



The Conservative Takeover of State Judiciaries

Ballot Referendums to Watch

Todd Phillips and Andrew Blotky August 13, 2012

Introduction

Since the New Deal, despite several attempts, no state in our nation has shifted to a system for seating state court judges that makes these judges more vulnerable to politics. But that might well change this year. This November, ballot measures in three states would politicize state courts in an unprecedented way, calling into serious question whether the citizens in those states can get a fair day in court.

Legislators in 24 states proposed legislation during the past legislative session (2011–2012) that would enable governors to replace competent state judges, a power that would, in practice, result in more conservative replacements in states across the country. Legislators in Missouri, Florida, and Arizona managed to place referendums on this November's ballot that if approved by voters would severely restrict judicial independence and belie the promise of fairness before the law. State judges that are expected to protect citizens' rights will become more and more aligned with conservative and corporate interests.

The reason: Conservatives are behind the majority of these efforts. After failing to achieve their preferred policy outcomes through the legislative process or the ballot box, these individuals are now turning their sights on the courts. Not only is much at stake for progressive policy causes, but even worse, the health of our democracy and the public's faith in our system of justice are at risk, too.

Judges, in their role interpreting laws and state constitutions, are meant to remain above politics, protected from shifting political winds and the tyranny of a majority swayed by current events. This is why federal judges have lifetime appointments—to insulate them from the whims of politics. Speaking directly to this point, U.S. Supreme Court Chief Justice John G. Roberts said at his confirmation hearing that “judges are not politicians.”¹

Yet as important as they are, state judges are much less insulated from politics than federal judges in many states. Indeed, judges in 39 states are seated on the bench through

elections just as partisan (and paid for by special interests) as those for governor and state legislators. This might not have been a serious problem in the past but it is today, following the huge influx of conservative money to judicial election campaigns in the last several years.

Consider a few recent examples. In 2010 Iowa voters threw out three justices who upheld same-sex marriage (and conservatives will likely attempt to throw out a fourth this year)² after conservative groups poured thousands of dollars into the state.³ And in 2011 conservative advocacy groups spent the most money ever in a Wisconsin Supreme Court election as a referendum on Gov. Scott Walker's antiunion policies, pouring more than \$3.5 million into the campaign to secure the state chief justice's seat for conservatives.⁴

It is important for anyone who cares about the health of our democracy and the ability of Americans to vindicate their constitutional rights to watch the outcome of these ballot measures. If any of these three pass, conservatives in the other states will be emboldened. With the knowledge that a referendum passed in one state and it may pass in another, legislators in the 21 other states where legislation was introduced will increase pressure to pass their own legislation, and legislators in any of the 26 others may introduce new bills. Judges in every state may face increased pressure to lean conservative in their judicial outcomes, affecting all Americans, due to anticipated election assaults by conservatives.

It is clear the conservative movement across the nation will be watching the results of these referendums and planning for 2014. It is important for progressives to be watching as well. Below are summaries of the history behind each legislative push and the potentially adverse outcomes if the voters in these states approve the measures.

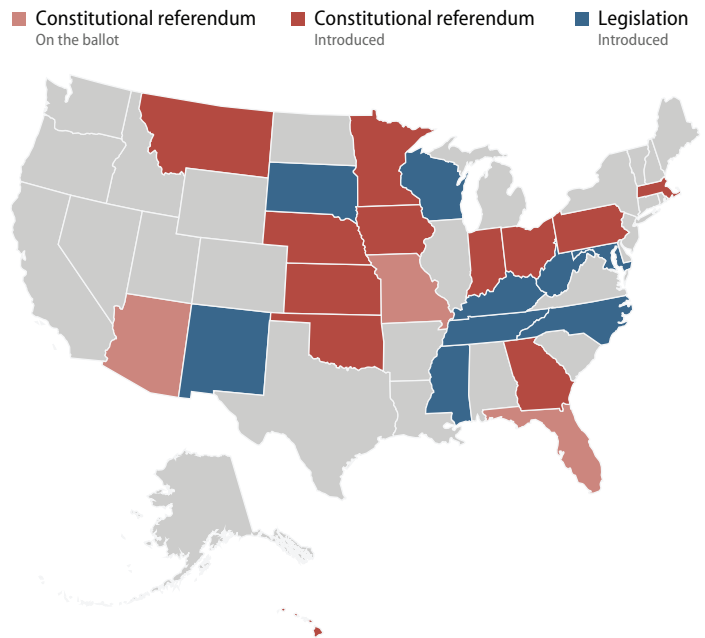
Missouri

Missouri currently selects supreme court justices through a merit selection process that aims to achieve a strong, independent judiciary.⁵ The Appellate Judicial Commission composed of the chief justice of the Missouri Supreme Court, three members of the bar association, and three citizens who serve four-year terms selects several judicial nomi-

FIGURE 1

Judicial shape shifting

States where constitutional referendums are on the ballot this coming election year in which the process for selecting state court judges could be made more political



Source: Legal Progress research of state legislatures and state Secretaries of State websites.

needs to send to the governor, who then chooses one nominee to become a judge. After each term in office, Missourians vote to retain or dismiss the judge.

The merit selection process ensures that the governor appoints only qualified, apolitical judges, as the committee will only nominate qualified, apolitical judicial candidates due to its divorce from politics. Yes, politics enters the equation once the judge faces the voters, but because of the merit-based appointment process, the initial appointment of the judge is based on a nonpartisan review of a nominee's competency, integrity, and temperament.

The conservative-controlled legislature is trying to change the makeup of the commission to give the governor more control over the candidates it selects. S.J.R. 51, a referendum supported in the legislature by 102 Republicans and 1 Democrat, would replace the chief justice with a nonvoting retired justice, and would allow the governor to appoint a fourth, nonattorney member as the tie-breaking vote.⁶ This would enable the governor to bring his or her own political philosophies directly to bear on the appointment process before the voters ever get a say on the matter.

Making the Appellate Judicial Commission more attuned to the winds of politics would be severely detrimental to judicial independence. If the four appointed commissioners are all of the same party, the most politically connected individuals will become judges at the expense of better qualified, more independent candidates. Missouri Bar President Lynn Vogel has stated that the plan benefits people who have "given enough money to the governor."⁷ Justice William Price has announced that he will retire on August 1 to ensure his successor is chosen "by the same ... nonpartisan merit plan that has served [Missouri] so well for the past 70 years."⁸ These and other astute observers recognize that if the referendum passes, party loyalty and adherence to ideology will become more important than qualifications.

This shift will become apparent immediately. Rather than allowing the current appointees to finish their terms, S.J.R. 51 allows the next governor to appoint all four members to the commission at once in January 2013 and replace two of them in January 2015, ensuring the governor's influence for at least six years.

Unlike other legislation limiting judges' independence, S.J.R. 51 was not the result of a judicial controversy. A former Missouri Republican Party chairman testified in committee that state judges "haven't done anything to the people that outrages them."⁹ The Missouri court has not legalized same-sex marriage or declared the death penalty unconstitutional. Instead, S.J.R. 51 is the culmination of half a decade's worth of work on the part of conservatives dismayed that the court will not bend to conservative ideology on issues such as medical malpractice and tort reform.

In 2007 Republican Gov. Matt Blunt stirred controversy, claiming that the nominating commission broke the law by meeting without public scrutiny, as state supreme court

rules require, in order to maintain political neutrality when it chose its candidates.¹⁰ Many believe that Gov. Blunt was more distressed that the three nominees were not as conservative as he would have liked, rather than about the process by which they were chosen.¹¹

Even though Democrat Jay Nixon became Missouri's governor in 2008, conservatives still worked to change the state's judicial nominating procedures. In 2010 and 2011 individuals attempted to get an initiative on the ballot that would have scrapped the Appellate Judicial Commission entirely, but they failed to submit a sufficient number of signatures to the ballot each time.¹²

Although the current proposal seems to be the result of Republicans looking for some accomplishment to tout in an election year—Republicans' in both chambers of the Missouri Assembly after the 2010 election wanted to point to some success as their other major accomplishments had been stymied by Gov. Nixon—it is heavily supported by conservative business interests. Better Courts for Missouri, a coalition of conservative interest groups that includes the St. Louis Tea Party and Americans for Prosperity, are heavily pushing for S.J.R. 51's passage.¹³ It has been placed on the November ballot and is expected to be contested closely by people on all sides.

While Republicans may, in the short term, be handing over the appointment process to a Democrat with passage of this ballot measure, Republicans in the state legislature really want to do something that looks like a win on its face in terms of fixing the process, even if it might result in a short-term loss in terms of the judges selected.

Florida

Over the course of several years, the Florida Supreme Court has upset conservatives by ruling against their interests. In 2006 the court declared school vouchers illegal under the Florida Constitution,¹⁴ and in 2010 it prevented several legislatively referred ballot measures from appearing on the ballot due to legal improprieties.¹⁵ The measures would have set limits on property tax increases, prevented the Affordable Care Act from being implemented, and curtailed political considerations when crafting district lines,¹⁶ though this last referendum was really intended to be used as part of a political strategy to confuse voters.¹⁷ Although the referendums were removed from the ballot for using language that would intentionally mislead voters, conservatives interpreted this to be “judicial activism.”¹⁸

In response, the Florida Legislature placed H.J.R. 7111 on the November ballot with the votes of 104 Republicans and zero Democrats.¹⁹ This referendum makes two major changes to the state supreme court. The first modification changes how justices are selected. Although the governor must still appoint a judge from the nominations of the Supreme Court Judicial Nominating Commission, similar to Missouri's plan, this referendum amends the state constitution to require Senate confirmation of the governor's selec-

tion. If the Senate rejects the selected candidate, the commission reconvenes to choose new nominees, with the condition that they “may not renominate” the rejected candidate.

This change to the judicial nominating procedure is even worse than the change in Missouri. While the Missouri referendum may still allow the commission to nominate qualified candidates without regard to politics, Florida’s referendum ensures that politics will always play a role in nominations by giving the Senate a veto. The Florida commission may nominate any number of qualified candidates, but only those with political views the Senate majority agrees with will be confirmed. Furthermore, the Senate may reject every nominee until the commission and governor nominate a specific candidate with close political ties to the party in power.

The second modification in H.J.R. 7111 is to allow the legislature to repeal a rule of the court with a simple majority vote in both chambers, rather than the two-thirds supermajority the state’s constitution currently requires. This easily allows the legislature to influence court proceedings and retaliate against judges for deciding cases in the interest of justice, rather than in the interest of the current conservative ideology of the majority of the legislature’s members today.

To support H.J.R. 7111 in the media, conservatives created an interest group with ties to “the Federalist Society, the Heritage Foundation, the Pacific Research Institute, the Center for Individual Freedom, the Manhattan Institute, ALEC [the American Legislative Exchange Council,] the Competitive Enterprise Institute, and the Washington Legal Foundation.”²⁰ The organization, called Restore Justice 2012, is working to alert voters of the initiative. As with Better Courts for Missouri, Restore Justice 2012 is a nonprofit corporation, so it is impossible to track its funders.

These affiliated organizations engaged with Restore Justice 2012 have also engaged in activities to limit the ability of government to support middle-class Americans. One case in point: ALEC is a coalition of legislators and corporate interests that have advocated for repealing minimum-wage laws, engaging in voter suppression, and pushing legislation to weaken access to justice.²¹ H.J.R. 7111 would be a boon to ALEC’s corporations, as conservative laws may only be enforced or enjoined by the courts. It is clear that these conservative interest groups want this referendum passed.

While Florida’s H.J.R. 7111 makes dangerous changes to the state judiciary selection process, the originally introduced version was even more extreme and would have produced a windfall for conservatives. It would have separated the Florida Supreme Court into two different divisions—one for dealing with civil matters and another for criminal, each with five members. The current court has seven members, meaning that incumbent Republican Gov. Rick Scott would have been able to appoint three new justices to the court.

Furthermore, the current justices would have been split into the two divisions based on their seniority, meaning that the three justices appointed by a Democratic governor would have gone to the criminal division while the four Republican-appointed justices would have gone to the civil division.²² Republican appointees would have controlled the civil branch, deciding challenges to constitutional amendments and potentially rewarding business interests who have worked across the nation to install pro-business judges on state courts.

Fortunately, this plan failed to garner the required number of votes in the Senate to place it on the ballot, forcing its sponsors to trim the legislation down to its current form. It is likely, though, that if voters approve H.J.R. 7111, the conservative legislative leaders will try once again to place the original court-packing plan on the ballot.

Indeed, conservatives are now trying by yet another means to create three new vacancies on the Florida Supreme Court for Gov. Scott. The Southeastern Legal Foundation, with help from the Koch brothers' Americans for Prosperity, filed a frivolous lawsuit to remove three justices from the court.²³ They claim the justices broke the law by using a court notary to notarize their retention election documents.²⁴ The state attorney charged by the governor with investigating the same incident declined to prosecute, explaining that "it is well established that the law does not concern itself with trifles."²⁵ The civil case is still pending.

Arizona

On several occasions in the past election cycle, the Arizona judiciary has frustrated the conservative legislature and Republican Gov. Jan Brewer from attempting to consolidate power in the hands of Republicans. First, the Arizona Supreme Court declared unconstitutional a law that would change Tucson's elections to enable Republicans to win more seats on the city council.²⁶ Later, the Arizona Supreme Court reinstated the independent chair of Arizona's Independent Redistricting Commission, Colleen Mathis, after Gov. Brewer removed her for creating a "flawed product" that Republicans disliked.²⁷ Gov. Brewer and her party objected to the final layout of the state's congressional districts, arguing that it allowed Democrats to win more seats than they deserve. The Arizona Supreme Court disagreed.

Adding to Republican ire, the state high court also allowed the recall of Senate President Russell Pearce—author of Arizona's controversial immigration law—to continue, which resulted in his removal from office.²⁸ It is no surprise that conservatives in the legislature would wish to bring the judiciary under political control. Proposition 115 will be on the ballot in November to do just that.²⁹

Prop 115, passed by 61 Republicans and 8 Democrats, makes changes to the Commission on Appellate Court Appointments, which performs a role similar to those in the two states above.³⁰ The 16-member commission is chaired by the chief justice

of the Arizona Supreme Court, includes 10 nonattorney members who are appointed by the governor in staggered terms and confirmed by the Senate, and has five attorney members appointed by the state bar and confirmed by the Senate, all with four-year terms (excluding the chief justice). Prop 115 modifies the commission's makeup to allow the state bar to appoint only one attorney member while the governor appoints the other four attorney members without input from the bar. This would give each governor at least seven political appointees, or nearly half of the commission, instead of only five every four years.

The referendum also changes the number of candidates the commission puts forward from three to eight and removes the limitation that not all candidates may be of the same political party. In other words, while currently the commission may put forward the names of two Republicans and one Democrat but not three Republicans, if Prop 115 passes the commission may put forward the names of eight Republicans and zero Democrats. Not only does the increase in candidates allow the governor to choose a less qualified nominee, but removing the party division requirement removes all semblances of bipartisanship and places politics above qualifications. Without requiring the commission to choose a bipartisan group of nominees, it is likely the number of applications will drop significantly.

Finally, the referendum allows the state's House and Senate Judiciary Committees to "take testimony on the justices and judges who are up for retention" up to 60 days before the retention election. The state constitution already creates a Commission on Judicial Performance Review that provides information on whether each judge meets performance standards, including attributes such as legal ability and integrity, based on comments from other judges, attorneys, and the public.³¹ Prop 115 allows the judiciary committees to take testimony solely to create an opportunity for senators and representatives to publically ridicule judges who are up for retention and hopefully get their comments in the media.

The upshot: Retention elections will become more politicized, judges will adjudicate claims by ordinary Arizonans with these committee "dog and pony shows" in mind, and the judiciary will be further politicized.

Because Prop 115 is solely a power play by conservative legislators enraged that the state supreme court followed the law in several instances, two outside interest groups have gotten involved in the referendum.³² The first interest group is the Center for Arizona Policy, a self-described "conservative, pro-family" lobbying organization,³³ which has previously supported legislation to prohibit same-sex marriage in the Arizona and U.S. constitutions, to use government funds to support religious schools, and to inhibit a woman's right to choose.³⁴ The second is Citizens for Clean Courts, a campaign committee started by former Maricopa County Attorney Andrew Thomas to exact retribution against the court for disbaring him after committing gross violations of professional conduct.³⁵ In this case big business is not getting involved because it looks like this measure may pass even without its help.

Conclusion

Forecasting the outcomes of these referendums based on past ballot measures would be cumbersome and imprecise. Of recent propositions similar to those up this year, only Nevada (2010) and South Dakota (2004) have seen similar measures, and voters in both states rejected a switch to merit selection in favor of elections for their judges.³⁶

This might imply that voters prefer democratically accountable judges, though it might also simply show a status quo bias that these three 2012 referendums also face. Each state's history is not helpful either. Missouri and Arizona have not had similar ballot propositions since 1940 and 1974, respectively, when voters instituted those states' current plans. Florida citizens voted to increase the number of nominees recommended to the governor by the Judicial Nominating Commission from three to six people in 1996,³⁷ but every circuit and every county voted to continue to elect, rather than allow the governor to appoint, local judges in 2000.³⁸

Despite the difficulty in forecasting their outcomes, the implications are clear: As a result of state judicial elections, a number of state supreme courts already have conservative majorities that rule for business interests over ordinary Americans. After spending millions of dollars to elect pro-business justices in Ohio, the asbestos industry received a windfall ruling that upheld retroactive anticonsumer legislation that had previously been held unconstitutional twice.³⁹ In another example business interests have announced plans to raise unlimited sums of money to support the reelection of a North Carolina justice this year to show their appreciation for a ruling to prohibit individuals from suing over illegal predatory lending practices.⁴⁰

Business interests and conservative organizations are fighting to pass these three referendums in order to get state judiciaries that align with their interests. Passing any or all referendums would encourage conservatives in at least the 21 other states highlighted in the map above to fight harder for similar measures in the next legislative session. States that did not previously see judicial reform bills may well see them in the near future.

Conservatives will learn how extreme a referendum can be in order to make future passage more likely. State judiciaries across the nation will face increasing threats to their independence buoyed by the knowledge that such a challenge may succeed, leaving them more exposed to political winds in the wake of successful referendums.

Progressives must watch the outcomes in these referendums and learn to counter measures in the future. In 2014, 2016, and beyond, conservatives will continue to bring measures forward, and progressives must fight back with their own initiatives to ensure America's courts are not rubber stamps for right-wing interests.

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