

JUSTICE FOR SALE

A SPECIAL REPORT FROM THE AMERICAN PROSPECT MAGAZINE



Lambda Legal
making the case for equality

Dēmos

Dear Reader:

A fair and impartial judiciary is one of the fundamental pillars of our democracy. It is the critical third leg in our system of checks and balances. Unfortunately, the judiciary in America increasingly faces powerful, organized threats to its independence. Popular election or re-election of state judges has been abused by far-right interest groups, both social and economic, to intimidate judges or remove them, politicize elections, and undermine the integrity of the judiciary. This recently took place in Iowa after the state supreme court upheld the right of same-sex couples to marry in a case brought by Lambda Legal; well-funded groups opposed to marriage equality successfully targeted for removal three accomplished justices they characterized as “activist.” In addition, the huge increase in campaign spending in judicial elections since 2000 now threatens impartial justice.

At Lambda Legal and Dēmos, we are focusing on the importance of preserving fair and impartial courts so they can continue to perform their intended and essential role in our democracy. Courts uphold the liberties and equality guaranteed by our Constitution, and we rely on them to do that fairly for all of us.

To protect the integrity of the judicial branch, we need to learn more about the interests and actors behind campaigns to bully the bench, and we need more public debate and engagement about these vital issues. We turned to *The American Prospect* to do what it does so well—shine a light on an issue of public importance with comprehensive reporting and sharp analysis. (The information and views expressed in the articles are not necessarily those of Lambda Legal or Dēmos.)

We will continue to advocate for fair and impartial courts, equality, and a vibrant democracy. Contact us if you'd like to help. We hope this special report, “Justice for Sale,” will help to inform greater public discussion and action.

Sincerely,

KEVIN M. CATHCART
EXECUTIVE DIRECTOR, LAMBDA LEGAL

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JUSTICE

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FOR SALE

IN THE LAST DECADE, PRO-BUSINESS
AND EVANGELICAL CHRISTIAN GROUPS HAVE
FLOODED JUDICIAL ELECTIONS WITH CASH—
AND UNDERMINED THE INDEPENDENCE
OF STATE COURTS.





Under the Influence

BY VIVECA NOVAK

Early in 2008, supporters of Wisconsin Justice Louis Butler heard that someone was looking for mug shots of his former clients, the accused criminals whom Butler had represented as a public defender back in the 1980s. Attack ads were brewing against Butler, who hoped to hold his state supreme court seat that April in an election against a well-financed opponent. But one person from that era whom Butler's campaign never expected to see in hostile ads was defendant Reuben Lee Mitchell. Butler had *lost* that case, after all.

Mitchell had been convicted of raping a young girl when Butler was assigned to represent him on appeal. Butler convinced the appellate court in 1987 to order a new trial on the grounds that the jury shouldn't have heard certain evidence.

The prosecution, however, appealed to the state supreme court, where a majority held that though the evidence shouldn't have been admitted, "there is no reasonable possibility that the error contributed to the conviction." Mitchell remained in prison.

Nevertheless, the convict became a TV star in 2008. Butler's opponent, circuit-court judge Michael Gableman, aired an ad claiming Butler "worked to put criminals on the street." In Mitchell's case, "Butler found a loophole," the narrator says in the commercial. "Mitchell went on to molest another child."

The ad artfully misled in two key respects, making it appear that Butler had handled the case as a judge rather than as a defense lawyer—and that as a judge, he had set Mitchell free to rape again. In fact, though, Mitchell committed the second rape after serving his sentence. The capper: The ad paired a mug shot of Mitchell, who is black, with a photo of Butler, the first black justice on Wisconsin's Supreme Court. The racial subtext of the juxtaposition was unmistakable.

The Butler-Gableman contest had it all: bank-

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ART BY JOHN RITTER (SOURCE PHOTOS THIS PAGE: DMITRY SUNAGATOV & SEAN PAVONE / FOTOLIA; PREVIOUS PAGE: TOMISLAV FORGO & KHZ / FOTOLIA)



according to “The New Politics of Judicial Elections 2000–2009: Decade of Change,” a report by the Justice at Stake Campaign, the Brennan Center for Justice, and the National Institute on Money in State Politics. Third-party groups spent about \$39 million in those races, mostly on ads. Conservative and business interests, however, spent more than twice as much as liberal ones (state Democratic parties, plaintiffs’ lawyers, and labor unions): \$26.2 million versus \$11.9 million.

In 2010, candidates raised another \$27 million, and third-party groups spent roughly \$11.4 million, according to Justice at Stake. The rightward tilt of spending by outside groups was even more pronounced last year than in the previous decade. Conservative and business groups spent almost \$8.9 million compared to \$2.5 million spent by the left.

No-holds-barred judicial campaigns certainly occurred before 2000. Millions were spent in 1986 to remove Chief Justice Rose Bird from the California Supreme Court over her votes against the death penalty. One of the earliest strategists on the state-court front was a consultant whose unrelenting methods would become the stuff of legend. In 1988, Karl Rove helped engineer the election of the first Republican chief justice of Texas’s then deeply blue high court by demonizing plaintiffs’ lawyers.

In 1994, Rove was called east. The Business Council of Alabama, irate over a long string of hefty awards against their interests, asked him to help GOP stalwart Perry Hooper unseat Democratic Chief Justice Ernest “Sonny” Hornsby. Rove saw to it that images of “jackpot justice” and fat-cat personal-injury lawyers dominated the campaign. Initially, it appeared that Hooper had lost by 304 votes. But Rove asked for a recount, and Alabamians then experienced the same elements of post-election drama that would play out nationally six years later in *Bush v. Gore*—restraining orders, recount observers, rumors of absentee-vote fraud and ballots cast by corpses, press conferences, and a ruling by the U.S. Supreme Court. Nearly a year later, Hooper was declared the winner by 262 votes.

The intensified push, however, came in this century, when a deep-pocketed national money source—the U.S. Chamber of Commerce—turned its attention to the courts, targeting states where it viewed the plaintiffs’ bar as too influential. According to a 2003 article in *Forbes*, the new initiative was bankrolled by corporate executives like Home Depot co-founder Bernard Marcus and American International Group chair Hank

breaking spending, involvement by national interest groups, a blizzard of misleading attack ads that masked the true interests of the sponsors—all the hallmarks, in other words, of modern American judicial elections, as they occur in some fashion in the 39 states where voters elect or vote to retain judges.

It was emblematic in its result, too. Butler was narrowly defeated, and the Wisconsin Supreme Court flipped from liberal to conservative.

WISCONSIN EPITOMIZES

a broad and destructive trend. Since the turn of this century, business-oriented groups have dedicated big money to loading state supreme courts with judges sympathetic to their cause, installing conservative majorities in state after state. With a nationwide strategic focus, they have won far more than they have lost, and progressives have struggled to match them.

The races are increasingly costly. From 2000 to 2009, state supreme court candidates raised a total of \$207 million nationally, more than double what candidates raised in the prior decade,



GERRYMANDERING

Until last year, prisoners incarcerated in New York state were counted as residents of the prisons’ legislative districts. The result was “prison-based gerrymandering”: The populations of districts with prisons—98 percent of which are disproportionately white—were inflated, while districts with larger Latino and African American populations were undercounted. In August 2010, New York legislators passed a law to end prison-based gerrymandering and count prisoners as residents in their home districts. In May, state Senator Elizabeth Little and other Republicans filed suit to strike down the provision. **Little v. Latfor** is pending before the New York Supreme Court. (Full disclosure: Dēmos, the institutional partner of *The American Prospect*, is among several groups that have filed motions in support of the law.)

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**FROM 2000
TO 2009, STATE
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DECADE.**

Greenberg, who were livid over lawsuits against their companies.

The Chamber raised \$8 million to contest judicial races in 2000, \$20 million in 2001, and \$40 million in 2002, *Forbes* reported. The Chamber won 21 of the 24 judicial races it attempted to influence from 2001 to 2003. Chamber president Tom Donohue declared in a 2002 speech: “Flush with billions of dollars in fees from tobacco and asbestos litigation, a small group of class-action trial lawyers is hell-bent on destroying other industries, and nobody is immune. ... On the political front, we’re going to get involved in key state supreme court and attorney general races as part of our effort to elect pro-legal reform judicial candidates.” Often it did so obliquely. That year the Chamber funded such groups as the American Taxpayers Alliance, which in turn financed efforts in Alabama and Illinois court races, as well as Mississippians for Economic Progress.

In 2004, the Chamber was on the winning side in 12 of the 13 state supreme court races in which it was involved, according to *Roll Call*, including four in Ohio. In 2005, the National Association of Manufacturers followed the Chamber’s lead, creating an offshoot, the American Justice Partnership (AJP), to target state courts. Voluminous cash outlays from AJP have included \$345,000 to Americans Tired of Lawsuit Abuse to help back two Republican candidates for Washington state Supreme Court seats in 2006 and \$1.3 million the same year to the Georgia Safety and Prosperity Coalition, which spent heavily on ads attacking Georgia Chief Justice Carol Hunstein and then melted away just a little more than a year after its appearance.

These figures greatly understate the reality, though. The true extent of spending by the Chamber and the AJP is impossible to know. They and many of the conduit groups through which they funnel money are organized under sections of the tax code that don’t require public disclosure of donors or outlays. Also, in some cases, groups can mask their donors when they run only “issue ads” that don’t explicitly call for someone’s election or defeat, even if their intent is clear.

The business assault on the courts is partly offset by spending by unions, trial lawyers, and in some cases, state Democratic parties. The Alabama Democratic Party, for example, gave lower-court judge Deborah Bell Paseur \$1.6 million, or 61 percent of her funds, in her 2008 bid for the Supreme Court. In that race, an Alabama plaintiffs’ firm, Beasley, Allen, Crow, Methvin, Portis & Miles, used a labyrinthine network of 30 political

action committees to get more than \$600,000 to Paseur. She lost narrowly.

When Democrats and liberals win, it’s often by using the same hardball techniques as business groups. In Michigan, the state Democratic Party spent \$1.2 million to oust Cliff Taylor from the high court, including outlays for a devastating ad that accused him of nodding off during a case involving the deaths of six children.

The amounts spent by each side, though, have been decidedly unequal. The upshot is that if trial lawyers once held sway in certain state courts, those days are long gone. From 2000 on, conservatives gained control of supreme courts in Illinois, Michigan, Mississippi, Ohio, and West Virginia. Few states, though, have had more contentious, money-driven judicial elections in recent years than Wisconsin.

LOUIS BUTLER, THEN

a judge in Milwaukee, mounted his first supreme court campaign in that tipping-point year of 2000. It was a respectful, low-dollar affair on both sides—the national interests, while active in neighboring states, had yet to turn to Wisconsin—and Butler lost decisively. But in 2004, the woman who’d beaten him became a federal judge, and Governor Jim Doyle, a Democrat, picked Butler to fill the supreme court vacancy. He was the first African American on that bench.

One of the early majority opinions Butler wrote was in the 2005 case *Thomas v. Mallett*. The issue was whether several makers of lead paint could be held liable collectively if the injured victim had no way of knowing which one had made the paint. Butler and three other justices said they could, expanding the “risk contribution” theory the court had laid out in an earlier case. Two conservative justices dissented (a third didn’t participate in the decision).

It was just the kind of ruling that had prompted the Chamber of Commerce and others to begin targeting state court races. In the 2007 election pitting Annette Ziegler, a Republican-leaning circuit-court judge, against liberal attorney Linda Clifford for an open seat, business groups went to work. Spending by the two candidates and outside groups that year came to \$5.8 million, a Wisconsin record. A coalition called Wisconsin Manufacturers and Commerce (WMC) spent \$2 million of that. The WMC had been formed years earlier through a merger of the Wisconsin Manufacturers Association, the state Chamber of Commerce, and the Wisconsin Council of Safety. Its funding sources

weren't disclosed, but it was listed as a partner of both the U.S. Chamber of Commerce and the American Justice Partnership.

Ziegler beat Clifford, drawing 58 percent of the vote, and pro-business groups geared up for Butler's face-off with Gableman the next year. The WMC produced a four-page brochure titled "Wisconsin Supreme Court Unbound: An Activist Majority in the Balance." The handout, aimed at business allies, cited a study from the U.S. Chamber of Commerce's Judicial Evaluation Institute that allegedly showed that Butler was the second-worst judge on the court when it came to expanding civil liability. Dumping Butler, the brochure emphasized, could swing the court away from "activists."

However, the WMC's TV ads made no mention of class-action lawsuits, punitive damages, or any of the civil-justice matters big business actually cared about. They were all about crime. One would have thought that Wisconsin was under siege by a gallery of depraved villains, rather than on its way to having its lowest murder rate in 20 years. The WMC refuses to comment about its involvement in any judicial elections.

The WMC was behind one of the most heavily run ads of the campaign, featuring a murder case that had garnered national attention. It centered on whether a defendant's Sixth Amendment right to confront witnesses against him was void when the witness was unavailable—dead, for instance, allegedly by the defendant's own hand.

The witness and the victim in the case were one and the same: Julie Jensen, the 40-year-old wife of Mark Jensen and the mother of the couple's two young boys. She was found dead in December 1998 of poisoning by ethylene glycol, the main ingredient in antifreeze. She'd seen it coming, telling several people she thought Mark was trying to poison her and leaving a handwritten letter with a neighbor, instructing him to give it to the police if she died. Legally, the letter was testimonial evidence, and the defendant had the right to confront its source. That was impossible here, of course.

The trial judge ruled the letter inadmissible. When six justices of the Wisconsin Supreme Court overturned him on the prosecutor's appeal, the letter played a key role in Mark Jensen's conviction. Butler, the single dissenter, argued that the Sixth Amendment applied even though Jensen himself may have caused his wife's unavailability for cross-examination. It wasn't, however, remotely true that Butler "almost jeopardized the prosecution," as the ad claimed. In fact, this circular constitutional quandary was so significant that less than three months after Wisconsin voters had decided



CAMPAIGN FINANCE

In its *Citizens United* decision, the U.S. Supreme Court struck down federal prohibitions on corporate funding of "electioneering communications." One result of the ruling was a flood of challenges in at least 15 states, testing the states' ability to regulate campaign funding. In one such case, Iowa Right to Life filed suit against the state's 2010 campaign-finance law, which prohibits direct corporate contributions to parties and candidates unless a political action committee (PAC) is formed. Iowa's restrictions, the group contends, run counter to both First Amendment protections and the 14th Amendment guarantee of equal protection. Forming a PAC, asserts Iowa Right to Life, "requires burdensome registration, record-keeping, and reporting requirements." James Bopp Jr., who headed the legal team for *Citizens United*, is serving as lead counsel in *Iowa Right to Life v. Miller*; he's also filed federal cases to overturn campaign-finance rules in Wisconsin, Alaska, and New Mexico. The case is pending in the Iowa Southern District Court.

the judicial race in which Butler lost, the U.S. Supreme Court, in a similar case from California, came down in accord with Butler's interpretation of the issue.

Two WMC ads highlighting Butler's *Jensen* dissent aired more than 3,000 times, according to the Campaign Media Analysis Group (CMAG), which monitors political TV spots.

Another ad, by a group called the Coalition for America's Families, which was led by a former head of the state GOP, attacked Butler for a 2005 opinion overturning a murder conviction. In fact, Butler and the three justices voting with him called for a new trial because previously unavailable DNA test results showed that hair on a key piece of evidence was not the defendant's.

Supporting Butler, the Greater Wisconsin Committee—whose leadership included an ex-aide to former Governor Doyle—laid out substantial funds. But after the group ran its first attack ad against Gableman, Butler asked for all third-party groups to "stand down." "Let us run our own campaigns," Butler said at a debate with his challenger. He could have saved his breath. In the end, special-interest groups were responsible for 90 percent of spending on TV ads—most of them negative—in the Butler-Gableman race. In the 2007 and 2008 elections, combined spending by independent groups in the Ziegler-Clifford and Butler-Gableman races totaled, conservatively, \$4.6 million—more than the \$3.9 million raised by the candidates.

In the final week, attack ads against Butler ran twice as often as ads against Gableman, according to CMAG data. Ads favoring Gableman outnumbered those favoring Butler, and they ran in more expensive time slots so were seen by more viewers. Gableman's supporters outspent Butler's on TV ads by 45 percent, CMAG's estimates show. Butler lost by a margin of 51-49.

The Wisconsin Democracy Campaign, a non-partisan watchdog group, later measured how much any of the groups sponsoring crime-focused ads in the race cared about the issue. The study found that five groups that spent nearly \$8 million on mostly negative ads centered on crime in 2007 and 2008 showed little to no interest in the 77 crime-related proposals being considered by the state legislature during that time. Three of them—two conservative, one liberal—took no position on any of the crime initiatives and didn't register as lobbyists, testify at hearings, or urge the public to take a position. Two other groups, including the WMC, took a stand on just three crime or public-safety measures, out of more than 240

total legislative matters on which they lobbied.

But ads about serial rapists, with their grainy images and ominous soundtracks, are effective, as consultants will attest. Ads about the issues these groups care about—such as tort liability—are about as motivating for voters as, well, watching lead paint dry.

THE SPENDING BY

business groups to elect conservatives to the Wisconsin Supreme Court paid off notwithstanding some sticky questions of integrity involving those new justices. Annette Ziegler stood accused of committing an elementary ethics violation as a circuit-court judge. She had ruled on cases involving a bank of which her husband was a paid director, a fact that came to light during her 2007 Wisconsin Supreme Court campaign. The high court had to contend with the transgression after Ziegler had joined its ranks. The justices formally reprimanded her in 2008, the first time in the court's history that they had rebuked one of their own.

Meanwhile, Gableman was fighting charges by the Wisconsin Judicial Commission that he'd lied in his Reuben Lee Mitchell ad against Butler. Eventually, a panel recommended the complaint be dropped, concluding that, even if the ad left a misimpression, it said nothing literally false. At that point, it was again up to the Supreme Court to take final action. The high court, minus Gableman, deadlocked 3-3 on whether their colleague had committed misconduct.

In still another outgrowth of the 2008 campaign, criminal-defense lawyers repeatedly asked for Gableman's recusal in their cases, citing statements by Gableman showing bias against them as a group. He refused. Yet again the justices deadlocked.

This series of internal flashpoints culminated in 2010 when the court, by a 4-3 vote, diluted its own conflict-of-interest rules in the wake of a 2009 U.S. Supreme Court decision on judicial recusal, *Caperton v. A.T. Massey Coal Company*. Though the decision prompted many states to consider toughening their standards, the Wisconsin justices rejected stronger proposals and adopted weak language drafted by the WMC and the Wisconsin Realtors Association. (One of the conservatives voting for the business-supported language, Ziegler had refused to sit out a case involving WMC in 2007, just months after the group had spent \$2 million supporting her candidacy.) The new rules say that judges need not



ENVIRONMENTAL PROTECTION

In March 2010, Montana's Land Board approved an \$86 million deal to lease a massive chunk of the state's vast untapped coal reserves—8,300 acres—to a company called Arch Coal. Governor Brian Schweitzer, a Democrat, touted the project, saying it could bring in millions more in taxes and royalties for decades to come. But environmental groups called foul: No environmental review had been conducted. Four groups have subsequently filed suit in *Montana Environmental Information Center and Sierra Club v. Montana Board of Land Commissioners, Ark Land Company, and Arch Coal*, saying that the impacts of the mining should have been scrutinized under the Montana Environmental Policy Act before the public land was sold. In January, a Montana district judge rejected an attempt by the state and Arch Coal to have the case dismissed, agreeing with the environmental groups that the defendants' position would allow state agencies "to convert public property rights to private property rights, stripping away special protections before even considering possible environmental consequences." Oral arguments were scheduled for September 27.

recuse themselves based *solely* on a lawful campaign contribution or independent expenditure, no matter how large.

THIS YEAR'S WISCONSIN

Supreme Court election between conservative sitting justice David Prosser and state assistant attorney general JoAnne Kloppenburg came against a fraught backdrop: First, there was the bad blood between conservative and liberal justices over the ethics cases and recusal rules. Then in 2011, the newly elected Governor Scott Walker, a Republican, and the GOP-controlled legislature sought to sharply limit the collective-bargaining rights of public-employee unions, prompting mass protests at the capitol.

Prosser, originally appointed in 1998 to the state's high court by Governor Tommy Thompson, a Republican, was heavily favored. But the public response to the collective-bargaining legislation was heated on both sides, and it was clear that challenges to the new collective-bargaining law would be resolved by the state's supreme court. Prosser was part of the court's 4-3 conservative majority.

Suddenly, the race was a proxy for the state's larger political battles. Some 35 interest groups spent \$4.5 million in the two months before the April 5 election, much of it in the last two weeks. The candidates, both publicly financed, spent less than half a million dollars each, but the outside groups supporting Prosser spent about \$2.7 million, and those backing Kloppenburg, roughly \$1.8 million.

Both sides played the crime card: The Greater Wisconsin Committee attacked Prosser, a district attorney in the late 1970s, for not prosecuting a Green Bay priest accused of sexually abusing two boys. The WMC ran a spot with out-of-context remarks Kloppenburg had made about being tough on crime. The incumbent's temperament also became an issue. A Greater Wisconsin ad showed footage of Prosser, a former legislator, menacingly approaching the front of the Assembly chamber with his fist cocked. Court e-mails also came out showing that Prosser had called Chief Justice Shirley Abrahamson a "total bitch" and threatened to "destroy" her. Prosser admitted it, said he'd "probably overreacted"—then dug himself in deeper by claiming Abrahamson and Justice Ann Walsh Bradley were "masters at deliberately goading people into perhaps incautious statements."

At the end of the tumult—which included a

recount—Prosser won by just 0.5 percent of votes cast. It wasn't over, though. Given the last few years, the court had become prickly and ideologically riven. So when a challenge to the collective-bargaining law did reach them, the justices fell into predictable camps. On June 13, the day that the court's conservatives hoped to release to the public their decision upholding the law, Justice Prosser's hands had an encounter with Justice Bradley's neck.

Reports of the incident vary, but it's agreed that Prosser and the other conservatives went to Bradley's office looking for Abrahamson. Abrahamson and Bradley were there, and the two sides argued. Bradley asked Prosser to leave. Whatever happened next, Bradley claims that Prosser then deliberately put his hands around her neck, attempting to choke her. Others have said that Bradley charged Prosser, who incidentally touched her neck while fending her off. Justice Patience Roggensack, a conservative, pulled them apart. The Dane County Sheriff's Office investigated the matter, and in August, a special prosecutor was named to consider the office's still-undisclosed findings.

In July, the recusal issue was again the subject of pitched debate, this time centering on Roggensack. A defendant appealing his sexual-assault conviction, Dimitri Henley, asked her to remove herself because she'd ruled, as a circuit-court judge, on Henley's co-defendant's case. She said no, and Henley petitioned the full court. Shocking most legal observers, Roggensack participated in the court's 4-3 decision, which said, "This court does not have the power to disqualify a judicial peer from performing the constitutional functions of a Wisconsin Supreme Court justice on a case-by-case basis." In previous circumstances—involving Gableman, for instance—the court had deadlocked, with the justice whose recusal was at issue not voting. Now, with Roggensack taking part and casting a fourth vote, the court had set policy.

The dissenters were appalled: "Justice Roggensack fails to respect a bedrock principle of law that predates the American justice system by more than a century—'no man is allowed to be a judge of his own cause.'"

THE CONSEQUENCES OF

ugly campaigns and altercations over judicial ethics ripple far beyond the courtroom where the justices gather. A July poll by Justice at Stake showed that the confidence Wisconsin voters had in their

Supreme Court had fallen to 33 percent, down from 52 percent three years earlier.

"I think the nastiness of the races and the ethical complaints have certainly contributed" to the court's poisonous atmosphere, former Wisconsin Justice Janine Geske says.

"The public's perception of the court is that its decisions are politically motivated," says Madison lawyer Tom Basting. When that happens, "democracy's in trouble."

Activities of third-party groups aside, the spectacle of judicial candidates raising money for their races puts attorneys in an awkward position. "The tricky part does come in getting calls from the justices for money," says a Wisconsin lawyer who was tapped for a check by the chief justice. "It was very uncomfortable for me, incredibly awkward. And then to appear in front of her ..."

Polls consistently show that the public believes those contributions pay off for donors. A 2010 Harris poll, for instance, found that more than 70 percent of Americans believe campaign contributions influence courtroom outcomes. Even many judges think money tilts judicial decisions.

But change won't come easily, if it comes at all. Over and over, polls have also shown that the public likes to elect its judges. An Annenberg Public Policy Center national survey in 2007, for instance, found that 64 percent of Americans favor the direct election of judges, a method with strong populist roots.

Still, in Wisconsin a growing number of former fans of elections are rethinking their position. Geske is one. She says that once, campaigning "forced judges to go out and be with the public, to be able to talk with people in small groups about the court system" and that elections usually produced high-quality judges. But, she adds, Wisconsin's recent experience "certainly has given me deep pause about whether this process works." To make things worse, Wisconsin just eliminated public financing for judicial elections, which had slowed at least a little the candidates' race for cash.

Some advocates of change see hope in the *Caper-ton v. Massey* decision, in which the Supreme Court held that a West Virginia justice who had received a \$3 million campaign contribution from a corporate CEO had wrongly failed to recuse himself from a major case involving that same corporation.

"If I'm putting all my money on a candidate, if that results in a recusal, I begin to ask myself the crass question, 'What is the return on my investment?'" says Mark White, former Alabama Bar

IF TRIAL LAWYERS ONCE HELD SWAY IN CERTAIN STATE COURTS, THOSE DAYS ARE LONG GONE—FROM 2000 ON, CONSERVATIVES GAINED CONTROL OF SUPREME COURTS IN SIX STATES.

president. “I think this is the one thing that could have an impact. *Caperton* has the most potential to change our judicial races.”

Historically, most states have left it only up to the justice whose fairness is being questioned to decide whether to stand aside. A handful of states—Wisconsin not among them—have adopted stricter standards since the *Caperton* ruling. Michigan now allows the entire court to review recusal motions and disqualify individual justices from cases “if the judge’s impartiality might objectively and reasonably be questioned.” New rules in New York state require recusal of any judge to whom any parties or lawyers involved in a case donated \$2,500 or more in the preceding two years.

The public, with its suspicions about the influence of campaign money, seems open to clamping down on recusals. In one Harris poll, 81 percent said a judge shouldn’t hear cases involving parties who had spent \$10,000 to help him or her get elected.

IN 2009, PRESIDENT

Barack Obama nominated Louis Butler to be a federal district judge in Wisconsin. Obama has renominated him three times, most recently last January. Repeatedly, Butler’s nomination has made it through the Senate Judiciary Committee and died on the Senate floor at the hands of Republicans. In the current go-around, even the committee hasn’t voted, because the new Republican senator from Wisconsin, Ron Johnson, hasn’t signed off, in accordance with a Senate custom calling for approval from a nominee’s home-state senators.

The Wall Street Journal has editorialized against Butler, citing the lead-paint and other cases, and both business and social conservatives have him in their sights. One manifesto attacks him for allegedly having “a far-left agenda of personal beliefs and political ideology” and making it easier for business to be slammed with “junk lawsuits.”

Butler is doing some teaching, playing a little golf, spending time with his family, and waiting for some movement in Washington, or perhaps for frustration to spur him to move on. Given the blockage of court appointees in today’s Senate, uncertainty is the nominee’s lot. But a few things are certain: Those who want to try to influence next year’s judicial elections are already at work raising money and testing messages. Spending on judicial races will climb. And if recent trends continue, one side will likely spend significantly more than the other. □

Beware: Judges with a Vision

BY GARRETT EPPS

In 1940, a small group of children, bullied by intolerant adults, sought the protection of the United States Supreme Court. The nation’s highest court spat in their faces. The results were so violent and tragic that the Court reversed itself three years later, trying to call a halt to the injustice it had spawned.

This story—the story of *Minersville School District v. Gobitis* and *West Virginia State Board of Education v. Barnette*—still teaches lessons today about the quality of justice, the character of judges, and the role of courts in spurring, or retarding, social change.

The issue was simple but explosive: Could school authorities require all children to recite the Pledge of Allegiance and salute the flag, even if their religious beliefs forbade it? The children at risk were Jehovah’s Witnesses; the head of their faith had declared that saluting the flag was idolatry, a violation of the Second Commandment’s injunction not to worship “graven images.” Thousands of Witnesses in Germany had been persecuted for refusing the Hitler salute, he said. American Witnesses should follow their example.

The Nazi parallel was disquieting. At the time, the prescribed form of taking the pledge, called the Bellamy salute, was a stiff-armed gesture that looked much like the fascist one. When fifth-grader Billy Gobitas and his sister Lillian (the federal courts, never overly concerned with individuals, spelled their name wrong) refused the salute and pledge, they were expelled from school.

Lower federal courts found the case an easy one. Compelling religious objectors to salute a symbol violated the First Amendment’s guarantee of “the free exercise” of religion. But when the case hit the Supreme Court, it ran headlong into a judge with a vision: Felix Frankfurter.

Frankfurter, a New Deal liberal, was also an immigrant with an almost mystical love of his adopted country—and an understandable fear of what was happening in Europe. America, not yet in the war, must come together to face the Nazi threat. His emotional plea for unity convinced eight of the justices that the misgivings of a few religious zealots must not obstruct national securi-

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ty. “National unity is the basis of national security,” he wrote. “The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties.” To allow any child to stand aloof “might cast doubts in the minds of the other children.”

Billy and Lillian lost—the expulsions stood—but there were many other losers that day at the Court. War hysteria was sweeping the country. Jehovah’s Witnesses, who refused to fight for any nation, were already under siege around the country. After *Gobitis*, persecution mounted. It was, according to one Mississippi legislative proposal, “Open Season on Jehovah’s Witnesses.” School districts coast to coast adopted the forced pledge and salute. Witnesses—whose faith requires them to preach the Word to non-Witnesses—were accosted by mobs demanding they salute on the spot; those who refused were arrested, beaten, forced to drink castor oil, tarred and feathered, or marched out of town. “They’re traitors—the Supreme Court says so,” one Southern sheriff, watching a mob, told a Northern reporter. As Shawn Francis Peters documents in his book *Judging Jehovah’s Witnesses*, a mob in Nebraska dragged Witness Albert Walkenhorst from his home and cut out one of his testicles.

Rarely has a decision gone so drastically wrong—and rarely, if ever, has the Court repented so quickly. By 1943, the accession of two new justices—and the switch of three of the *Gobitis* majority—gave new Justice Robert Jackson a majority to reverse *Gobitis*. In *West Virginia State Board of Education v. Barnette*, he wrote for a majority that struck down a West Virginia statute that had incorporated in its preamble the words of Frankfurter’s *Gobitis* opinion. (Unmoved, Frankfurter bitterly dissented.) Jackson’s opinion included these now-iconic words:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Persecution of the Witnesses subsided. This wasn’t solely because of the Court’s switch; by 1943, the fear of Nazi spies had died down. Still, there can be no question that the demise of *Gobitis* removed a powerful validation for jacks-in-office who wanted Witnesses out of their towns and mobs that wanted them dead.

Jackson’s ringing affirmation of free thought has been quoted countless times since, helping deflate the pretensions of would-be inquisitors in areas from religion to politics to culture. Few who cite his words probably reflect that they represent the Court’s apology for its own embarrassing mistake.

We can draw a few tentative conclusions from this sorry episode. First, beware a judge with a vision. Felix Frankfurter saw America in all its glory, the refuge of immigrants, arsenal of democracy, hope of the world. He wanted—oh, how desperately!—his beloved country to unite against Hitler. He tried to hurry that unity along, with awful consequences. Second, the impact of *Gobitis* was disastrous because Frankfurter’s opinion made a bad situation worse. Third, the Court’s most influential cases often arise out of attempts to clean up messes it has made itself.

Consider these famous decisions: *Brown v. Board of Education*, the Court’s shining 20th-century moment, reversed its racially contemptuous 1896 decision, *Plessy v. Ferguson*. *Katzenbach v. McClung* and *Heart of Atlanta Motel v. United States*, upholding the Civil Rights Act of 1964, were partial atonement for the grotesque *Civil Rights Cases*, an 1883 opinion striking down the progressive Civil Rights Act of 1875. *United States v. Darby Lumber* in 1941 restored Congress’s authority to ban child labor and other oppressive employer practices; the Court had gutted that authority in *Hammer v. Dagenhart* 20 years earlier. In 1969, *Brandenburg v. Ohio*, the cornerstone of modern free-speech law, capped a half-century struggle to reverse Justice Oliver Wendell Holmes’s restrictive opinion in *Schenck v. United States*. In 2003, *Lawrence v. Texas*, voiding state laws against consensual gay sex, reversed the truculent opinion in *Bowers v. Hardwick* 17 years earlier, which had brushed aside the same claim as “facetious.”

In each of these cases, the Court removed itself and its authority from blocking social change emanating from elsewhere. In the great sweep of American history, obstructing social change has been, more often than not, the high court’s chosen task. Although the Warren Court was an exception, the chief historical role of the fed-



CAMPAIGN FINANCE

The Wisconsin Prosperity Network, an umbrella organization for conservative and Tea Party groups, played a prominent role in the success of state Republicans in 2010. Its efforts were threatened, the group says, by a rule passed that summer by the Wisconsin Government Accountability Board requiring disclosure of contributors. Several groups, including Wisconsin Prosperity Network, filed suit in protest, alleging First Amendment violations, and ultimately won an injunction from the state supreme court that barred enforcement of the rule during the 2010 elections (and the 2011 recall elections). Oral arguments in *Wisconsin Prosperity Network Inc. v. Myse* are scheduled for September. If the Wisconsin Supreme Court rules in favor of the Prosperity Network, it would run counter to decades of pro-disclosure precedent set by the U.S. Supreme Court—and prompt further litigation in federal courts as well as more anti-disclosure suits in the states.



WITNESS IDENTIFICATION

A case involving Camden, New Jersey, resident Larry Henderson has highlighted problems with witness identification, which have frequently led to exonerations in recent years. After being identified by a witness in a photo lineup, Henderson was convicted in 2004 of reckless manslaughter and weapons charges as an accomplice to a fatal shooting. New Jersey is one of the few states with rules governing how police lineups are to be conducted. On appeal, though, Henderson and his lawyers contended that those procedures were not followed and that an officer moved photos around in a way that “nudged” the witness to choose Henderson’s picture. When the witness testified in *State of New Jersey v. Larry R. Henderson*, he also said that investigating officers—who are not permitted in the room during identification procedures—told him that his family would receive police protection if he cooperated. The appellate court ruled in Henderson’s favor in 2008. He awaits final word from the state supreme court.

eral courts has been to say no to democratically enacted social reform.

THE ISSUE OF WHETHER

courts “produce” social change has been a hot topic among lawyers and political scientists for at least 20 years. The most prominent skeptic is University of Chicago professor Gerald N. Rosenberg, whose 1991 book, *The Hollow Hope: Can Courts Bring About Social Change?*, concluded that “U.S. Courts can *almost never* be effective producers of significant social reform.” Rosenberg is right, but his thesis is a straw man. Of course, courts can’t conjure social change out of the air, like magicians with top hats. Courts don’t organize movements or conduct mass education campaigns. Those are the province of ordinary people.

Courts can, however, succeed depressingly often in freezing the status quo and paralyzing legislatures, sometimes for decades. After the *Civil Rights Cases* and *Plessy*, the ideal of an integrated society was crushed for more than 50 years. *Hammer v. Dagenhart* (1918) thwarted a national movement to end child labor. Only after *Darby*, two decades later, was child labor banished from mines and factories. (If you doubt that it would have persisted otherwise, consider that the Fair Labor Standards Act of 1938, upheld in *Darby*, exempts agricultural work from its child-labor provisions. Last year, Human Rights Watch reported that “hundreds of thousands of children under age 18 are working in agriculture in the United States.”)

Rosenberg is hardly alone in noting that *Brown* did not produce school desegregation—Southern apartheid broke down because the civil-rights movement exposed it and Congress outlawed it. But without *Brown*, would those victories have been possible, or would they have been delayed another 50 years? Can anyone believe that Congress would have broken the Southern filibuster and outlawed segregation if the Court had reaffirmed it in 1954?

We can, of course, study cases where the Court tried to substitute for a genuine popular movement. *Brown* was not one; black Americans had carried the idea of integration forward for nearly a century by the time the Court concurred. By contrast, in 1973, the Court decided *Roe v. Wade*, which leapfrogged ahead of public opinion to “settle” the issue of abortion, setting forth a detailed framework for its regulation in virtually all cases. Abortion-reform movements were stirring, and succeeding, in some states in 1973, but the issue had not been widely aired or made a focus of mass concern. Certainly there was nothing like the movement against school

segregation or child labor. The country was feeling its way, and the Court stepped in like an officious parent to “settle” an issue not ripe for settlement.

The aftermath of *Roe* we know; one of the well-springs of the early pro-life movement was a deep anger at the Court’s presumption in trying to finesse public debate. Pro-lifers like to compare *Roe* to *Dred Scott*. It’s an absurd comparison in substance, but the two cases share one similarity. In both, the Court imagined it could lay down rules that would not only focus but also end an intense national controversy. This kind of power simply does not inhere in courts.

In 1992, America’s leading feminist jurist, Ruth Bader Ginsburg, then a judge of the D.C. Circuit, agreed that the Court should have struck down the Texas law, which made any abortion, except to save the pregnant woman’s life, a felony. But, she lamented, the Court had gone on to set detailed rules in an attempt to short-circuit the process of social change. “A less encompassing *Roe*, one that merely struck down the extreme Texas law and went no further on that day ... might have served to reduce rather than to fuel controversy,” she wrote.

We can never know whether she was right any more than we can know what would have happened had the Court reaffirmed *Plessy*. But *Roe*, as decided, was a failure; beyond that, it was the brainchild of a justice with an agenda, Harry Blackmun. In 1973, Blackmun was no liberal social engineer—he was still a Nixon conservative. He had, however, worked for a decade as general counsel to the Mayo Clinic, and his agenda was to tell society to leave doctors alone.

That problem—the social-engineering judge with an agenda—brings us to the current state of the federal courts. Today’s federal bench, particularly the Supreme Court, is well stocked with visionaries who wish to engineer a new country. That new country—a libertarian, corporate-dominated “night watchman state”—isn’t one most of us would want to live in.

Forty years of systematic court-packing have produced one of the most aggressively conservative Courts in history. Since its coup d’état in *Bush v. Gore*, there has at all times been a bloc of justices who see their role as the kind of officious parent on display in *Roe*. The hard-right bloc’s social engineering is on display in *Heller v. District of Columbia* (2008) and *McDonald v. City of Chicago* (2010), which invented a new personal right to handgun possession. No less a conservative figure than Judge J. Harvie Wilkinson of the Fourth Circuit (one of George W. Bush’s finalists for chief justice) has written that “in a number of important

ways, the *Roe* and *Heller* Courts are guilty of the same sins.” Judge Richard Posner of the Seventh Circuit, also no bleeding heart, wrote that *Heller* “is evidence that the Supreme Court, in deciding constitutional cases, exercises a freewheeling discretion strongly flavored with ideology.”

Expanding gun rights is but one part of the agenda the Roberts Court is now eagerly pursuing. This Court has a vision, of an America in which corporations get their due deference as what Justice Scalia calls “the principal agents of the modern free economy.” The vision of corporate dominance in politics is on display in *Citizens United* (2010) and *Arizona Freedom Club’s Free Enterprise PAC v. Bennett* (2011), cases shredding even modest campaign-finance regulation. In the Court’s America, both shareholders and employees injured by corporate management must take their lumps. State and local governments mustn’t be tied down with a lot of burdensome accountability to citizens—in *Connick v. Thompson* (2011), the majority brushed aside a tort claim by a man who spent 14 years on death row because prosecutors hid and destroyed evidence that proved his innocence.

The Roberts Court envisions a nation where government and corporate power trump equality and individual rights, and the courts fold their hands while the dirty work is done.

Conservatives would respond to the above with an accusation of hypocrisy. Progressives, they argue, were happy enough with the Warren Court’s “visionary” jurisprudence; turnabout is fair play. This image of the Warren Court, though, misreads the historical record. The two dominant influences on the Warren Court, Chief Justice Earl Warren and his intellectual strategist, William Brennan, weren’t visionaries of any sort. Both were moderate Republicans, light-years removed from liberal ideologues like the marginal William O. Douglas. The Court’s enduring decisions actually have much less to do with setting out what America should look like than with attending to some core functions of courts. Its most important decisions, in fact, had the effect not of forcing judge-designed change but of making it easier for the political process to reflect the genuine wishes of society. Cases like *Reynolds v. Sims* (1964), which established “one person, one vote” as the rule for American politics, and *Harper v. Virginia Board of Elections* (1966), which invalidated the poll tax, opened the system up to ordinary people rather than closing it to conform to judicial ideas.

In a second set of cases, the Court took seriously the job of managing its own branch, making sure that courts and police treated defendants fairly.

Opinions like *Miranda v. Arizona* (1966) represent the core function of courts, not an activist overreach.

Third, the Court stepped in to stop gross violations of the Constitution—racial segregation in schools, anti-miscegenation laws, state statutes that banned criticism of government, official actions aimed at silencing the press, mandatory government prayers, and religious qualifications for office. There was nothing new in the idea that these measures were unconstitutional; what was new was a Court that was willing to say so.

What sort of judges should progressives hope for? I am not sure I yearn for a progressive who will sound Scalia-style political bugle calls from the bench. We’d do well to find judges who will focus on the third type of Warren Court case and say that gross and open violations of the Constitution have to stop.

I am haunted by an exchange last fall during oral argument in *Brown v. Plata*. The dialogue was between Chief Justice John Roberts and Donald Specter, the lawyer for a group of inmates in the California state correctional system. For 20 years, these inmates had been asking the federal courts to correct horrendous abuses in the prison mental-health system. By 2011, no one disagreed that the current system—disturbed inmates locked in small steel cages or languishing for days in their own waste—violates the Eighth Amendment’s prohibition of cruel and unusual punishment. For two decades, state officials had promised reform, federal courts had deferred action, and conditions grew worse. Then the court below played its final card, ordering the system to release inmates according to a plan that experts say will produce no increase in violent crime.

Chief Justice Roberts, though, was worried about the long-term hardships that observing the Eighth Amendment would impose on states. His objection was not to the prisoner release as such but to the idea that courts could require states to spend money to remedy constitutional violations. More like a conscientious legislator than a judge, he worried about cases that might arise and about the terrible inconvenience to states of court supervision: “What happens when you have this case, another district court ordering the State to take action with respect to environmental damage, another court saying, well, you’ve got to spend this much more on education for disabled, another court saying you’ve got to spend this much more on something else? How does the state sort out its obligations?”

Specter braved the chief justice’s scowl. “Well,” he responded, “my simple answer to your question, Your Honor—and I don’t mean to be flippant—but ... they have an obligation to follow the federal law, constitutional law and other laws. And if they’re not, then the federal court has an obligation to impose a remedy.”

California itself conceded that it was violating the Eighth Amendment. (Subsequently, by a 5-4 vote, the Supreme Court affirmed the prisoner-release order.) But Chief Justice Roberts was more concerned about the prerogatives of government than about the established law.

Roberts is a visionary. Maybe what we need are judges who will just say, “In this case, the Constitution, or the law, favors this side or that.” If we can get visionary judges out of the way in other cases, we the people can handle it on our own. ☐

COURTS CAN SUCCEED DEPRESSINGLY OFTEN IN FREEZING THE STATUS QUO AND PARALYZING LEGISLATURES, SOMETIMES FOR DECADES.



Disorder in the Court

BY PATRICK CALDWELL

The Iowa Supreme Court publishes, on average, a little more than 100 decisions a year. Each ruling goes online first thing Friday mornings. When *Varnum v. Brien* went live at 8:15 A.M. April 3, 2009, the court's website crashed when more than a million visitors tried to read the opinion. In a unanimous decision, the seven supreme court justices—five Democratic and two Republican appointees—had ruled that Iowa's ban on marriage for same-sex couples violated the equal-protection clause of the state constitution. When county clerks began issuing marriage licenses three weeks later, Iowa became the third state with legalized same-sex marriage.

The Massachusetts and Connecticut courts had previously ruled that banning marriage for same-sex couples was unconstitutional. So had California, but in 2008 voters reversed that decision with Proposition 8. The location of those first rulings

didn't surprise opponents of marriage equality. These were, after all, the states that had elected John Kerry and Nancy Pelosi. Iowa, though, was supposed to be different. It's smack-dab in the heartland. Home of John Wayne, *Field of Dreams*, and Captain James T. Kirk, the state is about as all-American as it gets. If Iowa ruled in favor of marriage equality, then maybe the movement wasn't confined to liberal redoubts on either coast.

The plaintiffs, six same-sex couples, were not among those clicking refresh that morning. They had sued the state in 2005. At the suggestion of one of their lawyers, Camilla Taylor from Lambda Legal, they went to the courthouse without their cell phones, where they waited for Taylor to announce the outcome in front of a throng of national media. "They understood that their tears in defeat or their thrill in victory would be meaningful in and of itself," she says. When Taylor announced the verdict, images of the couples with ear-to-ear grins, embracing each other and celebrating with their children, were sent around the world.

Opponents of gay marriage, though, were dismayed. None more so than Bob Vander Plaats, who had risen early that morning and driven three hours to join several evangelical pastors in praying

ART BY JOHN RITTER (SOURCE PHOTOS: CHARLIE NEIBERGALL / AP IMAGES; CTJF83 / WIKIMEDIA COMMONS)



cial selection and mounted a full-throttle assault against the supreme court judges who legalized same-sex marriage. No laws changed, but three of the judges lost their positions. The state's progressive community is still grappling with the question: How did a fringe political candidate expend what had once been a model of judicial independence?



SECURITIES FRAUD

While the Justice Department has failed to punish banks and mortgage companies that helped cause the 2008 financial meltdown, private companies have filed a spate of lawsuits. In one blockbuster case, the mega-insurance firm American International Group (AIG) is suing Bank of America and two of its subsidiaries, Merrill Lynch and Countrywide Financial, in the New York Supreme Court. AIG says the bank cheated it in a "massive fraud" by selling overvalued residential mortgage-backed securities. The insurer, which was bailed out by the federal government to the tune of \$182 billion, blames its 2008 crash in part on the toxic assets it purchased from Countrywide and Merrill Lynch. The company seeks \$10 billion in damages. **American International Group, Inc. v. Bank of America Corp.** could become one of the defining court cases of the financial crisis—but hardly the only one. According to the legal consulting firm McCarthy Lawyer Links, \$197 billion worth of mortgage allegations had been filed in more than 90 lawsuits across the country by mid-August.

THE GROUNDWORK FOR

the *Varnum* case had been laid two years before the lawsuit was filed in December 2005. After Massachusetts legalized same-sex marriage in 2003, other states—Maryland, New York, California—appeared ready to follow, but all of them were bastions of liberalism. Lambda Legal, the country's leading LGBT legal defense fund, wanted to target the Midwest. "We thought that it would be important," says Kevin Cathcart, Lambda Legal's executive director, "from a public-education point of view and from a law-reform point of view to show people that progress can be made not just in New England, the mid-Atlantic states, and not just on the West Coast. It would give gay people and our allies in the middle of the country a shot in the arm that victory and change is possible where they live."

Lambda Legal asked Taylor, who was based out of the organization's Chicago office and now directs its Marriage Project, to identify a Midwestern state where a lawsuit stood a strong chance of success. She did not have many choices. In 2004, Republicans—to increase turnout among social conservatives—had helped pass constitutional bans on same-sex marriage in 13 states. Iowa was not one of them.

Taylor had other reasons to consider Iowa. It is a solidly purple state that voted for Barack Obama in 2008, George W. Bush in 2004, and Al Gore in 2000. Although evangelical Christians make up a large bloc of the Republican Party in Iowa, a live-and-let-live populism pervades the state's politics.

The state also has a history of extending civil rights earlier than the federal government. In 1839, the Iowa Supreme Court's first opinion granted citizenship to a slave when he entered the territory from Illinois. Iowa had desegregated its schools by 1868; a year later, it became the first state to admit women to the bar. Iowa law also makes it difficult to amend the constitution. Unlike California, where voters changed the constitution six months after its supreme court legalized same-sex marriage, Iowa requires that an amendment pass both sides of the legislature in two consecutive sessions before it can be placed on the ballot.

But there was another argument for Lambda Legal to choose Iowa. Its courts were renowned

outside the supreme court building. He learned of the decision when smiling gay-rights supporters streamed out of the courthouse. "The feeling was one I haven't felt very often," he says. "It was a void. It wasn't one of being angry, of being sad. It was void of emotion. I can't recall another time I've had that emotion. It was a dark time in Iowa's history."

A marginal political figure, Vander Plaats was already laying the groundwork for his third run for governor, but that morning he stayed on the sidelines as social conservatives held a press conference on the supreme court's steps. He didn't keep quiet for long, though. He made his feelings known when he appeared on a popular conservative talk-radio station later in the day. "This is what happens when you have the absence of leadership," he said. "I believe all of Iowa is going to get a wake-up call today and say, 'This is not who we are.'"

Vander Plaats lost the Republican nomination for governor yet again, but *Varnum* gave him the issue he had always been looking for. A year after the decision, he mobilized an unprecedented attack against Iowa's judiciary, which had been known for its lack of partisanship. With assistance from a powerful evangelical organization from out of state, he exploited an obscure clause of judi-

THE ANTI-RETENTION CAMPAIGN WOULD NOT HAVE GOTTEN OFF THE GROUND IF A GROUP OUTSIDE OF IOWA HADN'T STEPPED IN—THE AMERICAN FAMILY ASSOCIATION.

for being free from political influence. The U.S. Chamber of Commerce ranks Iowa courts as the fifth fairest in the country. In an indication of the state's standing in the country's legal community, Iowa Supreme Court decisions are the fourth most cited by other states' courts, according to a study from the University of California, Davis.

The state owes that reputation to its 1962 adoption of the "Missouri Plan" for placing judges on the bench. Under the system, a panel of 15—seven selected by the governor, seven by the bar association, plus a sitting state supreme court justice—interviews potential judges on their experience and knowledge of the law. The panel is barred from asking interviewees their political affiliation. The governor picks from three finalists. Supreme court justices go on the ballot at the first general election after they are selected and every eight years after. Until 2010, Iowa's retention votes had always been ho-hum affairs. Only four lower-court judges had ever lost a retention vote, in each case because they were accused of malfeasance. A campaign had never been waged against a supreme court justice.

When *Varnum* came before the justices, national groups from the Human Rights Campaign to the Knights of Columbus flooded the court with amicus briefs. On the day of oral arguments, a winter storm hit Des Moines, and fewer spectators than expected gathered in the galleries. Because the justices asked extensive questions, the hearing lasted for almost two hours, twice as long as usual. By the time they were done, the courtroom was packed. "The judges were better prepared than probably any panel I've been in front of," says Dennis Johnson, whom Lambda Legal had brought in to represent the plaintiffs.

After every hearing, the justices slip out of their judicial robes and, if they have time, grab a cup of coffee before they meet in a small conference room on the fourth floor of the supreme court building. Clerks are barred. Justice Mark Cady, one of the two Republican appointees, had been randomly selected to write the majority opinion on the *Varnum* case, which meant that he would speak first. If any of the justices were going to find fault in the plaintiffs' interpretation of the constitution, it would likely be Cady, the strictest constitutionalist of the group. After laying out both sides' arguments, Cady announced he was ruling in favor of the plaintiffs. The justices went clockwise around the granite-topped table. They did not agree on every legal point, but after two hours, all of them had sided with the plaintiffs. "We went around the table, and we just pushed back and said, 'Jeez, this is going to be unanimous.' We were just shocked," a justice later told me.

BOB VANDER PLAATS

lives in Sioux City, a town of 82,000 sequestered on the northwestern edge of the state near the Nebraska and South Dakota borders. The drive from Sioux City to Des Moines, Iowa's capital, is about the same as the one from Washington, D.C., to Manhattan, but culturally the cities are far apart. To oversimplify, Sioux City prides itself on its number of churches; Des Moines on its number of Starbucks outlets. Vander Plaats, who is 48 years old, grew up in Sheldon, an agricultural town of 5,000; he was one of eight kids in what he describes as a "very Christian home." He attended local Northwestern College on a basketball scholarship, and he still has the physique of a high-school baller—tall and lanky but not imposing. After graduation, he worked in high schools around the state, teaching business and coaching basketball before becoming a principal at age 29. On the stump, he speaks in a slow, lecturing manner as if he were still addressing a classroom full of recalcitrant students.

While sitting on a governor's council on children with disabilities, Vander Plaats decided to pursue politics. In 2002, he ran for the Republican nomination for governor and came in third. In 2006, he ran again but dropped out to serve as the party's lieutenant-governor nominee. Although the ticket lost the general election, he had become a favorite among social conservatives, and former Arkansas Governor Mike Huckabee tapped Vander Plaats as his Iowa state chairman in his run for the presidency. Huckabee's surprise victory in the 2008 caucuses imbued Vander Plaats with more clout than he'd ever had. Still, when he prepared to run for governor again in 2010, many observers dismissed him as a joke, the perpetual candidate who always loses.

Iowa Republicans divide roughly into two groups: the evangelical right devoted to social issues and fiscal conservatives concerned with minimal government. The pro-business Republicans have long run the party, but their power has waned. In the last decade, evangelicals have developed a sophisticated infrastructure that includes motivated volunteers, expertise in phone banking, and deep ties to the national Christian right, which has poured resources into Iowa because of its outsized influence on presidential campaigns. Evangelicals were 60 percent of the Republican caucus voters in 2008. U.S. Representative Steve King, a Tea Party favorite, is their most visible elected official, but they have also infiltrated the party's inner circle. Three years ago, Steve Schef-

fler, president of the evangelical group Iowa Faith and Freedom Coalition, displaced a moderate in the state's delegation to the Republican National Committee who had held the spot for 20 years.

Heading into the 2010 gubernatorial election, the moderate wing of the Iowa GOP was depleted, and it appeared Vander Plaats might back into the nomination. For the first time in his career, he had a galvanizing issue. *Varnum* was the sign of government overreach he had been warning about for years. At almost every campaign stop, he vowed that on his first day in office he would issue an executive order to halt marriage licenses for same-sex couples until the public voted on a constitutional amendment—an idea dismissed by legal scholars as outside the governor's authority.

Vander Plaats's extremism frightened Republican elder statesmen, who were convinced he would cost the party the general election despite the unpopularity of the incumbent Democratic governor. They were desperate for an alternative and found the perfect candidate in Terry Branstad. A four-term governor in the 1980s and 1990s, Branstad had left office during an economic boom and remained a beloved figure. The primary turned into an all-out war between the two wings of the party.

Branstad dismissed Vander Plaats's executive order as a fantasy. Vander Plaats hammered the former governor for being soft on gay marriage, emphasizing that Branstad had appointed two of the justices who had ruled on *Varnum*. With money, name recognition, and the party establishment on his side, Branstad was considered the favorite, but thanks to enthusiastic support from Christian activists and favorable coverage from WHO-AM, the state's most influential radio station, Vander Plaats ran a much more competitive race than anyone imagined. Branstad won with only 50 percent of the vote, while Vander Plaats gained 41 percent. If another social conservative hadn't siphoned off 9 percent, Vander Plaats might have won.

After the election, Vander Plaats found himself in political limbo. He had no desire to endorse Branstad, but he did not want to fade from the spotlight after outperforming expectations. Rumors circulated about a third-party gubernatorial run. Indeed, he says, the possibility crossed his mind before he decided not to pursue a campaign that had no shot of winning.

On August 6, Vander Plaats held a press conference on the steps of the supreme court. Instead of announcing that he would run for governor as an independent, he surprised everyone when



WOMEN'S RIGHTS

Last December, Bei Bei Shuai, 33 weeks pregnant and severely depressed, attempted suicide by swallowing rat poison. Friends intervened, and doctors saved her life. Shortly after, her baby was delivered by cesarean section but survived only four days. Shuai was subsequently charged with murder and attempted feticide. A motion to dismiss the case, arguing that Shuai attempted suicide and not murder, was denied in June. A judge subsequently refused to release Shuai on bond, saying there was a strong presumption of guilt; at press time, the Indiana Court of Appeals was reviewing the request. The American Civil Liberties Union warns that *State of Indiana v. Bei Bei Shuai* could set a chilling precedent: "If a woman can be criminally prosecuted for those acts or omissions (or medical conditions) that pose a threat to her health while pregnant, then the state's control over her life would be limitless."

he declared that he would spearhead an effort to remove the three supreme court justices up for retention in November: Chief Justice Marsha Ternus and Associate Justices David Baker and Michael Streit. "This election, in my opinion, to remove these judges," he said, "is one of, if not the, most important election in our country."

The immediate reaction was one of bewilderment. It was only three months before Election Day, and an all-out assault on supreme court justices was something new to Iowans. Not only did Vander Plaats need to convince voters that the judges must be removed; he had to teach them the mechanics of the retention vote, a matter so arcane that voters had to flip to the back page of the ballot to find the names of judges. Vander Plaats's new campaign was also strictly symbolic. Whatever the outcome, marriage equality would remain law. If he succeeded, the only change would be three new names added to the unemployment rolls. Liberals scoffed. Vander Plaats had never won an election, and Iowans, they were convinced, would never want to politicize their courts.

A FEW DAYS BEFORE

announcing the anti-retention campaign, Vander Plaats gathered evangelical allies to gauge their interest in removing the judges. The attendees were a who's who of activists. They included Chuck Hurley, head of the Iowa Family Policy Center, which had pledged to sit out the general election if Branstad won the nomination; Barbara Heki and Vicki Crawford from the Network of Iowa Christian Home Educators, a new group on the political scene, which had played a key role in Huckabee's victory; and Chuck Laudner, Republican Party of Iowa state director during the 2008 caucuses and a former chief of staff to Representative Steve King. Laudner agreed to serve as campaign manager for Iowa for Freedom, as Vander Plaats's organization would be called. Laudner was the original believer in the cause. He votes "no" on the retention of any judge on the ballot and had floated the idea of a campaign against the three judges back in February 2010. At that time, social conservative circles showed little interest in the effort.

What changed between February and August? Vander Plaats's presence certainly lent credibility, but the anti-retention campaign would not have gotten off the ground if an organization outside of Iowa hadn't stepped in. Although Vander Plaats insisted that he was leading a "grassroots" operation that was a pure product of Iowans' discontent, it was, in fact, an extension of the American

Family Association (AFA). Iowa liberals claim that the entire campaign was an AFA invention, with Vander Plaats serving as a paid spokesperson, but it is unclear who approached whom. Records do, however, prove that once Iowa for Freedom was formed, it received all of its funding from the AFA. Its literature and ads included a disclaimer defining Iowa for Freedom as a “project” of the AFA.

The Reverend Donald Wildmon founded the American Family Association, originally called the National Federation for Decency, in 1977. Headquartered in Tupelo, Mississippi, the group runs a 200-station radio network across 33 states and claims it receives financial contributions from 180,000 supporters. The organization attracted national attention in 1989 when it joined Senator Jesse Helms of North Carolina in attacking the National Endowment for the Arts. Bryan Fischer, the AFA’s policy director, is notorious for making inflammatory statements. He once said that the United States should forbid the construction of new mosques, because each “is dedicated to the overthrow of the American government.” The immorality of homosexuality has been a constant topic. Fischer once explained that Adolf Hitler was gay and surrounded himself with gay soldiers, as “homosexual soldiers basically had no limits and the savagery and brutality they were willing to inflict on whomever Hitler sent them after.” The group tells its members to boycott businesses that promote safe LGBT work environments, and Fischer has said homosexuals should not be teachers. In 2010, the Southern Poverty Law Center included the AFA on its list of hate groups.

For the AFA, the Iowa retention vote was not about three particular justices. Rather, it was a chance to make a statement on a favorite conservative issue: the activist judge. The specter of courts “creating” law has pervaded modern conservatism at least going back to *Brown v. Board of Education* and has been a primary focus of conservatives since *Roe v. Wade*. “For a decade or so,” Hurley says, “the most frequent phone call we would get at election time was ‘What are we going to do about the judges?’” But most of the decisions that offended conservatives came from the federal courts, which left the Christian right no avenue to confront judicial activism; once federal judges are in office, they are insulated from political pressure. *Varnum*, though, offered the AFA the perfect opportunity to organize against judicial activism. Removing the three justices might be symbolic, but it was a powerful symbol: State judges would know their jobs would be at stake when they ruled against the values social conservatives cherished.



MARRIAGE RIGHTS

In late June, seven same-sex couples and their children filed a lawsuit seeking marriage equality in New Jersey. The case stems from a 2006 ruling in the state supreme court that under the New Jersey Constitution, same-sex couples must be provided with the same rights and benefits as married straight couples. The court left it to the state legislature to remedy the inequalities. Later that year, lawmakers voted to allow civil unions, but not marriage, for gay couples. A state-appointed Civil Union Review Commission subsequently reported that civil unions did not offer the court-mandated protections. Gay partners have reported difficulties with health insurance, company benefits, adoptions, and medical decision-making. In *Garden State Equality, et al. v. Dow, et al.*, the plaintiffs assert that “the separate and inherently unequal statutory scheme [of civil unions] singles out lesbians and gay men for inferior treatment on the basis of their sexual orientation.” The case awaits a hearing in the New Jersey Superior Court.

FROM THE BEGINNING,

the judges’ supporters floundered. Numerous organizations came out and defended the merit-selection system—from the state Bar Association to the Interfaith Alliance of Iowa—but because they were all nonprofits, they were prevented from campaigning for the judges themselves. It wasn’t until early September that Democratic operatives formed a direct advocacy organization called Fair Courts for Us. When the group approached national donors, though, their entreaties were dismissed—an early indication of the uphill struggle pro-retention forces would be facing. “The threat was not apparent,” says Jeff Link, a strategist who worked for Fair Courts.

In contrast, several social-conservative groups joined the AFA in its effort to oust the judges. The National Organization for Marriage spent \$635,627, almost all of it on TV ads. The Family Research Council contributed \$55,996 and ran a “Judge Bus” tour in conjunction with Hurley’s Iowa Family Policy Center. Vander Plaats led the tour, joined by figures like Steve King and former Pennsylvania Senator Rick Santorum. Republican presidential hopefuls Tim Pawlenty and Newt Gingrich lent their support when stumping in the state. Gingrich went even further, funneling \$125,000 to the AFA to help launch the campaign. According to campaign-finance filings, the AFA only spent \$171,025 on Vander Plaats’s organization; the true figure, though, would be higher if the staffers they provided were included. All told, conservative groups poured in a little less than a million dollars—an unheard-of figure for an Iowa retention election and a kingly sum for the state’s inexpensive media markets.

Fair Courts for Us only raised \$366,000. For any voter tuning in, the imbalance in resources was clear. Iowa for Freedom had placed TV ads by early September, and the attacks bombarded viewers the rest of the fall. The pro-justice groups never made it past a few radio spots. Strapped for money, Fair Courts could only purchase airtime after each new check arrived, whereas Iowa for Freedom could map out a media strategy. Fair Courts tried to send a piece of mail to every voter who had requested an absentee ballot; Iowa for Freedom had the same idea, but its financial advantage allowed it to *call* every absentee voter.

Even if they’d had more money, the pro-retention groups would have been in trouble. They couldn’t offer the same easy message as Vander Plaats. “A lot of people were trepidatious about making this about same-sex marriage,” says Troy Price, executive

director of One Iowa, the state's largest LGBT-rights group. "People had looked at other states and had seen what had happened, and they were afraid that if this was a straight-up referendum on *Varnum*, that would be why the judges were defeated."

Discarding the issue that most concerned liberals, Fair Courts offered instead a prolonged civics lesson on the need for judicial independence—which did not make for compelling 30-second commercials. "We were not as nimble as Vander Plaats," says Scott Brennan, a former Iowa Democratic Party chair who worked on the campaign. "We spent a lot of time talking about facts as opposed to attractive concepts, which is what Vander Plaats spent a lot more time doing."

The pro-retention side still might have prevailed if it could have presented a human face. But the judges refused to campaign—it would politicize the judiciary, and that was against their principles. When Vander Plaats announced his plans, the judges had discussed forming committees and campaigning to keep their seats. Although this would have been acceptable under the court's code of ethics, they never gave the idea serious consideration. Part of their decision was practical; unlike Vander Plaats, they didn't have an infrastructure at hand, and only one had ever run for office and that was 27 years earlier.

With each passing day, Vander Plaats's campaign seemed less and less implausible. Republican turnout was expected to be huge and, to the surprise of many, the retention vote dominated the attention of Iowans, much more so than the gubernatorial race, where Branstad was the heavy favorite. "It was a hot issue," strategist Link says. "People were talking about it at work. People mentioned that there were conversations about it at churches." According to a *Des Moines Register* poll conducted a few days before the election, the anti-retention forces held a statistically insignificant lead. On Election Day, though, it wasn't even close. Justices Baker and Streit lost by eight-point margins, Chief Justice Ternus by ten.

"WE DIDN'T THINK

Iowa voters would ever swallow Vander Plaats's story, and I don't have that confidence anymore today," Justice Streit says. Seven months after the election, he is still angry—about the lack of support he and his fellow justices received from groups that promised it, about the bind he and his fellow justices were put in. We are sitting in the offices of Ahlers and Cooney, the Des Moines law firm where he is of counsel. Sixty-one years old,

Streit has been a prominent member of Iowa's legal community for most of his adult life. He's both forceful and gregarious, and it is easy to understand why he was a popular judge.

Since he left office in January, Streit has been the most vocal of the defeated judges. In fact, his eagerness to go after Vander Plaats and the AFA makes one wonder how he remained silent during the campaign. "The AFA hired him to be the face of Iowa for Freedom," Streit says of Vander Plaats. "They maintained until the very end that this was a grassroots campaign—it wasn't. There was no grass or roots."

Streit epitomized the nonpartisan court. Branstad nominated him for two positions on the lower courts before Governor Tom Vilsack, a Democrat, elevated him to the supreme court in 2001. Vander Plaats, though, painted Streit not just as an overreaching liberal but as an elitist autocrat far removed from normal Iowans. When he and his fellow justices shied away from public attention, they played right into Vander Plaats's strategy; Vander Plaats was then free to portray them any way he wanted. On the other hand, if the justices had responded to the attacks—introduced themselves to voters on TV, planted yard signs—they wouldn't have been the disembodied figures voters could so easily dismiss. But for Streit, Baker, and Ternus, such an action would have led to other, more elemental quandaries.

"If we had done what we should have done, that is, form committees, raise money, and just run some commercials," Streit says, "this court system would have been changed drastically. Our biggest stock-in-trade for the court system is our credibility, our integrity, and our ability to be fair and impartial to all people. That is slowly but surely being whittled away by us being dragged into partisan elections and/or elections where money is involved."

Two concerns arise when a court is politicized: money and electoral pledges. Once judges accept campaign donations, impartiality loses any semblance of legitimacy. When an environmental group sues an oil company, neither side's lawyers want to worry if their argument has been jeopardized because opposing counsel contributed to the judge's re-election campaign. Judges are expected to recuse themselves if a conflict of interest arises, but Iowa, like most states, has a vague definition for what constitutes such a conflict.

Positions staked out during a campaign pose an even graver threat to a jurist's independence. Is the candidate for or against the Affordable Care Act? Does he think the national debt should be reduced

EVEN IF THEY HAD MORE MONEY, THE PRO-RETENTION GROUPS WOULD HAVE BEEN IN TROUBLE. THEY COULDN'T OFFER AN EASY MESSAGE.



REPRODUCTIVE RIGHTS

States enacted 80 abortion restrictions in the first half of 2011, according to the Guttmacher Institute—more than three times the number passed in all of 2010. None has proved more controversial than a Texas law (similar to one passed in Oklahoma in 2010) that prohibits a woman from having an abortion unless her provider first performs an ultrasound and then displays and describes the images and sounds to her—no matter the woman’s wishes. With few exceptions, women must then wait 24 hours to obtain an abortion. Doctors who violate the law could lose their medical licenses. In June, the Center for Reproductive Rights filed suit on behalf of medical providers and their patients. **Texas Medical Providers Performing Abortion Services v. Lahey** argues in part that the Texas law violates First Amendment rights by “forcing physicians to deliver politically motivated communications.” The suit is pending in Texas Western District Court.

through higher taxes or spending cuts? It’s essential for voters to know what kinds of policies a politician would pursue. The same standard, though, can’t be applied to judges. They are meant to be impartial referees who treat each case as a unique instance, not a chance to apply their broad ideological perspective. Campaigns also force judges to take simplified stances on complex issues. A judge might pose with police officers to present a tough-on-crime image during a campaign. Is that person then capable of rendering an unbiased opinion when a case involving police abuse comes before her?

“When you get involved in politics, you get labeled. You label yourself, or you let other people label you,” Streit says. “You have expectations that you’ve raised in other people’s minds on how you’re going to behave, and you will try to reach those expectations.”

The more Streit speaks of the retention election, the more his anger gives way to resignation. The world he grew up in, the world he believed in—where judges were removed from the rough-and-tumble of politics—is losing sway, and he isn’t sure it can be regained.

“It is not up to the people to determine what our Constitution means,” Streit says. “If that were the case, we would not have integrated schools, we would not have integrated lunch counters, we would not have women voting. All those civil rights pioneered by the courts, if they were left up to the people, would be different.”

THE RETENTION ELECTION

transformed Vander Plaats’s reputation. The candidate who had never won office is now a political figure whose blessings presidential candidates seek. He has become the de facto head of Iowa’s Tea Party. Shortly after the election, he launched a new organization called The Family Leader and announced a “presidential lecture series” that would feature all the major Republican candidates. The political newspaper *The Hill* named Vander Plaats, alongside Chris Christie and Sarah Palin, on its list of “10 coveted endorsements for Republicans running for president.”

In July, he asked presidential candidates to sign a pledge that opposed same-sex marriage but that also stated that African American families were better off during slavery than they are during Obama’s presidency. It’s been Vander Plaats’s one misstep. All the candidates except for Michele Bachmann and Rick Santorum have refused to sign the pledge. The retention campaign has turned into a rallying cry for the Republican presidential can-

didates in 2011. “I love the backbone of Iowans who stand for marriage as one man and one woman,” Michele Bachmann said in Ames just before she won the Iowa Straw Poll in early August. “Believe me, you set every judge in this country quaking when you did not retain those three judges.”

Once the caucuses are over in 2012, Vander Plaats will need a topic to keep his name in the headlines, especially if he plans yet another run for governor in 2014. Targeting David Wiggins, the next *Varnum* judge up for retention, would be a logical move, and Vander Plaats is already leveling threats. “What role I’ll take personally I’m not sure yet,” he says. “But I do believe he should be held accountable.”

If Vander Plaats does go after Wiggins in 2012, though, he will face a tougher opponent than he did in 2010. The pro-judge activists drew a number of lessons from their defeat. They’ve been holding meetings to discuss forming a new organization to replace the disjointed collection of groups that stumbled last time around. They also believe that they will be able to raise considerably more money for their cause. But the biggest difference may be the candidate himself. Wiggins has a fiery temperament, and many, including his former colleague, Justice Streit, predict that he will not stay silent if attacked. “I think he is going to have to run some commercials,” Streit says, “and explain to people, ‘Here is who I am, and here’s what I stand for.’”

When I met with Justice Wiggins at his office in the supreme court building, he spent most of the hour lauding Iowa’s history of judicial independence at the forefront of civil rights. That Wiggins would speak at all indicates that he has begun to contemplate his next retention vote. He and the three other remaining *Varnum* judges have started to shift tactics, making a conscious effort to increase their public presence. The judicial code of ethics states that a justice cannot campaign unless there is an active opposition, which grants Wiggins some time before he must decide.

“Right now, I’m just doing my job,” Wiggins told me. “I don’t know what I’m going to do. I don’t know if I’m going to campaign. I don’t know if there is going to be a campaign against me. I can tell you for certain I am going to be on the ballot and for certain if there is a campaign against me, I’m going to have to make a decision on whether to do what the other people did or whether to form a campaign committee.”

The defeat of his three colleagues, he acknowledges, has already left a mark. “They took the position that judges should not get involved in politics. They maintained their integrity,” he says. “And sometimes you lose your job by doing the right thing.” @

Stanching the Cash Flow

BY ERWIN CHEMERINSKY
AND JAMES SAMPLE

The influence of special-interest money in the corruption of state courts has been well documented. In 39 states, at least some judges are elected, and the costs of these elections are escalating dramatically. The money for such campaigns comes primarily from lawyers and litigants with matters before the courts. At the very least, this system undermines the public's perception of the integrity of courts and their rulings. More than seven in ten Americans surveyed said they believe campaign cash influences judicial decisions. Nearly half of state-court judges agreed. The pervasive perception and increasing reality of monetary influence in judicial decision-making weakens a cornerstone of American democracy.

What can we imagine by way of remedy? There are two distinct paths. In the first approach, states would accept judicial elections but mitigate monetary influence by combining rigorous recusal rules with limits on campaign expenditures. In the second scenario, states would shift from election of judges to executive appointment and merit selection. Each approach has advantages and disadvantages, both in terms of the substance and the political reality of reform. But whichever path is chosen, reform in judicial elections is imperative.

Though the Supreme Court has lately taken an expansive view of money as speech, there is reason to believe that even the Roberts Court might recognize that judicial elections are different from others and accept limits that would not be allowed in elections for the legislative and executive branches.

In the last few years, in a series of 5-4 decisions, the conservatives on the Court have declared unconstitutional several campaign-finance laws designed to prevent corruption and to ensure greater equality in the electoral process. However, none of these recent cases involved laws regulating campaign spending in judicial elections. The Court might be more accepting of the need to limit the role of money in the selection of judges. Two years ago, in *Caperton v. A.T. Massey Coal Company*, the Court ruled that due process was vio-

lated in a high-profile West Virginia case. A state supreme court justice participated in the case after the CEO of a company in the litigation had spent \$3 million to get the justice elected. In *Caperton*, the Court emphasized the “extreme facts,” including the timing of the expenditures and the amount of the CEO’s support, which totaled more than all other expenditures supporting the judicial candidate combined. In such circumstances, the Court declared, “the probability of actual bias rises to an unconstitutional level.” Significantly, this was also a 5-4 decision—but with Justice Anthony Kennedy siding with the Court’s moderates and liberals as the swing vote and writing the opinion for the majority. In other recent cases, Kennedy joined the Court’s conservatives in striking down campaign-finance reforms directed at other branches of government.

A legislator is not disqualified from voting on a bill that benefits those who spent a great deal of money for his or her election; the legislator gets in trouble for bribery only when there is an explicit quid pro quo. But judges are different. Due process requires an impartial decision-maker, and judges are expected to decide the cases before them on the merits, rather than to please constituents or donors. Therefore, campaign-finance laws that would not be allowed for elections of legislators or executive officials might be permitted in judicial elections, even by the Roberts Court, given Justice Kennedy’s views.

THREE KEY APPROACHES

to campaign-spending reforms in judicial elections are recusal rules, spending limits, and public funding. A minimal first step is for states to adopt rules, as recommended by the American Bar Association, requiring recusal of judges from cases where a party has spent more than a designated sum to elect the person to the bench.

More dramatically, the Supreme Court should uphold limits on campaign expenditures in judicial races that otherwise would not be allowed. Since 1976, in *Buckley v. Valeo*, the Supreme Court has held that the government may restrict the amount directly contributed to a candidate but not the amount that a person spends in campaign expenditures. However, as the Court recognized in *Caperton*, large expenditures—not just contributions—in judicial races are inconsistent with the Constitution’s requirement of due process of law. So states with elected judges should enact strict limits on spending, regulating both contributions and expenditures, in judicial races. The

THE STARTING POINT IS TO RECOGNIZE THAT JUDGES ARE DIFFERENT FROM OTHER POLITICIANS.

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courts should uphold these restrictions as essential to ensure fairness and due process of law.

Indeed, Kennedy's opinion for the Court in *Caperton* treats independent expenditures and contributions interchangeably for purposes of due-process analysis and thus provides a model for prospective judicial campaign reform. Implicitly, the majority recognizes that in judicial elections, large expenditures have the same undesirable effects as large contributions.

Similarly, the Court might allow public funding of judicial elections, even though in a ruling this past June in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Court, again in a 5-4 decision, declared unconstitutional an Arizona law providing public funding for elections

to state offices. The Court held that it violated the First Amendment to increase the amount of public funding for a candidate based on the amount of spending by candidates not receiving such funds. The Court rejected Arizona's argument that preventing corruption and the appearance of corruption justified such a law.

However, the special nature of judicial elections is a compelling reason why such systems should be allowed for judicial races. Some states, such as North Carolina, have enacted public-funding systems for judicial races, and these should be upheld. Prior to the Supreme Court's decision striking down Arizona's public-financing system for non-judicial offices, the Fourth Circuit, one of the more conservative federal appellate courts in the country, unanimously upheld North Carolina's system, which was enacted in response to the financial arms race in judicial elections that

was then taking hold across the country. In *North Carolina Right to Life v. Leake* (2008), the Fourth Circuit wrote powerfully that "the concern for promoting and protecting the impartiality and independence of the judiciary is not a new one; it dates back at least to our nation's founding." The challenged provisions of North Carolina's system, the Fourth Circuit wrote, "embody North Carolina's effort to protect this vital interest in an independent judiciary [and] are within the limits placed on the state by the First Amendment." Judges, again, are different.

THE ALTERNATIVE PATH

to reform, which in many ways is preferable, would be to eliminate the election of judges and have each state create a system of merit selection. States that already use such systems generally establish citizen nominating commissions to evaluate and recommend qualified candidates to an appointing authority—usually the governor—who then nominates one of the recommended candidates. Once on the bench for a period of time, the judges in some states then go before the voters in an up-or-down retention election. Eight states and the District of Columbia use merit selection without an elective retention mechanism.

Commission-based appointment systems are designed to avoid one of the problems that led many states to adopt judicial elections in the first instance—namely, the desire to reduce patronage and political clubhouse dynamics in direct-appointment systems. Eliminating contested elections also reduces the role of money in judicial selection. But their Achilles' heel

is retention elections, as the massive influence of special-interest money in Iowa's November 2010 retention elections demonstrated.

Politicians are expected to campaign based on what they will do if elected and are supposed to work to please their constituents once in office. But this is antithetical to the role of the judge. Citizens, including those unable or unwilling to spend on judicial campaigns, look to the judiciary to safeguard the highest ideals of equality under law.

Unfortunately, merit selection seems even less politically realistic than the hope that the Supreme Court will allow some limits on campaign expenditures in judicial elections. For more than a quarter of a century, every state effort to replace judicial elections with merit-selection systems has been defeated—often by huge margins. Last year, Nevada voters rejected such a proposal despite the tireless efforts by retired Supreme Court Justice Sandra Day O'Connor to have the state move from an elected to an appointed bench.

Changing from judicial elections to an appointive or merit selection requires a state constitutional amendment, which, in turn, generally requires voter approval (often in addition to legislative passage). Despite highly organized, well-funded campaigns led by established bar and good-government organizations, rank-and-file voters overwhelmingly resist giving up their right to vote in judicial races—even if they often choose not to vote in those races.

The most promising approach to reform, therefore, is to reduce the corrosive effects of money in judicial elections and drastically limit it. The starting point is to recognize that judges are different from other politicians and then to enact legislative reforms that the Supreme Court can accept.

From a practical perspective, there are two challenges: persuading states to legislate campaign-finance reforms for judicial races and then convincing the Supreme Court to uphold them. Both may seem like long shots. However, in the last two years, several state-court systems have begun examining their recusal rules and procedures to limit the influence of money. The increased attention to the escalating problem of spending in judicial elections could well provide the impetus for legislative action. Even though the Supreme Court generally views money as a form of speech, the Court majority evidently sees judicial elections somewhat differently. The justices—who are themselves appointed, not elected—must appreciate from their own experience that this country deserves better than the best judges that money can buy. ☐

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