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Article

CHANGING THE **RULES** BY **CHANGING** THE **PLAYERS**: THE ENVIRONMENTAL ISSUE IN STATE
JUDICIAL ELECTIONS

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Introduction

Elections to choose state judges represent a major new battlefield in the political warfare over U.S. environmental policy. But the significance of these electoral contests to environmental concerns has been largely invisible to the general public as well as to professionals in the environmental field. This Article seeks to illuminate the importance of the environmental issue in state judicial elections and to encourage greater public involvement in this relatively unfamiliar part of the political process.

Key developments discussed in this Article include the following:

- A little-known Oklahoma-based group with close ties to Koch Industries, a large, privately held company with interests in oil and gas, chemicals, and agriculture, has organized a nationwide program to promote the election of state judges sympathetic to business interests in environmental and other cases.

- In a number of states, business groups are preparing simplistic and misleading evaluations of how judges vote in environmental and other cases and then using the results as the basis for either supporting judges for reelection or targeting them for defeat.

***218** • In anticipation of the November 2000 elections, the Institute for Legal Reform, the legal arm of the U.S. Chamber of Commerce, quietly launched a \$10,000,000 campaign to support the election of judges “with strong pro-business backgrounds” in Alabama, Illinois, Michigan, Mississippi, and Ohio.

- In May 2000, Idaho Supreme Court Justice Cathy Silak was voted out of office as a result of a campaign led by resource companies and members of the Christian Coalition, attacking her for writing a judicial opinion recognizing federal “reserved” water rights in designated wilderness and recreation areas.

- In Ohio, the state Chamber of Commerce and other groups mounted a campaign to unseat supreme court Justice Alice Robie Resnick, in part because, the Chamber said, she voted to uphold state and local environmental laws more often than any other justice on the Ohio Supreme Court.

- In Louisiana, a coalition of petrochemical and other businesses has carried out a successful campaign to elect a majority of “business friendly” justices to the supreme court, capped by the coalition’s success in persuading the court to issue new **rules** sharply restricting the activities of environmental law clinics at the state’s law schools.

- In Michigan, once a leader in developing new environmental protection policies, a business coalition opposed to stringent environmental regulation has supported a number of successful candidates to the Michigan Supreme Court, transforming the court’s ideological orientation and threatening the state’s environmental protection standards.

The magnitude of the political activity surrounding the state judicial selection process may come as a surprise to some readers. One tends to think of judges as above the political fray. In fact, many judges, including most federal judges and some state judges, are appointed to their jobs and enjoy the independence permanent tenure provides. But judges in most states are required to run for office like other political officials. And in recent years state judicial elections have become increasingly indistinguishable from the rest of the American political process, complete with large campaign contributions, “independent expenditures” by special-interest groups, and massive television and print advertising.

These developments are important from an environmental standpoint because state courts play a major role in interpreting and enforcing environmental law. The most prominent environmental statutes, such as the Clean Water Act and the Clean Air Act, are federal enactments. But most states have taken on the responsibility for implementing these federal laws, and state implementation actions are frequently subject to review in state court. States also have adopted their own environmental statutes, and issues arising from the implementation of these laws are normally litigated in state court. In addition, environmental problems can give rise to claims based on tort, nuisance, or other common law theories, which are frequently litigated in state court. As reflected by the recent experience in Idaho mentioned above, state courts also typically handle disputes over water rights. Finally, traditional zoning and other land use decisions are the most important determinant of environmental quality in many communities. Judicial review of state and local government land use decisions is almost exclusively a state court function.

The contribution of this Article is to document, for the first time, that the environment has become a pervasive issue in state judicial elections across the country and, in several states, has emerged as one of the most prominent, if not the most prominent issue. A large network of pro-business advocacy groups is working to influence environmental policies by supporting the election of judges whom its members perceive as “business friendly.” On the other hand, environmental advocacy groups have been largely absent from this political process. This gap is striking because pro-business advocacy on other issues in state judicial elections, such as products liability, medical malpractice, and workers’ compensation, is being aggressively countered by other groups, such as labor unions or the national and state associations of trial lawyers. One clear lesson of this Article is that environmental advocacy groups should consider becoming more active in this important, if unfamiliar, political arena.

So far, pro-business advocacy in state judicial elections appears to have had some notable but limited effects on the strength and scope of state environmental protection policies. ²²⁰ But the threat to environmental protection standards in state judicial elections will likely increase in the years ahead.

While this Article focuses on the environmental issue, the environment is by no means the only, or necessarily the most prominent, issue in most judicial elections. Term limits and the death penalty, for example, have been hotly debated in certain state elections in years past. Today, if there is a single issue of unifying concern to the business community in state judicial elections, it is “tort reform,” a blanket term referring to the business community’s effort to limit companies’ financial liability to consumers, employees, homeowners, and other members of the public. Tort reform encompasses questions about potential liability for environmental harms. But tort reform is obviously much broader than the environmental issue. The environmental issue also includes distinct questions about the scope of governmental authority to regulate environmental risks and manage natural resources.

This Article reinforces frequently expressed concerns about the fairness and integrity of state judicial elections in general. From one standpoint, it is not surprising, so long as judges are selected at the ballot box, that interest groups will attempt to influence the outcomes of these races. Certain groups have called for the appointment rather than the election of state judges, and the findings in this Article arguably provide some support for that recommendation. However, there has been little popular enthusiasm for this idea around the country.

Even if one accepts the inherently “political” nature of state judicial elections, this Article provides grounds for public concern about disproportionate influence by well-heeled special-interest groups, conscious efforts to disguise or misrepresent the ideological or financial interests being served by certain advocacy efforts, and misleading reports and rhetorical attacks

on judicial candidates. All of these problems are compounded by the relatively low public visibility of state judicial elections.

One of the most striking features of recent state judicial elections is the extent to which pro-business advocacy groups and their allies use the label “judicial activist” to criticize judicial candidates whom they oppose on ideological grounds. The label “activist” is consistently attached to judges whose votes tend to disfavor business interests, whether or not the label accurately describes the judges’ actual method of decision-making. From all *221 appearances, the rhetoric about “judicial activism” has been selected simply because it is believed to convey a negative impression about a candidate. One aim of this Article is to encourage the media and the general public to look beyond the misleading rhetoric that has dominated state judicial elections.

This Article is divided into three sections. Part I provides a brief overview of the state judicial electoral process. Part II describes the several apparently related national-level projects to organize pro-business advocacy in state judicial elections, including the activities of the Oklahoma group, Citizens for a Sound Economy, and the U.S. Chamber of Commerce. Part III examines in detail how the environmental issue is playing out in four specific states: Idaho, Louisiana, Michigan, and Ohio.

This Article presents preliminary research and is, therefore, limited in both scope and depth. While the research to date demonstrates the importance of state judicial elections for the environment, further research is certainly warranted. A comprehensive investigation would likely reveal that the environment is a significant issue in the majority of state judicial elections across the country.

I. The State Judicial Electoral Process

As Tables One and Two show, the process of selecting judges varies from state to state.¹ In some states, the governor simply appoints the judges; but in thirty-nine states judges at some level stand for election of some type.² Partisan elections are conducted in sixteen states; nonpartisan elections are held in seventeen states; and twenty states hold “retention” elections, in which sitting judges are on the ballot seeking “yes” votes for another term but there is no direct opponent.³ Some states use a combination of methods, such as a partisan election to select *222 judges and a retention election to determine whether judges should be kept in office.⁴

Elected state judiciaries are a product of Americans’ nineteenth-century enthusiasm for direct democracy. According to one account, “The concept of an elected judiciary emerged during the Jacksonian era as part of a larger movement aimed at democratizing the political process in America. It was spearheaded by reformers who contended that the concept of an elitist judiciary . . . did not square with the ideology of government under popular control.”⁵ As a result, a number of states converted to an electoral process, and between 1846 and 1912 every state that joined the union provided for an elected judiciary.⁶

In the twentieth century, professional and academic opinion turned against the idea of an elected judiciary. For decades the American Bar Association has favored moving towards merit appointment systems and otherwise limiting special-interest influence over judicial selection.⁷ The respected American Judicature Society works tirelessly toward more reliance on merit appointments.⁸ This **change** in thinking reflects the higher value now assigned to the impartiality of the judiciary and the belief that impartiality is best fostered by removing judges from direct political influence.⁹ Notwithstanding this shift in thinking, the judicial electoral process remains a robust institution, and efforts to move toward merit appointments have achieved little success. Reformers are now focusing most of their energy on controlling the magnitude, and increasing the transparency, of the financing of judicial elections.¹⁰

*223 Until a few years ago, state judicial elections were relatively low key. Both to prevent the appearance that the courts are politicized and to minimize potential conflicts of interest, candidates avoided direct solicitation of campaign contributions from companies, groups, or individuals who might have a case before the courts. For the same reasons, candidates generally avoided detailed discussions of how they might **rule** on particular legal issues. As a result, judicial elections were, for better or for worse, largely devoid of substantive content. The outcomes were largely dependent on the candidates’ name

recognition and reputation and the endorsements of leading legal groups, such as the state bar associations.¹¹

Today, judicial election campaigns focus more specifically on issues likely to come before the courts, reflecting the increasing involvement of special interests with a stake in the outcome of cases. Individual lawyers and law firms representing diverse client interests traditionally have been, and remain, the leading participants in the state electoral process. New special-interest participants in the process include state-level associations of trial lawyers (i.e., the organized plaintiffs' bar), labor unions, state chambers of commerce, and many other, less familiar groups. So far as I have been able to determine, groups dedicated to environmental protection have been largely absent from the process.

For some groups, participation in the judicial electoral process is simply an extension of more traditional political activity. Indeed, some groups explicitly justify participation in the judicial electoral process as a necessary tactic to safeguard political gains achieved through traditional lobbying of the legislative branch. For example, a recent publication of the Ohio Chamber of Commerce contrasted the outcomes in cases before the Ohio Supreme Court with "record levels of support in the Ohio General Assembly" for "the business agenda."¹² The report singled out for criticism court **rulings** that invalidated "legislative enactments to limit intentional tort litigation and provide businesses with reasonable protections against excessive damage awards."¹³ *224 "Business leaders need to realize," the report concluded, "that as Ohio enters the 21st century, the anti-business tilt of the Ohio Supreme Court presents one of the biggest challenges to the state's business climate."¹⁴

The cost of state judicial elections has been exploding, making the state courts the last disappearing frontier with regard to big-money influence in American politics. The typical cost to run for a supreme court seat in a major state is now \$1 million or more.¹⁵ Judicial campaign costs for the Wisconsin Supreme Court increased by almost 800% since 1979.¹⁶ Judicial election costs increased by the same factor in Alabama since 1986.¹⁷ Special-interest groups are making large contributions to judicial candidates. Equally important, they are making large "independent expenditures" on advertising and other activities, supporting their favored candidates and criticizing candidates they oppose.¹⁸ The high cost of state judicial elections works to the advantage of relatively well-heeled, cohesive interest groups, such as the business community, and to the disadvantage of the general public.

The increasing cost of judicial races has had a number of negative effects on the judiciary and the judicial process. The large amount of time and effort required to raise campaign funds and effectively compete in the electoral process are a distraction from judges' official duties. In addition, the new fund-raising responsibilities associated with judicial office undoubtedly tend to winnow out candidates unable or unwilling to participate in the money race. Finally, financial contributions and expenditures by interest groups with a stake in the outcome of particular cases before the courts tend to foster a public perception that "justice is for sale," undermining public confidence in the fair administration of law.

The recent trend in the financing of state judicial elections has alarmed at least two justices of the United States Supreme Court. The increasing "scramble" to finance state judicial elections, Justice Anthony Kennedy has said, produces the concern "that there will be either the perception, or the reality, that judicial *225 independence is undermined."¹⁹ According to Justice Stephen Breyer:

Independence [of the judiciary] means you decide [cases] according to the law and the facts. Law and facts do not include deciding according to campaign contributions. And if that's what people think, that threatens the institution of the judiciary. To threaten the institution is to threaten fair administration of justice and protection of liberty.²⁰

II. National Efforts to Influence State Judicial Elections

Several nationwide initiatives have been launched to make the state courts more "business friendly" with respect to environmental and other issues. These initiatives are designed to achieve several different, overlapping purposes: to instigate pro-business advocacy in state judicial elections across the country, to provide assistance to different state-level coalitions working to influence judicial elections, and to produce evaluations and surveys of the performance of state judges in

connection with the environment and other issues of concern to the business community.²¹

A. The Oklahoma Project

The most substantial national effort to date has been centered in Oklahoma and conducted by a group of lobbyists, lawyers, and business people, most with close ties to the conservative wing of the Republican Party and to Koch Industries, a large, privately held corporation with a significant interest in environmental regulatory policy. The leaders of Koch Industries, David and Charles Koch, have established a solid track record of generous and effective financial support, primarily through grant-making by several Koch family foundations, for conservative public policy initiatives. One of the Kochs' primary areas of interest has been the state courts. Operating under the names "Citizens for Judicial Review" (during the 1996 election cycle) and the "Economic Judicial Report" (during the 1998 election cycle), the *226 Oklahoma group created a kind of nationwide franchising operation for pro-business advocacy in state judicial elections.

A 1996 fund-raising letter and project proposal, sent by Citizens for Judicial Review (CJR) to various business leaders, described the basic plan of action.²² CJR outlined a plan to prepare state-by-state evaluations of the voting records of state judges²³ and to distribute the results to "pro-business opinion leaders."²⁴ This project was necessary, CJR contended, because "the judiciary has a dramatic and often-overlooked effect on investment and employment decisions made by businesses."²⁵ The initiative would counter the "political and financial strength" of the trial lawyers and address the problem that some communities "are unaware of the negative economic effects which can result from judges who maintain unsound economic ideologies [sic]."²⁶ The proposal outlined a plan to conduct initial evaluations of state judges in eight states: Alabama, Arkansas, Kansas, Louisiana, Mississippi, Oklahoma, Tennessee, and Texas; it also referred to CJR's plans for a future "national program" of judicial evaluations.²⁷

The letter indicated that the fund-raising efforts were approaching "the \$400,000 mark in Oklahoma, with hopes of raising at least \$500,000."²⁸ It described "well-received presentations" to the Tulsa, Oklahoma City, and State Chambers of Commerce and the Mid-Continent Oil & Gas Association, and referred to CJR's expectation that the project would receive these organizations' "full endorsement."²⁹ The proposal also described plans to raise funds in the other targeted states and indicated that the total projected budget for the eight-state effort was \$1 million; "[a]ny additional dollars" above and beyond the \$1 million would "go toward funding a \$3.5 million national program."³⁰ *227 To underscore the ultimate goal of increasing business profits, the letter predicted that the effort "will have a very significant impact in [sic] judiciary behavior and create positive cost results in our state, region and nation."³¹ It is unclear whether the fund-raising goals in the proposal were achieved; but one of the organizers of the effort subsequently stated that "fifty-two associations and corporations" supported the effort.³²

The president of CJR--and presumably of its later incarnation, the Economic Judicial Report (EJR)--is Marc Nuttle.³³ Both CJR and EJR are actually business trade names utilized by Sequoyah Information Systems, Ltd.,³⁴ an Oklahoma corporation headed by Nuttle. Nuttle is a well-known conservative activist who served as counsel for the 1984 Reagan-Bush campaign, directed Pat Robertson's 1996 presidential campaign, and served as an advisor to the conservative Free Congress Research and Education Foundation.³⁵

Another leading figure in the Oklahoma-based effort is Ron Howell, who directs a private political consulting firm called StateSource. Before starting StateSource, Howell was the president of a subsidiary of Koch Industries.³⁶ StateSource claimed credit for helping lead the effort to establish CJR,³⁷ and Howell supplied day-to-day management for the effort, including signing the 1996 fund-raising letter from CJR soliciting business contributions.³⁸ In addition, Howell directed a 1998 project (an offshoot of the national effort) called Oklahomans for Judicial *228 Excellence, which one reporter described as "a coalition of pro-business, political conservatives," to evaluate Oklahoma judges.³⁹ According to The Wall Street Journal, Koch Industries, Howell's former employer, provided seed money to Oklahomans for Judicial Excellence to develop its judicial evaluation program.⁴⁰

Other participants in the Oklahoma-based national organizing effort include Ann Gallagher (formerly with the Ohio Chamber

of Commerce, where she played a role in launching the Ohio judicial evaluation project),⁴¹ Sam Hammons (whose law firm Hammons, Vaught & Conner, PC, prepared legal analyses of the cases used in the judicial evaluations),⁴² and James Milner (a member of the board of Oklahomans for Judicial Excellence who until 1998 was the director of the Oklahoma chapter of Citizens for a Sound Economy).

B. Judicial Evaluations and Surveys

The Oklahoma group has been solely or partly responsible for more than a half-dozen reports on state judicial performance in different states, including Alabama, Florida, Louisiana, Michigan, Mississippi, Oklahoma, and Texas. These states match closely--but not exactly--those initially targeted by CJR in 1996. Most of these reports purport to provide an objective evaluation of judicial performance based on an analysis of judges' voting records. The evaluations follow a simple recipe: They look at a sample of decisions on environmental issues and other topics, such as employment, insurance, products liability, and medical malpractice.⁴³ They then determine whether the outcomes in the cases were favorable or unfavorable to business interests by looking at whether a business entity won or lost the case. The pro-business votes in each category are then tabulated and combined in order to produce a cumulative favorability rating, with *229 100% representing maximal pro-business voting and 0% representing the opposite.

This evaluation procedure can be critiqued on several grounds. First, these evaluations obviously reflect a very narrow conception of what it means to be pro-business. The evaluations give no consideration to such factors as whether the **rulings** respect judicial precedent or reflect unbiased evaluation of the factual record in the particular case. Nor do they consider whether decisions beneficial to the environment might have positive long-term effects on the overall business climate. The only fact that matters for the evaluation is whether a business entity won or lost the case. On these criteria, if a business won the case, it is a "pro-business" decision; if a business lost, it is not a "pro-business" decision.

Second, while the evaluations provide some indication of a judge's ideological leanings, the reliability of the ratings is open to question because of the very small number of decisions examined and the absence of objective criteria for selecting the decisions. A judge might issue or join in hundreds, if not thousands, of **rulings** each year, but the judicial evaluations typically examine only a handful of cases decided in each subject area over the previous decade. The cases ostensibly are intended to be representative, but the evaluations offer no reliable guidelines for how specific cases were selected. Thus, there appears to be a high risk of conscious or unconscious bias in the case selection process. In one case, the state sponsors of evaluations prepared with the assistance of the Oklahoma group refused even to disclose the cases examined.⁴⁴

Finally, at a more fundamental level, these evaluations are problematic because they take the approach of treating a judge's vote in a legal case as being indistinguishable from a vote in the legislative arena, as if a judge's vote were simply a choice to favor one political interest over another. Judging, even by popularly elected judges, is generally viewed as involving decision-making of a different character than legislating. Indeed, a judge who conscientiously applies the law is sometimes expected to arrive at a result he or she would not prefer as a matter of policy. The evaluations simply ignore this aspect of a judge's responsibilities.

*230 The Oklahoma group has played either a lead or a supporting role in producing judicial evaluations of this type in Louisiana, Michigan, Oklahoma, Mississippi, and Texas. The Louisiana and Michigan efforts are described in detail in Part III. The evaluations produced for the other three states are briefly described below.

The Oklahoma evaluation in 1997 followed the standard format, ranking the state's supreme court justices based on the frequency with which they cast pro-business votes in a set of ostensibly representative cases.⁴⁵ With respect to the environment, the evaluation looked at nine environmental cases decided by the state supreme court over the previous decade and categorized each one as either "a positive decision for the state's economy" or "not a positive decision for the state's economy."⁴⁶ Thus, for example, the evaluators gave a negative ranking to a decision reversing and remanding a lower court **ruling** that individuals exposed to toxic chemicals by an electrical transformer explosion were barred from suing the manufacturer for compensation for their injuries.⁴⁷ They also ranked as positive a decision holding that the Oklahoma Water

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Resources Board lacked jurisdiction to order a company to clean up after an oil pipeline rupture.⁴⁸ After the Oklahomans for Judicial Excellence report was released, Oklahomans for Jobs and Economic Growth, a business political action committee (PAC) focusing on judicial elections, lobbied the public to vote two particular judges off the bench.⁴⁹

The Mississippi evaluation, based on a study by CJR, looked at 156 decisions in eight different categories, including the environment.⁵⁰ The sponsors of the evaluation, led by an entity called the Business and Industry Political Education Committee, released a report but declined to identify the cases they actually selected for study. According to one press report, a representative of the committee confirmed that it “did not release the *231 study’s cases when asked (to do so by a justice on the state supreme court), because, based on past experience with legislative studies, people who don’t like their ‘grade’ attempt to divert attention from the subject by focusing on details of the process.”⁵¹ Finally, the Texas judicial evaluation, which reportedly was released in very limited numbers and did not receive wide publicity, apparently followed the same model as the Oklahoma and Mississippi evaluations.

In addition to producing evaluations of judicial decisions, StateSource and Oklahomans for Judicial Excellence have promoted the use of lawyer surveys of judicial performance. By 1998, StateSource had conducted surveys in Oklahoma and five other states asking bar members’ to assess state trial judges.⁵² In the same year, Ron Howell, president of StateSource, formed Oklahomans for Judicial Excellence, which was hired to disseminate a similar survey of bar members in Florida.⁵³ The Florida survey generated significant controversy after it was revealed that it had been commissioned by a pro-business advocacy group, the Florida chapter of Citizens for a Sound Economy.⁵⁴ In Alabama, an effort to conduct a lawyer survey of judicial performance was met with strong criticism from the state bar association, and apparently no survey report was ever completed in that state.⁵⁵

C. The Koch Connection

As suggested above, the Kochs, operating through a variety of corporate or nonprofit foundation arms, have played a central *232 and dominant role in establishing the Oklahoma-based effort to influence the state courts through judicial evaluations and surveys.

The ties to the Kochs are numerous. Ron Howell is the head of StateSource, the consulting firm that provided day-to-day management for Citizens for Judicial Review and the Economic Judicial Report. Howell is a former high-level Koch Industries executive as well as a long-time independent consultant to the company.⁵⁶ Howell was identified in press accounts in the mid-1990s as Koch Industries’ Oklahoma state “director.”⁵⁷

In addition, the Kochs have provided direct financial support for the Oklahoma effort, although the exact extent of their support is difficult to pin down. According to press accounts, the Kochs provided start-up funding to StateSource for the preparation of judicial evaluations.⁵⁸ The Kochs might well have contributed some portion of the nearly \$400,000 in seed money for the judicial evaluation project described in the 1996 fund-raising proposal,⁵⁹ but this cannot be confirmed. In addition, Citizens for a Sound Economy (CSE), to which Koch family foundations have contributed nearly \$10 million dollars, apparently helped fund the preparation of judicial evaluations by the Oklahoma group: Citizens for a Sound Economy is listed on StateSource’s client list.⁶⁰ One could speculate that Koch family foundations contributed to CSE with the understanding, or at least the expectation, that the funds would be used to support the judicial evaluation project administered by StateSource.

The Kochs’ support for efforts to influence the outcomes of state judicial electoral races is actually only one component of a broader Koch-led effort to influence judicial decision-making. The Fred C. and Mary R. Koch Foundations have funded a judicial education program for state judges at the University of Kansas since 1995, emphasizing a law-and-economics approach to legal analysis.⁶¹ Thus, the Kochs have sought to promote **change** *233 in the state court systems not only by supporting the election of “pro-business” judges to the state courts, but also by helping to educate judges on important legal issues. The Koch foundations have also provided major support for educational programs for federal judges.⁶²

The Kochs' support for efforts to influence state courts is consistent with the Kochs' general approach of providing financial support in a comprehensive and organized fashion to achieve fundamental **change** in social policy. At a public conference, Richard Fink, a Koch foundation official, outlined the Kochs' strategy, summarized by *The Nation* as one of "investing in each stage of idea development--from academic research and the recruitment of young scholars, to think tanks for refining ideas into policy, to 'implementation' groups that push the concepts into reality."⁶³ "We at the Koch foundation," Fink said, "view them as complementary institutions, each critical for social transformation."⁶⁴

In a striking example of the synergy among the various Koch-funded efforts to influence the judiciary, Henry Butler, the Fred and Mary Koch Distinguished Professor and Director of the Law and Organizational Economics Center at the University of Kansas, wrote an opinion piece for the *Daily Oklahoman* in 1998, defending the accuracy of the judicial evaluation by Oklahomans for Judicial Excellence.⁶⁵ In his piece, Butler suggested that judges might improve their rankings in the (Koch-funded) judicial evaluations by attending the (Koch-funded) seminars at the University of Kansas.⁶⁶

The Kochs' involvement in efforts to reshape elected state judiciaries, with respect to environmental and other issues, is consistent with their personal "free market" philosophies. But it is also fair to observe that their support for these advocacy efforts has the potential to influence how Koch business interests *234 are (or are not) affected by environmental laws and regulations. Koch Industries is engaged in a wide variety of businesses that generate environmental problems, including oil transportation and refining and chemical manufacturing. Over the years, Koch Industries has been embroiled in a number of environmental controversies. In 1998, the Minnesota Pollution Control Agency levied a \$7.9 million fine in response to dozens of air-quality violations by a Koch-owned oil refinery.⁶⁷ Koch Industries also paid \$10.5 million to settle a suit brought by Texas fishermen whose fishing grounds were damaged by a 90,000-gallon oil spill from a Koch-owned pipeline.⁶⁸ Finally, in January of last year, Koch Industries agreed to pay a \$30-million penalty to the U.S. Treasury, the largest civil fine ever imposed on a company under federal environmental law, in connection with more than three hundred oil spills from pipelines and other oil facilities across the country.⁶⁹ Perhaps not coincidentally, the eight states that CJR initially targeted in 1996 are all states in which Koch Industries has facilities, including some of the company's largest concentrations of facilities.⁷⁰

D. Citizens for a Sound Economy

Citizens for a Sound Economy (CSE), another organization with close ties to the Kochs, also has been involved in the effort to influence the state judicial systems. CSE is a conservative think tank dedicated to promoting "free markets and limited government."⁷¹ Richard Fink, the Koch foundation official *235 quoted above,⁷² was a founder of CSE. Koch family foundations have reportedly contributed more than \$9 million to CSE since its founding in 1984.⁷³ David Koch also sits on the board of directors of the CSE foundation.

State chapters of CSE have acted as grassroots partners with the Oklahoma group in promoting judicial evaluations or surveys in different states, including Florida, Oklahoma, and Texas. The Florida chapter of CSE reportedly retained StateSource to conduct the 1998 Florida survey of judicial performance.⁷⁴ The Texas chapter of CSE played a lead role in distributing the 1996 judicial evaluation surveys conducted in that state.⁷⁵

CSE also has apparently served as a source, or at least as a conduit, for funding for judicial evaluations. As discussed, CSE has reportedly provided funding for the preparation of the Oklahoma judicial reports.⁷⁶ In addition, StateSource, the entity directed by Ron Howell that played such a prominent role in the Oklahoma-based effort, lists CSE as a client on its Web site.⁷⁷

E. The United States Chamber of Commerce

As discussed below in Part III, the Ohio Chamber of Commerce apparently invented the idea of judicial evaluations based on judges' **rulings** in environmental and other cases. Perhaps inspired by that example, and at about the same time that Marc

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Nuttle, Ron Howell, and others were launching the Oklahoma project, in 1998 the U.S. Chamber of Commerce formed the Institute for Legal Reform.⁷⁸ One of the items on the Institute's *236 agenda identified at that time was "rating and endorsing highly qualified candidates for judicial elections in certain key states."⁷⁹

An article published in summer 1999 provided a summary of the goals and objectives of the Institute. According to its president, Lawrence Kraus, the Institute was created because "[t]he Chamber realized that the business community was concerned" about what he called the "growing threat of abusive, frivolous and excessive litigation."⁸⁰ The project has a steering committee made up of corporate leaders. Funding comes from "businesses around the country."⁸¹ Kraus said that the Institute conducts "media campaigns which include press releases, op-ed pieces, letters to the editor, publishes pamphlets, holds conferences and even, on occasion, purchases ad time or space."⁸² To date, it appears that the Chamber (which has not published any judicial evaluations of its own) has carried out its agenda primarily by supporting the efforts of its state chapters. Indeed, state chapters of the Chamber have been involved in some fashion in creating, financing, or distributing judicial evaluations in every state investigated in depth in the course of the research for this Article.

In June 2000, the Institute for Legal Reform announced a major new campaign to support the election of pro-business judges to the state supreme courts in Alabama, Illinois, Michigan, Mississippi, and Ohio, indicating that it expected to raise at least \$10 million to support the effort.⁸³ Jim Wootton, Executive Director of the Institute, reportedly stated that the Institute would likely use these funds to make direct campaign contributions as well as pay for issue advertising.⁸⁴ The Institute announced the hiring of several high-powered consultants to help in this effort, including Mark Gitenstein, former Chief Counsel to the Senate Judiciary Committee and a partner with the firm of Mayer, Brown & Platt, "to provide strategic and legal guidance;" Shandwick International "to develop the message for an ad campaign;" *237 and Mike Murphy of the MPGH Agency, to "develop ads and provide strategic advice."⁸⁵

In an interesting twist, the political debates about judicial elections in both Michigan and Ohio during the 2000 races were enlivened by a series of newspaper and radio ads in Ohio paid for by the Michigan Chamber of Commerce. The ads urged Ohio businesses to move to Michigan, with the argument that the "judicial restraint of the Michigan Supreme Court"⁸⁶ had created a good economic climate in Michigan. The ads criticized the Ohio Supreme Court, stating it had "rejected reasonable legal reform."⁸⁷ While the Michigan Chamber had a plausible economic motivation for running the ads, the gambit of interstate competition seemed tailor-made to attract public attention in both Michigan and Ohio. While the Ohio Chamber denied any direct involvement in the ads,⁸⁸ it took advantage of the ads by its Michigan counterpart to amplify its attacks on the Ohio Supreme Court. A June 6, 2000, press release headlined "Ohio Chamber President Says Supreme Court Makes Ohio a Target," quoted Ohio Chamber President Andrew Doerhl as stating: "People in Michigan should be happy that their Supreme Court has shown judicial restraint and that citizens and businesses are able to have a predictable legal climate. That kind of climate is important to growth, and unfortunately, it does not exist here in Ohio."⁸⁹

III. Battleground States

This section describes efforts by business interests to reshape the state judiciaries in four states: Idaho, Louisiana, Michigan, and Ohio. These states were selected for different reasons. Idaho is apparently the first state in which a sitting justice has been successfully targeted for defeat based on a **ruling** in an environmental case. In Louisiana, the environment has been at the center of one of the most overt and successful efforts by the business *238 community to influence a state court system. In Michigan, advocacy by the business community and allied groups has helped produce a dramatic **change** in the composition of the state supreme court, a **change** that may well have important implications for environmental protections in the future. Ohio was selected because of its role in launching the idea of evaluating and rating judges and because the business community vigorously opposed the reelection of Justice Alice Robie Resnick in the November 2000 election. The Ohio Chamber of Commerce identified Justice Resnick as the least "pro-business" justice on environmental issues on the Ohio Supreme Court.

A. Idaho

The 2000 Idaho Supreme Court election represents the first judicial race in which a state judge has been successfully challenged for reelection based on a **ruling** in an environmental case. In 1999 Justice Cathy Silak authored an Idaho Supreme Court decision upholding claims by the United States to so-called “reserved federal water rights” in protected wilderness and recreation areas.⁹⁰ Judge (now Justice) Dan Eismann and his supporters made this controversial decision the focus of his campaign to unseat Justice Silak.⁹¹ The charge that Justice Silak’s water rights opinion reflected bias on this issue was arguably undermined by the fact that she joined in two other decisions in which the court rejected other federal reserved water rights claims by the United States.⁹² Nonetheless, Justice Silak’s vote in this single case became the focus of public debate, and in May 2000, Idaho voters removed her from office.

1. The Idaho Judicial Election Process

The five justices of the Idaho Supreme Court serve six-year terms and are elected in (ostensibly) nonpartisan elections.⁹³ The elections are conducted on a two-year cycle.⁹⁴ If a justice dies or retires before the end of his or her term, the State Judicial Council nominates a panel of potential replacements from which *239 the Governor makes a final selection.⁹⁵ If no candidate in the primary wins a majority, the two leading vote-getters compete in a run-off in the general election.⁹⁶ If, as occurred in the Silak-Eismann race, there are only two candidates in the primary, there is no need for a run-off and the winner is selected in the primary.⁹⁷

Until 1932, Idaho’s judicial election process was openly partisan. In that year, as the result of a pro-Democratic sweep in Idaho and across the country fueled by Depression-era popular discontent, two Idaho Republican incumbent justices were defeated at the polls.⁹⁸ Idaho’s Republican leadership subsequently pressed for a constitutional amendment mandating nonpartisan elections.⁹⁹

As a result of these reforms, Idaho judicial elections, were largely removed from the political process--at least until the 1990s. Prior to the 2000 election, no incumbent justice had been voted out of office for over fifty years.¹⁰⁰ Therefore, incumbent justices faced little real prospect of retribution at the polls for politically unpopular decisions. Furthermore, the process for selecting new justices was largely nonpolitical as well. From the mid-1960s, with the exception of two justices who died in office, every justice resigned his seat rather than retiring at the end of his term.¹⁰¹ As a result, the Judicial Council selection procedure mentioned above was used to select every new justice over this period.

In 1998, for the first time in thirty years, the State held an election for an open seat on the court. In that contentious race, Wayne Kidwell, who was publicly associated with the Republican Party, defeated Mike Wetherell, who was identified as a Democrat. *240¹⁰² The 1998 race marked the emergence of a new, essentially partisan judicial electoral process in Idaho. As described below, the partisan character of the electoral process increased in the following election.

2. The 2000 Candidates

The 2000 judicial race pitted Justice Cathy Silak against an Idaho district court judge, Dan Eismann. Eismann won the contest by a margin of 60 to 40 in the primary held on May 23, 2000.¹⁰³

Democratic Governor Cecil Andrus appointed Cathy Silak to the Idaho Court of Appeals in 1990 and appointed her to the Idaho Supreme Court in 1993.¹⁰⁴ In 1994, she won re-election to the court in a race against Wayne Kidwell (who would successfully run for a seat on the court in 1998).¹⁰⁵ Prior to her appointment to the bench, Silak served as a prosecutor in the offices of the U.S. Attorneys in New York and Idaho and had a private law practice.¹⁰⁶ She graduated from New York University and Boalt Hall Law School.¹⁰⁷ Immediately prior to becoming a judge, she was Associate General Counsel of Morrison-Knudsen Corp., a large engineering and construction firm.¹⁰⁸ Justice Silak was the first woman to sit on the Idaho Supreme Court.

Justice Silak was fairly easily identifiable as the Democratic candidate. She had been appointed to office by a Democratic

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Governor. She also had married into what one newspaper reporter referred to as a “prominent Idaho Democratic family.”¹⁰⁹ In addition, Silak’s volunteer work for the ACLU prior to joining the bench plausibly suggests she had liberal political leanings, an *241 argument repeatedly advanced by Eismann’s supporters during the campaign.¹¹⁰

Dan Eismann had deeper roots in Idaho than Silak, having received both his bachelor and law degrees from the University of Idaho.¹¹¹ He served as a magistrate judge for Owyhee County for about a decade, and in 1996 was appointed Ada County District Judge.¹¹² Eismann described himself as a born-again Christian of nearly twenty years,¹¹³ and, as discussed below, garnered major political support from the Idaho Christian Coalition, which reportedly distributed thousands of voter guides advocating his election over several Sundays preceding the election.¹¹⁴ Eismann was easily identifiable as the Republican candidate.

Before running for the Idaho Supreme Court seat, Judge Eismann was best known for his actions in the Idaho school funding litigation. Like many other state constitutions, the Idaho Constitution prescribes basic standards for the state system of public education.¹¹⁵ In a replay of similar litigation in other states, Idaho school districts brought suit, alleging that the legislature had failed to live up to its constitutional obligation to “provide a means for school districts across the state to fund facilities that provide a safe environment conducive to learning.”¹¹⁶ Judge Eismann dismissed the case.¹¹⁷ On appeal, the Idaho Supreme Court issued a unanimous **ruling** reversing Judge Eismann’s decision and returning the case for trial on the plaintiffs’ claims. Rather than conduct the trial mandated by the Idaho Supreme Court, Judge Eismann formally withdrew from the case. “I took an oath to uphold the Constitution,” he said. “To follow the court’s directive I would violate my oath of office.”¹¹⁸

*242 In general, of course, a trial court judge is bound by the legal **rulings** of a superior appellate court. It is extremely rare for a trial judge to refuse to hear a case based on his view that the appellate court made an erroneous legal **ruling**. If many judges acted so willfully, the administration of justice would be seriously undermined.

Another striking aspect of Judge Eismann’s candidacy was the fact that his brother-in-law, Barry Wood, was the presiding judge hearing the long-running Snake River Basin Adjudication case.¹¹⁹ As mentioned, an Idaho Supreme Court **ruling** in that case authored by Justice Silak was the focal point of Judge Eismann’s campaign against Silak. Thus, were appeals in this case to come before the Idaho Supreme Court, Justice Eismann would have reviewed decisions by his brother-in-law in the very case that was the central issue in his election campaign. To make matters more complicated, the Nez Perce Indian tribe filed a motion to disqualify Judge Wood from the case on the ground that he failed, prior to accepting appointment as presiding judge, to disclose to the parties that he and members of his family (not including Eismann) held water claims that could be adversely affected by recognition of the Nez Perce’s claims.¹²⁰ Judge Wood denied the disqualification motion.¹²¹ But he granted the Nez Perce’s request for permission to take the disqualification issue to the Idaho Supreme Court, and the Idaho Supreme Court issued an order allowing the appeal on July 19, 2000.

During the course of the campaign, when questions were raised about the propriety of potentially sitting in review of **rulings** made by his brother-in-law, Judge Eismann said he would not recuse himself if elected to the Idaho Supreme Court. “As long as we do not discuss the cases, which we aren’t, there’s no requirement” that he recuse himself, he stated.¹²²

*243 On August 31, 2000, the Idaho Supreme Court issued an order removing Judge Wood from the Snake River case.¹²³ This action followed an opinion by the Idaho Judicial Council concluding that it would be a conflict of interest for Justice Eismann to sit in review of his brother-in-law’s decisions, and a subsequent announcement by Justice Eismann that he would recuse himself from the Snake River case in order to abide the Council’s decision.¹²⁴ As between the removal of Justice Eismann or Judge Wood, the Idaho Supreme Court apparently preferred the removal of Judge Wood.

According to public reports, Silak and Eismann raised approximately equal amounts in direct campaign contributions.¹²⁵ Many of the contributors to the candidates are difficult if not impossible to categorize in terms of financial interest or political orientation. However, it is apparent that a good deal of Justice Silak’s support came from prominent Democratic party figures and such interest groups as the Idaho Trial Lawyers Association.¹²⁶ It is also apparent that Judge Eismann’s major supporters included Republican party leaders, resource industries, and agricultural interests.¹²⁷ In addition, according to press accounts, Eismann raised nearly one-quarter of his campaign fund from the chairman of the Idaho Christian Coalition and four

members of her family.¹²⁸

Apart from these direct campaign contributions, Judge Eismann's campaign was boosted considerably by extensive "independent expenditures" by various groups on advertising and telephone polling. The exact amount of these independent expenditures is basically unknown and unknowable, but was almost certainly in the hundreds of thousands of dollars.

*244 3. The Snake River Water Rights Decision

The contest for Justice Silak's seat on the supreme court began, in effect, with a blistering editorial on October 14, 1999, in *The Idaho Statesman*, one of the state's largest papers.¹²⁹ The subject of the editorial was the court's decision a few weeks earlier upholding, by a three to two vote, a claim by the U.S. government to federal "reserved" water rights in three designated wilderness areas (Frank Church River of No Return, Gospel Hump, and Selway-Bitterroot) and in the Hells Canyon National Recreation Area.¹³⁰ Justice Silak was the author of the majority opinion.

The Idaho Statesman editorial was remarkably blunt. "Through the hand-wringing over Idaho's water rights," the editorial began, "there is one quick-fix solution available to voters: elect a new supreme court Justice." The editorial pointed out that Justice Silak was up for reelection, and "[t]hat leaves an opening for anybody who thinks she was in error." And then, driving home the point, the editorial observed that "all it takes is one **change** on the supreme court--one individual who demonstrates a greater sensitivity to what's at stake, which is Idaho's water sovereignty."¹³¹

The striking feature of this editorial is its disregard for whether Justice Silak's opinion properly applied the relevant law to the facts of the case. Instead, the editorial addressed the court's decision as if it were purely a matter of political judgment. "Silak should be aware," the editorial warned, "that there isn't a single Idaho politician in the last 30-plus years-- Democrat or Republican--who would dare to run on the platform to allow the federal government to control every drop of water in designated areas of the state."¹³²

In a nutshell, the "reserved water rights" doctrine holds that when the United States "reserves" land from the public domain for some special purpose, it can also reserve a sufficient quantity of available water to serve the purposes of the reservation.¹³³ Reserved water rights may be either express or implied. Even in *245 the absence of explicit language in congressional legislation, the United States Supreme Court has said that an intent to reserve water will be inferred when the water reservation is necessary to fulfill the purpose of the land reservation.¹³⁴

In its October 1, 1999, decision, the Idaho Supreme Court, affirming the trial court, concluded that the United States could claim reserved rights in the water flowing through the wilderness and recreation areas as of the date the areas were created between 1964 and 1980.¹³⁵ The court also **ruled** that the United States was entitled to claim the entire unappropriated flow in order to fulfill the purposes of the reservations.¹³⁶ The court's recognition of this claim meant not only that the United States could block water development inside the areas but also development outside the areas that would impinge on the federal water rights. Because most of the affected areas were in the headwaters of the affected streams, this aspect of the **ruling** had little practical significance. However, in the case of the River of No Return Wilderness regarding protection of the Salmon River, the **ruling** could potentially affect various upstream developments outside the wilderness area. Moreover, because the **ruling** recognized the United States' right to claim all remaining water flows as of the date the wilderness area was created, the **ruling** could, at least in theory, force the cancellation of some established water uses in the upper reaches of the Salmon River.

Chief Justice Trout and Justice Walters concurred in Justice Silak's opinion. Two justices, Kidwell¹³⁷ and Schroeder,¹³⁸ filed vigorous dissents. They agreed that the legislation establishing the national recreation area included a reserved water right, but argued that the Wilderness Act created neither an express nor an implied water right in the three wilderness areas. They also dissented on the issue of the amount of water reserved. To the extent that the United States was entitled to claim water rights in any of the areas, they argued, the government had to prove how much water was actually necessary to fulfill the reservation purposes.

*246 Shortly after the court issued its **ruling**, the state, Potlatch Corporation, the cities of Salmon and Challis, three mining companies, and fourteen irrigation districts filed requests that the court rehear the case.¹³⁹ On November 30, 1999, the court granted the request, a step that requires the concurrence of at least one member of the majority. On October 27, 2000, following the primary election in which Silak was voted out of office (but while she was still on the court serving out her term), the court reversed itself by a three to two vote and concluded that the Wilderness Act did not create reserved federal water rights.¹⁴⁰ Chief Justice Trout switched her vote on the issue and **changed** the outcome of the case. Justice Silak¹⁴¹ and Walters¹⁴² filed dissenting opinions from the court's new **ruling**.

As discussed, the charge that Justice Silak's authorship of the court's original decision reflected bias on the water rights question was belied by the fact that Justice Silak joined in another decision issued by the court the same day rejecting the United States' claim to a reserved water right in federal lands administered by the U.S. Forest Service.¹⁴³ Moreover, a few months later, Justice Silak joined in another court decision rejecting a claim by the United States to a water right to support a national wildlife refuge.¹⁴⁴

*247 4. The Electoral Contest

Following the publication of the Idaho Statesman editorial, a steady torrent of public criticism rained down on the court. A board member of a large irrigation district in southern Idaho said "This is setting a precedent that is untenable. We can't live with it. No citizen in the Snake River Plain can live with this decision."¹⁴⁵ The mayor of Salmon, Idaho, upstream of the River of No Return Wilderness, called, it a "devastating and perplexing decision."¹⁴⁶ A representative of the Farm Bureau Federation said the organization was "astounded with this **ruling**."¹⁴⁷ On the other hand, there also were dissenting views about the Idaho Statesman editorial. One letter to the editor remarked, "What is inexcusable is that you think she should decide cases, not to what she believes the law to be, but to what she believes the voters want."¹⁴⁸

Judge Eismann effectively launched his campaign to unseat Justice Silak, despite the officially "nonpartisan" nature of Idaho judicial elections, by appearing and speaking at a Republican Party fund-raising banquet in Idaho Falls on February 12, 2000. Newspaper accounts of the event indicate that Eismann did not explicitly discuss the water rights case, but it was clearly the target of his remarks. Eismann said the "courts with increasing frequency have been pushing political agendas with decisions 'that reinterpret the Constitution.' 'They don't trust the people,' [he] said. 'Those kinds of justices should be removed from office.'" ¹⁴⁹ *248 In another statement highlighting the importance of the water case, a Republican official at a meeting prior to the banquet called for Silak's removal: "We anticipate having an opponent for her so you will have a choice. . . . In this instance you better get out there and vote or you'll be pretty dry."¹⁵⁰

A few weeks later, former supreme court Justice Robert Huntley, an active member of the Democratic party, filed a complaint with the prosecutor for the county in which the fund-raising event occurred.¹⁵¹ He alleged that Eismann had violated the constitutional provision that candidates "shall not be nominated nor endorsed by any political party."¹⁵² Violations are punishable by a \$1,000 fine, up to five years in prison, or both.¹⁵³ Huntley also submitted a copy of the complaint to Attorney General Al Lance and others. In explaining his decision to file the complaint, Huntley wrote: "This type of conduct is very serious in that it constitutes an invasion of the independence of the judiciary and will result in judges being fearful of the political consequences if either they write or enter unpopular **rulings** or happen to be former members of a minority political party."¹⁵⁴

No charges were ever brought as a result of the complaint, perhaps in part because of a letter the Attorney General's deputy chief of staff sent to Robert Huntley asserting that the law had not been broken.¹⁵⁵ According to public accounts of the letter, the deputy chief of staff contended that Republican leaders speaking out in favor of Eismann's candidacy at the Republican party event did not constitute party endorsement.¹⁵⁶ Furthermore, he asserted that there could have been no violation of the prohibition against nominating or endorsing judicial candidates because the event occurred before the May primary. "Therefore," he wrote, "no ballot has been created, used or voted on in which the name Judge Eismann or any other judicial candidates *249 [sic] was accompanied by any party designation."¹⁵⁷ As Huntley pointed out in response, the argument was

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fallacious because the supreme court race was going to be decided in the primary given that there were only two candidates in the race. Under the reasoning of the Attorney General's office, the constitutional prohibition against partisan nomination or endorsement of a judicial candidate is meaningless in any race in which there are only two candidates and the selection process is completed prior to the general election.¹⁵⁸

Later, a few weeks before the election, another controversy erupted over a questionnaire submitted to the candidates by the Idaho Christian Coalition asking for their responses to dozens of questions.¹⁵⁹ Justice Silak declined to respond to the specific questions posed but requested that the coalition include in its voter guide a statement to the effect that she had taken and several times reaffirmed an oath to uphold the Idaho and United States Constitutions.¹⁶⁰ When the coalition criticized her for not responding, she called the criticism misleading and asserted that it would be improper for her to provide answers to many of the coalition's questions. According to press accounts, the coalition asked such questions as whether the candidates "are pro-life or pro-choice, conservative or liberal, or believe God's laws have a higher authority than state and federal law."¹⁶¹

Judge Eismann apparently did provide answers to at least some of the questions on the questionnaire, but neither he nor the coalition would release the responses. However, in a newspaper interview Judge Eismann provided a synopsis of his answers.¹⁶² For example, in response to the question "Do you believe in the fact that God created all the heavens, Earth, creatures, plants and man?" he answered, "I have studied evolution in great detail. I think you can prove scientifically that evolution has not and cannot occur." Question: "Do you believe in the fact that man evolved from life forms in the sea?"; answer: "You *250 would have to have an oxygen-free atmosphere for anything like that to have occurred. The evidence is that this Earth has never had an oxygen-free environment." Question: "Vis-a-vis abortion, are you 'Pro-life?"; answer: "I think abortion is morally wrong."¹⁶³

This controversy prompted the filing of another complaint, this time by Silak supporter Scott Reed, an attorney in private practice in Coeur d'Alene, with the state Judicial Council.¹⁶⁴ Reed asserted that Eismann had violated the official **rules** of judicial conduct by answering the questionnaire. He pointed to an August 12, 1998, letter from the Judicial Council to candidate Mike Wetherell, responding to an inquiry Wetherell had made about the appropriateness of questionnaires he had received soliciting his views on such issues as gun control, capital punishment, and abortion. The Council's 1998 letter stated: "It is not appropriate for a judicial candidate to respond to such questions or surveys. However, a candidate may respond to general questions concerning the candidate's background, education, qualifications, experience and general philosophy on the law."¹⁶⁵ Judge Eismann called Reed's complaint a "political attack" and said, "I don't know of anything that says a judge can't express his religious beliefs."¹⁶⁶ On August 17, 2000, the Judicial Council sent a letter to Scott Reed informing him that the Council determined that the Idaho Code of Judicial Conduct "does not provide sufficient guidance to Idaho judges or to the Idaho Judicial Council to allow the Council to proceed with formal charges against Judge Eismann."¹⁶⁷

In perhaps the most controversial aspect of the race, in the last few weeks before the election an obscure South Carolina-based group financed an illegal "push poll" designed to sway voters against Justice Silak based on her opinion in the Snake River *251 case.¹⁶⁸ A push poll is an organized campaign to reach individuals by telephone in order to influence their votes, but is conducted under the guise of an informational survey. It is nominally a "poll," but in reality it is designed to "push" voters either toward or away from a particular candidate. The script of the push poll directed at Silak was released by the Idaho representative of the effort. As reported by a local newspaper, it read:

"Hello, Mr. XX? This is XX calling. I'm conducting a brief survey. Can I ask you one question? Do you support the move by the courts to transfer control over Idaho water rights to the federal government?"

Residents who answered 'no' were told; 'Your opposition to the federal power grab of Idaho water is important. You see, at the May 23 election, Idaho voters will be deciding who will serve on the state supreme court. The current judge, Cathy Silak, is the person most responsible for handing over Idaho water to the federal agents. Her opponent is Dan Eismann. Judge Eismann opposes this giveaway. He is a solid defender of individual freedom and has a record of being fair and honest.'

The caller was then asked: 'Can we count on you to go to the polls on Tuesday May 23rd and vote for Dan Eismann for state

Supreme Court?"¹⁶⁹

Immediately after the polling began, Silak's campaign brought suit alleging a violation of a state law requiring pollsters to identify to the people being polled the person or group paying for the poll.¹⁷⁰ On May 16, 2000, a district court judge **ruled** in favor of the Silak campaign, issuing a restraining order barring further polling.¹⁷¹ But the judge rejected the campaign's request that the sponsors of the poll re-telephone all those they contacted to inform them who paid for the poll.

Who or what was behind this push poll remains mysterious. The poll was nominally sponsored by an organization called the ***252** Citizens for Term Limits Idaho Campaign, based in Hayden Lake, Idaho.¹⁷² The actual telephoning was conducted by a Pennsylvania-based telemarketing firm. According to Dan Morgan, leader of the Idaho term limits group, the poll was funded by a \$50,000 check from Lyle Coggan of the Democracy Fund in South Carolina. Research efforts to further identify Coggan or the Democracy Fund have so far been fruitless.¹⁷³

Finally, in the last few days of the campaign, a virtual advertising blitz was mounted against Silak by a number of groups opposed to her reelection. A political action committee called Concerned Citizens for Family Values began running full-page newspaper ads across the state on the Sunday before the election stating, in large letters: "Will partial birth abortion and same-sex marriage become legal in Idaho? Perhaps so if liberal Supreme Court Justice Cathy Silak remains on the Idaho Supreme Court?"¹⁷⁴ The ads then went on to suggest that Silak's past involvement with the ACLU in Idaho indicated that she might support national ACLU positions on abortion and homosexuality.¹⁷⁵ Print and radio advertising run by gun advocates suggested that Silak would support gun registration and also opposed her reelection.¹⁷⁶ Eismann disavowed any knowledge of or control over these independent efforts on his behalf, though some argued he was less forceful than he might have been in objecting to them.¹⁷⁷ Justice Silak called them a "smear," emphasizing that the ads discussed issues that the court had never addressed and on which she had not stated her views.¹⁷⁸

***253 5. The Mantra of Judicial Activism**

One final, striking aspect of the race, and a point that only becomes clear after reviewing scores of news accounts of the election, is the consistent focus by Judge Eismann and his supporters on the issue of judicial activism. From the day he announced his campaign and in virtually every public statement thereafter, Judge Eismann and his supporters attacked what they called "judicial activism."¹⁷⁹ In emphasizing this theme, Eismann's campaign borrowed a page from Republican or Republican-leaning judicial candidates across the country.

It was of little consequence that Justice Silak asserted that she was a "strict constructionist"¹⁸⁰ and repeatedly stated that she was "not an activist judge."¹⁸¹ Like proverbial denials of wife beating, Justice Silak's protests against charges of judicial activism appeared to reinforce her opponent's message.

Based on the actual positions of the candidates, there was little reason to think that Justice Eismann would be a less "activist" member of the court than Justice Silak. Indeed, if anything, his history and campaign platform suggest that Justice Eismann is likely to be more activist than Justice Silak. For example, Eismann's refusal to accept the supreme court's binding interpretation of the Idaho Constitution in the school funding case represents, by any standard, a highly "activist" judicial step.¹⁸² His open political advocacy, despite his position as a judge, of "pro-life" positions that are inconsistent with binding U.S. Supreme Court precedent on the issue, also appears to smack of activism. And with respect to the central issue in the race, the Snake River case, the thrust of his campaign's criticism of Justice Silak's opinion was not that it was wrong as a matter of law but rather that it was out of step with sentiments of Idaho ***254** voters. A justice who endorses deciding cases based on popular sentiment rather than legal precedent would seem to fit the definition of a judicial activist. In the end, it is difficult to discern any legitimate content to the charge of "judicial activist" made by Judge Eismann and his supporters against Justice Silak.

One newspaper columnist commented on the apparent contradiction between Judge Eismann's stated fidelity to "strict construction" and his cavalier approach to complying with Idaho's constitutional guarantee of a "nonpartisan" election.

Referring to Judge Eismann, Bill Hall wrote: “These constitutional wobblers now thumbing their noses at the requirement are fair-weather friends of strict construction. They are laughing up their dark sleeves at the virtue of a nonpartisan judiciary.”¹⁸³

B. Louisiana

For the last decade, the Louisiana business community has waged an aggressive campaign to remake the state’s elected supreme court. Given the importance of petrochemical and related manufacturing in Louisiana, it is hardly surprising that this effort has been driven in part by the business community’s concerns about environmental regulation. Recent decisions by the court suggest that the campaign has succeeded in producing a court that is decidedly unsympathetic to environmental protection efforts. In one action that has drawn national media attention,¹⁸⁴ the court, at the urging of the business community, issued new **rules** governing law student participation in litigation matters. These new **rules** have seriously undermined the environmental law clinics at the state’s law schools and reduced the public’s already modest capacity in Louisiana to enforce environmental regulations.

1. Judicial Electoral Politics in Louisiana

The seven justices on the Louisiana Supreme Court are elected in openly partisan elections held in seven districts across the state.¹⁸⁵ The seven justices are elected for ten-year terms on *255 a two-year cycle.¹⁸⁶ If a vacancy occurs in a non-election year, the court appoints a temporary replacement, and the Governor calls for an election.¹⁸⁷ Circuit court judges, divided among four circuits, are also elected to ten-year terms.¹⁸⁸

Over the last half-dozen years, the composition of the supreme court has **changed** dramatically, giving the court a decidedly more “conservative” tilt. In 1994, Justice Victory, with the support of the Louisiana Association of Business and Industry, the Louisiana State Medical Society, and other business groups, won election to an open seat on the court.¹⁸⁹ In 1996, two business-backed candidates, Justices Knoll and Traylor, unseated two relatively liberal opponents, Justices Bleich and Watson. Knoll publicly labeled her opponent, Watson, as “one of the most liberal judges” on the court and claimed that with her election “there will be a **change** in the court philosophically.”¹⁹⁰ Traylor described his opponent, Bleich, as a “liberal” and asserted, “I’ll bring a more conservative voice to the Supreme Court.”¹⁹¹

In 1998, the Louisiana Association of Business and Industry and other business groups launched a vigorous--but ultimately unsuccessful--campaign to unseat Chief Justice Pascal Calogero. Despite its success in supporting openly pro-business candidates for the court, the business community concluded that the Chief Justice remained an important and sometimes decisive vote against business interests.¹⁹² Calogero was opposed by Judge *256 Charles Cusimano, who ran with strong financial backing from the business community. Calogero received 49% of the vote in the October 1998 preliminary election while Cusimano received 41%, and Bill Quigley, an independent candidate employed by the Loyola Poverty Law Center, received 9%.¹⁹³ Under Louisiana law, Calogero’s failure to receive a majority of the votes cast meant that a run-off election was required. Rather than face certain defeat, Cusimano withdrew, handing victory to Calogero.¹⁹⁴

While a defeat, Chief Justice Calogero’s reelection was hardly a total loss for the business community. As described below, over the course of the election campaign business groups were simultaneously petitioning the court to place new restrictions on law school clinics that help citizen groups enforce environmental laws against polluting industries. Prior to the election, the court, led by Chief Justice Calogero, granted the petition. Not surprisingly, this action created at least the public impression that the Chief Justice joined in this action to insulate himself from political attacks from the business community and thereby help ensure his reelection.

The 1998 campaign was described in the press as “nasty, expensive [[.] . . . with little respite”¹⁹⁵ and full of “biting television ads and a sea of glossy campaign posters.”¹⁹⁶ Calogero supporters filed a suit to stop the Cusimano campaign from passing out literature publicizing Calogero’s dissent in a case challenging the imposition of the death penalty for a rape involving a victim below the age of twelve.¹⁹⁷ Because the case was still pending in the courts, Calogero’s supporters argued that it was a

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violation of judicial ethics to discuss the case. The judge presiding over the case issued an injunction against the use of the ad and the Cusimano campaign pulled it.¹⁹⁸

*257 On the other side, Chief Justice Calogero's campaign ran an ad and direct mail campaign accusing Judge Cusimano of being soft on crime, and criticizing him in particular for the allegedly light sentence he meted out to a convicted rapist, a charge Cusimano called false.¹⁹⁹ Calogero also accused Cusimano of authorizing foreclosures of homes subsequently purchased by a company in which Cusimano held a financial stake.²⁰⁰

Candidate Quigley suggested that his opponents' resources would be better spent in buying television time for a public discussion of the issues rather than in purchasing ads which "demean" the office and make the campaign "like the Jerry Springer show."²⁰¹

As in other states across the country, the cost of running for judicial office in Louisiana is becoming exorbitant. The cost of a Louisiana Supreme Court race now approaches one million dollars.²⁰² In 1998, Judge Cusimano spent about \$650,000 in his campaign; had he competed in the run-off, he would have been forced to spend several hundred thousand dollars more.²⁰³ Chief Justice Calogero spent \$900,000 on his campaign and expected to have to spend another \$200,000 to \$300,000 in the run-off.²⁰⁴ Bill Quigley, who did not accept contributions over \$500, raised only about \$80,000.²⁰⁵

*258 Not surprisingly, given special-interest groups' increasing involvement in judicial elections, a 1998 survey conducted by the University of New Orleans found that 80% of state residents surveyed thought the Louisiana Supreme Court was too influenced by politics.²⁰⁶

2. The Louisiana Association of Business and Industry

The major force behind the effort to make the Louisiana Supreme Court more "business friendly" has been the Louisiana Association of Business and Industry (LABI).²⁰⁷ Created in 1975 by a consolidation of the Louisiana Chamber of Commerce, the Louisiana Manufacturers Association, and the Louisiana Public Affairs Council, LABI has emerged as the dominant voice of business in Louisiana. LABI has promoted, among other things, "right to work" legislation, limitations on workers' compensation remedies, lowering of unemployment and workers' compensation taxes, and protection of business tax incentives.²⁰⁸

LABI has managed to skirt Louisiana's campaign finance laws by creating multiple political action committees (PACs). The maximum a judicial candidate can receive from PACs is \$50,000.²⁰⁹ A PAC classified as "large" can contribute \$10,000 per candidate, and a "small" PAC can contribute up to \$5,000 per candidate. LABI has established four PACs, two of which are categorized as large (SOUTH and WEST PACs) and two of which are categorized as small (NORTH and EAST PACs). PAC contributions, though important, do not include LABI's significant "independent expenditures," including its investment in producing a report evaluating the justices' pro-business voting patterns,²¹⁰ discussed below.

Calogero charged that Judge Cusimano was "a handpicked candidate of the Louisiana Association of Business and Industry, trying to **change** the complexion of the supreme court," an accusation *259 the organization did not deny.²¹¹ Cusimano was in fact supported by LABI, its four PACs, and a number of its member companies. LABI's SOUTH PAC endorsed Cusimano the day he entered the race.²¹² LABI's PACs ultimately contributed \$26,000 to Cusimano's campaign, close to the maximum allowed.²¹³ Cusimano described himself as a candidate who would bring "a philosophy that understands business" to the court.²¹⁴

Environmental issues have been a consistent focus for LABI. In 1998, LABI announced an effort to improve the Louisiana business community's environmental image. The Baton Rouge Advocate commented on this effort skeptically, observing, "[t]he environmentalists will rightfully point out that much of the progress on the environmental front in the last two decades has come in the face of stiff opposition from big business."²¹⁵ LABI also has joined with other business groups around the country in expressing opposition to the Kyoto treaty on global warming, arguing that it would lead to a "total end to the

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increase in industrialization capacity in this country.”²¹⁶ Finally, LABI took a lead role in lobbying for environmental self-audit legislation, which would have immunized businesses from liability for environmental violations discovered and reported by the companies themselves.²¹⁷ Thus, LABI’s advocacy in the context of the state electoral process is consistent with LABI’s overall public policy agenda.

LABI has been strikingly frank in its preference for a merit selection process for state judges and also about its unwillingness to forego participating in the electoral process that currently exists. In the early 1980s, LABI supported legislation to establish a judicial appointment process but also threatened to start treating judicial elections like any other election contest if the selection *260 process did not **change**.²¹⁸ True to its word, following the failure of the reform legislation, and assertedly for the primary purpose of offsetting contributions to judicial candidates by trial lawyers, LABI joined the judicial electoral fray in the early 1990s.²¹⁹

LABI also has been candid about its objectives as a participant in the judicial electoral process. In 1994, LABI president Dan Juneau conceded that LABI was seeking to use its financial power and political clout to influence the court, stating, “[w]e don’t choose to make our judicial system in this state above influence.”²²⁰ LABI has contended, “[i]f the Legislature continues to resist some form of merit selection for judges, which is the obvious reform that is needed to insulate judges from the unavoidable influence of special interests, the business community must remain actively involved in the judicial election process.”²²¹

LABI has publicly expressed the view that its activities have had a positive effect on the supreme court from a business standpoint. For example, LABI’s political director told a reporter that certain recent supreme court pro-business **rulings** “wouldn’t have happened as they did” in the absence of LABI’s efforts on behalf of certain judicial candidates.²²²

3. Judicial Evaluations

Louisiana has seen two independent judicial evaluation projects. The first, in 1996, was produced by the Oklahoma-based Center for Judicial Review (CJR). The second, in 1998, obviously borrowing the idea from CJR, was produced by the Louisiana Association of Business and Industry (LABI).

The 1996 evaluation followed the pattern of the evaluations produced by the Oklahoma group. The report looked at other decisions from the Louisiana Supreme Court over the last ten years in environmental cases and six other areas, and ranked the justices by their pro-business votes from 100% to 0%.²²³ Cases were chosen with input from unspecified “business leaders and *261 lawyers.”²²⁴ Justice Victory, who won election in 1994 with business backing, received a 67% rating; Justice Marcus, 54%; Justice Kimball, 38%; and Justices Calogero and Lemmon tied with the lowest rating of 33%.²²⁵ Justices Knoll and Traylor, elected in 1996, were not included in the evaluation, presumably because they were involved in too few cases to provide a reasonable sample. In the environment category, Chief Justice Calogero received an 80% rating, a higher pro-business score than he received in any other category.²²⁶

LABI took over the work of conducting judicial evaluations in 1998.²²⁷ LABI’s analysis of judicial voting patterns was even more simplistic than the analysis by the Oklahoma group. The LABI evaluation was based on a “panorama” of fifty cases over a twenty-five-year period involving “key economic development issues.”²²⁸ LABI assertedly chose the cases based on what it called a “common thread,” including decisions “creat[ing] new theories of law,” “expand[ing] existing laws beyond their original scope,” and creating law “contrary to legislative intent.”²²⁹ The LABI analysis did not break the cases down into separate categories but rather gave each judge a single global score. LABI publicly released its analysis in September 1998, shortly before the preliminary election in early October, presumably to ensure that it had the greatest possible impact on the outcome.²³⁰

LABI assigned the justices the following “pro-business” scores: Justice Traylor, 100%; Justice Victory, 86%; Justice Knoll, 60%; Justice Marcus, 51%; Justice Kimball, 44%; Justice Johnson, 44%; Justice Lemmon, 16%; and Chief Justice Calogero, 3%.²³¹ Especially given the very small number of cases examined by LABI, and the even smaller subset of cases used to

evaluate recent appointees, the reliability of the evaluation is *262 open to substantial doubt. A skeptic might question the conclusion that the three successful LABI-backed candidates in the 1990's, Justices Traylor, Victory, and Knoll, received the three highest pro-business scores, whereas Chief Justice Calogero, whom LABI had targeted for defeat in 1998, received a pitiful pro-business rating of only 3%.

In order to defend himself against LABI's charge that he was anti-business, Calogero pointed to the relatively low but still substantially higher 33% pro-business rating he had received from the Center for Judicial Review in 1996.²³² In fact, others rejected the view that Calogero, though apparently not as reliable a business supporter as some other justices, could fairly be characterized as "anti-business." The New Orleans Chamber of Commerce endorsed him for reelection in 1998.²³³ Moreover, the Center for Judicial Review's 1996 evaluation gave Calogero an 80% pro-business rating based on his votes in environmental cases.²³⁴ If Calogero could be viewed as anti-business, it was only in comparison with the explicitly pro-business candidate LABI favored to replace Calogero.

It is difficult to gauge the actual effect of the release of the LABI analysis. Certainly there was a great deal of press coverage of LABI's report and the ensuing controversy. Judge Cusimano publicly cited the Chief Justice's low rating in the LABI study as a reason to vote against him, and argued that the report substantiated his charge of "judicial activism" against Calogero.²³⁵

4. Sacrificing Environmental Law at the Altar of Judicial Politics

Given the environmental challenges Louisiana faces, it is no surprise that environmental law and regulation have been at the center of the battle over the composition of the Louisiana Supreme Court. In 1998, Louisiana was second only to Texas in total on-site and off-site releases in pounds on the Toxic Releases Inventory, a comprehensive list maintained by the U.S. Environmental Protection Agency of toxic chemicals released into the *263 environment.²³⁶ Louisiana's gulf shore is widely nick-named "cancer alley" and the Mississippi River flowing through Louisiana has been called the "chemical corridor."

The supreme court's 1997 decision in *Meredith v. Ieyoub*²³⁷ provides one striking illustration of how the **changing** composition of the court has affected the outcome in environmental cases. The case arose from the decision by the Attorney General to enter into contingent-fee contracts with private firms to assist the state in prosecuting environmental damage claims against polluters. Under the contracts, the firms would retain a percentage of any financial recoveries successfully recovered on the state's behalf.²³⁸ One might conclude that the Attorney General's obvious motivation in entering into these contracts was to enlist the resources and expertise of private law firms in helping to enforce the environmental laws. The state association of oil and gas producers and some of its members, who were among the potential targets of this arrangement, brought suit claiming that the Attorney General lacked the legal authority to enter into this type of contract for legal services.

There is strong evidence that the plaintiffs' ultimate success in the litigation challenging the contracts is attributable to the business community's successful efforts to elect more "pro-business" justices to the supreme court. While the case was pending in the lower courts, LABI and other business groups succeeded in electing Justices Knoll and Traylor to the court. In a decision handed down in September 1997, the court **ruled**, by a four to three vote, that the contracts were illegal.²³⁹ Justice Victory, who was elected in 1994 with business backing, wrote the majority opinion, which was joined by Justices Knoll and Traylor (both elected in 1996) and concurred in by Justice Kimball. The Chief Justice and two other relatively long-time members of the court dissented. While it is impossible to know how the case would have turned out if Justices Knoll and Traylor had not defeated their opponents the year before, it seems more likely than not that the outcome in *Meredith v. Ieyoub* was determined by the *264 Louisiana business community's investment of time and resources in the judicial electoral process.

The most well-known fall-out from the political contests over the Louisiana Supreme Court has been the court's 1998 order restricting the ability of law students, working under the supervision of environmental law faculty at the state's law schools, to litigate environmental cases. The Louisiana Supreme Court, like courts in many other states, has adopted a **rule** authorizing limited participation in trial work "[a]s one means of providing assistance to clients unable to pay for such

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services and to encourage law schools to provide clinical instruction in trial work of varying kinds.”²⁴⁰

The environmental law clinics operating pursuant to **Rule XX** have generated political controversy as a result of their involvement in litigation affecting powerful business interests. In the early 1990’s, Louisiana Secretary of State Kai Midboe filed a complaint with the supreme court about the activities of the environmental law clinic at Tulane University School of Law, accusing the attorneys and students in the clinic of “lying to the state courts and to the public about environmental cases and with improperly contacting state officials about environmental lawsuits.”²⁴¹ On behalf of the court, Chief Justice Calogero rejected Midboe’s request for an investigation, stating that “[i]t was the feeling of the justices that there is no need to either create an oversight committee or to develop standards of conduct different from those that are already provided.”²⁴²

Complaints lodged a few years later, in reaction to the Tulane clinic’s assistance to a group opposing the construction of a new chemical plant in their community, and following significant **changes** in the personnel on the court, produced quite a different outcome. The origin of the controversy was a proposal by the Japanese-based Shintech Corporation to construct a polyvinyl chloride and ethylene dichloride plant in the St. James Parish town of Convent. A local community group, the St. James Citizens ***265** for Jobs and the Environment, opposed the plant, “on the grounds that, as a small, lower income and predominantly African-American community, Convent was already host to a disproportionate share of chemical facilities posing risks to both the environment and to the health of local inhabitants.”²⁴³ After failing to gain legal assistance from other sources,²⁴⁴ the group enlisted the help of the Tulane clinic. The clinic represented the St. James citizen group at hearings before the Louisiana Department of Environmental Quality in December 1996 and January 1997. Despite the objections, the Department issued pollution permits for the plant.

In May 1997, the Tulane clinic, on behalf of the St. James Parish citizens and other community and environmental groups, petitioned the U.S. Environmental Protection Agency (EPA) to review the state’s decision under the Clean Air Act. The clinic argued that the permit violated state and federal air quality **rules**, and also cited President Clinton’s Executive Order on environmental justice, which was designed to prevent minorities from having to bear the brunt of industrial pollution.²⁴⁵ In September 1997, the EPA granted the petition and overturned the state’s issuance of the permits to Shintech. Following this decision, Shintech shelved its plans to build the plant.²⁴⁶

The state government, led by Governor Foster, vigorously objected to the clinic’s efforts to halt the construction of the Shintech plant, which the state had supported in a variety of ways, including offering state tax benefits to the company.²⁴⁷ The Governor’s critics emphasized the fact that Shintech had contributed \$5,000 to the Governor’s campaign, and Shintech’s lobbying and public relations consultants made similar \$5,000 contributions to Foster’s campaign.²⁴⁸

***266** Shortly after the Tulane clinic filed its petition with the EPA, Louisiana Governor Foster reportedly urged a gathering of the New Orleans Business Council to withhold financial support from Tulane University until the clinic could be “gotten under control.”²⁴⁹ At the same meeting, industry leaders reportedly also urged the Business Council to write a letter to the state supreme court asking it to restrict the activities of the Tulane clinic.²⁵⁰ In a July 1997 talk radio show, Governor Foster threatened to revoke the tax benefits Tulane receives as a nonprofit educational institution and called the law clinic staffers “vigilantes” and the professors “a bunch of big fat professors drawing paychecks to run people out of Louisiana.”²⁵¹ Foster was later quoted as stating that “[a]ll the economic development in the world is difficult if we find groups out there to stop it. . . . All I ask is that you find some other way to train law students other than blocking projects on strange theories.”²⁵²

Other state officials joined in the criticism of the law clinic. In August 1997, Kevin Reilly of the Louisiana Department of Economic Development, Governor Foster’s chief liaison on the Shintech project, sent a letter to the President of Tulane, the board of trustees, and the university’s deans. The letter accused the Tulane clinic of “legalistic guerilla attacks against environmentally responsible industry and the Department of Environmental Quality” and urged that “Tulane request the Louisiana Supreme Court to review the activities of [the law clinic] to determine if the Clinic has overstepped the charter the Court originally gave it.”²⁵³

A number of business groups formally petitioned the state supreme court to investigate the need for **changes** to Court **Rule XX**.²⁵⁴ Several months later, the court granted the petitions and ***267** ordered an investigation, not limited to the Tulane clinic,

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but relating to all the clinics at the state's law schools. Following a series of visits to the various clinics across the state, the court-appointed investigators apparently issued a report.²⁵⁵ However, the court never released the report nor issued any findings that there had been a violation of **Rule XX**. Nonetheless, in June 1997, the court issued an amended version of **Rule XX**, limiting the kinds of cases law clinics could take in the future.²⁵⁶ The amended **rules** provided that clinics could only represent individuals making less than 125% of the federal poverty guideline or organizations in which fewer than 25% of the members made more than that amount.²⁵⁷ Also, the amended **rules** prohibited the clinics from representing any group affiliated with a national organization. In addition to directly limiting the pool of potential clients, the procedural requirements to demonstrate compliance with these guidelines created a major new administrative burden for the law clinics.

The deans of Tulane and Loyola law schools, the Louisiana Bar Association, and others objected to the new **rules**.²⁵⁸ Over the course of the next year, the court issued a series of modest amendments providing that the clinics could represent individuals making up to 200% of the federal poverty guideline, requiring that only 51% of a group's members must be indigent, and lifting the prohibition against representing groups affiliated with national organizations. Despite these **changes**, Louisiana still has the most restrictive **rules** governing student law clinics in the country.²⁵⁹ As a result of the new restrictions, the Tulane clinic *268 has had to turn down groups with environmental complaints but insufficient resources to hire an attorney.²⁶⁰

What was the connection between the petitions to amend **Rule XX** and the state supreme court race? Chief Justice Calogero insisted that the amended **rules** simply restated established law and that he did not bend to political pressure in launching the investigation of the law clinics.²⁶¹ Nonetheless, the timing of the order revising **Rule XX**, combined with the fact that the business groups seeking the revisions had declared their intent to support a candidate against Calogero, fostered the public impression that the Chief Justice was motivated to revise **Rule XX** by a desire to defuse criticism from the business community.

Independent candidate Bill Quigley, a Loyola University law professor, entered the race primarily to highlight the importance of the court's revisions to **Rule XX**. He contended that the court's amendments to the **rules** governing student law clinics effectively shut the working poor out of the legal process.²⁶²

The controversy over the supreme court's restrictions on law school clinics continues today. The Southern Christian Leadership Conference, Louisiana community groups, law school professors and students, and others groups, all represented by the Brennan Center for Justice, filed suit against the Louisiana Supreme Court in federal court challenging the restrictions on student practice as a violation of the First Amendment.²⁶³ The plaintiffs alleged that the amended **rules** infringed their right to free speech, to association, and to petition the government for redress of grievances. In an opinion handed down in July 1999, the court dismissed the complaint, concluding that none of the plaintiffs asserted a viable constitutional claim.²⁶⁴ The court recognized that the charge that the business community had exerted improper political pressure was "in need of closer examination and debate," but asserted that "the forum for addressing such questions is more properly a political one, not a judicial one."²⁶⁵ *269 "Furthermore," the court added, "in Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary."²⁶⁶ The plaintiffs have appealed this **ruling** to the United States Court of Appeals for the Fifth Circuit, where the case was still pending as of early 2001.²⁶⁷

The upshot of the political controversy surrounding the Louisiana Supreme Court has been a profound undermining of public confidence in the courts as an institution. As a result of extensive special-interest financing of judicial elections, Louisiana judges appear beholden to narrow partisan interests, drawing into question the objectivity of the court's decision-making process. When certain classes of litigants can also be systematically excluded from the litigation process, as in the case of the Tulane clinic's environmental clients, the problem is compounded. As Tulane law professor Oliver Houck summarized the point:

At the request of the Louisiana chemical industry, the Louisiana Supreme Court has done what the industry has been unable to get anyone else to do: silence organizations that are making it comply with environmental laws.

....

In this part of the country, where there are few public interest law firms of any kind, when you take away public access to the Tulane and Loyola law clinics, you have taken away public access to the law.

Which is exactly what the chemical industry intended.²⁶⁸

C. Michigan

The Michigan Supreme Court has the distinction of having undergone what is probably the most dramatic ideological transformation of any elected court in the nation. One motivation behind the campaign to **change** the court's composition has been concern in the Michigan business community about allegedly excessive environmental regulation. Whether the court's new *270 makeup will actually result in more pro-business environmental decisions remains to be seen.

1. Michigan Judicial Politics

Judicial elections in Michigan are officially nonpartisan in the sense that candidates are not identified on the ballot as running under the banner of any particular political party. But, in fact, the judicial selection process in Michigan is highly political. Judicial candidates are nominated at party conventions and party affiliations are routinely mentioned by the press.²⁶⁹ Furthermore, as discussed below, the public debate over the composition of the state courts has taken on a harsh new political tone in recent years.

The seven justices on the Michigan Supreme Court are elected to serve eight-year terms with elections held every two years.²⁷⁰ The Governor fills by appointment vacancies that occur between elections, but the appointee then must run in the next election to retain the seat for the balance of the term.²⁷¹ Michigan has four intermediate courts of appeals with seven judges on each court (the court actually hears cases in panels consisting of three judges). Elections to the court of appeals are conducted through the same party-nominated, nonpartisan process as supreme court elections.²⁷² Court of appeals judges are elected by district and serve terms of six years.²⁷³

The 1998 elections produced the first Republican-controlled state supreme court since 1976, and subsequent appointments to the court have solidified Republican control. Justice Taylor was appointed in 1997 by Republican Governor John Engler to replace retiring Justice Riley; Taylor retained his seat in the 1998 election. Justice Corrigan, a Republican, won election to an open seat in 1998. Justice Young, another Republican, was appointed in January 1999 to replace Chief Justice Mallett, who retired from the court to enter private practice. The newest Engler appointee, Justice Markman, yet another Republican, took the place of Justice Brickley who retired in October of 1999. Justices Markman, Taylor, and Young all faced reelection contests in November *271 2000, which they won by narrow margins. The fifth Republican on the court, Justice Weaver, was elected in 1994 and faces reelection in 2002. The Democrats on the court, Justices Kelly and Cavanagh, will be up for reelection in 2004 and 2006.

These appointments and electoral results have dramatically **changed** the ideological character of the court. In 1996, the supreme court had three Democrats, three Republicans, and one Independent. Now there are five Republicans and two Democrats on the court. Both Justices Taylor and Corrigan are outspoken conservatives. For example, both Taylor and Corrigan have served on the "Judicial Advisory Board" of the Law and Organizational Economics Center at the University of Kansas, which runs a conservative educational program for state judges.²⁷⁴ As already discussed, Koch family foundations, which have heavily supported various groups involved in the effort to make state courts more "business friendly," have provided major financial backing for the Kansas center.²⁷⁵ Also, Justice Markman, who replaced Justice Brickley, was "expected to more firmly entrench an attitude that is pro-business."²⁷⁶

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Critics of the new court have highlighted the fact that five out of seven Michigan Supreme Court justices are or were members of the conservative Federalist Society.²⁷⁷ They are Justices Corrigan, Markman, Taylor, Weaver, and Young. Overall, “[a]t least half of [Governor] Engler’s judicial appointments [to the Michigan courts] are members of the Federalist Society,” according to the president of the Michigan chapter of the Federalist Society.²⁷⁸

*272 Many observers in Michigan charge that the present state supreme court has embarked on a new activist course designed to undo many of the court’s prior decisions. For example, according to a 1999 editorial in the Detroit Free Press:

When Justices Elizabeth Weaver, Maura Corrigan, Clifford Taylor and Robert Young Jr. ascended to the Michigan Supreme Court, they were professed conservatives given to restraint, respect for precedent and decisions based on fact and law, not personal philosophy.

Yet all of seven months into a new term, this majority bloc has aggressively established new rights for business interests, such as insurance companies, while chipping away at protection for individuals, workers, and criminal defendants. They’re not even being subtle about it.²⁷⁹

The editorial contends that in the first half of 1999, the court **ruled** for insurance companies and against plaintiffs in nineteen out of twenty cases, whereas during the previous year the court split twenty-three to twenty-two in such cases. Since January, according to the editorial, the court has overruled ten of its prior precedents.²⁸⁰

Mary Ellen Gurewitz, General Counsel for the Michigan State AFL-CIO (obviously not a disinterested party when it comes to issues before the court), prepared a paper analyzing a subset of the court’s 1999 decisions.²⁸¹ She concluded that “the way to understand this court’s work, and to predict how it will decide cases in the future, is not to analyze or explain the law as lawyers are trained to do, but simply to identify the litigants.”²⁸² The “principles” which she concluded underlie the court’s opinions are these: “unions lose, personal injury plaintiffs lose, civil rights plaintiffs lose, workers’ compensation claimants lose, criminal defendants lose, insurance companies win, corporations win, Republicans win.”²⁸³ Some of the court’s most controversial decisions have upheld the exclusion of workers from the workers’ *273 compensation system,²⁸⁴ upheld state “tort reform” legislation restricting the use of expert medical testimony,²⁸⁵ and broadly interpreted exclusions from coverage in insurance policies.²⁸⁶

Members of the court have not responded to this criticism meekly. Justice Taylor was quoted in Michigan Lawyers Weekly as stating that the Michigan Democratic party “will use anything, will distort and misrepresent anything, to bring the court into disrepute.”²⁸⁷ Justice Young, criticizing Ms. Gurewitz’s analysis of recent court decisions, said: “I am absolutely outraged that sensible lawyers would get involved in a game of ‘which half won’ when there is nothing substantive being asserted here. . . I want to go on record as distancing myself from this entire process.”²⁸⁸

2. The Environmental Issue in Michigan

The newly constituted Michigan Supreme Court, in its roughly one and one-half years of existence, has not had an opportunity to issue a decision in a major environmental case. However, it appears to be only a matter of time before the new majority decides whether to break new ground in this area as well. As discussed in this section, environmental regulations were certainly an issue of concern to many of those who worked to elect the new Republican majority to the court.

In the early 1970’s, Michigan was a pioneer in the development of modern environmental law. Perhaps most notably, in 1970, with the assistance of Joseph Sax, then a professor at the University of Michigan, the state adopted the Michigan Environmental Protection Act, which established broad new public rights to environmental protection along with new mechanisms for enforcement of these rights.²⁸⁹

Governor Engler has taken the state in a very different direction on environmental policy, seeking to curb what he regards *274 as excessive regulation and to develop alternative environmental policies that are more acceptable to business. These

initiatives have generated great controversy. For example, a white paper by the Mackinac chapter of the Sierra Club sums up the situation from the standpoint of the environmental community:

State government in Michigan has turned its back on the environment. Meaningful citizen involvement in state decisions about regulating or permitting pollution and about enforcing Michigan's environmental laws has been stifled. Public access to information about polluting or environmentally damaging activities has been restricted. Important environmental statutes have been rewritten, rolled back, and weakened by pro-polluter legislators.²⁹⁰

The **change** in direction of state environmental policy has, not surprisingly, created conflict within the environmental agencies. Public Employees for Environmental Responsibility (PEER), a nonprofit advocacy group, published a 1998 survey of Michigan Department of Environmental Quality (DEQ) employees revealing a widespread perception that the new agency leadership favored economic development over resource protection.²⁹¹ Over 80% of the 609 employees who responded said that they did not "trust top management of DEQ to protect Michigan's natural resources and public health."²⁹² Individual comments included such statements as: "No incentive not to pollute," "Inadequate enforcement of laws," "Director Harding has been picked by the Governor to cater to the regulated community," "Harding is Michigan's own James Watt," and "If the general public knew what the Engler Administration is up to in state government they would be appalled."²⁹³

Some of this controversy has spilled over to the Michigan courts, most notably in the area of regulatory "takings" challenges *275 to environmental regulations. In an important 1996 decision, Judge Clifford Taylor (who was elevated the following year to the state supreme court) joined with two other members of the Michigan Court of Appeals in affirming a trial court's \$5 million takings award based on the denial of a permit to fill wetlands.²⁹⁴ This decision was highly controversial because it appeared to contradict one of the basic tenets of takings doctrine, namely, that a claim must be evaluated in relation not to the restricted portion of the property, but in relation to the property as a whole. The owners held eighty-two acres of land and proposed to fill twenty-eight acres of the property for development. The court of appeals **ruled** that the relevant parcel was limited to a portion of the property roughly coextensive with the area of regulated wetlands.²⁹⁵ Using this narrow definition of the parcel, the court of appeals concluded there was a taking.²⁹⁶ If upheld on appeal, this new approach to regulatory takings claims would have seriously undermined Michigan environmental protection programs across the board.

The Attorney General challenged the decision in the Michigan Supreme Court, supported by numerous amici curiae, including the United States, organizations representing local governments, and several national conservation groups. In a 1998 decision, the Michigan Supreme Court unanimously reversed the lower court **ruling**.²⁹⁷ By the time the court issued its decision, Justice Taylor had joined the court, but he did not participate in the case, presumably because of his involvement in the case in the lower court. The court's opinion was written by Justice Cavanagh, now one of the two remaining Democrats on the court. Not surprisingly, the case has prompted speculation about how the present supreme court, which has a very different composition, would have decided this important case or how it would decide similar cases in the future.

Another controversial regulatory takings action, *Miller Bros. v. Department of Natural Resources*,²⁹⁸ resulted in a settlement *276 personally negotiated by Governor Engler.²⁹⁹ The case arose from a state order prohibiting oil and gas development in a 5,000-acre wilderness area known as the Nordhouse Dunes administered by the U.S. Forest Service. After the trial court **ruled** in favor of the plaintiff, the court of appeals affirmed the finding of a taking but vacated the compensation award.³⁰⁰ Before the end of the trial on the compensation issue, and prior to any appeals, Governor Engler negotiated a settlement of the case. After extended political debate, the State finally resolved the case by paying \$90 million to the plaintiffs, with the Miller Brothers company, an oil and gas firm, receiving the lion's share.³⁰¹

For a variety of reasons, this settlement has been very controversial. Both the trial court and the court of appeals relied on an expansive reading of the Takings Clause, a reading that might well have been overturned if the Michigan Supreme Court (or the U.S. Supreme Court) had an opportunity to review the case. In addition, notwithstanding the tens of millions of dollars spent to settle the case and acquire the oil and gas rights, the state has apparently left open the possibility that these resources might be developed in the future.³⁰² Finally, critics charged that the principal plaintiff may have received favored treatment based on hundreds of thousands of dollars in campaign contributions the Miller family made to the state Republican Party.³⁰³

Because of Governor's Engler's central role in this important environmental case, as well as his central role in reshaping the state judiciary, the case has generated significant concern about the potential future direction of environmental law under the new Michigan Supreme Court.

***277 3. Business Community Efforts to Influence the Judiciary**

Business community involvement in Michigan judicial elections began in earnest with the founding of M-LAW in the late 1990s.³⁰⁴ M-LAW was presented publicly as a home-grown Michigan organization, with a Michigan-based board of directors.³⁰⁵ In reality, M-LAW was largely the creation of the American Tort Reform Association (ATRA), a Washington, D.C.-based organization that receives funding from the insurance industry, tobacco companies, and many other businesses.³⁰⁶ This link is confirmed by the indication in public tax records that \$284,500 of M-LAW's 1996-97 expenditures "were made on behalf of M-LAW by the American Tort Reform Association."³⁰⁷ The Michigan Chamber of Commerce,³⁰⁸ the Michigan State Medical Society,³⁰⁹ and "several [other] Michigan trade associations" *278 also helped start M-LAW.³¹⁰ The Chamber worked in close cooperation with M-LAW during the 1998 election cycle, for example, by publishing the M-LAW ratings in its magazine, Michigan Forward, just prior to the election.

M-LAW is essentially a conduit for corporate spending on advertising and other public outreach efforts designed to influence the outcome of Michigan judicial elections. M-LAW had 1996-97 revenues of \$640,400,³¹¹ but the organization had only one full-time staff person.³¹² In that year M-LAW reported spending \$311,200 on television advertising, \$46,000 on radio advertising, \$19,900 on "production of paid media," and \$94,000 on "media and other consultants."³¹³ M-LAW's preliminary 1998 budget proposed spending \$50,000 on television, \$20,000 on radio, \$10,000 on billboards, \$60,000 on a phone bank, \$1,000 on a toll-free telephone number, \$10,000 on "production of paid media," \$15,000 on mailings, \$15,000 on newsletters, and \$25,000 on "media and other consultants."³¹⁴

M-LAW's thinly veiled role as a political voice of business created difficulties with the Internal Revenue Service. M-LAW originally filed for tax-exempt status under [section 501\(c\)\(6\) of the Internal Revenue Code](#), which covers trade associations or business leagues such as the Chamber of Commerce. After the IRS raised objections,³¹⁵ M-LAW was ultimately granted tax exempt status under [section 501\(c\)\(4\)](#).

IRS materials in the public file on M-LAW provide some insight into both the funding for and objectives of M-LAW. For example, the IRS objected to M-LAW's application for recognition under [section 501\(c\)\(6\)](#) "because the funds were being utilized *279 for political or lobbying purposes."³¹⁶ In a letter to M-LAW, the IRS stated:

[Y]our support from what appears to be only a few sources, the large grant from a tort reform group [the American Tort Reform Association], the limited expenditures you have made for promotional materials and your lack of employees make it appear that you are not operating in a manner similar to a chamber of commerce. Rather you appear to be a single issue advocacy or lobbying group contracting for or acting on behalf of or performing services for another organization or organizations.³¹⁷

In the same letter, the IRS also expressed concern that M-LAW "appears to concentrate its efforts during election years."³¹⁸ In subsequent correspondence, the IRS declared "there is a major question as to whether the primary purpose of the organization is political," and stated that M-LAW appeared to be "flying under false colors i.e. a business group masquerading as a 'public watchdog.'" ³¹⁹

4. Michigan Judicial Evaluations

One of M-LAW's primary activities has been to publish reports evaluating whether or not Michigan judges are "pro-business" on environmental and other issues. M-LAW released a report on the state supreme court in May 1998, and

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released a similar evaluation of the court of appeals in July 1998. The reports were announced with great fanfare, highlighting the role of M-LAW in sponsoring the evaluations.³²⁰

In reality, the evaluations were prepared and at least partly financed by the groups directing the national campaign to influence the state courts.³²¹ The report on the Michigan Supreme Court was commissioned by the Judicial Evaluation Institute for Economic Issues (JEI) as well as by M-LAW. JEI is (or was) a *280 Washington, D.C.-based operation. However, the actual report was prepared by the Oklahoma-based Economic Judicial Report (EJR), a trade name of Sequoyah Information Systems, Ltd. (SIS), an Oklahoma corporation.³²² SIS claimed copyright protection for the report in its own name. The evaluation of the Michigan Supreme Court's opinions was performed by the Oklahoma law firm that works in cooperation with the EJR. Indeed, the Michigan sponsors of the evaluation specifically acknowledged that the Oklahoma firm "supervised all the research" for the report.³²³

According to the letter of agreement between M-LAW and SIS, which operates EJR, M-LAW paid SIS \$26,000 for the supreme court evaluation and \$32,000 for the court of appeals evaluation.³²⁴ The letter of agreement between the parties recognized that "EJR has and will continue to receive money from third parties to produce the Evaluation."³²⁵ The letter went on to state, "As you discussed with Sam [Hammons], SIS has an agreement with the Judicial Evaluation Institute for Economic Issues ('JEI'), a Washington DC [sic] non-profit corporation. Through JEI, dissemination of the Evaluation's information will be further assisted."³²⁶

What exactly JEI or the Judicial Evaluation Institute for Economic Issues is or was remains obscure. Research efforts have failed to disclose any record of any such nonprofit organization, and it is possible it was never officially established.³²⁷ One report, in a national Chamber of Commerce publication, stated that JEI was established to provide "expertise and funding to several budding state efforts at systematic judicial evaluation,"³²⁸ and may have been established to work in cooperation with the *281 U.S. Chamber of Commerce or some of its member companies. JEI was run out of the offices of a Washington, D.C., lobbying firm, the Lawler Group, headed by Greg Lawler, a former aide in the Clinton White House.³²⁹ **No evidence has been uncovered of JEI's involvement in any race other than the Michigan 1998 judicial elections**, and there is no evidence that JEI continues to operate. It appears that JEI served as a conduit for financial support for the Michigan judicial evaluations, but the ultimate source or sources of this funding is unknown.

The 1998 evaluation of the Michigan Supreme Court examined over one hundred decisions handed down between 1987 and 1997 in eight general areas, including environmental law.³³⁰ The stated purpose of the ratings was to determine whether the justices made decisions that "have a positive or negative effect on the general business climate of the state."³³¹

The justices' overall pro-business scores ranged from 81% to 25%. In descending order of pro-business voting tendencies, the justices received the following scores: Weaver, 81%; Brickley, 63%; Boyle, 49%; Mallett, 45%; Cavanagh, 38%; and Kelly, 25%.³³² Justice Clifford Taylor, who joined the court in September 1997, was not included in the ratings.³³³

Under the heading of environment, based on an analysis of seven decisions, Justices Boyle, Brickley, and Cavanagh received 43% ratings.³³⁴ Chief Justice Mallett received a 33% rating. Justice Weaver received a 0% rating, based on her participation in only two cases.³³⁵ Justice Kelly was not rated because she had participated in none of the seven decisions evaluated.³³⁶

Like the evaluations prepared for other states, the evaluations were based on whether the business party won or lost, without any assessment of the actual facts or legal issues in the cases. Though the seven cases examined in the environmental area *282 were intended to be representative, the report provides no explanation of how the cases were selected from the many environment-related cases decided over the previous decade.

The following offers synopses of the seven cases analyzed and the conclusions drawn by the evaluators:

•Hadfield v. Oakland County Drain Commissioner.³³⁷ This decision recognized a "trespass-nuisance" exception to governmental tort immunity doctrine, allowing a farmer to proceed with a suit for financial compensation against a county for property damages allegedly caused by the county's improper maintenance of a culvert. Evaluation: Positive effect on

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economy.³³⁸

•*McCaul v. Village of Lake Odessa*.³³⁹ This case was consolidated with the Hadfield case described above. The decision recognized that the government immunity doctrine does not bar a land owner's trespass-nuisance claim for damages resulting from sewage overflowing from a municipal waste treatment facility onto the plaintiff's private property. Evaluation: Positive effect on economy.³⁴⁰

•*Adkins v. Thomas Solvent Co.*³⁴¹ This decision held that homeowners had no valid nuisance claim for allegedly illegal discharges of toxic chemicals that resulted in a reduction of their property values due to the threat of ground water contamination. Evaluation: Positive effect on economy.³⁴²

•*Paragon Properties Co. v. City of Novi*.³⁴³ This decision held that a regulatory taking claim was not "ripe" for judicial review when the county denied a landowner's request to rezone the property for a mobile home park and the landowner failed to seek a variance. Evaluation: Not a positive effect on economy.³⁴⁴

•*Addison Township v. Gout*.³⁴⁵ This decision rejected a claim by a natural gas company that state regulatory authority *283 over oil and gas wells preempted local government zoning authority over a proposed gas pipeline. Evaluation: Not a positive effect on economy.³⁴⁶

•*Township of Holly v. Holly Disposal, Inc.*³⁴⁷ This decision held that a trial court did not abuse its discretion in finding that a proposed landfill posed a "real and imminent danger of irreparable injury" to the environment and in issuing a permanent injunction barring construction of the landfill. Evaluation: Not a positive effect on economy.³⁴⁸

•*Continental Paper v. City of Detroit*.³⁴⁹ This decision held that a city could not be sued under the trespass-nuisance exception to the governmental immunity doctrine where property was damaged by fire started in an adjacent abandoned building which the city did not own and over which the city had no control. Evaluation: Not a positive effect on economy.³⁵⁰

The 1998 court of appeals evaluation, released July 8, 1998, was similar in format and content to the state supreme court evaluation. The report rated twenty-four past and present judges, a majority of whom received a rating of over 50%, meaning the appeals court "tended to benefit job creation and economic growth."³⁵¹ According to M-LAW's accompanying press release, the highest overall scores were given to Judges Peter O'Connell and Clifford Taylor (who was subsequently elevated to the state supreme court), both of whom scored 81%.³⁵² The lowest scores went to Helene White (24%) and Marilyn Kelly (25%).³⁵³

5. The 1998 Judicial Elections

The 1998 judicial electoral race was extraordinarily contentious and expensive. Viewed as a simple contest between competing *284 interest groups, the race pitted the Michigan business community (broadly defined) against labor and the trial lawyers.

Michigan Chamber of Commerce members made large PAC campaign and "in kind" contributions to the candidates to the supreme court. The Chamber's number one PAC recipient in 1998 was Maura Corrigan, who received \$33,994, and the third top recipient was Clifford Taylor, who received \$5,500.³⁵⁴ In addition, the Chamber allowed 1998 candidates Taylor, Collins, and Corrigan to use rooms at the Chamber for fund raising and even purchased refreshments for the occasion.³⁵⁵

Because of the importance of independent expenditures, direct campaign contributions played only a part, perhaps a relatively minor part, in the 1998 judicial elections. However, direct contributions are, at least, relatively easy to measure.

Justice Taylor raised \$960,559 in his race to retain the seat to which he had been appointed the year before by Governor Engler.³⁵⁶ Justice Corrigan, who successfully ran for an open seat on the court in 1998, raised a total of \$906,482.³⁵⁷ Justice

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Cavanagh, the Democratic incumbent, raised \$247,497 in his successful reelection bid, with support primarily from unions and trial lawyers.³⁵⁸ While all of the candidates raised large sums from lawyers and law firms, Justice Cavanagh raised more than one-half of his campaign war chest from this source.³⁵⁹

***285** The lion's share of the money raised by the candidates was used to finance television advertising. Even in a state with overtly partisan judicial elections, judicial candidates are not well known and a candidate's primary objective in a judicial election is simply to raise his or her visibility.³⁶⁰ Clifford Taylor reportedly intended to spend \$700,000 on television advertising in the last two weeks before the election, and Maura Corrigan planned to spend around \$600,000 on advertising.³⁶¹

The magnitude or source of "independent expenditures" on "voter education" and "issue advertising" cannot be determined under present Michigan law. Nonetheless, independent expenditures clearly played a major role both in the 1996 and the 1998 elections.

In the 1996 election, M-LAW ran non-candidate-specific education ads on television and radio which were designed to highlight what M-LAW described as the problem of "wealthy personal injury lawyers" contributing to judicial campaigns. Although the exact amount spent on this advertising is unknown, financial records submitted to the Internal Revenue Service indicate that M-LAW spent \$311,200 on television advertising, \$46,000 on radio advertising, \$19,900 on "production of paid media," and \$94,000 on "media and other consultants."³⁶² The obvious purpose of this advertising was to demonize one of the primary sources of financial support for Democratic candidates, as well as to inoculate Republican candidates from criticism for accepting donations from their own well-funded contributors.

The 1998 elections saw even higher levels of independent expenditures, mostly on behalf of Republican candidates. The 1998 judicial race has been described as "hard-fought and expensive" with "special interests pump[ing] money into the coffers of their favored candidates."³⁶³ According to one account, in the days before the election, the "campaign ads [were] pouring out of voters' televisions faster than leaves are dropping from trees," with ***286** both sides reportedly buying up all available advertising time.³⁶⁴ The Michigan Republican Party ran numerous television ads in support of Corrigan and Taylor, financed with untraceable "soft" money.

6. November 2000

On November 7, 2000, following a heated contest, Justices Markman, Taylor, and Young were all reelected to the supreme court by narrow margins. Justice Markman received 56% of the votes cast, Justice Taylor received 54% of the votes cast, and Justice Young received 52% of the votes cast.³⁶⁵

Prior to the elections, it was estimated that spending for the judicial campaign could reach \$10 million, an all-time record.³⁶⁶ In fact, expenditures in the election exceeded that estimate by a wide margin, with estimates at between \$15 and \$16 million.³⁶⁷ According to one pre-election breakdown, the six candidates were estimated to have collectively raised and spent about \$7 million, the Democratic and Republican Parties \$2 million each, and the Michigan Chamber of Commerce another \$3 million.³⁶⁸

Interestingly, M-LAW did not release an updated evaluation of the candidates for this election, notwithstanding M-LAW's announcement on its web site when it released its 1998 evaluation that the judicial evaluations "will be updated to reflect the decisions of judges over time. It will give judges with lower scores the opportunity to raise their scores."³⁶⁹ Democratic partisans, borrowing a page from M-LAW, had produced their own compilations of decisions by the Michigan Supreme Court for the 2000 election, which purported to demonstrate a strong anti-consumer, pro-business bias on the court. Several of the justices vociferously ***287** objected to these evaluations, in part because they were based on a limited sample of cases.³⁷⁰ This is a criticism that could equally well have been made of M-LAW's 1998 judicial evaluations, which might have been a factor dissuading M-LAW from renewing its judicial evaluation strategy in 2000. Alternatively, M-LAW might have decided that a judicial evaluation strategy was useful in supporting challengers to incumbents but that it had relatively little value in a campaign designed to defend incumbents.

D. Ohio

Ohio has the distinction of being the apparent birthplace of the idea of evaluating and rating judges to determine their pro-business leanings. But five years after launching its judicial evaluation project, the Ohio business community had failed to unseat an incumbent state supreme court justice. The November 2000 elections were hotly contested and were critical in determining the court's future direction. The Ohio Chamber of Commerce identified Alice Robie Resnick as the least "pro-business" on environmental issues of any justice on the court, and led a major campaign to bring about her defeat in November 2000.³⁷¹ As described below, this effort to unseat an incumbent failed as well.

1. Judicial Politics in Ohio

The seven justices of the Ohio Supreme Court are elected "at large" in popular elections.³⁷² A justice serves a six-year term,³⁷³ and the justices are elected in two-year cycles.³⁷⁴ Judges on the Ohio Court of Appeals, the state intermediate court of appeals, are also elected for six year terms.³⁷⁵ Judicial candidates appear on the ballot without party affiliation, but they are usually selected and campaign as partisans.

There are currently five Republicans and two Democrats on the court. But the ideological division on the court cuts across party lines. In the 1998 elections, the business community criticized Justices Pfeifer and Moyer (both Republicans) for frequently *288 siding with the two Democratic justices, whom the business community views as hostile to their interests.³⁷⁶ According to one account, Ron Suster, a Democrat, was "recruited to run against Pfeifer [in 1998] mainly by conservatives and those representing insurance and business interests."³⁷⁷

As in many other states, the cost of Ohio judicial races has increased dramatically. Between the 1996 and 1998 elections, the average total contributions per candidate to the supreme court more than doubled (from \$202,861 to \$455,214).³⁷⁸ The maximum amount raised by a single candidate in each election cycle increased from \$476,703 in 1996 (Justice Stratton) to \$871,246 in 1998 (Chief Justice Moyer).³⁷⁹ These figures do not include the hundreds of thousands of dollars expended in these races on behalf of judicial candidates in the form of "independent expenditures."

For what is all this money raised? The answer is advertising, primarily. In 1998, incumbent Chief Justice Thomas Moyer reportedly spent more than \$560,000 on television advertising.³⁸⁰ While it is obviously difficult to determine advertising's actual effect on the voters, Chief Justice Moyer retained his seat.

2. The Origins of the Ohio Judicial Evaluation Project

Why is Ohio the birthplace of the idea of judicial evaluations and ratings? Part of the answer may be that the Ohio Supreme Court has been a consistent, long-standing obstacle to the business community's legislative agenda in Ohio. Both the office of *289 the Governor and the state legislature have been controlled by Republicans since 1994, and business interests have achieved a number of legislative gains during this period. Frequently, however, the Ohio Supreme Court has reversed these legislative victories.

The issue of single greatest concern to the business community has been the court's decisions striking down "tort reform" legislation. A coalition of business groups has pushed for various measures to restrict personal injury tort suits by limiting when such suits can be brought, the type of proof appropriate in such actions, and the scope of monetary relief available to a successful plaintiff. Supporters of these measures have included the Ohio Chamber of Commerce, the Ohio Chapter of the National Federation of Independent Business, Ohio Citizens Against Lawsuit Abuse, and the Ohio Alliance for Civil Justice.

Legislation limiting tort liability has been repeatedly struck down by the Ohio Supreme Court, primarily on the ground that it

violates the provision of the Ohio Constitution guaranteeing the right to seek redress for personal injuries.³⁸¹ In August 1999, in perhaps its most controversial decision on the subject, the supreme court, by a four to three vote, struck down legislative measures that the court majority construed as essentially reenacting measures the court had already declared unconstitutional in earlier decisions.³⁸² The court's conflicting opinions are strongly worded, with the majority accusing the legislature of "usurp[ing] judicial power" to define the meaning of state constitutional provisions.³⁸³ The dissent contended that "the majority has itself arguably affronted our constitutional system of government in a manner no less egregious than it attributes to the General Assembly."³⁸⁴ The majority opinion was authored by Justice Resnick, who was up for reelection in 2000.

***290** In response to this series of unfavorable decisions, the business community developed a strategy to pressure the Ohio Supreme Court on issues important to business and, over the long term, to alter the composition of the court. As long ago as 1987, following an adverse **ruling** from the court, an Ohio Chamber of Commerce official was quoted as stating "[w]e need to balance the playing field in our court system."³⁸⁵ Numerous business-sponsored groups have been set up to pursue this agenda. For example, the Ohio Chamber of Commerce, in cooperation with the National Federation of Independent Business and other groups, established the Ohio Alliance for Civil Justice, and an affiliate group, Court Watch, to defend state "tort reform" legislation in the state courts.³⁸⁶ Ohio Citizens Against Lawsuit Abuse (OCALA), part of the national network of similar organizations coordinated by the American Tort Reform Association, was also established to promote tort reform. This organization took a lead role in making the public argument that the invalidation of tort reform legislation by the state supreme court could be ascribed to heavy campaign expenditures by the trial lawyers.³⁸⁷

In a broad sense, the tort reform agenda includes potential limitations on liability for environmental injuries, such as property losses by homeowners or adverse effects on human health. Thus, to the extent efforts to influence the Ohio courts are driven by the tort reform agenda, that agenda includes environmental issues. In addition, however, the business community has focused on the role of the courts in interpreting regulatory statutes designed to prevent environmental injuries from occurring in the first place.

***291** Litigation over enforcement of Ohio's water quality standards provides a useful illustration. The case of Columbus & Franklin County Metro Park District v. Shank³⁸⁸ involved a challenge to the Ohio Environmental Protection Agency's issuance of a permit for a wastewater treatment facility to serve a residential development. A county park district challenged the permit on the ground that EPA had not followed the "anti-degradation" standards designed to maintain the quality of "exceptionally clean" waters.³⁸⁹ The Ohio Supreme Court upheld the challenge.³⁹⁰

The state legislature subsequently adopted revised anti-degradation policies by means of a rider attached to state budget legislation.³⁹¹ These revisions were supported by the Ohio Chamber of Commerce and other business groups. Environmental organizations were apparently unaware that the provision had been added to the 1300-page bill.³⁹² The most important part of the revised policy, which was ostensibly designed to be consistent with the federal Clean Water Act as well as the supreme court's decision, authorized the director of the EPA to allocate up to 80% of a water body's pollution-absorbing capacity to existing sources of pollution without completing an "anti-degradation" review.³⁹³

This legislative rider prompted yet another round of litigation in which Rivers Unlimited and other Ohio environmental groups challenged the new policy on the ground that it violated the federal Clean Water Act.³⁹⁴ The Ohio trial court agreed with the plaintiffs, concluding that the state's new anti-degradation policy "would render meaningless the comprehensive nature of the Federal Clean Water Act and its purposes and objectives both in relation to water pollution control efforts and public participation ***292** requirements."³⁹⁵ The court enjoined EPA from taking any further regulatory action pursuant to this invalid provision.³⁹⁶

Not surprisingly, as discussed below, the Chamber of Commerce included the supreme court's decision in the set of environmental cases it evaluated for "anti-business" bias on the court.

3. The Chamber's Judicial Evaluations

The Ohio Chamber of Commerce has now published three judicial evaluation reports, more than have been published in any other state. The first evaluation, which was apparently the first business-sponsored judicial evaluation anywhere in the country, was published in January 1996 in anticipation of the elections later that year. A second evaluation directed at the 1998 elections was published in 1997. The Chamber recently released a third evaluation addressing the 2000 elections.³⁹⁷ All of the reports have been produced by the Ohio Chamber's Political and Candidate Education Program, which also tracks voting patterns by state legislators. As stated in its latest report, the Program "undertook this endeavor to provide business leaders with a reliable barometer of how the Court was **ruling** on issues of vital concern to business and whether business was getting a fair shake."³⁹⁸

The 2000 report, which is essentially identical in format to the two previous reports, provides an appropriate focus for identifying the objectives and limitations of the Ohio judicial evaluation project. The introductory materials in the 2000 report state that the case selection criteria, which were the same as those employed in 1996 and 1997, "were used to achieve the most objective process possible, and they should be clearly understood in viewing the results."³⁹⁹ First, the cases were selected "with input" from "the Ohio Chamber's issue committees, which are composed of more than 600 business leaders from around the *293 state."⁴⁰⁰ These committees include, the report states, "many of the leading business experts" on issues including "environmental regulations."⁴⁰¹ Second, the cases were selected for inclusion because they "have a significant impact, either positive or negative, on businesses in the state of Ohio."⁴⁰² Emphasizing the narrow focus of the analysis, the report underscores that "[d]ecisions are labeled YES if they are pro-business, and NO if they are not considered pro-business."⁴⁰³ Third, the report states that 197 cases from the previous decade were selected, and that "[t]his large number of cases provides a true reading of the pattern of the Court's **rulings** in a wide spectrum of business-related cases."⁴⁰⁴ Finally, the cases were divided into eight categories: environmental, employment, insurance, medical malpractice, products liability, tax, torts, and workers' compensation.⁴⁰⁵

Overall, four justices received "pro-business" scores below 50%.⁴⁰⁶ Three justices scored below 25%.⁴⁰⁷ The highest score was 70%, assigned to Justice Stratton, and the lowest score was 18%, assigned to Justice Resnick.⁴⁰⁸

In environmental cases, the ratings ranged from a 100% pro-business rating to a 20% pro-business rating. In descending order, the "pro-business" environmental scores received by the seven justices were as follows: Justice Stratton, 100%; Justice Cook, 100%; Justice Sweeney, 60%; Chief Justice Moyer, 40%; Justice Douglas, 40%; Justice Pfeifer, 25%; and Justice Resnick, 20%.⁴⁰⁹

The 2000 report evaluated eleven environmental decisions⁴¹⁰ (most of which were also included in the preceding two reports). A brief examination of the issues in each case demonstrates how the Chamber's pro-business analysis often translates into simple *294 opposition to environmental protection. Again, the analysis is limited to whether the business party won or lost the case.

•State ex rel. Celebrezze v. Environmental Enterprises.⁴¹¹ This decision rejected the argument by a hazardous waste disposal operator that the federal Resource Conservation and Recovery Act (RCRA) preempted Ohio's regulatory program for waste disposal, with the result that the waste operator could be held to Ohio standards, which are more stringent than those set under federal law. "Pro-Business: No."⁴¹²

•Northeast Ohio Regional Sewer District v. Shank.⁴¹³ This decision rejected a claim by a sewer district that Ohio EPA's analysis of whether to designate the Cuyahoga River as "warm-water habitat" was invalid because the EPA did not address the costs of the designation in sufficient detail. The Chamber interpreted this decision as adverse to business interests, "since the court will not invalidate environmental regulations even if Ohio EPA fails to address the economic impact for those directly affected by the **rules**." "Pro-Business: No."⁴¹⁴

•Ohio Chamber of Commerce v. State Emergency Response Commission.⁴¹⁵ This decision rejected the claim that the State Emergency Response Commission has no authority to require companies to prepare maps showing the location of hazardous substances and materials. The Chamber argued that these reporting requirements conflicted with the federal Emergency Planning and Community Right to Know Act. According to the court, business groups objected to the extra cost associated

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with the mapping.⁴¹⁶ “Pro-Business: No.”⁴¹⁷

•Hybud Equipment Corp. v. Sphere Drake Insurance Co., Inc.⁴¹⁸ This case involved a suit against an insurance company that had denied a claim by a landfill operator whose *295 activities resulted in pollution and financial losses. The court rejected the suit and **ruled** that the clause in the policy that provided coverage for damage or injury due to “sudden and accidental discharges” did not cover damage caused by disposal of wastes over an extended period of time. “Pro-Business: No.”⁴¹⁹

•Columbus & Franklin County Metro Park District v. Shank.⁴²⁰ This decision held that Ohio EPA violated federal and state “anti-degradation” water pollution **rules** by issuing permits to build a wastewater treatment facility discharging into “high quality” waters without first complying with public notice and hearing requirements, following governmental coordination requirements, or imposing stringent effluent controls. The court **ruled** that the agency had to consider alternatives to the proposed facility and make a determination that technical, economic, and social factors justified the potential degradation of high-quality waters. “Pro-Business: No.”⁴²¹

•Atwater Township Trustees v. B.F.I. Willowcreek Landfill.⁴²² This decision rejected the argument by the operator of a waste disposal site that a state waste statute pre-empted a local anti-nuisance resolution. The operator made this argument in response to a lawsuit brought by Atwater Township to halt operation of a facility on the ground that it was a public nuisance. The Chamber objected that this result “undermines Ohio’s solid waste regulatory scheme.” “Pro-Business: No.”⁴²³

•State ex rel. Celebrezze v. National Lime and Stone Co.⁴²⁴ This decision **ruled** that replacement of a piece of equipment at a limestone quarrying operation was not the installation of a “new source of air pollutants” requiring a new air permit from the Ohio EPA. “Pro-Business: Yes.”⁴²⁵

*296 •Trumbull County Board of Health v. Snyder.⁴²⁶ This decision held that a county board of health had no authority to enforce county **rules** concerning the disposal of construction debris without state approval and that the county could be held liable for damages for attempting to enforce the **rules**. “Pro-Business: Yes.”⁴²⁷

•Chance v. BP Chemicals, Inc.⁴²⁸ This decision upheld a **ruling** in favor of an oil well operator who disposed of waste materials by deep-well injection. The waste migrated under the property of neighboring land owners, who sued the well driller. The court held that the neighbors were not entitled to recover because they failed to show an invasion of a protected property interest in the subsurface estate. “Pro-Business: Yes.”⁴²⁹

•Weiss v. Thomas & Thomas Development Co.⁴³⁰ This decision held that the owner of a natural gas well could be liable for the death of a homeowner caused by a faulty gas delivery system because the owner of the well owed a “high duty of care,” given the known dangers associated with natural gas. “Pro-Business: No.”⁴³¹

•Crossman Communities of Ohio, Inc. v. Greene County Board of Elections.⁴³² This decision held that the Ohio referendum process had properly been invoked to put approval of a proposed development to a popular vote. “Pro-Business: No.”⁴³³

Even apart from the narrow pro-business agenda reflected in these evaluations, they provide very little in the way of reliable information. The 2000 report looks at only a few hundred cases out of the thousands of cases decided by the court over the last decade. In the environmental area, the report looks at only eleven environmental cases out of the scores if not hundreds of environment-related decisions handed down by the court. In the case of justices more recently appointed to the court, the Chamber bases its environmental score on as few as three cases. Because *297 of the small number of cases examined, and the risk of bias in the case selection process, the rankings have little credibility.

If there is a striking aspect of the Chamber’s environmental scores, it is not the fact that several justices received relatively low “pro-business” scores in environmental cases, but that two justices received 100% pro-business rankings on the environment.⁴³⁴ If the Chamber’s ranking process were a reliable reflection of a particular justice’s approach to deciding cases, these figures would support the alarming suggestion that the decisions of a few members of the court in environmental cases are completely insensitive to the law or the facts of the particular case. While the Chamber might applaud such a

consistent “pro-business” voting pattern, it would raise a serious question about the integrity of the judicial decision-making process. Fortunately, given the limitations of the Chamber’s methodology, the scores cannot be viewed as accurate indicators of a justice’s pro-business or anti-business leanings in environmental cases.

While the Chamber’s initial judicial evaluation report was apparently intended to serve a general educational function, the Chamber indicated with the publication of its second report in 1997 that it would most likely begin endorsing particular candidates for seats on the state supreme court.⁴³⁵ In fact, in October 1998, the Chamber endorsed judicial candidates for the first time, recommending Democrat Ron Suster over Republican incumbent Justice Pfeifer. Chamber officials cited the results of the 1997 judicial evaluations as a reason not to reelect Pfeifer.⁴³⁶

4. Rhetoric About Judicial Activism

One noteworthy aspect of the political contests over judicial office in Ohio, as in many other states, has been the widespread use of the term “judicial activism” to criticize a judicial candidate. While the Chamber has not succeeded in **changing** the personnel on the Ohio Supreme Court, it has apparently succeeded to some degree in publicly contrasting its favored “pro-business” candidates with disfavored “activist judges.” In principle, a pro-business **ruling** would seem as likely to implicate an activist judicial *298 philosophy as a conservative one. Nonetheless, spokespersons for business interests routinely seek to characterize judges opposed by business as “activist.”

For example, The Columbus Dispatch reported that accusations of “judicial activism” against Justice Pfeifer began after court decisions “raised the ire of the Ohio Chamber of Commerce,” and Pfeifer’s opponent made judicial activism an issue in the 1998 election.⁴³⁷ Ohio Citizens Against Lawsuit Abuse also charged Justice Sweeney, another incumbent, with being a “judicial activist.”⁴³⁸ Following the court’s Sheward decision, the Ohio Chamber of Commerce issued a statement calling the decision “blatantly political” and asserting that “[t]his Court has created a ‘Catch-22’ for legislators for much of the last decade by acting as a super legislature.”⁴³⁹ The Chamber of Commerce’s senior vice president for government affairs added: “The only way to eliminate this kind of judicial activism is to work to make **changes** on the court.”⁴⁴⁰

5. November 2000

In the November 2000 election, the Ohio Chamber of Commerce and various allied groups mounted their largest effort yet to unseat an Ohio Supreme Court Justice. Justice Resnick, the author of the Sheward decision, had the lowest over-all business score of any member of the court. In addition, the Chamber assigned Justice Resnick the lowest pro-business voting record in the environmental cases.⁴⁴¹ After a heated contest, Justice Resnick prevailed with 57% of the vote.⁴⁴²

The Chamber rhetoric leading up to the campaign suggested the ferocity of the effort to unseat Resnick. In its 1997 report, the Chamber criticized the supreme court, stating that “a majority of established members of the high court repeatedly rendered decisions that discouraged employment and business opportunities.” *299⁴⁴³ The 2000 report upped the stakes by asserting that “the trend for important business litigation at the Supreme Court level has worsened to the point of being overwhelmingly negative.”⁴⁴⁴ In a direct call to action, the report stated that “[b]usiness leaders need to realize that as Ohio enters the 21st century, the anti-business tilt of the Ohio Supreme Court presents one of the biggest challenges to the state’s business climate. . . . The state’s legal climate has become a negative factor for businesses considering new or expanded operations in Ohio.”⁴⁴⁵

Citizens for a Strong Ohio, an arm of the Ohio Chamber of Commerce, and the U.S. Chamber of Commerce’s Institute for Legal Reform, spent a reported \$5 million in advertising attacking Justice Resnick.⁴⁴⁶ Citizens for a Strong Ohio came under fire because it refused to disclose the identity of its contributors.⁴⁴⁷ The harshest anti-Resnick ad featured a statue of lady justice peeking under her blindfold at bundles of money, with an announcer intoning that Justice Resnick had received \$750,000 in campaign contributions from the trial lawyers since 1994-and voted in their favor 70% of the time. The ad concluded by asking: “Is justice for sale in Ohio?”⁴⁴⁸

Resnick filed repeated complaints about the ads with the Ohio Elections Commission. The Commission first rejected the claim that the ads were “political” rather than “issue advocacy.” However, on the eve of the election, the Commission announced its intention to conduct a post-election hearing on the matter.⁴⁴⁹ That proceeding was still pending as of early 2001.

The Ohio Democratic Party and a committee formed of the Ohio AFL-CIO, the Academy of Trial Lawyers and two teachers *300 unions reportedly spent approximately \$2 million on advertising in support of Justice Resnick’s reelection.⁴⁵⁰

Conclusions and Recommendations

This preliminary research effort demonstrates that state judicial elections have important implications for the environment. Over the last decade, and particularly in the last few years, pro-business groups have mounted major campaigns to influence state environmental policies by altering the composition of the state courts. Environmental advocacy groups have played only a modest role in these political contests. The business community has achieved some gains, notably in supporting the election of “pro-business” candidates in Idaho, Louisiana, and Michigan. At present, it is less clear how the changes on the courts in these states have affected or will affect the actual content of environmental policies. In the future, the intensity of state judicial electoral contests, and the stakes for the environment, are likely to increase.

From a research perspective, this preliminary effort points to a number of additional questions worthy of exploration. This research has focused largely on the states’ highest courts; a more intensive examination of races for other state appellate and trial courts might reveal a more far-reaching effort to influence the composition of the state judiciaries. It may also be useful to inquire about the extent to which the environment has been an issue in state judicial elections in states other than those examined in depth in this report. Oregon, Washington, and Wisconsin, for example, all appear worthy of investigation. It also will be worthwhile to study more fully the role the environmental issue played in the November 2000 elections and to evaluate how the outcomes of these races may affect future environmental policies.

For the environmental advocacy community, the results of this investigation lead to several straightforward recommendations:

First, environmental advocacy groups should make a concerted effort to educate their members and the general public about what is at stake in state judicial elections from an environmental *301 perspective. To the extent groups are engaged in direct political activity, they should consider redirecting some of their time and resources to critical state judicial races.

Second, environmental advocacy groups should consider borrowing a page from the business community and prepare their own evaluations of judges’ voting records (at least until adoption of thorough reforms of the judicial selection process). If the environmental community can prepare League of Conservation Voters “scores” for other elected officials, why not for elected judges? Inevitably these types of evaluations oversimplify the judicial decision-making process, and some will regard them as an unwarranted intrusion on judicial independence. On the other hand, if the judicial selection process remains a political process, and if that process has direct and important implications for environmental policy, it is entirely appropriate for environmental groups to help voters educate themselves about the consequences of their choices in the voting booth. For the reasons discussed above, the evaluations prepared to date by pro-business advocacy groups are flawed in a number of respects. But there are statistically reliable methods for evaluating how political ideology influences how judges vote on the environment or other issues.⁴⁵¹ Thus, it certainly is possible to prepare evaluations of how judges vote in environmental cases that are fairer and more accurate than the current evaluations.

The future strength of environmental protection policies in many states will likely depend in significant part on whether the environmental community can meet this new challenge.

Table 1: Number of State Appellate Judges Selected by Alternative Methods (By State)

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***303 Table 2: Number of State Appellate Judges Selected by Alternative Methods (By Selection Category)**

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Footnotes

- ^{a1} Adjunct Professor of Law and Director, Environmental Policy Project, Georgetown University Law Center. J.D., Yale Law School, 1981; M.F.S., Yale School of Forestry and Environmental Studies, 1981; B.A., Yale College, 1976. I am grateful to Bill Christian, Rachel Cox, Lisa Heinzerling, and Roy Schotland for many useful comments on drafts of this article. I also acknowledge the valuable research assistance of Emily Headen of the Environmental Working Group and of the firm of MacWilliams, Cosgrove, Smith & Robinson.
- ¹ For the methods used to select state appellate judges, see *infra* app., tbls. 1 & 2.
- ² See 2 ABA Task Force on Lawyers' Political Contributions, Report and Recommendations Regarding Contributions to Judges and Judicial Candidates 7 (1998) [hereinafter Task Force]. See Appendix, Table 1 regarding recent **changes** in Idaho and Arkansas.
- ³ See *id.* at 5-7. However, unlike the task force report, I have included Idaho, Michigan, and Ohio, which have de facto partisan elections, in the group of states that hold partisan judicial elections.
- ⁴ See *id.* at 7.
- ⁵ Burton M. Atkins, Judicial Elections: What the Evidence Shows, Fla. Bar J. 50, No. 152 (Mar. 1976), quoted in Philip L. DuBois, From Ballot to Bench, Judicial Elections and the Quest for Accountability 3 (1980).
- ⁶ See DuBois, *supra* note 5, at 3.
- ⁷ See, e.g., Recommendation (To Be Presented to the ABA House of Delegates at the 1998 Annual Meeting), in Task Force, *supra* note 2, at 61 (recommending **changes** to the Model Code of Judicial Conduct regarding election contributions).
- ⁸ American Judicature Society, Judicial Selection, at [http:// www.ajs.org/select1.html](http://www.ajs.org/select1.html) (last visited Feb. 4, 2001).
- ⁹ The Center for Judicial Independence promotes these goals. See Center for Judicial Independence Mission Statement, at [http:// www.ajs.org/select2.html](http://www.ajs.org/select2.html) (last visited Feb. 4, 2001).
- ¹⁰ See Task Force on Selecting State Court Judges, Choosing Justice: Reforming the Selection of State Judges (Paul D. Carrington & Barbara E. Reed, reps.), in *Uncertain Justice: Politics and America's Courts; The Reports of Citizens for Independent Courts* 77, 83-84 (1999).

¹¹ See, e.g., *id.* at 87-88.

¹² Ohio Chamber of Commerce, 2000 Business Evaluation of the Ohio Supreme Court 1 (2000) (available from the Ohio Chamber of Commerce, Columbus, Ohio).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Kyle Johnson, Raising Money: Judges on the Campaign Trail, *Christian Sci. Monitor*, Aug. 13, 1998, at A1.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ *Frontline: Justice for Sale* (PBS television broadcast, Nov. 23, 1999).

²⁰ *Id.*

²¹ See discussion *infra* Part II.A-E.

²² Letter and Proposal from Ron Howell, Citizens for Judicial Review, to various business leaders 1 (July 1, 1996) [hereinafter *Howell Letter*] (on file with author).

²³ *Id.*, att. Judicial Evaluations: A Methodology for Evaluating Economic Biases of Judicial Candidates and Incumbents [hereinafter *Judicial Evaluations*].

²⁴ *Howell Letter*, *supra* note 22.

²⁵ *Id.*, att. *Judicial Evaluations*, at 1.

²⁶ *Id.*

²⁷ *Id.*, att. Projected Budget.

28 Howell Letter, supra note 22.

29 Id.

30 Id., att. Projected Budget.

31 Howell Letter, supra note 22.

32 StateSource, L.L.C., Company Profile, at [http:// www.statesource.com/profile.htm](http://www.statesource.com/profile.htm) (last visited Feb. 4, 2001) [hereinafter StateSource Profile].

33 Judicial Evaluations, supra note 23, at 4.

34 On CJR, see Inadmissible; '96 Election Returns, Tex. Law., Nov. 11, 1996, at 3 (stating that CJR is "a trade name for ... Sequoyah House Investments Ltd."). On EJR, see Mich. Lawsuit Abuse Watch & Jud. Eval. for Econ. Issues, Michigan Supreme Court Judicial Evaluation copyright p., 51 (1998) [hereinafter Michigan Judicial Evaluation] (noting that the evaluation of decisions by the Michigan Supreme Court was "compiled" by EJR, but the report was copyrighted in the name of Sequoyah Information Systems, Ltd.).

35 Howell Letter, supra note 22, att. R. Marc Nuttle Biographical Sketch, at 1.

36 Ronald W. Howell, Personal Biography, StateSource Profile, supra note 32, at <http://www.statesource.com/howell.htm> (last visited Feb. 4, 2001) [[hereinafter Howell Biography].

37 StateSource Profile, supra note 32.

38 Howell Letter, supra note 22.

39 Chuck Ervin, Oklahoma Judges Rated by Coalition, Tulsa World, Apr. 5, 1998, at B1.

40 John J. Fialka, How Koch Industries Tries to Influence Judicial System, Wall St. J., Aug. 9, 1999, at A20.

41 See Howell Letter, supra note 22, att. Ann T. Gallagher Biographical Sketch.

42 See Howell Letter, supra note 22, att. Sam Hammons Biographical Sketch, at 1.

43 See, e.g., Economic Judicial Report, Oklahoma Supreme Court & Court of Civil Appeals: Judicial Evaluation, 1997 Update (1997).

- 44 See infra notes 50-51 and accompanying text describing the evaluation in Mississippi.
- 45 Economic Judicial Report, supra note 43, at 2-3 (explaining the ratings and evaluation criteria).
- 46 Id. at SC2-1 to SC2-4.
- 47 Id. at SC2-1 (evaluating justices' **ruling** in [Smith v. Westinghouse Elec. Corp.](#), 732 P.2d 466 (Okla. 1987)).
- 48 Id. (evaluating the **ruling** in [Matador Pipelines, Inc. v. Okla. Water Res. Bd.](#), 742 P.2d 15 (Okla. 1997)).
- 49 See John Greiner, Nine State Justices, Judges Appear on Retention Ballot, Sunday Oklahoman, Nov. 1, 1998, at 13, available at LEXIS, News Database.
- 50 Kelly Russell, Mississippi Supreme Court Ranks Low on Job Issues, Miss. Bus. J., Oct. 28, 1996, at 1, available at [1996 WL 8572277](#).
- 51 Id.
- 52 Peter Wallsten, Top Jurist Questions Motives Behind Survey Rating Judges, St. Petersburg Times, June 1, 1998, at 1B, available at [1998 WL 4265649](#).
- 53 Id.
- 54 Id.
- 55 There are various reports of a 1998 judicial survey of bar members in Alabama organized by the Oklahoma group. See, e.g., Memorandum from Citizens for Corporate Accountability and Individual Rights (May 25, 1998) (on file with author) (alerting recipients to interests behind lawyer surveys). Alabama state bar officials reportedly urged members not to respond to the survey on the ground that a similar survey had been used to advance a narrow partisan agenda in other states. Perhaps for that reason, no report on the Alabama survey was apparently ever released. The President of the Alabama State Bar has no recollection that the results of the survey were released, and news databases reveal no report of the release of the survey. Interview with Keith B. Norman, Former President, Alabama State Bar (Oct. 5, 1999).
- 56 Howell Biography, supra note 36.
- 57 Ray Tuttle, Koch Court Fight Continues, Tulsa World, Oct. 14, 1995, at B1, available at [1995 WL 10046404](#).
- 58 Fialka, supra note 40, at A20.
- 59 See Howell Letter, supra note 22.

⁶⁰ Representative Consulting and Project Clients 1996-97, StateSource Profile, *supra* note 32, at <http://www.statesource.com/clients.htm> (last visited Feb. 4, 2001).

⁶¹ This information is derived from publicly available 990-PF forms for the years 1998 and 1999 filed by the Koch foundations (on file with author).

⁶² According to the 1998 and 1999 990-PF forms filed with the IRS, Koch foundations have made major grants to support courses on law and economics provided to federal judges by a Montana-based organization, the Foundation for Research and Environmental Economics, and they also have provided support for George Mason University “free market” seminars for federal judges.

⁶³ Robert Parry, Dole: What Wouldn’t Bob Do for Koch Oil?, *Nation*, Apr. 26, 1999, at 11.

⁶⁴ *Id.*

⁶⁵ Henry M. Butler, Judicial Decisions Can Affect the Economy, *Daily Oklahoman*, Oct. 29, 1998, at 4.

⁶⁶ See *id.*

⁶⁷ Tom Meersman, Decision on Koch is Tough for MPCA, *Star Trib. (Minneapolis)*, May 18, 1998, at 1A, available at LEXIS, News Database.

⁶⁸ Koch is Nation’s 2nd Largest Privately Held Company, *Albuquerque J.*, Dec. 6, 1999, at A8, available at LEXIS, News Database.

⁶⁹ Press Release, U.S. Environmental Protection Agency, Koch Industries to Pay Record Fine for Oil Spills in Six States (Jan. 13, 2000), available at <http://www.usdoj.gov/opa/pr/2000/January/019enrd.htm>. The public record contains reports of other enforcement actions against Koch Industries or its subsidiaries based on environmental violations. Most recently, in July 2000, Koch Industries paid \$172,000 to settle claims that it violated environmental **rules** governing oil-storage tanks in Texas. See Koch is Nation’s 2nd Largest Privately Held Company, *supra* note 68, at A8.

⁷⁰ See *supra* note 27 and accompanying text. Cf. Map of Koch Industry Locations, available at <http://www.kochind.com/location/us.asp> (last visited Mar. 10, 2001).

⁷¹ Citizens for a Sound Economy Mission Statement, at <http://www.cse.org/know/mission.html> (last visited Feb. 10, 2001).

⁷² See *supra* notes 63-64 and accompanying text.

⁷³ See David Callahan, \$1 Billion for Conservative Ideas: Gifts to Right-Wing Think Tanks Have Become a Form of Political Donation, *Nation*, Apr. 26, 1999, at 21 (indicating that CSE has received \$9.3 million from Koch family foundations since CSE’s founding). IRS 990-PF forms for two of the Koch family foundations, the Claude Lambe Charitable Foundation and the David H. Koch Charitable Foundation, reveal that in the period 1995 to 1997 the two foundations contributed in excess of \$3 million to CSE.

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- 74 Wallsten, *supra* note 52, at 1B.
- 75 See Peter H. Stone, *Grass-Roots Goliath*, *Nat'l J.*, July 13, 1996, at 1529, 1530, available at LEXIS, News, Individual Publication Database.
- 76 See Fialka *supra* note 40, at A20.
- 77 See StateSource Profile, *supra* note 60.
- 78 See Institute for Legal Reform, at [http:// www.uschamber.com/Instituteor+Legal+Reform](http://www.uschamber.com/Instituteor+Legal+Reform) (last visited Mar. 14, 2001).
- 79 See Press Release, U.S. Chamber of Commerce, U.S. Chamber Institute for Legal Reform Announces Board Appointments, Agenda (Aug. 8, 1998).
- 80 U.S. Chamber Institute for Legal Reform, *Metro. Corp. Couns.*, Aug. 1999, at 46, available at LEXIS, News Database.
- 81 *Id.*
- 82 *Id.*
- 83 Peter Stone, *K Street*, *Nat'l J.*, June 24, 2000, at 2004, available at LEXIS, News, Individual Publication Database.
- 84 See *id.*
- 85 *Id.*
- 86 Toledo Joins Ad Battle, *Dayton Daily News*, June 21, 2000, at 2E, available at LEXIS, News Database.
- 87 William Glaberson, *A Spirited Campaign for Ohio Court Puts Judges on New Terrain*, *N.Y. Times*, July 7, 2000, at A15.
- 88 Michael Bender, *Michigan Ads Seek Ohio's Fortunes*, *Dayton Daily News*, June 6, 2000, at 1B, available at LEXIS, News Database.
- 89 *The Right Ts*, *Crain's Cleveland Bus.*, June 12, 2000, at 10, available at LEXIS, News Database.
- 90 See *infra* Part III.A.3.

- 91 See infra Part III.A.4.
- 92 See infra notes 143-44.
- 93 Idaho Const. art. V, § 6.
- 94 Idaho Const. art. V, § 6.
- 95 Idaho Code § 1-2102 (Michie 2000).
- 96 Idaho Code § 34-1217 (Michie 2000).
- 97 Judges on the Idaho Court of Appeals and District Court are also elected. See Idaho Const. art. V, § 11; Idaho Code §§ 1-702, 1-2404, 34-616 (Michie 2000).
- 98 Betsy Z. Russell, Battle Looms Over Electing Judges, Spokesman-Rev. (Spokane, Wash.), May 28, 2000, at B1, available at LEXIS, News Database.
- 99 Idaho Const. art. VI, § 7.
- 100 Russell, supra note 98, at B1.
- 101 Scott Kidd, Guest Opinion, Courts Shouldn't Write Their Own Rules, Post Reg. (Idaho Falls), Apr. 2, 2000, at C1, available at LEXIS, News Database.
- 102 Mark Warbis, Observers Worry Race for Supreme Court Has Become Politicized, Idaho Statesman, Apr. 22, 2000, at 1b, available at LEXIS, News Database.
- 103 See discussion infra Part III.A.2.
- 104 See Justice Silak's Web Page, available at <http://www.justicecathysilak.com> (last visited Oct. 1, 2000).
- 105 See id.
- 106 See id.
- 107 See id.

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- 108 See id.
- 109 Gene Fadness, *The Battle for the Supreme Seat*, Post Reg. (Idaho Falls), May 21, 2000, at A, available at LEXIS, News Database.
- 110 See, e.g., Gene Fadness, *State GOP Chairman Endorses Eismann*, Post Reg. (Idaho Falls), May 19, 2000, at A1, available at LEXIS, News Database (quoting the Republican Party Chairman accusing Silak of promoting “the liberal, judicial activism she advanced as a co-founder of the Idaho ACLU”).
- 111 See Fadness, *Battle*, supra note 109, at A.
- 112 See id.
- 113 See id.
- 114 See id.
- 115 [Idaho Const. art. IX, § 1](#) (requiring the legislature to “establish and maintain a ... thorough system of public, free common schools”).
- 116 [Idaho Sch. for Equal Educ. Opportunity v. State](#), 976 P.2d 913, 914 (Id. 1998).
- 117 [Idaho Sch.](#), 976 P.2d at 914.
- 118 Angie Gaddy, *Supreme Court Race Has Political Feel*, Spokesman-Rev. (Spokane, Wash.), Apr. 9, 2000, at B1, available at LEXIS, News Database.
- 119 Gene Fadness, *Eismann Sees No Conflict in Water Court Appeals*, Post Reg. (Idaho Falls), May 18, 2000, at A3, available at LEXIS, News Database. See also [In re SRBA, No. 39576, 1999 WL 778325 \(Idaho Sup. Ct. Oct. 1, 1999\)](#).
- 120 See [Nez Perce Tribe’s Memorandum in Support of Motion to Set Aside All Decisions, Judgments and Orders of Judge R. Barry Wood and Motion to Disqualify Judge Wood, 1999 WL 778325 \(Idaho Sup. Ct. 1999\)](#) (Consolidated Subcase No. 03-10022).
- 121 See [Nez Perce Tribe’s Response to United States’ Motion for Status Conference and Order on Nez Perce’s Motion, 1999 WL 778325 \(Idaho Sup. Ct. 1999\)](#) (Consolidated Subcase No. 03-10022).
- 122 Fadness, *Eismann Sees No Conflict*, supra note 119, at A3.
- 123 Michael Journee, *Court Removes Wood: District Court Won’t Hear Idaho Water Cases*, Times-News (Twin Falls, Idaho), Sept. 1, 2000, available at <http://www.magicvalley.com>.

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- ¹²⁴ Michael Journee, No Water Cases for Eismann, Times-News (Twin Falls, Idaho), Aug. 31, 2000, available at <http://www.magicvalley.com>.
- ¹²⁵ See Fadness, Battle, *supra* note 109, at A.
- ¹²⁶ Idaho Secretary of State, Schedule of Contributions, Justice Cathy Silak Campaign 2000 (for period 1/1/00 to 5/7/00), available at <http://www.idsos.state.id.us/elect/finance.htm> (last visited Feb. 10, 2001).
- ¹²⁷ Idaho Secretary of State, Schedule of Contributions, Eismann for Idaho Supreme Court (for period 2/14/00 to 5/7/00), available at <http://www.idsos.state.id.us/elect/finance.htm> (last visited Feb. 10, 2001).
- ¹²⁸ Betsy Z. Russell, Occasional Slips in Speechifying, Spokesman-Rev. (Spokane, Wash.), May 20, 2000, at B1, available at LEXIS, News Database.
- ¹²⁹ Editorial, Idahoans Could Place Water Rights Issue in Their Hands, Idaho Statesman, Oct. 14, 1999, at 6b, available at LEXIS, News Database.
- ¹³⁰ [In re SRBA, No. 39576, 1999 WL 778325 \(Idaho Sup. Ct. Oct. 1, 1999\)](#).
- ¹³¹ See Editorial, *supra* note 129, at 6b.
- ¹³² *Id.*
- ¹³³ See [In re SRBA, 1999 WL 778325](#), at *2.
- ¹³⁴ *Id.*
- ¹³⁵ *Id.* at *8.
- ¹³⁶ *Id.* at *10.
- ¹³⁷ *Id.* at *13-21 (Kidwell, J., dissenting).
- ¹³⁸ *Id.* at *21-25 (Schroeder, J., dissenting).
- ¹³⁹ Rocky Barker, Idaho High Court to Rehear Water Case: Companies, Cities Sought Review, Idaho Statesman, Dec. 1, 1999, at 1a, available at LEXIS, News Database.
- ¹⁴⁰ [In re SRBA, 12 P.3d 1260 \(Idaho 2000\)](#).

141 [Id. at 1273-83](#) (Silak, J., dissenting).

142 [Id. at 1283-84](#) (Walters, J., dissenting).

143 [In re SRBA, 988 P.2d 1199](#) (Idaho 1999).

144 [In re SRBA, 996 P.2d 806](#) (Idaho 2000).

Apart from the Snake River Basin Adjudication case, Justice Silak's opponents took her to task for two other decisions, neither of which she authored but in which she joined the majority opinion reversing lower court **rulings**. In [Doe v. Garcia, 961 P.2d 1181](#) (Idaho 1998), the court reversed a trial court's dismissal of a tort suit based on a hospital's alleged negligence in hiring an employee who sexually abused the plaintiff, who was a minor, after meeting him and treating him at the hospital. The hospital's hiring process had allegedly failed to uncover the fact that the employee had previously been discharged from a similar position for sexual abuse of a patient. The court, which decided the case 4-1 in favor of the plaintiff, **ruled** that the trial court erred in not allowing the plaintiff to proceed to trial on his claim. [961 P.2d at 1185](#).

The second case, [Idaho Schools for Equal Educational Opportunity v. State, 976 P.2d 913](#) (Idaho 1998), discussed supra notes 116-17, involved a claim that the state's method for funding school facilities violated the provision of the Idaho Constitution, stating that the legislature must "establish and maintain a ... thorough system of public, free common schools." The supreme court reversed Judge Eismann's **ruling** dismissing the case.

145 Gene Fadness, Wilderness Area Water Rights--Opinions Varied on Impact of Court **Ruling**, Post Reg. (Idaho Falls), Oct. 14, 1999, at A4, available at LEXIS, News Database.

146 Stanley B. Davis, Guest Opinion, Idaho's Supreme Court Carries Water for the Feds, Post Reg. (Idaho Falls), Oct. 17, 1999, at C1, available at LEXIS, News Database.

147 Greg Nelson, Editorial, Supreme Court Water **Ruling** Could Hurt State, Idaho Statesman, Nov. 4, 1999, at 6b, available at LEXIS, News Database.

148 Carl E. Olsson, Letter to the Editor, Defending Silak, Idaho Statesman, Oct. 27, 1999, at 9b, available at LEXIS, News Database. See also Emil R. Berg, Letter to the Editor, Court Interprets Law, Idaho Statesman, Oct. 22, 1999, at 8b, available at LEXIS, News Database ("The Statesman's editorial attacking Justice Cathy Silak for authoring the opinion recognizing federal water rights in wilderness areas displays an amazing ignorance of the role of the courts in a constitutional republic.").

149 Gene Fadness, Republicans Unveil Choice for State's Supreme Court, Post Reg. (Idaho Falls), Feb. 13, 2000, at B1, available at LEXIS, News Database.

150 [Id.](#)

151 See Gene Fadness, I.F. Fundraiser Was Scene of Law Breaking, Former Justice Says-Huntley Files Complaint Against 4th District Judge Dan Eismann, Post Reg. (Idaho Falls), Feb. 22, 2000, at A1, available at LEXIS, News Database.

152 [Idaho Const. art. VI, § 7.](#)

- ¹⁵³ [Idaho Code § 18-2315](#) (Michie 2000).
- ¹⁵⁴ See Fadness, *supra* note 151, at A1.
- ¹⁵⁵ See Gene Fadness, Deputy A.G.: Supreme Court Candidate Didn't Violate Constitution, *Post Reg. (Idaho Falls)*, Mar. 1, 2000, at A1, available at LEXIS, News Database.
- ¹⁵⁶ See *id.*
- ¹⁵⁷ *Id.*
- ¹⁵⁸ See *id.*
- ¹⁵⁹ See Michael R. Wickline, Justice Wants Group to Note Oaths She Has Taken; Idaho Supreme Court Justice Responds to Idaho Christian Coalition's Questionnaire, *Morning Trib. (Lewiston, Idaho)*, May 3, 2000, at 6A, available at LEXIS, News Database.
- ¹⁶⁰ See *id.*
- ¹⁶¹ *Id.*
- ¹⁶² Dan Popkey, Eismann Plays Religion Card in Supreme Court Race, *Idaho Statesman*, May 9, 2000, at 1b, available at LEXIS, News Database.
- ¹⁶³ *Id.*
- ¹⁶⁴ See Angie Gaddy, Attorney Claims Judge Violated **Rules**; Complaint Filed Against High Court Candidate Contending He Shouldn't Have Answered Questionnaire, *Spokesman-Rev. (Spokane, Wash.)*, May 11, 2000, at B1, available at LEXIS, News Database.
- ¹⁶⁵ *Id.*
- ¹⁶⁶ *Id.*
- ¹⁶⁷ Letter from Robert G. Hamlin, Executive Director, Idaho Judicial Council, to Scott W. Reed 1 (Aug. 17, 2000) (on file with author).
- ¹⁶⁸ Betsy Z. Russell, Eismann Denies Role in Anti-Silak Push-Poll; Calls Disguised as Survey Cast Aspersions on High Court Justice, *Spokesman-Rev. (Spokane, Wash.)*, May 13, 2000, at A1, available at LEXIS, News Database.

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- ¹⁶⁹ Betsy Z. Russell, *Anti-Silak Calls Legal, Activist Says; Morgan Says Campaign Not Illegal ‘Push Poll’; Releases Complete Script for Telemarketing Firm, Spokesman-Rev.* (Spokane, Wash.), May 19, 2000, at B1, available at LEXIS, News Database.
- ¹⁷⁰ An Act Relating to Political Campaigns, ch. 153, sec. 1, § 67-6629 (Michie 2000) (amending Chapter 66, Title 67 of the Idaho Code to provide that persuasive polls concerning a candidate must identify the person paying for the poll).
- ¹⁷¹ See Russell, *Anti-Silak Calls Legal*, supra note 169.
- ¹⁷² *Id.*
- ¹⁷³ Information directory lists no phone number for a Democracy Fund or a Lyle Coggan in South Carolina. The names could not be located in various other information databases. The South Carolina Secretary of State has no record of any corporation named the Democracy Fund.
- ¹⁷⁴ Gene Fadness, *Ad Says Silak Could Bring Gay Marriage to Idaho, Post Reg.* (Idaho Falls), May 21, 2000, at A1, available at LEXIS, News Database.
- ¹⁷⁵ *Id.*
- ¹⁷⁶ Betsy Z. Russell, *Voters Oust Justice Silak for Eismann; After Campaign Marred by Controversy, Challenger Says He Ran a Clean Race, Spokesman-Rev.* (Spokane, Wash.), May 24, 2000, at A1, available at LEXIS, News Database.
- ¹⁷⁷ Marty Trillhaase, *Editorial, A Politician Seeks the Bench, Post Reg.* (Idaho Falls), May 21, 2000, at C2, available at LEXIS, News Database.
- ¹⁷⁸ See Fadness, *Ad Says*, supra note 175, at A1.
- ¹⁷⁹ See, e.g., Fadness, *Republicans*, supra note 149, at B1; Fadness, *State GOP*, supra note 110, at A1. See also Angie Gaddy, *Supreme Court*, supra note 118, at B1 (“The contest [for the supreme court] is supposed to be nonpartisan--but the race is already rife with politics and accusations of judicial activism.”).
- ¹⁸⁰ Fadness, *Battle*, supra note 109, at A.
- ¹⁸¹ Angie Gaddy, *Idaho Supreme Court; Eismann, Silak, Spokesman-Rev.* (Spokane, Wash.), May 18, 2000, at 3, available at LEXIS, News Database.
- ¹⁸² As stated by The Spokesman-Review editorial board, referring to Judge Eismann’s actions in the school funding case, “Eismann ... said judges should interpret the Constitution and laws according to the intent of the drafters. The problem is, he seems to think he’s the only judge who knows what they meant.” Ken Sands, *Editorial, Discipline, Gravitas Keys to Credibility, Spokesman-Rev.* (Spokane, Wash.), May 20, 2000, at B6, available at LEXIS, News Database.
- ¹⁸³ Bill Hall, *Opinion, Republican Wobblers Running for Idaho’s High Court, Morning Trib.* (Lewiston, Idaho), Feb. 20, 2000, at 1F,

available at LEXIS, News Database.

- ¹⁸⁴ See Frontline: Justice for Sale, *supra* note 19; 60 Minutes II: Buying Judges? (CBS television broadcast, Mar. 27, 2000).
- ¹⁸⁵ La. Const. art. V, §§ 3-4; La. Rev. Stat. Ann. § 13:101 (West 1999). In 1992, in response to a suit under the federal Voting Rights Act, the State established a temporary seat for an eighth supreme court justice, which expired in 2000. Only seven justices actually hear a case at any one time. See C.F. Perschall, Jr., New 'Supreme Court' Seat Unconstitutional, *Times-Picayune* (New Orleans), Oct. 23, 1994, at B6, available at LEXIS, News Database. To avoid a conflict with the constitutional provision prescribing seven supreme court justices, the eighth seat was created by establishing an additional judgeship on the Fourth Circuit Court of Appeals and assigning that judge to serve on the supreme court. See La. Rev. Stat. Ann. § 13:312.4 (West 1999).
- ¹⁸⁶ La. Const. art. V, §§ 3, 22.
- ¹⁸⁷ La. Const. art. V, § 22.
- ¹⁸⁸ La. Const. art. V, § 8.
- ¹⁸⁹ See Mark Schleifstein, Election Might Shift Balance on Supreme Court; Focus on Business, Law Clinics, Crime, *Times-Picayune* (New Orleans), Sept. 20, 1998, at A1, available at LEXIS, News Database; Fred Kalmbach, Doctors, Business Targeting Louisiana's Courts, *Advocate* (Baton Rouge), Feb. 19, 1995, at 1A, available at [1995 WL 6316477](#).
- ¹⁹⁰ Joe Gyan, Jr., New Justices Plan to Bring Conservative Voice to Court, *Advocate* (Baton Rouge), Sept. 23, 1996, at 11A, available at [1996 WL 5947620](#).
- ¹⁹¹ *Id.*
- ¹⁹² Schleifstein, Election, *supra* note 189, at A1.
- ¹⁹³ Susan Finch, Orleans Rallies Around Justice, Cusimano Beat Calogero in Jeff, *Times-Picayune* (New Orleans), Oct. 7, 1998, at B1, available at LEXIS, News Database.
- ¹⁹⁴ Susan Finch, Cusimano Quits Court Race, *Times-Picayune* (New Orleans), Oct. 10, 1998, at A2, available at LEXIS, News Database.
- ¹⁹⁵ Pamela Coyle & Susan Finch, Supreme Court Race Nasty to Bitter End, *Times-Picayune* (New Orleans), Oct. 2, 1998, at A3, available at LEXIS, News Database.
- ¹⁹⁶ Raya Tahan, Supreme Court Race Is Unusually Fierce, *Associated Press*, Sept. 28, 1998, available at [1998 WL 7449901](#).
- ¹⁹⁷ Pamela Coyle, High Court Hopefuls Spend, Spat, *Times-Picayune* (New Orleans), Sept. 27, 1998, at A4, available at LEXIS, News Database.

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- 198 Id.
- 199 See Coyle & Finch, *Bitter End*, supra note 195, at A3.
- 200 See Coyle, *High Court*, supra note 197, at A4.
- 201 Susan Finch, *Candidates Swap Charges of Misleading Ads*, *Times-Picayune* (New Orleans), Sept. 24, 1998, at A3, available at LEXIS, News Database. The 1996 campaign was hardly more civil. Candidate Knoll accused Justice Watson of using campaign contributions for personal expenses; Watson in turn questioned Knoll's experience in handling criminal cases. See Gyan, supra note 190, at 11A. Bleich backers accused Traylor of being a pawn of big business. On the other hand, Governor Foster, who backed Traylor, called the race "a case of the bad guys against us." Id.
- 202 Pamela Coyle, *Money, Politics, Justices Debated; Appointments Favored by Some*, *Times-Picayune* (New Orleans), Apr. 28, 1997, at A1, available at LEXIS, News Database.
- 203 Joe Gyan, Jr., *Cusimano Quits High Court Race*, *Advocate* (Baton Rouge, La.), Oct. 10, 1998, at 1A, available at [1998 WL 4915042](#).
- 204 See id.
- 205 See Coyle & Finch, *Bitter End*, supra note 195, at A3. By comparison, in 1994, Jeffrey Victory waged a successful bid for an open supreme court seat with \$403,000 (less than half of what Calogero raised for his 1998 race). Many of these contributions came from business interests, including \$25,000 from the Louisiana Association of Business and Industry, \$20,000 from the Louisiana State Medical Society, \$7,500 from Dow Chemical USA, \$5,000 from International Paper, and \$5,000 from Reily Foods. See Kalmbach, *Doctors*, supra note 189, at 1A. Victory's opponent, Henry Brown, raised about \$350,000, primarily from the legal profession. See id.
- 206 Joe Gyan, Jr., *Survey: Treatment in Court Unequal*, *Advocate* (Baton Rouge, La.), June 17, 1998, at 1A, available at [1998 WL 4902605](#).
- 207 Jeannie Smith, *LABI Turns 20*, *Greater Baton Rouge Bus. Rep.*, Oct. 3, 1995, at 22.
- 208 See LABI Issue Page, available at <http://www.labi.org/issue.html> (last visited Nov. 15, 2000).
- 209 [La. Rev. Stat. Ann. § 18:1505.2\(H\)\(7\)\(a\)\(i\)](#) (West 1999).
- 210 See *infra* Part III.B.3.
- 211 See Tahan, *Supreme*, supra note 196.
- 212 Joe Gyan, Jr., *Records Show Chief Justice Outspending Foe Cusimano*, *Advocate* (Baton Rouge), Sept. 5, 1998, at 5B, available at

[1998 WL 4911120](#).

213 See Schleifstein, Election, *supra* note 189, at A1.

214 Joe Gyan, Jr., La. Chief Justice Questions Timing of LABI Rating, *Advocate* (Baton Rouge), Sept. 22, 1998, at 1B, available at [1998 WL 4912846](#).

215 Carl Redman, Industry Spins an Image, *Advocate* (Baton Rouge), Jan. 18, 1998, at 15B, available at [1998 WL 4885883](#).

216 Chad Calder, Business Casts a Wary Eye on Global Treaty, *New Orleans City Bus.*, Dec. 29, 1997, at 1.

217 Pamela Henderson, Letter to the Editor, Suspicious About LABI's Move, *Times-Picayune* (New Orleans), June 16, 1997, at B4, available at LEXIS, News Database.

218 Carl Redman, LABI, Lobbying, and the Law, *Advocate* (Baton Rouge), Sept. 27, 1998, at 15B, available at [1998 WL 4913599](#).

219 See Schleifstein, Election, *supra* note 189, at A1.

220 See Fred Kalmbach, Doctors, *supra* note 189, at 1A.

221 Louisiana Association of Business and Industry, Supreme Court Voting Record (1998).

222 Mark Kozlowski, The Soul of an Elected Judge, *Legal Times*, Aug. 9, 1999, at 15.

223 See Gyan, La. Chief, *supra* note 214, at 1B.

224 Joe Gyan, Jr., Calogero Publicizes '96 Report, *Advocate* (Baton Rouge), Sept. 24, 1998, at 3B, available at [1998 WL 4913087](#). This information about the 1996 evaluation has been gleaned from press accounts. The 1996 evaluation apparently was not widely circulated and it was not possible to obtain an actual copy.

225 *Id.*

226 See *id.*

227 See Louisiana Association of Business and Industry, *supra* note 221.

228 *Id.*

- 229 Id.
- 230 See Gyan, Jr., La. Chief, *supra* note 214, at 1B.
- 231 Louisiana Association of Business and Industry, *supra* note 221.
- 232 See Gyan, Calogero, *supra* note 224, at 3B.
- 233 Joe Gyan, Jr., Political Philosophies, Affiliations Dominate Race, Advocate (Baton Rouge), Aug. 30, 1998, at 1A, available at [1998 WL 4910389](#).
- 234 Id. at 3B.
- 235 See Schleifstein, Election, *supra* note 189, at A1.
- 236 Environmental Protection Agency, Toxic Release Inventory (1998).
- 237 96-C-1110 (La. 9/9/97), 700 So.2d 478 (La. 1997).
- 238 Id. at 479.
- 239 Id. at 478.
- 240 *S. Christian Leadership Conference v. Supreme Court of the State of La.*, 61 F.Supp.2d 499, 501 (E.D. La. 1999) (describing origins of Court **Rule XX**).
- 241 Mark Schleifstein, La. Supreme Court Refuses Action on Midboe Complaint, Times-Picayune (New Orleans), Feb. 5, 1994, at B4, available at LEXIS, News Database.
- 242 Bob Anderson, High Court Rejects Midboe Request on Law Clinic Restraints, Advocate (Baton Rouge), Feb. 4, 1994, at 12C, available at [1994 WL 3982819](#).
- 243 *S. Christian Leadership Conference*, 61 F.Supp.2d at 501.
- 244 Complaint at P 3, *S. Christian Leadership Conference v. Supreme Court of the State of La.*, 61 F.Supp.2d 499 (E.D.La. 1999) (No. 99-1205). The citizens of St. James Parish had found it “impossible to secure non-law school counsel,” having been turned down by the Sierra Club Legal Defense Fund (now Earthjustice Legal Defense Fund), the Natural Resources Defense Council, and the NAACP Legal Defense Fund. See *id.* at P 25.

245 [S. Christian Leadership Conference](#), 61 F.Supp.2d at 501.

246 Id.

247 See Marcia Coyle, Governor v. Students in \$700M Plant Case, Nat'l Law J., Sept. 8, 1997, at A1.

248 See The Shintech Money Trail, available at <http://www.leanweb.org> (last visited Feb. 13, 2001).

249 See Coyle, Governor, *supra* note 247, at A1.

250 Complaint at P 29; [S. Christian Leadership Conference](#), 61 F.Supp.2d at 501.

251 Coyle, Governor, *supra* note 247, at A1.

252 Christi Daugherty, Louisiana Law Clinics Stung by **Ruling**, Dallas Morning News, Sept. 8, 1998, at 49A, available at LEXIS, News Database.

253 Complaint at P 35; [S. Christian Leadership Conference](#), 61 F.Supp.2d at 501.

254 In July 1997, the New Orleans Chamber of Commerce filed a letter complaining that the current **rules** “push and impose the social views of the faculty and students in the courts of the State of Louisiana as well as before Administrative Bureaus.” See Complaint at P 31. Later that month, the Louisiana Business Council filed a similar letter, asserting that the Tulane clinic uses “court **rules** to fight, harass and interfere with Louisiana’s interest to attract new business.” Id. at P 33. Finally, the Louisiana Association of Business and Industry wrote a letter to Chief Justice Calogero arguing that the Tulane clinic had exceeded its role of providing legal services to those who cannot afford it as provided under **Rule** XX. Id. at P 37. See also [S. Christian Leadership Conference](#), 61 F.Supp.2d at 501.

255 The existence of such a report can be inferred from the dissenting opinion of Justice Johnson to the court’s March 22, 1999 order amending **Rule** XX.

256 Complaint at P 51; [S. Christian Leadership Conference](#), 61 F.Supp.2d at 501.

257 See *supra* note 255.

258 See *id.*

259 See *id.*

260 Janet McConnaughey, Law Students’ Triumph Triggers Political Backlash, Record (Bergen County, N.J.), Nov. 13, 1998, at A12, available at LEXIS, News Database.

261 See Coyle & Finch, Bitter End, *supra* note 195, at A3.

262 See *id.*

263 [S. Christian Leadership Conference v. Supreme Court of the State of La.](#), 61 F.Supp.2d 499 (E.D.La. 1999).

264 *Id.* at 514.

265 *Id.* at 513.

266 *Id.*

267 Brennan Center for Justice, Status Report on S. Christian Leadership Conference v. Louisiana Supreme Court, Aug. 6, 1999 (on file with the Brennan Center for Justice, New York, N.Y.).

268 Oliver A. Houck, Point of View, Court's **Ruling** Unjust to Ordinary Citizens, *Times-Picayune* (New Orleans), June 25, 1998, at B7, available at LEXIS, News Database. Houck directs the environmental law program at Tulane Law School.

269 See, e.g., [Susanna Loof, Partisan Control at Stake in Supreme Court Race](#), *Associated Press*, Nov. 3, 1998, available at 1998 WL 7462446.

270 [Mich. Const. art. 6, § 2](#). See also [Mich. Comp. Laws § 168.396 \(2000\)](#).

271 [Mich. Comp. Laws § 168.04 \(2000\)](#).

272 [Mich. Comp. Laws § 168.409e \(2000\)](#).

273 [Mich. Const. art. 6, § 9](#).

274 See Law and Organizational Economics Center, Economics Institutes for State Judges, available at http://www.loec.org/t_index4.html (last visited Nov. 13, 2000).

275 See *supra* Part II.

276 [Court Opens Session with New Justice](#), *State Net Capitol J. (Mich.)*, Oct. 20, 1999, available at LEXIS, Legal News Database.

277 Thomas J. Bray, Behind Scare Campaign for State High Court, *Detroit News*, July 2, 2000, at 7, available at [2000 WL 3483215](#).

- 278 Id. Three Michigan Supreme Court justices attended the Koch-funded judicial education programs organized by the Law and Organizational Economics Center at the University of Kansas, including Justices Taylor, Weaver, and Young. A number of court of appeals judges have also attended, including Judges Bandstra, Corrigan (subsequently elected to the state supreme court), Markey, and O'Connell. See Memorandum from Law and Organizational Economic Center (LOEC), to Michigan Judges (June 1, 1998) (on file with author) (describing LOEC's Economics Institutes for State Judges).
- 279 Editorial, Faulty Justice: State Court **Rulings** Help Businesses, Not Individuals, Detroit Free Press, Sept. 5, 1999, at 4J, available at [http:// www.freep.com/newslibrary/](http://www.freep.com/newslibrary/) (emphasis in original).
- 280 Id.
- 281 Mary Ellen Gurewitz, Who Wins, Loses in Michigan Supreme Court? (1999).
- 282 Id. at 1.
- 283 Id.
- 284 See, e.g., *Hoste v. Shanty Creek Mgmt., Inc.*, 598 N.W.2d 336 (Mich. 1999).
- 285 See, e.g., *McDougall v. Schanz*, 597 N.W.2d 148 (Mich. 1999).
- 286 See, e.g., *Farm Bureau Mut. Ins. Co. v. Nikkel*, 596 N.W.2d 915 (Mich. 1999).
- 287 C. Jesse Green, Decisions From the 'New' MSC During 1999, Mich. Laws. Wkly., Dec. 6, 1999, at 1.
- 288 Id. (quoting Justice Young).
- 289 See Joseph L. Sax & Joseph F. DiMento, Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act, 4 Ecology L.Q. 1 (1974).
- 290 See Sierra Club Web Page, Mackinac Chapter 1999-2000 Campaigns, available at <http://www.sierraclub.org/chapters/mi/inside.html> (last visited Feb. 13, 2001).
- 291 See 1998 PEER Survey of Michigan DEQ Employees, available at http://www.peer.org/publications/srvy_mi_deq.html (last visited Feb. 13, 2001).
- 292 Id.

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- 293 By contrast, at least a few DEQ employees had an entirely different attitude, as exemplified by the following comment: “The Department is comprised primarily of field staff who long for a return to the ‘good old days’ of the 1980s when the eco-terrorists ran unchecked using their intimidation and ‘gestapo’-like tactics. The **changes** of the last 4-5 years were long overdue. These ‘malcontents’ need to be weeded out of state government.” Id.
- 294 [K & K Constr. v. Dep’t of Natural Res.](#), 551 N.W.2d 413 (Mich. Ct. App. 1996), rev’d, 575 N.W.2d 531 (Mich. 1998).
- 295 [K & K Constr.](#), 551 N.W.2d at 419.
- 296 Id. at 421.
- 297 [K & K Constr.](#), 575 N.W.2d at 540.
- 298 Nos. 88-11848-CC, 88-11874-CM (Mich. Ct. Cl. Oct 31, 1995).
- 299 Court of Claims Enters \$120.5 Million Judgment Against State in Takings Case, Mich. Env'tl. Compliance Update, Nov. 1995 [hereinafter Court of Claims Judgment].
- 300 [Miller Bros. v. Dep’t of Natural Res.](#), 513 N.W.2d 217 (Mich. Ct. App. 1994).
- 301 Court of Claims Judgment, supra note 299 (explaining that after the court of claims entered judgment against the state but remanded to the trial court to recalculate the award, the state legislature approved a settlement agreement in which the state awarded up to \$89.5 million to the parties) .
- 302 Jeff Alexander, Dunes Deal Won’t Prevent Oil Drilling, Grand Rapids Press, Mar. 10, 1996, available at <http://www.gr-press.com>.
- 303 Hillemonds, Hertel at Loggerheads on Dunes Settlement, 34 Gongwer News Serv. No. 207 (Oct. 26, 1995) (statement by Democratic House Leader Curtis Hertel).
- 304 The business community’s efforts to influence judicial elections in Michigan apparently began in 1996 with the formation of the Alliance for Judicial Accountability by the Michigan Chamber of Commerce, the Michigan State Medical Society, and the Michigan Health and Hospital Association. The alliance announced that it would “research and analyze the judicial records of Supreme Court justices, members of the Court of Appeals, and other judges.” Press Release, Alliance for Judicial Accountability, What Do Michigan Voters Know About the Supreme Court? (Feb. 1, 1996), available at LEXIS, News Database. But this project did not actually blossom until 1998 when it was taken up by Michigan Lawsuit Abuse Watch (M-LAW). The Michigan Chamber of Commerce also helped organize Justice for Michigan Citizens, a political action committee that supported judicial candidates in the 1996 election cycle.
- 305 Press Release, M-LAW, M-LAW President Responds to False Statements by the Michigan Trial Lawyers Association 2 (June 2, 1998) (on file with author) [hereinafter M-LAW Press Release 6/2/98]. The press release stated: “Contrary to the misinformation circulated by the trial lawyers, M-LAW is a Michigan-based and -run non-partisan organization with no ties to Washington, D.C.” Id.

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- 306 Jane Fritsch, Sometimes, Lobbyists Strive To Keep Public in the Dark, N.Y. Times, Mar. 19, 1996, at A1.
- 307 Michigan Lawsuit Abuse Watch Financial Report and Budget, att. to Form 1024, Application for Recognition of Exemption Under Section 501(a) (Dec. 8, 1997) [hereinafter M-LAW Budget]. M-LAW refused to make full disclosure of its funding sources or major supporters, claiming its donors require confidentiality because they fear “hostile action may be taken against them by personal injury lawyers.” M-LAW Press Release 6/2/98, supra note 305, at 2.
- 308 4 Court Justices Described as Biased Against Jobs, Gongwer News Serv., Michigan Rep. No. 100 (May 27, 1998) (stating that a representative of the Michigan Trial Lawyers Association predicted the study “will be used by the Michigan Chamber of Commerce, who he said is the power behind MLAW [sic].”)
- 309 M-LAW Study Evaluates, Ranks Bench Members, Medigram, Aug. 1998, at 2 (indicating which judges ranked as most “favorable to medicine in medical liability cases.”) Medigram is the weekly newsletter of the Michigan State Medical Society.
- 310 Letter from Duane L. Tarnacki, Attorney for M-LAW, Clark Hill P.L.C., to James L. Joseph, Internal Revenue Service 3 (May 27, 1998) (on file with author).
- 311 M-LAW Budget, supra note 307.
- 312 M-LAW Press Release 6/2/98, supra note 305, at 2.
- 313 M-LAW Budget, supra note 307.
- 314 Id.
- 315 Letter from James L. Joseph, Tax Law Specialist, Internal Revenue Service, to Michigan Lawsuit Abuse Watch (Apr. 15, 1998) (on file with author) [[hereinafter IRS Letter to M-LAW 4/15/98] (concluding that the application submitted by M-LAW suggests that it is not a membership organization and that it is more like a lobbying group than a chamber of commerce).
- 316 Memorandum of Conference of the Internal Revenue Service Regarding Meeting with Michigan Lawsuit Abuse Watch (June 4, 1998) (on file with author).
- 317 IRS Letter to M-LAW 4/15/98, supra note 315, at 1.
- 318 Id. at 2.
- 319 Memorandum of Conference of the Internal Revenue Service Regarding Meeting with Michigan Lawsuit Abuse Watch 1 (Aug. 13, 1998) (on file with author).
- 320 William Laimbeer, Jr., Opinion, Citizens Must Do Their Duty, Judge Justices, Detroit News, July 6, 1998, at A7.

- 321 See supra Part II.
- 322 See supra note 34.
- 323 M-LAW, Biographies: Individuals Responsible for the Michigan Judicial Evaluation (undated).
- 324 Letter from R. Marc Nuttle, Sequoyah Information Systems, Ltd., doing business as The Economic Judicial Report, to Bob Jones, President, Michigan Lawsuit Abuse Watch 1 (Nov. 18, 1997) (on file with author) (setting terms of contract to conduct judicial evaluations).
- 325 Id. at 2.
- 326 Id.
- 327 It is perhaps significant that in correspondence with the IRS an M-LAW representative stated that he understood JEI to be a Washington, D.C.-based entity with tax exempt status under [Section 501\(c\)\(4\)](#). Letter from Duane L. Tarnacki, Attorney for M-LAW, Clark Hill P.L.C., to James L. Joseph, Internal Revenue Service 2 (July 13, 1998) (on file with author).
- 328 Michael Barrier, *Lawsuits Gone Wild*, *Nation's Bus.*, Feb. 1998, at 18.
- 329 At the time of the 1998 judicial ratings, JEI's contact number listed in the Michigan report rang to the offices of the Lawler Group, then based in Bethesda, Md., a Washington, D.C. suburb. There was at the time of publication no telephone listing for the Judicial Evaluation Institute for Economic Issues in the Washington, D.C. area.
- 330 See Michigan Judicial Evaluation, supra note 34, at 1.
- 331 Id.
- 332 Id. at 5.
- 333 Id.
- 334 Id. at 6.
- 335 Id. at 6, 14.
- 336 Id.
- 337 [422 N.W.2d 205 \(Mich. 1988\)](#).

338 See Michigan Judicial Evaluation, *supra* note 34, at 14.

339 422 N.W.2d 205 (Mich. 1988).

340 See Michigan Judicial Evaluation, *supra* note 34, at 14.

341 487 N.W.2d 715 (Mich. 1992).

342 See Michigan Judicial Evaluation, *supra* note 34, at 14.

343 550 N.W.2d 772 (Mich. 1996).

344 See Michigan Judicial Evaluation, *supra* note 34, at 14.

345 460 N.W.2d 215 (Mich. 1990).

346 See Michigan Judicial Evaluation, *supra* note 34, at 14.

347 487 N.W.2d 753 (Mich. 1992).

348 See Michigan Judicial Evaluation, *supra* note 34, at 14.

349 545 N.W.2d 657 (Mich. 1996).

350 See Michigan Judicial Evaluation, *supra* note 34, at 14.

351 Press Release, M-LAW, Citizen Group Shines Spotlight on Michigan Court of Appeals (July 8, 1998) (explaining that a high score indicates that a judge's decisions tend to have this result).

352 *Id.*

353 *Id.*

354 National Institute on Money in State Politics at [http:// www.followthemoney.org](http://www.followthemoney.org) (last visited Dec. 15, 2000) (to access the information, enter the database, select Michigan, select "view a specific contributor," and enter "MI Chamber of Commerce PAC" in the search field).

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- ³⁵⁵ Michigan Chamber PAC, Itemized In-Kind Expenditures Schedule 2B-2, filed with Michigan Department of State Bureau of Elections (July 21, 1998, to Oct. 20, 1998), available at http://www.sos.state.mi.us/election/cfr/cfr_onln.html (last visited Feb. 15, 2000).
- ³⁵⁶ National Institute on Money in State Politics, *supra* note 354.
- ³⁵⁷ *Id.* The Michigan Chamber of Commerce contributed almost \$34,000 to Corrigan's campaign and the Detroit Regional Chamber of Commerce gave her an additional \$30,500. Other major PAC contributors to Corrigan's campaign included the Michigan Republican State Committee (\$66,144), Michigan Bankers Association (\$34,000), Michigan Restaurant Association (\$34,000), Associated Builders and Contractors (\$34,000), Posthumus Leadership Fund (\$34,000), Blue Cross Blue Shield (\$33,000), Michigan Health and Hospital Association (\$32,500), and the Builders PAC of Michigan (\$30,000). See *id.*
- ³⁵⁸ *Id.* Top contributors included the Michigan Trial Lawyers Association Justice PAC (\$34,000), Auto Workers MI PAC/UAW (\$34,000), Michigan Education Association PAC (\$10,000), and Citizens for Public Education (\$5,000). *Id.*
- ³⁵⁹ *Id.*
- ³⁶⁰ A poll of Michigan voters, conducted one month before the election, found that the justices' name recognition averaged around 25%. See Greta Guest, Poll Indicates Most Voters Undecided on [State Supreme Court Race](#), *Associated Press*, Oct. 5, 1998, available at 1998 WL 7451958.
- ³⁶¹ John Flesher, *Associated Press*, Oct. 3, 1998, available at 1998 WL 7451488 (untitled).
- ³⁶² M-LAW Budget, *supra* note 307.
- ³⁶³ Loof, *Partisan*, *supra* note 269.
- ³⁶⁴ Kathy Barks Hoffman, Campaigns Gearing Up Another Notch as Election Day Nears, *Associated Press*, Oct. 31, 1998, available at 1998 WL 7461192.
- ³⁶⁵ See Michigan Department of State, Bureau of Elections, at <http://www.sos.state.mi.us/election/elect.html> (last visited Mar. 1, 2001).
- ³⁶⁶ See Charlie Cain, High Court Race Will Be Nasty, Pricey, *Detroit News*, June 23, 2000, at 1, available at LEXIS, News Database.
- ³⁶⁷ See David Shepardson, Stakes Rise in Court Race, *Detroit News*, Oct. 31, 2000, at 1, available at LEXIS, News Database (stating that the Michigan Chamber of Commerce estimated the cost of the race at between \$15 and \$16 million); Dee-Ann Durbin, Court Selects Corrigan as Chief Justice, *S. Bend Trib.*, Jan. 5, 2001, at A2, available at LEXIS, News Database (stating that the two political parties spent \$16 million on the elections for the three open seats on the Michigan Supreme Court).
- ³⁶⁸ See Shepardson, *supra* note 367, at 1.

- ³⁶⁹ See M-LAW Web Site, at <http://www.mlaw.org> (last visited Mar. 1, 2001).
- ³⁷⁰ See Green, Decisions, *supra* note 287, at 1 (referring to the Gurewitz study discussed *supra* notes 281-88 and accompanying text).
- ³⁷¹ See *infra* Part III.D.5.
- ³⁷² [Ohio Const. art. IV, §§ 2, 6.](#)
- ³⁷³ [Ohio Const. art. IV, § 6.](#)
- ³⁷⁴ [Ohio Rev. Code Ann. §2503.03](#) (Anderson 2000).
- ³⁷⁵ [Ohio Const. art. IV, § 6.](#)
- ³⁷⁶ James Bradshaw, Opponents Criticize Incumbents' 'Activism,' Columbus Dispatch, Nov. 1, 1998, at 4C, available at LEXIS, News Database.
- ³⁷⁷ Editorial, For the Supreme Court, Cin. Post, Oct. 12, 1998, available at <http://www.cincypost.com/opinion/1998/edita101298.html> (last visited Dec. 15, 2000).
- ³⁷⁸ National Institute on Money in State Politics, *supra* note 354. In the 1998 elections, reported contributions to judicial candidates, not including independent expenditures on their behalf, were as follows: Chief Justice Thomas Moyer, incumbent (R), \$871,246, defeating G. Gary Tyack (D), \$281,416; Justice Francis Sweeney, incumbent (D), \$530,968, defeating Stephen Powell (R), \$207,990; Justice Paul Pfeifer, incumbent (R), \$568,569, defeating Ron Suster (D), \$271,094. *Id.* The 1996 figures were as follows: Justice Evelyn Stratton, incumbent (R), \$476,703, defeating Peter Sikora (D), \$34,605; Justice Andrew Douglas, incumbent (R), \$441,543, defeating Marianna Bettman (D), \$439,534; Justice Deborah Cook, incumbent, \$12,500, defeating Sara Harper, \$2,550, and Ross Haffey, \$12,595. *Id.*
- ³⁷⁹ *Id.*
- ³⁸⁰ Joe Hallett, Governor's Race Tops Spending Mark, Plain Dealer (Cleveland), Dec, 12, 1998, at 4B, available at LEXIS, News Database.
- ³⁸¹ [Ohio Const. art. I, § 16](#) ("All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."). For example, in 1994, in [Sorell v. Thevenir, 633 N.E.2d 504, 513 \(Ohio 1994\)](#), the court declared another legislative "tort reform" initiative unconstitutional.
- ³⁸² See [Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1076 \(Ohio 1999\)](#). See also John McCarthy, Supreme Court Slams Legislature - Again, Associated Press, Aug. 16, 1999, available at LEXIS, News Database.

383 [Sheward](#), 715 N.E.2d at 1097.

384 [Id.](#) at 1114 (Moyer, C.J., dissenting).

385 Lee Leonard, House Committee Begins Consideration of Product Liability Bill, United Press Int'l, Feb. 24, 1987, available at LEXIS, News Database.

386 According to the alliance web site, the alliance was disbanded in the aftermath of the Ohio Supreme Court's Seward decision. See Ohio Alliance for Civil Justice, at <http://www.alliancecourtwatch.com> (last visited Feb. 15, 2001).

387 Press Release, OCALA, Trial Lawyers Bankroll Supreme Court Majority; Group Concerned that Excessive Contributions Influenced Court Decision (on file with author). See also Press Release, PR Newswire, Trial Lawyers Bankroll Supreme Court Majority (Sept. 23, 1999), available at LEXIS, News Database (describing an analysis of campaign contributions to Justices Pfeifer and Sweeney suggesting that the court's 1999 Sheward decision was the result of trial lawyers' financial contributions); James Bradshaw, Pfeifer, Shuster Square Off for High Court Seat; Pfeifer Must Deal with 'Activist Judge' Label, Columbus Dispatch, Oct. 15, 1998, at 7D, available at LEXIS, News Database (stating that a series of adverse 4-3 **rulings** by the Ohio Supreme Court have given critics cause to allege that Justice Pfeifer favors the trial bar).

388 [600 N.E.2d 1042 \(Ohio 1992\)](#).

389 See [id.](#) at 1047.

390 See [id.](#) at 1062.

391 See Randall Edwards, Lawsuit Challenges New Pollution Law; Critics Say Statute Violates Federal **Rules**, Columbus Dispatch, June 18, 1996, at 2C, available at LEXIS, News Database.

392 See [id.](#)

393 See [Rivers Unlimited, Inc. v. Schregardus](#), 685 N.E.2d 603, 610-11 (Ohio Com.Pl. 1997).

394 [Id.](#) at 603.

395 [Id.](#) at 613. See also Randall Edwards, EPA Law Found in Violation: Public Has Right to Speak on Water Permits, Says Judge, Columbus Dispatch, Mar. 4, 1997, at 1A, available at LEXIS, News Database.

396 [Rivers Unlimited](#), 685 N.E.2d at 613.

397 Ohio Chamber of Commerce, *supra* note 12.

398 Id at 1.

399 Id. at 2.

400 Id.

401 Id.

402 Id.

403 Id. Justices were not scored for a case if they did not participate in the decision, or if they concurred in part and dissented in part. Scores were not weighted in any way to reflect authorship of opinions. Id.

404 Id.

405 Id.

406 Id.

407 Id.

408 Id.

409 Id. at 3.

410 Id. at 7-9.

411 [559 N.E.2d 1335 \(Ohio 1990\)](#).

412 Ohio Chamber of Commerce, *supra* note 12, at 7.

413 [567 N.E.2d 993 \(Ohio 1991\)](#).

414 Ohio Chamber of Commerce, *supra* note 12, at 7.

415 [597 N.E.2d 487 \(Ohio 1992\)](#).

416 William Jackson, State Can Require Firms to Map Hazards, Court Says, Bus. First-Columbus, Sept. 28, 1992, at A4.

417 Ohio Chamber of Commerce, *supra* note 12.

418 [597 N.E.2d 1096 \(Ohio 1992\)](#).

419 Ohio Chamber of Commerce, *supra* note 12, at 8.

420 [600 N.E.2d 1042 \(Ohio 1992\)](#).

421 Ohio Chamber of Commerce, *supra* note 12, at 8.

422 [617 N.E.2d 1089 \(Ohio 1993\)](#).

423 Ohio Chamber of Commerce, *supra* note 12, at 8.

424 [627 N.E.2d 538 \(Ohio 1994\)](#).

425 Ohio Chamber of Commerce, *supra* note 12, at 8.

426 [658 N.E.2d 783 \(Ohio 1996\)](#).

427 Ohio Chamber of Commerce, *supra* note 12, at 8.

428 [670 N.E.2d 985 \(Ohio 1996\)](#).

429 Ohio Chamber of Commerce, *supra* note 12, at 9.

430 [680 N.E.2d 1239 \(Ohio 1997\)](#).

431 Ohio Chamber of Commerce, *supra* note 12, at 9.

432 [717 N.E.2d 1091 \(Ohio 1999\)](#).

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- 433 Ohio Chamber of Commerce, *supra* note 12, at 9.
- 434 *Id.* at 3.
- 435 James Bradshaw, Justices Ranked by Pro-Business Votes; Ohio Chamber of Commerce Scale, *Columbus Dispatch*, Nov. 26, 1997, at 2C, available at LEXIS, News Database.
- 436 See Meg Fletcher, Business Hopes to Oust Judge in Ohio Election, *Bus. Ins.*, Oct. 26, 1998, at 1, available at LEXIS, News Database.
- 437 See Bradshaw, Pfeifer, *Suster Square Off*, *supra* note 387, at 7D.
- 438 See T.C. Brown, 'Activism' the Issue for High-Court Foes, *Plain Dealer (Cleveland)*, Oct. 21, 1998, at 4B, available at LEXIS, News Database.
- 439 See Tom Ford, GOP May Target Judicial Races After Latest High Court **Ruling**, *Crain's Cleveland Bus.*, Aug. 23, 1999, at 5, available at LEXIS, News Database.
- 440 *Id.*
- 441 Ohio Chamber of Commerce, *supra* note 12, at 9.
- 442 See Editorial, A Landslide, Thanks to the Chamber of Commerce, *Plain Dealer (Cleveland)*, Nov. 9, 2000, at 13B, available at LEXIS, News Database.
- 443 See News Release, Ohio Chamber of Commerce, 1997 P.a.C.E. Ohio Supreme Court Evaluation (Dec. 1, 1997), available at http://www.ohiochamber.com/political/evaluation_release.html.
- 444 See Ohio Chamber of Commerce, *supra* note 12, at 1.
- 445 *Id.*
- 446 See T.C. Brown, Resnick Overcomes Attacks, Wins High Court Race, *Plain Dealer (Cleveland)*, Nov. 8, 2000, at 1A, available at LEXIS, News Database.
- 447 Michael Culp, *Gannett News Serv.*, Nov. 8, 2000, available at LEXIS, News Database (untitled).
- 448 James Bradshaw, High Court Unchanged Despite Negative TV Ads, *Columbus Dispatch*, Nov. 8, 2000, at 1A, available at LEXIS, News Database.

⁴⁴⁹ See Brown, supra note 446, at 1A.

⁴⁵⁰ See Paul Souhrada, Resnick Revels in Getting the Last Laugh, Columbus Dispatch, Nov. 9, 2000, at 1D, available at LEXIS, News Database.

⁴⁵¹ See Richard L. Revesz, [Environmental Regulation, Ideology, and the D.C. Circuit](#), 83 Va. L. Rev. 1717 (1997) (presenting a sophisticated statistical analysis of how ideology has influenced decision-making in environmental cases before the U.S. Court of Appeals for the District of Columbia Circuit).