*To Recuse or not to Recuse, that is the Question: The Rising Tide of Money in State Judicial Elections and the Need for Legitimate Recusal Reform*

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## I. Introduction

The defining characteristics of the American judicial system are its impartiality and independence. Unlike the legislative and executive branches of our government who are directly accountable to the people who elect them, the judiciary is accountable only to the law and Constitution.[2] Unfortunately, due to several recent U.S. Supreme Court decisions, the independence and impartiality of the nation's state judiciaries have been threatened by two developments: (1) the weakening of restrictions on the conduct of elected state judges and judicial candidates, and (2) the concomitant increase in spending in state judicial elections by candidates and special interest groups.[3] These threats to our state courts are very real and very troubling as the election of state judges is the rule, not the exception, in the United States.[4]

A hidden cost of this escalating spending and weakening of restrictions on candidates in judicial elections "is the erosion of public confidence in the fairness of the judicial system."[5] A 2009 *USA Today*/Gallup poll found that 89 percent of respondents "believed that the influence of

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[2] Aimee Priya Ghosh, Comment, *Disrobing Judicial Campaign Contributions: A Case for Using the* Buckley *Framework to Analyze the Constitutionality of Judicial Solicitation Bans*, 61 AM. U. L. REV. 125, 126 (2011) (quoting former Supreme Court Justice Sandra Day O'Connor who recently stated in a *New York Times* editorial that "[i]n our system, the judiciary, unlike the legislative and executive branches, is supposed to answer only to the law and the Constitution. Courts are supposed to be the one safe place where every citizen can receive a fair hearing.") [hereinafter GHOSH].

[3] *Id.* at 126-27 (citing MARK KOZLOWSKI & PRAVEN KRISHNA, FREEING CANDIDATE SPEECH IN JUDICIAL ELECTIONS: OR, HOW SAFE ARE LOOSE CANONS? 3 (2002)).

[4] Thirty-nine out of fifty states use elections to select or retain some or all of the state's judges. *See Methods of Judicial Selection*, AM. JUDICATURE SOC'Y, *at* http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last visited Sept. 2, 2013) (compiling the methods of selecting judges in all fifty states).

[5] GHOSH, *supra* note 2, at 131.

campaign contributions on the decisions of judges was problematic."[6] Similarly, a 2009 Harris Interactive national poll found that 80 percent of Americans "believed that judges should not hear cases involving campaign contributors."[7]

In fact, judges themselves are concerned that campaign contributions are affecting their judicial decision-making. In a 2001 Greenberg Quinlan Rosner Research poll, "almost half of the 2,428 state court judges polled indicated that they believed campaign contributions influenced decisions."[8] Moreover, 80 percent of the same judges polled "believe that with campaign contributions, interest groups are trying to use the courts to shape policy."[9]

Confirming the foregoing perceptions, a recent study sponsored by the American Constitution Society for Law and Policy ("ACS") and conducted by Joanna Shepherd ("Shepherd"), Associate Professor of Law at Emory University School of Law; found there is a "significant relationship between business group contributions to state supreme court justices and the voting of those justices in cases involving business matters"[10]—"[t]he more campaign contributions from business interests justices receive, the more likely they are to vote for business litigants appearing before them in court."[11] Moreover, the data compiled for this study also revealed "that a justice who receives half of his or her contributions from business groups

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[6] *Id.* (citing ADAM SKAGGS, BUYING JUSTICE: THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTIONS 4 (2010) *available at* http://www.brennancenter.org/content/resource/buying_justice_the_impact_of_citizens_united_on_judicial_elections/, *see infra* note 38).

[7] *Id.*

[8] Shira J. Goodman et al., *What's More Important: Electing Judges or Judicial Independence? It's Time for Pennsylvania to Choose Judicial Independence*, 48 DUQ. L. REV. 859, 866 (2010) (citing GREENBERG QUINLAN ROSNER RESEARCH, INC., JUSTICE AT STAKE-STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), *available at* http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf) [hereinafter GOODMAN].

[9] Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Elections*, AMERICAN CONSTITUTION SOCIETY 7 (2013) *available at* http://www.acslaw.org/sites/default/files/ACS_Justice_at_Risk_6_24_13_0.pdf (citing GREENBERG QUINLAN ROSNER RESEARCH, INC., JUSTICE AT STAKE-STATE JUDGES FREQUENCY QUESTIONNAIRE 9 (2002), *available at* http://www.justiceatstake.org/files/JASJudgesSurveyResults.pdf) [hereinafter ACS JUDICIAL STUDY].

[10] *Id.* at 1.

[11] *Id.*

would be expected to vote in favor of business interests almost two-thirds of the time."[12] Most interestingly, the data from this study also showed "that there is a stronger relationship between business contributions and justices' voting among justices affiliated with the Democratic Party than among justices affiliated with the Republican Party."[13] Shepherd explained the reason for this phenomenon: "[b]ecause Republican justices tend to be more ideologically predisposed to favor business interests, additional business contributions may not have as large of an influence on them as they do on Democratic justices."[14]

This article argues that the best way to protect the impartiality and independence of our state judiciaries is for state supreme courts to adopt *per se* rules requiring the disqualification of judges because of judicial campaign contributions and independent expenditures made by litigants, their attorneys, and special interest groups. Part II of this article summarizes the unfortunate state of the current judicial election system in the U.S. due in large part to recent U.S. Supreme Court rulings. Part III of this article argues why recusal reform is the most effective solution to restoring the impartiality and independence of our state judiciaries and also explains which *per se* disqualification rule best serves as the national model that should be adopted. Part IV concludes that swift action needs to be taken to restore the impartiality and independence of the judiciary and the best way to do so is for state supreme courts to adopt recusal reform.

[12] *Id.*
[13] *Id.* at 2.
[14] *Id.*

II. Why Now? What Has Changed?

A. The Invalidation of the Announce Clause in *Republican Party of Minnesota v. White*[15]

In an effort to protect the independence and impartiality of judges, the American Bar Association ("ABA") and many states, have adopted codes of judicial conduct detailing "what judicial candidates or sitting judges running for retention, reelection, or election to a higher court can and cannot do or say during the campaign."[16] Until recently, there were two key components to these special restrictions, first, "the codes of judicial conduct limited the ability of judicial candidates to talk about hot button issues and make promises about what they would do if elected,"[17] and second, "the codes set restrictions on how judicial campaigns were to handle fundraising."[18] As a result of these codes, "judicial elections were 'low-key affairs, conducted with civility and dignity,' with very little in terms of campaign spending and media advertising."[19] In addition, "[c]andidates talked about their experience and reputations, and avoided making any controversial statements."[20] This state of affairs changed "in the late 1990s and early 2000s when legal challenges were brought against some state Codes of Judicial Conduct"[21] in an effort to make judicial elections treated more like legislative or executive elections.

The issue concerning "the restrictions on what judicial candidates could say on the campaign trail,"[22] was addressed in the case of *Republican Party of Minnesota v. White*.[23] In

[15] *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).
[16] GOODMAN, *supra* note 8, at 872.
[17] *Id.*
[18] *Id.*
[19] ACS JUDICIAL STUDY, *supra* note 9, at 5 (quoting Peter D. Webster, *Selection and Retention of Judges: Is There One 'Best' Method?*, 23 FLA. ST. U. L. REV. 1, 19 (1995)).
[20] GOODMAN, *supra* note 8, at 872 (citing David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 297 (2008)).
[21] *Id.*
[22] *Id.* at 873.
[23] 536 U.S. 765 (2002).

*White*, the plaintiff was "a judicial candidate for the Minnesota Supreme Court [who] alleged that Minnesota's announce clause, the judicial canon prohibiting judicial candidates from announcing their views on disputed legal or political issues, violated the [plaintiff's] free speech rights by preventing him from responding to voter and media inquiries about his views."[24] The Minnesota Code of Judicial Conduct Canon provision read: "[A] candidate for a judicial office, including an incumbent judge, shall not announce his or her views on disputed legal or political issues."[25] The plaintiff "argued that without being able to hear him speak about his views, citizens and the press would be unable to make an informed decision about whether to support or oppose his candidacy."[26]

Justice Antonin Scalia, writing for the majority of the U.S. Supreme Court, "held that the Minnesota canon violated the First Amendment of the Constitution"[27] ruling that "the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office."[28] The Court, "while recognizing the reasoning underpinning restrictions like the announce clause—maintaining judicial independence by keeping judicial candidates from seeming to prejudge cases or issues while campaigning—held that states could not prohibit judicial candidates from stating and discussing their views on disputed legal and political issues."[29] What was most troubling about the Court's decision was the conclusion reached by Justice Scalia that judicial elections are more like legislative elections:

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[24] GOODMAN, *supra* note 8, at 873 (paraphrasing *White*, 536 U.S. at 769-70).
[25] *Id.* (quoting MINN. CODE OF JUDICIAL CONDUCT CANON 5(A)(3)(d)(i) (2000)).
[26] *Id.* (citing *White*, 536 U.S. at 770).
[27] *Id.*
[28] *Id.* at 873-74 (citing *White*, 536 U.S. at 774, which was quoting *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 861, 863 (8th Cir. 2001)).
[29] *Id.* at 874 (citing *White*, 536 U.S. at 775-80). The announce clause was distinguished from the pledges and promises clause—which was not challenged in *White*—which prohibits judicial candidates from promising to rule one way or the other on a particular issue. *White*, 536 U.S. at 770 & 780; GOODMAN, *supra* note 8, at 873 n. 49.

> But in any case, Justice GINSBURG greatly exaggerates the difference between judicial and legislative elections. She asserts that 'the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench.' This complete separation of the judiciary from the enterprise of 'representative government' might have some truth in those countries where judges neither make law themselves nor set aside the laws enacted by the legislature. It is not a true picture of the American system. Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular.[30]

In dissent, Justice Ruth Bader Ginsburg, argued that judges "perform a function fundamentally different from that of the people's elected representatives,"[31] and that "this uniqueness calls for certain restraints on speech."[32] Justice Ginsburg further stated: "Unlike, their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide 'individual cases and controversies' on individual records…neutrally applying legal principles, and, when necessary, 'stand[ing] up to what is generally supreme in a democracy: the popular will.'"[33]

Prior to *White*, special interest groups "would make endorsements with little information because candidates would not speak out on the issues important to those groups."[34] Following *White*, "many states revised their codes of judicial conduct to conform to the decision"[35] and as a result of these changes, special interest groups "became very active surveying candidates,"[36]

[30] *White*, 536 U.S. at 784 (citations omitted).
[31] *White*, 536 U.S. at 803 (Ginsburg, J., dissenting).
[32] GOODMAN, *supra* note 8, at 874.
[33] *White*, 536 U.S. at 803-04 (Ginsburg, J., dissenting) (citations omitted).
[34] GOODMAN, *supra* note 8, at 869.
[35] *Id.* at 875.
[36] *Id.* at 869.

seeking their opinions on controversial issues upon which judicial candidate endorsements and appeals to voters would be based. Now that special interest groups have more information concerning the views of judicial candidates as per the influx of candidate surveys, and as will be explained below, these groups are contributing more money to judicial candidates than ever before thanks in large part to *White*.

B. *Caperton v. A.T. Massey Coal Co.*[37]: A By-Product of *White*?

In the judicial elections following the *White* decision, judicial races have progressively become more expensive as unprecedented amounts of money are being contributed to candidates by wealthy individuals, political parties, businesses, unions, and political action committees. Between 2000 and 2009, candidate fundraising in competitive elections for state supreme court more than doubled from 1990 to 1999—fundraising rose from $83.3 million to $206.4 million.[38] High court elections in 19 states set fundraising records in the 2000-2009 decade.[39] During the 2009-10 election cycle, "candidates raised more than $38 million, approximately $11.5 million of which was independent in nature."[40] Moreover, "[i]n three of the last six election cycles, candidates raised a total of more than $45 million."[41]

In some states, small groups of "super spenders" have started to assume "a dominant role, seeking to sway judicial elections with mostly secret money."[42] In 2009, the U.S. Supreme

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[37] *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009).
[38] ADAM SKAGGS, BUYING JUSTICE: THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTIONS 3 (2010) *available at* http://www.brennancenter.org/content/resource/buying_justice_the_impact_of_citizens_united_on_judicial_elections/ (citing JAMES SAMPLE, ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000-09: DECADE OF CHANGE (2010) and Ian Urbina, *24 States' Laws Open to Attack After Campaign Finance Ruling*, N.Y. TIMES, Jan. 22, 2010, *at* http://www.nytimes.com/2010/01/23/us/politics/23states.html).
[39] *Id.*
[40] ACS JUDICIAL STUDY, *supra* note 9, at 5 (citing ADAM SKAGGS ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: 2009-2010 11 (Charles Hall ed., 2011), *available at* http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf, *see infra* note 42).
[41] *Id.* (citing ADAM SKAGGS ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: 2009-2010 5 (Charles Hall ed., 2011), *available at* http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf, *see infra* note 42).
[42] ADAM SKAGGS ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: 2009-2010 5 (Charles Hall ed., 2011), *available at* http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf [hereinafter NEW POLITICS].

Court decided *Caperton v. A.T. Massey Coal Co.*,[43] a West Virginia case that addressed "whether Due Process requires recusal when a major financial supporter appears before a judge or justice whom his or her support helped to elect."[44] In August 2002, a West Virginia jury returned a verdict that found A.T. Massey Coal Company and its affiliates (hereinafter "Massey") "liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations."[45] The jury awarded Hugh Caperton and various other Massey competitors (collectively known as "Caperton") "the sum of $50 million in compensatory and punitive damages."[46] "After the verdict, but before the appeal, West Virginia held its 2004 judicial elections"[47] and Don Blankenship, Massey's Chairman, Chief Executive Officer, and President, decided to support the candidacy of Brent Benjamin, a candidate seeking to replace incumbent Justice McGraw on the Supreme Court of Appeals of West Virginia.[48] "In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to 'And For The Sake of the Kids,' a political organization formed under 26 U.S.C. § 527,"[49] which "opposed McGraw and supported Benjamin."[50] In addition, Blankenship spent "just over $500,000 on independent expenditures-for direct mailings and letters soliciting donations as well as television and newspaper advertisements"[51] in support of Benjamin.[52] All told, Blankenship's "$3 million in contributions were more than the total

[43] 129 S.Ct. 2252 (2009).
[44] GOODMAN, *supra* note 8, at 884.
[45] *Caperton*, 129 S.Ct. at 2257.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee."[53]

Brent Benjamin won the 2004 judicial election. In 2005, before Massey filed its petition for appeal in the Supreme Court of Appeals of West Virginia, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct "based on the conflict caused by Blankenship's campaign involvement."[54] In 2006, Justice Benjamin denied the motion stating that he found "no objective information…to show that [he] has a bias for or against any litigant, that [he] has prejudged the matters which comprise this litigation, or that [he] will be anything but fair and impartial."[55]

In 2007, the West Virginia Supreme Court of Appeals reversed the $50 million verdict imposed against Massey, with Justice Benjamin casting the tie-breaking vote.[56] Caperton sought re-hearing and moved for the disqualification of three of the five justices, including Benjamin, who decided the appeal.[57] Two of the three justices recused themselves, but Justice Benjamin did not.[58] Caperton then moved a third time for Justice Benjamin's disqualification, arguing that he failed to apply the correct recusal standard under West Virginia law.[59] Caperton also included the results of a public opinion poll which indicated that over 67 percent of West Virginians "doubted Justice Benjamin would be fair and impartial."[60]

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[53] *Id.*
[54] *Id.*
[55] *Id.* at 2258.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] The standard argued by Caperton was whether "a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin's ability to be fair and impartial." *Id.*
[60] *Id.*

In 2008, a divided court again reversed the $50 million jury verdict, and again Justice Benjamin cast the tie-breaking vote for the Court.[61] In a concurring opinion, Justice Benjamin defended his decision not to disqualify himself stating that he had no "direct, personal, substantial, pecuniary interest in this case."[62] The case was appealed to the U.S. Supreme Court, which reversed.

In a decision authored by Justice Anthony Kennedy, the U.S. Supreme Court held that:

> [I]n some cases, circumstances—including the amount of the contribution, the proportional size of the contribution related to other campaign fundraising and expenditures, the probable impact of the contribution on the election, and the timing of the litigation—may require recusal because 'there is a serious risk of actual bias.'[63]

Applying this rule, the Court held that Blankenship's campaign efforts, and more specifically, his contributions in comparison to the total amount contributed to the campaign and the total amount spent in the election, had "a significant and disproportionate influence on the electoral outcome."[64] The Court also pointed to the fact that although no *quid pro quo* arrangement existed, Blankenship's "extraordinary contributions" to Benjamin were made at a time when Blankenship had a vested stake in the outcome *vis-à-vis* who would hear the appeal of the $50 million jury verdict.[65] The Court concluded that Blankenship's "significant and disproportionate influence-coupled with the temporal relationship between the election and the pending case-'offer[ed] a possible temptation to the average…judge to…lead him not to hold the balance nice, clear and true.'"[66]

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[61] *Id.*
[62] *Id.* at 2259.
[63] GOODMAN, *supra* note 8, at 884 (quoting *Caperton*, 129 S.Ct. at 2263).
[64] *Caperton*, 129 S.Ct. at 2264.
[65] *Id.* at 2265.
[66] *Id.* The Court also admitted that the facts in *Caperton* were "extreme by any measure" and that the case was an "extraordinary situation." *Id.*

Although the Court declined to set any objective guidelines for how judges should make disqualification decisions in future cases, the Court pointed to state codes of judicial conduct as "'[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'"[67] As such, the Court instructed states to "adopt recusal standards more rigorous than due process requires"[68] in an effort to have disqualification disputes resolved without having state courts looking to the Due Process Clause and the standard adopted by the Court in *Caperton*. By acknowledging that large campaign contributions to judicial candidates undermines the impartiality of the judiciary in addition to the public faith in that impartiality, Justice Kennedy, in speaking for the Court and citing his concurring opinion in *White*, implicitly admitted that judicial elections are indeed different from legislative elections:

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. *Judicial integrity is, in consequence, a state interest of the highest order.*[69] (emphasis added.)

C. *Citizens United v. Federal Election Commission*[70]: One Step Forward, Two Steps Back

Just when it appeared the U.S. Supreme Court was moving in the direction of protecting judicial independence and impartiality by treating judicial elections differently than legislative and executive branch elections, the Court took two steps backwards just six months after *Caperton* when it decided the case of *Citizens United v. FEC* in January 2010. In that case, the Supreme Court—in a decision ironically written by Justice Kennedy—ruled that Section 203 of

[67] *Id.* at 2266.
[68] *Id.* at 2267.
[69] *Id.* at 2266-67 (citing Justice Kennedy's concurring opinion in *White*).
[70] *Citizens United v. FEC*, 130 S.Ct. 876 (2010).

the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. § 441b, violated the First Amendment.[71] The decision thereby allowed corporations and unions to use their general treasury monies to make independent expenditures for speech that constitutes an "electioneering communication"[72] or for speech that expressly advocates the election or defeat of a candidate.[73] The Court's primary conclusion was that independent expenditures, including those made by corporations and unions, do not give rise to corruption or the appearance of corruption insofar as such expenditures are made without any coordination or prearrangement with candidates.[74] The Court attempted to reconcile its prior holding in *Caperton* with its holding in *Citizens United* by stating that *Caperton* was a due process case while *Citizens United* was a free speech case:

> *Caperton* held that a judge was required to recuse himself '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.' The remedy of recusal was based on a litigant's due process rights to a fair trial before an unbiased judge. *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.[75]

Regardless of whether the Court can satisfactorily reconcile *Caperton* with *Citizens United*, there is no denying the Court's ruling in *Citizens United* will have a profound effect on judicial elections throughout the U.S. By invalidating state prohibitions on independent expenditures made by corporations and unions in all elections, the *Citizen's United* decision allowed corporations and unions to make unlimited independent expenditures in all judicial elections as well.

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[71] *Citizens United*, 130 S.Ct. at 913.
[72] An "electioneering communication" is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. 2 U.S.C. § 434(f)(3)(A).
[73] *Citizens United*, 130 S.Ct. at 913.
[74] *Id.* at 908-09.
[75] *Id.* at 910 (citations omitted).

This realization did not go unnoticed by Justice John Paul Stevens. In his dissent in *Citizens United*, Justice Stevens remarked: "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."[76] While Justice Stevens hoped that "[p]erhaps '*Caperton* motions' will catch some of the worst abuses,"[77] he admitted such recusal motions "will be small comfort to those states that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems."[78]

As a result of *Citizens United*, it is likely that independent spending from special interest groups, most notably corporations and unions, will increase as a percentage of all the money spent in future judicial elections throughout the country thereby leading to more expensive, contentious judicial races, which will further undermine judicial impartiality and independence.[79]

## III. Recusal Reform Is the Most Viable Alternative to Protect the Independence and Impartiality of State Judiciaries

Adam Liptak recently and rightly concluded that one message should be gleaned from the combined holdings of *Caperton* and *Citizens United*—the U.S. Supreme Court views the nation's judiciary as more vulnerable to the influence of money than legislators and other elected

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[76] *Citizens United*, 130 S.Ct. at 968 (Stevens, J., dissenting).
[77] *Id.*
[78] *Id.*
[79] To see what unfettered independent spending in judicial campaigns looks like, one need look no further than the 2011 Wisconsin Supreme Court election where special interest groups set a new record for television spending by non-candidate groups and these controversial ads tainted the debate by focusing on the candidates' handling of criminals and suspected sex offenders. Press Release, Justice At Stake Campaign, Nasty Campaign Deepens 'Crisis' for Wisconsin High Court (Apr. 6, 2011) *available at* http://www.justiceatstake.org/newsroom/press_releases.cfm/nasty_campaign_deepens_crisis_for_wisconsin_high_court?show=news&newsID=10401.

officials.[80] That said, and with the near-certain increase in the amount of money raised and spent in future state judicial elections in the U.S., state policymakers need to take action now to protect the independence and impartiality of their respective judiciaries. However, the Supreme Court's irreconcilable holdings in *White*, *Caperton*, and *Citizens United* have placed state policymakers in an uncertain position. On one hand, the Court in *Caperton* has encouraged states to impose new disqualification rules in order to protect judges from the perceived corrupting effects of large campaign contributions and independent expenditures. On the other hand, states must do so in a post-*White* and post-*Citizens United* world that allows judicial candidates to comment on controversial legal and political issues and erases the rules governing independent spending for corporations and unions.[81]

One proposed solution would be for states to eliminate judicial elections altogether and adopt an appointive or merit-based selection system whereby bipartisan nominating commissions pick slates of candidates for the governor, who then picks from that list.[82] Voters would then periodically decide whether to retain these judges.[83] Proponents argue that merit selection is the only adequate way for judges to be selected without the influence of money that comes with the judicial elections process.[84] However, there are two drawbacks to this system, one procedural, the other substantive—(1) adopting merit selection requires the adoption of a constitutional

[80] Adam Liptak, Caperton *After* Citizens United, 52 ARIZ. L. REV. 203 (2010).
[81] *See* Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 612-13 (2011) (pointing out that the Court's finding in *Caperton* that independent spending in judicial elections has the potential to create an appearance of bias was wholly inconsistent with the Court's finding in *Citizens United* that independent expenditures cannot give rise to the appearance of corruption in all elections).
[82] JUSTICE AT STAKE, ELECT OR APPOINT? A CENTRAL DEBATE, *at* http://www.justiceatstake.org/issues/state_court_issues/election_vs_appointment.cfm (last visited on Sept. 2, 2013).
[83] *Id.*
[84] PENNSYLVANIANS FOR MODERN COURTS, WHY MERIT SELECTION IS A SUPERIOR SOLUTION, *at* http://www.pmconline.org/node/58 (last visited on Sept. 2, 2013).

amendment, which can take a long time to adopt, and (2) "[s]urveys reveal that over 75 percent of the U.S. public prefers elections over appointments for selecting judges."[85]

Another alternative is the adoption of public financing of state judicial elections, which unlike the merit selection option, is a statutory remedy that can be adopted by simple majorities within state legislatures. Public financing of judicial elections eliminates the need for judicial candidates to raise large sums of money and thus be beholden to special interest groups when they are elected to the bench.[86] However, this option has proven to be ineffective for two reasons. First, because public financing systems can be adopted by simple majorities within a state legislature, they too can also be de-funded or repealed pursuant to such simple majorities. For example, Wisconsin's public financing system was repealed in June 2011 after one judicial election[87] and North Carolina's public financing system was recently repealed after being in existence for almost 10 years.[88] Second, in 2011, the U.S. Supreme Court found that the matching funds scheme in Arizona's public financing statute violated the First Amendment in *Arizona Free Enterprise Club v. Bennett*.[89] In that case, the Court rejected arguments that "leveling the playing field" or alleviating the corruptive influence of large campaign contributions were state interests compelling enough to justify the burdens on free speech imposed by the Arizona statute on non-participating candidates and independent expenditure groups.[90] Due to the Supreme Court's ruling in *Bennett*, it appears likely that in those remaining states with public financing systems, fewer judicial candidates will choose to participate on

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[85] ACS JUDICIAL STUDY, *supra* note 9, at 7 (citing GREENBERG QUINLAN ROSNER RESEARCH, INC., JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 7 (2001), *available at* http://justiceatstake.org/files/JASNationalSurveyResults.pdf).
[86] JUSTICE AT STAKE, PUBLIC FINANCING, *at* http://www.justiceatstake.org/issues/state_court_issues/public_financing.cfm (last visited on Sept. 2, 2013).
[87] NEW POLITICS, *supra* note 42, at 22.
[88] Michael Cobb & James Zink, *Financing, Fairness and Faith in Judicial Elections*, RALEIGH NEWS & OBSERVER, Aug. 4, 2013, *at* http://www.newsobserver.com/2013/08/04/3082166/financing-fairness-and-faith-in.html.
[89] 131 S.Ct. 2806 (2011).
[90] *See Bennett*, 131 S.Ct. at 2825-27.

account of the fact they will no longer be able to go "dollar for dollar" with better-financed non-participating candidates and their independent expenditure groups.[91]

The third, and most feasible alternative, is for state high courts to require by rule the disqualification of judges in cases where campaign contributions and independent spending raise reasonable questions about a judge's impartiality. What is most appealing about this alternative when compared to merit selection and public financing is the time it would take to adopt such a rule—recusal reform would take a shorter amount of time to adopt as state supreme courts do not need outside approval by state legislatures or governors when promulgating rules governing the conduct of judges and judicial candidates. Although this alternative would not eliminate the judicial election systems in the U.S., it would at least restore independence and impartiality to the judiciary by protecting sitting judges from the appearance of bias and impartiality following their election to the bench.

As mentioned above, the U.S. Supreme Court recognized in *Caperton* that serious threats to judicial impartiality can arise when judges preside over the cases of campaign contributors or special interest groups who make independent expenditures supporting or opposing the judge's candidacy.[92] However, after reviewing the Court's decision in *Caperton*, it has been a challenge for state high courts to devise clear rules because the Court said little about when the requirements of Due Process require judges to disqualify themselves beyond holding that three million dollars spent by one "super spender" in a judicial supreme court race creates "a serious

[91] *See North Carolina, Meet Citizens United*, NEW YORK TIMES, June 5, 2012, *at* http://www.nytimes.com/2012/06/06/opinion/north-carolina-meet-citizens-united.html.

[92] The U.S. Supreme Court stated: "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when-without the consent of the other parties-a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal." *Caperton*, 129 S.Ct. at 2265.

risk of actual bias."[93] In his dissent in *Caperton*, Chief Justice John Roberts quipped that the new standard established by the Court was "inherently boundless."[94]

In an effort to provide some clarity on this issue, immediately following the Court's decision in *Caperton*, then-American Bar Association ("ABA") President H. Thomas Wells announced that the ABA was going to develop "a series of guidelines for courts to assess whether contributions to judges' campaigns implicate the due process rights of parties appearing before them"[95] as a way "to restore the public confidence in our courts so critical to preserving our government of laws."[96] As such, the ABA's Standing Committee on Judicial Independence ("SCJI")[97] submitted a resolution and report on judicial disqualification that was adopted by the ABA House of Delegates during the ABA's Annual Meeting in August 2011.[98] ABA HOD Resolution 107 (2011) states as follows:

> RESOLVED, That the American Bar Association urges states to establish clearly articulated procedures for:
> A. Judicial disqualification determinations; and
> B. Prompt review by another judge or tribunal, or as otherwise provided by law or rule of court, of denials of requests to disqualify a judge.
>
> FURTHER RESOLVED, That the American Bar Association urges states in which judges are subject to elections of any kind to adopt:
> A. Disclosure requirements for litigants and lawyers who have provided, directly or indirectly, campaign support in an election involving a judge before whom they are appearing.

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[93] *Caperton*, 129 S.Ct. at 2263.
[94] *Id.* at 2272 (Roberts, C.J., dissenting).
[95] Maria da Silva, *Reinvigorate Recusal Reform*, BRENNAN CENTER FOR JUSTICE BLOG (Feb. 10, 2011) *at* http://www.brennancenter.org/blog/archives/reinvigorate_recusal_reform_/ [hereinafter DA SILVA].
[96] *Id.*
[97] "In 1997, the ABA formed the [SCJI] to promote public awareness of the values of an independent, accountable and efficient judiciary and to assist bar associations in responding to unwarranted criticism of judges." AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, http://www.americanbar.org/groups/justice_center/judicial_independence/about_us.html (last visited Sept. 2, 2013).
[98] *See* DA SILVA, *supra* note 95; *see also* Press Release, American Bar Association, ABA Adopts Policy to Improve Legal Profession, Advance Justice (Aug. 9, 2011) *available at* http://www.abanow.org/2011/08/aba-adopts-policy-to-improve-legal-profession-advance-justice/.

B. Guidelines for judges concerning disclosure and disqualification obligations regarding campaign contributions.

FUTHER RESOLVED, That the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Professional Discipline should proceed on an expedited basis to consider what amendments, if any, should be made to the ABA Model Code of Judicial Conduct or to the ABA Model Rules of Professional Conduct to provide necessary additional guidance to the states on disclosure requirements and standards for judicial disqualification.

In the report that accompanied HOD Resolution 107, the SCJI pointed out that with the recent *White*, *Caperton*, and *Citizens United* decisions, "there is an urgent need for States to have in place prompt, effective, and transparent disqualification procedures."[99] The SCJI also stated that it is important that each State, in particular those jurisdictions where judges face some form of election, "expeditiously review existing policies and procedures for disqualification, both judge-initiated (*sua sponte*) and on motion."[100] The SCJI also asserted that as a result of the dramatic escalation in campaign support by independent entities and special interest groups, states should commit resources to adopt administrative procedures that will help elected judges identify potential conflicts of interest surrounding campaign contributions received from potential parties during his or her judicial campaign prior to a case being scheduled for hearing or disposition.[101] In addition to providing further disclosure to judges, the SCJI also recommended that state judiciaries should consider incorporating into their disqualification standards "a non-exclusive list of factors to be considered by a judge in determining whether

[99] ABA STANDING COMM. ON JUD. IND., REPORT TO HOD RESOLUTION 107, 3 (2011) *available at* http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/report107_judicial_disqualification.authcheckdam.pdf.
[100] *Id.* at 5.
[101] *Id.* at 14.

disqualification is appropriate in the campaign support context."[102] More specifically, the SCJI suggested that state judiciaries adopt the following factors put forth by the Conference of Chief Justices in its *amicus curiae* brief in *Caperton*:

> (a) The level of support given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge's [or opponent's] campaign and to the total amount spent by all candidates for that judgeship;
>
> (b) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
>
> (c) The timing of support in relation to the case for which disqualification is sought;
>
> (d) If the supporter is not a litigant, the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate [or opponent], and (iv) the total support received by the judicial candidate [or opponent] and the total support received by all candidates for that judgeship.[103]

Following the lead of the SCJI, some state supreme courts[104] have attempted to reform their recusal rules in accordance with the Supreme Court's directive to enact "recusal standards more rigorous than due process requires."[105]

The issue of campaign spending and its effect on judicial impartiality was not first addressed in 2009 when the Court decided *Caperton*. In 1999, the ABA Model Code of Judicial Conduct was amended to include Canon 3(E)(1)(e) which required disqualification when: "the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the

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[102] *Id.* at 15.
[103] *Id.*
[104] For example, Georgia, Iowa, Michigan, Missouri, New Mexico, Oklahoma, New York, Tennessee and Washington adopted or amended their judicial codes in response to *Caperton*. CYNTHIA GRAY, JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS, AM. JUDICATURE SOC'Y 5-11 (2012) *at* http://www.ajs.org/ethics/eth_disqualification.asp [hereinafter JUDICIAL DISQUALIFICATION].
[105] *Caperton*, 129 S.Ct. at 2267.

previous [ ] year[s] made aggregate* contributions to the judge's campaign in an amount that is greater than [[ [$ ] for an individual or [$ ] for an entity] ]] [[is reasonable and appropriate for an individual or an entity]]."[106]

This rule was retained and re-codified as Rule 2.11(A)(4) in the 2007 ABA Model Code of Judicial Conduct with minor changes: "The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than $[insert amount] for an individual or $[insert amount] for an entity [is reasonable and appropriate for an individual or an entity]."[107]

As a practical matter, ABA Rule 2.11(A)(4) is easy to apply—"when aggregate contributions exceed a preset level, disqualification is automatic, with no further analysis required."[108] But according to the Brennan Center for Justice, ABA Rule 2.11(A)(4) in its current form should not be adopted by state judiciaries on account of the fact that it "does not sufficiently address the full array of contemporary campaign spending."[109] For example, ABA Rule 2.11(A)(4) only applies "to *contributions* made directly to judicial candidates"[110] and "does not call for recusal based on *independent campaign expenditures* of the sort that triggered disqualification in *Caperton*."[111] Another deficiency with ABA Rule 2.11(A)(4) identified by the Brennan Center for Justice is that ABA Rule 2.11(A)(4) also "opens the door to gamesmanship by lawyers and litigants, who may attempt to engage in judge-shopping by

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[106] JUDICIAL DISQUALIFICATION, *supra* note 104, at 1.
[107] *Id.*
[108] ADAM SKAGGS & ANDREW SILVER, PROMOTING FAIR AND IMPARTIAL COURTS THROUGH RECUSAL REFORM, BRENNAN CENTER FOR JUSTICE, 10 (2011) *available at* http://www.brennancenter.org/content/resource/promoting_fair_courts_through_recusal_reform [hereinafter FAIR AND IMPARTIAL COURTS].
[109] *Id.*
[110] *Id.* (emphasis in original).
[111] *Id.* (emphasis in original).

making a disqualifying campaign contribution to a disfavored judge."[112] The ABA Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Professional Discipline attempted to remedy the foregoing deficiencies by submitting a resolution and report before the ABA House of Delegates during the 2013 Annual Meeting asking that appropriate changes be made to ABA Rule 2.11(A)(4).[113] Unfortunately, the resolution was withdrawn by the ABA House of Delegates.[114]

Until ABA Rule 2.11(A)(4) is properly amended, state supreme courts would be better served to look to other states who have adopted *per se* disqualification rules that address both contributions and independent expenditures and look to specific factors when determining whether disqualification is appropriate in the campaign support context. Having said that, the *per se* disqualification rules that should serve as models for the rest of the country were recently adopted by the Supreme Courts of Georgia and Tennessee. Effective September 8, 2011, the Georgia Supreme Court amended its Code of Judicial Conduct to require that a judge is disqualified when:

> [T]he judge has received or benefited from an aggregate* amount of campaign contributions* or support* so as to create a reasonable question as to the judge's impartiality. When determining impartiality with respect to campaign contributions* or support,* the following may be considered:
> (i) amount of the contribution* or support*;
> (ii) timing of the contribution* or support*;
> (iii) relationship of contributor or supporter to the parties;
> (iv) impact of contribution* or support*;
> (v) nature of contributor's prior political activities or support* and prior relationship with the judge;

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[112] *Id.*
[113] ABA STANDING COMM. ON ETHICS AND PROF. RESP. & ABA STANDING COMM. ON PROF. DISCIPLINE, REPORT TO HOD RESOLUTION 108 (2013) *available at* http://www.americanbar.org/content/dam/aba/events/judicial/2013am_resol_108.authcheckdam.pdf.
[114] Daily Journal, ABA House of Delegates, 2013 Annual Meeting, San Francisco, CA, August 12-13, 2013, at 6, *available at* http://www.americanbar.org/groups/leadership/2013sanfranciscoannualmeeting.html.

> (vi) nature of case pending and its importance to the parties or counsel;
> (vii) contributions* made independently in support of the judge over and above the maximum allowable contribution* which may be contributed to the candidate; and
> (viii) any factor relevant to the issue of campaign contributions* or support* that causes the judge's impartiality to be questioned.[115]

Similarly, effective July 1, 2012, the Tennessee Supreme Court adopted a new code of judicial conduct that includes a provision requiring disqualification when:

> The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has made contributions or given such support to the judge's campaign that the judge's impartiality might reasonably be questioned.[116]

Comment 7 to this rule then provides a detailed list of circumstances that should be considered in assessing whether recusal is appropriate:

> (1) The level of support or contributions given, directly or indirectly, by a litigant in relation both to aggregate support (direct or indirect) for the individual judge's campaign and to the total amount spent by all candidate for that judgeship;
> (2) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
> (3) The timing of the support or contributions in relation to the case for which disqualification is sought; and
> (4) If the supporter or contributor is not a litigant, the relationship, if any, between the supporter or contributor and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate or opponent, and (iv) the total support received by the judicial candidate or opponent and the total support received by all candidates for that judgeship.[117]

[115] JUDICIAL DISQUALIFICATION, *supra* note 104, at 5 (quoting GA. CODE JUD. CONDUCT CANON 3E(1)(d)).
[116] *Id.* at 9 (quoting TENN. CODE JUD. CONDUCT R. 2.11(A)(4)).
[117] JUDICIAL DISQUALIFICATION, *supra* note 104, at 9 (quoting TENN. CODE JUD. CONDUCT R. 2.11(A)(4), Comment 7).

Both the Georgia and Tennessee rules successfully adopt *Caperton*'s due process standard and condition the disqualification decision on a broad range of factors that could affect judicial impartiality, including "the amount of direct contributions and independent spending, the timing of the support, and the relationship between the campaign spending in question and the total spent in the election."[118] Because of the overall comprehensiveness of the newly-enacted Georgia and Tennessee rules, state supreme courts should pattern their *per se* campaign contribution and spending disqualification rules after the Georgia and Tennessee rules.

## IV. Conclusion

Thanks to recent U.S. Supreme Court decisions, the independence and impartiality of judiciaries in states that elect their judges have been threatened by the weakening of restrictions on the conduct of judicial candidates and with it the increase in permissible spending by special interest groups and judicial candidates. These changes are not lost on the general public as polling data reveal the existence of a strong perception that campaign contributions affect judicial decision-making. These perceptions were recently reinforced by the results of ACS's *Justice at Risk* study, where the data compiled confirmed that a "significant relationship" between business group contributions to state supreme court justices and the voting of those justices in cases involving business matters.[119]

Swift action needs to be taken, but options on how best to proceed are varied. The most comprehensive option is for states to replace the partisan judicial election system with merit selection thereby eliminating the need for judicial candidates to raise and spend money in judicial elections. Unfortunately, this option requires passage of a constitutional amendment,

[118] FAIR AND IMPARTIAL COURTS, *supra* note 107, at 13.
[119] ACS JUDICIAL STUDY, *supra* note 9, at 1.

which can be a time-consuming process and merit selection has been found to be an unpopular option with the public. Public financing is also a viable alternative because it eliminates the need for judicial candidates to raise large sums of money and thus be beholden to special interest groups when they are elected to the bench, but such systems are subject to the political whims of general assemblies and with the recent Supreme Court ruling in *Bennett*, such public financing systems might not be effective in the future.

The most viable alternative is for state supreme courts to adopt *per se* rules modeled after the Georgia and Tennessee state rules requiring disqualification in cases where campaign contributions and independent spending raise reasonable questions about a judge's impartiality in a specific case. What is most appealing about this alternative is that that these *per se* rules will take less time to be adopted than merit selection or public financing and they will also help protect sitting judges from the appearance of bias and impartiality following their election to the bench.