



1-1-2010

Trends in Judicial Selection in the States

Maryl J. Chertoff

Georgetown University Law Center

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Judges Commons](#)

Recommended Citation

Maryl J. Chertoff, *Trends in Judicial Selection in the States*, 42 MCGEORGE L. REV. (2016).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol42/iss1/4>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Trends in Judicial Selection in the States

Meryl J. Chertoff*

I. INTRODUCTION

Many legal academics and the majority of the judiciary itself view judicial selection by election as inimical to values of judicial independence.¹ The elected-judge paradigm has been criticized repeatedly in the popular media, through bar association publications, and in law reviews. Defenders argue the system is as good as or better than any other, but this is a decidedly minority view among anyone with a law degree.² Yet Americans in the states that use this mechanism to select judges are reluctant to give it up. When put to polling, the elected-judge model, with its promise of accountability to the voters, is quite popular.³ And it is the polls, not the legal experts that hold the attention of state legislators, who

* The author is Director of the Justice and Society Program at the Aspen Institute, and Adjunct Professor of Law at Georgetown University Law Center. From 2006 to 2009 she directed the Sandra Day O'Connor Project on the State of the Judiciary at Georgetown Law. The author wishes to acknowledge Bert Brandenburg of Justice at Stake and Roy Schotland, Professor Emeritus at Georgetown Law for their valuable insights during the preparation of this article. Professor Charles Geyh offered many helpful observations, and is an inspiration to all of us thinking about these issues. Thanks also to Megan Gerking, Georgetown Law J.D. candidate, for excellent research assistance.

1. Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 631 (2009).
2. John D. Feerick observed in a symposium issue of the Fordham Urban Law Journal that proponents of elections are reluctant to give up their vote. See *Why We Seek Reform*, 34 FORD. URB. L.J. 3, 11 (2007) (noting that reforming a judicial selection system is especially difficult because the general public is easily persuaded that elections providing them with the right to vote are preferable to appointive systems because they are thought to be "more open and transparent and more fully reflective of the democratic principle"); see also Stephen Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290, 328 (2010) (empirical analysis demonstrating that the determination of whether an appointed judiciary is better than an elected judiciary is complicated and it may potentially be concluded that elected judges are better in some states but not in others); James Bopp, Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The Sui Generis Recusal Test of Caperton v. Massey*, 60 SYR. L. REV. 294, 308 (2010) (promoting judicial elections because they "ensure that judges are held accountable to the people, rather than to political elites and insiders, and provide a mechanism to keep judges within their legitimate bounds").
3. In a 2007 survey of 1,514 adults, 64% favored direct election and 31% favored a system in which governors nominate judges from a list of names prepared by an independent, bipartisan committee. ANNENBERG PUBLIC POLICY CENTER OF THE UNIVERSITY OF PENNSYLVANIA, PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS (2007), available at <http://www.law.georgetown.edu/Judiciary/documents/finalversion/JUDICIALFINDINGSoc1707.pdf> (on file with the *McGeorge Law Review*). In a 2008 poll, 82% of a sample of five hundred Alabama voters approved of the partisan election of Alabama Supreme Court justices only two years after a particularly bitter contested election for a supreme court seat in that state. WOMANTREND, ALABAMA: 501 LIKELY VOTERS (Sept. 25-28, 2008) (on file with the *McGeorge Law Review*). Other polls found similar margins among voters in Mississippi, Ohio, Pennsylvania, and Texas. See WOMANTREND, MISSISSIPPI: 500 LIKELY VOTERS (Sept. 23-28, 2008) (on file with the *McGeorge Law Review*) (finding 76% approval); WOMANTREND, OHIO: 502 LIKELY VOTERS (Sept. 22-24, 2008) (on file with the *McGeorge Law Review*) (finding 83% approval); WOMANTREND, PENNSYLVANIA: 500 REGISTERED VOTERS (Sept. 23-27, 2009) (on file with the *McGeorge Law Review*) (finding 67% approval); WOMANTREND, TEXAS: 700 LIKELY VOTERS (Oct. 6-11, 2008) (on file with the *McGeorge Law Review*) (finding 80% approval).

must weigh the risk and benefit, as well as the political consequences, of reforms in their states.

While the outlook has been grim for many years, there are a few recent developments which offer a glimmer of hope to reformers seeking to reduce the reliance of many states on electing judges. Two recent Supreme Court cases, *Caperton v. A.T. Massey Coal Co.*⁴ and *Citizens United v. Federal Election Commission*⁵, have focused increased public attention on the role of money both in state court judicial races and in elections generally. Advocacy groups that have long worked for changes in selection practices have grown increasingly sophisticated, and interest groups that have funneled funding to unseat incumbent judges have found increasing resistance from a more educated and informed group of interested voters.⁶

Historically, state court judicial elections were relatively sedate affairs.⁷ While judicial elections were subject to the criticism that they valued accountability over independence, the stakes of the argument were insufficient to draw widespread popular concern. Since 2002, the U.S. Supreme Court decision in *Republican Party of Minnesota v. White*,⁸ campaign finance reform, and the increasingly bitter economic contest of the “tort wars” in some states have led to an upward spiral in spending on state judicial races, particularly at the state supreme court level.⁹ The decision of the Supreme Court last term in *Caperton*,¹⁰ and the January 21, 2010 decision in *Citizens United*,¹¹ created a new focus on spending in all political races, but notably so in judicial races.

Now, concern about electing judges is no longer the province solely of academics, advocates, and interest groups. The new public awareness invites two arguments. First, that judicial elections are economically inefficient. Second, that the long-argued view among proponents of elections—that they are the only way to assure accountability by judges to popular opinion—can be addressed by other mechanisms, notably, a transparent judicial nomination commission system,

4. 129 S. Ct. 2252 (2009).

5. 130 S. Ct. 876 (2010).

6. Groups, such as Justice at Stake, Brennan Center for Justice, Institute for the Advancement of the American Legal System at the University of Denver, American Judicature Society, Sandra Day O'Connor Project on the Judiciary, and the National Institute of Money in State Politics, have increasingly been in the public forefront and the news.

7. Peter D. Webster, *Selection and Retention of Judges: Is There One “Best” Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995).

8. 536 U.S. 765 (2002).

9. JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE I, 11 (2010) (comprehensive report on the dramatic increase in spending on state judicial election campaigns), available at http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpv.pdf (on file with the *McGeorge Law Review*). “Campaign fundraising more than doubled, from \$83.3 million in 1990-1999 to \$206.9 million in 2000-2009.” *Id.* Twenty of twenty-two states that elect Supreme Court judges had the costliest contests in the 2000-2009 period. *Id.*

10. 129 S. Ct. 2252 (2009).

11. 130 S. Ct. 876 (2010).

more vigorous judicial recusal, and increased use and dissemination of judicial performance evaluations.

Recent developments in both Nevada and West Virginia suggest that legislatures and voters are ready to re-evaluate the way judges are selected, and that effective change in those states may serve as a model for a more widespread recalculation in other states.¹² West Virginia's efforts related to public financing and recusal standards in the wake of the *Caperton* decision and, in Nevada, voters were presented with the opportunity to move away from elected judges in a ballot proposition in the November 2010 elections.¹³ While these are incremental changes, they suggest that state legislatures may be willing to explore the possibility of moving away from the elected judge paradigm. This effort may be helped by, of all things, the economic downturn. Like a family recalculating its budget in light of straitened circumstances, the players in judicial elections—labor unions, corporations, and wealthy individuals—are reprioritizing their spending. As these corporations evaluate the responsible expenditure of funds, and as unions assess the best use of member dues, the economic waste of high-stakes campaigns becomes increasingly significant.

II. HISTORY AND RATIONALE

The United States is almost the only nation in the world that selects judges at any level by popular election.¹⁴ While the Framers of the U.S. Constitution established judicial independence through the structural provision of Article III's tenure "during good behaviour,"¹⁵ the states, after initially emulating the federal system, commenced an experiment in diversification as one aspect of federalism.¹⁶

In the early years of the American Republic, most judges were selected by a state's chief executive or legislature.¹⁷ Jacksonian reformers, convinced that the process created a spoils system, introduced judicial elections as an antidote to

12. Nevada lawmakers added a merit selection measure to the ballot in 2010 and voters will decide whether to scrap their judicial elections in November 2010. SAMPLE ET AL, *supra* note 9, at 4. West Virginia established a judicial nominating commission in March 2010 to screen and submit "qualified nominees to the governor when midterm judicial vacancies occur" and the state legislature approved a pilot public-financing program for Supreme Court elections in 2012. *Id.* at 69-71. However, in Minnesota, a proposed bill that would have adopted retention elections for appointed judges and would have establish a judicial performance commission responsible for evaluating the performance of judges was derailed in the state legislature. S.F. 70, 2009-2010 LEG., 86TH SESS. (MINN. 2010).

13. SAMPLE ET AL, *supra* note 9, at 81.

14. Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1232-33 (2008) (noting the exceptions are a "few small cantons in Switzerland and retention elections [for] high-court judges in Japan").

15. U.S. CONST. art. III, § 1.

16. Shepherd, *supra* note 1, at 630.

17. *Id.*

that perceived corrupt system.¹⁸ Judicial elections are enshrined in the constitutions of many states, particularly in the South and Midwest.¹⁹

Currently, thirty-two states use contested elections (either partisan or nonpartisan) to pick judges for at least some level of their courts, and twenty-one states elect all judges.²⁰ Twenty-five additional states utilize the so-called “merit selection” system, in which judges are initially selected by a state’s governor to serve a term in office, and then face the voters in an up-or-down uncontested retention election.²¹ A handful of states have adopted some version of the federal system, in which judges are selected by a state’s governor with senate confirmation. In two states, Virginia and South Carolina, the legislature selects the judiciary.²² Of course, even in states that utilize elections, it is common for a judge who intends to retire or resign to do so during his or her term in office, particularly if he or she is of the same party as the governor. Governors almost universally make midterm appointments. Thus, midterm resignations allow a newly-appointed judge of a governor’s own political party to run as an incumbent.²³

The pastiche of selection mechanisms in the various states, and even between different courts in the same state, presents a confusing picture to voters, and encourages indifference to judicial elections in the absence of some galvanizing issue.

III. INDEPENDENCE V. ACCOUNTABILITY

Judicial selection poses the systemic challenge of balancing independence against the accountability of members of a branch of government to the public that it serves. As Charles Geyh, a leading authority on the history of judicial elections and the history of state judicial constitutions points out, judicial independence is not viewed by scholars as an intrinsic good in itself, but is a means to an end: “It is thought that if judges are independent—if they are insulated from political and other controls that could undermine their impartial

18. *Id.* at 631.

19. *See, e.g.*, ALA. CONST. of 1901, amend. 328, §6.13 (establishing partisan elections for all state court judges); ARK. CONST. of 1868, amend. 80, §17-18 (1874) (establishing nonpartisan elections for all state court judges); GA. CONST. of 1777, art. VI, §7 (1983) (establishing nonpartisan elections for state court judges); ILL. CONST. of 1818, art. VI, §12 (1970) (establishing partisan election for all state court judges); LA. CONST. of 1812, art. V, §22 (1974) (establishing partisan elections for all state court judges); WIS. CONST. of 1848, art. VII (establishing nonpartisan elections for all state court judges).

20. Inst. for the Advancement of the Am. Legal Sys., Formal Methods of Judicial Selection in Each State, http://www.du.edu/legalinstitute/judicial_map.html (last visited June 28, 2010) (on file with the *McGeorge Law Review*). *See* appendices A and B to this article for a chart of each State’s selection method.

21. Appendices A & B.

22. Appendices A & B.

23. *See supra* note 19 (Alabama, Arkansas, Georgia, and Wisconsin dictate that the governor will appoint judges during interim vacancies).

judgment—they will be better able to uphold the rule of law, preserve the separation of powers, and promote due process of law.²⁴

Accountability, as Professor (and former Alabama Supreme Court Justice) Harold See notes, serves a distinct yet overlapping set of interests.²⁵ To improve the judicial selection process, See urges the following consideration:

[C]onsider what level of popular control is appropriate in a particular state. The answer to this question will depend on, among other things, the level of the public's confidence that a judge will foster the rule of law rather than implement the judge's own public policy predilections. If judges act, or are inclined to act, as a "super-legislature" the electorate may choose to control judges the way it does a legislature.²⁶

Professor See's argument has considerable popular support, although he often finds himself in the minority in the academy. A closer look though, suggests that the accountability argument vastly oversimplifies the institutional mechanism that exists within the judicial system to constrain the behavior of judges.

State courts have adopted various mechanisms to restrain outlier judges. Almost every judge is accountable to someone. For example, trial judges' rulings are subject to at least two levels of appellate review. Intermediate appellate judges act in panels of three or more, so the judgment of two colleagues may rein in the excess of another. Next are the canons of ethics, judicial conduct committees, and grievance procedures. Recusal motions (and self-recusal) exist as a mechanism to exclude a judge from hearing cases in which he or she may have a financial interest or bias. Only the highest court of the state exercises unreviewable discretion.

If this logic is correct, the only level at which examination of the accountability argument truly has weight is at the state supreme court level. Yet it is at that level where the fewest states elect judges—most elections are for trial judges.²⁷

This counterintuitive evidence suggests that the argument about accountability is really a mask for some other value. If the argument falls apart on scrutiny, perhaps a closer look at the selection system itself is warranted. What it suggests is that citizen/voters look for accountability at the level where they are exposed to the actions of the judge. If it is at the trial court level—and

24. Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1259 (2008).

25. See generally Harold See, *Judicial Selection and Decisional Independence*, 61 LAW & CONTEMP. PROBS. 141 (1998).

26. *Id.* at 144.

27. Of the thirty-two states that utilize elections, ten of the states do not elect judges at the supreme court level. See Amer. Judicature Soc'y, *Methods of Judicial Selection*, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Sept. 12, 2010).

that is where most Americans are exposed to the system, through the hundreds of thousands of traffic cases, divorces, and contract disputes that make their way through the system in any given year—then that is where anger will be expressed. If it is indirect exposure—through media reports on the actions of a state’s highest court, then that is where it will be expressed. In either case, populist sentiment expresses the desire that judges “act like us”, whereas the institutional role of the court is often to do exactly the opposite—to act according to legal rules, rather than popular sentiment.

In legal academic circles, the pitfalls associated with judicial elections are oft-enumerated: the threat to actual independence (if judges feel indebted to litigants or attorneys who have donated to their campaign); the threat to perceived independence (that the public will perceive an elected judge as no more than “a politician in a black robe”); the phenomenon of roll-off (in which voters do not reach the end of the ballot containing the names of poorly recognized judicial candidates); and straight ticket voting (where voters do not vote on the merits, but simply based on party affiliation).²⁸

Certainly, the most pernicious attribute of the elected-judge system is the threat to judicial legitimacy, that the public perceives judges to be influenced by campaign contributions, or worse still, that the judge actually is influenced by these contributions. It is this aspect of judicial selection that has most captivated the public imagination very recently, and it is this factor which may stimulate public debate about the elected-judge paradigm.

IV. CAMPAIGN FINANCE REFORM, *WHITE*, AND THE JUDICIAL ELECTION ARMS RACE

Developments in the early part of the decade contributed substantially to a “race to the bottom” in judicial elections. Passage of the McCain-Feingold Law, which enacted federal campaign finance reform, was accompanied by increasing use—both at the federal and state level, including in state judicial campaigns—of so-called “527 organizations” (527s),²⁹ contributed to this race to the bottom.³⁰

28. See *id.* at 279-81 (discussing that a large portion of funding for state judicial elections comes from attorneys and parties who have cases before the court); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 53 (2003) (discussing phenomenon of voter roll-off); CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 20-26 (2009) (discussing findings that during 1990-2004 approximately 22% of all voters who participate in other elections fail to vote in state supreme court elections); Pamela S. Karlan, *Judicial Independences*, 95 GEO. L. J. 1041, 1046 (2007) (suggesting that often people straight ticket vote or do not vote at all in judicial elections).

29. The term “527 organizations” refers to groups that engage in issue advertising without endorsing a particular candidate. This stems from 26 U.S.C. § 527 of the United States tax code, a provision that exempts groups from paying taxes. These organizations are tax-exempt entities that engage in issues advertising, focusing on policy issues in campaigns, including judicial campaigns. See Richard Briffault, *The 527 Problem . . . And the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 951 (2005) (generally explaining 527 organizations and their requirements).

Issues advertising, which is supported by independent expenditures, is subject to disclosure requirements in thirty-nine states, but unlike direct contributions, is not subject to limitation.³¹ These 527s have become big players in certain hotly contested judicial races. For example, the \$2.7 million in independent expenditures targeting the three Supreme Court races in the state of Washington in 2006 “was 36 percent greater than the \$1.7 million raised directly by the six candidates.”³²

The rise of the 527s coincided with a second key development: the U.S. Supreme Court’s 2002 decision in the leading case of *Republican Party of Minnesota v. White*.³³ In a 5-4 decision written by Justice Scalia, the Court held that “[t]he Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violate[d] the First Amendment.”³⁴ Following *White*, interest groups from all sides of the ideological spectrum made increasing use of judges’ responses (or non-responses) to questionnaires, as well as their rulings on past cases (if incumbents), to target or tout candidates with a particular philosophy or predisposition that the groups viewed as sympathetic.³⁵

Taken together, the rise of the 527s and the post-*White* judicial election climate facilitated scenarios not too far removed from the one portrayed by the novelist John Grisham in his 2008 novel, *The Appeal*.³⁶ In the novel, the CEO of a corporate defendant, confronted by a crippling and precedential jury verdict in a toxic tort case, seeks to improve his company’s chances of winning the appeal in the state’s supreme court through subterfuge.³⁷ He identifies and promotes an obscure trial judge as a candidate for the state supreme court in order to replace a more plaintiff-friendly incumbent.³⁸ The real-life facts of *Caperton* are disturbingly similar to the novel—newly elected Justice Benjamin provided the deciding vote in the appeal of a \$50 million dollar judgment against Massey Coal

30. See SAMPLE ET AL., *supra* note 9 at 9-22 (describing dramatic increase in state judicial campaigns by non-candidate groups).

31. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 882-883 (2010) (holding that restrictions on independent expenditures during campaigns violate the First Amendment, while disclosure requirements are consistent with the First Amendment).

32. ANNE BAUER, NATL. INST. ON MONEY IN STATE POLITICS, INDEPENDENT EXPENDITURES, 2006: INDEPENDENT EXPENDITURES IN FIVE STATES ALTER POLITICAL LANDSCAPES 27 (2007), available at <http://www.policyarchive.org/handle/10207/bitstreams/5809.pdf> (on file with the *McGeorge Law Review*). The law on contributions may be changing in the wake of *Citizens United*. See *Speechnow.org v. Fed. Election Comm’n*, 599 F.3d 686, 696 (D.C. Cir. 2010) (holding that independent contributions as well as expenditures cannot be limited under the First Amendment).

33. 536 U.S. 765 (2002).

34. *Id.* at 788.

35. Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573, 595-99 (2009) (discussing the rise of inappropriate efforts to educate the public with issue-based questionnaires).

36. JOHN GRISHAM, *THE APPEAL* (2008).

37. *Id.*

38. *Id.*

after its CEO Don Blankenship donated almost \$2.5 million dollars to Justice Benjamin's West Virginia Supreme Court campaign through a 527 called "And For The Sake of the Kids."³⁹

The *Caperton* facts point to the last component of what some commentators have called an "arms race" in judicial fundraising—judicial races as a surrogate for legislative tort reform.⁴⁰

Escalating expenditures through the early part of the decade were not a mere byproduct of *White* and the rise of 527s. They were largely motivated by a fierce clash between the trial attorneys' bar and corporate interests.⁴¹ Throughout the past twenty years, the corporate community has struggled for meaningful tort reform, especially damage caps, through the state legislative process.⁴² While a number of states have adopted damage caps, forum-shopping allows personal injury litigation to flourish in states that have not.⁴³ The corporate community remains convinced that state courts, at both the trial and appellate level, are dominated by former plaintiffs' attorneys and that this has biased the litigation process. Through local affiliates of the U.S. Chamber of Commerce and the National Association of Manufacturers, corporate interests have taken on trial attorneys in an effort to elect sympathetic judges through the creation of 527s and political action committees that channel corporate donations to targeted races.⁴⁴

Against this backdrop, the Court's decision in *Citizens United* is no seismic shift. Rather, it is part of a continuum, in which the actors—corporate, labor, and trial attorney—each with a strong interest in electing "their" judges, use all available speech and funding tools.

39. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257-58 (2009). In its campaign finance disclosure form "And for the Sake of the Kids" lists as its stated purpose to "promote[] the independence of West Virginia courts and educate[] West Virginia residents about the importance of an equal and balanced civil justice system and related matters." CampaignMoney.com, And for the Sake of the Kids "527" Political Organization Filing Information, http://www.campaignmoney.com/political/527/and_for_the_sake_of_the_kids.asp (last visited June 28, 2010) (on file with the *McGeorge Law Review*).

40. Justice Sandra Day O'Connor, Keynote Address at the Georgetown University Law Center and Aspen Institute Symposium on State Judicial Selection: Choosing (and Recusing) Our State Judges Wisely (Jan. 26, 2010) available at <http://www.law.georgetown.edu/webcast/eventdetail.cfm?eventid=1006> (last visited Oct. 19, 2010).

41. Rachel M. Janutis, *The Struggle Over Tort Reform and the Overlooked Legacy of the Progressives*, 39 AKRON L. REV. 943, 943 (2006).

42. See CONG. BUDGET OFFICE, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES (2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5549/Report.pdf> (showing states that have passed damage caps); Janutis, *supra* note 41 at 3 (examining tort reform initiatives at the state level).

43. *Id.* (for example, Delaware has not passed any tort reform legislation since 1986).

44. See SAMPLE ET AL., *supra* note 9, at 3. THE U.S. Chamber of Commerce's Institute for Legal Reform publishes a guide to "lawsuit climate" in the fifty states. The 2010 report lists biased and partial juries and judges as the top issue creating unfair and unreasonable litigation climates—at 37%. Institute for Legal Reform, Lawsuit Climate 2010, <http://www.instituteforlegalreform.com/lawsuit-climate.html> (last visited June 28, 2010) (on file with the *McGeorge Law Review*). A less polite publication, called "Judicial Hellholes," calls for voters in elected-judge states to vote out judges who are too generous to tort suit plaintiffs. AMERICAN TORT REFORM ASS'N, JUDICIAL HELLHOLES 28 (2009), available at <http://www.atra.org/reports/hellholes/report.pdf> (on file with the *McGeorge Law Review*).

V. CAPERTON AND CITIZENS UNITED

While the decision in *Caperton* captivated court watchers and reinvigorated efforts to refine judicial recusal guidelines in the states, it was the Court's decision in *Citizens United* that has become a cause célèbre.

In *Citizens United*, the Court, in a decision by Justice Kennedy, held that corporate funding of independent political broadcasts in candidate elections cannot be limited under the First Amendment.⁴⁵ The 5-4 decision resulted from a dispute over whether the non-profit corporation Citizens United could air via video-on-demand a critical film about Hillary Clinton, and whether the group could advertise the film in broadcast ads featuring Clinton's image, in apparent violation of the McCain-Feingold Act.⁴⁶ The Court struck down a provision of the McCain-Feingold Act that prohibited all corporations, including for-profit, not-for-profit, and unions, from broadcasting "electioneering communications."⁴⁷ McCain-Feingold defined an "electioneering communication" as a broadcast, cable, or satellite communication that mentioned a candidate within sixty days of a general election or thirty days of a primary.⁴⁸ The decision overruled *Austin v. Michigan Chamber of Commerce*⁴⁹ and partially overruled *McConnell v. Federal Election Commission*.⁵⁰ The Court upheld requirements for disclaimer and disclosure by sponsors of advertisements.⁵¹

The case will, without doubt, affect laws governing corporate political activity in nearly half the states.

While the ruling does not directly affect state laws, there are 24 states that currently prohibit or restrict corporate and/or union spending on candidate election. It is very likely that these states will act to either repeal or rewrite these laws, or face legal challenges under the new standard set by *Citizens United*. Furthermore, it is likely that states will elect not to enforce the restrictive laws from this point forward . . . It is important to note that the *Citizens United* decision does not strike down bans on corporate contributions to candidates, which currently exist in 23 states.⁵²

45. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010).

46. *Id.* at 887.

47. *Id.* at 913-14.

48. 2 U.S.C. 434(f)(3)(A)(i)(II)(aa)-(bb) (2005).

49. 494 U.S. 652 (1990).

50. 540 U.S. 93 (2003); *Citizens United*, 130 S. Ct. at 887, 913-14.

51. *Citizens United*, 130 S. Ct. at 913-14.

52. National Conference of State Legislators, *Life After Citizens United* (May 27, 2010), <http://www.ncsl.org/default.aspx?tabid=19607> (on file with the *McGeorge Law Review*).

The decision solely addressed the ban on direct corporate and union spending.⁵³

What effect will this have on spending in state court elections? As of the date of this article, no one knows. But if spending at the beginning of the 2010 Congressional campaign cycle provides a benchmark, the evidence is far from conclusive that this marks the profound change that critics, among them President Obama, allege. At least at the level of U.S. Congressional races, the concern that money in campaigns would dramatically increase because of large corporate donors has yet to be borne out.⁵⁴ Conversely, Republicans predicted in February that there would not be a direct effect on parties or candidates after the *Citizens United* decision. Likewise, spending this year by 527s offers no clear trends.⁵⁵ “So far, both collections and expenditures by Democratic or liberal-leaning groups have outpaced those by Republican or conservative groups, although a historically large Democratic advantage appears to have narrowed somewhat, according to data from the nonprofit Center for Responsive Politics.” Democrats and liberal-leaning groups have both raised and spent more money than Republicans this past year, but their historic advantage has narrowed.⁵⁶

In at least two states there have been court challenges to state campaign finance rules based on the *Citizens United* decision.⁵⁷ The Western Tradition Partnership recently filed suit challenging Montana’s state limits on corporate expenditures as an unconstitutional ban on political speech.⁵⁸ Colorado Governor Bill Ritter filed interrogatories with the Colorado Supreme Court asking the court to determine whether its state election laws were constitutional under *Citizens United*; the Court responded that they were not.⁵⁹

While most commentators focus on the increased potential for corporate spending, the disclosure language in the majority opinion in *Citizens United* has attracted less attention.⁶⁰ Yet it has a powerful potential. If states follow the federal lead, advocacy group ads will soon be accompanied by fuller disclosure of who has paid for an ad—a disincentive to out-of-state interest groups who hide behind ambiguous 527 names.

53. See *id.* (providing a summary of state laws affected and other developments in the states since *Citizens United*).

54. R. Jeffrey Smith, *Democrats Pull in More Cash for Campaigns than GOP*, WASH. POST, Apr. 4, 2010, at A3.

55. *Id.*

56. *Id.*

57. See *infra* notes 58-59 and accompanying text.

58. Press Release, Western Tradition Partnership, WTP Files Suit to Protect Free Speech in Montana (Mar. 8, 2010), available at <http://www.westerntradition.org/?p=626> (on file with the *McGeorge Law Review*).

59. In re Interrogatories Propounded by Governor Ritter v. Fed. Election Comm’n, 227 P.3d 892, 894 (Colo. 2010).

60. The Democracy is Strengthened by Casting Light on Spending in Elections Act, introduced in and passed by the House of Representatives, but failed in the Senate, would do this at the federal level. S. 3628, 111th Cong. (2010); H.R. 5175, 111th Cong. (2010).

VI. IS THERE A PROMISING FUTURE FOR MERIT SELECTION?

Both *Citizens United* and *Caperton* have energized efforts by reformers in the states. The effort has been further fueled by the emergence of a prominent figure on the American judicial and civic scene as an advocate for adoption of merit selection. While a number of advocacy groups have engaged with the issue for years—notably the American Bar Association, American Judicature Society, National Center for State Courts, The Institute for the Advancement of the American Legal System (IAALS), and Justice at Stake, the recent emergence of retired United Supreme Court Justice Sandra Day O'Connor as an advocate for merit selection in the states has given a shot of adrenaline to those who question whether contested elections are the best way to select judges.⁶¹

Through the Sandra Day O'Connor Project on the State of the Judiciary at Georgetown University Law Center, the O'Connor Judicial Selection Initiative at the IAALS at the University of Denver, personal appearances before the National Governors' Association 2007 annual meeting (July 23, 2007), and the ABA's National Summit on Fair and Independent Courts (May 8, 2009),⁶² as well as numerous speeches and publications from 2006 to date, Justice O'Connor has passionately pled for adoption of a version of merit selection along the lines first utilized in Missouri⁶³ to increase transparency and reduce attorney domination of selection panels in, among other places, her home state of Arizona.⁶⁴

61. See Justice Sandra Day O'Connor, Op-Ed, *Take Justice Off the Ballot*, N.Y. TIMES, May 21, 2010, at WK 9 (advocating for the merit selection system for choosing judges). O'Connor is not alone in her view among present and past members of the high Court. Justice Ruth Ginsburg recently publicly stated she disfavors judicial elections in the states. See Matthew Mosk, *Study Shows Money Flooding Into Campaigns for State Judgeships*, ABC NEWS, Mar. 17, 2010, <http://abcnews.go.com/Blotter/study-shows-money-flooding-campaigns-state-judgeships/story?id=10120048> (on file with the *McGeorge Law Review*) (noting that Justice Ruth Ginsburg announced that the one reform she would like to see is money in state judicial elections).

62. See generally ABA, JUSTICE IS THE BUSINESS OF THE GOVERNMENT: REPORT OF THE 2009 SUMMIT ON THE CRITICAL ROLE OF FAIR AND IMPARTIAL STATE COURTS (2009), available at <http://www.fwv.org/Content/ContentGroups/Projects/JudicialIndependence/Miscellaneous/summitreport.pdf> (on file with the *McGeorge Law Review*) (examining the role of fair and impartial state courts). O'Connor is the Honorary Chair of the ABA Presidential Commission on Fair and Impartial State Courts. *Id.* at 11.

63. See generally Justice Sandra Day O'Connor, The Essentials and Expendables of the Missouri Plan, Earl F. Nelson Lecture at the University of Missouri School of Law Symposium (Mulling over the Missouri Plan: A Review of State Judicial Selection and Retention Systems) (Feb. 27, 2009), in 74 MO. L. REV. 479 (2009).

64. Critics of O'Connor charge that she opposes a federal-style executive appointment of judges. Her public comments on the federal selection system belie that view. See *Situation Room: Interview with Sandra Day O'Connor* (CNN television broadcast Jan. 28, 2010), available at <http://transcripts.cnn.com/TRANSCRIPTS/1001/28/sitroom.02.html> (on file with the *McGeorge Law Review*) (discussing benefits of the appointed federal judiciary).

2010 / Trends in Judicial Selection in the States

The clearest articulation of the components of O'Connor's preferred model is in the position statement of the IAALS initiative. The IAALS advocates these "best practices" in selection systems:

- Politically balanced nominating commissions with a majority of non-lawyer members making recommendations in a transparent process;
- Appointments by the governor, who must select judges from lists provided by the nominating commissions;
- Comprehensive judicial performance evaluations that are based on criteria such as command of the law, impartiality, and temperament;
- Retention elections, so that voters armed with the performance evaluations can decide whether to keep the judges on the bench;
- Terms of office that are initially only two to three years in length, so that there is sufficient data about judicial performance before the retention elections;
- Judicial training.⁶⁵

The proposals mirror the system that was adopted by Arizona in 1974, and has since been refined through Proposition 109 in 1992.⁶⁶ Arizona's Proposition 109 changed the membership of judicial selection commissions—with the number of attorneys increased from three to five, and the number of laypeople increased from five to ten.⁶⁷ The selection commissions take applications from individuals for judicial positions.⁶⁸ They then hold public proceedings to screen and interview potential selectees.⁶⁹ The commissions are charged with selecting judges that reflect the diversity of the Arizona population.⁷⁰ The system makes use of judicial performance evaluations in advance of a retention election, providing voters with substantial information in advance of their vote.⁷¹ The Arizona system is quite popular in the state, and in the words of the Chief Judge of Arizona Ruth McGregor:

65. Inst. for the Advancement of the Am. Legal Sys., http://www.du.edu/legalinstitute/judicial_selection.html (last visited June 28, 2010) (on file with the *McGeorge Law Review*).

66. Ruth McGregor, *Arizona's Merit Selection System: Improving Public Participation and Increasing Transparency*, 59 SYRACUSE L. REV. 383, 383 (2009).

67. *Id.* at 389.

68. *Id.* at 390.

69. *Id.*

70. *Id.*

71. *Id.*

Proposition 109 not only assured greater participation by public members on the commissions, but also addressed the need for greater transparency; it required the commissions to take public testimony and to conduct more of their business in public sessions, including the commission vote on selecting candidates to send to the governor.⁷²

Arizona's retention election system and judicial selection commissions appear to have factored in the criticisms leveled by Professor See and others, and have created a system which is both accountable and has largely eliminated costly judicial elections in Arizona.

For the first time in many years, prospects seem somewhat favorable to the changes Justice O'Connor and others advocate for states besides Arizona. An example is Nevada, where a ballot initiative in November will ask voters to move from a contested election model to a merit selection system.⁷³ Advocates have assembled a coalition of labor, business, and grassroots organizations in what is hoped to be the first statewide rejection of an existing contested election system in recent years.⁷⁴

In Minnesota, a bill would present to the voters a constitutional change that would allow the governor to appoint judges to an eight-year term, with a retention election provision—a version of “merit selection.”⁷⁵ This would replace a contested-election system in the state.⁷⁶ The Minnesota bill also includes a vigorous judicial performance evaluation regimen, increasing the information available to voters in the retention election.⁷⁷

In Maryland, Attorney General Doug Gansler and State Senator Jamin Raskin partnered to introduce S.B. 833, a bill that would conform the selection of state circuit court judges, the state's trial court judges, to the method of selection used for other judges in the state, the “merit selection” system.⁷⁸

VII. THE ISSUE IS JOINED—IS DÉTENTE POSSIBLE IN THE TORT WARS?

If *Citizens United* and *Caperton* did anything to draw popular attention to the way judges are picked, it was to highlight the role of “big money” in those races. This requires, as Professor Pamela Karlan points out in her lucid review of the *Caperton* ruling in the *Harvard Law Review*, an examination of the structural problem in judicial elections—“the way in which money undermines judicial

72. *Id.* at 389-390.

73. O'Connor, *supra* note 61.

74. Meryl Chertoff, *SCOTUS Decision Could Trickle Change Down to States*, DAILY CALLER, Jan. 21, 2010, available at <http://dailycaller.com/2010/01/21/scotus-decision-could-trickle-change-down-to-states/> (on file with the *McGeorge Law Review*).

75. S.F. 70, 2009-2010 Leg., 86th Sess. (Minn. 2010).

76. *Id.*

77. *Id.*

78. S.B. 833, 2010 Leg., 427th Sess. (Md. 2010).

impartiality and public confidence in the judicial process.”⁷⁹ Parties with a pecuniary interest in the judicial philosophies and predispositions of judges—particularly supreme court judges—will continue to engage in an economic calculus in the states where they reside or do business for as long as judges are elected. And while there is no one-to-one correlation of contributions with outcomes, Karlan argues that regardless of the outcome in each case, the structural problem still exists.⁸⁰

Public financing is one suggested approach for eliminating the structural problem. West Virginia, in the wake of *Caperton*, has not only tightened its judicial recusal standards, but in March of this year it became only the fourth state in the nation to adopt a pilot program for public financing of state judicial elections—joining North Carolina, Wisconsin, and New Mexico.⁸¹ However, public financing, with its First Amendment issues and many loopholes, is fraught with hazards of its own.⁸²

Another answer is to take the money out of the system by shifting the paradigm. Ending judicial elections would free up large sums of money that could be put to a more collectively valuable use.⁸³ This approach makes sense from an economic standpoint given the current financial stresses.

For example, Arizona’s judicial selection system disbursed only about \$300,000 in 2008 supporting selection commissions.⁸⁴ By contrast, state supreme court candidates nationwide raised \$200.4 million from 1999-2008, compared with an estimated \$85.4 million from 1989-1998.⁸⁵

In its 2006 report, *The New Politics of Judicial Elections, Justice at Stake*, an advocacy group, took aim at the amount of spending in state court races and the

79. Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 101 (2009).

80. *Id.* at 101-102.

81. See N.C. GEN. STAT. § 163-278.61 (2010); N.M. STAT. ANN. § 1-19A (2007); WIS. STAT. ANN. § 11.31 (2009) (establishing limits on campaign disbursements for judicial election candidates).

82. See Brandenburg & Schotland, *supra* note 14.

83. In a system in which goods or money are inefficiently allocated, a more economically efficient outcome could be achieved. A change where one person is made better off, without making another person worse off, is considered a Pareto improvement. Ultimately, in Pareto efficient situations it is impossible to put someone in a better position without putting another person in a worse position. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 97-100 (2d ed. 1963); Richard S. Markovits, *On the Economic Efficiency of Using Law to Increase Research and Development, A Critique of Various Tax, Antitrust, Intellectual Property, and Tort Law Rules and Policy*, 39 HARV. J. LEGIS. 63, 71 (2002) (discussing theory that allocative efficiency will be maximized when government policies gives beneficiaries equivalent of more dollars than it takes away from its victims).

84. Telephone Interview with Theresa Spahn, Director of the O’Connor Judicial Selection Initiative Institute for the Advancement of the American Legal System, University of Denver (Apr. 8, 2010).

85. National Institute on Money in State Politics, <http://www.followthemoney.org> (last visited July 5, 2010) (on file with the *McGeorge Law Review*). Arizona expects to spend approximately \$425,000 for fiscal year 2010 on judicial selection at all three levels of its state courts. General Appropriation Act for Laws 2010, 7th Special Sess., Ch. 1. Colorado, a state with more judicial districts than Arizona, estimates that it will spend \$900,000 in 2010. H.B. 10-1376 (Co. 2010). Both states’ costs go toward maintaining nomination commissions, judicial performance evaluations, and salaries.

tone of the advertising campaigns in some of the most high profile races.⁸⁶ With a focus on high-stakes races in a few state supreme court races, some in states known for generous personal injury verdicts, the report outlines an escalating trend of spending.⁸⁷

With the boom-times over, the question is whether both sides will now reconsider their strategies. A few developments suggest this is possible. First, the U.S. Chamber of Commerce recently endorsed the Arizona merit selection system as a best practices model.⁸⁸ While this does not suggest that the Chamber has gone out of the business of putting money into judicial elections, it does suggest that a paradigm shift might not be totally unwelcome news to the Chamber. It would allow member resources to be focused on influencing the outcome of federal and state legislative campaigns and other advocacy priorities rather than state judicial candidate campaigns.⁸⁹ Second, the transparency requirements affirmed in *Citizens United* will make the use of 527s less appealing.⁹⁰ It appears that anonymous 527 funded advertising is on its way towards becoming a thing of the past.

In a heightened disclosure environment, corporate, union, and individual funders will need to ask themselves if they want their names directly associated

86. See generally JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS (2006), available at http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf (on file with the *McGeorge Law Review*). Among its findings: "In 2006 television advertisements ran in 10 of 11 states with contested Supreme Court elections, compared to four of 18 states in 2000;" "In 2006 average spending on TV airtime per state surpassed \$1.6 million, up from \$1.5 million two years ago;" and "[i]n 2006 television ads appeared during primary elections in seven of the 10 states in which advertising occurred. Nearly one third of all spots throughout the campaign cycle were in primary campaigns, totaling more than \$4.6 million." *Id.* at vi. The report also found that: "Of the 10 states that had entirely privately financed contested Supreme Court campaigns in 2006, five set fundraising records. Candidates in Alabama combined to raise \$13.4 million, smashing the previous state record by more than a million dollars;" "Donors from the business community gave \$15.3 million to high court candidates—more than twice the \$7.4 million given by attorneys;" "Third-party interest groups pumped at least \$8.5 million more into independent expenditure campaigns to support or oppose their candidates. About \$2.7 million of that was spent in Washington state alone;" "In 2006 the candidate raising more money won 68 percent of the time, down from 85 percent in 2004;" and that "[t]rial lawyers and corporate interests in a southern Illinois race combined to give more than \$3.3 million to two candidates for a seat on the state court of appeals, quadrupling the state record. Madison County witnessed a \$500,000 trial court campaign, and a Missouri trial court judge was defeated after an out-of-state group poured \$175,000 into a campaign to defeat him." *Id.* at vii.

87. See generally *id.*

88. U.S. CHAMBER INST. FOR LEGAL REFORM, PROMOTING "MERIT" IN MERIT SELECTION: A BEST PRACTICES GUIDE TO COMMISSION-BASE JUDICIAL SELECTION 2 (Oct. 2009), available at <http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/meritselectionbooklet.pdf> (on file with the *McGeorge Law Review*).

89. See *id.*

90. Again, while not binding on state regulators, a March 26 D.C. Court of Appeals decision, *Speechnow.org v. Federal Election Commission*, Nos. 08-5223, 09-5342, 2010 WL 1133857 (D.C. Cir. 2010) (citing *Citizens United*) held that restricting spending by 527 organizations was inconsistent with the First Amendment, but upheld financial disclosure requirements, suggesting that state courts presented with a similar challenge would do the same.

with issues advertisements or with direct advertisements in support of a particular candidate.⁹¹

This article argues that both sides would benefit from a long and careful look as to whether taking money out of the game would not benefit all in the long term. The 2008 Presidential election, state off-year elections, and special elections illustrate that it is becoming more difficult to gauge voter mood and to manipulate voter sentiment. The interests that have sought to manipulate voter bias to win judicial races now face competition from social networking sites, blogs, and “Netizen” advocates. Reform groups are particularly adept at tapping those resources.

The institutional legitimacy of the courts should concern both sides. While tempting to bash a particular candidate in any given race, the effects are cumulative, and if we foster disrespect for judges we undermine the rule of law in all our courtrooms. No frequent litigant benefits from a system without norms.

Taking judicial selection out of the contested election model has immediate, favorable economic consequences in cost savings, which can be redirected by the stakeholders to other, more pressing priorities.⁹²

Finally, while there are many critiques of merit selection, few have gone unaddressed by Arizona as it has made successive legislative adjustments to the judicial nominating structure it first adopted in the 1970’s. While no one system is perfect for every state, Arizona’s model provides a template worth examination by states considering reform.⁹³ Conversely, nothing prevents an elected judge from being an activist. The perils of judicial activism exist in every system of selecting judges: in pure selection states, in merit selection states, and in elected-judge states. But by taking the money out of the system, we reassure the people, and the judges themselves, that decisions are based on adherence to the law and not on a debt to donors.

91. They may get a nudge from at least some state legislative bodies. See H.B. 616 (Md. 2010) (introducing a bill that would require that corporate executives or union leaders who seek to make political campaign expenditures first obtain a majority vote of shareholders or union members); A.B. 9948 (N.Y. 2010) (requiring shareholder approval for both corporate independent expenditures (currently unlimited in New York)) and corporate contributions to candidates (currently limited to \$5,000)); H.B. 2016 61st Leg., 2010 Sess. (Wash. 2010) (requires listing of the top five contributors so that if the sponsor of a communication is a political committee established, maintained, or controlled directly or indirectly through the formation of one or more political committees, by an individual, corporation, union, association, or other entity, the full name of that entity must be listed).

92. See *supra* notes 84-85 and accompanying text.

93. Proponents of elections, such as my colleague Dmitry Bam in this volume, point out that elected judges give harsher sentences as they approach their re-election. Dmitry Bam, *Understanding Capterton: Judicial Disqualification under the Due Process Clause*, 42 MCGEORGE L. REV. 65 (2010). But if those sentences are not justified by sentencing guidelines, or are out of line with the general practice in the jurisdiction, such sentences are no less activist than any other departure from regular judicial process.

Appendix A

Some or All State Judges Elected Directly By Citizens or By State Legislature

State	Initial Selection			Retention		
	partisan election	nonpartisan election	legislative vote	partisan election	nonpartisan election	legislative vote
ALABAMA	1			1		
ARIZONA		1			1	
ARKANSAS		1			1	
CALIFORNIA		1			1	
FLORIDA	1	1			1	
GEORGIA		1			1	
IDAHO		1			1	
ILLINOIS	1			1		
INDIANA	1			1		
KANSAS	1			1		
KENTUCKY		1			1	
LOUISIANA	1			1		
MICHIGAN		1			1	
MINNESOTA		1			1	
MISSISSIPPI		1			1	
MISSOURI	1			1		
MONTANA		1			1	
NEVADA		1			1	
NEW MEXICO ¹	1					
NEW YORK	1			1		
NORTH CAROLINA		1			1	
NORTH DAKOTA		1			1	
OHIO ²	1				1	
OKLAHOMA		1			1	
OREGON		1			1	
PENNSYLVANIA ³	1					
SOUTH CAROLINA			1			1
SOUTH DAKOTA		1			1	
TENNESSEE	1			1		
TEXAS	1			1		
VIRGINIA			1			1
WASHINGTON		1			1	
WEST VIRGINIA	1			1		
WISCONSIN		1			1	
TOTAL	13	19	2	10	20	2

¹ Judges run in the first general election after their appointment in order to complete the remainder of their first term.

² Judges are chosen in a partisan primary election, then candidates' names are included on the general election ballot without their party affiliation. Sitting judges face nonpartisan elections for retention.

³ Sitting judges are subject to retention elections.

Sources: American Judicature Society, Arizona Commission on Judicial Performance Review, Kansas Commission on Judicial Performance, Missouri Judicial Branch, The Missouri Bar, Tennessee Supreme Court.

Appendix B

States That Select Judges in a Commission-Based Appointment and Retention Election System (No Judicial Performance Evaluation)

State	Commission nominates	Governor appoints	Retention elections
ALASKA	x	x	x
ARIZONA	x	x	x
COLORADO	x	x	x
FLORIDA	x	x	x
INDIANA	x	x	x
IOWA	x	x	x
KANSAS	x	x	x
MARYLAND	x	x	x
MISSOURI	x	x	x
NEBRASKA	x	x	x
NEW MEXICO	x	x	x
OKLAHOMA	x	x	x
SOUTH DAKOTA	x	x	x
TENNESSEE	x	x	x
UTAH	x	x	x
WYOMING	x	x	x
	16	16	16

Sources: American Judicature Society, Arizona Commission on Judicial Performance Review, Kansas Commission on Judicial Performance, Missouri Judicial Branch, The Missouri Bar, Tennessee Supreme Court.