Michigan Law Review

Volume 86 | Issue 2

1987

Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers

Mark Andrew Grannis
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Election Law Commons](#), [Judges Commons](#), [Legal Profession Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Mark A. Grannis, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382 (1987).

Available at: <https://repository.law.umich.edu/mlr/vol86/iss2/16>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTES

Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers

The various methods by which the states currently select their judges fall into five general categories: executive appointment, legislative selection, partisan election, nonpartisan election, and "merit" selection, which involves selection by a committee professing special competence to select judges.¹ Within these five categories, states differ as to many particulars, such as the term of office and the method of renomination, so that no two systems are exactly alike.² However, forty-three states currently use methods requiring at least some judges to stand for election in order to win or retain office.³ The nature of the elections varies from state to state;⁴ but no matter which selection method a state employs, the judges in all forty-three of these states must at some point raise campaign funds.⁵

The obvious place for judges to seek those campaign funds is the local bar,⁶ since attorneys are likely to be more familiar than the gen-

1. The broad outlines of each type of system are discussed in *Judicial Selection: What Fits Texas? A National Symposium on Judicial Selection and Tenure*, 40 SW. L.J. 1, 1-52 (1986).

2. The details of the various state selection processes are set forth in L. BERKSON, S. BELLER & M. GRIMALDI, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* 1-46 (1980).

3. The exceptions are Delaware, Hawaii, Massachusetts, New Hampshire, Rhode Island, Vermont, and Virginia. *Id.* Thirty-nine of those states elect the judges on the highest appellate court in the state, with Connecticut, Maine, New Jersey, and New York being the additional exceptions. *Id.*

The degree of conformity among American jurisdictions on this point is truly astounding. Outside of the United States the only places in the world where judges are elected are the Soviet Union, its satellites, and to a limited extent Switzerland. Kauffman, *Judicial Selection in Pennsylvania: A Proposal*, 27 VILL. L. REV. 1163, 1164 n.6 (1982).

4. Elections are generally partisan or nonpartisan races in which multiple candidates may vie for judicial office, or "retention" elections in which the incumbent judge is unopposed and the issue is simply whether he should remain in office. L. BERKSON, S. BELLER & M. GRIMALDI, *supra* note 2, at 1-46.

5. Moreover, the need for fundraising has increased markedly in the last decade. Dubois, *Financing Trial Court Elections: Who Contributes to California Judicial Campaigns?*, 70 JUDICATURE 8, 9 (1986). The author attributes the increased cost of judicial election campaigns to increases in both the number of candidates for judicial office and the amount spent by each.

6. Indeed, lawyers constitute the largest single group of contributors to judicial campaigns. DuBois, *supra* note 5, found that in the contested 1980 California Superior Court elections, lawyers and law firms donated 39.2% of the money spent in the primaries and 32.4% of the money spent in runoff elections. *Id.* at 12. In Circuit Court general elections in Cook County, Illinois, other researchers found that more than half of all outside contributions came from lawyers and

eral public with the candidates and the demands of the office.⁷ However, reliance on attorney contributions raises a disturbing question about the even-handedness of justice when one of a judge's major contributors⁸ later argues a case before that judge: Is the contributor's opponent being deprived of his constitutional right to a fair and impartial forum?

Traditionally, the states and the legal profession have viewed the problem of attorney contributions as one of professional ethics.⁹ The American Bar Association's Code of Judicial Conduct¹⁰ (CJC) defines the ethical bounds of judicial campaign conduct in Canon 7(B),¹¹

law firms. Nicholson & Weiss, *Funding Judicial Campaigns in the Circuit Court of Cook County*, 70 JUDICATURE 17, 21-22 (1986).

7. See C. WOLFRAM, MODERN LEGAL ETHICS § 11.3.2, at 601 (1986).

8. There is no obvious reason why pecuniary support should be more likely to influence a judge than some forms of nonpecuniary support, such as serving as a campaign manager or party leader. This Note is therefore concerned with all aspects of political support during judicial campaigns, and terms like "political contributors" will be used throughout the Note to include all political supporters, unless otherwise noted.

Somewhat more troubling is the case of conspicuous noncontributors. It would be absurd to argue for a due process right to have one's case heard only by a judge to whom one has contributed time or money. However, there may be cases where noncontributors' due process rights are jeopardized, such as where a perennial supporter withdraws support and refuses to contribute after overt solicitation, or where an attorney has been intimately involved in the opposition's campaign. This latter category would obviously include those cases where one of the attorneys was the losing candidate, especially in hotly contested races. While such cases may arise infrequently, the due process analysis set out in Part II of this Note should also apply when conspicuous noncontribution endangers a litigant's right to a fair and impartial forum.

Although this Note deals with all aspects of political support, it is concerned *only* with political support and does not rely on any assumptions about corruption in the state judiciary. On the contrary, actual bribery is completely irrelevant to this Note, since each state already prohibits that sort of misconduct. This Note deals only with the constitutional ramifications of campaign conduct which is perfectly legal and for which an adversely affected litigant currently has no other recourse.

9. Self-regulation is the primary form of regulation of the legal profession. See C. WOLFRAM, *supra* note 7, § 2.1, at 20-22.

10. Currently, the American Bar Association's Code of Judicial Conduct has been enacted in substantial part in forty-seven jurisdictions, including the federal system and the District of Columbia. Illinois, Maryland, Montana, Rhode Island, and Wisconsin have each adopted separate standards of judicial conduct. Goldstein, *Fundraising by Judges: Ethical Restrictions on Assisting Civic, Charitable and Other Organizations*, 70 JUDICATURE 27, 27 n.1 (1986).

11. Canon 7(B) states:

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates *should not* himself solicit or accept campaign funds,

which takes the general approach of attempting to prevent candidates from learning the identities of their contributors.¹² The CJC also suggests that "[a] judge *should* disqualify himself in a proceeding in which his impartiality might reasonably be questioned," including instances where "he has a personal bias or prejudice concerning a party," or where he knows that he or a close relative is financially interested in the litigation or a party to it.¹³ Moreover, the American Bar Association's Model Code of Professional Responsibility¹⁴ and Model Rules of Professional Conduct¹⁵ prohibit lawyers from making gifts or loans to judges unless allowable under the CJC.¹⁶

However, state attempts to police judicial campaigns through rules of professional ethics have been unsuccessful.¹⁷ One problem is that enforcement of the CJC has been hampered by the fact that the judicial conduct commissions vested with the authority to enforce the ethical provisions against *judges* often have no authority over *losing* candidates.¹⁸ However, a more fundamental problem is that the gen-

or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than [90] days before a primary election and no later than [90] days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

CODE OF JUDICIAL CONDUCT Canon 7(B) (1972) (emphasis added) (the bracketed portions are to be modified as appropriate in each state).

12. See CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (1972), quoted in note 11 *supra*. The inadequacy of anonymity as a general approach to questions of improper influence is discussed briefly in the text accompanying notes 19-21 *infra*.

13. CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (1972) (emphasis added).

14. The ABA promulgated the Model Code of Professional Responsibility in 1969. Since then nearly every jurisdiction has adopted the Code in some way, and in most states the Code has the force of law and is thus binding on all lawyers rather than ABA members only. C. WOLF-RAM, *supra* note 7, § 2.6.3, at 56-57.

15. The ABA promulgated the Model Rules of Professional Conduct in 1983 to respond to criticism of the Code of Professional Responsibility. *Id.* § 2.6.4, at 60. Though still young, the Model Rules do not promise to have nearly the influence that the earlier Code did. *Id.* § 2.6.4, at 62-63.

16. Disciplinary Rule 7-110(A) provides:

A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal, except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-110(A) (1980). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(f) (1983) (prohibiting lawyers from "knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law").

17. For a thorough examination of this problem, canvassing state adoption, modification, and enforcement of Canon 7(B), see generally Survey, *The Ethical Dilemma of Campaigning for Judicial Office: A Proposed Solution*, 14 FORDHAM URB. L.J. 353 (1986) [hereinafter *Ethical Dilemma*].

18. See Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 91-93 (1985); *Ethical Dilemma*, *supra*

eral approach taken by the CJC — forced contributor anonymity accompanied by discretionary disqualification — is hopelessly inadequate. The commentary to CJC Canon 7(B) states that “[u]nless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate.”¹⁹ However, only ten states included this commentary in their enactments of the CJC, and all fifty states currently require disclosure of all contributions and the names of those who contribute more than a minimum amount.²⁰ Contributor anonymity is thus nearly impossible to enforce. Furthermore, even with perfect enforcement of the CJC’s policy of contributor anonymity, judges will still know the identities of many of their supporters merely by looking around at fundraisers and other functions which are legitimate under the Canons.²¹

This failure of the states to police judicial elections adequately is no mere problem of judicial ethics. It also raises constitutional concerns to the extent that past campaign contributions by one of the attorneys²² in a case may deprive the opposing party of his right,

note 17, at 384. This is so in spite of the fact that Canon 7(B) applies by its own terms to “candidates,” rather than merely judges, and in spite of the fact that Disciplinary Rule 8-103 of the Model Code of Professional Responsibility expressly makes Canon 7 applicable to lawyer-candidates for judicial office. Losing candidates are generally still members of the bar, of course, but Professor Schotland suggests an *unwillingness* among state bar associations to punish colleagues for campaign violations. The fact that incumbent judges are much more likely to be punished for questionable campaign activity than their challengers led California to suspend Canon 7(B) altogether. Schotland, *supra*, at 91.

Professor Schotland also points to the problem of devising effective sanctions for ethical violations when the stakes are so high. *Id.* at 92-93. Apart from steps like impeachment that would reverse the election result, *see, e.g.*, OKLA. STAT. tit. 20, § 1404.1 (1981), it would be difficult to deter even successful candidates from pursuing a “win at all costs” strategy if the moral force of the ethical considerations is not enough.

19. CODE OF JUDICIAL CONDUCT Canon 7(B) commentary (1972).

20. *Ethical Dilemma*, *supra* note 17, at 374. The amount varies from zero (in Maryland, New Mexico, Ohio, and Wyoming) to \$2,000 (in Louisiana). *Id.* at 374 n.140.

21. *See* note 8 *supra*.

22. In any particular case, the probability of unconstitutional bias is perhaps independent of whether the contribution in question came from a party’s attorney or from the party himself. Hence, many of the arguments of Part II, that judges may be unconstitutionally biased by attorney contributions, might seem also to apply to contributions made by parties. However, this Note considers only attorney contributions, for two reasons.

First, in the absence of pending litigation, few nonlawyers can be thought to contribute to judges specifically in order to curry favor, for the simple reason that few nonlawyers are in court often enough to be able to say with any confidence that they will ever appear before a particular judge. (The appropriate exceptions are discussed in note 85 *infra*.) This means not only that the problem is less serious in statistical terms, but also that the judge has little reason to believe that the litigant’s support depends upon the judge’s verdict, and accordingly less reason to tip the scales in favor of the contributor.

Second, a different remedy may be indicated when it is a party rather than an attorney who contributes. Part III.A argues that the sheer volume of lawyer contributions, *see* note 6 *supra*, makes judicial recusal an unsatisfactory remedy. Because the discussion of these difficult remedial questions does not apply to situations that occur less frequently, the problem of nonlawyer contributions has been omitted entirely.

under the due process clause,²³ to a fair and impartial forum.²⁴ From this constitutional perspective, a judge's technical compliance with the CJC or other state regulatory statutes²⁵ is irrelevant. Instead, the inquiry is simply whether the forum is a fair one. If not, then settled due process doctrine requires that the litigant have the opportunity to be heard in a forum which is fair.²⁶

This Note will argue that the improprieties arising from some campaign contributions are so egregious that they offend the due process clause of the fourteenth amendment. Consequently, states must either reform judicial campaigns to eliminate such improprieties, or, through mandatory judicial recusal or disqualification,²⁷ respect the absolute constitutional right to an impartial forum. Part I of this Note will

23. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

24. The Supreme Court has said of this right, "A fair trial in a fair tribunal is a basic requirement of due process. . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

25. In addition to the requirements of the CJC which apply in most states, *see* note 10 *supra*, most states have statutes or constitutional provisions respecting disqualification of judges. *See* ALA. CONST. amend. 328, § 6.19; ALA. CODE § 12-1-12 (1986); ALASKA STAT. §§ 22.20.020, 22.20.022, 22.30.070 (1982); ARIZ. CONST. art. VI.I, §§ 2, 4; ARK. CONST. art. 7, § 20; CAL. CONST. art. VI, §§ 17, 18; CAL. CIV. PROC. CODE §§ 170 through 170.7 (West 1982); COLO. REV. STAT. § 16-6-201 (1986); CONN. GEN. STAT. § 51-39 (1983); FLA. STAT. §§ 38.01-.03, 38.10 (1985); GA. CODE ANN. § 15-1-8 (1985); HAW. REV. STAT. § 601-7 (1985); IDAHO CONST. art. I, § 18; ILL. REV. STAT. ch. 110A, para. 67, 68 (1985 & Supp. 1986); IND. CODE § 33-2.1-8-2 (1976); IOWA CODE § 605.17 (1983); KAN. STAT. ANN. § 20-311 (1981); LA. CODE CIV. PROC. ANN. art. 151-61 (West 1981 & Supp. 1987); LA. CODE CRIM. PROC. ANN. art. 671-79 (West 1981); ME. CONST. art. IX, § 2; ME. REV. STAT. ANN. tit. 14, § 1103 (Supp. 1987); MD. CONST. art. IV, § 7; MINN. STAT. §§ 487.40, 542.13, 542.16 (1982); MISS. CONST. art. VI, § 165; MISS. CODE ANN. § 11-1-11 (1972); MO. REV. STAT. §§ 476.180, 508.090 (1986); MONT. CODE ANN. § 3-1-802 (1986); NEB. REV. STAT. § 24-315 (1985); N.H. CONST. pt. I, art. 35th; N.J. STAT. ANN. § 2A:15-49 (West 1952); N.M. CONST. art. VI, § 18; N.Y. JUD. LAW § 14 (McKinney 1983); N.C. GEN. STAT. §§ 1-83(3), 15A-1223 (1983 & Supp. 1985); N.D. CONST. art. VI, § 11; OHIO REV. CODE ANN. § 2937.20 (Anderson 1987); OKLA. STAT. tit. 20, §§ 1401-04.1 (1981 & Supp. 1986); OR. REV. STAT. §§ 14.110, 14.210, 14.250 (1985); S.C. CONST. art. V, § 15; S.C. CODE ANN. §§ 14-1-130, 14-3-50 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. §§ 15-12-2 through -37 (1984); TENN. CODE ANN. § 17-2-101 (1980); TEX. CONST. art. V, §§ 11, 16; TEX. REV. CIV. STAT. ANN. art. 15 (Vernon 1969); TEX. CODE CRIM. PROC. ANN. art. 30.01 (Vernon 1966); UTAH CODE ANN. § 78-7-1 (1987); VT. STAT. ANN. tit. 12, § 61 (Supp. 1987); VA. CODE ANN. § 17-7 (1982); WASH. REV. CODE § 4.12.030(4) (1985); W. VA. CODE § 51-2-8 (1981); WIS. STAT. § 757.19 (1983-1984).

26. *See* notes 81-119 *infra* and accompanying text.

27. Technically, there is a distinction between recusal and disqualification. Disqualification involves the removal of jurisdiction by force of law; thus it is grounds for collateral attack, is not subject to the judge's discretion, and is generally not waivable. In contrast, recusal involves only considerations of propriety. This once meaningful distinction is far less important today. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 45 & n.7 (1970) (asserting that changes in the federal disqualification statute have made the term recusal "largely obsolete"). *But see* Kilgarlin & Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599 (1986) (describing the distinction as it still exists in Texas). The distinction is not important in the context of this Note, since due process is offended by the fact that the judge is sitting in the case, not by the subordinate rule of law which the judge may or may not have violated in doing so. This Note thus follows Frank and uses the terms interchangeably.

examine the history of disqualification at common law and in American practice, focusing on the extent to which it has been held to be a requirement of due process. Part II will argue that under the applicable due process standards, a litigant may successfully move to disqualify a judge who has accepted substantial political contributions from the opposing party or counsel. Part III will discuss the inadequacy of judicial recusal — the usual remedy for a denial of an impartial forum — as a remedy in the context of judicial campaign contributions from lawyers. Part III will also suggest that *preventing* improper influence, by severely limiting lawyers' contributions to judicial candidates, is the best way for states with elected judiciaries to ensure the impartiality of their judges.

I. THE RIGHT TO AN IMPARTIAL FORUM

A state normally possesses the power to regulate the administration of justice within its jurisdiction, subject only to the commands of the United States Constitution.²⁸ The particular command embodied in the fourteenth amendment, that no person be deprived of life, liberty, or property without due process of law, is violated only when state action "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁹ A survey of the evolution of the idea of impartiality from its common-law origins to its present-day constitutional status illustrates just how fundamental the notion of impartiality has been in Anglo-American jurisprudence.

A. *The Evolution of the Law of Disqualification*

At common law, the only recognized ground for disqualification was pecuniary interest.³⁰ This rule was merely a specific application of the broad principle that no man should be a judge in his own cause,³¹ applied in 1608 by Sir Edward Coke in *Bonham's Case*.³² Thomas Bonham was a doctor who was denied a license to practice "physic" by several other doctors designated by the King as "censors." When Bonham continued to practice, he was fined; and when he refused to pay the fine directly to the censors, they imprisoned him. Lord Coke rendered judgment for Bonham in his suit for false imprisonment, holding that "[t]he censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and

28. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977).

29. *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1585 (1986) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)).

30. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947).

31. "It is against reason, that if wrong be done any man, that he thereof should be his own judge." 1 E. COKE, INSTITUTES *141a.

32. 8 Coke 107a, 77 Eng. Rep. 638 (K.B. 1608).

parties to have the moiety of the forfeiture"³³ Lord Coke thought this principle so fundamental that it controlled even the Act of Parliament and patent of King Henry VIII which authorized the state of affairs in *Bonham's Case*.³⁴

Common-law judges were apparently willing to apply the concept of "interest" very broadly. For instance, the court in the *Case of Foxham and Tithing*³⁵ quashed an order affecting the office of the surveyor of the highways because the current surveyor was also a justice of the peace whose name appeared in the caption of the order. And the court in *Between the Parishes of Great Charte and Kennington*³⁶ quashed an order removing a pauper from one of the parishes because one of the justices of the peace issuing the order was an inhabitant of the parish whose taxes would be affected by the decision.³⁷

As strict as the early English judges were about disqualification for interest, it is somewhat surprising that they thought neither general bias³⁸ nor relationship to a party sufficient for disqualification.³⁹ The

33. 8 Coke at 118a, 77 Eng. Rep. at 652.

34. 8 Coke at 118a, 77 Eng. Rep. at 652. The letters patent, which Coke quoted in Latin, quite clearly authorize the President and Censors of the College of London to act as censors over all who practiced within seven miles of the city of London. Furthermore, the King had directed that any fines imposed by the censors were to be evenly divided between the censors and the King. The King also specifically approved imprisonment as a method of compelling payment. Parliament later ratified these concessions of the King. See 8 Coke at 114a-b, 77 Eng. Rep. at 647-48. I am indebted to the Reverend Eric McDermott, S.J., and the Reverend J.P.M. Walsh, S.J., both of Georgetown University, for translating the Latin quoted by Coke. See also Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 32 (1926).

35. 2 Salkend 607, 91 Eng. Rep. 514 (K.B. 1705).

36. 2 Strange 1173, 93 Eng. Rep. 1107 (K.B. 1726).

37. 2 Strange at 1173, 93 Eng. Rep. at 1107-08. This strict common-law rule is generally rejected today. Frank, *supra* note 30, at 614. It has been reversed by statute in some jurisdictions. See CONN. GEN. STAT. § 51-39 (1983); LA. CODE CIV. PROC. ANN. art. 151(B) (West Supp. 1987); LA. CODE CRIM. PROC. ANN. art. 671 (West 1981); MASS. GEN. L. ch. 220, § 10 (1986); N.J. STAT. ANN. § 2A:15-49 (1986); N.Y. JUD. LAW § 15 (McKinney 1983); VT. STAT. ANN. tit. 12, § 61 (Supp. 1987); W. VA. CODE § 51-3-6 (1981).

The court in *Great Charte and Kennington* intimated that the justices might be allowed to sit in such a case if *all* the justices in a particular town would be similarly disqualified. 2 Strange at 1173, 93 Eng. Rep. at 1108. Parliament later responded to this suggestion by providing that justices of the peace were not disqualified simply because they pay taxes. This is apparently the beginning of what is now known as the "Rule of Necessity." Frank, *supra* note 30, at 611. Under the Rule of Necessity a judge, even though disqualified from hearing a particular case, may nonetheless hear the case if no determination could otherwise be had. For a recent application of the Rule of Necessity, see *United States v. Will*, 449 U.S. 200 (1980). The Rule of Necessity is discussed further in the text accompanying notes 148-61 *infra*.

38. See Frank, *supra* note 30, at 618-19. In common parlance, the word "bias" would include concepts like financial interest and nepotistic tendencies. However, as used in discussions of disqualification, "bias" refers to "less tangible prejudices for or against a party, a lawyer, or a cause." *Id.* at 619. "Bias" is thus a term of art which excludes these more particular concepts by definition. As an original matter, this taxonomy would have little to commend it, but the creation of a new one at this point has even less. Therefore, "bias" is used throughout this Note as shorthand for the wide variety of personal antipathies (not arising from pecuniary interest) that might underlie "a tendency or inclination to treat a particular litigant more or less generously than a different litigant raising the identical legal issue." Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. A.B. CRTY N.Y. 694, 709 (1973) (calling this concept "favoritism").

reason that Blackstone gave was that

the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehavior would draw down a heavy censure from those to whom the judge is accountable for his conduct.⁴⁰

Early American courts differed with Blackstone on at least two points. First, Americans placed less reliance on the judge's own desire to avoid the "heavy censure" of which Blackstone spoke, choosing instead to make disqualification mandatory in certain types of situations.⁴¹ Second, jurists on this side of the Atlantic realized that the impartiality of the forum might be compromised for reasons other than pecuniary interest. Accordingly, they came to focus on the simple question of *whether* the forum was impartial with less regard for the particular reason *why* impartiality might be lacking.⁴² Soon state courts and legislatures required disqualification for relationship to parties or attorneys, and for a number of types of bias.⁴³ At the same time, the principle of pecuniary interest was extended by analogy to other types of interest created by changing economic institutions,⁴⁴ such as the rise of the corporate form.⁴⁵

In addition to these departures from the Blackstonian rule, American expansion of disqualification rested on a new interpretation of Blackstone's principle that the presumption of impartiality was the linchpin of judicial authority and legitimacy.⁴⁶ To Blackstone, this meant that judicial impartiality was too important an assumption to be doubted, except perhaps in cases of the most egregious violations of the assumption.⁴⁷ However, American jurists reached the opposite conclusion: that judges must exercise the utmost care to avoid any

39. Frank, *supra* note 30, at 611-12. Relationship is "the problem posed where a judge participates in a case involving his relative." *Id.* at 611. Apparently jurors could be disqualified for relationship even though judges could not. *Id.*

40. 3 W. BLACKSTONE, COMMENTARIES *361.

41. Note, *Disqualification of Judges Because of Bias and Prejudice*, 51 YALE L.J. 169, 169 (1941).

42. "Despite Blackstone's denial that bias could exist as a ground for disqualification a more recent humility has prompted recognition that human judges may deny justice not only for profit or to benefit a kinsman, but for less tangible prejudices for or against a party, a lawyer, or a cause." Frank, *supra* note 30, at 619.

43. *Id.* at 612.

44. *Id.*

45. For instance, judges were disqualified for owning stock in a party-corporation, or for being an officer of the corporation, or even for being the executor of an estate with stock in the corporation. *Id.* at 613-14.

46. See text accompanying note 40 *supra*.

47. *Id.*

public suspicion of impropriety, so as not to diminish public respect for the judiciary. As the Supreme Court stated in *In re Murchison*,

Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."⁴⁸

Hence, in order to preserve its legitimacy, our judicial system admonishes bench and bar alike to avoid even the appearance of impropriety.⁴⁹

48. *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). This language has been quoted recently with approval in *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1587 (1986).

However, note the ambiguity in the quotation between appearance in the probabilistic sense ("probability of unfairness") and appearance in the truly cosmetic sense ("appearance of justice"). For one highly placed commentator's argument that our system has exaggerated the cosmetic aspect in situations where "no reasonable person . . . could fairly conclude that the judge's vote might even be subconsciously influenced," see Rehnquist, *supra* note 38, at 696-702. In this article (then-) Justice Rehnquist stresses that, absent special circumstances, it is a judge's duty to hear the cases before him — a duty that should not be lightly cast aside:

I do not think our profession will be well served by the creation of a climate of professional opinion in which the kudos invariably go to the judge who is quickest to disqualify himself, for such a climate could easily bring about a situation in which, to use Judge Hand's words, only "the most resolute or the most irresponsible" judges would sit in cases in which they ought to sit.

Id. at 713. Although these remarks were made in reference to disqualification generally, with no special emphasis on the constitutional standards, they would seem to apply *a fortiori* to the constitutional limitations which the court has found in the due process clause, see Part I.B *infra*. Hence, unless the current Chief Justice has changed his mind on this matter, at least one member of the Supreme Court can be counted upon to ignore mere appearances of impropriety if they are unaccompanied by reasonable probabilities of actual favoritism. The constitutional importance of appearance to the other Justices is not clear, but Chief Justice Rehnquist appears to espouse the orthodox view, see note 49 *infra*.

49. See CODE OF JUDICIAL CONDUCT Canon 2 (1972); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1981). The importance of the "appearance of impropriety" rationale in the realm of constitutional standards is far less clear than its importance at common law. On the one hand, the Supreme Court has often referred to the appearance of a particular arrangement when it strikes it down for some other reason. See, e.g., *Taylor v. Hayes*, 418 U.S. 488, 501 (1974) (reversing contempt conviction for lack of notice, inadequate opportunity to be heard, and likelihood that judge would be biased by the contemnor's courtroom antics) ("inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused'" (emphasis added)); text accompanying note 48 *supra*. On the other hand, it is difficult to read any case as holding a judge's participation unconstitutional *solely* because it might look improper.

The actual probability of unfairness was emphasized in *Withrow v. Larkin*, 421 U.S. 35 (1975) (upholding a medical discipline panel against a charge of unconstitutional bias). There Justice White stated for a unanimous Court that a charge of bias would succeed only if, "under a realistic appraisal of psychological tendencies and human weakness, [the challenged practice] poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." 421 U.S. at 47 (emphasis added). As *Withrow v. Larkin* illustrates, the Court seems much more concerned with probabilities than with appearances, and the "appearance of impropriety" language seems to be mere icing on the "probability of unfairness" cake. But see Note, *Justice Without Favor: Due Process and Separation*

B. *The Constitutional Law of Disqualification*

The constitutional standards of disqualification have developed in many of the same factual settings as the common-law and statutory standards.⁵⁰ However, not all of the common-law grounds for disqualification are of constitutional magnitude.⁵¹ In general, the situations in which disqualification is constitutionally required are the most shocking variations on the common-law themes, leading one authority to characterize the constitutional safeguards as "the inner core of disqualification."⁵² The Supreme Court has often borrowed common-law terms such as "interest" or "bias" as shorthand for the factual situations in constitutional "impartial forum" adjudication, but the substance of the constitutional disqualification decisions generally follows the American trend toward generalization in this area.⁵³ Hence, the "impartial forum" decisions eschew the common-law tendency to engage in outcome-determinative categorization of factual settings. Instead, the Court has concentrated on the ultimate question of impartiality.

Unfortunately, the Court has been inconsistent in its *articulation* of the standard of impartiality to be applied. The Supreme Court has used at least two formulations in different cases: the "possible temptation" test,⁵⁴ and the "direct, personal, substantial, pecuniary interest" test.⁵⁵ However, regardless of which way the Court phrases the test it applies, the emphasis is on the *degree* of danger to the impartial administration of justice, rather than the *cause* of the danger.

tion of Executive and Judicial Powers in State Government, 94 YALE L.J. 1675, 1676-77 (1985) (reading *Taylor and Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (trial judge who was the object of the contemnor's insolent conduct could not be impartial in later contempt conviction), for the proposition that appearance alone is sufficient).

The proposition that appearance of impropriety alone does not violate the due process clause is probably also "the better view." After all, the concern for avoiding the appearance of impropriety is usually based upon preserving public respect for the law. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 EC 9-1, -2, -4, -6 (1981). The degree to which the people of a state wish their legal system to be publicly respected would seem to be a matter of state autonomy, and if a litigant receives a trial which is fair *in fact*, it is difficult to see how his right to due process of law is violated merely because his fellow citizens believe otherwise. *Cf.* C. WOLFRAM, *supra* note 7, at 319-23 (criticizing the "appearance" standard as it is misused in the context of lawyer conflicts of interest).

50. *Compare, e.g.*, *Bonham's Case*, 8 Coke 107a, 77 Eng. Rep. 638 (K.B. 1608) (discussed in text at notes 32-34 *supra*), with *Gibson v. Berryhill*, 411 U.S. 564 (1973) (involving licensing decisions made by a board of optometrists who stood to gain by restricting the number of licenses).

51. *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580, 1584 (1986); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

52. Frank, *supra* note 27, at 45.

53. *See* text accompanying notes 42-45 *supra*.

54. *See* text accompanying notes 56-60, 101-19 *infra*.

55. *See* text accompanying notes 56-59, 83-100 *infra*.

1. *Tumey v. Ohio: Interest or Bias?*

The seminal case on *constitutional* disqualification is *Tumey v. Ohio*.⁵⁶ Tumey was tried and convicted by the Mayor of the Village of North College Hill, Ohio for violating Ohio's Prohibition Act. The statutes in question gave the Mayor a right to \$12 in costs for himself and a \$100 fine for the village only if Tumey were convicted. On the basis of this interest, Tumey moved to disqualify the Mayor, but the Mayor denied that request.

The United States Supreme Court reversed Tumey's conviction, holding that the Mayor was disqualified from hearing the case because of his interest in the result. Chief Justice Taft's opinion for a unanimous Court noted that while disqualification for interest was "the general rule,"⁵⁷ some questions of judicial qualification "would seem generally to be matters merely of legislative discretion."⁵⁸

But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a *direct, personal, substantial, pecuniary interest* in reaching a conclusion against him in his case.⁵⁹

Had the opinion ended there, the rule of *Tumey v. Ohio* would be both simple and historically familiar: every litigant is entitled to a judge without "a direct, personal, substantial, pecuniary interest" in the outcome. However, the opinion did not end there. Addressing the fact that the Mayor was only interested to the extent of \$12, the Chief Justice wrote:

There are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible temptation to the average man as a judge* to forget the burden of proof required to convict the defendant, or *which might lead*

56. 273 U.S. 510 (1927).

57. 273 U.S. at 522.

58. 273 U.S. at 523.

59. 273 U.S. at 523 (emphasis added). Chief Justice Taft's suggestion that the impartiality requirement might be limited to criminal cases has not stood the test of time. Until recently, no case had squarely held the requirement applicable to civil cases. See Leubsdorf, *Constitutional Civil Procedure*, 63 TEXAS L. REV. 579, 624 (1984) (calling the absence of any decision so holding "the most extraordinary gap in our constitutional law of civil procedure"). However, a dictum in Justice Marshall's opinion for the Court in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), asserted that the due process clause entitled litigants to a fair and impartial tribunal "in both civil and criminal cases." 446 U.S. at 242. There was never much reason to doubt the Court's dictum; none of the opinions in the criminal and administrative situations in which the Court has developed the right to an impartial tribunal have limited its scope to criminal or administrative cases, or employed reasoning that does not apply with equal force to the civil realm. However, *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986) (applying the impartiality requirement in a civil action), removes all doubt. The *Lavoie* case is discussed in the text accompanying notes 64-66 & 89-95 *infra*.

him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.⁶⁰

This "possible temptation" language appears much broader than the "direct, personal, substantial, pecuniary" language, and it is difficult to tell whether it simply amplifies the earlier test or instead suggests an independent standard.

Apparently, the Court applied two independent tests in *Tumey*. Chief Justice Taft noted that the Mayor's pecuniary interest was not the only aspect of Mr. Tumey's trial which violated the strictures of the due process clause.⁶¹ An alternative basis for the holding was that Mayor Pugh's capacity as the executive of his village placed him in "two practically and seriously inconsistent positions, one partisan and the other judicial, [which] necessarily involves a lack of due process of law."⁶² Hence, the disqualification resulted "both because of his direct pecuniary interest in the outcome, and because of his official motive."⁶³

2. The Standard After *Tumey*

The alternative holdings in *Tumey* left the proper standard in doubt. Was the due process clause violated whenever there existed "possible temptation" to depart from neutrality? Or was it necessary for the litigant asking for disqualification to show that the judge had a "direct, personal, substantial, pecuniary" interest in the outcome? As recently as two terms ago, the Court, speaking through Chief Justice Burger, treated the matter as an open question in *Aetna Life Ins. Co. v. Lavoie*.⁶⁴ In that case Aetna challenged Alabama Supreme Court Justice Embry's refusal to disqualify himself from consideration of a case even though he was a party to an essentially identical suit pending in a lower state court. The Court found Justice Embry to have been impermissibly interested, but brushed aside Aetna's allegations of bias, writing:

We need not decide whether allegations of bias or prejudice by a judge of

60. 273 U.S. at 532 (emphasis added). The proposition that the apparent insignificance of the amount does not preclude a finding of impermissible interest was reaffirmed more recently in *Connally v. Georgia*, 429 U.S. 245 (1977), in which the Court applied *Tumey* to strike down a Georgia statutory scheme whereby nonsalaried justices of the peace were paid \$5 for each search warrant issued, but nothing for each search warrant denied.

61. 273 U.S. at 532.

62. 273 U.S. at 534.

63. 273 U.S. at 535. That either ground of disqualification would have been sufficient by itself is indicated by *Dugan v. Ohio*, 277 U.S. 61 (1928). There the Court, again speaking through Chief Justice Taft, upheld a conviction and fine imposed by the Mayor of Xenia, Ohio. Chief Justice Taft thought it necessary to emphasize both that "[t]he mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not," 277 U.S. at 65, and that "[t]he mayor has no executive, and exercises only judicial, functions," 277 U.S. at 63. The negation of both aspects of *Tumey* strongly suggests that either one would have been sufficient by itself.

64. 106 S. Ct. 1580 (1986).

the type we have here would ever be sufficient under the Due Process Clause to force recusal. Certainly only in the most extreme of cases would disqualification on this basis be constitutionally required, and appellant's arguments here fall well below that level.⁶⁵

As *Lavoie* shows, the confusion over the proper standard has been aggravated by the considerable degree to which the two standards applied in *Tumey* overlap.⁶⁶

Careful examination of the decisions since *Tumey* suggests that when both *Tumey* standards are applicable, the Supreme Court prefers to rely on pecuniary interest. For instance, in *Gibson v. Berryhill*,⁶⁷ a group of optometrists successfully challenged a state delicensing procedure as a violation of their due process rights to an impartial forum. The "unprofessional conduct" with which the plaintiff optometrists were charged consisted of accepting employment from a corporate chain rather than establishing independent practices. The plaintiffs claimed that the State Board of Optometry was biased against "corporate" optometrists, and that the state-law procedure was for that reason bound to result in their delicensing, depriving them of their livelihoods without due process of law. The district court agreed and enjoined the state-law administrative proceeding,⁶⁸ finding both bias⁶⁹ and interest.⁷⁰ The Supreme Court affirmed solely on the basis of impermissible interest, although the majority opinion intimated that the ruling as to impermissible bias was also correct.⁷¹

However, there have been many cases in which bias was present but pecuniary interest was not, and in these cases the Court has not hesitated to rely solely on the broader "possible temptation" test. One such case was *In re Murchison*,⁷² which involved a challenge to Michi-

65. 106 S. Ct. at 1585. The "bias" asserted in *Lavoie* — a "general frustration with insurance companies," 106 S. Ct. at 1585 — was clearly not in the same league with the "interest" asserted, see notes 89-91 *infra* and accompanying text, and one can scarcely quarrel with the Court's decision to rely only on the latter ground.

66. Presumably, most interests which are "direct, personal, substantial, [and] pecuniary" also create "possible temptation[s] . . . not to hold the balance nice, clear and true." Hence, the Court is usually able to rely on the more traditional ground of pecuniary interest.

67. 411 U.S. 564 (1973).

68. 411 U.S. at 570-71.

69. 411 U.S. at 578. The district court identified two possible causes of bias. First, the Board consisted exclusively of members of the Alabama Optometric Association, which excluded corporate optometrists. Second, the Board had performed a prosecutorial role in charging the plaintiffs with unprofessional conduct, and this prosecutorial role was bound to induce preconceived notions of guilt. 411 U.S. at 578.

70. 411 U.S. at 578. The "interest" involved was the fact that delicensing all "corporate" optometrists would have cut the number of optometrists practicing in the state nearly in half. 411 U.S. at 578.

71. 411 U.S. at 579. Justice White, speaking for the majority, wrote that "[a]rguably, the District Court was right on both scores, but we need reach, and we affirm, only the latter ground of possible personal interest." 411 U.S. at 579.

72. 349 U.S. 133 (1955).

gan's "one-man grand jury" law⁷³ whereby any judge of the state could compel witnesses to testify before him in secret about suspected crimes. Murchison was interrogated at length in secret, but the judge-grand jury, apparently unconvinced by Murchison's testimony, proceeded to charge, try, convict, and sentence Murchison for contempt. The Supreme Court reversed the conviction on the ground that the judge was biased by his concurrent role as grand jury.⁷⁴ The Court, over three dissenting votes,⁷⁵ explicitly relied on the "possible temptation" language from *Tumey*.⁷⁶

More recently, the Court was faced with a descendant of the *Tumey* "mayor's court" in *Ward v. Village of Monroeville*.⁷⁷ In *Ward*, as in *Tumey*, the Mayor convicted the accused of violating a municipal ordinance and fined him. However in *Ward*, unlike in *Tumey*, the Mayor did not receive any portion of the fines collected from traffic violators, and thus no "direct, personal, substantial, pecuniary interest" was present. On this score, Justice Brennan wrote for the Court that "[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle."⁷⁸ The test, he said, was the "possible temptation" standard from *Tumey*,⁷⁹ and under this test the Mayor's conflicting responsibilities for revenue pro-

73. See also *In re Oliver*, 333 U.S. 257 (1948).

74. *Murchison*, 349 U.S. at 137-38. For other rulings to this effect in contempt cases, see note 103 *infra*. The Supreme Court has also cautioned against the combination of prosecutorial and adjudicatory functions in other contexts. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 197-98 (1974) (White, J., concurring) (federal employee's pretermination hearing must be conducted by someone other than the supervisor accused of slandering the employee); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972) (parole revocation hearing must be conducted by someone other than the parole officer who ordered the defendant's arrest); *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1970) (search warrant may not be issued by state attorney general directing investigation of crime); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (termination of welfare benefits requires a hearing before a decisionmaker who did not participate in the determination under review); *Pickering v. Board of Educ.*, 391 U.S. 563, 578 n.2 (1968) (absence of an impartial factfinder at hearing to review teacher's dismissal deprived the Board of Education's findings of weight and justified Supreme Court's independent review of the record); but see *Marshall v. Jerico, Inc.*, 446 U.S. 238, 248 (1980) (assistant regional administrator of child labor enforcement agency not subject to strict requirement of neutrality, since his function was less judicial than prosecutorial, and prosecutors "are necessarily permitted to be zealous in their enforcement of the law"); *Withrow v. Larkin*, 421 U.S. 35 (1975) (medical examining board's authority to investigate physicians, present charges, rule upon the charges, and impose punishment does not violate due process); *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948) (even if commissioners were biased by their prior roles as prosecutors, requirement of impartiality was satisfied as long as their minds were not "irrevocably closed").

75. 349 U.S. at 139 (Reed and Minton, JJ., dissenting, joined by Burton, J.).

76. 349 U.S. at 136. Interestingly, the dissenters noted the majority's heavy reliance upon *Tumey* but did not squarely confront the appropriateness of the "possible temptation" standard, choosing instead merely to quote the "direct, personal, substantial, pecuniary interest" test in response. 349 U.S. at 142 (Reed and Minton, JJ., dissenting, joined by Burton, J.).

77. 409 U.S. 57 (1972).

78. 409 U.S. at 60.

79. 409 U.S. at 60.

duction and law enforcement⁸⁰ infected the Ohio adjudicatory scheme with constitutional invalidity.

In summary, it appears from *Ward* and *Murchison* that the more general "possible temptation" standard from *Tumey* not only survives, but envelops the older and narrower "direct, personal, substantial, pecuniary interest" test, even though the Supreme Court may refer only to the narrower of the two when it has a choice. Part II analyzes the constitutional status of campaign contributions under these standards.

II. CAMPAIGN CONTRIBUTIONS AND THE RIGHT TO AN IMPARTIAL TRIBUNAL

The constitutional tests described in Part I suggest two distinct ways in which a campaign contribution might constitute grounds for disqualification under the due process clause of the fourteenth amendment. First, the campaign contribution may give the judge an impermissible financial interest in the litigation under *Tumey's* "direct, personal, substantial, pecuniary" standard.⁸¹ Alternatively, whether or not campaign contributions constitute "interest," they may nonetheless be "possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true,"⁸² under the broader of the *Tumey* standards.

A. Contributions as Interest

Campaign contributions are certainly "personal" and "pecuniary," and they may often be "substantial."⁸³ But can the interest created by a campaign contribution ever be so "direct" that it violates the fourteenth amendment?

One answer which seems initially plausible is that a campaign contribution cannot be "interest" of any kind because it is wholly unrelated to the litigation. Because the contribution has by hypothesis *preceded* the judgment, the judge keeps the money regardless of the result in the litigation. It is tempting to conclude that this state of affairs, far from constituting a "direct" interest in the litigation, shows that there is in fact no correlation whatsoever between the outcome and the contribution.

However, this argument ignores the fact that the contributors in question here are typically *lawyers*, who are interested in the judge as much for his general responsiveness to their arguments as for his decision in an isolated case. They have, by hypothesis, made prior contri-

80. It was on this basis that the Court distinguished *Dugan v. Ohio*, 277 U.S. 61 (1928), discussed in note 63 *supra*. 409 U.S. at 60-61.

81. See text accompanying note 59 *supra*.

82. See text accompanying note 60 *supra*.

83. See text accompanying notes 143-45 *infra*.

butions to a particular judge's campaign, and it is entirely reasonable for the judge to assume that they will continue to contribute as long as the contributor remains satisfied with the judge's performance. In short, there may be a "course of dealing"⁸⁴ between the judge and the lawyer-contributor⁸⁵ which makes it reasonable for the judge to weigh the importance of the contributor's continued support in arriving at a decision.⁸⁶

Still, in the absence of actual bribery,⁸⁷ a campaign contribution is hardly direct in the same way that the \$12 fee in *Tumey* was direct. In *Tumey*, a verdict of guilty put \$12 in the judge's pocket, while a verdict of not guilty left the judge uncompensated for trying the case. Even if a judge assumes that he must keep a particular contributor happy *in general*, the contributor surely cannot expect to win *every* case before the judge; thus, the interest in any particular case would seem to be something less than "direct."

However, the Supreme Court has not always required the directness present in *Tumey*. In *Lavoie*,⁸⁸ for example, Justice Embry's only interest in the outcome was its precedential value: the fact that his decision approved the largest punitive damage award of its kind in Alabama history presumably enhanced the settlement value of Justice Embry's own suit against a different insurer.⁸⁹ Although the Court characterized this effect of Justice Embry's decision as "clear and immediate,"⁹⁰ it is certainly a far cry from the directness involved in taking \$12 out of Mr. Tumey's pocket and placing it in Mayor

84. Cf. U.C.C. § 1-205(1) (1978): "A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."

85. A similar "course of dealing" may arise with nonattorneys who are so-called "institutional litigants"; i.e., those litigants who find themselves in court so often that costs incurred in any one case may yield benefits in a whole range of other cases in the future. See D. LAYCOCK, *MODERN AMERICAN REMEDIES* 855-56 (1985) (drawing a distinction between "one-shotters" and "repeat players"). These litigants may know in advance that they will have a significant number of cases before a particular judge simply by virtue of the frequency with which they sue or are sued. Just as these litigants may treat a favorable result in an otherwise insignificant case as an asset to be used in other cases, cf. Fairchild, *Comment*, 19 U. CHI. CONF. SERIES 9, 16 (1964), the favorable disposition of a judge is an asset which can be every bit as important to these litigants as it is to a lawyer who practices often in the judge's court.

The difficulty with treating such litigants as lawyers for the purpose of due process analysis is that it is difficult to draw any principled distinction between an "institutional litigant" and a regular litigant that could reliably identify the former, let alone justify dissimilar treatment.

86. Note, however, that such a "course of dealing" is only relevant (indeed, only possible) where the judge must someday campaign again. Thus, a system in which judges were elected to life terms would avoid this particular constitutional difficulty, although it might still be subject to the problems of bias explored in Part II.B. No state currently employs such a system. L. BERKSON, S. BELLER & M. GRIMALDI, *supra* note 2, at 1-46.

87. See note 8 *supra*.

88. See text accompanying notes 64-66 *supra*.

89. 106 S. Ct. at 1586.

90. 106 S. Ct. at 1586.

Pugh's.⁹¹

While nothing in Chief Justice Burger's majority opinion in *Lavoie* explained the type of directness required, Justice Brennan's concurrence⁹² was more helpful. He pointed out that the Court had found due process violations in cases where the "direct, personal, substantial, pecuniary" test was not met.⁹³ But he also maintained that even under this test, "an interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding."⁹⁴ Under this standard, the inquiry should be whether a particular outcome substantially advances a judge's chance of reelection.

The pervasive influence of money on modern elections demands that *substantial* contributions be considered direct interest under this standard. A survey of California judges conducted by the California Judges' Association is informative in this connection.⁹⁵ One judge who responded to the survey wrote, "[M]y 'reasons for winning' . . . are as follows: (1) *Money*; (2) Organization; (3) An early start; (4) *Money*; (5) An 'excellent' candidate; (6) A weak opponent; (7) Excellent public relations and use of media advice; (8) *Money*; (9) Luck."⁹⁶ Elaborating on the importance of money, this respondent opined that "[t]here is no way in a metropolitan area [of four hundred thousand registered voters] that you can do anything effective without a large amount of money since both electronic media and direct mail are very costly."⁹⁷ This need for funding has a predictable effect on the way judges view attorney support. As another respondent wrote, "I would solicit and expect more help from local attorneys next time. Because of the ethical problems, I avoided the whole issue. If the Bar wants competent judges (and in my case the issue was clear) *it must get down in the dirt with us*."⁹⁸ When there is reason to believe that a judge

91. See text accompanying notes 56-59 *supra*.

92. 106 S. Ct. at 1589.

93. 106 S. Ct. at 1589. Justice Brennan cited *Murchison*, discussed in the text accompanying notes 72-76 *supra*, as an example.

94. 106 S. Ct. at 1589-90. Justice Brennan cited *Ward*, 409 U.S. 57 (1972), discussed in the text accompanying notes 77-80 *supra*, and *Gibson*, 411 U.S. 564 (1973), discussed in the text accompanying notes 67-71 *supra*, for this proposition, and added, "Nothing in the Court's opinion should be read, as I understand it, to limit these precedents in any way." 106 S. Ct. at 1590.

95. See Schotland, *supra* note 18, at 155.

96. *Id.* (emphasis in original). Perhaps it is reassuring that the relative merits of the candidates finished ahead of "luck" in importance, but still one might have hoped for higher showings than fifth and sixth. In any event, the quality factor lost two out of three to money.

97. *Id.* A Northwestern Law School professor who ran a losing campaign concurs. "My runningmates and I had substantial funding, around \$175,000, . . . but still there was time to tell the voter little more than he or she is told in an equal amount of time about the comparative effectiveness of Duz and Dash." Waltz, *Some Firsthand Observations on the Election of Judges*, 63 JUDICATURE 185, 186-87 (1979).

98. Schotland, *supra* note 18, at 155 (emphasis added).

depends upon one of the attorneys before him for the financial support he so desperately needs, the judge should be deemed to have an interest in the outcome which is sufficiently direct under the Brennan test that it offends due process.

Justice Brennan's test for the directness of the interest is consistent not only with the precedent he cites, but also with the modern emphasis on the fact of partiality rather than its cause.⁹⁹ Under that test, it seems clear that some campaign contributions are significant enough that it would constitute a denial of due process for the recipient to preside over a case involving the donor. Just as the common-law concept of interest expanded with changing economic conditions to include interests such as the ownership of stock in a corporate party,¹⁰⁰ the constitutional concept of interest should now broaden to encompass a judge's reasonable expectation of continued political support.

B. Campaign Contributions as "Possible Temptation"

If a particularly large campaign contribution constitutes a "direct, personal, substantial, pecuniary interest," it is *a fortiori* a "possible temptation to the average man as judge . . . not to hold the balance nice, clear and true."¹⁰¹ Hence, the arguments of Part II.A apply with even greater force to the possible temptation standard than to the pecuniary interest test. Under this broader standard the question is no longer whether campaign contributions can be categorized as "interest"; it is now whether certain large contributions from attorneys affect the impartiality of sitting judges.¹⁰² Even if advancing one's chance of reelection is not a direct pecuniary interest, it must be presumed to be a temptation for anyone who is actually running for office.

However, there are independent reasons to question the impartiality of judges when major contributors practice before them. These reasons have to do not with the judge's expectation of future gain, but rather with the extent to which the judge is favorably or unfavorably disposed toward a litigant as a result of past support. Supreme Court decisions in analogous areas suggest that this personal favoritism may sometimes rise to unconstitutional levels.

The easiest analogy is to the law of contempt. In this area, the Supreme Court has held repeatedly that unless immediate action by the trial judge is necessary to prevent hindrance of the administration of justice, a judge who has been personally insulted or angered by al-

99. See text accompanying notes 42-45 *supra*.

100. See note 45 *supra* and accompanying text.

101. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)

102. Consider the shift in emphasis from the early common law to the later common law and statutory law on disqualification, discussed in the text accompanying notes 42-45 *supra*, as well as the tendency toward generalization which has animated the constitutional "impartial forum" decisions, discussed in the text accompanying notes 64-80 *supra*.

legedly contemptible behavior may sit at the contempt hearing only at the risk of denying due process of law.¹⁰³ The theory of these cases is not that the trial judge has anything to gain by holding the defendant in contempt, but rather that impartiality is not possible because of prior dealings between the two.¹⁰⁴

The same reasoning applies to situations where one of the parties is a large contributor to the judge's election campaign.¹⁰⁵ Even if the judge has no reason to expect that the supporter in question will stop contributing as soon as the judge renders an adverse decision, the judge's sympathies in the situation will be altered.¹⁰⁶ This is not to say that all judges or even most judges will twist and bend the law until it comes out in their supporters' favor.¹⁰⁷ It is only to say that the non-supporter has reason to fear that he is starting with a handicap in such circumstances, and "possible temptation" exists regardless of whether or not the judge actually fails to discharge his duty of impartiality.

This personal bias may sometimes operate in situations that seem at first blush to involve far less probability of unfairness than either the contempt cases just examined or the political contribution scenario. For instance, in *Public Utilities Commission v. Pollak*,¹⁰⁸ Justice Frankfurter recused himself from a case challenging the District of Columbia's practice of broadcasting radio programs in public buses.¹⁰⁹ He noted, "My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it."¹¹⁰ The degree of bias present in that case might

103. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Offutt v. United States*, 348 U.S. 11 (1954); *Cooke v. United States*, 267 U.S. 517 (1925).

104. See *Mayberry*, 400 U.S. at 465; *Offutt*, 348 U.S. at 17-18; *Cooke*, 267 U.S. at 539. Cf. the problem of conspicuous noncontributors raised in note 8 *supra*.

105. If anything the argument is stronger in the context of campaign contributions. In contempt proceedings, at least it is the behavior of the contemnor that is in question. However, a litigant who is disadvantaged by an opposing attorney's political support for the judge will in most cases have nothing to do with the source of the favoritism. As repugnant as it is for impartiality to be precluded by one's own political beliefs, it seems all the worse when the source of the bias is the political beliefs of one's attorney—or the attorney of one's opponent.

106. *Ethical Dilemma*, *supra* note 17, at 402-03. One respondent to this nationwide survey of state court judges stated, "I very much appreciated the contributions I received from others. However, it makes me feel uncomfortable dealing with them in court." *Id.* at 402.

This same judge continued, "Perhaps it would be better if we didn't know where the contributions came from." *Id.* at 402-03. However, other judges disagreed, mostly on the ground that a judge must be able to recuse himself in a case involving a contributor. *Id.* at 403.

107. Indeed, the direction in which the judge's sympathies may be altered is by no means clear. One judge who responded to the *Ethical Dilemma* survey, *supra* note 17, wrote that when a political contributor comes before him, he makes a practice of telling the opposing counsel. "If he or his client requests, I will then disqualify myself. Usually they don't, perhaps thinking I'll bend over backwards to the other side, which *perhaps sub-consciously [sic] I might*." *Id.* at 403 (emphasis added).

108. 343 U.S. 451 (1952).

109. 343 U.S. at 466-67.

110. 343 U.S. at 467.

have seemed trivial to some, but to Justice Frankfurter his recusal followed from a broader principle:

The judicial process demands that a judge . . . think dispassionately and submerge private feeling on every aspect of a case. . . . This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is *ground for believing* that such unconscious feelings *may* operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. . . . The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.¹¹¹

Some may object that attempting to eliminate bias from the judicial process altogether is taking things too far.¹¹² Indeed, on some views of the judicial process, bias is so inevitable that disqualification for any one ground of bias — such as political support — is pointless. Consider Jerome Frank:

[U]niquely individual factors often are more important causes of judgments than anything which could be described as political, economic, or moral biases. . . .

. . . .

. . . [T]hese more minute and distinctly personal biases are operating constantly. So the judge's sympathies and antipathies are likely to be active with respect to the persons of the witness, the attorneys and the parties to the suit. . . . A certain twang or cough or gesture . . . may affect the judge's initial hearing of, or subsequent recollection of, what the witness said, or the weight or credibility which the judge will attach to the witness's testimony.¹¹³

If Frank's view of the enterprise of adjudication is correct, then the

111. 343 U.S. at 466-67 (emphasis added). Justice Frankfurter was speaking only of discretionary recusal; the constitutional significance of mere "appearance of impropriety" unaccompanied by a probability of actual bias is doubted in note 48 *supra*. However, since observers could hardly have known much about the intensity of Justice Frankfurter's opinion about the bus broadcasts (or even whether he rode the bus to Capitol Hill each morning), appearance probably played little part in his decision to recuse himself.

112. Contrast with Justice Frankfurter's decision the following anecdote told by Chief Justice Rehnquist in 1973:

I was sitting with a group of people whom I didn't know very well at a dinner party in Washington . . . during the time the Watergate hearings were being televised daily. Not long after we sat down, the subject turned, as it doubtless did at most other dinner parties in Washington that evening, to the subject of Watergate and what the various diners thought of the various witnesses. In the midst of the discussion, one of the speakers turned to me and said: "Wait a minute. We probably shouldn't be talking about this in front of you, because it will probably come to the Supreme Court eventually."

I thanked him for his consideration, but added that if listening to this discussion were to render me damaged goods for the purpose of adjudication, it was at most harmless error in view of the damage I had already sustained by being exposed to the daily newspapers and television news programs.

Rehnquist, *supra* note 38, at 711.

113. J. FRANK, *LAW AND THE MODERN MIND* 106 (1930) (footnote omitted).

thesis of this Note might be thought to be ridiculously underinclusive. Is there a response?

Certainly, one response would be to dispute Frank's characterization of the enterprise of adjudication, but a critique of Legal Realism is beyond the scope of this Note. However, even if Frank is correct in asserting that judicial bias is inevitable, there is a special case for eliminating bias from *political* sources. "A certain twang or cough or gesture" may, unfortunately, affect a judge's decision in any particular case; and if that is inevitable, then more is the pity. But no state currently selects its judges on the basis of twangs, coughs, gestures, or a judicial candidate's reactions thereto. Forty-three states *do* select judges on the basis of their ability to develop political connections and attract political support. Given that the state's authority will be reposed in some judges *precisely because of* their political views and affiliations, the state has a special duty to neutralize the improper effects of its own selection process, even if it cannot hope to control for all possible sources of bias.

Of course, the question of whether the possible temptation presented by large contributions rises to constitutional magnitude is ultimately a factual question about human nature itself. Can campaign contributions which fall short of bribery really cause any judge to show favoritism to a party? Some statistics indicate that at the very least, many contributors think so.¹¹⁴ In Cook County, for instance, unopposed candidates raised substantial sums of money over and above their modest needs,¹¹⁵ and data on attorney contributions in particular show that "the tendency to give heavily to sitting judges was more pronounced for attorney contributors" than it was for nonattorney contributors.¹¹⁶ These researchers concluded that "the data suggests [sic] that a great many contributions are given for rea-

114. It may seem odd to argue for the utility of a "temptation" standard, which focuses on the mental state of the judge, by pointing to the motivations of some contributors. However, it would be difficult to explain the persistence of the belief among many contributors that the cost of contributing is justified by the favor it buys unless the lawyers confessing such motivations had some reason to believe that their contributions did in fact work to their clients' advantage in court.

115. See Nicholson & Weiss, *supra* note 6, at 20.

116. *Id.* at 22. Nicholson and Weiss note that the "strong attorney preference for sitting judges [is] independent of whether the candidate is expected to win or lose." They explain, "Because of the size of the Cook County court system, contributors cannot know whether they will ever practice before successful partisan candidates. Therefore, the possibility of obtaining influence may be remote when contributions are given to expected winners. On the other hand, attorneys may have to deal on a day-to-day basis with sitting judge candidates. . . . Although there may be legitimate reasons why attorneys contribute so heavily to sitting judge candidates, even when they know they will lose, it is difficult to dispel the impression that some of these contributions are given for improper motives."

Id. (footnote omitted). Predictions of a candidate's success are unusually reliable in Cook County, due to its highly partisan style of politics and its heavily Democratic demography. *Id.* at 18.

sons other than to assure the victory of qualified candidates.”¹¹⁷ These trends certainly do not prove that judges or attorneys are corrupt,¹¹⁸ and they do not necessarily prove that attorneys are “getting their money’s worth.” However, the inadequacy of any apparent legitimate explanation suggests a substantial possibility of constitutional violations.¹¹⁹

C. Assessing a Contribution’s Legitimacy

Not all campaign contributions create constitutional difficulties. Courts should determine whether a recipient-judge’s participation raises constitutional questions by evaluating the amount of the contribution in question, the timing of the contribution, and the pattern of support, if any, existing between the contributor and the judge.

The most obvious criterion for evaluating the legitimacy of a contribution is the amount.¹²⁰ However, the amount should be evaluated with respect to the importance of the contribution to the judge rather than the importance of the judge to the contributor.¹²¹ If the judge

117. *Id.* at 25.

118. See note 8 *supra*.

119. Whether or not the states or the legal profession are willing to indulge in the assumption that attorney contributions can actually bias a judge sworn to impartiality, there can be little doubt that the general public embraces such an assumption without reservation. For examples of this sentiment, see Baum, *Query: Should Judges Know Who Gave to Their Campaigns?*, 60 JUDICATURE 258 (1977), in which the author quotes citizens of Detroit who assume that attorney contributions are attempts to “curry favor,” create an obligation on the judge’s part “to repay the favor,” or engage in “a form of bribery.” *Id.* at 258.

As observed in notes 48 & 49 *supra*, the constitutional significance of the improper appearance of some contributions is uncertain. However, there can be little doubt that some contributions do create such an improper appearance. Nicholson & Weiss wrote of their data, “Although there are plausible explanations other than that the contributors are seeking undue influence, an aura of impropriety is difficult to dispel.” Nicholson & Weiss, *supra* note 6, at 25 (footnote omitted). Another commentator has summed up the problem of attorney contributions to judicial campaigns by noting, “There may be some other questionable yet lawful and largely accepted practice that similarly undermines respect for judicial integrity and impartiality, but none comes to mind.” Schotland, *supra* note 18, at 90. Whether or not the damage these contributions do to public respect for the judiciary is relevant to the constitutional inquiry, it certainly presents a compelling prudential reason for the states to adopt the reforms suggested in Part III *infra*.

120. Or perhaps more aptly, the “substantiality” of the amount. Arguably, the constitutional significance of a contribution should be measured with respect to the total cost of the judge’s campaign, or perhaps the total of his contributions. One problem with the latter, however, is that the better a judge is at parlaying his influence into contributions, the less significant each contribution will look, even if quite sizeable in absolute terms.

While the cost of judicial campaigns varies widely from jurisdiction to jurisdiction, judicial election campaigns generally cost less than campaigns for other elective offices at the same level of government. See Schotland, *supra* note 18, at 60, 112.

The focus on amount obviously fits very poorly when the question is the judge’s impartiality with respect to one who has provided nonpecuniary support, see note 8 *supra*. The analogous concept in the realm of nonpecuniary support might be called “intimacy,” and courts might evaluate it by examining how closely the supporter worked with the judge, or how instrumental the support was in bringing about the judge’s subsequent election. Whether the question is framed in terms of “amount,” “substantiality,” “intimacy,” or something else, the ultimate question is the extent to which a judge may feel grateful or indebted to a particular supporter.

121. *But see* Committee on Professional and Judicial Ethics of The Association of the Bar of

does not rule in the contributor's favor, what will be the deleterious consequences for the judge's chance of reelection? To what extent is the judge likely to feel that he owes a favor to the contributor? To what extent would the judge simply like to see the contributor win, regardless of any personal gain? If the amount of the contribution is high enough that the judge's self-interest, gratitude, or personal sympathy clearly operate in favor of his supporter, the probability of unfairness in court is very high.¹²²

Courts should also look at the timing of the contribution. A substantial contribution made five or six years before the judge must stand for reelection looks more suspicious (and may be more conspicuous to the judge) than a contribution of the same amount made two or three months before the election.¹²³ But a proper inquiry into the timing of the contribution must also take account of the political and legal contexts in which the contribution is given. Even fairly large contributions might seem legitimate if given two months before the election to help out a candidate in a tight race, or within a few months after the election to help retire a heavy campaign debt. The picture changes, however, if the recipient looks like a landslide winner two months before the election,¹²⁴ or if there is no campaign debt. Likewise, the pendency of litigation may arouse suspicion.¹²⁵ Joseph D. Jamail, lead counsel for Pennzoil in its recent suit with Texaco over the acquisition of Getty Oil,¹²⁶ made two contributions of \$10,000 each two days after filing the answer in that case. The first was to the pre-trial judge, and the second was to the judge who assigned trial judges.¹²⁷ This of course is not conclusive evidence of impropriety, but courts must take

The City of New York, *Ethical Guidelines for Judicial Campaigns*, Opinion No. 882, 28 REC. A.B. CITY N.Y. 364, 365-66 (1973) [hereinafter *Ethical Guidelines*] (taking the counter-intuitive position that the important ethical consideration is whether the contribution is out of proportion to the contributor's ability to pay).

122. The degree of temptation which might serve as the constitutional threshold is open to dispute. However, most states have laws forbidding the use of campaign funds for personal expenses, and in these states at least the threshold amount could be safely set above the amount which would trigger due process concerns in states that allow candidates to use campaign funds for expenditures other than campaigning. Cf. *Tumey v. Ohio*, 273 U.S. 510 (1927), in which the "mayor's court" system that the Supreme Court invalidated added about \$700 to the Mayor's annual income. 273 U.S. at 522.

123. Cf. CODE OF JUDICIAL CONDUCT Canon 7(B)(2) (1972), which limits the *solicitation* of campaign funds to a period of 90 days (subject to modification by each state) before and after the election. The text of Canon 7(B) is set forth in note 11 *supra*.

124. See Schotland, *supra* note 18, at 94: "In Pennsylvania's 1983 supreme court election, for example, the winning candidate received about 53% of his \$193,575 campaign funds from lawyers; but over \$75,000 of that was raised after he had won both parties' nominations in the primaries, and of that sum, 75% came from lawyers."

125. See *Ethical Guidelines*, *supra* note 121, at 365.

126. *Pennzoil Co. v. Texaco Inc.*, No. 84-05905 (Tex. Dist. Dec. 10, 1985).

127. Comment, *Texaco Inc. v. Pennzoil Co.: Some Thoughts on the Limits of Federal Court Power Over State Court Proceedings*, 54 FORDHAM L. REV. 767, 768 n.10 (1986). "[The pre-trial judge] was running unopposed in the primary, and the sum was large by local standards." *Id.*

note of timing considerations such as these if they are to reach an accurate conclusion about contributions which are in other respects questionable.

Finally, courts should consider any pattern of past contributions. For instance, a well-established pattern of support would generally indicate the sort of "course of dealing" between judge and attorney that raises the probability of bias in court.¹²⁸ However, such patterns may support conflicting inferences, and a pattern of support might actually mitigate an otherwise suspicious transaction. If Smith's first contribution to Judge Jones occurs two days after Smith files a pleading in litigation before Judge Jones, the transaction appears suspicious and due process concerns arise. However, if Smith has been contributing to Judge Jones for the last fifteen years, during which time he has never appeared before Judge Jones, the situation intuitively seems less improper. And the "course of dealing" rationale confirms this intuition: By all indications, the course of dealing between Smith and Jones is such that Smith will continue to contribute *no matter what*. Hence Judge Jones has less reason to worry about satisfying Smith, and the opposing party has less reason to worry about Judge Jones.

None of these factors should be taken in isolation to produce a result either way.¹²⁹ However, by evaluating exceptional contributions with respect to all of these factors, courts can draw inferences about the relationship between judge and litigant. Extremely large contributions will often constitute "possible temptation" to depart from neutrality whether or not any of the other circumstances surrounding the contribution look suspicious. However, when a judge accepts contributions of even moderate amounts for which there are

Texaco sought recusal, but that motion was denied. *Id.* (citing the transcripts of the unpublished decision cited in note 126 *supra*).

When Texaco filed a complaint in federal district court seeking an injunction against enforcement of this judgment, it renewed these allegations of judicial impropriety, but Judge Brieant apparently regarded the fact that the contributions were so openly given as evidence that they were legitimate. He confined his rather glib rejection of Texaco's allegations to a single footnote, writing,

That some judicial goodwill eventuated to the contributing lawyer we may assume. Goodwill means perhaps his brief will be accepted a day late, a golfing continuance may be granted, and his jokes may evoke more judicial laughter than they otherwise deserve. But it is impossible for a lawyer to rub his own goodwill off onto the client, or the merits of his client's cause.

Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250, 254 n.3 (S.D.N.Y.), *affd. in part and revd. in part*, 784 F.2d 1133 (2d Cir. 1986). As an example of the subtle art of writing with a wink, this disposition of the issue is superb. As a rational argument why Texaco should be forced to litigate under such circumstances, Judge Brieant's response is far less satisfactory. *See also* Petzinger & Solomon, *Texaco Case Spotlights Questions on Integrity of the Courts in Texas*, Wall St. J., Nov. 4, 1987, at 1, col. 6 (Midwest ed.).

128. *See* notes 84-86 *supra* and accompanying text.

129. Of course, the amount is probably the most important factor, with the others working in mitigation or aggravation. For instance, it is highly unlikely that due process concerns arise over a five-dollar contribution, no matter what the other circumstances are (unless of course the judge is insulted by the contributor's "generosity").

no plausible legitimate explanations, the danger that a litigant will be denied his due process right to an impartial forum may be increased. Part III addresses the question of what courts should do in such circumstances.

III. THE APPROPRIATE REMEDY

The argument thus far has been almost syllogistically straightforward. The due process clause grants to each litigant the right to a judge who has neither a "direct, personal, substantial, pecuniary interest" in the outcome, nor a "possible temptation . . . not to hold the balance nice, clear and true."¹³⁰ Some campaign contributions are significant enough to the judge that they preclude his impartiality.¹³¹ Therefore, the due process clause is violated when any litigant is forced to try his case before a judge who is likely to have been influenced by a prior contribution from opposing counsel.

But this "conclusion" is really only the beginning of a more daunting inquiry: What is to be done to protect the due process rights that are currently being violated? This question is by its nature more speculative, and the conclusions must accordingly be more tentative. This Part first examines the remedy usually employed to redress due process violations,¹³² but then moves on to consider whether problems associated with the usual remedy make prevention the best medicine.¹³³

A. *The Pound of Cure: Recusal*

A litigant who is denied due process under the standards discussed in Part II will in most cases be entitled to a new trial with a new judge.¹³⁴ Whenever the constitutional deficiency in the first trial is an

130. The derivation of these two standards from Supreme Court decisions is the subject of Part I.B.2 *supra*.

131. This proposition is defended in Part II *supra*.

132. See text accompanying notes 134-61 *infra*.

133. See text accompanying notes 162-98 *infra*.

134. Occasionally in the realm of nonconstitutional disqualification resulting from relationships between a judge and an attorney, the attorney is disqualified rather than the judge. See, e.g., *Young v. Champion*, 142 Ga. App. 687, 236 S.E.2d 783 (Ga. Ct. App. 1977) (disqualifying city commissioner from practicing before the recorder's court because city commission was responsible for selecting the judge of the recorder's court). However, the effects of such disqualifications on both lawyers and clients, perhaps tolerable in the isolated case, make a blanket rule of attorney disqualification undesirable. First, such a rule would "deprive[] the resulting unrepresented client of a free choice of counsel and [would] almost inevitably entail additional expense and delay." C. WOLFRAM, *supra* note 7, § 7.1.3, at 318. This deprivation could be all the more severe if it had been sought in order "to gain strategic advantage in litigation by depriving an opponent of the services of an advocate known by experience to be particularly effective." *Id.* (footnote omitted).

Second, a policy of attorney disqualification would force the attorney to strike a balance between the unfettered exercise of his first amendment freedoms of political participation, see Part III.B *infra*, and the unfettered practice of his profession. Part III.B.2 argues that states may

aberration involving only one particular judge or one particular litigant,¹³⁵ such a disposition of the case will satisfy the requirement of an impartial forum.¹³⁶ Sometimes, however, the adjudicatory system in question is constructed so that the disqualifying factor is a *necessary* concomitant of *any* trial;¹³⁷ in these cases an order remanding the case “for further proceedings not inconsistent with this opinion”¹³⁸ is tantamount to the invalidation of the entire system.¹³⁹

Conceptually, a due process claim based on an extraordinary campaign contribution would seem to be of the aberrational variety. By hypothesis, the due process concerns arise only because of some special relationship between the judge and counsel for one of the parties. There will undoubtedly be a great many cases in which no such relationship is present, and which therefore pose no due process problem at all. Only if the threat to impartiality were systemic would invalidation of the system be appropriate, and there is no reason to think that this is true of state judicial elections: some judges decline contributions, and judicial elections could *conceivably* be run without attorney contributions at all.¹⁴⁰

However, state judicial elections aren’t *in fact* run without attorney

not prohibit independent expenditures on behalf of judicial candidates, and if that conclusion is sound then it ought to follow that the state may not force lawyers to engage in self-censorship. As for state restrictions on political contributions, Part III.B.1 argues that these are constitutional. If that conclusion is sound, then *perhaps* states could pursue a policy of attorney disqualification *for contributions only*. However, such a policy would be no more effective than direct regulation, and would have the distinct disadvantage of infringing client freedom of choice of counsel.

135. See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986) (judge was plaintiff in a similar suit pending in lower court); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (contempt for insults to judge); *Offutt v. United States*, 348 U.S. 11 (1954) (contempt); *In re Oliver*, 333 U.S. 257 (1948) (contempt proceedings before judge–grand jury); *Cooke v. United States*, 267 U.S. 517 (1925) (contempt, but not in open court). Cf. *Arnett v. Kennedy*, 416 U.S. 134, 197-98 (1974) (White, J., concurring) (federal employee’s pretermination hearing conducted by supervisor accused of slandering the employee).

136. Hence, *Aetna’s* right to an impartial forum was fully secured by remanding the case to the Alabama Supreme Court, sitting without Justice Embry.

137. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973) (state licensing procedure for optometrists); *Ward v. Village of Monroe*, 409 U.S. 57 (1972) (“mayor’s court”); *In re Murchison*, 349 U.S. 133 (1955) (one-man grand jury); *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928) (veto over zoning ordinances given to neighbors, who owe no duty to be reasonable or to consider any interests but their own); *Tumey v. Ohio*, 273 U.S. 510 (1927) (“mayor’s court”); *Eubank v. City of Richmond*, 226 U.S. 137 (1912) (zoning decisions made by residents of block, who owe no duty to be reasonable or to consider any interests but their own).

138. See, e.g., *Ward*, 409 U.S. at 62.

139. See *Ward*, 409 U.S. at 62 (White, J., dissenting). The facts of *Ward* illustrate perfectly the phenomenon described in the text. Remanding Clarence Ward’s case to the “mayor’s court” in Monroe, Ohio would not have remedied the due process violation (even if Monroe had elected a new mayor by the time of remand) because *any* fine imposed on *any* offender by *anyone* exercising the powers that the Monroe charter granted to the mayor would be subject to the objection that the judge imposing the fine had been biased toward a verdict of guilty by his concurrent role as mayor.

140. But see notes 95-98 *supra* and accompanying text.

contributions. On the contrary, attorneys are the largest single group of contributors.¹⁴¹ Therefore, even if the proper remedy is simply a different judge in each individual case rather than a judicial invalidation of the entire system, recusal might not be a realistic solution to the problem. If instances of extraordinary campaign contributions are too frequent, there will be a dearth of uninfluenced judges.¹⁴²

Empirical conclusions about the frequency of extraordinary campaign contributions are hard to come by. However, some data suggest that, at least in some jurisdictions, due process violations are frequent indeed. Schotland's research reveals that in the 1981-1983 races for the Pennsylvania appellate courts, sixty-six attorneys contributed amounts of \$500 or greater, with seventeen contributing more than \$2,000 and six contributing more than \$5,000.¹⁴³ Furthermore, the statements of some local attorneys indicate that many of these contributors were motivated by something other than an unusually high regard for the candidates in question. A recent series of articles in the *Philadelphia Inquirer* quotes one western Pennsylvania lawyer as saying that he, "like any other lawyer in town," believed that refusing to contribute to a judge's campaign would jeopardize the interests of his firm and its clients in that judge's courtroom.¹⁴⁴ Another lawyer stated that a \$1,000 donation for Supreme Court justices was all but required,¹⁴⁵ and many law firms apparently "cover" themselves either by supporting both candidates or by sending a check to the winner after the election.¹⁴⁶ Recusal in every case argued by one of these attorneys or their firms might well be impracticable at the appellate level.¹⁴⁷

141. Schotland, *supra* note 18, at 118.

142. See *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. Ct. App. 1983), in which the Texas Court of Appeals rejected a motion to disqualify two of its justices on the allegation that opposing counsel had contributed "many thousands of dollars" to the justices in the past. 662 S.W.2d at 77. The court seemed to recoil at the logical implications of the argument, asserting,

If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, *judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts*. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.

662 S.W.2d at 78 (emphasis added). No constitutional claim was made in *Rocha*.

143. Schotland, *supra* note 18, at 149.

144. Biddle, *Fear Contributes to Lawyer Donations*, *Philadelphia Inquirer*, May 15, 1983, at 21-A, col. 1.

145. *Id.*

146. *Id.*

147. Furthermore, there is reason to believe that the situation might be more desperate still with respect to small towns with only one or two trial judges and few lawyers, or specialized courts like probate courts which customarily appoint executors and the like from a fairly exclusive list of attorneys. Cf. C. WOLFRAM, *supra* note 7, § 7.1.3, at 318. Unfortunately, these specialized courts may present the most danger of improper political influence. A Colorado attorney has written, "Many [practicing lawyers] will recall telephone calls from court clerks in which they are told the exact dollar amounts of fees they have received through court appointments since the last election and what percentage of this amount they are expected to contribute

The administrative burden which constitutionally mandated recusal would force upon the states is thus a heavy one. In light of this fact, it might be argued that the "Rule of Necessity" ends the recusal question here. According to that ancient common-law doctrine, a judge, even though disqualified from hearing a particular case, may nonetheless hear the case if no determination could otherwise be had.¹⁴⁸ Thus, the argument would run, the very impracticability of disqualifying judges in so many individual cases on the basis of past political support from one of the attorneys dictates, under the Rule of Necessity, that no judge be disqualified on that basis.

However, any such argument should be rejected. The Rule of Necessity "can be justified only by strict and imperious necessity."¹⁴⁹ Thus, in *United States v. Will*,¹⁵⁰ the Supreme Court was forced to hear a case involving the compensation clause of article III¹⁵¹ even though the federal disqualification statute¹⁵² seemed to disqualify all the justices from hearing such a case. The basis for the decision was that *all* article III judges would have been similarly disqualified; even the Chief Justice's statutory authorization to remit direct appeals¹⁵³ to the court of appeals whenever disqualification precludes a quorum,¹⁵⁴ combined with his statutory power to reassign other federal judges to sit temporarily,¹⁵⁵ could not have produced a competent tribunal.¹⁵⁶ It was thus a case of *absolute necessity*, where even the normal procedures for substitution were inadequate and a constitutional right was in need of determination.¹⁵⁷

in the campaign." Anderson, *Ethical Problems of Lawyers and Judges in Election Campaigns*, 50 A.B.A. J. 819, 821 (1964).

148. See generally Annotation, *Necessity as Justifying Action by Judicial or Administrative Officer Otherwise Disqualified to Act in Particular Case*, 39 A.L.R. 1476 (1925). On the origins of the Rule of Necessity, see note 37 *supra* and accompanying text.

149. Annotation, *supra* note 148, at 1479.

150. 449 U.S. 200 (1980).

151. U.S. CONST. art. III, § 1 (providing that the compensation of a federal judge shall not be diminished while in office).

152. 28 U.S.C. § 455 (1982).

153. The *Will* case was appealed to the Supreme Court directly from the district court under 28 U.S.C. § 1252 (1982), which permits direct appeal from any district court decision invalidating an act of Congress. *Will*, 449 U.S. at 210-11.

154. 28 U.S.C. § 2109 (1982). Had the case not been on direct appeal, see note 153 *supra*, § 2109 would have directed the Court to affirm the decision of the court of appeals. However, § 2109 guarantees the right to at least one appeal in cases invalidating acts of Congress.

155. 28 U.S.C. §§ 291-96 (1982).

156. *Will*, 449 U.S. at 212-13.

157. See also *Evans v. Gore*, 253 U.S. 245 (1920) (involving a federal district judge's challenge to the income tax as a violation of the compensation clause):

Because of the individual relation of the members of this court to the question, . . . we cannot but regret that its solution falls to us . . . But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his own compensation, . . . and there was no other appellate tribunal to which under the law he could go.

253 U.S. at 247-48.

Contrast with these cases of absolute necessity the far less desperate (though admittedly serious) problem of political disqualification. It would be surprising indeed if anyone were so liberal with his contributions that *all* judges were disqualified from hearing him argue a case. Even in small jurisdictions, or on appellate courts, where a situation of absolute necessity might most plausibly arise, states could provide for substitution of judges¹⁵⁸ or even for the creation of special tribunals¹⁵⁹ to mitigate the problem or even eliminate it entirely.¹⁶⁰ In short, the serious administrative burden which constitutionally mandated recusal would place on the states makes recusal unattractive as a matter of state administration of justice; but the problem of how to vindicate the constitutional rights¹⁶¹ of litigants remains one of *convenience*, not *necessity*. The Rule of Necessity thus cannot absolve states of their constitutional duty to provide each and every litigant with an impartial forum. Each of the forty-three states that elect their judges is faced with a choice between leaving many of its judgments vulnerable to attack on due process grounds or taking more effective measures to protect litigants' rights. Part III.B examines the feasibility and efficacy of using campaign finance regulations to preserve the impartiality of state tribunals.

B. *The Ounce of Prevention: Regulating Campaign Contributions*

A due process violation of the type discussed in this Note stems not from the fact that a judge is elected, but from the fact that his contributors have impermissibly biased him in the decision of a particular case. Thus, rather than requiring recusal of a great many judges, a state may prefer to attack the problem by limiting campaign contributions.

158. See, e.g., MISS. CONST. art. 6, § 165; MISS. CODE ANN. §§ 9-1-13, 11-1-15 (1972).

159. See, e.g., *Johnson v. Darr*, 272 S.W. 1098 (Special Supreme Court of Texas 1925), which involved an appeal by a fraternal organization to which all the justices of the Texas Supreme Court belonged. The Governor of Texas used his statutory authority to appoint a Special Supreme Court, composed of three women, to hear the case. 272 S.W. at 1098. Some Governors still possess similar authority. See, e.g., TENN. CODE ANN. § 17-2-102 (1980).

160. It is difficult to imagine how *absolute necessity* could ever arise in a jurisdiction in which some state official wielded the power of temporary appointment mentioned in note 159 *supra*.

161. Note that the constitutional rights present in the compensation clause cases and in the impartial forum cases are crucially different. In *Will* and *Evans*, the constitutional right at issue was the subject matter of the suit in which the disqualification problem arose. Strict application of constitutional disqualification doctrine, unameliorated by the Rule of Necessity, would have led to the intolerable result that the claimed constitutional right could not have been vindicated in any court of the United States. In such a case, it could well be said that imperfect justice was better than no justice at all.

In contrast, the due process right to an impartial forum may arise in any substantive context. The underlying dispute may be a claim in tort or contract, which presents a far less compelling case for "resolution at any cost." The constitutional right involved is concerned precisely with the way in which the state resolves the underlying claim. In such a situation, the Rule of Necessity, far from providing the only means of vindicating an important constitutional right, is actually an excuse for ignoring the right altogether.

However, this course of conduct raises first amendment concerns similar to those which the Supreme Court faced in *Buckley v. Valeo*.¹⁶² In *Buckley*, various federal officeholders, candidates, political organizations, and potential contributors brought suit for declaratory and injunctive relief against the enforcement of the Federal Election Campaign Act (FECA) of 1971.¹⁶³ The plaintiffs argued that the Act's limitations on both contributions and expenditures violated the first amendment by abridging the freedoms of both expression and association. The Court agreed that both contributions and expenditures constituted speech rather than conduct.¹⁶⁴

However, the Court perceived that limitations on independent expenditures would produce consequences for political debate which were very different from those produced by limitations on contributions, and it distinguished between these two kinds of speech on that basis.¹⁶⁵ Because it concluded that the Act's "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions,"¹⁶⁶ the Court upheld the \$1,000 limitation on contributions by any individual to any one candidate,¹⁶⁷ and struck down the \$1,000 limitation on independent expenditures by any individual "relative to a clearly identified candidate."¹⁶⁸

While *Buckley* clarified first amendment limitations on congressional power to restrict contributions and expenditures in nonjudicial¹⁶⁹ campaigns, it is not fully dispositive of the question of state power to impose similar restrictions on contributions and expenditures in judicial campaigns. However, the principles the *Buckley* Court

162. 424 U.S. 1 (1976).

163. 424 U.S. at 8-9.

164. 424 U.S. at 16. This conclusion seems to have been closely related to the Court's observation that "virtually every means of communicating ideas in today's mass society requires expenditure of money." 424 U.S. at 19. But see Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1011-12 (1976). Judge Wright disagrees with the Court's passive acceptance of the "mass society's definitions of effectiveness" and argues that "face-to-face communication is more effective in a sense highly relevant to the First Amendment: it promotes real interchange among citizens concerning the issues and candidates about which they must make a choice." *Id.* Judge Wright also sharply criticizes *Buckley's* central premise that money is speech.

165. 424 U.S. at 19-23. The Court opined that an expenditure limitation "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19 (footnote omitted). By contrast, "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20-21.

166. 424 U.S. at 23.

167. 424 U.S. at 24-29.

168. 424 U.S. at 39-51.

169. *Buckley* cannot provide direct authority as to judicial campaigns because the elections regulated by the FECA were exclusively federal, which of course means nonjudicial.

used to analyze each type of campaign regulation provide a framework for scrutinizing such legislation under the first amendment.

1. Campaign Contributions

Because the "transformation of contributions into political debate involves speech by someone other than the contributor,"¹⁷⁰ the *Buckley* Court believed that limitations on contributions implicated primarily the freedom of association rather than the freedom of speech.¹⁷¹ The Court interpreted several of its rulings to stand for the proposition that governmental interference with the freedom of association could be sustained "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."¹⁷²

Using this formula, the Court proceeded to weigh the congressional interests advanced in support of the FECA against the magnitude of the interference with first amendment rights. Having already characterized the contributions ceilings as "marginal restriction[s]"¹⁷³ which "leave the contributor free to become a member of any political association,"¹⁷⁴ the Court found it "unnecessary to look beyond the Act's primary purpose [of combatting the actuality and appearance of corruption] in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation."¹⁷⁵ The Court rejected the plaintiffs' claim that bribery laws and disclosure requirements constituted less restrictive means of furthering this anticorruption purpose,¹⁷⁶ and concluded that the contribution limitations passed muster under this "rigorous standard of review."¹⁷⁷

Nothing in *Buckley* indicates that the Court relied on any congressional justifications not available to the states.¹⁷⁸ Indeed, the state courts that have considered the constitutionality of state campaign regulation since *Buckley* was decided have been unanimous in applying to their own statutes the same standards that the United States

170. 424 U.S. at 21.

171. 424 U.S. at 24-25.

172. 424 U.S. at 25.

173. 424 U.S. at 20.

174. 424 U.S. at 22.

175. 424 U.S. at 26. The government also claimed that the FECA equalized citizens' comparative abilities to affect election outcomes, and acted as a brake on skyrocketing campaign costs. 424 U.S. at 26.

176. 424 U.S. at 27-28.

177. 424 U.S. at 29. For an attack upon the Court's extraordinary deference in this part of the opinion, so uncharacteristic in the first amendment area, see Nicholson, *Buckley v. Valco: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 Wis. L. REV. 323, 346-48.

178. On the contrary, the formulation of the balancing test employed by the Court was accompanied by citations to several cases challenging state action. See 424 U.S. at 25.

Supreme Court applied in *Buckley*.¹⁷⁹ However, neither the United States Supreme Court nor the state courts that have considered contribution ceilings have defined the constitutional minima in the area of contribution restrictions.¹⁸⁰ This is somewhat troublesome in the context of judicial elections, since they differ sufficiently from legislative elections that due process concerns may be thought to arise from contributions of considerably less than \$1,000.¹⁸¹

However, these same differences between judicial and nonjudicial elections increase the weight of the state's interest in campaign regulation, and justify special rules for judicial elections. First, judicial elections differ from legislative elections in that judges often run unopposed, or with the endorsement of both major parties.¹⁸² The upshot is that many candidates need very little in the way of campaign funds — a phenomenon virtually unknown in United States Congressional races. Combined with the lower comparative cost of judicial elections in general, the danger of any one contributor gaining undue influence is therefore much greater in judicial elections. More fundamentally, it is in some sense legitimate for one who contributes to a legislative campaign to expect the candidate to heed the contributor's views more than those of a noncontributor.¹⁸³ Judges, on the other hand, are expected to be impartial as between the parties. Any altera-

179. See, e.g., *Partido Nuevo Progresista v. Hernandez Colon*, 415 F. Supp. 475 (D.P.R. 1976); *Schiller Park Colonial Inn v. Berz*, 349 N.E.2d 61 (Ill. 1976); *Advisory Opinion on Constitutionality of 1975 PA 227* (Questions 2-10), 242 N.W.2d 3 (Mich. 1976).

180. See *Nicholson*, *supra* note 177 at 347 n.105. Some language in the opinion suggests that contributions may, consistently with the first amendment, be limited to considerably less than \$1,000 since contributing is merely an "undifferentiated, symbolic act." 424 U.S. at 21. The Court also observed that the amount of any contribution can provide no more than "a very rough index of the intensity of the contributor's support for the candidate" due in part to inequalities in financial ability to contribute. See 424 U.S. at 21 & n.22.

However, the problem with interpreting *Buckley* to mean that symbolism is the primary value implicated by restrictions on contributions is that such an interpretation seems inconsistent with the *Buckley* Court's explicit rejection of the "symbolic speech" analysis announced in *United States v. O'Brien*, 391 U.S. 367 (1968). See 424 U.S. at 15-17. This is part of a larger coherence problem with the lengthy per curiam opinion in *Buckley*, which has been criticized as having "a certain patchwork . . . quality [that] seems to extend beyond style [to] an analytical inconsistency [in] the Court's discussion of many of the substantive issues." *Nicholson*, *supra* note 177 at 325.

181. See note 183 *infra*.

182. Schotland, *supra* note 18, at 83-84.

183. Professor Schotland notes that contributions in nonjudicial campaigns usually dwarf those in judicial campaigns, and asks,

What is it about those other races that attracts more dollars? To the extent that such races draw funds aimed at "buying access," one is quite willing to accept lesser funding for judicial races; such contributions are clearly improper in judicial races. Can we safely assume that judicial campaign contributions are selfless support for friends, for courts as institutions, or for judges especially worthy of retention? If we deem such an assumption realistic about only some of the contributions to judicial candidates (or perhaps the assumption reveals only that faith in tooth fairies is not limited to our children), aren't we implicitly condemning the other dollars contributed to these campaigns? That is, whatever may be the "right" level of funding for non-judicial races, almost any substantial funding in any judicial race seems presumptively a matter for deep concern.

Schotland, *supra* note 18, at 112-13.

tion of that balance toward one side or the other is a departure from the fundamental ideal of Justice. To the extent that a state seeks to protect the constitutional rights of litigants in its own fora, its interest is accordingly more compelling than the anticorruption justification which supported the statute challenged in *Buckley*. As Justice Stewart has written, "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary."¹⁸⁴ Hence, a state should have even greater power to protect its judiciary from the taint of financial influence than it would have to police legislative races.

In summary, a state's interest in preserving the integrity of its judicial selection process is even stronger than the justifications for congressional action approved in *Buckley*, and should justify limitations on contributions to state judicial campaigns even more restrictive than the congressionally imposed ceiling of \$1,000 upheld in *Buckley*. However, the first amendment requirements surrounding the regulation of independent expenditures are more difficult to satisfy.

2. *Independent Expenditures*

In stark contrast to the Supreme Court's characterization of contribution as an "undifferentiated, symbolic act"¹⁸⁵ is its assertion that expenditure ceilings "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'"¹⁸⁶ Thus, while only associational freedoms were impinged upon by contribution restrictions, the expenditure limitations squarely raised the right to freedom of expression. Against this weightier first amendment right, the Court found none of the proffered governmental interests sufficient.¹⁸⁷

In order to avoid vagueness problems, the Court interpreted the statutory limitation on expenditures "relative to a clearly identifiable candidate" to encompass only those "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."¹⁸⁸ Having done so, the Court unsurprisingly found it to be insufficiently related to the problem of corruption, since the narrow construction made it easy to circumvent the statute.¹⁸⁹ The Court also noted that independent expenditures do

184. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978) (Stewart, J., concurring).

185. *Buckley*, 424 U.S. at 21.

186. 424 U.S. at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). This difference in the way the Court characterized the two rights at stake reflects its earlier conclusion that a limitation on expenditures constituted a direct restraint which "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19 (footnote omitted).

187. 424 U.S. at 51.

188. 424 U.S. at 41-44 (footnote omitted).

189. For instance, an advertisement could promote the candidate and his views without expressly advocating his election or his opponent's defeat. See 424 U.S. at 45.

not present the same degree of danger of corruption as large campaign contributions.¹⁹⁰ Finally, the Court rejected the government's "ancillary" interest in equalizing political influence, calling "the concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of others . . . wholly foreign to the First Amendment."¹⁹¹

State and lower federal courts have followed *Buckley* to invalidate state restrictions on independent spending as uniformly as they have upheld contribution ceilings.¹⁹² Absent some special state interest of more gravity than those that the Court found insufficient in *Buckley*, it seems unlikely that a state could constitutionally regulate independent political expenditures. Fortunately, however, the due process rights of litigants can be protected without such limitations: if the states may constitutionally limit campaign contributions, then the only threat to the impartiality of state elective judges will be from independent expenditures, and the incidence of such expenditures is surely slight.¹⁹³ As a result, recusal will be a manageable solution to the problem of possible judicial bias.¹⁹⁴

Furthermore, there are three reasons why it seems implausible to expect that imposing a ceiling on contributions will result in any appreciable rise in the independent expenditures attorneys undertake on behalf of judges. First, judges are sensitive to the appearance of impropriety, and many indicate that they take contributions from attor-

190. 424 U.S. at 47:

Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Compare the Court's earlier statement that banning contributions would have no adverse effect upon funding because it would merely "compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." 424 U.S. at 22.

191. 424 U.S. at 48-49.

192. See, e.g., *Bang v. Chase*, 442 F. Supp. 758 (D. Minn. 1977), *affd. mem.*, 436 U.S. 941 (1978); *Hardie v. Fong Eu*, 18 Cal. 3d 371, 556 P.2d 301, 134 Cal Rptr. 201 (1976), *cert. denied*, 430 U.S. 969 (1977); *Citizens for Jobs and Energy v. Fair Political Practices Commn.*, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal. Rptr. 106 (1976); *Labor's Educational and Political Club — Indep. v. Danforth*, 561 S.W.2d 339 (Mo. 1977).

193. Indeed, the increasing significance of political action committees since *Buckley* might be seen as the logical response to the difficulty of making an effective independent political expenditure on one's own.

194. Regardless of the fecundity of any distinction between judicial and nonjudicial elections in assessing the relevant state interest in regulating expenditures, *cf.* notes 147-50 *supra* and accompanying text, the viability of recusal (when used in conjunction with campaign contribution limitations) as a way to advance the state's interest in the administration of justice in its courts makes any attempt to avoid the *Buckley* prohibition on expenditure ceilings less likely to succeed, due to the "least restrictive means" aspect of the Court's analysis. See text accompanying note 172 *supra*.

neys reluctantly.¹⁹⁵ An independent political expenditure of a magnitude sufficient to attract the judge's attention is likely to attract the attention of others as well, and the increased scrutiny and aura of impropriety may well be most unwelcome.¹⁹⁶ Second, anecdotal accounts of why lawyers contribute indicate that they simply want to be "on record" as having made a show of support.¹⁹⁷ However, the cost of any meaningful independent expenditure may very well exceed what most lawyers are willing to pay to gratify this desire.¹⁹⁸

But probably more important than either of these reasons is the self-fulfilling nature of a rule requiring judicial recusal whenever one of the attorneys has made an independent expenditure on behalf of the judge. If an attorney knows that the consequence of spending abnormal amounts of money on a judicial candidate will be that candidate's disqualification from any case in which the attorney appears, then he will have little reason to believe that making the expenditure will benefit him or his clients. The level of independent expenditures on behalf of judicial candidates can therefore be expected to continue to reflect honest enthusiasm for the candidate, rather than the illegitimate desire to avoid campaign restrictions.

To be sure, prohibiting campaign contributions from lawyers raises other problems; and although they are problems of public policy rather than of constitutionality, they are nonetheless serious. One concern is that if the amount of funding supplied by lawyers is restricted by statute, it is reasonable to expect that total contributions will decline, since lawyers account for so much of the total amount contributed.¹⁹⁹ This might lead to less discussion of the issues in judicial campaigns;²⁰⁰ or worse, increase the importance of a candidate's personal wealth.²⁰¹ To offset this problem, states might try to institute

195. See, e.g., Schotland, *supra* note 18, at 160, 162; *Ethical Dilemma*, *supra* note 17, at 397-403.

196. Cf. *Buckley*, 424 U.S. at 47, where the Court observed that independent, uncoordinated political expenditures may be counterproductive. It is important to remember in this connection that independent expenditures, unlike campaign contributions, are made in a way calculated to attract as much public attention as possible.

197. See text accompanying notes 114-19, 144-46 *supra*.

198. The *Buckley* Court was impressed by the finding in the record that "as of January 1, 1975, one full-page advertisement in a daily edition of a certain metropolitan newspaper cost \$6,971.04." 424 U.S. at 20 n.20. This sum is by no means prohibitive, as all too many anecdotal accounts suggest. See, e.g., text accompanying notes 126-27 *supra*. It is important to remember, however, that campaign regulation need not prevent *all* political improprieties in order to protect the right to an impartial forum. To be successful, regulation need only *reduce the frequency* of improper support to the level at which recusal becomes a manageable solution.

199. See notes 6 & 124 *supra*.

200. Anyone familiar with the standard fare in judicial campaigns may certainly wonder how deleterious fewer repetitions of it would be. There are so many outrageous anecdotes, ranging from the merely irrelevant through the unseemly to the downright misleading, that it would be impossible to do them justice in this Note. For just a smattering, interested readers should consult Forum, *The Robed Politician*, L.A. LAW., Mar. 1979, at 12.

201. See *Ethical Dilemma*, *supra* note 17, at 398-99.

a system of public funding by which qualified candidates would receive financial assistance in return for a promise not to accept contributions from lawyers or their firms.²⁰²

A second problem with strict regulation of lawyer contributions is the possibility that the "funding gap" they leave might be filled by "[s]pecial interest groups [who] are less qualified than attorneys to assess the professional competence of the candidates, and [who] may care less about competence."²⁰³ Two separate dangers arise here. The first is that lawyers and law firms might reconstitute themselves as political action committees (PACs) for the purpose of circumventing the statutory limitations on lawyer contributions or the constitutional rule of disqualification that would normally result from an independent expenditure by a lawyer.²⁰⁴ With respect to contributions, competent draftsmanship should be able to solve the problem by limiting contributions from PACs that are dominated by lawyers in terms of administration, membership, or funding. As for independent expenditures, courts could subject lawyer PACs to the same constitutional rule of disqualification that applies to the lawyers themselves.²⁰⁵

A more serious danger is raised by ostensibly *nonlawyer* PACs that nonetheless have a real stake in the overall predisposition of the bench. A group of insurance companies, for instance, might engage in extensive independent expenditures on behalf of judicial candidates who

202. Some local bar associations have tried this approach on a voluntary basis. For instance, the Bar Association of Greater Cleveland adopted a plan in 1974 which requires any candidate seeking the Bar Association's endorsement to agree "not [to] solicit or accept funds, directly or indirectly, from or through any individual attorney or any member of his immediate family, or from or through any law firm practicing in Cuyahoga County, Ohio." Agreement of Candidate Seeking Bar's Endorsement, 45 CLEVELAND B.J. 157, 157 (1974). The candidate must also pledge not to allow any attorney to serve on his campaign committee, and to recuse himself in any case in which a member of his campaign committee is a party unless, after full disclosure of the relationship, the consent of all parties to the action has been obtained. *Id.*

The Cleveland plan has generally worked very well; however, the Cleveland plan and similar plans in Dade County, Florida, and Wayne County, Michigan, have been beset by the fact that federal and state officials charged with enforcing the applicable tax and disclosure laws have been unwilling to treat the resulting judicial campaign funds any differently than they would treat funds dispersed by a typical political action committee. These difficulties eventually led to the death of the Dade County and Wayne County plans. See Schotland, *supra* note 18, at 96-107. State legislation providing for a publicly financed version of these programs would enjoy distinct advantages in this respect.

203. Baum, *supra* note 119, at 258.

204. See text accompanying notes 192-94 *supra*.

205. Note that disqualification in this situation would not depend upon theories of *alter ego* or "controlling person" liability such as those familiar to corporations law or securities regulation. Instead, it would be a straightforward application of the analysis developed in Part II.C. If a particular PAC's contribution to a judge, and a particular attorney's influence within the PAC, were significant enough that a decision in favor of the party represented by the PAC attorney would substantially advance that judge's chance of reelection, or create a possible temptation for the judge to favor one litigant, then the attorney affiliated with the PAC should be disqualified. The question of how closely the attorney and the PAC are affiliated is relevant only to the extent that it bears on whether the judge's gratitude to or dependence on the PAC might manifest itself in bias toward the attorney.

have generally been more demanding of plaintiffs in personal injury cases. Or, the American Medical Association might support judges who are more exacting in malpractice cases.²⁰⁶ This danger is real, but it is not a danger of favoritism toward a particular litigant; instead it is a matter of the overall character of the bench. As such, it would seem to be one of the incidents of having an elective system at all rather than a malady peculiar to limitations on lawyer contributions.

In summary, the best way for a state to protect its citizens from the due process violations occasioned by extraordinary judicial campaign contributions may be to prevent those contributions from becoming "extraordinary" in the first place. This it may do, consistently with the first amendment, by limiting contributions to judicial campaigns. It is probably constitutionally impermissible to regulate independent political expenditures, but these expenditures are likely to be of such slight incidence that mandatory recusal in such cases is feasible.

CONCLUSION

This Note has argued that the constitutional right to an impartial forum should protect individuals from judicial bias that results from an attorney's campaign contributions. Whenever such contributions are large enough that a decision in the contributor's favor would substantially advance a judge's chance of reelection, or whenever such contributions otherwise create a possible temptation to decide one way or the other, this important constitutional right is violated. The adversely affected litigant should be granted a new trial with a new judge. However, the magnitude of the problem may be so great that recusal alone will not suffice to cure the constitutional infirmity. States may need to regulate lawyer contributions more strictly in order to fully protect the individual's right to due process.

In the end, it may be that the best way to preserve the impartiality of elected judges is not to elect them. The Constitution does not specify how judges are to be selected in the various states. It does, however, specify that individuals are not to be deprived of life, liberty, or property without due process of law. And impartiality is the very heart of due process. As one judge has stated,

A legislator or executive may to some extent represent special interests to whom he owes his election. To be sure, he should not put those interests ahead of the general welfare, but no one expects him to be impartial. A judge, however, who is not impartial is nothing. Worse, he is an oppression; only because of her blindfold is the goddess of justice given a sword.²⁰⁷

If the states are to demonstrate that they take the constitutional right

206. These PACs would not themselves be litigants, and so could not be treated as "institutional litigants" on the theory described in note 85 *supra*.

207. Spaeth, *Reflections on a Judicial Campaign*, 60 JUDICATURE 10, 14 (1976).

to an impartial forum seriously, then they must reform their judicial selection processes to eliminate the political bias that now creeps into the system in the vast majority of states, and runs rampant in some. If this can be done within an elective system, then the state is perfectly free to choose that method. Whatever other arguments there are against such a system, nothing in the Constitution prohibits it *per se*.

However, if an elective system can only be instituted at the expense of individual rights of due process, then the Supreme Court must be ready to take its own pronouncements about procedural fairness seriously, and to strike down such systems. The primacy of the constitutional rights of the individual in our constitutional scheme demands no less.

— *Mark Andrew Grannis*