worth of free legal services to fight the ethics charges.[142] He received the services from

Michael Best & Friedrich, the same law firm that defended Gov. Walker's anti-union bill. Three of the four members of the conservative majority have been charged with ethics violations, and the court recently voted—along ideological lines—not to reappoint the ethics investigator.[143] Prosser seems to have scuttled the investigation into the alleged chokehold, which occurred during the deliberation of the antiunion bill case.[144]

The court has been an embarrassment to Wisconsin citizens and to judges everywhere. A July 2011 poll found that only 33 percent of Wisconsinites had confidence in their high court.[145] The justices are clearly unable to police themselves on ethical issues and conflicts of interest. Justice Bradley has criticized the relaxation of ethics standards. "We shouldn't be above the law," she said.[146]

With the court closely divided, the judicial election next year promises to be just as contentious. The state's public financing could not keep up with the outside corporate money in the 2011 race, but now that Republicans in the legislature have eliminated public financing in a 2011 budget bill,[147] citizens can expect even more corporate money in judicial elections. This time, however, the donations can go directly to the candidates, and the new recusal standard will ensure that donors' money will be a good investment.

Top spenders, 2000–09	Candidate contributions	Independent expenditures	Total
Wisconsin Manufacturers & Commerce	$9,600	$2,012,748	$2,022,348
Greater Wisconsin Committee	$0	$1,736,535	$1,736,535
Club for Growth	$0	$611,261	$611,261
Coalition for America's Families	$0	$398,078	$398,078
Wisconsin Education Association	$0	$48,321	$48,321



Source: http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpgv.pdf

Michigan

Money flooding state courts in tort reform battles

After Mattie Howard was hospitalized for a stroke in 1992, she began receiving treatment at The Wellness Center in New Buffalo, Michigan. Howard had a history of hypertension, heart disease, and renal problems. The center's physician monitored her blood pressure and treated her hypertension. In late 1993 Howard's physician referred her to a nephrologist, who began dialysis treatment in May 1994. Howard was admitted to the hospital in November 1995 and her condition deteriorated. She passed away and her seven children and seven siblings sued her health care providers for negligence in treating her conditions.[148] They sued the health care providers for wrongful death and the jury awarded them $10 million in noneconomic damages. Due to Michigan's cap on noneconomic damages, however, the judge reduced that amount to $500,000.[149]

The Michigan legislature has passed tort reform legislation with some of the strictest limits on lawsuits. Unlike courts in other states, the Michigan high court has not acted to strike down these limits as unconstitutional. When the Illinois Supreme Court struck down a limit on damages in 2010, it acknowledged that limits on damages deny the most severely injured persons their full measure of justice[150] (see box on following page). Tort reform advocates assert that frivolous lawsuits are hurting the economy,[151] but a cap on damages only affects plaintiffs that have made it through a trial and had a jury award them substantial damages.[152]

Faced with a deluge of corporate money in its elections, the Michigan Supreme Court has abdicated its responsibility to protect those with the most severe injuries. The high court, with a pro-corporate majority for around 12 years, upheld some of the state's minor tort reform measures. In 2004 the court ruled that a law capping damages for plaintiffs who lease rental cars at $20,000 does not violate the right to jury trial protected by the state constitution. The dissent argued, "The right to a jury trial is illusory in the most severe cases, those in which the amount of damages exceeds $20,000. … the right to a jury trial is not satisfied by providing jurors the opportunity to announce an award and then have it arbitrarily ignored with no regard for the facts of the case."[156] In other cases the court simply refrained from reviewing a lower court's decision in favor of tort reform. The Michigan Court of Appeals, relying on the high court's rental car case, upheld a statute that limits noneconomic damages in medical malpractice actions.[157]

Illinois Supreme Court fights tort reform

Vernon Best drove a forklift. One day in 1995, the mast of his forklift collapsed while moving slabs of hot steel. Hydraulic fluid in the machine ignited and "engulfed Best in a fireball." He survived with severe burns on 40 percent of his body. Best sued the manufacturers of the forklift and the hydraulic fluid. Under a tort reform statute, though, he could only recover $500,000 for noneconomic damages.

The Illinois Supreme Court, however, ruled the limit unconstitutional, finding it was not justified by the goal of reducing the cost of health care. The state constitution "does not permit the entire burden of the anticipated cost savings to rest on one class of injured plaintiffs."[153] Best could fully recover from his injuries. The Illinois high court has thrown out several statutory caps on damages.[154] It has recognized that because caps only come into play when a jury awards damages above a certain threshold, such legislation harms plaintiffs with the most severe injuries. [155]

The Illinois Supreme Court, unlike the other courts in this report, represent certain districts in the state. This has led to a relatively consistent ideological makeup of the court, because liberal candidates have usually prevailed in urban districts, and conservative candidates in rural districts. Once judges are elected to the high court, they face uncontested retention elections. This system has resulted in a high court that is not as politicized as in other states, as the data on Illinois court cases in the appendix shows.

During the elections that gave conservatives a majority—1998 and 2000—donations from the health care industry increased sharply, to just less than $300,000 each year.[158] With pro-corporate justices in the majority for the next 10 years, the high court only ruled in favor of individuals suing insurance companies, hospitals, or other corporate defendants on very rare occasions.[159] The Appendix to this report shows that when pro-corporate justices controlled the bench, the vast majority of rulings involving an individual suing a corporation resulted in a 5-2 ruling for the corporation.[160]

After conservative judges lost their majority in 2008, the new court relaxed the burden of proof in medical malpractice cases.[161] The health care industry sounded alarm bells and increased donations to pro-corporate justices and the Michigan Republican Party.[162] The insurance industry gave more than twice the amount as in the previous election. Industry groups and the Republican Party spent just less than $1 million each on ads supporting Justice Robert Young and challenger Mary Kelly in 2010, according to data from the National Institute of Money in State Politics.[163] Young's opponent received just more than $50,000 from state Democrats.[164] The two pro-corporate justices won, and the health care industry breathed a sigh of relief.[165]

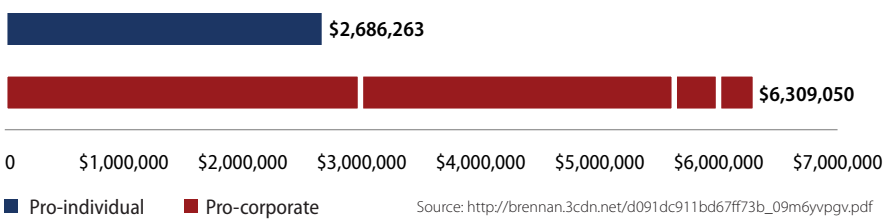
A bipartisan taskforce, which included Justice Marilyn Kelly, examined the problems surrounding Michigan's judicial elections and recently issued a scathing report. The taskforce noted that the vast majority of cases before the high court involve campaign

contributors. "Michigan voters already believe that campaign spending has infected the decision-making of their judiciary."[166] Michigan's disclosure laws for independent spending are notoriously weak,[167] and spending has grown to alarming levels.[168]

Michigan has nominally nonpartisan judicial elections, but the label does not mean much. Candidates are chosen by party leaders at state conventions, and the state parties are often the biggest campaign spenders. So while the parties are involved at every stage of the campaigns, voters do not see party affiliation listed on the ballot. Justice Marilyn Kelly said Michigan's nominating process "infects the process with a partisan component that is hard to deny."[169] A 2010 University of Chicago study examined partisanship among high court judges and ranked the Michigan Supreme Court dead last.[170]

Like other judiciaries around the country, the Michigan high court has become a political battlefield for groups that support and oppose legislative attempts to cap damages for injured plaintiffs. The state political parties fight on behalf of their supporters by pumping money into judicial elections. The question of whether capping damages for injured plaintiffs violates a litigant's constitutional rights seems to depend solely on which political party has a majority on the court. When the law shifts with the political winds, the public questions the integrity of the judiciary. The courts seem to be yet another political branch of government, where the voices of citizens without money to contribute often go unheard.

Top spenders, 2000–09	Candidate contributions	Independent expenditures*	Total
Michigan Chamber of Commerce	$164,140	$2,825,255	$2,989,395
Michigan Democratic Party	$219,142	$2,467,121	$2,686,263
Michigan Republican Party	$217,233	$2,420,328	$2,637,561
Citizens for Judicial Reform	$0	$372,094	$372,094
Ann Arbor PAC	$102,000	$208,000	$310,000



Source: http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpgv.pdf

Conclusion

The independence of our judiciary is under attack. Corporate interest groups are spending enormous amounts of money to elect judges sympathetic to their causes. The flood of money into state courts has resulted in corporate-friendly courts that are not protecting individual rights.[171] Judges might worry that ruling against wealthy corporations could harm their ability to win reelection, since the candidate with the most money usually wins.[172]

Progressives are largely sitting on the sidelines as corporate interests are taking over the bench. Labor unions and trial lawyers used to give generously to liberal candidates, but these groups are being overwhelmed by corporate money. One report found that just three corporate interest groups spent 13 times the amount that unions spent in the most recent judicial election cycle.[173] In Alabama trial lawyers are now donating to socially conservative Republican candidates,[174] but in other states, they've given up altogether. Measures like tort reform and Wisconsin's antilabor bill make it harder for trial lawyers and labor unions to survive, let alone marshal their resources to support progressive judges. These groups cannot hope to match the resources of big business. If money keeps overwhelming judicial elections, Americans will have more and more judges who favor corporations over individuals.

It does not have to be this way. In fact, it was not always this way. When America was founded, high courts were not elected. Federal judges have never been elected. The mid-19th century saw the populist wave ushered in by President Andrew Jackson, and states began to amend their constitutions to elect high court judges.[175] At the time, citizens viewed elections as a means to free judges from the influence of the political branches of government, which were controlled by special interests. But now, the same special interests have taken over judicial elections. Judges appear to be just another political branch, subject to the same corrupting influence of campaign cash. How can citizens who lack political influence perceive the courtroom as a level playing field?

Polls have shown that Americans do not feel confident in their knowledge of judicial races,[176] yet the idea of electing judges remains popular.[177] Even in states that have seen their courts racked by scandals, such as Wisconsin and Nevada, citizens remain opposed to eliminating judicial elections.[178]

The practice of electing judges is here to stay but there are steps we can take to make the system work for everyone, not just wealthy special interests. Citizens must inform themselves of candidates' qualifications and positions instead of relying on misleading ads from special interest groups. Americans should demand tough recusal standards to ensure parties to lawsuits cannot use money to influence judges. And all states should, at the very least, implement strong disclosure rules. This will allow citizens to know the source of a political ad and decide whether to trust its veracity.

In 2011 U.S. Supreme Court Justice Sandra Day O'Connor, a tireless advocate for judicial campaign finance reform since leaving the U.S. Supreme Court, wrote:

> *We all expect judges to be accountable to the law rather than political supporters or special interests. But elected judges in many states are compelled to solicit money for their election campaigns, sometimes from lawyers and parties appearing before them. Whether or not these contributions actually tilt the scales of justices, three out of every four Americans believe that campaign contributions affect courtroom decisions. This crisis of confidence in the impartiality of the judiciary is real and growing. Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold.*[179]

Our constitutional values are under attack by powerful corporate interests and we must fight to preserve them. If we want to return the judiciary to its rightful role of protecting individuals from the abuses of powerful institutions, then Americans must demand that judges and legislators stop the flood of money into judicial elections.

Appendix

To illustrate the impact of judicial campaign contributions on the law, the Center for American Progress examined high-court rulings for the six states that have seen the most money spent in judicial elections from 1992 to 2011. The rulings in this data set include cases in which an individual is the plaintiff, and the named defendant is a corporation, private employer, institutional health care provider, or other business. The data also include cases in which an individual is seeking workers compensation benefits or benefits from an insurer.

In the modern debate over tort reform, judicial activism, and the role of the judiciary, a state judge's "ideology" often refers to the tendency to vote for either

corporations or individuals in these cases. The data only includes cases with a dissenting opinion because these cases illustrate a court's ideological divide. Unanimous cases are ostensibly uncontroversial.

In some states, the data for some years is scant, presumably because the court issued many unanimous rulings. In Texas, for example, the court has issued several unanimous rulings involving tort reform and employer liability that favor corporations, and such decisions would probably not have been unanimous had the court not had such a strong tendency to favor corporations over individuals.[1]

The data excludes cases in which judges from other courts are sitting, cases involving procedural issues, legal ethics rulings, and cases decided without an opinion. The reason: Such cases do not shed light on a court's ideological leaning. The data also excludes cases on remand from the U.S. Supreme Court and cases reheard in light of case law handed down while the appeal was pending. In those circumstances, justices often vote to apply precedent even though they disagree with the underlying decision. Similar to other studies of justices' ideologies, the data focuses on tort and employment cases and does not include family law, property, or wills and trust issues.

Listed in chronological order by year, the cases in which the court sides with the plaintiff are in blue, and the cases decided for the defendant are in red. The dataset includes a total of 561 cases. In 195 of those cases, the high courts ruled in favor of an individual plaintiff. The courts ruled in favor of corporate defendants in 366 of the 561 cases. For the most expensive states, there is an obvious shift in favor of pro-corporate decisions after the flood of special interest money began.[2]

Alabama

The Alabama Supreme Court is now dominated by judges who favor corporations over individuals. From 1992 to 1998 the court ruled in favor of plaintiffs over corporate defendants in 74 of the 121 cases in the data set. From 1999 to 2010, however, the court ruled for corporate defendants in 133 of 192 cases studied.

Texas

The trend of increasing corporate campaign donations may have started with the Texas courts. By the mid-1990s, procorporate judges dominated the bench and routinely ruled in favor of corporate interests. Of the 100 cases in the data set, the court ruled for corporate defendants and against individual plaintiffs in 69 of the cases. As noted above, data is scant for the most recent years studied because the court reached many unanimous decisions.

Ohio

Ohio has long seen some of the most expensive judicial elections in the country. The abrupt and clear change in the ideology of the court is alarming. From 1992 to 2002, the court ruled for individual plaintiffs in 56 of the 68 cases studied. From 2002 to 2010, however, the court ruled for corporate defendants in 32 out of 36 cases studied.

Michigan

The Michigan high court shows a clear tendency to rule for corporations over individual plaintiffs. Although its jurisprudence was somewhat balanced in the early 1990s, the cases studied overwhelmingly favor defendants. Out of the 134 cases in the data set, 105 resulted in a ruling for the corporate defendant.

Illinois

The vast majority of judicial elections in Illinois have largely avoided the flood of special-interest money. In 2000 and 2004, however, candidates for the high court spent $8 million and $9 million, respectively. Elections in other years only saw candidates spending $1 million or $2 million. The court is not as politicized as the other courts studied, and its decisions are less predictable. High court judges are elected by district, and liberal candidates have usually prevailed in urban districts, while conservative candidates have been successful in rural districts. This means that the ideological leaning of the court has remained fairly consistent. The court ruled in favor of corporate defendants in 55 of the 87 cases in the data set.

Pennsylvania

Though Pennsylvania has consistently seen expensive high-court elections, its high court remains closely divided between procorporate and proplaintiff judges. Of the 87 cases in the data set, 38 resulted in a ruling for the individual plaintiff, and 49 resulted in a ruling for the corporate defendant.

1 *Entergy Gulf States, Inc. v. Summers,* No. 05-0272 (Tex. August 31, 2007), the court ruled unanimously that contract employees are included within the workers compensation system, despite the legislature's repeated rejections of this idea; vacated by *Entergy Gulf States, Inc. v. Summers,* 282 S.W.3d 433 (Texas, 2009), the court upheld the earlier ruling, but three justices dissented; compare *Hayes v. Mercy Hosp. and Medical Center*, 557 N.E.2d 873, 136 Ill.2d 450, 145 Ill.Dec. 894 (Ill., 1990)—when the court ruled that the statute of repose for medical malpractice claims is constitutional, with two justices dissenting—with *Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283 (Texas, 2010), when the court unanimously upheld the statute of repose for medical malpractice claims.

2 Descriptions of cases can be found in the full text of the report at http://www.americanprogress.org/issues/civil-liberties/report/2012/08/13/11974/big-business-taking-over-state-supreme-courts/

Endnotes

1 Joan Biskupic, "Supreme Court Case with the Feel of a Best Seller," *USA Today*, February 16, 2009, available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

2 Seven states elect judges in partisan elections: Alabama, Illinois, Louisiana, North Carolina, Pennsylvania, Texas, and West Virginia. Fourteen states have nonpartisan elections: Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin. In 17 states, judges are appointed and then run in uncontested "retention" elections, in which voters decide whether to keep the judge in place: Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. See: "Judicial Elections in the States," available at http://www.judicialselection.us.

3 "National Overview Map," available at http://www.followthemoney.org/database/nationalview.phtml?l=0&f=J&y=2000&abbr=1

4 Ibid., 2001–2012 (adding up to a total of $197,423,968).

5 Robert Lendzner and Matthew Miller, "Buying Justice," *Forbes*, July 21, 2003, available at http://www.forbes.com/forbes/2003/0721/064_print.html.

6 "National Overview Map," Ohio, 2006.

7 "National Overview Map," Alabama, 2010.

8 Erwin Chemerinsky and James Sample, "You Get the Judges You Pay For," *The New York Times*, April 17, 2011, available at http://www.nytimes.com/2011/04/18/opinion/18sample.html.

9 Justice at Stake, Brennan Center for Justice, and National Institute on Money in State Politics, "The New Politics of Judicial Elections 2006" (2007), p. 7, available at http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf.

10 Viveca Novak, "Under the Influence," *The American Prospect*, September 19, 2011, available at http://prospect.org/article/under-influence.

11 Ian Milhiser, "*Citizens United* Decision: 'A Rejection Of The Common Sense Of The American People,'" ThinkProgress, January 21, 2010, available at http://thinkprogress.org/politics/2010/01/21/78365/citizens-united/.

12 Craig Jarvis, "New super PAC gets involved in Supreme Court race to back Newby," *Raleigh News & Observer*, June 2, 2012, http://www.newsobserver.com/2012/06/02/2105910/new-super-pac-formed-to-help-re.html.

13 Billy Corriher, "Supreme Court Assault On Campaign Finance Reform Likely To Kill West Virginia Anti-Corruption Law," ThinkProgress, June 26, 2012, available at http://thinkprogress.org/justice/2012/06/26/505379/supreme-court-assault-on-campaign-finance-reform-likely-to-kill-west-virginia-anti-corruption-law/.

14 See Appendix. The data suggest that, from 2000 to 2010, the court ruled in favor of individuals in 115 cases and in favor of corporations in 288 cases.

15 National Center for State Courts, Court Statistics Project, "Examining the Work of State Courts" (2011), available at http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf.

16 Biskupic, "Supreme Court Case with the Feel of a Best Seller."

17 *Caperton v. Massey*, 129 S. Ct. 2252 (2009).

18 Ibid.

19 Greenberg Quinlan Rosner Research, American Viewpoint, Justice at Stake, "National Surveys of American Voters and State Judges," February 14, 2002, available at http://www.justiceatstake.org/media/cms/PollingsummaryFINAL_9EDA3EB3BEA78.pdf.

20 Wisconsin Supreme Court, "Supreme Court unanimously backs realistic, meaningful public campaign financing for Supreme Court Justices," December 10, 2007, available at http://www.wicourts.gov/news/archives/view.jsp?id=60.

21 Adam Liptak and Janet Roberts, "Campaign Cash Mirrors a High Court's Rulings," *The New York Times*, October 1, 2006, available at http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all.

22 60 Minutes, "Justice for Sale," December 6, 1987 (discussing the influence of plaintiffs' lawyers over the Texas Supreme Court).

23 Stephanie Mencimer, *Blocking the Courthouse Door* (New York: Free Press, 2006).

24 Ibid.

25 Ian Millhiser, "Just Three Corporate Front Groups Spent 13 Times as much as the Entire Labor Movement to Buy Judicial Elections," ThinkProgress, October 17, 2011.

26 Adam Liptak and Janet Roberts, "Campaign Cash Mirrors a High Court's Rulings," *The New York Times*, October 1, 2006.

27 *Alabama Title Loans, Inc., v. Kimberly White*, 80 So. 3d 887 (Ala. 2011).

28 Ibid.

29 Eileen Ambrose, "Consumer Agency to Review Mandatory Arbitration in Financial Services," *The Baltimore Sun*, April 29, 2012, available at http://articles.baltimoresun.com/2012-04-29/business/bs-bz-ambrose-mandatory-arbitration-20120429_1_arbitration-clauses-consumer-financial-protection-bureau-arbitration-in-financial-services.

30 Stephen Ware, "The Source of Alabama's Abundance of Arbitration Cases," *American Journal of Trial Advocacy* 28 (2004).

31 "National Overview Map," Alabama, 2000.

32 Texas Watch Foundation, "The Consumer Pitfalls of Binding Arbitration" (2003), available at http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/Abitrationreportfinal-2.pdf.

33 Public Citizen, "The Arbitration Trap: How Credit Card Companies Ensnare Consumers" (2007), available at http://www.citizen.org/publications/publicationredirect.cfm?ID=7545.

34 U.S. Chamber of Commerce, "Anti-Arbitration Bill Sets Dangerous Precedent," Press release, June 8, 2000, available at http://www.uschamber.com/press/releases/2000/june/anti-arbitration-bill-sets-dangerous-precedent; U.S. Chamber of Commerce, "U.S. Chamber Supports Keeping Binding Arbitration," Press release, March 1, 2000, available at http://www.uschamber.com/press/releases/2000/march/us-chamber-supports-keeping-binding-arbitration.

35 Bureau of Economic Analysis, "State Personal Income 2006" (Department of Commerce, 2007), available at http://www.bea.gov/newsreleases/regional/spi/2007/pdf/spi0307.pdf.

36 "National Overview Map," Alabama, 2006.

37 "National Overview Map," 2006.

38 "National Overview Map," Alabama, 2010.

39 K.O. Myers, "Alabama Judicial Campaign Disclosures Reveals Unusual Giving," JudgesOnMerit.org, February 8, 2011, available at http://www.judgesonmerit.org/2011/02/08/alabama-judicial-campaign-disclosures-reveals-unusual-giving/.

40 See Appendix, Alabama.

41 Ian Millhiser, "The Supreme Court's One Thousandth Cut Against Consumers," ThinkProgress, November 9, 2010, available at http://thinkprogress.org/justice/2010/11/09/176967/att-concepcion/.

42 Ian Millhiser, "Has Corporate America Achieved Total Judicial Victory Over American Consumers?", ThinkProgress, October 3, 2011, available at http://thinkprogress.org/justice/2011/10/03/334251/has-corporate-america-achieved-total-judicial-victory-over-american-consumers/.

43 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003).

44 Joshua Green, "Karl Rove in a Corner," *The Atlantic*, November 2004.

45 "National Overview Map," Alabama, 2000.

46 Stephen Ware, "Money, Politics, and Judicial Decisions, A Case Study of Arbitration Law in Alabama," *Journal of Law & Politics* 15 (645) (1999).

47 *Southern Energy Homes, Inc., v. Ard*, 772 So.2d 1131 (Ala. 2000).

48 *Brilliant Homes, Ltd. v. Lind*, 722 So. 2d 753 (Ala. 1998).

49 *Bennett v. Skinner*, No. NC-10-1208-BaJuH (Ala. June 29, 2012) (compelling arbitration); *Auto Owners Insurance, Inc., v. Blackman Insurance Agency, Inc.*, No. CV-10-902245 (Ala. March 2, 2012) (compelling arbitration); *American Family Life Assuranve Co. v. Parker*, CV-10-900060) (Ala. March 16, 2012) (compelling arbitration); *Aurora Healthcare, Inc., v. Ramsey*, CV-06-2168 (Ala. Oct. 21, 2011) (compelling arbitration); *Alabama Title Loans, Inc., v. White*, 80 So. 3d 887 (Ala. 2011) (compelling arbitration); *Thomas v. Sloan Homes, LLC*, 81 So.3d 309 (Ala. 2011) (compelling arbitration); *Jim Parker Bldg. Co. Inc. v. G & S Glass & Supply Co. Inc.*, 69 So.3d 124 (Ala. 2011) (denying motion to compel arbitration); *Olshan Found. Repair Co. of Mobile v. Schultz*, 64 So.3d 598 (Ala. 2010) (compelling arbitration); *Lighting Fair, Inc. v. Rosenberg*, No. CV-09-900314 (Ala. 2010) (denying motion to compel arbitration); *Jenkins v. Atelier Homes Inc.*, 62 So.3d 504 (Ala. 2010) (denying motion to compel arbitration); *Olshan Found. Repair Co. of Mobile v. Schultz*, No. CV-08-900054 (Ala. 2010) (compelling arbitration); *I.C.E. Contractors Inc. v. Martin & Cobey Constr. Co. Inc.*, 58 So.3d 723 (Ala. 2010) (denying motion to compel arbitration); *Dudley v. Knight*, 57 So.3d 68 (Ala. 2010) (compelling arbitration).

50 Thomas Keith, interview with author, May 30, 2012.

51 "National Overview Map," Alabama, 2010, James Main.

52 *Auto Owners Insurance, Inc., v. Blackman Insurance Agency, Inc.*, No. CV-10-902245 (Ala. March 2, 2012).

53 "National Overview Map, Alabama, 2010, Charles Malone.

54 Dana Beyerle, "Moore Credits Grassroots Effort in Primary Win," *Gadsden Times*, March 15, 2012,

55 *Casarotto v. Lombardi*, 268 Mont. 369; 886 P.2d 931 (1994).

56 Paul Bland, interview with author, July 23, 2012.

57 Paul Bland, remarks at American Constitution Society, Annual Convention 2012, June 15, 2012.

58 Alabama Access to Justice Commission, "2008 Annual Report to the Supreme Court of Alabama and the Alabama State Bar" (2008), p. 5, available at http://www.alabamaatj.org/pdfs/ATJ 2008 Annual Report Version 2.PDF.

59 Ian Milhiser, "Now That We Have A CFPB Director, It's Time To Ban Corporate-Owned Courts In The Financial Industry," ThinkProgress, January 5, 2012, available at http://thinkprogress.org/justice/2012/01/05/398327/now-that-we-have-a-cfpb-director-its-time-to-ban-corporate-owned-courts-in-the-financial-industry/.

60 Texas Watch, "Profile in Courage: Jose Herrera," May 11, 2010, available at http://www.texaswatch.org/2010/05/profile-in-courage-jose-herrera/.

61 Mark Greenblatt, "Justice for Sale in Texas?", KHOU, May 12, 2008, available at http://www.khou.com/news/local/66173432.html.

62 Jim Morris, "The Forgotten Ones: Few Remedies for Injured Contractors," iWatch News, Center for Public Integrity, March 1, 2011, available at http://www.iwatchnews.org/2011/03/01/2103/forgotten-ones-few-remedies-injured-contractors.

63 Ian Graham, "Working Conditions of Contract Employees in the Oil and Gas Industries" (Geneva: International Labor Office, 2010), available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_161194.pdf.

64 Lee Nichols, "Justice and Worker Safety," *Austin Chronicle*, December 21, 2007, available at http://www.austinchronicle.com/news/2007-12-21/574169/.

65 *Entergy Gulf States, Inc. v. Summers*, 50 Tex. Sup. J. 1140 (Tex., Aug. 31, 2007) (vacated by *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009)).

66 Texans for Public Justice, "Justices in Activist 'Entergy' Ruling Ran on High-Octane Campaign Funds," April 28, 2008, available at http://info.tpj.org/pdf/entergymoneytosupremes.pdf.

67 Ibid.

68 See Appendix, Texas.

69 *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009).

70 *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210 (Tex. 1988).

71 *Texas Mutual Insurance Co. v. Ruttinger*, No. 08-0751 (Tex. June 22, 2012).

72 *Coastal Oil and Gas Corp., v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008).

73 See Appendix, Texas.

74 Madhavi McCall and Michael McCall, "Campaign contributions, judicial decisions, and the Texas Supreme Court," *Judicature* 90 (5) (2007), available at http://www.ajs.org/ajs/publications/Judicature_PDFs/905/mccall_905.pdf.

75 Ian Millhiser, "The Most Neglected Branch," Center for American Progress, December 15, 2010, available at http://www.americanprogress.org/issues/2010/12/neglected_branch.html.

76 Nake Blakeslee, "How Enron Did Texas," *The Nation*, March 4, 2002, available at http://www.thenation.com/article/how-enron-did-texas?page=0,2.

77 Jim Yardley, "Enron's Collapse: Enron Ruling by Nominee to U.S. Court is Being Noticed," *The New York Times*, January 22, 2002, available at http://www.nytimes.com/2002/01/22/business/enron-s-collapse-texas-judge-enron-ruling-nominee-us-court-being-noticed.html.

78 See Appendix, Texas.

79 See also: *Diamond Shamrock Refining Co., L.P. v Hall*, 168 S.W.3d 164 (TX, 2005) (overruling jury verdict for injured employee, entering judgment for employer);

80 Adam Liptak and Janet Roberts, "Campaign Cash Mirrors a High Court's Rulings," *The New York Times*, October 1, 2006, available at http://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all.

81 Doug Buchanan, "Insurance Industry Targets Ohio Supreme Court Races," Business First, October 25, 1999, available at http://www.bizjournals.com/columbus/stories/1999/10/25/focus2.html?page=all.

82 *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 710 N.E.2d 1116 (Ohio, 1999) (four-justice majority construed an employer's UIM policy to cover an employee who was not driving a company car and accident was not in the scope of employment; three justices dissented).

83 "National Overview Map."

84 "National Overview Map," Ohio, 2004.

85 *In re: Uninsured and Underinsured Motorist Coverage Cases*, 100 Ohio St.3d 302 (Ohio 2003).

86 "National Overview Map," Ohio, 2006.

87 See Appendix, Ohio.

88 *Barbee v. Nationwide Mutual Ins. Co.*, 130 Ohio St.3d 96 (Ohio 2011).

89 Ibid.

90 "National Overview Map," Ohio, 2012.

91 *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250 (Ohio 2010); *Stetter v. R.J. Corman Derailment Services, LLC*, 125 Ohio St.3d 280 (Ohio 2010).

92 *Stetter v. R.J. Corman Derailment Services, LLC*, 125 Ohio St.3d 280 (Ohio 2010).

93 *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228 (Ohio 2008).

94 "National Overview Map," Ohio, 2008.

95 *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007).

96 Ibid.

97 See Appendix, Ohio, 2007–2010.

98 Liptak and Roberts, "Campaign Cash Mirrors a High Court's Rulings."

99 Judge Bill O'Neill, interview with author, June 5, 2012.

100 Liptak and Roberts, "Campaign Cash Mirrors a High Court's Rulings."

101 Judge Joseph Russo, Richard Johnson, and Jack DeSario, "A Legal, Political, and Ethical Analysis of Judicial Selection in Ohio: A Proposal for Reform," *Capital University Law Review* 38 (4) (2010): 825–856.

102 Follow the Money, "Search Results: MGM," available at http://www.followthemoney.org/database/search.phtml?searchbox=MGM.

103 Michael Goodman and William Rempel, "In Las Vegas, They're Playing with a Stacked Judicial Deck," *Los Angeles Times*, June 8, 2006, available at http://www.latimes.com/la-na-justice080606,0,4781277.story.

104 *Governor v. Nevada State Legislature*, 119 Nev. 460, 76 P.3d 22 (Nev. 2003).

105 K.C. Howard, "Recall Campaign: Activists to Target Six Justices," *Las Vegas Review-Journal*, July 18, 2003, available at http://www.reviewjournal.com/lvrj_home/2003/Jul-18-Fri-2003/news/21753763.html.

106 "National Overview Map," Nevada, 2004.

107 "National Overview Map," Nevada, 2006.

108 Ibid.

109 *Nevadans for Nev. v. Beers*, 142 P.3d 339, 348 (Nev. 2006).

110 *Lvcva v. Secretary of State*, 191 P.3d 1138, (Nev. 2008).

111 *Sparks Nugget Inc. v. State Dept. of Taxation*, 179 P.3d 570 (Nev. 2008).

112 Cy Ryan, "Ruling Rebuffs Casinos Seeking Refund on Taxes Paid on Comped Meals," *Las Vegas Sun*, January 24, 2012, available at http://www.lasvegassun.com/news/2012/jan/24/ruling-rebuffs-casinos-wanting-refund-taxes-paid-c/.

113 Lisa Kim Bach, "Nevada Still Near Bottom in Per-Pupil Spending," *Las Vegas Review-Journal*, April 3, 2008, available at http://www.lvrj.com/news/17255649.html.

114 Progressive Leadership Alliance of Nevada, "Fool's Gold: The Silver State's Tax Structure, Inadequate and Inequitable" (2009), available at http://planevada.drupalgardens.com/sites/planevada.drupalgardens.com/files/Fools Gold_0.pdf.

115 Ibid.

116 Cy Ryan, "Petition to Raise Casino Taxes Can Go Forward," *Las Vegas Sun*, April 3, 2008, available at http://www.lasvegassun.com/blogs/gaming/2008/apr/03/petition-raise-casino-taxes-can-go-forward/.

117 Molly Ball and Howard Stutz, "Casinos, Teachers Discuss Tax Plan," *Las Vegas Review-Journal*, May 8, 2008, available at http://www.lvrj.com/news/18761884.html.

118 "Noteworthy Contributor Summary, Wynn Las Vegas," available at http://www.followthemoney.org/database/topcontributor.phtml?u=9553&y=0.

119 Steve Green, "Wynn Tip Sharing Dispute Aired Again in Court," *Las Vegas Sun*, August 14, 2011, available at http://www.lasvegassun.com/news/2011/aug/14/wynn-tip-sharing-dispute-aired-again-court.

120 *Smith v. The Wynn*, Nevada State Labor Commissioner, July 2010.

121 Chris Sieroty, "Wynn Tip Policy said to Violate State Law," *Las Vegas Review-Journal*, November 11, 2011.

122 Michael Goodman and William Rempel, "In Las Vegas, They're Playing with a Stacked Judicial Deck," *Los Angeles Times*, June 8, 2006, available at http://www.latimes.com/la-na-justice080606,0,4781277.story.

123 Nevada Supreme Court, "In the Matter of the Amendment of the Nevada Code of Judicial Conduct," December 17, 2009, available at http://www.leg.state.nv.us/courtrules/scr_cjc.html.

124 Associated Press, "Nevada Voters Reject Judicial Ballot Measures," *Las Vegas Sun*, November 3, 2010, available at http://www.lasvegassun.com/news/2010/nov/03/nv-nevada-measures-2nd-ld-writethru/.

125 Ian Millhiser, "Conservative Justice Prosser Suggests He Merely Breached 'Etiquette' When He Allegedly Choked a Colleague," ThinkProgress, May 1, 2012, available at http://thinkprogress.org/justice/2012/05/01/474656/conservative-justice-prosser-claims-he-merely-breached-etiquette-when-he-allegedly-choked-a-colleague/.

126 Patrick Marley, "Supreme Court Tensions Boil Over," *Milwaukee Journal-Sentinel*, March 19, 2011, available at http://www.jsonline.com/news/statepolitics/118310479.html.

127 Monica Davey, "Wisconsin Election is Referendum on Governor," *The New York Times*, April 4, 2011, available at http://www.nytimes.com/2011/04/05/us/politics/05wisconsin.html?_r=1.

128 "Highlight of Gov. Walker's Budget Repair Bill," *Wisconsin State Journal*, February 11, 2011, available at http://host.madison.com/wsj/news/local/govt-and-politics/article_3d93e6aa-363a-11e0-8493-001cc4c002e0.html.

129 Mike Elk, "Progressive Solidarity Movement Emerges in Wisconsin," ThinkProgress, February 17, 2011.

130 *State Ex Rel. Ismael R. Ozanne v. Fitzgerald*, 334 Wis.2d 70, 798 N.W.2d 436, (Wis. 2011).

131 Wisconsin Supreme Court, "Supreme Court unanimously backs realistic, meaningful public campaign financing for Supreme Court Justices."

132 Brennan Center for Justice, "Judicial Public Financing in Wisconsin – 2011," April 5, 2011, available at http://www.brennancenter.org/content/resource/judicial_public_financing_in_wisconsin_2011/.

133 Lisa Graves, "Group called 'Citizens for Strong America' Operates out of a UPS Mail Drop but Runs Expensive Ads in Supreme Court Race?", PR Watch, Center for Media and Democracy, April 2, 2011, available at http://www.prwatch.org/news/2011/04/10534/group-called-citizens-strong-america-operates-out-ups-mail-drop-runs-expensive-ad.

134 "National Overview Map," Wisconsin, 2011, Joanne Kloppenburg.

135 Ian Millhiser, "Corporate Lobbyists Get What They Paid For as Wisconsin Justice David Prosser Reinstates Walker's Anti-Union Law," ThinkProgress, June 14, 2011, available at http://thinkprogress.org/justice/2011/06/14/245674/prosser-equals-walker/.

136 *State Ex Rel. Ismael R. Ozanne v. Fitzgerald*, 334 Wis.2d 70, 798 N.W.2d 436, (Wis. 2011).

137 Ibid.

138 *In the Matter of Amendment of the Code of Judicial Conduct's Rules on Recusal*, Nos. 08-16, 08-25, 09-10, and 09-11, Wisconsin Supreme Court (July 7, 2010).

139 Brennan Center for Justice, "Judicial Public Financing in Wisconsin – 2011."

140 *n the Matter of Amendment of the Code of Judicial Conduct's Rules on Recusal*, Nos. 08-16, 08-25, 09-10, and 09-11, Wisconsin Supreme Court (July 7, 2010).

141 *Wisconsin Judicial Commission v. Gableman*, Statement of Facts, February 27, 2009, available at http://www.wispolitics.com/1006/090316_WJC_statement_of_facts.pdf; Joel McNally, "Justice Gableman Found His Own Loophole," *The Capital Times*, July 17, 2010, available at http://host.madison.com/ct/news/opinion/column/joel_mcnally/article_eb045cce-9122-11df-be9c-001cc4c002e0.html.

142 Ian Millhiser, "Wisconsin Lawmaker Introduces Resolution to Remove Ethically Tainted Justice Michael Gableman," ThinkProgress, January 12, 2012, available at http://thinkprogress.org/justice/2012/01/12/403493/wisconsin-lawmaker-introduces-resolution-to-remove-ethically-tainted-justice-michael-gableman/; Ian Millhiser, "Justice who upheld Gov. Walker's Anti-Union Law Received Over $10K Worth of Free Services from Walker's Law Firm," ThinkProgress, December 20, 2011, available at http://thinkprogress.org/justice/2011/12/20/392885/justice-who-upheld-gov-walkers-anti-union-law-received-over-10k-worth-of-free-services-from-walkers-law-firm/.

143 Ian Milhiser, "Conservative Wisconsin Justices Remove Ethics Official After He Charges Three of Them with Ethics Violations," ThinkProgress, May 14, 2012, available at http://thinkprogress.org/justice/2012/05/14/483360/conservative-wisconsin-justices-remove-ethics-offical-after-he-charges-three-of-them-with-ethics-violations/.

144 Josh Israel, "Justice Prosser Attempts to Kill Ethics Case Against Him by Asking All Colleagues to Recuse Themselves," ThinkProgress, March 21, 2012, available at http://thinkprogress.org/justice/2012/03/21/448919/prosser-attempts-to-kill-ethics-case/; Patrick Marley, "Ziegler Recuses Herself in Prosser Case," *Milwaukee Journal Sentinel*, July 27, 2012, available at http://www.jsonline.com/news/wisconsin/ziegler-recuses-herself-in-prosser-case-7r6960v-164034006.html.

145 Justice at Stake, "Confidence in Wisconsin Supreme Court Plunges," July 21, 2011, available at http://www.justiceatstake.org/newsroom/press_releases.cfm/new_poll_confidence_in_wisconsin_supreme_court_plunges?show=news&newsID=11188.

146 Justice Ann Walsh Bradley, interview with author, June 16, 2012.

147 Peter Hardin, "WI Budget Axes Public Financing Dollars," Gavel Grab, June 27, 2011, available at http://www.gavelgrab.org/?p=22032.

148 *Jenkins v. Patel*, 256 Mich. App. 112 (Mich. App., 2003).

149 *Jenkins v. Patel*, 688 N.W.2d 543, 263 Mich. App. 508 (Mich. App., 2004).

150 *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (1997).

151 American Legislative Exchange Council, "State Legislator's Guide: Tort Reform Boot Camp" (2011), available at http://www.alec.org/wp-content/uploads/TortReform-BootCampGuideFinal.pdf.

152 Michelle Mello, "Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms" (Princeton, NJ: Robert Wood Johnson Foundation, 2006), available at http://www.rwjf.org/files/research/15168.medmalpracticeimpact.report.pdf.

153 *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (1997).

154 See: *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (1997); *Lebron v. Gottlieb Mem'l Hospital*, 930 N.E.2d 895 (Ill., 2010) (ruled unconstitutional a cap on noneconomic damages in medical malpractice actions).

155 Public Citizen, "Gov. Perry Has 'Wrong Diagnosis, Wrong Prescription' for Malpractice Insurance Spikes," February 11, 2003, available at http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=1333; Kevin Drum, "The Problem With Damage Caps," Mother Jones, January 23, 2011, available at http://www.motherjones.com/kevin-drum/2011/01/problem-damage-caps.

156 *Phillips v. Mirac, Inc.*, 685 N.W.2d 174, (Mich., 2004) (upholding statute capping damages for lessees of rental cars, finding that cap does not violate state constitutional right to equal protection, due process, or jury trial).

157 *Jenkins v. Patel*, 688 N.W.2d 543, 263 Mich. App. 508 (Mich. App., 2004).

158 "National Overview Map."

159 See Appendix, Michigan, 2000–2009.

160 See Appendix, Michigan, 1999–2009.

161 *O'neal v. St. John Hosp. & Med. Ctr.*, 487 Mich. 485, 791 N.W.2d 853 (Mich., 2010).

162 Michigan State Medical Society, "Electing Kelly and Young to Supreme Court is Crucial to Preserving Tort Reform!", October 2010, available at http://www.msms.org/AM/Template.cfm?Section=Home&CONTENTID=16174&TEMPLATE=/CM/ContentDisplay.cfm; "Supreme Court Majority Targets Tort Reform; Support Justice Young," available at http://www.msms.org/AM/Template.cfm?Section=Tort_Reform&CONTENTID=20101&TEMPLATE=/CM/ContentDisplay.cfm.

163 "National Overview Map," Michigan, 2010, Independent Expenditures by Target.

164 Ibid.

165 "Kelly & Young Win Helps Keep Tort Reform and Physicians in Michigan," available at http://www.mdpac.org/AM/Template.cfm?Section=Engage&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=20107.

166 Michigan Judicial Selection Task Force, "Report and Recommendations" (2012), available at http://sbmblog.typepad.com/files/jstfreport.pdf.

167 Michigan Campaign Finance Network, "Anonymous Donors Dominated Supreme Court Campaign," News release, November 19, 2008, available at http://www.mcfn.org/press.php?prId=77.

168 "Michigan Supreme Court Campaign Finance Summary, 1984 – 2010," available at http://www.mcfn.org/pdfs/reports/MSC_bar84_10.pdf.

169 Justice Marilyn Kelly, remarks at American Constitution Society Annual Convention, June 16, 2012.

170 Stephen Choi, Mitu Gulati, and Eric Posner, "Which States Have the Best (and Worst) High Courts?", Duke Law School Faculty Scholarship Series, Paper 168, May 1, 2008, available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1169&context=duke_fs&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar_url%3Fhl%3Den%26q%3Dhttp%3A%2F%2Flsr.nellco.org%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1169%26context%3Dduke_fs%26sa%3DX%26scisig%3DAAGBfm22YiQJqnIPUEg2Ee4NdR7i8OSqIg%26oi%3Dscholarr#search=%22http%3A%2F%2Flsr.nellco.org%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1169%26context%3Dduke_fs%22.

171 See Appendix.

172 Justice at Stake, Brennan Center for Justice, and National Institute on Money in State Politics, "The New Politics of Judicial Elections, 2000-2009: Decade of Change" (2010), available at http://thinkprogress.org/politics/2010/08/16/113755/judicial-election-spending/.

173 Ian Millhiser, "Just Three Corporate Front Groups Spent 13 Times as much as the Entire Labor Movement to Buy Judicial Elections," ThinkProgress, October 17, 2011, available at http://thinkprogress.org/justice/2011/10/27/355090/just-three-corporate-front-groups-spent-13-times-as-much-as-the-entire-labor-movement-to-buy-judicial-elections/.

174 Eric Velasco, "Trial Lawyers Putting Their Campaign Cash Behind Roy Moore for Alabama Chief Justice," *The Birmingham News*, July 3, 2012, available at http://blog.al.com/spotnews/2012/07/alabama_trial_lawyers_putting.html.

175 "How Did We Come to Elect Judges?", available at http://www.pbs.org/wgbh/pages/frontline/shows/justice/howdid.

176 Greenberg Quinlan Rosner Research, American Viewpoint, "Justice at Stake: National Surveys of American Voters and State Judges," February 14, 2002, available at http://www.justiceatstake.org/media/cms/PollingsummaryFINAL_9EDA3EB3BEA78.pdf.

177 Charles Geyh, "Why Judicial Elections Stink," *Ohio State Law Journal* 64 (43) (2003).

178 Justice at Stake, 20/20 Insight, LLC, July 2011 Poll, Wisconsin Registered Voters, available at http://www.justiceatstake.org/media/cms/WI_Merit_Poll_Results_734DCFE0AA5C8.pdf; Associated Press, "Nevada Voters Reject Judicial Ballot Measures," *Las Vegas Sun*, November 3, 2010, available at http://www.lasvegassun.com/news/2010/nov/03/nv-nevada-measures-2nd-ld-writethru/.

179 Justice at Stake, Brennan Center for Justice, and National Institute on Money in State Politics, "The New Politics of Judicial Elections, 2000-2009" (2011), available at http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpgv.pdf.

Disclosure Laws Needed to Ensure Transparency in Judicial Elections

Originally published: October 16, 2012

Summary

In a series of cases striking down campaign finance reform laws, federal courts have opened the door to unlimited political spending by ostensibly "independent" groups. In his dissent in the 2010 *Citizens United* case, former U.S. Supreme Court Justice John Paul Stevens said that the majority's decision "unleashes the floodgates of corporate and union general treasury spending" in judicial elections. Disclosure rules are crucial for judi¬cial elections because they determine whether voters can find out who is spending money on judicial campaigns. When information on campaign spending is not made public, a litigant cannot know whether to ask a judge to recuse him or herself for receiving campaign contributions from an opposing litigant.

Most states still fail to regulate electioneering communications—ads that fall just short of expressly advocating for certain candidates. Although the state of Michigan said it could not regulate these ads, it did concede that most of them "are campaign ads with¬out words of express advocacy." Since 2000 the Michigan Chamber of Commerce has purchased $8.3 million in ads for Michigan Supreme Court candidates—$8.3 million that was not reported under state law.

A few states have updated their disclosure rules since *Citizens United* unleashed unlimited corporate political spending. In Maryland, for example, an organization engaged in independent spending must either disclose political spending in any reports to its shareholders, members, or donors, or it must post a link on its website to its disclosure reports. Many states—including Arizona, Iowa, and Missouri—require corporations to report that their board of direc¬tors approved any political spending. The Court in *Citizens United* endorsed this type of disclosure: "Shareholders can determine whether their corporation's politi¬cal speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests." Any effective disclosure system must include a requirement that independent spenders disclose last-minute expenditures and contributions occurring after the last campaign finance report is filed.

Introduction

As this year's election approaches, political attack ads are flooding the airwaves, fueled by unprecedented sums of money from corporations and wealthy individuals funding "independent" political ads.[1] Much of the money is funneled through nonprofit organizations that do not disclose their donors.[2]

In August 2012 the Center for American Progress issued a report on how campaign donations from big business have come to dominate judicial elections, resulting in courts that favor corporations over individual citizens.[3] Our new report concludes with recommendations for strong rules that require reporting of all ads that mention candidates, including information on those who gave money to independent spenders. States should also respond to Citizens United by requiring corporations engaged in political spending to disclose that information to their shareholders.

Although disclosure laws usually apply to elections for all branches of government, these recommendations were made specifically with judicial campaigns in mind. Judicial elections involve unique interests that make the need for transparency in campaign finance even greater than in other elections.

In a series of cases striking down campaign finance reform laws, federal courts have opened the door to unlimited political spending by ostensibly "independent" groups.[4] The U.S. Supreme Court in Citizens United v. Federal Election Commission overruled a 1990 case that thwarted an attempt by the Michigan Chamber of Commerce, a nonprofit corporation under Michigan law, to spend its general treasury funds on political ads in the local newspaper. Since 2000 the organization has become a major player in judicial races, having purchased $8.3 million in ads for Michigan Supreme Court candidates—$8.3 million, which was not reported under state law.[5]

The rapid rise in unlimited independent spending is even more alarming when the politicians in question are judges, who are supposed to be true to the law, not to campaign contributors. Voters are not surprised when legislators are responsive to their campaign donors, but in a courtroom, ordinary citizens should stand on the same footing as those most powerful in our society. Justice is supposed to be blind, but polls suggest Americans are concerned that campaign cash will influence judges' rulings.[6]

In his dissent in Citizens United, U.S. Supreme Court Justice John Paul Stevens said the majority's decision "unleashes the floodgates of corporate and union general treasury spending" in judicial elections. He worried that "States ... may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems."[7] Justice Stevens's warning seemed prescient when the Supreme Court—without a hearing or oral argument—threw out Montana's law requiring corporations to register as political action committees in order to air political ads.[8]

In Citizens United, a five-justice majority swept aside Justice Stevens's concerns and held that restrictions on corporate electioneering violate the First Amendment. The U.S. Supreme Court ruled that independent expenditures by corporations "do not give rise to corruption or the appearance of corruption."[9] The Court's decision rested on the premise that more political speech, even corporate speech, means more information for voters.[10]

In the same vein, Citizens United upheld disclosure requirements in federal campaign finance law. Justice Anthony Kennedy said disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages."[11] Thus Citizens United gutted restrictions on corporate electioneering and left disclosure as the only possible check on corporate political power.[12] Several circuit courts have relied on Citizens United in upholding disclosure rules.[13]

Without effective disclosure laws, the growing tide of unlimited anonymous campaign cash threatens to overwhelm judicial elections. Candidates for state Supreme Courts have shattered fundraising records in recent elections, and more states are seeing special interest money flood judicial elections.[14] The figures for independent spending are hard to discern because the states' disclosure rules vary widely. It is clear that independent spending has exceeded direct spending by the candidates in many states,[15] meaning that special interest groups—not the candidates—set the tone of the campaigns.

One critic of stricter disclosure laws, Sen. Mitch McConnell (R-KY), claims that such measures are "an effort by the government itself to expose its critics to harassment and intimidation."[16] The U.S. Chamber of Commerce agrees with this assessment, calling the federal DISCLOSE Act[17] an effort to "upend irretrievably core First Amendment protections of political speech in the months leading up to an election."[18] The Supreme Court has repeatedly rejected arguments that such concerns render disclosure rules unconstitutional.[19] The Court has said that if a

spender can demonstrate that disclosure would lead to intimidation, then applying the rules in that case may be unconstitutional.[20] Thus far, opponents of disclosure have failed to produce any such evidence.

Disclosure is a commonsense reform, and polls suggest the vast majority of citizens—Republican and Democrat alike—support disclosure.[21] These rules are crucial for judicial elections because they determine whether voters can find out who is running ads for judicial candidates. Justice Stevens noted in his Citizens United dissent that a litigant can argue that a judge should recuse herself for receiving campaign contributions from an opposing litigant,[22] but when information on campaign spending is not made public, this right to a trial before an unbiased judge cannot be availed.

Many states have not yet adapted to the new campaign finance landscape. North Dakota and Indiana, for example, have no rules requiring disclosure of independent spending. Michigan has rules governing independent spending, but they fall well short of full disclosure. Maryland, on the other hand, reacted to Citizens United by enacting rules that require more disclosure from corporations engaged in politics.

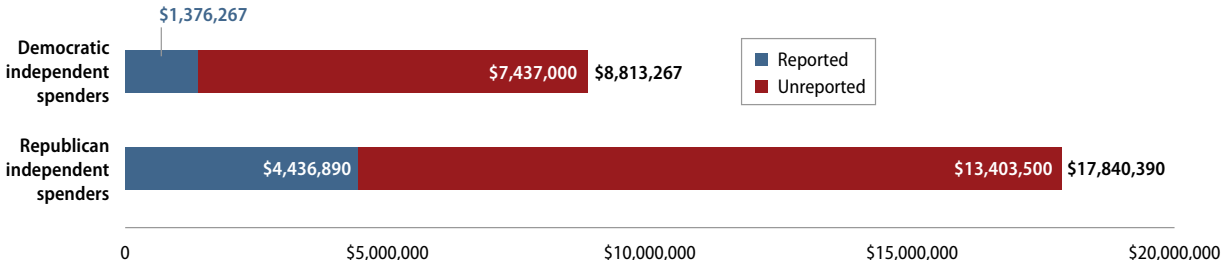
Disclosure rules for electioneering communications

Federal law regulates two types of political spending that are independent of candidates' official spending. Both types mention candidates and are aired before elections. Independent expenditures include ads "expressly advocating the election or defeat of a clearly identified candidate."[23] Ads that fall short of express advocacy but still "refer to" candidates are considered electioneering communications.[24] Some states such as Vermont use this terminology but subject the two types of independent spending to similar disclosure rules.[25] Most states, including Michigan, fail to regulate electioneering communications at all,[26] even though such ads have been regulated at the federal level since 2002.[27]

Recent elections for the Wisconsin Supreme Court have been overwhelmed by "independent" ads funded by special interests that do not disclose their donors.[28] The sidebar on page 5 discusses how a front group for Americans for Prosperity, a group associated with the Koch brothers, has worked to elect judges who will protect the profits of the Koch brothers and other industrial corporations.

Independent spending in Michigan Supreme Court elections, 2000-2010

$20 million in unreported spending



Michigan Campaign Finance Network, $70 Million Hidden in Plain View, Appendix A, June 2011,http://www.mcfn.org/pdfs/reports/MICFN_HiddenInPlainViewP-rev.pdf

Michigan has no rules governing electioneering communications. In a letter to the state Chamber of Commerce, the Michigan Department of State said it had no authority to regulate "issue" ads that do not constitute "express advocacy." The agency told the Chamber:

> *This in no way endorses some of the so-called issue ads, which are often more vicious than regulated ads. Clearly, many if not most of these issue ads are campaign ads without words of express advocacy. Moreover, because they are not considered expenditures, relevant information, such as who paid for them, is often not disclosed.*[29]

By avoiding keywords such as "vote for" or "vote against," independent groups in Michigan can run all the political ads they want without disclosing who paid for them.[30]

The U.S. Supreme Court, in a 1990 case, upheld a Michigan campaign finance law that required corporations to establish a separate account for purchasing political ads.[31] The High Court said Michigan's ban on spending general corporate funds on political ads was justified by the state's interest in preventing corruption. The Court said, "Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."[32] Even though the Michigan Chamber of Commerce was a nonprofit organization, the Court noted that for-profit "corporations therefore could circumvent the Act's restriction by funneling money through the Chamber's general treasury."[33] When it overruled Austin v. Michigan Chamber of Commerce, the Supreme Court in Citizens United opened the door to unlimited independent

spending by the state Chamber of Commerce, and Michigan campaign finance law does not require the Chamber to report the source of its money, as long as it avoids the "magic words" that expressly advocate voting for or against someone.[34]

The Michigan Campaign Finance Network has unearthed spending data on electioneering communications for state Supreme Court races. Spending by the candidates themselves has skyrocketed, but the network found that such funds accounted for only 37 percent of total spending on judicial races in the same time period.[35] Of the $27 million in independent spending from 2000–2010, only 22 percent was reported to the state.[36] The Michigan Chamber of Commerce has spent $8.3 million on ads for state Supreme Court races, but all of it has been in the form of electioneering communications, which do not have to be reported.[37] The public is therefore left in the dark, as millions of dollars from special interests influence the Michigan High Court.[38]

Some states regulate electioneering communications but narrow the category so much that it is meaningless. Illinois and Florida,[39] for example, have adopted the definition of electioneering communications that was laid out by the U.S. Supreme Court in FEC v. Wisconsin Right to Life.[40] The High Court limited the definition to include only ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[41] In states that use this definition, electioneering communications are defined as ads that fall short of explicitly endorsing a candidate but cannot be interpreted as anything except "an appeal to vote for or against a specific candidate."

Disclosure rules for donors to independent spenders

Most states that require the reporting of independent spending also require information on those donating money toward such expenditures. Without such information, citizens have to search elsewhere to find the ultimate source of money for independent spending. Most political spenders organized under Section 501(c)(4) of the Internal Revenue Code do not disclose their donors.[42] State laws should require information on the source of funding for independent spending so that citizens know whose money is influencing their elections.

Several states have lower disclosure standards for electioneering communications. West Virginia tightened its disclosure rules after a coal company executive spent $3 million to influence an election to the state Supreme Court, where the company had

a $50 million case pending.[43] The state now requires donor information for independent expenditures greater than $250. The threshold for reporting electioneering communications donations, however, is $1,000.[44] North Carolina has the same high standard for electioneering communications but requires disclosure of those donating more than $100 toward independent expenditures.[45] States should not have lower thresholds for electioneering communications because the public probably sees little difference between the two. Both types of ads mention candidates and are aired in the weeks before an election.

Some states require that information on donors be included in the ads. The state of Washington saw its 2006 judicial elections flooded with $2.6 million in independent spending—more money than the state's judicial candidates had ever spent in a single election.[46] The vast majority of this money came from construction and real estate interest groups.[47] After this explosion in special interest spending, Washington state amended its disclosure rules to require that any independently funded ads list the sponsor and the top five contributors.[48] Alaska, North Carolina, and California also require that such ads include information on the spender's top donors.[49]

The 2009 Wisconsin Supreme Court race saw Wisconsin Manufacturers and Commerce spend millions on ads attacking Justice Louis Butler. Wisconsin Manufacturers and Commerce also published a brochure attacking Butler for voting for plaintiffs who sue corporations. Because the ads did not expressly advocate his defeat, Wisconsin Manufacturers and Commerce did not have to disclose its donors.[1]

Butler lost, giving pro-corporate judges a slim majority. The new court voted 4-3 to reject a widow's lawsuit against a company whose asbestos-laden products may have killed her husband.[2]

In 2005, Koch Industries purchased Georgia Pacific—the target of more than 340,000 asbestos lawsuits from plaintiffs who developed cancer or lung disease.[3] By purchasing Georgia Pacific, Koch assumed these liabilities, and thus, it had an interest in how the law of asbestos liability developed.

A group affiliated with the Koch brothers' Americans for Prosperity spent heavily in the bitter 2011 Wisconsin high court election. The group ran "issue" ads which did not trigger Wisconsin's disclosure rules. [4]

The group's money helped ensure the court remained in the hands of justices who favor corporations over injured plaintiffs. The Kochs may have spent big to influence the court, but plaintiffs suing the corporation may never know.

1 Viveca Novak, "Under the Influence," The American Prospect, September 19, 2011, available at http://prospect.org/article/under-influence.

2 Tatera v. FMC Corp., 786 N.W.2d 810 (2010).

3 John Aloysius Farrell, "Koch's Web of Influence," Center for Public Integrity, April 6, 2011, available at http://www.publicintegrity.org/2011/04/06/3936/kochs-web-influence.

4 Novak, "Under the Influence"; Lisa Graves, "Group Called Citizens for a Strong America Operates out of a UPS Mail Drop but Runs Expensive Ads in Supreme Court Race?", Center for Media and Democracy, April 2, 2011, available at http://www.prwatch.org/news/2011/04/10534/group-called-citizens-strong-america-operates-out-ups-mail-drop-runs-expensive-ad.

Since much of the money is routed through nonprofit organizations that are not required to disclose their donors, some states impose their own rules on federally registered nonprofits engaged in independent spending on state elections. Connecticut law states that when an organization registered under Sections 501(c) or 527 of the Internal Revenue Code makes an independent expenditure, the ad must list the top five contributors.[50] While North Dakota has no rules governing independent expenditures, it does require any 527 organizations that purchase political ads to report those funders contributing more than $200 each.[51]

As with direct contributions to candidates, many states require disclosure of the employer and occupation of those donating to independent spenders.[52] Other states, including Alabama and Utah, do not require this information. Knowledge of donors' occupation is important because it allows voters to know which industries favor or oppose the candidates.

Disclosure rules for corporate independent spending

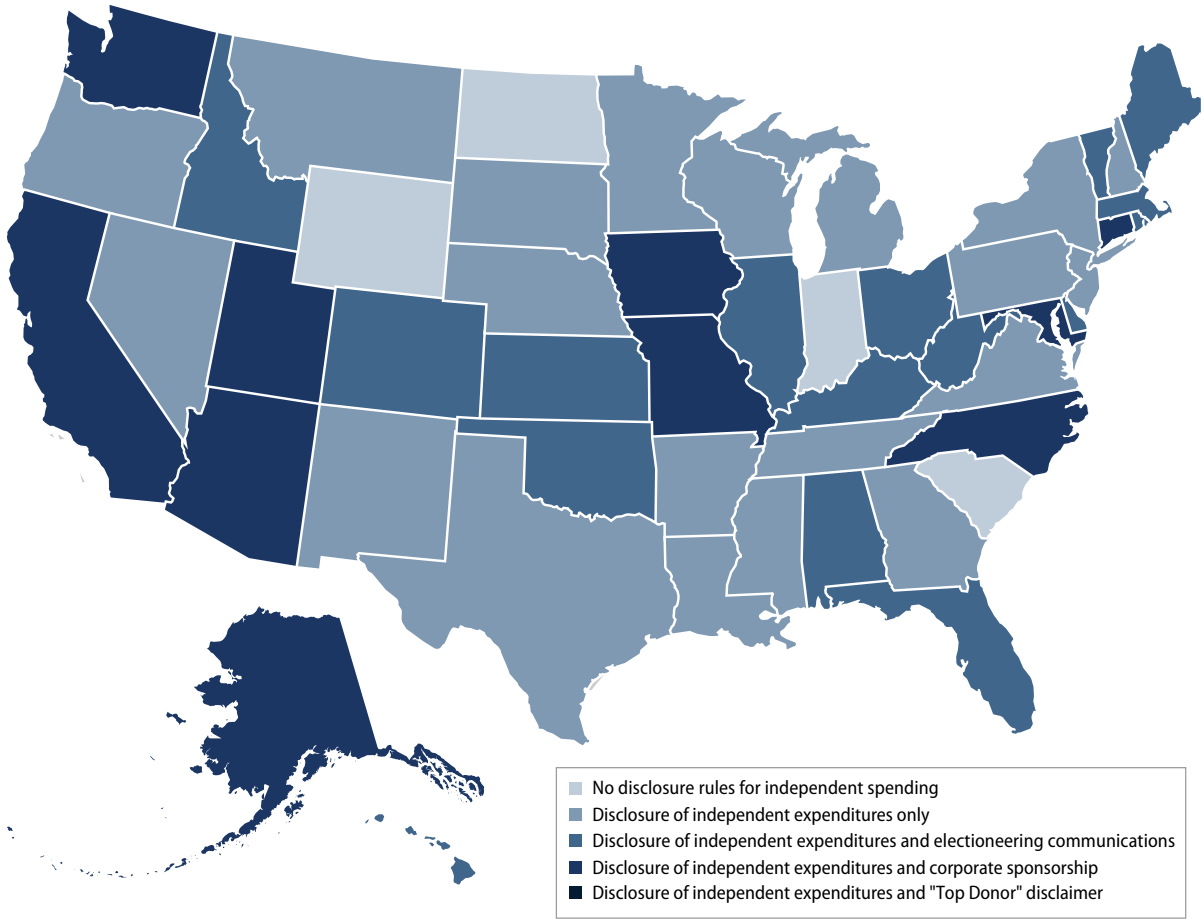
Since the U.S. Supreme Court's 2010 decision in Citizens United, many states have updated their campaign finance laws to impose tougher requirements on corporations. Justice Kennedy's opinion in Citizens United approved of disclosure rules for corporate political spending:

> *[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "in the pocket" of so-called moneyed interests.*[53]

Maryland law says that an independent spender must do one of two things: First, if the entity issues periodic reports to its shareholders, members, or donors, it can include information on its independent spending in such reports; or second, it can post a link on its homepage to the site where its independent spending reports can be accessed.[54] Campaign finance reform advocates have praised the Maryland legislation. The president of the Maryland Chamber of Commerce, however, criticized these rules as "unnecessary and onerous," and he alleged that they were "clearly designed to discourage entities from making independent expenditures."[55]

Campaign finance disclosure laws in the United States

Rules for independent spending



*Data for two of these states, New York and Delaware, are based on new state laws that will be in effect in future elections. N.Y. Comp. Codes R. & Regs. tit. 9, § 6200.10 (proposed Jan. 21, 2012); 15 Del. C. §§ 8001-8046.

Source: Author's analysis of state statutes.

Connecticut requires detailed disclaimer rules for corporate independent expenditures. Any ads that "promote the success or defeat of any candidate" must include the name of the corporation, its chief executive officer, and its address.[56] Many states—including Arizona, Iowa, and Missouri—require corporations to report that their board of directors approved any political spending.[57]

Corporate political spending must be disclosed to the public so that citizens can know to whom these elected judges will be responsive.[58] Judges will likely hear cases involving corporations active in their states, and, without robust disclosure,

a litigant may not know that an opposing corporate party spent huge sums of money to elect the judges hearing the case.

Disclosure rules for last-minute contributions

Any effective disclosure system includes a requirement that independent spenders disclose last-minute expenditures and contributions (i.e., those occurring after the last campaign finance report is filed). With the advent of electronic filing, many states now require reporting—within 24 hours or 48 hours—of contributions and expenditures that occur in the final days before an election. Without prompt last-minute disclosure, citizens will have no idea who is funding independent ads until after the election.

Virginia mandates that all independent expenditures be reported within 24 hours.[59] Utah has a similar rule for electioneering communications.[60] Most states, however, only impose such tight deadlines in the days or weeks preceding an election.

In Pennsylvania, for example, any contribution to or expenditure by an independent spender in the 14 days prior to an election must be disclosed within 24 hours.[61] California requires 24-hour reporting for independent expenditures after October 31 of an election year.[62] South Dakota, Nebraska, and Missouri mandate 48-hour reporting for late independent spending.[63]

States such as Arkansas and Nevada have no rules on reporting late independent spending.[64] In these states, any independent spending in the last week of a campaign will not be reported until after the election. As a consequence, citizens lack information that could prove useful in the voting booth.

Conclusion

States have struggled to keep up with the drastic changes in campaign finance wrought by the U.S. Supreme Court's recent cases, and the standards for disclosure of independent spending have diverged widely. This year's judicial elections could see unprecedented independent spending, as the first "super PACs" have been created for judicial races.[65] This makes the need for robust disclosure rules even more imperative.

Some states have sought to shed light on the opaque arrangements between corporations, political organizations, and nonprofits. North Carolina prohibits establishing more than one 527 group with the intent to evade the state's disclosure rules,[66] but proving the requisite intent might be difficult. Starting in 2013 Delaware will institute a new rule governing donations greater than $100 from corporations or other entities to independent spenders. The independent spenders will have to report anyone who "owns a legal or equitable interest of 50 percent or greater" in the contributing organization.[67]

Because of the unique interests involved in judicial elections, states should consider specific disclosure rules that govern contributions and independent expenditures in these races. Texas limits contributions from law firms to judicial candidates.[68] Further, many states require judges to disclose any campaign donations received by litigants in their courtrooms.[69] States should consider additional disclosure for lawyers and law firms donating to judicial campaigns and for independent spenders running ads supporting or opposing judicial candidates. Disclosure rules could require law firms donating toward independent spending to inform the recipient of all cases pending before the court the candidate hopes to join. The independent spender could then report the information to the state. This would allow litigants to know whether an opposing party has donated money to a judge, allowing them to raise the conflictof interest issue at trial.

Policy options: Campaign finance disclosure in judicial elections

- Require reporting of independent expenditures and any other ads that refer to candidates
- Ensure that campaign finance laws require disclosure of the donors who gave money to independent spenders, as well as the donors' occupation and employer
- Demand that a corporation obtain approval from its board of directors for any political spending and that it report such spending to its shareholders
- Implement rules that require ads funded by corporations and nonprofits to list the top five donors
- Mandate that contributions or expenditures occurring in the final weeks of an election be reported within 24 hours

As in other elections, independent spending on judicial races is beginning to exceed the money spent by the campaigns.[70] This trend shows no signs of abating. Robust disclosure rules for independent spending have never been more important. The policy options we suggest are intended to illustrate what a strong disclosure system might include, but each state must implement its own campaign finance rules, taking into account a number of factors, including the cost of advertising and political characteristics. (see box)

One thing is true throughout all the states: With the federal regulatory agency paralyzed by partisan infighting,[71] it falls to state agencies to take a tough approach to enforcing campaign finance laws.

Endnotes

1 Aviva Shen, "Outside Spending has Already Surpassed Entire 2008 Election Cycle," ThinkProgress, September 7, 2012, available at http://thinkprogress.org/justice/2012/09/07/811411/outside-spending-has-already-surpassed-entire-2008-election-cycle/.

2 Spencer MacColl, "Citizens United Decision Profoundly Affects Political Landscape" (Washington: Center for Responsive Politics, 2011), available at http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html. MacColl found that the percentage of independent spending from anonymous donors rose from 1 percent in 2006 to 47 percent in 2010, and that spending by 501(c) nonprofits increased from 0 percent of total independent spending to 42 percent in the same time period.

3 Billy Corriher, "Big Business Taking Over State Supreme Courts" (Washington: Center for American Progress, 2012), available at http://www.americanprogress.org/issues/civil-liberties/report/2012/08/13/11974/big-business-taking-over-state-supreme-courts.

4 Josh Isreal, "Two-Year Anniversary of SpeechNow.org v. FEC Ruling," ThinkProgress, March 26, 2012, available at http://thinkprogress.org/justice/2012/03/26/451808/two-year-anniversary-of-speechnoworg-v-fec-ruling.

5 For a list of expenditures for television "electioneering" ads, which are not reported under state law, see Michigan Campaign Finance Network, "$70 Million Hidden in Plain View: Michigan's Spectacular Failure of Campaign Finance Disclosure, 2000-2010," available at http://www.mcfn.org/pdfs/reports/MICFN_HiddenInPlainViewP-rev.pdf.

6 Joan Biskupic, "Supreme Court Case with the Feel of a Best Seller," USA Today, February 16, 2009, available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm. Biskupic discusses a poll finding that 89 percent of respondents said they "believe the influence of campaign contributions on judges' rulings is a problem"; Justice at Stake, "Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions" (2010), available at http://www.justiceatstake.org/newsroom/press_releases.cfm/9810_solid_bipartisan_majorities_believe_judges_influenced_by_campaign_contributions?show=news&newsID=8722. This article discusses a poll that found that 70 percent of Democrats and Republicans believed campaign donations have a "significant impact" on judges' rulings.

7 Citizens United v. Federal Election Commission, 130 S. Ct. 876, 968 (2010).

8 American Tradition Partnership, Inc., v. Bullock, 567 U.S. ___ (June 25, 2012).

9 Citizens United v. Federal Election Commission.

10 Citizens United v. Federal Election Commission. "By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."

11 Citizens United v. Federal Election Commission.

12 Ibid; The Eighth Circuit Court of Appeals recently ruled unconstitutional a Minnesota law requiring a corporation or association to file certain reports if it makes independent expenditures. The court said the law applied to a broader range of communications than the rules upheld in Citizens United. In that case, the dissent argued the majority "underestimate[s] the states' interests in disclosure laws and overestimate[s] the burdens those laws impose on speech." The dissent noted that Citizens United held that "the voting public has a right to know where the money is coming from"; see Minnesota Citizens Concerned for Life, Inc., v. Swanson, No. 10-3126 (8th Cir. Sept. 5, 2012).

13 SpeechNow.org v. FEC, 599 F.3d 686, 696-98 (D.C. Cir. 2010); Family PAC v. McKenna, Nos. 10-35832, 10-35893 (9th Cir. Dec. 29, 2011); National Org. for Marriage, Inc. v. Sec'y, No. 11-14193 (11th Cir. May 17, 2012); The Real Truth about Abortion, Inc. v. FEC, 681 F.3d 544 (4th Cir. June 12, 2012); National Org. for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011); Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 34 (1st Cir 2011); Center for Individual Freedom v. Madigan, No. 11-3693 (7th Cir. Sept. 10, 2012).

14 Corriher, "Big Business Taking Over State Supreme Courts."

15 Erwin Chemerinsky and James Sample, "You Get the Judges You Pay For," New York Times, April 17, 2011, available at http://www.nytimes.com/2011/04/18/opinion/18sample.html?_r=2 .

16 U.S. Chamber of Commerce, "McConnell discloses the truth about DISCLOSE Act," available at http://www.uschamber.com/feed/mcconnell-discloses-truth-about-disclose-act.

17 Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175 § 328.

18 Letter from the U.S. Chamber of Commerce Opposing H.R. 5175, May 20, 2010, available at http://www.uschamber.com/issues/letters/2010/letter-opposing-hr-5175-democracy-strengthened-casting-light-spending-elections.

19 Buckley v. Valeo, 424 U.S. 1 (1976); McConnell v. FEC, 540 U.S. 93 (2003).

20 Ibid; Citizens United v. FEC.

21 Ron Faucheux, "U.S. Voters: Congress is Selfish about Campaign Finance," The Atlantic, July 16, 2012, available at http://www.theatlantic.com/politics/archive/2012/07/us-voters-congress-is-selfish-about-campaign-finance/259812/; Justice at Stake, "Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions."

22 Justice Stevens was referring to "Caperton" motions. In Caperton v. Massey Coal, Inc., 129 S. Ct. 2252 (2009), the U.S. Supreme Court found that a litigant's due process rights were violated when an opposing litigant donated $3 million toward independent spending on behalf of a candidate for the West Virginia Supreme Court. The donor spent more money than the candidate's own campaign, and the candidate won a seat on the bench. The justice then cast the deciding vote, striking down a $50 million verdict against the donor's company. The U.S. Supreme Court held that the justice should have recused himself.

23 Federal Election Commission, Coordinated Communications and Independent Expenditures, June 2007 (updated February 2011) http://www.fec.gov/pages/brochures/indexp.shtml.

24 Federal Election Commission, Electioneering Communications (2010), available at http://www.fec.gov/pages/brochures/electioneering.shtml. The U.S. Supreme Court has limited this category to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The Court narrowed the definition so that restrictions on electioneering communications do not violate the free speech rights of corporations, but the case did not deal with disclosure rules; see FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 470 (2007).

25 17 V.S.A. § 2893.

26 Robert M. Stern, "Sunlight State by State After Citizens United" (Corporate Reform Coalition, 2012), available at http://www.citizen.org/documents/sunlight-state-by-state-report.pdf.

27 Bipartisan Campaign Reform Act, Public Law 155, 107th Cong., (March 27, 2002).

28 Viveca Novak, "Under the Influence," The American Prospect, September 19, 2011, available at http://prospect.org/article/under-influence.

29 Letter from Brian DeBano, Michigan Department of State, to Robert S. Labrant, Michigan Chamber of Commerce, April 20, 2004, available at http://www.michigan.gov/documents/2004_126239_7.pdf.

30 For example, one unreported Michigan judicial ad claimed an incumbent judge who was up for reelection had been "voted the worst judge on the State Supreme Court." See Annenberg Public Policy Center, "The Case of the Sleeping Justice" (2008), available at http://www.factcheck.org/2008/11/the-case-of-the-sleeping-justice; Michigan Compiled Laws §§ 169.229 & 169.233(3). These laws outline the requirements for campaigns and political committees to disclose information on campaign contributions and independent expenditures.

31 Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

32 Ibid.

33 Ibid.

34 Certain laws in Michigan require an "independent expenditure" report to include "the name, address, occupation, employer, and principal place of business of each person who contributed $100.01 or more to the expenditure." Michigan does not regulate "electioneering communications," only ads which use words that constitute "express advocacy"; see Michigan Compiled Laws § 169.251; letter from DeBano to Labrant.

35 Michigan Campaign Finance Network, "$70 Million Hidden in Plain View: Michigan's Spectacular Failure of Campaign Finance Disclosure, 2000-2010."

36 Ibid.

37 Ibid; National Institute on Money in State Politics, "Noteworthy Contributor Summary, Michigan Chamber of Commerce," available at http://www.followthemoney.org/database/topcontributor.phtml?u=17295&y=0. This report lists donations totaling $49,805 to Justice Taylor, $46,058 to Justice Markman, $41,073 to Justice Young, $20,125 to Justice Corrigan, $15,080 to Justice Weaver, and $10,000 to Justice Mary Beth Kelly.

38 Michigan Campaign Finance Network, "$70 Million Hidden in Plain View: Michigan's Spectacular Failure of Campaign Finance Disclosure, 2000-2010."

39 Florida's rules on independent spending make little sense. The vast majority of independent ads in Florida are electioneering communications; see Kevin McNellis, "Independent Spending In Florida, 2006-2010" (Helena, Montana: National Institute on Money in State Politics, 2011), available at http://www.followthemoney.org/press/ReportView.phtml?r=466. State law imposes no contribution limits for electioneering communications and permits sponsors of such ads to collaborate with candidates; a statute outlines contribution limits for political committees, which do not include "electioneering communications organizations"; see Fla. Stat. § 106.08(1)(a). Another Florida statute defines "Electioneering Communications" and omits the provision [found in other statutory definitions] that such expenditures cannot be coordinated with candidates or their campaigns. If an independent spender can coordinate with the campaign, the spending is not actually independent; see Fla. Stat. § 106.011(18)(A).

40 10 Ill. Compiled Stat. § 5/9-1.14; Fla. Stat. § 106.011(18)(a).

41 FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 470 (2007). This case did not deal with disclosure rules, which the High Court has consistently upheld. Thus the U.S. Constitution does not require states to limit their disclosure rules to ads that satisfy this limited definition. See Center for Individual Freedom v. Madigan, No. 11-3693, 34-35 (7th Cir. Sept. 10, 2012), which states that, "Citizens United made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context ... . [M]andatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate advocacy."

42 Josh Israel, "Conservative Group Ignores Court Order Requiring it to Disclose Donors Behind TV Ads," ThinkProgress, September 14, 2012, available at http://thinkprogress.org/justice/2012/09/14/850231/conservative-group-ignores-court-order-disclose.

43 Caperton v. Massey Coal, Inc.

44 W. Va. Code § 3-8-2b(b) & (c); W. Va. Code § 3-8-2(b)(1).

45 N.C. Gen. Stat. § 163-278.12(c); N.C. Gen. Stat. § 163-278.12C(a)(5). See also N.C. Gen. Stat. § 163-278.101(b)(5).

46 National Institute on Money in State Politics, "National Overview Map, Washington, 2006" available at http://www.followthemoney.org/database/nationalview.phtml?l=0&f=J&y=2012&abbr=0.

47 Ibid.

48 Rev. Code Wash. (ARCW) §§ 42.17A.320(4) & (5).

49 An Alaska statute requires a disclaimer with the top three donors to independent spending entities; see Alaska Stat. § 15.13.090. North Carolina requires independently funded print ads to include the names of the spender's top five donors from the past six months; see N.C. Gen. Stat. § 163-278.39(a)(7) & (8). If radio or TV ads are funded by a corporation that promotes "social, education, or political ideas," the state requires the corporation to disclose its name and information on where to find its donors; see N.C. Gen. Stat. § 163-278.39A(b)(5) & (7). California requires independently funded ads to name the top two contributors (if the contributions add up to more than $50,000); see Cal. Gov. Code § 84506(a)(2).

50 Conn. Gen. Stat. § 9-621(h).

51 N.D. Cent. Code, § 16.1-08.1-03.12.

52 For example, Pennsylvania requires those engaging in independent expenditures to report the name, employer, and occupation of donors who give more than $250; see 25 P.S. § 3246(g). Nebraska requires that those making independent expenditures report the name, address, occupation, employer, and place of business of donors who gave more than $250 for the expenditure; see R.R.S. Neb. § 49-1467.

53 Citizens United v. FEC.

54 The Maryland law is similar to one version of the federal DISCLOSE Act, but the federal bill would require corporations to both disclose independent spending to their shareholders and post a link to their FEC reports; see Md. Election Law Code Ann. §§ 13-306(j), 13-307(j); Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175 § 328; Reform advocates say spenders will exploit a provision of the Maryland law which, similar to federal regulations, limits disclosure to contributions "made for the purpose of furthering" independent spending; Dan Froomkin, "Maryland To Require Companies To Post Election Spending Online," Huffington Post, April 25, 2011, available at http://www.huffingtonpost.com/2011/04/25/maryland-campaign-finance-reform_n_853431.html.

55 Froomkin, "Maryland To Require Companies To Post Election Spending Online."

56 Conn. Gen. Stat. § 9-621(h)(1).

57 A.R.S. §§ 16-914.02(B) & (E); Iowa Code §§ 68A.404(2)(a) & (5)(g); R.S.Mo. § 130.029(1).

58 In its seminal campaign finance case, the U.S. Supreme Court said disclosure laws "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." Buckley v. Valeo, 424 U.S. 1, 67 (1976).

59 Va. Code Ann. § 24.2-945.2(B).

60 Utah Code Ann. § 20A-11-901(2)(a).

61 25 Penn. Statutes § 3248.

62 Cal. Gov. Code § 84203.5.

63 S.D. Codified Laws § 12-27-16; R.R.S. Neb. § 49-1478.01(1); R.S.Mo. § 130.047.

64 Nev. Rev. Stat. Ann. § 294A.210; A.C.A. § 7-6-220.

65 Josh Israel, "Super-PAC Trying to Buy NC Supreme Court Reelection for Pro-Corporate Conservative Justice," ThinkProgress, June 4, 2012, available at http://thinkprogress.org/justice/2012/06/04/494284/super-pac-trying-to-buy-nc-supreme-court-re-election-for-pro-corporate-conservative-justice.

66 N.C. Gen. Stat. § 163-278.101(c).

67 15 Del. C. § 8031.

68 Tex. Elec. Code § 253.155(d).

69 For example, Tennessee's judicial ethics rules require that a judge recuse himself whenever his "impartiality might reasonably be questioned," including instances when a law firm "has made contributions or given such support to the judge's campaign that the judge's impartiality might reasonably be questioned"; see Tennessee Canon of Judicial Ethics, Canon 2, Rule 2.1. Comment 5 to this rule states that a judge must "disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."

70 Chemerinsky and Sample, "You Get the Judges You Pay For"; MacColl, "Citizens United Decision Profoundly Affects Political Landscape," Center for Responsive Politics.

71 Jonathan Backer, "Dysfunction on Display at FEC Oversight Hearing" (Washington: Brennan Center for Justice, 2011), available at http://www.brennancenter.org/blog/archives/gridlock_and_dysfunction_on_display_at_fec_oversight_hearing.

Partisan Judicial Elections and the Distorting Influence of Campaign Cash

Originally published: October 25, 2012

Summary

Only six states elect their state supreme court justices in partisan races—Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia. All of these states are among the top 10 in total judicial campaign contributions from 2000 to 2010. In fact, all of the top six states are those with partisan elections or partisan processes to nominate their judicial candidates.

Potential campaign donors may find it easier to donate money in partisan races. In these states there is a ready-built infrastructure in place for "bundling" donations, with state parties acting as conduits for special interests. Donors can also be much more certain of a candidate's views prior to donating money in partisan races. Montana Supreme Court Justice James Nelson said that special interests want "their judge" on the bench: "In partisan elections they have a leg up, as they already know the judge's likely political philosophy."

Partisan elections also create a different dynamic on the bench. When justices owe their offices to political parties and their fundraising machines, they must invariably feel a certain pressure to "toe the party line." When campaign costs rise, all judges feel the pressure to please interest groups that fund their re-election campaigns. The experience of the Michigan Supreme Court suggests that a partisan nominating process, more than partisan general elections, may bear the bulk of the blame for divisiveness on the bench. Although its judicial elections are ostensibly nonpartisan, Michigan's political parties choose their candidates at state party conventions. In 50 cases from 1998 to 2004, the era after pro-corporate justices gained a majority on the Michigan Supreme Court, the partisan divide was clear in cases in which an individual was suing a corporation. In 64 percent of those cases, the vote was 5-2 in favor of the corporate defendant.

Introduction

The steep rise in campaign contributions for judicial elections has been well documented. Candidates in state supreme court races raised around $211 million from 2000 to 2009—two and a half times more than in the previous decade.[1] The states that have seen the most campaign cash are those that hold partisan judicial elections. This year, political parties are intervening at an unprecedented level in judicial races in two states – Montana and Florida – that have nonpartisan elections.[2]

This report argues that partisan elections lead to more campaign contributions and increased partisanship among judges. These problems may be the reason why several states have abandoned the idea of partisan judicial elections in recent decades.[3]

While 38 states elect their state supreme courts, only six elect justices in partisan races—Alabama, Illinois, Louisiana, Pennsylvania, Texas, and West Virginia.[4] All of these states are among the top ten in total judicial campaign contributions from 2000 to 2010. In fact, four of the top six states include those with partisan elections. The other states in the top six, Ohio and Michigan, have ostensibly nonpartisan elections but use partisan processes to nominate their judicial candidates. [5]

Inundated with campaign cash, courts with partisan elections have seen their share of scandals in recent years. West Virginia saw the integrity of its high court questioned when it came to light that a coal company executive spent millions in 2004 to elect a justice who subsequently voted to overturn a $50 million verdict against his company.[6] A similar scandal erupted that same year in Illinois, when it was revealed that the insurance and financial services giant State Farm spent millions (the actual amount of the firm's campaign spending is in dispute) to elect a justice who voted to overturn a $1 billion class-action verdict against the insurer.[7] The Louisiana Supreme Court was accused of bowing to pressure from varied corporate interests after it took action against law school legal clinics that were investigating environmental hazards in New Orleans.[8] The Texas Supreme Court has been the subject of multiple media reports looking into the influence of judicial campaign donors, including the poster child for corporate malfeasance, the Enron Corporation.[9]

Many of these state supreme courts—Alabama, Texas, Ohio, and Michigan—are now dominated by conservative judges that favor corporate defendants over individual plaintiffs.[10] Republican justices outnumber[11] Democratic justices nearly two-to-one in the six states with partisan elections.[12]

Some state high court justices have publicly called for nonpartisan races. Chief Justice Wallace Jefferson of the Texas Supreme Court argues his state's partisan system "permits politics to take precedence over merit."[13] Justice Maureen O'Connor of the Ohio Supreme Court says a nonpartisan primary would "keep moneyed special interests, ideologues and partisan politicians out of the courthouse."[14]

Political parties funnel special interest money to judicial candidates

Why are partisan judicial races so much more expensive than nonpartisan contests? One answer could be that potential campaign donors find it easier to donate money in these races. In states with partisan judicial elections, there is a ready-built infrastructure for "bundling" donations in place, with state parties acting as conduits for special interests.[15] In judicial elections, these interest groups usually include trial lawyers (for Democratic candidates) and big business groups (for Republican candidates).[16]

Moreover, in partisan elections, campaign donors can be much more certain of a candidate's views prior to donating money. Partisan primaries tend to force candidates to appeal to the base constituencies of their respective parties, pushing Democrats to the left and Republicans to the right. By the time a candidate is chosen in a partisan primary, special interests can be sure the party's candidate is a "team player."

Not mincing words, Justice James Nelson of the Montana Supreme Court said political parties and special interests want "their judge" on the bench. "In partisan elections they have a leg up, as they already know the judge's likely political philosophy." Nelson also said Republican judges tend to be "pro-business, anti-government, pro-life, etc.," while Democrats are pro-choice and less skeptical of government regulation of markets. "Each party wraps within its brand a number of different issues and ideologies," he said.[17]

Removing restrictions on judicial campaigning

Justice Nelson also noted that federal courts have recently struck down statutory and ethical rules that limited the ability of judicial candidates to expound their views while campaigning. In *Republican Party of Minnesota v. White*, the U.S. Supreme Court struck down a Minnesota judicial ethics standard which forbade

candidates from commenting on issues that might come before them as judges. The Court said the rule "burdene[ed] a category of speech that is at the core of First Amendment freedoms—speech about the qualifications of candidates for public office."[18] The Court decreed that Minnesota cannot hold judicial elections while "preventing candidates from discussing what the elections are about."[19]

Federal appeals courts have expanded this holding to strike down a variety of restrictions on judicial politicking.[20] The U.S. Ninth Circuit Court of Appeals recently struck down a Montana law that prohibited political parties from endorsing judicial candidates and spending money to support or oppose them. The court said the Montana law was not justified by the state's interest in a "fair and independent judiciary."[21]

The dissenting judge in the case argued that the majority's decision "threatens to further erode state judges' ability to act independently and impartially." She called the court's ruling "another step in the unfortunate slide toward erasing the fundamental distinctions" between elections for the judiciary and the political branches of government.[22] One pundit commenting on the decision predicted that "America is going to get more of what it seems to want—state judiciaries that are as beholden to special interests, and as corrupted by money and lobbying, as the other two branches of government."[23]

Increased partisanship on the bench

In addition to increasing campaign donations, partisan elections also create a different dynamic on the bench. When justices owe their offices to political parties and their fundraising machines, they must invariably feel a certain pressure to "toe the party line." As a consequence, the judges form liberal and conservative factions, which often lead to very clear ideological divides on these courts.

Admittedly, this phenomenon is also evident to some degree in states with nonpartisan elections. Wisconsin's judicial races are nonpartisan, but as special interest money has flooded these elections, the Wisconsin Supreme Court has been beset by what Justice Ann Walsh Bradley termed "hyperpartisanship."[24] When campaign costs rise, all judges feel the pressure to please interest groups that spend big on judicial races.

Because states with partisan elections see more campaign cash than other states, this "hyperpartisanship" is even more evident. Further, the experience of the Supreme

Court of Michigan suggests that a partisan nominating process, more so than partisan general elections, may bear the bulk of the blame for divisiveness on the bench. Although its judicial elections are ostensibly nonpartisan, Michigan's nominating process is in fact even more partisan than partisan primaries. Michigan's Republican and Democratic parties choose their judicial candidates at state party conventions[25] where the political elites of each party select candidates in accord with the party's views.[26] A recent University of Chicago study examined "whether judges are influenced by partisan considerations" and ranked the Michigan Supreme Court as the most influenced.[27] Justice Marilyn Kelly said the partisan nominating process "infects the process with a partisan component that is hard to deny."[28]

Michigan's absurdly partisan nominating process, along with a surge in campaign spending, has resulted in a court with a very clear ideological divide. Campaign contributions in Michigan Supreme Court elections peaked in 2000, around the same time that conservative judges obtained a clear majority on the court.[29] The 2000 election saw candidates and independent entities spend a total of $16 million. The Michigan Campaign Finance Network estimates that the state political parties and other organizations spent nearly $27 million on independent political ads from 2000 to 2010, but only 22 percent of this spending was reported under state law.[30]

TABLE 1
Spending on Michigan judicial elections

Year	Total spending
1992	$1,091,925
1994	$1,403,783
1996	$3,547,338
1998	$3,809,581
2000	$15,912,140
2002	$2,011,750
2004	$3,615,978
2006	$1,937,066
2008	$7,506,607
2010	$11,132,214

Source: http://www.mcfn.org/pdfs/reports/MICFN_HiddenInPlainViewP-rev.pdf

An August 2012 report from the Center for American Progress included a compilation of rulings from the state supreme courts with the most campaign cash. The compilation consists of all cases from 1992 to 2010 in which an individual plaintiff sued a corporation.[31] The appendix to this report is comprised of the compilation's data for the Michigan Supreme Court. The appendix includes 50 cases from 1998 to 2004, the era after Republicans and pro-corporate justices gained a majority on the Michigan High Court. In 64 percent of those cases, the court was divided 5-2, with five justices voting in favor of the corporate defendant and two justices dissenting.[32]

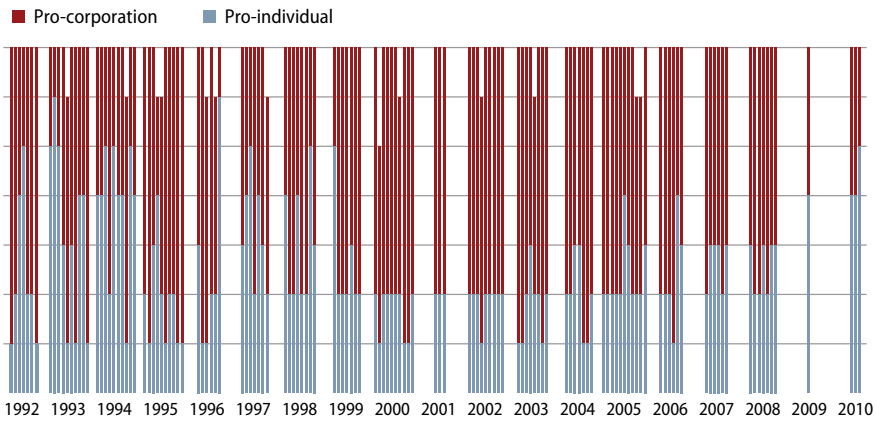
The chart above illustrates the court's divide in each of the 135 Michigan Supreme Court cases in the appendix. Before 1999 the court's decisions were less predictable, with a mix of results that favor individual plaintiffs and those that favor corporations. After the big money elections of 1998 and 2000, however, the 5-2 split is clear.

Party identification as relevant voter information

Conservative scholars point out that identifying judges by party gives voters at least some basis on which to make an informed decision.[33] Some might argue that partisan elections leave less room for ads funded by "independent" interest groups to define the candidates.

FIGURE 1

Ideological split of Michigan Supreme Court in selected cases, 1992-2010



Source: http://www.americanprogress.org/issues/civil-liberties/report/2012/08/13/11974/big-business-taking-over-state-supreme-courts

This argument might bear more weight if citizens had a clearer idea of what judges do on a daily basis. If voters understood how a Republican judge differs from a Democratic one in the run-of-the-mill cases that occupy most of the courts' time, then partisan identification might prove more useful. Simply labeling a judge as a Republican or Democrat probably tells most voters little about how the judges will decide cases.

When voters think of judges' political affiliation, they often think of cases involving controversial social issues, such as abortion or gay marriage, that garner a lot of media attention but constitute merely a fraction of a court's rulings.[34] But in the states that have seen the most judicial campaign cash, the campaign donors are not concerned with social issues. Instead, liberal judges are supported by trial lawyers who want to see judges protecting individuals' right to sue wrongdoers; conservative judges are strongly backed by corporate interest groups that want judges who will uphold "tort reform" laws that limit lawsuits.[35] These interest groups often fail to mention these goals in the "independent" political ads they air, instead focusing on criminal justices issues that frighten viewers.[36] This further muddies the water for voters seeking information to help them make their decisions in judicial races.

There are ways that states can provide voters with relevant information without relying on political parties. Ten years ago, as the surging tide of judicial campaign cash was swelling, North Carolina decided to end partisan judicial elections.[37] At

the same time, the state implemented a public financing program, and it began distributing voter guides on judicial candidates.[38] Although its public financing program will face a test this year from a super PAC,[39] North Carolina has shown that judicial elections can be held in a manner that minimizes the influence of partisan special interests.

Conclusion

Reasonable minds can differ over whether to elect judges, but it is clear that electing judges in partisan elections leads to a myriad of problems. The U.S. Supreme Court has loosened restrictions on judicial campaigning and struck down campaign finance rules, all in the name of the First Amendment. These developments have amplified the problems presented by partisan judicial races. In these elections, it is easier for special interests to spend money influencing the courts. Political parties serve as "bundling" agents, and they have contacts with donors that judicial candidates can exploit.

Special interests in states with nonpartisan elections may face greater difficulty in swaying voters with independent political ads. Two states—Georgia and Washington—that had never experienced high-profile judicial races saw their 2006 elections overwhelmed with money from corporate special interests. In the 2006 election for the Georgia Supreme Court, corporate-funded groups and the state Republican Party spent more than $2 million attacking incumbent Justice Carol Hunstein, who was appointed by a Democratic governor.[40] Although she was attacked as a "liberal incumbent activist judge," she held onto her seat in a state that strongly leans conservative. In Washington an incumbent judge was attacked with more than $1 million worth of ads from corporate special interests and the real estate industry.[41] But again the incumbent judge won, despite being outspent. Though special interests have had more success in other states,[42] these two examples suggest that special interests might find it harder to influence nonpartisan judicial elections, at least in states where voters are accustomed to low-key, inexpensive judicial races.

Partisan primaries lead to judicial candidates who are clearly on the side of one interest group or another, and once on the bench, judges in states with expensive judicial races are dependent on special interests for their reelection. This leads to more partisanship on the bench—a court with clear conservative and liberal factions. If judges were deciding cases based on the law, one would expect that some

cases would favor the plaintiff and some the defendant. That is not the case, however, in states with partisan nominating processes. The data from the Michigan Supreme Court clearly suggests that a partisan nominating process results in more campaign cash and a court where the justices' votes break along party lines.

Additionally, partisan elections may affect the quality of jurists. A recent study examined the success rates of judicial candidates rated highly by state bar associations and found that in a partisan election, a high rating by a bar association had no impact on a candidate's chances of winning.[43] Instead, voters tend to vote for the judicial candidates from the party with which they are affiliated. "By contrast, the quality of judicial candidates has a substantial effect on their vote share and probability of winning in nonpartisan elections."[44] Another study from two conservative scholars looked at the relationship between campaign contributions and rulings in three state supreme courts. It concluded, "Campaign contributions appear to affect the outcome of cases in states where judges are elected in a partisan contest (Michigan and Texas) but not where they are elected on a nonpartisan ballot (Nevada)."[45]

The New York Times editorial board agrees that partisan nominating processes can lead to lower-quality judges:

> *Requiring would-be judges to cozy up to party leaders and raise large sums from special interests eager to influence their decisions seriously damages the efficacy and credibility of the judiciary. It discourages many highly qualified lawyers from aspiring to the bench. Bitter campaigns — replete with nasty attack ads — make it much harder for judges to work together on the bench and much harder for citizens to trust the impartiality of the system.*[46]

Partisan politics have no place in judicial races. More than other politicians, judges are expected to be true to the law, not to political parties or campaign contributors.

Appendix

The rulings in this data set include Michigan Supreme Court cases from 1992 to 2010 in which an individual is the plaintiff, and the named defendant is a corporation, private employer, institutional health care provider, or other business. Out of the 134 cases in the data set, 105 resulted in a ruling for the corporate

defendant. The appendix includes 50 cases from 1998 to 2004, the era after Republicans and pro-corporate justices gained a majority on the Michigan High Court. In 64 percent of those cases, the court was divided 5-2, with five justices voting in favor of the corporate defendant and two justices dissenting. The full appendix can be found in the original publication. The methodology can be found on pages 34 and 35 of this report.

Endnotes

1 High court candidates from 2000-2009 spent $210,859,178, which amounts to 2.6 times more than the $82,460,441 spent from 1990-1999. See National Institute on Money in State Politics, "National Overview Map, High Court Candidates," http://www.followthemoney.org/database/nationalview.phtml?l=0&f=J&y=2012&abbr=0.

2 In this year's retention election, the Florida Republican Party has joined independent groups in opposition to three Florida Supreme Court justices. See: Jane Musgrave, "Republican Powerhouses Urge GOP to leave Supreme Court Justices Alone," *Palm Beach Post*, October 8, 2012, available at http://www.postonpolitics.com/2012/10/republican-powerhouses-urge-gop-to-leave-supreme-court-justices-alone/. The Sanders County Republican Central Committee successfully sued to invalidate Montana's ban on political parties endorsing and spending money for high court candidates. See: *Sanders County Republican Committee v. Bullock*, No. 12-35543 (9th Cir. Sept. 17, 2012).

3 Arkansas implemented nonpartisan judicial elections in 2001, North Carolina in 2004. Georgia ended partisan judicial elections in 1983, and Tennessee ended them in 1994. Brandice Canes-Wrone, Tom S. Clark, "Judicial Independence and Nonpartisan Elections," (August 2008): 35-36, available at http://userwww.service.emory.edu/~tclark7/nonpartisanlawreview.pdf.

4 American Judicature Society, "Methods of Judicial Selection," available at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm. Each justice on the New Mexico Supreme Court runs in a partisan election after being nominated by the Governor from a list compiled by a nominating commission. Once on the court, the justices run in nonpartisan, uncontested retention elections.

5 The states with the most expensive judicial races, 2000-2010, are Alabama ($44.4 million); Ohio ($24.3 million); Texas ($22.6 million); Illinois ($23.7 million); and Pennsylvania ($22.1 million). The next highest state was Michigan with $15.3 million, which, like Ohio, uses a partisan process to nominate judicial candidates. *See National Institute on Money in State Politics, "National Overview Map, High Court Candidates."*

6 *Caperton v. Massey Coal, Inc., 129 S. Ct. 2252 (2009).*

7 *Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill.2d 100 (2005); Ann Maher, "Supreme Court won't reopen Avery v. State Farm," The Madison Record, November 17, 2011, available at* http://www.madisonrecord.com/news/239796-supreme-court-wont-reopen-iavery-v.-state-farmi. Maher notes that the plaintiffs' attorneys alleged State Farm donated $2 million to the Illinois Civil Justice League and the U.S. Chamber of Commerce, both of which ran ads for Justice Karmeier. She also notes that a former FBI agent swore that the judge knew that State Farm "used the Civil Justice League to elect him."

8 CBS News, "Justice for Sale?" Feb. 11, 2009, available at http://www.cbsnews.com/2100-500164_162-175831.html.

9 Nate Blakeslee, "How Enron Did Texas," *The Nation*, March 4, 2002, available at http://www.thenation.com/article/how-enron-did-texas?page=0,2; Jim Yardley, "Bankrupt: Texaco, and Texas Justice," *The New York Times*, April 14, 1987, available at http://www.nytimes.com/1987/04/14/opinion/bankrupt-texaco-and-texas-justice.html?scp=2&sq=colonels%20in%20mirrored%20sunglasses&st=cse.

10 Billy Corriher, "Big Business Taking Over State Supreme Courts" (Washington: Center for American Progress, 2012), available at http://www.americanprogress.org/issues/civil-liberties/report/2012/08/13/11974/big-business-taking-over-state-supreme-courts.

11 This disparity may be amplified by the fact that the Alabama and Texas high courts each have nine members, more than the other courts, and both of these states have leaned heavily toward Republicans in recent elections. These two high courts also have six-year terms, shorter than the other courts. This may have allowed the trend towards conservative, pro-corporate high courts to emerge more quickly in these states.

12 There are 28 Republicans and 15 Democrats on the six high courts with partisan elections. The Alabama and Texas high courts each have nine Republicans and zero Democrats. The West Virginia Supreme Court of Appeals has four Democrats and one Republican. The Pennsylvania high court is evenly split, with three Justices from each party. The Louisiana and Illinois Supreme Courts each include four Democrats and three Republicans. *See National Institute on Money in State Politics, "National Overview Map, High Court Candidates, 2010."*

13 Morgan Smith, "Chief Justice Delivers State of the Judiciary," *The Texas Tribune, Feb. 23, 2011, available at* http://www.texastribune.org/texas-courts/texas-judicial-system/chief-justice-delivers-state-of-the-judiciary/.

14 James Nash, "O'Connor wants to end partisan primaries in Supreme Court races," *The Columbus Dispatch, September 13, 2010, available at* http://www.dispatch.com/content/stories/local/2010/09/14/oconnor-wants-to-end-partisan-primaries-in-supreme-court-races.html. Some in Ohio disagreed. *See Thomas Suddes, "A century later, Ohio judicial elections remain half-reformed," The Cleveland Plain-Dealer, January 15, 2011, available at* http://www.cleveland.com/opinion/index.ssf/2011/01/a_century_later_ohio_judicial.html.

15 See Michael S. Kang & Joanna M. Shepherd, "The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisionmaking," 86 N.Y.U. L. Rev. 69, 107 (2011) (noting that political parties are "natural bundling agents that coordinate sprawling political coalitions").

16 See Ross Ramsay, "What Comes with Tort Reform?" The Texas Tribune, August 29, 2011, available at http://www.texastribune.org/texas-special-interest-groups/texans-for-lawsuit-reform/collateral-politics-what-comes-tort-reform/; Stephanie Mencimer, Blocking the Courthouse Door, Chapters 2-4, Free Press, 2006.

17 Email from Justice James Nelson, Supreme Court of Montana, Sept. 19, 2012 (on file with author). Nelson emphasized that his views were his own, not those of the Montana Supreme Court.

18 *Republican Party v. White, 536 U.S. 765, 774 (2002).*

19 *Republican Party v. White, 536 U.S. 765, 788 (2002).*

20 *See Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002); Buckley v. Ill. Judicial Inquiry Bd., 997 F.2d 224 (7th Cir. 1993).*

21 *Sanders County Republican Central Committee v. Bullock*, No. 12-35543, p.9 (9th Cir. Sept. 17, 2012) (Rakoff, J. sitting by designation).

22 *Sanders County Republican Central Committee v. Bullock*, No. 12-35543, p.4-5 (9th Cir. Sept. 17, 2012) (Schroeder, J. dissenting).

23 Andrew Cohen, "A New Gold Rush: Montana's Judicial Elections Are About to Get Political," *The Atlantic*, Sept. 21, 2012, available at http://www.theatlantic.com/national/archive/2012/09/a-new-gold-rush-montanas-judicial-elections-are-about-to-get-political/262613.

24 Justice Ann Walsh Bradley, interview with author, June 16, 2012.

25 Michigan Compiled Laws § 168.392 ("At its fall state convention, each political party may nominate the number of candidates for the office of justice of the supreme court as are to be elected at the next ensuing general election.")

26 Michigan Judicial Selection Task Force, "Report and Recommendations" (April 2012): 5 ("The close link between candidates for the supreme court and the political parties that Michigan's current process signals may suggest to the voters that justices decide cases merely to carry out the political platforms of their respective parties.").

27 Stephen Choi, Mitu Gulati, and Eric Posner, "Which States Have the Best (and Worst) High Courts?" Duke Law School Faculty Scholarship Series, Paper 168, May 1, 2008, available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2803&context=faculty_scholarship.

28 Justice Marilyn Kelly, remarks at American Constitution Society Annual Convention, June 16, 2012.

29 National Institute on Money in State Politics, "National Overview Map, Michigan."

30 Michigan Campaign Finance Network, "$70 Million Hidden in Plain View: Michigan's Spectacular Failure of Campaign Finance Disclosure, 2000-2010," "Appendix A: Summaries of Michigan Supreme Court Campaigns, 1984-2010," June 2011, available at http://www.mcfn.org/pdfs/reports/MICFN_HiddenInPlainViewP-rev.pdf. (listing expenditures for television "electioneering" ads, which are not reported under state law). The data includes $26,653,657 in independent spending, and $20,840,500 of that spending went toward electioneering communications, which are not disclosed under state law.

31 Billy Corriher, "Big Business Taking over State Supreme Courts." The appendix consists of high-court rulings for the six states that have seen the most judicial campaign contributions in from 1992-2011. The rulings include cases in which an individual is the plaintiff, and the named defendant is a corporation, private employer, institutional health care provider, or other business. The rulings include cases with a dissenting opinion, as those cases illustrate a court's ideological divide. The appendix excludes cases in which a judge from another court is sitting, cases decided without an opinion, and rulings involving procedural issues or legal ethics. The appendix excludes cases on remand from the U.S. Supreme Court and cases reheard in light of case law handed down while the appeal was pending.

32 *See Appendix*. The appendix includes 50 cases from 1998-2004, and in 32 of those cases, the court voted 5-2 for the corporate defendant. These figures only include cases in which the entire seven-member court voted.

33 *See Michael DeBow and others, "The Case for Partisan Judicial Elections," The Federalist Society for Law and Public Policy Studies, January 1, 2003, available at* http://www.fed-soc.org/publications/detail/the-case-for-partisan-judicial-elections; Andrew Henson, "Should Voters Pick Justices Blindly?" John W. Pope Civitas Institute, June 15, 2011, available at http://www.nccivitas.org/2011/should-voters-pick-justices-blindly/.

34 *See Grant Schulte, "Iowans dismiss three justices, Des Moines Register, November 3, 2010,* available at http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices. ("Three Iowa Supreme Court justices lost their seats Tuesday in a historic upset fueled by their 2009 decision that allowed same-sex couples to marry"); Americans United for Life, "Preparing for the Day After *Roe," available at* http://www.aul.org/courts/state-supreme-courts/ (last accessed October 11, 2012). ("Many state supreme courts are hotbeds of judicial activism. Already, sixteen activist state supreme courts have invented a right to abortion in their state's constitution.")

35 See Stephanie Mencimer, *Blocking the Courthouse Door*, Chapters 2-4 (Free Press, 2006).

36 Adam Skaggs, Maria da Silva, Linda Casey, and Charles Hall, "The New Politics of Judicial Elections 2000-2009" pp. 25-36, Brennan Center for Justice, Justice at Stake, National Institute on Money in State Politics, available at http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf.

37 North Carolina Bar Association, "Judicial Selection in North Carolina," available at http://www.ncbar.org/about/communications/judicial-selection.aspx (last accessed October 11, 2012).

38 North Carolina State Board of Elections, "2010 General Election Judicial Candidate Voter Guide," available at www.ncsbe.gov/GetDocument.aspx?id=2408 (last accessed October 11, 2012).

39 Craig Jarvis, "New super PAC gets involved in Supreme Court race to back Newby," *News & Observer*, June 2, 2012, available at http://www.newsobserver.com/2012/06/02/2105910/new-super-pac-formed-to-help-re.html.

40 James Sample, Lauren Jones, and Rachel Weiss, "The New Politics of Judicial Elections 2006," Justice at Stake, Brennan Center for Justice, National Institute on Money in State Politics, pp. 22-23, available at http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf.

41 National Institute on Money in State Politics, "Independent Expenditures by Target," available at http://www.followthemoney.org/database/StateGlance/ierace.phtml?osID=10087&y=2006&s=WA(last accessed October 11, 2012).

42 However, recent judicial elections in Wisconsin have proved that special interests can play a crucial role in nonpartisan elections. In the 2011 election, the state's public financing system was overwhelmed by "independent" ads from special interest groups. See Billy Corriher, "Big Business Taking over State Supreme Courts," pp. 20-23, available at http://www.americanprogress.org/issues/civil-liberties/report/2012/08/13/11974/big-business-taking-over-state-supreme-courts.

43 Claire S. H. Lim, James M. Snyder, Jr., "Elections and Government Accountability: Evidence from the U.S. State Courts, "Feb. 22, 2012, available at http://www.yale.edu/leitner/resources/papers/Election_paper_Jim_CL.pdf. This study focused on trial court judges, not state Supreme Court justices.

44 Claire S. H. Lim, James M. Snyder, Jr., "Elections and Government Accountability: Evidence from the U.S. State Courts," p. 3.

45 Chris Bonneau and Damon Cann, "The Effect of Campaign Contributions on Judicial Decisionmaking," Working Paper, (2009)" (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337668.In contrast to the findings of these scholars, a 2006 story in The Los Angeles Times described conflicts of interests related to campaign donations to Nevada Supreme Court justices. Michael Goodman and William Rempel, "In Las Vegas, They're Playing with a Stacked Judicial Deck," The Los Angeles Times, June 8, 2006, available at http://www.latimes.com/la-na-justice080606,0,4781277.story.

46 Editorial, "No Way to Choose a Judge," *The New York Times, March 15, 2012,* available at http://www.nytimes.com/2012/03/16/opinion/no-way-to-choose-a-judge.html.

Merit Selection and Retention Elections Keep Judges Out of Politics

Originally published: November 1, 2012

Summary

To curb the influence of special interests on judges, many reform advocates have called for more states to choose judges through merit selection systems, which are used in some form by two-thirds of the states to select judges. Merit selection starts with a nominating commission that composes a list of potential judges. The governor then chooses a nominee from this list. These commissions can be structured to ensure transparency and prevent inappropriate partisanship. Most merit selection systems require appointed judges to face voters in unopposed retention elections, in which voters decide whether to keep them on the bench.

These systems offer a far better alternative to contested elections because they foster judicial independence. Judges must be independent from political pressure so that they can vindicate constitutional rights without fear of political backlash. Merit selection frees a potential judge from political influence by focusing on his or her qualifications, not on his or her ability to make deals with legislators or rake in campaign contributions. Retention elections subject judges to much less political pressure than contested elections. Voters are not asked to replace a candidate with a specific alternative, and special interests cannot recruit a candidate they believe will serve their agenda.

Judges often suffer the strongest political backlash when they settle a conflict between a constitutional rule and a statute or referendum. These rulings often involve protecting the constitutional rights of same-sex couples, women, religious minorities, or unpopular groups such as criminals. As defenders of constitutional principles, high court justices must be free to make unpopular decisions that protect these rights. For the judiciary, unlike for the political branches of government, independence is more important than accountability. The judiciary is the only institution that can remedy violations of the Constitution by the other branches of government.

Introduction

As the amount of money donated to judicial campaigns has exploded in recent elections, the influence of campaign cash on the judiciary has become a more urgent problem. Candidates in state supreme court races from 2000 to 2009 raised around $211 million—two and a half times more than in the previous decade.[1] Conflicts of interest have arisen as special interests and parties before high courts have spent money to influence elections to those courts.[2] The insurance giant State Farm, for example, was facing a $1 billion verdict in a case pending before the Illinois Supreme Court in 2004. The plaintiffs in that case allege that State Farm asked a lower court judge to run for a seat on the high court, organized his campaign, and spent millions to elect him. After the justice took his seat on the bench, he voted to overturn the $1 billion verdict.[3]

To curb the influence of special interests in the selection of judges, many reform advocates have called for more states to choose judges through merit-selection systems, used in some form by two-thirds of the states to select judges.[4] In those systems a nominating commission composes a list of potential judicial candidates from which the governor chooses a nominee. The state senate must confirm the choice in some states. The commissions use a wide range of criteria to make their recommendations.[5] Connecticut law, for example, requires the nominating commissions to consider "the legal ability, competence, integrity, character and temperament of such judge and any other relevant information."[6]

Most merit-selection systems require appointed judges to subsequently face voters in unopposed retention elections in which voters are asked whether the judge should remain on the bench. Historically, retention elections saw very little campaigning and hardly any campaign contributions.[7] Conservative interests groups—usually angered by one or two high-profile cases—are now mounting unprecedented campaigns opposing retention elections in Iowa, Florida, and possibly in Indiana and Arizona.[8] As a consequence, retention elections could join the trend of expensive and politicized judicial elections.

This brief argues that, despite this risk, merit selection and retention elections offer a far better alternative to contested elections. Judges must be independent from political pressure so they can vindicate constitutional rights without fear of political backlash. The judiciary is the only institution that can remedy violations of the constitution by the other branches of government. At the first step of the process, merit selection frees a potential judge from political influence by focusing

on his or her qualifications, not on the ability to make deals with legislators or rake in campaign contributions. Retention elections, the second step of the process, subject judges to much less political pressure than contested elections and offer greater judicial independence. Although some recent retention elections have become politicized, these systems can provide the public with unbiased, neutral information on a judge's qualifications and record. This allows voters to focus on merit and not on one or two politicized, high-profile cases.

The very name—merit selection—implies that the system produces higher-quality judges, but, admittedly, measuring a judge's "merit" is a difficult task. Merit-selection commissions have a wide range of information to evaluate potential judges, but voters in contested elections usually lack meaningful information on judicial candidates, except for what they glean from sound bites and advertisements.

The very name—merit selection—implies that the system produces higher-quality judges, but, admittedly, measuring a judge's "merit" is a difficult task.

Critics argue merit-selection commissions are undemocratic and often do not share the values of a state's population. Opponents are particularly critical of systems in which state bar associations appoint some members of the commissions. Some conservatives argue this practice leads to judges who are too liberal.

To address these perceived deficiencies, conservative legislators have sought to impose greater control over judges and the merit-selection nominating process. Missouri lawmakers have placed a referendum on the 2012 ballot that would give the governor more appointees on the nominating commission, and conservative legislators in Florida are giving voters the chance to require senate confirmation of a judicial nominee.[9] Some politicians have gone much further to "rein in" judges. New Hampshire legislators, for example, introduced a bill that would essentially end judges' power to rule laws unconstitutional.[10] Supporters of merit selection warn that conservative efforts to chip away at the process will culminate in a push for contested elections.[11]

At the same time, recent efforts to institute merit-selection systems have stalled. Voters in a 2010 Nevada election rejected a referendum to use merit selection, even after a *Los Angeles Times* story exposed judges being swayed by campaign contributions in a "style of wide-open, frontier justice that veers out of control across ethical, if not legal, boundaries."[12] Likewise, a merit-selection bill recently stalled in the Pennsylvania legislature.[13] Yet a poll from merit-selection advocates found that voters in Pennsylvania have little information on which to base their votes for judges, and once respondents were given information on the merit-selection system, a sizable majority liked the idea.[14]

Some critics of judges chosen through merit selection argue the judges are "activist"—usually a code word for liberal. The term suggests that judges are making policy and doing so in line with their own liberal views. At times, of course, courts do have to make policy decisions because the law is ambiguous, but that is clearly not their primary role. Judges are rarely making up law from whole cloth because their successors or other courts would call them on it. Some state courts do build on judge-made common law. Many states, however, have codified entire areas of common law, and even if they have not, legislatures can always override judge-made common law.

Judges often suffer the strongest political backlash when they settle a conflict between a constitutional rule and a statute or referendum. As defenders of constitutional principles, high court justices must be free to make unpopular decisions that protect the rights of individuals.

Constitutions are composed of timeless principles that govern the relationship between branches of government and between a government and its citizens. These principles are approved by super majorities (such as two-thirds or three-quarters) of an electorate or its representatives.[15] Because super majorities approve constitutional principles, these laws trump ordinary statutes or referenda that are approved by a simple majority of representatives or voters. That's why, unlike the political branches of government, independence is more critical than accountability for the judiciary.

Some judges, even in states with retention elections, have faced a political backlash for rulings that protected the constitutional rights of same-sex couples, women, religious minorities, or unpopular groups such as criminals.[16] In state supreme courts, this often means ruling on the constitutionality of statutes or citizen-sponsored referenda on hot-button social issues such as same-sex marriage.[17] The targets of many of these statutes and referenda are often politically powerless, so the judicial branch is the only place where they can turn for protection of their rights.

An independent judiciary is crucial to the idea of checks and balances

More than any other institution, judges have to keep the government true to its constitution. The framers of the U.S. Constitution and state constitutions established governments with checks and balances. The executive, legislative, and judicial

branches have distinct roles. In general, the legislatures make the laws; the executive branches enforce them; and courts interpret the laws, including constitutions. A judiciary free from political constraints is crucial to this system of separation of powers. Without this independence, judges are just politicians in black robes.

In the *Federalist Papers*, Alexander Hamilton affirmed the judiciary's power to rule statutes unconstitutional and described the judiciary as the only institution that can ensure the legislature does not violate the Constitution.[18] Hamilton said that unless courts can rule statutes unconstitutional, "all the reservations of particular rights or privileges would amount to nothing."[19]

Judges interpret constitutions and define the boundaries of individual rights and rules that prohibit the government from taking certain actions. This sometimes requires courts to strike down statutes that violate constitutional rights, even though the laws may be popular with voters. As Hamilton explained:

> *[I]t is not to be inferred ... that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions.*[20]

In other words, just because a statute is popular does not mean it is constitutional. Courts must be free from political pressure in order to protect constitutional rights.

The justices of the Iowa Supreme Court struck down a statute limiting marriage to heterosexual couples in a 2009 case. The court unanimously ruled that denying same-sex couples the right to marry violates the Iowa and U.S. constitutions.[21] In its opinion, the court noted that, "The idea that courts, free from the political influences in the other two branches of government, are better suited to protect individual rights was recognized at the time our Iowa Constitution was formed."[22]

Though the Iowan justices had never before been compelled to raise campaign funds, the ruling spurred Christian conservative groups that are opposed to the decision to mount a campaign to unseat the justices in the 2010 retention election—solely because of the ruling on same-sex marriage. Conservative political groups from outside Iowa spent nearly $1 million attacking the justices.[23]

All three justices lost their seats in 2010, but polling suggests a fourth justice may fare better this year.[24] One Iowan who attended a recent rally against the justice

Iowa's experience shows that retention elections can become politicized. But uncontested elections are less susceptible to political pressure than contested elections.

said, "I don't think judges should have the right to decide for us on the marriage issue or other constitutional issues."[25] When voters argue judges should not have the power to decide constitutional issues, there is a drastic misunderstanding of the role of the judicial branch.

Iowa's experience shows that retention elections can become politicized. But uncontested elections are less susceptible to political pressure than contested elections. In a two-person race, a challenger will likely characterize an incumbent judge's rulings in a certain way and detail how his or her own rulings would be different and, presumably, better. A judge in a retention election, however, only needs to defend his or her record and qualifications. Voters in a merit-selection system never actually get to choose a judge; they just decide whether to throw him or her out of office. Merit-selection systems can be structured to provide voters with useful information or evaluations based on neutral criteria, and such systems make judges even less susceptible to political pressure.[26]

If the judiciary becomes another political branch responsive to political pressure, then there would be no branch of government that could check the power of legislatures or executives when they infringe on the constitutional rights of individuals. Retired U.S. Supreme Court Justice John Paul Stevens warned that, "Disciplining judges for making an unpopular decision can only undermine their duty to apply the law impartially."[27] Judges who face contested elections may feel more pressure to avoid striking down laws that are popular with voters and therefore cannot protect the constitutional rights of individuals. These rights are meaningless if they cannot be vindicated.

Judges as politicians

Judges should not be forced to act like politicians to keep their jobs. Legislators have to raise funds for their re-election campaigns, and citizens are not surprised when legislators are responsive to their campaign contributors. Judges, however, should not be beholden to election funders in the same manner. The judiciary should be beyond the influence of special interests.

The drafters of the U.S. Constitution recognized that political considerations or campaign contributors should not be able to influence judges. They established a system in which federal judges are subject to political processes when they are nominated by the president and confirmed by the U.S. Senate, but they serve for life once con-

firmed.[28] Current Chief Justice John Roberts, during his 2005 confirmation hearing, said that, "Judges are not politicians. They cannot promise to do certain things in exchange for votes."[29]

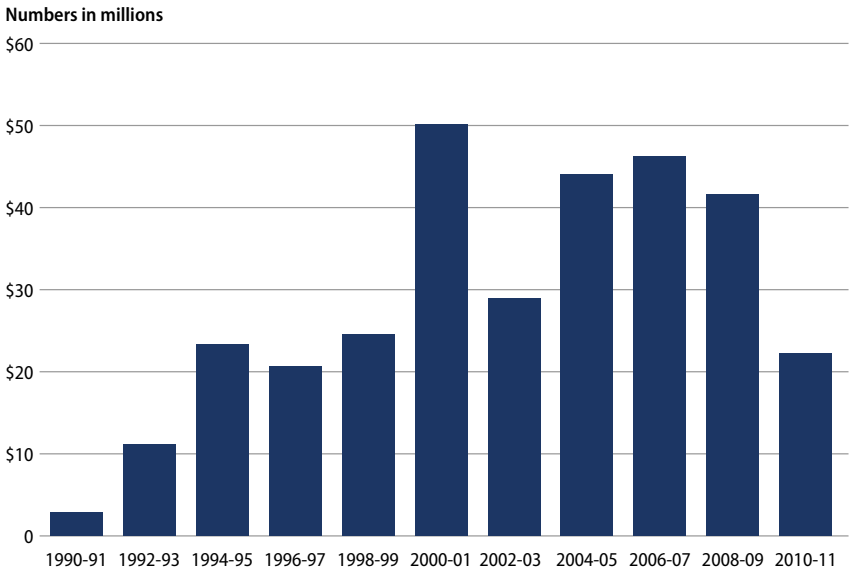
Chief Justice Roberts' lofty promise of judicial independence is threatened when judges must campaign the way other politicians do and must rely on interest groups to ensure their political futures. Retired U.S. Supreme Court Justice Sandra Day O'Connor said that, "When you enter one of these courtrooms, the last thing you want to worry about is whether the judge is more accountable to a campaign contributor or an ideological group than to the law."[30]

In August 2012 the Center for American Progress issued a report on how campaign donations from big business have come to dominate judicial elections. The states that have seen the most campaign cash now have high courts dominated by judges who favor corporations over individual citizens. In states with contested elections, some Democratic judges count on labor unions or trial lawyers for campaign cash or "get out the vote" operations. Republicans often look to corporations and organizations funded by big business for campaign money.[31] As these so-called big-money judicial elections spread to more states, these judicial candidates will come to depend on these same interest groups. In these states, those who sue corporations—such as injured employees or consumers who have been scammed—are finding it much more difficult to obtain real justice from these courts.[32]

The CAP report demonstrated how contested judicial elections open the door for special interest groups to influence the law. Groups that desire a change in the law can seek out judges who will deliver that change and then spend money to get those

Campaign cash in state supreme court races

Campaign contributions, 1990-2011*



*These figures include campaign contributions and do not include independent spending.

Source: National Institute on Money in State Politics, High Court Candidates, 2000-2010, available at http://followthemoney.org/database/nationalview.phtml?l=0&f=J&y=2011&abbr=0

judges elected. The insurance industry in Ohio, for example, was dissatisfied with several rulings against insurers in the late 1990s and donated money to elect judges who promptly reversed those rulings once in office.[33] In a merit-selection system, special interests lose the chance to bolster candidates who favor their agenda.[34]

Special interests influence contested elections

Contested races affect judicial behavior in other ways, as well. A court's role as protector of constitutional rights sometimes requires it to rule for criminal defendants, even if the defendant's actual guilt is not in doubt.[35] Studies have found that judges facing imminent elections are less likely to overturn criminal convictions. A 2009 study found that this tendency was highest in partisan elections and not as significant in retention elections.[36] The vindication of a defendant's rights should not depend on a judge's political considerations.

Criminal cases provide fodder for special interests running attack ads against judges. In a 2006 race for the Washington Supreme Court, an ad featured a grieving mother criticizing an incumbent judge for a decision that "let my son's killer walk free after serving less than a third of his murder sentence. You could have a convicted murderer released ... next door and you wouldn't even know it." The ad was paid for by Americans Tired of Lawsuit Abuse, a pro-tort-reform group that has nothing to do with criminal law.[37]

When a West Virginia coal executive spent a huge sum of money to influence the 2004 election to the West Virginia Supreme Court, he poured his money into a group that attacked the judge for allegedly granting probation to a child abuser.[38] These ads did not mention the coal company's $50 million verdict that was pending before the court, but the U.S. Supreme Court took note of this conflict of interest when it ruled that the judge who benefited from the money should have recused himself.[39] Though they have no interest in crime, special interest groups use criminal cases to scare citizens into voting for judges who support their particular agenda.

Some of the same interest groups that influence judicial elections have opposed merit-selection initiatives. In Pennsylvania, for example, pro-life groups opposed a statute that would have replaced the state's partisan judicial elections with a merit-selection system.[40] The proposed constitutional amendment would have created a commission to produce a list of nominees and allow the governor, with the state

Senate's consent, to appoint the judges on the state's appellate courts.[41] Pro-life and conservative religious groups have donated hundreds of thousands of dollars to Pennsylvanian judicial candidates in recent years,[42] and in June 2012 they defeated a bill that would have lessened their ability to influence the law.

Merit selection reduces the opportunities for special interests to influence courts. Advocates point out that merit selection can "minimize political influence by eliminating the need for candidates to raise funds, advertise, and make campaign promises, all of which can compromise judicial independence."[43] Retention elections also subject judges to less political pressure than contested elections.

Many judges argue that merit selection leads to better-qualified judges.[44] One organization of civil defense lawyers warns that contested elections might prevent the most qualified lawyers from seeking seats on the bench, saying that, "Otherwise qualified individuals may opt not to run for fear of losing to a judge before whom future cases must be tried."[45]

Although empirical evidence is hard to come by, a recent study from conservative scholars used the number of times a judge's opinion was cited by other jurisdictions as an indicator of quality. By this measure, the authors found that appointed judges outperformed elected judges.[46] The authors posit that, "A system that selects for judges skilled at electioneering and politicking does not also necessarily select for judges skilled at authoring high quality legal opinions."[47]

Structuring merit-selection systems to ensure independence

Critics of merit selection argue the system is undemocratic. They claim that unelected nominating commissions should not have so much authority over judicial selection.[48] These critics often fail to recognize that judicial independence—not democratic accountability—is the most important consideration in deciding how to select judges. The framers of the U.S. Constitution and the drafters of early state constitutions established systems in which judges are completely free from political accountability once they are appointed.

Some conservatives, acknowledging the value of judicial independence but decrying a lack of democracy in merit selection, argue for a system similar to the federal model—gubernatorial appointment (without a nominating commission), state Senate confirmation, and long terms.[49] This so-called Washington model would

present its own problems, however, with politics being present at the selection stage. The process would not be as transparent as modern merit-selection systems, and would open the door to politicized appointments, as we see in the federal system today, appointments can lead to gridlock if the executive and legislative branches are controlled by different political parties.[50]

The history of merit selection

Merit selection emerged after states saw gubernatorial appointments tarnished by allegations of partisanship and political corruption. The first system was approved by Missouri voters in 1940 after the state's courts had become politicized and subject to control by a powerful political machine.[51] The Missouri plan, as it came to be known, was adopted in Kansas after a 1956 scandal involving then-Gov. Fred Hall, who had lost the Republican primary. Gov. Hall's friend, the chief justice of the state supreme court, resigned his position at the same time Gov. Hall resigned as governor. The lieutenant governor assumed office for the last few days of the term, and his single official act was to appoint Gov. Hall to the empty seat on the Kansas Supreme Court.[52]

In 1970 a Florida governor appointed a state supreme court justice who was charged with selling drugs and who became a fugitive from the law. The then-president of the Florida state bar said the governor ignored the bar's background check, which had raised red flags.[53] Florida amended its constitution to institute a merit-selection system a few years after the scandal, but state legislators are fighting to establish a system that would again give politicians more control.

Merit selection frees judges from political infighting and shady deal-making. Opponents of merit selection are particularly critical, however, of systems that allow state bar associations to appoint some members of nominating commissions.[54] Conservative critics argue bar associations are often more liberal than their state's citizens.[55] A recent study found that merit-selection systems in Missouri and Tennessee resulted in judges that were more liberal than the majority of citizens in those states.[56] The author of the study acknowledged, however, that the governors of the two states and the elected officials who appointed some commission members were overwhelmingly Democrats during the time period studied.[57] Other scholars have found mixed results in asking whether state bar associations skew left.[58]

Studies that focus on the outcomes—not the processes—shed little light on the actual deliberations of the commissions. Earlier this year, the American Judicature Society conducted a broad survey of 487 nominating-commission members in 30 states, and the results cast doubt on the argument that merit selection is a politicized process. The survey found that commission members overwhelmingly reject the use of political considerations in their deliberations. More than 73 percent of the commission members said party affiliation is not considered during their deliberations.[59] A majority said they were not even aware of candidates' party affiliations.[60]

The survey did find that Democrats outnumber Republicans in the total number of commission members, but this discrepancy was much more pronounced for members appointed by governors.[61] This suggests that any partisan imbalance is more a result of gubernatorial appointment than of the role of state bar associations.

A survey of older research suggests that a rule prohibiting a partisan imbalance on the nominating commissions can reduce the influence of political considerations.[62] This reform could address any imbalance on the nominating commissions without subjecting judicial candidates to more influence from the political branches of government.

Ensuring legitimacy in the eyes of the public

The U.S. Chamber Institute of Legal Reform argues that state bars should recommend lawyers to serve on the commissions, but governors should actually appoint them.[63] New York has a requisite number of attorneys on its nominating commissions, but they are all chosen by elected officials and not by the state bar.[64] In Arizona the state bar recommends the attorney commissioners, but the governor actually appoints them.[65]

Merit-selection systems are not designed to be accountable to politicians or the public, because a judge's role as a defender of the Constitution requires him or her to be above politics. That being said, many states have reformed their merit-selection processes to ensure that citizens perceive them as legitimate and unbiased.

Justice O'Connor offers Arizona's system as a model. "In that state, nominating commissions are dominated by non-lawyers, and their meetings are open. Candidates' applications are available online, and the public is invited to comment," she said.[66] More transparency and lay-citizen participation can

Merit selection frees judges from political infighting and shady deal-making. Opponents of merit selection are particularly critical, however, of systems that allow state bar associations to appoint some members of nominating commissions.

inspire confidence in the process. The American Judicature Society recommends that merit-selection systems include written ethical and procedural rules.[67] Massachusetts, for example, has strict standards for preventing any conflicts of interest with applicants.[68]

Nominating commissions must have clear and consistent criteria on which to assess candidates. In New York the commission is governed by an executive order, which requires it to evaluate a candidate based on his or her "integrity, independence, intellect, judgment, temperament and experience."[69] Most of the constitutional provisions establishing nominating commissions do not specify the criteria that govern them. While governors have issued executive orders filling in the blanks, legislatures can provide more continuity by passing statutes that establish criteria for assessing a candidate's merit.

ASSOCIATED PRESS/HARRY CABLUCK

Retired U.S. Supreme Court Justice Sandra Day O'Connor

Many states that use merit selection appoint their judges for long terms—between 10 years and 12 years—before their first retention elections.[70] The longer the term, the more independence the judge enjoys from political influence because judges will less often feel pressure to ensure their decisions are popular.

Giving voters useful information

With retention elections becoming more politicized, advocates of merit selection argue that voters should not make their decisions based on a single high-profile decision by a judge. Instead, advocates and state bar associations argue that impartiality, an understanding of the law, and other values are the criteria voters should use to make their decisions in a retention election. The Florida Bar Association, for example, asks citizens to base their votes on a judge's "legal abilities, temperament, and commitment to follow the law and decide cases impartially."[71]

Surveys have shown that voters often do not feel knowledgeable about judicial candidates.[72] It is therefore asking a lot for voters to seek out and find information on the judges' qualifications, temperament, and legal abilities. If a voter is aware of a high-profile decision from his or her state supreme court, how can that voter put aside his or her views on that case and focus solely on merit? Retention elections must be accompanied by evaluations or voter guides that give the public useful information—a broad range of material beyond just one or two cases that received media attention.

Judicial performance evaluations have proven to be very useful for voters. These evaluations can promote meaningful accountability for judges by imparting knowledge about the judge's performance in office. Supporters point out that judicial performance evaluations are "process-oriented, not outcome-oriented."[73] Anonymous surveys are given to attorneys, jurors, and others who watch judges as they work, and more comprehensive programs include information on case-management statics, public comments, and interviews with the judges.[74] New Mexico goes so far as to seek input from "court staff, other appellate judges, trial court judges whose cases have been appealed, the judge's current and former law clerks, and law professors."[75]

The Defense Research Institute, an organization of civil defense attorneys, says judicial performance evaluations should be structured to enable a judge's self-improvement and a voter's informed decision. The institute also says the evaluations should "educate the public that specific case outcome should not be the determinative factor in judicial election or retention."[76] The American Bar Association offers detailed model criteria for assessing a judge's legal abilities, integrity/impartiality, communication skills, professionalism/temperament, and administrative capacity.[77]

North Carolina, a state that holds nonpartisan contested elections, offers citizens a voter guide, which describes the candidates' background. Voters are informed of the candidates' experience, education, and endorsements. The candidates are also allowed to submit statements to be included in the guide.[78]

As recent campaigns have shown, retention elections are not perfect and do not provide judges with complete independence from political considerations. Retention elections are vastly preferable to contested elections, though, and providing voters with relevant, unbiased information can keep the focus on a judge's merit, not on his or her views on a single high-profile issue. Further, voters in retention elections make their decisions after a judge has been on the bench for at least one term, giving voters a track record to consider before making a decision.

Conclusion

Constitutional principles are supposed to be above the petty politics of legislatures. When a statute or referendum conflicts with the constitution, a court must

enforce constitutional values. It is often a thankless task that judges carry out, striking down the will of the people manifested in statutes and referenda. But judges are the only institutions in place to protect our constitutions and the individual rights enshrined therein.

If judges are politically accountable, they cannot perform this crucial function. We need institutions in our society that can check the whims of the citizenry when they are not in accordance with the timeless principles laid down by the leaders who founded these states and our country.

There are times when it might be politically popular for politicians to target certain groups—those that are in the minority, naturally, since attacking a majority of citizens would likely not lead to electoral victory. This is especially true in tough economic times, when politicians have used groups such as immigrants as scapegoats. Courts must be able to stop legislatures and governors who cross the line. A majority of citizens might feel satisfied when elected judges avoid striking down popular statutes related to certain hot-button issues, but a constitution suffers when there is no branch of government to ensure the laws conform to it. If the courts do not protect individual rights from government encroachment, no one can.

Unfortunately, judicial independence is increasingly threatened by politicized retention elections. In an eerily prescient 2008 law review article, Justice Mark Cady of the Iowa Supreme Court warns of this very danger. Cady remarked:

> *Just as the personal views of a judge should not drive the judicial decision-making process, the personal views of the voter also should not be a focus in retention elections. Both views are inappropriate as a driving mechanism for judicial decisions because no individual's view—either judge or voter—is above the law.*[79]

Justice Cady points out that states that use retention elections can provide useful information to voters, allowing them to make decisions based on a broad understanding of a judge's role.[80]

Despite Iowa's experience in 2010, the question of whether a judge should be retained is less likely to be politicized than a choice between two candidates with divergent views. Voters in retention elections are not asked to replace a candidate with a specific alternative, and special interests cannot recruit a candidate they believe will serve their agenda. If judicial independence is paramount, the question of whether to vote a judge off the bench for protecting the rights of same-sex

couples is preferable to choosing between a judge with a certain view on same-sex marriage and a challenger with an opposite view.

Not surprisingly, conservative critics of merit selection like to quote the framers of the U.S. Constitution on the need for democratic legitimacy.[81] Those with an affinity for the framers must remember that they did not favor judicial elections, which were not introduced for state supreme courts until many decades later. On the contrary, the framers of the U.S. Constitution set up a federal system that completely insulates judges, once on the bench, from political accountability. In the *Federalist Papers*, Alexander Hamilton said citizens "of every description" should value judicial independence because "no man can be sure that he may not be tomorrow the victim of a spirit of injustice."[82] As the framers of the Constitution clearly understood, a judiciary that can protect our constitutional rights without fear of political backlash guarantees freedom for all.

Endnotes

1 "National Overview Map, High Court Candidates," available at http://www.followthemoney.org/database/nationalview.phtml?l=0&f=J&y=2000&abbr=1 (last accessed October 2012).

2 *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009). This case ruled that a litigant's due process rights were violated when the opposing party spent more than $3 million to elect a high court judge who subsequently ruled to overturn a $50 million verdict against the opposing party. See also Erwin Chemerinsky and James Sample, "You Get the Judges You Pay For," *The New York Times*, April 17, 2011, available at http://www.nytimes.com/2011/04/18/opinion/18sample.html; Viveca Novak, "Under the Influence," *The American Prospect*, September 19, 2011, available at http://prospect.org/article/under-influence.

3 *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100 (Ill. 2005). This case overruled the $1 billion class-action verdict against the insurer. The plaintiffs asked the court to reopen the case, but the court refused. *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 91494, Advisement Docket (Ill. Nov. 17, 2011). This case declined the motion to reopen the case. The plaintiffs have now filed a Racketeer Influenced and Corrupt Practices Act (RICO) suit against the company and others involved in the justice's 2004 campaign. Bethany Krajelis, "Class action suit alleges RICO enterprise in *Avery v. State Farm*," *The Madison-St. Clair Record*, September 26, 2012, available at http://madisonrecord.com/news/246926-class-action-suit-alleges-rico-enterprise-in-avery-v-state-farm.

4 American Judicature Society, "Merit Selection: The Best Way to Choose the Best Judges," available at http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf.

5 In Missouri applicants provide information on education, professional experience, any professional discipline or legal malpractice suits, tax delinquencies, and criminal charges, as well as writing samples, references, and consent for a background check. Appellate Judicial Commission, "Commission seeks applicants for Wolff Vacancy on Supreme Court of Missouri," June 6, 2011, available at http://www.courts.mo.gov/pressrel.nsf/3966cdf827e0d8d7862565ec00679fb1/d2729f536afaeade862578a70068e7f8?OpenDocument.

6 Conn. Gen. Stat. § 51-44a. Rhode Island has a longer list of desired qualities. R.I. Gen. Laws § 8-16.1-4. Kansas law includes a similar list and notes that "the best qualified nominees may be those whom it would be most difficult to persuade to serve." Kan. Stat. Ann. § 20-133 (2011). The Vermont law states that, "The criteria and standards shall include, but not be limited to, such factors as integrity, legal knowledge and ability, judicial temperament, impartiality, health, experience, diligence, administrative and communicative skills, social consciousness, and public service." Vt. Stat. Ann. title 4 § 601.

7 One campaign finance reform organization warns that "traditionally low-cost retention elections" are seeing more spending from interest groups. Brennan Center for Justice, "Campaign Money Patterns Entering New Phase in 2012 Judicial Races," Press release, September 13, 2012, available at http://www.brennancenter.org/content/resource/campaign_money_patterns_entering_new_phase_in_2012_judicial_races/.

8 Igor Volsky, "Iowa Chief Justice Defends Marriage Decision, Judiciary Review: 'Courts Serve The Law,'" ThinkProgress, January 12, 2011, available at http://thinkprogress.org/lgbt/2011/01/12/177211/cady-marriage; Editorial board, "GOP's Unwarranted Assault," *Miami Herald*, October 7, 2012, available at http://www.miamiherald.com/2012/10/07/3036417/gops-unwarranted-assault.html; Megan Simons, "Court Ruling from 2011 Sparks Anti-Retention Push in Indiana," Gavel Grab, October 12, 2012, available at http://www.gavelgrab.org/?p=45319; Howard Fischer, "High Court Judge in Fight to Keep his Post," *The Herald*, October 23, 2012, available at http://www.svherald.com/content/news/2012/10/23/336020.

9 Todd Phillips and Andrew Blotky, "The Conservative Takeover of State Judiciaries: Ballot Referendums to Watch" (Washington: Center for American Progress, 2012), available at http://www.americanprogress.org/wp-content/uploads/2012/08/StateCourtBallotReferendum.pdf.

10 Eeva Moore, "NH Legislators Propose End to Judicial Review of Laws," Gavel Grab, January 5, 2012, available at http://www.gavelgrab.org/?p=29118.

11 The Kansas Republican Party platform argues the state should "change its judicial selection process to reflect the federal model of legislative confirmation or by adopting direct election of judges statewide." The Republican Party of Kansas, "2010 Republican State Platform" (2010), available at http://ksgop.org/state_platform/.

12 Michael J. Goodman and William C. Rempel, "In Las Vegas, They're Playing with a Stacked Judicial Deck," *Los Angeles Times*, June 8, 2006, available at http://articles.latimes.com/2006/jun/08/nation/na-vegas8.

13 Josh Isreal, "Special Interests Kill Proposal for Merit Selection of Judges in PA," ThinkProgress, June 16, 2012, available at http://thinkprogress.org/justice/2012/06/16/500331/special-interests-kill-proposal-for-merit-selection-of-judges-in-pa/.

14 The poll was conducted for Pennsylvanians for Modern Courts, and 69 percent of respondents said they either had "not much" information on judicial candidates or "none." Sixty-two percent of respondents favored replacing the system with merit selection. Pennsylvanians for Modern Courts, "Pennsylvania Statewide Poll," May 25-26, 2010, available at http://www.judgesonmerit.org/wp-content/uploads/2010/06/2010-Merit-Selection-Poll1.pdf.

15 Some Constitutions outline a ratification process that requires the approval of three-fifths of the state legislature, followed by approval of a majority of voters. Illinois Const., Art. XIV, § 2; Alabama Const. Art. XVIII, Sec. 284. Others require two-thirds of the legislature and a majority of the electorate to ratify an amendment. Kan. Const. Art. 14, § 1. Some states, including California and Massachusetts, require ratification by a majority or super majority of two consecutive legislatures and a majority of voters. Cal Const, Appx. I Art. X § 1 (requiring ratification by a majority of two consecutive legislatures and a majority of voters); ALM Constitution Amend. Art. IX (2012) (requiring ratification by a majority of senators and two-thirds of the members of the state House of Representatives in two consecutive ses-

sions before approval by a majority of voters). In New Jersey the ratification process begins with approval by three-fifths of the legislature or approval by a majority in two consecutive legislatures. N.J. Const., Art. IX, Para. 1. A few states allow ratification by simple majorities of a legislature and the electorate. Mo. Const. Art. XII, § 2.

16 Three members of the Iowa Supreme Court lost their seats in 2010 after ruling that denying same-sex couples the right to marry is unconstitutional. See *Varnum v. Bailey*, 763 N.W.2d 862 (Iowa 2009). Three members of the Florida Supreme Court are facing unprecedented opposition in this year's election. Opponents have singled out a Florida case in which the court found that a lawyer provided inadequate counsel to his client when he admitted to the jury that the client was guilty without the client's consent. *Nixon v. State*, 857 So. 2d 172 (2003) (overruled by *Florida v. Nixon*, 543 U.S. 175 (2004)).

17 *Varnum v. Bailey* (ruling that a state law limiting marriage to heterosexual couples violates the U.S. and Iowan constitutions).

18 Chief Justice John Marshall echoed this sentiment in his seminal opinion in *Madison v. Marbury*. The U.S. Supreme Court said the role of the judiciary is to interpret the law, and "the law" includes the Constitution. *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

19 Alexander Hamilton, "The Federalist #78, The Judiciary Department." In *The Federalist Papers* (1788), available at http://www.constitution.org/fed/federa78.htm.

20 Ibid.

21 *Varnum v. Bailey*.

22 Ibid. at p. 875-76.

23 Patrick Caldwell, "Disorder in the Court," *The American Prospect*, September 19, 2011, available at http://prospect.org/article/disorder-court.

24 A *New York Times* report mentions a survey from the *Des Moines Register* that found that 49 percent of respondents said they would vote to retain the justice, while only 41 percent said they plan to vote to deny retention. John Eligon, "Gay Marriage Ruling Fuels Iowa Vote on a Justice," *The New York Times*, October 23, 2012, available at http://www.nytimes.com/2012/10/23/us/gay-marriage-ruling-fuels-iowa-vote-on-a-justice.html?_r=1.

25 David Alexander, "Local Park Hosts Dueling Rallies on State Justice," *Times-Republican*, September 27, 2012, available at http://www.timesrepublican.com/page/content.detail/id/553094/Local-park-hosts-dueling-rallies-on-state-justice.html?nav=5005.

26 Rebecca Love Kourlis and Jordan M. Singer, "Using Judicial Performance Evaluations to Promote Judicial Accountability," *Judicature* 90 (2007): p. 201, available at http://iaals.du.edu/images/wygwam/documents/publications/Using_JPE_To_Promote_Judicial_Accountability2007.pdf.

27 John Paul Stevens, "Should we have a New Constitutional Convention?" *New York Review of Books*, October 11, 2012, available at http://www.nybooks.com/articles/archives/2012/oct/11/should-we-have-new-constitutional-convention/.

28 "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III § 1.

29 Senate Judiciary Committee, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the U.S.*, 109th Cong., 1st sess., 2005, 56.

30 Sandra Day O'Connor, "Take Justice off the Ballot," *The New York Times*, May 23, 2010, available at http://www.nytimes.com/2010/05/23/opinion/23oconnor.html.

31 Stephanie Mencimer, *Blocking the Courthouse Door* (New York: Free Press, 2006).

32 Billy Corriher, "Big Business Taking Over State Supreme Courts" (Washington: Center for American Progress, 2012), available at http://www.americanprogress.org/wp-content/uploads/2012/08/StateCourtsReport.pdf.

33 Ibid. at 13-16.

34 In the 2004 election for Illinois Supreme Court, State Farm allegedly recruited Judge Joseph Karmeier to run for a seat on the high court, ran his campaign, and donated millions toward his election. Justice Karmeier then voted to overturn a $1 billion class-action verdict against the company. Ann Maher, "Supreme Court won't Reopen Avery v. State Farm," *Madison-St. Clair Record*, November 11, 2011, available at http://www.madisonrecord.com/news/239796-supreme-court-wont-reopen-iavery-v.-state-farmi.

35 William Blackstone, *Commentaries*, 4, p. 358; *In re: Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("In a criminal case ... we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. ... [The reasonable doubt standard is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.")

36 Joanna Shepherd, "The Influence of Retention Politics on Judges' Voting," *Journal of Legal Studies* 38 (2009): p. 169. Shepherd found that judges in retention elections with Republican-leaning constituencies "are more likely to vote for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases, for the original defendant in torts cases, and against criminals in criminal appeals." The opposite tendency is found in states with liberal constituencies.

37 Justice at Stake, National Institute on Money in State Politics, and the Brennan Center for Justice, "New Politics of Judicial Elections: 2000-2009, Decade of Change" (YEAR), available at http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf.

38 Mannix Porterfield, "For the Sake of Kids gets $2.5 million, mostly Massey cash," *Register-Herald*, October 15, 2004, available at http://www.wvcag.org/news/fair_use/2004/10_15.htm.

39 *Caperton v. Massey Coal Co*.

40 Isreal, "Special Interests Kill Proposal for Merit Selection of Judges in PA."

41 Ibid.

42 "Contributor Summary, John M. Templeton, Jr., Pennsylvania 2007," available at http://www.followthemoney.org/database/StateGlance/contributor.phtml?d=939328986 (last accessed October 2012).

43 American Judicature Society, "Merit Selection: The Best Way to Choose Judges?"

44 Sandra Day O'Connor, "Foreward," Wayne Law Review 56 (2010): p. 581. O'Connor argues that Arizona's merit-selection system has "produced a better qualified and more diverse judiciary in Arizona."

45 DRI, The Voice of the Defense Bar, "Without Fear or Favor in 2011: A New Decade of Challenges to Judicial Independence and Accountability" (2011), available at http://www.dri.org/ContentDirectory/Public/WhitePapersReports/DRI%20Judicial%20Task%20Force%20Report%20-%20Without%20Fear%20or%20Favor%20(2011).pdf.

46 Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, "Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary," *J.L. Econ. & Org.* 26 (2008): p 291. The authors find that elected judges outperformed other judges in another measure of quality: productivity, or the number of opinions issued. "Appointed judges write higher quality opinions than elected judges do, but elected judges write many more opinions, and the evidence suggests that the large quantity difference makes up for the small quality difference."

47 Ibid.

48 Matthew Schneider, "Why Merit Selection of State Court Judges Lacks Merit," *Wayne Law Review* 56 (2010); Brian T. Fitzpatrick, "The Politics of Merit Selection," *Missouri Law Review* 74 (2009).

49 Stephen J. Ware, "The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court," *Kansas Journal of Law and Public Policy* 18 (2009): p. 424. Ware argues for a judicial-selection system requiring Senate confirmation of a governor's nominee with no merit selection committee, followed by "terms of office that are long and non-renewable."

50 For example, New Jersey's tradition of maintaining a partisan balance on the state's high court has fallen apart, and the Democratic-controlled state Senate is refusing to confirm the Republican governor's nominees, leaving two seats vacant on the high court. Charles Stile, "Christie Fight over State Supreme Court Justices is One for the Ages," *North Jersey Record*, October 7, 2012, available at http://www.northjersey.com/news/crime_courts/crime_courts_news/Christie_fight_over_state_Supreme_Court_has_roots_in_19th_century.html?page=all.

51 Brett Emison, "Special Interests Attacking Missouri Court Plan Stand Down ... but They'll be Back," *The Legal Examiner*, October 3, 2012, available at http://kansascity.legalexaminer.com/wrongful-death/special-interests-attacking-missouri-court-plan-stand-down-but-theyll-be-back.aspx?googleid=304624.

52 *Dool v. Burke*, No. 10-3320, 4-5 (10th Cir. Sept. 13, 2012) (O'Brien, J., concurring) (describing the "Kansas triple play" that led the state to adopt merit selection).

53 Burton Young, "Politics Again Threatens the Independence of the Judiciary," *South Florida Sun-Sentinel*, October 29, 2012, available at http://www.sun-sentinel.com/news/opinion/fl-bycol-oped1029-20121029,0,1429082.story.

54 Schneider, "Why Merit Selection of State Court Judges Lacks Merit"; Fitzpatrick, "The Politics of Merit Selection"; Ware, "The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court."

55 Fitzpatrick, "The Politics of Merit Selection."

56 Ibid, p. 693-696. The study looked at 87 nominees in Tennessee and found that "67% voted more often in Democratic primaries, and 33% voted more often in Republican primaries." The study examined 54 nominees in Missouri and found that "87% gave more [campaign contributions] to Democrats than Republicans, and only 13% gave more to Republicans than Democrats."

57 Ibid, p. 700-701. Fitzpatrick noted that Missouri had Democratic governors in 10 years during the 14-year period studied. He also found that the commissions sent "overwhelmingly Democratic slates to Democratic governors." Fitzpatrick also said that the leaders of the two houses of the Tennessee legislature select "almost all" of the commission members, and he acknowledged that, "Over almost the entire period since 1995 [the period studied], the speakers of *both* Tennessee houses were Democrats."

58 A recent article looked at the partisan composition of the Nebraska bar association's executive council, which appoints members to the state's nominating commission. It found that, "In 2006, the council was 83% Democrat and 17% Republican. In 2010, the council was 67% Republican and 33% Democrat by party registration." L. Steven Grasz, "Judicial Selection in Nebraska" (Washington: The Federalist Society, 2012), available at http://www.fed-soc.org/publications/detail/judicial-selection-in-nebraska.

59 Respondents were asked if "political considerations, such as applicant's party affiliations, play a role" in the process. Approximately 37 percent of respondents strongly disagreed, and 35.9 percent disagreed. About 11 percent neither agreed nor disagreed. Rachel Paine Caufield, "Inside Merit Selection" (Des Moines, Iowa: American Judicature Society, 2012), available at http://www.judicialselection.us/uploads/documents/JNC_Survey_ReportFINAL3_92E04A2F04E65.pdf.

60 Ibid. Of the respondents, 19.2 percent said they "strongly disagreed" with the idea that members know an applicant's party affiliation, and 30.9 percent disagreed.

61 Ibid.

62 Malia Reddick, "Merit Selection: A Review of the Social Scientific Literature," Dickinson Law Review 106 (2002): p. 733. Reddick discusses previous studies, which found that nominating commissions that require partisan balance have fewer members who say that political considerations influence their decisions.

63 U.S. Chamber Institute for Legal Reform, "Promoting 'Merit' in Merit Selection" (2009), available at http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/research/meritselectionbooklet.pdf.

64 N.Y. Judiciary Law § 62(1) (2012). "The commission shall consist of twelve members of whom four shall be appointed by the governor, four by the chief judge of the court of appeals, and one each by the speaker of the assembly, the temporary president of the senate, the minority leader of the senate, and the minority leader of the assembly. Of the four members appointed by the governor, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state. Of the four members appointed by the chief judge of the court of appeals, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state."

65 "Selection of Judges," available at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last accessed October 2012).

66 O'Connor, "Take Justice off the Ballot."

67 American Judicature Society, "Model Judicial Selection Provisions" (2008), available at http://www.ajs.org/selection/docs/MJSP_web.pdf.

68 Mass. Exec. Order No. 500, "Order Reconstituting The Judicial Nominating Commission And Establishing A Code Of Conduct For Commission Members And Nominees To Judicial Office" §§ 1.5.7 & 2 (March 13, 2008), available at http://www.mass.gov/governor/docs/executive-orders/executive-order-500.pdf.

69 N.Y. Exec. Order No. 15, "Establishing Judicial Screening Committees" (June 18, 2008), available at http://www.governor.ny.gov/executiveorder/15.

70 Justices on the Colorado, Maryland, Utah, and Indiana High Courts serve 10-year terms. Justices on the Delaware and Missouri High Courts serve 12-year terms following merit selection. New York's highest court is composed of justices serving 14-year terms. "Selection of Judges," available at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm.

71 Florida Bar Association, "Guide for Florida Voters: Questions and Answers about Florida Judges, Judicial Elections, and Merit Retention" (2012), available at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/53691BEC3B7D4C0B852579E6006BFD1B/$FILE/Voter%20Guide%20FINAL.pdf?OpenElement.

72 One 2002 survey found that only 13 percent of respondents said they had "a great deal of information" on which to base their vote for judges. Greenberg Quinlan Rosner Research, Inc., "RE: Justice At Stake National Surveys of American Voters and State Judges" (2002), available at http://www.justiceatstake.org/media/cms/PollingsummaryFINAL_9EDA3EB3BEA78.pdf.

73 Rebecca Love Kourlis and Jordan M. Singer, "Using Judicial Performance Evaluations to Promote Judicial Accountability," Judicature 90 (2007): p. 201.

74 Ibid.

75 Ibid.

76 DRI, The Voice of the Defense Bar, "Without Fear or Favor in 2011: A New Decade of Challenges to Judicial Independence and Accountability."

77 American Bar Association, "Black Letter Guidelines for the Evaluation of Judicial Performance" (2005), available at http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/jpec_final.authcheckdam.pdf.

78 North Carolina State Board of Elections, "2010 General Election Judicial Candidate Voter Guide" (2010), available at www.ncsbe.gov/GetDocument.aspx?id=2408.

79 Mark S. Cady and Jess R. Phelps, "Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-*White* World," *Cornell Journal of Law and Public Policy* 17 (2008): p. 368, available at http://www.lawschool.cornell.edu/research/JLPP/upload/Cady-Phelps.pdf.

80 Ibid.

81 One anti-merit-selection publication said that efforts to replace contested elections with merit selection would "shock the founding generation who formed our nation and states on the notion that all power traces back to the people." American Justice Partnership, "Justice Hijacked" (2010), available at http://americanjusticepartnership.com/pdf/Justice_Hijacked_Report.pdf.

82 Alexander Hamilton, "The Federalist #78, The Judiciary Department."

Strong Recusal Rules Are Crucial to Judicial Integrity

Originally published: November 20, 2012

Summary

The flood of judicial campaign cash in recent years has flowed from corporations, interest groups, and lawyers seeking to influence the rulings issued by those courts. Unlike legislators, judges make decisions that impact specific individuals or entities, which means the avoidance of any bias or partiality is critical. The recusal rules in most states are vague, and judges all too often refuse to abstain in the face of glaring conflicts of interest. This has caused the public to doubt the impartiality of judges.

In most states, high court judges write their own ethical rules and decide when recusal is appropriate. Some courts have recently weakened their recusal rules. In 2010 four conservative justices in Wisconsin adopted the standards urged by pro-corporate associations that have donated millions of dollars to their campaigns. The new rule says campaign donations or independent spending by a litigant or an attorney can never be the sole basis for recusal. A dissenting judge criticized the court for adopting "word-for-word the script of special interests that may want to sway the results of future judicial campaigns."

Only five states explicitly require recusal when contributions reach a certain threshold. Alabama has such a law, but it has not been enforced. In 2010 Alabama Supreme Court candidates accepted dozens of contributions higher than the recusal threshold, with some donors giving tens of thousands of dollars. Because the recusal rule is unenforced, the justices can hear cases involving these contributors. State legislatures should pass laws that specify when recusal is required due to campaign contributions and independent expenditures, which play an increasingly crucial role in judicial elections. Mandatory recusal rules would go a long way toward disabusing citizens of the notion that justice can be bought.

Introduction

Since the 2000 election season, state supreme court races have seen a surge in campaign cash. State supreme court candidates from 2000 to 2009 raised more than $200 million—two and a half times more than the amount raised in the previous decade.[1] A report from Justice at Stake, an advocate for fair courts, found that judicial elections in 2012 set a spending record, with $27.8 million shelled out for television advertising alone.[2] This flood of campaign cash has flowed from corporations, interest groups, and lawyers seeking to influence the composition of state high courts and the rulings issued by those courts.

This abundance of campaign donations has sometimes led to alarming conflicts of interest. Unlike legislators, judges make decisions that impact specific individuals or entities, which means the avoidance of any bias or partiality is critical. Under the ethical rules and guidelines in place in most states, judges must disclose any campaign donations from parties or attorneys before their courts, and they must refrain from hearing a case if it would give rise to "impropriety or the appearance of impropriety."[3] This standard, however, is vague and leaves much to interpretation.

Judges sometimes recuse themselves from cases involving litigants or lawyers who have given money to their campaigns, but all too often judges refuse to abstain in the face of glaring conflicts of interest. This has caused the public to doubt the impartiality of judges. According to several recent polls, more than three quarters of respondents believe that campaign cash influences rulings.[4]

The North Carolina state legislature acknowledged these concerns in 2002, when it overhauled its judicial elections process and established public financing for qualified candidates for the state's appellate courts.[5] This system kept special interests from influencing the law and allowed North Carolina judicial candidates to avoid the ethical dilemmas that have plagued other states.[6] The 2012 election, however, saw the state's public financing system overwhelmed by "independent spending" as organizations supporting conservative Justice Paul Newby spent more than $2.5 million in his successful re-election bid.[7] Funding these organizations were tobacco companies, education advocates, and health care interests—groups with a stake in cases before the North Carolina Supreme Court. The largest donation, by far, was $875,000 from the Republican State Leadership Committee, a national group dedicated to electing Republicans to state offices.[8]

One of those cases before the North Carolina high court involves a lawsuit filed by the state chapter of the National Association for the Advancement of Colored People, or NAACP, among others, alleging that Republican legislators discriminated against African American voters in redrawing the state's legislative districts. The plaintiffs allege that the drafters of the redistricting map purposely diluted the political power of "minority voters" by using race as a proxy for political party. A lower court granted the plaintiffs' motion to access information about how the map was drawn.[9] That decision, which is now being challenged in the high court, is seen as a precursor to the North Carolina Supreme Court eventually ruling on the legality of the redrawn legislative map. With the redistricting issue looming, the Republican Party and corporate interest groups used independent spending to influence the 2012 North Carolina Supreme Court election. Newby will have to decide whether all that independent campaign cash supporting his candidacy means that he should recuse himself from the case.

In a 2009 case the U.S. Supreme Court tackled the ethical dilemmas that arise from huge judicial campaign donations from parties before a court. The Court in *Caperton v. Massey Coal Co.* held that "extraordinary" campaign donations from Don Blankenship, CEO of Massey Coal, violated the plaintiff's due process rights. The plaintiff in *Caperton* was the owner of a small mining company who sued the much larger Massey corporation, alleging that it "destroyed" his business. The jury awarded the plaintiff $50 million, but while the case was pending before the West Virginia Supreme Court, Blankenship spent $3 million to help elect a Republican justice to that court.[10] The newly elected justice refused to recuse himself from the lawsuit, even though two of his colleagues had done so.[11] The justice cast the deciding vote to overturn the verdict on a technicality.[12]

ASSOCIATED PRESS/JEFF GENTNER

Massey Energy President Don Blankenship stands beneath the columns of the Capitol Dome, during the first day of the 2005 legislative special session in Charleston, W.Va.

The U.S. Supreme Court held that the Constitution required the West Virginia justice to recuse himself. Justice Anthony Kennedy's opinion said Blankenship's "extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when … a man chooses the judge in his own cause."[13] Kennedy noted that the Constitution "demarks only the outer boundaries of judicial disqualifications" and that states can implement stronger rules.[14]

Judges refuse to police themselves

The most recent American Bar Association Model Code of Judicial Conduct instructs judges to disclose any potential conflicts of interest and requires recusal when campaign contributions exceed a certain amount. Leaving it to states to fill in the blanks, the rule says recusal is mandated when "a party, a party's lawyer, or the law firm of a party's lawyer has within the previous ___ years made aggregate contributions to the judge's campaign in an amount greater than ___."[15] In the wake of the *Caperton* decision, a few states strengthened their recusal rules, but most states have not responded to the ethical dilemmas that have emerged as campaign cash has flooded judicial elections.[16]

Some state supreme courts have even weakened their recusal standards in recent years. In a 2010 decision by the Wisconsin Supreme Court, a four-justice majority of conservative justices voted for an inadequate recusal rule.[17] The court adopted the watered-down standards articulated by a number of conservative organizations, including the Wisconsin Realtors Association and Wisconsin's Manufacturers and Commerce. These corporate-funded groups subsequently donated nearly a million dollars to support Justice David Prosser's successful re-election in 2011, keeping in place the court's four-justice conservative majority.[18] The new rule states that campaign donations or independent expenditures by a litigant or an attorney can never be the sole basis for recusal.[19]

The four conservative Wisconsin justices rejected an alternate proposal from the League of Women Voters to mandate recusal when a party contributes to a justice's campaign. The League argued the court must have "rules for recusal which remove any perception that justices and judges are beholden to those who contribute to their campaigns."[20]

Wisconsin Justice Ann Walsh Bradley dissented from the order adopting the standard urged by the corporate interest groups, expressing alarm that judges' campaigns can now ask parties before the court for campaign contributions. "Judges must be perceived as beyond price," Bradley stated. She criticized the majority for adopting "word-for-word the script of special interests that may want to sway the results of future judicial campaigns."[21] The Wisconsin high court's four-justice majority seems intent on making it easier for big money to influence the judiciary, at the expense of litigants without resources to contribute to political campaigns.

One substantial donor to judicial campaigns—insurance giant State Farm—saw several recusal requests directed toward a beneficiary of the company's generosity, Illinois Supreme Court Justice Lloyd Karmeier, in a class action lawsuit in which a jury awarded a $1 billion verdict against the insurer. According to the plaintiffs in that case, the company spent millions of dollars to elect Karmeier to the Illinois Supreme Court in 2004. The class action lawsuit was brought by millions of policyholders who claimed State Farm had violated their insurance policies and consumer protection laws by offering inferior parts to repair their cars. Justice Karmeier was elected to the court while the case was pending. The plaintiffs asked Justice Karmeier to recuse himself because State Farm's employees and lawyers had donated around $350,000 to his campaign, but he declined. Justice Karmeier voted to overturn the verdict.[22]

The plaintiffs, claiming they had discovered new connections between the judge's campaign and State Farm, filed a new lawsuit in the fall of 2011 alleging that State Farm—through political groups such as the U.S. Chamber of Commerce and the Illinois Civil Justice League—"recruited Karmeier, directed his campaign, had developed a vast network of contributors, and funneled as much as $4 million to the campaign" in an effort to influence the outcome of the appeal.[23] State Farm has sought to dismiss the lawsuit, arguing that it rehashes many of the claims asserted in the previous case.[24]

Some judges oppose stricter recusal rules on the basis of their "duty to sit," which requires them to hear cases and controversies before them. Because they belong to the courts of last resort for many cases, state supreme court justices who refuse to abstain often cite this notion.

Even when judges seek to recuse themselves, this duty has sometimes made it impossible for them to do so. In a 2000 Nevada Supreme Court case, a trial court judge recused himself from hearing a lawsuit brought by two plaintiffs whose land was seized through eminent domain for a private redevelopment project.[25] After the case was assigned to the judge, four casinos that would benefit from the redevelopment project gave contributions to the judge's campaign.[26] The landowners asked the judge to recuse himself because of the contributions and because two of the witnesses were casino executives who gave money to the judge's campaign.

To his credit, the judge agreed and abstained. But after three other trial court judges similarly recused themselves, the redevelopment authority persuaded the Nevada Supreme Court to order the original judge to hear the case. In issuing its

Some judges oppose stricter recusal rules on the basis of their "duty to sit," which requires them to hear cases and controversies before them. Because they belong to the courts of last resort for many cases, state supreme court justices who refuse to abstain often cite this notion.

order, the high court noted "this recurring problem of campaign contributions" but said a rule requiring recusal due to campaign contributions would "severely and intolerably obstruct the conduct of judicial business."[27] In other words, campaign cash from litigants and attorneys is so pervasive that requiring recusal in these circumstances would make it impossible for judges to do their jobs.

The Nevada plaintiffs—their land taken to provide a parking deck for the same casinos that donated to the judge's campaign—likely found little solace in the judge's "duty to sit." This legal axiom predates multimillion-dollar judicial campaigns and ignores the damage they have done to public confidence in the judiciary.

Several years after the Nevada high court's decision, the *Los Angeles Times* described the Nevada judiciary as rife with conflicts of interest, displaying a "style of wide-open, frontier justice that veers out of control across ethical, if not legal, boundaries."[28] The Nevada high court in 2009 adopted a rule requiring recusal when a judge's "impartiality might reasonably be questioned," but the justices rejected two proposals to specify when campaign contributions require recusal.[29] One rule would have kicked in when contributions exceed $50,000, and the other would have required recusal when a party or law firm provides 5 percent or more of a judge's campaign funding.[30]

When courts are left to police themselves, the strength of a court's standards depends on the will of a majority of the justices. The Michigan Supreme Court has taken a step in the right direction, but not every justice is on board. The court recently adopted a rule that permits the entire court to review motions to recuse a justice. Under the rule, a justice must respond in writing to requests for recusal, and if he or she decides not to abstain, the party making the request can appeal that decision to the entire court.[31]

Two of the Michigan court's seven justices, however, have refused to participate in these appeals. Justice Maura Corrigan, dissenting in one such case, argued that Michigan's recusal standard is too high:

> *The rule effectively gives a majority of justices carte blanche to disqualify their colleagues simply by articulating its impressions of why a challenged justice's participation appeared improper, without regard to the existence of the traditional, more objective grounds for recusal such as personal bias, involvement in the case, or economic interest in the case.*[32]

Corrigan also argues that the rule "nullifies the electoral choice of the people of Michigan by permitting the Court to decide which justices may participate in a given case."[33]

Justice Corrigan's objections are based on outdated notions of judicial impartiality. Ethics rules have been strengthened as campaign cash has flooded judicial elections. A personal financial stake in a case is no longer the only basis for demanding recusal. In *Caperton*, the U.S. Supreme Court quoted the then-existing version of the American Bar Association Model Code of Judicial Conduct, which instructed judges to avoid "the appearance of impropriety." The Court noted that this rule has been adopted by "almost every state."[34] The Court explicitly did not find any actual bias or impartiality on the part of the judge in *Caperton*, but recusal was still required because of the risk of bias.

Justice Corrigan's stance illustrates the folly of leaving it to judges to police themselves on ethical issues. If two more justices were elected to the Michigan bench who share Corrigan's views, the justices could revoke the rule. Legislative action is necessary to ensure recusal rules are more consistent, legislative.

Legislatures should pass real recusal reform

Despite the steep rise in judicial campaign cash, courts have failed to implement the tough recusal rules needed to ensure public confidence in judicial impartiality. *Caperton* may provide some relief from the most extraordinary and blatant conflicts of interests, but it is not enough. State legislatures should pass laws that specify when recusal is required.

Only five states explicitly require recusal when campaign contributions reach a certain threshold.[35] In California a judge cannot hear a case if he or she has received campaign contributions of more than $1,500 from a party or a lawyer in the case.[36] Alabama similarly requires a trial court judge's recusal when a litigant or attorney has given more than $2,000 to the judge's campaign. For appellate judges, the threshold is $4,000.[37] The Alabama law states: "Under no circumstances shall a justice or judge solicit a waiver of recusal or participate in any way when . . . the contributions of a party or its attorney exceed the applicable limit."[38] The statute instructs the high court to promulgate rules allowing motions to recuse under these standards to be heard by lower court judges.[39]

As the trend toward expensive judicial races spreads, states around the country should emulate California and Alabama by passing rules that mandate recusal when campaign contributions from a party or lawyer reach a certain point.

The Alabama law was passed in 1995, but it remains stuck in legal limbo. The Alabama Attorney General's office initially submitted the rule to the U.S. Department of Justice for "preclearance" under[40] Section 5 of the Voting Rights Act, which requires certain jurisdictions with a history of racial discrimination in voting to "pre-clear" any changes in voting with the federal government. After the department asked for more information on the rule, the office sought to revoke its submission, claiming the rule was not subject to preclearance. The state and federal government have yet to resolve the issue. The Alabama high court, meanwhile, has refused to implement the rule until it is precleared.[41] Rejecting a lawsuit seeking to break this stalemate, a federal court recently referred to the situation as a "game of political chicken, with both players staring (or perhaps winking) at each other."[42]

Alabama was on the leading edge of the trend of exploding campaign costs for high court races. The 2006 high court race saw candidates spend $13.5 million—nearly half of all the money spent on high court races nationwide that year.[43] Candidates in the 2010 Alabama Supreme Court election accepted dozens of contributions higher than the $4,000 threshold, with some contributors forking over tens of thousands of dollars to the judges' campaigns.[44] Because the recusal rule is unenforced, however, the judges can hear cases involving these campaign contributors. Alabama citizens and their state legislators should demand that the court honor this law, which is now nearly 20 years old.

As the trend toward expensive judicial races spreads, states around the country should emulate California and Alabama by passing rules that mandate recusal when campaign contributions from a party or lawyer reach a certain point.

Alabama and California use a specific monetary threshold. One scholar recently suggested using a standard of "five to ten percent of the judge's total campaign expenditures."[45] *Caperton* similarly relied on criteria such as "a contribution's relative size in comparison to the total amount of money contributed to the campaign."[46] As long as recusal rules are based on vague standards of "impropriety," judges will be able to avoid recusal in the face of large campaign contributions.

Additionally, recusal statutes should cover independent expenditures made on behalf of a judge's campaign. Spending by groups that are independent of judicial campaigns has risen sharply in recent elections. According to the Justice at Stake report, in the 2012 election independent spending on television ads exceeded the amount spent by campaigns.[47] In *Caperton*, the coal executive's influence on the 2004 West Virginia Supreme Court election was mostly in the form of

independent spending. Even though the coal executive's direct contribution to the candidate was rather modest, the U.S. Supreme Court held that his indirect contributions—in the form of a $2.5 million donation to a group criticizing the judge's criminal decisions and $500,000 spent on ads by the executive himself—resulted in an unconstitutional conflict of interest.[48]

Independent spending allows interest groups to circumvent campaign contribution limits, and if allowed to remain unchecked, they will continue to play a crucial role in judicial races. The U.S. Supreme Court, in cases like *Citizens United*, has loosened restrictions on independent spending, and the federal agency regulating campaign finance is paralyzed by a partisan stalemate.[49] Omitting independent expenditures from recusal rules would present a huge loophole for litigants and lawyers looking to influence judges.

If state legislatures do not implement mandatory recusal rules, they should at least follow the Michigan high court's lead and allow review of a recusal decision by an entire court. The judge facing the alleged conflict of interest should not be the only person deciding the issue. After all, if a judge has a conflict of interest in a lawsuit, he or she also has a conflict of interest in deciding whether to hear the suit.

Some judges might express alarm at legislatures crafting ethics rules for the judicial branch, citing concerns about separation of powers. The courts, however, retain their role as interpreters of their respective state constitutions, meaning that any rules that violate the constitutional separation of powers can be stricken. These rules generally leave the ultimate decision on recusal in the hands of judges, so they do not give other branches control over who hears a specific case. More importantly, these concerns gloss over the damage that conflicts of interest inflict on the public's perception of the judiciary. Unlike laws allowing legislatures to override court rules or giving politicians more control over judicial selection, recusal rules govern the ethics of judges, and they are only necessary in states in which the high courts have failed to respond adequately to the swelling tide of campaign cash.

Conclusion

The explosion of money in judicial politics has brought renewed attention to the issue of judicial ethics. Conflicts of interest like those in *Avery v. State Farm* and *Caperton v. Massey Coal Co.* shock the consciences of citizens and cause them to

question the integrity of the judiciary. The Supreme Court's *Caperton* ruling may provide relief in some of the most egregious cases, but states must go further.

State legislatures should pass rules mandating recusal when the campaign contributions of a party or its attorneys reach a certain point. The legislatures can base the threshold on a certain dollar amount, based on the historical cost of judicial elections, or on a percentage of a candidate's total contributions. A bright-line rule would not allow judges any wiggle room to avoid recusal. It would also discourage special interests from donating too much money to judicial candidates they favor because doing so would mean that the judges, once on the bench, could not hear their cases.

Recusal statutes should also govern independent expenditures, which play an increasingly important role in judicial elections. The defendant in *Caperton* used independent expenditures to evade contribution limits, and omitting this money from recusal rules would leave a glaring loophole for those seeking to curry favor with judges.

Polls show that the vast majority of citizens are concerned that campaign cash affects judges' rulings.[50] This is a bipartisan concern, and the public must demand that state legislators take action. Citizens should also hold judicial candidates to account for these concerns about impartiality. Voters should reward high court candidates who run on a platform of recusal reform.

Coal executive Hugh Caperton saw his business destroyed by a much larger corporation and won a jury verdict for his losses, but then saw the larger corporation work to elect a judge who overturned the verdict. In 2010 Caperton said he had "experienced firsthand the devastation and destruction that big money campaign donations are causing in judicial elections and ultimately, in our courts." He lamented, "It appears that justice is indeed for sale." Mandatory recusal rules would go a long way toward disabusing citizens of the notion that judges and by extension, justice, can be bought.

Endnotes

1 High court candidates from 2000 to 2009 spent $210,859,178, which amounts to 2.6 times more than the $82,460,441 spent from 1990 to 1999. See: "National Overview Map, Total Dollars for all High Court Candidates," available at http://www.followthemoney.org/database/nationalview.phtml?l=0&f=J&y=2012&abbr=0 (last accessed November 9, 2012).

2 Justice at Stake Campaign, "Judicial Election TV Spending Sets New Record, Yet Voters Reject Campaigns to Politicize Judiciary," Press release, November 7, 2012, available at http://www.justiceatstake.org/state/judicial_elections_2012/election-2012-news-releases/?judicial_election_tv_spending_sets_new_record_yet_voters_reject_campaigns_to_politicize_judiciary&show=news&newsID=15337.

3 The American Bar Association Model Code of Judicial Conduct, Rule 1.2, instructs judges to avoid "impropriety and the appearance of impropriety." The association notes that 28 states use Rule 1.2 or something similar. See: American Bar Association CPR Policy Implementation Committee, "Comparison of ABA Model Code and State Variations, Rule 1.2: Promoting Confidence in the Judiciary," March 12, 2012, available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1_2.authcheckdam.pdf.

4 Joan Biskupic, "Supreme Court case with the feel of a best seller," *USA Today*, February 16, 2009, available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm. Biskupic discusses a poll where 89 percent of respondents said they "believe the influence of campaign contributions on judges' rulings is a problem." A 2010 poll found that 70 percent of Democrats and Republicans believed campaign donations have a "significant impact" on judges' rulings. See: Justice at Stake, "Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions," Press release, September 8, 2010, available at http://www.justiceatstake.org/newsroom/press_releases.cfm/9810_solid_bipartisan_majorities_believe_judges_influenced_by_campaign_contributions?show=news&newsID=8722.

5 The bill stated its purpose as protecting "voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections … since impartiality is uniquely important to the integrity and credibility of the courts." See: Judicial Campaign Reform Act, 2002 N.C. Adv. Legis. Serv. 158. 2001 N.C. SB 1054

6 In 2002 candidates for the North Carolina supreme court raised around $800,000, and more than half of the money came from lawyers or business interests. Sixty-four percent of the campaign funds in the 2004 race came from the public financing fund. North Carolina Center for Voter Education, "Graphic: How the Public Campaign Fund has reduced the role of private money in elections for the N.C. Supreme Court," 2010, available at http://www.ncjudges.org/jcra/graphic_contributions.html.

7 Craig Jarvis, "More than 2.5 million raised so far by outside groups in state Supreme Court race," *The News & Observer*, October 30, 2012, available at http://www.newsobserver.com/2012/10/30/2450677/more-than-25-million-raised-so.html.

8 Mark Binker, "Will Campaign Contributions Come up in Court Cases?", WRAL.com, November 14, 2012, available at http://www.wral.com/will-campaign-contributions-come-up-in-court-cases-/11773709/.

9 Bruce Mildwurf, "Many questions from NC Justices on map records," WRAL.com, July 10, 2012, available at http://www.wral.com/news/state/nccapitol/story/11299460/.

10 *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009).

11 Justice Elliott Maynard recused himself after pictures surfaced of him on vacation with the same coal executive while the appeal was pending. Justice Larry Starcher recused himself "based on his public criticism of [coal executive Don] Blankenship's role in the 2004 elections." Ibid., 2258.

12 Ibid.

13 Ibid., 2265.

14 Ibid., 2267.

15 American Bar Association, "Model Code of Judicial Conduct," Rule 2.11(A)(4).

16 Brennan Center for Justice, Justice at Stake Campaign, "2 Years after Landmark Ethics Case, Courts lag on Campaign-Cash Rules," Press release, June 6, 2011, available at http://www.justiceatstake.org/newsroom/press_releases.cfm/2_years_after_landmark_ethics_case_courts_lag_on_campaigncash_rules?show=news&newsID=10754.

17 *In the Matter of Amendment of the Code of Judicial Conduct's Rules on Recusal*, Nos. 08-16, 08-25, 09-10, and 09-11 (Wis. July 7, 2010), available at http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51874. XX MORE INFO NEEDED

18 Brennan Center for Justice, "Judicial Public Financing in Wisconsin – 2011," April 5, 2011, http://www.brennancenter.org/content/resource/judicial_public_financing_in_wisconsin_2011.

19 *In the Matter of Amendment of the Code of Judicial Conduct's Rules on Recusal*.

20 The League of Women Voters Wisconsin Education Fund, "In re creation of rules for recusal when a party or lawyer made contributions effecting a judicial campaign," Petition to the Supreme Court of Wisconsin, June 2008, available at http://www.wicourts.gov/supreme/docs/0816petition.pdf.

21 *In the Matter of Amendment of the Code of Judicial Conduct's Rules on Recusal*.

22 *Avery v. State Farm*, 216 Ill. 2d 100 (2005).

23 *Hale v. State Farm*, No. 3:12-cv-006600, 3 (S.D.Ill. May 26, 2012), available at http://www.princetonautobody.com/Archive/SF_RICO.pdf. "The investigation, led by a retired FBI Special Agent, uncovered that to gain reversal of the $1.05 billion judgment in the *Avery Action*, State Farm . . . recruited Karmeier, directed his campaign, had developed a vast network of contributors, and funneled as much as $4 million to the campaign. Then, after achieving Karmeier's election, State Farm deliberately concealed all of this from the Illinois Supreme Court while its appeal was pending."

24 Bethany Krajelis, "Class action suit alleges RICO enterprise in *Avery v. State Farm*," *The Madison-St. Clair Record*, September 26, 2012, available at http://madisonrecord.com/news/246926-class-action-suit-alleges-rico-enterprise-in-avery-v-state-farm.

25 *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Circuit*, 5 P.3d 1059 (Nev. 2000).

26 "In August 1998, the underlying action was assigned to Judge Denton. Later that same year, Judge Denton conducted a successful campaign to retain his seat, during which time he received contributions ranging from $ 150.00 to $ 2,000.00 from four casinos involved in or affiliated with the redevelopment project." Ibid., 1061.

27 Ibid., 1062.

28 Michael J. Goodman and William C. Rempel, "In Las Vegas, They're Playing with a Stacked Judicial Deck," *Los Angeles Times*, June 8, 2006, available at http://articles.latimes.com/2006/jun/08/nation/na-vegas8.

29 "In the Matter of the Amendment of the Nevada Code of Judicial Conduct," available at http://www.leg.state.nv.us/courtrules/scr_cjc.html.

30 Ibid.

31 Michigan Judicial Institute, "Judicial Disqualification in Michigan—Revised Edition" (2012), available at http://courts.michigan.gov/education/mji/Publications/Documents/JDQ.pdf.

32 *Pellegrino v. Ampco Sys. Parking*, 789 N.W.2d 777, 789 (2010) (Corrigan, J., dissenting and refusing to participate).

33 Ibid.

34 *Caperton v. Massey Coal*, 1225.

35 Adam Skaggs and Andrew Silver, "Promoting Fair and Impartial Courts through Recusal Reform" (New York: Brennan Center for Justice, 2011), available at http://brennan.3cdn.net/09c926c04c9eed5290_e4m6iv2v0.pdf.

36 2010 Cal. Stat. 686 (2010) (amending Cal. Code Civil Procedure § 170.1)

37 Ala. Code § 12-24-2.

38 Ibid.

39 Ibid.

40 42 U.S.C.S. § 1973c.

41 Peter Hardin, "Court: 'Political Chicken' Game over Alabama Recusal Law," Gavel Grab Blog, July 26, 2011, available at http://www.gavelgrab.org/?p=23098.

42 *Luther v. Strange*, 796 F. Supp. 2d 1314, 1331, n. 7 (2011) (parentheses in original).

43 "National Overview Map, Total Dollars for all High Court Candidates," 2006, available at http://www.followthemoney.org/database/nationalview.phtml?l=0&f=J&y=2006&abbr=1.

44 "High Court Candidates, Alabama 2010," available at http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?f=J&y=2010&s=AL.

45 Charles Raley, "Judicial Independence in the Age of Runaway Campaign Spending: How More Vigilant Court Action and Stronger Recusal Statutes can Reclaim the Perception of an Independent Judiciary," Case W. Res. 62 (2011): p. 175.

46 *Caperton v. A.T. Massey Coal Co*, 2255.

47 Justice at Stake Campaign, "Judicial Election TV Spending Sets New Record, Yet Voters Reject Campaigns to Politicize Judiciary," Press release, November 7, 2012, available at http://www.justiceatstake.org/state/judicial_elections_2012/election-2012-news-releases/?judicial_election_tv_spending_sets_new_record_yet_voters_reject_campaigns_to_politicize_judiciary&show=news&newsID=15337.

48 *Caperton v. A.T. Massey Coal Co*.

49 *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); Jonathan Backer, "Dysfunction on Display at FEC Oversight Hearing," Brennan Center for Justice, November 4, 2011, available at http://www.brennancenter.org/blog/archives/gridlock_and_dysfunction_on_display_at_fec_oversight_hearing.

50 Biskupic, "Supreme Court case with the feel of a best seller." Biskupic discusses a poll where 89 percent of respondents said they "believe the influence of campaign contributions on judges' rulings is a problem."

Public Financing of Judicial Races Can Give Small Donors a Decisive Role

Originally published: December 12, 2012

Summary

Public financing programs can drastically limit the opportunity for litigants and special interests to influence the law through campaign contributions. In most public financing systems, candidates must qualify for public funds by raising a certain amount of small contributions. The participating candidates must agree to spending limits and pledge to forgo private funds. North Carolina's public financing program has been held out as a model for other states, but this year's election saw the system overwhelmed by independent spending. The state's options for regulating campaign finance were sharply limited by recent U.S. Supreme Court cases.

While the U.S. Supreme Court has ruled traditional "matching funds" unconstitutional, some states are considering "small donor matching" programs in which public funds "multiply" the impact of small donors. New York City's public financing system gives participating municipal candidates six dollars in matching funds for each dollar of the first $175 donated to a campaign. Thus, a $175 donation becomes a $1,225 donation. The system has made small donors much more important relative to large donors. Municipal candidates receive most of their donations from middle-class and working-class donors who are matched by public funds. The system has made the pool of campaign donors more diverse and more representative of the city's population.

A system of small donor matching funds offers candidates the flexibility they need, given the unpredictable cost of judicial campaigns. Moreover, small donor matching can give challengers a better chance at defeating incumbents. Most importantly, judges would be beholden to ordinary citizens making small donations, not corporations and lawyers that have tons of money to donate. This would be an important step toward a justice system that works for all citizens, not just those with money to spend influencing the law.

Introduction

The 2012 elections saw spending records shattered as the unlimited campaign cash unleashed by *Citizens United* and other federal court cases funded billions of dollars in independent expenditures.[1] Candidates in state supreme court races across the country spent a record $27.8 million for television advertising, and more than half of this money came in the form of independent expenditures, according to Justice at Stake and the Brennan Center for Justice—two groups that track money in judicial elections.[2] Spending on judicial races exceeded $1 million in 10 states.[3] This money, as usual, came from corporations, lawyers, and others with a stake in cases before these courts. Judicial campaign contributions often give rise to conflicts of interest when judges rule on cases involving their campaign donors.

Public financing programs can drastically limit the opportunity for lawyers, corporations, or others to influence the law through campaign contributions. In most public financing systems, candidates must qualify for public subsidies by raising a certain amount of small contributions.[4] The participating candidates must agree to certain conditions, such as spending limits and pledging to forgo private funds.[5] North Carolina, for example, has a public financing system in which appellate court candidates must raise roughly between $40,000 and $80,000 in small contributions to qualify for public funds.[6] Participating candidates receive more than $200,000 in public financing, but they can only spend that sum and the qualifying contributions on their campaigns.[7] New Mexico instituted a similar system for statewide judicial races in 2007.[8]

North Carolina's program has been held out as a model for other states considering reforms to keep special interest money out of judicial campaigns, but this year's election saw the system overwhelmed by independent spending as the state's options for regulating campaign finance were sharply limited by recent U.S. Supreme Court cases.

Like New Mexico and other states,[9] North Carolina offered publicly financed candidates "matching funds" whenever their opponents and the groups supporting their opponents spent more than the amount available through the public subsidy. This matching funds system, however, was ruled unconstitutional under a 2011 U.S. Supreme Court case, which held that distributing funds to publicly financed candidates in response to an opponent's spending is effectively a "penalty" for the opponent's political speech.[10]

While the traditional form of "matching funds" is now unconstitutional, some jurisdictions have implemented "small-donor matching" systems in which public funds are used to "multiply" the impact of small donors. If a state offers five-to-one matching funds for small donations, for example, a $200 contribution becomes a $1,000 contribution. These systems have not yet been implemented for judicial campaigns. But if these systems were put in place, small-donor matching could help states shore up public confidence in judicial integrity and drastically change the pool of campaign funds on which judicial candidates rely, while also providing candidates the flexibility needed to respond to unlimited independent spending.

Small-donor matching could help states shore up public confidence in judicial integrity and drastically change the pool of campaign funds on which judicial candidates rely, while also providing candidates the flexibility needed to respond to unlimited independent spending.

Given the explosive growth in judicial campaign cash, states should act quickly to implement viable public financing programs that do not violate U.S. Supreme Court precedents. Recent polls suggest that the vast majority of citizens believe that campaign contributions affect judicial rulings.[11] A 2011 poll from Justice at Stake, a nonpartisan campaign to keep courts fair and impartial, found that "94 percent of North Carolina voters believe campaign contributions have some sway on a judge's decision."[12] The millions spent in the 2012 race for the North Carolina Supreme Court is unlikely to assuage these concerns.

Several organizations spent around $2.5 million to help conservative Justice Paul Newby win re-election. Much of this money came from corporate interests like the North Carolina Chamber of Commerce and two tobacco companies that benefited from a 2009 ruling[13] authored by Newby.[14] The largest donation, by far, was nearly $1.2 million from the Republican State Leadership Committee, which helped the Republican-led North Carolina state legislature draft its recent redistricting map.[15] Those maps are being challenged in a lawsuit by civil rights groups alleging that the drafters used race as a proxy for political party and disenfranchised minority voters.[16] Under judicial ethics rules, Justice Newby will have to decide whether he "should disqualify himself" because his "impartiality may reasonably be questioned."[17] While this case was pending before the North Carolina Supreme Court, the Republican State Leadership Committee contributed about half of the millions of dollars spent to re-elect Justice Newby and keep a 4-3 conservative majority on the court.

This type of conflict of interest is exactly what North Carolina was hoping to avoid a decade ago, when it began offering public financing to appellate court candidates. A 2002 statute established a public financing system for judicial campaigns to prevent special interests from influencing the law.[18] As the state was debating the issue, Judge James Wynn of the North Carolina Court of Appeals said the

existing system allowed those with an interest in pending cases too much influence. Judge Wynn said it was "like letting major league baseball players contribute money to influence the selection of umpires to call their games."[19]

The effort was a resounding success in keeping special interests from influencing the composition of the court and its decisions. In 2002 candidates for the state supreme court raised around $800,000, with more than half of this money coming from lawyers or business interests.[20] In the 2008 race, by contrast, candidates raised almost $700,000, and 72 percent of that came from the public financing program.[21]

This year's election, however, saw independent spending from special interests outside the state overwhelming North Carolina's public financing system. The U.S. Supreme Court, in cases like *Citizens United*, has struck down restrictions on independent spending and made it easier for those with money to use their resources to influence elections. Entities with an interest in cases before the North Carolina Supreme Court spent $2 million in 2012 to elect their preferred judge. Justice Newby's opponent lost, having been massively outspent by the independent groups supporting the incumbent. The challenger would have qualified for matching funds if a recent U.S. Supreme Court case had not made those funds unavailable.[22]

Constitutional limits on public finance

In a landmark 1976 campaign finance case, *Buckley v. Valeo*, the U.S. Supreme Court upheld a public financing system for presidential candidates. The *Buckley* Court reviewed a federal statute that instituted broad reforms of federal campaigns in the wake of the Watergate scandal, asking whether the reforms violate the First Amendment.[23] The federal public financing system was upheld by the Court as a means of furthering, not abridging, political speech. The Court said that Congress, in establishing this system, sought to "facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people."[24]

In a 2011 case, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the U.S. Supreme Court cast many public financing systems into doubt by ruling that traditional matching funds are unconstitutional.[25] The *Bennett* case concerned an Arizona public financing program for statewide candidates—not including judicial candidates—who agree to certain spending and contribution limits. Participating candidates were eligible for traditional matching funds.[26] For every dollar the pri-

vately financed campaign spent above the amount of public financing, the state gave a dollar to the publicly financed candidate.[27]

In an opinion by Chief Justice John Roberts, a five-justice majority described the matching funds as a "penalty" on privately financed candidates who spend above a certain amount on political speech.[28] "The direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival."[29] The Court ruled that this "penalty" on speech violates the First Amendment rights of privately financed candidates.

Arizona argued the funds were necessary to combat corruption and the appearance of corruption through its public financing system, but the Court claimed the real goal of the matching funds was to "level the playing field" in political races.[30] The Court stated, "The *First Amendment* embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas—not whatever the State may view as fair."[31]

Justice Elena Kagan wrote a stinging dissent describing the matching funds as a "view-point-neutral" government subsidy for speech, which the Court had never before held unconstitutional. Justice Kagan argued the matching funds program results in more speech, not less speech, since it provides more money for campaigning.[32] The majority responded that any increase in speech comes "at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups."[33]

After the ruling in *Bennett*, some states repealed their matching funds provisions, and federal courts struck down others.[34] Yet, as Justice Kagan noted in her dissent, public financing systems must be flexible because "the dynamic nature of our electoral system makes *ex ante* predictions about campaign expenditures almost impossible."[35] This is especially true in judicial elections. Without matching funds, how can public financing keep pace with the unpredictable, skyrocketing costs of judicial campaigns? Some states and localities are experimenting with a promising new system of small-donor matching funds, a new form of public financing that provides candidates flexibility and vastly expands the pool of campaign donors to include ordinary citizens.

Empowering small donors by "multiplying" their contributions

In the wake of *Bennett*, some states are looking to New York City's public financing system as a model. The city gives participating municipal candidates $6 in matching funds for each $1 of the first $175 that a city resident donates to a campaign.[36] These funds multiply the impact of small donations. A $175 donation, for example, becomes a $1,225 donation. New York City's system has had great success in making small donors much more important relative to large donors in campaign fundraising.[37] Instead of relying solely on wealthy campaign contributors, candidates receive most of their private campaign donations from middle-class and working-class donors who are matched by public funds.

The city's Campaign Finance Board reports, "The most common individual contribution size for candidates participating in the Campaign Finance Program for the 2009 election was $100," compared to state-level campaigns, in which more than half of the contributions were $5,000 or more.[38] The city's 2009 election saw organizations like political action committees, or PACs; corporations; or unions contributing only 6.8 percent of campaign cash, compared to 65.1 percent in state-level elections.[39]

According to a recent study by the Campaign Finance Institute, the "percentage role of small donors was higher in every [New York City] election after 2000."[40] The Campaign Finance Institute found that the system made the pool of campaign donors more diverse and more representative of the city's population. Nearly all of New York City's "census block groups" were home to at least one small donor, and the blocks where citizens gave small donations had "higher levels of poverty, higher percentages of non-whites, higher percentages of adult residents who did not complete high school," and so forth.[41]

Advocates for campaign finance reform argue that this system has allowed candidates "to fuse their fundraising efforts with voter outreach, and has incentivized political engagement by communities that can only afford modest contributions–communities all too often ignored by traditionally funded candidates."[42] The system has given rise to "house parties"—small political gatherings where ordinary citizens can learn about candidates and make small contributions.[43]

The state of New York, among others, is considering a small-donor matching system for statewide elections,[44] and some major cities have already adopted similar systems.[45] Several states match small contributions on a dollar-for-dollar

basis,[46] but this does not have the same dramatic effect on campaign finance as "multiplier" matching funds. A few states, including Rhode Island and New Jersey, provide two-for-one matching for certain candidates who agree to lower contribution limits and other conditions.[47] A bill was recently introduced in the U.S. House of Representatives to implement a system like the one in New York City for federal elections.[48]

Small-donor matching for judicial races

Because campaign cash is particularly problematic in judicial races, these small-donor matching programs could be useful in states that elect their judges. Legislators might accept contributions from corporations or industries affected by legislation, but unlike judges, a legislator's vote on a single bill will rarely impact just one campaign contributor. Judges, on the other hand, make decisions that affect specific individuals and corporations. This means that whenever an attorney or a party before a court contributes to a judge's campaign, there is a more harmful conflict of interest than the type seen in the political branches of government. The surge in judicial campaign cash has led citizens to believe that judges are more responsive to campaign contributors than to the law.[49]

The U.S. Supreme Court recognized the unique interests at stake in judicial campaigns in a 2009 case involving an extreme conflict of interest stemming from the 2004 election for the West Virginia Supreme Court. Justice Brent Benjamin won a seat on the state's high court after benefiting from $3 million in independent spending funded by the chief executive officer of Massey Coal, which had a $50 million verdict against it pending before the court.[50] These donations amounted to three times the amount raised by the campaign itself. After Justice Benjamin won by fewer than 50,000 votes, he cast the deciding vote to overturn the $50 million verdict against Massey Coal. The U.S. Supreme Court ruled that the plaintiff's due process rights were violated by Justice Benjamin's refusal to recuse himself after he received "extraordinary" political support from the coal company.[51] The Court said, "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when … a man chooses the judge in his own cause."[52]

The state of West Virginia, in the wake of the scandal, created a pilot public financing program for the 2012 state supreme court election. The legislature said the program would "protect the impartiality and integrity of the judiciary and strengthen public confidence in the judiciary."[53] The system included "matching funds," but the state

refused to disburse the money because of the ruling in *Bennett*.[54] The West Virginia Supreme Court agreed with the state, but it permitted the publicly financed candidate to raise money outside of the public financing program.[55] If it wishes to implement the public financing program for all high court candidates, West Virginia will have to replace the matching-funds provision with something that will keep public financing viable but pass constitutional muster.

A system of small-donor matching funds fits that description. It provides publicly financed candidates the flexibility they need given the unpredictable cost of judicial campaigns. Because these funds are not disbursed in reaction to an opponent's expenditures, they cannot be construed as a "penalty" for speech like the matching funds at issue in *Bennett*.

In a state such as West Virginia, where only a few women and African Americans have ever served on the high court, small-donor matching can also make the bench more diverse and more representative of the state's population. Some studies have found that potential candidates who are female or members of a racial minority face high hurdles in deciding whether to run for office.[56] These potential candidates often lack access to established fundraising networks.

When candidates rely on existing fundraising networks, they are looking to a very small sliver of the population. The Center for Responsive Politics reports that in 2012 a mere 0.37 percent of the population was responsible for two-thirds of all federal campaign contributions of more than $200, and two-thirds of those contributions came from men.[57] The Associated Press surveyed the same contributions at the presidential level and concluded that "more than 90 percent came from majority white neighborhoods."[58] Because donors are disproportionately white and male, women and racial minorities may not feel as confident in their chances of raising enough money to compete.

Furthermore, incumbents almost always have a fundraising advantage over their challengers,[59] and women and minorities are much less likely to be incumbents than white men. A 2009 study found that just 12.8 percent of state supreme court justices belong to a racial minority group, and only 31.9 percent are women.[60] A recent study found that female candidates are more likely than male candidates to take advantage of public financing.[61] By vastly broadening the base of potential contributors, small-donor matching can make courts more diverse and give challengers a better chance at defeating incumbents.

Restoring the public's confidence in the judiciary

Many judges have recognized the toll that politicization exacts on the public's view of the courts and have joined in calls for reform. Justice James Nelson of the Montana Supreme Court laments the time that judges are forced to devote to politics and fundraising. During his last judicial race, Justice Nelson said he had little time to devote to the actual job of deciding cases. Instead, he said, "I became a full time politician for ten months."[62] Citizens do not want the schedule of judges to resemble those of members of Congress, who now spend more time communicating with fundraisers and campaign donors than deliberating policy choices.[63]

In Wisconsin the public's perception of the state supreme court has been damaged by nasty attack ads funded by millions of dollars in independent spending. A July 2011 poll of Wisconsinites found that only 33 percent of respondents had confidence in their state supreme court, with 88 percent reporting concerns that "campaign spending and the deteriorating tenor of judicial elections are tarnishing the reputation of the Wisconsin Supreme Court."[64]

In 2007 the court asked the legislature to provide adequate public financing for high court races, warning that "the public may inaccurately perceive a justice as beholden to individuals or groups that contribute to his or her campaign."[65] The legislature complied in 2009, and both candidates received public financing for the 2011 Wisconsin Supreme Court race. The public financing system, however, was overwhelmed by more than $3.5 million in independent spending.[66] Conservative Justice David Prosser was supported by millions of dollars from big business groups. Nearly half of the money supporting Justice Prosser came from Citizens for a Strong America, a shadowy organization affiliated with Americans for Prosperity—the political advocacy group founded by billionaire brothers Charles and David Koch.[67]

Why might the Koch brothers have an interest in helping the court's conservative, pro-corporate majority stay in power? The 4-3 majority emerged as a result of the 2009 election, after which the four pro-corporate justices voted to reject a widow's lawsuit against a company whose asbestos-laden products may have killed her husband.[68] In 2005 Koch Industries purchased the huge paper and building products manufacturer Georgia-Pacific—the target of more than 340,000 asbestos lawsuits from employees and others who developed cancer or lung disease.[69] In buying

A 2009 study found that just 12.8 percent of state supreme court justices belong to a racial minority group, and only 31.9 percent are women. By vastly broadening the base of potential contributors, small-donor matching can make courts more diverse and give challengers a better chance at defeating incumbents.

Campaign cash has allowed special interests to shape the law by influencing the composition of the Wisconsin high court, and this has damaged Wisconsin citizens' confidence in judicial impartiality.

Georgia-Pacific, Koch Industries assumed these liabilities, and thus, it has an interest in how the law of asbestos liability develops.

Campaign cash has allowed special interests to shape the law by influencing the composition of the Wisconsin high court, and this has damaged Wisconsin citizens' confidence in judicial impartiality. Justice Ann Walsh Bradley said the high court is caught "in the crossfire of the battle being fought between special interest groups," and she says the money from these groups has led to "hyper-partisanship" on the bench.[70] Justice Prosser referred to one of his colleagues as a "total bitch" and is accused of putting Justice Bradley in a "chokehold."[71] The court has been bitterly divided over these and other ethical issues.

After it was overwhelmed in the 2011 elections, Wisconsin's judicial public financing system was repealed by the Republican-led state legislature.[72] But a system of small-donor matching funds could reduce the opportunities for special interests to influence the law and restore Wisconsinites' confidence in their judiciary. Wisconsin advocates of campaign finance reform have proposed a statewide public financing system that matches a donation of $50 or less with four-for-one matching funds (three-for-one for donations between $50 and $100).[73]

If such a system were implemented, the conflicts of interest created by large campaign contributions from litigants or attorneys would be minimized as judicial candidates funded their campaigns through small donations from their middle- and working-class constituents. These small donations would be amplified by public financing and in turn, citizens would perceive judges as beholden to small donors and voters, not wealthy campaign contributors.

Conclusion

The amount of money in judicial elections has exploded, and now that special interests are increasingly using independent spending to circumvent contribution limits, this trend shows no signs of slowing. Citizens are therefore justified in asking whether a judge might be influenced by millions of dollars in campaign cash.

States should step in to curb the growing influence of campaign cash on judges by implementing robust public financing programs. Before the 2012 election in North Carolina saw a torrent of independent spending, the state's public financing system was a model. Without traditional matching funds, however, the publicly

financed challenger could not contend with the millions in independent spending on behalf of the incumbent justice.

States that offer public financing must contend with the reality of unlimited independent expenditures.[74] Even before it ruled traditional matching funds unconstitutional, the U.S. Supreme Court had begun weakening restrictions on campaign finance.[75] Public financing programs for judicial races must provide some mechanism that allows participating candidates to keep pace with independent spending.

One promising option is small-donor matching funds that provide the flexibility needed to keep judicial public financing systems viable in this era of skyrocketing campaign costs. If a privately financed candidate benefits from millions in campaign cash or millions in independent spending, the publicly financed candidate can seek out more small donors to keep pace. The system would also avoid the First Amendment problems created by traditional matching fund systems. The disbursal of small-donor matching funds is not related in any way to the campaign funds of privately financed candidates, so it cannot be construed as "punishing" political speech.

Effective public financing systems for judicial races would permit judges to spend more time deliberating cases and writing opinions, rather than devoting their energy to fundraising. Small-donor matching systems would also lead to courts that are more diverse—courts that more closely resemble the populations they serve.

As with existing public financing systems, some candidates may choose not to participate. But if the terms of small-donor matching were as generous as New York City's program—$6 for every $1 in small donations—the candidates who do not participate would be leaving money on the table.

Some have pointed to the successful candidacies of New York Mayor Michael Bloomberg, who spent hundreds of millions of dollars of his own money in his campaigns, as evidence that the city's system does not keep money out of elections.[76] Likewise, the sole publicly financed candidate in West Virginia faced a self-financed candidate who spent a million dollars of her own money.[77] A wealthy candidate using her or his own money, however, does not give rise to any conflict of interest. A judge cannot participate in a corrupt transaction with him or herself.

Rather than being responsive to corporations and lawyers that have tons of money to donate, judges would be beholden to ordinary citizens making small donations. This would be an important step toward a justice system that works for all citizens, not just those with money to spend influencing the law.

Public financing, moreover, can help candidates stay competitive in races against self-financed candidates. One candidate who faced Mayor Bloomberg stated, "It is irrational to argue against a system that enables a diverse group of people to run competitive campaigns because a wealthy candidate can occasionally outspend a participating candidate."[78]

Public financing systems based on small-donor matching would magnify the impact of small donations, making the pool of campaign contributors broader and more representative of a state's population. Rather than being responsive to corporations and lawyers that have tons of money to donate, judges would be beholden to ordinary citizens making small donations. This would be an important step toward a justice system that works for all citizens, not just those with money to spend influencing the law.

Endnotes

1 *Citizens United v. FEC*, 558 U.S. 310 (2010). The Supreme Court ruled unconstitutional a ban on certain independent political spending by corporations and unions, reasoning that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *SpeechNOW.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). The D.C. Circuit Court of Appeals ruled unconstitutional limits on contributions to organizations making independent expenditures, based on *Citizens United*.

2 Justice at Stake Campaign and Brennan Center for Justice, "Judicial Election TV Spending Sets New Record, Yet Voters Reject Campaigns to Politicize Judiciary," Press release, November 7, 2012, available at http://www.justiceatstake.org/state/judicial_elections_2012/election-2012-news-releases/?judicial_election_tv_spending_sets_new_record_yet_voters_reject_campaigns_to_politicize_judiciary&show=news&newsID=15337.

3 Ibid.

4 Maine, for example, requires candidates to announce their intention to participate in its "Clean Elections" program and to raise a certain number of $5 contributions to qualify for public subsidies. Me. Rev. Stat. Ann. 21-A § 1125. To qualify in Arizona, candidates for the state legislature must collect 200 $5 contributions, and gubernatorial candidates must collect 4,000 $5 contributions. A.R.S. §§ 16-946, 16-950 (2012).

5 See: M.R.S. 21-A § 1125(6) (2012). "After certification, a candidate must limit the candidate's campaign expenditures and obligations, including outstanding obligations, to the revenues distributed to the candidate from the fund and may not accept any contributions unless specifically authorized by the commission." A.R.S. § 16-947 (2012). The Arizona law requires that publicly financed candidates agree that they "will not accept private contributions."

6 North Carolina law defines the minimum qualifying contributions as an amount of small donations (less than $500) from at least 350 voters that add up to at least 30 times the filing fee for running for the office. N.C. Gen. Stat. § 163-278.62 & 64. The maximum for qualifying contributions equals 60 times the filing fee. N.C. Gen. Stat. § 163-278.62. The filing fee for a candidate for associate justice on the North Carolina Supreme Court is currently $1,372. See: "Candidacy Filing Fees," available at http://www.ncsbe.gov/content.aspx?id=64 (last accessed November 2012). The minimum qualifying contributions must therefore equal at least $41,160 but no more than $82,320.

7 N.C. Gen. Stat. § 163-278.64(d)(3).

8 Voter Action Act, 2007 N.M. Laws 2; N.M. Stat. Ann. § 1-19A (2012).

9 N.M. Stat. Ann. § 1-19A-14 (2012).

10 *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011) The Supreme Court ruled unconstitutional a system of "matching" funds distributed to publicly financed candidates in response to their opponents' spending. *N.C. Right to Life PAC v. Leake*, No. 5:11-CV-472-FL (4th Cir. May 18, 2012) The Fourth Circuit overruled a previous case and relied on *Bennett* to strike down North Carolina's matching funds program.

11 A 2010 poll from Justice at Stake found that 71 percent of respondents said they "believe campaign expenditures have a significant impact on courtroom decisions." Justice at Stake, "Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions," Press release, September 8, 2010, available at http://www.justiceatstake.org/newsroom/press_releases.cfm/9810_solid_bipartisan_majorities_believe_judges_influenced_by_campaign_contributions?show=news&newsID=8722. A 2009 Gallup/*USA Today* poll found that 89 percent of respondents said they "believe the influence of campaign contributions on judges' rulings is a problem." Joan Biskupic, "Supreme Court case with the feel of a best seller," *USA Today*, February 16, 2009, available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

12 Justice at Stake and North Carolina Center for Voter Education, "N.C. Voters: Campaign Contributions Influence Court Rulings," Press release, February 22, 2011, available at http://www.justiceatstake.org/newsroom/press_releases.cfm/nc_voters_campaign_contributions_influence_court_rulings?show=news&newsID=10005.

13 *North Carolina v. Phillips Morris USA, Inc.*, No. 2A05-4 (N.C. Nov. 6, 2009) (unpublished decision), available at http://www.aoc.state.nc.us/www/public/sc/opinions/2009/pdf/2-05-4-4.pdf.

14 Sharon McCloskey, "Now playing on your phone: 'Newby Tough but Fair'?," The Progressive Pulse, November 7, 2012, available at http://pulse.ncpolicywatch.org/2012/11/07/now-playing-on-your-phone-newby-tough-but-fair; Chris Kromm, "Justice for Sale? Backers of shadow groups pushing money into NC judicial election may have high stakes in outcome," Facing South, October 30, 2012, available at http://www.southernstudies.org/2012/10/justice-for-sale-shadow-group-pushing-money-into-nc-judicial-election-is-backed-by-interests.

15 Justice for All NC, "48-Hour Notice, North Carolina State Board of Elections," November 5, 2012, available at http://www.app.sboe.state.nc.us/cf_pdf/2012/20121105_121121.pdf.

16 Plaintiff-Appellee's Motion for Recusal of Justice Paul Newby, *Dickson v. Rucho*, No. 11 CVS 16896 (N.C. Nov. 21, 2012), available at https://dl.dropbox.com/u/49063581/Motion%20for%20Recusal%20of%20Justice%20Newby/Plaintiff-Appellees'%20File-Stamped%20Motion%20for%20Recusal%20of%20Justice%20Paul%20Newby.pdf.

17 N.C. Code of Judicial Conduct Canon 3(C)(1). The North Carolina Supreme Court in 2003 weakened its ethics rules by removing language that required judges to avoid conduct that presents "the appearance of impartiality." See: *Lange v. Lange*, 357 N.C. 645, 588 S.E.2d 877 (2003). The North Carolina Supreme Court held in 1951 that if the judge finds that the recusal motion is of "sufficient force" to require findings of fact, the judge should refer the matter to another judge. See: *Ponder v. Davis*, 233 N.C. 699, 65 S.E.2d 356 (1951). If the judge reaches the same decision, the party may file a complaint with the North Carolina Judicial Standards Commission. See: N.C. Gen. Stat. § 7A-376 (2012). Neither the ethics rules nor North Carolina case law specifies campaign contributions as a basis for recusal. The U.S. Supreme Court, however, has recently ruled that a litigant's due process rights were violated by

"extraordinary" political support provided to a judge by the opposing litigant. See: *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

18 Judicial Campaign Reform Act, 2002 N.C. Adv. Legis. Serv. 158, 2001 N.C. SB 1054. The bill's stated purpose is protecting "voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections … since impartiality is uniquely important to the integrity and credibility of the courts."

19 Democracy N.C., "Attorneys Supply 70% of Campaign Money Raised by Candidates for State's Top Court" (2002), available at http://www.democracy-nc.org/downloads/JudicElecAttyReliancePR062002.doc.

20 "Graphic: How the Public Campaign Fund has reduced the role of private money in elections for the N.C. Supreme Court," available at http://www.ncjudges.org/jcra/graphic_contributions.html (last accessed November 2012).

21 "High Court Candidates, North Carolina 2008," available at http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?f=J&y=2008&s=NC.

22 *N.C. Right to Life PAC v. Leake*, No. 5:11-CV-472-FL (4th Cir. May 18, 2012) The Fourth Circuit Court of Appeals relied on *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011) to strike down the state's matching funds.

23 The Court struck down limits on campaign expenditures as unconstitutional, but they upheld limits on contributions, disclosure rules, and the public financing system. *Buckley v. Valeo*, 424 U.S. 1 (1976).

24 Ibid., p. 92-93.

25 *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011).

26 Ibid., p. 2813-14.

27 Ibid., p. 2814-15. Once a publicly financed campaign spent above the threshold, Arizona's system matched 94 percent of the expenditures. The state deducted six percent to account for "fundraising costs."

28 Ibid.

29 Ibid., p. 2821.

30 Ibid., p. 2824-2826.

31 Ibid., p. 2826 (italics in original).

32 Ibid., p. 2833-2836.

33 Ibid., p. 2821.

34 See, for example: *N.C. Right to Life PAC v. Leake*, No. 5:11-CV-472-FL (4th Cir. May 18, 2012) The Fourth Circuit Court of Appeals invalidated North Carolina's matching funds provision. A 2011 statute repealed Maine's matching funds program. An Act Regarding the Matching Funds Provisions of the Maine Clean Election Act, 2011 Me. Laws 558 .

35 *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, p. 2832.

36 New York, N.Y., Administrative Code § 3-701-720, available at http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@SLADC0T3C7+&LIST=LAW+&BROWSER=EXPLORER+&TOKEN=44215594+&TARGET=VIEW.

37 A study from the Campaign Finance Institute says the system has increased "the proportional role of small donors" and increased "the number of people who contribute." Michael Malbin, Peter Brusoe, and Brendan Glavin, "Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States," *Election Law Journal* 11 (1) (2012): p. 4.

38 New York City Campaign Finance Board, "Why do we have public financing of NYC elections?", April 24, 2012, available at http://www.nyccfb.info/PDF/press/WhyPublicFinancing.pdf?sm=press_21f

39 Ibid.

40 Malbin, Brusoe, and Glavin, "Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States," p. 7.

41 Ibid., p. 13. "Of the city's 5,733 census block groups, only 809 (14 percent) had one or more donor-to-candidate pairs of people who gave $1,000 or more to a candidate. Mid-range donor-to-candidate pairs of people who gave $251–$999 to a candidate lived in 1,651 (29 percent) of the census block groups. Donor-to-candidate pairs giving $250 or less lived in 5,267 (92 percent) of the city's block groups. In fact, 5,128 block groups (89 percent) were home to at least one donor-to-candidate pair of $100 or less."

42 Adam Skaggs and Fred Wertheimer, "Empowering Small Donors in Federal Elections," (Washington: Brennan Center for Justice and Democracy 21: 2012), p. 15, available at http://brennan.3cdn.net/b71b1ef6391b3a4813_5jm6bwz6j.pdf.

43 Ibid., p. 21.

44 Jimmy Vielkind, "Cuomo Turns to Campaign Finance," *Albany Times-Union*, July 11, 2012, available at http://www.timesunion.com/local/article/Cuomo-turns-to-campaign-finance-3697696.php.

45 See Los Angeles, Cal., Municipal Code § 49.7; San Francisco, Cal., Campaign & Governmental Conduct Code § 1.144.

46 See, for example: Mass. Gen. Laws ch. 55C (2012); Haw. Rev. Stat. § 11-429 (2012).

47 N.J. Stat. Ann. § 19:44A-33 (2012). The state offers public matching funds for contributions up to $1,500. R.I. Gen. Laws § 17-25-19 (2012). The state offers matching public funds for contributions less than $500.

48 Empowering Citizens Act, H.R. 6448, 112th Cong. (introduced in House of Representatives, September 20, 2012).

49 A 2009 Gallup/*USA Today* poll found that 89 percent of respondents said they "believe the influence of campaign contributions on judges' rulings is a problem." Joan Biskupic, "Supreme Court case with the feel of a best seller."

50 *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

51 Ibid.

52 Ibid., p. 2265.

53 W. Va. Code § 3-12-2(9) (2012).

54 *State ex rel. Loughry v. Tennant*, 732 S.E.2d 507 (W.V. 2012).

55 Ibid.

56 A 2003 study concluded, "At the entry level, gender matters, suggesting that there are some specific barriers that apply more to women than to men." Timothy Werner and Kenneth R. Mayer, "Public Election Funding, Competition, and Candidate Gender" *PS: Political Science & Politics* 40 (4) (2003): 661–667, available at http://www.apsanet.org/imgtest/psoct07wernermayer.pdf.

57 "2012 Overview: Donor Demographics," Opensecrets.org, available at http://www.opensecrets.org/overview/donordemographics.php.

58 Jack Gillum and Luis Alonso Lugo, "Minorities donating little to presidential races," *Associated Press*, November 3, 2012, available at http://bigstory.ap.org/article/minorities-donating-little-presidential-races.

59 "2012 Overview: Incumbent Advantage," Opensecrets.org, available at http://www.opensecrets.org/overview/incumbs.php.

60 Gregory Acquaviva and John Castiglione, "Judicial Diversity on State Supreme Courts," *Seton Hall Law Review* 39 (4) (2009): 1203–1261.

61 Timothy Werner, Kenneth R. Mayer, "Public Election Funding, Competition, and Candidate Gender."

62 Ian Milhiser, "Montana Justice Explains How Judicial Elections Distract Judges From Their Jobs for Months At A Time," ThinkProgress, August 17, 2012, available at http://thinkprogress.org/justice/2012/08/17/701641/montana-justice-explains-how-judicial-elections-distract-judges-from-their-jobs-for-months-at-a-time/.

63 Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (New York: Twelve 2011) p. 138-142.

64 Justice at Stake, "Confidence in Wisconsin Supreme Court Plunges," Press release, July 21, 2011, available at http://www.justiceatstake.org/newsroom/press_releases.cfm/new_poll_confidence_in_wisconsin_supreme_court_plunges?show=news&newsID=11188.

65 Wisconsin Supreme Court, "Supreme Court unanimously backs realistic, meaningful public campaign financing for Supreme Court Justices," December 10, 2007, available at http://www.wicourts.gov/news/archives/view.jsp?id=60.

66 "Judicial Public Financing in Wisconsin — 2011," April 5, 2011, available at http://www.brennancenter.org/content/resource/judicial_public_financing_in_wisconsin_2011/. A Wisconsin reform group has an even higher estimate, $4.5 million in outside spending. "Smear Groups, Candidates Spent $5.4 Million On Supreme Court Race," April 19, 2011, available at http://www.wisdc.org/pr041911.php.

67 Viveca Novak, "Under the Influence," *The American Prospect*, September 19, 2011, available at http://prospect.org/article/under-influence; Lisa Graves, "Group Called 'Citizens for Strong America' Operates out of a UPS Mail Drop but Runs Expensive Ads in Supreme Court Race?", PR Watch, Center for Media and Democracy, April 2, 2011, available at http://www.prwatch.org/news/2011/04/10534/group-called-citizens-strong-america-operates-out-ups-mail-drop-runs-expensive-ad.

68 *Tatera v. FMC Corp.*, 786 N.W.2d 810 (2010).

69 John Aloysius Farrell, "Koch's web of influence," Center for Public Integrity, April 6, 2011, http://www.publicintegrity.org/2011/04/06/3936/kochs-web-influence.

70 Justice Ann Walsh Bradley, remarks at American Constitution Society Annual Convention, June 16, 2012.

71 Ian Millhiser, "Conservative Justice Prosser Suggests He Merely Breached 'Etiquette' When He Allegedly Choked a Colleague," ThinkProgress, May 1, 2012, available at http://thinkprogress.org/justice/2012/05/01/474656/conservative-justice-prosser-claims-he-merely-breachedetiquette-when-he-allegedly-choked-a-colleague; Patrick Marley, "Supreme Court tensions boil over," *Milwaukee Journal-Sentinel*, March 19, 2011, available at http://www.jsonline.com/news/statepolitics/118310479.html.

72 Peter Hardin, "WI Budget Axes Public Financing Dollars," Gavel Grab, June 27, 2011, available at http://www.gavelgrab.org/?p=22032.

73 Wisconsin Democracy Campaign, "Ending Wealthfare As We Know It: A reform to stop legal bribery in Wisconsin" (2011), available at http://www.wisdc.org/endingwealthfare.php.

74 In the 2012 election, independent spending exceeded the expenditures by candidates. Justice at Stake Campaign and Brennan Center for Justice, "Judicial Election TV Spending Sets New Record, Yet Voters Reject Campaigns to Politicize Judiciary."

75 *Citizens United v. FEC; Davis v. FEC*, 554 U.S. 724 (2008) The Supreme Court ruled unconstitutional the "Millionaire's Amendment" to the Bipartisan Campaign Finance Reform Act, which restricted a self-financed candidate's expenditures.

76 Angela Migally and Susan Liss, "Small Donor Matching Funds: The NYC Election Experience" (New York: Brennan Center for Justice, 2010), p. 22, available at http://brennan.3cdn.net/8116be236784cc923f_iam6benvw.pdf.

77 Ry Rivard, "Democrat Davis retains seat on high court, Republican Loughry also wins," *Charleston Daily Mail*, November 7, 2012, available at http://www.dailymail.com/News/statenews/201211070018.

78 Migally and Liss, "Small Donor Matching Funds: The NYC Election Experience," p. 22.

About the author

Billy Corriher is the Associate Director of Research for Legal Progress at the Center for American Progress, where his work focuses on state courts and the influence of political contributions on judges. Corriher joined CAP after serving as a weekly blogger for the *Harvard Law & Policy Review* blog, Notice and Comment, with a focus on federal appellate court cases and other legal/policy matters. He has also written op-eds and blog posts for the American Constitution Society and the Bill of Rights Defense Committee. Corriher received his bachelor's degree in political science from the University of North Carolina, Chapel Hill. He received a law degree and master's in business from Georgia State University, graduating with honors in 2009. He is a member of the State Bar of Georgia.

Acknowledgements

The author would like to thank his colleagues, Andrew Blotky, April Carson, and Carl Chancellor, for their helpful comments and suggestions. The author would also like to thank the communication staff for publicizing these reports, the copy editors who proofread them, and the Art team that designed the graphics accompanying the reports. Ellie Sandemeyer assisted with compiling the data in the Appendices.

The Center for American Progress is a nonpartisan research and educational institute dedicated to promoting a strong, just, and free America that ensures opportunity for all. We believe that Americans are bound together by a common commitment to these values and we aspire to ensure that our national policies reflect these values. We work to find progressive and pragmatic solutions to significant domestic and international problems and develop policy proposals that foster a government that is "of the people, by the people, and for the people."

Center for American Progress

1333 H STREET, NW, 10TH FLOOR, WASHINGTON, DC 20005 • TEL: 202-682-1611 • FAX: 202-682-1867 • WWW.AMERICANPROGRESS.ORG