

# A NORM NO MORE: ELECTED OFFICIALS' LACK OF DEFERENCE TO STATE COURTS

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While recent verbal attacks by President Trump on the federal judiciary have rightly garnered attention and condemnation, they are predated by a more aggressive and less discussed series of attacks on the judiciary at the state level. These state-level attacks are two-pronged: Groups with interests before the court can spend large sums of money to intimidate or replace judges who they believe will rule against their interests, while legislatures opposed to a court's rulings or ideology can pass legislation that packs, cracks, or otherwise undermines the judiciary. This playbook has been repeated in state after state, and the cumulative effect has been a subordination of state judiciaries to legislatures and interest groups, and a dramatic curtailment of the courts' independence. Since 95% of all cases initiated in the United States are filed in state courts, this will have real consequences for the average American.<sup>1</sup> While Professor Grove writes that compliance by the executive branch with judicial branch decisions at the federal level is likely to endure through the Trump presidency, this democratic norm had already showed signs of erosion at the state level before Trump took office, and that troubling trend continues now.<sup>2</sup>

Judicial elections came to exist in the United States in a wave of state constitutional conventions, primarily from 1846 to 1860.<sup>3</sup> Research from the field of political science has shown that support for this reform came from both radical Jacksonian populist Democrats, and moderates of both the Whig and Democratic parties.<sup>4</sup> The radicals belittled appointed judges as tools of an aristocracy that thwarted the will of the people and their elected representatives, arguments similar to those employed by current

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<sup>1</sup> See ROBERT C. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS, at cmt. from the chair (2011), <http://www.courtstatistics.org/flashmicrosites/csp/images/csp2009.pdf> (analyzing trends nationwide in state court caseloads by case type using various metrics).

<sup>2</sup> See Tara Leigh Grove, *The Power of "So-Called Judges,"* 93 N.Y.U. L. REV. ONLINE 14, 19–20 (2018).

<sup>3</sup> See Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860*, 45 THE HISTORIAN 337, 337–38 (1983).

<sup>4</sup> See *id.* at 338–39.

“anti-establishment” populists. Election of judges would tame judicial activism, which they believed protected corporations and other powerful interests.<sup>5</sup> The moderates, however, thought that judicial elections would *raise* the prestige and, thus the power, of the judiciary. Election of judges would increase popular legitimacy, accountability, and administrative efficiency, and stop the proliferation of patronage appointments.<sup>6</sup> It was conservatives who were most opposed to judicial elections, out of fear of majority tyranny, and support for judicial review and an apolitical, independent judiciary.<sup>7</sup>

The loftiest aims of the pro-election reformers have not been realized. Elected judges are in fact some of the ones least responsive to the people, because they are reliant on donations from business trade groups, unions, and lawyers, all of which have business interests before the courts.<sup>8</sup> These contributions do indeed have an impact on judicial decision making, especially in election-related cases, or when attack ads label judges as “soft on crime.”<sup>9</sup> In recent years, the problem has only grown worse, as a result of the Supreme Court’s decision in *Citizens United*.<sup>10</sup> In the wake of *Citizens United*, outside spending on judicial elections has broken records.<sup>11</sup> This spending prompts a need for strong recusal rules, something

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<sup>5</sup> See *id.* at 348.

<sup>6</sup> See *id.* at 345.

<sup>7</sup> See *id.* at 341, 344–45.

<sup>8</sup> See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, *THE POLITICS OF JUDICIAL ELECTIONS 2015–16: WHO PAYS FOR JUDICIAL RACES?* 11 (2017), [https://www.brennancenter.org/sites/default/files/publications/Politics\\_of\\_Judicial\\_Elections\\_Final.pdf](https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf) (“About 56% of contributions to state supreme court candidates during the 2015–16 cycle came from lawyers, lobbyists, and business interests, a cohort regularly involved in state court matters.”).

<sup>9</sup> See JOANNA SHEPHERD, AM. CONSTITUTION SOC’Y, *JUSTICE AT RISK: AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS 13–14* (2013), [https://www.acslaw.org/ACS%20Justice%20at%20Risk%20\(FINAL\)%206\\_10\\_13.pdf](https://www.acslaw.org/ACS%20Justice%20at%20Risk%20(FINAL)%206_10_13.pdf) (finding a correlation between contributions by business groups to state supreme court justices and the decisions of those justices in cases where business groups have an interest); see also Joanna Shepherd & Michael S. Kang, *Partisan Justice: How Campaign Money Politicizes Judicial Decision Making in Election Cases*, AM. CONSTITUTION SOC’Y (2016), <https://partisanjustice.org/> (finding a relationship between judicial campaign financing and re-election pressures and the likelihood of a judge ruling for the litigant of their party in election disputes); Joanna Shepherd & Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices’ Decisions in Criminal Cases*, AM. CONSTITUTION SOC’Y (2014), <http://skewedjustice.org/> (finding that in states with greater numbers of television ads in supreme court races, or where restrictions on union and corporate donations were struck down post-*Citizens United*, judges are less likely to rule in favor of criminal defendants).

<sup>10</sup> *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365–66 (2010) (striking down restrictions on independent expenditures for electioneering communications by corporations and labor unions).

<sup>11</sup> See BANNON ET AL., *supra* note 8, at 2 (finding that political action committees and other non-party groups accounted for forty percent of overall supreme court election spending during the 2015–2016 cycle, an eleven percent increase from the year before).

that virtually no states have, according to a recent review by the Center for American Progress.<sup>12</sup> Most famously, the Supreme Court held in *Caperton v. A.T. Massey Coal Co.* that a West Virginia Supreme Court justice's refusal to recuse himself in a case involving a major benefactor was unconstitutional.<sup>13</sup>

Even if judges can withstand electoral pressures, legislatures can strip them of their seats or authority. In recent years, nowhere has this been more true than in North Carolina.<sup>14</sup> There, legislators are planning to redraw judicial and prosecutorial districts, which will result in many incumbents losing their seats due to being "double-bunked" with other incumbents. Analysis by NC Policy Watch shows that this will most reduce the number of judges of color, who already occupy a disproportionately small share of the judiciary.<sup>15</sup> Prior to this, the state eliminated a well-regarded public financing system for judicial elections, which aimed to alleviate the problems associated with fundraising, and changed elections from non-partisan to explicitly partisan.<sup>16</sup> Following that, the legislature shrunk the size of the court of appeals to prevent the Governor from nominating judges to it.<sup>17</sup> In its latest move, the General Assembly is considering replacing popular election of judges not with merit selection but with

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<sup>12</sup> See BILLY CORRIHER & JAKE PAIVA, CTR. FOR AM. PROGRESS, STATE JUDICIAL ETHICS RULES FAIL TO ADDRESS FLOOD OF CAMPAIGN CASH FROM LAWYERS AND LITIGANTS 2–3 (May 7, 2014), <https://www.americanprogress.org/wp-content/uploads/2014/05/JudicialRecusal.pdf> (finding that only eight of the thirty-nine states that elect judges would earn a passing grade for their judicial recusal rules, with the highest score being seventy-five, or a "C").

<sup>13</sup> 556 U.S. 868, 885–87 (2009).

<sup>14</sup> See Trip Gabriel, *In North Carolina, Republicans Stung by Court Rulings Aim to Change the Judges*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/us/north-carolina-republicans-gerrymander-judges-.html> (describing steps taken by the North Carolina legislature to redraw judicial districts and institute partisan judicial elections).

<sup>15</sup> See TRACEY E. GEORGE & ALBERT H. YOON, AM. CONSTITUTION SOC'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 9, 24–27 (2016), <http://gavelgap.org/pdf/gavel-gap-report.pdf> (finding that in a near majority of states, minority judges fell below fifty percent of proportional representation of the general population); see also Melissa Boughton, *A Guide to Proposed Judicial Maps as Court Commission Set to Meet Today*, NC POL'Y WATCH: THE PROGRESSIVE PULSE (Sept. 29, 2017, 8:00 AM), <http://pulse.ncpolicywatch.org/2017/09/29/guide-proposed-judicial-maps-court-commission-set-meet-today/#sthash.a1TnUiZq.dpbs>.

<sup>16</sup> See Robert N. Hunter, Jr., *Do Nonpartisan, Publicly Financed Judicial Elections Enhance Relative Judicial Independence*, 93 N.C. L. REV. 1825, 1863–65 (describing the system of publicly financed elections in place from 2002 to 2013); Melissa Price Kromm, Editorial, *NC Should Restore Public Funding for Judicial Elections*, NEWS & OBSERVER (Oct. 19, 2016, 7:44 PM), <http://www.newsobserver.com/opinion/op-ed/article109283122.html> ("In 2013, Governor Pat McCrory and the state legislature eliminated the program over the objections of business and civic leaders, former governors, a dozen former presidents of the State Bar Association, the American Bar Association and hundreds of other public leaders.").

<sup>17</sup> See Gabriel, *supra* note 14.

legislative appointment.<sup>18</sup> Only two states use this method because, historically, it has been highly vulnerable to patronage, according to a recent study conducted by the Brennan Center for Justice.<sup>19</sup> These actions would cumulatively make the court's subordination to the legislature a *fait accompli*.

North Carolina is not alone in this respect. In Florida, outgoing Governor Rick Scott has asserted that he has the authority to install three judges on the state supreme court in his final hours in office, despite the results of a 2014 ballot referendum in which voters rejected a state constitutional amendment to explicitly grant the governor that power.<sup>20</sup> In Kansas, the three branches of government engaged in a protracted battle after the state's supreme court issued a ruling invalidating a school funding scheme. The State Senate passed a bill that would have allowed for the impeachment of justices that "usurp" the authority of the other branches.<sup>21</sup> Governor Sam Brownback later signed a bill which guaranteed that the judiciary would lose funding if it invalidated a law that changed appointment and budgetary policies for the district courts.<sup>22</sup> Most recently, the President Pro Tempore of the Pennsylvania State Senate threatened not to comply with an order by the state supreme court to redraw the state's congressional map, and one of his peers has proposed impeaching the judges who wrote that order.<sup>23</sup> This is only a small snapshot of what is

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<sup>18</sup> Anne Blythe, *Should NC Lawmakers Create Laws and Select Judges Who Review Them? GOP Senator Asks Why Not*, NEWS & OBSERVER (Dec. 9, 2017), <http://www.newsobserver.com/news/politics-government/state-politics/article188970949.html> ("[State Senate leader Phil] Berger's chief of staff has been floating the possibility of lawmakers asking voters whether the state should abandon the election of judges and move toward an appointment process to decide who sits on the bench.").

<sup>19</sup> See DOUGLAS KEITH & LAILA ROBBINS, BRENNAN CTR. FOR JUSTICE, LEGISLATIVE APPOINTMENT FOR JUDGES: LESSONS FROM SOUTH CAROLINA, VIRGINIA, AND RHODE ISLAND 1-3 (2017), [https://www.brennancenter.org/sites/default/files/analysis/North\\_Carolina.pdf](https://www.brennancenter.org/sites/default/files/analysis/North_Carolina.pdf) (detailing allegations of nepotism and favoritism stemming from legislative appointment systems in South Carolina and Virginia).

<sup>20</sup> See Mary Ellen Klas, *Who Gets to Appoint 3 New Florida Justices, Rick Scott or the Next Governor?*, MIAMI HERALD (Nov. 1, 2017), <http://www.miamiherald.com/news/politics-government/state-politics/article182113661.html>.

<sup>21</sup> S. 439, 2106 Sess. (Kan. 2016); see also Edward M. Eveld, *Kansas Senate Approves Bill Establishing New Grounds for Impeaching State Supreme Court Justices*, KAN. CITY STAR (March 22, 2016), <http://www.kansascity.com/news/politics-government/article67517672.html>.

<sup>22</sup> See John Eligon, *Courts Budget Intensifies Kansas Dispute over Powers*, N.Y. TIMES (June 6, 2015), <https://www.nytimes.com/2015/06/07/us/courts-budget-intensifies-kansas-dispute-over-powers.html>.

<sup>23</sup> See Mark Joseph Stern, *Pennsylvania GOP Leader Defies Court Order to Preserve Partisan Gerrymander*, SLATE (Jan. 31, 2018), <https://slate.com/news-and-politics/2018/01/pennsylvania-gop-leader-defies-court-order-to-preserve-partisan-gerrymander.html>; see also Eric Brander, *Pennsylvania Republican Wants to Impeach Judges in Gerrymandering Case*, CNN (Feb. 7, 2018), <https://www.cnn.com/2018/02/06/politics/pennsylvania-gerrymandering->

happening in the states.

This wave of inter-branch conflict affects the composition and authority of the courts in ways that would be unimaginable at the federal level, while conflicts of interest created by industry influence over state judiciaries are rarely addressed. Neither trend gets significant national attention despite the broad reach of the state judiciary. While both Professors Grove and Whittington argue that at the federal level, politicians have concluded that it is in their interest to defer to court orders and likely will continue to do so, some actors at the state level have reached the opposite conclusion—that defiance of the courts is in their political interest.<sup>24</sup> The norm of an independent judiciary is not uniformly reflected in the states, and will not be, so long as tampering with the composition and authority of state courts is a relatively easy and common undertaking.

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impeachment/index.html.

<sup>24</sup> See Grove, *supra* note 2, 19–20 (hypothesizing that a politician might think it is advantageous to be seen attacking a ruling they disagree with as opposed to be seen disobeying it); see also Keith E. Whittington, *The Bounded Independence of American Courts*, 93 N.Y.U. L. REV. ONLINE 70, 72 (arguing that President Trump’s coalition partners have more to lose by abandoning norms than he does).