COMMENT

Judging Judicial Elections: The Tension between *White*[1] and *Caperton*[2]

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A judicial tug-of-war is afoot. Unlike the debates between Brutus and Publius concerning the manner of judicial selection,[3] the present tension arises from conflicting interests of the First Amendment[4] and the requirements of the Due Process Clause[5] as applied to state judicial elections. In *Republican Party of Minnesota v. White*, the Supreme Court reopened the door for campaign speech in judicial elections.[6] In turn, judicial elections have become high dollar affairs not unlike political races.[7] However, in *Caperton v. A.T. Massey Coal, Inc.*, the Court required a state supreme court justice to disqualify himself over campaign contributions and spending.[8] While *White* leaves uncertainty about the extent of speech available to a judicial candidate, *Caperton* brings to the forefront potential consequences of exercising that speech. Following a brief history of judicial elections, this comment will seek to explore the boundaries drawn by the tension between *White* and *Caperton*, at times paying specific attention to how the decisions affect Mississippi. First, in the aftermath of *White*, what are the limits of judicial candidate speech? Second, what due process limits might *Caperton* place on electoral speech and recusal standards? In order to answer these questions, this comment will review both the *White* and *Caperton* cases, many of the post-*White* lower court cases, and information and statistics concerning the financial aspect of judicial campaigning. On the whole, however, this comment will merely seek to explain and illuminate the tensions between free speech and due process apparent in the *White* and *Caperton* decisions, including the present state of judicial election policy and recusal standards.

I. HISTORY OF JUDICIAL ELECTIONS

Although the debate between Publius and Brutus was settled in favor of lifetime appointments for federal judges, the issue of judicial selection was not similarly settled in the states.[9] Judicial elections began in 1789 in Georgia, and were introduced in Mississippi in 1832.[10] Today, thirty-nine states hold some form of judicial elections.[11] As

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[1] Republican Party of Minn. v. White, 536 U.S. 765 (2002).
[2] Caperton v. A.T. Massey Coal, Inc., 129 S. Ct. 2252 (2009).
[3] In the debate between Federalists and Anti-Federalists concerning the adoption of the United States Constitution, Publius (Alexander Hamilton) and Brutus argued though a series of essays the merits of an appointed judiciary. *See, e.g.,* THE FEDERALIST NOS. 78-83 (Alexander Hamilton); BRUTUS NOS. 11-15.
[4] U.S. CONST. amend. I.
[5] U.S. CONST. amend. XIV, § 1.
[6] 536 U.S. 765 (2002).
[7] In a speech to Seattle University School of Law, former Justice O'Connor stated, "The result has been an arms race in funding, making it so a campaign for state judge is often as expensive, or more so, than a campaign for a U.S. Senate seat." Jennifer Sullivan, *Ex-Justice O'Connor: Electing Judges Puts Courts at Risk*, SEATTLE TIMES, Sept. 15, 2009, at B1.
[8] 129 S. Ct. 2252 (2009).
[9] U.S. CONST. art. II, § 2 (Presidential appointment); U.S. CONST art. III, § 1 (tenure of good behavior).
[10] Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1093 (2007).

such, states have a "variety" of methods for selecting judges.[12] Presently, there are states with appointments,[13] appointments with retention elections,[14] partisan elections,[15] non-partisan elections,[16] or some combination of these four basic systems for the selection of their appellate and general jurisdiction judges. Despite the varied means of selection, most jurisdictions have in common certain restrictions on judges and judicial candidates, including restrictions on political activity and statements regarding issues likely to come before the court.[17] Additionally, most states have judicial terms longer than other elected offices, with over thirty-eight percent holding terms of ten to fifteen years.[18] While such restrictions may serve compelling state interests in an impartial judiciary,[19] they were, and some remain, rife for challenges as inappropriate prohibitions of speech under the First Amendment.[20]

II. *WHITE* AND JUDICIAL CANDIDATE SPEECH

A. Republican Party of Minnesota v. White

In 1996, Gregory Wersal decided to run for a seat on the Minnesota Supreme Court, but withdrew after complaints were filed against him challenging the propriety of his campaign literature.[21] In 1998, Wersal ran again, although this time he sought an advisory opinion[22] concerning enforcement of the announce clause.[23] Unsatisfied with the response, Wersal filed suit for a declaratory judgment that the announce clause violated

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[11] Brennan Center for Justice, *State Judicial Elections*, http://www.brennancenter.org/content/section/category/state_judicial_elections (last visited Apr. 7, 2010).

[12] Schotland, *supra* note 10, at 1084.

[13] Appointments are made at the appellate level in ten states, and selection by legislatures occur in an additional two states. New York appoints at the appellate level and has partisan elections for general jurisdiction courts. *Id.* at 1085.

[14] Retention elections are held in fifteen states. *Id.* Sometimes called the "Missouri Plan," retention elections are essentially recall elections to determine whether the judge should be retained or a new judge appointed. Republican Party of Minn. v. White, 536 U.S. 765, 791 (O'Connor, J., concurring).

[15] Partisan elections are held in nine states, although Illinois, Pennsylvania, and New Mexico have partisan elections followed by retention elections at the end of each subsequent term. Schotland, *supra* note 10, at 1085.

[16] Thirteen states, including Mississippi, hold non-partisan elections for appellate judges. *Id*. *See also* MISS. CONST. art. VI, § 145; MISS. CODE ANN. § 23-15-976 (2008).

[17] Brief for Conference of Chief Justices as Amici Curiae Supporting Petitioners, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521), 2002 WL 257559.

[18] *Id.* at *7, n.6.

[19] *Id.* at *14. For example, pre-*White*, the Third Circuit stated, "There can be no question, however, that a state has a compelling interest in the integrity of its judiciary." Stretton v. Disciplinary Bd. of Sup. Ct. of Penn., 944 F.2d 137, 143 (3d Cir. 1991) (rejecting a challenge to the announce clause later struck down in *White*).

[20] *See* discussion *infra* Part II.B-E.

[21] *White*, 536 U.S. at 768-69. Although the initial complaints were dismissed, fear of additional complaints caused Wersal to withdraw from the election. *Id.* at 769.

[22] *Id.* The advisory opinion was not answered because Wersal did not submit "announcements" that he planned to make. *Id.*

[23] The "Announce Clause" forbade a candidate for judicial office to "announce his or her views on disputed legal or political issues." MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2002) (abrogated July 1, 2009).

the First Amendment. The district court held that the announce clause did not violate Wersal's First Amendment rights, and the Eighth Circuit affirmed. [24] Although Wersal initially challenged other clauses[25] prohibiting speech, the Supreme Court granted certiorari only regarding the announce clause.[26]

Prior to delving into the reasoning and holding in *White*, there are a few interesting bits of trivia that may alter perceptions of the case. First, in 1998, Greg Wersal ran against Justice Alan Page.[27] Justice Page later supported an initiative to get rid of head-to-head judicial elections in favor of the Missouri System.[28] Naturally, this drew a response from Wersal, who condemned the proposal as elitist.[29] While an elected judge proposing to get rid of elections may be viewed as incumbent-friendly, it is not that different from the announce clause. Under the announce clause, neither candidate could announce positions on disputed political or legal issues; however, a sitting judge would, necessarily, continue writing opinions.[30] Perhaps one of the more unusual facts regarding *White* is that the American Civil Liberties Union and the Republican Party were on the same side of the issue.[31]

The ACLU also asserted an intriguing argument in its amicus brief. Particularly, they noted that merely preventing candidates from announcing their views on disputed political and legal issues cannot be equated with candidates having no views on those issues. In essence, the ACLU argued the announce clause resulted in a "blind" choice by the voters.[32] Another fascinating piece came from the Republican Party's brief in response to an argument put forth by Minnesota. The State of Minnesota had argued that in confirmation hearings, each Supreme Court Justice had stated it would be improper to announce a position on issues likely to come before the Court.[33] The argument can be summarized that the announce clause is proper because the Justices have announced their position on the announce clause, or, as the Republican Party argued, "Paradoxically, the

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[24] Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967 (N.D. Minn. 1999), *aff'd*, 247 F.3d 854 (8th Cir. 2001).

[25] Wersal also challenged the partisan activity clauses and solicitation clauses. *Id.* These will be discussed in Part II.B, *infra*.

[26] *Kelly*, 534 U.S. 1054; Petition for Writ of Certiorari, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521), 2001 WL 34092019.

[27] *Incumbent Page Faces Past Vote-Getter*, ST. PAUL PIONEER PRESS, Nov. 1, 1998, at 11A. Justice Page had an illustrious football career, including a consensus All-American selection while playing at Notre Dame, NFL MVP award in 1971 while playing for the Minnesota Vikings, and induction into the NFL Hall of Fame in 1988. *Hall of Famers: Alan Page*, Pro Football Hall of Fame, http://www.profootballhof.com /hof/member.aspx?player_id=171 (last visited Apr. 7, 2010).

[28] Mark Brunswick, *Plan Takes That Long List of Judges Off Your Ballot*, STAR TRIBUNE: NEWSPAPER OF THE TWIN CITIES, Feb. 1, 2008, at 1A.

[29] Wersal said of the proposal, "You got one group of muckity mucks giving the rubber stamp to another group of muckity mucks." *Id*.

[30] The ability of a judge to issue opinions, likely on disputed political issues, while a challenger candidate could not make his position known, can likewise be viewed as incumbent-friendly.

[31] *See* Brief for ACLU as Amici Curiae Supporting Petitioners, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521), 2002 WL 100225.

[32] *Id*. at *9.

[33] Brief for the Respondents at 24, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (No. 01-521), 2002 WL 264727.

State would place the Justices of this Court on the horns of the very dilemma that they . . . claim the announce clause is intended to avoid . . . ."[34]

Turning, then, to the holding, Justice Scalia delivered the Court's opinion,[35] noting that campaign speech is at the "core of our electoral process."[36] The Court determined that the announce clause should be subjected to strict scrutiny review, where Minnesota would have to show that the announce clause is "(1) narrowly tailored, to serve (2) a compelling state interest."[37] Since the alleged state interest was impartiality of the judiciary, the opinion focused greatly on the definition of impartiality.[38] The Court proposed three definitions of impartiality: (1) a "lack of bias for or against either *party* to the proceeding,"[39] (2) a "lack of preconception in favor of or against a particular *legal view*,"[40] and (3) "openmindedness."[41] The Court determined that the first definition did not pass strict-scrutiny review because the announce clause was not narrowly tailored to serve the interest of removing bias for or against parties.[42] The second definition, in the Court's view, was not a compelling state interest, causing the announce clause to fail strict-scrutiny review on this definition as well.[43] Regarding the last definition, the Court opined that Minnesota did not adopt the announce clause for the purposes of maintaining open-mindedness of the judiciary.[44] Since the Court found that all three definitions of impartiality failed strict-scrutiny review, the Court held that the announce clause violated the First Amendment.[45]

Although Justice O'Connor concurred in *White*, she is not a supporter of judicial elections.[46] This sentiment was somewhat evident in her concurring opinion in *White* where she wrote, "If the State has problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges."[47] Later,

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[34] Reply Brief for the Petitioners at 7, Republican Party of Minn. v. White, 536 U.S. 765 (No. 01-521), 2002 WL 833398.

[35] *White*, 536 U.S. at 766. Justice Scalia was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. Justices O'Connor and Kennedy filed concurring opinions. Justices Stevens and Ginsburg filed dissents joined by each other and Justices Souter and Breyer. *Id.*

[36] *Id*. at 781 (quoting Eu v. San Francisco County Democratic Cent. Comm'n, 489 U.S. 214, 222-23 (1989)).

[37] *Id*. at 774-75.

[38] *Id.* at 775-79.

[39] *Id*. at 775.

[40] *Id*. at 777.

[41] *Id.* at 778.

[42] *Id.* at 776. "Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*." *Id.*

[43] *Id.* at 777. "[I]t is not a *compelling* state interest . . . ." *Id.* The court continued, "it is virtually impossible to find a judge who does not have preconceptions about the law." *Id.*

[44] *Id.* at 778. The court noted two famous examples in this discussion: Justice Black's participation in cases regarding the Fair Labor Standards Act, which he authored; and "Chief Justice Hughes authorship of the opinion overruling Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923), a case he criticized in a book written before his appointment to the Court." *White*, 536 U.S. at 779.

[45] *White*, 536 U.S. at 788.

[46] Kashmir Hill & David Lat, *Should Judicial Elections be Abolished? (Or: ATL Chats with Justice Sandra Day O'Connor)*, ABOVE THE LAW, Oct. 6, 2009, 2009 WLNR 19702560. "Justice O'Connor would like to see judicial elections ended . . . ." *Id.*

[47] *White*, 536 U.S. at 792 (O'Connor, J., concurring).

however, Justice O'Connor's post-*White* comments suggest that the outcome could have been different. In a 2006 address, Justice O'Connor stated that the *White* case "does give me pause."[48] While such a statement suggests that *White* could have gone the other way, Justice Kennedy's concurrence, setting the stage for later challenges of other restrictions on candidate speech, implies that the Court did not go far enough in *White*—that no content-based restrictions should be placed on judicial candidate speech.[49] With those two views in mind, it is time to delve into the post-*White* cases.

B. Post-White Cases

Following *White*, a number of challenges were lodged against other clauses prohibiting judicial speech. Four clauses will be analyzed in groups of two—the "commit clause"[50] and "pledges and promises"[51] clause will be evaluated as one since a number of courts give the same meaning to both.[52] The other two clauses receiving substantial challenges following *White* are the "solicitation clause"[53] and the "partisan activities"[54] clause, both of which were challenged in the initial case by Greg Wersal.[55]

C. Pledges, Promises & Commit Clauses

Although somewhat similar to the announce clause in *White*, the pledges, promises, and commit clauses go a little further in that they prohibit an allusion to how a judge would rule. The announce clause merely prohibited disclosure of a judge's personal views on disputed political and legal issues. If this distinction seems more semantic than practical, it probably is. With that, courts have reached different conclusions regarding the pledges, promises, and commit clauses. Perhaps adding some levity to the discussion, in *White*, Justice Scalia wrote, "[O]ne would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment."[56]

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[48] Matthew Hirsch, *Swing Voter's Lament: At Least One Case Still Bugs O'Connor*, LEGAL INTELLIGENCER, Nov. 9, 2006 at 4.

[49] *White*, 536 U.S. at 793 (Kennedy, J., concurring). *See also id.* at 802 n.4 (Stevens, J., dissenting) ("Justice Kennedy would go even further and hold that no content-based restriction of a judicial candidate's speech is permitted under the First Amendment.").

[50] *E.g.* MISS. CODE OF JUDICIAL CONDUCT, Canon 5A(3)(d)(ii) (2002). A judge or candidate shall not "make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court." *Id.*

[51] Candidates shall not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." *Id.* at Canon 5A(3)(d)(i).

[52] *See, e.g.,* N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021 (D.N.D. 2005).

[53] *E.g.*, MISS. CODE OF JUDICIAL CONDUCT, Canon 5C(2) (2002) ("A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support."). Many states require a candidate to establish a committee through which campaign funds are solicited. *See id.*

[54] *E.g.*, *id.* at Canon 5A(1). A candidate may not hold a leadership position in a political party, make speeches for the party or endorse candidates, solicit funds for a political candidate, attend political gatherings, or purchase tickets to party dinners. *Id.* However, a judge up for reelection or a challenging candidate may speak to political gatherings in their own behalf as a candidate. *Id.* at Canon 5C(1).

[55] Republican Party of Minn. v. White (*White II*), 416 F.3d 738 (8th Cir. 2005).

[56] Republican Party of Minn. v. White, 536 U.S. 765, 780 (2002).

In *North Dakota Family Alliance, Inc. v. Bader*,[57] a challenge was brought against North Dakota's pledges, promises, and commit clauses.[58] In the case, North Dakota Family Alliance sought to distribute a questionnaire to judicial candidates inviting commentary about United States Supreme Court cases the candidates thought were wrongly decided.[59] The questionnaire also asked where candidates rated themselves on a philosophical scale between "strict constitutionalist" and "living document approach."[60] Reasoning that since North Dakota opted for judicial elections it could not impermissibly restrict candidate speech, the court held both clauses to be unconstitutional.[61]

During the past few years, a new version of judicial canons has been adopted in several jurisdictions. This revision combines the pledges, promises, and commit clauses into one.[62] In *Duwe v. Alexander*, a version of the revised canons was challenged in Wisconsin. The Judicial Advisory Committee had issued an opinion that a judge stating an opinion concerning the fairness, efficacy, and wisdom of the death penalty would be in violation of the judicial canons.[63] Although the court determined the canon was not facially unconstitutional, as applied in the advisory opinion and in commentary,[64] the canons acted as an impermissible prohibition of speech protected by the First Amendment.[65] The Tenth Circuit reached a different result regarding a challenge to Kansas regulations, holding the revised language mooted a challenge to the former pledges, promises, and commit clauses.[66]

On the state level, Florida has upheld its own code of judicial conduct in an unusual case, *In re Kinsey*.[67] In *Kinsey*, the Florida Supreme Court publicly admonished

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[57] N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021 (D.N.D. 2005).
[58] The North Dakota clauses were the same as Mississippi's current clauses. *See supra* notes 51-52.
[59] *Bader*, 361 F.Supp. 2d at 1025-26.
[60] *Id*. at 1026; *see id*. at 1027-28 (reprinting the entire questionnaire).
[61] *Id.* at 1044-45. "This court is persuaded that Canons 5A(3)(d)(i) and (ii) pose a chilling effect on a judicial candidate's efforts and desire to express his or her views to the public on problems confronting the judiciary and how the candidate proposes to deal with them. These canons impose a direct limitation on expressions that are protected under the First Amendment, and which the United States Supreme Court in *White* said was constitutionally-protected speech." *Id*. at 1044.
[62] *See, e.g.*, Duwe v. Alexander, 490 F. Supp. 2d 968, 975 (W.D. Wis. 2007) (quoting WIS. CODE OF JUDICIAL CONDUCT SCR 60.06(3)(b) (2002)) ("A judge, judge-elect, or candidate for judicial office shall not make . . . with respect to cases, controversies, or issues that are likely to come before the court, pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.").
[63] *Id*. at 971.
[64] The commentary construed the canon to include statements by judicial candidates that "may reasonably be viewed as committing" the candidate. *Id*. at 976.
[65] *Id*.
[66] Kan. Judicial Review v. Stout 562 F.3d 1240 (10th Cir. 2009). Kansas adopted the same language as Wisconsin, and commentary includes a "reasonable person" standard to determine if the candidate has actually made a pledge, promise or commitment. *See* KAN. R. JUDICIAL CONDUCT, Canon 4 (2009). However, the Tenth Circuit did not discuss the commentary to Kansas rules in *Stout*. *Stout*, 562 F.3d 1240. *See also* Carey v. Wolnitzek, No. 3:06-36-KKL, 2008 WL 4602786 (E.D. Ky. Oct. 15, 2008) (holding commit clause with "reasonable person" standard constitutional).
[67] *In re* Kinsey, 842 So. 2d 77 (Fla. 2003).

and fined Pat Kinsey $50,000 for her campaign statements.[68] Florida did not have an announce clause, but did have the pledges, promises and commit clauses.[69] Although one justice felt Kinsey's statements were no more than announcements protected under *White*,[70] others were of the opinion that Pat Kinsey was no longer fit to hold judicial office.[71] In light of *White*, this decision appears absurd, but goes to illustrate the current status of the pledges, promises, and commit clauses. The irony of this decision, perhaps, should be pointed out in that the Florida Supreme Court was forced to issue an opinion concerning rules it had previously adopted. It would be hard to conclude that issuance of a rule is anything short of a pledge or promise to later enforce those rules.[72]

On the whole, though, these cases do nothing to illuminate the current state of affairs regarding the pledges, promises, and commit clauses. In some jurisdictions, the clauses are acceptable, and in some they are not. However, it appears that, as Justice Wells in *Kinsey* opined, statements prohibited under pledges, promises, and commit clauses are eerily similar to those granted First Amendment protection in *White*. As such, the trend should be to recognize more candidate speech as protected.

D. Partisan Activities and Solicitation Clauses

Turning to another aspect of campaigning, the partisan activities and solicitation clauses are perhaps the other side of the pledges, promises, and commit clauses. They appear to tackle the first two definitions of impartiality Justice Scalia articulated in *White*; however, both seem inappropriate in light of *White* and, to a certain extent, common sense.[73] This is particularly true regarding the imposition of campaign committees[74] by the solicitation clause, which creates a faux veil of impartiality by separating contributors from candidates.[75]

The Wersal cases illustrate the absurdity of the distinctions drawn out in these clauses.[76] On remand from the Supreme Court, the Eighth Circuit took up in *White II* the issues not addressed in *White*. In *White II*, Wersal challenged the clauses in an attempt to solicit contributions generally from large gatherings and concerning the use of his signature on letter requests sent by his committee.[77] Wersal did not challenge the

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[68] *Id*. at 91. Kinsey's statements included notions of putting criminals behind bars, referencing the "defense mode" of her opponent, and various "pro-law enforcement" statements. *Id*. at 81.
[69] *See, e.g.*, MISS. CODE OF JUDICIAL CONDUCT, *supra* notes 51-52.
[70] *Kinsey*, 842 So. 2d at 100 (Wells, J., dissenting).
[71] *Id*. (Lewis, J., concurring in part and dissenting in part).
[72] Florida has retention elections after appointment, so it may be an imperfect conclusion to impute the irony of *Kinsey* to each justice instead of the court as a whole. *See* Schotland, *supra* note 10, at 1085.
[73] *See supra* notes 39-40 and accompanying text.
[74] *See, e.g.*, MISS. CODE OF JUDICIAL CONDUCT.
[75] *See* Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002) (opining the use of campaign committees does little to insulate the candidate from contributors).
[76] Republican Party of Minn. v. White (*White II*), 416 F.3d 738; Wersal v. Sexton, 607 F. Supp. 2d 1012 (D. Minn 2009).
[77] *White II*, 416 F.3d at 764.

campaign committee system.[78] The court held that the partisan activities clause and solicitation clauses, as challenged, inappropriately prohibited speech protected by the First Amendment.[79] The court reasoned that if a candidate may announce views under *White*, then there is no logical reason to prevent a candidate from associating with a party espousing the same views the candidate may articulate himself.[80] Following *White II*, Minnesota allowed direct solicitation to groups of more that twenty people and the placement of a candidate's signature on contribution requests, provided those requests directed correspondence to the candidate's campaign committee.[81] Wersal challenged again, and the district court determined that the changes to Minnesota's solicitation clauses were sufficient to survive strict-scrutiny review.[82] The difference between asking one person for money and asking twenty seems arbitrary and utterly worthless in accomplishing the goal of veiling the candidate from contributors. Furthermore, *White II* and *Sexton* both reference the secretive nature of the campaign committees in preventing disclosure of contributors to the candidates.[83] However, as the following cases illustrate, using the non-disclosure of contributors as a means of upholding the solicitation clause is at best nonsensical.

In *Weaver v. Bonner* the Eleventh Circuit took the solicitation clause head-on. [84] The court found that the clause impermissibly restricted speech, writing, "In effect, candidates are completely chilled from speaking to potential contributors . . . about their potential contributions . . . ."[85] The court continued to lambaste the silly distinctions drawn by the requisite use of campaign committees, noting in particular, that if successful candidates are to be beholden to supporters, that will be so "regardless of who did the soliciting of support."[86] Bringing common sense to the equation, the court further cited Justice O'Connor's concurrence in *White* that elections necessarily require funding, and that any questions of impartiality related to funding come from the state's use of judicial elections.[87]

Similarly, in *Carey v. Wolnitzek*, the court discarded Kentucky's solicitation and partisan activities clauses as unconstitutional restrictions on candidate speech.[88] Carey was a candidate for the Kentucky Supreme Court and sought an injunction against enforcement of the clauses.[89] The *Carey* court reasoned that there was enough information available to voters after *White* that decisions would not be based solely on

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[78] *Id*. at 765. *Compare id.* at 745 (quoting Canon 5) *with* MISS. CODE OF JUDICIAL CONDUCT, Canon 5C(2) (2002).
[79] *White II*, 416 F.3d at 766.
[80] *Id*. at 758.
[81] Wersal v. Sexton, 607 F.Supp. 2d 1012, 1026 (D. Minn. 2009).
[82] *Id*. at 1026-27. "The setting of the group size at a minimum of twenty persons is not talismanic, but the inclusion of a number does not, by itself, establish an arbitrary political speech restriction." *Id.* at 1026.
[83] *White II*, 416 F.3d at 765; *Sexton*, 607 F. Supp. 2d at 1015.
[84] Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).
[85] *Id*. at 1322.
[86] *Id*. at 1323.
[87] *Id*. at 1322.
[88] Carey v. Wolnitzek, No. 3:06-36-KKL, 2008 WL 4602786 (E.D. Ky. Oct. 15, 2008).
[89] *Id.* at *1.

political affiliation, even in a non-partisan election.[90] Regarding the solicitation clause, the court noted that the forces against impartiality—the implications of a quid-pro-quo for contributions—are not lessened by requiring an agent to solicit funds for the candidate.[91] Furthermore, the court noted that there was no state interest in "simply making it more comfortable for solicitees to decline to contribute to judicial campaigns."[92]

As with Florida in *Kinsey*, it is interesting that examples of the clauses being upheld come from state courts interpreting their own rules.[93] For example, in *Simes v. Arkansas Judicial Discipline & Disability Commission*, the Arkansas Supreme Court held that the solicitation clause was narrowly tailored because a judge who had directly solicited from a contributor would have a "direct, personal, substantial, pecuniary interest" in the outcome of a case in which the contributor was a party.[94] Harkening back to *Carey*, such a distinction between the judge and his agent is hardly a line in the sand which impartiality cannot cross. Similarly, in *In re Raab*, New York upheld its own partisan activities clause.[95]

E. Mississippi Application

Regarding the status of the judiciary and candidate speech in Mississippi, it is necessary to point out that each of the four clauses evaluated have been held to be unconstitutional in some jurisdictions.[96] Furthermore, each of Mississippi's clauses is similar, if not exactly the same, as the successfully challenged clauses.[97] The only specific application regarding *White* in Mississippi, however, is *Mississippi Commission on Judicial Performance v. Osborne*.[98] In *Osborne*, Judge Solomon Osborne[99] made various "offensive" statements[100] to the Greenwood Voters League[101] concerning the

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[90] *Id*. at *19-20. Of particular interest, the court noted that "permitting a candidate to reveal his political party in advertisements, speeches, and discussions will not change the nominating structure of the election. . . ." *Id*. at *19. This is quite relevant to the state of elections in Mississippi, especially the non-partisan election structure. *See supra* note 16.

[91] *Carey*, 2008 WL 4602768, at *16.

[92] *Id*. (suggesting that potential contributors are less likely to refuse a request from the candidate than from the candidate's agent).

[93] *See supra* text accompanying notes 72-73.

[94] Simes v. Ark. Judicial Discipline & Disability Comm'n, 247 S.W.3d 876, 883 (Ark. 2007).

[95] *In re* Raab, 793 N.E.2d 1287 (N.Y. 2003).

[96] *See supra* notes 58, 80, and 93, and accompanying text.

[97] *Id.*

[98] Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107 (Miss. 2009).

[99] This was Judge Osborne's third encounter with the Mississippi Commission on Judicial Performance. Previously, he had been sanctioned for practicing law as a judge. Miss. Comm'n on Judicial Performance v. Osborne, 876 So. 2d 324 (Miss. 2004). Additionally, Judge Osborne had been penalized for invoking his office in objecting to the repossession of an automobile. Miss. Comm'n on Judicial Performance v. Osborne, 977 So. 2d 314 (Miss. 2008).

[100] Judge Osborne said at the Greenwood Voters League, "White folks don't praise you unless you're a damn fool. Unless they think they can use you. If you have your own mind and know what you're doing, they don't want you around." *Osborne*, 11 So. 3d at 114. *But see* NMC, *Justice Easely in Criminal Cases: There Aren't Two Sides to Every Story*, FOLO, May 16, 2008, http://www.folo.us/2008/05/16/justice-easley-in-criminal-cases-there-arent-two-sides-to-every-story/ (last visited Apr. 7, 2010) (quoting then-Mississippi

appointment of two African-Americans to the Greenwood Election Commission.[102] His speech was made during an election year.[103] Instead of applying *White*, the court inexplicably used the *Pickering*[104] test to determine the propriety of Judge Osborne's statements.[105] The Mississippi Supreme Court determined that Judge Osborne's speech was not a matter of public concern, but that of personal animosity.[106] All hope is not lost on Mississippi, however, for Justices Dickinson and Kitchens each filed a dissenting opinion relying on *White*.[107] Justice Dickinson would have held Judge Osborne's statements to be protected under *White* because he was announcing his views on a disputed political issue as a candidate in an election year.[108]

On the whole, it appears *White* was the beginning of deregulating campaign speech. Following quick on its heels, the partisan activities, solicitation, pledges, promises, and commit clauses have been held to be unconstitutional restrictions on speech in some jurisdictions. Although such a wave of speech acceptance has not fully reached all jurisdictions, particularly Mississippi, it appears that the trend is to recognize the necessity of campaign speech where elections are the method of judicial selection. That being said, progress is often a slow process, and opening one's mouth could lead to martyrdom rather than the appropriate recognition of acceptable candidate speech commenced by *White*.

III. JUDICIAL ELECTIONS IN THE POST-*WHITE* WORLD

Following *White*, the door was opened to increased campaign speech, and accordingly, increased spending to spread candidate views to voters. As Justice O'Connor stated, elections for state judges are frequently "as expensive, or more so, than a campaign for a U.S. Senate seat."[109] According to the Brennan Center, campaign expenditures for television advertising exploded between 2000 and 2004 from $10.6 million to $24.4 million.[110] Much of this advertising came from special interests, as evident from early-cycle spending in Wisconsin in 2008, where third-party expenditures accounted for ninety-five percent of television advertising between February 20, 2008

Supreme Court Justice Charles Easley, "I've got the toughest record of any judge in history, not just on this court. I haven't reversed a conviction in seven and a half years.").

[101] The Greenwood Voters League is a predominantly African-American political organization which regularly endorses candidates sympathetic to the black community. *Osborne*, 11 So. 3d at 112 n.5.

[102] *Id*. at 112.

[103] *Id.*

[104] Pickering v. Bd. of Educ. 391 U.S. 563 (1968). The *Pickering* test looks at content, form, context, and whether the speech was a matter of public concern. *Id.*

[105] *Osborne,* 11 So. 3d at 113.

[106] *Id.*

[107] *Id*. at 119-22.

[108] *Id*. at 122 (Dickinson, J., dissenting).

[109] *See* Sullivan, *supra* note 7.

[110] Brennan Center for Justice, *Buying Time: Television Advertising in the 2004 State Supreme Court Elections*, http://www.brennancenter.org/content/resource/buying_time_television_advertising_in_the_2004_state_supreme_court_election/ (last visited Apr. 7, 2010).

and March 16, 2008.[111] In addition to Wisconsin, Michigan and Alabama saw 2008 television spending on judicial races exceed $3.5 million.[112] A good portion of the special interest money has arisen from battles between trial lawyers and the business community.[113] It is estimated that between 1998 and 2004, the United States Chamber of Commerce spent nearly $50 million on judicial races.[114] This influx of money can create sordid campaigns, as Justice O'Connor called them, "not a very civilized or educational campaign."[115]

In Mississippi in 2008, nearly $3.0 million was raised by candidates for the Mississippi Supreme Court.[116] Furthermore, the winning candidates outspent their opponents nearly two-to-one.[117] In particular, in his successful campaign to unseat Mississippi Supreme Court Chief Justice Jim Smith, Jim Kitchens spent nearly $1.0 million.[118] Illustrating the prevalence of special interests, Jim Kitchens also posted a website, Jim Smith Uncovered, which highlighted political action committee contributions from doctors, bankers, realtors, and manufacturers.[119]

In light of the massive amounts of money spent on judicial campaigns, it could be possible that certain contributions have the potential to sway judicial opinions. Such opinions are not uncommon, and a report in 2001 found that a contributor giving in excess of $250,000 was ten times more likely to have a discretionary review granted than a non-contributor.[120] For contributions of $100,000, the favorable rate drops to only 7.5 times that of non-contributors.[121] However, a counter-argument was posed by the James Madison Center for Free Speech, namely, are decisions fueled by contributions, or do

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[111] Laura MacCleery, et al., *Special Interests Dominate Wisconsin Airwaves in High Court Race*, http://www.brennancenter.org/content/resource/special_interests_dominate_wisconsin_airways_in_high_court_race/ (last visited Apr. 7, 2010).

[112] James Sample, *Buying Time: Spending Rockets Before Elections*, http://www.brennancenter.org/content/resource/buying_time_spending_rockets_before_elections/ (last visited Apr. 7, 2010).

[113] Mike France, et al., *The Battle Over the Courts: How Politics, Ideology, and Special Interests are Compromising the U.S. Justice System*, BUSINESS WEEK, Sept. 27, 2004, *available at* http://www.businessweek.com/magazine/content/04_39/b3901001_mz001.htm.

[114] *Id*.

[115] *See* Hill, *supra* note 47.

[116] *Campaign Finance Reports: 2008 Judicial Candidates*, MISSISSIPPI SECRETARY OF STATE, http://www.sos.state.ms.us/elections/CampFinc/Reports/election.asp (follow drop-down menu to 2008 Judicial Candidates) (last visitedApr. 7, 2010).

[117] *Id*.

[118] *Id*.

[119] The original website, http://www.jimsmithuncovered.com (last visited Oct. 10, 2009), is no longer available online. However, reference is still made to the site on Jim Kitchens' campaign website. *See Jim Smith Uncovered*, JIM KITCHENS FOR SUPREME COURT, http://www.kitchensforjustice.com/2008/10/jim-smith-uncovered/ (last visited Apr. 7, 2010).

[120] Brief for Brennan Center for Justice, et al. as Amici Curiae Supporting Petitioner at *12, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 3165831 (citing Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court*, 10 (2001), *available at* http://info.tpj.org/docs/2001/04/reports/ paytoplay/paytoplay.pdf (last visited Apr. 7, 2010)).

[121] *Id*.

contributions follow favorable decisions in hopes of guaranteeing a predictable judiciary?[122]

IV. *CAPERTON*

On the heels of an explosion in campaign contributions to judicial candidates, *Caperton* arose as the inevitable question of when contributions become excessive and require their beneficiary to recuse himself from a case. Although the Supreme Court noted several times that *Caperton* presented an extreme set of facts,[123] the court did not fully grasp the nature of those facts and the interests involved.[124]

In 2004, Don Blankenship was chief executive officer of Massey Energy and its subsidiary A.T. Massey Coal, Inc.[125] Displeased with the jurisprudence of then-Justice McGraw, Blankenship set out to support McGraw's opponent, Brent Benjamin.[126] In support of Benjamin, Blankenship directly spent $500,000 on literature and advertising opposed to Justice McGraw.[127] He further contributed an additional $2.5 million to And for the Sake of the Kids.[128] Brent Benjamin won that election.[129] In 2006, Massey Coal appealed to the West Virginia Supreme Court a $50 million verdict rendered against the company in a contract dispute.[130] In that appeal, Caperton moved three times for Justice Benjamin's recusal, but was denied each time by Justice Benjamin.[131] The West Virginia Supreme Court, with Justice Benjamin sitting, overturned the verdict against Massey Coal.[132]

The Supreme Court referenced these facts in its opinion in *Caperton*; however, it did not mention one very important piece of information. Don Blankenship owned only .35 percent of Massey Stock.[133] The portion of Blankenship's interest in Massey Stock equated to at most a $175,000 direct interest in the $50 million verdict issued against Massey Coal.[134] Although other Massy Coal items surely arose before the West Virginia

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[122] Brief for James Madison Center for Free Speech as Amici Curiae Supporting Respondents at *17, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22), 2009 WL 298469. The brief further notes that even if there is correlation between contributions and outcomes, such information does not imply causation. *Id*. at *18.
[123] *Caperton*, 129 S. Ct. at 2265 ("On these extreme facts . . . "); *Id*. at 2263 ("this is an exceptional case").
[124] *See infra* notes 136-37 and accompanying text.
[125] Brief of Respondents at *3, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165.
[126] *Id*.
[127] *Id*.
[128] *Id*. at *4. And for the Sake of the Kids was a political action committee formed under 26 U.S.C. 527(e). *Id*.
[129] Brent Benjamin won the vote with more than fifty-three percent of the vote. Tom Searls, *One McGraw Wins a Squeaker Campaign 2004*, CHARLESTON GAZETTE, Nov. 4, 2004 at 1C.
[130] Brief of Respondents, *supra* note 128 at *7-9.
[131] *Id*.
[132] *Id*. at *8. Although Justice Benjamin did not recuse himself, Justice Maynard disqualified himself after pictures surfaced of him vacationing with Blankenship in the French Riviera, and Justice Starcher recused himself based on his public criticisms of Blankenship's involvement in the 2004 election of Justice Benjamin. *Caperton*, 129 S. Ct. at 2258.
[133] Brief of Respondents, *supra* note 128 at *5 n.1.
[134] *Id*.

Supreme Court, it would be illogical to suggest that Don Blankenship spent $3 million of his own money to buy a justice who could secure a personal interest of only $175.000.[135] Lest one confuse Blankenship as the good guy in this equation, according to the record, it appeared that he "treated his business competitors in a manner that blackens the names of honest industrialists everywhere."[136] However, that does not necessarily mean that he tried to buy Justice Benjamin or that Justice Benjamin could be bought.

In resolving the question of whether Justice Benjamin should have disqualified himself from the appeal of Caperton's verdict against Massey Coal, the Supreme Court was rather divided. Justice Kennedy authored the Court's opinion,[137] which looked to the requirements of due process to construct guidelines for recusal when a probability of bias becomes too great.[138] The Court then sought to define probability of bias as a "person with a personal interest in a particular case" who has "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."[139] The Court further refined the inquiry by listing several important factors, including: (1) "the contribution's relative size in comparison to the total amount of money contributed to the campaign," (2) "the total amount spent in the election," and (3) "the apparent effect such contribution had on the outcome of the election."[140] Despite what seems like a test that could be applied to any contribution to determine recusal, the Court stressed that not all contributions create a probability of bias and that *Caperton* was an exceptional case.[141]

Although the majority saw *Caperton* through the eyes of extreme facts, the dissent authored by Chief Justice Roberts viewed a different problem. Chief Justice Roberts, instead, saw courthouses flooded with *Caperton* motions[142] alleging judges are biased, which, in turn, could lead to an erosion of confidence in the judiciary that the majority sought to protect.[143] The dissent also argued that the Court's holding in *Caperton* vastly expanded the notions of due process regarding recusal, namely that a probability of bias had never before been a basis for disqualification.[144] In light of these concerns, and the vague guidance concerning what constitutes an unacceptable probability of bias, Chief Justice Roberts also posed a series of forty questions, including the amount of money required, the amount at stake in the case, whether contributions

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[135] *See Id*. at *7.
[136] Brief for Center for Competitive Politics as Amici Curiae Supporting Respondents at *4, Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (No. 08-22), 2009 WL 298463.
[137] Justice Kennedy was joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Caperton*, 129 S. Ct. at 2256. Chief Justice Roberts filed a dissent, joined by Justices Scalia, Thomas, and Alito. *Id*. Justice Scalia also filed a dissent. *Id*.
[138] *Id*. at 2263.
[139] *Id.* at 2263-64.
[140] *Id*. at 2264.
[141] *Id*. at 2263.
[142] *See, e.g.*, Petition for Writ of Certiorari, HCA Health Servs. of Okla. v. Shinn (U.S. 2009) (No. 09-311), 2009 WL 2918999, *cert. denied* 2009 WL 2912504. *See also* Petition for Writ of Certiorari, Pinnick v. Corboy & Demetrio (U.S. 2009) (No. 09-168), 2009 WL 2459863, *cert. denied* 2009 WL 2444700.
[143] *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting). *See also id*. at 2274-75 (Scalia, J., dissenting).
[144] *Id.* at 2267 (Roberts, C.J., dissenting).

may be imputed to corporations and family members, and whether the biased judge's vote must be outcome-determinative.[145]

Although the questions Chief Justice Roberts posed in the dissent are informative in highlighting the uncertainty created by *Caperton*, a nugget from oral arguments brings to mind visions of high-stakes court poker. In this instance, could a person give a significant amount of money to a judge adverse to that person's interest and then demand recusal?[146] While Caperton's attorney suggests that one should not be allowed to "game the system," the factors presented by the majority would arguably cover such a situation.[147] As pointed out by the James Madison Center for Free Speech, if a person is willing to buy a vote on the court, there is no reason that person would not also buy a vote off the court.[148]

By viewing both the majority and dissent in *Caperton*, it is possible to see some of the tension between free speech and due process drawn out relative to *White*. Particularly, in the states holding judicial elections, participating in the electoral process via campaign contributions may result in the tumult of recusal motions evaluating illusory standards from an extreme case. At the same time, there is obviously some interest in protecting the impartiality and perception of fairness in the judicial system. However, as the current state of the issue shows, where two constitutional rights tug in different directions, there is no perfect answer to settle tensions.

V. EXAMINING THE POST-*WHITE* AND POST-*CAPERTON* WORLD

Justice Kennedy, perhaps, has offered the best understanding of tensions between *White* and *Caperton*. In his concurrence in *White*, Justice Kennedy argued for expansive freedoms regarding campaign speech.[149] At the same time, he argued that while a state could not interfere with or restrict campaign speech, it could place strict recusal standards in excess of due process requirements.[150] In *Caperton*, Justice Kennedy quotes his concurrence in *White* regarding disqualification standards.[151] He adds, "The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards . . . ."[152]

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[145] *Id*. at 2269-72 (Roberts, C.J., dissenting). The questions are numbers 1, 5, 29, and 13, respectively. *Id.*

[146] Transcript of Oral Argument at 56, *Caperton*, 129 S. Ct. 2252 (No. 08-22) ("What about protective donations? You actually give, not three million, but a couple hundred thousand to somebody you don't want deciding your case. And it comes up, and you say, you have to recuse yourself . . .").

[147] *Id*.

[148] Brief for James Madison Center for Free Speech, *supra* note 123 at *28 ("If a party or attorney is willing to spend large amounts of money on behalf of a candidate in the hopes that this candidate will vote in accordance with his interests if elected, then there is no reason why he would not be willing to spend an equal amount of money on behalf of a candidate in order to secure his disqualification.").

[149] *White*, 536 U.S. at 793 (Kennedy, J., concurring). *See also supra* note 50 and accompanying text.

[150] White, 536 U.S. at 794 (Kennedy, J., concurring) ("[Minnesota] may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."). *See also*, Bauer v. Shepard, 634 F. Supp. 2d 912 (N.D. Ind. 2009).

[151] *Caperton*, 129 S. Ct. at 2266-67.

[152] *Id*. at 2267 (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986)).

Mississippi adheres to the American Bar Association recusal requirements found in most states.[153] These standards require disqualification when a judge's impartiality may be reasonably questioned.[154] However, the question of reasonableness, arguably, is as vague as the standards announced in *Caperton*. Somewhat ameliorating the vagueness and addressing the monetary interest in *Caperton*, Mississippi also contains a provision relating to major campaign donors.[155]

Although recusal may address the due process considerations, it nonetheless conflicts with the First Amendment. Namely, if a person inputs too much "speech" into a campaign via contributions or independent expenditures, that person may be deprived of the benefits of the judicial philosophy elected. Looking back to *White*, the Court stated bias for or against a particular legal view was not a state interest.[156] Now, under *Caperton* and the interest of due process, that definition of impartiality can be elevated to a constitutional issue.

Aside from recusal requirements, another method employed to curb the possibilities of unduly influencing the judiciary through campaign contributions is public financing. North Carolina instituted an optional public financing system in 2002.[157] The system prevented candidates who opted out of public financing from soliciting contributions within twenty-one days of an election.[158] Holding that the public financing system protected a vital state interest in an impartial judiciary, the Fourth Circuit affirmed the district court's dismissal of this challenge to the public financing option.[159] Despite the favor this alternative found with the Fourth Circuit, it does little to resolve the tensions between *White* and *Caperton*. In effect, sole public financing could either run into excessive *Caperton* style independent expenditures or face an abridgement of large-scale speech by anybody other than the candidate.[160]

VI. CONCLUSION

Despite the potential attractiveness, or functionability as imperfect solutions, of recusal standards or public financing, neither resolves the tension between due process and free speech as illuminated in the comparison of *White* and *Caperton*. Although each option provides a workable solution, neither accounts for all possibilities. From *White*, a candidate may announce views on disputed legal and political issues, but may then have

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[153] MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(1) (2002). *See also Caperton*, 129 S. Ct. at 2266 ("disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.").

[154] MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(1).

[155] *Id.* at Canon 3E(2) ("A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge.").

[156] *See supra* note 43.

[157] N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 432 (4th Cir. 2008). *See also* N.C. GEN. STAT. §§ 163-278.61-278.79.

[158] *Leake*, 524 F.3d at 434.

[159] *Id*. at 441.

[160] *See White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech.").

to disqualify himself from hearing any cases regarding those issues. Similarly, from *Caperton*, an interested voter may contribute to campaigns and make independent expenditures but then be prevented from benefiting from the judicial philosophies elected. As the lower courts begin to break the limitations imposed by codes of judicial conduct regarding the pledges, promises, commit, political activities, and solicitation clauses, more doors are opened, each of which likely leads to increased recusals. Where *Caperton* addressed monetary contributions, will the next case address endorsements solicited by the candidate, campaign speeches, or ideological biases? Or, will the issue be left to recusal standards and self-answered questions of impartiality by individual judges such as Justice Benjamin? In the end, although *White* sought to improve the judiciary through more informed elections and *Caperton* sought to maintain a judiciary free from the specter of bias and unfairness, it is possible that such endeavors to resolve the tensions between the First Amendment and Due Process Clause simply revert to the paradox highlighted by Chief Justice Roberts—that an effort to improve confidence in the judiciary may only result in reduced confidence and distrust.[161]

[161] *See supra* text accompanying note 146.