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BUYING JUSTICE:
The Impact of *Citizens United*
on Judicial Elections

by Adam Skaggs

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THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTIONS

In *Citizens United v. FEC*,¹ the United States Supreme Court struck down the long-standing federal ban on corporate independent expenditures in elections.² The transformational effect that unrestricted corporate and union spending will have on elections for legislative and executive offices has been widely denounced.³ But the most severe impact of *Citizens United* may be felt in state judicial elections.

Just last year, the Supreme Court ordered a West Virginia judge disqualified from hearing the case of a campaign supporter who had spent extravagantly to elect the judge. It did so after concluding that, by refusing to step aside from hearing his benefactor's case, the judge had violated the opposing party's constitutional right to a fair hearing before an impartial court.⁴ Yet, by opening the door to expanded corporate spending in judicial races, *Citizens United* is likely to make this type of conflict of interest more common, and to increase pressures on judges who seek to remain independent and impartial.

Equally important, heightened spending in judicial races will almost certainly exacerbate existing public concerns that justice is for sale to the highest bidder. As Justice John Paul Stevens noted in dissent, the *Citizens United* decision came at a time "when concerns about the conduct of judicial elections have reached a fever pitch."⁵ And after *Citizens United*, if retired Justice Sandra Day O'Connor's predictions are correct, "the problem of campaign contributions in judicial elections might get considerably worse and quite soon."⁶

This paper examines the damage that runaway spending in judicial elections is having on our state judiciaries, and offers several policy recommendations that states should consider in responding to the threat that outsized campaign spending poses to fair and independent courts. It first summarizes recent trends in judicial election spending and documents the impact that escalating spending is having on public confidence in the courts. Next, the paper highlights seven states in which *Citizens United's* impact on judicial campaigns is likely to be significant, and explains why the decision is likely to spur increased special interest spending in judicial elections. The paper concludes with proposals for responding to our increasingly expensive judicial elections: public financing for judicial campaigns; enhanced disclosure and disqualification rules; and replacing judicial elections with merit selection systems in which bipartisan committees nominate the most qualified applicants, governors appoint judges from the nominees, and voters choose whether to retain the judges at the ballot box.

INTRODUCTION

Retired Justice Sandra Day O'Connor recently explained the risks that unlimited campaign spending poses to fair and independent courts — and the likelihood that *Citizens United* will intensify these risks:

If you're a litigant appearing before a judge, it makes sense to invest in that judge's campaign. No states can possibly benefit from having that much money injected into a political judicial campaign. The appearance of bias is high, and it destroys any credibility in the courts.

[After *Citizens United*], we can anticipate labor unions' trial lawyers might have the means to win one kind of an election, and that a tobacco company or other corporation might win in another election. If both sides open up their spending, mutually assured destruction is probably the most likely outcome. It would end both judicial impartiality and public perception of impartiality.⁷

The threat to our state courts is real — and serious. Thirty-nine states use elections to select some or all of their judges.⁸ According to the National Center on State Courts, nearly 9 in 10 — fully 87% — of all state judges run in elections, either to gain a seat on the bench in the first place, or to keep the seat once there.⁹ In a 2001 poll of state and local judges, more than 90% of all elected judges nationwide said they are under pressure to raise money in election years, and almost every elected judge on a state high court — 97% — said they were under a “great deal” or at least some pressure to raise money in the years they faced election.¹⁰

Corporations and special interests are already major spenders in judicial campaigns. As repeat players in high-stakes litigation, these groups have strong incentives to support judges they believe are likely to favor their interests. This is particularly true on state high courts, where electing a majority or a crucial swing vote can make the difference in litigation involving multi-million dollar claims. As a result, business interests and lawyers account for nearly two-thirds of all contributions to state supreme court candidates. Pro-business groups have a distinct advantage: in 2005-2006, for example, they were responsible for 44% of all contributions to supreme court candidates, compared with 21% for lawyers.¹¹ In 2006, pro-business groups were responsible for more than 90% of all spending by interest groups on television advertising in supreme court campaigns.¹²

This special interest spending has occurred in judicial elections despite the fact that approximately half the states previously banned or sharply restricted corporations from using treasury funds for campaign advocacy. None of these restrictions is permissible after *Citizens United*. The inevitable result will be increased corporate spending in judicial elections — and increased threats to independent and impartial courts.

RECENT DRAMATIC INCREASES IN SPENDING IN STATE JUDICIAL ELECTIONS ALREADY POSE SIGNIFICANT THREATS TO INDEPENDENT AND IMPARTIAL COURTS.

Over the last ten years, state judicial elections have been transformed from quiet, civil contests to expensive affairs featuring exorbitant spending, negative campaign advertising, and bitter personal attacks. As a result, even before *Citizens United*, there has been growing public apprehension about the influence of money in judicial elections. Concerns about money on the campaign trail, in turn, have spawned questions about the impact of money in our courtrooms — and the perception that, too often, justice goes to the highest bidder.

Over the last decade, spending in judicial races has skyrocketed.

Between 2000 and 2009, candidate fundraising more than doubled from the previous decade across more than 20 states with competitive elections for state supreme courts — rising to \$206.4 million from \$83.3 million between 1990 and 1999.¹³ Nineteen states set high court fundraising records in the 2000-2009 decade.¹⁴ Candidate fundraising, collectively, topped \$45 million in three of the last five election cycles.¹⁵

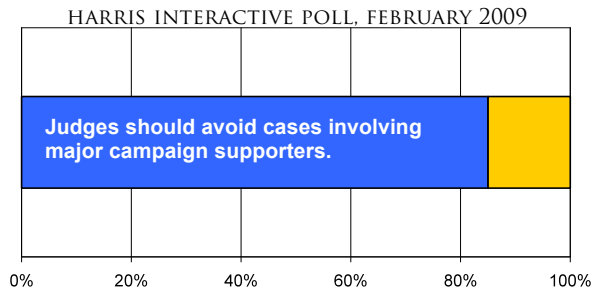
Just as candidate fundraising has soared, so has the use of television advertising in judicial races, and an increasing percentage of this advertising comprises negative ads and character attacks. From 2000 to 2009, an estimated \$93.6 million was spent on television advertising by candidates and interest groups hoping to sway judicial contests.¹⁶ The period from 2007 to 2008 was the most expensive two-year cycle for television advertising in supreme court election history, with nearly \$27 million spent.¹⁷ Nearly another \$5 million was spent on television advertising in 2009, when only 3 states had races for supreme court seats.¹⁸ Eight states set records for spending on television ads from 2007 to 2008, and 2008 saw more television ads aired in supreme court contests than ever before.¹⁹

The swelling costs of campaigns for the bench have coincided with the expanded involvement of outside special interest groups. The so-called “tort wars” have spilled onto the campaign trail, with business groups squaring off against plaintiffs’ lawyer groups and unions in arms-race spending battles. Special interests and party organizations paid for more than 40% of all the television advertising for judicial candidates from 2000 to 2009.²⁰ In some races, interest group spending dwarfed that of the candidates themselves: in a 2006 high court race in Washington, for example — the most expensive judicial election that state had ever seen — every single television ad was paid for by outside special interest groups independent of the candidates themselves.²¹ In a 2004 race in West Virginia, campaign spending by a single contributor to one judge’s campaign eclipsed the total amount spent by all other supporters of the judge *combined* — and exceeded by 300% the amount spent by the judge’s own campaign committee.²²

The arms-race spending in judicial campaigns is undermining public confidence in fair and impartial courts.

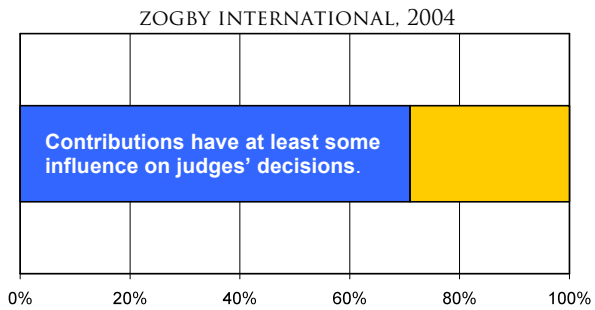
The public has consistently demonstrated serious concern about the growing price-tag associated with running for the bench. And because of fears that campaign spending influences judicial decision making, there is broad consensus that judges should not preside over the cases of their campaign supporters. These views have been repeatedly confirmed through national polls and surveys in several states.

- According to a February 2009 national poll conducted by Harris Interactive, more than 80% of the public believes judges should avoid cases involving major campaign supporters.²³ And a USA Today/Gallup Poll also conducted in February 2009 found that 89% of those

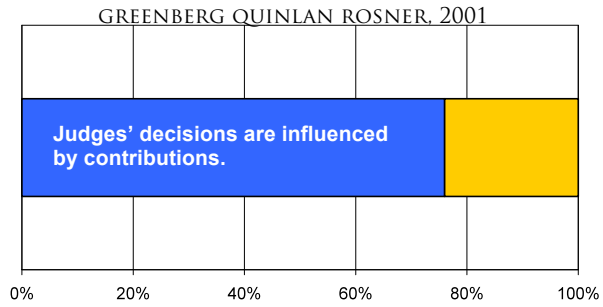


surveyed believe the influence of campaign contributions on judges' rulings is a problem. More than 90% of the respondents said judges should not hear a case if it involves an individual or group that contributed to the judge's election campaign.²⁴

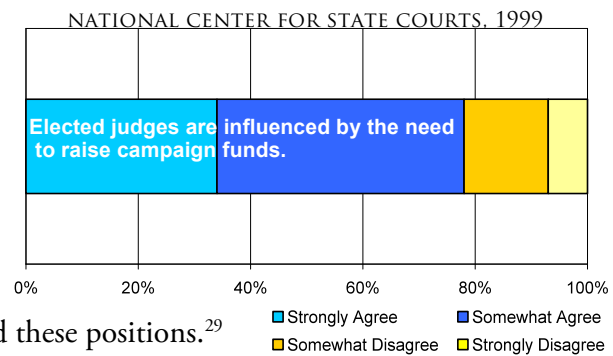
- Similarly, in a 2004 survey conducted by Zogby International, more than 70% of the respondents said they believed that campaign contributions had at least some influence on judges' decisions.²⁵ More than 80% of African Americans expressed this view, including a majority who said contributions had a "great deal" of influence.²⁶



- In a national poll conducted by Greenberg Quinlan Rosner Research in 2001, 76% of those surveyed reported believing that judges' decisions were influenced by contributions.²⁷



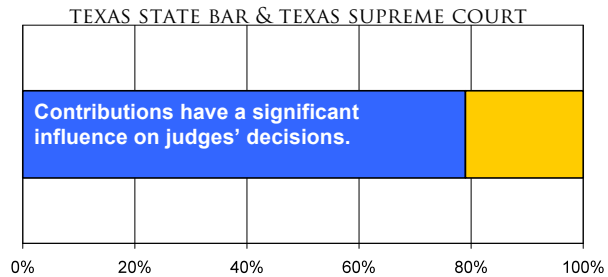
- A 1999 national survey for the National Center for State Courts found that 34% of respondents "strongly" agreed, and 44% "somewhat" agreed, that "elected judges are influenced by the need to raise campaign funds."²⁸ Non-white respondents were more likely than whites to hold these positions.²⁹



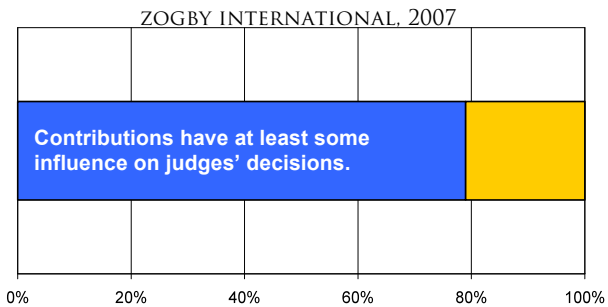
- State-wide polls have reached similar conclusions. In 2008, 90% of Wisconsin voters³⁰ and 85% of Minnesotans³¹ said they believed judges' decisions were influenced by campaign contributions. In North Carolina, 86% of those polled in 2005 reported believing that campaign contributions to judges too often lead to conflicts of interest.³² In New York, a 2004 poll found that 83% of New Yorkers thought that contributions have at least some influence on judicial decisions,³³ and a 2003 poll found that 80% of registered voters believed that campaign contributions influenced judicial decision making, and that judges should not rule on cases that involve their campaign contributors.³⁴ In Texas, 83% of those polled thought that money had an impact on judicial decisions,³⁵ and nine out of ten Pennsylvania voters reported in 2002 that they believed large campaign contributions influenced judicial decisions.³⁶

Business leaders and trial lawyers share the public’s misgivings about money in judicial elections. But because neither lawyers nor business groups are willing to cede any perceived advantage to the other side, they believe they can’t afford *not* to contribute to potential judges — and therefore account for the lion’s share of contributions made to judicial candidates.³⁷

- A study by the Texas State Bar and Texas Supreme Court found that 79% of attorneys surveyed believe that campaign contributions have a significant influence on a judge’s decision.³⁸



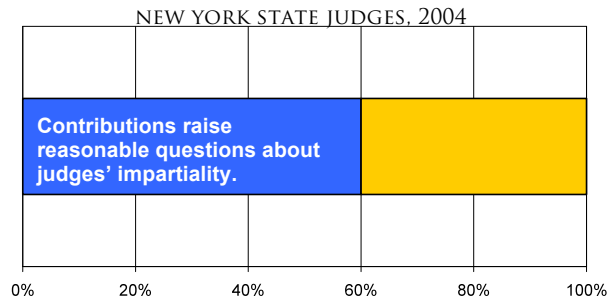
- According to a 2007 Zogby poll, 79% of business leaders believe that campaign contributions made to judges have at least some influence on their decisions in the courtroom, and 90% are concerned that campaign contributions and political pressure will make judges accountable to politicians and special interest groups instead of the law and the Constitution.³⁹



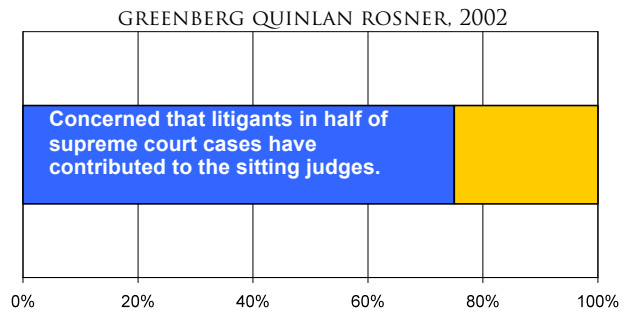
- Business leaders are also concerned that fears about money’s influence in the courtroom can cause real economic harm: in a friend of the court brief submitted to the U.S. Supreme Court by the Committee for Economic Development and corporations including Intel, PepsiCo, and Wal-Mart, they argued that “where outsized contributions by parties create the perception that legal outcomes can be purchased, economic actors will lose confidence in the judicial system, markets will operate less efficiently, and American enterprise will suffer accordingly.”⁴⁰

Perhaps most alarming is the fact that judges themselves are worried about money's influence on judicial decision making.

- Approximately 60% of New York State judges surveyed in 2004 reported believing that campaign contributions raise reasonable questions about judges' impartiality.⁴¹



- In a 2002 survey of more than 2,400 state judges by Greenberg Quinlan Rosner Research, nearly half of those surveyed — 46 percent — reported believing that judges' decisions were influenced by campaign contributions.⁴² More

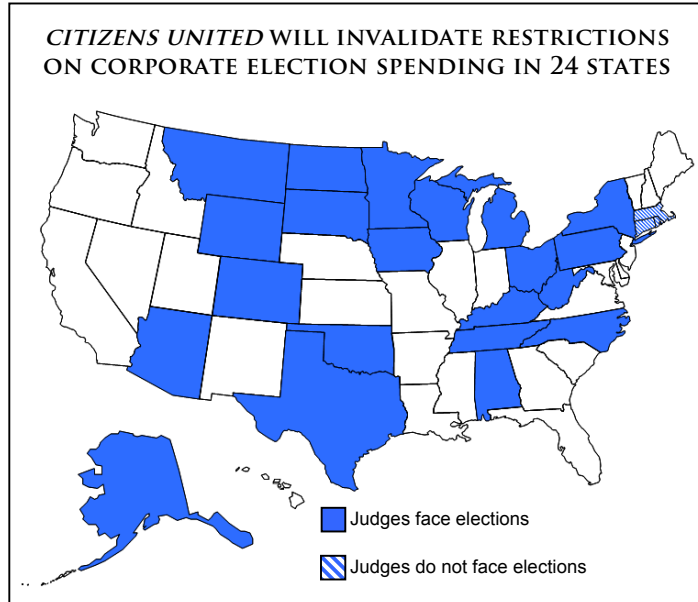


than 70 percent of judges expressed concern about the fact that, “[i]n some states, nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case.”⁴³ And more than 55 percent of state court judges believe that “judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign.”⁴⁴

CITIZENS UNITED WILL SPUR ENHANCED SPECIAL INTEREST SPENDING IN JUDICIAL CAMPAIGNS AND EXACERBATE CONCERNS THAT JUSTICE IS FOR SALE.

Although spending by corporate and other special interests in judicial elections has already reached alarming levels, *Citizens United* promises to boost their spending even further. Before the Supreme Court issued the decision, 22 states prohibited corporations from using treasury funds for campaign advocacy, and two more states strictly limited corporate expenditures.⁴⁵ Some or all judges face elections in 21 of the 24 states in which *Citizens United* will invalidate restrictions on corporate spending.⁴⁶

In those 21 states, it is likely that corporate spending will increase as a percentage of all the money spent in judicial elections, because in states where corporations have not been barred from election spending, their spending constitutes a significantly greater proportion of overall election fundraising than in states which previously restricted the use of corporate dollars. According to the National Institute for Money in State Politics:



In the 22 states that restrict direct corporate donations to candidates, individual donors provided 48 percent of the money. Just 23 percent came from corporations

[In contrast], in the six states that permit unlimited corporate donations, corporations provided 41 percent of the money, while individual donors gave just 23 percent.⁴⁷

The prospect of increased corporate spending in judicial elections in the 21 states where *Citizens United* invalidated corporate spending bans is of particular concern because many of these states have already experienced some of the highest spending and nastiest races to date. Moreover, even in states which have historically avoided the most egregious judicial electioneering, this year *Citizens United* may usher in a race to the bottom in terms of campaign finance practices. For example:

- **Alabama** is no stranger to expensive, contentious judicial elections, in spite of the fact that the state has historically strictly limited campaign spending by corporations.⁴⁸ Candidates for Supreme Court seats in Alabama, collectively, raised more money over the last decade than candidates in any other state.⁴⁹ Special interest groups from across the political spectrum have been big spenders in Alabama, with business or conservative

groups like the Business Council of Alabama (nearly \$5 million from 2000-2009) and Alabama Civil Justice Reform Committee (almost \$2.5 million) collectively outspending left-leaning interest groups, including the State Democratic Executive Committee (more than \$5 million), and Franklin PAC (nearly \$1 million).⁵⁰ With three high court races this year in Alabama, special interest spending is sure to continue, and may escalate as corporations and unions can spend directly rather than funneling their money through third party groups.

- **Iowa**, which has banned corporate election spending to date,⁵¹ has been largely spared the type of expensive, hard-fought judicial elections typical in other states. In part, this is because Iowa Supreme Court justices aren't initially elected to the bench; they are appointed, and then stand for retention elections. Iowa's retention elections have ordinarily been relatively quiet affairs, but this year could be different. Three justices in Iowa will face retention elections, and all three voted last year to strike down the state's ban on same-sex marriage. They have been highly criticized by conservative and Republican commentators, and are likely to face a well-funded campaign to persuade Iowa citizens to vote these justices off the bench.
- Because **Michigan** has previously banned corporate and union election spending,⁵² these interests have sought to influence Michigan judicial elections through intermediary groups, including the Michigan Chamber of Commerce (with \$2.88 million in independent television ads and \$164,400 in direct contributions in the last decade) and the state parties (the Michigan Democratic Party spent \$1.86 million on television ads and \$219,000 in donations, and the Republican Party spent \$613,000 on television ads and \$217,233 in donations).⁵³ After *Citizens United*, the corporate and union contributors to these intermediate groups will be free to spend directly, and it's very likely they will. A justice on Michigan's high court recently wrote about the sharp "philosophical, personal, and sometimes frankly partisan cleavages" that separate its 4 progressive and 3 conservative justices.⁵⁴ One justice in each camp is up for election this fall,⁵⁵ and special interests supporting one will oppose the other, with high spending on both sides.
- The role of money in **Ohio's** judicial elections has attracted significant criticism, though the state has historically banned direct campaign spending by corporations.⁵⁶ A 2006 New York Times study found both that Ohio justices routinely sat on cases after having received campaign contributions from the parties involved, and that they voted in favor of those contributors in 7 cases out of 10. (One justice voted for his contributors 91% of the time.)⁵⁷ One sitting justice, Paul E. Pfiefer, told the New York Times that he "never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race. Everyone interested in contributing has very specific interests. . . . They mean to be buying a vote."⁵⁸ This year, Justice Pfiefer is up for reelection, and given the green-light that *Citizens United* gave to direct corporate and union spending, it is unlikely the election process will be any more genteel.
- Before *Citizens United*, **Pennsylvania** prohibited corporations from making any "contribution or expenditure in connection with the election of any candidate or for any political purpose whatever."⁵⁹ But that has not kept big money out of judicial elections in the Keystone State. In 2009, Democrat Jack Panella broke a state record for individual fund-raising — spending more than \$2.6 million dollars — but still lost to

Republican Joan Orié Melvin.⁶⁰ Orié Melvin challenged Panella over his connections to his campaign supporters, lambasting him for taking \$1 million from the Philadelphia Trial Lawyers Association and asking, “Is it pay-to-play? Is it justice for sale? I don’t know, but it sure sounds suspect.”⁶¹ Further questions about Pennsylvania’s judicial elections surfaced after the Panella-Orié Melvin contest when two of Orié Melvin’s sisters — including State Senator Jane Orié — were indicted for a series of campaign violations, including allegedly using public resources to support Orié Melvin’s campaign for the Commonwealth’s high court.⁶² The outsized role of money in Pennsylvania’s judicial elections and reports of campaign irregularities have led one prominent group, Pennsylvanians for Modern Courts, to advocate scrapping contested elections entirely and adopting a system of merit-based appointments.⁶³ Editorial boards across Pennsylvania have echoed the calls to adopt merit selection; in the words of the Philadelphia Inquirer, “Pennsylvanians would have more faith in their judiciary without legal scandals and campaign-donor conflicts arising from judicial elections.”⁶⁴ Legislation to amend Pennsylvania’s constitution to adopt merit selection is currently pending in both houses of the state legislature, and Governor Edward Rendell has recently urged prompt adoption of the bills, explaining that “The influence of big money in judicial elections has exploded in this decade, and it’s something we have to pay attention to because it has totally eroded public confidence in the judicial system.”⁶⁵

- As noted above, it was a case of extraordinary campaign spending in **West Virginia** that led the Supreme Court to declare last year that judges must recuse themselves from hearing the cases of their largest campaign supporters. That case, *Caperton v. A.T. Massey Coal Co.*, arose when the CEO of a large coal company, Don Blankenship, who was appealing a \$50 million verdict against his company, spent \$3 million of his personal funds to elect a judge to the appellate court. (The judge won and cast the tie-breaking, deciding vote to throw out the \$50 million damages award.⁶⁶) Blankenship had to reach into his own pockets to support the judge of his choosing because, until *Citizens United*, West Virginia prohibited using corporate funds for electioneering purposes.⁶⁷ Now, a litigant in Blankenship’s shoes will not be limited to using his own money to influence a judicial election; he’ll be able to use millions in corporate treasury funds, without limitation. Increased corporate spending will place additional pressure on West Virginia judges, who already struggle to avoid favoring campaign supporters. As Richard Neely, a retired chief justice of West Virginia’s high court, put it, “[i]t’s pretty hard in big-money races not to take care of your friends. It’s very hard not to dance with the one who brought you.”⁶⁸
- Despite a ban on corporate election spending,⁶⁹ runaway spending in **Wisconsin** court races led the state legislature last year to adopt a system of public financing for judicial elections.⁷⁰ The vote for public financing took place against the backdrop of a months-long, scorched-earth battle in the state’s high court over rules governing when justices are disqualified from the cases of campaign supporters. The court ultimately adopted — by a razor-thin, 4-3 vote — a rule that flies in the face of the U.S. Supreme Court’s *Caperton* decision: it provides that campaign spending alone is *never* a sufficient basis to for a judge’s disqualification.⁷¹ The controversial rule was actually drafted and proposed to the court by a special interest group, Wisconsin Manufacturers and Commerce, or “WMC,” that has spent more in Wisconsin judicial elections over the last decade than any other group.⁷² Indeed, in 2007 and 2008, WMC spent approximately \$4 million to elect two of the four justices in the majority voting for the new disqualification rule it

wrote,⁷³ leaving critics of the new rule to complain that WMC had achieved what it had “pursued relentlessly for years: A bought-and-paid-for conservative majority [on] the Wisconsin Supreme Court.”⁷⁴

These examples of excessive spending in judicial elections are troubling enough, and they all took place in states that previously restricted direct corporate spending in elections. In each of those states — as in 14 others that elect judges and have banned corporate election spending — unrestricted corporate and union spending is now the law of the land.

Special interest spending is almost certain to increase in these states, placing ever greater strains on an already challenged court system. State judiciaries can ill afford increased public skepticism about their impartiality, since their very legitimacy depends on a reputation as an impartial, neutral, and bias-free forum.⁷⁵ Empirical research confirms that the public perception of unfair treatment “is the single most important source of popular dissatisfaction with the legal system,”⁷⁶ and with three-quarters of all Americans believing that the biggest spenders in judicial elections have a home-field advantage in the courts, increased spending in judicial elections will only further undermine the public’s confidence.

CONCLUSION

Chief Justice Rehnquist once called our court system the “crown jewel” of our American experiment, but the judiciary is threatened as never before. Corporations, unions and other special interests believe that the most efficient way to buy influence is to control the bench: as an Ohio union official put it two decades ago, “We figured out a long time ago that it’s easier to elect seven judges than to elect 132 legislators.”⁷⁷ With its opinion in *Citizens United*, the Supreme Court has sanctioned even greater, more transparent attempts to capture the bench.

States must respond, and quickly. To counter the perception — and potential reality — that justice is for sale, states should consider the following:

Adopting Public Financing for Judicial Campaigns.

As the President of the American Bar Association recently noted, “[a] judicial system that requires judges to solicit contributions from interests appearing before the court risks removing the blindfold from the eyes of Lady Justice.”⁷⁸ To get judges out of the unseemly business of dialing for dollars, states should adopt systems of public financing.

North Carolina became the first state to enact a voluntary public financing program for judicial campaigns in 2002. Public financing has now been in place there for three complete election cycles (2004, 2006, and 2008), and has been highly successful. Thirty-one of the 41 candidates competing for seats on the state Supreme Court or Court of Appeals during those years participated in public financing (and three other candidates applied to participate, but did not qualify).⁷⁹ As the 2010 judicial election season gets underway, all 12 eligible judicial candidates have declared their intent to participate in the North Carolina’s public financing program.⁸⁰ Moreover, participation has been high across demographic lines: challengers and incumbents, men and women, whites and African Americans, and Democrats and Republicans have all participated in high numbers. And, even in these economically challenging times, the program has remained solvent.⁸¹

Other states have followed — or are considering following — North Carolina’s lead. New Mexico adopted public financing for appellate judges in 2007,⁸² Wisconsin followed suit in 2009,⁸³ and West Virginia recently adopted a pilot program that will provide public financing for state supreme court races in 2012.⁸⁴ Other states whose judges are elected should adopt public financing for their elections. Such programs remove the potential for conflicts of interest in the courtroom when judges raise money from the parties and lawyers who appear before them.

Judicial public financing is embraced by the public. The year before the Wisconsin legislature passed judicial public financing, two-thirds of voters in the Badger State reported favoring such a system.⁸⁵ North Carolina’s system, too, has strong public support, according to a 2005 poll, which showed that 74 percent supported the program.⁸⁶ And public financing is popular with judicial candidates: as North Carolina Court of Appeals Judge Wanda Bryant said, public financing “makes all the difference. I’ve run in two elections, one with campaign finance reform and one without. I’ll take ‘with’ any time, any day, any where.”⁸⁷

Codifying Robust Disclosure and Recusal Rules.

When it disqualified a West Virginia judge from hearing the case of his \$3 million benefactor in *Caperton*, the U.S. Supreme reaffirmed that an impartial, unbiased tribunal is the *sine qua non* of due process of law. With unprecedented levels of money flowing into judicial elections, it is all the more important for states to adopt strict disqualification rules to ensure that judges do not hear cases when their impartiality might reasonably be questioned. Writing for the majority in *Caperton*, Justice Anthony Kennedy made clear that states are permitted to require recusal even when circumstances do not rise to constitutional significance, noting that “States may choose to ‘adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.’”⁸⁸ Various states have examined their recusal guidelines since *Caperton*, with Michigan and Wisconsin among the first to adopt broad changes to their disqualification rules.⁸⁹

The Brennan Center has long advocated reforming state recusal practice, and we have put forward several procedural and substantive reforms.⁹⁰ Among the key proposals are ones designed to enhance disclosure — both by litigants and by judges. Without robust disclosure of the spending involved in judicial campaigns, meaningful recusal practice is impossible. Thus, states should require judges, at the outset of litigation, to disclose any information regarding campaign statements and campaign contributions, which potentially impact their impartiality in any given case. To further assist judges in determining whether grounds for disqualification exist because of campaign spending, states should require litigants and their attorneys to file a disclosure affidavit at the outset of litigation, in which they list any campaign contributions to or expenditures in favor of presiding judges or judicial candidates against whom the presiding judges have competed or will compete (or to state that no such contributions or expenditures have been made).

Just as public financing addresses the role of money on the front end of the election process, strict disclosure and disqualification rules address money in the courtroom on the back end of the process. States should strengthen their disclosure and disqualification procedures, to ensure that judges do not preside over the cases of their biggest campaign supporters.

Replacing Contested Elections with Appointment and Retention Elections.

Given the price tags associated with judicial elections in many states, various judges, lawyers and policy makers advocate doing away with contested elections all together, and replacing them with so-called merit systems, in which judges are screened by nominating commissions, appointed by the governor, and then subject to periodic retention elections.

Retired Justice O’Connor, who is chairing an initiative at the Institute for the Advancement of the American Legal System that seeks to eliminate contested judicial elections, has been an outspoken proponent of replacing elections with merit systems. She has explained that, “What the people need and want at the end of the day is a fair and impartial judiciary, one that’s qualified, fair and impartial. . . . It is much more difficult to achieve that by using popular campaign-funded elections.”⁹¹ U.S. Supreme Court Justice Ruth Bader Ginsburg recently echoed Justice O’Connor’s position, calling for an end to judicial elections at a meeting of the National Association for Women Judges.⁹²

In November, voters in Nevada will be presented with a ballot initiative to eliminate that state's contested judicial elections, and groups are pushing similar initiatives in other states, including Pennsylvania, Ohio and Minnesota.⁹³ While efforts to replace judicial elections with merit selection systems have struggled to find broad public support in past years, with the volume of money that has flooded judicial elections in the last several election cycles, we may have reached a tipping point in which a majority of citizens conclude that the only way to fix judicial elections is to eliminate them entirely.

* * *

Some states may ultimately choose to dispense with contested elections all together, while others may prefer to reform existing election systems by adopting public financing and strengthening disclosure and disqualification rules. While the particular solutions that are appropriate in one state may not make the most sense in another, it is true in every state that inaction is not an acceptable choice. The transformation of judicial elections over the last decade, with ever-increasing spending and growing involvement of special interest groups seeking to influence the bench, has led to an unprecedented level of public skepticism that state judges apply the law evenly, fairly, and without bias. Reforms are needed, now, to restore the public's faith in the state courts.

ENDNOTES

¹ 130 S.Ct. 876 (2010).

² *Citizens United* allows corporations and unions to make unlimited independent expenditures and electioneering communications in federal and state elections, including state judicial elections. The federal ban on direct contributions from corporations and unions to candidates' campaigns remains in effect after *Citizens United*. Also, disclosure of independent expenditures and electioneering communications was upheld by *Citizens United*.

³ See, e.g., Editorial, *Court's campaign ruling threatens the public interest*, USA Today, Jan. 22, 2010, available at http://www.usatoday.com/printedition/news/20100122/editorial22_st.art.htm; Erwin Chemerinsky, Op-Ed., *Conservatives embrace judicial activism in campaign finance ruling*, L.A. Times, Jan. 22, 2010, available at <http://www.latimes.com/news/opinion/la-oe-chemerinsky22-2010jan22,0,5829403.story>; David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. Times, Jan. 21, 2010, available at <http://www.nytimes.com/2010/01/22/us/politics/22donate.html?ref=politics>; Bob Edgar, Op-Ed., *Supreme Court's campaign ruling: a bad day for democracy*, Christian Sci. Monitor, Jan. 22, 2010, available at <http://www.csmonitor.com/Commentary/Opinion/2010/0122/Supreme-Court-s-campaign-ruling-a-bad-day-for-democracy>.

⁴ See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

⁵ *Citizens United*, 130 S.Ct. at 968 (Stevens, J., dissenting).

⁶ Adam Liptak, *Former Justice O'Connor Sees Ill in Election Finance Ruling*, N.Y. Times, Jan. 27, 2010.

⁷ Charlie Hall, O'Connor: *Contributions 'Can Poison the System'*, Gavel Grab, Jan. 26, 2010, at <http://www.gavelgrab.org/?p=7352>.

⁸ See American Judicature Society, *State Judicial Selection*, at http://www.ajs.org/selection/sel_stateselect.asp.

⁹ See National Center for State Courts, *Judicial Selection and Retention*, at <http://www.ncsconline.org/WC/CourTopics/FAQs.asp?topic=JudSel>; see also Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. Times, May 25, 2008.

¹⁰ See Greenberg Quinlan Rosner Research, *Justice at Stake – State Judges Poll, 2001*, at http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf (“2001 Greenberg Quinlan Poll”).

¹¹ See James Sample *et al.*, *The New Politics of Judicial Elections 2006* 18 (2007), at http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_2006/ (“New Politics 2006”).

¹² *Id.* at 7.

¹³ See James Sample *et al.*, *The New Politics of Judicial Elections, 2000-09: Decade of Change* (2010) (forthcoming) (“New Politics 2000-2009”); see also Ian Urbina, *24 States' Laws Open to Attack After Campaign Finance Ruling*, N.Y. Times, Jan. 22, 2010.

¹⁴ See *New Politics 2000-2009*.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See New Politics 2006 at 13.

²² See *Caperton*, 129 S. Ct. at 2264.

²³ Justice at Stake Campaign, Press Release, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009), at <http://www.justiceatstake.org/node/125>.

²⁴ See Joan Biskupic, *Supreme Court Case With The Feel Of A Best Seller*, USA Today, Feb. 16, 2009.

²⁵ See Justice at Stake, March 2004 Survey Highlights Americans Speak Out On Judicial Elections, 2004, at <http://www.gavelgrab.org/wp-content/resources/polls/ZogbyPollFactSheet.pdf>.

²⁶ *Id.*

²⁷ 2001 Greenberg Quinlan Poll.

²⁸ National Center for State Courts, How the Public Views the State Courts: a 1999 National Survey (1999), available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf.

²⁹ *Id.*

³⁰ Justice at Stake, American Viewpoint: Wisconsin Statewide Survey (Jan. 2008), at http://www.justiceatstake.org/media/cms/AmView_Wisconsin_Statewide_Toplines_4BAC7C24F248C.pdf (“Wisconsin Statewide Survey”).

³¹ Justice at Stake: Decision Resources, Ltd.: Minnesota Statewide Survey (Jan. 2008), at http://www.justiceatstake.org/media/cms/MinnesotaJusticeatStakesurvey_717C253F67D9B.pdf.

³² N. Carolina Center for Voter Education, American Viewpoint: North Carolina Statewide Survey (June 2005).

³³ Commission to Promote Public Confidence in Judicial Elections, Report to the Chief Judge of the State of New York (June 29, 2004)

³⁴ Commission to Promote Public Confidence in Judicial Elections, Public Opinion and Judicial Elections: A Survey of New York State Registered Voters (2003).

³⁵ Texas Supreme Court Justice Thomas R. Phillips, State of the Judiciary Address to the 76th Legislature of the State of Texas (March 29, 1999).

³⁶ A.B.A. Standing Committee on Judicial Independence, Public Financing of Judicial Campaigns: Report of the Commission on Public Financing of Judicial Campaigns (Feb. 2002).

³⁷ See, e.g., New Politics 2006 at 18-19; see also Deborah Goldberg *et al.*, The New Politics of Judicial Elections 2004 20-21 (2005), at http://www.brennancenter.org/content/resource/the_new_politics_of_judicial_elections_2004/.

³⁸ See *Republican Party of Minn. v. White*, 416 F.3d 738, 774 (8th Cir. 2005) (en banc) (Gibson, J. dissenting) (citing Alexander Wohl, *Justice for Rent*, The Am. Prospect (May 22, 2000)).

³⁹ See Zogby International, Attitudes and Views of American Business Leaders on State Judicial Elections and Political Contributions to Judges, May 2007, at http://www.justiceatstake.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf.

⁴⁰ *Caperton v. A.T. Massey Coal Co.*, Brief of Amici Curiae Cmte. for Economic Development *et al.* in Support of Petitioners 9 (No. 08-22 2009), available at http://brennan.3cdn.net/2c21a25a061c25740f_dkm6bnptq.pdf.

⁴¹ Commission to Promote Public Confidence in Judicial Elections, New York State Judges: Mail Survey Results (2004).

⁴² See Greenberg Quinlan Rosner Research & American Viewpoint, Justice At Stake State Judges Frequency Questionnaire 5 (2002), at http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf.

⁴³ *Id.* at 9.

⁴⁴ *Id.* at 11.

⁴⁵ The states that prohibited corporate treasury spending are Alaska, Arizona, Colorado, Connecticut, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming. Alabama and New York severely curtail corporate spending. For a list of the relevant state statutes, see *Citizens United v. FEC*, Supplemental Brief Of Amici Curiae Senator John McCain *et al.*, Appendix (No. 08-205, S.Ct. 2005), at http://www.campaignfreedom.org/docLib/20091007_McCainamicus.pdf. Judges face contested or retention elections in all these states except Connecticut, Massachusetts, and Rhode Island.

⁴⁶ The states with judicial elections in which *Citizens United* will invalidate corporate spending restrictions are Alabama, Alaska, Arizona, Colorado, Iowa, Kentucky, Michigan, Minnesota, Montana, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming.

⁴⁷ Edwin Bender, *Corporations' Influence On Elections Will Grow*, Billings Gazette, Feb. 6, 2010, at http://billingsgazette.com/news/opinion/guest/article_59f82a8e-12b6-11df-8976-001cc4c002e0.html.

⁴⁸ See Ala. Code § 10-2A-70 (generally prohibiting corporations from making election expenditures); *id.* § 10-2A-70.1(a) (permitting corporate expenditures of \$500 or less per election “to aid, promote or prevent the nomination or election of any person”).

⁴⁹ See New Politics 2000-2009.

⁵⁰ *Id.*

⁵¹ See Iowa Code § 68A.503(1) (prohibiting corporations from contributing to a candidate or expressly advocating the election or defeat of a candidate); see also *id.* § 68A.503(3).

⁵² See Mich. Comp. Laws § 169.254 (prohibiting corporations and labor organizations from making contributions or expenditures).

⁵³ See New Politics 2000-2009.

⁵⁴ *Amendment of Rule 2.003 of the Michigan Court Rules*, ADM File No. 2009-04 (Mich. S. Ct. 2009) (Young, J., dissenting), *available at* <http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-04-112509.pdf>.

⁵⁵ The two Michigan justices whose terms expire this year are Robert Young and Elizabeth Weaver. Young, a Republican, has been a solidly conservative vote on the bench. Weaver is also nominally a Republican, but she has voted with the court's three progressive justices on numerous issues, and with tensions between Weaver and the state Republican party, there is speculation Weaver may run as an independent. *See MSC's Weaver stumps for judicial election reform*, The Michigan Lawyer, Mar. 16, 2010, *at* <http://michiganlawyerblog.wordpress.com/2010/03/16/mscs-weaver-stumps-for-judicial-election-reform/>.

⁵⁶ *See* Ohio Rev. Code Ann. § 3599.03(A)(1) (prohibiting corporations from political spending); *see also id.* § 3517.082(A).

⁵⁷ *See* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, *available at* <http://www.nytimes.com/2006/10/01/us/01judges.html> ("Liptak & Roberts").

⁵⁸ *Id.*

⁵⁹ 25 Pa. Stat. Ann. § 3253

⁶⁰ *See* New Politics 2000-2009.

⁶¹ *See* Associated Press, *Donations become issue in Pennsylvania Supreme Court race*, October 26, 2009.

⁶² *See* Paula Reed Ward, *Senator Orié Is Charged in Fraud*, Pittsburgh Post-Gazette, Apr. 8, 2010, *available at* <http://www.post-gazette.com/pg/10098/1048759-454.stm>.

⁶³ *See generally* Pennsylvanians for Modern Courts, *at* <http://www.pmconline.org/>.

⁶⁴ Editorial: Supreme Court Tainted By Orié Sisters' Charges, Philadelphia Inquirer, Apr. 15, 2010, *available at* http://www.philly.com/philly/blogs/inq_ed_board/Supreme_Court_tainted_by_Orie_sisters_charges.html.

⁶⁵ Jan Murphy, *Gov. Ed Rendell urges Legislature to allow merit selection of appellate court judges*, The Patriot-News, Apr. 21, 2010, *available at* http://www.pennlive.com/midstate/index.ssf/2010/04/gov_ed_rendell_urges_legislatur.html.

⁶⁶ *See generally* http://www.brennancenter.org/content/resource/caperton_v_massey/.

⁶⁷ *See* W. Va. Code § 3-8-8(a), (b)(1)(C) (forbidding corporate contributions "for the purpose of expressly advocating the election or defeat of a clearly identified candidate").

⁶⁸ Liptak & Roberts, *supra* note 57.

⁶⁹ *See* Wis. Stat. Ann. § 11.38(1)(a) (forbidding corporate contributions and expenditures in state elections).

⁷⁰ *See* Governor Jim Doyle, Press Release: Governor Doyle Signs Impartial Justice Bill to Provide Full Public Financing of Supreme Court Campaigns, Dec. 1, 2009, *at* http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=4763.

⁷¹ See Alex DeGrand, *Wisconsin Supreme Court adopts amended recusal rules*, State Bar of Wisconsin, Jan. 22, 2010, *available at* <http://www.wisbar.org/AM/Template.cfm?Section=News&Template=/CM/ContentDisplay.cfm&ContentId=89703>.

⁷² See New Politics 2000-2009.

⁷³ See Patrick Marley, *Former justice's case raises ethical issues with state high court*, Milwaukee Journal-Sentinel, Jan. 21, 2009, *at* <http://www.jsonline.com/news/wisconsin/38082744.html>.

⁷⁴ LaCrosse Tribune, Editorial: A Bad Day for Democracy, Jan. 24, 2010, *at* http://www.lacrossetribune.com/news/opinion/article_a188dbdc-07bc-11df-9b17-001cc4c002e0.html.

⁷⁵ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (“[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship”).

⁷⁶ Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *Law & Soc’y Rev.* 513, 517 (2003).

⁷⁷ Bert Brandenburg & Roy A. Schotland, *Keeping Courts Impartial Amid Changing Judicial Elections*, *Dædalus*, Fall 2008, *at* 105, *at* <http://www.mitpressjournals.org/doi/pdf/10.1162/daed.2008.137.4.102>.

⁷⁸ Carolyn B. Lamm, *Let’s Leave Politics Out of It*, *ABA Journal*, Mar. 1, 2010, *at* http://www.abajournal.com/magazine/article/lets_leave_politics_out_of_it/.

⁷⁹ See generally Center for Governmental Studies, *Public Campaign Financing: North Carolina Judiciary; Balancing the Scales*, 2009 (“Balancing the Scales”), *at* http://www.cgs.org/images/publications/cgs_nc_judg_061709.pdf.

⁸⁰ See Nelda Holder, *Three judicial races on primary ballot*, (Asheville) *Mountain Xpress*, Apr. 21, 2010, *available at* http://www.mountainx.com/news/2010/042110three_judicial_races_on_primary_ballot

⁸¹ See *Balancing the Scales*, *supra* note 79.

⁸² See NM ST § 1-19A-1 *et seq.*

⁸³ See Governor Jim Doyle, *Press Release: Governor Doyle Signs Impartial Justice Bill to Provide Full Public Financing of Supreme Court Campaigns*, Dec. 1, 2009, *at* http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=4763.

⁸⁴ Mannix Porterfield, *Supreme Court public campaign finance bill signed*, *Beckley Register-Herald*, Mar. 24, 2010, *available at* <http://www.register-herald.com/todaysfrontpage/x250445119/Supreme-Court-public-campaign-finance-bill-signed>.

⁸⁵ See *Wisconsin Statewide Survey*, *supra* note 30.

⁸⁶ See *Justice at Stake*, *Press Release: Justice at Stake Hails Public Financing Breakthrough in Wisconsin*, Nov. 5, 2009, *at* <http://tinyurl.com/ycmq5vs>.

⁸⁷ *Id.*

⁸⁸ 129 S. Ct. at 2267 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)).

⁸⁹ See generally Letter from J. Adam Skaggs to Hon. Henry Johnson, Jr., Chair, Subcommittee on Courts and Competition Policy, Committee on the Judiciary, U.S. House of Representatives, Dec. 15, 2009, at <http://tinyurl.com/yhcv7ru> (describing state recusal reform efforts after *Caperton* and analyzing Michigan and Wisconsin policies).

⁹⁰ See James Sample *et al.*, *Fair Courts: Setting Recusal Standards* (2008), at http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/; see also Brennan Center, *Recusal Standards after Caperton v. Massey* (2009), at http://www.brennancenter.org/content/resource/recusal_standards_after_caperton_v_massey/.

⁹¹ See Debra Cassens Weiss, *O'Connor: Want a Qualified, Impartial Judiciary? Don't Use Contested Elections*, *ABA Journal*, Dec. 10, 2009, at http://www.abajournal.com/news/article/oconnor_want_a_qualified_impartial_judiciary_dont_use_contested_elections/.

⁹² See *Ruth Bader Ginsburg says she would forbid state judicial elections*, *Washington Post*, Mar. 12, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031105136.html>.

⁹³ See generally Fredreka Schouten, *States Act To Revise Judicial Selection*, *USA Today*, Mar. 30, 2010, at http://www.usatoday.com/printedition/news/20100331/1ajudges31_st.art.htm; Editorial, *Judicial fairness: Let's take money out of judge elections*, *Harrisburg Patriot-News*, Apr. 5, 2010, at http://www.pennlive.com/editorials/index.ssf/2010/04/judicial_fairness_merit_select.html; James Nash, *Moyer, others want justice selection changed*, *Columbus Dispatch*, Nov. 17, 2009, at http://www.dispatch.com/live/content/local_news/stories/2009/11/17/moyer.html?sid=101.

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