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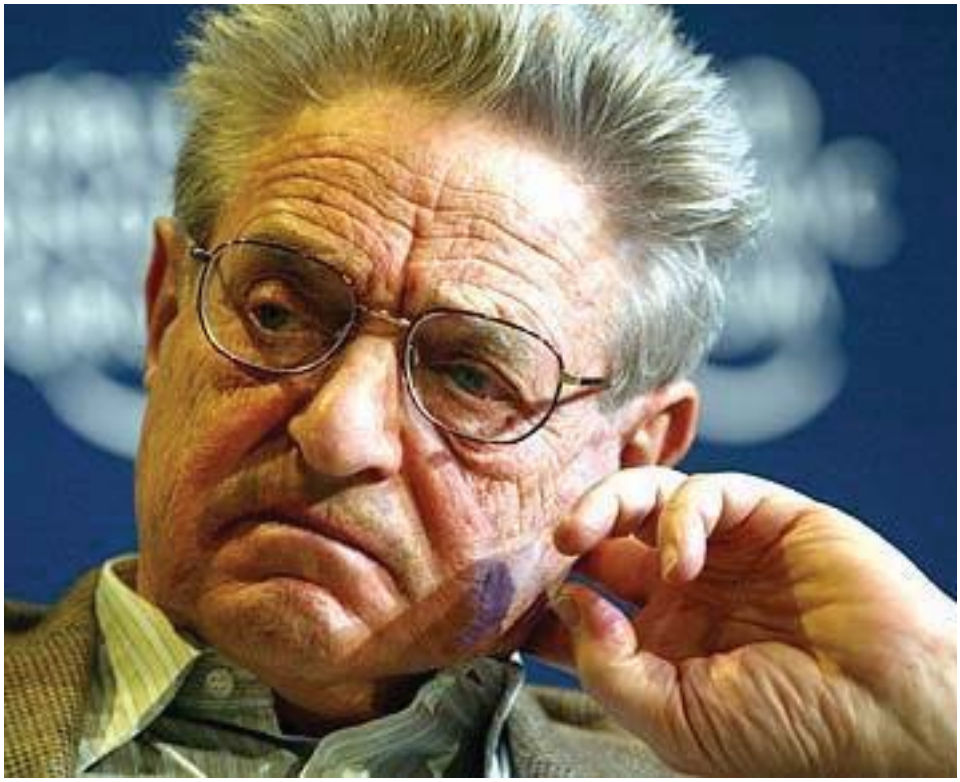
Foundation Watch

# State Judicial Elections and Public Policy: George Soros's Plan to Seize State High Courts

**By John Gizzi**

***Summary**: In some states supreme court judges are elected by the people. In others the governor appoints judges from a list of recommendations compiled by a commission composed mainly of lawyers. Arguments can be made for either process. But George Soros knows what he wants: appointed supreme court judges recommended by lawyer-driven commissions. Call us knee-jerk, but that may be one good reason why this is not a good idea.*



**Up to his usual mischief: philanthropist George Soros wants to push state courts to the left.**

In 2010 there are spirited contests for supreme court judgeships in eight states that pit "activist" candidates against supporters of judicial restraint: They are in Alabama, Illinois, Michigan, Minnesota, North Carolina, Ohio, Texas and Washington.

Iowa voters will decide this fall whether three state supreme court justices will be retained or rejected. The campaign is focused on the Iowa supreme court's unanimous ruling that the state's ban on same-sex marriage was unconstitutional.

In Kansas, pro-life groups are trying to remove four of seven supreme court justices, and in Colorado a grassroots group known as "Clear the Bench, Colorado" seeks to remove three state supreme court judges over their rulings on school funding, property taxes, eminent domain and the separation of powers.

The race in Illinois is interesting because business interests are attempting to unseat Justice Thomas Kilbride, a Democrat, and Justice (and onetime Chicago Bears placekicker) Robert Thomas, a Republican and normally a favorite of conservatives. Kilbride voted to uphold a lower court ruling overturning caps enacted by the state legislature that put limits on jury awards in medical malpractice cases. Thomas recused himself from the case because of his prior connections to one of the attorneys. The result: a 4-2 vote tossing out the state law limiting the amount of damages. Doctors

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and hospitals were disappointed while trial lawyers and consumer groups cheered. The November election will decide whether the justices receive new 10-year terms.

The common denominator in Colorado, Iowa and Kansas is that supreme court justices in these states are initially picked according to a merit selection system. But the decision on whether to retain them on the high court is subject to the approval of the state's voters. In Illinois justices are nominated at primary elections and elected to 10-year terms in general elections.

The results of the November elections to Congress will surely overshadow voter decisions on whether incumbent state supreme court justices continue to serve. Nonetheless, these elections are important barometers of voter sentiment and they will shape state public policies. Perhaps more importantly, they may have an eventual impact on political battles across America when the states draw legislative and congressional district lines after the results of the 2010 census are announced. Along with partisan elections to organize state legislatures, state judicial elections could have a major impact on future Congresses and the public policies of the federal government.

### The Mechanics of State Judicial Selection

In 16 states there are processes in place by which judicial nominees are selected by commissions of lawyers. However, 39 states also give voters a major role in deciding whether judges sit on their state supreme courts. Until recently, the press and voters have shown little interest in the method by which states decide to pick and retain their judges. But that's quickly changing. Elections to state high courts are becoming competitive races, attracting donor contributions and campaign advisers. A Sept. 25 front-page story in the New York Times, "Voters Moving to Oust Judges Over Their Decisions," noted that "[c]andidate spending for competitive state supreme court races nationwide increased to more than $200 million over the last decade—more than double the figure for the previous decade."

Interest in judicial elections is growing because what judges decide is affecting more and more people. The 1990s were a period of widespread judicial activism. State courts made it easier for lawyers to file and win class action lawsuits and malpractice cases. Court decisions diminished the scope of property rights and weakened the enforcement of contracts. These and other adverse court rulings triggered a sharp response from the business community. One study by the American Justice Partnership, a tort reform group, noted, "Approximately 95% of civil disputes in America wind up in state courts, giving the judges who hear these cases enormous power over our lives, property, and business affairs."

New issues are now being decided by state high court judges. In three states so far, state jurists have ruled that same sex couples are entitled to marry, setting off public debates and political skirmishing between opponents and proponents of gay marriage. It's no wonder that voters are increasingly interested in who becomes a state supreme court judge.

It's often said that state supreme courts are the "bench" for subsequent federal judicial appointments. So as public interest in the nomination and confirmation battles over U.S. Supreme Court justices peaks and overflows into the politics of selecting federal district and appellate court judges, it's only natural that more attention is being paid to how we pick state supreme court jurists. Indeed, two of the nation's three living former Supreme Court justices—David Souter and Sandra Day O'Connor—previously served on the high courts in New Hampshire and Arizona.

With much-increased interest in how we elect and reelect state judges comes the increasing amounts of money that are used to fund their election campaigns. Adam Skaggs, a lawyer with the Brennan Center for Justice at the New York University Law School and co-author of a recently-released study of judicial elections spending, told the New York Times: "These [judicial contests] suggest that the same type of arms-race spending in other contested elections is now beginning to impact previously quiet judicial elections."

### Enter George Soros

A key player in the emerging battles over state court selections is George Soros, the Hungarian-born hedge fund billionaire and bankroller of liberal political groups such as MoveOn.org and America Coming Together. Using his grantmaking foundation, the Open Society Institute (OSI), Soros has contributed more than $45 million over the past decade to several dozen special interest advocacy groups affiliated with an umbrella 501(c)(3) organization called Justice at Stake (JAS). JAS, which styles itself a "non-partisan, watchdog group," has as its mission the "reform" of the process for selecting state

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judges. It is an opponent of state judicial elections.

A principal goal for JAS is to replace judicial elections with a system of "merit selection." JAS believes a model system, such as one used in Missouri since 1940, would strengthen the role of state bar associations in providing advice on court selections. Since 1999, OSI has given just over $5 million to the American Bar Association (ABA) to promote the Missouri model.

How important is George Soros's philanthropy in changing the American system of justice? In 2000 the American Bar Association Journal observed that Soros is "putting millions of dollars where his mouth is," but noted that "some reasonable minds question his efforts." However, the Journal concluded, "[B]y sheer ambition and focus, he could bring more change to the justice system and the legal profession than anyone since a small group of founders crafted the Constitution."

Hamilton, Madison, Soros?

**Judge Wars: Stars Fell on Alabama**

For the prototype of the "judge wars" that occur today, one must go back to the 1994 races for the Alabama state supreme court, one in which more than $1 million was spent in the contest for chief justice. The results in Alabama demonstrated that elections to a state high court can be costly, hard-fought and partisan contests that make a real political difference.

Before 1994, Alabama was known to lawyers as "tort heaven." In *Courting Votes in Alabama*, Montgomery attorney Winthrop Johnson recalled how the state's courts once operated when wealthy Democratic trial lawyers funded campaigns to elect the state's judges:

> "The self-appointed autonomy of Alabama judges led to a tendency toward chaos in Alabama's tort law. The Alabama courts were consistent on one subject—using the Alabama Constitution to strike down tort reform. . . Alabama judges seemed to follow the money—the money lawyers earned from huge judgments. It was simply done the way things were done for members of the club, the bar association. Everyone on the bar profited. As long as no one made a fuss about tort reform, that profitable business of lawsuits and judgments would continue."

In 1994 somebody "made a fuss." For the first time in more than a century, Republicans made a serious effort to win the position of chief justice. Perry Hooper Sr., a retired probate judge and former Republican National Committeeman, challenged Democratic incumbent Sonny Hornsby. Hooper had an election strategy, sculpted by an up-and-coming political consultant named Karl Rove, and he ran television ads, produced by veteran media maestro John Deardourff.

The Alabama Democratic Committee and the Alabama Trial Lawyers Association rallied for Hornsby. Alabama trial lawyers reportedly contributed $5.1 million to state judicial candidates. ($1 million came from five Birmingham attorneys.) The race took 11 months what with vote counts and recounts that ended in a U.S. Court of Appeals ruling that declared Hooper the winner.

Alabama's "tort heaven" faded as Republicans, backed by the business community, secured a majority on Alabama's high court and began exercising judicial restraint in their rulings. Not until 2006 did a Democrat win back the state's top judicial office.

Thanks to Hooper, Rove, and the business community, Alabama began to overcome its anti-business reputation. The state also established a model for mounting what amount to political campaigns to elect state judges. Nothing would be the same again.

**How Times Have Changed**

Judicial contests such as the one in Alabama 16 years ago are now the norm. In 2008, for example, organized labor and plaintiffs attorneys drew a bead on the Michigan Supreme Court, which was widely known in conservative legal circles as "the high court Ronald Reagan wished he had." Four of the justices were strong believers in judicial restraint, two were judicial activists, and Justice Elizabeth Weaver, a nominal Republican, wobbled between them.

With solid backing from the AFL-CIO and the Progressive Women's Alliance, Wayne County Superior Court Judge Diane Marie Hathaway unseated Justice Cliff Taylor, a conservative Federalist Society member. Her election changed the line-up to a 3-to-3 standoff, with Weaver now the all-important "swing" vote.

In Pennsylvania, last year's election of Pittsburgh Superior Court Judge Joan Orie Melvin to the state's Supreme Court gave a 4-to-3 advantage to supporters of judicial restraint. Republican Melvin overcame fellow Superior Court Judge Jack Panella, who had the blessings of Planned Parenthood's Pennsylvania Political Action Committee. Candidates for judgeships typically feel bound not to say where they stand on issues that may come before their courts, but Panella ran ads toward the end of the campaign that charged, "Melvin wants to take away our rights, including our right to choose" and "Only Panella will protect women in their healthcare decisions."

**The Paymaster Cometh**

It's easy to trace the genesis of modern judicial elections, but more difficult to learn what has influenced the movement to end judicial elections. There are many advocates for "merit selection" of state judges, but wherever you look the hand and purse of

George Soros, "paymaster of the left," is obvious. Soros has the resources and the allies. If he gets his way, voters in all 50 states will never get to elect, retain or reject their judges.

The Justice at Stake Campaign, formed in 2002, is now the front group spearheading the movement, but Soros's Open Society Institute was making grants to its allied members two years earlier. In 2000, the fledgling group that would develop into JAS was housed at the Georgetown University Office of Sponsored Programs. OSI gave the office $550,000 for a public education campaign on the courts. The following year it added another $300,000.

In 2001, OSI donated $400,000 in seed money that launched the Justice at Stake Campaign umbrella organization, and it provided $280,000 for polling to determine public attitudes toward judicial elections. According to a review of IRS records by the American Justice Partnership, OSI contributed $2.7 million to JAS between 2001 and 2006 when it was housed at Georgetown, and $2.8 million to JAS between 2006 and 2008.

"Justice Hijacked," an American Justice Partnership report by attorney Colleen Pero, notes that other large donors to JAS include the Joyce Foundation ($970,000), the Carnegie Corporation ($750,000), the Moriah Fund ($80,000), and the Herb Block Foundation ($20,000).

Formally launched on Feb. 14, 2002, JAS is defined on the Open Society Institute's website as "a broad-based national and grassroots campaign organization, created by the OSI to work with various OSI grantees and various organizations engaged in judicial independence work."

JAS began to urge states to pass state constitutional amendments to replace judicial elections with some variation of what it called the "Missouri Plan," the grandfather of all judicial merit selection systems introduced in the Show-Me State in 1940. JAS followed up by launching affiliates in some of the states that currently elect their state supreme court justices—Nevada, Pennsylvania, Washington, and Wisconsin. The affiliates' mission was to champion the cause of "taking politics out" of the selection of judges.

In these states JAS created a template for overturning the election of judges, and it orchestrated a campaign that called for instituting a merit system under which judges would be selected under the aegis of the state bar association. The campaign typically began by having a JAS affiliate produce public opinion polls that purport to show that voters prefer having judges appointed on merit rather than resort to political nominations and elective campaigns for office. The campaign then demands that a high profile committee be established made up of community and business leaders, civic organizations and retired jurists. They then endorse a merit selection system.

For all the nonpartisan trappings that surround it, the JAS national headquarters is peopled with the alumni of liberal Democratic causes and campaigns. JAS executive director Bert Brandenburg worked for Rep. Edward Feighan (D-Ohio) and at the Progressive Policy Institute before he became a spokesman for Attorney General Janet Reno in the Clinton administration. The JAS director of state affairs, John Robinson, was a counsel for the Gore-Lieberman 2000 presidential campaign. More recently Robinson was chief financial officer for John Edwards's presidential bid. Robinson's deputy Aaron Ament worked for Hillary Clinton's 2008 presidential campaign. Last year Ament ran Stand Up America PAC, a political action committee dedicated to defeating conservative Republican members of Congress.

In recent months, however, the public face of judicial merit selection has been a former Republican state legislator. She received a key federal judicial appointment from President Ronald Reagan with the strong encouragement of Arizona senator Barry Goldwater. Her name: Sandra Day O'Connor.

O'Connor is not officially connected with JAS, but her "O'Connor Judicial Selection Initiative" adds credibility and publicity to the JAS cause. Affiliated with the University of Denver, the initiative boasts an 11-member panel of distinguished legal advisors and has sponsored O'Connor's nationwide speaking tour advocating the end of judicial elections.

Speaking in Michigan in February 2010, O'Connor declared that "in order for judges to dispense law without prejudice, they need to be certain they won't suffer political retribution." (Detroit News, Feb. 10, 2010). In an article in the Missouri Law Review, she lashed out at proponents of partisan elections of judges, declaring: "Money is pouring into our courtrooms by way of increasingly expensive judicial campaigns. Litigants are attempting to buy judges along with their verdicts, and the public's trust in our courts is rapidly deteriorating as a result."

Most recently, the first woman to serve on the U.S. Supreme Court has told Iowans not to recall their three controversial state supreme court justices.

**So What's Wrong With "Merit"?**

By pointing to the 1994 court elections in Alabama as well as to the recent "judge wars" in Pennsylvania and Michigan and the contests in Illinois and elsewhere, JAS and its supporters have argued that judicial campaigns are getting out of hand—not to mention costly. They claim that politics and big money can be eliminated by establishing a system in which potential judges are recommended and vetted by a state's legal community before being submitted for appointment by the governor.

This is the basis for what proponents call "merit selection" of judges.

For over two hundred years states either elected judges or governors appointed them with the advice and consent of their state legislatures. It was only in 1940, in reaction to the heavy-handed tactics of "Boss" Tom Prendergast, head of Kansas City's powerful Democratic political machine, that Missouri became the first state to adopt the "merit system." A commission was established to submit three names to the governor for judicial consideration. Under the "Missouri Plan," if the governor fails to select one of the nominees, the commission is authorized to make the selection. Voters get a chance to vote "aye" or "nay" on the judicial selection—eventually. Only after judges complete a specified term in office do voters get to decide on their reappointment.

The reasoning behind the Missouri Plan seems noble: its advocates say the process removes the political contributions and ignoble campaigning for judicial office that leads to excessive campaign spending and sordid promises by those who should apply the law impartially. Moreover, it puts the initial choice of judicial nominees into the hands of those who know them and the requirements of the law best—fellow lawyers—and it gives the public a role in the process by giving voters the power to retain or reject a serving judge.

The Missouri Plan has spread like a prairie fire. Seventy years after Missouri opted for merit, 24 states and the District of Columbia use some variant of the system to select judges for their highest courts. (Fewer states have adopted merit systems to select lower court judges.) Only in the last quarter-century has momentum developed against the lawyer-driven selection system. Since 1985 proposals to enact or extend the existing selection system have been rejected in Florida, Louisiana, New Hampshire, North Carolina, Ohio, Pennsylvania, South Dakota, Texas, Virginia and Washington State.

Vanderbilt University law professor Brian Fitzpatrick points out that in most of the states opting for the system, "lawyers are required by law to be well-represented on these commissions." (The Politics of Merit Selection, 74 MO L. REV. 2009). In Kansas, for example, five of the nine members of the Supreme Court Nominating Commission must be lawyers. In Tennessee until 2009,

over 80% of the Judicial Selection Commission (14 out of 17) were required to be lawyers. The state legislature then changed the law to require that no more than 10 be lawyers, although this year 15 of the 17 commissioners are lawyers.

In Missouri, three of the seven members of the Appellate Judicial Commission have ties to the Missouri Association of Trial Lawyers.

University of Kansas law professor Stephen Ware notes that nearly all states that use a merit selection system delegate the authority to fill some or all of the lawyer seats on their commissions to their state bar associations. The bar associations either directly select commission members or they control the list of names from which elected officials must select members. In 10 of the 24 states with merit selection, 100% of lawyer members on the commissions are controlled by the state bar association.

Are the lawyers on a judicial selection committee unbiased champions of the rule of law? Professor Fitzpatrick pulls no punches:

> "It is hard to believe that the lawyers who select judges in merit systems care less about the decisional propensities of judicial candidates than do voters or elected officials. Not only do lawyers have opinions about public policy they wish to vindicate as much as non-lawyers do, but the lawyers who sit on these commissions also practice in front of the judges they select. It is hard to believe these lawyers care only about whether the judges who hear their cases issue learned and scholarly opinions; surely these lawyers also care about whether a judicial candidate will be inclined to rule in their favor." (p.686)

Fitzpatrick doubts that judicial selection by lawyers will eliminate considerations of politics and quotes Justice Antonin Scalia, who noted in his dissent in *Romer v. Evans* that the "lawyer class" is more liberal than the general public on social issues. Fitzpatrick also cites a former Federal Elections Commission head who observed that lawyers contribute more money to Democratic candidates for federal office than to Republicans, evidence that "lawyers generally tend to lean left politically."

Prof. Fitzpatrick offers a startling statistic to back this up: of the appellate nominees in Missouri since 1995 who made any campaign contributions, 87% gave more to Democrats than Republicans and only 13% gave more to Republicans than Democrats.

In a study of judicial selection commissions the nonpartisan American Judicature Society made the case for including non-lawyers: "Requiring more non-lawyers than lawyers enhances public participation in the process." The study said adding non-lawyers "lends the process credibility and legitimacy in the eyes of the public." Is that a euphemism for window-dressing?

**"The Plaintiffs' Bar": A Closed Circle**

In addition to arguments and inference, the raw facts show that merit systems are not immune to political pressure. In Missouri, the archetypal "merit" system state, 20 of the last 21 nominees to the state supreme court have been supporters or contributors to the Democratic party. Under the Missouri plan, should a governor fail to select any of the recommended nominees, the Commission itself "shall make the appointment." That may explain why the Missouri Appellate Judicial Commission nominated three liberals for consideration to the state supreme court when Republican Matt Blunt was governor (2005-2009).

"I wanted Matt to reject the Commission's recommendation and then campaign at the next [vote on retention] against the choice of the lawyers," recalled Republican Lt. Gov. Peter Kinder. "It would have been a civic, teachable moment and opened a fresh re-examination of the Missouri Plan." (Blunt did not follow Kinder's advice.)

Kinder himself a lawyer, recalled that by the 1980s and 1990s "a tiny self-interested group known as the 'Plaintiffs' bar' took over the Missouri Bar Association and therefore dominated the commission. And they continue to operate as a closed circle. There is no sunshine, no publicity, and no public input."

Kinder noted that the judicial commission meets in private before it makes its recommendations. In 2009, Missouri's House of Representatives passed a bill to apply the state's "sunshine law" to judicial selection, but it died in the Senate. Later that year, the Missouri Supreme Court did alter the rules so that the names of all the judicial candidates under consideration by the commission are made public.

Operating behind closed doors is not alien in other states with a judicial selection commission. When Tennessee's Democratic governor Phil Bredesen pushed for a requirement that the state's judicial selection commission hold its meeting in public, the proposal died in a legislative subcommittee that the Knoxville-News Sentinel denounced as "lawyer-dominated."

And claims that voters have oversight over judges and can override judicial selections at election-time are weakened by the facts. In Iowa, where the attempt to oust three supreme court judges is gaining national attention, the last time a judge failed to win retention was 50 years ago. According to data compiled by Fitzpatrick, sitting judges win retention elections 98.9% of the time. A sample study of 10 states by Larry Aspin found that in 4,588 retention elections in 1964-1998 only 52 judges were not retained.

This data is in sharp contrast to states that hold partisan elections for supreme court judges. Incumbent jurists there win reelection only 78% of the time.

"Retention elections seek to have the benefit of appearing to involve the public," concludes law professor Michael Dimino, "but in actuality function as a way of blessing the appointed judge with a false aura of electoral legitimacy."

**What's the Best Way to Pick Judges?**

No doubt the direct election of judges can be unsettling, especially when contested elections feature personal and partisan attacks between candidates for an office that is meant to render impartial justice.

"I go back and forth on it," said attorney Edward F. Cox, chairman of the New York Republican State Committee (and Richard Nixon's son-in-law) who served on New York's 12-member selection panel for 19 years, "and I do question whether merit selection would work as well for the less visible trial courts."

Cox defends closed sessions and emphasized that the panel process works "if the governor is careful to play his role in the spirit of merit selection and not inadvertently hurt the process—especially regarding the crucial input of applicants—by his announcements or, even worse, by using the bully pulpit to bully the panel."

But according to historian David Pietrusza:

> "The idea that appointing Court of Appeals judges makes for less politics and better decisions is a concept simultaneously elitist and naive. Political maneuvering has merely moved into a shabbier and more shadowy back room within the house of politics. The law that has resulted is often even more fanciful than previously decided, as witnessed by the Court of Appeals' recent ruling that Governor David Paterson possessed the power to appoint a lieutenant governor. This unconstitutional and extra-legal measure to wrest control of the State Senate was judicial politics on steroids."

It's clear that George Soros also has no doubts about the wisdom of appointing judges from recommendations submitted by lawyer-dominated selection committees. And he's putting his money behind his beliefs. Should Soros prevail, the tradition of judicial elections will give way to the hidden politics of judicial selection.

*John Gizzi is the political editor for Human Events, a weekly Washington news journal.*

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Many thanks.

Terrence Scanlon
President

# **Philanthropy**Notes

The money man behind some of America's most radical, destructive leftist groups (including **ACORN**) announced he will retire as CEO of the funding entity he created. Sixties radical **Drummond Pike** founded the shadowy **Tides Foundation**. Pike is also treasurer of the **George Soros**-led billionaires' funding clearinghouse known as the **Democracy Alliance**. Pike's replacement is **Melissa Bradley**. She worked as an **Open Society Institute** Soros Justice Fellow. She also worked at **Van Jones**'s **Green for All**, which embraces the myth that America could have a "green" economy without being transformed into a Third World country.

**Philanthropy Roundtable** president **Adam Meyerson** praised Florida for enacting a law that helps preserve philanthropy's independence. Although lawmakers in some states are indicating they want to curb the work of foundations, "Florida has put up a big welcome sign saying, 'We would like your charitable business.'" The law bans the collection of race- and gender-related information and other data on employees and grant recipients from charitable foundations. Leftist groups like the **Greenlining Institute** and the **Florida Minority Community Reinvestment Coalition** were hoping to use the information to shake down foundations.

Why did the **Bill & Melinda Gates Foundation** give a $1.5 million grant to for-profit **ABC News**? The TV news network will conduct a yearlong examination of global health issues and match the grant with its own $4.5 million contribution, according to the Chronicle of Philanthropy. Journalism professor **Marc Cooper** said it is "grotesque" that **Disney**-owned ABC is accepting the Gates grant. Cooper said the grant creates a conflict of interest: Will ABC shy away from probing evidence of corruption or problems at Gates-funded projects? The Gates Foundation also gave an undisclosed sum to the Guardian, a British newspaper, to create a website about global development issues.

Mexican billionaire **Carlos Slim**, ranked by Forbes magazine as the richest man in the world, says the best way to alleviate poverty is to create jobs, not provide handouts to the poor. "To give 50%, 40%, that does nothing," he said. "There is a saying that we should leave a better country to our children. But it's more important to leave better children to our country."

The **IRS** unveiled a draft of its 2010 Form 990 informational tax return, which charities are required to file annually. The document is available online at http://www.irs.gov/pub/irs-dft/f990--dft.pdf. The tax agency said it may amend the form before it is officially published.

## Goldman Sachs WATCH

Securities and Exchange Commission Inspector General H. David Kotz found that the SEC's fraud lawsuit against the Wall Street titan was not politically motivated, the Wall Street Journal reports. The federal regulator sued Goldman for allegedly selling mortgage-linked securities without publicly telling its clients that a hedge fund that was a Goldman client was betting against the investment. According to the SEC complaint, Goldman created the investment vehicle known as "Abacus 2007-AC1" at the request of hedge fund manager John A. Paulson. Paulson was not named in the complaint but reportedly earned $3.7 billion in the transaction by betting that the housing bubble would deflate.