MICHIGAN: A MODEL OF RECUSAL REFORM

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It's a privilege to be here today, and I want to particularly thank Wayne State, as well as Bob Garvey, and all of those who have worked so hard to put this event together.

One principle that we all hold dear, which is among the rules of law most foundational aspects, is the right to a fair hearing before an impartial arbiter. That right is increasingly in jeopardy. Judicial selection debates often devolve into an exclusive binary discussion pitting judicial elections versus judicial appointment systems. But, the fact of the matter is that only rarely, and only after decades of sustained efforts, do states change their fundamental modes of judicial selection. How rarely? Well, it's been more than twenty years since *any* state moved from a system of judicial selection to a system of merit selection. Facing up to that reality means acknowledging two other realities: Elective systems must be improved. Appointive systems must be improved. If we focus on those challenges, then it will be fruitful to also have a parallel election versus appointments discussion. In other words, I submit that we must think small and think big. In terms of thinking small, the rule of law increasingly needs a tourniquet. It may also be a good idea to consider hypothetical far off surgery, but ignoring the more acute harms should not be an option.

There are some who look at judicial selection issues and who, in effect, see only one amendment—the First. But, make no mistake—that is a fringe position. Indeed, wherever one is on campaign finance regulation in the legislative and executive contexts, when it comes to our courts focusing solely on the First Amendment, it minimizes and even ignores an equally important constitutional right—the right to due process. The fact is that even in these highly partisan times, there still remain certain American values that transcend our partisan divisions. One of those is that money should not influence the courts. To put that differently, at least when it comes to the judiciary, concern over the influence of green is not a matter of red versus blue. Now, this is not mere rhetoric. It is statistically clear that the broad perception of Americans on the left and the right agree that money is getting in the way of the fundamental role of the courts. Seventy-six percent of Americans believe that campaign contributions influence the core of the judicial

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process, the judicial decision itself.[1] Much scarier still, forty-six percent of state court judges agree that there is some influence on their decision.[2] I will repeat that last part for the sake of emphasis. In a written survey of approximately two thousand state court judges from around the country, nearly *half* indicated that they believe money, in the form of campaign support, is influencing judicial decision-making.[3] Now, human psychology being what it is, naturally all of those judges believe that it is their colleagues and not themselves who are being influenced. But, when nearly half of the judges believe that money is influencing decision-making, the concern is a serious one.

Keep that psychological dynamic in mind for when we consider West Virginia's Brett Benjamin. Record spending in judicial elections is creating both the perception, and very possibly, at least in certain instances, but we cannot prove exactly which ones, the actuality of pay to play justice. In the judicial context, the perception alone is a serious problem. This is especially true because it is impossible to determine absent the express acknowledgement of a quid pro quo. This acknowledgement never occurs because, among other things, it would be tantamount to the admission of criminal bribery—a specific instance in which the money really is influencing the judiciary. Consequently, I think there is a decisional fork in the road. Since monetary influence cannot be proven in individual instances, we either address the concern systemically or not at all. The latter choice should not seriously be an option.

Two years ago, Justice O'Connor, whose extraordinary attention to these issues is reflected in her participation in today's event, put the matter bluntly and correctly. She said, and I quote: "We put cash in the courtroom and it's just wrong."[4] Well, as the slide on the screen illustrates, trends indicate exponential increases in the amount of that

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1. Greenburg Quinlan Rosner Research Inc., Justice at Stake Campaign, & AmericanViewpoint, Justice at Stake Frequency Questionnaire, Oct. 30, 2007—Nov. 7, 2007 (1000 Respondents), *available at* http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf.

2. Stan Greenberg & Linda A. Divall, *"Courts Under Pressure"—A Wake-Up Call From State Judges,* 41 JUDGES J. 11, 11-12 (2002).

3. Greenberg Quinlan Rosner Research Inc. & Justice at Stake Campaign, Justice at Stake—State Judges Frequency Questionnaire 5, Nov. 5, 2001—Jan. 2, 2002 (2,428 Respondents, 1943 Weighted), http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf.

4. Dorothy Samuels, *The Selling of the Judiciary: Campaign Cash 'in the Courtroom,'* N.Y. TIMES (Apr. 15, 2008), http://www.nytimes.com/2008/04/15/opinion/15tues4.html.

judicial campaign cash. Between 2000 and 2009, state supreme court candidates raised $206.9 million.[5] That is more than double the $83.3 million raised in the prior decade.[6] Why the dramatic increase? One reason is that television advertising is now all but a prerequisite for a state supreme court seat. As this next slide indicates, as recently as one decade ago, just one of every four contested supreme court races had *any* television advertising at all.[7] And with respect to the figure of $206.9 million, keep in mind that this figure is composed only of direct contributions to the candidates' official campaigns.[8] It does not include independent expenditures—expenditure campaigns that in states like Alabama, Washington, Wisconsin, Ohio, Illinois, West Virginia and, yes, here in Michigan, have frequently dwarfed the candidates' official campaigns.[9]

Indeed, to provide just one dramatic example, in 2006, 100 percent of the television advertising in the state supreme court contests in Washington was paid for, not by the candidates' campaigns, but by outside groups—including groups from outside the state.[10] In Wisconsin, in 2008, the analogous figure was 91 percent.[11] Consequently, many judicial candidates are being reduced to bystanders in the sideshows that define the contests in which they are nominally participants. And when that occurs, judicial candidates without vast resources have only two options: (1) to acquiesce and hope for the best; or (2) to go hat-in-hand to the very litigants, lawyers and major stakeholders, who do or will appear before them.

After the Supreme Court's *Citizens United* decision this term, corporations and unions—the key players in these election battles—though not the only ones, will now have access to exponentially larger

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5. James Sample et al., *The New Politics of Judicial Elections, 2000-2009: Decade of Change*, at 1 (Charles Hall ed. 2010), *available at* http://www.brennancenter.org/page/-/JAS-NPJE-Decade-ONLINE.pdf.

6. *Id.*

7. Thomas J. Moyer & Bert Brandenburg, *No Way to Choose: Big Money and Special Interests are Warping Judicial Elections*, LEGALTIMES, Oct. 9, 2006, at 1, *available at* http://www.learner.org/series/ethics2/pdf/related_judicia3l_brandenburg.pdf.

8. Sample, *The New Politics of Judicial Elections, 2000-2009: Decade of Change*, *supra* note 5, at 8.

9. *Id.* at 9.

10. James Sample et al., *The New Politics of Judicial Elections 2006*, at 11 (Jesse Rutledge ed. 2007), *available at* http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf.

11. *Buying Time—Michigan and Alabama Join Costly Wisconsin*, BRENNAN CTR. FOR JUSTICE, (Oct. 30, 2008), *available at* http://www.brennancenter.org/content/resource/michigan_and_alabama_join_wisconsin_as_2008s_costliest_court_campaigns/.

pools of capital (i.e. to their general treasury funds).[12] As such, and given the massive stakes involved, some of these organizations will conclude that investing in judicial elections, to the tune of hundreds of thousands, and in some instances, millions of dollars, is not only a piddling proposition but is frankly simple cost-benefit analysis. What will they buy with that money? Let's take a look. (Video presentation of television advertisements in recent judicial election campaigns).

In the interest of time, without going into each and every advertisement that you just witnessed, we will just pick one, though one can perform a similar type of fact-checking analysis with almost every single one of those ads. You saw the ad that was featured in the 2006 Republican primary for the chief justice slot in the state of Alabama. It was a contest between two sitting members of the court at that time. The storyboard on the screen shows us the advertisement in freeze frame intervals. The first couple of freezes are actually accurate. "Nine years ago a vicious thug raped and repeatedly stabbed a pregnant woman ... "[13] But then truth starts to disappear. "But now, Adams is off death row thanks to Chief Justice Drayton Nabers and the Alabama Supreme Court using a five to four decision."[14] Well, even in this erudite audience—much less in the general electorate—that particular sleight of hand probably catches a few of us off-guard. Here is a little tip for you: the five-to-four decision was a decision of a court in Washington, D.C., rather than Birmingham, Ala.—namely, the U.S. Supreme Court.[15] And, this audience knows well that the fact that the U.S. Supreme Court decided a case five to four does not make the Alabama Supreme Court any less subject to it. Likewise, the claim in the advertisement that Nabers and the Alabama Supreme Court decided the matter "based on foreign law" holds no weight. The fact was that the U.S. Supreme Court, in *its* decision, referenced foreign norms.[16] Once again, of course, that fact does not make the Alabama Supreme Court any less subject to the ruling.

The background in this instance is that the U.S. Supreme Court had decided a case involving the death penalty for individuals convicted of crimes that were committed while they were juveniles, and the U.S. Supreme Court concluded that the death penalty in that context was unconstitutional.[17] As such, the advertisement's saucy and plainly

12. Citizens United v. Federal Elections Commission, 130 S. Ct. 876 (2010).
13. Sample, *The New Politics of Judicial Elections 2006 supra* note 9, at 4.
14. *Id.* at 4-5.
15. Roper v. Simmons, 543 U.S. 551 (2005).
16. *Id.* at 561.
17. *Id.* at 559-60.

pejorative references to "foreign law and ungratified U.N. treaties" are followed in the advertisement by Nabers' opponent and fellow justice, Tom Parker. Parker remarkably, asserts that "Alabama courts need to stand up for American law not foreign law" and that "some things are worth fighting for." Given the actual facts, if nothing else, when it comes to "American law" we know at least one thing, and that is that Justice Parker has a *very* unique interpretation of the Supremacy Clause.[18]

In addition to a lack of informative content—which is a problem of civics and democracy though generally not a problem of law—there is increasing empirical evidence. A study of the Ohio State Supreme Court by Adam Liptak of *The New York Times* supports the proposition, though it is still impossible to prove in individual instances, that contributions not only correlate with decisions, but actually alter them.[19] Commenting on that study, Ohio Justice Paul Pfeifer put it this way: "Everyone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not it's hard to say."[20] Is this really a problem or is this hyperbole? Well, in considering that question, contemplate as background the following four real-world scenarios. The ABA's basic maxim, adopted more or less in every state with minor variations, is that judges disqualify themselves whenever their "impartiality might reasonably be questioned."[21] To put that a different way, as you hear the following examples think to yourself, *might* it be reasonable to question the judge's impartiality?

A *Los Angeles Times* investigation of Nevada trial court judges revealed that even judges running unopposed collected hundreds of thousands of dollars from litigants appearing in their courtrooms.[22] The report noted that donations were "frequently dated within days of when a judge took action in the contributor's case."[23] Might it be reasonable?

In Illinois, Justice Lloyd Karmeier won a $9.3 million campaign for the state high court.[24] He was supported by $350,000 in direct contributions from employees, lawyers and others involved with State

18. Sample, *The New Politics of Judicial Elections 2006*, *supra* note 9, at 4-5.

19. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html.

20. *Id.*

21. MODEL CODE FOR JUDICIAL CONDUCT CANNON 3(E)(1) (1999).

22. Michael J. Goodman & William C. Rempel, *In Las Vegas, They're Playing with a Stacked Judicial Deck*, L.A. TIMES, June 8, 2006, at A1, *available at* http://www.corpwatch.org/article.php?id=13692.

23. *Id.*

24. James Sample, *The Campaign Trial: The True Cost of Expensive Court Seats*, SLATE (Mar. 6, 2006), http://www.slate.com/id/2137529/.

Farm and then-pending litigation, including its amici, and by an additional $1 million from larger groups of which State Farm was a member or to which State Farm contributed. [25] Upon winning the seat on the high court, Karmeier immediately described the fund-raising totals as "obscene," and yet his concern for obscenity faded rather quickly, given that almost immediately upon taking the bench he cast a vote ending proceedings on a $456 million claim against State Farm.[26] Perhaps most notably, that claim had been pending for the duration of the campaign.[27] Coincidence? Maybe. Causation? Probably not. But the optics? Not good.

In Wisconsin, Justice Annette Ziegler was elected in 2007 with more than $2 million dollars in support from the Wisconsin Manufacturers and Commerce Association—a sum that was more than the total of her entire official campaign.[28] Ziegler then declined to recuse herself from a case that the WMC had long considered a top priority.[29] Democratic accountability as applied to the judicial branch? Maybe. But pause to consider that after taking the state high court bench, it came to light that while a lower court judge, Zeigler had ruled on cases involving companies in which she held substantial stock,[30] and oh-by-the-way, had ruled on eleven cases involving a bank for which her own husband served as a director.[31] Last year, Ziegler became the first ever sitting justice in Wisconsin Supreme Court history to be disciplined by her own court.[32] So justice was served, right? Well, I doubt it's lost on many in this audience that after-the-fact disciplinary proceedings are of scant value to the litigants and of only marginal value to the public's faith in the rule of law.

Then, of course, there is West Virginia—the details of which are not for the faint of heart. A.T. Massey Coal Co. faced a $50 million trial court judgment arising from a business dispute between two mining companies.[33] It is worth pausing for emphasis right there. This was not a

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25. *Id.*

26. *Id.*

27. *Id.*

28. James Sample, *Justice for Sale*, BRENNAN CTR. FOR JUSTICE, (Mar. 22, 2008), http://www.brennancenter.org/content/resource/justice_for_sale/.

29. *Id.*

30. Wisconsin Judicial Comm'n v. Ziegler, 750 N.W.2d 710, 731 (Wis. 2008).

31. Sample, *Justice for Sale, supra* note 28.

32. Patrick Marley & Steven Walters, *Judicial Commission Says Gableman Ad was* Deceiving, JSONLINE (Milwaukee, WI), (Oct. 8, 2008), http://www.jsonline.com/news/statepolitics/32440994.html; *Wis. Judicial Comm'n*, 750 N.W.2d at 738.

33. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009)

class action; it was not a referendum on lead paint; not an anti-mining environmental case. It involved a business to business dispute.[34] In other words, a "pro-business" philosophy or ideology did not map onto the case in any meaningful way. One sole individual, Massey Coal CEO Don Blankenship, spent $3 million dollars in support of Brent Benjamin's candidacy for the state supreme court.[35] Now mind you, $3 million is a lot of money by any measure. But much more than that, here, it was also more than all of the others' expenditures in Benjamin's support *combined*.[36] Blankenship's expenditures occurred after the verdict against Massey, during the consideration of post-verdict motions, while the appeal to the court on which Benjamin would sit, if elected, was inevitable. [37] Benjamin won the election and refused to recuse himself from Massey's appeal.[38] Indeed he denied, repeatedly and at great overstated length, that there was any reason to do so.[39] This, despite a mandatory canon of conduct that plainly required his recusal.[40] Again, recall the phrase, whenever a judge's "impartiality might reasonably be questioned."[41]

Benjamin then cast an outcome-determinative vote in a three-to-two decision reversing the judgment.[42] But wait, like a good infomercial, there's more. There is a re-hearing of the case.[43] Why? Because two months after the court issues its decision it came to light—both figuratively and in the third of the timeline windows pictured on the screen, photographically—that the then-chief justice of the court, Eliot "Spike" Maynard, who was also in that 3-2 majority, had been vacationing in the French Riviera with the same individual—Blankenship—while the same appeal was pending before his court and without any disclosure of the same.[44] Photos depicting their fun ended up on front pages across the country, including the front page of *The New*

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34. *Id.* at 2257.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 2258.

39. *Caperton*, 129 S.Ct. at 2258.

40. W. VA. CODE OF JUDICIAL CONDUCT CANON § 3(E)(1) (2010) (requiring a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"). MODEL CODE FOR JUDICIAL CONDUCT CANON 3(E)(1) (1999).

41. *Id.*

42. *Caperton*, 129 S.Ct. at 2258.

43. *Caperton*, 690 S.E.2d 322 (W.Va. 2009).

44. Keith R. Fisher & Konstantina Vagenas, *Chief Justice Roberts and the "forty Thieves,"* 1 AKRON STRICT SCRUTINY 63, 72 (2010), http://strictscrutiny.akronlawreview.com/files/2010/04/chief-justicerobertsand-the-forty-thieves.pdf.

York Times.[45] Based on the fallout from the photos, Maynard, who insisted that he was impartial, disqualified himself citing the perception of impropriety.[46] Yet still a third justice, Larry Starcher, criticized Blankenship for creating a "cancer" in the affairs of the court.[47] And then, though also asserting that he could be impartial, Starcher recused himself, also due to the appearance problem.[48]

Benjamin, on the contrary, once again declined to recuse; once again cast a deciding vote; and of course, the rest is history. As everyone in this audience knows, the Court, this past June, found that Justice Benjamin's decision not to recuse violated even the constitutional minimum of due process.[49] Chief Justice Roberts' dissent in that case literally sets out forty numbered questions,[50] some of which we may address in the question-and-answer session later today. Chief Justice Roberts felt that the majority's opinion left unanswered matters of complex line-drawing: questions of how-much-is-too-much; questions of what if it had been a trade group rather than an individual, etc.[51] The questions are well taken, and they raise serious issues. But, Chief Justice Roberts' comments were directed at the court majority rather than at the states, who should and will address them in the first instance, if at all. I would be happy to discuss the questions, and developments related to those questions, but for now, most strikingly, it seems clear that the chief justice was chastising the Court for serving one of its most sacred roles: that of establishing a constitutional outer boundary, without drawing unnecessarily bright lines based on questions *not* before the Court.

Prospectively, and particularly now in light of *Citizens United*,[52] it is also worth noting that if the Court had done nothing in *Caperton*, then the line-drawing questions in dissent could just as easily be flipped. For example, what about $10 million? $100 million? Is that enough to mandate recusal? What if both Maynard and Benjamin had refused to recuse? What if Blankenship had accounted for the majority of the support for *all* of the justices on the court? Would Hugh Caperton and

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45. Adam Liptak, *Motion Ties W. Virginia Justice to Coal Executive*, N.Y. TIMES (Jan. 15, 2008), http://www.nytimes.com/2008/01/15/us/15court.html.

46. Chris Dickerson, *Maynard Recuses, Benjamin Refuses,* THE RECORD (W. Va.) (Jan. 18, 2008), http://wvrecord.com/news/contentview.asp?c=206509.

47. John Gibeaut, *Caperton's Coal: The Battle Over an Applachian Mine Exposes a Nasty Vein in Bench Politics*, ABAJOURNAL (Feb. 1, 2009), http://www.abajournal.com/magazine/article/capertons_coal/.

48. Dickerson, *supra* note 46.

49. *Caperton*, 129 S.Ct. at 2257.

50. *Id.* at 2269-72.

51. *Id.*

52. *Citizens United*, 130 S. Ct. 876.

Harman Mining have had their fair hearing in those instances? All of which is to say that while the slippery-slope arguments and the floodgates arguments ultimately provide for nice sassy copy, they do little substantive lifting.

In any event, both Chief Justice Roberts and Justice Scalia made it perfectly clear that while they were dissenting on the constitutional question, they were in complete agreement that states are free and indeed, in many cases, should go beyond the constitutional floor in their vigilance with respect to recusal.[53]

One micro-point is worth mentioning here, if only briefly: While *Citizens United* clearly further opens the spending coffers, it also offers strong support for strengthened disclosure rules which Rich Robinson will discuss later today.[54] At the very least, disclosure helps us to know from whom and from whence the millions flow—and flow they surely will.

I contend that the broad amicus and media support in *Caperton*, ranging even from Ted Olson as the lead counsel,[55] to the support, as *amici*,[56] of companies like Lockheed Martin, Pepsi, Intel, WalMart, and dozens of diverse organizations reflects the increasing agreement—the big tent, to use Bert's phrase from earlier—that even among those who generally disagree, there is an agreement that whatever short-term victories might be earned rather at the ballot box or in the television ad campaigns, over the long term, we all lose when decisions and circumstances reinforce the notion that the biggest spender and not the best case wins.

In terms of thinking about the tourniquets that mentioned at the outset, I count myself among many who believe that Chief Justice Kelly and the Michigan Supreme Court have taken a significant step towards making this state a national model for states considering post-*Caperton* recusal reforms. And in terms of thinking big, in terms of hypothetical far-off surgeries, for the first time in years there is also a parallel sense—led by Justice O'Connor, from whom we will hear later today, and whose tireless advocacy on this issue is a marvel—that merit selection efforts may actually finally be beginning to yield the results that have long proven elusive.

There will disagreement as to the details. There is already substantial disagreement here in Michigan, and that will no doubt continue, but I

53. *Caperton*, 129 S.Ct. at 2268-69.

54. *Citizens United*, 130 S. Ct. at 913-17.

55. *Caperton*, 129 S. Ct. at 2256.

56. Brief for the Committee for Economic Development et al. as Amici Curiae Supporting Petitioners, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45974 (2009).

submit that thinking big and thinking small on a parallel track is the right strategy. Chief Justice Kelly's leadership on the recusal front has placed Michigan at the forefront of that very approach. *Caperton* drew a line at the constitutional extreme. It said that, fundamentally, the judiciary is different. *Caperton*, consequently, provides real momentum for state-based efforts to protect the actuality and the appearance of fair courts. *Citizens United* increases the need to take advantage of that momentum. Thank you.