A PAST AND FUTURE OF JUDICIAL ELECTIONS: THE CASE OF MONTANA

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I. INTRODUCTION

Judicial elections are approaching their second century in the United States, and they are not going away anytime soon. After the rise of Jacksonian Democracy in the early nineteenth century, and popular calls for increased judicial independence from the political branches, most states hard-wired the election of judges into state constitutions.[1] Despite reform efforts that emerged in the twentieth century and continue today, states that hold judicial elections reliably reject alternative selection methods. Nearly ninety percent of state judges in the United States are subject to election.[2]

Recent deregulation of campaigns and elections through successful constitutional challenges now has reached judicial campaigns and elections. Many of the legal and ethical constraints on judicial campaign speech and finance, once a realm of electoral exceptionalism respecting the distinct office

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1. For a recent account of this history emphasizing the role of post-Jacksonian financial crises, see Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).

2. *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077 (2007). Schotland reports that "[o]f all state judges (appellate and general-jurisdiction trial courts), 89% . . . face the voters in some type of election. Facing contestable elections are 60% . . . of our appellate judges and 80% . . . of our trial judges; facing only retention elections are another 26% of appellate and 9% of trial judges." *Id.* at 1105.

of a judge, fell to these challenges alongside their political-campaign analogues. The remaining exceptions, which protect a core of judicial impartiality from due process violations, are inconsequential to most modern judicial campaigns. These campaigns quickly learned the political tactics of the *Citizens United* era, prompting a flood of attack ads financed by independent expenditures, some of which are not fully disclosed.[3]

Meanwhile, state courts in general, and state supreme courts in particular, remain important players in increasingly polarized debates concerning state law and politics. One-party state legislatures and executive branches, encouraged by historically large legislative margins,[4] test state courts with contentious laws and constitutional questions. In states where a balance of power once encouraged political compromise, the losing party now may resort to litigation. The same moneyed interests that help set the legislative agenda also loom over state courts. Those judges and justices must decide the high-stakes and politically charged cases that follow, knowing their decisions may set the course for their next election campaigns. A moderate judge who does not line up neatly with moneyed interests on one side or the other risks electoral defeat. Case by case, issue by issue, term by term, the polarization of the political branches runs to the courts.

This is the new normal in judicial elections. It follows the new normal in political elections of the *Citizens United* era. Judicial candidates seeking to interpret the laws are nearly as free to speak on legal and political issues as are the legislative candidates seeking to write the laws. Even in traditionally non-

3. *See generally* Citizens United v. F.E.C., 558 U.S. 310 (2010) (holding that the federal government may not suppress political speech by banning corporate expenditures for electioneering, but that it may require donors both to identify themselves in materials that they underwrite and to disclose campaign-related expenditures in excess of established thresholds); *see also* SCOTT GREYTAK ET AL., BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013–2014 at 1 (2015) ("Over the last decade and a half, state Supreme Court elections have been transformed into politicized and costly contests, dominated by special interests seeking to shape courts to their liking.").

4. *See* Karl Kurtz, *These Unified States*, STATE LEGISLATURES MAGAZINE (May 2013) ("For the first time in more than 50 years, one party controls both chambers of the legislature and the governor's' office in 37 states—Republicans in 23 states, Democrats in 14.").

partisan judicial elections, political parties may be as free to endorse judicial candidates as they are to endorse political candidates. Campaign-contribution laws limit donations to candidates' campaigns, judicial or political, but face renewed challenges. Corporations and unions are as free to spend unlimited amounts of shareholder and member funds on independent expenditures in judicial campaigns, just as they may in political campaigns. Contributors are free to choose their preferred levels of disclosure by selecting among candidate campaigns, super PACs, or less transparent vehicles. Careful contributors may enjoy significant influence in candidate campaigns—judicial or political—without triggering either a disqualifying conflict or even the obligation to identify themselves.

Montana's 2014 election for one of two contested seats on the state supreme court exemplifies this new normal. In 2011, the Montana Supreme Court took a lonely stand against this state of affairs by attempting to distinguish Montana's campaigns, including judicial campaigns, from the presidential campaign addressed by the Supreme Court's decision in *Citizens United*. But that principled stand was short-lived, drawing a quick and brief rebuke from the Supreme Court. Despite state concerns about financial and outside influence on judicial campaigns that date back a century and a half, and their continued relevance to judicial politics today, the Supreme Court so far has refused to grapple with the implications of *Citizens United* for elected judges.

This article searches for lessons from Montana's experience for the future of American judicial elections. Part II considers the origin of judicial elections and history of reforms in Montana, which is marked both by substantial worries about outside political intervention in state courts and by several innovative responses to it. Part III reviews the practice established by Montana's reformed model of judicial selection over the past four decades. Part IV examines the Montana Supreme Court's engagement with *Citizens United*, followed by a close analysis of an election held in its aftermath: the hard-fought 2014 campaign between incumbent Justice Mike Wheat and challenger Lawrence VanDyke. Part V suggests some preliminary conclusions about the meaning of *Citizens United*

and other recent legal developments for judicial elections in the states, and how states might respond.

II. A HISTORY OF MONTANA'S JUDICIAL ELECTIONS AND JUDICIAL-ELECTION REFORMS

Judicial selection in Montana is both distinct from and representative of its practice across the states. Montana's 150-year-old judiciary began in territorial days, when outside judges appointed in Washington, D.C., produced resentment among Montanans even as these territorial judges helped the new territory develop toward statehood. The state's first constitution responded to this popular resentment by providing for judicial elections. In the Progressive Era, the state adopted typical campaign-finance and nonpartisan election reforms, but only after exceptional agonies of corporate corruption. By the second half of the twentieth century, Montana had joined many other states in reconsidering judicial elections, though it did so through the extraordinary means of popular deliberation through a constitutional convention. Montana, in short, is a microcosm of judicial election reform in the American states.

A. The Territorial Origins of Montana's Elected Judiciary

Twenty-five years of territorial status forged Montana's attitude toward its courts. In the gold rush that opened Montana's territorial history, customary miners' courts and the storied vigilantes dispensed civil and criminal justice.[5] Territorial justices, appointed by the President, "owed allegiance to the federal government and to political parties, yet at the same

5. For a sympathetic overview of customary legal institutions in the American West from a public-choice perspective, *see* Andrew P. Morriss, *Miners, Vigilantes, & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 LAND & WATER L. REV. 581 (1998). *See generally* FREDERICK ALLEN, A DECENT ORDERLY LYNCHING: THE MONTANA VIGILANTES (2004). For a colorful contemporary account of the vigilantes, see THOMAS J. DIMSDALE, THE VIGILANTES OF MONTANA: POPULAR JUSTICE IN THE ROCKY MOUNTAINS (1953). Even today, the Montana Highway Patrol patch features the vigilantes' mysterious warning "3-7-77," in "a tribute to the Vigilantes, the first law enforcement group in the Montana Territory." Montana Department of Justice, *History of the Montana Highway Patrol*, https://dojmt.gov/highwaypatrol/history-of-the-montana-highway-patrol/ (2015) (indicating that the numbers were added to the patch in 1956).

time were not insensitive to pressures within the territory itself."[6] These tensions played out when Territorial Secretary Thomas Meagher, a Union Democrat serving as acting governor, pushed for statehood in 1866 with a constitutional convention and two extraordinary legislative sessions. When a two-member majority of the territorial court, both Republicans, declared the acts of the extraordinary sessions null and void, the state legislature redistricted those justices to the wilderness. Congress responded with a rare nullification of all laws enacted in the extraordinary sessions. To make clear its "irritation toward the Democratic populace of this ill-mannered western province," the Republican Congress also revoked the legislature's judicial districting power and raised the territorial judges' salaries by $1000.[7]

Once the territorial government settled in, "Montana gained recognition as having one of the most efficient court systems among western territories."[8] Yet territorial justices were "[h]ampered . . . by an unfamiliarity with mining law, and by resentment stemming from local political cleavages and the dislike of 'foreign' officials."[9] Despite the quality of some territorial justices, residents chafed at their lack of democratic legitimacy.[10] Montanans complained about "'breaking in' pilgrim Judges from Eastern States who have known nothing of our people, laws and customs."[11] On the eve of the second Montana constitutional convention in 1884, one newspaper editorial captured the popular complaint that

> [t]he President has nominated another carpetbagger for Associate Justice of the Supreme Court of Montana. Seventy-five thousand people in the Territory to make laws

6. CLARK C. SPENCE, TERRITORIAL POLITICS AND GOVERNMENT IN MONTANA, 1864–89 at 212 (1975).

7. *Id.* at 43–45.

8. MICHAEL P. MALONE, RICHARD B. ROEDER & WILLIAM L. LANG, MONTANA: A HISTORY OF TWO CENTURIES 110 (1991).

9. SPENCE, *supra* note 6, at 231.

10. Andrew P. Morriss, *Opting for Change or Continuity? Thinking About 'Reforming' the Judicial Article of Montana's Constitution*, 72 MONT. L. REV. 27, 39–40 (2011).

11. SPENCE, *supra* note 6, at 218 (quotations omitted).

> for themselves, and a Hoosier sent out from Indiana to tell us what we have done. How long, oh Lord; how long![12]

The proposed 1884 Constitution, the unsuccessful predecessor of the 1889 Constitution that secured statehood, reflected this suspicion of outside influence. In its memorial to Congress, the convention sought statehood to redress "the policy which has so long prevailed of sending strangers to rule over us and fill our offices."[13] The convention's address to voters detailed the grievances. Notably, the address devoted more lines to the Judicial Department than it devoted to the legislative and executive branches combined. The proposed judicial system responded to popular distrust of outsider territorial justices:

> The present system is manifestly wrong again; by it the people have no voice in selecting the judges. They are sent to us from the far off East, probably in deference to the traditional idea that it was from thence all of the "wise men" came. . . . The character of our litigation is such that, however learned in the law our eastern judge may be, he will find himself much embarrassed in his new field.[14]

Under the proposed state constitution, justices would be "elected *by the people*" for six-year terms, and would be "required to have resided in the State or Territory at least two years prior to their election."[15]

When Montana finally attained statehood in 1889, the convention's address to voters[16] was shorter, as the Constitution proposed was similar in all its fundamental provisions to the Constitution of 1884, which had been ratified by a large majority.[17] Still, the judicial provisions retained primary importance as the only article specifically recommended in the address: "yet we think in this the judiciary system is better suited to the wants and interests of our people."[18] The 1889 Constitution contained several stylistic and procedural changes,

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12. MALONE, ROEDER & LANG, *supra* note 8, at 111.

13. MONT. CONST. of 1884 (proposed), Memorial.

14. *Id.*, Address 3.

15. *Id.* (emphasis in original).

16. *See* text accompanying note 14, *supra*, for an excerpt from the text of the address accompanying the judicial article of the proposed 1884 constitution.

17. MONT. CONST. of 1889, art. 75.

18. *Id.*

but retained the elected terms and residency requirements for justices.[19]

B. The Copper Kings and Their Influence on Montana's Judicial Elections Today

With statehood, Montana's judiciary transitioned from federal appointees unfamiliar with mining law to elected officials all too familiar with the corporate overreach and corruption that came to be known as the War of the Copper Kings. The mining industry matured with outside investment of capital from the so-called Copper Kings: the 1884 and 1889 Constitutional Convention President (and disgraced United States Senator) William A. Clark; the head of the giant Anaconda Copper Mining Company Marcus Daly; and the aggressive young industrialist F. Augustus Heinze.

These larger-than-life personalities engaged in a decades-long struggle for domination of Butte's "richest hill on earth,"[20] and incidental to that struggle, for control of the state's government—including its courts.[21] The Montana Supreme Court once recounted the broad history of "[t]hose tumultuous years . . . marked by rough contests for political and economic domination primarily in the mining center of Butte, between mining and industrial enterprises controlled by foreign trusts or corporations."[22] Some of those rough contests played out before

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19. *Id.*, art. VIII, §§ 6–7, 10.

20. Larry Howell, *"Purely the Creature of the Inventive Genius of the Court":* State ex rel. Whiteside *and the Creation and Evolution of the Montana Supreme Court's Unique and Controversial Writ of Supervisory Control*, 69 MONT. L. REV. 1, 5 (2008) (explaining that the War of the Copper Kings occurred "at a time when the spread of electricity and telephones made copper one of the world's most important natural resources").

21. For the classic account, see C. B. GLASSCOCK, THE WAR OF THE COPPER KINGS (1935). A detailed contemporary telling is MICHAEL P. MALONE, THE BATTLE FOR BUTTE: MINING & POLITICS ON THE NORTHERN FRONTIER, 1864–1906 (1995). The canonical story is summarized in MALONE, ROEDER & LANG, *supra* note 8, at 201–31. Scholars have recently reconsidered the consequences of the era for current legal questions. *See* Howell, *supra* note 20; Larry Howell, *Once Upon a Time in the West,* Citizens United*,* Caperton*, and the War of the Copper Kings*, 73 MONT. L. REV. 25 (2012); Jeff Wiltse, *The Origins of Montana's Corrupt Practices Act: A More Complete History*, 73 MONT. L. REV. 299 (2012).

22. *W. Tradition P'ship, Inc. v. Attorney General* 271 P.3d 1, 8 (2011), *rev'd sub nom. Am. Tradition P'ship, Inc. v. Bullock*, ___ U.S. ___, 132 S. Ct. 2490 (2012).

elected state judges, and provide a backdrop for judicial elections in Montana today.

Clark and Daly feuded mainly in the political arena. In the 1894 "Capital Fight," Clark's Helena bested Daly's Anaconda to win the designation of state capitol.[23] Clark won his 1899 United States Senate campaign, but resigned shortly after taking office when a Senate committee found evidence that he had bribed state legislators on a massive scale.[24] Montana Attorney General C. B. Nolan then explained that the local grand jury would not indict Clark because "the people of said county felt that they were discharging an obligation due to the said Clark on account of the assistance rendered to the said county of Lewis and Clarke in the selection of the city of Helena as the state capital."[25]

The corruption didn't stop there: Once the court accepted the case, Clark supporters approached all three justices with overtures ranging from ex parte conversations to an offer of a $100,000 bribe.[26] The justices "did not pursue any official legal recourse against the persons attempting to influence them, deciding that exposing the effort would reflect poorly on the reputation of the Court."[27] They only reluctantly testified to the attempted bribery under subpoena from the Senate Committee on Privileges and Elections in its investigation of Clark's election, providing important evidence in support of the Committee's recommendation not to seat Senator Clark.[28]

Heinze waged a more focused battle, largely in the courts, to extend his mining holdings in Butte and defend them against industry consolidation by the Amalgamated Copper Company,

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23. MALONE, ROEDER & LANG, *supra* note 8, at 213–14.

24. *Id*. at 218–21. The bribery came before the Montana Supreme Court in disbarment proceedings against Clark's lawyer and bribery bagman John B. Wellcome, during which the Court initially dismissed the petition because the crimes charged against Wellcome had not been prosecuted. *See* In re Wellcome, 58 P. 45, 45, 47 (1899). Election of United States Senators by popular vote did not become law until 1913. *See* U.S. CONST. amend. XVII (providing that "[t]he Senate of the United States shall be composed of two Senators from each State, elected by the people thereof").

25. *Wellcome*, 58 P. at 49.

26. Howell, *supra* note 20, at 41.

27. *Id.* at 40.

28. *Id.* at 42–44.

which had purchased Daly's Anaconda interests in 1889.[29] Heinze met mixed results as a defendant in federal court,[30] and through a series of corporate maneuverings turned to state court,[31] where he could more easily influence the judges. In 1900, with his support for the re-election of William Clancy and the election of Edward Harney for the Second Judicial District Court, the state trial court with jurisdiction over Butte, Heinze did just that.[32] For their four-year terms, "[w]ith his allies sitting on the local courts, Heinze could easily drive the titans of Standard Oil to absurd lengths" of vexatious litigation that kept Amalgamated—a holding company formed by Standard Oil officers—at bay while Heinze, sometimes literally, mined ore out from under the company's feet.[33] Indeed, "in a burlesque of judicial dignity, William Clancy found in Heinze's favor with monotonous regularity."[34]

After years of delaying cases to the strategic advantage of Heinze, Judge Clancy dealt two devastating blows to Amalgamated on October 22, 1903: first, awarding ownership of the strategically crucial Minnie Healy mine from Amalgamated to Heinze; and second, enjoining the Amalgamated from holding its Montana subsidiaries.[35] Amalgamated responded in kind, shutting down its Montana operations and throwing more than 15,000 employees out of work.[36] Governor Joseph Toole, elected in 1900 with the support of Clark and Heinze, eventually capitulated to Amalgamated's demand. He called a special

29. MALONE, supra note 21, at 140, 142 (1995) (explaining that even against the litigious standards of early American mining, "[w]hat happened at Butte . . . seemed to be in a class by itself," a "carnival of litigation" costing thousands of jobs and tens of millions of dollars at the turn of the twentieth century, in large part because Heinze, who earned a reputation as a "court-house miner," employed a legal force of thirty-seven attorneys).

30. *See, e.g.*, Morse v. Montana Ore-Purchasing Co., 105 F. 337, 348 (D. Mont. 1900) ("[U]pon the ground that there was undue influence exerted as to the jury by the objectionable publications [by the anti-Amalgamated Helena press], the court will grant a new trial.").

31. MALONE, *supra* note 21, at 142–43.

32. Howell, *supra* note 20, at 34–41.

33. MALONE, ROEDER & LANG, *supra* note 8, at 226.

34. K. ROSS TOOLE, MONTANA: AN UNCOMMON LAND 199 (1959).

35. MALONE, *supra* note 21, at 173 (reporting that Judge Clancy then announced he would "break away to the woods tomorrow" for hunting).

36. *Id.* at 172–73.

session to enact an unprecedented "Fair Trials" law allowing the peremptory substitution of a district judge.[37]

Heinze turned his attention to the Montana Supreme Court in 1904, reportedly offering Congressman Joseph Dixon a bribe to support an opponent to Chief Justice Theodore Brantly.[38] Chief Justice Brantly was then showing "unimpeachable integrity during . . . corrupt times" as he completed his first term, and would go on to become Montana's longest-serving Chief Justice.[39] Thus, Brantly was re-elected and Heinze's Judges Clancy and Harney lost. Heinze "lost the war when he lost control of the courts," and sold out to Amalgamated in 1906.[40]

Progressive opposition to the Company solidified with the consolidation of economic power in the Amalgamated, eventually completed by its purchase of Clark's mining interests in 1910. Sweeping political reforms included a constitutional amendment providing for initiative and referendum in 1906 and a series of electoral reforms in 1912 including a Corrupt Practices Act.[41] During the politically tumultuous years in between, the Montana legislature attempted to reform judicial elections by providing for non-partisan nominations. Previously judges ran for office like other elected officials, through nominations by political parties.[42] In 1909 the legislature enacted a short law that limited judicial candidates to nominations by citizen petition to the exclusion of nominations by party convention or primary.[43] Chief Justice Brantly won his

37. *Id.* at 177–79; *see generally* W. William Leaphart, *First Right of Recusal*, 72 MONT. L. REV. 287, 287–89 (2011). A one-substitution variation of the law, still called the "Clancy Law," remains in effect, providing that "[e]ach adverse party is entitled to one substitution of a district judge." MONT. CODE ANN. § 3-1-804(1) (2015).

38. MALONE, ROEDER & LANG, *supra* note, 8 at 229.

39. Howell, *supra* note 20, at 16 n.104.

40. MALONE, ROEDER & LANG, *supra* note 8, at 229.

41. *See* Wiltse, *supra* note 21.

42. *See* 1895 Mont. Pol. Code §§ 1310–1320 (addressing methods of nomination, certification of nominees, and related subjects).

43. *See* An Act to Provide for Non-Partisan Nominations for Judicial Offices, 1909 MONT. LAWS 160 ch. 113 11th Leg. Assembly (Mont. 1909); *see also* Montana Judicial Branch, *Brief History of the Montana Judicial Branch*, http://courts.mt.gov/supreme/history (characterizing the law as "a brief and largely forgotten experiment in nonpartisan judicial elections") (accessed August 18, 2015; copy on file with Journal of Appellate Practice and Process).

second reelection in the first non-partisan election held in 1910, though only by winning a plurality of 12,493 votes in a four-candidate race that drew a total of 31,960—a ballot falloff of more than half from the 65,774 votes cast for the congressional seat.[44]

In 1911, a Republican candidate for Butte police judge challenged the non-partisan election reform, and the state supreme court (all Republican justices) voted two-to-one to invalidate the law due to constitutional defects in the law's title and transition process.[45] In 1935, at the height of the New Deal and the Democratic Party's unprecedented dominance over state politics,[46] including a sweep of the supreme court,[47] the legislature brought non-partisan judicial elections back for good with a more comprehensive reform.[48]

The War of the Copper Kings left lasting scars on the integrity of state government in Montana, including its courts. Shortly after it ended, President Roosevelt's Solicitor General worried about bringing the so-called smoke-wars litigation to end the deadly pollution of forest and farmlands by Amalgamated's smelter, noting that "[t]he suit will be filed in a territory which has heretofore been the battleground between the Amalgamated and Heinze interests . . . where open confessions

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44. ELLIS WALDRON, AN ATLAS OF MONTANA POLITICS SINCE 1864 at 130, 134 (1958). When he ran as a Republican in 1904, Brantly alone garnered 30,956 votes in a race with little ballot falloff, perhaps due to the party labels. *Id.* at 108, 113 (reporting 65,765 total votes for governor and 63,026 total votes for chief justice). "The spectacular drop of voter participation in the one-time nonpartisan election of 1910 and the general decline of voter participation in nonpartisan elections after 1932 suggest that party labels were important for many voters." ELLIS WALDRON & PAUL B. WILSON, ATLAS OF MONTANA ELECTIONS: 1889–1976 at 289 (1978).

45. State ex rel. Holliday v. O'Leary, 115 P. 204 (1911).

46. *See* MALONE, ROEDER & LANG, *supra* note 8, at 303.

47. WALDRON, *supra* note 44, at 229, 251, 261 (explaining that all three justices were elected as Republicans in 1928, that two associate justices were elected as Democrats in 1932, and that the chief justice and an associate justice were elected as Democrats in 1934). In an example of the effect of partisanship during this period, Associate Justice Albert H. Angstman, an incumbent elected as a Republican in 1928, lost to Democrat C. F. Morris in 1934, and then won over incumbent John A. Matthews (who was elected and reelected as a Democrat in 1924 and 1930) in the 1936 nonpartisan election. *See id.* at 208, 237, 261, 272 (discussing the elections of 1924, 1930, 1934, and 1936).

48. 1935 MONT. LAWS 389, ch. 182 (Mont. 24th Leg. Assembly, 1935). The Legislature had by then expanded the Supreme Court from three to five seats. *See* 1919 MONT. LAWS 86, ch. 31.

of sales of political and even judicial influence were lightly looked upon."[49] A mining trade publication observed at the time that "[t]he judiciary of a State has been debauched, its politics mired, its people obsessed, while two parties of mine owners have twisted our awkward mining laws to the acquirement of territory and the destruction of property."[50] Going forward, Amalgamated's successor the Anaconda Company "dominated Montana after 1906 like no other single company dominated any other state, with the possible exception of the tiny Dupont satrapy of Delaware."[51] This corporate domination lasted decades, until a mix of political and social changes in the 1960s brought calls for reform, and eventually a new state constitution.

C. A New State Constitution

Reapportionment of the state legislature in 1965, ordered in the wake of the one-person one-vote revolution,[52] accelerated the declining political influence of the Anaconda Company and its antagonists in the mining unions.[53] In 1967 the new legislature commissioned a report "to determine if [the 1889 Constitution] is adequately serving the current needs of the people."[54] The resulting Legislative Council Report concluded in 1968 that just forty-eight percent of the sections in the 1889 Constitution were adequate in that they did not "present a major obstacle to effective government."[55] The Montana Supreme Court itself may have hastened constitutional reform. In a series of decisions leading up to ratification of the 1972 Constitution, the court voided several attempts to revise some of the more

49. DONALD MACMILLAN, SMOKE WARS: ANACONDA, COPPER, MONTANA AIR POLLUTION, AND THE COURTS, 1890–1920 at 173 (2000).

50. *Id.* (quoting *The Amalgamated and Mr. Heinze*, Mining and Scientific Press 92 (Feb. 17, 1909)).

51. MALONE, *supra* note 21, at 210.

52. *See Herweg v. Thirty-Ninth Leg. Assembly*, 246 F. Supp. 454 (1965).

53. *See* MALONE, ROEDER & LANG, *supra* n. 8, at 393–94.

54. Mont. H. Rep. No. 17 (1967); Mont. S. Rep. No. 22 (1967).

55. Montana Constitutional Convention Commission, *Report No. 6: Legislative Council Report on the Montana Constitution* 1 (1971) [hereinafter *Legislative Council Report*].

inflexible provisions of the 1889 Constitution.[56] Professor Ellis Waldron concluded at this time that the Montana Supreme Court had been "notably 'activist' in its willingness to become involved in the processes of constitutional revision, and notably 'conservative' in its view of the power of the people and their constituted representatives to change basic constitutional rules."[57]

1. A Call for a New Constitution

The judiciary, including judicial selection, emerged as a central concern of constitutional reformers. In a 1967 "Blueprint for Modernization," Professors David Mason and William Crowley proposed a comprehensive revision of the state's judicial system, criticizing the 1889 judicial article as "designed for a horse and buggy society . . . cumbersome, inefficient and expensive."[58] The Blueprint's primary focus was judicial administration and organization, particularly of the inferior courts. Yet it included an option to enact alternatives to judicial elections, "[i]f the legislature should see fit at some time in the future to adopt the Missouri Plan [of merit selection] or some variant thereof."[59] The Legislative Council stopped short of criticizing judicial elections, but noted that the method of judicial selection presented "a basic question," and that the Missouri Plan had been recommended by the American Judicature Society, the American Bar Association, and the National Municipal League.[60]

The Council also indicated that the practice of judicial elections in Montana resembled the policy of the Missouri Plan: "many judges are appointed initially and subsequent elections are essentially on the question of whether the judge should be retained," and "appointments to fill vacancies are not usually

56. Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 MONT. L. REV. 325, 335–36 (2010).

57. Ellis Waldron, *The Role of the Montana Supreme Court in Constitutional Revision*, 35 MONT. L. REV. 227, 229 (1974).

58. David R. Mason & William F. Crowley, *Montana's Judicial System—A Blueprint for Modernization*, 29 MONT. L. REV. 1 (1967).

59. *Id.* at 11.

60. *Legislative Council Report*, *supra* note 55, at 39.

made without consultation with informed persons."[61] This was, however, consistently true only for district court judges, and was less often the case for supreme court justices. Indeed, from the adoption of the 1889 Constitution to its replacement in 1972, sixty-four of sixty-eight elections for supreme court justice were contested.[62] These elections often were competitive. The average vote total for winning a supreme court justice was fifty-two percent during the period of partisan judicial elections, and sixty-two percent during the period of nonpartisan judicial elections.[63] Twenty incumbent justices lost reelection bids.[64] Before 1972, one-third of supreme court justices were initially appointed, but only one-third of those appointees went on to be elected for a full term.[65] Judicial elections played a more significant role in the composition of the supreme court than the Council suggested.

In a 1970 referendum, Montana voters called a Constitutional Convention.[66] As the Convention approached, the Legislative Council's 1968 report was supplemented by a 1969 Constitution Revision Commission report, and by in-depth staff reports prepared by a legislatively authorized Constitutional Convention Commission.[67] A subcommittee of the Revision Commission noted five failed attempts from 1945 to 1967 to ballot constitutional amendments adopting the Missouri Plan in Montana.[68] The subcommittee, in consultation with a Judicial Reform Committee appointed by the Montana Bar Association, also largely endorsed the Mason-Crowley Blueprint, adding that

61. *Id.*

62. WALDRON & WILSON, *supra* note 44, at 289–304.

63. JAMES J. LOPACH, ET AL., WE THE PEOPLE OF MONTANA: WORKINGS OF A POPULAR GOVERNMENT 159 (1983) (counting judicial elections from 1889 to 1977).

64. *Id.* at 158 (counting judicial elections from 1889 to 1977).

65. *Id.* at 290–92; *see also id.* at 157 (noting that "[o]nly seven of fifteen appointed justices seeking an elective term were successful between 1889 and 1977").

66. LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 9 (2001).

67. *Id.* at 8–9 (also indicating that the Commission included representatives appointed by the legislative, executive, and judicial branches).

68. Montana Constitutional Convention Commission, *Report No. 7: Constitutional Provisions Proposed by Constitution Revision Subcommittees* 11 (1972).

"the constitution should permit the legislature to adopt a merit system of selection, and not require election of judges."[69]

When the Constitutional Convention delegates met in early 1972, they had the benefit of a detailed report on the Montana courts and state judiciaries in general.[70] The report explained that judicial elections arose from a combination of concerns about checking judicial review, the common-law authority of judges to make interstitial law, and populist critiques of lawyers as a class.[71] It noted the sweep of judicial elections across most states in latter half of the nineteenth century, many states' switch to nonpartisan elections in reaction to machine politics in the early twentieth century, and the advent of merit selection under the Missouri Plan in the latter half of the twentieth century.[72] Like the earlier Council Report, the Convention Commission Report misleadingly repeated that in practice, "the original selection of most of Montana's appellate and trial court judges is not by the people but by the governor."[73] By 1972, four of the five supreme court justices had been appointed before being elected, though this was an anomaly; at the time those four justices represented more than half of the seven appointees elected since statehood.[74]

The report explained that "[t]he major criticism of the elective system of judicial selection, be it partisan or non-partisan, is that voter knowledge of candidates and their qualifications is insufficient to form a basis for a rational choice."[75] In Montana, where non-partisan elections lack the intermediation of party nomination, "candidates who would never be nominated by a party could be elected to political office by such irrelevant factors as a large campaign fund, a

69. *Id.* at 16.

70. Sandra R. Muckelston & Montana Constitutional Convention Commission, *Report No. 14: The Judiciary* (1972) (including appendices of model judicial articles from the American Bar Association, National Municipal League, and other reform groups, and a description of the Missouri Plan).

71. *Id.* at 133.

72. *Id.* at 134–35 (also explaining that at the time of the Convention, seventeen states selected judges by partisan elections, fourteen states by nonpartisan elections, fourteen states by appointment, and nine states by merit selection).

73. *Id.* at 136.

74. *See supra* note 63 and accompanying text.

75. Muckelston, et al., *supra* note 70, at 138.

pleasing television image, or a preferential place on the ballot."[76] Non-partisan elections, the report found, also may aggravate the campaign finance problems associated with electing judges. Without a party's financial base, a judicial candidate must "use his own resources or depend upon contributions from 'friends,' which may affect his impartiality just as much as those judges who receive financial support from party coffers."[77] One Montana justice estimated that he spent nine months of an election year campaigning for office.[78] Yet without party labels, much of the campaigning may have been futile due to ballot roll-off in relatively low-information judicial races. "Prior to the adoption of the non-partisan ballot the Chief Justice race in various years polled 91 to 94 percent of the votes cast for the governor; this decreased to 77 [percent] seventeen years after initiation of the plan."[79]

These concerns led to legislative consideration of a merit plan for judicial selection in Montana at least five times between 1945 and 1969.[80] One of the more heavily debated bills was proposed in 1957, after "the Montana Supreme Court had amassed a three-year backlog of cases caused, in part, by justices' campaigning for re-election in 1956," and "some representatives felt a solution to the court's backlog was elimination of the election of judges."[81] The nominating commission contemplated by the 1957 proposal consisted of five district judges from different regions of the state, the president of the Montana Bar Association, and three gubernatorial appointees confirmed by the senate: a farmer or rancher, a labor union member, and a businessman.[82] The bill was defeated in the House by forty-six votes to forty-four, with broad support from Republicans but opposition from most Democrats, who were then in the majority.[83] Opponents complained that the bill

76. *Id.* at 140.

77. *Id.*

78. *Id.* (citing 1971 interview with Justice Frank Haswell).

79. *Id.* (citing MONTANA BAR ASSOCIATION, METHODS OF JUDICIAL SELECTION (1956)).

80. *Id.* at 148.

81. *Id.* at 149.

82. *Id.* at 148–49 (citing H.B. 48 35th Leg. Sess. § 6 (Mont. 1957)).

83. *Id.*; *see also* House J. 35th Leg. Sess. 399 (Mont. 1957).

was "undemocratic," and "deprived the people of the right to decide for themselves what members of the legal profession should sit as judges."[84] The convention report viewed the merit plans favorably, but rebutted the opponents' arguments by repeating the misleading claim that

> [b]ecause most district judges and supreme court justices were initially appointed by the governor to an interim vacancy and subsequently as an incumbent elected by the people for another term when the appointive term expired, two elements of the merit plan were already in existence: gubernatorial appointment and retention election.[85]

Thus, according to the report, a merit plan would be more democratic, since "[t]hrough citizen representation on the nominating commission the electorate in effect would have had a voice in the initial choice of a judge—an element non-existent under Montana's present system."[86] Again, however, this overstated the role of appointments in judicial selection, particularly with respect to the Montana Supreme Court of 1957: While approximately half of district judges (who outnumbered supreme court justices) were appointed at that time, nearly two-thirds of then-sitting supreme court justices had been elected initially.[87]

2. The Constitutional Convention of 1972

The 1972 report and the earlier studies set the stage for an unusually deliberative discussion of judicial selection by the one hundred elected delegates of the Constitutional Convention. Twenty-four of the delegates were lawyers, and those lawyer-delegates carried on most of the debate on the judicial article among themselves.[88] The delegates' consideration of the judicial article was among the longest and most divided at the

84. Muckelston, et al., *supra* note 70, at 149.

85. *Id.*

86. *Id.*

87. WALDRON & WILSON, *supra* note 44, at 289.

88. Fritz Snyder & Mae Nan Ellingson, *The Lawyer-Delegates of the 1972 Montana Constitutional Convention: Their Influence and Importance*, 72 MONT. L. REV. 53, 86 (2011) (noting that "[v]ery few delegates other than lawyers participated in the debate on the Judicial Article").

Convention, consuming nearly two full days of debate.[89] The Judiciary Committee divided five-to-four, issuing a majority and a minority report, and "split most sharply on the issue of how judges should be selected."[90]

The convention's proceedings were notable for a general atmosphere of bipartisanship.[91] Yet the Judiciary Committee's votes substantially divided along party lines, even to the extent that party "trumped the divide between lawyers and non-lawyers on the Committee."[92] Democrats controlled the Committee six members to three, though in their work they broke into a working majority of five Democrats supporting the majority proposal, and three Republicans and a Democrat supporting a minority proposal.[93]

The majority report retained much of the 1889 Constitution's provisions, including judicial elections.[94] The minority report proposed a modified merit plan, in which "the governor of the state shall nominate a supreme court or district court judge from nominees selected in the manner provided by law," with one opportunity for a contested election after appointment, followed by retention elections for each succeeding term of office.[95] In extensive commentary, the minority observed "that today, few, if any, of the voters are at all acquainted with the judicial candidates," and "the present system of elected judiciary utterly and completely fails to attain"

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89. IV MONTANA CONSTITUTIONAL CONVENTION, VERBATIM TRANSCRIPT 1010–1180 (1979) [hereinafter CONVENTION TRANSCRIPT].

90. Jean M. Bowman, *The Judicial Article: What Went Wrong?* 51 MONT. L. REV. 492, 497 (1990); *see also Judiciary Committee Report* in I MONTANA CONSTITUTIONAL CONVENTION, PROCEEDINGS 485 (1972) (indicating that "the members of the committee had philosophical differences, particularly about selection of judges") [hereinafter CONVENTION PROCEEDINGS].

91. ELISON & SNYDER, *supra* note 66, at 11 ("The voters elected delegates on a partisan basis, but the sentiment in the convention was to organize it in a bipartisan fashion. Thus seating was alphabetical rather than by party. The president of the convention appointed both Democrats and Republicans to chair committees, and he appointed a delegate from the opposite party to be a co-chairperson of each committee.")

92. Morriss, *supra* note 10, at 30.

93. The Democrat in the minority, J. Mason Melvin of Gallatin County, who had a law-enforcement background, "may have been a relatively conservative Democrat." *Id.* at 30 n.19.

94. CONVENTION PROCEEDINGS, *supra* note 90, at 495 (Majority Proposal § 6).

95. *Id.* at 511–12 (Minority Proposal § 7).

the informed electorate necessary for "the survival of democratic institutions."[96] At the same time, the minority was "especially apprehensive of the future political character of [Montana's] judges," citing "statistics revealing that an overwhelming majority" of the judges (but not supreme court justices) had "been appointed by the governor."[97] This modified Missouri Plan of commission nomination, executive appointment, and voter retention reflected elements of the so-called Montana Plan,[98] but added the intervening opportunity for a contested election after appointment.[99]

Despite the legal establishment's support for a merit plan more like the minority's hybrid proposal, the Judiciary Committee's poll of nearly 500 lawyers in the state found that a slight majority favored judicial elections; over a hundred members of the Montana Trial Lawyers Association favored elections by more than a two-to-one margin.[100] Delegate John M. Schiltz, a former legislator and an unsuccessful candidate for chief justice in 1970,[101] made a case for judicial elections based on personal and political history. In Montana, he explained, "we have strong corporate influence; where, if I can elect a Governor, and through that office nominate and appoint the district and the Supreme Court judges, I can run this state. . . . I can own it."[102] Noting how the Anaconda Company and its former affiliate the Montana Power Company could dominate

96. *Id.* at 520.

97. *Id.* at 521.

98. *See generally* Mason & Crowley, *supra* note 58.

99. The Committee witness list named proponents of the Montana Plan including Professors Mason and Crowley of the Montana School of Law; the Dean of the Montana School of Law, Robert E. Sullivan; the Chief Justice of the Montana Supreme Court, J. T. Harrison; the President of the Montana Bar Association, William Bellingham; representatives of the American Judicature Society and Montana Citizens for Court Improvement, several state district judges (Paul Hatfield, W. W. Lessley, and Robert Wilson); and federal district judge Russell Smith. *See* CONVENTION PROCEEDINGS at 533–36 (Appendix C). Interestingly, Francis Mitchell, a representative of the political reform group Montana Common Cause, opposed the Montana Plan and favored partisan election of Supreme Court justices. *Id.* at 534.

100. CONVENTION TRANSCRIPT, *supra* note 89, at 1014 (statement of Del. Holland).

101. *See* CONVENTION PROCEEDINGS, *supra* note 90, at 58 (summarizing Schiltz biography); WALDRON & WILSON, *supra* note 44, at 290 (discussing Schiltz as a candidate for chief justice).

102. CONVENTION TRANSCRIPT, *supra* note 89, at 1026 (statement of Del. Schiltz).

appointment processes, including the Constitutional Convention Commission itself, he concluded that

> you cannot pick a committee in the State of Montana that will be totally free of that kind of influence. And I am afraid of it, and if I have to choose between one or the other, I'm going to the electorate every time, because I had a chance . . . to be elected. With another few bucks, I might have made it.[103]

Delegate James C. Garlington, also a lawyer, argued for judicial appointment. "There is clear agreement on the part of all that we do need good judges," he noted, "[t]he question is how to recruit them."[104] He expressed "utmost sympathy" for judicial candidates who "must undergo the type of ordeal that Mr. Schiltz very feelingly described."[105] He suggested that such an ordeal makes judicial office unattractive for most lawyers "who have any kind of a stable, private practice" because the judicial candidate "must sever himself completely from the private practice of law," and should he return to practice after losing a campaign, "he then begins at absolute rock bottom . . . no clients, no office, no library, no nothing."[106]

Because the minority proposal represented a greater change from the current judicial article, and perhaps because delegates were initially more receptive to its reforms, the Convention voted to debate it instead of the minor changes contained in the majority proposal.[107] Over the lengthy debate, however, amendments transformed key provisions of the minority report into something resembling the majority report's election plan.[108]

In a series of sharply divided votes the delegates eventually rejected both the majority and minority proposals and adopted Article VII, section 8, whose original text suggests its

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103. *Id.* at 1027 (statement of Del. Schiltz).

104. *Id.* at 1032 (statement of Del. Garlington).

105. *Id.* (statement of Del. Garlington).

106. *Id.* (statement of Del. Garlington).

107. *Id.* at 1034–35; *see also* Snyder & Ellingson, *supra* note 88, at 86 (asserting that "[w]ith that vote, it became clear that a majority of the delegates favored judicial reform").

108. Bowman, *supra* note 90, at 495 (reporting that "much of the majority report actually was adopted" and noting "the lack of major substantive change from the 1889 Constitution" in the judicial article of the new constitution).

complicated origins.[109] In a concession to merit selection, its first section provides "replacement . . . for any vacancy" by the governor's appointment "from nominees selected in the manner provided by law," subject to senate confirmation.[110] Its second section provides for retention elections as the default, but permits contested elections.[111] Its third section provides for an election "[i]f an incumbent does not run."[112] The result, in other words, was the maintenance of contested judicial elections, but with a merit plan of appointment by nominees from a selection committee in case of vacancies. Based on a campaign that noted, revealingly "[c]ontested election of judges is not changed,"[113] the people narrowly ratified the 1972 Constitution, including the new judicial article.

3. Public Financing for Judicial Elections

A collateral consequence of the debate at the Constitutional Convention was a failed proposal for public financing of judicial campaigns. The Judiciary Committee proposed a section requiring the legislature to "appropriate funds for the contested general election campaign expenses of candidates for the offices of justices of the supreme court and district court judges."[114] Unlike the primary selection proposal, the public-financing proposal enjoyed broad support on the committee.[115] Public

109. Snyder & Ellingson, *supra* note 88, at 88–90 (referring to principles involved, summarizing work of ad hoc committee, and describing portions of floor debate).

110. MONT. CONST. art. VII, § 8(1) (1973).

111. *Id*. art. VII, § 8(2).

112. *Id*. art. VII, § 8(3).

113. MONTANA CONSTITUTIONAL CONVENTION, PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION 13 (1972).

114. CONVENTION PROCEEDINGS, *supra* note 90, at 508 (setting out Separate Majority Proposal on Campaign Expenses). The proposal also prohibited expenditures "in excess of the amount appropriated," an expenditure limit that would even then have been found unconstitutional. *See Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976) (holding that campaign expenditure limits "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate").

115. The reprinted report includes the names of all nine committee members under the proposal, but denotes the names of Delegates Pemberton, Bowman, and Berg as "(original unsigned)." CONVENTION PROCEEDINGS, *supra* note 90, at 508 (setting out Separate Majority Proposal on Campaign Expenses). These were the three Republican delegates on the Committee; the others were Democrats. *See id.* at 31–64 (listing delegate biographies).

financing of judicial elections was not raised in any of the pre-convention studies, and appeared to originate with the Judiciary Committee itself. Because the majority and minority proposals both contemplated contested non-partisan judicial elections, the entire committee recognized "the same problems we have always had" with judges running for office.[116] These included

> (1) the necessity that the judge demean himself and his position by seeking campaign funds;
>
> (2) the fact that the wrong people can make contributions;
>
> (3) the fact that lawyers are the biggest contributors and solicitors of campaign funds to the detriment of themselves than the candidate;
>
> (4) the fact that the candidate with the most money to spend is the more likely to win regardless of merit; and
>
> (5) the fact that the appearance of justice suffers in the process.[117]

The committee's solution to these problems prompted a prescient discussion of campaign finance in judicial elections.

Delegate Schiltz opened the debate on the public-financing provision, noting that the cost to taxpayers of financing judicial elections was a "pittance in view of the benefits," including an "independent Judiciary" and assurance "that one man was not buying the job."[118] More broadly, he turned to the national presidential election then underway, noting that Edmund Muskie's presidential campaign was "going to cost him or somebody $40 million."[119] Looking toward a future of big-money campaigns, he warned that "this is going to come to Montana, and I can think of no other, better place to start as an experiment for a very small amount of money than on the Judiciary."[120] But Delegate Jean Bowman, who favored the appointment-and-retention-election plan of the minority

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Unlike votes on the primary majority and minority proposals, votes on the public-financing proposal appear to have broken along party lines.

116. *Id.* at 509 (including comments on Separate Majority Proposal on Campaign Expenses).

117. *Id.*

118. CONVENTION TRANSCRIPT, *supra* n. 89, at 1137 (statement of Del. Schiltz).

119. *Id.* (statement of Del. Schiltz).

120. *Id.* (statement of Del. Schiltz).

proposal, suggested that if judicial candidates had to run in contested elections, they should look to the political parties for financial support.[121] "As a taxpayer," the Republican Bowman argued in response to the Democrat Schiltz, "I really do not wish to have part of my taxes go to someone's campaign expenses."[122]

The delegates gave the public-financing proposal preliminary approval by a narrow margin, but voted later that day to reconsider the proposal, and opened a deeper debate on the issue.[123] Delegate William Burkhardt reported that a lawyer friend wrote to him, stating that he hoped it would be "well debated before its death."[124] So it was. Several lawyers spoke in support. Delegate Wade Dahood argued that

> only the so-called "big boys" can afford to support [candidates] with enough campaign funds so that they can be successful; and as a consequence, being the imperfect beings that they are, just like the rest of us, subconsciously, at least, it has an effect upon their decision and upon their work in our behalf as part of the highest tribunal of this state.[125]

Delegate and Convention President Leo Graybill asked whether the delegates were "going to let the Judiciary continue to get its money to run for contested Supreme Court offices by getting it from big . . . corporations and concerns who have a lot of litigation in the Supreme Court."[126] To the criticism that public financing would simply relieve lawyers from funding judicial campaigns, Delegate Graybill continued by asserting that "[t]he people that it's going to relieve is the common people who have to go to that Supreme Court occasionally against some major interest who is there constantly."[127]

Opponents, however, doubted that the legislature would provide sufficient funding, and asked why only the judiciary should have public campaign financing entrenched in the

121. *Id.* (statement of Del. Bowman).
122. *Id.* (statement of Del. Bowman).
123. *Id.* at 1164–65.
124. *Id.* at 1165 (statement of Del. Burkhardt).
125. *Id.* at 1166 (statement of Del. Dahood).
126. *Id.* at 1167 (statement of Del. Graybill).
127. *Id.* (statement of Del. Graybill).

constitution. "If we can't do it for . . . the Governor and all the rest of the candidates," announced Delegate Grace Bates, "why, I don't feel we should do it just for Supreme Court."[128] Delegate Joe Eskildsen, originally a proponent of the proposal on the Judiciary Committee, argued that

> when you look for political office, then you got to expect to find your own campaign funds and to finance it yourself. . . . I don't think we should do anything for the Judiciary that we don't do for the Legislature and, especially, that we don't do for the Governor.[129]

Delegate Garlington, a lawyer, raised free speech concerns, worried that the measure would "inhibit the rights of citizen groups to take an interest in" judicial elections.[130] Delegate William Swanberg, another lawyer, raised concerns about circumvention: "[T]he state will be on the [hook] for the basic campaign expenses, and some candidate will find some way of getting around it."[131] By the end of the day's debate, several delegates moved to adjourn and take "a chance to think about this overnight," but those motions were defeated.[132] Then the delegates voted to delete the provision.[133]

Two weeks later, with the judiciary article reported out of the Style and Drafting Committee, Delegate Rick Champoux recalled an earlier point made by Delegate Schiltz: "[I]f we don't provide the expenses for these judges, somebody else will, and that other group will be, in the main, large companies that come before this court, whether they do it directly or indirectly."[134] In response, the delegates suspended the rules to reconsider the proposal, but only as applied to supreme court

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128. *Id.* at 1169 (statement of Del. Bates). Schiltz later responded to Bates by indicating that he hoped Montana would "someday" finance the campaigns of candidates in political campaigns as well as those in judicial races, but pointing out that "in the meantime [candidates for political offices] have the advantage of running on a partisan ticket." *Id.* at 1177 (statement of Del. Schiltz).

129. *Id.* (statement of Del. Eskildsen).

130. *Id.* at 1173 (statement of Del. Garlington).

131. *Id.* at 1177 (statement of Del. Swanberg).

132. *See, e.g.*, *id.* at 1168 (motion of Del. Babcock); *see also id.* at 1170–71 (motion of Del. Babcock asking for proposal to be printed and distributed overnight so that the delegates could study it in the morning).

133. *Id.* at 1178–79, 1181.

134. *Id.* at 2189 (statement of Del. Champoux).

justices.[135] Judges "are supposed to decide fairly and evenly between all of us after they get elected," Delegate Graybill reminded the delegates during the debate that followed, pointing out that "[i]t's one thing to support a senator or a congressman and have him help you out with a bureaucracy; it's another thing to support a judge and have him help you out with a decision."[136]

Delegate Garlington, however, had already advised against an unprecedented constitutional provision for public financing: "[I]t seems to me the proper judgment here is to leave this to such time as it may genuinely prove in our own state to be an evil that needs correction, and then our people's representatives, the Legislature, can do so."[137] And Delegate Dave Drum observed that public financing might upset the longstanding tradition of the lawyers-money primary, whereby "you may wind up with the gentleman as a Supreme Court justice who the legal fraternity generally thinks will be the best judge."[138] Others raised fiscal concerns that voters might reject a new constitution with spending mandates that seemed to have been included "in order to finance all the political aspirations of our lawyers wanting to run for Supreme Court justice or other higher offices."[139] Delegate Dahood responded by arguing that "[t]he taxpayer, above all, should have paramount interest in this proposal" because "[h]e is the one that is affected by the quality of justice, more than anyone else."[140] This time, the delegates adopted the proposal by fifty-five votes to thirty-two.[141]

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135. *Id.* at 2190–91.

136. *Id.* at 2198 (statement of Del. Graybill).

137. *Id.* at 2196 (statement of Del. Garlington).

138. *Id.* at 2201 (statement of Del. Drum).

139. *Id.* at 2199 (statement of Del. Erdmann); *see also id.* at 2200–01 (statement of Del. Kamhoot expressing concern about taxpayer reaction to funding mandates when voting on whether to approve the new constitution).

140. *Id.* at 2201 (statement of Del. Dahood).

141. *Id.* at 2204–05. Yet the debate was not quite over. Delegates adopted the Style and Drafting Committee report on the reconsidered proposal by voice vote, but not before Delegate John Toole, a former Republican legislator, said that he had "talked to a number of Legislators about this in the last few days," and "[t]hey seem[ed] to be of the unanimous opinion they will appropriate $1" for judicial campaign expenses. *Id.* at 2432 (Statement of Del. Toole).

All that remained was final consideration of the judicial article. The Convention adopted the first thirteen sections—including the compromise judicial-selection section—by wide margins.[142] But when the Convention reached the final section of the judicial article, on campaign expenses, the ayes fell three votes short of a majority.[143] The Convention sent the Sergeant to find absent delegates, and voted upon their return to reconsider. But in a final vote, with all but three of the delegates present, the public-financing proposal fell short again.[144] After an agonizing series of debates, what would have been a major innovation in state judicial elections failed by just two votes.

4. Implementation and Modifications

The implementation of the new constitution's hybrid merit plan for appointees though a judicial nomination commission fell short of the reformers' aspirations even for a compromise. According to the new judicial article, "the governor shall appoint a replacement [for a vacant judicial office] from nominees selected in the manner provided by law."[145] The minority report, "not satisfied with the current process of unlimited gubernatorial appointive power of judges," had expressed a preference that "the committee should be elected by the legislature for staggered terms" and "bi-partisan in character."[146] The minority report, however, had "purposely refrained from attempting to provide for the organization of the nominating committee in the belief that the legislature is better able to vigilantly oversee its operation."[147] In 1973, a Democratic majority in the legislature enacted—and a Democratic governor signed—a bill creating a seven-member

142. *Id.* at 2434–49. The votes became so routine, in fact, that the President of the Convention, Delegate Graybill, noticed that several delegates were forgetting to vote: "I don't want to disturb you people—(Laughter)—but if you want to vote, now is the time." *Id.* at 2441 (Statement of Del. Graybill).

143. *Id.* at 2450.

144. *Id.* at 2453 (showing the final vote tally on the public-funding section of the judicial article as forty-nine to forty-eight).

145. Mont. Const. Art. VII, § 8(2).

146. CONVENTION PROCEEDINGS, *supra* note 90, at 520–21 (Minority Proposal § 7 comments).

147. *Id.* at 521.

judicial nomination commission controlled by a majority of four members appointed by the governor, not the legislature.[148]

Proponents of broader reforms hardly welcomed the compromise judicial article. Delegate Mason Melvin, a Democrat who signed onto the reform-minded minority report with the three Republicans on the Judiciary Committee, later noted with regret that "the Legislature tossed the mechanics of the appointment of judges right into the political kettle" by giving the governor the power to appoint the majority of the nominating commission.[149] But he also pointed out that "when Montanans decide to take another step in insulating the Judiciary from the other branches—and politics—corrections will be made."[150] Delegate Jean Bowman, also in the minority on the Judiciary Committee, agreed, writing years later that the 1972 Constitution "bungles the method of selection process," because it "provides for neither pure election nor merit selection and, at best, constitutionalizes uncertainty in the constitution in the method of selection."[151] The judge for whom Delegate Bowman later clerked, Justice John C. Harrison, reached a harsher judgment: the "worst judiciary article in fifty states."[152]

The legislature and voters appear to agree that the Convention left room for improvement. The judicial article is among the most frequently amended articles in the Montana Constitution, with voters approving all four constitutional referenda amending the article.[153] Sometimes popular backlash prompted these judicial reforms.

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148. MONT. LAWS 1177, ch. 470, § 1 (1973). The commission consists of "four lay members who are neither judges nor attorneys" appointed by the governor from different regions and vocations, two attorneys appointed by the supreme court from different regions, and one district judge elected by the district judges. MONT. CODE ANN. § 3-1-1001. The members serve staggered four-year terms. MONT. CODE ANN. § 3-1-1002.

149. Mason Melvin, *Judiciary Committee*, *in* 100 DELEGATES: MONTANA CONSTITUTIONAL CONVENTION OF 1972 at 31 (1989).

150. *Id.*

151. Bowman, *supra* note 90, at 498.

152. *LOPACH ET AL.*, *supra* n. 63, at 150 (quoting 1980 Interview with Justice John C. Harrison).

153. Johnstone, *supra* note 56, at 355. One of those amendments comprehensively revised the selection provision in 1992, twenty years after its adoption. *See* H.B. 353 (Mont. 52nd Leg. Sess. 1992) (proposing language that became amendment 22 to the Montana Constitution).

In the 1980s, the Montana Supreme Court confronted the legislature repeatedly in cases involving the constitutionality of tort immunity and welfare reform.[154] By the end of the decade, vote changes on the court and constitutional amendments by the people resolved much of the controversy.[155] Yet concern about the court's potential overreach lingered.[156]

Calls to broaden the scope of judicial elections, and narrow remaining opportunities for judicial appointments, intensified in response to a 1990 case upholding three judicial appointments, including a supreme court appointment, made without submitting the appointees to an election on the next possible ballot. The Montana Supreme Court interpreted Article VII, section 8, to postpone the election of an appointed justice or judge until after the senate had the opportunity to confirm or reject the appointee.[157] The court emphasized that section eight provided "a selection system which gives recognition to both appointment and election," reiterating the incomplete history that "most of the justices and judges" (in fact, most of the judges but few of the justices) were appointed initially.[158] Further, the court noted that "[t]he current makeup of the judiciary reflects the delegates' recognition of both appointment and election," as "[e]ighteen of the thirty-six currently serving District Court Judges and three of the seven currently serving Supreme Court Justices began their offices as appointees."[159]

In 1992, critics of the decision upholding these judicial appointments proposed a constitutional amendment requiring appointees to stand for election regardless of whether the senate had yet had an opportunity to confirm them during one of its biennial sessions. Proponents of the amendment argued that too many "holdover" appointees held office for years pending

154. *See* James J. Lopach, *The Montana Supreme Court in Politics*, 48 MONT. L. REV. 267 (1987) (criticizing the court); *see also* Bari R. Burke, *Constitutional Initiative 30: What Constitutional Rights Did Montanans Surrender in Hopes of Securing Liability Insurance?* 48 MONT. L. REV. 53 (1987) (criticizing the legislature).

155. *See* Johnstone, *supra* note 56, at 357–59.

156. *See* Lopach, *supra* note 154, at 296 ("The court's insistence that it must have the last word in state policymaking has severely damaged democratic politics.").

157. State ex rel. Racicot v. Dist. Court, 794 P.2d 1180 (Mont. 1990).

158. *Id.* at 1185.

159. *Id.*

confirmation without standing for election. The amendment eliminated "the potential for the improper use of the appointment process," according to the proponents, under a constitution that provides "for the electoral selection of judges."[160] Montanans ratified the amendment by a three-to-one margin.[161] The election results suggested that voters viewed these holdover appointments as a bug, not a feature, of the constitution's judicial-selection process.

The constitutional journey of judicial reform began with the Montana Plan for merit selection. At the Constitutional Convention, it moved through the minority report's emphasis on commission nominations with retention elections. With ratification of the original section 8, it led to an uneasy compromise of appointments and contested elections during the state constitution's first two decades. The journey ended (for now, at least) with the 1992 amendment, an emphatic doubling down, by constitutional referendum, on judicial elections.[162]

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160. Montana Secretary of State, *1992 Voter Information* 5 (1992).

161. Montana Secretary of State *1972–Present Historical Constitutional Initiatives and Constitutional Amendments*, 7 (Feb. 26, 2013), http://sos.mt.gov/Elections/forms/history/constitutionalmeasureslist2012.pdf (accessed Sept. 8, 2015; copy on file with Journal of Appellate Practice and Process). The amendment clarified that "Supreme court justices and district court judges shall be elected by the qualified electors as provided by law," and that "[n]o appointee, whether confirmed or unconfirmed, shall serve past the term of his predecessor without standing for election." Mont. Const. Art. VII, § 8.

162. In 2006 voters petitioned for a constitutional amendment providing for recall of judges and justices for "any reason acknowledging electoral dissatisfaction with a justice or judge," a broader standard than that required by prior law. *See* Montana Secretary of State, *2006 Voter Information* 20 (2006) (addressing Constitutional Initiative No. 98). Proponents in the legislature argued that it would "be a powerful tool for judicial accountability and democratic oversight of a branch of government that for too long has been too removed from the will of the people." *Id.* at 22 (statements of Rep. Edward B. Butcher, Rep. Diane Rice, and Rep. Michael Lange). It would, they argued, "allow us to challenge judges who throw violent criminals and pedophiles out on the street, 'legislate' radical political agendas or destroy our constitutional freedoms." *Id.* at 24. Three retired justices wrote in opposition to the amendment because "[t]he rights and protection of our citizens are dependent upon a fair, impartial and unbiased judiciary," and "[i]f the judges were confronted with the threat of constant and repeated recall elections, they would be distracted from the performance of their duties and subjected to great expense in defending recall elections." *Id.* 23 (statements of former Justice John C. Harrison, former Chief Justice Jean Turnage, and former Justice John C. Sheehy). The amendment was decertified and struck from the ballot for fraud in the petition process. *See* Montanans for Just. v. State ex. rel. McGrath, 146 P.3d 759 (Mont. 2006).

III. A MODERN PRACTICE OF STATE JUDICIAL ELECTIONS

A. Appointments, Retention, and Elections

Despite arguments during the Constitutional Convention about whether appointed or elected justices were the norm in Montana, and the renewed debate during the 1992 amendment campaign, appointments of justices increased slightly since 1972 without notable comment. Eleven of the 27 justices seated under the new constitution—or forty-one percent—were appointed initially, up from one-third under the old constitution.[163] Of the eleven appointees, six were reelected.[164] Earlier commentators described "justices who resigned before completion of a term so that a politically allied governor could appoint a replacement," and others who "endured under personally adverse conditions to prevent a replacement being appointed by an unfriendly governor."[165] Yet there is no evidence since 1972 that justices timed retirements to coincide with a governor of the same party as the governor who appointed them.[166]

Every incumbent justice who sought reelection won except for Charles Erdman, a recent appointee who lost to the slightly better financed private practitioner James Regnier in 1996.[167] In contests for open seats, the candidate who raised the most

163. Anthony Johnstone, *Montana Supreme Court Justices Dataset* (on file with Author) [hereinafter *Justices Dataset*]. The source data from 1912 to 2014 is available from the state of Montana. Montana Secretary of State, *Montana Statewide General Election Canvass*, 1912–2014, http://sos.mt.gov/Elections/archives/index.asp (accessed Nov. 10, 2015; copy of main page on file with Journal of Appellate Practice and Process). The source data from 1889 to 1910 is available in WALDRON & WILSON, *supra* note 44, at 289–92. Included in the eleven appointees is Justice Frank Haswell, who was appointed to Chief Justice from Associate Justice in 1977.

164. *Id.*

165. LOPACH ET AL., *supra* note 63, at 157.

166. Four appointees retired before the ends of their terms. Two appointees of Democrats retired under Republican governors: John C. Sheehy (appointed by Governor Thomas Judge in 1978 and resigned under Governor Stan Stephens in 1991) and R.C. McDonough (appointed by Governor Ted Schwinden in 1987 and resigned under Governor Marc Racicot in 1993). One appointee of a Republican retired during the appointing governor's term: Diane Barz (appointed by Governor Stan Stephens in 1989 and resigned in 1991 when Stephens was still in office). The other appointee of a Republican, John Warner, retired under a Democratic governor (appointed by Governor Judy Martz in 2003 and resigned under Governor Brian Schweitzer in 2009). *Justices Dataset*, *supra* note 163.

167. *Id.*

money won except for Judge Edward McLean in 2004, who lost to State Solicitor Brian Morris despite raising more money, and private practitioner Beth Baker, who beat District Judge Nels Swandal in a relatively low-dollar campaign.[168] Of twenty-seven elections for supreme court justice since 1990, including post-appointment elections for the remainder of an appointee's first term, twelve were uncontested.[169]

B. Increasing Partisanship

Partisanship only recently emerged as a major issue in Montana Supreme Court campaigns. That is not to say that voters respected a barrier between judicial and legislative or executive offices, even after non-partisan elections began in 1935. Montanans occasionally elected partisan politicians to the supreme court, and elected justices to partisan political office. Six state attorneys general moved from in front of the bench to behind it, including current Chief Justice Mike McGrath.[170] Two governors became justices, and two justices became governors, including former associate justice Forrest H. Anderson, who governed during the 1972 Montana Constitutional Convention.[171] A half-dozen justices came to the bench with experience as state legislators, including two-term Chief Justice Jean Turnage, who served two decades as a state legislator, and current Justices Jim Rice and Mike Wheat.[172]

Party affiliations appeared as an issue in the hard-fought 2000 races for chief justice and associate justice, when three of the four candidates in the general election had histories of

168. *Id.*

169. *Id.*

170. The six are Albert J. Galen; Wellington D. Rankin; Sam C. Ford; Harrison J. Freebourn; R.V. Bottomly; and Mike McGrath. *Id.* John W. Bonner served as Attorney General before he was elected as Governor, and then to the Supreme Court. *See id.*

171. Sam V. Stewart and John W. Bonner both served as governor before serving as justices. Hugh R. Adair served as lieutenant governor before serving as a justice. Sam C. Ford and Forrest H. Anderson served as justices before serving as governor. *Id.*

172. Hugh R. Adair, Forrest H. Anderson, John C. Sheehy, Jean A. Turnage, James A. Rice, and Mike Wheat all served in the legislature before joining the court, and Henry C. Smith served in the state senate after leaving the bench. *Id.*

contributing significant amounts to Democratic candidates.[173] In 2008, the supreme court revised the Code of Judicial Conduct to prevent judicial candidates from attending partisan campaign events.[174] Justice Jim Rice (a former legislator) and Justice John Warner dissented from the change on grounds that suggest the informal, background role of partisan politics in past Montana judicial campaigns. Justice Rice observed that

> such practices reflect the reality of Montana culture, particularly within our many small, rural communities. . . . I recall attending a Republican dinner in a rural county which was also attended by a large contingent of local Democrats. Everyone was grinning from ear to ear, because it was more about community than anything else.[175]

More recently, in a 2010 associate justice contest, Judge Nels Swandal ran an ad purportedly distancing himself from partisan politics, explaining his family has "always supported Republican candidates," but his "political opinions have never influenced my decisions."[176] He lost the election, and went on to be elected as a Republican state senator in 2014.[177]

After *Citizens United*, and in an increasingly polarized partisan atmosphere in the state, judicial elections came to the forefront of party politics. In 2011 the Montana Legislature referred to the voters LR-119, a Republican-sponsored measure carried by a vote that hewed closely to party lines. It was a legislative referendum (not a constitutional amendment, which would have required a legislative supermajority) to elect supreme court justices by districts and select the chief justice by

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173. Erin P. Billings, *Supreme Court Candidates Give Primarily to Democrats*, Helena Indep. Record, Nov. 2, 2000, *available at* http://helenair.com/news/local/supreme-court-candidates-give-primarily-to-democrats/article_581b74e1-80cc-5a96-928a-97caef5d0983.html.

174. *In the Matter of the 2008 Montana Code of Judicial Conduct*, No. AF 08-0203 (Dec. 12, 2008).

175. *Id.* at 6–7 (Rice and Warner, JJ., concurring and dissenting).

176. Swandal for Justice, *Set the Record Straight*, available at BRENNAN CTR. FOR JUST. (Sept. 27, 2010), http://www.brennancenter.org/sites/default/files/legacy/Buying%20Time%202010/STSUPCT_MT_SWANDAL_SET_RECORD_STRAIGHT.pdf (accessed Sept. 8, 2015; copy on file with Journal of Appellate Practice and Process).

177 *See, e.g.*, Montana Legislature 64th Session, *Nels Swandal (R) SD 30*, http://leg.mt.gov/css/Sessions/64th/leg_info.asp?HouseID=2&SessionID=109&LAWSID=16524 (May 14, 2014) (accessed Sept. 8, 2015; copy on file with Journal of Appellate Practice and Process).

majority vote of the justices.[178] In a challenge brought by a group of voters including Constitutional Convention Delegates Arlyne Reichert, Wade Dahood, and Jean Bowman, the Supreme Court held the referendum "facially unconstitutional" because it attempted to amend by statute the constitutional qualifications for election to justice.[179] After the 2012 elections, several Republican legislative leaders discussed a plan to "chang[e] the face of the Montana Supreme Court."[180] The focus on judicial elections became part of developing a "long term strategy . . . to actually elect a majority of conservatives in both (the House and Senate), adopt conservative legislation and have a court that will uphold it."[181]

C. Campaign Finance

1. Direct Contributions

Since 1990, which marks the earliest extent of detailed campaign-finance records in Montana, the average amount of campaign contributions raised per race by all statewide candidates in both primary and general elections is about $231,000 overall and $460,000 in contested elections.[182] But the average supreme court candidate raised about $139,000 overall, and $212,000 in a contested election,[183] which puts supreme

178. *See* S.B. 268, 2011 MONT. LAWS ch. 203.

179. *See* Reichert v. State ex rel. McCulloch, 278 P.3d 455, 483 (Mont. 2012).

180. Associated Press, *Emails Document GOP Leadership Power Struggle*, Missoulian, Jan 16, 2013, *available at* http://missoulian.com/news/state-and-regional/montana-legislature/emails-document-gop-leadership-power-struggle/article_ce884f7c-5ffd-11e2-96b6-0019bb2963f4.html

181. *Id.*

182. Anthony Johnstone, *Montana Supreme Court Campaign-Finance Dataset* (on file with Author) [hereinafter *Campaign-Finance Dataset*]. The source data are available from National Institute on Money in State Politics, *Contributions to State Supreme Court Candidates in Elections in Montana Selected Years*, *available at* followthemoney.org, http://www.followthemoney.org/showme?s=MT&y=2014,2012,2010,2008,2006,2004,2002,2000,1998,1996,1994,1992,1990&f-core=1&c-exi=1&c-r-ot=J#[{1|gro=d-Ins{4| (2015). For comparability, all cited amounts from the *Campaign-Finance Dataset* are adjusted to 2014 dollars and rounded to the nearest thousand. (The adjustment takes the nominal amount reported for a campaign year, multiplies it by the Consumer Price Index for 2014, then divides it by the Consumer Price Index for the campaign year.)

183. Calculations for contested elections exclude noncompetitive candidates who raised less than ten percent of the amount raised by the winning candidate.

court campaigns near the low end of the second-tier (non-gubernatorial) statewide elections in Montana.[184] The largest source of campaign contributions in supreme court elections, not surprisingly, is lawyers and lobbyists: In inflation-adjusted terms, supreme court candidates raised about $6.24 million between 1990 and 2014, and nearly a third of that total—$1.97 million—came from lawyers and lobbyists.[185] The other significant source is the candidates themselves, their contributions amounting to $1.35 million, or nearly a quarter of the total.[186] Less than six percent of campaign contributions have come from out-of-state sources.[187]

Before the rise of independent expenditures after *Citizens United*, three supreme court campaigns stand out as the most expensive in contribution terms. In 1992, Justice Terry Trieweiler raised $275,000 challenging incumbent Chief Justice Jean Turnage, who raised $360,000 successfully defending his seat.[188] Two years earlier, Trieweiler had raised the second-highest total of any judicial candidate in Montana to win a seat as associate justice in 1990; just more than half of the $452,000 came from his own pockets.[189] In 1994 Montana voters approved I-118, which reduced individual contribution limits for supreme court candidates from $750 (about $1200 in 2014 dollars) to $200, an amount that is now adjusted for inflation ($320 in 2014).[190]

Under the lower contribution limits, some candidates relied more on their own bank accounts and less on individual and political-committee contributions. In the 2000 election for associate justice, Justice Patricia Cotter raised $366,000 (most of it self-financed) to fend off three other candidates in primary and general elections.[191] Also in 2000, Justice Trieweiler ran again for chief justice, raising $436,000 (again, most of it self-

184. *Campaign-Finance Dataset*, *supra* note 182.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. MONT. CODE ANN. § 13-37-216 (1994); MONT. ADMIN. R. § 44.10.338(1) (2013); Montana Secretary of State, *1994 Voter Information* 26 (discussing I-118).

191. *Campaign-Finance Dataset*, *supra* note 182.

financed) in a contest against his colleague Justice Karla Gray, who raised $499,000 and won.[192] In inflation-adjusted terms, these were the third-highest and highest fundraising totals for a Montana court candidate, and at just short of one million dollars, the campaigns amounted to the most expensive Supreme Court race then on record.[193] In the 2004 contest between Justice James Nelson and challenger Republican State Representative Cindy Younkin, Nelson raised about $286,000 to defeat Younkin, who raised $382,388, putting both candidates in the top ten for campaign contributions since 1990.[194]

2. Independent Expenditures

Independent-expenditure records are more limited than those for direct contributions.[195] There is, however, evidence of significant outside money in races beginning in the competitive 2000 campaigns for chief justice and associate justice, nearly all of it from the Montana Trial Lawyers Association affiliate, the Montana Law PAC.[196] In that race for chief justice, still the most expensive in Montana history in terms of direct contributions, Justice Karla Gray asked her opponent Justice Terry Trieweiler to oppose independent expenditures in the campaign, particularly from the Montana Trial Lawyers Association, whose prior affiliations with Justice Trieweiler gave "the appearance of an improperly coordinated effort," according to Justice Gray.[197]

192. *Id.*

193. *Id.*

194. *Id.*

195. At the time of the elections considered here, Montana regulations interpreted reportable independent expenditures narrowly to include only "communications expressly advocating the success or defeat of a candidate," and not the broader category of reportable "electioneering communications" in current law. *Compare* MONT. ADMIN. R. § 44.10.323(3) (2013) (defining "independent expenditure" as express advocacy) *with* MONT. CODE ANN. § 13-1-101(15) (2015) (defining "electioneering communication" as publicly distributed materials referring to "clearly identified candidates").

196. A 1996 filing suggests that the Montana Law PAC raised about $18,000 (2014 dollars) to support challenger James Regnier. *See* Montana Commissioner of Political Practices, *Montana Law-Pac*, *Form C-6* (Jan. 30, 1997) (Closing Report).

197. Erin P. Billings, *Gray Asks Trieweiler to Reject Third-Party Spending in Race*, Helena Indep. Record, July 18, 2000, *available at* http://helenair.com/news/local/gray-asks-trieweiler-to-reject-third-party-spending-in-race/article_829f8d56-6203-574e-af1d-4f4a9c79ed5a.html.

In that year's race for associate justice, one candidate complained of a "push poll . . . purportedly being taken by an unknown national interest group . . . to unjustly influence Montana voters."[198] In the 2000 campaigns, the Montana Law PAC sent out mailings supporting Justice Trieweiler at a cost of about $82,000 and Justice Patricia Cotter at a cost of about $85,000.[199] The Montana Law PAC also spent $150,000 in support of two candidates in the 2002 campaign; recent appointee Jim Rice, who ran unopposed, and Justice William Leaphart, who faced a challenger and enjoyed significant support from trial lawyer contributions.[200]

In a bitter 2004 campaign for one of two associate justice seats, the Montana Law PAC raised significant amounts of money to support Justice James Nelson in anticipation of the U.S. Chamber of Commerce entering the race on behalf of his challenger, Republican State Representative Cindy Younkin.[201] It spent as much as $409,000 that year,[202] prompting Younkin to claim that "[t]he Montana trial lawyers bought the race, and I think that's a sad commentary on the state of judicial affairs in Montana."[203] One commentator noted that "a Younkin victory

198. Erin P. Billings, *Tweeten Asks Cotter to Disavow National Poll*, Missoulian, Sept. 8, 2000, *available at* http://missoulian.com/uncategorized/tweeten-asks-cotter-to-disavow-national-poll/article_2820aa41-2226-541e-bad5-23a7c2a2f591.html.

199. Erin P. Billings, *Gray Files Complaint over State Trial Lawyer Mailing*, Billings Gazette, Nov. 4, 2000, *available at* http://billingsgazette.com/news/local/gray-files-complaint-over-state-trial-lawyer-mailing/article_ea448fc9-ee5f-544d-8c3a-c60e24fcec24.html.

200. Mike Dennison, *"Outside Money" Haunts Court Race*, Great Falls Tribune, Sept. 27, 2004, *available at* http://archive.greatfallstribune.com/news/stories/20040927/localnews/1310006.html (indicating that "[t]he Montana Law PAC spent $150,000 on ads and literature to help two Supreme Court candidates in 2002"); *Campaign-Finance Dataset*, *supra* note 182.

201. Dennison, *supra* note 200; Shaila Dewan, *Montana Judicial Race Joins Big-Money Fray*, N.Y. Times, Nov. 3, 2014, at A11 (quoting the executive director of the trial lawyers' group about the 2004 race, who characterized its work in that election as "trying to ensure that candidates were credible and had experience with Montana law," and who noted that "the challenger was inexperienced and the group anticipated a large amount of spending from the U.S. Chamber of Commerce that never materialized").

202. Dewan, *supra* note 201 (reporting on "a 2004 race in which the Montana Trial Lawyers Association contributed $326,000 to retain a justice, James C. Nelson"); Dennison, supra n. 200 (reporting in September that "[t]he Law PAC had $138,000 in its account as of June, and its next report isn't due until late October.").

203. Len Iwanski, *Younkin: Trial Lawyers 'Bought the Race' for Nelson; Morris Beats McLean*, Assoc. Press, Nov. 2, 2004, *available at* http://billingsgazette.com/news/state-and

could tip the political balance of the seven-member court in a direction favored by business interests and law enforcement," but the Chamber did not appear.[204] Several races from 2006 through 2010 either were uncontested or did not appear to involve significant independent expenditures. As the Montana Trial Lawyers Association executive director told the New York Times during the 2014 campaign, "[i]n 2006, 2008, '10, '12, we didn't spend anything—nothing, zero."[205]

The first Montana Supreme Court campaign waged entirely after *Citizens United* came in 2012, when independent expenditures played a larger role and raised new questions about so-called dark-money groups. Associate Justice James Nelson announced his retirement in early 2011, noting that judicial campaigns "are expensive, time consuming and increasingly partisan."[206] Three candidates announced: trial lawyer Elizabeth Best, district court judge Laurie McKinnon, and criminal defense attorney Ed Sheehy. In the primary, Best raised more money than the other two candidates combined, most of it from other lawyers and her own funding, but finished a close third in what was nearly a three-way tie.[207] The Montana Trial Lawyers Association provided significant support through its members' contributions to Best's campaign, but did not make independent expenditures in the primary.[208] Best's loss in the primary surprised observers, some of whom credited Sheehy's name

-regional/montana/younkin-trial-lawyers-bought-the-race-for-nelson-morris-beats/article_1277e654-8312-5a0f-ad31-e75b59096ce7.html.

204. Dennison, *supra* note 200; *see also* Ray Ring, *State Judges Get Political: Special-Interest Money Pours into Hotly Contested Judge Campaigns*, High Country News, Oct. 11, 2004, *available at* http://www.hcn.org/issues/284/15051.

205. Dewan, *supra* note 201.

206. Associated Press, *Montana Supreme Court Justice Nelson to Retire*, Billings Gazette, Feb. 1, 2011, *available at* http://billingsgazette.com/news/state-and-regional/montana/montana-supreme-court-justice-nelson-to-retire/article_e3f72dcc-2e33-11e0-b328-001ccc4c002e0.html.

207. Michael Beckel, *Judicial Candidate Blames Mystery Nonprofit's Attacks for Defeat*, Center for Public Integrity (May 16, 2013), *available at* http://www.publicintegrity.org/013/05/16/12656/judicial-candidate-blames-mystery-nonprofits-attacks-defeat; *Campaign-Finance Dataset*, *supra* note 182.

208. *Campaign-Finance Dataset*, *supra* note 182; Dewan, *supra* note 201 (quoting Montana Trial Lawyers Association executive director's summary of independent expenditures: "In 2006, 2008, '10, '12, we didn't spend anything—nothing, zero").

recognition as the nephew of a longtime Montana Supreme Court Justice John "Skeff" Sheehy.[209]

The decisive factors included mailers from an organization called the Montana Growth Network, which criticized Best and Sheehy for past campaign contributions to Democrats and praised McKinnon as "the only non-partisan choice for supreme court justice."[210] That group was founded by a Republican state senator, and in the general election it sent two additional mailers attacking Sheehy.[211] Although the group disclosed spending about $42,000 on the mailers in the primary—more than either McKinnon or Sheehy raised in their own primary campaigns—it did not disclose its general election expenditures.[212] Tax filings show that the group spent about $690,000 that year on ads concerning "judicial fairness" as well as "energy and the environment, taxes and the economy and healthcare," and raised most of its funds from five unnamed donors including four contributions of more than $100,000.[213] A significant amount of that spending bought mailers and broadcast advertisements attacking Sheehy in the general election.[214] American Tradition Partnership also entered the campaign with a major mailing attacking Sheehy, a development perhaps related to a more than $50,000 transfer it received that year from Montana Growth

209. Charles S. Johnson, *Dissecting a Montana Primary of Surprises, Crossover Voters*, Ravalli Republic, June 9, 2012, *available at* http://ravallirepublic.com/news/state-and-regional/article_31bce989-b1ff-5899-9bc6-ffb102777ccd1.html.

210. Beckel, *supra* note 207.

211. *Id.*

212. *Id.*; Michael Beckel, *Montana State Senators Raise Big Bucks with Secretive Nonprofit; Conservative Montana Growth Network Spent Heavily during Supreme Court Elections*, Helena Indep. Record, May 4, 2014, *available at* http://helenair.com/news/local/montana-state-senators-raise-big-bucks-with-secretive-nonprofit/article_03c4fc80-d352-11e3-8f16-0019bb2963f4.html (indicating that the group's general-election expenditures "went unreported with state regulators because it did not explicitly urge people to cast their votes against Sheehy").

213. Montana Growth Network, *Form 990: Return of Organization Exempt from Income Tax* (2012), http://www.publicintegrity.org/2014/05/03/14709/montana-growth-network-filing [hereinafter *MGN 990*] (accessed Sept. 10, 2015; copy on file with Journal of Appellate Practice and Process).

214. *See, e.g.*, Mike Dennison, *Pro-Business Group's Ad Attacks Montana Supreme Court Candidate on Death Penalty*, Missoulian, Oct. 16, 2012, *available at* http://missoulian.com/news/state-and-regional/pro-business-group-s-ad-attacks-montana-supreme-court-candidate/article_4af2a4cc-17f1-11e2-b259-001a4bcf887a.html; Beckel, *supra* note 207; Beckel, *supra* note 212.

Network.[215] McKinnon disavowed the attacks on her opponent, saying "[m]udslinging diminishes the prestige of our highest court."[216] While the sources and total amount of independent expenditures in the 2012 Supreme Court race may never be determined,[217] the scope of that activity set the stage for the 2014 judicial campaigns.

IV. A JUDICIAL ELECTION IN THE AFTERMATH OF *CITIZENS UNITED*: PARTISANSHIP, OUTSIDE ORGANIZATIONS, AND DARK MONEY

A. The Setting

Weeks after newly appointed Justice Mike Wheat took the bench in January 2010, the United States Supreme Court issued *Citizens United*. The case concerned federal elections, but also would affect the states in general, Montana in particular, and especially the Montana Supreme Court. Due in large part to its history of corporate corruption, including corruption of judges,[218] Montana led twenty-six states in an amicus brief urging the Supreme Court not to reach the regulation of corporate electioneering in the states.[219] The states drew on the recent case of *Caperton v. A.T. Massey Coal Company*, in which the Court held that "significant and disproportionate" campaign

215. Mike Dennison, *Montana Supreme Court Candidate Disavows Negative Ads*, Missoulian, Oct. 30, 2012, *available at* http://missoulian.com/news/state-and-regional/montana-supreme-court-candidate-disavows-negative-ads/article_079c224-22f2-11e2-afd8-0019bb2963f4.html; *MGN 990*, *supra* note 213.

216. Dennison, *supra* note 215.

217. Several campaign practice complaints against the Montana Growth Network remain pending before the state's Commissioner of Political Practices. *See* Montana Commissioner of Political Practices, *Docket of Formal Complaints*, Driscoll v Montana Growth Network COPP-2013-CFP-0011, http://politicalpractices.mt.gov/content/2recentdecisions/DriscollvMTGrowthNetworkComplaint; Van Hyning v Montana Growth Network COPP-2013-CFP-0005, http://politicalpractices.mt.gov/content/2recentdecisions/VanHyningvMTGrowthNetworkComplaint; Hamlett v Montana Growth Network, Inc. COPP-2012-CFP-0053, http://political practices.mt.gov/content/2recentdecisions/HamlettvMTGrowthNetworkIncComplaint (all accessed Sept. 10, 2015; copies on file with Journal of Appellate Practice and Process).

218. *See supra* Section II(B).

219. *See generally* Brief for the States of Montana, et al., as Amici Curiae in Support of Neither Party, *Citizens United v. F.E.C.*, 2009 WL 2365205.

funds, including independent expenditures like those at issue in *Citizens United*, amounted to a violation of due process.[220] "In the majority of states with judicial elections at some level, corporate-electioneering laws help ensure that such situations remain 'extraordinary' acts of a single individual," the states argued, "rather than business as usual."[221]

In holding that contribution limits in the federal election law violated the First Amendment, the *Citizens United* Court did not address judicial elections. Instead, in a crucial passage narrowing the definition of corruption, it arguably relied on a principle that was inapplicable to judicial elections: "It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies."[222] In other words, "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt."[223] And yet, as Professor Larry Howell observes, "if the elected officials in question are judges, it means exactly that."[224] Justice Stevens noted in dissent that "[a]t a time when concerns about the conduct of judicial elections have reached a fever pitch, . . . the Court today unleashes the floodgates of corporate and union general treasury spending in these races."[225]

The states accepted *Citizens United*, including its consequences for judicial elections, except for Montana. The state chose to defend its prohibition on corporate electioneering, which dated back to the popularly enacted 1912 Corrupt

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220. *Id.* at *15–*16 (quoting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884 (2009)).

221. *Id.* at *16 (quoting *Caperton*, 556 U.S. at 887); *see also* Brief of Amici Curiae Justice at Stake et al., *Citizens United v. F.E.C.*, 2009 WL 2365225 at *2 (arguing that "[e]liminating states' longstanding ability to regulate corporate influence on judicial elections will cripple these essential reform efforts [aimed at "shoring up the public's confidence in the fairness and integrity of the nation's elected judges"] and exacerbate the recent explosion of special interest pressure on the courts").

222. *Citizens United*, 558 U.S. 310, 359 (quoting McConnell v. F.E.C., 540 U.S. 93, 297 (Kennedy, J., dissenting)).

223. *Id.*

224. Howell, *supra* note 21, at 59.

225. *Citizens United*, 558 U.S. at 460 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part) (citations omitted) (recognizing in addition that "[t]he majority of the States select their judges through popular elections").

Practices Act.[226] A secretive organization called Western Tradition Partnership led a challenge to the law.[227] The plaintiffs' activities focused on the legislature, and they did not openly seek to spend corporate funds in judicial campaigns.[228] Yet the consequences for electing judges were clear.

Ironically, perhaps, it took an elected court to comprehend the implications of *Citizens United* for state judiciaries. On December 30, 2011, the Montana Supreme Court upheld the state law in *Western Tradition*, distinguishing *Citizens United*: "Clearly Montana has unique and compelling interests to protect through preservation of this statute."[229] Among those distinguishing interests the court counted "corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs," which combine to "make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government."[230]

The Court also addressed judicial elections in detail. It recalled Heinze's corrupt judges in Butte.[231] It cited polls showing that three out of four Americans "believe that campaign contributions affect judicial decisions in states where judges are elected."[232] It even quoted Mark Twain's quip about Copper King William Clark, who "is said to have bought legislatures and judges as other men buy food and raiment. By his example he has so excused and so sweetened corruption that in Montana

226. *See* MONT. CODE ANN. § 13-35-227(1) (2010) ("A corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."); *see also* 1913 MONT. LAWS 604 (prohibiting certain business corporations from "pay[ing] or contribut[ing] in order to aid, promote or prevent the nomination or election of any person"); Wiltse, *supra* note 21.

227. W. Tradition P'ship., Inc. v. Atty. Gen., 271 P.3d 1, 7 (Mont. 2011) (confirming that the organization's stated purpose is "to solicit and anonymously spend the funds of other corporations, individuals and entities to influence the outcome of Montana elections"), *cert. granted*, *judgment rev'd sub nom*. Am. Tradition P'ship., Inc. v. Bullock, ___ U.S. ___, 132 S. Ct. 2490 (2012).

228. *Id.* at 6–7.

229. *Id.* at 11.

230. *Western Tradition*, 271 P.3d at 11.

231. *Id.* at 8.

232. *Id.* at 10 (citing JUSTICE AT STAKE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009 (Charles Hall ed., 2010)).

it no longer has an offensive smell."[233] Thus, the Court concluded, the state's preservation of clean judicial elections and an independent judiciary are compelling interests: "[T]he free speech rights of the corporations are no more important than the due process rights of litigants in Montana courts to a fair and independent judiciary, and both are constitutionally protected."[234] It found support for this defense of an independent, fair, and impartial judiciary in *Caperton*, noting the United States Supreme Court's acknowledgement there that "[j]udicial integrity is, in consequence, a state interest of the highest order."[235]

Sounding a broader theme of the state's vulnerability due to its relatively low-cost elections and high-value resources, the Court also noted that "the total expenditure for media advertising was about $60,000" in the last race for chief justice, compared to corporations' capacity to spend millions.[236] Finally, the court turned to former Justice Sandra Day O'Connor's then-recent statement that a "crisis of confidence in the impartiality of the judiciary is real and growing," in large part because of "the extraordinary spending power of 'super spender groups,' which are mostly corporate funded."[237]

Even the two dissenting justices only reluctantly conceded that *Citizens United* was controlling. Justice Beth Baker sought a saving construction of the Montana law "to preserve what remains of its constitutionality and to further the legislature's underlying intent to prevent corruption."[238] Justice James C. Nelson, noting that he "never had to write a more frustrating dissent," expressed his disapproval of *Citizens United* at length while nonetheless acknowledging "the applicability of a controlling precedent with which I profoundly disagree."[239] Justice Nelson doubted that "the Supreme Court will allow a state to single out corporations as a group and prohibit them

233. *Id.* at 11 (quoting MARK TWAIN, MARK TWAIN IN ERUPTION 72 (1940)).

234. *Id*. at 12.

235. *Id.* (quoting *Caperton*, 556 U.S. at 889 (quoting Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring))).

236. *Id.* at 13.

237. *Id.*

238. *Id.* at 14 (Baker, J., dissenting).

239. *Id.* at 18 (Nelson, J., dissenting).

from speaking in judicial elections," even as he noted that he "share[d] some of the . . . concerns"[240] raised by the *Western Tradition* majority.

The nation took notice of the Montana Supreme Court's ruling.[241] The Supreme Court also took notice, staying the state court decision pending the filing of a petition for certiorari.[242] In an unusual statement concurring in the stay, Justice Ginsburg, joined by Justice Breyer, sounded agreement with the Montana court that "Montana's experience, and experience elsewhere," warranted reconsideration of *Citizens United*.[243] Less than six months later, however, the Supreme Court issued an extraordinary summary reversal of the Montana court's decision.[244] With a curt citation to the Supremacy Clause the Court held that "[t]here can be no serious doubt" that "the holding of *Citizens United* applies to the Montana state law."[245] Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, voted to deny the petition, asserting that "this Court's legal conclusion should not bar the Montana Supreme Court's finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana."[246]

As in *Citizens United*, the Supreme Court's one-paragraph opinion in *American Tradition* did not address judicial elections even though the State of Montana and several amici, like the

240. Id. at 30 (Nelson, J., dissenting).

241. *See, e.g.*, George F. Will, *Montana Attempts to Buck the Supreme Court on* Citizens United, Wash. Post, May 30, 2012, *available at* https://www.washingtonpost.com/opinions/montana-attempts-to-buck-the-supreme-court-on-citizens-united/2012/05/30/gJQA4DCi2UU_story.html; Editorial, *Montana Takes on* Citizens United, N.Y. Times Jan. 23, 2012, at A26; Jess Bravin, *Montana Tests Supreme Court Political Spending Ruling*, Wall St. J., Jan. 4, 2012, *available at* http://www.wsj.com/articles/SB10001424052970204368104577139100369896494.

242. *See* Order in Pending Case, Am. Tradition P'ship v. Bullock, No. 11A762 (Feb. 17, 2012).

243. *Id.* (Ginsburg & Breyer, JJ., concurring in issuance of stay).

244. American Tradition Partnership v. Bullock, ___ U.S. ___, 132 S. Ct. 2490 (2012) (per curiam); *see also* Anthony Johnstone, *The State of the Republican Form of Government in Montana*, 74 MONT. L. REV. 5, 14 (2013) ("The decision appears to be the first time in decades that a divided Court summarily reversed a state court to invalidate a state law on constitutional grounds.").

245. *Id.* at 2491.

246. *Id.* (Breyer, Ginsburg, Sotomayor & Kagan, JJ., voting to deny certiorari).

Montana Supreme Court itself, highlighted the consequences of unlimited corporate and union campaign expenditures for the selection of judges and justices in most states.[247] Judicial elections, Montana argued, were "wholly unexamined in *Citizens United*," and "[n]ot even Petitioners claim a right to influence judicial campaigns through corporate expenditures, yet their arguments sweep broadly enough to undermine the integrity of the judicial system as much as the political system."[248] Eight of the eleven then-living retired justices of the Montana Supreme Court argued that "[e]normous special interest expenditures in state judicial elections are threatening one of the Constitution's most central guarantees—the right to due process and a fair trial."[249]

Beyond Montana, constitutional scholars noted that "[i]t is difficult to imagine that the Court intended to foreclose evaluation of whether judicial elections present compelling government interests in a case that did not involve judicial elections."[250] Twenty-two states and the District of Columbia argued that state judges, unlike the presidential and congressional candidates who were the subject of the campaigns at issue in *Citizens United*, "are not 'representatives' with offices open to the public, and outside influence by major campaign spenders is not recognized as a legitimate factor in judicial decision-making."[251] The Court did not engage these arguments about the implications of *Citizens United* for judicial elections, but instead noted generally that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case."[252]

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247. *See generally* Br. in Opp. of Montana, *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012), 2012 WL 1853622 [hereinafter *Montana Brief*]; Amicus Br. of Retired Justices of the Mont. Sup. Ct. and Justice at Stake in Support of Resps., *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012), 2012 WL 1829056 [hereinafter *Montana Justices' Brief*].

248. *Montana Brief*, *supra* note 247, at 25–26.

249. *Montana Justices' Brief*, *supra* note 247, at 3.

250. Amicus Br. of Walter Dellinger and James Sample in Support of Resps. at 8, *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012), 2012 WL 1863412.

251. Amicus Br. of New York, et al. in Support of Resps. at 17, *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012), 2012 WL 1853624.

252. *American Tradition*, 132 S. Ct. at 2491.

American Tradition blazed a trail for other challenges following the reasoning of *Citizens United*.[253] Having learned from the Montana Supreme Court a lesson about challenging election laws before state judges with first-hand experience of elections, litigants turned to the more favorable forum of appointed judges in the federal courts. One of the first laws to fall after the 1912 Corrupt Practices Act was Montana's 1935 non-partisan judicial election law, which made it unlawful for a political party to "endorse, contribute to, or make an expenditure to support or oppose a judicial candidate." [254] In a challenge brought by a county Republican Committee, the Ninth Circuit preliminarily enjoined enforcement of the law.[255] Relying on *Citizens United*, the court applied strict scrutiny to the speaker-based restriction,[256] and held that the law was likely to fail the narrow-tailoring requirement. Its ban on partisan endorsements was overbroad because

> [i]f Montana were concerned that party endorsements might undermine elected judges' independence, Montana could appoint its judges, with a bipartisan and expert panel making nominations—a less restrictive alternative currently practiced by several states.[257]

The partisan-endorsement ban also was under-inclusive because "it forbids judicial endorsements by political parties but not by other associations, individuals, corporations, special interest groups, and the like."[258] The court concluded that "Montana must be enjoined forthwith from enforcing [the statute] or otherwise interfering with a political party's right to endorse

253. *See* Johnstone, *supra* note 244, at 11–12 (discussing challenges to state election laws following *American Tradition*); *see also* Cox v. McLean, 49 F. Supp. 3d 765, 768 (D. Mont. 2014) (preliminarily enjoining state law prohibiting complainant's publication of his complaint to the Judicial Standards Commission). Most recently, and with significant consequences for judicial elections—among others—in Montana, the Ninth Circuit remanded a challenge to the state's contribution limits for consideration of whether they meet the narrower quid pro quo corruption interest identified in *Citizens United*. *See* Lair v. Bullock, 798 F.3d 736 (9th Cir. 2015) (amending and superseding opinion first reported at 787 F.3d 989).

254. MONT. CODE ANN. § 13-35-231.

255. Sanders Cnty. Republican Cent. Comm. v. Bullock, 698 F. 3d 741 (9th Cir. 2012).

256. *Id.* at 745–46.

257. *Id.* at 746.

258. *Id.* at 747.

judicial candidates and to expend monies to publicize such endorsements."[259] Thus, Montana's judicial elections not only had to be political, they had to be partisan too.

Judge Mary Schroeder dissented from what she noted was the first case "to hold that even though a state has chosen a non-partisan judicial selection process, political parties have a right to endorse candidates."[260] The result, she wrote, was that "parties can work to secure judges' commitments to the parties' agendas in contravention of the non-partisan goal the state has chosen for its selection process."[261] Partisan influence, Judge Schroeder explained, is "particularly pernicious because parties serve as 'natural bundling agents that coordinate sprawling political coalitions across all types of policy domains and venues,'"[262] and their power to make unlimited independent expenditures for or against judicial candidates under *Citizens United* "threatens to further erode state judges' ability to act independently and impartially."[263] In early 2014, the Supreme Court denied Montana's petition for certiorari,[264] declining another opportunity to address judicial elections after *Citizens United*. Like the Supreme Court's breach of the 100-year-old Corrupt Practices Act, this decision would lead within a matter of months to a flood of new money into Montana elections.

B. The Candidates and Issues

The 2014 campaign of Mike Wheat and Lawrence VanDyke produced a contest between two lawyers who were born elsewhere but quickly moved to southwestern Montana. There the similarities ended. Wheat returned home after service

259. *Id.* at 749.

260. *Id.* (Schroeder, J., dissenting).

261. *Id.* (Schroeder, J., dissenting).

262. *Id.* at 750 (Schroeder, J., dissenting) (quoting Michael S. Kang & Joanna M. Sheperd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisionmaking*, 86 N.Y.U. L. REV. 69, 107 (2011)).

263. *Id.* at 751 (Schroeder, J., dissenting). The Ninth Circuit later clarified that its decision invalidated the prohibition on party endorsements and independent expenditures, but not the prohibition on party contributions to candidates. *See* Sanders Cnty. Republican Cent. Comm. v. Fox, 717 F. 3d 1090, 1092 (9th Cir. 2013).

264. Fox v. Sanders Cnty. Republican Cent. Comm., ___ U.S. ___, 134 S. Ct. 1345 (2014) (denying certiorari).

as a marine in Vietnam for law school at the University of Montana and a short stint as a state prosecutor. VanDyke left Montana for Harvard Law School and a clerkship on the D.C. Circuit. Wheat had been a plaintiff's attorney in Montana trial courts for three decades. VanDyke was in his first decade of practice, having started as an appellate attorney at a national firm. Wheat eventually entered politics as an elected Democratic state senator and later lost a campaign for state attorney general. VanDyke never served in elective office, but was attracted to the high-profile legal docket of the Republican Texas Attorney General's office before landing an appointed position under the newly elected Republican Montana Attorney General. These biographical differences would become the foundation of the core political differences in the campaign.

1. Mike Wheat

Mike Wheat was born in Spokane, Washington in 1947, and moved to Montana in 1948.[265] He graduated from the University of Montana School of Law, after which he served as a deputy county attorney in Butte-Silver Bow County, Montana, for three years.[266] For nearly three decades he practiced "plaintiff-oriented and appellate litigation, with an emphasis on personal injury, product liability and insurance-related claims," in a firm he founded with a law-school classmate in Bozeman, Montana.[267] From 2003 to 2007 he served one four-year term in the Montana Senate as a Democrat, chairing the Senate Judiciary Committee in 2005.[268] In 2008 he ran unsuccessfully in the Democratic primary for state attorney general.[269] Wheat was one of eleven applicants to fill the associate justice seat opened by

265. Charles S. Johnson, *Bozeman's Mike Wheat Appointed to Montana's Supreme Court*, Missoulian, Dec. 23, 2009, *available at* http://missoulian.com/news/local/bozeman-s-mike-wheat-appointed-to-montana-supreme-court/article_6464ff9a-efea-11de-95a0-001cc4c03286.html.

266. *Id.*

267. *Id.*

268. Charles S. Johnson, *Montana Supreme Court Race; Wheat Touts Years of Experience*, Missoulian, Oct. 19, 2014, *available at* http://missoulian.com/news/state-and-regional/montana-supreme-court-race-wheat-touts-years-of-experience/article_8a182a04-5814-11e4-82be-b7c7a1293861.html.

269. Johnson, *supra* note 265.

the retirement of Justice John Warner, and one of three finalists to emerge as a nominee from the state Judicial Nomination Commission process.[270] Governor Brian Schweitzer, a Democrat, appointed Wheat to fill the remainder of Justice Warner's eight-year term ending in 2014, subject to an initial election in 2010.[271] In a 2010 uncontested retention election, voters retained Justice Wheat with seventy-eight percent of the vote.[272]

In his 2014 campaign for a new term, Wheat ran on "four decades of legal and public service experience," as well as his time on the Montana Supreme Court.[273] He argued that "the rights afforded to us by the Constitution of Montana deserve a strong and independent guardian," and focused specifically on his defense of the distinctive state constitutional right to "a clean and healthful environment" as well as public access to land and water.[274] As the campaign progressed, Wheat emphasized what he called a "depth of professional and personal experience in life that I think helps me develop what I call judicial common sense and just understanding of what's going on in the case," in implicit contrast to an opponent who was twenty-five years younger.[275] In response to criticisms of his decisions by the U.S.

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270. *Id.*

271. *Id.* Justice Wheat became the second former legislator on the court, joining Justice Jim Rice, who served three terms as a Republican state representative before his appointment and subsequent election. Jennifer McKee, *Lawyer, Ex-Legislator Sworn in as Justice*, Billings Gazette, Jan. 5, 2010, *available at* http://billingsgazette.com/news/state-and-regional/montana/lawyer-ex-legislator-sworn-in-as-justice/article_902b9e3a-fa86-11de-9e48-001cc4c03286.html. Chief Justice Mike McGrath was previously elected as a Democrat for state attorney general, and Justice James C. Nelson was previously elected as a Democrat for county attorney (though Nelson was appointed to the court by Republican Governor Marc Racicot). *Id.*; *see also* Anthony Johnstone, *The Hercules of Helena: Justice James C. Nelson and the Jurisprudence of Principle*, 75 MONT. L. REV. 199, 201 (2014).

272. MONTANA SECRETARY OF STATE, 2010 STATEWIDE GENERAL ELECTION CANVASS 6-1, available at http://sos.mt.gov/Elections/Archives/2010s/2010/2010_General_Election_Official_Statewide_Canvass.pdf (accessed Sept. 18, 2015; copy on file with Journal of Appellate Practice and Process).

273. *See Mike Wheat for Justice*, http://www.wheatforjustice.com/, *archived at* https://web.archive.org/web/20141013014020/http://www.wheatforjustice.com/ (accessed Sept. 18, 2015; copy on file with Journal of Appellate Practice and Process).

274. *Id.*; *see also* MONT. CONST. art. IX, § 1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.").

275. Johnson, *supra* note 268.

Chamber of Commerce, Wheat cited an eighty-five percent approval level in the court's anonymous biennial survey of lawyers.[276] "The chamber is more of a political organization," Wheat argued, suggesting that its policy views make it better suited to lobbying the legislature.[277] In general, Wheat rejected any complaints that he might bring a particular agenda to the court, noting that the justices act collectively and mostly unanimously.[278] Interestingly, he also criticized *Citizens United* and echoed traditional concerns about "outside influences" in judicial races, explaining that "[w]e Montanans have an independent attitude and we don't want outside corporations or special interest group[s] telling us how to run our affairs."[279] Wheat received endorsements from major newspapers,[280] as well as from the public-employee and teachers union MEA-AFT and the environmental advocacy group Montana Conservation Voters.[281]

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276. *Id.*; *see also* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, 2012 STATE LIABILITY SYSTEMS SURVEY: LAWSUIT CLIMATE 7 (2012) (ranking Montana forty-fifth among states for their "legal climate"), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Lawsuit_Climate_Report_2012.pdf; MONTANA SUPREME COURT, MONTANA SUPREME COURT PERFORMANCE MEASURES, *2014 Bench and Bar Survey* 2 (2014) (showing that, averaged across ten performance measures, eighty-five percent of 404 respondent judges, law faculty, and attorneys agreed that the court performed well), *available at* http://courts.mt.gov/portals/113/supreme/measures/2014/bar-survey14.pdf.

277. Johnson, *supra* note 268.

278. *Id.*

279. *Wheat, VanDyke Compete for Supreme Court Post*, Great Falls Tribune, Oct. 11, 2014, *available at* http://www.greatfallstribune.com/story/news/2014/10/12/wheat-vandyke-compete-supreme-court-post/17068781/.

280. Gazette Opinion: *Let's Keep Rice, Wheat on Supreme Court*, Billings Gazette, Oct. 7, 2014, *available at* http://billingsgazette.com/news/opinion/editorial/gazette-opinion/gazette-opinion-let-s-keep-rice-wheat-on-supreme-court/article_f38ff427-a3d1-567f-8591-f52f00e67487.html ("The Montana Supreme Court must remain a venue where a former GOP lawmaker and a former Democratic lawmaker can work together, put aside personal biases and make fair, just decisions for the people of Montana. Voters will get that result if they return Rice and Wheat to the court."); Editorial: *Wheat, Rice Deserve Support for Montana's Supreme Court*, Bozeman Daily Chronicle, Oct. 2, 2014, *available at* http://www.bozemandailychronicle.com/opinions/editorials/editorial-wheat-rice-deserve-support-for-montana-s-supreme-court/article_8939c216-4a43-11e4-947e-6b1003c5c88e.html ("Wheat and Rice have both served with distinction. And they bring balance to the high court. Both were appointed to fill the terms of retiring justices—Rice by Republican Gov. Judy Martz, Wheat by Democratic Gov. Brian Schweitzer.").

281. *See Election 2014: Who Are the Recommended Candidates?* MEA-AFT Public Schools Public Service (Oct. 2014), http://www.mea-mft.org/Articles/election_2014_who_are_the_recommended_candidates.aspx; *2014 MCV Endorsed Candidates*, MONTANA

2. Lawrence Van Dyke

Lawrence VanDyke was born in Midland, Texas, in 1972 and moved to Montana in 1973.[282] He graduated from Harvard Law School in 2005, after which he clerked for Judge Janice Rogers Brown of the D.C. Circuit, and then spent five years practicing business litigation and working on pro bono cases for groups supporting civil and religious liberty causes with the national law firm Gibson, Dunn & Crutcher in Washington, D.C., and Texas.[283] In 2012, VanDyke became an assistant solicitor general in the office of Republican Texas Attorney General Greg Abbott—an office noted for a leading role in constitutional challenges and defenses consistent with the state's conservative politics, and for developing alumni, including U.S. Senator Ted Cruz, who are influential in Republican politics.[284] Newly elected Republican Montana Attorney General Tim Fox tapped VanDyke in 2013 to serve as solicitor general in his administration. Van Dyke left the post after eighteen months, "saying he had disagreements with co-workers over his approach to the job."[285]

CONSERVATION VOTERS (n.d.), http://mtvoters.org/node/2161 (both accessed Sept. 18, 2015; copies on file with Journal of Appellate Practice and Process).

282. Charles S. Johnson, *VanDyke Cites Experience, Criticizes Wheat as Result-Oriented*, Missoulian, Oct. 9, 2014, *available at* http://missoulian.com/news/state-and-regional/vandyke-cites-experience-criticizes-wheat-as-result-oriented/article_a85a5b9c-5011f-11e4-ad31-c3d720ff006c.html.

283. Mike Dennison, *Montana Supreme Court Candidate VanDyke Says Appeals Are Focus*, Missoulian, Oct. 30, 2014, *available at* http://missoulian.com/news/state-and-regional/montana-supreme-court-candidate-vandyke-says-appeals-are-focus/article_39b9c640-5854-5fed-8158-060ae2f771bd.html.

284. Johnson, *supra* note 282; *see also, e.g.*, Alex Wilts, *Ted Cruz Longest-Serving Solicitor General of Texas, Jerry Falwell Said*, Austin-American Statesman: PolitiFact Texas (Mar. 23, 2015), http://www.politifact.com/texas/statements/2015/mar/25/jerry-falwell/ted-cruz-longest-serving-solicitor-general-texas-j/ (indicating that Ted Cruz was solicitor general in Texas for more than five years) (accessed Sept. 21, 2015; copy on file with Journal of Appellate Practice and Process).

285. Dennison, *supra* note 283. One of VanDyke's former colleagues told a reporter that "I just don't think he has the maturity or the work ethic to aspire to this position." Matt Volz, *Colleague Questions Candidate's Skills for Montana Supreme Court*, A.P., Oct. 25, 2014, *available at* http://missoulian.com/news/state-and-regional/colleague-questions-candidate-s-skills-for-montana-supreme-court/article_6cdf44c8-1b41-5390-a83d-604622ecd1ee.html.

VanDyke's campaign emphasized his experience in appellate and constitutional litigation.[286] His campaign slogan was "Following the Law, Not the Politics," and his campaign materials highlighted Wheat's partisan political background while de-emphasizing the partisan alignments in his own career.[287] VanDyke reportedly declined to answer "whether he's a partisan conservative warrior," and instead explained that "[j]ob one for judges is to put that tendency [to let personal biases influence decisions] aside and not apply your own preferences."[288] He said that he decided to run because "working as the state's top appeals and constitutional lawyer, I came to the conclusion that my opponent Mike Wheat has failed to live up to the essential requirement of complete neutrality."[289] "My problem with Mike Wheat is not that he's a liberal Democrat," VanDyke told a reporter, "[m]y problem is he judges like a liberal Democrat"[290] In interviews, he repeatedly cited the U.S. Chamber of Commerce report and criticized what he called the court's unpredictability in business cases.[291] VanDyke received endorsements from the Montana Chamber of Commerce, the Montana Association of Realtors, Montana Contractors Association, the Montana Farm Bureau Federation, and the National Rifle Association.[292]

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286. Johnson, *supra* note 282

287. vandykeforjustice.com, Van Dyke for Justice (n.d.), *archived at* https://web.archive.org/web/20141017104149/http://vandykeforjustice.com/view/compare/ (accessed Sept. 21, 2015; copy on file with Journal of Appellate Practice and Process).

288. Dennison, *supra* note 283; Johnson, *supra* note 282.

289. Great Falls Tribune, *supra* note 279.

290. Mike Dennison, *Wheat's Record under Attack: What's Really in the Record?* DailyInterLake.com (Oct. 31, 2014), http://www.dailyinterlake.com/news/local_elections/wheat-s-record-under-attack-what-s-actually-in-the/article_a9f59eac-6155-11e4-98ad-3b38e855072b.html (indicating as well that Van Dyke thought the most significant issue in the race was how "activist or agenda-driven judging undermines our entire system of government") (accessed Sept. 21, 2015; copy on file with Journal of Appellate Practice and Process).

291. Johnson, *supra* note 282; Dennison, *supra* note 283.

292. Johnson, *supra* note 282 (mentioning the Chamber of Commerce, Realtors, Contractors, and Farm Bureau endorsements); *Debating Who Won, Plus NRA Likes VanDyke*, Great Falls Tribune, Sept. 30, 2014, *available at* http://www.greatfallstribune.com/story/opinion/2014/09/30/debating-won-plus-nra-likes-vandyke/16516839/ (noting that its endorsement of Van Dyke was the NRA's "only endorsement of any judicial candidate in Montana for 2014").

C. The Qualifications Challenge: Cross v. Van Dyke

Both candidates made their experience as practicing lawyers a primary qualification for serving on the bench, and each criticized his opponent for a lack of relevant experience. Pointing to his own specialized appellate experience, VanDyke said "I don't think it would hurt to have at least one on our court that focuses on appellate and constitutional issues."[293] Wheat responded that "it's not the kind of job that demands a constitutional specialist," given that the court faced a much broader docket of issues of which constitutional law is just a part.[294] Wheat also criticized VanDyke's lack of trial experience, stating that Wheat was himself the candidate who "has the kind of experience in the area of law that's required for this kind of a position."[295] VanDyke's response was that Wheat's long experience on the plaintiffs' side of cases made him too sympathetic to trial lawyers.[296] Early in the campaign, these political issues about experience became a legal question because the Montana Constitution requires judges to be "admitted to the practice of law in Montana for at least five years prior to the date of appointment or election."[297]

While VanDyke was admitted to the State Bar of Montana in 2005, he took inactive status—a class of bar membership for lawyers who "are not engaged in the practice of law in Montana"—in 2007.[298] Less than two weeks after VanDyke filed for office in March 2014, he was sued for lack of qualification under the "admitted to the practice of law in

293. Johnson, *supra* note 282; *see also* Volz, *supra* note 285 ("We've got lots of people with lots of trial experience on the court," VanDyke said. "I think what we need is somebody who actually focuses on the law and the constitution, has some expertise in that.").

294. Johnson, *supra* note 282 (reporting that "[t]he Supreme Court Clerk's office said that since January 2006, the court has had only 34 out of 6,602 cases in which a party gives notice to the court that a constitutional issue is at question.") The figure reported in this story understates the constitutional caseload, however, because the notice requirement applies only to "a party who challenges the constitutionality of any act of the Montana legislature," or facial challenges to laws, and does not apply to the constitutionality of executive actions or local laws. *See* MONT. R. APP. P. 27.

295. Dennison, *supra* note 283.

296. Dennison, *supra* note 290.

297. MONT. CONST. art. VII, § 9(1).

298. Cross v. VanDyke, 332 P. 3d 215, 216 (Mont. 2014).

Montana" provision.[299] The district court disqualified VanDyke, excluding him from the primary ballot.[300] VanDyke attacked the suit as "brought by Mike Wheat campaign donors to eliminate competition by lawsuit."[301]

On appeal, Justice Wheat and Chief Justice McGrath, who each had contributed $200 to Wheat's campaign, recused themselves.[302] Considering the case without them, a divided Supreme Court reversed in a four-to-three vote.[303] The court framed the issue as "whether VanDyke's decision to take inactive status with the State Bar of Montana while he practiced law in other states disqualifies him from meeting the constitutional requirement of admission to the practice of law in Montana for five years prior to the election."[304] The majority, Justice Baker writing for the court, focused on the word "admitted" and held that bar membership—active or inactive—satisfied that requirement.[305] The court concluded that the

299. *Id.*

300. *Id.*

301. Charles S. Johnson, *Judge Orders Montana Supreme Court Candidate Removed from Ballot*, Missoulian, Apr. 24, 2014, *available at* http://missoulian.com/news/local/judge-orders-montana-supreme-court-candidate-removed-from-ballot/article_4ff9de60-ccca-11e3-ba8b-0019bb2963f4.html. Two of the five plaintiffs, Wade Dahood and Michael McKeon, and one of their attorneys, Gene Jarussi, had contributed to the Wheat campaign. *See, e.g.*, *Contributions to Mike Wheat: 2014 Supreme Court – 2*, followthemoney.org (n.d.), http://followthemoney.org/ (accessed Sept. 21, 2015; copy of main page on file with Journal of Appellate Practice and Process) (click "start here," then enter individual contributors' names to find records).

302. Charles S. Johnson, *Court to VanDyke: McGrath, Wheat Already Recused Selve*s, Billings Gazette, May 7, 2014, *available at* http://billingsgazette.com/news/government-and-politics/court-to-vandyke-mcgrath-wheat-already-recused-selves/article_4847f972-4d96-5a1a-943a-0e16767ae3b1.html.

303. *See generally* Tyler Stockton, Note, Cross v. VanDyke*: Admitted Only Means Admitted*, 75 MONT. L. REV. ONLINE 88 (2014) (summarizing facts, background, and opinions, and analyzing reasoning) (accessed Sept. 22, 2015; copy on file with Journal of Appellate Practice and Process).

304. *Cross*, 332 P.3d at 215–16.

305. *Id.* The court contrasted this qualification for justices with the constitutional qualification for attorney general, which requires "active practice [of law] for at least five years before election." *Id.* at 219 (noting requirement of construing state constitution "as a whole," and citing both MONT. CONST. art. VI, § 3(2) (addressing qualifications for attorney general) and MONT. CONST. art.. VII, § 9(1) (addressing qualifications for justices)).

constitution "determines minimum eligibility" and "the voters decide who is qualified to serve."[306]

For the dissent, Justice Cotter focused on the word "practice" and concluded that VanDyke was disqualified because he was prohibited from "the practice of law in Montana" while on inactive status.[307] The dissent emphasized the court's power to establish the qualifications to practice law in Montana and the ways in which inactive status falls short of those qualifications; it took the position that VanDyke "cannot have it both ways."[308] Neither the majority nor the dissent adopted the plaintiffs' argument that the delegates to the constitutional convention of 1972 (presumably including the plaintiffs themselves) intended to limit supreme-court candidates only to those who had actually practiced in Montana for five years so that they would be familiar with Montana law and procedure.[309]

D. Financing the Campaign

With the field set, the candidates and allied advocacy groups began what would become a million-dollar judicial campaign of national note.[310] Surprisingly, however, the amount of campaign contributions raised by both candidates was below

306. *Id.* at 222.

307. *Id.* at 224 (Cotter, Sandefur & McLean, JJ., dissenting). District Judge Dirk M. Sandefur was sitting for Chief Justice McGrath, and District Judge Edward P. McLean was sitting for Justice James Jeremiah Shea, who had contributed to the Wheat campaign. *See, e.g.*, followthemoney.org, *supra* note 301.

308. *Cross*, 332 P. 3d at 224 (Cotter, Sandefur & McLean, JJ., dissenting) (explaining that "[t]he State Bar By-Laws clearly and plainly prohibited VanDyke from practicing law in Montana while on inactive status," and that "for over five years VanDyke availed himself of the benefits of inactive status by paying reduced Bar dues, freeing himself from the payment of assessments to the Lawyers' Fund for Client Protection, and avoiding the CLE requirements imposed on active bar members," and concluding that, "[h]aving done so, he should be estopped from now asserting that he was admitted to practice law in Montana during those same five years").

309. *Id.* at 221 (quoting IV CONVENTION TRANSCRIPT, *supra* note 89, at 1119–20); *see also id.* at 222 ("The Constitutional Convention record thus supports our analysis of the plain language of Article VII, Section 9(1)").

310. *See* Joe Palazollo, *Judges Step Up Electioneering as Outside Money Pours into Races*, Wall St. J., Oct. 13, 2014, *available at* http://www.wsj.com/articles/judges-step-up-electioneering-as-outside-money-pours-into-races-1413149643; Dewan, *supra* note 201; GREYTAK, ET AL., *supra* note 3.

average for a Montana supreme court race. Due to its relatively low contribution limits, the Montana campaign stood out for its candidates' reliance on small donors, compared with the dominance of large donors of $1000 or more in most other state judicial campaigns.[311] On the other hand, Montana drew an exceptional amount of independent spending by national groups including the Republican State Leadership Committee; the three-quarters of campaign spending financed by outside groups was the second-highest share of independent expenditures in any state supreme court race in 2014.[312]

1. Fundraising by Van Dyke

Lawrence VanDyke raised $132,999 from about 700 contributors. His support came from a range of interests, with relatively little support from the bar: twenty-two percent from lawyers, twelve percent from retirees, ten percent from agriculture, and five percent from construction, with fifteen percent of his contributors unidentifiable and four percent of his contributions self-funded.[313] Thirty percent of VanDyke's contributions came from outside Montana, the highest rate of out-of-state contributions for any supreme court candidate on record.[314] He defended these contributions, contrasting the donors, including former colleagues at Gibson, Dunn & Crutcher, who have nothing to gain "personally" from their contributions, with in-state lawyers who would be appearing before the court.[315]

311. *See* GREYTAK, ET AL., *supra* note 3, at 16.

312. *Id.* at 70.

313. *Campaign-Finance Dataset*, *supra* note 182.

314. *Id.*

315. Jessica Mayrer, *Crowding the Race: Partisan Politics, PAC Money Permeate Supreme Court Campaign*, Missoula Independent, Oct. 9, 2014, *available at* http://missoulanews.bigskypress.com/missoula/crowding-the-race/Content?oid=2093248. In fact, Gibson, Dunn & Crutcher has appeared before the Montana Supreme Court in at least one major case as both counsel and a party. *See* Seltzer v. Morton, 154 P. 3d 561, 609, 615 (2007) (affirming $11 million abuse-of-process judgment against Gibson, Dunn & Crutcher, one of its lawyers, and his client, including $9.9 million of punitive damages for what the court called "legal thuggery").

The campaign produced ads reinforcing VanDyke's basic message, "Following the Law, Not the Politics."[316] In one ad, the candidate noted voters often asked him, "So are you a Republican or a Democrat; are you a conservative or a liberal," because "people . . . have gotten used to some justices acting like a partisan official."[317] VanDyke demurred, explaining that when judges base decisions on their own politics, "[t]hat is wrong."[318] In its final weeks, the VanDyke campaign responded to attack ads from what it called "dark money groups" funded by "the same group of wealthy trial lawyers who have poured buckets of money into Montana supreme court elections for decades," countering those ads by asserting that "Mike Wheat spent over twenty years as a personal injury lawyer before starting his partisan political career as a Democrat."[319] The ad also portrayed Wheat as "anti-gun," "anti-death penalty," and "anti-resource development."[320] In his closing argument, VanDyke criticized "shadowy groups supported by Montana trial lawyers," claiming that "ninety-four percent of money supporting Mike Wheat is from trial lawyers," and that "eighty-three percent of Mike Wheat's lawyer donors have recently had cases in front of him."[321]

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316. *See* Lawrence VanDyke for Montana Supreme Court, television ad, *Judges Shouldn't Legislate from the Bench*, YouTube (Sept. 25, 2014), *available at* https://youtu.be/Ysd6TbILnC8 (featuring a soundtrack that concludes with Van Dyke's campaign slogan, "Following the Law, Not the Politics") (accessed Sept. 22, 2015; YouTube-generated transcript on file with Journal of Appellate Practice and Process) ; Lawrence VanDyke for Montana Supreme Court, radio ad, *Following the Law, Not the Politics*, YouTube (Sept. 30, 2014), *available at* https://youtu.be/B_y4-5aB4E4 (accessed Sept. 22, 2015; screen shot of YouTube page on file with Journal of Appellate Practice and Process (no transcript available)).

317. *See* Lawrence VanDyke for Montana Supreme Court, television ad, *Are you Republican or Democrat?* YouTube (Sept. 8, 2014), *available at* https://youtu.be/MhzDHVMgYsw (accessed Sept. 22, 2015; YouTube-generated transcript on file with Journal of Appellate Practice and Process).

318. *Id.*

319. Lawrence VanDyke for Montana Supreme Court, television ad, *Don't Trust the Wheaties*, YouTube (Oct. 20, 2014), *available at* https://www.youtube.com/watch?v=YQ_iG3xqygA (accessed Sept. 22, 2015; screen shot of YouTube page on file with Journal of Appellate Practice and Process (no transcript available)).

320. *Id.*

321. Lawrence VanDyke for Montana Supreme Court, television ad, *Nothing Changes if Nothing Changes*, YouTube (Oct. 24, 2014), *available at* https://youtu.be/IzYiJjwaFvQ.

2. Fundraising by Wheat

Mike Wheat raised $161,662 from more than 900 contributors. He relied mostly on contributions from lawyers (fifty-three percent), with the remainder concentrated in the following sectors: twelve percent from government (including education) and eight percent from retirees, with five percent of contributors unidentifiable and five percent of contributions self-funded.[322] Only three percent of Wheat's contributions came from outside Montana.[323] Wheat's campaign advertising emphasized his legal experience as a criminal prosecutor and in private practice, as well as on the supreme court: "It's important to elect judges that have plenty of legal experience," he asserted, and "[t]he knowledge I gained over the years has helped me make decisions on the court."[324] As negative advertising by independent-expenditure groups increased late in the campaign, however, Wheat leveled his attacks against the messengers, characterizing them as "[t]hese out of state corporations . . . distorting the truth about me and my record."[325] Criticism of his unnamed opponent's experience was secondary to naming "the Koch brothers and others who want to buy my seat on the supreme court for an inexperienced lawyer."[326] His closing argument was a request to "please vote to retain me, and tell these corporations that neither your vote nor my seat are for sale."[327]

3. Independent Expenditures for Wheat against Van Dyke

As their campaign advertising suggested, the candidates became bit players as the election neared. Several state and national advocacy groups spent hundreds of thousands of dollars

322. *Campaign-Finance Dataset*, *supra* note 182.

323. *Id.*

324. Brennan Center for Justice, *Buying Time 2014—Montana*, *Advertisements*, http://www.brennancenter.org/analysis/buying-time-2014-montana [hereinafter *Buying Time 2014—Montana*] (scroll down to *Criminal Prosecutor* (Sept. 30, 2014)) (accessed Sept. 22, 2015; copy of storyboard on file with Journal of Appellate Practice and Process).

325. *Id.* (scroll down to *At It Again* (Oct. 27, 2014)) (accessed Sept. 22, 2015; copy of storyboard on file with Journal of Appellate Practice and Process).

326. *Id.*

327. *Id.*

on mailers and broadcast media, mostly attacking the candidates.[328] The trial lawyers' Montana Law PAC remained active in 2014, raising more than $161,483 in disclosed direct contributions of up to $10,000 each from trial lawyers and law firms.[329] Yet it spent only $36,283 on direct campaign expenditures, including research, polling, and client letters supporting Mike Wheat. The PAC transferred most of its money—$125,200 of in-kind contributions in the form of payments for broadcast production and purchases—to a new political committee called Montanans for Liberty and Justice (MLJ). This group functioned as the new campaign arm for the Montana Trial Lawyers Association, sharing an office and officers with the association.[330] It self-identified as "a coalition of groups representing trial lawyers, women, conservationists, hunters and anglers and human rights advocates."[331] Most of its funding came from trial lawyers, however, with smaller contributions from the political committee of the MEA-MFT public-employee and teachers union.[332] In total, MLJ spent $394,640 on research, polling, consulting, and print and broadcast campaign advertising, which combined with the in-kind contributions from Montana Law PAC, amounted to $519,840 of independent expenditures on behalf of Mike Wheat.[333] The contributions to MLJ, erroneously called a "dark money" group by the VanDyke campaign, were disclosed in nearly all cases down to the individual level, including the contributions behind the Montana Law PAC's transfers.[334]

328. GREYTAK, ET AL., *supra* note 3, at 53 ("Montana's 2014 nonpartisan election saw the highest percentage of negative ads of any race this cycle, with 93 percent of all spots characterized as negative in tone.").

329. *Campaign-Finance Dataset*, *supra* note 182.

330. Montanans for Liberty and Justice, *Form C-2 Statement of Organization*, Mont. Comm'r of Political Practices (Aug. 27, 2014 & Oct. 10, 2014).

331. Charles S. Johnson*, Independent Groups Raise Profile of Montana Supreme Court Race*, Missoulian, Oct. 8, 2014, *available at* http://missoulian.com/news/local/independent-groups-raise-profile-of-montana-supreme-court-race/article_c85a3734-4e8d-11e4-b633-abf3456caa6f.html.

332. Montanans for Liberty and Justice, *Form C-6 Political Committee Finance Report*, Mont. Comm'r of Political Practices (Oct. 23, 2014 & Oct. 29, 2014).

333. *Campaign-Finance Dataset*, *supra* note 182.

334. *Id.*

MLJ ran two television advertisements in the last month of the campaign. It spent more on television time than the other independent expenditure groups combined,[335] including an estimated $153,880 on its first commercial, more than three times the next largest purchase.[336] That ad attacked Lawrence VanDyke as "in the pocket of out of state special interests," who worked for a "Washington D.C. lobbying firm that lobbies for corporate interest groups," and as someone who has "112 out-of-state campaign donors." It then praised Mike Wheat as "his own man," "impartial," and "experienced." The second MLJ commercial was an updated version of the first, run in the closing days of the election.[337]

Less is known about a third outside group supporting Wheat. Montana Lawyers for Experienced Judges filed as an incidental political committee less than a month before the election, but did not disclose any contributions or expenditures.[338] It shared an office and officer with a prominent Montana personal-injury law firm.[339] Its one campaign advertisement, posted online, contrasts Wheat's practice experience with an attack against his opponent asking, "Who is Lawrence VanDyke?"[340] The advertisement answers by noting VanDyke's relatively short career in Montana, his work as "[c]orporate lawyer for a California firm Gibson Dunn," his

335. *Buying Time 2014—Montana*, *supra* note 324 (showing that the Republican State Leadership Committee made $65,360 of television purchases and Americans for Prosperity made $69,580 of television purchases). (accessed Sept. 23, 2015; copy on file with Journal of Appellate Practice and Process).

336. *Id.* (scroll down to *Pocket* (Oct. 7, 2014)) (accessed Sept. 23, 2015; copy of storyboard on file with Journal of Appellate Practice and Process).

337. *Id.* (scroll down to *Pocket Rev* (Oct. 31, 2014) (accessed Sept. 23, 2015; copy of storyboard on file with Journal of Appellate Practice and Process).

338. Montana Lawyers for Experienced Judges, *Form C-2 Statement of Registration*, Mont. Comm'r of Political Practices (Oct. 9, 2014).

339. *Compare id. with* Bishop & Heenan Law Firm, *About Us*, *available at* http://www.heenanlawfirm.com/about-us/ (indicating that John Heenan, who is listed as Treasurer in the Montana Lawyers for Experienced Judges C-2, is a partner at the law firm) (accessed Sept. 23, 2015; copy on file with Journal of Appellate Practice and Process).

340. Montana Lawyers for Experienced Judges, *Lawrence VanDyke*, YouTube (Oct. 9, 2014), *available at* https://youtu.be/RS6a8OYIxW8 (accessed Sept. 23, 2015; transcript on file with Journal of Appellate Practice and Process).

support from Gibson Dunn lawyers, and the circumstances of his departure from the Montana Department of Justice.[341]

4. Independent Expenditures for Van Dyke against Wheat[342]

a. The Republican State Leadership Committee

On the other side, the campaign saw the unprecedented entry of a national political party in a Montana Supreme Court race. The Republican State Leadership Committee (RSLC), "the only national organization whose mission is to elect down-ballot, state-level Republican officeholders,"[343] registered the Republican State Leadership Committee—Judicial Fairness Initiative Montana PAC to support VanDyke and oppose Wheat.[344] Unlike the trial-lawyer groups, the RSLC PAC was funded almost entirely by lump-sum transfers from its parent

341. *Id.*

342. One anti-Wheat committee, the anti-abortion group Women Speak Out PAC, is not addressed in this section. It sent mailers attacking Wheat but did not register or report its spending, which makes analysis of its involvement in the campaign impossible. *See* Mike Dennison, *At Least $1.5M Spent on Wheat-VanDyke Race for Montana Supreme Court*, Missoulian, Nov. 26, 2014, *available at* http://missoulian.com/news/state-and-regional/at-least-m-spent-on-wheat-vandyke-race-for-montana/article_7de6d55b-cda1-574e-b16b-beaafaa719c3.html (reporting that the Women Speak Out group "did not report its spending to the state Political Practices Office").

343. Republican State Leadership Committee, *About RSLC*, *available at* http://rslc.gop/about_rslc/ (accessed Sept. 23, 2015; copy on file with Journal of Appellate Practice and Process). The RSLC is a 527 organization that aggregates contributions and expenditures at a high level that makes it impossible to trace the funding sources for the Montana Supreme Court campaign expenditures. In 2014, the RSLC raised more than $38 million from corporations ranging from the U.S. Chamber of Commerce (itself a conduit of contributions from other corporations) to Blue Cross/Blue Shield to Koch Industries; none of its major donors are Montanan. Opensecrets.org, *Republican State Leadership Committee: Overview 2014*, *available at* https://www.opensecrets.org/527s/527cmtedetail.php?ein=050532524&cycle=2014 (accessed Sept. 23, 2015; copy on file with Journal of Appellate Practice and Process); Opensecrets.org, *Republican State Leadership Committee: Contributors 2014*, *available at* https://www.opensecrets.org/527s/527comtedetail_contribs.php?ein=050532524&cycle=2014. In 2014, it spent more than $10 million on contributions to state and local candidates, committees, and parties. Opensecrets.org, *Republican State Leadership Committee: Expenditures 2014*, *available at* https://www.opensecrets.org/527s/527cmtedetail_contribs.php?ein=050532524&cycle=2014 (all accessed Sept. 23, 2015; copies on file with Journal of Appellate Practice and Process).

344. Republican State Leadership Committee, *Form C-2 Statement of Registration (Amended)*, Mont. Comm'r of Political Practices (Oct. 1, 2014).

organization in Washington.[345] In the Montana Supreme Court race, it spent a total of $430,263 on mail and broadcast advertising.[346]

The RSLC's first advertisement supported VanDyke as "no politics, no agenda, all Montana."[347] It opened with a clip of a report about a "convicted Anaconda rapist granted new trial," then asked viewers if they were "tired of stories like these."[348] The advertisement did not cite the case it alluded to, or identify Justice Wheat or any connection between Wheat and the "convicted Anaconda rapist." It made general claims that VanDyke "is not a politician," and "will defend our constitutional rights, protect our property rights, [and] enforce strict punishment for violent criminals."[349] The second advertisement was more specific, attacking the judicial record of "partisan politician Mike Wheat" in connection with two criminal cases[350] in which he joined majority opinions siding with criminal defendants.[351] The advertisement also explained that "Lawrence VanDyke will protect Montana families."[352]

b. Americans for Prosperity

Americans for Prosperity (AFP) was even less transparent than the RSLC about its funding sources. It reportedly spent

345. Republican State Leadership Committee, *Form C-6 Political Committee Finance Report*, Montana Comm'r of Political Practices (Oct. 23, 2014).

346. *Id.*

347. *Buying Time 2014—Montana*, *supra* note 324 (scroll down to *Tired of Stories* (Oct. 7, 2014)) (accessed Sept. 28, 2015; copy of storyboard on file with Journal of Appellate Practice and Process).

348. *Id.*

349. *Id.*

350. *Buying Time 2014—Montana*, *supra* note 324 (scroll down to *Critical* (Oct. 7, 2014)) (accessed Sept. 28, 2015; copy of storyboard on file with Journal of Appellate Practice and Process).

351. One of those decisions—in the case characterized in the RSLC ad as that of the "Anaconda rapist"—was unanimous but for the partial dissent of one justice, and the other decision generated only one dissent. *See* State v. Strong, 236 P. 3d 580 (Mont. 2010) (including specially concurring opinion by Nelson, J., and dissenting opinion by Rice, J.); State v. Sage, 235 P. 3d 1284 (Mont. 2010) (including concurring and dissenting opinion by McGrath, C.J., on one of two grounds for reversal).

352. *Buying Time 2014—Montana*, *supra* note 324 (scroll down to *Critical* (Oct. 7, 2014)) (accessed Sept. 28, 2015; copy of storyboard on file with Journal of Appellate Practice and Process).

about $170,000 on television advertising alone,[353] but did not register with or report to the Montana Commissioner of Political Practices.[354] The likely basis for the group's failure to disclose would be that it engaged only in "issue advertising," and did so prior to the recent enactment of a broader "electioneering communications" disclosure requirement.[355] Such a claim would be questionable given the text of the advertising and the context of a judicial election. AFP ran two televised advertisements against Mike Wheat. The first argues that "Montana deserves a fair and impartial supreme court," then claims that Wheat "has a history of supporting extreme partisan measures."[356] It conflates four of Wheat's votes as a state senator with one of his dissents as a justice, all over a photograph of Wheat in a judicial robe. The legislative votes concerned new taxes and higher fees, while the judicial dissent held an environmental assessment of oil and gas drilling permits insufficient under the Montana Environmental Policy Act.[357] After criticizing the legislative votes on taxes and fees, the advertisement elides them into the dissenting judicial votes, characterizing them as "vot[ing] no on clean burning natural gas, jeopardizing Montana jobs."[358] Most

353. Dewan, *supra* note 201.

354. Commissioner of Political Practices online records contain no registration or reports for this expenditure by AFP.

355. *See* MONT. CODE ANN. § 13-1-101(15) (2015) (defining reportable "electioneering communications" as paid communication broadly distributed within 60 days of the initiation of voting in an election that refers to one or more clearly identified candidates in that election). But the AFP advertisements arguably were reportable even under the broad definition of campaign expenditures then in effect. *See* Graybill v. W. Tradition P'ship et al., No. COPP-2010-CFP-0016 (Oct. 21, 2010), *available at* http://politicalpractices.mt.gov/content/2recentdecisions/GraybillvWTPandCoalitionforEnergyandEnvironmentDecision (finding that ads characterized by the distributing organizations as "issue ads" were in fact intended to persuade voters to vote against specific candidates); W. Tradition P'ship v. Gallik, 2011 Mont. Dist. LEXIS 83, *30 (Dec. 14, 2011) (rejecting constitutional challenges to disclosure requirement as applied to purported "issue ads," and noting it could be argued that mailers painting a candidate in a negative light are advocating for the defeat of the candidate under Montana law).

356. *Buying Time 2014—Montana*, *supra* note 324 (scroll down to *Montana Deserves* (Oct. 27, 2014)) (accessed Sept. 29, 2015; copy of storyboard on file with Journal of Appellate Practice and Process).

357. *Id.*; *see* Montana Wildlife Fed. v. Bd. of Oil & Gas Conservation, 280 P.3d 877, 894 (Mont. 2012) (Wheat & Morris, JJ., dissenting on procedural grounds).

358. *Buying Time 2014—Montana*, *supra* note 324 (scroll down to *Montana Deserves* (Oct. 27, 2014)) (accessed Sept. 29, 2015; copy of storyboard on file with Journal of Appellate Practice and Process).

implausibly, it ends with a tactic borrowed from legislative-campaign issue ads by asking the viewer to "call Mike Wheat and tell him to keep his partisan politics out of our supreme court," and providing the court's phone number as if to invite *ex parte* public comment on cases before the court.[359] The second AFP advertisement is more sophisticated in its attempt to compare Senator Wheat's votes in the legislature with Justice Wheat's votes on cases involving taxes, property rights, and energy development, but again ends with a request to call the court and "tell Mike Wheat to keep his extreme politics out of the Montana Supreme Court."[360]

c. Montanans for a Fair Judiciary

Montanans for a Fair Judiciary entered the campaign late. It described itself as campaigning by radio and mail for "a more stable and business-friendly Supreme Court," and was led by a former Executive Director of the Montana Republican Party.[361] It disclosed spending about $60,000 raised from a handful of individual contributions (more than half of the total from out-of-state donors), with most of its money consisting of transfers from other PACs in the banking, construction, energy, and real-estate sectors.[362] One of its mailers, supporting VanDyke as "fair, honest and impartial," landed in Wheat's mailbox.[363]

359. *Id.*

360. *Buying Time 2014—Montana*, *supra* note 324 (scroll down to *How Do the Votes Compare?* (Oct. 28, 2014)) (accessed Sept. 29, 2015; copy of storyboard on file with Journal of Appellate Practice and Process).

361. Johnson, *supra* n. 331.

362. Montanans for a Fair Judiciary, *Form C-2 Statement of Organization (Amended)*, Mont. Comm'r of Political Practices (Oct. 16, 2014); Montanans for a Fair Judiciary, *Form C-6 Political Committee Finance Report*, Mont. Comm'r of Political Practices (Oct. 23, 2014) (listing $15,000 contribution from Contractors' PAC and $5,050 of individual contributions from Montana); Montanans for a Fair Judiciary, *Form C-6 Political Committee Finance Report*, Mont. Comm'r of Political Practices (Nov. 24, 2014) (listing $30,000 total of contributions from Montana Prosperity PAC and $5,500 of individual contributions from Connecticut and Texas); Montana Prosperity PAC, *Form C-6 Political Committee Finance Report*, Mont. Comm'r of Political Practices (Oct. 22, 2014) (listing $24,500 of contributions from the Montana REALTORS PAC, Montana Gas & Oil PAC, Montanans for Affordable Housing PAC, Montana Bankers PAC, and the Cloud Peak Energy Employee PAC).

363. Mayrer, *supra* note 315.

5. The Close of the Campaign

a. The Debate

By the time the four candidates for two associate justice seats met for a candidate forum at the University of Montana on September 23, 2014, the advertising campaign had not yet reached its peak.[364] Still, questions of campaign finance took center stage in the debate between Wheat and VanDyke.

Wheat opened by framing his perspective on "what this race really is all about. . . . how our court may be under attack from out-of-state money, from out-of-state corporations who want to come into this state and influence who's going to be on the court."[365] Citing a report that the national Republican Party intended to spend $5 million campaigning in judicial races, Wheat said that "[w]e have to be vigilant," as outside money "starts pecking away at what we all want—fair, independent and impartial justices."[366] VanDyke responded that voters should have their "hypocrisy filter on,"[367] citing independent spending by trial lawyers in prior judicial elections.[368] He estimated that the trial-lawyer PAC again would spend hundreds of thousands of dollars in the campaign, saying that "[t]he issue is whether or not the trial lawyers are going to be the only ones who are spending money."[369] For VanDyke this was an issue of "free-speech rights of organizations to say what they believe."[370] "If someone says they'd shut down speech, be skeptical," he argued, "it's a huge problem telling people what they can and can't say."[371] Wheat, on the other hand, criticized *Citizens*

364. The author served as moderator of the candidate forum.

365. John S. Adams, *Supreme Court Candidates Square off in Missoula*, Great Falls Tribune, Sept. 24, 2014, *available at* http://www.greatfallstribune.com/story/news/local/2014/09/23/supreme-court-candidates-square-missoula/16135685/.

366. Martin Kidston, *Montana Supreme Court Candidates Debate Funding, Partisanship, More at UM*, Missoulian, Sept. 24, 2014, *available at* http://missoulian.com/news/local/montana-supreme-court-candidates-debate-funding-partisanship-more-at-um/article_94637b28-439a-11e4-ae18-77d63833d048.html.

367. *Id.*

368. Adams, *supra* note 365.

369. *Id.*

370. *Id.*

371. Kidston, *supra* note 366.

United and sided with his colleague and fellow candidate Justice Jim Rice, who argued that "[t]he state of Montana has a compelling interest in protecting and preserving a fair and impartial judiciary."[372]

b. The Retired Justices' Commentary

Meanwhile, seven former Montana Supreme Court justices published a broadside against independent expenditures in newspapers across the state, claiming that "our civil justice system is at stake,"[373] and that "*Citizens United* empowered organizations with opaque, feel-good names to pour significant amounts of dark money into judicial elections."[374] Citing studies on the impact of campaign finance on judicial behavior, the retired justices pointed out that "the amount of expenditures and contributions to judicial races correlates directly with how a benefiting justice votes on cases."[375] Although the version in print did not mention any candidate, the justices clearly appeared to target Van Dyke's support from outside spending. They began their concluding paragraph with a line that could have served well in a campaign advertisement: "Montanans deserve fair, impartial, independent and non-partisan judges and justices elected by Montana voters—not political hacks, bought and paid for by out of state dark money."[376] In a subsequent interview, former Justice James Nelson called it "political

372. *Id.*

373. James C. Nelson, *et al.*, *Will Montana Judges Be for Sale?* Missoulian, Sept. 25, 2014, *available at* http://missoulian.com/news/opinion/columnists/will-montana-judges-be-for-sale/article_2c81d34e-44c4-11e4-8b97-8b098cd6b8d6.html (containing no mention of Van Dyke, but indicating that the other justices sponsoring the broadside included Terry Trieweiler, Jim Regnier, Bill Leaphart, Bill Hunt, John Sheehy, and John Warner); *see also* Troy Carter, *Ex Justices Say Candidate for Supreme Court a Corporate Puppet*, Bozeman Chronicle, Oct. 17, 2014, *available at* http://www.bozemandailychronicle.com/news/politics/ex-justices-say-candidate-for-supreme-court-a-corporate-puppet/article_0e4fc104-558d-11e4-8401-636fb002328c.html (indicating that the version of the broadside distributed to newspapers may have referred to Van Dyke by name).

374. Nelson, et al., *supra* note 373 (referring to "opaquely named conservative organizations headquartered in Washington, D.C.," and calling out the Republican State Leadership Committee and Americans for Prosperity by name).

375. *Id.* (referring to studies published by two progressive-leaning research groups, the American Constitution Society and the Center for American Progress).

376. *Id.*

hypocrisy for VanDyke or his supporters to call Wheat a partisan judge."[377] Former Justice Terry Trieweiler praised Wheat and warned that "VanDyke's election would totally shift the balance on the court in the direction of right-wing activism in total service of the corporate agenda," and that "[e]vironmental laws, consumer protection laws and labor laws are all at risk."[378] VanDyke dismissed the criticism, claiming that

> all of the former justices who have criticized me in this race have extensive ties to the Trial Lawyers, . . . [t]he organization of wealthy lawyers that for decades has been spending huge sums of money to get justices on the court who will make sure they get big attorney fee awards, whether they deserve it or not. [379]

c. The Research Mailer

Just as the campaign was winding down to its final days, a new and surprising voice emerged. A mysterious mailer, the *2014 Montana General Election Voter Information Guide*, appeared featuring the official Great Seal of the State of Montana, but with an attribution of "[p]aid for by researchers at Stanford University and Dartmouth College."[380] The mailer contained columns for both "Nonpartisan Supreme Court Justice" races, and under each contained a continuum from "More Liberal" to "More Conservative," with Barack Obama and Mitt Romney positioned near each end, respectively.[381] Under the Wheat-VanDyke race, the mailer put Wheat slightly to the (more conservative) right of Obama and Vandyke slightly to the (more conservative) right of Romney.[382] The mailer was sent to 102,780 registered voters in Montana, approximately

377. Carter, *supra* note 373.

378. *Id.*

379. *Id.*

380. *McCulloch v. Stanford and Dartmouth*, No. COPP 2014-CFP-046, *Decision Finding Sufficient Facts to Demonstrate a Violation of Montana's Campaign Practice Laws*, at Exhibit (May 11, 2015) (also noting—in small print—that "[t]his guide is non-partisan and does not endorse and candidate or party" and that it "was created as part of a joint research project at Stanford and Dartmouth").

381. *Id.*

382. *Id.*

fifteen percent of the state electorate.[383] After a flood of complaints to state election officials, the Presidents of Dartmouth and Stanford sent a remarkable apology "to the voters and citizens of Montana," explaining that the mailer was not affiliated with or endorsed by the State of Montana despite its inclusion of the state seal.[384] Instead, it was "part of an academic research study," publishing to voters a comparison of candidates based on "public information about who had donated to each of the campaigns" in order "to determine whether voters who are given more information are more likely to vote."[385] The Montana Commissioner of Political Practices, however, found the mailer to be an independent expenditure subject to campaign finance disclosure, given that its purpose was to influence the election by affecting voter turnout.[386]

d. Total Expenditures

By the end of the campaign, estimates put the total spending for the Wheat-VanDyke race at around $1.6 million, making it the most expensive judicial race in state history.[387] Wheat had $780,981 spent on his side, including $162,658 in direct contributions, plus allied independent expenditures of $519,840 from the trial-lawyer-led coalition Montanans for Liberty and Justice, $62,200 of support from Montana Lawyers for Experienced Judges, and $36,283 (net of transfers) from the traditional trial-lawyer Montana Law PAC.[388] Nearly all of these funds were disclosed and originated in-state, mostly from lawyers.[389] VanDyke had approximately $794,081 spent on his side, including $133,818 in direct contributions, plus allied independent expenditures of $430,263 from the Republican

383. *Id.* at 7.

384. *Id.* at Exhibit.

385. *Id.*; *see also* Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367 (2014) (describing the methodology of mapping ideology based on campaign-contribution records). No results of the research study have been published, and as the letter of apology asked Montana voters to ignore the mailer, it seems unlikely that the study generated any useful data.

386. *McCulloch*, No. COPP 2014-CFP-046, at 18–19.

387. *See* Dennison, *supra* note 342.

388. *Campaign-Finance Dataset*, *supra* note 182.

389. *Id.*

State Leadership Committee, at least $170,000 from Americans for Prosperity, and about $60,000 from Montanans for a Fair Judiciary.[390] These numbers are less precise because only the one-quarter of total campaign funding coming from the VanDyke campaign and Montanans for a Fair Judiciary provided full political committee disclosure of contributors; the contributors of the remaining amount (approximately $600,000) were not disclosed. Presumably it originated almost entirely from out-of-state sources, given the dominant national funding sources for the RSLC and AFP.[391] After nearly $300,000 in candidate contributions and $1.3 million in independent expenditures, the money race between Wheat and VanDyke ended in a draw.

E. The Election and Its Aftermath

In the June primary only one-third of registered voters turned out despite the primaries in both Congress and U.S. Senate races.[392] Then, three-quarters of primary voters cast a ballot in the supreme court race and Wheat won with sixty-two percent of the vote.[393] A poll from early October showed Wheat leading VanDyke twenty-five percent to thirteen percent, with sixty-two percent undecided.[394] By the time Election Day arrived on November 4, early voting had been ongoing for a month.[395] Turnout was low by Montana standards—fifty-five percent of registered voters in a non-gubernatorial year.[396] Yet

390. *Id.*

391. *See* notes 343 & 354, *supra*.

392. Dennison, *supra* note 342.

393. Montana Secretary of State, *2014 Statewide Primary Election Canvass*, *available at* http://sos.mt.gov/elections/2014/2014-Primary-Official-Statewide-Canvass.pdf (accessed Oct. 5, 2015; copy on file with Journal of Appellate Practice and Process) Wheat swept every county but one, rural Powder River County, where he lost by seven votes. *Id.*

394. Mike Dennison, *Montana's Hottest Race May Be for State Supreme Court,* Missoulian, Nov. 1, 2014, *available at* http://missoulian.com/news/state-and-regional/montana-s-hottest-race-may-be-for-state-supreme-court/article_609d8176-0993-5b09-ac38-5df9b9bc1823.html.

395. *See* MONT. CODE ANN. § 13-13-205 (requiring ballots to be "available for absentee voting at least . . . 25 days prior to election day").

396. Montana Secretary of State, *Montana Voter Turnout (1920-2014)*, *available at* http://sos.mt.gov/elections/Voter_Turnout/index.asp (indicating that "Montana consistently has had one of the highest voter turnout rates in the nation" and that turnout in the 2012

ballot roll-off was lower than usual for judicial campaigns,[397] with eighty-eight percent of general-election voters casting a ballot in the Wheat-VanDyke race.[398] The heavy campaigning had a demonstrable if minor impact on name recognition; the quieter—and more lopsided—race between Justice Jim Rice and the relative unknown David Herbert drew only eighty-one percent of voters who cast a ballot.[399] The heavy campaigning had a less demonstrable impact on persuading voters to choose Wheat or VanDyke: Wheat won the election with fifty-nine percent of the vote, a move of just three points in favor of VanDyke since the primary.[400] Wheat won thirty-five of fifty-six counties, with VanDyke leading only in rural counties.[401]

Justice Wheat took office for the third time in five years in January, 2015. After his appointment in 2010, election in 2010 for the remainder of that term, and re-election in 2014, he will serve a full eight-year term through December 2022. A month after the election, VanDyke again took office as a state solicitor general, this time in Nevada.[402] There he will work for the state's new Attorney General, Adam Laxalt, a Republican who won with the support of the Republican State Leadership Committee.[403]

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and 2010 general elections was seventy-two percent and fifty-six percent, respectively) (accessed Oct. 5, 2015; copy on file with Journal of Appellate Practice and Process).

397. Judicial elections experience an average ballot "roll-off" of around one quarter of voters who select candidates in the top races but do not cast votes for judicial candidates; higher campaign spending reduces ballot roll-off. *See* Melinda Gann Hall & Chris W. Bonneau, *Mobilizing Interest: The Effects of Money on Citizen Participation in State Supreme Court Elections*, 52 AM. J. POL. SCI. 457 (2008).

398. Montana Secretary of State, *2014 Statewide General Election Canvass*, *available at* http://sos.mt.gov/elections/2014/2014-General-Official-Statewide-Canvass.pdf (accessed Oct. 5, 2015; copy on file with Journal of Appellate Practice and Process).

399. *Id.*

400. *Id.*; *see also* text accompanying note 393, *supra*.

401. *Id.*

402. Associated Press, *Ex-Montana Solicitor General Taking Post in Nevada*, Missoulian, Dec. 10, 2014, *available at* http://missoulian.com/news/state-and-regional/ex-montana-solicitor-general-taking-post-in-nevada/article_bb0d1a91-2691-5254-9af0-2d624911d9a8.html.

403. *Id.*

V. LESSONS FROM MONTANA

What most distinguished the Wheat–Vandyke campaign is the extent to which the candidates and their allies openly aired usually subliminal questions of campaign finance, partisanship, and related issues. These questions never became the exclusive center of attention. Conventional themes of biography, experience, and values pervaded the campaign. Staple controversies around criminal justice and natural resources also played their part.[404] But little mention was made of several controversies that emerged in other states. For example, in 2012 the Montana Supreme Court rejected by a four-to-three vote a state constitutional claim for same-sex civil unions on procedural grounds, with Justice Wheat joining a dissent that would have recognized spousal benefits for same-sex couples.[405] Unlike in other states, the issue went largely unnoticed in the judicial campaign. Similarly, in the months before the election two well-publicized cases involving punitive damages challenged the constitutionality of the state law capping those damages; the court heard argument in one of the challenges at the height of the campaign in September.[406] Again, however, tort reform was not a major issue in the campaign, except as an

404. GREYTAK, *supra* note 3, at 48 ("[O]ver half the spots that aired in 2013–14 (both positive and negative) related to whether candidates were 'tough on crime.'"); *id.* at 43 (characterizing Wheat–VanDyke campaign as "Big Business Clashes with Environmental Interests").

405. *See* Donaldson v. State, 292 P.3d 364, 374 (Mont. 2012) (indicating that Justice Wheat joined the dissent of Justice Cotter); *see also id.* at 375 (Nelson, J., dissenting).

406. *See, e.g.*, Vince Devlin, *Polson Judge Reduces Damage Award to $73M in Crash that Killed Missoula Cousins*, Missoulian, Sept. 23, 2014, *available at* http://missoulian.com/news/local/polson-judge-reduces-damage-award-to-m-in-crash-that/article_2162da6c-4285-11e4-a2cc-2b338b9819a1.html; Associated Press, *Montana Supreme Court Hears Arguments in Jury Award Cap Case*, Missoulian, Sept. 27, 2014, *available at* http://missoulian.com/news/state-and-regional/montana-supreme-court-hears-arguments-in-jury-award-cap-case/article_4f9ce400-4685-11e4-86ce-9f65a9e381d5.html. The argued case, in which the court did not reach the punitive-damages issue, is Masters Group Int'l, Inc. v. Comerica Bank, 352 P.3d 1101 (Mont. 2015). The other case was settled on appeal before briefing. *See* Olsen v. Hyundai Motor Co., No. DA 14-0500, Stipulated Motion to Dismiss (Jan. 14, 2015), *available at* supremecourtdocket.mt.gov (enter case number into search box to see docket sheet indicating that case was dismissed on January 14, 2015 upon filing of a stipulated motion to dismiss) (accessed Oct. 5, 2015; copy on file with Journal of Appellate Practice and Process).

implication behind questions around campaign financing by trial lawyers and corporations.

There is reason to believe that campaign finance is an especially salient political issue to Montana voters. The colorful history of corporate corruption in Montana at the turn of the twentieth century, which remained a powerful force shaping the 1972 Constitutional Convention, remerged after *Citizens United* and *American Tradition*. In 2012, Montanans overwhelmingly approved initiative I-166, the "Prohibition on Corporate Contributions and Expenditures in Montana Elections Act," by a margin of nearly three to one.[407] The law is almost entirely symbolic,[408] and establishes as state policy that

> each elected and appointed official in Montana . . . advance the philosophy that corporations are not human beings with constitutional rights and that each such elected and appointed official is charged to act to prohibit, whenever possible, corporations from making contributions to or expenditures on the campaigns of candidates or ballot issues.[409]

The same election saw the state attorney general who litigated *Citizens United* and *American Tradition*, Steve Bullock, win the race for governor, but only after his opponent took advantage of an election-eve invalidation of state contribution limits to accept a $500,000 donation before the limits were reinstated on appeal.[410] More recently, several Montana legislators rebuffed

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407. Montana Secretary of State, *2012 Statewide General Election Canvass*, *available at* http://sos.mt.gov/elections/2012/2012_General_Canvass.pdf (showing (343,549 votes for and 116,554 against) (accessed Oct. 5, 2015; copy on file with Journal of Appellate Practice and Process).

408. Johnstone, *supra* note 244, at 22–26.

409. MONT. CODE ANN. § 13-35-503.

410. Charles S. Johnson, *Voter Reaction to Hill's $500k Donation Could Determine Montana Governor's Race*, Missoulian, Oct. 20, 2012, *available at* http://missoulian.com/news/state-and-regional/voter-reaction-to-hill-s-k-donation-could-determine-montana/article_467e5fb4-1b1e-11e2-ad85-001a4bcf887a.html . The money's source turned out to be the Republican Governor's Association, a national affiliate of the Republican State Leadership Committee that shares many of its corporate donors. *See* Missoulian State Bureau, *Republican Governor's Association Source of Hill's $500K Donation*, Missoulian, Oct. 25, 2012,*available at*http://missoulian.com/news/local/republican-governors-association-source-of-hill-s-k-donation/article1340ba48-1ee8-11e2-86d6-001a4bcf887a.html; Opensecrets.org, *Republican Governor's Association: Contributors 2014*, *available at* https://www.opensecrets.org/527s/527cmtedetail_contribs.php?ein=113655877&cycle=2014 (including some

efforts by Americans for Prosperity to defeat a Medicaid expansion in the 2015 Legislature, a backlash that brought several legislators to support major disclosure reforms to state campaign-finance law.[411] This history makes Montana a particularly uninviting target for what Montanans might consider to be out-of-state dark-money groups.

Notwithstanding its distinctive history, however, Montana may hold lessons for campaigns and elections in other states. Those lessons include some applicable specifically to judicial campaigns and elections. Any reforms to judicial elections must recognize and work around the challenges to judicial-election exceptionalism presented by the Supreme Court's First Amendment doctrine. As discussed in Part IV(A) above, these challenges culminate in the impact of unlimited independent and partisan expenditures under the rationale of *Citizens United*. That impact overwhelms the marginal protections offered by remaining regulations of judicial conduct in political campaigns, and even the ultimate backstop of due process in the most extreme cases. Once policymakers acknowledge the limited efficacy of these specific judicial election reforms given the primacy of independent expenditures, several ordinary campaign-finance reforms emerge as workable responses to the current role of money in judicial elections.

A. Background: Challenges to Judicial-Election Exceptionalism

The Supreme Court in *Republican Party of Minnesota v. White*[412] emphasized the principle that judicial elections are not politics-free contests. Its holding that "the First Amendment does not permit [a state] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about,"[413] clarified that

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of the RSLC donors mentioned in note 343, *supra*) (accessed Oct. 5, 2015; copy on file with Journal of Appellate Practice and Process).

411. *See, e.g.*, Charles S. Johnson, *Late-Night Soul-Searching Pushed Garner to Forefront of Dark Money Fight*, Missoulian, Mar. 29, 2015, *available at* http://missoulian.com/news/state-and-regional/late-night-soul-searching-pushed-garner-to-forefront-of-dark/article_0532cdfd-f5de-5171-813c-e98db825f449.html.

412. 536 U.S. 765 (2002).

413. *Id.* at 788.

freedom of speech protections apply fully to judicial speech. In dissent from the invalidation of an "announce clause" that prohibited judicial candidates from expressing views on particular legal issues, Justice Ginsburg predicted that candidates would express commitments on issues "to win votes."[414] And Justice Stevens opined that "the judicial reputation for impartiality and open-mindedness is compromised by electioneering that emphasizes the candidate's personal predilections rather than his qualifications for judicial office."[415] It has not turned out quite that way. As the Wheat and Van Dyke campaigns demonstrated, judicial candidates still campaign on impartiality. Before electorates with any diversity of views, public commitments on particular issues can backfire because they compromise the image of a candidate's impartiality and undermine candidates' attacks on their opponents for supposed partiality. So judicial candidates campaign in code, as they always have, counting on proxies to recognize and advertise on the issues that win voters. Hot-button topics need not be debated by the candidates because they can leave arguing them to their allied independent expenditure groups, which face no ethical constraints on their characterizations of opposing candidates.

Despite the hopes of its majority and fears of its dissenters, *Caperton v. Massey*[416] presents no general solution to concerns about judicial-campaign finances. It recognized a due process problem "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[417] While the rule as stated may appear to have significant applications in judicial campaigns, the facts of the case suggest that its practical scope may be limited to nearly unheard-of incidents involving a single contributor who funds "more than the total amount spent by all other [of the candidate's] supporters and three times the amount spent by [the candidate's]

414. *Id.* at 820 (Ginsburg, J., dissenting).
415. *Id.* at 802 (Stevens, J., dissenting).
416. 556 U.S. 868 (2009).
417. *Id.* at 884.

own committee."[418] The dissenting justices were not reassured by these limits. In his dissent of forty questions, Chief Justice Roberts asked, for example, "What about contributions to independent outside groups supporting a candidate?" and "What if the 'disproportionately' large expenditure is made by an industry association, trade union, physicians' group, or the plaintiffs' bar?"[419]

The following year, *Citizens United* distinguished these questions in form: "*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."[420] But in practical terms, *Citizens United* answered them.[421] Its deregulation of independent expenditures, and the subsequent proliferation of networked "outside groups" and "industry associations" engaged in campaign spending, makes an anachronism of the direct, disclosed, and overwhelming contributions at issue in *Caperton*. Now big donors hoping to influence the work of the courts enjoy a range of national and state-based conduits for campaign spending that are practically impossible to track for a litigant who might later have grounds for a recusal motion.[422]

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418. *Id.* at 873.

419. *Id.* at 893, 894 (Roberts, C.J., dissenting).

420. *Citizens United*, 558 U.S. at 360.

421. *See* Richard Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 611–15 (2011) (arguing that the distinction between *Citizens United* and *Caperton* in their treatment of independent expenditures is unpersuasive); *but see* James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. Ann. Survey Am. L. 727 (2011) (arguing for a distinction from *Citizens United* for judicial campaigns based on *Caperton*'s treatment of judicial-campaign expenditures as "contributions").

422. The Montana Supreme Court itself has recognized the impracticality of recusal based on electoral consequences. In Reichert v. State ex rel. McCulloch, 278 P.3d 455 (Mont. 2012), the court heard a constitutional challenge to a referendum that would place the justices in seven districts for election. Several legislators who supported the referendum intervened, and sought the recusal of four justices who were not currently standing for election but might have stood for re-election in the future because the referendum would have disqualified from re-election any sitting justice who did not relocate to his assigned district. *Id.* at 463. The court held that the justices were "potential" candidates whose reelection bids "could possibly" be hindered by the referendum, and that there was therefore no "actual evidence of bias, prejudice, or unethical conduct on the part of any justice or judge sitting" on the case. *Id.* at 471. If possible disqualification from re-election to judicial office is insufficient to trigger "actual evidence of bias" justifying recusal, it would seem that large campaign contributions by litigants likely will be insufficient too, at least if they are funneled through intermediaries into independent expenditures.

Recusal under *Caperton* is impracticable in a post-*Citizens United* regime in which particular interest groups, and even particular litigants, are able to aggregate and route large campaign expenditures through a shell game of trade organizations and political committees. The primitive *Caperton* tactic of direct expenditures is naive in a world of campaign-finance conduits like Americans for Prosperity, the Republican State Leadership Committee, and home-grown interlocking super PACs like Montanans for Liberty and Justice and Montanans for a Fair Judiciary. If a latter-day Copper King wanted to elect a latter-day Judge Clancy, there would be no need for direct contributions or even corporate independent expenditures. Instead, he could run his corporation's treasury funds into a trade organization like America's Natural Gas Alliance, through a like-minded national committee like the Republican State Leadership Committee, and into a state affiliate like the Judicial Fairness Initiative Montana PAC. Similarly, though more transparently, a trial lawyer with a major punitive damages award on its way to the Montana Supreme Court might write a big check to the Montana Trial Lawyers Association to fund its Montana Law PAC, knowing that most of his funds would transfer to an affiliate like Montanans for Liberty and Justice. Either the industrialist or the litigator could hedge his bets with more direct PAC contributions to a single-candidate super PAC, signaling his interest in the campaign to related committees that might then double down on the race, and also signaling his support to the candidate. Short of a simply enormous transfer of $1,000,000 straight through the committees and into the campaign, none of these maneuvers is likely to draw scrutiny under *Caperton*. Nor are they likely to satisfy ordinary recusal standards, given the nature of "independent" expenditures and the aggregation of any one donor's contributions with those made by others.

Just as *Caperton* is no match for the flood of independent expenditures authorized by *Citizens United*, the Supreme Court's recent decision in *Williams-Yulee v. State Bar of Florida*,[423] which presented a challenge to a prohibition against a judicial candidate's personal solicitation of campaign

423. ___ U.S. ___, 135 S. Ct. 1656 (2015).

contributions or endorsements, seems likely to have little effect in the present environment.[424] Consistent with the logic of *Citizens United*, the vast majority of money spent in the Wheat and VanDyke campaigns was in the form of independent expenditures that could not have been solicited by the candidates. As the 2014 Montana campaign demonstrated, no matter how a candidate raises $150,000, the campaign message will be delivered four times more loudly by independent expenditures of $600,000. In *Williams-Yulee*, only Justice Ginsburg's concurrence, joined by Justice Breyer, addresses a possible distinction between campaigns for judicial office and *Citizens United*'s theory that "[i]t is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies."[425]

B. The Primacy of Independent Expenditures

The crucible of campaign finance in Montana between 2010 and 2014 established the primacy of independent expenditures in judicial campaigns. The series of cases from *White* to *Caperton* to *Williams-Yulee* might suggest significant shifts in the landscape arising from the Supreme Court's decisions of issues specific to judicial campaigns. Montana's experience suggests, however, that no development in the constitutional law of judicial campaigns has had as much impact as *Citizens United* and its narrowing of the corruption interest so

424. It is possible that the Court has opened a path to limit the reach of *Citizens United* in judicial elections with its recognition in *Williams-Yulee* that "a State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians." *Williams-Yulee*, 135 S. Ct. at 1672.

425. *Williams-Yulee*, 135 S. Ct. at 1673–74 (Ginsburg, concurring in part and concurring in the judgment); *Citizens United*, 558 U.S. at 359 (quoting McConnell v. F.E.C., 540 U.S. 93, 297 (Kennedy, J., concurring in part and dissenting in part)). Perhaps this potential limitation of *Citizens United*'s reach is a development that the dissenting justices in *Williams-Yulee* anticipate by their surprising lack of reliance on *Citizens United*. See *Williams-Yulee* at 1682 (Scalia, J., dissenting) (citing United States v. Stevens, 559 U.S. 460 (2010); Brown v. Entertainment Merchants Ass'n, ___ U.S. ___, 131 S. Ct. 2729 (2011); and United States v. Alvarez, ___ U.S. ___, 132 S. Ct. 2537 (2012)); *see also id.* at 1684 (Kennedy, J. dissenting) (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) and *White*). Justice Alito's dissent did not cite a case. *See id.* at 1685.

as to exclude concerns about undue influence arising from unlimited independent expenditures. *Citizens United* not only reached judicial elections (through *American Tradition*) with little consideration of the consequences of that extension, but it also played a crucial role in the invalidation of the partisan endorsement and expenditure ban for judicial elections in *Sanders County Republican Central Committee*.[426] That broke the barrier between national party treasuries and state judicial campaigns, adding to the flood of outside money.

In short, *Citizens United* preempts *White* because candidates need not worry about public campaign promises once private money starts lining up. *Citizens United* trumps *Caperton* because no form of due process or recusal practicably can sift out a sophisticated litigant's independent expenditures, and—at least according to the reasoning of *Citizens United*—independent expenditures can no longer corrupt. And *Citizens United* overwhelms *Williams-Yulee* because, in the judicial campaigns that matter most, neither candidates nor supporters rely on direct contributions given the ease and efficacy of indirect independent expenditures.

The chart on the following page[427] details the primacy of independent expenditures after *Citizens United*. The Wheat–

426. 698 F. 3d 741 (9th Cir. 2012).

427. All data in the chart are from *Campaign-Finance Dataset*, *supra* note 182, and are inflation-adjusted to 2014 dollars. The Chart excludes both uncontested races and noncompetitive campaigns of candidates who raised less than ten percent of the amount raised by the winning candidate.

Information relevant to particular campaigns:

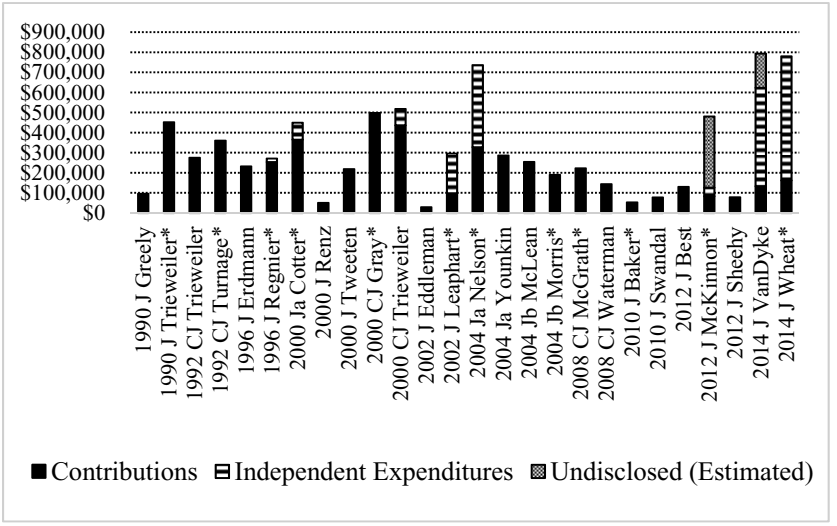
An asterisk (∗) denotes the winner of a particular race.

In 2002, the Montana Law PAC reportedly spent $150,000 (nominal) toward two candidates, but only one race was contested; all of that amount is allocated as spent on behalf of candidate William Leaphart.

In 2012, the Montana Growth Network disclosed spending $42,000 to support candidate Laurie McKinnon in the primary, but later reported on a tax form spending $687,720 on public education mailings and advertising, likely in the form of campaign-related "issue ads" targeting judicial and legislative candidates; based on the group's emphasis on the judicial campaign in the primary and a $50,000 transfer to American Tradition Partnership—which targeted McKinnon's opponent Sheehy in a mailing—half of that amount is allocated as spent on behalf of McKinnon. It is not known how much the Montana Growth Network ultimately targeted for the race between Laurie McKinnon and Ed Sheehy, but even a conservative estimate of the share dedicated to the judicial race pegs it as a major factor in the 2012 campaign.

VanDyke campaign was the most expensive on record only because of independent expenditures and related election spending. Indeed, the candidates themselves raised relatively small amounts of campaign contributions by historical standards for contested races. Only Justice Nelson's defense of a seat in 2004 came close to the 2014 campaigns.

Financing of Contested Montana Judicial Campaigns: 1990-2014



C. Ordinary Campaign-Finance Reforms for Judicial Campaigns

Because *Citizens United* matters to judicial campaigns in the same way it matters to all political campaigns, there are common responses to it. These include improved campaign-finance disclosure, especially of electioneering communications and conduit organizations; recalibrating contribution limits to draw more fundraising directly to candidate campaigns without significantly increasing corruption concerns; and reconsidering public financing for judicial campaigns. Eliminating judicial campaigns, a solution proposed by many frustrated with recent

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In 2014, the Republican State Leadership Committee reported independent expenditures on behalf of candidate Lawrence VanDyke, but received most of its contributions as an opaque transfer from its national affiliate.

campaign-finance developments, is a last resort that may not resolve the most important concerns about political influence in judicial selection. The trend toward increased amounts of money in judicial campaigns presents the challenge of undue influence, but also presents an opportunity to revisit the ways in which campaign finance law can mitigate, or at least not aggravate, that trend.

1. Effective Campaign-Finance Disclosure

Campaign-finance disclosure law should embrace *Citizens United*'s validation of electioneering communication disclosure.[428] This empowers state law to reach campaign-targeted advertising, like the Americans for Prosperity commercials attacking Wheat, that may currently evade disclosure by avoiding appeals to vote for or against a candidate. More broadly, *Citizens United*'s endorsement of disclosure in general enables states to consider more robust application of disclosure requirements to conduit organizations like the Republican State Leadership Committee's Montana-based PAC, which disclosed little more than a massive contribution from its parent organization's aggregation of corporate funds. Improved disclosure is important not because it enables recusals at the courthouse—though it may in extreme cases—but because it enables rejoinders on the campaign trail. Revealing the money behind a candidate raises consciousness of factions, giving voters an opportunity to check such special interests on the ballot.[429] On both sides of the Wheat–VanDyke campaign, the candidates and even the super PACs used campaign-finance disclosure to make each side's financial supporters a central issue in the campaign. It would have been difficult to develop a clearer referendum on Montana trial lawyers versus out-of-state corporations than those interests themselves provided in the 2014 campaign.

428. *Citizens United*, 558 U.S. at 369 ("[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.")

429. *See* Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 443–49 (2012).

Another element of effective campaign-finance disclosure is higher disclosure thresholds. This reform could be particularly important in judicial campaigns, where the smart money may sit idle in thousands of lawyers' and clients' pockets for fear that a contribution could unconsciously or consciously affect a candidate's judgment in a future case. A little of that idle money, aggregated across thousands of potential contributors, could boost the influence of constituents who know the candidates best and counter the impact of independent expenditures by outside interests. Relatively low disclosure thresholds—like the thirty-five dollar trigger in Montana, which applies regardless of the size of the constituency or donor base[430]—discourage such retail-level campaign contributions without significant benefits in preventing corruption. Judicial campaigns already start with relatively narrow donor bases that leave candidates dependent on a few large donors willing to contribute to either their campaigns or their allied PACs. In a million-dollar campaign, an anonymous (or reported but not disclosed) contribution of a hundred dollars will go unnoticed, but enough of them will go a long way toward countering the effects of outside spending.[431]

2. Recalibrated Contribution Limits

Montana has relatively low contribution limits.[432] Independent expenditures, including many made by the same contributors who make the maximum contribution allowed to a candidate campaign, render these limits less effective. First, they make it more difficult for a candidate to raise enough funds to counter attacks funded by independent expenditures. Second, they divert contributions away from disclosed, accountable candidate campaigns toward sometimes opaque, less accountable independent expenditure groups. In Montana a

430. *See, e.g.*, MONT. CODE ANN. § 13-37-229(2).

431. *See* Anthony Johnstone, *The System of Campaign Finance Disclosure*, 99 IOWA L. REV. BULL. 143, 159–60 (2014).

432. *See* MONT. CODE ANN. § 13-37-216 (2014); *see also Lair*, 798 F.3d at 748–49 (remanding for reconsideration of whether those limits are constitutional). *See generally* Anthony Johnstone, *Recalibrating Campaign Finance Law*, 32 YALE L. & POL'Y REV. 217 (2014).

typical supreme court candidate has a base of between 500 and 1000 contributors (a number that may increase if the law raises disclosure thresholds).[433] In 2014, a candidate in a contested election could accept $320 in the primary election and another $320 in the general election.[434] A judicial candidate can raise a few hundred thousand dollars assuming that many contributors give the maximum amount; this means that, at most, a candidate's leading contributors could take credit for a fraction of one percent of the candidate's fundraising total. A modest increase in contribution limits would be large enough to enable a judicial candidate to respond to the new scale of independent expenditures but still small enough to prevent any one donor or group from taking credit for the candidate's campaign. This would pose few additional corruption concerns, especially compared to the current alternative of diverting unlimited contributions to single-candidate super PACs. An increased contribution limit can channel larger contributions back toward candidates and away from independent expenditures.

3. Public Financing for Judicial Campaigns

One of the most important ideas to come out of Montana's 1972 Constitutional Convention, in concept if not in law, is limited public financing of judicial elections. Any new proposal for public financing must take care not to limit expenditures[435] or penalize candidates who self-fund or benefit from independent expenditures.[436] A proposal also must minimize the risk of strategic behavior by candidates looking to exploit public

433. *Campaign-Finance Dataset*, *supra* note 182.

434. MONT. ADMIN. R. § 44.10.338(1) (2014) (limiting contributions to $320 per election for supreme court candidates in 2014).

435. *See* Buckley v. Valeo, 424 U.S. 1, 58–59 (1976) (invalidating limits for independent expenditures, a candidate's expenditures from his or her own personal funds, and overall campaign expenditures).

436. *See* Davis v. Federal Election Comm'n, 554 U.S. 724 (2008) (invalidating so-called "millionaires amendment" lifting contribution limits for candidates facing self-funded opponents); Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, ___ U.S. ___, 131 S. Ct. 2806 (2011) (invalidating matching funds for publicly financed candidates that were triggered by opponents' spending and that of independent-expenditure groups).

financing.[437] Preserving an independent judiciary, an original purpose of judicial elections, may justify the public expense necessary to finance judicial candidate campaigns. As delegates argued in 1972, there are significant distinctions between judicial campaigns and other political campaigns;[438] these differences might draw even those opposed in general to public financing of elections to support it for judicial elections.

4. Abolishing Judicial Elections

There is a final option that would be unthinkable for other elective offices: abolish judicial elections. As ambitious as disclosure and public financing may be, this is likely the least realistic response to *Citizens United*'s impact on judicial elections. Voters have not surrendered their power to elect judges for decades.[439] For some, the world after *Citizens United* demands abolition now more than ever. Consider, for example, former Justice James Nelson, who dissented in *Western Tradition* while decrying *Citizens United*. He once defended judicial elections as practiced in Montana, writing in 2010 that "[t]he elected judges and justices with whom I am familiar make decisions based on the facts and the law as they see it, regardless of whose ox is gored in the process," and also noted that "a judicial election decided on the basis of one unpopular decision is relatively rare."[440] His own experience had been that "Montanans want nonpartisan judges and will not elect candidates who fail that threshold test," and, he pointed out, "Montana, with its severe campaign-contribution restrictions, has not faced the sort of buy-a-judge problems that have

437. Under current Montana law, for example, candidates (or their allies) have an incentive to recruit a primary challenger so as to double the contribution limits. *See* MONT. CODE ANN. § 13-37-216(5) (2015) ("If there is a contested primary, then there are two elections to which the contribution limits apply.").

438. *See generally* CONVENTION TRANSCRIPT, *supra* note 89; CONVENTION PROCEEDINGS, *supra* note 90.

439. Rhode Island was the most recent state to change from judicial elections to merit selection, in 1994. *See, e.g.*, Nat'l Center for State Courts, *Judicial Selection in the States: Rhode Island*, *available at* http://www.judicialselection.us/judicial_selection/index.cfm?state=RI (accessed Oct. 7, 2015; copy on file with Journal of Appellate Practice and Process).

440. James C. Nelson, *Keeping Faith with the Vision: Interpreting a Constitution for This and Future Generations*, 71 MONT. L. REV. 299, 310 (2010).

poisoned elections in states where there are sky-is-the-limit individual and corporate contributions."[441] But as *Citizens United* impacted campaigns, including the 2014 judicial campaign in Montana, Nelson turned sharply against judicial elections. Not only does the threat of independent expenditures discourage qualified attorneys from running for judicial office, Nelson now argues, but the promise of independent expenditures encourages unqualified candidates to run.[442] As a result, Nelson now argues for a constitutional amendment establishing "a purely merit-based system" by a selection committee of designated legal and civic leaders.[443] Other jurists, like former Justice Sandra Day O'Connor, opposed judicial elections well before *Citizens United*,[444] and she continues to oppose them today.[445]

In light of the origins of judicial elections in arguments leading to the 1889 Montana Constitution, and the concerns about judicial appointments expressed around the 1972 Montana Constitution, we might be careful what we wish for. The "Missouri Plan" of merit selection still requires retention elections that, as Iowa's experience shows, are also susceptible to campaigns that threaten to compromise judicial integrity.[446] Appointive systems without retention elections may free judges

441. *Id.* (footnote omitted)

442. James C. Nelson, *It's Time to Make a Change in Selecting Judges in a Post* Citizens United *World*, 40 MONT. LAWYER 21, 21 (Feb. 2015) (also acknowledging that he had "always been a strong proponent for electing Montana's judges and justices," but announcing that he had changed his mind because "[i]t is clear from this last election cycle that campaigns for Montana's Supreme Court—and, potentially, other State judicial offices—will henceforth be characterized by huge expenditures of dark money, attack ads, misleading mail stuffers, and the involvement of out of state money and organizations—all directed to the end of influencing Montana's elections and buying a seat or seats on the Court").

443. *Id.*

444. *See White*, 536 U.S. at 792 (O'Connor, J., concurring) ("If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges.").

445. *See, e.g.*, Sandra Day O'Connor & Institute for the Advancement of the American Legal System, *The O'Connor Judicial Selection Plan* (2014) (providing for merit selection, gubernatorial appointments, performance evaluations, and non-partisan, no-opponent retention elections); Sandra Day O'Connor, *Take Justice Off the Ballot*, N.Y. Times, May 22, 2010, at WK9.

446. *See, e.g.*, Todd E. Pettys, *Retention Redux: Iowa 2012*, 14 J. APP. PRAC. & PROCESS 47 (2013) (contrasting two sets of Iowa retention elections).

of the burden of elective politics, but at the cost of concentrating those politics on the elected officials responsible for the selection. A critic of *Citizens United*—on grounds that undue influence is far more pervasive than the Supreme Court acknowledged in that decision—must also recognize that appointive selection concentrates that influence on the appointer. The federal model of executive appointment and legislative confirmation for life terms only raises these political stakes,[447] and would raise them even more for state judges whose general jurisdiction and common law powers allow them a far greater impact on state electorates than their federal counterparts. To use the hydraulics metaphor sometimes applied to campaign finance,[448] it seems safe to say that, like water or money, political influence will find its way through any judicial-selection landscape.

VI. CONCLUSION

State courts, no less than federal courts, pose critical questions of independence and accountability under the rule of law. There is no one right answer to those questions for all jurisdictions. Montana's answer reflects a territorial suspicion of outside influence, a progressive-era concern about corporate corruption, and an extraordinarily deep deliberation among ordinary citizens about competing models for judicial selection in the formation of its 1972 constitution. The result is a hybrid model sharing elements of contested election, retention election, merit, and (with strong gubernatorial representation on the nominating commission) straight appointment models. After the invalidation of its partisan-endorsement prohibition, Montana now also shares some elements of a partisan-election model, for better or worse.

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447. *See, e.g.*, John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1, 3 (2003) (referring to "confirmation battles over judicial nominees" and "a dramatic slowdown of the confirmation process for federal judges").

448. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713 (1999) ("Money, like water, will seek its own level. The price of apparent containment may be uncontrolled flood damage elsewhere. . . . The money that reform squeezes out of the formal campaign process must go somewhere.").

As in other states with similar models of judicial elections, Montana's model is being tested by a new normal in politics. More than any other recent development, *Citizens United* disrupted the traditional practice of judicial elections in Montana. The Montana Supreme Court itself invited the justices to consider the implications of that case for judicial elections in *Western Tradition*, but the United States Supreme Court declined. In the aftermath, corporate expenditures, super PACs, dark money, and even national political parties flooded Montana's relatively small supreme court campaigns with exactly the sort of out-of-state corporate influence Montanans had fought against for the last 150 years. This prompted a vigorous public debate, in the context of the campaign between Mike Wheat and Lawrence VanDyke, about the Montana Constitution and *Citizens United*, the influence of trial lawyers and corporations, and the merits of electing judges at all. The campaign did not settle that debate, of course. Instead, it raised old questions about judicial selection in a new era of campaign finance. In 2014, as in 1864, 1889, 1972, and 2010, and in Montana as in its sister states, those questions continue to call for answers.