

THE NEW POLITICS OF JUDICIAL ELECTIONS 2011-12

How New Waves of Special Interest
Spending Raised the Stakes for Fair Courts

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Table of Contents

Introduction	1
Chapter 1	
The Money Trail	3
Independent Spending Drives Judicial Races	3
Spending Highest on Divided Courts	5
State in Focus: Wisconsin	9
State in Focus: Michigan	10
National Politics Invades State Judicial Races	11
Who Are the Donors' Donors?	12
New Super Spenders Gain Prominence	14
Special Interests Dominate Candidate Contributions	15
State in Focus: Alabama	16
Chapter 2	
Court TV: Record Spending on Television Ads	18
Overview	18
Special-Interest Groups and Parties Lead TV Spending	18
Ad Tone and Negativity	22
Beyond Television: Internet and Social Media Arrive in High Court Campaigns	23
Hall of Shame	24
"The West Wing" Meets the Michigan Supreme Court	26

Table of Contents, continued

Chapter 3	
The Political Climate Heats Up	27
Merit Selection Faces Challenges	27
Florida's Bid to Remake the Judiciary	28
Iowa's Retention Battle Redux	30
Additional Assaults on Judicial Independence	32
Battles in Other States	33
Looking Forward: Merit Selection in 2013 and Beyond	34
Looking Forward: Public Financing in 2013 and Beyond	36
Public Financing in Peril	36
Appendix A	
State Profiles, 2011–2012	38
Part I: States with Candidate Races	38
Part II: States with Ballot Measures	47
Appendix B	
Television Ad Details, 2011–2012	48
Endnotes	49

List of Charts and Figures

Introduction

Moyers & Company Photo	2
------------------------	---

Chapter 1 The Money Trail

<i>New York Times</i> Editorial	3
2011-2012 Supreme Court Races Spending Breakdown	4
Non-Candidate Spending as a Portion of Total Spending, 2001-2012	5
Estimated Spending on Supreme Court Races, 2011-2012	6
Michigan Supreme Court Campaign TV Ad	8
Editorial Cartoon on Florida's Judicial Retention Races	8
Wisconsin Supreme Court Campaign TV Ads	9
<i>Des Moines Register</i> , Jindal, Santorum Bus Tour	11
North Carolina Supreme Court Campaign TV Ad	12
Michigan Supreme Court <i>The West Wing</i> Web Video	13
Top 10 Super Spenders, 2011-2012	14
Alabama Supreme Court Campaign TV Ad	16
Alabama Supreme Court Campaign Direct Mail	17

Chapter 2 Court TV: Record Spending on Television Ads

Sponsors, 2011-2012 Supreme Court TV Ads	19
Total TV Spending by Year, 2001-2012	20
North Carolina Supreme Court Campaign TV Ad	20
Number of Ad Spots by Sponsor, 2011-2012	21
Top 10 TV Spenders	21
Ad Tone by Sponsor, 2011-2012	22
Facebook Page of Defend Justice from Politics	23
Ohio Supreme Court TV Ad	24
Michigan Supreme Court TV Ads	24
Kentucky Supreme Court TV Ad	25
Wisconsin Supreme Court TV Ad	25
Michigan Supreme Court <i>The West Wing</i> Web Video	26

List of Charts and Figures, continued

Chapter 3 The Political Climate Heats Up

Florida Supreme Court TV Ad	28
Rick Santorum speaks at the “NO Wiggins” bus tour in Iowa	30
Iowa Supreme Court Campaign Direct Mail	31
Oklahoma Bar Association webpage, courtfacts.org	33
No on Proposition 115 TV Ad	34
Missouri Ballot Measure Promotional Literature	35
Support for Public Financing in North Carolina, 2013	36

INTRODUCTION

In recent years, as the cost of judicial campaigns has soared, the boundaries that keep money and political pressure from interfering with the rule of law have become increasingly blurred.

Thirty-eight states conduct elections for their Supreme Courts, including partisan and non-partisan contested elections and up-or-down judicial retention votes. During the 2011–12 election cycle, many of these judicial races seemed alarmingly indistinguishable from ordinary political campaigns—featuring everything from Super PACs and mudslinging attack ads to millions of dollars of candidate fundraising and independent spending.

Since 2000, *The New Politics of Judicial Elections* series has tracked the increased politicization and escalating spending in state judicial campaigns, as well as the growing role of special interest money. These trends continued in 2011–12, even as several new and troubling developments emerged.

- **Television spending hit record highs:** States saw record levels of spending on television advertising in high court races. The 2011–12 cycle saw \$33.7 million in TV spending, far exceeding the previous two-year record of \$26.6 million in 2007–08 (\$28.5 million in inflation-adjusted terms). In 2012 alone, more than \$29.7 million was spent to air TV ads, topping the previous single-year record of \$24.4 million in 2004 (\$29.3 million when adjusted for inflation). Negative advertisements aired in at least 10 states, including misleading ads that described candidates as being “sympathetic to rapists,” “volunteer[ing] to help free a terrorist,” and “protect[ing] . . . sex offenders.”

- **Independent spending escalated:** *Citizens United v. FEC*, 2010’s blockbuster Supreme Court decision that unleashed unlimited independent spending on elections, cast a long shadow on the 2011–12 judicial election cycle. Special-interest groups alone spent a record \$15.4 million on television ads and other electioneering in high court races in 2011–12, accounting for more than 27 percent of the total amount spent on high court races. This spending was more than 50 percent higher than the previous record \$9.8 million in independent spending by interest groups in 2003–04 (\$11.8 million when adjusted for inflation), which made up 16 percent of total spending.
- **National politics invaded judicial races:** National groups better known for their efforts to influence presidential and congressional elections turned their sights on judicial contests in several states. Major spenders included the Republican State Leadership Committee in North Carolina, the National Rifle Association-linked Law Enforcement Alliance of America in Mississippi, the progressive advocacy group America Votes in Florida, and the conservative group Americans for Prosperity, financially supported by billionaire brothers Charles and David Koch, in Florida and North Carolina.

The 2011–12 cycle saw \$33.7 million in television spending, far exceeding the previous two-year record of \$26.6 million in 2007–08.

- **Costly races continued around the country:** Total estimated spending on judicial races in 2011-12 was \$56.4 million, slightly lower than the total spending in the last presidential election cycle in 2007-08 (\$57.1 million, or \$60.7 million when adjusted for inflation). Twelve states saw more than \$1 million of spending on high court races in 2011-12, similar to 2007-08, when spending surpassed \$1 million in 11 states. Spending was concentrated among a few interest groups and political parties: the top 10 spenders were responsible for approximately \$19.6 million of total spending in 2011-12, compared with just \$12.3 million in 2007-08.
- **Merit selection faced new challenges:** In merit selection states, judges are appointed from a slate of qualified finalists identified by a nominating commission, and then typically stand for an up-or-down retention vote after subsequent terms. While retention races have historically been less politicized than contested elections, in 2012 two merit selection states, Florida and Iowa, saw prominent and politically charged challenges to sitting justices. These justices were ultimately retained, but only after costly battles. Several states also

saw ballot measures in 2012 that would have injected new politicization into merit selection systems. These proposals were likewise rejected by voters.

The good news is that states retain powerful tools to resist the growing politicization of judicial races. Strong disclosure laws and recusal rules promote accountability and help ensure that special interests cannot buy justice. Public financing can provide judicial candidates with an alternative path to running a competitive race without needing to rely on contributions from lawyers and litigants seeking to influence judicial decision-making. Merit selection, meanwhile, is designed to ensure that judges are selected based on their qualifications and to help insulate them from political pressure (although in recent years concerns have emerged regarding the politicization of retention elections). Finally, voter guides and judicial performance evaluations give ordinary citizens the information they need to assess judges based on their experience and qualifications—and not on misleading attack ads. These commonsense measures can help ensure that citizens feel confident that their judges are accountable to the law and the Constitution, not to special interests.



“In case you haven’t noticed, something’s afoot with our judicial system. Across the country, large sums of money—much of it secret—are pouring into the races for high court judges. And in several states, partisan groups with funds from undisclosed sources are out to punish justices for rulings the partisans don’t like.”

CHAPTER 1

The Money Trail

Independent Spending Drives Judicial Races

The growing role of independent spending by special-interest groups and political parties in state Supreme Court races was one of the most notable and troubling trends in 2011–12, the first full election cycle since the 2010 *Citizens United* ruling changed the landscape for political contributions.¹

Instead of directly contributing money to judicial candidates, interest groups and political parties increasingly spent money independently of campaigns, often leading to less transparent and more negative races. In many cases, weak disclosure laws coupled with opaque names that obscured groups' political or philosophical lean-

ings made it impossible to discern the sources behind increased interest group spending.

Total spending on high court races in 2011–12 was slightly lower than total spending in the last presidential election cycle (an estimated \$56.4 million in 2011–12, as compared to \$57.1 million in 2007–08, or \$60.7 million when adjusted for inflation²). At the same time, however, spending by special-interest groups and political parties on television ads and other electioneering rose to unprecedented levels.*

Interest groups put a record \$15.4 million toward independent spending on state Supreme Court races in 2011–12, accounting for more than 27 percent of the total dollars spent on high court races. This figure is more than 50 percent higher

* Total spending is estimated based principally on campaign contribution data furnished by the National Institute on Money in State Politics and independent television spending data provided by Kantar Media/CMAG. For Florida, Illinois, Iowa, Michigan, Montana, North Carolina, and Wisconsin, additional information on independent expenditures by parties and interest groups was obtained through campaign finance filings and other verified reports. This data was included in spending totals to the extent it did not duplicate television spending estimates provided by Kantar Media/CMAG. See Chapter 2, note 1 for a further description of the Kantar Media/CMAG methodology.

The New York Times

The Opinion Pages

WORLD U.S. N.Y. / REGION BUSINESS TECHNOLOGY SCIEN

EDITORIAL

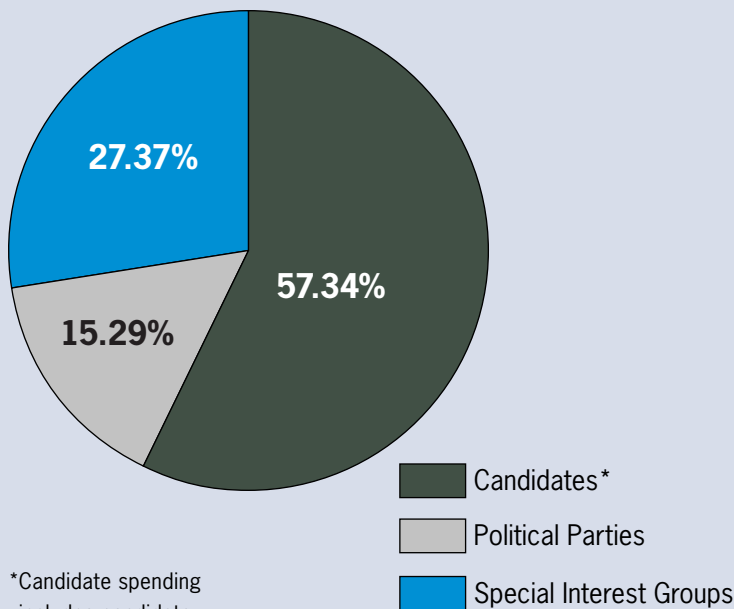
Judicial Elections, Unhinged

Published: November 18, 2012

This year's round of state judicial elections broke records for the amounts spent on around the country. The special-interest money

The New York Times
editorial,
November 18, 2012

2011-2012 Supreme Court Races Spending Breakdown



*Candidate spending includes candidate fundraising and public funds.

For data sources, see notation on page 3

Total spent 2011–2012:
\$56,378,404

than the previous record \$9.8 million in independent spending by interest groups in 2003–04 (\$11.8 million when adjusted for inflation), which accounted for 16 percent of total spending. When independent spending by political parties is also included, total non-candidate spending in 2011–12 was a record \$24.1 million, or 43 percent of total spending. In contrast, non-candidate spending was only 22 percent (\$12.8 million) of total spending in 2007–08 and 30 percent (\$11.4 million) in 2009–10.

The shift toward non-candidate spending in state Supreme Court races was most pronounced among the highest spenders. Ninety-seven percent of the dollars spent by the top 10 spenders in 2011–12 went toward independent expenditures, rather than candidate contributions. Only three of the top 10 spenders donated any money at all to candidates and only one (the Ohio Republican Party) put a majority of its funding towards direct contributions.

Independent spending by interest groups (as compared to political parties) was particularly significant in 2011–12: 11 states saw independent spending by interest groups, while only two states (Michigan and Ohio) saw independent spending by political parties.

This trend is part of the long shadow cast by *Citizens United v. FEC*, which paved the way for unlimited corporate and union independent expenditures in federal elections and in the 24 states that restricted such spending at the time of the ruling.³ The decision led to a significant shift toward interest group spending in federal and state races, as well as the development of new spending infrastructure through Super PACs and so-called “social welfare” organizations, or 501(c)(4)s, which do not have to disclose their donors—changes that trickled down into state court races.

In North Carolina, for example, the Super PAC North Carolina Judicial Coalition, backed by conservative and business interests, spent nearly \$2.9 million in its efforts to reelect incumbent Justice Paul Newby, making it the biggest spender in the state.

North Carolina’s Supreme Court race was also targeted by the conservative Americans for Prosperity, a nonprofit social welfare group linked to the billionaire brothers Charles and David Koch, which spent \$250,000 in support of Justice Newby—AFP’s largest judicial advocacy effort ever.⁴

In Wisconsin, a turbulent 2011 state Supreme Court race saw an infusion of almost \$1.4 million by the progressive Greater Wisconsin Committee, which bankrolled an aggressive series of TV ads targeting incumbent Justice David Prosser. On the other side, groups with conservative or business ties collectively spent approximately \$2.2 million in support of Justice Prosser or in opposition to challenger JoAnne Kloppenburg.

While the growing role of independent spending by unaccountable interest groups raises concerns in both judicial and non-judicial races, it is particularly worrisome in the judicial context, where judges are constitutionally obliged to

ensure impartial justice for all who appear before them.

With lax disclosure requirements in many states, more independent spending means less transparency as to who is spending—and potentially seeking to buy case outcomes—in judicial races. Independent spending also leads to more negativity, as outside groups frequently resort to outrageous attacks and misleading accusations. Independent spending by political parties raises similar concerns. Parties often serve as conduits for special interest money and influence, and like outside groups, parties utilize negative ads more often than judicial candidates.

Perhaps most disturbing of all, however, is that while independent spending on state court races ballooned in 2011–12, it still has room to grow. Even though outside groups and political parties were responsible for more than 40 percent of all spending in 2011–12, their spending was documented in only 11 states, while in 12 states only candidate spending was documented.

This disconnect underscores just how high non-candidate spending was in the 11 states

What is a Super PAC?

Super PACs, which emerged as an indirect side effect of *Citizens United*, can accept and spend unlimited contributions from corporations and other donors, as long as they do not coordinate with candidates or give them direct contributions.

that experienced it, with five states seeing more than \$1 million in independent spending by outside groups and parties. At the same time, it also suggests an untapped market for outside dollars—future years may see an even greater expansion in independent spending by interest groups and parties in judicial races.

Spending Highest on Divided Courts

The most expensive high-court elections in 2011–12 occurred in four states where courts remain closely divided by judicial philosophy and, in the cases of states with partisan elections, political party: Michigan, Wisconsin, Florida, and North Carolina. Deep-pocketed parties and interest groups overshadowed the candidates’

Non-Candidate Spending as a Portion of Total Spending, 2001-2012



Data from *New Politics of Judicial Elections* series

Estimated Spending on Supreme Court Races, 2011-2012*

STATE	CANDIDATE FUNDRAISING***	PUBLIC FUNDS	INDEPENDENT EXPENDITURES BY POLITICAL PARTIES	INDEPENDENT EXPENDITURES BY INTEREST GROUPS	TOTALS
Michigan†	\$3,419,187	\$0	\$8,370,969	\$1,216,617	\$13,006,773
Wisconsin ** †	\$563,269	\$800,000	\$0	\$3,737,748	\$5,101,017
Florida†	\$1,529,020	\$0	\$0	\$3,333,190	\$4,862,210
North Carolina†	\$173,011	\$480,200	\$0	\$3,841,998	\$4,495,209
Alabama	\$4,053,131	\$0	\$0	\$0	\$4,053,131
Ohio	\$3,467,446	\$0	\$250,840	\$141,270	\$3,859,556
West Virginia	\$3,322,370	\$363,705	\$0	\$0	\$3,686,075
Texas	\$3,206,614	\$0	\$0	\$0	\$3,206,614
Louisiana	\$2,644,271	\$0	\$0	\$555,440	\$3,199,711
Mississippi	\$1,793,742	\$0	\$0	\$1,078,240	\$2,871,982
Illinois†	\$2,285,198	\$0	\$0	\$195,493	\$2,480,691
Washington	\$1,288,379	\$0	\$0	\$0	\$1,288,379
Iowa†	\$0	\$0	\$0	\$833,087	\$833,087
Oregon	\$792,176	\$0	\$0	\$0	\$792,176
Pennsylvania**	\$629,756	\$0	\$0	\$0	\$629,756
Oklahoma	\$0	\$0	\$0	\$453,140	\$453,140
Montana†	\$329,384	\$0	\$0	\$42,000	\$371,384
Kentucky	\$363,191	\$0	\$0	\$0	\$363,191
Minnesota	\$260,317	\$0	\$0	\$0	\$260,317
Arkansas	\$209,230	\$0	\$0	\$0	\$209,230
Georgia	\$183,402	\$0	\$0	\$0	\$183,402
New Mexico	\$166,373	\$0	\$0	\$0	\$166,373
Arizona	\$5,000	\$0	\$0	\$0	\$5,000
Totals	\$30,684,467	\$1,643,905	\$8,621,809	\$15,428,223	\$56,378,404

Nationally, 12 states saw judicial election spending top \$1 million in 2011-12.

*This chart estimates spending on high court races, including competitive and retention elections, in the 23 states in which spending was documented. Candidate fundraising and public funding figures were provided by the National Institute on Money in State Politics. Independent expenditures by political parties and interest groups reflect television spending estimates by Kantar Media/CMAG. In Florida, Illinois, Iowa, Michigan, Montana, North Carolina, and Wisconsin, additional information on independent expenditures by parties and interest groups was obtained through campaign finance filings and other verified reports, as detailed in the notations for each state. This additional data was added to spending totals to the extent it did not duplicate television spending estimates by Kantar Media/CMAG.

** 2011 election

*** Candidate fundraising includes contributions and self-financing by candidates. It excludes fundraising by judges that did not run for election in 2011-12.

† Independent expenditures reflect estimated spending on television ad time, as provided by Kantar Media/CMAG, and data from the following sources: *Michigan*: Michigan Campaign Finance Network, Michigan Supreme Court Campaign Finance Summary 2012 (excluding estimated television spending); *Wisconsin*: campaign finance filings provided to the Wisconsin Campaign Finance Information System; *Florida*: IRS filings by Restore Justice, as documented by opensecrets.org, public statements made by the Florida director of Americans for Prosperity; *North Carolina*: campaign finance filings provided to the North Carolina State Board of Elections (excluding television spending), press release by Americans for Prosperity; *Illinois*: independent expenditures tracked by the National Institute on Money in State Politics; *Iowa*: campaign finance filings provided to the Iowa Ethics & Campaign Disclosure Board (including television spending reported in excess of estimates provided by Kantar Media/CMAG); *Montana*: spending reported by the Center for Public Integrity. Additional documentation on file with the Brennan Center for Justice.

budgets in these four states, pouring in millions of dollars in independent spending. Nationally, 12 states saw judicial election spending top \$1 million in 2011-12.

In **Michigan**, a 4-3 conservative majority was at stake with three state Supreme Court seats up for election in 2012. Michigan easily led the nation in overall spending in 2011-12, with estimates ranging from \$13 million to \$18.9 million, depending on how television costs are approximated. Independent spending by parties and interest groups was an estimated \$9.6 million to \$15.5 million.* The Court maintained its 4-3 conservative majority after voters elected Republican Brian Zahra for a partial term and Republican Stephen Markman and Democrat Bridget McCormack for full eight-year terms.

Political parties dominated spending in Michigan's races, reflecting the heated battle over the court's composition. Although party affiliation does not appear on the ballot for high court candidates in Michigan, the state Democratic and Republican parties select candidates and campaign actively on their behalf, relying heavily on attack ads. The Democratic Party spent an estimated \$4.8 million to \$6.8 million and the Republican Party spent an estimated \$3.5 million to \$7 million, nearly all on TV ads, making them the two highest spenders nationally. Each party spent more than the six high court candidates combined (\$3.4 million).

The conservative Washington, D.C.-based Judicial Crisis Network also sought to influence Michigan's race. It spent an estimated \$600,000 to \$1 million on an attack ad against Bridget McCormack, making it the ninth highest spender nationally.

Although estimates put Michigan first in the nation in spending in 2011-12, the vast majority of these expenditures were never disclosed

* The different Michigan totals represent differences in two methods of estimating total television spending. The higher estimate, from the Michigan Campaign Finance Network, is based on MCFN's examination of records of TV stations across Michigan that logged ads aired in the high court race. The lower estimate, by Kantar Media/CMAG, is based on an analysis of ads monitored by satellite technology, and does not include some local cable TV ads. All charts and tables rely on the Kantar Media/CMAG data. See Chapter 2, note 1 for a further description of the Kantar Media/CMAG methodology.



A TV ad run by the Democratic State Central Committee in Michigan opposing the three Republican candidates: “But Supreme Court Justice Brian Zahra, Justice Steven Markman and Colleen O’Brien have protected criminals, not kids.”

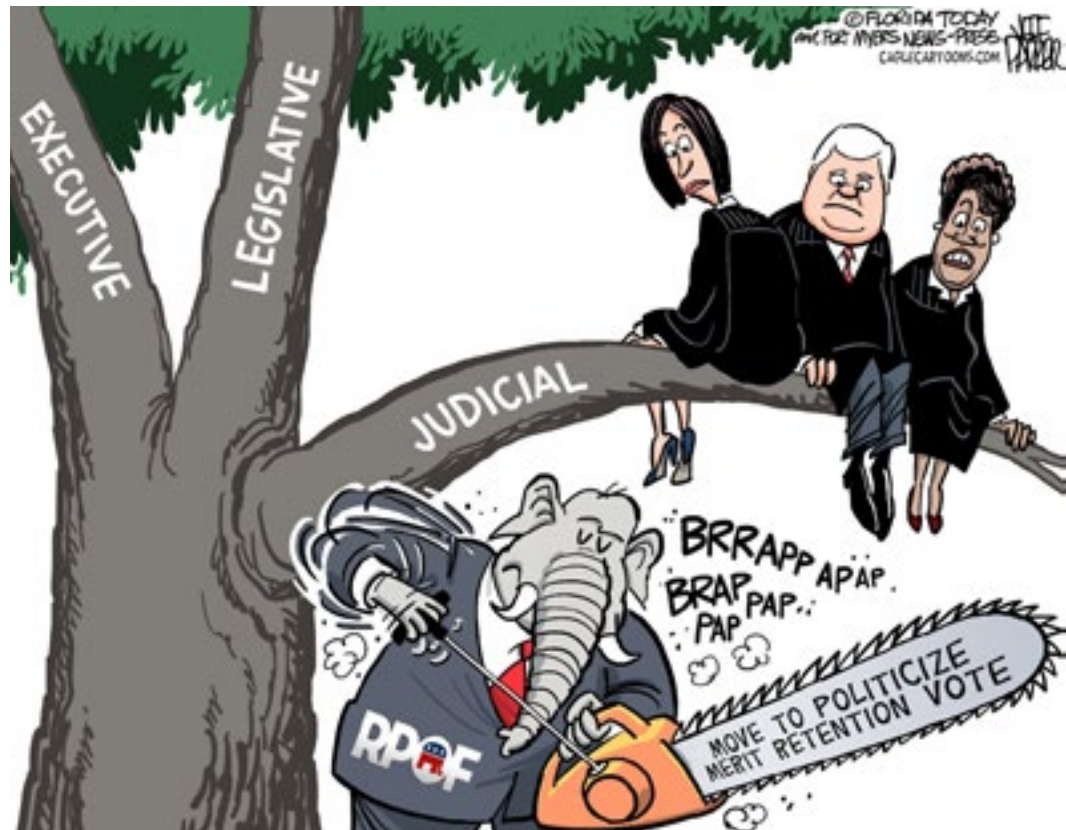
Copyright 2012 Kantar Media/CMAG.

in campaign finance filings due to Michigan’s narrow definition of what triggers a disclosure requirement. A report by a campaign finance watchdog group, the Michigan Campaign Finance Network, called the race “the most expensive and least transparent in state history.”

The second most expensive state was neighboring **Wisconsin**, where a 4–3 conservative majority was on the line in a race for a single seat in 2011. The race was followed nationally and effectively became a referendum on Republican Governor Scott Walker’s initiative to end col-

lective bargaining for most public workers. The election took place as the state Supreme Court was poised to rule on a challenge to Walker’s initiative, and total spending on the race reached more than \$5.1 million. The Court’s ideological balance remained intact when incumbent Justice David Prosser, a former Republican legislator, narrowly defeated challenger JoAnne Kloppenburg after a recount.

Candidate spending in Wisconsin was overshadowed by spending by progressive and conservative outside groups, which poured more than \$3.7 million into the race. Three of the groups bankrolling the 2011 race were among the 10 highest spenders nationwide: the labor-friendly Greater Wisconsin Committee, which spent an estimated \$1.4 million; the pro-business Issues Mobilization Council of Wisconsin Manufacturers & Commerce, which spent an estimated \$900,000; and the conservative Citizens for a Strong America, which spent an estimated \$800,000. The candidates raised a combined \$563,000 (including fundraising by primary candidates) and drew on \$800,000 in public financing.



An editorial cartoon weighs in on Florida’s judicial retention races

“Local Florida Merit Retention Vote” by Jeff Parker

State in Focus: Wisconsin



Election Battles and Judicial Dysfunction Hurt Public Confidence in the Courts

Wisconsin provides a potent example of how the new politics of judicial elections can undermine a court and the public's confidence in it. The rise of money and political pressure triggered a chain of events that led *The New York Times* editorial board to call the Wisconsin Supreme Court “a study in judicial dysfunction.”¹

After years of quiet races, groups on both sides of the political aisle have dominated several recent Wisconsin judicial elections in an effort to influence the sharply divided court's makeup. Interest groups have spent more than \$8.6 million from 2007–2011 on television ads and other electioneering.

While spending gradually accelerated over the last decade, 2007 was “the year it went from elections to the Supreme Court to auctions for the Supreme Court,” according to Mike McCabe, director of the Wisconsin Democracy Campaign.² The outside money in Wisconsin elections—along with the \$6.9 million raised by the candidates from 2007–2011 and \$800,000 in public financing in the 2011 election—paid for some of the nation's nastiest attack ads and other bruising campaign tactics as the composition of the court shifted from liberal to conservative.

Wisconsin's 2011 election exemplified this race to the bottom. The contest between Justice David Prosser and challenger JoAnne Kloppenburg, largely fueled by special interest attack ads, quickly became nasty. Outside groups poured money into a competition that many sought to recast as a referendum on Governor Scott Walker, whose plan to end collective bargaining for most state workers was about to come before the court. Prosser narrowly won the race, following a recount, maintaining the court's conservative majority.

Many of the harshest ads were run against Justice Prosser, including one by the Greater Wisconsin Committee that accused him of covering up molestation by a priest when Prosser was a district attorney. Another Greater Wisconsin Committee ad described him as a “rubber stamp” for Governor Walker. Kloppenburg was not immune from attack either, including an ad by Citizens for a Strong America that described her as “so extreme she even put an 80 year old farmer in jail for refusing to plant native vegetation on his farm.” Total spending reached more than \$5.1 million in 2011.

Internal disputes among justices—from personality clashes to battles over recusal rules—have also torn apart the court. Justice Prosser hurled an expletive at Chief Justice Shirley Abrahamson and threatened to “destroy” her during a private court session in 2010.³ In 2011, Justice Ann Walsh Bradley accused Justice Prosser of angrily grabbing her around the throat during a meeting.⁴ He admitted touching her neck but described it as unintentional. These occurrences, and the media attention they have generated, have had an effect: “In a very short period of time, we have gone from having a Supreme Court that was a national model to a Supreme Court that is really fodder for late-night comics,” said Howard Schweber, a political science and law professor at the University of Wisconsin-Madison.⁵

With Wisconsin's high court remaining bitterly divided both personally and ideologically, it is perhaps unsurprising that public confidence has plummeted. A 2011 poll of Wisconsin voters by 20/20 Insight found that Wisconsin voters' confidence in their Supreme Court had fallen to just 33 percent, down from 52 percent only three years earlier.⁶

TV ad by Greater Wisconsin Committee opposing Justice David Prosser

Copyright 2011 Kantar Media/CMAG



TV ad by Citizens for a Stronger America opposing JoAnne Kloppenburg

Copyright 2011 Kantar Media/CMAG



State in Focus: Michigan

Record Spending Hidden From View

For the second election cycle in a row, Michigan had the highest Supreme Court election spending in the country. And, as documented by the watchdog group Michigan Campaign Finance Network, nearly 75 percent of the money spent on Michigan's state record-setting 2012 Supreme Court race was not subject to state disclosure laws.¹

With the Supreme Court's 4–3 conservative majority on the line, Democrats Connie Kelley, Shelia Johnson, and Bridget McCormack faced off against Republicans Brian Zahra, Steven Markman and Colleen O'Brien in 2012, with money pouring in on both sides from political parties and outside groups. Markman, O'Brien, and McCormack won their respective races, which had the effect of maintaining the Court's conservative majority.

Overall spending reported to state campaign finance authorities by candidates, parties, and groups was approximately \$5 million in 2012. But MCFN's review of public files from television broadcasters and cable systems documented more than \$13.85 million spent on air time for issue ads, which did not trigger state disclosure requirements. The result, as observed by *The New York Times* editorial board, was that Michigan's 2012 high court races set records “for both spending and lack of accountability.”²

Michigan's weak disclosure rules are to blame. Under a 2004 interpretation of the Michigan Campaign Finance Act, published by the Department of State, spending on ads does not need to be disclosed unless the ads contain words directly calling on voters to vote for or against a particular candidate. Savvy political strategists in Michigan have easily exploited this gaping loophole, crafting advertisements that voters clearly understand as urging them to vote for or against a particular candidate, but that avoid saying “vote for,” “elect,” or “defeat” a candidate—and thus avoid disclosure requirements.

Rich Robinson, MCFN's executive director, wrote in *Dome* magazine about the harm to ordinary citizens from the resulting lack of transparency:

This is a big problem. Nobody has the motivation to spend big money in a judicial race like a litigant with a high-stakes case in the appeals pipeline. Imagine being in court opposing the person who financed the campaign of the justice who is going to decide your case. Imagine not knowing it, so you can't make a legitimate motion for recusal. Dark money undermines the whole premise of judicial impartiality.³

In 2012, the Michigan Judicial Selection Task Force, a blue ribbon commission chaired by Justice Sandra Day O'Connor, called for Michigan to expand disclosure requirements to apply to all judicial campaign expenditures, including “issue ads” by political parties or outside groups.

The Task Force explained the importance of this reform, noting, “Public trust in the candidates and the courts will increase as voters begin to feel less manipulated by unseen forces.”⁴

Florida ranked third among states for overall spending in 2011–12, with total spending reaching nearly \$5 million. Unlike Michigan and Wisconsin, Florida is a merit selection state with retention elections, rather than a contested election state, giving the governor the power to appoint a new judge in the event a sitting justice loses his or her seat. With three justices facing retention in 2012, two of whom were appointed by a Democratic governor and one who was jointly appointed by a Democrat and a Republican,

the political stakes were high. Special-interest groups on one side sought to unseat the justices and give Republican Governor Rick Scott three new appointments (which would ensure that all seven Florida Supreme Court justices were appointed by Republican governors).

Although the justices were targeted in an anti-retention campaign by a tea party-linked group, Restore Justice 2012, as well as by Americans for Prosperity and the Republican Party of Florida, most of the spending in Florida's retention race

came from the candidates themselves and pro-retention outside groups. Pro-retention group Defend Justice from Politics, which received funding from law firms and progressive advocacy groups, spent an estimated \$3.1 million during the campaign season, ranking third in the nation among spenders in 2011–12. The justices' campaigns collectively raised more than \$1.5 million. By contrast, from 2000–2010, only \$7,500 was raised by Florida Supreme Court justices, all in 2000.

Ultimately, the voters retained all three justices.

In **North Carolina**, a 4–3 conservative majority was on the line in 2012 when incumbent Justice Paul Newby faced off against Court of Appeals Judge Sam Ervin IV. Estimated spending surpassed \$4.4 million, shattering state records for judicial elections.

Driving this election spending was the newly created North Carolina Judicial Coalition, a conservative Super PAC that spent an estimated \$2.9 million in TV advertisements promoting Newby and ranked as the fourth highest spender nationally in 2011–12. Independent spending on behalf of Ervin came mainly from a group

called N.C. Citizens for Protecting Our Schools and totaled some \$270,000. The candidates raised a combined \$173,011 and benefitted from \$480,020 in public financing. When voters reelected Justice Newby, the 4–3 conservative split remained the same.

National Politics Invades State Judicial Races

State Supreme Court elections have been caught up in national political trends for more than a decade, but never more conspicuously than in 2011–12.

Wedge political issues were injected into several races, with TV ads referencing marriage for same-sex couples in Iowa, the federal Affordable Care Act in Florida, and collective bargaining in Wisconsin—all issues that had appeared or were likely to appear before each state's high court.

Numerous groups more commonly associated with national politics and presidential and legislative races also weighed in on state judicial races, as did national groups focused on the courts.

Des Moines Register,
September 18, 2012



Who Are the Donors' Donors?

Many of the top-spending special interest groups in 2011–12 shrouded their agendas and donor lists in secrecy. Names like the “Greater Wisconsin Committee” and the “North Carolina Judicial Coalition” leave ordinary citizens hard-pressed to identify spenders’ ideological or political agendas. Efforts to delve deeper by looking into the “donors’ donors” result in varying degrees of additional clarity. In many cases, reviewing donor lists is like peeling back the layers of an onion, as the next level of contributors contains names of more umbrella groups. In other cases, attempting to go deeper leads to a dead end, as weak state disclosure laws and provisions of the federal tax code allow donors to avoid scrutiny.

Top donors to the North Carolina Judicial Coalition, which was a major spender for television advertising in support of Justice Paul Newby, included Justice for All NC, the North Carolina Chamber of Commerce, R.J. Reynolds Tobacco, the North Carolina Republican Party, General Parts International, Inc., the Next Century Fund, and a variety of individuals. The Center for Public Integrity reports that one of these groups, Justice for All NC, received most of its money from the Republican State Leadership Committee, which in turn counted the U.S. Chamber of Commerce’s Institute for Legal Reform as its single biggest donor in 2012.¹

The Next Century Fund counts among its donors numerous individuals but also the PACs of a variety of corporations and industry groups, including the American Financial Services Association, the Consumer Bankers Association, the American College of Radiology Association, GlaxoSmithKline, 3M, and more.²

The North Carolina Judicial Coalition provides an example of more or less discernible sources of funding one or two layers down, although it cannot be assumed in all cases that the “donors’ donors” earmarked their funds for judicial races. Contributors to the Next Century Fund, for example, most likely intended their money to support a variety of GOP initiatives. Meanwhile, the left-leaning Greater Wisconsin Committee is harder to scrutinize—at least, when it comes to who paid for TV ads in judicial races. The Greater Wisconsin Committee, Inc. (GWC Inc.), has been affiliated with three other related groups: the Greater Wisconsin Committee PAC, the Greater Wisconsin Political Fund, and the Greater Wisconsin Committee Political Independent Expenditure Fund. While donor disclosure information is available for the related groups, disclosure forms filed by the groups show that none of them spent money on TV ads. Rather, tax filings suggest that only GWC Inc. spent money on TV ad buys during the 2011 judicial election.

GWC Inc.’s IRS Form 990 for 2011 shows that the group spent \$2.4 million on judicial issues and a total of \$3 million in TV ad production and air time for all of its 2011 campaigns; of this, Kantar Media/CMAG estimates indicate that some \$1.3 million was spent on TV advertising in the judicial race. However, GWC Inc. is a 501(c)(4) that does not have to disclose its donors. Donors to the GWC-linked groups include labor unions and national Democratic groups, so observers might assume some overlap with donors to GWC Inc. But when it comes to exactly who played in the judicial race spending game, GWC Inc. is silent.



North Carolina Judicial Coalition sponsored this ad supporting Paul Newby for Supreme Court.

Copyright 2012 Kantar Media/CMAG

Americans for Prosperity was one national organization that put new focus on judicial races. AFP spent \$250,000 on direct mailings in support of incumbent Justice Paul Newby in North Carolina, which it described as its “largest judicial issue advocacy effort ever.”⁶ The mailing praised Justice Newby for upholding the rights of taxpayers to sue the government over misuse of taxpayer dollars. AFP also put \$155,000 toward television ads and other advocacy to oppose the retention of three state Supreme Court justices

on the ballot in Florida.⁷ Koch Industries, the Wichita-based company owned by the conservative billionaire brothers Charles and David Koch, likewise contributed to Republican judicial candidates in Louisiana and Texas.

Other, mostly conservative, national groups opened their pocketbooks as well, including:

- The Washington, D.C.-based **Judicial Crisis Network**, a conservative group focused on the courts, which spent

an estimated \$600,000 to \$1 million in Michigan on television ad air time opposing a Democratic candidate;

- The NRA-linked **Law Enforcement Alliance of America**, which spent more than \$450,000 in Mississippi to air an attack ad against a candidate who had been a plaintiff-side trial lawyer;
- The **American Future Fund**, a conservative free-market organization that spent \$126,000 on television ad air time in Louisiana in support of primary candidate Bill Morvant;
- The **National Organization for Marriage**, a conservative group that spent more than \$130,000 in Iowa on television ads opposing the retention of Iowa Supreme Court Justice David Wiggins,⁸ who had participated in a unanimous decision determining that the Iowa Constitution's Equal Protection Clause did not allow the denial of marriage for same-sex couples; and
- **Wisconsin Manufacturers & Commerce**, an official state ally of the U.S. Chamber of Commerce, which spent an estimated \$900,000 to air a series of ads supporting incumbent Justice David Prosser and attacking challenger JoAnne Kloppenburg as weak on crime.

In addition to spending directly on high court races, some national groups sought to influence races by contributing to state-level organizations. Several of these were progressive organizations:

- **America Votes**, a progressive advocacy organization, contributed \$300,000 to the Florida pro-retention group Defend Justice from Politics, which spent more than \$3 million on ads supporting the retention of three Florida justices;
- The **Human Rights Campaign**, the largest national LGBT advocacy organization, contributed \$135,000 to Justice Not Politics Action in Iowa, in addition to some \$5,000 it spent under its own name in the battle to retain Justice David Wiggins; and

Hollywood Weighs In

The 2011–12 cycle saw a unique development, as Hollywood waded into a judicial race in Michigan. Famous television actors who starred in the long-running series “The West Wing,” featuring a fictional Democrat as president and his loyal Democratic staff, jumped in to make a judicial election ad that went viral, with more than 1 million views on YouTube. There were two versions of the ad, which were made in Michigan on a pro bono basis by the show’s cast.

See “The West Wing Meets the Michigan Supreme Court” in Chapter 2.



- The **National Education Association** weighed in on North Carolina’s high court race, contributing \$180,000 to North Carolina Citizens for Protecting Our Schools, which funded mailings and phone calls in support of the challenger in the race, Judge Sam Ervin IV.

Web video created by McCormack for Justice

Similarly, the Republican State Leadership Committee contributed \$1.2 million to Justice for All N.C., a PAC that funded an attack ad in the North Carolina Supreme Court race. Justice for All N.C. also contributed to the North Carolina Judicial Coalition, a Super PAC that led the state in overall spending in the high court race. In Mississippi, the Improve Mississippi PAC received donations from the Washington, D.C.-based American Tort Reform Association, in addition to receiving donations from a number of local groups.

Finally, national politicians also entered the fray. In Iowa, Louisiana Governor Bobby Jindal and former U.S. Senator Rick Santorum of Pennsylvania—both talked about as potential Republican presidential candidates in 2016—made public appearances to bolster a drive to unseat Justice Wiggins. Santorum assailed

“appointed judges [who] continuously legislate from the bench,” while Jindal said some judges “actually make the replacement refs in the NFL look like geniuses.”⁹

New Super Spenders Gain Prominence

Since 1999, fewer than two dozen groups have been responsible for nearly \$1 of every \$4 contributed to a Supreme Court candidate or spent independently on TV ads and other electioneering.

A small number of “super spenders” continued to dominate high court races in 2011–12, with the top 10 spenders pumping \$19.6 million into judicial races, representing 35 percent of all candidate contributions and independent expenditures. Spending was even more concentrated in

2011–12 than during the last presidential election cycle, when the top 10 spenders were responsible for 21 percent of all candidate contributions and independent spending.

Many of the top spenders represented opposing sides in the tort wars, pitting corporate interests and their lawyers on one side (typically supporting Republican candidates) and plaintiffs and their trial lawyers on the other (typically supporting Democrats). In 2011–12, the single highest-spending group was the Michigan Democratic Party. Business and conservative groups proved the dominant force overall, however, accounting for seven of the top 10 spenders in 2011–12.

At the same time, other newly competitive states saw spending skyrocket — and with it, the emergence of new super spenders. The Florida group Defend Justice from Politics burst onto

Top 10 Super Spenders, 2011–2012

SOURCE	INDEPENDENT EXPENDITURES	CONTRIBUTIONS TO CANDIDATES	TOTAL
Michigan Democratic Party	\$4,822,418	\$135,254	\$4,957,672
Michigan Republican Party	\$3,548,551	\$175,847	\$3,724,398
Defend Justice From Politics (Florida)	\$3,108,190	\$0	\$3,108,190
North Carolina Judicial Coalition	\$2,888,440	\$0	\$2,888,440
Greater Wisconsin Committee	\$1,365,340	\$0	\$1,365,340
WMC Issues Mobilization Council (Wisconsin)	\$910,970	\$0	\$910,970
Citizens for a Strong America (Wisconsin)	\$836,090	\$0	\$836,090
Improve Mississippi PAC	\$626,310	\$0	\$626,310
Judicial Crisis Network (D.C./Michigan)*	\$614,370	\$0	\$614,370
Ohio Republican Party	\$250,840	\$267,511	\$518,351
Totals	\$18,971,519	\$578,612	\$19,550,131

* The Judicial Crisis Network is a D.C.-based organization that spent money in Michigan's high court race. For data sources, see notation on page 7.

the scene in 2012, spending more than \$3 million in TV ads in 2012 to support the retention of three justices. Funded principally by lawyers, the group condemned the anti-retention campaign as a “hijack” of our justice system.” Another new super spender in 2012 was the Super PAC North Carolina Judicial Coalition, funded largely by business and conservative interests, which spent more than \$2.8 million in ads supporting conservative incumbent Justice Newby.

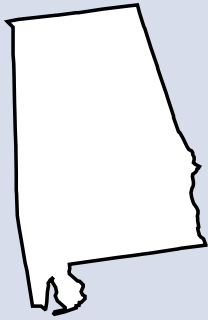
Special Interests Dominate Candidate Contributions

Nationwide, high court candidates raised \$32.3 million in 2011–12, including \$1.6 million in public financing in Wisconsin, North Carolina, and West Virginia, and \$3.6 million in candidate self-funding. This fundraising figure represents a significant decline from the 2007–08 presidential election cycle, when judicial candidates raised \$44.3 million, reflecting a sharp shift from candidate contributions toward independent spending by interest groups and parties.

While overall resources shifted away from candidate contributions and toward independent expenditures in 2011–12, contributions continued to follow historical patterns. As in past years, direct contributions to candidates were dominated by lawyers, lobbyists, and business interests—the parties who are likely to appear before state high courts, and those who represent them. Of the \$30.7 million received by candidates in contributions, lawyers and lobbyists donated more than \$10.1 million, while more than \$7.1 million derived from business or corporate interests. Political parties provided nearly \$900,000.

Big spending on judicial campaigns troubles a majority of Americans, who believe that campaign cash tilts the scales of justice. In a 2011 national poll of 1,000 voters, 93 percent said judges should not hear cases involving major financial supporters, and 83 percent said that campaign contributions have at least some influence on a judge’s decisions. Regarding disclosure, 84 percent said all contributions to a judicial candidate should be “quickly disclosed and posted to a web site.”¹⁰

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State in Focus: Alabama

Chief Justice Race Brings Surprises

In 2003, a panel of state judges removed Alabama Chief Justice Roy Moore from office for refusing to obey a federal judge's order, pursuant to the Establishment Clause of the U.S. Constitution, to remove a Ten Commandments monument from the state judicial building.

On November 6, 2012, Alabama voters returned him to office at the top of their state court system after a multi-million dollar campaign.

This result surprised many, for despite ranking first in the nation for candidate fundraising and overall spending in 2000-09, Alabama initially looked poised for a sleepy and inexpensive election in 2012. Republicans had solidified their control of the state's high court—holding all nine seats—and observers predicted that support for long-shot Democratic candidates would largely dry up. Indeed, though five seats on the nine-person state Supreme Court were up for a vote in 2012, Republican candidates were running unopposed in all but one race in the general election and in all but two primaries.



Yet some surprising twists led to a \$4 million campaign season in Alabama—still significantly less expensive than the races from the last decade, which included \$14.5 million in spending in 2006, but high

enough to place Alabama fifth in the nation in total spending in 2011–12.

The first turn came months before the election season even began, when then-Chief Justice Sue Bell Cobb suddenly resigned in 2011. Once considered the Alabama Democratic Party's brightest star and a potential candidate for governor, Cobb had been the only Democrat on the state Supreme Court and one of only two Democrats who held any statewide office. After her resignation, the Court consisted of exclusively Republican judges.

Explaining her decision to resign rather than campaign for an additional term on the Court, Cobb said she wanted to spend more time with

her family after three decades on the bench. She also joked that she had realized “Big Oil and Big Business didn't care if they won 8-1 or 9-0.”¹ But Cobb also cited her disdain for the need to raise huge sums of money from potential litigants in order to mount a credible reelection campaign.² The \$8.2 million chief justice race in 2006, which Cobb won, was the second most-expensive single judicial race in U.S. history.

Cobb's resignation was a serious blow to the state Democratic Party. The party chairman, a former state high court justice himself, could not recruit anyone to run for any of the five Supreme Court seats. The lone Democratic qualifier was Harry Lyon, a frequent fringe candidate for state office who declared his candidacy for chief justice.³

Meanwhile, in the March 2012 Republican primary for the chief justice seat, Moore was buoyed by a heavy turnout for presidential primary candidates Rick Santorum and Newt Gingrich. Moore then surprised observers by beating two mainstream Republican candidates (without needing a runoff). Stunned GOP leaders felt compelled to call a press conference to announce they supported the people's choice for party nominee.⁴

The next twist came in August, when state Democratic leaders voted to remove Lyon from the ballot over anti-gay internet postings he had made while criticizing President Obama's announcement in support of marriage for same-sex couples.

Lyon's replacement was Robert Vance, a Birmingham civil-court judge and the son of a widely respected federal appeals court judge who was assassinated in a 1989 mail bombing. In the lead-up to the November election, Vance received close to a million dollars in financial support, from both Democrats and, perhaps surprisingly, mainstream Republicans concerned about some of Moore's extreme views. Vance also contributed more than \$240,000 in self-financing in his last-minute campaign.

Trying to build instant name recognition, Vance's campaign spent more than \$1 million airing TV ads during his 77-day campaign. Folksy ads drew on Vance's commitment to public service. In one, Vance's teenaged daughter assured view-

TV ad by Alabama Supreme Court candidate Roy Moore: “Roy Moore stood up to the ACLU and liberal judges to preserve our rights and freedoms.”

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Kantar Media/CMAG



ers, “He may be a nerd, but he’s no politician.” Vance’s lone negative ad accurately pointed out that his opponent had defied a federal judge.

Meanwhile, Moore spent some \$373,000 on TV air time during the general election, while the state Republican Party distributed direct mail pieces linking Vance with President Obama and invoking a comparison with “Chicago-style politics.”

Moore was also running during a presidential year in a traditionally Republican state where his name was well-known. On Election Day, he garnered 52 percent of the vote to regain the chief justice seat.

As long as the state Democratic Party remains weak and essentially abandons the field, million-dollar candidates are likely to become less common in Alabama’s judicial races. But as 2012 showed, anything can happen in Alabama judicial politics.

Direct mail piece distributed by the Alabama Republican Party

Court TV: Record Spending on Television Ads

Overview

Spending on television advertisements in state Supreme Court races hit record levels in 2011–12. Since 2000, growing reliance on TV ads has transformed judicial races, pushing up costs and all too often injecting negativity and politics into previously civil contests.

In 2012, according to estimates based on satellite capture of advertising in major TV markets, more than \$29.7 million was spent on TV ads in 16 states, topping the previous single-year record of \$24.4 million in 2004 (\$29.3 million in inflation-adjusted terms).¹ When Wisconsin's contentious 2011 race is included, TV spending for the 2011–12 cycle reached an estimated \$33.7 million, far exceeding the previous 2007–2008 record \$26.6 million (\$28.5 million in inflation-adjusted terms).² Eleven states saw high court races exceed \$1 million in TV air time spending in the 2011–12 cycle.

Expensive ad time helped drive this skyrocketing spending. As compared to 2008, races in 2012 saw \$8.5 million more in TV spending (\$29.7 million as compared to \$19.9 million, or \$21.2 million in inflation-adjusted terms) but 7,000 fewer ad spots (51,328 as compared to 58,879). The unprecedented election spending brought on by *Citizens United* was one contributing factor: as campaign ads flooded the airwaves and pushed up prices, advertisers in judicial races were forced to dig deeper into their pockets.

Michigan led the nation in overall TV spending, with an ad war by political parties and outside groups that turned increasingly negative, including ads that described a candidate as having “volunteer[ed] to help free a terrorist.” Estimated TV spending ranged from \$8.9 million to more

than \$13.8 million, the highest in state history. (The lower estimate comes from Kantar Media/CMAG and is based on an analysis of TV ads monitored by satellite technology. The higher estimate is from the Michigan Campaign Finance Network, and is based on an examination of TV station records.) Michigan also led the nation in total ad spots, with 15,532.

For the first time since tracking of campaign ads began in 2000, ads supporting embattled incumbent justices facing retention challenges also hit the airwaves. Florida's Defend Justice from Politics spent an estimated \$3.1 million to air a TV ad urging voters to reject a “political power grab” and vote to retain three sitting justices. And Oklahoma's Yes for Fair and Impartial Judges spent more than \$450,000 in 2012 airing an ad highlighting bipartisan support for the four justices facing retention votes and calling on voters to “keep politics out of the Oklahoma Supreme Court.”

Television spending during the primary season also reached new heights, with nearly \$7 million spent in the 2011–12 cycle, including over \$6 million in 2012 alone. Four states, Alabama, Texas, Illinois, and Louisiana, had \$1 million or more of spending on airtime during the 2012 primaries.

Special-Interest Groups and Parties Lead TV Spending

Consistent with overall spending patterns, special-interest groups and political parties dominated television ad spending in 2011–12, making up four of the top five and seven of the top 10 TV spenders. Special-interest groups were

Sponsors, 2011–12 Supreme Court TV Ads

State	Sponsor	Spot Count	Est. Spending
Alabama	Total	7,644	\$3,375,910
	Candidate	7,644	\$3,375,910
Arkansas	Total	560	\$168,410
	Candidate	560	\$168,410
Florida	Total	2,140	\$3,108,190
	Interest Group	2,140	\$3,108,190
Illinois	Total	1,042	\$1,334,170
	Interest Group	1,042	\$1,334,170
Iowa	Total	265	\$163,600
	Candidate	265	\$163,600
Kentucky	Total	275	\$131,850
	Candidate	275	\$131,850
Louisiana	Total	2,838	\$1,925,500
	Candidate	2,329	\$1,370,060
	Special Interest	509	\$555,440
Michigan	Total	15,532	\$8,862,220
	Candidate	994	\$550,810
	Party	14,122	\$7,697,040
	Interest Group	416	\$614,370
Mississippi	Total	4,154	\$2,306,990
	Candidate	2,999	\$1,228,750
	Special Interest	1,155	\$1,078,240
Montana	Total	128	\$22,110
	Candidate	128	\$22,110
North Carolina	Total	3,804	\$3,585,400
	Candidate	1,176	\$543,030
	Interest Group	2,628	\$3,042,370
Ohio	Total	4,694	\$1,736,880
	Candidate	3,898	\$1,344,770
	Party	640	\$250,840
	Interest Group	156	\$141,270
Oklahoma	Total	372	\$453,140
	Interest Group	372	\$453,140
Oregon	Total	192	\$101,630
	Candidate	192	\$101,630
Texas	Total	2,076	\$1,167,930
	Candidate	2,076	\$1,167,930
West Virginia	Total	5,612	\$1,257,110
	Candidate	5,612	\$1,257,110
Wisconsin	Total	10,882	\$3,957,250
	Candidate	2,197	\$375,790
	Interest Group	8,685	\$3,581,460
Grand Totals		62,210	\$33,658,290

Subtotals

Candidate

31,122 spots for
\$12,972,330

Party

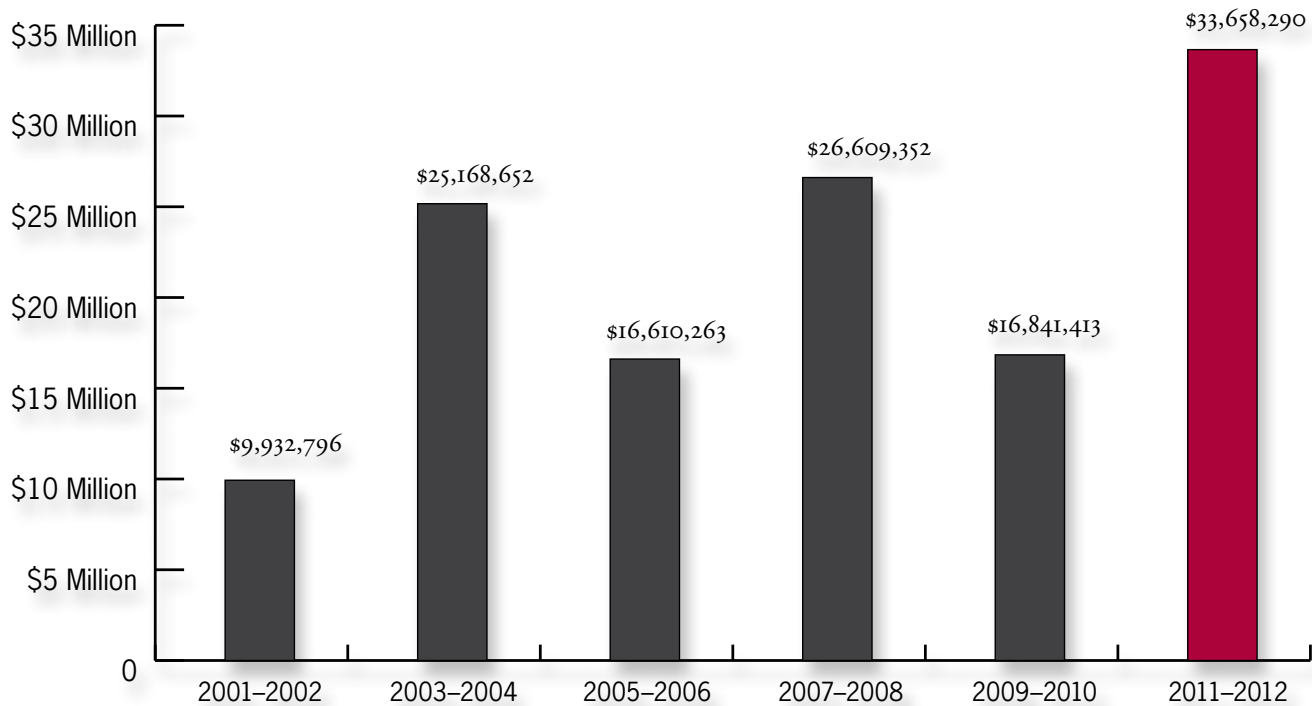
14,762 spots for
\$7,947,880

Interest Group

16,326 spots
\$12,738,080

Data courtesy of
Kantar Media/CMAG

Total TV Spending by Year, 2001–2012



Data courtesy of
Kantar Media/CMAG

TV ad by North Carolina Supreme Court candidate Judge Sam Ervin IV: “The North Carolina Supreme Court should not be for sale, but so-called independent groups are spending thousands to buy a seat on the state’s highest court.”

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Kantar Media/CMAG

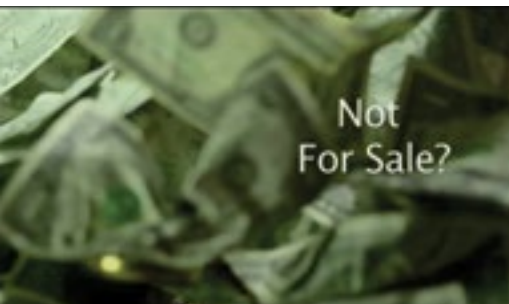
responsible for 38 percent of total TV spending, while political parties were responsible for 24 percent. Together, non-candidates spent an estimated \$20.7 million on TV air time, a whopping 61 percent of total TV spending. In contrast, total non-candidate spending was only 47.5 percent of total TV spending in 2007–2008.

Michigan, which led the nation in TV spending, saw the highest number of non-candidate ads, mostly from political parties weighing in on the three-seat race. Michigan’s ad war cost an estimated \$8.8 million to \$13.8 million, of which \$7.7 million to \$12.9 million came from the state Democratic and Republican parties.

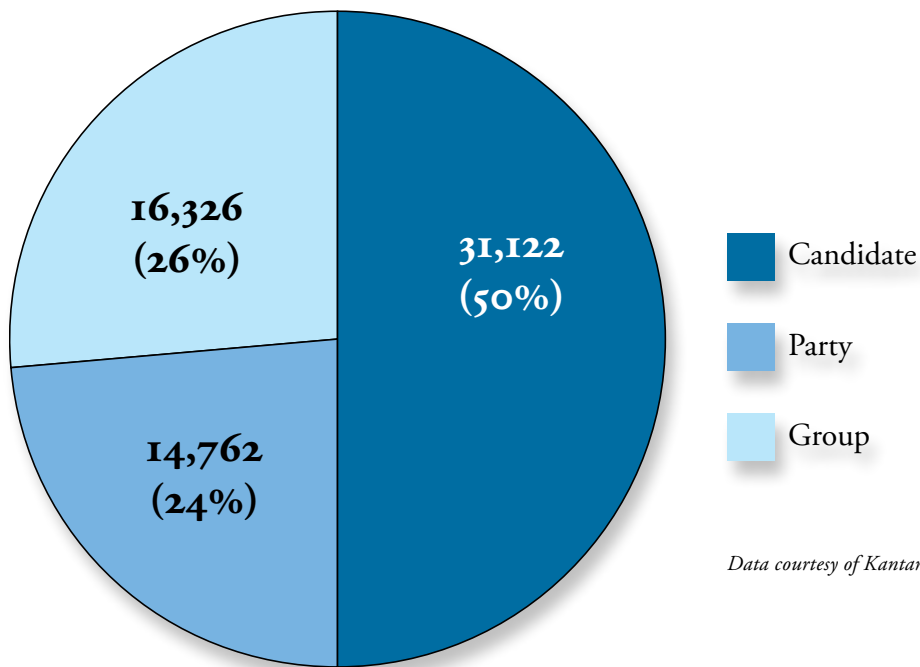
Wisconsin, which came in second overall in TV spending, saw the most TV spending by special-

interest groups. Overall, interest groups spent an estimated \$3.6 million on TV ads in Wisconsin during its hotly contested 2011 election for a single Supreme Court seat. The progressive Greater Wisconsin Committee spent nearly \$1.4 million in support of challenger JoAnne Kloppenburg. At the same time, conservative groups Wisconsin Manufacturers & Commerce, Citizens for a Strong America, Wisconsin Club for Growth, and the Wisconsin Tea Party Express spent a combined \$2.2 million, all in support of incumbent Justice David Prosser.

Continuing a trend that gathered steam in 2010, interest groups also set their sights on traditionally low-cost retention elections, as well as putting huge sums into races in nonpartisan



Number of Ad Spots by Sponsor, 2011-2012



Data courtesy of Kantar Media/CMAG

Top 10 TV Spenders

Spender	State	Spot Count	Est. Spending
Michigan Democratic State Central Committee	Michigan	9,483	\$4,198,810
Michigan Republican Party	Michigan	4,639	\$3,498,230
Defend Justice from Politics	Florida	2,140	\$3,108,190
North Carolina Judicial Coalition	North Carolina	2,491	\$2,888,440
Vance, Robert	Alabama	3,084	\$1,611,790
Greater Wisconsin Committee	Wisconsin	3,187	\$1,365,340
Theis, Mary Jane	Illinois	911	\$1,198,590
Willett, Don	Texas	2,076	\$1,167,930
WMC Issues Mobilization Council	Wisconsin	2,203	\$910,970
Citizens for a Strong America	Wisconsin	2,067	\$836,090

Data courtesy Kantar Media/CMAG

election states. Ninety percent of all TV spending by special-interest groups (excluding political parties) took place in only six states—the reten-

tion races in Florida, Oklahoma, and Iowa, as well as the nonpartisan competitive elections in Mississippi, North Carolina, and Wisconsin.

Ad Tone and Negativity

Overall negativity in TV ads was lower in 2011–12 than in recent elections, but in many states, attack ads still substituted for meaningful discussion of candidates’ credentials. Ten of the 17 states with TV ads in 2011–12 had at least one negative advertisement, defined as either an attack or contrast ad, and in Iowa, Kentucky, Illinois, Mississippi, Ohio, Michigan, and Wisconsin more than 20 percent of total TV ad spots were negative in tone.

In states that saw negative ads, fear-mongering and name-calling were prevalent.³

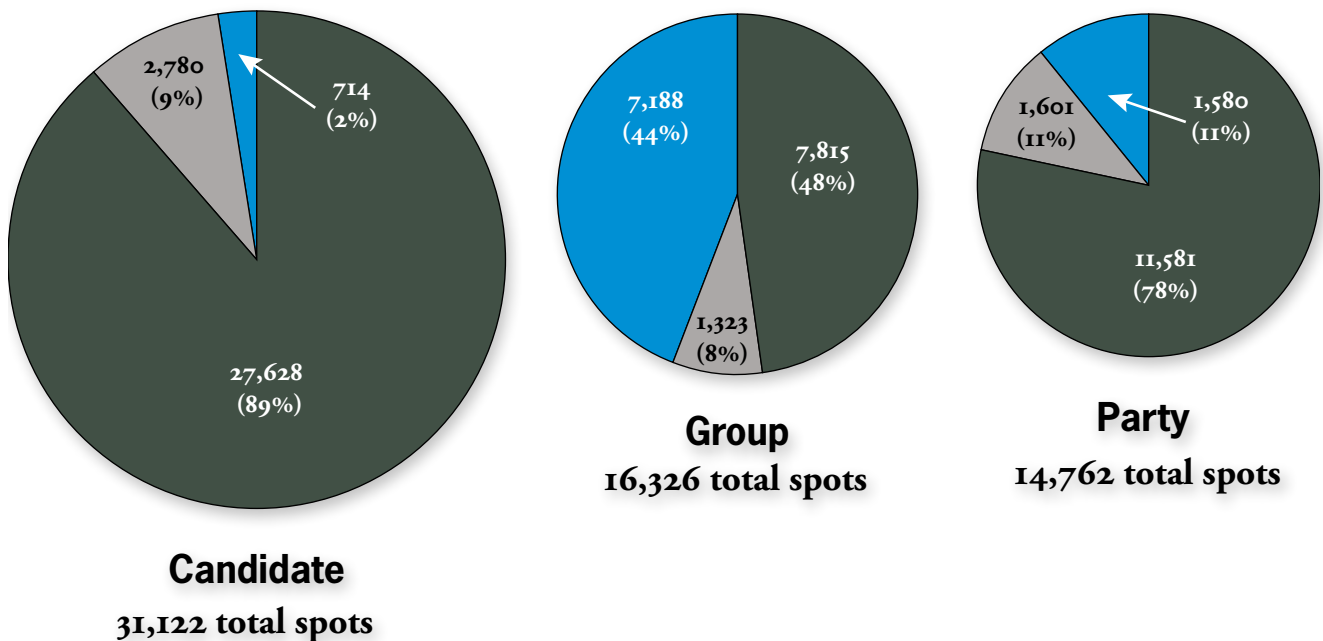
In **Michigan**, for example, an ad by the Republican Party described candidate Shelia Johnson as a “judicial activist,” an ad by the Democratic Party described candidate Colleen O’Brien as having “worked to deny benefits to a cancer patient,” an ad by the Republican Party described Bridget McCormack as having “fought to protect sexual predators,” and an ad by the Democratic Party suggested that “unlike some judges,” the Democratic candidates “have zero tolerance for violence against women and kids.”

“Based on the commercials you wouldn’t vote for any of the six [Michigan Supreme Court candidates] even if they were running for dog catcher. You’d be afraid they would abuse the dogs.”

—Op-ed by political consultant Tim Skubicki

In **Wisconsin**, ads by the progressive Greater Wisconsin Committee accused incumbent Justice David Prosser of covering up molestation by a priest instead of prosecuting him when Prosser was a district attorney. Justice Prosser called the ad about a 33-year-old case “sleazy” and said it was false, and the victim in the case asked for it to be pulled.⁵ Another ad described Justice Prosser as a “rubber stamp” for Governor Scott Walker. On the other side, an ad by the state Tea Party Express asserted that “big union bosses want [challenger JoAnne] Kloppenburg” because she is “an activist judge they can control,” while an ad by Wisconsin Manufacturers

Ad Tone by Sponsor, 2011-2012



Source: Analysis of total ad spots by the Brennan Center for Justice based on data provided by Kantar Media/CMAG



& Commerce described Kloppenburg as “weak on criminals.”

In **Ohio**, a state Republican Party ad accused Supreme Court candidate Bill O’Neill of being “sympathetic to rapists,” based on a decision he made as an appeals judge overturning a rape conviction due to ineffective assistance of counsel. The Ohio State Bar Association described the ad as misleading and stated that it “impugn[s] the integrity both of a candidate and of the court, and impl[ies] that justice is for sale.”⁶ Republican candidate Justice Robert Cupp distanced himself from the ad, stating through his campaign committee that “he has not and would not approve a commercial like this.”⁷

Significantly, some of the most negative ads did not yield the desired results. Despite being subject to some of the nastiest ads of 2011–12, McCormack, Prosser, and O’Neill each won their respective races.

As in previous years, ads from non-candidate groups were more likely to be negative in tone than candidate ads, while candidates typically relied on traditional positive ads that promoted their backgrounds and accomplishments. In 2012, 26 percent of ad spots by outside groups and 21 percent of ad spots by political parties were negative, compared with 12 percent of ad spots by candidates. In 2011, Wisconsin’s race saw outside groups particularly on the attack: nearly 75 percent of all ad spots by outside groups were negative in tone, while no candidate released a negative advertisement. Overall, more than half of all ad spots by outside groups in 2011–12 were negative in tone.

Breaking with history, nonpartisan races in 2011–12 saw a higher percentage of negative ads than partisan races (40 percent as compared to 16 percent), stemming in large part from the surge of negative ads in nonpartisan Kentucky, Mississippi, and Wisconsin. Despite rancorous ads in several states, however, the most common ads in 2011–12 struck a positive note, praising a candidate’s ethical standards (26 percent of all ad spots) or discussing a candidate’s history, education, family, or experience (17 percent of all ad spots).



Finally, in what may be a reflection of the heightened sensitivity to the politicization of judicial races around the country, 16 percent of all ad spots in 2011–12 discussed special-interest influence, either asserting that a candidate was not swayed by special interests or accusing a candidate or court of being captured by special interests.

Facebook page posted by Florida group Defend Justice from Politics during 2012 retention race

Beyond Television: Internet and Social Media Arrive in High Court Campaigns

The record spending on TV ads in 2011–12 is just the latest confirmation that reliance on television advertising is here to stay as a virtual prerequisite to gaining electoral victory in many state high court races. But with social media and internet advertisements offering lower-cost options to candidates and groups seeking to reach a wide audience, high tech alternatives to TV took on growing importance in 2011–12.

Several Supreme Court campaigns took to the internet and social media to spread their messages. Florida’s Defend Justice from Politics, for example, maintained an active Facebook page and Twitter account linking to articles about the Florida retention races and encouraging Floridians to vote.

Hall of Shame

Too often as Election Day approaches, the road to the courthouse detours through a gauntlet of political mudslinging. Here are some of the significant low points in the 2011-12 race to the bottom in judicial election advertising:

OHIO: The Ohio Republican Party, which backed an incumbent justice facing former appeals-court judge Bill O'Neill, seized on a 2000 decision O'Neill wrote reversing a rape conviction. Variations on the allegation ran in several ads, including "When Crime Occurs," over six days ending Oct. 29, 2012.

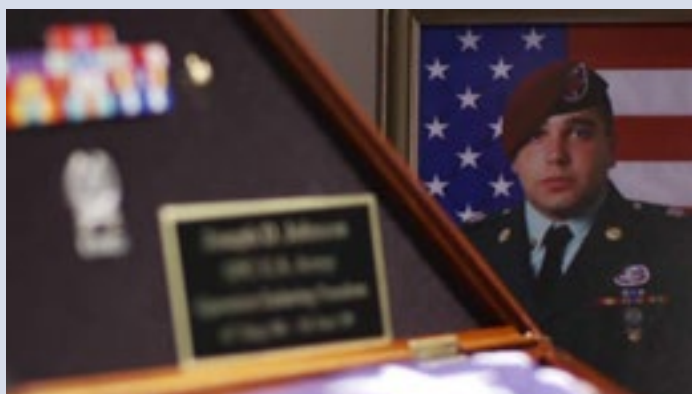
"When crime occurs victims deserve justice. But as a judge, Bill O'Neill expressed sympathy for rapists."



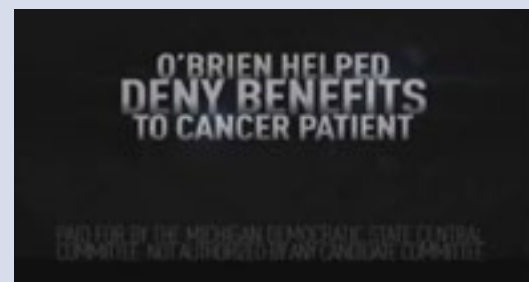
Copyright 2012 Kantar Media/CMAG

MICHIGAN: A Washington, D.C.-based group, the Judicial Crisis Network, ran an ad featuring the mother of a Michigan soldier killed in Afghanistan that referred to Bridget McCormack's involvement as volunteer co-counsel for a Guantanamo Bay detainee. The detainee was transferred for prosecution in Tajikistan, where he is serving a 17-year term. The ad aired 416 times over eight days through Election Day.

"My son is a hero and fought to protect us. Bridget McCormack volunteered to free a terrorist. How could you?"



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MICHIGAN: The Michigan Democratic Party ran an ad attacking the three Republican-backed Supreme Court candidates for their alleged ties with special interests. Focusing in on candidate Colleen O'Brien, a former insurance lawyer, the ad asserted that "she worked to deny benefits to a cancer patient." The ad aired 553 times.

"O'Brien helped deny benefits to cancer patient."

KENTUCKY: In a rematch between Supreme Court Justice Will T. Scott and Janet Stumbo, whom he unseated in 2004, the Scott campaign evoked the infamous race-baiting Willie Horton ad from the 1988 presidential election. While flashing images of black murderers and pregnant white women, the ad referred to murder convictions that Stumbo voted to reverse while on the Supreme Court. The ad aired 71 times, ending one week before the election.

“Lee Parrish and Roger Wheeler were sentenced to death for ruthlessly murdering pregnant women. But former justice Janet Stumbo voted to reverse both convictions.”



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WISCONSIN: The Greater Wisconsin Committee targeted Justice David Prosser with what one columnist called “the mother of all attack ads.”¹ It accused him of protecting a priest accused of molestation in 1979, when Prosser was a prosecutor. A victim in the case, among others, labeled the ad “offensive and inaccurate” and called for it to be removed.² It aired 1,089 times over 13 days through the 2011 election.

“Tell David Prosser judges should protect our children, not sex offenders.”



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Candidates in Florida and Michigan used YouTube to disseminate advertisements that did not make it onto TV, and candidates, parties, and groups also regularly posted copies of TV ads online. In Iowa, pro- and anti-retention groups released Internet-only ads trading barbs about keeping politics out of the courtroom and avoiding “activist” judges. In one particularly notable pro-retention ad by Progress Iowa, a reformed member of a hate group drew a connection between hate groups and the conservative political organization The Family Leader, headed by activist Bob Vander Plaats, which campaigned against retention. Stating “I know hate,” he argued that groups like The Family Leader “only believe in equality for people like them.”

Another notable Internet-only ad by Democratic Michigan Supreme Court candidate Bridget McCormack featured stars from the popular television series “The West Wing” (McCormack’s sister was a cast member on the show). The four-minute ad doubled as a public service announcement, encouraging voters not to skip the nonpartisan races at the bottom of their ballots when they vote. It garnered more than 1 million views on YouTube.

McCormack also relied on Facebook to support her campaign. Roughly half of her ad budget went to Facebook ads, according to her campaign manager, who credited Facebook with delivering her the margin of victory.⁸

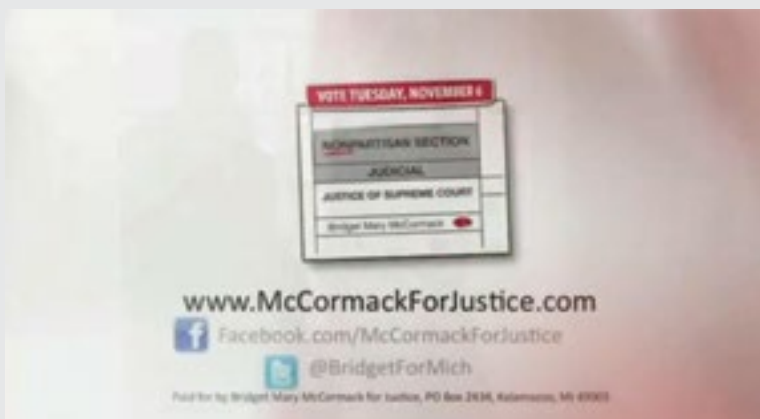
Texas Supreme Court Justice Don Willett likewise turned to Twitter as part of his reelection strategy. In an interview with the Texas Lawyer—conducted by tweets, naturally—Willett said he took to Twitter “About 3 yrs ago, mostly b/c of re-election. Voters increasingly consume info online, esp political info. & cand must harness s-m [social media] potency.” In another 140-character burst he added that “For me it’s mainly a political comm medium 2 stay connected, a byproduct of elected judges.”⁹

“The West Wing” Meets the Michigan Supreme Court

“Walk and talk?”

Fans of the White House television drama “The West Wing,” which ran from 1999-2006, instantly recognize the phrase. It signaled the start of snappy dialogue over an issue or crisis confronting the fictional Democratic president or his staff.

Web video created by McCormack for Justice



When Bridget McCormack started her campaign for Michigan Supreme Court, she confided to her younger sister that straight-ticket voting was her biggest election concern because it typically led to a 25 to 39 percent drop-off in voter participation on the nonpartisan part of the ballot that would include her race.

Her sister, Mary McCormack, is an actor whose credits include the role of Deputy National Security Adviser Kate Harper on the last three seasons of “The West Wing.”

Little sister’s solution? “Walk and Talk,” a voter-education ad that doubled as a campaign ad for Democrat McCormack.

Actor McCormack first approached West Wing alums Allison Janney and Bradley Whitford with the idea. Cast members Martin Sheen, Richard Schiff, Joshua Malina, Janel Moloney, Lily Tomlin, and Melissa Fitzgerald also volunteered.¹

Borrowing the show’s format, the four-minute ad “Walk and Talk” laid out candidate McCormack’s dilemma:

“If people fail to realize a straight-ticket vote doesn’t count in non-partisan races, if they just casually vote the party line, then their interests will continue to go unrepresented,” Sheen, reprising his role as Democratic President Josiah “Jed” Bartlet, said in one scene.

The ad also included a plug for candidate McCormack, who had been the target of negative advertising for her work as founder of the Michigan Innocence Project and as co-counsel for a Guantanamo Bay detainee.

“Bridget has spent her entire career fighting for justice for ordinary people, for families with sick kids, for victims of domestic violence,” said Whitford, reprising his character Josh Lyman, deputy chief of staff. “She’s fought to free innocent men and women—and get the actual criminal behind bars.”

The ad, which went viral online with more than 1 million views on YouTube, cost McCormack’s campaign a mere \$5,000. Some credited it as a possible factor in her finish as the top vote-getter in the Michigan Supreme Court race.²

The Political Climate Heats Up

Merit selection for judges and public financing for judicial races are each designed to help reduce the influence of special-interest spending and politics on courts. But 2011–12 brought challenges to both reforms.

Several states that use merit selection for judges or public financing for judicial races experienced costly and politically charged races in 2011–12, exposing vulnerabilities in programs designed to keep special interests away from judicial elections. While the challenges were serious, those who brought them did not always prevail. Voters in several states rejected efforts to inject politics into merit selection retention races, although often only after costly battles where special interests weighed in on both sides. And public financing succeeded in allowing candidates to run competitive races even in the face of ballooning special-interest spending.

The greatest threat came from state legislatures. In several states, lawmakers sought to weaken or dismantle reform measures altogether—including unsuccessful ballot measures in Arizona, Florida, and Missouri seeking to politicize merit selection, and successful efforts to eliminate public financing in Wisconsin and North Carolina. Similar challenges to fair courts reforms are poised to continue through the end of 2013 and beyond.

Merit Selection Faces Challenges

To understand what happened in judicial retention races in 2011–12, it is helpful to review precursor events in 2010. Compared to contested elections, retention races traditionally have drawn far less interest group spending and pressure. But in 2010, Iowa made headlines when three Supreme Court justices, each of whom had participated in the Court's unanimous decision under the state constitution's Equal Protection Clause to legalize marriage for same-sex couples, lost their seats in a politically charged retention vote. The losses followed an intense campaign by interests opposed to the marriage decision. The 2010 election produced roughly \$1.4 million worth of spending in a state where not a penny had been spent in judicial retention races in the preceding decade.

The year 2010 also saw unsuccessful campaigns of varying intensity against the retention of judges in four other merit selection states: Alaska, Colorado, Florida, and Kansas. The events in these states led to predictions of new challenges for a form of judicial selection that had largely avoided the politicization and arms-

What is Merit Selection?

Merit selection is a judicial selection system that utilizes nonpartisan nominating commissions to recruit, vet, and winnow down applicants for judgeships. These commissions typically submit a short-list of potential candidates to the governor, who appoints one of them. In some states with merit selection, judges are subject to an up-or-down retention election for subsequent terms. Twenty-three states (and the District of Columbia) utilize merit selection to choose some high court judges.



TV ad by Defend Justice from Politics urging voters to “stand up for our justices against this political power grab.”

Copyright 2012
Kantar Media/CMAG

race spending that characterizes many states with competitive judicial elections.

These challenges sharpened in 2012. Not only was there another intense anti-retention effort in Iowa, but a vigorous anti-retention campaign emerged in Florida, with high spending by the justices and other retention proponents in response. Arizona, Indiana, and Oklahoma also experienced politically charged retention races. Simultaneously, ballot measures in Florida, Arizona, and Missouri threatened to weaken merit selection in those states.

In contrast to the 2010 election in Iowa, however, the 2012 efforts uniformly failed. Voters chose to retain all sitting justices up for retention, and also rejected ballot measures that would have weakened merit selection. But with challenges to judges and to merit selection systems likely to continue, and with judges and pro-retention forces increasingly turning to fundraising and spending to support their cause, retention elections appear poised to become a second significant front in the judicial election wars.

“I am very, very stressed at the entire circumstance.... What is going on now is much larger than any one individual. This is a full-frontal attack—that had been in the weeds before—on a fair and impartial judicial system, which is the cornerstone and bedrock of our democracy.”

—Florida Supreme Court Justice R. Fred Lewis⁴

Florida's Bid to Remake the Judiciary

In 2011 and 2012, Florida voters saw a multi-pronged bid to remake the judiciary by the state Republican Party and conservative groups.² Three justices facing a retention election in 2012 confronted an unprecedented ouster drive, while voters also considered a ballot measure that would have weakened Florida's merit selection system.

Record-Breaking Retention Battle

The ouster drive against Justices Barbara J. Pariente, R. Fred Lewis, and Peggy A. Quince was, as described by the *Washington Post*, “a high-stakes political contest unlike any [Florida] has ever seen.”³ The retention battle attracted special-interest money and national attention.

Conservative groups targeted the three justices, creating controversy surrounding rulings in which they had participated. Most prominently, in 2010, the Court rejected a ballot proposal that sought to amend the state constitution to resist mandates imposed by the federal Affordable Care Act, concluding that the ballot proposal had “misleading and ambiguous language.”³

The Republican Party of Florida also called for the justices' ouster, the first time a political party took sides in Florida's nonpartisan retention races in the almost four decades since Florida first adopted merit selection. Six former state Supreme Court justices, appointees of Democratic and Republican governors, decried the Republican Party's decision, calling it “an unprecedented attempt to politicize the judiciary.”³

Spending in the retention races quickly ratcheted up. Between 2000 and 2010, documented spending on Florida Supreme Court retention races had totaled only \$7,500. In 2012, spending exploded to nearly \$5 million, with outside groups accounting for nearly 70 percent of expenditures. The conservative group Americans for Prosperity spent an estimated \$155,000 on direct mail and television advertising, while a tea party-linked state advocacy group, Restore Justice 2012, spent about \$70,000. The vast majority of documented spending, however,

came from campaign committees formed by the justices themselves as well as pro-retention allies.

The three targeted justices set up political committees to seek campaign funding, visited news media outlets, and made several public appearances to educate voters about the role and work of the courts. “The test is going to be whether the citizens of this state understand that they are not going to let the judiciary be bought,” Justice Pariente said at one of her appearances.⁶ Collectively, the campaign committees for the three justices raised more than \$1.5 million, principally from lawyers.

Defend Justice from Politics, which was also funded primarily by lawyers, likewise mounted an active pro-retention campaign, spending more than \$3.1 million on a television ad accusing “politicians in Tallahassee” of engineering a “power grab.”

Democracy at Stake—a coalition of Florida individuals and organizations formed to educate voters about attacks on the state Supreme Court and the retention election process—likewise spoke out against efforts to politicize Florida courts, urging on its website for “Floridians to see the relentless assault on our Supreme Court for what it is—a calculated power grab.”⁷ State bar officials weighed in as well, with a statewide nonpartisan educational campaign promoting merit selection that featured retired U.S. Supreme Court Justice Sandra Day O’Connor, an advocate for protecting state courts from political influence.

Merit Selection on the Defensive

At the same time the retention battle was raging in Florida, voters were also asked to consider a ballot measure that would have weakened Florida’s merit selection system. Known as Amendment 5, it was the lone measure to make it to the ballot among a raft of legislative proposals in 2011 that targeted the Florida courts. The proposals followed an earlier decision by the state Supreme Court to remove three GOP-backed proposed constitutional amendments from the November 2010 ballot.

Amendment 5 sought to require state Senate confirmation of the governor’s Supreme Court appointees, adding a new layer of politics to the

Amendment 5, originally introduced as HJR 7111, was one among several measures put forward in the Florida legislature in a campaign spearheaded by then-House Speaker Dean Cannon to remake the judiciary. None of the other measures advanced to the ballot:

- HJR 7111: Constitutional amendment to split the Supreme Court into separate criminal and civil divisions and give the legislature increased power over the appointment process. An amended version of this bill, which eliminated the court-splitting measure, was ultimately passed and presented to voters as Amendment 5.
- HJR 1097: Constitutional amendment to end merit selection for judges and replace it with governor appointments and Senate confirmation.
- HJR 7025: Constitutional amendment to repeal the Supreme Court’s power to adopt rules for practice and procedure, which would instead be adopted by the legislature.
- HB 7027: Creates a judicial conference made up of the Chief Justice and several chief judges and gives it broad oversight over the state’s judiciary.
- HJR 7037/SJR 1704: Constitutional amendment to make documents related to complaints and investigations of the Judicial Qualifications Commission publicly available.
- HJR 7039: Constitutional amendment to require that justices receive 60 percent of the vote in order to survive a retention election, up from 50 percent.
- HB 7101: Repeals existing state judicial nominating commissions and replaces them with new commissions selected entirely by the governor, with no input from the state bar.

appointment system. It also would have allowed the legislature to override any Florida Supreme Court administrative decision with a simple majority (50 percent plus one vote), as opposed to a supermajority (66 percent). Under a third component of the proposed amendment, legislators would have gained access to confidential records of the commission that investigates complaints against judges.

Proponents said Amendment 5 would make the court more accountable and restore the balance of power between the legislative and judicial branches of government. “Today the Florida Supreme Court has more power, more autonomy and less accountability to the legislative and

executive branches than the U.S. Supreme Court has to Congress and the president,” then-House Speaker Dean Cannon said weeks before the election.⁸

But defenders of merit selection said Florida’s system not only provides checks and balances, but helps depoliticize the judicial selection process as well. Sandy D’Alemberte, a Florida lawyer, former American Bar Association president, and former president of Florida State University, cautioned that the proposed constitutional amendment “puts the nominee back into a political process, with the specter of partisan lawmakers rejecting qualified appointees over ideological issues.”⁹

Some of the strongest opposition came from newspaper editorial boards. “Unsatisfied with dominating the other two branches of government in Florida, Republican leaders are going for broke,” the Orlando Sentinel editorial board wrote. “They’re out to control the only branch left that will dare stand up to them—the judiciary.”¹⁰



Rick Santorum speaks at the “NO Wiggins” bus tour in Iowa
AP Photo/Charlie Neibergall

The Outcome

On Election Day, Florida voters rejected efforts to apply partisan pressure to the courts. Justices Pariente, Lewis, and Quince were retained overwhelmingly, each with roughly two-thirds of the vote. Amendment 5, which would have required 60 percent approval to pass, received only 37 percent of the vote, with 63 percent voting “no.”

Iowa’s Retention Battle Redux

Conservative activists in Iowa started 2012 hoping for a repeat of the 2010 Supreme Court retention races, when three justices were unseated after a campaign targeting them for their 2009 unanimous constitutional ruling legalizing marriage for same-sex couples.¹¹ The \$1.4 million campaign in 2010 marked the first time voters had not retained a sitting justice in Iowa, which adopted a merit selection system in 1962.

In 2012, conservative groups set their sights on Justice David Wiggins, who also had participated in the 2009 decision. Among these groups was The Family Leader, led by former gubernatorial candidate Bob Vander Plaats. Three other justices on the 2012 retention ballot were replacements for the trio defeated two years earlier, and were not targeted for ouster.

But much had changed in Iowa between 2010 and 2012. Public opinion had shifted in favor of marriage equality.¹² Members of the legal community decried the outside interference in the 2010 retention race and the attempt to use a one-issue litmus test to determine the court’s makeup. Anti-retention forces also put fewer resources into the state, spending an estimated \$466,000 in 2012, as compared to nearly \$1 million in 2010.

On September 24, 2012, Iowa for Freedom, an offshoot of Vander Plaats’ group, started crisscrossing the state in a “NO Wiggins” bus tour, which was sponsored by CitizenLink, Patriot Voices, The Family Leader, the National Organization for Marriage, and CatholicVote.org. Former U.S. Senator Rick Santorum, a 2012 presidential candidate, and Louisiana Governor Bobby Jindal joined the tour as well.

The Iowa Republican Party, which had stayed quiet in 2010, also called for Wiggins’ defeat, which would have given Governor Terry



Branstad, a Republican, his fourth appointment to the court since taking office in 2010.

At the same time, Iowa Supreme Court Chief Justice Mark S. Cady spearheaded an effort to educate Iowans on the dangers inherent in subjecting judges to political pressure, embarking on an ambitious statewide speaking tour. At his urging, Supreme Court justices began traveling to hold oral arguments in cases at locations across the state, as well as meeting with high school and college students to discuss civics education. In an effort to enhance judicial transparency and increase public trust in the state's court system, Cady advocated for live-streaming of Supreme Court oral arguments. Cady's efforts predictably drew attacks, including threats of

impeachment. In a particularly harsh personal attack, Iowa conservative radio host Steve Deace and Republican Party of Iowa central committee member Wes Enos accused Cady's fellow justices of being "open enemies of God" for choosing him to serve as the chief justice.¹³

Justice Not Politics Action, a pro-retention independent expenditure committee, also engaged in robust pro-retention and educational efforts throughout Iowa. JNPA distributed pro-retention materials, including mail and online communications, and attended events across the state to raise awareness about the importance of voting "yes" on retention.

Justice Not Politics, a coalition that included the Iowa State Bar Association, League of Women Voters, Interfaith Alliance of Iowa, and others, developed and distributed materials at legal

Direct mail piece distributed by Justice Not Politics Action in Iowa

Additional Assaults on Judicial Independence

During the 2011-12 biennium, legislators intending to limit judicial authority and judicial independence launched a series of other assaults.

In New Hampshire, Oklahoma, and Tennessee, legislators introduced bills to bar judicial review of acts passed by the state legislature. The Oklahoma and New Hampshire bills died, while the Tennessee bill was withdrawn by its sponsor, House Judiciary Committee Chair Mae Beavers, after it came under sharp criticism from both political parties. “That is crossing the line on separation of powers between the legislative and judicial branches,” said Tennessee Senate Speaker Ron Ramsey, a fellow Republican. “Because we make the law and they interpret the law. If you don’t like what they’re coming down with, then you do everything you can to change the court.”¹

Some legislators in New Hampshire attempted to assert new authority over the courts with a proposal to amend the constitution to disband the state’s appellate courts, with the option of reconstructing them by statute.² The bill aimed to put a constitutional amendment before voters, but was killed by the House of Representatives on a 251-47 vote.

On Election Day 2012, New Hampshire voters also rejected a proposed constitutional amendment that had been approved by the legislature. It would have given the legislature a veto over procedural rules established by the state’s Supreme Court. The referendum marked the third time New Hampshire voters have rejected this measure in the past decade.³ Opponents of the measure included the New Hampshire Bar Association and two former state Supreme Court justices.

In addition to proposed statutory and constitutional changes, a record number of impeachment bills were also introduced in 2011. Impeachment efforts over specific rulings in hot-button cases were advanced by legislators in several states, including Iowa, Missouri, and New Hampshire. To date, they have been unsuccessful.

In Iowa, a handful of legislators pushed to impeach four justices who had not stood for retention in 2010. Despite solid voter opposition, the legislators pushed a resolution contending the court and these four justices had overstepped their authority in 2009 in the decision legalizing marriage for same-sex couples in Iowa. Iowa’s constitution states that a justice can be impeached only “for any misdemeanor or malfeasance in office,” yet the impeachment resolution did not allege ethical or criminal wrongdoing.

The calls for impeachment were condemned widely, and after Iowa’s Republican governor and House speaker spoke out against impeachment, the threat died. A similar effort was resurrected briefly in 2012 but it gained no traction.

In Missouri, articles of impeachment against St. Louis Circuit Judge John A. Ross were filed by a Missouri state representative on the same day that Judge Ross was scheduled to testify in his confirmation hearing for a federal judgeship before the U.S. Senate Judiciary Committee in Washington. Judge Ross was accused of “judicial activism” and racial discrimination in the impeachment articles, which were later dropped. He ultimately was confirmed for the federal bench in Missouri.

events and other allied gatherings. They worked with additional stakeholders to share educational materials, including an online effort encouraging Iowans to turn over their ballots and vote in the non-partisan retention elections.

The bar association also launched a “Yes Iowa Judges” bus tour. They shadowed the “NO

Wiggins” caravan to, as organizers put it, “respond to, and correct, misinformation about Iowa’s judicial system.”⁴ Newspapers throughout Iowa also spoke up, arguing that the anti-retention campaigns threatened judicial independence.

Spending in the Iowa Supreme Court retention election totaled more than \$833,000 in 2012, down from the \$1.4 million spent in 2010 but still substantial in a state with no recorded spending on high court races during the previous decade. Anti-retention groups spent \$466,000 on the 2012 election, including \$318,000 by Iowans For Freedom and \$148,000 by the National Organization for Marriage. Both groups ran television ads. Pro-retention groups spent \$367,000, including \$320,000 by Justice Not Politics, \$37,000 by the Iowa State Bar and roughly \$5,000 each by Progress Iowa and the Human Rights Campaign. Justice Wiggins himself (like the three Iowa justices ousted in 2010) refused to raise campaign funds.

Despite receiving a 63 percent rating by the state bar, the lowest ever in a retention race—a fact used against him in opposition ads—Wiggins won retention with 54.5 percent of the vote. It remains uncertain whether the retention tempest will strike again in 2016, when the remaining three justices who ruled in the marriage equality suit will be up for retention votes.

Battles in Other States

In **Oklahoma**, a typically placid retention election was jolted weeks before Election Day 2012 when the state Chamber of Commerce, through its organization the Oklahoma Civil Justice Council, issued its first-ever ratings of state Supreme Court justices.

The Chamber-backed Council issued low approval ratings to two of the Oklahoma Supreme Court justices seeking retention, James E. Edmonson (32 percent approval) and Yvonne Kauger (31 percent approval), and “provisional” low ratings to two others, Norma D. Gurich (32 percent approval) and Douglas L. Combs (22 percent approval). Chamber officials said they assigned the highest scores to justices whose decisions “had the effect of restraining the spread of liability.”¹⁵

Although organized opposition to the four justices seeking retention did not materialize, the Council’s ratings prompted individual lawyers to post web videos and speak out in favor of Oklahoma’s merit selection system and retention. The Oklahoma Bar Association created a

website with information about the justices and their legal backgrounds.

And, while no candidate fundraising or independent spending had been documented in Oklahoma retention races from 2000–2010, in 2012 a pro-retention group organized by Oklahoma City lawyer Terry W. West, Yes for Fair and Impartial Judges, spent more than \$450,000 on air time for TV ads supporting retention.

All four justices were retained for six-year terms, each with roughly two-thirds of the vote.

In **Indiana**, a muted challenge to a statewide judge’s retention was mounted over a single controversial court ruling. Tea party activists, college students, and libertarians sought to oust Indiana Supreme Court Justice Steven David, who had been appointed by then-Governor Mitch Daniels, a Republican, in 2010 and was seeking retention for a 10-year term.

Justice David was targeted after authoring the 3–2 majority ruling in *Barnes v. State*, which ruled, as a matter of state common law, that Indiana citizens did not have the right to use force to resist illegal police entry into their homes.¹⁶ The state legislature later rewrote the

Oklahoma Bar Association webpage, courtfacts.org



Television ad created by the No on Proposition 115 Committee

law to allow people to resist “unlawful” police actions in their homes.¹⁷

Justice David was retained, with 69 percent of the vote. No justice has lost a retention vote in

Indiana since the state switched to the appointment/retention system in 1970.

In **Arizona**, legislators aiming to reduce the state bar’s role in judicial selection put an initiative on the statewide ballot, and Arizonans also voted in a retention contest where opponents called for the ouster of Justice John Pelander.

Arizona’s Proposition 115 would have allowed Arizona’s governor to increase control over membership of the state’s judicial nominating commission, and to reduce the influence of the state bar. It also would have ended a mandate for bipartisan representation on lists of judicial finalists sent to the governor and would have required the nominating commission to submit eight names to the governor, not three.

The ballot measure was a compromise reached over a 2011 bill, which would have wholly eliminated merit selection in Arizona.

Proponents said the compromise would improve the quality of both applicants and judges. But not all supporters of the merit system supported the compromise. Opponents included 19 past state bar presidents and five retired Arizona Supreme Court justices.

“It is a blatant attempt by the Legislature to inject politics into the judicial selection process and significantly change a system that has served our state well for over thirty-seven years.”

—Retired Arizona Chief Justice Ruth V. McGregor¹⁸ and Santa Cruz Presiding Judge James A. Soto¹⁹

A controversial state Supreme Court ruling also fueled a retention challenge in Arizona. State tea party members and factions of the Arizona Republican Party called for voters to unseat Justice Pelander, citing a ruling he participated in two months before the election that allowed voters to consider a ballot proposal to end the state’s two-party primary system. (A Republican precinct chair also sent out flyers to every Republican in her precinct urging them to vote not to retain any of the state’s appellate judges up for retention who were appointed by former



Looking Forward: Merit Selection in 2013 and Beyond

Efforts to undo merit selection systems continued in 2013, with opponents increasingly seeking to replace merit selection with a federal-style system in which the governor nominates judges that are confirmed by the legislature. Unlike the federal system, however, these judges would not be appointed for life; they would either have to be reappointed or face periodic retention elections.

Efforts to change the selection method for Kansas Supreme Court justices faltered in the state legislature. But Kansas Governor Sam Brownback signed a bill passed in early 2013 to use federal-style selection for Court of Appeals judges in Kansas.

Meanwhile, Tennessee voters will decide in 2014 whether to adopt a federal-style system that would include periodic retention elections. Tennessee had utilized a legislatively-authorized merit selection system. However, because the Tennessee legislature allowed the state’s judicial nominating commission to expire on June 30, 2013, there was continued uncertainty at the time of publication as to how to fill judicial vacancies prior to the 2014 vote.

All was not bad for merit selection, however. At the same time merit selection is on the defensive in several states, it is also being considered anew in others. At the time of publication, legislation to institute merit selection for all judicial offices in Minnesota had been introduced and subsequently passed out of the Senate Judiciary Committee and the House Elections Committee, with momentum building for further advancement in 2014.



Democratic Governor Janet Napolitano. That effort was not successful.)

Lawyers Mark Harrison and Paul Eckstein set up the pro-retention committee, “Save Our Judges,” marking the first time in more than four decades that a political committee had been formed in an Arizona Supreme Court retention election.²⁰

Pelander, who spent approximately \$5,000 of his personal funds supporting his retention campaign, won a new six-year term with 74 percent of the vote. Arizona voters also overwhelmingly rejected Proposition 115, with 72.4 percent voting “no.”

Missouri voters also faced a ballot measure, Amendment 3, which sought to weaken merit selection in the very state that introduced the judicial selection method to the country in 1940. The so-called “Missouri Plan” became a model system for merit selection in states across the country. Yet it also has been under fire at home for years, both from some Republicans in the Missouri legislature and from a group organized as Better Courts for Missouri and funded in large part by two wealthy contractors, David Humphreys, President and CEO of TAMKO Building Products, Inc., based in Joplin, and Stanley Herzog, chairman and CEO of St. Joseph, Missouri-based Herzog Contracting Corp., a highway and railroad construction company. The two are also donors to national conservative political causes.

Amendment 3 would have allowed each new governor to control a majority of seats on the

state’s judicial nominating commission, which screens and recommends candidates for the governor to choose as top judges. It would have removed one voting position on the commission that had been reserved for a member of the state Supreme Court. The ballot measure also would have increased the number of finalists submitted to the governor from three to four.

Proponents argued that lawyers have too much control over judicial selection, and that having an elected official choose both a screening committee majority and the judge would make the process more accountable to the electorate.

Defenders of the Missouri Plan included six former state Supreme Court justices—both Republican and Democratic appointees—organized with other supporters of the Missouri Plan as the Missourians for Fair and Impartial Courts Committee. The Committee aired a TV ad urging voters to “keep politics out of Missouri courtrooms” and warning that “special interests want to change Missouri’s constitution and tip our scales of justice.” The narrator added, “They’re pushing Amendment 3 because they don’t like nonpartisan courts they can’t control.”

A major turning point in the campaign came in mid-October, when Better Courts for Missouri, which was unhappy with a ballot summary drawn up by state officials, decided to pull its support. At the ballot box on Election Day, 76 percent of Missouri’s voters rejected Amendment 3. Nonetheless, both sides in Missouri’s merit selection debate said the 2012 vote did not settle the issue. Both vowed to stay active.

Promotional literature created by Missourians for Fair and Impartial Courts Committee

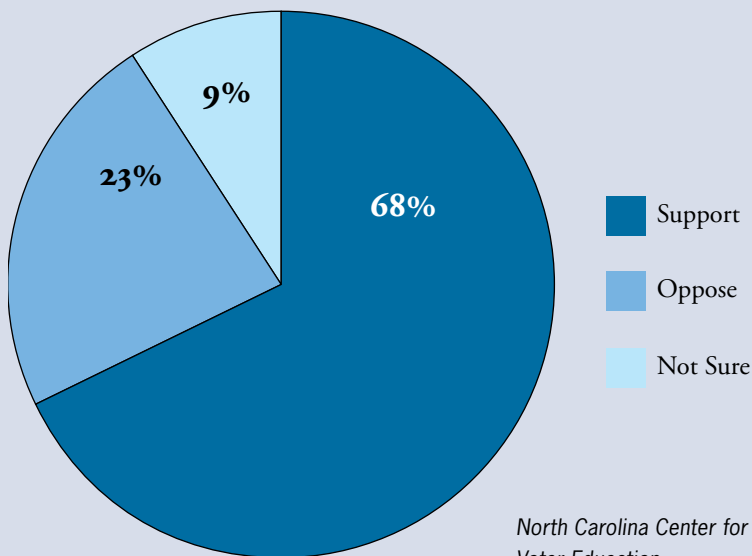
Looking Forward: Public Financing in 2013 and Beyond

When this report went to press, the fate of judicial public financing in the states was mixed. In North Carolina, opponents of the state's public financing program succeeded in repealing it, despite its popularity with the public. Public financing also faced a loss in Wisconsin in 2011, when the public financing program was defunded and subsequently repealed.

New Mexico also missed an opportunity to strengthen its public financing program in the wake of the Supreme Court's decision in *Arizona Free Enterprise Club v. Bennett*. This decision was interpreted by a lower court as barring the state's "trigger matching" program, which gave judicial candidates additional public funds in response to high levels of opposition spending. Overruling an overwhelming bipartisan majority, Governor Susana Martinez vetoed a reform bill in 2013 that would have strengthened the state's public financing system. The bill would have instituted a small-donor matching proposal to replace the trigger matching funds provision that had been struck down. Under the proposal, participating candidates would receive an initial grant from the state, but then would be allowed to raise additional small contributions that the state would match with public funds at a 4-1 ratio. Governor Martinez said she vetoed the bill because it did not do enough to reform New Mexico's judicial selection process.

In West Virginia, there was substantially better news for public financing. The state legislature voted in 2013 to make West Virginia's pilot public financing program for Supreme Court races permanent. The legislature also substantially increased the block grants available under the program, ensuring that its public financing program would remain attractive to candidates and provide them with sufficient funds to run credible campaigns without depending on influence-seeking contributions.

Support for Public Financing in North Carolina, 2013



Public Financing in Peril

With the costs of running a judicial campaign soaring across the nation, would-be judges in many states have had little choice but to raise election funds from lawyers and parties involved in frequent litigation—which leads voters to fear that justice is for sale. Public financing for judicial candidates was a bright spot in 2011-12, allowing judicial candidates in some states to pursue an alternative means of financing their campaigns that did not leave them beholden to campaign contributors or outside spenders.

But while public financing helps potential judges say no to special interest money, it faced new challenges from a surge of independent spending by outside groups and parties, along with hostile state legislatures and judicial decisions that imposed new burdens on these systems.

Supreme Court candidates in Wisconsin, North Carolina, and West Virginia utilized public financing in 2011-12, opting to receive public funds for their campaigns in exchange for limiting their fundraising from other sources. New Mexico also offered public financing for appellate races, but no Supreme Court candidates opted into the program. In total, judicial candidates received more than \$1.6 million in public funds in the 2011-12 biennium.

The recent flood of outside spending in judicial races posed one challenge to the effectiveness of these public financing programs, offering a back door for outside interests trying to buy influence without directly donating to candidates.

In Wisconsin's 2011 race, for example, three of the four Supreme Court candidates, including the two candidates who faced off in the general election, opted to receive a combined \$800,000 in public financing. At the same time, outside groups flexed their muscles during the race, pouring more than \$3.7 million into independent expenditures supporting both sides. In North Carolina, where both Supreme Court candidates accepted a combined \$480,200 in public financing, independent groups spent more than \$3.5 million supporting the incumbent, Justice Paul Newby. The challenger, Judge Sam Ervin IV, benefited from some independent spending as well, principally from a group called N.C.

Citizens for Protecting Our Schools, with funding from the National Education Association, which spent approximately \$270,000.

Recent court decisions also created challenges for states seeking to mitigate the impact of outside dollars with public financing. In a 2010 U.S. Supreme Court decision involving legislative and executive races, *Arizona Free Enterprise Club v. Bennett*, the Court ruled that states could not give candidates additional public funds in response to high levels of opposition spending, concluding that this so-called “trigger matching” mechanism violated the First Amendment.²¹

Arizona Free Enterprise Club limited its analysis to legislative and executive elections, but courts in North Carolina, New Mexico, and West Virginia subsequently ruled that *Arizona Free Enterprise Club*’s reasoning applies to judicial races as well, despite the unique concerns posed by special interest spending in support of judges.²² Accordingly, while those states remained able to distribute a basic lump sum to publicly financed judicial candidates, they could not supplement those grants with additional matching funds—limiting the funding available to candidates under the public system.

Yet even as public financing of judicial races faced new challenges from special interests and new limitations from the courts, it remained a vital tool for promoting fair and impartial courts. In West Virginia, for example, four candidates competed for two open seats, and one candidate, Republican Allen Loughry, opted to participate in a pilot public financing program established by the state in 2010. While one of Loughry’s opponents, Letitia Chafin, had more than three times as much money in her coffers as Loughry, most of it from self-funding, public financing nevertheless gave Loughry sufficient resources to broadcast three different TV ads and get his campaign message out to West Virginia voters. Loughry ultimately defeated Chafin, gaining one of the two vacant seats on West Virginia’s high court and demonstrating the viability of public financing in West Virginia.

Similarly, in North Carolina’s 2012 race, both the incumbent Justice Newby and the challenger Judge Ervin opted to receive public financing. While North Carolina saw an explosion of

“The [public financing] program is not a panacea for the ills created by the current method of judicial selection, but it helps restore public confidence in judicial independence and impartiality.”

—*Letter from 14 Justices of the North Carolina Court of Appeals to the state legislature, in favor of retaining public financing for judicial elections*

outside spending in support of Newby, with television spending by outside groups exceeding \$3 million, Ervin mounted a strong defense, including broadcasting two TV ads. He ultimately lost by fewer than 150,000 votes. By ensuring that Ervin had the resources to make his case to the public, North Carolina’s public financing system succeeded in giving each candidate a voice even in the face of massive outside spending.

Although public financing systems have proved resilient even in the face of runaway outside spending and negative court decisions, a more existential threat has flowed from recent assaults against public financing by state legislatures and governors. Wisconsin repealed its public financing program after the 2011 judicial race, and North Carolina subsequently defunded and then repealed its own program in 2013. At the same time, West Virginia voted to make its pilot public financing program permanent, offering some positive news in the face of these troubling setbacks.

State Profiles, 2011-2012

Part I: States with Candidate Races*

Alabama, Contested Election



Four of the five open seats on the Supreme Court went uncontested in the 2012 general election. The chief justice race became surprisingly heated, however, when former Chief Justice Roy Moore—best known for being removed from his position in 2003 after defying a federal court order to take down a monument of the Ten Commandments that he had installed in the Alabama Judicial Building—won the Republican nomination. His Democratic opponent Robert Vance attracted some traditionally Republican supporters who viewed Moore as too extreme, and Vance spent more than \$1 million in 77 days in an effort to win the chief justice seat. Despite being vastly outspent, however, Moore won the race for his old seat.

National Ranking

Spending	\$4,053,131	5
TV Spending	\$3,375,910	4
Candidate Fundraising	\$4,053,131	1

Arizona, Retention Election



A controversial state Supreme Court ruling fueled a retention challenge in Arizona in 2012. State tea party members and factions of the Arizona Republican Party called for voters to unseat Justice John Pelander, citing a ruling he participated in two months before the election that allowed voters to consider a ballot proposal to end the state's two-party primary system. (A Republican precinct chair also sent out flyers to every Republican in her precinct urging them to vote not to retain any of the state's appellate judges up for retention who were appointed by former

Democratic Governor Janet Napolitano. That effort was not successful.)

With a modest expenditure of \$5,000, Pelander won retention with 74 percent of the vote.

National Ranking

Spending	\$5,000	23
TV Spending	\$0	No rank
Candidate Fundraising	\$5,000	21

* Appendix lists those races for which estimated fundraising or spending data is available.

Arkansas, Contested Election



Arkansas Court of Appeals judges Josephine Linker Hart and Raymond Abramson vied for a seat on the Arkansas Supreme Court vacated by Justice Jim Gunter, who did not seek reelection. Both candidates broadcast television ads touting their experience and background. Judge Hart described herself as “a no-nonsense judge,” emphasizing her experience in the Army JAG Corps and stating that her husband of 28 years “is still my best friend.” Judge Abramson emphasized his “small-town values” and his experience as a judge and an attorney. The non-partisan election was held on May 22, 2012, and Judge Hart won the open seat.

National Ranking

Spending	\$209,230	20
TV Spending	\$168,410	13
Candidate Fundraising	\$209,230	17

Florida, Retention Election



Florida’s retention race saw a concerted effort by conservative groups to unseat three sitting Florida Supreme Court justices (Barbara Pariente, Peggy Quince, and R. Fred Lewis), including approximately \$155,000 on television ads and other advocacy spending by Americans for Prosperity. Defend Justice from Politics, a pro-retention group, responded strongly, blanketing the airways with more than 2,140 ad spots in support of the three justices and spending an estimated \$3.1 million on air time. It marked the first time that campaign ad spending exceeded \$1 million in any merit selection state since the *New Politics* report began tracking judicial races in 1999–2000. All three justices retained their seats.

National Ranking

Spending	\$4,862,210	3
TV Spending	\$3,108,190	5
Candidate Fundraising	\$1,529,020	9

Georgia, Contested Election (Unopposed)



Four seats were originally expected to be up for election in Georgia in 2012—those belonging to Justices Carol Hunstein, Harold Melton, Hugh Thompson, and George Carley. As Georgia’s Supreme Court is composed of seven justices, this election would have determined the makeup of more than half the court. Several months prior to the election, Justice Carley announced his retirement, leaving Governor Nathan Deal to appoint his successor, Keith Blackwell, who will stand for election in 2014. Justices Hunstein, Melton, and Thompson each ran unopposed and won reelection.

National Ranking

Spending	\$183,402	21
TV Spending	\$0	No rank
Candidate Fundraising	\$183,402	18

Illinois, Contested & Retention Election



In 2012, Illinois held an election for the Supreme Court’s First District seat, which was formerly held by Justice Thomas Fitzgerald. This seat is voted upon by residents of Cook County, which includes the city of Chicago. Justice Mary Jane Theis, who was appointed to succeed Fitzgerald when he retired in 2010, ran for election to a full six-year term, facing off against three opponents in the Democratic primary. Theis spent close to \$1.2 million on TV advertisements in the primary, while the pro-choice group Personal PAC reportedly spent \$200,000 in print ads attacking Theis’s opponent, Illinois Appellate Court Judge Aurelia Pucinski, according to the Center for Public Integrity. Theis won the primary on March 20, 2012, and subsequently defeated Judge James G. Riley of the Cook

County 4th Subcircuit Court, who ran unopposed in the Republican primary, in the general election. Sitting Justice Rita Garman also won a retention election.

National Ranking

Spending	\$2,480,691	11
TV Spending	\$1,334,170	9
Candidate Fundraising	\$2,285,198	7

Iowa, Retention Election



In 2012, Justice David Wiggins, who participated in the Iowa Supreme Court’s unanimous decision finding a right to marriage for same-sex couples in Iowa, stood for a retention election. Opponents of the marriage decision campaigned for his ouster, broadcasting two television ads about the marriage decision and going on a bus tour around the state featuring out-of-state politicians such as

Rick Santorum and Bobby Jindal; opponents spent approximately \$466,000 in total. While Justice Wiggins did not fundraise, other supporters spent approximately \$367,000 in a campaign in support of his retention. Justice Wiggins won his retention election. Three other justices who did not participate in the 2009 marriage decision and did not face an anti-retention challenge, Justices Bruce B. Zager, Edward Mansfield, and Thomas D. Waterman, also won retention elections in 2012.

National Ranking

Spending	\$833,087	13
TV Spending	\$163,600	14
Candidate Fundraising	\$0	No rank

Kentucky, Contested Election



In 2012, incumbent Justice William T. Scott faced Judge Janet Stumbo, a judge on the Court of Appeals who previously served on the Supreme Court from 1993 until Scott defeated her in 2004. The race turned nasty, with an ad from Justice Scott accusing Judge Stumbo of “sid[ing] with criminals fifty-nine percent of the time.” Judge Stumbo issued a reply ad accusing Justice Scott of “airing misleading ads.” Justice Scott won reelection in the non-partisan race.

National Ranking

Spending	\$363,191	18
TV Spending	\$131,850	15
Candidate Fundraising	\$363,191	14

Louisiana, Contested Election



In Louisiana, eight candidates competed in the November 6, 2012 election to replace retiring Justice Kitty Kimball. Jefferson Hughes and John Guidry squared off in a run-off election on December 8. In the lead-up to the December 8 run-off, the Clean Water and Land PAC released a television ad accusing Guidry of “hiding his liberal record,” while Guidry released an ad stating that Hughes “suspended the sentence of a cocaine dealer, of a man who killed a state trooper, . . . and over half the sentence of a child rapist.” Hughes defeated Guidry.

National Ranking

Spending	\$3,199,711	9
TV Spending	\$1,925,500	7
Candidate Fundraising	\$2,644,271	6

Michigan, Contested Election



With the Supreme Court’s 4-3 conservative majority on the line in 2012, Democrats Connie Kelley, Shelia Johnson, and Bridget McCormack faced off against Republicans Brian Zahra, Steven Markman, and Colleen O’Brien, with money pouring into the race from political parties and outside groups. Michigan’s Supreme Court race was the most expensive in the 2011–12 cycle, with estimated spending between \$13 million and \$18.9 million. Although party affiliation does not appear on the ballot, parties

select the candidates and the state Democratic and Republican parties were the main spenders in the 2012 races—and the top two spenders nationally. Twenty-one percent of the TV ad spots broadcast in Michigan were negative in tone. McCormack, Zahra, and Markman each won seats on the Supreme Court, which retained its 4-3 conservative majority.

National Ranking

Spending	\$13,006,773	1
TV Spending	\$8,862,220	1
Candidate Fundraising	\$3,419,187	3

Minnesota, Contested Election



There were three seats up for election in the 2012 Minnesota Supreme Court race. Chief Justice Lorie Gildea was challenged by attorney Dan Griffith, Justice Barry Anderson ran against Dean Barkley, former campaign manager for Governor Jesse Ventura, and Justice David R. Stras was challenged by magistrate Tim Tingelstad. All incumbent justices were reelected.

National Ranking

Spending	\$260,317	19
TV Spending	\$0	No rank
Candidate Fundraising	\$260,317	16

Mississippi, Contested Election



In Mississippi, there were four positions open on the Supreme Court in 2012, with three of the races contested. Most of the spending centered around the race for District Three, Position Three, where Josiah Dennis Coleman faced off against Richard “Flip” Phillips to fill the seat vacated by retiring Justice George Carlson. The Improve Mississippi PAC and the Law Enforcement Alliance of America both issued negative ads against Phillips, accusing him of siding with plaintiff trial lawyers. Phillips responded with an ad stating “Don’t let special interests buy our court.” On Election Day, Coleman defeated Phillips. Chief Justice William L. Waller, Jr. and Justice Michael K. Randolph also won their respective races, and Justice Leslie King ran unopposed.

National Ranking

Spending	\$2,871,982	10
TV Spending	\$2,306,990	6
Candidate Fundraising	\$1,793,742	8

Montana, Contested & Retention Election



In Montana, two Supreme Court seats were on the ballot in 2012. Justice Brian Morris faced a retention election, while Judge Laurie McKinnon of the 9th District Court of Montana, attorney Elizabeth Best, and attorney Ed Sheehy competed in the state’s primary election for the seat of Justice James Nelson, who was not seeking reelection. McKinnon and Sheehy both moved on to the general election, where McKinnon emerged victorious. During the campaign, the U.S. Court of Appeals for the Ninth Circuit struck down a Montana law that prohibited political parties from endorsing judicial candidates. However, both McKinnon and Sheehy announced that they would not accept party endorsements because doing so was barred by the state judicial code of conduct. Sheehy went further and refused to accept any endorsements, while McKinnon accepted endorsements from conservative groups such as the Montana Chamber of Commerce.

National Ranking

Spending	\$371,384	17
TV Spending	\$22,110	17
Candidate Fundraising	\$329,384	15

New Mexico, Contested & Retention Election



Two seats on the New Mexico Supreme Court were up for election in 2012. In one race, Justice Paul Kennedy, who had been appointed by Governor Susana Martinez earlier in 2012 following the retirement of Justice Patricio Serna, faced off against District Court Judge Barbara Vigil. Judge Vigil defeated Justice Kennedy and will fill the remainder of Justice Serna's unexpired term. In a second race, Justice Richard Bosson stood for a retention election, in which he retained his seat. In

New Mexico, judges are initially selected by competitive elections and then stand for retention elections for subsequent terms. In the event a judge steps down in the middle of a term, the vacancy is filled by the governor from a list of candidates recommended by a judicial nominating commission, and the appointee must then compete in the next general election to serve the remainder of the unexpired term.

National Ranking

Spending	\$166,373	22
TV Spending	\$0	No rank
Candidate Fundraising	\$166,373	20

North Carolina, Contested Election



Incumbent Justice Paul Newby faced off against challenger Judge Sam Ervin IV in a race with the potential to shift the 4-3 conservative majority on the Supreme Court. Both candidates accepted public financing for their 2012 campaigns, but outside money in support of Justice Newby flooded the race, with 85 percent of total TV

spending coming from outside groups. Justice Newby held on to his seat, maintaining the conservative majority on the high court.

National Ranking

Spending	\$4,495,209	4
TV Spending	\$3,585,400	3
Candidate Fundraising	\$173,011	19
Public Funds	\$480,200	2

Ohio, Contested Election



Three positions on the Ohio Supreme Court were up for election in 2012, two full-term seats and one partial-term seat that expires on December 31, 2014. Incumbent Terrence O'Donnell faced off against Michael Skindell; Robert Cupp faced off against Bill O'Neill; and incumbent Yvette McGee Brown, who was appointed to the Court on an interim basis, faced off against Sharon Kennedy. Ohio led the nation in TV spending over the 2000-09 decade, but spending was relatively

lower in 2012. Ohio nevertheless was the home of one of 2011-12's most negative TV ads, in which the Ohio Republican Party said that O'Neill "expressed sympathy for rapists" while serving as a judge. O'Donnell, O'Neill, and Kennedy won their respective races.

National Ranking

Spending	\$3,859,556	6
TV Spending	\$1,736,880	8
Candidate Fundraising	\$3,467,446	2

Oklahoma, Retention Election



In Oklahoma, Supreme Court justices Douglas Combs, James Edmondson, Norma Gurich, and Yvonne Kauger sought retention in 2012. Supporters of the justices formed "Yes for Fair and Impartial Judges" after the state Chamber of Commerce released its first-ever ratings of justices. Each candidate received low ratings from the chamber group, which critics said was an unfair

assessment that only looked at a small percentage of the court's decisions. Yes for Fair and Impartial Judges spent more than \$450,000 on a pro-retention ad that aired the week before the election. The four justices were retained.

National Ranking

Spending	\$453,140	16
TV Spending	\$453,140	12
Candidate Fundraising	\$0	No rank

Oregon, Contested Election

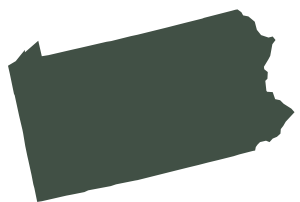


In Oregon, three Supreme Court seats were on the ballot in 2012. Justice Virginia Linder and Oregon Court of Appeals Chief Judge David V. Brewer ran unopposed, while Judge Richard C. Baldwin of the Multnomah County Circuit Court, Judge Timothy Sercombe of the Court of Appeals, and attorney Nena Cook competed in a primary for the third seat. Baldwin and Cook squared off in the general election, with Baldwin winning the seat. Baldwin and Cook both spent money on TV advertisements.

National Ranking

Spending	\$792,176	14
TV Spending	\$101,630	16
Candidate Fundraising	\$792,176	11

Pennsylvania, Retention Election



In 2011, J. Michael Eakin stood for retention in the Pennsylvania Supreme Court, raising approximately \$630,000 and ultimately retaining his seat. In Pennsylvania, judges are initially selected by competitive elections and then stand for retention elections for subsequent terms. The state ranked second in overall spending for the 2009-2010 election cycle.

National Ranking

Spending	\$629,756	15
TV Spending	\$0	No rank
Candidate Fundraising	\$629,756	12

Texas, Contested Election



Texas had elections for three Supreme Court seats in 2012. Justice Don Willett won one seat after defeating former Supreme Court Justice Steve Smith in the Republican primary and Libertarian Party candidate Robert Stuart Koelsch in the general election. Former District Judge John Devine won a seat after defeating Justice David Medina and attorney Joe Pool in the Republican primary, and Libertarian Party candidate Tom Oxford and Green Party candidate Charles Waterbury in the general election. Neither Willett nor Devine had a Democratic opponent in the general election. Justice Nathan Hecht ran unopposed in the Republican primary and defeated

Democratic candidate Michele Petty, Libertarian Party candidate Mark Ash, and Green Party candidate Jim Chisholm in the general election. Justice Willett was the only candidate to spend money on TV ads; he spent nearly \$1.2 million on advertisements in the Republican primary.

National Ranking

Spending	\$3,206,614	8
TV Spending	\$1,167,930	11
Candidate Fundraising	\$3,206,614	5

Washington, Contested Election



In Washington, public defender Sheryl McCloud defeated former Supreme Court Justice Richard Sanders for the seat of departing Justice Tom Chambers. Incumbent Justices Steven Gonzalez and Susan Owens were also up for election. Both justices received more than 50 percent of the primary vote and advanced unopposed to the general election.

National Ranking

Spending	\$1,288,379	12
TV Spending	\$0	No rank
Candidate Fundraising	\$1,288,379	10

West Virginia, Contested Election



In 2012, following an eight-person primary, two Republicans (Allen Loughry and John Yoder) and two Democrats (Letitia “Tish” Chafin and incumbent Justice Robin Jean Davis) faced off in the general election for two Supreme Court seats. Chafin self-funded 71 percent of her campaign, while Davis self-funded 62 percent. Neither sought public financing. Loughry, who participated in West Virginia’s pilot public financing program, and incumbent Justice Davis won the two seats.

National Ranking

Spending	\$3,686,075	7
TV Spending	\$1,257,110	10
Candidate Fundraising	\$3,322,370	4
Public Funds	\$363,705	3

Wisconsin, Contested Election



Wisconsin’s off-year 2011 Supreme Court race drew intense attention, with groups seeking to recast the race between incumbent Justice David Prosser and challenger JoAnne Kloppenburg as a referendum on Governor Scott Walker following his controversial decision to change the state’s collective bargaining process. Special interest groups spent just under \$3.6 million on TV ads—a new record for independent TV spending—and overall spending in the state was about \$5 million. Prosser narrowly won the race, following a recount, maintaining the court’s conservative majority. Three

groups bankrolling Wisconsin spending in 2011 were among the top 10 spenders nationally in 2011-12: the labor-friendly Greater Wisconsin Committee (\$1.4 million); the pro-business Issues Mobilization Council of Wisconsin Manufacturers & Commerce (\$911,000); and the conservative Citizens for A Strong America (\$836,000).

National Ranking

Spending	\$5,101,017	2
TV Spending	\$3,957,250	2
Candidate Fundraising	\$563,269	13
Public Funds	\$800,000	1

Part II: States with Ballot Measures

Arizona



Arizona's Proposition 115 would have given Arizona's governor increased control over membership of the state's judicial nominating commission, and would have reduced the influence of the state bar. It also would have ended a mandate for bi-partisan representation on lists of judicial finalists sent to the governor and would have required the nominating commission to submit eight names to the governor, not three. The measure was conceived as a compromise reached over a 2011 bill introduced in the

Republican-controlled legislature, which would have eliminated the state's merit selection system entirely. The measure failed.

Total spending	\$150,394
Supporter spending	\$400
Opponent spending	\$149,994

Florida



Amendment 5 would have required Senate confirmation of the governor's Supreme Court appointees, empowered the legislature to override any Florida Supreme Court administrative decision with a simple majority rather than a supermajority, and given legislators access to confidential records of the commission that investigates complaints against judges. The measure failed.

Total spending	\$227,584
Supporter spending	\$0
Opponent spending	\$227,584*

* The Vote No Committee spent a total of \$227,584 opposing three ballot measures: Amendment 5 and two non-court-related measures. Campaign materials produced by the Committee discussed the three measures jointly.

Missouri



In Missouri, Amendment 3 would have allowed each new governor to control a majority of seats on the state's judicial nominating commission. It also would have increased the number of finalists submitted to the governor from three to four. The measure failed.

Total spending	\$1,182,958
Supporter spending	\$79,900
Opponent spending	\$1,103,058

APPENDIX B

Television Ad Details, 2011-2012

An appendix containing a comprehensive list of all television advertisements aired in 2011-2012, as captured by Kantar Media/CMAG, is available at: <http://newpoliticsreport.org>. Information on ad sponsorship, spot count, and estimated cost was provided by Kantar Media/CMAG. The coding of ad content, including tone and subject matter, was done by the Brennan Center for Justice.

ENDNOTES

CHAPTER 1 NOTES

1. *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).
2. Inflation-adjusted terms calculated using the inflation calculator at <http://www.westegg.com/inflation/>, converting the numbers to 2012 dollars.
3. See National Conference of State Legislatures, *Life After Citizens United* (Jan. 4, 2011), available at <http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx>.
4. Press Release, Americans for Prosperity, *Americans for Prosperity Launches \$250,000 Direct Mail Issue Advocacy Effort* (Oct. 30, 2012), available at <http://www.prweb.com/releases/2012/10/prweb10074121.htm>.
5. Michigan Campaign Finance Network, *Descending into Dark Money: A Citizen's Guide to Michigan Campaign Finance 2012*, at 31 (2013), available at http://www.mcfn.org/pdfs/reports/MCFN_2012_Citizen_Guide_final_rev..pdf.
6. Press Release, *supra* note 4.
7. Mary Ellen Klas, *Campaign for Justices is on Track to Spend \$5.5 Million*, Tampa Bay Times, Nov. 1, 2012, <http://www.tampabay.com/news/courts/campaign-for-justices-is-on-track-to-spend-55-million/1259460>.
8. This figure is based on the National Organization for Marriage's filings with the Iowa Ethics & Campaign Disclosure Board. Kantar Media/CMAG's estimates for television ad spending, which are reflected in the state and national totals provided in the tables and appendix, provides a lower figure (\$86,020). The CMAG estimate is likely lower than the National Organization for Marriage's self-reported data because CMAG's estimate excludes ad agency commissions, the costs of producing advertisements, and ad purchases limited to local cable channels.
9. Rod Boshart, *Santorum, Jindal Join Effort to Oust an Iowa Supreme Court Justice*, Waterloo-Cedar Falls Courier, Sept. 18, 2012, http://wfcourier.com/news/local/govt-and-politics/santorum-jindal-join-effort-to-oust-an-iowa-supreme-court/article_beb62100-01a7-11e2-87c4-0019bb2963f4.html.
10. 20/20 Insight LLC, *National Registered Voters Frequency Questionnaire 2-4* (2011), available at http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf.

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1. Editorial, *A Study in Judicial Dysfunction*, N.Y. Times, Aug. 19, 2011, <http://www.nytimes.com/2011/08/20/opinion/a-study-in-judicial-dysfunction.html>.
2. Mary Spicuzza & Clay Barbour, *Justices Split by Politics, Personality*, Wisconsin State Journal, June 30, 2011, http://host.madison.com/wsj/news/local/govt-and-politics/article_79of4a4e-a304-11e0-9c8f-001cc4c03286.html.
3. Patrick Marley, *Supreme Court Tensions Boil Over: Prosser Says He Was Goaded Into Insulting Chief Justice*, Milwaukee Journal-Sentinel, Mar. 19, 2011, <http://www.jsonline.com/news/statepolitics/118310479.html>.
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