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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.”¹

Gorgias (483 – 375 BC)

INTRODUCTION

It has long been in vogue to discredit the judiciary.² From the early days of legal realism, the concept of the “impartial” judge has been repeat-

1. READINGS FROM CLASSICAL RHETORIC, 34, 35 (Patricia P. Matsen, Philip Rollinson & Marion Sousa eds., 1990) (quoting the Greek philosopher Gorgias).

2. See, e.g., Alex B. Long, “*Stop Me Before I Vote for This Judge Again*”: Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges, 106 W. VA. L. REV. 1, 48 (2003). Long argues that judicial independence and accountability is a modern reaction against judicial misconduct, which is made even more obscene by the poorly written judicial opinions against judges accused of judicial misconduct. This distrust can be traced as far back as colonial American times given that “the framers of the United States Constitution provided for only one explicit method of disciplining federal judges—impeachment.” *Id.* at 17; see also Martin H. Redish, *Taking a Stroll Through Jurassic Park*:

edly scoffed at by those initiated in modern theories of jurisprudence.³ Ever more convincing studies into the pervasive nature of cognitive biases,⁴ 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.⁵

Yet, the judiciary remains the most trusted of the three branches of government.⁶ Though imperfect, the public does generally trust and respect the judiciary.⁷ 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.”).

4. Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2005 (2010) (describing judges’ “paradigmatic status,” which has been understood to require “the separation of legal reason from emotion”); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 39-41 (1998).

5. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 630 (2011) (defining “judicial dispassion” synonymously with “emotionless judging”).

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&pagewanted=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.).

7. Liptak, *supra* note 6; Nancy S. Marder, Letter to the Editor, *Invitation to a Dialogue: Cameras in the Court?*, N.Y. TIMES, Dec. 6, 2011, <http://www.nytimes.com/2011/12/07/opinion/invitation-to-a-dialogue-cameras-in-the-supreme-court.html?scp=1&sq=cameras%20in%20the%20court&st=cse>.

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,

8. *Americans Trust Judiciary Branch Most, Legislative Least*, GALLUP POLITICS (Sept. 10, 2009), <http://www.gallup.com/video/122894/Americans-Trust-Judicial-Branch-Legislative-Least.aspx> (“More than three in four Americans (76%) say they have a great deal or fair amount of trust and confidence in the government’s judicial branch, compared with 61% who trust the executive branch and 45% who trust the legislative branch.”); see also Frank Newport, *Trust in Legislative Branch Falls to Record-Low 36%*, GALLUP POLITICS (Sept. 24, 2010), <http://www.gallup.com/poll/143225/Trust-Legislative-Branch-Falls-Record-Low.aspx>; Maroney, *supra* note 5, at 636.

9. MODEL CODE OF JUDICIAL CONDUCT (2010).

10. 531 U.S. 98 (2000); see Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 364–65 (2010) (“The scholarly literature generally supports the denial of First Amendment protection in such cases, indicating that attorney speech—when made in court proceedings—is entitled to little, if any, constitutional protection. Indeed, in its 1991 plurality opinion, *Gentile v. State Bar of Nevada*, a majority of the U.S. Supreme Court stated in dicta: ‘It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to “free speech” an attorney has is extremely circumscribed.’”).

11. See Stephanie Condon, *Elena Kagan: Four Potential Confirmation Hurdles*, CBS NEWS (May 10, 2010), http://www.cbsnews.com/8301-503544_162-20004539-503544.html; Dylan Loewe, *The Politics of Sotomayor*, HUFFINGTON POST (May 26, 2009), http://www.huffingtonpost.com/dylan-loewe/the-politics-of-sotomayor_b_207617.html (“Will nominating the first Hispanic justice to the high court further Obama’s courtship of the Hispanic community? It certainly can’t hurt, though it’s hard to imagine that it alone will do the job. But Obama may stand to gain more, not from corraling a majority of Democrats to vote in favor of Sotomayor, but from inspiring the most virulent elements of the Republican Party to oppose her.”).

12. See *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/Supreme-Court.aspx> (last visited Feb. 17, 2012).

13. ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, *BUYING JUSTICE: THE IMPACT OF CITIZENS UNITED ON JUDICIAL ELECTIONS*, 4–7 (2010), available at <http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1>

judicial decisions are bought through the corrosive process of political campaign donations.¹⁴ Justice is for sale.

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

For the judiciary, the reality of a *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.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

[hereinafter 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).

14. ADAM SKAGGS ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: 2009-10, 20-22 (2011), available at http://brennan.3cdn.net/23b60118bc49d599bd_35m6yyon3.pdf [hereinafter NEW POLITICS].

15. *Solid Bipartisan Majorities Believe Judges Influenced by Campaign Contributions*, JUSTICE AT STAKE CAMPAIGN (Sept. 8, 2010), http://www.justiceatstake.org/newsroom/press_releases.cfm/9810_solid_bipartisan_majorities_believe_judges_influenced_by_campaign_contributions?show=news&newsID=8722 (among the findings of the survey were the following: “71 percent of Democrats, and 70 percent of Republicans, believe campaign expenditures have a significant impact on courtroom decisions.” Only 23 percent of all voters “believe campaign expenditures have little or no influence on elected judges.” Moreover, “82 percent of Republicans, and 79 percent of Democrats, say a judge should not hear cases involving a campaign supporter who spent \$10,000 toward his or her election.” Finally, “88 percent of Republicans, and 86 percent of Democrats, say that ‘all campaign expenditures to elect judges’ should be publicly disclosed, so that voters can know who is seeking to elect each candidate.”).

16. *Id.*

17. *Id.*

18. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010); CHRISTIAN W. PECK, ZOGBY INT’L, ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES 3 (2007), available at http://www.justiceatstake.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf (“Four in five business leaders worry that financial contributions have a major influence on decisions rendered by judges. There is *near-universal* concern among business leaders that ‘Campaign contributions and political pressure will make judges accountable to politicians and special interest groups instead of the law and the Constitution.’”).

19. See generally Michael C. Dorf, *The Constitution and the Political Community*, 27 CONST. COMMENT. 499 (2011). See also Girardeau A. Spann, *Constitutional Hypocrisy*, 27 CONST. COMMENT. 557, 571-72 (2011) (“Judicial review can *rationalize* the practice of illegitimate discrimination by making the culture’s oppressive behavior seem as if it flows *rationally* from the equality principle embodied in the Constitution. This, in turn, provides an excuse for engaging in cultural practices that would otherwise seem unconstitutionally invidious.”).

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))).

22. *Evans v. Gore*, 253 U.S. 245, 251 (1920) *overruled by* *United States v. Hatter*, 532 U.S. 557 (2001), *citing* *Debates Va. Conv. 1829-1831*, pp. 616, 619.

those on the ballot.²³ 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.²⁴ By the mid-nineteenth century, judicial elections had become popular as part of the Jacksonian movement toward greater control of public office.²⁵ 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.²⁶ Their concern was that of accountability.²⁷ An independent judge could “feel themselves independent of heaven itself.”²⁸ 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.²⁹ 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.³⁰ 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.”³¹

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-

23. Judicial elections remain incredibly popular, given that around eighty percent of judicial positions are fulfilled via an election. Charlie Geyh, *Preserving Public Confidence in the Courts in an Age of Individual Rights and Public Skepticism*, in *BENCH PRESS: THE COLLISION OF COURT, POLITICS, AND THE MEDIA* 43 (Keith Bybee ed., 2007).

24. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 706-710, 716 (1995); see *Republican Party of Minn. v. White*, 536 U.S. 765, 791 (2002).

25. Terri Day, *Buying Justice: Caperton v. A.T. Massey: Campaign Dollars, Mandatory Recusal and Due Process*, 28 MISS. C. L. REV. 359, 363 (2009); *Republican Party of Minn. v. White*, 536 U.S. 765, 791 (2002).

26. Day, *supra* note 25, at 364-65.

27. *Id.*

28. *Id.* at 364.

29. *Id.* at 365.

30. *Id.* at 363.

31. BRENNAN CTR. FOR JUSTICE (May 17, 2007) http://www.brennancenter.org/content/resource/report_shows_spread_of_special_interest_pressure_growing_clout_of_business.

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.³² 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.³⁴ 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

32. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2010). ADMIN. OFF. OF U.S. CTS., CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf>.

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.⁴⁰ 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.⁴¹

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.⁴² 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.⁴³ 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.⁴⁴ 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*, BRENNAN CTR. 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*, BRENNAN CTR. 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 Croley, *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.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 *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 "Elections have Consequences"⁴⁶ will become all too true.

B. The Influence-Corruption Spectrum

*"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."*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.⁴⁸ Nor, despite many allusions to the contrary, was that power ignored by the Supreme Court in crafting its decision in *Citizens United*. The Court simply found that "[t]he fact that speakers may have influence over or access to elected officials *does not* mean that these officials are *corrupt*."⁴⁹

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.").

46. Sen. Bernie Sanders, *Elections Have Consequences*, HUFFINGTON POST POLITICS (July 14, 2011, 7:15 PM), http://www.huffingtonpost.com/rep-bernie-sanders/elections-have-consequenc_b_899378.html.

47. Transcript of *Justice at Stake: Is Campaign Money Corrupting Our Courts?* (PBS television broadcast Feb. 19, 2010), <http://www.pbs.org/moyers/journal/02192010/transcript4.html>.

48. JANET M. ATWILL, *RHETORIC RECLAIMED: ARISTOTLE AND THE LIBERAL ARTS TRADITION* 2-3 (1998).

49. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 910 (2010) (emphasis added).

It is that distinction, the ability to *influence* a judge or for a speaker's point to be *avored* 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.⁵⁰ After all, a judge is not only required not to be corrupt, but also affirmatively charged with being impartial and unbiased.⁵¹ 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.⁵² That case involved the validity of the Federal Election Campaign Act of 1974 (FECA) restrictions on campaign contributions and third-party expenditures.⁵³

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.⁵⁴ 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."⁵⁵ Second, it held that the First Amend-

50. Geyh, *Preserving Public Confidence*, in BENCH PRESS, *supra* note 23, at 85. [L]aw, 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.

Id.

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))).

61. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 297 (2003), *overruled by Citizens United*, 130 S. Ct. 876.

“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.’”⁶⁸ 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))).

69. Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 77 (2011) (quoting OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 773 (1853) (statement of Edward L. Keyes)).

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

illiberal aspects of their biased decisionmaking.”); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (“[T]he theory of cognitive psychology states that the culture—including, for example, the media and an individual’s parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual’s rational ordering of her perceptions of the world.”).

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>)).

74. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 908-09 (2010).

will likely be magnified.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.⁷⁶

Empirical evidence, however, shows that the Canons are not sufficient in the direct campaign contributions context.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?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?”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.”⁸⁰ Specifically, they focused on campaign contributions from business groups, routinely the single largest contributors in state Supreme Court races.⁸¹ The results were “provocative.”⁸² They found that “campaign contributions from business groups” were positively associated with “judicial votes in favor of business interests.”⁸³

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

75. Melody Kramer, ‘Citizens United’ Ruling Opened Floodgates on Groups’ Ad Spending, NPR (Oct. 7, 2010) <http://www.npr.org/blogs/itsallpolitics/2010/10/07/130399554/fresh-air>.

76. See MODEL CODE OF JUDICIAL CONDUCT Canons 1-4 (2010).

77. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290, 293-96 (2010) (finding that appointed judges write higher quality opinions, whereas elected judges write more opinions—focusing on service to voters).

78. Kang & Shepherd, *supra* note 69, at 69.

79. *Id.* at 71.

80. *Id.* at 72.

81. *Id.* at 73.

82. *Id.*

83. *Id.*

business litigants.”⁸⁴ This result was statistically significant only under partisan election schemes, but not under non-partisan ones.⁸⁵ This is a hopeful fact we will reprise later in Section II.C.⁸⁶

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.”⁸⁷ Simply, “both Republican and Democratic judges facing partisan elections are more likely to decide for business litigants than judges in other systems.”⁸⁸

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.”⁸⁹ 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.⁹⁰ 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.”*⁹¹

Aristotle (384 BC – 322 BC)

All those who appear in court, be they litigants or criminal defendants, are entitled to an unbiased judge.⁹² They are entitled to a fair trial.⁹³ This is

84. *Id.*

85. *Id.*

86. *See infra* Section II.C.

87. Kang & Shepherd, *supra* note 69, at 75.

88. *Id.*

89. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 910 (2010).

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.”).

91. POLITICS, ARISTOTLE (350 B.C.E.), available at <http://classics.mit.edu/Aristotle/politics.2.two.html>.

not simply a compelling government interest. It is the Due Process right of the litigant, and it is axiomatic to our system of laws.⁹⁴ It is also unchallenged by the Court in *Citizens United*.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 *Citizens United* Court.⁹⁶ The remedy for such violation, according to the Court, was not, however, to ban the “litigant’s political speech”—campaign expenditures.⁹⁷ Rather, in such instances the remedy is simply the judge’s recusal.⁹⁸

The case standing for that proposition (judicial recusal) is the notorious *Caperton v. A. T. Massey Coal Co.*,⁹⁹ whose holding was affirmed but distinguished in *Citizens United*.¹⁰⁰ In *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.¹⁰¹ Massey appealed.¹⁰²

In the intervening time, the Supreme Court of Appeals in West Virginia held its elections.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.¹⁰⁴ Blankenship complied with the limit on direct contributions to Benjamin’s

92. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009) (“It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’” (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))).

93. See U.S. CONST. amend. VI.

94. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (“Concededly, a ‘fair trial in a fair tribunal is a basic requirement of due process.’” (quoting *Murchison*, 349 U.S. at 136)); see *Murchison*, 349 U.S. at 136 (“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.”).

95. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 910 (2010).

96. *Id.* (“The *McConnell* record was ‘over 100,000 pages’ long, . . . yet it ‘does not have any direct examples of votes being exchanged for . . . expenditures.’ . . . This confirms *Buckley*’s reasoning that independent expenditures do not lead to, or create the appearance of, quid pro quo corruption. In fact, there is only scant evidence that independent expenditures even ingratiate.” (citations omitted)).

97. *Id.*

98. *Id.*

99. 129 S. Ct. 2252, 2256-58 (2009).

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

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

102. *Id.* at 2257-58.

103. *Id.* at 2257.

104. *Id.*

campaign, donating only the maximum allowed \$1,000.¹⁰⁵ 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.¹⁰⁶

After Benjamin won the judicial election, Caperton moved to disqualify Justice Benjamin because of the conflict caused by Blankenship's campaign involvement.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.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.¹⁰⁹ The Court held recusal had been required under those circumstances.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."¹¹¹

Importantly, the vast majority of Blankenship's money went towards campaign expenditures, rather than direct campaign contributions.¹¹² Yet, the Court found that, given the totality of the circumstances, "Blankenship's campaign contributions . . . had a . . . disproportionate influence on the electoral outcome."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.¹¹⁴

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 2257-58.

109. *Id.* at 2256-57, 2259.

110. *Id.* at 2264.

111. *Id.* at 2263-64.

112. *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. *Id.* at 2264.

114. *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.¹¹⁵ As the Court stated in *Citizens United*, "*Caperton's* holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."¹¹⁶

The Court in *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.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.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).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.¹²⁰ It is no surprise, therefore, that as the amount of money being

115. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 910 (2010). Due process requires "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 129 S. Ct. at 2263 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). However, "[s]tates may choose to 'adopt recusal standards more rigorous than due process requires.'" *Id.* at 2267 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring)).

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

117. *Caperton*, 129 S. Ct. at 2263 ("The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case.").

118. Kang & Shepherd, *supra* note 69, at 128-29.

119. *Id.*

120. See *Caperton*, 129 S. Ct. at 2257.

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

121. Ruth V. McGregor, *Rule of Law in Challenging Times*, 34 OKLA. CITY U. L. REV. 549, 553 (2009); see J. Christopher Heagarty, *Public Opinion and an Elected Judiciary: New Avenues for Reform*, 39 WILLAMETTE L. REV. 1287, 1292 (2003).

122. Heagarty, *supra* note 121, at 1300.

123. Richard B. McQuade, *Report of the Citizens' Committee on Judicial Elections* (1995), available at <http://www.pbs.org/wgbh/pages/frontline/shows/justice/que/studies.html#oh> (last visited June 5, 2011).

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).

125. LAKE, SOSIN, SNELL, PERRY & ASSOCS., INC., PENNSYLVANIA SPECIAL COMMISSION TO LIMIT CAMPAIGN EXPENDITURES 4, 6 (1998), available at <http://www.pacourts.us/NR/rdonlyres/75F3607E-B0B4-4B9B-9554-63B281279EC6/0/appenda.pdf>.

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 rethink 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

126. See *id.* at 7.

127. 536 U.S. 765, 821 (2002) (Ginsburg, J., dissenting) (quoting *Chisom v. Roemer*, 501 U.S. 380, 400 (1991)).

128. *Money, Politics, and the Constitution: Beyond Citizens United*, BRENNAN CTR. FOR JUSTICE (Apr. 28, 2011), http://www.brennancenter.org/content/resource/money_politics_and_the_constitution_beyond_citizens_united.

Citizens United was the fruit of “long-term ideological warfare.”¹²⁹ 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.¹³⁰

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.

129. Eric Lichtblau, *Long Battle by Foes of Campaign Finance Rules Shifts Landscape*, N.Y. TIMES, Oct. 15, 2010, http://www.nytimes.com/2010/10/16/us/politics/16donate.html?_r=1&ref=politics.

130. Cynthia Gray, *Top Judicial Ethics Stories of 2010*, 93 JUDICATURE 187, 190 (2011).