

RETHINKING JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS: A PRACTICAL CRITIQUE OF POST- CAPERTON PROPOSALS AND A CALL FOR GREATER TRANSPARENCY

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I. INTRODUCTION

A 2009 Gallup poll found that more than 90 percent of those surveyed believed a judge should be disqualified from hearing a case if a party appearing before that judge has contributed to the judge's election campaign.¹ Other polls have found that 79 percent of businesses² and even 26 percent of judges³ believed campaign contributions have at least some impact on judicial decisions. These polls indicate a growing concern among citizens, businesses, and the judiciary that money is manipulating the fair administration of justice.⁴ Additionally, of the thirty-nine states that have some form of judicial election system in place,⁵ at least fourteen are reevaluating their judicial recusal standards⁶ in light of the growing risk of monetary influence in the judiciary.⁷

Recent studies and events have encouraged states to adapt their judicial codes and laws to the reality of increased campaign money in judicial elections. Previously, despite authoritative evidence indicating that judicial elections were

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¹ Joan Biskupic, *At the Supreme Court, a Case with the Feel of a Best Seller*, USA TODAY, Feb. 17, 2009, at 1A.

² CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 105 (2009).

³ Terry Carter, *Boosting the Bench*, A.B.A. J., Oct. 2002, at 29, 34.

⁴ Kenneth Jost, *Judicial Elections*, 19 CQ RESEARCHER 375, 376 (2009) (noting the concern of Bret Brandenburg, executive director of Justice at Stake).

⁵ *Id.* at 375; Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1094 (2007).

⁶ While judicial elections comprise a wide range of issues, including the ongoing debate of selection reform, this Note primarily focuses on critiquing recent disqualification proposals based solely on campaign contributions. See discussion *infra* Part IV.

⁷ See *Recusal Reform in the States After Caperton v. Massey*, BRENNAN CENTER FOR JUST. (Nov. 20, 2010), http://www.brennancenter.org/content/resource/state_judicial_reform_efforts_2009/ (follow "2009-10 Judicial Disqualification Initiatives in the States" hyperlink).

becoming increasingly expensive,⁸ states consistently avoided the controversial task of expanding their respective recusal standards to include a provision that required disqualification when a judge had received significant and disproportionate campaign contributions⁹ from a party appearing before that judge in a case.¹⁰ However, the United States Supreme Court's holding in *Caperton v. A.T. Massey Coal Company, Inc.* has encouraged many state legislatures to craft provisions requiring disqualification at certain monetary thresholds.¹¹ In *Caperton*, the Court held that the failure of a judge to recuse himself or herself upon receiving an excessive and disproportionate amount of campaign support from a party or litigant appearing in a case creates a "probability of bias" that violates the Due Process Clause of the Fourteenth Amendment.¹² However, the Court—recognizing that the situation in *Caperton* was extreme—reaffirmed that states have the discretion to "adopt recusal standards more rigorous than due process requires" in order to protect judicial integrity.¹³

This Note discusses whether recent state judicial-disqualification proposals effectively balance the independence traditionally afforded to judges with the risk posed to due process by excessive campaign contributions. Section II examines the historical development of judicial disqualification, elections, and campaign spending. Section III discusses *Caperton v. Massey* and the "probability of bias" standard that it reaffirmed. Section IV categorizes and

⁸ See Jost, *supra* note 4, at 377.

⁹ "Contribution" technically refers to the gifting of money or anything else of value with the coordination of the candidate. See 2 U.S.C. § 431(8)(A) (2006) (defining contribution on the Federal level); see also Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247, 261 (2010) (distinguishing contributions from independent expenditures). "Independent expenditure" refers to spending one's own money not in coordination with the candidate. See 2 U.S.C. § 431(17) (defining independent expenditure on the federal level); Rotunda, *supra*, at 261. While independent expenditures are constitutionally protected as free speech, the states have much greater leeway in regulating contributions. *Id.* For simplicity, this Note will generally refer to "contribution" as both (1) monetary and in-kind gifts made directly or indirectly to a judicial candidate by an individual, organization, or through a third-party intermediary, and (2) independent expenditures that either directly or indirectly advocate for the defeat of a judicial candidate. However, this Note will sometimes differentiate between the two types of activity to emphasize the importance of creating a disqualification rule that takes into account both contributions and independent expenditures. See *infra* Part IV.

¹⁰ See JUDICIAL DISQUALIFICATION PROJECT, AM. BAR ASS'N, REPORT OF THE JUDICIAL DISQUALIFICATION PROJECT 26 (discussion draft 2008), <http://www.ajs.org/ethics/pdfs/ABAJudicialdisqualificationprojectreport.pdf> (noting that only two states, Mississippi and Alabama, have adopted provisions accounting for campaign contributions to judicial candidates).

¹¹ At least California, Louisiana, Montana, Nevada, Texas, Washington, and Wisconsin have proposals that would implement a monetary threshold for disqualification. See *Recusal Reform in the States After Caperton v. Massey*, *supra* note 7 (describing California, Montana, Nevada, Texas, Washington, and Wisconsin proposals); *Special Edition: Judicial Recusal Legislation*, GAVEL TO GAVEL (Nat'l Ctr. for State Courts, Williamsburg, Va.), July 2009, at 1, 5-6, available at http://www.ncsconline.org/D_Research/gaveltogavel/G%20to%20G%20Special%20Recusal%20Edition.pdf (describing Louisiana proposal).

¹² *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263-64 (2009).

¹³ *Id.* at 2265-67 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring) ("Judicial integrity is, in consequence, a state interest of the highest order.")).

critiques five state disqualification proposals that would create a monetary threshold for disqualification based on campaign contributions. Finally, Section V argues that the lack of transparency and relaxed standards in judicial campaign-finance reporting must be effectively addressed in order for any disqualification rule based on campaign contributions to succeed.

II. HISTORICAL DEVELOPMENT OF JUDICIAL DISQUALIFICATION, ELECTIONS, AND CAMPAIGN SPENDING

A historical overview of judicial disqualification is necessary to evaluate reform measures that attempt to balance traditional judicial independence against the potential due process violation created by excessive and disproportionate campaign contributions. This section examines the alarming context in which states have recognized the need for disqualification reform: first, by describing the historical background of judicial disqualification; second, by summarizing the current state of disqualification; third, by noting the sharp rise in judicial elections; fourth, by briefly discussing three alternative selection methods that have attempted to abate the drastic increase in campaign spending; and, finally, by examining the present-day effect of campaign contributions on the judiciary.

A. *Historical Underpinnings of Judicial Disqualification*

European civil law and common law countries had markedly different approaches regarding the appropriate circumstances under which judicial disqualification should be mandated. In the early history of Roman law, litigants had the right to disqualify (or recuse)¹⁴ judges who were “under suspicion” of being biased.¹⁵ This practice was common among civil law countries for hundreds of years.¹⁶ In contrast, the English placed more confidence in judicial impartiality.¹⁷ Sir William Blackstone, a prominent English judge and professor, opined on the ability of English society to hold judges accountable in the “isolated” cases in which judges were overcome by their bias.¹⁸ Furthermore, England’s common law system deemphasized the need for judicial recusal except in instances where the judge had a direct financial interest in the outcome of a case.¹⁹ The long-standing adage that “[n]o man shall be a judge in his own case” had taken its hold on the English court system, but its practical

¹⁴ “Disqualification” technically refers to the mandatory removal of a judge in accordance with the applicable statute. “Recusal” describes voluntary removal based on the judge’s own discretion. However, this Note will follow the general practice of modern scholarship, which uses both terms interchangeably. See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1, at 3-4 (2d ed. 2007).

¹⁵ *Id.* § 1.2, at 5; see also JUDICIAL DISQUALIFICATION PROJECT, *supra* note 10, at 5 (quoting an amendment to the Justinian Code, which emphasized the importance of disqualification in cases of suspected bias).

¹⁶ JUDICIAL DISQUALIFICATION PROJECT, *supra* note 10, at 5.

¹⁷ *Id.* at 6.

¹⁸ *Id.*

¹⁹ *Id.*

application only focused on direct conflicts of interest and excluded recusal based on the mere suspicion of bias.²⁰

Unlike in England, the Founding Fathers generally placed less confidence in U.S. judges to perform their duties as impartial arbiters.²¹ The Founders decided on a federal appointment system,²² which the states initially mirrored,²³ in an effort to suppress the rampant political influence on the judiciary at the time.²⁴ Still, there was enough trust in the impartiality of judges that judicial recusal was only required in the narrowest of circumstances.²⁵ As in England, judges disqualified themselves at their own discretion, and recusal was only required when a judge had conflicts of interest from previous legal matters²⁶ or when the judge had a direct financial interest in the case.²⁷

In the early twentieth century, Congress, the Supreme Court, and the American Bar Association (ABA) attempted to clarify and limit the situations in which a judge could be impartial. In 1911, Congress enacted legislation, eventually codified at 28 U.S.C. § 144, which was the first federal statute to include the possibility of extrajudicial bias as a basis for disqualification.²⁸ The legislation required the party seeking disqualification to file an affidavit stating that party's "reasons for the belief that bias or prejudice exists"²⁹ If granted, the motion would allow another judge to be assigned to the proceeding.³⁰ In 1924, the ABA adopted the Canons of Judicial Ethics, which promulgated model guidelines that required judges to be "free from impropriety and

²⁰ *Id.* (internal quotation marks omitted).

²¹ Matthew J. Streb, *The Study of Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS* 1, 8 (Matthew J. Streb ed., 2007) (discussing Alexander Hamilton's distrust of the relationship between the King of England and the judiciary).

²² *Id.*

²³ *Id.* at 8-9.

²⁴ *Id.* at 8.

²⁵ John A. Meiser, *The (Non)Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1804 (2009) (discussing the narrow situations that required judicial recusal).

²⁶ *Id.* at 1804 n.41.

²⁷ John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609-12 (1947) (discussing how judges were disqualified for "direct pecuniary interest and nothing else").

²⁸ Act of March 3, 1911, ch. 231, §§ 20-21, 36 Stat. 1087, 1090 (1911). The statute was not codified at 28 U.S.C. § 144 until 1948. Act of June 25, 1948, ch. 646, § 144, 62 Stat. 869, 898 (1948) (codified as amended at 28 U.S.C. § 144 (2006)).

²⁹ Act of March 3, 1911, § 21, 36 Stat. at 1090.

³⁰ *Id.* §§ 14, 20, 36 Stat. at 1089-90. State governments followed suit by adopting similar disqualification laws of their own. *See, e.g.*, MD. CONST. art. IV, § 7 (barring judicial participation in a case "wherein he may be interested, or where either of the parties may be connected with him, by affinity or consanguinity, within such degrees as now are, or may hereafter be prescribed by Law, or where he shall have been of counsel in the case"); Kenneth S. Kilimnik, *Recusal Standards for Judges in Pennsylvania: Cause for Concern*, 36 VILL. L. REV. 713, 719 n.21 (1991) (noting that Pennsylvania passed judicial disqualification laws in 1816 and 1825). However, some American colonies had already enacted similar disqualification laws as early as the late seventeenth century. *See, e.g.*, FLAMM, *supra* note 14, § 28.8, at 838 (describing how Connecticut has had its own disqualification law since 1672).

the appearance of impropriety.”³¹ Thirty years later, in *In re Murchison*, the Supreme Court finally recognized the importance of requiring judges to be free from actual bias as well as the “appearance of bias” in order to ensure a fair trial in accordance with due process.³²

Finally, in 1972, the ABA adopted the Model Code of Judicial Conduct (Model Code), which condensed the various ethical notions surrounding judicial disqualification into a single set of rules.³³ Specifically, Rule 2.11 provided that a judge would be subject to disqualification “in a proceeding in which [the judge’s] impartiality might reasonably be questioned, including but not limited to” instances in which the judge had an actual bias concerning a party or lawyer, or some other interest in the case.³⁴ This language was much broader than 28 U.S.C. § 144, which allowed judges to escape disqualification by ruling that the alleged disqualifying acts were not legally sufficient to constitute actual “bias and prejudice.”³⁵ Two years later, Congress revised 28 U.S.C. § 455 in an effort to supplant the ineffective language of 28 U.S.C. § 144 with diction that more closely resembled the 1972 Model Code.³⁶ In 1990, the 1972 Model Code was revised to include a provision allowing parties to waive disqualification for any reason other than actual bias so long as all parties agreed that the judge would be impartial.³⁷

Today, most of the provisions under Rule 2.11(A) are mirrored by the judicial conduct codes of forty-seven states and Washington, D.C.³⁸ These rules provide disqualification standards above those which due process, under the U.S. Constitution, minimally requires.³⁹

In 1999, the ABA added Rule 2.11(A)(4) to the Model Code, which requires disqualification when “a party or a party’s lawyer” has contributed an amount of money, to be determined by the state, over a certain period of time.⁴⁰

³¹ JUDICIAL DISQUALIFICATION PROJECT, *supra* note 10, at 8 (internal quotation marks omitted).

³² *In re Murchison*, 349 U.S. 133, 136 (1955).

³³ MODEL CODE OF JUDICIAL CONDUCT Canon 3C (1972) (current version at MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007)).

³⁴ *Id.* Canon 3(C)(1).

³⁵ Frank, *supra* note 27, at 629.

³⁶ Brian Downing, *Action, Accountability, and the Judiciary: United States Federal Judicial Recusal Reform in a New Century*, HALT (Aug. 9, 2001), http://www.halt.org/reform_projects/judicial_integrity/pdf/History_of_Judicial_Recusal.pdf.

³⁷ MODEL CODE OF JUDICIAL CONDUCT Canon 3F (1990).

³⁸ See JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 4.02, at 4-7 to 4-8 (4th ed. 2007) (noting that most state courts have interpreted the phrasing “should disqualify” and “shall disqualify” to both have the same mandatory effect); FLAMM, *supra* note 14, § 2.6, at 39. The few states that have not adopted the language of Rule 2.11(A) may still require disqualification in some circumstances. See TEX. R. CIV. P. 18b(2)(a) (Texas rules of civil procedure incorporate Rule 2.11’s language); WIS. SUP. CT. R. 60.04(4); *Adair v. State*, 709 N.W.2d 567, 581-82 (Mich. 2006) (Cavanagh, J., statement) (proposing a rule for Michigan that would incorporate similar standard); *Washington v. Mont. Mining Properties, Inc.*, 795 P.2d 460, 466 (Mont. 1990) (Sheehy, J., dissenting) (noting that Canon 3E(1), now R. 2.11, may require disqualification).

³⁹ FLAMM, *supra* note 14, § 2.5.2, at 34-39.

⁴⁰ MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(e) (1999).

This rule has remained the same notwithstanding minor changes in 2007.⁴¹ The controversial rule attempts to encourage states to “fill-in-the-blank” with an appropriate maximum threshold amount, which, in theory, would eliminate incentives for parties and lawyers to influence judicial decision-making through significant campaign contributions.⁴²

The current Model Code requires that the actual or apparent bias of the judge be directly related to the issue or case before the judge, and that the bias must be personal—for example, a personal or financial relationship with a party to the proceeding that could be substantially affected by the proceeding.⁴³ However, Courts differ on the evidentiary burden and the process used for disqualification proceedings. The standard ranges from a showing of compelling evidence to a preponderance of the evidence.⁴⁴ Although some states require challenged judges to hold disqualification hearings, most states leave disqualification solely to the judge’s discretion.⁴⁵ In most jurisdictions, judges are not required to give an official explanation for their decision to recuse.⁴⁶

1. *The Modern Balancing Act of Judicial Disqualification*

The current debate surrounding disqualification concerns the delicate balance between providing standards that safeguard due process⁴⁷ and upholding the independence traditionally afforded to judges.⁴⁸ Financial burdens associated with filing and defending a disqualification motion and the fear of angering judges with unsuccessful motions are cited as barriers to widespread use and enforcement;⁴⁹ however, discontent directed toward federal and state recusal laws still manages to spur the movement in support of stricter recusal standards.⁵⁰

⁴¹ MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007) (The rule states that a judge shall be disqualified when the “judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge’s campaign in an amount that [is greater than \$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].”) (alterations in original).

⁴² JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, FAIR COURTS: SETTINGS RECUSAL STANDARDS 29 (2008) [hereinafter SAMPLE ET AL., FAIR COURTS], available at http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf/.

⁴³ MODEL CODE OF JUDICIAL CONDUCT R 2.11.

⁴⁴ SAMPLE ET AL., FAIR COURTS, *supra* note 42, at 40 n.63.

⁴⁵ See Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 546-51 (1994) (explaining various methods states employ); see also FLAMM, *supra* note 14, § 17.6, at 498-507.

⁴⁶ PATRICK M. MCFADDEN, AM. JUDICATURE SOC’Y, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL ELECTION CAMPAIGNS 19 (1990) (noting the deference given to the judge on appellate review of recusal motions).

⁴⁷ SAMPLE ET AL., FAIR COURTS, *supra* note 42, at 43 n.89 (criticizing the argument that focusing on the appearance of bias will distract from issues of actual bias).

⁴⁸ See generally Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061 (2007) (discussing the fundamental principle of judicial independence).

⁴⁹ SAMPLE ET AL., FAIR COURTS, *supra* note 42, at 20 (discussing potential reasons for the underuse and under-enforcement of disqualification motions).

⁵⁰ See FLAMM, *supra* note 14, § 23.1, at 669-70 (discussing federal recusal statutes); see generally *id.* §§ 27-28, at 789-906 (listing state recusal laws and provisions).

Moreover, modern studies on social psychology show that “much bias is unconscious and that people tend to underestimate and undercorrect for their own biases.”⁵¹ Recent polling data on the effect of campaign contributions on judicial decision-making comports with the results of these studies, making the implicit suggestion that donning a black robe is not an impenetrable shield from inherent fallibility.⁵² As was noted in the amicus curiae of former chief justices and justices in *Caperton*, “every judge is first and foremost a human being, not a detached and unemotional law machine.”⁵³ Judicial independence is a fundamental characteristic of an impartial judiciary; however, it comes with the unavoidable risk of judicial bias.

Even with this recent evidence, most states have been hesitant to adopt Model Rule 2.11(A)(4) or similar disqualification language that takes into account campaign support, no matter how large.⁵⁴ Notably, motions to disqualify judges due to receipt of substantial campaign contributions regularly fail.⁵⁵ Only two states have adopted provisions that include at least some language from Model Rule 2.11(A)(4), which requires a judge to recuse upon receipt of campaign contributions over an unspecified amount.⁵⁶ The first state, Mississippi, allows a party to “file a motion to recuse a judge . . . [if] an opposing party or counsel . . . is a major donor to the [judge’s] election campaign.”⁵⁷ The second state, Alabama, requires the recusal of a judge from “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.”⁵⁸ However, the Alabama Supreme Court has failed to adopt any rules or procedures to implement the statute.⁵⁹

⁵¹ SAMPLE ET AL., *FAIR COURTS*, *supra* note 42, at 20; *see also* Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1248-50 (2002).

⁵² Carter, *supra* note 3, at 34 (reporting a recent poll indicating that 26 percent of judges believe campaign contributions have at least some impact on judicial decisions).

⁵³ Brief Amicus Curiae of 27 Former Chief Justices and Justices in Support of Petitioners at 6, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22).

⁵⁴ *See* JUDICIAL DISQUALIFICATION PROJECT, *supra* note 10, at 73.

⁵⁵ John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87-88 (2000) (“[S]cholarly opinion is just as unanimous that a campaign contribution should require a judge to recuse as the courts are agreed that recusal is unnecessary.”).

⁵⁶ MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007).

⁵⁷ MISS. CODE OF JUDICIAL CONDUCT CANON 3(E)(2) (2010). A “major donor” is defined as: [A] donor who or which has, in the judge’s most recent election campaign, made a contribution to the judge’s campaign of (a) more than \$2,000 if the judge is a justice of the Supreme Court or judge of the Court of Appeals, or (b) more than \$1,000 if the judge is a judge of a court other than the Supreme Court or the Court of Appeals.

Id. terminology (c). “[C]ontribution[s] to the judge’s campaign” also includes in-kind donations, advertisements, and publications, other than “bona fide news item[s] published by existing news media,” which advocate for a judge or criticize his or her opponent. *Id.* terminology (d) (internal quotation marks omitted).

⁵⁸ ALA. CODE §§ 12-24-1 to 12-24-2 (2006).

⁵⁹ JUDICIAL DISQUALIFICATION PROJECT, *supra* note 10, at 26 n.109; *see also* Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 675, 675 n.28 (2001) (arguing for automatic disqualification in the Alabama statute).

The preamble of the current Model Code states that “[a]n independent, fair and impartial judiciary is indispensable to our system of justice.”⁶⁰ This provision demonstrates the expectation that judges decide cases fairly and without “undue influence.”⁶¹ However, there is no current empirical data on the effectiveness of disqualification motions and recusal decisions.⁶² Furthermore, some critics believe that stricter disqualification rules will encourage litigants to “actively search” for any reason to question a judge’s impartiality—that is, crafty lawyers may exploit loopholes in disqualification rules to intentionally remove a disfavored judge from hearing a case.⁶³ By directing efforts to disqualify judges, stricter recusal standards might “prevent the best judge from hearing [a] case.”⁶⁴ Finally, other judges note that any disqualification based on apparent bias would result in a drastic increase in the number of disqualification motions, creating significant administrative burdens and delays on courts.⁶⁵ Although the debate involving due process and disqualification is unlikely to end anytime soon, these conflicting interests must be addressed in any disqualification rule that attempts to control the growing influence of money in the judiciary.

B. *The Rise of Judicial Elections*

Analyzing the rise of judicial elections is essential to understanding the marked increase in campaign spending and the need for greater reform. In 1788, Alexander Hamilton expressed trepidation about judicial elections because of the potential risk it posed to judicial independence: “The complete independence of the courts of justice is peculiarly essential [under] a limited Constitution.”⁶⁶ To avoid political influence on the judiciary, the Founders decided on an appointment system in which federal judges would serve life-terms.⁶⁷ However, the states, although they initially adopted similar systems, were still preoccupied with the inherent conflict and lack of accountability that existed between judges and England’s royalty.⁶⁸ The states’ distrust of political and business elites, who were seen to be in control of the selection of judges, amplified the negative perception of an appointed judiciary.⁶⁹ Americans were also concerned about the difficulty of the impeachment process and

⁶⁰ MODEL CODE OF JUDICIAL CONDUCT pmbl.

⁶¹ See Julie A. Robinson, *Judicial Independence: The Need for Education About the Role of the Judiciary*, 46 WASHBURN L.J. 535, 540 (2007).

⁶² SAMPLE ET AL., FAIR COURTS, *supra* note 42, at 20.

⁶³ See Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 18-21 (2007) (describing the danger in overvaluing the public’s perception of the judiciary at the expense of actual judicial integrity).

⁶⁴ Meiser, *supra* note 25, at 1828 (emphasis omitted).

⁶⁵ Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in BENCH PRESS: THE COLLISION OF THE COURTS, POLITICS, AND THE MEDIA 21, 41-43 (Keith J. Bybee ed., 2007).

⁶⁶ THE FEDERALIST NO. 78, at 451 (Alexander Hamilton) (Am. Bar Ass’n ed. 2009) (1788).

⁶⁷ *Id.* at 453-55.

⁶⁸ Streb, *supra* note 21, at 8-9.

⁶⁹ Jost, *supra* note 4, at 381.

the belief that the judiciary needed to be more responsive to the peoples' needs, rather than to the desires of the legislative branch.⁷⁰

Pervading all of these reasons was the rise of Jacksonian Democracy,⁷¹ which motivated the common man to question the status quo of appointed officials and advocate for popular elections, which were associated with accountability to the people.⁷² By the 1830s, many states were amending their constitutions to require judicial elections.⁷³ However, by the early twentieth century, the proliferation of political machines led many to believe that "compelling judges to become politicians . . . [was] destroy[ing] the traditional respect held for the bench."⁷⁴

C. *Alternative Selection Methods*

It is worth mentioning that several comprehensive selection reforms emerged in the twentieth century to combat the growing influence of party politics and special interest campaign contributions in judicial elections. Restrictions and outright abolishment of state judicial elections have largely failed over the past twenty years; however, other selection reforms have recently gained considerable traction.⁷⁵ Three of the most popular selection reforms include nonpartisan judicial elections,⁷⁶ publicly financed elections,⁷⁷ and the "merit-based" Missouri Plan.⁷⁸

Many states implemented nonpartisan judicial elections in an effort to rid the judiciary of partisan politics and the distortions it brought to the judiciary.⁷⁹ As of June 2009, six states had given up partisan elections in favor of nonpartisan elections.⁸⁰ However, even this reform failed to stop the politicization of the selection process and inevitably still attracted many of the same corrupting interests.⁸¹ Indeed, recent studies show that nonpartisan state supreme court

⁷⁰ Streb, *supra* note 21, at 9.

⁷¹ "Jacksonian Democracy" is the political philosophy associated with President Andrew Jackson and his followers. During the 1820s to the 1850s, this philosophy promoted basic democratic principles, including expanded political participation by the "common man" and greater government accountability. *See generally* RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES' RIGHTS AND THE NULLIFICATION CRISIS* (1989).

⁷² Streb, *supra* note 21, at 9.

⁷³ *Id.*

⁷⁴ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 46 J. AM. JUDICATURE SOC'Y 55, 66 (1962).

⁷⁵ James Bopp, Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The Sui Generis Recusal Test of Caperton v. Massey*, 60 SYRACUSE L. REV. 305, 307 (2010) ("[B]allot measure[s] have been rejected by the voters in Pennsylvania, Illinois, Nevada, Tennessee, Florida, Oregon, Arkansas, Ohio, Louisiana and South Dakota, in some cases, multiple times.").

⁷⁶ BONNEAU & HALL, *supra* note 2, at 3.

⁷⁷ Jost, *supra* note 4, at 377 (noting that North Carolina and New Mexico currently have public financing for judicial campaigns).

⁷⁸ BONNEAU & HALL, *supra* note 2, at 3.

⁷⁹ Streb, *supra* note 21, at 10 (describing the effort to drive out "machine politics" and its corrupting influence in the states).

⁸⁰ BONNEAU & HALL, *supra* note 2, at 3 (Arkansas, Georgia, Kentucky, Mississippi, and North Carolina). As of April 2009, there were thirteen nonpartisan judicial election states and eight partisan judicial election states. Jost, *supra* note 4, at 376.

⁸¹ Streb, *supra* note 21, at 10.

elections actually increase the “demands on judges to solicit campaign contributions.”⁸²

Public financing is another possible solution to the rise of campaign spending in judicial elections.⁸³ In North Carolina and Wisconsin, this system is funded by a state tax return check-off,⁸⁴ similar to the check-off on federal tax returns.⁸⁵ In the few states that have public financing, contributions to supreme court candidates have been reduced;⁸⁶ however, candidates in North Carolina must still raise a *minimum* of thirty times the filing fee from at least 350 contributors to receive public funding.⁸⁷ Additionally, some candidates may refuse public funding to circumvent campaign spending limits, thus bringing campaign money and influence back into judicial elections.⁸⁸ Even Seth Andersen, executive director of the American Judicature Society⁸⁹ and general supporter of judicial election reform, feels that public financing “may . . . exacerbate the problem because ‘legitimate money’ can’t go to the candidates themselves[,] . . . entic[ing] . . . well-heeled groups to break the system.”⁹⁰ Thus, public financing programs, while attractive in theory, might still fail to eliminate the influence of money in the judiciary.

Finally, in 1940, Missouri became the first state to adopt the “Missouri Plan,” a merit-based appointment system.⁹¹ The most common version of the Missouri Plan involves a nominating commission selecting a judge, who is subsequently appointed by the governor and subject to retention elections.⁹² At least seven states have switched to this plan from partisan elections⁹³ and seventeen states in total have some form of a combined merit-retention election system.⁹⁴ This system, in theory, was supposed to combine “the best features of appointed ([judicial] independence) and elected (accountability) schemes.”⁹⁵ While reducing spending overall, the Missouri Plan has also failed to contain the monetary influence of powerful interest groups who wish to oust a judge during a retention election with targeted funds.⁹⁶ Indeed, well-heeled groups and individuals have greatly influenced the outcome of judicial elections based

⁸² BONNEAU & HALL, *supra* note 2, at 66.

⁸³ Jost, *supra* note 4, at 377.

⁸⁴ BONNEAU & HALL, *supra* note 2, at 125-26.

⁸⁵ *Quick Answers to Public Funding Questions*, FED. ELECTION COMMISSION, http://www.fec.gov/ans/answers_public_funding.shtml (last visited Apr. 18, 2011).

⁸⁶ BONNEAU & HALL, *supra* note 2, at 126.

⁸⁷ *Id.* at 108.

⁸⁸ *Id.* at 106.

⁸⁹ The American Judicature Society is an independent and nonpartisan organization whose stated mission is to “improve the justice system” and “secure and promote an independent and qualified judiciary.” *About AJS*, AM. JUDICATURE SOC’Y, http://www.ajs.org/ajs/ajs_about.asp (last visited Apr. 18, 2011).

⁹⁰ Jost, *supra* note 4, at 378 (suggesting that, even with a public financing scheme, independent expenditure committees will ultimately find other means to financially support judicial candidates).

⁹¹ *Id.* at 383.

⁹² BONNEAU & HALL, *supra* note 2, at 8-9.

⁹³ *Id.* at 3 (Colorado, Florida, Indiana, Iowa, Oklahoma, Tennessee, and Utah).

⁹⁴ Jost, *supra* note 4, at 376.

⁹⁵ BONNEAU & HALL, *supra* note 2, at 8.

⁹⁶ Streb, *supra* note 21, at 11.

on a disagreement with a controversial decision or the judge's personal philosophy.⁹⁷

D. Current State of Campaign Spending in Judicial Elections

Nonpartisan elections, public financing, merit-based selection, and other efforts to protect the judiciary from outside influence have failed to control the one unavoidable reality of any election-based system—campaign contributions. Empirical reviews of campaign spending in judicial elections indicate a nearly 700 percent increase in contributions to state supreme court judicial candidates from 1989-2008,⁹⁸ 65 percent of which came from business interests and lawyers in 2005-2006.⁹⁹ Indeed, between 2000 and 2009, 537 judicial candidates combined to raise more than \$206 million, more than double the \$83 million judicial candidates raised during the 1990s.¹⁰⁰ The American Bar Association, Justice at Stake, the Brennan Center for Justice, and other public interest groups have pushed for stricter recusal standards to counteract what they see as “negative effects on public confidence in the judiciary.”¹⁰¹ Supreme Court Justice Ruth Bader Ginsburg and former Supreme Court Justice Sandra Day O’Connor have also expressed strong concern over the threat of campaign contributions to the integrity of the judicial system.¹⁰²

Although increasing campaign contributions to judicial candidates seems alarming, studies fail to conclusively show that money is directly influencing judicial decision-making.¹⁰³ Many studies, although showing a statistically significant link between campaign contributions and judicial decisions, fail to show a directional component¹⁰⁴ and have yet to conclusively establish, assuming it is even possible to establish, that campaign contributions specifically influence judicial decisions.¹⁰⁵ Erwin Chemerinsky, the dean of University of California, Irvine School of Law and preeminent constitutional scholar, has

⁹⁷ *Id.*

⁹⁸ Jost, *supra* note 4, at 377.

⁹⁹ SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 18 fig.11 (Jesse Rutledge ed., 2007) [hereinafter SAMPLE ET AL. 2006], available at http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf.

¹⁰⁰ SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009, at 6-7 fig.2, 8 (Charles Hall ed., 2010) [hereinafter SAMPLE ET AL. 2000-2009], available at http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83E3.pdf; see also Matthew Mosk, *Study Shows Money Flooding into Campaigns for State Judgeships*, ABC NEWS, Mar. 17, 2010, <http://abcnews.go.com/Blotter/study-shows-money-flooding-campaigns-state-judgeships/story?id=10120048&page=1>.

¹⁰¹ See Jost, *supra* note 4, at 376-77. See generally SAMPLE ET AL. 2000-2009, *supra* note 100.

¹⁰² See Sandra Day O’Connor, Op-Ed., *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25; Mosk, *supra* note 100.

¹⁰³ Damon Cann, *Beyond Accountability and Independence: Judicial Selection and State Court Performance*, 90 JUDICATURE 226, 228 (2007); Madhavi M. McCall & Michael A. McCall, *Campaign Contributions, Judicial Decisions, and the Texas Supreme Court: Assessing the Appearance of Impropriety*, 90 JUDICATURE 214, 216 (2007).

¹⁰⁴ Cann, *supra* note 103, at 228 (describing a Wisconsin Supreme Court study that showed a link between attorney contributions and judges and the probability of winning the case); McCall & McCall, *supra* note 103, at 216.

¹⁰⁵ McCall & McCall, *supra* note 103, at 214.

commented on the difficulty of ascertaining a cause-and-effect relationship between contributions and decisions, noting that “[t]here is no way to prove the extent to which contributions and spending actually affect judicial decision-making.”¹⁰⁶ Some scholars say that it is more likely that many—if not most—contributions are made to judicial candidates for the sole purpose of supporting a like-minded individual.¹⁰⁷

However, one recent study of the partisan election states of Michigan and Texas finds evidence of a “quid pro quo relationship” between contributors and judicial decisions.¹⁰⁸ Considering other studies show that partisan elections generally involve higher levels of spending,¹⁰⁹ this finding is not surprising.

The lack of current empirical certainty in the relationship between contributions and judicial decision-making, though, should not deter potential reform. Irrespective of whether contributions actually influence decisions, supporters of judicial reform emphasize that the more pressing concern involves the public perception of judges—that is “people *think* judges are [being] influenced” by campaign contributions.¹¹⁰ Indeed, public confidence in the judiciary is eroded when people believe a judge is unable or unwilling to divorce himself from personal bias in court proceedings.¹¹¹ As the judicial system loses the public’s trust, it becomes more difficult to provide stability and order.¹¹² This doubt also creates a chilling effect, deterring weaker parties from pursuing legal action, which, in turn, undermines the legal system.¹¹³ Even some of the most stalwart critics of reform agree that the perception of bias created by excessive campaign contributions can pose a threat to due process in some situations.¹¹⁴

III. THE EXTREME CASE OF *CAPERTON V. MASSEY*

The modern reality of excessive campaign contributions came to a head in West Virginia during the 1990s.¹¹⁵ In *Caperton v. A.T. Massey Coal Company*, the United States Supreme Court held, in a 5-4 decision, that Supreme Court of Appeals of West Virginia (“Supreme Court of West Virginia”) Chief Justice Brent Benjamin’s failure to recuse himself after receiving more than \$3 million in campaign support from A.T. Massey Chief Executive Officer Don

¹⁰⁶ *Id.*

¹⁰⁷ See Cann, *supra* note 103, at 228 (citing congressional election studies that disprove the myth that ideological groups are attempting to “buy the votes of legislators”).

¹⁰⁸ Chris W. Bonneau & Damon M. Cann, The Effect of Campaign Contributions on Judicial Decisionmaking 19 (Feb. 4, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337668.

¹⁰⁹ Chris W. Bonneau, *The Dynamics of Campaign Spending in State Supreme Court Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL AND LEGAL STAKES OF JUDICIAL ELECTIONS*, *supra* note 21, at 59, 64.

¹¹⁰ *Id.* at 61; see also Biskupic, *supra* note 1.

¹¹¹ Cravens, *supra* note 63, at 11.

¹¹² *Id.* at 11-12.

¹¹³ *Id.* at 12.

¹¹⁴ Meiser, *supra* note 25, at 1833-34 (discussing the extreme case of *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009)).

¹¹⁵ Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 SYRACUSE L. REV. 229, 230 (2010) (describing *Caperton* as “a poster boy for the bigger problem occasioned by the role of large campaign expenditures in state judicial elections”).

Blankenship constituted an unconstitutional “probability of bias” in violation of the Due Process Clause of the Fourteenth Amendment.¹¹⁶ Justice Kennedy, writing for the majority, described the story behind *Caperton* as an “extraordinary situation” where intervention was required to preserve the due process of law.¹¹⁷ To provide context for the modern movement toward more stringent judicial disqualification standards, this section will (1) examine the unusual facts behind *Caperton* and (2) discuss the “probability of bias” standard created by that decision.

A. *The Underlying Action*

The story began in the early 1990s, when A.T. Massey Coal Company (“A.T. Massey”), one of the nation’s largest coal companies, sought to purchase LTV Steel (“LTV”).¹¹⁸ However, LTV refused to purchase Massey’s “inferior . . . quality” coal, instead acquiring it from the Harman Mine in Virginia, which was owned by the petitioner, Hugh Caperton.¹¹⁹ Wellmore Coal Corporation (“Wellmore”) was the sole purchaser of coal from Harman Mine, and LTV purchased Wellmore’s coal.¹²⁰ In an effort to secure LTV’s business, Massey purchased Wellmore, but LTV again refused to purchase coal from Massey.¹²¹ In response, Massey invoked the *force majeure* clause in Wellmore’s contract with Caperton, ending all coal purchases from Harman Mine.¹²² The trial court found that Massey intentionally “delayed Wellmore’s termination of [the] contract until late in the year, knowing it would be virtually impossible for [Caperton] to find alternate buyers.”¹²³ “Massey simultaneously entered into negotiations . . . to purchase the Harman Mine.”¹²⁴ During negotiations, Massey obtained confidential information that it later used to decrease the value of the Harman Mine.¹²⁵ Massey’s actions left Caperton without a purchaser or mining operations, effectively forcing his company into bankruptcy.¹²⁶

In 1998, Caperton sued Massey in a West Virginia court alleging tortious interference with existing contractual relations, fraudulent misrepresentation, and fraudulent concealment.¹²⁷ In late 2002, a jury returned a verdict of \$50 million for Caperton.¹²⁸ Over the next four years, Massey filed several post-

¹¹⁶ *Caperton*, 129 S. Ct. 2252, 2263-64 (2009).

¹¹⁷ *Id.* at 2265.

¹¹⁸ Petition for a Writ of Certiorari at 3, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 2676568.

¹¹⁹ *Id.* at 3-4.

¹²⁰ *Id.* at 4.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (first alteration in original).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 4-5.

¹²⁷ *Caperton*, 129 S. Ct. at 2257.

¹²⁸ *Id.*

trial motions before eventually appealing the decision to the Supreme Court of West Virginia in 2006.¹²⁹

In 2004, between the verdict and the appeal, Justice Warren McGraw sought re-election to the Supreme Court of West Virginia.¹³⁰ Massey's CEO, Don Blankenship, donated the statutory maximum of \$1,000 to Justice McGraw's opposing candidate, Brent Benjamin.¹³¹ Blankenship also helped to create a 527 group,¹³² "And for the Sake of the Kids," through which he donated nearly \$2.5 million on Benjamin's behalf.¹³³ Blankenship spent another \$500,000 to purchase anti-McGraw television and newspaper advertisements as well as direct mailings to solicit donations for Benjamin.¹³⁴ Blankenship's combined \$3 million in campaign support was more than "the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee,"¹³⁵ the largest individual contribution in any judicial election in 2004,¹³⁶ and the second largest contribution between 2000 and 2009.¹³⁷ Notably, of the top fifty-five contributors to judicial candidates during the period from 2000 to 2009, Don Blankenship was the only individual.¹³⁸ With Blankenship's support, Benjamin won the election with more than 53 percent of the vote.¹³⁹

In October 2005, Caperton requested the disqualification of Benjamin on grounds that Blankenship's exorbitant financial support of Benjamin's campaign created an appearance of impropriety in violation of the Due Process Clause.¹⁴⁰ Benjamin refused, stating that there was "no objective information . . . to show that [he] ha[d] prejudged the matters which comprise[d] th[e] litigation, or that [he would] be anything but fair and impartial."¹⁴¹ In November 2007, the court reversed the \$50 million judgment against Massey in a 3-2 decision in which Justice Benjamin joined the majority.¹⁴²

Caperton subsequently sought rehearing, again seeking the disqualification of Benjamin for the previous campaign support he received and also the dis-

¹²⁹ *Id.* (describing Massey's efforts in attacking the verdict and damages award); *see, e.g.*, *Caperton v. A.T. Massey Coal Co.*, No. 98-C-192, 2005 WL 5679073 (W. Va. Cir. Ct. Mar. 15, 2005).

¹³⁰ *Caperton*, 129 S. Ct. at 2257.

¹³¹ *Id.*

¹³² A "527 group" is a tax-exempt organization named after the section of the U.S. tax code that led to their creation. Generally, 527 groups are unregulated, non-profit organizations that are required by law to advocate for particular issues rather than the direct support or defeat of a candidate in order to maintain their tax-exempt status. *See generally* 26 U.S.C. § 527 (2006).

¹³³ *Caperton*, 129 S. Ct. at 2257.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See* RACHEL WEISS, INST. ON MONEY IN STATE POLITICS, FRINGE TACTICS: SPECIAL INTEREST GROUPS TARGET JUDICIAL RACES 5 (2005), available at <http://www.policyarchive.org/handle/10207/bitstreams/6027.pdf>.

¹³⁷ *SAMPLE ET AL.* 2000-2009, *supra* note 100, at 10-11 fig.4.

¹³⁸ *Id.* at 9.

¹³⁹ *Caperton*, 129 S. Ct. at 2257.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2258.

¹⁴² *Id.*

qualification of Chief Justice Maynard for an unrelated matter.¹⁴³ Maynard recused himself, but Benjamin declined to follow suit,¹⁴⁴ despite strong disapproval.¹⁴⁵ In his recusal memorandum, Justice Starcher, stated that “Blankenship’s bestowal of his personal wealth, political tactics, and ‘friendship’ have created a cancer in the affairs of this Court.”¹⁴⁶ The court accepted the rehearing, and then Chief Justice Benjamin rejected yet another motion for disqualification.¹⁴⁷ In April 2008, the court again voted 3-2, reversing the trial court’s ruling amid strongly worded dissents.¹⁴⁸ Benjamin’s concurring opinion contained a 44-page explanation of his refusal to recuse himself in which he rejected the “appearance of impropriety” standard as a basis for disqualification.¹⁴⁹

The United States Supreme Court granted certiorari¹⁵⁰ and, in June 2009, reversed by a 5-4 majority. It vacated and remanded the Supreme Court of West Virginia’s decision, which had reversed Caperton’s \$50 million judgment.¹⁵¹ In September 2009, the Supreme Court of West Virginia re-heard the case.¹⁵² Circuit Judge James Holiday replaced Justice Benjamin in accordance with the United States Supreme Court’s decision that Benjamin should have been disqualified in the initial hearing of Caperton before the Supreme Court of West Virginia.¹⁵³ On November 12, 2009, the West Virginia Supreme Court once again decided in favor of Massey.¹⁵⁴ Finally, on March 11, 2010, the Supreme Court of West Virginia rejected requests by Caperton to reconsider its decision.¹⁵⁵

B. “Probability of Bias” Standard Articulated in Caperton

The United States Supreme Court held that Blankenship’s substantial campaign support while Caperton’s rehearing was pending violated the Due Process Clause of the Fourteenth Amendment because it created a serious risk that Justice Benjamin would not be an impartial adjudicator in that case.¹⁵⁶ Recognizing that not every campaign contribution to a judge creates a “probability of

¹⁴³ A photograph revealed Chief Justice Maynard dining with Blankenship in the French Riviera. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (internal quotation marks omitted).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2258-59 (noting “genuine due process implications” due to Justice Benjamin’s refusal to recuse himself).

¹⁴⁹ *Id.* at 2258 (alteration in original) (quoting Joint Appendix at 336a-37a, *Caperton*, 129 S. Ct. 2252 (No. 08-22)).

¹⁵⁰ *Id.* at 2259.

¹⁵¹ *Id.* at 2263-64.

¹⁵² *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 333 (W. Va. 2009).

¹⁵³ *Id.* at 333 n.26.

¹⁵⁴ *Id.* at 357.

¹⁵⁵ John O’Brien, *W. Va. SC Won’t Rehear Controversial \$50M Case*, LEGALNEWSLINE.COM (March 11, 2010, 1:00 PM), <http://www.legalnewsline.com/news/226057-w.va.-sc-wont-rehear-controversial-50m-case>. Upon receiving the final order, Hugh Caperton caustically said, “I guess Don and Spike and Robin and Brent won.” *Id.* (internal quotation marks omitted).

¹⁵⁶ *Caperton*, 129 S. Ct. at 2263-64.

bias” requiring recusal, the Court noted the high likelihood of “actual bias” that occurs when an individual with a personal relationship to a case disproportionately supports a judge’s campaign.¹⁵⁷

Although the Court had not previously found due process to require recusal in situations involving substantial campaign support, the *Caperton* decision is consistent with the common-law rule and modern precedent that applied the Due Process Clause in cases involving judicial disqualification.¹⁵⁸ As early as 1927, the Supreme Court had held that the Due Process Clause incorporated the common law rule that requires recusal when a judge has a “direct, personal, substantial pecuniary interest” in a case before him or her.¹⁵⁹ This rule not only protects against direct financial interest in the outcome of a case, but also requires recusal when “the interest [is] less than what would have been considered personal or direct at common law.”¹⁶⁰ Indeed, the Court’s concern shifted from merely direct pecuniary interests to avoiding *any* interests that might tempt judges to disregard neutrality in hearing cases¹⁶¹ or create an unconstitutional potential for bias.¹⁶²

The Court held that a party does not need to show actual bias to violate the Due Process Clause. In numerous opinions, Benjamin insisted that *Caperton* merely provided subjective evidence of bias, claiming that there was no “actual conduct . . . that could be [viewed] as ‘improper’” by a sitting judge.¹⁶³ However, the Court intentionally passed on answering the question of “actual bias” in *Caperton*, instead emphasizing the objective principles embodied in the Due Process Clause with respect to recusal determination.¹⁶⁴ It avoided declaring that campaign contributions actually influenced Benjamin’s decision, by relying on a more objective standard: whether the contributions “‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’”¹⁶⁵ The Court found that Blankenship’s role in Justice Benjamin’s reelection failed the objective test required to pass constitutional muster.¹⁶⁶ The majority took pains to emphasize the extraordinary nature of the *Caperton* situation,¹⁶⁷ underscoring the unusual timing of the campaign contributions in relation to the justice’s election and the pendency of the case.¹⁶⁸

¹⁵⁷ *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

¹⁵⁸ *See id.* at 2259-63 (discussing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Ward v. Monroeville*, 409 U.S. 57 (1972); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); and *Tumey*, 273 U.S. 510).

¹⁵⁹ *Tumey*, 273 U.S. at 523.

¹⁶⁰ *Caperton*, 129 S. Ct. at 2259-60.

¹⁶¹ *Id.* at 2260.

¹⁶² *Id.* at 2262.

¹⁶³ *Id.* (internal quotation marks omitted).

¹⁶⁴ *Id.* at 2263 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971); and *Tumey*, 273 U.S. at 532).

¹⁶⁵ *Id.* at 2264 (quoting *Tumey*, 273 U.S. at 532).

¹⁶⁶ *Id.* at 2264-65.

¹⁶⁷ *Id.* at 2265.

¹⁶⁸ *Id.* at 2264-65.

Unfortunately, the “probability of bias” standard articulated in *Caperton* does not constitute a bright-line rule for judicial disqualification based on campaign contributions. Rather, the Court “set a floor” through the promulgation of several flexible factors, which in turn assist in determining whether a due process violation has occurred.¹⁶⁹ The Court articulated three guiding factors in determining whether a contributor’s support is sufficient to create a probability of bias that requires recusal: (1) “the contribution’s relative size in comparison to the total amount of money contributed to the campaign,” (2) “the total amount spent in the election,” and (3) “the apparent effect such contribution had on the outcome of the election.”¹⁷⁰ Additionally, the Conference of Chief Justices recommended several balancing factors in its amicus curiae brief—including the nature of the supporter’s prior political activities, the nature of the supporter’s pre-existing relationship with the judge, and the relationship between the supporter and the litigant—for evaluating due process concerns caused by excessive contributions to judicial candidates.¹⁷¹

C. *The Dissenters’ Unrealized Fears in Caperton*

Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito), wrote the dissenting opinion in *Caperton*.¹⁷² The dissenters rejected the *probability of bias* standard on the grounds that it is too difficult to define.¹⁷³ Using a unique dissent format, Chief Justice Roberts posed forty questions, comprised of numerous sub-parts, testing the practical application of the majority’s use of the Due Process Clause to mandate disqualification when a judge has received substantial and disproportionate campaign contributions from a party appearing before that judge in a case.¹⁷⁴ The dissent appeared “to have a dramatically different view of human nature” and the potential risk that a judge could be influenced by substantial campaign contributions.¹⁷⁵ Many of Chief Justice Roberts’s questions emphasized the ambiguity involved in creating a threshold amount that triggered a probability of bias and the mechanics involved in making such a rule operational.¹⁷⁶ However, recent attempts at creating a disqualification rule based on contributions show that these questions can be adequately addressed.

For the first time, the United States Supreme Court found due process to require recusal based on election campaign support.¹⁷⁷ Understandably, Justice Roberts expressed trepidation about the potential for a flood of certiorari peti-

¹⁶⁹ James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 296 (2010).

¹⁷⁰ *Caperton*, 129 S. Ct. at 2264.

¹⁷¹ Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 24-29, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45973.

¹⁷² See *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

¹⁷³ *Id.*

¹⁷⁴ See *id.* at 2269-72.

¹⁷⁵ 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. L. REV. 1, 27 (2009).

¹⁷⁶ See *Caperton*, 129 S. Ct. at 2269-72 (Roberts, C.J., dissenting).

¹⁷⁷ *Id.* at 2263-64 (majority opinion)

tions alleging failure to recuse in violation of due process.¹⁷⁸ However, as of April 2010, “only twenty-six cases had conducted an in-depth analysis of *Caperton*, while thirty-three” had briefly mentioned the decision.¹⁷⁹ As Justice Kennedy noted, because states are permitted to have stricter recusal standards than due process requires, states will be able to resolve most recusal disputes without resorting to application of the Due Process Clause of the U.S. Constitution.¹⁸⁰ Therefore, states should be encouraged to adopt recusal standards that are appropriate for their respective election and judicial systems.

IV. CRITIQUE OF RECENT STATE PROPOSALS FOR STRICTER DISQUALIFICATION RULES BASED ON CAMPAIGN CONTRIBUTIONS

Since the Supreme Court’s *Caperton* decision in early 2009, many states have considered revising their judicial codes to include language that reflects Model Code 2.11(A)(4).¹⁸¹ Rule 2.11(A)(4) is the controversial provision requiring recusal when a 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 contributed an amount of money (to be determined by the state) to his or her campaign.¹⁸² States should take into account the factors articulated by Justice Kennedy in *Caperton*, and the additional considerations listed by the Conference of Chief Justices in its amicus brief, as they debate and propose new legislation and judicial conduct codes that address potential due process violations caused by disproportionate campaign support for judges. These factors—the contribution’s relative size in comparison to the total amount of money contributed to the judge’s campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election—help to ensure the creation of a disqualification rule that takes into account the complexity of judicial elections.¹⁸³ It is against these factors and other practical considerations that recent state proposals are critiqued throughout this section.

At least eleven states are considering adoption of Rule 2.11(A) or a variation thereof in the wake of the *Caperton* decision.¹⁸⁴ Eight of these states have proposed plans placing a monetary cap on contributions to a judicial candidate that would trigger mandatory disqualification.¹⁸⁵ Of those, five states—Cali-

¹⁷⁸ See *id.* at 2267 (Robert, C.J., dissenting).

¹⁷⁹ Catherine Stone & Wendy Martinez, *Caperton v. A.T. Massey Coal Co.: The Texas Implications*, 41 ST. MARY’S L.J. 621, 634 (2010).

¹⁸⁰ *Caperton*, 129 S. Ct. at 2267 (“Judicial integrity is, in consequence, a state interest of the highest order.”) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)).

¹⁸¹ See generally John Gibeaut, *Caperton Capers: Court’s Recusal Ruling Sparks States to Mull Judicial Contribution Laws*, A.B.A. J., Aug. 2009, at 21.

¹⁸² MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007).

¹⁸³ See *supra* notes 169-70 and accompanying text.

¹⁸⁴ *Recusal Reform in the States After Caperton v. Massey*, *supra* note 7 (outlining recent proposals, initiatives, and hearings in California, Florida, Georgia, Massachusetts, Michigan, Montana, North Carolina, Nevada, New York, Texas, Washington, and Wisconsin regarding modifications to their respective model judicial codes).

¹⁸⁵ *Id.* (California, Montana, Nevada, Texas, Washington, and two proposals in Wisconsin); *Special Edition: Judicial Recusal Legislation*, *supra* note 11, at 5, 7 (Louisiana).

ifornia, Montana, Texas, Wisconsin,¹⁸⁶ New York,¹⁸⁷ and Louisiana¹⁸⁸—have considered contribution caps at or below \$1,500, and three states—Nevada, Washington, and Wisconsin—have contemplated proposals that seek significantly higher thresholds for disqualification.¹⁸⁹ California has a relatively low threshold, while Nevada has a relatively high threshold. Although the details of each proposal are unique to the respective state, a categorical analysis reveals potential advantages and concerns that are common across the various approaches.

A. California's Low Disqualification Threshold Proposal: A Strict Application of Caperton

California's proposal emphasizes a strict and transparent approach to judicial disqualification based on campaign contributions,¹⁹⁰ reaching beyond the scope of the due process requirements discussed in *Caperton*.¹⁹¹ The important question is whether California's proposal effectively balances judicial independence with the preventative factors articulated in *Caperton*.

In August 2009, the Judicial Council of California, the policymaking body of the California court system, concluded that mandatory disqualification and disclosure would adequately address the concerns involving the effect of campaign contributions on actual or perceived judicial impartiality.¹⁹² The Council proposed that trial and appellate court judges¹⁹³ would be disqualified if they received at least \$1,500 in campaign contributions from a party, counsel, or other interested party in a hearing before the judge in the two years following receipt of the contribution.¹⁹⁴ Furthermore, the Council—recognizing that inflation and increased campaign spending could make the \$1,500 limit ineffec-

¹⁸⁶ The League of Women voters plan would have required recusal when a party to a case contributed \$1,000. *In re* Creation of Rules for Recusal When a Party or Lawyer in a Case Made Contribution Effecting a Judicial Campaign at 3, *In re* Amendment of the Code of Judicial Conduct's Rules on Recusal (Wis. July 7, 2010) (08-16), available at <http://www.wicourts.gov/supreme/docs/0816petition.pdf>. The Wisconsin Supreme Court denied the petition. *In re* Amendment of the Code of Judicial Conduct's Rules on Recusal, *supra*, at 2, available at <http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51874>.

¹⁸⁷ The proposed bill would require parties and their lawyers to disclose to opposing counsel campaign contributions in excess of \$500 for the past five years to the campaign of the presiding judge. *Recusal Reform in the States After Caperton v. Massey*, *supra* note 7. If other side has made no contribution themselves, the judge must recuse upon timely application by the non-contributing party. *Id.*

¹⁸⁸ The proposed—but unadopted—bill would have required automatic recusal if judge knew or learned by a timely motion that a party, party's counsel or law firm, or any person within the third degree of relationship to them had made *any* contribution to his or her campaign in the past five years. H.R. 769, 2008 Leg., 34th Session (La. 2008).

¹⁸⁹ See *Recusal Reform in the States After Caperton v. Massey*, *supra* note 7.

¹⁹⁰ See generally CAL. CIV. PROC. CODE § 170.1(a)(9) (West 2006); see also COMM'N FOR IMPARTIAL COURTS, JUDICIAL COUNCIL OF CAL., FINAL REPORT 33 (2009), available at <http://www.courts.ca.gov/xbcr/cc/cicfinalreport.pdf>.

¹⁹¹ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009).

¹⁹² COMM'N FOR IMPARTIAL COURTS, *supra* note 190, at 33.

¹⁹³ See *id.* at 43 (discussing the impracticability of also requiring Supreme Court justices to adhere to the same \$1,500 limit).

¹⁹⁴ *Id.* at 35.

tive in the future—recommended a regular review and adjustment of the threshold amount.¹⁹⁵ The Council also recommended a higher threshold of \$25,900 for Supreme Court justices due to the large amounts of campaign spending at that level.¹⁹⁶

Additionally, in an attempt to prevent unscrupulous parties or lawyers that may try to “game” the proposed system, the Council decided on two protective measures: (1) a provision allowing the noncontributing party to waive mandatory disqualification, and (2) a requirement that disqualification still be mandatory if a judge knows or reasonably should know that multiple individual contributions, in the aggregate, reach the \$1,500 threshold and are all affiliated with the same entity.¹⁹⁷ The waiver provision would typically apply when a party tries to intentionally disqualify a judge by contributing to the judge’s election campaign. This situation might occur if a party feels that the judge will be less favorable to that party’s case. If the noncontributing party suspects foul play, the party can invoke the waiver to ensure the judge hears its case.

In August 2010, the California State Legislature passed, and Governor Arnold Schwarzenegger subsequently signed, Assembly Bill 2487, which closely follows the Council’s proposed disqualification language.¹⁹⁸ California Code of Civil Procedure section 170.1(9), the enacted law, requires a judge to disqualify himself or herself from any matter in which a lawyer or party contributed more than \$1,500 to the judge’s upcoming election campaign or last election, if the last election took place within the previous six years.¹⁹⁹ CCP § 170.1(9) also provides for the possibility of a waiver from the non-contributing party and mandatory disclosure of all contributions, regardless of size, from any party or lawyer appearing before the judge.²⁰⁰ Notably, unlike the Council’s proposal, the disqualification law only applies to superior court (trial) judges, extends the disqualification time period from two to six years, and fails to include a provision mandating disqualification when aggregate individual contributions reach the \$1,500 threshold through a single entity.²⁰¹ Because section 170.1(9) was largely based on the Council’s recommendations, and—as of April 2011—there does not appear to be any pending litigation or press surrounding the recently enacted law, this section will primarily focus on the Council’s proposal.

The Judicial Council first considered and then dismissed the idea of imposing strict contribution limits that parties could actually contribute.²⁰² It instead focused on the *effect* that contributions could have or appear to have on

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 44 (noting the Commission’s recommendation that the “disqualification threshold amount for Supreme Court justices should be the same as the contribution limit amount applicable to candidates for Governor.”). At the time the report was written, the individual contribution limit for the governor was \$25,900. *California Contribution Limits*, CAL. SEC. RETARY ST. (Oct. 2008), <http://www.sos.ca.gov/prd/FACTS.pdf><http://www.sos.ca.gov/prd/FACTS.pdf>

¹⁹⁷ COMM’N FOR IMPARTIAL COURTS, *supra* note 190, at 41.

¹⁹⁸ Assemb. 2487, 2009-10 Leg., Reg. Sess. (Cal. 2010).

¹⁹⁹ CAL. CIV. PROC. CODE § 170.1(a)(9) (West 2006).

²⁰⁰ *See id.* § 170.1(a)(9)(C)-(D).

²⁰¹ *See id.* § 170.1(a)(9).

²⁰² *Id.* at 33.

judicial decisions.²⁰³ The Council decided that a fixed threshold amount, rather than a percentage of total contributions, would best provide an objective standard for disqualification.²⁰⁴ They arrived at this figure by equating “campaign support” with “financial interest,” a classification that is currently subject to a \$1,500 statutory limit under section 170.1.²⁰⁵ The Council also stressed that this new provision would merely supplement the current requirements outlined in section 170.1, which may require disqualification in circumstances involving less than \$1,500.²⁰⁶ The Council gave deference to this previous legislative determination, explaining that California lawmakers already found \$1,500 to be “meaningful with respect to a judge’s ability to be impartial, or at least to give the appearance of impartiality.”²⁰⁷ Additionally, it consulted a database consisting of six years of campaign disclosure information, which showed a “relatively low number” of contributions above \$1,500.²⁰⁸ This data—along with statutory definition of a “de minimis economic interest in a party” outlined in section 170.1²⁰⁹—supported the inference that \$1,500 would not inhibit potential contributors nor impede the ability of judicial candidates to fundraise.²¹⁰

1. *Notable Omissions and Assumptions of the California Proposal*

The Council glazed over several important considerations regarding judicial disqualification based on campaign contributions. First, the Council did not articulate sufficient reasons for its choice not to use a percentage of the candidate’s total campaign support as the threshold requirement.²¹¹ Second, it decided not to recommend a threshold amount of contributions made to an *independent expenditure committee* that would also trigger automatic disqualification.²¹² Finally, it failed to address concerns of judicial independence, a traditional challenge to reform.

The Council quickly dismissed the alternative method of percentage-based recusal based on aggregate campaign contributions to judicial candidates. With respect to its rationale for the \$1,500 threshold amount, the Council merely stated that it “determined that a uniform, fixed amount would be the most efficient and effective solution.”²¹³ The Council qualified its preference for a set figure for disqualification by pointing to a previous legislative determination that defined the amount at which a judge has a “financial interest”; however, it

²⁰³ *Id.* at 33; see generally CAL. FAIR POLITICAL PRACTICES COMM’N, INDEPENDENT EXPENDITURES: THE GIANT GORILLA IN CAMPAIGN FINANCE (2008), available at <http://www.fppc.ca.gov/ie/IEReport2.pdf> (reporting on data that shows the ineffectiveness of contribution caps on limiting overall spending).

²⁰⁴ COMM’N FOR IMPARTIAL COURTS, *supra* note 190, at 40.

²⁰⁵ CAL. CIV. PROC. CODE § 170.5(b) (West 2006).

²⁰⁶ See *id.* § 170.1(a)(6)(A).

²⁰⁷ COMM’N FOR IMPARTIAL COURTS, *supra* note 190, at 40.

²⁰⁸ *Id.* at 40 n.35.

²⁰⁹ JUDICIAL DISQUALIFICATION PROJECT, *supra* note 10, at 26.

²¹⁰ *Id.*

²¹¹ COMM’N FOR IMPARTIAL COURTS, *supra* note 190, at 40.

²¹² Timm Herdt, *Herdt: When Is Justice for Sale? Court Ruling Comes as California Ponders Its Rules*, VENTURA COUNTY STAR (June 10, 2009, 12:01 AM), <http://www.vcstar.com/news/2009/jun/10/when-is-justice-for-sale>.

²¹³ COMM’N FOR IMPARTIAL COURTS, *supra* note 190, at 40.

immediately dismissed the relative benefits of using a percentage-based requirement.²¹⁴ Notably, a percentage-based requirement would better account for substantial contributions made in less expensive judicial races.²¹⁵

Additionally, the evidence relied upon by the Council to determine the \$1,500 threshold utilized flawed empirical data that failed to reflect the variance in contribution amounts based on county population.²¹⁶ Notably, the contribution data was taken solely from judicial races in some of the most-populous counties in the state: Alameda, Orange, Los Angeles, and Sacramento.²¹⁷ The study cited by the Council showed a relatively low number of contributions exceeding \$1,500 in the aforementioned counties.²¹⁸ However, a smaller donation could drastically impact the outcome of a less expensive judicial race, such that might occur in a county with a smaller population.

The Council felt it more appropriate to err on the side of “statewide uniformity”²¹⁹ by tying the current statutory requirement for disqualification based on financial interest²²⁰ to the proposed threshold amount. However, the set threshold amount fails to take into account the possibility that a single party could greatly influence the outcome of a less-expensive judicial race with a contribution just slightly below the \$1,500 limit. The Council considers \$1,500 the point at which a probability of bias is created in a more expensive judicial race; however, less expensive judicial races may require a much smaller figure to avoid a probability of bias. By utilizing a percentage-based model—or at least lowering the disqualification threshold for less populous counties, where there are generally fewer expensive judicial races—California might be able to avoid this potential issue. Fortunately, the Council, recognizing the need for an escape hatch if a contributor(s) attempted to force disqualification of a judge, recommended the option of a waiver of mandatory disqualification by the non-contributing party.²²¹ Another alternative would have been to trigger mandatory review of challenged disqualifications in less-populous counties.²²²

Additionally, the Council failed to adequately reconcile stricter recusal standards with the rise of constitutionally protected independent expenditures.²²³ Recent studies have shown a significant increase in the amount of independent expenditures in judicial elections in the United States, albeit

²¹⁴ *Id.*

²¹⁵ See discussion *infra* Part IV.B.1 (noting the advantages of Nevada’s percentage-based requirement).

²¹⁶ COMM’N FOR IMPARTIAL COURTS, *supra* note 190, at 40 n.35.

²¹⁷ *Id.*; see also Geographic Comparison Table of Race and Ethnicity in California Counties, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&mt_name=DEC_2000_PL_U_GCTPL_ST2&format=st-2&_box_head_nbr=GCT-PL&ds_name=DEC_2000_PL_U&geo_id=04000US06 (last visited Apr. 18, 2011) (showing total populations of California counties).

²¹⁸ COMM’N FOR IMPARTIAL COURTS, *supra* note 190, at 40 n.35.

²¹⁹ *Id.* attachment C, at 69 (responding to a public comment concerning the threshold amounts based on county population).

²²⁰ CAL. CIV. PROC. CODE § 170.5(b) (2009).

²²¹ COMM’N FOR IMPARTIAL COURTS, *supra* note 190, at 41; This provision was also included in the enacted law. CAL. CIV. PROC. CODE § 170.1(a)(9)(D) (West 2006)

²²² See, e.g., *infra* Part IV.B.1 (discussing Nevada’s use of a percentage-based trigger).

²²³ See *Buckley v. Valeo*, 424 U.S. 1, 45-51 (1976).

mostly at the state supreme court level.²²⁴ The \$1,500 limit proposed by the Council would not require recusal if a contributor made independent expenditures in support of a judicial candidate.²²⁵

Admittedly, there is a valid concern that stricter recusal standards for independent expenditures might “penalize campaign activity,” thereby limiting constitutionally protected political speech.²²⁶ In *Citizens United v. Federal Election Commission*, a 2010 case in which the United States Supreme Court held that corporations and labor unions could make independent expenditures in support of or against political candidates, Justice Kennedy, writing for the majority, emphasized that *Caperton* did not involve a restriction on political speech.²²⁷ Indeed, a restraint on government in the form of mandatory judicial disqualification does not necessarily equate to a free speech restriction on a private actor in the form of limits on independent expenditures. The Council’s failure to confront independent expenditures head-on sidesteps the most troubling aspect of *Caperton*—Don Blankenship contributed nearly \$2.5 million to Justice Benjamin’s campaign through “And for the Sake of the Kids,” an independent expenditure committee.²²⁸ Justice Kennedy explicitly agreed that these independent expenditures left Benjamin “feel[ing] a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.”²²⁹ The Council cited a study concluding that contribution caps encourage spending by independent expenditure groups²³⁰ and yet failed to adequately address a predictable rise in that same sort of spending caused by individuals and entities attempting to avoid the Council’s proposed mandatory disqualification threshold.

Finally, the Council failed to address traditional concerns of judicial independence. Requiring recusal based on specified contributions levels tests the delicate “balance between allowing judges their due independence, and limiting that freedom in order to ensure impartiality.”²³¹ Some critics of recusal reform believe that “[i]mpartiality is fundamentally an unapproachable question . . . that . . . only the individual judge can answer”²³² and advocate a “restrained due process” right to address unique recusal situations.²³³ They believe that recusal primarily consists of a delicate balance between fairness, protecting judicial independence and discretion, and limiting that freedom in only the most extreme of situations to ensure impartiality.²³⁴ The critics stress the difficulty of keeping this balance at equilibrium merely through a common law

²²⁴ See generally SAMPLE ET AL. 2000-2009, *supra* note 100.

²²⁵ COMM’N FOR IMPARTIAL COURTS, *supra* note 190, at 43 (noting that such an expenditure “could possibly be considered an indirect contribution or could trigger [permissive] disqualification . . . under the Code of Judicial Ethics”).

²²⁶ Bopp & Woudenberg, *supra* note 75, at 333 (discussing the potential due process ramifications created by strict recusal standards); Richard M. Esenberg, *If You Speak up, Must You Stand Down: Caperton and Its Limits*, 45 WAKE FOREST L. REV. 1287, 1325 (2010).

²²⁷ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 910 (2010).

²²⁸ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

²²⁹ *Id.* at 2262.

²³⁰ COMM’N FOR IMPARTIAL COURTS, *supra* note 190, at 33 (citing CAL. FAIR POLITICAL PRACTICES COMM’N., *supra* note 200).

²³¹ Meiser, *supra* note 25, at 1826.

²³² *Id.* at 1822-23.

²³³ *Id.* at 1834.

²³⁴ *Id.* at 1826-27.

standard or bright-line rule.²³⁵ Moreover, many judges aspire to “ensure[] the greatest possible public confidence in their independence, impartiality, integrity and competence.”²³⁶

The Council, while thorough in its report, failed to give an estimate of the number of judges that would be forced to recuse themselves due to the \$1,500 limit. Forced recusal, at its heart, is an affront to the independence that has been traditionally afforded to judges to make their own decisions as to impartiality. The Council’s concerns seemed to be directed toward protecting the First Amendment rights of contributors rather than the risk posed to judicial independence.

B. Nevada’s High Disqualification Threshold Proposal: A Balanced Approach to Caperton

Nevada’s failed approach²³⁷ to disqualification reform adequately addressed the growing concern over rising contributions and independent expenditures; however, a few questions remain as to the ramifications of its implementation. This section will evaluate the Nevada proposal: first, by briefly describing the details of the amendment; second, by critiquing the mandatory threshold amount; third, by analyzing the percentage-based trigger for recusal; fourth, by identifying the need for a multiple election exception; finally, by pointing out the lack of supporting empirical data.

In response to the *Caperton* decision, the Commission on the Amendment to the Nevada Code of Judicial Conduct (the Commission) proposed to amend the Nevada Code of Judicial Conduct Rule 2.11(A).²³⁸ The proposed amendment utilized a two-tiered approach to disqualification: (1) mandating recusal based on high-figure campaign contributions; and (2) creating a separate, percentage-based threshold that triggers additional analysis of the judge’s potential impartiality.²³⁹ The eighteen-member commission represented a “broad philosophical spectrum”²⁴⁰ consisting of judges, professors, and other lawyers in Nevada.²⁴¹ Surprisingly, this diverse group of individuals unanimously approved the Commission’s recommendation to adopt the mandatory disqualification language.²⁴² However, on December 17, 2009, the Nevada Supreme Court voted to amend its Code of Judicial Conduct without the proposed disqualification language.²⁴³ Despite unanimous approval by the Commission,

²³⁵ *Id.* at 1822-24.

²³⁶ *Id.* at 1824-25 (quoting the preamble of the Model Code of Judicial Conduct and several judges who are confident in their ability to uphold those ideals).

²³⁷ See generally Supplement to Final Report Dated April 1, 2009, *In re* Amendment to the Nev. Code of Judicial Conduct, ADKT No. 427 (Nev. Aug. 12, 2009) [hereinafter Nevada Proposed Code].

²³⁸ *Id.* at 1.

²³⁹ *Id.* at 2-4.

²⁴⁰ Jane Ann Morrison, *Judge’s Duty to Sit Still Knows No Contribution Limits*, LAS VEGAS REV. J., Jan. 11, 2010, at 1B.

²⁴¹ Nevada Judicial Conduct Code Commission Members, NEV. JUDICIARY, www.nevadajudiciary.us/index.php/njcccommissionmembers (last updated Feb. 27, 2009).

²⁴² Morrison, *supra* note 237.

²⁴³ Order, *In re* Amendment of the Nevada Code of Judicial Conduct, ADKT 427, at 22 (Nev. Dec. 17, 2009) [hereinafter Nevada Adopted Code].

Nevada Supreme Court Justice James Hardesty likened the proposed recommendation to “killing a fly with a sledgehammer.”²⁴⁴ Under 2.11(A)(4), the section where language pertaining to campaign contributions is located under the Nevada Code of Judicial Conduct, the court inserted the word “[Reserved].”²⁴⁵ Although Justice Hardesty noted that the court’s lack of action did not preclude future monitoring of contributions to judicial candidates,²⁴⁶ it is unclear whether the court intends to add disqualification language in the future.

The proposed—but unadopted—amendment required the recusal of a judge if a “party, or a party’s affiliated entities or constituents, or a party’s lawyer or the law firm of a party’s lawyer” had contributed \$50,000 in “financial or electoral campaign support” within the previous six years.²⁴⁷ This disqualification was based on the presumption that \$50,000 in financial support over a period of six years would conclusively give reason to question a judge’s impartiality to hear a case involving that individual or related entity.²⁴⁸ Additionally, the amendment provided that a judge would be subject to disqualification if he or she received “aggregate campaign support exceeding [five percent] of the judge’s total financial or electoral backing within the previous [six] years.”²⁴⁹ But, rather than immediately disqualifying the judge, this provision would merely subject the controversy in question to the eight factors listed in Rule 2.11(A)(4)(E) to determine whether it would be reasonable to question the judge’s impartiality.²⁵⁰

1. *A Missed Opportunity for Reform*

The Commission’s proposed rule addressed many of the technical issues that arise in implementing a disqualification standard based on campaign contributions. First, the proposal avoids the controversial approach of tying disqualification to the statutory contribution limit. By creating a higher threshold over a span of years, the proposal would allow contributors to max out their contributions to a judicial candidate over an election cycle without fear of recusal if the contributor ever appears before the judge in a case. Second, the authors chose the phrase “campaign support” in an effort to prevent “bundling,” a controversial practice that involves funneling campaign contributions and other financial support through individuals in an organization or community.²⁵¹ Under the language of “campaign support,” bundlers, and those contributing to bundlers, would likely be more hesitant to donate to a particular judge if they feared disqualification. This would seemingly prevent situations where an unscrupulous bundler requests preferential treatment from the judge in

²⁴⁴ Morrison, *supra* note 237.

²⁴⁵ Nevada Adopted Code, *supra* note 240, at 22.

²⁴⁶ Morrison, *supra* note 237 (“Just because the court didn’t act on it, doesn’t mean it doesn’t have to be monitored.”).

²⁴⁷ Nevada Proposed Code, *supra* note 234, at 2.

²⁴⁸ *Id.* at 4.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 3.

²⁵¹ See David Kihara, *Panel Urges Trigger for Disqualification*, LAS VEGAS REV. J., July 21, 2009, at 2B.

exchange for bundling large sums of individual contributions and other campaign support.²⁵²

The percentage-based trigger created by the proposed language in Rule 2.11(A)(4)(A) presents a unique method for determining whether campaign support has cast a reasonable cloud of impropriety. Rather than mandating recusal at exactly 5 percent, the rule triggers an analysis under subsection E of Rule 2.11, which reflects the factors articulated by the Conference of Chief Justices in its amicus curiae brief in *Caperton*.²⁵³ Furthermore, by using a percentage-based trigger, the rule takes into account less-expensive judicial races where mandatory disqualification for accepting \$50,000 in campaign support over a period of six years would rarely ever have any effect. However, by applying the eight factors in subsection E to determine disqualification under these circumstances, the court runs the risk of a lengthy mini-trial to determine whether there is a reasonable question as to the judge's impartiality.

Another potential issue with the amendment is that it ignores judicial candidates that have to run for multiple elections within six years. In Nevada, Supreme Court justices²⁵⁴ and District Court judges²⁵⁵ are elected for six-year terms. Therefore, judges that are appointed to a position on the higher court before the end of their current term would be subject to two elections within the proposed six-year period. For example, Nevada Supreme Court Justice Michael Douglas was first appointed to the Court in March 2004 from the Eighth Judicial District Court after winning election for Chief District Judge in October 2003.²⁵⁶ He has since run in two elections to retain his seat on the Nevada Supreme Court.²⁵⁷ Due to this unique situation, Chief Justice Douglas would have received more than the stated \$50,000 maximum from a number of donors. This situation could be easily remedied by creating an exception that utilizes a higher threshold figure for multiple elections within the same six-year cycle.

Finally, the Commission failed to offer any empirical justification for either the \$50,000 figure or the 5 percent trigger. Responding to a question regarding the lack of empirical support for the chosen figures, Professor Jeffrey Stempel, a Commission member and law professor at the University of Nevada Las Vegas, explained that the Commission chose the figures based on an anecdotal review of studies and court cases on judicial disqualification.²⁵⁸ Professor Stempel further suggested that a "trial and error" approach through court

²⁵² See, e.g., Adrienne Packer, *Legal Ethics Expert Raises Concerns About Justice*, LAS VEGAS REV. J., May 23, 2009, at 1B (discussing an alleged quid pro quo offer by a local attorney to Nevada Supreme Court Justice Pickering that would have provided her \$200,000 in campaign contributions in exchange for recusal).

²⁵³ Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party, *supra* note 171, at 24-29.

²⁵⁴ NEV. CONST. art. VI, § 3.

²⁵⁵ *Id.* § 5.

²⁵⁶ John G. Edwards, *New Business Judge Sees Need for Speedy Resolutions*, LAS VEGAS REV. J., Oct. 16, 2003, at 2D; *Chief Justice Michael L. Douglas*, NEVADA SUPREME COURT, <http://nevadajudiciary.us/index.php/justicedouglas/31> (last updated Feb. 17, 2011).

²⁵⁷ *Chief Justice Michael Douglas*, *supra* note 253.

²⁵⁸ Oral Argument at 54:40, Nevada Adopted Code, *supra* note 240 (on file with author).

decisions would allow for future revisions to the figures if necessary.²⁵⁹ It is impossible to predict every possible issue that might arise with any legislation; however, the Commission should have at least performed a survey of Nevada campaign contribution data to ensure that the threshold amounts would not have resulted in a flood of unnecessary disqualifications.

Nevada's proposal, despite the lack of an exception for multiple elections and supporting empirical data, made a comprehensive attempt at disqualification reform. The proposal's use of the term "campaign support" encompasses contributions from parties, affiliated entities or constituents, a party's lawyer or law firm, and independent expenditure committees.²⁶⁰ By targeting bundling and independent expenditure committees, the Commission succeeded in addressing the primary issue in *Caperton*—accounting for contributions from indirect sources.²⁶¹ Additionally, Nevada's innovative use of a percentage-based trigger would have taken into account substantial contributions to judges in less expensive races. Although the recommended threshold of \$50,000 may ultimately prove ineffective at identifying and preventing the appearance of impropriety, the Nevada Supreme Court missed an opportunity to implement greatly needed reform in this area by implementing an otherwise largely effective rule.

C. Other Attempts at Statewide Implementation of *Caperton*

1. *The High Costs of Caperton: Texas's Rejection of Strict Disqualification*

In 2009, Texas legislators introduced a bill²⁶² that would have required the recusal of a justice of the supreme court or judge of the court of criminal appeals if the judge had received campaign contributions in the preceding four years totaling a mere \$1,000 or more from a party, attorney, the attorney's law firm, or by an affiliated entity or committee created by an individual.²⁶³ With such a low disqualification figure, it is unsurprising that the Texas Legislative Budget Board's fiscal analysis of House Bill 4548 found that the proposed provisions "would create a [fifty] percent recusal rate for supreme court justices."²⁶⁴

The Board estimated that the high recusal rate would result in an annual cost of \$1,144,926.²⁶⁵ The vast majority of the cost (\$931,500) would stem from travel expenses incurred by lower court judges who are commissioned by the governor to hear cases in place of recused supreme court justices.²⁶⁶ The remaining costs mostly stem from the salary and benefits for additional

²⁵⁹ *Id.* at 54:00.

²⁶⁰ *Id.* at 17:20 (Professor Jeffrey Stempel discussing how the reach of the proposed rule goes beyond just the parties appearing before the judge).

²⁶¹ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2256-57 (2009).

²⁶² H.B. 4548, 81st Leg., Reg. Sess., § 22.305(a)(1)(6) (Tex. 2009).

²⁶³ *Id.*

²⁶⁴ John S. O'Brien, Fiscal Note on H.B. 4548, TEX. LEGISLATURE ONLINE (Apr. 20, 2009), <http://www.legis.state.tx.us/tlodocs/81R/fiscalnotes/html/HB04548I.htm>.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

supreme court staff attorneys.²⁶⁷ Likely based on the estimated costs, the bill failed in committee in April 2009.²⁶⁸

Texas's failed legislation presents a significant issue associated with unnecessarily strict recusal limits: replacing disqualified judges. A recusal rate of 50 percent would have a *drastic* impact on the court system's ability to effectively ensure the proper administration of justice. The Board's finding supports reform critics' argument that stricter disqualification rules may "prevent the best judge from hearing a case."²⁶⁹ As more litigants seek to enforce mandatory disqualification, court budgets will face an even heavier burden.²⁷⁰ Furthermore, parties' litigation costs will increase as a result of relocation and extended trials.²⁷¹ Strict recusal standards like those proposed in Texas, particularly at the costly appellate and supreme court levels, could therefore "disproportionately benefit the wealthiest parties."²⁷² On the other hand, setting the threshold amount to such a low figure would better ensure that excessive campaign contributions are not creating an appearance of impropriety. But, courts would need to implement a mechanism for quick and efficient replacement of disqualified judges to reduce administrative costs for the courts and litigation costs for the parties.²⁷³

However, one could argue the Legislative Budget Board's methodology was flawed and favored a higher annual cost projection. The Board made several assumptions about the travel costs for replacement judges.²⁷⁴ The Board assumed that appellate and district court judges would need to travel to Austin at least three times for hearings and conferences.²⁷⁵ Although this estimate seems reasonable, it is not supported by any empirical data. Additionally, the Board estimated that each trip would cost \$500 per trip for transportation, hotel, and expenses.²⁷⁶ This cost may be appropriate for judges that must travel great lengths for a hearing, but it does not factor in judges that are already within close proximity of the Supreme Court or the reduced costs associated with video and teleconferencing.

Cynics might view the Board's potentially flawed finding as an attempt by the Texas legislature to artificially inflate the costs of replacing disqualified judges to preserve the financial freedom of judges in electoral campaigns. Considering at least one recent study has found a "quid pro quo" relationship

²⁶⁷ *Id.*

²⁶⁸ History of H.B. 4548, TEX. LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=81R&Bill=HB4548> (last visited Apr. 18, 2011).

²⁶⁹ Meiser, *supra* note 25, at 1828-29.

²⁷⁰ See Geyh, *supra* note 65, at 41-43 (noting that any disqualification based on apparent bias would eventually result in administrative burdens on the court); see also Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1081-82 (1996) (describing the constraints imposed on court resources as judges are "shuffled around" the state).

²⁷¹ Meiser, *supra* note 25, at 1829.

²⁷² *Id.*

²⁷³ SAMPLE ET AL., FAIR COURTS, *supra* note 42, at 33.

²⁷⁴ See O'Brien, *supra* note 261.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

between contributors and judges in Texas, this protectionist theory may be more plausible than previously thought.²⁷⁷

2. *Montana's \$250 Disqualification Proposal*

In January 2009, Montana legislators drafted a bill²⁷⁸ that would have required recusal of a Montana Supreme Court justice if he or she received a campaign contribution in excess of \$250, the statutory limit for contributions to a justice,²⁷⁹ from a party or attorney appearing before that judge.²⁸⁰ Like the California proposal, the Montana bill did not require disqualification in the event that an independent expenditure committee donated to a justice's campaign in excess of the threshold amount.²⁸¹ The bill died in the draft process less than four months after its introduction.²⁸²

The Montana disqualification approach attempted to implement a threshold amount without sufficiently addressing potential ramifications. By tying the contribution threshold amount for recusal to the statutory contribution limit, Montana would have left the Supreme Court system open to potential attacks through a simple loophole: parties and lawyers could simply donate one dollar below the contribution limit to avoid mandatory disqualification when they appear before that particular justice. In addition, the Montana bill did not provide an optional waiver for the non-contributing party like that proposed by the Judicial Council of California.²⁸³ The lack of such a waiver could result in unscrupulous litigants contributing a meager \$250 to an unwanted judge in order to force their disqualification.

3. *Washington's Neglect of Bundled Contributions*

In early 2008, the Washington State Supreme Court commissioned a task force to review the 2007 ABA Model Code of Judicial Conduct to recommend whether the Court should partially or fully adopt its provisions.²⁸⁴ In its recommendations, the task force included a proposed revision to Rule 2.11.²⁸⁵ The proposed Judicial Code of Conduct was open for public comment until

²⁷⁷ See *supra* note 108 and accompanying text.

²⁷⁸ L.C. 2027, 61st Leg., Reg. Sess. (Mont. 2009) (bill draft), <http://data.opi.mt.gov/bills/2009/billpdf/LC2027.pdf>.

²⁷⁹ MONT. CODE ANN. § 13-37-216(1)(a)(ii) (2009).

²⁸⁰ Mont. L.C. 2027 § 1.

²⁸¹ See *generally id.*; see also MONT. CODE ANN. § 13-37-216(1)(b) (defining "contribution" as "contributions made to the candidate's committee and to any political committee organized on the candidate's behalf").

²⁸² Detailed Bill Information for L.C. 2027, MONT. LEGISLATURE, [http://laws.leg.mt.gov/laws09/law0203w\\$.startup](http://laws.leg.mt.gov/laws09/law0203w$.startup) (enter "LC2027" in "Bill Draft Number" and press "Find") (last visited Apr. 18, 2011) (bill died in draft process on April 28, 2009).

²⁸³ See COMM'N FOR IMPARTIAL COURTS, *supra* note 190, at 33 (discussing the need for a waiver of disqualification to prevent a litigant from forcing recusal by making a large contribution over the threshold amount).

²⁸⁴ SUPREME COURT TASK FORCE ON THE CODE OF JUDICIAL CONDUCT, FINAL REPORT (2009) [hereinafter WASH. FINAL REPORT], <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Code%20of%20Judicial%20Conduct%20Task%20Force%20Committe/Final%20CJC%20%20Task%20Force%20Report%20Sept%202009.pdf>.

²⁸⁵ *Id.*

April 30, 2010.²⁸⁶ On September 9, 2010, the Washington State Supreme Court adopted Rule 2.11(A) without the proposed disqualification language.²⁸⁷ Like Nevada, the court inserted “[Reserved]” under section (4).²⁸⁸

The proposed—but unadopted—rule provided for mandatory disqualification of a judge if he or she learned that an “adverse party ha[d] provided financial support for any of [his or her] judicial election campaigns within the last six years in an amount in excess of [ten] times the dollar amount of the campaign contribution limit.”²⁸⁹ Because the current Washington State judicial contribution limit is \$1,400,²⁹⁰ a judge could only receive \$14,000 in total financial support within the past six years before automatic disqualification. Additionally, the task force recommended optional disqualification if a party’s support is “more than two times but less than [ten] times the contribution limit” and the judge concludes that his or her impartiality might reasonably be questioned.²⁹¹ The permissive disqualification option implies that even a relatively small amount of financial support has the possibility of creating a reasonable question as to the judge’s impartiality. Furthermore, the proposal suggested that the judge should make this determination by using the same factors articulated by the majority in *Caperton*.

There are three main issues with Washington’s current proposal. First, Washington could face the same issues as Nevada when multiple elections occur within one six-year election cycle.²⁹² Second, \$14,000 over six years may be too low a figure to cover the financial support of both contributions and independent expenditures. Finally, Washington failed to include language that broadens the scope of the rule to include individuals or groups affiliated with parties that appear before the judge. Indeed, it is unclear from the plain language of the rule whether the lawyers for each party would also be subject to the proposed rule or whether contributions from an attorney should be added to those made by his or her client.

V. THE OVERARCHING NEED FOR GREATER TRANSPARENCY: MANDATING FULL DISCLOSURE

Without a complementary expansion in campaign-finance disclosure requirements, any of the aforementioned disqualification proposals would be ineffective in achieving their primary goal: stymieing the influence of campaign money in the judiciary. In fact, the ABA Model Code urges judges to disclose facts relevant to the question of disqualification; however, this provi-

²⁸⁶ See *Recusal Reform in the States After Caperton v. Massey*, *supra* note 7.

²⁸⁷ Order, *In re* Adoption of the New Code of Judicial Conduct, No. 25700-A-963, at 21 (Wash. Sept. 9, 2010).

²⁸⁸ *Id.*; Nevada Adopted Code, *supra* note 240, at 22.

²⁸⁹ WASH. FINAL REPORT, *supra* note 281. Financial support is defined by the proposed rules as campaign contributions or independent expenditures made in support of a judge’s campaign or against the opposing candidate, including a portion of funds given to political action committees that support the judge’s candidacy or attack his or her opponent. *Id.* “Adverse party,” on the other hand, is not clearly defined in the report. *Id.*

²⁹⁰ WASH. REV. CODE ANN. § 42.17.645(1) (West Supp. 2011).

²⁹¹ WASH. FINAL REPORT, *supra* note 281.

²⁹² See generally *supra* Part IV.B.1.

sion is “phrased in hortatory, not mandatory terms.”²⁹³ Moreover, campaign finance reporting statutes, although prevalent throughout the United States,²⁹⁴ are still largely ineffective at informing parties about campaign contributions received by judicial candidates in a timely manner.²⁹⁵ If parties are not able to obtain this information, they will not be able to move for disqualification. Admittedly, mandatory disclosure is an “incomplete solution in the sense that it only provides the grounds for disqualification.”²⁹⁶ However, when paired with mandatory recusal language, the two mechanisms combine to ensure that due process is being preserved.

A. A Brief History of Poor Campaign Finance Disclosure

Campaign disclosure laws serve one essential purpose: “informing the public about who is seeking to win government influence through election spending.”²⁹⁷ Disclosure law is particularly important in determining from whom candidates are receiving independent expenditures.²⁹⁸ The National Institute on Money in State Politics has commented on the lack of adequate disclosure laws in the United States: “[m]illions of dollars spent by special interests each year to influence state elections go essentially unreported to the public. [Independent expenditures] form the single-largest loop-hole in the laws . . . implementing transparency in state electoral politics.”²⁹⁹ Indeed, it was a West Virginia disclosure law that revealed Don Blankenship’s \$2.5 million contribution through And for the Sake of the Kids, an independent expenditure committee.³⁰⁰

Campaign finance disclosure laws are largely inconsistent and ineffective in the United States.³⁰¹ The duty to report campaign contributions typically falls on the candidate or party receiving the money, not the individual or organization giving the money.³⁰² In state elections, campaign spending is reported to the state, not a central entity like the Federal Election Commission for federal spending.³⁰³ States often have vastly different campaign disclosure laws

²⁹³ James Sample & Michael Young, *Invigorating Judicial Disqualification: Ten Potential Reforms*, 92 JUDICATURE 26, 29 (2008) (citing John Leubsdorf, *Theories of Judging and Judicial Disqualification*, 62 N.Y.U. L. REV. 237, 242 (1987)).

²⁹⁴ See Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 471-72 (1988) (noting that all fifty states and the District of Columbia require judicial candidates to file reports disclosing all campaign contributions).

²⁹⁵ See Ciara Torres-Spelliscy, Brennan Ctr. for Justice, *Corporate Campaign Spending: Giving Shareholders a Voice* 11 (2010), available at http://brennan.3cdn.net/54a676e481f019bfb8_bvm6ivakn.pdf (reporting on failure of campaign disclosure generally).

²⁹⁶ SAMPLE ET AL., *supra* note 42, at 28.

²⁹⁷ SAMPLE ET AL. 2000-2009, *supra* note 100, at 64.

²⁹⁸ *Id.*

²⁹⁹ LINDA KING, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, *INDECENT DISCLOSURE: PUBLIC ACCESS TO INDEPENDENT EXPENDITURE INFORMATION AT THE STATE LEVEL* 4 (2007), available at <http://www.followthemoney.org/press/Reports/200708011.pdf>.

³⁰⁰ *Id.* at 62.

³⁰¹ TORRES-SPPELLISCY, *supra* note 292, at 11.

³⁰² *Id.*

³⁰³ *Id.*

and regulations.³⁰⁴ While states have improved access to campaign finance data, a number of states still lack basic features to inform the electorate. For example, as of 2008, only twenty-four of the forty-two states that operate electronic filing programs actually mandate their use for both statewide and legislative candidates.³⁰⁵ Additionally, only twenty-seven states provide a searchable database of contributions and expenditures.³⁰⁶ Finally, only twenty-seven states require last-minute independent expenditures to be disclosed.³⁰⁷ It is unacceptable for any state not to provide easily accessible and constantly updated campaign finance information to their residents.

B. Fixing the Lack of Transparency in Judicial Elections

Fortunately, *Citizens United* reaffirmed the constitutionality of disclosure laws and their legitimate purpose in providing the electorate with information about election-related spending sources.³⁰⁸ Therefore, in addition to requiring disqualification based on a threshold amount of campaign contributions, states should implement a system that: (1) mandates disclosure for all contributions of \$100 or more; (2) replaces inefficient reporting systems with a twenty-four-hour requirement; and (3) creates an easily accessible, sortable, and searchable online database of all campaign support received by a candidate, including independent expenditures.

Judicial candidates and independent expenditure committees should be required to disclose all contributions of \$100 or more. The Judicial Council of California made a similar recommendation in its December 2009 report.³⁰⁹ The Council recommended that trial judges be required to disclose to all interested parties and counsel appearing before them in a case, all contributions of \$100 made directly or indirectly to the judge's campaign.³¹⁰ The California State Legislature included this provision in CCP § 170.1(9), but it omitted disclosure requirements for indirect contributions.³¹¹ In making this recommendation, the Council hoped to "enhance public trust and confidence in an impartial judiciary."³¹² Interestingly, this proposal placed the burden on the judge to be aware of contributions to his or her campaign and to disseminate the information to the parties. Ideally, a judge should be able to disclose his or her receipt of contributions to a state agency, which, in turn, would make the information available such that reporting directly to the parties would not be necessary. In addition, independent expenditure committees in each state should be required to file reports and expenditures with a state agency within

³⁰⁴ *Id.*; see generally CAL. VOTER FOUND. ET AL., GRADING STATE DISCLOSURE 2008: EVALUATING STATES' EFFORTS TO BRING SUNLIGHT TO POLITICAL MONEY (2008), available at <http://www.campaigndisclosure.org/gradingstate/GSD08.pdf>.

³⁰⁵ CAL. VOTER FOUND. ET AL., *supra* note 301, at 2 (citing findings of the Campaign Disclosure Project).

³⁰⁶ *Id.* at 3.

³⁰⁷ *Id.* at 5.

³⁰⁸ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 885 (2010).

³⁰⁹ See COMM'N FOR IMPARTIAL COURTS, *supra* note 190, at 36-44 (discussing recommendations regarding mandatory disclosure and disqualification).

³¹⁰ COMM'N FOR IMPARTIAL COURTS, *supra* note 190, at 34.

³¹¹ CAL. CIV. PROC. CODE § 170.1(a)(9)(C) (West 2006).

³¹² COMM'N FOR IMPARTIAL COURTS, *supra* note 190, at 36.

twenty-four hours so the American people know “whether corporate and unions contributions are being channeled through straw organizations or middlemen.”³¹³

However, the Judicial Council’s proposal did not go far enough in mandating full disclosure. In order to place a check on a judge’s disclosed financial information, litigants and other interested parties must be able to view that information on an easily accessible, sortable, and searchable online database. This would allow parties to quickly determine whether a judge has received campaign support from anyone appearing before that judge in a case. Assuming the state has also passed a disqualification rule based on campaign contributions, parties could use the publicly accessible information to support a motion to disqualify.

Finally, judges should be required to post all direct and indirect campaign disclosure data on a state website within twenty-four hours of receipt of those funds. The Judicial Council of California was justifiably concerned that a public posting of contribution information could compel litigants and attorneys to match contributions from the opposing party.³¹⁴ However, full disclosure and near-instantaneous reporting would ensure that last-minute contributions are visible to all interested parties, providing a crucial check on those that may try to buy justice.

VI. CONCLUSION

Current state efforts to implement reform requiring mandatory disqualification of a judge based on campaign support are positive steps in the path to controlling the growing influence of money in the judiciary. Unfortunately, with the recent decision in *Citizens United*³¹⁵—which ruled that, under the First Amendment, Congress cannot limit corporate spending in support of a candidate³¹⁶—corporations have more influence than ever over the election of judges.³¹⁷ In his dissent, Supreme Court Justice John Paul Stevens warned that *Citizens United* “unleashes the floodgates of corporate and union general treasury spending in [judicial elections].”³¹⁸ Indeed, individuals like Don Blankenship, are now able to dip into corporate coffers in addition to personal funds to

³¹³ *A Comprehensive Disclosure Regime in the Wake of the Supreme Court’s Decision in Citizens United v. Federal Election Commission*, SUNLIGHT FOUND., <http://sunlightfoundation.com/policy/documents/comprehensive-disclosure-regime-wake-supreme-court/> (last visited Apr. 18, 2011) (describing an analogous suggestion for political candidates for federal office).

³¹⁴ COMM’N FOR IMPARTIAL COURTS, *supra* note 190, at 34.

³¹⁵ *See generally* *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

³¹⁶ *See id.* at 886.

³¹⁷ Jeffrey Toobin, legal analyst for CNN and author of *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* (2007), suggests that the *Citizens United* decision will have greater impact on state courts than on the national level because corporations and labor unions “will get better bang for their buck” in that arena. *Bill Moyers Journal: Jeffrey Toobin* (PBS television broadcast Feb. 19, 2010), available at <http://www.pbs.org/moyers/journal/02192010/watch2.html>.

³¹⁸ *Citizens United*, 130 S. Ct. at 968 (Stevens, J. dissenting).

provide substantial campaign support to judicial candidates.³¹⁹ The need for judicial recusal reform has never been greater.

While it remains to be seen whether contributions conclusively drive judicial decision-making,³²⁰ state courts—in accordance with *Caperton*—should adopt recusal standards more rigorous than due process requires to protect against the probability of bias caused by excessive and disproportionate campaign support.³²¹ Whether a low or high disqualification threshold is used, states must be careful to adopt an amount that sufficiently addresses the variance in contribution levels among judicial races in differently populated counties, potential gaming of the system by unscrupulous litigants, and the respect traditionally afforded to judicial independence.

Unfortunately, the uncertainty involved in implementing a threshold amount, by itself, may prevent states from ever adopting it into their respective judicial codes and laws. Moreover, even if a threshold rule is adopted, courts may limit their effect over free speech concerns. Therefore, the only viable solution to increased contributions in the judiciary—other than moving to a system that removes private money entirely from the selection process—is to combine mandatory disqualification with full disclosure. Mandating disclosure for all contributions of \$100 or more, requiring faster campaign reporting, and creating an easily accessible, sortable, and searchable online database of judicial campaign finance data would give litigants, lawyers, and the public the assurance they need in the face of horror stories like *Caperton* and the ever-increasing contributions to judicial candidates.

³¹⁹ SAMPLE ET AL. 2006, *supra* note 99, at 9.

³²⁰ McCall & McCall, *supra* note 103, at 216.

³²¹ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (“Judicial integrity is, in consequence, a state interest of the highest order.”) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J. concurring)).