

University of Montana

## ScholarWorks at University of Montana

---

Faculty Journal Articles & Other Writings

Faculty Publications

---

9-2016

### Montana Judicial Elections: Does the Past Hold Lessons for Future?

A. C. Johnstone

Alexander Blewett III School of Law at the University of Montana, [anthony.johnstone@umontana.edu](mailto:anthony.johnstone@umontana.edu)

Follow this and additional works at: [https://scholarworks.umt.edu/faculty\\_barjournals](https://scholarworks.umt.edu/faculty_barjournals)



Part of the [Election Law Commons](#), and the [Judges Commons](#)

Let us know how access to this document benefits you.

---

#### Recommended Citation

Johnstone, A. C., "Montana Judicial Elections: Does the Past Hold Lessons for Future?" (2016). *Faculty Journal Articles & Other Writings*. 121.

[https://scholarworks.umt.edu/faculty\\_barjournals/121](https://scholarworks.umt.edu/faculty_barjournals/121)

This Article is brought to you for free and open access by the Faculty Publications at ScholarWorks at University of Montana. It has been accepted for inclusion in Faculty Journal Articles & Other Writings by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact [scholarworks@mso.umt.edu](mailto:scholarworks@mso.umt.edu).

# Montana judicial elections: Does the past hold lessons for future?

By Anthony Johnstone

University of Montana's Alexander Blewett III School of Law

Montanans never much liked outside influence in their judiciary, and their first line of defense was judicial elections. This may strike us as odd now, in our *Citizens United* era of unlimited outside money and even national party politics entering our Supreme Court campaigns. Yet the outsider problem and our electoral solution are older than statehood itself. After seeing record amounts of money spent on court candidates in the last campaign, and with three seats on the ballot this fall, it is worth considering where we've been and where we're headed on Montana's judicial campaign trail.

Judicial elections arose two centuries ago as a democratic solution to the problem of political influence on judges. Under the traditional model still used by the federal government and a few states, judges owed their appointments to the executive and legislative branches. In such a system, the composition of the judiciary is neither independent of the political branches—witness the present gaming of the United States Supreme Court vacancy—nor directly accountable to the people. Most states have taken the alternative path of judicial elections. Today, with about 90 percent of state judges subject to election, judicial elections are not going away anytime soon.

## A history of Montana's judicial elections

The origins of judicial elections in Montana date back 150 years to a suspicion of the political appointees who staffed the territorial courts. In the gold rush that opened Montana's territorial history, customary miners' courts and the storied vigilantes dispensed civil and criminal justice. Acting Gov. Thomas Meagher, a Union Democrat, chafed against federal influence over the new territory. He pushed for statehood in 1866 with a constitutional convention and two extraordinary legislative sessions. When a two-member majority of the territorial court, both Republicans, declared the acts of the extraordinary sessions null and void, the state legislature redistricted those justices to the wilderness. The Republican U.S. Congress retaliated by nullifying all laws enacted in the extraordinary sessions, revoking the legislature's judicial districting power, and raising the territorial judges' salaries by \$1,000.

Once the territorial government settled in, Montana courts developed a reputation for efficiency. Yet residents still resented the courts' lack of democratic legitimacy. On the eve of the second Montana constitutional convention in 1884, one newspaper editorial captured the popular complaint that

[t]he President has nominated another

## Editor's note

This is an abridged version of *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. App. Practice & Process 47 (2015), and is reprinted by permission of the publisher. The full article is available for download at: <http://ssrn.com/abstract=2660514>. The author served as counsel for the State of Montana in *Citizens United v. Federal Election Commission* and *American Tradition Partnership v. Bullock*.

carpetbagger for Associate Justice of the Supreme Court of Montana. Seventy-five thousand people in the Territory to make laws for themselves, and a Hoosier sent out from Indiana to tell us what we have done. How long, oh Lord; how long!

The proposed 1884 Constitution reflected this suspicion of outside influence. In its memorial to Congress, the convention sought statehood to redress "the policy which has so long prevailed of sending strangers to rule over us and fill our offices." The convention's address to voters devoted more lines to grievances against the appointed judiciary than it devoted to the legislative and executive branches combined:

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

In the proposal, justices would be "elected *by the people*" for six-year terms, and would be "required to have resided in the State or Territory at least two years prior to their election." The 1889 Constitution retained both provisions.

With statehood, Montana's judiciary transitioned from federal appointees unfamiliar with mining law to state elected officials all too familiar with corporate overreach and corruption. In what came to be known as the War of the Copper Kings, William A. Clark, Marcus Daly, and F. Augustus Heinze engaged in a decades-long struggle for domination of Butte's "richest hill on earth," and incidentally, for control of the state's government—including its courts. The Montana Supreme Court later recounted the broad history of "[t]hose tumultuous

years . . . marked by rough contests for political and economic domination primarily in the mining center of Butte, between mining and industrial enterprises controlled by foreign trusts or corporations.”

Some of those rough contests played out before elected state judges. Heinze waged litigation in state courts to hold the rival Amalgamated Copper Company at bay while he, sometimes literally, mined ore out from under the company’s feet. One of the judges hearing Heinze’s case, William Clancy, “found in Heinze’s favor with monotonous regularity” in what the historian K. Ross Toole memorably termed “a burlesque of judicial dignity.” In 1903, after two devastating blows in Judge Clancy’s court, Amalgamated shut down its operations until winning the enactment of a “Fair Trials” law allowing the peremptory substitution of a district judge. (A descendent of the “Clancy Rule” remains in effect today.) Heinze sold out to Amalgamated after Clancy lost re-election. Yet the War of the Copper Kings left lasting scars, as the Anaconda Company consolidated power over state government in Montana.

It took the one-person one-vote revolution, and reapportionment of the state legislature in 1965, to dethrone Anaconda. The new legislature moved toward constitutional reform and a more accountable state government. As with the earlier constitutions, judicial selection emerged as a central concern. In a 1967 “Blueprint for Modernization,” Professors David Mason and William Crowley offered a variant of the “Missouri Plan” of merit panel selection, a reform that had failed five times in Montana since 1945. When the Constitutional Convention delegates met in early 1972, Sandra Muckelston’s detailed commission report explained that “[t]he major criticism of the elective system of judicial selection, be it partisan [as Montana’s system was before 1935] or non-partisan, is that voter knowledge of candidates and their qualifications is insufficient to form a basis for a rational choice.” A judicial candidate also might “depend upon contributions from ‘friends,’ which may affect his impartiality just as much as those judges who receive financial support from party coffers.” One Montana justice estimated that he spent nine months of an election year campaigning for office.

These studies set the stage for an unusually deliberative discussion of judicial selection by the 100 elected delegates of the Constitutional Convention. The 24 lawyer-delegates carried on most of the debate among themselves. The delegates’ consideration of the judicial article was among the longest and most divided at the convention. The Judiciary Committee divided five-to-four on the issue of judicial selection. Despite the convention’s general atmosphere of bipartisanship, the Judiciary Committee’s votes divided largely along party lines. Democrats in the majority would retain judicial elections, while the predominantly Republican minority noted it was “especially apprehensive of the future political character of [Montana’s] judges,” and proposed merit selection.

Although the Montana Bar Association and leading judges supported a merit selection plan, the Judiciary Committee’s poll of nearly 500 lawyers in the state found that a slight majority favored judicial elections; over 100 members of the Montana Trial Lawyers Association favored elections by more than a two-to-one margin. Delegate John M. Schiltz, a former legislator and an unsuccessful candidate for chief justice in 1970,

## About the Author

**Anthony Johnstone is an Associate Professor at the University of Montana’s Alexander Blewett III School of Law. He teaches and writes about Federal and State Constitutional Law, Election Law, Legislation, and related subjects.**



made a case for judicial elections based on personal and political history. In Montana, he explained, “we have strong corporate influence; where, if I can elect a Governor, and through that office nominate and appoint the district and the Supreme Court judges, I can run this state. . . . I can own it.” Noting how the Anaconda Company and its former affiliate the Montana Power Company could dominate appointment processes, including the Constitutional Convention Commission itself, he concluded

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

Noted lawyer-delegate James C. Garlington argued for judicial appointment. “There is clear agreement on the part of all that we do need good judges,” he noted, “[t]he question is how to recruit them.” He suggested that campaigns make judicial office unattractive for many good lawyers because the judicial candidate “must sever himself completely from the private practice of law.”

In a series of divided votes the delegates rejected both the majority and minority proposals and adopted Article VII, section 8, whose original text suggests its complicated origins in both the minority and majority proposals. The result was the maintenance of contested judicial elections, but with a merit plan of appointment by nominees from a selection committee in case of vacancies. Based on a campaign that noted, revealingly, “[c]ontested election of judges is not changed,” the people narrowly ratified the 1972 Constitution, including the new judicial article.

Reformers were discouraged by the implementation of the compromise judicial article. Delegate Mason Melvin regretted that “the Legislature tossed the mechanics of the appointment of judges right into the political kettle” by giving the governor the power to appoint the majority of the nominating commission. Delegate Jean Bowman observed the Constitution “buckles the method of selection process,” because it “provides for neither pure election nor merit selection and, at best, constitutionalizes uncertainty in the constitution in the method of selection.” The judge for whom Delegate Bowman later clerked, Justice John C. Harrison, reached a harsher judgment: the “worst judiciary article in fifty states.” The legislature and voters appear to agree that the convention left room for improvement.

The judicial article is among the most frequently amended articles in the Montana Constitution, with voters approving all four constitutional referenda amending the article.

Notably, the convention delegates also debated an innovative plan for public financing of judicial campaigns. The Judiciary Committee proposed a section requiring the legislature to “appropriate funds for the contested general election campaign expenses of candidates for the offices of justices of the supreme court and district court judges.” Unlike the judicial selection proposal, the public-financing proposal enjoyed broad support on the committee. It recognized “the same problems we have always had” with judges running for office, including “the necessity that the judge demean himself and his position by seeking campaign funds,” the influence of lawyers’ contributions, and “the fact that the appearance of justice suffers in the process.”

The committee’s solution to these problems prompted a prescient discussion of campaign finance in judicial elections. Delegate Schiltz opened the debate on the public-financing provision, noting that the cost to taxpayers of financing judicial elections was a “pittance in view of the benefits,” including an “independent Judiciary” and assurance “that one man was not buying the job.” Looking toward a future of big-money campaigns, he warned that “this is going to come to Montana, and I can think of no other, better place to start as an experiment for a very small amount of money than on the Judiciary.” The delegates gave the public-financing proposal preliminary approval by a narrow margin, but voted later that day to reconsider the proposal. Delegate William Burkhardt reported that a lawyer friend wrote to him that he hoped it would be “well debated before its death.” So it was.

Several lawyers spoke in support of public financing. Delegate Wade Dahood argued “only the so-called ‘big boys’ can afford to support [candidates] with enough campaign funds,” and “subconsciously, at least, it has an effect upon their decision.” Delegate and Convention President Leo Graybill asked whether the delegates were “going to let the Judiciary continue to get its money to run for contested Supreme Court offices by getting it from big . . . corporations and concerns who have a lot of litigation in the Supreme Court.” To the criticism that public financing would simply relieve lawyers from funding judicial campaigns, Delegate Graybill continued by asserting that “[t]he people that it’s going to relieve is the common people who have to go to that Supreme Court occasionally against some major interest who is there constantly.”

Opponents, however, doubted that the legislature would provide sufficient funding, and asked why only the judiciary should receive public campaign financing. Delegate Joe Eskildsen, originally a proponent of the proposal, argued that “when you look for political office, then you got to expect to find your own campaign funds and to finance it yourself.” Delegate Garlington raised free speech concerns, worried that the measure would “inhibit the rights of citizen groups to take an interest in” judicial elections. Delegate William Swanberg, another lawyer, raised concerns about circumvention: “[T]he state will be on the [hook] for the basic campaign expenses, and some candidate will find some way of getting around it.” The delegates then voted to delete the provision.

Two weeks later, Delegate Rick Champoux returned to the proposal, arguing “if we don’t provide the expenses for these judges, somebody else will, and that other group will be, in the main, large companies that come before this court, whether they do it directly or indirectly.” In response, the delegates suspended the rules to reconsider the proposal, but only as applied to Supreme Court justices. This time, the delegates adopted the proposal by 55 votes to 32. All that remained was final consideration of the judicial article. The convention adopted the first 13 sections — including the compromise judicial-selection section — by wide margins. But in a final vote, the public-financing proposal fell short. What would have been a major reform of state judicial elections failed by just two votes.

### **The new normal of judicial elections in Montana**

The failure of the public financing proposal left open the door to increasingly expensive privately funded judicial campaigns. This, in turn, exposed judicial elections to the eventual deregulation of campaign finance that culminated with *Citizens United v. Federal Election Commission* in 2010. Although that case is associated with corporate speech rights — an idea already established in constitutional doctrine — it primarily holds that unlimited campaign spending cannot corrupt the political process as long as the money is not contributed directly to a candidate. The Montana Supreme Court took a lonely stand against the case in *American Tradition Partnership v. Bullock*, trying to distinguish Montana’s campaigns, including judicial campaigns, from the presidential campaign at issue in *Citizens United*. Yet Montana drew a quick rebuke from the Supreme Court. As a result, many of the legal and ethical constraints on judicial campaign speech and finance, once a realm of electoral exceptionalism respecting the distinct office of a judge, have fallen alongside their political-campaign analogues.

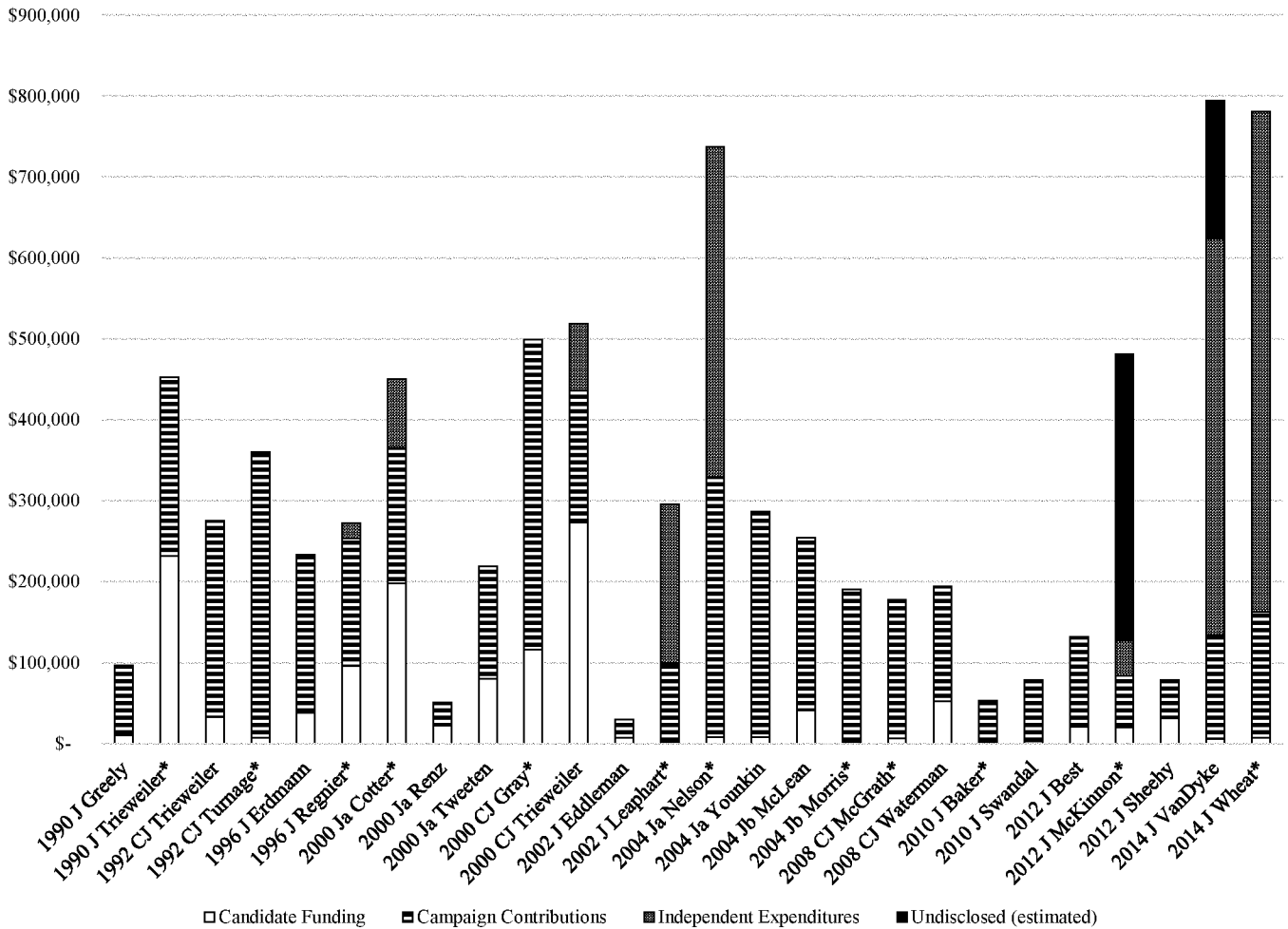
Following *Citizens United*, political parties now are as free to endorse nonpartisan judicial candidates as they are to endorse partisan political candidates. Corporations and unions now are as free to spend unlimited amounts in judicial campaigns, just as they may in political campaigns. Contributors now are free to choose their preferred levels of disclosure by selecting among candidate campaigns, super PACs, or less transparent vehicles. Careful contributors may enjoy significant influence in candidate campaigns — judicial or political — without triggering either a disqualifying conflict or even the obligation to identify themselves. Even campaign contribution limits, not at issue in *Citizens United* itself, have been lifted by a recent constitutional challenge in Montana.

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

# Financing of contested Montana judicial campaigns

The chart below shows contested Supreme Court candidate financing since 1990, in 2014 dollars. Fully disclosed candidate contributions accounted for the majority of judicial

campaign spending from 1990 — the earliest existence of detailed campaign finance records in Montana — until the U. S. Supreme Court’s 2010 *Citizens United* decision.



\* denotes winner

by term, the polarization of the political branches runs to the courts. This is the new normal in judicial elections.

Until *Citizens United*, fully disclosed candidate contributions accounted for the majority of judicial campaign spending. (See Chart 1.) Since 1990, the earliest extent of detailed campaign-finance records in Montana, the average Supreme Court candidate raised about \$139,000 overall, and \$212,000 in a contested election (all figures are in 2014 dollars). The largest source of campaign contributions in Supreme Court elections, not surprisingly, is lawyers and lobbyists, who account for nearly a third of campaign contributions. Next are the candidates

themselves, accounting for nearly a quarter of the total. On average less than six percent of campaign contributions have come from out-of-state sources. Before the rise of independent expenditures after *Citizens United*, Montana’s most expensive judicial campaign was the 2000 race between Justices Karla Gray and Terry Triewweiler for chief justice, which neared one million dollars.

Independent campaign expenditures are less transparent. Significant outside money first appeared in the competitive 2000 campaigns for chief justice and associate justice, nearly all of it from the Montana Trial Lawyers Association affiliate the Montana Law PAC. This

PAC, like most PACs, fully disclosed its contributors, who are almost entirely Montana lawyers. In the 2000 and 2002 Supreme Court campaigns, the Montana Law PAC spent around \$150,000 total on multiple candidates. In the bitter 2004 race between Justice James Nelson and state Rep. Cindy Younkin, the PAC spent as much as \$409,000, the highest amount of independent expenditures prior to *Citizens United*. Several races from 2006 through 2010 either were uncontested or did not appear to involve significant independent expenditures. As the Montana Trial Lawyers Association executive director later told the New York Times, “[i]n 2006, 2008, ‘10, ‘12, we didn’t spend

anything—nothing, zero.”

The first Montana Supreme Court campaign waged entirely after *Citizens United* came in 2012, when independent expenditures raised new questions about so-called dark-money groups. Justice Nelson announced his retirement in early 2011, noting that judicial campaigns “are expensive, time consuming and increasingly partisan.” An organization called the Montana Growth Network, founded by Republican state Sen. Jason Priest, criticized candidates Elizabeth Best and Ed Sheehy for past campaign contributions to Democrats and praised candidate Laurie McKinnon as “the only non-partisan choice for Supreme Court justice.” Judge McKinnon disavowed the outside attacks, saying “[m]udslinging diminishes the prestige of our highest court.” In 2015, an investigation by Montana’s Commissioner of Political Practices revealed the group raised \$878,000 in largely undisclosed funds, including several six-figure donations from out-of-state individuals (and their companies) with Montana property affected by then-pending stream access litigation.

The 2014 contest between Mike Wheat and Lawrence VanDyke marked the full fruition of *Citizens United* in a Montana judicial campaign. Justice Wheat had been appointed to the seat in 2010, weeks before *Citizens United* was decided. In his 2014 campaign, Justice Wheat criticized *Citizens United* and echoed traditional concerns about “outside influences” in judicial races, explaining that “[w]e Montanans have an independent attitude and we don’t want outside corporations or special interest group[s] telling us how to run our affairs.” In his challenge, former State Solicitor General Lawrence VanDyke highlighted Justice Wheat’s partisan political background. “My problem with Mike Wheat is not that he’s a liberal Democrat,” VanDyke told a reporter, “[m]y problem is he judges like a liberal Democrat.” Both candidates emphasized experience, and each criticized his opponent for a lack of it. VanDyke also won a challenge to his qualifications as a lawyer “admitted to the practice of law in Montana for at least five years,” a constitutional provision rooted in historical concerns about outsiders.

With the field set, the candidates and allied advocacy groups began what would become a million-dollar judicial campaign of national note. Surprisingly, however, the amount of campaign contributions raised by both candidates was below average for a Montana Supreme Court race. VanDyke raised \$132,999 from about 700 contributors, 22 percent of whom were lawyers. Thirty percent of VanDyke’s contributions came from outside Montana, the highest rate of out-of-state contributions for any Supreme Court candidate on record. Justice Wheat raised \$161,662 from more than 900 contributors, 53 percent of whom were lawyers. Three percent of Justice Wheat’s contributions came from outside Montana.

As state and national advocacy groups spent hundreds of thousands of dollars on attack ads, the candidates’ campaigns became bit players. On Justice Wheat’s side, the trial lawyers’ Montana Law PAC raised more than \$161,483 from trial lawyers and law firms. It transferred most of its money to a new political committee called Montanans for Liberty and Justice (“MLJ”), also primarily funded by lawyers, with smaller contributions from the MEA-MFT union PAC. In total, including in-kind contributions from the Montana Law PAC, MLJ

spent \$519,840 of independent expenditures on behalf of Mike Wheat. The contributions to MLJ, erroneously called a “dark money” group by the VanDyke campaign, were disclosed in nearly all cases down to the individual level. A third outside group, Montana Lawyers for Experienced Judges, did spend an undisclosed amount to run an online attack ad against VanDyke.

Mr. VanDyke’s side saw the unprecedented entry of a national political party in a Montana Supreme Court race. The Republican State Leadership Committee (“RSLC”) formed the Judicial Fairness Initiative Montana PAC to spend \$430,263 supporting VanDyke. Unlike the trial-lawyer groups, the RSLC PAC was funded almost entirely by lump-sum transfers from its parent organization in Washington, D.C. Americans for Prosperity (“AFP”), which reportedly spent about \$170,000 on television advertising alone, did not register with or report to the Montana Commissioner of Political Practices. Implausibly, it maintained its exemption from disclosure by purporting to be an issue ad, asking the viewer to “call Mike Wheat and tell him to keep his partisan politics out of our Supreme Court,” and providing the court’s phone number as if to invite *ex parte* public comment on cases before the court. A late entrant on VanDyke’s side was Montanans for a Fair Judiciary, led by a former executive director of the Montana Republican Party, which disclosed spending about \$60,000 raised from a handful of mostly out-of-state donors.

By the time the candidates met for a forum in September 2014, questions of campaign finance had taken center stage. Justice Wheat opened by framing his perspective on “what this race really is all about. . . . how our court may be under attack from out-of-state money, from out-of-state corporations who want to come into this state and influence who’s going to be on the court.” VanDyke responded that voters should have their “hypocrisy filter on,” saying that “[t]he issue is whether or not the trial lawyers are going to be the only ones who are spending money.” For VanDyke this was an issue of “free-speech rights of organizations to say what they believe.” Justice Wheat, on the other hand, criticized *Citizens United*, siding with his colleague and fellow candidate Justice Jim Rice, who argued that “[t]he state of Montana has a compelling interest in protecting and preserving a fair and impartial judiciary.”

As negative advertising by independent-expenditure groups increased late in the campaign, the VanDyke campaign responded to so-called “dark money groups” funded by “the same group of wealthy trial lawyers who have poured buckets of money into Montana Supreme Court elections for decades.” It criticized “shadowy groups supported by Montana trial lawyers,” claiming that “94 percent of money supporting Mike Wheat is from trial lawyers,” and that “83 percent of Mike Wheat’s lawyer donors have recently had cases in front of him.” Justice Wheat’s campaign also attacked independent expenditures, characterizing them as “[t]hese out of state corporations . . . distorting the truth about me and my record.” Criticism of his opponent was secondary to “the Koch brothers and others who want to buy my seat on the Supreme Court for an inexperienced lawyer.” His closing argument asked voters to “tell these corporations that neither your vote nor my seat are for sale.”

By the end of the campaign, estimates put total spending at

around \$1.6 million, making it the most expensive judicial race in state history. Justice Wheat had \$780,981 spent on his side, including \$162,658 in direct contributions. Nearly all of these funds were disclosed and originated in-state, mostly from lawyers. VanDyke had approximately \$794,081 spent on his side, including \$133,818 in direct contributions. While the ultimate source for most of the outside spending in support of VanDyke was not disclosed, presumably it originated almost entirely from out of state, given the dominant national funding sources for the RSLC and AFP campaigns. After nearly \$300,000 in candidate contributions and \$1.3 million in independent expenditures, the money race ended in a draw. Justice Wheat won the general election with 59 percent of the vote, with VanDyke gaining just three points since the primary election.

### Lessons from the past for the future

What most distinguishes the VanDyke-Wheat campaign from other campaigns is the extent to which the candidates and their allies openly aired usually subliminal questions of campaign finance, partisanship, and related issues. There is reason to believe that campaign finance is an especially salient issue to Montana voters. The colorful history of corporate corruption in Montana at the turn of the 20th century, which remained a powerful force shaping the 1972 Constitutional Convention, re-emerged after *Citizens United*. In 2012, Montanans overwhelmingly approved Initiative 166, a symbolic rejection of *Citizens United*, by a margin of nearly three to one. This history makes Montana a particularly uninviting target for what Montanans might consider to be out-of-state dark-money groups. Beyond this history, however, Montana's recent experience may hold policy lessons for future judicial campaigns and elections.

After *Citizens United*, any reforms to judicial elections must address the primacy of independent expenditures. For example, if a latter-day Copper King wanted to elect a latter-day Judge Clancy, there would be no need for direct contributions or even corporate independent expenditures. A direct intervention, such as an independent expenditure of \$1 million by a single litigant, may require recusal under the 2009 case of *Caperton v. Massey*. Instead, the Copper King could run his corporation's treasury funds into a trade organization, through a like-minded national party committee, and into a state affiliate, thus avoiding disclosure. The Copper King also could hedge his bets with contributions to a single-candidate Super PAC, signaling his interest in the campaign to related committees that might then double down on the race, and also signaling his support to the candidate. These maneuvers are likely to satisfy ordinary recusal standards, given the nature of "independent" expenditures and the aggregation of any one donor's contributions with others.

Because *Citizens United* opens new channels for unlimited campaign spending in judicial and political campaigns alike, there are common responses to it. These include more disclosure for big-money groups, less disclosure of smaller individual campaign contributions, and public financing for judicial campaigns. Eliminating judicial campaigns, a solution proposed by many frustrated with recent campaign finance developments, may not resolve the most important concerns about political influence in judicial selection. The trend toward increased spending in judicial campaigns presents the challenge of undue

influence, but it also presents an opportunity to revisit the ways in which campaign finance reform can mitigate, or at least not aggravate, that trend.

First, *Citizens United* actually endorsed broader campaign finance disclosure. This enables states to require more transparency from conduit organizations like the Republican State Leadership Committee's Montana-based PAC, which disclosed little more than a massive contribution from its parent organization's aggregation of corporate funds. Improved disclosure is important not because it enables recusals at the courthouse—though it may in extreme cases—but because it enables rejoinders on the campaign trail. On both sides of the VanDyke-Wheat campaign, the candidates and even the Super PACs used campaign-finance disclosure to make each side's financial supporters a central issue in the campaign. At the other end of the money race, higher disclosure thresholds for small donors could boost the influence of constituents and practitioners who know the candidates best. Judicial candidates already start with relatively narrow donor bases, leaving campaigns dependent on outside spending by a few large donors. In a million-dollar campaign, an anonymous contribution of a \$100 poses little risk of corruption, but enough of them will go a long way toward countering outside spending.

Second, one of the most important ideas to come out of Montana's 1972 Constitutional Convention, in concept if not in law, is limited public financing of judicial elections. Any new proposal for public financing must take care not to limit expenditures or penalize candidates who self-fund or benefit from independent expenditures. It also must minimize the risk of strategic exploitation. Preserving an independent judiciary, an original purpose of judicial elections, may justify the public expense necessary to finance judicial candidate campaigns. As delegates argued in 1972, there are significant distinctions between judicial campaigns and other political campaigns; these differences might draw even those generally opposed to public financing to support it for judicial elections. While a million dollars of outside money looks expensive compared to prior judicial campaigns in Montana, a million dollars of "inside money" in the form of public funding could be a bargain if it helps secure judicial independence.

There is a final option that would be unthinkable for other public offices: abolish judicial elections by constitutional amendment. It has been decades since voters in any state surrendered their power to elect judges. In light of the origins of judicial elections as a response to political appointees, abolitionists might be careful what they wish for. A critic of *Citizens United* — on grounds that undue influence is far more pervasive than the U.S. Supreme Court acknowledged — also must recognize that appointive selection concentrates that influence on the appointer. The federal model of executive appointment and legislative confirmation for life terms only raises the political stakes. The stakes would be even higher for state judges whose general jurisdiction and common law powers allow them a greater impact on state electorates than their federal counterparts. Moreover, merit selection still requires retention elections that threaten to compromise judicial independence, such as the



**Roland Graham**

Roland "Rollie" Graham died on July 30 at the age of 86 in Helena.

Rollie was born in Minneapolis on May 12, 1930, to Arthur George Graham and Amelia Martina Bille Graham.



Graham

He attended and graduated from the University of Minnesota with a degree in Business Administration, during which time he served in ROTC.

In 1952, he began two years of active duty in the United States Navy as an ensign, and spent 10 months patrolling the waters off of Korea during the Korean conflict. Upon his return from active duty, he married Shari Jones. After he completed his final year of active service in San Diego, he spent the next three years attending the University of Minnesota School of Law, serving on the Law Review, and graduating with a juris doctorate in 1957.

Rollie practiced law in Minnesota and Wisconsin until 1999, working as counsel for the Milwaukee Railroad, the Federal Reserve Bank of Minneapolis, and the First Wisconsin Holding Company. He moved to Helena with his daughter and son-in-law, Sue and Gabe Woodrow, and eventually becoming bored with retirement. Missing the practice of law, he sat for the Montana bar exam. At the age of 72, Rollie was proudly admitted to the Montana State Bar. Shortly after, he began a 10-year "second" law career as of-counsel with the law firm Gough,

Shanahan, Johnson & Waterman in Helena, finally retiring at age 82.

Rollie loved the practice of law but, even more so, he loved his family and cherished his friends and colleagues. Special memories are of camping; summers spent boating, fishing, and water skiing; years of piano, trumpet and percussion recitals, band and choir concerts, and dance recitals; Boy Scouts and coaching little league baseball games and watching synchronized swimming and school theater productions; winter skiing in Colorado and Montana; cross country skiing in the Twin Cities' parks; bicycling in the Upper Peninsula; family road trips to Texas, Montana, and Alberta, Canada; golfing; and even a few brief years attempting to master photography. He was a role model, willing audience and constant friend to grandchildren Graham and Lauren who were privileged to have Grandpa ever present as they were growing up.

During these years, Rollie gave back generously to the community with his time and talents. When his family was young, Rollie served in the Optimist Club setting up and manning Christmas tree lots for several years. He found great satisfaction and joy as an active member of Rotary Club, first in Minneapolis for a number of years, and then in the Rotary Club of Helena from 2002 until his passing.

He was buried with military honors at Montana State Veterans Cemetery. In lieu of flowers, memorials may be made in Rollie's name to the Helena Rotary Foundation, P.O. Box 333, Helena, MT 59624. Please visit [www.retzfuneralhome.com](http://www.retzfuneralhome.com) to offer a condolence or to share a memory of Rollie.

**Judicial** from page 17

2010 ouster of three Iowa justices — led by outside campaign spending — after its Supreme Court recognized a right to same-sex marriage. To use the hydraulics metaphor sometimes applied to campaign finance, it seems safe to say that, like water or money, political influence will find its way through any judicial-selection landscape.

**Conclusion**

Montana's judicial elections reflect a

territorial suspicion of outside influence, a progressive-era concern about corporate corruption, and extraordinarily deep deliberation among ordinary citizens about competing models for judicial selection in the framing of its 1972 Constitution. The result is a hybrid selection model sharing elements of contested election, retention election, merit, and (with strong gubernatorial representation on the nominating commission) straight appointment models. After the invalidation of its partisan endorsement prohibition in the wake of *Citizens United*, Montana now shares some

elements of a partisan-election model, for better or worse. This prompted a vigorous public debate, in the context of the campaign between Mike Wheat and Lawrence VanDyke, about the Montana Constitution and *Citizens United*, the influence of trial lawyers and corporations, and the merits of electing judges at all. The campaign did not settle that debate, of course. Instead, it raised old questions about judicial selection in a new era of campaign finance. In 2016, as in 1866, 1972, and 2014, those questions continue to call for answers.

**406-683-6525**

**Montana's Lawyers Assistance Program Hotline**

Call if you or a judge or attorney you know needs help with stress and depression issues or drug or alcohol addiction .