

THE NEW POLITICS OF JUDICIAL ELECTIONS 2009–10

How Special Interest “Super Spenders” Threatened Impartial Justice and Emboldened Unprecedented Legislative Attacks on America’s Courts

*Sanders County Republican Cent. Committee v. Bullock
No. 12-35543 archived on October 30, 2012*

by

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Justice at Stake Campaign

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at New York University School of Law

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For more information, visit 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 the following organizations: Arkay Foundation, Baumann Fund, Blum-Kovler Foundation, Carnegie Corporation of New York, Columbia Foundation, Democracy Alliance Partners, Ford Foundation, HKH Foundation, Joyce Foundation, Kohlberg Foundation, Open Society Foundations, Public Welfare Foundation, Rockefeller Brothers Fund, Vanguard Charitable Foundation, and Wallace Global Fund.

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Table of Contents

List of Charts and Figures	page vi
Introduction	page 1
Chapter 1	
The Money Trail	Page 3
Interest Groups Drive Spending	Page 3
Spending Highest on Divided Courts	Page 3
National Overview	Page 5
Some States Trail Off	Page 7
Retention Election Spending Skyrockets in 2010	Page 7
State in Focus: Iowa	Page 9
After Citizens United: Patchwork Disclosure Rules Leave Voters in the Dark	Page 10
Disclosure vs. Hidden Spending	Page 10
State in Focus: Michigan	Page 12
Chapter 2	
Court TV 2009–10	Page 13
Spending on Television Advertising in 2009 and 2010 Judicial Elections	Page 13
TV Advertising in the 2009–10 Supreme Court Elections: A Detailed Analysis	Page 14
Spending by Non-Candidate Groups Remains High in 2010	Page 16
Sponsorship and Content: Who Paid for What Ads	Page 16
2010 Elections—State Snapshots	Page 18
State in Focus: Illinois	Page 20
Chapter 3	
Implications of the 2009–10 Elections	Page 21
2011 Legislative Aftershocks Follow 2010 Earthquake	Page 21
Public Financing	Page 21
Impeachment Threats: Iowa, New Hampshire and Elsewhere	Page 23
Attacks on Merit/Retention	Page 23
Florida: Court-Splitting or Court-Packing?	Page 26
Funding Cuts Court Disaster	Page 26
Looking Ahead: More Assaults Expected	Page 27
Appendix	Page 28
Endnotes	Page 29

Sanders County Republican Cent. Committee v. Bullock
No. 12-35543 archived on October 30, 2012

List of Charts and Figures

Chapter 1 The Money Trail

Candidate Fundraising, 2009–10	Page 5
Top 10 States, by Total Spending	Page 5
Top 10 Super Spenders, 2009–10	Page 6
Contributions to Candidates by Sector, 2009–10	Page 6
Candidate Fundraising by Type of Election, 2009–10	Page 7
Iowa Campaign Ads	Page 9
Michigan Campaign Finance Network Report Cover	Page 11
Michigan Campaign Ads	Page 12

Chapter 2 Court TV 2009–10

Number of Television Ad Airings by Biennium, 2001–2010	Page 13
Total Spending on TV Ads per Biennium, 2001–2010	Page 14
Monthly Spending Trend, All Groups, 2010	Page 15
State Totals, 2010	Page 15
State Totals, 2009	Page 15
2010 Ads, by Sponsor	Page 16
2010 Attack Ads, by Sponsor	Page 16
Sponsors, 2010 Supreme Court Elections	Page 17
Party Ad Tone	Page 18
Candidate Ad Tone	Page 18
Alabama Campaign Ad	Page 18
Arkansas Campaign Ad	Page 19
Party Ads Mentioning Criminal Justice	Page 19
Candidate Ads Mentioning Criminal Justice	Page 19
Illinois Campaign Ads	Page 20
Attacks on Merit Selection, 2011	Page 24

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No. 12-35543 archived on October 30, 2012

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INTRODUCTION

On Election Day 2010, for the first time in a generation, three state supreme court justices were swept out of office in a retention election when voters expressed anger over a single controversial decision on same-sex marriage. The special-interest campaign—which poured nearly a million dollars into Iowa to unseat the justices—was the logical culmination of a decade of rising efforts to inject more partisan politics into our courts of law.

Outside money continued its hostile takeover of judicial elections. More than ever, a small number of super spenders played a dominant role in influencing who sits on state supreme courts. Much of this influence was exercised secretly.

But Election Day was only the beginning. Campaign leaders in Iowa issued a blunt warning to judges around the country that they could be next. For the next half year, legislatures across the country unleashed a ferocious round of attacks against impartial justice.

More judges were threatened with impeachment than at any time in memory. Merit selection, an appointment system that has historically kept special-interest money out of high court selection in two dozen states, faced unprecedented assault. Public financing for court elections, one of the signature reforms to protect elected courts in the last decade, was repealed in one state and faced severe funding threats in two others.

The story of the 2009-10 elections, and their aftermath in state legislatures in 2011, reveals a coalescing national campaign that seeks to intimidate America's state judges into becoming accountable to money and ideologies instead of the constitution and the law. In its full context, the most recent election cycle poses some of the

gravest threats yet to fair and impartial justice in America.

A total of \$38.4 million was spent on state high court elections in 2009-10, slightly less than the last non-Presidential election cycle, in 2005-06. However, \$16.8 million was spent on television advertising—making 2009-10 the costliest non-presidential election cycle for TV spending in judicial elections. Outside groups, which have no accountability to the candidates, continued their attempts to take over state high court elections, pouring in nearly 30 percent of all money spent—far higher than four years earlier. Two states, Arkansas and Iowa, set fundraising or spending records in 2010, following a decade in which 20 of 22 states with competitive supreme court elections shattered previous fundraising marks.

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Laced among these numbers were several worrying trends:

- In many states, small groups of “super spenders” maintained a dominant role, seeking to sway judicial elections with mostly secret money. Of the top 10 super spenders nationally, there was only one newcomer, the National Organization for Marriage. Unlike in 2007-08, when the biggest groups on the left and right established a rough parity, business and conservative groups were the top spenders in 2009-10.
- Spending also spiked on judicial retention elections, which—with a handful of notable exceptions—had been extremely resistant to special-interest encroachment before 2010. Retention elections accounted for 12 percent of all election spending—compared with just 1 percent for the entire previous decade. [See Chapter 1, The Money Trail]
- Costly television advertising remained all but essential to win a state supreme court election, while TV ads by non-candidate groups often resorted to rank character assassination against sitting judges. Even in states that lacked competitive races, such as Ohio and Alabama, candidates and groups poured millions of dollars into costly ad campaigns. [See Chapter 2, Court TV, 2009-10]
- Across the country, the 2010 judicial and legislative elections ignited an unprecedented post-election attack on state courts. This included challenges to merit selection systems for choosing judges, a campaign to roll back public financing, and threats to impeach judges for unpopular decisions. [See Chapter 3, Implications of the 2009-10 Elections]



CHAPTER 1

The Money Trail

Interest Groups Drive Spending

Spending is always lower in non-presidential election cycles, and that was true in the most recent biennium. Candidates and special-interest groups spent nearly \$38.4 million on state supreme court elections in 2009-10, somewhat lower than the \$42.7 million spent in 2005-06. Despite the slight falloff, a closer analysis shows a deepening of two worrisome trends.

Independent expenditures—by state parties and special-interest groups—were, in proportion to total spending, significantly greater in 2009-10 than four years earlier. Such independent activities accounted for \$11.5 million, or 29.8 percent of all money spent to elect high court justices. In 2005-06, outside groups represented about 18 percent of the total spending.

For the public, this translates to a greater use of attack ads by groups not affiliated with candidates on the ballot. It also means greater secrecy. In many states with weak, outdated campaign disclosure laws, political parties and interest groups are able to conceal the sources of funds they use to spend most aggressively to determine which judges sit on the highest courts.

Moreover, to a significantly greater degree than in 2005-06, the spending was driven by a few powerful special-interest groups in 2009-10. Of the nearly \$38.4 million raised and spent on state high court elections, just 10 groups accounted for nearly \$15 million (including direct contributions to candidates, as well as independent expenditures)—or 38.7 percent of every dollar spent on all state high court elections. By comparison, the top 10 groups in 2005-06 accounted for \$11.4 million, or 26.7 percent of total spending.

The 2009-10 election spending breakdown depicts a striking disparity between the power of a few “super spenders”—organizations capable of spending millions on court elections that affect their bottom line—and that of all other donors to judicial campaigns. The term was first coined in a 2010 study of 29 elections in the 2000-2009 decade, held in 10 states with high-cost campaigns. In each of those 29 elections, the top five spenders averaged \$473,000 apiece. All other donors and groups averaged just \$850.¹

The money amassed by a few groups underscores an important reality about the politics of judicial elections. With candidates enjoying limited name recognition, and with few members of the public tuned in to court elections, judicial candidates must overcome serious obstacles if they hope to tap the small-donor revolution seen in recent presidential races. Presently, a few super spenders can dominate judicial election funding with an ease unparalleled in campaigns for other offices. And loopholes in disclosure laws give them numerous options for doing so in substantial secrecy.

Spending Highest on Divided Courts

In 2009-10, the most expensive high-court elections included those in Michigan, Pennsylvania and Illinois—states in which courts remain closely divided by party and/or judicial philosophy. In all three states, super spender groups drove the campaigns, often overshadowing the budgets of candidates.

In **Michigan**, where a final-week television blitz by candidates, interest groups and political

parties dominated the airwaves, estimates of campaign spending ranged from \$9.1 million to \$11.1 million (with \$6.8 million to \$8.8 million in non-candidate spending).² Regardless of the precise figure, Michigan's judicial election spending was easily the nation's highest in 2009-10. The reelection of Justice Robert Young, and the election of Justice Mary Beth Kelly to the narrowly divided court, tipped the balance from a 4-3 progressive majority to a 4-3 conservative majority.

So great was the independent spending in Michigan that the four supreme court candidates, who raised a total of \$2.3 million, at times seemed like bystanders in their own elections.³ The state Republican Party single-handedly outspent all four candidates, investing more than \$4 million in electoral support. Kicking in more than \$1.5 million was the state Democratic Party, while the Law Enforcement Alliance of America (LEAA), a Virginia-based group with ties to the National Rifle Association, also made a major TV splash.

Most of the special-interest spending in Michigan was concealed from the public, a fact that accounts for the variance in estimates of total spending. Although ads by both parties and the LEAA were blatant attempts to sway votes, Michigan's outdated disclosure law treated them as apolitical "issue ads," and required no campaign finance filings disclosing the amounts spent. Estimates of total spending therefore were largely based on the volume of TV ads each group ran, and estimates of what that airtime cost.

It also was impossible to decipher who ultimately bankrolled independent efforts in Michigan. After being the preeminent player in the previous five supreme court campaigns, the state Chamber of Commerce sponsored no television advertisements in 2010. But it did give \$5.4 million to the Republican Governors Association

(RGA), a national campaign organization. The RGA ultimately transferred \$5.2 million back to Michigan's Republican Party, which was the leading television sponsor in this year's high court campaign. Accountability was lost in the face of the RGA's massive national shell game. [See State in Focus: Michigan]

The second most expensive state in 2009-10 was **Pennsylvania**, where Republican Joan Orié Melvin and Democrat Jack Panella raised a combined \$5.4 million for their November 2009 election. Since 2007, Pennsylvania candidates and interest groups have spent \$15.5 million, the highest total nationally from 2007-10. In 2009, just two groups accounted for more than half of all candidate fundraising in Pennsylvania. The state GOP poured \$1.4 million into the campaign of eventual winner Joan Orié Melvin, while the Philadelphia Trial Lawyers Association donated \$1.37 million to Jack Panella.

Muddying the waters was the Pennsylvania Republican Party's claim, during the election campaign, that its TV ads were being aired independently of Justice Orié Melvin's election bid, even though the GOP effort was orchestrated by the Justice's sister, state Senator Jane Orié. After the election, the party updated its campaign finance reports, treating more than a million dollars in TV ads as an in-kind contribution to the Orié Melvin campaign.

In **Illinois**, a single source, the Illinois Democratic Party, accounted for half of the \$2.8 million raised by incumbent Justice Thomas Kilbride in his bid to retain his seat. And the \$1.5 million donated to the Democratic Party by major plaintiffs' law firms almost identically matched the \$1.4 million that the party gave to Kilbride. Because of this apparent conduit, Kilbride's own contributions showed almost no money from plaintiffs' lawyers, enabling him to avoid direct links to special-interest money.

Nationally, nine states accounted for \$24.6 million of the \$27.02 million raised by state high court candidates.

National Overview

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These state rankings change when independent expenditures by political parties and special-interest groups are included to identify total overall spending. Michigan, ranked sixth in candidate fundraising, surges to No. 1 when all sources of money, including independent TV ads, are considered. When state Chamber of Commerce spending is accounted for, Ohio also rises in the rankings, leapfrogging past Alabama, Illinois and Texas.

In 2009–10, business and conservative groups dominated the national list of 10 ten super spenders, accounting for seven of the top 10 groups, and for \$10.5 million of the \$14.9 million spent. This disparity differs from the 2007–08 biennium, when the left and the right spent roughly equal amounts. Nine of the 10 highest spending groups in the 2009–10 cycle were identified as judicial-election super spenders in “The New Politics of Judicial Elections, 2000–2009: Decade of Change.” Only the National Organization for Marriage, which spent \$65,000 in the Iowa retention election, was a newcomer.

Candidate Fundraising, 2009–10*

Pennsylvania**	\$5,424,210
Alabama	\$3,164,615
Texas	\$2,951,719
Ohio	\$2,865,847
Illinois***	\$2,789,649
Michigan	\$2,342,827
Arkansas	\$1,965,962
Wisconsin**	\$1,624,343
Louisiana****	\$1,499,408
Washington	\$751,180
Georgia	\$588,251
West Virginia	\$306,447
North Carolina	\$163,718
Idaho	\$162,148
Montana	\$160,174
Minnesota	\$152,803
Oregon	\$100,536
Mississippi	\$50,000
Kentucky	\$3,450
Total	\$27,022,287

*Except as indicated, figures refer to 2010 elections, **2009 election
 Retention election, *Elections in 2009 and 2010

Top 10 States, by Total Spending, 2009–10

State	Total	Candidates	Party	Group
Michigan	\$9,243,914	\$2,342,827	\$5,503,369	\$1,274,842
Pennsylvania	\$5,424,210	\$5,424,210		
Ohio	\$4,437,302	\$2,865,847		\$1,571,455
Alabama	\$3,538,805	\$3,164,615		\$374,190
Illinois	\$3,477,649	\$2,789,649		\$688,000
Texas	\$2,951,719	\$2,951,719		
Arkansas	\$1,965,962	\$1,965,962		
Wisconsin	\$1,930,051	\$1,624,343		\$305,708
Louisiana	\$1,499,408	\$1,499,408		
Iowa	\$1,414,618			\$1,414,618
Totals	\$35,760,762	\$24,628,580	\$5,503,369	\$5,628,813

Top 10 Super Spenders, 2009–10

Group	Contributions	Independent Expenditures	Total
Michigan Republican Party ⁴	\$122,876	\$3,945,205	\$4,068,081
Partnership for Ohio's Future (Chamber of Commerce)		\$1,571,455	\$1,571,455
Illinois Democratic Party	\$1,475,000		\$1,475,000
Michigan Democratic Party		\$1,558,164	\$1,558,164
Pennsylvania Republican Party	\$1,458,522		\$1,458,522
Philadelphia Trial Lawyers Association	\$1,370,000		\$1,370,000
Business Council of Alabama	\$ 1,295,000		\$1,295,000
Law Enforcement Alliance of America		\$803,770	\$803,770
Illinois Civil Justice League (JustPac)		\$688,000	\$688,000
National Organization for Marriage		\$635,627	\$635,627
Total	\$5,721,398	\$9,202,221	\$14,923,619

Contributions to Candidates by Sector, 2009–10

Sector	Total Donations
Lawyers/Lobbyists	\$8,561,050
Business	\$6,214,596
Political Party	\$3,483,609
Unknown	\$2,864,698
Organized Labor	\$261,430
Candidate Contributions	\$1,878,836
Other*	\$1,122,736
Ideology/Single Issue	\$382,912
Unitemized Contributions	\$250,330
Total	\$27,022,287

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

When contributions are broken down by sector, lawyers and lobbyists led the way, with \$8.5 million in donations, followed by business, with \$6.2 million. The third largest sector was political parties, which contributed \$3.4 million. All of these categories include contributors from the left and the right. Lawyers and lobbyists, for instance, include both plaintiffs' firms and the defense bar.

The two biggest gifts by political parties were \$1.4 million from the Pennsylvania Republican Party to Justice Joan Orié Melvin, and \$1.4 million from the Illinois Democratic Party to Justice Thomas Kilbride. The Pennsylvania contribution took the form of TV ads that originally were labeled as independent expenditures. The Illinois money was funded by checks to the Democratic Party from plaintiffs' law firms.

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Some States Trail Off

In 2010, spending fell compared to earlier election cycles in some of the historically most expensive states.

In Alabama—easily the most costly state in the 2000–09 decade, during which candidates raised \$40.1 million—fundraising fell to \$3.1 million. While still high compared with many states, that figure was a far cry from the \$13.5 million raised in Alabama in 2006, still the costliest multi-candidate judicial election in American history. Likewise, fundraising in Texas was \$2.9 million, down from \$3.5 million in 2006.

What Alabama and Texas had in common was the lack of competitive races, and high courts overwhelmingly dominated by Republican justices. In contrast to 2008, when the national political climate encouraged Texas and Alabama Democrats to spend heavily in court races, the rightward national countertrend of 2010 appeared to cement gains previously made by conservatives and Republicans in those states.

But even a lessening of strong ballot competition did not eliminate big special-interest spending. In Alabama, where three Republican incumbent justices easily outspent Democratic challengers, the Business Council of Alabama still invested nearly \$1.3 million. Similarly, in Ohio, the Partnership for Ohio's Future, a state Chamber of Commerce affiliate, spent about \$1.5 million on independent campaign efforts, nearly matching the \$1.7 million raised by two Republican incumbents.

Several other states that set records in 2006, including Georgia and Kentucky, had little or no competition in 2010, with no money spent by special-interest groups. In Washington, a small number of independent TV ads aired in the primary season, but spending paled in comparison to a big-money showdown in 2006, when the state builders association sought unsuccessfully to elect two justices.⁵

In Nevada, which set a fundraising record in 2008, two incumbents ran unopposed. The main court-related battle there was an unsuccessful ballot measure to replace the state's non-partisan high-court election system with merit selection and retention election of judges.

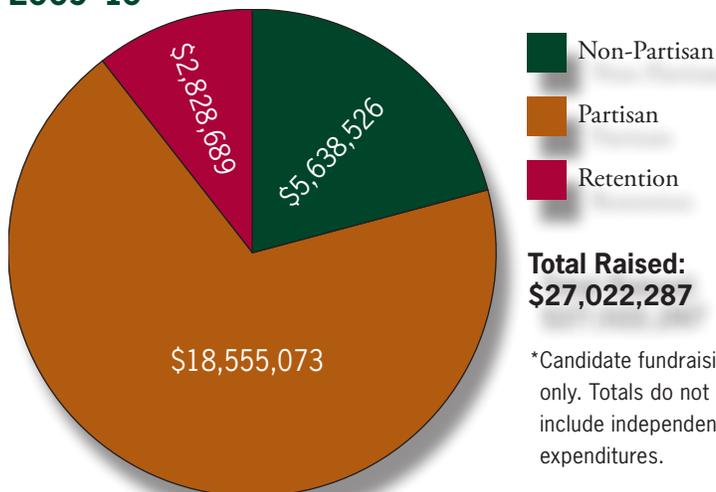
Collectively, the lower levels of spending in several previously contested states resulted in national spending levels that fell somewhat short of those from the last non-presidential cycle, in 2005–06.

Retention Election Spending Skyrockets in 2010

One category of judicial election spending stood out in 2009–10: the money explosion in retention elections. Incumbent justices faced unprecedented fundraising by the opposition in four states: Illinois, Iowa, Alaska and Colorado. Cumulatively, nearly \$4.9 million was spent, with incumbents raising \$2.8 million and independent groups spending near \$2.1 million.

Those numbers have deeply disturbing implications. In the entire decade from 2000 to 2009, a time when special-interest spending skyrocketed on judicial elections, retention elections remained largely immune to big-money politics. With only incumbents appearing on the ballot, and voters deciding "yes" or "no" on whether to grant another term, candidates in retention elections raised just \$2.2 million nationally in 2000–09, barely 1 percent of the nearly \$207 million raised by high court candidates overall.⁶ By contrast, retention elections accounted for 12.7 percent of all judicial election spending in 2009–10, including independent election campaigns.

Candidate* Fundraising by Type of Election, 2009–10



In 2010, elections in Iowa and Illinois blew apart any sense that runaway spending can't happen in retention contests. Quite the contrary: in those states national and state-based special-interest groups poured in millions of dollars. Even in other states where the "Vote No" campaigns' funding was limited, significant challenges were mounted.

In three states with the most serious retention challenges—Iowa, Illinois and Alaska—"Vote No" campaigns had sharply different funding profiles.

In **Iowa**, not a single penny of spending was reported in state high-court elections in the 2000–09 decade. That changed abruptly in 2010, when three justices who voted to strike down a state law banning same-sex marriage sat for retention elections. The race became a raging statewide battle that attracted national attention and special-interest money.

The "Vote No" campaign cost about \$1 million, with out-of-state groups accounting for more than \$900,000. According to state disclosure records, the National Organization for Marriage spent \$635,000 on two TV ads, while four other national groups, the American Family Association, the Family Research Council, the Campaign for Working Families, and the Citizens United Political Victory Fund, spent smaller amounts on the campaign, which amplified the TV ads with a statewide bus tour.

Fair Courts for Us, a "Vote Yes" group led by former governor Robert Ray, spent nearly \$400,000 to support the incumbents. However, they struggled to gain traction in a state where anger over the court's ruling on same-sex marriage remained intense outside such urban centers as Des Moines and Ames. In the end, Justices Marsha Ternus, Michael Streit and David Baker all were turned out by margins of roughly 55 to 45 percent. [See State in Focus: Iowa]

In **Illinois**, a state that holds multi-candidate elections for open seats and retention contests for incumbents, a longstanding history of costly competitive elections crossed the line into a retention race. Justice Thomas Kilbride was the target of the nation's costliest retention fight since Rose Bird and two fellow justices were forced off the California Supreme Court in 1986.

The funding patterns in Kilbride's retention race paralleled, on a smaller scale, those of a record-setting 2004 Illinois election, in which candidates Lloyd Karmeier and Gordon Maag raised a total of \$9.3 million. Angered by Kilbride's vote to help strike down a ceiling on certain medical-malpractice awards, national business groups financed a \$688,000 challenge. The effort, led by the Illinois Civil Justice League, was largely funded by the U.S. Chamber of Commerce, the American Justice Partnership (a creation of the National Association of Manufacturers), and the American Tort Reform Association.

Justice Kilbride responded aggressively, raising nearly \$2.8 million, and benefiting from contributions by major plaintiffs' law firms that were routed through the Illinois Democratic Party. Justice Kilbride retained his seat, gaining 65 percent of the vote. [See State in Focus: Illinois]

In **Alaska**, Chief Justice Dana Fabe faced a stiff challenge from a group with very limited funding—simply through the power of a hot-button social issue. A social conservative group called Alaskans for Judicial Reform opposed Fabe because of her rulings in abortion cases. Even though the anti-Fabe campaign was organized very late in the election season, and spent only a few thousand dollars on TV advertising, Justice Fabe gained only 55 percent of the vote.

Three other anti-retention challenges, by a group called Clear the Bench in Colorado, a social conservative group in Kansas, and a tea party group in Florida, were poorly funded and ultimately failed.

All this occurred in a year in which, nationally, "yes" vote totals for incumbent justices were among the lowest ever. According to the Judicial Elections Data Initiative, justices on retention ballots received 67.09 percent of all votes, the worst rate since 1990—another time of broad anti-government sentiment.

Collectively, the 2010 retention elections raised the question whether future challenges will become more common. By the end of the 2010 election season and the subsequent 2011 legislative sessions, activists were exploring 2012 retention challenges in Iowa, Indiana and Florida.

State in Focus: Iowa

Decision Puts Justices in National Cross-Hairs

Of all the judicial elections in 2009 and 2010, none was more jarring, and more important in its long-term impact, than the Iowa retention election.

Three Iowa justices were ousted by voters in the wake of a single decision, *Varnum v. Brien*, which legalized same-sex marriage in Iowa.

Chief Justice Marsha Ternus and Justices David Baker and Michael Streit faced a well-funded, well-organized campaign that shifted the retention debate from one about the justices' character and qualifications to one about same-sex marriage and other hot-button social issues.

Iowa for Freedom and its affiliated national anti-gay marriage groups sponsored two negative TV ads attacking the justices for their votes to strike down Iowa's ban on same-sex marriage. The ads sought to cast the judges as willing to "usurp the will of the voters," and advocated for their removal. By implying that if the court could legalize same-sex marriage, other pillars of American life might be in peril, the ads cast a wide net that preyed on the fears of moderates and conservatives alike. One ad claimed that "none of the freedoms we hold dear are safe from judicial activism."

The defeat of the three incumbents represented the first time in a quarter-century that multiple justices were defeated in a retention election over a controversial issue. (In 1986, death penalty rulings sparked the ouster of three California justices.)

While the initial ruling sparked wide public anger in Iowa, the marriage issue quickly became embroiled in national politics. According to reports, Republican presidential candidate Newt Gingrich arranged seed money to fund Iowa for Freedom, and national anti-gay groups including the National Organization for Marriage and the American Family Association provided most of the campaign's nearly \$1 million in funding.

The fall-out from Iowa's retention election continues to be felt. After failing in a noisy bid to impeach the four

other justices in the *Varnum* ruling, opponents of same-sex marriage have vowed to challenge their retention in 2012 and 2014. And Iowa's merit selection system faced a failed legislative challenge in 2011.

More chillingly, the campaign was explicitly intended to send a warning to judges in all states, not just Iowa.

Bob Vander Plaats, a failed Iowa gubernatorial candidate who led the Vote No campaign, told his supporters, "We have ended 2010 by sending a strong message for freedom to the Iowa Supreme Court and to the entire nation that activist judges who seek to write their own law won't be tolerated any longer."⁷

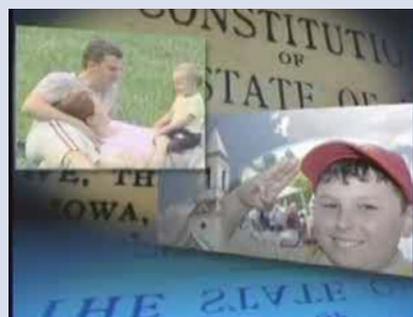
Minnesota Congresswoman Michele Bachmann, like Gingrich a Republican presidential candidate looking for votes in Iowa's 2012 caucuses, echoed these beliefs when she congratulated an audience in Iowa for their successful effort to oust the three justices. Repeatedly deriding judges as "black-robed masters," Bachmann said, "You said enough is enough and sent them packing, and I'm very proud of what you've done."⁸



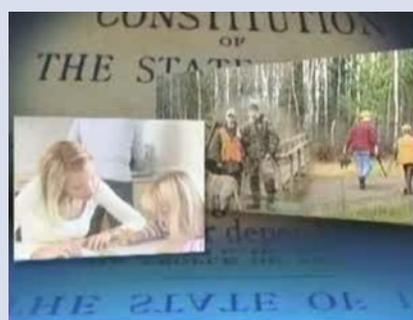
Liberal out of control judges ignoring our traditional values and legislating from the bench.



Imposing their own values on Iowa.



If they can usurp the will of voters and redefine marriage, what will they do to



other long established Iowa traditions and rights?

Storyboards Copyright 2010 TNS Media Intelligence/CMAG.

After Citizens United: Patchwork Disclosure Rules Leave Voters in the Dark

When the Supreme Court issued its 2010 decision in *Citizens United v. FEC*, it lifted decades-old restraints and ruled that businesses can spend directly from their treasuries on federal elections. The decision unleashed a tsunami of campaign cash in federal elections—and ended similar restrictions in more than 20 states—but the decision also had a silver lining.

By an 8-1 vote, the Court declared campaign disclosure laws constitutional, adding, “With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests.”⁹

Thus, by a near unanimous vote, the Supreme Court underlined the important role that transparency in political spending plays in ensuring accountability of elected officials. Despite this constitutional green light, however, many states have fallen far short of enacting or implementing effective disclosure laws.

Disclosure vs. Hidden Spending

When states have an inadequate patchwork of disclosure rules, the public can be left in the dark.

An example of starkly contrasting state disclosure requirements is found in analyses of recent state supreme court spending in four Midwestern states. The example shows that millions of campaign dollars spent to elect judges may be concealed when disclosure laws are weak.

In the historic 2010 **Iowa** ouster vote, state disclosure laws made it possible for the public to track major campaign support from outside groups. Of almost \$1 million in campaign spending to remove the judges, more than \$900,000 came from out-of-state organizations, including the National Organization for Marriage based in Washington, D.C.; the American Family Association’s AFA Action, Inc. of Tupelo, Mississippi; and the Campaign for Working Families PAC of Arlington, Virginia. To defend the three state supreme court justices facing retention votes, the Iowa-based Fair Courts for Us Committee spent \$423,767.

In **Michigan**, a staggering half of the more than \$40 million spent on behalf of state Supreme Court candidates in the past decade was unreported due to lax disclosure laws, according to a report by a watchdog group, the Michigan Campaign Finance Network.¹⁰ Judicial election spending has been soaring in Michigan, which, when non-candidate spending is factored in, had the nation’s most expensive judicial elections in 2009-10.

“The gross failure of campaign disclosure in the Michigan Supreme Court campaigns creates a toxic cloud that shadows the court’s presumed impartiality,” the Michigan Campaign Finance Network wrote in June 2011. It urged reform to

“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”

—Citizens United v. FEC

Sanders County Republican Cent. Committee v. Bullock
No. 12-35543 archived on October 30, 2012

“The gross failure of campaign disclosure in the Michigan Supreme Court campaigns creates a toxic cloud that shadows the court’s presumed impartiality.”

—Michigan Campaign Finance Network

make campaign spending more transparent. [See State in Focus: Michigan]

In **Ohio**, the Partnership for Ohio’s Future in previous years identified companies and organizations that financed its TV ads. This year, in a letter to Ohio election officials, the Chamber-affiliated group declined to do so, taking more than \$1.5 million in special-interest spending out of the public eye.

Secretive political spending is on the rise in **Wisconsin’s** elections. Outside groups spent a record \$3.6 million on political advertising in the state’s spring 2011 supreme court race—without disclosing the identities of their funders.

These developments are part of a larger, national trend. Independent spending in the 2010 federal elections was more than four times greater than it was in 2006—and more of this spending was done anonymously than ever before, largely due to the disclosure loopholes in federal law. Voters are now bracing for the most expensive and secretive election in American history as November 2012 approaches.

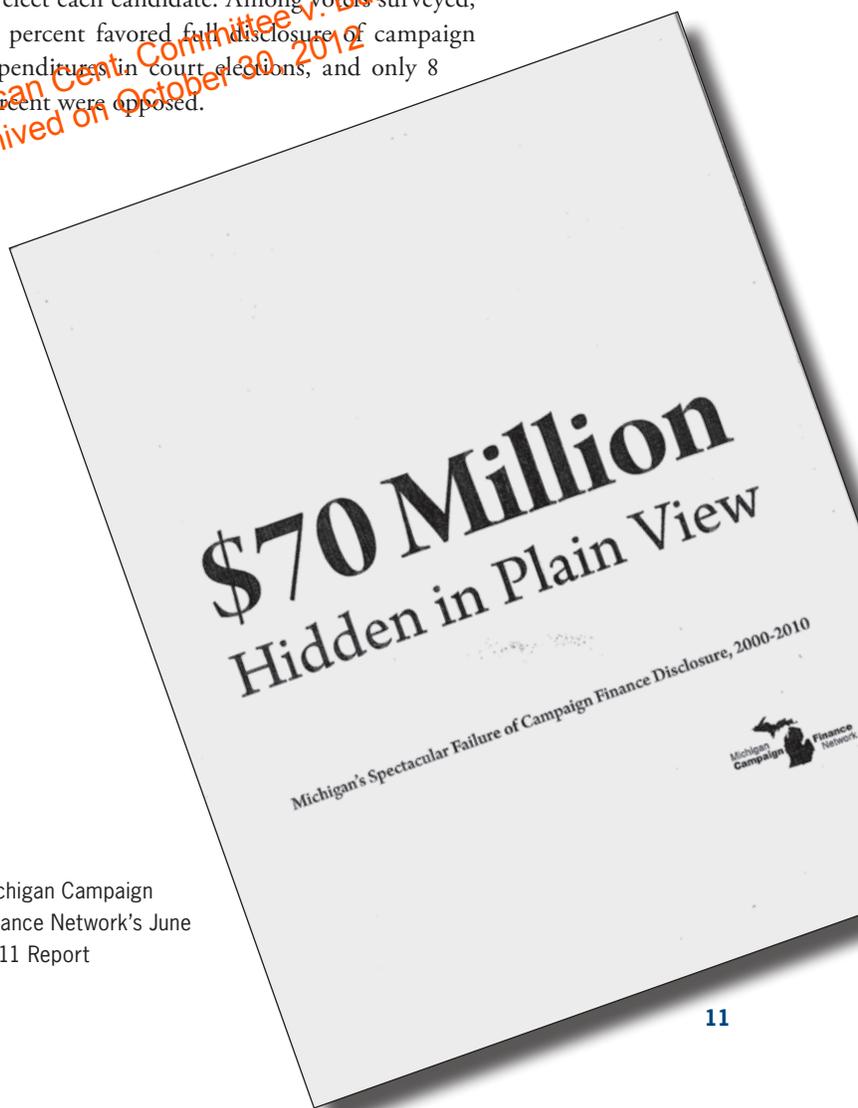
While legislatures lag, voters overwhelmingly agree with the courts that robust disclosure laws benefit the public and democracy, especially in elections involving the courts.

In a June 2010 national survey by Harris Interactive, 88 percent of Republicans, and 86

percent of Democrats, said that “all campaign expenditures to elect judges” should be publicly disclosed, so that voters can know who is seeking to elect each candidate. Among voters surveyed, 87 percent favored full disclosure of campaign expenditures in court elections, and only 8 percent were opposed.

*Sanders County Republican Cent. Committee v. Bullock
No. 12-35543 archived on October 30, 2012*

Michigan Campaign
Finance Network’s June
2011 Report



State in Focus: Michigan

Post-Election Mystery:

Who Paid for \$4 Million Campaign Onslaught?

For a decade, the Michigan Chamber of Commerce was the state's No. 1 spender on state supreme court elections, but in 2010, its name did not appear on a single TV ad or campaign mailing.

In a June 2011 report, the Michigan Campaign Finance Network (MCFN) noted that the Michigan Chamber gave nearly \$5.4 million to a national political action committee, operated by the national Republican Governors Association. After forwarding the Michigan Chamber money to campaigns across the country, the Republican Governors Association transferred \$8.4 million to its Michigan committee, which in turn sent \$3 million to Texas, for the reelection campaign of Governor Rick Perry. In the end, about \$5.2 million from these labyrinthine transactions was routed to the Michigan Republican Party.

That amount closely matched the Michigan Chamber's original check to the Republican Governors Association. And it closely approximated the \$4.8 million that MCFN concluded the state GOP spent on contributions and independent electioneering in the 2010 Michigan Supreme Court election.

Because of Michigan's opaque disclosure laws, which effectively make TV ad spending off limits to any transparency, it is impossible to confirm that Chamber money financed the state Republican campaign. Likewise, it is impossible to identify who ultimately bankrolled the state Democratic Party's TV ad blitz, estimated at \$1.5 million to \$2.5 million, or the \$800,000–\$1.2 million spent on TV by the Law Enforcement Alliance of America, a group with ties to the National Rifle Association.

What all this money purchased is clearer: some of the 2010 campaign's most relentlessly negative ads.

Michigan was a national leader in three areas in 2009-10: total campaign spending, total TV spending, and number of negative ads aired. According to TNS Media Intelligence/CMAG estimates, the TV ads aired by the three non-candidate groups totaled nearly \$4.3 million, compared with a total of less than \$900,000 in ads by the four candidates on the ballot.

The onslaught of negative ads began in the summer of 2010, when the Democratic Party launched several internet video ads against Robert Young, who is now the state's chief justice. Seeking to leverage public anger over the disastrous BP-Horizon oil spill, the ads called Young a "puppet for the oil and gas industry" and said he was a "[f]riend to Big Oil . . . not to Michigan Citizens."

Michigan Democrats followed up with a searing barrage of negative hits on Justice Young, claiming that he "gutted the Michigan Consumer Protection Act" and "ruled that Michigan citizens can't protect the environment," and even going so far as to claim that Justice Young said it's "not his job" to be a "fair and just" judge.

The Democrats' anti-Young campaign reached rock-bottom, however, when they ran an ad that said Young "used the word 'Slut!' and 'The "N" Word!' in deliberations with other justices" and urged voters to call Young and "tell him we don't need a racist or a sexist on the Michigan Supreme Court."

Michigan Republicans responded to the Democrats' attacks with a series of positive ads touting the experience of Young and Republican Mary Beth Kelly, arguing that Young and Kelly would be tough on crime. But outside groups supporting the Republican candidates did not stick to the high road. The Law Enforcement Alliance of America joined the fray, contributing an ad that suggested Democratic challenger Denise Langford Morris was "soft on crime for" three evidently disfavored groups: "rappers, lawyers, and child pornographers."

The election of two Republican justices, incumbent Young and newcomer Mary Beth Kelly, tipped the court's balance, but the Republicans' 4-3 majority remains narrow—making future high-cost elections a virtual certainty in Michigan.

Storyboards Copyright 2010 TNS Media Intelligence/CMAG.



What all this money purchased is clear: Some of the 2010 campaign's most relentlessly negative ads.



CHAPTER 2

Court TV 2009-10

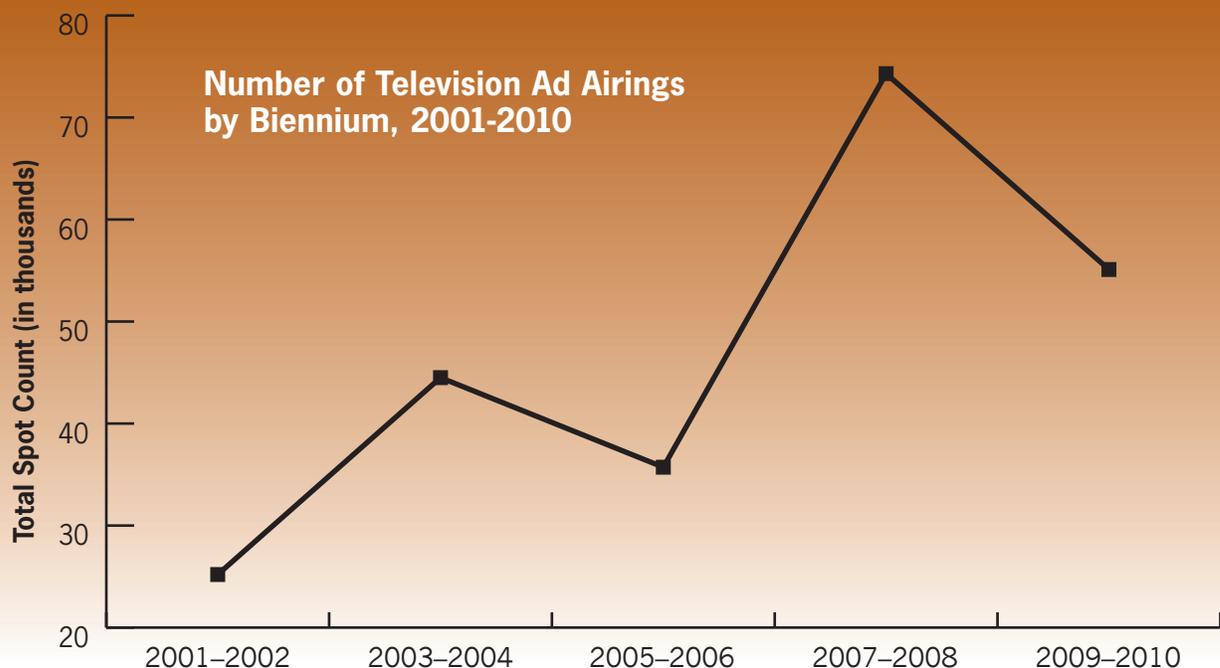
Spending on Television Advertising in 2009 and 2010 Judicial Elections

The 2009–10 election cycle represented the costliest non-presidential election cycle for TV spending in state supreme court elections. Candidates, parties and special-interest groups spent a total of \$16.8 million, just slightly more than the \$16.6 million spent on Supreme Court TV advertising 2005–06.¹¹ And for the first time since the “New Politics of Judicial Elections” series began in 2000, attack ads targeted high-court incumbents in retention elections.

TV advertising in 2009–10 also showed heavy reliance on independent ads by non-candidate groups. Only one of the five most expensive

ad campaigns was sponsored by a candidate on the ballot. The other four came from party organizations or special-interest groups. In 2010, non-candidate groups accounted for nearly 50 percent of all high-court election ads.

As in prior years, non-candidate groups played the attack-dog role, sponsoring a disproportionate number of negative ads while candidates continued to run predominantly positive, traditionally themed advertisements. Though many of the non-candidate ads were funded by “tort reform” groups concerned with civil justice issues, the vast majority of these ads focused on criminal justice themes, often involving misleading claims that judicial candidates were soft on crime.



Data courtesy TNS Media Intelligence/CMAG.

In addition to the overall high levels of spending on TV advertising, the number of advertisements aired continued to rise: 46,659 total television spots ran in 2009-10, compared with 35,720 in the previous non-presidential cycle.

While the \$16.8 million spent on TV in 2009-10 makes it the most expensive non-presidential election cycle for election ads, the highest two-year total remains 2007-08, when candidates, political parties and outside special-interest groups combined to spend \$26.6 million on nearly 60,000 television spots in state supreme court races.

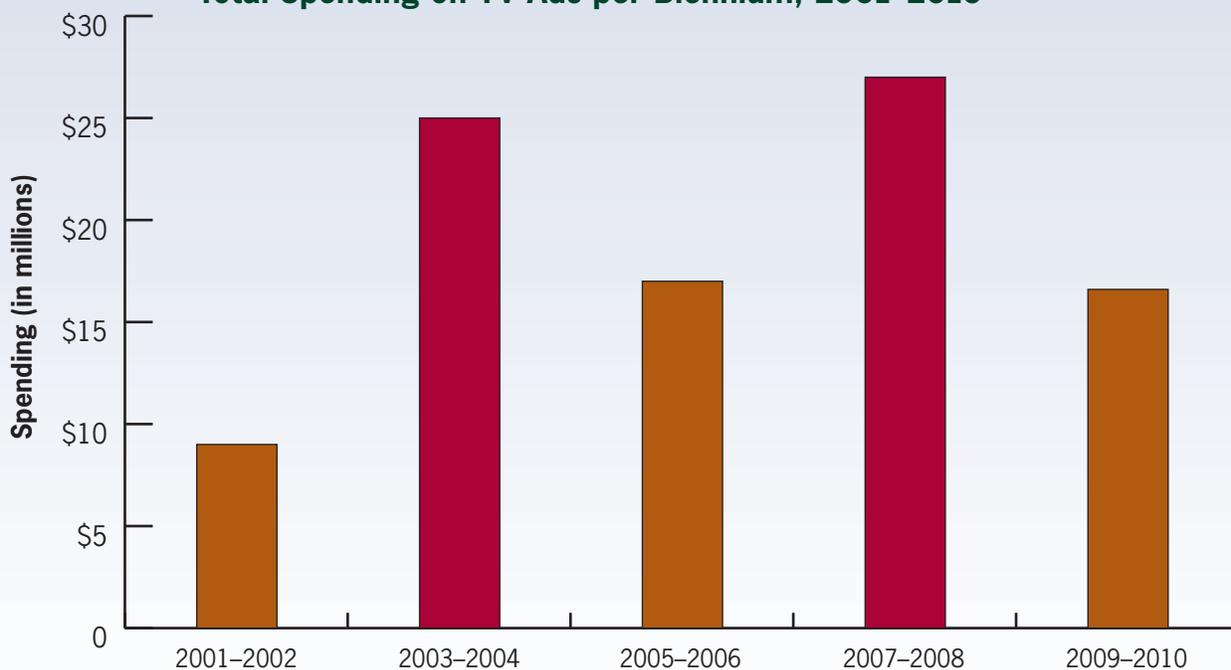
Overall, as in previous cycles, partisan races drew the most cash. In 2010, \$9,134,460 was spent on TV advertising in partisan Supreme Court elections nationally, compared with \$3,039,480 in nonpartisan elections. And in 2009, \$3.35 million was spent on TV in Pennsylvania's partisan election, compared with \$1.32 million spent in Wisconsin's non-partisan contest. That said, 2010 saw a previously unheard-of explosion of special-interest spending in nonpartisan retention elections, and this trend is likely to continue.¹²

TV Advertising in the 2009-10 Supreme Court Elections: A Detailed Analysis

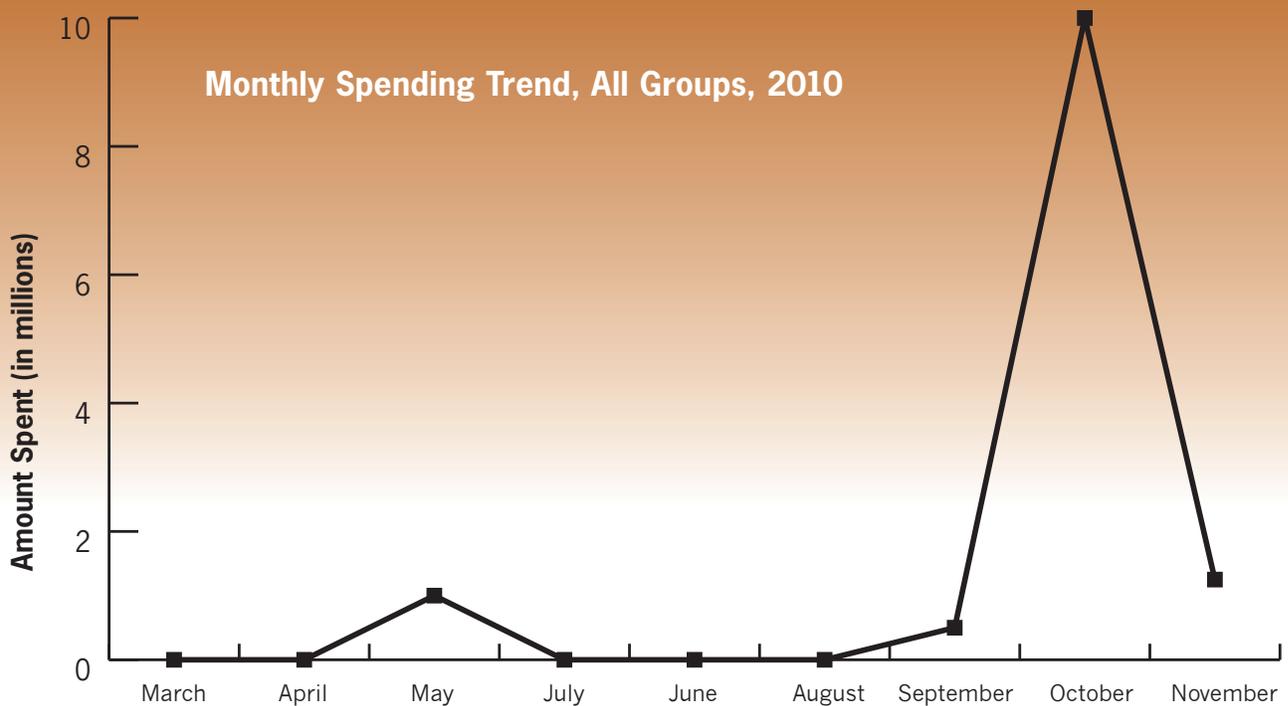
Judicial candidates, political parties, and outside special-interest groups spent approximately \$4.7 million on television advertisements in 2009 and \$12.1 million in 2010. Television spots aired in ten out of 13 states that held contested elections for supreme court seats in 2010, as well as in four states that held retention elections. All told, in 2010 judicial election TV spots aired in Alabama, Alaska, Arkansas, Colorado,¹³ Idaho, Illinois, Iowa, Michigan, Montana, North Carolina, Ohio, Texas, Washington and West Virginia.

According to satellite captures of advertising in major TV markets,¹⁴ \$12,173,940 was spent nationally on TV air time in 2010 state supreme court elections. Of that, the lion's share—more than \$10.5 million—was spent in the final month of the general election campaign. A whopping \$5.0 million—nearly 43% of total spending for the year—was spent in the week leading up to the election alone, from Tuesday, Oct. 26 through Election Day.

Total Spending on TV Ads per Biennium, 2001–2010



Data courtesy TNS Media Intelligence/CMAG.



State Totals, 2010 (in order of total TV spending)

State	Spot Count	Est. Spending
Michigan	10,781	\$5,184,210
Ohio	7,472	\$1,962,340
Alabama	9,238	\$1,915,870
Illinois	3,834	\$1,677,350
Arkansas	1,608	\$450,320
North Carolina	1,499	\$353,110
Iowa	638	\$293,030
Colorado*	1,052	\$134,820
Montana	439	\$102,720
Texas	150	\$45,980
Idaho	336	\$26,200
West Virginia	175	\$26,060
Alaska	30	\$1,930
Grand Totals	37,252	\$12,173,940

*In Colorado no advertisements endorsing or opposing candidates were aired, though a nonpartisan coalition sponsored a public education campaign to provide voters with information on the state's judicial elections. See note 13.

State Totals, 2009 (in order of total TV spending)

State	Spot Count	Est. Spending
Pennsylvania	5,445	\$3,346,302
Wisconsin	4,906	\$1,321,171
Grand Totals	7,715	\$4,667,473

Data courtesy
TNS Media
Intelligence/CMAG.

\$12,173,940
was spent nationally
on TV air time in
**2010 state supreme
court elections.**

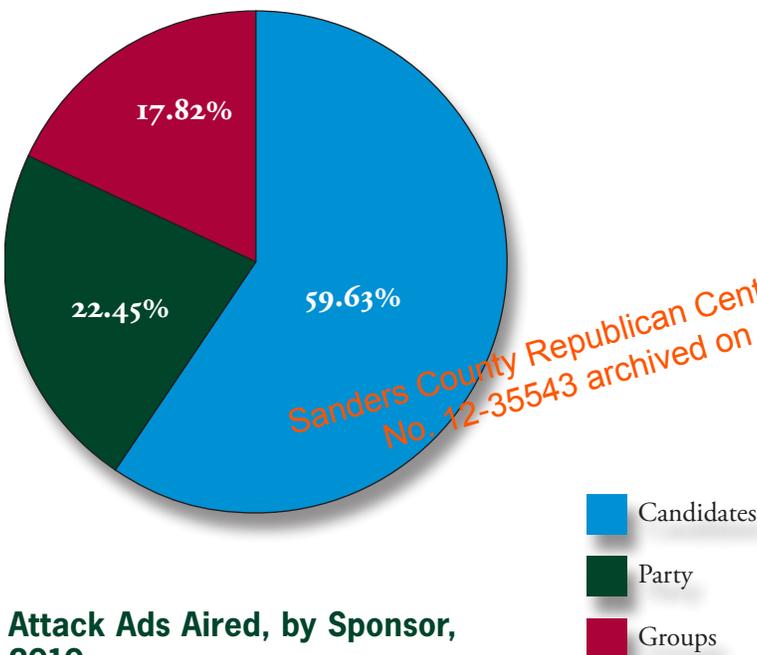
Spending by Non-Candidate Groups Remains High in 2010

In 2010, spending on supreme court TV advertising was split relatively evenly between judicial candidates and non-candidate groups. Non-candidate groups spent \$5.98 million (just over 49% of all spending on television airtime), while candidates spent \$6.19 million.

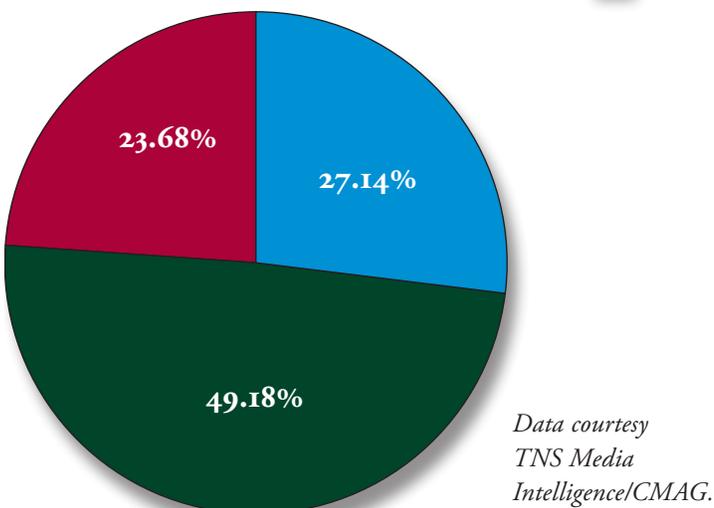
Four of the top five TV spenders were non-candidate groups. The Michigan Republican Party ranked first overall in TV spending (\$2.0 million). The only candidate on the top-spender

list, Illinois Justice Thomas Kilbride, came in second, spending about \$1.6 million on TV in his record-setting bid for retention. [See State in Focus: Illinois] The Michigan State Democratic Party ranked third (\$1.4 million); the Chamber of Commerce-affiliated Partnership for Ohio's Future ranked fourth, spending \$846,000 on TV ads supporting two Republican candidates in contested Ohio elections; and the Law Enforcement Alliance of America, which bought \$803,000 worth of TV ads supporting two Republican candidates for the Michigan Supreme Court, ranked fifth.

Ads Aired, by Sponsor, 2010



Attack Ads Aired, by Sponsor, 2010



Data courtesy
TNS Media
Intelligence/CMAG.

Sponsorship and Content: Who Paid for What Ads

Analyzing the 2010 totals in terms of the numbers of TV advertisements aired (as opposed to the number of dollars spent) reveals that candidates purchased 20,296 television ad spots, or, 59.6% of the 37,252 total television spots purchased. While candidates paid for the majority of TV spots overall—just under 60%—they paid for only about a quarter of attack ads—27%. Non-candidate groups, including special interests and political parties, accounted for 3 of every 4 attack ads.

Advertisements aired by parties and special-interest groups in 2010 often sought to play on voters' ideological leanings, sensationalizing rather than focusing on candidates' backgrounds or qualifications. Most notably, in 2010 almost 64% of advertisements sponsored by parties focused on criminal justice themes, often accusing disfavored candidates of being soft on crime.

Nationally, while the majority of ads were run by candidates themselves, the majority of attack ads were run by the state political parties or independent groups. Almost half (49.1%) of the attack ads were run by parties, even though parties only accounted for 23.1% of the total number of ads run nationally. By contrast, more than 90% of the ads run by candidates focused on issues other than criminal justice: fewer than one ad in 10 sponsored by candidates referenced whether the candidate (or opponent) was "tough on crime."

About half—46.2%—of ads run by parties were attack ads directly targeting opposition

Sponsors, 2010 Supreme Court Elections

State	Sponsor	Spot Count	Est. Spending
Alabama	Total	9,238	\$1,915,870
	Candidate	8,294	\$1,541,680
	Special Interest	944	\$374,190
Alaska	Total	30	\$1,930
	Special Interest	30	\$1,930
Arkansas	Total	1,608	\$450,320
	Candidate	1,608	\$450,320
Colorado	Total	1,052	\$134,820
	Special Interest*	1,052	\$134,820
Idaho	Total	336	\$26,200
	Candidate	336	\$26,200
Illinois	Total	3,834	\$1,677,350
	Candidate	3,715	\$1,631,490
	Special Interest	119	\$45,860
Iowa	Total	638	\$293,030
	Special Interest	638	\$293,030
Michigan	Total	10,781	\$5,184,210
	Candidate	2,245	\$902,420
	Special Interest	912	\$803,770
	Party	7,624	\$3,478,020
Montana	Total	439	\$102,720
	Candidate	439	\$102,720
North Carolina	Total	1,499	\$353,110
	Candidate	1,499	\$353,110
Ohio	Total	7,472	\$1,962,340
	Candidate	5,067	\$1,116,050
	Special Interest	2,405	\$846,290
Texas	Total	150	\$45,980
	Candidate	131	\$40,410
	Party	19	\$5,570
West Virginia	Total	175	\$26,060
	Candidate	175	\$26,060
Grand Totals		37,112	\$12,132,100

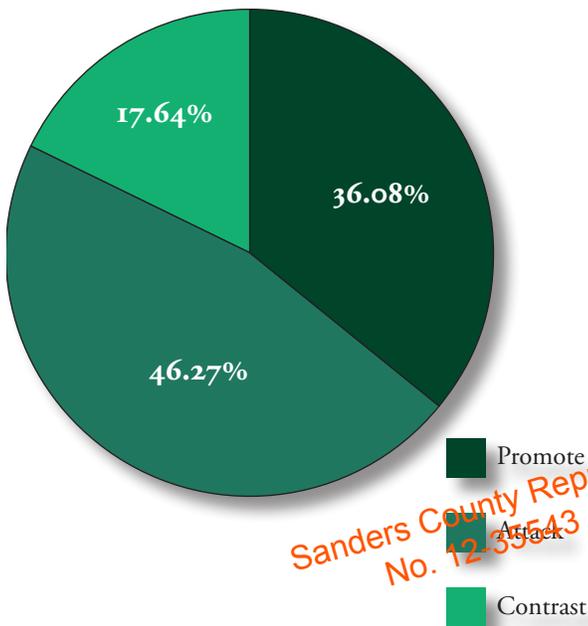
*In Colorado no advertisements endorsing or opposing candidates were aired, though a nonpartisan coalition sponsored a public education campaign to provide voters with information on the state's judicial elections. See note 13.

In 2010, parties and independent groups accounted for almost 50% of all TV spending.

candidates and another 17.6% contrasted candidates, often using negative portrayals of the opposing candidate. Only 36% of ads run by parties sought to promote a candidate without engaging in any mudslinging. In contrast, 81.36% of candidate-sponsored ads were positive promotions of that candidate and only 18.64% of candidate-sponsored ads even mentioned an opposing candidate.

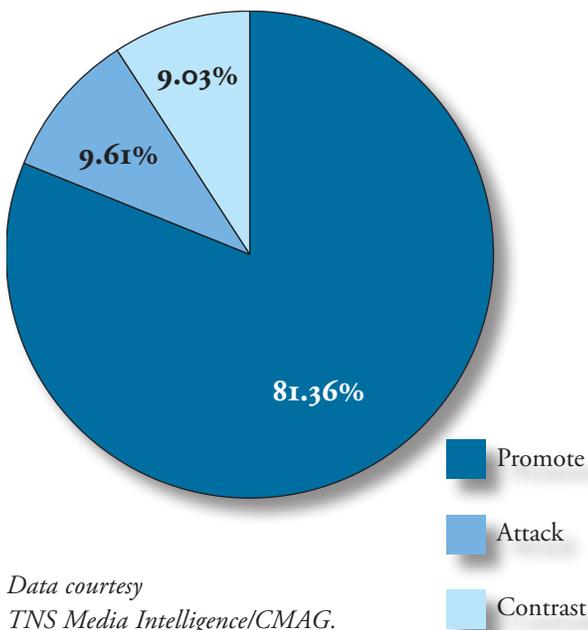
Candidates in nonpartisan races aired no attack ads. However, as shown by the increasingly large infusions of cash from special-interest groups for attack ad buys in nonpartisan races over the past decade, the nonpartisan label offers decreasing insulation against big-money campaigns in both contested and one-candidate retention elections. The judicial election campaigns of 2010 provide further support for this distressing assessment. The nonpartisan retention election of Justice Thomas Kilbride to the Illinois Supreme Court is a prime example of this trend. [See State in Focus: Illinois]

Party Ad Tone



Sanders County Republican Cent. Committee v. Bullock
No. 12-35543 archived on October 30, 2012

Candidate Ad Tone

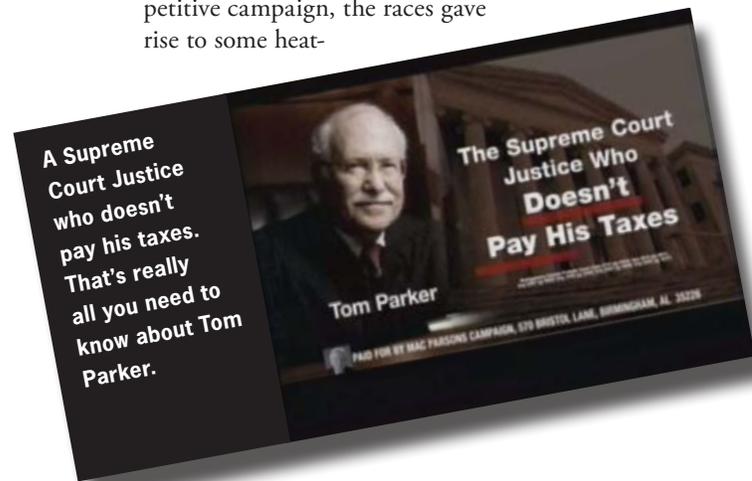


Data courtesy
TNS Media Intelligence/CMAG.

2010 Elections— State Snapshots

→ In **Ohio**, four candidates competed for two supreme court seats. (An additional Ohio Justice, Paul Pfeifer, ran unopposed in a vote in which no TV advertising aired.) Ohio ranked second in 2010 with \$2 million in overall TV airtime spending. Justice Judith Ann Lanzetta squared off against challenger Mary Jane Trapp and Chief Justice Eric Brown faced a challenge from Justice Maureen O'Connor. The two Republican candidates and a group affiliated with the U.S. and Ohio Chambers of Commerce spent more than \$1.6 million on TV ads in support of Republican candidates. Democratic candidates spent just over \$300,000 on TV. The Republican candidates swept the two contested races, defeating the incumbent Democratic chief justice.

→ In 2010, more than \$1.9 million was spent on TV ads for three contested seats on the **Alabama** Supreme Court; Republicans captured all three seats. Although the clean sweep by Republicans suggests a largely uncompetitive campaign, the races gave rise to some heat-





[Karen Baker]: "My grandmother only had an 8th grade education.



but she taught me more about wisdom and justice than any law book.



Work hard and be fair, I promise you that these will be the principles that will guide me.



as your next Supreme Court justice." [PFB: JUDGE KAREN BAKER

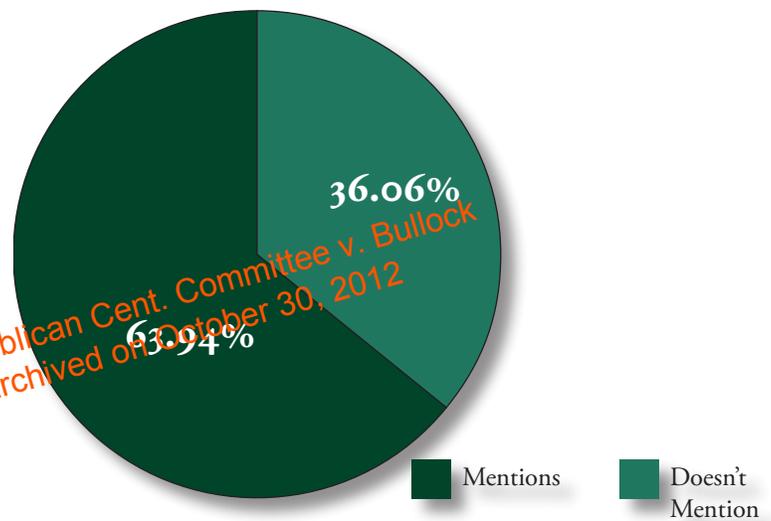
Previous page's Alabama ad storyboard and the above's Arkansas ad storyboards Copyright 2010 TNS Media Intelligence/CMAG.

ed advertising. During the Republican primary, incumbent Mike Bolin and challenger Tracy Cary both sponsored negative ads. As the Gulf Coast oil spill made headlines, Tracy Cary claimed that Justice Bolin was funded by BP oil. Justice Bolin responded by painting his opponent as a liberal who had "never even been a judge." During the general election, the race between incumbent Tom Parker and challenger Mac Parsons was characterized by negative attacks, with Parsons claiming that Justice Parker evaded his taxes for years while serving on the bench.

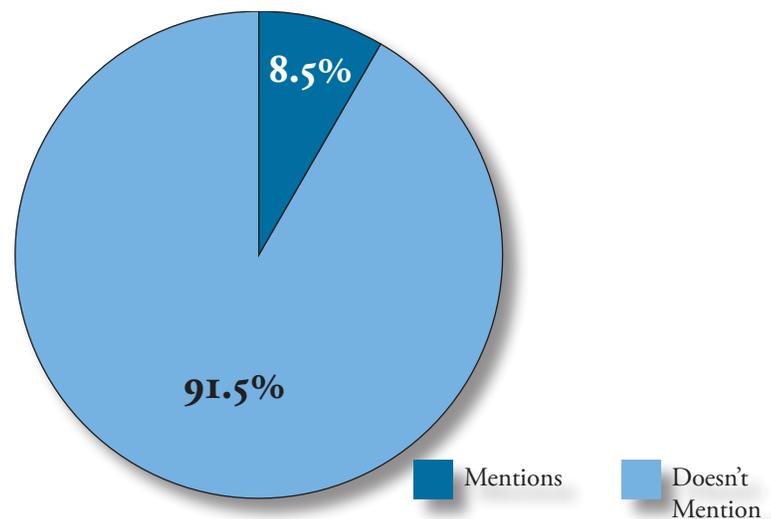
→ There were two contested seats on the **Arkansas** Supreme Court in 2010. While the state set a new fundraising record in 2010, and while candidates spent \$450,000 on television advertising, no attack ads aired, and no outside groups took to the airwaves. Instead, the four competing candidates each aired biographical TV spots touting their fairness and traditional values.

→ **Alaska:** In the final days before Election Day, the socially conservative group Alaskans for Judicial Reform urged Alaska voters not to allow "bad judges to shred the will of the people," stating that Fabe had "opposed parents rights [and] forced taxpayers to pay for abortions." The group spent just under \$2,000 to run 30 anti-Fabe ads in the week immediately preceding the election.

Party Ads Mentioning Criminal Justice



Candidate Ads Mentioning Criminal Justice



Data courtesy TNS Media Intelligence/CMAG.

State in Focus: Illinois



[Announcer]:
Convicted of stabbing his victim twenty-four times, of shooting his ex-girlfriend and murdering her sister, of sexual assault on a mom and her daughter.



On appeal, Judge Thomas Kilbride sided with them over law enforcement.



Other judges overruled Kilbride, and their appeals were denied.



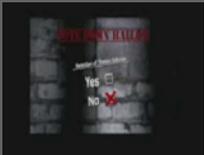
Thomas Kilbride chooses criminals' rights way more than any other Justice.



Vote no on retention of Thomas Kilbride. Vote down ballot. It's a top priority.



[PFB]: JUSTPAC



The anti-Kilbride campaign produced probably the most outrageous ad of the entire 2010 judicial election season. Dressed in orange jumpsuits, actors posing as convicted criminal recounted the grisly details of their crimes, and then said that Justice Thomas Kilbride had taken their side and voted against law enforcement and victims.

These “soft on crime” ads, widely condemned as misleading, were financed by groups focused solely on civil lawsuit awards. According to state campaign finance records, the Illinois Civil Justice League—a major player in a record-shattering 2004 election between Lloyd Karmeier and Gordon Maag—spent \$688,000. Most of the League’s money came from the U.S. Chamber of Commerce (\$150,000), a National Association of Manufacturers spinoff group (\$180,000), and the American Tort Reform Association (\$89,000).

Justice Kilbride fought back against his critics, and aired an advertisement in which he said, “As a judge, I’ve tried every day to be fair and evenhanded, and most of all, to make sure the law works for everyone, not just the wealthy and well connected.” According to campaign filing records, Kilbride raised about \$2.8 million, much of it from the state Democratic Party.

In the months leading up to the election, the Illinois Democratic Party received more than \$1.5 million from major plaintiffs’ law firms—almost the same amount it then contributed to Kilbride. The law firms included many that also spent heavily in the 2004 Karmeier-Maag race, in which a total of \$9.3 million was raised. Among the biggest players were: Clifford Law Offices (\$125,000 to the state Democrats in 2010, \$150,000 in 2004); Power, Rogers, & Smith (\$125,000 in 2010, \$200,000 in 2004); Cooney and Conway (\$125,000 in 2010, \$140,000 in 2004); and Corboy & Demetrio (\$100,000 in 2010, \$100,000 in 2004).

Justice Kilbride was retained on November 2, as were Justices Charles Freeman and Robert Thomas, who faced no organized opposition. Kilbride’s race was the most expensive retention election ever in Illinois, and the second costliest ever nationally (behind only the 1986 retention election ouster of California Chief Justice Rose Bird and two fellow justices). Kilbride raised more money in one election than the \$2.2 million raised by candidates in all retention elections, nationally, from 2000–2009.



[Tom Kilbride]: “I’m Tom Kilbride. I’ve been attacked harshly and repeatedly and falsely.



I’m here to tell you flat out these attacks are lies and distortions.”



[Tom Kilbride]: “demand fairness in elections for the independence and integrity of our court system.”

[Announcer]: Vote “Yes” for Tom Kilbride.

Implications of the 2009–10 Elections

2011 Legislative Aftershocks Follow 2010 Earthquake

The confluence of negative, costly television ads and secretive, special-interest spending continued to define contested judicial elections in 2009–10—and also spread to previously sedate retention elections. But the impact of the most recent election cycle did not end at the ballot box.

After Iowa voters ousted three incumbent justices, and four other states saw organized attempts to unseat incumbents, emboldened lawmakers pressed the assault on impartial courts in the 2011 legislative season. Cumulatively, these attacks represented a historically significant concerted attack on judicial independence, and on various reforms intended to reduce the influence of money and politics on state courts. The serious challenges to fair and impartial courts included:

- Attempts to defund or repeal public financing of judicial elections;
- Politically motivated impeachment threats—the most ever recorded in one legislative season;
- Attacks on judicial appointment and retention election systems;
- A scheme to split the Florida Supreme Court, in what critics said was court-packing; and
- Severe judicial budget reductions that threaten to undermine courts' ability to maintain necessary functions as the nation strives to emerge from budgetary crises.

While many of the attacks failed to stick, some did, especially against widely popular public financing laws. The season raised the distinct possibility—or likelihood—that the attacks will continue into the 2012 legislative sessions. Meanwhile, experts predict that 2012 will see the most expensive and secretive election season in American history.

Public Financing

Special-interest contributions pose a tremendous threat to the public's faith in fair and impartial courts. Overwhelming bipartisan majorities are extremely wary of the role that money plays in judicial elections and believe that campaign funding support buys favorable legal outcomes.¹⁵ Among the most effective reforms to confront these concerns is public financing. By providing public funds to qualifying judicial candidates, public financing reduces the need for judges to “dial for dollars” from the parties and lawyers who appear before them. Public financing can have positive effects on all elections, but it plays a particularly valuable role in judicial elections, where it not only helps eliminate any risk of *quid pro quo* corruption, but also protects elected judges against even the appearance of bias in the courtroom.

Substantial public attention has focused on a U.S. Supreme Court decision issued in June 2011—*Arizona Free Enterprise Club v. Bennett*—which struck down a narrow provision of Arizona's public financing system. Despite some pronouncements that the case sounded the death knell for public financing as a whole, *Arizona Free Enterprise Club* expressly held that the foundation for public financing is constitution-

Sanders County Republican Committee v. Bullock
No. 12-35543 archived on October 30, 2012

ally sound. And the case did not deal specifically with judicial elections at all, because the Arizona law at issue involved only legislative and executive races. As a result, there are strong arguments that judicial public financing would survive a litigation challenge like that in *Arizona Free Enterprise Club*.¹⁶

Regardless of the vulnerability of judicial public financing to litigation attacks, after the 2010 election cycle, far greater harm to public financing for judicial elections came at the hands of state legislatures.

In the four states that have adopted public financing for judicial elections over the last decade, legislators in two mounted furious attacks against the programs. Most notably, the Wisconsin legislature took aim at judicial public financing in the Badger State.

In 2009, after two particularly vitriolic and expensive Wisconsin Supreme Court contests,¹⁷ the Wisconsin legislature enacted the Impartial Justice Act to provide public financing to state supreme court candidates.

April 2011 saw the first supreme court election in which Wisconsin's public financing program was active. Three of four supreme court candidates, including the final two contestants— took advantage of the new system and waged competitive campaigns without relying on contributions from parties with a direct interest in how the court decides cases.

Public financing allowed the candidates to eschew the traditional “dash for cash” fundraising approach, but this did not mean overall spending levels dropped. Instead, a heated political climate transformed the supreme court election into a proxy battle over a controversial law slashing state workers' collective bargaining rights, and special interests spent a record breaking amount of cash on supreme court television advertisements.¹⁸

But even while the historic level of special-interest campaign spending in 2011 suggested a greater need for investing in ways to maintain the fairness and impartiality of the judiciary,¹⁹ legislators agitated against the Wisconsin program. In a serious blow to defenders of impartial courts, the legislature used a biennial budget to

kill the public financing program after just one election.

In West Virginia, legislators deflated hopes for a pilot public financing program for state supreme court campaigns in 2012 when they failed to enact a lawyers' fee important to fully fund the program. This occurred despite the damage to public confidence in West Virginia courts that occurred after a coal executive's \$3 million campaign in 2004 to elect a judge of his choice. That campaign led to the U.S. Supreme Court's 2009 ruling *Caperton v. Massey* ruling, which underlined the threat that judicial campaign spending poses to impartial courts.

And in North Carolina, which pioneered public financing of judicial elections, critics launched a move to repeal public financing (though it was at least temporarily derailed). A legislator tried to introduce a measure ending public financing as an amendment on the House floor, but withdrew it after “bedlam” erupted.²⁰ The legislature adjourned for the summer without enacting another plan to make all judicial elections partisan contests.

Republican opponents of public financing led the efforts in all three states, although polls, including a 2011 Justice at Stake survey, show broad, bipartisan support for public financing of judicial elections.²¹ Since its launch in the 2004 Supreme Court election, North Carolina's public financing system has been a national model. About 75 percent of all candidates have participated in the voluntary system, including women, minorities and members of both parties.

Public financing is popular with North Carolina judges and voters because it frees up candidates to talk with voters instead of campaign donors, greatly reducing the perception of special-interest bias. Wanda Bryant, a judge on the North Carolina Court of Appeals, said, “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.”

Impeachment Threats: Iowa, New Hampshire and Elsewhere

While the legislative attacks on public financing were troublesome signs for advocates seeking to insulate judicial elections from money and partisanship, 2011 also saw explicit attempts by lawmakers to attack sitting judges.

The most immediate aftershocks from the 2010 judicial election season were seen in Iowa, where three incoming freshman lawmakers vowed to impeach four justices who were not on the ballot in the recently concluded retention election.

Defying solid voter opposition, the legislators pushed a resolution contending the court had overstepped its authority by permitting same-sex marriage. Although Iowa's Constitution spells out that a justice can be impeached only "for any misdemeanor or malfeasance in office," the resolution did not allege any ethical or criminal wrongdoing. A wide range of observers condemned the calls for impeachment, and when Iowa's Republican governor and House speaker both spoke out against it, the impeachment threat fizzled.

Yet Iowa was not alone. According to the National Center for State Courts, 2011 likely marked the "single biggest year in history for efforts to impeach state judges."²² In New Hampshire, a controversy over whether to impeach a family-law judicial officer over accusations that he altered official documents was turned by legislators into a blank check to investigate all state trial judges, who had not been identified in connection with any alleged wrongdoing. In Oklahoma, there was a bid to impeach a judge who accepted a plea agreement in a child molestation case that had been approved by the prosecution, the defense, and the victim's parents.

Attacks on Merit/Retention

The challenges for advocates of merit selection began on Nov. 2, 2010, when voters in Nevada rejected a ballot measure to establish a system in which a non-partisan commission reviews judicial candidates and forward nominations to the governor; the governor appoints judges; and once on the bench, judges face periodic retention elections. Once legislatures gathered in January 2011, more systemic assaults raged against merit selection systems. Overall, there were efforts to weaken or eliminate merit selection of judges in at least seven states: Arizona, Florida, Iowa, Kansas, Missouri, Oklahoma, and Tennessee. These states represent nearly one-third of the 24 states that use merit selection in appointing high-court justices (of those, 16 hold periodic retention elections for justices).

In Arizona, for example, bills were introduced to end retention elections and to force appointed judges to periodically return to the legislature for confirmation, a process used in very few states. Under one proposal, judges would go through legislative hearings and face potential retaliation from political enemies. Currently, appointed judges in Arizona face periodic retention elections, where voters have the power to grant or refuse additional terms on the bench.

In Iowa, proposals included a bill to eliminate merit selection for appellate judges and a constitutional amendment to eliminate merit selection of supreme court justices and district court judges.

The Washington Post

End the Impeachment War On Judges

By Bert Brandenburg
Friday, January 7, 2011

For more than 200 years, a safety barrier has protected our nation's courts and our democracy. No matter how controversial the case or unpopular the ruling, no state or federal judge has been impeached for an opinion issued from the bench.

In the next few months, that may change. The fight is being waged by political operatives in every state should be watching.

...usted three high-court... ruling per-

and undermine courts. Witch hunts against judges could also threaten state economies by driving out investments that create jobs, since businesses count on stable courts to settle disputes.

But there are deeper reasons why Iowans and Americans elsewhere need to catch their breath and avoid waging war on the courts.

Impeachments of judges were not designed as a tool for this kind of political disagreement, and the reason is essential to our democracy. If courts can't make tough calls, they won't be able to uphold the Constitution and protect our rights.

Impeachment is reserved for serious misconduct. In Iowa, the standards for impeaching judges are "misdemeanor" and "malfeasance" - in other words, committing a crime or violating one's oath of office. Other states, and the federal Constitution, have similarly demanding standards.

...courts off-limits to political im-...ed everyone. Take last... which the... should

impeached the five justices behind the majority opinion and subjected them to Senate show trials.

The trials would have shut down the government and spread the word that judges shouldn't follow the law but rather opinion polls and party bosses. And politically driven impeachments would cause generational acrimony, leading to endless payback against judges appointed by both parties.

There's a reason this all sounds so familiar: It has been seriously tried only once in our history - in 1805, when Thomas Jefferson tried to oust Justice Samuel Chase. The Federalist Party. Senators across the political spectrum rejected the idea. Jefferson hasn't tried it since, even though he made unpopular decisions on slavery, segregation, abortion and presidential elections.

Iowa citizens, no matter what the issue, want same-sex marriage, want work on policy issues that... not by settling po... should

Sanders County Republican Cent. Committee v. Buillock
No. 12-35543 archived on October 30, 2012

Attacks on Merit Selection, 2011

STATE	MEASURE	CATEGORY	COMMENT
Arizona	HCR 2020	Constitutional Amendment	End Merit Selection: Governor to fill judicial vacancies with Senate confirmation. Change Retention: Reappointment and legislator reconfirmation required for new terms.
	HCR 2026	Constitutional Amendment	Change Merit Selection: Restrict to counties with 500,000 or more people (now 250,000).
	SB 1482	Bill	Evaluation: Requires online posting of all decisions by an appellate judges facing re-election.
	SCR 1040	Constitutional Amendment	Change Merit Selection: Requires Senate confirmation of judicial appointees.
			Change Merit Selection: Bar loses power to fill seats on nominating panels. Change Retention: Ends retention elections, requiring legislative reconfirmation.
	SCR 1042	Constitutional Amendment	Change Merit Selection: Governor chooses lawyer members of nominating panels, instead of bar.
	SCR 1043	Constitutional Amendment	Change Merit Selection: Panels would list all legally qualified applicants, and rank by merit.
	SCR 1044	Constitutional Amendment	Change Merit Selection: Governor could ignore nominating panel and appoint any candidate.
	SCR 1045	Constitutional Amendment	Change Merit Selection: State bar would not nominate attorney members for judicial panels.
	SCR 1046	Constitutional Amendment	Change Merit Selection: Governor's judicial appointees subject to Senate confirmation.
Change Merit Selection: Would revise membership of judicial nominating commissions.			
SCR 1048	Constitutional Amendment	Change Retention: Senate would vote on retaining a judge for additional terms.	
		Change Retention: Judges would stay on bench unless two-thirds of the Senate votes against.	
SCR 1049	Constitutional Amendment	Change Merit Selection: Would revise judicial nomination commission membership.	
		Change Merit Selection: Expand from three to seven the nominees submitted to a governor. Change Merit Selection: Would require Senate confirmation of governor's nominees.	
Florida	HJR 1097	Constitutional Amendment	End Merit Selection: Eliminate nominating panels for supreme court and district courts of appeals. End Merit Selection: Governor to appoint, with Senate confirmation.

Sanders County Republican Cent. Committee v. Bullock
 No. 12-35543 Archived on October 30, 2012

STATE	MEASURE	CATEGORY	COMMENT
Iowa	HB 343	Bill	Change Merit Selection: State bar members of Judicial Nominating Commissions would have advisory role only.
	HB 416	Bill	Change Merit Selection: State bar members and presiding judge on Judicial Nominating Commissions advisory only.
	HB 429	Bill	End Merit Selection for Court of Appeals: Governor would appoint appellate judges, Senate would confirm.
	HJR 13	Constitutional Amendment	Term Limits: Limits Supreme Court and district court judges to two full terms totaling 12 years.
	SJR 13	Constitutional Amendment	End Merit Selection: Would replace with judicial elections.
Kansas	HB 2101	Bill	End Merit Selection: For appellate court only; Senate would confirm nominations from governor
	HCR 5015	Constitutional Amendment	End Merit Selection: For Supreme Court; Senate would confirm nominations from governor.
Missouri	HJR 18	Constitutional Amendment	Change Merit Selection: Would increase judicial nominees submitted to a governor, from three to five. Change Merit Selection: Governor could reject first slate of names and receive a second list.
	SJR 17	Constitutional Amendment	Change Merit Selection: Would expand judicial nominating commissions.
			Change Merit Selection: Would reduce ratio of attorney members to non-attorney members.
Oklahoma	HJR 1008	Constitutional Amendment	End Merit Selection: Partisan elections for all appellate judges.
	HJR 1009	Constitutional Amendment	Change Merit Selection: Governor could ignore commission nominees for appellate court. Change Merit Selection: Senate confirmation required of governor's appointments.
Tennessee	HB 1702	Bill	Change Retention: Requires appellate judges to obtain 75% of retention election vote (now 50%).
	HB 1017	Bill	Change Merit Selection: Governor can ignore names submitted by nominating panel. Change Retention: Appointed judge would later have to run in a contested election.
	HB 231	Bill	End Merit Selection: Supreme court justices would be chosen through nonpartisan elections.
	HB 958	Bill	End Merit Selection: Requires popular election of trial, appellate, judges, and high-court judges.

In Florida, the House Speaker pushed a measure to oust judges unless they won a 60 percent supermajority in a retention election vote, increased from 50 percent under current law. In Tennessee, bills were introduced to replace retention elections with competitive elections, or to require appellate judges to receive 75 percent of the retention vote to stay on the bench.

Other anti-merit attacks included proposals to enact partisan election of judges; shut down citizen nominating commissions so that governors can appoint judges without any checks or balances; allow governors to ignore citizen commissions; and remove state bar members from nominating commissions. For the most part, these attacks faltered—but there were exceptions. Arizona legislators put a proposed constitutional amendment on the 2012 ballot to reduce the state bar's role in judicial selection. Also in 2012, voters in Florida will decide whether to require Senate confirmation of state Supreme Court justices appointed by the governor. In the other direction, legislative campaigns remained active in Minnesota and Pennsylvania to allow voters to decide whether to shift to a merit selection system. In Pennsylvania, four current and former governors endorsed the plan at a June 2010 event.

Florida: Court-Splitting, or Court-Packing?

Are two Supreme Courts really better than one? Florida lawmakers had to ponder that question after the House Speaker aggressively pushed a plan to create separate panels for civil and criminal cases.

With the passage of this plan widely seen as inevitable, a new coalition of prominent lawyers and judges, Floridians for Fair and Impartial Courts, led a potent counterattack, denouncing the plan as costly and unnecessary. Other critics, noting that the state's Republican governor would appoint three new justices, said it was a brazen power grab unparalleled since President Franklin Delano Roosevelt's failed attempt to pack the U.S. Supreme Court. "This bad idea is a bad deal for Floridians in every way," Stephen Zack, a Miami lawyer then serving as American

Bar Association president, wrote in April 2011. "We'll wind up paying more, waiting longer and facing a highly politicized court. Back in the 1930s, near the beginning of his presidency, Franklin D. Roosevelt tried to pack the U.S. Supreme Court, but the American people had the good sense to reject it."²³

Only two states in the country, Texas and Oklahoma, have such bifurcated systems, and in Texas, a Supreme Court justice in 2011 castigated the split system as archaic and ineffective. "Truth be told—and this particular truth has been told repeatedly—the State's entire Rube Goldberg-designed judicial 'system' is beyond piecemeal repair; it should be scrapped and rebuilt top-to-bottom,"²⁴ Justice Don Willett wrote in a case involving a jurisdictional dispute between the state's top civil and criminal courts.

After the Florida House approved the court-splitting plan, the Senate would go no further than to authorize a \$400,000 study of the state Supreme Court's efficiency. Even that measure died when Governor Rick Scott vetoed the study as he worked to staunch a budgetary hemorrhage.

Funding Cuts Court Disaster

As courts endeavor to preserve their independence and impartiality in the face of increasingly expensive, negative and special-interest-dominated judicial elections and attacks on judicial power, their ability to safeguard fundamental principles of democratic governance is further constrained by resource limitations.

Across the country state judiciaries are making do with less, as legislatures impose recession-driven budget cuts across the board. More than 30 states experienced judicial budget reductions in fiscal year 2010, while 28 states saw reductions in fiscal year 2011. In many states, these cuts will continue, and potentially even accelerate, in fiscal year 2012.²⁵ Strapped for cash, courts have reduced hours of operation, fired staff, frozen salaries and hiring, increased filing fees, diverted resources from civil trials—which in some cases suspended jury trials—and, in the worst cases, closed courts entirely.

Sanders County Republican Cent. Committee v. Bullock
No. 12-35543 archived on October 30, 2012

California's judiciary has absorbed a \$350 million budget reduction, which Chief Justice Tani Cantil-Sakauye predicts will be "devastating and crippling" to the state's ability to dispense justice.²⁶ Similar sounds of warning are being heard across the country. After New York courts were forced to lay off more than 350 court employees to offset \$170 million in cuts to the state judiciary's budget, 65 dismissed part-time judges continued to work as volunteers to ensure that the courts' indispensable work would not grind to a halt. Iowa's court system today is operating with a smaller workforce than it had in 1987—even though, in the same period, the total number of cases in Iowa courts has doubled.

These cuts are coming at precisely the time when courts desperately need more, not fewer, resources. State courts confront elevated numbers of foreclosure filings, consumer debt proceedings and domestic violence cases—all of which rise in tough economic times—along with sustained numbers of other proceedings.

Unlike other government agencies, courts cannot simply cut some services; they have a constitutional duty to resolve criminal and civil cases. And because about 90% of court budgets go to personnel costs, cutting staff is the only way for courts to absorb reductions. Eliminating judicial employees means that some citizens looking to the courts for justice will walk away empty-handed. These draconian cuts also contain alarming long-term implications. Several studies have concluded that counties and states would suffer dramatic economic losses as a result of court closings.²⁷

As the second decade of the twenty-first century begins, state judiciaries are caught in a vise, squeezed on one hand by interest groups waging an unrelenting war to impose partisan political agendas on the bench and on the other by devastating fiscal pressures.

Looking Ahead: More Assaults Expected

More assaults on impartial courts, taking a range of different forms, are on the horizon. They include special-interest election spending, retention election challenges, and further attacks on merit selection of judges.

While funding for courts continues to fall, the ability of special interests to spend freely on high-court elections, unfettered and in secrecy, will be greater than ever in 2012, given continued court rulings and legislative attacks on campaign finance laws.

There were strong indications of likely retention challenges in three states. In Iowa, organizers of the 2010 "Vote No" campaign have vowed to challenge another participant in the same-sex marriage decision in 2012, while in Indiana, there were early threats of a campaign to unseat the author of a bitterly controversial decision about resisting illegal police entry into a person's home. In Florida, a group announced it was mounting a 2012 campaign to oust three state Supreme Court justices over a court decision that removed health care reform from the 2010 ballot in Florida.

And in Arizona and Florida, ballot measures would weaken key features of existing merit selection systems.

In early 2011, as Iowa's legislature was wrestling with noisy, but ultimately unsuccessful, calls to impeach four justices, Chief Justice Mark Cady of the Iowa Supreme Court addressed legislators on the state of Iowa's courts. Cady's warning was grim, and applied to courts across America: "This branch of government is under attack."

ENDNOTES

1. JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE* (2010), available at <http://www.brennancenter.org/NPJEO9> ("NEW POLITICS 2000-2009").
2. These figures include money from three sources: candidate fundraising totals, many non-TV expenses by non-candidate groups, and estimates of independent television expenses. Under Michigan campaign law, the first two categories are documented in state election filings, but independent TV spending is not. The different totals reflect the difference between two methods of estimating of total TV spending. The higher TV estimate, by the Michigan Campaign Finance Network (http://www.mcfn.org/pdfs/reports/MS_10.pdf), is based on the examination of records of television stations across Michigan to log ads aired in the high-court race. The lower TV estimate, by TNS Media Intelligence/CMAG, is based on an analysis of satellite ads monitored on satellite technology, and does not include cable TV ads. See note 11 for a description of the TNS Media Intelligence/CMAG methodology.
3. A similar pattern occurred in the April 2011 Wisconsin Supreme Court election, when Justice David Prosser and challenger JoAnne Kloppenburg, each receiving \$400,000 in public financing, were heavily outspent by special-interest groups. The candidates accounted for less than 20 percent of all money spent on election communications.
4. Numbers for three groups that spent in Michigan—the state Republican and Democratic parties and the Law Enforcement Alliance of America, reflect TV data capture by TNS Media Intelligence/CMAG for the Brennan Center for Justice. A full explanation of this technology is available in Chapter 2. Calculations by the Michigan Campaign Finance Network, which examined TV station ad logs arrived at a higher spending total for all three groups. The MCFN data are available at: http://www.mcfn.org/pdfs/reports/MS_10.pdf
5. These advertisements are not reflected in the TNS Media Intelligence/CMAG estimates cited throughout this report. As explained in note 11, below, because TNS/CMAG data relies on satellite capture of television advertising, small ad buys on local channels are not included in the estimates.
6. Press Release, Brennan Center for Justice, "2010 Judicial Elections Increase Pressure on Courts, Reform Groups Say," Brennan Center for Justice, (Nov. 3, 2010) available at http://www.brennancenter.org/judicial_pressure.
7. See <http://iowafreedom.com/>.
8. Andy Barr, *Michele Bachmann Calls Judges 'Black-Robed Masters' in Iowa*, Politico (March 23, 2011), available at <http://www.politico.com/news/stories/0311/11847.html>.
9. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 915 (2010).
10. See Michigan Campaign Finance Network, *\$70 Million Hidden in Plain View*, (June 2011), available at http://www.mcfn.org/pdfs/reports/MICFN_HiddenInPlainViewP-rev.pdf.
11. All data on ad airings and spending on ads are calculated and prepared for the Brennan Center by TNS Media Intelligence/CMAG, which captures satellite data in the nation's largest media markets. CMAG's calculations do not reflect ad agency commissions, the costs of producing advertisements, or ad purchases limited to local cable channels. The costs reported above, therefore, approximate actual expenditures and should be considered conservative estimates of actual TV spending. These estimates are useful principally for purposes of comparing relative spending levels across states, and across time.
12. The highest levels of TV spending by special interest groups ever seen in a judicial election took place in a non-partisan election, Wisconsin's hotly contested April 2011 race. See Press Release, Brennan Center for Justice, "Final Numbers: Special Interest Spending Near \$3.6 Million in Wisconsin," Brennan Center for Justice, (Apr. 6, 2011) available at http://www.brennancenter.org/WI_2011_Final; Larry Sandler, "As Supreme Court race nears, TV ad spending soars", Milwaukee Journal Sentinel, March 30, 2011.
13. In Colorado, no candidates or outside groups aired advertising endorsing or opposing specific judicial candidates. Several groups in Colorado did, however, sponsor a public education campaign to provide voters with impartial, nonpartisan information about the judges appearing on Colorado's ballot. These groups—including the Institute for the Advancement of the American Legal System, the League of Women Voters of Colorado, the Colorado Judicial Institute, and the Colorado Bar Association—launched a website called "KnowYourJudge.com," and produced radio and television public service announcements alerting voters to available resources that provided information relating to Colorado's judicial elections.
14. As noted, all data on ad airings and spending on ads derived from analysis performed by TNS Media Intelligence/CMAG. See note 11.

APPENDIX

An appendix containing a comprehensive list of all television advertisements aired in 2010, including sponsorship, tone, content, and cost, is available for download at:

<http://newpoliticsreport.org>.

*Sanders County Republican Cent. Committee v. Bullock
No. 12-35543 archived on October 30, 2012*



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No. 12-35543 archived on October 30, 2012