

THE
NEW POLITICS OF
JUDICIAL ELECTIONS in the
Great Lakes States, 2000–2008



Justice at Stake
c a m p a i g n

in collaboration with



Jesse Rutledge, Editor
Justice at Stake Campaign

About the Justice at Stake Campaign



Justice at Stake
c a m p a i g n

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

Note on Methodology

This report bears many similarities to Justice at Stake's signature series of reports about America's Supreme Court elections, "The New Politics of Judicial Elections." That series is now in its fourth edition, with a fifth scheduled following the November 2008 elections.

Those reports are a collaboration between Justice at Stake, the Brennan Center for Justice, and the National Institute on Money in State Politics. And while much of the data presented in this report is drawn from research conducted over the years by both the Brennan Center and the National Institute, this volume was prepared solely by the Justice at Stake Campaign.

Acknowledgements

For their research support and editorial assistance, the author wishes to thank Bert Brandenburg, Raheem Dawodu, Danielle Dervin, Lawrence Hansen, and members of the steering committee of Midwest Democracy Network. The publication of this report was supported by a grant from the Joyce Foundation of Chicago.

THE NEW POLITICS OF JUDICIAL ELECTIONS in the Great Lakes States, 2000–2008



Justice at Stake
c a m p a i g n

717 D Street, NW, Suite 203

Washington, D.C. 20004

Phone (202) 588-9700 • Fax (202) 588-9485

info@justiceatstake.org

www.justiceatstake.org

Jesse Rutledge, Editor

Justice at Stake Campaign

Table of Contents

Part 1

An Introduction	I
-----------------	---

Part 2

The Midwest as Ground Zero in the Battle for America’s State Courts	3
Placing the Midwest States in National Context	3
Show Me the Money: Midwest Court Candidates Among Nation’s Most Prolific Fundraisers	3
The Tort Battle is on the Air	5
Independent Groups Muscle Their Way In	9
A Delayed Win for Disclosure	10

Part 3

State Profiles	II
Illinois	12
Michigan	16
Minnesota	20
Ohio	24
Wisconsin	28

Endnotes	33
----------	----

An Introduction

This special report shows how five midwestern states—**Illinois, Michigan, Minnesota, Ohio and Wisconsin**—have become caught up in America’s “New Politics of Judicial Elections.” Between 2000 and April of 2008, four of these states have become national symbols of rising special interest pressure on state Supreme Courts, along with serious attempts at reform.

Attorneys, business interests, ideological groups and political partisans have locked themselves into an escalating arms race. Judges and justices routinely raise millions of dollars from contributors whose cases they decide. Campaign ads are designed to destroy confidence in the integrity of the candidates. Above all, special interests are working to convert judicial elections into a tool of political intimidation rather than public accountability.

This report details how these recent trends are turning the “Great Lakes” states into leading battlefields in the growing national struggle for the courts.

- Of the 22 states nationally that use contestable elections to choose members of their high courts, three of the six most expensive can be found in the Midwest (**Illinois, Ohio and Michigan**).
- More than half of all television advertisements that have appeared in state Supreme Court races since 2000 have aired in one of those three states.
- Voters in **Ohio** have been saturated with more than \$20 million in such ads, ranking the state first in the nation by a wide margin.
- The most expensive contested judicial election in American history took place in 2004 in **Illinois**, when two candidates combined to raise over \$9.3 million.
- In **Michigan**, rumors are swirling about a possible \$20 million campaign—but the real cost will probably never be known because of weak disclosure laws and the absence of a state electioneering communications law.
- At the time of this report’s publication, **Wisconsin** has just endured its second high court bloodbath in the last twelve months, with an estimated \$6.6 million spent on television advertising since March 2007.

These trends were fueled by the June 2002 U.S. Supreme Court decision in *Republican Party of Minnesota v. White*, which changed the rules for judicial elections in America. By a 5-4 vote, the Court struck down Minnesota’s “Announce Clause,” which prohibited a candidate for judicial office from “announc[ing] his or her views on disputed legal and political issues.”

The fairness and impartiality of our courts is stake. But the news is not all bad. Political and civic leaders have begun pursuing reforms designed to insulate courts from special interest pressure. In **Illinois and Wisconsin**, the state’s senate has passed proposals to publicly finance judicial elections. In **Minnesota**, an esteemed collaborative of legal and civic leaders recently proposed to overhaul how the state chooses its judges.

Leading the charge for reforms is the Midwest Democracy Network (midwestdemocracynetwork.org), an alliance of civic reform groups committed to strengthening democratic institutions in the Midwest. The Network includes state-based civic and public interest organizations as well as prominent academic institutions and respected policy and legal experts.

This report is designed to help reporters, reformers and citizens understand why impartial justice is in danger in the Midwest—and what can be done.

The Midwest as Ground Zero in the Battle for America's State Courts

Placing the Midwest States in National Context

The new politics of judicial elections as a phenomenon can be traced back to a handful of political battles in the mid-1990s in states such as Alabama, Pennsylvania, and Texas. But it was in 2000 that the astounding fundraising figures started to roll in from all over the country. Nowhere was this as marked as in the Midwest. The 1999–2000 election cycle brought record-breaking Supreme Court campaigns to all five midwestern states. Even candidates in normally tranquil Minnesota combined to raise \$528,703, the first time court races there moved past the half-million dollar mark in candidate fundraising. Wisconsin's 1999 campaign for chief justice also marked a turning point for negativity and expense.

Real battles, however, exploded in 2000 in Illinois, Michigan, and Ohio, where Supreme Court candidate fundraising combined to total more than \$18 million for nine seats. Those campaigns, featuring competing infusions of big money from business groups on one side and trial lawyers, labor unions and other left-leaning groups on the other, sent a clear message: running for the Supreme Court in the Midwest would no longer be a civil affair. The stakes were high, and special interests were opening their checkbooks.

Show Me the Money: Midwest Court Candidates Among Nation's Most Prolific Fundraisers

Between 1999 and 2007, candidates for America's highest courts have raised over \$165 million, a remarkable jump from the \$62 million raised between 1993 and 1998. Of this \$165 million national total, more than one of every three of those dollars was raised by a Supreme Court candidate from a midwestern state.

The Great Lakes states include three of the six most expensive states in the country over that time frame. Illinois ranks second at \$19.3 million; Ohio is third at \$18.7 million; and Michigan is sixth, at \$10.2 million. The \$5.2 million raised by Wisconsin candidates places it in the middle of the pack nationally (ninth), though the \$2.6 million raised by two candidates in the 2007 race and the big money flowing in 2008 indicates it may be moving up the list. None of these figures include expenditures made by third-party groups, which are discussed in greater detail later in this chapter.

Six Most Expensive States for Supreme Court Elections, 1999–2007

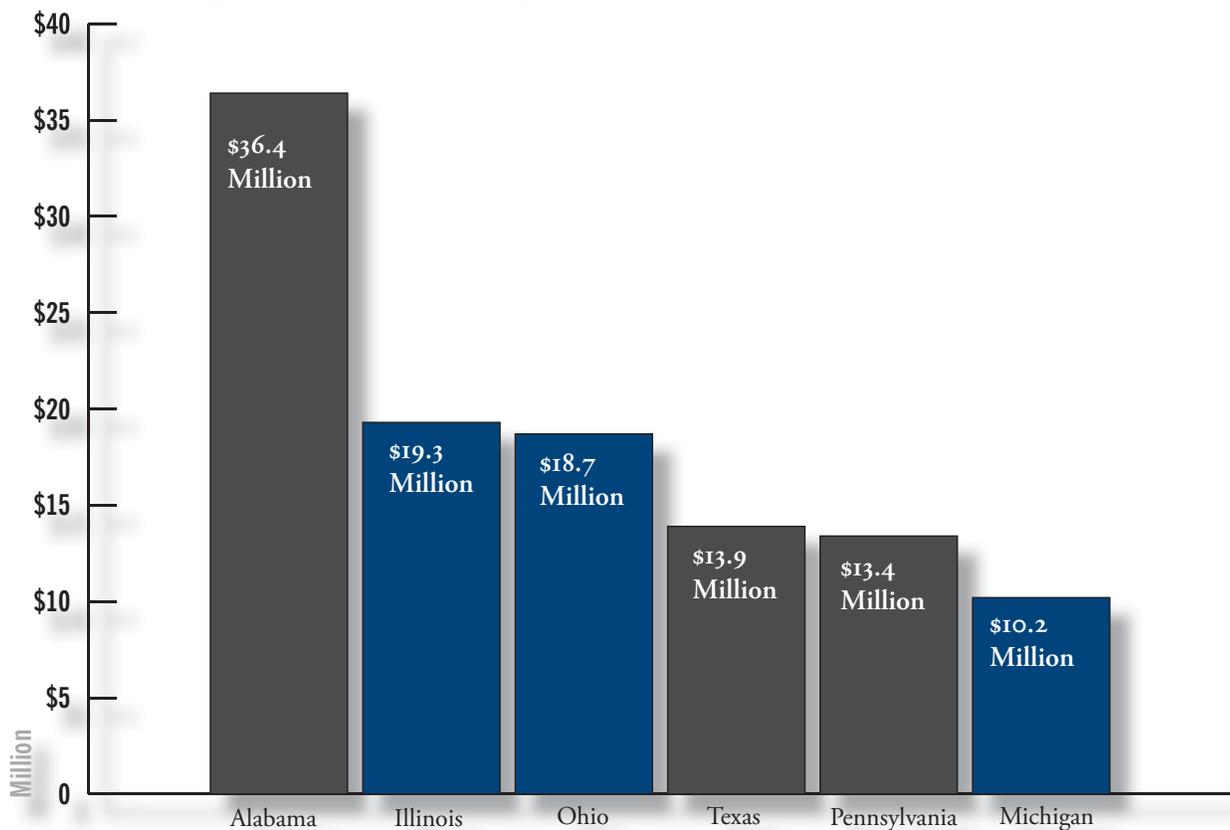


Figure A. These figures reflect total fundraising by all candidates for state Supreme Court. These figures do not include independent expenditures made by third party groups.

Minnesota is the lone Midwest state to so far have escaped the expensive new politics of judicial elections. The \$740,733 raised by candidates there between 1999 and 2007 places it 20th of 22 states; only New Mexico and North Dakota have had cheaper Supreme Court races.

The vast sums now required to run for a seat on most Midwest Supreme Courts paint a troubling picture when coupled with recent public opinion research in those states. That research—conducted across a number of different years, in a number of different Midwest states, by a number of different firms—paints a picture of an electorate greatly troubled by the role that money plays in the judicial election process.

Two January 2008 surveys of midwestern states, both commissioned by Justice at Stake but conducted by separate polling firms, underscore how troubled many voters in the midwest are by the growing demand for campaign cash to fuel heated judicial races. For instance, 78 percent of Wisconsin voters believe that campaign contributions to judges have either some or a great deal of influence on their decisions. A majority of voters in Minnesota—where campaign fundraising has been dramatically lower—

agrees. These surveys (and others in Ohio, Illinois and Michigan) illustrate that the public believes that such conflicts are highly problematic. Fundraising of this scale damages public trust in the courts, and the courts have little to rely on if public confidence is eroded.

The Tort Battle Is on the Air

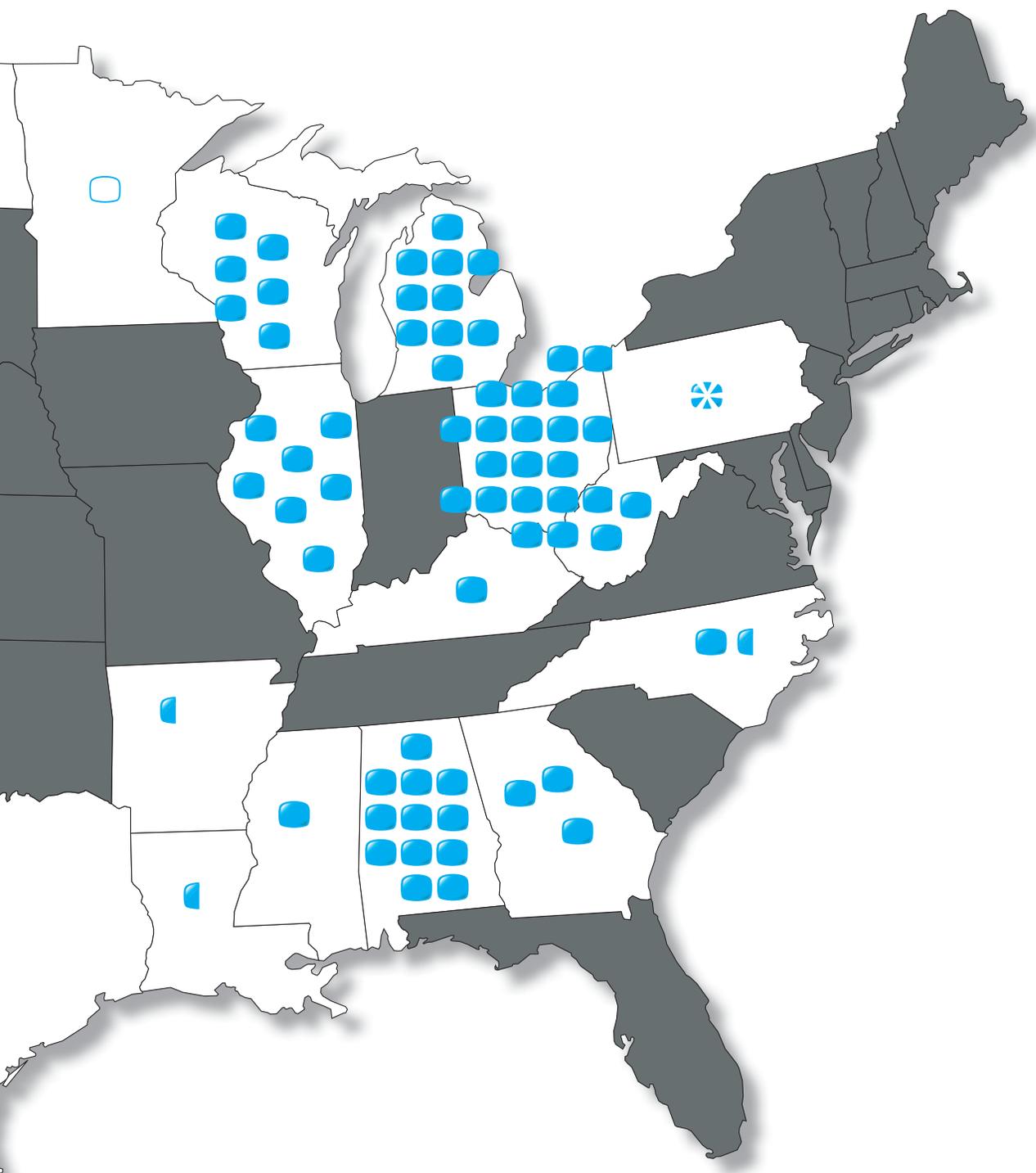
With the rise of high dollar, big-time campaigns for judicial races has come a newfound dependence on television advertising to sway voters for, and against, particular candidates. Since the 1999–2000 cycle, voters in 20 of the 22 states with contestable high court races have been exposed to expensive broadcast network television advertising in Supreme Court campaigns. Three of the four states with the most aired spots come from the Midwest (Ohio, Illinois and Michigan). Minnesota retains the unique position of being only one of two states never to have seen TV advertising of this nature (North Dakota is the other).

Midwestern states account for more than half of all Supreme Court television ads aired between 1999 and 2006 (62,826 of 121,646). Put differently, even though Illinois, Michigan or Ohio account for fewer than one-third of the nation’s population that might ever see a Supreme Court election ad, more than half (52 percent) of all 2000–2006 ads ran in one of those three states. And while the Midwest generally sees more TV ads than any other part of the country, such advertising is fairly concentrated in Ohio, which accounts for 68 percent of the high court TV ads aired

Number of Television Ad Airings by State and Election Cycle, 2000–2006

	IL	MI	MN	OH	WI	Total
2000	0	5,763	0	11,907	*	17,670
2002	1,473	1,030	0	13,105	*	15,608
2004	7,500	1,512	0	14,139	*	23,151
2006	N/A	634	U	5,763	*	6,397
Total	8,973	8,939	0	44,914	*	62,826

Figure B. A U indicates an uncontested election. N/A indicates there were no open judicial seats. Data is not available for Wisconsin, though TV ads did appear in both the 2007 and 2008 elections (see Figure D for cost estimates of television advertising in those elections).



Estimated Cost of Television Advertising, 2000–2008* Supreme Court Elections

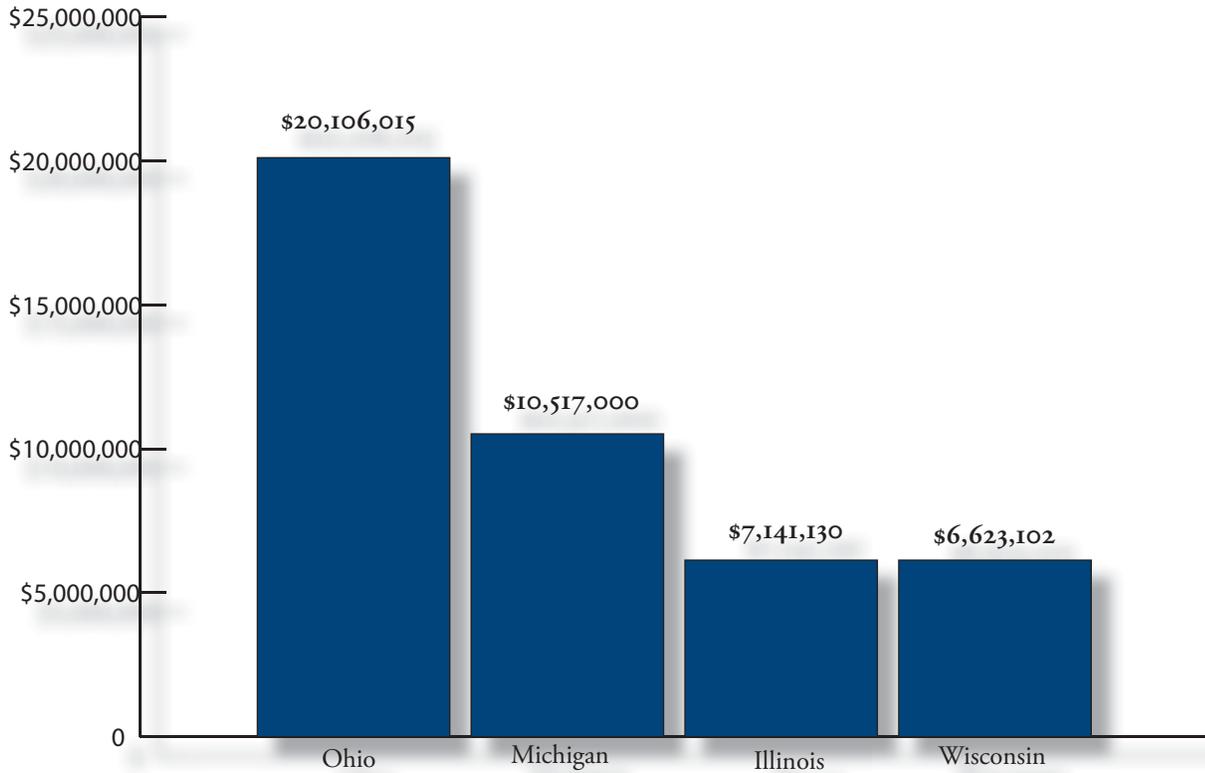


Figure D. These figures are estimates of spending on television airtime in Supreme Court elections between 2000 and April 2008, and do not include production or other costs associated with airing television commercials. Estimates are sourced as follows: For Michigan, estimates provided by Michigan Campaign Finance Network; for Ohio and Illinois, estimates are provided by TNS-Media Intelligence; for Wisconsin, estimates for the 2007 campaign are provided by the Wisconsin Democracy Campaign and for the 2008 campaign by TNS-Media Intelligence.

in the band of five Midwest states. In fact, viewers in Ohio have seen more television ads since 2000—39,151—than in the three next most saturated states combined (Alabama, Illinois and Michigan).

Proponents of these ads argue that voters benefit when they are exposed to more campaign speech. It's questionable, however, whether the sort of information conveyed in the vast majority of these 30-second sound bite ads are providing the sort of information that will actually assist the average voter make an informed choice.

Public opinion research from Wisconsin may indicate that such ads are not living up to their defender's claims. Even though the state's 2007 Supreme Court election featured well over \$3 million in broadcast television advertisements, a January 2008

poll nonetheless found that 43 percent of voters reported having just a little or no information about the candidates the last time they voted in a judicial race. Indeed, many of the television ads in the 2007 Clifford-Ziegler campaign in Wisconsin focused on personal attacks, and featured little about each candidate's qualifications and experience.

Independent Groups Muscle Their Way In

The rise of television advertising in high court races in the Midwest is in fact a symptom of a broader political trend: the growth of campaigns dominated by surrogates from political parties or by third-party independent groups. Calculating the work of such groups can be difficult in some of the midwestern states because of weak disclosure laws, especially in Michigan and Wisconsin. However, estimates of spending on airtime to purchase television advertisements—almost always the largest expense involved in such efforts—provide some insight into the growing scope of such activity.

Between 1999–2006, non-candidate sponsored television advertising totaled an estimated \$27,320,418 in Illinois, Michigan, Ohio and Wisconsin (includes independent campaigns and ads by political parties).

Almost all of the money underwriting these immense media buys comes either from business interests or trial lawyers. In some cases, these groups come with mom-and-apple pie brand names, such as the Partnership for Ohio's Future (a business group) or Justice for All (a trial lawyer front group in Illinois). Just as often the groups don't even bother trying to conceal the interest behind the advertising, as with the Greater Wisconsin Manufacturers Association's successful campaign to help elect Judge Annette Ziegler in 2007.

Third-party independent expenditure efforts are a growing force in American politics. There is no reason to expect these groups won't play to win in court races, just as they do in Congressional campaigns or in supporting local legislative leaders. Voters in the Midwest do, however, have the right to know who is financing these efforts, and the degree of disclosure varies widely across the five states. (Disclosure issues are addressed on a state-by-state basis in the third part of this report.)

A Delayed Win for Disclosure

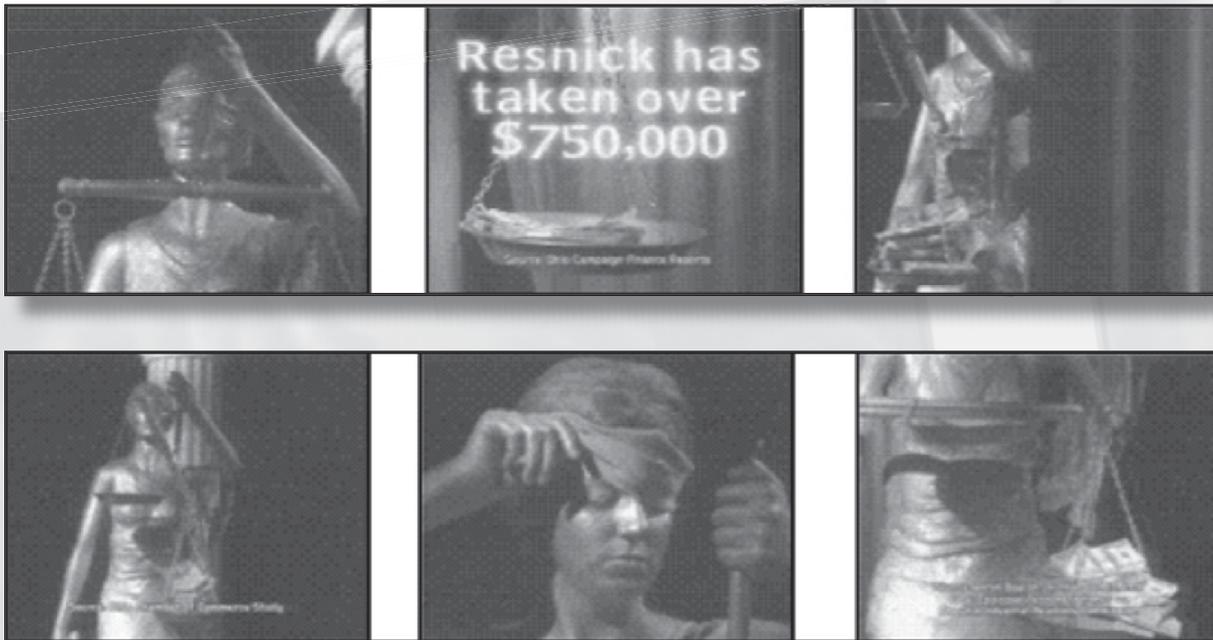


Figure E. Citizens for a Strong Ohio, television advertisement against Justice Alice Robie Resnick, Ohio 2000.

The ad features the classic image of a blindfolded Lady Justice holding scales, indicating balance and fairness. In the TV ad the blindfold is lifted, and by implication justice is sold. But it was Ohio voters who were kept in the dark for years about the financial backers of a multi-million dollar campaign—ultimately unsuccessful—to defeat Justice Alice Robie Resnick of the Ohio Supreme Court in the 2000 elections.

Resnick became the target because she authored a 1999 high court decision overturning tort reform. The ad—and the drama surrounding the public’s right to know who paid for it—neatly encapsulates how the tort liability tug of war has played out in state Supreme Court elections.

The group running the ads, later unmasked as the Ohio Chamber of Commerce and its various allies from the business community, refused to release the name of its donors, arguing that the spots were “issue ads” and thus exempt from disclosure. A complaint filed by the Alliance for Democracy and Common Cause/Ohio took years to wind its way through the Ohio Elections Commission and various courts of appeal. It was not until January 2005—more than four years after the ads saturated the Ohio airwaves—that the corporate underwriters of the advertising campaign were publicly identified.

Corporate Directors Behind Disclosure

According to a 2008 poll for the Center for Political Accountability, 88 percent of corporate directors surveyed agree with the statement that “Corporations should be required to publicly disclose all corporate funds used for political purposes.”

State Profiles

Noisy and Nasty Campaigns Plague Midwest, While Reform Stalls

Four of the five states profiled in this section serve as models for how not to conduct judicial elections. To date, only Minnesota has escaped the full-frontal assault of the new politics of judicial elections, while Illinois, Michigan, Ohio and Wisconsin have all been beset by an onslaught of big money and negative television ads injected by powerful special interests from across the political spectrum. Those groups flex their muscles with campaign cash, or million-dollar independent expenditure campaigns for their candidate of choice (or, increasingly, against an incumbent they dislike and would be happy to see ushered out the courthouse door).

Uniformly weak—sometimes virtually nonexistent (or unenforced)—campaign finance laws are another shared characteristic of these midwestern states. In most of these states, loopholes have been easily exploited by powerful interest groups.

Opportunities to address such weaknesses exist across all five of these midwestern states; in some, like Ohio, the best hope may lie with the powerful administrative capacity of the state Supreme Court itself; in others, the state legislature will need to be the locus of reform for judicial elections. In Minnesota, a major policy review commission has suggested replacing contested elections with retention elections, though prospects for such a major reform appear unlikely in 2008. Public financing has received an increasing amount of consideration in Michigan, and has passed the state Senate in both Illinois and Wisconsin in the recent past.



Illinois

A recent analysis of judicial elections in Illinois summed up the current state of affairs this way:

Fueled by huge interest group contributions, increased partisanship, ideological considerations and hot button issues (such as tort reform), recent judicial elections in Illinois, especially at the appellate level, have become distressingly expensive, partisan and uncivil—a trend which, left unchecked, has the potential of permanently undermining the independence of the judiciary.¹

In part two, we outlined evidence bolstering this sort of stinging indictment, and indicating that Illinois ranks near the head of the class in both of the major data points—campaign fundraising and television advertising—across the five midwestern states. This fact is even more remarkable because it is the only of the five midwestern states that does not use statewide elections to choose members of its high court; it uses geographic districts, and each district contains only a fraction of the total population of the state. It is, however, the only state of the five that uses an unapologetically partisan system. Candidates for the state’s top court run in traditional partisan primaries, and are identified by party label on the general election ballot.² Illinois is also the only midwestern state without contribution limits to judicial candidates.

The Shockwaves of 2004

Like Ohio, 2000 was a record-setting year for campaigns for the Illinois Supreme Court, when candidates combined to raise nearly \$8 million for two open seats. A 2002 campaign was relatively quieter, not quite topping the \$2 million mark. All of this was a prelude to the looming battle of 2004 in the state’s fifth judicial district. Anchored by Madison County, a jurisdiction that earned a national reputation for large tort awards (including a \$10.1 billion award against tobacco giant Philip Morris), this working-class southern swath of Illinois would become the site of a no-holds-barred “battle royale” between business groups and trial lawyers. And while it was not a “balance of the court” race that would tip the overall judicial philosophy of the Illinois Supreme Court, the considerable power accorded the district representative on the state Supreme Court to fill lower court vacancies turned this election into a must-win for both sides of the civil justice debate.

By November 2, 2004, this one race—theoretically run by two candidates, though obviously dominated by the two major political parties and their third-party surrogates—had set a fundraising record for a single state Supreme Court campaign, with the two candidates raising more than \$9.3 million. By contrast, this down-ballot race in a rural district attracted more money than did 18 of the 34 United States Senate races decided that day.³

The major players brought their checkbooks. Trial lawyers wrote six-figure checks to the Democratic Party of Illinois, which contributed about \$2.8 million to the campaign of Judge Gordon Maag. Maag received over \$1.2 million from the Justice for All PAC, an ad hoc coalition of trial lawyers and labor leaders. The U.S. Chamber of Commerce sent \$2.3 million to Judge Lloyd Karmeier's campaign through the Illinois Republican Party, the Illinois Chamber of Commerce and JUSTPAC, the political arm of the Illinois Civil Justice League, which also received \$415,000 from the American Tort Reform Association.

After the results were in, even the winner expressed contempt for the expense of the process. "That's obscene for a judicial race," Justice Karmeier said on the eve of his election, referring to the six-figure checks that poured into both sides of the campaign. "What does it gain people? How can people have faith in the system?"⁴

Maag-Karmeier: The Aftermath

In a survey of Illinois voters conducted shortly after the Maag-Karmeier battle, with its national record spending and saturation of airwaves, a large majority of fifth district residents—77 percent—said the \$9.3 million price tag was too high; 87 percent expressed support for limits on contributions to judicial candidates.⁵

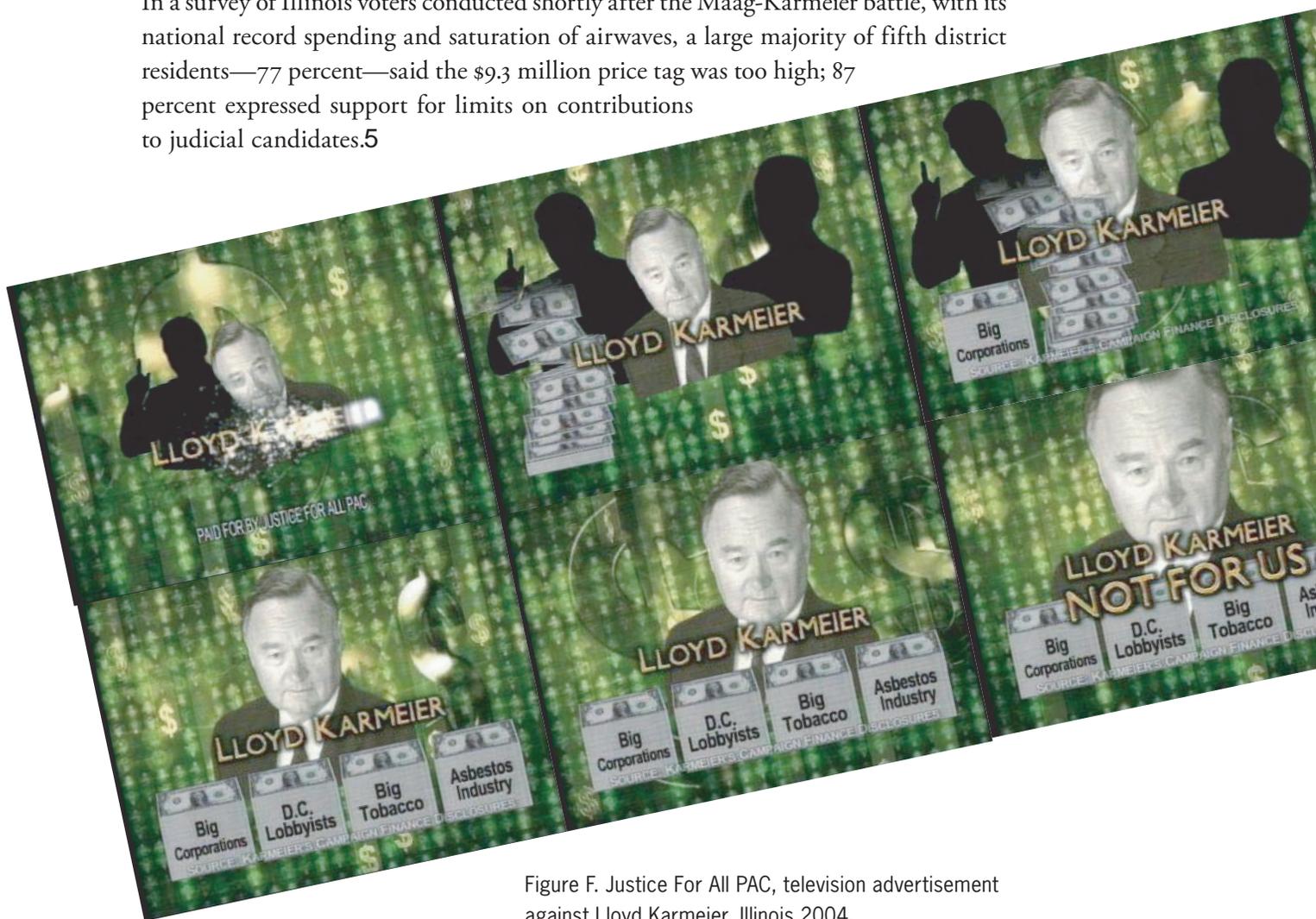


Figure F. Justice for All PAC, television advertisement against Lloyd Karmeier, Illinois 2004.

In spite of the massive spending, only about half of the residents of the election district polled said they felt qualified to decide who should be elected, and nearly 80 percent said they had not received enough useful information about the two candidates. This survey result counteracts the argument that the bigger the war chests the better informed the electorate invariably is.

Public confidence in the courts is hurt not only by the major sums “invested” in candidate campaigns for the bench, but also by the appearance that there are returns being yielded for such investments. It is perhaps this fact even more than the record spending that makes the Maag-Karmeier case so illustrative. In May 2003, the Illinois Supreme Court had heard arguments in the case of *Avery v. State Farm*, and the outcome of the case was pending throughout the 2004 campaign. As noted above, contributions from both sides poured in, with Maag receiving millions from plaintiffs’ attorneys funneled through the Illinois Democratic Party, and Karmeier receiving more than \$2 million from the U.S. Chamber of Commerce and more than \$350,000 in direct contributions from employees of State Farm. Newly elected, Justice Karmeier refused to disqualify himself from the pending *Avery* case, and eventually voted to overturn the verdict against State Farm.

As other observers of the national impact (or rather decrying the lack thereof) of the *Avery* case have noted: “Was Justice Karmeier’s decision unbiased? Very possibly, yes, but we will never know. Overshadowing the merits of his decision is a single fact: without Karmeier’s vote, State Farm would have faced further proceeding on claims valued at up to \$456 million. That result is either a coincidence or an impressive rate of return on State Farm’s investment. Because we cannot know which it is, public trust in the courts invariably suffers.”⁶

Four years after the record-setting election, in spite of the deepening crisis of faith identified by the victor himself on election night and exacerbated by rulings on cases involving major contributors, few protections have been enacted to ensure that such an expensive campaign could not recur, or that another *Avery* isn’t lurking around the corner.

It’s hard not to draw such a conclusion given the new reality of money in Illinois judicial elections. In 2007, Justice Anne Burke reported raising \$1.7 million for her 2008 re-election campaign. The money served its apparent purpose: challengers were dissuaded from filing, and Justice Burke returned much of the money when it became apparent she did not have an opponent.⁷

Modest Reforms Approved, Major Obstacles Ahead

Campaign finance law in Illinois is notoriously weak, and reforms to the campaign system, for judicial elections or otherwise, face major political obstacles at every turn. With that said, it is critical to recognize that the state's 2003 adoption of a "Mini-BCRA" law—mandating disclosure of the financial underwriters of candidate-focused advertising—was a significant step in the right direction, though groups immediately began to seek loopholes to avoid such disclosure.

Other modest reforms have made some progress or at least paid lip service. The state adopted an online voter guide for candidates for state office in 2006 which will include profiles of Supreme Court candidates. Regrettably, the guide does not include down-ballot judges; for the time being this information vacuum is being filled on an ad hoc basis by a number of civic groups. Additionally, legislation that would enact limits on contributions to judicial candidates has picked up some favorable "buzz" in Springfield, though legislation has yet to show any real signs of movement.

Reformers in Illinois see a major change in the system of judicial selection as the only way that judicial elections can be reigned in from their present day excesses. Two major policy proposals to do this include creating a system of voluntary public financing, or replacing contested elections for appellate courts with a system of commission-based merit selection with retention elections. Moving away from contested elections would require a constitutional amendment, and recent public opinion studies in Illinois indicate that the public strongly supports voting for judges, making ratification of such a proposal unlikely and thus politically unsupportable for many in the Illinois legislature.

Illinois law requires that voters be presented with the option of opening a Constitutional Convention every 20 years, and that option will be put to voters in November 2008. If voters elect to open the Illinois Constitution to reform, changes to judicial selection should be seriously considered.





Michigan

Candidate-Focused Issue Ads Dominate Campaigns

In the new politics of judicial elections, it is not unusual for independent groups to come and go, dominating in one election cycle and then turning their attention to a different state. But in Michigan, independent groups are evolving into the long-term surrogates for incumbents and challengers. In 2006, Justice Maura Corrigan received more on-air advertising support from third party groups than she raised for her own re-election coffers. In 2004, five candidates raised slightly over \$1.6 million, while independent groups spent \$1.8 million on TV advertising. As Figure G indicates, since 2002 there has been a steady trend upward in the share of the total advertising spots paid for by outside groups.

Percentage of Television Advertising Spots Sponsored By Independent Groups in Michigan Supreme Court Elections, 2002–2006

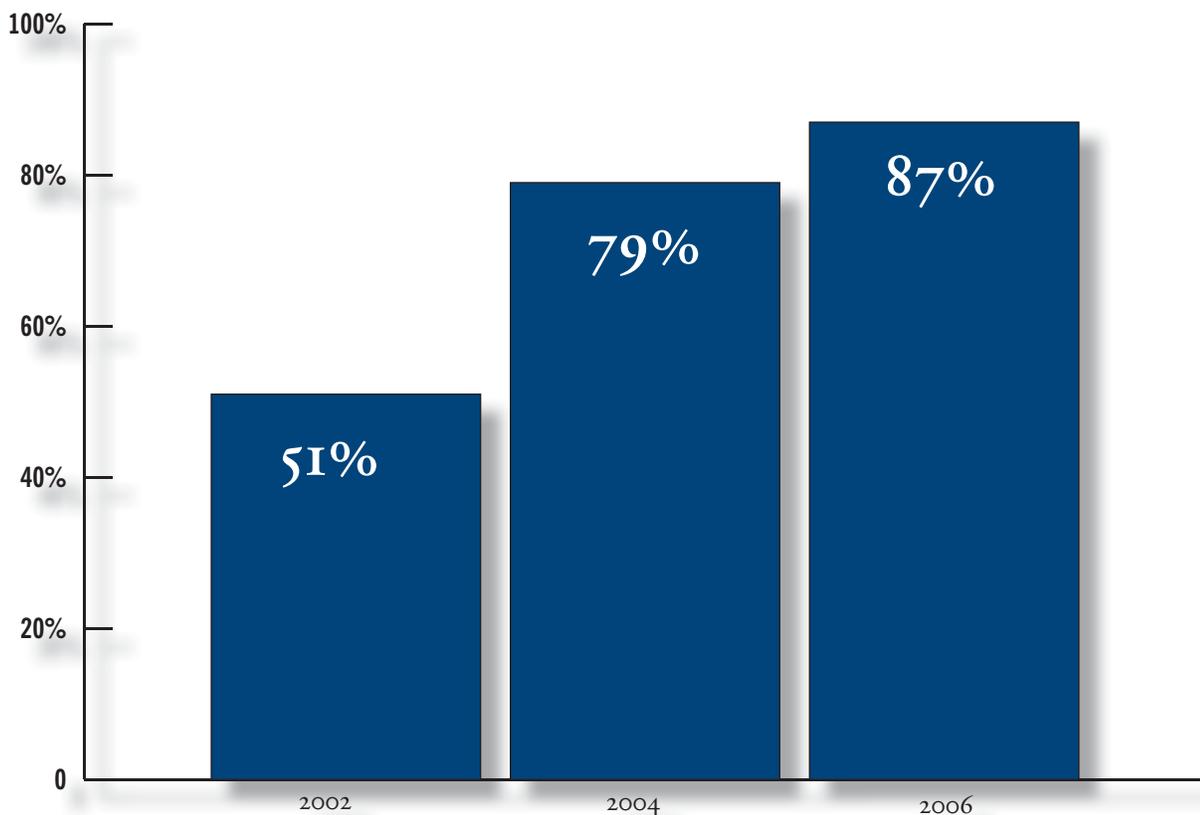


Figure G. Data for this chart is supplied by TNS-Media Intelligence and includes spot counts of advertising paid for by independent groups in Michigan's Supreme Court races between 2002 and 2006.

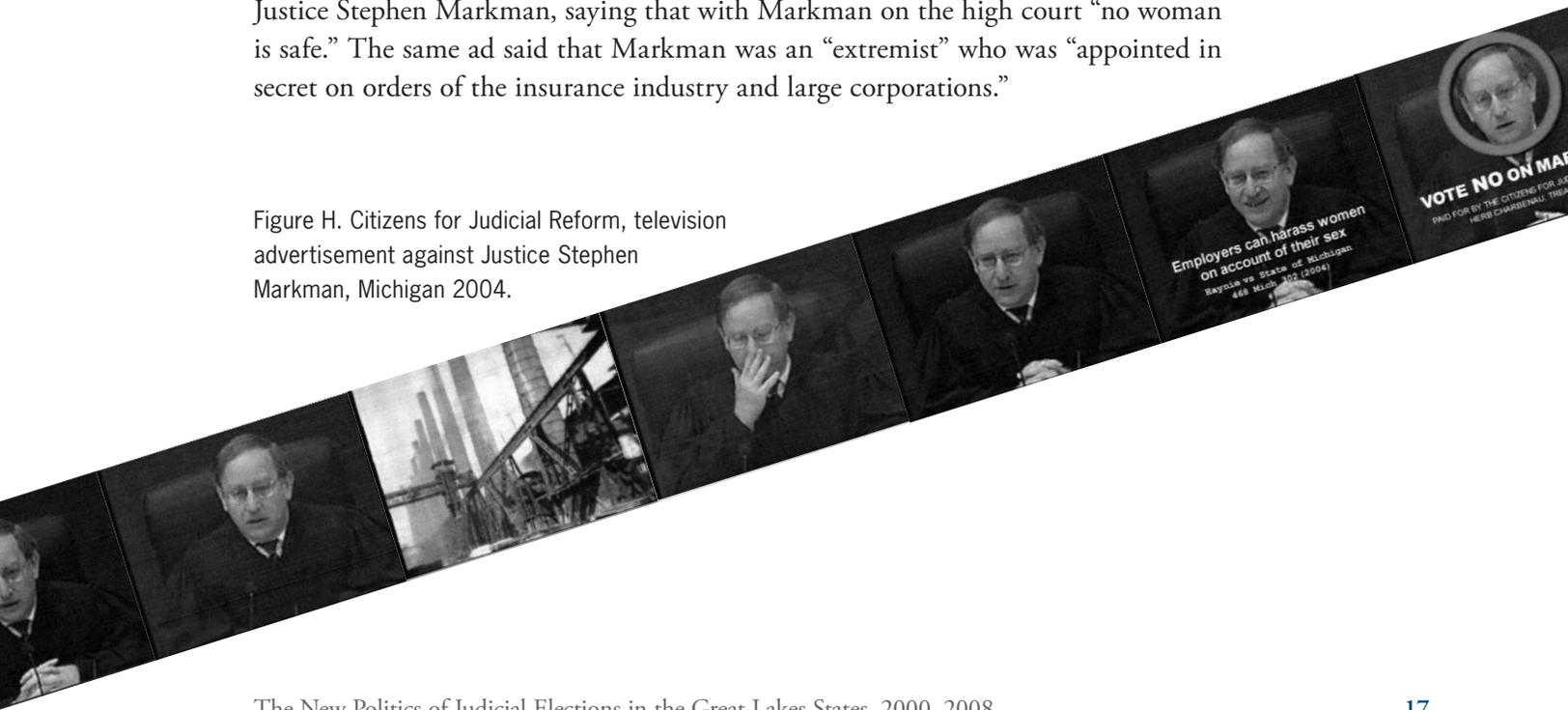


A study by the National Institute on Money in State Politics found that 86 percent of the cases heard by the Michigan Supreme Court in the 1990s involved at least one contributor to at least one justice.

Unlike Illinois and Ohio, but like Wisconsin, Michigan has no disclosure requirements for groups that run so-called “issue” advertisements, even if those ads mention candidates and are run in the period immediately before an election. Other than their benign-sounding names, very little is known about who is underwriting these ads. Stealth TV campaigns amplify the public’s fear that courts are becoming political footballs to be tossed around by well-heeled special interests. This cheapens the judiciary in the eyes of voters, most of whom already fear that campaign cash affects courtroom decisions.

Political operatives and special interests are also more likely to poison the tone of judicial campaigns. In 2004, a group called “Citizens for Judicial Reform”—later revealed to be a front group for trial attorney Geoffrey Fieger—attacked incumbent Justice Stephen Markman, saying that with Markman on the high court “no woman is safe.” The same ad said that Markman was an “extremist” who was “appointed in secret on orders of the insurance industry and large corporations.”

Figure H. Citizens for Judicial Reform, television advertisement against Justice Stephen Markman, Michigan 2004.



Recusal

Though Ohio has received more national media coverage for the conflicts of interest that abound between the justices of its Supreme Court and their contributors, such conflicts have also been front and center in Michigan, and the subject of multiple hearings in the House Judiciary Committee. This serves to reinforce the weakness of current recusal standards across the Great Lakes states.

Public trust in the courts suffers when judges categorically refuse, with little or no explanation, to recuse themselves from cases involving campaign contributors. Michigan has not yet updated its model code of judicial conduct to adjust to the new reality that Supreme Court campaigns cost millions of dollars, where big-time contributors and supporters frequently appear in court. Meanwhile, the Michigan Supreme Court has drawn national media attention for its internal partisanship and bickering.⁸

The 2008 Campaign: Another Watershed?

At press time, Michigan was awash with speculation that its 2008 Supreme Court campaign could be its most expensive and contentious ever. The lone incumbent on the ballot will be Chief Justice Clifford Taylor. The Democratic Party won't choose its nominee until their fall convention. But the lack of a nominee won't necessarily slow down outside attack ads.

Both Chief Justice Taylor and the chair of the Michigan Democratic Party have thrown around \$20 million as a potential cost of the race. That would be more than twice the national record, set in Illinois in 2004.

Rich Robinson, the executive director of the Michigan Campaign Finance Network, summed up the situation in testimony to the Michigan legislature:

“To borrow from Chief Justice John Roberts’ baseball analogy where he characterizes judges as the umpires of society: If one team pays to hire the umpire, can the umpire be expected to call balls and strikes fairly and impartially when that team comes to bat? Do we suppose that this would be agreeable to the opposing team? Would spectators and future players think that this was a fair practice?”⁹

Can Public Financing Help Michigan?

If the Michigan Supreme Court will not take action to implement a thoroughgoing recusal policy, the legislature of the state could help improve public confidence in the judiciary by establishing a voluntary system of public funding for qualified candidates, similar to that in place in North Carolina and New Mexico, and under serious consideration in Wisconsin.

A coalition called The Michigan Independent Supreme Court Campaign (MISCC) has been formed to build grassroots support for reforming the state's high court races. The group has collected over 1,000 signatures from supporters in the Grand Traverse area alone. "It was very easy to collect these petition signatures," Anne Magoun, MISCC spokesperson and past-president of the League of Women Voters of Michigan said in a media statement. "When you explain the problem and the alternative we're supporting, it has natural appeal to citizens' values. People understand the potential for conflicts of interest when the justices' campaign supporters are involved in the Court's cases. The judiciary is different from the other branches of government. Public confidence in its impartiality means everything, and the mere appearance of a conflict has a corrosive effect."

"The current system does make it look like the justices are up for sale. I hope people will buy into the need for change."

—*Michigan Supreme Court Justice Maura Corrigan*¹⁰

Short of public financing, Michigan should seriously consider an electioneering communications law that will pull the curtain back on those actors intent on running million-dollar candidate-focused "issue" advertising campaigns, so that voters in Michigan are properly informed of the interests of those seeking to influence judicial elections.





Minnesota

Minnesota has watched as the new politics of judicial elections has plagued nearly all of its neighbors, but has not seeped across the borders into the Land of 10,000 Lakes—yet.

Ironically, the state that brought the rest of the nation *Republican Party of Minnesota v. White*, the U.S. Supreme Court case that has reshaped the politics of judicial elections nationwide, has largely remained above the fray.

Most members of the Minnesota judiciary initially reach the bench through an interim appointment, and the state has a political culture that has resulted in relatively few direct challenges to incumbents. Open seat elections, often the most expensive and contentious races in judicial politics, are also rare in Minnesota. In 2003, 91 percent of Minnesota's judges were initially appointed; in 2004 nearly 80 percent of Minnesota's judicial elections were uncontested.¹¹

The results? Many of the negative side effects besetting judicial elections elsewhere have yet to materialize in Minnesota.

Unlike Illinois, where candidates for the state high court routinely raise millions of dollars to fight election campaigns, no candidate for the Minnesota high court has ever raised more than \$250,000.

Unlike in Michigan and Wisconsin, special interest groups have so far been content to sit on the sidelines in Minnesota.

And unlike Ohio, television advertising has not proved the dominant political force in shaping the outcome of judicial campaigns. In fact, as of this writing in early 2008, Minnesota remains only one of two states that use contestable elections to choose top judges that has never seen a broadcast television advertisement.

So is Minnesota fundamentally different than its Great Lakes brethren? Or has it just been lucky? Many leading Minnesotans aren't wasting time on that largely academic question and instead have taken two major steps to protect public trust in the state court system. First, Minnesota was one of the first states to overhaul its Code of Judicial Conduct in the wake of the American Bar Association's revamped model code.¹² Second, even absent the nastiness now legendary in other midwestern states, Minnesota legal and civic leaders launched a preemptive effort to reform the state's judicial elections.

“The plan’s wisdom is evident in its simplicity. . . . The independence of Minnesota’s judiciary is one of the state’s uncounted blessings. It will be missed once it’s gone. The Quie Commission—empowered only by its own good sense—can preserve the gift.”

—*Minneapolis Star Tribune*, March 6, 2007

The Quie Commission

In February of 2006, former Minnesota Governor Al Quie convened a special task force that was charged with studying alternatives to the present judicial selection system, which many believed was susceptible to many of the same problems seen in other states.

After over a year of hearings, testimony and internal debates, the Quie Commission offered its findings to the public in February of 2007. While commission members were in near universal agreement on the need for reform, there was a split in opinion when it came to how best to protect Minnesota courts.¹³

Majority Report: A majority of members signed on to a series of recommendations aimed at restructuring how the state balanced independence with accountability. The majority report proposed instituting a system of “merit selection” to screen candidates for judicial office, with the governor making a final choice from a list of three candidates delivered by the panel. After a set term, the judge would then be evaluated by a performance evaluation commission, which would be comprised of both lawyers and non-lawyers. The results of each evaluation would be made available to the public; in fact, the evaluation commission’s key finding—whether the judge should or should not remain in office—would appear on the retention election ballot when the judge faced the voters for a retention election. Terms for judges would also be lengthened from six to eight years, to reduce the frequency of judicial elections.

Minority Report: Dissenters largely embraced the fundamental findings of the majority, but with one vital exception. Those in the minority suggested that the performance evaluation commission—not the voters—be granted the final say on whether the judge would serve a subsequent term.



Figure 1.
Former
Minnesota
Governor
Al Quie

The Pulse of Minnesota Voters— “Reform is Good, But Keep Voters in the Equation”

With dueling ideas for how best to maintain the fairness and impartiality of Minnesota’s courts, Justice at Stake commissioned Decision Resources of Minneapolis to conduct a major survey of Minnesota voters in early January 2008.¹⁴In essence, the question was: which way forward?

Survey findings painted a stark picture of which option was likely to receive voter endorsement in the constitutional amendment process. The survey asked voters to choose between keeping the status quo of contested judicial elections, or whether they would favor one of the two Quie Commission proposals. Support for the majority report—keeping voters in the mix by maintaining direct accountability to voters in the form of a retention election—was far and away the highest. The survey found little stomach for the risks associated with the status quo, nor for the major shift away from elections entirely.

Also in early 2008, a group called Minnesotans for Impartial Courts began to push for a constitutional amendment in the state legislature. Arguing that the clock was ticking—the new politics of judicial elections that have swept the Midwest and much of the rest of the country couldn’t be held in abeyance forever—the advocates began a public campaign to urge the legislature to adopt the Quie Commission’s majority report recommendations, and to put the issue before Minnesota voters in November 2008.

Supporters in the legislature moved the constitutional amendment out of one committee in both the House and the Senate, but the measure quickly stalled in the Judiciary committees of both chambers. At press time for this report, it appeared that Minnesota voters would not be presented in 2008 with an opportunity to vote for or against this fundamental shift in how the state’s judges are chosen.

Simultaneous to the demise of the reform proposal in the legislature came the retirement of Chief Justice Russell Anderson. Chief Justice Anderson was scheduled to stand for election in 2008, but elected to stand aside. In an interview with a newspaper columnist following his announcement, he said: “If big spending on judicial races doesn’t come to Minnesota in this election cycle, it will soon. When it gets here, it’s going to be very difficult to change.”¹⁵

Minnesota Voter Attitudes by the Numbers

22: Percent who believe the Minnesota judiciary is free from special interest influence

59: Percent who believe that campaign contributions have “some” or “a great deal” of influence on decisions in the courtroom

93: Percent who support allowing the public to vote on whether judges should be retained in office





The (Multi) Million-Dollar Ohio Supreme Court

The Ohio Supreme Court consists of seven members, all of whom are elected on a statewide basis in officially “nonpartisan” elections. (But nominees are chosen in party primaries, so party labels and party politics are quite important). Since 2000, candidates for the Ohio Supreme Court have raised \$18.7 million.

In their most recent election or re-election campaigns, six of the seven members of the court raised at least \$1 million (Justice Pfeifer is the lone exception to the million-dollar rule because he ran without opposition). The justices have out-raised all challengers, making fundraising prowess a sure predictor of victory at the polls.

Money is the mother’s milk of Ohio judicial politics for several reasons: The state is one of the nation’s largest, spanning five major (and expensive) media markets and driving up the cost of statewide campaigns. It has become a perennial battleground in presidential politics, further placing a premium on creating television advertising that can “cut through.” Ohio has also seen the emergence of independent groups, especially on the business side, that view Supreme Court elections as an extension of their campaigns for political influence (this was a lesson that clearly informed business-led efforts to oust Justice Alice Robie Resnick in 2000; see page 10).

According to a 2002 survey by the League of Women Voters of Ohio, 83 percent of Ohio voters think that campaign contributions influence judicial decisions.

A recent analysis by Ohio Citizen Action illustrates the immense financial resources being brought to bear in Ohio Supreme Court campaigns by a number of sectors of the economy. The analysis—which looked only at donations to the incumbents, not to their vanquished challengers—found that since 2000 members of the court have received over \$5 million in campaign contributions from four sectors: lawyers (\$2,262,533), insurance (\$1,784,668), manufacturing (\$933,829), and labor unions (\$45,900).¹⁶

Interest Groups and Television Advertising

Pity the average Ohio television viewer: In addition to the crush of presidential, congressional and state legislative political advertising, since 2000 Ohio television stations have aired more Supreme Court campaign ads than any other state. It is the only state that has seen at least 5,000 judicial broadcast spots in each of the last four cycles (and over 10,000 spots per cycle in 2000, 2002 and 2004). The ads come

All the News
That's Fit to Print"

The New York Times

VOL. CLVI. No. 53,719

Copyright © 2006 The New York Times

NEW YORK

Late Edition
Today: Morning showers,
high 68. Tonight, clearing,
low 48. Tomorrow, mostly sunny,
high 68, low 48. Yesterday, high 66,
low 48. See Page 35.

\$3.50

Campaign Cash Mirrors a High Court's Rulings

By ADAM LIPTAK
and JANET ROBERTS

TILTING THE SCALES?
The Ohio Experience

COLUMBUS, Ohio — In the fall of 2004, Terrence O'Donnell, an affable judge with the placid good looks of a small-market news anchor, was running hard to keep his seat on the Ohio Supreme Court. He was also considering two important class-action lawsuits that had been argued many months before.

In the weeks before the election, Justice O'Donnell's campaign accepted thousands of dollars from the political action committees of three companies that were defendants in the suits. Two of the deals dealt with defective cars, and one involved a toxic substance. Weeks after winning his race, Justice O'Donnell joined majorities that handed the three companies significant victories.

Justice O'Donnell's conduct was unexceptional. In one of the cases,

"An examination of the Ohio Supreme Court by *The New York Times* found that its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time."

An examination of the Ohio Supreme Court by *The New York*

Times found that its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time. The justices almost never disqualified themselves in interest conflicts. They received themselves just 9 times. "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race," said Justice Paul E.

Continued on Page 22

Criticized for its slow response

from every possible source: the candidates themselves, political parties, and huge independent expenditure campaigns by special interest groups seeking to tilt the outcome of Supreme Court elections.

Prior to the 2006 races, there was little in the way of transparency. Election law changes after the 2004 campaigns made air wars a little more transparent by demanding more thorough disclosure of electioneering television ads. But they have had little impact on the steady growth of 30-second ads run during local newscasts. In 2006, the Partnership for Ohio's Future—which shared a mailing address and key overlapping staff members with the Ohio Chamber of Commerce—spent about \$1.3 million on television airtime supporting its two preferred candidates for the court. In 2004, third-party groups spent over \$2 million; in 2002, \$1.6 million; and in the 2000 races, such groups were estimated to have spent at least \$2.7 million.

Figure J.
Copyright
© 2006 by
The New York
Times Co.
Reprinted with
permission.

The Ohio Supreme Court and Judicial Reform

Ohio's Chief Justice, Thomas J. Moyer, is the longest-serving state chief justice in the nation, having assumed that position in 1987 (Moyer serves on Justice at Stake's board of directors). As administrative head of one of the nation's most important Supreme Courts, Chief Justice Moyer is uniquely positioned to help advance the public dialogue about judicial selection issues in Ohio. This is bolstered by the strong role that the Ohio Supreme Court has in setting judicial conduct and campaign finance rules for all state judges.¹⁷

Chief Justice Moyer has been critical of the existing process of judicial selection in Ohio, while at the same time playing within the existing rules of the road (he raised over \$1.5 million for his re-election campaign in 2004). In the state, he has been a vocal proponent of abandoning contestable elections in favor of a merit selection system. As he told the *New York Times*, "In a perfect world you would have justices being selected not based on the amount of money their campaign committees can raise from various interests, but on their character and record—and somewhat on



judicial philosophy, certainly, but in a more abstract way." Chief Justice Moyer has also favored other reforms, and in 2008 he published a column supporting a letter signed by every member of the Wisconsin Supreme Court that urged their state to adopt public financing.

The Ohio Supreme Court's unique administrative powers give it leadership potential enjoyed by few other state courts. In 2003, Chief Justice Moyer helped assemble a commission, "The Next Steps," to consider reforms. The Commission brought together a very broad range of stakeholders, convened hearings, and produced a series

of recommendations through its working groups. But, as astute observers of Ohio politics recently noted, “this well-intentioned effort quietly expired before producing anything of significant value, owing to a lack of support among lawmakers and the legal establishment.”¹⁸

Early in 2008, the Ohio Supreme Court began new efforts to improve public confidence in Ohio’s courts. A task force will soon release suggestions on how to update Ohio’s code of judicial conduct, a worthy goal given the unflattering coverage in the *New York Times*. As part of this effort, the Ohio Supreme Court is also reportedly studying how best to handle requests for recusal and disqualification. One possibility: mandatory disclosure of campaign contributions to Ohio Supreme Court justices by all parties appearing at the court.



Figure K. Consumers for a Fair Court, television advertisement against Justice Eve Stratton, Ohio 2002.





Background: Wisconsin’s Partial Public Financing Program and the Rise of Expensive Elections

Wisconsin is the latest entrant to the club of midwestern states now coping with the new politics of judicial elections. It was reasonable to forecast that a bruising 1999 campaign for the re-election of Chief Justice Shirley Abrahamson might have hastened the downward spiral of nasty campaigns, but contested races in 2000 and 2003 were unremarkable, with neither breaking the \$1 million milestone.

Meanwhile, Wisconsin’s system of partial public financing for Supreme Court races atrophied. Candidates received less public money with every passing cycle, and it became increasingly clear that the system would never be able to withstand a tsunami of big money, should one arrive. Reform groups across Wisconsin pushed to modernize the system and turn it into a full public financing program with adequate resources, but, absent a compelling motive for reform, the pleas fell on deaf ears in the corridors of power in Madison.

The Turning Point: Ziegler Versus Clifford

The tsunami arrived in Wisconsin in early 2007.

The April 2007 Wisconsin Supreme Court election set a new state record for fundraising by the candidates, joining five other states that broke records in the November 2006 campaigns. Official campaign finance records indicate that Clifford and Ziegler combined raised \$2,662,903, nearly double the state’s 1999 record of \$1,350,369.

Fundraising by the candidates was modest compared to the amounts of money spent by interest groups that lined up to wage an all-out air war. Estimates by the Wisconsin Democracy Campaign indicate that television ads purchased by the three major groups (Club for Growth and Wisconsin Commerce and Manufacturers Association on the right and the Greater Wisconsin Committee on the left) totaled about \$3 million, bringing the true cost of the race to somewhere in the \$5 to \$6 million range.¹⁹

In one ad sponsored by the Greater Wisconsin Committee—a Democrat-oriented special interest group—an attack on Ziegler’s sentencing of a pedophile concludes with a call for voters to lobby the judge, as if she were a legislator: “Contact Annette Ziegler, “ the narrator says, flashing a phone number on the screen. “Tell her judges must get tough on child sex offenders.”

An ad sponsored by the Ziegler campaign suggested Clifford would use a seat on the court to make her husband wealthy. In a fascinating throwback to a notorious U.S. Chamber of Commerce-led effort to defeat an Ohio Supreme Court justice in 2000 (see page 10), background video used in the Wisconsin ad shows a “Lady Justice” holding scales tipped by piles of campaign cash. It appears to be the same stock video footage employed by the national business group in Ohio in 2000.

The Clifford campaign attacked Justice Ziegler for financial conflicts. The issue became fodder for editorial writers well after Ziegler won. Ziegler came under criticism for failing to recuse from cases involving a bank on which her husband served as a director, as well as ruling on cases in which Ziegler herself owned stock. More troubling to many was Ziegler’s (initial) refusal to stand aside in cases brought by the Wisconsin Manufacturers and Commerce Association, which spent millions assisting Ziegler’s election. She later recused herself.

On the Edge of Reform

For some time now, Wisconsin has been examining a full public financing plan to minimize conflicts of interest and free judicial candidates from having to raise money like politicians. North Carolina is the only state in the nation that has employed a full public financing plan to inoculate judges from conflicts of interest, though the New Mexico legislature voted to follow suit and enact a plan for the 2008 season and beyond.

“The risk inherent in any non-publicly funded judicial elections for this court is that the public may inaccurately perceive a justice as beholden to individuals or groups that contribute to his or her campaign. Judges must not only be fair, neutral, impartial and non-partisan but also should be so perceived by the public.”

—open letter from all seven members of the Wisconsin Supreme Court,
endorsing judicial public financing, December 10, 2007

The April 2007 election, combined with the scandal that continued to hang over Justice Ziegler like a dark cloud, has fueled a renewed effort to make Wisconsin the first state in the Midwest to adopt such a landmark campaign reform. In late 2007, Governor Jim Doyle called a special session of the legislature to address campaign finance reform, and asked the legislature to “establish a fully-funded public campaign finance system for Wisconsin Supreme Court candidates.”

As in most midwestern states, Wisconsin’s legislature has moved slowly—some might say ploddingly—to deal with the growing tide of special interest pressure on the courts. In December of 2007, the Wisconsin legislature was pressed by the Wisconsin state Supreme Court itself, when all seven members of the Court signed a public statement calling for the legislature to approve the voluntary program of financing.



Figure L. Mike Gableman for Supreme Court, television advertisement against Justice Louis Butler, Wisconsin 2008.

In the 2008 campaign, Judge Mike Gableman ran an attack ad against Justice Louis Butler that the Annenberg Political Fact Check described as a “Willie Horton-style hit.” Fact Check concludes: “This ad falsely implies that Butler was responsible for freeing the rapist and allowing him to commit another sexual assault. Actually, Butler failed to win the man’s release (while representing him as a public defender). The rapist served his sentence and didn’t commit his next crime until he had been paroled.”²⁰

Most Wisconsin voters have little patience for slouching towards reform, according to a public opinion survey from January of 2008. Seventy-seven percent agreed with the statements that “the legislature and the governor need to take action on judicial campaign reform before the next election,” a clear mandate to get reform on the fast track. What’s more, the poll revealed that support for public financing is strong, with 65 percent backing the plan and only 26 percent opposing it.²¹

In February of 2008, the state Senate passed the Impartial Justice act by a vote of 23-10. Supporters included five Republicans. At press time for this report, the fate of the reform legislation in the state Assembly was uncertain.

In March 2008, Wisconsin withstood another vicious Supreme Court campaign, which is certain to heighten calls for reform. Justice Louis Butler—the first and only African-American to serve on the Wisconsin Supreme Court—was challenged by trial Judge Michael Gableman. Though fundraising by both campaigns appears to have been modest compared to the \$2.6 million raised by Clifford and Ziegler in 2007, this campaign will be remembered for the millions spent by special interests on both sides, and for the negativity of some of the advertising. An estimate prepared by Justice at Stake and the Brennan Center for Justice showed that 89 percent of the television ads in this race were paid for by third-party groups.

Of course, most voters make little distinction when it comes to who is paying for television advertising, especially absent any meaningful disclosure of the bankrollers of these third party-groups. The negative tone of the race surely depressed the number of voters willing to show up at the polls. Voter turn-out on election day was well below 20 percent. In spite of the millions spent on this race, only about half the number of voters who went to the polls in the state's February 19 presidential preference primary turned out for the April 1 general election.²²

The Wisconsin Democracy Campaign, which supports public funding and other reforms to protect the disintegrating judicial election process, put it this way: "Wisconsin is heading down a very dangerous path," Mike McCabe, the group's executive director, told the Associated Press. "This election did tremendous harm to the court. It did great harm to the public's confidence in and understanding of the court."²³



Endnotes

- 1 Kent Redfield, ed., *Democratic Renewal: A Call to Action from America's Heartland*, (University of Illinois at Springfield, 2008) p. 27.
- 2 Minnesota and Wisconsin are nonpartisan election states; Ohio and Michigan use a hybrid system where parties have significant influence in selecting general election nominees, though candidates are not identified with a party label on the general election ballot.
- 3 The \$9.3 million raised in this race was more than was raised by all candidates in U.S. Senate races in AL, AZ, AR, HI, ID, IN, IA, KS, KY, MD, NV, NH, ND, OH, OR, UT, and VT.
- 4 Ryan Keith, "Spending for Supreme Court seats renews cry for finance reform," *Associated Press*, November 3, 2004.
- 5 Statewide public opinion survey conducted by the Survey Research Office at the University of Illinois at Springfield; available online at http://www.ilcampaign.org/issues/judicial/judicial_poll/index.asp
- 6 Deborah Goldberg, James Sample and David Pozen, "The Best Defense: Why Elected Courts Should Lead Recusal Reform," 46 *Washburn Law Journal*, 503, 511 (2007).
- 7 Michael Higgins, "Burke to return most of war chest to donors," *Chicago Tribune*, January 21, 2008.
- 8 See Adam Liptak, "Unfettered debate takes unflattering turn in Michigan Supreme Court," *New York Times*, January 19, 2007.
- 9 A copy of Robinson's testimony is available online at http://www.mcfn.org/pdfs/reports/HJC_20071010.pdf
- 10 David Shepardson, "Special interests pour \$15 million into battle for control of state justices," *The Detroit News*, October 31, 2000.
- 11 *Democratic Renewal*, p. 70.
- 12 The ABA's revised model code can be accessed at http://www.abanet.org/judicialethics/approved_MCJC.html
- 13 A list of commission members, minutes from public hearings, and the majority and minority reports are available online at <http://www.keepmnjusticeimpartial.org/>
- 14 Complete poll results can be found at <http://www.justiceatstake.org/files/MinnesotaJusticeatStakesurvey.pdf>

- 15 Lori Sturdevant, "Judiciary could soon be dripping with politics," *Minneapolis Star-Tribune*, March 15, 2008.
- 16 A detailed analysis of contributions to each sitting member of the Ohio Supreme Court is accessible online at <http://www.ohiocitizen.org/money/judicial/profiles/profiles.html>
- 17 In most states, campaign finance limits in judicial campaigns are established by the legislature, not the Supreme Court.
- 18 *Democratic Renewal*, p. 105.
- 19 For a detailed breakdown of the estimate, see <http://www.wisdc.org/indo7issueads.php>
- 20 Complete analysis of this and other Wisconsin judicial campaign ads is online at http://www.factcheck.org/elections-2008/wisconsin_judgment_day_the_sequel.html
- 21 Complete poll results are available online at <http://www.justiceatstake.org/files/AmViewWisconsinStateWideToplines.pdf>
- 22 Unofficial tallies show fewer than 820,000 voters cast ballots in the April 1, 2008 Supreme Court race, compared to 1,524,360 who voted in the February 19, 2008 primary.
- 23 Scott Bauer, "Critics decry Supreme Court race," *Associated Press*, April 2, 2008.



Justice at Stake
c a m p a i g n

717 D Street, NW, Suite 203
Washington, D.C. 20004
Phone (202) 588-9700 • Fax (202) 588-9485
info@justiceatstake.org

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

The New Politics of Judicial Elections Great Lakes States 2000–2008: April 2008

Visit us at www.justiceatstake.org