



Fixing Wisconsin's Dysfunctional Supreme Court Elections

A Single, 16-Year Term Could Minimize the Influence of Campaign Cash

Billy Corriher July 2013

Introduction and summary

Judicial elections have changed dramatically in the past two decades as the amount of money spent to elect judges has skyrocketed.¹ Special interests and political parties have poured money into supporting their favored candidates for state supreme courts. In recent years the Wisconsin Supreme Court has offered perhaps the most dramatic illustration of what happens with courts suffering from too much politics.

In our system of government, judges interpret and apply laws to situations involving two or more parties. State supreme court justices are the final interpreters of state constitutions, which means that the judiciary is responsible for holding state legislatures and governors accountable if they violate state constitutions. In the Federalist Papers, Alexander Hamilton explained that judicial independence is crucial to ensuring that legislators do not enact laws that are popular but unconstitutional.² If the judiciary is subject to the same political pressures as legislators, however, then it cannot serve its vital role as a check on the political branches of government.

Elections also offer the opportunity for litigants and attorneys to influence the judges hearing their cases through campaign contributions or independent spending in judicial campaigns. The resulting conflicts of interest can be more harmful than attempts to curry favors with legislators because the decisions of judges, unlike those of legislators, can impact a single individual or corporation.

These concerns have become more urgent in Wisconsin, where the amount of money spent in high court elections has risen sharply in recent years, starting with a \$3 million race in 2007.³ In the 2008 and 2009 high court races, candidates raised around \$1.7 million and more than \$800,000, respectively.⁴ Independent spending, however, far exceeded the direct campaign contributions in both elections.

Fair-courts advocates estimate that one independent spender, Wisconsin Manufacturers & Commerce, the state's chapter of the U.S. Chamber of Commerce, spent more than \$2 million in high court races in 2007 and 2008.⁵ The group criticized the court for some of its rulings in product liability and personal-

injury cases.⁶ In the 2008 race, 90 percent of the money spent on ads came in the form of independent spending that was ostensibly unaffiliated with the candidates, and these independently funded ads were overwhelmingly negative.⁷

Independent spending grew even more in 2011, with at least \$3.5 million spent on television ads.⁸ The re-election campaign of conservative Wisconsin Supreme Court Justice David Prosser was supported by more than \$2 million from conservative groups and big-business groups.⁹ Nearly half of this money came from a secretive group affiliated with Americans for Prosperity, the conservative group backed by billionaires Charles and David Koch¹⁰ that ran misleading attack ads against Justice Prosser's opponent, then-Assistant Attorney General JoAnne Kloppenburg. The election occurred while the court was considering a legal challenge to Gov. Scott Walker's (R-WI) anti-collective bargaining bill, which would have negatively impacted Wisconsin labor unions. Groups affiliated with the labor unions supported Justice Prosser's opponent with more than \$1 million in ad spending.¹¹ One of the groups supporting Kloppenburg, the Greater Wisconsin Committee, ran an ad accusing Justice Prosser of failing to prosecute a priest who sexually abused children when he was a prosecutor in 1978.¹²

These bitter political battles led to a sharply divided bench as consensus became scarce. The schism in the high court grew even wider as the state was torn apart by the fight over Gov. Walker's anti-collective bargaining bill. As the court was deliberating a challenge to the bill, Justice Prosser was accused of choking a fellow jurist.¹³ Justice Prosser also called Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court a "total bitch," adding that he would "destroy" her in a "war."¹⁴

The Wisconsin high court has now split sharply into liberal and conservative factions, even though the office of supreme court justice is ostensibly nonpartisan. Before this politicization, the court enjoyed a record of many unanimous decisions. It has gotten so bad that the court has even stalemated over ethics decisions involving its infighting and the physical altercation involving Justices Prosser and Bradley. A 2011 poll found that only one-third of Wisconsinites had confidence in their high court.¹⁵

The State Bar of Wisconsin appointed a task force to study the problems surrounding Wisconsin's high court elections. On July 1, 2013, the task force proposed a constitutional amendment to elect the justices to a "single, 16-year term" beginning in August.¹⁶ The report argues that such a system would "improve public perception of our judicial system and ... promote collegiality." The proposed constitutional

amendment would prevent anyone from being elected to the high court more than once, but it would allow the current justices to run for another term.¹⁷

The task force argues that limiting justices to one long term would remove political pressure from their jobs. Once on the bench, the justices would never again have to solicit campaign cash or “seek support and approval from individuals and groups with identifiable political perspectives and economic agendas.”¹⁸ An amendment to the state constitution requires approval by two consecutive terms of the legislature, followed by approval by citizens in a referendum.¹⁹

If the amendment wins approval, Wisconsin would become the only state that limits elected justices to a single term, although three states appoint justices for life or until a mandatory retirement age.²⁰ The 16-year term would become the longest term for any elected judge in the country. The only other states with comparable terms are New York, which holds retention elections for its high court judges every 14 years, and West Virginia, which currently has the longest term—12 years—for high court seats filled through contested elections.²¹

This proposal is a big change, and it may seem drastic, but the reputation of Wisconsin’s high court is in tatters. The court has become just another political branch of government—with all of the baggage that politicians bring to their jobs. Special interests spend overwhelming sums of money on political ads for candidates whom they think will rule in their favor. The court now functions like a bitterly divided political body, issuing more divided rulings with clear liberal and conservative factions.

The proposed constitutional amendment could address these problems because the justices would never again have to run for re-election once they are on the bench. Some have raised concerns, however, that spending per election will increase because special interests will have fewer chances to influence the composition of the court. Although this concern merits further study, Wisconsin needs to think big in terms of reforming its judicial elections, and this proposed constitutional amendment could be just what it needs.

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