

**A NEW PERSPECTIVE ON JUDICIAL DISQUALIFICATION:  
AN ANTIDOTE TO THE EFFECTS OF THE DECISIONS IN  
*WHITE AND CITIZENS UNITED***

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*“[W]hat you see and hear depends a great deal on where you are standing.”<sup>1</sup>*

INTRODUCTION

For the first decade of my legal career, as a member of the bar, I held members of the judiciary in uniform high esteem. I viewed judges as prestigious, accomplished members of the bar who deserved the upmost respect and honor. Even when judges ruled against my clients, I assumed that their rulings were legally justified. Because they were judges, I imagined that they had developed keener insight and wisdom that, in time, I too would acquire. If I had lost a case, it must have been because I had missed something in my factual investigation or failed to uncover or interpret relevant legal precedent. Even in my losses, I generally came away impressed with the judgment of the judiciary, even though it was inconsistent with my own. I largely attributed our different viewpoints to my youth and inexperience, and I aspired to develop wisdom, insight, and judiciousness.

In the second decade of my law life, I served as a member of this institution that I so revered. I became a trial judge by running in a hotly contested, non-partisan-in-name-only election in a multi-county judicial district, spanning more than 1000 square miles of rural eastern Tennessee. I campaigned based on qualifications, which included my educational background and my trial and appellate experience as a small-town lawyer. I knocked on doors, rode on unexceptional floats in Fourth of July parades, and ate tons of pancakes, country ham, and spaghetti. Because that formula worked, giving me a landslide victory, I determined, by virtue of my newly-acquired judicial wisdom, that the popular election system for choosing judges worked well.

Within a few years, I was appointed by Tennessee’s governor to the intermediate appellate bench following a commission-based nomination. My application was based on my record as a lawyer and trial judge. I did not need to tell the commission that I was a woman, nor did they need reminding that only one female had served as an appellate judge in the state’s nearly 200-year history. When the state’s Democratic governor selected my name from the commission’s three nominees, he made history by appointing a thirty-four-year old woman. He

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This essay is largely derived from a presentation given on April 5, 2012, at the Indiana University Robert H. McKinney School of Law at a Symposium entitled “Reflecting on Forty Years of Merit Selection.” I am grateful to the *Indiana Law Review* for both inviting me to participate in the Symposium and for publishing these comments.

1. The entire quote from C.S. Lewis continues as follows: “It also depends on what sort of person you are.” C.S. LEWIS, *THE MAGICIAN’S NEPHEW* 136 (1955).

also acquired the opportunity to fill the seat I vacated on the trial bench in a completely Republican judicial district, undoubtedly a factor for him but a factor about which I was blissfully oblivious.

The commission-based selection system in effect at the time was based ostensibly on merit—a consideration of whether the applicant’s background and experiences prepared the applicant for the particular judicial position.<sup>2</sup> I perceived the system as quite appropriate, especially for an appellate judge whose duty it was to review the trial court’s application of the law. My satisfaction with the merit-based system was magnified when I easily won a state-wide retention election two years after my initial appointment without organizing a campaign committee, raising any funds, or eating a single pancake.

With my new-found perspective as a (learned) appellate judge, I began to favor merit appointment systems and retention elections over popular or partisan elections for judges. I embraced this point of view and praised the advantages of a merit-based judicial selection system when I was again nominated by the commission and appointed by the governor, this time to serve on Tennessee’s highest court. Again, the governor made history, appointing the second woman, and the youngest person, to serve on the Tennessee Supreme Court, and again he acquired the added benefit of creating a vacancy on the intermediate appellate court which he had the opportunity to fill.

The retention election two years later—which I lost, making me the first and only judge to lose a retention election in Tennessee—did not change my point of view on the preferable and appropriate method for selecting judges, but it did enable me to view the tasks of judging from a different perspective.<sup>3</sup> I was no longer a judge or lawyer. Nor did I remain a member of the inner circle or the legal elite. Since I had chosen not to return to the practice of law, I was, in effect, not even a member of the legal fraternity. As a result, I gained the advantage of an outsider and was able to view the system objectively, rather than from my particular, subjective point of view.

I have spent the last ten years standing at a distance, rather than shoulder to shoulder with members of the bar or in robed isolation with members of the bench. I still bear and relish the benefit of my prior experiences, but I now endeavor to view the justice system in general and the tasks of judging in particular from the unique perspective of those who the justice system exists to serve, the general public.

Some obvious truths bear repeating. The justice system does not exist and should not function for the benefit of lawyers; nor is its *raison d’être* the career advancement, job satisfaction, or job security of judges. The justice system exists to provide a fair, orderly, and efficient method of resolving disputes in accord with the rule of law. As John Adams noted in Article 29 of the Massachusetts Declaration of Rights, “It is the right of every citizen to be tried by judges as free,

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2. See TENN. CODE ANN. § 17-4-102, repealed by 2009 Tenn. Pub. Acts ch. 517, § 1 (current version at TENN. CODE ANN. § 17-4-102 (West 2012)).

3. See Christine Buttorff, *WPLN News Feature Transcripts: Judicial Retention*, NASHVILLE PUB. RADIO (Aug. 3, 2006), <http://wpln.org/?p=8050>.

impartial, and independent as the lot of humanity will admit.”<sup>4</sup>

This essay undertakes to address, first, the effects that the United States Supreme Court’s decisions in *Republican Party of Minnesota v. White*<sup>5</sup> and *Citizens United v. Federal Election Commission*<sup>6</sup> have had on state courts.<sup>7</sup> Second, the essay suggests that robust disqualification<sup>8</sup> provisions can serve as a powerful antidote to the harmful effects of those two decisions, particularly when judges view disqualification requests from the public’s perspective.

#### I. THE DECISION IN *WHITE*, ITS AFTERMATH, AND EFFECTS

A 5-4 majority of the Supreme Court in *Republican Party of Minnesota v. White* invalidated a provision of the Minnesota Code of Judicial Conduct that prohibited a judge or judicial candidate from announcing personal “views on disputed legal or political issues.”<sup>9</sup> The decision was narrow in its scope<sup>10</sup> and application<sup>11</sup> but had wide-reaching effects, both on individual judges and on state

4. MASS. CONST. of 1780, art. XXIX; *see* 4 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 229 (1851).

5. 536 U.S. 765 (2002).

6. 130 S. Ct. 875 (2010).

7. As was noted, this essay is drawn largely from a presentation given in conjunction with the *Indiana Law Review*’s Symposium on merit selection. Because those in attendance were largely familiar with *White* and *Citizens United*, I did not undertake to explain why, as I do briefly here, those two decisions have had a negative effect on state courts, in my opinion.

8. Some have observed that, historically, judicial recusal referred to a judge’s *sua sponte* decision to withdraw from hearing a case, while judicial disqualification referred to the procedure by which a litigant requested the judge to decline to hear the case. Clearly, this historical distinction is no longer observed. *See* MODEL RULES OF PROF’L CONDUCT R. 2.11 (1972) (utilizing the term “disqualification” to refer to both *sua sponte* withdrawal and withdrawal based upon a party’s motion or request).

9. 536 U.S. 765, 788 (2002).

10. The “announce” clause, Canon 5(A)(3)(d)(i) of the Minnesota Code of Judicial Conduct, in effect at the time of the *White* case was part of the 1972 Model Code of Judicial Conduct. *See White*, 536 U.S. at 768. It provided that a “candidate for a judicial office, including an incumbent judge, shall not announce his or her views on disputed legal or political issues.” *Id.* (internal quotation marks omitted) (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

11. *Id.*; *see id.* at 773 n.5, 786-87 (noting the limited number of states with provisions similar to the “announce clause” in effect in Minnesota, and that the provision had been modified in the revised Model Code of Judicial Conduct). Not only did the Court limit its grant of certiorari to one of several issues raised, *see* Petition for a Writ of Certiorari, *Republican Party of Minnesota v. Kelly*, 534 U.S. 1054 (2001) (No. 01-521), the Court also described the issue narrowly in the opening sentence of the opinion (“whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues”), and specifically confined the holding to the Minnesota announce clause (“[T]he Minnesota Code contains a so-called ‘pledges or promises’ clause . . . that is not challenged here and on which we express no view.”). *White*, 536 U.S. at 768-70 (internal

courts as an institution.

Before the decision in *White*, most state judicial elections were low-key, decorous events in which candidates talked about their educational backgrounds, their professional experiences, and their military and community service.<sup>12</sup> This was the norm in judicial elections, not only because judicial ethics rules restricted political activity, but also because many judges envisioned themselves as a unique class of elected officials insulated from rough-and-tumble politics and high-dollar campaigns incumbent upon ordinary politicians.

The dispute that brought the *White* case to the Supreme Court was emblematic of an emerging landscape in judicial elections. A candidate for the Minnesota Supreme Court wanted to run on a platform which would include criticism of some of the decisions of the Minnesota high court and statements of his own views on the issues raised in those decisions.<sup>13</sup> When the state ethics board refused to endorse this type of campaigning, the candidate sued, challenging the restrictions placed upon him and other candidates for judicial office by the Minnesota Code of Judicial Conduct.<sup>14</sup> The United States Supreme Court limited its inquiry to only one of the challenged provisions<sup>15</sup> and ultimately agreed that the provision restricting candidates for judicial office from announcing their views on contested legal and political issues violated the First Amendment.<sup>16</sup>

The success of those mounting the constitutional challenge in *White* emboldened special interest groups and First Amendment advocates, while simultaneously cowering lower federal courts, state supreme courts, and judicial ethics bodies.<sup>17</sup> Special interest groups were now empowered to dispute judicial candidates' claims that they were ethically prohibited from answering questions

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citation omitted).

12. See James Bopp, Jr., *Preserving Judicial Independence: Judicial Elections as the Antidote to Judicial Activism*, 6 FIRST AMENDMENT L. REV. 180, 180-81 (2007).

13. Gregory Wersal, a Minnesota lawyer, sought election to the Minnesota Supreme Court on three occasions. See *White*, 536 U.S. at 768-69. He filed the first of three lawsuits seeking to enjoin enforcement of several provisions of the Minnesota Code of Judicial Conduct during his 1996 election bid. See *Republican Party of Minn. v. Kelly*, 996 F. Supp. 875, 875-76 (D. Minn. 1998). The original lawsuit in *White*, 536 U.S. 765 (2002), was filed in the United States District Court by Gregory Wersal, his wife, and the following additional plaintiffs: the Republican Party of Minnesota, the Indian Asian American Republicans of Minnesota, the Republican Seniors, the Young Republican League of Minnesota, the Minnesota College Republicans; the Campaign for Justice, the Minnesota African-American Republican Council, the Muslim Republicans, Mark E. Wersal, Corwin C. Hulbert, Michael Maxim, and Kevin J. Kolosky. See Brief for Petitioners Party of Minn. et al. at \*ii, *Republican Party of Minn. v. Kelly*, 996 F. Supp. 875 (1998) (No. 05-521).

14. *White*, 536 U.S. at 769-70, 769 n.2.

15. *Id.* at 768-70.

16. *Id.* at 788.

17. See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 297-98 (2008) (noting the many post-*White* challenges to judicial ethics rules).

about their political and personal opinions.<sup>18</sup> The questionnaires became the new weapon in state judicial races.<sup>19</sup> When candidates responded with answers that mirrored the interest groups' views, the candidates received either direct contributions or inclusion in the interest groups' issue advertisements or voters' guides.<sup>20</sup> Thus, the decision in *White* helped interest groups to simplify the task of identifying which judicial candidates to support politically and financially.<sup>21</sup>

Though significant, it seemed that this ability to identify, publicize, and fund like-minded candidates for judicial office did not satisfy special interest groups' and first amendment advocates' appetite for involvement in state judicial elections. These groups seemed to crave even greater influence in matters related to judicial selection, as was evidenced by the uncompromising stance they took against some candidates who chose not to respond to questionnaires. When candidates refused to answer, the groups often juxtaposed their refusal to answer with the stated views of cooperating candidates.<sup>22</sup> Moreover, some groups painstakingly differentiated between "decline to respond" and "refuse to respond," designating "decline to respond" as indicating a candidate's unwillingness to respond based on the candidate's perceived belief that state ethics rules prohibited a response.<sup>23</sup> When a candidate indicated that he or she

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18. The questionnaires distributed to candidates for judicial office often included a recitation of the *White* holding along with an assurance that the questionnaire sought only the candidate's views, and not his or her pledges, promises, or commitments. For example, a letter drafted by James Bopp, plaintiff's counsel in *White*, and sent to Alaska judicial candidates by the Alaska Right-to-Life Committee in 2002, contained this introduction:

The Alaska Right to Life [C]ommittee certainly recognizes that judicial candidates should maintain actual and apparent impartiality [and] should not pledge or promise certain results in particular cases that may come before them . . . . This questionnaire is intended to elicit candidates' views on issues of vital interest to the constituents of the Alaska Right to Life Committee without subjecting candidates answering its questions to accusations of impartiality or requiring candidates to recuse themselves in future cases.

POUND CIVIL JUSTICE INST., *THE LEAST DANGEROUS BUT MOST VULNERABLE BRANCH: JUDICIAL INDEPENDENCE AND THE RIGHTS OF CITIZENS* 15 n.130 (2010), available at <http://www.roscoepound.org/2007%20Pound%20Forum%20Report.pdf> (second and third alteration in original).

19. *Id.* at 15.

20. *Id.*

21. See Mark S. Cady & Jess R. Phelps, *Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World*, 17 CORNELL J.L. & PUB. POL'Y 343, 345, 358-60 (2008).

22. See, e.g., Camille M. Tribble, *Awakening a Slumbering Giant: Georgia's Judicial Selection System After White and Weaver*, 56 MERCER L. REV. 1035, 1067-68 (2005) (noting how one judge's refusal to answer specific questions in the Christian Coalition of Georgia survey put the candidate at a disadvantage to his opponent, who chose to advertise his conservative credentials).

23. For example, a questionnaire sent to candidates for judicial office in Kansas included a

was not responding because of ethics rules, or based on specific advice from state judicial bodies, the state judicial bodies frequently were sued.<sup>24</sup>

Based either on a misreading of *White* or a desire to avoid protracted and expensive litigation with an uncertain result, some lower federal courts, state supreme courts, and judicial ethics bodies unnecessarily dismantled or discontinued enforcement of numerous other important restrictions on judges' political speech and conduct,<sup>25</sup> while other courts distinguished and upheld limitations on political conduct by candidates for judicial office.<sup>26</sup> The advocates in *White* continue to challenge other provisions of the Minnesota Code of Judicial Conduct following the remand from the United States Supreme Court.<sup>27</sup> The result of these efforts were mixed, with the United States Court of Appeals for the Eighth Circuit striking some additional restrictions on political conduct in the Minnesota Code of Judicial Conduct,<sup>28</sup> and upholding others,<sup>29</sup> but by and large

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paragraph describing the “decline to response” answer as follows:

This response indicates that I would answer this question, but believe that I am or may be prohibited from doing so by Kansas Canon of Judicial Conduct 5A(3)(i) and (ii), which forbids judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office” or “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” This response also indicates that I would answer this question, but believe that, if I did so, then I will or may be required to recuse myself as a judge in any proceeding concerning this answer on account of Kansas Canon 3E(1), which requires a judge or judicial candidate to recuse him or herself when “the judge’s impartiality might reasonably be questioned. . . .”

Kan. Judicial Watch v. Stout, 440 F. Supp. 2d 1209, 1218 (D. Kan. 2006), *vacated*, 562 F.3d 1240 (10th Cir. 2009).

24. *See, e.g.*, Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002); Stout, 440 F. Supp. 2d at 1218-19; Ind. Right to Life, Inc. v. Shepard, 463 F. Supp. 2d 879 (N.D. Ind. 2006), *rev'd in part*, 507 F.3d 545 (7th Cir. 2007); Family Trust Found. of Ky., Inc. v. Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004).

25. *See, e.g.*, Weaver, 309 F.3d 1312; Stout, 440 F. Supp. 2d 1209; Duwe v. Alexander, 490 F. Supp. 2d 968 (W.D. Wis. 2007); Shepard, 463 F. Supp. 2d 879; N. Dakota Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021 (D. N.D. 2005); Wolnitzek, 345 F. Supp. 2d 672.

26. *See, e.g.*, Wersal v. Sexton, 674 F.3d 1010 (8th Cir. 2012); Bauer v. Shepard, 620 F.3d 704 (7th Cir. 2010).

27. Republican Party of Minn. v. White, 361 F.3d 1035, 1041 (8th Cir. 2004) (upholding challenges to partisan-activities and solicitation restrictions in Minnesota Code of Judicial Conduct), *vacated*, 416 F.3d 738, 744 (8th Cir. 2005) (en banc) (affirming judgment for the plaintiffs and holding that “the partisan-activities and solicitation clauses” violated the First Amendment).

28. *Id.* at 1047-49.

29. *See* Wersal v. Sexton, 607 F. Supp. 2d 1012 (D. Minn. 2009), *rev'd*, 613 F.3d 821 (8th Cir. 2010) (holding the endorsement and solicitation clauses violated the First Amendment), *and rev'd*, 674 F.3d 1010, 1013 (8th Cir. 2012) (en banc) (upholding the constitutionality of the

these ambiguous events have not led jurisdictions to reinstate or revisit their eliminated restrictions.

Because ethical restrictions on judicial political speech and conduct have been greatly diminished, the historical distinctions between judicial elections and elections for executive and legislative offices have been significantly lessened. Some suggest that the result is not only a more politicized state judiciary, but a less respected one as well.<sup>30</sup>

## II. THE DECISION IN *CITIZENS UNITED*, ITS AFTERMATH, AND EFFECTS

With a simplified means of identifying judicial candidates' views on legal and political issues, interest groups are better able to filter funds to support like-minded candidates of their choice.<sup>31</sup> Even before the stopgaps on campaign expenditures were lifted by the United States Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*,<sup>32</sup> the *White* decision and other factors had prompted a deluge of spending in state judicial elections.<sup>33</sup> For

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endorsement, personal solicitation, and political organization solicitation clauses of the Minnesota Code of Judicial Conduct). Wersal's most recent suit challenged restrictions on political endorsements and solicitations. The district court ruled against him, but a panel of the Eight Circuit reversed. Ultimately, an en banc panel of the Eighth Circuit upheld the district court ruling.

30. As Justice O'Connor noted in her concurring opinion in *White*, "Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so." Republican Party of Minn. v. White, 536 U.S. 765, 789 (2002) (O'Connor, J., concurring). Justice O'Connor cited a 2001 national opinion poll that found "that 76% percent of registered voters believe that campaign contributions" affect judicial decision-making and that two-thirds of voters believe that judges give favorable treatment to donors. *Id.* at 790 (citing GREENBERG QUINLAN ROSNER RESEARCH, INC., JUSTICE AT STAKE CAMPAIGN & AM. VIEWPOINT, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4-5 (2001), available at [www.justiceatstake.org/files/JASNationalSurveyResults.pdf](http://www.justiceatstake.org/files/JASNationalSurveyResults.pdf)).

31. See *supra* text accompanying notes 17-24.

32. 558 U.S. 310 (2010).

33. See JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009: DECADE OF CHANGE 1-2 (2010), available at [http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE\\_8E7FD3FEB83e3.pdf](http://www.justiceatstake.org/media/cms/JASNPJEDecadeONLINE_8E7FD3FEB83e3.pdf) [hereinafter SAMPLE ET AL., JUDICIAL ELECTIONS 2000-2009]; JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, 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 15 (2007), available at [http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006\\_D2A2449B77CDA.pdf](http://www.justiceatstake.org/media/cms/NewPoliticsofJudicialElections2006_D2A2449B77CDA.pdf); DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, 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 13-14 (2005), available at <http://www.justiceatstake.org>.

example, from 1990-1999, the decade before the 2002 *White* decision, judges seeking seats on America's fifty state supreme courts spent a combined total of over \$83 million dollars.<sup>34</sup> In the near-decade that followed, 2000-2009, that amount nearly tripled, to \$206.9 million,<sup>35</sup> with the increase being virtually across the board.<sup>36</sup> This spending trend continued and expanded in 2010 and 2011, with many states experiencing their most expensive state supreme court races ever<sup>37</sup> and with enormous amounts of out-of-state money being invested in a retention race in Iowa.<sup>38</sup>

While the decision in *White* provided a means by which special interest groups could identify judicial candidates who shared the groups' political ideologies, the United States Supreme Court's decision in *Citizens United* enabled corporations and labor unions to invest their funds and vastly influence the election of state court judges as well.<sup>39</sup> In the *Citizens United* decision, the Court invalidated portions of the Bipartisan Campaign Reform Act of 2002, which restricted corporate and union campaign expenditures.<sup>40</sup> In so doing, the Court overruled two decisions<sup>41</sup> that had upheld modest restrictions on campaign expenditures.<sup>42</sup>

Although the dispute in *Citizens United* arose from expenditures in an

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org/media/cms/NewPoliticsReport2004\_83BBFBD7C43A3.pdf.

34. SAMPLE ET AL., JUDICIAL ELECTIONS 2000-2009, *supra* note 33, at 1-2.

35. *Id.*

36. Twenty of the twenty-two states that elect their supreme courts witnessed their costliest judicial race ever in the last decade. *Id.* at 8.

37. Illinois Supreme Court Justice Thomas Kilbride spent nearly \$3 million to retain his seat on Illinois' high court in a down-state race in 2011. ADAM SKAGGS ET AL., JUSTICE AT STAKE CAMPAIGN, BRENNAN CTR. FOR JUSTICE & NAT'L INST. ON MONEY IN STATE POLITICS, THE NEW POLITICS OF JUDICIAL ELECTIONS 2009-10: HOW SPECIAL INTEREST "SUPER SPENDERS" THREATENED IMPARTIAL JUSTICE AND EMBOLDENED UNPRECEDENTED LEGISLATIVE ATTACKS ON AMERICA'S COURTS 8 (2011), available at <http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf>. Candidates for the Michigan Supreme Court in 2010 spent just over \$2 million, while special interest groups spent an additional \$6.8 million to \$8.8 million. *Id.* at 3-4. Candidates for the Wisconsin Supreme Court agreed to public financing, which limited the amounts their respective campaigns could spend, but special interest groups spent an additional \$3.6 million in the race. *Id.* at 11.

38. *Id.* at 8. Chief Justice Marsha Ternus, Justice David Baker, and Justice Michael Streight of the Iowa Supreme Court were defeated in a retention election in November 2010.

39. See ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, BUYING JUSTICE: THE IMPACT OF *CITIZENS UNITED* ON JUDICIAL ELECTIONS 1-2 (2010), available at <http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1> [hereinafter SKAGGS, BUYING JUSTICE].

40. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 886-87 (2010).

41. See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (per curiam), overruled by *Citizens United*, 130 S. Ct. at 876; *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), overruled by *Citizens United*, 130 S. Ct. at 876.

42. *Citizens United*, 130 S. Ct. at 886.



executive branch campaign<sup>43</sup> and dealt explicitly with federal campaign finance laws,<sup>44</sup> the decision eliminated a distinction between individual and corporate expenditures, recognized the First Amendment rights of corporations and unions,<sup>45</sup> and rejected the notion that independent expenditures, including those made by corporations and unions, could give rise to corruption or the appearance of corruption.<sup>46</sup> Thus, the decision's ill effects will not be limited to federal elections.

Both the majority<sup>47</sup> and the dissent acknowledged the decision's broader implications for state judicial elections, but the dissent more aptly forecast the concern:

[T]he consequences of today's holding will not be limited to the legislative or executive context. The majority of the States select their 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.<sup>48</sup>

As was true in the aftermath of the decision in *Republican Party of Minnesota v. White*, courts have already begun expanding the reach of the *Citizens United* holding. In *SpeechNow.org v. Federal Election Commission*, for example, the United States Court of Appeals for the D.C. Circuit invalidated a cap on campaign contributions to independent political groups who spent money in direct support of candidates for federal office.<sup>49</sup> The *SpeechNow* case involved restrictions on campaign contributions, not campaign expenditures, as were at issue in *Citizens United*, but the D.C. Circuit applied the rationale of *Citizens United* to a different set of facts and invalidated restrictions, not on campaign expenditures, but on campaign contributions.<sup>50</sup>

Even before the full effects of the decision in *Citizens United* are felt, the public believes that the entanglement of money and special interest is having a

43. *Id.* (evaluating the legality of the airing of a movie regarding Secretary of State Hillary Clinton when she was a candidate for the Democratic Party's presidential nomination). *Id.* at 887.

44. *Id.* at 886-87 (raising challenges to the federal Bipartisan Campaign Reform Act of 2002).

45. Some commentators have referred to the decision as bestowing "personhood" on corporations and unions. See, e.g., Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 720-21 (2011).

46. *Citizens United*, 130 S. Ct. at 908.

47. *Id.* at 910-11.

48. *Id.* at 968 (Stevens, J., concurring in part and dissenting in part) (internal citation omitted).

49. 599 F.3d 686, 696 (D.C. Cir. 2010).

50. *Id.* at 692-93, 695 ("Because of the Supreme Court's recent decision in *Citizens United v. FEC*, the analysis is straightforward. There, the Court held that the government has no anti-corruption interest in limiting independent expenditures. . . . Given this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as *SpeechNow*.").

toxic effect on state courts.<sup>51</sup> Recent studies show that more than three-fourths of the public believes that campaign contributions influence judicial decision-making.<sup>52</sup> When asked to quantify the influence, 89% of those surveyed said that money buys influence in the courts, and 90% of the surveyed voters agreed that a judge should not preside over a case involving any of his or her campaign contributors.<sup>53</sup> Equally disconcerting is that 80% of the public expresses concern with the influence that special interest groups exert over state courts.<sup>54</sup> Accordingly, when public trust in the judicial process is undermined, the public will become disenfranchised, disengaged, and disinterested in the courts.<sup>55</sup>

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51. Professor Zephyr Teachout, an expert on political corruption, provides a significant argument about the dangers corruption creates for the Constitution. *See* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009). Teachout argues that the *Citizens United* Court ignored the Framers' concerns with preventing corruption. She posits that the Framers of the American Constitution were acutely concerned about political corruption and that they largely viewed the Constitution as a safeguard against political corruption. *Id.* at 347. To curb the potential for political corruption, defined as the "self-serving use of public power for private ends," Teachout argues that the Framers regulated elections, imposed term limits, limited acceptance of foreign gifts, outlined impeachment provisions, and provided for the separation of powers. *Id.* at 373-74. With regard to the Judicial Article, Professor Teachout notes that "[m]any of the Article III discussions concerned ways to ensure the independence of the judiciary. The judiciary, it was argued, needed to be independent of both 'the gust of faction' and corruption. Thus, in determining the method of selection of judges, the Framers were concerned with dependency and corruption. . . . The determination that judges were to hold their office during good behavior meant the absence of corruption. Similarly, the jury protection came in part from the anti-corruption urge. . . . Likewise, inferior courts were established in part due to anti-corruption concerns." *Id.* at 368-69 (footnotes omitted).

52. *See* SAMPLE ET AL., JUDICIAL ELECTIONS 2000-2009, *supra* note 33, at 68 (figure 33). Additionally, in an October 2011 survey, only 3% of the public expressed a belief that campaign contributions have "no influence" over judges' decisions. *National Registered Voters Frequency Questionnaire*, 20/20 INSIGHT LLC, at Q6 (Oct. 10-11, 2011), available at [http://www.justiceatstake.org/media/cms/NPJE2011poll\\_7FE4917006019.pdf](http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf) [hereinafter *20/20 Survey*].

53. SKAGGS, BUYING JUSTICE, *supra* note 39, at 4. *See 20/20 Survey, supra* note 52, at Q6 (96% of surveyed voters believe campaign contributions have either a "great deal," "some," or "just a little" influence on a judge's decisions involving those contributors); Memorandum from Stan Greenberg, Chairman & CEO of Greenberg Quinlan Rosner Research, Inc., & Linda A. DiVall, President of Am. Viewpoint, to Geri Palast, Exec. Dir. of Justice at Stake Campaign (Feb. 14, 2002), available at [http://justiceatstake.org/media/cms/PollingsummaryFINAL\\_9EDA3EB3BEA78.pdf](http://justiceatstake.org/media/cms/PollingsummaryFINAL_9EDA3EB3BEA78.pdf).

54. *See* SKAGGS, BUYING JUSTICE, *supra* note 39, at 4; *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 962 (2010) (Stevens, J., concurring in part and dissenting in part) (citing *McCannell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 623-24 (D.C. Cir. 2003) (per curiam)).

55. To illustrate, see Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1098 (2007).

## III. FINDING A SILVER LINING

Although the decisions in *White* and *Citizens United* lionized the First Amendment, not all of the justices who joined to form the majority opinions completely disregarded the adversaries' concerns about the effect that unfettered political speech and unlimited campaign expenditures would have on state courts. In both cases, Justice Kennedy, author of a concurring opinion in *White* and the majority opinion in *Citizens United*, addressed these concerns, but he cautioned that fear of the effects of political speech and campaign expenditures could not be allowed to suppress the exercise of important First Amendment freedoms.<sup>56</sup> Rather than restrict important speech rights, Justice Kennedy suggested that robust judicial disqualification rules could be used to ameliorate the feared effects.<sup>57</sup> In so doing, Justice Kennedy, in essence, embraced judicial disqualification as an antidote to the harms occasioned by an unyielding First Amendment.

While the First Amendment would not tolerate restrictions on political speech and campaign expenditures, states could articulate standards of judicial conduct that advanced the state's interest in assuring "citizen's respect for judgments [which] depends in turn upon the issuing court's absolute probity."<sup>58</sup> "Explicit standards of judicial conduct provide essential guidance for judges in the proper discharge of their duties and the honorable conduct of their office."<sup>59</sup> In his concurring opinion in *White*, Justice Kennedy counseled states to "adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."<sup>60</sup>

Justice Kennedy's support for robust recusal provisions in *White* acquired added significance in light of his majority opinion, as well as Chief Justice Robert's dissenting opinion, in *Caperton v. A.T. Massey Coal Co.*, a case in which judicial recusal was actually at issue.<sup>61</sup> In *Caperton*, the Court held that due process requires recusal when "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"<sup>62</sup> such as existed in the case before the Court.<sup>63</sup> Although the dissenting justices were extremely critical of the *Caperton*

56. *Citizens United*, 130 S. Ct. at 910; *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

57. *Citizens United*, 130 S. Ct. at 910; *White*, 536 U.S. at 793-94 (Kennedy, J., concurring).

58. *White*, 536 U.S. at 793 (Kennedy, J., concurring).

59. *Id.* at 794.

60. *Id.*

61. 556 U.S. 868, 872 (2009).

62. *Id.* at 884.

63. A newly elected judge on West Virginia's highest court refused to recuse himself and ultimately voted to reverse a \$50 million jury verdict against a company whose chair, president, and chief executive officer had donated more than two-thirds of the judge's campaign's total funds and

holding<sup>64</sup> and predicted that the probability of bias standard would in fact diminish public confidence in the system, even the dissenting opinions endorsed the freedom of states to adopt broad recusal rules.<sup>65</sup>

Perhaps based on this apparent consensus, the four dissenting justices in *Citizens United* suggested that the *Caperton* holding undermined *Citizen United*'s position.<sup>66</sup> Justice Kennedy curtly disposed of any implication of incompatibility between the litigant's due process rights recognized in *Caperton* and the First Amendment rights of individuals, corporations, and unions to expend funds in political campaigns.<sup>67</sup> Although Justice Kennedy matter-of-factly observed that the connection between a contributor and a candidate for judicial office could not be eliminated by banning or curbing political speech, he reiterated that states could require judicial disqualification.<sup>68</sup>

If a silver lining exists, it is in the recognition that states may mandate robust disqualification standards, informed by the states' interest in enhancing the public's confidence in the courts.<sup>69</sup> Strong disqualification provisions can counterbalance the unfortunate effects of the decisions in *Republican Party of Minnesota v. White*<sup>70</sup> and *Citizens United v. Federal Election Commission*.<sup>71</sup> Consistent application of those strong provisions will curtail the incentive of special interest groups to invest in judicial races. Even the potential that a judge may disqualify herself will likely cause groups to reevaluate their investments.

Shouldering Justice Kennedy's suggestions, the American Bar Association<sup>72</sup>

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spent an additional half of a million dollars supporting the judge's candidacy. *Id.* at 872-73.

64. *See id.* at 902 (Roberts, C.J., dissenting) ("I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous 'probability of bias,' will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts."); *see also id.* at 902-03 (Scalia, J., dissenting) (lamenting that "the principal consequence of today's decision is to create vast uncertainty with respect to a point of law . . . . This course was urged upon us on grounds that it would preserve the public's confidence in the judicial system. . . . The decision will have the opposite effect.").

65. *Id.* at 892-93 (Roberts, C.J., dissenting) (joined by Justices Scalia, Thomas, and Alito).

66. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 967-68 (2010) (Stevens, J., concurring in part and dissenting in part) (joined by Justices Ginsburg, Breyer, and Sotomayor).

67. *Id.* at 910 (majority opinion) (observing that "*Caperton* . . . is not to the contrary. . . . *Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.").

68. *Id.*

69. *See Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (noting that "[j]udicial integrity is, in consequence, a state interest of the highest order.").

70. *Id.* at 768.

71. *Citizens United*, 130 S. Ct. at 886.

72. In August 2011, the American Bar Association House of Delegates passed Resolution 107, which "urge[d] states to establish clearly articulated procedures for: [j]udicial disqualification determinations; and [p]rompt review . . . of denials of requests to disqualify." A.B.A. STANDING COMM. ON JUDICIAL INDEPENDENCE, A.B.A., RESOLUTION 107 (revised July 22, 2011) (adopted by

and some states have undertaken to revise their judicial disqualification provisions.<sup>73</sup> The Tennessee Supreme Court, for example, recently adopted new judicial disqualification rules, with both substantive and procedural changes,<sup>74</sup> which have been widely applauded and positively received.<sup>75</sup> Other states have attempted recusal reform only to face internal dissension. In Wisconsin, for

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the ABA House of Delegates on Aug. 8-9, 2011), *available at* [http://www.americanbar.org/content/dam/aba/administrative/judicial\\_independence/report107\\_judicial\\_disqualification.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/report107_judicial_disqualification.authcheckdam.pdf). Resolution 107 also recommended that states provide for a prompt review of a denied disqualification motion, conducted by a different judge and that states in which judges are elected adopt provisions requiring disclosures of direct and indirect campaign support and guidelines regarding disqualification of judges presiding over cases involving litigants or lawyers who have contributed support. *Id.* Following the passage of Resolution 107, the ABA Standing Committees on Judicial Independence and Ethics and Professional Responsibility conducted public hearings on proposed amendments to the Model Code of Judicial Conduct. *See, e.g.*, A.B.A. STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY & A.B.A. STANDING COMM. ON PROF'L DISCIPLINE, *Proposed Amendments to the Model Code of Judicial Conduct Regarding Judicial Disqualifications*, A.B.A. (Feb. 3, 2012), *available at* [http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20111228\\_scepr\\_draft\\_proposed\\_amendments\\_and\\_hearing\\_notice\\_dec\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/ethics/20111228_scepr_draft_proposed_amendments_and_hearing_notice_dec_2011.authcheckdam.pdf).

73. According to the American Judicature Society, nine state supreme courts have adopted judicial disqualification rules that address campaign contributions in light of and consistent with the decision in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Those states include: Georgia, Iowa, Michigan, Missouri, New Mexico, North Dakota, Oklahoma, Tennessee, Washington. *See Judicial Disqualification Based on Campaign Contributions*, AM. JUDICATURE SOC'Y 5-10 (last updated Mar. 8, 2012), [http://www.ajs.org/ethics/pdfs/Disqualification\\_contributions.pdf](http://www.ajs.org/ethics/pdfs/Disqualification_contributions.pdf).

74. The revised Tennessee Rules of Judicial Conduct retain their previous standard, which requires disqualification of a judge whose "impartiality might reasonably be questioned," but expand the non-exclusive list of circumstances which may require disqualification. TENN. SUP. CT. R. 10, Rule 2.11(A). Specifically, disqualification is required when "[t]he judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has made contributions or given such support to the judge's campaign that the judge's impartiality might reasonably be questioned." *Id.* Rule 2.11(A)(4). Comment 7 clarifies that the fact of contribution "does not of itself disqualify the judge," but requires consideration of a number of detailed factors. *Id.* Rule 2.11 cmt. 7. Additionally, the rule requires disqualification when the judge "has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." *Id.* Rule 2.11(A)(5).

The procedural changes in the Tennessee rules effect both trial and appellate judges. The revised Tennessee rules require trial judges to rule "promptly by written order," which, in the event the motion is denied, includes the grounds for denial. TENN. SUP. CT. R. 10, Rule 2.11(D); TENN. SUP. CT. R. 10B § 1.03. Appellate review of denied disqualification motions is *de novo* and expedited. Tenn. Sup. Ct. R. 10B § 2.01.

75. *See, e.g.*, Editorial, *A Reform for Fair Courts*, N.Y. TIMES, Jan. 30, 2012, at A22, *available at* <http://www.nytimes.com/2012/01/30/opinion/a-reform-for-fair-courts.html>.

example, a majority of the Supreme Court declined to adopt rules requiring recusal in cases involving endorsements, lawful campaign contributions, independent expenditures, or “issue advocacy communications” made by individuals or entities regardless of the amount or content and notwithstanding the involvement of the individuals or entities in the proceedings before the court.<sup>76</sup> Similarly, in Nevada, justices rejected a proposal that would have made disqualification mandatory when a judge received contributions totaling \$50,000 or more from a party or lawyer during the previous six-year period.<sup>77</sup>

Still other states have faced legal challenges based on proposed modifications to their judicial disqualification standards. First Amendment advocates maintain that disqualification rules

have merely shifted unconstitutional regulations of speech from an ex ante prohibition of speech during judicial campaigns to an ex post

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76. Petitions were filed requesting the Wisconsin Supreme Court to amend the judicial disqualification rules applicable to disqualification based on campaign contributions. A petition filed by the League of Women Voters of Wisconsin sought to require disqualification for contributions over \$1000 within the preceding two years of the election. See Petition of the League of Women Voters of Wis. Education Fund to the Wis. Supreme Court, at 3, *In re* Creation of Rules for Recusal When a Party or Lawyer in a Case Made Contribution Effecting a Judicial Campaign (amended July 28) (No. 08-16), available at <http://www.wicourts.gov/supreme/docs/0816petition.pdf>. Petitions filed by the Wisconsin Realtors Association and the Wisconsin Manufacturers and Commerce took the position that disqualification should never be required based on a lawful campaign contribution. Petition for Supreme Court Rule of the Wisconsin Realtors Assoc. to the Justices of the Wis. Supreme Court at 1, *In re* Amending the Rules of Judicial Conduct (Sept. 30 2008) (No. 08-25), available at <http://wicourts.gov/supreme/docs/0825petition.pdf>; Petition for Supreme Court Rule of the Wisconsin Manufacturers & Commerce to the Justices of the Wis. Supreme Court at 1, *In re* Amending the Code of Judicial Conduct (Oct. 16, 2009) (No. 09-10), available at <http://wicourts.gov/supreme/docs/0910petition.pdf>. The court adopted two rules that provided that judges “shall not be required to recuse” based solely on endorsements, campaign contributions, independent expenditures, or “issue advocacy communication” including endorsements, contributions, expenditures, or issue advocacy communications from or by individuals or entities involved in the proceeding. WIS. SUP. CT. RULES 60.04(7); 60.04(8). For a full discussion of the petitions and the adoption of the rules, see *Legislative Report: Special Legislative Committee Studies Judicial Discipline and Recusal*, WIS. CIVIL JUST. COUNCIL, INC., [http://www.wisciviljusticecouncil.org/policy-project/legislative-report-special-legislative-committee-studies-judicial-discipline-and-recusal/#\\_ftn3](http://www.wisciviljusticecouncil.org/policy-project/legislative-report-special-legislative-committee-studies-judicial-discipline-and-recusal/#_ftn3) (last visited Nov. 28, 2012).

77. Editorial, *Can Justice Be Bought?*, N.Y. TIMES, June 16, 2011, at A34, available at [http://www.nytimes.com/2011/06/16/opinion/16thu1.html?\\_r=1](http://www.nytimes.com/2011/06/16/opinion/16thu1.html?_r=1). *Nevada Judicial Code Commission Issues Proposed Amendments*, ADMIN. OFFICE (Oct. 23, 2008), <http://www.nevada.judiciary.us/index.php/njccnews/130-nevada-judicial-codecommission-issues-proposed-amendments>; *2009 Nevada Code of Judicial Conduct*, WASHOE CNTY. BAR ASSOC. (Feb. 2010), <http://www.wcbar.org/documents/JudicialCode.Feb2010.Handouts.pdf>; Order, *In re* Amendment of the Nevada Code of Judicial Conduct, ADKT 427 (Nev. 2009), available at [http://www.leg.state.nv.us/courtrules/SCR\\_CJC.html](http://www.leg.state.nv.us/courtrules/SCR_CJC.html).

formulation that requires judges to disqualify themselves for statements they have made, all the while continuing to reach the same speech protected in [*White*]: the right of judges and judicial candidates to announce their views.<sup>78</sup>

These advocates argue that forcing judges to disqualify themselves unconstitutionally chills protected political speech and conduct.<sup>79</sup>

The recent United States Supreme Court decision in *Nevada Commission on Ethics v. Carrigan* appears to undermine this argument.<sup>80</sup> At issue in *Carrigan* was a conflict-of-interest recusal provision of the Nevada Ethics in Government Law.<sup>81</sup> Carrigan, a public official, was censured for voting on a matter involving his close friend and campaign manager.<sup>82</sup> Carrigan challenged the constitutionality of the Nevada law, arguing that it violated the First Amendment.<sup>83</sup> The Nevada Supreme Court agreed with Carrigan's argument and held "that voting by an elected public officer on public issues is protected speech under the First Amendment."<sup>84</sup> Several states, as amici, urged a reversal of the Nevada Supreme Court's holding.<sup>85</sup> They argued that disqualification rules are "a measured response to the credibility gap between the public and its public officials."<sup>86</sup> To their delight, a unanimous Supreme Court agreed.<sup>87</sup>

Justice Scalia, writing for seven members of the Court, upheld the constitutionality of the Nevada ethics provision based on the history and tradition of recusal rules in the United States.<sup>88</sup> Because these rules have long been a part of the American tradition and history, their constitutionality is presumed.<sup>89</sup> And

78. James Bopp, Jr. & Anita Y. Woudenberg, *An Announce Clause by Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify Themselves for Exercising Their Freedom to Speak*, 55 DRAKE L. REV. 723, 724 (2007) (internal footnotes omitted).

79. *Id.* at 739 (submitting that "[r]ecusal for announcing one's view is unprecedented").

80. *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011).

81. *Id.* at 2346. The specific provision prohibited a public officer from "vot[ing] upon or advocat[ing] the passage or failure of . . . a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by [his or her] commitment in a private capacity to the interests of others." *Id.* (quoting NEV. REV. STAT. ANN. § 281A.420(3) (West 2011)).

82. *Carrigan v. Comm'n on Ethics*, 236 P.3d 616, 618-19 (2010) (en banc), *rev'd*, *Nev. Comm'n on Ethics*, 131 S. Ct. at 2352.

83. *Nev. Comm'n on Ethics*, 131 S. Ct. at 2347.

84. *Carrigan*, 236 P.3d at 621.

85. See Brief of Florida et al., Amici Curiae in Support of the Petitioner at 2-3, *Carrigan v. Comm'n on Ethics*, 236 P.3d 616 (2010) (No. 10-568) (2011 WL 771327 at \*\*2-3).

86. Brief of Florida et al. as Amici Curiae in Support of the Petition for a Writ of Certiorari at 6, *Carrigan v. Comm'n on Ethics*, 236 P.3d 616 (2010) (No. 10-568) (2010 WL 4852436 at \*6).

87. Justices Kennedy and Alito filed concurring opinions. *Carrigan*, 131 S. Ct. at 2352 (Kennedy, J., concurring); *id.* at 2354 (Alito, J., concurring in part and concurring in judgment).

88. *Id.* at 2346-48 (majority opinion).

89. *Id.* at 2347-48 (noting that "[a] universal and long-established tradition of prohibiting

although the case before the Court concerned legislative recusal rules, the majority opinion explicitly referenced longstanding judicial disqualification statutes.<sup>90</sup> Most noteworthy were two observations, one by Justice Scalia and the other by Justice Kennedy. Justice Scalia gratuitously commented that “there do not appear to have been any serious challenges to judicial recusal statutes as having unconstitutionally restricted judges’ First Amendment Rights”<sup>91</sup> and differentiated between rules that restrict exercising the functions of one’s office (be that voting as a legislature or ruling as a judge) and rules that restrict speech.<sup>92</sup> Justice Kennedy meticulously distinguished between the role of legislators and the role of judges and the corresponding breadth of applicable disqualification rules:

The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the other, may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that may be imposed upon them.<sup>93</sup>

#### IV. URGING A NEW PERSPECTIVE ON JUDICIAL DISQUALIFICATION

These aspects of the *Carrigan* rationale should provide an adequate defense to constitutional challenges against strong state judicial disqualification rules.<sup>94</sup> But even if the decision in *Carrigan* is ultimately confined to its facts, robust judicial disqualification rules can remain a strong antidote to the toxic effects of *White* and *Citizens United* if individual judges consider the broad view of the public when ruling on disqualification motions.

Perhaps human nature causes judges to view disqualification motions as a challenge to their personal integrity. Certainly, no judge, and arguably no person, enjoys being told that he or she is, or appears to be, unfair. It is understandable, therefore, that some (perhaps, many) judges take umbrage at the filing of disqualification motions. These motions may track the language of judicial ethics rules and allege that the judge’s “impartiality might reasonably be questioned.”<sup>95</sup> Judges may be offended by the allegations that they believe challenge their good

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certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation’s consciousness.”) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002) (internal quotation marks omitted)).

90. *Id.* at 2348-49.

91. *Id.* at 2349.

92. *Id.* at 2349 n.3.

93. *Id.* at 2353 (Kennedy, J., concurring) (internal citation omitted).

94. See Keith Swisher, *Recusal, Government Ethics, and Superannuated Constitutional Theory*, 72 MD. L. REV. (forthcoming Dec. 2012).

95. TENN. SUP. CT. R. 10, Rule 2.11(A).



name and reputation.<sup>96</sup> They may view the motion as suggesting that they lack the most essential characteristic of good judging—the ability to judge a case impartially.

But judges must battle these natural instincts to consider the motions as personal attacks<sup>97</sup> or criticisms and instead reflect on the underlying purpose for judicial disqualification motions—to preserve public trust and confidence in the judiciary.<sup>98</sup> Judges should strive to set aside personal reactions to disqualification motions and view the motions, instead, in light of their underlying purpose, against a backdrop of history,<sup>99</sup> and in the face of modern attempts to undermine the integrity of state courts.

When motions for disqualification are viewed as a vehicle for upholding the court's integrity, rather than as a personal attack or criticism of an individual judge, the importance of taking into account the broader perspective of the public becomes apparent. The view from outside the system, from the non-judge, focuses on preserving the integrity of the system. That preservation, rather than the individual judge's desire to remain free from challenge, is the overriding concern.

Viewing disqualification methods from the public's perspective is consistent with some of the longstanding per se disqualification rules. A good example is Rule 2.11, which prohibits a judge from sitting in cases in which a person “within the third degree of relationship to” the judge is a party or in cases in which the

96. Unfortunately, this was the attitude expressed by the Chief Justice in his dissenting opinion in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 898, 902 (2009) (Roberts, C.J., dissenting) (asking “Does the *judge* get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case?” and predicting that an upsurge in recusal motions would tarnish judges' reputations and diminish respect for the judicial system).

97. I do not intend to suggest that all disqualification motions are meritorious. I know that many are not and that some lawyers attempt to “game” the system, but I adhere to views I have expressed previously—that the ramifications of filing spurious disqualification motion are great enough to deter most lawyers from doing so.

98. See H.R. Rep. No. 93-1453, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355; S. Rep. No. 93-419, at 5 (1973) (noting that the federal judicial disqualification statute “is designed to promote confidence in the impartiality of the judicial process”).

99. Not only are judicial disqualification rules ingrained in American history and tradition, they were also an established part of common-law and civil law jurisprudence. See, e.g., Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 *DRAKE L. REV.* 751, 753 (2010) (noting that Congress passed “the first federal judicial disqualification statute in 1792,” but that “the notion that judges should stand fair and detached between the parties who appear before them did not originate with Congress”); John P. Frank, *Disqualification of Judges*, 56 *YALE L. J.* 605, 610 (1947) (noting that judges were disqualified at common law only for direct pecuniary interests, which “took many forms”); Harrington Putnam, *Recusation*, 9 *CORNELL L. Q.* 1, 3 (1923) (citing to the *Codex* of Justinian, dated 529-534 A.D.) (noting that “[t]he chief ground of recusation in continental practice . . . has been on the salutary doctrine that the personal attitude of the judge toward the litigant, or toward the cause itself shall be above all suspicion”).

judge previously presided in another court.<sup>100</sup> These per se disqualification provisions do not exist to disqualify judges who are actually biased. Rather, they are based on appearances—the appearance that is created when a judge presides over a case in which a relative is involved, including a relative whom the judge may not know, or the appearance that is created when a judge presides over a case in which he has previously ruled, including a case that the judge does not recollect.<sup>101</sup>

Disqualifications based on per se rules rarely seem to trigger negative reactions. The affected judge is not offended; nor is he or she viewed in a negative light. Custom and practice simply dictate that judges will step aside in these cases. In the same manner, and within time, custom and tradition will adhere to other disqualification motions, eliminating negative connotations and replacing the unhelpful undertones with a healthy acceptance of their beneficial purpose.

We are reminded with every new survey that the most important source of public dissatisfaction with the justice system is its perceived unfairness.<sup>102</sup> This source of dissatisfaction becomes clear when we step back and view the system from the perspective of someone who is outside the legal system. The public can almost never know with certainty that a decision is unfair. They will rarely have sufficient information about the legal or factual background to make that determination, but they definitely sense when the system *seems* unfair. It is that perception of unfairness that promotes disrespect and erodes public trust and confidence in the courts. So from the perspective of those for whom the system exists—those who the system is designed to serve—the single most important concern is that the justice system not only be fair but also appear to be fair. Justice is as it is perceived to be.

When a judge receives a disqualification motion, the tendency is for the judge to ask, “Am I biased?”; “Can I be fair?”; or “Did I do something wrong?” These are the wrong questions posed from the wrong perspective. Rather, the judge should ask: “Will the integrity of the system suffer if I hear this case?”; “Will the

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100. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2), (6) (2011).

101. *See id.* R. 2.11 (A)(6) (setting out *per se* disqualification rules).

102. Research indicates, for example, that the perception of, and thus respect for, the judiciary is influenced not only by the nature of the outcome of its work—that is, the public’s agreement or disagreement with court decisions—but also by the degree to which the system is perceived to be procedurally and substantively fair. “People who believe specific decisions are wrong, even wrongheaded, and individual judges unworthy of their office” will continue to accept judicial decisions “if they respect the court as an institution that is generally impartial, just, and competent.” Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Change*, in *FRONTIERS OF JUDICIAL RESEARCH* 275 (Joel B. Grossman & Joseph Tanenhaus eds., 1969). *See* James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 *LAW & SOC’Y REV.* 469, 471 (1989); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 *LAW & SOC’Y REV.* 621, 621-22 (1991).

public's impression of justice be affected negatively if I decide the issue?"; and "Will my sitting as a judge in this case undermine the public's trust and confidence in the judiciary?" At the risk of being overly unsophisticated, the proper inquiry is no more than slightly varied from the ancient Hippocratic oath, often quoted as simply "first, do no harm."<sup>103</sup> When ruling on motions to disqualify, a judge's duty should be first and foremost to do no harm to the institution of justice.

Not long ago, a judge who was at the center of a disqualification controversy confronted me after I had written an article addressing his situation. He scolded me for not calling him and getting his point of view on the disqualification motion. My response was respectful, but candid: "Judge, I'm sorry, but it's just not about you!" Judges should resist viewing disqualification motions as personal accusations because doing so promotes the judges' personal interests above much more substantial concerns about the integrity of the justice system.

#### CONCLUSION: UNDERTAKING THE "WORK OF A LIFETIME"

As the judicial selection landscape shifts, so too must the perspectives from which judges view disqualification motions. This shift in perspective is a key step to inoculating the justice system against the ill effects of the decisions in *White* and *Citizens United*. As states struggle to draft strong, yet enforceable disqualification standards, judges too must struggle to promote the public good over their personal concerns. Robust disqualification standards will act as a disincentive only to the extent that judges rigorously apply those standards.

Justice Kennedy noted in *White* that "[t]o comprehend, then to codify, the essence of judicial integrity is a hard task."<sup>104</sup> But he cautioned that the enormity and complexity of the task "should not dissuade the profession."<sup>105</sup> States who undertake that hard task have the value of a diversity of opinion on which

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103. For additional background on the Oath, see Lisa R. Hasday, *The Hippocratic Oath as Literacy Text: A Dialogue Between Law and Medicine*, 2 YALE J. HEALTH POL'Y L. & ETHICS 299, 301, 313 (2002). The oath dates back to the fourth or fifth century B.C. and is generally thought of as an oath taken by members of the medical profession promising to perform their practices ethically. *Id.* at 301. Other professional communities have required similar codes. Kim Economides, then a Professor of Legal Ethics at the University of Exeter School of Law, posed this question in the *London Times*: "Should there not be some kind of Hippocratic Oath for lawyers so that, in the future, lawyers' commitment to justice and the rule of law is more than purely rhetorical?" *Lawyers Take a Stand*, TIMES (London), May 17, 2008. Similarly, the Society of Ethical Attorneys at Law requires its members to take an oath similar to Hippocratic Oath, requiring its members to promote "honesty, clarity and integrity in the practice of law." *Oath*, SOC'Y OF ETHICAL ATTORNEYS AT LAW, <http://www.societyofethicalattorneys.org/index.php?p=oath> (last visited Nov. 29, 2012).

104. *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

105. *Id.* at 794.

standards should be adopted, but these divergent viewpoints do not dilute the benefit of consensus on the most fundamental issue before us: state courts must maintain public trust and confidence in order to play their vital role in our democracy. Yet even the most well-defined code will fail without judges who embark upon the “work of a lifetime” in a continual struggle for judicial integrity.<sup>106</sup>

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106. *Id.*