

**AMENDING CODES OF JUDICIAL CONDUCT TO IMPOSE  
CAMPAIGN CONTRIBUTION AND EXPENDITURE LIMITS ON  
JUDICIAL CAMPAIGNS**

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*Every judicial campaign year, millions of dollars pour into individual court races around the country. The bulk of that money is donated by lawyers, businesses, and others with financial interests in how judges, especially appellate judges, decide cases. United States Supreme Court rulings on political contributions and spending have hamstrung the ability of states to control largescale expenditures in judicial races. This essay reviews empirical research by political scientists who have documented the effect of large campaign donations on how judges decide cases and on the public's perception of court impartiality. It describes how legislatures and courts have addressed (or failed to address) the flood of money into judicial races. The essay then proposes a number of actions that state courts and legislatures could take to control judicial campaign spending. First, we recommend that in jurisdictions with inadequate statutory judicial campaign controls, state supreme courts should act forcefully to impose strict caps on both direct and coordinated contributions to judicial campaigns, using the American Bar Association's Model Code of Judicial Conduct, Rule 4.4(B)(1). Second, we suggest that state codes of judicial conduct should integrate the parallel mandatory disqualification mechanism in the ABA's Model Code of Judicial Conduct, Rule 2.11(A). Next, we contend that legislatures have sufficient cause under a strict scrutiny test to protect judicial impartiality and the appearance of impartiality by limiting total judicial campaign committee expenditures and controlling independent expenditures by outside groups. Further, we assert that if legislatures fail to act, the courts themselves have sufficient inherent authority to impose those expenditure limits. Finally, we urge states to adopt public funding systems for judicial campaigns, and we argue that the need for judicial impartiality should provide legislatures with sufficient cause to adopt restrictions that would not be constitutionally acceptable in non-judicial campaigns.*

*Magna Carta, 1215, para. 40: "To no one will we sell, to no one deny or delay right or justice."*

INTRODUCTION

EVERY judicial election year, millions of dollars pour into individual court races around the country. The Brennan Center at New York University's School of Law reports that outside groups spent an

estimated \$19.4 million on judicial campaign television ads in the 2015-16 cycle, a 44 percent increase over the 2011-12 period.<sup>1</sup> Much of that money comes from independent groups whose funders are difficult to identify.<sup>2</sup> As of 2013, only a dozen states appointed their highest appellate courts with no electoral participation.<sup>3</sup> Fifteen used nonpartisan elections, seven carried out partisan elections, and the others either use some form of appointment plus a retention election or an open nonpartisan election.<sup>4</sup> States with partisan elections for judgeships typically witness the largest judicial campaign expenditures.<sup>5</sup>

Some political scientists observe that massive judicial campaign spending increases voter interest and participation,<sup>6</sup> which would

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<sup>1</sup> *Spending By Outside Groups in Judicial Races Hits Record High, Secret Money Dominates*, BRENNAN CTR. FOR JUST. (Nov. 15, 2016), <https://www.brennancenter.org/press-release/spending-outside-groups-judicial-races-hits-record-high-secret-money-dominates> [<https://perma.cc/X5LE-9TDZ>]. For an analysis of where money is concentrated in judicial elections, and why, see Chris W. Bonneau, *What Price Justice(s)? Understanding Campaign Spending in State Supreme Court Elections*, 5 ST. POL. & POL'Y Q. 107 (2005).

<sup>2</sup> Paul Blumenthal, *This Dark Money Group Is Spending Big on Judicial Races, And No One Knows Why*, HUFFINGTON POST (Nov. 3, 2016), [http://www.huffingtonpost.com/entry/dark-money-judicial-races-center-for-individual-freedom\\_us\\_581b5234e4b0c43e6c1e740d](http://www.huffingtonpost.com/entry/dark-money-judicial-races-center-for-individual-freedom_us_581b5234e4b0c43e6c1e740d) [<https://perma.cc/6KJB-U96Z>].

<sup>3</sup> MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* 37 (2015). For state-by-state summaries of judicial selection, see *Methods of Judicial Selection*, NAT'L CTR. FOR ST. CTS., [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=) [<https://perma.cc/G7HG-5FT4>] (last visited Aug. 1, 2017) [hereinafter *Methods of Judicial Selection*]; *Judicial Selection in the States: Overview*, BALLOTPEdia, [https://ballotpedia.org/Judicial\\_selection\\_in\\_the\\_states](https://ballotpedia.org/Judicial_selection_in_the_states) [<https://perma.cc/G8QC-BCXH>].

<sup>4</sup> *Methods of Judicial Selection*, *supra* note 3.

<sup>5</sup> Linda Casey, *Courting Donors: Money in Judicial Elections, 2011 and 2012*, NAT'L INST. ON MONEY IN ST. POL. (Mar. 18, 2014), <http://www.followthemoney.org/research/institute-reports/courting-donors-money-in-judicial-elections-2011-and-2012/> [<https://perma.cc/2CXD-78TY>].

<sup>6</sup> HALL, *supra* note 3, at 4, 161. In her book, Hall focuses on negative campaign advertising, and concludes “that attack airings mobilize voters in non-partisan state supreme court elections.” HALL, *supra* note 3, at 161. See also Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 140, 161 (Matthew J. Streb ed., 2007); Chris W. Bonneau & Matthew J. Streb, *White Noise: The Unrealized Effects of Republican Party of Minnesota v. White on Judicial Elections*, 32 JUST. SYS. J.

normally be a cause for celebration. Other political scientists, as well as many judges, lawyers and legal academics, focus on the sinister side of court campaign spending—particularly expenditures to attack sitting judges viewed as unfriendly to special interest groups or to elect candidates seen as friendlier to those groups. The main concerns are that large judicial campaign contributions will influence how judges decide cases (which happens, according to researchers<sup>7</sup>), and that the public's confidence in the legal system will decline because people will *believe* that big money buys judicial outcomes and undermines perceptions of judicial fairness and legitimacy (which political scientists have also documented<sup>8</sup>).

Many state legislatures have enacted statutes limiting individual and corporate contributions to judicial campaigns, but eight states that use judicial elections or retention votes have little or no controls on individual or PAC contributions to campaign committees.<sup>9</sup> Further, the reach of contribution and spending limits has been constrained by First Amendment cases such as *Republican Party of Minnesota v. White*<sup>10</sup> and *Citizens United v. FEC*.<sup>11</sup>

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247, 261–63 (2011); Melinda Gann Hall & Chris W. Bonneau, *Does Money Buy Voters? Campaign Spending and Citizen Participation in State Supreme Court Elections* (Feb. 1, 2007), [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=1009671](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1009671) [<https://perma.cc/J8KB-DJGV>].

<sup>7</sup> See Damon M. Cann, *Campaign Contributions and Judicial Behavior*, 23 AM. REV. POL. 261 (2002); Morgan L.W. Hazelton et al., *Does Public Financing Affect Judicial Behavior? Evidence From the North Carolina Supreme Court*, 44 AM. POL. RES. 587 (2016); Michael S. Kang & Joanna M. Shepherd, *Partisanship in State Supreme Courts: The Empirical Relationship between Party Campaign Contributions and Judicial Decision Making*, 44 J. LEGAL STUD. S161 (2015); Chris W. Bonneau & Damon M. Cann, *The Effect of Campaign Contributions on Judicial Decisionmaking* (Feb. 4, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1337668](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337668) [<https://perma.cc/7FAD-ZKJJ>]. Interestingly, in those states with partisan judicial elections, the relationship between political party contributions and partisan voting appears to be stronger for Republican judges than for Democrats. Michael S. Kang & Joanna M. Shepherd, *Partisanship in State Supreme Courts: The Empirical Relationship between Party Campaign Contributions and Judicial Decision Making*, 44 J. LEGAL STUD. S161 (2015).

<sup>8</sup> James L. Gibson & Gregory A. Caldeira, *Judicial Impartiality, Campaign Contributions, and Recusals: Results from a National Survey*, 10 J. EMPIRICAL LEGAL STUD. 76 (2013).

<sup>9</sup> *Judicial Campaigns and Elections*, NAT'L CTR. FOR ST. CTS., [http://www.judicialselection.us/judicial\\_selection/campaigns\\_and\\_elections/campaign\\_financing.cfm?state](http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state) [<https://perma.cc/R9VB-25KV>] (last visited July 28, 2017).

<sup>10</sup> *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

<sup>11</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Part II of this essay describes United States Supreme Court rulings that have reduced state control over largescale spending in court races, as well as more recent decisions that provide hope for new parameters on judicial campaign contributions—particularly limits set by the courts themselves through codes of judicial conduct. Part III reviews empirical research by political scientists who have documented the effect of large campaign donations on how judges decide cases and on the public’s perception of court impartiality. Part IV describes how legislatures and courts have addressed (or not addressed) the flood of money into judicial races. Part V proposes a package of actions by state courts and legislatures to control spending in judicial elections. First, we recommend that in jurisdictions with inadequate statutory judicial campaign controls, state supreme courts should act forcefully to impose strict caps on both direct and coordinated contributions to judicial campaigns, using the mechanism suggested by the American Bar Association’s Model Code of Judicial Conduct, Rule 4.4(B)(1).<sup>12</sup> Second, state codes of judicial conduct should integrate the parallel mandatory disqualification mechanism in the ABA’s Model Code of Judicial Conduct, Rule 2.11(A). Third, we contend that legislatures have sufficient cause under a strict scrutiny test to protect judicial impartiality and the appearance of impartiality by limiting total judicial campaign committee expenditures and controlling independent expenditures by outside groups. And, if legislatures fail to act, we argue that the courts have sufficient inherent authority to impose those expenditure limits. Finally, we urge states to adopt public funding systems for judicial campaigns, and we similarly argue that the need for judicial impartiality should provide legislatures with sufficient cause to adopt restrictions that would not be constitutionally acceptable in non-judicial campaigns.<sup>13</sup>

We are not proposing that states abandon the election of judges when they choose to do so—that is beyond the scope of this article, and it is an issue on which the authors hold differing views. But when jurisdictions give a role to the voters in the selection or retention of judgeships, we believe that strong protections must be put in place to help ensure the continued independence and impartiality of the judicial branch.

#### I. BACKGROUND: A WINDING ROAD OF CASES

The explosion of cash in judicial elections—and what might be done about it—must be analyzed in the context of a number of Supreme Court

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<sup>12</sup> MODEL CODE OF JUDICIAL CONDUCT R. 4.4(B)(1) (AM. BAR ASS’N 2016) [hereinafter MODEL CODE].

<sup>13</sup> As evident from many of the academic articles cited in this essay as well as American Bar Association proposals, calls for greater controls on spending in judicial elections are nothing new. *See, e.g.,* Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHL-KENT. L. REV. 133 (1998).

and circuit court cases that can be traced back to *Buckley v. Valeo*<sup>14</sup> in 1976. The *Buckley* per curiam opinion relied on the First Amendment and struck down several provisions the Federal Election Campaign Act of 1971,<sup>15</sup> including caps on spending by campaigns, individuals, and independent groups in federal elections.<sup>16</sup> At the same time, *Buckley* upheld provisions limiting the size of individual and political committee contributions to campaigns,<sup>17</sup> as well as mandatory campaign disclosures<sup>18</sup> and voluntary public funding programs.<sup>19</sup> In its opinion, the *Buckley* court used a “closely drawn” scrutiny approach.<sup>20</sup> Yet the Court found that annual dollar limits on individual and committee contributions constituted the statute’s “primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions”<sup>21</sup> and that the contribution ceilings served “the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion.”<sup>22</sup> At the same time, the Court found “that the government interest in preventing corruption and the appearance of corruption” were inadequate to justify the statute’s ceiling on independent expenditures,<sup>23</sup> asserting that independent advocacy did not “*presently* appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions”<sup>24</sup> and that the “absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”<sup>25</sup> The Court also ruled that no government interest—at least none proposed to it—was sufficient to justify the restrictions on total campaign expenditures, and that the contribution caps and disclosure requirements appeared to be sufficient.<sup>26</sup> The *Buckley* court did not consider the statute’s ban on corporate independent expenditures. But in 2003, *Citizens United v. Fed-*

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<sup>14</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>15</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 52 U.S.C. § 30101-30146).

<sup>16</sup> *Buckley*, 424 U.S. at 39-51.

<sup>17</sup> *Id.* at 26-36.

<sup>18</sup> *Id.* at 60-61.

<sup>19</sup> *Id.* at 86.

<sup>20</sup> *Id.* at 25; *se also*, *McConnell v. Federal Elections Commission*, 540 U.S. 93, 94 (2003) (Justice Stevens, for the Court, describes *Buckley* as having applied a “‘closely drawn’ scrutiny” test).

<sup>21</sup> *Id.* at 58.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 44.

<sup>24</sup> *Id.* at 46 (emphasis added).

<sup>25</sup> *Id.* at 47.

<sup>26</sup> *Id.* at 55.

*eral Election Commission*<sup>27</sup> held that laws burdening political speech were subject to strict scrutiny<sup>28</sup> and that restrictions could not suppress political speech based on a speaker's corporate identity, and that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."<sup>29</sup> More recently, in *McCutcheon v. Federal Election Commission*,<sup>30</sup> Chief Justice Roberts held for a 5-4 majority that statutory aggregate limits on how much a donor may contribute in total to all political candidates or committees violated the First Amendment. The aggregate limit also had not been addressed in *Buckley v. Valeo*. Roberts wrote that the Court had previously "identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption."<sup>31</sup> He asserted: "In assessing the First Amendment interests at stake, the proper focus is on an individual's right to engage in political speech, not a collective conception of the public good."<sup>32</sup> *McCutcheon* did not affect individual contribution limits to a single campaign—just the aggregate cap on all contributions in a campaign cycle. But *Buckley*, *Citizens United* and their progeny such as *McCutcheon*, paved the way for the increase in campaign spending nationally, including special interest spending in judicial elections.<sup>33</sup>

Other Supreme Court cases have focused on the First Amendment in the *judicial* campaign context, including decisions relating to campaigning, fund-raising and expenditures. The campaign practices case that surprised and perturbed many in the judiciary<sup>34</sup> and academia<sup>35</sup> was *Re-*

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<sup>27</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>28</sup> *Id.* at 340.

<sup>29</sup> *Id.* at 365.

<sup>30</sup> *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

<sup>31</sup> *Id.* at 1438.

<sup>32</sup> *Id.*

<sup>33</sup> See, e.g., Debra Erenberg & Matt Berg, *The Dark Night Rises: The Growing Role of Independent Expenditures in Judicial Elections after Citizens United*, 49 WILLAMETTE L. REV. 501 (2013); Norman L. Greene, *How Great is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in Caperton and Citizens United, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873 (2010); Nicholas LaRow, *Open Floodgates? Independent Spending in State Supreme Court Elections after Citizens United*, 100 JUDICATURE 47 (2016) (demonstrating an immediate increase in expenditures in state supreme court races after *Citizens United*). But see Bonneau & Streb, *supra* note 6, at 260–61, in which the authors conclude that the cost of judicial election campaigns have not increased since *White* in a statistically significant way.

<sup>34</sup> See, e.g., Robert H. Als Dorf, *The Sound of Silence: Thoughts of a Sitting Judge on the Problem of Free Speech and the Judiciary in a Democracy*, 30 HASTINGS CONST. L.Q. 197 (2003); American Judicature Society, *The Legacy of Republican Party of Minnesota v. White: Judicial Independence, Judicial Selec-*

*Republican Party of Minnesota v. White*<sup>36</sup> in 2002. In *White*, Justice Antonin Scalia wrote the Court's opinion in a 5-4 decision that the Minnesota Code of Judicial Conduct's "Announce Clause"<sup>37</sup> banning judges and judicial candidates from announcing their views on disputed legal or political issues, violated judicial candidates' First Amendment rights. Scalia reasoned that announcing one's views "covers much more than *promising* to decide an issue a particular way."<sup>38</sup> Applying a strict scrutiny standard, Scalia concluded that the Announce Clause was not narrowly tailored to serve impartiality or its appearance, and he narrowed the concept of "impartiality" to bias for or against particular parties to a proceeding—not for or against particular issues.<sup>39</sup> Scalia wrote that while there might be an interest in "impartiality" in the broader sense of lack of a predisposition on a particular topic, that was not a *compelling* state interest.<sup>40</sup> He noted: "A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the

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*tion, and the First Amendment in the Post-White Era*, 91 JUDICATURE 135 (2007).

<sup>35</sup> See, e.g., Dale A. Riedel, *Losing Faith in the System: Unfettered Political Speech of Judicial Candidates Fails to Assure an Openminded Judiciary after Republican Party of Minnesota v. White*, 28 U. DAYTON L. REV. 421 (2003); Roy A. Schotland, *Republican Party of Minnesota v. White: Should Judges be More Like Politicians?* 41 JUDGES' J. 7 (2002); Wendy R. Weiser, *Regulating Judges' Political Activity after White*, 68 ALB. L. REV. 651 (2005).

<sup>36</sup> *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

<sup>37</sup> Former Canon 5(A)(3)(d) of the Minn. Code of Judicial Conduct (2000) provided that a candidate for judicial office must not "announce his or her views on disputed legal or political issues." For a detailed discussion of the history and controversy of Minnesota's "Announce Clause," see Plymouth Nelson, *Don't Rock the Boat: Minnesota's Canon 5 Keeps Incumbents High and Dry While Voters Flounder in a Sea of Ignorance*, 28 WM. MITCHELL L. REV. 1607, 1625–29 (2002). Since the American Bar Association's promulgation of a revised Model Code of Judicial Conduct in 2007, a number of states, including Minnesota, have revised their codes of judicial conduct. The ABA Model Code of Judicial Conduct, as well as Minnesota's, now address campaign activity at Canon 4. For a brief history of the development of the ABA Model Code in light of the Supreme Court's decision in *White*, see STEPHEN GILLERS, ROY D. SIMON, ANDREW M. PERLMAN & JOHN STEELE, *REGULATION OF LAWYERS: STATUTES & STANDARDS* 691–94 (2015). For a description of the state-by-state adoption of the American Bar Association's 2007 revisions to the *Model Code of Judicial Conduct*, see *State Adoption of Revised Model Code of Judicial Conduct*, A.B.A., CTR. FOR PROF'L RESP., [http://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/map.html](http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html) [https://perma.cc/V8DU-LJDY].

<sup>38</sup> *White*, 536 U.S. at 770.

<sup>39</sup> *Id.* at 776.

<sup>40</sup> *Id.* at 777.



law.”<sup>41</sup> Justice O’Connor, a former state judge, concurred with a glum assessment that “the very practice of electing judges undermines” the state interest in an impartial judiciary, noting that “[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.”<sup>42</sup> Justice Steven’s dissent vigorously disagreed with the notion that judicial candidates should have the same freedom to express themselves as candidates for political office,<sup>43</sup> and also with the concept of narrowing “impartiality” to a predisposition towards a specific *party*.<sup>44</sup> Justice Ginsburg also dissented, emphasizing that “judges perform a function fundamentally different from that of the people’s elected representatives,”<sup>45</sup> and that Minnesota could further “its interest in judicial integrity through this precisely targeted speech restriction.”<sup>46</sup>

On the other hand, a majority of the Supreme Court certainly *did* appear concerned about impartiality of judges when it involved a specific company’s possible “purchase” of an individual state supreme court judge when that company had a high stakes case in front of that court. Seven years after *White*, the Court in *Caperton v. Massey Coal*<sup>47</sup> held that gigantic campaign contributions and independent expenditures (almost \$3 million) by the chair of Massey Coal to unseat a sitting justice on the West Virginia Supreme Court of Appeals while Massey Coal was appealing a \$50 million judgment to that court, required the disqualification of the successful candidate backed by Massey Coal. Don Blankenship, chair and CEO of Massey Coal, had contributed the \$1,000 statutory maximum to the campaign committee of Brent Benjamin, who was running to unseat the sitting Justice Warren McGraw.<sup>48</sup> But Blankenship also gave almost \$2.5 million to a political organization opposed to McGraw, and separately spent \$500,000 on independent expenditures in support of the challenger, Benjamin.<sup>49</sup> Benjamin was elected, but declined to recuse himself from the appeal in a \$50 million commercial lawsuit against Massey Coal. That case was decided 3-2, and the plaintiff appealed to the Supreme Court because Benjamin had declined to recuse himself.<sup>50</sup> Writing for a 5-4 majority, Justice Anthony Kennedy noted that an opinion poll indicated that 67% of West Virginians believed that the newly-elected Justice Benjamin could not be impartial in the case.<sup>51</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 788.

<sup>43</sup> *Id.* at 797.

<sup>44</sup> *Id.* at 800.

<sup>45</sup> *Id.* at 803.

<sup>46</sup> *Id.* at 804.

<sup>47</sup> *Caperton v. A.T. Massey Coal, Inc.*, 556 U.S. 868 (2009).

<sup>48</sup> *Id.* at 873.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 873–76.

<sup>51</sup> *Id.* at 875.

Kennedy emphasized that due process requires a fair tribunal,<sup>52</sup> and concluded that in this “exceptional case” there was “a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”<sup>53</sup> He ruled that the case must be reversed because of Justice Benjamin’s refusal to recuse himself.<sup>54</sup> Chief Justice Roberts wrote a lively dissent, arguing that the Due Process Clause does not mandate recusal based on a mere “probability of bias.”<sup>55</sup> He concluded that Justice Kennedy had failed to articulate a workable standard for recusals, and listed 40 “fundamental questions” the majority opinion had, in his view, failed to address.<sup>56</sup>

But a year after *Caperton*, Chief Justice Roberts appeared much more sympathetic to court controls on judicial candidates. In *Williams-Yulee v. the Florida Bar*,<sup>57</sup> Roberts authored an opinion upholding, against a First Amendment challenge, a Florida Code of Judicial Conduct rule that prohibited judicial candidates from personally soliciting funds. Importantly, Roberts wrote an opinion that in marked contrast to *White*, emphasized: “A State’s interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections.”<sup>58</sup> He noted:<sup>59</sup>

“Judges are not politicians, even when they come to the bench by way of the ballot. And a State’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.”

Roberts then highlighted the importance of Florida’s Code of Judicial Conduct in preserving the integrity and independence of the judiciary.<sup>60</sup> He pointed out the strong temptations that judges would be faced when deciding cases in which campaign donors known to them were lawyers or litigants appearing before them,<sup>61</sup> and openly worried that litigants might believe it necessary to search for attorneys who had made

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<sup>52</sup> *Id.* at 876.

<sup>53</sup> *Id.* at 884.

<sup>54</sup> *Id.* at 889–90.

<sup>55</sup> *Id.* at 890–91.

<sup>56</sup> *Id.* at 893–98.

<sup>57</sup> *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).

<sup>58</sup> *Id.* at 1667.

<sup>59</sup> *Id.* at 1662.

<sup>60</sup> *Id.* at 1662–63, 1666.

<sup>61</sup> *Id.* at 1667.

significant campaign donations to individual judges.<sup>62</sup> Applying a strict scrutiny test, he concluded that the Code's restriction on direct solicitation by judicial candidates "advances the State's compelling interest in preserving public confidence in the integrity of the judiciary," and it did so through "means narrowly tailored to avoid unnecessarily abridging speech."<sup>63</sup>

*Williams-Yulee* is important because it suggests that Chief Justice Roberts firmly believes that elected judges are different from elected politicians, that the First Amendment applies to judges differently than to other people, and that codes of judicial conduct are legitimate tools to protect judicial integrity and public confidence in the judiciary. Accordingly, he might be willing to sustain more vigorous state court actions to preserve their independence though canons that constrain judicial campaign money in ways that would not be acceptable restrictions when applied to legislative or executive elections. As we next discuss, social science research suggests that large donations for and against judicial candidates appear to have a material effect on both the appearance *and* the actuality of an impartial judiciary.

## II. THE IMPACT OF MONEY ON JUDGES' DECISIONS AND PUBLIC PERCEPTIONS OF IMPARTIALITY.

### A. *Money Appears to Talk . . .*

Whether or not the individual judges who receive large campaign donations are fully conscious of the resulting impact on their decisions, social scientists have solid evidence that judicial behavior is materially affected by who is contributing—and by how much. This suggests that large campaign contributions pose a real danger to an impartial judiciary, and not just a perceived problem.

Political scientists Chris W. Bonneau of the University of Pittsburgh and Damon M. Cann of Utah State University have jointly and separately published several papers linking judicial campaign contributions to how judges rule from the bench. In a 2009 paper, Bonneau and Cann concluded that campaign contributions appeared to have a particular effect on the outcome of cases in states in which judges are elected in partisan contests.<sup>64</sup> Law professors Michael S. Kang and Joanna Shepherd found in one study an unsurprising relationship between political party contributions and judicial stance, particularly with respect to Republican judges.<sup>65</sup> In another paper, Kang and Shepherd showed that "the more

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<sup>62</sup> *Id.* at 1668.

<sup>63</sup> In concurring opinions, Justices Breyer and Ginsburg rejected the strict scrutiny test in this context. *Id.* at 1673–75.

<sup>64</sup> Bonneau & Cann, *supra* note 7, at 19.

<sup>65</sup> Kang & Shepherd, *supra* note 7, at S181; *see also* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 103–05

TV ads aired during state supreme court judicial elections in a state, the less likely justices are to vote in favor of criminal defendants.”<sup>66</sup> In an article focusing on the Georgia Supreme Court, Cann was also able to correlate campaign contributions with judges’ decisions, a phenomenon suggesting “that independence of the judiciary may be seriously compromised in states that use competitive elections to select judges.”<sup>67</sup>

Many studies demonstrate correlation without showing causation,<sup>68</sup> and correlations between contributors and judicial decisions can often be explained by the observation that judicial campaign donors are likely to direct their money toward candidates whose general views they prefer. But a 2016 study by a team of political scientists led by St. Louis University’s Morgan Hazelton compared rulings by supreme court justices in North Carolina who joined a public financing mechanism with those who did not. They concluded that after opting into public financing, justices “became relatively less favorable toward attorney donors” and that “the justices who opted into the system become more ideologically moderate relative to nonparticipating justices.”<sup>69</sup> This study, with its built-in control group of justices who continued to rely on private campaign funding, provides solid evidence that whether or not the judges themselves perceive it, funding sources influence voting patterns on the bench. Hazelton and her colleagues concluded that “donors do in fact

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(2011) (in which the authors demonstrate that competitive elections produce judges whose opinions are more “pro-business” than judges selected and confirmed through a retention method, and suggest a link between campaign contributions and judicial decision-making.).

<sup>66</sup> Joanna Shepherd & Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices’ Decisions in Criminal Cases*, AM. CONST. SOC’Y FOR L. & POL’Y, 2014, <https://skewedjustice.org/> [<https://perma.cc/2C2W-9L82>].

<sup>67</sup> Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decision Making* (2006), [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=991364](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=991364) [<https://perma.cc/FUQ3-ZUCX>]. On the other hand, Cann concluded in a 2002 paper that in the 1998 term of the Wisconsin Supreme Court, there was no correlation between lawyers’ donations to specific justices and how those jurists ruled in cases argued by the contributing lawyers. Damon M. Cann, *Campaign Contributions and Judicial Behavior*, 23 AM. REV. POL. 261 (2002).

<sup>68</sup> A study of state supreme court campaigns from 1993 to 1998, by *The Plain Dealer* newspaper in Ohio, concluded that two-thirds of the time the court ruled in favor of clients represented by the lawyers who contributed the most to the justices’ campaigns. Charles G. Geyh, *Publicly Financing Judicial Elections: An Overview*, 34 LOY. L.A. L. REV. 1467, 1470 (2001). Geyh pointed out that there may be “perfectly innocuous explanations” for the correlation between campaign donations and success. But he noted that even “if the reality of influence can be rebutted . . . appearance problems remain.” *Id.*

<sup>69</sup> Morgan L. W. Hazelton, Jacob M. Montgomery, & Brendan Nyhan, *Does Public Financing Affect Judicial Behavior? Evidence from the North Carolina Supreme Court*, 44 AM. POL. RES. 587, 608 (2016).

have distorting influence on judicial decision making.”<sup>70</sup> This conclusion is consistent with similar studies, such as one by Joanna Shepherd, that concluded that when judges are serving in their last terms prior to mandatory retirement, their voting patterns change and they become much less business-oriented in their decisions.<sup>71</sup>

*B. . . . And the Voters are Not the Least Bit Surprised*

While there is evidence that campaign contributions affect judges’ impartiality, there is even more evidence that the public *believes* campaign donations directly influence judicial decision-making. Voters seem to think this is true even where judges are in fact immune to the subtle pressures of campaign contributions and the interest groups making them. James Sample and David Pozen have summarized data suggesting that more than 70 percent of Americans believe that campaign contributions have some impact on judicial decisions.<sup>72</sup> In a 2013 study,<sup>73</sup> political scientists James Gibson and Gregory Caldeira found that judges who turn down contributions are perceived as fairer, and that the public seems to believe that the size of a campaign contribution makes less difference than the fact that a judge’s campaign accepts money from an interest group or litigant at all. The authors suggest that their “most important findings are that campaign contributions and support can indeed create perceptions of conflicts of interest and thereby weaken the legitimacy of state courts”<sup>74</sup> and that in “a post-*Citizens United* world, these findings . . . point to significant threats to the legitimacy of elected state courts.”<sup>75</sup> A 2011 poll of North Carolina voters by the advocacy group Justice at Stake, found that 83% of those questioned thought that campaign contributions either greatly (43%) or somewhat (40%) influence the rulings judges make.<sup>76</sup>

<sup>70</sup> *Id.* at 608–09.

<sup>71</sup> Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169, 190 (2009).

<sup>72</sup> James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES’ J. 17 (2007).

<sup>73</sup> Gibson & Caldeira, *supra* note 8.

<sup>74</sup> *Id.* at 78.

<sup>75</sup> *Id.* at 76. One of the most interesting findings by Gibson and Caldeira is that “about one-third of the American people . . . accept a fairly politicized judiciary” and that this represents “a card-core minority of Americans who are unfazed by possible conflicts of interest.” *Id.* at 96.

<sup>76</sup> North Carolina Registered Voter Survey Ref. 2011-165, *20/20 Insight, LLC, JUSTICE AT STAKE* (2011), [http://www.justiceatstake.org/file.cfm/media/cms/q165\\_\\_freq\\_limited\\_release\\_9E72F4684EB8B.pdf](http://www.justiceatstake.org/file.cfm/media/cms/q165__freq_limited_release_9E72F4684EB8B.pdf) [<https://perma.cc/2FED-S542>]. A similar 2010 poll in West Virginia yielded similar results. Anzalone Liszt Research, Inc., *Justice at Stake-West Virginia 2010, JUSTICE AT STAKE* (2010), [http://www.justiceatstake.org/media/cms/West\\_Virginia\\_Poll\\_Results\\_674E634FDB13F.pdf](http://www.justiceatstake.org/media/cms/West_Virginia_Poll_Results_674E634FDB13F.pdf) [<https://perma.cc/4X5L-AMT7>].

The bottom line is that impartiality, and the appearance of impartiality, are distinct phenomena—both important to a functioning independent judiciary. And both are directly affected by judicial campaign contributions. So next we turn to what the states and the state courts are (or are not) doing about it.

### III. WHAT STATES ARE (AND AREN'T) DOING ABOUT JUDICIAL CAMPAIGN CONTRIBUTIONS AND EXPENDITURES.

States in which voters play a role in selecting or retaining judges vary significantly in whether and how they address the level of money directed at the judicial selection process. Many states (but by no means all) have statutes limiting individual and corporate donations to judicial campaigns. The American Bar Association has not succeeded in its attempt to have contribution caps inserted in codes of judicial conduct, but many judicial conduct codes do include disqualification language with alternate approaches to addressing bias or perceived bias in cases involving large contributors. Tight recusal or disqualification<sup>77</sup> rules are one path. And a few jurisdictions have public financing for judgeship elections. Because of *Buckley v. Valeo*,<sup>78</sup> the states currently are not attempting mandatory caps on total expenditures by judicial candidate's campaign committees or by independent groups. This section discusses the status of these various methods of reducing campaign donations that affect the independence of judges and how the public views that independence.

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<sup>77</sup> Historically, the term “recusal” was used to connote a judge’s voluntary decision to stand down from a case, while “disqualification” was mandatory. However, the leading treatise on the topic concludes that the terms are used interchangeably today and are frequently seen as being synonymous. RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* 3–4 (2d ed. 2007).

<sup>78</sup> See *supra* note 14 and accompanying text.

A. *Statutory Limits on Individual and Organizational Contributions*

Statutory caps on donations to judicial elections not only vary from state to state, but within states based on whether the position is statewide or local, appellate or trial court, or a specialty court such as the probate or family bench. One can appreciate the variety by reviewing the statutory restrictions on contributions to supreme court races. Based on a review of official websites and statutes<sup>79</sup> for the 37 states where voters play a role in selecting supreme court justices,<sup>80</sup> as of 2017, individuals in three states are restricted to campaign donations of \$1,000 or less per campaign per election cycle, individuals in seven states may contribute amounts more than \$1,000 but less than \$5,000, individuals in 17 states are subject to contribution limits above \$5,000, and in 10 states there are no individual contribution limits at all. This is summarized on the following table:

TABLE 1  
STATE LIMITS ON STATE SUPREME COURT CAMPAIGN CONTRIBUTIONS  
BY INDIVIDUALS DURING AN ELECTION CYCLE

Up to \$1,000	> \$1,000 but < \$5,000	\$5,000 +	No limits
AK, MT, WV	CO*, KY, MN, SD, TN, WA, WY	AZ, AR, FL, GA, ID, IL, LA, MI, MS, MO, NV, NM, NC, OH, OK, TX, WI	AL, CA, IN, IA, KS, NE,* ND, OR, PA, UT

\* Colorado's Code of Judicial Conduct Rules 4.2 and 4.3, and Nebraska's Court Rule §5-3-4.4, ban any judicial campaign activity unless a judge encounters "active opposition" in a retention election, and then statutory statewide candidate contribution rules apply.

The size of the states' individual campaign contribution limits does not appear to correlate to whether those states select justices through par-

<sup>79</sup> The authors reviewed official state campaign disclosure websites and statutes for each state at the time of the article's publishing. A website with summary data that is not up to date) is Ballotpedia, [https://ballotpedia.org/Judicial\\_elections](https://ballotpedia.org/Judicial_elections) [<https://perma.cc/RT8U-XVKQ>] (then, for each state, choose the state and then click on "Campaign Finance Requirements for [name of state] Judicial Elections."). Also see the out-of-date website originally compiled by the American Judicature Society, and now available through the National Center for State Courts, at: [http://www.judicialselection.us/judicial\\_selection/campaigns\\_and\\_elections/campaign\\_financing.cfm?state](http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state) [<https://perma.cc/7BYY-V7VZ>].

<sup>80</sup> Although some of these states provide for the election of some lower court judges, members of the supreme courts in the following thirteen states are appointed by governors and/or legislatures, with no role for the voters: Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, South Carolina, Vermont and Virginia.

tisan elections, non-partisan elections, or some type of appointment-plus-retention system. It is likely that the limit amounts are driven by local history, custom, and political factors.

Statutory limits on supreme court campaign contributions by organizations is more complicated because many states have different limits, or contribution prohibitions, with respect to political action committees, political parties, corporations,<sup>81</sup> unions, and other entities. However, lumping all types of organizations together, a general picture of the distribution of state limits on entity contributions to judicial campaigns emerges:

TABLE 2  
STATE LIMITS ON STATE SUPREME CAMPAIGN CONTRIBUTIONS  
BY ORGANIZATIONS DURING AN ELECTION CYCLE

Up to \$1,000	> \$1,000 but < \$5,000	\$5,000 +	No limits
AK*, AZ*, MS, MT*, WV*	CO*, KY*, MN*, SD, WA, WY*	AR*, FL, GA, ID, IN, IL, LA, MI*, MO*, NM, NV, NC*, OH, OK, TN, TX,* WI*	AL, CA, IA*, KS, NE, ND*, OR, PA*, UT

\* Applies to certain campaign committees and/or PACs, but corporations prohibited from contributing directly to campaigns. See Table 1 note regarding Colorado and Nebraska.

There are only modest differences between the donation limits for individuals and for organizations. It should be noted that slightly more states put organizations in the lowest limit category than those states do for individual donors. Fewer states appear in the second category of donation amounts. Fewer states allow organizations to make unlimited contributions, although some states permit very large organizational donations—up to \$55,400 for PACs in Illinois, and \$537,100 for political parties in Ohio.

Similar to individual contribution limits, there does not appear to be an immediately apparent correlation between maximum limits and the method of supreme court selection. However, notwithstanding the state-

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<sup>81</sup> Although statutes in a number of states purport to ban corporate contributions, in many jurisdictions corporations may contribute indirectly through committees or PACs. Further, bans on corporate political contributions are subject to attack on both equal protection and free speech grounds, particularly since *Citizens United*. In *Protect My Check v. Dilger*, 176 F. Supp. 3d 685, 704 (E.D. Ky. 2016), a federal district court ruled, on equal protection grounds, that a ban on corporate contributions to political campaigns of all types was unconstitutional to the extent that the ban on corporate contributions did not apply equally to unions and LLCs. See also, *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010); In re Interrogatories of Ritter, 227 P.3d 892 (Colo. 2010).



by-state limits, a detailed 2013 study by Joanna Shepherd concluded that total business contributions were much higher in states with elections, and especially in those with partisan elections.<sup>82</sup> For both individual and organization contributions, limits are irrelevant for those states that have no campaigns for supreme court because the voters play no role whatsoever in the selection or retention process. But for those states with judicial selection or retention elections, it is significant that statutes in 19 states allow organizations—especially PACs—to contribute \$5,000 or more to supreme court campaign committees, and 22 states permit individuals (often lawyers) to contribute \$5,000 or more. Those numbers represent a majority of states that include the voters in determining who serves on their highest appellate bench. And the three states that allow the largest contributions from organizations—Illinois, Texas, and Ohio—all use partisan elections for the initial selection of their supreme court justices. Contributions of \$5,000 are readily noticed by judicial candidates.

Most codes of judicial conduct follow the ABA model rule prohibiting them from personally soliciting or accepting campaign contributions.<sup>83</sup> However, as former candidates for supreme court positions, the authors are both familiar with the fund raising process.<sup>84</sup> Our experience is that while justices might not know precisely who has contributed to their campaign committees, or how much, it is difficult to avoid knowing, from public endorsements and from attendance at fund raisers (which the candidates politely leave before money is requested), the types of lawyers and interest groups that seem ready to help out.<sup>85</sup>

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<sup>82</sup> Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, AM. CONST. SOC'Y 10–11 (June 2013),

[http://www.acslaw.org/ACS%20Justice%20at%20Risk%20\(FINAL\)%206\\_10\\_13.pdf](http://www.acslaw.org/ACS%20Justice%20at%20Risk%20(FINAL)%206_10_13.pdf) [<https://perma.cc/XFZ3-4JQ2>].

<sup>83</sup> MODEL CODE R. 4.1(A)(8).

<sup>84</sup> Author Philip A. Talmadge was elected to the Washington State Supreme Court in 1994, serving from 1995–2001. Hugh D. Spitzer was an unsuccessful candidate for the Washington State Supreme Court in 1998.

<sup>85</sup> The practical difficulty of shielding judicial candidates from the identities of their contributors is discussed in FLAMM, *supra* note 77, at 154–57. Flamm points out that by attending fundraisers, a judicial candidate “cannot help but learn the identity of the contributors” and that because candidates often must sign campaign disclosure documents as to their accuracy, “the ethical provisions designed to screen judges from their contributors are, as a practical matter, unenforceable.” *Id.*, at 190. Indeed, as the authors are aware from their respective judicial campaigns, Model Code of Judicial Conduct Rule 4.1(A)(7) prohibits judicial candidates from personally soliciting campaign funds, and most candidates leave the room when solicitations are made and conscientiously avoid learning the identity of contributors. Yet state elections law requires the candidates to certify disclosure information to state election authorities, including the identities of in-kind contributors, pledges, and corrections in the identi-

B. *The ABA's Unsuccessful Attempt to Limit Contributions Through Model Code of Judicial Conduct Rule 4.4(B)(1)*

In 1998, the American Bar Association's Task Force on Lawyers' Political Contributions recommended, among other things, that the Model Code of Judicial Conduct be amended to limit the amount of money that a judicial candidate's committee could accept from any specific lawyer, firm, or organization.<sup>86</sup> The following year, the ABA House of Delegates amended the Model Code to add a provision establishing capping both individual and entity campaign contributions at amounts to be determined on a state-by-state basis.<sup>87</sup> The 2007 revision to the Model Code placed these recommended limits at Rule 4.4((B)(1), which currently reads:

(B) A judicial candidate subject to public election shall direct his or her campaign committee:

(1) to solicit and accept only such campaign contributions\* as are reasonable, in any event not to exceed, in the aggregate,\* \$[insert amount] from any individual or \$[insert amount] from any entity or organization;

The concept is for each state adopting the Model Code to consider inclusion of aggregate limits from individuals and organizations that are seen by the rule promulgators as being "reasonable in amount, appropriate under the circumstances, and in conformity with applicable law."<sup>88</sup> A similar Model Code provision, at Rule 2.11(A)(4), would require the disqualification of judges where a party or lawyer appearing before that judge has made aggregate campaign contributions of a specified amount within a specified time period.<sup>89</sup>

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ties of contributors or amounts donated. WASH. ADMIN. CODE § 390-16-041 (2017).

<sup>86</sup> GILLERS ET AL., *supra* note 37, at 690.

<sup>87</sup> Former MODEL CODE R. 5(C)(3). The 1999 amendments are available at *Model Code of Judicial Conduct: Canon 5*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_canon\\_5.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_5.html) [<https://perma.cc/T6NS-FNHV>].

<sup>88</sup> MODEL CODE R. 4.4(C)(3). The 2007 adjustments to the rule also added language to that comment to the effect that a candidate "should be especially cautious in connection with such contributions, so they do not create grounds for disqualification if the candidate is elected to judicial office." CHARLES G. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE ABA MODEL CODE OF JUDICIAL CONDUCT 113 (2008).

<sup>89</sup> MODEL CODE R. 2.11(A)(4) states that a judge must disqualify himself or herself when his or her impartiality might reasonably be questioned, including when: "(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the pre-

But the ABA's attempt to promote contribution limits in codes of judicial conduct has been markedly unsuccessful. Although 35 states have codes of judicial conduct that reflect many of the ABA's recommended 2007 revisions,<sup>90</sup> none have in place Rule 4.4(B)(1) language that tracks the ABA's recommended provision. Many either have not adopted Rule 4.4,<sup>91</sup> or have adopted and shortened Rule 4.4(B)(1) so that it admonishes judicial campaign committees to "to solicit and accept only such campaign contributions as are reasonable,"<sup>92</sup> or, in eleven states,<sup>93</sup> to accept contributions that do not exceed those permitted by law. Only Ohio's Rule 4.4(H)<sup>94</sup> details the maximum amounts that campaign committees may accept for various judicial offices, and for the state supreme court the limits are relatively high: \$7,600 for full election cycle from individuals, \$14,000 from organizations, and \$537,100 from political parties. Michigan, which has not updated its code of judicial conduct, includes only one prescribed limit: its Canon 7(B)(2)(C) bans judicial campaign committees from soliciting more than \$100 from any attorney.<sup>95</sup>

Minnesota experimented with Rule 4.4(B)(1), adopting in 2008 a version requiring judicial campaign committees "to solicit and accept only campaign contributions not to exceed, in the aggregate, \$2,000 from any individual, entity, or organization in an election year and \$500 in a non-election year."<sup>96</sup> That rule was repealed five years later<sup>97</sup> after

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vious [insert number] year[s] made aggregate\* contributions\* to the judge's campaign in an amount that [is greater than \$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity]."

<sup>90</sup> See *State Adoption of Revised Model Code of Judicial Conduct*, A.B.A. (2016), [http://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/map.html](http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html) [<https://perma.cc/GA77-MKBZ>].

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., INDIANA CODE OF JUDICIAL CONDUCT R. 4.4 (2011); MAINE CODE OF JUDICIAL CONDUCT R. 4.4 (2015); NEBRASKA CODE OF JUDICIAL CONDUCT R. 4.4 (2011).

<sup>93</sup> See, e.g., ARIZONA CODE OF JUDICIAL CONDUCT R. 4.4 (2017); IDAHO CODE OF JUDICIAL CONDUCT R. 4.4 (2017); IOWA CODE OF JUDICIAL CONDUCT R. 4.4 (2010); KANSAS CODE OF JUDICIAL CONDUCT R. 4.4 (2009); MINNESOTA CODE OF JUDICIAL CONDUCT R. 4.4 (2016); MONTANA CODE OF JUDICIAL CONDUCT R. 4.4 (2014); NEVADA CODE OF JUDICIAL CONDUCT R. 4.4 (2009); OKLAHOMA CODE OF JUDICIAL CONDUCT R. 4.4 (2010); PENNSYLVANIA CODE OF JUDICIAL CONDUCT R. 4.4 (2014); TENNESSEE CODE OF JUDICIAL CONDUCT R. 4.4 (2017); WASHINGTON CODE OF JUDICIAL CONDUCT R. 4.4 (2011).

<sup>94</sup> OHIO CODE OF JUDICIAL CONDUCT R. 4.4(H) (2017).

<sup>95</sup> MICHIGAN CODE OF JUDICIAL CONDUCT R. 7(B)(2)(C) (2016).

<sup>96</sup> ORDER PROMULGATING REVISED MINNESOTA CODE OF JUDICIAL CONDUCT, ADM08-8004 (Dec. 18, 2008).

<sup>97</sup> ORDER PROMULGATING AMENDMENTS TO THE MINNESOTA CODE OF JUDICIAL CONDUCT, ADM08-8004 (Dec. 31, 2013).

the Minnesota legislature amended its campaign finance law to cover judicial elections.<sup>98</sup> Justice Barry Anderson dissented from the original order on the grounds that the state's Board of Judicial Standards, as a judicial ethics board, was ill-equipped to supervise and enforce the rule as a type of campaign finance regulatory agency.<sup>99</sup> He suggested that Minnesota's Campaign Finance and Public Disclosure Board would be a better agency to manage judicial campaign contribution limits.<sup>100</sup> Justice Anderson's view ultimately prevailed, and soon after the legislature brought judicial campaign contributions under the general statute, the Minnesota Supreme Court amended its Rule 4.4(b)(1) so that it now required judicial candidates to direct their campaign committees "to solicit and accept only campaign contributions in an amount allowed by law."<sup>101</sup>

It is hard to know why Model Code Rule 4.4(B)(1) has been so unsuccessful. Justice Anderson's reticence about the judiciary overseeing campaign practices is a reasonable explanation—at least in those states where statutes *do* set limits on contributions to judicial campaigns. Where the only rule requirement is that judicial campaign committees must solicit accept only such contributions as are "reasonable," that reasonableness standard is largely incapable of enforcement. Precisely how large a contribution is "unreasonable?" Does it make a difference if the candidate is an incumbent who has the benefit of some name familiarity? Does it make a difference if the candidate is facing a well-financed opponent or large independently-financed attack ads? One can also speculate that because the proposed Rule 4.4(B)(1) does not control independent expenditures, some justices may wish to keep their powder dry and maintain the ability of their committees to raise substantial amounts of cash if those justices are targeted by well-funded independent groups. These practical concerns are real in the rough and tumble world of campaigns.

### C. *Tighter Disqualification Rules*

Some concerned about the impact of large campaign contributions on judicial impartiality (and the appearance of impartiality) advocate for stiffer mandatory disqualification rules. The Gibson and Caldeira study,

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<sup>98</sup> Act of May 24, 2013, ch. 138, 2013 Minn. Laws 2353.

<sup>99</sup> ORDER PROMULGATING AMENDMENTS TO THE MINNESOTA CODE OF JUDICIAL CONDUCT, ADM08-8004, *supra* note 97, at D-1.

<sup>100</sup> *Id.* Before joining the court, Justice Anderson had served on Minnesota's Ethical Practices Board, the predecessor agency of the Campaign Finance and Public Disclosure Board. Telephone Interview with Justice Barry Anderson, Minnesota Supreme Court (Jan. 30, 2017).

<sup>101</sup> ORDER PROMULGATING AMENDMENTS TO THE MINNESOTA CODE OF JUDICIAL CONDUCT, ADM08-8004, *supra* note 97.

discussed above,<sup>102</sup> concluded that the impact of large contributions on the perceived legitimacy of the courts was mitigated, but not entirely cured, by strong recusal requirements.<sup>103</sup> A recent study by political scientists Banks Miller and Brett Curry<sup>104</sup> focused on the impact of a mandatory disqualification statute in Alabama.<sup>105</sup> Miller and Curry concluded that the law “played a role in reducing the number of large donations from attorneys, business, and parties,”<sup>106</sup> but that one response to the requirement was simply to shift money from individuals to PACs so that “donations do not count against the contribution limit, triggering recusal.”<sup>107</sup>

In Model Code Rule 2.11(A)(4),<sup>108</sup> the ABA has recommended that a “judge must disqualify himself or herself when his or her impartiality might reasonably be questioned,” including when a party or lawyer has contributed more than an amount to be specified in the rule. However, in a phenomenon similar to the fate of Model Rule 4.4(B)(1), the ABA’s approach to mandatory disqualification has almost completely ignored. Again, practical problems intrude. How large a contribution would result in a judge’s impartiality being questioned? Is it measured based on the percentage of all contributions to the judge’s campaign, or by a hard dollar amount? Based on two national surveys,<sup>109</sup> it appears that only Arizo-

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<sup>102</sup> See Gibson & Caldeira, *supra* notes 8, 74, 75 and accompanying text.

<sup>103</sup> See Gibson & Caldeira, *supra* note 8, at 78.

<sup>104</sup> Banks Miller & Brett Curry, *The Effect of Per Se Recusal Rules on Donor Behavior in Judicial Elections*, 24 JUSTICE SYS. J. 125 (2013).

<sup>105</sup> The statute relevant to the Miller and Curry study, ALA. CODE § 12-24-2, was adopted in 1995 and required supreme court justices to recuse if a party or lawyer before them had contributed more than \$4,000 during the previous election cycle. See ALA. CODE § 12-24-2(c). That statute was repealed in 2014 by Act 2014-455, p. 1688, § 2, after something of a stalemate between the state’s Attorney General and the State Supreme Court over enforcement. See NAT’L CTR. FOR ST. CTS., JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS (Nov. 2016), <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Disqualificationcontributions.ashx> [https://perma.cc/HU3W-79ME]. The statute was then replaced by Ala. Laws 2014-455, codified at ALA. CODE § 12-24-3. *Id.* at 2–3. The new approach created a rebuttable presumption that the justice or judge should recuse if a contribution during the previous election cycle exceeded a specified percentage of all contributions to that jurist’s campaign, provided for an appeal if a judge did not recuse.

<sup>106</sup> See Miller & Curry, *supra* note 104, at 101.

<sup>107</sup> See *id.* at 102.

<sup>108</sup> See *supra* note 89.

<sup>109</sup> A.B.A. CPR Pol’y Implementation Comm., *Comparison of ABA Model Judicial Code and State Variations, Rule 2.11: Disqualification*, (Aug. 31, 2016), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_respo](http://www.americanbar.org/content/dam/aba/administrative/professional_respo)

na and Utah have adopted Model Code Rule 2.11(A)(4) in a form close to that suggested by the ABA, and only four other states (Alabama, California, Mississippi and New York) have adopted differently worded rules mandating recusal when campaign contributions from a party or lawyer exceed a specific amount. Based on the same surveys, it seems that every other state has either done nothing, or adopted Model Code Rule 2.11 while deleting Rule 2.11(A)(4), or, in the case of 11 states identified in the National Center for State Courts' study,<sup>110</sup> "adopted new disqualification rules that do not have specific triggers like the ABA model, but that expressly or impliedly incorporate the decision in *Caperton*."<sup>111</sup> Those new rules tend to be fairly general and permissive in character, not at all like the mandatory disqualification approach recommended in Model Code Rule 2.11(A)(4).

Law professors Deborah Goldberg, James Sample and David Pozen have reviewed the nation's experience with courts underusing and underenforcing recusals,<sup>112</sup> and recommended a number of potential reforms including *per se* disqualification based on high campaign contributions.<sup>113</sup> They suggest that the lack of adoption of such a rule can be explained by (1) the fact that the rule is unnecessary in states where statutes have already capped donations to all political campaigns,<sup>114</sup> and (2) the likelihood that parties might try to disqualify a judge by intentionally contributing to his or her campaign committee.<sup>115</sup> Their solution is a rule that would aggregate contributions not just from a single donor but from all donors associated with a party to a legal action. They would also permit a party to waive disqualification.<sup>116</sup> But given the low interest of courts in adopting *any* contribution caps, it is unlikely that these recommendations would be adopted. Goldberg, Sample and Pozen recommend several other approaches, including, among others, preemptory disqualifications, independent determinations on disqualification motions, and improved mechanisms for replacing disqualified appellate judges.<sup>117</sup>

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nsibility/2\_11.authcheckdam.pdf [https://perma.cc/M27J-B2D2]; JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS, *supra* note 105.

<sup>110</sup> JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS, *supra* note 105, at 4–10, identifies Florida, Iowa, Michigan, Georgia, Missouri, New Mexico, Oklahoma, Pennsylvania, Tennessee, and Washington.

<sup>111</sup> *Id.* at 4.

<sup>112</sup> Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L. J. 503, 524 (2007).

<sup>113</sup> *Id.* at 528.

<sup>114</sup> See *supra* notes 93–95 and accompanying text, regarding Minnesota's repeal of a rule based on MODEL CODE R. 2.11(A)(4) after the legislature expanded that state's campaign finance law to encompass the judiciary.

<sup>115</sup> Goldberg et al., *supra* note 112, at 529.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 526, 530, and 532; see also Sample & Pozen, *supra* note 72.

Perhaps the best explanation for the resistance of courts to impose tough disqualification rules on themselves is that judges seem to think—rightly or wrongly—that they can resist pressures and preconceptions and remain impartial most of the time. With respect to political pressures and campaign contributions, this is borne out by a study on disqualifications by the American Judicature Society, which showed that compared to other bases for disqualification, relatively few judges saw “political reasons” and campaign donations as posing difficult disqualification choices.<sup>118</sup> As a state supreme court justice remarked to one of this essay’s authors, many judges reject tight recusal mandates based on political contributions because they feel that a rule like this “suggests that people thought they could be bought.”<sup>119</sup>

#### D. Public Financing of Judicial Campaigns

Still another proposed solution to the influx of special interest money in judicial election campaigns is to shift to public funding for those candidates who agree to tight spending limits. A number of public financing approaches have been proposed, including offering refunds or tax credits to contributors, matching private donations to campaigns, free television time on public channels like C-SPAN, added space in official voter pamphlets, and providing grants to candidates once they raise a minimum amount in small private donations.<sup>120</sup> The argument for this approach is that, if funded generously enough, it can detach judicial candidates from their reliance on special interest groups and allow them to compete even when their opponents are receiving large donations or independent expenditures. But for those who wish to discourage contested judicial elections, a downside of a robust public funding program is that the availability of funds might encourage challengers.<sup>121</sup> On the other hand, this assistance would be available to challengers, too, counteracting the argument that judicial campaign limits are protective of incumbents.

Whatever the pros and cons of public financing of judicial campaigns, this approach to the influence of big money has not taken off—indeed, only 13 states have some type of public funding for non-judicial

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<sup>118</sup> JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, *JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES* 54–58 (1995).

<sup>119</sup> Telephone Interview with Justice Charles Wiggins, Washington State Supreme Court (Feb. 24, 2017). For a lively debate about recusal and judges’ attitudes and resistance to mandatory disqualification, see Charles Geyh, Myles Lynk, Robert S. Peck & Toni Clarke, *The State of Recusal Reform*, 18 N.Y.U. J. Legis. & Pub. Pol’y 515 (2015).

<sup>120</sup> Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95, 104–05 (2003).

<sup>121</sup> *Id.* at 109.

races,<sup>122</sup> and only four have attempted this mechanism in court campaigns. Wisconsin's program, begun in 1977,<sup>123</sup> was first under-funded and then entirely defunded in Governor Scott Walker's 2011 budget.<sup>124</sup> Notwithstanding the evidence that North Carolina's public financing program changed judges' behavior on the bench and made them less favorable to attorney donors,<sup>125</sup> that state's legislature demolished that state's popular system in 2013.<sup>126</sup>

Today, only New Mexico and West Virginia have public financing in place for supreme court candidates.<sup>127</sup> West Virginia's program went into effect after the Massey Coal contributions to a state judicial campaign first came to light,<sup>128</sup> and it provides up to a \$525,000s in public support for candidates who raise a sufficient number of contributions under \$250.<sup>129</sup> But the existence of public money for judicial candidates campaign committees has apparently done little to stem to the flow of large

<sup>122</sup> *Overview of State Laws on Public Financing*, NAT'L CTR. FOR ST. CTS., <http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx> [<https://perma.cc/XA4E-HXRU>].

<sup>123</sup> Bill 664, 1977 Leg., Reg. Sess. (Wis. 1977).

<sup>124</sup> Bill Leuders, *Public Financing of Elections a State Budget Casualty*, WIS. ST. J., (July 4, 2011), [http://host.madison.com/wsj/news/local/govt-and-politics/elections/public-financing-of-elections-a-state-budget-casualty/article\\_3dfcc38a-a63f-11e0-ad5d-001cc4c03286.html](http://host.madison.com/wsj/news/local/govt-and-politics/elections/public-financing-of-elections-a-state-budget-casualty/article_3dfcc38a-a63f-11e0-ad5d-001cc4c03286.html) [<https://perma.cc/3DQH-MUHK>].

<sup>125</sup> See Hazelton et al., *supra* note 69 at 590.

<sup>126</sup> Although 77 percent of judicial candidates in contested races used North Carolina's public financing system between 2004 and 2010, the state's legislature repealed the program in 2013. Adam Smith, *North Carolina Legislature Repeals Popular 'Voter Owned Elections' Program*, HUFFINGTON POST (July 26, 2013), [http://www.huffingtonpost.com/adam-smith/nc-campaign-finance\\_b\\_3660472.html](http://www.huffingtonpost.com/adam-smith/nc-campaign-finance_b_3660472.html) [<https://perma.cc/8NMJ-XT2F>] (last updated Sept. 25, 2013).

<sup>127</sup> *Overview of State Laws*, *supra* note 122.

<sup>128</sup> Alex Kotch, *Outside Money Wins Big in West Virginia Supreme Court Election*, FACING SOUTH (May 13, 2016), <https://www.facingsouth.org/2016/05/outside-money-wins-big-in-west-virginia-supreme-co> [<https://perma.cc/UB8D-X2TB>]. Kotch's article observes an irony of West Virginia's 2016 election: Justice Brent Benjamin, who had declined to recuse himself in *Caperton*, availed himself of that state's public campaign financing system in his reelection bid, but was defeated by a candidate who benefited from \$3 million in spending by outside groups.

<sup>129</sup> W. VA. CODE § 3-12-11 (2016). The part of West Virginia's judicial campaign public financing tied to amounts raised by opponents was ruled unconstitutional in *State ex rel Loughry v. Tennant*, 229 W.Va. 630, 632 (2012) (citing *Arizona Free Enterprise Club's Freedom Pac v. Bennet*, 563 U.S. 721, 755 (2011)). The legislature then approved a version omitting the "matching fund trigger" component. House Bill 2805, 2013(RS), W. Va. Reg. Sess. (W. Va. 2013).



independent expenditures in that state's judicial elections.<sup>130</sup> New Mexico's program began in 2007,<sup>131</sup> and it was updated in 2013, which witnessed the first appellate judge elected with his campaign almost entirely financed with public funding.<sup>132</sup> But that state's public funding program is facing budget challenges, and it remains to be seen if it will be successful on a long term basis.<sup>133</sup>

Finally, one of the most promising types of public campaign funding mechanisms—increased public money for candidates facing attacks from large independent expenditures—was ruled unconstitutional in *Arizona Free Enterprise v. Bennett*,<sup>134</sup> a case involving public financing of executive and legislative races in Arizona. In *Arizona Free Enterprise*, Chief Justice Roberts held for a 5-4 majority that the increased public funds to match outside expenditures violated the First Amendment because it could result in the suppression of expenditures by those outside groups<sup>135</sup> (which is of course the whole point).<sup>136</sup>

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<sup>130</sup> Kotch, *supra* note 128. Because independent expenditures dwarfed state funding in West Virginia's 2016 judicial campaign, several of that state's legislators have proposed eliminating the program altogether. Rusty Marks, *WV Senate Introduces Bill to Eliminate Public Funding for Supreme Court Races*, W. VA. PRESS (Mar. 1, 2017), <http://wvpress.org/breaking-news/wv-senate-introduces-bill-eliminate-public-funding-supreme-court-races/> [<https://perma.cc/N3HM-DT9U>].

<sup>131</sup> Billy Corriher, *Public Financing of Judicial Races Can Give Small Donors a Decisive Role*, CTR. FOR AM. PROGRESS (Dec. 12, 2012), <https://www.americanprogress.org/issues/courts/reports/2012/12/12/47657/public-financing-of-judicial-races-can-give-small-donors-a-decisive-role/> [<https://perma.cc/9L8G-C4N2>].

<sup>132</sup> Thomas Cole, *First Judge Elected with Public Financing*, ALBUQUERQUE J. (Nov. 17, 2014), <https://www.abqjournal.com/497234/first-judge-elected-with-public-financing-in-new-mexico.html> [<https://perma.cc/GBU6-VWG3>].

<sup>133</sup> Mark Staines, *Budget Cuts Continue to Threaten State Judicial Systems Across the Nation*, IAALS ONLINE: ISSUES BLOG (Feb. 13, 2017), <http://iaals.du.edu/blog/budget-cuts-continue-threaten-state-judicial-systems-across-nation> [<https://perma.cc/VKQ3-K3B4>].

<sup>134</sup> *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011).

<sup>135</sup> *Id.* at 746.

<sup>136</sup> A new public campaign funding technique has been initiated in Seattle for city council races: each voter receives four \$25 vouchers that can be donated to any candidate. Russell Berman, *Seattle's Experiment with Campaign Funding*, THE ATLANTIC (Nov. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/11/seattle-experiments-with-campaign-funding/415026/> [<https://perma.cc/YFS7-Z65Z>]. But that city's new program has also been challenged as violating free speech rights. See Rick Anderson, *In Seattle, Vouchers Let Voters Steer Money to Political Campaigns. But Some Aren't Buying It*, L.A. TIMES (July 21, 2017),

In summary, the small number of states participating in public financing of judicial campaigns, and the ups and downs of funding for those programs, suggests that the success of this approach is yet to be determined. But Morgan Hazelton's recent North Carolina study<sup>137</sup> suggests that public funding makes a difference in how judges vote in specific cases, reducing their proclivity to side with donating attorneys and moving them to more ideologically moderate stances in their opinions.

#### IV. WHAT IS TO BE DONE?

In this section we, suggest an array of actions that state courts and legislatures can take if they are serious about spending controls in judicial elections. As noted above, not all judges are willing to get tough on this issue<sup>138</sup> or on the issue of mandatory disqualification from cases involving major donors.<sup>139</sup> But if jurists and legislators *are* serious about reducing the influx of money into judicial elections, there definitely are things they can do about it. Exercising their inherent judicial powers, courts can establish both tight campaign contribution limits and corresponding mandatory disqualification requirements. Below, we also present an argument for the constitutionality of state legislation controlling campaign expenditures and independent expenditures in the narrow area of judicial elections. Finally, states can establish public campaign funding systems for court races.

Two of our recommendations are based on the widely-recognized power of the courts—typically the supreme courts—to regulate the judicial branch,<sup>140</sup> particularly where necessary to preserve the integrity and independence of the judiciary and to protect public confidence in the administration of justice.<sup>141</sup> This includes the authority to “regulate election activities of its members and potential members”<sup>142</sup> and to require recusal when the probability of bias is too high.<sup>143</sup> As discussed below, our other two recommendations require legislative action because

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<http://www.latimes.com/nation/la-na-seattle-vouchers-2017-story.html>  
[<https://perma.cc/JGU3-HDG7>].

<sup>137</sup> See Hazelton et al., *supra* note 69 at 590 and accompanying text.

<sup>138</sup> See *supra* notes 96–101 and accompanying text.

<sup>139</sup> See *supra* notes 118–119 and accompanying text.

<sup>140</sup> *In re* Petition of Judicial Conduct Comm., 151 N.H. 123, 126 (2004) (holding that the state supreme court has the power “to control its proceedings, the conduct of participants, the actions of officers of the court...[as] a power absolutely necessary for a court to function.”); *In re* Dunleavy, 838 A.2d 338, 346 (Me. 2003) (holding that the supreme judicial court has “inherent authority to discipline and sanction judges...grounded upon the fundamental need for an independent judiciary.”).

<sup>141</sup> *In re* Complaint Against Linder, 271 Neb. 323, 330–31 (2006)

<sup>142</sup> *In re* Fadeley, 310 Or. 548, 558 (1990).

<sup>143</sup> *Reichert v. State ex rel. McCulloch*, 365 Mont. 92, 103 (2012).

they involve controls over persons outside the control of the judicial branch.

*A. Using the Code of Judicial Conduct to Install Contribution Limits*

In states where a supreme court concludes that the statutory framework does not adequately limit donations to judicial campaigns, we recommend that state supreme courts should act forcefully to impose strict caps on contributions to judicial campaigns, using the mechanism suggested by the American Bar Association's Model Code of Judicial Conduct, Rule 4.4(B)(1). We suggest a cap of \$2,000 per individual or organizational contributor per election cycle. We see this as an amount that is a reasonable compromise among the variety of levels set by states that have any limits at all. As described above,<sup>144</sup> of the 37 states where voters play a role in selecting supreme court justices, three states cap individual contributions at \$1,000, and another seven allow contributions between \$1,000 and \$5,000. Five states have set a \$1,000 maximum for entity contributions, and six between \$1,000 and \$5,000. 10 states have no individual contribution maximum at all, and another 17 states cap donations at \$5,000 or higher. The lack of relatively tight contribution limits means that those latter states are more susceptible to an influx of campaign cash, and according to the political scientists this can affect both impartiality and the appearance of fair courts.

Many justices might dislike a \$2,000 maximum because it means that they, along with their campaign committees, will be forced to work much harder to collect a large number of small donations rather than a small number of big donations. But that's the point. If it is harder to raise campaign cash, then less cash will be spent by campaigns. Justices might also be concerned that these caps could put them at a disadvantage in the face of large independent expenditures for an opponent or a swarm of attack ads. Below, we suggest a solution to that problem, *i.e.*, by legislative limits on independent expenditures in judicial races (and only in judicial races). Justices like Minnesota's Barry Anderson<sup>145</sup> have a legitimate argument that courts are not as institutionally qualified as election commissions to collect campaign data and oversee donations. But if the legislators refuse to cap campaign contributions to judicial campaigns, or if those caps are too high (*i.e.*, above \$2,000 in our view), then the courts need to step up and do the job. That job will be easier by virtue of the fact that most of the states with no contribution limits do have mandatory campaign reporting systems in place, so that court administrators (and candidates' campaigns) can quickly identify instances of donations exceeding the limits imposed by that state's Rule 4.4(B)(1).

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<sup>144</sup> See *supra* notes 79–81 and accompanying text.

<sup>145</sup> See *supra* notes 96–101 and accompanying text.

We also recommend that courts expressly bring under the control of Rule 4.4(B)(1), those outside expenditures that are prearranged or coordinated with judicial campaigns—this appears to be acceptable under *Buckley v. Valeo*.<sup>146</sup> So long as the expenditures are not fully independent, they are appropriately treated as part of the campaigns so that those expenditures can be limited to \$2,000.

*B. Corresponding Mandatory Disqualification Rules*

As a companion to campaign contribution limits, state supreme courts should adopt the mandatory disqualification mechanism in the ABA's Model Code of Judicial Conduct, Rule 2.11(A).<sup>147</sup> Our recommendation is that disqualification should be required where an attorney or party before a judge has contributed more than \$2,000 to that jurist's (or an opponent's) election campaign during the preceding election cycle. In jurisdictions in which a supreme court or the legislature has capped contributions at \$2,000, the disqualification requirement will rarely be needed, and will simply serve as a double protection against oversized contributions. But in states with higher contribution limits or none at all, the disqualification requirement will provide an important check on campaign spending—and an effective one, according to researchers.<sup>148</sup>

At the same time, mandatory disqualification could cause a shift of donations from candidates' campaigns to independent PACs that launch attacks against a candidate.<sup>149</sup> Consequently, we urge state supreme courts to broaden Rule 2.11(A) of the Model Code of Judicial Conduct to include independent expenditures. That rule could require disqualification of a judge when there is verifiable information<sup>150</sup> that a party before her has contributed more than \$2,000 to an independent entity that paid for advertisements supporting or attacking her during the previous election cycle. We considered a recommendation that judges recuse themselves on issues on which independent organizations spent

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<sup>146</sup> 424 U.S. at 47; *see also* accompanying text *supra* note 25.

<sup>147</sup> *See* MODEL CODE R. 2.11(A).

<sup>148</sup> *See* Gibson & Caldeira, *supra* note 8, at 78; *see also* Miller & Curry *supra* note 104.

<sup>149</sup> *See supra* note 107 and accompanying text.

<sup>150</sup> One of the challenges of tracking independent expenditures is that they are often structured in ways that make it difficult to determine who or what groups are contributing to an independent advertising campaign for or against a candidate. *See* Tim Cullen, *Judicial Campaign Finance: Can the Independence, Integrity, and Impartiality of the Judiciary Survive Unlimited Stealth PAC Expenditures in Judicial Elections?* 51-WTR ARK. LAW. 20, 21–22 (2016), which observes that if Massey Coal CEO Don Blankenship had contributed to a 501(c)(4) organization rather than to “527” group (an organization described in 28 U.S.C. §527), no one would have known about his donation because 527 organizations are not required to publicly disclose their donors.

substantial amounts attacking or supporting those judges. But such a rule would be difficult to implement, and in any event, we believe that it is legitimate to support or oppose judicial candidates based on their legal philosophy or broad approach to legal issues. For example, if an independent group were to spend \$100,000 criticizing a judge during a campaign for being unfairly harsh on criminal defendants, it would not make sense for that judge, upon reelection, to be required to recuse himself from every criminal case. Other provisions of the Code of Judicial Conduct, such as Rule 2.2, can be relied upon to ensure that the judge continues to be impartial and fair. But there are other methods, which we next discuss, that can provide tighter controls on independent expenditures in court races.

C. *Bucking Buckley: Limits on Judicial Campaign and Independent Expenditures*

The key to controlling the level of spending in judicial campaigns is a mechanism limiting independent expenditures as well as total spending by campaigns. Yet both of these were ruled out in *Buckley v. Valeo*,<sup>151</sup> at least for political races. *Buckley* applied a “closely drawn” test for limits on campaign speech,<sup>152</sup> and that has since evolved towards standard “strict scrutiny” approach in cases like *White*<sup>153</sup> and *McCutcheon*.<sup>154</sup> However, we contend that judicial elections present a special circumstance that justify greater restrictions than are permitted in campaigns for policy-making positions, and that even the strict scrutiny standard can be satisfied. It is important to note that the *Buckley* decision concluded that independent campaign expenditures did not “*presently* appear to pose dangers of real or apparent corruption. . . .”<sup>155</sup> Perhaps that was the case in 1976, but the research shows that those expenditures *do* pose real dangers today in the judicial election context. Based on the Supreme Court’s willingness in *Caperton* and *Williams-Yulee* to go to greater lengths to protect judicial impartiality and public confidence in the fairness of the courts,<sup>156</sup> we suggest that a strong case can be made that a

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<sup>151</sup> *Buckley*, 424 U.S. at 1.

<sup>152</sup> *Id.* at 25; *see also*, *McConnell v. Federal Elections Commission*, 540 U.S. 93, 94 (2003).

<sup>153</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002).

<sup>154</sup> *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014). In *McCutcheon*, Chief Justice Roberts did not expressly decide whether *Buckley*’s “closely drawn scrutiny” or *White*’s “strict scrutiny” standard should apply to aggregate limits on how much a donor may contribute in total to all political candidates or committees. But he concluded that under either standard, the limits were not based on a sufficiently compelling interest to justify the speech restrictions. *Id.* at 1445.

<sup>155</sup> *Buckley*, 424 U.S. at 46 (emphasis added).

<sup>156</sup> The extent to which *Williams-Yulee* does, or doesn’t, represent significant movement in the Supreme Court’s attitude about treating judicial elec-

compelling interest exists for greater restrictions on expenditures (“financial speech”) in judicial campaigns. Our view is supported by recent circuit court opinions sustaining various restrictions on judicial candidates.<sup>157</sup>

First, it should be emphasized that because of society’s interest in protecting the integrity of the judiciary and public confidence in the courts, judges are universally expected to give up certain rights that are possessed by others in the community. For example, while most individuals can speak out publicly about others’ race, religion or national origin (including quite outrageous things), judges are almost entirely constrained in this respect.<sup>158</sup> Ordinary citizens have a right to be rude, but judges must “be patient, dignified, and courteous.”<sup>159</sup> Jurists are limited in their *ex parte* communications with litigants and lawyers.<sup>160</sup> When disciplining trial court Judge Wilbur Maltheusius for publicly criticizing other judges and inappropriately authoring a letter to the local newspaper, New Jersey’s Supreme Court stated:<sup>161</sup>

In accepting that appointment, New Jersey judges also accept restrictions on personal conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Some of these restrictions are of constitutional dimension. . . . Some of those restrictions may otherwise abridge a private person’s free speech rights. But, by his own choice, Judge Maltheusius is not a private person. He is a judge.

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tions differently than political races, is discussed in Charles G. Geyh, *The Jekyll and Hyde of First Amendment Limits on the Regulation of Judicial Campaign Speech*, 68 VAND. L. REV. EN BANC 83 (2015). See also Stephen J. Ware, *Judicial Elections, Judicial Impartiality and Legitimate Judicial Lawmaking: Williams-Yulee v. The Florida Bar*, 68 VAND. L. REV. EN BANC 59, 81 (2015), which makes some of the same recommendations as this essay.

<sup>157</sup> See, e.g., *Wersal v. Sexton*, 674 F.3d 1010, 1021–32 (8th Cir. 2012) (finding a compelling state interest and upholding Minnesota’s Code of Judicial Conduct restrictions on judicial candidate’s endorsements of political candidates and on personal solicitation of campaign donations); *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010) (upholding Wisconsin’s restrictions on judicial candidates’ party affiliation and recusal rules under strict scrutiny test); *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010) (upholding Indiana court rules banning personal solicitation, candidate commitments on future ruling, and a recusal rule). But see *Wolfson v. Concannon*, 750 F.3d 1145 (9th Cir. 2014) (reversed en banc) (finding, prior to the Supreme Court’s ruling in *Williams-Yulee*, that Arizona’s personal solicitation rule violated the First Amendment, at least with respect to non-judge candidates in judicial elections).

<sup>158</sup> See, e.g., MODEL CODE, R. 2.3(B) and (C).

<sup>159</sup> MODEL CODE, R. 2.8(B).

<sup>160</sup> MODEL CODE, R. 2.9.

<sup>161</sup> *In re Maltheusius*, 188 N.J. 496, 522–23 (2006) (citations and internal quotation marks omitted).

In suspending Judge Solomon Osborne for making racist remarks in public, Mississippi's Supreme Court wrote:<sup>162</sup>

No one is compelled to serve as a judge, but once an individual offers himself or herself for service, that individual accepts the calling with full knowledge of certain limitations upon speech and actions in order to serve the greater good. A calling to public service is not without sacrifice, including the acceptance of limitations on constitutionally granted privileges.

These speech restrictions on judges are typical, unremarkable, and extend to their involvement in the political realm as well. In reprimanding a state district court judge for posting a sign supporting the county sheriff's reelection, Iowa's Supreme Court held:<sup>163</sup>

The strength of our judicial system is due in large part to its independence and neutrality. . . . These twin qualities help remove outside influences from judicial decision-making, and promote public respect and confidence in our system of justice. Yet, judicial independence does not come without some personal sacrifice by judges. Judicial independence and neutrality require judges to limit or abstain from involvement in a variety of activities commonly enjoyed by others in the community, including politics.

Justice Scalia, in *White*, concluded that a judicial candidate's mere statement about a legal issue did not sufficiently serve the need to preserve impartiality for or against a party, or its appearance, contending that no one expects judges to be without some preconceptions about the law.<sup>164</sup> Notwithstanding Justice Scalia's view, and despite the robust campaign finance protections for ordinary political candidates in *Buckley*<sup>165</sup> and *McCutcheon*,<sup>166</sup> the Supreme Court has taken a different approach in judicial campaign finance cases. In *Caperton*, a majority recognized that a litigant's contribution of \$3 million to alter the West Virginia supreme court's composition caused a risk of actual bias, not to speak of the fact that two-thirds of the state's voters did not believe that

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<sup>162</sup> Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107, 114 (Miss. 2009).

<sup>163</sup> *In re McCormick*, 639 N.W.2d 12, 15 (Iowa 2002) (citations omitted) (citing Charles W. Wolfram, *Modern Legal Ethics* § 17.5.1 at 980.).

<sup>164</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 776-77 (2002).

<sup>165</sup> *See Buckley v. Valeo*, 424 U.S. 1, 3 (1976); *see also supra* notes 14-26 and accompanying text.

<sup>166</sup> *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1436 (2014); *see also supra* notes 20-33 and accompanying text.

the successful candidate could be impartial.<sup>167</sup> Justice Kennedy concluded that due process required “an objective inquiry into whether the contributor’s influence on the election . . . ‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’”<sup>168</sup> In *Williams-Yulee*, Chief Justice Roberts’ opinion for the Court emphasized that judges “are not politicians,”<sup>169</sup> and that a rule prohibiting judicial candidates from personally soliciting funds was supported by the “compelling interest in preserving public confidence in the integrity of the judiciary.”<sup>170</sup> Roberts added that states may appropriately conclude “that the public may lack confidence in a judge’s ability to administer justice without fear or favor if he comes to office by asking for favors.”<sup>171</sup> He noted that personal solicitation by a judicial candidate puts those solicited in a position to fear retaliation if they do not contribute, and that potential litigants would then fear that the integrity of the judicial system was compromised:<sup>172</sup> “A State’s decision to elect its judges does not require it to tolerate these risks. The Florida Bar’s interest is compelling.”<sup>173</sup>

If the Supreme Court has concluded that the appearance of impartiality is materially damaged by a candidate simply asking for favors, then the Court should similarly conclude that in the judicial election context, a state has a compelling interest to reduce or curtail the actual receipt of favors in the form of campaign cash. As described above, the public firmly believes that judicial contributions affect judges’ decision-making,<sup>174</sup> so the appearance of impartiality is patently affected by campaign donations by litigants, attorneys, and special interest groups. Even more important is the empirical research demonstrating that judges are in fact more impartial when they are not dependent on private campaign contributors or when those judges are subject to mandatory recusal rules.<sup>175</sup>

The Supreme Court recognized in *Caperton* and in *Williams-Yulee* that judicial elections are fundamentally different from elections for political posts, and that the need for judicial independence and impartiality may provide a compelling interest for restrictions that would not be legally acceptable with respect to political candidates.

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<sup>167</sup> *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009); see also *supra* notes 51–55 and accompanying text.

<sup>168</sup> *Caperton*, 556 U.S. at 885.

<sup>169</sup> *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015).

<sup>170</sup> *Id.* at 1666.

<sup>171</sup> *Id.* In his opinion, Chief Justice Roberts quoted Justice Felix Frankfurter for the proposition that “justice must satisfy the appearance of justice.” *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

<sup>172</sup> *Williams-Yulee*, 135 S. Ct. at 1668.

<sup>173</sup> *Id.*

<sup>174</sup> See *supra* notes 72–76 and accompanying text.

<sup>175</sup> See *supra* notes 64–71 and accompanying text.



Notwithstanding *Buckley* and *McCutcheon*, we believe that the Court might well uphold a code of judicial conduct provision capping total judicial campaign expenditures, and/or a state law or court rule prohibiting or limiting independent expenditures on judicial campaigns. We contend that one or more state supreme courts should impose tight judicial campaign expenditure limits, and one or more legislatures—or the courts themselves—should enact statutes curtailing independent expenditures in judgeship races.

Some might argue that legislative action is required to govern independent campaign contributions because the courts (and their rulemaking authority) have limited control over contributors who are outside the judicial branch, *i.e.*, contributors other than judges and attorneys. However, we assert that massive judicial campaign contributions and expenditures pose such a serious threat to judicial independence and the public's confidence in the justice system, that state supreme courts have sufficient inherent authority to impose strict judicial campaign expenditure limits and limits on outside independent spending in court races. Notwithstanding legislative assertions to the contrary, state high courts have long asserted and exercised inherent powers to safeguard the judicial branch, including those powers "essential to the existence, dignity, and functions" of the judicial system.<sup>176</sup> In protecting and overseeing the judiciary, courts across the country have long assumed control of rulemaking,<sup>177</sup> the admission and discipline of attorneys,<sup>178</sup> the management and regulation of the judicial system (including judges and staff),<sup>179</sup> and, controversially, the mandatory

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<sup>176</sup> *In re* Integration of the Nebraska Bar Ass'n, 275 N.W. 265, 267 (Neb. 1937); *see generally* FELIX F. STUMPF, *INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY* (1994).

<sup>177</sup> *See, e.g.*, Appeal of Dattilo, 72 A.2d 50, 52 (Conn. 1950); Hall v. State, 539 So. 2d 1338, 1339–41 (Miss. 1989); Ammerman v. Hubbard Broad., Inc., 551 P.2d 1354, 1359–60 (N.M. 1976); State ex. rel. Foster-Wyman Lumber Co. v. Superior Court, 267 P. 770, 771–72 (Wash. 1928); *see generally* DONNA J. PUGH, ET AL., *JUDICIAL RULEMAKING: A COMPENDIUM* (1984); JACK B. WEINSTEIN REFORM OF COURT RULE-MAKING PROCEDURES (1977); Tyrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L.Q. 459, 477 (1937).

<sup>178</sup> *See, e.g.*, *In re* Integration of Bar of Haw., 432 P.2d 887, 888 (Haw. 1967); Martin v. Davis, 357 P.2d 782, 787–88 (Kan. 1960); *In re* Greathouse, 248 N.W. 735, 737 (Minn. 1933); *In re* Integration of State Bar of Okla., 95 P.2d 113, 116 (Okla. 1939); Belmont v. Bd. of Bar Exam'rs, 511 S.W.2d 461, 464 (Tenn. 1974).

<sup>179</sup> Opinions of the Justices to the Senate, 363 N.E.2d 652, 659–60 (Mass. 1977); *In re* DeSaulnier, 279 N.E.2d 296, 307–08 (Mass. 1971); State ex rel. Weinstein v. St. Louis County, 451 S.W.2d 99, 101–02 (Mo. 1970) (Per Curiam); Zylstra v. Piva, 539 P.2d 823, 826–27 (Wash. 1975); *In re* Kading, 235 N.W.2d 409, 414 (Wis. 1975); *see generally* James D. Cameron, *The Inherent*

provision of funds to support the judicial branch when lack of adequate funding threatens the viability of the courts.<sup>180</sup> Although some have contended that by taking these self-protective actions judges have pushed their way into policy-making that ought to reside in legislatures,<sup>181</sup> strong inherent judicial powers have been firmly established in most states.<sup>182</sup> In our view, if a state supreme court concludes that its legislature has failed to enact adequate controls over judicial campaign expenditures and outside contributions, and the court concludes that the lack of adequate contribution and spending limits endangers the judiciary, that court has sufficient authority to impose those controls by court rule. Attached in Appendix [A] is a suggested court rule implementing those limits. Although a rule such as the one we recommend might face a First Amendment challenge, we believe that there are solid arguments for upholding a judicially-imposed regulation.<sup>183</sup>

#### D. *Moving Ahead with Public Funding.*

Our final recommendation is that state legislatures move forward with the adoption of public funding systems for judicial campaigns. Although lawmakers have pulled back from such programs for financial reasons,<sup>184</sup> the research suggests that they are effective in promoting

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*Power of a State's Highest Court to Discipline the Judiciary*, 54 CHI.-KENT L. REV. 45, 52–53 (1977).

<sup>180</sup> Allen Cty. Council v. Circuit Court, 549 N.E.2d 364, 367 (Ind. 1990); Webster Cty. Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 874–75 (Iowa 1978); Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193, 197–98 (Pa. 1971); *In re Salary of Juvenile Dir.*, 552 P.2d 163, 170–71 (Wash. 1976); see generally Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1033–40 (2004); G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12, 14 (2004).

<sup>181</sup> See, e.g., F. Keith Ball, Comment, *The Limits of the Mississippi Supreme Court's Rule-Making Authority*, 60 MISS. L.J. 359, 384–85 (1990); Hugh D. Spitzer, *Court Rulemaking in Washington State*, 6 U. PUGET SOUND L. REV. 31, 65–68 (1982).

<sup>182</sup> See generally STUMPF, *supra* note 176.

<sup>183</sup> From a strategic standpoint, those defending Free Speech challenges to our recommended court rule should consider taking the time to engage in a full trial or other proceeding that brings the social science research into the record. It would be helpful, on appeal to the Supreme Court, for a trial court judge to have determined, as a finding of fact, that large judicial campaign expenditures and large outside independent expenditures for or against judicial candidates, affect how those candidates act when serving as judges and affects how the public views the jurists' impartiality.

<sup>184</sup> See *supra* notes 122–126 and accompanying text.

impartial decision-making<sup>185</sup> and improving public perceptions of judicial fairness.<sup>186</sup> If controls on independent expenditures are added to existing limits on donations to judicial campaigns, the cost of court elections will remain at modest levels and public financing systems should not present a substantial budget hurdle.

Further, if the Supreme Court is willing to accept that states have a compelling interest in preserving judicial impartiality (and its appearance) such that they can control total campaign expenditures and independent spending, then the Court should similarly permit public funding programs for judicial elections to use the matching mechanism that was not permitted for political elections in *Bennett*,<sup>187</sup> *i.e.*, increasing the public funding for a judicial campaign as outside expenditures against a candidate (or for an opponent) increase. Again, a state's interest in assuring the public that justice cannot be bought, and preventing the actual purchase of justice, provides a compelling interest that might not exist in the context of executive and legislative races.

## VI. CONCLUSION

In 1215, King John's barons, clearly a special interest group with substantial resources, were so upset about the influence of money and power on the courts that they forced the king to promise: "To no one will we sell, to no one deny or delay right or justice."<sup>188</sup> In our view, the political scientists' findings on the direct and material impact of judicial campaign cash on judges' behavior and public confidence in the courts, provide the compelling interest for state courts and legislatures to take action. In the spirit of Magna Carta's commitment to impartial courts, courts and legislatures should install much stronger controls on donations to judicial campaigns, total campaign expenditures, and independent spending on court races. The social scientists' findings also provide an adequate basis for public funding for judicial elections. The universally recognized need to ensure judges' impartiality and the appearance of fairness also provides a constitutionally-acceptable basis for much more robust controls and programs than are permitted in non-judicial elections. We hope that state supreme courts and legislatures will step up to the challenge.

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<sup>185</sup> See *supra* notes 69–71 and accompanying text.

<sup>186</sup> See *supra* notes 72–76 and accompanying text.

<sup>187</sup> *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011).

<sup>188</sup> MAGNA CARTA para. 40 (1215), *reprinted in* J. C. HOLT, MAGNA CARTA (2d ed. 1992).

