



**ON THE CHALLENGES FACING STATE SUPREME
COURTS:
CAMPAIGN FINANCE, JUDICIAL SPEECH, AND THE
APPEARANCE OF IMPARTIALITY**

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ABSTRACT

In the past twenty to thirty years, tremendous changes have occurred in state courts. Specifically, spending in judicial campaigns has skyrocketed, resulting in a “new style” of politics with state supreme court races becoming “louder, nastier, and more expensive.” Decisions of the United States Supreme Court have also contributed to the changes in judicial elections as it relates to restriction on the speech of candidates and recusal rules, potentially affecting the impartiality of judges. I discuss these issues, and the concerns expressed by some that these changes may have for the functioning of state courts. I evaluate these concerns by referencing empirical research conducted in recent years and draw conclusions about the veracity of those concerns in light of the empirical results. I conclude with a discussion of some of the more popular reform efforts that are being forwarded to reduce the effect of money in state judicial campaigns.

On The Challenges Facing State Supreme Courts: Campaign Finance, Judicial
Speech and the Appearance of Impartiality

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“That’s obscene for a judicial race. . . .What does it gain people? How can people
have faith in the system?”

– Lloyd Karmeier, Illinois Supreme Court Justice

“The improper appearance created by money in judicial elections is one of
the most important issues facing our judicial system today.”

--Theodore B. Olson, former U.S. Solicitor General and attorney in *Caperton v.
A. T. Massey Coal Company*

INTRODUCTION

In March of 2006, the United States Supreme Court refused to grant certiorari in the
case *Avery v. State Farm Automobile Ins. Co.*¹ from the Illinois Supreme Court. The
Avery case was notable for its role in what is, to this day, the most expensive state
Supreme Court race in history, with the candidates spending over \$9 million combined.
The case involved a class action suit against State Farm brought by its policyholders and
relating to the use of aftermarket parts in the repair of vehicles covered by State Farm.
The Illinois Supreme Court heard oral arguments in this case in the spring of 2004, but
did not immediately decide the case. In 1999, the trial court granted the plaintiffs class
status and in the resulting trial a judgment was entered for the plaintiffs in the amount of
\$1.2 billion. The Illinois appellate court largely upheld the ruling and it was then
appealed to the Illinois Supreme Court where oral arguments were held in the spring of
2004.

In the interim, Gordon Maag and Lloyd Karmeier were locked in a race for the 5th

¹ *Avery v. State Farm Automobile Ins. Co.*, 547 U.S. 1003 (2006) [cert. denied].

Judicial District's seat on the Illinois Supreme Court, to replace Democrat Moses Harrison who had retired in 2002. In that race, of the over \$4.5 million raised by Karmeier, over \$1.2 million came from JUSTPAC, the single largest contributor to his campaign next to the state Republican party, which donated \$1.9 million. State Farm, its employees, lawyers, and other parties directly related to State Farm donated another \$350,000. Karmeier further received over one million dollars from other groups to which State Farm was associated. The character of the donations to Gordon Maag's campaign followed a similar pattern in terms of volume, receiving over \$2.7 million from the Illinois Democratic Party, and \$1.2 million from the Justice for All PAC. In all, Maag raised almost \$4.4 million (Sample 2006). Ultimately, Karmeier won the seat to the 5th District and upon taking his seat on the Supreme Court, refused to recuse himself from the *Avery* case, and ultimately sided with the majority in a 4-2 decision, overturning the judgment against State Farm.

The *Avery* case, and the Maag-Karmeier race, illustrate the growing concern to those within the judiciary, as well as policy makers, and the public about the increasing presence of money in state judicial campaigns over the last twenty to thirty years. Many believe that this influx of outside money from lawyers, corporations, and interest groups has the potential to negatively influence the legal process, with large donors regularly appearing before judges that they helped to elect, creating the appearance of, if not actual, bias.

The Supreme Court, through a number of decisions in the last decade has also added to the level of uncertainty regarding the conduct of judicial campaigns and the effective administration of justice. In 2002, the Court ruled in *The Republican Party of*

¹ *Avery v. State Farm Automobile Ins. Co.*, 547 U.S. 1003 (2006) [cert. denied].

*Minnesota v. White*² that state restrictions on the campaign speech of judicial candidates was a violation of the First Amendment's free speech protections. The suggestion of many following *White* was that it would open judicial campaigns to judges making claims regarding issues that might come before them on the court, which had previously been prohibited by the Minnesota announce clause, as well as similar such prohibitions in other states.

The Court further complicated state judicial elections with their decision in *Caperton v. A.T. Massey Coal Co.*³ The case involved campaign expenditures made by Don Blankenship, CEO of A.T. Massey, in support of the 2004 campaign bid of Brent Benjamin, who was challenging the chief justice of the West Virginia Supreme Court. In a rather eerie similarity to what was occurring in the Illinois Supreme Court contest between Maag and Karmeier that same year, Massey Coal had a case that would later come before the West Virginia Supreme Court, now with Benjamin sitting on the state high court. With Benjamin's vote the difference, the court overturned a lower court award of \$50 million in damages against Massey. Caperton appealed to the United States Supreme Court, arguing that the expenditures by Massey on behalf of Benjamin gave the appearance of impropriety and that he should have been recused from the case.

Writing for a 5-4 majority, Justice Anthony Kennedy sided with Caperton, holding that "...there is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent" (*Caperton* 2009, 870). The Supreme Court found that large

¹ *Avery v. State Farm Automobile Ins. Co.*, 547 U.S. 1003 (2006) [cert. denied].

independent expenditures did in fact pose a problem for the legitimacy of the West Virginia Supreme Court, and provided the basis for the appearance of impropriety. The Court provided a standard for state court judges to follow in deciding whether to recuse themselves from cases, but further complicated the situation given the increasing importance of money in judicial elections and increasing participation by actors who could potentially appear before those same courts.

And in 2010, the Supreme Court decided *Citizens United v. Federal Election Commission*⁴ in which they held that restrictions on independent expenditures by corporations and PACs was an unconstitutional infringement on the First Amendment's protection of free expression. While it is likely still too early to gauge the effect of *Citizen's United* on state judicial campaigns, the potential to accelerate the already rapidly increasing amounts of money being committed to these races is a concern.

These cases illustrate a number of trends that have been occurring in judicial campaigns in recent years causing some to question the integrity and legitimacy of those institutions. The first is the explosion in money in judicial campaigns and the possible negative effects that has had on the administration of justice. Second, the changes in standards related to campaign speech and what effect that might have on the campaign strategies of candidates for judicial office. And last, the changes to standards regarding recusal by state court judges and how the decisions of the Supreme Court have affected the interaction between money, speech, and the decisions of judges at the state level.

¹ *Avery v. State Farm Automobile Ins. Co.*, 547 U.S. 1003 (2006) [cert. denied].

CAMPAIGN FINANCE AND STATE COURTS

The Illinois situation is not unique. In 2004, the same year as the Maag-Karmeier race, the candidates vying for the state supreme court in Alabama spent more than \$7.5 million combined. In 2006, Republican candidate for the chief justiceship of the high court in Alabama spent almost \$5 million in a losing effort.⁵ In the 2007-2008 cycle, the eight candidates running for state supreme court in Pennsylvania raised a combined \$9.5 million. Five other states set fundraising records during that year, including Louisiana, Wisconsin, Nevada, West Virginia, and Michigan (Sample, et. al. 2010). These numbers from individual states underscores a larger trend in the rapidly escalated fundraising in state supreme court elections.

In the 1999-2000 campaign cycle, candidates for state supreme court raised over \$45 million, an increase of over 60% from the previous election cycle just two years earlier (Sample 2006). The decade from 2000-2009 saw campaign fundraising more than double from the previous decade, rising from \$83.3 million during the 1990s, to over \$200 million. Alabama leads all states in fundraising during the last decade, with over \$40 million raised by forty-five candidates for state supreme court. They are followed by Pennsylvania (\$21 million), Ohio (\$21 million), Illinois (\$20 million), and Texas (\$19 million). All five of those states employ partisan election systems or hybrid partisan election/retention elections to choose and retain their justices. Of the top ten states in terms of spending, six of the ten are partisan election states, while nine of the next ten in terms of spending choose justices via non-partisan election systems (Sample, et. al. 2010, 4-8).

The cause of this increase in fundraising has largely been the result of increasing

¹ *Avery v. State Farm Automobile Ins. Co.*, 547 U.S. 1003 (2006) [cert. denied].

attention from interest groups, lawyers, lobbying groups, and political action committees. Outside groups are not unknown players in state supreme court races. In 1986, numerous groups mobilized in opposition to the retention elections of members of the California Supreme Court who had invalidated the state's death penalty law. In that election more than \$11.5 million was spent, resulting in the defeat of Chief Justice Rose Bird and associate justices Cruz Reynoso and Joseph Grodin. However, the widespread spending in state supreme court races would not become an even larger issue in the years ahead.

This increase in spending in state supreme court races raises the potential for problems in the operation and perception of those courts. As Lloyd Karmeir said about the money being raised during his ultimately successful bid for the Illinois Supreme Court seat in 2004, "That's obscene for a judicial race. What does it gain people? How can people have faith in the system?" He is not alone in expressing such a sentiment, with members of the United States Supreme Court weighing in on the topic of campaign finance in state judicial elections. Former U.S. Supreme Court justice Sandra Day O'Connor said in 2010, "The crisis of confidence in the impartiality of the judiciary is real and growing. Left unaddressed, the perception that justices is for sale will undermine the rule of law that the courts are supposed to uphold" (Sample, et. al. 2010). *Empirical Research on the Effect of Rising Campaign Spending*

The concern over the role of money in state judicial campaigns has not gone unnoticed among scholars and researchers of the courts. Over the last twenty years, numerous studies have addressed the impact of money on judicial elections at the state level and the impact that such spending may have on judicial decision making. Hojnacki

¹ *Avery v. State Farm Automobile Ins. Co.*, 547 U.S. 1003 (2006) [cert. denied].

and Baum first identified this “new style” of judicial campaigns, characterized by the increasing amounts of money into state judicial contests coming from interest groups and the willingness of candidates to engage in “large scale efforts to reach the voters and emphasize substantive issues in their appeals” (1992, 921). This “new style” of campaigning may have measureable effects on the types of candidates that are elected to state supreme courts and their behavior once on those courts.

Abbe and Herrnson point out that judicial elections have become more competitive over time and that it was in California in the late 1970s where this new style of judicial campaigning found its genesis (2003, 538). They argue that this is the result of several factors, including the increasing specialization within the legal community, where competing networks within the bar led to focused strategies to support that group’s preferred candidate for the bench. During this time, the court system came to be understood as a forum for the pursuit, and extension of, individual rights, by the states. This increasing importance of these forums and the willingness of states to take up controversial legal issues contributed to the increase in competition for seats on state supreme courts. Lastly, they argue that tort reform was perhaps the most important of all of these issues in leading to the increased politicization of the bench, serving as the catalyst in a number of high profile races in Alabama, Illinois, Michigan, Mississippi, and Ohio in the late 1990s and early 2000s (539-540).

Opinions within the legal community are generally sympathetic to the view that the injection of money is a serious problem with measurable negative consequences for state courts. This view is best reflected by Skaggs et al. (2011), who state “Special-interest contributions pose a tremendous threat to the public’s faith in fair and impartial

¹ *Avery v. State Farm Automobile Ins. Co.*, 547 U.S. 1003 (2006) [cert. denied].

courts. Overwhelming bipartisan majorities are extremely wary of the role that money plays in judicial elections and believe that campaign funding support buys favorable legal outcomes” (21). The difficulty with statements like these is whether there is sufficient empirical support to maintain that concern for the functioning of the judiciary.

¹ *Avery v. State Farm Automobile Ins. Co.*, 547 U.S. 1003 (2006) [cert. denied].

Perhaps the most extensive work on state supreme court elections has been conducted by Bonneau and Hall (2009) who find that campaign spending is not entirely negative, as the increased spending also serves an informational role, providing voters with more information about judicial candidates, giving them the opportunity to make more well informed decisions about the candidates when voting. Examining elections from 1990 to 2004, they do find that partisan and non-partisan elections differ substantially, with average total spending in states that employ partisan elections outpacing spending in non-partisan states by approximately \$250,000 (52-53).

Perhaps more concerning than overall spending levels is the impact that such spending may have on specific judicial races. As Theodore Olson, former United States Solicitor General said, “The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today” (Caperton 2008). One of the concerns about the increase in campaign spending is the likelihood that a candidate can “buy” their way onto a state supreme court. Bonneau (2007a) shows that while incumbents are more likely spend more than challengers, the money spent by challengers is more beneficial. That is, spending by challengers actually does increase the number of votes they receive, while for incumbents, increased spending does not lead to increased votes. The reason for this, Bonneau suggests is because “...incumbents are generally more well-known than their challengers. Spending money adds little to the voters’ knowledge of the incumbent...[However] a challenger can increase her or his level of electoral support simply by spending more money” (496).

Others have focused on the likelihood that the influx of money into these elections may result in a quid pro quo, with judicial decisions being directly influenced by campaign contributions. Looking at decisions of the Texas Civil Supreme Court between 1994 and 1997, McCall finds a link between contributions and decisions, though her analysis is limited to cases involving only individual litigants versus businesses and cases pitting businesses against businesses (2003). McCall and McCall extend this analysis, including the state as a party, with a larger population of cases, and are able to address questions regarding the individual votes of justices (McCall and McCall 2007). They find that both campaign contributions and proximity to a justice's re-election date lead to an increased likelihood of receiving a favorable vote (220), though there is substantial deviation across justices (223).

Analyzing decisions of the Georgia Supreme Court during its 2003 term, Cann finds a direct link between contributions and decisions (2007). This effect holds for both liberal and conservative donors, and the effects of each appear to be quite similar, suggesting that, *ceteris paribus* liberal and conservative interests have approximately equal influence over votes. Unlike most other previous studies of judicial decision making, Cann does not find that the ideology of the justices has an independent effect on votes, and as he surmises, it may simply be due to the ideological homogeneity of the court (289).

Others have not found that individual contributions lead to favorable rulings from justices. Cann, Bonneau, and Boyea focus on multiple states to get a better sense of the effect of contributions on decisions across states (2012). Compensating for the potential problem with a lack of variation in judicial ideology facing Cann (2007), they collect data from the Michigan, Nevada, and Texas state supreme courts. Their results

suggest a link between contributions and votes in Michigan, but not for Texas and Nevada.

It is difficult to draw any firm conclusions from this research about the connection between campaign contributions and judicial votes. For one, the scope of these studies are limited to one, or several, state supreme courts over relatively short periods of time. Further, they cover only a small range of cases. And aside from the fact that the sample of states is small, there is little variation across selection methods. Would we expect to see differences between states based on how justices are selected and retained? Future work will need to address some of these issues before we are able make any serious claims about a direct link between money and votes.

Citizens United v. Federal Election Commission

In 2010, the United States Supreme Court ruled in *Citizens United v. FEC*, that the government may not suppress the political speech of corporate entities.⁶ Justice Kennedy, writing for the majority wrote that “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech” (*Citizens United* 2010, 883). For all practical purposes, the decision allows corporate entities to make unlimited campaign donations to political campaigns. It did keep in place campaign disclosure laws so that the donations could be tracked. Dissenting in the case, Justice Stevens wrote “The consequences of today’s holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. 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” (Citizens United, 968). Given the rise in spending in state supreme court races, Stevens’ dire warning is not unexpected. However, the question of when, where, and how much the *Citizen’s United* ruling will affect state races is still unclear.

Whatever the effect of *Citizens United*, the growth in spending in state supreme court races is most likely going to continue. The question really becomes one of whether it will accelerate it even more. For states like Illinois, already with no campaign contribution limits, the effect of *Citizens United* may mean very little. But campaign spending, and the influence of money are not the only issues with the potential to fundamentally affect state court races.

MINNESOTA V. WHITE AND JUDICIAL SPEECH

In 2002, the United States Supreme Court struck down part of the Minnesota code of judicial conduct in the case *Republican Party of Minnesota v. White*.⁷ Specifically, the Court addressed one of the canons of judicial ethics first established by the American Bar Association (ABA), and later adopted by the by the state of Minnesota, known as the “Announce Clause.” The Clause prohibited “a candidate for a judicial office, including an incumbent judge shall not announce his or her views on disputed legal or political issues” (*Republican Party of Minnesota v. White* 2002, 768). In response to statements and campaign advertisements made by Gregory Wersal, candidate for the Minnesota Supreme Court in 1996, he was charged with violating the state’s Announce Clause. Though he was not ultimately found to have violated the Clause, Wersal withdraw from that race only to attempt a run for the same position two years later. At that time, he filed suit to enjoin the enforcement of the Clause (Bonneau, Hall, and Streb 2011, 253).

In a 5-4 decision, the Supreme Court ruled in the case that the Announce Clause amounted to an unconstitutional infringement on the candidates’ freedom of speech under the First Amendment. Justice Antonin Scalia, writing for a majority that included Chief Justice Rehnquist and Associate Justices Sandra Day O’Connor, Anthony Kennedy, and Clarence Thomas, said that the opinion was not sufficiently narrowly tailored to meet the states interest in maintaining the appearance of impartiality of the courts. Specifically, Scalia concluded that “a judge’s lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason” (*White*, 777). Scalia continued, “We neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office” (*White*, 783). Despite Scalia’s assertion, some on the

Court question whether that is, in fact, what will occur.

In her dissent, Justice Ginsburg argued that “Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency... They must strive to do what is legally right, all the more so when the result is not the one ‘the home crowd’ wants” (White, 806). Ginsburg’s concern was echoed by Justice Stevens, who warned “The Court’s reasoning, however, will unfortunately endure beyond the next election cycle. By obscuring the fundamental distinction between campaigns for the judiciary and the political branches, and by failing to recognize the difference between statements made in articles or opinions and those made on the campaign trail, the Court defies any sensible notion of the judicial office and the importance of impartiality in that context” (White, 797). And the concern over the potential for the easing of speech restrictions in judicial campaigns to have negative consequences for the appearance of impartiality of the courts was not limited to members of the Court.

Robert Hirshon, President of the ABA responding to the decision, stated “It will open a Pandora’s Box [with] judicial candidates running for office by announcing their positions on particular issues” (Greenhouse 2002). Hirshon voiced a concern common to those opposing the Court’s decision in *White*. Given the growth in “new style” judicial campaigns, the *White* decision had the potential to make judicial elections, which were already becoming “louder, nastier, and more expensive,” to be even more so in the years ahead (Peters 2007, 27).

The response by the ABA to the decision in *White* was to replace the announce clause that was the model for the state of Minnesota with a new condition, that “prohibits a candidate for judicial office from making statements that commit the

candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views"⁸ Since then, nine states have adopted the ABA language, while another thirty-two states have some form of "commit" clause that is similar to the ABA canons (see Peters 2007, 27-28).

Despite these changes, there are relatively few empirical studies of judicial campaign language in the wake of *White* and the subsequent changes at the state level. Peters conducted a nationwide survey of state supreme court candidates in the 2006 elections. He found that "In 2006, at least, candidates for state courts of last resort focused primarily on image and qualifications, the traditional form of communications for judicial campaigns, rather than on issues" (2008, 183). Despite this finding, Peters expects that situation to change as more money flows into the system, with judicial races becoming more and more politicized (183).

Others have found little evidence of campaign speech changing the tone and conduct of judicial speech. Both Kritzer (2011) and Hall (2011) find little evidence of change in tone or content of advertisements by candidates. According to Kritzer, "The proportion of elections that feature attack-style ads has remained stable since 2002. The proportion of advertising airings comprised of attack ads has varied since 2000, but show no particular pattern" (2011, 238). It should be noted that Kritzer's analysis relies solely on the use of television advertising, and does not address print ads or comments made by candidates in other contexts.

Focusing on lower court elections, Arbour and McKenzie administered a survey to 445 candidates in six states during the 2008 election (2011). The results of the survey demonstrate that candidates complained the least about the campaign tactics of their

opponents the least in those states that had the fewest restrictions on the speech of candidates (2). Moreover, candidates in partisan election states – those where the “new style” of judicial campaigning has been most prevalent – appeared to violate campaign norms the least (15). Candidates were also more likely to discuss their own qualifications and experience than attacking their opponents in partisan election states than non-partisan states (3). They conclude “In other words, the expectation of *White’s* critics is that one should see more complaints about opponents' rhetoric in states that have expansive readings of *White*. Instead, we find that candidates are more likely to complain about improper issues or attacks in states that narrowly interpret *White*” (17-18). They attribute this to the “culture” of judicial campaigns and the legal community where both voters and the professional norms of the legal profession work to limit the discussion of topics such as how the candidates may view particular legal issues (19).

The conclusion drawn from the research on the effect of *White* would seem to be that it has had little impact on state court races. Unfortunately, one of the problems with these studies lies in the fact that they may be quite accurate about the behavior of judges in these races, whether it is a question of campaign spending or campaign speech. However, the difficulty becomes one of the perception of the courts by the public, and whether people actually *believe* that judges are in fact engaging in these activities, and what impact that has on their faith in the legitimacy of the system.

JUDICIAL LEGITIMACY

All of the previous discussion relates to what many believe to be the “proper” functioning of state judicial systems, and how the changes in recent years may affect how state courts operate. The larger issue implied is ultimately the legitimacy of those institutions

and whether changes in the campaign activities and influx of money into those campaigns has any measurable impact on how the public views those institutions. The argument of reformers is that these changes have on campaign speech, relying on many of the same data collected in the Kentucky survey (2008b). Looking at attack ads in Kentucky, he finds the picture somewhat murkier. He states, “When it comes to policy talk, most Kentuckians are not off-put by general statements of policy positions, and most do not object to even fairly vigorous attack ads” (920). However, there appears to be a limit to the “policy talk” that Kentuckians are willing to tolerate before it takes a toll on the courts, with “specific policy promises” endangering judicial legitimacy (921).

Still addressing the question of speech and legitimacy, Gibson (2009) expanded his analysis, relying now on a national survey (2008b). The results from the national survey are quite similar to what he finds in the Kentucky example. Regarding policy statements, “no harm is done to the institutional legitimacy of the courts. Indeed the data even indicate that policy *promises* have no untoward effects on court legitimacy” (2009, 1298). The campaign contributions going to state courts does appear to harm the legitimacy of the courts, and here Gibson finds that contributions from those with direct business in the courts *as well as* contributions from those without direct links to litigation before those courts does cause harm to the legitimacy of courts (1295-1297). The results here should cause some alarm to those who are interested in maintaining the appearance of impartiality of the courts.

THE FUTURE OF REFORM?

In 2009, the Illinois Civil Justice League polled Illinois voters on a number of questions related to the selection of judges. Illinois selects judges via partisan elections, and the results indicated that 67% of respondents believed that switching to a non-partisan selection system would result in better judges, while 20% disagreed that a change would result in better judges. Respondents were also asked whether they favored public financing of partisan elections, with only 22% agreeing with such a plan and almost disagreeing with such a move (ICJL 2009).

These numbers mirror national attitudes about the relationship between campaign donations and judicial decisions. A 2007 national poll by Justice at Stake, a group that has consistently opposed the rise in campaign spending in judicial elections as threatening to the fairness and impartiality of the courts, found that 76% of respondents felt that campaign spending affects court decisions a “a great deal or some,” with 19% concluding that such spending affects decisions “just a little or some.” Another question posed in that survey addressed public financing of elections, asking respondents whether they favored public financing for state supreme court races, with 65% agreeing with the statement, and 26% opposed to public financing (Sample et al. 2010, 67-69).

These attitudes, spurred by the changes in state judicial elections over the last twenty to thirty years, has resulted in numerous proposals for changes in the operation of judicial elections and rules for judges more generally. Some of those recommended by groups such as Justice at Stake run the gamut from changing selection methods, to public financing of elections, to changes in the recusal rules of justices.

Perhaps the most prevalent argument has been in favor of changing judicial selection systems. Partisan election systems such as the one used in Illinois are seen as being most prone to the influence of money through direct campaign contributions, and some have suggested switching to a non-partisan (where the judges' party identification is not listed on the ballot), or to a merit based system, where judges are appointed by the governor and then run in retention elections where they do not face a challenger and voters simply choose whether to retain the judge. The justification for such a system is that it would remove some of the politics from the system and thus the money from flowing into campaigns.

Another potential area for reform is to replace current private financing systems with public financing for judicial races. The justification for public financing is that it “reduces the burden on judicial candidates to raise money from special interests before the court and thus lowers the potential for ethical conflict” (Justice at Stake 2010, 69). Both Wisconsin and West Virginia have adopted some version of public financing, but neither has been implemented, so conclusions about the efficacy of such efforts are still to be determined.

Stronger recusal rules for judges have also become a greater issue in the wake of the United States Supreme Court decision in *Caperton*. The argument for such rules is that it would encourage judges to opt out of cases directly involving those who contribute to their campaigns, and therefore maintain the legitimacy of the court. The Brennan Center for Justice, part of the New York University School of Law, prepared a proposal in 2008 recommending numerous changes to recusal rules (Brennan Center for Justice 2008). To date, none of these rules have been adopted by any states, and that is

perhaps best explained by the belief that such rules are not necessary in the post-*Caperton* era.

These are just a few of the many proposed reforms that have been proposed for state courts. Currently, it is not clear that any of them are going to be adopted *en masse* by any significant number of states. However, it may be that if the trends in campaign spending continue, and evidence builds of damage to the legitimacy of state courts, some of them may receive more attention from policy makers.

CONCLUSION

My purpose in this paper was to discuss the current state of affairs facing state courts. Rising campaign spending, the lifting of speech restrictions, and recusal standards, are among many of the changes that state courts have undergone in recent years. Many have argued that these changes have had serious negative consequences for the operation and legitimacy of those courts. And the data that has been conducted in recent years has been consistent in some areas, such as the effect of campaign spending on legitimacy, and less consistent in others, such as the effect of campaign speech on both the decision making of justice and the confidence of the public in those courts. We are in a unique period as state courts are increasingly targeted by groups seeking to pursue policy through the legal system, and willing to spend large sums of money to achieve those goals. Hopefully, as more research on these issues is conducted, we will gain greater clarity on the impact these changes have had on the courts, providing some guidance on how policy makers can best design institutions to cope with those changes.

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