



Case Western Reserve Law Review

Volume 62 | Issue 1

2011

Judicial Independence in the Age of Runaway Campaign Spending: How More Vigilant Court Action and Stronger Recusal Statutes Can Reclaim the Perception of an Independence Judiciary

Charles R. Raley

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Charles R. Raley, *Judicial Independence in the Age of Runaway Campaign Spending: How More Vigilant Court Action and Stronger Recusal Statutes Can Reclaim the Perception of an Independence Judiciary*, 62 Case W. Res. L. Rev. 175 (2011)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol62/iss1/9>

This Note of the Year is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

JUDICIAL INDEPENDENCE IN THE AGE OF RUNAWAY CAMPAIGN SPENDING: HOW MORE VIGILANT COURT ACTION AND STRONGER RECUSAL STATUTES CAN RECLAIM THE PERCEPTION OF AN INDEPENDENT JUDICIARY

“I never felt so much like a hooker down by the bus station in any race I’ve ever been in as I did in a judicial race. . . . Everyone interested in contributing has very specific interests. They mean to be buying a vote.” – Ohio Supreme Court Justice Paul E. Pfeifer¹

INTRODUCTION

Justice Pfeifer’s quotation illustrates a prominent dynamic in modern judicial elections: the involvement of interest groups, attorneys, and wealthy litigants who pledge substantial amounts of campaign money to judicial candidates in the hope that the candidates will later rule in their favor.² This aspect of judicial campaigns leads

¹ Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1. Justice Pfeifer has experience as both a judicial candidate and a candidate for the state legislature, which makes his colorful remark about judicial campaigns and fundraising all the more telling. *Justice Paul E. Pfeifer*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM <http://www.sconet.state.oh.us/SCO/justices/pfeifer/default.aspx> (last visited Oct. 17, 2011).

² Consider the view of an anonymous AFL-CIO official who offers the observation that “[w]e [the AFL-CIO] figured out a long time ago that it’s easier to elect seven judges than to elect 132 legislators.” JAMES SAMPLE ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE 9 (2010) (footnote omitted). Some judicial campaign contributors provide money not to ensure a positive result for their interests, but to ensure that they are not harmed for failing to provide a contribution. *See id.* at 8 (recounting Texas Supreme Court Chief Justice Wallace B. Jefferson’s statement that “[w]hen 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.”); Michael J. Goodman & William C. Rempel, *In Las Vegas, They’re Playing with a Stacked Judicial Deck*, L.A. TIMES, June 8, 2006, at A1 (recounting Nevada attorney Robert D.

to elected judges hearing cases that involve their campaign supporters,³ a practice that produces scenarios suggesting judicial bias.⁴ Unfortunately, such scenarios are the norm in the nation's courtrooms. According to a *New York Times* review of campaign contributions and the outcomes of cases before the Ohio Supreme Court,⁵ justices "routinely" heard cases after receiving campaign contributions from either the parties to the cases or those filing amicus briefs in support of the parties.⁶ Furthermore, justices ruled in favor of their campaign contributors around 70 percent of the time and "almost never" recused themselves in these situations.⁷ Moreover, at least one study has shown that state supreme court justices in many other jurisdictions have "routinely adjust[ed] their rulings to attract votes and campaign money," which suggests that the Ohio Supreme Court is not an outlier.⁸

The story of Duane Adams poignantly demonstrates the extent to which judicial independence is jeopardized by elected judges hearing cases that involve their campaign contributors. Adams was a plaintiff in a class-action lawsuit against DaimlerChrysler and Ford Motor Company for violations of Ohio's lemon law.⁹ Adams leased a 1996 Dodge¹⁰ that soon became "nothing but trouble" and made him feel unsafe.¹¹ DaimlerChrysler gave Adams a refund for the car, but deducted over \$6,000 from the refund for mileage that Adams put on

Vannah's statement that "[g]iving money to a judge's campaign means you're less likely to get screwed A \$1,000 contribution isn't going to buy special treatment. It's a hedge against bad things happening.").

³ This Note uses "campaign supporters" and "campaign contributors" as shorthand expressions for interest groups, attorneys, and litigants who are either (1) directly involved in litigation before an elected judge as attorneys of record or parties or (2) indirectly involved in litigation before an elected judge because the litigation implicates their interests.

⁴ See Sandra Day O'Connor, *Foreword*, in *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE*, at i (2010) ("We all expect judges to be accountable to the law rather than political supporters or special interests. But elected judges in many states are compelled to solicit money for their election campaigns, sometimes from lawyers and parties appearing before them. [This creates] a crisis of confidence in the impartiality of the judiciary.").

⁵ Ohio holds elections for seats on the Ohio Supreme Court. See OHIO REV. CODE ANN. §§ 2503.02–2503.03 (West 2006) (providing for the elections of Ohio Supreme Court Justices in each even-numbered year and that of the Chief Justice every six years).

⁶ Liptak & Roberts, *supra* note 1.

⁷ *Id.* The review indicated that the sitting justices of the Ohio Supreme Court in 2006 only recused themselves in nine out of 215 cases involving their campaign contributors. *Id.*

⁸ Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 625 (2009).

⁹ OHIO REV. CODE ANN. § 1345.71 (West 2006).

¹⁰ *Maitland v. Ford Motor Co.*, 816 N.E.2d 1061, 1064 (Ohio 2004).

¹¹ Liptak & Roberts, *supra* note 1.

the car.¹² After an appeals court allowed the resulting lawsuit to move forward, the case went before the Ohio Supreme Court in May 2004.¹³

At that time, Justice Terrence O'Donnell was running for reelection, and, as part of that effort, DaimlerChrysler and Ford contributed a total of \$1,500 to his campaign fund.¹⁴ Furthermore, the law firms representing DaimlerChrysler and Ford chipped in \$115,000 to the campaign committees of Chief Justice Thomas Moyer, Justice Maureen O'Connor, Justice Evelyn Lundberg Stratton, and Justice O'Donnell.¹⁵ All of these donations occurred after the Supreme Court had granted review of Adams's lawsuit.¹⁶

Eight days after the 2004 election, Moyer, O'Connor, Lundberg Stratton, and the reelected O'Donnell¹⁷ voted for their campaign contributors by dismissing the class action lawsuit.¹⁸ Meanwhile, the three dissenters received campaign contributions from the plaintiffs' lawyers.¹⁹ The result, combined with the campaign contributions, made Adams feel like the members of the majority "should be prosecuted for what I consider is taking a bribe."²⁰

Adams' lawsuit and the trends described in the *New York Times* article create the perception that state judicial systems lack independence.²¹ The public's pessimistic view of judicial independence has only intensified in the past twenty years with the explosion of fundraising and campaign spending in judicial campaigns.²² Since public confidence is a prominent source for judicial credibility, policymakers and legal reformers must address

¹² *Maitland*, 816 N.E.2d at 1064.

¹³ *Id.* at 1061; Liptak & Roberts, *supra* note 1.

¹⁴ Liptak & Roberts, *supra* note 1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ O'Donnell received 61 percent of the vote. *Election and Ballot Issues: Justice of the Supreme Court – Unexpired Term: November 2, 2004*, OHIO SEC'Y OF STATE, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2004ElectionsResults/04-1102JusticeSupremeCourtUnexpired.aspx> (last visited Oct. 17, 2011).

¹⁸ *Maitland*, 816 N.E.2d at 1068.

¹⁹ Liptak & Roberts, *supra* note 1.

²⁰ *Id.*

²¹ See Brief of Conference of Chief Justices as Amicus Curiae Supporting Respondents, *Republican Party of Minn. v. White*, 536 U.S. 765 (2003) (No. 01–521), 2002 WL 257559 at *18 ("The States know that if candidates for judicial office appeal for voters' support on the same basis as legislative candidates—if they answer to the same electoral majorities—the courts run the grave risk of becoming second legislatures. As electoral twins to the legislature, courts would stand to lose the essential independence required for them to discharge their high constitutional duty of judicial review."); see also *infra* Part I.C (discussing the public's lack of confidence in the judiciary).

²² See *infra* Part I.B for a brief history of judicial fundraising.

the public's negative perception as the crux of solving the judicial independence problem.²³

Although there are a variety of proposals to combat the perception of a judiciary biased by campaign contributions' in states with elected judges, recusal is the most effective tool. A recusal-based solution would effectively prevent judges from hearing cases that involve their campaign supporters. Furthermore, it would be constitutionally sustainable, and would attract strong support from policymakers.²⁴ These characteristics place recusal at a distinct advantage over other commonly-proposed solutions that are either impractical or ineffective.²⁵

The law surrounding recusal, however, is extremely unsettled, leaving its potential to protect judicial independence unrealized.²⁶ Even the United States Supreme Court weighed in on judicial recusal in *Caperton v. A.T. Massey Coal Company*,²⁷ but did little to clarify the law. The Court found that West Virginia Supreme Court Justice Brent Benjamin violated the Due Process Clause when he failed to recuse himself after receiving \$3 million in campaign contributions from the owner of the defendant corporation, rendering him objectively biased towards the defendant.²⁸ Although *Caperton* advances the cause of ensuring judicial independence in state systems through recusal, it does not create a workable standard for future cases. Furthermore, *Caperton* does not offer guidance on what judges should do when hearing less "exceptional" cases involving their campaign contributors.²⁹ Most codified recusal rules similarly fail to create cognizable requirements that prevent elected judges from hearing "unexceptional" cases involving their campaign supporters.³⁰

The nebulous recusal standards articulated in *Caperton* and found in state statutory and ethics codes reflect our nation's failure to adequately protect judicial independence. A two-prong remedy is necessary to protect judicial impartiality: (1) more vigilant action by

²³ See *infra* Part I.A (describing the relationship between campaign fundraising and judicial decision making).

²⁴ See *infra* Part IV.A (arguing for a recusal-based solution).

²⁵ See *infra* Part III (highlighting the deficiencies of other remedies).

²⁶ RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.5, at 13 (2d ed. 2007) ("[T]he theoretical underpinnings of American judicial disqualification jurisprudence remain murky and unsettled. In fact, modern American judicial disqualification case precedents are replete with inconsistencies which . . . raise troubling questions as to precisely how much impartiality a litigant has the right to reasonably expect of a judge.") (footnotes omitted).

²⁷ 129 S. Ct. 2252 (2009).

²⁸ *Id.* at 2263. For a more complete description of *Caperton*, see *infra* Part II.A.2.

²⁹ *Caperton*, 129 S. Ct. at 2263.

³⁰ See *infra* Part II.B.1 (discussing state recusal statutes with no specific reference to campaign contributions).

the Supreme Court and (2) stronger state statutes. The Court can accomplish the first prong by reading the *Caperton* standard expansively to include less exceptional facts. To effectuate this expansive reading, the Court should employ a presumption that, in the absence of contrary evidence showing a lack of bias on the judge's part, the existence of a substantial campaign contribution by a litigant, attorney of record, or special interest group who has filed an amicus brief in support of one party necessitates a judge's recusal. In accomplishing the second prong, states should follow Alabama and California's lead³¹ and adopt laws requiring judges to recuse themselves when they hear cases involving their campaign contributors whose donations exceed a certain limit.

This Note offers a justification for the above two-prong solution to the judicial independence problem in our state courts. In doing so, this Note addresses the current legal principles surrounding judicial recusal in state systems with elected judges, the impact of judicial campaigns and fundraising on those principles, and how those principles should be changed. Part I introduces the relationship between campaign contributions and judicial decision making, the amount of fundraising present in modern judicial campaigns, and the public's perception of judicial independence. Part II then proceeds to discuss the current legal principles governing judicial recusal. This discussion focuses on three sources: the Supreme Court's recusal jurisprudence, the states' judicial ethics codes, and the states' statutory codes. Next, Part III outlines various proposals offered to address the appearance of impropriety resulting from judges hearing their campaign supporters' cases. Finally, Part IV presents the two prong recusal remedy needed to protect judicial independence. Implementing this remedy advocates that the Supreme Court read *Caperton* broadly, and that the states adopt recusal statutes similar to Alabama's and California's.

I. DEFINING THE PROBLEM: THE EXPLOSION OF CAMPAIGN FUNDRAISING AND THE PERCEPTION OF JUDICIAL BIAS

Before understanding the Supreme Court's and state policymakers' response to judicial recusal, it is necessary to first discuss the dynamics of modern judicial campaigns. The states' current structure of judicial elections produces an environment that requires elected state judges to obtain contributions from interested parties and members of the bar. Such solicitation and acceptance of contributions

³¹ See *infra* Part II.B.3 for a more complete description of the Alabama and California statutes.

creates a troubling situation in which elected judges hear cases that involve their contributors.

A. Campaign Contributions and Judicial Decision Making

The requisite threshold question in analyzing modern judicial campaigns is what relationship exists between campaign contributions and judicial decision making. Political science and legal commentary posit two primary viewpoints of this relationship: the quid-pro-quo view³² and the ideological-matching view.³³ The quid-pro-quo view envisions the following situation. First, a judicial candidate runs for office and receives campaign contributions from individuals, members of the bar, and special interest groups. Then, the judicial candidate wins, assumes his or her role on the bench, and feels indebted to those who bankrolled his or her campaign. Finally, quid-pro-quo advocates argue, the judge decides cases involving his or her campaign contributors based on the receipt of the contributions.³⁴ The courts, including the United States Supreme Court, have shown a willingness to accept the quid-pro-quo view of the relationship between campaign contributions and judicial decision making.³⁵

Conversely, the ideological-matching viewpoint imagines the following type of situation. A judge runs for reelection after acquiring a judicial record of sentencing convicted criminal defendants to

³² See, e.g., James L. Gibson, *Campaigning for the Bench: The Corrosive Effects of Campaign Speech?*, 42 LAW & SOC'Y REV. 899, 903 (2008) ("Contributions to candidates for judicial office imply for many a conflict of interest, even a quid pro quo relationship between the donor and the judge . . .").

³³ See, e.g., Kenneth C. Smurzynski, Note, *Modeling Campaign Contributions: The Market for Access and Its Implications for Regulation*, 80 GEO. L.J. 1891, 1893 (1992) ("The traditional view is that individuals and groups contribute to candidates whose positions they support in order to increase the candidates' chances for election.").

³⁴ See, e.g., PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 21 (1980) ("The requirement that judicial candidates campaign for election means that the successful candidate carries to the bench a list of obligations and favors owed. Where a position on the bench has been secured with the political, organizational, and financial assistance of party leaders, the judges 'will find it almost impossible to resist completely the opportunities of his creditors for payment through judicial favors,' including favorable treatment of certain litigants.") (quoting LEWIS MAYERS, *THE AMERICAN LEGAL SYSTEM* 386 (1964)); Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 278 (2002) ("Elected judges may feel pressured to reward their supporters or be tempted to rule against those who do not support them. Likewise, the growing involvement of special interest groups in judicial campaigns may pressure a candidate to adopt the political or social agenda that arrives tied to a stack of cash.").

³⁵ See Richard Briffault, *Judicial Campaign Codes after Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 225 (2004) (stating that the Supreme Court has held that "campaign contributions raise the dangers of corruption – defined as candidate too compliant with the wishes of their donors – and appearance of corruption").

shorter terms than those requested by the government.³⁶ During the judge's campaign, criminal defense attorneys contribute money in recognition of the judge's record and its congruence with their own ideology.³⁷ Thus, campaign contributions flow to judicial candidates because the ideological position of a contributor matches that of the judicial candidate. Therefore, under this view, donations are not meant to "buy a vote" or to create a quid-pro-quo relationship, but are designed to help elect ideologically similar candidates.³⁸

Both the quid-pro-quo and the ideological-matching views enjoy considerable support among commentators. Determining which view is more appropriate is beyond the scope of this Note because considerable portions of both the public and the bar believe that campaign donations create a quid-pro-quo relationship between contributors and judges.³⁹ Even if empirically evidence attested that campaign contributions have no effect on the decisions made by elected judges, as the ideological-matching viewpoint arguably suggests, the public will still perceive the opposite. This is particularly troubling because the public provides legitimacy to the judiciary.

The public's negative perception of the judiciary, and not the relationship between contributions and judicial decision making, is the central problem that policymakers must confront. This is because "whether or not a judge is actually unduly influenced is unimportant since public perception of the courts as impartial is . . . essential to the effective operation of the judicial process."⁴⁰ A diminishment of judicial independence threatens the very legitimacy of state judicial systems, for, as Justice Anthony Kennedy stated: "[T]he law commands allegiance only if it commands respect. It commands

³⁶ The example of a first-time judicial candidate can also demonstrate the ideological-matching viewpoint. For instance, a criminal defense attorney could run for judge and, based on his practice area, receive the support of his fellow criminal defense attorneys.

³⁷ Indeed, ideological grassroots and business organizations demonstrate this dynamic. See Deborah Goldberg, *Interest Group Participation in Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 73, 80–84 (Matthew J. Streb ed., 2007) (describing various organizations' contributions to judicial campaigns geared toward advancing a particular issue).

³⁸ See *id.* (reviewing efforts of interest groups to elect ideologically-similar candidates).

³⁹ See *infra* Part I.C (discussing the public's poor perception of the elected judiciary).

⁴⁰ DUBOIS, *supra* note 34, at 21–22; see also Theodore J. Boutrous, Jr. & Thomas G. Hungar, *Ethical Issues After Election*, in *STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES* 53, 73 (Roger Clegg & James D. Miller eds., 1996) (arguing that increased fundraising "has contributed to a perception of 'justice for sale' and has damaged public respect for the judiciary"); O'Connor, *supra* note 4, at i ("Whether or not [campaign contributions] actually tilt the scales of justice, three out of every four Americans believe that campaign contributions affect courtroom decisions.").

respect only if the public thinks the judges are neutral.”⁴¹ Due to the threat campaign contributions pose to judicial legitimacy, policymakers must recognize the perceived lack of judicial independence and take action to correct it.⁴² As such, this Note proceeds based on the understanding that the public, and a sizable portion of the bar, views campaign contributions to judicial candidates as a form of manipulating judicial decisions and seeks to craft a solution that will improve that perception.

B. Judicial Election Systems and Fundraising

Thirty-eight states hold some form of judicial election.⁴³ Twenty-two of these states hold competitive elections for members of their highest court.⁴⁴ States adopting this type of election feature campaigns in which all candidates battle for the seat and the one with the most votes wins.⁴⁵ Additionally, sixteen states hold retention elections for members of their highest court.⁴⁶ In retention elections, voters periodically decide whether sitting justices should serve another term by voting either “yes” or “no” on their retention.⁴⁷

Regardless of which type of election system is adopted, judges in these jurisdictions must raise money to ensure that they remain on the bench.⁴⁸ Judicial candidates have responded to the need to raise money at an amazing rate, as Tables 1 and 2 indicate below.⁴⁹ Tables

⁴¹ Behrens & Silverman, *supra* note 34, at 282 (citation omitted).

⁴² See Jonathan Berman, *You May Know the Law but I Own the Judge: Why Congress Can and Should Get Involved in State Judicial Election Reform*, 34 J. LEGAL PROF. 145, 150 (2009) (suggesting a congressional solution); Boutrous & Hungar, *supra* note 40, at 76 (“Our judicial system can and should do better if public confidence in an elected judiciary is to be maintained.”); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 43 (2003) (advocating both “short-term improvements in judicial elections” as well as “a longer but ultimately more promising course toward the gradual elimination of elected judiciaries”).

⁴³ SAMPLE ET AL., *supra* note 2, at 99.

⁴⁴ *Id.*

⁴⁵ See, e.g., MINN. CONST. art VI, § 7 (providing that Minnesota judicial elections are to take place every six years); MINN. STAT. ANN. § 200.015 (West 2009) (providing that Minnesota election law applies to all elections in the state).

⁴⁶ SAMPLE ET AL., *supra* note 2, at 99.

⁴⁷ See, e.g., IOWA CODE § 46.21 (2011) (providing a form to be used in judicial election ballots), *id.* § 602.4101 (providing that judicial officials must be appointed in accordance with chapter 46 of the Iowa Code).

⁴⁸ See *Simes v. Ark. Judicial Discipline and Disability Comm’n*, 247 S.W.3d 876, 883 (Ark. 2007) (noting that judicial candidates need to “raise the resources necessary to run their campaigns”); Penny J. White, *‘The Appeal’ to the Masses*, 86 DENV. U. L. REV. 251, 272 (2009) (“All contested judicial elections require incumbent judges to spend time raising money and campaigning during election years.”). Although all judicial candidates must raise money, those running in competitive elections are under particular pressure to do so. Boutrous & Hungar, *supra* note 40, at 72.

⁴⁹ Note that these tables do not include independent expenditures made in support of or in opposition to judicial candidates and that Table 2 does not include information for the 2010

1 and 2 also show the rapid growth of campaign fundraising by judicial candidates between the 1990s and the first decade of the twenty-first century. Such growth will likely continue to occur for two key reasons. First, it is extremely unlikely that states will move away from judicial elections in the near future, which means that the need for campaign funds will continue.⁵⁰ Second, in light of the Supreme Court's decision in *Citizens United v. Federal Election Commission*,⁵¹ corporations and other interest groups will likely contribute even more money to their favored judicial candidates.⁵²

Table 1: Judicial Campaign Fundraising, 1990 Elections through 1998 Elections⁵³

Election Cycle	Total Funds Raised by All State Judicial Candidates
1990	\$5,935,367
1992	\$9,502,350
1994	\$20,728,646
1996	\$21,378,007
1998	\$27,357,316
Total, 1990 through 1998 Cycle	\$84,901,686

election cycle because data are not available from that cycle. An independent expenditure is an expenditure “for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents.” 11 C.F.R. § 100.16(a) (2010). Essentially, independent expenditures are those monies that outside groups spend for the purpose of either supporting or opposing a candidate.

⁵⁰ See *infra* Part III.A (detailing the difficulties encountered in attempting to abolish judicial elections).

⁵¹ 130 S. Ct. 876 (2010).

⁵² For discussions of *Citizens United* and its effect on judicial elections, see ADAM SKAGGS, BUYING JUSTICE: THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTION (2010) and Dorothy Samuels, Editorial, *Hanging a “For Sale” Sign Over the Judiciary*, N.Y. TIMES, Jan. 30, 2010, at A22 (arguing that *Citizens United* will make the problem of money in judicial elections much worse).

⁵³ SAMPLE ET AL., *supra* note 2, at 5.

Table 2: Judicial Campaign Fundraising, 2000 Elections through 2008 Elections⁵⁴

Election Cycle	Total Funds Raised by All State Judicial Candidates
2000	\$45,997,238
2002	\$29,738,006
2004	\$46,108,547
2006	\$33,238,379
2008	\$45,650,435
Total, 2000 through 2008 Cycle	\$200,732,605

The figures in Tables 1 and 2 are daunting; particularly in light of how “low-key” judicial campaigns were prior to 1990.⁵⁵ To better understand these numbers, it is necessary to know what types of actors provide money to judicial candidates. Table 3 illustrates that special interests are predominantly responsible for the funding of judicial campaigns and shows that business interests and lawyers are the most prominent contributors to judicial candidates.⁵⁶ Note that, unlike Tables 1 and 2, Table 3’s totals include independent expenditures made in support of and in opposition to judicial candidates.⁵⁷ Also note that all sources, including those not provided in Table 3, gave a total of \$206,941,244 to judicial candidates through campaign contributions and independent expenditures.⁵⁸

⁵⁴ *Id.* Note that there are fluctuations between cycles. Such fluctuation occurs because certain cycles involve more judicial elections than the other cycles. *Compare 2011–2012 Contestable Supreme Court Elections*, JUSTICE AT STAKE CAMPAIGN, 3 (last updated Feb. 22, 2011),

http://www.justiceatstake.org/media/cms/20112012_Supreme_Court_Elections_Li_5A51906F8029B.pdf (listing 23 state supreme court seats that are up for election in the 2012 cycle), *with 2009–2010 Contestable Supreme Court Elections*, JUSTICE AT STAKE CAMPAIGN, 3 (last updated Oct. 12, 2010), http://www.justiceatstake.org/media/cms/2010_Contestable_Supreme_Court_Elec_DEE38A6955861.pdf (listing 36 state supreme court seats that are up for election in the 2010 cycle).

⁵⁵ See White, *supra* note 48, at 270 (describing three studies of judicial elections held prior to 2000 finding that one-third of judicial candidates raised no funds).

⁵⁶ See also Behrens & Silverman, *supra* note 34, at 279 (“A large portion of donations to judicial campaigns is contributed by parties and lawyers with cases before the court.”); Boutrous & Hungar, *supra* note 40, at 73 (“Not surprisingly, the natural source for most of the campaign contributions in judicial elections is the local bar.”) (footnote omitted); White, *supra* note 48, at 266–69 (discussing the increase in special interest groups’ contributions to judicial candidates).

⁵⁷ See SAMPLE ET AL., *supra* note 2, at 9 (“Much of the cash boom [in judicial election spending] in the last decade was fueled by a new class of super spenders . . . including business executives, unions and lawyers who are stakeholders in litigation . . .”).

⁵⁸ Table 3 does not include the amount contributed by “other” groups, “unknown” sources, and “single issue” groups since they are not germane to this Note. *Id.* at 8. It is also

Table 3: Sources of Judicial Campaign Contributions, 2000–2009⁵⁹

Interest Type	Amount Contributed	Percentage of All Contributions
Business Interests	\$62,589,165	30
Lawyers/Lobbyists	\$59,272,198	29
Political Parties	\$22,168,234	11
Other Candidates	\$17,177,609	8
Organized Labor	\$6,704,944	3
Total Contributions Provided⁶⁰	\$167,912,150	81

The amount contributed by business interests and lawyers, and the percentage that those amounts represent, speaks for itself. The clear inference is that business interests and other powerful groups are seeking to elect judges who will be amenable to their interests.⁶¹ As Richard Flamm observed in his judicial recusal treatise:

[The election of state judges], as well as the fact that raising sufficient funds to wage a successful judicial election campaign is becoming increasingly more difficult, has inspired concerns regarding the nature of the election process, including concerns about the creation of a possible appearance of influence or corruption, and the appearance that such contributions may create opportunities for judges to curry favor with attorneys.⁶²

Furthermore, it is telling that judicial campaigns “are now high-stakes contests in which chambers of commerce, tort reform lobbyists, organized labor, plaintiffs’ lawyers, and other much narrower interest groups spend substantial resources—frequently without disclosing the sources of their funding.”⁶³ Because the parties who fund judicial campaigns are likely to appear before the court in

important to note that large donors are responsible for a vastly disproportionate share of contributions to judicial campaigns. *See* Behrens & Silverman, *supra* note 34, at 279 (discussing the effect of attorney campaign contributions on judicial decisions).

⁵⁹ SAMPLE ET AL., *supra* note 2, at 8.

⁶⁰ This refers to the total contributions provided only by the sources listed in Table 3.

⁶¹ *See, e.g.*, Berman, *supra* note 42, at 147 (2009) (noting the increasing activity of business interests in judicial campaigns); White, *supra* note 48, at 268–69 (discussing the United States Chamber of Commerce’s efforts to influence judicial elections).

⁶² FLAMM, *supra* note 26, § 9.4, at 240 (footnotes omitted).

⁶³ James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, JUDGES’ J., Winter 2007, at 17, 18 (footnote omitted).

one capacity or another, it not difficult to understand why the public perceives the judiciary as lacking independence.

C. The Perceived Lack of Judicial Independence

Two extremely important segments of the population perceive elected state judges as lacking independence: the general public and the legal community, including judges. While there is a great deal of polling data available to demonstrate the public's view of state court systems, a 1999 National Center for State Courts study⁶⁴ and a 2001 Greenberg Quinlan Rosner Research and American Viewpoint survey are most illustrative.⁶⁵ The 1999 survey shows that 38 percent "strongly agree" and 43 percent "somewhat agree" that "[j]udges' decisions are influenced by political considerations."⁶⁶ It also indicates that 34 percent "strongly agree" and 44 percent "somewhat agree" that "[e]lected judges are influenced by having to raise campaign funds."⁶⁷

The 2001 study has similar findings. According to this study, 55 percent of respondents felt that the statement "[b]eholden to campaign donors" applied either "very well" or "well" to state judges, while 52 percent felt the same about the statement "[c]ontrolled by special interests."⁶⁸ Furthermore, 56 percent said they were "concern[ed] . . . a lot" that "nearly half of all state supreme court"⁶⁹ cases involve someone who has given money to one or more of the justices hearing the case."⁷⁰

⁶⁴ NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS (1999). This survey asked 1,826 people about their views of state judicial systems. *Id.* at 9.

⁶⁵ *Justice at Stake Frequency Questionnaire*, GREENBERG QUINLAN ROSNER RESEARCH & AM. VIEWPOINT, (Nov. 7, 2001), http://www.greenbergresearch.com/articles/1617/1412_JAS_ntlsurvey.pdf. This survey asked 1,000 respondents about their views of state judicial systems. *Id.* at 1.

⁶⁶ NAT'L CTR. FOR STATE COURTS, *supra* note 64, at 41. While the term "political considerations" encompasses more items than campaign contributions, it is difficult to see how respondents were not at least cognizant of campaign contributions when answering this question, especially in light of other questions about campaign fundraising and its effect on judges. *See infra* note 66 and accompanying text.

⁶⁷ NAT'L CTR. FOR STATE COURTS, *supra* note 64, at 42. Similarly, a 2004 Zogby Poll of 1,204 adult Americans found that 71 percent believed that campaign contributions to elected judges has "at least some influence on judges' decisions in the courtroom." JUSTICE AT STAKE CAMPAIGN, MARCH 2004 SURVEY HIGHLIGHTS: AMERICANS SPEAK OUT ON JUDICIAL ELECTIONS (2004).

⁶⁸ GREENBERG QUINLAN ROSNER RESEARCH & AM. VIEWPOINT, *supra* note 65, at 5.

⁶⁹ The poll only asked questions referring to state supreme courts, not the United States Supreme Court. *See id.* at 3.

⁷⁰ *Id.* at 8. 81 percent said that they were either "a lot" or "a little" concerned with this prospect. *Id.* Only 5 percent said that campaign contributions have no effect at all on judicial decisions. *Id.* at 4.

Statewide polls have shown similar results. In Texas, 83 percent of adults indicate that they believe campaign contributions “very significantly” or “fairly significantly” affect judges’ decisions.⁷¹ In Pennsylvania, around 90 percent of adults say that large contributions influence judicial decisions.⁷² And, in Ohio, 58 percent believe contributions affect judges’ rulings.⁷³ North Dakota⁷⁴ and Louisiana exhibit the same dynamics.⁷⁵

The most troubling aspect of this sentiment is the effect it has on the public’s perception of equality in the judicial system. In the Greenberg Rosner Research and American Viewpoint survey, only 33 percent say that the American judiciary “works equally for all citizens” while 62 percent believe that “[t]here are two systems of justice in the United States—one for the rich and powerful and one for everyone else.”⁷⁶ Although there are likely a variety of reasons why most Americans feel this way, a clear connection exists between these responses and the survey’s findings regarding the public’s negative perception that judges treat litigants who are and are not campaign donors differently. The survey shows that 67 percent of respondents indicated that the statement “[i]ndividuals and groups who give money to judicial candidates often get favorable treatment” is either “much” or “somewhat” closer to their view than the statement that “individuals and groups who give money to judicial candidates are treated the same as everyone else.”⁷⁷

Perhaps more disconcerting than the public’s recognition of campaign contributions’ hold on judicial decisions are judges’ and other legal professionals’ recognition of the same force. A 2002 survey of close to 2,500 judges indicated that 22 percent believed that campaign contributions have “some influence” on judicial decisions and that 46 percent believed that contributions have at least “a little influence.” This feeling undoubtedly led 56 percent of the judges surveyed to indicate that they somewhat supported the statement that

⁷¹ Charles Gardner Geyh, *Publicly Financed Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1470–71 (2001).

⁷² Behrens & Silverman, *supra* note 34, at 283.

⁷³ *Suster v. Marshall*, 149 F.3d 523, 531 (6th Cir. 1998) (discussing a poll of Ohio voters regarding their beliefs on campaign contributions to judicial candidates conducted by a judicially appointed Special Committee and the poll’s findings).

⁷⁴ See Dale Wetzel, *N.D. Residents Support Courts, But with Reservations*, BISMARCK TRIB., Nov. 7, 1999, at 6C (reporting that many citizens of North Dakota believe that “judges’ decisions are influenced by politics and campaign contributions”).

⁷⁵ See Michelle Millhollon, *Poll: Funds Can Sway Louisiana Judges*, BATON ROUGE ADVOC., Jan. 10, 2000, at 1A.

⁷⁶ GREENBERG QUINLAN ROSNER RESEARCH & AM.VIEWPOINT, *supra* note 65, at 7.

⁷⁷ *Id.* at 7. Only 23 percent answered that the statement “[i]ndividuals and groups who give money to judicial candidates are treated the same as everyone else” was closer to their opinion. *Id.*

“[j]udges should be prohibited from presiding over and ruling in cases when one of the parties has given money to their campaign.”⁷⁸ Furthermore, in Texas, 79 percent of attorneys, 69 percent of court personnel, and, most notably, 48 percent of judges believe that campaign contributions affect judges’ decisions.⁷⁹ In light of both the public’s and the legal profession’s recognition of the potential bias inherent in cases involving campaign contributors, it is difficult to suggest that no action is necessary to correct the negative perception of judicial independence.

II. JUDICIAL RECUSAL IN THE SUPREME COURT AND AMONG THE STATES

The Supreme Court and the states have sought to protect judicial independence by promulgating various recusal rules. The current legal framework for handling recusal motions in cases involving campaign contributors arises from three key sources: (1) case law, (2) state judicial ethics provisions, and (3) state statutory codes.⁸⁰

A. *The Supreme Court’s Jurisprudence on Recusal*

Caperton, and precedents cited therein, has had central importance in recent developments surrounding judicial recusal,⁸¹ making it critical in discussing the Court’s current analytical framework for recusal issues. Throughout the Court’s recusal jurisprudence, it has recognized the following foundational principle: due process demands recusal where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”⁸²

1. *Pre-Caperton Standards*

Before *Caperton*, the Court formulated its recusal jurisprudence around two primary maxims. First, it drew from *The Federalist’s* statement that “[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”⁸³ Second, it has declared that

⁷⁸ GREENBERG QUINLAN ROSNER RESEARCH & AM.VIEWPOINT, *supra* note 65, at 11.

⁷⁹ Geyh, *supra* note 71, at 1470–71 (footnote omitted).

⁸⁰ FLAMM, *supra* note 26, § 2.6, at 39 (“[T]he right to disqualify a judge is more commonly found in a jurisdiction’s statutory law than in its constitution.”).

⁸¹ See generally James Sample, *Court Reform Enters the Post-Caperton Era*, 58 DRAKE L. REV. 787 (2010) (discussing *Caperton’s* impact on state recusal rules and public financing for judicial elections).

⁸² *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

⁸³ THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961). The *Caperton* Court approvingly noted that the Court’s jurisprudence reflects this language.

judicial recusal is required to ensure the availability of “[a] fair trial in a fair tribunal.”⁸⁴

According to the *Caperton* Court, there are two prominent contexts that raise recusal concerns. The first context involves local tribunals that heard cases involving violations of local ordinances.⁸⁵ The common characteristic of these tribunals is that the arbiters often had financial interest in the outcome of the cases they heard, which resulted in the Court striking down the tribunals’ existence.⁸⁶ Justice Kennedy concluded that the local tribunal cases indicated the Court was concerned not just with pecuniary interest when deciding the proper scope of recusal, but also “with a more general concept of interests that tempt adjudicators to disregard neutrality.”⁸⁷ He also found from this precedent that the Court noted the importance of using an objective standard when hearing recusal cases.⁸⁸

The second context that the *Caperton* Court cited involves criminal contempt proceedings.⁸⁹ Justice Kennedy referred to this context as illuminative in *Caperton* because, like the local tribunal cases, it shows the importance of utilizing an objective test. The objective test created in the criminal contempt cases was formulated as an assessment of “whether the average judge in his position is ‘likely’ to be neutral or whether there is unconstitutional ‘potential for bias.’”⁹⁰

These pre-*Caperton* cases provide some guidance for courts and state legislatures in handling judicial recusal. As Justice Kennedy noted, these cases establish that the recusal standard should be

Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009).

⁸⁴ *In re Murchison*, 349 U.S. 133, 136 (1955).

⁸⁵ *Caperton*, 129 S. Ct. at 2259–60.

⁸⁶ *See, e.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972) (invalidating a mayor’s court that heard cases involving local ordinance violations because case outcomes provided additional revenue to the city budget); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (invalidating a mayor’s court that heard cases involving alcohol ordinance violations because the mayor received direct financial benefit from convictions); *cf. Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (invalidating an administrative boards composed of optometrists that settled disputes among other optometrists because the board’s decisions benefited the practices of its members).

⁸⁷ *Caperton*, 129 S. Ct. at 2260.

⁸⁸ *Id.* at 2261.

⁸⁹ *Id.* In discussing criminal contempt contexts, the *Caperton* Court cited *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), and *In re Murchison*.

⁹⁰ *Caperton*, 129 S. Ct. at 2262. The *Caperton* Court’s view that an objective test is appropriate for recusal situations is consistent with the general view among the nation’s courts. *See FLAMM, supra* note 26, § 2.8.2, at 47 (“[I]t has generally been considered that any conduct that would lead a reasonable person, knowing all of the relevant facts and circumstances, to conclude that a judge’s impartiality might reasonably be questioned, provides a proper basis for seeking judicial disqualification.”) (footnote omitted).

objective and not based on whether the judge in question had a subjective bias towards or against one party.⁹¹ However, these precedents and the standards they create are deficient. First, the precedents are not directly on point since they do not involve judicial recusal in the context of campaign contributions. Second, the standards are not particularly explicit because they simply refer to reasonableness, which is open to many different interpretations.

2. *The Caperton Standard*

Caperton went beyond the Court's recusal precedents discussed above and provides particularly significant guidance to this Note's topic.

a) *Facts of the Case*

Caperton involves complex and unique facts. The case commenced in August 2002 when a West Virginia jury found A.T. Massey Coal Company and its affiliates liable for fraudulent misrepresentation, concealment, and tortious contractual interference.⁹² As a result, Hugh Caperton, the owner of another mining operation, was awarded \$50 million in both compensatory and punitive damages. Massey moved twice for post-judgment relief, but was denied on both occasions.⁹³

As the post-judgment stage proceeded, Don Blankenship, Massey's chief executive officer, president, and chairman, became convinced that the West Virginia Supreme Court of Appeals would hear the case. Blankenship then targeted Justice Warren McGraw for defeat in the 2004 Election and supported McGraw's opponent, Brent Benjamin. Blankenship's support for Benjamin primarily took the form of extensive financial contributions. These contributions included the following:

- (1) A personal contribution of \$1,000 to Benjamin's campaign committee, which was the maximum allowed by law;
- (2) A \$2.5 million contribution to "And For The Sake Of The Kids," a political organization that supported Benjamin's campaign; and

⁹¹ *Caperton*, 129 S. Ct. at 2260–63.

⁹² *Id.* at 2257.

⁹³ *Id.*

(3) \$500,000 in independent expenditures to support Benjamin's campaign.⁹⁴

Justice Kennedy put these contributions in perspective by stating: "Blankenship's \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee."⁹⁵ Blankenship's contributions ultimately proved beneficial, as Benjamin defeated McGraw by almost 50,000 votes out of about 715,000 votes cast.⁹⁶

After Benjamin won and before the case was placed on the West Virginia Supreme Court's docket, Caperton moved that Benjamin recuse himself.⁹⁷ Benjamin predictably declined because "he found no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial."⁹⁸ Following this first recusal motion, the court reversed the verdict against Massey by a vote of 3-2, with Justice Benjamin in the majority. On rehearing, both Caperton and Massey moved to disqualify three of the justices. Two of them, one in the majority and one in the minority, did recuse themselves, but Justice Benjamin again refrained from doing so. In recusing himself, Justice Larry Starcher, who was originally in the minority, starkly described "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship'" as a "cancer in the affairs of this Court."⁹⁹ With Benjamin in the three-person majority, the West Virginia Supreme Court again decided to vacate the judgment against Massey, which precipitated Caperton's appeal to the United States Supreme Court.¹⁰⁰

b) A New Objective Standard

In a 5-4 decision, the Supreme Court reversed the West Virginia Supreme Court and found that Justice Benjamin's failure to recuse

⁹⁴ *Id.*

⁹⁵ *Id.* Blankenship's contribution to And For The Sake Of The Kids amounted to about two-thirds of the organization's fundraising. *Id.*

⁹⁶ STATE OF W. VA., ORIGINAL CERTIFICATION OF NOVEMBER 2, 2004 GENERAL ELECTION (2005), *available at* <http://www.sos.wv.gov/elections/historyresource/Documents/allgeneral04.pdf>.

⁹⁷ *Caperton*, 129 S. Ct. at 2257-58.

⁹⁸ *Caperton*, 129 S. Ct. at 2258 (internal citations omitted). In the last decade, legislators in four states have considered new laws to prevent judges from hearing motions that ask for their own recusal. William E. Raftery, "The Legislature Must Save the Court from Itself?": *Recusal, Separation of Powers, and the Post-Caperton World*, 58 DRAKE L. REV. 765, 772-73 (2010).

⁹⁹ *Id.* (citations omitted).

¹⁰⁰ *Id.* at 2259. Note that two judges were designated to sit by Justice Benjamin after Justices Larry Starcher and Eliot Maynard recused themselves. *Id.* at 2258.

himself violated of the Due Process Clause.¹⁰¹ The Court specifically noted 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.”¹⁰² Drawing from the precedents discussed above, the majority held that “[d]ue process requires an objective inquiry into whether the contributor’s influence on the election under all the circumstances ‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true.’”¹⁰³ In the context of judicial recusal and campaign contributions, the Court determined that this inquiry should consider the size of the contribution, the total amount spent in the course of the campaign, the “apparent effect such contribution had on the outcome of the election,” and “[t]he temporal relationship” between the contribution, election, and the imminence of the case’s decision.¹⁰⁴

Indeed, *Caperton*’s result represented a positive step toward reclaiming judicial independence in the modern age of runaway campaign spending.¹⁰⁵ Still, the standard that the Court articulated in *Caperton* has serious deficiencies. Justice Kennedy immediately undercut the decision’s effectiveness in advancing the cause of judicial independence. He labeled the case as “exceptional”¹⁰⁶ and involving “extreme” facts,¹⁰⁷ which suggests that the case has limited precedential value.¹⁰⁸ So, while *Caperton* is a positive development in the protection of judicial independence, it is not the final solution needed to adequately protect judicial independence, especially in light of the questions raised in Chief Justice John Roberts’ dissent.

¹⁰¹ *Id.* at 2256, 2266–67.

¹⁰² *Id.* at 2263–64.

¹⁰³ *Id.* at 2264 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

¹⁰⁴ *Id.* at 2264.

¹⁰⁵ See Jeffrey W. Stempel, *Impeach Brent Benjamin Now!?: Giving Adequate Attention to Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. 1, 9 (2010) (“The Court’s [decision in *Caperton*] was a huge step forward in promoting sounder judicial ethics, particularly so in the recent era of big money in state judicial elections.”).

¹⁰⁶ *Caperton*, 129 S. Ct. at 2263.

¹⁰⁷ *Id.* at 2265.

¹⁰⁸ See Stephen M. Hoersting & Bradley A. Smith, *The Caperton Caper and the Kennedy Conundrum*, 2009 CATO SUP. CT. REV. 319, 344 (“[The] *Caperton* opinion struggles to define the case as an outlier that should have no broad precedential value.”). For an argument that *Caperton* is limited only to its facts, see James Bopp, Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The Sui Generis Recusal Test of Caperton v. Massey*, 60 SYRACUSE L. REV. 305, 327 (2010).

c) Chief Justice Roberts' Dissent

Justice Kennedy's opinion drew a strong dissent from Chief Justice Roberts that Justices Scalia, Thomas, and Alito joined.¹⁰⁹ The dissenters seized on Kennedy's two references to "probability of bias" as representing the majority's short-hand for the new standard on judicial recusal¹¹⁰ and criticized such a standard as having unlimited application¹¹¹ and "fail[ing] to provide clear, workable guidance for future cases."¹¹² In presenting this criticism, Chief Justice Roberts enumerated forty questions that the majority's standard left unresolved.¹¹³ While each of these questions "are serious and require reflection,"¹¹⁴ only those that are the most applicable to this Note's topic are described below.

Based on a review of Chief Justice Roberts' dissent, the most applicable questions fall into three categories: (1) "contribution questions"; (2) "contributor questions"; and (3) "judge questions." "Contribution questions" are those regarding what amount and what type of campaign contributions trigger the application of the *Caperton* standard. For example, Chief Justice Roberts asked, "What level of contribution or expenditure gives rise to a 'probability of bias?'"¹¹⁵ Another key concern that Chief Justice Roberts raised in this category of questions is whether the litigant's independent expenditures or contributions to independent groups involved in judicial elections also implicate the *Caperton* standard.¹¹⁶ He also inquired whether non-financial support for judicial candidates, such as "endorsements by newspapers, interest groups, politicians, or celebrities" gives rise to *Caperton* concerns.¹¹⁷

The "contributor questions" focus on the characteristics of a donor, whether an individual or an interest group, and its effect on the

¹⁰⁹ *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

¹¹⁰ *Id.* at 2263 (majority opinion). Justice Kennedy did not explicitly refer to the standard developed in the majority opinion as requiring "probability of bias," but that did not prevent Chief Justice Roberts from referencing various formulations of the term seventeen times in his dissent. *Id.* at 2267–71, 2274 (Roberts, C.J., dissenting).

¹¹¹ *Id.* at 2267 (Roberts, C.J., dissenting) ("[A] 'probability of bias' cannot be defined in any limited way.").

¹¹² *Id.* at 2269.

¹¹³ For all forty questions, see *id.* at 2269–72.

¹¹⁴ Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts's Concerns in Caperton and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SW. U. L. REV. 1, 8 (2009).

¹¹⁵ *Caperton*, 129 S. Ct. at 2269 (Roberts, C.J., dissenting).

¹¹⁶ See *id.* at 2269 ("Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?").

¹¹⁷ *Id.* at 2270.

application of the *Caperton* standard. For instance, Chief Justice Roberts inquired, “What if the ‘disproportionately’ large expenditure is made by an industry association, trade union, physicians’ group, or the plaintiffs’ bar? Must the judge recuse in all cases that affect the association’s interest?”¹¹⁸ He also asked whether the *Caperton* standard applied to cases in which the judge’s campaign supporter is not a party to the pending litigation but is affected by the pending litigation, as well as whether the standard applied to cases in which the litigant’s attorney provided the donation.¹¹⁹

Questions in the third category, the “judge questions,” focus on what types of judges are potentially affected by the *Caperton* standard. Chief Justice Roberts’ questions include “[d]oes it matter whether the judge plans to run for reelection?”¹²⁰ and “[w]hat if the election is nonpartisan?”¹²¹ In this category of questions, Chief Justice Roberts also focused on the fact that Justice Benjamin was not alone in ruling in favor of Massey.¹²² In connection with this, he asked, “Must the judge’s vote be outcome determinative in order for his non-recusal to constitute a due process violation?”¹²³

Some commentators defend Chief Justice Roberts’s dissent by labeling the result reached by the majority as a “mistake.”¹²⁴ Others have called it nit-picking¹²⁵ and argue that “Chief Justice Roberts appears to have become lost in his thicket of point-picking questions and abandoned perspective, embracing the tree so closely that his view of the forest was lost.”¹²⁶

Regardless of which view one accepts, one must recognize that Chief Justice Roberts raises important questions that lawmakers and judges must address.¹²⁷ Indeed, many of Chief Justice Roberts’s questions remain unresolved in recusal provisions found in the states’

¹¹⁸ *Id.* at 2269. Chief Justice Roberts also asked, “What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse himself from cases involving, say, abortion rights if he has received ‘disproportionate’ support from individuals who feel strongly about either side of that issue?” *Id.*

¹¹⁹ *Id.* at 2270.

¹²⁰ *Id.* at 2269.

¹²¹ *Id.* at 2271.

¹²² *Caperton*, 129 S. Ct. at 2258 (majority opinion).

¹²³ *Caperton*, 129 S. Ct. at 2270 (Roberts, C.J., dissenting).

¹²⁴ Lawrence Lessig, *What Everyone Knows and What Too Few Accept*, 123 HARV. L. REV. 104, 112 (2009). Lessig further stated that “[t]he Supreme Court was wrong to expand the reach of due process to remedy [Judge Benjamin’s] bad judgment . . .” *Id.*

¹²⁵ See Stempel, *supra* note 105, 1–3 (drawing an analogy between Chief Justice Roberts’s forty questions and high school debating strategy).

¹²⁶ *Id.* at 66.

¹²⁷ Even critics of Chief Justice Roberts’s dissent concede that he raises important questions. See, e.g., *id.* at 8 (conceding that the forty questions found in Chief Justice Roberts’s dissent are “serious and require reflection”).

statutory and judicial ethics codes. As such, a recusal-based solution should resolve the Chief Justice's questions.

B. The States' Treatment of Judicial Recusal

The Supreme Court has noted that "most matters relating to judicial disqualification [do] not rise to a constitutional level."¹²⁸ This recognition indicates that the Court typically views judicial recusal as a matter that falls within the province of state discretion.¹²⁹ As such, it is important to acquire a flavor for what the states' recusal rules normally require. Generally, states have promulgated statutes and ethics provisions that create starkly different standards for judicial recusal.¹³⁰ Among the thirty-nine states that hold judicial elections, there are three primary approaches to judicial recusal in cases involving campaign contributors: (1) passing statutes and ethics code provisions that lack any explicit reference to campaign contributions as potentially disqualifying factors, (2) passing ethics code provisions, but not statutes, that explicitly refer to a certain level of contribution by a litigant or attorney as a disqualifying factor, and (3) passing statutes with explicit reference to campaign contributions as grounds for recusal.

1. States with Recusal Statutes and Ethics Provisions Lacking Reference to Campaign Contributions

The overwhelming majority of states holding judicial elections fall into the first category: states with recusal statutes and ethics provisions that lack specific reference to campaign contributions.¹³¹

¹²⁸ *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948).

¹²⁹ *See* *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (stating that "matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion").

¹³⁰ *See* FLAMM, *supra* note 26, § 28.1, at 824 ("[P]recisely what a party needs to show in order to carry its burden on disqualification varies considerably from jurisdiction to jurisdiction.").

¹³¹ *See* MD. CONST. art. IV, part I § 7; N.M. CONST. art. VI, § 18; TENN. CONST. art. VI, § 11; TEX. CONST. art V, § 11; ALASKA STAT. § 222.20.020 (LexisNexis 2010); ARK. CODE ANN. §§ 16-11-108, 16-13-214, 16-15-111 (2010); COLO. REV. STAT. § 13-1-122 (2010); FLA. STAT. § 38.01 (2010); GA. CODE ANN. § 15-1-8 (2008); 725 ILL. COMP. STAT. 5 / 114-5 (2010) (recusal for criminal cases); 735 ILL. COMP. STAT. 5 / 2-1001 (2011) (recusal for civil cases); IND. CODE § 34-35-1-1 (2008); KAN. STAT. ANN. § 20-311d (West 2011); KY. REV. STAT. ANN. § 26A.015 (West 2006); LA. CODE CIV. PROC. ANN. art. 151(A) (1999 & Supp. 2011); MINN. STAT. ANN. § 542.16 (West 2011); MO. ANN. STAT. § 508.100 (West 2009); MONT. CODE ANN. § 3-1-803 (2009); NEB. REV. STAT. ANN. § 24-739 (LexisNexis 2004); NEV. REV. STAT. § 1.230 (West 2009); N.Y. JUDICIARY LAW § 14 (McKenney 2002 & Supp 2011); N.C. GEN. STAT. § 15A-1223 (2009) (only applicable in criminal cases); N.D. CENT. CODE § 29-15-21 (2006); OHIO REV. CODE ANN. § 2701.031 (West 2006); OKLA. STAT. tit. 20, § 1401 (2002 & Supp. 2011); OR. REV. STAT. § 14.210 (2009); S.D. CODIFIED LAWS § 23A-21-1 (2004);

New Mexico, for example, uses representative language regarding the grounds for recusal: “No justice, judge, or magistrate of any court shall . . . sit in any cause in which either of the parties are related to him . . . , or in the trial of which he presided in any inferior court, or in which he has an interest.”¹³² This type of language provides three bases for a judge’s recusal: (1) a familial relationship to a party, (2) previous involvement with a case in an inferior court, and (3) the existence of an interest. The first two bases are relatively straightforward, but the last one presents less certainty.¹³³

When determining what amounts to a recusal-worthy “interest,” most courts in these states have rejected the contention that the mere receipt of campaign contributions renders a judge subject to recusal.¹³⁴ The clearest expression of this general trend comes from the Wisconsin Supreme Court, which has stated that “[t]here is no case law in Wisconsin or elsewhere that requires recusal of a judge or justice based solely on a contribution to a judicial campaign.”¹³⁵

WASH. REV. CODE § 4.12.030 (2010); W. VA. CODE ANN. § 51–2–8 (West 2011); WIS. STAT. ANN. § 757.19 (West 2010); WYO. STAT. ANN. § 5–9–119 (West 2011). For a discussion of the various standards established among the states in this group, see Raftery, *supra* note 98, at 769–72. A review of the states’ statutory codes on the judiciary reveals that Idaho, Michigan, and Pennsylvania lack any general statute outlining the grounds for recusal.

¹³² N.M. CONST. art. VI, § 18. The United States Congress has passed a statute that creates a very similar standard for judicial recusal as the states in this group. See 28 U.S.C. § 455 (2006) (allowing a judge to recuse himself or herself where the judge’s objectivity “might reasonably be questioned”).

¹³³ See, e.g., *State ex rel. Anaya v. Scarborough*, 410 P.2d 732, 733–34 (N.M. 1966) (noting the difficulties of interpreting the meaning of “interest” in N.M. CONST. art. VI, § 18).

¹³⁴ See, e.g., *Keane v. Andrews*, 555 So. 2d 940, 940 (Fla. App. 1990) (per curiam) (holding “that a contribution not exceeding the legal limit for campaign contributions made by counsel to the campaign of a trial judge before whom counsel then appears is a legally insufficient ground to justify recusal . . . ”); *Peterson v. Borst*, 784 N.E.2d 934, 937 (Ind. 2003) (noting that states with judicial elections do not consider receipt of campaign contributions from a party in the case as grounds for recusal); *Williams v. Viswanathan*, 65 S.W.3d 685, 688–89 (Tex. Ct. App. 2001) (holding that the receipt of campaign contributions is not enough to require judicial recusal); *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial District Court*, 5 P.3d 1059, 1062 (Nev. 2000) (per curiam) (commenting that the Nevada Judicial Ethics Code did not require a judge to recuse himself or herself if the judge received campaign contributions from one of the parties in a case); *Collier v. Griffith*, No. 01–A–019109CV00339, 1992 WL 44893, at *6 (Tenn. Ct. App. Mar. 11, 1992) (commenting that neither Tennessee’s Code of Professional Responsibility nor its Code of Judicial Conduct prohibit judges from accepting campaign contributions from attorneys or from presiding over cases litigated by attorneys from whom they have received contributions); cf. *Reems v. St. Joseph’s Hosp. & Health Ctr.*, 536 N.W.2d 666, 668, 671 (N.D. 1995) (holding that judges decision to preside over case when one of the party’s attorneys served as his campaign chair did not violate the state’s judicial ethics code); *In re Disqualification of Ney*, 657 N.E.2d 1367, 1368 (Ohio 1995) (holding that the fact that one of the attorneys of record in a pending case practices law with the chairman of the judge’s campaign committee is not, without more, grounds for disqualification).

¹³⁵ *Storms v. Action Wis., Inc.*, 754 N.W.2d 480, 487 (Wis. 2008) (quoting letter from James S. Alexander, Exec. Dir., Wis. Judicial Comm’n, to Julaine K. Appling, President, Wis.

Moreover, ethics codes in these states also suggest that it is permissible for judges to hear cases involving their campaign contributors. As the Wisconsin Judicial Conduct Advisory Committee has opined:

[T]he mere fact of prior support for, or opposition to, a judge's election does not necessarily rise to the level of an appearance of impropriety. Both the public, and knowledgeable persons within the judicial system, are fully aware of, and likely comfortable with, the fact that people will support an individual for judicial office with various levels of assistance, monetary support, or endorsements. This fact, in and of itself, does not create so close or special a relationship to require automatic recusal.¹³⁶

Most states that lack statutes with explicit reference to campaign contributions as grounds for recusal also lack ethics code provisions that require recusal when campaign contributors appear before a judge. Louisiana's judicial ethics code serves as a representative example. It requires that a judge "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . In all other instances, a judge should not recuse himself or herself."¹³⁷

In 2006, the Louisiana Court of Appeal applied this ethics code to judicial recusal in *Whalen v. Murphy*.¹³⁸ In *Whalen*, a trial court judge

Family Action, Inc. (Apr. 28, 2008)).

¹³⁶ See, e.g., Wis. Jud. Conduct Advisory Comm., Op. 03-1, 4 (2004).

¹³⁷ LA. CODE OF JUD. CONDUCT Canon 3(C) (2010). The other states in this category similarly lack reference to campaign contributions in the recusal provisions of their judicial ethics codes. See ALASKA CODE OF JUD. CONDUCT Canon 3(E) (1998); ARK. CODE OF JUD. CONDUCT R. 2.11 (2009); COLO. CODE OF JUD. CONDUCT R. 2.11 (2010); FLA. CODE OF JUD. CONDUCT Canon 3(E) (2010); GA. CODE OF JUD. CONDUCT Canon 3(E) (2009); IDAHO CODE OF JUD. CONDUCT Canon 3(E) (2010); ILL. SUP. CT. R. 63, Canon 3(C) (2009); IND. CODE OF JUD. CONDUCT R. 2.11 (2010); KAN. SUP. CT. R. 601B, CODE OF JUD. CONDUCT R. 2.11 (2009); KY. SUP. CT. R. 4.300, Canon 3(C)(3) (2010); MD. CODE OF JUD. CONDUCT R. 2.11 (2010); MICH. CODE OF JUD. CONDUCT Canon 3(C) (2008); MINN. CT. RULES, Canon 2, Prof'l R. 2.11 (2011); MO. CODE OF JUD. CONDUCT R 2.03, Canon 3(E) (2007); MONT. CODE OF JUD. CONDUCT Canon 2, R. 2.12 (2008); NEB. CODE OF JUD. CONDUCT § 5-203, Canon 3(E) (2010); REVISED NEV. CODE OF JUD. CONDUCT R. 2.11 (2010); N.M. CODE OF JUD. CONDUCT Canon 21-400 (2010); N.Y. CODE OF JUD. CONDUCT Canon 3(E) (2010); N.C. CODE OF JUD. CONDUCT Canon 3(C) (2008); OHIO CODE OF JUD. CONDUCT R. 2.11 (2011); OKLA. CODE OF JUD. CONDUCT R. 2.11 (2011); REVISED OR. CODE OF JUD. CONDUCT JR 2-106 (2011); PA. CODE OF JUD. CONDUCT Canon 3(C) (2007); S.D. CODE OF JUD. CONDUCT Canon 3(E) (2009); TENN. CODE OF JUD. CONDUCT R. 10, Canon (E) (2007); TEX. CODE OF JUD. CONDUCT (2010) (containing no reference to any grounds for disqualification); W. VA. CODE OF JUD. CONDUCT Canon 3(E) (1993); WIS. CODE OF JUD. CONDUCT R. 60.04(4) (2002); WYO. CODE OF JUD. CONDUCT R. 2.11 (2011).

¹³⁸ 943 So. 2d 504 (La. Ct. App. 2006).

vacated a summary judgment order against the plaintiff after the attorney for the plaintiff contributed to the judge's campaign committee.¹³⁹ The defendant moved for recusal, which the trial court denied and the Court of Appeal affirmed.¹⁴⁰ The Court of Appeal reasoned that "[a]lthough the record establishe[d] that Judge Kelly vacated the previously-granted summary judgment in favor of [the defendant] after receiving a campaign contribution from [the plaintiff's attorney], the evidence simply [did] not establish actual bias."¹⁴¹ *Whalen's* result suggests that judicial ethics provisions without explicit reference to campaign contributions as disqualifying factors are as unlikely as similarly silent statutes to compel recusal in cases involving judges' campaign contributors.

The responses in Wisconsin and Louisiana, as well as the other states in this category, appear tone-deaf. The deficiency of these responses becomes increasingly apparent when one considers studies showing the connection between campaign contributions and elected judges' positions in cases involving their contributors¹⁴² and the public's lack of confidence in the judiciary.¹⁴³ States can and should do better than merely sweeping the involvement of campaign contributors in a pending case under the rug.

¹³⁹ *Id.* at 505–06.

¹⁴⁰ *Id.* at 506, 509.

¹⁴¹ *Id.* at 509.

¹⁴² Shepherd, *supra* note 8, at 652–65 (using empirical data to support the assertion that judges decide cases in line with the dominant political philosophy held by voters); Liptak & Roberts, *supra* note 1 (describing cases in which judges voted in support of campaign contributors).

¹⁴³ For a discussion of the public's lack of confidence in the judiciary, see *supra* Part I.C.

2. States with Judicial Ethics Provisions Enumerating Campaign Contributions as Grounds for Recusal¹⁴⁴

While the norm is for states not to consider campaign contributions as dispositive for recusal purposes, “in some jurisdictions, the fact that contributions have been made to a judge, either by attorneys or by others, may be considered to be relevant to the question of [recusal].”¹⁴⁵ Five states—Arizona, Iowa, Mississippi, Utah, and Washington—have made campaign contributions “relevant” by passing judicial ethics provisions that enumerate campaign contributions by an attorney of record or litigant as grounds for judicial recusal.¹⁴⁶ Both Arizona’s and Utah’s provisions are based on the American Bar Association’s Model Code of Judicial Conduct, which sets explicit contribution limits that give rise to recusal motions.¹⁴⁷ Meanwhile, Mississippi, Alabama, Georgia, Iowa, Michigan, Missouri, New York, Oklahoma and Washington developed their own language independent of the Model Code.¹⁴⁸

In regard to campaign contributions as grounds for judicial recusal, the Model Code provides that:

¹⁴⁴ Four states have taken some action to make campaign contributions possible grounds for recusal, but those actions are either not to the level of statutory or ethics codification or they do not explicitly enumerate campaign contributions. New York has not passed a judicial ethics provision in this area, but the state’s top court officials recently handed down a policy that bars “elected judges from hearing cases involving lawyers and others” who contributed \$2,500 or more to the judge’s campaign in the two years before the case’s initiation. William Glaberson, *State Is Cutting Judges’ Ties to Lawyers Who Are Donors*, N.Y. TIMES, Feb. 14, 2011, at A1. Furthermore, Missouri has not enacting a judicial ethics provision enumerating campaign contributions as grounds for recusal, but it has added commentary to that effect. *See* MO. CODE OF JUD. CONDUCT R. 2, Canon 5(B) cmt. (2010) (“A candidate for judicial office should consider whether his or her conduct may create grounds for recusal for actual bias or a probability of bias pursuant to [*Caperton*].”). Moreover, the Michigan Supreme Court has changed the state’s civil procedure rules to imply that campaign contributions are possible grounds for recusal. *See* MICH. R. CIV. P. 2.003(C)(1)(b) (2011) (“Disqualification of a judge is warranted . . . [if t]he judge, based on objective and reasonable perceptions, has . . . a serious risk of actual bias impacting the due process rights of a party as enunciated in [*Caperton*] . . .”). Finally, the Oklahoma Supreme Court has enacted a judicial ethics provision that enumerates campaign contributions as grounds for recusal. *See* OKLA. CODE OF JUD. CONDUCT R. 2.11(A)(4) (2011) (requiring disqualification if “[t]he 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 four (4) years made aggregate contributions to the judge’s campaign in an amount that a reasonable person would believe could affect the fairness of the judge’s consideration of a case involving the party, the party’s lawyer or the law firm of the party’s lawyer”).

¹⁴⁵ FLAMM, *supra* note 26, § 9.4, at 246.

¹⁴⁶ None of the five states has passed a *statute* enumerating campaign contributions as possible grounds for recusal. *See* ARIZ. STAT. ANN. § 12-409 (2002); IOWA CODE. § 602.1606 (2011); MISS. CODE ANN. § 9-1-11 (1999); UTAH CODE ANN. § 78A-2-222 (West 2011); WASH. REV. CODE ANN. § 4.12.030 (2010).

¹⁴⁷ *Judicial Disqualification Based on Commitments and Campaign Contributions*, AM. JUDICATURE SOC’Y, 2-3 (last updated Sept. 23, 2011).

¹⁴⁸ *Id.* at 6-11.

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . .

(4) 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 aggregated 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].¹⁴⁹

This provision is non-discretionary and requires judges to recuse themselves whenever the contribution amount provided by a litigant or attorney is greater than the level set.¹⁵⁰ Arizona modified the model language to set the applicable time period for the aggregate contributions at four years; it also set the contribution level requiring recusal at the maximum campaign contribution allowed for all statewide and non-statewide elections.¹⁵¹ Conversely, Utah established the much lower threshold of fifty dollars within the previous three years.¹⁵²

The Model Rule and its enactment in Arizona and Utah are positive developments in ensuring that judges hear fewer cases involving their campaign contributors. Still, this step does not address the influence of independent expenditures. Furthermore, it does not provide guidance to a judge who hears cases that involve special interest groups that previously supported the judge as a candidate. These are glaring deficiencies in light of the rise in independent

¹⁴⁹ MODEL CODE OF JUD. CONDUCT R. 2.11(A)(4) (2011).

¹⁵⁰ AM. JUDICATURE SOC'Y, *supra* note 147, at 4.

¹⁵¹ ARIZ. CODE OF JUD. CONDUCT R. 211(A)(4) (2009) (requiring recusal where "[t]he 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 *four* years made aggregate contributions to the judge's campaign in the amount that is greater than the amounts permitted *pursuant to [statute setting maximum contribution limits].*") (emphasis added). Arizona law sets the following contribution limits: \$390 for non-statewide, non-legislative campaigns and \$1,010 for statewide, non-legislative campaigns. *See* ARIZ. REV. STAT. ANN. § 16-905(A)(2) (2006) (setting the \$390 limit); ARIZ. REV. STAT. ANN. § 16-905(B)(1)-(2) (2006 & Supp. 2011) (setting the \$1,010 limit).

¹⁵² *See* UTAH CODE OF JUD. CONDUCT R. 2.11(A)(4) (2011) (requiring recusal where "[t]he 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 *three* years made aggregate contributions to the judge's retention in an amount that is greater than \$50") (emphasis added).

expenditures and judicial campaign contributions by interest groups.¹⁵³

Mississippi similarly enumerates campaign contributions by a litigant or an attorney of record as *possible* grounds for recusal. The Mississippi provision, however, has significant differences from the model rule: it neither explicitly sets a contribution limit nor requires judges to recuse themselves once the contributions received reach a certain limit.¹⁵⁴ Instead, the Mississippi rule states that “[a] party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for the party is a major donor to the election campaign of such judge.”¹⁵⁵ Likewise, the rules in Iowa and Washington fail to specify explicit contribution limits by essentially codifying the *Caperton* standard.¹⁵⁶

These rules are better than ethics provisions and statutes lacking any reference to campaign contributions as grounds for recusal; they are not, however, a panacea for the appearance of impropriety that occurs when judges hear cases involving their campaign contributors. Two problems exist with the Mississippi rule. First, the term “major donor” opens the rule to uncertainty and its inclusion in the rule allows judges to continue to hear cases in which their campaign contributors are parties.¹⁵⁷ Second, the commentary to the rule undercuts its effectiveness and reach by recognizing that, “political

¹⁵³ See *supra* Part I.B.

¹⁵⁴ See AM. JUDICATURE SOC’Y, *supra* note 147, at 3–4 (labeling “[s]tatements that . . . Mississippi [has] adopted a rule similar to the model code provision [as] not accurate” and stating that the Mississippi provision “falls far short of the ABA model rule requiring a judge to disqualify”).

¹⁵⁵ MISS. CODE OF JUD. CONDUCT Canon 3(E)(2) (2002).

¹⁵⁶ See IOWA CODE OF JUD. CONDUCT R. 51:2.11(A)(4) (2010) (“The judge knows or learns by means of disclosure mandated by law or a timely motion that the judge’s participation in a matter or proceeding would violate due process of law as a result of: (a) campaign contributions made by donors associated or affiliated with a party or counsel appearing before the court; or (b) independent campaign expenditures by a person other than a judge’s campaign committee, whose donors to the independent campaign are associated or affiliated with a party or counsel appearing before the court.”); WASH. CODE OF JUD. CONDUCT R. 2.11(D) (2011) (“A judge may disqualify himself or herself if the judge learns by means of a timely motion by a party that an adverse party has provided financial support for any of the judge’s judicial election campaigns within the last six years in an amount that causes the judge to conclude that his or her impartiality might reasonably be questioned. In making this determination the judge should consider: (1) the total amount of financial support provided by the party relative to the total amount of the financial support for the judge’s election, (2) the timing between the financial support and the pendency of the matter, and (3) any additional circumstances pertaining to disqualification.”); see also AM. JUDICATURE SOC’Y, *supra* note 147, at 8, 11 (describing the Iowa and Washington statutes).

¹⁵⁷ For instance, the inclusion of this language in the judicial ethics code did not prevent a Mississippi appellate court from holding that a \$500 campaign contribution to a probate judge by a party with a pending case before the judge was insufficient to establish grounds for recusal. *In re Estate of Woodfield*, 968 So. 2d 475, 488 (Miss. Ct. App. 2006), *rev’d on other grounds*, 968 So. 2d 421, 430 (Miss. 2007).

donations *may but do not necessarily* raise concerns about a judge's impartiality."¹⁵⁸ In regard to the Iowa and Washington rules, since they codify the ambiguous *Caperton* standard, those rules are just as muddled.¹⁵⁹ Thus, while the Iowa, Mississippi, and Washington rules are well-intentioned attempts to rehabilitate the poor perception of judicial independence, their uncertain language and standards are ineffective in achieving this goal.

3. States with Recusal Statutes Explicitly Covering Campaign Contributions

There are only two states that fit into the category of states with statutes explicitly requiring recusal in cases involving judges' campaign contributors: Alabama and California.¹⁶⁰ Alabama's statute "require[s] the recusal of a justice or judge from hearing a case in which there may be an appearance of impropriety because as a candidate the justice or judge received a substantial contribution from a party to the case, including attorneys for the party."¹⁶¹ This language merely represents the broad contours of the state's handling of judicial recusal. The next section of the Alabama Code explicitly states that if one party or that party's attorney has contributed over \$4,000 to the assigned appellate judge (or \$2,000 to a trial court judge) and the other party has not, the judge must recuse so long as the other party requests such a recusal.¹⁶² Similarly, California's recently enacted statute¹⁶³ provides that the judge shall recuse himself or herself if:

The judge [whether appellate or trial court] has received a contribution in excess of one thousand five hundred dollars

¹⁵⁸ MISS. CODE OF JUD. CONDUCT Canon 3(E)(2) cmt. (2002) (emphasis added).

¹⁵⁹ See *supra* text accompanying notes 106–08.

¹⁶⁰ See ALA. CODE §§ 12–24–1, 12–24–2 (LexisNexis 2005) (requiring recusal if "as a candidate [a] justice or judge received a substantial contribution from a party to the case" and requiring judges and attorneys to disclose certain campaign contributions); CAL. CIV. PROC. CODE § 170.1(a)(9)(A) (2006, Supp. 2011) (requiring disqualification if a judge has received a campaign contribution from a party or a lawyer in certain circumstances). The Alabama statute is not yet in force since the Department of Justice has not pre-cleared it yet for consistency with the Voting Rights Act. AM. JUDICATURE SOC'Y, *supra* note 147, at 3–4 (citing Ala. Jud. Inquiry Comm., Advisory Op. 99–725 (1999)). For a history of the non-enforcement of the Alabama recusal law, see *Little v. Strange*, No. 2:11–CV–107–WKW [WO], 2011 WL 2462649, at *4–7, *11 (M.D. Ala. June 21, 2011) (per curiam) (3-judge panel) (dismissing Voting Rights Act challenge to law's enforceability).

¹⁶¹ ALA. CODE § 12–24–1 (LexisNexis 2005).

¹⁶² ALA. CODE § 12–24–2 (LexisNexis 2005).

¹⁶³ See 2010 Cal. Legis. Serv. 686 (2010) (outlining the legislative history of the statute and its enactment during the 2010 legislative session).

(\$1,500) from a party or lawyer in the proceeding, and either of the following applies:

- (i) The contribution was received in support of the judge's last election, if the last election was within the last six years.
- (ii) The contribution was received in anticipation of an upcoming election.¹⁶⁴

Both Alabama's and California's recusal statutes represent the best statutory solution for preserving judicial independence in state court systems with elected judges. Although these two states have adopted strong and explicit statutes on judicial recusal, they are in the distinct minority among the thirty-nine states holding judicial elections. Most states have failed to view campaign contributions as permissible grounds for judicial recusal.¹⁶⁵ Furthermore, even the explicit statutes and ethics provisions enacted by Alabama, Arizona, California, and Utah fail to address the impact that independent expenditures and campaign contributions from interest groups have on judicial campaigns. The most logical conclusion from such statutory and ethics code treatment is that state legislatures are not adequately addressing the influence that judicial campaign contributions have upon the perception of judicial independence.¹⁶⁶

III. THE DEFICIENCIES OF PROPOSED REMEDIES

Scholars and bar associations have sought to remove the influence of campaign money from the courtroom in a variety of ways. Three of the most discussed and used proposals are: abolishing judicial elections altogether, setting contribution limits and restrictions, and shielding contributors' identities from judicial candidates. The following describes these proposals and offers reasons why they are

¹⁶⁴ CAL. CIV. PROC. CODE § 170.1(a)(9)(A) (West 2006 & Supp. 2011). The California statute also states that campaign contributions to a judge for less than \$1,500 *may* require recusal. *Id.* § 170.1(a)(9)(B) (referencing alternative grounds for disqualification). In circumstances where the litigant or attorney of record provided a campaign contribution under \$1,500, then the judge must recuse himself or herself if the contribution, "[f]or any reason" leads the judge to believe either that "his or her recusal would further the interests of justice" or that "there is substantial doubt as to his or her capacity to be impartial." *Id.* § 170.1(a)(6).

¹⁶⁵ See *supra* Part II.B.1.

¹⁶⁶ Commentators have come to a similar conclusion. See, e.g., JAMES SAMPLE ET AL., FAIR COURTS: SETTING RECUSAL STANDARDS 20 (2008) (observing that the states have "systematically underused and underenforced" judicial recusal provisions), available at <http://www.ajs.org/ethics/pdfs/Brennancenterrecusalreport.pdf>.

either ineffective or impractical solutions to the problem of perceived judicial bias in state court systems.

A. Abolishing Judicial Elections

A number of commentators have argued that judicial independence is so threatened by judicial elections that the practice needs to be eliminated in favor of a strictly appointive system.¹⁶⁷ In fact, some commentators have been calling for the appointment of judges since the early twentieth century.¹⁶⁸ Supporters of abolishing judicial elections claim that systems with appointed judges avoid “problems inherent to an elected judiciary.”¹⁶⁹ These problems include “the appearance of impropriety caused by judges taking money from those who appear before them” and the “threat to judicial independence resulting from a judge’s dependence on campaign contributions and party support”¹⁷⁰ They also rely on evidence suggesting that voters lack information in judicial elections and are unable to adequately assess judicial qualifications, which render judicial elections an ineffective form of judicial selection.¹⁷¹

There is certainly a normative attraction to abolishing judicial elections. It has been noted that “[a]s long as the system of lawyer-financed judicial elections continues to exist, public respect for the integrity of the judicial system will be difficult to maintain, and perceptions of bias and unfairness will continue.”¹⁷² This proposed solution completely removes this difficulty, since there would no longer be any contributions by lawyers or litigants to judicial candidates. It is clearly a defensible solution and it would remove the threat to judicial independence posed by campaign contributions.¹⁷³

Although abolishing elections is a strong proposal for fixing the problem of campaign contributions in judicial elections, it fails as a practical solution. As the Conference of Chief Justices has stated,

¹⁶⁷ See, e.g., Behrens & Silverman, *supra* note 34, at 276 (advocating the elimination of judicial elections).

¹⁶⁸ See, e.g., Stuart H. Perry, *Shall We Appoint Our Judges?*, ANNALS AM. ACAD. OF POL. & SOC. SCI., Sept. 1935, at 97, 98 (arguing that the City of Detroit should end its practice of electing judges in favor of an appointive system).

¹⁶⁹ Behrens & Silverman, *supra* note 34, at 304.

¹⁷⁰ *Id.*

¹⁷¹ See CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 1 (2009) (“Critics . . . question whether citizens are capable of assessing judicial qualifications”); Behrens & Silverman, *supra* note 34, at 290–95 (analyzing data to arrive at the conclusion that the public lacks sufficient information to make informed decisions in judicial elections).

¹⁷² Boutros & Hungar, *supra* note 40, at 84.

¹⁷³ Although it should also be stated that other threats to judicial independence will continue to exist, even without judicial elections. BONNEAU & HALL, *supra* note 16, at 137–38.

“Whatever one’s view of the desirability of judicial elections, a generation of experience . . . makes it clear that elections will stay in many and perhaps all of the states that have that system.”¹⁷⁴

The Conference of Chief Justices’ conclusion is derived from the history of judicial campaigns and the recent failure of state voters to approve referenda creating appointive judicial selection procedures. Immediately after the nation’s founding, federal and state constitutional framers sought to ensure that judges were removed from electoral pressure.¹⁷⁵ As such, both Article III and its original counterparts in state constitutions provided for some form of appointive judicial system.¹⁷⁶ This early support in state constitutions for appointive judicial selections, however, was short-lived and started to crack in 1812 when Georgia became the first state to provide for the popular election of state judges.¹⁷⁷ After this point, the general trend among the states was to shed appointive judicial selection in favor of judicial elections.¹⁷⁸ This shedding of appointive judicial selection developed due to the Jacksonian philosophy¹⁷⁹ that saw judicial appointments as “aristocratic mistrust of the people”¹⁸⁰ and inconsistent with the “core value” of “distrust of unrepresentative, unaccountable government officers.”¹⁸¹ The result of this trend has rendered judicial elections “ingrained in our system.”¹⁸² Moreover, elective judicial selection is so entrenched that its extensive use continues despite “widespread public and legislative awareness of the concerns inspired by judicial elections”¹⁸³

The strong historical foundation underlying judicial elections has manifested itself in voters’ rejection of referenda to abolish judicial elections in favor of appointive selection systems. According to the American Judicature Society, voters in Florida, Nevada, Ohio,

¹⁷⁴ *Declaration: Judicial Elections are Different from other Elections*, CONFERENCE OF CHIEF JUSTICES, <http://ccj.ncsc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html> (last visited Oct. 17, 2011).

¹⁷⁵ David K. Stott, Comment, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 B.Y.U.L. REV. 481, 484.

¹⁷⁶ See *id.* (explaining that due to the Framers’ concerns over the “runaway whims of the people,” they viewed “judicial independence [as] the bedrock principle of Article III”) (footnote omitted).

¹⁷⁷ Shepherd, *supra* note 8, at 630.

¹⁷⁸ See *id.* at 631 (describing the historical trend of states moving towards judicial elections).

¹⁷⁹ See BONNEAU & HALL, *supra* note 171, at 5 (attributing the rise of judicial elections to Jacksonian democracy).

¹⁸⁰ Stott, *supra* note 175, at 485.

¹⁸¹ Shepherd, *supra* note 8, at 631.

¹⁸² Stott, *supra* note 175, at 485.

¹⁸³ FLAMM, *supra* note 26, § 9.4, at 241.

Pennsylvania, and South Dakota have all voted down referenda that would abolish judicial elections and replace them with merit selection plans.¹⁸⁴ Many of these referenda have rejected abolishing judicial elections by overwhelming margins. For instance, in 1987, Ohio voters rejected a plan to end judicial elections for appellate judges by a margin of 65 percent to 35 percent,¹⁸⁵ and in 2004, South Dakota voters similarly rejected such a plan by a margin of 62 percent to 38 percent.¹⁸⁶ Not only have voters rejected the abolition of judicial elections, but some have voted to abolish *appointive systems* in favor of partisan judicial elections.¹⁸⁷

Such lopsided results have deterred lawmakers from further exploration of abandoning judicial elections. Consider the example of Florida. In 2000, the state administered an election that was so close it took more than a month to resolve,¹⁸⁸ and another that was such a blowout it took an evening to settle. The blowout occurred on a referendum in which voters had the option of abolishing competitive judicial elections in favor of appointive judicial selection. Each county's voters "overwhelmingly rejected" the referendum with an average affirmative vote of only 32 percent in favor of the referendum.¹⁸⁹ In light of this defeat, no further legislative action was taken to remove judicial elections in favor of appointive selection.¹⁹⁰

¹⁸⁴ *Judicial Campaigns and Elections – History of Reform Efforts*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/reform_efforts/failed_reform_efforts.cfm (last visited Oct. 17, 2011).

¹⁸⁵ *General Election Overview: Nov. 3, 1987*, OHIO SEC'Y OF STATE, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/1980-1989OfficialElectionResults/GenElectOverview11031987.aspx> (last visited Oct. 17, 2011). The measure only won in eight of Ohio's eighty-eight counties. AM. JUDICATURE SOC'Y, *supra* note 184.

¹⁸⁶ *See 2004 Election Information – General Election Official Returns for Ballot Questions*, S.D. SEC'Y OF STATE, http://sdsos.gov/content/viewcontent.aspx?cat=elections&pg=/elections/pastelections_electionin fo04_GEBallotquestionreturns.shtm (last visited Oct. 17, 2011) (providing the vote count); *2004 Election Information – Ballot Texts and Attorney General Questions*, S.D. SEC'Y OF STATE, http://sdsos.gov/content/viewcontent.aspx?cat=elections&pg=/elections/pastelections_electionin fo04_ballotquestiontextsAGexplanations.shtm (last visited Oct. 17, 2011) (providing the text of the rejected constitutional amendment). The measure only acquired a majority in one of the state's 66 counties. *2004 Election Information – General Election Official Returns for Ballot Questions*, S.D. SEC'Y OF STATE, http://sdsos.gov/content/viewcontent.aspx?cat=elections&pg=/elections/pastelections_electionin fo04_GEBallotquestionreturns.shtm (last visited Oct. 17, 2011).

¹⁸⁷ Two counties in Kansas voted in 1980 and 1984 to end the use of appointive selection for local trial judges in favor of a return to partisan elections. AM. JUDICATURE SOC'Y, *supra* note 184.

¹⁸⁸ *See* Richard L. Berke, *Who Won Florida? The Answer Emerges, but Surely Not the Final Word*, N.Y. TIMES, Nov. 12, 2001, at A16 (describing the tumult that Florida's results created in the 2000 presidential election).

¹⁸⁹ AM. JUDICATURE SOC'Y, *supra* note 184.

¹⁹⁰ *Merit Selection and Retention*, THE FLORIDA BAR, <https://www.floridabar.org/DIVCOM/PI/BIPS2001.nsf/1119bd38ae090a748525676f0053b606/>

The enormity of the threat posed to judicial independence by elected judges hearing cases that involve their campaign contributors certainly invites an extreme proposal such as the abolition of judicial elections. Although this proposal would remove such a threat, it is one that is not practically achievable based on this nation's history of democratizing the bench and voters' recent rejection of referenda to end judicial elections. As such, abolishing judicial elections is an impractical solution better suited for the law school classroom than for the real world composed of actual voters.

B. Barring Contributions by Attorneys

Some bar associations have attempted to reduce the appearance of impropriety created when judges hear cases involving their campaign supporters by barring lawyers from contributing to judicial campaigns.¹⁹¹ In fact, the ABA codified such a ban in its ethics code until 1972.¹⁹² Additionally, some have argued that an attorney contribution ban to judicial campaigns should become the modern norm across the nation.¹⁹³ An attorney contribution ban would clearly be effective in battling one symptom of the perceived lack of judicial independence: judges hearing cases in which the attorneys are also the judges' campaign donors. However, this proposal suffers from several flaws that render the proposal ineffective and impractical. As such, an attorney contribution ban is ill-suited for the purpose of strengthening judicial independence in state court systems with elected judges.

There are three reasons the attorney contribution ban proposal is ineffective. First, the proposal fails to address, even cursorily, the improprieties created by judges hearing cases in which either litigants

db7173e85a333f978525669e004d01f3!OpenDocument (last visited Oct. 17, 2011).

¹⁹¹ See Jason Miles Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71, 82 (1997) (describing the Bar Association of Greater Cleveland's ban on lawyer contributions to judicial candidates in the mid-1970s); Aman Mcleod, *If at First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 521 (2005) (describing the Illinois bar's contribution ban for attorneys).

¹⁹² See FLAMM, *supra* note 26, § 9.4, at 246 ("Canon 32 of the Model Canons of Judicial Ethics mandated that judges not accept presents or favors from litigants or from lawyers practicing before them. [This Canon combined with Canon 30.] which generally prohibited a candidate from doing anything to create the impression that, if elected, he would administer his office with bias or improper discrimination, effectively precluded a judicial candidate from receiving even the smallest campaign contribution from attorneys.").

¹⁹³ See, e.g., Bradley A. Siciliano, Note, *Attorney Contributions in Judicial Campaigns: Creating the Appearance of Impropriety*, 20 HOFSTRA L. REV. 217, 239-40 (1991) (advocating an attorney contribution ban).

or groups whose interests are implicated in the litigation are also the judges' campaign donors. Second, an attorney contribution ban may shift even more influence in judicial campaigns to special interest groups and other wealthy actors. For instance, the ABA abolished their attorney contribution ban once it observed that the ban gave newspapers, political parties, and other special interests greater control in judicial campaigns.¹⁹⁴ There is little reason to doubt that such a shift in influence will reoccur, especially in light of interest groups' increased spending in judicial campaigns.¹⁹⁵ Third, an outright attorney contribution ban would be overinclusive. For example, such a ban would include transactional attorneys despite the likelihood that they would never appear before the judge to argue a case.¹⁹⁶

Additionally, the attorney contribution ban may be impractical as a result of the Supreme Court's decision in *Republican Party of Minnesota v. White*¹⁹⁷ and its progeny among the lower courts.¹⁹⁸ *White* struck down a Minnesota judicial ethics provision that precluded judicial candidates from "announc[ing] his or her view on disputed legal or political issues."¹⁹⁹ Since this "announce clause" involved First Amendment rights, the Court majority applied strict scrutiny, which required Minnesota to carry the heavy burden of showing that the clause was "narrowly tailored" to a "compelling state interest."²⁰⁰ In applying this test, the Court ruled that the clause may advance the interest of fostering judicial impartiality, but that

¹⁹⁴ FLAMM, *supra* note 26, § 9.4, at 246.

¹⁹⁵ See *supra* Part I.B, Table 3.

¹⁹⁶ See Siciliano, *supra* note 193, at 222 n.36 (noting that corporate attorneys rarely appear in front of judges and therefore have little to gain personally from contributing to a judicial campaign).

¹⁹⁷ 536 U.S. 765 (2002); see also Behrens & Silverman, *supra* note 34, at 276 ("[Campaign finance reform] changes . . . face significant constitutional hurdles . . .").

¹⁹⁸ See, e.g., Cary v. Wolnitzek, 614 F.3d 189, 209 (6th Cir. 2010) (invalidating Kentucky statutes prohibiting judges from disclosing party affiliation, soliciting campaign funds, or making statements that could be reasonably interpreted as committing to vote in a specific way on a specific issue); Wersal v. Sexton, 613 F.3d 821, 841–42 (8th Cir. 2010) (holding that the Minnesota Judicial ethics codes limiting endorsement of other candidates and campaign fund solicitation are unconstitutional under *Republican Party of Minnesota v. White*); Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1234, 1240 (D. Kan. 2006) (holding that the Kansas Judicial Ethics Code's canons prohibiting a judge from making pledges or making statements which may indicate how a judge will rule in the future is unconstitutional); Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1084 (D. Alaska 2005) (holding that Judicial Ethics Code provisions restricting judicial candidates from responding to surveys are constitutional); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1044–45 (D.N.D. 2005) (holding that judicial ethics canons that restrict judge from speaking on issues that may appear before the court are unconstitutional).

¹⁹⁹ MINN. CODE OF JUD. CONDUCT Canon 5(A)(3)(d)(i) (2002).

²⁰⁰ *White*, 536 U.S. at 774–75.

the interest was not compelling.²⁰¹ The Court also found that the clause only aided impartiality in that it merely restricted speech related to issues, not speech related to particular parties.²⁰² In addition, the Court ruled that the clause was underinclusive since it only applied to a small amount of judicial candidates' speech.²⁰³ As such, the Court found that the clause failed the tailoring prong of the strict scrutiny test and, therefore, violated the First Amendment.²⁰⁴

Justice Scalia, the author of *White*'s majority opinion, limited the scope of the decision simply to Minnesota's and other states' announce clauses,²⁰⁵ which were extremely uncommon at the time of the decision.²⁰⁶ Despite *White*'s limited scope and lack of effect on most states' judicial ethics codes, lower courts have broadly read the decision to either "strik[e] down or weaken[] numerous judicial speech regulations"²⁰⁷ A variety of cases show that such a trend has developed among lower federal courts.²⁰⁸ Essentially, "[c]ourts and states appear to think that if *White* found announce clauses unconstitutional, other state restrictions on judicial campaign speech—anything from fraudulent or misleading speech to solicitation of campaign contributions—must be unconstitutional as well."²⁰⁹

In the face of this trend, it is quite possible that lower courts will view a flat attorney contribution ban as a violation of the First Amendment. Such a ban implicates campaign speech, which would necessitate the application of strict scrutiny, and probably lead to the ban's invalidation. This result is even more likely in light of the Supreme Court's statement in *Citizens United* that there is "no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored

²⁰¹ See *id.* at 777 ("Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires.") (emphasis in the original).

²⁰² *Id.*

²⁰³ See *id.* at 779–80 (reasoning that a judicial candidate may state his or her position on an issue prior to announcing their candidacy, and after he or she is elected prior to a pending litigation).

²⁰⁴ *Id.* at 788.

²⁰⁵ *Id.* at 768 (describing the issue presented in *White* as "whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues").

²⁰⁶ See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1095 n.77 (2007) ("This same canon was law in only nine states . . .").

²⁰⁷ Stott, *supra* note 175, at 495.

²⁰⁸ See, e.g., cases cited *supra* note 198.

²⁰⁹ Stott, *supra* note 175, at 497.

speakers.”²¹⁰ As such, the attorney contribution ban is impractical due to its dubious constitutional standing.

C. Shielding the Identity of Contributors from Judicial Candidates

The final proposed solution to the problem of judges hearing their campaign supporters’ cases is to shield the judges from learning the identity of their campaign contributors. A number of jurisdictions have endorsed this approach, codifying the requirement that judicial candidates’ campaign committees must make reasonable efforts to prevent the candidate from learning the identity of his or her financial supporters.²¹¹ This proposal, like the ones described above, also fails due to its lack of effectiveness and lack of practicality.

It seems apparent that “it would be unrealistic to believe that candidates are not aware of who is helping to run their campaigns.”²¹² For example, it is not difficult to imagine a situation where a judicial candidate’s campaign committee organizes a fundraising dinner for the campaign. Since this is a campaign activity, it is likely that the candidate himself or herself would appear to thank those in attendance for coming. In such a scenario, the candidate would know who came to the fundraiser as well as the cost of attendance. Furthermore, campaign committee reports, including those of judicial candidates, are publicly available; it is not difficult to imagine a judicial candidate accessing such a report, even if his campaign committee keeps it from him or her.²¹³ Thus, in both of these scenarios, the proposal of shielding judicial candidates from learning the identities of their campaign supporters is rendered entirely ineffective. Additionally, the proposal is possibly impractical for the same reason that an attorney contribution ban is possibly impractical: it may run afoul of *White* and its application by lower courts.²¹⁴

²¹⁰ *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

²¹¹ *See, e.g.*, ARK. CODE OF JUD. CONDUCT Canon 4, R. 4.1(A)(8) (2009) (codifying such a shielding requirement by prohibiting personal solicitation of campaign funds other than through a campaign committee).

²¹² FLAMM, *supra* note 26, § 9.4, at 248.

²¹³ *See Campaign Finance - Online Database*, OHIO SEC’Y OF STATE, <http://www.sos.state.oh.us/SOS/Campaign%20Finance/Database.aspz> (last visited Oct. 17, 2011). Through this database, users are able to access all publicly filed campaign finance reports. *Id.*

²¹⁴ *See, e.g.*, *Cary v. Wolnitzek*, 614 F.3d 189, 194 (6th Cir. 2010) (invalidating a judicial solicitation ban because it is “incompatible” with *White*); *Wersal v. Sexton*, 613 F.3d 821, 826 (8th Cir. 2010) (holding that under *White* a ban on judicial solicitation and endorsement was unconstitutional under *White*). In *Wolnitzek*, the Sixth Circuit held that Kentucky’s solicitation ban was not narrowly tailored to important governmental interests. The court noted that the ban favored certain judicial candidates, such as incumbents, wealthy, and insider candidates over others and they covered a wide range of activities from personal solicitations to mass mailers. *Wolnitzek*, 614 F.3d at 204–05. It also observed that the ban did “little to protect [Kentucky’s]

In summary, three of the most discussed remedies for problems associated with campaign contributions and judicial independence are: (1) outright abolition of judicial elections; (2) barring contributions by attorneys; and (3) shielding contributors' identities from candidates. The abolition of judicial elections is impractical because it is unlikely that it would receive enough support among policymakers or voters. Barring attorneys' contributions to judicial candidates, meanwhile, would be ineffective because this proposal does not address the influence of interest groups and wealthy litigants. A contribution ban could also be impractical due to its dubious constitutionality under *White*. Finally, a proposal to shield contributors' identities from judicial candidates would be ineffective because candidates could easily discover who their contributors are despite the shielding activities. Moreover, this proposal may also be unconstitutional under *White*. Due to the deficiencies of these proposed remedies, it is necessary that policymakers and courts look to recusal as a better option.

IV. A PROPOSAL FOR THE TREATMENT OF *CAPERTON* AND A NEW STATUTORY APPROACH FOR THE STATES

The Supreme Court and the states have failed to adequately delineate the circumstances requiring recusal. This has led to the underutilization of recusal as means of addressing the problem of judges hearing cases involving campaign contributors. Furthermore, other potential remedies to the problem have fatal flaws that would prevent them from either being adopted or effective. As such, it is necessary for the Supreme Court to read *Caperton* expansively to find that due process requires recusal in less extreme circumstances than those present in that case and for the states to adopt a new statutory approach to recusal.

A. Recusal is the Best Proposed Solution

A solution requiring judges to recuse themselves in cases involving their campaign contributors is both effective and practical. Recusal is an effective remedy because it would prevent judges from hearing cases involving their campaign contributors, reducing the

interests" since the ban allowed the judicial candidate's close associates to ask attorneys and other litigants who are frequently before the court for contributions. *Id.* at 205. The *Wersal* court utilized the same reasoning when striking down Minnesota's personal judicial solicitation ban. *Wersal*, 613 F.3d at 840–41. Any solicitation ban is likely to present these concerns and courts following the *Wolnitzek* and *Wersal* courts' view are likely to strike other bans down.

public's perception that state courts with elected judges lack independence. Removing this factor should correspondingly produce greater confidence in the judiciary's independence.

More importantly, recusal is a practical solution that should pass constitutional muster and generate widespread support among policymakers. A recusal-based solution would avoid the application of strict scrutiny or the implication of the *White* line of cases described above because recusal "is an *ex post* remedy tailored to the specific factual situation [of a case, so] recusal does not trigger the same First Amendment scrutiny as canons limiting political speech or activity."²¹⁵ As such, it would only need to pass the more easily satisfied intermediate scrutiny test of substantial relation to important governmental interests.²¹⁶ Fostering an independent judiciary is an important governmental interest, so that prong of intermediate scrutiny is most likely satisfied.²¹⁷ Furthermore, a recusal-based solution would be substantially related to the fostering of an independent judiciary in that it would remove judges from cases in which campaign contributors have an interest in the outcome.²¹⁸ Additionally, the Supreme Court has indicated its willingness to countenance stronger recusal statutes and standards than those required by the Constitution.²¹⁹

Moreover, a stronger recusal statute is practical because it should receive significant support among policymakers of every political persuasion. Two states with statutes explicitly requiring recusal in cases involving judges' campaign contributors are Alabama and California, which have little in common. The states are politically different,²²⁰ culturally different,²²¹ and demographically different.²²²

²¹⁵ Sample & Pozen, *supra* note 63, at 19; *see also* Stott, *supra* note 175, at 504 (arguing that recusal "only incidentally burden[s] campaign speech").

²¹⁶ *See* Stott, *supra* note 175, at 504 (arguing that recusal policies "only incidentally burden campaign speech," and noting that "[t]he standard for 'incidental burdens' is similar to intermediate scrutiny . . .").

²¹⁷ The Supreme Court has provided some support for this view of an independent judiciary as a *compelling* interest. *See* Republican Party of Minn. v. White, 536 U.S. 765, 776 (2002) (Kennedy, J., concurring) ("Judicial integrity is . . . a state interest of the highest order.").

²¹⁸ *See* Stott, *supra* note 175, at 505–06 (arguing that a recusal solution for judicial speech regulations would satisfy intermediate scrutiny).

²¹⁹ *See, e.g., White*, 536 U.S. at 794 (Kennedy, J., concurring) (noting that states may "adopt recusal standards more rigorous than due process requires . . ."); *cf. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986) ("Congress and the states . . . remain free to impose more rigorous standards for judicial disqualification than those . . . mandated here today.").

²²⁰ For example, in the 2008 Election, sixty-one percent of California voted for Barack Obama for President. CAL. SEC'Y OF STATE, STATEMENT OF VOTE NOVEMBER 4, 2008, GENERAL ELECTION 19 (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf. In the same year, however, only thirty-nine percent of Alabama voted for Obama. STATE OF ALA., CANVASS OF RESULTS: GENERAL ELECTION, NOVEMBER 4, 2008 3 (2008), *available at*

Yet, despite these significant differences, both states drafted and enacted similar judicial recusal statutes. Furthermore, the California Assembly's unanimous enactment and the California Senate's subsequent adoption of its recusal statute may suggest that such statutes would enjoy widespread support in other state legislatures.²²³ Consequently, a recusal statute like the ones adopted by Alabama and California "represents a simple, straightforward, and easily implemented response to the serious problems posed by" judges hearing cases involving their campaign contributors.²²⁴

B. Treatment of Caperton

For a recusal-based solution to be effective, the Supreme Court needs to expand its application of the *Caperton* standard. The first improvement that the standard requires is, as suggested by Chief Justice Roberts' dissent, greater definition.²²⁵ *Caperton*'s result stands for the proposition that campaign contributions should not be allowed to threaten the appearance of elected judges' impartiality.²²⁶ As such, the spirit of *Caperton* should counsel the Court to answer Chief Justice Roberts' questions in ways that lead to recusal in situations less extreme than the one present in *Caperton*.

<http://www.sos.alabama.gov/downloads/election/2008/general/statecert-2008-general-election-11-25-2008-without-write-in-appendix.pdf>.

²²¹ See Anita Gates, *Just a Home Girl Like Me, With Roots in Two Americas*, N.Y. TIMES, Sept. 22, 2002, at A13 (discussing cultural differences between places like Alabama and California).

²²² For instance, consider the state's respective racial demographics. Alabama's racial breakdown is 70.4 percent white and 26.2 percent African-American while California's racial breakdown is 60.9 percent white (56.6 percent of which is of Latino origin), 6.2 percent black, and 12.3 percent Asian. ALABAMA ACS DEMOGRAPHIC AND HOUSING ESTIMATES: 2006–2008 UNITED STATES CENSUS BUREAU, available at http://factfinder.census.gov/servlet/ADPTable?_bm=y&-geo_id=04000US01&-qr_name=ACS_2008_3YR_G00_DP3YR5&-context=adp&-ds_name=&-tree_id=3308&-_lang=en&-redoLog=false&-format=; CALIFORNIA-ACS DEMOGRAPHIC AND HOUSING ESTIMATES: 2006-2008, UNITED STATES CENSUS BUREAU, available at http://factfinder.census.gov/servlet/ADPTable?_bm=y&-context=adp&-qr_name=ACS_2008_3YR_G00_DP3YR5&-ds_name=ACS_2008_3YR_G00_-tree_id=3308&-redoLog=false&-_caller=geoselect&-geo_id=04000US06&-format=&-_lang=en. Note that the numbers do not add to 100 percent due to rounding and exclusion of other less statistically significant racial groups.

²²³ CAL. ASSEMB. DAILY JOURNAL, 2009–2010 Reg. Sess., at 6160–61 (2010); CAL. S. DAILY JOURNAL, 2009–2010 Reg. Sess., at 4298 (2010).

²²⁴ Boutros & Hungar, *supra* note 40, at 85.

²²⁵ For a discussion of Chief Justice Roberts's dissent, see *supra* Part II.A.2.c. Even Justice Kennedy implies in *Caperton* that the standard may be imprecise. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009) (noting that "sometimes no administrable standard may be available to address [a case's] perceived wrong").

²²⁶ See Sample, *supra* note 81, at 789 (arguing that *Caperton* has had the effect of "protecting the courts from the influence of money").

Most notably, the Court should find that a “campaign contribution” includes both contributions to the candidate’s campaign committee and independent expenditures. This conclusion flows naturally from the observation that “[i]n modern electoral politics . . . independent expenditures assisting candidates may be as important as direct campaign contributions, [and] sometimes more important.”²²⁷ Additionally, the Court should consider the aggregate of a person’s contributions to a judge’s campaign fund and independent expenditures in support of that judge’s campaign as “substantial” whenever it reaches the point of five to ten percent of the judge’s total campaign expenditures and above. It is a common axiom that losing that percentage of revenue is noticeable to the revenue loser, and will cause serious financial health questions.²²⁸ Furthermore, contributions to either a judge’s past or future campaign should be considered, since it is likely that a judge will feel indebted to both his her past and future benefactors.

The Court should not place much weight on the fact that Justice Benjamin was the deciding vote in *Caperton*. It should not matter in the analysis whether a judge who was biased toward his or her campaign supporter was joined by others in his or her ruling. The mere participation of a biased judge, regardless of the case’s outcome or the margin by which that outcome was reached, renders the ruling violative of due process.²²⁹ Allowing a biased judge to continue to sit in a case and to hand down rulings without consequence would do little to preserve the appearance of judicial impartiality or to improve the public’s view of judicial independence.

To further ensure that the spirit of *Caperton* is followed, the Court should adopt the following judicial presumption:

In the absence of contrary evidence, a substantial campaign contribution by an attorney of record, litigant, or interest group in the form of either direct donations to the judge’s campaign committee or independent expenditures requires that the judge recuse himself or herself from hearing the case. If the judge does not recuse himself or herself in these situations and the party opposing recusal does not present contrary evidence, then the Court reverses the court below’s

²²⁷ Stempel, *supra* note 105, at 31 (internal quotations and footnote omitted).

²²⁸ *See id.* at 28 (“Where a particular person, entity, or alliance provides more than five to ten percent or more of campaign spending, reasonable people get concerned.”).

²²⁹ *See id.* at 39 (arguing that the “mere participation of a tainted judge requires vacating the decision . . .”).

decision even if the judge's vote was not outcome-determinative.

A "substantial contribution" is one that is at least ten percent of all the expenditures of both a judicial candidate's campaign committee and independent groups advocating for the judicial candidate. Moreover, for donations or independent expenditures by an interest group to give rise to the presumption, the interest group must either be a party to the litigation or file an amicus brief on behalf of a litigant.²³⁰ Contrary evidence that could defeat the presumption includes evidence that the litigant, attorney, or interest group that provided a substantial contribution to the judge's campaign also gave financial support to the judge's opponent. Other possible contrary evidence is a showing that both litigants, attorneys of record for both parties, or interest groups filing amicus briefs on behalf of both parties provided substantial contributions to the judge's campaign.

This presumption has three key benefits. First, it makes the *Caperton* standard more concrete and should allow the Court to reach uniform results in future recusal cases. The presumption addresses Chief Justice Roberts' criticisms by defining what type of contributors, what sort and level of contribution, and what class of judges the *Caperton* standard implicates.²³¹

Second, the presumption reaches more situations than the "extreme" one present in *Caperton*.²³² Unlike in *Caperton*, a campaign contributor need not provide more than 50 percent of a judge's campaign spending or millions of dollars to invoke the presumption.²³³ Rather, a more commonplace contribution is all that is necessary to trigger the presumption.²³⁴ For instance, take the following circumstance. A litigant donates \$1,000 to the appellate judge's previous campaign and spends \$9,000 in independent

²³⁰ This requirement removes Chief Justice Roberts's worry that there is too little definition as to when interest groups' support implicates the *Caperton* standard. See *Caperton*, 129 S. Ct. at 2270 (Roberts, C.J., dissenting) ("What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the decision?").

²³¹ See *supra* Part II.A.2.c.

²³² See *supra* text accompanying notes 106–08. Blankenship's fundraising on behalf of Justice Benjamin was so extreme that he was the only individual contributor listed among the major fundraisers for judicial elections in the most expensive states. See *SAMPLE ET AL.*, *supra* note 2, at 78–85 (summarizing the largest fundraisers from 2000 to 2009 in states with the most expensive judicial elections). Indeed, only five groups provided more money to *all* judicial candidates in the most expensive states than Blankenship provided *only* to Justice Benjamin. *Id.* at 78–80, 82.

²³³ See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009) (describing Blankenship's \$3 million in campaign contributions and independent expenditures on behalf of Justice Benjamin's election campaign).

²³⁴ This is just a representative example. Many other similar types of situations could invoke the presumption.

expenditures on behalf of the judge's campaign. Funds derived from the judge's campaign committee and independent expenditures total \$100,000. Thus, the presumption is invoked and the party opposing recusal must show contrary evidence to establish that recusal is unwarranted. This type of situation is more likely to occur than the extreme scenario presented in *Caperton*, but it presents the same threat to judicial independence.²³⁵ As such, it is the type of situation that the Supreme Court's recusal jurisprudence should reach.

Third, the presumption should lead to fewer instances of judges hearing cases that involve their campaign supporters. Employing this presumption puts campaign contributors and elected judges on notice that recusal is necessary in far less extreme situations than those present in *Caperton*. This would naturally lead more judges to recuse themselves on the basis of campaign contributions. One of the reasons underlying the public's poor perception of judicial independence is starkly diminished by reducing the incidence of judges hearing cases that involve their campaign supporters.²³⁶

The judicial presumption that this Note advances would greatly enhance the Supreme Court's recusal jurisprudence. The presumption provides greater definition to the *Caperton* standard and makes *Caperton*'s application to less extreme cases operational. Additionally, the presumption advances the important policy goal of reducing the appearance of impropriety that results from judges hearing cases that involve their campaign contributors. Thus, the Court, and other judicial bodies with the responsibility of handling recusal situations involving campaign contributions, should adopt this presumption.

C. Model Recusal Statute

While vigilant Supreme Court action in situations requiring recusal will help to improve judicial independence, the Court's action by itself will not adequately address the appearance of impropriety created by judges hearing cases involving their campaign contributors. State legislative action is also necessary, especially due to the states' failure to adopt effective recusal statutes.²³⁷ The

²³⁵ This example is more like Duane Adams's story as opposed to the extreme one presented by Blankenship's involvement in West Virginia Supreme Court elections. Despite the lower amounts of campaign money involved in Adams' story, he still felt like the Ohio Supreme Court lacked independence in his case. *See supra* text accompanying notes 9–20.

²³⁶ *See supra* Part I.C (discussing the public's poor perception of the judiciary as a result of increased campaign spending).

²³⁷ *See supra* Part II.B.1 (discussing state statutes with no recusal requirement when a judge hears a case involving campaign contributors).

examples of Alabama and California provide a strong starting point for a model statute requiring recusal in certain cases involving campaign contributions.²³⁸ Although those states' statutes offer a good starting point, they are not exhaustive sources for a model statute since they still leave unresolved many of the questions presented in Chief Justice Roberts' *Caperton* dissent. Thus, drawing from the language found in the Alabama and California statutes and the concerns raised in Chief Justice Roberts' dissent, the following model statute is an appropriate and effective response to the threat posed by campaign contributions to judicial independence:

Section 1. General Provision. Pursuant to the requirements of this Act, a trial or appellate judge shall recuse himself or herself from hearing and ruling on cases involving the financial supporters of his or her election campaigns.

Section 2. Litigant-Campaign Supporters. A judge shall recuse himself or herself when one party to the case before the judge has provided any of the following types of financial contributions in support of the judge's election:

A. A contribution of \$2,000 or more to the judge's campaign fund in either the judge's preceding campaign for the judgeship that he or she now occupies or the judge's upcoming campaign for a judgeship or other elective office;

B. A contribution of \$2,000 or more to a Political Action Committee or independent group that either donated money to the judge's campaign fund or spent money in support of the judge in either the judge's preceding campaign for the judgeship that he or she now occupies or the judge's upcoming campaign for a judgeship or other elective office; or

C. An independent expenditure of \$2,000 or more in support of either the judge's preceding election to the judgeship that he or she now occupies or the judge's upcoming campaign for a judgeship or other elective office.

²³⁸ See *supra* Part II.B.3 (discussing the California and Alabama statutes).

Section 3. Attorney-Campaign Supporters. A judge shall recuse himself or herself when the attorney of record for one party to the case before the judge has provided any of the following types of financial contributions in support of the judge's election:

A. A contribution of \$2,000 or more to the judge's campaign fund in either the judge's preceding campaign for the judgeship that he or she now occupies or the judge's upcoming campaign for a judgeship or other elective office;

B. A contribution of \$2,000 or more to a Political Action Committee or independent group that either donated money to the judge's campaign fund or spent money in support of the judge in either the judge's preceding campaign for the judgeship that he or she now occupies or the judge's upcoming campaign for a judgeship or other elective office; or

C. An independent expenditure of \$2,000 or more in support of either the judge's preceding election to the judgeship that he or she now occupies or the judge's upcoming campaign for a judgeship or other elective office.

Section 4. Independent Group-Campaign Supporters. A judge shall recuse himself or herself when an independent group, labor organization, industry group, or other organization has filed a brief in support of one party to the case before the judge and has provided any of the following types of financial contributions in support of the judge's election:

A. A contribution of \$2,000 or more to the judge's campaign fund in either the judge's preceding campaign for the judgeship that he or she now occupies or the judge's upcoming campaign for a judgeship or other elective office;

B. A contribution of \$2,000 or more to a Political Action Committee or independent group that either donated money to the judge's campaign fund or spent money in support of the judge in either the judge's

preceding campaign for the judgeship that he or she now occupies or the judge's upcoming campaign for a judgeship or other elective office; or

C. An independent expenditure of \$2,000 or more in support of either the judge's preceding election to the judgeship that he or she now occupies or the judge's upcoming campaign for a judgeship or other elective office.

Section 5. Definitions.

A. A "party to the case" includes either a named party in the case or a person related to the named party by consanguinity or marriage.

B. The "attorney of record" includes both the attorney of record in court records and the law firm of that attorney.

Section 6. Exclusions. A judge shall not recuse himself or herself if any of the following occur:

A. Both parties to the case provided any of the contributions described in Section 2-A, 2-B, or 2-C;

B. The attorneys of record for both parties to the case provided any of the contributions described in Section 3-A, 3-B, or 3-C; or

C. There are independent groups, labor organizations, industry groups, or other organizations that have provided any of the contributions described in Section 4-A, 4-B, or 4-C and that have filed briefs in support of both parties to the case.

This model statute creates a \$2,000 ceiling for recusal that applies regardless of whether the judge is an appellate or trial court judge. As such, the model statute is similar to the Mode Code of Judicial Conduct,²³⁹ the California statute,²⁴⁰ and the Utah judicial ethics

²³⁹ See MODEL CODE OF JUD. CONDUCT R. 2.11(A)(4) (2011) (requiring recusal if a judge learns that he received a campaign contribution over a certain dollar limit from a "party, party's lawyer, or the law firm of a party's lawyer").

provision,²⁴¹ all of which create one contribution threshold for both appellate and trial judges. This threshold can be modified by each state to better match its own circumstances.²⁴² For instance, states could follow Arizona's lead and make separate thresholds for appellate and trial court judges, based on the maximum contribution allowed to statewide and non-statewide candidates.²⁴³

On one level, creating separate ceilings for appellate and trial court judges is logical because appellate judges must appeal to larger voter demographics and consequently require more money, and more contributions, to effectively run their campaigns.²⁴⁴ However, policymakers should resist blindly accepting this general trend. Some campaigns for trial court judgeships require appealing to as many, or even more, voters as campaigns for appellate courts.²⁴⁵ Furthermore,

²⁴⁰ CAL. CIV. PROC. CODE § 170.1(a)(9)(A) (West 2006 & Supp. 2011) (requiring recusal in certain circumstances if a judge has received over \$1,500 from a party).

²⁴¹ UTAH CODE OF JUD. CONDUCT R. 2.11(A)(4) (2010) (requiring recusal in certain circumstances if a judge received more than fifty dollars from a party).

²⁴² When Utah decided to adopt the Model Code of Judicial Conduct's provision on campaign contributions, it adopted a much lower threshold than this Note's model statute does. *Id.* It adopted such a low threshold because the state's practice is to appoint judges, who are then subject only to retention elections. As such, judges have less need to raise substantial amounts of campaign money. AM. JUDICATURE SOC'Y, *supra* note 147, at 3. The states should take these types of dynamics into consideration when adopting and modifying the model recusal statute.

²⁴³ ARIZ. REV. STAT. § 16-905(A)(2), (4), (B)(1)-(2) (2006 & Supp. 2011) (setting different maximum contribution amounts for statewide and non-statewide offices); ARIZ. CODE OF JUD. CONDUCT R. 2.11(A)(4) (2009) (requiring recusal if a judge learns that he has received a contribution over the statutory amount); *see also* ALA. CODE § 12-24-2 (2005) (setting different thresholds for appellate and trial court judges). Both states have lower thresholds for trial court judges than for appellate court judges.

²⁴⁴ For example, the Judge of the Vinton County (Ohio) Court of Common Pleas may only face 4,000 voters or less for his judgeship. *See Judge of the Court of Common Pleas: November 2, 2010, OHIO SEC'Y OF STATE*, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2010results/20101102commonpleas.aspx> (last visited Oct. 17, 2011) (revealing that only 3,296 voters cast ballots in Vinton County during the 2010 Election for the Common Pleas judgeship). Meanwhile, the Judge of the Ohio Court of Appeals, the state's intermediate appellate court, for the Fourth District, which includes Vinton County, may face 125,000 voters for her judgeship. *See Judge of the Court of Appeals: November 2, 2010, OHIO SEC'Y OF STATE*, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2010results/20101102appeals.aspx> (last visited Oct. 17, 2011) (revealing that 122,336 voters cast ballots in the Fourth District during the 2010 Election for the Court of Appeals judgeship).

²⁴⁵ For instance, Judge Dick Ambrose of the Cuyahoga County, Ohio Court of Common Pleas faced 316,926 voters who cast ballots in the 2010 Election. *Judge of the Court of Common Pleas: November 2, 2010, OHIO SEC'Y OF STATE*, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2010results/20101102commonpleas.aspx> (last visited Oct. 17, 2011). Meanwhile, Judge Kathleen Keough of the Ohio Court of Appeals for the Eighth District, which is contained only within Cuyahoga County, faced 302,919 voters in the 2010 Election. *Judge of the Court of Appeals: November 2, 2010, OHIO SEC'Y OF STATE*, <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2010results/20101102appeals.aspx> (last visited Oct. 17, 2011).

raises for trial court judgeships may require fundraising that is as substantial as that of appellate judgeships.²⁴⁶ Thus, states should carefully consider, based on the particular fundraising trends of its judicial candidates, whether creating separate thresholds for appellate and trial court judges is appropriate.

This Note's proposed model statute is a vast improvement over the current state of recusal law in the states. Unlike the sizable majority of states with elected judges, this statute explicitly enumerates campaign contributions and independent expenditures as grounds for a judge's recusal.²⁴⁷ As such, the statute avoids the pitfalls of a vague recusal standard, which states typically interpret as not requiring recusal when a litigant or attorney of record is one of the judge's campaign contributors.²⁴⁸

Furthermore, the model statute addresses the disproportionate impact of independent expenditures in judicial elections²⁴⁹ by explicitly requiring recusal for any independent expenditure greater than \$2,000. Additionally, the statute deals with interest groups' increasing involvement in judicial campaigns²⁵⁰ by outlining the types of contributions and expenditures by interest groups that requires recusal. In these regards, the model statute goes further than the Alabama and California statutes, which are silent on the matter of independent expenditures and the involvement of interest groups in judicial elections.²⁵¹

Most importantly, the statute's enforcement would reduce the number of times that a judge hears a case involving his or her campaign contributors, which would help to restore the public's perception of an independent judiciary.²⁵² For example, if the statute had been in effect at the time that the Ohio Supreme Court considered *Maitland v. Ford Motor Company*,²⁵³ the result of the case could have

²⁴⁶ See Glaberson, *supra* note 144 (noting that three candidates for the Manhattan Surrogate's Court raised a combined \$900,000 for the Democratic Party's nomination).

²⁴⁷ See *supra* Part II.B.1 (discussing statutes without specific reference to campaign contributions).

²⁴⁸ See *supra* notes 134–42 and accompanying text (discussing case law related to various recusal statutes).

²⁴⁹ See *supra* note 63 and accompanying text (describing the extent of independent expenditures in judicial elections).

²⁵⁰ See *supra* notes 56–60 and accompanying text.

²⁵¹ See *supra* Part II.B.3 (describing the Alabama and California statutes).

²⁵² See *supra* Part I.C (describing the public's negative perception of the judiciary); see also Glaberson, *supra* note 144 (noting that New York Chief Judge Jonathan Lippman implemented a policy barring judges from hearing cases involving campaign contributors because “[n]othing [is] more important for the judiciary than to have the public see that we're neutral arbiters of disputes”).

²⁵³ 816 N.E.2d 1061 (Ohio 2004).

been very different.²⁵⁴ The justices in the majority received contributions to their campaign committees that totaled \$115,000 from the law firm that represented the defendant companies.²⁵⁵ Thus, under Sections 3(A) and 5(B) of the model statute, the four members of the majority would have had to recuse themselves. Justice Pfeifer, a dissenter, would also have to recuse himself because his campaign committee received a \$5,500 contribution from one of the law firms representing the plaintiffs.²⁵⁶ Without the participation of these jurists, perhaps Duane Adams would not have felt like the justices were “taking a bribe” when the court decided against him.²⁵⁷

Finally, the model statute offers a practical solution that attempts to reduce the administrative inconvenience caused by the increased incidence of recusal.²⁵⁸ The exclusions found in Section 6 allow judges to continue hearing cases involving their campaign contributors provided that there are campaign contributors on both sides of the litigation. For instance, if the plaintiff contributed \$5,000 to the judge’s campaign committee and an interest group filing an amicus brief on behalf of the defendant also contributed \$5,000 to the judge’s campaign committee, the judge could still hear the case. There is not the same appearance of impropriety in such a situation because, regardless of which way the judge rules, he or she is bound to disappoint at least one of his or her campaign contributors. Furthermore, allowing judges to hear such cases will prevent the number of recusals from becoming too onerous for court administrators.

The model recusal statute represents a much more effective remedy to the appearance of impropriety created by judges hearing cases that involve their campaign contributors. It is a clear improvement on the states’ overall silence regarding campaign contributions as grounds for recusal. Furthermore, it is more comprehensive than the Alabama and California statutes because, whereas those statutes only list contributions to a judge’s campaign committee as requiring recusal, the model statute also covers

²⁵⁴ See *supra* text accompanying notes 9–20. “Different” here does not necessarily mean a different result for the parties; rather it means that the process could have had less of an appearance of impropriety.

²⁵⁵ Liptak & Roberts, *supra* note 1.

²⁵⁶ COMMITTEE FOR PAUL E. PFEIFER, ANNUAL CAMPAIGN FINANCE DISCLOSURE (filed Jan. 26, 2004), available at http://www2.sos.state.oh.us/pls/cfonline/f?p=119:44:522892284983147::NO::P44_RP_ID,P44_LISTTYPE:161566,simple (click on “Total Contribution Received”).

²⁵⁷ Liptak & Roberts, *supra* note 1.

²⁵⁸ See *infra* Part IV.D.1 (analyzing the argument that an increase in recusal will interfere with judges’ duty to hear cases).

independent expenditures. Thus, adopting the model statute would reduce the perceived influence of campaign money in the courtroom and consequently would improve the public's view of judicial independence.

D. Rebutting Potential Criticisms

Critics could raise several objections to the judicial presumption and model statute that this Note proposes. The most prominent objections would be: (1) that both proposals interfere with a judge's duty to sit, (2) that both engage in arbitrary line-drawing, and (3) that the model statute blurs the boundaries in the separation of powers and is thus ineffective. Each of these objections is discussed and ultimately dismissed below.

I. Duty to Sit

A potential criticism of the judicial presumption and model statute is that such recusal rules would run afoul of the duty to sit, which "emphasizes a judge's obligation to hear and decide cases unless there is a compelling ground for [recusal]" ²⁵⁹ Many federal courts have recognized the duty to sit on the part of judges in cases that are assigned to their dockets. ²⁶⁰ The most prominent discussion of the duty to sit is found in then-Justice William Rehnquist's memorandum opinion ²⁶¹ explaining his decision not to recuse himself from hearing *Laird v. Tatum*. ²⁶² Rehnquist said that the duty to sit was particularly important for United States Supreme Court justices

²⁵⁹ Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 814 (2009).

²⁶⁰ See, e.g., *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) (noting that "[a] judge is as much obliged not to recuse himself when it is not called for as he is obliged when it is"); *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976) (recognizing that "[a] trial judge has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when the converse is true") (citation omitted); *Edwards v. United States*, 334 F.2d 360, 362 n.2 (5th Cir. 1964) (noting that a judge has a duty to sit when there is no valid reason to recuse him or herself); *In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir. 1961) (finding that "there is . . . [an] obligation upon a judge not to recuse himself" when there is no reason to do so). State courts have also recognized a similar duty in their judicial ethics codes. See ARIZ. CODE OF JUD. CONDUCT R. 2.7 (2009) (enumerating one of a judge's duties as a "[r]esponsibility to [d]ecide").

²⁶¹ *Laird v. Tatum (Tatum II)*, 409 U.S. 824 (1972) (mem.). Rehnquist's memorandum has been described as an "important catalyst" in the development of duty to sit doctrine. Stempel, *supra* note 259, at 817.

²⁶² 408 U.S. 1 (*Tatum I*) (1972). The case involved plaintiffs' claim that the United States Army was illegally engaged in "surveillance of lawful and peaceful civilian political activity." *Id.* at 2. The Court, in a 5–4 decision (with Rehnquist in the majority), reversed the D.C. Circuit's ruling and dismissed the plaintiffs' action for lack of ripeness. *Id.* at 1, 13.

because the Court has no mechanism for replacing recused justices.²⁶³ He also claimed that justices should uphold their duty to sit because recusal could lead to a split court affirming conflicting opinions in companion cases.²⁶⁴

A further consideration underlying the duty to sit is that recusal places administrative burdens upon the court system and other non-recused judges.²⁶⁵ Recusal “is thought to create significant capacity issues for the judicial system and to constitute a threat to the efficiency of the system.”²⁶⁶ Indeed, whenever a judge decides to recuse himself or herself, he or she requires that another judge take over the case, which in turn disrupts the replacement judge’s docket. Such shuffling among judicial dockets is even more troublesome due to the already-crowded nature of the dockets.²⁶⁷

Critics of this Note’s proposals are likely to grab onto the underlying concern regarding clogged judicial dockets to suggest that not only do the proposals harm the duty to sit but they add to the problem of judicial inefficiency.²⁶⁸

The proposals included in this Note do not excessively trample upon the duty to sit. Rehnquist’s concern, that United States Supreme Court justices should uphold the duty to sit due to the lack of a mechanism for replacing recused justices, is not present in most states. Most states have procedural rules that provide for the replacement of a recused judge.²⁶⁹ For example, the West Virginia Supreme Court has promulgated a rule that “[w]hen any justice [recuses himself or herself], the Chief Justice or the Acting Chief Justice may, in his or her discretion, assign a senior justice, senior judge, or circuit judge to service for the [recused] justice.”²⁷⁰ Because

²⁶³ *Tatum II*, 409 U.S. at 837. Rehnquist was presented with a motion for his recusal because he had testified before Congress that he saw no constitutional problems with surveillance programs like the one operated by the Army. *Id.* at 824–25.

²⁶⁴ *Id.* at 837–38.

²⁶⁵ See Stempel, *supra* note 259, at 820–21 (“The recusal of one judge puts greater pressure on judges that are not disqualified To a degree, the duty to sit . . . is in large part a duty not to unreasonably burden fellow judges”).

²⁶⁶ *Id.* at 820.

²⁶⁷ See Charles F. Hobson, *St. George Tucker’s Law Papers*, 47 WM. & MARY L. REV. 1245, 1258 (2006) (noting that “[c]logged dockets continue to be a problem . . .”).

²⁶⁸ See Bopp & Woudenberg, *supra* note 108, at 331 (arguing that more demanding recusal rules, including the *Caperton* standard, will “clog the courts . . . with recusal-related litigation . . .”).

²⁶⁹ Indeed, Rehnquist hinted in *Tatum II* that besides the Supreme Court, most courts have replacement mechanisms by noting that federal district courts have such a mechanism. See *Tatum II*, 409 U.S. at 837 (“There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts.”).

²⁷⁰ W. VA. R. APP. P. 33(h) (2010). See also, e.g., SUPREME COURT OF CAL., THE INTERNAL OPERATING PRACTICES AND PROCEDURES OF THE CALIFORNIA SUPREME COURT 43 (2007) (describing the replacement process used by the California Supreme Court to replace

state courts have replacement mechanisms, Rehnquist's concern regarding the possibility of a split court affirming conflicting results in companion cases also falls away.

Finally, the critics' argument that the judicial presumption and model recusal statute will create administrative inconvenience is unavailing. That argument, at its most basic level, fails to adequately account for individual litigants' right to a "fair trial in a fair tribunal"²⁷¹ and is tone-deaf to the public's perception of the judiciary as lacking independence.²⁷² The courts and the states should not resort to the specter of clogged dockets to gloss over the appearance of impropriety resulting from judges ruling in cases that involve their campaign contributors. Such an argument probably would not provide any comfort to a litigant, like Duane Adams,²⁷³ who feels cheated by the judicial system, nor would it improve the public perception of judicial independence. Thus, criticisms of this Note's proposals based on the duty to sit and administrative convenience should not dissuade policymakers and courts from adopting these proposals.

2. *Line-Drawing*

Critics of the judicial presumption and the model recusal statute could also seize on the proposals for setting clearly-defined campaign contribution thresholds, which they may label "arbitrary." In support of that point, the critics may point out the following scenarios. The judicial presumption would attach if the attorney of record donated \$10,000 to a judge's campaign committee that spent a total of \$100,000, but not if the attorney donated \$9,999. Similarly, the model

recused judges). The states that do not have such a mechanism should adopt one to ensure that the recusal rules articulated in this Note do not create situations in which state supreme courts cannot reach the necessary quorum.

²⁷¹ *In re Murchison*, 349 U.S. 133, 136 (1955). Many courts and commentators have concluded that an argument of administrative convenience is insufficient to justify policies that trample upon individual rights. *See, e.g.*, *INS v. Cadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."); *Jones v. City of Ridgeland*, 48 So. 3d 530, 538 (Miss. 2010) (citations omitted) (noting with approval the above-mentioned quotation); Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 81 (1965) (advocating more active judicial review of arbitrary administrative decisions because "[w]here constitutional rights are involved . . . the courts have said that 'convenience' and 'efficiency' must yield"); Robert Alan Culp, Note, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick Up Where the Fourth Amendment Left Off?*, 86 COLUM. L. REV. 800, 821 (1986) (arguing that "administrative convenience alone cannot provide [a] requisite compelling state interest" for dragnet questioning of immigrants) (footnote omitted).

²⁷² *See supra* Part I.C (describing the public's poor perception of judicial independence).

²⁷³ *See supra* text accompanying notes 9–20.

statute would cover a campaign contribution that was for \$2,000.01, but not one that was for \$1,999.99.

Again, this argument is unavailing for potential critics of the judicial presumption and model recusal statute. First, setting clearly-defined campaign contribution thresholds is the path taken by the ABA in its Model Code of Judicial Conduct²⁷⁴ and four states.²⁷⁵ Second, specific thresholds provide greater clarity to recusal rules that are currently muddled and, consequently, difficult to apply to situations involving presiding judges' campaign contributors.²⁷⁶ Third, a certain amount of arbitrariness is natural in the area of campaign contributions thresholds.²⁷⁷ For instance, every statute setting maximum contribution amounts by individuals can conceivably be labeled arbitrary.²⁷⁸ Finally, to reduce the appearance of impropriety and to improve the public perception of state judicial systems' independence, setting explicit contribution thresholds is necessary. Without rules enumerating explicit limits, states have failed to consider campaign contributions as possible grounds for recusal,²⁷⁹ and the Supreme Court's jurisprudence on recusal only applies to the "extreme facts" of *Caperton*.²⁸⁰ Thus, the judicial presumption and model recusal statute, and their explicit contribution thresholds, should be adopted despite potential objections based on alleged arbitrariness.

²⁷⁴ See MODEL CODE OF JUD. CONDUCT R. 2.11(A)(4) (2011) (setting an undetermined contribution threshold requiring a judge to disqualify himself or herself).

²⁷⁵ See ALA. CODE §§ 12-24-1, 12-24-2 (LexisNexis 2005) (setting a threshold amount for judicial recusal); ARIZ. CODE OF JUD. CONDUCT R. 2.11(A)(4) (2009) (same); CAL. CIV. PROC. CODE § 170.1(a)(9)(A) (West 2006 & Supp. 2011) (same); UTAH CODE OF JUD. CONDUCT R. 2.11(A)(4) (2010) (same).

²⁷⁶ See *supra* Part II.B.1 (describing various recusal statutes with no specific reference made to campaign contributions); see also notes 154-59 and accompanying text (describing statutes that attempt to address the issue of campaign contributions, but that are nonetheless difficult to apply).

²⁷⁷ See *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (per curiam) (noting that contribution limits "constitute the . . . primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions"); see also *id.* at 83 ("The line is necessarily a judgmental decision, best left . . . to congressional discretion.).

²⁷⁸ See, e.g., ARIZ. REV. STAT. § 16-905(A)(2), (4) (2006 & Supp. 2011) (setting \$390 campaign contribution limit for non-legislative, non-statewide candidates); *id.* § 16-905(B)(1)-(2) (setting \$1,010 contribution limit for non-legislative, statewide candidates).

²⁷⁹ See *supra* notes 134-41 and accompanying text (describing difficulties state courts have had in applying statutes and judicial codes with no reference to campaign contributions).

²⁸⁰ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009). See also Hoersting & Smith, *supra* note 108, at 344 (noting that the *Caperton* Court sought to render its ruling as having "no broad precedential value").

3. Separation of Powers

The final potential criticism that this Note addresses is that the model recusal statute harms the delicate balance of power between the judiciary and the legislature. One critic has suggested that commentators and state legislators are not adequately considering the potential that enhanced judicial recusal statutes will anger the judiciary.²⁸¹ This anger could lead to the judiciary flatly refusing to follow a legislatively-enacted recusal statute or deciding to invalidate such a statute as a violation of the separation of powers.²⁸² While this objection raises a legitimate point, it fails to appreciate the judiciary's lack of movement on this issue. As such, the objection should not prevent the adoption of the model recusal statute.

Since 1999, the year that the ABA promulgated its first model judicial ethics provision on campaign contributions as grounds for recusal,²⁸³ only two states have adopted judicial ethics provisions based on the model rule.²⁸⁴ Furthermore, two state supreme courts have specifically considered and rejected the ABA's model rule.²⁸⁵ When the Wisconsin Supreme Court was presented with a petition to enact an ethics provision with explicit contribution limits, the court reacted by passing rules codifying the view that contributions, by themselves, have no effect on recusal.²⁸⁶ Instead of a movement toward adopting the model rule, the most notable progress since 2007

²⁸¹ See Raftery, *supra* note 98, at 766 (“Lost amid the discussion, however, has been an examination of the legislature’s potential and actual implementation of recusal standards, with or without the approval of, or even in open hostility to, the desires of the judiciary.”).

²⁸² See *id.* at 780–84 (reviewing instances where state courts have either invalidated or refused to follow statutes that fall into the realm of judicial rulemaking).

²⁸³ See MODEL CODE OF JUD. CONDUCT Canon 3(E)(1)(e) (1999) (stating that a judge should disqualify himself or herself where “the judge knows or learns by means of a timely motion that a party or a party’s lawyer has within the 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”) or which is “greater than is reasonable and appropriate for an individual or an entity”).

²⁸⁴ AM. JUDICATURE SOC’Y, *supra* note 147, at 2–3.

²⁸⁵ *Id.* at 4.

²⁸⁶ *Id.* The Wisconsin judicial ethics code now provides the following in regards to campaign contributions and independent expenditures:

60.04(7) – Effect of Campaign Contributions. A judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge’s campaign committee’s receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity . . . involved in the proceeding.

60.04(8) – Effect of Independent Expenditures. A judge shall not be required to recuse himself or herself in a proceeding where such recusal would be based solely on the sponsorship of an independent expenditure or issue advocacy communication . . . by an individual or an entity involved in the proceeding or a donation to an organization that sponsors an independent communication by an individual or entity involved in the proceeding.

WIS. CODE OF JUD. CONDUCT SCR 60.04(7)–(8) (2010).

among state supreme courts has been to codify the muddled *Caperton* standard in judicial ethics codes.²⁸⁷

This “progress” is neither sufficient nor does it adequately address the increasing influence of interest groups and wealthy actors in judicial elections. State judiciaries’ track records indicate that they are not the most willing partners in attempts to remove the appearance of impropriety created by judges hearing cases that involve their campaign contributors. In face of the state judiciaries’ inaction, state policymakers should pass legislation that removes that appearance of impropriety.²⁸⁸

Potential criticisms of this Note’s proposed judicial presumption and model recusal statute are unavailing. This Note’s proposed rule changes will not cause serious damage to the doctrine of a duty to sit, nor will it advance excessively arbitrary line-drawing, nor will it unjustly trample upon the separation of powers. These potential criticisms should not prevent courts or policymakers from adopting the judicial presumption and model recusal statute.

CONCLUSION

State judiciaries with elected judges are under siege by increasing amounts of campaign money and independent expenditures spent by wealthy litigants, attorneys, and interest groups. As a result, an increasing number of state judges are called upon to hear cases that involve their campaign contributors. Such scenarios have led a sizable portion of the public to view state judiciaries as lacking sufficient independence, which harms their very legitimacy. Thus, the appearance of impropriety created by judges hearing cases that involve their campaign contributors and its negative impact on the public’s perception of judicial independence is a serious problem.

²⁸⁷ See AM. JUDICATURE SOC’Y, *supra* note 147, at 6–11 (noting that seven states have either impliedly or explicitly codified the *Caperton* standard in their judicial ethics codes).

²⁸⁸ It has been suggested that courts could “co-opt” the model statute’s adoption (or others similar to it) by “tak[ing] the legislature’s interest in [removing the appearance of impropriety caused by judges hearing cases that involve their campaign contributors] and internaliz[ing] it as a matter of judicial policy, practice, or rules.” Raftery, *supra* note 98, at 779. Indeed, this is the method adopted by several states and commentators. See ARIZ. CODE OF JUD. CONDUCT R. 2.11(A)(4) (2009) (requiring a judge to recuse himself by motion of a party that the judge received a contribution from a party in the case); UTAH CODE OF JUD. CONDUCT R. 2.11(A)(4) (2010) (requiring judicial recusal if a judge learns by motion of another party that the judge received more than \$50 from one of the parties); Glaberson, *supra* note 144, at A1. If courts follow this path, that is a positive development and it would have the same effect as enacting the model statute that this Note proposes. Thus, it is not inconsistent with this Note’s position. However, based on the state judiciaries’ lack of progress in this direction, relying on them to change their policies is somewhat naïve. This is especially true when one considers that requiring state judiciaries to change internal policies would mean asking elected judges to take actions that would dramatically change how they raise campaign money.

Consequently, policymakers and courts must take action to remedy that public perception by reducing the incidence of judges hearing cases that involve their campaign contributors.²⁸⁹

Current recusal rules have failed to adequately reduce the incidence of judges hearing cases involving their campaign contributors. The Supreme Court's jurisprudence on recusal, including *Caperton*, is ill-defined and remains muddled. Meanwhile, state ethics provisions and statutes suffer from a variety of deficiencies. Many fail to even mention campaign contributions by a litigant, attorney of record, or interest group as possible grounds for recusal. Others codify the *Caperton* standard or other vague language that classify campaign contributions as possible grounds for recusal, but these provisions are still difficult to apply. Some states have enacted provisions that require judicial recusal if the judge has received a certain level of contribution from either a litigant or an attorney of record. These states' provisions only reach part of the influence of campaign money in the courtroom since they do not cover contributions by interest groups whose interests are implicated in a case. Furthermore, none of these provisions even cursorily address independent expenditures' effect on judicial campaigns.²⁹⁰

The sum of this case law and statutory treatment is that recusal's potential for enhancing the public perception of judicial independence is unrealized. This is especially troublesome because other prominent proposals for protecting judicial independence are either ineffective or impractical.²⁹¹ In light of recusal's potential to reduce the number of scenarios in which judges hear cases that involve their campaign contributors and the deficiencies of other proposals, the Supreme Court and state policymakers must adopt more clearly defined and expansive recusal rules.

The Supreme Court can create a more clearly defined recusal rule that reaches less "extreme" facts than those present in *Caperton*²⁹² by adopting a judicial presumption that guides the Court in future recusal cases. Essentially, unless the non-moving party shows contrary evidence, the Court should find that recusal is appropriate if a litigant, its attorney, or an interest group filing an amicus brief in support of one party provided a substantial contribution or independent expenditure to the judge hearing the case.²⁹³ This presumption makes

²⁸⁹ See *supra* Part I (defining the problem of judicial campaign contributions).

²⁹⁰ See *supra* Part II (detailing state legislatures' and courts' efforts to curtail judges hearing cases involving campaign contributors).

²⁹¹ See *supra* Part III (rejecting various proposals for judicial recusal reform).

²⁹² *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009).

²⁹³ See *supra* Part IV.B (discussing the *Caperton* standard as it applies to this proposal).

Caperton operational and it allows for the Court to apply its recusal jurisprudence in more normal situations besides those where a litigant provided \$3 million to one of the judges on the bench.²⁹⁴

Finally, the states should augment the Court's presumption by adopting a model recusal statute that explicitly lays out contribution and independent expenditure levels that require the recusal of a judge who hears cases that involve his or her campaign contributors. Such a statute could potentially receive widespread support among policymakers of various ideologies and backgrounds. It would also be effective in reclaiming the public's perception of an independent judiciary because it would reduce the incidence of judges hearing cases that involve their campaign contributors.²⁹⁵ Furthermore, it would not trample upon judges' duty to sit, it would not engage in arbitrary line-drawing, and it would not upset the balance between state legislatures and state judiciaries that have been unwilling partners in the movement towards stronger recusal rules.²⁹⁶

Improving and strengthening this nation's recusal rules will be difficult, and criticism will surely arise.²⁹⁷ But, mere difficulty should not deter action that is necessary for reclaiming the public's confidence in the judiciary. Indeed, leaving the current state of recusal law undisturbed will do nothing but perpetuate the practice of judges hearing cases that involve their campaign contributors and continue the declining public perception of judicial independence. That is an unacceptable result and the possibility that it could occur should galvanize judges and policymakers to consider adopting solutions like the judicial presumption and model statute outlined in this Note.

CHARLES R. RALEY[†]

²⁹⁴ *Caperton*, 129 S. Ct. at 2257.

²⁹⁵ See *supra* Part IV.C (discussing the benefits of the proposed model statute).

²⁹⁶ See *supra* Part IV.D (discussing potential criticisms of the proposals in this Note).

²⁹⁷ See *Caperton*, 129 S. Ct. at 2269–72 (Roberts, C.J., dissenting) (raising 40 questions about the *Caperton* majority's recusal standard); see also *supra* Part IV.D (outlining potential criticisms to this Note's proposed solutions).

[†] J.D. Candidate, 2012, Case Western Reserve University School of Law.