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## First Right of Recusal

W. William Leaphart

*Justice, Montana Supreme Court*

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## COMMENT

### FIRST RIGHT OF RECUSAL

W. William Leaphart\*

No single Montana judge or justice has more impacted judicial procedure than Judge Clancy. Judge Clancy was one of two district court judges sitting in Butte during the infamous War of the Copper Kings—William A. Clark, Marcus Daly and F. Augustus Heinze—at the turn of the nineteenth century.<sup>1</sup> As Professor Larry Howell thoroughly chronicles in his article “*Purely the Creature of the Inventive Genius of the Court*”: State ex rel. Whiteside and the Creation and Evolution of the Montana Supreme Court’s Unique and Controversial Writ of Supervisory Control,<sup>2</sup> Judge Clancy was “bought and paid for” by Heinze who used the courts, and Clancy in particular, to tie up his adversaries in their battles over the “Richest Hill on Earth.”<sup>3</sup> The Clancy-Heinze relationship was so blatant that the Montana Supreme Court ultimately decided it could not properly restrain Clancy through the normal process of addressing appeals from final judgments.<sup>4</sup> Accordingly, as Professor Howell concludes, the Court adopted the unprecedented practice of exercising “supervisory control,” whereby it reviews

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\* Justice Leaphart recently retired after 16 years on the Montana Supreme Court. Prior to that, he was in private practice with an emphasis on appellate advocacy, orally arguing cases before the United States Supreme Court, the Montana Supreme Court, and the Ninth Circuit Court of Appeals. He received his J.D. from the University of Montana School of Law where, some 40 years ago, he served as an associate editor of the *Montana Law Review*. Justice Leaphart gives his thanks to the staff of the *Law Review*. Scott Peterson in particular, for all their editorial assistance.

1. Michael P. Malone, Richard B. Roeder, & William L. Lang, *Montana: A History of Two Centuries* 224 (Rev. Ed., U. of Wash. Press 1976).

2. Larry Howell, “*Purely the Creature of the Inventive Genius of the Court*”: State ex rel. Whiteside and the Creation and Evolution of the Montana Supreme Court’s Unique and Controversial Writ of Supervisory Control, 69 Mont. L. Rev. 1 (2008).

3. *Id.* at 5, 7.

4. *Id.* at 7.

pre-judgment rulings without regard to whether the district court was exceeding its jurisdiction.<sup>5</sup> The writ of supervisory control is still very much alive and well some 111 years after the seminal *State ex rel. Whiteside v. District Court of First Judicial District*<sup>6</sup> decision.

The writ of supervisory control, however, is not Judge Clancy's only legacy to Montana's judicial procedure. As of 1903, Montana law had no provision allowing a litigant to peremptorily challenge a district court judge for perceived bias. In their book, *Montana: A History of Two Centuries*, Michael P. Malone, Richard B. Roeder, and William L. Lang reviewed the intriguing origins of what is now Montana Code Annotated § 3-1-804,<sup>7</sup> which allows each adverse party one substitution of a district judge.<sup>8</sup> As the authors note, this arose out of a feud between two of the Copper Kings, F. Augustus Heinze and Anaconda-Amalgamated Copper Company ("Amalgamated")—the successor to Marcus Daly's Anaconda Company.<sup>9</sup> Heinze claimed ownership of the Minnie Healy mine where a vein of ore "apexed."<sup>10</sup> He argued that since the vein apexed on his property, he could follow the vein wherever it went, including laterally under the property of Amalgamated.<sup>11</sup> On October 22, 1903, the sitting judge in Butte, Judge Clancy, ruled in Heinze's favor on the ownership question.<sup>12</sup>

Amalgamated was incensed and concerned about further "apex" litigation, so hours after Judge Clancy's decision, it shut down most of its Montana operations, putting some 15,000 men—the majority of Montana wage earners—out of work.<sup>13</sup> Having attracted the State's attention, Amalgamated then arranged a meeting with Governor Joseph Toole. Amalgamated demanded that the Governor call a legislative special session to pass an unprecedented law, the "Clancy Law," to allow litigants to have a judge disqualified.<sup>14</sup> Although he initially resisted, Governor Toole called the special session, and on December 10, 1903, the Legislature passed the Fair Trial Bill<sup>15</sup> to allow litigants to disqualify district court judges for unspeci-

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5. *Id.* at 4.

6. *State ex rel. Whiteside v. Dist. Ct. of 1st Jud. Dist.*, 63 P. 395 (Mont. 1900).

7. Mont. Code Ann. § 3-1-804 (2009).

8. Malone et al., *supra* n. 1, at 224-227.

9. *Id.* at 224-225.

10. *Id.* at 226-227.

11. *Id.*

12. *Id.* at 227.

13. *Id.* at 228.

14. Malone et al., *supra* n. 1, at 229.

15. Mont. H. 3, 8th Leg., Spec. Sess. (Dec. 10, 1903). The act was entitled "An Act to Amend Section 180 of the Code of Civil Procedure, relating to the Disqualification of Judges." *Id.* Although the original Fair Trial Bill allowed for five peremptory disqualifications per party (ten total), over the years, the number was reduced to two disqualifications in 1915 and one in 1987, where it remains today. The present Code distinguishes between disqualification and substitution of judges. The Code provides

fied bias.<sup>16</sup> While the Supreme Court had taken imaginative steps to reign in Judge Clancy through supervisory control, the Legislature went a step further by giving Heinze's foes the power to sidestep Judge Clancy altogether through "substitution."

Interestingly, the Fair Trial Bill was limited to district court judges and did not address appellate court judges.<sup>17</sup> This is attributable to Amalgamated's frustrations being with the district court, and Judge Clancy in particular, rather than the Supreme Court. As a result, Montana has a very liberal rule for disqualifying district court judges but has no enforceable mechanism for disqualifying justices. Currently, Montana justices are required to voluntarily recuse themselves in very limited circumstances: when the justice is a party to or interested in the litigation, is related to a party, or has served as counsel for a party.<sup>18</sup> The determination of whether a conflict exists and the recusal decision are left solely to the discretion of the individual justice.<sup>19</sup>

The purpose of this article is to explore the question of whether, in light of two recent decisions from the United States Supreme Court, *Republican Party of Minnesota v. White*<sup>20</sup> and *Citizens United v. Federal Election Commission*,<sup>21</sup> the right to disqualify a judge should be extended to the Montana Supreme Court. The article begins by discussing *White* and its implication for judicial elections. Second, it examines *Citizens United* and how corporate spending in judicial elections will have profound impacts on justices' impartiality. Finally, it concludes that Montana should adopt some enforceable mechanism for removing Montana justices when potential bias exists and suggests principles that should guide any such mechanism.

In 2002, the United States Supreme Court held in *White* that prohibiting judicial candidates from "announcing" their views violates the First Amendment.<sup>22</sup> A candidate for judicial office, along with various political groups including the state Republican Party, challenged a provision in the Minnesota Canons of Judicial Conduct, which prohibited candidates for judicial election from announcing<sup>23</sup> their views on disputed legal or political

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for one peremptory "substitution" of a district judge, Mont. Code Ann. § 3-1-804, and has a separate provision for "disqualification" of district judges for specified cause. § 3-1-805.

16. Malone et al., *supra* n. 1, at 229.

17. Mont. H. 3, 8th Leg., 1903 Reg. Sess.

18. Mont. Code Ann. § 3-1-803.

19. *Id.*

20. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

21. *Citizens United v. Fed. Election Commn.*, 558 U.S.\_\_\_\_, 130 S. Ct. 876 (2010).

22. *White*, 536 U.S. at 766.

23. The "announce" clause is separate from the "pledge or promise" clause, which was not challenged. The "announce" clause prohibited a candidate from announcing his/her personal views on disputed issues of the day. In contrast, the "pledge or promise" clause prohibits the candidate from com-

issues.<sup>24</sup> The plaintiffs contended that the canon violated judicial candidates' First Amendment right to discuss their views on disputed legal issues.<sup>25</sup> With candidates unable to announce their views on disputed issues, the political groups claimed to be unable to determine whether to support or oppose their candidacy.<sup>26</sup> The Court found a tension between the Minnesota constitutional requirement that judges be elected and the canon which "places most subjects of interest to the voters off limits."<sup>27</sup> It concluded the canon was unconstitutional, holding the First Amendment does not permit Minnesota to leave "the principles of elections in place while preventing candidates from discussing what the elections are about."<sup>28</sup>

Although the majority rejected their reasoning, the dissenters—Justices Stevens, Breyer, Ginsburg, and Souter—made a convincing argument that the Court's holding ignores the crucial difference between judicial offices and other elected offices.<sup>29</sup> That is, unlike legislative officers for example, judicial officers are not elected to serve a constituency.<sup>30</sup> In announcing their views on disputed issues, candidates are misleading the voters "by giving them the false impression that a candidate for the trial court will be able to and should decide cases based on his personal views rather than precedent."<sup>31</sup> The candidate has effectively told the electorate, "Vote for me because I believe X, and I will judge cases accordingly."<sup>32</sup>

Montana, like Minnesota, has statutes requiring that judicial elections be nonpartisan.<sup>33</sup> Our Code of Judicial Conduct very clearly endorses the dissenters' view in *White* that the role of a judge is different from that of a legislator. Thus, "campaigns for judicial office must be conducted differently from campaigns for other offices."<sup>34</sup> What, then, is the effect of the *White* decision in Montana?

Now that the United Supreme Court has held that states may not prohibit judicial candidates from announcing their political views, candidates for judicial office have free reign to conduct themselves as "political actors."<sup>35</sup> Although the prohibition on pledges and promises is still intact,<sup>36</sup>

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mitting or promising to reach a particular result with respect to cases that are likely to come before the court.

24. *White*, 536 U.S. at 768–770.

25. *Id.* at 769–770.

26. *Id.* at 770.

27. *Id.* at 787.

28. *Id.* at 788.

29. *Id.* at 797–798.

30. *White*, 536 U.S. at 797–798.

31. *Id.* at 799.

32. *Id.* at 800 (Stevens, J., dissenting).

33. Mont. Code Ann. §§ 13–14–211 to 213.

34. Mont. Code of Jud. Conduct canon 4, cmt. 11 (2008).

35. *White*, 536 U.S. at 806 (Ginsburg, J., dissenting).

candidates worth their salt can circumvent the pledges and promises clause by prefacing a campaign commitment with the caveat, “Although I cannot promise anything, here is what I think about the issue.”<sup>37</sup> The Montana Code of Judicial Conduct seeks to ameliorate this concern by prohibiting judges and judicial candidates from publically identifying themselves as candidates of a political organization and from seeking, accepting, or using endorsements from a political organization.<sup>38</sup>

During the 2011 Montana Legislative session, there was an attempt to follow *White*’s lead and formally politicize judicial elections. House Bill 521, a proposed referendum, provided that judicial candidates, like candidates for other public office, must file on a partisan basis.<sup>39</sup> Fortunately, the bill was defeated because this proposed referendum reflected a profound misunderstanding of the judiciary’s role.<sup>40</sup> That role is to honor the fundamental principle that all litigants have a right, protected by the Due Process Clause of the Fourteenth Amendment, to “an impartial and disinterested tribunal in both civil and criminal cases.”<sup>41</sup>

Partisan judicial elections obviously conflict with this Fourteenth Amendment right. Once judicial candidates declare themselves affiliated with a political party, they have endorsed the party’s position on many controversial issues such as abortion, the death penalty, gun control, and environmental policy. Human nature dictates that candidates elected on party support greatly compromise their impartiality; for fear of losing that support in future elections, they are unlikely to buck the party’s position on a disputed issue and keep an open mind. Judges elected on party affiliation have a personal stake in resolving issues consistently with the party line because their success and tenure in office depend on certain outcomes.<sup>42</sup>

This explains why Rule 4.1(A)(6) of the Montana Code of Judicial Conduct provides that a judicial candidate shall not “publically identify himself or herself as a candidate of a political organization.”<sup>43</sup> Although canon 4 has the proviso, “except as provided by law,” it is apparent that the

36. Mont. Code of Jud. Conduct R. 4.1(A)(12) provides that a candidate shall not, “in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”

37. *White*, 536 U.S. at 819 (Ginsburg, J. dissenting).

38. Mont. Code of Jud. Conduct R. 4.1(A)(6)–(7). Comment 13 to Rule 4.1 notes that the making of a pledge or promise is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result.

39. Mont. H. 521, 62d Leg. (Feb. 12, 2011).

40. *Id.*

41. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

42. *White*, 536 U.S. at 815 (Ginsburg, J., dissenting).

43. Mont. Code of Jud. Conduct R. 4.1(A)(6).

exception would swallow the rule.<sup>44</sup> That is, a law permitting such partisan campaigning would completely defeat the spirit of the canon as expressed in the comments to canon 4. Since judges should not be making decisions based upon the expressed views or preferences of the electorate, “judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure.”<sup>45</sup>

The United States Supreme Court further compromised the integrity of judicial elections in *Citizens United v. Federal Election Commission*. Section 203 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that is “an electioneering communication” or for speech that expressly advocates the election or defeat of a candidate.<sup>46</sup> Having produced a documentary (*Hillary*) criticizing Hillary Clinton, Citizens United sought to shortcut the possibility of civil or criminal sanctions by filing suit to declare the BCRA unconstitutional.<sup>47</sup>

The Court had previously recognized that the First Amendment applies to corporations.<sup>48</sup> Subsequently, the Court extended that protection to political speech.<sup>49</sup> However, in *Austin v. Michigan Chamber of Commerce*, the Court upheld a corporate independent expenditure restriction designed to prevent “the corrosive and distorting effects of immense aggregations of [corporate] wealth . . . that have little or no correlation to the public’s support for the corporation’s political ideas.”<sup>50</sup> In *Citizens United*, the Court overruled *Austin* and returned to the previously recognized principle: government may not suppress political speech based on the speaker’s corporate identity.<sup>51</sup>

Now that *Citizens United* has taken the lid off of independent campaign expenditures, courts will no doubt be faced with future challenges based upon the corrupting influence of big money. The specter of big money most notably reared its head in *Caperton v. A.T. Massey Coal Company*.<sup>52</sup> *Caperton* involved Brent Benjamin’s candidacy for the West Virginia Supreme Court.<sup>53</sup> Benjamin’s primary financial supporter was Don Blankenship, CEO of Massey Coal Company.<sup>54</sup> Massey had lost a \$50 mil-

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44. *Id.* at R. 4.1(A).

45. *Id.* at canon 4, cmt 1.

46. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 2 U.S.C. 441(b) (held unconstitutional, *Citizens United*, 130 S. Ct. at 913)).

47. *Id.* at 888.

48. See e.g. *1st Natl. Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

49. See e.g. *NAACP v. Button*, 371 U.S. 415, 428-429 (1963).

50. *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 660 (1990).

51. *Citizens United*, 130 S. Ct. at 913.

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

53. *Id.* at 2257.

54. *Id.*

lion jury verdict in favor of Harman Mining, and the case was appealed to the West Virginia high court.<sup>55</sup> Prior to that appeal, Blankenship spent \$3 million of his personal funds independently promoting Benjamin's candidacy, which was three times the amount spent by Benjamin's own campaign.<sup>56</sup> Benjamin won his election, and when the Massey case came before the Court, he refused to recuse himself and he cast the deciding vote in a 3–2 decision in favor of Massey Coal.<sup>57</sup>

Harman Mining appealed to the United States Supreme Court. In a 5–4 ruling written by Justice Kennedy, the Supreme Court concluded that Blankenship had a “significant and disproportionate influence” in Justice Benjamin's election. It specifically noted the amount of money Blankenship invested in the campaign, the size of his contributions compared to the total spent by the campaign, and the effect the expenditures appeared to have on the election.<sup>58</sup> Despite the fact that there was nothing illegal about Blankenship's expenditures, the Court expressed due process concerns and held that the contributions constituted a “serious, objective risk of actual bias” that required recusal.<sup>59</sup> If Blankenship's personal largesse resulted in “disproportionate influence,” one can only imagine how disproportionate the influence will be in the wake of *Citizens United*. *Citizens United* gave CEOs virtually unfettered leeway to tap into corporate coffers, not just their own personal funds.

Although Montana is currently struggling to preserve its ban on corporate campaign expenditures, the viability of that ban appears dubious in light of *Citizens United*. In October 2010, First Judicial District Judge Jeffrey Sherlock held that the State's 1912 law banning direct corporate spending for or against political candidates or political parties was unconstitutional.<sup>60</sup> Despite noting the “pernicious influence of the Copper Kings and their various corporate egos” that led to the ban's enactment, Judge Sherlock nonetheless concluded that the *Citizens United* decision trumps Montana's unique historical circumstances.<sup>61</sup> Attorney General Bullock has appealed the decision to the Montana Supreme Court.<sup>62</sup>

With *White* and *Citizens United*, Montana's nonpartisan judicial election procedure has been hit with a one-two punch. Not only can candidates

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55. *Id.* at 2256–2257.

56. *Id.* at 2257.

57. *Id.* at 2257–2258.

58. *Caperton*, 129 S. Ct. at 2263–2264.

59. *Id.* at 2265; *Citizens United*, 130 S. Ct. at 910 (“The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge.”).

60. *W. Tradition Partn., Inc. v. Bullock*, 2010 WL 4257195 (Mont. 1st Jud. Dist. Oct. 18, 2010).

61. *Id.*

62. Notice of App., *W. Tradition Partn., Inc. v. Bullock*, No. DA 11–0081 (Feb. 11, 2011) (available at <http://supremecourtdocket.mt.gov/search/case?case=14335>).



wage a campaign based upon political positions, but political entities can reward (or punish) candidates with unrestricted, anonymous,<sup>63</sup> corrosive, and distorting corporate wealth.

In light of this assault on the judiciary's impartiality by way of politicized elections, the question becomes what, if any, recourse does a litigant have in order to obtain an unbiased, apolitical judge? A litigant faced with a biased state Supreme Court justice might take comfort in the United States Supreme Court's willingness to intervene in *Caperton*. But such reliance would be misplaced given that the Court accepts few petitions and intervened in *Caperton* only because the situation was so extreme.

Under Montana's present statutes, grounds for disqualifying a justice are very narrow and do not address the concern that arises when, through campaign speech or support, a justice effectively commits to ruling in a particular way.<sup>64</sup> The new 2008 Montana Code of Judicial Conduct does include a provision addressing "disqualification" which ostensibly speaks to the concerns raised here. Rule 2.12 provides that:

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to [when] . . . [t]he judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.<sup>65</sup>

While the substance of Rule 2.12 directly addresses the concerns engendered by *White*, the Rule is of dubious value given the complete lack of any enforcement procedure. The Rule, as part of a "code" of conduct, is by its nature voluntary: the judge "shall disqualify himself or herself." Interest-

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63. *But see* Jia Lynn Yang & Dan Eggen, *Campaign Spending Puts Target in Bull's-Eye*, Wash. Post A01 (Aug. 19, 2010). "When Target gave money in July to a pro-business group in Minnesota, the company thought it was helping its bottom line by backing candidates in its home state who support lower taxes. Instead the retailer has found itself in a fight with liberal and gay rights groups that has escalated into calls for a nationwide boycott and protests at the company's headquarters and stores. The problem: Target's \$100,000 helped pay for TV ads supporting the gubernatorial campaign of Republican state Rep. Tom Emmer, who thinks Minnesota's corporate taxes should be lower. As it turns out, he also wants to ban same-sex-marriage." *Id.* The Post noted that this was an embarrassment for Target which had cultivated an image of urbanity and goodwill with the gay community, annually sponsoring the Twin Cities Gay Pride Festival. *Id.* The Post states that Target's contribution came to light only because Minnesota law requires political committees to disclose the money they receive. Many states do not have similar requirements.

64. Mont. Code Ann. § 3-1-803 (providing that "[a]ny justice, judge, justice of the peace, municipal court judge or city court judge must not sit or act in any action or proceeding: (1) To which he is a party, or in which he is interested. (2) When he is a party, or in which he is interested. (3) When he has been attorney or counsel in the action or proceeding for any party or when sitting in a case on appeal he as a judge in the lower court rendered or made the judgment, order, or decision appealed from").

65. Mont. Code Jud. Conduct R. 2.12(A)(4). It is noteworthy that the Montana Code of Judicial Conduct defines "impartiality" as not only encompassing absence of bias as to a party, but also "maintenance of an open mind in considering issues that may come before the judge." *Id.* at Terminology 4.

ingly, the Comments to Rule 2.12 seem to envision that a party can force the issue by filing a “motion to disqualify.”<sup>66</sup> Given, however, that Montana has no statutory procedure allowing for motions to disqualify a judge, the litigant who disagrees with the judge’s assessment of the situation and refusal to disqualify “himself” *sua sponte* is left with no viable recourse. Although the litigant may improvise and file a motion to disqualify, there is no procedure requiring that the motion be recognized.

This lack of an enforceable recusal procedure is not unlike the situation in the United States Supreme Court, which also lacks a recusal policy and leaves each justice to decide whether he or she is meeting the standard of impartiality. A recent *New York Times* article notes that a bipartisan group of 107 law professors from 76 law schools has proposed that “if a justice denies a motion to recuse, he or she should have to issue an opinion explaining why,” and that opinion “could be reviewed by some yet to be specified group.”<sup>67</sup>

It is noteworthy that the Michigan Supreme Court amended its rule on disqualification in November 2009 in response to *Caperton*.<sup>68</sup> The Amended Michigan Court Rule 2.003 now includes Michigan Supreme Court justices as well as trial judges, and allows either the justice or a party to raise the issue of disqualification for cause.<sup>69</sup> The Rule provides that if a challenged justice denies the initial motion to disqualify, the party may move for the entire court to consider the motion.<sup>70</sup> The Rule sets forth certain nonexclusive grounds for disqualification and also provides that a justice “is not disqualified based solely upon campaign speech” protected by *White* “so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or any attorney involved in the action.”<sup>71</sup>

This exception, of course, swallows the rule in the sense that judicial candidates who have announced their views on *issues* before the Court are not disqualified so long as they have shown no bias towards a “party” or an “attorney.” Although *White* recognizes that judicial candidates have a First Amendment right to “announce” their views, a justice who has exercised that right as to an issue before the court should be subject to recusal or

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66. *Id.* at R. 2.12 cmts. 2, 5. Comment 2 provides that “[a] judge’s obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.” Comment 5 provides that “[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.”

67. *The Court’s Recusal Problem*, N.Y. Times A30 (Mar. 16, 2011).

68. Or., Amend. of R. 2.003 of the Mich. Ct. Rs. (Mich. 2009).

69. Mich. Ct. R. 2.003(A)–(B).

70. *Id.* at 2.003(D)(3)(b).

71. *Id.* at 2.003(C).

disqualification in order to honor the litigant's paramount right to an impartial tribunal. After all, the judicial system exists not to benefit the justices but to accord justice to litigants. This broader view of recusal encompassing bias as to issues as well as parties comports with Canon 2.12 of the Montana Code of Judicial Conduct.<sup>72</sup>

In light of *White* and *Citizens United*, Montana needs to adopt a process whereby litigants are afforded a means of addressing the judiciary's politicization, and any such process should consider and incorporate the principles of disqualification outlined by the American Academy of Appellate Lawyers ("the Academy").<sup>73</sup> In the wake of *Caperton*, the Academy studied the state of judicial selection and disqualification rules and established general principles that should govern disqualification of state appellate court judges. The eight principles established by the Academy are set forth below as a springboard for further discussion:

1. The right to review on the merits by judges whose impartiality cannot reasonably be questioned.
2. The right to be timely informed of who will decide an appeal.
3. The right to seek disqualification of any member of the merits panel pursuant to clearly articulated procedures.
4. The right to know who will decide a disqualification request.
5. The right to decision on any disqualification request before an appeal is submitted on the merits.
6. The right to be informed of grounds for disqualification of any member of the merits panel.
7. Review of the disqualification decision pursuant to clearly articulated procedures.
8. Replacement of a disqualified judge to maintain a quorum or prevent a tie.<sup>74</sup>

The first principle—right to review by judges whose impartiality cannot be reasonably questioned—corresponds with the litigant's right, protected by the Due Process Clause of the Fourteenth Amendment, to "an impartial and disinterested tribunal in both civil and criminal cases."<sup>75</sup> If the litigant's due process right to an unbiased tribunal is in question, the judge "must be recused."<sup>76</sup> The appellate litigant in Montana, however, has no procedure to recuse, substitute, or disqualify a justice whose impartiality the litigant reasonably questions. The right to an impartial review is left entirely to the individual justice's discretion to recognize potential conflicts and recuse him- or herself.

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72. Mont. Code Jud. Conduct R. 2.12 cmts. 2, 5.

73. The author of this essay is a judicial member of the American Academy of Appellate Lawyers.

74. Am. Acad. App. Laws., *Principles of State Appellate Judicial Qualification* (April 2010) (available at [http://www.appellateacademy.org/publications/policies/recusal\\_standards.pdf](http://www.appellateacademy.org/publications/policies/recusal_standards.pdf)).

75. *Marshall*, 446 U.S. at 242.

76. *Citizens United*, 130 S. Ct. at 910.

The second principle—to be timely informed of who will decide an appeal—is problematic in Montana under the Court’s internal operating rules. Under the rules, each appeal is initially assigned to a panel of five justices from the seven member court.<sup>77</sup> If four members of the panel agree on a result, the matter is resolved at the panel level.<sup>78</sup> If four members of the panel are unable to reach a consensus, or the matter is selected for oral argument, the case is considered by the full court.<sup>79</sup> A high percentage of appeals to the Montana Supreme Court are decided by these five-member panels. Since the panel rotations are internal to the Court and not made public, litigants have no means of ascertaining the panel’s makeup and thus cannot know whether there are concerns about the impartiality of a panel member. Obviously, if litigants are going to be afforded a right to challenge a justice’s impartiality, they must first know which of the justices are going to be hearing the appeal. This can easily be remedied with a provision making the panel assignments public in a timely fashion.

The other six principles outline specific procedures designed to ensure the integrity of a disqualification process. Such specific provisions are more appropriately left to the Court’s or the Legislature’s discretion in designing a disqualification process.

#### CONCLUSION

The constitutional guarantee of due process ensures litigants the right to an open-minded, impartial judiciary. In keeping with that guarantee, Montana statutes require nonpartisan judicial elections.<sup>80</sup> That guarantee risks being meaningless when judicial candidates are encouraged to announce their views on disputed issues and corporate entities are allowed to spend unlimited funds in supporting candidates. For it to remain meaningful, Montana needs to provide litigants before the Montana Supreme Court the opportunity to challenge a justice’s impartiality they reasonably believe has been compromised. This is especially true when the justice has made partisan announcements concerning the issue or when the justice may be heavily influenced by third-party, issue-oriented, corporate support in the judicial election.

Thanks to the demands of the corporate moguls of the early 1900s, litigants before Montana trial courts have the right to substitute or disqualify a judge whose impartiality they question. Ironically, now that *Citizens United* has given those corporate entities license to spend unlimited

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77. Mont. S. Ct. Internal Operating Rs. § 1(2) (available at <http://courts.mt.gov/clerk/rules/internal.mcp>).

78. *Id.* at § 1(3)(e) (four being a majority of the seven-member Court).

79. *Id.* at § 1(3)(a), (e).

80. Mont. Code Ann. §§ 13-14-211 to -213.

amounts of corporate money to influence elections, the time has come to give litigants the opportunity to disqualify elected justices whose impartiality can be questioned because of disproportionate corporate support focused on an issue before the Court. Given that the appellate court plays a much larger role in forming policy and publishing precedent than the trial courts, the significance of candidate announcements and the influence of big money are much greater in appellate court elections. Accordingly, the rationale for affording litigants a similar process for substituting or disqualifying justices whose impartiality is reasonably in doubt is even more compelling.