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.

Fundraising by Supreme Court Candidates, 2000–09:

$206.9 Million

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-

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. The candidate who raised the most money won 11 of 17 contested high court races in 2007–08. But three well-funded incumbent chief justices were defeated, perhaps 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.

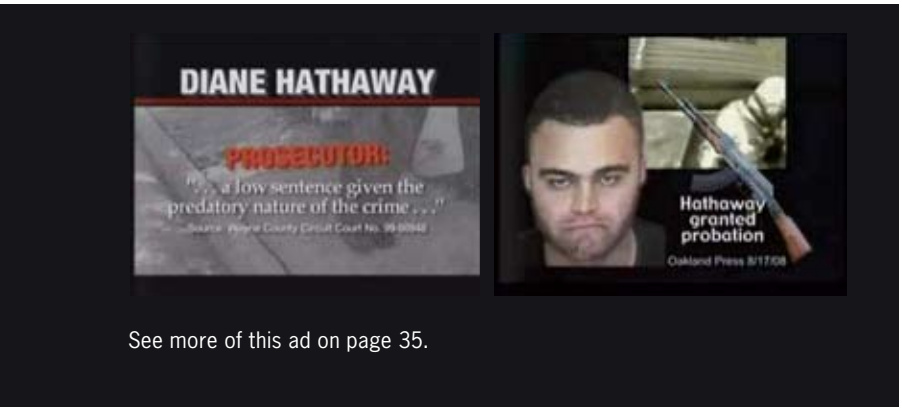
Court TV: The Rise of Costly Attack Ads

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.



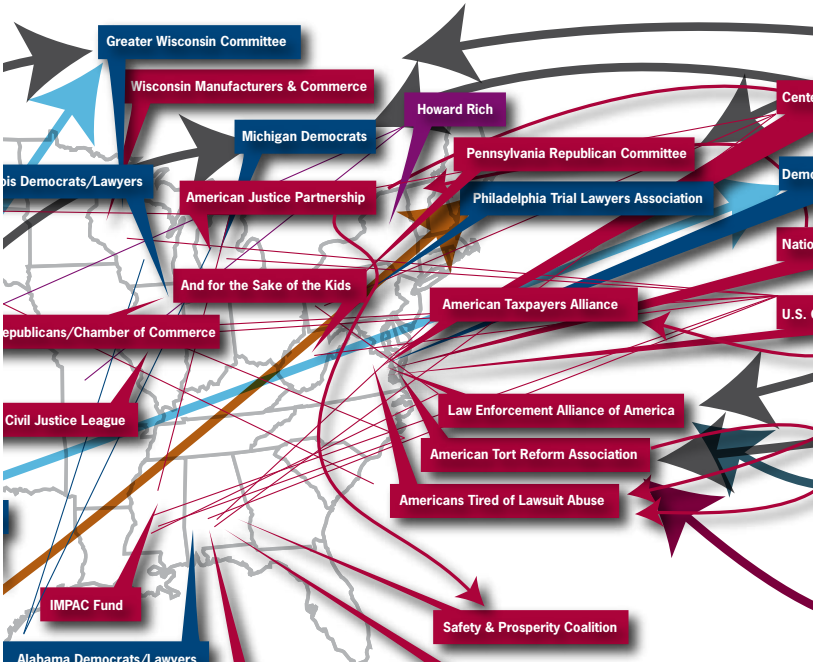
See more of this ad on page 35.

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.

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.

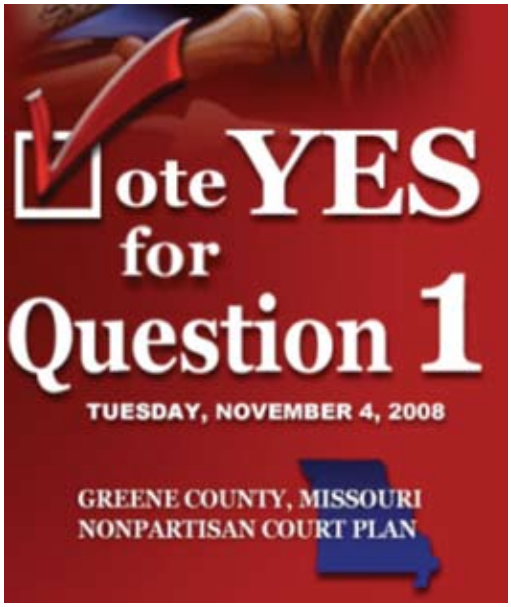
A 2002 Supreme Court decision, *Republican Party of Minnesota v. White*, loosened restrictions on judicial campaign speech. Interest groups are using questionnaires to pressure judges into signaling courtroom decisions on the campaign trail. Professional norms are becoming more important in helping judicial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


Court rejects corporate political spending limits

Campaign finance returns to the high court on page 62.

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*