

Changing the Rules by
Changing the Players:
The Environmental Issue
in State Judicial Elections

Environmental Policy Project
Georgetown University Law Center

The Environmental Policy Project
conducts research and education
on legal policy issues relating to
protection of the environment and
conservation of natural resources

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SUMMARY AND INTRODUCTION

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

Key developments discussed in this report include the following:

- A little known Oklahoma-based group with close ties to Koch Industries, a large privately held company with interests in oil and gas, chemicals, and agriculture, has organized a nationwide program to promote the election of state judges sympathetic to business interests in environmental and other cases.
- In a number of states, business groups are preparing simplistic and misleading evaluations of how judges vote in environmental and other cases and then using the results as the basis for either supporting judges for reelection or targeting them for defeat.
- A few months ago, the Institute for Legal Reform, the legal arm of the U.S. Chamber of Commerce, quietly launched a \$10,000,000 campaign to support the election of judges "with strong pro-business backgrounds" in Alabama, Illinois, Michigan, Mississippi, and Ohio.
- In May of this year, Idaho Supreme Court Justice Cathy Silak was voted out of office as a result of a campaign, led by resource companies and members of the Christian Coalition, attacking her for writing a judicial opinion recognizing federal "reserved" water rights in designated wilderness and recreation areas.
- In Ohio, the state Chamber of Commerce and other groups have mounted a campaign to unseat Supreme Court Justice Alice Robie Resnick, in part because the Chamber says she has voted to uphold state and local environmental laws more often than any other justice on the Ohio Supreme Court.
- In Louisiana, a coalition of petrochemical and other businesses has carried out a successful campaign to elect a majority of "business friendly" justices to the Supreme Court, capped by the coalition's success in persuading the Court to issue new rules sharply restricting the activities of environmental law clinics at the state's law schools.
- In Michigan, once a leader in developing new environmental protection policies, a business coalition opposed to stringent environmental regulation has supported a number of successful candidates to the Michigan Supreme Court, transforming the Court's ideological orientation and threatening the state's environmental protections standards.

The magnitude of the political activity surrounding the state judicial selection process may come as a surprise to some readers. One tends to think of judges as above the political fray. In fact, many judges, including most federal judges and some state judges, are appointed to their jobs and enjoy the independence permanent tenure provides.

But judges in most states are required to run for office just like other political officials. And in recent years state judicial elections have become increasingly indistinguishable from the rest of the American political process, complete with large campaign contributions, "independent expenditures" by special interest groups, and massive television and print advertising.

State courts play a major role in interpreting and enforcing environmental law. The most prominent environmental statutes, such as the Clean Water Act and the Clean Air Act, are federal enactments. But most states have taken on the responsibility for implementing these federal laws and state implementation actions are frequently subject to review in state court. States also have adopted their own environmental statutes, and issues arising from the implementation of these laws are normally litigated in state court.

In addition, environmental problems can give rise to claims based on tort, nuisance, or other common law theories which are frequently litigated in state court. As reflected by the recent experience in Idaho mentioned above, state courts also typically handle disputes over water rights. Finally, traditional zoning and other land use decisions are the most important determinant of

environmental quality in many communities. Judicial review of state and local government land use decisions is almost exclusively a state-court function.

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

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

While this report focuses on the environmental issue, the environment is by no means the only, or necessarily the most prominent, issue in most judicial elections. Term limits and the death penalty, for example, have been hotly debated in certain state elections in years past. Today if there is a single issue

of unifying concern to the business community in state judicial elections, it is "tort reform," a blanket term referring to the business community's effort to limit companies' financial liability to consumers, employees, homeowners and other members of the public. Tort reform encompasses questions about potential liability for environmental harms. But tort reform is obviously much broader than the environmental issue. The environmental issue also includes distinct questions about the scope of government authority to regulate environmental risks and manage natural resources.

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

However, even if one accepts the inherently "political" nature of state judicial elections, this report provides grounds for public concern about disproportionate influence by well-heeled special interest groups, conscious efforts to disguise or misrepresent the ideological or financial interests being served by certain advocacy efforts, and misleading reports and rhetorical attacks on judicial candidates. All of these problems are compounded by the relatively low public visibility of state judicial elections.

One of the most striking features of recent state judicial elections is the extent to which pro-business advocacy groups and their allies are using the label "judicial activist" to criticize judicial candidates whom they oppose on ideological grounds. The label "activist" is being consistently attached to judges whose votes tend to disfavor business interests, regardless of whether the label accurately describes the judges' actual method of decision-making. From all appearances, the rhetoric about "judicial activism" has been selected simply because it is believed to convey a negative impression about a candidate. Hopefully one service provided by this report will be to encourage the media and the general public to look beyond the misleading rhetoric that has dominated state judicial elections.

This report is divided into three sections. Section one provides a brief overview of the state judicial electoral process. Section two describes the several apparently related national-level projects to organize pro-business advocacy in state judicial elections, including the activities of the Oklahoma group, Citizens for a Sound Economy, and the U.S. Chamber of Commerce. Section three examines in detail how the environmental issue is playing out in four

specific states: Idaho, Louisiana, Michigan, and Ohio.

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

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I. The State Judicial Electoral Process.

The process of selecting judges varies from state to state. In some states, the Governor simply appoints the judges. But in 42 states judges at some level stand for election of some type.¹ Partisan elections are conducted in 17 states; non-partisan elections are held in 14 states; and 20 states hold "retention" elections, in which sitting judges are on the ballot seeking "yes" votes for another term but there is no direct opponent.² Some states use a combination of methods, such as a partisan election to select judges and a retention election to determine whether judges should be kept in office. (See the table on the next page listing the methods used to select state appellate judges).

Elected state judiciaries are a product of Americans' nineteenth century enthusiasm for direct democracy. According to one account, "The concept of an elected judiciary emerged during the Jacksonian era as part of a larger movement aimed at democratizing the political process in America. It was spearheaded by reformers who contended that the concept of an elitist judiciary... did not square with the ideology of government under popular control."³ As a result, a number of states converted to an electoral process, and between 1846 and 1912 every new state that joined the union provided for an elected judiciary.⁴

In the twentieth century, professional and academic opinion turned against the idea of an elected judiciary. For decades the American Bar Association has favored moving towards merit appointment systems and otherwise limiting special interest influence over judicial selection.⁵ The respected American Judicature Society works tirelessly toward more reliance on merit appointments.⁶ This change in thinking reflects the higher value now assigned to the impartiality of the judiciary and the belief that impartiality is best fostered by removing judges from direct political influence. Notwithstanding this shift in thinking, the judicial electoral process remains a robust institution, and efforts to move toward merit appointments have achieved little success. Reformers are now focusing most of their energy on controlling the magnitude, and increasing the transparency, of the financing of judicial elections.⁷

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

Today, judicial election campaigns focus more specifically on issues likely to come before the courts, reflecting the increasing involvement of special interests with a stake in the outcome of judicial issues.

Traditionally, individual lawyers and law firms representing diverse client interests have been the leading participants in the state electoral process. New special interest participants in the process include state-level associations of trial lawyers (i.e., the organized plaintiffs' bar), labor unions, state chambers of commerce, and many other, less familiar groups. So far as we have been able to determine, groups dedicated to environmental protection have been largely absent from the process.

For some groups, participation in the judicial electoral process is simply an extension of more traditional political activity. Indeed, some groups explicitly justify participation in the judicial electoral process as a necessary tactic to safeguard political gains achieved through traditional lobbying of the legislative branch. A recent publication of the Ohio Chamber of Commerce contrasted the outcomes in cases before the Ohio Supreme Court with "the support the business agenda has enjoyed... in the Ohio General Assembly."⁸ The report singled out for criticism court rulings that invalidated "legislative enactments to limit... tort litigation and provide businesses with reasonable protections against excessive damage awards."⁹ "Business leaders need to realize," the report concluded, "that as Ohio enters the 21st century, the anti-business tilt of the Ohio Supreme Court presents one of the biggest challenges to the state's business climate."¹⁰

The cost of state judicial elections has been exploding, making the state courts the last disappearing frontier in terms of big-money influence in American politics. The typical cost to run for a supreme court seat in a major state is now \$1 million or more. Judicial campaign costs for the Wisconsin Supreme Court increased by almost 800% since 1979.¹¹ Judicial election costs increased by the same amount in Alabama since 1986.¹² Special interests groups are making large contributions to judicial candidates. Equally important, they are making large "independent expenditures" on advertising and other activities in support of their favored candidates and to criticize candidates they oppose. The high cost of state judicial elections works to the advantage

of relatively well-heeled, cohesive interest groups, such as the business community, and to the disadvantage of the general public.

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

The recent trend in financing of state judicial elections has alarmed at least two justices of the U.S. Supreme Court. The increasing "scramble" to finance state judicial elections, Justice Anthony Kennedy has said, produces the concern "that there will be either the perception, or the reality, that judicial independence is undermined."¹³ According to Justice Stephen Breyer: "Independence [of the judiciary] means you decide [cases] according to the law and facts. Law and facts do not include deciding according to campaign contributions. And if that's what people think, that threatens the institution of the judiciary. To threaten the institution is to threaten fair administration of justice and protection of liberty."¹⁴

II. National Efforts To Influence State Judicial Elections.

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

The most substantial national effort to date has been centered in Oklahoma and operated by a group of lobbyists, lawyers and business people, most with close ties to the conservative wing of the Republican Party and Koch Industries, a large, privately held corporation with a significant interest in environmental regulatory policy. The leaders of Koch Industries, David and Charles Koch, have established a solid track record, primarily through grant-making by several Koch family foundations, of generous and effective financial support for conservative public policy initiatives. One of the Kochs' primary areas of interest has been the state courts.

Operating under the name "Citizens for Judicial Review" (during the 1996 election cycle) and the Economic Judicial Report (during the 1998 election cycle), the Oklahoma group has created a kind of nationwide franchising operation for pro-business advocacy in state judicial elections.

A 1996 fund-raising letter and project proposal sent by Citizens for Judicial Review (CJR) to various business leaders described the basic plan of action.¹⁵ In the proposal, captioned "Judicial Evaluation: A Methodology for Evaluation of Economic Biases of Judicial Candidates and Incumbents," CJR outlined a plan to prepare state-by-state evaluations of the voting records of state judges and to distribute the results to "pro-business opinion leaders." This project was necessary, CJR contended, because "the judiciary has a dramatic and often-overlooked effect on investment and employment decisions made by businesses." The initiative would counter the "political and financial strength" of the trial lawyers, and address the problem that some communities "are unaware of the negative economic effects which can result from judges who maintain unsound economic ideologies [sic]." The proposal outlined a plan to conduct initial evaluations of state judges in eight states: Alabama, Arkansas, Kansas, Louisiana, Mississippi, Oklahoma, Tennessee, and Texas. The proposal also referred to CJR's plans for a future "national program" of judicial evaluations.

The proposal indicated that the fundraising efforts were approaching "the \$400,000 mark in Oklahoma, with hopes of raising at least \$500,000." The proposal described "well received presentations" to the Tulsa, Oklahoma City, and State Chambers of Commerce and the Mid-Continent Oil & Gas Association, and referred to CJR's expectation that the project would receive these organizations' "full endorsement." The proposal also described plans to raise funds in the other targeted states and indicated that the total budget for the eight-state effort was \$1 million. "[A]ny additional dollars" above and beyond the \$1 million would "go toward funding a \$3.5 million national program." To underscore that the ultimate goal was to increase business profits, the letter predicted that the effort "will have a very significant impact on judiciary behavior and create positive cost results in our state, region, and nation." It is unclear whether the fund raising goals in the proposal were achieved. But one of the organizers of the effort subsequently stated that "fifty associations and corporations" supported the effort.¹⁶

The president of Citizens for Judicial Review, and presumably of its later incarnation, the Economic Judicial Report, is Marc Nuttle.¹⁷ Both CJR¹⁸ and EJ¹⁹ are actually business trade names utilized by Sequoyah Information Systems, Ltd., an Oklahoma corporation headed by Nuttle. Nuttle is a well known conservative activist who served as counsel for the 1984 Reagan-Bush campaign, directed Pat Robertson's 1998 presidential campaign, and served as an advisor to the conservative Free Congress Research and Education Foundation.²⁰

Another leading figure in the Oklahoma-based effort is Ron Howell, who directs a private political consulting firm called Statesource. Before starting Statesource, Howell was the president of a subsidiary of Koch Industries. Statesource (Howell) claims credit for "help[ing] lead the effort to establish" Citizens for Judicial Review,²¹ and supplied day-to-day management for the effort.²² Howell signed the 1996 fund-raising letter soliciting business contributions. In addition, as an offshoot of the national effort, Howell directed a 1988 project called Oklahomans for Judicial Excellence, which one reporter described as "a coalition of pro-business, political conservatives,"²³ to evaluate Oklahoma judges. According to The Wall Street Journal, Koch Industries, Howell's former employer, provided

seed money to Statesource and the Oklahomans for Judicial Excellence project.²⁴

Other participants in the Oklahoma-based national organizing effort include Ann Gallagher (formerly with the Ohio Chamber of Commerce, where she played a role in launching the Ohio judicial evaluation project), Sam Hammons (whose law firm Hammons, Vaught and Conner, PC prepared legal analysis of legal cases used in the judicial evaluations), and James Milner (a member of the board of Oklahomans for Judicial Excellence who until 1998 was the director of the Oklahoma Chapter of Citizens for a Sound Economy).²⁵ Judicial Evaluations and Surveys.

The Oklahoma group has been solely or partly responsible for more than half a dozen reports on state judicial performance in different states, including Alabama, Florida, Louisiana, Michigan, Mississippi, Oklahoma, and Texas. These states match closely - but not exactly - those initially targeted by CJR in 1996.

Most of these reports purport to provide an objective evaluation of judicial performance based on an analysis of judges' voting records. The evaluations follow a simple recipe. They look at a sample of decisions on environmental issues and other topics, such as employment, insurance, products liability, and medical malpractice. They then determine whether the outcomes in the cases were favorable or unfavorable to business interests based on whether a business entity won or lost the case. The pro-business votes in each category are then tabulated and combined in order to produce a cumulative favorability rating, with 100% representing maximal pro-business voting and 0% representing the opposite.

First, these evaluations obviously reflect a very narrow pro-business agenda. The evaluations give no consideration to such factors as whether the rulings respect judicial precedent or reflect unbiased evaluation of the factual record in the particular case. Nor do they consider whether decisions beneficial to the environment might have positive long-term effects on the overall business climate. The only fact that matters is whether a business entity won or lost the case. If business won the case, it is a "good" decision. If business lost, it is a "bad" decision.

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

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

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

The Oklahoma evaluation followed the standard format, ranking the state's Supreme Court justices based on the frequency with which they cast pro-business votes in a set of ostensibly representative cases.²⁶ With respect to the environment, the evaluation looked at nine environmental cases decided by the Supreme Court over the previous decade and categorized each one as being

either "a positive decision for the state's economy" or "not a positive decision for the state's economy." Thus, for example, the evaluators gave a negative ranking to a decision holding that individuals exposed to toxic chemicals by an electrical transformer explosion had a right to sue the manufacturer for compensation for their injuries.²⁷ The evaluators ranked as positive a decision holding that the Oklahoma water resources board lacked jurisdiction to order a company to clean up after an oil pipeline rupture.²⁸ A business PAC focusing on judicial elections, Oklahomans for Jobs and Economic Growth, ran ads attacking particular judges for having a "negative impact on the economy," citing the evaluation sponsored by Oklahomans for Judicial Excellence to support this assertion.²⁹

The Mississippi evaluation looked at 156 decisions in eight different categories, including the environment. However, the sponsors of the report, led by an entity called the Business and Industry Political Education Committee, declined to release the actual evaluation or to identify the cases they selected for study. According to one press report, a representative of the committee confirmed that it "did not release the study's cases when asked [to do so by a justice on the state supreme court], because, based on past experience with legislative studies, people who don't like their 'grade' attempt to divert attention from the subject by focusing on details of the process."³⁰

Finally, the Texas judicial evaluation, which reportedly was released in very limited numbers and did not receive wide publicity, apparently followed the same model as the Oklahoma and Mississippi evaluations.

In addition to producing evaluations of judicial decisions, the Oklahoma group also has promoted the use of lawyer surveys of judicial performance. In 1998, the Economic Judicial Report, working on behalf of Oklahomans for Judicial Excellence, issued a survey of bar members' assessments of state trial judges. In the same year, the Oklahoma group assisted with a similar survey of bar members in Florida. The Florida survey generated significant controversy after it was revealed that it had been commissioned by a pro-business advocacy group, the Florida Chapter of Citizens for a Sound Economy.³¹ In Alabama, an effort to conduct a lawyer survey of judicial performance was met with strong criticism from the state bar association, and no survey report was apparently ever completed in that state.³²

The Koch Connection.

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

The ties to the Kochs are numerous. Ron Howell is the head of Statesource, the consulting firm which provided day-to-day management for Citizens for Judicial Review and the Economic Judicial Report. Howell is a former high-level Koch Industries executive as well as a long-time independent consultant to the company.³³ Howell was identified in press accounts in the mid-1990s as Koch's Oklahoma state "director."³⁴

In addition, the Kochs have provided direct financial support for the Oklahoma effort, though the exact size of their support is difficult to pin down. According to press accounts, the Kochs reportedly provided "start up" funding to Statesource for the preparation of judicial evaluations.³⁵ The Kochs might well have contributed some portion of the nearly \$400,000 in seed money for the judicial evaluation project described in the 1996 fundraising proposal, but this cannot be confirmed. In addition, Citizens for Sound Economy, to which Koch family foundations have contributed nearly \$10 million dollars, apparently helped fund the preparation of judicial evaluations by the Oklahoma group: Citizens for a Sound Economy is listed on Statesource's client list.³⁶ Koch family foundations might have contributed to CSE with the understanding or at least the expectation that the funds would be used to support the judicial evaluation project administered by Statesource.

The Kochs' support for efforts to influence the outcomes of state judicial electoral races is actually only one component of a broader Koch-led effort to influence judicial decision-making. The Fred C. and Mary R. Koch Foundations have funded a judicial education program for state judges at the University of Kansas since 1995, emphasizing a law and economics approach to legal analysis.³⁷ Thus, the Kochs have sought to promote change in the state court systems not

only by supporting the election of "pro-business" judges to the state courts but also by helping to educate judges on important legal issues. The Koch foundations also have provided major support for educational programs for federal judges.³⁸

The Kochs' support for efforts to influence state courts is consistent with the Kochs' general approach of providing financial support in a comprehensive and organized fashion to achieve fundamental change in social policy. Richard Fink, a Koch foundation official, at a public conference, "outlined the Kochs' strategy of investing in each stage of idea development - from academic research and the recruitment of young scholars, to think tanks for refining ideas into policy, to 'implementation' groups that push the concepts into reality."³⁹ "We at the Koch foundation," Fink said, "view them as complementary institutions, each critical for social transformation."⁴⁰

In a striking example of the synergy between the various Koch-funded judiciary projects, Henry Butler, the Fred and Mary Koch Distinguished Professor and Director of the Law and Organizational Economics Center at the University of Kansas, wrote an opinion piece for the Daily Oklahoman in 1998 defending the accuracy of the Oklahomans for Judicial Excellence judicial evaluation.⁴¹ In his piece, Butler suggested that judges might improve their rankings in the (Koch-funded) judicial evaluations by attending the (Koch-funded) seminars at the University of Kansas.

The Kochs' involvement in efforts to reshape elected state judiciaries, on the environment and on other issues, is consistent with their personal "free market" philosophies. But it is also fair to observe that their support for these advocacy efforts has the potential to influence how Koch business interests are (or are not) affected by environmental laws and regulations. Koch Industries is engaged in a wide variety of businesses that generate environmental problems, including oil transportation and refining and chemical manufacturing. Over the years, Koch Industries has been embroiled in a number of environmental controversies. In 1998, the Minnesota Pollution Control Agency levied a \$7.9 million fine based on dozens of air quality violations by a Koch-owned oil refinery.⁴² Koch Industries also paid \$10.5 million to settle a suit brought by Texas fishermen whose fishing grounds were damaged by a 90,000 gallon oil spill from a Koch-owned pipeline.⁴³ Finally, in January of this year, Koch Industries agreed to pay a \$30 million penalty to the U.S. Treasury, the largest civil fine ever imposed on a company under federal environmental law, based on more than 300 oil spills from pipelines and other oil facilities across the country.⁴⁴

Perhaps not coincidentally, the eight states which CJR initially targeted in 1996 are all states in which Koch Industries has facilities, including some of the company's largest concentrations of facilities.

Citizens for a Sound Economy, another organization with close ties to the Kochs, also has been involved in the effort to influence the state judicial systems. CSE is a conservative think tank dedicated to promoting "free markets and limited government."⁴⁵ Richard Fink, the Koch foundation official quoted above, was a founder of Citizens for a Sound Economy. Koch family foundations have reportedly contributed over \$9 million dollars to CSE since its founding in 1984.⁴⁶ David Koch also sits on the board of directors of the CSE foundation.

State chapters of Citizens for a Sound Economy have acted as grass-roots partners with the Oklahoma group in promoting judicial evaluations or surveys in different states, including Florida, Oklahoma, and Texas. The Florida Chapter of Citizens for a Sound Economy reportedly retained Statesource to conduct the 1998 Florida survey of judicial performance.⁴⁷ The Texas Chapter of Citizens for a Sound Economy played a lead role in distributing the 1996 judicial evaluation surveys conducted in that state.⁴⁸

CSE also has apparently served as a source, or at least as a conduit, for funding for judicial evaluations. As discussed, CSE has reportedly provided funding for the preparation of the Oklahoma judicial reports. In addition, Statesource, the entity directed by Ron Howell which played such a prominent role in the Oklahoma-based effort, lists Citizens for a Sound Economy as a client on

its website.

The U.S. Chamber of Commerce.

As discussed below in chapter III, the Ohio Chamber of Commerce apparently invented the idea of judicial evaluations based on judges' rulings in environmental and other cases. Perhaps inspired by that example, and at about the same time that Marc Nuttle, Ron Howell, and others were launching the Oklahoma project, the U.S. Chamber of Commerce formed the Institute for Legal Reform. One of the stated functions of the Institute is "rating and endorsing highly qualified candidates for judicial elections in certain key states."⁴⁹

An article published in summer 1999 provides a summary of the goals and objectives of the Institute. According to its president, Lawrence Kraus, the Institute was created because "[t]he Chamber realized that the business community was concerned" about what he called the "growing threat of abusive, frivolous and excessive litigation."⁵⁰ The project has a steering committee made up of corporate leaders. Funding comes from "businesses around the country." Kraus said that the Institute conducts "media campaigns which include press releases, op-ed pieces, letters to the editor, publishes pamphlets, holds conferences and even, on occasion, purchases ad time or space." To date, it appears that the Chamber (which has not published any judicial evaluations of its own) has carried out its agenda primarily by supporting the efforts of its state chapters. Indeed, state chapters of the Chamber have been involved in some fashion in creating, financing, or distributing judicial evaluations in every state investigated in depth in the course of this research project.

In June of this year, the Institute for Legal Reform announced a major new campaign to support the election of pro-business judges to the state supreme courts in Alabama, Illinois, Michigan, Mississippi, and Ohio, indicating that it expected to raise at least \$10 million to support the effort.⁵¹

Jim Wootton, Executive Director of the Institute, reportedly stated that the Institute would likely use these funds to make direct campaign contributions as well as pay for issue advertising. The Institute announced the hiring of several high-powered consultants to help in this effort, including Mark Gitenstein, former Chief Counsel to the Senate Judiciary Committee and a partner with the firm of Mayer, Brown & Platt, "to provide strategic and legal guidance;" Shandwick International "to develop the message for an ad campaign;" and Mike Murphy of the MPMG Agency, to "develop ads and provide strategic advice."

In an interesting twist, the political debates about judicial elections in both Michigan and Ohio have been enlivened by a series of newspapers and radio ads in Ohio in mid-June paid for by the Michigan Chamber of Commerce. The ads urged Ohio businesses to move to Michigan with the argument that the "judicial restraint of the Michigan Supreme Court"⁵² has created a good economic climate in Michigan. The ads criticized the Ohio Supreme Court, stating it had "rejected reasonable legal reform."⁵³ While the Michigan Chamber had a plausible economic motivation for running the ads, the gambit of interstate competition seemed tailor-made to attract public attention in both Michigan and Ohio. While the Ohio Chamber denied any direct involvement in the ads,⁵⁴ it took advantage of the ads by its Michigan counterpart to amplify its attacks on the Ohio Supreme Court. A June 6 press release headlined "Ohio Chamber President Says Supreme Court Makes Ohio a Target," quoted Ohio Chamber President Andrew Doerhl as stating: "People in Michigan should be happy that their Supreme Court has shown judicial restraint and that citizens and businesses are able to have a predictable legal climate. That kind of climate is important to growth, and unfortunately, it does not exist here in Ohio."⁵⁵

III. Battleground States.

This section describes efforts by business interests to reshape the state judiciaries in four states: Idaho, Louisiana, Michigan, and Ohio. These states were selected for different reasons. Idaho is apparently the first state in which a sitting justice has been successfully targeted for defeat based on a ruling in an environmental case. In Louisiana, the environment has been at the center of one of the most overt and successful efforts by the business community to influence a state court system. In Michigan, advocacy by the business community and allied groups has helped produce a dramatic change in the composition of the Supreme Court, a change that may well have important implications for environmental protections in the future. Ohio was selected

because of its role in launching the idea of evaluating and rating judges and because the business community is vigorously opposing the reelection of Justice Alice Robie Resnick in the upcoming November election. The Ohio Chamber of Commerce has identified Justice Resnick as the least "pro-business" justice on environmental issues on the Ohio Supreme Court. Idaho.

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

The five justices of the Idaho Supreme Court serve six-year terms and are elected in (ostensibly) non-partisan elections.⁵⁶ The elections are conducted on a two-year cycle.⁵⁷ If a justice dies or retires before the end of his or her term, the State Judicial Council nominates a panel of potential replacements from which the Governor makes a final selection.⁵⁸ If no candidate in the primary wins a majority, the two leading vote-getters compete in a run off in the general election.⁵⁹ If, as occurred in the Silak-Eismann race, there are only two candidates to begin with, there is no need for a run off and the winner is selected in the primary.⁶⁰

Until 1932, Idaho's judicial election process was openly partisan. In that year, as the result of a pro-Democratic sweep in Idaho and across the country fueled by depression-era popular discontent, two Idaho Republican incumbent justices were defeated at the polls.⁶¹ Idaho's Republican leadership subsequently pressed for a constitutional amendment mandating non-partisan elections.⁶²

As a result of these reforms, Idaho judicial elections, until the 1990s, were largely removed from the political process. Prior to the 2000 election, no incumbent justice had been voted out of office for over 50 years.⁶³ Therefore, incumbent justices faced little real prospect of retribution at the polls for politically unpopular decisions. Furthermore, the process for selecting new justices was largely nonpolitical as well. From the mid 1960s, with the exception of two justices who died in office, every justice resigned his seat rather than retiring at the end of his term.⁶⁴ As a result, the Judicial Council selection procedure mentioned above was used to select every new justice over this period.

In 1998, for the first time in 30 years, the State held an election for an open seat on the Court. In that contentious race, Wayne Kidwell, who was publicly associated with the Republican Party, defeated Mike Wetherell, who was identified as a Democrat.⁶⁵ The 1998 race marked the emergence of a new, essentially partisan judicial electoral process in Idaho. As described below, the partisan character of the electoral process increased in the following election.

The 2000 Candidates.

The 2000 judicial race pitted Justice Cathy Silak against an Idaho District Court Judge, Dan Eismann. Eismann won the contest by a margin of 60 to 40 in the primary held on May 23rd.

Democratic Governor Cecil Andrus appointed Cathy Silak to the Idaho Court of Appeals in 1990 and appointed her to the Supreme Court in 1993.⁶⁶ In 1994, she won re-election to the Court in a race against Wayne Kidwell (who would successfully run for a seat on the Court in 1998). Prior to her appointment to the bench, Silak served as a prosecutor in the offices of the U.S. Attorneys in New York and Idaho and had a private law practice. She graduated from New York University and Boalt Hall Law School. Immediately prior to becoming a judge, she was Associate General Counsel of Morrison-Knudsen Corp., a large engineering

and construction firm. Justice Silak was the first woman to sit on the Idaho Supreme Court.

Justice Silak was fairly easily identifiable as the Democratic candidate. She had been appointed to office by a Democratic Governor. She also had married into what one newspaper reporter referred to as a "prominent Idaho Democratic family."⁶⁷ In addition, Silak's volunteer work for the ACLU prior to joining the bench arguably suggested she had liberal political leanings, an argument repeatedly advanced by Eismann's supporters during the campaign.⁶⁸

Dan Eismann had deeper roots in Idaho than Silak, having received both his bachelor and law degrees from the University of Idaho.⁶⁹ He served as a Magistrate Judge for Owyhee County for about a decade, and in 1996 was appointed Ada County District Judge. Eismann described himself as a born again Christian of nearly twenty years,⁷⁰ and, as discussed below, garnered major political support from the Idaho Christian Coalition, which reportedly distributed thousands of voter guides advocating his election over several Sundays preceding the election. Eismann was easily identifiable as the Republican candidate.

Before running for the Supreme Court seat, Judge Eismann was best known for his actions in the Idaho school funding litigation. Like many other state constitutions, the Idaho Constitution prescribes basic standards for the state system of public education.⁷¹ In a replay of similar litigation in other states, Idaho school districts brought suit alleging that the legislature had failed to live up to its constitutional obligation to "provide a means for school districts across the state to fund facilities that provide a safe environment conducive to learning."⁷² Judge Eismann dismissed the case. On appeal, the Supreme Court issued a unanimous ruling reversing Judge Eismann's decision and returning the case for trial on the plaintiffs' claims. Rather than conduct the trial mandated by the Supreme Court, Judge Eismann formally withdrew from the case. "I took an oath to uphold the Constitution," he said. "To follow the court's directive I would violate my oath of office."⁷³

In general, of course, a trial court judge is bound by the legal rulings of a superior appellate court. For a trial judge to refuse to hear a case based on his view that the appellate court has made an erroneous legal ruling is extremely rare if not unprecedented. If many judges acted so willfully, the administration of justice would be seriously undermined.

Another striking aspect of Judge Eismann's candidacy was the fact that his brother-in-law, Barry Wood, was the presiding judge hearing the long-running Snake River Basin Adjudication case.⁷⁴ As mentioned, a Supreme Court ruling in that case authored by Justice Silak was the focal point of Judge Eismann's campaign against Silak. Thus, were appeals in this case to come before the Supreme Court, Justice Eismann would be reviewing decisions by his brother-in-law in the very case that was the central issue in his election campaign. To make matters more complicated, the Nez Perce Indian tribe filed a motion to disqualify Judge Wood from the case on the ground that he failed, prior to accepting appointment as presiding judge, to disclose to the parties that he and members of his family (not including Eismann) held water claims that could be adversely affected by recognition of the Nez Perce's claims.⁷⁵ Judge Wood denied the disqualification motion.⁷⁶ But he granted the Nez Perce's request for permission to take the disqualification issue to the Supreme Court, and the Supreme Court issued an order allowing the appeal on July 19, 2000.

During the course of the campaign, when questions were raised about the propriety of potentially sitting in review of rulings made by his brother-in-law, Judge Eismann said he would not recuse himself if elected to the Supreme Court. "As long as we do not discuss the cases, which we aren't, there's no requirement" that he recuse himself, he stated.⁷⁷

On August 31, 2000, the Idaho Supreme Court issued an order removing Judge Wood from the Snake River case.⁷⁸ This action followed an opinion by the Idaho Judicial Council concluding that it would be a conflict of interest for Justice Eismann to sit in review of his brother-in-law's decisions, and a subsequent announcement by Justice Eismann that he would recuse himself from the Snake River case in order to abide the Council's decision.⁷⁹ As between the removal of Justice Eismann or Judge Wood, the Supreme Court apparently preferred the removal of Judge Wood.

Another controversial issue in the Idaho judicial contest was race. At a

campaign appearance in Idaho Falls, Judge Eismann challenged the view that the death penalty is not being fairly applied across racial lines, arguing that statistics supporting this view fail to take into account all relevant factors. According to a reporter's summary of his remarks: "When blacks kill whites it is often during the commission of a crime, such as theft, Eismann said. But when whites kill blacks the parties often know each other and the crime is committed in a heated moment, a motive that carries a lesser sentence than murder committed during theft or a drug deal."⁸⁰ In other words, according to this view, white murderers are generally less deserving of severe punishment because they tend to know their victims. Not surprisingly, this sweeping, implicitly racist comment generated a good deal of negative comment. A columnist for the Lewiston Morning Tribune wrote: "When I hear some sincerely believed racial myth uttered in public, it makes my head spin. How could anyone in this day and age still buy into stuff like that?"⁸¹

Based on public reports to date, Silak and Eismann raised approximately equal amounts in direct campaign contributions.⁸² Many of the contributors to both candidates are difficult if not impossible to categorize in terms of financial interest or political orientation. However, it is apparent that a good deal of Justice Silak's support came from prominent Democratic party figures and such interest groups as the Idaho Trial Lawyers Association.⁸³ It is also apparent that Judge Eismann's major supporters included Republican party leaders, resource industries and agricultural interests.⁸⁴ In addition, according to press accounts, Eismann raised nearly one-quarter of his campaign fund from the chairman of the Idaho Christian Coalition and four members of her family.⁸⁵

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

The contest for Justice Silak's seat on the Supreme Court began, in effect, with a blistering editorial on October 14, 1999, in The Idaho Statesman, one of the state's largest papers.⁸⁶ The subject of the editorial was the Court's decision a few weeks earlier upholding, by a 3 to 2 vote, a claim by the United States government to federal "reserved" water rights in three designated wilderness areas (Frank Church River of No Return, Gospel Hump and Selway-Bitterroot) and in the Hells Canyon National Recreation Area.⁸⁷ Justice Silak was the author of the majority opinion.

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

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

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

In its October 1 decision, the Supreme Court, affirming the trial court, concluded that the United States could claim reserved rights in the water

flowing through the wilderness and recreation areas as of the date the areas were created between 1964 and 1980. The Court also ruled that the United States was entitled to claim the entire unappropriated flow in order to fulfill the purposes of the reservations. The Court's recognition of this claim meant not only that the United States could block water development inside the areas, but also development outside the areas that would impinge on the federal water rights. Because most of the affected areas were in the headwaters of the affected streams, this aspect of the ruling had little practical significance. However, in the case of the Salmon River and the River of No Return Wilderness, the ruling did potentially affect various upstream developments outside the wilderness area. Moreover, because the ruling recognized the United States' right to claim all remaining water flows as of the date the wilderness area was created, the ruling could, at least in theory, force the cancellation of some established water uses in the upper reaches of the Salmon River.

Chief Justice Trout and Justice Walters concurred in Justice Silak's opinion. Two justices (Kidwell⁸⁸ and Schroeder⁸⁹) filed vigorous dissents. They agreed that the legislation establishing the national recreation area included a reserved water right, but argued that the Wilderness Act created neither an express nor an implied water right in the three wilderness areas. They also dissented on the issue of the amount of water reserved. To the extent the United States was entitled to claim water rights in any of the areas, they argued, the government had to prove how much water was actually necessary to fulfill the reservation purposes.

Shortly after the Court issued its ruling, the state, Potlatch corporation, the cities of Salmon and Challis, three mining companies and fourteen irrigation districts filed requests that the Court rehear the case.⁹⁰ On November 30, 1999, the Court granted the request, a step that requires the concurrence of at least one member of the majority. The case has now been reargued and is pending a decision.

As discussed, the charge that Justice Silak's authorship of the decision reflected bias on the water rights question was belied by the fact that Justice Silak joined in another decision issued by the Court the same day rejecting the United States' claim to a reserved water right in federal lands administered by the U.S. Forest Service.⁹¹ Moreover, a few months later, Justice Silak joined in another Court decision rejecting a claim by the United States to a water right to support a national wildlife refuge.⁹² The Electoral Contest.

Following the publication of The Idaho Statesman editorial, a steady torrent of public criticism rained down on the Court. A board member of a large irrigation district in southern Idaho said, "this is setting a precedent that is untenable. We can't live with it. No citizen in the Snake River Plain can live with this decision."⁹³ The mayor of Salmon, Idaho, upstream of the River of No Return Wilderness called it a "devastating and perplexing decision."⁹⁴ A representative of the Farm Bureau Federation said the organization was "astounded with this ruling."⁹⁵ On the other hand, there also were dissenting views about The Idaho Statesman's editorial. One letter to the editor remarked, "What is inexcusable is that you think she should decide cases, not to what she believes the law to be, but to what she believes the voters want."⁹⁶

Judge Eismann effectively launched his campaign to unseat Justice Silak, despite the officially "non-partisan" nature of Idaho judicial elections, by appearing and speaking at a Republican Party fund-raising banquet in Idaho Falls on February 12, 2000. Newspaper accounts of the event indicate that Eismann did not explicitly discuss the water rights case, but it was clearly the target of his remarks. Eismann said the "courts with increasing frequency have been pushing political agendas with decisions 'that reinterpret the Constitution.'"⁹⁷ "They don't trust the people," he said. "Those kinds of justices should be removed from office." In another statement highlighting the importance of the water case, a Republican official at a meeting prior to the banquet called for Silak's removal, stating: "We anticipate having an opponent for her so you will have a choice... In this instance you better get out there and vote or you'll be pretty dry."⁹⁸

A few weeks later, former Supreme Court Justice Robert Huntley, an active member of the Democratic party, filed a complaint with the prosecutor for the county in which the fund raising event occurred.⁹⁹ He alleged that Eismann had violated the constitutional provision that candidates "shall not be nominated nor endorsed by any political party."¹⁰⁰ Violations are punishable by a \$1,000 fine, up to five years in prison, or both.¹⁰¹ Huntley also submitted a copy of the complaint to Attorney General Al Lance and others. In explanation of his decision to file the complaint, Huntley wrote: "This type of conduct is very serious in that it constitutes an invasion of the independence of the judiciary and will result in judges being fearful of the political consequences if either they write or enter unpopular rulings or happen to be former members of a minority political party."¹⁰²

No charges were ever brought as a result of the complaint, perhaps in part because of a letter the Attorney General's deputy chief of staff sent to Robert Huntley asserting that the law had not been broken.¹⁰³ According to public accounts of the letter, the deputy chief of staff contended that Republican leaders speaking out in favor of Eismann's candidacy at the Republican party event did not constitute party endorsement.¹⁰⁴ Furthermore, he asserted that there could have been no violation of the prohibition against nominating or endorsing judicial candidates because the event occurred before the May primary. "Therefore," he wrote, "no ballot has been created, used or voted on in which the name Judge Eismann, or any other judicial candidate was accompanied by any party designation." As Huntley pointed out in response, the argument was fallacious because the Supreme Court race was going to be decided in the primary given that there were only two candidates in the race. Under the reasoning of the Attorney General's office, the constitutional prohibition against partisan nomination or endorsement of a judicial candidate is meaningless in any race in which there are only two candidates and the selection process is completed prior to the general election.¹⁰⁵

Later, a few weeks before the election, another controversy erupted over a questionnaire submitted to the candidates by the Idaho Christian Coalition asking for their responses to dozens of questions.¹⁰⁶ Justice Silak declined to respond to the specific questions posed but requested that the coalition include in its voter guide a statement to the effect that she had taken and several times reaffirmed an oath to uphold the Idaho and U.S. Constitutions.¹⁰⁷ When the coalition criticized her for not responding, she called the criticism misleading and asserted that it would be improper for her to provide answers to many of the coalition's questions. According to press accounts, the coalition asked such questions as whether the candidates "are pro-life or pro-choice, conservative or liberal, or believe God's laws have a higher authority than state and federal law."

Judge Eismann apparently did provide answers to at least some of the questions on the questionnaire, but neither he nor the coalition would release the responses. However, in a newspaper interview, Judge Eismann provided a synopsis of his answers.¹⁰⁸ For example, in response to the question "Do you believe in the fact that god created all the heavens, earth, creatures, plants and man?", he answered, "I have studied evolution in great detail. I think you can prove scientifically that evolution has not and cannot occur." Question: "Do you believe in the fact that man evolved from life forms in the sea?"; answer: "You would have to have an oxygen-free atmosphere for anything like that to have occurred. The evidence is that this Earth has never had an oxygen-free environment." Question: "Vis-a-vis abortion, are you 'Pro-life?"; answer: "I think abortion is morally wrong."

This controversy prompted the filing of another complaint, this time by Silak supporter Scott Reed, an attorney in private practice in Coeur d'Alene, with the state Judicial Council.¹⁰⁹ Reed asserted that Eismann had violated the official rules of judicial conduct by answering the questionnaire. He pointed to an August 12, 1998, letter from the Judicial Council to candidate Mike Wetherell responding to an inquiry Wetherell had made about the appropriateness of questionnaires he had received soliciting his views on such issues as gun control, capital punishment and abortion. The Council's 1998 letter stated: "It is not appropriate for a judicial candidate to respond to such questions or surveys. However, a candidate may respond to general questions concerning the

candidate's background, education, qualifications, experience and general philosophy on the law." Judge Eismann called Reed's complaint a "political attack" and said, "I don't know of anything that says a judge can't express his religious beliefs."¹¹⁰ As of the date of publication of this report, the complaint was still pending.

In perhaps the most controversial aspect of the race, in the last few weeks before the election an obscure South Carolina-based group financed an illegal "push poll" designed to sway voters against Justice Silak based on her opinion in the Snake River case.¹¹¹ A push poll is an organized campaign to reach individuals by telephone in order to influence their vote, but is conducted under the guise of an informational survey. It is nominally a "poll," but in reality it is designed to "push" voters in favor of a particular candidate. The script of the push poll directed at Silak was released by the Idaho representative of the effort:

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

Residents who answered 'no' were told; 'Your opposition to the federal power grab of Idaho

water is important. You see, at the May 23 election, Idaho voters will be deciding who will serve on the state supreme court. The current judge, Cathy Silak, is the person most responsible for handing over Idaho water to the federal agents. Her opponent is Dan Eismann. Judge Eismann opposes this giveaway. He is a solid defender of individual freedom and has a record of being fair and honest.

The caller was then asked: 'Can we count on you to go to the polls on Tuesday May 23rd and vote for Dan Eismann for state Supreme Court?'"¹¹²

Immediately after the polling began, Silak's campaign brought suit alleging a violation of a state law requiring pollsters to identify to the people being polled the person or group paying for the poll.¹¹³ On May 16, a District Court judge ruled in favor of the Silak campaign, issuing a restraining order barring further polling. But the judge rejected the campaign's request that the sponsors of the poll re-telephone all those they contacted to inform them who paid for the poll.

Who or what was behind this push poll remains mysterious. The poll was nominally sponsored by an organization called the Citizens for Term Limits Idaho Campaign, based in Hayden Lake, Idaho.¹¹⁴ The actual telephoning was conducted by a Pennsylvania-based telemarketing firm. According to Dan Morgan, leader of the Idaho term limits group, the poll was funded by a \$50,000 check from Lyle Coggan of the Democracy Fund in South Carolina. Research efforts to further identify Coggan or the Democracy Fund have so far been fruitless.¹¹⁵

Finally, in the last few days of the campaign, a virtual advertising blitz was mounted against Silak by a number of groups opposed to her reelection. A political action committee called "Concerned Citizens for Family Values" began running full-page newspaper ads across the state on the Sunday before the election stating, in large letters: "Will partial birth abortion and same-sex marriage become legal in Idaho? Perhaps so if liberal Supreme Court Justice Cathy Silak remains

on the Idaho Supreme Court?"¹¹⁶ The ads then went on to suggest that Silak's past involvement

with the ACLU in Idaho indicated that she might support national ACLU positions on abortion and homosexuality. Print and radio advertising run by gun advocates suggested that Silak would support gun registration and also opposed her reelection.¹¹⁷ Eismann disavowed any knowledge of or control over these independent efforts on his behalf, though some argued he was less forceful than he might have been in objecting to them.¹¹⁸ Justice Silak called them a "smear," emphasizing that the ads discussed issues which the Court had never addressed and on which she had not stated a view.¹¹⁹

The Mantra of Judicial Activism.

One final, striking aspect of the race, and a point that only becomes clear after reviewing scores of news accounts of the election, is the consistent focus by Judge Eismann and his supporters on the issue of "judicial activism." From the day he announced his campaign and in virtually every public statement thereafter, Judge Eismann and his supporters attacked what they

called "judicial activism."¹²⁰ In emphasizing this theme, Eismann's campaign borrowed a page from Republican or Republican-leaning judicial candidates across the country.

It was of little consequence that Justice Silak asserted that she was a "strict constructionist,"¹²¹ and repeatedly affirmed, I am "not an activist judge."¹²² Like proverbial denials of wife beating, Justice Silak's protests about the charge of "judicial activism" appeared to reinforce her opponent's message.

Based on the actual positions of the candidates, there was little reason to think that Justice Eismann would be a less "activist" member of the Court than Justice Silak. Indeed, if anything, based on his history and campaign platform, Justice Eismann seems likely to be more activist than Justice Silak. For example, Eismann's refusal to accept the Supreme Court's binding interpretation of the Idaho Constitution in the school funding case represents, by any standard, a highly "activist" judicial step.¹²³ His open political advocacy, despite his position as a judge, of "pro-life" positions that are inconsistent with binding U.S. Supreme Court precedent on the issue also appears to smack of activism. And with respect to the central issue in the race, the Snake River case, the thrust of his campaign's criticism of Justice Silak's opinion was not that it was wrong as a matter of law but rather that it was out of step with sentiments of Idaho voters; a justice who endorses deciding cases based on popular sentiment rather than legal precedent would seem to fit the definition of a judicial activist. In the end, it is difficult to discern any legitimate content to the charge of "judicial activist" made by Judge Eismann and his supporters against Justice Silak.

One newspaper columnist commented on the apparent contradiction between Judge Eismann's stated fidelity to "strict construction" and his cavalier approach to complying with Idaho's constitutional guarantee of a "non-partisan" election. Referring to Judge Eismann, Bill Hall wrote, "These constitutional wobblers now thumbing their noses at the requirement are fair-weather friends of strict construction. They are laughing up their dark sleeves at the virtue of a non-partisan judiciary." Louisiana.

For the last decade, the Louisiana business community has waged an aggressive campaign to remake the state's elected Supreme Court. Given the importance of petrochemical and related manufacturing in Louisiana, it is hardly surprising that this effort has been driven in part by the business community's concern about environmental regulation. Recent decisions by the Court suggest that the campaign has succeeded in producing a Court that is decidedly unsympathetic to environmental protection concerns. In one action that has drawn national press attention,¹²⁴ the Court, at the urging of the business community, issued new rules governing law student participation in litigation matters. These new rules have seriously undermined the environmental law clinics at the state's law schools and reduced the public's already modest capacity in Louisiana to enforce environmental regulations. Judicial Electoral Politics in Louisiana.

The seven justices on the Louisiana Supreme Court are elected in openly partisan elections held in seven districts across the state.¹²⁵ The seven justices are elected for ten-year terms on a two-year cycle.¹²⁶ If a vacancy occurs in a non-election year, the Court appoints a temporary replacement, and the Governor calls for an election.¹²⁷ Circuit Court Judges, divided into four circuits, are also elected to ten-year terms.¹²⁸

Over the last half-dozen years, the composition of the Supreme Court has changed dramatically, giving the Court a decidedly more "conservative" tilt. In 1994, Justice Victory, with the support of the Louisiana Alliance of Business and Industry, the Louisiana State Medical Society, and other business groups, won election to an open seat on the Court.¹²⁹ In 1996, two business-backed candidates, Justices Knoll and Traylor, unseated two relatively liberal opponents, Justices Bleich and Watson. Knoll publicly labeled her opponent, Watson, as "one of the most liberal judges" on the Court and claimed that with her election "there will be a change in the court philosophically."¹³⁰ Traylor described his opponent, Bleich, as a "liberal," and asserted, "I'll bring a more conservative voice to the Supreme Court."¹³¹

In 1998, the Louisiana Alliance of Business and Industry and other business groups launched a vigorous -- but ultimately unsuccessful -- campaign to unseat Chief Justice Pascal Calogero. Despite its success in supporting openly pro-business candidates for the Court, the business community concluded that the Chief Justice remained an important and sometimes decisive vote against business interests.¹³² Calogero was opposed by Judge Charles Cusimano, who ran with strong financial backing from the business community. Calogero received 49% of the vote in the October preliminary election while Cusimano received 41%, and Bill Quigley, an independent candidate employed by the Loyola Poverty Law Center, received 9%. Under Louisiana law, Calogero's failure to receive a majority of the votes cast meant that a run-off election was required. Rather than face certain defeat, Cusimano withdrew, handing victory to Calogero.

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

The 1998 campaign was described in the press as "nasty, expensive" and "without respite"¹³³ and full of "biting television ads and a sea of glossy campaign posters."¹³⁴ Calogero supporters filed a suit to stop the Cusimano campaign from passing out literature publicizing Calogero's dissent in a case challenging the imposition of the death penalty for a rape involving a victim below the age of twelve.¹³⁵ Because the case was still pending in the courts, Calogero's supporters argued that it was a violation of judicial ethics to discuss the case. The judge presiding over the case issued an injunction against the use of the ad and the Cusimano campaign pulled it.

On the other side, Chief Justice Calogero's campaign ran an ad and direct mail campaign accusing Judge Cusimano of being soft on crime, and criticizing him in particular for the allegedly light sentence he meted out to a convicted rapist, a charge Cusimano called false.¹³⁶ Calogero also accused Cusimano of authorizing foreclosures of homes subsequently purchased by a company in which Cusimano held a financial stake.¹³⁷

Candidate Quigley suggested that his opponents' resources would be better spent in buying television time for a public discussion of the issues rather than in purchasing ads which "demean" the office and make the campaign "like the Jerry Springer show."¹³⁸

As in other states across the country, the cost of running for judicial office in Louisiana is becoming exorbitant. The cost of a Louisiana Supreme Court race now approaches \$1 million dollars.¹³⁹ In 1998, Judge Cusimano spent about \$650,000 in his campaign; had he competed in the run-off, he would have been forced to spend several hundred thousand dollars more.¹⁴⁰ Chief Justice Calogero spent \$900,000 on his campaign and expected to have to spend another \$200-300,000 in the run-off. Bill Quigley, who did not accept contributions over \$500, raised only about \$80,000.¹⁴¹

Not surprisingly, given special interest groups' increasing involvement in judicial elections, a 1998 survey conducted by the University of New Orleans found that 80 percent of state residents surveyed thought the Louisiana Supreme Court was too influenced by politics.¹⁴² The Louisiana Alliance of Business and Industry.

The major force behind the effort to make the Louisiana Supreme Court more "business friendly" has been the Louisiana Alliance of Business and Industry (or "LABI").¹⁴³ Created in 1975 by a consolidation of the Louisiana Chamber of Commerce, the Louisiana Manufacturers Association, and the Louisiana Public Affairs Council, LABI has emerged as the dominant voice of business in Louisiana. LABI has promoted, among other things, "right to work" legislation, limitations on workers compensation remedies, lowering of unemployment and workers compensation taxes, and protection of business tax incentives.¹⁴⁴

LABI has managed to skirt Louisiana's campaign finance laws by creating multiple PACs. The maximum a judicial candidate can receive from PACs is

\$50,000. A PAC classified as "large" can contribute \$10,000 per candidate, and a "small" PAC can contribute up to \$5,000 per candidate. LABI has established four PACs, two of which are categorized as large (SOUTH and WEST PACs) and two of which are categorized as small (NORTH and EAST PACs). PAC contributions, though important, do not include LABI's significant "independent expenditures," including its investment in producing a report evaluating the justices' pro-business voting patterns (discussed below).

Calogero charged that Judge Cusimano was "a handpicked candidate of the Louisiana Association of Business and Industry, trying to change the complexion of the Supreme Court," an accusation the organization did not deny.¹⁴⁵ Cusimano was in fact supported by LABI, its four PACs, and a number of its member companies. LABI's SOUTH PAC endorsed Cusimano the day he entered the race.¹⁴⁶ LABI's PACs ultimately contributed \$26,000 to Cusimano's campaign, close to the maximum allowed.¹⁴⁷ Cusimano described himself as a candidate who would bring "a philosophy that understands business" to the Court.¹⁴⁸

Environmental issues have been a consistent focus for LABI. In 1998, LABI announced an effort to improve the Louisiana business community's environmental image. The Baton Rouge Advocate commented on this effort skeptically, observing, "The environmentalists will rightfully point out that much of the progress on the environmental front in the last two decades has come in the face of stiff opposition from big business."¹⁴⁹ LABI also has joined with other business groups around the country in expressing opposition to the Kyoto treaty on global warming, arguing that it would lead to a "total end to the increase in industrialization capacity in this country."¹⁵⁰ Finally, LABI took a lead role in lobbying for environmental self-audit legislation, which would have immunized businesses from liability for environmental violations discovered and reported by the companies themselves.¹⁵¹ Thus, LABI's advocacy in the context of the state electoral process is consistent with LABI's overall public policy agenda.

LABI has been strikingly frank in its preference for a merit selection process for state judges and also about its unwillingness to forego participating in the electoral process that currently exists. In the early 1980s, LABI supported legislation to establish a judicial appointment process but also threatened to start treating judicial elections like any other election contest if the selection process did not change.¹⁵² True to its word, following the failure of the reform legislation, and assertedly for the primary purpose of offsetting contributions to judicial candidates by trial lawyers, LABI joined the judicial electoral fray in the early 1990s.¹⁵³

LABI also has been candid about its objectives as a participant in the judicial electoral process.

In 1994, LABI president Dan Juneau conceded that LABI was seeking to use its financial power and political clout to influence the Court, stating, "We don't choose to make our judicial system in this state above influence."¹⁵⁴ LABI has contended, "If the Legislature continues to resist some form of merit selection for judges, which is the obvious reform that is needed to insulate judges from the unavoidable influence of special interests, the business community must remain actively involved in the judicial election process."

LABI has publicly expressed the view that its activities have had a positive effect on the Supreme Court from a business standpoint. For example, LABI's political director told a reporter that certain recent Supreme Court pro-business rulings "wouldn't have happened as they did" in the absence of LABI's efforts on behalf of certain judicial candidates.¹⁵⁵ Judicial Evaluations.

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

The 1996 evaluation followed the same basic pattern as all the other evaluations produced by the Oklahoma group. The report looked at decisions from the Louisiana Supreme Court over the last ten years in environmental cases and six other areas, and ranked the justices in terms of their pro-business votes from 100% to 0%. Cases were chosen with input from unspecified "business leaders and lawyers."¹⁵⁶ Justice Victory, who won election in 1994 with business backing, received a 67% rating; Justice Marcus a 54% rating; Justice Kimball a 38% rating; and Justices Calogero and Lemmon tied with the lowest

score of 33%.¹⁵⁷ Justices Knoll and Traylor, elected in 1996, were not included in the evaluation, presumably because they were involved in too few cases to provide a reasonable sample. In the environment category, Chief Justice Calogero received an 80% rating, a higher pro-business score than he received in any other category.

LABI took over the work of conducting judicial evaluations in 1998.¹⁵⁸ LABI's analysis of judicial voting patterns was even more simplistic than the analysis by the Oklahoma group. The LABI evaluation was based on a "panorama" of 50 cases over a 25-year period involving "key economic development issues." LABI assertedly chose the cases based on what it called a "common thread," including decisions "creat[ing] new theories of law," "expand[ing] existing laws beyond their original scope," and creating law "contrary to legislative intent." The LABI analysis did not break the cases down into separate categories but rather gave each judge a single global score. LABI publicly released its analysis in September 1998, shortly before the preliminary election in early October, presumably to ensure that it had the greatest possible impact on the outcome.¹⁵⁹

LABI assigned the justices the following "pro-business" scores: Justice Traylor (100%) Justice Victory (86%), Justice Knoll (60%), Justice Marcus (51%), Justice Kimball (44%), Justice Johnson (44%), Justice Lemmon (16%), and Chief Justice Calogero (3%). Especially given the very small number of cases examined by LABI, and the even smaller subset of cases used to evaluate recent appointees, the reliability of the evaluation is open to substantial doubt. A skeptic might question the conclusion that the three successful LABI-backed candidates in the 1990's, Justices Traylor, Victory and Knoll, received the three highest pro-business scores, whereas Chief Justice Calogero, whom LABI had targeted for defeat in 1998, received a pitiful pro-business rating of only 3%.

In order to defend himself against LABI's charge that he was anti-business, Calogero pointed to the relatively low, but still substantially higher 33% pro-business rating he had received from the Center for Judicial Review in 1996.¹⁶⁰ In fact, others rejected the view that Calogero, though apparently not as reliable a business supporter as some other justices, could fairly be characterized as "anti-business." The New Orleans Chamber of Commerce endorsed him for reelection in 1998. Moreover, as discussed, the Center for Judicial Review's 1996 evaluation gave Calogero an 80% pro-business rating based on his votes in environmental cases. If Calogero could be viewed as anti-business, it was only in comparison with the explicitly pro-business candidate LABI favored to replace Calogero.

It is difficult to gauge the actual effect of the release of the LABI analysis. Certainly there was a great deal of press coverage of LABI's report and the ensuing controversy. Judge Cusimano publicly cited the Chief Justice's low rating in the LABI study as a reason to vote against him, and argued that the report substantiated his charge of "judicial activism" against Calogero.¹⁶¹ Sacrificing Environmental Law at the Altar of Judicial Politics.

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

The Supreme Court's 1997 decision in *Meredith v. Ieyoub*¹⁶² provides one striking illustration of how the changing composition of the Court has affected the outcome in environmental cases. The case arose from the decision by the Attorney General to enter into contingent-fee contracts with private firms to assist the state in prosecuting environmental damage claims against polluters. Under the contracts, the firms would retain a percentage of any financial recoveries successfully recovered on the state's behalf. The Attorney General's obvious motivation in entering into these contracts was to enlist the resources and expertise of private law firms in helping to enforce the environmental laws.

The state association of oil and gas producers and some of its members, who were among the potential targets of this arrangement, brought suit claiming that the Attorney General lacked the legal authority to enter into this type of contract for legal services.

There is strong evidence that the plaintiffs' ultimate success in the litigation challenging the contracts is attributable to the business community's successful efforts to elect more "pro-business" justices to the Supreme Court. While the case was pending in the lower courts, LABI and other business groups succeeded in electing Justices Knoll and Traylor to the Court. In a decision handed down in September 1997, the Court ruled, by a 4 to 3 vote, that the contracts were illegal.¹⁶³ Justice Victory, who was elected in 1994 with business backing, wrote the majority opinion, which was joined by Justices Knoll and Traylor (both elected in 1996) and concurred in by Justice Kimball. The Chief Justice and two other relatively long-time members of the Court dissented. While it is impossible to know how the case would have turned out if Justices Knoll and Traylor had not defeated their opponents the year before, it seems more likely than not that the outcome in *Meredith v. Ieyoub* was determined by the Louisiana business community's investment of time and resources in the judicial electoral process.

The most well-known fall out from the political contests over the Louisiana Supreme Court has been the Court's 1998 order restricting the ability of law students, working under the supervision of environmental law faculty at the state's law schools, to litigate environmental cases. The Louisiana Supreme Court, like courts in many other states, has adopted a rule authorizing limited participation in trial work "[a]s one means of providing assistance to clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds."¹⁶⁴

The environmental law clinics operating pursuant to Rule XX have generated political controversy as a result of their involvement in litigation affecting powerful business interests. In the early 1990's, Louisiana Secretary of State Kai Midboe filed a complaint with the Supreme Court about the activities of the environmental law clinic at Tulane University School of Law, accusing the students in the clinic of "lying to the state court and to the public about environmental cases and with improperly contacting state officials about environmental lawsuits."¹⁶⁵ On behalf of the Court, Chief Justice Calogero rejected Midboe's request for an investigation, stating that "It was the feeling of the justices that there is no need to either create an oversight committee or to develop standards of conduct different from those that are already provided."¹⁶⁶

Complaints lodged a few years later, based on the Tulane clinic's assistance to a group opposing the construction of a new chemical plant in their community, and following significant changes in the personnel on the Court, produced quite a different outcome. The origin of the controversy was a proposal by the Japanese-based Shintech corporation to construct a polyvinyl chloride and ethylene dichloride plant in the Saint James Parish town of Convent. A local community group, the St. James Citizens for Jobs and the Environment, opposed the plant, "on the grounds that, as a small, lower income and predominantly African-American community, Convent was already host to a disproportionate share of chemical facilities posing risks to both the environment and to the health of local inhabitants."¹⁶⁷ After failing to gain legal assistance from other sources,¹⁶⁸ the group enlisted the help of the Tulane clinic. The clinic represented the St. James citizens group at hearings before the Louisiana Department of Environmental Quality in December 1996 and January 1997. Despite the objections, the Department issued pollution permits for the plant.

In May 1997, the Tulane clinic, on behalf of the St James Parish citizens and other community and environmental groups, petitioned the U.S. Environmental Protection Agency (EPA) to review the state's decision under the Clean Air Act. The clinic argued that the permit violated state and federal air quality rules, and also cited President Clinton's Executive Order on environmental justice designed to prevent minorities from having to bear the brunt of industrial pollution.¹⁶⁹ In September 1997, the EPA granted the petition and overturned the state's issuance of the permits to Shintech. Following this decision, Shintech shelved its plans to build the plant.

The state government, led by Governor Foster, vigorously objected to the clinic's efforts to halt the construction of the Shintech plant, which the state had been supporting in a variety of ways, including by extending state tax benefits to the company.¹⁷⁰ The Governor's critics emphasized the fact that Shintech had contributed \$5,000 to the Governor's campaign, and Shintech's lobbying and public relations consultants made similar \$5,000 contributions to Foster's campaign.¹⁷¹

Shortly after the Tulane clinic filed its petition with the EPA, Louisiana Governor Foster reportedly urged a gathering of the New Orleans Business Council to withhold financial support from Tulane University until the clinic could be "gotten under control."¹⁷² At the same meeting, industry leaders reportedly also urged the Business Council to write a letter to the Supreme Court asking it to restrict the activities of the Tulane clinic.¹⁷³ In a July 1997 talk radio show, Governor Foster threatened to revoke the tax benefits Tulane receives as a non-profit educational institution and called the law clinic staffers "vigilantes" and the professors "a bunch of big fat professors drawing paychecks to run people out of Louisiana."¹⁷⁴ Foster was later quoted as stating, "All the economic development in the world is difficult if we find groups out there to stop it. All I ask is that you find some other way to train law students other than blocking projects on strange theories."¹⁷⁵

Other state officials joined in the criticism of the law clinic. In August 1997, Kevin Reilly of the Louisiana Department of Economic Development, Governor Foster's chief liaison on the Shintech project, sent a letter to the President of Tulane, the board of trustees, and the university's deans. The letter accused the Tulane clinic of "legalistic guerilla attacks against environmentally responsible industry and the Department of Environmental Quality" and urged that "Tulane request the Louisiana Supreme Court to review the activities of [the law clinic] to determine if the Clinic has overstepped the charter the Court originally gave it."¹⁷⁶

A number of business groups formally petitioned the Supreme Court to investigate the need for changes to Court Rule XX. Several months later, the Supreme Court granted the petitions and ordered an investigation, not limited to the Tulane clinic, but relating to all the clinics at the state's law schools. Following a series of visits to the various clinics across the state, the Court-appointed investigators apparently issued a report.¹⁷⁸ However, the Court never released the report nor issued any findings that there had been a violation of Rule XX. Nonetheless, in June 1997, the Court issued an amended version of Rule XX, limiting the kinds of cases law clinics could take on in the future. The amended rules provided that clinics could only represent individuals making less than 125% of the federal poverty guideline or organizations in which fewer than 25% of the members made more than that amount. Also, the amended rules prohibited the clinics from representing any group affiliated with a national organization. In addition to directly limiting the pool of potential clients, the procedural requirements to demonstrate compliance with these guidelines created a major new administrative burden for the law clinics.

The deans of Tulane and Loyola law schools, the Louisiana Bar Association and others objected to the new rules. Over the course of the next year, the Court issued a series of modest amendments providing that the clinics could represent individuals making up to 200% of the federal poverty guideline, requiring that only 51% of a group's members must be indigent, and lifting the prohibition against representing groups affiliated with national organizations. Despite these changes, Louisiana still has the most restrictive rules governing student law clinics in the country.¹⁷⁹ As a result of the new restrictions, the Tulane clinic has had to turn down groups with environmental complaints but insufficient resources to hire an attorney.¹⁸⁰

What was the connection between the petitions to amend Rule XX and the Supreme Court race? Chief Justice Calogero insisted that the amended rules simply restated established law, and that he did not bend to political pressure in launching the investigation of the law clinics.¹⁸¹ Nonetheless the timing of the order revising Rule XX, combined with the fact that the business groups seeking the revisions had declared their intent to support a candidate against Calogero, fostered the public impression that the Chief Justice was motivated to revise Rule XX by a desire to defuse

criticism
from the business community.

Independent candidate Bill Quigley, a Loyola University law professor, entered the race primarily to highlight the importance of the Court's revisions to Rule XX. He contended that the Court's amendments to the rules governing student law clinics effectively shut the working poor out of the legal process.¹⁸²

The controversy over the Supreme Court's restrictions on law school clinics continues today. The Southern Christian Leadership Conference, Louisiana community groups, law school professors and students, and others groups, all represented by the Brennan Center for Justice, filed suit against the Louisiana Supreme Court in federal court challenging the restrictions on student practice as a violation of the First Amendment.¹⁸³ The plaintiffs alleged that the amended rules infringed their right to free speech, to association, and to petition the government for redress of grievances. In an opinion handed down in July 1999, the court dismissed the complaint, concluding that none of the plaintiffs asserted a viable constitutional claim. The court recognized that the charge that the business community had exerted improper political pressure was "in need of closer examination and debate," but asserted that "the forum for addressing such questions is more properly a political one, not a judicial one."¹⁸⁴ "Furthermore," the court added, "in Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary."¹⁸⁵

The plaintiffs have appealed this ruling to the U.S. Court of Appeals for the Fifth Circuit, where the case is now pending.¹⁸⁶

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

At the request of the Louisiana chemical industry, the Louisiana Supreme Court has done

what the industry has been unable to get anyone else to do: silence organizations that are making it comply with environmental laws. In this part of the country, where there are few public interest law firms of any kind, when you take away public access to the Tulane and Loyola law clinics, you have taken away public access to the law. Which is exactly what the chemical industry intended.¹⁸⁷

Michigan.

The Michigan Supreme Court has the distinction of having undergone what is probably the

most dramatic ideological transformation of any elected court in the nation. One motivation behind the campaign to change the Court's composition has been concern in the Michigan business community about allegedly excessive environmental regulation. Whether the Court's new make-up will actually result in more pro-business environmental decisions remains to be seen. The future direction of environmental law in Michigan also will likely depend in part on the outcome of the judicial elections in November 2000, which are expected to be the most expensive and contentious in the state's history.

Michigan Judicial Politics.

Judicial elections in Michigan are officially non-partisan in the sense that candidates are not identified on the ballot as running under the banner of any particular political party. But, in fact, the judicial selection process in Michigan is highly political. Judicial candidates are nominated at party conventions and party affiliations are routinely mentioned by the press.¹⁸⁸ Furthermore, as discussed below, the public debate over the composition of the state courts has taken on a harsh new political tone in recent years.

The seven justices on the Michigan Supreme Court are elected to serve

eight-year terms with elections held every two years.¹⁸⁹ The Governor fills by appointment vacancies that occur between elections, but the appointee then must run in the next election to retain the seat for the balance of the term.¹⁹⁰ Michigan has four intermediate Courts of Appeals with seven judges on each court (the court actually hears cases in panels consisting of three judges). Elections to the Court of Appeal are conducted through the same party-nominated, non-partisan process as Supreme Court elections.¹⁹¹ Court of Appeals judges are elected by district and serve terms of six years.¹⁹²

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

These appointments and electoral results have dramatically changed the ideological character of the Court. In 1996, the Supreme Court had three Democrats, three Republicans and one Independent. Now there are five Republicans and two Democrats on the Court. Both Justices Taylor and Corrigan are outspoken conservatives. For example, both Taylor and Corrigan have served on the "Judicial Advisory Board" of the Law and Organizational Economics Center at the University of Kansas, which runs a conservative educational program for state judges.¹⁹³ As discussed in section II, Koch family foundations, which have heavily supported various groups involved in the effort to make state courts more "business friendly," have provided major financial backing for the Kansas center. Also, Justice Markman, who replaced Justice Brickley, was "expected to more firmly entrench an attitude that is pro-business."¹⁹⁴

Critics of the new Court have highlighted the fact that five out of seven Michigan Supreme Court justices are or were members of the conservative Federalist Society.¹⁹⁵ They include Justices Corrigan, Markman, Taylor, Weaver, and Young. Overall, "[a]t least half of [Governor] Engler's judicial appointments [to the Michigan courts] are members of the Federalist Society," according to the president of the Michigan Chapter of the Federalist Society.¹⁹⁶

Many observers in Michigan charge that the present Supreme Court has embarked on a new activist course designed to undo many of the Court's prior precedents. For example, according to a 1999 editorial in the Detroit Free Press, "When Justices Elizabeth Weaver, Maura Corrigan, Clifford Taylor and Robert Young Jr. ascended to the Michigan Supreme Court, they were professed conservatives given to restraint, respect for precedent and decisions based on fact and law, not personal philosophy. Yet all of seven months into a new term, this majority bloc has aggressively established new rights for business interests, such as insurance companies, while chipping away at protection for individuals, workers, and criminal defendants. They're not even being subtle about it."¹⁹⁷ The editorial contends that in the first half of 1999, the court ruled for insurance companies and against plaintiffs in 19 out of 20 cases, whereas during the previous year the Court split 23 to 22 in such cases. Since January, according to the editorial, the Court has overruled ten of its prior precedents.

Mary Ellen Gurewitz, General Counsel for the Michigan State AFL-CIO (obviously not a disinterested party when it comes to issues before the Court), prepared a paper analyzing a subset of the Court's 1999 decisions.¹⁹⁸ She concluded that "the way to understand this Court's work, and to predict how it will decide cases in the future, is not to analyze or explain the law as lawyers

are trained to do, but simply to identify the litigants." The "principles" which she concluded underlie the Court's opinions are these: "unions lose, personal injury plaintiffs lose, civil rights plaintiffs lose, workers' compensation claimants lose, criminal defendants lose, insurance companies win, corporations win, Republicans win." Some of the Court's most controversial decisions have upheld the exclusion of workers from the workers' compensation system,¹⁹⁹ upheld state "tort reform" legislation restricting the use of expert medical testimony,²⁰⁰ and broadly interpreted exclusions from coverage in insurance policies.²⁰¹

Members of the Court have not responded to this criticism meekly. Justice Taylor was quoted in the Michigan Lawyers Weekly as stating that "[t]he Michigan Democratic party 'will use anything, will distort and misrepresent anything to bring the court into disrepute.'"²⁰² Justice Young, criticizing Ms. Gurewitz's analysis of recent Court decisions, said "I am absolutely outraged that sensible lawyers would get involved in a game of 'which half won' when there is nothing substantive being asserted here. I want to go on record as distancing myself from this entire process."²⁰³

The Environmental Issue in Michigan.

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

In the early 1970's, Michigan was a pioneer in the development of modern environmental law. Perhaps most notably, in 1970, with the assistance of Joseph Sax, then a professor at the University of Michigan, the State adopted the Michigan Environmental Protection Act, which established broad new public rights to environmental protection along with new mechanisms for enforcement of these rights.²⁰⁴

Governor Engler has taken the state in a very different direction on environmental policy, seeking to curb what he regards as excessive regulation and to develop alternative environmental policies that are more acceptable to business. These initiatives have generated great controversy. For example, a white paper by the Mackinac Chapter of the Sierra Club sums up the situation from the standpoint of the environmental community:

State government in Michigan has turned its back on the environment. Meaningful citizen involvement in state decisions about regulating or permitting pollution and about enforcing Michigan's environmental laws has been stifled. Public access to information about polluting or environmentally damaging activities has been restricted. Important environmental statutes have been rewritten, rolled back, and weakened by pro-polluter legislators.²⁰⁵

The change in direction of state environmental policy has, not surprisingly, created conflict within the environmental agencies. Public Employees for Environmental Responsibility, a non-profit advocacy group, published a 1998 survey of Michigan Department of Environmental Quality employees revealing a widespread perception that the new agency leadership favored economic development over resource protection. Over 80% of the 609 employees who responded said that they did not "trust top management of DEQ to protect Michigan's natural resources and public health."²⁰⁶ Individual comments included such statements as: "No incentive not to pollute," "Inadequate enforcement of laws," "Director Harding has been picked by the Governor to cater to the regulated community," "Harding is Michigan's own James Watt," and "If the general public knew what the Engler Administration is up to in state government they would be appalled."²⁰⁷

Some of this controversy has spilled over to the Michigan courts, most notably in the area of regulatory "takings" challenges to environmental regulations. In an important 1996 decision, Judge Clifford Taylor (who was elevated the following year to the Supreme Court) joined with two other members of the Michigan Court of Appeals in affirming a trial court's \$5 million takings award based on the denial of a permit to fill wetlands.²⁰⁸ This decision was highly controversial because it appeared to contradict one of the basic tenets of takings doctrine, namely that a claim must be evaluated in relation not to

the restricted portion of the property, but in relation to the property as a whole. The owners held 82 acres of land and proposed to fill 28 acres of the property for development. The Court of Appeals ruled that the relevant parcel was limited to a portion of the property roughly coextensive with the area of regulated wetlands. Using this narrow definition of the parcel, the Court of Appeals concluded there was a taking. If upheld on appeal, this new approach to regulatory takings claims would have seriously undermined Michigan environmental protection programs across the board.

The Attorney General challenged the decision in the Michigan Supreme Court, supported by numerous amici curiae, including the United States, organizations representing local governments, and several national conservation groups. In a 1998 decision, the Michigan Supreme Court unanimously reversed the lower court ruling.²⁰⁹ By the time the Court issued its decision, Justice Taylor had joined the Court, but he did not participate in the case, presumably because of his involvement in the case in the lower court. The Court's opinion was written by Justice Cavanagh, now one of the two remaining Democrats on the Court. Not surprisingly, the case has prompted speculation about how the present Supreme Court, which has a very different composition, would have decided this important case or how it would decide similar cases in the future.

Another controversial regulatory takings action, *Miller Brothers v. Department of Natural Resources*, resulted in a \$90 million settlement personally negotiated by Governor Engler. The case arose from a state order prohibiting oil and gas development in a 5,000 acre wilderness area known as the Nordhouse Dunes administered by the U.S. Forest Service. After the trial court ruled in favor of the plaintiff, the Court of Appeals affirmed the finding of a taking but vacated the compensation award. Before the end of the trial on the compensation issue, and prior to any appeals, Governor Engler negotiated a settlement of the case. After extended political debate, the State finally resolved the case by paying \$90 million to the plaintiffs, with the Miller Brothers company, an oil and gas firm, receiving the lion's share.²¹⁰

For a variety of reasons, this settlement has been very controversial. Both the trial court and the Court of Appeals relied on an expansive reading of the Takings Clause, a reading that might well have been overturned if the Michigan Supreme Court (or the U.S. Supreme Court) had had an opportunity to review the case. In addition, notwithstanding the tens of millions of dollars spent to settle the case and acquire the oil and gas rights, the state has apparently left open the possibility that these resources might be developed in the future.²¹¹ Finally, critics charged that the principal plaintiff may have received favored treatment based on hundreds of thousands of dollars in campaign contributions the Miller family made to the state Republican Party.²¹²

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

Business community involvement in Michigan judicial elections began in earnest with the founding of M-LAW in the late 1990's.²¹³ M-LAW was presented publicly as a home-grown Michigan organization, with a Michigan-based board of directors.²¹⁴ In reality, M-LAW was largely the creation of the American Tort Reform Association (ATRA), a Washington DC-based organization that receives funding from the insurance industry, tobacco companies, and many other businesses.²¹⁵ This link is confirmed by the indication in public tax records that \$284,500 of M-LAW's 1996-97 expenditures "were made on behalf of M-LAW by the American Tort Reform Association."²¹⁶ The Michigan Chamber of Commerce,²¹⁷ the Michigan State Medical Society²¹⁸ and "several [other] Michigan trade associations" also helped start M-LAW.²¹⁹ The Chamber worked in close cooperation with M-LAW during the 1998 election cycle, for example by publishing the M-LAW ratings in its magazine, *Michigan Forward*, just prior to the election.

M-LAW is essentially a conduit for corporate spending on advertising and other public outreach efforts designed to influence the outcome of Michigan judicial elections. M-LAW had 1996-97 revenues of \$640,000,²²⁰ but the organization had only one full-time staff person.²²¹ In that year M-LAW reported spending \$311,200 on television advertising, \$46,000 on radio

advertising, \$19,900 on "production of paid media," and \$94,000 on "media and other consultants."²²² M-LAW's preliminary 1998 budget proposed spending \$50,000 on TV, \$20,000 on radio, \$10,000 on billboards, \$60,000 on a phone bank, \$1,000 on a toll-free number, \$10,000 on "production of paid media," \$15,000 on mailings, \$15,000 on newsletters, and \$25,000 on "media and other consultants."²²³

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

IRS materials in the public file on M-LAW provide some insight into both the funding for and objectives of M-LAW. For example, the IRS objected to M-LAW's application for recognition under section 501(c)(6) "because the funds were being utilized for political or lobbying purposes."²²⁴ The IRS said that "your support from what appears to be only a few sources, the large grant from a tort reform group [i.e., the American Tort Reform Association], the limited expenditures you have made for promotional materials and your lack of employees make it appear that you are not operating in a manner similar to a chamber of commerce. Rather you appear to be a single issue advocacy or lobbying group contracting for or acting on behalf of or performing a service for another organization or organizations."²²⁵ In the same letter, the IRS also expressed concern that M-LAW "appears to concentrate its efforts during election years." In subsequent correspondence, the IRS declared "there is a major question as to whether the primary purpose of the organization is political," and stated that M-LAW appeared to be "flying under false colors, i.e. a business group masquerading as a 'public watchdog'."²²⁶

Michigan Judicial Evaluations.

One of M-LAW's primary activities has been publishing reports evaluating whether or not Michigan judges are "pro-business" on environmental and other issues. M-LAW released a report on the Supreme Court in May 1998, and released a similar evaluation of the Court of Appeals in July 1998. The reports were announced with great fanfare, highlighting the role of M-LAW in sponsoring the evaluations.²²⁷

In reality, the evaluations were prepared and at least partly financed by the groups directing the national campaign to influence the state courts described in section II. The Supreme Court report was commissioned by the Judicial Evaluation Institute for Economic Issues as well as by M-LAW. As discussed below, the Judicial Evaluation Institute is (or was) a District of Columbia-based operation. The actual report was prepared by the Oklahoma-based Economic Judicial Report (EJR), a trade name of Sequoyah Information Systems, Ltd. (SIS), an Oklahoma corporation. Sequoyah Information Systems claimed copyright protection for the report in its own name. The evaluation of Michigan Supreme Court judicial opinions was performed by the Oklahoma law firm that works in cooperation with the Economic Judicial Report. Indeed, the Michigan sponsors of the evaluation specifically acknowledged that the Oklahoma firm "supervised all the research" for the report.²²⁸

According to the letter of agreement between M-LAW and Sequoyah Information Systems (SIS), which operates the Economic Judicial Report, M-LAW paid SIS \$26,000 for the Supreme Court evaluation and \$32,000 for the Court of Appeals evaluation.²²⁹ The letter of agreement between the parties recognized that "EJR has and will continue to receive money from third parties to produce the evaluation." The letter went on to state, "As you discussed with Sam [Hammons], SIS has an agreement with the Judicial Evaluation Institute for Economic Issues (JEI), a Washington DC non-profit corporation. Through JEI, dissemination of the Evaluation's Information will be further assisted."

What exactly the Judicial Evaluation Institute for Economic Issues is or was remains obscure. Research efforts have failed to disclose any record of any such non-profit organization, and it is possible it was never officially established.²³⁰ One report, in a Chamber of Commerce publication, stated that JEI was established to provide "expertise and funding" to "several budding state efforts at systematic judicial evaluation,"²³¹ and may have been established to work in cooperation with the U.S. Chamber of Commerce or some of its member

companies. JEI was run out of the offices of a Washington D.C. lobbying firm, the Lawler Group, headed by Greg Lawler, a former aide in the Clinton White House.²³² No evidence has been uncovered of JEI's involvement in any race other than the Michigan 1998 judicial elections, and there is no evidence that JEI is continuing to operate. It appears obvious that JEI served as a conduit for financial support for the Michigan judicial evaluations, but the ultimate source or sources of this funding is unknown.

The 1998 Supreme Court evaluation examined over a hundred decisions decided between 1987 and 1997 in eight general areas, including environmental law.²³³ The stated purpose of the ratings was to determine whether the justices made decisions that "have a positive or negative effect on the general business climate of the state."²³⁴

The justices' overall pro-business scores ranged from 81% to 25%. In descending order of

pro-business voting tendencies, the justices received the following scores: Weaver (81%), Brickley (63%), Boyle (49%), Mallett (45%), Cavanagh (38%), and Kelly (25%). Justice Clifford Taylor, who joined the court in September 1997, was not included in the ratings.

Under the heading of environment, based on an analysis of seven decisions, Justices Boyle, Brickley, and Cavanagh received 43% ratings. Chief Justice Mallett received a 33% rating. Justice Weaver received a 24% rating, based on her participation in only four cases. Justice Kelly was not rated because she had participated in none of the seven decisions evaluated.

These ratings relied on only a small sample of just seven cases. Like the evaluations prepared

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

- Hadfield v. Oakland County Drain Commissioner, 422 NW2d 205 (1988). This decision recognized a "trespass-nuisance" exception to governmental tort immunity doctrine, allowing a farmer to proceed with a suit for financial compensation against a county for property damages allegedly caused by the county's improper maintenance of a culvert. "Positive effect on economy."
- McCaul v. Village of Lake Odessa, 422 NW2d 205 (1988). This case was consolidated with the Hadfield case described above, and recognized that the government immunity doctrine does not bar a land owner's trespass-nuisance claim for damages resulting from sewage overflowing from a municipal waste treatment facility onto the plaintiff's private property. "Positive effect on economy."
- Adkins v. Thomas Solvent Co., 487 N.W.2d 715 (1992). This decision held that homeowners had no valid nuisance claim based on illegal discharges of toxic chemicals that resulted in a reduction of their property values due to the threat of ground water contamination. "Positive effect on economy."
- Paragon Properties Company v. City of Novi, 550 N.W.2d 772 (1996). This decision held that a regulatory taking claim was not "ripe" for judicial review when the county denied a landowner's request to rezone the property for a mobile home park and the landowner failed to seek a variance. "Not a positive effect on economy."
- Addison Township v. Gout, 460 N.W.2d 215 (1990). This decision rejected a claim by a natural gas company that state regulatory authority over oil and gas wells preempted local government zoning authority over a proposed gas pipeline. "Not a positive effect on economy."
- Township of Holly v. Holly Disposal, Inc., 487 N.W.2d 753 (1992). This decision held that a trial court did not abuse its discretion in finding that a proposed landfill posed a "real and imminent danger of irreparable injury" to the environment and by issuing a permanent injunction barring construction of the landfill. "Not a positive effect on economy."
- Continental Paper v. City of Detroit, 545 N.W.2d 657 (1996). This decision held that a city could not be sued under the trespass-nuisance exception to the governmental immunity doctrine where property was damaged by fire started in an adjacent abandoned building which the city did not own and over which city had no control. "Not a positive effect on economy."

The 1998 Court of Appeals evaluation, released July 8, 1998, was similar in format and content to the Supreme Court evaluation. The report rated 24 past and present judges, a majority of whom received a rating of over 50 %, meaning the Appeals Court "tended to benefit job creation and economic growth."²³⁵ According to the accompanying press release, the highest overall scores were given to Judges Peter O'Connell and Clifford Taylor (who was subsequently elevated to the Supreme Court), both of whom scored 81%. The lowest scores went to Helene White (24 %) and Marilyn Kelly (25%).

The 1998 Judicial Elections.

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

Michigan Chamber of Commerce members made large PAC campaign and "in kind" contributions to the candidates to the Supreme Court. The Chamber's number one PAC recipient in 1998 was Maura Corrigan, who received \$33,994, and the third top recipient was Clifford Taylor who received \$5,500.²³⁶ In addition, the Chamber allowed 1998 candidates Taylor, Collins, and Corrigan to use rooms at the Chamber for fund raising and even purchased refreshments for the occasion.²³⁷

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

Justice Taylor raised \$960,599 in his race to retain the seat to which he had been appointed the year before by Governor Engler.²³⁸ Justice Corrigan, who successfully ran for an open seat on the Court in 1998, raised a total of \$906,482.²³⁹ Justice Cavanagh, the Democratic incumbent, raised \$297,497 in his successful reelection bid, with support primarily from unions and trial lawyers.²⁴⁰ While all of the candidates raised large sums from lawyers and law firms, Justice Cavanagh raised almost one-half of his campaign war chest from this source.

The lion's share of the money raised by the candidates was used to finance television advertising. Even in a state with overtly partisan judicial elections, judicial candidates are not well known and a candidate's primary objective in a judicial election is simply to raise his or her visibility.²⁴¹ Clifford Taylor reportedly intended to spend \$700,000 on television advertising in the last two weeks before the election, and Maura Corrigan planned to spend around \$600,000 for ads.²⁴²

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

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

The 1998 elections saw even higher levels of independent expenditures, mostly on behalf of Republican candidates. The 1998 judicial race has been described as "hard-fought and expensive" with "special interests pump[ing] money into the coffers of their favored candidates."²⁴³ According to one account, in the days before the election, "the campaign ads [were] pouring out of voter's televisions faster than leaves are dropping from trees," with both sides reportedly buying up all available advertising time.²⁴⁴ The Michigan Republican Party ran numerous television ads in support of Corrigan and Taylor, financed with untraceable "soft" money.

Looking Ahead to November 2000.

In November 2000, Justices Taylor, Young, and Markman will all be seeking

reelection, with Justices Young and Taylor seeking election to full six-year terms and Markman seeking election to serve out the remainder of the term of the justice he was appointed to replace. By all accounts, the 2000 election promises to be the most expensive and contentious in Michigan's history. Justice Young has been quoted as predicting that the campaign will be "the ugliest, unseemliest in recent memory."²⁴⁵ It is now estimated that candidates and their backers could spend \$10 million in this year's Supreme Court races.²⁴⁶

M-LAW announced on its website that judicial evaluations "will be updated to reflect the decisions of judges over time. It will give judges with lower scores the opportunity to raise their scores."²⁴⁷ However, as of the date of this report, M-LAW had not published an updated evaluation of judicial decisions.

If M-LAW decides not to release an updated judicial evaluation for the Supreme Court, it might be because Democratic partisans, borrowing a page from M-LAW, have recently produced their own compilations of decisions by the new Michigan Supreme Court, as described above. These compilations purport to demonstrate a strong anti-consumer, pro-business bias on the Court. Several of the sitting justices have vociferously objected to these evaluations, in part because they are based on a limited sample of cases.²⁴⁸ This is a criticism that could equally well be made of M-LAW's 1998 judicial evaluations and it might persuade M-LAW not to renew the judicial evaluation strategy in 2000.

Alternatively, M-LAW also might decide against publishing an updated evaluation of Supreme Court decisions because this strategy has proven useful in supporting challenges to incumbent judges, but is of no use for generating opposition to non-incumbents who have no track record to evaluate. In November, M-LAW will be supporting all of the incumbent justices up for election or reelection. Therefore, this political tool would appear to have little appeal for M-LAW in this election year. Ohio.

Ohio has the distinction of being the apparent birthplace of the idea of evaluating and rating judges to determine their pro-business leanings. But five years after launching its judicial evaluation project, the Ohio business community has so far failed to unseat an incumbent Supreme Court justice. The November 2000 elections will be hotly contested and could be critical in determining the court's future direction. The Ohio Chamber of Commerce has identified Alice Robie Resnick as the least "pro-business" on environmental issues of any justice on the Court, and is leading a major campaign to bring about her defeat in this year's election. Judicial Politics in Ohio.

The seven justices of the Ohio Supreme Court are elected "at large" in popular elections.²⁴⁹ A justice serves a six-year term,²⁵⁰ and the justices are elected in two year cycles.²⁵¹ Judges on the Ohio Court of Appeals, the state intermediate court of appeals, are also elected for six year terms.²⁵² Judicial candidates appear on the ballot without party affiliation, but they are usually selected and campaign as partisans.

There are currently five Republicans and two Democrats on the Court. But the ideological division on the Court cuts across party lines. In the 1998 elections, the business community criticized Justices Pfeifer and Moyer (both Republicans) for frequently siding with the two Democratic justices, whom the business community views as hostile to their interests.²⁵³ According to one account, Ron Suster, a Democrat, was "recruited to run against Pfeifer [in 1998] mainly by conservatives and those representing insurance and business interests."²⁵⁴

As in many other states, the cost of Ohio judicial races has increased dramatically. Between the 1996 elections and the 1998 elections, the average total contributions per candidate to the Supreme Court more than doubled (from \$200,468 to \$476,868).²⁵⁵ The maximum amount raised by a single candidate in each election cycle increased from \$476,253 in 1996 (Justice Stratton) to \$872,838 in 1998 (Chief Justice Moyer).²⁵⁶ These figures do not include the hundreds of

thousands of dollars expended in these races on behalf of judicial candidates in the form of "independent expenditures."

What is all this raised money for? Advertising, mostly. In 1998, incumbent Chief Justice Thomas Moyer reportedly spent more than \$560,000 on television advertising.²⁵⁷ While it is obviously difficult to determine advertising's actual effect on the voters, Chief Justice Moyer retained his seat.

The Origins of the Ohio Judicial Evaluation Project.

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

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

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

the right to seek redress for personal injuries.²⁵⁸ In August 1999, in perhaps its most controversial decision on the subject, the Supreme Court, by a 4 to 3 vote, struck down legislative measures which the Court majority construed as essentially reenacting measures the Court had already declared unconstitutional in earlier decisions.²⁵⁹ The Court's conflicting opinions are strongly worded, with

the majority accusing the legislature of "usurp[ing] judicial powers" to define the meaning of state constitutional provisions.²⁶⁰ The dissenters contended that "the majority has itself arguably affronted our constitutional system of government in a manner no less egregious than it attributes to the General Assembly."²⁶¹ The majority opinion was authored by Justice Resnick, who is up for reelection in 2000.

In response to this series of unfavorable decisions, the business community developed a strategy to pressure the Supreme Court on issues important to business and, over the long term, to alter the composition of the court. As long ago as 1987, following an adverse ruling from the Ohio Supreme Court, an Ohio Chamber of Commerce official was quoted as stating "We need to balance the playing field in our court system."²⁶² Numerous business-sponsored groups have been set up to pursue this agenda. For example, the Ohio Chamber of Commerce, in cooperation with the National Federation of Independent Business and other groups, established the Ohio Alliance for Civil

Justice, and an affiliate group, Court Watch, to defend state "tort reform" legislation in the state courts.²⁶³ Ohio Citizens Against Lawsuit Abuse, part of the national network of similar organizations coordinated by the American Tort Reform Association, was also established to promote tort reform. This organization took a lead role in making the public argument that the invalidation of tort reform legislation by the Supreme Court could be ascribed to heavy campaign expenditures by the trial lawyers.²⁶⁴

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

prevent environmental injuries from occurring in the first place.

Litigation over enforcement of Ohio's water quality standards provides a useful illustration.

The case of Columbus & Franklin County Metro Park District v. Shank²⁶⁵ involved a challenge to the Ohio Environmental Protection Agency's issuance of a permit for a wastewater treatment facility to serve a residential development. A county park district challenged the permit on the ground that EPA had not followed the "anti-degradation" standards designed to maintain the quality of "exceptionally clean" waters. The Ohio Supreme Court upheld the challenge.

The state legislature subsequently adopted revised anti-degradation policies by means of a rider attached to state budget legislation.²⁶⁶ These revisions were supported by the Ohio Chamber of Commerce and other business groups. Environmental organizations were apparently unaware that the provision had been added to the 1300-page bill.²⁶⁷ The most important part of the revised policy, which was ostensibly designed to be consistent with the federal Clean Water Act as well as the Supreme Court's decision, authorized the director of the EPA to allocate up to 80% of a waterbody's pollution-absorbing capacity to existing sources of pollution without completing an "anti-degradation" review.

This legislative rider prompted yet another round of litigation in which Rivers Unlimited, Inc. and other Ohio environmental groups challenged the new policy on the ground that it violated the federal Clean Water Act.²⁶⁸ The Ohio trial court agreed with the plaintiffs. The court said that the state's new anti-degradation policy "would render meaningless the comprehensive nature of the Federal Clean Water Act and its purposes and objectives, both in relation to water pollution control efforts and public participation requirements."²⁶⁹ The court enjoined EPA from taking any further regulatory action pursuant to this invalid provision.

Not surprisingly, as discussed below, the Chamber of Commerce included this case in the set of environmental cases it evaluated for "anti-business" bias on the Court.

The Chamber's Judicial Evaluations.

The Ohio Chamber of Commerce has now published three judicial evaluation reports, more than have been published in any other state.²⁷⁰ The first evaluation, which was apparently the first business-sponsored judicial evaluation anywhere in the country, was published in January 1996 in anticipation of the elections later that year. A second evaluation directed at the 1998 elections was published in 1997. The Chamber recently released a third evaluation addressing the 2000 elections. All of the reports have been produced by the Ohio Chamber's Political and Candidate Education (PACE) program, which also tracks voting patterns by state legislators. As stated in its latest report, the Chamber "undertook this endeavor to provide business leaders with a reliable barometer of how the Court was ruling on issues of vital concern to business and whether business was getting a fair shake."

The 2000 report, which is essentially identical in format to the two previous reports, provides an appropriate focus for identifying the objectives and limitations of the Ohio judicial evaluation project.

The introductory materials in the 2000 report state that the case selection criteria, which were the same as those employed in 1996 and 1997, "were used to achieve the most objective process possible, and they should be clearly understood in viewing the results." First, the cases were selected "with input" from "the Ohio Chamber's issue committees, which are composed of more than 600 business leaders from around the state." These committees include, the report states, "many of the leading experts on a variety of issues," including "environmental regulations." Second, the cases were selected for inclusion "because they have a significant impact, either positive or negative, on businesses in the state of Ohio." Emphasizing the narrow focus of the analysis, the report underscores that "[d]ecisions are labeled YES if they are pro-business, and NO if they are not considered pro-business."²⁷¹ Third, the report states that 197 cases from the previous decade were selected, and that "[t]his large number of cases provides a true reading of

the pattern of the Court's rulings in a wide spectrum of business-related cases." Finally, the cases were divided into eight categories including, in addition to "environmental," employment, insurance, medical malpractice, products liability, tax, tort, and worker's compensation.

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

In environmental cases, the ratings ranged from a 100% pro-business rating to a 20%

pro-business rating. In descending order, the "pro-business" environmental scores received by the seven Justices were as follows: Justice Stratton (100%), Justice Cook (100%), Justice Sweeney (60%), Chief Justice Moyer (40%), Justice Douglas (40%), Justice Pfeifer (25%) and Justice Resnick (20%).

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

- State ex rel. Celebrezze v. Environmental Enterprises, 559 N.E.2d 1335 (1990). This decision rejected the argument by a hazardous waste disposal operator that the federal Resource Conservation and Recovery Act (RCRA) preempted Ohio's regulatory program for waste disposal, with the result that the waste operator could be held to Ohio standards which are more stringent than those set under federal law. "Pro-Business: No."

- Northeast Ohio Regional Sewer District v. Shank, 567 N.E.2d 993 (1991). This decision rejected a claim by a sewer district that Ohio EPA's analysis of whether to designate the Cuyahoga river as "warm-water habitat" was invalid because the EPA did not address the costs of the designation in sufficient detail. The Chamber interpreted this decision as adverse to business interests, "since the court will not invalidate environmental regulations even if Ohio EPA fails to address the economic impact for those directly affected by the rules." "Pro-Business; No."

- Ohio Chamber of Commerce v. State Emergency Response Commission, 597 N.E.2d 487 (1992). This decision rejected the claim that the State Emergency Response Commission has no authority to require companies to prepare maps showing the location of hazardous substances and materials. The Chamber argued that these reporting requirements conflicted with the federal Emergency Planning and Community Right to Know Act. Business groups objected to the extra cost associated with the mapping.²⁷² "Pro-Business: No."

- Hybud Equipment Corp. v. Sphere Drake Insurance Co., Inc., 597 N.E.2d 1096 (1992). This case involved a suit against an insurance company which had denied a claim by a land fill operator whose activities resulted in pollution and financial losses. The court rejected the suit and ruled that the clause in the policy which provided coverage for damage or injury due to "sudden and accidental discharge" did not cover damage caused by disposal of wastes over an extended period of time. "Pro-Business: No."

- Columbus and Franklin County Metro Park District v. Shank, 600 N.E.2d 1042 (1992). This decision held that Ohio EPA violated federal and state "anti-degradation" water pollution rules by issuing permits to build a waste water treatment facility discharging into "high quality" waters without first complying with public notice and hearing requirements, following governmental coordination requirements, or imposing stringent effluent controls. The Court ruled that the agency had to consider alternatives to the proposed facility and make a determination that technical, economic and social factors justified the potential degradation of high quality waters. "Pro-Business: No."

- Atwater Township Trustees v. B.F.I. Willow Creek Landfill, 617 N.E.2d 1089 (1993). This decision rejected the argument by the operator of a waste disposal site that a state waste statute pre-empted a local anti-nuisance resolution. The operator made this argument in response to a lawsuit brought by Atwater Township to halt operation of a facility on the ground that it was a public nuisance. The Chamber objected that this result "undermines Ohio's solid waste regulatory scheme." "Pro-Business: No."

- State ex rel. Celebrezze v. Natl. Lime and Stone Co., 627 N.E.2d 538 (1994). This decision ruled that replacement of a piece of equipment at a

limestone quarrying operation was not the installation of a "new source of air pollutants" requiring a new air permit from the Ohio EPA. "Pro-Business: Yes."

- *Trumbull County Board of Health v. Snyder*, 658 N.E.2d 783 (1996). This decision held that a county board of health had no authority to enforce county rules concerning the disposal of construction debris without state approval and that the county could be held liable for damages for attempting to enforce the rules. "Pro-Business: Yes."
- *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985 (1996). This decision upheld a ruling in favor of an oil well operator who disposed of waste materials by deep-well injection. The waste migrated under the property of neighboring land owners, who sued the well driller. The court held that the neighbors were not entitled to recover because they failed to show an invasion of a protected property interest in the subsurface estate. "Pro-Business: Yes."
- *Weiss v. Thomas & Thomas Development Co.*, 680 N.E.2d 1239 (1997). This decision held that the owner of a natural gas well could be liable for the death of a homeowner caused by a faulty gas delivery system because the owner of the well owed a "high duty of care" given the known dangers associated with natural gas. "Pro-Business; No."
- *Crossman Communities of Ohio, Inc. v. Greene County Board of Elections*, 717 N.E.2d 1091 (1999). This decision held that the Ohio referendum process had properly been invoked to put approval of a proposed development to a popular vote. "Pro-Business: No."

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

If there is a striking aspect of the Chamber's environmental scores, it is not the fact that several justices received relatively low "pro-business" scores in environmental cases, but that two justices received 100% pro-business rankings on the environment. If the Chamber's ranking process were a reliable reflection of a particular justice's approach to deciding cases, these figures would support the alarming suggestion that the decisions of a few members of the Court in environmental cases are completely insensitive to the law or the facts of the particular case. While the Chamber might applaud such a consistent "pro-business" voting pattern, it would raise a serious question about the integrity of the judicial decision-making process. Fortunately, given the limitations of the Chamber's methodology, the scores cannot be viewed as accurate indicators of a justice's pro-business or non-pro-business leanings in environmental cases.

While the Chamber's initial judicial evaluation report was apparently intended to serve a general educational function, the Chamber indicated with the publication of its second report in 1997 that it intended to begin endorsing particular candidates for seats on the Supreme Court.²⁷³ In fact, in October 1998, the Chamber endorsed judicial candidates for the first time, recommending Democrat Ron Suster over Republican incumbent Justice Pfeifer. Chamber officials cited the results of the 1997 judicial evaluations as a reason not to reelect Pfeifer.²⁷⁴

The Chamber has announced plans to expand its judicial evaluation program beyond the Supreme Court to include judges on the intermediate courts of appeal.²⁷⁵ The Chamber is expected to publish this new report in advance of the November 2000 elections.

Rhetoric About Judicial Activism.

One noteworthy aspect of the political contests over judicial office in Ohio, as in many other states, has been widespread use of the term "judicial activism" to criticize a judicial candidate. While the Chamber has not succeeded in changing the personnel on the Supreme Court, it has apparently succeeded to some degree in publicly contrasting its favored

"pro-business" candidates with disfavored "activist judges." In principle, a pro-business ruling would seem as likely to implicate an activist judicial philosophy as a conservative one. Nonetheless, spokespersons for business interests routinely seek to characterize judges opposed by business as "activist."

For example, The Columbus Dispatch reported that accusations of "judicial activism" against Justice Pfeifer began after court decisions "raised the ire of the Ohio Chamber of Commerce," and Pfeifer's opponent made judicial activism an issue in the 1998 election.²⁷⁶ Ohio Citizens Against Lawsuit Abuse also charged Justice Sweeney, another incumbent, with being a "judicial activist."²⁷⁷ Following the Court's Sheward decision, the Ohio Chamber of Commerce issued a statement calling the decision "blatantly political" and asserting that "[t]his Court has created a Catch-22 for legislators for much of the last decade by acting as a super legislature."²⁷⁸ The Chamber of Commerce's senior vice president for government affairs added: "The only way to eliminate this kind of judicial activism is to work to make changes on the court."²⁷⁹ Looking Ahead to November 2000.

The evidence suggests that "pro-business" advocacy in Ohio judicial contests will expand with the upcoming November elections. As described, despite substantial effort, the Chamber and its allies have so far failed to remove any sitting justice from the Supreme Court.²⁸⁰ In addition, because there has been no vacancy on the Court in recent years, the Chamber has not had an opportunity to mount an affirmative campaign on behalf of a pro-business candidate to fill an open seat.

In November, Justice Resnick will be up for reelection and the Chamber has mounted a major effort to unseat her. The author of the Sheward decision, Justice Resnick has the lowest overall pro-business score of any member of the Court. In addition, Justice Resnick was assigned the lowest pro-business voting record in environmental cases. In 2002, Justice Douglas, the Justice with the second lowest overall pro-business record (and the third lowest voting record in environmental cases) will be forced to retire due to his age. This will provide a rare opening for the Chamber and other interest groups to nominate candidates to fill an open seat.

Chamber rhetoric signals that the approaching political contest will be heated. In its 1997 report, the Chamber criticized the Supreme Court, stating that "a majority of established members of the high court repeatedly rendered decisions that discouraged employment and business opportunities."²⁸¹ However, the 2000 report ups the stakes by asserting that "the trend for important business litigation at the Supreme Court level has worsened to the point of being overwhelmingly negative."²⁸² In a direct call to action, the report states that "[b]usiness leaders need to realize that as Ohio enters the 21st century, the anti-business tilt of the Ohio Supreme Court presents one of the biggest challenges to the state's business climate.... The state's legal climate has become a negative factor for businesses considering new or expanded operations in Ohio."²⁸³

Early indications are that the 2000 election will be the nastiest and most expensive in the history of the state and probably the nation. Estimates of total projected spending in the race now reach \$12 million.²⁸⁴

CONCLUSIONS AND RECOMMENDATIONS

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

From a research perspective, this preliminary effort points to a number of additional questions worthy of exploration. This research has focused largely on the states' highest courts; a more intensive examination of races for other

state appellate and trial courts might reveal a more far-reaching effort to influence the composition of the state judiciaries. In addition, to what extent has the environment been an issue in state judicial elections in states other than those examined in depth in this report? Washington, Illinois, and Texas, for example, all appear worthy of investigation. It also will be worthwhile to study the role the environmental issue plays in the elections this November and to evaluate how the outcomes of these races may affect future environmental policies.

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

- First, environmental advocacy groups should make a concerted effort to educate their members and the general public about what is at stake in state judicial elections from an environmental perspective. To the extent groups are engaged in direct political activity, they should consider redirecting some of their time and resources to critical state judicial races.
- Second, at least pending adoption of thorough reforms of the judicial selection process, environmental advocacy groups should consider borrowing a page from the business community and prepare their own evaluations of judges' voting records. If the environmental community can prepare League of Conservation (LCV) "scores" for other elected officials why not for elected judges? Inevitably these types of evaluations oversimplify the judicial decision-making process, and some will regard them as an unwarranted intrusion on judicial independence. On the other hand, if the judicial selection process remains a political process, and if that process has direct and important implications for environmental policy, it is entirely appropriate for environmental groups to help voters educate themselves about the consequences of their choices in the voting booth. For the reasons discussed above, the evaluations prepared to date by pro-business and other advocacy groups are flawed in a number of respects. But there are statistically reliable methods for evaluating how political ideology influences how judges vote on the environment or other issues.²⁸⁵ Thus, it certainly is possible to prepare evaluations of how judges vote in environmental cases that are fairer and more accurate than the current evaluations. The future strength of environmental protection policies in many states will likely depend in significant part on whether the environmental community can meet this new challenge.

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1 American Bar Association, Report and Recommendations of the Task Force on
Lawyers' Political Contributions 7 (July 1998).

2 *Id.* at 5-7. Unlike the American Bar Association, we have included Idaho,
Michigan, and Ohio, which have de facto partisan elections, in the group of
states that hold partisan judicial elections.

3 Philip L. DuBois, *From Ballot to Bench, Judicial Elections and the Quest for
Accountability* 3 (1980), quoting Burton M. Atkins, "Judicial Elections: What the
Evidence Shows," *Florida Bar Journal* 50, no. 152 (March 1976).

4 *Id.*

5 See American Bar Association, Report and Recommendations of the Task Force on
Lawyers' Political Contributions (July 1998).

6 See www.ajs.org.

7 See Citizens for Independent Courts, *Choosing Justice, Reforming the
Selection of State Judges* (1999).

8 Ohio Chamber of Commerce, 2000 Business Evaluation of the Ohio Supreme Court 1
(2000).

9 *Id.*

10 *Id.*

11 Kyle Johnson, "Raising Money: Judges on the Campaign Trail," *Christian
Science Monitor* (August 13, 1998).

12 *Id.*

13 PBS Frontline, *Justice for Sale* (November 23, 1999).

14 *Id.*

15 Letter dated July 1, 1996 from Ron Howell to unspecified business leaders,
with accompanying project proposal ("1996 CJR letter and proposal") (on file).

16 See www.statesource.com.

17 See Biographical Sketch of Marc Nuttle, attached to 1996 CJR letter and
proposal.

18 See "Inadmissible; '96 Election Returns," *Texas Lawyer* (November 11, 1996).

19 See "Michigan Supreme Court Judicial Evaluation, Commissioned by Michigan
Lawsuit Abuse Watch & the Judicial Evaluation Institute for Economic Issues" 51.
Though the evaluation of decisions by the Michigan Supreme Court was "compiled"
by the Economic Judicial Report, the report was copyrighted in the name of
Sequoyah Information Systems, Ltd.

20 See 1996 CJR letter and proposal.

21 See Statesource "Company Profile," www.statesource.com.

22 See Biographical Sketch of Ron Howell, attached to 1996 CJR letter and
proposal (indicating that Howell "will provide management and coordinate
corporate communications").

23 Chuck Ervin, "Oklahoma Judges Rated by Coalition," *Tulsa World* (April 5,
1998).

24 John Fialka, "How Koch Industries Tries to Influence Judicial System," *The
Wall Street Journal* (August 9, 1999).

25 See 1996 CJR letter and proposal.

26 Oklahomans for Judicial Excellence, *Judicial Evaluation 1997 Update*.

27 See *Smith v. Westinghouse Electric Co.*, 732 P.2d 466 (Okla. 1987).

28 See *Matador Pipelines, Inc. v. Oklahoma Water Resources Board*, 742 P.2d 15
(Okla. 1997).

29 John Greiner, "Nine Justices, Judges Appear on Retention Ballot," *The Sunday
Oklahoman* (November 1, 1998).

30 Kelly Russell, "Mississippi Supreme Court Ranks Low on Job Issues,"
Mississippi Business Journal
(October 28, 1996).

31 See Peter Wallenstein, "Top Jurist Questions Motives Behind Survey Rating
Judges," *St Petersburg Times* (June 1, 1998).

32 There are various reports of a 1998 judicial survey of bar members in Alabama
organized by the Oklahoma group. See, e.g., Citizens for Corporate
Accountability and Individual Rights, "Alert" (May 25, 1998). Alabama State Bar
officials reportedly urged members not to respond to the survey on the ground
that a similar survey had been used to advance a narrow partisan agenda in other
states. Perhaps for that reason, no report on the Alabama survey was apparently
ever released. The President of the Alabama Bar Association has no recollection
that the results of the survey were released and news databases reveal no report
of the release of the survey. (October 5, 1999, EWG interview with Keith

Norman).

33 See www.statesource.com.

34 See Ray Tuttle, "Koch Court Fight Continues," Tulsa World (October 14, 1996).

35 See John Fialka, "How Koch Industries Tries to Influence Judicial System," The Wall Street Journal (August 9, 1999).

36 See www.statesource.com.

37 This information is derived from publicly available 990 PF forms filed by the Koch foundations.

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

39 David Callahan, "Gifts to Right Wing Think Tanks Have Become a Form of Political Donation," The Nation (April 26, 1999).

40 Id.

41 Henry M. Butler, "Judicial Decisions Can Affect the Economy," Daily Oklahoman (October 29, 1998).

42 Tom Meersman, "Decision on Koch Tough for MPCA," The Minneapolis Star & Tribune (May 18, 1998).

43 "DOJ/EPA/Coast Guard Oil Spill Suit v. Koch Likely to Do Lengthy Battle," The Houston Chronicle (April 18, 1995).

44 U.S. Department of Justice, Press Release, "Koch Industries to Pay Record Fine for Oil Spills in Six States" (January 13, 2000). The public record contains reports of other enforcement actions against Koch Industries or its subsidiaries based on environmental violations. Most recently, in July 2000, Koch Industries paid \$172,000 to settle claims that it violated environmental rules governing oil-storage tanks in Texas. See "Koch Agrees to Settle Suit on Oil-Storage Violations," Houston Chronicle (July 12, 2000).

45 See www.cse.org.

46 See David Callahan, "Gifts to Right Wing Think Tanks Have Become a Form of Political Donation," The Nation (April 26, 1999) (indicating the CSE has received \$9.3 million from Koch family foundations since CSE's founding). IRS 990PF forms for two of the Koch family foundations, the Claude Lambe Charitable Foundation and the David H. Koch Charitable Foundation, reveal that in the period 1995 to 1997 the two foundations contributed in excess of \$3,000,000 to CSE.

47 See Peter Wallenstein, "Top Jurist Questions Motives Behind Survey Rating Judges," St Petersburg Times (June 1, 1998).

48 See Peter H. Stone, "Grass-Roots Goliath," National Journal 1530 (July 13, 1996).

49 U.S. Chamber of Commerce, Press Release, "U.S. Chamber Institute for Legal Reform Announces Board Appointments Agenda" (August 8, 1998).

50 "US Chamber Institute for Legal Reform," The Metropolitan Corporate Counsel (August 1999).

51 Peter Stone, "K Street," National Journal (June 24, 2000).

52 Associated Press, "Toledo Joins Ad Battle," Dayton Daily News (June 21, 2000).

53 William Glaberson, "A Spirited Campaign for Ohio Court Puts Judges on New Terrain," The New York Times (July 7, 2000).

54 Michael Bender, "Michigan Ads Seek Ohio's Fortunes," Dayton Daily News (June 6, 2000).

55 "The Right Ts," Crain's Cleveland Business (June 12, 2000).

56 Idaho Constitution, Article V, section 5.

57 Id.

58 Idaho Code, section 1-2102.

59 Idaho Code, section 34-1217.

60 Judges on the Idaho Court of Appeals and District Court are also elected. See Idaho Constitution, Article V, section 11; Idaho Code, sections 1-702, 1-2404, and 34-616.

61 Betsy Russell, "Battle Looms Over Electing Justices," The Spokesman-Review

(May 28, 2000).

62 See Idaho Constitution, Article VI, Section 7.

63 Betsy Russell, "Battle Looms Over Electing Judges," The Spokesman-Review (May 28, 2000).

64 Scott Kidd, "Courts Shouldn't Write Their Own Rules," Idaho Falls Post Register (April 2, 2000).

65 Mark Warbis, "Observers Worry Race for Supreme Court Has Become Politicized," The Idaho Statesman (April 22, 2000).

66 See www.justicecathysilak.com.

67 Gene Fadness, "The Battle for the Supreme Court," Idaho Falls Post Register (May 21, 2000).

68 See, e.g., Gene Fadness, "State GOP Chairman Endorses Eismann," Idaho Falls Post Register (May 19, 2000) (quoting the Republican Party Chairman accusing Silak of promoting "the liberal, judicial activism she advanced as a co-founder of the Idaho ACLU").

69 Gene Fadness, "The Battle for the Supreme Court," Idaho Falls Post Register (May 21, 2000).

70 Id.

71 Article IX, section 1 of the Idaho Constitution requires the legislature to "establish and maintain a... thorough system of public, free common schools."

72 Idaho Schools for Equal Educational Opportunity v. State of Idaho, 976 P.2d 913, 914 (Id. 1998).

73 Angie Gaddy, "Supreme Court Race Has Political Feel," The Spokesman-Review (April 9, 2000).

74 Gene Fadness, "Idaho Judge Sees No Conflict in Court Appeals for Water Rights," Post Register (May 18, 2000).

75 See "Motion to Set Aside All Decisions, Orders and Judgments of Judge J. Barry Wood in Consolidated Subcase No. 03-10022 and Motion to Disqualify Judge R. Barry Wood and Memorandum in Support Thereof," filed February 22, 2000.

76 See "Response to United States' Motion for Status Conference and Order on Nez Perce's Motion," filed February 23, 2000.

77 Gene Fadness, "Idaho Judge Sees No Conflict in Court Appeals for Water Rights," Post Register (May 18, 2000).

78 Michael Journee, "Supreme Court Removes Wood from Water Case," The Times-News (September 1, 2000).

79 Michael Journee, "Eismann Won't Hear Adjudication Cases," The Times-News (August 31, 2000).

80 Gene Fadness, "High Court Candidate Eismann: Death Penalty is Applied Fairly," Idaho Falls Post Register (May 7, 2000).

81 Bill Hall, "A Judge Explains Why White's Murder Safer," Lewiston Morning Tribune (May 10, 2000). In yet another odd twist, despite his strong support from the Christian Coalition, Judge Eismann worked as a counselor for Planned Parenthood in the 1970's, a fact apparently unearthed or in any event circulated by supporters of Justice Silak. See Betsy Russell, "Occasional Slips in Speechifying," The Spokesman-Review (May 20, 2000). According to a columnist for The Idaho Spokesman, Eismann counseled pregnant women "about options -- including abortion -- at a time when Idaho made that illegal for anyone but a medical professional." Id. Eismann's campaign manager reportedly responded to this disclosure by stating that "the judge changed his views after he became a born-again Christian in 1983." Id. Some indication of how radically Eismann's views had changed on the subject is suggested by his statement at a 1993 anti-abortion rally describing the pro-choice movement as "the spiritual forces of evil." See Marty Trillhaase, "Cheers and Jeers," Idaho Falls Post Register (May 5, 2000). Eismann later submitted an official apology to the State Judicial Council for participating in this rally while serving as a magistrate judge.

82 See Gene Fadness, "The Battle for the Supreme Court," Idaho Falls Post Register (May 21, 2000).

83 Idaho Secretary of State, Schedule of Contributions, Justice Cathy Silak Campaign 2000 (for period 1/1/00 to 5/7/00).

84 Idaho Secretary of State, Schedule of Contributions, Eismann for Idaho Supreme Court (for period 2/14/00 to 5/7/00).

85 Betsy Russell, "Occasional Slips in Speechifying," The Spokesman-Review (May 20, 2000).

86 Editorial, "Idahoans Could Place Water Rights Issue in Their Hands," The Idaho Statesman (October 14, 1999).

87 In re Snake River Basin Adjudication, 1999 WL 778325 (October 1, 1999).

88 In re Snake River Basin Adjudication, 1999 WL 778325, at 53-72 (October 1, 1999).

89 In re Snake River Basin Adjudication, 1999 WL 778325, at 72-83 (October 1, 1999).

90 Rocket Barber, "Idaho High Court to Rehear Water Case," The Idaho Statesman (December 1, 1999).

91 United States v. City of Challis, 988 P.2d 1199 (1999).

92 In re SRBA Minidoka National Wildlife Refuge, 996 P.2d 806 (2000).

Apart from the Snake River Basin Adjudication case, Justice Silak's opponents took her to task for two other decisions, neither of which she authored but in which she joined the majority opinion reversing lower court rulings. See "Courts, Silak Exasperate Conservative Legislators," The Press (March 13, 2000). In *Doe v. Garcia*, 961 P.2d 1181 (Id. 1998), the Court reversed a trial court's dismissal of a tort suit based on a hospital's alleged negligence in hiring an employee who sexually abused the plaintiff, who was a minor, after meeting him and treating him at the hospital. The hospital's hiring process had allegedly failed to uncover the fact that the employee had previously been discharged from a similar position for sexual abuse of a patient. The Court, which decided the case 4 to 1 in favor of the plaintiff, ruled that the trial court erred in by not allowing the plaintiff to proceed to trial on his claim.

The second case, *Idaho Schools for Equal Educational Opportunity v. State of Idaho*, 976 P.2d 913 (Id. 1999), discussed above, involved a claim that the state's method for funding school facilities violated the provision of the Idaho Constitution stating that the legislature must "establish and maintain a... thorough system of public, free common schools." The Supreme Court reversed Judge Eismann's ruling dismissing the case.

93 Gene Fadness, "Wilderness Area Water Rights - Opinions Varied on Impact of Court Ruling," Idaho Falls Post Register (October 14, 1999).

94 Stanley B. Davis, "Idaho's Supreme Court Carries Water for the Feds," Idaho Falls Post Register (October 17, 1999).

95 Greg Nelson, "Editorial," The Idaho Statesman (November 4, 1999).

96 Carl E. Olsson, Letter to the Editor, The Idaho Statesman (October 27, 1999). See also Emil R. Berg, Letter to the Editor, The Idaho Statesman (October 22, 1999) ("The Statesman's editorial attacking Justice Cathy Silak for authoring the opinion recognizing federal water rights in wilderness areas displays an amazing ignorance of the role of the courts in a constitutional republic.")

97 Gene Fadness, "Republicans Unveil Choice for State's Supreme Court," Idaho Falls Post Register (February 13, 2000).

98 Id.

99 Gene Fadness, "I.F. Fundraiser Was Scene of Law Breaking, Former Justice Says," Idaho Falls Post Register (February 22, 2000).

100 Idaho Constitution, Article VI, section 7.

101 Idaho Code, section 18-2315.

102 Gene Fadness, "I.F. Fundraiser Was Scene of Law Breaking, Former Justice Says," Idaho Falls Post Register (February 22, 2000).

103 Gene Fadness, "Speech by Judge at Republican Event Lawful, Idaho Attorney General Says," Post Register (March 1, 2000).

104 Id.

105 Id.

106 Michael R. Wickline, "Justice Wants Group to Note Oaths She Has Taken," Lewiston Morning Tribune (May 3, 2000).

107 Id.

108 Dan Popkey "Eismamm Plays Religion Card in Supreme Court," The Idaho Statesman (May 9, 2000).

109 Angie Gaddy, "Attorney Claims Judge Violated Rules," The Spokesman-Review (May 11, 2000).

110 Id.

111 Betsy Russell, "Eismann Denies Role in Anti-Silak Push-Poll," The Spokesman-Review (May 13, 2000).

112 Betsy Russell, "Anti-Silak Calls Legal, Activist Says," The Spokesman-Review (May 19, 2000).

113 200 Idaho Laws Ch. 153 (effective April 3, 2000).

114 Betsy Russell, "Anti-Silak Calls Legal, Activist Says," The Spokesman-Review (May 19, 2000).

115 Information directory lists no phone number for a Democracy Fund or a Lyle Coggan in South Carolina. The names could not be located in various other information databases. The South Carolina Secretary of State has no record of any corporation named the Democracy Fund.

116 Gene Fadness, "Ad Says Silak Could Bring Gay Marriage to Idaho," Idaho Falls Post Register (May 21, 2000).

117 Betsy Russell, "Voters Oust Justice Silak for Eismann," The Spokesman-Review (May 24, 2000).

118 Mary Trillhaase, "A Politician Seeks the Bench," Idaho Falls Post Register (May 21, 2000).

119 Gene Fadness, "Ad Says Silak Could Bring Gay Marriage to Idaho," Idaho Falls Post Register (May 21, 2000).

120 See, e.g., Gene Fadness, "Republicans Unveil Choice for State's Supreme Court," Idaho Falls Post Register (February 13, 2000); Gene Fadness, "State GOP Chairman Endorses Eismann," Idaho Falls Post Register (May 19, 2000). See also Angie Gaddy, "Supreme Court Race has Political Feel," The Handle (April 9, 2000) ("The contest [for the Supreme Court] is supposed to be non-partisan - but the race is already rife with politics and accusations of judicial activism.")

121 Gene Fadness, "The Battle for the Supreme Court," Idaho Falls Post Register (May 21, 2000).

122 Angie Gaddy, "Idaho Supreme Court," The Spokesman-Review (May 18, 2000).

123 As stated by an editorial writer for The Spokesman Review, referring to Judge Eismann's actions in the school funding case, Eismann "said judges should interpret the Constitution and the laws according to the intent of the drafters. The problem is, he seems to think he's the only judge who knows what they mean." Editorial, "Discipline, Gravitas Keys to Credibility," The Spokesman-Review (May 20, 2000).

124 See PBS Frontline, "Justice for Sale" (November 23, 1999); CBS 60 Minutes, "Buying Judges?" (March 27, 2000).

125 La. Const., Article 5, sections 3 and 4; LARS 13:101. In response to a suit under the federal Voting Rights Act, in 1992 the State established a temporary seat for an eighth supreme court justice, which will expire in 2000. Only seven justices actually hear a case at any one time. See C.F. Perschall, Jr., "New Supreme Court Seat Unconstitutional," The Times-Picayune (October 23, 1994). To avoid a conflict with the constitutional provision prescribing seven supreme court justices, the eighth seat was created by establishing an additional judgeship on the fourth circuit court of appeal and assigning that judge to serve on the supreme court. See LARS 13:312.4.

126 La. Const, Article 5, section 3, section 22.

127 La. Const, Article 5, section 22.

128 La. Const, Article 5, section 8.

129 See Mark Schleifstein, "Election Might Shift Balance on Supreme Court, Focus on Business, Law Clinics, Crime," The Times-Picayune (September 20, 1998); Fred Klambach, "Doctors, Business Targeting Louisiana Courts," The Advocate (February 19, 1995).

130 Joe Gyan Jr., "New Justices Plan to Bring Conservative Voice to Court," The Advocate (September 23, 1996).

131 Id.

132 Mark Schleifstein, "Election Might Shift Balance on Supreme Court, Focus on Business, Law Clinics, Crime," The Times-Picayune (September 20, 1998).

133 Pamela Coyle & Susan Finch, "Supreme Court Race Nasty to the Bitter End," The Times-Picayune (October 2, 1998).

134 Raya Tahan, "Supreme Court Race is Unusually Fierce." Associated Press (September 28, 1998).

135 Pamela Coyle, "High Court Hopefuls Spend, Spat," The Times-Picayune (September 27, 1998).

136 Pamela Coyle & Susan Finch, "Supreme Court Race Nasty to the Bitter End," The Times-Picayune (October 2, 1998).

137 Pamela Coyle, "High Court Hopefuls Spend, Spat," The Times-Picayune (September 27, 1998).

138 Susan Finch, "Candidates Swap Charges of Misleading Ads," The Times-Picayune (September 24, 1998). The 1996 campaign was hardly more civil. Candidate Knoll accused Justice Watson of using campaign contributions for personal expenses; Watson in turn questioned Knoll's experience in handling criminal cases. See Joe Gyan Jr., "New Justices Plan to Bring Conservative Voice to Court." The Advocate (September 23, 1996). Bleich backers accused Traylor of being a pawn of big business. On the other hand, Governor Foster, who backed Traylor, called the race "a case of the bad guys against us." Id.

139 Pamela Coyle, "Money, Politics, Justices Debated; Appointments Favored by Some," The Times-Picayune (April 28, 1997).

140 Joe Gyan Jr., "Cusimano Quits High Court Race," The Advocate (October 10, 1998).

141 Pamela Coyle & Susan Finch, "Supreme Court Race Nasty to the Bitter End," The Times-Picayune (October 2, 1998). By comparison, in 1994, Jeffrey Victory waged a successful bid for an open Supreme Court seat with \$403,000 (less than half of what Calogero raised for his 1998 race). Many of these contributions came from business interests, including \$25,000 from the Louisiana Association of Business and Industry, \$20,000 from the Louisiana State Medical Society, \$7,500 from Dow Chemical USA, \$5,000 from International Paper, and \$5,000 from Reily Foods. See Fred Kalmbach, "Doctors, Business Targeting Louisiana's Courts," The Advocate (February 19, 1995). Victory's opponent, Henry Brown, raised about \$350,000, primarily from the legal profession. Id.

142 Joe Gyan Jr., "Survey: Treatment in LA Courts is Inequitable," The Advocate (June 17, 1998).

143 Jeannie Smith, "LABI Turns 20," Greater Baton Rouge Business Report (October 3, 1995).

144 See www.labi.org.

145 Raya Tahan, "Supreme Court Race is Unusually Fierce," Associated Press (September 28, 1998).

146 Joe Gyan Jr., "Records Show Chief Justice Outspending Foe Cusimano," The Advocate (September 5, 1998).

147 Mark Schleifstein, "Election Might Shift Balance on Supreme Court, Focus on Business, Law Clinics, Crime," The Times-Picayune (September 20, 1998).

148 Joe Gyan Jr., "La. Chief Justice Questions Timing of LABI Rating," The Advocate (September 22, 1998).

149 Carl Redman, "Louisiana's Top Business Lobby Has Set a Difficult Task for 1998," The Advocate (January 18, 1998).

150 Chad Calder, "Business Casts A Wary Eye on Global Treaty," New Orleans City Business (December 29, 1997).

151 Pamela Henderson, "Suspicious About LABI's Move," The Times-Picayune (June 16, 1997).

152 Carl Redman, "LABI, Lobbying, and the Law," The Advocate (September 27, 1998).

153 Mark Schleifstein, "Election Might Shift Balance on Supreme Court, Focus on Business, Law Clinics, Crime," The Times-Picayune (September 20, 1998).

154 Fred Kalmbach, "Doctors, Business Targeting Louisiana's Courts," The Advocate (February 19, 1995).

155 Mark Kozlowski, "The Soul of an Elected Judge," Legal Times (August 9, 1999).

156 Joe Gyan Jr. "Calogero Publicizes '96 Report." The Advocate (September 24, 1998). This information about the 1996 evaluation has been gleaned from press accounts. The 1996 evaluation apparently was not widely circulated and we were unable to obtain an actual copy.

157 Joe Gyan Jr, "Calogero Publicizes '96 Report," The Advocate (September 24,

1998).

158 See Louisiana Alliance of Business and Industry, "Supreme Court Voting Record" (1998).

159 Joe Gyan Jr., "La. Chief Justice Questions Timing of LABI Rating," The Advocate (September 22, 1998).

160 See Joe Gyan, Jr., "Calogero Publicizes '96 Report," The Advocate (September 24, 1998).

161 Mark Schleifstein, "Election Might Shift Balance on Supreme Court, Focus on Business, Law Clinics, Crime," The Times-Picayune (September 20, 1998).

162 700 So.2d 478 (La.1997).

163 Meredith v. Ieyoub, 700 So.2d 478 (La. 1997).

164 See Southern Christian Leadership Conference v. Supreme Court of the State of Louisiana, 61 F.Supp.2d 499, 501 (E.D. La. 1999) (describing origins of Court Rule XX).

165 Mark Schleifstein, "LA Supreme Court Refuses Action on Midboe Complaint." The Times-Picayune (February 4, 1994).

166 Bob Anderson, "High Court Rejects Midboe Request on Law Clinic Restraints," The Advocate (February 4, 1994).

167 Southern Christian Leadership Conference, 61 F.Supp.2d at 501.

168 According to the allegations in the complaint filed in Southern Christian Leadership Conference v. The Supreme Court of the State of Louisiana, CA No. 99-1205 (E.D.La., filed April 16, 1995), the citizens of St. James Parish had found it "impossible to secure non-law school counsel," having been turned down by the Sierra Club Legal Defense Fund (now the Earth Justice Legal Defense Fund), the Natural Resources Defense Council, and the NAACP Legal Defense Fund.

169 Southern Christian Leadership Conference, 61 F.Supp.2d at 501.

170 Marcia Coyle, "Governor v. Students in \$700M Plant Case," National Law Journal (September 8, 1997).

171 See www.leanweb.org, citing Counterpunch (July 31, 1997).

172 Marcia Coyle, "Governor v. Students in \$700M Plant Case," National Law Journal (September 8, 1997).

173 Complaint in Southern Christian Leadership Conference v. The Supreme Court of the State of Louisiana, CA No. 99-1205 Para. 29 (E.D.La., filed April 16, 1995).

174 Marcia Coyle, "Governor v. Students in \$700M Plant Case," National Law Journal (September 8, 1997).

175 Christi Daugherty, "Louisiana Law Clinics Stung by Ruling," The Dallas Morning News (September 8, 1998).

176 Complaint in Southern Christian Leadership Conference v. The Supreme Court of the State of Louisiana, CA No. 99-1205, Para. 35 (E.D.La, filed April 16, 1995).

177 In July 1997, the New Orleans Chamber of Commerce filed a letter complaining that the current rules "push and impose social views of the faculty and students in the courts of the State of Louisiana as well as before Administrative Bureaus." Later that month, the Louisiana Business Council filed a similar letter, asserting that the Tulane clinic uses "court rules to fight, harass, and interfere with Louisiana's interest to attract new business." Finally, the Louisiana Alliance of Business and Industry wrote a letter to Chief Justice Calogero arguing that the Tulane clinic had exceeded its role of providing legal services to those who cannot afford it as provided under Rule XX. See Complaint in Southern Christian Leadership Conference v. The Supreme Court of the State of Louisiana, CA No. 99-1205, Paras. 31, 33, 37 (E.D.La., filed April 16, 1995). LABI suggested "the student practice of environmental law be regulated more closely" and described the clinic's activities as "misguided challenges to environmental permits" that had cost the state "millions of dollars." Joe Gyan Jr., "LABI asking justices to rein in law clinics," The Advocate (October 2, 1997).

178 The existence of such a report can be inferred from the dissenting opinion of Justice Johnson to the Court's March 22, 1999 order amending Rule XX.

179 Complaint in Southern Christian Leadership Conference v. The Supreme Court of the State of Louisiana, CA No. 99-1205, Para. 51 (E.D.La., filed April 16, 1995).

180 Janet McConnaughey, "Law Students' Triumph Triggers Political Backlash," The

Bergen Record (November 13, 1998).

181 Pamela Coyle, "Supreme Court Race Nasty to Bitter End," The Times-Picayune (October 2, 1998).

182 Pamela Coyle & Susan Finch, "Supreme Court Race Nasty to Bitter End," The Times-Picayune (October 2, 1998).

183 See Southern Christian Leadership Conference v. Supreme Court of the State of Louisiana, 61 F. Supp. 499 (E.D.La. 1999), appeal pending.

184 Id. at 513.

185 Id.

186 Brennan Center for Justice, "Status Report on Southern Christian Leadership Conference v. Louisiana Supreme Court" (August 6, 1999).

187 Oliver Houck, "Point of View: Court's Ruling Unjust to Ordinary Citizens," The Times-Picayune (June 25, 1998). Houck directs the environmental law program at Tulane.

188 Susanna Loof, "Partisan Control At Stake in Supreme Court Race," Associated Press (November 3, 1998).

189 Mich. Const, Article 6, section 2; see also MCLA 168.396.

190 MCLA 168.04.

191 MCLA 168.409e.

192 Mich. Const, Article 6, section 9.

193 See Law and Organizational Economics Center, "Economics Institutes for State Judges, September 1999 to August 2000."

194 "Court Opens Session with New Justice," State Net Capitol Journal (October 20, 1999).

195 Trevor Coleman, "Federalist Group Wields a Lot of Influence on Laws, In Court," Detroit Free Press (May 24, 1999); Thomas Bray, "Behind Scare Campaign for State Highest Court," Detroit News (July 2, 2000).

196 Id. Three Michigan Supreme Court Justices attended the Koch-funded judicial education programs organized by the Law and Organizational Economics Center at the University of Kansas, including Justices Taylor, Weaver and Young. A number of Court of Appeals judges have also attended, including Judges Bandstra, Corrigan (subsequently elected to the Supreme Court), Markey and O'Connell. See Memo from Law and Organizational Economic Center to Michigan Judge explaining LOEC program (on file).

197 Editorial, Detroit Free Press (September 5, 1999).

198 Mary Ellen Gurewitz, "Who Wins, Who Loses in Michigan Supreme Court" (November 1999).

199 See, e.g., Hoste v. Shanty Creek Management, Inc., 598 N.W.2d 336 (Mich.1999).

200 See, e.g., McDougall v. Schanz, 597 N.W.2d 148 (Mich.1999).

201 See, e.g., Farm Bureau Mutual Insurance Co. v. Nikkel, 596 N.W.2d 915 (1999).

202 Michigan Lawyers Weekly, at 14 (December 6, 1999).

203 Id.

204 See Joseph L. Sax & Joseph F. DiMento, "Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act," 4 Ecology L.Q. 1 (1974).

205 See www.sierraclub.org/chapter.

206 See 1998 PEER Survey of Michigan DEQ Employees (available on PEER website at www.peer.org).

207 In contrast, at least a few DNR employees had an entirely different attitude, as exemplified by the following comment: "The Department is comprised primarily of field staff who long for a return to the 'good old days' of the 1980s when the eco-terrorists ran unchecked using their intimidation and 'gestapo'-like tactics. The changes of the last 4-5 years were long overdue. These 'malcontents' need to be weeded out of state government."

208 K & K Construction, Inc. v. Department of Natural Resources, 551 N.W. 2d 413 (Mich.Ct.Apps., 1996).

209 575 N.W.2d 531 (Mich. 1998).

210 Honigman Miller Schwartz & Cohn, "Court of Claims Enters Judgment Against State in Takings Case," Michigan Environmental Compliance Update (November 1995).

211 Jeff Alexander, "Dunes Deal Won't Prevent Oil Drilling," Grand Rapids Press

(March 10, 1996).

212 "Hillegonds, Hertel at Loggerheads on Dunes Settlement," Gongwer News Service Report # 207 (October 26, 1995) (statement by Democratic House Leader Curtis Hertel).

213 The business community's efforts to influence judicial elections in Michigan apparently began in 1996 with the formation of the Alliance for Judicial Accountability by the Michigan Chamber of Commerce, the Michigan State Medical Society, and the Michigan Health and Hospital Association. The alliance announced that it would "research and analyze the judicial records of Supreme Court justices, members of the Court of Appeals," and other judges. See Alliance for Judicial Accountability, Press Release, "What Do Michigan Voters Know About the Supreme Court?" But this project did not actually blossom until 1998 when it was taken up by Michigan Against Lawsuit Abuse (M-LAW). The Chamber of Commerce also helped organize Justice for Michigan Citizens, a political action committee that supported judicial candidates in the 1996 election cycle.

214 M-LAW, Press Release, "M-LAW President Responds to False Statements By the Michigan Trial Lawyers Association" (June 2, 1998). The press release stated: "Contrary to the misinformation circulated by the trial lawyers, M-LAW is a Michigan-based and run non-partisan organization with no ties to Washington, DC."

215 Jane Fritsch, "Tort-Reform Bill Had Hidden Sponsors: Lobbyists Shielded Clients' Identity on Measure Limiting Lawsuit Damages," The New York Times (October 10, 1997).

216 "Michigan Lawsuit Abuse Watch Financial Report and Budget," attachment to form 1024, Application for Recognition of Exemption Under Section 501(a), dated December 8, 1997. M-LAW refused to make full disclosure of its funding sources or major supporters, claiming its donors require confidentiality because they fear

"hostile action may be taken against them by personal injury lawyers." M-LAW, Press Release, "M-LAW President Responds to False Statements By the Michigan Trial Lawyers Association" (June 2, 1998).

217 "Four Court Justices Described as Biased Against Jobs," Michigan Report (May 27, 1998). According to Michigan Department of Commerce Corporation and Securities Bureau documents, Patrick O'Meara, an ex-Chamber board member, was the initial registrant for M-LAW when it applied for incorporation in August 1996.

218 "M-LAW Study Evaluates, Ranks Bench Members," Medigram (undated).

219 Letter from M-LAW attorneys to IRS, May 27, 1998.

220 Michigan Lawsuit Abuse Watch, "Financial Report and Budget, FY 1997."

221 M-LAW, Press Release, "M-LAW President Responds to False Statements By the Michigan Trial Lawyers Association" (June 2, 1998). M-LAW's lease dated March 31, 1997, also specifies the rental of one office with maximum occupancy of one person.

222 "Michigan Lawsuit Abuse Watch, "Financial Report and Budget, FY 1997."

223 "Michigan Lawsuit Abuse Watch, Financial Report and Budget, FY 1997."

224 Memorandum of Conference, re: Michigan Lawsuit Abuse Watch, June 4, 1998.

225 Letter from James L. Joseph, Internal Revenue Service to Michigan Lawsuit Abuse Watch, April 15, 1998.

226 Memorandum of Conference, re: Michigan Lawsuit Abuse Watch, August 13, 1998.

227 William Lambeer, Jr., "Citizens Must Do Their Duty, Judge Justices," The Detroit News (July 6, 1998).

228 M-LAW, "Biographies: Individuals Responsible for the Michigan Judicial Evaluation" (undated).

229 Contract letter between M-LAW and Economic Judicial Report/Seqouyah Information Systems Ltd, November 18, 1997 (on file).

230 It is, perhaps, significant that in correspondence with the IRS, an M-LAW representative stated that he "believed" JEI was a Washington DC 501(c)(4) non-profit. Letter to James Joseph from M-LAW attorney, July 13, 1998.

231 Michael Barrier, "Lawsuits Gone Wild," Nation's Business (February 1998).

232 At the time of the 1998 judicial ratings, JEI's contact number listed in the Michigan report rang to the offices of the Lawler Group, then based in Bethesda,

Maryland, a Washington, D.C. suburb. There is no present telephone listing for the Judicial Evaluation Institute for Economic Issues in the Washington, D.C. area.

233 See "Michigan Supreme Court Judicial Evaluation" (undated).

234 Id. at 1.

235 M-LAW, Press Release, "Citizens Group Shines Spotlight on Michigan Court of Appeals" (July 8, 1998).

236 From Institute on Money and State Politics database at www.followthemoney.org.

237 "Itemized In-Kind Expenditures Schedule 2B-2" for the Michigan Chamber PAC, filed with Michigan Department of State Bureau of Elections for the period July 21, 1998 to October 20, 1998.

238 Top contributors to Governor Engler's campaign included the Michigan Republican State Committee (\$55,000 or 5.7 percent of the total), the Posthumus Leadership Fund, a conservative PAC directed by Republican Lieutenant Governor Posthumus (\$34,000 or 3.5%), the Michigan Health and Hospital Association PAC (\$10,000), and the Michigan Doctors PAC (\$8,200). The full listing of contributors by category is available on the National Institute on Money in State Politics, at www.followthemoney.org.

239 The Michigan Chamber of Commerce contributed almost \$34,000 to Corrigan's campaign and the Detroit Regional Chamber of Commerce gave her an additional \$30,500. Other major contributors to Corrigan's campaign included the Michigan Republican State Committee (\$66,144), Michigan Bank PAC (\$34,000), Michigan Restaurant Association PAC (\$34,000), Associated Builders and Contractors PAC of MI (\$34,000), Posthumus Leadership Fund (\$34,000), Blue Cross Blue Shield PAC (\$33,000), Michigan Health and Hospital Association Health PAC (\$32,500), and the Builders PAC of Michigan (\$30,000).

240 Top contributors included the Michigan Trial Lawyers Association Justice PAC (\$34,000), Auto Workers MI PAC/UAW (\$34,000), Michigan Education Association PAC (\$10,000), and Citizens for Public Education (\$5,000).

241 A poll of Michigan voters, conducted one month before the election, found that the justices' name recognition averaged around 25 percent. Greta Guest, "Poll Indicates Most Voters Undecided on State Supreme Court Race," Associated Press (October 5, 1998).

242 John Flesher, "Another Tough Battle Looms for State's Highest Court," Associated Press (October 3, 1998).

243 Susanna Loof, "Partisan Control at Stake in Supreme Court Race," Associated Press, (November 3, 1998).

244 Kathy Barks Hoffman, "Campaigns Gearing Up for Another Notch as Election Day Nears," Associated Press (October 31, 1998).

245 David Shepardson, "Ideological Battle Brews as High Court Opens for Term," The Detroit News (October 12, 1999).

246 See Charles Cain, "High Court Race Will be Nasty, Pricey," The Detroit News (June 23, 2000).

247 See www.mlaw.org.

248 C. Jesse Green, "Decisions from the 'New' MSC During 1999; Some Say Bias; Others Say Its 'Just Politics,'"

14 Mich.L.Week 165 (December 6, 1999).

249 Ohio Const., Art. IV, sections 2 and 6.

250 Ohio Const., Art. IV, section 6.

251 Ohio Statutes section 2503.03.

252 Ohio Const., Art. IV, section 6.

253 James Bradshaw, "Opponents Criticizing Incumbents 'Activism'" Columbus Dispatch (November 1, 1998).

254 "Editorial: For the Supreme Court," Cincinnati Post (October 12, 1998).

255 In the 1998 elections, reported contributions to judicial candidates - not including independent expenditures on their behalf - were as follows: Chief Justice Thomas Moyer (R) (incumbent) (\$872,838) defeated Gary Tyack (D) (\$389,717); Justice Francis Sweeney (D) (incumbent) (\$531,411) defeated Steven Powell (R) (\$208,753); Justice Paul Pfeifer (R) (incumbent) (\$570,297) defeated Ron Suster (D) (\$288,195). (Compiled from data collected by Ohio Secretary of State).

The 1996 figures were as follows: Justice Evelyn Stratton (R) (incumbent) (\$476,253) defeated Peter Sikora (D) (\$34,605); Justice Andrew Douglas (R)

(incumbent) (\$441,542) defeated Marianna Bettman (D) (\$423,235); Justice Deborah Cook (incumbent) (\$12,500) defeated Sara Harper (\$12,595) and Ross Hafley (\$2550). (Compiled from data collected by the National Institute for Money in State Politics (www.followthemoney.org)).

266 See note 255, *supra*.

257 See Joe Hallett, "Governor's Race Tops Spending Mark," *The Plain Dealer* (December 12, 1998).

258 Ohio Constitution, Section 16, Article I ("All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.") For example, in 1994, in *Sorrell v. Thevenir*, 633 N.E.2d 504 (Ohio 1994), the Court declared another legislative "tort reform" initiative unconstitutional.

259 See *Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999). See also John McCarthy, "Supreme Court Slams Legislature Again," *Associated Press* (August 16, 1999).

260 715 N.E.2d at 494.

261 *Id.* at 518 (Moyer, C.J., dissenting).

262 Lee Leonard, "House committee begins consideration of product liability bill." *United Press International* (February 24, 1987).

263 According to the alliance website, the alliance was disbanded in the aftermath of the Ohio Supreme Court's Sheward decision. See www.alliancecourtwatch.com.

264 OCALA, Press Release, "Trial Lawyers Bankroll Supreme Court Majority; Group Concerned that Excessive Contributions Influenced Court Decision." See also PR Newswire, (September 23, 1999) (describing an analysis of campaign contributions to Justices Pfeifer and Sweeney suggesting that the Court's 1999 Sheward decision was the result of trial lawyers' financial contributions); James Bradshaw, "Pfeifer, Shuster Square Off for High Court Seat; Pfeifer Must Deal with 'Activist Judge' Label," *The Columbus Dispatch* (October 15, 1998) (suggesting that a series of adverse 4 to 3 rulings by the Ohio Supreme Court "indicate significant favor to [the] trial bar").

265 600 N.E.2d 1042 (Ohio 1992).

266 See Randall Edwards, "Lawsuit Challenges New Pollution Law; Critics Say Statute Violates Federal Rules," *The Columbus Dispatch* (June 18, 1996).

267 *Id.*

268 *Rivers Unlimited, Inc v. Schregardus*, 685 N.E.2d 603 (Ohio Ct.Comm.Pl. 1997).

269 *Id.* at 613. See also Randall Edwards, "EPA Law Found in Violation: Public Has Right to Speak on Water Permits, Says Judge," *The Columbus Dispatch* (March 4, 1997).

270 See Ohio Chamber of Commerce, "2000 Business Evaluation of the Ohio Supreme Court" (undated).

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

272 William Jackson, "State Can Require Firms to Map Hazards, Court Says," *Business First-Columbus* (September 28, 1992).

273 James Bradshaw, "Justices Ranked by Pro-Business Votes: Ohio Chamber of Commerce Scale," *The Columbus Dispatch* (November 26, 1997).

274 Meg Fletcher, "Business Hopes to Oust Judge in Ohio Election," *Business Insurance* (October 26, 1998).

275 See www.ohiochamber.com.

276 James Bradshaw, "Opponents Criticize Incumbents 'Activism,'" *The Columbus Dispatch* (November 1, 1998).

277 T.C. Brown, "'Activism' the Issue for High-Court Foes," *The Plain Dealer* (October 21, 1998).

278 Tom Ford, "GOP May Target Judicial Races After Latest High Court Ruling," *Crain's Cleveland Business* (August 23, 1999).

279 *Id.*

280 In past 50 years of judicial elections in Ohio, only five incumbents have lost elections. "Business Is Taking

a Swing at Supremes; Ruling Raises Stakes in Election of Douglas' Successor,"
Business-First Columbus

(April 23, 1999).

281 See www.ohiochamber.com.

282 Ohio Chamber of Commerce, "2000 Business Evaluation of the Ohio Supreme
Court" 1.

283 Id.

284 William Glaberson, "A Spirited Campaign for Ohio Court Puts Judges on New
Terrain," The New York Times

(July 7, 2000).

285 See Richard Revesz, "Environmental Regulation, Ideology, and the D.C.
Circuit." 83 Virginia Law Review

1717 (1997) (presenting a sophisticated statistical analysis of how ideology has
influenced decision-making in environmental cases before the U.S. Court of
Appeals for the District of Columbia Circuit).