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Save it for the Judge? A Case Study on the Effects of Big Money on State Judicial Elections and the Call for Stronger Recusal Rules

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COMMENT

Save it for the Judge? A Case Study on the Effects of Big Money on State Judicial Elections and the Call for Stronger Recusal Rules

Gustavo A. Jimenez*

Abstract

Elected judges take an oath to be impartial in upholding the law. This is easily called into question when judges hear a case from parties that contributed large amounts of money into their judicial campaigns. The Wisconsin Supreme Court was once considered a model of an impartial and non-partisan state court system. However, state politics and U.S. Supreme Court jurisprudence have led to developments that have damaged the court's reputation, politicized the court, and undermined the legitimacy of the Wisconsin Supreme Court. Many interest groups contribute large amounts into judicial campaigns to get judges elected who they hope will rule in their favor and further interest groups' agendas. As judicial elections around the country become more expensive and politicized, judicial elections begin to look like partisan races. The Wisconsin Supreme Court case study serves as an example for other states who elect their judges as to what can happen if they do not amend their recusal rules regarding campaign contributions or fail to enact mechanisms to ensure judges properly recuse themselves when necessary. We need an impartial judiciary, smart and fair judges to ensure due process and to preserve the legitimacy of the judiciary.

INTRODUCTION

For years the Wisconsin Supreme Court was considered an exemplary legal body.¹ Before 2007, the Wisconsin Supreme Court “had a national reputation for having among the most respected, impartial, non-partisan, fair and trusted state

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¹ See Emily Mills, *The Unbelievable True Story of Wisconsin's Supreme Court and What's at Stake (Updated)*, REWIRE.NEWS (Mar. 22, 2018, 1:15 PM), <https://rewire.news/article/2018/03/22/unbelievable-true-story-wisconsins-supreme-court-whats-stake/>.

court systems in the nation.”² Many Wisconsinites believed that their state courts were above politics, impartial, and uncompromised by outside lobbying groups and campaign contributions.³ The case today presents a different story. A significant influx of outside spending on campaign contributions has destroyed the Wisconsin Supreme Court’s reputation, polarized the court, damaged the public’s perception of it, and undermined the legitimacy of the judiciary.⁴

Statements and actions by the conservative Wisconsin Supreme Court justices have made it clear that they do not see an issue with the state’s current recusal rule as it applies to campaign contributions. U.S. Supreme Court jurisprudence has opened the floodgates to an increase of campaign contributions that has helped the Wisconsin legislature enact laws allowing unlimited campaign coordination and contributions. In this Comment I argue why Wisconsin needs to amend its recusal rules, and present and evaluate proposed reforms that the state should implement given the erosion of judicial campaign spending safeguards in the last decade.

In order for the public to trust and have confidence in the judiciary, it is important that judges not only be fair and impartial in upholding the rule of law but that they *appear* so to the public.⁵ Judicial recusal, or disqualification, is “the removal of a judge (voluntary or otherwise) from a case because the judge has—or may appear to have—an interest or involvement in . . . the case” that would prevent him or her from reaching an unbiased decision.⁶ Disqualification is important in ensuring parties have a fair hearing and cases are adjudicated by an impartial judge.⁷ Disqualification is a reactive remedy, meaning that it comes into play after a judge has done something that calls his impartiality into question.⁸ The Fourteenth Amendment’s Due Process Clause and a state’s constitution, statutes, and case law govern recusal in state courts.⁹ Elected judges take an oath to be impartial. Judges’

² Jay Heck, *Stronger Judicial Recusal Rules Vital for an Impartial State Judiciary*, PR WATCH (Feb. 12, 2018, 12:05PM), <https://www.prwatch.org/news/2018/02/13319/stronger-judicial-recusal-rules-vital-impartial-state-judiciary>.

³ *Id.*

⁴ See Mills, *supra* note 1.

⁵ See Charles G. Geyh, *Why Judicial Disqualification Matters. Again*, 30 REV. LITIG. 671, 690–93 (2011).

⁶ RUSSELL WHEELER & MALIA REDDICK, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., JUDICIAL RECUSAL PROCEDURES, JUDICIAL RECUSAL PROCEDURES 1 (2017), http://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf; see also *Definitions*, JUD. DISQUALIFICATION RESOURCE CTR, <http://www.judicialrecusal.com/judicial-disqualification-definition/> (“Technically ‘recusal’ often refers to the act by which a judge recuses herself, whereas ‘disqualification’ refers to the removal of a judge on a party’s motion, but many judges have used the terms ‘recusal’ and ‘disqualification’ interchangeably.”). I use the words “recusal” and “disqualification” interchangeably.

⁷ CHARLES G. GEYH, *COURTING PERIL* 105 (2016).

⁸ Charles Gardner Geyh, *Judicial Elections in the Aftermath of White, Caperton, and Citizens United*, THE ADVOCATE, Winter 2010, at 78, 80.

⁹ WHEELER & REDDICK, *supra* note 6, at 1.

impartiality can easily be called into question when they hear a case from parties that contributed large amounts of money into their judicial campaigns. Ideally, in these instances, judges should recuse themselves from a case.

Part I begins by presenting the Wisconsin Supreme Court as a case study, including the rise of big money in judicial elections, the development of the current recusal rules, and their effects on the court as a whole. Part II explores some of the underlying causes for the state of today's Wisconsin's Supreme Court elections including major U.S. Supreme Court decisions and changes to Wisconsin's campaign finance laws. Part III proposes and evaluates reforms to Wisconsin's current recusal rule as well as enforcement mechanisms to restore legitimacy and confidence in the court. Part IV then briefly presents some general takeaways from the Wisconsin Supreme Court case study as state judicial elections around the country become more expensive and politicized. Finally, Part V discusses the last three Wisconsin Supreme Court elections and how those outcomes have shaped the court.

There is a clear divide along ideological lines regarding views of the current recusal rule. Moreover, both liberal-backed candidates and conservative-backed candidates in recent elections have been pretty transparent about their stance on the state's recusal rule. Politics and ideologies aside, Wisconsin needs to adopt a stronger recusal rule given how expensive judicial elections have become. To get the Wisconsin Supreme Court back on track, any notions of partiality and perceptions of bias need to be eliminated.

I. THE WISCONSIN SUPREME COURT CASE STUDY

A. A Brief Overview of the Wisconsin Supreme Court

The Wisconsin Supreme Court is the state's highest court and is composed of seven justices.¹⁰ The court has appellate jurisdiction over all Wisconsin courts.¹¹ Each justice is elected to serve a ten-year term in statewide, non-partisan elections.¹² The Code of Judicial Conduct, under Chapter 60 of the state's Supreme Court Rules, lays out the ethics rules that govern the members of the Wisconsin judiciary.¹³

The rules' language shows us that Wisconsin recognizes the importance of ensuring that impropriety, or the appearance of impropriety, be kept out of legal proceedings. Wisconsin Supreme Court Rule 60.04(1) states that "a judge may not be swayed by partisan interests" and will perform all judicial duties "without

¹⁰ *Supreme Court*, WIS. CT. SYS., <https://wicourts.gov/courts/supreme/index.htm> (last updated Dec. 17, 2018).

¹¹ *Id.*

¹² The current Wisconsin Supreme Court is made up of Chief Justice Patience D. Roggensack, Justice Ann W. Bradley, Justice Annette K. Ziegler, Justice Rebecca G. Bradley, Justice Daniel Kelly, Justice Rebecca F. Dallet, and Justice Brian Hagedorn. *See Supreme Court: Justices*, WIS. CT. SYS., <https://wicourts.gov/courts/supreme/justices/index.htm> (last updated Aug. 15, 2019). Justice Kelly's current terms ends on July 31, 2020, after which the Honorable Jill Karofsky will assume the bench as an associate justice.

¹³ *See* WIS. SUP. CT. R. 60.

creating or manifesting bias or prejudice.”¹⁴ Supreme Court Rule 60.04(4) states that a judge shall recuse himself or herself from a proceeding when the judge knows, or reasonably should know, that there are facts and circumstances that would cast doubt into the judge’s ability to be impartial in a proceeding.¹⁵ The disqualification rule, Wisconsin Statutes section 757.19, lays out when recusal is necessary.¹⁶ However, the rule does not recognize how campaign contributions can also lead to apparent or actual bias. In Wisconsin, a justice has the sole authority to decide whether to recuse himself or herself,¹⁷ and it is a subjective decision.¹⁸

B. The Rise of Big Money in Wisconsin

Over the last decade, big money has entered Wisconsin’s judicial elections with force. Interest groups have spent over \$13.2 million supporting supreme court candidates.¹⁹

Lincoln Caplan, a Yale Law School lecturer and research scholar, states that “money-fueled and often nasty judicial elections, ha[ve] intensified the turn of the Wisconsin Supreme Court from a congenial moderately liberal institution into a severely divided conservative stronghold . . . [and] reduced it from one of the nation’s most respected state tribunals into a disgraceful mess.”²⁰

The story begins with the 2007 judicial election of Justice Annette K. Ziegler. Her campaign spent \$1.4 million, which was coupled with \$2.5 million and \$400,000 in undisclosed expenditures on issue ads from Wisconsin Manufacturers & Commerce (WMC) and the Wisconsin Club for Growth (WCFG), respectively: two very conservative special-interest groups.²¹ Justice Ziegler went on to face ethics charges by the Judicial Commission for not recusing herself from hearing a case in

¹⁴ WIS. SUP. CT. R. 60.04(1)(b), (e) (“A Judge shall perform the duties of judicial office impartially and diligently.”). It is worth noting that the comment to subsection (e) of the rule states, “[a] judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.” WIS. SUP. CT. R. 60.04(1)(e) cmt.

¹⁵ WIS. SUP. CT. R. 60.04(4).

¹⁶ WIS. STAT. § 757.19 (2019).

¹⁷ See *State v. Henley*, 2010 WI 12, 322 Wis. 2d 1, 778 N.W.2d 853.

¹⁸ WIS. STAT. § 757.19(2)(g) note (2019) (citing *State v. Am. TV & Appliance*, 443 N.W.2d 662 (Wis. 1989)).

¹⁹ Molly Beck, *Analysis: Last 6 State Supreme Court Races Attracted 13.2M in Issue Ad Spending*, WIS. ST. J. (Jan. 11, 2016), https://madison.com/wsj/news/local/govt-and-politics/analysis-last-state-supreme-court-races-attracted-m-in-issue/article_b670e7c4-7bb5-5771-9153-c224ce696389.html.

²⁰ Lincoln Caplan, *The Destruction of the Wisconsin Supreme Court*, THE NEW YORKER (May 5, 2015), <https://www.newyorker.com/news/news-desk/the-destruction-of-the-wisconsin-supreme-court>.

²¹ See Brendan Fischer, *Justices in Walker Criminal Probe Face Conflicts of Interest*, PR WATCH (Oct. 6, 2014, 8:48 AM), <https://www.prwatch.org/news/2014/10/12617/justices-walker-criminal-probe-face-conflict-interest>; see also Jim Pugh, *WMC: Big Stakes for Supreme Court Election*, WIS. MANUFACTURERS & COM. (Jan. 7, 2013), <https://www.wmc.org/issues/wmc-taking-on-personal-injury-lawyers>.

which she had a clear conflict of interest.²² Justice Ziegler became the first Wisconsin Supreme Court Justice to be reprimanded by the court, which deemed her conduct “serious,” “willful,” and “inexcusable” and noted that the conduct “diminishes [the] public’s confidence in the legal system.”²³ The public was not satisfied with the punishment and saw the reprimand as belittling the gravity of her violation.²⁴

In the 2008 judicial election, Justice Michael Gableman narrowly defeated Justice Louis Butler (the first incumbent to lose since 1967).²⁵ WMC spent \$2.25 million in undisclosed money on issue ads; five-and-a-half times the amount of the justice’s own campaign.²⁶ The WCFG added another \$500,000.²⁷ WMC sponsored a “nasty” issue ad portraying Justice Butler as being soft on crime and protecting criminal defendants.²⁸ The Wisconsin Judicial Commission filed a complaint against Justice Gableman for knowingly misrepresenting facts in one of his campaign ads against his opponent.²⁹ The Wisconsin Supreme Court’s decision on Justice Gableman’s misconduct ended in a deadlock tie vote divided along partisan lines.³⁰ The three conservative justices argued that the ad was protected by the First Amendment because even though the ad was “distasteful,” it was “objectively true.”³¹ The complaint was dropped,³² but this would not be the only ethical violation Justice Gableman would face.³³

²² The case involved a bank on whose board her husband sat. See Fischer, *supra* note 21.

²³ Bill Lueders, Opinion, *Justice, Annette Ziegler-Style: Why Settle for One Standard When You Can Have Two?*, ISTHMUS (June 5, 2008), <https://isthmus.com/opinion/opinion/justice-annette-ziegler-style/>.

²⁴ See Jonathan Turley, *The Thin Black Line: Wisconsin Supreme Court Reprimands Justice Annette Ziegler – Refusing More Serious Discipline for Violating Conflicts of Interest Rules*, JONATHANTURLEY.ORG (Jan. 4, 2008), <https://jonathanturley.org/2008/01/04/the-thin-black-line-wisconsin-supreme-court-reprimands-justice-annette-ziegler-refusing-more-serious-discipline-for-violating-conflicts-of-interest-rules/>.

²⁵ Pugh, *supra* note 21.

²⁶ *Id.*

²⁷ Fischer, *supra* note 21.

²⁸ Bill Mears, *Big Money, Nasty Ads Highlight Wisconsin Judicial Race*, CNN POL. (Mar. 31, 2008, 12:40 PM), <http://www.cnn.com/2008/POLITICS/03/31/wisconsin.judicial.race/>.

²⁹ The issue ad in question portrayed then-Justice Butler as releasing a child molester from prison when he was a public defender, which resulted in another offense. See Lincoln Caplan, *Justice for Sale*, AM. SCHOLAR (June 1, 2012), <https://theamericanscholar.org/justice-for-sale/>.

³⁰ *In re* Judicial Disciplinary Proceedings Against Gableman, 2010 WI 61, ¶¶ 4, 108–09, 325 Wis. 2d 579, 784 N.W.2d 605 (per curiam).

³¹ Ryan J. Foley, *Supreme Court Deadlocks in Gableman Ethics Case*, WIS. ST. J. (July 1, 2010), https://madison.com/wsj/news/local/govt_and_politics/supreme-court-deadlocks-in-gableman-ethics-case/article_059e2f86-8522-11df-83b6-001cc4c03286.html.

³² *Ethics Complaint filed Against Justice Gableman*, WIS. L.J. (Jan. 10, 2012, 1:56 PM), <https://wislawjournal.com/2012/01/10/ethics-complaint-filed-against-wis-justice/>.

³³ It was discovered that Justice Gableman had received “the unpaid counsel from a law firm that regularly appeared before him and the court.” Justice Gableman previously ruled in favor of the

The amounts of campaign spending in the 2007 and 2008 elections did not go unnoticed. In 2009, the League of Women Voters of Wisconsin petitioned the Wisconsin Supreme Court to adopt a rule that would force a justice to recuse himself or herself from a case when a party had donated \$1,000 or more to the justice's campaign, either directly or through an interest group.³⁴ The court rejected the petition by a 4-3 vote.³⁵ Instead, in 2010, the Wisconsin Supreme Court adopted a new recusal rule by a 4-3 conservative majority that allows Wisconsin judges to hear cases involving their campaign contributors or sponsors of independent expenditures.³⁶ This recusal "non-standard" rule was written by the Wisconsin Realtors Associations and WMC—two conservative interest groups and major contributors in many Wisconsin judicial elections.³⁷

Big money continued to play a role in securing conservative wins in Wisconsin's judicial elections. In 2011, Justice David Prosser barely won re-election by a narrow margin of just over 7,000 votes.³⁸ WMC and the WCFG spent \$2 million and \$520,000, respectively, on Justice Prosser's re-election campaign.³⁹ In 2013, WMC and the WCFG spent a total of \$850,000 in campaign contributions to re-elect Justice Patience D. Roggensack.⁴⁰ Her win secured conservative control of the Wisconsin Supreme Court.⁴¹

The recusal rule in Wisconsin had lost its teeth. The rule, written by conservative parties, seemed to come in handy when conservative interest groups WMC and WCFG petitioned the court to shut down what became known as the "John Doe criminal investigations."⁴² The 2012 investigation began after

firm in a 4-3 decision. Recusal should have occurred as his impartiality could have easily be called into question. Caplan, *supra* note 29.

³⁴ See Heck, *supra* note 2.

³⁵ *Id.*; see also Patrick Marley, *Court Adopts New Campaign Donation Rules*, MILWAUKEE J. SENTINEL (Jan. 21, 2010), <http://archive.jsonline.com/news/statepolitics/82319592.html>.

³⁶ Alex De Grand, *Wisconsin Supreme Court Adopts Amended Recusal Rules*, ST. BAR WIS. (Jan. 22, 2010), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=2&Issue=3&ArticleID=5794>.

³⁷ WIS. SUP. CT. R. 60.04(7); see also Editorial, *How to Clean Up Wisconsin Supreme Court Mess*, CAP TIMES (Oct. 5, 2017) [hereinafter *Cap Times Editorial*], https://madison.com/ct/opinion/editorial/editorial-how-to-clean-up-wisconsin-supreme-court-mess/article_1e935d85-faa9-5d38-b696-5c703e352088.html.

³⁸ Fischer, *supra* note 21.

³⁹ Once again, the money was not disclosed. *Id.*

⁴⁰ *Id.*

⁴¹ See Bruce Murphy, *Wisconsin Supreme Court Justice Pat Roggensack Wins Second Term as Big Liberal Money Sits out Race*, ISTHMUS (Apr. 3, 2013), <https://isthmus.com/news/news/wisconsin-supreme-court-justice-pat-roggensack-wins-second-term-as-big-liberal-money-sits-out-race/>.

⁴² See Ed Pilkington, *Scott Walker, the John Doe Files, and How Corporate Cash Influences U.S. Politics*, GUARDIAN (Sep. 14, 2016), <https://www.theguardian.com/us-news/ng-interactive/2016/sep/14/john-doe-files-scott-walker-corporate-cash-american-politics>. A "John Doe proceeding" is an investigative tool codified in Wisconsin law used to determine whether crimes have been committed and by whom. WIS. STAT. § 968.26 (2015).

prosecutors alleged that Wisconsin Governor Scott Walker was “part of an elaborate effort to illegally coordinate fund-raising and spending between his campaign and [outside] conservative groups during efforts to recall him and several state senators.”⁴³ Prosecutors asked some of the justices on the Wisconsin Supreme Court to recuse themselves from hearing challenges to the investigation.⁴⁴ Both Justice Prosser and Justice Gableman, two conservative justices who won their seats by narrow margins in great part to conservative interest groups’ efforts, refused to recuse themselves from the case.⁴⁵

In July of 2015, the court’s decision in *State ex rel. Two Unnamed Petitioners v. Peterson* closed the investigation by a 4-2 decision⁴⁶ into the unlawful campaign coordination and declared that the coordination did not violate the law because it only involved issue ads.⁴⁷ The Wisconsin Supreme Court ruled that Walker’s campaign, which included the support of conservative groups, did not violate any campaign-finance laws by evading campaign finance disclosures requirements and contribution limits right before the 2012 recall vote.⁴⁸ Justice Gableman’s majority opinion exculpated the groups and rewrote Wisconsin’s campaign finance laws allowing candidates and justices alike to “permissibly work hand in-glove with ‘independent’ groups that take unlimited, secret donations as long as they only coordinate regarding issue ads.”⁴⁹ Also in 2015, Walker and the legislature put the nail in the coffin of campaign contribution limits by repealing the longstanding prohibitions on campaign coordination between candidates and “independent”

⁴³ Monica Davey & Nicholas Confessore, *Wisconsin Governor at Center of a Vast Fund-Raising Case*, N.Y. TIMES (June 19, 2014), <https://www.nytimes.com/2014/06/20/us/scott-walker-wisconsin-governor.html>.

⁴⁴ See Brendan Fischer, *Prosecutor in Scott Walker Probe Asks Justices to Recuse*, PR WATCH (Feb. 13, 2015, 3:03 PM), <https://www.prwatch.org/news/2015/02/12734/walker-wisconsin-supreme-court-recuse>.

⁴⁵ See Pilkington, *supra* note 42; see also Mary Bottari, *Cleaning Up the Courts, Citizen Hearings at Three Locations in Wisconsin*, PR WATCH (Sept. 29, 2017, 6:14 PM), <https://www.prwatch.org/news/2017/09/13287/cleaning-courts-citizen-hearings-three-locations-wisconsin>.

⁴⁶ Justice Ann Walsh Bradley recused herself because her son was a member of a law firm participating in the case. See Patrick Marley & Mary Spicuzza, *Wisconsin Supreme Court Ends John Doe Probe into Scott Walker's Campaign*, MILWAUKEE J. SENTINEL (July 16, 2015), <http://archive.jsonline.com/news/statepolitics/wisconsin-supreme-court-ends-john-doe-probe-into-scott-walkers-campaign-b99535414z1-315784501.html/>.

⁴⁷ *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, 363 Wis. 2d 1, 866 N.W.2d 165. The decision interpreted Wisconsin Statute 11.01 and limited the definition of “political purpose” to express advocacy, leaving issue advocacy unregulated. See Amanda R. Schwarzenbart, Comment, *Coordination is Corruption: An Argument for the Regulation of Coordinated Issue Advocacy Under Campaign Finance Law*, 66 EMORY L.J. 1493, 1507 (2017).

⁴⁸ *Two Unnamed Petitioners*, 2015 WI 85, ¶¶10–11; see also Patrick O’Connor, *Wisconsin Court Ends Investigation into Scott Walker’s Recall Election Bid*, WALL ST. J. (July 16, 2015, 11:59 AM), <https://www.wsj.com/articles/wisconsin-court-ends-investigation-into-scott-walkers-recall-election-bid-1437062374>.

⁴⁹ Lynn Adelman, *How Big Money Ruined Public Life in Wisconsin*, 66 CLEV. ST. L. REV. 1, 26 (2017).

outside interest groups.⁵⁰ As the law stands today, the contribution amount an individual can make to a state Supreme Court Race is capped at \$20,000.⁵¹ Political parties, political action committees, legislative campaign committees, independent expenditure groups, and issue ad groups generally have no contribution limits.⁵²

The large amounts of campaign contributions in judicial elections over the past decade that helped the conservative justices win their seats seem to have also led to a decline in the collegiality among the justices. In 2012, a complaint of misconduct was filed against Justice Prosser due to his lack of proper decorum and for calling then-Chief Justice Shirley Abrahamson “a total bitch” in the presence of the other justices.⁵³ The second count in the complaint came from the liberal Justice Ann W. Bradley who accused Justice Prosser of choking her as the justices deliberated during their conference.⁵⁴ Justice Prosser filed motions for the recusal of the rest of the justices as they had each been “a material witness and [because] two [justices] had reported the conduct that led to the complaint.”⁵⁵ All but Justice Crooks, who invoked the rule of necessity, recused themselves from the case.⁵⁶ Justice Prosser did not face criminal charges,⁵⁷ but these events showed the tension and division of the court following the Judicial Commission’s internal investigation.

On April 7, 2015, voters considered a referendum to amend the Wisconsin Constitution.⁵⁸ The referendum would change the selection process for the state’s chief justice from a seniority system to a majority vote by the seven Wisconsin Supreme Court justices.⁵⁹ The liberal Greater Wisconsin Committee urged a vote against the referendum as the amendment would take the vote away from the people.⁶⁰ Conservative supporters saw the decision as a way of making the courts

⁵⁰ See Heck, *supra* note 2.

⁵¹ *Campaign Finance: Contribution Limits*, ST. WIS. ETHICS COMMISSION, <https://ethics.wi.gov/Pages/CampaignFinance/ContributionLimits.aspx> (last visited Feb. 21, 2020).

⁵² See *id.*

⁵³ Caplan, *supra* note 20.

⁵⁴ Frank James, *Wisconsin’s Alleged High-Court Choking Incident Gets Two Probes*, NPR (June 28, 2011, 5:35 PM), <https://www.npr.org/sections/itsallpolitics/2011/06/28/137480847/wisconsins-alleged-high-court-choking-incident-gets-two-probes>.

⁵⁵ Caplan, *supra* note 20.

⁵⁶ Wis. Judicial Comm’n v. Prosser, 2012 WI 69, 341 Wis. 2d 656, 817 N.W.2d 830.

⁵⁷ Steven Elbow, *No Charges for Justice Prosser in High Court Ruckus*, CAP TIMES (Aug. 25, 2011), https://madison.com/ct/news/local/crime_and_courts/blog/no-charges-for-justice-prosser-in-high-court-ruckus/article_1a274f3e-cdae-11e0-9bd6-001cc4c002e0.html.

⁵⁸ Tom Kertscher, *Would Wisconsin Voters No Longer Decide Who Leads the State Supreme Court?*, POLITIFACT (Apr. 3, 2015, 5:00 AM), <https://www.politifact.com/wisconsin/statements/2015/apr/03/greater-wisconsin-political-fund/would-wisconsin-voters-no-longer-decide-who-leads-/>; see also 2015 S.J. Res. 2, 2015–2016 Leg., Reg. Sess. (Wis. 2015), <http://docs.legis.wisconsin.gov/2015/related/proposals/sjr2>.

⁵⁹ See Kertscher, *supra* note 58.

⁶⁰ Scott Bauer, *Patience Roggensack Elected Chief Justice; Shirley Abrahamson Says She Still Holds Post*, WIS. ST. J. (Apr. 29, 2015), <https://madison.com/wsj/news/local/govt-and->

fairer by adding merit to the democratic process.⁶¹ Others saw the referendum as “pure political hardball” with political implications and a partisan majority attack on Justice Abrahamson.⁶² The referendum passed, and Justice Abrahamson was ousted from her position as Chief Justice—a position she had held since 1996.⁶³

Justice Roggensack became Wisconsin’s new Chief Justice by a majority conservative vote.⁶⁴ She then went on to speak on a very conservative radio station known to promote Republican campaigns and conservative causes.⁶⁵ Chief Justice Roggensack’s decision could be seen as a clear partisan message to voters—a conservative majority view that neither advances the court’s impartiality nor its democratic values. Wisconsin is now one of twenty-three states where the justices select their chief justice by a majority vote.⁶⁶

Wisconsin is now considered to be one of the four worst states in the country for its recusal standards when judges receive campaign contributions.⁶⁷ The Center for American Progress created a grading scale to identify and evaluate states’ recusal rules across the country to determine whether elected judges address the conflict of interest that can arise from campaign contributions in million-dollar judicial elections.⁶⁸ Wisconsin received a failing grade, with only thirty-five points, due in part to its recusal rule.⁶⁹ The influence of money has clearly moved Wisconsin away from holding “non-partisan” judicial elections for the state’s supreme court seats.

II. UNDERLYING CAUSES: U.S. SUPREME COURT DECISIONS

On a national level, developments in U.S. Supreme Court jurisprudence contributed to Wisconsin’s current status. In 2002, the U.S. Supreme Court decided *Republican Party of Minnesota v. White*, which held that judicial candidates cannot

politics/patience-roggensack-elected-chief-justice-shirley-abrahamson-says-she-still/article_76ebef79-7e77-54de-823b-f4fb74f0895d.html.

⁶¹ See Patrick Marley, *Groups Decry Chief Justice Referendum*, MILWAUKEE J. SENTINEL (Mar. 23, 2015), <http://archive.jsonline.com/blogs/news/297272861.html>.

⁶² *Id.*

⁶³ Bauer, *supra* note 60.

⁶⁴ *Id.*

⁶⁵ Bruce Murphy, *Lady MacBeth of the Supreme Court*, URB. MILWAUKEE (May 7, 2015, 10:56 AM), <https://urbanmilwaukee.com/2015/05/07/murphys-law-lady-macbeth-of-the-supreme-court/>.

⁶⁶ Caplan, *supra* note 20.

⁶⁷ *Cap Times Editorial*, *supra* note 37.

⁶⁸ The grading criteria was partially based on the American Bar Association Model Code of Judicial Conduct and reform proposals from the Brennan Center for Justice and other fair-court advocates, as well as the *Caperton v. Massey* decision. See Billy Corrier & Jake Paiva, *State Judicial Ethics Rules Fail to Address Flood of Campaign Cash from Lawyers and Litigants*, CTR. FOR AM. PROGRESS (May 7, 2014, 9:33 AM), <https://www.americanprogress.org/issues/courts/reports/2014/05/07/89068/state-judicial-ethics-rules-fail-to-address-flood-of-campaign-cash-from-lawyers-and-litigants-2/>.

⁶⁹ *Id.*

be prohibited by state statutes from announcing their views on disputed legal and political issues.⁷⁰

In 2009, the U.S. Supreme Court decision *Caperton v. A.T. Massey Coal Co.* held that a litigant's due process rights were violated under the Eighteenth Amendment when state supreme court Justice Brent Benjamin failed to recuse himself in an appeal after he had received over three million dollars in campaign donations from Massey's chief executive officer.⁷¹ The Court asserted:

[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.⁷²

The Court noted that while recusal is not always necessary when a judge received campaign contributions from parties to a suit, this case presented “extreme facts” that created the risk of actual bias rising “to an unconstitutional level.”⁷³

Under the standards set out in *Caperton*, the proper action for Justice Prosser and Justice Gableman should have been recusal when the Wisconsin Supreme Court decided to cease the John Doe investigations. Because both justices won their seats by a narrow margin, the risk of bias was very strong.⁷⁴ Ironically, Justice Prosser, who previously moved for the Justices' recusal from his disciplinary charge,⁷⁵ refused to recuse himself here when money was involved.⁷⁶

The campaign contribution landscape continued to change in 2010 when the U.S. Supreme Court decided *Citizens United v. FEC*.⁷⁷ The Court held that under the First Amendment, the government may not suppress political speech on the

⁷⁰ 536 U.S. 765, 788 (2002).

⁷¹ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 873 (2009).

⁷² *Id.* at 884.

⁷³ *Id.* at 886–87.

⁷⁴ See Brendan Fischer, *Supreme Court Challenge to WI Dark Money Probe Raises Questions of Judicial Ethics*, PR WATCH (Feb. 19, 2014, 9:02 AM), <https://www.prwatch.org/news/2014/02/12389/new-challenge-john-doe-raises-questions-judicial-ethics>; see also Editorial, *The Ethics Collapse of Justice Michael Gableman and David Prosser*, CAP TIMES (Sept. 21, 2016), https://madison.com/ct/opinion/editorial/editorial-the-ethical-collapse-of-justices-michael-gableman-and-david/article_15ace076-2fd2-5641-92ab-f6a470c79df8.html.

⁷⁵ See Caplan, *supra* note 20.

⁷⁶ See Bottari, *supra* note 45.

⁷⁷ 558 U.S. 310 (2010).

basis of the speaker's corporate identity.⁷⁸ Thus, "unless a donor receives an agreed-upon benefit in exchange for a contribution, the donation cannot rise to the level of being a corruptive influence sufficient to justify congressional regulation of the free speech rights of a corporation . . . providing campaign money."⁷⁹ This decision limited Congress's ability to limit campaign finance.⁸⁰ Writing for the majority, Justice Kennedy stated that there were very few campaign contributions that actually involved quid pro quo arrangements, and that a corporation's independent expenditure did not rise to the level of corruption.⁸¹ In the dissenting opinion, Justice Stevens recognized and warned that the Court's ruling would "undermine the integrity of elected institutions across the Nation."⁸² This was certainly the case in Wisconsin.

After *Citizens United*, the Wisconsin legislature and Governor Scott Walker made several changes to Wisconsin's campaign finance laws that changed the nature of political advertising. The legislature eliminated public financing for state candidates in 2011,⁸³ repealed the Impartial Justice law,⁸⁴ and repealed the prohibitions on campaign coordination between candidates and independent interest groups in 2015.⁸⁵ The current campaign finance laws—under Wisconsin Act 117⁸⁶—only regulate express advocacy by third-parties, leaving issue advocacy unregulated.⁸⁷

The decisions at both the federal and state level seemed to open the floodgates and introduce third-party advertisements to attack or support the candidates in Wisconsin judicial elections.⁸⁸ The only issue ads in Wisconsin from

⁷⁸ *Id.* at 372.

⁷⁹ Christopher Terry & Mitchell T. Bard, *Judicial Elections and Issue Advertising: A Two State Study*, 39 U. ARK. LITTLE ROCK. L. REV. 579, 582 (2007).

⁸⁰ *See Citizens United*, 558 U.S., at 372 (2010).

⁸¹ *Id.* at 357.

⁸² *Id.* at 396 (Stevens, J., dissenting).

⁸³ *See* Bill Lueders, *Public Financing of Elections a State Budget Casualty*, WIS. ST. J. (July 4, 2011), https://madison.com/wsj/news/local/govt-and-politics/elections/public-financing-of-elections-a-state-budget-casualty/article_3dfcc38a-a63f-11e0-ad5d-001cc4c03286.html. The system, enacted in 1978, was considered one of the best public campaign financing laws in the nation for limiting funding to participating candidates. *See* STEVEN M. LEVIN, PUBLIC CAMPAIGN FINANCING IN WISCONSIN: SHOWING ITS AGE 6 (2008) (discussing how the Wisconsin Legislature's previous campaign finance reform law created contribution limits, a strong campaign finance disclosure program, and voluntary expenditure ceilings linked to public financing programs).

⁸⁴ *See* Heck, *supra* note 2 ("[The Impartial Justice Law] had provided full public financing elections to candidates for the Wisconsin Supreme Court who voluntarily agreed to limit their total spending to \$400,000.").

⁸⁵ *See id.*

⁸⁶ *See* State Assemb. B. 387, 102d State Assemb., Reg. Sess. (Wis. 2015).

⁸⁷ Brendan M. Fischer & Nicholas D. Harken, *Fear of Favor: Judicial Elections and Campaigns Finance Law*, WIS. LAW., Feb. 2018, at 36, 37.

⁸⁸ *See generally* Christopher Terry & Mitchell Bard, *Milwaukee Radio Public File Data, 1998-2011: An Empirical Analysis of Issue Advertising After the BCRA and Citizens United*, 24 U. FLA. J.L.

1998 to 2009 were from third-party groups advertising to support the confirmation of Justice Samuel Alito to the U.S. Supreme Court.⁸⁹ A 2016 study of issue advertisements found that there was an increase in both the amount of spending and the number of ads bought in statewide judicial races.⁹⁰

The money that has helped the conservative justices secure their victories and gain control of the Wisconsin Supreme Court has compromised their integrity “as plainly as if they had personally solicited every dollar that helped elect them.”⁹¹ The *White* decision contributed to the Wisconsin Chief Justice’s confidence in making bold, conservative driven statements to the public.⁹² Law professor Charles G. Geyh argues that if judicial candidates have a constitutional right to announce partisan affiliations, “the practical differences between partisan and nonpartisan elections may gradually disappear.”⁹³ Professor Geyh proposes, among others, that for an independent judiciary to exist, reforms should defend the ethical considerations on judicial campaign conduct and encourage judicial candidates to do their part to reduce the impact of *White*.⁹⁴ Merely because a judge can state their position on a reviewable issue before them does not mean they should do so. Strong recusal rules encourage the perception of an independent judiciary.

III. PROPOSED AMENDMENTS

A. Strong Recusal Rules Are Needed for Judicial Integrity

In 2014, the American Bar Association (ABA) passed Resolution 105C, calling for states to improve their recusal rules.⁹⁵ Despite Wisconsin’s history, the state has

& PUB. POL’Y 157 (2013) (examining issue advertising data on broadcast radio in Milwaukee, Wisconsin and finding that after *Citizen United*, the percentage of issue ads mentioning candidates by name had doubled).

⁸⁹ See Christopher Terry & Mitchell T. Bard, *An Opening for Quid Pro Quo Corruption: Issue Advertising in Wisconsin Judicial Races Before and After Citizens United*, 16 J. APP. PRAC. & PROCESS 305, 316 (2015).

⁹⁰ See Terry & Bard, *supra* note 79.

⁹¹ Caplan, *supra* note 20.

⁹² See Murphy, *supra* note 65.

⁹³ See Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1273 (2008).

⁹⁴ *Id.* at 1279; see also Charles Gardner Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS AND THE MEDIA 21 (2007); CONSTITUTION PROJECT, THE HIGHER GROUND: STANDARDS OF CONDUCT FOR JUDICIAL CANDIDATES (2000),

http://www.constitutionproject.org/pdf/The_Higher_Ground_Standards_of_Conduct_for_Judicial_Candidates.pdf.

⁹⁵ [T]he American Bar Association urges that states and territories adopt certain judicial disqualification procedures which: (1) take into account the fact that certain campaign expenditures and contributions, including independent expenditures, made during judicial elections raise concerns about possible effects on judicial impartiality and independence; (2) are transparent; (3) provide for the timely resolution of disqualification and recusal

yet to improve its rules. Wisconsin must act soon. The Brennan Center for Justice, an institute working to reform and revitalize our country's system of justice and protect our Constitutional democracy,⁹⁶ has also asked for reform of recusal rules. A Brennan Center Report found that “[i]n the 2015-16 cycle, Wisconsin Supreme Court elections saw \$5.9 million in spending, including \$2.5 million from outside groups. Nearly all—91 percent—of that outside spending was from dark money groups that conceal their donors from the public.”⁹⁷ Attorneys with the Campaign Legal Center, a national group that supports limits on campaign spending, have also argued for Wisconsin courts to revisit disqualification rules.⁹⁸ At the state level, Common Cause, the League of Women Voters of Wisconsin, and the American Association of University Women have sought to have open dialogues on ethics issues, including Wisconsin's recusal rule.⁹⁹

It seems simple to propose that Wisconsin should adopt a bright-line recusal rule. Such a rule could read: “A judge shall recuse himself or herself from any proceedings involving a party that has made any contribution to that judge's election campaign.” The problem is trying to implement such a rule given the likelihood that an amendment would be rejected. A recusal rule in line with the concerns set out in *Caperton*,¹⁰⁰ however, might gain support. Eleven states have amended their recusal rules in this manner.¹⁰¹ Wisconsin can model a new rule after Georgia's rule, for example, which takes into account the “amount of the contribution”; the “timing of the contribution or support”; the “relationship of [the] contributor or supporter to the parties”; and whether a judge has any knowledge of a party's significant campaign contribution that can reasonably call a judge's impartiality into question.¹⁰²

motions; and (4) include a mechanism for the timely review of denials to disqualify or recuse that is independent of the subject judge[.]

ABA Standing Comm. on Judicial Indep., Resolution 105C (2014),
https://www.americanbar.org/content/dam/aba/images/abanews/2014am_hodres/105c.pdf

⁹⁶ See *Programs*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/about/programs> (last visited April 27, 2020).

⁹⁷ Press Release, *Brennan Center to Examine Spending in Wisconsin Supreme Court Election*, BRENNAN CTR. FOR JUSTICE (Feb. 1, 2018), <https://www.brennancenter.org/press-release/brennan-center-examine-spending-wisconsin-supreme-court-election>.

⁹⁸ See Letter from Brendan Fischer, Fed. & FEC Reform Program Dir. & Catherine Hinckley Kelley, State & Local Reform Program Dir., Campaign Legal Ctr, to Patience D. Roggensack, Chief Justice, Wis. Supreme Court (Mar. 15, 2017), <https://wicourts.gov/supreme/docs/1701commentsfischer.pdf>.

⁹⁹ *Cap Times Editorial*, *supra* note 37.

¹⁰⁰ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009).

¹⁰¹ See CYNTHIA GRAY, NAT'L CTR. FOR STATE COURTS, JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS 1, 4 (2016), <https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Disqualificationcontributions.ashx>.

¹⁰² GA. CODE OF JUDICIAL CONDUCT, R. 2.11(A)(4).

Another rule variation which might gain more support is a recusal rule with specific caps on the amounts or percentages of campaign spending. As of 2016, five states amended their recusal rules to include a specific amount or percentage.¹⁰³ Even a rule that accounts for specific amounts coupled with the *Caperton* considerations above may garner wider support. For example, under California statutory law, a judge can be disqualified “for cause” if the judge has received a contribution in excess of \$1500 from a party or lawyer in a proceeding.¹⁰⁴ There have been previous attempts for a rule like this to be adopted in Wisconsin. On January 11, 2017, fifty-four retired Wisconsin judges concerned about the influence that big money has had on the State’s Supreme Court filed a petition regarding the current recusal rule when a party or lawyer has made a large campaign contribution.¹⁰⁵ The petition sought to require recusal from a case if a party or attorney has contributed \$10,000 or more to a justice’s campaign.¹⁰⁶

The petition was aimed directly at the public’s concern with the appearance of bias, the appearance of partiality, and the perceptions of justice being for sale—all of which undermine the public’s respect for the judiciary and its judgment.¹⁰⁷ The court received several written comments both in support and in opposition of the petition.¹⁰⁸ By a vote of 5-2, the court rejected the petition without holding a public hearing.¹⁰⁹ Ironically, part of the justification for rejecting the petition was on the grounds that taking up the proposal would damage the public’s view of the state’s courts since judges should be able to determine on their own when they must step aside from a case.¹¹⁰

While an amendment to Wisconsin’s recusal rule seems unlikely in the near future, it is perhaps better for the Wisconsin judiciary and legislature to adopt

¹⁰³ See GRAY, *supra* note 101, at 2.

¹⁰⁴ CAL. CODE CIV. PRO. § 170.1(a)(9)(A).

¹⁰⁵ See Rules Petition No. 17-01 (Wis. Sup. Ct. Jan. 11, 2017) [hereinafter Petition 17-01], <https://www.wicourts.gov/supreme/docs/1701petition.pdf> (asking the court “[t]o establish an objective standard requiring recusal of disqualification of a judge when he or she has received the benefit of campaign contributions or assistance from a party or lawyer”).

¹⁰⁶ *Id.* at 5; see also Dan Stier, Opinion, *Are Wisconsin’s Supreme Court Races Really Just About Money?*, MILWAUKEE J. SENTINEL (Jan. 30, 2018, 3:26 PM), <https://www.jsonline.com/story/opinion/contributors/2018/01/30/wisconsin-supreme-court-recusal-campaign-contributions-money/1078851001/>.

¹⁰⁷ Petition 17-01, *supra* note 105, at 2.

¹⁰⁸ See *Supreme Court Rules, Petition Archive: 17-01 In re Rule for Recusal*, WIS. COURT SYS., <https://www.wicourts.gov/scrules/1701.htm> (last updated June 30, 2017).

¹⁰⁹ *Cap Times Editorial*, *supra* note 37.

¹¹⁰ The motion to deny the petition was also based in part on constitutional concerns caused by the proposed amendment to the Wisconsin Constitution and the potential that granting the petition could preclude Supreme Court review in some cases. Order Denying Petition No. 17-01, *In re Rule for Recusal When a Party or Lawyer has Made a Large Campaign Contribution* (Wis. June 30, 2017), <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=192530>; see also, Alan Greenblatt, *Improper Influence? Who, Us?*, GOVERNING (Dec. 2017), <http://www.governing.com/topics/politics/gov-wisconsin-supreme-court-improper-influence.html>.

stronger recusal mechanisms when it comes to campaign contributions. While my proposed reforms would apply to all Wisconsin judges, I focus my analysis on state supreme court justices.

B. Requirement of a Written, Reasoned, and Transparent Recusal Decision

First, justices and judges should be required to write and issue a well-reasoned, transparent recusal decision to be entered into the record regardless of whether recusal or disqualification occurs. As the current Wisconsin disqualification rule stands, a judge only files a written decision as to the reasons for disqualification when it does occur.¹¹¹ I propose that there always be a written decision, including whenever a party requests recusal or if a fellow justice calls for it. This proposal gives justices the opportunity to reason out their decisions any time their impartiality is called into question.

Social science has shown that judges have implicit biases, but the hope is that judges and justices can limit the outward appearance of bias through a written record.¹¹² Opinion writing is familiar to judges, and this proposed solution would allow justices to deliberate and rationalize any intuitive decision they make.¹¹³ A written decision allows judges to articulate their decision, assess their decision logically, and explain how their decision was reached.¹¹⁴ Judges are humans too, and they are subject to cognitive biases that can affect their thought process and decision making.¹¹⁵ Judges can become overconfident in their ability to be impartial in situations where a bias or conflict might exist.¹¹⁶ Thus, a written decision can lessen the reliance on implicit biases.¹¹⁷

The Brennan Center and the Institute for the Advancement of the American Legal System (IAALS) also propose a transparent, written decision because it preserves judicial legitimacy and facilitates appellate review if and when necessary.¹¹⁸ When a written decision is on the record and available to the public, that decision can be scrutinized by judges and the public, giving insight into the

¹¹¹ WIS. STAT. § 757.19(5) (2019).

¹¹² See Lance D. Reich, *Cognitive Biases: Make Judges & Juries Believe Weird Things*, SCITECH LAW., Fall 2013, at 5, 5.

¹¹³ See Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How it Affects Judgement and What Judges Can Do About It*, in AM. BAR ASS'N, ENHANCING JUSTICE: REDUCING BIAS 87, 118 (Sarah E. Redfield ed., 2017).

¹¹⁴ See S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges*, 2015 J. DISP. RESOL. 93, 104 (2015).

¹¹⁵ See Reich, *supra* note 112.

¹¹⁶ See Geyh, *supra* note 5.

¹¹⁷ See Wistrich & Rachlinski, *supra* note 113.

¹¹⁸ See MATTHEW MENENDEZ & DOROTHY SAMUELS, JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION 1, 11 (2016), https://www.brennancenter.org/sites/default/files/publications/Judicial_Recusal_Reform.pdf; WHEELER & REDDICK, *supra* note 6, at 3, 30.

judge's mind that we might not otherwise have.¹¹⁹ This also helps hold judges accountable.¹²⁰ Moreover, a written and transparent decision detailing the reasons for recusal—or lack thereof—provides a written record for meaningful review, the absence of which frustrates the already difficult task of ascertaining what guided a judge's recusal decision.¹²¹

This problem was addressed by the U.S. Supreme Court's response to West Virginia Supreme Court Justice Brent Benjamin's concurring opinion in *Caperton v. Massey*. In a series of opinions through the procedural history of the case, Justice Benjamin reasoned that his recusal was unnecessary since he claimed to have probed his actual motives and inclinations and did not find any bias.¹²² He went on to write that the plaintiff in the case failed to provide any objective evidence to indicate otherwise and that the plaintiff had merely shown a subjective belief of bias.¹²³ In its response to Justice Benjamin, the U.S. Supreme Court properly stated how difficult it is to inquire into actual bias because the inquiry is often a private one.¹²⁴ Requiring a written recusal decision is needed to protect "against a judge who simply misreads or misapprehends the real motives at work in deciding the case" since there is no proper way to measure or review a judge's actual bias.¹²⁵

Public confidence in the judiciary declines if the public has the perception that a judge has been influenced by campaign spending to rule in favor of the party he or she gained support from. Justice Benjamin seemed to understand this sentiment.¹²⁶ However, if judges do not perceive themselves to have a bias in the first place, they will favor facts that correspond to this belief and disregard circumstantial evidence to the contrary. This is what social scientists call

¹¹⁹ See generally Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237 (2008).

¹²⁰ WHEELER & REDDICK, *supra* note 6, at 10.

¹²¹ See generally Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 DRAKE L. REV. 751, 760 (2010) (discussing the problems and lack of guidance that exist with the federal judicial disqualification scheme).

¹²² See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2009) (providing a summary of Justice Benjamin's various opinions in the case).

¹²³ *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 292–93 (W. Va. 2008) (Benjamin, J., concurring).

¹²⁴ 556 U.S. at 883.

¹²⁵ *Id.*

¹²⁶ [T]he public's confidence in our system of justice is necessarily undermined and the stability and predictability of the rule of law is compromised when politics cross the threshold of our Court. The most important factors therefore affecting the public's perception of actual justice in this Court necessarily are the actual decisions of this Court, and its members, over time, the professional demeanor of this Court's members, and the quality of the written opinions and orders which we produce in specific cases.

Caperton, 679 S.E.2d at 286 (W. Va. 2008) (Benjamin, J., concurring), *rev'd*, 556 U.S. 868 (2009).

confirmation bias.¹²⁷ Measures must be taken to avoid a judge's preexisting attitudes forming impressions that negatively affect the judge's evaluation of the evidence in rendering decisions.¹²⁸ Moreover, written decisions help provide guidance to judges making similar recusal decisions in the future and facilitate data collection on recusal activity.¹²⁹ A written, transparent decision will help increase public confidence in the Wisconsin judiciary.

C. Independent Review of Recusal Motions

i. En Banc Review

Studies have shown that allowing a judge to rule on his or her own recusal motion is filled with the dangers of perceived or actual unfairness and with unconscious bias.¹³⁰ First, I recommend that the Wisconsin Supreme Court overrule *State v. Henley*'s holding that the recusal decision is the sole responsibility of the individual justice for whom disqualification is sought, and that a majority of the Wisconsin Supreme Court does not have the power to disqualify a justice from adjudicating a case.¹³¹ Working off the assumption that *State v. Henley* no longer applies, my second proposed reform would be to create an independent review of a justice's recusal decision and of recusal motions.

Removing a justice from the recusal decision-making process is a simple way to ensure meaningful independent review of recusal decisions and motions. One model the Wisconsin Supreme Court can adopt is Texas' review of recusal motions at the supreme court level. In Texas, "the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc."¹³² The Brennan Center and IAALS find the rule appealing because it excludes judges from the deliberative process by avoiding tainting any part of it.¹³³ A rule like this also removes whatever hesitation there might be from other justices to vote on a warranted recusal out of the need to maintain a collegial working environment.¹³⁴ Given the highly polarized court, the adoption of Wisconsin's current recusal rule in 2010, and control by a conservative majority, it seems unlikely the Wisconsin Supreme Court would adopt such a rule.

¹²⁷ See Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 CT. REV. 114, 114–15 (2013) ("This confirmation bias makes people search, code, and interpret information in a manner consistent with their assumptions.").

¹²⁸ See GEYH, *supra* note 7, at 59–60.

¹²⁹ *Id.*

¹³⁰ Debra Lyn Bassett, *Three Reasons Why the Challenged Judge Should Not Rule On a Judicial Recusal Motion*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 659, 680 (2015); see also Geyh, *supra* note 5.

¹³¹ *State v. Henley*, 2010 WI 12, 322 Wis. 2d 1, 778 N.W.2d 853.

¹³² TEX. R. APP. PROC. 16.3(b).

¹³³ See MENENDEZ & SAMUELS, *supra* note 118, at 9–10; WHEELER & REDDICK, *supra* note 6, at 8.

¹³⁴ See MENENDEZ & SAMUELS, *supra* note 118, at 12.

ii. An Independent Commission

A better alternative would be for Wisconsin to establish an independent commission made up of retired justices and judges to consider recusal decisions. Similar reforms are advocated by the ABA Standing Committee on Judicial Independence and the IAALS.¹³⁵ These commissions should be created by government officials and lawyers with various political views to make the selection process for the commission as fair as possible. In order to ensure independence, additional safeguards should be implemented when creating and selecting the retired justices and judges who will serve on the commission. The commission's purpose should be aimed at ensuring the impartiality and independence of the judiciary. To work toward this purpose, retired judges and justices seeking to serve on the commission should have no record in their past that could call their impartiality into question.¹³⁶ It would be best to keep any non-lawyers or practicing lawyers out of the commission for lack of expertise in the judicial decision making process and because they could become parties to a case before the court. Likewise, current judges should be excluded as any of their decisions might come before the Wisconsin Supreme Court on appeal.¹³⁷

The commission should be made up entirely of retired justices and judges. By including only judges, we can assure that the commission has the proper expertise that retired judges bring from their experiences on the bench.¹³⁸ Retired justices and judges will ideally continue to be impartial and hold themselves to the same standards as when they were on the bench.¹³⁹ There definitely seems to be support

¹³⁵ See ABA Standing Comm. on Judicial Indep., Resolution 107 (2011), https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_107.pdf (“[T]he American Bar Association urges states to establish clearly articulated procedures for: (1) Judicial disqualification determinations; and (2) Prompt review by another judge or tribunal, or as otherwise provided by law or rule of court, of denials of requests to disqualify a judge.”); see also WHEELER & REDDICK, *supra* note 6, at 8.

¹³⁶ For example, a judge should not have joined any organization with strong ideological beliefs, made disparaging comments against a party, or articulated his or her views on any number of issues in any manner. The selection for judges can be based on criteria similar to that set out by the IAALS, which includes “legal ability, integrity, and impartiality, communication skills, professionalism and temperament, and administrative capacity.” INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *TRANSPARENT COURTHOUSE REVISITED: AN UPDATED BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION* 1, 7 (2016), https://iaals.du.edu/sites/default/files/documents/publications/transparent_courthouse_revisited.pdf.

¹³⁷ See *id.* at 4.

¹³⁸ *Id.*

¹³⁹ See CODE OF CONDUCT FOR U.S. JUDGES, Compliance with the Code of Conduct (C) Retired Judge (JUDICIAL CONFERENCE OF THE U.S 2019), <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#g> (promoting continued adherence to ethics canons by retired federal judges).

for this idea from the retired Wisconsin judges' 2017 petition.¹⁴⁰ I believe that retired justices and judges would be willing to become a part of this commission.

The commission should provide meaningful review of recusal motions and decisions as if they were on appeal. Review should be done by a panel with at least one retired justice. Because the Wisconsin Supreme Court is the state's court of last resort, a commission with a panel of retired justices would keep the recusal motion from having to be reviewed by lower level judges who may have some hesitation to rule on a decision made by a higher-level judge. A decision reviewed by a panel that includes at least one retired justice will give the review and decision more legitimacy since current justices would ideally respect a review from peers they hold to the same level of competence, esteem and prestige.¹⁴¹ Lastly, I propose that the panel be set up on a rotation system and that review be anonymous to avoid any resentment among judges.

This reform also addresses many of the criticisms from reviewing recusal motions on appeal. The Wisconsin Supreme Court will be able to focus on resolving cases with novel legal issues or those that have no clear legal precedent that make their way up to the state's highest court. Recusal review by a panel of retired judges would alleviate concerns that recusal review is a waste of judicial resources¹⁴² because the decision would be made outside the court system.

D. *Judicial Performance Evaluations*

The independent commission should track the number of recusal motions and decisions filed, the number of times justices properly chose to recuse themselves, and the number of times they did not. This information should be saved, compiled, and made available to the public through judicial performance evaluations. Statistics about judicial performance aid voters in deciding whether to re-elect a justice and are crucial to restoring the public's confidence in the judiciary.

Judicial performance evaluations help address a few of the "Axiom of 80" problems described by law professor Charles G. Geyh.¹⁴³ The Axiom of 80 refers to the political reality that:

- (1) Roughly 80% of the public prefers to select its judges by election and does so;
- (2) Roughly 80% of the electorate does not vote in judicial elections;
- (3) Roughly 80% of the electorate cannot identify the

¹⁴⁰ The judges who submitted the petition "include[d] 12 former Chief Judges appointed by the Supreme Court, and retired circuit and appellate court judges." Press Release, *Coalition of Retired Judges to Ask Wisconsin Supreme Court to Adopt Standards to Limit Cash Influence in Judiciary*, URB. MILWAUKEE (Jan. 12, 2017, 2:07 PM), <https://urbanmilwaukee.com/pressrelease/coalition-of-retired-judges-to-ask-wisconsin-supreme-court-to-adopt-standards-to-limit-cash-influence-in-judiciary/>; see also Petition 17-01, *supra* note 105.

¹⁴¹ See GEYH, *supra* note 7, at 59 (noting that judges can be influenced by the audiences whose approval they seek).

¹⁴² See MENENDEZ & SAMUELS, *supra* note 118, at 12.

¹⁴³ See Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52–55 (2003).

candidates for judicial office; and (4) Roughly 80% of the public believes that when judges are elected, their decisions are influenced by the campaign contributions they receive.¹⁴⁴

More specifically, evaluations can help inform the public about which judicial candidates have received campaign contributions in the past, the aggregate amount of those contributions, and if those contributions led to any potential conflicts of interest. This can help alleviate some of the public's concern that financial contributions buy influence. The hope is that the public will regain confidence in the judiciary by becoming better informed about the candidates and by feeling that they made an informed decision in casting their vote. Likewise, Wisconsin justices should be provided resources to help them properly identify recusal issues and how their actions shape public perception.

The standards by which a justice is evaluated should include: integrity, legal knowledge, communication skills, judicial temperament, administrative performance, and service to the legal profession and the public. For example, Colorado has judicial performance evaluations that the public may use to determine if a judge has met judicial standards when he or she is up for reelection.¹⁴⁵ Should Wisconsin accept such standards of evaluation, we should see an improvement in the demeanor of the judiciary as a whole, improving both the collegiality among justices and public confidence in the judiciary.

Other states have similar performance evaluation systems for judges who are on judicial retention election ballots.¹⁴⁶ Because judges in Wisconsin are all elected and can run for reelection,¹⁴⁷ the proposed commission's data collected over time concerning judicial conduct and discipline boast potential added benefits. Judges may worry about their reputation among their peers and will (hopefully) choose to recuse themselves in cases where they clearly have a conflict of interest. A negligent recusal decision can call into question a judge's ability to perceive such problems.¹⁴⁸ This point is particularly important for judges who are looking to advance their

¹⁴⁴ *Id.* at 52.

¹⁴⁵ COLO. COMM'N JUDICIAL PERFORMANCE, <http://www.coloradojudicialperformance.gov> (last visited April 28, 2020).

¹⁴⁶ See ARIZ. COMM'N ON JUDICIAL PERFORMANCE REV., <https://www.azcourts.gov/jpr/Judicial-Performance-Reports> (last visited Oct. 3, 2018); *Voter's Guide to Nebraska's Judicial Retention Elections*, NEB. JUDICIAL BRANCH, <https://supremecourt.nebraska.gov/public/vote> (last visited Oct. 3, 2018).

¹⁴⁷ See *Methods of Judicial Selection: Wisconsin*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.com/judicial_selection/methods/selection_of_judges.cfm?state=WI (last visited May 12, 2020). The Wisconsin Constitution prescribes the selection, retention methods, and term lengths for judges. See WIS. CONST. art. VII, §§ 5-6.

¹⁴⁸ See GEYH, *supra* note 7, at 59 ("Judge Alex Kozinski has argued that judges' desire for the respect of their colleagues operates as a brake on decision-making that strays too far from the rule of law."); see also James Sample, *Retention Elections 2.010*, 46 U.S.F. L. REV. 383, 402-05 (2011).

careers and want the respect of their peers.¹⁴⁹ Judicial evaluations can also better inform voters in retention elections with objective information regarding the judge's performance and behaviors.¹⁵⁰ Thus, performance evaluation systems help deter the influence from campaign contributions by creating incentives for judges to recuse themselves when their supporters or contributors come before them.

E. Mechanism for Replacing Disqualified Justices

Wisconsin prescribes the reason for its recusal rule in the comment to Rule 60.04(7) stating that the court has a tradition of electing judges, and that recusal for campaign support “would deprive citizens who lawfully contribute to judicial campaigns whether individually or through an organization, of access to the judges they help elect.”¹⁵¹ This is precisely the problem. The final suggestion I have is to establish a clear and practical mechanism within the judicial system for replacing disqualified justices on the Wisconsin Supreme Court.¹⁵² When there are no mechanisms to replace disqualified justices, the court runs the risk of a tie vote¹⁵³ and issues left unresolved.

One approach, endorsed by the Brennan Center and the IAALS, to replace a disqualified justice is found in Florida's Manual of Internal Operating Procedures section X(D).¹⁵⁴ Under Florida's approach, “associate justices shall be the chief judges of the district courts of appeal selected on a rotating basis from the lowest numbered court to the highest and repeating continuously. If more than one associate justice is needed, they shall be selected from separate district courts according to the numerical rotation.”¹⁵⁵ A mechanism like Florida's could work in Wisconsin, given the Wisconsin Supreme Court's current composition. Justices have not recused themselves in at least ninety-eight percent of cases involving a

¹⁴⁹ See Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993 (1993), reprinted in JUDGES ON JUDGING: VIEWS FROM THE BENCH 63, 73 (David M. O'Brien ed., 1997).

¹⁵⁰ See Geyh, *supra* note 94, at 1279. See generally Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375 (2001).

¹⁵¹ See WIS. SUP. CT. R. 60.04(7) cmt.

¹⁵² See MENENDEZ & SAMUELS, *supra* note 118, at 13–15; WHEELER & REDDICK, *supra* note 6, at 12–13.

¹⁵³ The Wisconsin Supreme Court will issue a *per curiam* decision affirming the court of appeals in cases where the court is equally divided. See Anne-Louise T. Mittal, *Overview of the Wisconsin Supreme Court's 2017-18 Term*, FOLEY & LARDNER LLP: WIS. APP. L. BLOG (Oct. 30, 2018), <https://www.foley.com/en/insights/publications/2018/10/overview-of-the-wisconsin-supreme-courts-201718-te>; see also Smith v. Kleynerman, 2017 WI 22, 374 Wis. 2d 1, 892 N.W.2d 734; New Richmond News v. City of New Richmond, 2015 WI 106, 365 Wis.2d 610, 875 N.W.2d 107.

¹⁵⁴ See MENENDEZ & SAMUELS, *supra* note 118, at 13; WHEELER & REDDICK, *supra* note 6, at 12.

¹⁵⁵ FLA. SUPREME COURT, THE SUPREME COURT OF FLORIDA MANUAL OF INTERNAL OPERATING PROCEDURES § X(D) (2016), http://www.floridasupremecourt.org/pub_info/documents/IOPs.pdf.

contributor to their election campaigns.¹⁵⁶ Florida's approach prevents parties from seeking to replace a justice who is likely to rule unfavorably with a more favorable justice through strategic use of the recusal rules.¹⁵⁷ Thus, the rotating system also helps prevent charges that a replacement justice was chosen because they are likely to issue a favorable ruling.¹⁵⁸ A rotating system allows the ideological lines in the current court to not play as big of a role in deciding cases while ensuring a full roster of justices hear any particular case.

Alternatively, Wisconsin can adopt a standard similar to Kansas, which replaces a disqualified justice with a retired justice designated by the Kansas Supreme Court to ensure a full bench at all times.¹⁵⁹ This approach would go hand in hand with the independent commission I suggested above. For this replacement mechanism to be effective, it is necessary for the replacement justice to be free from conflicts. Perhaps having an automatic rotation system of retired justices here would also prevent strategic recusal motions from parties. Including a retired justice as the replacement justice would help ensure finality to all cases adjudicated by the Wisconsin Supreme Court.

At a minimum, it is important that the Wisconsin Supreme Court adopt a mechanism by which it replaces a disqualified judge in cases of ethical violations. As previously described, there have been at least two previous incidents when the Wisconsin justices were deadlocked in disciplinary charges.¹⁶⁰ Replacing justices in disciplinary cases is important because it helps prevent justices from using distasteful (yet true) statements in issue advertisements during re-election campaigns. Having a replacement judge step in when cases like the chock-hold incident arise¹⁶¹ also ensures the issue will be resolved and the offending justice will be punished. At the very least, a justice will be deterred from committing similar actions in the future. This can help restore public confidence by ensuring that all justices are held accountable for their actions and helps restore collegiality and respect among them. These reforms are just a starting point for the Wisconsin courts and legislature in crafting a new recusal rule.

IV. LESSONS LEARNED FROM THE WISCONSIN SUPREME COURT STORY

The case study of the Wisconsin Supreme Court serves as a warning for other states that have not heeded the call of the ABA and other institutions to reform

¹⁵⁶ See Jake Harper, *Wisconsin Supreme Court Justices Tend to Favor Attorney Donors*, WIS. WATCH (Oct. 20, 2013), <https://www.wisconsinwatch.org/2013/10/wisconsin-supreme-court-justices-tend-to-favor-attorney-donors/>.

¹⁵⁷ See MENENDEZ & SAMUELS, *supra* note 118, at 13.

¹⁵⁸ See FLA. SUPREME COURT, *THE SUPREME COURT OF FLORIDA MANUAL OF INTERNAL OPERATING PROCEDURES* § X(D) (2016), *supra* note 155.

¹⁵⁹ See KAN. STAT. ANN. § 20-2616 (2016).

¹⁶⁰ See James, *supra* note 54.

¹⁶¹ See Gil Halsted, *Wis. Justices Deadlocked Over Chokehold Allegations*, NPR (May 11, 2012, 3:00 PM), <https://www.npr.org/2012/05/11/152520957/wis-justices-deadlocked-over-chokehold-allegation>.

their recusal rule. The effects of *Caperton* are clearly visible in Wisconsin and many other states are seeing judicial elections that are now openly partisan, very expensive, and actively influenced by partisan interest groups.¹⁶² Electing well qualified justices loses its effect when lobbying groups like WMC spend money in elections that clearly surpass the amount of a justice's own campaign budget.¹⁶³ This surely rises to the level of violating due process as Justice Kennedy's majority *Caperton* opinion stated.

It is imperative to keep corporations and interest groups from seeing money as an investment and a means to influence a judicial candidate when the issues they are interested in come before the court.¹⁶⁴ Conservative business-oriented interest groups are well aware of the leverage they can gain in having the "right" judge elected to the bench. For instance, prior to the 2013 Wisconsin Supreme Court election, WMC issued a Supreme Court edition of its "Business Voice" magazine with a two-page article about business interests in the judicial election.¹⁶⁵ The article warned its readers that "all the reforms of Governor Scott Walker and the business community would hang in the balance" if Justice Roggensack lost and the court lost its conservative majority.¹⁶⁶ Wisconsin is just one example of this type of lobbying, and one can look at judicial elections in other states to see how widespread this issue really is.¹⁶⁷

Interest groups placing millions of dollars in state judicial campaigns to further their own agendas is not a new phenomenon. Campaign contributions first saw a dramatic increase in state supreme courts in the 1990s.¹⁶⁸ Beginning in the 1980s and 1990s, Karl Rove, a political consultant, began working with the U.S. Chamber of Commerce to influence the outcome of key judicial elections.¹⁶⁹ The U.S. Chamber of Commerce is a membership organization of some of the largest

¹⁶² See KEITH J. BYBEE, *ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW* 6 (2010).

¹⁶³ See *Wisconsin's Largest Corporate Lobby Seeks to Buy a Justice: WMC Spending \$1 Million to Purchase Supreme Court Candidate Michael Schenock*, DEMOCRATIC PARTY OF WIS. (Mar. 23, 2018), <http://www.wisdems.org/news/wmc-spends-1-million-to-buy-justice>.

¹⁶⁴ See Christopher Terry & Mitchell T. Bard, *An Opening for Quid Pro Quo Corruption: Issue Advertising in Wisconsin Judicial Races Before and After Citizens United*, 16 J. APP. PRAC. & PROCESS 305, 319 (2015).

¹⁶⁵ See Rick Esenberg, *The Democratic Process is at Stake*, WIS. BUS. VOICE, Mar. 2013, at 14, 14–15, https://www.prwatch.org/files/businessvoice_specialedition2013-med.pdf.

¹⁶⁶ *Id.*

¹⁶⁷ See Press Release, *New Analysis: 2016 Judicial Elections See Secret Money and Heightened Outside Spending*, BRENNAN CTR. FOR JUST. (Sept. 14, 2016), <https://www.brennancenter.org/press-release/new-analysis-2016-judicial-elections-see-secret-money-and-heightened-outside-spending> (discussing the politicized and high-dollar races in Kansas, Montana, North Carolina, Ohio, and Washington).

¹⁶⁸ See CHARLES GARDNER GEYH, *WHO IS TO JUDGE? THE PERENNIAL DEBATE OVER WHETHER TO ELECT OR APPOINT AMERICA'S JUDGES* 67 (2019).

¹⁶⁹ Joseph Tanfani, *Judicial Elections Getting More Political with New Campaign Spending*, LA TIMES (Nov. 23, 2014, 6:00 AM), <https://www.latimes.com/nation/politics/la-na-judicial-elections-20141123-story.html>.

businesses and is the nation's largest lobbying group for corporations.¹⁷⁰ Rove was partly responsible for the turnover in the Texas Supreme Court by ensuring conservative judges had well-funded campaigns to entrench pro-business interests who "took a hard line on injury and product-liability cases."¹⁷¹

From 2000 to 2008, the supreme courts of Illinois, Michigan, Mississippi, Ohio, and West Virginia also shifted favor from trial lawyers and unions to corporate interests, largely because businesses and conservative groups funded and organized state judicial races.¹⁷² Some notable examples of interest groups mounting expensive campaigns and paying for ads that negatively portrayed a judge's judicial record include the 2000 Mississippi Supreme Court judicial election¹⁷³ and the 2014 North Carolina Supreme Court race.¹⁷⁴ Third-party lobbying groups clearly have their own incentives for contributing large amounts of money to a justice's campaign. Obviously, these interests do not include attaining an impartial judiciary that advances the rule of law.

Interest groups have good reason to contribute large amounts of money through independent expenditures instead of donating to that candidate's campaign committee directly. One of those reasons is that by organizing independent campaigns, interest groups control the campaign's message directly instead of the campaign committee controlling the message itself.¹⁷⁵ A more important reason is that direct contributions to judicial campaigns are subject to state-imposed contribution limits, which is not the case with independent expenditures on a candidate's behalf.¹⁷⁶ After the 2010 *Citizens United* ruling, spending by independent organizations and political parties reached an all-time high at twenty-seven percent of the total spending on judicial campaigns in the 2011–2012 election cycle and then twenty-nine percent in the 2013–2014 election cycle.¹⁷⁷ The money coming into state supreme court elections has helped increase the use of campaign

¹⁷⁰ See *Top Spenders*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/lobby/top.php?indexType=s> (last updated Apr. 22, 2020).

¹⁷¹ Opinion, *Big Money Taints Judicial Elections*, SEATTLE TIMES (Aug. 29, 2010, 12:01 AM), <https://www.seattletimes.com/opinion/big-money-taints-judicial-elections/>.

¹⁷² *Id.*

¹⁷³ Former Justice Oliver Diaz of the Mississippi Supreme Court was up for reelection in 2000. Because he was not considered "pro-business" and due to his resistance to tort reform, the U.S. Chamber of Commerce sought to remove him from the court by purchasing extensive amounts of airtime and paying for ads that negatively distorted his judicial record. Despite the odds, Diaz ended up winning the 2000 election. See *HOT COFFEE* (HBO 2011).

¹⁷⁴ In 2014, Justice Robin E. Hudson of the North Carolina Supreme Court was targeted by the Republican State Leadership Committee, "which spent \$4 million nationwide on an effort to tilt state courts in a conservative direction." One campaign ad targeting Justice Hudson stated that she sided with child predators and was not tough on child molesters. Justice Hudson survived the attacks and won the election. Tanfani, *supra* note 169.

¹⁷⁵ See GEYH, *supra* note 168, at 70.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*; see also SCOTT GREYTAK, ALICIA BANNON, ALLYSE FALCE & LINDA CASEY, *BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013–14*, at 9 (Laurie Kinney ed., 2015).

ads in nonpartisan supreme court elections. The modern era of judicial elections has seen a rise in the percentage of supreme court campaigns featuring television ads and “[i]nfusions of campaign cash have enabled candidates and their supporters to buy bigger megaphones with which to deliver a meaner message.”¹⁷⁸

In Wisconsin, research suggests that there is a correlation between the donations that Wisconsin justices receive and favorable outcomes in cases brought before the court: the court rules for vested interests over fifty percent of the time.¹⁷⁹ Other state supreme court justices are aware of this to some extent. In 2006, retired West Virginia Chief Justice Richard Neely stated, “[i]t’s pretty hard in big-money races not to take care of your friends.”¹⁸⁰ In the past decade there have been numerous other examples of the effects of big money on state judicial elections and the failure of justices to recuse themselves. In contrast, former Alabama Supreme Court Chief Justice Sue Bell Cobbs recently wrote: “I never quite got over the feeling of being trapped inside a system whose very structure left me feeling disgusted. I assure you: I’ve never made a decision in a case in which I sided with a party because of a campaign donation.”¹⁸¹ Cobbs became the first female Chief Justice in Alabama, winning in the most expensive campaign but quickly realizing the restrictions that big money has on judicial autonomy.¹⁸² In the modern era of judicial elections, the Republican party has gained control of many supreme courts in southern states and business interests are prevailing in making the states’ highest courts more business-friendly and sympathetic to their causes.¹⁸³

Strong recusal rules are needed for judicial integrity. If states with weak recusal rules do not amend their rules, there is the possibility that justices and judges will violate more ethics rules which could result in more disciplinary hearings that waste judicial time and resources. This also affects the justices’ working relationship with one another. Moreover, there are various due process concerns that arise. Transparent campaign disclosures are important for all parties involved. A judge needs to know where the funding is coming from to properly assess if recusal is necessary. Litigants need to know about donors and contributions if they are to properly raise due process concerns.¹⁸⁴ The public needs to know about campaign contributions to avoid believing that favorable decisions

¹⁷⁸ GEYH, *supra* note 168, at 71; *see also* MELINDA GANN HALL, *ATTACKING JUDGES: HOW CAMPAIGN ADVERTISING INFLUENCES STATE SUPREME COURT ELECTIONS* 75 (2015) (“Attack advertising—advertising that criticizes the favored candidate’s opponent—has increased from about 18% of the television ads produced, to between 21% to 29% in the succeeding three election cycles.”).

¹⁷⁹ *See* Harper, *supra* note 156.

¹⁸⁰ Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Ruling*, N.Y. TIMES (Oct. 1, 2006), <https://www.nytimes.com/2006/10/01/us/01judges.html?pagewanted=all>.

¹⁸¹ Sue Bell Cobb, *I Was Alabama’s Top Judge. I’m Ashamed by What I Had to Do to Get There*, POLITICO (Mar. 2015), <https://www.politico.com/magazine/story/2015/03/judicial-elections-fundraising-115503>.

¹⁸² *See id.*

¹⁸³ *See* GEYH, *supra* note 168 at 70.

¹⁸⁴ *See* Fischer & Harken, *supra* note 87, at 37–38.

can be bought by those with deep pockets. Thus, judges need continuous education regarding their duties of upholding the rule of law, adhering to the Model Rules of Judicial Conduct, and identifying their biases, particularly in the context of campaign spending. Likewise, there needs to be transparency when it comes to the millions of dollars being funneled into judicial elections and public education about a judge's role. These recommendations would hold judges accountable and strengthen trust in the legal system.

V. WHERE ARE WE NOW: RECENT WISCONSIN SUPREME COURT ELECTIONS

A. *The 2018 Wisconsin Supreme Court Judicial Election*

By 2018, the effects of campaign contributions and the recusal rules on Wisconsin's judiciary were clear. Statements were made calling for Wisconsin voters to vote and have their voices heard regarding the recusal standards for judges receiving large campaign contributions.¹⁸⁵ The 2018 election for the Wisconsin Supreme Court seat was a race between Rebecca Dallet, a Milwaukee County Circuit Judge, and Michael Screnock, a Sauk County Circuit Judge. While the race was officially nonpartisan, the race followed its predecessors and fell along partisan lines.¹⁸⁶

Judge Dallet campaigned largely on changing the rules governing when Wisconsin judges or justices should recuse themselves from hearing cases involving top campaign donors to prevent the court from doing their bidding.¹⁸⁷ Among her top priorities were revisiting the court's recusal rules and holding a hearing to amend those rules.¹⁸⁸ During the final weeks of debates, Judge Dallet promised to recuse herself from hearing cases involving Eric Holder Jr., the former attorney general who heavily supported her campaign.¹⁸⁹ When Judge Dallet asked her opponent, Judge Screnock, to promise voters he would also recuse himself from hearing cases involving WMC, one of his main campaign supporters, Judge Screnock said he would not make that kind of promise.¹⁹⁰ WMC had spent almost \$1

¹⁸⁵ See *Cap Times Editorial*, *supra* note 37.

¹⁸⁶ See Monica Davey, *Liberal Judge Wins Wisconsin Supreme Court Seat, Buoying Democrats*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/wisconsin-election-supreme-court.html>.

¹⁸⁷ Molly Beck, *Rebecca Dallet Wins 10-Year Term on Wisconsin Supreme Court*, WIS. ST. J. (Apr. 4, 2018), https://madison.com/wsj/news/local/courts/rebecca-dallet-wins--year-term-on-wisconsin-supreme-court/article_1e5524f8-e10f-50f5-bb69-b0837c2307db.html.

¹⁸⁸ *Id.*

¹⁸⁹ Patrick Marley, *Holder to Campaign for Dallet in High Court Race*, MILWAUKEE J. SENTINEL (Mar. 13, 2018, 11:22 AM), <https://www.jsonline.com/story/news/politics/2018/03/13/former-obama-ag-eric-holder-campaign-week-rebecca-dallet-wisconsin-supreme-court-race/420041002/>.

¹⁹⁰ Chuck Quirmback, *Dallet Promises to Recuse Herself from Special Elections Cases*, WIS. PUB. RADIO (Mar. 26, 2018, 4:20 PM), <https://www.wpr.org/dallet-promises-recuse-herself-special-elections-case>.

million in the election.¹⁹¹ Judge Dallet recognized that WMC's large contributions created the perception or expectation of favorable rulings on its behalf.

On April 3, 2018, Judge Dallet beat Judge Screnock for a seat on the Wisconsin Supreme Court to serve her ten-year term.¹⁹² By replacing the conservative Justice Michael Gableman, the court slightly shifted from a 5-2 conservative control to a 4-3 majority. Justice Dallet attributed her win to Wisconsin voters and the notion that they were ready to stand up to special interest groups like WMC and regain an independent court.¹⁹³ Her comments continued to be consistent in recognizing that the current recusal rule on campaign contributions is a problem. Electing Justice Dallet seemed to be a major step for voters toward restoring the impartiality and legitimacy of the judiciary. Democrats echoed the same sentiment, approved of the win, and seemed (apparently) eager for campaign finance reform.¹⁹⁴ However, this victory was short lived.

B. *The 2019 Wisconsin Supreme Court Judicial Election*

After forty-three years on the Wisconsin Supreme Court, Justice Abrahamson retired from the bench in July 2019.¹⁹⁵ The open seat on the Wisconsin Supreme Court led to another contested race between conservative- and liberal-backed candidates. The race was between Appeals Court Judge Brian Hagedorn and Wisconsin Chief Appeals Court Judge Lisa Neubauer. As expected, millions of dollars were spent on each candidate's campaign as both liberals and conservatives knew what was at stake—control of the court. Liberal groups spent about \$1.6 million to support Neubauer while conservative groups spent about \$1.2 million supporting Hagedorn, on top of what each candidate had spent, \$1.7 million and

¹⁹¹ See *Buying Time 2018- Wisconsin*, BRENNAN CTR. FOR JUSTICE (Jan. 23, 2018), <https://www.brennancenter.org/analysis/buying-time-2018-wisconsin>; see also Molly Beck, *Group Headed by Eric Holder Spends \$140K to Back Wisconsin Supreme Court Candidate Rebecca Dallet*, WIS. ST. J. (Mar. 10, 2018), https://madison.com/wsj/news/local/govt-and-politics/group-headed-by-eric-holder-spends-k-to-back-wisconsin/article_a6837656-cbb5-518c-8467-c0d92a5a9902.html.

¹⁹² Patrick Marley, *Rebecca Dallet Beats Michael Screnock in Race for Wisconsin Supreme Court*, MILWAUKEE J. SENTINEL (Apr. 4, 2018, 7:43 AM), <https://www.jsonline.com/story/news/politics/2018/04/03/rebecca-dallet-beats-michael-srenock-race-wisconsin-supreme-court/477978002/>.

¹⁹³ *Id.*

¹⁹⁴ See *id.*; see also Matthew DeFour, *Democrats Call for Laws to Regulate Campaign Coordination, Election-Related Issue Ads*, WIS. ST. J. (Oct. 20, 2016), https://madison.com/wsj/news/local/govt-and-politics/democrats-call-for-laws-to-regulate-campaign-coordination-election-related/article_d0117596-5c60-564b-bdd4-8ac18ac69c21.html.

¹⁹⁵ Joe Forward, *Shirley Abrahamson: A Legacy of Judicial Service in Wisconsin*, WIS. LAW., May 2019, at 32, 33, <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=92&Issue=5&ArticleID=27016>.

\$1.3 million respectively.¹⁹⁶ Partisan groups supporting each candidate saw a win for the opposing side as a win for that candidate's political party.¹⁹⁷ The election was the most expensive the state had seen in the last decade.¹⁹⁸

Both candidates presented very different approaches to the law, but both saw the importance of a judge's impartiality and restoring legitimacy in the state's highest court.¹⁹⁹ However, in addressing Wisconsin's current recusal rule during each respective campaign, Judge Hagedorn indicated that he was not supportive of a stronger recusal rule.²⁰⁰ On the other hand, Judge Neubauer stated that stronger rules should be considered and that she would welcome a public hearing for more input.²⁰¹

After a close race in the April 2019 election, Judge Hagedorn defeated Judge Neubauer by 6,000 votes.²⁰² The state supreme court power shifted back to a 5-2

¹⁹⁶ Riley Vetterkind, *Lisa Neubauer Outpaces Brian Hagedorn in Final Fundraising Reports Before Election*, WIS. ST. J. (Mar. 26, 2019), https://madison.com/wsj/news/local/govt-and-politics/lisa-neubauer-outpaces-brian-hagedorn-in-final-fundraising-reports-before/article_16fc612d-1ef9-5b01-a6ba-705d054bdb62.html.

¹⁹⁷ Each candidate had strong ties and connections to their respective political group through previous employment, family member affiliations, their espoused views on controversial topics, and their affiliation with certain political groups and events. See Riley Vetterkind, *Supreme Court Debate: Brian Hagedorn, Lisa Neubauer Knock Each Other Over Personal Views, Political Backgrounds*, WIS. ST. J. (Mar. 16, 2019), https://madison.com/wsj/news/local/govt-and-politics/supreme-court-debate-brian-hagedorn-lisa-neubauer-knock-each-other/article_7b70127d-b189-5de3-8f13-7f2caf8dc488.html; Riley Vetterkind, *Wisconsin Supreme Court Race Too Close to Call, Possibly Headed for Recount*, WIS. ST. J. (Apr. 3, 2019), https://madison.com/wsj/news/local/govt-and-politics/wisconsin-supreme-court-race-too-close-to-call-possibly-headed/article_2c4348ed-ee5-5d69-9aa1-209fe728c3bf.html.

¹⁹⁸ Douglas Keith, *Wisconsin's Most Expensive Supreme Court Election in a Decade*, BRENNAN CTR. FOR JUSTICE (Apr. 10, 2019), <https://www.brennancenter.org/blog/wisconsin-most-expensive-supreme-court-election-decade>.

¹⁹⁹ On the one hand, Judge Neubauer intended to bring an impartial and independent view to the bench and had hopes of restoring confidence in the court stating, "People don't want a liberal and they don't want a conservative They want a judge. They want to know that this person is going to come to the case with an open mind." Riley Vetterkind, *Lisa Neubauer Wants to Restore Confidence in High Court*, WIS. ST. J. (Mar. 24, 2019), https://madison.com/wsj/news/local/govt-and-politics/lisa-neubauer-wants-to-restore-confidence-in-high-court/article_b7845cfc-0d4f-525d-8f56-557bb9887381.html. On the other hand, Judge Hagedorn said he would move the court away from becoming another type of legislature with partisan views. Riley Vetterkind, *Brian Hagedorn Seeks to Extinguish Partisan Influence on the Court*, WIS. ST. J. (Mar. 24, 2019), https://madison.com/wsj/news/local/govt-and-politics/brian-hagedorn-seeks-to-extinguish-partisan-influence-on-court/article_58bf0fc7-135f-5a4a-b50d-ddddb512846c.html.

²⁰⁰ Jay Heck, Opinion, *Hagedorn Shows Why Recusal Rule Needed*, URB. MILWAUKEE (May 23, 2019, 2:51 PM), <https://urbanmilwaukee.com/2019/05/23/op-ed-hagedorn-shows-why-recusal-rule-needed/>.

²⁰¹ *Id.*

²⁰² Molly Beck, *Lisa Neubauer Concedes Supreme Court Race, Prepares Appeals Court Re-Election Bid*, MILWAUKEE J. SENTINEL (Apr. 10, 2019, 11:48 AM), <https://www.jsonline.com/story/news/politics/elections/2019/04/10/wisconsin-politics-lisa->

conservative majority. Despite his comments about wanting an impartial judiciary, Judge Hagedorn went on to address the Republican Party of Wisconsin state convention, specifically thanking Republican activists for their support and, ultimately, his win.²⁰³

In this election, liberal groups outspent conservative groups when it came to financing the campaign for Judge Neubauer.²⁰⁴ Previous large contributors like WMC, the U.S. Chamber of Commerce, and the Wisconsin Realtors Association (WRA) sat out primarily due to some of Judge Hagedorn's expressed views.²⁰⁵ Moreover, given that the Democrats ousted governor Scott Walker in the 2018 midterm election, it appeared that Judge Hagedorn, the underdog, would lose the election. However, it was now-Judge Hagedorn that emerged victorious.²⁰⁶ Some political scientists attribute the conservative win in part to the overt liberal attacks against Judge Hagedorn's religious views because he founded a Christian school with traditional views on marriage and sex.²⁰⁷ It seemed these attacks helped motivate voters to come to the polls against the media ads attacking Judge Hagedorn regardless of what their religious beliefs were.²⁰⁸

Perhaps it is becoming clearer to voters that what the state needs is an impartial judiciary, and their votes in the 2019 election seems to send a message that they will not stand for clear ideological attacks from political groups supporting either party. Despite outside spending from liberal interest groups favoring her, Judge Neubauer attributed this loss to the large amounts of campaign and ad money and acknowledged that large contribution amounts are not good for our democracy.²⁰⁹

C. *The April 2020 Wisconsin Supreme Court Judicial Election*

The most recent Wisconsin Supreme Court election took place on April 7, 2020. The election determined who would take the open seat on the bench once

neubauer-concedes-supreme-court-race/3410456002/. The race was close enough that it almost headed for a recount. *The Latest: Wisconsin Supreme Court Race Too Close to Call*, US NEWS (Apr. 3, 2019, 12:48 AM), <https://www.usnews.com/news/best-states/wisconsin/articles/2019-04-02/the-latest-wisconsin-voters-picking-supreme-court-justice>.

²⁰³ Heck, *supra* note 200.

²⁰⁴ See Vetterkind, *Wisconsin Supreme Court Race Too Close to Call, Possibly Headed for Recount*, *supra* note 197.

²⁰⁵ Keith, *supra* note 198.

²⁰⁶ Beck, *supra* note 202.

²⁰⁷ See Matt Batzel, *Why the Wisconsin Supreme Court Win Is a Big Deal*, REAL CLEAR POL. (Apr. 13, 2019), https://www.realclearpolitics.com/articles/2019/04/13/why_the_wisconsin_supreme_court_win_is_a_big_deal_140045.html; see also Beck, *supra* note 202.

²⁰⁸ Batzel, *supra* note 207.

²⁰⁹ See Beck, *supra* note 202.

Justice Daniel Kelly's term on the court expires in July 2020.²¹⁰ The race was between the conservative-backed incumbent, Justice Daniel Kelly, and the liberal-backed Dane County Circuit Court Judge Jill Karofsky.²¹¹ Again, this race was officially nonpartisan, but in name only.

The election followed the same partisan trend as all those in the last decade.²¹² Justice Kelly received endorsements from the Republican party and the judges' ideologies were clearly divided along partisan lines.²¹³ According to the Wisconsin Democracy Campaign, political parties and special interest groups spent almost \$5 million on advertising: "Karofsky benefited from \$2.4 million in spending and Kelly [from] \$2.5 million."²¹⁴ The Democratic Party of Wisconsin also contributed \$1.3 million to Judge Karofsky's campaign.²¹⁵

On the topic of recusal, Justice Kelly was criticized by liberal groups and his opponents for ruling for conservative interests and Republican causes.²¹⁶ He stated that he would not necessarily recuse himself from a case involving a donor before him because state law allows a judge to hear a case in which a contributor donates up to \$20,000.²¹⁷ Judge Karofsky, on the other hand, stated she would call for hearings to determine a clear rule as to when a justice should step away from a case, especially when a party in the case is also a political donor.²¹⁸ Judge Karofsky's philosophy on recusal would be to take herself off cases whenever there is an appearance of impropriety.²¹⁹

The way the Wisconsin Supreme Court 2020 election played out is one for the history books. The general election was scheduled on the same day as the Wisconsin

²¹⁰ See Molly Beck, *Challengers Line Up to Take on Supreme Court Justice in 2020*, MILWAUKEE J. SENTINEL (May 1, 2019, 9:58 AM), <https://www.jsonline.com/story/news/politics/elections/2019/04/30/challengers-line-up-take-supreme-court-justice-2020/3626363002/>.

²¹¹ Riley Vetterkind, *Jill Karofsky, Daniel Kelly Advance to Wisconsin Supreme Court General Election*, WIS. ST. J. (Feb. 19, 2020), https://madison.com/wsj/news/local/govt-and-politics/jill-karofsky-daniel-kelly-advance-to-wisconsin-supreme-court-general/article_927aab99-eca3-50ac-adcc-cf4f184da10a.html.

²¹² See Riley Vetterkind, *Dane County Judge Jill Karofsky Wins State Supreme Court Race*, WIS. ST. J. (Apr. 14, 2020), https://madison.com/wsj/news/local/govt-and-politics/dane-county-judge-jill-karofsky-wins-state-supreme-court-race/article_a60dd913-bd22-589d-855b-ca2788b81d9a.html.

²¹³ See Patrick Marley, *Wisconsin Supreme Court Race Will Pit Daniel Kelly Against Jill Karofsky*, MILWAUKEE J. SENTINEL (Feb. 19, 2020, 3:43 PM), <https://www.jsonline.com/story/news/politics/elections/2020/02/18/daniel-kelly-ed-fallone-jill-karofsky/4785953002/>.

²¹⁴ Vetterkind, *supra* note 212.

²¹⁵ *Id.*

²¹⁶ Riley Vetterkind, *Wisconsin Supreme Court Candidates Make Case to Voters*, WIS. ST. J. (Jan. 13, 2020), https://madison.com/wsj/news/local/govt-and-politics/wisconsin-supreme-court-candidates-make-case-to-voters/article_21356ea0-ade4-5079-aa16-cffbd71e8061.html.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

presential primary, where Democratic turnout was expected to be high.²²⁰ Liberals hoped that a win by Judge Karofsky would give them a chance to retake the majority of the court in 2023, when conservative-supported Chief Justice Patience Roggensack's term expires.²²¹ Otherwise, conservatives would hold the majority until at least 2025.²²² A win for either side was important in developing a majority on the court in the coming election years.

No one could have anticipated what happened next. On March 12, 2020, Wisconsin Governor Tony Evers signed Executive Order Number 72, declaring a public health emergency due to the Coronavirus (COVID-19) outbreak throughout the world, including the United States.²²³ On March 13, 2020, President Donald Trump declared the COVID-19 outbreak a national emergency.²²⁴ Like many states, Wisconsin took action issuing a series of Executive Orders including a "Safer at Home" order to help reduce the spread of the virus.²²⁵ On April 6, 2020 Governor Evers signed Executive Order Number 74, suspending in-person voting for the April 7, 2020 election until June 9, 2020, unless the legislature passed a different date for in-person voting, for the safety of all Wisconsinites.²²⁶ The Executive Order allowed Wisconsinites to continue to request and mail in absentee ballots consistent with Wisconsin Statutes.²²⁷ However, by a 4-2 conservative majority, the Wisconsin Supreme Court issued an order enjoining Executive Order Number 74 on the

²²⁰ Marley, *supra* note 213.

²²¹ Vetterkind, *supra* note 216.

²²² *Id.*

²²³ Wis. Exec. Order No. 72 (Mar. 12, 2020), <https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf>.

²²⁴ Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020) (declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak). *See generally* CORONAVIRUS (COVID-19), <https://www.coronavirus.gov> (including information the latest news, updates, cases and resources regarding COVID-19); *Coronavirus (COVID-19)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-nCoV/index.html> (last visited May 17, 2020).

²²⁵ Wis. Emergency Order No. 12 (Mar. 24, 2020), <https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf>.

²²⁶ By April 6, 2020, 2,267 Wisconsinites had tested positive for COVID-19. Wis. Exec. Order No. 74 (Apr. 6, 2020), <https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession2.pdf>. This Executive Order came after statements from various national and state officials that the threat of COVID-19 was quickly escalating for the time period during which the April 7 election was to take place. *See* Jason Slotkin & Barbara Sprunt, *Trump Warns 'One Of The Toughest Weeks' Is Ahead, Says To Brace For 'A Lot Of Death'*, NPR (Apr. 4, 2020, 2:31 PM), <https://www.npr.org/2020/04/04/826741317/federal-government-implements-relief-as-nation-reels-from-coronavirus-pandemic>; Dave Michaels, *Surgeon General: Next Week Will Be Hardest, Saddest*, WALL ST. J. (Apr. 5, 2020, 10:51 AM), <https://www.wsj.com/livecoverage/coronavirus-2020-04-03/card/1YJjTvtgwgAnGUaW3FLw>; Sarah Westwood, *Surgeon General: This week will be like a 'Pearl Harbor' and '9/11' moment*, CNN (Apr. 5, 2020, 1:25 PM), <https://www.cnn.com/2020/04/05/politics/jerome-adams-coronavirus/index.html>.

²²⁷ Wis. Emergency Order No. 12, *supra* note 225; *see also* WIS. STAT. § 6.86(1)(b); WIS. STAT. § 6.87(6).

grounds that Governor Evers did not have “the authority to suspend or rewrite state election laws.”²²⁸ Justice Ann W. Bradley put it best when she wrote in her dissenting opinion, “the majority gives Wisconsinites an untenable choice: endanger your safety and potentially your life by voting or give up your right to vote by heeding the recent and urgent warnings about the fast growing pandemic.”²²⁹

On April 6, 2020, the U. S. Supreme Court also issued a decision along ideological lines with a conservative majority, holding that mail ballots that arrived after Election Day must either be postmarked by Election Day, and received by 4:00 pm on April 13, 2020 to count.²³⁰ The decision cut the week extension given to voting residents to cast absentee ballots as long as the ballots were postmarked by April 13.²³¹ Thus, the April 7 election would proceed against the advice of public health experts. Those who had not requested or received their absentee ballots on time would either “brave the polls, endangering their own and others’ safety[, o]r . . . lose their right to vote, through no fault of their own.”²³²

Despite the fears associated with the pandemic, Wisconsinites went to the polls on April 7, 2020 to vote in the critical races that included the Democratic presidential primary and a key state Supreme Court seat.²³³ The pandemic contributed to a record number of people voting by absentee ballot—1,098,489 absentee ballots were returned by April 13th.²³⁴

²²⁸ Wis. Legislature v. Evers, No. 2020AP608-OA, at 3 (Wis. amended order Apr. 6, 2020), https://www.wicourts.gov/news/docs/2020AP608_2.pdf.

²²⁹ *Id.*

²³⁰ Republican Nat’l Comm. v. Democratic Nat’l Comm., No. 19A1016 (U.S. April 6, 2020) (per curiam).

²³¹ *Id.*

²³² *Id.* (Ginsburg, J., dissenting) (“That is a matter of utmost importance—to the constitutional rights of Wisconsin’s citizens, the integrity of the State’s election process, and in this most extraordinary time, the health of the Nation.”). The Court’s decision may signal what may happen later in the 2020 presidential election: lower voter turnout and a curtailment of citizens’ constitutional rights. See Leah Litman, *The Supreme Court’s Wisconsin Decision Is a Terrible Sign for November*, THE ATLANTIC (Apr. 7, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/supreme-courts-hypocrisy-going-get-americans-killed/609598/>. This is of great importance given the ongoing pandemic and the potential for states to allow for voters to cast ballot by mail or absentee ballots in November. See Rebecca Klar, *Almost 2 in 3 Favor Voting By Mail This November Amid Fraud Concerns: Poll*, THE HILL (May 12, 2020, 8:13 AM), <https://thehill.com/homenews/campaign/497262-almost-two-in-three-favor-voting-by-mail-this-november-amid-fraud-concerns>; Mohamed Younis, *Most Americans Favor Voting by Mail as Option in November*, GALLUP (May 12, 2020), https://news.gallup.com/poll/310586/americans-favor-voting-mail-option-november.aspx?utm_source=alert&utm_medium=email&utm_content=morelink&utm_campaign=syndication.

²³³ See Astead W. Herndon & Alexander Burns, *Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-election-coronavirus.html>.

²³⁴ *Absentee Ballot Statistics for April 7*, WIS. ELECTIONS COMMISSION, <https://elections.wi.gov/node/6765> (last visited May 17, 2020).

On April 13, 2020, a week after the election, it was announced that Jill Karofsky defeated conservative incumbent Daniel Kelly, 55.28 percent to 44.72 percent, reducing the conservative majority on the court to 4-3.²³⁵ The use of absentee ballots created controversy regarding absentee ballots not arriving in time or getting lost in the mail and the potentially large number of disenfranchised voters.²³⁶

The 2020 judicial election was set against a backdrop of clear partisan politics. Judge Karofsky's win followed the Republican Legislature and conservative-controlled Wisconsin Supreme Court rejecting Democratic efforts to move the date of the election. The ongoing battle continues between Democrats who believe that Republicans forcing in-person voting is "voter suppression on steroids" and Republicans defending in-person elections amid the pandemic.²³⁷ The result of the election was a huge win for Democrats, who saw Judge's Karofsky's dominant win and high voter turnout as positive signs for the upcoming 2020 presential election.²³⁸

Following her win, Judge Karofsky addressed the series of decisions that took place before the election: "Courts making partisan decisions, sending people out to vote in the middle of a global pandemic, is exactly what's wrong with a judiciary that has become too political, and I think a deliberate attempt to suppress the vote in Wisconsin."²³⁹ Judge Karofsky recognizes that actions like the ones that took place during the 2020 election are what undermine the public's trust in the judiciary and damage the court's reputation. Her win means it could take only a single justice to sway the outcome of several important cases that may come before the court in the next few years as well as amendments to Wisconsin's recusal rule.

CONCLUSION

The amount of campaign contributions have effectively made it difficult to draw a line between partisan politics and the judiciary. Wisconsin attorneys fear that the Wisconsin Supreme Court cannot rely on campaign finance laws to guard

²³⁵ *Wisconsin Elections Results*, ASSOCIATED PRESS: ELECTIONS, <https://elections.ap.org/wpr/results/2020-04-07/state/WI/race/0/raceid/50888> (last updated Apr. 30, 2020). Justice Kelly became the second incumbent State Supreme Court justice to lose an election since 1967. Reid J. Epstein, *Upset Victory in Wisconsin Supreme Court Race Gives Democrats a Lift*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/us/politics/wisconsin-primary-results.html>.

²³⁶ See Nathaniel Rakich, *What Went Down In The Wisconsin Primary*, FIVETHIRTYEIGHT (Apr. 13, 2020, 11:43 PM), <https://fivethirtyeight.com/features/what-went-down-in-the-wisconsin-primary/>; see also Jim Rutenberg & Nick Corasaniti, *How a Supreme Court Decision Curtailed the Right to Vote in Wisconsin*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/13/us/wisconsin-election-voting-rights.html>.

²³⁷ Epstein, *supra* note 235.

²³⁸ *Id.*

²³⁹ Jill Karofsky, Opinion, *I'm the Judge Who Won in Wisconsin. This Principle Is More Important Than Winning*, N.Y. TIMES (Apr. 27, 2020), <https://www.nytimes.com/2020/04/27/opinion/wisconsin-election.html>.

against the appearance of impropriety and ensure due process.²⁴⁰ The Wisconsin legislature needs to enact new campaign finance reform statutes that, among other things, regulate issue ads.²⁴¹ How likely is it that the Wisconsin legislature will amend its current recusal rules? In the 2018 midterm elections, Tony Evers defeated Scott Walker for Wisconsin's Governor seat.²⁴² As part of his campaign, Evers said he would seek to reform the state's campaign finance laws and support legislation to overturn *Citizens United* and to clean up Wisconsin's elections.²⁴³ Recognizing that Walker and the legislature had completely transformed Wisconsin's voting rights and campaign finance laws, Evers hopes to return the power to the people.²⁴⁴

Since Evers' win, campaign finance reform efforts have become a hot topic in Wisconsin with efforts being made to undo the 2015 laws passed by former Governor Walker. Soon after Evers' win, Assembly Democrats laid out a set of proposals they said would give Wisconsin a "fresh start," including bills that would limit contributions made by individuals, campaign committees, and political parties.²⁴⁵ Among those taking the lead in campaign finance reform is State Senator Chris Larson, Democrat from Milwaukee.²⁴⁶ The Brennan Center for Justice recognizes how Wisconsin's campaign finance laws have slid "into a state of decay" and recently made recommendations including enacting new legislation for public financing and to reduce contribution limits.²⁴⁷

A big challenge to Governor Evers' possible reform efforts will be the Republican-controlled legislature and the Wisconsin Supreme Court. Wisconsin is among one the nation's most politically polarized states and issues like changes to the recusal rule may be met with great contention. We have a recent example of what may happen when Evers was pushed to the sideline after trying to delay the

²⁴⁰ See Letter from Brendan Fischer & Catherine Hinckley Kelley to Chief Justice Patience D. Roggensack, *supra* note 98.

²⁴¹ See generally Adelman, *supra* note 49, at 29.

²⁴² See *Wisconsin Election Results*, N.Y. TIMES (May 15, 2019, 2:12 PM), <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-wisconsin-elections.html>.

²⁴³ See TONY EVERS, <https://tonyevers.com/plan/> [<https://web.archive.org/web/20181129132259/https://tonyevers.com/>] (last visited Nov. 26, 2018).

²⁴⁴ See *id.*

²⁴⁵ See Jessie Opoien, *Assembly Democrats Propose 'Fresh Start' Agenda Including Redistricting, Campaign Finance Changes*, CAP TIMES (Jan. 15, 2019), https://madison.com/ct/news/local/govt-and-politics/election-matters/assembly-democrats-propose-fresh-start-agenda-including-redistricting-campaign-finance/article_046fa866-bdd2-54ff-bde6-2a40821fb595.html.

²⁴⁶ Senator Larson introduced what he calls the 2019–2020 Campaign Integrity Package, consisting of nine bills to rectify the damage that was done when the GOP rewrote Wisconsin's campaign finance laws in 2015. See Matthew Rothschild, *Sen. Larson Leads on Campaign Finance Reform*, WIS. DEMOCRACY CAMPAIGN (Feb. 6, 2019), <https://www.wisdc.org/news/commentary/6294-sen-larson-leads-on-campaign-finance-reform>.

²⁴⁷ Michael Waldman, *Foreword* to SUZANNE NOVAK & SEEMA SHAH, BRENNAN CTR FOR JUSTICE CAMPAIGN FINANCE IN WISCONSIN, 2, 2 (2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_Campaign-Finance-Wisconsin.pdf.

April 2020 election, “only to see the Republican-controlled state legislature immediately challenge him in court, and the state’s Supreme Court rule against Evers.”²⁴⁸ The Republican legislature then filed a lawsuit challenging Evers’ “Safer at Home” emergency order asking the state’s highest court to block it.²⁴⁹ In a 4-3 decision, the Wisconsin Supreme Court overturned Governor Evers’ state’s stay-at-home order, ruling that the state Department of Health Services did not have the authority to issue the emergency order.²⁵⁰ It is very possible that many major reforms in the near future—including Wisconsin’s current recusal rule—will be met with similar challenges from the Republican legislature. At the state level, Republicans and the business community may be among those who would present the biggest opposition to reforms, especially given that conservative interest groups crafted the state’s current recusal rule.

In order for new laws to survive constitutional challenges, the U.S. Supreme Court will have to change direction on its views regarding campaign finance legislation.²⁵¹ Recusal rules that are able to withstand constitutional challenges are essential to ensuring due process for litigants.²⁵² It is equally important to recognize and acknowledge the new politics of judicial elections and the ability of interest groups to influence judicial decisions and affect the autonomy of our state judges. By reforming recusal rules on campaign contributions, the Wisconsin legislature and judiciary can remove money from the equation, or at least limit it in a meaningful way.

Ultimately, we need bright-line rules, mechanisms, and standards to restore the public’s confidence in the judiciary after the substantial campaign contributions in state judicial elections over the last decade.²⁵³ I agree with Professor Geyh when he writes that “judges need [to] be capable, honest, impartial, and independent

²⁴⁸ Eric Bradner, *Pandemic Response is Further Politicized in Wisconsin as GOP Strikes Down Stay-at-Home Order*, CNN POL. (May 14, 2020, 4:35 PM), <https://www.cnn.com/2020/05/14/politics/wisconsin-coronavirus-political-fight/index.html>.

²⁴⁹ “The suit was filed specifically against state Department of Health Services Secretary-designee Andrea Palm and other health officials, who made the decision in mid-April to extend the state’s “Safer at Home” emergency order.” Omar Jimenez & Paul LeBlanc, *Wisconsin Supreme Court Strikes Down State’s Stay-at-Home Order*, CNN POL. (May 14, 2020, 10:12 AM), <https://www.cnn.com/2020/05/13/politics/wisconsin-supreme-court-strikes-down-stay-at-home-order/index.html>.

²⁵⁰ *Wis. Legislature v. Palm*, 2020 WI 42, 2020AP765-OA (Wis. May 13, 2020); see also Riley Vetterkind & Mitchell Schmidt, *Wisconsin Supreme Court Strikes Down Stay-At-Home Order; Dane County Institutes Local Order*, WIS. ST. J. (May 14, 2020), https://madison.com/wsj/news/local/govt-and-politics/wisconsin-supreme-court-strikes-down-stay-at-home-order-dane-county-institutes-local-order/article_fd2be344-666f-5437-8955-f5cd9ae17a50.html.

²⁵¹ See Adelman, *supra* note 49, at 29.

²⁵² See generally Penny J. White, *A Matter of Perspective*, 3 FIRST AMEND. L. REV. 5 (2004).

²⁵³ See ALICIA BANNON, CATHLEEN LISK & PETER HARDIN WITH DOUGLAS KEITH, LAILA ROBBINS, ERIC VELASCO, DENISE ROTH BARBER & LINDA CASEY, WHO PAYS FOR JUDICIAL RACES? THE POLITICS OF JUDICIAL ELECTIONS 2015–2016, at 1 (Dec. 14, 2017) (identifying the developments in partisan and special interest pressures in judicial races and the impact it has on administering justice).

enough to further . . . : (1) upholding the law; (2) respecting rules of process; and (3) rendering justice.”²⁵⁴ A judicial seat should not be for sale, easily bought by those with the deepest pockets. While recusal rules are important in all respects, we also need judges with integrity, ability, and proper temperament.²⁵⁵ For there to be judicial integrity, there needs to be confidence that a win in a judicial election is a solid victory by a qualified candidate who will uphold the rule of law in all respects.

Given the political nature of many elections now and the highly polarized country we live in today, it is imperative that states work to preserve and maintain the integrity, independence, and impartiality of their judicial system. This will take time and continued efforts. Enacting new campaign finance laws and amending recusal rules would be a step in the right direction.

²⁵⁴ GEYH, *supra* note 7, at 10 (emphasis added).

²⁵⁵ See Adam Liptak, Keith Swisher, James Sample & Bradley Smith, Caperton *and the Courts: Did the Floodgates Open?*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 481, 495 (2015).