

“THE LEGISLATURE MUST SAVE THE COURT
FROM ITSELF”?: RECUSAL, SEPARATION OF
POWERS, AND THE POST-CAPERTON WORLD

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I. INTRODUCTION

Since the United States Supreme Court handed down *Caperton v. A.T. Massey Coal Co.*,¹ much scholarly attention has focused on

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considering how the state courts in general, and state courts of last resort in particular, will react, either through their determinations on individual recusal motions or through changes to their codes of judicial conduct. Lost amid the discussion, however, has been an examination of the legislature's potential and actual implementation of recusal standards, with or without the approval of, or even in open hostility to, the desires of the judiciary. This is starting to change with the 2010 legislative cycle, the first since not only *Caperton*, but *Citizens United v. FEC* as well.² When the Wisconsin Supreme Court debated the adoption of a new rule on recusal, for example, one of its justices took to the op-ed pages and inveighed that “[t]he Legislature must save the court from itself.”³ For many, however, the question lies not only in how the legislatures would “save” the courts, but whether they can or should do so at all. This Article focuses on the statutory provisions that currently exist with respect to *for cause* recusal and disqualification and on what state legislatures have proposed or enacted in the last decade on the subject. The Article concludes with some possible mechanisms through which state judiciaries may embrace, modify, or outright reject these efforts as such legislation returns or is reintroduced in some modified form in the coming legislative years.

II. EXISTING STATUTORY SCHEMES

A. *Who Hears the Motion?*

Forty-three states provide a statutory or constitutional right of recusal for cause at the trial or appellate level.⁴ Those states may be divided into

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

2. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

3. Editorial, *To the Highest Bidder?*, MILWAUKEE J. SENTINEL, Nov. 4, 2009, <http://www.jsonline.com/news/opinion/69192522.html>.

4. ALA. CODE § 12-1-12 (LEXISNEXIS 2005); ALASKA STAT. § 22.20.020 (2008); ARIZ. REV. STAT. ANN. § 12-409 (2003); ARK. CODE ANN. § 16-13-214 (1999 & Supp. 2009); CAL. CIV. PROC. CODE § 170.3(c)(1) (West 2006 & Supp. 2010); COLO. REV. STAT. § 16-6-201 (2008); CONN. GEN. STAT. ANN. § 51-39 (West 2005); FLA. STAT. ANN. § 38.10 (West 2003); GA. CODE ANN. § 15-1-8 (West 2007); HAW. REV. STAT. § 601-7 (1993 & Supp. 2007); 725 ILL. COMP. STAT. ANN. 5/114-5 (West 2006) (criminal);

two groups: those that permit the judge whose recusal is sought to hear and rule on the motion, and those that require some other person or persons to rule on the motion. When it comes to trial courts, only two states explicitly permit trial judges to hear their own recusal motions.⁵ Twenty-three are silent on the subject, thus implicitly allowing trial judges to hear recusal motions, court rules notwithstanding.⁶ Fifteen states require a recusal motion to be heard by another trial judge either initially or if the judge whose recusal is sought declines to recuse.⁷ A judge on an Ohio court of common pleas may be disqualified either by a motion

735 ILL. COMP. STAT. ANN. 5/2-1001 (West 2006) (civil); IND. CODE ANN. § 29-1-1-6 (LexisNexis 2000) (probate); IND. CODE ANN. § 35-36-5-2 (LexisNexis 1998) (criminal); IOWA CODE § 602.1606 (2009); KAN. STAT. ANN. § 20-311d (1995); KY. REV. STAT. ANN. § 26A.015 (LexisNexis 1998); LA. CODE CIV. PROC. ANN. art. 151(A) (Supp. 2010); MINN. STAT. ANN. § 542.16 (West 2000 & Supp. 2010); MISS. CODE ANN. § 9-1-11 (West 1999); MO. ANN. STAT. § 508.090 (West 2003) (civil); MONT. CODE ANN. §§ 3-1-803, 3-1-805 (2009); NEB. REV. STAT. ANN. § 24-739 (LexisNexis 2004); NEV. REV. STAT. §§ 1.225, 1.230 (2009); N.H. REV. STAT. ANN. § 492:1 (LexisNexis 2009); N.J. STAT. ANN. § 2A:15-49 (West 2000); N.Y. JUD. LAW § 14 (McKinney 2002); N.C. GEN. STAT. § 15A-1223 (2007) (only applicable in criminal cases); N.D. CENT. CODE § 29-15-21 (2006); OHIO REV. CODE ANN. §§ 2701.03–2701.03.1 (LexisNexis 2008); OKLA. STAT. ANN. tit. 20, § 1401–1403 (West 2002); OR. REV. STAT. ANN. § 14.260 (West 2003); 42 PA. CONS. STAT. ANN. § 3302 (West 2004 & Supp. 2009); R.I. GEN. LAWS § 8-9-5 (1997 & Supp. 2009); S.C. CODE ANN. § 14-1-130 (1977); S.D. CODIFIED LAWS § 15-12-26 (2004); TENN. CODE ANN. § 20-4-208 (2009); TEX. GOV'T CODE ANN. § 25.00255 (Vernon 2004) (probate); UTAH CODE ANN. § 78A-2-222(1) (2008); VT. STAT. ANN. tit. 12, § 61(a) (2002); VA. CODE ANN. § 16.1-69.23 (2003); WASH. REV. CODE ANN. § 4.12.040 (West 2005 & Supp. 2010); W. VA. CODE ANN. § 51-2-8 (LexisNexis 2000); WIS. STAT. ANN. § 757.19(2) (West 2001); WYO. STAT. ANN. § 5-9-119(b) (2009).

5. MO. ANN. STAT. § 508.140; OKLA. STAT. ANN. tit. 20, § 1403.

6. ALA. CODE § 12-1-12; ARIZ. REV. STAT. ANN. § 12-409; CONN. GEN. STAT. ANN. § 51-39; GA. CODE ANN. § 15-1-8; HAW. REV. STAT. § 601-7; IND. CODE ANN. § 29-1-1-6 (probate); IND. CODE ANN. § 35-36-5-2 (criminal); IOWA CODE § 602.1606; KY. REV. STAT. ANN. § 26A.015; MINN. STAT. ANN. § 542.16 (Supp. 2010); MISS. CODE ANN. § 9-1-11; NEB. REV. STAT. ANN. § 24-739; N.H. REV. STAT. ANN. § 492:1; N.Y. JUD. LAW § 14; N.C. GEN. STAT. § 15A-1223; 42 PA. CONS. STAT. ANN. § 3302; R.I. GEN. LAWS § 8-9-5; S.C. CODE ANN. § 14-1-130; TENN. CODE ANN. § 20-4-208; UTAH CODE ANN. § 78A-2-222; VT. STAT. ANN. tit. 12, § 61; W. VA. CODE ANN. § 51-2-8; WIS. STAT. ANN. § 757.19; WYO. STAT. ANN. § 5-9-119(b).

7. *See, e.g.*, ALASKA STAT. § 22.20.022; ARK. CODE ANN. § 16-19-406; CAL. CIV. PROC. CODE § 170.3(c)(5); COLO. REV. STAT. § 16-6-201; FLA. STAT. ANN. § 38.10; 725 ILL. COMP. STAT. ANN. 5/114-5; LA. CODE CIV. PROC. ANN. art. 154–56 (1999); MONT. CODE ANN. § 3-1-805; NEV. REV. STAT. § 1.235; N.D. CENT. CODE § 29-15-21 (2006); OR. REV. STAT. ANN. § 14.260; S.D. CODIFIED LAWS § 15-12-32; TEX. GOV'T CODE ANN. § 25.00255; VA. CODE ANN. § 17.1-105; WASH. REV. CODE ANN. § 4.12.040.

directed to the judge or, under a constitutional provision, by motion made directly to the state's chief justice.⁸ For Ohio municipal courts, however, recusal motions are heard directly by the presiding judge of the court of common pleas for the county.⁹ Oregon's trial court provision resembles a peremptory challenge—no cause need be given to have the judge disqualified.¹⁰ However, the same statute does permit the recusal to be contested by the judge, in which case the matter is heard by a “disinterested judge.”¹¹ New Jersey's statutes permit the challenged judge or “3 disinterested persons” to hear the motion,¹² but this statute may be inoperative based on several rulings by the state's supreme court.¹³ Finally, and perhaps most relevant to electoral conditions in existence today, Alabama circuit court judges are automatically recused upon motion in those cases in which they received more than \$2,000 in campaign contributions from a party or a party's attorney.¹⁴ Otherwise, the statutes are silent as to whether Alabama circuit court judges may hear their own recusal motions.¹⁵

Recusal law distinguishes between appellate courts and trial courts in many states. In seven states, the rules applicable to the trial courts with respect to recusal do not explicitly apply to the appellate courts.¹⁶ For example, while trial judges in Illinois,¹⁷ Kansas,¹⁸ Texas,¹⁹ South Dakota,²⁰ and Washington²¹ are required to submit motions for their disqualification to another judge, their appellate brethren are under no such explicit

8. OHIO CONST. art. IV, § 5(C); OHIO REV. CODE ANN. § 2701.03.

9. OHIO REV. CODE ANN. § 2701.03.1.

10. OR. REV. STAT. ANN. § 14.260.

11. *Id.*

12. N.J. STAT. ANN. § 2A:15-50 (West 2000).

13. *See infra* Part IV.D.

14. *See* ALA. CODE §§ 12-24-1, 12-24-2(c) (LexisNexis 2005).

15. *Id.* § 12-1-12.

16. The statutory provisions detailed in nn.5 & 6, *supra*, are applicable to trial courts, and do not apply to the appellate courts of Illinois, *see* 725 ILL. COMP. STAT. ANN. 5/114-5(d) (West 2006); Kansas, *see* KAN. STAT. ANN. § 20-311 (1995); Nevada, *see* NEV. REV. STAT. §§ 1.230-1.235 (2009); North Carolina, *see* N.C. GEN. STAT. § 15A-1223 (2007); Ohio, *see* OHIO REV. CODE ANN. § 2701.03 (LexisNexis 2008); South Dakota, *see* S.D. CODIFIED LAWS § 15-12-21 (2004); or Washington, *see* WASH. REV. CODE ANN. § 4.12.040 (West 2005).

17. 725 ILL. COMP. STAT. ANN. 5/114-5(d).

18. KAN. STAT. ANN. § 20-311(d)(b).

19. TEX. R. CIV. P. 18a.

20. S.D. CODIFIED LAWS § 15-12-32.

21. WASH. REV. CODE § 4.12.040.

statutory burden. In Texas, trial judges are required to submit recusal motions to other judges,²² but the state's laws specifically contemplate cases in which the supreme court justices "have recused themselves"²³ and the law is silent as to who decides the matter for the Court of Criminal Appeals²⁴ and Court of Appeals.²⁵ Alabama's campaign contribution threshold for automatic recusal, while \$2,000 for trial judges, is \$4,000 for appellate jurists.²⁶

B. *Basis for Recusal*

1. *Party*

Statutes in nineteen states require recusal based on the judge being a party to the case.²⁷ With the exception of New Hampshire, all these states connect the concept of "party" to "interest" (e.g., "is a party or is interested in any case").

2. *Interest*

Thirty-six states specify "interest" in the litigation as being a basis for

22. TEX. GOV'T CODE ANN. § 24.002 (Vernon 2004).

23. *Id.* § 22.005.

24. *Id.* § 22.105.

25. *Id.* § 22.217.

26. ALA. CODE § 12-24-2(c) (LexisNexis 2005).

27. Those nineteen states are: Alaska, Arizona, California, Colorado, Illinois, Iowa, Kentucky, Montana, Nebraska, Nevada, New Hampshire, New York, Oregon, Rhode Island, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. *See* ALASKA STAT. § 22.20.020(a)(1) (2008); ARIZ. REV. STAT. ANN. § 12-409 (2003 & Supp. 2009); CAL. CIV. PROC. CODE § 170.1(a)(4) (West 2006); COLO. REV. STAT. § 13-1-22 (2008) (requiring recusal unless parties consent); 735 ILL. COMP. STAT. ANN. 5/2-1001(a)(1) (West 2003); IOWA CODE § 602.1606.4 (2009); KY. REV. STAT. ANN. § 26A.015(2)(d)(1) (LexisNexis 1999); MONT. CODE ANN. § 3-1-803 (2009); NEB. REV. STAT. ANN. § 24-739-740 (LexisNexis 2004) (however, a judge may hear such a case if both parties consent in writing); NEV. REV. STAT. §§ 1.225, 1.230 (2009); N.H. REV. STAT. ANN. § 492:1 (LexisNexis 2009); N.Y. JUD. LAW § 14 (McKinney 2002); OR. REV. STAT. ANN. § 14.210(1)(a) (West 2003); R.I. GEN. LAWS § 8-9-5 (1997) (requiring recusal in probate court only); UTAH CODE ANN. § 78A-2-222 (2008) (except by consent of all parties); VA. CODE ANN. § 16.1-69.23 (2003) (requiring recusal of district court judges); W. VA. CODE ANN. § 51-2-8 (LexisNexis 2000) (requiring recusal unless all parties consent in writing); WIS. STAT. ANN. § 757.19(2) (West 2001) (a judge is not required to recuse himself, however, if he determines the pleading making the judge a party is frivolous); WYO. CODE J. CONDUCT R. 2.11(A)(2)(a) (2009).

recusal or disqualification.²⁸ In six of those states (Alaska, California, Connecticut, Georgia, Iowa, and Kentucky), these interests are specified as being “financial” or “pecuniary.”²⁹ Hawaii requires that a pecuniary interest be more than *de minimis*, while Wisconsin requires a “significant financial or personal interest.”³⁰ Missouri’s statute on the subject of pecuniary interest leaves the question somewhat open, as discussed later.³¹

3. *Related*

Thirty-seven states provide that a familial relationship is a basis for disqualification. The degree of kinship varies from third (Alaska, California, Connecticut, Florida, Hawaii, Indiana, Iowa, Kentucky, Minnesota, Montana, Nevada, New Jersey, Oregon, Utah, Wisconsin, and Wyoming),³² to fourth (Alabama, Arkansas, Louisiana, Nebraska,

28. TEX. CONST. art. V, § 11; ALA. CODE § 12-1-12; ALASKA STAT. § 22.20.020; ARIZ. REV. STAT. ANN. § 12-409; ARK. CODE ANN. § 16-13-214 (1999); CAL. CIV. PROC. CODE § 170.1; COLO. REV. STAT. § 16-6-201; CONN. GEN. STAT. § 51-39 (2005); FLA. STAT. ANN. § 38.02 (West 2003); GA. CODE ANN. § 15-1-8 (West 2007); HAW. REV. STAT. § 601-7 (1993 & Supp. 2007); 735 ILL. COMP. STAT. ANN. 5/2-1001; IND. CODE ANN. § 29-1-1-6 (LexisNexis 2000) (probate); IND. CODE ANN. § 35-36-5-2 (LexisNexis 1998) (civil); IOWA CODE § 602.1606; KAN. STAT. ANN. § 20-311d (1995); KY. REV. STAT. ANN. § 26A.015; LA. CODE CRIM. PROC. ANN. art. 671 (2003); LA. CODE CIV. PROC. ANN. art. 151 (1999); MINN. STAT. ANN. § 542.13 (West 2000); MISS. CODE ANN. § 9-1-11 (West 1999); MO. ANN. STAT. § 508.090 (West 2003) (civil); MO. ANN. STAT. § 546.660 (West 2002) (criminal); MONT. CODE ANN. § 3-1-803; NEB. REV. STAT. ANN. § 24-739; NEV. REV. STAT. §§ 1.225, 1.230; N.J. STAT. ANN. §§ 2A:15-49 (West 2000); N.Y. JUD. LAW § 14; OHIO REV. CODE ANN. §§ 2701.03, 2701.031 (LexisNexis 2008); OKLA. STAT. ANN. tit. 20, § 1401 (West 2002); OR. REV. STAT. ANN. § 14.210; R.I. GEN. LAWS § 8-9-5; S.C. CODE ANN. §§ 14-3-50, 14-8-70 (1976 & Supp. 2009); TENN. CODE ANN. §§ 17-2-101, 20-4-208 (2009); UTAH CODE ANN. § 78A-2-222; VT. STAT. ANN. tit. 12, § 61 (2002); VA. CODE ANN. § 16.1-69.23(2); W. VA. CODE ANN. § 51-2-8; WIS. STAT. ANN. § 757.19(2)(f); WYO. CODE J. CONDUCT R. 2.11(A)(3).

29. ALASKA STAT. § 22.20.020; CAL. CIV. PROC. CODE § 170.1; CONN. GEN. STAT. § 51-39; GA. CODE ANN. § 15-1-8; IOWA CODE § 602.1606; KY. REV. STAT. ANN. § 26A.015.

30. *Compare* HAW. REV. STAT. § 601-07(a)(1) (Supp. 2007) (disqualifying judge for “any pecuniary interest” that is not *de minimis*), with WIS. STAT. ANN. § 757.19(2)(f) (disqualifying a judge when she has a “*significant* financial or personal interest in the outcome of the matter” (emphasis added)).

31. *See* MO. ANN. STAT. § 105.464 (Supp. 2010).

32. ALASKA STAT. § 22.20.020(2); CAL. CIV. PROC. CODE § 170.1(a)(1)(B); CONN. GEN. STAT. ANN. § 51-39(a); FLA. STAT. ANN. § 38.02; HAW. REV. STAT. § 601-07(a)(1); IND. CODE ANN. § 29-1-1-6; IOWA CODE § 602.1606; KY. REV. STAT. ANN. § 26A.015(2)(d); MINN. STAT. § 542.16 (2010); MONT. CODE ANN. § 3-1-803(2); NEV. REV. STAT. § 1.230(2)(b); N.J. STAT. ANN. § 2A:15-49(a); OR. REV. STAT. ANN. §

Oklahoma, Vermont, Virginia, and West Virginia),³³ to sixth (Georgia, New York, South Carolina, and Tennessee).³⁴ Eight other states are silent on the degree of relationship,³⁵ and North Carolina requires only that the judge may not be “[c]losely related.”³⁶

4. *Attorney for Party*

Twenty-six states have statutes prohibiting judges from hearing a case in which the judge previously served as counsel.³⁷ Alaska has expanded this into a broader prohibition. There, a judicial officer may not hear a case when

a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the

14.210(1)(c); UTAH CODE ANN. § 78A-2-222(1)(b); WIS. STAT. ANN. § 757.19(2)(a); WYO. STAT. ANN. § 5-9-119(b) (2010); MINN. CODE J. CONDUCT R. 2.11 (2009); PA. CODE J. CONDUCT Canon 3C(1)(d) (2005); WYO. CODE J. CONDUCT R. 2.11(A)(3); *but see* IND. CODE ANN. § 35-36-5-2 (Indiana Criminal Code does not specify degree of relationship required for recusal).

33. ALA. CODE § 12-1-12; ARK. CODE ANN. § 16-13-214; LA. CODE CIV. PROC. ANN. art. 151 (1999); LA. CODE CRIM. PROC. ANN. art. 671 (2003); NEB. REV. STAT. § 24-739(1) (2004) (general); OKLA. STAT. ANN. tit. 20, §§ 1401–1402; VT. STAT. ANN. tit. 12, § 61 (2010); VA. CODE ANN. § 16.1-69.23(3) (district courts); W. VA. CODE ANN. § 51-2-8 (West 2000 & Supp. 2009).

34. GA. CODE ANN. § 15-1-8(a)(2); N.Y. JUD. LAW § 14 (McKinney 2002); S.C. CODE ANN. § 14-1-130 (1977); TENN. CODE ANN. § 17-2-101 (2009).

35. ARIZ. REV. STAT. ANN. § 12-409 (2003); COLO. REV. STAT. § 16-6-201 (2008); 735 ILL. COMP. STAT. ANN. 5/2-1001 (West 2003); IND. CODE ANN. § 35-36-5-2; KAN. STAT. ANN. § 20-311d (1995); MISS. CODE ANN. § 9-1-11 (1999); MO. ANN. STAT. § 508.090 (West 2003); OHIO REV. CODE ANN. § 2701.03 (LexisNexis 2008).

36. N.C. GEN. STAT. § 15A-1223(b)(3) (2007).

37. *See* ALA. CODE § 12-1-12; ARIZ. REV. STAT. ANN. § 12-409(B)(1); CAL. CODE CIV. PROC. § 170.3(a)(2)(B); COLO. REV. STAT. § 16-6-201(1)(c) (criminal); HAW. REV. STAT. § 601-7(a); 725 ILL. COMP. STAT. 5/114-5 (2006) (criminal); 735 ILL. COMP. STAT. 5/2-1001 (civil); IND. CODE ANN. § 35-36-6-2 (criminal); IND. CODE ANN. § 29-1-1-6 (2000) (probate); IOWA CODE § 602.1606(2); KAN. STAT. ANN. § 20-311d(c)(1); LA. CIV. CODE ANN. art. 151(B)(1) (1999); MISS. CODE ANN. § 9-1-11; MO. REV. STAT. ANN. § 508.090(1)(1); MONT. CODE ANN. § 3-1-803(3); NEB. REV. STAT. § 24-739(1)(d); NEV. REV. STAT. ANN. §§ 1.225(2)(a), 1.230(2)(a); N.H. REV. STAT. ANN. § 492:1 (2009); N.J. STAT. ANN. § 2A:15–49(b); N.Y. JUD. LAW § 14; OKLA. STAT. tit. 20, § 1401(A); OR. REV. STAT. § 14.210(1)(d); S.C. CODE ANN. §§ 14-3-50, 14-8-70 (1977 & Supp. 2009); TENN. CODE ANN. § 17-2-101(3) (1995); UTAH CODE ANN. § 78A-2-222(1)(c); VT. STAT. ANN. tit. 12 § 61(a) (2002); VA. CODE ANN. § 16.1-69.23(5); WIS. STAT. § 757.19(2)(c).

matter . . . [or] . . . the judicial officer has represented a person as attorney for the person against a party, except the state or a municipality of the state, in a matter within two years preceding the assignment of the judicial officer to the matter.³⁸

III. LEGISLATIVE ACTIVITY

A. *Who Hears the Motion?*

In the last decade, four states have considered joining the fifteen states that statutorily require disqualification motions be heard by a judge other than the judge whose recusal is sought either initially or if the judge whose recusal is sought declines to recuse. In 2000, the West Virginia Senate passed a bill that would have required each justice of the Supreme Court of Appeals to first hear her own recusal motions and, if she rejected the motion, the motion would have been automatically forwarded to the other justices of the court for determination.³⁹ Because the court was—and still is—composed of five members, a 2–2 tie was possible. A provision was included to allow for the appointment of a retired justice or retired current circuit court judge to be appointed as a tiebreaker.⁴⁰ The bill was introduced amid a series of debates as to whether and which supreme court justices should recuse from a challenge to a sitting justice’s efforts to run for a full term, despite having been declared ineligible by a lower court.⁴¹ The senate version was approved by that chamber, amended by the house judiciary committee, and died on the house floor.⁴² It was never reintroduced.

Like West Virginia in 2001, Alabama’s legislature in 2002 addressed the question of who should hear recusal motions, with specific reference to the state’s supreme court.⁴³ The effort was a direct reaction to changes the supreme court made in 2001 to the rules of procedure of the court of the judiciary, which serves to discipline and remove judges from office.⁴⁴ The

38. ALASKA STAT. § 22.20.020(a)(5), (6) (2008).

39. S.B. 658, 2000 Leg., Reg. Sess. (W. Va. 2000).

40. *Id.*

41. See Fanny Seller, *Lawyer Wants Justices Disqualified: Lawsuit Seeks to Bar McGraw from Running*, CHARLESTON GAZETTE, Feb. 26, 2000, at 2A.

42. History of S.B. 658-2000, Reg. Sess. (W. Va. 2000), www.legis.state.wv.us/Bill_Status/Bill_history.cfm?input=658&year=2000&sessiontype=RS&btype=bill.

43. See H.B. 498, 2002 Leg., Reg. Sess. (Ala. 2002).

44. *Id.* “The Legislature finds that certain rule changes for the Court of the Judiciary made by the Supreme Court of Alabama, and promulgated without public

bill declared in part that “the suspension of a justice of the Supreme Court who continues to sit on a case in violation of the canons of judicial ethics remains inadequate” and that there was a need for “not only fair justice, but the perception of fair justice.”⁴⁵ The bill provided that when a supreme court justice refused to recuse, the denial was subject to an appeal to the court of the judiciary, and that the filing of a petition with the court of the judiciary automatically suspended the justice from the case until a final determination.⁴⁶ The bill empowered the court of the judiciary not only to force the removal of the member of the supreme court from the case, but also to select any member of the Alabama Bar with at least ten years of legal experience, whether or not a present or past jurist, to sit as a replacement.⁴⁷ The senate judiciary committee rejected the bill by a 6–8 vote, and the bill was later indefinitely postponed by the full senate.⁴⁸

In 2001, New Hampshire’s General Court considered a bill that, among other things, would have allowed a judge’s decision not to recuse to be reviewed by “another judge of that court—presumably this applied to both trial courts and the state supreme court.”⁴⁹ It was rejected by a 14–1 vote of the house judiciary committee.⁵⁰ In 2008, Kansas considered a similar bill that would have required, in civil trials only, that another judge hear a motion for recusal that had first been rejected.⁵¹ The party or attorney seeking recusal was required to declare by affidavit her inability to receive a fair trial in the action, and specify the basis for that belief.⁵² The bill was referred to the house judiciary committee, but died there with no action taken.⁵³

comment, are not justified, lessen the ethical accountability of judges of this state to the sovereign people who elected them, and are in conflict with the generally accepted principles of judicial procedure.” *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. History of S.B. 300-2002, Reg. Sess. (Ala. 2002), <http://alisondb.legislature.state.al.us/acas/ACTIONHistoryFrameMac.asp?OID=29450&LABEL=SB300>.

49. H.B. 553, 2001 Leg., Reg. Sess. (N.H. 2001), *available at* <http://www.gencourt.state.nh.us/legislation/2001/HB0533.html>.

50. N.H. H. Judiciary Comm., Comm. Rep., H.B. 533, 2001 Sess., at 29 (2001), *available at* http://gencourt.state.nh.us/sofs_archives/2001/house/HB533h.pdf.

51. H.B. 2619, 2008 Leg., Reg. Sess. (Kan. 2008).

52. *Id.*

53. NAT’L CTR. FOR STATE COURTS, *GAVEL TO GAVEL: A REVIEW OF STATE LEGISLATION AFFECTING THE COURTS 4–5* (2009), *available at* http://www.ncsconline.org/D_Research/gaveltogavel/Year%20in%20Review%202009.pdf.

B. *Basis for Recusal*

1. *General*

Having been unable in 2002 to enact changes to the method for recusing members of the state's supreme court, in 2003 several Alabama senators proposed changing the basis for recusal for all judges in 2003. Senate Bill 280 would have eliminated the existing ninety-eight word provision, in place since 1940, that requires recusal for interest, family relations to the fourth degree, or service as counsel to the parties regarding the case.⁵⁴ The provisions of Senate Bill 280 were voluminous in detail, specifying definitions for interest, personal bias, and several causes for mandatory disqualification from a case while taking care to state that recusal "does not reflect adversely on either the competence or integrity of the judge, who is most likely to be the innocent victim of unforeseen consequences of prior events."⁵⁵ That caution aside, the supreme court was given particular attention regarding its advisory opinions.⁵⁶ The bill specifically targeted for recusal any justice who "voluntarily raises and answers a constitutional question in an advisory opinion . . . that was not expressly raised in the request for such an advisory opinion," barring that justice from sitting on any subsequent litigation involving any case related to the advisory opinion.⁵⁷ A petition for refusal of a trial court judge, court of civil appeals judge, or court of criminal appeals judge was to be reviewable by writ of mandamus to the state's supreme court.⁵⁸ The refusal of a judge of the supreme court to recuse would be referred to the other members of the court, and a majority would have been permitted to force recusal.⁵⁹ The bill, with amendments, was advanced from the senate judiciary committee by a 5-1 vote, but it was never taken up by the full senate and was never reintroduced in subsequent legislative sessions.⁶⁰

54. See ALA. CODE § 12-1-12 (LexisNexis 2005); S.B. 280, 2003 Leg., Reg. Sess. (Ala. 2003).

55. S.B. 280 § 12-1-12(c).

56. *Id.* § 12-1-12(b)(6).

57. *Id.*

58. *Id.* § 12-1-13(a)-(b).

59. *Id.* § 12-1-13(c).

60. Alabama Legislative Information System Online, <http://alisondb.legislature.state.al.us/acas/acaslogin.asp> (select "Regular Session 2003" from the drop-down menu in the top-left corner, expand "Bills" in the menu bar on the left, select "Status" from the expanded list, enter Bill Number "SB280," and select "History" from the top menu bar).

Hawaii's "any pecuniary interest" disqualification statute can be traced back at least to the 1852 Constitution of the Kingdom of Hawai'i,⁶¹ and it carried over as either a constitutional, organic act, or statutory provision for over 150 years until 2004. In that year, the legislature amended the then-statutory provision to specify that the interest must be "more than de minimis pecuniary interest," and specifically delineated that ownership of mutual funds or similar investments is not an "interest" requiring recusal.⁶² The amended statute also permits waiver of the disqualification requirement if agreed to by all parties "after full disclosure on the record."⁶³

Louisiana's recusal statutes establish a bifurcated disqualification system. Prior to 2008, judges in civil cases were only required to recuse when the judge was a witness in the cause.⁶⁴ Discretionary bases for recusal included prior service or consultation as an attorney in the cause, being related to a party, and being generally "biased, prejudiced, or interested in the cause."⁶⁵ In criminal cases, the discretionary bases listed in civil cases are mandatory.⁶⁶ Amendments enacted in 2008 converted some discretionary recusal provisions related to judges in civil cases (those involving prior service as attorney for a party and the familial relationship to the parties or their attorneys) into mandatory ones.⁶⁷

2. *Contributions*

All the efforts to emulate or duplicate Alabama's campaign contribution recusal statute over the last decade have failed. *Citizens United* and *Caperton*, however, may have changed the legislative environment, opening the door for the reappearance of such legislation. California's Assembly has already acted, passing unanimously on May 6, 2010 a bill that would require recusal where a judge has received \$1,500 or

61. See CONSTITUTION AND LAWS OF HIS MAJESTY KAMEHAMEHA III art. 11 (1852), available at <http://hooilina.org/collect/journal/index/assoc/HASH01ce.dir/5.pdf>; see also HAWAIIAN KINGDOM CONST. art. 10 (1887); *Thurston v. Allen*, 8 Haw. 391, 391 (1892) (considering whether the Chief Justice of the Republic's Supreme Court had a "pecuniary interest" in the case at hand sufficient to warrant his recusal under Article 10 of the 1887 Constitution, which was similar to Article 11 of the 1852 version).

62. HAW. REV. STAT. § 601-7 (Supp. 2007).

63. *Id.*

64. LA. CODE CIV. PROC. ANN. art. 151(A) (1999).

65. *Id.*

66. LA. CODE CRIM. PROC. ANN. art. 671(a) (2003).

67. LA. CODE CIV. PROC. ANN. art. 151(A)(2)-(3).

more in campaign funds from a party or counsel appearing before her. As of this writing, the bill is pending in the senate's rules committee.⁶⁸

Among the questions posed most often is how much of a contribution would require recusal. Montana⁶⁹ and Louisiana⁷⁰ have considered making *any* contribution by an attorney or a party grounds for disqualification. Louisiana's House Bill 919 of 2004 and Georgia's House Bill 601 of 2009 would have set the recusal amount equal to the maximum permissible contribution to the judge's campaign in a given election cycle.⁷¹ More commonly, recusal amounts are set below contributory maximums. Georgia,⁷² Texas,⁷³ and New York⁷⁴ have sought to establish \$500 as the threshold for mandatory recusal; however, they differ in terms of time frame. Texas's 2001 legislation would have specifically made the monetary threshold cumulative over the prior two years,⁷⁵ while New York's several attempts over the last decade would have used a five-year standard.⁷⁶ Georgia's 2007 legislation specified the time period as "in the last[,] previous or present election cycle."⁷⁷ Georgia's jurists serve four-year (trial court judges) and six-year terms (appellate court judges).⁷⁸ If the \$500 "in the last previous or present election cycle" was treated cumulatively, as was specifically proposed in New York and Texas, members of the Georgia Supreme Court and Georgia Court of Appeals may have had to keep track of contributions for over a decade and make reference to them prior to any proceedings. Mississippi's 2002 proposal went even further. While specifying a higher limit than the other states—\$2,000—the bill specified no

68. A.B. 2487, 2009–2010 Leg., Reg. Sess. (Cal. 2010), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2451-2500/ab_2487_bill_20100504_ended_asm_v96.html (The bill's status can be viewed at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2451-2500/ab_2487_bill_20100506_history.html).

69. H.B. 229, 60th Gen. Assem., Reg. Sess. (Mont. 2007), <http://data.opi.mt.gov/bills/2007/billpdf/HB0229.pdf>.

70. H.B. 769, 2008 Leg., Reg. Sess. (La. 2008), *available at* <http://www.legis.state.la.us/billdata/streamdocument.asp?did=470086>.

71. *See* NAT'L CTR. FOR STATE COURTS, *supra* note 53, at 4, 6.

72. H.B. 97, 149th Gen. Assem., Reg. Sess. (Ga. 2007).

73. H.B. 589, 77th Leg., Reg. Sess. (Tex. 2001).

74. A.B. 6879, 232d Leg., Reg. Sess. (N.Y. 2009); A.B. 5656, 230th Leg., Reg. Sess. (N.Y. 2007); A.B. 7983, 228th Leg., Reg. Sess. (N.Y. 2005); A.B. 10455, 226th Leg., Reg. Sess. (N.Y. 2003).

75. Tex. H.B. 589.

76. N.Y. A.B. 6879; N.Y. A.B. 5656; N.Y. A.B. 7983; N.Y. A.B. 10455.

77. Ga. H.B. 97.

78. Ga. Const. art VI, § VII, ¶ I.

particular timeframe.⁷⁹ Because the state's appellate judges serve eight-year terms, and at least two justices serving on the supreme court in 2002 had been on the court for multiple terms,⁸⁰ there was the possibility of decades of contribution tracking by jurists, lawyers, and parties.

3. *Political Endorsement/Activity*

One bill, introduced in every legislative session in the New York State Assembly since at least 1993, would have prohibited a judge from hearing proceedings related to a single-issue political party that had endorsed the judge for election.⁸¹ Single-issue parties that have been active in New York since 1993 include the Right to Life, Marijuana Reform, and Tax Cut Now. Of all of its iterations, none progressed out of committee.

IV. POSSIBLE JUDICIAL RESPONSES

As a separate branch of government, the judiciary has certain devices that are designed to enable it not only to defend itself from intrusions by the other branches, but also to protect itself through cases brought to it by parties seeking to have their rights protected or defined. For the judiciary of a given state, and in particular the court of last resort, there are four possible ways to react or respond to the ongoing and inevitable interest of the legislature in injecting itself into the recusal discussion: cooperate, co-opt, comity, and conflict.

A. *Cooperate*

The most amenable direct approach—and the one subject to the least possible acrimony—is a cooperative model. In it, the judiciary either

79. H.B. 1256, 2002 Leg., Reg. Sess. (Miss. 2002).

80. The supreme court, as constituted in January 2002 when the legislation was introduced, included then-Chief Justice Edwin Lloyd Pittman, who was first elected to the court in 1989 and re-elected in 1997, and Justice C.R. "Chuck" McRae, who was first elected in 1990. See Miss. State Univ., Mississippi's Top Judge Being Honored by MSU Pre-Law Society, <http://www.msstate.edu/web/media/detail.php?id=1726> (last visited Apr. 27, 2009); Miss. Supreme Court, Presiding Justice C.R. "Chuck" McRae, <http://web.archive.org/web/20020107214440/www.mssc.state.ms.us/bios/suprem e/ChuckMcRae.htm> (last visited Apr. 21, 2010).

81. A.B. 4092, 230th Gen. Assem., Reg. Sess. (N.Y. 2007); A.B. 3150, 228th Gen. Assem., Reg. Sess. (N.Y. 2005); A.B. 786, 226th Gen. Assem., Reg. Sess. (N.Y. 2003); A.B. 2210, 224th Gen. Assem., Reg. Sess. (N.Y. 2001); A.B. 2437, 222d Gen. Assem., Reg. Sess. (N.Y. 1999); A.B. 104, 220th Gen. Assem., Reg. Sess. (N.Y. 1997); A.B. 217, 218th Gen. Assem., Reg. Sess. (N.Y. 1995); A.B. 3902, 215th Gen. Assem., Reg. Sess. (N.Y. 1993).

directly, or through intermediaries such as the state bar associations or others, seeks to craft legislation that is consistent with a respect for the third branch's responsibility for conducting its own affairs and respectful of the legislature's interest in ensuring justice is afforded in the state. For example, at least eight states—Maryland,⁸² Montana,⁸³ New York,⁸⁴ North Dakota,⁸⁵ Oregon,⁸⁶ South Dakota,⁸⁷ Washington,⁸⁸ and Wisconsin⁸⁹—allow the judiciary to introduce legislation or to have bills introduced with introductory phrases such as “on behalf of,” or “at the request of,” placed atop a bill. Some states also have “State of the Judiciary” addresses that give chief justices a unique opportunity to place their concerns before the legislature.⁹⁰ Even if the judiciary opts not to act proactively, it may act reactively yet cooperatively through written testimony, judicial impact statements, or appearing and testifying directly to the corresponding legislative committees generally, without running afoul of existing judicial canons or other restrictions.

82. S.R. 136, 424th Gen. Assem., Reg. Sess. (Md. 2007) (providing the district court and circuit courts the power to end a period of probation at any time “[b]y request [of the] Maryland Judicial Conference”).

83. H.R. 18, 60th Leg., Reg. Sess. (Mont. 2007) (seeking to repeal statutory time limit for filing travel expense vouchers by district court judges “[b]y [r]equest of the Supreme Court”).

84. A.B. 6921, 232d Gen. Assem., Reg. Sess. (N.Y. 2009) (relating to the emergency relocation of terms of courts “[a]t the request of the Office of Court Administration”).

85. H.B. 1083, 60th Leg. Assem., Reg. Sess. (N.D. 2007) (seeking to change the fees of the clerk of the supreme court “[a]t the request of the Supreme Court”).

86. H.B. 2317, 75th Leg. Assem., Reg. Sess. (Or. 2009) (relating to collection of state judicial branch delinquent accounts “at the request of House Interim Committee on Judiciary for Judicial Department”).

87. H.B. 1131, 2008 Leg., 83d Sess. (S.D. 2008) (attempting to permit the court to assess the crime victims' compensation surcharge in cases involving certain adjudicated children “at the request of the Chief Justice”).

88. H.B. 1158, 61st Leg. Assem., Reg. Sess. (Wash. 2009) (relating to electronic signatures for juror questionnaires “by request of [the] Board for Judicial Administration”).

89. A.B. 122, 2009 Leg., Reg. Sess. (Wis. 2009) (relating to appellate time limits and procedure “by request of [the] Wisconsin Judicial Council”).

90. See, e.g., Hon. Walter L. Carpeneti, Chief Justice, Supreme Court of Alaska, State of the Judiciary Address (Feb. 10, 2010); Hon. Sue Bell Cobb, Chief Justice, Supreme Court of Ala., 2010 State of the Judiciary Address at the Ala. House Chamber (Jan. 26, 2010).

B. *Co-opt*

An approach that focuses on co-opting the issue is one in which the judiciary takes the legislature's interest in a particular issue and internalizes it as a matter of judicial policy, practice, or rules. In this model, the judiciary is somewhat more concerned with encroachment in its prerogatives as a separate branch, but not so much so as to suggest outright hostility to the legislature's interest. One particularly public example involved the Louisiana Legislature's 2008 Extraordinary Session, called by Governor Bobby Jindal for the purpose of passing ethics reforms.⁹¹ House Bill 1 of that session, as introduced, applied to anyone seeking "public office" and specifically requested annual financial statements from every judge.⁹² Then-Chief Justice Pascal F. Calogero, Jr., submitted a letter indicating that he shared the legislature's and governor's concerns over ethics and financial disclosure.⁹³ However, the chief justice noted that, as a separate branch of government, the judiciary was better placed to determine, through rules of court, how to implement such a reform package, and he urged that the provisions applicable to judges be removed.⁹⁴ The provisions were removed from the version signed into law by Governor Jindal on March 3, 2008.⁹⁵ On March 26, the Louisiana Supreme Court issued orders enacting new judicial standards.⁹⁶ One order, amending the Louisiana Code of Judicial Conduct, restricted the circumstances under which a judge could accept gifts and "other things of

91. See Proclamation No. 3 BJ 2008, <http://gov.louisiana.gov/assets/docs/OfficialDocuments/2008ExtraordinarySessionCall.pdf>.

92. H.B. 1, 2008 Leg., 1st Extraordinary Sess. (La. 2008), available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=455867>.

93. See Sarah Laskow, Ctr. for Pub. Integrity, Louisiana Tightens Its Ethics Standards (Feb. 28, 2008), <http://projects.publicintegrity.org/oi/report.aspx?aid=939>.

94. *Requires Certain Public Servants and Candidates for Certain Offices to Disclose Certain Financial Information: Hearing on H.B. 1 Before S. Comm. on S. and Governmental Affairs*, 1st Extraordinary Sess. (La. 2008) (statement of Rep. Jim Tucker), available at <http://senate.legis.state.la.us/video/2008/february.htm#19> (click "Senate & Government Part 2" under Feb. 19, 2008).

95. 2008 La. Sess. Law Serv. 1st Ex. Sess. Act 1 (H.B.1) (West).

96. See LOUISIANA SUPREME COURT, 2008 LOUISIANA SUPREME COURT RULE CHANGES, http://www.lasc.org/rules/orders/2008/Rule_XXXIX_Financial_Disclosure.pdf (last visited Apr. 27, 2010); see also SUPREME COURT OF LOUISIANA AMEND CANON 6 OF THE LOUISIANA CODE OF JUDICIAL CONDUCT (2008), http://www.lasc.org/rules/orders/2008/Canon_6_ORDER.pdf;

SUPREME COURT OF LOUISIANA, ENACT PART N, RULE XXXIX OF THE RULES OF THE SUPREME COURT OF LOUISIANA (2008), http://www.lasc.org/rules/orders/2008/Rule_XXXIX_Financial_Disclosure.pdf.

value” and imposed reporting requirements.⁹⁷ The other order amending the rules of the Supreme Court of Louisiana outlined the mechanics of disclosure, as well as the rules concerning what needed to be disclosed.⁹⁸ While parallel to the language of House Bill 1, the amended court rule does state that the supreme court, and not the state board of ethics, will enforce the requirements.⁹⁹

C. Comity

Comity, as it applies to relations between the judiciary and the other governmental branches, rests on the notion that the judicial branch in general, or the court of last resort in particular, is inviolate in those matters that the state’s constitution has vested to the judiciary, but also that this inviolability can be waived. Derived from this understanding is the idea of inherent powers—those which are held by a particular court by virtue of its possession of the judicial power of a state or, on a larger scale, the power of a state supreme court or court of last resort to exercise administrative control over subordinate elements of the judicial branch.¹⁰⁰ The Kentucky Supreme Court stated in *Commonwealth v. Reneer* that this principle is one in which:

the legislative function cannot be so exercised as to interfere unreasonably with the functioning of the courts, and that any unconstitutional intrusion is per se unreasonable, unless it be determined by the court that it can and should be tolerated in a spirit of comity *Inevitably, there is and always will be a gray area in which a line between the legislative prerogatives of the General Assembly and the rule-making authority of the courts is not easy to draw. The policy of this court is not to contest the propriety of legislation in this area to which we can accede through a wholesome comity.*¹⁰¹

97. See SUPREME COURT OF LOUISIANA, AMEND CANON 6 OF THE LOUISIANA CODE OF JUDICIAL CONDUCT (2008), http://www.lasc.org/rules/orders/2008/Canon_6_ORDER.pdf.

98. See SUPREME COURT OF LOUISIANA, ENACT PART N, RULE XXXIX OF THE RULES OF THE SUPREME COURT OF LOUISIANA (2008), http://www.lasc.org/rules/orders/2008/Rule_XXXIX_Financial_Disclosure.pdf.

99. *Id.* at 6; see also H.B. 1, 2008 Leg., 1st Extraordinary Sess. (La. 2008), available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=455867>.

100. See BLACK’S LAW DICTIONARY 853 (9th ed. 2009) (defining inherent-powers doctrine).

101. *Commonwealth v. Reneer*, 734 S.W.2d 794, 797 (Ky. 1987) (citing *Ex*

At issue in *Reneer* was a bifurcated trial process, created by the legislature, which consisted of a jury verdict on guilt or innocence, followed by a separate sentencing hearing at which certain evidence not admissible at trial could be introduced.¹⁰² The trial judge in *Reneer* found the bifurcated process infringed on the supreme court's power to set rules of practice and procedure.¹⁰³ Although *Reneer* was found not guilty, a motion to certify the question to the supreme court was granted.¹⁰⁴ The supreme court held 5–2 that dictation of trial proceedings in this manner was “a legislative attempt to invade the rule making prerogative of the Supreme Court” and an explicit violation of the separation of powers.¹⁰⁵ However, citing comity, the court declined to invalidate the statute, but warned that:

this court has the power to preempt the statute by the promulgation of different rules of procedure at any time we determine it necessary. We reserve the right to consider any abuses or injustices alleged to be caused by [the statute] when presented by a proper case, but until such time as we do so, we decline to hold [the statute] unconstitutional, and we accept its provisions for the time being under the principle of comity.¹⁰⁶

The dissenters would have simply held the statute an unconstitutional infringement on the judiciary.¹⁰⁷

Comity, as applicable in the case of recusal, would rest on the inherent or implicit power of the courts or the explicit grants of authority given to the judiciary or courts of last resort to set rules of administration, practice, and procedure.¹⁰⁸ An appellate court confronted with a recusal statute enacted without the active cooperation of the judiciary or co-option in the form of a court rule may nevertheless opt to abide by its provisions. A trial court, however, will be confronted by several challenges. The question of the applicability of the recusal statute would, presumably, be

Parte Auditor of Pub. Accounts, 609 S.W.2d 682, 688 (Ky. 1980)).

102. *Id.* at 795.

103. *Id.* at 796.

104. *Id.* at 796, 798.

105. *Id.*

106. *Id.* at 797–98.

107. *Id.* at 799 (Leibson, J., dissenting).

108. Glenn S. Koppel, *When Push Comes to Shove Between Court Rule and Statute: The Role of Judicial Interpretation in Court Administration*, 40 SANTA CLARA L. REV. 103, 130–31 (1999).

raised in the context of a motion to disqualify a particular judge—Judge *X*. If the statute requires that recusal motions be forwarded to another judge for determination, Judge *X* may at this point determine that the statute is an unconstitutional violation of the separation of powers, opt *not* to engage in comity, and instead force the issue to be determined by the appellate courts. Conversely, Judge *X* may forward the initial motion to another judge to determine whether there is cause for recusal. One of the parties could then on appeal (or, as in *Reneer*, when the question is certified or otherwise directed to the supreme court) argue that forwarding of the motion was inappropriate.¹⁰⁹ This could place the supreme court in the unenviable position of finding the entire recusal proceeding improper and remanding the case back to Judge *X*, the same judge whom *another* judge had previously determined was disqualified.

D. Conflict

The possibility of conflict between the legislature and the judiciary has the greatest potential for open acrimony between the branches, although this is not necessarily the result. The courts may simply ignore or work around a given recusal statute, and the legislature may opt not to press the matter. A good example is New Jersey Code section 2A:15-49, which has been in existence in one statutory form or fashion for at least 200 years.¹¹⁰ The law prohibits a judge from sitting in a matter when she is related in the third degree to a party, was an attorney for a party, has given an opinion regarding a matter in question, or is interested in the action.¹¹¹ At least initially, the courts seemed to have engaged in some degree of comity with respect to it. In 1961, the New Jersey Supreme Court cited the statute but did not strike it down when a trial judge was challenged for being related to an *attorney* (rather than a *party* as required by section 2A:15-49) in the third degree.¹¹² Instead, the court held that while the statute may not have necessitated recusal, the supreme court could require it:¹¹³

109. Cf. *Reneer*, 743 S.W.2d at 795.

110. N.J. STAT. ANN. § 2A:15-49 (West 2000); see *Sebolt v. Nat'l Bank of N.J.*, 55 A.2d 97, 98 (N.J. 1947) (“Our present statute, R.S. 2:26-193 N.J.S.A., is explicit. . . . This legislation, in substantially the same language, has been on the statute books since 1797.”).

111. N.J. STAT. ANN. § 2A:15-49.

112. *State v. Deutsch*, 168 A.2d 12, 20 (N.J. 1961).

113. *Id.* at 22 (“Although they did not adopt a formal Rule directing that no judge shall sit in a cause in which a near relative is of counsel there is no reason to doubt that they confidently expected that when any such situation arose the cause

[W]e shall not pursue the inquiry as to the scope of the statute since we are satisfied that it is not exclusive and that the important disqualification issue before us will be dealt with best by the discharge of our constitutional responsibility for the application of sound general principles of judicial administration.¹¹⁴

Thereafter, the state's supreme court was willing to cite, in passing, to the statute,¹¹⁵ or apply its provisions directly to a case at hand.¹¹⁶ Lower courts, however, have noted that the bases for requiring recusal set forth in rules promulgated by the supreme court (specifically Rules 1:12-1 and 2) and those set forth in the statute, "are not perfectly consistent with each other."¹¹⁷ Indeed, the court noted that it "may have to deal someday with a problem created by an inconsistency."¹¹⁸

When courts do not ignore or work around a recusal statute they find offensive, however, inter-branch conflict may arise—even conflict in which a statute is explicitly struck down. In 1997, Missouri's legislature amended its existing disqualification law (enacted in 1978), which prohibited a judge from serving in a case when the judge was related to the party or could receive a "direct financial gain from any potential result of the proceeding," to include *indirect* financial gain as well. Violating judges were subject to prosecution. In February, 1999, the state supreme court amended its judicial canons to change the prior discretionary disqualification for economic interest ("should") into a mandatory one ("shall"), but waiving the requirement if, in enforcing its provisions, no judge would be available to hear the case.

In November, 1998, a retired judge sued over the way the state's judicial compensation was set earlier in the year, and a direct conflict arose between the statute and the rule. The Missouri Supreme Court held that

would be remitted to another judge under the broad transferability authority which they provided." (citations omitted)).

114. *Id.* at 20 (citations omitted).

115. *See* Sorentino v. Family & Children's Soc'y, 378 A.2d 18, 20 (N.J. 1977); *In re Gaulkin*, 351 A.2d 740, 747 n.6 (N.J. 1976).

116. *Hamilton Twp. v. Bd. of Chosen Freeholders*, 235 A.2d 891, 892 (N.J. 1977) ("Plaintiffs claim that the trial judge was disqualified from hearing and determining the in lieu action because his prior *ex parte* order constituted the giving of an 'opinion' under N.J.S. 2A:15-49(c), N.J.S.A. That statute provides that no judge shall sit on the trial or argument of any pending controversy when he has 'given his opinion upon a matter in question in such action.' We find no merit in plaintiff's contention; there was no disqualifying opinion here.").

117. *Magill v. Casel*, 568 A.2d 1221, 1224 (N.J. Super. Ct. App. Div. 1990).

118. *Id.*

its “general superintending control over all courts and tribunals” and power to “establish rules relating to the practice, procedure, and pleading for all courts,” which were created by the constitution, necessitated striking down the statute as a “violat[ion of] constitutional principles concerning separation of legislative and judicial functions.”¹¹⁹ Perhaps anticipating this ruling, the state senate introduced a bill in December, 1998 that acknowledged the judiciary’s authority.¹²⁰ Two weeks after the supreme court’s decision, the senate judiciary committee sent to the floor a version of the bill that deleted the statute in its entirety but retained the criminal sanctions for judges who heard cases in which they were related to a party.¹²¹ This version was signed into law in July of that year.¹²²

V. CONCLUSION

Even absent *Caperton* and *Citizens United*, state legislatures have been especially active in the last several years in their efforts to examine the issue of recusal and disqualification. The increased interest that is almost sure to follow these decisions could be viewed as a welcome intervention by a (somewhat) disinterested body into a fray in which the parties are unable to come to an agreement. That this role would be played by the legislature rather than the courts, where conflict resolution is the *sine qua non* of the branch, is at best mildly ironic or at worst a startling admission of the court’s inability to police itself. On the other hand, the state courts themselves, or the courts of a particular state, may have no need for such assistance. They could, arguably, observe such an endeavor as stemming from open hostility to the branch as an institution or to a court or courts for decisions that have drawn the ire of legislators who now see an opportunity to exact some sort of revenge. Even the most well-meaning of legislators may lack the knowledge and nuance necessary to be able to devise a scheme of disqualification, whether for campaign contributions or otherwise, that would be practical and functional. Witness the all but unused Alabama campaign contribution recusal statute. Regardless, the

119. Weinstock v. Holden, 995 S.W.2d 408, 410–11 (Mo. 1999) (per curiam) (quoting MO. CONST. art V, §§ 4–5).

120. S.B. 1, 90th Gen. Assem., Reg. Sess. (Mo. 1998), available at <http://www.senate.mo.gov/99info/billtext/intro/SB001.htm> (“The person knows the subject matter is such that the person may receive a direct, or indirect *as defined by the canons of judicial conduct*, financial gain from any potential result of the proceeding . . .”).

121. See MO. ANN. STAT. § 105.464 (West 1997 & Supp. 2010).

122. S.B. 1, Changes Laws on Judges, Jurors and Civil and Criminal Procedure, www.senate.mo.gov/99info/bills/SB001.htm (last visited Apr. 27, 2010).

ultimate venue and center of concern rests in the judiciary and its determination of how to balance the interests of the public at large, the parties' interests in a particular case, and the institutional discourse that is required to maintain any semblance of interbranch relations.

A judiciary that welcomes with open arms *any* legislative intrusion into its proceedings, particularly when the state constitution vests general superintending or administrative control and rulemaking authority in the court itself, functionally abandons its responsibilities. The rejection out-of-hand of any effort by the legislature to suggest, promote, study, or enact changes to existing recusal practices and standards is to invite criticism. This sort of condemnation would almost certainly lead to diminishment of the judiciary and its legitimacy that may even be greater than some have suggested will occur, especially as judicial elections become “noisier, nastier, and costlier” in the next quarter century, post-*Caperton* and *Citizens United*, than they were in the nearly twenty-five years since that description was first applied to judicial elections.¹²³

123. Nicholas C. McBride, *Pressure Grows in Legal Profession to Get Judges out of Politics*, CHRISTIAN SCI. MONITOR, Aug. 14, 1987, at 5.