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The Need for Effective Recusal Standards for an Elected Judiciary

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THE NEED FOR EFFECTIVE RECUSAL STANDARDS FOR AN ELECTED JUDICIARY

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In 2004, the president of a coal company donated $3 million to Brent Benjamin's campaign for the West Virginia Supreme Court of Appeals just before a matter involving the coal company was to come before the court. When Benjamin won, he refused to recuse himself from the case, and cast the deciding vote in favor of the coal company. With so many states holding judicial elections, this example illustrates the due process concern that elected judges may be unable to appear impartial when litigants who have contributed to their campaigns come before their court. To address this concern, uniform standards should be implemented by states to require mandatory judicial recusal under certain circumstances. Litigants should not have to overcome the twin hurdles of proving actual bias and getting a judge to voluntarily step down. States should look at specific factors—such as the intent behind campaign contributions, the timing, and amount of the contributions—to determine whether such campaign contributions would be likely to bias a judge. Moreover, states should implement procedures that prevent judges from ruling on motions for their recusal. Only when objective factors are weighed by an objective body, can litigants fully realize their due process right to a fair trial.

I. INTRODUCTION

In 2002, a West Virginia trial court ordered A.T. Massey Coal Company ("Massey") to pay more than $50 million in compensatory and punitive damages to Harman Mining Corporation for fraudulent misconduct.1 Massey appealed, and in 2004, Caperton v. A.T. Massey Coal Co.2 came before the state’s highest court, the West

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Virginia Supreme Court of Appeals. West Virginia holds partisan elections for seats on its highest court, and the 2004 election occurred shortly before Massey's appeal was scheduled to be heard.\footnote{3} In this election, a virtually unknown lawyer named Brent Benjamin opposed incumbent Justice Warren McGraw.\footnote{4} With Massey's appeal pending and millions of dollars at stake, Don L. Blankenship, Massey's CEO, involved himself in the election by donating $3 million to Benjamin's campaign.\footnote{5} This amount constituted more than 60 percent of the total amount spent in Benjamin's entire campaign.\footnote{6} With the help of Blankenship's support and money, Benjamin defeated the incumbent.\footnote{7}

Justice Benjamin took his seat on the West Virginia Supreme Court of Appeals just as Massey's appeal came before it.\footnote{8} Concerned about Justice Benjamin's ability to rule impartially on a matter concerning such a large campaign contributor, the petitioners, Harman Mining Company and its founder, Hugh Caperton, brought three separate recusal motions requesting Justice Benjamin step down from the case.\footnote{9} The movants argued that Justice Benjamin's failure to step away from the case created an "objective 'probability of actual bias'"\footnote{10} that violated their right to a fair trial, and thus violated the Due Process Clause of the Fourteenth Amendment.\footnote{11} Despite the massive contributions that Justice Benjamin had accepted from Massey's CEO, he nonetheless refused to recuse himself from participating in Massey's appeal.\footnote{12}

When criticized for the impropriety of deciding a case involving a substantial campaign supporter, Justice Benjamin justified his participation in the matter by explaining that "no objective information is advanced to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which
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comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case." 13 After all three recusal motions were denied, Justice Benjamin joined the court and found for Massey. The $50 million verdict was overturned by a vote of three to two. Justice Benjamin cast the deciding vote. 14

Over the past few decades, judicial elections have become "noisier, nastier and costlier." 15 Meanwhile, attempts to regulate election campaigns have been challenged as unconstitutional. 16 The ethical dilemma presented by Justice Benjamin’s refusal to recuse him in Caperton is not novel. Judicial elections require campaigning. 17 Campaigns can be expensive, and they require candidates to seek out private contributions in order to remain competitive. 18 As more money becomes involved in these elections, the risk increases that a litigant appearing before the court could attempt to “buy” a judge through a sizeable campaign contribution. 19 Such situations may create a perceived bias or an objective “probability of actual bias.” 20 Moreover, allowing judges to hear

13. Id.
14. Id. at 14.
17. See Nancy Marion, Rick Farmer & Todd Moore, Financing Ohio Supreme Court Elections 1992–2002: Campaign Finance and Judicial Selection, 38 AKRON L. REV. 567, 569 (2005) (“Elections require judicial candidates to engage in fundraising, seek voter approval and address political issues before the court. Scholars argue elections place inappropriate demands on the court by having candidates seek campaign contributions from individuals and interest groups. . . .”).
18. See id.
19. See, e.g., Editorial, Illinois Judges: Buying Justice?, ST. LOUIS POST-DISPATCH, Dec. 20, 2005, at B8 (“Although Mr. Karmeier is an intelligent and no doubt honest man, the manner of his election will cast doubt on every vote he casts in a business case. This shakes public respect for the courts and the law—which is a foundation of our democracy.”).
such cases undermines the public’s confidence in the impartiality of the judiciary. 21

Attempts to limit the problem have failed. Restrictions on campaign contributions, like restrictions on campaign speech, have invoked First Amendment problems. Although regulation of direct contributions has been upheld, independent spending is not regulated, so contributors can—and do—spend money with virtually no restrictions. 22 Without other safeguard mechanisms in place, firm recusal standards are necessary to maintain the impartiality of the bench and prevent elected judges from being improperly influenced by campaign contributions. 23

The Supreme Court has not considered whether the Due Process Clause requires elected judges to recuse themselves from certain cases when their impartiality is questioned. Thus, states are free to determine their own recusal standards. 24 Most states, including West Virginia, have no clear and objective standard for determining when a judge should recuse himself from a given case because of impartiality concerns.

To ensure every litigant’s right to a fair trial, elected judges should recuse themselves from cases in which their impartiality is at issue. When a judge’s ability to remain impartial is questionable, a litigant’s due process rights—the right to be heard by an impartial magistrate—is jeopardized. For example, a judge should recuse himself from cases involving a litigant who has donated to the judge’s electoral campaign or to an independent group formed on behalf of the judge. To achieve this goal, the current recusal mechanism must be revised. First, the current recusal standard is too

actual bias on the part of the judge . . . is too high to be constitutionally tolerable.”” (citations omitted)).


23. See generally U.S. v. Balistrieri, 779 F.2d 1191, 1199 (7th Cir. 1985) (explaining that “28 U.S.C. § 144 requires a judge to recuse himself [if he] has a ‘personal bias or prejudice’ against [a party]”).

24. Traditionally, “recusal” refers to a judge’s voluntary removal from a case, while “disqualification” results from a party’s motion to require the judge’s removal. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 3–4 (2nd ed. 2007). This Article uses them interchangeably to stay in line with the majority of literature on the subject.
vague. Objective factors must be devised to help judges evaluate their own impartiality. Second, adequate procedural protections must be implemented to guarantee that substantive factors are evaluated objectively.

This Article proposes new recusal standards to ensure that campaign contributions in judicial elections do not undermine a litigant’s right to a fair trial or taint the public’s perception of the judiciary. Part II discusses how the public’s desire for an accountable judiciary can lead to impartiality concerns and how such concerns have resulted in threats to due process. Part III analyzes the effect of campaign contributions on due process and public confidence in the judiciary through an examination of cases, public opinion polls, and empirical studies. Part IV demonstrates that attempts to ensure judicial impartiality by limiting judicial speech and campaign contributions will not solve the problem. This part emphasizes that limitations violate the First Amendment but explains why recusal is not subject to such limitations. Lastly, Part V delineates specific substantive and procedural factors that could be considered to determine when campaign contributions would affect a judge’s neutrality to such an extent that recusal would be required.

II. BACKGROUND

States have increasingly turned to elections as the preferred method of judicial selection to promote judicial accountability. This mode of judicial selection, however, naturally conflicts with the impartiality that is demanded of the judiciary. Once elected, judges must abide by the due process guarantee of a fair trial by being an impartial arbiter. Judicial elections, however, are becoming increasingly expensive, requiring a judicial candidate to raise significant funds to be a viable contender. A problem may arise when a judicial candidate accepts significant funds from a contributor who later becomes a litigant appearing in a case heard before that judge. To ensure that the judiciary remains neutral, judges accepting contributions should not adjudicate cases involving those contributors so that there is no objective probability of bias.

A. Methods of Judicial Selection in the States

In the federal system, district court judges are appointed by the U.S. president and confirmed by the Senate for lifetime terms. There is no constitutional requirement mandating the appointment of state judges. While states use various methods of judicial selection, the vast majority of states use some sort of elective process to select their judges. The widespread adoption of judicial elections grew out of the Jacksonian democracy movement in the mid-1800s. In this movement, which granted the "common person" more political influence, a distrusting American people felt that judges had too much power as a result of their appointments. Today, rival candidates freely and intensely challenge incumbents in most judicial elections. While there is an ongoing debate over whether an appointive or elective system would be more desirable, there is no indication that judicial elections will be invalidated or that they are at risk of being replaced by an appointment process.

The method of electing judges is popular among states because it ensures that judges remain accountable to the public and because it is consistent with the cherished notions of self-government and democracy. However, the election process can also conflict with the judiciary's core function as an impartial tribunal that upholds the rule of law, protects individual rights against majority.
encroachments, and acts as a check against the legislative and executive branches.\textsuperscript{35}

Modern judicial candidates require more money for their campaigns in order to be competitive. The necessity to campaign creates a "fundamental tension between the ideal character of the judicial office and the real world of electoral politics."\textsuperscript{36} Justice Ruth Bader Ginsburg has commented in dicta on how the U.S. Supreme Court is taking a "unilocular" or "an election is an election" approach in determining whether judicial elections should resemble legislative and executive ones.\textsuperscript{37} From the "vitriolic name-calling, the attack ads, and the million-dollar fundraising" to "the influence of special interest groups,"\textsuperscript{38} judicial elections are becoming a "form indistinguishable in cost, rhetoric, and partisanship from executive and legislative elections."\textsuperscript{39}

At the heart of the problem with treating judicial elections on par with legislative and executive ones is that a judge is fundamentally different from a legislative or executive representative. One—the judge—upholds the law against the majority while the other—the representative—is the majority. Elected officials in the legislative and executive branches are not under the same obligation to maintain neutrality in their official duties.\textsuperscript{40} They remain free to give preferential access and consideration to campaign supporters.\textsuperscript{41} The representatives' freedom to be partial runs contrary to the due process ideals that prohibit judges from according preferential treatment to litigants appearing before them.\textsuperscript{42} As long as judicial elections remain

\textsuperscript{35} Id. at 272.
\textsuperscript{37} Republican Party of Minn. v. White, 536 U.S. 765, 805 (Ginsburg, J., dissenting). The majority declared that "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." Id. at 783.
\textsuperscript{38} Steven Zeidman, Judicial Politics: Making the Case for Merit Selection, 68 ALB. L. REV. 713, 715 (2005) (highlighting the pitfalls of the popular election system in favor of merit selection).
\textsuperscript{40} Brief for Petitioners, supra note 1, at 27.
\textsuperscript{41} Id.
\textsuperscript{42} See White, 536 U.S. at 776 (due process "guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party").
prevalent, real and perceived problems regarding the fairness of judicial outcomes will persist unless they are properly addressed.

B. The Right to a Fair Trial

The Due Process Clause of the Fourteenth Amendment guarantees litigants the right to a fair trial in front of an impartial decision maker. A judge is prohibited from participating in a case in which he is biased towards or against one of the litigants because the disfavored litigant will not receive a fair hearing and will likely be unjustly or mistakenly deprived of his right to due process. Due process can be compromised by a contribution when it is so great and suspect that no judge at the receiving end of such a contribution could objectively remain impartial towards the contributor appearing as a litigant before the judge. The Supreme Court has held that a litigant's due process rights are violated when the probability of actual bias is too high to be constitutionally tolerable, but the Court has not given any examples of when campaign contributions would not be "constitutionally tolerable." As discussed in Part II.C, there is considerable controversy over when the probability of actual bias is "too high" and how to determine when a judge's impartiality has been compromised.

In addition to promoting accuracy, due process guarantees that each litigant receives a fair hearing and is treated with dignity. A litigant is entitled "to all the respect and fair treatment that befits the dignity of man." A judge already appears to have chosen sides before he even hears a case if one of the litigants in that case is responsible for a massive campaign contribution. This objective probability of actual bias makes it difficult for the other litigant to participate meaningfully and receive the full benefit of the Due

45. Id.; see also Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("[The] requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process.").
Process Clause. A wary public may not believe its due process rights are safe in a system where the very judges responsible for upholding the U.S. Constitution fail to recuse themselves from those objectively biased situations.

C. The Development of Recusal Standards

The common law has set forth a clear standard to determine when judicial recusal is required that is based on a judge’s actual bias. While clear, the standard was developed at a time before judicial elections became, in the words of Justice Sandra Day O’Connor, “political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution.”

The actual-bias standard has proven ineffective in maintaining judicial impartiality in the current environment, which the American Bar Association ("ABA") acknowledged in its Model Code of Judicial Conduct (the "Model Code"). The current Model Code requires recusal based on a judge’s perceived bias. This standard, however, does not adequately prevent campaign contributions from affecting litigants’ right to a fair trial. The Model Code proposes neither objective requirements for determining when a perceived bias becomes too great, nor a procedural mechanism for preventing the judges themselves from deciding their own recusal motions.

1. The Common Law Actual-Bias Standard Is Unworkable

At common law, only a judge’s direct pecuniary interest in the outcome of a case was recognized as a threat to impartiality. Indeed, when the American court system was first established, the common law required a judge to recuse himself to ensure due process only "for direct pecuniary interest and for nothing else," such as when a judge’s compensation depended on a defendant’s conviction. In 1792, Congress codified these disqualification requirements for
federal judges in the first recusal statute. The statute provided that a judge should recuse himself in any case in which he appears to be "concerned in interest."  

Judicial campaign contributions, however, do not fit neatly into this common law actual-bias model. There is no common law precedent explaining how substantial campaign expenditures might affect a judge's bias. A judge does not necessarily have a pecuniary interest in the outcome of a trial if he previously received the litigant's money in the form of campaign contributions. In those situations, the judge receives no money from the direct outcome of a case. Nonetheless, receiving substantial financial support has benefited a judge and thus echoes common law concerns about pecuniary interests that should be addressed in the modern system of judicial elections.

Monetary contributions help judicial candidates win elections. Even if the common law does not directly address these monetary contributions, the contributions still give judges a significant pecuniary interest in the outcome of a case. A judge could feel indebted and be inclined to rule in the contributor-litigant's favor out of gratitude or out of awareness that he needs that contributor's money to win in the subsequent reelection. In these situations, it is nearly impossible to establish that a judge has a direct pecuniary interest sufficient to bias him towards a litigant. However, an indirect pecuniary interest in the outcome of a case may still create an objective probability that the judge is biased and should be removed from the case.

52. Id.
54. Id. at 393
55. Mark Spottswood, Comment, Free Speech and Due Process Problems in the Regulation and Financing of Judicial Election Campaigns, 101 NW. U. L. Rev. 331, 346 (2007) ("[O]ne out of every four judges believes that their decisionmaking is affected by a pecuniary interest that has nothing to do with the merits of the litigation before them.").
56. See Republican Party of Minn. v. White, 536 U.S. 765, 790 (O'Connor, J., concurring) ("[R]elying on campaign donations may leave judges feeling indebted to certain parties or interest groups.").
2. The ABA’s Guidelines Recognize That Perceived Bias Requires Recusal

The ABA and Congress have long recognized that the common law standard for recusal provides insufficient protection against the possibility of bias. They acknowledge that even the appearance of judicial impropriety—the objective probability of actual bias—can undermine a litigant’s access to a fair and impartial arbiter. When Congress created the first recusal statute for federal judges, it required “disqualification whenever [a judge’s] impartiality might reasonably be questioned.” 57 Similarly, although no uniform standard exists for state judges, the ABA Model Code, originally drafted in 1922 by Chief Justice Howard Taft and the ABA Standing Committee on Ethics and Professional Responsibility, provides that a judge should avoid even the appearance of impropriety. 58 These provisions in the Model Code serve as templates for individual states that have enacted their own judicial codes and disqualification rules. 59

Two specific provisions of the modern versions of the Model Code provide guidelines for judicial recusal standards. Canon 1 of the 2007 Model Code states that “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” 60 The test for the appearance of impropriety is whether a reasonable person would perceive that the judge violated this provision or engaged in other conduct that reflects adversely on the judge’s “honesty, impartiality, temperament, or fitness to serve as a judge.” 61 Adopted by forty-seven states, this canon serves as the primary safeguard against judicial partiality in most jurisdictions. 62 The pervasive use of this canon indicates that the majority of states consider that

57. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79 (1792) (repealed 1911).
58. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).
60. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).
61. MODEL CODE OF JUDICIAL CONDUCT Canon 1, R. 1.2, cmt. 5 (2007).
protection against a judge's perceived bias is necessary to ensure the guarantees of due process.\textsuperscript{63}

Although most states require recusal when the appearance of impartiality is great, almost no state has adopted the ABA's specific recusal rules pertaining to campaign contributions. Canon 2, Rule 2.11 of the 2007 Model Code requires a judge to recuse himself when he has received campaign contributions from litigants or lawyers before the court in an amount that exceeds a designated limit.\textsuperscript{64} A judge already appears to have chosen sides before he even hears a case if one of the litigants in that case is responsible for a massive campaign contribution. This objective probability of actual bias makes it difficult for the other litigant to participate meaningfully and receive the full benefit of the Due Process Clause. The ABA is concerned that beyond a certain amount, a given contribution would make judicial impartiality impossible to maintain.\textsuperscript{65}

3. The ABA Standards Do Not Mitigate Due Process Concerns That Arise when Judicial Candidates Receive Substantial Campaign Contributions

The modern versions of the Model Code reflect the ABA's attempt to address the unfairness that can result from judicial elections involving large campaign contributions. However, the ABA has failed to adequately address this problem because the majority of states have only chosen to adopt the more general guidelines in Canon 1, not the specific recusal guidelines in Canon 2. Canon 1, requiring recusal because of the appearance of impropriety, is extremely vague and subject to varying interpretations. In \textit{Caperton}, for example, four different justices on West Virginia's highest court had different opinions about the effect on the appearance of impartiality of a sitting judge when a massive

\textsuperscript{63} \textit{JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, FAIR COURTS: SETTING RECUSAL STANDARDS} 17 (Brennan Center for Justice 2008), available at http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf.

\textsuperscript{64} \textit{MODEL CODE OF JUDICIAL CONDUCT} Canon 1, R. 2.11(A4). Specific limits are individually designated by the states.

campaign contributor came before the court. Moreover, scholars have suggested that the broad language of the Model Code "might reasonably be questioned" and may be challenged as overbroad, chilling political expression.

In addition, the general provision is problematic because the judge himself usually hears the recusal motion filed by one of the litigants. However, judges are ill-suited to objectively determine whether they themselves are biased. When a judge must rule on his own recusal, he may declare himself impartial—even when he knows he is not—just to protect his reputation. It may be difficult or awkward for a judge to directly admit he is biased when admitting that his prejudice has jeopardized his chief responsibility to arbitrate impartially. Moreover, judges may not know when they are biased. Researchers have observed that many biases are formed on an unconscious level; judges may harbor unrecognized prejudices, something a judge will not be able to acknowledge when determining his own impartiality.

Another challenge that a litigant moving for recusal faces is that discovery is not often available for litigants to prove such a bias exists. Whether discovery is granted is up to the discretion of the judge whose own impartiality is at issue. When the judge denies such discovery and declares himself to be free from any bias, a concerned litigant can only rely on what is publicly available in order to make his case against the judge. Moreover, if the judge himself

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67. MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.11(A) (2007).
71. Brief for Petitioners, supra note 1, at 16.
72. Id. at 22.
73. Id. at 22–23.
is the only one hearing a motion for his own recusal without any objective input on the issue, it would not matter if other judges, the media, or the public disapproved of his decision to hear the case because his word would be final.  

Rule 2.11’s per se limit on judicial campaign contributions could address many of these issues. This provision is relatively new and more states may adopt it over time, especially following the U.S. Supreme Court’s decision in Caperton. However, as discussed above in Part II.C.2, a per se rule that depends on the amount of a contribution alone may not be an adequate standard. The overall contribution should be considered along with other factors, such as the contribution as a percentage of the judicial candidate’s overall pool of money, the timing of such a contribution, and the intent of the donor.

III. CAMPAIGN CONTRIBUTIONS RAISE DUE PROCESS CONCERNS AND UNDERMINE PUBLIC CONFIDENCE IN THE JUDICIARY

Judicial elections are a well-established and constitutionally-permissible method to select judges. However, the fact is that judicial campaigns have become more high-profile and expensive in recent years, which raises due process concerns on many levels. Campaign contributions to judicial candidates undermine judicial impartiality, infringe on a litigant’s right to a fair trial, and threaten public confidence in the judiciary.

Campaign contributors, such as chambers of commerce, law firms, and businesses, donate substantial amounts both directly to candidates and through independent committees. Independent expenditures are usually much larger than the amounts spent by a

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74. SAMPLE, POZEN, & YOUNG, supra note 63, at 31.
75. MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.11(A) (2007).
76. See American Bar Association, Joint Commision to Evaluate the Model Code of Judicial Conduct, http://www.abanet.org/judicaethics/approved_MCJC.html (last visited Mar. 28, 2009) (various rules including 2.11 were revised as of February 12, 2007).
77. Brief for Petitioners, supra note 1, at 26.
79. See infra Part III for a detailed discussion of campaign contributions.
candidate’s personal campaign because these independent committees can spend large amounts of money in support of a candidate without requiring the candidate to disclose those unaffiliated sources of funding.

Not every contribution to a judge’s campaign raises due process concerns when the contributor litigates before that judge. After all, an objective observer would not likely conclude that a nominal contribution to a campaign would automatically create a substantial probability that the judge was biased towards this supporter. However, as the following studies demonstrate, at some amorphous point, the size of a campaign contribution creates a need for judicial disqualification because an objective observer may conclude that the contribution compromises the appearance of the judge’s impartiality.

A. Campaign Contributions Bias the Decision Maker and Affect the Fairness of a Trial

A fair trial requires an impartial arbiter. When judges decide motions for their own recusal motions, they may not acknowledge objective biases because such biases are unconscious or because they do not want to admit being prejudice while in a position that requires complete neutrality. However, recent studies indicate that the voting patterns of elected judges are highly favorable to judicial campaign contributors, a finding that suggests that judges may have biases that current recusal procedures do not resolve. The Caperton example illustrates just how a bias can affect the probability that a litigant will receive a fair trial. Both hard facts and circumstantial evidence tend to show that campaign contributions affect how the judge rules in a case concerning a campaign supporter.

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80. See Deborah Goldberg et al., The New Politics of Judicial Elections 2004: How Special Interest Pressure on Our Courts Has Reached a “Tipping Point”—And How to Keep Our Courts Fair and Impartial 8 (Justice at Stake Campaign 2004) (In state supreme court elections in Michigan and West Virginia, interest groups outspent candidates almost four-to-one on television advertising); James Sample et al., The New Politics of Judicial Elections 2006: How 2006 Was the Most Threatening Year Yet to the Fairness and Impartiality of Our Courts—And How Americans Are Fighting Back 20 (Justice at Stake Campaign 2006) (Independent groups nearly doubled the amount spent by the candidates’ campaigns during the 2006 Washington Supreme Court election race.).

1. Empirical Studies Indicate That Judges Are More Biased Than They Believe Themselves To Be

Several empirical studies illustrate that judges are more likely to rule in favor of their campaign contributors. Such findings indicate that judges are not aware of their own biases. A 2007 study of the Wisconsin Supreme Court conducted over a ten-year period produced data suggesting that some individual judges are influenced to vote in favor of contributors despite state efforts, like public funding, to curb such influence.82 The data indicated that specific judges voted in favor of their contributors, even when such a vote ran afoul of their usual ideological voting patterns.83 A similar study of Alabama Supreme Court decisions between 1995 and 1999 pointed to an incredibly close correlation between the justices’ votes on arbitration cases and their source of campaign funds.84 The study found that justices most often sided with their contributors, and suggested that this correlation might occur because the judicial candidates who lack firmly established views are willing to tailor their views to match the policy preferences of their contributions.85

A 2006 New York Times study found similar behavior occurring in the Ohio Supreme Court. According to the study, over a twelve-year period, the justices of the Ohio Supreme Court voted in favor of their contributors more than 70 percent of the time.86 One justice voted for his contributors nearly 91 percent of the time.87 Moreover, of the 215 cases with potential conflicts of interests, the justices collectively recused themselves only nine times.88

These empirical studies are evidence that there is a correlation between campaign contributions and judicial decision-making, but the causality is unclear. For example, donors may contribute to judicial candidates who share their ideological views or to certain judges who are more receptive to their interests. Nevertheless, these
studies, such as the one of the Wisconsin Supreme Court, are strong evidence that large contributions may bias judges and affect their decision-making.

2. *Caperton* Exposes the Inadequacies of the Current System

The *Caperton* case illustrates the due process concerns raised by significant campaign contributions. The case has raised constitutional issues so serious that the U.S. Supreme Court granted certiorari. The egregious facts of the case were publicized. The West Virginia public and other judges believed that Justice Benjamin’s actions created an objective probability of actual bias.

After the initial trial, the jury returned a $50 million fraud verdict against Massey. Shortly thereafter, Don Blankenship, Massey Coal’s CEO, raised $3 million in support of Justice Benjamin’s campaign—more than the total amount spent by all of Justice Benjamin’s other contributors and supporters combined. Most of Blankenship’s campaign expenditures (roughly $2.5 million) were made through an independent group called “And For The Sake Of The Kids,” an organization created on the heels of the trial court’s verdict against Massey. The group was formed by Blankenship and others with the purpose of beating Justice Benjamin’s opponent, the incumbent Justice Warren McGraw, in the upcoming election for associate justice on West Virginia’s highest court.

Blankenship publicly stated that Justice McGraw’s policies were bad for the children and their future. Blankenship’s organization ran advertisements depicting the incumbent as soft on crime and dangerous to children. This independent group did not focus on

90. Brief for Petitioners, supra note 1, at 1.
91. Id. at 2, 6.
93. Id.; see also Brad McElhinny, Big-Bucks Backer Felt He Had to Try, Coal Executive Put $1.7 Million into Fierce Battle Against McGraw, CHARLESTON DAILY MAIL, Oct. 25, 2004, at 1A.
94. McElhinny, supra note 93. McGraw’s campaign claimed Massey and its chief executive officer, Don Blankenship, were the masterminds behind “And For The Sake of the Kids,” which ran ads targeting McGraw’s vote in granting probation to a child rapist. Id; see also Doyle, supra note 92.
95. Doyle, supra note 94; see also Brief for Petitioners, supra note 1, at 7.
explicitly endorsing Justice Benjamin, but rather on defeating Justice McGraw. Blankenship contributed largely to this independent group and not directly to Justice Benjamin's campaign. 96 Even though the majority of Blankenship's money passed to Justice Benjamin through this independent group, Blankenship still personally contributed over $500,000 in direct contributions to Justice Benjamin's campaign. 97

The petitioners in Caperton filed three recusal motions seeking Justice Benjamin to recuse himself from the appeal. 98 They argued that federal due process required Justice Benjamin to recuse himself from participation because Blankenship's extraordinary support of his campaign created a constitutionally unacceptable appearance of bias. 99 Under West Virginia law, Justice Benjamin was to rule on the motions himself to determine whether or not his apparent bias was a great enough threat to judicial impartiality. 100 His decision would not be subject to review by any other member of the court. 101

Justice Benjamin ignored calls from his peers and the media to step down. Two of Justice Benjamin's fellow justices, Justice Starcher and Justice Albright, called for him to step down as his apparent bias was too great a threat to impartiality to allow him to hear the case. Justice Starcher urged Justice Benjamin to step aside because Blankenship's extraordinary campaign expenditures gave rise to "the very definition of 'appearance of impropriety.'" 102 In his dissent in Caperton, Justice Albright wrote that "it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts," and that after the last recusal motion against Justice Benjamin, "there are now genuine due process implications arising under federal law, and therefore under [West Virginia] law, which have not been addressed." 103

Justice Benjamin's decision to hear Caperton led some local media outlets to question Blankenship's motives during the election, especially since they were well aware that Blankenship was

96. Brief for Petitioners, supra note 1, at 6-7.
97. Id. at 7.
98. See Massey Petition, supra note 20, at 9-15.
99. Id. at 9.
100. See W. VA. R. APP. P. 29.
101. Id.
103. Id. at 15 (quoting In re Murchison, 349 U.S. 133, 136 (1955)).
preparing to appeal the $50 million verdict against his company to the court to which Justice Benjamin was hoping to be elected.\textsuperscript{104} The media believed that Blankenship was attempting to "buy" a judge.\textsuperscript{105} Despite these objections, Justice Benjamin denied having any reason to recuse himself.\textsuperscript{106} He maintained that recusal was not appropriate in this situation and would only be appropriate when "the facts asserted provide what an objective, knowledgeable person would find to be a reasonable basis for doubting the judge's impartiality."\textsuperscript{107}

Chief Justice Maynard and Justice Benjamin both faced recusal motions in \textit{Caperton}, but only one believed his situation merited recusal.\textsuperscript{108} Justice Benjamin's refusal came from his belief that as a judge, he could maintain impartiality when faced with the possibility of a contributor's financial influence on him.\textsuperscript{109} He refused to acknowledge what everyone else believed—that the facts did indeed present such a shocking situation where it appeared that Blankenship successfully bought Justice Benjamin's seat on the court.\textsuperscript{110}

Chief Justice Maynard recused himself from participating in \textit{Caperton} after pictures surfaced of him vacationing with Blankenship on the French Riviera.\textsuperscript{111} When asked to step down, Chief Justice Maynard subjectively believed he could still be impartial in hearing the case, but because the "mere appearance of impropriety... can compromise the public confidence in the courts," he stepped aside.\textsuperscript{112} Justice Benjamin, however, believed that his


\textsuperscript{105} See, e.g., Ed Peeks, Editorial, \textit{How Does Political Cash Help Uninsured?}, CHARLESTON GAZETTE, Nov. 9, 2004, at 2D ("[T]hese voices raise the question of vote buying to a new high in politics."); American Radioworks: Justice for Sale?, http://americanradioworks.publicradio.org/features/judges/ (last visited Mar. 28, 2009) ("One of [Justice Benjamin's] major backers was the CEO of Massey Energy Company, the largest coal producer in the region. The company happened to be fighting off a major lawsuit headed to the West Virginia Supreme Court. That prompted many in these parts to say that Massey was out to buy itself a judge.").

\textsuperscript{106} Massey Petition, supra note 20, at 14.

\textsuperscript{107} Id.


\textsuperscript{109} Brief for Petitioners, supra note 1, at 12.

\textsuperscript{110} Baron, supra note 108.


\textsuperscript{112} Brief for Petitioners, supra note 1, at 12.
situation would not create a similar appearance of impropriety and refused to recognize his perceived bias. Even as the U.S. Supreme Court reviewed his role in *Caperton*, he continued to preside over other cases where Massey was a party.

The two justices' opposite rulings on the recusal motions demonstrate the subjectivity and vagueness of current recusal standards. The standards fail to consistently protect against bias because a judge's prerogative, rather than any rule of law, determines his decision. When judges personally decide motions for their recusal and are not subject to peer review, different judges will come to completely different conclusions on their own impartiality. Without clear recusal standards based on the objective probability of actual bias decided by an impartial and independent body, similar situations will continue to arise.

**B. Campaign Contributions Undermine Public Confidence in the Judiciary**

Substantial campaign contributions also undermine the public's confidence in the judiciary. Public surveys indicate that both the public and even judges themselves do not believe that judges can remain impartial to a litigant who has made significant campaign contributions. According to one recent poll, over 70 percent of Americans believe that campaign contributions have at least some influence on a judge's decisions in the courtroom. Only 5 percent believed campaign contributions had no effect. Polls within specific states have found similar results. In a poll conducted in Texas, 83 percent of those surveyed said that state judges are influenced by campaign contributions. In West Virginia, polling

113. *Id.*  
showed that 67 percent of West Virginians doubted Justice Benjamin’s ability to be fair and impartial in deciding the *Caperton* appeal.  

The judges who were surveyed have similar apprehensions about a judge’s ability to be impartial in the face of such contributions. Twenty-six percent of judges responding to a 2002 written survey believed campaign contributions have at least “some influence” over judges while 46 percent believed contributions have at least “a little influence.” The *Caperton* appeal provoked twenty-seven former chief justices and justices of nineteen state supreme courts to file an amici curiae in support of the petitioners.

All of the judges on the brief would have recused themselves had they been in Justice Benjamin’s position and benefited from the “level and proportion of independent expenditures” contributed by the “CEO of a party to a case pending before the court,” referring to Blankenship.

A 2008 Texas study reflects the notion that judicial seats can be bought. The study found that during the 2005 to 2008 Texas Supreme Court election, of the $1.6 million that three incumbent justices running for reelection raised, 65 percent of their campaign funds were from lawyers and litigants who had recent business before the court, which seems to indicate that contributors hoped such spending would improve their chances with that judge. The study highlights the concern that campaign contributions foster the belief that enough money can “buy” a judge, which weakens public confidence in the independence of the judiciary. Society suffers when the public loses confidence in the judiciary. Instead of relying

120. Pozen, *supra* note 115.
122. *Id.* at 5.
124. *Id.*
on the courts to arbitrate disputes, people take matters into their own hands. Citizens often feel a sense of commitment towards the government which is reflected in their socially constructed obligation to abide by the rule of law. If judges themselves do not abide by the principles imposed by the Constitution to remain impartial arbiters of the law, confidence in the law will likely deteriorate. The studies discussed above demonstrate that the public already fears judicial partiality in the face of campaign contributions. Without proper safeguards, the widespread perception that large campaign contributions may distort a judge’s decision-making ability is likely to continue.

IV. RECUSAL IS THE ONLY EFFECTIVE MEANS TO ENSURE THE IMPARTIALITY OF ELECTED JUDGES

States have tried to limit the impact of elections on judicial impartiality by regulating judges’ campaign speech and limiting campaign contributions. Longstanding doctrine regarding the regulation of elections in general and recent Supreme Court jurisprudence regarding judicial elections in particular indicate that these regulations unconstitutionally infringe on First Amendment rights. Although judicial impartiality is recognized as a legitimate interest, courts have held that such restraints on campaign speech are not narrowly tailored and thus unconstitutional. Recusal is a viable solution to ensure judicial impartiality while avoiding censorship and the unconstitutional infringement of the First Amendment.

128. *Republican Party of Minnesota v. White* struck down Minnesota’s Announce Clause and lower courts have struck down other speech codes and campaign contribution limits. See infra Part IV.C.1 for a discussion on campaign contribution limits.
A. The First Amendment Restricts Limitations That Can Be Imposed in the Name of Judicial Impartiality

The First Amendment allows judicial candidates to speak freely on political issues. It also allows contributors to spend money in support of the candidates of their choice. The rights bestowed on candidates and contributors to express freely their political views are at the heart of the First Amendment, and attempts to censor such speech in the name of due process are unconstitutional.

The First Amendment provides the broadest protection of political expression to “assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” The right to speak freely is so important within the election context that “[i]nfringements upon any individual’s exercise of First Amendment rights, especially where they have their most urgent application—in campaigns for electoral offices—requires strict scrutiny review.” Speech canons and contribution limits can censor too much of this core political expression. In such a system, recusal is a narrowly tailored remedy that addresses due process concerns without the risk of running afoul of the First Amendment by regulating campaign speech.

B. Limits on Judicial Campaign Speech Are Routinely Held Unconstitutional and Thus Cannot Adequately Ensure Impartiality

In Republican Party of Minnesota v. White, judicial hopeful Gregory Wersal and the Republican Party of Minnesota challenged

130. White, 536 U.S. at, 765.
131. See discussion infra Part IV on the First Amendment and Campaign Contributions.
135. Contribution limits in the form of independent expenditures are generally impermissible, as discussed below.
Minnesota’s Announce Clause, which constrained candidates seeking election to the state judiciary from announcing their views on legal or political issues that could come before them if elected, as an unconstitutional infringement on judicial candidates’ First Amendment right to free speech. The Supreme Court characterized the Announce Clause as a content-based restriction subject to strict scrutiny that burdens a category of speech at the core of the First Amendment, “speech about the qualifications of candidates for public office.” Although the Court acknowledged that the state’s interest in maintaining judicial impartiality was legitimate, it ultimately struck down the Announce Clause because it was not narrowly tailored to further this interest, and “[was] barely tailored to serve that interest at all, inasmuch as it [did] not restrict speech for or against particular parties, but rather speech for or against particular issues.”

White has been read broadly by lower courts to strike down other limitations on judicial speech as free speech violations. Lower courts have determined that the following judicial speech codes are also unconstitutional: the Pledges and Promises Clause, which prohibits judicial candidates from making pledges and promises regarding their judicial duties; the Commit Clause, which prohibits statements committing or appearing to commit a candidate with respect to cases or issues likely to come before a court; the Partisan Activities Clause, which prohibits judges or judicial candidates from seeking political endorsements, attending political gatherings, or identifying themselves as members of political organizations; and the Solicitations Clause, which prohibits candidates from personally soliciting and accepting campaign contributions.

137. Id.
138. Id. at 774.
139. Id. at 776.
140. See Goldberg, Sample & Pozen, supra note 129, at 505–06.
142. Id. at 699.
143. Republican Party of Minn. v. White, 361 F.3d 1035, 1048 (8th Cir. 2004).
144. The Eighth Circuit held it unconstitutional to the extent that it prohibited judges or judicial candidates from soliciting funds in front of large groups. Id.
The Solicitations Clause is one judicial speech code bearing a clear relationship to campaign contributions.\textsuperscript{145} The Eleventh Circuit struck down Georgia's Solicitation Clause by holding judicial elections to the same standard as legislative and executive elections.\textsuperscript{146} As a component of judicial speech, candidates have the right to solicit funding.\textsuperscript{147} Censoring direct candidate solicitations chills a candidate's speech "while hardly advancing the state's interest in judicial impartiality at all."\textsuperscript{148} Georgia's interest in maintaining judicial impartiality did not pass strict scrutiny because campaigning is an essential part of political speech, and campaigning for office "necessarily entails raising funds and seeking endorsements from prominent figures and groups in the community."\textsuperscript{149} Censoring speech in an effort to reduce a candidate's indebtedness to a contributor is an insufficient interest when faced with the First Amendment's protection of political speech. Candidates can speak and campaign freely, and money can still easily, readily, and freely flow into candidates' campaigns.

\textbf{C. "Money, Like Water, Will Always Find an Outlet"\textsuperscript{150}}

The amount of money that a corporation or its officers may spend in support of a judicial candidate's election cannot be legally restrained. Public interest supports banning direct corporate spending on candidates in order to prevent large corporate money "war chests" from reaching candidates in a manner that corrupts or creates an appearance of corruption.\textsuperscript{151} This well-established principle of campaign finance jurisprudence applies to judicial

\textsuperscript{145} Republican Party of Minn. v. White, 416 F.3d 738, 763–67 (8th Cir. 2005) (en banc) (striking down Solicitation Clause as applied to large groups); Weaver v. Bonner, 309 F.3d 1312, 1321–23 (11th Cir. 2002) (declaring Georgia's Solicitation Clause unconstitutional); see also Yost v. Stout, No. 06-4122 JAR (D. Kan. Nov. 16, 2008) (granting summary judgment declaring Kansas Solicitation Clause unconstitutional).

\textsuperscript{146} Weaver, 309 F.3d at 1320–21.

\textsuperscript{147} Id. at 1322–23.

\textsuperscript{148} Id.

\textsuperscript{149} Id. at 1322.


elections because state-specific campaign finance laws govern judicial campaigns in states that elect judges.\textsuperscript{152} 

One foundational component of campaign finance law is that government can limit direct campaign contributions because such limitations theoretically curb the appearance of judicial partiality by reducing corporate influence.\textsuperscript{153} West Virginia has enacted such a law.\textsuperscript{154} If effective, this regulation would prohibit companies like Massey from contributing corporate treasury funds to a judicial candidate's campaign and would limit a corporate officer's personal involvement in it. Independent spending, however, undermines these regulations and threatens judicial impartiality because the amount of independent spending and the content of such speech cannot be constitutionally regulated.

\textit{Caperton} illustrates that current limitations have not prevented money from flooding judicial elections through other legally permissible means. West Virginia's law permitted Blankenship to donate only $1,000 in direct contributions to Justice Benjamin's campaign.\textsuperscript{155} The remaining $3 million came from both Blankenship's and independent expenditures from "And For The Sake Of The Kids."\textsuperscript{156} The First Amendment protects independent spending so long as it is outside the control or coordination of a candidate.\textsuperscript{157} However, such independent expenditures can also easily affect the appearance of impartiality if such money benefited a judicial candidate. As a result, obligatory judicial recusal of those judges who received substantial support from parties who appear before them is the only way to ensure minimum due process while

\begin{itemize}
  \item \textsuperscript{153} See, \textit{e.g.}, Buckley v. Valeo, 424 U.S. 1, 1 (1976) (discussing the reasons—including "corruption"—for permitting limits on individual contributions).
  \item \textsuperscript{154} W. VA. CODE § 3-8-8(a) (2008).
  \item \textsuperscript{156} Paul J. Nyden, \textit{Redistricting Changes Likely After 2010 Democrats Look at Ways to Pick Off Capito's Seat}, CHARLESTON GAZETTE, Jan. 6, 2009, at 5A.
\end{itemize}
EFFECTIVE RECUSAL STANDARDS

still allowing individuals and corporations to exercise their First Amendment right to political speech.


In *Buckley v. Valeo*, the Supreme Court held that direct campaign contribution limits were constitutionally acceptable in the interest of fighting corruption and the appearance of corruption. Limiting contributions does not directly restrain a contributor’s political speech, “for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues.” Though these limitations are constitutionally accepted, in *Randall v. Sorrell*, the Court struck down limits on individual campaign contributions for being too low. The *Randall* Court found that exceptionally low contribution limits may harm the electoral process by preventing challengers from mounting effective campaigns against incumbents and reducing democratic accountability. The Court also indicated that it may strike down similar contribution restrictions as being too low in the future. But, the threat of low contribution limits is not a major threat to judicial impartiality so long as independent expenditures allow contributors to speak freely

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159. Id. at 26.
160. Id. at 21.
162. Id. at 248.
163. Id. at 248–49. The Court held that Vermont’s contribution limits of $400, $300, and $200 for various state offices during a two-year general election cycle, were too low to allow candidates to be competitive and infringed on contributor’s right to free speech. Id. at 230, 238.
164. See Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law after Randall v. Sorrell*, 68 Ohio L.J. 849, 868 (2007) (“The shelf life of *Randall* may be short. If and when Chief Justice Roberts and Justice Alito become ready to move into the deregulationist camp, Justice Kennedy would hold the controlling vote on campaign finance questions, and it is unclear whether he would vote to overrule *Buckley* on contribution limits so as to disallow all contribution limits or simply continue to apply *Buckley* in the stringent way he interprets it.”); see also James Bopp, Jr., *So There Are Campaign Contribution Limits That Are Too Low*, 18 Stan. L. & Pol’y Rev. 266, 295 (2007) (“[T]he future of contribution limits is uncertain. For now, however, contribution limits must be high enough to allow candidates to effectively campaign. In addition, they must be high enough to protect the associational and speech rights of parties and the government must be able to show that the limits further a bona fide interest in preventing real or apparent corruption.”).
and spend unlimited amounts of money to approve or oppose judicial candidates of their choice.

2. Independent Expenditures Allow Money to Continue to Influence Judicial Candidates

The government cannot limit an individual or corporate expenditure in support of, or in opposition to, a judicial candidate if the expenditure is made without collaboration between the individual or corporation and the candidate, his or her campaign committee or its agents, or a political party or its agents.\footnote{165} Consequently, individuals and corporations are able to sidestep campaign finance regulations and spend large sums of money to benefit a political candidate.\footnote{166} The Supreme Court has explained that contributions are "general expression[s] of support for the candidate" that can be regulated, but independent spending by individuals constitutes expressive conduct protected by the First Amendment.\footnote{167}

The Court differentiated independent expenditures from contributions by finding that the value of a contribution rests on the "symbolic act of contributing" and not the size of the contribution, whereas the limit on an independent expenditure "necessarily reduce[s] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."\footnote{168} In other words, in the contribution context, the act of contributing and not the amount of the contribution, constitutes political speech. Because contributors do not directly determine how their contributions will be used, the contributions helps the candidates who receive them to promote their political messages, and not the personal political messages of the contributors.\footnote{169} On the other hand, independent expenditures are direct political speech in

\footnote{165} Brief of the Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research as Amici Curiae Supporting Petitioners at 9, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 593 (2008) (No. 08-22), 2009 WL 45977 (citing Buckley v. Valeo, 424 U.S. 1, 20-21, 46 (1976)).

\footnote{166} Id.

\footnote{167} Buckley, 424 U.S. at 19–21. For a more in depth discussion of campaign contributions and expenditures, see Emily Schuman, Davis v. Federal Election Commission: Muddying the Clean Money Landscape and the Path Toward a Revived Electoral Process and American Democracy, 42 LOY. L.A. L. REV. 737 (2009).

\footnote{168} Buckley, 424 U.S. at 19.

\footnote{169} Id. at 21 ("[T]ransformation of contributions into political debate involves speech by someone other than the contributor.")
the sense that they are not filtered through a third party before being converted to political communication. Such donations are used directly to express the contributor’s political agenda through advertisements, mailings, and push polls instead of being funneled to the candidate’s campaign committee, which would likely use the money to conduct similar operations.

As a result of this legal differentiation, a corporate officer such as Blankenship may make expenditures supporting or opposing judicial candidates without being limited by campaign finance regulations. Such spending can be seen as a business investment in the candidate who best suits the company’s interests. By funding television and radio advertisements, attack advertisements, and direct mailings, contributors can effectively fund a candidate’s campaign without constraints.

It is currently unclear whether contributions to independent expenditure committees violate the First Amendment.\textsuperscript{170} There has been some support for the proposition that contributions to such committees may violate the First Amendment, a theory that has received “scant and inconclusive judicial consideration and has never been carefully analyzed by the Supreme Court.”\textsuperscript{171} Independent organizations like “And For The Sake Of The Kids” allow a small group of people to play a tremendous role in the election process.\textsuperscript{172} Buckley also permits such contributions, but rejects limiting their role in an effort to protect political equality in election campaigns.\textsuperscript{173} Ever since Buckley, restricting campaign spending has been analyzed “almost exclusively” based on a corruption rationale, but it is unclear whether such large donations to organizations promote judicial corruption under the Supreme Court’s current definition.\textsuperscript{174} The current trend indicates that lower courts are striking down laws barring contributions to independent expenditure committees,

\textsuperscript{170} For a more detailed account of the current debate over regulating independent expenditure committees, see Richard Briffault, The 527 Problem . . . and the Buckley Problem, 73 GEO. WASH. L. REV. 949 (2005).
\textsuperscript{171} Id. at 953.
\textsuperscript{172} See id. at 954.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
signifying that such groups will continue to influence judicial candidates through independent spending.\footnote{175}{N.C. Right to Life v. Leake, 525 F.3d 274, 295 (4th Cir. 2008). The government is not only prohibited from regulating political independent expenditures, but also is precluded from regulating the content of political speech. Republican Party of Minn. v. White, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring).}

Judicial elections are also subject to the same set of campaign finance rules. But, while the legislative and executive branches are intended to represent the views of constituents, making it more appropriate for people to vigorously support—financially and otherwise—candidates who represent their beliefs and values, the judicial branch should be an impartial body dedicated to upholding the law without the consideration of public opinion.\footnote{176}{See White, 536 U.S. at 799 (Stevens, J., dissenting) ("Nevertheless, the elected judge, like the lifetime appointee, does not serve a constituency while holding that office. He has a duty to uphold the law and to follow the dictates of the Constitution. If he is not a judge on the highest court in the State, he has an obligation to follow the precedent of that court, not his personal views or public opinion polls.").} An effective recusal mechanism will avoid these issues and curtail resulting impartiality concerns.

D. Recusal as a Narrow Remedy and Effective Solution

In \textit{White}, the Supreme Court held that judicial impartiality is a legitimate interest, but the restraints on political speech were not narrowly tailored to serve that interest because they restricted protected speech."\footnote{177}{Republican Party of Minn. v. White, 536 U.S. 765, 795 (2002).} This section discusses recusal as a more narrowly tailored solution to address the problems of judicial bias.

In other areas of election law where there is a threat to free speech, the Court has permitted narrowly tailored remedies that prevent total censorship. In \textit{Buckley v. American Constitutional Law Foundation},\footnote{178}{525 U.S. 182 (1999).} the Court struck down a Colorado statute requiring initiative-petition circulators to be registered voters as a violation of the First Amendment’s free speech guarantee.\footnote{179}{Id. at 183.} In \textit{Buckley}, the government’s interest was to deter fraud by policing lawbreaking circulators and ensuring that they would be within the government’s subpoena power.\footnote{180}{Id. at 196.} However, the Court found that this interest was not great enough to require all circulators to become registered
voters. In addition, the Court found that requiring circulators to register as voters was not narrowly tailored; instead, the narrowly tailored means to achieve this goal would have been to require circulators to submit affidavits with their residency information. A narrowly tailored means can be similarly applied to judicial elections and recusal. In particular, recusal is a narrowly tailored means that addresses the concern for due process owed to litigants without restricting the free speech rights of judicial candidates and their campaign contributors.

In his concurrence in White, Justice Kennedy recognized that states cannot censor free speech, but he believed that recusal may be used to address due process concerns. Recusal can be an effective safeguard because it is narrowly tailored to the specific factual circumstances of the case at issue, so as not to trigger the same First Amendment scrutiny. Instead of censoring judicial speech, recusal prevents the speech from negatively affecting the due process rights of litigants to a fair trial.

1. Proposed Factors to Consider to Determine Whether Campaign Contributions Require Recusal

States have their own individual procedures for how recusal challenges are to be carried out. However, for recusal to be an effective safeguard against due process and public concerns, it must be implemented in a uniform and direct way. Without clear guidance, states will be unable to guarantee litigants their due process right to a fair trial.

To create an effective recusal mechanism, states can look to specific substantive factors to determine whether contributions would make an objective observer believe a judge had an actual bias. States must also implement procedural mechanisms that would

181. Id.
182. Id.
183. Id.
185. SAMPLE, POZEN & YOUNG, FAIR COURTS, supra note 63, at 25. As suggested by Justice Kennedy's concurrence in White, courts may even "adopt recusal standards more rigorous than due process requires. . . ." White, 536 U.S. at 794.
prevent judges from ruling on motions for their own recusal. Without such procedures, the substantive factors would not matter so much. Substantive and procedural reform is needed primarily at the appellate level, where elections are the most expensive and volatile. It is in the higher courts that contributors could influence judges deciding many of their cases, especially since these judges may have the final say in such matters.

2. Substantive Factors

No bright-line rule should be used in determining the factors that are to be considered because the applicability of the Due Process Clause in situations arising from campaign spending depends on the particular facts of each case.  

However, when determining which substantive factors require recusal when contributors become litigants, the overall amount of the contributions and timing of the contributions are primary considerations. When intent can be inferred, it may also determine what the contributors wanted to accomplish through their contributions and what impact it would have on a judge based on an objective observer’s analysis of these factors.

\[a. \ \text{Overall amount of contribution}\]

The first factor to consider is the overall amount that the contributor has donated to the judge’s past campaigns. Both direct contributions and independent expenditures should be factored into the evaluation.

\[i. \ \text{Total amount}\]

One suggested standard for when the total amount of contributions may lead to an objective probability of actual bias is whether there is an eye-catching amount of overall campaign contributions at issue.  

\[187. \ \text{Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."\}). \ From \ Caperton, \ some reoccurring trends present themselves as factors that can be used to evaluate whether a judge’s apparent bias is suspicious enough to merit his disqualification. The facts of this case are rather extraordinary, so an evaluation of future cases on a case-by-case basis will be infrequent, yet necessary.}\]

million to Justice Benjamin’s campaign, which is not the average campaign contribution for a state supreme court candidate.\textsuperscript{189} The amount caught the attention of the nation, which is something certainly eye-catching enough to be factored into a recusal evaluation.

The size of the jurisdiction or electorate should be considered because the same contribution may be considered small in a large metropolis while exorbitant in a rural county.\textsuperscript{190} Local practices in a jurisdiction should also be evaluated. The amount may seem more outrageous if the jurisdiction’s judicial elections are usually low-key affairs rather than multi-million dollar battles.\textsuperscript{191}

\begin{itemize}
  \item[ii.] Percentage
  
  Along with the overall total amount of campaign expenditures, the overall ratio of the contribution at issue as compared to the overall campaign expenditures should be considered. A race that does not run into the millions of dollars may still produce an objective probability of actual bias if the percentage of those contributions dwarfs comparative campaigns. More than 60 percent of Justice Benjamin’s total financial support came from Mr. Blankenship—three times as much as Benjamin’s own campaign committee.\textsuperscript{192} Elections are becoming increasingly expensive, and contributors are likely to continue to donate large amounts of money. When questionable expenditures are matched by other larger contributions in the same campaign, it may diminish the impact of each individual contribution on a judge’s impartiality.\textsuperscript{193} However, when the absolute amount is “eye-catching” and the percentage of the overall campaign matches the amount in impact, recusal is necessary.

\begin{itemize}
  \item[b.] Timing
    
    The timing of the contributions is another factor. Contributions made to a candidate’s campaign are most suspicious when the
\end{itemize}

\begin{footnotes}
\item[189] Brief for Petitioners, \textit{supra} note 1, at 6.
\item[191] \textit{Id.} at 26.
\item[192] Brief for Petitioners, \textit{supra} note 1, at 2.
\item[193] \textit{Id.} at 28–29.
\end{footnotes}
contributor appeals a trial court verdict and expects it to come before the same court the candidate would sit on should he prevail in his election to the bench. The timing of such a contribution leads to the perception that parties can "buy" judges. When a party loses a massive verdict at the trial court level and appeals it, the party could potentially believe that funneling enough money towards the campaign of an appellate judge will prompt the judge to show gratitude or leniency by reversing the verdict at the appellate level.

The more remote in time the contribution was given relative to when a matter involving the contributor appears before the judge, the less likely it is to create due process concerns. A contributor who consistently gives money to a judge during each election cycle has a past record of consistent contributions of similar amounts when issues are not up on appeal, or contributes before a case has developed, may be less suspicious. In this instances, judicial recusal may not be necessary.

c. Intent

Looking at past spending habits of contributors may shed some light on whether their contributions were well-intended or whether the contributors had ulterior motives. Lawyers contributing to a judge's campaign because they feel that the judge is doing a good job seem to indicate that their contributions were well-intended. Such contributions could be motivated by the desire to commend that judge for upholding the law and to ensure that such a great judge remains on the bench. This motivation to contribute may be quite different from a large company's desire to funnel massive amounts of money to a candidate right after it has just been ordered to pay a $50 million class-action verdict. As with the timing of a suspicious contribution, the intent of such a contribution should be evaluated to determine if the contribution created an objective probability of actual bias.

Recusal factors must be sensitive to potential abuse by those trying to manipulate the system. Different types of evidence may exist to show whether a contributor is being altruistic or simply hopes to take advantage of the election system. One way to determine intent is to see if the contributor made donations to rival candidates. Contributors may try to manipulate the system by contributing massive amounts to a judge's campaign because they do
not want that judge to hear their cases and hope to trigger mandatory disqualification to prevent that from happening. Intent can also be evidenced through the timing of contributions, discussed in more depth in the previous section. Another indicator may be whether contributors give large amounts of money to every member of an appellate court in hopes that all those judges would recuse themselves. If too many judges recuse themselves and the result is an even split, then the lower court decision in some states may stand, removing the litigant’s right to appeal. 194

These factors help establish when campaign contributions create such an objective probability of bias that requires judicial recusal. Recusal will protect litigants from a partially biased judiciary, ensuring a fair trial and reassuring the public that the judiciary’s integrity remains intact.

3. Implementation Issues

In addition to establishing a clear recusal test, it is important to develop an implementation structure that will guarantee disqualification when appropriate. When judges personally decide motions for their own recusal, or too many judges recuse themselves, due process may be jeopardized by preventing the litigants from receiving a fair trial. An independent body must decide whether a given contribution towards a judge’s campaign has created an objective probability of actual bias. If the judge personally affected is the one deciding the motion, the judge will decide subjectively, undermining the legitimacy of such a recusal system.

Independent adjudication of disqualification or recusal motions will take away a judge’s personal ability to decide whether or not he is biased. 195 In states like West Virginia where judges decide motions for their own recusal, a judge’s refusal to step down after his objectivity is questioned highlights the disparity between what a

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194. For example, Avery v. State Farm Mutual Auto Ins., 547 U.S. 1003 (2006) illustrates a problem with recusal procedures in states that do not designate a substitute for a disqualified appellate judge. If Justice Karmeier had agreed to step down from the case, his court would have split evenly, leaving the decision below intact. The potential for such even splits at the appellate level can raise serious problems of gamesmanship, and it undermines the precedential value of the resulting decisions. It is therefore important that regardless of which recusal policies they adopt, courts have in place mechanisms for efficiently replacing a disqualified judge.

Goldberg, Sample, & Pozen, The Best Defense, supra, note 129, at 532.

195. Sample, Pozen, & Young, Fair Courts, supra note 63, at 31.
subjective judge believes and versus an objective observer perceives. If a separate body were to rule on the motion while considering the objective substantive factors discussed above, a more just outcome would result.

There are many ways states can modify the recusal procedure to establish a more objective standard. A group of fellow judges could rule on the motion together. As an objective body, they have the added benefit of personally knowing the judge involved, which may help them in deciding whether recusal is necessary. States can also adopt a model similar to the one established in Texas. There, when judges are presented with disqualification motions, they may choose one of two options before proceeding to trial: recuse themselves or request the presiding judge to assign another judge to hear and rule on the motion. Even if the judge facing a disqualification motion has the best knowledge of the facts, there is no guarantee that the judge will weigh such facts objectively. Judicial elections take place because the public demands accountability from its governmental officers. One way to ensure such accountability is to have an external check to keep them honest to the public at large and not subservient to a wealthy minority.

When a judge decides a motion for his own recusal, there is no systematic method or grounds for his decision. Currently, no detailed reasoning for the ruling is required. If an independent body would be too costly or burdensome, requiring judges to explain their decision on the record may at least require judges to think more carefully about how their decision might be interpreted by the public, which could increase judicial accountability and potentially pressure judges to reevaluate their ability to impartially hear cases involving contributors to their campaigns.

196. See W. VA. R. APP. P. R. 29. An editorial in the Charleston Gazette stated “Benjamin remains the only Massey-connected justice still presiding over Massey cases. Clearly for the sake of impartiality, he should . . . recuse[s] himself from all Massey cases.” Editorial, Bravo, Starcher, Maynard acts, CHARLESTON GAZETTE, Feb. 16, 2008, at 4A.
197. Sample, Pozen, & Young, Fair Courts, supra note 63, at 31.
198. Id. at 32.
199. See id.
200. See id.
V. CONCLUSION

The Due Process Clause guarantees that litigants receive a fair trial before an impartial judge. But, when an elected judge presides over a case that involves a substantial contributor to his judicial campaign, that judge's impartiality is called into question. The result is that the opposing side's due process right to be fairly heard is jeopardized. The opposing side can move for recusal, but the motion is heard by the very same judge whose impartiality is no longer certain. Instead of relying on that judge's ability to fairly and objectively rule on the recusal motion, states should implement a mandatory recusal procedure which is supervised by an objective body. This objective body should use objective substantive factors to determine whether judicial recusal is appropriate in a given case. This system is the only way to protect litigants from a potentially impartial judiciary and to reassure the public that judges can fulfill their essential function as impartial arbiters even if they are elected.