

# THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009

## DECADE OF CHANGE

by

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With a foreword from  
Justice Sandra Day O'Connor

  
**Justice at Stake**  
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**BRENNAN  
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FOR JUSTICE**

at New York University School of Law



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*at New York University School of Law*

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For more information, visit [www.followthemoney.org](http://www.followthemoney.org).

## About the Justice at Stake Campaign



**Justice at Stake**  
c a m p a i g n

The Justice at Stake Campaign is a nonpartisan national partnership working to keep our courts fair, impartial and free from special-interest and partisan agendas. In states across America, Campaign partners work to protect our courts through public education, grass-roots organizing and reform. The Campaign provides strategic coordination and brings organizational, communications and research resources to the work of its partners and allies at the national, state and local levels.

For more information, visit [www.justiceatstake.org](http://www.justiceatstake.org).

This report was prepared by the Justice at Stake Campaign and two of its partners, the Brennan Center for Justice and the National Institute on Money in State Politics. It represents their research and viewpoints, and does not necessarily reflect those of other Justice at Stake Campaign partners, funders or board members. Publication of this report was supported by grants from Carnegie Corporation of New York, Democracy Alliance Partners, the Joyce Foundation, the Moriah Fund, the Open Society Institute, Rockefeller Brothers Fund, and Wallace Global Fund.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR (RET.)

August 2010

Dear Reader:

I am pleased to introduce *The New Politics of Judicial Elections, 2000-2009: Decade of Change*. This report, the latest in a series begun in 2000, provides a comprehensive review of the threat posed by money and special interest pressure on fair and impartial courts.

We all expect judges to be accountable to the law rather than political supporters or special interests. But elected judges in many states are compelled to solicit money for their election campaigns, sometimes from lawyers and parties appearing before them. Whether or not these contributions actually tilt the scales of justice, three out of every four Americans believe that campaign contributions affect courtroom decisions.

This crisis of confidence in the impartiality of the judiciary is real and growing. Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold.

To avoid this outcome, states should look to reforms that take political pressure out of the judicial selection process. In recent years, I have advocated the system used in my home state of Arizona, where a bipartisan nominating committee recommends a pool of qualified candidates from which the governor appoints judges to fill vacancies. Voters then hold judges accountable in retention elections. Other promising state initiatives have included public financing of judicial elections, campaign disclosure laws, and recusal reforms.

We all have a stake in ensuring that courts remain fair, impartial, and independent. If we fail to remember this, partisan infighting and hardball politics will erode the essential function of our judicial system as a safe place where every citizen stands equal before the law.

For 10 years, the *New Politics* reports have played a leading role in documenting the growing threat to the credibility of our courts. I applaud the authors—Justice at Stake, the Brennan Center for Justice, the National Institute on Money in State Politics, and the Hofstra Law School—for working to protect the courts that safeguard our rights.

Sincerely,



Sandra Day O'Connor

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The Justice at Stake Campaign is a nonpartisan national partnership working to keep our courts fair and impartial. Across America, Campaign partners help protect our courts through public education, grass-roots organizing, coalition building and reform. The Campaign provides strategic coordination and brings unique organizational, communications and research resources to the work of its partners and allies at the national, state and local levels.

The New Politics of Judicial Elections 2000–2009: Decade of Change *Published August 2010*

**Visit us at [www.justiceatstake.org](http://www.justiceatstake.org)**

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# Executive Summary

State judicial elections have been transformed during the past decade. The story of America's 2000–2009 high court contests—tens of millions of dollars raised by candidates from parties who may appear before them, millions more poured in by interest groups, nasty and misleading ads, and pressure on judges to signal courtroom rulings on the campaign trail—has become the new normal. For more than a decade, partisans and special interests of all stripes have been growing more organized in their efforts to use elections to tilt the scales of justice their way. Many Americans have come to fear that justice is for sale.

Unlike previous editions, which covered only the most recent election cycle, this fifth edition of the “New Politics of Judicial Elections” looks at the 2000–2009 decade as a whole. By tallying the numbers and “connecting the dots” among key players over the last five election cycles, this report offers a broad portrait of a grave and growing challenge to the impartiality of our nation's courts. These trends include:

- The explosion in judicial campaign spending, much of it poured in by “super spender” organizations seeking to sway the courts;
- The parallel surge of nasty and costly TV ads as a prerequisite to gaining a state Supreme Court seat;
- The emergence of secretive state and national campaigns to tilt state Supreme Court elections;
- Litigation about judicial campaigns, some of which could boost special-interest pressure on judges;
- Growing public concern about the threat to fair and impartial justice—and support for meaningful reforms.

## The Money Explosion

**The surge in spending is pronounced and systemic.** Campaign fundraising more than doubled, from \$83.3 million in 1990–1999 to \$206.9 million in 2000–2009. Three of the last five Supreme Court election cycles topped \$45 million. All but two of the 22 states with contestable Supreme Court elections had their costliest-ever contests in the 2000–2009 decade.

**Special-interest “super spenders” played a central role in this surge.** A study of 29 elections in the nation's 10 most costly election states shows the extraordinary power of super spender groups. The top five spenders in each of these elections invested an average of \$473,000, while the remaining 116,000 contributors averaged \$850 each. In the most widely publicized case, one coal executive spent \$3 mil-

Fundraising by Supreme Court Candidates, 2000–09:

**\$206.9 Million**

See chart on super spenders, page 10.

lion to elect a West Virginia justice. The disparity suggests that a small number of special interests dominated judicial election spending even before the *Citizens United* case ended bans on election spending by corporations and unions.

**In 2007–08, five states felt the worst blast of the super spender phenomenon.** When TV spending by political parties and special-interest groups is factored in, Pennsylvania broke the \$10 million barrier, while spending reached \$8.5 million in Wisconsin. Texas and Alabama each topped \$5 million, and Michigan, which had just under \$5 million in fundraising and independent TV ads, witnessed some of the cycle’s most brutal campaign commercials.

**Partisan races drew the most cash, but that may be changing.** Candidates in partisan Supreme Court elections raised \$153.8 million nationally in 2000–09, compared with \$50.9 million in nonpartisan elections (retention election candidates raised \$2.2 million). But in some states, notably Wisconsin in 2007–08 and Georgia in 2006, nonpartisan races have been just as costly and nasty as their partisan counterparts.

**Special-interest money sometimes comes with a cost.** National business groups, often working with state affiliates, were the decade’s most powerful force. But three well-funded incumbent chief justices were ousted in 2008, in part because they were tied to special-interest patrons.

**The trends continued in 2009.** In Pennsylvania, Wisconsin and Louisiana, candidates and independent groups spent a total of about \$8.7 million on 2009 elections. And in each race, candidates accused opponents of being ethically tainted.

## Court TV: The Rise of Costly Attack Ads

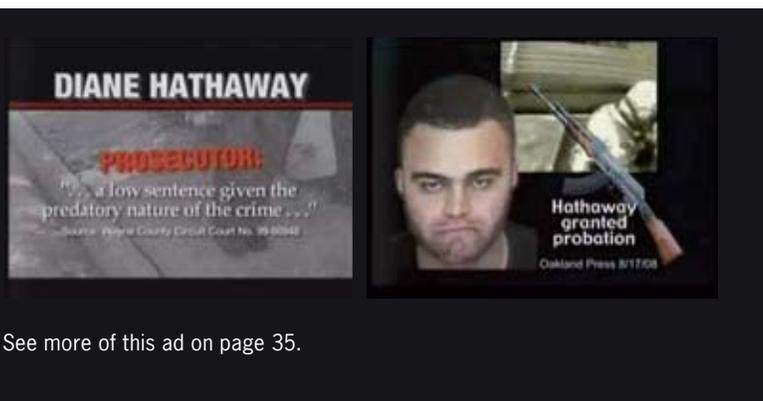
**Spending on TV ads has helped fuel the money chase.** From 2000 to 2009, an estimated \$93.6 million was spent on air time for high court candidate TV ads. That total includes TV spending in odd-numbered election years, which for the first time is included in the New Politics data.

**New records were set in 2007 and 2008.** Including costly 2007 elections in Wisconsin and Pennsylvania, the 2007–08 cycle was, at \$26.6 million, the most expensive biennium ever for TV ad spending on Supreme Court races. Eight states set all-time records for spending on TV ads during the two-year period, and there were more ad airings than ever before in 2008.

**Average spending on TV continues to surge.** Continuing a trend seen in 2004 and 2006, in states where TV advertisements ran, an average of more than \$1 million was spent on campaign ads. In 2008, in the 13 states where Supreme Court ads aired, the average was \$1.5 million.

**Outside groups played a critical role in the TV wars.** Special-interest groups and party organizations accounted for \$39.3 million, more than 40 percent of the estimated TV air time purchases in 2000–09. In 2008, special-interest groups and political parties accounted for 52 percent of all TV spending nationally—the first time that noncandidate groups outspent the candidates on the ballot.

**Special-interest group ads are often harsher than candidate ads.** Independent groups remain the “attack dogs” of judicial TV ads. But in 2008, Wisconsin Judge Michael Gableman’s spot attacking Justice Louis Butler provoked lingering ethics and legal challenges.



See more of this ad on page 35.

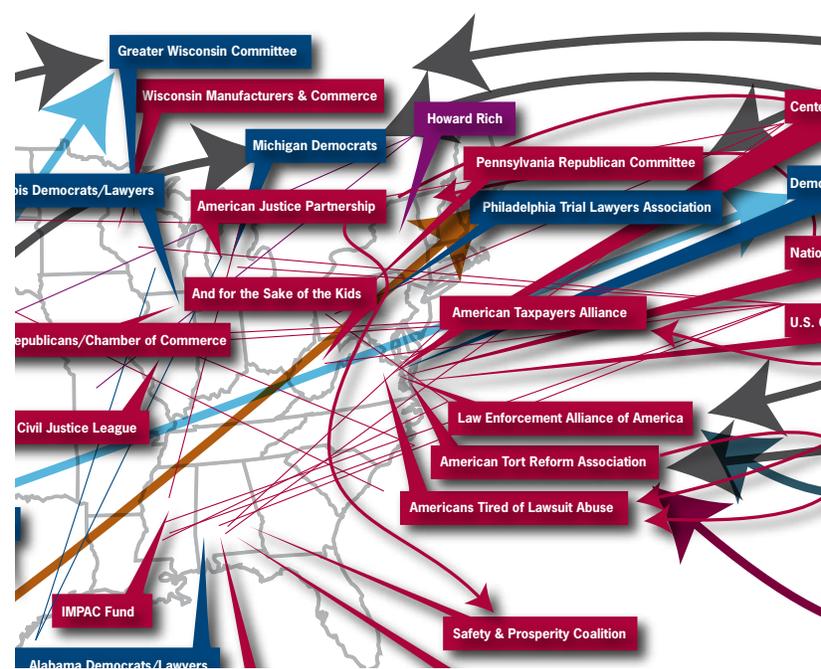
## Who Played? Who Won?

**Tort wars have become court wars.** Judicial elections have become a multi-million-dollar duel, pitting business and conservative groups against plaintiffs' lawyers and unions. High court justices know that their decisions could trigger support or retaliation in the next election.

**The two sides bring starkly different profiles.** The right has brought together big-name groups like the U.S. Chamber of Commerce and National Association of Manufacturers, leaders of corporate giants such as Home Depot and AIG Insurance, and political actors like Karl Rove. Bankrollers on the left tend to be wealthy plaintiffs' lawyers, who often use state party organizations to hide the extent of their financial backing of a candidate.

**Secret money dominates; players can give big sums**

**with little publicity.** In Alabama, the Montgomery law firm of Beasley Allen gave more than \$600,000 to Judge Deborah Bell Paseur's unsuccessful Supreme Court campaign, without ever appearing on her contribution records. This approach has been emulated in other states, including Texas.



See the battle for America's courts unfold on page 50.

## Litigation: The Battle Inside the Courtroom

**Federal courts have been increasingly pulled into state judicial election controversies,** especially in the areas of campaign finance, candidate speech and recusal (when a judge avoids a case with potential ethical conflicts). Many of these cases are designed to strengthen or challenge rules that would insulate judges from special-interest pressure.

**The U.S. Supreme Court declared that campaign spending could disqualify a judge** from cases involving major supporters. The landmark *Caperton v. Massey* decision creates an incentive for every state to craft meaningful rules for when judges must step aside.

**Campaign finance laws face growing litigation challenges.** North Carolina's judicial public financing law was upheld by the federal courts. But a more recent Supreme Court case, *Citizens United v. Federal Election Commission*, overturned longstanding bans on election spending from corporate and union treasuries—posing a special threat in judicial elections.

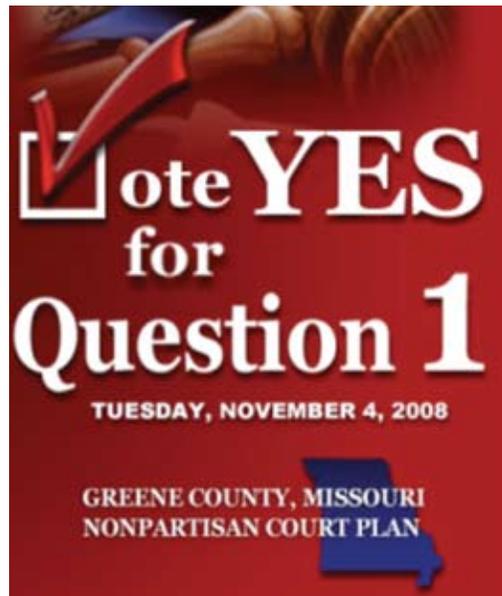
**A 2002 Supreme Court decision, *Republican Party of Minnesota v. White*,** loosened restrictions on judicial campaign speech. Interest groups are using questionnaires to pressure judges into signaling courtroom decisions on the campaign trail. Professional norms are becoming more important in helping judicial candidates steer clear of special-interest pressures and political agendas.

Campaign finance returns to the high court on page 62.

**Court rejects corporate political spending limits**

## The Public Takes Note, Decision-Makers Play Catch-Up

Voters weigh in on  
page 74.



**The new politics of judicial elections has made the public fear that justice is for sale.**

More than seven in ten Americans believe that campaign contributions affect the outcome of courtroom decisions. *Nearly half of state judges agree.* Former Justice Sandra Day O'Connor says, "In too many states, 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."

**Reform efforts are making progress.** After years of slow progress, reform gained steam in 2009. Wisconsin enacted public financing for court races, joining North Carolina and New Mexico, and in March 2010, West Virginia's legislature also enacted a pilot public financing program. In Michigan, the Supreme Court adopted

tough new recusal rules. Polls show continued strong public support for reform measures—such as public financing of judicial races, election voter guides, recusal reform and full financial disclosure for election ads.

**Merit selection has gained momentum—and more organized opposition.** In a pair of 2008 county-level ballot measures, voters in Kansas and Missouri opted for appointment systems over competitive elections for judges, while Nevada lawmakers put a merit selection measure on the 2010 ballot. Meanwhile, a cadre of groups has organized to challenge merit selection systems in several states. And in a significant revisiting of its position, the U.S. Chamber of Commerce cited one model of merit selection as fair and compatible with business interests.



**“The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today.”**

—Theodore B. Olson, former U.S. Solicitor General and attorney in *Caperton v. Massey case*

## The Money Explosion

In just a decade, in high court contests across America, cash has become king. Would-be justices must raise millions from individuals and groups with business before the courts. Millions more are spent by political parties and special-interest groups, much of it undisclosed. The money explosion is not just a threat to impartial courts. It has left a sour taste for a majority of

Americans, who believe that campaign cash is tilting the scales of justice.

Although warning signs were gathering in the 1990s, the new politics of judicial elections burst on the scene with the 1999–2000 election cycle, when Supreme Court candidates raised \$45.9 million—a 62% increase over 1998.<sup>1</sup> Since 2000,

\*Chapter 1 notes begin on page 23.

### State Supreme Court Fundraising by Biennium

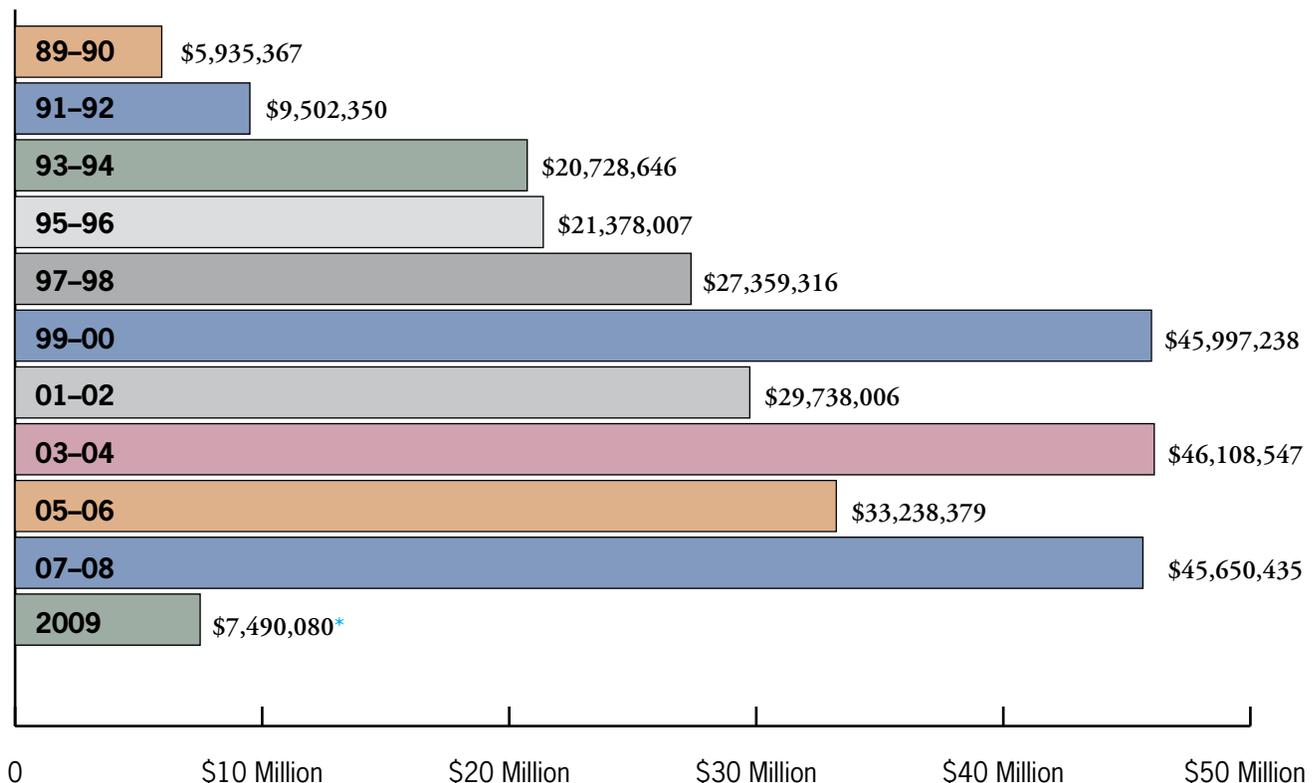


Figure 1. Non-contribution income to candidates is excluded from fundraising analyses in this report. Not counted are interest income, public funding, repayment of loans received in previous cycles, and miscellaneous receipts such as refunds and reimbursements.

\*One year only; 2010 data not available. In addition, Wisconsin Chief Justice Shirley Abrahamson raised \$822,104 in 2008 that she spent on her 2009 reelection campaign. Thus, total fundraising by 2009 candidates, including Abrahamson's 2008 money, was just more than \$8.3 million.

## Total Supreme Court Fundraising Ranked by State, 2000–2009

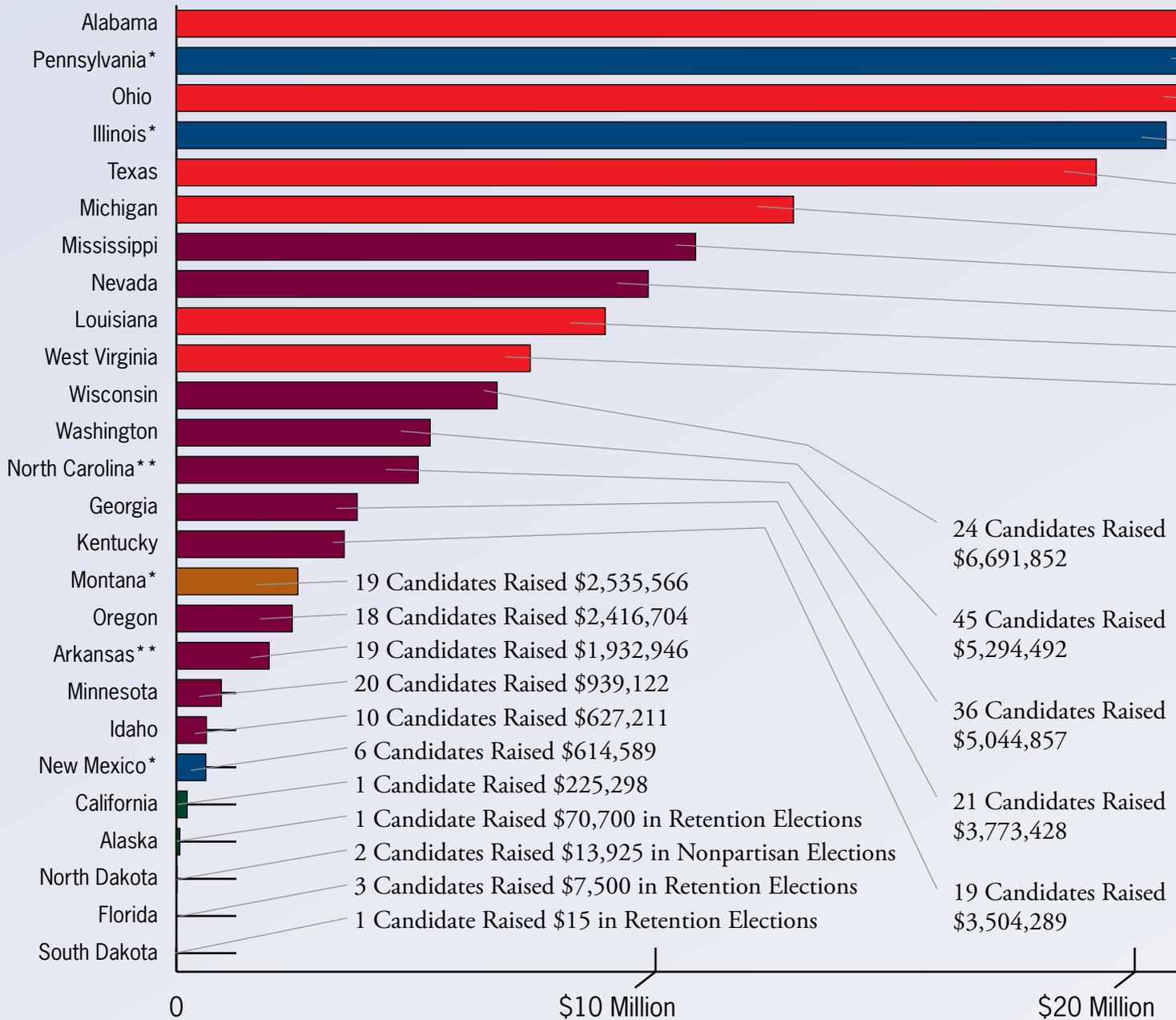


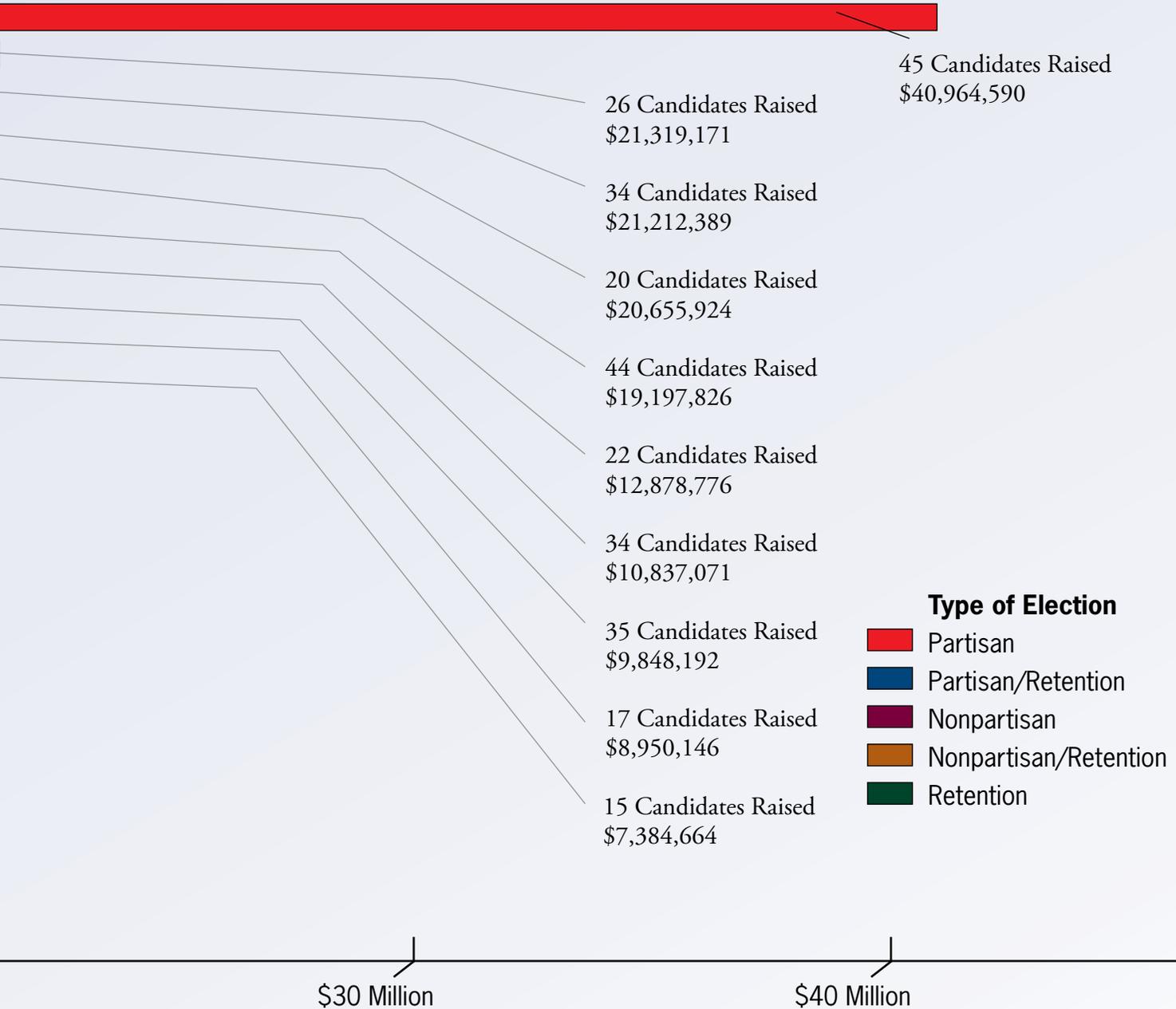
Figure 2.

\*Four states—Illinois, Montana, New Mexico and Pennsylvania—have hybrid systems that use more than one process to select and retain high court judges. In addition, the American Judicature Society lists Michigan and Ohio as partisan election states, because candidates are nominated through party primaries and conventions. For full details, see the AJS Judicial Selection in the States section, [www.ajs.org](http://www.ajs.org).

Totals:

537<sup>\*\*\*</sup> Candidates Raised

\$206,941,244<sup>\*\*\*\*</sup>



\*\* Arkansas and North Carolina held partisan elections for high court through 2000. Both switched to nonpartisan elections in 2002.

\*\*\*Reflects the number of names appearing on the ballot for voters to choose among. For instance, where the same candidate has appeared on the ballot in three separate elections, he or she is listed as three candidates.

\*\*\*\* Includes money raised by candidates for elections in future years, as well as candidates who withdrew before an election was held.

## Contributions by Sector, 2000–2009 High Court Elections

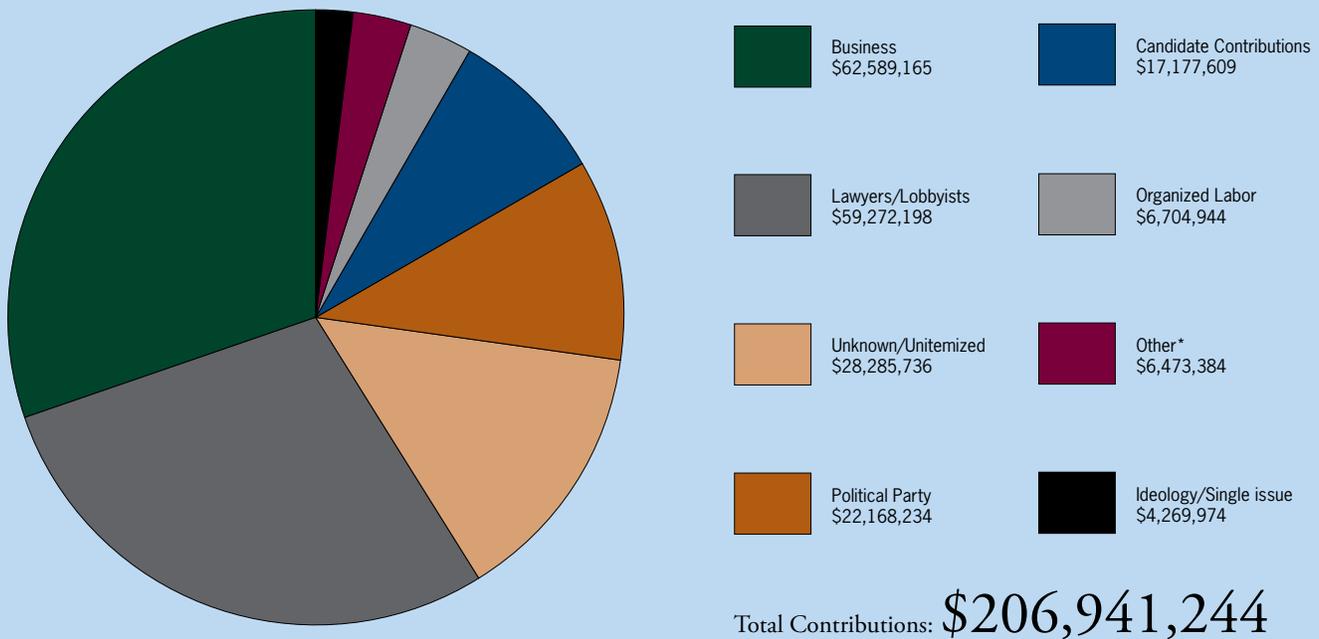


Figure 3.

\* Other includes: Retired persons, civil servants, local or municipal elected officials, tribal governments, clergy, nonprofits, and military persons.

expensive campaigns have become all but essential for a candidate to reach the high court.

From 2000–09, Supreme Court candidates raised \$206.9 million nationally, more than double the \$83.3 million raised from 1990–1999 (by comparison, the consumer price index rose only 25 percent from 2000–2009). During the earlier decade, 26 Supreme Court campaigns raised \$1 million or more, and all but two came from three states: Alabama, Pennsylvania and Texas. In 2000–09, by contrast, there were 66 “million-dollar” campaigns, in a dozen states. During the same 2000–2009 period, 20 of the 22 states that elect Supreme Court judges set spending records; only Texas and North Dakota had their highest-spending elections in the 1990s.

In other words, the most remarkable thing about the 2007–08 cycle—in which state Supreme Court candidates raised \$45.6 million<sup>2</sup>, seven

times the 1989–90 total—was that such totals have become so unremarkable. It was the third time in the last five cycles that high court candidates raised more than \$45 million (\$46.8 million was raised in the high-water 2003–2004 election cycle).<sup>3</sup>

Bulging campaign war chests are only part of the story. Millions more dollars have flowed into judicial elections from political parties and special-interest groups, frequently in ways crafted to avoid financial disclosure even as they seek to sway judicial contests. From 2000–09, independent groups and political parties spent at least \$39.3 million on television time, about 42 percent of total ad costs.<sup>4</sup> (The real totals are likely substantially higher. For details, see Chapter 2, *Court TV: The Rise of Costly Attack Ads.*)

**“In a close race, the judge who solicits the most money from lawyers and their clients has the upper hand. But then the day of reckoning comes. When you appear before a court, you ask how much your lawyer gave to the judge’s campaign. If the opposing counsel gave more, you are cynical.”**

—Wallace Jefferson, *Chief Justice of the Texas Supreme Court*



# Rise of the Super Spenders

The *Citizens United* decision, which struck down bans on corporate election spending, has sparked debate on whether unlimited special-interest money will fundamentally change the election process. A close look at state judicial elections in 2000–09 suggests such a transformation has already begun.

Much of the cash boom in the last decade was fueled by a new class of super spenders. These special interests, including business executives, unions and lawyers who are stakeholders in litigation, can dominate contributions to candidates, year after year, and/or go outside the system by spending millions on independent TV ad campaigns.<sup>5</sup>

For big money interests, high court seats are just one more investment. As an Ohio AFL-CIO official put it, “We figured out a long time ago that it’s easier to elect seven judges than to elect 132 legislators.”<sup>6</sup> When those big-dollar supporters appear before the very judges whom they helped elect, many Americans conclude that justice is not impartial.

A review of 10 states with the highest judicial campaign costs shows two separate worlds—a small coterie of organized super spenders who dominate election financing, and a large number of small contributors who simply cannot keep up. (See chart, pages 10 and 11.) Of equal concern, a large number of justices in those states owe their elections to a few key benefactors.

The yawning gap is best shown by 29 contested elections held from 2000–09 in Alabama, Ohio, Pennsylvania, Illinois, Texas, Michigan, Mississippi, Wisconsin, Nevada, and West Virginia. In these elections, at least one candidate benefited from \$1 million or more in other people’s money—either in direct contributions or through independent election spending by other groups that benefited their campaigns.

When all 29 elections are taken together, the top five super spenders from each election—145 in all—spent an average of \$473,000 apiece. By contrast, the remaining donors averaged \$850. Excluding self-financing candidates, the 145 super spenders accounted for just over 40 percent of all campaign cash in the 29 elections.

Moreover, the disparity was widespread, not just the result of a few outlier contests. In 22 of 29 elections, the top five spenders averaged more than \$200,000 apiece—and in 12 elections, they exceeded \$500,000. In 21 of 29 elections, a mere five spenders accounted for at least 25 percent of all campaign funding. In nine elections, five super spenders accounted for more than 50 percent, exceeding thousands of contributors combined.

In a potential harbinger of the post-*Citizens United* world, almost all super spenders in the 29 elections were organizations, some with documented backing from corporations, unions or plaintiffs’ lawyers. Of 55 top five spenders that exceeded \$100,000 one or more times, only one was an individual: Don Blankenship, whose \$3 million expenditure on the 2004 West Virginia election led to the landmark *Caperton v. Massey* case.

But even that case raised a question: If the *Citizens United* ruling had been issued before 2004, allowing Blankenship to dip into the treasury of Massey Energy Co. instead of his own personal funds, how much more might he have spent?

## The Threat to Justice

As expensive as these races have become, their real cost to the justice system is more profound. Americans believe that justice is for sale. Numerous polls show that three in four Americans believe campaign cash affects courtroom decisions.

Indeed, judges themselves—who take an oath to treat parties impartially—are delivering their own warnings. In a 2009 brief to the U.S. Supreme Court, the Conference of Chief Justices, which represents 57 chief justices from every state and U.S. territory, wrote: “As judicial

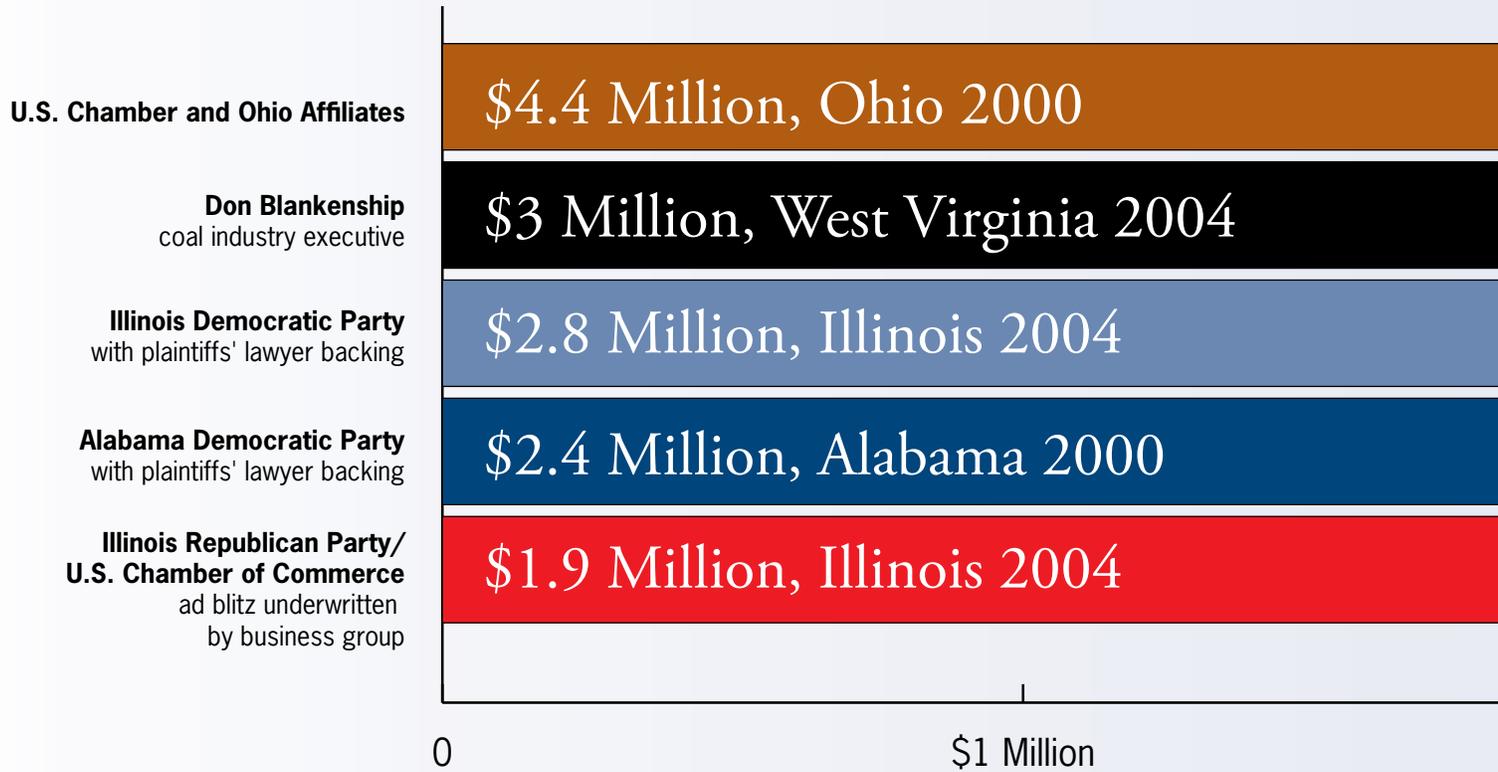


More information  
[@justiceatstake.org](https://twitter.com/justiceatstake)

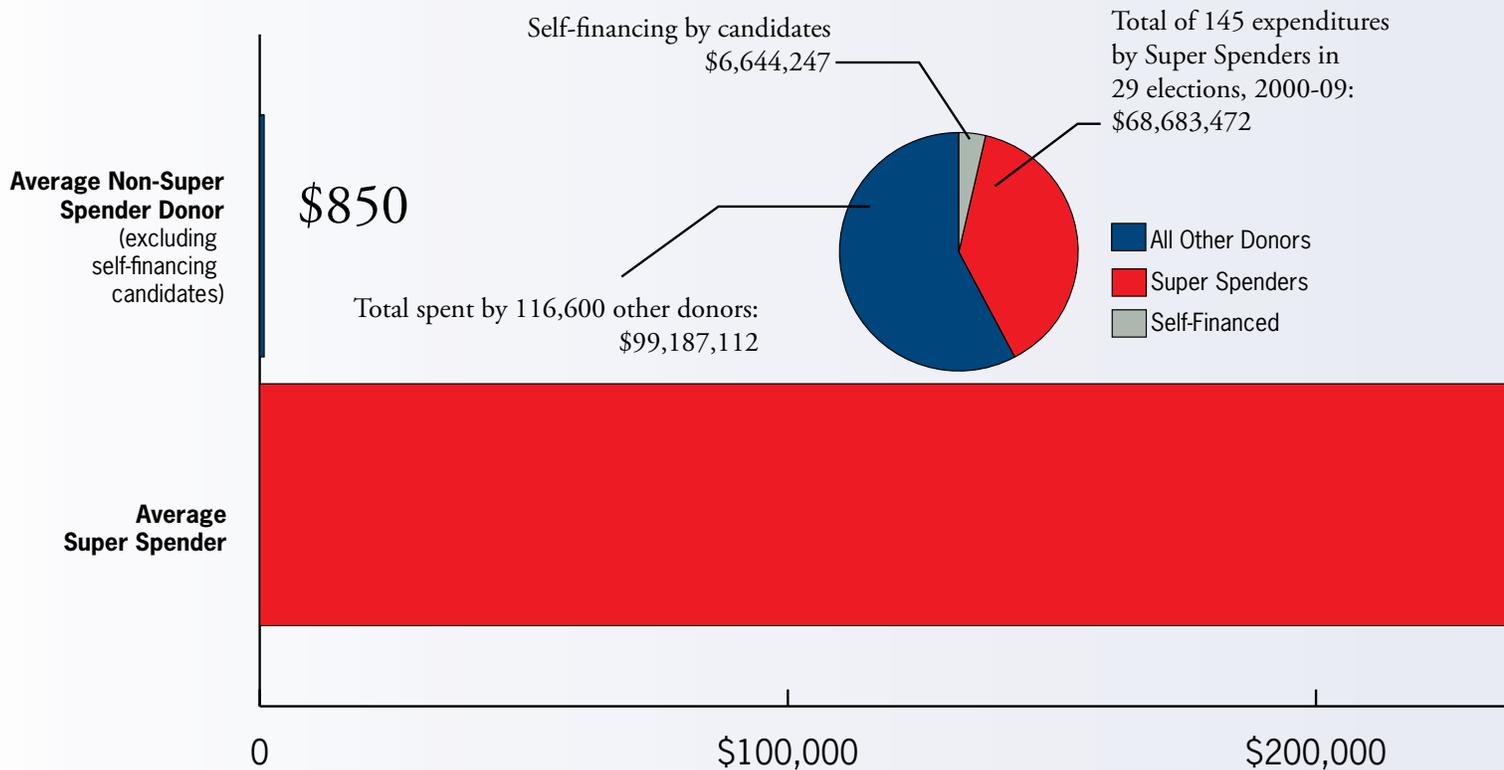


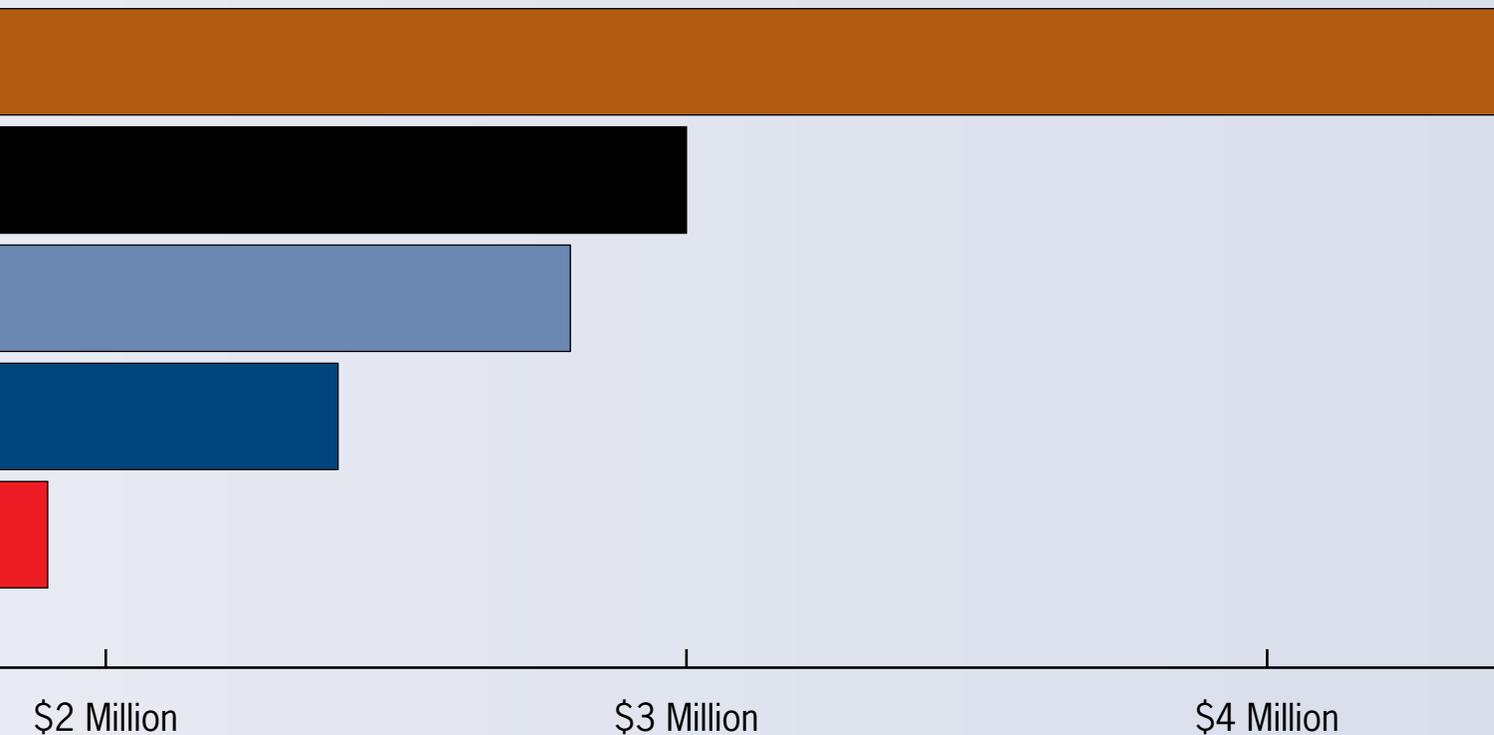
# Super Spenders and What They Spent

## Greatest Expenditures by One Source on a Single Court Election, 2000–2009



## Super Spenders, Versus Other Donors: 29 High Court Elections, 2000–2009





Total Spending in 29 Supreme Court Elections, 2000–09:

**\$174,514,881**

Figure 4. This chart shows estimated total spending in 29 contested Supreme Court elections from 2000 to 2009—including contributions, self-financing by candidates and independent spending by groups not affiliated with candidates. All contested elections were selected in 10 high-spending states in which at least one candidate was aided by \$1 million or more from others, either in the form of contributions or independent expenditures. The states are Alabama, Illinois, Michigan, Mississippi, Nevada, Ohio, Pennsylvania, Texas, West Virginia and Wisconsin.

With three exceptions, all data are compiled from two sources. Campaign contribution data are from the National Institute on Money in State Politics, [www.followthemoney.org](http://www.followthemoney.org), and independent TV spending data are provided by TNS Media Intelligence/CMAG. In three elections, more detailed records were available, and those sources are used. A lawsuit against the U.S. Chamber of Commerce after the Ohio 2000 election disclosed \$4.4 million in spending. In papers filed with the state of West Virginia, Don Blankenship disclosed spending \$3 million on that state's 2004 Supreme Court election. State finance records for the Improve Mississippi PAC in 2008 also were used.



\*In 2009, the Pennsylvania Republican Party ran an estimated \$975,849 in non-candidate ads under its own name. Following the campaign, the party donated the ad expenditures as in-kind contributions to the Joan Orié Melvin campaign. To avoid double-counting, those ad costs are listed here only as contributions to the Melvin campaign.

\*\*In 2004, the Illinois parties and two political action committees aired an estimated \$5.8 million in non-candidate ads under their respective organizational names. Following the campaign, the four groups donated the ad expenditures as in-kind contributions to the Lloyd Karmeier and Gordon Maag campaigns. To avoid double-counting, those ad costs are listed here only as contributions to the candidates.

## Total Spending for Top 10 States, 2000–2009 High Court Elections

State	Candidate Contributions	Non-candidate TV spending	Total Spending 2000–09
Alabama	\$40,964,590	\$2,622,580	\$43,587,170
Ohio	\$21,212,389	\$8,622,603	\$29,834,992
Pennsylvania *	\$21,319,171	\$1,334,711	\$22,653,882
Texas	\$19,197,826	\$1,519,241	\$20,717,067
Illinois* *	\$20,655,924	\$39,428	\$20,695,352
Michigan	\$12,878,776	\$5,724,667	\$18,603,443
Mississippi	\$10,837,071	\$1,247,703	\$12,084,774
Wisconsin	\$6,691,852	\$4,848,367	\$11,540,219
Nevada	\$9,848,192	\$39,929	\$9,888,121
W. Virginia	\$7,384,664	\$2,181,468	\$9,566,132

Figure 5.

election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation’s elected judges may be imperiled.”<sup>7</sup>

In a 2001 poll of state judges, almost half—46 percent—agreed that campaign donations influence judicial decisions.<sup>8</sup> Most elected high court justices cited pressure to raise campaign money during their election years. In 2006 Ohio Supreme Court justice Paul Pfeifer told the *New York Times*, “I never felt so much like a hooker down by the bus station. . . as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote.”<sup>9</sup>

Wallace Jefferson, Chief Justice of the Texas Supreme Court, warned in 2009: “In a close race, the judge who solicits the most money from lawyers and their clients has the upper hand. But then the day of reckoning comes. When you appear before a court, you ask how much your lawyer gave to the judge’s campaign. If the opposing counsel gave more, you are cynical.”<sup>10</sup>

The new politics of judicial elections arrived at the U.S. Supreme Court in the 2009 case *Caperton v. Massey*. The case, in which coal executive Don Blankenship spent \$3 million to help elect Judge Brent Benjamin to the West Virginia Supreme Court in 2004, while his company appealed a \$50 million jury award given to a competing coal company, crystallized the threat to due process when seven-figure judicial campaign supporters have business before the courts. When Justice Benjamin cast the tie-breaking vote to overturn the jury award, Hugh Caperton, owner of Harman Mining Corp., said his company’s right to a fair and impartial tribunal had been violated.

In the end, the U.S. Supreme Court agreed. Ordering Justice Benjamin to remove himself from the case, the court for the first time ruled that campaign spending could threaten a litigant’s due-process rights: “Blankenship’s extraordinary contributions were made at a time when he had a vested stake in the outcome,” Justice Anthony M. Kennedy wrote for the majority. “Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise

## Top U.S. Super Spenders, 2000–2009 High Court Elections

Spender	Candidate Contributions	Non-Candidate Spending	Total	Linkage
U.S. Chamber/Ohio Affiliates	\$49,000	\$7,560,168	\$7,609,168	U.S. Chamber of Commerce
Alabama Democratic Party	\$5,460,117	\$0	\$5,460,117	Conduit/Plaintiffs' lawyers
Business Council of Alabama	\$4,633,534	\$0	\$4,633,534	U.S. Chamber, NAM
Illinois Democratic Party	\$3,765,920*	\$0	\$3,765,920	Conduit/Plaintiffs' lawyers
Michigan Chamber of Commerce	\$164,140	\$2,875,965	\$3,040,105	U.S. Chamber
Don Blankenship	\$3,000	\$2,978,207	\$2,981,207	Massey Energy Co.
Alabama Civil Justice Reform Committee	\$2,474,905	\$224,463	\$2,699,568	Insurance money
Michigan Democratic Party	\$219,142	\$2,467,121	\$2,686,263	Unions, plaintiffs' lawyers
Pennsylvania Republican Party	\$2,274,534*	\$387,300	\$2,661,834	Conservative groups, donors
Michigan Republican Party	\$217,233	\$2,420,328	\$2,637,561	Business executives
<b>Total, Top 10 Spenders, 2000–2009</b>	<b>\$19,261,525</b>	<b>\$18,913,752</b>	<b>\$38,175,277</b>	
Democratic/Plaintiff Lawyers/Unions	\$9,445,179	\$2,467,121	\$11,912,300	
Republican/Business/Conservative	\$9,816,346	\$16,446,631	\$26,262,977	
<b>Other Notable Top Spenders</b>				
Philadelphia Trial Lawyers Association	\$2,398,300	\$0	\$2,398,300	Plaintiffs' lawyers
American Justice Partnership	\$300,000	\$1,800,000	\$2,100,000	National Association of Manufacturers
Wisconsin Manufacturers & Commerce	\$9,600	\$2,012,748	\$2,022,348	U.S. Chamber, NAM
Illinois Republican Party	\$1,981,714*	\$0	\$1,981,714	U.S. Chamber, insurance company money
Center for Individual Freedom	\$0	\$1,824,140	\$1,824,140	Ad money sources unknown; big tobacco ties
Greater Wisconsin Committee	\$0	\$1,736,535	\$1,736,535	Union backing
American Taxpayers Alliance	\$0	\$1,293,080	\$1,293,080	U.S. Chamber money
Law Enforcement Alliance of America	\$0	\$924,075	\$924,075	National Rifle Association

Figure 6.

\*Includes money spent on party-sponsored TV ads that were listed as in-kind contributions to candidates

## Supreme Court Fundraising: Partisan, Nonpartisan and Retention Elections

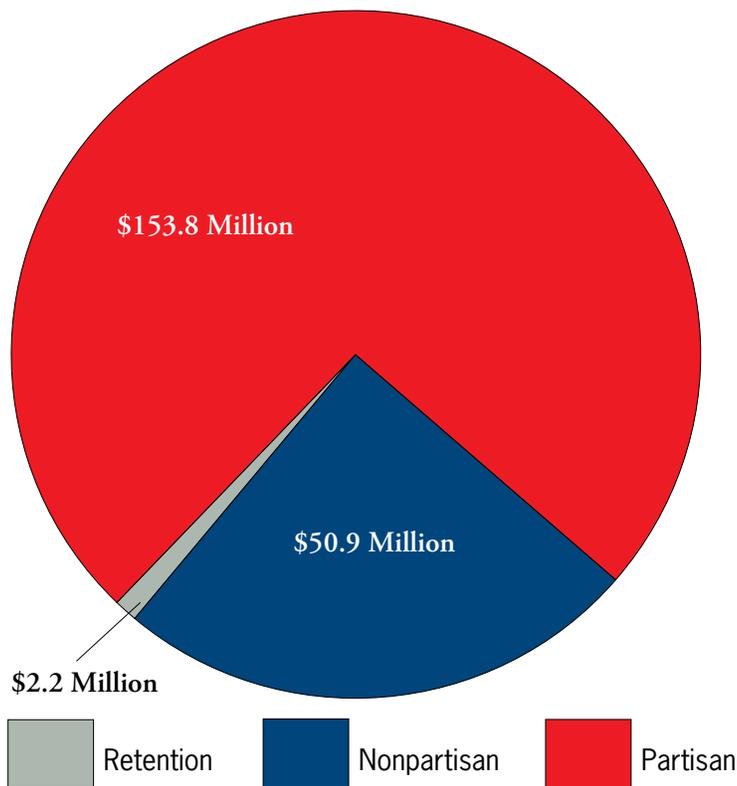


Figure 7.

when—without the other parties’ consent—a man chooses the judge in his own cause.”<sup>11</sup>

### How We Got Here

American history has no precedent for the financial arms race that threatens to overwhelm our courts of law. Until the 1990s, state Supreme Court races were typically low-key and low-budget. As a nationwide battle over tort reform heated up, battles over jury awards and product liability standards pitted pro-business groups against plaintiffs’ lawyers and labor unions.

Candidate fundraising for court races saw successive spikes, from an estimated \$5.9 million in 1989–90 to \$21.4 million in 1995–96. In 2000, candidate fundraising abruptly doubled again, to \$45.9 million. From 1999–2000 through 2007–08, the average fundraising for each two-year election cycle has been \$40.1 million, compared with \$16.9 million the decade before.

One factor had a particular impact. Although special-interest spending had traditionally been a factor at the state level, national groups dramatically increased their involvement in state-wide elections. In 2000, the U.S. Chamber of Commerce announced it was stepping up its involvement in Supreme Court elections, by allocating up to \$10 million to as many as seven states where the Chamber said plaintiffs’ lawyers had too much influence.

By the end of 2002, unprecedented amounts of money poured into court races from both sides of the tort wars. The U.S. Chamber of Commerce and allied forces had begun winning a string of victories.<sup>12</sup> Of the top 10 election spenders nationally in 2000–09, seven had business or expressly Republican leanings, while three had plaintiffs’ lawyer and Democratic backing. Including independent TV ads by non-candidate groups, the top conservative/business spenders invested \$26.2 million—considerably more than double the \$11.9 million spent by three Democratic-leaning spenders. The new flood of money from both sides fed voter cynicism and fueled campaign-trail accusations that judges were beholden to their election backers.

Although national business groups, often working with state-level affiliates, remained the decade’s most powerful force, by 2008 signs of a potential counter-trend emerged, as chief justices with high-level business backing were voted off the bench in Michigan, Mississippi and West Virginia.

Partisan elections traditionally draw more money than nonpartisan races, but that may be changing.<sup>13</sup> Through much of the decade, states with nonpartisan elections, especially those with smaller populations, had escaped the worst excesses. Overall, candidates in 13 nonpartisan states raised \$50.9 million in 2000–09, about 25 percent of the total, compared with nearly \$153.8 million raised by candidates in nine partisan states, about 74 percent of all fundraising. Retention election candidates raised \$2.2 million, about 1 percent.<sup>14</sup>

Large infusions of cash from special-interest groups showed that the nonpartisan label offered decreasing insulation against big-money campaigns. Including both candidate contributions

and independent TV ads by parties and special-interest groups, Georgia's 2006 election cost \$3.6 million. In Wisconsin, spending from all sources on two elections in 2007 and 2008 totaled \$8.5 million—seven times as much as all Wisconsin Supreme Court elections put together from 2000 through 2006. National and state-level super spender groups played major roles in both states.

## The Rise of the Super Spenders: Alabama

Super spenders—groups that repeatedly overwhelm all other givers in state Supreme Court elections—have been key factors in most states where election costs rose sharply in 2000–2009. Possibly the most extreme example is Alabama, where a select club of state and national special interests emerged to bankroll Supreme Court elections and fundamentally reshape the court.

In 1994, as Republicans mounted one of their first major efforts to win control of the Alabama Supreme Court, law professor Harold F. See Jr. raised \$509,783 in a losing effort, and only seven of his contributions were greater than \$5,000. Just two years later, he raised nearly \$2.7 million and won. Nine of his top 10 donors were business PACs, led by the Business Council of Alabama (\$331,000) and the Alabama Forestry Association (\$105,000).<sup>15</sup>

For Alabama, the 1990s were a prelude to a surge in spending by single-interest groups and politi-

cal parties. The Business Council gave \$480,500 to Bernard Harwood in 2000 (29 percent of his total); \$540,000 to Michael Bolin in 2004 (32 percent of his total fundraising); and \$600,000 to losing chief-justice candidate Drayton Nabers in 2006. That same year, the Alabama Civil Justice Reform Committee gave \$842,825 to Nabers, and the Lawsuit Reform PAC gave Nabers \$443,000.

By 2009, after Justice See retired, the court had been reshaped into a far more business-friendly tribunal. The Business Council of Alabama/Progress PAC was a top five contributor for seven of Alabama's nine justices who stood for election during the decade. Three other PACs—the Alabama Civil Justice Reform Committee, the Alabama Automobile Dealers Association and the Lawsuit Reform PAC of Alabama—were top five contributors to five justices. A fifth PAC—the Pro Business Pac—was a top five contributor to four Alabama justices.

In 2006, after Republicans had captured every seat on Alabama's high court, challenger Sue Bell Cobb led a Democratic Party resurgence. She was equally dependent on large-scale backers, though she relied on a different group of funders. Justice Cobb received 32.3 percent of her \$2.62 million from two sources: Franklin PAC (\$638,000), run by a Montgomery lobbyist, and the state Democratic Party (\$209,700). In 2008, Judge Deborah Bell Paseur, who narrowly lost her bid to replace Justice See, received \$1.66 million—61.5 percent of her total—from one



**“Alabama is first in the country in money spent on judicial races, and last in funding legal access for the poor.**

**I am embarrassed.”**

—*J. Mark White, former president of the Alabama State Bar*

source, the state Democratic Party. A review of campaign records showed that plaintiffs' lawyers accounted for most of the Democratic money. (See "Shell Game on the Left?" page 46.)

Not coincidentally, the super spender groups made Alabama home to the nation's most expensive state Supreme Court elections, even though it is only the nation's 23rd most populous state. Candidates in Alabama raised \$40.9 million in 2000–09, nearly double the next most costly state, Pennsylvania (where candidates raised \$21.3 million).

### Supreme Court Super Spenders in Other States

Alabama's judicial politics are extreme, but a similar story has been repeated elsewhere. Both in 2007–08, and over the 2000–09 decade, the most expensive campaigns in other states overwhelmingly involved tales of super spenders, both as campaign contributors and sponsors of independent ads. The same players often reappear, again and again.

In 2007–08, Pennsylvania had the highest total cost: about \$10.3 million, including \$9.5 million in candidate fundraising, led by \$913,500 from the Philadelphia Trial Lawyers Association, and an estimated \$858,000 in independent TV ad spending by the Virginia-based Center for Individual Freedom. The state GOP and trial-lawyers association led the way in 2009, with the GOP spending about \$1.4 million for Joan Orié Melvin and the trial lawyers contributing \$1.2 million to Democrat Jack Panella.

In Wisconsin, which ranked second in 2007–08 with a total of \$8.5 million in fundraising and independent TV ads, an explosion in special-interest money was led by Wisconsin Manufacturers & Commerce and the labor-friendly Greater

Wisconsin Committee. Alabama was third in 2007–08, at \$5.4 million when accounting for contributions and independent TV spending, again by the Center for Individual Freedom. Other top-spending states included Michigan, Texas, Louisiana, Mississippi, West Virginia and Nevada.

### Triumph of the Super Spenders: Illinois

Perhaps no race in the last decade better showed the potential of a super spender takeover than the 2004 Illinois race between Lloyd Karmeier and Gordon Maag. The two ran in a semi-rural district in southwestern Illinois, which had few local resources to fund a costly court race. But the local Madison County court had been branded a "judicial hellhole" by the American Tort Reform Association, which was unhappy about jury awards and class-action litigation against national corporations in the county.

A study by the Illinois Campaign for Political Reform showed the players whose money found its way to southwestern Illinois that autumn. Karmeier's supporters included the U.S. and Illinois Chambers of Commerce (which together spent a total of more than \$2 million), the American Tort Reform Association (which spent \$515,000), and multiple insurance and medical organizations. Contributing to Maag were a broad array of Illinois plaintiffs' lawyers, funneling their money through the state Democratic Party. Altogether, the candidates raised \$9.3 million, including multi-million-dollar media buys by the state parties and other groups.<sup>16</sup> The amount, still a national record for a two-candidate race, was almost identical to the combined estimate of the amount raised for all races nationally just 12 years earlier.

**"That's obscene for a judicial race. What does it gain people? How can people have faith in the system?"**

*—Illinois Justice Lloyd Karmeier, after winning \$9.3 million 2004 election*

## Total Supreme Court Spending: Top 10 States, 2007–08

State	Candidate Money	Independent TV	Total Spending
Pennsylvania	\$9,464,975	\$858,611	\$10,323,586
Wisconsin (07 & 08)	\$3,876,595	\$4,642,659	\$8,519,254
Alabama	\$4,472,621	\$965,529	\$5,438,150
Texas	\$4,310,923	\$904,978	\$5,215,901
Michigan	\$2,614,260	\$2,370,260	\$4,984,520
Louisiana	\$3,686,879	\$306,120	\$3,992,999
Mississippi	\$2,976,446	\$860,532	\$3,836,978
West Virginia	\$3,303,380	\$479,255	\$3,782,635
Nevada	\$3,135,214	\$0	\$3,135,214
Ohio	\$2,448,388	\$684,623	\$3,133,011

Figure 8.

### Money: Focus on 2007–08

#### Five States Lead the List

In 2007–08, 84 candidates on the ballot for state Supreme Court seats raised \$43.8 million and five states set fundraising records.<sup>17</sup> But the full blast of the super spender phenomenon was felt especially in five states, where a combination of candidate fundraising and independent ads shattered records, and in two states sent advertising to new lows of personal assault.

The states experiencing the greatest special-interest spending in 2007–08 were Pennsylvania, Wisconsin, Michigan, Alabama and Texas.

Based purely on candidate fundraising records, Pennsylvania's 2007 race was easily the nation's biggest blowout in 2007–08. The \$9.5 million raised by eight general and primary election candidates more than doubled the state's previous record of \$4.1 million. Other fundraising records were set in Louisiana, Nevada, West Virginia and Wisconsin (in 2007). Chief Justice Cliff Taylor set an individual fundraising record in Michigan, but still lost—due in part to a Democratic Party TV blitz. Likewise, Democrats set a TV spending record in Texas.

The numbers are even higher when independent TV ad spending is factored in.<sup>18</sup> For instance, an estimated \$858,611 campaign by the Virginia-

based Center for Individual Freedom helped push Pennsylvania's total spending to \$10.3 million.

The increase was almost as startling in Wisconsin. Candidates raised \$3.8 million in the 2007 and 2008 elections, the nation's fourth-highest total for the election cycle, but that was just the beginning of the story. An estimated \$4.6 million was spent on independent campaign activity, very possibly a conservative estimate. That raised total spending to \$8.5 million, making Wisconsin the second costliest state in 2007–08. Likewise, Michigan ranks only ninth in candidate fundraising, but rises to fifth when an estimated \$2.37 million in special-interest group and political party TV ads are factored in.

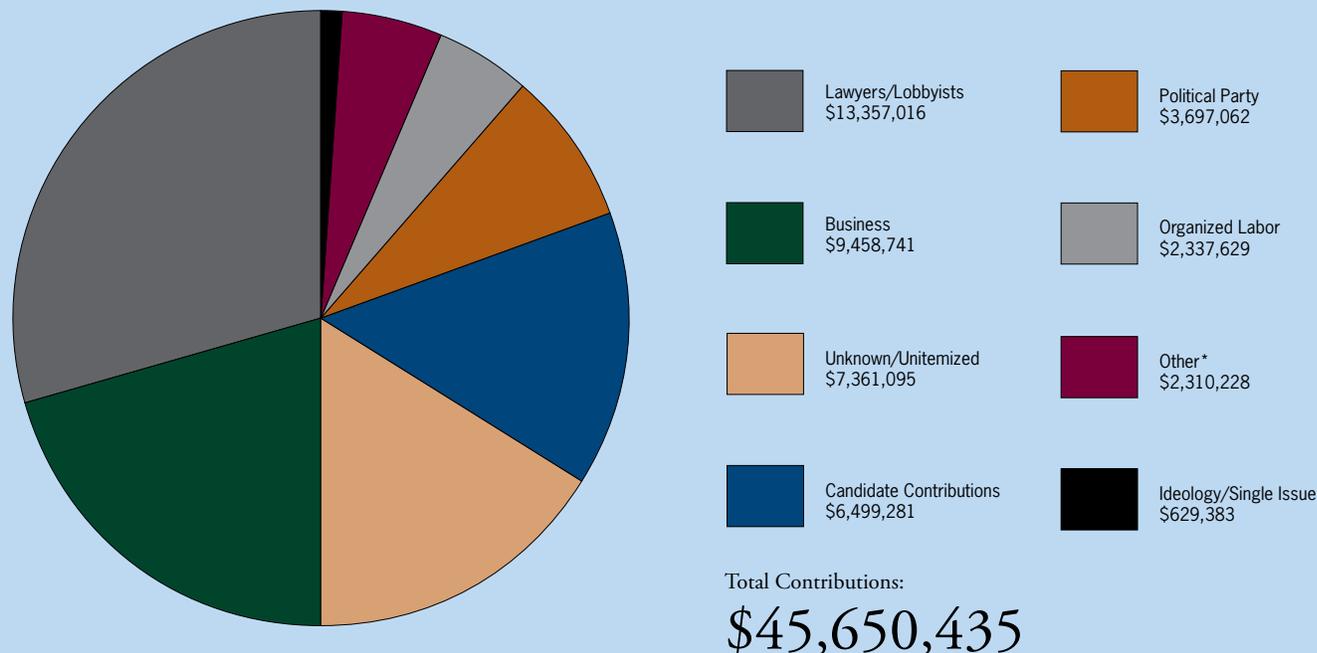
Examining independent expenditures underscores the real impact of institutional super spenders playing in the 2007–08 elections, in a way that official candidate finance records cannot. Looking only at candidate fundraising reports shows that the top 10 contributors, excluding self-financing candidates, nationally gave an average of \$514,098 each. When adding in estimates of non-candidate group expenditures on TV ads, the average surges to \$1,234,880. All of the top 10 super spenders in 2007–08 were institutional, such as PACs and independent special-interest groups—although,

## Top 10 Supreme Court Super Spenders, 2007–08

Spender	Candidate Contributions	Independent TV Spending	Total	State, National Links	States/Years
Wisconsin Manufacturers & Commerce	\$8,100	\$2,012,748	\$2,020,848	U.S. Chamber, NAM	Wisconsin, 2007–2008
Center for Individual Freedom	\$0	\$1,824,140	\$1,824,140	Big Tobacco, money sources unknown	Pennsylvania 2007, Alabama 2008
Alabama Democratic Party	\$1,661,550	\$0	\$1,661,550	Plaintiffs' lawyers	Alabama 2008
Greater Wisconsin Committee	\$0	\$1,430,807	\$1,430,807	Labor Unions, Democratic leadership	Wisconsin, 2007–2008
Michigan Democratic Party	\$64,259	\$1,164,132	\$1,228,391	Heavy Labor, Plaintiffs' Lawyer Support	Michigan 2008
Texas Democratic Party	\$36,000	\$904,978	\$940,978	Plaintiffs' Lawyers	Texas 2008
Philadelphia Trial Lawyers Assn	\$913,500	\$0	\$913,500	Plaintiffs' Lawyers	Pennsylvania 2007
Michigan Chamber of Commerce	\$34,000	\$804,869	\$838,869	U.S. Chamber	Michigan 2008
Pennsylvania Republican Party	\$805,094	\$0	\$805,094	Conservative groups, leaders	Pennsylvania 2007
Partnership for Ohio's Future	\$0	\$684,623	\$684,623	U.S., Ohio Chambers	Ohio 2008
<b>Total, Top 10 Spenders, 2007–08</b>	<b>\$3,522,503</b>	<b>\$8,826,297</b>	<b>\$12,348,800</b>		
<b>Average, Top 10 spender, 2007–08</b>	<b>\$522,650</b>	<b>\$882,629</b>	<b>\$1,234,880</b>		
Democratic/Plaintiff Lawyers/Unions	\$2,675,309	\$3,499,917	\$6,175,226		
Republican/Business/Conservative	\$847,194	\$5,326,380	\$6,173,574		

Figure 9.

## Contributions by Sector, 2007–08 High Court Elections



as Massey Coal CEO Don Blankenship showed in the 2004 West Virginia election, individual super spenders can have significant impact.

The nation's top super spender in 2007–08 was the Wisconsin Manufacturers & Commerce's PAC, which spent an estimated total of \$2,020,848 on the state's 2007 and 2008 elections. Three Democratic state committees also were in the top 10. In previous years, plaintiffs' lawyers have been identified as underwriting Democratic ad blitzes, and published reports in Alabama and Texas suggested the same in 2008.

A summary of the top super spenders reveals one interesting distinction. For the decade as a whole, conservative/business groups dominated the top 10 election-spenders list, occupying seven slots and outspending more liberal opponents by 2 to 1. But in 2007–08, there was a virtual financial standoff. There were five super spender groups from each end of the spectrum, with each side totaling just over \$6 million apiece.

In Wisconsin, independent groups played a critical role in the defeat of Justice Louis Butler. Three groups in particular led the way, bank-rolling many of the television ads attacking

Justice Butler. Together, the Club for Growth, Coalition for America's Families and Wisconsin Manufacturers & Commerce spent a total of \$2,118,807 on TV ads in the 2008 Butler-Gableman race.

Michigan was not far behind. The state parties and the Chamber of Commerce spent an estimated \$2.4 million on TV ads, twice as much as the candidates themselves. (Locally gathered data, which included cable TV ads and small TV markets, suggested much higher totals in both Wisconsin and Michigan. For example, the Michigan Campaign Finance Network reported \$3.8 million in independent TV ads in 2008.)<sup>19</sup>

Chief Justice Cliff Taylor raised nearly \$1.9 million, breaking the record of \$1.3 million he set in 2000, while challenger Diane Hathaway raised \$754,000. But more money did not spell victory. Taylor, whose reelection was backed by a total of \$3.1 million in spending, including Chamber and GOP ads, lost by 10 points to Hathaway. Her total spending, including Democratic ads, was \$1.9 million.

Figure 10.

\*Other includes retired persons, civil servants, local or municipal elected officials, tribal governments, clergy, nonprofits, and military persons.

Figure 11.

## Supreme Court Fundraising by Candidates on Ballot, 2007–08

State	Contested or Retention	Number of Candidates on Ballot	Total Raised
Pennsylvania	Partisan/Retention*	8	\$9,464,975
Alabama	Partisan	2	\$4,472,621
Texas	Partisan	8	\$4,310,923
Wisconsin	Nonpartisan	5	\$3,876,595
Louisiana	Partisan	5	\$3,686,879
West Virginia	Partisan	5	\$3,303,480
Nevada	Nonpartisan	6	\$3,135,214
Mississippi	Nonpartisan	9	\$2,976,446
Michigan	Partisan	2	\$2,614,260
Ohio	Partisan	4	\$2,448,388
Illinois	Partisan	1	\$1,091,092
Kentucky	Nonpartisan	4	\$515,711
Washington	Nonpartisan	6	\$417,034
Georgia	Nonpartisan	2	\$389,102
Montana	Nonpartisan/Retention*	3	\$334,446
Idaho	Nonpartisan	2	\$243,190
Minnesota	Nonpartisan	5	\$196,402
North Carolina	Nonpartisan	2	\$178,273
Arkansas	Nonpartisan	2	\$86,635
New Mexico	Partisan	1	\$51,656
Oregon	Nonpartisan	2	\$7,525
<b>TOTAL</b>		<b>84</b>	<b>\$43,800,847**</b>

\* In Pennsylvania, justices initially are elected to court seats, then face retention elections. In Montana, justices face retention elections if no challengers enter a competitive nonpartisan election.

\*\* Does not include money raised by candidates for future election cycles. When including future elections, a total of \$45.6 million was raised in 2007–08.

## Other States of Note in 2007–08

In **Alabama**, more than \$5.4 million was spent, with candidates raising a total of more than \$4.4 million and the Virginia-based Center for Individual Freedom (CFIF) spending an estimated \$965,529 in TV ads. The extra air time helped boost Republican Greg Shaw, who narrowly defeated Democrat Deborah Bell Paseur. Just four groups accounted for 61 percent of all contributions and independent expenditures—\$3,316,358 of the \$5,438,150 spent in Alabama. Those groups were the Alabama Democratic Party (\$1,661,550 in contributions), CFIF (\$965,529 in TV ads), Alabama Civil Justice Reform Committee (\$434,079 in contributions), and the Business Council of Alabama (\$275,200 in contributions).

In **Mississippi**, one out-of-state group, the Law Enforcement Alliance of America, spent more on TV ads, an estimated \$660,472, than all the other candidates and independent groups put together. The alliance had mounted a similar campaign in 2002 to knock off Justice Chuck McRae. Also running ads were Mississippians for Economic Progress, traditionally a funnel for U.S. Chamber of Commerce money. And IMPAC, a campaign arm of the Business & Industry Political Education Committee that ran an independent campaign supporting Chief Justice Jim Smith, received a \$125,000 check from the National Association of Manufacturers-related American Justice Partnership. Justice Smith suffered a surprise defeat to Jim Kitchens and was voted out of office.<sup>20</sup>

**West Virginia** experienced a significant shot of independent TV money from the state Chamber of Commerce, amounting to nearly a half-million in estimated ad-time purchases. And during a West Virginia primary, an ad patterned after “Lifestyles of the Rich and Famous” mockingly showed pictures of Chief Justice Elliott “Spike” Maynard vacationing on the Riviera with Don Blankenship, the coal executive at the heart of the *Caperton v. Massey* case. Maynard was defeated.

In **Nevada**, newly elected Justice Kris Pickering was her own biggest backer, supplying 50 percent

of her \$1.3 million in fundraising, as she and Mark Gibbons were elected. The MGM Mirage casino, a regular player in Nevada Supreme Court elections, placed winning bets on both candidates. The \$3,135,214 raised by candidates marked the third straight election in which contributions totaled in the multi-millions, and it narrowly broke the previous mark, set in 2004.

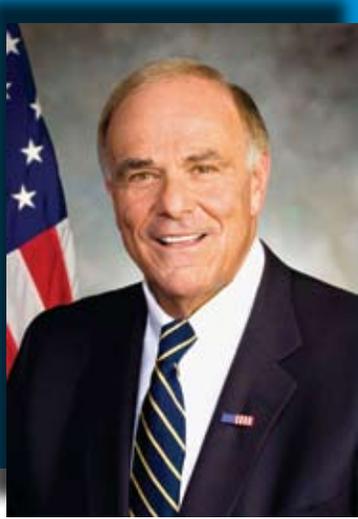
Based solely on candidate fundraising records (See chart, Page 20), the most expensive campaign totals in 2007–08 occurred in Pennsylvania, followed by Alabama, Texas and Wisconsin.

While candidates must list the sources of their money, many independent groups do not. Inevitably, some of the groups embroiled in controversy were also the most mysterious. Who, for instance, funded the Center for Individual Freedom’s \$965,000 TV ad campaign backing Alabama’s Greg Shaw, or its \$858,611 campaign in 2007 pushing Maureen Lally-Green in Pennsylvania? Ads by opponent Deborah Bell Paseur suggested that it was “the likes of the oil and gas industry” that bankrolled the Virginia-based group, but the charge was unproven. The Center, whose origins date back to the Big-Tobacco funded National Smokers Alliance, has refused to disclose its funders.

And who ultimately paid for \$660,000 in air time purchased by the Law Enforcement Alliance of America, in its attempt to unseat Mississippi Justice Oliver Diaz, Jr.? The group, also based in Virginia, has been linked in published reports to the National Rifle Association and the U.S. Chamber of Commerce. But because Mississippi’s governor vetoed a 2005 bill that would have required independent groups to disclose their financial sources for election expenditures, it was impossible to know where the group got its money.

## 2009 High Court Elections: Costly Trends Continue

Continuing established trends, state Supreme Court elections remained costly and negative in 2009. Total candidate contributions in Wisconsin, Pennsylvania and Louisiana exceeded \$8.3 million, and non-candidate groups spent



**“The influence of big money in judicial elections has exploded in this decade, and it’s something we have to pay attention to because it has totally eroded public confidence in the judicial system.”**

*—Governor Edward Rendell of Pennsylvania*



More information  
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an estimated \$305,000 in independent TV ads, bringing total spending to \$8.7 million.

In Wisconsin and Pennsylvania, candidates faced accusations of special-interest ties, which reflected growing public concerns about the impact of campaign cash and the unsavory loyalties such money implies among judges and campaign supporters.

In Pennsylvania, Democrat Jack Panella broke a state record for individual fund-raising but still lost to Republican Joan Orié Melvin. According to state data, Judge Panella raised 2,706,137, more than the \$2.3 million raised and spent by the state’s previous record setter, Justice Seamus McCaffery in 2007.

Judge Orié Melvin lambasted Panella for taking \$1.2 million from the Philadelphia Trial Lawyers Association. In October, she told the Pennsylvania Press Club: “Is it pay-to-play? Is it justice for sale? I don’t know, but it sure sounds suspect.”<sup>21</sup>

But Orié Melvin’s final campaign records showed the gap between her fund-raising and Panella’s was much narrower than she’d suggested. Although she reported raising only \$942,978 during the campaign, she later reported receiving more than \$1.4 million in in-kind contributions from the state Republican Party, raising her total funding to \$2,479,507—a total that also broke McCaffery’s 2007 record. Total campaign fundraising by all of Pennsylvania’s general and primary election candidates in 2009 was \$5.4 million.

The Republican backing, mainly in the form of pro-Melvin TV ads aired under the GOP label, was confirmed by TNS Media Intelligence/CMAG estimates, which showed more than \$975,000 in state party ads.<sup>22</sup>

In Wisconsin, ads by Judge Randy Koschnick attacked Chief Justice Shirley Abrahamson for not recusing herself from a case involving relatively modest campaign contributors. Abrahamson won easily, both in the fund-raising battle and among voters. The \$1,452,000 she raised, compared with just \$171,000 for Koschnick, broke (albeit narrowly) a record set in 2007 by Justice Annette Ziegler. Nearly \$306,000 in TV ads, spent by the Greater Wisconsin Committee on Abrahamson’s behalf, also helped her to victory.

In central Louisiana, an October special election to fill a vacant Supreme Court seat was surprisingly costly and nasty. Judge Marcus Clark defeated Jimmy Faircloth, a former aide to Gov. Bobby Jindal, despite campaign charges that Clark had once been suspended as a judge for failing to issue timely rulings. The candidates raised a total of \$1.3 million.

All told, an estimated \$4,667,473 was spent on TV ads in 2009. Of that, \$3,385,916 was spent by candidates, \$975,849 by party organizations, and \$305,708 by special-interest groups. Judge Panella was the top TV spender, with an estimated \$1,853,695. As exorbitant as his spending turned out to be, it was nearly matched by the combined advertising of Orié Melvin (\$516,758) and the Pennsylvania Republican Party (\$975,849).

## CHAPTER 1 NOTES

1. These numbers are slightly higher than those reported in the *New Politics of Judicial Elections 2000*. Campaign fundraising data from the National Institute on Money in State Politics are subject to minor fluctuations over time, as a result of late candidate filings and amendments to earlier finance records.
2. Unless otherwise specified, fundraising data include money raised by candidates for future election cycles. The 2007–08 total includes \$1.8 million raised by candidates for competitive and retention elections scheduled after 2008. Candidates on the ballot in 2007–08 raised \$43.8 million, including money raised before the actual year of their election.
3. Reporting techniques have been progressively refined and improved since the National Institute on Money in State Politics began gathering information on state court races. While some details are not available for the early 1990s elections, such as details about some contributors, the NIMSP data for the 1990s court elections are the best and most complete in existence.
4. Totals include previously unreported TV ad data from odd-year elections during the decade, as compiled by TNS Media Intelligence/CMAG for the National Center for State Courts and the Justice at Stake Campaign. The odd-year numbers augment data previously collected for even-year elections by the Brennan Center for Justice. For a fuller explanation of TNS/CMAG methodology, see Chapter 2.
5. Campaign fundraising data come from National Institute on Money in State Politics. Television data for independent election ads are compiled by CMAG for the Brennan Center for Justice.
6. J. Christopher Heagarty, “The Changing Face of Judicial Elections,” *North Carolina State Bar Journal* 19, 20 (Winter 2002).
7. *Caperton v. A.T. Massey Coal Co.*, Brief of Amici Curiae, The Conference of Chief Justices, in Support of Neither Party 4 (U.S. No. 08-22), available at [http://brennan.3cdn.net/d6274e472669a87b58\\_dqm6i-iz9.pdf](http://brennan.3cdn.net/d6274e472669a87b58_dqm6i-iz9.pdf).
8. Justice at Stake Campaign, “2001 National Bipartisan Survey of Almost 2,500 State Judges” available at [http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults\\_EA8838C0504A5.pdf](http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf).
9. Adam Liptak, “Tilting the Scales?: The Ohio Experience; Campaign Cash Mirrors a High Court’s Ruling” *The New York Times*, Oct. 1, 2006, available at [www.nytimes.com](http://www.nytimes.com).
10. Wallace B. Jefferson, “Why not elect judges on merit, not whim?” *The Dallas Morning News*, March 12, 2009, available at [http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-jefferson\\_13edi.State.Edition1.2212195.html](http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-jefferson_13edi.State.Edition1.2212195.html).
11. *Caperton v. Massey*, 129 S. Ct. 2252 (2009). Ruling available at <http://www.supremecourt.gov/opinions/08pdf/08-22.pdf>.
12. Robert Lenzner and Matthew Miller, “Buying Justice,” *Forbes.com*, July 21, 2003, available at [http://www.forbes.com/forbes/2003/0721/064\\_print.html](http://www.forbes.com/forbes/2003/0721/064_print.html).
13. According to the American Judicature Society, nine states are classified as having partisan elections for state Supreme Court seats: Alabama, Illinois, Louisiana, Michigan, Ohio, New Mexico, Pennsylvania, Texas and West Virginia. Thirteen states are labeled as nonpartisan: Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington and Wisconsin. Four of the above states—Illinois, Montana, New Mexico and Pennsylvania—have hybrid systems in which Supreme Court judges must face at least one partisan or nonpartisan election, but otherwise may face retention elections once on the court. A full summary is available at the American Judicature Society “Judicial Selection in the States” web site, [http://www.judicial-selection.us/judicial\\_selection\\_materials/index.cfm](http://www.judicial-selection.us/judicial_selection_materials/index.cfm).
14. Two states, Arkansas and North Carolina, had partisan elections for appellate judges in 2000, but switched to nonpartisan elections in 2002. While they are counted as nonpartisan states, money contributed in the 2000 elections was apportioned to the partisan category.
15. All Alabama data are from National Institute on Money in State Politics, [www.followthemoney.org](http://www.followthemoney.org).
16. A detailed chart of the Illinois Campaign for Political reform is available in *The New Politics of Judicial Elections 2004*, available at [http://www.justiceatstake.org/media/cms/NewPoliticsReport2004\\_83BBFD7C43A3.pdf](http://www.justiceatstake.org/media/cms/NewPoliticsReport2004_83BBFD7C43A3.pdf).
17. These numbers refer only to candidates on a ballot in 2007 or 2008, and do not include money raised by candidates for future elections.
18. All TV data in this section are from TNS Media Intelligence/CMAG, as provided to the Brennan Center for Justice and the National Center for State Courts. For a fuller explanation of TNS/CMAG methodology, see Chapter 2.
19. Michigan Campaign Finance Network, “2008 Citizen’s Guide to Michigan Campaign Finance,” Tables 15 and 16, <http://www.mcfn.org/pdfs/reports/MCFNCitGuide08.pdf>.
20. Adam Lynch, “Court Showdown: Chamber v. Plaintiffs,” *Jackson Free Press*, Oct. 29, 2008, [http://www.jacksonfreepress.com/index.php/site/comments/court\\_showdown\\_chamber\\_v\\_plaintiffs\\_102908/](http://www.jacksonfreepress.com/index.php/site/comments/court_showdown_chamber_v_plaintiffs_102908/). For original campaign filing, see <http://www.sos.state.ms.us/PDF-Out/00000059296.pdf>, Page 15.
21. “Donations Become Issue in Pennsylvania Supreme Court Race,” Associated Press, Oct. 26, 2009, [http://www.pennlive.com/midstate/index.ssf/2009/10/donations\\_become\\_issue\\_in\\_penn.html](http://www.pennlive.com/midstate/index.ssf/2009/10/donations_become_issue_in_penn.html).
22. For more information on TNS Media Intelligence/CMAG’s methodology, see Chapter 2.

# Court TV: The Rise of Costly Attack Ads

### Introduction: After the Flood

Fueled by the explosion of money in high court elections, the past decade has also seen an unprecedented surge in money spent on TV ads in judicial races. From 2000–2009, an estimated \$93.6 million was spent on air time for high court candidate TV ads, including an estimated \$6.6 million spent in the unusually costly odd-year elections in 2007.<sup>1</sup>

Though 2004 remains the high-water mark, 2008 showed that the flood of TV money remains strong. At over \$19 million, more money was spent on Supreme Court TV ads in 2008 than in any year except 2004—when 34 contested races had TV ads, compared with 21 in 2008.<sup>2</sup> More ads ran than ever before, and for the first time nationally, special interest groups and political parties combined to spend more on TV ads than did the candidates on the ballot.

When odd-year elections are combined, 2007–08 was the costliest biennium ever, at \$26.6 million (see “2007: TV Spending in an Off Year,” Page 36). During those two years, eight states set all-time records for spending on TV ads. The figures are further evidence of a forward march toward more money and harsher ads.

The 2007–08 biennium illustrated the new imperative in state Supreme Court elections. Put simply, massive spending on television is all but a prerequisite for gaining the bench. And to compete, judges need tremendous financial support, either in the form of large contributions or independent expenditures.

From 2004 onward, no one could doubt how expensive and hard-fought these judicial elec-

tion air wars would be. All that remained was a question of degree: How far were candidates willing to go? How negative were special interest groups capable of being? How much would state parties spend to throw their weight behind the endorsements and attacks?

An analysis of the 2008 cycle answers some of these questions—and raises new ones. The question after 2008, given the exorbitant totals and their confirmation of mounting trends, is whether now the perception is inevitable, at least in certain situations, that justice is for sale. Likewise, the corollary question is whether, in the face of big money expenditures by litigants and lawyers, and after the U.S. Supreme Court’s decision in *Caperton v. Massey*, states and litigants will take proactive steps to combat that perception.

Just 22 percent of states with contested Supreme Court elections featured television advertising in 2000, but that number jumped to 64 percent in 2002. By 2004, judicial TV ads were the unquestioned norm; 80 percent of states with contested elections ran TV ads. And that number rose even further, to 91 percent, in 2006. Of the 16 states with contested elections in 2007 and 2008, TV ads appeared in 14 of them (more than 85 percent). Minnesota and Washington were the only two states where television ads did not run in competitive high court contests.

More advertising, of course, means spikes in spending. For the third consecutive even-year election cycle, each state with TV advertising averaged over \$1 million in spending on those ads; in 2008, \$1.5 million on television ads was spent on average in 13 states, down slightly from 2006 but bracing by any estimation. And 2008

broke the record for number of ads aired on TV—58,879 ads were recorded, over 16,000 more than the previous record set in 2004. Among the races that featured television ads, 2,803 spots ran on average in each contest in 2008, compared to 1,242 in 2004.

### Independent Ads Lead the Attack

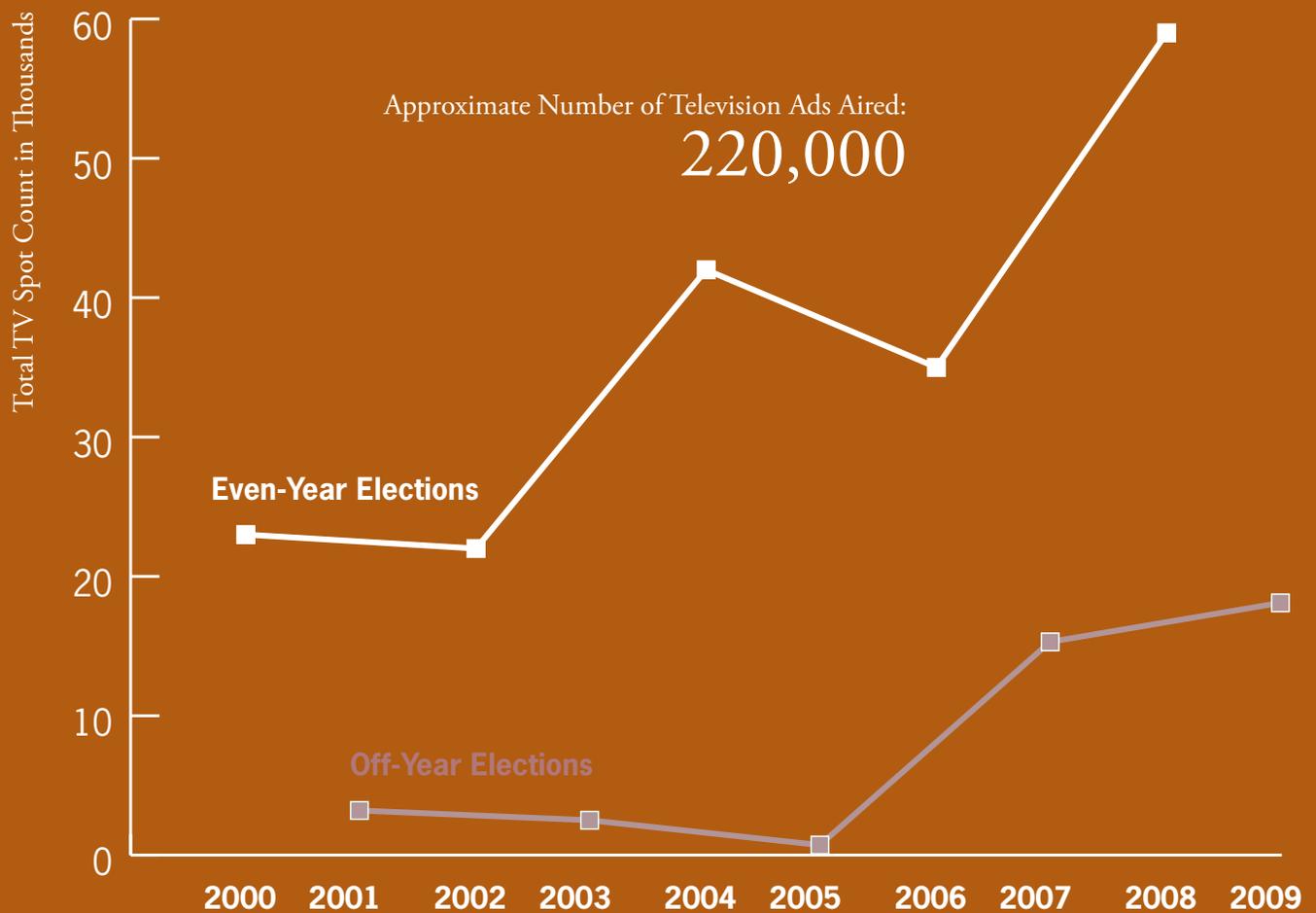
The decade also saw a surge in judicial campaign advertising by special-interest groups and political parties, and a startling rise in negative

advertising—two trends that with the exception of 2006 have been interwoven.

From 2000–2009, an estimated \$93.6 million was spent on air time in high court contests, including previously unreported ads from odd-year elections in Wisconsin and Pennsylvania. Ads by non-candidate groups played a critical role, accounting for about \$39 million, or 42 percent of the total—with special interest groups spending \$27.5 million, and party organizations adding \$11.7 million. In the two most expensive TV cycles, 2004 and 2008, independent ads from special interest and party organizations accounted for almost half of all air-time costs. In

Figure 12.

### Number of TV Ad Airings by Year, 2000–2009 High Court Elections



## Total Spending on High Court TV Ads, 2000–2009

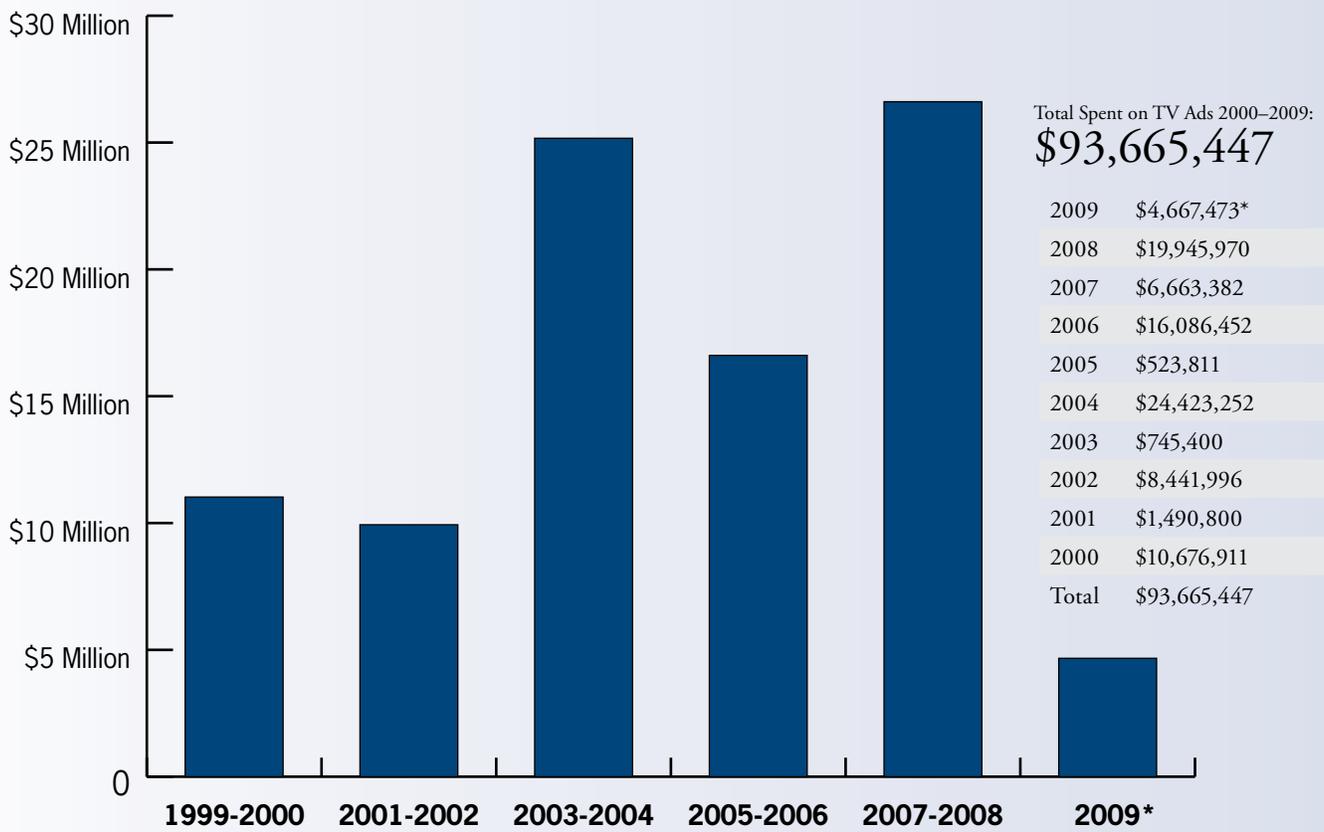


Figure 13.

• One year only; 2010 data not available. Data provided by TNS Media Intelligence/CMAG

2008, they combined to account for 52.2 percent of TV ad costs.<sup>3</sup>

Beyond the dollar totals, non-candidate groups accounted for an out-

sized share of the negative ads—frequently becoming the attack dogs of state Supreme Court elections.

In 2000, special interest group ads accounted for 61.9 percent of all documented attack ads, even though they only purchased 26.7 percent of the estimated \$10.6 million in air time for judicial ads. A similar pattern prevailed in 2008. Special interest groups and state political parties were responsible for 65 percent and 22 percent of all negative ads, respectively. Of 20,739 ads aired by special interest groups, 14,749 came from pro-business or otherwise conservative groups. Mississippi, Wisconsin, and Alabama offered prime examples of interest groups on the offensive in 2008.

### Ohio 2000 Ad: Is Justice for Sale?



Figure 14. Source: TNS Media Intelligence/CMAG

## High Court Election TV Spending, 2000–2009 (in order of total cost)

State	Candidate Airings	Candidate Cost	Group Airings	Group Cost	Party Airings	Party Cost	Total Airings	Total Cost
Ohio	32,195	\$12,742,243	14,807	\$7,847,403	2,342	\$775,200	49,344	\$21,364,846
Alabama	40,167	\$13,068,197	6,100	\$2,588,132	139	\$34,448	46,406	\$15,690,777
Michigan	8,756	\$5,258,283	3,545	\$3,248,059	4,884	\$2,476,608	17,185	\$10,982,950
Pennsylvania	15,821	\$7,674,018	1,286	\$947,411	4,277	\$1,925,680	21,384	\$10,547,109
Wisconsin	9,611	\$2,484,547	15,219	\$4,848,367	\$0	\$0	24,830	\$7,332,914
Illinois	2,252	\$1,275,692	1,731	\$1,624,553	4,990	\$4,240,885	8,973	\$7,141,130
West Virginia	5,356	\$1,222,513	5,740	\$2,181,468	0	\$0	11,096	\$3,403,981
Georgia	883	\$1,065,619	1,073	\$1,321,494	897	\$741,459	2,853	\$3,128,572
Nevada	5,807	\$2,854,746	50	\$39,929	0	\$0	5,857	\$2,894,675
Texas	1,320	\$1,014,297	\$0	\$0	2,896	\$1,519,241	4,216	\$2,533,538
Mississippi	3,612	\$1,165,212	3,996	\$1,247,703	0	\$0	7,608	\$2,412,915
North Carolina	4,077	\$1,291,450	327	\$272,715	0	\$0	4,404	\$1,564,165
Louisiana	2,168	\$944,611	507	\$306,120	0	\$0	2,675	\$1,250,731
Washington	273	\$66,127	1,118	\$1,092,304	0	\$0	1,391	\$1,158,431
Kentucky	2,895	\$1,007,886	0	\$0	0	\$0	2,895	\$1,007,886
Oregon	1,176	\$576,304	0	\$0	0	\$0	1,176	\$576,304
New Mexico	326	\$383,023	0	\$0	0	\$0	326	\$383,023
Arkansas	326	\$161,540	0	\$0	0	\$0	326	\$161,540
Montana	548	\$60,801	0	\$0	0	\$0	548	\$60,801
Idaho	479	\$42,447	133	\$26,712	0	\$0	612	\$69,159
All States	138,048	\$54,359,556	55,632	\$27,592,370	20,425	\$11,713,521	214,105	\$93,665,447

Figure 15. Data provided by TNS Media Intelligence/CMAG

**“I never felt so much like a hooker down by the bus station. . . as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote.”**

—Paul Pfeifer, Ohio Supreme Court justice,  
2006 New York Times interview



## Top 12 TV Ad Spenders, 2000–2009 High Court Elections

Group	Est. Ad Costs	Comments
U.S. Chamber/Ohio affiliates	\$4,258,822	Includes ads by Chamber, Citizens for a Strong Ohio, Partnership for Ohio's Future
Michigan Chamber	\$2,875,965	State affiliate of U.S. Chamber
Illinois Democratic Party	\$2,519,473	Funding From plaintiffs' lawyers
Wisconsin Manufacturers & Commerce	\$2,012,748	Affiliate of U.S. Chamber, National Association of Manufacturers
Michigan Democratic Party	\$1,863,189	Heavy support from plaintiffs' lawyers, unions
Center for Individual Freedom	\$1,824,140	Big tobacco ties, other funding unknown
Illinois Republican Party	\$1,816,705	U.S. Chamber funded 2004 ad blitz
Greater Wisconsin Committee	\$1,736,535	Organized labor, state Democratic ties
Pennsylvania Republican Party*	\$1,559,280	Funding from conservative groups
Citizens for an Independent Court	\$1,543,478	Lawyers, unions in 2000/02 Ohio elections
Safety and Prosperity Coalition	\$1,321,494	Funding from American Justice Partnership (formed by National Association of Manufacturers)
American Taxpayers Alliance	\$1,293,080	Received significant U.S. Chamber funding

Figure 16.

*Data provided by TNS Media Intelligence/CMAG.*

Occasionally, negative ads have backfired. In 2000, a Chamber-sponsored attack ad against Ohio Justice Alice Resnick depicted a “Blind Justice” statue peeking under her blindfold as cash was placed on the scales. Backlash from offended Ohio voters helped return Resnick to office.

But more often, negative ads helped defeat court candidates—some, but not all, of whom had little public profile and could easily be defined by nasty and often misleading 30-second spots. For example, in 2000, a Michigan Republican Party ad accused three Democratic candidates of freeing killers and rapists, “again and again.” In 2004, a \$3 million independent campaign painted West Virginia Justice Warren McGraw as “radical” and “dangerous,” also accusing him of freeing child molesters. In 2008, a Michigan Democratic Party portrayed Michigan Chief Justice Cliff Taylor as sleeping on the bench. Each of the targeted candidates was defeated.

### Party Ads Crucial in '08

Nationwide, a significant percentage of attacks came from the state political parties themselves. Seven of the 14 states where TV ads aired in 2007 and 2008 Supreme Court contests involved partisan elections.<sup>4</sup> State political parties aired ads in only two of those states, Texas and Michigan, but those ads constituted about 11 percent of all TV spots nationwide. In Texas and Michigan, these attacks included ad hominem assaults and charges of guilt by association, with images, for example, linking Chief Justice Cliff Taylor to the unpopular President Bush. Ads sponsored by the various state Democratic parties outnumbered those of Republicans nearly 4 to 1, reflecting the Democrats' 2.5 to 1 spending advantage on TV ads.

The top five spenders on TV ads in 2008 included, unsurprisingly, three special interest groups: Wisconsin Manufacturers & Commerce<sup>5</sup> (spending just shy of \$1.3 million), the Greater Wisconsin Committee<sup>6</sup> (at a little over \$1.1 mil-

lion), and the Center for Individual Freedom<sup>7</sup> (over \$965,000 in Alabama). In two of these cases, the candidate sponsored by the group was the better-funded candidate—in terms of spending on TV ads—and went on to win the election. The Michigan Democratic State Central Committee was the fourth biggest spender on TV ads during 2007–08, putting \$1,164,132 toward Diane Hathaway’s November victory.

The outlier, and the single greatest spender on TV ads in 2008, was Alabama Democrat Deborah Bell Paseur, whose narrow loss to Republican Greg Shaw speaks volumes about where state Supreme Court elections stand after 2008. The only one among the top five spending leaders to have put her money toward a losing cause, Paseur spent \$1,741,179 on television ads, but she was still outspent by the combination of her opponent’s campaign and the conservative interest group that supported him. Shaw spent

\$884,828 on TV ads, and benefited from the \$965,529 in outside support from the Virginia-based Center for Individual Freedom.

Paseur’s loss was, in the end, an example of the fact that, absent public financing, massive fundraising from lawyers, parties, and interest groups with causes before the courts is increasingly necessary, but not sufficient to win election to state high courts.



Figure 17. Source: TNS Media Intelligence/CMAG

Figure 18.  
Data provided  
by TNS Media  
Intelligence/CMAG.

### TV Spending, 2008 High Court Elections (in order of total cost)

State	Candidate		Group		Party		Total	
	Airings	Cost	Airings	Cost	Airings	Cost	Airings	Cost
Wisconsin	1,904	\$411,517	10,056	\$3,377,640	0	\$0	11,960	\$3,789,157
Michigan	3,704	\$1,268,391	1,208	\$804,869	3,471	\$1,565,391	8,383	\$3,638,651
Alabama	8,505	\$2,626,007	2,444	\$965,529	0	\$0	10,949	\$3,591,536
Texas	937	\$728,321	0	\$0	2,813	\$1,377,003	3,750	\$2,105,324
Nevada	3,906	\$1,450,506	0	\$0	0	\$0	3,906	\$1,450,506
Mississippi	1,798	\$434,537	2,765	\$860,532	0	\$0	4,563	\$1,295,069
West Virginia	4,119	\$788,995	1,932	\$479,225		\$0	6,051	\$1,268,220
Ohio	2,670	\$574,208	1,760	\$684,623	0	\$0	4,430	\$1,258,831
Louisiana	1,880	\$791,399	574	\$306,120	0	\$0	2,454	\$1,097,519
North Carolina	1,049	\$234,274	0	\$0	0	\$0	1,049	\$234,274
Kentucky	334	\$113,635	0	\$0	0	\$0	334	\$113,635
Montana	571	\$60,801	0	\$0	0	\$0	571	\$60,801
Idaho	479	\$42,447	0	\$0	0	\$0	479	\$42,447
<b>Total</b>	31,856	\$9,525,038	20,739	\$7,478,538	6,284	\$2,942,394	58,879	\$19,945,970



## State in Focus: Michigan

### Party Ads Bathe Both Candidates in Mud

In 2008, spending on television ads in Michigan was 4.5 times higher than just two years earlier, placing the state third nationally in total ad spending for the 2007–08 biennium, behind only Wisconsin and Pennsylvania.<sup>8</sup> More striking still was the victory of Diane Hathaway, a Democratic challenger, who unseated the state’s sitting Supreme Court Chief Justice, Republican Cliff Taylor. Taylor’s loss marked the first time in Michigan state history that an incumbent chief justice lost a bid for re-election.

A confluence of factors may partly explain the circumstances of Hathaway’s commanding victory. A Democrat, she ran with significant party support in a state from which the national Republicans effectively withdrew in the midst of the presidential race. In a race where more than 40 percent of all television spending (in excess of \$1.5 million) came from the state political parties, and in which one of those parties, while still spending on the court race, significantly cut back on its in-state “ground-game,” party presence may have been a key to Hathaway’s campaign success.

Justice Taylor had more overall air-time support than Judge Hathaway, with ads sponsored by the Michigan Chamber of Commerce, the Michigan Republican Party, and his own campaign. Hathaway’s air-time support drew from her own campaign as well as the state Democratic Party. The Michigan Democratic State Central Committee outspent its

Republican counterpart nearly 3 to 1, putting up over \$1 million (almost a third of the money spent on TV advertising in the state) to attack Taylor. In all, combined television spending—including TV ads by the Michigan Chamber, state political parties, and candidates themselves—amounted to \$2,075,423 in TV costs for Taylor and \$1,563,228 for Hathaway.

The Democratic Party’s attacks on Taylor were significant and perhaps decisive. Whether they were accurate portrayals of the facts remains a matter of in-state debate. The state Democratic Party ran over 2,800 television ads, 34 percent of all spots run in the state and more than any other single group. Every Democratic ad attacked Taylor.

One ad, in particular, was thought to have been crucial. It begins with talk of a nightmare: a dramatized image purporting to show Cliff Taylor asleep on the bench in the middle of a trial involving the death of six children in a fire at a public housing unit. Testimonials (from the actual people involved in the trial) follow. The mothers of the children say that Taylor fell asleep “several times in the middle of our arguments.” A recurrent image shown throughout the ad—the one that opens and concludes it—is apparently of Taylor sleeping, though on the bottom of each frame is the word “Dramatization.”

Accounts of Taylor sleeping on the bench seem dubious. The two mothers of the children were the only people who claimed that he had fallen asleep. Their own lawyer seemed to evade the question when asked (even though he was outspoken in his criticism of Taylor), and Michigan Government Television broadcasts of the trial do not show any images of Taylor asleep on the bench. Moreover, according to Fact Check.org of the Annenberg Public Policy Center at the University of Pennsylvania, the allegation itself had not surfaced publicly until a month before the election, even though the trial in question had taken place over a year earlier.<sup>9</sup>

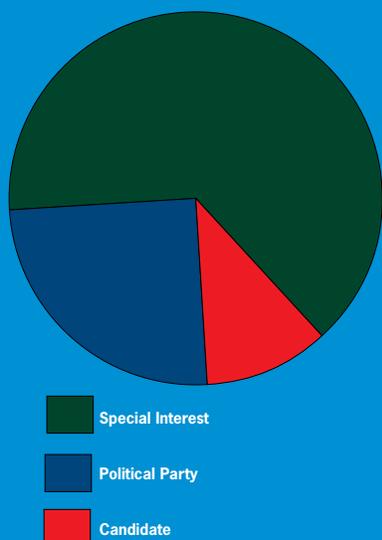
### The “Sleeping Judge”: Democratic Ad Slams Michigan Chief Justice



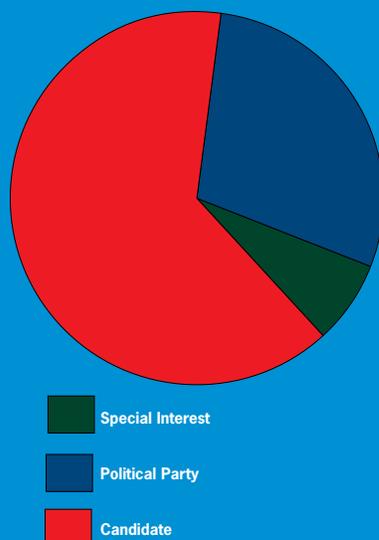
Figure 19. Source: TNS Media Intelligence/CMAG

## Sponsors and Tone, 2008 High Court Election Ads

### Attack Ads



### Contrast Ads



### Promote Ads

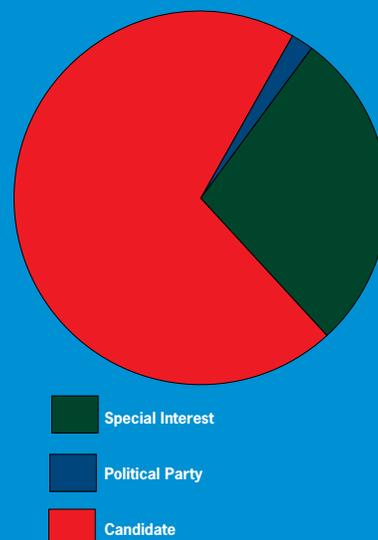


Figure 20. Data provided by TNS Media Intelligence/CMAG

## TV: Focus on 2008

### 2008 Television Advertising Snapshots

In 2008, independent special interest groups played an unprecedented role, spending a combined \$7,478,538 on TV ads and topping the record set by such groups in 2004. Combined with the \$2.9 million spent by state party organizations, it was the first time that groups not affiliated with the official campaigns spent more on television than the candidates themselves. Groups and parties outspent the candidates in four states: Michigan, Mississippi, Ohio and Wisconsin.

Of the 21 contested races in which campaign ads were aired, candidates who benefited from more television advertising—including amounts spent by special interest groups and political parties on their behalf or against their opponents—won 70 percent of the time in 2008. That figure was up from 67 percent in 2006, though still shy of the 85 percent success rate in 2004. In the six races

where the candidate with less money spent on airtime went on to win, three of the winning candidates were incumbents who clearly benefited from name-recognition and an established reputation.<sup>10</sup>

2008 also saw less electoral success for candidates supported by pro-business and conservative groups than in 2006. In 2006 candidates supported by pro-business and conservative groups won 71 percent of the time, whereas in 2008, candidates backed by such groups won only half their races. Candidates supported by progressive groups received less financial support and did not fare as well. Many candidates received no outside support from groups on either side.

Seven states set TV spending records in 2008: Idaho, Louisiana, Mississippi, Montana, Nevada, Texas and Wisconsin (an eighth state, Pennsylvania, set a new mark in 2007).<sup>11</sup> For a comprehensive summary of ad airings and spending in all states in 2008, see chart on page 29.



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## State in Focus: Wisconsin

### Election Victory at What Price to the Courts?

The April 2008 Supreme Court contest between incumbent Louis Butler and lower court judge Mike Gableman was the most expensive and hardest fought race of the season. While special interest groups were responsible for nearly 90 percent of all money spent on television ads in the state (over \$3 million), the most controversial ad came from Judge Gableman himself.

In a spot that first aired March 14, a female voice, speaking over sinister background music, declared that Louis Butler worked to “put criminals on the street.” A recent image of Butler flashed across the screen—but the ad’s narrator named Reuben Lee Mitchell, the convicted rapist of an “11 year old girl with learning disabilities.” Quickly citing a later crime committed by Mitchell, the ad insinuated that Butler was responsible for letting Mitchell go free and molest another child. The final image on the screen shows Butler as a judge—visually reinforcing the impression that he freed Mitchell while on the bench.

The claim was misleading. During his career as a judge, Louis Butler never even heard a case involving Reuben Lee Mitchell. Instead, in 1987, as a court-appointed public defender, he represented Mitchell, asking for a new trial of a rape conviction because of a violation of criminal procedure in the original proceeding. The court of appeals agreed, but the Wisconsin Supreme Court did not, and the conviction stood.<sup>12</sup> Mitchell served his prison sentence until 1992, when he was paroled. Three years after his release, Mitchell molested another girl. But Butler had nothing to do with Mitchell’s parole, either as an attorney or as a judge.

The ad also engaged in racial provocation. It showed Butler, Wisconsin’s only African American Supreme Court justice, alongside a photo of Mitchell, who is also black. The visual side-by-side dissolve and pairing—which caused a widespread outcry for its racial undertones—was capped by a suggestive closing message: “Can Wisconsin families feel safe with Louis Butler on the Supreme Court?” National organizations including Factcheck.org compared the ads to the infamous Willie Horton ads—the

controversial, racially divisive ads run by a PAC supporting George H.W. Bush’s presidential campaign. In 1988, the Bush campaign took pains to distance itself from the Willie Horton ads. Two decades later, it was a judicial candidate’s own campaign that paid for, produced and aired the campaign’s most divisive ad.

Judge Gableman won by two percentage points and became the first challenger to beat a sitting Wisconsin justice in over 40 years. But the controversy did not end on Election Day. The Wisconsin Judicial Commission alleged that Gableman had violated the code of judicial conduct by running a false television ad against Butler, “made knowingly with reckless disregard for truth”—triggering a protracted inquiry that ended only when the Wisconsin Supreme Court deadlocked 3-3 on the charges.

Special interest groups also played a critical role in Butler’s defeat. Two groups, the Coalition for America’s Families and Wisconsin Manufacturers & Commerce, spent more than \$1.6 million on TV ads. All of the Coalition for America’s Families ads included direct assaults on Butler. Eighty percent of the WMC ads were attacks, focusing almost exclusively on one of Butler’s past decisions as a judge involving criminal justice.

Justice Butler estimates that the total amount of money spent on the contest was closer to \$10 million. “We know that [the reported] number [is] grossly underrepresented because none of it tracks the cable money. Unless you have the resources and unless you’re willing to go out to the municipalities to track the cable spending one by one, you can’t get at those figures.”<sup>13</sup>

At a 2008 program in Washington, D.C., sponsored by former Justice Sandra Day O’Connor to discuss the state of the judiciary, Butler used John Grisham’s writing to convey his plight. Holding up *The Appeal*, Grisham’s best-selling tale of a chemical company that spends heavily to tilt the Mississippi Supreme Court, Butler told the audience: “Welcome to my world.”<sup>14</sup>

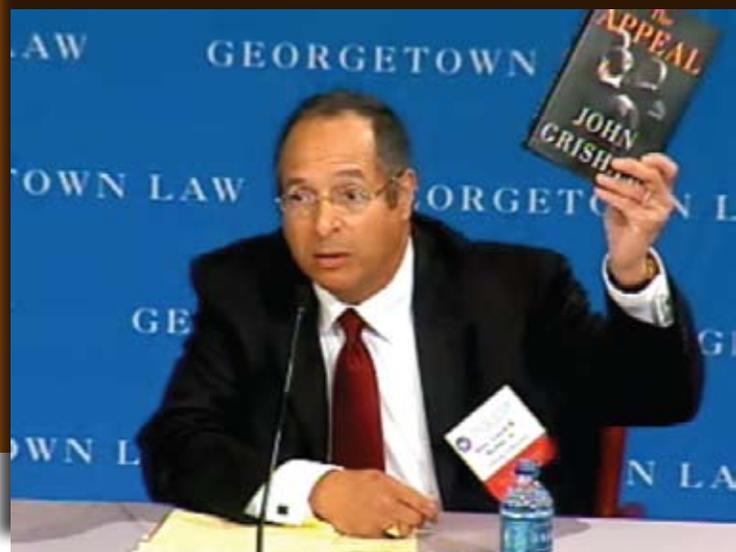
## 2008 Anti-Butler Ad Triggered Questions on Truth, Race

 <p><b>Unbelievable</b></p>	 <p>Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman</p>	 <p>Judge Michael Gableman Endorsed by a majority of State's &amp; District Attorneys</p>	 <p>Judge Michael Gableman putting child molesters behind bars for over 100 years</p>
<p>[Announcer]: Unbelievable. Shadowy special interests supporting Louis Butler are attacking Judge Michael</p>	<p>Gableman. It's not true. Judge, District Attorney Michael Gableman</p>	<p>has committed his life to locking up criminals to keep families safe, putting</p>	<p>child molesters behind bars for over 100 years. Louis Butler worked to put</p>
 <p>Louis Butler Defended Criminals</p>	 <p>State of Wisconsin CASE # 109ACF000250</p>	 <p>State of Wisconsin CASE # 109ACF00143 12/11/08 24 306</p>	 <p>Can Wisconsin families feel safe with Louis Butler on the Supreme Court? AUTHORIZED AND PAID FOR BY GABLEMAN FOR SUPREME COURT, JAMES ZELLER, TREASURER</p>
<p>criminals on the street, like Reuben Lee Mitchell who raped an 11-year-old girl</p>	<p>with learning disabilities. Butler found a loophole, Mitchell went on to molest</p>	<p>another child. Can Wisconsin families feel safe with Louis Butler on the Supreme Court?</p>	<p>[PFB]: GABLEMAN FOR SUPREME COURT</p>

Figure 21. Copyright 2008 TNS Media Intelligence/CMAG

## “Welcome to my world.”

—Louis Butler, holding up John Grisham’s novel *The Appeal*, after reality followed art and a high-cost campaign helped push Butler off the Wisconsin Supreme Court.



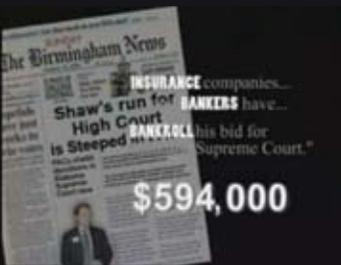
## Alabama 2008: Ad Ties Candidate to Special Interests



[Announcer]: The Sunday newspaper just reported



that insurance companies and bankers have bankrolled Greg Shaw's



campaign with hundreds of thousands of dollars. Then there's a million dollars



tied to gas and oil lobbyists from this building



near Washington, DC. So the choice is clear. Deborah Bell Paseur



is the only judge who sentenced criminals to jail. And Deborah can't be bought.



[Deborah Bell Paseur]: "You honor me with your vote, I'll serve you with honor."



[PFB]: JUDGEDEBORAHBELL.COM

→ In **Michigan** and **Nevada**, spending on television ads in 2008 dwarfed totals from the previous election cycle. Spending in Nevada was three times what it was in 2006, and eclipsed spending in the 2004 and 2006 election cycles combined. Increased spending on television ads was similarly dramatic in Michigan. The \$3,638,651 spent there in 2008 represented a 450 percent increase in spending compared to 2006.

→ **Louisiana** and **Mississippi** also saw significant swells in spending on TV ads. In 2004, \$153,212 was spent on television advertisements in Louisiana.<sup>15</sup> In 2008, spending exceeded \$1 million. Totals in Mississippi doubled between the 2004 and 2008 election cycles, shooting from just over \$600,000 in 2004 to nearly \$1.3 million in 2008.

→ **Texas** witnessed spending spikes in 2008 that made figures from previous election cycles in the state look minuscule. The more than \$2 million spent on TV ads in the state in 2008 was *five times* what it was in 2002, the last year prior to 2008 in which the state saw TV ads in their Supreme Court contests.<sup>16</sup>

The majority of the most controversial and costly ad campaigns were sponsored by special interest groups and state party organizations.

→ In **Mississippi**, a Virginia-based group, the Law Enforcement Alliance of America, accused incumbent Oliver Diaz, Jr. of "voting for" convicted killers and rapists in three separate cases. Each accusation proved overwrought if not misleading. The state's Special Committee on Judicial Election Campaign Intervention roundly denounced the ad, issuing a public statement on October 29. Some—though not all—television stations stopped running the ad. But the ad had aired for over a week before the Committee intervened. Diaz lost the election to lower-court judge Randy "Bubba" Pierce, who said he had nothing to do with the ads.

→ **In Michigan**, the Democratic State Central Committee, capitalizing on President Bush's dwindling popularity, ran ads linking Republican incumbent Cliff Taylor to the former President. One ad intoned: "George W. Bush and Clifford Taylor, political soldiers for the rich." It went on to show clips of Bush endorsing Taylor. In another ad, the veracity of which has been widely questioned, Democrats depicted Taylor as sleeping on the job (see "State in Focus: Michigan," Page 30). Ads by the state Republican Party and state Chamber of Commerce branded Judge Diane Hathaway as a terrorist sympathizer, weak on crime and lazy.

→ **In Alabama**, the Virginia-based Center for Individual Freedom purchased more air time, an estimated \$965,529 worth, than did the candidate it was supporting, Republican Greg Shaw, who spent an estimated \$884,828. Together, the two narrowly outspent Democrat Deborah Bell Paseur, who lost by a close margin. While many CFIF ads were positive, Paseur lashed out at the group, claiming it was working as a front for the oil and gas industry.

→ **In Wisconsin**, the nation's ugliest and most controversial ad of 2008 came from a judge. Mike Gableman's racially tinged ads against sitting Justice Louis Butler triggered an ethics complaint against Gableman after he defeated Butler. ("See State in Focus: Wisconsin," Page 32). But independent special interest groups accounted for 56 percent of all attack ads. One ad, run by the conservative group Coalition for America's Families, featured a dramatization of a "raped, beaten, and strangled co-ed," adding that Justice Butler sought to let the attacker go free. The ad claimed that Butler sided with criminals "nearly 60 percent of the time." Gableman's integrity was attacked in ads aired by the Greater Wisconsin Committee, which suggested he was appointed to a judgeship as a payoff for a political contribution.

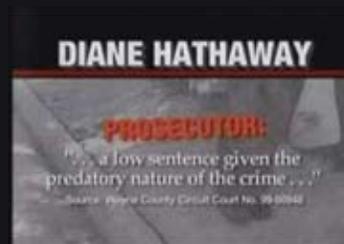
## Michigan 2008: Challenger Assailed as Soft on Terrorism



[Announcer]: Newspapers call Diane Hathaway, "[un]qualified," for the Supreme Court.



Remember the low sentence Hathaway gave a sex predator



that targeted a minor? There's more.



Hathaway granted probation to a man who was arrested in camouflage paint



while carrying a loaded AK-47.



His web page praised terrorists and declared his own personal Jihad.



Probation for a terrorist sympathizer? We're at war with terrorists. Diane Hathaway, out of touch.



[PFB]: MICHIGAN REPUBLICAN PARTY

## 2007: Supreme Court TV Spending in an Off Year

Only two states—Pennsylvania and Wisconsin—routinely hold Supreme Court elections in odd-numbered years. Spending in these elections typically has fallen short of other election states in the past decade. But in 2007, Pennsylvania’s high court election was more expensive than any in 2008, and spending on TV ads reflected that, at more than \$4.5 million. While spending in Wisconsin’s race between Michael Gableman and Louis Butler drew headlines in 2008, the state also reached unprecedented heights for off-year elections in 2007. On TV ad airings alone, candidates and special interest groups combined to spend more than \$2.1 million. Spending in off-year elections has generally not been significant enough to justify systematic tracking, but if 2007 is any indication for judicial elections, there may be fewer quiet years in the future.

The impact of 2007 spending is captured in one fact. While 2004 remains the single most expensive year for TV ad spending, 2007–08 set a new record as the costliest biennium. The estimated \$26.6 million in ad buys in 2007–08 exceeds the \$25.2 million recorded in 2003–04.

### TV Spending, 2007 High Court Elections

State	Candidate		Group		Party		Total	
	Airings	Cost	Airings	Cost	Airings	Cost	Airings	Cost
Pennsylvania	6,386	\$3,500,454	1,048	\$858,611	795	\$196,131	8,229	\$4,555,196
Wisconsin	3,392	\$943,167	3,755	\$1,165,019	0	\$0	7,147	\$2,108,186
Total	9,778	\$4,443,621	4,803	\$2,023,630	795	\$196,131	15,376	\$6,663,382

Figure 24. Data provided by TNS Media Intelligence/CMAG.

### TV Spending in Off-Year High Court Elections, Pennsylvania and Wisconsin

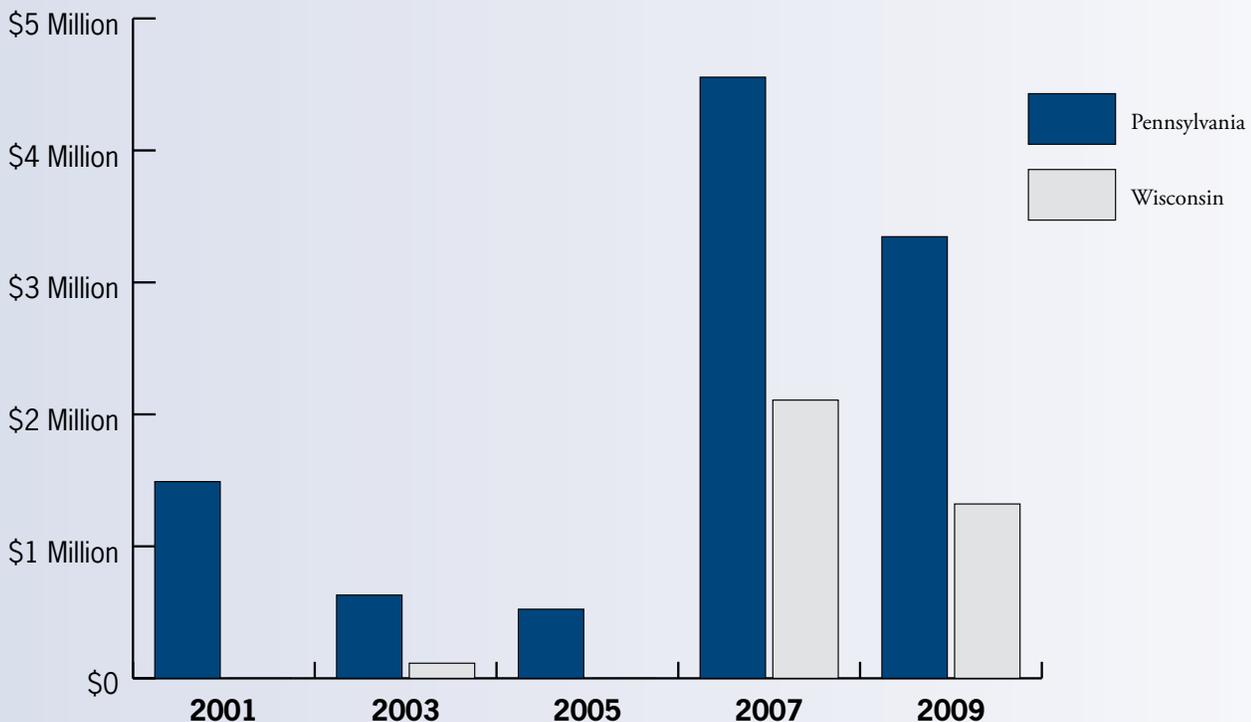


Figure 25. Data provided by TNS Media Intelligence/CMAG

## CHAPTER 2 NOTES

1. In prior “New Politics of Judicial Election” reports, only even-year elections were monitored for Supreme Court TV ads. In response to the unusually costly 2007 elections in Pennsylvania and Wisconsin, this report for the first time incorporates odd-year election data, dating back to 1999. The odd-year data have been added to decade TV totals, leading to revisions of earlier published estimates.
2. The estimated costs of airtime in this report are drawn from television advertising data from the nation’s 100 largest media markets. The estimates were calculated and supplied by TNS Media Intelligence/CMAG. The calculations do not include either ad agency commissions or the costs of production. The costs reported here therefore understate expenditures, and the estimates are useful principally for purposes of comparison within each state.
3. While odd-year election TV spending totals are included for the first time in this report, because of the late arrival of some odd-year data, many specific analyses, such as the percentage of ads accounted for by non-candidate groups, are based only on 2008 and other even years.
4. Those states are Alabama, Louisiana, Michigan, Ohio, Pennsylvania, Texas, and West Virginia. (No ads were run in the other two partisan states, Illinois, where the incumbent was not challenged, or New Mexico).
5. Wisconsin Manufacturers & Commerce is a Wisconsin-based business issues advocacy group that includes large and small manufacturers, service companies, local chambers of commerce and specialized trade associations. The group was responsible for more ad airings in the state than any other group or candidate in 2008, running 32 percent of all ads, and was the biggest spender on TV ads in the state. By the campaign’s end, their disclosed spending reached \$1,296,842, making it the single biggest spender among special interest groups across the country in 2008. WMC also spent heavily 2007, to help elect Justice Annette Ziegler. Between the two elections, the group spent an estimated \$2,054,292.
6. The Greater Wisconsin Committee is a Wisconsin-based progressive political action committee that receives significant funding from organized labor and whose leadership has close ties to the office of Democratic Governor Jim Doyle. Including the 2007 election, GWC spent an estimated total of \$1,430,807 on TV air time in 2007–08.
7. The Center for Individual Freedom, a conservative PAC based in Virginia, works primarily on legal and legislative issues ranging from Supreme Court nominees to energy and tax policy reform. In addition to the 2008 Alabama race, CFIF spent an estimated \$858,611 in the 2007 Pennsylvania election. That raised the group’s total to \$1,824,140, making it the nation’s second biggest spender on Supreme Court ads in the 2007–08 biennium.
8. Michigan ranked sixth in total spending in 2006 among the ten states nationwide where there were contested Supreme Court elections.
9. Viveca Novak, “The Case of the Sleeping Judge,” Factcheck.org (Nov. 26, 2008), available at [http://www.factcheck.org/elections-2008/the\\_case\\_of\\_the\\_sleeping\\_justice.html](http://www.factcheck.org/elections-2008/the_case_of_the_sleeping_justice.html).
10. These candidates were Joel Horton (Idaho), Lisabeth Hughes Abramson (Kentucky), and Phil Johnson (Texas). The name recognition of an incumbent is, of course, an advantage in campaigns for any office. But it is especially important in judicial races because of the so-called “voter roll off” that tends to plague elections for judgeships. Voters who select presidential, gubernatorial, congressional and even local candidates often fail to vote for Supreme Court candidates. As a result, candidates generally rely on television ads to boost name recognition and visibility; having served a previous term, with the attendant status that provides, is thus an obvious advantage.
11. Wisconsin set TV ad records in both 2007 and 2008. For more on the Wisconsin/Pennsylvania 2007 elections, see article on Page 36.
12. Writing for the majority, Justice Shirley Abrahamson (now Chief Justice) granted that Butler’s argument had legal merit but she maintained that it did not change the basis of his conviction. “We can conclude,” she reasoned, “that there is no reasonable possibility that the error contributed to the conviction.”
13. Honorable Louis Butler, Remarks at the Sandra Day O’Connor Conference on the State of the Judiciary, Panel: State Judicial Races – How Can Corporations Help Stop the Campaign Funding ‘Arms Race’?, (Oct. 2, 2008).
14. Id.
15. Prior to 2008, the last state Supreme Court elections held in Louisiana were in 2006, when two incumbents ran unopposed.
16. Though Texas held contested Supreme Court elections in 2004 and 2006, no TV ads ran there during those years.

**“The risk inherent in any non-publicly funded judicial election for this court is that the public may inaccurately perceive a justice as beholden to individuals or groups that contribute to his or her campaign.”**

*—Wisconsin’s seven Supreme Court justices, in a December 2007 letter appealing for public financing of court elections*

## CHAPTER 3

# Who Played? Who Won?



Karl Rove was among the first to organize serious fundraising for judicial races.

Who has been working the hardest to change judicial politics and place their preferred candidates on the bench? A perfect map is impossible to draw, because inadequate disclosure laws make it so difficult to trace money to its roots, especially since all sides use conduit groups to mask the real sources of donations. But two conclusions can be drawn. First, for more than a decade, players on the political right have raised more money and won more court races. Second, it has been an asymmetrical battle, with conservatives channeling money through national and sometimes state-based groups, while the left largely has organized at the state level, routing its biggest money from plaintiffs' lawyers and unions through Democratic Party committees and independent groups.

One thing is clear: in America's tort wars, both sides feel perpetually aggrieved, pointing to rulings they believe to be abusive and courts they are convinced are biased, and vowing to out-organize and outspend the other side.

One of the first players to successfully organize such efforts on a large scale is well-known: **Karl Rove**. In the late 1980s and early '90s, Rove masterminded a turnaround that reversed the makeup of the Texas Supreme Court, from a Democratic body known for cozy relations with the plaintiffs' bar to an all-Republican panel that took a hard line on injury and product liability cases. In the early 1990s, he was hired by the Business Council of Alabama to perform a similar feat in that state.<sup>1</sup> Both state courts eventually became overwhelmingly Republican, along with Louisiana's.

In 2000, business and conservative groups began funding, and organizing, state Supreme Court races from a national stage, often with an invisible hand. Over the next eight years, plaintiffs' lawyers and unions lost control of Supreme Courts in Illinois, Michigan, Mississippi, Ohio, Wisconsin and West Virginia.

Key players in the conservative coalitions have included leaders from such top companies as

### Washington 2006: National Groups Finance Attack Ads in State Race



[Roberts]: "He was adorable. Stevie had just turned three years old before he was



beaten and tortured to death. The Andress decision let my son's killer



walk free after serving less than a third of his murder sentence. You could have a



convicted murderer released on the Andress decision next door

Figure 26. Americans Tired of Lawsuit Abuse waged a TV assault in Washington's 2006 election, aided by funding from an arm of the National Association for Manufacturers.

Copyright 2006 TNS Media Intelligence/CMAG

**Home Depot**, insurance giant **AIG**, **Chrysler** and **big tobacco**, and such leading business trade groups as the **U.S. Chamber of Commerce** and the **National Association of Manufacturers**.

Intellectual support has been provided by a number of state **Federalist Society** chapters. Political players included **Bob Perry**, a real estate magnate who financed the Swift Boat Veterans for Truth campaign in 2004's presidential election, and **CRC Communications**, the PR company that spearheaded the Swift Boat campaign.

Faced with an unprecedented spigot of money from Washington-based business and conservative groups, the lawyers and unions have funneled money into state-level special interest groups and political party organizations, often masking the scale of their support (see "Focus on Alabama: Shell Game on the Left," Pages 46–47)—and have gradually clawed back a little of their lost turf. (See chart, "Top Supreme Court Spenders, 2000–09 and 2007–08," Page 40)

In Alabama, for instance, Deborah Bell Paseur, who narrowly lost to Republican Greg Shaw in 2008, got fully 61 percent of her money from the state Democratic Party, while in Michigan and Texas, state Democrats ran million-dollar TV ad campaigns. In each case, plaintiffs' lawyers were believed to have played a key role in the funding.

The success of the business groups has recently slowed, possibly due in part to shifting public attitudes about party identification and the business sector. In 2006, a spinoff of the **National**

**Association of Manufacturers** failed to oust Georgia's chief justice, while in Alabama, Sue Bell Cobb became chief justice, and the only Democrat, on the state's Supreme Court. In 2007–08, chief justices were voted out in three states, in part because of perceived business and special interest ties. Trial lawyer and union money also played a key role as Democrats won two seats in Pennsylvania's 2007 election, the nation's costliest in the 2007–08 cycle. And even in Alabama and Texas, the two states where Rove pioneered the conservative remaking of state Supreme Courts, the margin of defeat for Democratic candidates was unexpectedly narrow.

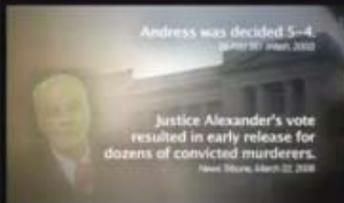
The closing gap makes a disturbing prognosis clear: With each side able to draw blood, and therefore hopeful that they can win if they just spend enough money, the odds of continuing super spender showdowns are greater than ever.

## Nationalizing of Court Elections

It would be inaccurate to say the 2000–2009 period saw the first special interest spending on state Supreme Court elections. As far back as the late 1980s, national reports using the phrase "Justice for Sale" were run by *Time* magazine and "60 Minutes," and focused on plaintiffs' lawyers in Texas.<sup>2</sup> In 2000, national and business media were reporting on how the business sector was fighting to shift the balance on state courts back from what many considered a pro-plaintiff bias.



and you wouldn't even know it. If Justice Alexander hadn't voted for this decision



this wouldn't have happened. Judge Alexander is way out of touch with this issue.



I'm here supporting John Groen because John Groen is for victims and their families."



[PFB]: Americans Tired of Lawsuit Abuse

## Top Supreme Court Spenders, 2000–09 and 2007–08

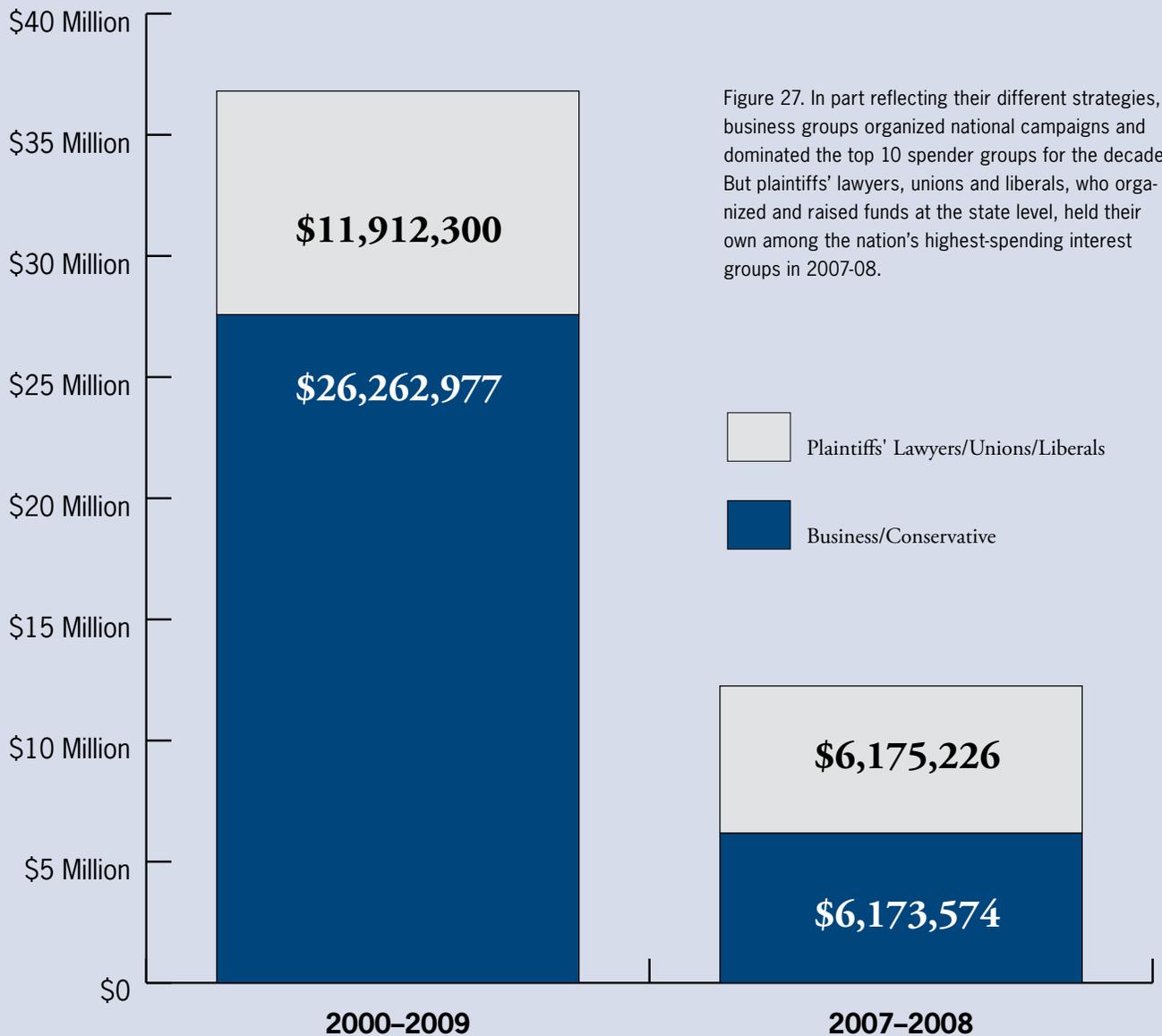


Figure 27. In part reflecting their different strategies, business groups organized national campaigns and dominated the top 10 spender groups for the decade. But plaintiffs' lawyers, unions and liberals, who organized and raised funds at the state level, held their own among the nation's highest-spending interest groups in 2007-08.



Home Depot  
co-founder  
Bernard Marcus

These groups took spending to unprecedented heights and for the first time nationalized state Supreme Court elections.

In a 2002 speech to the Illinois Chamber of Commerce, **U.S. Chamber of Commerce** President **Thomas Donohue** suggested a precipitating event in explaining the Chamber's state Supreme Court strategy.

"Flush with billions of dollars in fees from tobacco and asbestos litigation, a small group of class-action trial lawyers is hellbent on destroy-

ing other industries, and nobody is immune," Donohue told the Illinois Chamber. "Our approach is simple—implement a multi-front strategy of challenging these unscrupulous trial lawyers every time they poke their head out of the ground. ... On the political front, we're going to get involved in key state Supreme Court and attorney general races as part of our effort to elect pro-legal reform judicial candidates. . . . We're clearly engaged in hand-to-hand combat, and we've got to step it up if we're going to survive."<sup>3</sup>



**“We’re going to get involved in key state supreme court and attorney general races as part of our effort to elect pro-legal reform judicial candidates. . . . We’re clearly engaged in hand-to-hand combat, and we’ve got to step it up if we’re going to survive.”**

*—Thomas Donohue, president of U.S. Chamber of Commerce, 2002 speech*

From the start, the Chamber campaign drew on some of America’s deepest pockets. According to a landmark 2003 Forbes article, Home Depot co-founder **Bernard Marcus** and **Maurice “Hank” Greenberg**, chairman of the insurance giant **AIG**, contributed millions of dollars to the cause, and they remain vocal leaders in the anti-tort movement. Other early \$1 million contributors included Wal-Mart, DaimlerChrysler, and the American Council of Life Insurers.<sup>4</sup>

The spending in 2000 has never been fully accounted for because the Chamber spent much of its money through conduit groups. In 2005, successful disclosure litigation revealed that one Chamber-funded group, **Citizens for a Strong Ohio**, spent an estimated \$4.4 million in ads. The Chamber’s Alabama affiliate, the **Business Council of Alabama**, poured \$1.6 million into a then-record \$13.1 million election. Mississippi’s attorney general said the Chamber spent \$400,000 in ads there, while other estimates accounting for the full reach of the campaign ranged as high as \$1 million. While the Chamber lost widely publicized races in Ohio and Mississippi, it swept all five seats in Alabama, and all but ran the table in 2002 and 2004 state Supreme Court elections.<sup>5</sup>

In 2005, the **National Association of Manufacturers** (NAM) took this sort of coordination a step further. NAM leader **John Engler**, previously the governor of Michigan, launched the **American Justice Partnership**. Other national players also began financing state Supreme Court races. The **American Tort Reform Association** and the **Center for Individual Freedom** have historic links to big

tobacco, while the **Law Enforcement Alliance of America** has received funding from the National Rifle Association—although the funding of that group’s state court campaigns remains unclear.

Many of the groups have worked to conceal the original sources of their money, sometimes in protracted litigation, and documentation of financial backers is partial at best.



Former AIG CEO  
Maurice Greenberg

## **The Left: Organizing at the State Level**

At the national level, competing groups such as plaintiffs’ lawyers, unions and the Democratic Party have failed to match their conservative and business-group opponents.

In 2007, a new national PAC, the **Democratic Judicial Campaign Committee**, was founded, but in its first two years, it failed to identify a national funding stream that would enable it to fight back against national groups on the right. The **American Association of Justice**, formerly the American Trial Lawyers Association, has primarily focused on federal elections.

Former Georgia governor Roy Barnes was on the board of the Democratic Judicial Campaign Committee.



Nonetheless, in 2007–08, the state-based groups were much more successful in holding their own financially, even when they ultimately lost elections. In Michigan, the state Democrats spent an estimated \$1.16 million on a series of TV ads lambasting then-Chief Justice Cliff Taylor, who was ousted by Democrat Diane Hathaway. In Wisconsin, the **Greater Wisconsin Committee**, a PAC whose leadership includes Kirk Brown, a former aide to Democratic Governor Jim Doyle, spent just under \$1.2 million on TV air time. The committee nearly matched the TV spending of **Wisconsin Manufacturers & Commerce**, although the Democratic incumbent, Louis Butler, eventually lost.

In Mississippi, where the conviction of class-action lawyer Richard Scruggs plunged the plaintiffs' bar into scandal, trial lawyers took a novel approach in 2008 to keep a low profile. The state trial lawyers group, the **Mississippi Association for Justice**, passed the hat *after* the election.<sup>6</sup> Thus, newly elected Justice Jim Kitchens was able to retire \$300,000 in debt he had incurred during his underdog campaign against incumbent Jim Smith—with help from the very lawyers and other interests who would appear before him in court.

And Alabama and Texas provided vivid examples of how plaintiffs' lawyers can spend millions on preferred candidates without identifying themselves, by the simple expedient of using political action committees to route money to state party organizations. (See "Focus on Alabama: Shell Game on the Left," Pages 46–47.)

**"With businesses and interest groups pouring more and more money into state judicial elections. . . the public can't be faulted for concluding that donors are getting what they pay for, namely favorable treatment from judges who are supposed to be impartial."**

—Tony Mauro, USA Today opinion column

# The National Networks

## American Justice Partnership

The national network on the right that has emerged around tort issues can be glimpsed in a group formed in 2005 by the **National Association of Manufacturers**: the **American Justice Partnership**. AJP was founded shortly after former Michigan Gov. **John Engler** took the helm at NAM, and its membership list contains many of the biggest state-level and national funders in judicial politics today.

Although AJP generally has worked through conduits, in 2006 it gave \$300,000 to Oregon Supreme Court candidate Jack Roberts. It was also the primary financial backer of an interest-group campaign to unseat Georgia Supreme Court Chief Justice Carol Hunstein, writing \$1.3 million in checks to the **Safety and Prosperity Coalition**. AJP also contributed \$345,000 to **Americans Tired of Lawsuit Abuse**, at a time when that group was running a 2006 independent campaign backing John Groen and Stephen Johnson for Washington state Supreme Court. And in 2008 it donated \$125,000 to the **Business & Industry Political Action Committee's** campaign arm, for ads supporting then-Mississippi Chief Justice Jim Smith.<sup>7</sup>

AJP President **Dan Pero** has declared that AJP "receives no funds from NAM." But there is little doubt whose efforts it seeks to support. Every documented check from the American Justice Partnership to candidates and independent campaigns lists its address as 1331 Pennsylvania Avenue NW, in Washington, D.C.—the same address as the national headquarters of the National Association of Manufacturers.<sup>8</sup>

## The Long Reach of the American Justice Partnership

Founded by the National Association of Manufacturers in 2005, the American Justice Partnership lists 20 national partners and 42 state-level partners based in 21 states. It is formally partnered with at least 12 groups that have spent money on state Supreme Court elections, and financially supported campaign efforts by three other groups. In addition to being one of the nation's top super spenders for 2000–09 state Supreme Court elections, the AJP is formally allied with two members of the top 10 spenders for the 2000–09 decade. Two other partners, Wisconsin Manufacturers & Commerce and the Center for Individual Freedom, were top 10 spenders nationally in 2007–08 elections.

### State Partners

Business Council of Alabama  
Illinois Chamber of Commerce  
Illinois Civil Justice League  
Michigan Chamber of Commerce  
Mississippians for Economic Progress  
Ohio Chamber of Commerce  
Stop Lawsuit Abuse of Alabama  
Texas Civil Justice League  
West Virginia Chamber of Commerce  
Wisconsin Manufacturers & Commerce

### National Partners

American Tort Reform Association  
Center for Individual Freedom

### Campaigns Subsidized by AJP

Americans Tired of Lawsuit Abuse, Washington 2006  
Safety and Prosperity Coalition, Georgia 2006  
Business & Industry Political Education Committee, Mississippi 2008

## U.S. Chamber of Commerce Network

While the **U.S. Chamber of Commerce** has never issued a detailed listing of which races it played a financial role in, its involvement has been documented in campaigns in Alabama, Illinois, Michigan, Ohio, Mississippi and West Virginia. A 2003 *Forbes* article credited the Chamber with backing the winning candidate in 21 of 24 contested races in 2000 and 2002.

In 2008, the U.S. and Ohio Chambers accounted for \$624,260 of the \$943,000 raised by the **Partnership for Ohio's Future**,<sup>9</sup> while state chambers spent heavily in Michigan and West Virginia. **Mississippians for Economic Progress**, a group that the Chamber has routed money through in the past, operated an independent campaign that spent an estimated \$67,797 in TV ads in 2008, favoring then-Chief Justice Jim Smith. The **American Taxpayers Alliance**, which has financed independent campaigns in Alabama and Illinois, reported receiving \$2.6 million in 2002 from the U.S. Chamber,<sup>10</sup> making the Chamber its biggest financial contributor that year. ATA spent heavily on ads backing now-Justice Rita Garman.

The Chamber lists **Wisconsin Manufacturers & Commerce** and the **Business Council of Alabama** as its official state allies. WMC was the nation's top super spender group in 2007–08 state Supreme Court races, while BCA, as the second highest contributor in Alabama during the 2000–2009 period, helped make that state's Supreme Court elections the costliest in the nation.

The Chamber also established the **Institute for Legal Reform**, whose annual survey ranking states' "litigation climate" is widely cited, and established three newspapers—in Texas, Illinois and West Virginia—that report heavily on tort-related issues. ILR has served as a funnel for getting Chamber money into state Supreme Court independent campaigns.



John Engler, president of the National Association of Manufacturers



More information  
[@justiceatstake.org](https://www.justiceatstake.org)



## American Tort Reform Association

The **American Tort Reform Association** was founded in the 1980s to coordinate national and state-level tort liability reform campaigns. Receiving a mix of funding from Fortune 500 companies and big tobacco (according to Philip Morris documents unearthed during tobacco industry litigation, major tobacco companies accounted for more than half of ATRA's budget in 1995), the group has invested money in several major state Supreme Court elections.

In 2004, ATRA invested \$765,000 into two races, in Illinois and Mississippi. In 2006, it contributed \$503,000 to **Americans Tired of Lawsuit Abuse**, a Virginia group that in turn underwrote an independent campaign backing two business-backed candidates for Washington Supreme Court.<sup>11</sup>

## The Secret Money Players: Center for Individual Freedom and the Law Enforcement Alliance of America

Two repeat players in state Supreme Court elections have worked zealously to keep their money cloaked in mystery: the **Center for Individual Freedom** (CFIF) and the **Law Enforcement Alliance of America**. CFIF spent an estimated \$858,611 in Pennsylvania in 2007, on an independent campaign supporting Maureen Lally-Green's unsuccessful state Supreme Court campaign. In 2008, the Center bought an estimated \$965,000 in air time in Alabama, supporting the successful campaign of Republican Greg Shaw.

CFIF has guarded the identities of its donors, suing two states, Pennsylvania and West Virginia, to challenge their election disclosure laws. But its

roots appear likely to be grounded in big tobacco. The group emerged in 1998, just as Philip Morris was publicly cutting off millions in funding for a mouthpiece organization, the **National Smokers Alliance**. W. Thomas Humber, head of the Alliance, was listed on the CFIF site as the latter group's founder, and two other senior officers at the Smokers Alliance also took charge of CFIF. The Center for Individual Freedom didn't even bother to switch buildings, operating for years at the same Alexandria, Virginia, address as the Smokers Alliance. According to documents, in 1999 Humber actively sought tobacco industry financial backing on behalf of the fledgling CFIF.<sup>12</sup>

The Law Enforcement Alliance of America bought air time in Mississippi in 2002 and 2008, as well as Pennsylvania in 2001. One of its 2008 Mississippi ads, accusing then-Justice Oliver Diaz, Jr. of "voting for" killers and rapists in various cases, was pulled from the air by some stations after a state-run campaign conduct committee cried foul.<sup>13</sup>

Like many of the out-of-state groups running independent TV ads in state Supreme Court elections, LEAA is based in the Virginia suburbs of Washington, D.C. According to a Public Citizen project, called "Stealth PACs,"<sup>14</sup> the group received significant funding from the **National Rifle Association**, but it is not clear whether the NRA has directly invested in state Supreme Court races.

## Democratic Judicial Campaign Committee

The **Democratic Judicial Campaign Committee** was formed in 2007, but by the end of the 2008 election campaign had still not become a major financial player. Despite some support from unions, and from **Fred Baron**, a Texas plaintiffs' lawyer, the group raised only

**"The promise of America is broken if the public thinks that judges are captured by special interests, controlled by the wealthy and powerful."**

—*"Justice in Jeopardy," 2003 American Bar Association report*

**“Not only does the law allow independent groups to operate like Swiss banks, it allows them to effectively to take the ‘r’ out of free speech.”**

— *Mike McCabe, Wisconsin Democracy Campaign*

about \$155,000 through the 2008 elections, and disbursed only about \$21,000 in direct aid to campaigns in Wisconsin and Michigan.

The group’s goal is explicitly partisan, saying it is “the only organization whose primary mission is to elect Democratic judges to state courts.” The group’s board of advisers includes former Georgia Gov. **Roy Barnes**; former Wisconsin Attorney General **Peg Lautenschlager**; former Washington Insurance Commissioner **Deborah Senn**, who lost a 2004 bid for attorney general after the U.S. Chamber spent heavily on her opponent; Democratic pollster **Celinda Lake**; and **Martin Frost**, former Texas congressman.<sup>15</sup>

## State-Level Coalitions

### Texas Titans: Bob Perry and Fred Baron

During the past decade, Texas was home to two super spenders who have been leading players in state Supreme Court elections—and who have extended their influence beyond state lines, primarily for non-judicial politics.

Home builder **Bob Perry** has been a leading funder of two Texas PACs that ranked second and seventh in contributions to Texas Supreme Court candidates over the 2000–2009 period: **Texans for Lawsuit Reform** and **HillCo Partners**, which accounted for a combined \$429,045 in candidate contributions. One or both Perry-funded PACs were Top 5 donors to five of the six Texas justices elected in 2006 and 2008.<sup>16</sup> (Until the Supreme Court’s 2010

*Citizens United* ruling, Texas imposed strict limits on corporate and PAC spending, and most members of the all-Republican state Supreme Court were backed prominently by corporate law firms—including **Haynes & Boone**, **Fulbright & Jaworski**, and **Vinson & Elkins**, former corporate counsel to Enron.)

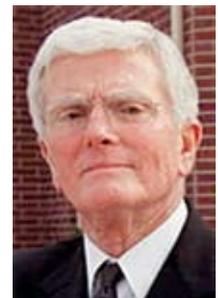
Perry is best known for his role in financing the **Swift Boat Veterans** campaign against John Kerry in the 2004 presidential campaign. The **Federalist Society** hired the public relations firm behind that campaign, **CRC Communications**, to work on judicial selection issues, including campaigns against merit selection in Missouri and Tennessee.<sup>17</sup>

On the other side, Texas Democrats channeled their big-money backing through state party PACs. In 2008, three poorly funded state Supreme Court candidates were bailed out by a \$905,000 independent TV campaign by the **Texas Democratic Party**, helping all three to lose by respectably close margins. Two groups with competing agendas, **Texans for Lawsuit Reform** and the public-interest **Texans for Public Justice**, both identified the same source: plaintiffs’ lawyers, and specifically, **Fred Baron**, a Dallas lawyer who was an asbestos litigation pioneer. Baron gave more than \$5 million to the **Texas Democratic Trust**, which in turn gave \$2 million to the state Democratic Party in 2008. The two PACs were the two biggest spenders in Texas politics in 2008.<sup>18</sup> Baron, who died in 2008, was also credited with spearheading a partisan challenge in which Democratic judges swept most Republicans from the local bench in Dallas, in 2006, and Houston in 2008.

Like Perry, Baron also was formidable on the national stage, heading finance operations for the 2004 John Kerry-John Edwards presidential campaign and running Edwards’ 2008 presiden-



The late Fred Baron, a Texas plaintiffs’ lawyer and contributor to the Democratic Judicial Campaign Committee



Bob Perry, real estate magnate and financier of Swift Boat Veterans for Truth



### **Focus on Alabama: Shell Game on the Left**

Did some state Democratic parties serve as conduits for plaintiffs' lawyer money in 2007–08, allowing lawyers with court interests to funnel millions of dollars anonymously to state Supreme Court candidates? An examination of the 2008 elections in Texas (See “Texas Titans,” page 45) and Alabama suggests that the answer is yes.

Without contributing a single dollar directly to Democrat Deborah Bell Paseur, the Montgomery law firm of Beasley, Allen, Crow, Methvin, Portis & Miles funneled \$606,000 to her treasury. Beasley Allen used an arcane maze of 30 political action committees, which eventually routed the money to the State Democratic Executive Committee. Other lawyers also contributed to the Democratic party, directly or through other PACs, accounting for virtually all of the \$1.6 million that the state party donated to Paseur. That money represented 61 percent of the \$2.7 million raised by Paseur, who lost narrowly to Republican Greg Shaw.<sup>19</sup>

## **Without contributing a single dollar directly to Democrat Deborah Bell Paseur, the Montgomery law firm of Beasley, Allen, Crow, Methvin, Portis & Miles funneled \$606,000 to her treasury.**

Beasley Allen used this route more than any other backer, successfully obscuring the firm's financial support for Paseur. A total of 52 checks, averaging \$11,653, were written by six senior Beasley Allen partners: Jere Locke Beasley, Greg Allen, Thomas J. Methvin, J. Cole Portis, W. Daniel Miles III, and Andy D. Birchfield, Jr. The 30 PACs, mostly controlled by lobbyists John Teague or John D. Crawford, then wrote checks to one another, so that by the time final transfers arrived at the Democratic committee, it was difficult, though not impossible, to trace the original source of the money.

Beasley Allen is a plaintiffs' law firm, which has handled significant cases before the Alabama Supreme Court. According to its web site, the firm has won multi-billion-dollar lawsuits, including a \$3.6 billion judgment against Exxon Corp. that was largely reversed by the state high court.

While Paseur was covertly receiving more than \$600,000 from one law firm, she publicly accused her Republican opponent of ethical conflicts, saying he was beholden to the energy industry. In campaign ads, Paseur boasted that she “can't be bought.”

# PACs Used by Beasley Allen to Mask High Court Donations



Beasley-Allen

- \$29,000 A PAC
- \$22,500 AID PAC
- \$23,000 BIP PAC
- \$27,400 CGR PAC
- \$26,500 COM pac
- \$18,000 GA PAC
- \$15,000 Group PAC
- \$40,000 High St. PAC
- \$12,500 I&C PAC
- \$22,500 Poll PAC
- \$14,300 RACE PAC
- \$13,500 Resolution PAC
- \$12,500 Speed PAC
- \$13,500 Step PAC
- \$8,000 SUN PAC
- \$11,500 Supply PAC
- \$27,200 T PAC
- \$15,000 Watch PAC
- \$8,700 Brother

Total contributed to John Teague PACs  
**\$360,600**

- \$25,500 Alabez
- \$22,500 EcoDev
- \$30,000 Enviro
- \$27,900 Franklin
- \$27,500 Green
- \$22,000 Growth
- \$20,000 JDC PAC
- \$18,000 Jefferson PAC
- \$22,500 Vision PAC
- \$23,500 21st Century

Total contributed to John D. Crawford PACs  
**\$239,400**

- \$5,000 Eagle PAC
- \$1,000 To State Democrats
- \$0 Direct to Deborah Bell Paseur



Deborah Bell Paseur

**\$606,000**  
Eventually received by Paseur, via conduits.

Figure 28.

**“A fundamental principle of our democracy is that judges must be perceived as beyond price. When litigants go to court, they want a judge who will decide the case based on the facts and the law. They do not want the umpire calling balls and strikes before the game has begun.”**

*—Ann Walsh Bradley, Wisconsin Supreme Court justice*



tial bid. Baron was one of the few major national donors to the **Democratic Judicial Campaign Committee**, whose goal was to offer national financial support to state Supreme Court candidates. Baron gave \$10,000 to the DJCC.

### **Michigan/Wisconsin: What’s Behind the Curtain?**

In two of the Midwest’s costliest states in 2007–08, Michigan and Wisconsin, the real money was largely undisclosed. The **Wisconsin Democracy Campaign** estimated that independent campaigns accounted for 90 percent of TV ad costs in the 2008 Michael Gableman-Louis Butler race, and 80 percent of all spending in the election campaign.

In Michigan, three independent TV campaigns—run by the **Michigan Democratic Committee**, the **Michigan Republican Party** and the **Michigan Chamber of Commerce**—accounted for two-thirds of all TV spending. The estimated \$2.4 million spent by the groups

nearly equaled the \$2.6 million raised by candidates Cliff Taylor and Diane Hathaway.

Both states had one thing in common: campaign disclosure laws and court rulings that allowed independent groups to advertise with impunity while concealing their funding sources.

Although **Wisconsin Manufacturers & Commerce** is affiliated with both the **U.S. Chamber of Commerce** and the **National Association of Manufacturers**, while the **Greater Wisconsin Committee** clearly had Democratic leadership and the support of plaintiffs’ lawyers and unions, it was difficult to know their original money sources, or those for campaigns run by the out-of-state **Club for Growth** and **Coalition for America’s Families**.

In an opinion column, Mike McCabe, executive director of the Wisconsin Democracy Campaign, said all the groups had operated as a pass-through for secret money, making a shambles out of any public transparency: “Not only does [the law] allow them to operate like Swiss banks,” McCabe wrote, “it allows them to effectively take the ‘r’ out of free speech.”<sup>20</sup>

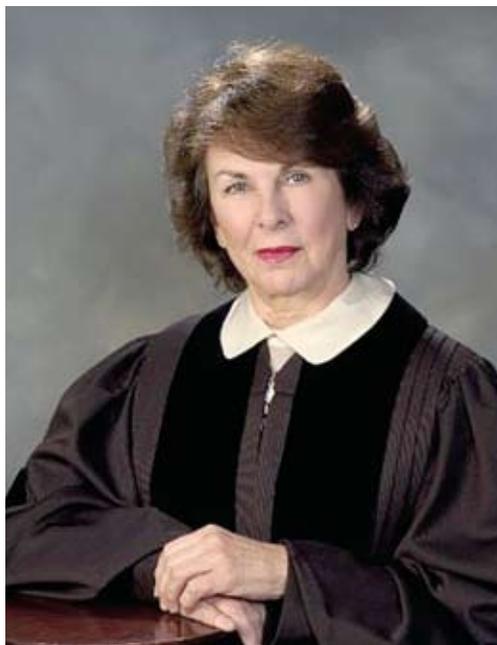
## Georgia: Here Today, Gone Tomorrow

As recently as 2005, there was no **Safety and Prosperity Coalition** in Georgia, and by 2007, the group had all but evaporated, with records showing virtually no contributions or operating funds.

But during the Georgia Supreme Court election of 2006, the Safety and Prosperity Coalition was practically unrivaled in size or stature. Aided by national groups, it swiftly raised \$1.8 million, unleashing a harsh television assault against Chief Justice Carol Hunstein.

The Coalition was formed in January 2006 by **Eric Dial**, development director for an **American Justice Partnership** ally, the **Southeastern Legal Foundation**. It raised \$300,000 in contributions from corporations including DaimlerChrysler, Coca-Cola Bottlers, the American Insurance Association, and the Georgia Hospital Association.

The Michigan-based American Justice Partnership then cut checks totaling \$1.3 mil-



Georgia Supreme Court Chief Justice Carol Hunstein withstood a severe 2006 challenge that was funded heavily by the American Justice Partnership.

lion, reporting its address as the **National Association of Manufacturers'** D.C. headquarters. The AJP money constituted the heart of the Safety and Prosperity Coalition's \$1.7 million funding. In spite of the significant spending against her, Hunstein defeated challenger Mike Wiggins.<sup>21</sup>



**“There is no system for selecting judges that will guarantee a judge’s character. . . . But we can reduce the perception that money and politics matter more than merit and performance.”**

*—The late Thomas Moyer, Ohio Chief Justice*

# The Battle for America's Courts

## The Left

Plaintiffs' lawyers and unions formed one key side in the battle for America's courts that reached full force in 2000-2009. Their primary goals were to elect judges sympathetic to them on tort-reform and product liability issues.

Unlike their conservative counterparts, these groups generally organized and raised funds at the state level. One national group, the Democratic Judicial Campaign Committee based in Washington, D.C., failed to play a major financial role. Especially in Alabama, Illinois and Texas, lawyers contributed cash through the Democratic Party to mask their support of candidates.

While the lawyers and unions spent millions on swing elections, they lost ground in several key states early in the decade, notably including Alabama, Illinois, Michigan, Mississippi, Ohio, West Virginia and Wisconsin, after previously losing control of courts in Texas and Louisiana. Plaintiffs' lawyers regained the upper hand in Michigan in 2008, in a year that signaled a possible broader comeback.

## Key Players

- Philadelphia Trial Lawyers Association
- Greater Wisconsin Committee
- Michigan Democratic Party
- Alabama Democrats/plaintiffs' lawyers
- Illinois Democrats/plaintiffs' lawyers
- Texas Democrats/plaintiffs' lawyers
- Democratic Judicial Campaign Committee
- The late Fred Baron





Howard Rich

Pennsylvania Republican Committee

Philadelphia Trial Lawyers Association

American Taxpayers Alliance

Law Enforcement Alliance of America

American Tort Reform Association

Americans Tired of Lawsuit Abuse

Prosperity Coalition

of Alabama

Reform Committee

## The Right

Business groups and other conservative organizations organized nationally as the decade started, hoping to reverse what they perceived as excess influence on elected courts by the plaintiff bar.

At least eight national groups, many based in or near Washington, D.C., have spent directly or indirectly on state Supreme Court elections. While the U.S. Chamber of Commerce worked largely through its state chapters, the National Association of Manufacturers created a Michigan-based spinoff, the American Justice Partnership, to coordinate campaign efforts. Two national spenders, the Center for Individual Freedom and the Law Enforcement Alliance of America, have historic ties to big tobacco and the gun lobby, respectively, but their financial backing for specific court election campaigns remains unknown.

The national strategy proved highly effective, winning control of numerous state courts before suffering a partial reversal in 2008, when three business-backed chief justices were voted out of office.

### Key Players

U.S. Chamber of Commerce/State Chapters

American Justice Partnership/National Association of Manufacturers

Center for Individual Freedom

Law Enforcement Alliance of America

American Tort Reform Association

American Taxpayers Alliance

Club for Growth

Pennsylvania State Republicans

Business Council of Alabama

# Quotes from the Decade

“Acknowledging that judicial elections are here to stay does not mean we have to accept spectacularly dysfunctional electoral systems like the one on display in West Virginia. If a state plans to embrace judicial elections, it should shield judges from having to collect campaign donations from the very groups that appear before them.”

—*Amanda Frost, American University law professor*



“The temptations of corporate cash mean that in those states where judicial elections still prevail there hangs a crooked sign on every courthouse reading, ‘Justice for Sale.’”

—*Bill Moyers, journalist*



“Now as never before, reinvigorating recusal is truly necessary to preserve the court system that Chief Justice Rehnquist called the ‘crown jewel’ of our American experiment.”

—*Thomas R. Phillips, Retired Chief Justice, Supreme Court of Texas, in “Fair Courts: Setting Recusal Standards” (Brennan Center)*

“I’ve been around West Virginia long enough to know that politicians don’t stay bought.”

—*Don Blankenship, New York Times interview*



**“I am extremely proud of what *Caperton v. Massey* has accomplished in just a short period of time. The decision by the Court is leading to sweeping changes across the country in judicial elections and rules for recusal that will protect citizens from big money campaign donors. Over time, these reforms will lead to fairer courts and help restore faith in our judicial system. For the families of Harman Mining, however, the pursuit of justice remains an ongoing battle.”**

*—Hugh Caperton, litigant in  
Caperton v. Massey*



**Michigan’s new recusal rule “permits a justice’s recusal where that justice is unable to render an unbiased decision and unable or unwilling to acknowledge that fact. The justice system and this Court can only be stronger for it.”**

*—Michigan Chief Justice Marilyn Kelly*

**“We had a 10-year plan to take all this down. . . And if we do it right, I think we can pretty well dismantle the entire regulatory regime that is called campaign finance law.”**

*—Lawyer James Bopp, after Citizens United ruling*



**“It’s a rotten system, Wes.”**

**“How do you fix it?”**

**“Either take away the private money and finance the races with public funds or switch to appointments.”**

*—John Grisham, The Appeal*

## CHAPTER 3 NOTES

1. Joshua Green, "Karl Rove in a Corner," *Atlantic*, November 2004, <http://www.theatlantic.com/doc/200411/green>.
2. Richard Woodbury, "Is Justice for Sale?" *Time* magazine, Jan. 11, 1988, available at <http://www.time.com/time/magazine/article/0,9171,966426,00.html>. "60 Minutes" report is cited by multiple sources, including <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/hill.html>.
3. U.S. Chamber of Commerce President Tom Donohue, March 11, 2002, speech to Illinois Chamber of Commerce, available at: [http://www.uschamber.com/press/speeches/2002/020311tjd\\_illinois.htm](http://www.uschamber.com/press/speeches/2002/020311tjd_illinois.htm).
4. Robert Lenzner and Matthew Miller, "Buying Justice," *Forbes.com*, July 21, 2003, available at [http://www.forbes.com/forbes/2003/0721/064\\_print.html](http://www.forbes.com/forbes/2003/0721/064_print.html).
5. The U.S. Chamber of Commerce's state court campaign received broad attention in the mainstream and business media. Details on the Chamber campaign and its electoral successes are drawn from the 2003 *Forbes* article, and from articles that include the following: William Glaberson, "U.S. Chamber Will Promote Business Views in Court Races," *New York Times*, October 22, 2000; Jim VandeHei, "Political Cover: Major Business Lobby Wins Back Its Clout By Dispensing Favors—Some Members Can Hide Behind Chamber's Name To Pursue Private Ends—Targeting 'Unfriendly' Judges," *Wall Street Journal*, Sept. 11, 2001; "Battle Over the Courts," *Business Week*, Sept. 27, 2004.
6. "Lawyers asked to help judge clear debt," *Jackson Clarion-Ledger*, Dec. 16, 2008. See also commentary in "Choose Judges on Merit" blog, *Pennsylvanians for Modern Courts*, at <http://judgesonmerit.org/tag/jim-kitchens/>.
7. Oregon 2006 contribution is available at [www.followthemoney.org](http://www.followthemoney.org). Georgia expenditure available at Georgia State Ethics Commission, [http://ethics.georgia.gov/Reports/Campaign/Campaign\\_ByName.aspx](http://ethics.georgia.gov/Reports/Campaign/Campaign_ByName.aspx); contribution to Americans Tired of Lawuit Abuse at, [http://www.campaignmoney.com/political/527/americans\\_tired\\_of\\_lawsuit\\_abuse.asp](http://www.campaignmoney.com/political/527/americans_tired_of_lawsuit_abuse.asp); donation to Improve Mississippi PAC (IMPAC), Mississippi Secretary of State's Office, <http://www.sos.state.ms.us/PDF-Out/00000059296.pdf>.
8. See expenditure filings cited in previous footnote.
9. Secretary of State data, compiled by Public Citizen, at [http://www.citizen.org/congress/article\\_redirect.cfm?ID=15877](http://www.citizen.org/congress/article_redirect.cfm?ID=15877).
10. Rachel Paine Caufield, American Judicature Society, "Judges Under Attack, 2005 paper for Iowa Judges' Conference," [http://www.ajs.org/selection/docs/caufield\\_ia\\_judges\\_conference.pdf](http://www.ajs.org/selection/docs/caufield_ia_judges_conference.pdf).
11. Spending by ATRA and the Institute for Legal Reform is documented in "Fringe Tactics," a 2005 report by Rachel Weiss for the National Institute on Money in State Politics (<http://www.followthemoney.org/press/Reports/200508251.pdf>). ATRA's contribution to Americans Tired of Lawuit Abuse is at [http://www.campaignmoney.com/political/527/americans\\_tired\\_of\\_lawsuit\\_abuse.asp](http://www.campaignmoney.com/political/527/americans_tired_of_lawsuit_abuse.asp). ATRA also issued a statement after the 2002 election, claiming "key judicial election victories for civil justice reform" in Alabama, Illinois, Michigan, Mississippi, North Carolina, Ohio, Texas and Washington state (*Liability and Insurance Weekly*, Nov. 12, 2002, <http://www.allbusiness.com/finance-insurance/insurance-carriers-related/404858-1.html>).
12. In a July 16, 1999, letter on National Smokers Alliance letterhead, NSA president Humber sought funding from Lorillard Tobacco Co. and mentioned "a development project, the Center for Individual Freedom, which might be of some interest to Lorillard's parent or associated companies" (<http://legacy.library.ucsf.edu/tid/lwd62doo/pdf>). A 2002 motion in federal court in Pennsylvania listed the Center for Individual Freedom's address as 901 N. Washington St., Alexandria, Va., same as the Smokers Alliance ([http://www.cfif.org/htdocs/legal\\_issues/legal\\_updates/us\\_supreme\\_court/checkoff\\_motion.pdf](http://www.cfif.org/htdocs/legal_issues/legal_updates/us_supreme_court/checkoff_motion.pdf)). CFIF later moved. Humber, Eric Schippers and David Nummy were early leaders of CFIF, and had leadership roles in the smokers alliance.
13. "Mud Flies, Spending Soars in Mississippi," *Gavel Grab*, Oct. 30, 2008, <http://www.gavelgrab.org/?p=670>. See also, "Mississippi Muck," part of a Nov. 26, 2008, [www.factcheck.org](http://www.factcheck.org) report on the Michigan and Mississippi Supreme Court campaigns.
14. [www.stealthpacs.org](http://www.stealthpacs.org), Public Citizen project to list financial resources of advocacy groups.
15. The Democratic Judicial Campaign Committee web site ([www.djcc.org](http://www.djcc.org)) contains a national map, analyzing each elected court's political makeup.
16. Data for this calculation are drawn from the National Institute on Money in State Politics, [www.followthemoney.org](http://www.followthemoney.org).
17. See "Swift-Boating the Courts: Missouri Edition," *Gavel Grab*, June 11, 2008 ([www.gavelgrab.org/?p=330](http://www.gavelgrab.org/?p=330)), and "Tennessee Poll Leaves Out Key Question to Get Desired Answer," *Gavel Grab*, Feb. 27, 2008 (<http://www.gavelgrab.org/?p=192>).
18. Texans for Public Justice report on 2008 campaign spending is at <http://info.tpj.org/reports/txpaco8/chapter2.html>. Texans for Lawsuit Reform report is at <http://www.tlrpac.com/news-08-1121.php>.
19. Alabama Secretary of State's Office, 2008 campaign finance reports. Information is derived by examining reports of political action committees that eventually wrote checks to the State Democratic Executive Committee.
20. Mike McCabe, "A Traffic Jam on the Low Road of Politics," *BizTimes.com*, Oct. 22, 2008, <http://www.biztimes.com/blogs/milwaukee-biz-blog/2008/10/22/a-traffic-jam-on-the-low-road-of-politics>.
21. Safety and Prosperity Coalition financial information is available at Georgia State Ethics Commission, [http://ethics.georgia.gov/Reports/Campaign/Campaign\\_ByName.aspx](http://ethics.georgia.gov/Reports/Campaign/Campaign_ByName.aspx).

# Litigation: The Battle Inside the Courtroom

Some of the most significant developments affecting state judicial elections have occurred in federal court, where increasingly thorny questions of judicial independence and conduct on the campaign trail have gone for resolution. The past decade has seen important U.S. Supreme Court cases involving how judges can campaign, when campaign spending should trigger a judge's recusal, and whether corporations and unions can pour their treasuries directly into election campaigns. Much of this litigation has been generated by interest groups as a new front in their efforts to strengthen or erode rules designed to insulate court decisions from special-interest campaign pressure.

### **Caperton v. Massey: When Judges Must Step Aside**

*Caperton v. Massey*, decided in June 2009, provided a national lesson in what can go wrong when big money supporters and pending litigation

coincide in the courtroom. *Caperton* has moved recusal—when a judge steps aside from a case to prevent ethical conflict—to the national stage. And it has created incentives for every state to make sure that their recusal procedures have not been rendered ineffective by the new politics of judicial elections.

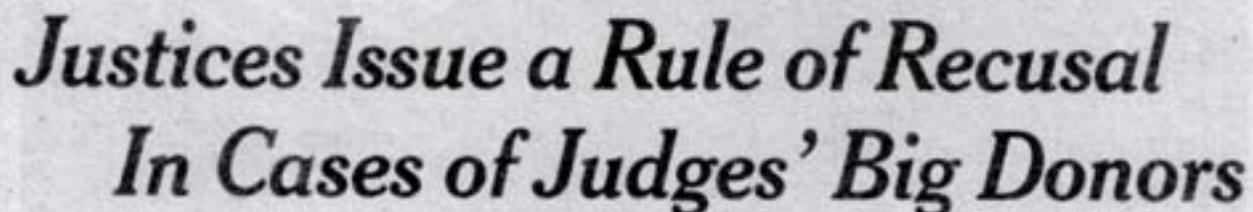
The case involved the campaign of Brent D. Benjamin, a lawyer who in 2004 ran for a seat on the West Virginia Supreme Court of Appeals against incumbent Warren McGraw. The campaign became notorious nationwide for its bitter tone, no-holds-barred attacks, and extraordinarily high spending. Especially noteworthy were the circumstances surrounding Benjamin's principal financial supporter, Don Blankenship. At the time, Blankenship, CEO of Massey Coal Co., was embroiled in a lawsuit with Harman Mining Corp., and Massey stood to lose \$50 million in damages after a jury found Massey liable for fraudulent misrepresentation and tortious interference with existing contractual relations. As post-verdict motions were under consideration, it became clear that the case was bound for the state Supreme Court of Appeals



West Virginia Justice Brent D. Benjamin was at the heart of the landmark *Caperton v. Massey* case.

\*Chapter 4 notes are on page 66.

Figure 30.



The image shows a close-up of a newspaper headline. The text is in a large, bold, serif font. The headline reads: "Justices Issue a Rule of Recusal In Cases of Judges' Big Donors". The background of the newspaper is slightly blurred, showing other text and a grid pattern on the right side.



A photo of West Virginia Chief Justice Elliott "Spike" Maynard (left), on vacation in the Riviera with coal executive Don Blankenship, contributed to Maynard's 2008 election defeat.

—just as the Benjamin-McGraw campaign was heating up.

Blankenship went on to spend \$3 million of his personal funds to support Benjamin's campaign, both by promoting Benjamin and attacking his opponent. That included \$2.5 million Blankenship contributed to a 527 group called And For the Sake of the Kids, whose purported mission was to defeat Warren McGraw, and \$500,000 Blankenship spent independently. The \$3 million spent by Blankenship was three times the amount spent by Benjamin's own campaign. Benjamin went on to defeat McGraw by a mar-

gin of 53-47 percent. More than 60 percent of Benjamin's total campaign support came from Blankenship's pockets.

When the case came before the West Virginia Supreme Court of Appeals almost two years later, Justice Benjamin refused to recuse himself. He cast the deciding vote in a 3-2 decision in favor of Blankenship's company, reversing the damages awarded to Harman Mining. Articles and op-eds across the country likened the scenario to a plot out of a John Grisham novel, and indeed, Grisham cited West Virginia as an inspiration for his Mississippi-based novel "The Appeal." What's more, West Virginians were skeptical that Justice Benjamin—in spite of his protestations to the contrary—could appear unbiased in hearing the case. According to a 2008 survey, over 67% of West Virginians doubted that Justice Benjamin would be fair and impartial in considering the case before him, even if he claimed otherwise.<sup>1</sup>

Hugh Caperton, owner of Harman Mining, appealed to the U.S. Supreme Court, where he was represented by Theodore B. Olson, former Solicitor General of the United States under George W. Bush. "The improper appearance created by money in judicial elections is one of the most important issues facing our judicial

## Who Decides What Is Fair and Impartial?

In a March 3, 2009, hearing, lawyers for Caperton and Massey offered U.S. Supreme Court justices two starkly different standards for deciding whether a judge might have to avoid a case involving a major campaign supporter.



**"If you were in Justice Benjamin's situation, do you really think you would be incapable of rendering an impartial decision in a case involving Massey? Because if the answer to that is no. . . then there's no justification for saying that Justice Benjamin would."**

—Andrew Frey, representing Massey Coal Co.

**"Would a detached observer conclude that a fair and impartial hearing would be possible? So instead of the question that Mr. Frey was asking. . . I would like to ask you to ask this question: If this was going to be the judge in your case, would you think it would be fair, and would it be a fair tribunal, if the judge in your case was selected with a \$3 million subsidy by your opponent?"**

—Theodore B. Olson, representing Hugh Caperton



## An Earlier Case of Election Bias?

Several years before the U.S. Supreme Court's landmark ruling in *Caperton v. Massey*, the high court declined to hear a case that raised similar issues of potential bias by an elected judge.



*Avery v. State Farm Mutual Automobile Ins. Co.* involved the most expensive state judicial campaign in United States history, a 2004 contest in which Illinois Appellate Judge Gordon Maag and then-circuit Judge Lloyd Karmeier raised a total of \$9.3 million. Karmeier, who received over \$350,000 in direct contributions from employees, lawyers and others linked to State Farm Insurance, and over \$1 million more from groups of which State Farm was a member or to which it contributed, won the election.

**“It cost just over \$9 million for that race. As you might have guessed, the winner of that race got his biggest contributions from a company that had an appeal pending before the Illinois Supreme Court. You like that?”**

—Sandra Day O'Connor, U.S. Supreme Court Justice

Justice Karmeier then refused to recuse himself from *Avery*, which, as the timeline illustrates, was pending before the Illinois Supreme Court during the entire campaign. The stakes in *Avery* were hardly trivial. Justice Karmeier cast the decisive vote to reverse a verdict on breach of claims valued at over \$450 million against State Farm.

## Chronology Of *Avery v. State Farm* Controversy

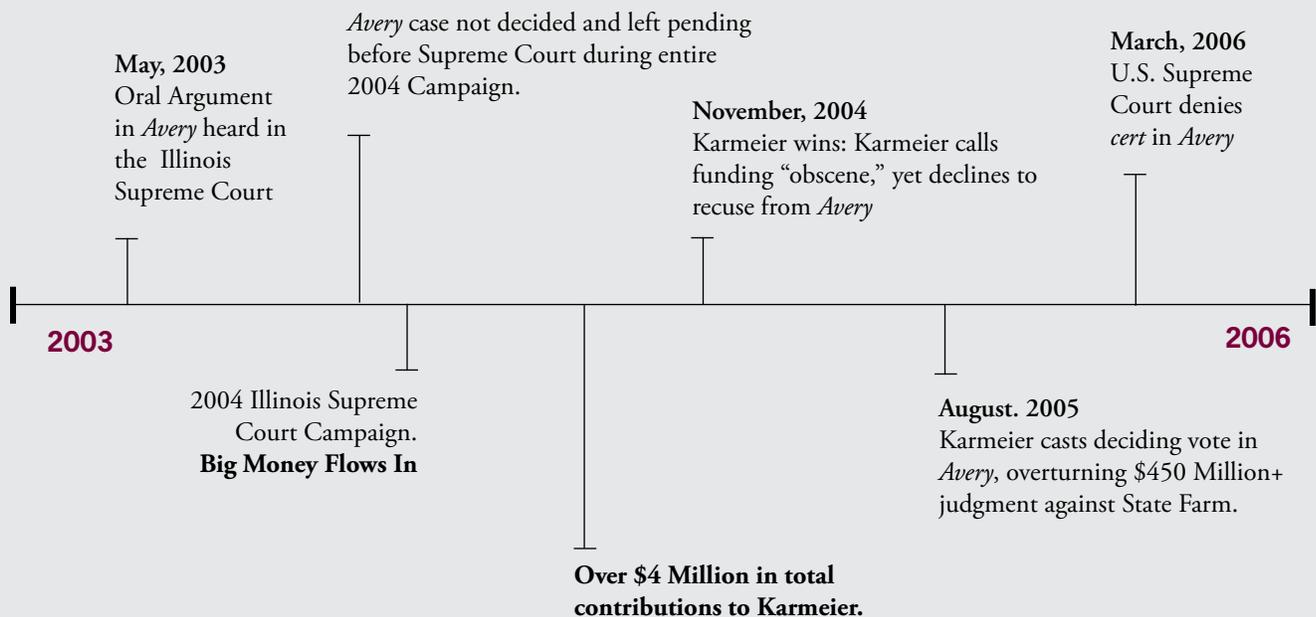


Figure 31.

**“The juxtaposition of gigantic campaign contributions and favorable judgments for contributors creates a haze of suspicion over the highest court in Illinois. . . . Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt over every vote he casts in a business case.”**

—St. Louis Post-Dispatch *editorial*

**ST. LOUIS POST-DISPATCH**

## The Caperton Coalition: Diverse Groups Rally to Defend Impartial Justice

A striking aspect of the *Caperton v. Massey* recusal case was the exceptionally broad range of groups—including businesses, retired justices, and civic and legal organizations—urging that a West Virginia justice not hear a case involving his biggest campaign benefactor.

After the ruling, a New York Times editorial noted, “The only truly alarming thing about Monday’s decision was that it was not unanimous. The case drew an unusual array of friend-of-court briefs from across the political spectrum, and such an extreme case about an ethical matter that should transcend ideology should have united all nine justices.”

Among the notable briefs:

**“Essential to public confidence in the judiciary is the assurance that justice is not for sale and that legal disputes will be resolved by fair and impartial judicial officers. [Justice Benjamin’s refusal to recuse] created an appearance of bias that would diminish the integrity of the judicial process in the eyes of any reasonable person.”**



—The Committee for Economic Development, Intel Corp., Lockheed Martin Corp., Pepsico, Wal-Mart Stores, and Transparency International USA



**PEPSICO**



**“The integrity of the judicial process requires that judges avoid both actual bias and the reasonable appearance of bias. . . . Few actions jeopardize public trust in the judicial process more than a judge’s failure to recuse in a case brought by or against a substantial contributor.”**

—American Bar Association

**“All amici view with alarm the increasing expense of mounting a serious campaign for election to a state supreme court, and with even greater alarm the increasing level of independent expenditures in these elections. . . . Substantial financial support of a judicial candidate—whether contributions to the judge’s campaign committee or independent expenditures—can influence a judge’s future decisions, both consciously and unconsciously.”**

—27 former state Supreme Court Chief Justices and Justices

**“The escalation of judicial campaign spending traps business leaders into a classic ‘prisoner’s dilemma.’ . . . A corporation must consider the likelihood that its opponent in high-stakes litigation may actively support one or more of the judges that will hear its case.**

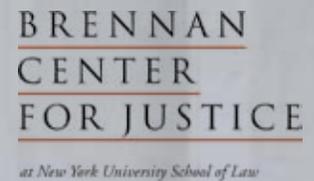
**Mandatory recusal is necessary to stanch this campaign spending arms race and maintain the integrity of the judicial system.”**

—The Center for Political Accountability and Zicklin Center for Business Ethics Research at the Wharton School



**“The \$3 million in expenditures; the fact that those expenditures represented more than all other financial support for Justice Benjamin combined; the sole interested source of those funds; the timing of the expenditures; and the other facts of this case are so egregious—by today’s standards at least—that they offer the Court the ideal opportunity to reinforce one of the most fundamental rights in any system based on the rule of law: the right to a fair hearing before an impartial arbiter.”**

—Brennan Center for Justice, Campaign Legal Center, Reform Institute



**“Judicial elections have created a crisis of confidence. National surveys from 2001 and 2004 found that over 70% of Americans believe that campaign contributions have at least some influence on judges’ decisions in the courtroom.”**

—Justice at Stake Campaign (in a brief including 27 civic reform groups)<sup>2</sup>



Other briefs urging recusal were submitted by: the American Association for Justice; the American Academy of Appellate Lawyers; the National Association of Criminal Defense Lawyers.

### **Conference of Chief Justices: An Influential Brief**

One of the most significant briefs was submitted by the Conference of Chief Justices. While not formally taking sides in the case, the body of chief justices in every state and U.S. territory made clear its concerns about runaway spending in state court elections. The Conference, whose brief was mentioned 10 times during Supreme Court arguments, said:

**“Under certain circumstances, the Constitution may require the disqualification of a judge. . . because of extraordinarily out-of-line campaign support.”**

The state chief justices added:

**“Some may claim that allowing any due process challenge to an elective judge because of campaign support might open the floodgates for thousands of constitutional disqualification challenges. . . Such a fear, the Conference submits, is unfounded.”**



**“Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the other parties’ consent—a man chooses the judge in his own cause.”**

—*Caperton v. Massey opinion, authored by Justice Anthony M. Kennedy*

system today,” said Olson. “A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge.”<sup>3</sup>

As the Brennan Center for Justice wrote in its amicus brief to the Supreme Court: “The \$3 million in expenditures; the fact that those expenditures represented more than all other financial support for Justice Benjamin combined; the sole interested source of those funds; the timing of the expenditures; and the other facts of this case are so egregious—by today’s standards at least—that they offer the Court the ideal opportunity to reinforce one of the most fundamental rights in any system based on the rule of law: the right to a fair hearing before an impartial arbiter.”<sup>4</sup>

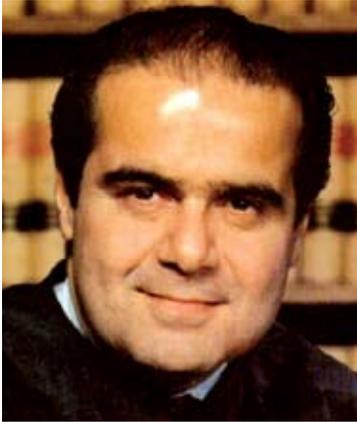
A broad coalition of strange bedfellows agreed (see: “The *Caperton* Coalition,” Pages 58 and 59). Most notably, the Conference of Chief Justices, which includes the chief justice of every state and U.S. territory, filed its own amicus brief. Consistent with the Conference’s policy, the brief did not formally support either party, but its contents made clear that on the fundamental question of law, the Conference supported the legal arguments advanced by *Caperton*: “under certain circumstances, the Constitution may require the disqualification of a judge in a particular matter because of extraordinarily out-of-line campaign support from a source that has a substantial stake in the proceedings.”<sup>5</sup>

On June 8, 2009, the U.S. Supreme Court issued its ruling. In a 5-4 opinion written by Justice Kennedy, the court concluded that, given the “serious risk of actual bias,” the Constitution’s

Due Process Clause required the recusal of Justice Benjamin, calling the facts of the case “extreme by any measure.” The Court reached its conclusion that Blankenship had a “significant and disproportionate influence” in Justice Benjamin’s placement on the court, based upon the total amount of money Blankenship spent on the election, its size compared to the total amount spent on the election, and the effect such expenditures seemed to have on the election’s outcome.<sup>6</sup>

The timing of the expenditures was also a crucial factor in the decision. According to Justice Kennedy, “[I]t was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice.”<sup>7</sup> There was no claim of *quid pro quo* collusion between Blankenship and Justice Benjamin, but the contributions nonetheless constituted a “serious, objective risk of actual bias” that required recusal, both because of their timing and relative size.

Although four justices dissented, no one on the Court disputed that states can enact disqualification standards even more rigorous than the Constitution’s due process requirements. “States are, of course, free to adopt broader recusal rules than the Constitution requires,” Chief Justice John G. Roberts Jr. wrote, “and every State has.” Indeed, former Texas Chief Justice Thomas Phillips argues that the most important issue in the case was the Court’s first-ever acknowledgment that even lawful contributions made to the campaign of a judge could warrant his or her recusal, if such support was “so substantial and overwhelming” as to raise due process concerns.<sup>8</sup>



**“We neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.”**

—Republican Party of Minnesota v. *White* opinion, authored by Justice Antonin Scalia

A variety of post-*Caperton* reforms are available, including empaneling neutral judges to hear recusal motions against a particular judge, creating *per se* rules for disqualification, and enhancing disclosure requirements for judges as well as litigants. Americans agree that reform is needed: A 2009 Justice at Stake poll showed that more than 80 percent of all voters support the idea of a different judge deciding on recusal requests, and agree that judges should not hear cases involving major campaign backers.<sup>9</sup>

In November 2009, Michigan’s Supreme Court became the nation’s first high court to adopt new recusal rules, after *Caperton*, that allow the entire court to review recusal motions, and disqualify individual justices from cases that pose possible ethics violations.

### **Judicial Speech: How Far Can Candidates Go?**

Another decision that is reshaping the rules around judicial elections is the 2002 Supreme Court ruling in *Republican Party of Minnesota v. White*, holding that judicial candidates cannot be barred from announcing their positions on political issues. Since *White*, federal courts have divided on what other judicial campaign speech regulations conform with the First Amendment. ABA President Robert Hirshon predicted *White* would “open Pandora’s box.”

*White* has fueled a boom in additional litigation seeking to loosen restrictions on judicial campaign speech, though federal courts remain split on how far candidates can go. For example,

in *Weaver v. Bonner* (2002), the 11th Circuit struck down a prohibition on Georgia judicial candidates personally soliciting campaign contributions, and a prohibition on false or misleading campaign speech. Despite the U.S. Supreme Court’s clear statement in *White* that it “neither assert[ed] nor impl[ied] that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office,”<sup>10</sup> the 11th Circuit asserted “that the Supreme Court’s decision in *White* suggests that the standard for [First Amendment review of] judicial elections should be the same as the standard for legislative and executive elections.”<sup>11</sup> Similarly a federal district court in Wisconsin overturned in *Siefert v. Alexander* (2009) a rule barring judges, candidates for judicial office and judges-elect from belonging to a political party.<sup>12</sup>

Other courts, however, have not agreed with post-*White* challenges to judicial canons, or have upheld canons that were revised or adopted to achieve a more finely tuned balance between free speech and due process rights. (A revised Model Code of Judicial Conduct adopted by the ABA House of Delegates in 2007 included numerous changes made in light of *White*, and 15 states had adopted these restrictions on speech by judges and judicial candidates as of July 2009.)

In Indiana, for example, a federal court at first enjoined enforcement of a disputed judicial rule restricting partisan activity. After the state’s Supreme Court adopted a new, narrower version, the court vacated its injunction in the case, *Bauer v. Shepard* (2009). The same federal court rejected a legal attack on judicial conduct rules restricting partisan political activities, including

one that bars a judge or judicial candidate from holding office in a political organization or acting as a leader in it.

As formal rules fall, professional norms of conduct have become more important. In 2008, the Justice at Stake Campaign and the Midwest Democracy Network recommended a set of guidelines<sup>13</sup> to help judicial candidates steer clear of special interest pressures and political agendas. It includes recommendations that judicial candidates:

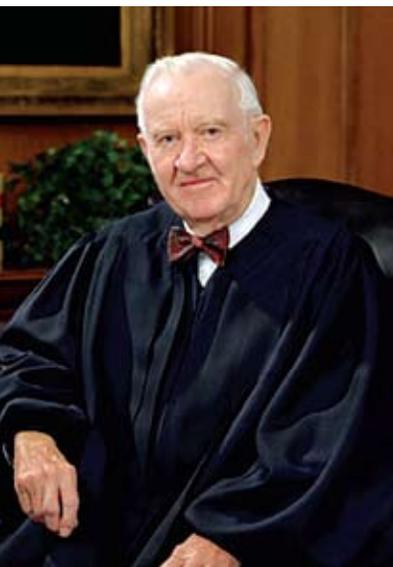
- Use election campaigns as an opportunity to educate the public about how courts work, how they protect civil liberties, and where they fit in the Constitution's system of checks and balances.
- Avoid expressing views—in public and in interest group questionnaires—on issues they might rule on. Candidates should use their responses to explain why stating one's views on controversial issues is both inappropriate and damaging to public belief in impartial justice. Elected judges should be ready to recuse themselves from cases involving issues they do publicly discuss.
- Limit how much money they will take from a single source or category of contributor—and never make promises “explicit or implied,” that from the bench, cases will be decided in a particular way.
- Promote civil campaigns by disassociating themselves from groups that make misleading statements about an opponent, and by working with campaign conduct committees to ensure clean campaigns.

## Campaign Finance Returns to the High Court

Money may be endemic to politics, but special-interest money poses a unique threat to courts, which unlike legislators and governors have a constitutional obligation to be impartial. Such spending creates the appearance of unequal influence, in a branch that represents, above all, the right to an equal, fair hearing before the law.

That's why lawmakers in North Carolina established public financing for appellate court races in 2002, reducing pressure on judicial candidates to raise money from those appearing in court. In part to guard against the reality or appearance of partiality, disclosure laws are designed to shed light on who is spending on court elections. Indeed, it was a West Virginia law that revealed the role of Don Blankenship, the coal executive who spent \$3 million to sway a Supreme Court election, because he had to document his massive independent expenditures.

But increasingly, such reforms are under assault, facing court challenges alleging that they violate First Amendment free-speech rights. Many of these cases don't single out judicial elections. But as a whole, they seek a broad dismantling of campaign finance rules that could have a profound effect on elected courts, by encouraging an unlimited boom in special interest campaigns to “buy justice.” (See “Balancing Two Constitutional Rights,” Page 64.) Days after the *Citizens United* ruling in January 2010, lawyer James Bopp, Jr. told the *New York Times*: “We had a 10-year plan to take all this down...And if we do it right, I think we can pretty well dis-



**“At a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races.”**

*—Justice John Paul Stevens,  
from dissent in Citizens United v. Federal Election Commission*

mantle the entire regulatory regime that is called campaign finance law.”<sup>14</sup>

In the three decades since the U.S. Supreme Court upheld public financing and contribution limits for federal elections, much of the debate has focused on spending by independent campaigns. In judicial elections, these independent expenditures frequently eclipse the candidates’ official campaigns. In 2008, four of the five most expensive ad campaigns were run by independent groups, only one by a candidate.

In *Caperton v. Massey*, which involved an independent campaign, the Supreme Court found that large independent expenditures, not just donations to candidates, can in some cases threaten the proper functioning of elected state courts, by creating an unacceptable potential for bias favoring a campaign benefactor.

The courts have provided significant victories for the public’s right to enact campaign finance

laws. In *Duke v. Leake*, the Fourth U.S. Circuit Court of Appeals unanimously upheld North Carolina’s public financing law, including its rescue and trigger funds provisions and reporting requirements. And while some federal courts have struck down disclosure requirements for independent groups, even as the Supreme Court has repeatedly affirmed such laws, disclosure rules have been upheld and remain in effect in other states.

The most recent challenge, *Citizens United v. Federal Election Commission*, may be the biggest yet. In June 2009, the Supreme Court asked for an additional special hearing, to consider whether a federal ban on election spending by corporations violated the First Amendment. (The original federal corporate limits date to 1907, and such laws had been upheld by the U.S. Supreme Court in 1990 and 2003.)



More information  
[@justiceatstake.org](https://www.justiceatstake.org)



Figure 32.



**“What latitude is there for trying to impose more ex ante limits on the kind of judge buying. . . that led to the *Caperton* ruling? Now, I strongly support First Amendment limits on expenditure limitations in the political campaign context, but I think there is no reason to think they apply exactly the same way in judicial election contexts.”**

—*Kathleen Sullivan,*  
*Stanford University law professor*



An amicus brief filed by Justice at Stake and 19 other reform groups warned that ending the corporate treasury ban could engulf elected courts with special interest money, if similar state laws also were struck down. “Special interest spending on judicial elections—by corporations, labor unions, and other groups—poses an unprecedented threat to public trust in the courts and to the rights of litigants,” said the brief, which added, “As other groups felt pressure to match this corporate treasury spending, these issues would only snowball.”<sup>15</sup>

Citing the 2009 *Caperton* ruling, the brief added: “This Court itself held last term . . . that some independent expenditures in judicial campaigns are so excessive that they in fact deny litigants due process under the law. If corporate treasury spending were unregulated in judicial elections, these concerns would only get worse.”

In January 2010, the Supreme Court voted 5-4 to declare corporate spending bans unconstitutional. In his dissent, Justice John Paul Stevens cited the Justice at Stake amicus brief, warning that the ruling could have an especially heavy impact on state court elections. “At a time when concerns about the conduct of judicial elections have reached a fever pitch,” Stevens wrote, “the Court today unleashes the floodgates of corporate and union general treasury spending in these races.”

## **Balancing Two Constitutional Rights: Free Speech and Fair Trials**

The U.S. Supreme Court has ruled that properly crafted campaign laws serve compelling government interests and are consistent with the First Amendment. But opponents of campaign reform often file challenges invoking the First Amendment—broadly and sometimes improperly—in order to cripple efforts to deal with the tide of money flooding our political system.

Shortly after Watergate, the Court upheld campaign contribution limits in *Buckley v. Valeo*, rejecting the argument that the First Amendment overrode the government’s compelling interest in preventing corruption.

Financial disclosure laws have been held to serve another compelling interest: informing the public about who is seeking to win government influence through election spending.<sup>16</sup> A 2007 ruling, *Wisconsin Right to Life v. Federal Election Commission*, exempted non-election issue ads from campaign regulation, but it didn’t give advocacy groups a blank check to bypass financial disclosure laws. When supposed issue ads are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,” they can be regulated like any other election ad, the Supreme Court ruled.

Much of the First Amendment debate has not focused on whether campaign regulation is constitutional for candidates on the ballot—overwhelmingly, such laws have been upheld—but how campaign laws relate to special-interest groups running independent campaigns. That split was reflected in the controversial ruling in *Citizens United v. Federal Election Commission*. By a 5-4 vote, the court ruled that corporations can finance independent campaigns directly from their treasuries. But by 8-1, the court reaffirmed that financial disclosure laws are constitutional, even for independent election campaigns. The new bottom line is that corporations can spend freely on independent election campaigns, but they have no constitutional right to do so anonymously.

Moreover, federal courts have consistently ruled that, when it comes to court elections, the First Amendment must be properly weighed against other constitutional rights.

In *Caperton v. Massey*, the Supreme Court held that the First Amendment does not trump the Constitution's Due Process Clause, and its guarantee of a fair, impartial tribunal. In disqualifying a judge from a case involving a major campaign supporter, the Court made clear that there is no First Amendment right to the judge of one's choosing. Thus, the Constitution provides robust protections for political speech during a judicial campaign. But once the voting is over, the Constitution guarantees all litigants a fair hearing, even if a particular elected judge must sometimes step aside. Significantly, although *Citizens United* allowed unlimited spending by corporate treasuries, Justice Anthony M. Kennedy nonetheless reaffirmed *Caperton*, saying that a judge may be disqualified when one litigant's campaign expenditures have "a disproportionate influence in placing the judge on the case."

In *Duke v. Leake*, the Fourth U.S. Circuit Court of Appeals emphatically rejected a First Amendment challenge to North Carolina's judicial public financing system. Saying that the state had a "vital interest" in protecting courts, it ruled that participating judicial candidates could receive additional public funds if an oppo-

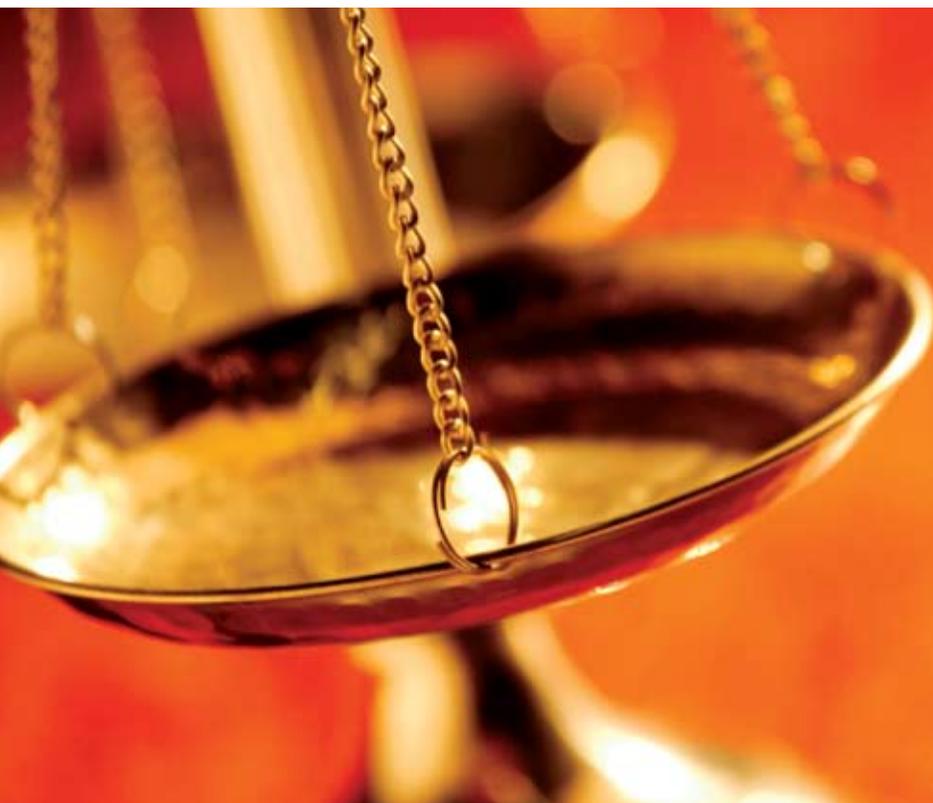
nent or independent group exceeds specified spending limits.

Various interest groups continue trying to use the First Amendment to trump the guarantee of due process.

In Wisconsin, months after *Caperton v. Massey* was decided, two of the state's biggest interest groups, Wisconsin Manufacturers & Commerce and the Wisconsin Realtors Association, persuaded the state Supreme Court to adopt language they supplied that turned the *Caperton* decision on its head. By a 4-3 majority, the court said campaign contributions and independent expenditures could never be the sole cause of a judge's recusal. The Wisconsin court accepted the groups' argument that recusal in such cases represented "de facto suppression" of the free speech of campaign spenders.<sup>17</sup>

The WMC and WRA argued that the only constitutional concerns at stake were First Amendment values. In doing so, they largely ignored the clear message of *Caperton*: where issues of recusal are concerned, First Amendment claims must be balanced with due process concerns.

Such efforts will no doubt continue. If the First Amendment becomes a proxy to use limitless secret money to tilt the scales of justice, or is twisted into a right to choose the judge one has paid to elect, then the Constitution's guarantee of a fair trial will be swallowed up.



**"The concern for promoting and protecting the impartiality and independence of the judiciary is not a new one; it dates back at least to our nation's founding. . . . The provisions challenged today, which embody North Carolina's effort to protect this vital interest in an independent judiciary, are within the limits placed on the state by the First Amendment."**

*—Fourth U.S. Circuit Court of Appeals opinion in Duke v. Leake, upholding public financing of state appellate court elections*

## CHAPTER 4 NOTES

1. “Company asks Benjamin to recuse himself again, this time with poll numbers,” Legal News Online, March 28, 2008, <http://legalnewsline.com/news/209989-company-asks-benjamin-to-recuse-himself-again-this-time-with-poll-numbers>.
2. Co-signing the Justice at Stake Campaign’s amicus brief were: American Judicature Society, Appleseed, Common Cause, Constitutional Accountability Center, Institute for the Advancement of the American Legal System, League of Women Voters, National Ad Hoc Advisory Committee on Judicial Campaign Conduct, Alabama Appleseed Center for Law & Justice, Colorado Judicial Institute, Democracy North Carolina, Fund for Modern Courts, Illinois Campaign for Political Reform, Justice for All, League of Women Voters of Michigan, League of Women Voters of Wisconsin Education Fund, Massachusetts Appleseed Center for Law & Justice, Michigan Campaign Finance Network, Missourians for Fair and Impartial Courts, NC Center for Voter Education, Ohio Citizen Action, Pennsylvanians for Modern Courts, Texans for Public Justice, Washington Appellate Lawyers Association, Washington Appleseed, Wisconsin Democracy Campaign, Chicago Appleseed, and Chicago Council of Lawyers.
3. Paul Nyden, “Mining Appeal Moving Along,” West Virginia Gazette, May 16, 2008, at <http://www.wvga-zette.com/News/200805150741>.
4. *Caperton v. A.T. Massey Coal Co.*, Amicus Curiae brief, Brennan Center for Justice, available at [http://brennan.3cdn.net/7ef37b5cbb848b77e8\\_b9m6b5zt9.pdf](http://brennan.3cdn.net/7ef37b5cbb848b77e8_b9m6b5zt9.pdf).
5. *Caperton v. A.T. Massey Coal Co.*, Brief of Amici Curiae, The Conference of Chief Justices, in Support of Neither Party 4 (U.S. No. 08-22), available at [http://brennan.3cdn.net/d6274e472669a87b58\\_dqm6iiz9.pdf](http://brennan.3cdn.net/d6274e472669a87b58_dqm6iiz9.pdf)
6. In-depth information on the case and court arguments are available at Justice at Stake, [http://www.justiceatstake.org/resources/in\\_depth\\_issues\\_guides/caperton\\_resource\\_page/](http://www.justiceatstake.org/resources/in_depth_issues_guides/caperton_resource_page/), and the Brennan Center for Justice, [http://www.brennancenter.org/content/resource/caperton\\_v\\_massey/](http://www.brennancenter.org/content/resource/caperton_v_massey/).
7. All quotes, including those in dissent, are taken from the U.S. Supreme Court opinion in *Caperton v. Massey*, <http://www.supremecourt.gov/opinions/08pdf/08-22.pdf>.
8. Tony Mauro, “Coping With Caperton,” Blog of Legal Times, June 10, 2009, <http://legaltimes.typepad.com/blt/2009/06/coping-with-caperton-a-conversation-with-tom-phillips.html>.
9. Press Release, Justice at Stake, “Poll: Huge Majority Wants Firewall Between Judges, Election Backers,” (Feb. 22, 2009), includes link to polling data. Release is available at [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/poll\\_huge\\_majority\\_wants\\_firewall\\_between\\_judges\\_election\\_backers?show=news&newsID=5677](http://www.justiceatstake.org/newsroom/press_releases.cfm/poll_huge_majority_wants_firewall_between_judges_election_backers?show=news&newsID=5677).
10. *Republican Party of Minnesota v. White* (2002), opinion available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=01-521>.
11. *Weaver v. Bonner* (2002), opinion available at <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=11th&navby=docket&no=00151580pn>.
12. *Siefert v. Alexander*, order and opinion, available at <http://caselaw.findlaw.com/us-7th-circuit/1527183.html>.
13. Midwest Democracy Network, Justice at Stake Campaign, “Guidelines for Judicial Candidates,” September 2008, [http://staging.justiceatstake.sitevcenterprise.com/media/cms/JASMWMemorev\\_50F6EDD22B678.pdf](http://staging.justiceatstake.sitevcenterprise.com/media/cms/JASMWMemorev_50F6EDD22B678.pdf).
14. David D. Kirkpatrick, “A Quest to End Spending Rules for Campaigns,” New York Times, Jan. 24, 2010, <http://www.nytimes.com/2010/01/25/us/politics/25bopp.html?emc=eta1>.
15. Justice at Stake Campaign, amicus brief in *Citizens United v. Federal Election Commission*, [http://www.justiceatstake.org/media/cms/JAS\\_CU\\_Brief\\_FA9AEiD6AB94E.pdf](http://www.justiceatstake.org/media/cms/JAS_CU_Brief_FA9AEiD6AB94E.pdf).
16. In *Buckley v. Valeo* (1976), the U.S. Supreme Court specifically considered the First Amendment, but cited three compelling government interests that justified various campaign finance rules. “Preserving the integrity of the election process”—combatting corruption and the appearance of corruption—was sufficient reason to justify both campaign contribution limits and financial disclosure rules. The court said two additional reasons justified financial disclosure rules, both for candidates and independent campaigns urging a candidate’s election or defeat. These were “informing the public” as to which interests were supporting a particular candidate; and as a “record-keeping” aid, to help detect potential violations of campaign contribution limits.
17. Wisconsin Manufacturers & Commerce, Petition to Wisconsin Supreme Court on Proposed Amendment to Judicial Code, <http://wicourts.gov/supreme/docs/0910petitionsupport.pdf>.



**“Judicial elections are not going away [and] Caperton provides a backstop for the most egregious cases of large campaign spending, particularly when other measures are off the table or severely limited.”**

—Richard Hasen, Loyola University professor and expert in election law

# Public Takes Note, Decision-Makers Begin to Follow

If 2000–2009 was the decade when runaway spending defined a “New Politics” of judicial elections, it also was the decade when the public, media and legal community took note, and demanded reforms to restore trust in the courts.

Throughout the decade, state and national polls have shown an overwhelming concern about the intersection of campaign money with the courts’ historic and constitutional role as a fair, impartial tribunal that provides “equal justice under law.” Since 2001, nationwide polls by Justice at Stake,<sup>1</sup> *USA Today*<sup>2</sup> and Zogby International<sup>3</sup> have revealed similar numbers: About three Americans in four believe campaign contributions can tilt the scales of justice, by influencing courtroom decisions.

Other polls show 79 percent of business executives, and even 46 percent of state judges, believe campaign cash affects rulings by judges.<sup>4</sup> Newspaper articles and editorials have extensively documented the dangers of special interest money and called for stronger recusal mechanisms, merit selection of judges, and/or public financing of judicial election campaigns. Most encouragingly, in the few cases where court issues went directly to voters, they have voted to protect impartial courts.

The good news of the past decade is this: Americans support the Constitution’s vision of courts free from outside manipulation. They understand that our nation’s courts should be accountable to the law, not special interest or extremist agendas. Instinctively and overwhelmingly, they understand that there should not even be an appearance that one side can win a case by subsidizing a judge’s election.

## Recent Reform Efforts

While decision-makers have frequently been slow to respond with concrete reforms, there were real signs as the decade closed that the new politics of judicial elections were creating a growing openness to meaningful reform.

In November 2009, Michigan’s Supreme Court became the nation’s first court, after the *Caperton* decision, to significantly strengthen state recusal rules. It also became the first high court ever to say individual justices could be ordered, by a vote of fellow justices, to step aside from cases where ethical conflicts had been demonstrated.

Under the rule, all Michigan judges and justices may be asked to step aside if “the judge’s impartiality might objectively and reasonably be questioned.” At the Supreme Court level, “If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification *de novo*.” In lower courts, a judge’s refusal to step aside can be appealed to the chief judge.

In December 2009, Wisconsin, which had been buffeted by two costly Supreme Court elections, became the third state nationally to adopt public financing for appellate court elections. Just three months later in West Virginia, where the money-soaked 2004 election ultimately led to *Caperton v. Massey*, lawmakers in March 2010 enacted a pilot public-financing program for the state’s 2012 Supreme Court elections.<sup>5</sup> Public financing of appellate races has also been discussed in Illinois, as part of a package of reforms following the impeachment of Gov. Rod Blagojevich. Illinois lawmakers also enacted

\*Chapter 5 notes  
are on page 76.

## What the Public and Business Leaders Think

Do you believe campaign spending affects court room decisions?

Judges should not rule on cases involving campaign contributors?

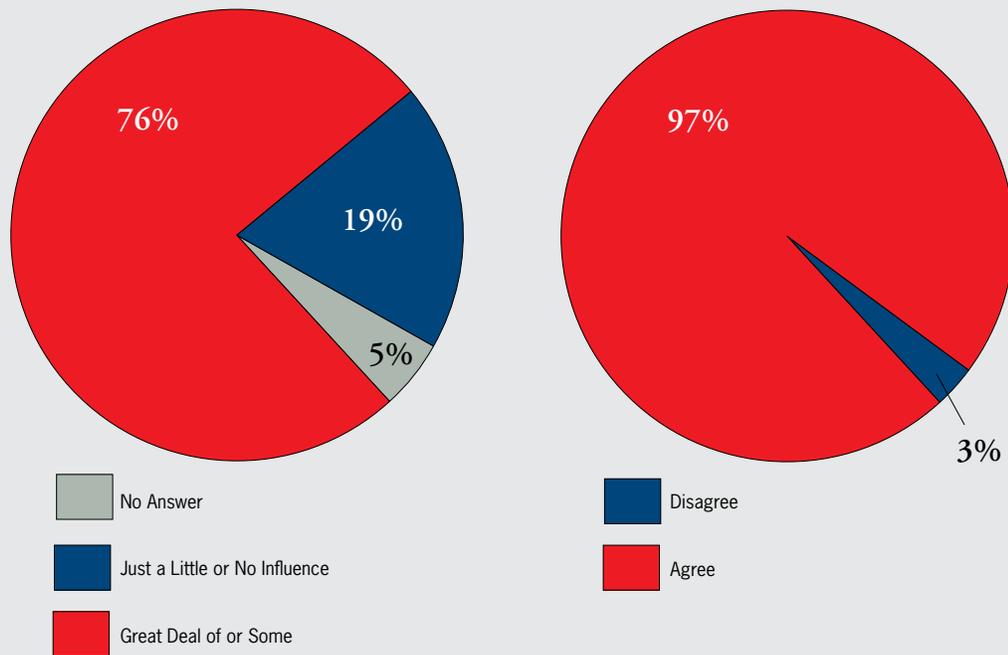


Figure 33.

Sources, from left to right: *Justice at Stake*, 2001 national poll; Committee for Economic Development, 2007 survey of business leaders; *Justice at Stake*, 2008 poll of Wisconsin voters

contribution limits for all elections, including judicial campaigns.

In Nevada, where the *Los Angeles Times*<sup>6</sup> detailed judicial fundraising scandals, voters were set to decide in 2010 whether to choose judges through merit selection. In merit systems, a nonpartisan panel submits candidates to the governor, who selects from that list. Judges then face voters in periodic retention elections. Former Gov. Al Quie pushed a similar plan in Minnesota, and in Pennsylvania a constitutional amendment

was urged by Pennsylvanians for Modern Courts and four present and former governors.<sup>7</sup>

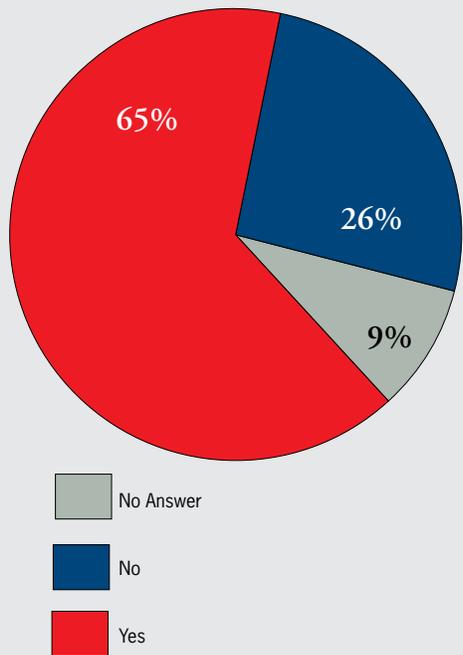
Americans are ready for real reform. For instance, a January 2008 survey of Wisconsin voters showed strong bipartisan support for public financing of state Supreme Court elections, with 65 percent favoring such a plan and only 26 percent opposing it. A December 2007 poll in Missouri showed strong public support for the existing judicial appointment system. In February 2009, a series of national polls, includ-



**Public financing “makes all the difference. I’ve run in two elections, one with campaign finance reform and one without. I’ll take ‘with’—any day, anytime, anywhere.”**

—Judge Wanda Bryant, Court of Appeals of North Carolina

**Do you favor voluntary public financing for Supreme Court candidates?**



ing a Harris Interactive survey for Justice at Stake, showed that more than eight Americans in 10 supported rules changes so that judges would not hear cases involving big-money election supporters.<sup>8</sup>

**The Broader Reform Menu**

Here is a summary of efforts to insulate courts from special-interest pressure:

**Public Financing for Appellate Court Elections**

North Carolina adopted public financing in 2002. By any measure, the North Carolina program has been a huge success. Women, minorities and candidates of both parties have been elected, and in three elections (2004, 2006 and 2008), 31 of 40 eligible candidates participated in the system.<sup>9</sup> Public financing reduces the burden on judicial candidates to raise money from special interests before the court, and thus lowers the potential for ethical conflict. Said Wanda Bryant, Judge on the North Carolina Court of Appeals: “It makes all the difference. I’ve run

in two elections, one with campaign finance reform and one without. I’ll take ‘with’ – any day, anytime, anywhere.”<sup>10</sup> (New Mexico, which has a hybrid appointment-election system and only rarely holds contestable elections, adopted public financing in 2007 but the system has not yet been used.) Wisconsin’s public-financing law was signed by Gov. Jim Doyle in December 2009, and in March 2010, West Virginia’s legislature approved a pilot public-financing program for Supreme Court elections in 2012.

**Financial Disclosure Laws**

Financial disclosure laws, important because they give the public information and perspective on who is spending money in their elections, were enacted in a few states after Congress passed the McCain-Feingold campaign finance law in 2002. But many legislatures have been indifferent, and in a few cases, federal courts have struck down or limited the use of disclosure laws. A bill passed in Mississippi to improve disclosure laws was vetoed in 2005. “Indecent Disclosure,” a 2007 report by the National Institute on Money in State Politics, noted that only five states had truly effective, timely laws for shedding sunlight on independent campaigns

**“Millions of dollars spent by special interests each year to influence state elections go essentially unreported to the public. [Independent expenditures] form the single-largest loophole in the laws. . . implementing transparency in state electoral politics.”**



–Indecent Disclosure, *2007 report by the National Institute on Money in State Politics*

by interest groups: “Millions of dollars spent by special interests each year to influence state elections go essentially unreported to the public. [Independent expenditures] form the single-largest loophole in the laws and administrative procedures implementing transparency in state electoral politics.”<sup>11</sup> One important dimension of the *Citizens United* ruling is that it declared, 8-1, that election disclosure laws are constitutional—giving states a clear green light that they may strengthen their laws to shed sunlight on election spending by special-interest groups.

### **Stronger Recusal Rules for Judges**

Stronger recusal rules for judges in cases involving campaign benefactors have enormous potential to reduce conflict, by encouraging judges not to handle cases involving major campaign supporters. An American Bar Association model rule, which proposed toughening recusal rules for judges, has been largely ignored by state court systems, in part because of perceived flaws with the specific proposal. However, *Caperton v. Massey*, which involved a West Virginia judge’s refusal to step aside, highlighted the problem of jurists serving as the final arbiter in their own recusal cases. A 2008 Brennan Center for Justice report, “Fair Courts: Setting Recusal Standards,” established a menu of 10 possible reforms, significantly focusing on the need for independent adjudication of the most serious disqualification motions. The ABA is exploring new model recusal rules,<sup>12</sup> and according to a Brennan Center summary, disqualification rules were being reviewed in 11 states in 2009, by courts, legislatures, bar associations or appointed bodies.<sup>13</sup>

### **Voter Information/Guides**

In 2004, North Carolina became the first, and to date only, state to mail judicial voter educa-

tion guides to every registered voter. Michigan and Ohio have worked with civic groups such as the League of Women Voters to publish online voters guides for judicial races, while other states, including Alaska, California, Oregon and Washington, mail out judicial information as part of more extensive voter guides. In Washington, a creative non-government information source is provided by [www.votingforjudges.org](http://www.votingforjudges.org), which includes candidate statements and experience, as well as reports on their financial backing. But there remains an overwhelming need for greater resources. According to a 2004 Justice at Stake poll, 67 percent of those surveyed said reliable nonpartisan voters guides would make them more likely to vote in judicial elections.<sup>14</sup>

### **Judicial Performance Evaluations**

Well-designed judicial performance evaluations provide objective feedback to judges from lawyers, staff, witnesses, jurors and others who come into contact with judges, while quantifying that data to help voters assess a judge’s fitness. According to the Institute for the Advancement of the American Legal System, nine states conduct government-run survey programs and release data to the public on at least some judges. Seven others conduct government-run surveys but show data only to the judges themselves. Hawaii shows the full data to judges and releases a summary to the public.<sup>15</sup>

### **Appointment/Retention Systems**

Judicial appointment/retention systems (also known as merit selection) gained national popularity in the 1960s and 1970s, and 24 states eventually chose to use nonpartisan commissions to screen state supreme court nominees. But the movement stalled in the 1980s.<sup>16</sup> Signaling a potentially significant shift, voters in Greene County, Missouri, chose in 2008 to replace

**“I think judicial elections are really the untold story of *Citizens United*, the untold implication. . . . But judicial elections are really a national scandal that few people really know about.”**

—*Jeffrey Toobin, writer for The New Yorker*

## The Rise and Fall of Judicial Tampering by Ballot Measures

For fair courts advocates, one of the biggest stories in 2008 was a non-story. Nationally, no statewide ballot measures sought to make damaging attacks on the court system. This stood in welcome contrast to 2006, when five ballot measures had the potential to expose courts to special interest and partisan assault.

In the last decade, few proposals caused greater dread than the 2006 “J.A.I.L. 4 Judges” ballot measure in South Dakota. The measure, inspired by a disgruntled populist in California, was a test drive of a truly radical idea: creating a special grand jury that could indict judges for making “wrong” decisions. Judges would have been forced to pay their own legal bills to defend themselves. They also would have been stripped of their immunity from civil suits.

In the months before the election, a broad bipartisan opposition stepped forward. The business community, which needs stable arbiters to resolve business disputes, joined with both political parties and civic groups. The measure suffered a devastating loss, 89 to 11 percent, in a conservative heartland state. Perhaps as a consequence, no other states saw a “J.A.I.L. 4 Judges” initiative in 2008.

Less extreme, but still significant, ballot measures also were defeated in 2006—in Colorado, Hawaii and Oregon—that sought to tamper with the courts’ composition. Hawaii voters rejected a plan to eliminate mandatory retirement for judges, just as a Republican candidate was poised to claim the governorship and appoint judges to fill vacancies normally created by retirement. Oregon voters rejected a plan to choose appellate judges by district. A Montana initiative was voided because of fraudulent petition signatures, and Colorado voters rejected a measure to institute retroactive term limits on appellate judges.

Forces opposing the Colorado measure warned that the measure would force more than half of all appellate judges into instant retirement, and allow one governor to repack the court en masse. They reduced their campaign to four words: “Bad Idea, Serious Consequences.” Voters agreed, and in 2008, the measure’s sponsor, a former state senator, said he couldn’t get enough money to attempt a new petition drive.

elections for local judges with a nonpartisan judicial nominating commission, while voters in Johnson County, Kansas, soundly rejected efforts to get rid of their appointment system for local judges. In 2009, Nevada lawmakers put a constitutional amendment before voters, to be decided in November 2010, on whether to use an appointment/retention system for state Supreme Court justices, and in 2010, Minnesota lawmakers were considering a proposed amendment to use retention elections for sitting justices, instead of nonpartisan competitive elections. In Ohio, the late Chief Justice Thomas Moyer (a Justice at



Figure 34.

Stake board member) led public efforts to adopt merit selection for the Supreme Court until his death in April 2010, while Maryland, which uses retention elections for appellate courts, considered an amendment to use the same system for Circuit Court judges. And in March 2010, West Virginia established a judicial nominating commission to screen and submit qualified nominees to the governor when midterm judicial vacancies occurred. Fourteen states now use similar commissions to help fill at least some midterm vacancies.

## The Media Take Note

On March 3, 2009, the same morning that the U.S. Supreme Court heard oral arguments in *Caperton v. Massey*, the *New York Times*, *USA Today* and the *Washington Post* all ran editorials decrying special-interest money in court elections. This unprecedented one-day display capped a decade of growing national media attention to runaway special-interest spending. Some highlights:

**The New York Times**

**The West Virginia case, while extreme, points to an alarming trend. It comes at a time when judicial neutrality — and the appearance of neutrality — basic to due process are under a growing threat from big-money state judicial campaigns and the special-interest contributions that fuel them.**

—New York Times editorial, March 3, 2009



**Judicial races, once staid, low-budget affairs, have in the past decade turned into mudslinging, multimillion-dollar brawls that have shaken public confidence in justice. All over the nation, Republicans and business interests often vie against Democrats, trial lawyers and labor unions to shop for judges who will vote their way.**

—USA Today editorial, March 3, 2009

**The Washington Post**

**States should consider barring judges from considering cases involving litigants or lawyers who were directly or indirectly responsible for campaign contributions beyond a certain limit. More fundamental, states should consider abolishing judicial elections in favor of an appointment system that distances jurists from politics and fundraising.**

—Washington Post editorial, March 3, 2009

**Los Angeles Times**

**In 2006, a *Los Angeles Times* investigation showed that even Nevada judges running unopposed collected hundreds of thousands of dollars in contributions from litigants. The report noted that donations were “frequently” dated “within days of when a judge took action in the contributor’s case.”**

**The New York Times**

**In 2006, Adam Liptak and Janet Roberts of the *New York Times* published a groundbreaking study of Ohio Supreme Court decisions. The study showed that over a twelve-year period, Ohio justices voted in favor of their contributors more than 70% of the time, with one justice, Terrence O’Donnell, voting with his contributors 91% of the time.**



**The issue is whether Supreme Court justices will be perceived as just your common ordinary politician, thought to be willing to dance with the folks whose big money brought them to the ball.**

—Milwaukee Journal-Sentinel editorial

**The Clarion-Ledger**

**Since 2000, judicial elections in Mississippi have degenerated into spending contests between the state’s business/medical community and trial lawyers— with hefty national special interest groups joining in.**

—Jackson Clarion-Ledger editorial

**The Boston Globe**

**How would you like to go into an appeals court if your opponent in the case spent \$3 million to help elect one of the judges?**

—Boston Globe editorial

## Judicial Appointments: The Emerging Battlefield

One of the hottest battles in judicial politics has pivoted on one question: should judges be elected at all?

Some leading papers, scholars and judicial luminaries, such as former Justice Sandra Day O'Connor, advocate merit selection, a system in which nonpartisan commissions submit slates of judicial candidates, to the governor, for final appointment. But a passionate and well-connected opposition has worked with unprecedented force to weaken or dismantle merit selection systems, and bring more states into the free-spending world of judicial elections.

In 2007 and 2008, this fight played out at the state level, in Missouri and Tennessee, and at the county level, in elections in Missouri and Kansas.

Lining up to eliminate or modify judicial appointment systems—commonly known as merit selection—were a number of national heavyweights. They included the Wall Street Journal's editorial page;<sup>17</sup> the Federalist Society (with polls in Missouri and Tennessee, and prominently published academic papers in Kansas and Tennessee); and the American Justice Partnership, an offshoot of the National Association of Manufacturers. CRC Communications, which

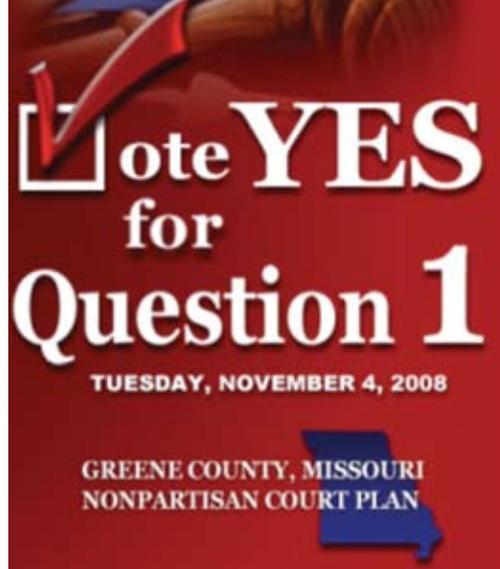


Figure 35. Ad for Greene County Nonpartisan Court Plan

ran the 2004 "swift boat" campaign, helped handle anti-merit publicity in Missouri and Tennessee.<sup>18</sup> In Kansas, a conservative religious group called Kansas Judicial Review (with a program called "Clear the Bench") led anti-merit efforts.<sup>19</sup>

For all the fury, the effort so far has borne limited fruit.

In April 2008, Missouri legislators beat back a ferocious campaign to tamper with the state's commission nomination system, which dates to 1940 and is the nation's oldest. Defenders of the plan, including the Missouri State Bar, said the changes would expose courts to greater partisan politics. An encore effort also failed in 2008, when the Senate refused to vote on a proposed ballot measure.



Figure 36. Ad against Greene County Nonpartisan Court Plan featuring John Ashcroft, former Missouri senator and U.S. attorney general

## U.S. Chamber of Commerce and Merit Selection

Throughout the decade, a widely publicized U.S. Chamber of Commerce survey showed that states using the nonpartisan merit selection process to appoint judges ranked among the most trusted by America's business leaders. The survey's lowest-ranking states were dominated by those with runaway judicial election spending.

### Highest-Ranking Litigation Climates

1. Delaware (Judges Appointed/Merit Selection)
2. North Dakota (Nonpartisan Elections)
3. Nebraska (Judges Appointed/Merit Selection)
4. Indiana (Judges Appointed/Merit Selection)
5. Iowa (Judges Appointed/Merit Selection)

### Lowest-Ranking Litigation Climates

46. California (Judges Appointed)
47. Alabama (Partisan Elections)
48. Mississippi (Nonpartisan Elections)
49. Louisiana (Partisan Elections)
50. West Virginia (Partisan Elections)

In a 2009 report indicating further consideration of merit selection, the Chamber's Institute for Legal Reform outlined best practices for merit selection of judges.

**“Quality of justice in our state courts is of critical importance to the entire business community.”**

—Promoting “Merit” in Merit Selection, 2009 report by U.S. Chamber of Commerce’s Institute for Legal Reform



Tennessee, a long-standing judicial appointment system was scheduled to expire in 2009—coincidentally, just as the U.S. Supreme Court was deliberating on *Caperton v. Massey*. Faced with a worst-case scenario in neighboring West

Virginia, Tennessee lawmakers shied away from state Supreme Court elections, instead voting to preserve a modified appointment system.

“The Tennessee Plan may need some tweaking, but it’s better than state-wide races that force appellate judges to raise huge amounts of cash from sources who often contribute for selfish reasons,” said a Memphis Commercial Appeal editorial. The paper added that chances of a *Caperton* scenario in Tennessee “might be slim, but it’s a chance we shouldn’t have to take at all.”<sup>20</sup>

But anti-merit efforts were complicated by a key factor over the 2000–09 decade. The public, while showing an instinctive desire to elect officials, generally failed to buy the vitriolic language peddled by the harshest enemies of judicial appointments.

Whereas the Wall Street Journal has likened appointment systems to a “judicial coup” by trial lawyers, and the American Justice Partnership regularly calls appointment panels “star chambers,” the appointment/retention systems have helped keep money out of judicial selection for decades—and they have earned broad public confidence.

A 2007 poll by Justice at Stake showed that 71 percent of Missouri voters trusted the state’s system of appointing appellate judges.<sup>21</sup> While a state Federalist Society pollster later claimed a “full-throated cry” for change,<sup>22</sup> the Justice at Stake poll found that only 2 percent of Missouri voters considered changing the judicial selection system a top priority.

## The Voters Weigh In

The public confirmed its wariness of special-interest influence in 2008 at the ballot box. Voters in Greene County, Missouri, were asked to get rid of competitive elections for local trial judges, instead using a system of appointments and periodic retention elections, while voters in Johnson County, Kansas, were asked to do the opposite, and get rid of their appointment system for local judges.

The elections forced voters to weigh two well-documented competing values. Polls—including

surveys by such disparate groups as the American Bar Association, American Judicature Society and American Justice Partnership—show three Americans in four initially favor electing judges over appointing them, when asked that question in a vacuum. But opinion surveys also show a second, countervailing concern: three Americans in four believe special-interest spending makes courtrooms less fair and impartial.

Defenders of the appointment system in Johnson County invoked public concerns about campaign cash in one slogan, “Keep Politic\$ Out of Our Courts.” Opponents of merit selection in Greene County persuaded John Ashcroft, a local hero who became Missouri senator, and U.S. attorney general, to take the other side, airing a TV ad urging the public not to surrender its right to vote in judicial races.

Attempting to convert these local measures into a national ideological debate, the Wall Street Journal cited Johnson and Greene counties in separate editorials—extraordinary attention for county-level ballot measures<sup>23</sup>—while the national Federalist Society mailed educational letters to voters in Greene County, an equally unusual intervention in a local race. The Ashcroft ad was funded by \$315,000 from a statewide group, whose ultimate funding source remains a mystery.<sup>24</sup>

In the end, voters backed merit selection in both jurisdictions. They put their trust in local leaders, including the local chambers of commerce, who said the appointment systems produce qualified judges and stable courts. The supporting role of the local business community was intriguing, and may have a significant impact as states such as Nevada and Minnesota consider whether to move away from competitive elections for state Supreme Court judges.

## Debate in the Business Sector

While business groups have enjoyed considerable success in such elections during the “New Politics” era, the U.S. Chamber of Commerce’s own national rankings offer a different take on the election/appointment debate. According to the Chamber’s annual survey of corporate counsel, four of the five lowest-ranking states, from a business perspective, have contested judicial elections marked by runaway spending. Four of the five states with the best litigation climates, according to the survey, have appointment systems—using the commission nominating system known as merit selection.<sup>25</sup>

In October 2009, the Chamber’s Institute for Legal Reform sent a significant signal that the nation’s top business organization may be rethinking the potential benefits of judicial appointment systems. In a groundbreaking report, “Promoting ‘Merit’ in Merit Selection,”<sup>26</sup> the Institute presented a list of best practices for states that fill judicial vacancies through appointment rather than election. Without endorsing appointment systems over elections, the Chamber report praised Arizona’s appointment system as a model that promotes public trust.

Noting that the “quality of justice in our state courts is of critical importance to the entire business community,” the report said appointment systems serve the public best when they are “characterized by transparency, diverse participation in the Commission, and opportunities for the public at large to provide input into the process.”



More information  
[@justiceatstake.org](https://twitter.com/justiceatstake.org)



**“Messy judicial campaigns are not inevitable in Missouri if citizens are willing to . . . stand up for independent courts and say no to political extremism and opportunists.”**

—St. Louis Post-Dispatch *editorial*

# The New York Times

## Editorial Notebook

### Hanging a 'For Sale' Sign Over the Judiciary

As I read over last week's aggressively wrong 5-to-4 Supreme Court decision greatly escalating the power of corporate and union money in elections, my thoughts turned to former Justice Sandra Day O'Connor.

That is not just because the ruling is another reminder of the court's rightward shift since Justice O'Connor was replaced by the starkly conservative Justice Samuel Alito. Since retiring, Justice O'Connor has been warning about the threat to judicial independence from big-money state judicial campaigns and attack ads paid for by special interests hoping to influence future court decisions. The Citizens United ruling promises to make that problem worse, possibly much worse.

Thirty-nine states hold judicial elections. Between 2000 and 2009, State Supreme Court candidates raised \$205.8 million, according to the Justice at Stake Campaign, a watchdog group that monitors money in court races. That was more than double the \$84.9 million raised the previous decade. One immediate result of the Citizens United ruling, as Justice John Paul Stevens noted in dissent, is that these states "may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems."

Another result is that all states are now effectively barred from adopting curbs on corporate and union spending on political campaigns, including judicial races. Business and other outside interest groups able to spend the cash could further dominate the airwaves and the debate in campaigns. Judicial candidates concerned about retaining control of their message will need to devote even more time to fund-raising.

Thoughtful candidates known to look at the law on a case-by-case basis will be at a distinct disadvantage, forecasts Professor James Sample, a judicial elections expert at Hofstra Law School. The accelerated money war, he warns, will inevitably polarize the bench "because more moderate candidates are unlikely to be considered a bankable vote by any special interest group investing heavily in judicial campaigns."

To protect the integrity of their court systems, states need to enact basic reforms: switching from judicial elections, for instance, to the selection of judges on merit, or adopting strict rules that bar judges from ruling in cases involving major financial supporters. "No states can possibly benefit from having that much money injected into a political judicial campaign," Justice O'Connor said on Tuesday. Achieving these reforms won't be easy, but now they are even more essential.

DOROTHY SAMUELS

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A week after the U.S. Supreme Court's ruling in *Citizens United v. Federal Election Commission*, New York Times editorial writer Dorothy Samuels wrote the above column about special-interest spending and elected courts. The column appeared January 30, 2010, on Page A22.

## CHAPTER 5 NOTES

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2. Joan Biskupic, "Supreme Court case with the feel of a best seller," USA Today, Feb. 16, 2009 available at [http://www.usatoday.com/news/washington/2009-02-16-grisham-court\\_N.htm](http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm). According to the USA

Today/Gallup poll, 89 percent felt contributions potentially affecting courtroom decisions was a problem, and 52 percent consider it a "major" problem. The article added: "More than 90% of the 1,027 adults surveyed said judges should be removed from a case if it involves an individual or group that contributed to the judge's election campaign."

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4. Both polls, the 2007 Committee for Economic Development Survey of Business Executives and the 2001 National Bipartisan Survey of Almost 2,500 Judges, are available at [http://www.justiceatstake.org/resources/justice\\_at\\_stake\\_polls.cfm](http://www.justiceatstake.org/resources/justice_at_stake_polls.cfm).
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6. Michael J. Goodman and William C. Rempel, "Juice vs. Justice: In Las Vegas, They're Playing With a Stacked Judicial Deck" *Los Angeles Times*, June 8, 2006, <http://articles.latimes.com/2006/jun/08/nation/na-vegas8>.
7. A 2009–10 national summary of judicial reform efforts is available at the Brennan Center for Justice, [http://www.brennancenter.org/content/resource/state\\_judicial\\_reform\\_efforts\\_2009/](http://www.brennancenter.org/content/resource/state_judicial_reform_efforts_2009/).
8. Information on all three surveys is available at Justice at Stake's polling page, [http://www.justiceatstake.org/resources/justice\\_at\\_stake\\_polls.cfm](http://www.justiceatstake.org/resources/justice_at_stake_polls.cfm).
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10. "New Politics of Judicial Elections, 2006," Brennan Center for Justice, National Institute on Money in State Politics, Justice at Stake Campaign, [http://www.justiceatstake.org/resources/the\\_new\\_politics\\_of\\_judicial\\_elections.cfm](http://www.justiceatstake.org/resources/the_new_politics_of_judicial_elections.cfm).
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13. See also, James Sample, "Court Reform Enters the Post-Caperton Era," *Drake Law Review* (publication scheduled in 2010).
14. Justice at Stake Campaign, press release, "Americans Speak Out on Judicial Elections," March 2004, [http://www.justiceatstake.org/media/cms/ZogbyPollFactSheet\\_54663DAB970C6.pdf](http://www.justiceatstake.org/media/cms/ZogbyPollFactSheet_54663DAB970C6.pdf).
15. Institute for the Advancement of the American Legal System, Judicial Performance Evaluation page, <http://www.du.edu/legalinstitute/jpe.html>.
16. A comprehensive survey of judicial selection methods in the states is available at the American Judicature Society, [http://www.judicialselection.us/judicial\\_selection\\_materials/index.cfm](http://www.judicialselection.us/judicial_selection_materials/index.cfm). Also see Justice at Stake's "Your State" national map, <http://www.justiceatstake.org/state/index.cfm>.
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21. Justice at Stake poll, December 2007, [http://www.justiceatstake.org/media/cms/MissouriMemoAndOverallResults\\_15E5E80BAC758.pdf](http://www.justiceatstake.org/media/cms/MissouriMemoAndOverallResults_15E5E80BAC758.pdf).
22. See Note 18, *Missouri Lawyers Weekly* article.
23. The Wall Street Journal explicitly cited Johnson County in an Aug. 14, 2008, editorial, as part of a broader attack on judicial appointment systems ("The ABA Plots a Judicial Coup," <http://online.wsj.com/article/SB121867190633138889.html?mod=article-outset-box>). Greene County, the only Missouri jurisdiction voting on merit selection in 2008, was alluded to in an Oct. 30 Wall Street Journal editorial, which said: "In Missouri, where trial court judges are still elected, a referendum would eliminate elections for judges and give the state bar association a larger role in selecting them." The editorial, "State Courts in the Balance," is available at <http://online.wsj.com/article/SB122533125197182865.html>.
24. "Local Merit Election Explodes Into National Campaign," Gavel Grab blog, <http://www.gavelgrab.org/?p=671>.
25. "Lawsuit Climate 2010," Institute for Legal Reform, [www.instituteforlegalreform.com/lawsuit-climate.html#2010](http://www.instituteforlegalreform.com/lawsuit-climate.html#2010).
26. Institute for Legal Reform, "Promoting 'Merit' in Merit Selection," October 2009 report, <http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/meritselectionbooklet.pdf>. See also, Oct. 28, 2009, commentary by Bert Brandenburg, "Big Business Group Lays Out Preferred Merit Model," in Gavel Grab blog, <http://www.gavelgrab.org/?p=4605>.

# APPENDIX 1

## State Profiles, 2000–2009

### Alabama



One of the first states to experience the new politics of judicial elections, Alabama also has been the most expensive. Of the \$40.9 million raised by Alabama Supreme Court candidates from 2000 through 2009, \$22 million, or 53.7 percent, came from just 20 groups. Eight of the 10 biggest spenders were business or conservative groups, led by the **Business Council of Alabama** (No. 2, at \$4,633,534) and the **Alabama Civil Justice Reform Committee** (No. 3, at \$2,699,568), which was the leading funder of 2008 winner Greg Shaw. The other two, the **Alabama Democratic Party** (No. 1, at \$ 5,460,117) and Franklin PAC (No. 8, at \$765,250), were heavily underwritten by plaintiffs' lawyers.

Total Supreme Court spending in 2007–08 (candidate fundraising and independent TV ads): \$5.4 million, ranking third nationally.

**Candidate Fundraising**  
\$40,964,590

**National Ranking**  
1

**Total TV**  
\$15,690,777

**National Ranking**  
2

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
Alabama Democratic Party	\$5,460,117	\$0	\$5,460,117
Business Council of Alabama	\$4,633,534	\$0	\$4,633,534
Alabama Civil Justice Reform Committee	\$2,474,405	\$224,663	\$2,699,568
American Taxpayers Alliance	\$0	\$1,337,244	\$1,337,244
Lawsuit Reform PAC of Alabama	\$1,321,250	\$0	\$1,321,250

## Georgia



Because of tough, comprehensive rules on candidate contributions, and because three election cycles produced little or no opposition to incumbents, Georgia ranked only 14th in candidate fundraising among the 22 states that held competitive Supreme Court elections during 2000–09. But in 2006, Georgia’s high court election became one of the nation’s noisiest and costliest when the Michigan-based

**American Justice Partnership** poured \$1.3 million into an independent ad campaign, and the state GOP spent an additional \$550,000 on its own TV ads. The effort failed to unseat Justice Carol Hunstein, who relied overwhelmingly on lawyers to raise nearly \$1.4 million.

**Candidate Fundraising**  
\$3,773,428

**National Ranking**  
14

**Total TV**  
\$3,128,572

**National Ranking**  
8

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
Safety and Prosperity Coalition	\$0	\$1,747,803	\$1,747,803
Georgia Republican Party	\$0	\$550,003	\$550,003
Georgia Democratic Party	\$0	\$191,456	\$191,456
Thomas W. Malone	\$27,400	\$0	\$27,400
Troutman Sanders LLP	\$26,889	\$0	\$26,889

## Illinois



The 2004 Lloyd Karmeier-Gordon Maag race was the most expensive two-candidate judicial election in American history, with \$9.3 million raised by the two campaigns. Top spenders over the decade include the **Illinois Democratic Party** (spending \$3,765,920 in contributions and in-kind media buys); the **Illinois Republican Party**, (\$1,981,714 in contributions and TV ads); the **Justice for All PAC** (spending \$1,221,367) and the **Illinois Civil Justice League** (spending \$1,272,083 in contributions and ads).

Most, but not all, of that money was spent in the 2004 race, and was heavily underwritten by plaintiffs’ lawyers or Chamber of Commerce and insurance groups. In 2002, the **American Taxpayers Alliance**, a group that has received U.S. Chamber funding, spent an estimated \$250,000 on TV ads to help elect Republican Rita Garman to the Supreme Court. The 2008 election was a relatively tame footnote to a tumultuous decade: Justice Ann Burke raised \$1.8 million in advance of the campaign, which helped drive away any potential opposition, and then later gave back \$760,000 after no challengers emerged.

**Candidate Fundraising**  
\$20,655,924

**National Ranking**  
4

**Total TV**  
\$7,141,130

**National Ranking**  
6

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
Illinois Democratic Party	\$3,765,920	\$0	\$3,765,920
Illinois Republican Party	\$1,981,714	\$0	\$1,981,714
Illinois Civil Justice League	\$1,272,083	\$0	\$1,272,083
Justice for All PAC	\$1,221,367	\$0	\$1,221,367
Illinois Chamber of Commerce	\$276,838	\$0	\$276,838

**Candidate Fundraising**  
\$8,950,146

**National Ranking**  
9

**Total TV**  
\$1,250,731

**National Ranking**  
13

## Louisiana



Louisiana set a TV spending record in 2008, as incumbent Catherine D. “Kitty” Kimball and newcomer Greg G. Guidry were elected. Despite fairly tight contribution limits, state Supreme Court candidates raised \$8.9 million in 2000–09, ranking ninth nationally. The **Louisiana Association of Business & Industry** was a top contributor to the four most recently elected justices, including Guidry and Kimball. In 2009, Marcus Clark defeated Jimmy Faircloth in a nasty \$1.2 million race.

Total Supreme Court spending in 2007–08 (candidate fundraising and independent TV ads): \$3.9 million, ranking sixth nationally.

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
Louisiana Conservative Action Network	\$0	\$251,227	\$251,227
Louisiana Democratic Party	\$109,416	\$0	\$109,416
Louisiana Association of Business & Industry	\$76,688	\$0	\$76,688
Alliance for Justice	\$0	\$40,192	\$40,192
Adams & Reese	\$36,000	\$0	\$36,000

## Michigan



For much of the decade, four conservative Supreme Court justices dominated Michigan’s Supreme Court. Their opponents, who assailed the justices as an anti-plaintiff “Gang of Four,” helped defeat Chief Justice Cliff Taylor in 2008. The four justices’ top supporters from 2000–09 included the **Michigan Chamber of Commerce** and the **Michigan Republican Party**. Top super spenders on the

other side included the **Michigan Democratic Party**; the **Michigan Trial Lawyers Association**; and **Citizens for Judicial Reform** (CFJR), a group wholly funded by **plaintiffs’ lawyer Geoffrey Fieger** and his law firm. The state Democrats ran more than \$1.1 million ads for 2008 winner Diane Hathaway, almost exactly offsetting the \$1.2 million that the Michigan Chamber and GOP combined to spend on TV ads for Justice Taylor. In addition, the state parties and other PACS reported an additional \$1 million in non-TV spending in 2008.

Total Supreme Court spending in 2007–08 (candidate fundraising, independent TV ads, and \$1 million in non-TV independent expenditures registered with state): \$5.9 million.

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures*	Total
Michigan Chamber of Commerce	\$164,140	\$2,825,255	\$2,989,395
Michigan Democratic Party	\$219,142	\$2,467,121	\$2,686,263
Michigan Republican Party	\$217,233	\$2,420,328	\$2,637,561
Citizens for Judicial Reform	\$0	\$372,094	\$372,094
Ann Arbor PAC	\$102,000	\$208,000	\$310,000

\*Includes non-TV independent expenditures listed on state campaign records

## Mississippi



Mississippi was targeted by the **U.S. Chamber of Commerce** in 2000 and 2002. In a pivotal 2002 election, Justice Chuck McRae was ousted after expensive TV campaigns by **Mississippians for Economic Progress** and by the **Law Enforcement Alliance of America**. Forbes magazine, in 2003, said MFEP received \$1 million from the Chamber and that LEAA spent \$500,000. LEAA also spent \$660,000 to help oust Justice Oliver Diaz, Jr. in 2008. On the flip side, Chief Justice Jim Smith was defeated in 2008 by Jim Kitchens, a candidate backed by the plaintiffs' bar.

Total Supreme Court spending in 2007–08 (candidate fundraising and independent TV ads): \$3.8 million, ranking seventh nationally.

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
U.S. Chamber/Mississippians for Economic Progress*	\$0	\$2,067,797	\$2,067,797
Improve Mississippi PAC (IMPAC)	\$0	\$1,305,910	\$1,305,910
Law Enforcement Alliance of America	\$0	\$835,255	\$835,255
Stop Lawsuit Abuse in Mississippi	\$0	\$132,259	\$132,259
Mississippi Manufacturers Association	\$62,100	\$0	\$62,100

\*Based on estimates from 2003 *Forbes* magazine article.

**Candidate Fundraising**  
\$10,837,071

**National Ranking**  
7

**Total TV**  
\$2,412,915

**National Ranking\***  
11

## Nevada



With no particularly noteworthy election, Nevada was the nation's eighth most expensive state for Supreme Court elections in 2000–2009. The \$3,135,214 spent in the 2008 Supreme Court race narrowly edged the state's previous record, set in 2004. But unlike most states, Nevada's impetus for reform came from local courts. A 2006 Los Angeles Times investigation revealed that even judges running unopposed collected hundreds of thousands of dollars from litigants. Contributions were "frequently" dated "within days of when a judge took action in the contributor's case," the report noted. Lawyers said that challenging the system was the "kiss of death" and likened the contributions to a "shakedown" by judges. A state commission recommended a more transparent, timely disciplinary process, and an end to competitive judicial elections. In November 2010, voters will decide whether to replace competitive elections with a merit selection appointment system.

Total Supreme court spending in 2007–08 (candidate fundraising and independent TV ads): \$3.1 million, ranking ninth nationally.

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
MGM Mirage	\$156,000	\$0	\$156,000
Boyd Gaming	\$90,000	\$0	\$90,000
Station Casinos	\$76,534	\$0	\$76,534
Coast Hotels & Casinos	\$71,000	\$0	\$71,000
Mainor Eglet Cottle	\$70,000	\$0	\$70,000

**Candidate Fundraising**  
\$9,848,192

**National Ranking**  
8

**Total TV**  
\$2,894,675

**National Ranking**  
9

## North Carolina

**Candidate Fundraising**  
\$5,044,857

**National Ranking**  
13

**Total TV**  
\$1,564,165

**National Ranking**  
12



In 2002, two years after North Carolina saw its first multi-million-dollar Supreme Court election, state leaders established public financing for appellate court elections. The program has enjoyed broad support from voters and judicial candidates: 11 of 12 eligible candidates took public funding in 2008.

What it hasn't done is stifle the finances needed for robust campaigning. In 2006, when five of eight Supreme Court candidates accepted public funding, total fundraising was \$2.7 million—more than the \$2,057,360 raised in 2000. But the public money comes from income-tax check-offs and lawyer fees, as opposed to private funding by those with court business. A 2005 poll showed that 74 percent of state voters wanted to continue public financing for appellate judges.<sup>2</sup>

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
Public funding from state	\$2,517,197	\$0	\$2,517,197
Fair Judges	\$0	\$272,715	\$272,715
North Carolina Democratic Party	\$196,359	\$0	\$196,359
North Carolina Academy of Trial Lawyers	\$20,000	\$0	\$20,000
North Carolina Republican Party	\$16,000	\$0	\$16,000

## Ohio

**Candidate Fundraising**  
\$21,212,389

**National Ranking**  
3

**Total TV**  
\$21,364,846

**National Ranking**  
1



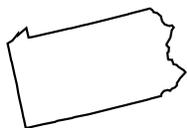
Few states have more clearly demonstrated how the nationwide tort wars—led by the state and national chambers of commerce on one side, and unions and plaintiffs' lawyers on the other—can be a driving force in state court elections.

According to TNS Media Intelligence/CMAG estimates, the **U.S. Chamber of Commerce** and two state affiliates, **Citizens for a Strong Ohio (CSO)** and **Partnership for Ohio's Future**, spent \$4.2 million on independent TV ads. In 2005, litigation revealed that spending in 2000 by Citizens for a Strong Ohio was higher than previous public estimates. According to court records, CSO spent \$4.4 million in its 2000 campaign alone.<sup>3</sup> Funding for Democratic candidates, who were supported by the state party and a lawyer-funded group called **Citizens for an Independent Court**, ebbed dramatically after Chamber-backed candidates scored court-changing victories in 2002 and 2004.

Total Supreme Court spending in 2007–08 (candidate fundraising and independent TV ads): \$3.1 million, ranking 10th nationally.

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
U.S. Chamber of Commerce/Ohio Affiliates	\$49,000	\$7,560,168	\$7,609,168
Citizens for an Independent Court	\$0	\$1,543,478	\$1,543,478
Ohio Democratic Party	\$571,530	\$718,349	\$1,289,879
Ohio Republican Party	\$1,131,131	\$52,303	\$1,183,434
Ohio Hospital Association	\$50,250	\$941,910	\$992,160

## Pennsylvania



With no spending limits and a strong trial lawyers' bar, Pennsylvania has been ripe for a decade-long battle between competing special interests. It also was the scene of a rare high-cost retention battle, when one of two justices was defeated in 2005, amid a public furor over a salary increase for state judges.

The leading players have been the **Philadelphia Trial Lawyers Association** and the **Pennsylvania Republican Party**. Citing rising election costs, the legal reform group **Pennsylvanians for Modern Courts** (PMC) has urged merit selection for state appellate judges, in which governors choose from candidates identified by nonpartisan commissions. The plan, endorsed by Gov. Edward Rendell and three former governors, has broad bipartisan support, according to a 2010 PMC poll.

Total Supreme Court spending in 2007–08 (candidate fundraising and independent TV ads): \$10.3 million, ranking first nationally.

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
Pennsylvania Republican Party	\$2,274,534	\$387,300	\$2,661,834
Philadelphia Trial Lawyers Association	\$ 2,398,300	\$0	\$2,398,300
Center for Individual Freedom	\$0	\$858,611	\$858,611
Pennsylvania Democratic Party	\$291,516	\$366,400	\$657,916
International Brotherhood of Electrical Workers/Affiliated Locals	\$628,770	\$0	\$628,770

**Candidate Fundraising**  
\$21,319,171

**National Ranking**  
2

**Total TV**  
\$10,547,109

**National Ranking**  
4

## Texas



Texas was one of the nation's earliest states to witness the new big-money politics of judicial elections. But a coterie of corporate defense firms, using rules that allow law firms to contribute more than individuals, were prime backers of the state's all-Republican Supreme Court. Their contributions were dwarfed in one year by the state

**Democratic Party**, which in 2008 spent an estimated \$904,000 on TV ads for three candidates who all lost by narrow margins. Conservative critics accused plaintiffs' lawyers of covertly financing the ads—a charge supported by groups as diverse as **Texans for Lawsuit Reform** and **Texans for Public Justice**.<sup>4</sup> Texas's unusually strict ban on corporate election spending was invalidated by *Citizens United*, exposing the state to a potential increase in special-interest campaign money.

Total Supreme Court spending in 2007–08 (candidate fundraising and independent TV ads): \$5.2 million, ranking fourth nationally.

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
Texas Democratic Party	\$36,000	\$904,978	\$940,978
Vinson & Elkins	\$467,768	\$0	\$467,768
Texans for Lawsuit Reform	\$284,045	\$0	\$284,045
Haynes & Boone	\$248,464	\$0	\$248,464
Fulbright & Jaworski	\$240,848	\$0	\$240,848

**Candidate Fundraising**  
\$19,197,826

**National Ranking**  
5

**Total TV**  
\$2,533,538

**National Ranking**  
10

## Washington

**Candidate Fundraising**  
\$5,294,492

**National Ranking**  
12

**Total TV**  
\$1,158,431

**National Ranking**  
14



In 2006, every Supreme Court TV ad was paid for by groups not affiliated with the campaigns. The election culminated a crescendo in which special-interest spending rose in three straight election cycles.

The most persistent players were the **Building Industry Association of Washington** and the **Washington Affordable Housing Council**. After electing two candidates in 2004, the groups failed to unseat Chief Justice Gerry Alexander in 2006. Pushing back, unions, environmentalists and plaintiffs' lawyers funded **Citizens to Uphold the Constitution**, which spent an estimated \$228,000 on TV ads supporting Alexander. In 2008, incumbents Mary Fairhurst and Charles W. Johnson won modestly financed primaries and had no opposition in the November election. Recently appointed incumbent Justice Debra Stephens ran unopposed.

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
Building Industry Association of Washington	\$219,573	\$464,369	\$683,942
Americans Tired of Lawsuit Abuse	\$0	\$362,030	\$362,030
Citizens to Uphold the Constitution	\$0	\$228,749	\$228,749
Wash. Affordable Housing Council	\$157,200	\$0	\$157,200
Cruise Specialists Inc.	\$102,000	\$0	\$102,000

## West Virginia

**Candidate Fundraising**  
\$7,384,664

**National Ranking**  
10

**Total TV**  
\$3,403,981

**National Ranking**  
7



West Virginia suffered a series of controversies, mostly involving one man: Don Blankenship. The CEO of **Massey Coal Co.** bankrolled a group called **And for the Sake of the Kids** to help elect Justice Brent D. Benjamin, while appealing a \$50 million verdict against his company. Then-Justice Larry Starcher warned that Blankenship had created “a cancer in the affairs of this Court.” Blankenship’s campaign led to a landmark U.S. Supreme Court case (*Caperton v. Massey*). In 2008, Chief Justice Elliott Maynard, who was photographed vacationing on the Riviera with Blankenship, was ousted by voters. In March 2010, the legislature approved a trial test of public financing for the 2012 Supreme Court elections. It also established an eight-member judicial nominating commission, to screen and recommend appointees to the Governor whenever midterm vacancies occur on the bench.<sup>5</sup>

Total Supreme Court spending in 2007–08 (candidate fundraising and independent TV ads): \$3.7 million, ranking eighth nationally.

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
Don Blankenship	\$3,000	\$2,978,207	\$2,981,207
Consumer Attorneys of West Virginia	\$0	\$1,899,200	\$1,899,200
West Virginia Chamber of Commerce	\$8,500	\$1,166,427	\$1,174,927
Doctors for Justice	\$0	\$745,000	\$745,000
West Virginia Coal Association	\$8,500	\$230,000	\$238,500

## Wisconsin



With the 2007 race between Annette Ziegler and Linda Clifford, and the 2008 race between Justice Louis Butler and challenger Michael Gableman, Wisconsin turned overnight into one of the costliest, nastiest battleground states in the nation. Though their TV ads largely focused on criminal justice, the biggest spenders were squarely on opposing sides of the tort/product liabilities debate. Technically nonpartisan, both elections were won by candidates backed by the Republican establishment against Democratic Party-supported opponents. Backing the winners were **Wisconsin Manufacturers & Commerce; Club for Growth**; and the **Coalition for American Families**. The **Greater Wisconsin Committee**, backed by organized labor and progressive groups, spent heavily for the two losing candidates. Spending and vitriol both were lower in 2009, as Chief Justice Shirley Abrahamson easily defeated challenger Randy Koschnick, both in fund-raising and at the polls. In response to the turmoil, the state enacted public financing of Supreme Court elections in December 2009.

Total Supreme Court spending in 2007–08 (candidate fundraising and independent TV ads): \$8.5 million, ranking second nationally.

Top Spenders, 2000–09	Candidate Contributions	Independent Expenditures	Total
Wisconsin Manufacturers & Commerce	\$9,600	\$2,012,748	\$2,022,348
Greater Wisconsin Committee	\$0	\$1,736,535	\$1,736,535
Club for Growth	\$0	\$611,261	\$611,261
Coalition for America's Families	\$0	\$398,078	\$398,078
Wisconsin Education Association	\$0	\$48,321	\$48,321

**Candidate Fundraising**  
\$6,691,852

**National Ranking**  
11

**Total TV**  
\$7,332,914

**National Ranking**  
5

## APPENDIX 1 NOTES

1. Michael J. Goodman and William C. Rempel, "Justice vs. Justice: In Las Vegas, They're Playing With a Stacked Judicial Deck" *Los Angeles Times*, June 8, 2006, <http://articles.latimes.com/2006/jun/08/nation/na-vegas8>.
2. Press release, North Carolina Center for Voter Education, June 28, 2005, available at [http://www.ncjudges.org/media/news\\_releases/7\\_28\\_05.html](http://www.ncjudges.org/media/news_releases/7_28_05.html).
3. Public Citizen report, available at [http://www.citizen.org/congress/special\\_intr/articles.cfm?ID=15877](http://www.citizen.org/congress/special_intr/articles.cfm?ID=15877).
4. Texans for Public Justice report on 2008 campaign spending is at <http://info.tpj.org/reports/txpaco8/chapter2.html>. Texans for Lawsuit Reform report is at <http://www.tlrpac.com/news-08-1121.php>.
5. Additional information and articles are available at <http://www.gavelgrab.org/?p=5169>.

## APPENDIX 2

# Supreme Court TV Advertisements, 2008

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost
Alabama																		
Paseur Amazing Grace 60	Candidate	Paseur, D Bell	Labor, trial lawyer, Democrat	Promote	•		•										700	\$364,923
Paseur Choice Is Clear	Candidate	Paseur, D Bell	Labor, trial lawyer, Democrat	Contrast				•									810	\$211,560
Paseur Amazing Grace Rev 60	Candidate	Paseur, D Bell	Labor, trial lawyer, Democrat	Promote	•		•										337	\$205,765
Paseur Forget Politics	Candidate	Paseur, D Bell	Labor, trial lawyer, Democrat	Promote	•												923	\$203,452
Paseur Tough Smart	Candidate	Paseur, D Bell	Labor, trial lawyer, Democrat	Promote			•										699	\$193,815
Paseur Not Me	Candidate	Paseur, D Bell	Labor, trial lawyer, Democrat	Contrast			•	•									781	\$189,440
Paseur Amazing Grace	Candidate	Paseur, D Bell	Labor, trial lawyer, Democrat	Promote	•		•										582	\$140,370
Paseur Only Candidate	Candidate	Paseur, D Bell	Labor, trial lawyer, Democrat	Promote	•	•	•										720	\$126,175
Paseur Bank Account	Candidate	Paseur, D Bell	Labor, trial lawyer, Democrat	Attack				•									364	\$82,559
Paseur Sunday Newspaper Reported	Candidate	Paseur, D Bell	Labor, trial lawyer, Democrat	Contrast				•									91	\$23,120
Shaw Most Sons 60	Candidate	Shaw, G	Business, medical, Republican	Promote	•												430	\$280,685

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost
<b>Alabama, continued</b>																		
Shaw Sam Shaw	Candidate	Shaw, G	Business, medical, Republican	Promote	•												620	\$169,640
Shaw Broke Her Pledge	Candidate	Shaw, G	Business, medical, Republican	Contrast	•												406	\$138,848
Shaw Amazing Nor Graceful	Candidate	Shaw, G	Business, medical, Republican	Contrast	•												448	\$122,202
Shaw Newspapers Recommend	Candidate	Shaw, G	Business, medical, Republican	Contrast	•												326	\$95,440
Shaw Just Plain Wrong	Candidate	Shaw, G	Business, medical, Republican	Promote	•								•				21	\$5,413
Shaw One Vote	Candidate	Shaw, G	Business, medical, Republican	Promote	•						•						247	\$72,600
CFIF Shaw Tough Place	Special interest group	CFIF	Business, medical, Republican	Promote		•											1,255	\$512,302
CFIF Passeur The Whole Truth	Special interest group	CFIF	Business, medical, Republican	Attack			•	•									1,189	\$453,227
<b>State Total</b>																	10949	\$3,591,536
<b>Kentucky</b>																		
Abramson Neighbors Support	Candidate	Abramson, LH	Non Partisan	Promote	•												61	\$21,877
Abramson Choice Is Clear	Candidate	Abramson, LH	Non Partisan	Promote	•												55	\$18,375
Abramson My Mom	Candidate	Abramson, LH	Non Partisan	Promote	•												32	\$11,597
Shake True Story Ex-Husband	Candidate	Shake, J	Non Partisan	Promote		•				•			•				90	\$29,245
Shake Homegrown Success	Candidate	Shake, J	Non Partisan	Promote	•												75	\$23,864
Shake True Story Ex-Husband 2	Candidate	Shake, J	Non Partisan	Promote		•				•			•				21	\$8,677
<b>State Total</b>																	334	\$113,635
<b>Idaho</b>																		
Bradbury Questions	Candidate	Bradbury, J	Non Partisan	Promote									•				245	\$22,407
Bradbury Facts	Candidate	Bradbury, J	Non Partisan	Promote	•								•				234	\$20,040
<b>State Total</b>																	479	\$42,447

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost
Louisiana																		
Belsome Bully	Candidate	Belsome, R	Labor, trial lawyer, Democrat	Promote	•	•											108	\$66,506
Belsome People's Court	Candidate	Belsome, R	Labor, trial lawyer, Democrat	Promote	•	•							•				93	\$56,247
Belsome Some Ethics	Candidate	Belsome, R	Labor, trial lawyer, Democrat	Attack				•						•		•	18	\$10,605
Guidry Ethics And Values	Candidate	Guidry, G	Business, Medical, Republican	Promote	•					•	•						164	\$51,723
Guidry Message To America	Candidate	Guidry, G	Business, Medical, Republican	Promote							•		•				143	\$47,488
Guidry Strange Characters	Candidate	Guidry, G	Business, Medical, Republican	Promote	•	•											36	\$15,318
Guidry Set Record Straight	Candidate	Guidry, G	Business, Medical, Republican	Promote					•								45	\$14,412
Guidry Quiet Strength	Candidate	Guidry, G	Business, Medical, Republican	Promote	•		•			•	•						43	\$11,133
Stsupctla Guidry Louisiana's Rising	Candidate	Guidry, G	Business, Medical, Republican	Promote							•		•				21	\$6,955
Guidry Best For Louisiana	Candidate	Guidry, G	Business, Medical, Republican	Promote	•						•						19	\$6,708
Hughes Where In The World	Candidate	Hughes, J	Business, Medical, Republican	Attack										•			55	\$46,872
Hughes Bio	Candidate	Hughes, J	Business, Medical, Republican	Promote	•												49	\$34,123
Hughes Vote Early	Candidate	Hughes, J	Business, Medical, Republican	Promote	•												29	\$29,634
Kimball Grandmother	Candidate	Kimball, K	Labor, trial lawyer, Democrat	Promote	•					•			•				183	\$75,779
Kimball Set New Standards	Candidate	Kimball, K	Labor, trial lawyer, Democrat	Promote	•								•				185	\$71,164
Kimball Built Reputation	Candidate	Kimball, K	Labor, trial lawyer, Democrat	Promote	•												159	\$57,677

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost
Louisiana, continued																		
Kuhn Most Experienced	Candidate	Kuhn, J	Business, Medical, Republican	Promote	•	•	•										176	\$63,253
Kuhn Walter Reed	Candidate	Kuhn, J	Business, Medical, Republican	Promote			•						•				80	\$30,020
Kuhn Some Ethics	Candidate	Kuhn, J	Business, Medical, Republican	Attack										•		•	86	\$25,825
Kuhn Fails The Test	Candidate	Kuhn, J	Business, Medical, Republican	Attack				•									52	\$23,607
Kuhn Mike Foster	Candidate	Kuhn, J	Business, Medical, Republican	Promote							•						66	\$23,320
Kuhn Most Experienced	Candidate	Kuhn, J	Business, Medical, Republican	Promote	•	•	•										176	\$63,253
Kuhn November 2	Candidate	Kuhn, J	Business, Medical, Republican	Attack												•	39	\$13,540
Kuhn Most Important Thing	Candidate	Kuhn, J	Business, Medical, Republican	Promote	•								•				19	\$5,633
Kuhn Guidry's Victims	Candidate	Kuhn, J	Business, Medical, Republican	Attack				•								•	12	\$3,857
Lacan Guidry Big Differences	Special interest group	LCAN	Business, Medical, Republican	Contrast		•	•										150	\$100,740
Lacan Guidry Big Differences 3	Special interest group	LCAN	Business, Medical, Republican	Contrast		•	•										163	\$86,535
Lacan Guidry Big Differences Rev	Special interest group	LCAN	Business, Medical, Republican	Contrast		•	•										15	\$6,376
Lacan Kuhn Smear Squad 18 Months	Special interest group	LCAN	Business, Medical, Republican	Attack			•										59	\$30,187
AFJ Guidry Pollster	Special interest group	AFJ	Labor, trial lawyer, Democrat	Attack				•								•	69	\$40,192
AFGG Candidate Endorsements	Special interest group	AFGG	Non Partisan	Promote												•	39	\$6,222
AFGG Alliance Recommends 7	Special interest group	AFGG	Non Partisan	Promote												•	14	\$3,064

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost
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Louisiana, continued

RDO Moreno Belsome Cannizzaro Skrmetta	Special interest group	RDO	Business, Medical, Republican	Promote											•		6	\$3,375
RDO Endorses Candidates	Special interest group	RDO	Business, Medical, Republican	Promote											•		5	\$2,040
<b>State Total</b>																	2454	\$1,097,519

Michigan

Taylor Lies About Chief Justice	Candidate	Taylor, C	Business, Medical, Republican	Attack											•		880	\$299,029
Taylor Earn Your Way	Candidate	Taylor, C	Business, Medical, Republican	Promote	•								•				869	\$279,067
Taylor Unqualified Hathaway	Candidate	Taylor, C	Business, Medical, Republican	Attack									•				390	\$134,815
Taylor Right To Be Protected	Candidate	Taylor, C	Business, Medical, Republican	Promote		•											358	\$118,136
Taylor Works Hard	Candidate	Taylor, C	Business, Medical, Republican	Promote	•												141	\$38,248
Hathaway Taylor Fell Asleep	Candidate	Hathaway, DM	Labor, trial lawyer, Democrat	Contrast		•	•										1,066	\$399,096
MDCC Taylor Bush's Agenda	Party	MDSCC	Labor, trial lawyer, Democrat	Attack				•					•				105	\$82,556
MDSCC Taylor The Sleeping Judge	Party	MDSCC	Labor, trial lawyer, Democrat	Attack									•				1,450	\$701,681
MDCC Taylor Wake Up Call 15	Party	MDSCC	Labor, trial lawyer, Democrat	Attack									•				1,020	\$250,967
MDCC Taylor George Bush	Party	MDSCC	Labor, trial lawyer, Democrat	Attack									•				85	\$57,486
MDCC Taylor Good Soldier	Party	MDSCC	Labor, trial lawyer, Democrat	Attack				•									136	\$53,390
MDCC Taylor Good Soldier 2	Party	MDSCC	Labor, trial lawyer, Democrat	Attack				•									31	\$18,052

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost	
<b>Michigan, continued</b>																			
MRP Hathaway Unqualified	Party	MRP	Business, Medical, Republican	Attack			•										644	\$401,259	
MCC Taylor Tough On Crime	Special interest group	MCC	Business, Medical, Republican	Promote			•						•				1,153	\$750,772	
MCC Hathaway Tough On Predators	Special interest group	MCC	Business, Medical, Republican	Attack			•										55	\$54,097	
																	<b>State Total</b>	8383	\$3,638,651
<b>Mississippi</b>																			
Chandler Man Of Character	Candidate	Chandler, D	Non Partisan	Promote	•												84	\$34,123	
Kitchens Blessed 60	Candidate	Kitchens, J	Non Partisan	Promote	•		•										299	\$110,368	
Kitchens Out Of My Kitchen	Candidate	Kitchens, J	Non Partisan	Promote	•												287	\$55,984	
Kitchens Blessed	Candidate	Kitchens, J	Non Partisan	Promote	•		•										150	\$37,040	
Smith Protecting Children	Candidate	Smith, J.	Non Partisan	Promote	•												485	\$77,632	
Smith Measure Man's Character	Candidate	Smith, J.	Non Partisan	Promote	•												276	\$56,485	
Smith Rated Efficient	Candidate	Smith, J	Non Partisan	Promote	•		•										145	\$42,535	
Smith Record Of Integrity	Candidate	Smith, J	Non Partisan	Promote	•												72	\$20,370	
LEAA Diaz Protect Our Families	Special interest group	LEAA	Non Partisan	Attack			•										770	\$337,519	
LEAA Smith Protect Our Families	Special interest group	LEAA	Non Partisan	Promote	•		•										1,195	\$322,957	
Stoplaw Smith Serving Ms	Special interest group	SLAM	Business, medical, Republican	Promote	•												562	\$132,259	
MFEP Smith Tort Reform	Special interest group	MFEP	Business, medical, Republican	Promote	•												238	\$67,797	
																	<b>State Total</b>	4,563	\$1,295,069

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost	
<b>Montana</b>																			
STSUPCTMT Mcgrath Pam Bucy	Candidate	McGrath, M	Non Partisan	Promote	•												206	\$22,916	
STSUPCTMT Mcgrath Mike Menahan	Candidate	McGrath, M	Non Partisan	Promote	•												184	\$19,099	
STSUPCTMT Mcgrath Bill Slaughter	Candidate	McGrath, M	Non Partisan	Promote	•												181	\$18,786	
																	<b>State Total</b>	571	\$60,801
<b>North Carolina</b>																			
Edmunds These People 15	Candidate	Edmunds, B	Public funding	Promote	•												668	\$148,586	
Reynolds Understand	Candidate	Reynolds, S	Public funding	Promote	•					•							220	\$58,660	
Reynolds Understand 15	Candidate	Reynolds, S	Public funding	Promote		•				•							161	\$27,028	
																	<b>State Total</b>	1,049	\$234,274
<b>Nevada</b>																			
Allf Endorsements	Candidate	Allf, N	Non Partisan	Promote	•												398	\$143,830	
Allf Bio	Candidate	Allf, N	Non Partisan	Promote	•												218	\$123,008	
Allf Bio Rev	Candidate	Allf, N	Non Partisan	Promote	•												175	\$23,728	
Chairez Bio 60	Candidate	Chairez, D	Non Partisan	Promote	•	•	•										184	\$131,905	
Gibbons Years Of Experience	Candidate	Gibbons, M	Non Partisan	Promote	•												360	\$108,970	
Gibbons Top Rated	Candidate	Gibbons, M	Non Partisan	Promote	•												357	\$101,712	
Pickering Blew The Whistle Rev	Candidate	Pickering, K	Non Partisan	Promote		•										•	354	\$204,447	
Pickering Right Experience	Candidate	Pickering, K	Non Partisan	Promote	•												287	\$107,995	
Pickering Praise	Candidate	Pickering, K	Non Partisan	Promote	•												208	\$85,728	
Pickering Only Right Experience	Candidate	Pickering, K	Non Partisan	Promote	•												236	\$84,841	
Pickering Only Right Experience 2	Candidate	Pickering, K	Non Partisan	Promote	•												272	\$63,328	
Pickering The Choice Rev	Candidate	Pickering, K	Non Partisan	Contrast	•												117	\$51,748	
Pickering Blew The Whistle Sp	Candidate	Pickering, K	Non Partisan	Promote	•	•										•	69	\$28,959	
Pickering The Choice	Candidate	Pickering, K	Non Partisan	Contrast	•												221	\$28,034	

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost
<b>Nevada, continued</b>																		
Pickering Right Experience Rev	Candidate	Pickering, K	Non Partisan	Promote	•												194	\$28,020
Pickering Blew The Whistle Rev 2	Candidate	Pickering, K	Non Partisan	Promote	•	•										•	58	\$8,080
Pickering Blew The Whistle	Candidate	Pickering, K	Non Partisan	Promote		•										•	13	\$4,699
Schumacher Proud Of Mom	Candidate	Schumacher, D	Non Partisan	Promote	•												123	\$89,296
Schumacher I'm Voting Not A Judge	Candidate	Schumacher, D	Non Partisan	Contrast	•												57	\$31,109
Schumacher I'm Voting	Candidate	Schumacher, D	Non Partisan	Promote	•												5	\$1,069
<b>State Total</b>																	3,906	\$1,450,506
<b>Ohio</b>																		
O'Connor Voice Plain Dealer 15	Candidate	O'Connor, M	Business, medical, Republican	Promote	•				•								290	\$81,893
O'Connor Voice Dispatch 15	Candidate	O'Connor, M	Business, medical, Republican	Promote	•				•								381	\$76,185
O'Connor Voice Police Fire 15	Candidate	O'Connor, M	Business, medical, Republican	Promote	•				•								407	\$63,278
Russo Facts	Candidate	Russo, J	Labor, trial lawyer, Democrat	Contrast				•									40	\$28,054
Stratton Big Heart	Candidate	Stratton, E	Business, medical, Republican	Promote	•												564	\$117,121
Stratton Rated Excellent 15	Candidate	Stratton, E	Business, medical, Republican	Promote	•												498	\$109,446
Stratton Velvet Hammer 10	Candidate	Stratton, E	Business, medical, Republican	Promote	•												490	\$98,231
PFOF Stratton Eyes Of A Child	Special interest group	PFOF	Business, medical, Republican	Promote					•								1,237	\$477,175
PFOF O'Connor Peaceful Night Rev	Special interest group	PFOF	Business, medical, Republican	Promote		•			•								424	\$160,139
PFOF O'Connor Peaceful Night	Special interest group	PFOF	Business, medical, Republican	Promote		•			•								99	\$47,309
<b>State Total</b>																	4,430	\$1,258,831

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost
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Texas

Jefferson Only In America	Candidate	Jefferson, W	Business, medical, Republican	Promote	•												569	\$400,980
Jefferson Rose To Chief Justice	Candidate	Jefferson, W	Business, medical, Republican	Promote	•												4	\$3,504
Wainwright Activist Judges	Candidate	Wainwright, D	Business, medical, Republican	Promote	•								•				299	\$292,123
Yanez Ideal World	Candidate	Yanez, L	Labor, trial lawyer, Democrat	Promote	•	•											65	\$31,714
Jordan Yanez Houston	Party	TDP	Labor, trial lawyer, Democrat	Contrast				•					•				2,075	\$904,978
Jefferson Wainwright Johnson	Party	HCRP	Business, medical, Republican	Promote	•												705	\$463,368
Rising Gas Prices	Party	EPCDP	Labor, trial lawyer, Democrat	Contrast											•		33	\$8,657

State Total 3,750 \$2,105,324

West Virginia

STSUPCTWV Bastress Bio	Candidate	Bastress, B	Labor, trial lawyer, Democrat	Promote	•												148	\$31,238
STSUPCTWV Bastress Warped Justice	Candidate	Bastress, B	Labor, trial lawyer, Democrat	Contrast				•								•	91	\$17,795
STSUPCTWV Ketchum Bio	Candidate	Ketchum, M	Labor, trial lawyer, Democrat	Promote	•												389	\$71,269
STSUPCTWV Ketchum Bio 60	Candidate	Ketchum, M	Labor, trial lawyer, Democrat	Promote	•	•											123	\$54,070
STSUPCTWV Ketchum Bio Rev 60	Candidate	Ketchum, M	Labor, trial lawyer, Democrat	Promote	•	•											80	\$17,430
STSUPCTWV Ketchum Ketchup Guy	Candidate	Ketchum, M	Labor, trial lawyer, Democrat	Promote	•												565	\$120,501
STSUPCTWV Ketchum Ketchup Guy Rev	Candidate	Ketchum, M	Labor, trial lawyer, Democrat	Promote	•												1,022	\$166,238
STSUPCTWV Ketchum Mumbo Jumbo	Candidate	Ketchum, M	Labor, trial lawyer, Democrat	Promote	•												228	\$49,255

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost
West Virginia, continued																		
STSUPCTWV Ketchum Take A Hike	Candidate	Ketchum, M	Labor, trial lawyer, Democrat	Attack													• 16	\$2,566
STSUPCTWV Maynard I Like Spike	Candidate	Maynard, S	Labor, trial lawyer, Democrat	Promote	•	•											168	\$27,617
STSUPCTWV Maynard Menace	Candidate	Maynard, S	Labor, trial lawyer, Democrat	Attack										•			66	\$12,948
STSUPCTWV Maynard Newspapers Endorse	Candidate	Maynard, S	Labor, trial lawyer, Democrat	Promote	•												139	\$25,475
STSUPCTWV Maynard Son Of West Virginia	Candidate	Maynard, S	Labor, trial lawyer, Democrat	Promote	•												192	\$45,215
STSUPCTWV Walker Always	Candidate	Walker, B	Business, medical, Republican	Promote						•	•						160	\$27,463
STSUPCTWV Walker Believe	Candidate	Walker, B	Business, medical, Republican	Promote			•			•	•						270	\$52,407
STSUPCTWV Workman Integrity	Candidate	Workman, M	Labor, trial lawyer, Democrat	Promote	•												209	\$34,990
STSUPCTWV Workman Working People	Candidate	Workman, M	Labor, trial lawyer, Democrat	Promote	•												203	\$25,479
STSUPCTWV Workman Working People Rev	Candidate	Workman, M	Labor, trial lawyer, Democrat	Promote	•												50	\$7,039
STSUPCTWV WVBCT Maynard Denouncement	Special interest group	WVBCT	Labor, trial lawyer, Democrat	Attack				•						•			87	\$46,638
STSUPCTWV WVCOC Maynard For The Record	Special interest group	WVCOC	Business, medical, Republican	Promote	•												386	\$109,918
STSUPCTWV WVCOC Maynard For The Record Rev	Special interest group	WVCOC	Business, medical, Republican	Promote	•												26	\$10,388
STSUPCTWV WVCOC Maynard True Friend	Special interest group	WVCOC	Business, medical, Republican	Promote					•								122	\$19,626

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost
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West Virginia, continued

STSUPCTWV Wvcoc Mcgraw Enough	Special interest group	WVCOC	Business, medical, Republican	Attack										•	•		732	\$165,450
STSUPCTWV Wvcoc Walker Treated Fairly	Special interest group	WVCOC	Business, medical, Republican	Promote	•												579	\$127,205
<b>State Total</b>																	6,051	1,268,220

Wisconsin

Butler Battleground	Candidate	FoJLB	Non Partisan	Promote	•	•											940	\$181,952
Butler Kohl For Butler	Candidate	FOJLB	Non Partisan	Promote	•	•											474	\$111,239
Butler It's An Honor	Candidate	FOJLB	Non Partisan	Promote	•	•	•										114	\$17,269
Butler Shame	Candidate	FOJLB	Non Partisan	Contrast	•											•	29	\$7,221
Gableman Slimy Attacks	Candidate	Gableman, M	Non Partisan	Promote			•										241	\$48,823
Gableman Shadowy Special Interests	Candidate	Gableman, M	Non Partisan	Contrast			•										106	\$45,013
CFAF Butler Murdered Wife	Special interest group	CFAF	Business, medical, Republican	Attack			•										687	\$222,374
CFAF Butler Ralph Armstrong 2	Special interest group	CFAF	Business, medical, Republican	Attack			•										301	\$108,652
CFAF Butler Ralph Armstrong	Special interest group	CFAF	Business, medical, Republican	Attack			•										186	\$52,433
CFAF Butler Ralph Armstrong 3	Special interest group	CFAF	Business, medical, Republican	Attack			•										39	\$14,619
CFG Criminals Threaten	Special interest group	CFG	Business, medical, Republican	Promote			•										1,191	\$465,431
GWC Butler Who Can	Special interest group	GWC	Labor, trial lawyer, Democrat	Promote	•	•											960	\$277,374
GWC Remember Mike Gableman	Special interest group	GWC	Labor, trial lawyer, Democrat	Attack										•	•		855	\$272,487
GWC Meet Mike Gableman	Special interest group	GWC	Labor, trial lawyer, Democrat	Attack										•	•		780	\$267,927
GWC Gableman Too Far	Special interest group	GWC	Labor, trial lawyer, Democrat	Attack										•	•		835	\$251,373

Creative Name	Sponsor	Who	Interest	Tone	Traditional	Civil Justice	Criminal Justice	Special Interest	Criticism for Decisions	Family Values	Conservative Values	Civil Rights	Role of Judges	Attack	Not Applicable	Ethics	Spot Count	Estimated Cost
Wisconsin, continued																		
GWC Better Choice	Special interest group	GWC	Labor, trial lawyer, Democrat	Contrast	•			•									193	\$96,034
GWC It's Mike Gableman	Special interest group	GWC	Labor, trial lawyer, Democrat	Attack			•										6	\$3,773
WEAC Gableman Imagine	Special interest group	WEAC	Labor, trial lawyer, Democrat	Attack			•										187	\$48,321
WMC Loophole Louie	Special interest group	WMC	Business, medical, Republican	Attack			•						•				1,718	\$524,212
WMC Butler Common Sense	Special interest group	WMC	Business, medical, Republican	Attack			•										1,350	\$444,250
WMC Gableman Thank Judges 2	Special interest group	WMC	Business, medical, Republican	Promote		•											751	\$323,544
WMC Gableman Thank Judges	Special interest group	WMC	Business, medical, Republican	Promote		•											17	\$4,836
<b>State Total</b>																	11,960	\$3,789,157

## Abbreviations

AFGG	Alliance for Good Government
AFJ	Alliance for Justice
CFAF	Coalition for America's Families
CFG	Club for Growth
CFIF	Center for Individual Freedom
EPCDP	El Paso County Democratic Party
GWC	Greater Wisconsin Committee
HCRP	Harris County Republican Party
LCAN	Louisiana Conservative Action Network
LEAA	Law Enforcement Alliance of America
MCC	Michigan Chamber of Commerce
MDSCC	Michigan Democratic State Central Committee
MFEP	Mississippians for Economic Progress
MRP	Michigan Republican Party
PFOF	Partnership for Ohio's Future
RDO	Regular Democratic Organization
SLAM	Stop Lawsuit Abuse in Mississippi
TDP	Texas Democratic Party
WEAC	Wisconsin Education Association Council
WMC	Wisconsin Manufacturers & Commerce
WVBCT	West Virginia Building & Construction Trades PAC
WVCOC	West Virginia Chamber of Commerce



## APPENDIX 3

# Facts About State Court Election and Appointment Systems

### Judicial Elections: A National Overview

- 22 states hold at least some competitive elections for state Supreme Court justices.
- 16 states hold only one-candidate retention elections for Supreme Court justices.
- Thus, Supreme Court justices face some form of election in 38 states.
- When local general jurisdiction trial courts are considered, appellate and trial judges face some form of election in 39 states.

### Judicial Appointments: A National Overview

- 29 states initially appoint Supreme Court justices.\*
- 24 states use a system known as merit selection. Governors select justices from slates of nominees submitted to them by nonpartisan commissions.
- 5 states use other appointment systems, such as gubernatorial or legislative appointments, without any use of nonpartisan nominating commissions.

### Public Financing States

As of June 2010, four states with competitive elections provide public financing for appellate candidates: North Carolina (enacted in 2002); New Mexico (enacted in 2007); and Wisconsin (enacted in 2009). In 2010, West Virginia enacted a pilot public financing program for the 2012 state Supreme Court of Appeals elections.

**To learn more about which states use each system, visit the American Judicature Society's "Judicial Selection in the States" website, at [www.ajs.org](http://www.ajs.org), or visit the "State Issues" section at [www.justiceatstake.org](http://www.justiceatstake.org).**



More information  
[@justiceatstake.org](https://www.justiceatstake.org)



\*In a unique hybrid system, New Mexico Supreme Court justices are appointed, but must face one partisan election to stay in office. Thus, New Mexico is listed in both the election and appointment categories.

# About the Authors



**James J. Sample** is an Associate Professor at Hofstra University School of Law. From 2005-2009, Professor Sample served as Counsel at the Brennan Center for Justice, where he litigated and wrote on issues involving campaign finance, voting rights, and judicial independence. Previously, he worked on Montana Governor Brian Schweitzer's 2004 campaign and clerked for the Honorable Judge Sidney R. Thomas of the U.S. Court of Appeals for the Ninth Circuit. Professor Sample is widely quoted by the national press on courts issues, and his articles have appeared in the *Wall Street Journal*, *Slate*, *Politico*, and the *HuffingtonPost*. Professor Sample's recent scholarship includes "Caperton: Correct Today; Compelling Tomorrow" (Syracuse Law Review 2010), and "Court Reform Enters the Post-Caperton Era" (Drake Law Review 2010). While at the Brennan Center, he served as counsel on certiorari and merits stages briefs in support of the Petitioners in *Caperton v. A.T. Massey Coal Co.* Professor Sample received his JD from *Columbia Law School*, where he was a Harlan Fiske

Stone and James Kent Scholar and a Notes Editor on the Columbia Law Review. Before law school he was a three-time Emmy Award winner for his work with NBC Sports. He can be reached at james.sample@hofstra.edu.



**Adam Skaggs** is Counsel in the Brennan Center for Justice's Democracy Program, where he works on a range of judicial independence, voting rights, and election administration issues. Before joining the Brennan Center, he was a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison LLP. In 2003, Mr. Skaggs graduated summa cum laude with a J.D. from Brooklyn Law School, and was a member of the *Brooklyn Law Review*. He subsequently clerked for Judge Stanley Marcus of the U.S. Court of Appeals for the Eleventh Circuit and Judge Edward Korman, Chief Judge of the U.S. District Court for the Eastern District of New York. Mr. Skaggs received an M.S. in Urban Affairs from Hunter College of the City University of New York, and holds a B.A., awarded with distinction, from Swarthmore College.



**Jonathan Blitzer** is a former Research Associate with the Fair Courts program at the Brennan Center. He graduated from Columbia University, with a degree in English and Philosophy, in 2007.

**Linda Casey** is lead researcher at the nonpartisan, nonprofit National Institute on Money in State Politics. In addition to comprehensive research duties, she has focused on judicial elections since 2001. “High Court Contests: Competition, Controversy and Cash in Pennsylvania and Wisconsin,” “Diversity in State Judicial Campaigns, 2007–2008,” “Judicial Diversity and Money in Politics: AL, GA, IL, NM, NC, OH, PA, WA, WI.” Ms. Casey earned degrees in political science and sociology from Carroll College, in Helena, Montana. Before joining the National Institute in 1996, she worked for several nonprofit organizations and served as a financial officer for a number of statewide and legislative political campaigns in Montana.



**Charles W. Hall** is Director of Communications for the Justice at Stake Campaign. A career journalist, he worked for 20 years as a reporter and editor for the Washington Post, including extensive stints covering federal and local courts. Before joining Justice at Stake in 2008, Mr. Hall was manager of presidential communications for the American Bar Association. He also is active in civic affairs in Northern Virginia, and has had numerous commentaries published on regional land use policies. Mr. Hall can be reached at [chall@justiceatstake.org](mailto:chall@justiceatstake.org).



# Photo Sources

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Page 55: West Virginia Justice Brent D. Benjamin. Source: <http://lawyersusadcdicta.files.wordpress.com/2009/01/benjamin.jpg>

Page 56: Blankenship and Maynard. Source: Courtesy of High Caperton

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# jus•tice |'jəstis|

noun

- 1 just behavior or treatment : *a concern for justice, peace, and genuine respect for people.*
  - the quality of being fair and reasonable : *the justice of his case.*
  - the administration of the law or authority in maintaining this : *a tragic miscarriage of justice.*
  - (**Justice**) the personification of justice, usually a blindfolded woman holding scales and a sword.
- 2 a judge, or magistrate, in particular a judge of the supreme court of a country or state.



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# eth•ics |'eθiks| |'ɛθiks| |'ɛθiks|

plural noun

- 1 [usu. treated as pl. ] moral principles that govern a person's or group's behavior : *Judeo-Christian ethics.*
  - the moral correctness of specified conduct : *the ethics of euthanasia.*
- 2 [usu. treated as sing. ] the branch of knowledge that deals with moral principles.