

BIG MONEY AND IMPARTIAL JUSTICE: CAN THEY LIVE TOGETHER?

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Many Americans believe that justice is for sale. Over the past decade, polling data has shown that a majority of Americans believe campaign contributions can tilt the scales of justice by influencing courtroom decisions. Two recent U.S. Supreme Court cases, Caperton v. A.T. Massey Coal Company and Citizens United v. Federal Election Commission, have once again drawn attention to this trend in public opinion and, in particular, to the influence of campaign contributions on judicial decision-making. This Article provides an overview of fundraising, spending, and advertising in judicial campaigns, discusses public confidence in the courts, and explores reform efforts to protect the impartiality of the judiciary.

INTRODUCTION

During the past decade state judicial elections have dramatically changed. In order to get elected, judicial candidates have had to raise millions of dollars from parties who may eventually appear before them. Partisan and special interest groups have poured millions more into the campaign coffers of judicial candidates with the aim of tilting the scales of justice their way. On the campaign trail, judicial candidates face heightened pressure to signal courtroom rulings. And campaign ads are frequently nasty, misleading, and uninformative. As things grow worse, many Americans have come to fear that justice is for sale.

In this Article, we examine the surge in judicial campaign fundraising over the past ten years and the key states that have seen exorbitant spending in their elections. We also look at the emergence of non-candidate groups as major players in judicial elections. We explore the trends and key spenders and show how the impact of reforms such as public financing and disclosure laws reduces the money spent on judicial elections and can help increase public confidence in the courts.

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We connect these reforms and trends of public opinion to two U.S. Supreme Court cases, *Caperton v. A.T. Massey Coal Company*¹ and *Citizens United v. Federal Election Commission*.² In *Caperton*, the Court held that judges can be required to recuse themselves in certain cases involving campaign supporters.³ In *Citizens United*, the Court overturned precedent that permitted states to regulate direct corporate and union spending in elections, which will have a substantial effect in judicial races.⁴

This Article will also discuss post-*Caperton* reform efforts in states like Wisconsin, Michigan, and West Virginia, which have seen efforts to reform recusal standards for judges along with disclosure requirements for donors and independent groups in judicial elections.

I. THE RECENT SURGE IN JUDICIAL CAMPAIGN SPENDING

During the past decade, high court electoral contests across America have been flooded with cash. Would-be justices must raise millions from individuals and groups, many that have business before the courts. Millions more dollars are spent by non-candidate organizations, including interest groups and political parties, with no obligation under many state laws to disclose their spending to the public. The money explosion threatens impartial justice and public confidence in the courts.

From 2000 to 2009, state supreme court candidates raised \$206.4 million nationally, more than double the \$83.3 million raised from 1990 to 1999.⁵ Further, nineteen of the twenty-one states that elect supreme court judges set spending records.⁶ During the 1990–1999 period, twenty-six candidates raised \$1 million or more, and all but two came from three states: Alabama, Pennsylvania, and Texas.⁷ In 2000–2009, by contrast, there were sixty-eight “million-dollar” candidates from a dozen states.⁸ In 2007–2008, state supreme court candidates raised \$45.6 million, seven times the 1989–1990 total.⁹ It was the third time in the last five cycles that high court candidates raised more than \$45 million.¹⁰

Through much of the decade, states with nonpartisan elections, especially those with smaller populations, escaped the worst excesses. In aggregate, supreme court candidates in thirteen nonpartisan states raised \$50.9 million in 2000–2009,

1. 129 S. Ct. 2252 (2009). Justice at Stake filed an amicus brief. Brief for Justice at Stake et al. as Amici Curiae Supporting Petitioners, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), 2009 WL 45976.

2. 130 S. Ct. 876 (2010). Justice at Stake filed an amicus brief. Brief for Justice at Stake et al. as Amici Curiae Supporting Appellee, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 2365225.

3. 129 S. Ct. at 2265.

4. 130 S. Ct. at 968.

5. THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009 (forthcoming May 2010).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

compared with \$153.3 million by candidates in eight partisan states (candidates in retention elections, in which only incumbents appear on the ballot seeking a “yes” vote to stay in office, raised an additional \$2.2 million).¹¹ But this trend may be changing: for example, in 2007–2008, in two nonpartisan Wisconsin elections, candidate spending and interest group television advertisements cost more than \$8.4 million, making it the nation’s second most expensive state election during that period.¹²

Candidate fundraising is only part of the story. Millions more dollars have flowed into judicial elections from special interest groups and political parties, frequently masking the true financial backers of television advertising campaigns. From 2000 to 2009, independent groups and political parties spent at least \$39 million on television airtime.¹³

II. THE EMERGENCE OF NON-CANDIDATE GROUPS IN JUDICIAL ELECTIONS

National special interest groups dramatically increased their involvement in state elections over the past ten years, led by business groups such as the U.S. Chamber of Commerce. In 2000, the U.S. Chamber of Commerce announced it was stepping up its involvement in state supreme court elections by allocating up to \$10 million to as many as eight states where it said plaintiffs’ lawyers had too much influence.¹⁴ By the end of 2002, unprecedented amounts of money were pouring into court races from both sides of the tort war.¹⁵

Early in the decade, the Chamber and allied business forces established electoral dominance, winning a large majority of the elections in which they and local conduit organizations funneled money.¹⁶ On the opposing side, plaintiffs’ lawyers and unions organized and raised funds at the state level and lost heavily. By 2008, signs of a potential countertrend emerged, as chief justices with high-level business backing were voted off the bench in Michigan, Mississippi, and West Virginia.¹⁷ In addition to the tort battles, other state-level business interests sought to influence court selection, including a coal industry executive in West Virginia and building industry leaders in Washington.

11. *Id.*

12. *Id.* These data are derived by combining two sources. Candidate fundraising data are available from the National Institute for Money in State Politics. Television advertisement data have been compiled by Campaign Media Analysis Group through the Brennan Center for Justice and the National Center for State Courts.

13. *Id.*

14. Rachel Paine Caufield, *The Foreboding National Trends in Judicial Elections at Iowa Judges Conference* (June 24, 2005), *available at* http://www.ajs.org/selection/docs/caufield_ia_judges_conference.pdf.

15. DEBORAH GOLDBERG & SAMANTHA SANCHEZ, *THE NEW POLITICS OF JUDICIAL ELECTIONS* 2002, at 4 (2002), *available at* http://www.justicestake.org/media/cms/NewPoliticsReport2002_CDB5276C31D15.pdf.

16. Robert Lenzner & Matthew Miller, *Buying Justice*, FORBES.COM, July 21, 2003, http://www.forbes.com/forbes/2003/0721/064_print.html.

17. Press Release, Justice at Stake, 2008 Supreme Court Elections: More Money, More Nastiness (Nov. 5, 2008), *available at* <http://www.gavelgrab.org/?p=692>.

III. THE PUBLIC TAKES NOTICE

Many Americans believe that justice is for sale. Since 2001, nationwide opinion research by Justice at Stake,¹⁸ USA Today,¹⁹ and Zogby International²⁰ revealed that three out of four Americans believe campaign contributions can tilt the scales of justice by influencing courtroom decisions. Polls further show public support for the courts' historic and constitutional role as a fair and impartial tribunal that provides equal justice under law. More than 80%, for example, believe judges should not hear cases involving major campaign supporters. The Conference of Chief Justices concisely described the public's concern over judicial elections in their 2008 amicus brief to the U.S. Supreme Court in *Caperton*, stating that "[a]s judicial election campaigns become costlier and more politicized, public confidence in the fairness and integrity of the nation's elected judges may be imperiled."²¹

Many judges share this fear. In a 2001 survey of state judges, almost half—46%—agreed that campaign donations influence courtroom decisions by some judges. In addition, most elected high court justices cited pressure to raise campaign money during their election years. In 2006, Ohio Supreme Court Justice Paul Pfeifer told *The New York Times*, "I never felt so much like a hooker down by the bus station . . . as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote."²²

Wallace Jefferson, Chief Justice of the Texas Supreme Court, warned:

In a close race, the judge who solicits the most money from lawyers and their clients has the upper hand. But then the day of reckoning comes. When you appear before a court, you ask how much your lawyer gave to the judge's campaign. If the opposing counsel gave more, you are cynical.²³

18. Press Release, Justice at Stake, RE: Justice at Stake National Surveys of American Voters and State Judges (Feb. 14, 2002), available at http://www.justiceatstake.org/media/cms/PollingsummaryFINAL_9EDA3EB3BEA78.pdf.

19. Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USA TODAY, Feb. 16, 2009 available at http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

20. Press Release, Justice at Stake, March 2004 Survey Highlights, available at http://www.justiceatstake.org/media/cms/ZogbyPollFactSheet_54663DAB970C6.pdf (last visited Mar. 10, 2010).

21. Brief for the Conference of Chief Justices as Amici Curiae Supporting Neither Party at 4, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22) 2009 WL 45973.

22. Adam Liptak, *Tilting the Scales?: The Ohio Experience; Campaign Cash Mirrors a High Court's Ruling*, N.Y. TIMES, Oct. 1, 2006, available at <http://query.nytimes.com/gst/fullpage.html?res=9A06E7D81730F932A35753C1A9609C8B63>.

23. Wallace B. Jefferson, *Why Not Elect Judges on Merit, Not Whim?*, DALLAS MORNING NEWS, Mar. 12, 2009, available at http://www.dallasnews.com/shared/content/dws/dn/opinion/viewpoints/stories/DNJefferson_13edi.State.Edition1.2212195.html

IV. THE EFFECTS OF CAMPAIGN SPENDING ARRIVE AT THE SUPREME COURT

The U.S. Supreme Court was forced to grapple with many of the judicial campaign developments in its 2009 *Caperton v. A.T. Massey Coal Company* decision.²⁴ The case, in which coal executive Don Blankenship spent \$3 million to help elect Brent Benjamin to the West Virginia Supreme Court, illustrated the threat to due process when million-dollar campaign supporters have business before the courts. At the time of the election, Blankenship, CEO of Massey Coal Co., was embroiled in a lawsuit against business competitor Hugh Caperton. Massey stood to lose \$50 million in damages (a figure that would increase to \$76 million with interest) after a jury found Massey liable for fraudulent misrepresentation and tortious interference with existing contractual relations.²⁵ As post-verdict motions were under consideration, it became clear that the case was bound for the West Virginia Supreme Court of Appeals—just as the Benjamin-McGraw campaign was heating up.

Blankenship spent \$3 million of his personal funds to support Benjamin's campaign, both by promoting Benjamin and attacking his opponent.²⁶ That total included \$2.5 million Blankenship contributed to a 527 group²⁷ called And For the Sake of the Kids, whose purported mission was to defeat Warren McGraw. Blankenship spent the remaining \$500,000 independently to support Benjamin's election. Blankenship's campaign-related expenditures equaled three times the amount spent by Benjamin's own campaign.²⁸ Benjamin defeated McGraw by a margin of 53% to 47%. More than 60% of Benjamin's total campaign support came from Blankenship.²⁹

When Blankenship's case came before the West Virginia Supreme Court of Appeals almost two years later, Justice Benjamin refused to recuse himself.³⁰ Justice Benjamin cast the deciding vote in a 3–2 decision in favor of Blankenship's company, reversing the damages awarded to Hugh Caperton.³¹ Articles and op-eds across the country likened the scenario to a plot out of a John Grisham novel; indeed, Grisham cited West Virginia as an inspiration for his Mississippi-based novel *The Appeal*.³²

24. 129 S. Ct. 2252.

25. *Id.* at 2257.

26. *Id.*

27. A "527 organization" is a nonprofit organization formed under § 527 of the Internal Revenue Code that is engaged in political advertising. Political action committees and candidate committees are formed under § 527, although the term "527" is typically used to refer to groups that do not advocate directly for or against a candidate and are able to avoid filing with the Federal Election Commission and state election commissions. *See* 26 U.S.C. § 527 (2006).

28. *Id.*

29. Brief for Petitioners at 2, *Caperton*, 129 S. Ct. 2252 (No. 08-22).

30. *Caperton*, 129 S. Ct. at 2257.

31. *Id.* at 2258.

32. John Grisham, *THE APPEAL* (2008).

Justice at Stake argued in an amicus brief along with twenty-seven other groups: “Justice Benjamin’s decision not to recuse himself from Massey’s appeal—despite the staggering amount of Blankenship’s campaign expenditures and the timing of those contributions in relation to Massey’s appeal—creates an undeniable appearance of impropriety, if not evidence of an actual bias.”³³

Caperton appealed to the U.S. Supreme Court. Caperton argued that his right to due process and a fair, impartial tribunal was violated. “The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today,” Caperton’s lawyer, former U.S. Solicitor General Theodore B. Olson, told a West Virginia newspaper.³⁴ “A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge.”³⁵

In the end, the U.S. Supreme Court agreed. Ordering Justice Benjamin to remove himself from the case, the Court for the first time ruled that campaign spending could threaten a litigant’s due process rights.³⁶ The size of the expenditures, along with their timing, created the impression that Judge Benjamin’s impartiality might reasonably be questioned. “[T]he extraordinary contributions were made at a time when [Massey CEO] Blankenship had a vested stake in the outcome,” Justice Anthony M. Kennedy wrote for the majority.³⁷ Justice Kennedy continued, “Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the other parties’ consent—a man chooses the judge in his own cause.”³⁸

In 2009, the U.S. Supreme Court also considered another daunting challenge to judicial independence in *Citizens United v. Federal Election Commission*.³⁹ The Court considered whether laws banning direct corporate and union treasury spending in campaigns violate the First Amendment.⁴⁰ In a 5–4 decision, the Court invalidated such restrictions.

The case arose out of a film titled “Hillary: The Movie,”⁴¹ which was produced as an attack on Hillary Clinton by a nonprofit organization called Citizens United. At issue was whether federal election laws prohibited Citizens United from airing the film with corporate treasury money because the advertisement was considered an “electioneering communication.”⁴² Going well

33. Brief of Justice at Stake et al. as Amici Curiae Supporting Petitioners at 17, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45976.

34. Paul J. Nyden, *Mining Appeal Moving Along: Olson to Argue Harman Case Against Massey Before Supreme Court*, CHARLESTON GAZETTE, May 16, 2008, at P1A.

35. *Id.*

36. *Caperton*, 129 S. Ct. at 2256.

37. *Id.*

38. *Id.*

39. 130 S. Ct. 876 (2010).

40. The original federal corporate ban dates to 1907, and such bans had been upheld by the U.S. Supreme Court in 1990 and 2003.

41. HILLARY: THE MOVIE (Citizens United Productions 2008).

42. Press Release, Campaign Legal Center, Citizens United Hotly Debated Over Airwaves, Internet (Sept. 4, 2009), available at <http://www.campaignlegalcenter.org/press-3715.html>.

past the original issues in the case, the Court set a special session to ask the parties to argue whether the Court should overrule its decisions in two cases, *McConnell v. Federal Election Commission*⁴³ and *Austin v. Michigan Chamber of Commerce*,⁴⁴ and rule that restrictions on corporate spending on elections are unconstitutional.

In an amicus brief, Justice at Stake and nineteen other groups cited *Caperton*, stressing, “[t]his Court itself held last term . . . that some independent expenditures in judicial campaigns are so excessive that they in fact deny litigants due process under the law. If corporate treasury spending were unregulated in judicial elections, these concerns would only get worse.”⁴⁵ The brief warned that ending the corporate treasury ban could engulf elected courts with special interest money: “Special interest spending on judicial elections—by corporations, labor unions, and other groups—poses an unprecedented threat to public trust in the courts and to the rights of litigants As other groups felt pressure to match this corporate treasury spending, these issues would only snowball.”⁴⁶

Justice Stevens, citing the Justice at Stake brief in his dissent, wrote: “At a time when concerns about the conduct of judicial elections have reached a fever pitch . . . the Court today unleashes the floodgates of corporate and union general treasury spending in these races.”⁴⁷

V. POST-CAPERTON RECUSAL REFORMS

Caperton highlighted the problem of jurists serving as the final arbiters considering motions for their disqualification and asked state courts, and some legislatures, to consider reforms to encourage or mandate judges to step aside in cases involving campaign benefactors and where there are potential conflicts of interest. Since *Caperton*, several states—including California, Nevada, Michigan, Ohio, Washington, West Virginia, and Wisconsin—have either expanded work begun by existing judicial ethics commissions, considered rule making motions, or accelerated reviews of their existing recusal practices.

Americans agree that reform is needed: a 2009 Justice at Stake poll showed that more than 80% of all voters support the idea of an impartial judge deciding recusal requests and agree that judges should not hear cases involving their own major campaign backers.⁴⁸ Several groups have proposed model reforms. A 2008 Brennan Center for Justice report, “Fair Courts: Setting Recusal

43. 540 U.S. 93 (2003).
44. 494 U.S. 652 (1990).
45. Brief of Justice at Stake et al. as Amici Curiae Supporting Appellee at 2, *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 2365225.
46. *Id.* at 2, 19.
47. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. at 968 (Stevens, J., dissenting) (citations omitted).
48. Press Release, Justice at Stake, Poll: Huge Majority Wants Firewall Between Judges, Election Backers (Feb. 22, 2009), available at http://www.justiceatstake.org/newsroom/press_releases.cfm/poll_huge_majority_wants_firewall_between_judges_election_backers?show=news&newsID=5677.

Standards,”⁴⁹ established a menu of ten ideas, including empanelling outside judges to hear recusal motions against a particular judge, creating per se rules for disqualification, and enhancing disclosure requirements for judges as well as litigants. The American Bar Association is exploring new model recusal rules,⁵⁰ and a few states have been reexamining their recusal rules.⁵¹

In November 2009, the Michigan Supreme Court voted 4–3⁵² to approve new recusal standards that go beyond what the U.S. Supreme Court required in *Caperton*. The new rule provides that whenever a Michigan justice rejects a recusal motion, a litigant may appeal that ruling to the entire high court. The Court ordered that “[t]he entire Court shall then decide the motion for disqualification de novo. The Court’s decision shall include the reasons for its grant or denial of the motion for disqualification.”⁵³ Under the new rule approved in Michigan, judges will now have to step aside if there is bias or the appearance of bias.⁵⁴

While there is pressure in the aftermath of *Caperton* for states to amend their disqualification statutes,⁵⁵ not all states are heeding the call for stronger recusal laws. The Wisconsin Supreme Court considered four proposals to amend their recusal rules, and adopted two—put forward by big-spending interest groups—that run counter to the spirit of *Caperton*. Taken together, the proposals by the Wisconsin Realtors Association and Wisconsin Manufacturers & Commerce say that judges should never recuse “solely” because of campaign support from a litigant—either in the form of direct contributions or independent election ads.⁵⁶

The court, which later rescinded its recusal vote while it redrafted the wording of its policy, turned back two “trigger” proposals mandating recusal when campaign spending reached certain levels. First, the court denied a proposal from the Wisconsin League of Women Voters that would have forced a judge to recuse if a party had contributed \$1000 or more to the judge’s campaign.⁵⁷ In addition, the

49. JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, *FAIR COURTS: SETTING RECUSAL STANDARDS* 25–35 (2008), available at http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/.

50. Draft ABA Report Reviews Rules and Processes for Judicial Recusal, Recommends Improvements, U.S. L. WK., June 16, 2009, available at <http://www.abanet.org/judind/pdf/LawWeekCaseFocus.pdf>.

51. See Tresa Baldas, *Judges Slow To Toughen Up Recusal Rules*, NAT’L L. J., Feb. 15, 2010.

52. Associated Press, *Mich. Supreme Court Adopts Disqualification Rules*, CHI. TRIB., Nov. 5, 2009, available at <http://archives.chicagotribune.com/2009/nov/05/local/chic-ap-mi-judicialethics-ru>.

53. Mich. Supreme Court, *Proposals Regarding Procedure for Disqualification of Supreme Court Justices* at 6, ADM File No. 2009-4, Mar. 18, 2009, available at <http://courts.michigan.gov/supremecourt/Resources/Administrative/2009-04-DQ-Order.pdf>.

54. Associated Press, *supra* note 52.

55. See, e.g., WIS. STAT. § 757.19(2) (2009).

56. Petition of Wisconsin Manufacturers and Commerce to the Wisconsin Supreme Court at 5, *In re Amending the Code of Judicial Conduct*, Oct. 28, 2009, available at <http://wicourts.gov/supreme/docs/0910petitionssupport.pdf>.

57. Petition of Wisconsin League of Women Voters to the Wisconsin Supreme Court, *In re Creation of Rules for Recusal When a Party or Lawyer in a Case Made*

court denied a petition from retired Wisconsin Supreme Court Justice William Bablitch that would have imposed an automatic recusal trigger for contributions of \$10,000 or more.⁵⁸

Nevertheless, other states have considered reforming recusal rules to call for the removal of a judge in cases involving specific contribution amounts. In Nevada, the Commission on the Amendment to the Nevada Code of Judicial Conduct recommended that the state supreme court adopt a rule calling for the disqualification of a judge who receives campaign contributions of \$50,000 or more from a party appearing before the judge, with lower benchmarks in jurisdictions where less total money is spent on judicial elections.⁵⁹ The Nevada Supreme Court did not adopt the rule.⁶⁰

VI. PUBLIC FINANCING REFORMS AT THE STATE LEVEL

In addition to recusal reforms, several states are examining public financing as a way to curb excessive spending by judicial candidates and outside groups, such as special-interest campaigns and political parties. This is particularly important given the Court's recent decision in *Citizens United* and could provide states with a method for lessening the influence of corporate spending.

Public financing reduces the burden on judicial candidates to raise money from special interests and, thus, lowers the potential for ethical conflicts. Wanda Bryant, judge on the North Carolina Court of Appeals, commented: "It makes all the difference. I've run in two elections, one with campaign finance reform and one without. I'll take 'with' any day, anytime, anywhere."⁶¹

Different states have implemented public financing systems. North Carolina adopted a public financing system for its judicial elections in 2002 that has proven very successful.⁶² The system has helped elect a wider pool of candidates including women, minorities, and members of different political parties. And as more candidates use it to finance their campaigns, the system has been

Contribution Effecting a Judicial Campaign, June 2008, *available at* <http://www.wicourts.gov/supreme/docs/0816petition.pdf>.

58. Petition of William A. Bablitch to the Wisconsin Supreme Court, *In re Amending the Code of Judicial Conduct*, Oct. 28, 2009, *available at* <http://wicourts.gov/supreme/docs/0911petition.pdf>.

59. Press Release, Comm'n on the Amendment to the Nev. Code of Judicial Conduct, Nevada Judicial Code Commission Issues Proposed Amendments (Oct. 23, 2008), *available at* <http://www.nevadajudiciary.us/index.php/njccnews/130-nevada-judicial-code-commission-issues-proposed-amendments>; Information on the 2009 Nevada Code of Judicial Conduct, <http://www.wcbar.org/documents/JudicialCode.Feb2010.Handouts.pdf> (last visited Mar. 25, 2010).

60. Order, *In re Amendment of the Nevada Code of Judicial Conduct*, ADKT47, (Nov. 2009), *available at* http://www.leg.state.nv.us/courtrules/SCR_CJC.html.

61. Bert Brandenburg, *Protecting Wisconsin's Courts from Special Interest Pressure*, MILWAUKEE J. SENTINEL, Mar. 27, 2007, *available at* <http://www.jsonline.com/news/opinion/29460844.html>.

62. DEMOCRACY NORTH CAROLINA, A PROFILE OF THE JUDICIAL PUBLIC FINANCING PROGRAM, 2004-06 (2007), *available at* http://www.ncvce.org/image_uploads/judicial%20program%20overview%20january%202007.pdf.

legitimized. In 2008, for example, eleven of the twelve candidates participated in the system.⁶³

The North Carolina Public Campaign fund offers public financing to candidates for the North Carolina Supreme Court and Court of Appeals and also pays for a state judicial voter guide.⁶⁴ Candidates become eligible for the Fund by demonstrating a reasonable level of public support through raising qualifying funds that must come in contributions between \$10 and \$500 from at least 350 registered North Carolina voters.⁶⁵ The Fund is paid for by a check-off option on North Carolina personal income tax forms allowing voters to check a box that they wish for \$3 of their taxes to be designated to the Fund.⁶⁶ This is not an additional tax but simply appropriates money they have already been taxed into the Fund.

Wisconsin passed its own “Impartial Justice” bill in November 2009.⁶⁷ This bill creates a public financing system for Wisconsin Supreme Court elections under which candidates may opt to receive public grants to use for campaign expenditures if they fit certain eligibility requirements.⁶⁸ The bill was inspired by the dramatic increase in campaign spending for Wisconsin Supreme Court races. During the last decade, candidates for the Supreme Court and third-party groups have raised and spent more than \$13.9 million.⁶⁹ This has threatened public confidence in the impartiality and accountability of the justice system. The “Impartial Justice” bill is designed to restore the public’s trust in the Supreme Court by slowing runaway spending on judicial elections, freeing judicial candidates to spend more time talking to voters instead of focusing their election activities on courting big donors who may appear before them.⁷⁰

The Wisconsin system is voluntary. Supreme court candidates may take public financing if they demonstrate reasonable levels of public support by raising a certain amount of “qualifying funds” in small amounts between \$5 and \$100 from 1000 different contributors, which total at least \$5000 but not more than \$15,000.⁷¹ Eligible candidates will be able to receive public financing benefits of up to \$100,000 in the primary and up to \$300,000 in the general election.⁷² If

63. Damon Circosta, *Public Financing Not So Radical Anymore*, N.C. CTR. FOR VOTER EDUC., Feb. 2, 2009, http://www.ncvotered.com/column/2009/2_2_09_pcf_not_radical.php.

64. N.C. Ctr. for Voter Educ., Fact Sheet: The Public Campaign Fund, http://www.ncjudges.org/media/fact_sheet_pcf.html (last visited Mar. 4, 2010).

65. *Id.*

66. *Id.*

67. S. 40, 2009–2010 Leg. (Wis. 2009), available at <http://www.legis.state.wi.us/2009/data/SB-40.pdf>.

68. Patrick Marley & Lee Bergquist, *Doyle Signs High Court Election Bill*, MILWAUKEE J. SENTINEL, Dec. 1, 2009, available at <http://www.jsonline.com/news/statepolitics/78230432.html>.

69. See THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009, *supra* note 5.

70. Adam Korbitz, *State Bar Lauds Signing of Landmark Impartial Justice Bill*, ROTUNDA REP. Dec. 1, 2009, available at <http://www.wisbar.org/AM/Template.cfm?Section=News&Template=/CM/ContentDisplay.cfm&ContentID=87964>.

71. S. 40, 2009–2010 Leg. (Wis. 2009).

72. *Id.*

candidates opt out of the public financing system, their opponents would then be eligible for public “matching funds” of up to \$300,000 in the primary and up to \$900,000 in the general election.⁷³ The bill contains a “rescue provision” to help participating judicial candidates respond to independent campaign attacks. It provides candidates with funds equal to the amount that an independent non-candidate group spends attacking them, but only if the amount spent by the group exceeds 20% of the public financing received by the candidate.⁷⁴

Other states have been looking at North Carolina and Wisconsin as models, including West Virginia. The West Virginia Independent Commission on Judicial Reform released a report on November 15, 2009, that recommended that the state legislature look at passing a pilot program for public financing for one of the two supreme court races in 2012.⁷⁵ The legislature adopted such a program in 2010.⁷⁶

CONCLUSION

Money is changing judicial elections and threatens to erode trust in the courts themselves. Cases like *Caperton* and *Citizens United* have drawn national attention to the corrosive effect of increased spending in judicial elections. Now the states need to respond. Left to the mercies of interest groups and political partisans, the new politics of judicial elections will only get worse.

73. *Id.*

74. *Id.*

75. Chris Dickerson, *Judicial Reform Panel Submits Report*, W. VA. RECORD, Nov. 16, 2009, available at <http://www.wvrecord.com/news/222248-judicial-reform-panel-submits-report>.

76. H.B. 4130, 79th Leg., 2nd Sess. (W. Va. 2010).
