Justice for Sale: Contemplations on the "Impartial" Judge in a Citizens United World

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JUSTICE FOR SALE: CONTEMPLATIONS ON THE "IMPARTIAL" JUDGE IN A CITIZENS UNITED WORLD

Aviva Abramovsky

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"The power of speech has the same effect on the condition of the soul as the application of drugs to the state of bodies, for just as different drugs dispel different fluids from the body, and some bring an end to disease but others end life, so also some speeches cause pain, some pleasure, some fear; some instill courage, some drug and bewitch the soul with a kind of evil persuasion."

Gorgias (483 – 375 BC)

INTRODUCTION

It has long been in vogue to discredit the judiciary. From the early days of legal realism, the concept of the "impartial" judge has been repeat-
edly scoffed at by those initiated in modern theories of jurisprudence. Ever more convincing studies into the pervasive nature of cognitive biases, among other disheartening studies, have further eroded our faith in the ability of human nature to transcend itself to faithfully mete out that most elusive of concepts—justice.

Yet, the judiciary remains the most trusted of the three branches of government. Though imperfect, the public does generally trust and respect the judiciary. And, if we are honest with ourselves, so do the majority of Americans (lawyers and even academics) because judges are perceived as

Neutral Principles and the Originalist-Minimalist Fallacy in Constitutional Interpretation, 88 NW. U. L. REV. 165, 165-66 (1993) (The basic premise of the article is that judicial constitutional interpretation is the first line of defense against the “unrepresentative judicial philosopher-kings,” [which] surely threatens the values of self-determination, accountability and representationalism that provide core notions of American political theory.

3. Scott B. Gitterman, Taking on Big Money: How Caperton Will Change Judicial Disqualification Forever, 35 NOVA L. REV. 475, 498 (2011); Gabriel D. Serbulea, Due Process and Judicial Disqualification: The Need for Reform, 38 PEPP. L. REV. 1109, 1143 (2011) (“The fifth and most important tenet, judge impartiality, is not consistent with the self-judging of recusal motions, which is the law in most states and the federal system, and finding an impartial appellate judge for an interlocutory appeal places a heavy burden on litigants. In fact, it is so ingrained in our judiciary that the challenged judge should pass upon a recusal motion that Chief Justice Rehnquist rebuked Senators Patrick Leahy and Joe Lieberman for questioning Justice Scalia in Cheney while the case was pending.”); see Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (“There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.”).


6. Adam Liptak, Sunday Dialogue: Putting the Justices on TV, N.Y. TIMES, Dec. 10, 2011, http://www.nytimes.com/2011/12/11/opinion/sunday/sunday-dialogue-putting-the-justices-on-tv.html?r=2&pageviewed=all?src=tp; see THE FEDERALIST No. 78 (Alexander Hamilton) (It is the judiciary’s duty “to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.” Hamilton warned that courts exercising executive or legislative powers would amount to judicial tyranny; but he believed that only the judiciary could be trusted to hold the other branches to the prescribed limits of their authority.)

the least corrupt product of our political system. 8 Held to the standards of Judicial Codes of Conduct, 9 sheathed in the mystery of the law, by dint of their education, experience, age, and public reputation, the judiciary has remained mostly removed from the scorn of the public and generally untarnished from the dirt and mudslinging of the public square.

It still takes some guts to impugn the integrity of a judge. Or, at least, it used to. Since Bush v. Gore,10 however, even the Supreme Court has increasingly been subject to the new accepted truth of the political judge.11 It no longer even raises eyebrows to refer to the “conservative” or the “liberal” Justices in the prediction of judicial decisions.12 Those predictions are presumptively based on the political ideology of the judge, and not on some accepted version of truth or even simply deferral to ideals of the law somewhere beyond partisanship.

Recently, however, even that subjective ideological characterization is increasingly turning into a darker and greatly more troubling conceptualization. The new sense is that judges, particularly those coming out of the judicial election process, are bought and paid for.13 If not with direct bribes,
judicial decisions are bought through the corrosive process of political campaign donations.\textsuperscript{14} Justice is for sale.

Empirical evidence supports the conclusion that judicial campaign donations do appear to affect judicial decision making.\textsuperscript{15} Results are apparently exacerbated by contentious political judicial races.\textsuperscript{16} Moreover, there is clear evidence that the public perception of the corrosive effects of campaign contributions is endemic.\textsuperscript{17} And that was before \textit{Citizens United}.\textsuperscript{18}

For the judiciary, the reality of a \textit{Citizens United} worldview of campaign speech and the regulation of the judiciary has only begun to be felt or really examined in the context of the judicial election paradigm.\textsuperscript{19} It creates the reality of a fundamental clash of principles—the "guiding principle" of freedom, the primacy of the unfettered exchange of ideas—with the "guiding principle" of justice, the idea of blind Lady Justice herself, embodied in

\begin{quote}
[hereinafter \textit{BUYING JUSTICE}] (collecting survey data on national and state level data demonstrating that Americans believe, by significant margins, that campaign spending has an impact on judicial decision-making).
\end{quote}
the fragile transcendent concept of the rule of law beyond faction or group. Such tension always existed in the defining of the appropriate role of judicial selection, but never before has the Supreme Court pushed freedom of speech so far forward and combined it with the freedom to advertise, to sway opinion, and to campaign on behalf of the heretofore mostly silent judge.20 We are left with the very real question of whether what's left of society's belief in the law will be subsumed into a sea of never ending, well-funded, and vicious chatter.

This Article will look at the idea of judicial elections and ask the fundamental question: Is it possible to maintain an impartial judiciary in the wake of Citizens United? In Part I, it will argue that the system as it currently exists and the remedies currently available make little sense in the brave new world we now live in. In Part II, it will argue that there are only two legitimate societal choices available, accept the entrance of a pervasive, increasingly powerful influence on judges and its corollary of ever decreasing faith of the public in judges, or end judicial elections entirely. The Supreme Court was quite correct when it said, "campaigning for office is not a game."21 It is deadly serious and, I will argue, inherently incompatible with the universality required in the belief of the rule of law and not men.

I. ELECTIONS HAVE CONSEQUENCES

"I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary."22

John Marshall (1830)
Proceedings and Debates of the Virginia State Convention of 1829-1830

A. The Majoritarian Dilemma

There is attraction to the idea of accountability—that the judge must be and should be held up to the majoritarian view and that such majoritarian views can best be discerned by the people's choice of candidates among

20. Citizens United, 130 S. Ct. at 913 (2010) ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

21. Arizona Free Enter. Club’s Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826 (2011) ("Leveling the playing field' can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair." (citing Buckley v. Valeo, 424 U.S. 1, 14 (1976))).

those on the ballot. After all, we are all subject to the law. Hence, the legal arbiter, the judge, should be subject to us—by ballot. There is comfort in the idea that the people can express their anger at judicial excess by vote, democracy at work.

The tradition of empowering the people through electoral rights has a storied history in the United States. By the mid-nineteenth century, judicial elections had become popular as part of the Jacksonian movement toward greater control of public office. Though the Federalists, embodied by Hamilton, had prevailed in having judicial merit appointment be the sole selection process for the Federal bench, the Anti-Federalists had persevered in the state arena. Their concern was that of accountability. An independent judge could "feel themselves independent of heaven itself." Thus, the appeal of the judicial election is that it keeps the judge firmly in tune with the constituency responsible for the selection.

From its outset, this majoritarian ideal was acknowledged to be in conflict with the equally long-standing common law tradition of judicial independence. To arrive at a workable median, the judicial election process was bound by rules significantly more restrictive than those of its legislative or executive counterparts. As judicial elections have become more politicized, however, the majoritarian paradigm may be understood to be succumbing to partisan faction. As Justice O'Connor identified, "In too many states, judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution."

The majoritarian ideal itself is fraught with certain dangers not present in executive or legislative elections. First, this ideal of judicial accountability by election is arguably better understood as a sense of effective popular-

27. Id.
28. Id. at 364.
29. Id. at 365.
30. Id. at 363.
ism than one of actual judicial accountability. The judge, after all, is required to be neutral. The various Codes of Judicial Conduct—both Model (MR) and enacted—are rife with admonitions requiring impartiality. Some examples include MR 2.4(a), "A judge shall not be swayed by public clamor or fear of criticism," and MR 2.3(a), "A judge shall perform the duties of judicial office . . . without bias or prejudice."33

Similarly, a judge's failure to conduct herself impartially is the near universal standard for requiring judicial recusal. For example, MR 2.11(a): "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."35 This includes specific admonitions for recusal when, for example, "[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."36

For these reasons, judges do not and cannot be understood as appropriately being able to represent a certain political constituency. It is simply not within the purported role of the judge in his judicial office to act in a way that is representative of even a majoritarian consensus, if that consensus is beyond the requirements of the law.37 Thus, judicial accountability is at best properly restricted to inappropriate role behavior in a judge's application of the law. Yet, as stated above, the Codes of Conduct and other regulatory apparatuses of the judiciary already prohibit such behavior.38 Given that judicial elections occur primarily at the state court level and predominantly at the trial level of those states, the implication that election is a proper method of accountability is simply a form of popularist enforcement of social norms.39

Even assuming the public is truly capable of understanding the judicial role, elections have always had a very uncomfortable fit with the idea of

33. MODEL CODE OF JUDICIAL CONDUCT Canons 2.3(a) & 2.4(a) (2010).
34. See id. R. 2.11.
35. Id. Canon 2.11(a).
36. Id. Canon 2.11(a)(5).
37. See id. Canon 1 ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."); see also id. pmbl. ("[T]he judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.").
38. See id. Canon 1.
39. BUYING JUSTICE, supra note 13, at 11-12.
judicial selection or retention. Popularism, or even majoritarianism, has never been consistent with the judicial function, much of which exists in the application of laws exists to protect the rights of the inherently unpopular.

Majoritarian arguments in favor of judicial elections combined with the unfettered ability of interested parties to advertise can only enhance the populist effect of judicial elections. Or, perhaps more perniciously, they increase the risks that an effective call to populist elements by interested parties—political or otherwise—will overwhelm the objectivity which effective judicial elections require. Majoritarian arguments for judicial elections in a post Citizens United world force a very high rationality burden on the public and an even higher burden of judicial probity of the judge subject to election by such a system.

Effectively, it rests on a very problematic basic assumption that as elections get louder and noisier and hence more costly, the effect of campaign contributions or funded advertising will be subsumed within that of adherence to the true majoritarian position, if such can even be correctly perceived by the much put upon political judge. Accountability will be effectuated by the judge hearing the public and comporting herself in accordance with that expression, within the bounds of her proper role. If that does not occur, the advertiser can inform the public of such failing and hope the next judge elected will be more compliant.

There is little evidence to suggest, however, that whoever is funding informational campaign ads in a judicial election would do so out of anything other than their own particular interest. There is no requirement that such advertisements be for a public educational purpose and, if legislative electoral ads are any basis for speculation, advertisements in the judicial

40. See Merit Selection Should Apply to All Superior Court Judges, BRENAN NCTR. FOR JUSTICE (May 18, 2011), http://www.brennancenter.org/content/elert/merit_selection_should_apply_to_all_superior_court_judges/; see New Call for Merit Selection of Judges, BRENAN NCTR. FOR JUSTICE (Mar. 14, 2008), http://www.brennancenter.org/content/elert/new_call_for_merit_selection_of_judges.
41. Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) ("Sir Matthew Hale pointedly described this essential attribute of the judicial office in words which have retained their integrity for centuries: '11. That popular or court applause or distaste have no influence in anything I do, in point of distribution of justice. 12. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice.'" (quoting 2 J. CAMPBELL, LIVES OF THE CHIEF JUSTICE OF ENGLAND 208 (1873) (citations omitted))).
42. See generally Crolely, supra note 24, at 713-28.
43. See id. at 714-15.
44. NEW POLITICS, supra note 14, at 5 ("The money amassed by a few groups underscores an important reality about the politics of judicial elections. . . . Presently, a few super spenders can dominate judicial election funding with an ease unparalleled in campaigns for other offices. And loopholes in disclosure laws give them numerous options for doing so in substantial secrecy.")).
context will be just as particular and reflective of the funder’s, not the public’s, interest. There is also not a true countervailing source of advertising to support the basic idea of neutrality or objectivity.\textsuperscript{45} The most basic of public choice analysis would predict that the rational judicial candidate will seek to adopt at the margins behaviors most likely to assure her reelection. We are likely to have a market failure in advertising supporting rational choice and moderation.

In the wake of \textit{Citizens United}, the fear in the judicial election context is not that the judge will fail to hear the expressed opinion of those voting and not be accountable to them. The fear in the judicial electoral context is that the principle that \textit{“Elections have Consequences”}\textsuperscript{46} will become all too true.

B. The Influence-Corruption Spectrum

\textit{“The abuse of buying and selling votes crept in and money began to play an important part in determining elections. Later on, this process of corruption spread to the law courts and then to the army. And finally, the Republic was subjected to the rule of emperors.”}\textsuperscript{47}

Plutarch (46 – 120 AD)

The fact that speech can influence elections and elected officials has not been lost on Western civilization. It was, after all, the Ancient Greeks who raised rhetoric to a science and enshrined it in the canon of liberal arts.\textsuperscript{48} Nor, despite many allusions to the contrary, was that power ignored by the Supreme Court in crafting its decision in \textit{Citizens United}. The Court simply found that \textit{“[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”}\textsuperscript{49}

\textsuperscript{45} Id. at 13 (“As in prior years, non-candidate groups played the attack-dog role, sponsoring a disproportionate number of negative ads while candidates continued to run predominantly positive, traditionally themed advertisements. Though many of the non-candidate ads were funded by ‘tort reform’ groups concerned with civil justice issues, the vast majority of these ads focused on criminal justice themes, often involving misleading claims that judicial candidates were soft on crime.”).


\textsuperscript{48} JANET M. ATWILL, \textsc{Rhetoric Reclaimed: Aristotle and the Liberal Arts Tradition} 2-3 (1998).

It is that distinction, the ability to influence a judge or for a speaker's point to be favored by a judge as somehow distinct from a conclusion that the judge is corrupted, that is the crux of the difficulty in applying Citizens United to the judicial election context. After all, a judge is not only required not to be corrupt, but also affirmatively charged with being impartial and unbiased. That seeming dissonance is a source of discomfort for many.

Why is corruption, as opposed to influence or a reduction in impartiality, the standard in Citizens United? Simply because, for the purpose of campaign-expenditures law, the original constitutional decision of Buckley v. Valeo made it so. That case involved the validity of the Federal Election Campaign Act of 1974 (FECA) restrictions on campaign contributions and third-party expenditures.

It is necessary to begin at Buckley because that Court's holdings set the frame for the decision of Citizens United and continues to be the reference by which the Court reviews limitations of political speech. The Court made six findings of continuing significance. First, it held that spending money on political campaigns, both by direct contribution and through expenditures, was a form of "speech." Second, it held that the First Amend-

50. Geyh, Preserving Public Confidence, in BENCH PRESS, supra note 23, at 85. Law, in order to be a language of dispute management for everyone, appeal[s] to those honestly seeking principled and impartial adjudication as well as to those who merely want to drape themselves in the mantle of principled impartiality. People value the ideal of objective reasoning and fair judgment, but they usually remain too filled with self-love to live up to this ideal and will seek shortcuts where they can. As a result, many individuals will merely dress up their claims and preferences in the formal language of law in the hope that this will allow their cause to look better than it actually is. The presence of so many poseurs in the system naturally leads the public to suspect that the judicial process is subject to instrumental manipulation. Yet even though such suspicions chip away at judicial legitimacy, they also point to the very mechanism that attracts people to judicial dispute management. It is the possibility of hypocrisy that at once threatens public support for the judiciary and makes the courts appealing.

51. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2010).

52. 424 U.S. 1, 66-68 (1976) (providing that government's interest in providing the electorate with information as to where political campaign money comes from and how it is spent by the candidate deters actual corruption and avoids the appearance of corruption by exposing large contributions and expenditures to the light of publicity. Moreover, corruption deterrence is of sufficient magnitude to justify intrusion on First Amendment rights resulting from Federal Election Campaign Act's disclosure and reporting requirements).

53. Id. at 6-7, 9, 11-14.

54. Citizens United, 130 S. Ct. at 913 (providing that under Buckley, "the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations").

55. Id. at 913.
ment protected such "speech." 56 Third, it held that the relevant and compelling interest was "in preventing corruption and the appearance of corruption." 57 Fourth, it held that the prevention of corruption as a compelling interest is somewhat lesser in the campaign expenditure arena than in the campaign contribution area. 58 Fifth, it held that independent expenditures by third parties lack the "prearrangement and coordination" of campaign contributions. 59 Lastly, it held that restrictions on this funding as speech need to be narrowly tailored to serve that governmental interest in preventing corruption. 60

This last finding, the need to narrowly tailor a restriction on Free Speech when that speech is financial and when the compelling government interest is preventing electoral corruption, is itself initially puzzling. After all, it does seem to allow for the acceptance that something less than official "corruption," such as "favoritism" or "influence," is acceptable as an initial matter. That was reaffirmed by the following in Citizens United, where the Court citing McConnell with approval stated:

Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness. 61

56. Id. at 898 ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office.") (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (citations omitted))).

57. Id. at 908 (quoting Buckley, 424 U.S. at 45). "The corporate independent expenditures at issue in this case, however, would not interfere with governmental functions, so these cases are inapposite." Id. at 899.

58. Id. at 901-02 ("The Buckley Court explained that the potential for quid pro quo corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that 'the independent expenditure ceiling ... fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process,' ... because '[t]he absence of prearrangement and coordination ... alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.'") (quoting Buckley, 424 U.S. at 47-48).

59. Id. at 902.

60. Id. at 898 ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'") (quoting Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449, 464 (2007))).

“Democracy is premised on responsiveness.”62 That is a powerful statement, but it begs the question, is responsiveness consonant with justice? On that, the Court is silent. Their reasoning, however, suggests that they are less concerned with the risks of corruptive spending as speech in accordance with a majoritarian view of elected governance:

The appearance of influence or access ... will not cause the electorate to lose faith in our democracy. ... The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.63

As discussed above in Section I.A., the incompatibility of the majoritarian view with the judicial function has more than one valid and frequently articulated set of failings. In fact, the American Bar Association, flawed organization though itself may be, is clear in its opposition to judicial elections as a matter of course.64 They have noted, “If we were writing on a clean slate, based on what we now see in how judicial campaigns have come to be conducted ... judicial elections would gradually be abandoned.”65

The fact that there is a risk of corruption in permitting this kind of speech in the electoral process is accepted.66 The Court simply does not find it sufficient to support the type of restrictions that were struck down.67 As

62. Id.
63. Citizens United, 130 S. Ct. at 910.
64. Alfred P. Carlton, Jr., Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary v-vi (2003), available at http://www.americanbar.org/content/dam/aba/migrated/committees/judind/PublicDocuments/report.authcheckdam.pdf (“The preferred system of state court judicial selection is a commission-based appointive system, with the following components: [1] The governor should appoint judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by a credible, neutral, nonpartisan, diverse deliberative body or commission. [2] Judicial appointees should serve until a specified age. Judges so appointed should not be subject to reselection processes, and should be entitled to retirement benefits upon completion of judicial service. [3] Judges should not otherwise be subject to reselection, nonetheless remain subject to regular judicial performance evaluations and disciplinary processes that include removal for misconduct.”).
65. Id. at xii (“But we write not on the clean slate but in recognition of the varied approaches of the citizens of the 50 states through their Constitutions have dealt and continue to deal with the conundrum of judicial selection. We offer recommendations as to changes in various existing election methodologies and urge that efforts to improve how judicial elections are conducted must continue, such as the trend to nonpartisan campaigns and the use of public financing mechanisms, in the face of difficulties to eliminate the use of judicial elections. Any selection system should be accompanied by a sound code of judicial ethics accompanied by effective, enforced judicial disciplinary procedures.”); Jill E. Moenius, Note, Buying Promises: How Citizens United’s Campaign Expenditures Convert Our “Impartial” Judges and Their Nonpromissory Campaign Statements into an Indebted, Influenced, and Dependent Judiciary, 59 U. Kan. L. Rev. 1101, 1106 (2011).
66. See Citizens United, 130 S. Ct. at 910 (because there is no quid pro quo).
67. Id.
they stated, "Reliance on a 'generic favoritism or influence theory ... is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.'" As we will see in the next Part, however, empirical evidence studying campaign contributions suggests that partisan elections themselves may be the source of financial speech's corruptive influence.

II. THE POWER OF MONEY

"What has been is what will be, and what has been done is what will be done; and there is nothing new under the sun."

Ecclesiastes 1:9

A. Campaign Contributions Affect Judicial Action

The fact that judges are subject to a certain amount of influence arising from the manner by which they reach the bench is intuitively obvious. As early as the 1853 Massachusetts State Constitutional Convention, "one delegate said of judges: 'They are men, and they are influenced by the communities, the societies and the classes in which they live, and the question now is, not whether they shall be influenced at all, ... but from what quarter that influence shall come.'"69

It has long been accepted that we can no more completely remove the human bias of experience from a judge than we can from any other person.70

68. Id. at 910 (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 296 (2003), overruled by Citizens United, 130 S. Ct. 876) ("The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse 'to take part in democratic governance' because of additional political speech made by a corporation or any other speaker." (quoting McConnell, 540 U.S. at 296 (citations omitted))).


70. Paul M. Secunda, Cultural Cognition at Work, 38 Fla. St. U. L. Rev. 107, 111 (2010) ("This distinction between viewing judges as subconsciously motivated by cultural preferences rather than by prejudicial partisan or legal objectives is a crucial one. First, if the form of bias in judicial decisionmaking is not properly understood, the judging function is unnecessarily delegitimized as being merely a partisan or normative exercise. Second, although it is impossible to rid judicial decisions of all remnants of bias because of the manner in which human cognition operates, social science and legal research indicate that debiasing techniques do exist for judges to counteract their susceptibility to the more troubling and
We are all reflections of our own experience and despite what is a consider­able effort by legal educators of ethics to move towards a decrease in uncon­scious bias among lawyers, no judge can completely be made into a tru­ly impartial entity.71 Nor, truly, do we want them to.72 Some aspect of hu­manity is expected of the judiciary, to be used within the discretion of wis­dom and experience, lest we simply replace the legal system with a comput­er-run justice algorithm and have done with humanity at all.73

The fact that humanity is imperfect is not sufficient to end the use of humans in the justice system. The question that must now urgently be an­swered is simply at what levels of directness do we wish to allow campaign contributions to be a source of influence on judicial decisions. A corollary to that inquiry is whether we consider the remedies of the judicial regulatory system sufficient to combat the effects of this influence.

If we accept as a first principle that campaign contributions, direct or indirect, affect the behavior of the elected, then we encounter a normative question of where that influence is appropriate if it is inescapable. The Citizen's United decision stands for the principle that restricting the abilities of corporate actors to fund advertisements beyond the campaign's own control is permissible.74 Thus, whatever effect advertising has on election results

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71. Secunda, supra note 70, at 144 (“This persistent state of affairs only means that judges will have to work harder to craft their decisions with appropriate humility and self-awareness.”).

72. Theodore A. McKee, Judges As Umpires, 35 Hofstra L. Rev. 1709, 1724 (2007) (“I am troubled by the fact that our jurisprudence is shaped by personal beliefs, but I am more troubled by pretending that judges can somehow become perfect objective adjudicators at the flip of a switch, or the wearing of a robe.”).

73. Id. at 1716-17 (“From the judicial perspective, the vast majority of these cases are fairly clear cut, relatively easy to resolve, and usually involve none of today’s hot-button issues where personal values may have a greater tendency to affect one’s jurisprudence. . . Moreover, even when cases do involve ‘vexing issues of constitutional interpretation’ the facts and law are often so clear that there is little room for a judge’s personal view to impact his or her decision. However, I think we should candidly admit that there are other instances where there is enough play in the factual or precedential joints to allow personal beliefs to affect our adjudication. I do not say that this is a good thing, but I do believe it is unavoidable, and that our jurisprudence will be strengthened by admitting this dynamic rather than denying its existence.” (quoting Seth Rosenthal, The Jury Snub: A Conservative Form of Judicial Activism, Slate, Dec. 18, 2006, http://www.slate.com/id/2155723)).

will likely be magnified.\textsuperscript{75} While that has its own dangers in the other branches of government, the question of the effect of such advertising in judicial elections requires an assessment of whether the amplified effect is cause for even greater concern in judicial decision making.

As a threshold matter it thus becomes necessary to inquire if the judge is susceptible to the influence of campaign donors or campaign expenditures in actual judicial decisions. Intuition would suggest that such influence exists, but faith in judicial training would suggest that on the bench, such influence would be disregarded in the active role behavior of the judge. After all, judges are all subject to the various Canons that stress such requirements as impartiality and lack of bias.\textsuperscript{76}

Empirical evidence, however, shows that the Canons are not sufficient in the direct campaign contributions context.\textsuperscript{77} In a remarkable recent article, Michael Kang and Joanna Shepherd of Emory University sought to answer the critical inquiry underpinning the legitimacy of the judicial election model; does the money matter?\textsuperscript{78} They framed their inquiry thusly: “To what degree is financing for judicial campaigns associated with judicial decisions favorable to the interests of the sources of that campaign financing? To put it more bluntly, to what extent does money buy judicial decisions, at least where judges rely on campaign contributions to get elected?”\textsuperscript{79}

Their dataset included “detailed information on virtually every state supreme court case in all fifty states between 1995 and 1998[,] . . . more than 28,000 cases, involving more than 470 judges.”\textsuperscript{80} Specifically, they focused on campaign contributions from business groups, routinely the single largest contributors in state Supreme Court races.\textsuperscript{81} The results were “provocative.”\textsuperscript{82} They found that “campaign contributions from business groups” were positively associated with “judicial votes in favor of business interests.”\textsuperscript{83}

Moreover, “every dollar of contributions from business groups is associated with increases in the probability that elected judges will decide for

\begin{itemize}
\item \textsuperscript{76} See \textit{MODEL CODE OF JUDICIAL CONDUCT} Canons 1-4 (2010).
\item \textsuperscript{78} Kang & Shepherd, \textit{supra} note 69, at 69.
\item \textsuperscript{79} \textit{Id.} at 71.
\item \textsuperscript{80} \textit{Id.} at 72.
\item \textsuperscript{81} \textit{Id.} at 73.
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.}
\end{itemize}
business litigants." This result was statistically significant only under partisan election schemes, but not under non-partisan ones. This is a hopeful fact we will reprise later in Section II.C.

Interestingly, the relation was evident in judges affiliated with either major political party. The study found, "[c]ampaign contributions are predictive of judicial voting in partisan system, regardless of the judges’ party affiliations." Simply, “both Republican and Democratic judges facing partisan elections are more likely to decide for business litigants than judges in other systems.

While other empirical research is obviously necessary and we can hope further significant study may mitigate the seemingly inescapable indictment of the partisan judicial electoral system, the current findings are damning. Again, these studies were done on elections held _before Citizens United_ and only looked at direct campaign contributions. Studies on the effect of advertising are clearly needed. As the Court noted in _Citizens United_, “there is only scant evidence that independent expenditures even ingratiate” the elected and that “[i]ngratiation and access, in any event, are not corruption.” To the extent that money does matter in judicial voting as described by Kang and Shepherd, there is little reason to hope that no level of ingratiation or access is accomplished in response to the advertising campaign. This is likely even more true as the costs of judicial campaigns continue to escalate.

### B. The Remedy of Recusal? A Due Process Concern

"The fact is that the greatest crimes are caused by excess and not by necessity."

Aristotle (384 BC – 322 BC)

All those who appear in court, be they litigants or criminal defendants, are entitled to an unbiased judge. They are entitled to a fair trial. This is

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84. _Id._
85. _Id._
86. _See infra_ Section II.C.
87. Kang & Shepherd, _supra_ note 69, at 75.
88. _Id._
90. Kang & Shepherd, _supra_ note 69, at 94 ("[S]everal empirical studies have found that the significant differences in competitiveness and spending across election types produce different voting behaviors among judges. For example, studies have shown that judges subject to nonpartisan and partisan reelection are more likely to avoid unpopular voting on politically salient issues and impose the death penalty.").
not simply a compelling government interest. It is the Due Process right of the litigant, and it is axiomatic to our system of laws.\textsuperscript{94} It is also unchallenged by the Court in \textit{Citizens United}.\textsuperscript{95}

That the Due Process right to a fair trial and an unbiased judge can be abridged through the medium of disproportionate influence via campaign expenditures also went unchallenged by the \textit{Citizens United} Court.\textsuperscript{96} The remedy for such violation, according to the Court, was not, however, to ban the "litigant's political speech"—campaign expenditures.\textsuperscript{97} Rather, in such instances the remedy is simply the judge’s recusal.\textsuperscript{98}

The case standing for that proposition (judicial recusal) is the notorious \textit{Caperton v. A. T. Massey Coal Co.},\textsuperscript{99} whose holding was affirmed but distinguished in \textit{Citizens United}.\textsuperscript{100} In \textit{Caperton}, the trial jury had found the defendant, Massey, liable for $50 million in compensatory and punitive damages for fraudulent misrepresentation, concealment, and tortious interference with contract relations.\textsuperscript{101} Massey appealed.\textsuperscript{102}

In the intervening time, the Supreme Court of Appeals in West Virginia held its elections.\textsuperscript{103} Massey’s chairman, Don Blankenship, knowing that the Supreme Court of Appeals would soon be determining the $50 million appeal, chose to support Brent Benjamin’s campaign for that bench.\textsuperscript{104} Blankenship complied with the limit on direct contributions to Benjamin’s
campaign, donating only the maximum allowed $1,000.\textsuperscript{105} He would, however, go on to spend $500,000 in independent expenditures, including television and newspaper advertisements as well as donating an additional $2.5 million to a political organization targeting Benjamin’s opponent.\textsuperscript{106}

After Benjamin won the judicial election, Caperton moved to disqualify Justice Benjamin because of the conflict caused by Blankenship’s campaign involvement.\textsuperscript{107} Justice Benjamin denied the motion and later, along with the minimum number of additional judges required to form the majority, reversed the jury verdict against Massey.\textsuperscript{108}

Eventually, the United States Supreme Court granted certiorari to determine if Caperton’s Fourteenth Amendment Due Process rights were violated by Justice Benjamin’s refusal to recuse himself from the Caperton appeal, given the level of Blankenship’s support of his electoral campaign.\textsuperscript{109} The Court held recusal had been required under those circumstances.\textsuperscript{110} Particularly, the Court stated that an elected judge must recuse himself “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”\textsuperscript{111}

Importantly, the vast majority of Blankenship’s money went towards campaign expenditures, rather than direct campaign contributions.\textsuperscript{112} Yet, the Court found that, given the totality of the circumstances, “Blankenship’s campaign contributions . . . had a . . . disproportionate influence on the electoral outcome.”\textsuperscript{113} Since only $1,000 of the nearly $3 million spent by Blankenship actually went directly to Benjamin’s campaign, the Court clearly articulated in this case that campaign expenditures have the ability to influence elected behavior much in the same way as direct campaign contributions, at least for the purpose of Due Process evaluation.\textsuperscript{114}

105. \textit{Id.}
106. \textit{Id.}
107. \textit{Id.}
108. \textit{Id.} at 2257-58.
109. \textit{Id.} at 2256-57, 2259.
110. \textit{Id.} at 2264.
111. \textit{Id.} at 2263-64.
112. \textit{Id.} at 2257 (“Blankenship donated almost $2.5 million to ‘And For The Sake Of The Kids,’ a political organization . . . [and] in addition, just over $500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements.”).
113. \textit{Id.} at 2264.
114. \textit{Id.} at 2257, 2264-65 (“We find that Blankenship’s significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—‘offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’” (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (citations omitted))).
Moreover, the standard requiring Benjamin's recusal was simply that of a substantial risk of actual bias, rather than the much stricter requirement "that independent expenditures . . . lead to, or create the appearance of, quid pro quo corruption" required to support a categorical ban on corporate political speech.\footnote{115} As the Court stated in \textit{Citizens United}, "\textit{Caperton}'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."\footnote{116}

The Court in \textit{Caperton}, however, did note that determining when campaign expenditures would be sufficient to require the judge's recusal would be extraordinarily difficult in the usual course.\footnote{117} Moreover, it is likely rare that the actual chairman of the defendant in a case being appealed would take so direct and blatant a position in the funding of a potential jurist's campaign.

When the donor of disproportionately large campaign expenditures has a clear personal stake in the pending appeal, the remedy of requiring recusal is apparent and relatively easy to apply. If the donor does not have a "personal stake," is the risk of actual bias, however, necessarily lessened? Not if the findings of Kang and Shepherd are to be believed.\footnote{118} That study clearly stands for the proposition that classes of campaign donors can actually influence the ruling of judges (both Democrat and Republican) on behalf of classes of litigants (donors).\footnote{119} While impossible to prove without additional research, there is no reason to believe that further study would not likewise find that classes of campaign expenditure donors would actually influence the ruling of judges in favor of those classes of litigants. Yet, there is currently no remedy, not even that of recusal, that could be applied to protect those litigants' Due Process right to a fair trial.

All recusal standards are risk-based approaches. They tend to support the recusal of the judge on due process grounds if the risk is sufficiently substantial.\footnote{120} It is no surprise, therefore, that as the amount of money being
spent on judicial elections increases, so too does the public’s perception that the risk of a biased judge increases in tandem.

C. Communities Negatively Perceive the Effect of Contributions on Judicial Elections

There is a very interesting dichotomy on the public’s opinion of judicial elections. When surveyed, the public often expresses its firm belief that elected judges are “more likely to be fair and impartial.”121 One national survey found that 75% of the public believed elected judges were more impartial while only 18% chose appointed, and in another survey 76% favored judicial elections to only 20% for judicial appointments.122

Yet, when Chief Justice Moyer of the Ohio Supreme Court established the Citizens Committee on Judicial Elections in order to review Ohio’s judicial election system,123 the Committee shockingly found that nine out of ten Ohioans believed that judges are affected by political contributions and that they question the impartiality of judges towards campaign contributors.124 Similarly, the Pennsylvania Supreme Court appointed a Special Commission to determine whether the state of judicial elections across the state diminished the public’s perception of the judiciary.125 After several public hearings, polls, and meetings with interested parties, the Special Commission concluded that: 88% of Pennsylvanians believed that judges’ decisions were influenced, at least some of the time, by campaign contributions; 75% believed that those who can afford large contributions have more

122. Heagarty, supra note 121, at 1300.
124. Id. (providing the Committee’s proposal that there must be the following: a limit to campaign contribution of $500 from individuals and $2,500 from organizations ($5,000 for Supreme Court candidates); candidates’ speech must be limited; recusal for judges in cases where attorneys or parties made a significant campaign contribution; limitations on contribution periods; and increased disclosure requirements (identification of each donor and full disclosure twenty days before an election). The Committee set out its responsibility with the assumptions that a majority of the committee would not be comprised of lawyers and that, unlike other politicians, judges are held to a higher standard. The report was based on work performed from several hearings, commissioned public opinion polls, and, meetings with experts and interested parties).
influence in electing judges; and, Pennsylvanians are more anxious about the judiciary than about other elected offices.126

This divergence in opinion could well be summed up with the view that the public thinks that elected judges are more independent than appointed ones, except when it comes to their contributors. It suggests the public perceives and the empirical evidence supports that the judges stay bought. The corollary is that the public appears to believe that those appointed are corrupt or at least biased by the political appointment system itself, despite the lack of any supporting evidence. Since the appointment process is beyond the public's control or understanding, there is a general mistrust of it and those that profit from it, namely, the judges themselves. Also, it is possible that the simple availability of having elections comforts the public; in the sense they believe that corrective action is possible.

It is likely impossible to create a system where the public feels that the judiciary is truly impartial and fair as both options generally require that political parties be involved in the selection process in some way. The evidence from the Kang article that the correlation in rulings to judicial action disappears in non-partisan elections suggests that the public may, in fact, be intuitively correct at some level. It is the presence of party officers or officials that is the actual problematic source of bias.

CONCLUSION

The U.S. Supreme Court previously recognized in Republican Party of Minnesota v. White that there exists a "'fundamental tension between the ideal character of the judicial office and the real world of electoral politics.'"127 Despite this, last year's Supreme Court reached a provocative decision in Citizens United, allowing for a remarkable expansion in funding avenues for political speech.

Citizens United was the product of a "decades-long legal drive" to re-think limitations on political speech doctrine. Much of the original inspiration drew "from the 1971 memo drafted by soon-to-be Justice Lewis Powell that urged corporate leaders to fund scholars and public interest legal groups to promote a 'free market' approach in the courts."128 Former Federal Election Commission chair Bradley Smith bragged to the New York Times that

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126. See id. at 7.
Citizens United was the fruit of "long-term ideological warfare." This effort was bold, strategic, and willing to rethink basic premises. It has been markedly effective. Above all, it sought to advance a powerful but narrow notion of the First Amendment, focused on the rights of the speaker, especially corporate speakers.

The potential impact of this decision on judicial elections has not gone without notice. As one author wrote, the potential for such advertising to further corrode the public faith in the judiciary is clear:

While corporate and union big money may or may not be ideal for elections of legislative and executive offices, it poses even greater risk for judicial elections. In his dissent, Justice Stevens cites the Justice At Stake amicus brief, joined by AJS. He writes "the majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, the Court today unleashes the floodgates of corporate and union general treasury spending in these races." More money injected into judicial races threatens to undermine both the actual and perceived impartiality of the judiciary.

Thus, the question becomes simply, if we acknowledge that increased advertising spending in judicial elections will only increase the public perception of bias by the judiciary, how can we allow judicial selection by election? The answer is that we cannot. The role of the judge requires impartiality and our system of laws requires lack of partisanship in judicial decision-making. The answer seems to be fundamentally clear, neither campaign finance laws nor the self-regulation of the judiciary can restrain the impartial judge from acting like the politician. In a system allowing for no restraint on speech, the only option is silence.