Chapter

INEQUALITY, ACCESS TO THE COURTS, AND JUDICIAL INTEGRITY

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ABSTRACT

Because political conflicts inevitably become legal conflicts, judicial integrity is an essential element of any system that protects civil rights and civil liberties. Judges must be willing and able to defend the politically powerless from oppression and exploitation. In this chapter, we argue that mass inequality in capitalist nations, particularly the United States, poses a substantial threat to judicial integrity. First, we document the development of a two-tiered system of civil justice that effectively reserves courtrooms for the haves and prevents have-nots from accessing the courts. Second, we maintain that the widespread practice of judicial elections, which appears to make justice a commodity, undermines public trust and potentially corrupts judicial behavior. Finally, we note that organized interest groups are beginning to extend their influence beyond the US Supreme Court by filing amicus curiae briefs in other courts, including state supreme courts, to the detriment of the unorganized masses. For these reasons, we believe that growing inequality presents a serious challenge to judicial integrity in capitalist countries and hope to draw attention to this problem.

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INTRODUCTION

Because political conflicts inevitably become legal conflicts, access to a fair, independent judiciary is essential to upholding civil rights and civil liberties. Judges must be willing and able to defend politically powerless members of society from oppression and exploitation. International human rights norms recognize the human right to equality and non-discrimination before the courts and the right to fair and public hearings by independent, competent, and impartial tribunals. The *Universal Declaration of Human Rights 1948*, which represents the classic international statement of human rights, endorses equality before the law and the right to have civil rights claims and criminal charges fairly adjudicated by competent courts[1]. Under international soft law, judicial independence requires, at a minimum, that judges decide matters impartially, without being improperly influenced, and that the method of selecting judges safeguards against improper appointments[2].

In the United States, access to an independent judiciary is seen as "conservative of all other rights … the foundation of orderly government"[3]. Courts potentially serve as a great equalizer; money and power may dominate ordinary politics, but no man is thought to be above the law. Indeed, the US Supreme Court has declared: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has"[4]. While there is much to applaud in the modern judiciary's defense of civil rights and civil liberties, we believe economic inequality presents a serious challenge to judicial integrity and hope to draw attention to several dimensions of this problem.

By almost any measure, economic disparity between economic elites and the masses is significant and increasing in the US and in most industrialized nations (Bartels, 2009; Piketty & Saez, 2014). This ominous trend has important implications for the judicial process: economic inequality affects which cases judges hear, which interests are heard, and the incentives judges have to make particular decisions.

These problems are particularly severe in state court systems with elected judges. What happens to the administration of justice when resources are limited and judges are elected? Judges cannot devote their full attention to all cases; they must prioritize the resolution of some cases over others. As we discuss in this chapter, there is some evidence that judicial integrity is compromised by electoral incentives. Viewed from the perspective of electoral value (rather than legal merit), some cases have more electoral value than others do and some decisions are more politically popular than other decisions are. To maximize return on limited judicial resources, courts endeavor to please their best clients, rather than defend the most vulnerable

[1] *Universal Declaration of Human Rights 1948*, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), Art. 7, 8, and 10. The international community also recognizes the rights to equality and non-discrimination and to have claims heard by impartial judges in the *International Covenant on Civil and Political Rights 1966*, 999 United Nations Treaty Series 171, Art. 2(1) and 14(1), the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*, European Treaty Series 5, Art. 6(1) and 14, and the *American Convention on Human Rights 1969*, Organization of American States Treaty Series, No. 36, Art. 8 (1), 24, and 25(1).

[2] *Basic Principles on the Independence of the Judiciary*, adopted by Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.121/22/Rev.1 (1985), endorsed by G.A. Res. 40/32, U.N. GAOR, 40th Sess., Supp. No. 53, at 204, U.N. Doc. A140/53 (1985). See particularly Art. 1, 2, 4, 6, and 10.

[3] Chambers v. Baltimore and Ohio R.R., 207 US 142, 148 (1907).

[4] *Griffin v. Illinois*, 351 US 12, 19 (1956).

members of society. Increasingly, courts are operated like a for-profit business rather than a public service.

In this chapter, we argue that economic inequality poses a substantial threat to access to the courts and judicial integrity. First, we document the development of a two-tiered system of civil justice that effectively reserves courtrooms for the haves and prevents have-nots from having their claims fairly heard. Second, we maintain that the widespread practice of judicial elections, which appears to make justice a commodity, undermines public trust and potentially corrupts judicial behavior. Finally, we note that organized interest groups are filing more amicus curiae briefs in state supreme courts to the detriment of the unorganized masses.

TWO-TIERED CIVIL JUSTICE SYSTEM

In this section, we outline the contours of a two-tiered system of justice in the United States. A number of relatively recent developments have limited the ability of ordinary citizens and consumers to exercise their traditional right to have their cases heard by judges and juries. Having civil disputes resolved by the judicial system is increasingly a privilege reserved for economic elites. The great mass of ordinary cases is now subject to an array of devices that preclude litigation or compel individuals to settle in the shadows of the legal system.

Some of the implications of economic inequality on access to justice are relatively well documented, particularly with respect to criminal justice. It has been shown that poor defendants frequently stay in jail awaiting trial because they are unable to post bail; as a result, they cannot assist in the preparation of their defense and are more like to be convicted and sentenced (Neubauer & Meinhold, 2012). Public defenders are chronically underfunded, poorly supervised, and crushed by staggering caseloads (Udell & Diller, 2007). As a result of these and other factors, "it is often better to be rich and guilty than poor and innocent" (Rhode, 2001, p. 1790). Without discounting the seriousness any of these issues, we want to draw attention to some of the implications of inequality on civil justice, such as limited access to legal representation, the proliferation of mandatory arbitration provisions, and procedural devices to manage judicial workload.

Although the US has more lawyers than other country in the world, the legal needs of most Americans are not served. It is estimated that four-fifths of the civil legal needs of poor Americans is unmet as is roughly half of the civil legal needs of middle class Americans (Rhode, 2001; Udell & Diller, 2007). It is hard to reconcile the fact that many recent law school graduates are unemployed with the fact that most individuals pursue claims without representation, unable to hire attorneys (Hadfield, 2010). This mismatch between the supply of and demand for lawyers has profound consequences for daily living. "For people of limited financial means," Udell and Diller (2007, pp. 1129-1130) "access to an attorney can be the difference between losing a home or keeping it, suffering from domestic violence or finding refuge, succumbing to illness or obtaining a cure, remaining hungry or securing food, or languishing in prison or reuniting with family and community." Most people face these crises alone. As the economic standing of the middle class erodes, we should expect these unmet legal needs to increase.

Although states are required to provide attorneys to poor criminal defendants, indigent civil litigants have no comparable right to an attorney (Rhode, 2001). For example, poor parents are

not entitled to court-appointed attorneys when the government files suit to terminate parental rights and take their children away from them (although it is hard to imagine a more severe state sanction)[5]. According to the Supreme Court, due process may require appointing counsel in very specific circumstances, but it recently held in *Turner v. Rogers* that an indigent defendant is not entitled to counsel when he faces incarceration as a result of contempt of order to pay child support[6]. Some states provide poor parties counsel in select civil cases, even though not required to do so by federal law; nevertheless, the right to counsel in civil cases is not widely recognized at the state level (Davis, 2012).

Access to quality legal representation plays a particularly important role in responding to domestic violence. Legal representation can help victims achieve some measure of safety and security in order to leave their abusers. However, victimization is generally regarded as a private, civil matter for which there is no right to an attorney. According to Abel and Rettig (2006), New York is the only state that guarantees counsel in domestic violence proceedings. In fact, in domestic violence cases, *abusers* are entitled to legal representation (despite minimal risk of incarceration) while *victims* are expected to navigate the legal process alone (Rhode, 2001). In some jurisdictions, legal aid may be available to assist in filing a temporary protective order, but legal aid budgets are limited and legal aid lawyers, limited by restrictive regulations.

As discussed above, middle and working class individuals frequently must represent themselves in court. Self-representation is on the rise, but judges show reluctance, and even hostility, toward *pro se* litigants. In courts of limited jurisdiction, like specialized courts for housing disputes and small claims courts, most parties are self-represented, but even these courts, Rhode (2001, p. 1804) observes, "have been designed by lawyers, and courts have done far too little to make them accessible to the average claimant." According to Rhode (2001, p. 1806), "[s]ome courts are openly hostile to unrepresented parties, whom they view as tying up the system or attempting to gain tactical advantages." Judges lose patience for *pro se* litigant's rambling statements and unfamiliarity with standard courtroom procedures (Engler, 1999; Goldschmidt, 1998; Van Wormer, 2007). Based on an extensive study of a specialized housing court in Baltimore, Engler (1999, pp. 2015-2016) observes, "some judges do not simply deter unrepresented litigants, they silence them." Proceeding *pro se* in a family law matter involving domestic violence is particularly challenging because judges view these cases as toxic with no practical, legal solutions. Even judges who are sympathetic to the plight of unrepresented parties may be reluctant to antagonize lawyers by improving *pro se* assistance; judges may view the support of local lawyers as critical to re-election campaigns and professional advancement (Rhode, 2001). Civil litigation, for Americans of ordinary means, is an overwhelming burden.

Another factor limiting access to courts is the proliferation of binding arbitration provisions in agreements frequently entered into by individuals. Traditionally confined to specialized industrial agreements, arbitration provisions are now found in a wide variety of contracts. According to Sternlight (2005), mandatory arbitration terms spread into all types of contracts as a result of a series of favorable Supreme Court decisions in the 1980s and 1990s. It is estimated that over twenty-five percent of the US workforce and more than a third of significant consumer transactions are now subject to mandatory arbitration (Demaine & Hensler, 2004).

[5] See *Lassiter v. Dept. of Social Services*, 452 US 18 (1981) (poor, incarcerated mother not entitled to attorney when state seeks termination of parental rights).

[6] 131 S.Ct. 2507 (2011).

When a consumer or employee signs an agreement with a binding arbitration provision, he or she gives up the right to trial and consents to have any claims arising out of the agreement resolved by a private company (typically selected by the author of the agreement) before any dispute or disagreement actually occurs.

Arbitration is not necessarily inferior to litigation. It is particularly appealing when parties knowingly agree to it after a dispute arises. For example, in the domestic relations context, arbitration can help parties limit risk, protect privacy, and reduce costs compared to traditional litigation (Edwards, 2008). The "creeping" use of binding arbitration in standard consumer and employment agreements is problematic insofar as it creates a lesser system of civil justice for consumers and employees. Researchers have documented repeat player advantages in arbitration (Colvin, 2011). Arbitration provisions may also limit the remedies available to injured parties. For example, mandatory arbitration agreements now frequently include collective action waivers. When collective action waivers are used, the individual gives up his or her right to join with others to pursue a collective remedy (Udell & Diller, 2007). This practice is particularly troubling with respect to consumers' rights because collective action may be the only way to effectively overcome the cost of arbitration. The Supreme Court recently endorsed the use of collective action waivers in mandatory arbitration provisions so we can expect to see them in greater use[7]. These terms may seem unfair and unreasonable, but individuals have no real power to bargain over terms when they sign up for phone service or start a new job (Sternlight, 2005). The individual's only option is not to engage the corporate marketplace, but the consolidation of wealth and market share in our winner-take-all economy makes that option increasingly unrealistic. The only real limitation on mandatory arbitration provisions imposed by corporations is a rarely-enforced probation on unconscionable terms[8]. For these reasons, we should view mandatory arbitration as one of the main features of a two-tiered civil justice system.

Rather than adequately fund state courts or reduce the volume of criminal prosecutions, most states have implemented procedural barriers to make it more difficult for individuals to have civil cases heard by a judge or jury. The US Constitution guarantees criminal defendants the right to a speedy trial but no such right exists in civil cases. An injured person, defrauded consumer, or parent seeking child support may not have their complaints heard for months or even years (Grossi, Mills, & Vagenas, 2012). Procedural devices designed to manage judicial workload may appear to promote efficiency, but closer examination reveals that they significantly burden ordinary individuals' access to courts. We'll look at two examples: tort reform and mandatory mediation.

Responding to a perceived "litigation crisis," most states have enacted tort reform legislation (American Tort Reform Association, 2015). Among the most significant reforms are heightening the requirements for filing certain personal injury claims, particularly medical malpractice actions. In many states, prospective plaintiffs are now required to retain expert witnesses to testify by way of affidavit before conducting any discovery in order to commence a lawsuit (Brown & Lomurro, 2014; Papailiou, 2013). These pleadings requirements significantly raise the cost of pursuing claims, forcing many individuals to settle for modest recovery or abandon their claims entirely.

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[7] See *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (US 2011).

[8] See, for example, *Washington Mutual Finance Group v. Bailey*, 364 F.3d 260 (5th Cir. 2004), where the Court held that illiterate individuals have a duty to read small print arbitration terms or have them read to them to independently verify bank employees' assurances they were just signing "insurance and finance papers."

Another procedural requirement that falls particularly hard on ordinary individuals is the widespread adoption of mandatory mediation in state courts. In many jurisdiction, parties are required to attempt to settle their disputes by working with a neutral, third-party mediator (usually paid by the parties) before they can bring their dispute to trial. The cost of mediation to private parties is significant. How much does it cost to produce a mediated settlement? According to Edwards (2013), private parties in a typical Georgia state court mediation program paid approximately $1,850 per session (including average mediation and attorney hourly rates). While the cost of mediation may be relatively small in the context of complex, corporate litigation, it is significant in ordinary civil matters. Eaton, Talarico, and Dunn (1999) found that the median award in civil jury trials in Georgia was $7,859 and in bench trials, $17,606. The private costs of mandatory mediation may represent 10-25% of the total expected value of a typical tort case. Given the roughly 50% chance of mediated settlement, typical settlements may not warrant the expected private cost of mediation. As a result, many parties decide the price is too high after receiving a notice to mediate and are forced to settle (Edwards, 2013). In some cases, requiring mediation is a monetary sanction on parties who wish to pursue legal recourse (Dayton, 1991).

The problem is that mediation in state courts is frequently both mandatory and expensive[9]. If courts were to encourage voluntary mediation or provide mediation services at no cost to parties, the danger of coercing settlement by raising litigation costs would be lessened. A court's order to mediate as a precondition to trial limits parties' access to the court system and forces them to negotiate privately, largely unfettered by the rules of law.

THE COST OF JUDICIAL ELECTIONS

State courts have never seen quite the level of independence granted to federal courts. From the very beginning, judges were essentially subservient to the wills of the executive and legislative branches of state governments, which had appointed them to office in the first place (Croley, 1995). If judges issued rulings contrary to the taste of state legislators, it was not uncommon for the legislature to respond by removing judges from office, cutting their terms of office, or even charter new courts (Shugerman, 2012).

In the 1830s, the State of Mississippi, seeking in part to reduce the dependence of judges on the legislative and executive branches, transitioned from a purely appointive method of judicial selection to a purely elected method. By 1860, twenty-one out of thirty states in the Union elected their judges. This, Hall (1983) writes, was not done out of "emotional" support for democratic principles, but because moderates at the time felt strongly that judicial elections, if properly regulated, would enhance the "power and prestige" of the judiciary.

Judicial elections have evolved significantly since then. Progressives, eager to trim the power of "party bosses," pushed the idea of nonpartisan judicial elections, which was an idea quickly embraced by a number of states. Concerns about voters' ability to make an informed decision without partisan cues, however, persuaded a few states to move back to partisan elections. An apparent solution was discovered in 1940, when the State of Missouri

[9] Alternative dispute resolution in the federal court system is different than ADR in state courts. Referrals to ADR are often voluntary in US District Courts, or made on a case-by-case basis. Frequently, federal magistrates serve as mediators, which substantially reduces the cost borne by litigants.

implemented a method of selection that merged appointment and elections—while judges would be appointed, they would also face retention elections every few years. The idea was to combine judicial independence and democratic accountability in one system (Streb, 2007).

Today, we face a complex map of state judiciaries that serves as a telling metaphor for federalism—different states, acting with their constitutional authority to develop different systems, have developed different methods of selection and retention for judges. Thirty-nine out of fifty states utilize some method of judicial election, which represents ninety percent of all state judges. Even within judicial elections, there is a great deal of variety—nonpartisan, partisan, and retention elections—which gives states the ability to concoct a combination of multiple selection methods (Streb, 2007).

The nature of contemporary judicial elections leaves much to be desired—uncontested elections, pervasive voter apathy, and third-party expenditures all threaten the fabric of judicial elections, and in turn, the integrity of the judiciary. Levenson (2014) argues that when voters have no way to make an informed decision, they "tend to vote based on factors that have little or no bearing on a candidate's qualifications," specifically calling attention to anecdotal examples of "qualified sitting judges with foreign-sounding last names being defeated by less-qualified or unqualified challengers with Anglo-Saxon sounding names."

Over the last few decades, spending on judicial elections has increased substantially. The Brennan Center for Justice reports that campaign fundraising, which was $83.9 million from 1990 to 1999, increased to $206.9 million from 2000 to 2009. Where has most of the money gone? Television advertisements. From 2000 to 2009, $93.6 million was spent on television advertisements alone, more than was raised in the entire preceding decade (Sample, Skaggs, Blitzer, & Casey, 2010). A subsequent report noted that a large part of the explosion in spending in judicial elections was driven by independent expenditures, which, they note, often led to "less transparent and more negative races" (Bannon, Velasco, Casey, & Reagan, 2013).

What is particularly troubling about the rising cost of judicial elections is that judges' decisions appear to be swayed by the necessities of modern judicial campaigns. "In too many states," observed Former Supreme Court Justice Sandra Day O'Connor, "judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution" (Sample et al., 2010, p. 4). Consistent with O'Connor's observation, there is mounting evidence that elections undermine the integrity of the judiciary; as one might expect, judges appear to act in manner that advances their ability to raise campaign contributions and win re-election:

- The *New York Times* found that Ohio Supreme Court justices voted in favor of contributors approximately seventy percent of the time, with one justice voting in favor of contributors over ninety percent of the time (Liptak & Roberts, 2006).
- A 2008 study found that in cases where there was a single donor appearing before the Louisiana Supreme Court, justices voted for their contributor approximately sixty-five percent of the time. When both parties before the Court were campaign contributors, the justices were significantly more likely to take the position of the party who had given them more contributions (Palmer & Levendis, 2008).

While democratic accountability is frequently viewed as a virtue of judicial elections, the electoral connection potentially undermines a judge's ability to protect vulnerable members of society from oppression and exploitation. High court justices who issue controversial rulings

on divisive social issues oftentimes see electoral retribution following public campaigns against them. California Supreme Court Justice Rose Bird serves as one of the first (and best) examples of this occurrence. Bird, who was appointed to the Supreme Court by then-Governor Jerry Brown, was strongly opposed to capital punishment, and consistently struck down death penalty sentences. When she faced a retention election in 1986, television advertisements featuring the parents of murder victims were used against her. In the end, she—and two of her colleagues—were removed from the Supreme Court by an overwhelming majority of California voters (Lindsey, 1986). Tennessee Supreme Court Justice Penny White, like Bird, faced electoral consequences for her tenure on the Court, but unlike Bird, only issued one ruling that voters found problematic. In *State v. Odom*, White ruled to uphold the defendant's conviction, but struck down the death penalty sentence[10]. The response was swift—in a retention election held later that year, she was targeted by conservative interest groups and the state's Republican politicians, and ended up losing her seat (Bills, 2008).

To win elections, judges frequently run on platforms that emphasize their "tough on crime" attitude (Thompson, 2014). These campaign promises are troubling because they commit judges to a course of action rather than judging each case on its individual merits[11]. Consistent with these expectations, the influence of elections on judicial behavior is perhaps most evident in the field of criminal law where judges are expected to perform the often unpopular task of upholding the rights of particularly powerless members of society.

- Huber and Gordon (2004) found that as elections draw closer, sentencing of defendants becomes significantly more severe.
- A study conducted by the American Constitution Society for Law and Policy, in conjunction with the Emory University School of Law, found that, as the amount of television advertisements airing in high court elections increases, "the less likely justices are on average to vote in favor of criminal defendants" (Shepherd & Kang, 2014).
- The Equal Justice Initiative found that, in Alabama, judges are significantly more likely to sentence criminal defendants to death, overriding jury decisions that would have sentenced the defendants to life imprisonment, in election years (Equal Justice Initiative, 2011).

Regardless of whether one supports getting tough on crime, the impact of elections on judges' behavior is disturbing for two reasons. First, elections produce inconsistency. The length of a defendant's sentence depends on the electoral calendar, rather than the seriousness of the crime, defendant's criminal history, or other legitimate sentencing factor. At a minimum, judicial integrity requires consistency. Second, legislatures already express the public's desire for tough criminal sanctions. It is important that the judiciary check and balance the legislature to maintain the rule of law.

The US Supreme Court addressed some of these issues in *Caperton v. A.T. Massey Coal Co.* in 2009[12]. In 2002, Caperton was awarded $50 million in compensatory and punitive

[10] 928 S.W.2d 18 (Tenn. 1996).

[11] According to former Supreme Court Justice John Paul Stevens, "[a] campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a candidate from sitting in criminal cases" (Bright, 1997).

[12] 556 US 868 (US 2009).

damages by a jury in West Virginia. Massey appealed the ruling to the West Virginia Supreme Court of Appeals immediately thereafter, but before the Court could hear the appeal, several of its members were up for re-election in 2004. One of the justices was Warren McGraw, who was opposed by private practice attorney Brent Benjamin. Massey formed a political action committee to support Benjamin's candidacy, and spent nearly $3 million on television advertisements attacking McGraw for allegedly being "soft on crime." The campaign to unseat McGraw worked—Benjamin ended up defeating him with 53% of the vote and took his seat on the Supreme Court of Appeals. Then, when hearing Massey's appeal, Benjamin joined a 3-2 majority on the Court to reverse the jury's settlement against Massey. Caperton filed several motions to have Benjamin disqualified, but in a twist of irony, Benjamin himself reviewed the motions and denied all of them (Todt, 2011).

Caperton filed an appeal to the United States Supreme Court, which granted certiorari and heard the case. In a 5-4 opinion authored by Justice Anthony Kennedy, the Court held that it was a violation of the Fourteenth Amendment's Due Process Clause for a judge with a demonstrated conflict of interest to not recuse himself. According to Kennedy, "There is a serious risk of actual bias … when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent"[13].

While it is difficult to prove that someone like Brent Benjamin is actually biased in favor of campaign contributors, there is something unsettling about marketing and promoting judicial values to raise campaign contributions and win elections. Research suggests that the "political prizefight" nature of modern judicial elections, prominently featuring negative television advertising, tends to corrode public confidence in the judiciary (Gibson, 2008, 2009). We believe that judicial elections, which are almost unknown outside of the United States, tend to degrade judges' integrity, reducing justice to a commodity beholden to opinion polls and campaign contributions[14].

INTEREST GROUP INFLUENCE

When a case is heard by a state supreme court or the US Supreme Court, the focus is typically on the parties named in the lawsuit. However, there are often third parties operating in to influence the outcome of the case. These parties are called amicus curiae, or "friends of the court." These "friends" can range from interest groups, to states, to government officials who are either asked by the court or choose on their own to file a brief in a case.

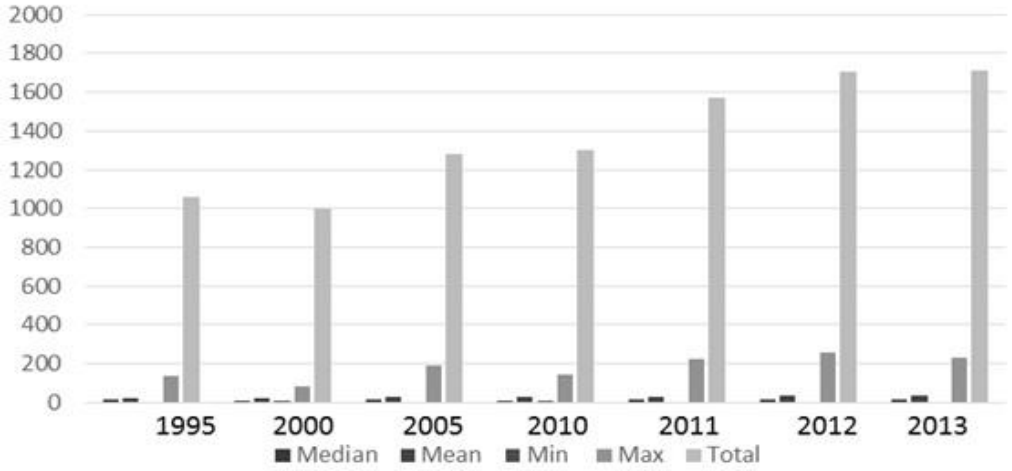
Amicus Curiae, translated to be "selfless servant of the court," like most of American legal traditions, evolved out of early English common law (Flango, Bross, & Corbally, 2006, p. 181; Samuels, 2004). Samuels (2004) reports evidence of amicus participation in Ancient Rome, where the briefs were used for informational purposes. The first amicus brief to be submitted to the United States Supreme Court was filed in a dispute over land titles on behalf of the State of Kentucky by Henry Clay (Samuels, 2004). The Court did not permit *private* interest groups to submit amicus briefs until the 1900's (Samuels, 2004). It was also during this transitional time that amicus briefs became more adversarial and less neutral (Krislov, 1963). During the

[13] 556 US at 884.
[14] Some Swiss cantons elect judges and Japanese Supreme Court justices face periodic retention elections.

1940's special interest groups such as the NAACP and the ACLU began to promote their causes in the courts as both litigants and amici. For example, in *Brown v. Board of Education*, 347 US 483 (US 1954), there was an amicus brief that used social scientific data to describe the ills of racial segregation (Samuels, 2004).

Amicus participation at the Supreme Court of the United States (SCOTUS) has increased by over 800% in the past 50 years (Kearney & Merrill, 2000). There have been similar increases in state courts of last resort (Corbally, Bross, & Flango, 2004). The rise in amicus brief filings in state supreme courts is significant because state courts are becoming centers of policy due to their status as courts of last resort for many litigants. Interest groups, and other groups with policy agendas, are realizing this importance and acting accordingly by participating at greater rates as amicus curiae.

The primary purpose of amicus briefs is to provide courts with additional information of some type (Comparato, 2003; Flango et al., 2006; Munford, 1999; Spriggs & Wahlbeck, 1997). According to Flango et al. (2006), amicus amplify or supplement the legal and factual arguments presented by the litigants, emphasize the broader consequences of the potential ruling, and their mere presence emphasizes the importance of the legal issue at hand. Amicus curiae participation also alerts courts that certain cases are politically, socially, or economically significant (Caldeira & Wright, 1990). In her in-depth analysis of amicus curiae briefs in right to privacy cases, Samuels (2004) asserts that amici effectively supplement information parties provide to courts. Unlike the litigants, the amici may be willing to take the political or tactical risk of making a particular argument that one of the legal parties declines to make. Highly technical arguments may be given more credibility if presented by an amici with expertise in a particular field.



Note: Volume of filings measured by number of cases containing at least one amicus brief; median, mean, min, and max refer to level of activity in individual states.

Figure 1. Amicus Filings in State Supreme Courts, 1995-2013.

If amicus filings by interests groups simply helped courts better understand complex issues, their growing influence in appellate litigation at the state and federal levels would not be troubling. Like lobbyists in the nation's legislatures, however, organized interest groups file amicus briefs to influence courts to make decisions in their favor (Banner, 2003; Collins, 2007;

Collins & Martinek, 2010; Samuels, 2004). Not surprisingly, amicus briefs are often filed on behalf of organized business interests that can afford to file them (Caldeira & Wright, 1990). As a result, the information presented to courts by way of amicus briefs may be leading and lopsided, advancing the particular interests of vested economic interests rather than the cause of ordinary individuals.

Although existing research on amicus activity in state high courts is limited, scholars have analyzed the levels of participation, the key players involved, and amici influence on judicial decision-making (Comparato, 2003; Corbally et al., 2004; Epstein, 1994; Flango et al., 2006; Songer & Kuersten, 1995).

The available evidence suggests amicus briefs filed by interests groups do influence state supreme courts:

- Songer and Kuersten (1995) studied the success of litigants who are supported by amicus at the merits stage, comparing judges' votes in similar cases with and without amicus support. Their results indicate that amicus support does have a significant influence on litigant success at the merits stage.
- Samuels (2004) finds that even though amicus participation in the state courts is considerably lower than in federal courts, amicus briefs filed in state courts are frequently cited.
- Based on a survey of Chief Justices and appellate court clerks, Flango et al. (2006) report that amicus curiae briefs at the state court level are generally viewed favorably.

While the direct influence of amici on judicial decision-making is striking, it is important to note that these interests groups may also exert a powerful indirect influence on judicial decisions. As discussed in the preceding section, many high court justices are elected in highly contested partisan races. As a result, state supreme court justices, concerned with their electoral support, will tend to support those litigants and third parties who control their livelihood (Comparato, 2003). Interest groups donate large sums of money to judicial candidates. It is rational to assume that individual justices who receive campaign donations from amicus curiae, in either a selection or retention election, will be more likely to side with these amici as well as include amicus language in their judicial opinions. Justices may be ethically obligated to recuse themselves from hearing a case if they have received significant campaign donations from a party, but no such prohibition applies to interest groups participating as amicus curiae. The presence of amici in a case can be used as a surrogate for salience, or the importance of the case to the general public, a measure that is hard to find when comparing across the states. The presence or absence of an amicus brief in a case, as long as the state filing requirements are taken into consideration, can offer the state court justices a measure (even if informal) of the potential impact and reach of a particular ruling.

While these indirect effects of interest group activity are somewhat speculative and are subject to ongoing research (Trochesset, 2014, 2015), we think there is some evidence that interest groups are leveraging judicial elections to influence state supreme courts. If judicial elections make some high courts particularly susceptible to interest group influence, interest groups should concentrate their amicus filings in jurisdictions with judicial elections. Consistent with this view, states with the lowest amicus participation are also from states without partisan elections of their justices. For instance, three states with political appointments

have a mean amicus participation rate of just one or two cases with amicus per year. It is notable that of the top ten states for amicus participation, four are states where judges are selected via partisan elections (Michigan, Ohio, Pennsylvania, and Texas). Although these do not claim causation, they do highlight the possible variables at play in the role of interest group influence on state courts of last resort. In this light, increasing interest group activity by way of amicus curiae briefs in state supreme courts is a troubling development for individual appellants. When parties of ordinary means are able to overcome numerous obstacles and have their claims heard by a state supreme court, there may be an outside interest group working to tip the scales in favor of organized, business interests.

CONCLUSION

In this chapter, we have attempted to draw attention to several problems economic inequality raises for access to justice and judicial integrity. In our view, these problems undermine our capacity to protect civil rights and civil liberties.

It seems unrealistic to suggest that the answer to these problems lies in eliminating economic inequality or fully funding the right to counsel in all cases. Rather than eliminate inequality to solve its effects on the judicial system, we ought to focus on ways to reduce how much of a difference wealth and income make on court outcomes. One of the main problems is that court-based processes are too costly and complicated for most individuals to navigate. States should make procedures for frequently litigated claims as simple and straightforward as possible and consider amending rules regulating the unauthorized practice of law (Barton & Bibas, 2012; Hadfield, 2008). To some extent, alternatives to traditional litigation, like arbitration and mediation, were intended to provide simpler, more efficient dispute resolution methods, but they are quickly becoming second-rate solutions for ordinary individuals. Courts should consider whether these alternatives are fair in practice or impose unreasonable, coercive costs on individuals.

We would also suggest reducing the unsavory influence of money on judicial selection and decision-making. One possible solution is the abolition of judicial elections in favor of nomination commissions and merit appointments (Riggs & Gillette, 2015). Another possible solution is public financing of judicial elections to eliminate any special interest influence (via campaign contributions) on the elected judges. With respect to interest groups influencing appeals courts through amicus curiae briefs, courts should consider actively soliciting input from non-profit organizations to counterbalance the influence of special interest groups, or perhaps requiring prospective amici to demonstrate the need for their participation in a given appeal.

We cannot provide definitive solutions to the problems that economic inequality presents to access to the courts and judicial integrity. There are multiple contributing factors and the problem affects different types of cases at multiple levels of the judicial system. Although our contribution is primarily to draw attention to several aspects of the problem that have not been widely discussed, we hope our work adds to this important topic.

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