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# Court Reform Enters the Post-Caperton Era

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# COURT REFORM ENTERS THE POST-CAPERTON ERA

*James Sample\**

## TABLE OF CONTENTS

I.	Introduction .....	788
II.	<i>Caperton</i> Against the National Backdrop .....	789
	A. Wisconsin .....	793
	B. Michigan .....	805
	C. West Virginia .....	810
	D. Nascent Developments in Other States .....	814
III.	Conclusion .....	818

*An impartial and independent tribunal is the sine qua non of our nation's promise of equal justice under law. The rule of law is imperiled if justice is not done and if it is not seen to be done.*

...

*As political pressures on the judiciary mount, most states should consider more fundamental changes to their systems of judicial selection. But until that day, improved recusal procedures are among the most promising incremental reforms.<sup>1</sup>*

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1. Thomas R. Phillips, Retired Chief Justice, Supreme Court of Texas, *Foreword* to JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, BRENNAN CTR. FOR JUST., *FAIR COURTS: SETTING RECUSAL STANDARDS* 3–4 (2008), available at [http://brennancenter.org/content/resource/fair\\_courts\\_setting\\_recusal\\_standards/](http://brennancenter.org/content/resource/fair_courts_setting_recusal_standards/) (follow the “Download PDF of report” hyperlink).

## I. INTRODUCTION

This Article considers the significant state court reform developments in the year following the Supreme Court's landmark decision in *Caperton v. A.T. Massey Coal Co.*,<sup>2</sup> as well as ancillary federal developments, including renewed congressional interest in judicial disqualification. Picking up on the author's view that "paradoxically for a decision overturning a state justice's non-recusal, the majority's approach [in *Caperton*] is a model of cooperative federalism,"<sup>3</sup> this Article focuses primarily on the initial developments pertaining to money in the courts in Wisconsin, Michigan, and West Virginia in the short period since the decision itself in June of 2009.

This Article notes that while recusal practices have certainly been one focal point of developments in the states, *Caperton* has also provided a significant boost to judicial public financing. After considering tangible developments in the three identified states, this Article briefly points to more nascent judicial independence efforts in other states, in which *Caperton* connections are less direct, but where the case is nonetheless figuring prominently in rejuvenated efforts to modify judicial selection practices. The Article asserts that, while not all of the post-*Caperton*

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2. See *Caperton*, 129 S. Ct. 2252.

3. James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293, 293 (2010). The term "cooperative federalism" is used in a wide variety of contexts, including, most commonly, statutory regulatory schemes. See, e.g., Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1692, 1752 (2001) (describing "the classic cooperative federalism architecture of a federal floor with state supplementation"). In the context of *Caperton*, I assert that the majority heeded the counsel of both Ted Olson, whose federalism credentials could scarcely be stronger, and of the Conference of Chief Justices (CCJ), which expressed its view that "the Constitution may require the disqualification of a judge in a particular matter because of extraordinarily out-of-line campaign support from a source that has a substantial stake in the proceedings" via a remarkable amicus curiae brief. Brief for the Conference of Chief Justices as Amicus Curiae Supporting Neither Party at 4, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45973. Also in line with the CCJ's guidance, the Court properly set "a floor without drawing unnecessary and sweeping bright lines, and without answering questions not presented—i.e., the majority decided the case in exactly the manner suggested by the state chief justices themselves." Sample, *supra*, at 296. This Article focuses on the next stage of the cooperative federalism sequence: the initial efforts in the state—some successful, some rebuffed, and some inchoate—to go beyond the newly defined "constitutional minimum" in protecting and promoting the interest in the appearance and actuality of fair and impartial courts.

developments have improved the judicial impartiality landscape, on balance, the decision is already producing meaningful improvements in protecting the courts from the influence of money.

## II. CAPERTON AGAINST THE NATIONAL BACKDROP

The key to analyzing *Caperton*'s prospective import is to distinguish between the bare constitutional floor set by the Court when faced with a set of facts that the Court rightly—and repeatedly—described as “extreme,”<sup>4</sup> and the Court’s clear understanding that more stringent state judicial conduct rules are “[t]he principal safeguard against judicial campaign abuses’ that threaten to imperil ‘public confidence in the fairness and integrity of the nation’s elected judges.’”<sup>5</sup> On the constitutional level, the Court emphasized several factors that inform an ultimately objective inquiry:

We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.<sup>6</sup>

Much is rightly made of the Court’s repeated emphasis on what it called the “extraordinary situation where the Constitution requires recusal.”<sup>7</sup> Yet it is also worth noting that all nine justices signed opinions that also repeatedly expressed, in Chief Justice John Roberts’s words, that “[s]tates are, of course, free to adopt broader recusal rules than the Constitution requires.”<sup>8</sup>

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4. The word “extreme” is used throughout the majority’s opinion, even appearing four times on a single page. Roy A. Schotland, *Caperton Capers: Comment on Four of the Articles*, 60 SYRACUSE L. REV. 337, 337 n.3 (2010) (citing *Caperton*, 129 S. Ct. at 2265, 2267).

5. *Caperton*, 129 S. Ct. at 2266 (quoting Brief for the Conference of Chief Justices as Amicus Curiae Supporting Neither Party at 4, 11, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45973).

6. *Id.* at 2263–64.

7. *Id.* at 2265.

8. *Id.* at 2268–69 (Roberts, C.J., dissenting); see also *id.* at 2267 (majority opinion) (“States may choose to ‘adopt recusal standards more rigorous than due

Noting the “vital state interest” in public confidence in the courts, the *Caperton* majority went as far as to reflect on its 2002 statement in *Republican Party of Minnesota v. White* that “[t]he power and the prerogative of a court to perform [its] function rest, in the end, upon the respect accorded to its judgments”; that “respect for judgments depends in turn upon the issuing court’s absolute probity”; and that, consequentially, “[i]t is for *this reason* that States may choose to ‘adopt recusal standards more rigorous than due process requires.’”<sup>9</sup> So while the holding as to the absolute floor for constitutionally mandated disqualification is appropriately narrow, the full Court could scarcely be more clear in reiterating that states have the broad authority—and perhaps even the responsibility—to enact stringent, rule-based disqualification procedures that obviate the need for federal due process analysis.

Applying that principle where the rubber meets the road, it should be abundantly clear that the applicable rules in West Virginia proved insufficient *even* in a case so clear as to ultimately involve the violation of a constitutional right. Why? Simply put, because one single individual, Justice Brent Benjamin, failed to comply with either the letter or the spirit of West Virginia’s Code of Judicial Conduct. To be clear, West Virginia’s Code of Judicial Conduct required Benjamin’s recusal whenever his impartiality “might reasonably be questioned.”<sup>10</sup> With minor textual variance, this standard is nearly universally applicable in the states.<sup>11</sup> Yet

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process requires.” (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)).

9. *Id.* at 2266–67 (quoting *White*, 536 U.S. at 793–94 (Kennedy, J., concurring)) (emphasis added). The combination of Justice Kennedy’s concurrence in *White* and his majority opinion in *Caperton* yields an interesting dynamic in which certain traditional *ex ante* campaign restrictions are constitutionally suspect based on the First Amendment—which at that stage stands as a relative matter, alone—while unfettered First Amendment spending by stakeholders who end up before the court *ex post* requires a balancing between First Amendment and due process interests. For three compelling—though not always entirely in accord—analyses of the impact of *White*, see Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181 (2004); Rachel P. Caufield, *The Changing Tone of Judicial Election Campaigns as a Result of White*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 34 (Matthew J. Streb ed., 2007); and Roy A. Schotland, *Impacts of White*, 55 DRAKE L. REV. 625 (2007).

10. W. VA. CODE OF JUDICIAL CONDUCT Canon 3E(1) (1993).

11. See SAMPLE, POZEN & YOUNG, *supra* note 1, at 17 (noting that “the general standard has been incorporated into federal law and the judicial conduct codes of forty-seven states . . . and it offers the most expansive ground for disqualification everywhere it appears”).

short of United States Supreme Court intervention, there was no rule or procedural backstop to enforce the standard that Justice Benjamin ignored. Given dramatic increases in judicial campaign spending, and given the striking fact that West Virginia's pertinent recusal rules mirror the rules in most of the thirty-nine states in which judges face election, the practical—indeed the definitional—insufficiency and even impotence of West Virginia's rules should create a clarion call for courts with similar rules to protect against the same fundamental flaw. Absent United States Supreme Court review, the objective standard was a dead letter in the face of Justice Benjamin's subjective insistence on imposing his will, even in circumstances so extreme as to ultimately violate the Constitution (much less the ethical rules).

On a collision course with the general disqualification standard is an increasingly stunning volume of cash. Nationally, at the state supreme court level, direct campaign fundraising more than doubled, from \$85.4 million from 1989–1998 to \$200.7 million from 1999–2008.<sup>12</sup> The source of that cash is often the litigants, lawyers, and litigation stakeholders appearing before the judges they support—a reality that is the cause of concern among broad swaths of the public, lawyers, businesses, and jurists alike.<sup>13</sup> Wallace Jefferson, the current Chief Justice of the Texas Supreme Court, recently framed the concerns in rather blunt terms:

In a close race, the judge who solicits the most money from lawyers and their clients has the upper hand. But then the day of reckoning comes. When you appear before a court, you ask how much your lawyer gave to the judge's campaign. If the opposing counsel gave more, you are cynical.<sup>14</sup>

There is little doubt that in terms of numbers, timing, stakes, and other circumstances, the situation in West Virginia was exceptional. The scenario, while an outlier, primarily because the source of funding was a single individual, also illustrates important trends. Notably, while the increases in campaign contributions noted above are substantial, those

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12. JAMES SAMPLE, CHARLES HALL, JONATHAN BLITZER, ADAM SKAGGS & LINDA CASEY, *THE NEW POLITICS OF JUDICIAL ELECTIONS, 2000–09: DECADE OF CHANGE* (forthcoming 2010).

13. See *Justice at Stake Campaign, Polls*, <http://www.justiceatstake.org/resources/polls.cfm> (last visited Apr. 19, 2010) (collecting and summarizing both national and state level polling data from a range of organizations).

14. Wallace B. Jefferson, Op-Ed, *Why Not Elect Judges on Merit, Not Whim?*, *DALLAS MORNING NEWS*, Mar. 12, 2009, [http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-jefferson\\_13edi.State.Edition1.2212195.html](http://www.dallasnews.com/sharedcontent/dws/dn/opinion/viewpoints/stories/DN-jefferson_13edi.State.Edition1.2212195.html).

figures do not include independent expenditures, akin to the \$3 million spent by Massey Coal Chief Executive Officer Don Blankenship in Justice Benjamin's support. In the last decade, six- and seven-figure independent expenditures have become the norm in judicial battleground states—frequently dwarfing candidates' official campaign war chests, drowning out official campaigns on the airwaves, and distorting the discourse—with little incentive for accuracy and even less interest in the distinct role of the courts.<sup>15</sup> Accordingly, recusal rules—or trigger mechanisms in public financing systems, for that matter—that address only direct contributions and do not take into account substantial independent expenditures are not only likely to be ineffective, but may actually incentivize special interests to operate less and less accurately and transparently than they otherwise would.

The centrality of the role played in judicial elections by large independent expenditures will surely increase in light of the Supreme Court's January, 2010 decision in *Citizens United v. Federal Elections Commission*.<sup>16</sup> In the words of Justice Sandra Day O'Connor: "In invalidating some of the existing checks on campaign spending, the majority in *Citizens United* has signaled that the problem of campaign contributions in judicial elections might get considerably worse and quite soon."<sup>17</sup> Justice O'Connor added that "if both [unions and corporations] unleash their campaign spending monies without restrictions, then I think

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15. Even those opposed to campaign finance regulations in the legislative and executive contexts recognize that major expenditures can create uniquely pernicious dynamics in a judicial campaign. Rick Hasen of Loyola Law School, who is one of the country's foremost election law experts, recently wrote about a judicial elections conference he attended in Seattle, and reflected that "[i]t was a somewhat surreal experience to sit next to Kathleen [Sullivan] (usually an ardent opponent of campaign regulations aside from disclosure) [and] to hear Kathleen call for consideration of a ban for everyone on independent spending in judicial campaigns . . . ." Posting of Rick Hasen to Election Law Blog, <http://electionlawblog.org/archives/014439.html> (Sept. 15, 2009, 08:17).

16. *Citizens United v. FEC*, 130 S. Ct. 876 (2010); see also Posting of Rick Hasen to Room for Debate Blog, <http://roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics/#richard> (Jan. 21, 2010, 15:00) (asserting that "[e]ven if the court is willing to entertain a fiction about the role large, independent corporate and union spending plays in the campaigns, those in the public paying attention will not be fooled," and that expensive judicial elections will be "going from bad to worse").

17. Adam Liptak, *Former Justice O'Connor Sees Ill in Election Finance Ruling*, N.Y. TIMES, Jan. 27, 2010, at A17, available at <http://www.nytimes.com/2010/01/27/us/politics/27judge.html>.

mutually-assured destruction is the most likely outcome.”<sup>18</sup> Justice O’Connor’s concern is hardly unfounded. One scholar has estimated that in the 2000 judicial election cycle alone, *noncandidate* spending in just the five states with the most heated elections that year (Ohio, Michigan, Mississippi, Alabama, and Illinois) totaled at least \$16 million.<sup>19</sup>

While such problems are not unique to the post-*Caperton* era, the decision has put them in the spotlight, and has indirectly spurred tangible movement in an arena—court reform—often marked by more talk than action. On balance, the early post-*Caperton* developments reveal a kind of “two steps forward, one step back” dynamic. This dynamic, while a net positive in which the steps forward are significant and not to be discounted, nonetheless brings to mind the mid-twentieth century observation of New Jersey Supreme Court Chief Justice and noted court reformer Arthur Vanderbilt, who stated: “Manifestly judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat.”<sup>20</sup>

In the vein of Justice Vanderbilt’s observation, then, the early developments in Wisconsin, Michigan, and West Virginia, and the state-specific political contexts in which they are grounded, can be seen to exemplify not only the momentum created by the case, but also the substantial hurdles that persist for even the most modest incremental court reform measures.

#### A. Wisconsin

If post-*Caperton* court reform is viewed strictly in terms of judicial disqualification rules, the immediate aftermath of the Court’s decision can best be described as mixed.<sup>21</sup> While the case was broadly supported and the decision was predominantly cheered by the legal and judicial

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18. *Id.*

19. See Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, L. REV. MICH. ST. U. DETRIOT C.L. 849, 863 (2001) (noting with respect to those figures that “although we lack even rough data on noncandidate spending in other states in 2000 or other years, there is no question that this activity is not merely an increase but a change in kind”).

20. ARTHUR T. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION: A SURVEY OF THE EXTENT TO WHICH THE STANDARDS OF THE AMERICAN BAR ASSOCIATION FOR IMPROVING THE ADMINISTRATION OF JUSTICE HAVE BEEN ACCEPTED THROUGHOUT THE COUNTRY*, at xix (1949).

21. See Posting of Bert Brandenburg to ACS Blog, <http://www.acslaw.org/node/14849> (Nov. 17, 2009, 12:31) (noting that the “[f]irst answers are coming from the Midwest, where divided courts have recently taken *Caperton* in different directions”).

establishment,<sup>22</sup> at the state level or even the judge-specific level, the landscape quickly becomes more complicated. Wisconsin is a state in which significant action has occurred since *Caperton* on two fronts—recusal and judicial public financing—and the developments on those fronts, at least when viewed through a primitive, binary, “pro or con” fair-courts lens, have gone in opposite directions. As one group recently noted, “Wisconsin has been electing Supreme Court justices for more than 150 years, but in very recent years these elections have been turned into auctions.”<sup>23</sup>

Wisconsin, which holds its high court elections “off-cycle,” in April, in

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22. *Caperton* has been particularly well received by state jurists. See Posting of Nathan Koppel to Wall St. J. L. Blog, <http://blogs.wsj.com/law/2009/06/08/massey-coal-ruling-getting-thumbs-up-in-judicial-circles/> (June 8, 2009, 14:47 EST) (noting Indiana Chief Justice Randall Shepard’s view that “it was wise of the majority to focus not just on the amount of a particular contribution . . . but its size relative to the total amount of contributions”); see also John Schwartz, *Uncertainty in Law Circles over New Rules for Judges*, N.Y. TIMES, June 10, 2009, at A20 (citing Alabama Chief Justice Sue Bell Cobb’s view that *Caperton* is a “‘good thing’ because it will push judges to be more careful”); Posting of Tony Mauro to The Blog of Legal Times, <http://legaltimes.typepad.com/blt/2009/06/coping-with-caperton-a-conversation-with-to-m-phillips.html> (June 10, 2009, 16:21) (quoting former Texas Chief Justice Tom Phillips’s view that “Caperton established a principle that is really important: There are constitutional concerns with a judge sitting in judgment of a case where a party is a significant donor”). Meanwhile, academics and media have largely echoed American University Professor Amanda Frost’s assessment of the opinion as “a victory for common sense and fundamental fairness.” Amanda Frost, Editorial, *Only a Partial Win*, NAT’L L.J., June 15, 2009, [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431401637&Only\\_a\\_partial\\_win&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431401637&Only_a_partial_win&slreturn=1); see also, e.g., Editorial, *Honest Justice*, N.Y. TIMES, June 8, 2009, [http://www.nytimes.com/2009/06/09/opinion/09tue1.html?\\_r=1](http://www.nytimes.com/2009/06/09/opinion/09tue1.html?_r=1) (describing the “right to a fair hearing before an impartial judge” as “more secure” following the decision); Eliza Newlin Carney, *A Win for Fairer Courts*, NAT’L J., June 15, 2009, [http://www.nationaljournal.com/njonline/rg\\_20090615\\_7680.php](http://www.nationaljournal.com/njonline/rg_20090615_7680.php) (noting that *Caperton*’s “likely outcome is that state supreme courts will establish and enforce clearer recusal rules for judges who may face conflicts of interest, guidelines that are long overdue”). Still, praise for *Caperton* has certainly not been universal. Although I disagree with some of the characterizations and conclusions that he offers, Professor Ronald Rotunda offers a particularly thoughtful and, for critics of the decision, representative critique. See Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247, 277 (2010) (arguing, *inter alia*, that “the Supreme Court should be able to give judges a better test than ‘it all depends’ in deciding whether the judge must recuse himself as a matter of constitutional law”).

23. Wisconsin Democracy Campaign, Wisconsin Democracy Campaign Statement on Passage of Impartial Justice Bill, <http://www.wisdc.org/pr110609.php> (last visited Apr. 1, 2010).

part to separate them from the din of the races at the top of the November ticket, had high court contests in three consecutive election cycles from 2007 to 2009. In sharp contrast to the relatively modest elections that marked most of the 150-year practice, “[w]ith the 2007 race between Annette Ziegler and Linda Clifford, and the 2008 race between Justice Louis Butler and challenger Michael Gableman, Wisconsin turned overnight into one of the costliest, nastiest battleground states in the nation.”<sup>24</sup> In March of 2007, the website FactCheck.org put it this way: “The April 3 face-off between county Judge Annette Ziegler and attorney Linda Clifford for a seat on the state’s highest court has spawned a springtime blizzard of negative ads in the milk-fed Midwest.”<sup>25</sup> The 2007 contest set a state record for its expense,<sup>26</sup> with Ziegler emerging as the victor in part due to the strong support of Wisconsin Manufacturers & Commerce (WMC), a business lobbying association which spent more than \$2 million in her support—a sum that exceeded the total of Ziegler’s entire official campaign.<sup>27</sup> Then, after its involvement in the election, WMC helped to finance the appeal, and ultimately filed a friend-of-the-court brief, in a \$350 million tax refund case.<sup>28</sup> The case was “long considered . . . a top priority” by WMC.<sup>29</sup>

From a timing standpoint, the controversy over Justice Ziegler and WMC was magnified by a different controversy involving Ziegler that went straight to the question of her credibility in evaluating her own disqualification. While a lower court judge, Ziegler faced ethics charges because she did not disqualify herself when she ruled on eleven cases involving a bank for which her husband served as a director.<sup>30</sup> Ultimately,

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24. SAMPLE ET AL., *supra* note 12.

25. Viveca Novak & Emi Kolawole, *Warring Ads in Wisconsin Supreme Court Race*, FACTCHECK.ORG, Mar. 30, 2007, [http://www.factcheck.org/judicial-campaigns/warring\\_ads\\_in\\_wisconsin\\_supreme\\_court\\_race.html](http://www.factcheck.org/judicial-campaigns/warring_ads_in_wisconsin_supreme_court_race.html).

26. Keegan Kyle, *Ziegler, Clifford Spend Record Amount on Campaigns*, BADGER HERALD (Madison), Mar. 27, 2007, at A6, available at [http://badgerherald.com/news/2007/03/27/ziegler\\_clifford\\_spe.php](http://badgerherald.com/news/2007/03/27/ziegler_clifford_spe.php).

27. Patrick Marley & Stacy Forster, *Ziegler, Big Lobby Think Alike*, MILWAUKEE J. SENTINEL, July 12, 2008, at A6, available at <http://www.jsonline.com/news/statepolitics/29473254.html>.

28. James Sample, *Can \$2 Million for a Judge Buy a \$350 Million Tax Refund?*, HUFFINGTON POST, Dec. 5, 2007, [http://www.huffingtonpost.com/james-sampl/e/can-2-million-for-a-judge\\_b\\_75492.html](http://www.huffingtonpost.com/james-sampl/e/can-2-million-for-a-judge_b_75492.html).

29. Marley & Forster, *supra* note 27.

30. Posting of Andy Szal to WisPolitics.com, [http://blogs.wispolitics.com/legal/labels/Annette\\_Ziegler.html](http://blogs.wispolitics.com/legal/labels/Annette_Ziegler.html) (May 29, 2008 10:19); see also Sample, *supra* note 28

based on those conflicts, Ziegler became the first sitting supreme court justice in Wisconsin history to be disciplined by that same court.<sup>31</sup> Given the patent ethical breaches in cases with such clear-cut conflicts, query then whether a system that allows Ziegler the ability to subjectively judge, without review, whether, *objectively*, “reasonable, well-informed persons . . . would reasonably question” her impartiality<sup>32</sup> in a case involving the “top priority”<sup>33</sup> of a \$2 million supporter, is the optimal safeguard for fairness—or even much of a safeguard at all. The question is more than theoretical: Just two months after being disciplined by the state supreme court, Ziegler authored a 4–3 decision in the \$350 million tax case in favor of the position advocated by WMC.<sup>34</sup>

Wisconsin’s 2008 contest became a national judicial election flashpoint both for its cost and its content. First, in furtherance of the trend described above, nearly ninety percent of the television advertisements that aired in the state were paid for not by the candidates’ campaigns, but by competing interest groups.<sup>35</sup> Second, by any measure, it was expensive. Due to a combination of outdated Wisconsin campaign disclosure rules and other factors, spending estimates for the 2008 election vary widely, ranging from about \$6 million to defeated incumbent Justice Louis Butler’s estimate of \$10 million.<sup>36</sup> Regardless of the exact total—

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(“[S]tanding by while scenarios like Justice Ziegler’s become the rule rather than the exception is not a serious option. Not unless you actually want to ‘tell your great grandkids about what happened to the rule of law in America back in the day.’”).

31. See Szal, *supra* note 30; see also *In re Disciplinary Proceedings Against Ziegler*, 750 N.W.2d 710 (Wis. 2008).

32. See Wis. S.C.R. ch. 60.04(4) (2005).

33. Marley & Forster, *supra* note 27.

34. See *Wis. Dep’t of Revenue v. Menasha Corp.*, 754 N.W.2d 95 (Wis. 2008); see also Marley & Forester, *supra* note 27.

35. Press Release, Brennan Ctr. for Just., Wisconsin Supreme Court Election Raises New Questions About Judicial Election Reform (Apr. 4, 2008), available at [http://www.brennancenter.org/content/resource/wisconsin\\_supreme\\_court\\_election\\_raises\\_new\\_questions\\_about\\_judicial\\_electi/](http://www.brennancenter.org/content/resource/wisconsin_supreme_court_election_raises_new_questions_about_judicial_electi/).

36. See Craig Gilbert & Patrick Marley, *Ruling on Judges’ Campaign Cash May Echo in Wisconsin*, MILWAUKEE J. SENTINEL, June 13, 2009, <http://www.jsonline.com/news/statepolitics/48009917.html> (estimating cost at \$6 million); see also Hon. Louis Butler, Remarks at the Sandra Day O’Connor Conference on the State of the Judiciary: State Judicial Races—How Can Corporations Help Stop the Campaign Funding ‘Arms Race’? (Oct. 2, 2008), available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=625> (“We know that [the reported] number is grossly underrepresented because none of it tracks the cable money and all of the cable expenditures. Unless you have the resources and [unless you are] willing to go out to

which, barring altruism by the spenders, will never be known—spending was at or near the record levels of 2007, and most of the underwriting came from a few big-spending interest groups, led by WMC.<sup>37</sup> Third, the most notorious, though electorally effective, aspect of the campaign was a grossly misleading and racially divisive television campaign sponsored not by a special interest group, but rather by Justice Butler’s opponent, Michael Gableman. The advertising campaign received national attention, with some national analysts characterizing it as a “Willie Horton-style hit.”<sup>38</sup> The advertisement so distorted and disparaged the constitutionally protected role of criminal defense counsel that, as with Ziegler, upon taking the bench, Gableman quickly found himself in the midst of an ethics inquiry and a recusal thicket of his own.<sup>39</sup>

Instead of following through on the United State Supreme Court’s mandate for states to enact recusal rules that protect the “vital state interest” in promoting the “respect for judgments [that] depends . . . upon the issuing court’s absolute probity,”<sup>40</sup> a bitterly divided Wisconsin Supreme Court, with WMC’s prime beneficiaries Justices Ziegler and Gableman in a 4–3 majority, adopted two petitions for amendments to the state code of judicial conduct that go in exactly the opposite direction—including one petition that, to bring matters full circle, was submitted four

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the municipalities to track the cable spending one by one, you can’t get at those figures.”).

37. See SAMPLE ET AL., *supra* note 12.

38. Viveca Novak, *Wisconsin Judgment Day, the Sequel*, FACTCHECK.ORG, Mar. 21, 2008, [http://www.factcheck.org/elections-2008/wisconsin\\_judgment\\_day\\_the\\_sequel.html](http://www.factcheck.org/elections-2008/wisconsin_judgment_day_the_sequel.html).

39. In November 2009, a three-judge panel recommended that the ethics complaint asserting Gableman’s advertisement was a lie be dismissed. Patrick Marley, *Judicial Panel Recommends Dismissal of Gableman Complaint*, MILWAUKEE J. SENTINEL, Nov. 13, 2009, <http://www.jsonline.com/news/statepolitics/69866327.html>. The panel, however, while finding the advertisement merely misleading, stopped far short of approving the advertisement. *Id.* One judge wrote separately to indicate his view that “[m]ore troubling than the misleading implication (in the ad) is the advertisement’s disdain for the role of defense counsel in our adversary system.” *Id.*; see also Patrick Marley, *Issue of Gableman Recusal Divides State Supreme Court*, MILWAUKEE J. SENTINEL, Oct. 16, 2009, <http://www.jsonline.com/news/statepolitics/64550007.html> (noting that criminal defense attorneys have sought to have Gableman removed from multiple criminal cases and that the matter has divided the high court).

40. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266–67 (2009) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

months after *Caperton* by none other than WMC.<sup>41</sup> The majority also voted to adopt another similar petition that was drafted by the Wisconsin Realtors Association (WRA).<sup>42</sup>

Pursuant to WMC's petition, no judge would be required to recuse herself based solely on a litigant's "sponsorship of an independent expenditure or issue advocacy communication . . . or by a party to the proceeding's donation to another organization that sponsors an independent communication."<sup>43</sup> As the State Bar of Wisconsin noted in an article previewing the hearing on the petitions, "[o]n its face, WMC's proposed rule might apply no matter how large a litigant's financial expenditure or donation."<sup>44</sup> Capturing this aspect of the rule, Bert Brandenburg wrote, in an article for the American Constitution Society, that "if Bernie Madoff had spent \$100 million to elect a Wisconsin Supreme Court justice, a victim suing him for redress couldn't point to the support and ask the justice to abstain."<sup>45</sup> Squaring such a rule even with *Caperton's* constitutional floor seems difficult, but squaring it with the

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41. Alex De Grand, *In Battle over Judicial Recusal, First Amendment Trumped Due Process Rights*, STATE BAR OF WIS., Nov. 4, 2009, <http://www.wisbar.org/AM/Template.cfm?Section=InsideTrack&Template=/CustomSource/InsideTrack/contentDisplay.cfm&ContentID=87204>; see also Petition for Supreme Court Rule, In the Matter of Amending the Code of Judicial Conduct (No. 09-10), available at <http://wicourts.gov/supreme/docs/0910petition.pdf>.

42. De Grand, *supra* note 41; see also Petition for Supreme Court Rule, In the Matter of Amending the Rules of Judicial Conduct (No. 08-25), available at <http://wicourts.gov/supreme/docs/0825petition.pdf> (applying "lawful campaign contribution[s]," a matter of significantly less concern given that states, including Wisconsin, can and do cap contributions, whereas independent expenditures are unlimited under *Buckley v. Valeo*, 424 U.S. 1 (1976)).

43. Petition for Supreme Court Rule, *supra* note 41. The Court rejected an absurd petition by Wisconsin's League of Women Voters that would have required recusal for contributions over a \$1,000 threshold. See Adam Korbitz & Alex De Grand, *Court to Tackle Recusal Issue and Other Rules Petitions*, STATE BAR OF WIS., Oct. 27, 2009, [http://www.wisbar.org/am/template.cfm?section=Legislative\\_Advocacy&template=/CM/ContentDisplay.cfm&ContentID=87014](http://www.wisbar.org/am/template.cfm?section=Legislative_Advocacy&template=/CM/ContentDisplay.cfm&ContentID=87014). The Court likewise rejected a more moderate proposal by former Wisconsin Supreme Court Justice William Bablitch that would require recusal if a party or an attorney gave the justice \$10,000, the legal limit for individual campaign donations, and would have also required recusal for third-party expenditures, though the threshold for those was less clear. *Id.* The Wisconsin State Bar recommended the establishment of a study commission to look into the issue in more depth. *Id.*

44. Korbitz & De Grand, *supra* note 43.

45. Posting of Bert Brandenburg to ACS Blog, <http://www.acslaw.org/node/14849> (Nov. 17, 2009, 12:31) (emphasis added).

state's further mandate to protect and promote the "vital interest" in probity is impossible.

Members of the court's majority, including Justice Patience Roggensack, emphasized the First Amendment: "I know we are being asked to focus on recusal, not the right to vote," Roggensack said. "But I do not think you can help but impact the First Amendment when you set the kind of limits that require recusal."<sup>46</sup> After the rule was widely disparaged in editorials across the state, Justice Roggensack, responding to what she characterized as "some articles in the media,"<sup>47</sup> took the unusual step of writing an op-ed in the state's largest paper, the *Milwaukee Journal Sentinel*, the editorial board of which had described the rule adopted by the court as "[f]oolish."<sup>48</sup> In that op-ed, Justice Roggensack asserted that her vote was "about protecting the state's voters" and that the "protection of every voter's First Amendment right to have his or her vote counted . . . was the driving force behind the decision of the court" because, while it would have been "politically correct" to decide otherwise, "the oath of judicial office that I took requires much more. It requires that I do my best to uphold the First Amendment rights of all Wisconsin voters."<sup>49</sup> Similarly, Justice Gableman expressed his view that "[i]f there is something unacceptable about a political candidate, a candidate for any public office including a judge or justice, the power in this country resides with the people [to remove him or her]."<sup>50</sup>

The overlap in the two approaches, as described by the justices, is striking in many respects, but perhaps no aspect is more notable than this: despite *Caperton*, neither justice sees *any* other constitutional interest against which the First Amendment must be balanced. Justice Roggensack's self-described perception of her oath of office is narrow, even to the point of dismissing circumstances that, just months earlier, the United States Supreme Court described as involving "a serious risk of

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46. De Grand, *supra* note 41.

47. Patience Drake Roggensack, Op-Ed, *The Vote Was About Protecting State's Voters*, MILWAUKEE J. SENTINEL, Dec., 5, 2009, <http://www.jsonline.com/news/opinion/78556262.html>.

48. Editorial, *To the Highest Bidder?*, MILWAUKEE J. SENTINEL, Nov. 5, 2009, at 12A, available at <http://www.jsonline.com/news/opinion/69192522.html> ("Last week in a 4-3 vote, the court's conservative majority adopted a rule that essentially says no amount of campaign backing constitutes a conflict even if that contributor has a case before the court. Foolish. The Legislature must save the court from itself.").

49. Roggensack, *supra* note 47.

50. De Grand, *supra* note 41 (first alteration in original).

actual bias—based on objective and reasonable perceptions.”<sup>51</sup> For that matter, it is apparently of little concern to Justice Gableman that the chance to vote against an incumbent justice in a distant future election is of scant consolation to a litigant deprived of a fair tribunal.

In a peculiar development, on December 7, 2009, Justice David Prosser, the fourth member of the majority (with Justices Roggensack, Ziegler, and Gableman), announced that he was withdrawing his October vote in which he and the court had adopted “verbatim” the petitions by WMC and WRA.<sup>52</sup> Prosser indicated that this was because of the need for “fine tuning.”<sup>53</sup> As such, the new rule no longer commanded a majority of the court, although there was little reason to believe that, beyond minor drafting changes, Justice Prosser would ultimately support a materially different provision.<sup>54</sup> Accordingly, Chief Justice Shirley Abrahamson indicated that the court would revisit the matter in January of 2010.<sup>55</sup>

In a chilling and coincidental bit of foreshadowing, Wisconsin’s high court not only re-adopted the original proposal by the same 4–3 vote, but did so on the very same day that the United States Supreme Court announced its decision in *Citizens United*, which, among other things, overturned century-old restrictions on corporations and unions spending their general treasury funds to support candidates for election.<sup>56</sup> Taken in combination, Wisconsin’s disqualification rule and *Citizens United* form an embossed invitation for corporate and union litigants to shower unprecedented sums of cash on judicial campaigns. Such a scenario was not lost on Justice John Paul Stevens, who, in his dissenting opinion in *Citizens United*, wrote:

[T]he consequences of today’s holding will not be limited to the legislative or executive context. The majority of the States select their

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51. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2263 (2009).

52. Alex De Grand, *Wisconsin Supreme Court Withdraws Earlier Vote on Recusal Rules*, STATE BAR OF WIS., Dec. 7, 2009, <http://www.wisbar.org/AM/Template.cfm?Section=News&Template=/CM/ContentDisplay.cfm&ContentID=88385>.

53. *Id.*

54. See Posting of Patrick Marley to All Politics Blog, <http://www.jsonline.com/blogs/news/78723802.html> (Dec. 7, 2009) (noting that Justice Prosser “said he still supports the rule in principle, but thinks it could be clarified”).

55. See De Grand, *supra* note 52.

56. See *Citizens United v. FEC*, 130 S. Ct. 876 (2010); Patrick Marley, *Court Adopts New Campaign Donation Rules*, MILWAUKEE J. SENTINEL, Jan. 21, 2010, at B1, available at <http://www.jsonline.com/news/statepolitics/82319592.html>.

judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races. Perhaps “*Caperton* motions” will catch some of the worst abuses. This will be small comfort to those States that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.<sup>57</sup>

The dissenters on the Wisconsin Supreme Court, including Chief Justice Abrahamson, were so exercised by the court’s October action that one dissenter, Justice Ann Walsh Bradley, took the step of reading her dissent aloud during the court’s December conference.<sup>58</sup> Justice Roggensack interjected, “Ann, do you really want to do this? . . . Do you really want to do this as a justice of this court?”<sup>59</sup> Justice Bradley responded that she would not “be silenced” and read aloud the dissenting opinion, which was joined by Chief Justice Abrahamson and Justice Patrick Crooks.<sup>60</sup> Justice Bradley indicated, *inter alia*, that, “[i]n light of the peculiar way that this change to our code of conduct was adopted, it is no wonder that some perceive the court as allowing “powerful lobbying groups in our state . . . to write a major new portion of the state judicial ethics code.””<sup>61</sup> During the January 22, 2010 session, in which the majority once again adopted the WMC approach, Justice Bradley stated bluntly: “I’m just dumbfounded.”<sup>62</sup>

Whether the rule adopted, withdrawn, and re-adopted in Wisconsin directly contradicts *Caperton*, or whether it merely, in the words of Justice Bradley, “memorialize[s] the status quo into law,” is not yet clear.<sup>63</sup> On one hand, WMC and those who support the rule can claim that, at least as a matter of pure formalism, their singular focus on the factor of expenditures not necessitating recusal does not contradict *Caperton*, which focused on expenditures in the context of multiple factors. As a practical matter, though, the issue of expenditure-based recusal, coming up as it does in the context of litigation, almost always involves additional factors. Those

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57. *Citizens United*, 130 S. Ct. at 968 (Stevens, J., concurring in part and dissenting in part) (internal citations omitted).

58. Marley, *supra* note 54.

59. *Id.*

60. *Id.*

61. *Id.*

62. Marley, *supra* note 56 (internal quotation marks omitted).

63. De Grand, *supra* note 41.

factors include the nature of the spender's interest, the timing of the expenditures vis-à-vis the litigation, the proportion of overall support for the judge traceable to that particular benefactor, and, at least at the extremes of six- to seven-figure support, it is the extent of the support itself that makes the concerns *sui generis*.

While final formal action on the new rule did not occur until January, the December tremors in Wisconsin amounted to the first significant post-*Caperton* recusal development in the states, and that action unequivocally favored the perspective that failed to carry the day in *Caperton* itself. From the perspective of those concerned about money in the courts, Wisconsin's new disqualification rule amounts to snatching defeat from the jaws of victory.

After Wisconsin's high court initially passed the new rule, the *Milwaukee Journal Sentinel* editorial page, in addition to calling the rule "[f]oolish," framed the in-state political landscape this way: "The Legislature must save the court from itself."<sup>64</sup> The reference was an exhortation to the legislature to pass a long-sought, long-stalled public financing bill for judicial campaigns in the state.<sup>65</sup> In December of 2009, Wisconsin became the third state in the nation to enact public financing laws for supreme court elections.<sup>66</sup> FactCheck.org summarizes the new law's key provisions as follows:

Would-be justices would qualify for the funds by agreeing to limit spending and by raising small sums totaling between \$5,000 and \$15,000 from 1,000 different contributors. They could then receive up to \$100,000 for a primary race and up to \$300,000 for a general election—which, even in an inexpensive media market, won't fund too many TV ads of any kind. However, if one candidate "opts out" of the new system to raise unlimited funds, his or her opponent(s) could then receive more money, and a "rescue provision" would give additional funds to candidates who were being attacked by third parties. In no case, though, could they receive more than \$900,000 for a general election. The law also limits individual contributions to candidates who aren't participating in the system to \$1,000, down from the current \$10,000 cap—a factor likely to encourage candidates to choose public

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64. Editorial, *supra* note 48.

65. *Id.*

66. Viveca Novak, *Public Financing Comes to Wisconsin Supreme Court*, FACTCHECK.ORG, Dec. 2, 2009, <http://www.factcheck.org/2009/12/public-financing-comes-to-wisconsin-supreme-court/>.

financing.<sup>67</sup>

That such a bill passed despite the worst economic crisis in Wisconsin in decades, and at a time of dramatic state spending cuts,<sup>68</sup> speaks to the breadth of public concern growing out of Wisconsin's recent high court campaigns.<sup>69</sup> Indeed, a 2008 poll indicated that not only did support for the bill command a 65%–26% majority, but that Republicans (who would be traditionally less likely to support campaign finance regulations) supported it by a 58%–32% margin, and that “[e]ven a plurality of self-identified ‘very conservative voters’ supported the proposal” by a 48%–39% margin.<sup>70</sup> The State Bar of Wisconsin released a statement calling the Governor's signature on the bill “the finishing touches on the most significant judicial election reform in several decades.”<sup>71</sup> The Bar's “several decades” sentiment was echoed by in-state reform groups which stated that the system “easily qualifies as the most significant campaign reform in Wisconsin in more than 30 years” and which hope that the

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67. *Id.*; see also S.B. 40, 2009 Leg., Reg. Sess. (Wis. 2009), available at <http://www.legis.state.wi.us/2009/data/SB-40.pdf>.

68. See, e.g., Press Release, Office of the Governor Jim Doyle, Governor Doyle Announces Cuts to State Budget (May 7, 2009), available at [http://www.wisgov.state.wi.us/journal\\_media\\_detail.asp?locid=19&prid=4224](http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=4224) (announcing a number of significant Wisconsin state budget cuts in response to a deficit reaching \$1.5 billion).

69. Perhaps somewhat ironically, the law now characterized as saving the court from itself received a major boost from that same court in December of 2007, when Chief Justice Abrahamson organized a public letter, signed unanimously by the court members at the time, endorsing the concept of public financing for judicial elections, while stopping short of endorsing any particular bill:

We write to support the concept of realistic, meaningful public financing for Supreme Court elections to facilitate and protect the judicial function.

A cornerstone of our state is that the judiciary is fair, neutral, impartial, and non-partisan. The risk inherent in any non-publicly funded judicial election for this Court is that the public may inaccurately perceive a justice as beholden to individuals or groups that contribute to his or her campaign. Judges must not only be fair, neutral, impartial and non-partisan but also should be so perceived by the public.

Letter from The Supreme Court of Wisconsin to The Public (Dec. 10, 2007), available at <http://www.wicourts.gov/news/archives/2007/docs/campaignfinanceletter.pdf>.

70. JUSTICE AT STAKE CAMPAIGN, JAN. 2008 WIS. SURVEY HIGHLIGHTS, available at [http://www.justiceatstake.org/media/cms/AmViewWIPollFactSheet\\_76C0015493CD4.pdf](http://www.justiceatstake.org/media/cms/AmViewWIPollFactSheet_76C0015493CD4.pdf).

71. Adam Korbitz, *State Bar Lauds Signing of Landmark Impartial Justice Bill*, STATE BAR OF WIS., Dec. 1, 2009, <http://www.wisbar.org/AM/Template.cfm?Section=News&Template=/CM/ContentDisplay.cfm&ContentID=87964>.

system “marks the beginning of Wisconsin’s return to the kind of high court elections that served [Wisconsin] extremely well for over a century and a half.”<sup>72</sup>

That optimism must be balanced against a serious concern that the one significant shortcoming in the Impartial Justice Bill will seriously undermine its efficacy: namely, the system enacted by Wisconsin, unlike the highly successful public financing system for judicial elections in North Carolina<sup>73</sup> upon which Wisconsin’s new system is partly modeled, does not take into account the advertisements run by groups like WMC, as opposed to the candidates’ own campaigns. In other words, a candidate participating in the system will not receive so-called “trigger” or “rescue” funds based on advertisements that effectively support his or her opponent (most often by attacking the disfavored candidate) if the ads are paid for by independent groups—a category so significant that it has recently amounted to the majority of the television advertising in the state’s court races.<sup>74</sup>

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72. Wisconsin Democracy Campaign, *supra* note 23.

73. For an excellent summary of North Carolina’s system, which was recently unanimously upheld by the Fourth Circuit against a constitutional challenge, see DAMON CIRCOSTA, N.C. CTR. FOR VOTER EDUC., PUBLIC FINANCING OF JUDICIAL ELECTIONS IN NORTH CAROLINA—A BRIEF HISTORY, *available at* <http://www.lwwwi.org/cms/images/stories/Damon%20Circosta%20handout.pdf>. The Fourth Circuit held that North Carolina’s system furthered First Amendment interests and that the system “embod[ied] North Carolina’s effort to protect [the] vital interest in an independent judiciary.” N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 441 (4th Cir. 2008). By way of disclosure, in proceedings before the district court, I represented defendant Common Cause North Carolina, who intervened in support of the North Carolina system. The Fourth Circuit affirmed the district court’s decision granting defendants’ motion to dismiss the challenge.

74. See Korbitz, *supra* note 71 (noting that “supplemental grants cannot be made to counter so-called ‘issue ads’ run by third parties during a campaign, which target candidates without invoking specific calls to vote for or against a candidate”). In one recent and illustrative example of the import of outside expenditures, in Wisconsin’s 2008 election, “special interest groups were responsible for nearly 90% of all money spent on television ads in the state.” SAMPLE ET AL., *supra* note 12. Although the criminal justice advertisements run against Justice Butler were particularly distasteful, one scholar has noted that as a general matter, “the tough on crime message, or some derivation thereof, is among the most, if not *the* most, prevalent in judicial campaigns.” Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 327 (forthcoming 2010). See also Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 676–79, 687–89 (2002) (studying the 2000 state supreme court elections and finding criminal justice to be the most frequent theme in campaign advertisements).

For that reason, at least one prominent Wisconsin political scientist, University of Wisconsin Professor Charles Franklin, stated that he will “be surprised if this solves the problem.”<sup>75</sup> Since Wisconsin does not have a high court race in 2010, the first opportunity to test the system will come in 2011, when the aforementioned Justice Prosser, who opposed the bill, is up for re-election.<sup>76</sup> The system’s failure to address independent expenditures and to include triggered matching funds based on those expenditures, particularly in a state where they have become a dominant electoral factor, is the elephant in the room. But while imperfect, the law is a significant step forward, particularly in a challenging economic time, and will likely mitigate the perceived influence of money in the Wisconsin courts.

### B. Michigan

As in Wisconsin, the contextual backdrop in Michigan involves contentious and expensive high court campaigns over the last decade, particularly in 2008, as well as a perceived shift in the court resulting from those campaigns. Whereas the perception in Wisconsin (where candidates are officially nonpartisan) is that candidates unofficially backed by Republicans went from a minority on the court to a 4–3 majority with the victories of Justices Ziegler and Gableman, in Michigan, the perception is the opposite. As noted in the latest edition of the *New Politics of Judicial Elections*, “[f]or much of the decade, four conservative Supreme Court justices dominated Michigan’s Supreme Court. Their opponents, who assailed the justices as an anti-plaintiff ‘Gang of Four,’ helped sweep Chief Justice Cliff Taylor out in 2008.”<sup>77</sup> In the 2008 contest, Chief Justice Taylor was unseated by challenger Diane Hathaway based in significant part on a controversial, million-dollar advertising campaign underwritten by the state Democratic Party, which, via a dramatization, portrayed Taylor as sleeping on the bench.<sup>78</sup> Taylor was supported by advertising from the Michigan Republican Party and the Michigan Chamber of Commerce.<sup>79</sup>

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75. *Public Funding Available for Supreme Court Races*, WIS. L.J., Dec. 2, 2009, <http://www.wislawjournal.com/article.cfm/2009/12/07/Public-funding-available-for-Supreme-Court-races>.

76. Patrick Marley & Lee Bergquist, *Doyle Signs High Court Election Bill*, MILWAUKEE J. SENTINEL, Dec. 1, 2009, at A1, available at <http://www.jsonline.com/news/statepolitics/78230432.html>.

77. SAMPLE ET AL., *supra* note 12.

78. Viveca Novak, *The Case of the Sleeping Justice*, FACTCHECK.ORG, Nov. 26, 2008, [http://www.factcheck.org/elections-2008/the\\_case\\_of\\_the\\_sleeping\\_justice.html](http://www.factcheck.org/elections-2008/the_case_of_the_sleeping_justice.html).

79. *Anonymous Donors Dominated Supreme Court Campaign*, MICH.

Assuming that one credits as the first major recusal development post-*Caperton* the subsequently withdrawn (but only formally so) October vote in Wisconsin to adopt a rule prohibiting recusal based solely on unlimited expenditures, the second major development occurred just across Lake Michigan. As in Wisconsin, the action caused bitter divisions on Michigan's court, but unlike in Wisconsin, the new rules are unequivocally consistent with the spirit of *Caperton*.<sup>80</sup> Michigan's Supreme Court voted in November, 2009 to adopt new rules governing disqualification.<sup>81</sup>

On the issue of recusal, in a very short time, and expressly in response to *Caperton*, Michigan jumped from laggard to leader. First, Michigan is no longer among the lone outliers in not having adopted the American Bar Association's general disqualification standard requiring judges to recuse themselves whenever their impartiality "might reasonably be questioned."<sup>82</sup> Second, with the strong support of Michigan Chief Justice Marilyn Kelly, the state adopted a new administrative rule whereby the objective component of that standard would no longer be subject to the fundamental flaw exposed in *Caperton* itself—the entirely subjective and unreviewable determination of that objective standard by the target judge herself.<sup>83</sup>

Michigan's responsiveness to *Caperton* could scarcely be more direct, with the new rules going so far as to include in their articulations of the reasons warranting disqualification instances in which the "judge, based on objective and reasonable perceptions, has . . . a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton*."<sup>84</sup> But the responsiveness is hardly limited to directly incorporating the case in the rule; it includes the more significant step of full-court review, stating:

In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the

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CAMPAIGN FIN. NETWORK, Nov. 19, 2008, <http://www.mcfn.org/press.php?prId=77>.

80. See MICH. CT. R. 2.003(C)(1)(b) (2010).

81. AMD File No. 2009-04, Amendment of Rule 2.003 of the Michigan Court Rules (Nov. 25, 2009), available at <http://www.courts.michigan.gov/supremecourt/Resources/Administrative/2009-04-112509.pdf>.

82. See W. VA. CODE OF JUDICIAL CONDUCT Canon 3E(1) (1993); see also SAMPLE, POZEN & YOUNG, *supra* note 1, at 17 (describing the near ubiquity of this provision and identifying Michigan as one of just three outliers that have not formalized the rule).

83. MICH. CT. R. 2.003(C).

84. *Id.*; see also Amendment of Rule 2.003, *supra* note 81.

issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.<sup>85</sup>

Referencing the *Caperton* facts while on a Detroit talk radio program, Chief Justice Kelly stated that “[w]e don’t want a situation like that in Michigan . . . . The constitutional rights of judges don’t overbalance the right of the people to get a fair trial.”<sup>86</sup> Justice Michael Cavanaugh’s written concurrence supporting the adoption of the new rule asserts, as remains true in many states around the country, that tradition rather than wisdom was the primary argument against the new rule. According to Justice Cavanaugh, there “is no reasonable justification that can be proffered for allowing a justice accused of bias to be the only one who decides whether he or she should be disqualified, other than ‘we have always done it this way.’”<sup>87</sup> Chief Justice Kelly’s written statement in support of the rule goes straight to the heart of the dilemma illustrated by Justice Benjamin, and ignored by the dissenters in *Caperton*: “[W]ith this rule, the Court permits a justice’s recusal where that justice is unable to render an unbiased decision *and unable or unwilling to acknowledge that fact*. The justice system and this Court can only be stronger for it.”<sup>88</sup>

The three justices who opposed the adoption of the new rule in Michigan assert that the rules pose, in the words of Michigan Justice Maura

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85. Amendment of Rule 2.003, *supra* note 81, at 3–4.

86. Mark Hornbeck, *Mich. Supreme Court Split on Judicial Disqualification*, DETROIT NEWS, Nov. 30, 2009, at 4A.

87. *Id.*

88. *Id.* (emphasis added). Chief Justice Kelly’s acknowledgment that sometimes judges are “unable or unwilling” to step aside, or to serve as an impartial arbiter as to their own disqualification, is a hard truth borne out by high-profile scenarios such as Justice Benjamin’s, but also in less notorious circumstances. As Professor Jeffrey Stempel writes, while “[i]n close cases, judges should err on the side of recusal in order to enhance public confidence in the judiciary,” the reality is that “unfortunately, some judges appear capable of denying even a compelling case for disqualification.” Jeffrey W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 815 (2009).

Corrigan, “a huge threat to our liberties as Americans.”<sup>89</sup> Under the dissenters’ theory, “gamesmanship”<sup>90</sup> would rule the day, and the court majority would not only be theoretically able, but also inclined, to impose its will on a disfavored justice without regard for the merits of the circumstances. For what little the political scorecard may be worth given the polarizing nature of both the issue and the comments by the judges, the Republican Party backed all three dissenting justices. The Democratic Party nominated Chief Justice Kelly and Justices Cavanaugh and Hathaway, who supported the rule. Justice Elizabeth Weaver, a Republican, who is seen as a moderate swing vote on the court, supported the rule, writing that it “is a positive, historical step forward toward achieving more transparency and fairness in the Michigan Supreme Court.”<sup>91</sup>

Against the dissenters’ hypothesis, Larry Dubin, a legal ethics professor at the University of Detroit Mercy, asserts that the new rules “hold the judges to a higher standard” and that while “some justices are afraid others on the court will use this rule to disqualify them from deciding important cases,” that concern is “outweighed by the need for specific rules.”<sup>92</sup> Dubin is in good company. In the words of Deborah Rhode, the director of the Center for Ethics at Stanford Law School, “[t]here’s a lot not to like in leaving it up to the conscience of the individual judge.”<sup>93</sup> Former Tennessee Supreme Court Justice Penny White wrote an excellent article on *Caperton*, published in the *Harvard Law Review*. Written from her unique perspective as both a scholar and a state court jurist, the article suggests that, when faced with a recusal motion, the “challenged judge may grant the motion,” but that “[i]f the judge does not, he or she should be required to transfer the motion to an assigned judge or recusal panel for decision.”<sup>94</sup>

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89. Hornbeck, *supra* note 86.

90. *Id.* at 27.

91. *Id.* at 12.

92. *Id.*

93. *Massey–Maynard Photos Highlight Judicial Recusal Rule*, HUNTINGTON HERALD-DISPATCH, Jan. 27, 2008, <http://www.herald-dispatch.com/homepage/x808411314>; *see also* Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 530 (2007) (asserting that “[a]llowing judges to decide on their own recusal motions is in tension not only with the guarantee of a neutral decisionmaker, but also with our explicit commitment to objectivity in [the recusal] arena.”).

94. Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 148 (2009) (citations omitted).

The as-yet unapproved draft of the American Bar Association's Judicial Disqualification Project—an effort ably directed by Indiana Professor Charlie Geyh—frames the broader aspects of this problem and the merits of solutions akin to Michigan's new rule:

Vesting responsibility for deciding disqualification motions in the target judge alone is ill-advised for reasons too obvious to ignore. The overriding point is not that a judge whose disqualification is sought is presumptively biased against the movant, but that in a system devoted to impartial justice both in appearance and in fact, litigants are entitled to a process that is above suspicion.

Divesting the target judge of all authority to act when disqualification motions are filed avoids this problem. The third option—authorizing the target judge to review the timeliness and facial validity of a disqualification motion before turning those that pass this threshold scrutiny over to a second judge for a ruling on the merits of the motion—obviates the need for a second judge to waste time on patently defective motions and may stake out an acceptable middle ground, provided that the target judge's discretion to deny the motions is circumscribed.<sup>95</sup>

“The fact that judges in many jurisdictions decide on their own recusal challenges, with little to no prospect of immediate review, is one of the most heavily criticized features of United States disqualification law—and for good reason.”<sup>96</sup> Objectifying the subjective enforcement of recusal is a sensitive subject. As Professor Geyh explained in recent Congressional hearings:

[J]udges who are deeply committed to the appearance and reality of impartial justice are called upon to acknowledge, in the context of specific cases, that despite their best efforts to preserve their impartiality, they are either partial or appear to be so. That is a hard thing to ask of our judges.<sup>97</sup>

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95. See ABA STANDING COMM. ON JUD. INDEPENDENCE, REPORT TO THE HOUSE OF DELEGATES 9 (2009), available at [http://www.wisbar.org/AM/Template.cfm?Section=Content\\_Folders&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=85087](http://www.wisbar.org/AM/Template.cfm?Section=Content_Folders&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=85087).

96. See SAMPLE, POZEN & YOUNG, *supra* note 1; see also Amanda Frost, *Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 571–72 (2005) (“Although precedent does exist for referral of disqualification motions to a neutral judge, it is rare.”) (citations omitted).

97. *Examining the State of Judicial Recusals After Caperton v. A.T. Massey*:

Given those sensitivities, and given the extraordinary individual and collective disincentives for court members to act in the manner that the doomsaying dissenters predict, Michigan's new rule will likely be invoked only in very rare instances, and will even more rarely lead to a disqualification. Yet while Michigan's rule will only rarely be invoked, it genuinely takes the *Caperton* constitutional baton and furthers the reality and appearance of impartial justice. In that sense, and in stark contrast to the parade-of-horribles, slippery-slope, and unworkability arguments advanced by Chief Justice Roberts in his *Caperton* dissent, Michigan's new rule represents the very best of federalism.<sup>98</sup> For that matter, the two perspectives may ultimately end up proving not to be in tension with each other. Chief Justice Roberts, of course, was objecting to the rule as constitutionally based and unworkable, but if courts succeed in crafting rules and processes that simply reflect good policy, the constitutional inquiries that concern Chief Justice Roberts will generally be obviated.

### C. West Virginia

Professor Geyh is correct that recusal can be a sensitive subject among judges, and nowhere is that more true than in West Virginia. A full recitation of the judicial circus that preceded the *Caperton* decision is beyond the scope of this Article. Contextually, though, it bears noting briefly here that in addition to the extreme nature of its best known facts, the case also involved: (1) the recusals of two other justices; (2) front-page

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*Hearing Before the Subcomm. on Courts and Competition of the H. Comm. On the Judiciary*, 111th Cong. 2 (2009) (statement of Charles G. Geyh, John F. Kimberling Chair in Law, Indiana University Maurer School of Law at Bloomington), available at <http://judiciary.house.gov/hearings/pdf/Geyh091210.pdf>.

98. Notably, the rule does not pretend to answer all forty of Chief Justice Roberts's questions in his *Caperton* dissent. Instead, the process-based approach demonstrates that answering them immediately was always unnecessary in the first place, and that the broad, boundary-defining value of *Caperton*, about which Rick Pildes has written, is in fact deeply significant. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2269–72 (2009) (Roberts, C.J., dissenting) (listing forty numbered questions that he characterizes as “only a few uncertainties that quickly come to mind”); Posting of Rick Pildes to Balkinization, <http://balkin.blogspot.com/2009/06/caperton-and-supreme-courts-boundary.html> (June 8, 2009, 12:05); see also Posting of kswisher to Judicial Ethics Forum, <http://judicialethicsforum.com/2009/06/15/caperton-answers-to-chief-justice-roberts-twenty-questions-times-two/> (June 15, 2009, 08:50) (noting that “an umpire who merely calls balls and strikes should be less concerned with questions not before the court, and indeed, every case could spawn a multitude of forward-looking questions not raised by the facts at hand”).

photographs of West Virginia's then-Chief Justice on vacation in the Riviera with Justice Benjamin's chief benefactor, Massey Chief Executive Officer Don Blankenship;<sup>99</sup> (3) a series of intracourt recriminations related to the same;<sup>100</sup> (4) an embattled court information officer's factually selective press release and Massey's counsel's related strategic overreach;<sup>101</sup>

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99. Then-West Virginia Chief Justice Eliot Maynard, who had joined the majority's first opinion in favor of Massey, was photographed vacationing with Blankenship on the French Riviera during the pendency of Massey's appeal. See Paul J. Nyden, *Coal Operator Says Photos Show Maynard Should Not Hear Appeal*, CHARLESTON GAZETTE, Jan. 15, 2008, at 1A. After public outcry, Maynard ultimately recused himself from the rehearing of the appeal. Justice Larry Starcher, who had dissented from the initial opinion in favor of Massey, also recused himself from the rehearing due to the perception created by his public statements criticizing Blankenship and his extraordinary spending in support of Justice Benjamin. See *Voluntary Disqualification of Justice Larry V. Starcher, A.T. Massey Coal Co. v. Caperton*, 679 S.E.2d 223 (W. Va. 2008) (No. 33350), available at <http://www.state.wv.us/wvsca/press/caperton.pdf>.

100. For example, Justice Starcher's written order in which he stepped down from the case stated that "the pernicious effects of Mr. Blankenship's bestowal of his personal wealth and friendship have created a cancer in the affairs of this court. And I have seen that cancer grow and grow, in ways that I may not fully disclose at this time." Justice Starcher Recusal Memorandum at 9, *Caperton*, 679 S.E.2d 223.

101. Two days after oral argument in the Supreme Court, Massey's counsel submitted a motion for leave to file a supplemental brief on the ground that "[a]ccording to a March 2, 2009 news release issued by the [West Virginia] Supreme Court of Appeals' Public Information Office . . . Justice Benjamin has voted against Massey affiliates 81.6% of the time since taking office." Supp. Brief for Respondents at 1, *Caperton*, 129 S. Ct. at 2252 (No. 08-22) (citing Press Release, Supreme Court of Appeals State of West Virginia, Summary of Chief Justice Benjamin's Dispositive Voting Record Regarding Massey Energy Cases from 01/01/2005 to 12/31/2008 (Mar. 2, 2009), available at [http://www.state.wv.us/wvsca/press/march2\\_09.htm](http://www.state.wv.us/wvsca/press/march2_09.htm)). The West Virginia Public Information Office failed to mention in the release that, for example, many of those votes were five to zero procedural matters. Petitioners pointed out, in their opposition to the supplemental filing, that the "only thing that is remotely 'new' about the information proffered by Massey is that it was repackaged in a self-serving news release on the eve of the oral argument before this Court." Opposition to Respondents' Motion for Leave to File a Supplemental Brief at 1, *Caperton*, 129 S. Ct. 2252 (No. 08-22). Likewise, Petitioners noted that neither the release nor the Respondents acknowledged that:

[A]fter he denied petitioners' first motion for recusal, Justice Benjamin voted against Massey in several other cases, in each of which his vote was *not* outcome-determinative. Yet neither Massey nor the "news release" it proffers refutes that, in the only cases in which his vote *was* outcome-determinative—among them, petitioners' \$50 million case in which "conduct of Massey CEO Don Blankenship was at issue"—Justice Benjamin voted for Massey.

and (5) in a matter technically involving another case, but involving many of the same parties, even the remarkable specter of a failed certiorari petition, on due process grounds, focusing on the participation of another justice, that was filed by the same lawyers who then represented Massey in the Supreme Court and who argued that Benjamin's failure to recuse was not even remotely a due process issue.<sup>102</sup>

In light of the above, it was hardly surprising that recusal was not a focal point when West Virginia's Independent Commission on Judicial Reform, established by Governor Joe Manchin approximately one month after the *Caperton* oral argument, came back with its final report.<sup>103</sup> The Commission, for which Justice Sandra Day O'Connor served as Honorary Chair, issued four primary recommendations.<sup>104</sup> Most pertinently, the Commission suggested that the state should establish a pilot public financing program for one of two open supreme court seats in the 2012 election.<sup>105</sup> In connection with that recommendation, the Commission recommended a state voter guide for judicial candidates, the intent of which would be to serve as a source of nonpartisan information about the candidates to supplement the current primary source—television advertising.<sup>106</sup> The other three recommendations focused on state-specific matters with little to no connection to the issue of money and the courts.<sup>107</sup>

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*Id.* at 2 (citation omitted).

102. Massey filed a petition for certiorari arguing for the recusal of another West Virginia Supreme Court justice on the ground that a "biased decisionmaker is 'constitutionally unacceptable.'" Petition for Writ of Certiorari at 26, *Massey Energy Co. v. Wheeling Pittsburgh Steel Corp.*, 129 S. Ct. 626 (2008) (No. 08-218). Andrew L. Frey served as counsel of record for Massey on that certiorari petition and in the Supreme Court in *Caperton*. In another ironic nuance, one of the arguments Massey advanced in that effort was that West Virginia's recusal practices violate federal due process because they do not provide a means for the full court to review a justice's decision not to recuse himself. See *Massey Energy Co. v. Supreme Court of Appeals of W. Va.*, No. 2:06-0614, 2007 WL 2778239, at \*2 (S.D. W. Va. Aug. 8, 2006).

103. See W. VA. INDEP. COMM'N ON JUD. REFORM, FINAL REPORT (Nov. 15, 2009) (on file with *Drake Law Review*).

104. See *id.* at 7–8.

105. *Id.* at 15 ("The Legislature should adopt a public financing program similar to that contained in the proposed Senate Bill 311 from the 2009 regular session.").

106. *Id.* at 17–19 ("The Commission also recommends the creation and publication of a voter guide for the 2012 judicial elections.").

107. The other recommendations involved formalizing the process and criteria that the governor uses to select candidates to fill seats that become vacant during a judicial term, establishing an intermediate appellate court, and undertaking a study to determine the feasibility of a specialized business court in the state. See *id.* at 20–28,

The Commission's recommendations were rather modest, despite calls from Justice O'Connor and others for the state to move to a system of merit-based judicial appointments.<sup>108</sup> Considered, however, in light of the lengthy and still raw experience with Justice Benjamin—who is now the state's Chief Justice—the Commission's report includes some remarkably sobering reflections with respect to money and the courts. In addition to acknowledging “an erosion of the public's confidence in the State's justice system as a neutral and unbiased arbiter,”<sup>109</sup> the Commission stated:

As campaign spending has increased, so too has the perception that interested third parties can sway the court system in their favor through monetary participation in the election process. This perception strikes at the very heart of the judiciary's role in our society.

....

Something must be done to address the continued growth in spending on judicial campaigns in West Virginia. As spending by candidates and third parties increases, so too will the perception that “justice may be bought.”<sup>110</sup>

As compared to the recusal and public-funding developments in Wisconsin and Michigan,<sup>111</sup> the nonbinding recommendations of West Virginia's Independent Commission were quite modest. Considering the in-state backstory, however, the modest recommendations in West Virginia offered cause for cautious optimism that *Caperton* spurred not only concern, but the potential for genuine reform. In late March of this year, that potential was realized when, following on the recommendations of the Commission, the West Virginia legislature passed, and Governor Manchin signed into law, a pilot public financing system for state supreme court contests beginning in the 2012 elections.<sup>112</sup>

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29–45.

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

109. W. VA. INDEP. COMM'N ON JUD. REFORM, *supra* note 103, at 3.

110. *Id.* at 3–4, 12.

111. See *supra* Parts I.A, I.B.

112. See Press Release, Justice at Stake, New West Va. Law Shows “National Momentum” for Court-Election Reforms (March 25, 2010), available at [http://www.justiceatstake.org/newsroom/press\\_releases.cfm/new\\_west\\_va\\_law\\_shows\\_national\\_momentum\\_for\\_courtelection\\_reforms?show=news&newsID=7148](http://www.justiceatstake.org/newsroom/press_releases.cfm/new_west_va_law_shows_national_momentum_for_courtelection_reforms?show=news&newsID=7148).

#### D. Nascent Developments in Other States

Since *Caperton*, commentators and advocates who favor appointive systems, including many jurists around the country, have seized on the case's underlying scenario as a messaging opportunity and an illustration of the worst manifestations of judicial elections.<sup>113</sup> While the *Caperton* scenario certainly qualifies as the latter, history suggests that—messaging opportunity or not—these advocates are unlikely to achieve their ultimate goal of abandoning elections. Penny White recently explained that “[d]espite clear documentation that judicial elections erode public trust and confidence in the judiciary, we persistently avoid a discussion about the constitutionality of judicial elections and view such a discussion as counterproductive because surveys suggest that most Americans want to elect their judges.”<sup>114</sup>

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113. In addition to the initiatives enumerated in this Article, a variety of disqualification proposals were recently in various stages of circulation and adoption. For example, in California—where many judges, though not the appellate justices, are elected—a commission has recommended adopting contribution-based disqualifications over particular threshold limits. See COMM’N FOR IMPARTIAL COURTS, JUDICIAL COUNCIL OF CAL., RECOMMENDATION FOR SAFEGUARDING JUDICIAL QUALITY, IMPARTIALITY, AND ACCOUNTABILITY IN CALIFORNIA 32–34 (Aug. 2009) (draft), available at [http://www.courtinfo.ca.gov/jc/tflists/documents/cic-fin\\_alreport.pdf](http://www.courtinfo.ca.gov/jc/tflists/documents/cic-fin_alreport.pdf). In Nevada, the state supreme court declined to adopt a commission’s recommendation that judicial disqualification be triggered when a party appearing before a judge had contributed a total of \$50,000 to the judge’s campaigns in the previous six years. See *Nevada High Court Revises Judicial Conduct Rules*, LAHONTAN VALLEY NEWS (Fallon), Jan. 2, 2009, <http://www.lahontanvalleynews.com/article/20100102/NEWS/100109997/1002&parentprofile=1045>; see also Nathan Koppel, *States Weigh Judicial Recusals: Some Judges, Businesses Oppose Restrictions on Cases Involving Campaign Contributions*, WALL ST. J., Jan. 26, 2010, <http://online.wsj.com/article/SB10001424052748703822404575019370305029334.html> (noting, in particular, the view of Professor Jeffrey Stempel, who served on the commission, that Nevada “missed an opportunity to strike a blow for judicial impartiality”). Prospectively, the Brennan Center for Justice is tracking and periodically updating state proposals and developments relating to recusal, which are inevitably—though one hopes not eternally—in various inchoate stages in states around the country. See BRENNAN CTR. FOR JUST., RECUSAL REFORM IN THE STATES: 2009 TRENDS AND INITIATIVES, <http://www.brennancenter.org/page/-/2009DISQUALIFICATIONREFORMINSTATES.pdf> (last visited Apr. 19, 2010).

114. White, *supra* note 94, at 127. While the author is relatively agnostic on the “elections or appointments” debate, I do count myself among those who find that the discussion is often counterproductive—particularly when the change is politically infeasible, but the discussion persists nonetheless—and thus comes at the expense of attention devoted to more incremental measures that might improve the perception and actuality of fairness in the courts. See Charles Gardner Geyh, *The Endless Judicial*

Numerous judicial leaders, including, in particular, the Chief Justices of Texas and Ohio, see *Caperton* as creating a window for momentum on merit selection efforts. In November of 2009, Ohio Chief Justice Tom Moyer convened a major conference of state and national political, business, and civic leaders focused on Moyer's view that "[t]he time has come to do something to address the widespread perception that campaign contributions influence judicial decision making. Our goal is to determine whether to pursue a new selection method for Supreme Court Justices."<sup>115</sup> Chief Justice Moyer, having been elected four times, was at the time the longest-sitting state Chief Justice in the country, and he was quite familiar with expensive state supreme court contests—between 2000 and 2008, Ohio ranked first in the nation for the \$20 million spent on television advertisements in supreme court races.<sup>116</sup> At the close of the conference, Moyer pledged in a press release to work with state organizations "to support a constitutional amendment to replace statewide elections of the justices with a new system where justices are appointed and stand for a retention election."<sup>117</sup> The mountain is tall. Ohio's voters roundly rejected a similar proposal in 1987.<sup>118</sup>

Chief Justice Moyer's words echoed those of Texas Chief Justice Wallace Jefferson, who referenced *Caperton* in a February, 2009 (pre-decision) address to the Texas state legislature, in which he argued that:

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*Selection Debate and Why it Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1279–80 (2008) (noting that changing election systems "can be a worthy goal and one well worth pursuing . . . but not at the expense of ignoring shorter-term remedies that can make a bad system better in the interim").

115. Patrick Lewis, Editorial, *False Perception of Elected Judges*, AKRON BEACON J., Nov. 24, 2009, <http://www.ohio.com/editorial/commentary/72246132.html>. Information on the conference is available on its website at <http://www.judicialselection.net/Test.asp>.

116. SAMPLE ET AL., *supra* note 12. Chief Justice Moyer passed away on April 2, 2010. Chief Justice Moyer's passing is not only a great loss to the state of Ohio, but to citizens around the country who, regardless of political persuasion, cherish the rule of law and the judiciary's role in its preservation.

117. William Hershey, *Chief Justice Moyer, Allies Promise Campaign to Change Selection of Supreme Court Justices*, DAYTON DAILY NEWS, Nov. 20, 2009, [http://www.daytondailynews.com/o/content/shared-gen/blogs/dayton/ohiopolitics/entries/2009/11/20/chief\\_justice\\_moyer\\_allies\\_pro.html](http://www.daytondailynews.com/o/content/shared-gen/blogs/dayton/ohiopolitics/entries/2009/11/20/chief_justice_moyer_allies_pro.html).

118. James Nash, *Democratic Judge Against Merit Picks for High Court*, COLUMBUS DISPATCH, Dec. 1, 2009, [http://www.dispatchpolitics.com/live/content/local\\_news/stories/2009/12/01/copy/dem-judge-against-high-court-merit-picks.html?adsec=politics&sid=101](http://www.dispatchpolitics.com/live/content/local_news/stories/2009/12/01/copy/dem-judge-against-high-court-merit-picks.html?adsec=politics&sid=101).

If the public believes that judges are biased toward contributors, then confidence in the courts will suffer. So I ask the question—is our current judicial election system, which fuels the idea that politics and money play into the rule of law, the best way to elect judges in Texas? The status quo is broken.<sup>119</sup>

After the decision, Chief Justice Jefferson asserted in a statement that the “*Caperton* decision challenges us to do more to remove the perception that judicial campaign contributions influence decisions in Texas courts. *Caperton* identified a core problem that exists in Texas . . . .”<sup>120</sup> Chief Justice Jefferson’s view is shared by, among others, one of his predecessors as Texas Chief Justice, Tom Phillips, who “hope[s] *Caperton* will spur states to focus on whether our 19th century method of selecting judges works well in the 21st century.”<sup>121</sup>

The political landscape with respect to changing judicial selection in Texas and Ohio is largely mirrored in other traditional judicial election battlegrounds, including Pennsylvania, where the House Judiciary Committee recently held hearings aimed at promoting a commission-based appointment system.<sup>122</sup> The concept of an appointive system in Pennsylvania received some conditional support for the first time from the AFL–CIO,<sup>123</sup> as well as renewed support from Governor Ed Rendell and others.<sup>124</sup> Similarly, in Michigan, the first steps in what some envision as a

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119. Wallace B. Jefferson, Chief Justice, Sup. Ct. of Tex., Address to the 81st Legislature 9 (Feb. 11, 2009) (transcript available at <http://www.setexasrecord.com/content/img/f217336/2009stateofthejudiciary.pdf>).

120. Mary Flood, *High Court Ruling May Stir Debate in Texas*, HOUSTON CHRON., June 8, 2009, <http://www.chron.com/disp/story.mpl/nation/6465965.html>.

121. Eliza Newlin Carney, *A Win for Fairer Courts*, NAT’L J., June 15, 2009, [http://www.nationaljournal.com/njonline/rg\\_20090615\\_7680.php](http://www.nationaljournal.com/njonline/rg_20090615_7680.php).

122. *The Appellate Court Nominating Commission: Hearing on H.R. 1619 Before the H. Comm. on the Judiciary*, 2009 Leg., 194th Sess. (Pa. 2009).

123. Holly Herman, *Pennsylvanians Likely to Continue Electing, Not Appointing Judges, Local Legal Community Says*, READING EAGLE, Dec. 25, 2009, <http://readingeagle.com/article.aspx?id=180475> (explaining that the AFL–CIO prefers electing judges but is willing to consider merit selection because voter turnout is low).

124. Choose Judges on Merit, Supporters of Merit Selection in Pennsylvania, June 17, 2008, <http://judgesonmerit.org/about-this-campaign/supporters-of-merit-selection/> (last visited Apr. 19, 2010). Pennsylvania, which has been rocked with expensive races for its high court in recent years, including the most expensive contest in the nation during the 2007–08 election cycle, is another state in which charges of “pay to play” justice have been leveled. Current Justice Joan Orié Melvin, addressing the matter of her opponent’s seven-figure support from a state political action committee, said “such a large donation made it look like ‘justice for sale’ and ‘pay to

ten-year plan to bring about a commission-based appointment system were taken in February, 2010, when state leaders convened a conference similar to the one in Ohio, with Justice Sandra Day O'Connor delivering the keynote address.<sup>125</sup>

In 2004, Seth Andersen, the Executive Director of the American Judicature Society, wrote that “[p]opular support for constitutional change from judicial elections to merit selection systems has declined significantly over the past three decades.”<sup>126</sup> The first test for whether there might be any groundswell of populist support for moving away from elected judiciaries will come this year in Nevada, where in 2007 and 2008 the state legislature, responding in part to contribution-related scandals at the state trial court level,<sup>127</sup> approved a proposed constitutional amendment in which candidates would first go through a commission-based appointment process and then would face a retention election in which they “would need 55% of the vote to remain in office.”<sup>128</sup> Nevada “voters rejected appointment systems in 1972 and 1988.”<sup>129</sup>

There is little question that efforts favoring appointment systems around the country have been rejuvenated since *Caperton*. Apart from Nevada, where the answer as to whether voters favor moving to an appointment system will come this year, the answer to the question of whether the more inchoate appointment efforts will bear fruit is a matter about which this author is dubious. Still, the United States Supreme

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play.” Tom Barnes, *Orie Melvin Bucks Odds to Win Pa. Supreme Court Seat*, PITTSBURGH POST-GAZETTE, Nov. 4, 2009, <http://www.post-gazette.com/pg/09308/1010658-178.stm>.

125. Wayne State University Event Calendar, Options for an Independent Judiciary in Michigan featuring Sandra Day O'Connor, <http://events.wayne.edu/law/2010/02/09/options-for-an-independent-judiciary-in-michigan-featuring-sandra-day-o-connor-21332/> (last visited Apr. 19, 2010).

126. Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 793 (2004).

127. See Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing with a Stacked Judicial Deck*, L.A. TIMES, June 8, 2006, <http://articles.latimes.com/2006/jun/08/nation/na-vegas8> (finding that even Nevada judges running unopposed, but who benefited from a ready campaign war chest, collected hundreds of thousands of campaign dollars from litigants and lawyers, and finding, most notably, that the donations were frequently via checks dated “within days of when a judge took action in the contributor’s case”).

128. See Am. Judicature Soc., *Judicial Selection in the States: Nevada*, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=NV](http://www.judicialselection.us/judicial_selection/index.cfm?state=NV) (last visited Apr. 19, 2010).

129. See *id.*

Court's imprimatur in support of the proposition that there are serious risks inherent in injecting large amounts of money into the judicial process can only serve to help those efforts on the margins.

### III. CONCLUSION

In his ever-trenchant manner, Roy Schotland recently wrote: “*Caperton*’s fundamental holding is that judicial elections are different. One cannot conceive of a court holding that a legislator (or executive) would be barred from acting in X matter because a campaign supporter was involved.”<sup>130</sup> *Caperton* established, in Schotland’s terms, the absolute minimum level of “difference” that is constitutionally required.<sup>131</sup> Still, Wisconsin’s new recusal rule reflects the inertia and opposition among some to recognizing that in the context of the judiciary—regardless of whether judges are appointed or elected—due process, as well as the First Amendment, must be protected. The groundbreaking recusal rule adopted by the Michigan Supreme Court, however, as well as the public financing system signed into law in Wisconsin, have the potential to mitigate the appearance of money influencing the judiciary in the courts of those states. The initial recommendations of West Virginia’s Independent Commission on Judicial Reform, including the pilot program for public financing of its high court campaigns, are quite modest, but plainly reflect a chastened view and a renewed commitment to reverse what it bluntly described as the “erosion of the public’s confidence in the State’s justice system as a neutral and unbiased arbiter.”<sup>132</sup> Finally, *Caperton* is rejuvenating efforts in some states to at least reconsider whether, given the spiraling costs of judicial elections and the commensurate conflicts created by expensive campaigns, carefully crafted appointive systems might better serve the public. In sum, following *Caperton*, states are taking next steps to protect the differences that make the judiciary distinct, and the early returns reflect cautious and mixed, but mostly positive, results.

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130. Schotland, *supra* note 4, at 344.

131. *Id.*

132. W. VA. INDEP. COMM’N ON JUD. REFORM, *supra* note 103, at 3.