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### The New Politics of Judicial Elections 2000-2009: Decade of Change

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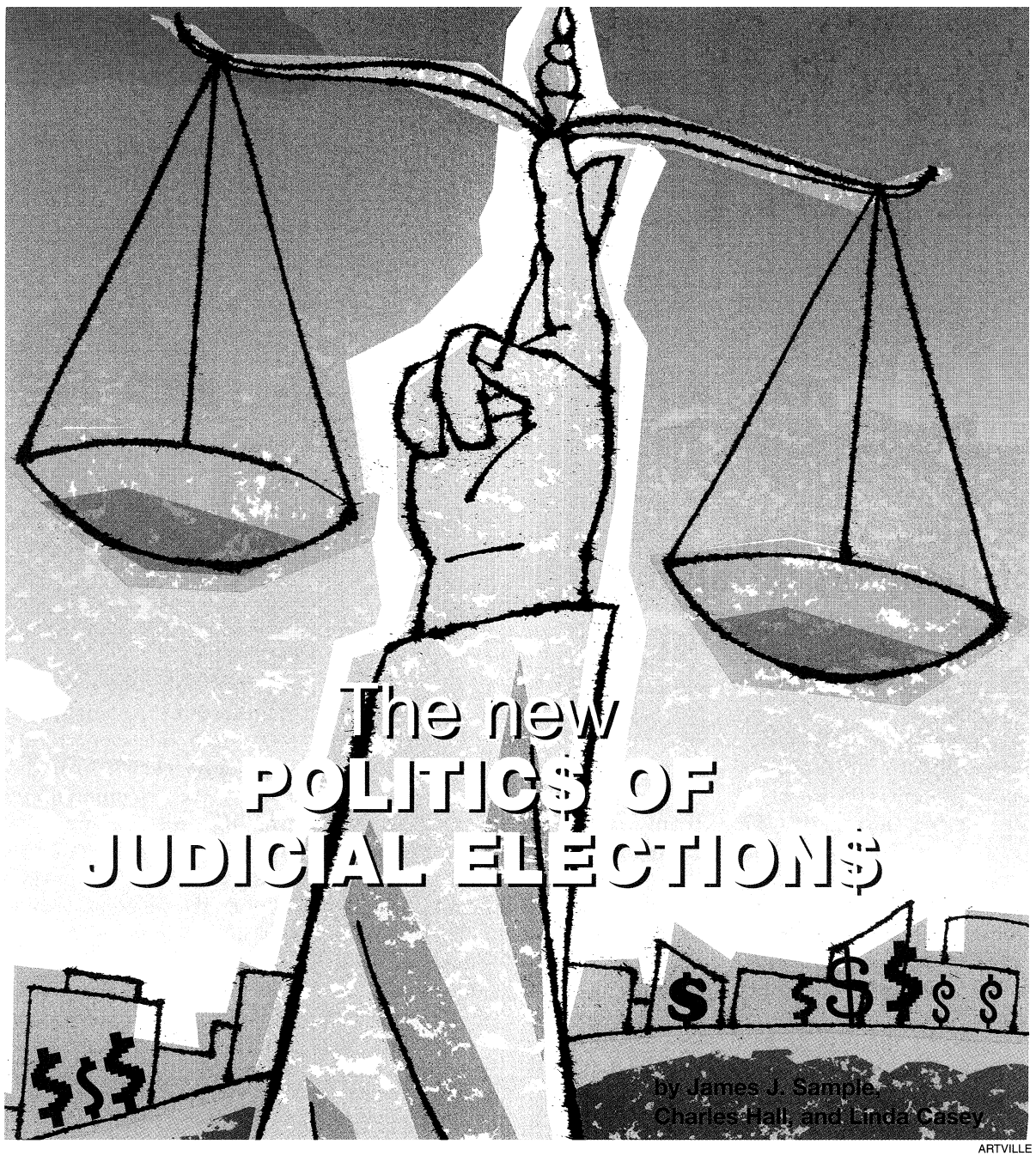
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## The new POLITICS OF JUDICIAL ELECTIONS

by James J. Sample,  
Charles Hall, and Linda Casey

ARTVILLE

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.

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. While the public supports reforms, decision makers

have only belatedly begun to enact them, and many of those new laws are embattled in a growing litigation war that threatens all campaign finance regulation.

These are the conclusions of "The New Politics of Judicial Elections 2000-2009: Decade of Change." The report, co-authored by the Justice at Stake Campaign, the Brennan Center for Justice, the National Institute on Money in State Politics, and Hofstra University Law Professor James Sample, is

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This article is adapted from "The New Politics of Judicial Elections 2000-2009: Decade of Change." The complete report is available for free download at [http://www.justiceatstake.org/resources/new\\_politics\\_of\\_judicial\\_elections\\_20002009/](http://www.justiceatstake.org/resources/new_politics_of_judicial_elections_20002009/).

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

Sandra Day O'Connor



the first comprehensive national study of a decade in which state judicial elections underwent radical change.

From 2000 to 2009, fundraising by state high-court candidates soared to \$206.9 million, more than double the \$83.3 million raised in the previous decade. Special-interest groups spent an estimated \$39 million more on independent TV ads, meaning that all forms of state high-court spending in 2000-2009 totaled nearly \$250 million, and very likely more.

As noted in a foreword by Justice Sandra Day O'Connor, who has crusaded tirelessly to reduce special interest influence on courts since her retirement from the U.S. Supreme Court, this explosion in spending has convinced many Americans that campaign bankrollers get favored treatment from judges they help elect. “This crisis of confidence in the impartiality of the judiciary is real and growing,” Justice O'Connor wrote. “Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold.”

The “New Politics 2000-2009” report is the fifth in a series examin-

ing spending, nasty TV ads, and other trends in the 38 states that hold competitive or retention elections for state supreme courts. But as noted, the newest report is the first to look at an entire decade, and not just the previous two-year election cycle. The report's authors said: “By tallying the numbers and ‘connecting the dots’ among key players over the last five election cycles, the report offers a broad portrait of a grave and growing challenge to the impartiality of our nation's courts.”

The trends identified in the report 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

In just a decade, in high court contests across America, cash has become king. Would-be justices must raise millions from individuals and

groups with business before the courts. Millions more are spent by political parties and special-interest groups, much of it undisclosed. The money explosion is not just a threat to impartial courts. It has left a sour taste for a majority of Americans, who believe that campaign cash is tilting the scales of justice.

Although warning signs were gathering in the 1990s, the new politics of judicial elections burst on the scene with the 1999–2000 election cycle, when supreme court candidates raised \$45.9 million—a 62 percent increase over 1998.<sup>1</sup> Expensive campaigns have become all but essential for a candidate to reach the high court. From 2000–2009, supreme court candidates raised \$206.9 million nationally, more than double the \$83.3 million raised from 1990–1999 (by comparison, the consumer price index rose only 25 percent from 2000–2009). During the earlier decade, 26 supreme court campaigns raised \$1 million or more, and all but two came from three states: Alabama, Pennsylvania, and Texas. In 2000–2009, by contrast, there were 66 “million-dollar” campaigns, in a dozen states. During the same 2000–2009 period, 20 of the 22 states that elect supreme court judges set spending records; only Texas and North Dakota had their highest-spending elections in the 1990s.

In other words, the most remark-

1. These numbers are slightly higher than those reported in the “New Politics of Judicial Elections 2000.” Campaign fund-raising data from the National Institute on Money in State Politics are subject to minor fluctuations over time, as a result of late candidate filings and amendments to earlier finance records.

able thing about the 2007–2008 cycle—in which state supreme court candidates raised \$45.6 million, seven times the 1989–1990 total—was that such totals have become so unremarkable. It was the third time in the last five cycles that high court candidates raised more than \$45 million (\$46.8 million was raised in the high-water 2003–2004 election cycle).<sup>2</sup>

Bulging campaign war chests are only part of the story. Millions more dollars have flowed into judicial elections from political parties and special-interest groups, frequently in ways crafted to avoid financial disclosure even as they seek to sway judicial contests. From 2000–2009, independent groups and political parties spent at least \$39.3 million on television time, about 42 percent of total ad costs. (The real totals are likely substantially higher.)

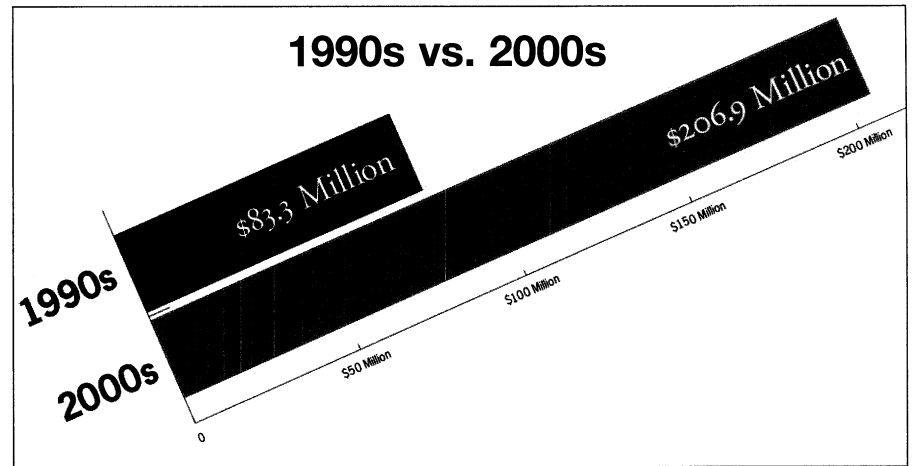
### Rise of super spenders

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

For big money interests, high court seats are just one more investment. As an Ohio AFL-CIO official put it, “We figured out a long time ago that it’s easier to elect seven judges than to elect 132 legislators.”<sup>3</sup> When those big-dollar supporters appear before the very judges whom they helped elect, many Americans conclude that justice is not impartial.

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

The yawning gap is best shown by 29 contested elections held from 2000–2009 in Alabama, Ohio, Penn-



sylvania, Illinois, Texas, Michigan, Mississippi, Wisconsin, Nevada, and West Virginia. In these elections, at least one candidate benefited from \$1 million or more in other people’s money—either in direct contributions or through independent election spending by other groups that benefited their campaigns. When all 29 elections are taken together, the top five super spenders from each election—145 in all—spent an average of \$473,000 apiece. By contrast, the remaining donors averaged \$850.

Excluding self-financing candidates, the 145 super spenders accounted for just over 40 percent of all campaign cash in the 29 elections. Moreover, the disparity was widespread, not just the result of a few outlier contests. In 22 of 29 elections, the top five spenders averaged more than \$200,000 apiece—and in 12 elections, they exceeded \$500,000. In 21 of 29 elections, a mere five spenders accounted for at least 25 percent of all campaign funding. In nine elections, five super spenders accounted for more than 50 percent, exceeding thousands of contributors combined.

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

on the 2004 West Virginia election led to the landmark *Caperton v. Massey* case.

### How we got here

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

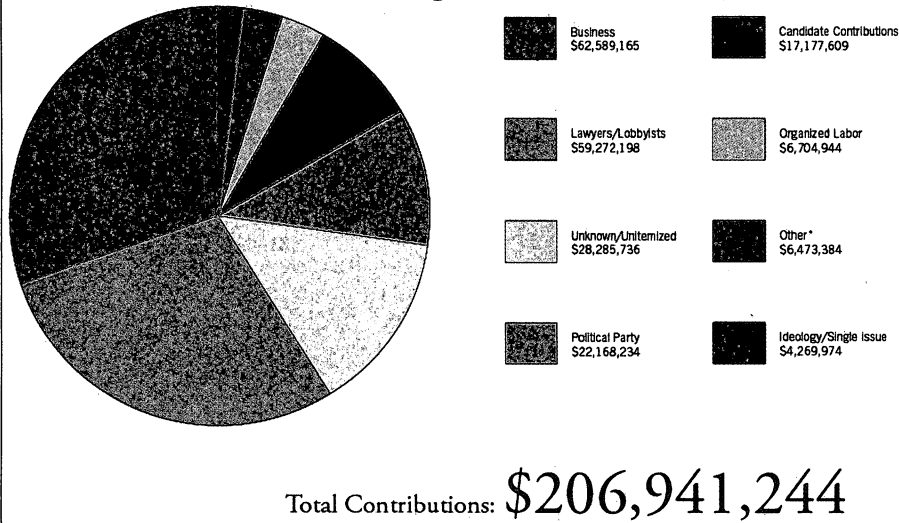
Candidate fundraising for court races saw successive spikes, from an estimated \$5.9 million in 1989–1990 to \$21.4 million in 1995–1996. In 2000, candidate fundraising abruptly doubled again, to \$45.9 million. From 1999–2000 through 2007–2008, the average fundraising for each two-year election cycle has been \$40.1 million, compared with \$16.9 million the decade before.

One factor had a particular impact. Although special-interest spending had traditionally been a factor at the state level, national groups dramatically increased their involvement in statewide elections.

2. Reporting techniques have been progressively refined and improved since the National Institute on Money in State Politics began gathering information on state court races. While some details are not available for the early 1990s elections, such as details about some contributors, the NIMSP data for the 1990s court elections are the best and most complete in existence.

3. J. Christopher Heagarty, *The Changing Face of Judicial Elections*, 19 N. C. St. B. J. 20 (Winter 2002).

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



In 2000, the U.S. Chamber of Commerce announced it was stepping up its involvement in supreme court elections, by allocating up to \$10 million to as many as seven states where the Chamber said plaintiffs' lawyers had too much influence.

4. Robert Lenzner and Matthew Miller, "Buying Justice," *Forbes.com*, July 21, 2003, available at [http://www.forbes.com/forbes/2003/0721/064\\_print.html](http://www.forbes.com/forbes/2003/0721/064_print.html).

5. According to the American Judicature Society, nine states are classified as having partisan elections for state supreme court seats: Alabama, Illinois, Louisiana, Michigan, Ohio, New Mexico, Pennsylvania, Texas, and West Virginia. Thirteen states are labeled as nonpartisan: Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, and Wisconsin. Four of the above states—Illinois, Montana, New Mexico, and Pennsylvania—have hybrid systems in which supreme court judges must face at least one partisan or nonpartisan election, but otherwise may face retention elections once on the court. A full summary is available at the American Judicature Society "Judicial Selection in the States" web site, [http://www.judicialselection.us/judicial\\_selection\\_materials/index.cfm](http://www.judicialselection.us/judicial_selection_materials/index.cfm).

6. Two states, Arkansas and North Carolina, had partisan elections for appellate judges in 2000, but switched to nonpartisan elections in 2002. While they are counted as nonpartisan states, money contributed in the 2000 elections was apportioned to the partisan category.

7. The estimated costs of airtime in this report are drawn from television advertising data from the nation's 100 largest media markets. The estimates were calculated and supplied by TNS Media Intelligence/CMAG. The calculations do not include either ad agency commissions or the costs of production. The costs reported here therefore understate expenditures, and the estimates are useful principally for purposes of comparison within each state. In contrast to previous "New Politics" reports, which contained only even-year TV ad data, the "New Politics 2000-2009" report contains TV data from odd-year elections

By the end of 2002, unprecedented amounts of money poured into court races from both sides of the tort wars. The U.S. Chamber of Commerce and allied forces had begun winning a string of victories.<sup>4</sup> Of the top 10 election spenders nationally in 2000–2009, seven had business or expressly Republican leanings, while three had plaintiffs' lawyer and Democratic backing. Including independent TV ads by non-candidate groups, the top conservative/business spenders for the decade invested \$26.2 million—considerably more than double the \$11.9 million spent by three Democratic-leaning spenders. The new flood of money from both sides fed voter cynicism and fueled campaign-trail accusations that judges were beholden to their election backers.

Partisan elections traditionally draw more money than nonpartisan races, but that may be changing.<sup>5</sup> Through much of the decade, states with nonpartisan elections, especially those with smaller populations, had escaped the worst excesses. Overall, candidates in 13 nonpartisan states raised \$50.9 million in 2000–2009, about 25 percent of the total, compared with nearly \$153.8 million raised by candidates in nine partisan states, about 74 percent of all fundraising. Retention election

candidates raised \$2.2 million, about 1 percent.<sup>6</sup>

Large infusions of cash from special-interest groups showed that the nonpartisan label offered decreasing insulation against big-money campaigns. Including both candidate contributions and independent TV ads by parties and special-interest groups, Georgia's 2006 election cost \$3.6 million. In Wisconsin, spending from all sources on two elections in 2007 and 2008 totaled \$8.5 million—seven times as much as all Wisconsin Supreme Court elections put together from 2000 through 2006. National and state-level super spender groups played major roles in both states.

### Court TV: The rise of costly attack ads

The past decade has also seen an unprecedented surge in money spent on TV ads in judicial races. From 2000–2009, an estimated \$93.6 million was spent on air time for high court candidate TV ads, including an estimated \$6.6 million spent in the unusually costly odd-year elections in 2007. Though 2004 remains the high-water mark for high-court television ads, 2008 showed that the flood of TV money remains strong. At over \$19 million, more money was spent on supreme court TV ads in 2008 than in any year except 2004—when 34 contested races had TV ads, compared with 21 in 2008.<sup>7</sup>

More ads ran in 2008 than ever before, and for the first time nationally, special interest groups and political parties combined to spend more on TV ads than did the candidates.

When odd-year elections are factored in, 2007–2008 was the costliest biennium ever, at \$26.6 million. During those two years, eight states set all-time records for spending on TV ads.

The 2007–2008 biennium illustrated the new imperative in state supreme court elections. Put simply, massive spending on television is all but a prerequisite for gaining the bench. And to compete, judges need tremendous financial support, either in the form of large contributions or

independent expenditures. From 2004 onward, no one could doubt how expensive and hard-fought these judicial election air wars would be. All that remained was a question of degree: How far were candidates willing to go? How negative were special interest groups capable of being? How much would state parties spend to throw their weight behind the endorsements and attacks?

An analysis of the 2008 cycle answers some of these questions—and raises new ones. The question after 2008, given the exorbitant totals and their confirmation of mounting trends, is whether now the perception is inevitable, at least in certain situations, that justice is for sale.

Likewise, the corollary question is whether, in the face of big money expenditures by litigants and lawyers, and after the U.S. Supreme Court's decision in *Caperton v. Massey*, states and litigants will take proactive steps to combat that perception.

Just 22 percent of states with contested supreme court elections featured television advertising in 2000, but that number jumped to 64 percent in 2002. By 2004, judicial TV ads were the unquestioned norm; 80 percent of states with contested elections ran TV ads. And that number rose even further, to 91 percent, in 2006. Of the 16 states with contested elections in 2007 and 2008, TV ads appeared in 14 of them (more than 85 percent). Minnesota and Wash-

ington were the only two states where television ads did not run in competitive high court contests.

More advertising, of course, means spikes in spending. For the third consecutive even-year election cycle, each state with TV advertising averaged over \$1 million in spending on those ads; in 2008, \$1.5 million on television ads was spent on average in 13 states, down slightly from 2006 but bracing by any estimation. And 2008 broke the record for number of ads aired on TV—58,879 ads were recorded, over 16,000 more than the previous record set in 2004. Among the races that featured television ads, 2,803 spots ran on average in each contest in 2008, compared to 1,242 in 2004.

### Independent ads

The decade also saw a surge in judicial campaign advertising by special-interest groups and political parties, and a startling rise in negative advertising—two trends that with the exception of 2006 have been interwoven. Ads by non-candidate groups played a critical role, accounting for about \$39 million, or 42 percent of the \$93.6 million in total TV ad costs—with special interest groups spending \$27.5 million, and party organizations adding \$11.7 million. In the two most expensive TV cycles, 2004 and 2008, independent ads from special interest and party organizations accounted for almost half of all air-time costs. In 2008, they combined to account for 52.2 per-

cent of TV ad costs.

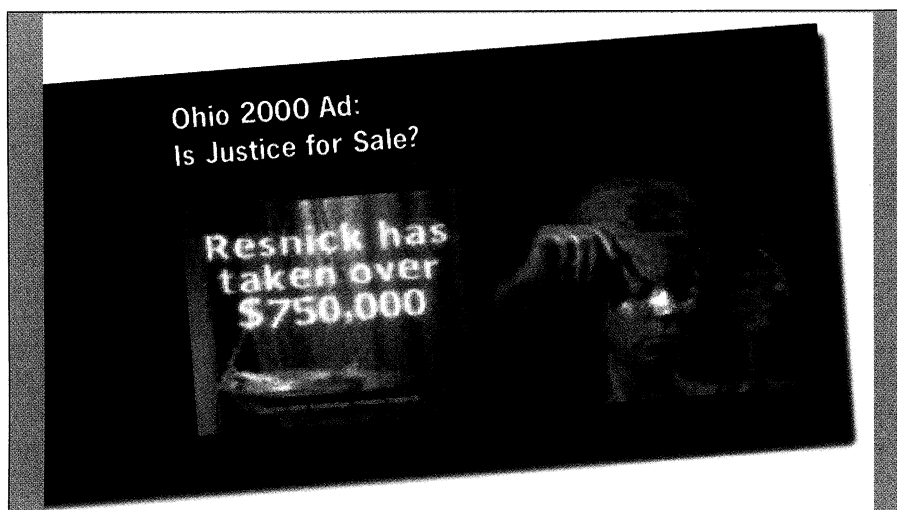
Beyond the dollar totals, non-candidate groups accounted for an outsized share of the negative ads—frequently becoming the attack dogs of state supreme court elections. In 2000, special interest group ads accounted for 61.9 percent of all documented attack ads, even though they only purchased 26.7 percent of the estimated \$10.6 million in air time for judicial ads. A similar pattern prevailed in 2008. Special interest groups and state political parties were responsible for 65 percent and 22 percent of all negative ads, respectively.

### Nationalizing of court elections

It would be inaccurate to say the 2000–2009 period saw the first special interest spending on state supreme court elections. As far back as the late 1980s, national reports using the phrase “Justice for Sale” were run by *Time* magazine and “60 Minutes,” and focused on plaintiffs’ lawyers in Texas.<sup>8</sup> In 2000, national and business media were reporting on how the business sector was fighting to shift the balance on state courts back from what many considered a pro-plaintiff bias. These groups took spending to unprecedented heights and for the first time nationalized state supreme court elections.

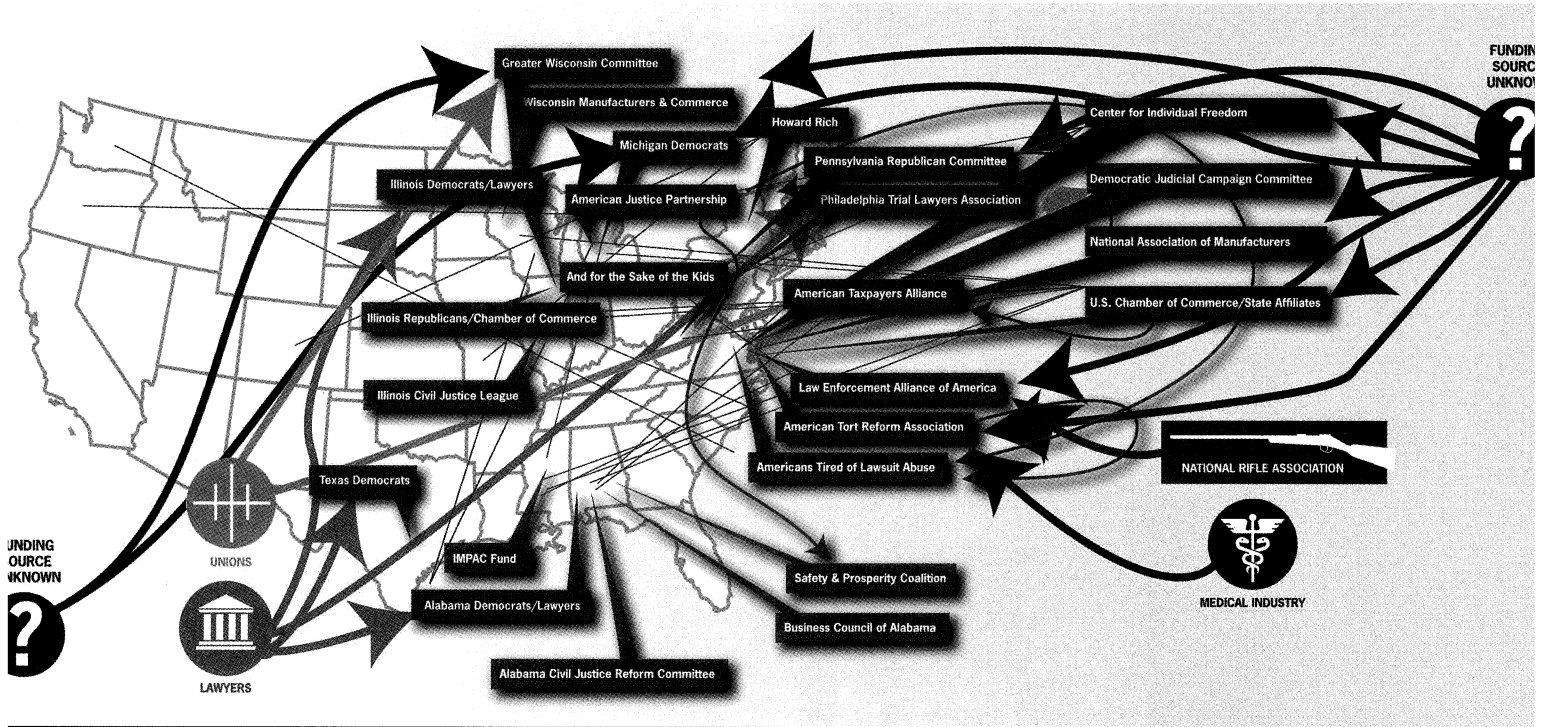
In a 2002 speech to the Illinois Chamber of Commerce, U.S. Chamber of Commerce President Thomas Donohue suggested a precipitating event in explaining the Chamber’s state supreme court strategy:

Flush with billions of dollars in fees from tobacco and asbestos litigation, a small group of class-action trial lawyers is hell-bent on destroying other industries, and nobody is immune. Our approach is simple—implement a multi-front strategy of challenging these unscrupulous trial lawyers every time they poke their head out of the ground. ... On the political front, we’re



8. Richard Woodbury, “Is Justice for Sale?” *Time* magazine, Jan. 11, 1988, available at <http://www.time.com/time/magazine/article/0,9171,966426,00.html>. “60 Minutes” report is cited by multiple sources, including <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/hill.html>.

# Battle for America's Courts 2000-2009



JUSTICE AT STAKE CAMPAIGN

going to get involved in key state Supreme Court and attorney general races as part of our effort to elect pro-legal reform judicial candidates. . . . We're clearly engaged in hand-to-hand combat, and we've got to step it up if we're going to survive.<sup>9</sup>

Such efforts met with significant success. From 2000 through 2006, plaintiffs' lawyers and unions lost control of supreme courts in Illinois, Michigan, Mississippi, Ohio, Wisconsin, and West Virginia. Key players in the conservative coalitions have included leaders from such top companies as Home Depot, insurance giant AIG, Chrysler, and big tobacco, and such leading business trade groups as the U.S. Chamber of Commerce and the National Association of Manufacturers.

By contrast, plaintiffs' lawyers and unions raised funds and organized at the state level. But like conservative groups, they often channeled money through conduit organizations to con-

ceal the true extent of their involvement in campaigns. An extreme case of this occurred in Alabama in 2008, when plaintiffs' lawyers accounted for virtually all of the \$1.6 million given by the state Democratic Party to high-court candidate Deborah Bell Paseur. One law firm, Beasley Allen of Montgomery, gave \$606,000 to Paseur's campaign without ever appearing on her campaign finance reports. They did so by routing money through 30 political action committees, which eventually transferred it to the Democratic organization. During the decade, plaintiffs' lawyers in Illinois, Michigan, and Texas used the state Democratic Party to mask their expenditures.

In 2008, there were signs of at least a modest comeback by Democratic-backed candidates. Republican chief justices were voted out in Michigan, Mississippi, and West Virginia, at least in part because of perceived ties to business interests.

## Litigation: The battle inside the courtroom

Some of the most significant developments affecting state judicial elec-

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

**Caperton v. Massey: When judges must step aside.** *Caperton v. Massey*, decided in June 2009, provided a national lesson in what can go wrong when big money supporters and pending litigation coincide in the courtroom. *Caperton* has moved recusal—when a judge steps aside from a case to prevent ethical conflict—to the national stage.

The case involved the campaign of Brent D. Benjamin, a lawyer who in 2004 ran for a seat on the West Vir-

9. U.S. Chamber of Commerce President Tom Donohue, March 11, 2002, speech to Illinois Chamber of Commerce, available at: [http://www.uschamber.com/press/speeches/2002/020311td\\_illinois.htm](http://www.uschamber.com/press/speeches/2002/020311td_illinois.htm).

ginia Supreme Court of Appeals against incumbent Warren McGraw. Critical to his election was \$3 million in expenditures by Don Blankenship, CEO of Massey Coal Co., which had stood to lose \$50 million in a lawsuit filed by Harman Mining Co. When the case came before the West Virginia Supreme Court of Appeals almost two years later, Justice Benjamin refused to recuse himself, and cast the deciding vote to overturn the judgment against Massey.

Hugh Caperton, owner of Harman Mining, appealed to the U.S. Supreme Court, where he was represented by Theodore B. Olson, former Solicitor General of the United States under George W. Bush. “The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today,” said Olson. “A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge.”<sup>10</sup>

On June 8, 2009, the U.S. Supreme Court ruled 5-4 that the Constitution’s Due Process Clause required the recusal of Justice Benjamin. The Court said Blankenship had a “significant and disproportionate influence” in Justice Benjamin’s placement on the court, creating a “serious, objective risk of actual bias.”<sup>11</sup>

A variety of post-*Caperton* reforms are available, including empaneling neutral judges to hear recusal motions against a particular judge, creating *per se* rules for disqualification, and enhancing disclosure requirements for judges as well as litigants.

Americans agree that reform is needed: A 2009 Justice at Stake poll showed that more than 80 percent of all voters agree that judges should not hear cases involving major campaign backers, and support the idea of a different judge deciding recusal requests. In November 2009, Michigan’s Supreme Court became the nation’s first high court to adopt new recusal rules, after *Caperton*, that

allow the entire court to review recusal motions, and disqualify individual justices from cases that pose possible ethics violations.

**Citizens United and judicial elections.** Campaign finance laws face growing litigation challenges. North Carolina’s judicial public financing law was upheld by the federal courts. But a 2010 Supreme Court ruling, in *Citizens United v. Federal Election Commission*, overturned longstanding bans on election spending from corporate and union treasuries—posing a special threat in judicial elections.

An amicus brief filed by Justice at Stake and 19 other reform groups warned that ending the corporate treasury ban could engulf elected courts with special interest money, if similar state laws also were struck down. “Special interest spending on judicial elections—by corporations, labor unions, and other groups—poses an unprecedented threat to public trust in the courts and to the rights of litigants,” said the brief, which added, “As other groups felt pressure to match this corporate treasury spending, these issues would only snowball.”<sup>12</sup>

Citing the 2009 *Caperton* ruling, the brief added: “This Court itself held last term ... that some independent expenditures in judicial campaigns are so excessive that they in fact deny litigants due process under the law. If corporate treasury spending were unregulated in judicial elections, these concerns would only get worse.” Writing for the four dissenting justices, Justice John Paul Stevens agreed with these warnings: “At a time when concerns about the conduct of judicial elections have reached a fever pitch,” Stevens wrote, “the Court today unleashes the floodgates of corporate and union general treasury spending in these races.”

### The public takes note

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

out the decade, state and national polls have shown an overwhelming concern about the intersection of campaign money with the courts’ historic and constitutional role as a fair, impartial tribunal that provides “equal justice under law.”

Since 2001, nationwide polls by Justice at Stake, *USA Today*, and Zogby International have revealed similar numbers: About three Americans in four believe campaign contributions can tilt the scales of justice by influencing courtroom decisions. Other polls show 79 percent of business executives, and even 46 percent of state judges, believe campaign cash affects rulings by judges.<sup>13</sup>

Newspaper articles and editorials have extensively documented the dangers of special interest money and called for stronger recusal mechanisms, merit selection of judges, and/or public financing of judicial election campaigns. Most encouragingly, in the few cases where court issues went directly to voters, they have voted to protect impartial courts.

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

### The broader reform menu

Efforts to insulate courts from special-interest pressure include the following:

- Public financing for appellate court elections

10. Paul Nyden, “Mining Appeal Moving Along,” *West Virginia Gazette*, May 16, 2008, at <http://www.wvgazette.com/News/200805150741>.

11. *Caperton v. Massey*, <http://www.supremecourt.gov/opinions/08pdf/08-22.pdf>.

12. Justice at Stake Campaign, amicus brief in *Citizens United v. Federal Election Commission*, [http://www.justiceatstake.org/media/cms/JAS\\_CU\\_Brief\\_FA9AE1D6AB94E.pdf](http://www.justiceatstake.org/media/cms/JAS_CU_Brief_FA9AE1D6AB94E.pdf).

13. Information on all polls cited in this article is available at Justice at Stake’s polling page, [http://www.justiceatstake.org/resources/justice\\_at\\_stake\\_polls.cfm](http://www.justiceatstake.org/resources/justice_at_stake_polls.cfm).



- Financial disclosure and transparency
- Stronger recusal rules for judges
- Voter information/guides
- Judicial performance evaluations
- Appointment/retention systems (“Merit Selection”)

While public financing had the greatest forward movement (North Carolina, New Mexico, Wisconsin, and West Virginia all have enacted

with unprecedented force to weaken or dismantle merit selection systems, and bring more states into the free-spending world of judicial elections.

In 2007 and 2008, this fight played out at the state level, in Missouri and Tennessee. Lining up to eliminate or modify merit selection systems were a number of national heavyweights. They included the *Wall Street Journal’s* editorial page;<sup>14</sup> the Federalist Soci-

tion/appointment debate. According to the Chamber’s annual survey of corporate counsel, four of the five lowest-ranking states, from a business perspective, have contested judicial elections marked by runaway spending. Four of the five states with the best litigation climates, according to the survey, have appointment systems—using the commission nominating system known as merit selection.<sup>16</sup>

In October 2009, the Chamber’s Institute for Legal Reform sent a significant signal that the nation’s top business organization may be rethinking the potential benefits of judicial appointment systems. In a groundbreaking report, “Promoting ‘Merit’ in Merit Selection,”<sup>17</sup> the Institute presented a list of best practices for states that fill judicial vacancies through appointment rather than election. Without endorsing appointment systems over elections, the Chamber report praised Arizona’s appointment system as a model that promotes public trust.

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

## The good news is: Americans support the Constitution's vision of courts free from outside manipulation.

public financing systems for appellate court races), the most heated debate has been over merit selection. Now used to initially appoint justices on 24 state supreme courts, merit selection has become an emerging battlefield in the nation’s court wars.

Some leading papers, scholars, and judicial luminaries, such as former Justice Sandra Day O’Connor, advocate merit selection, in which nonpartisan commissions submit slates of judicial candidates to the governor. But a passionate and well-connected opposition has worked

ety (with polls in Missouri and Tennessee, and prominently published academic papers in Kansas and Tennessee); and the American Justice Partnership, an offshoot of the National Association of Manufacturers. CRC Communications, which ran the 2004 “swift boat” campaign, helped handle anti-merit publicity in Missouri and Tennessee.<sup>15</sup>

For all the fury, the effort so far has borne limited fruit. In April 2008, Missouri legislators beat back a ferocious campaign to tamper with the state’s commission nomination system, which dates to 1940 and is the nation’s oldest. Defenders of the plan, including the Missouri State Bar, said the changes would expose courts to greater partisan politics. An encore effort also failed in 2008, when the senate refused to vote on a proposed ballot measure. In Tennessee, lawmakers shied away from state supreme court elections, instead voting to preserve a modified appointment system.

### Debate in the business sector

While business groups have enjoyed considerable success in state high-court elections during the “New Politics” era, the U.S. Chamber of Commerce’s own national rankings offer a different take on the elec-

14. A number of *Wall Street Journal* editorials targeting merit selection can be found at [www.gavelgrab.org](http://www.gavelgrab.org). One example is the Aug. 14, 2008, editorial, “The ABA Plots a Judicial Coup,” <http://online.wsj.com/article/SB121867190633138889.html?mod=articleoutset-box>.

15. See separate articles in Gavel Grab blog focusing on CRC/Federalist Society in Missouri (<http://www.gavelgrab.org/?p=330>) and Tennessee (<http://www.gavelgrab.org/?p=192>). Also see Scott Lauck, “Federalist Society Finds Missouri Voters Want More Say Over Judges,” *Missouri Lawyers Weekly*, March 12, 2007, [http://www.accessmylibrary.com/coms2/summary\\_0286-29956442\\_ITM](http://www.accessmylibrary.com/coms2/summary_0286-29956442_ITM)

16. Institute for Legal Reform, “Lawsuit Climate 2010,” [www.instituteforlegalreform.com/lawsuit-climate.html#2010](http://www.instituteforlegalreform.com/lawsuit-climate.html#2010).

17. Institute for Legal Reform, “Promoting ‘Merit’ in Merit Selection,” October 2009 report, <http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/meritselection-booklet.pdf>. See also, Oct. 28, 2009, commentary by Bert Brandenburg, “Big Business Group Lays Out Preferred Merit Model,” in Gavel Grab blog, <http://www.gavelgrab.org/?p=4605>.

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