
Constitutionalizing Judicial Ethics: Judicial Elections After *Republican Party of Minnesota v. White, Caperton, and Citizens United*

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I. INTRODUCTION

Recent times have witnessed strong lobbying efforts to move states away from a system of electing judges to one of appointing them. Opponents of judicial elections repeatedly argue that the general public does not want judges who are bought by contributors. Of course, that must be true, yet the electorate typically rejects efforts to move away from an elected judiciary.

Consider the recent elections in Nevada. The voters soundly rejected (57.7% to 42.3%)¹ a ballot measure that would change judicial selection to an appointive, instead of elective, system. The voters rejected appointive judges even though outside groups such as George Soros's Open Society Institute spent millions of dollars promoting merit selection.² In addition, former Justice Sandra Day O'Connor, who has been a strong advocate against electing judges,³ entered into the Nevada fray. Although she is still a federal judge who sits on the bench and

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1. *2010 Official Statewide Election Results*, NEV. SEC'Y OF STATE, <http://www.nusos.gov/soselectionpages/results/2010StatewideGeneral/ElectionSummary.aspx> (last visited Feb. 6, 2011); *Nevada Voters Reject Judicial Ballot Measures*, LAS VEGAS SUN (Nov. 3, 2010, 1:21 AM), <http://www.lasvegassun.com/news/2010/nov/03/nv-nevada-measures-2nd-ld-writethru/>; Doug McMurdo, *Voters Reject Changing Judge Selection*, LAS VEGAS REV.-J. (Nov. 3, 2010, 11:17 AM), <http://www.lvrj.com/news/voters-reject-changing-judge-selection-106597233.html>.

2. *Soros Bets on Nevada*, WALL ST. J. (Oct. 22, 2010), <http://online.wsj.com/article/SB10001424052748703859204575526164036476490.html>.

3. See, e.g., Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479 (2009).

decides cases,⁴ she personally campaigned for the measure, both in television commercials and robo-calls (mistakenly sent out at 1 am instead of 1 pm).⁵

The people have spoken, and the people are usually right. That, anyway, is the bedrock postulate that is the cornerstone of democracy: the people are smart enough to rule themselves. The economists often talk about the wisdom of crowds. A larger group of people is more likely to come to a better solution than one person. For example, the TV studio audience of *Who Wants to Be a Millionaire* guessed correctly 91% of the time, while the “experts” guessed only 65% correctly.⁶

When the “experts” talk about electing judges, they often say that the average voter does not know how to pick the better judge. Yet, when we ask people how they decide to vote for or against a judicial candidate, the great majority of their reasons are quite sensible and reasonable:

4. Since the beginning of this year, she has written the opinion in a half-dozen cases: *United States v. Mateos*, 623 F.3d 1350 (11th Cir. 2010); *Spivey v. Adaptive Mktg. LLC*, 622 F.3d 816 (7th Cir. 2010); *United States v. Cruz*, 611 F.3d 880 (11th Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010); *Fortis Corporate Ins., SA v. Viken Ship Mgmt. AS*, 597 F.3d 784 (6th Cir. 2010); *Demings v. Nationwide Life Ins. Co.*, 593 F.3d 486 (6th Cir. 2010); and *Hornbeak-Denton v. Myers*, 361 F. App'x 684 (6th Cir. 2010). In addition, she participated in approximately fifteen additional cases: *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476 (7th Cir. 2010); *United States v. Hills*, 618 F.3d 619 (7th Cir. 2010); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *Bank of Am. Nat'l Ass'n v. Colonial Bank*, 604 F.3d 1239 (11th Cir. 2010); *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010); *Mingus v. Butler*, 591 F.3d 474 (6th Cir. 2010); *Lovaas v. Bureau of Land Mgmt.*, 393 F. App'x 527 (9th Cir. 2010); *United States v. Puerto*, 392 F. App'x 692 (11th Cir. 2010); *United States v. Sardinias*, 386 F. App'x 927 (11th Cir. 2010) (per curiam); *United States v. Morneau*, 392 F. App'x 614 (9th Cir. 2010); *United States v. Allen*, 381 F. App'x 617 (7th Cir. 2010); *Perez v. Carey Int'l, Inc.*, 373 F. App'x 907 (11th Cir. 2010) (per curiam); *Messias v. U.S. Attorney General*, 371 F. App'x 41 (11th Cir. 2010) (per curiam); and *Huber v. Astrue*, No. 09-3942, 2010 WL 3869011 (7th Cir. Sept. 30, 2010). One of these cases, *Gonzalez v. Arizona*, was an election-law case. The panel held (two to one, with O'Connor in the majority) that Arizona could not enforce its requirement that prospective voters provide documentary proof of citizenship. *Gonzalez*, 624 F.3d at 1169. This decision came down on October 26, 2010, within days of her television commercials and robo-calls. See Rotunda, *Justice O'Connor's Robo Call Apology*, AOL NEWS, Oct. 28, 2010, <http://www.aolnews.com/discuss/opinion-justice-oconnors-robo-call-apology-isnt-enough/19693741#gcpDiscussPageUrlAnchor>

5. Robert Barnes, *Sandra Day O'Connor Defends Work on Nev. Judicial Issue, Despite Robo-calls*, WASH. POST (Oct. 27, 2010, 5:11 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/27/AR2010102706196.html>.

6. JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 3-4 (Anchor Books 2005).

- Research their background 48%
- Look to editorials/endorsements in my local paper 37%
- Discuss with friends/family 31%
- Political party affiliation 29%
- Look for bar association recommendations 24%
- Check with community groups I respect/belong to 23%⁷

When voters do choose judges, the conventional wisdom also assures us that the results will be less partisan if the judges run in nonpartisan elections—where candidates run but do not disclose their political affiliation, Republican or Democrat. Justice Sandra Day O’Connor embraces this assertion,⁸ along with the American Bar Association.⁹ However, empirical evidence does not support this frequent claim. Nonpartisan judicial elections are, in fact, more partisan than partisan elections.

I know, you will say that does not make sense. However, Professors Canes-Wrone and Clark examined the patterns of judicial decisions on abortion-related cases heard by state courts of last resort for over a quarter of a century, between 1980 and 2006. They looked at nearly 600 judicial votes in 85 cases from

7. The ABA survey asked:

When you do vote on judicial candidates, how do you usually decide who to vote for or against? Please select all that apply.

Random—Multiple Response

- Research their background 48%
- Look to editorials/endorsements in my local paper 37%
- Discuss with friends/family 31%
- Political party affiliation 29%
- Look for bar association recommendations 24%
- Check with community groups I respect/belong to 23%
- Gender (i.e. tend to vote for men or women only) 4%
- Other 10%
- Tend not to vote for judges 10%

HARRIS INTERACTIVE, AMERICAN BAR ASSOCIATION HARRIS POLL QUESTIONS (SEPT. 15-22, 2008), at 2, http://www.abanet.org/media/harrispoll_judicialselection.pdf.

8. Sandra Day O’Connor, Op-Ed., *Justice for Sale*, WALL ST. J., Nov. 15, 2007, at A25 (arguing that states should use merit selection, “or at least with a nonpartisan system in which the candidates do not affiliate with political parties”).

9. Thomas J. Moyer, *Commission on the 21st Century Judiciary*, 38 AKRON L. REV. 555, 561 (2005) (quoting AM. BAR ASS’N COMM. ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY (2003), <http://new.abanet.org/committee/judind/PublicDocuments/report.pdf>) (“For states that retain contested judicial elections as a means to select or reselect judges, all such elections should be non-partisan and conducted in a non-partisan manner.”).

16 states.¹⁰ What they found was that public opinion about abortion policy affects judicial decisions in nonpartisan systems, while no such relationship exists in states with partisan elections.¹¹ Judges whom the people elected in partisan elections were substantially more likely to be independent and not simply reflect public opinion, while judges selected in nonpartisan elections were more responsive to public opinion.¹²

Yet, the apprehension with judicial elections—particularly with partisan judicial elections—continues. It reflects other issues, such as concern (1) that we do not produce the best judges by electing them; (2) that the increasingly high costs of judicial campaigns leads to a perception (and a correct perception, according to its adherents) that there is a link between contributors and the results of judicial decisions; (3) that campaign speech by judges is unseemly and leads to judicial disqualification; and finally, (4) that new protections for corporate and union campaign expenditures will further undermine the concept of an impartial judiciary. These fears, in turn, reflect a larger fear that First Amendment limitations on the power of government to regulate campaigns are too onerous. Let us consider each of these questions to see if we are in need of reform, and if proposed reforms will pass constitutional muster under the First Amendment.

People who bemoan judicial elections because they are becoming more and more expensive often attack two United States Supreme Court decisions that appear to politicize the judiciary. One is *Republican Party of Minnesota v. White*,¹³ which recognized the free speech rights of judicial candidates. They similarly criticize *Citizens United v. FEC*¹⁴ as a pro-business decision that recognizes First Amendment rights of corporations or individuals to spend money to engage in political speech that favors their candidates.

Yet, *White* is not really a pro-business or pro-Republican Party decision (notwithstanding the fact that the Republican

10. Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WISC. L. REV. 21, 45.

11. *Id.*

12. *Id.*

13. 536 U.S. 765 (2002).

14. 130 S. Ct. 876 (2010).

Party was the petitioner). Instead, *White* simply evens the playing field by overturning restrictions that were really a form of incumbent-protection legislation. So too, the controversy surrounding *Citizens United* is misplaced. It does not favor business at the expense of unions. Instead it gives all entities, including unions and individuals, free speech rights that the government cannot restrict, which is why the ACLU supported the position of the petitioner and opposed the FEC's regulation.¹⁵

Still others view *Caperton v. A.T. Massey Coal Co.*¹⁶ as a case that will force judges to disqualify themselves if a party is related to an independent group that had supported the judicial candidate. It is too soon to judge the effect of *Caperton*, but there are plenty of indications in the five-person majority that the case has little growth. First, as discussed below, the majority itself emphasized that the case was unique. Second, the case does not involve campaign *contributions* to judicial candidates; instead, it involved *independent campaign* expenditures that appeared to benefit the judge who should have disqualified himself. The difficulty (if not inability) to codify the holding in that case—because the majority lists so many different reasons that, all added together, support the disqualification—also points to the conclusion that the case is a rare combination of factors.

Caperton offers no coherent and reasonably clear theory of judicial disqualification. Instead of focusing on vague and nebulous tests like the “appearance of impropriety,” it would be more useful to develop specific tests that are easier for judges to follow and for appellate courts to implement because they are not imprecise and ambiguous.

First, let us turn to a brief review of how states now select judges.

15. See Amicus Curiae Brief of the American Civil Liberties Union in Support of Appellant on Supplemental Question at 2-4, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 2365203 at *2-4 [hereinafter ACLU Brief].

16. 129 S. Ct. 2252 (2009). For further analysis, see Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247 (2010).

II. SECURING JUDGESHIPS

There has been much debate in recent times questioning whether it is better for the people to elect their judges directly, or for the judges to assume office by appointment. If the state chooses to elect its judges, the election may be partisan (the judges run under a party label) or nonpartisan. In some states, if the judge seeks reelection, he or she has a retention election. That is, the judge runs against no one and the voters decide whether to retain the judge or vote to remove the judge. It is hard to beat someone with no one, so judges in the great majority of cases win retention elections. In other states, judges must run for reelection against their political opponents (in a partisan or nonpartisan election), just like the governor seeking reelection runs against his or her opponent.¹⁷

Selecting judges by appointment is often called “merit selection.” In the federal system, the president appoints Article III judges subject to Senate confirmation. However, on the state level, very few states follow that model. Instead, when people refer to “merit selection,” they are typically referring to the most famous form of appointing state judges in what is often called the Missouri plan. Under that system, a panel of commissioners (so-called “experts”) decides to approve a short list of potential candidates that the panel presents to the governor.¹⁸ Then the governor must choose from this list. If the governor picks no one, the commission or the state chief justice makes the final selection.¹⁹ Compared to senate-confirmation states, the Missouri Plan creates a more powerful commission because it can “force one of its favorites on the democratically elected

17. The American Judicature Society keeps track of the many ways that one becomes a judge in the fifty-one United States jurisdictions (the fifty states plus the District of Columbia). As of 2009, the American Judicature Society listed only sixteen jurisdictions as using what it calls “Merit Selection.” In addition, eight other states use merit plans only to fill midterm vacancies on some or all levels of court: Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, and North Dakota. AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES 3 & n.1 (2009), <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf>.

18. Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 678 (2009). The American Judicature Society, from its beginning in 1913, wanted “experts, rather than voters” to be “responsible for selecting judges.” Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 854 (2002).

19. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 760 & n.37 (2009).

officials.”²⁰ Because Missouri Plan states are less democratic, commentators conclude that they are “more elitist” than senate-confirmation states.²¹

There are various flavors of the Missouri Plan, with some of them allowing for very little control by the voters. Some Missouri Plan states impose a limit on the number of lawyers who are on the nominating commission, while others provide for popularly elected officials to select some members of the commission.²² In contrast, other states allow very little input by the people. Those states require that a certain number of the commissioners (sometimes, a majority) must be lawyers or judges.²³

In general, most states now select judges through some sort of election.²⁴ Even when the governor may initially appoint judges, the judges find that they have to face the electorate to confirm their nomination. Does this system of elected judges lead to worse judges? Let us look at some recent cases of judicial misbehavior.

III. CAUSES FOR CONCERN: JUDGES ACHIEVING NOT FAME BUT INFAMY

Andy Warhol, the pop artist, famously predicted that in the future, everyone will have their fifteen minutes of fame. In recent times, a surprising number of judges—both state and federal—have secured their ephemeral media publicity. But, these judges have garnered not fame but infamy, not honor but dishonor, not prominence but notoriety, not repute but ill repute. Consider a few examples from the recent headlines.

20. *Id.* at 760.

21. *Id.*

22. *Id.* at 762 & nn.40-41. *See, e.g.,* ARIZ. CONST. art. VI, § 36.A (providing for sixteen commission members: the chief justice; five lawyers nominated by the governing body of the bar and appointed by the governor with advice and consent of the senate; and ten nonlawyers appointed by the governor with advice and consent of the senate).

23. *Id.* at 762-64 & n.43.

24. Initially, all thirteen of the original states provided that the governor, an executive council, or the legislature would appoint the judges. Jacksonian democracy and the extension of the franchise led the voters of the states to favor electing judges. EVAN HAYNES, SELECTION AND TENURE OF JUDGES 93-95, 99-135(1944). Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714-25 (1995) (discussing the emergence of elected judges in the various states).

In October 2010, a Mississippi state judge sent a lawyer to jail for refusing to recite the Pledge of Allegiance.²⁵ Yet the Supreme Court held over a half-century earlier that the government may not force its citizens to pledge allegiance to the flag:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.²⁶

The state judge refused to talk to the press and made no effort to explain how his contempt order complied with the First Amendment.²⁷

The Mississippi judge merely refused to follow the law. Other judges engage in illegal behavior that requires their removal. The Nevada Judicial Discipline Commission recently removed a state judge who admitted to sexual improprieties, such as having sex with a staff member during working hours.²⁸ Then, it removed a state judge who was sleeping on the job, breaching security by hiring private security guards, inflicting her foul mouth and “mercurial temperament” on her staff, and making false statements to the Nevada Judicial Discipline Commission.²⁹ The Commission’s investigation concluded,

25. Debra Cassens Weiss, *Miss. Judge Sends Lawyer to Jail for Refusing to Recite the Pledge*, A.B.A. J. (Oct. 7, 2010, 5:31 AM), http://www.abajournal.com/weekly/article/miss_judge_sends_lawyer_to_jail_for_refusing_to_recite_the_pledge.

26. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)(footnote omitted). In *Barnette*, the parties objecting to being forced to recite the pledge were schoolchildren, and their particular objection related to their religious beliefs. However, the Court based its holding on free speech principles and did not limit the protection it gave to those solely with religious objections. 6 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE §§ 20.11(c) n.11, 20.48, 21.6(b), 21.7 (4th ed. 2008).

27. *Miss. Judge Again Asks Courtroom to Say Pledge After Jailing Lawyer for Refusing*, FOXNEWS.COM (Oct. 8, 2010), <http://www.foxnews.com/us/2010/10/07/miss-judge-jails-attorney-reciting-pledge/>.

28. David Kihara, *Halverson Removed from Bench*, LAS VEGAS R.-J. (Nov. 18, 2008, 10:00 PM), <http://www.lvrj.com/news/34633874.html> (noting the previous removal of Clark County Family Court Judge Nicholas Del Vecchio).

29. *Id.* (discussing removal of District Judge Elizabeth Halverson).

“The damage resulting from her antics and willful misconduct will be felt by the judicial system for a significant future period of time.”³⁰

Meanwhile the Texas Commission on Judicial Conduct issued a “Public Warning” to a judge who keyed a neighbor’s car to the tune of \$6000 in damage.³¹ Fortunately for the judicial system, and unfortunately for this particular judge, video surveillance tapes recorded the act.³² A grand jury indicted the judge for felony criminal mischief.³³ The judge pled guilty to a reduced offense of a Class A Misdemeanor, paid a \$1500 fine, and \$6000 in restitution.³⁴ After that, he falsely *denied* to the Texas Commission on Judicial Conduct that he committed the offense.³⁵ Perhaps he thought that the videotape and his guilty plea did not exist. The Commission issued a “Public Warning,” and the judge continues to sit on the bench.³⁶ Perhaps he will be sympathetic to the defendant if he presides over a vandalism case.

In 2008, the class-action-specialist law firm, Milberg LLP, settled a federal indictment outlining a thirty-year illegal-kickback scheme.³⁷ As part of the agreement with federal prosecutors, it repudiated three of its partners, including Melvyn Weiss.³⁸ Eventually all three pled guilty. Still, the Milberg law firm agreed to pay Weiss a share of the law firm’s *future* lawsuit winnings.³⁹ However, the ethics rules prohibit a law firm from

30. Findings of Fact, Conclusions of Law & Imposition of Discipline at 23, *In re Honorable Elizabeth Halverson*, No. 0801-1066 (Nev. Comm’n on Jud. Discipline Nov. 17, 2008).

31. Public Warning, *In re Honorable Woodrow “Woody” Densen*, No. 09-0948-RT (Tex. Comm’n on Jud. Conduct Oct. 14, 2010).

32. *Id.* at 1.

33. *Id.*

34. *Id.* at 2.

35. *Id.*

36. Public Warning, *supra* note 31, at 2.

37. Press Release, U.S. Atty’s Office, Cent. Dist. of Cal. (June 16, 2008), <http://www.justice.gov/usao/cal/pressroom/pr2009/083.html>. For an economic analysis of the impact of the kickbacks, in terms of giving the lawyers a greater share of the settlements in cases where the law firm paid kickbacks, see Michael A. Perino, *The Milberg Weiss Prosecution: No Harm, No Foul?*, BRIEFLY, May 2008.

38. *Milberg’s New Hire*, WALL ST. J., Feb. 25, 2009, at A14.

39. *Id.*

sharing legal fees with someone not a member of the firm.⁴⁰ Mr. Weiss is not a member of the firm; he is also a nonlawyer.⁴¹ Nonetheless, New York Supreme Court Judge Herman Cahn approved sharing fees with Mr. Weiss.⁴² What does this episode have to do with judicial notoriety? Well, in December 2008, the Milberg law firm announced that it had hired a new lawyer, none other than Judge Herman Cahn—the same judge who had approved of the Milberg arrangement.⁴³ Interesting.

Meanwhile, another state judge, this time from Pennsylvania, pled guilty to taking part in an illegal \$2.6 million kickback scheme to send teenagers to two privately run youth-detention centers.⁴⁴ A week after that, a Wilkes-Barre newspaper accused him of fixing an unrelated defamation case where he ordered the newspaper to pay \$3.5 million.⁴⁵ The Pennsylvania Supreme Court will have to overturn up to 1200 juvenile convictions because of this illegal-kickback scheme.⁴⁶

In February 2009, federal judge Samuel Kent pled guilty to obstruction of justice.⁴⁷ His indictment charged him with “sexually abusing two court employees and . . . failing to fully disclose the extent of the alleged abuse to a court panel investigating the matter.”⁴⁸ He must now spend time behind

40. MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2009); *see also* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §§ 5.4-1 to 5.4-3 (2010).

41. *Milberg's New Hire*, *supra* note 38.

42. *Id.*

43. *Id.*

44. Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES (Feb. 12, 2009), <http://www.nytimes.com/2009/02/13/us/13judge.html>.

45. Ian Urbina, *Judge Guilty in Kickbacks Is Accused of Fixing Suit*, N.Y. TIMES (Feb. 21, 2009), <http://www.nytimes.com/2009/02/21/us/21judge.html>; *see also* Ian Urbina, *Suit Names 2 Judges Accused in a Kickback Case*, N.Y. TIMES (Feb. 13, 2009), <http://www.nytimes.com/2009/02/14/us/14judge.html>; Peter Hall & Leo Strupczewski, *Judges to Serve More Than Seven Years in Prison After Pleading Guilty in Kickbacks Probe*, LEGAL INTELLIGENCER (Jan. 28, 2009), <http://www.law.com/jsp/article.jsp?id=1202427800493&rss=newswire>.

46. John Sullivan, *Court Overturns Hundreds of Cases in Court Scandal*, PHILA. INQUIRER (Mar. 26, 2009), http://www.philly.com/philly/hp/news_update/20090326_Court_overturns_hundreds_of_cases_in_court_scandal.html. Another judge, Michael T. Conahan, pleaded guilty to participation in the same scheme. *Id.*

47. Nathan Koppel, *Federal Judge Pleads Guilty to Obstruction*, WALL ST. J. (Feb. 24, 2009), <http://online.wsj.com/article/SB123540590474748727.html>.

48. *Id.*

bars with felons whom he earlier sentenced.⁴⁹ Because he refused to resign from the bench (in order to collect his full federal pay of \$174,000 per year), the House impeached him on June 19, 2010.⁵⁰ He resigned effective June 30, 2009 so the Senate did not have to remove him.⁵¹

Also in 2008, yet another federal judge, Edward W. Nottingham, chief of the federal district court in Colorado, resigned because he faced multiple misconduct complaints.⁵² The Tenth Circuit Chief Judge, Robert H. Henry, announced: “At this critical time in the investigation of these multiple complaints of misconduct, Judge Nottingham has stepped down, effective immediately, as Chief Judge of the District of Colorado, has ceased judicial duties, and has resigned his commission as a United States District Judge”⁵³

On March 11, 2010, after just one hour of debate, the House, with not even one dissenting vote, impeached Judge G. Thomas Porteous, Jr., of the Eastern District of Louisiana.⁵⁴ The

49. *Id.*

50. ELIZABETH B. BAZAN & ANNA C. HENNING, CONG. RESEARCH SERV., NO. 98-186, IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURES & PRACTICE 4-5 & n.22 (2010), http://assets.opencrs.com/rpts/98-186_20100426.pdf.

51. *Id.* at 5.

52. *Court News & Events*, THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT (Oct. 21, 2008), <http://www.ca10.gov/readnews.php?id=61>; see also Molly McDonough, *Qwest CEO Judge Nottingham Resigns amid Misconduct Probe*, A.B.A. J. (Oct. 21, 2008, 3:23 PM), http://www.abajournal.com/weekly/qwest_judge_nottingham_resigns_amid_misconduct_probe

Sean Harrington, who heads a legal technology firm, had filed a complaint in January citing news reports that Nottingham allegedly viewed adult Web sites on his government computer in his chambers. Harrington also alleged that Nottingham had testified in his own divorce case that he spent \$3,000 at a strip club. Sealed transcripts of the divorce case were first obtained in August 2007 by KUSA-TV. . . . Another complaint against Nottingham involved a September 2007 dispute between him and attorney Jeanne Elliott over a parking spot for the disabled. Nottingham had parked in the spot, and Elliott parked her wheelchair behind his vehicle and refused to get out of his way. Police issued Nottingham a \$100 ticket.

Judge in Qwest CEO Insider Trading Case Resigns, SEATTLE POST-INTELLIGENCER (Oct. 21, 2008, 2:21 PM), http://www.seattlepi.com/business/384302_qwest22.html.

53. *Court News & Events*, *supra* note 52.

54. BAZAN & HENNING, *supra* note 50, at 2. The House acted at the request of the Judicial Council for the Fifth Circuit, which issued an Order and Public Reprimand concerning Judge Porteous on September 10, 2008. *In re Complaint of Judicial Misconduct Against U.S. Dist. Judge G. Thomas Porteous, Jr. Under the Judicial Conduct*

four articles of impeachment charged him with (1) engaging “in a pattern of conduct incompatible with the trust and confidence placed in him” as a federal judge, such as “by denying a motion to recuse himself in a case where he had a corrupt financial relationship with the law firm representing one of the parties,” and, in failing “to disclose that he had engaged in a corrupt scheme with two lawyers in that firm beginning while he was a state court judge in the late 1980s”; (2) “engag[ing] in a longstanding pattern of corrupt conduct that demonstrates his unfitness to serve as a U.S. district court judge,” such as “engaging in a corrupt relationship with a bail bondsman and his sister”; (3) “knowingly and intentionally” committing perjury “related to his personal bankruptcy filing and by repeatedly violating a court order in his bankruptcy case”; and (4) knowingly making “material false statements about his past to both the United States Senate and to the FBI in order to obtain” his judicial office.⁵⁵ The Senate, shortly thereafter, removed him from judicial office.⁵⁶

It seems that federal judges may have to queue up and wait their turn for impeachment. Federal authorities recently arrested a senior federal district judge (the former Chief Judge of the Northern District of Georgia) for buying and using cocaine and other illegal drugs and for a firearms violation in the course of his sexual relationship with an exotic dancer.⁵⁷ When the FBI

and Disability Act of 1980 at 5-6, No. 07-05-351-0085 (Ind. Council of the Fifth Cir. Sept. 10, 2008), <http://www.ca5.uscourts.gov/news/news/gtp%20order%20and%20public%20reprimand.pdf>.

55. BAZAN & HENNING, *supra* note 50, at 1 n.1.

56. The Senate, on December 8, 2010, convicted him on all four articles of impeachment. 156 CONG. REC. S8610 (daily ed. Dec. 8, 2010). Porteous became only the eighth federal judge in our entire history to be impeached and removed from the bench.

57. Steve Visser & Bill Torpy, *Federal Judge Charged with Buying Drugs from Stripper*, ATLANTA J.-CONST. (Oct. 5, 2010), <http://www.ajc.com/news/atlanta/federal-judge-charged-with-658597.html>. Judge Jack T. Camp Jr. has been a federal judge since 1988. He is noted as a tough sentencing judge. In 2009, he sentenced a former doctor to ten years in prison. *Id.* The doctor had prescribed drugs to a professional wrestler who then killed his wife, his son, and then himself. *Id.* Camp specifically mentioned the indiscriminately prescribing of drugs that caused at least two other people to die from overdoses. *Id.*; see also Martha Neil, *Exotic Dancer's Tip Links Federal Judge, 67, to Drug & Firearms Case*, A.B.A.J. (Oct. 4, 2010 2:53 PM), http://www.abajournal.com/weekly/article/federal_judge_67_arrested_in_drug_firearms_case_based_on_tip_from_exotic_da; Greg Bluestein, *Ga. Federal Judge Arrested on Drug, Gun Charges*, WASH. POST (Oct. 4, 2010 5:33 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/04/AR2010100405548.html>.

arrested Senior United States District Judge Jack T. Camp Jr., they recovered the drugs, and two pistols from Camp's car, including "a .380-caliber Sig Sauer with a full magazine and a round in the chamber" with the hammer of the gun cocked.⁵⁸

The mind boggles when one considers these problem judges. Granted, this romp through the legal news of the last few years is more an anecdotal analysis than a vigorous statistical study, yet it does serve a useful reminder: the laundry list of problem judges includes *both* federal judges, who are appointed, and state judges, who are typically elected. Whatever the merits of "merit selection"—that is, having a special commission, or a legislature, or the governor appointing a judge—it does not seem to offer those who receive the appointment any immunity from the temptations that affect judges who secure their position by election.

The federal system, like the state systems, has problem judges because judges are human. They put on their robes two legs as a time, just like the rest of us. One cannot show, by an objective empirical study, that federal judges are better than state judges, or that Supreme Court Justices are better than the federal judges they routinely overrule.

Indeed, the empirical studies that do exist should give us pause. They tend to show bias that is divorced from merit. One interesting finding is that when a federal court of appeals judge moves to the United States Supreme Court, the new Justice is more likely to affirm the decisions of his or her former circuit.⁵⁹ Some of these Justices are *more than twice as likely* to cast their votes in favor of the circuit from whence they came.⁶⁰ The fact that the home circuit of the Justice now has a home-court advantage (a pun intended) does suggest that the Justices chosen by the merit system are deciding issues not simply based on merit. Instead, they are reflecting their biases, perhaps unconsciously. This problem of circuit bias is magnified by the fact that all the Justices save one (Justice Kagan) now come from one of the federal courts of appeals—typically, the D.C. Circuit (Justices Roberts, Scalia, Thomas, and Ginsberg).

58. Visser & Torpy, *supra* note 57.

59. Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PENN. L. REV. 833, 838 (2009).

60. *Id.*

Another empirical study showed that United States Supreme Court Justices may not follow the election returns, but they do follow the economy: the extensive empirical evidence is that they tend to vote against the federal government in bad economic times while tending to vote for the government in good economic times,⁶¹ just like the rest of us tend to throw out the party in power during recessions. Justices chosen by merit selection appear to be deciding cases based not on merit but on the economy.

IV. CAMPAIGN CONTRIBUTIONS AND JUDICIAL INDEPENDENCE

A. The Paradox Between Public Concern over Electing Judges and the Public's Support of Electing Judges

It is surprisingly difficult to demonstrate, in any rigorous empirical way, the oft-repeated claim that campaign contributions affect judges' decisions. It may well be the case that contributors only give their contributions to the campaigns of judicial candidates who already reflect their view on how judges should act.⁶² Those who think a judge should be activist or restrained (or liberal or conservative, or Republican or Democrat, or pro-business or pro-labor) are not likely to donate campaign funds to those candidates that do not already share their views.

It is not unusual for politicians to break their promises to the voters and change their view on abortion to match the changing views of the electorate. But, one cannot readily identify a politician who changes his or her views on hot button issues like abortion simply because, e.g., a pro-choice group suddenly contributes to a pro-life politician. Of course, we should be concerned about judicial partiality, but we also should not jump to conclusions.

Political campaigns cost money. There are only two ways to do that. One source is self-financing from the candidates'

61. Thomas Brennan et al., *The Political Economy of Judging*, 93 MINN. L. REV. 1503, 1508 (2009).

62. Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Contributions Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J.L. & ECON. 317 (1997).

own deep pockets. Hence the rise of the wealthy as candidates, because they can fund their own campaigns without restrictions.⁶³ To some extent one can say that we really live in a plutocracy because so many candidates have been multimillionaires who are their own campaign contributors. Yet, these candidates do not invariably win—Jon Corzine, former Governor of New Jersey,⁶⁴ California gubernatorial candidate Meg Whitman,⁶⁵ and United States Senate candidate Carly Fiorina⁶⁶ are recent losers.

Thus far, these very rich candidates have not chosen to run for judicial office. So, the question of millionaire judges self-financing their own campaigns is a moot one, at least for now. Still, the statistics do show that while money is necessary to wage a political campaign, it is not sufficient to win it. Whitman spent about \$46 per vote and lost to Jerry Brown by twelve percentage points.⁶⁷ Brown spent only about \$7.50 per vote.⁶⁸ In Connecticut, senatorial candidate Linda McMahon lost to Richard Blumenthal; she spent \$46 million of her own

63. See *Davis v. FEC*, 554 U.S. 728, 740-41 (2008) (invalidating the so-called “Millionaire’s Amendment”). The Bipartisan Campaign Reform Act of 2002 (BCRA) provided, in section 319(a), that the ordinarily applicable limits on contributions to campaigns for the United States House would be trebled for a candidate whose opponent’s campaign was self-funded to a prescribed degree. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 319(a), 116 Stat. 81, 109 (codified as amended at 2 U.S.C. § 441a-1), *invalidated by* *Davis v. FEC*, 128 S. Ct. 2759 (2008). The Court concluded that the First Amendment gives to each individual the right to spend his or her own money for campaign speech. *Davis*, 128 S. Ct. at 2771. The rationale for limiting campaign contributions is the possibility of corruption and a candidate cannot corrupt himself, so he can give as much as he wants to his own campaign. *Id.* Conditioning unfavorably asymmetrical contribution limits on the exercise of that right was an unacceptable burden. *Id.* at 2771-72.

64. Corzine lost his gubernatorial reelection by about 5% in 2009, even though he spent more than \$100 million of his own money to become a senator of, and then governor of, New Jersey. *Jon Corzine: Why He Matters*, WASH. POST (Dec. 27, 2010 11:07 PM), [http://www.whorunsgov.com/Profiles/Jon_Corzine_\(D\)](http://www.whorunsgov.com/Profiles/Jon_Corzine_(D)).

65. Whitman spent \$142 million of her own money, or \$46 per vote, in her primary and her general elections. Jerry Brown, who won, spent about \$7.50 per vote. *Whitman’s Campaign Cost Her \$46 Per Vote*, CBS L.A. (Nov. 4, 2010 5:42 AM), <http://losangeles.cbslocal.com/2010/11/04/whitmans-campaign-cost-her-46-per-vote/>.

66. Carly Fiorina spent about \$6.5 million of her own money, and most of that was in the Republican primary. *Id.*

67. *Id.*; Patrick McGreevy, *California Voter Turnout Is Highest Since 1994 Gubernatorial Election*, L.A. TIMES (Dec. 11, 2010), <http://articles.latimes.com/2010/dec/11/local/la-me-vote-tally-20101211>.

68. *Whitman’s Campaign*, *supra* note 65.

money, or about \$96 for every vote she got in the general election.⁶⁹

Instead of the candidate self-financing the election, the other way is for the candidate to raise campaign contributions from the public. Those who give contributions are interested in the election, and that leads to the typical objection to an elected judiciary: contributors affect the justice that the judges mete out. The public certainly understands the problem. For example, a poll of the nonpartisan Illinois Campaign for Political Reform reported that more than 85% of Illinois voters expressed concern that political contributions to the judges influence their decisions.⁷⁰ The President of the Chicago Bar Association admitted that he was “very concerned that the public questions the propriety of that system,” and he personally “had doubts about the impartiality of the judges involved.”⁷¹ Other polls also showed that 75% of the voters think that campaign contributions have “some influence” on judicial decisions.⁷² Only 7% of Illinois voters believed that judicial rulings are “never influenced by campaign cash.”⁷³

This public-opinion survey is hardly unique to Illinois. A North Carolina poll revealed that 84% of likely voters surveyed were “concerned about how judges raise money for their elections.”⁷⁴ Nearly three-quarters of the respondents (74%) believed that campaign contributions “influence judicial decisions.”⁷⁵ Still, 81% of these same respondents favored judicial elections.⁷⁶

69. Fredreka Schouten & Gregory Korte, *Conservatives Outspent Liberals 2-1 in Elections*, USA TODAY (Nov. 4, 2010 2:21 AM), http://www.usatoday.com/news/politics/2010-11-04_money04_ST_N.htm.

70. Steve Neal, Editorial, *State Needs Fairer Way to Pick Judges*, CHI. SUN-TIMES, Sept. 4, 2002, at 47. The columnist concludes: “[O]ur current system of electing judges is broken. Isn’t it time to balance the scales of justice?” *Id.*

71. John Flynn Rooney, *Not All Warm to Limits on Judicial Races*, CHI. DAILY L. BULL., Mar. 15, 2001, at 1 (quoting William J. Linklater).

72. Daniel C. Vock, *Poll: Judges Fret over Election Process*, CHI. DAILY L. BULL., Feb. 13, 2002, at 1.

73. Daniel C. Vock, *Voters Leery on Judicial-Race Funding: Survey*, CHI. DAILY L. BULL., Oct. 25, 2000, at 1.

74. J. Barlow Herget, Op-Ed., *It’s Time for Judicial Reform*, CHARLOTTE OBSERVER, May 31, 2002, at 14A. The organization that conducted the poll was the North Carolina Center for Voter Education. *Id.*

75. *Id.*

76. *Id.*

An ABA survey measuring attitudes from 2001-02 concluded that 76% of voters, and 26% of state judges believe that campaign contributions to judges have at least some influence on judicial decisions.⁷⁷ And, 84% of voters and 79% of judges were concerned about special-interest groups buying advertising to influence judicial elections.⁷⁸ Another poll, seven years later, reached similar conclusions: “89% of those surveyed believe[d] the influence of campaign contributions on judges’ rulings [was] a problem, and 52% deem[ed] it a ‘major’ problem.”⁷⁹

Obviously we do not want judges to treat parties or lawyers differently because of contributions that the judges did or did not receive. Some litigants are institutional litigants—that is, they expect to be in court from time to time. Major corporations and unions fall into this category. Major law firms, such as law firms routinely defending major corporations or plaintiff-tort class-action law firms, also fall into this category. We should be concerned if these institutional litigants are affecting judicial rulings by their campaign contributions or expenditures. Yet, while the assertion of linkage is common, it is surprisingly difficult to prove.

Moreover, we have a paradox because the same voters who express concern with judicial elections do not appear to be in any rush to change the system. In the North Carolina poll, for example, 81% of the respondents still preferred the election of judges over their selection by the merit system.⁸⁰ Another recent survey showed that nearly 79% of Illinois voters favor electing judges over appointing them.⁸¹ And, Nevada voters (notwithstanding recent high-profile judicial discipline cases)⁸²

77. *Recommendation*, ABA STANDING COMM. ON JUD. INDEPENDENCE, at 3 (2002), <http://www.abanet.org/judind/pdf/hod-final/pdf>.

78. *Id.* The poll was conducted by Greenberg Quinlan Rosner Research and American Viewpoint for the Justice at Stake Campaign. *Id.* at 3 n.1.

79. Joan Biskupic, *Supreme Court Case with the Feel of a Best Seller*, USA TODAY (Feb. 16, 2009, 10:12 PM), http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm.

80. Herget, *supra* note 74.

81. Daniel C. Vock, *ABA Chief: End Private Funding of Judge Races*, CHI. DAILY L. BULL., Sept. 18, 2002, at 1.

82. See Kihara, *supra* note 28; see also Debra Cassens Weiss, *Discipline Body Removes Judge Halverson, Citing ‘Bizarre’ Staff Treatment*, A.B.A. J. (Nov. 18, 2008, 7:03 AM), http://www.abajournal.com/news/article/discipline_body_removes_judge_halverson

recently rejected—overwhelmingly, 57.7% to 42.3%—a proposition to move their state to a system of electing judges.⁸³ If voters are asked, should judges be selected by merit, a recent ABA poll showed that just 1% of the voters favored that alternative.⁸⁴

Because voters do not seem all that anxious to move from an elective system to the Missouri Plan, opponents of judicial campaign contributions have focused attention on regulating judicial campaign speech and judicial campaign contributions. One can impose restrictions on campaign contributions by mere statute; it is not necessary for the proponents to persuade the people to change the state constitution from elected judges to the Missouri Plan. However, if empirical data do not support the assumption that campaign contributions have a corrosive, corrupting effect on judicial decisionmaking, that undercuts the constitutional bases for enacting laws regulating and restricting campaign contributions. Laws restricting contributions and expenditures on campaign financing must be measured against various United States Supreme Court cases that apply the First Amendment to protect campaign financing as a form of free speech.⁸⁵ Money talks, both literally and figuratively. As Justice Souter noted in the campaign-financing case of *Nixon v. Shrink Missouri Government PAC*, “We have never accepted mere conjecture as adequate to carry a First Amendment burden”⁸⁶

B. The Evidence Linking Campaign Contributions to Judicial Decisions

1. Introduction

Obviously, if there is a bribe—a campaign contribution in exchange for a vote on a case—present law already forbids that. It is often difficult to prove that. Hence, people typically argue that campaign contributions must affect judicial decisionmaking. The empirical studies on campaigns generally do not bear out

[_citing_bizarre_staff_treatment/](#).

83. See *supra* notes 1-2 and accompanying text.

84. HARRIS INTERACTIVE, *supra* note 7, at 2.

85. See ROTUNDA & NOWAK, *supra* note 26, § 20.51.

86. 528 U.S. 377, 392 (2000).

this easy assertion. One econometric study after another fails to find a linkage. In fact, “most academic experts would agree that it is very difficult to find consistent and convincing evidence that interested money buys either elections or policy favors.”⁸⁷ If we focus just on judicial elections, we reach the same conclusion.

One would think that it would be more straightforward to demonstrate by statistics that campaign contributions affect judicial decisionmaking. Indeed, it should be easier to examine this link than the possible link between campaign contributions to legislators and members of the executive branch. While legislators deal with many issues and interest groups, judges deal with specific parties involving particular matters. Legislators deal with compromise: the tax rate may go up 9% instead of 10%. Judges are more likely to rule in decisions that do not allow compromise: either the court rejects comparative negligence or it does not; either it invalidates tort reform as violating the state constitution or it does not. If litigants (or their lawyers) give the judges campaign contributions, and then the judges rule in favor of these parties (or their lawyers), that does not necessarily mean that judges are corrupt, but it does mean that people’s fear regarding the impartiality of judges is not unreasonable.

The empirical work in this area is quite interesting. Granted, the experience of a few states may not mimic the experience of others. And, what is true in one year may not be true in another. Still, it is worthwhile to examine the evidence that does exist to see in which direction it points. Thus far, studies of several states do not support any statistical conclusion that judicial campaign contributions are corrosive.

2. The Illinois Experience

Let us turn first to the State of Illinois, where I taught and practiced law for many years. Let us examine litigants (a party or an organization involved in litigation or the lawyers for any litigant) who have given campaign contributions to judges before whom they have cases. We will call these people (the

87. Jeffrey Milyo, *The Political Economics of Campaign Finance*, 3 INDEP. R. 537, 539 (1999), available at http://www.independent.org/pdf/tir/tir_03_4_milyo.pdf.

litigants or their lawyers) the “contributor-litigants.” The question is whether one can find any evidence of a tacit or implicit quid pro quo where the judges favor or tilt towards the contributor-litigants.

Illinois has witnessed corrupt judges, whom the government has prosecuted for bribery, an *explicit* quid pro quo.⁸⁸ Our inquiry is different: Do judicial campaign contributions constitute or appear to constitute an *implicit* quid pro quo—where the judges favor or tilt towards the contributor-litigants? We have a fair sample of cases to investigate because, over three election cycles (1990, 1992, and 1994), 34% of the cases that the Illinois Supreme Court decided involved a contributor-litigant.⁸⁹ During these three election cycles, each of the seven members of the supreme court participated in at least one election. There were no supreme court elections in 1996 or 1998.⁹⁰ In this sample of cases and election cycles that are selected, can one find evidence that judges are biased in favor of those who have given them campaign contributions?

The vast majority of people who made campaign contributions to Illinois Supreme Court justices had no cases before the high court, and the vast majority of litigants who appeared before the Illinois Supreme Court had not made any campaign contributions. The litigants were contributors in only about one-third of the court’s cases.⁹¹ Still, that figure would be

88. The “Operation Greylord” series of criminal prosecutions uncovered evidence of a few judges accepting bribes. *See, e.g.*, *Bracy v. Gramley*, 520 U.S. 899, 901-02 (1997); *United States v. Maloney*, 71 F.3d 645, 645 (7th Cir. 1995).

89. *See* SAMANTHA SANCHEZ, THE NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, ILLINOIS SUPREME COURT: MONEY IN JUDICIAL ELECTIONS 2 (2002), <http://www.policyarchive.org/handle/10207/bitstreams/5907.pdf>. The National Institute on Money in State Politics developed the Money in Judicial Politics Project to:

track contributions and spending in Supreme Court elections in a number of states, including Illinois. To compile a complete campaign profile of the Court[] that included at least one election for each of the seven sitting Justices, data was collected for three election cycles—1990, 1992 and 1994. In these election cycles, 32 candidates sought one of the seven positions. The Supreme Court races of 2000, in which 12 candidates spent \$7.7 million, are not included here . . . *Id.*

90. *Id.* at 3. The study I used did not consider the election of 2000 because those who were elected had not yet participated in enough cases to make a useful statistical analysis of contributors and litigants.

91. *Id.* at 2.

more significant if the amounts of the contributions—rather than the raw number of the contributors—were great.

So, let us take a look at the funds contributed by *all* parties appearing before the Illinois Supreme Court. It turns out that the total amount of money that the contributor-litigants gave is not large, and appears to be even less significant when compared to the total amount of all campaign contributions that non contributor-litigants gave. The contributor-litigants as a group gave only 6.6% of the money that the candidates raised.⁹²

Moreover, the amount that the judges gave themselves dwarfed the amount that the contributor-litigants gave them. In other words, the judicial candidates contributed to their own campaigns two and one-half times more than all of the contributions of the contributor-litigants.⁹³ “Self-contribution” is significant because there is *no* risk of corruption when judicial candidates contribute to their own campaigns.⁹⁴ The justices are not litigants before their own court, and so they do not need to spend money to influence themselves. Of course, an unintended consequence of campaign-finance restrictions is the rise of the plutocrat candidate. The law restricts the extent to which the multimillionaire can give to others, but there are no restrictions on the extent to which the multimillionaire can give to his or her own candidacy.

92. *Id.*

93. *Id.* at 6-7.

94. *Davis v. FEC*, 128 S. Ct. 2759 (2008). The Court invalidated the so-called “Millionaire’s Amendment,” which eased the campaign contribution restrictions on a candidate if he or she was running against a self-financed candidate. The Court concluded that the government has no interest in leveling electoral opportunities for candidates of different personal wealth; *see also* *Buckley v. Valeo*, 424 U.S. 1, 53 (1976) (*per curiam*) (internal citations omitted), which invalidated federal limits on a candidate spending his or her own money because there is no danger of real or apparent corruption when candidates use their own funds:

The primary governmental interest served by the Act—the prevention of actual and apparent corruption of the political process—does not support the limitation on the candidate’s expenditure of his own personal funds. As the Court of Appeals concluded: ‘Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family.’ Indeed, the use of personal funds reduces the candidate’s dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act’s contribution limitations are directed.

When we look more closely at which individuals comprise the list of contributor-litigants, there is even less there than meets the eye. Remember, in the eight-year period between 1991 and 1999, 34% of the cases that the Illinois Supreme Court heard involved a party, lawyer, or organization that had made a campaign contribution to a supreme court justice in the prior election cycles. However, more than two-thirds of those cases involved *public* attorneys representing the state.⁹⁵ The state's lawyers were giving judicial campaign contributions, but they do not have the same interest in litigation as private lawyers. The publicly employed do not work on contingent fees; they do not worry about losing their client.⁹⁶ Indeed, state prosecutors should not even worry about losing their cases if they lose for the right reason because: "The duty of the prosecutor is to seek justice, not merely to convict."⁹⁷ The sovereign wins whenever justice is done, which is why the prosecutor in the Perry Mason novels was probably a very happy man.⁹⁸

In our statistical analysis, let us remove these publicly employed lawyers from the list of contributors, because their interests are different in kind than the interest of privately employed lawyers, and their success or failure in litigation before that court is not likely to be related to their contributions. If we do that, then the percentage of cases before that court where a contributor-litigant made a campaign contribution drops to just 10.7%. And when we turn to that 10.7%, we find that those contributors were more likely to be on the *losing* side than the winning side of the case.⁹⁹ In other words, to the extent that there is a statistical correlation, it is negative.

In short, fewer than 4% of the lawyers or parties who appeared before the Illinois Supreme Court made a contribution to a winning candidate, and one-third of the judicial campaign funds came from an unlikely source of corruption: the

95. SANCHEZ, *supra* note 89, at 2.

96. *See id.* at 8 ("If the publicly employed attorneys are removed from consideration, on the theory that their success before the Court is unlikely to be related to their contributions, just 10.7 percent of cases before the Supreme Court involved a contributor.").

97. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-1.2(c) (3d ed.).

98. ROTUNDA & DZIENKOWSKI, *supra* note 40, § 1.11-4.

99. SANCHEZ, ILLINOIS SUPREME COURT, *supra* note 89, at 8.

candidates themselves or from the political parties that backed the candidates.¹⁰⁰ The United States Supreme Court has rejected restrictions on campaign financing when an anticorruption rationale is unlikely to exist.¹⁰¹ Just as a candidate who gives money to his own campaign is not influencing his views, the concept that the political party can “corrupt” the views of its candidates is equally peculiar, because the party’s candidates are *its* candidates.¹⁰²

Let us look specifically as to whether major contributors who had cases before the Illinois Supreme Court were more likely to win. The average contribution was only \$645, but there were 68 contributors who gave \$5000 or more in the three elections cycles.¹⁰³ Of these major contributors, only seven appeared before the court, and they lost as many cases as they won.¹⁰⁴

Instead of looking at particular cases and the contributor-litigants, we can look at a class of cases and a class of people who contributed to the justices. The *Chicago Daily Law Bulletin* analyzed a series of tort opinions and concluded that there was no correlation between campaign contributions and favoritism to plaintiff-tort lawyers who had contributed to the

100. *Id.* at 2.

101. See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (striking limits on campaign expenditures by incorporated political associations because spending by such groups “does not pose [any] threat” of corruption); *FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 498 (1985) (invalidating limits on independent expenditures by PACs because, in that context, “a quid pro quo for improper commitments” was only a “hypothetical possibility”); *Citizens Against Rent Control/Coal for Fair Housing v. City of Berkeley*, 454 U.S. 290, 297 (1981) (reaffirming that “*Buckley* does not support limitations on contributions to committees formed to favor or oppose ballot measures” because an anticorruption rationale is inapplicable) (emphasis omitted); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 790 (1978) (holding that limits on referendum speech by corporations violate the First Amendment because “[t]he risk of corruption . . . simply is not present”).

102. *Cf. Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618-19 (1996) (holding that the First Amendment prohibits the application of the FEC Act’s party-expenditure provision to expenditures that the political party has made independently, without coordination with any candidate) (Breyer, J., concurring). A separate opinion of Justice Thomas, joined as to this part by Chief Justice Rehnquist and Justice Scalia, also concluded that the anticorruption rationale justifying campaign restrictions is inapplicable in the context of political parties funding campaigns because there is only a minimal threat of corruption when a party spends to support its candidate or to oppose the competitor to its candidate, even if that expenditure is made in concert with the candidate. *Id.* at 646-47 (Thomas, J., concurring).

103. SANCHEZ, ILLINOIS, *supra* note 89, at 1-2.

104. *Id.* at 1.

judicial campaigns of the Illinois Supreme Court justices.¹⁰⁵ Tort plaintiffs lost in nearly two-thirds of the tort cases the justices had decided since February 2001, although tort plaintiff lawyers were heavy contributors to the Democratic controlled Illinois Supreme Court.¹⁰⁶ Indeed, “[s]carcely a member of the court has been elected without the financial backing of the state’s trial lawyers.”¹⁰⁷ The personal-injury lawyers often support more than one candidate in a contest, and then “reward primary winners with even more money to help the candidates in November, even when they face no serious threats in the general elections.”¹⁰⁸ But these contributions did not lead to plaintiff-friendly judges.

In the year 2000 alone, Chicago personal-injury lawyer Joseph A. Power, Jr. and his law firm and partners gave financial support to three Illinois Supreme Court candidates to the tune of \$63,000.¹⁰⁹ His reaction to the *Chicago Daily Law Bulletin* study: “Had I known ahead of time that the candidates were going to take two-thirds of the cases and decide them in favor of [the defense], I would have donated the money to a good charity.”¹¹⁰ Whatever his intentions may have been (whether he spoke in jest or in earnest), he clearly did not influence the results.

Of course, the fact that there is no statistical correlation between the major contributors to the campaigns of justices of the Illinois Supreme Court and success before that court—the fact that major contributors were just as likely to lose cases

105. Daniel C. Vock, *Dem Majority Aside, High Court Leans Right*, CHI. DAILY L. BULL. Sept. 3, 2002, at 1. The *Chicago Daily Law Bulletin*’s

conclusions are part of a comprehensive Law Bulletin analysis of every high court decision issued in the last 19 months. The rulings were broken into a number of factors, and each variable was entered in a computer database to examine how the judges rule in different types of cases, their tendencies toward various types of litigants and how the justices rule in relation to each other.

Id.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Vock, *supra* note 105.

before these justices¹¹¹—does not preclude an argument that the contributions are corrupting. Perhaps, if the contributors had given less, they would have lost even more than two-thirds of the cases. Yet, the statistical evidence is still relevant because it does demonstrate that in Illinois, at least, there is no statistical evidence supporting the assertion of corruption. Yet, that assertion is often repeated as if it had the certainty of a law of physics, just as the night follows the day.

Recently, those who supported limits on jury awards in malpractice cases spent millions of dollars to defeat an Illinois Supreme Court justice who opposed that view. The voters retained the justice.¹¹² The more expensive campaign does not always win.

3. *The Michigan Experience*

One robin does not make a spring, to coin a phrase (or to repeat one coined a long time ago), and one state, even one as populous as Illinois, does not demonstrate a trend. Let us turn to a study of the Supreme Court of the State of Michigan. This analysis included a complete campaign profile of the state supreme court that included at least one election for each of the

111. The private attorneys who contributed to at least one member of the Illinois Supreme Court and later appeared before that court, in order of funds contributed, are:

- (1) Jerome Mirza gave \$11,264, appeared in three cases and lost all three;
- (2) Robert A. Clifford gave \$9500, appeared in two cases and lost both;
- (3) Leonard M. Ring, gave \$7750, appeared in two cases, lost one and received a split decision in the second;
- (4) Philip H. Corboy gave \$4450, appeared in three cases, lost one and had two split decisions;
- (5) Joseph Curcio gave \$4100 and appeared in one case which he won; and, Patrick A. Salvi gave \$3030 and appeared in only one case, filing an amicus brief.
- (6) Amiel Stephen Cueto gave \$3000 and appeared in one case, which he lost.
- (7) 66 other attorneys who gave less than \$3000 each had similar mixed results.

112. Monique Garcia, *State Supreme Court Justice Wins Retention Battle*, CHI. TRIB., Nov. 3, 2010, http://articles.chicagotribune.com/2010-11-02/news/ct-elect-kilbride-20101102_1_jury-awards-retention-battle-constitutionality-of-state-law. Justice Thomas Kilbride needed 60% to win his retention election (where he runs against his record and does not run against any other candidate). He won about 65% of the vote, to win a second ten-year term. Political advertisements, featuring actors portraying rapists and murderers, claimed he was soft on crime. Those advertisements triggered “backlash from other judges, lawyers and legal scholars who pointed out that Kilbride’s opinions were based on legal procedures and points of law.” *Id.* In response to attacks by the Illinois Civil Justice League, the state Democratic Party, unions, and trial lawyers contributed \$3 million to retain Kilbride.

sitting justices. The investigators collected data for an eight-year period, 1990-98.¹¹³ The conclusions are similar: the data do not support any claim that the judges favored or leaned towards the contributor-litigants.

During an eight-year period covering five election cycles, 89% of the cases that the Michigan Supreme Court decided involved a contributor who was either a party or was an attorney.¹¹⁴ Yet, when we look more closely, we find that “more than half of those cases involved a state-employed attorney who had made a campaign contribution.”¹¹⁵ This lawyer was representing the state, not a private client, when appearing before the court.¹¹⁶ Lawyers constituted 23% of the contributors, but at least 80% of these lawyers never appeared before the court during the entire time of the study.¹¹⁷ In Michigan, the judicial candidates contributed only 2% of the total funds raised.¹¹⁸

In Michigan, like Illinois, one cannot find a statistical linkage between judicial campaign contributions and outcomes favorable to those who gave the contributions. For example, one law firm (and its 53 individual lawyers) contributed the most to judicial candidates over the five election cycles; they gave a total of \$344,403.¹¹⁹ However, only \$41,735 (12%) of that amount went to candidates who won and then became supreme

113. According to the authors:

Databases were created of all campaign contributions to all winning candidates during the study period, and those contributors' names were matched against a database of the parties and attorneys whose cases were heard by the Supreme Court from 1991 through 1999. During that time, 26 candidates sought one of the seven positions, several of them more than once, and raised a total of \$9,536,710. The 2000 Supreme Court races, where nine candidates spent a total of \$6,352,002 in just one election, are not included in this study because those elected have not yet participated in enough cases to make the process of matching contributors and litigants worthwhile.

SAMANTHA SANCHEZ, NAT'L INST. ON MONEY IN STATE POLITICS, CAMPAIGN CONTRIBUTIONS AND THE MICHIGAN SUPREME COURT 2 (2002), <http://www.policyarchive.org/handle/10207/bitstreams/5961.pdf>.

114. *Id.* at 1.

115. *Id.*

116. *Id.*

117. *Id.* at 6.

118. SANCHEZ, MICHIGAN SUPREME COURT, *supra* note 113, at 6.

119. *Id.* at 9.

court justices.¹²⁰ The nine lawyers from that firm “who actually argued cases before the Court gave just \$4532 to members of the Court.”¹²¹ The law firm was involved in twenty-three cases four of which were amicus brief.¹²² If we turn to the nineteen cases in which the law firm represented a litigant, we find that they “won three, lost [twelve], and got split decisions in four.”¹²³

Maybe the law firm fared so poorly because it gave only \$41,735 to the candidates who won. And, if the contributor-litigants had not given any money, one might argue that they might have lost even more frequently. All we know from the statistical evidence is that it does not suggest that the justices favored these contributor-litigants, who were four times more likely to lose than to win. These statistics cannot reveal the inner workings of the judicial mind. They only show that one cannot find a statistical linkage between judges who are ruling in favor of litigants who contribute to them. Or, more precisely, to the extent that there is any statistical linkage it is negative; that is, to the extent a litigant (or the litigant’s attorney) gave to a judge’s campaign fund, that litigant was more likely to lose the case.

4. *The Wisconsin Experience*

The results in Wisconsin are similar to Illinois and Michigan. If we examine a lengthy period covering several election cycles, the results are similar to those for Illinois and Michigan. For example, during a ten-year period under review, there were 95 cases involving attorney discipline.¹²⁴ Nine of these cases involved attorneys who had contributed to the justices, and in all nine of these cases, the lawyers lost their appeals.¹²⁵ One law firm with eight lawyers was one of the largest contributors in the state. It contributed a total of \$8150

120. *Id.*

121. *Id.*

122. *Id.*

123. SANCHEZ, MICHIGAN SUPREME COURT, *supra* note 113, at 6.

124. SAMANTHA SANCHEZ, NAT’L INST. ON MONEY IN STATE POLS., CAMPAIGN CONTRIBUTIONS AND THE WISCONSIN SUPREME COURT 6 (2001), <http://www.policyarchive/handle/10207/bitstreams/6002.pdf>.

125. *Id.* at 6.

to six justices.¹²⁶ That firm argued seven cases before the state, winning two and losing five.¹²⁷

The available data, as best as can be determined, do not support any inference that judges tilt towards those litigants who contributed to their judicial campaigns. One can always claim that the judicial campaign contributions create judicial bias, but the figures and statistics do not support such an easy assertion.¹²⁸

5. Conclusion

These statistics from three major states may not necessarily represent what we might find in other jurisdictions. In addition, cases that go before appellate courts are often complex, so that it may be difficult to determine if a decision is a complete victory for any party. The party may win, but the ruling of law may not be exactly what the party had desired and might come back to haunt the party, particularly if the party is an institutional litigant (a union, a major corporation, a class-action law firm) who often appears before a court. In addition, if a contributor wins a case, one can argue that he or she might have won anyway, so that the contribution was superfluous.

Nonetheless, these statistical studies do show that charges of corruption can only be proved by looking at specific situations and motivations, not by painting with a broad brush and postulating as fact the claim that there is a linkage between campaign contributions and judicial decisionmaking.

Even if judicial campaign contributions do not determine how a judge will decide a case, that fact does not mean that one should oppose an appointive selection. There may be persons who would make good judges but may be reluctant to seek election when they are unsure of raising funds and are unwilling to contribute seed money (by securing a second mortgage from their house) to fight a campaign that they are not certain to win. What they do know with certainty is that the second mortgage on their house will remain long after an unsuccessful election is a memory.

126. *Id.* at 7.

127. *Id.*

128. *Id.*

If there were no elections, there would be no need for judges to raise campaign contributions from litigants or lawyers who later appear before the judge. Still, we should not delude ourselves into thinking that in an appointive system the judicial candidate meekly sits at home and then, out of the blue, the president calls and says, “I would like to appoint you to the Second Circuit.” Judicial appointees are often no stranger to politics. No one becomes a judge by taking a civil-service examination. Nor can we assert that an appointive system will pick out those people who would in fact make good judges because the appointers (the president, the governor, the “merit selection commission”) often have their own agenda and disinterested objectivity may not be high on their list.

V. THE FREE SPEECH OF JUDGES

A. When Judges Are Not Campaigning

For many years, courts gave scant recognition to the free speech rights of judges, whether campaigning or simply acting in normal ways while remaining a judge. For many years, many judges did not even attempt to balance societal interests in placing limits on the speech of judges with societal interests in free speech.¹²⁹

A leading case illustrating how little judges used to think about the free speech rights of judges is *In re Bonin*.¹³⁰ The court held that a judge violated a judicial code when he attended a public meeting that included a lecture by Gore Vidal on “Sex and Politics in Massachusetts.”¹³¹ At this meeting, the judge heard comments about a case pending in the superior court—a criminal case alleging illegal sexual acts between men and

129. ROTUNDA & NOWAK, *supra* note 26, § 20.42(d); JEFFREY SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS, §§ 10:30-10:31 (2d ed. 1995); Talbot D’Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611 (1987); Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181 (1986); Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983 (1985); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589 (1989); Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 U.C.L.A. L. REV. 207 (1987); J. Scott Gary, Comment, *Ethical Conduct in a Judicial Campaign: Is Campaigning an Ethical Activity?*, 57 WASH. L. REV. 119 (1981).

130. 378 N.E.2d 669 (Mass. 1978).

131. *Id.* at 672, 682.

boys.¹³² Judge Bonin was the chief judge of the superior court, but this criminal case was *not* before him.

The Massachusetts Supreme Judicial Court said that Judge Bonin should have known that the purpose of the public meeting was to raise money for the criminal defendants. In addition, by attending this public meeting, Judge Bonin “not only exposed himself to *ex parte* or one-sided statements and argumentation on matters before his court, but further compromised his position by seeming to favor or to have particular sympathy with the views of the partisan group which sponsored the affair.”¹³³ The Massachusetts Supreme Judicial Court acknowledged that normally “any judge would be entirely free to attend a public lecture about sex and politics whether or not sponsored by a ‘gay’ group.”¹³⁴ Yet that same court unanimously held that Judge Bonin’s actions were improper and justified his suspension and censure.

However, Judge Bonin knew that he had not been assigned to hear this criminal case, and he would make no ruling regarding it, so the court’s reference to hearing “one-sided argumentation” was not particularly relevant. Moreover, Judge Bonin could read newspaper stories about the case, and we would not consider that to infect the judge with illegal *ex parte* arguments. When Judge Bonin was on the bench, he made no comments regarding that case, because it was not before him. And when Judge Bonin was off the bench (at the large public meeting), he also made no remarks or comments about the case. He simply attended a meeting. Granted, some people might recognize him and infer that his attendance meant sympathy for the defendants. On the other hand, one could just as well conclude that the judge was curious and wanted to see Gore Vidal speak on sex in Massachusetts.¹³⁵

In re Bonin embraced a very broad view of the *ex parte* prohibition, and a very narrow view of the First Amendment right of a judge to attend a lecture. Judges are human beings who cannot divorce themselves from the real world, public

132. *Id.* at 679.

133. *Id.* at 683.

134. *Id.* at 683.

135. STEVEN LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES 44 (1984).

discussions, newspapers, and the like.¹³⁶ The Massachusetts court acknowledged that normally “any judge would be entirely free to attend a public lecture about sex and politics whether or not sponsored by a ‘gay’ group.” Yet the court claimed that Judge Bonin’s actions were different because the lecture concerned cases pending in the superior court where he was chief justice but not the presiding judge.

Contrast *Bonin* with an incident involving Justice Benjamin N. Cardozo. Shortly *before* he had authored the leading tort decision of *Palsgraf v. Long Island Railroad Co.*,¹³⁷ Justice Cardozo attended a meeting of The American Law Institute (ALI). The ALI used the facts of that very case as the focus for a debate at its meeting.¹³⁸ Cardozo attended the ALI meeting and listened to the discussion on unforeseeable plaintiffs, but he did not vote on the question.¹³⁹ By a single vote, and after a “long and lively debate,” the ALI voted that there should be no liability.¹⁴⁰ When he later decided *Palsgraf*, Cardozo agreed with the ALI position.¹⁴¹ No court ever reprimanded Cardozo for attending the ALI discussion. Not many people may have recognized Judge Bonin, but nearly everyone at the ALI meeting would have recognized Cardozo. Yet, he did not think that the mere fact that the ALI had exposed him to a discussion required him to disqualify himself. And, of course, even if he had not heard the discussion, he could have read about the ALI position in its proceedings. Cardozo would later decide *Palsgraf*; Bonin would never decide any issue regarding the criminal case that interested Gore Vidal and Judge Bonin.

Judges often hear arguments about the governing law outside of the lawyers’ presence because they are supposed to be looking at principles larger than issues facing particular litigants in a particular case.¹⁴² Thus, it is perfectly proper for law schools to ask judges to judge moot court cases about issues that

136. William Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. ASS’N. B. N.Y.C. 694, 711 (1973).

137. 162 N.E. 99 (N.Y. 1928).

138. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 148 (Farrar, Strauss & Giroux 1976).

139. *Id.*

140. *Id.* at 148-49.

141. *Id.* at 149.

142. *Id.* at 148.

may be or come before them. Judges may also read law review articles arguing about what the law should be, or read dissents, concurring opinions, and majority opinions that discuss the law even though the judges have similar cases before them.¹⁴³

Nonetheless, some courts, dominated by people with no strong sense of humor, have even disciplined judges for writing memoranda in limerick form.¹⁴⁴ Although these appellate judges do not seem to appreciate the whimsical or droll, other judges, including United States Supreme Court Justices, have engaged in puns or other forms of humor, with no one even suggesting that such behavior was improper.¹⁴⁵

Bonin typifies a judicial regime that gave little weight to the free speech right of judges. For years that regime dominated the precedent, but *Republican Party of Minnesota v. White* overthrew it.¹⁴⁶ Let us now turn to that case.

B. When Judicial Candidates Are Campaigning for Office

1. Introduction

The protection that the First Amendment offers to judges is affected by the fact that judges also have special obligations that do not restrict ordinary people who do not assume the status of a judge. For example, if the judge, while acting in his or her capacity as judge, espouses racial bigotry, the judge is exercising no First Amendment privilege that would immunize the judge from discipline.¹⁴⁷

143. In *In re Gridley*, 417 So. 2d 950, 954-56 (Fla. 1982), the court refused to discipline a trial judge who had written letters to the editor and an article in his church newsletter expressing his opposition to capital punishment (though the judge did state that he would follow the law as written). Yet, there was a dissent, and even the majority said that Judge Gridley's statements on the death penalty were "close to the dividing line." *Id.* at 954.

144. *In re Rome*, 542 P.2d 676, 680-86 (Kan. 1975); see also *State ex rel. Comm'n on Judicial Qualifications v. Rome*, 623 P.2d 1307 (Kan. 1981).

145. *E.g.*, *Maine v. Taylor*, 477 U.S. 131 (1986) (involving a state prohibition on the importation of live baitfish from out of state). Justice Stevens, dissenting, said, "There is something fishy about this case." *Id.* at 152.

146. 536 U.S. 765 (2002).

147. Abbie G. Baynes, *Judicial Speech: A First Amendment Analysis*, 6 GEO. J. LEGAL ETHICS 81, 81 (1992); Stanley Mosk, *Judges Have First Amendment Rights*, CAL. LAW., Oct. 1982, at 30.

On the other hand, one would think that the strongest First Amendment rights should protect a judge or lawyer running for judicial office. Elections and political campaigns should be at the heart of the First Amendment. Once the state decides to have elections, that decision carries with it a certain amount of baggage. Part of the baggage is the First Amendment. The state should not be able to take the politics out of politics.

What has happened is that the people in many states have decided to choose their judges by election. In response, many states have chosen to extensively regulate the campaign speech of the judicial candidates. These regulations, usually based on the ABA Model Rules of Judicial Conduct, are rules of the court. That allows state courts to impose these restrictions by the simple act of rulemaking, just like they promulgate Rules of Civil Procedure. Because incumbent judges promulgate rules that govern the campaign speech of judicial candidates, one should not be surprised that these rules tend to be incumbent-protection legislation.

Is it really permissible for state law (whether court rule or state statute) to restrict what the candidates say? Can the state determine that the voters must decide among the candidates but that the candidates may not tell the voters why they should cast their votes for them? The United States Supreme Court answered some of these questions in *Republican Party of Minnesota v. White*,¹⁴⁸ and the Court came down strongly on the side of free speech.

In *White*, a candidate for judicial office (joined as well by various political groups including the Republican Party of Minnesota) sued state boards and offices who established and enforced judicial ethics. They argued that the Minnesota Supreme Court's canon of judicial conduct that prohibited candidates for judicial election from "announcing" their views on disputed legal or political issues violated the First Amendment. The United States Supreme Court agreed.

White is important not merely because it decided the question before the Court but because it embraced a judicial methodology that favors a more active review of state regulations of judicial campaign speech. The Court's opinion

148. See generally 536 U.S. 765. The author was of counsel for the Republican Party of Minnesota in that case.

and the questions during oral argument also demonstrate that several Justices view restrictions on campaign speech as a form of incumbent-protection legislation.

The fact that the Court uses strict scrutiny for this type of speech, and that at least some of the Justices recognize that incumbents impose campaign restrictions as a form of job security are two factors that portend an uncertain future for other rules regulating campaign speech.

Campaign speech is well within the essence of the First Amendment, but judicial elections are different in that judges are supposed to decide cases on the basis of merit, not on the basis of interest groups, pressure politics, and polling data.¹⁴⁹ On the other hand, if a state requires that its judges win popular elections, to some degree the judicial candidates must assume the burden of political campaigns. Like ham and eggs, or eggs and cholesterol, elections and campaign speech go together. Even if the state ameliorates the effects of political campaigns by requiring that judges be selected in nonpartisan elections, there will still be elections and that means campaign speeches.

If the arguments for regulating campaign speech fail in the case of *judicial* campaign speech—where any state interests in regulating political speech should be at their apex—then *Republican Party of Minnesota v. White* casts a long shadow that will extend far beyond the rules governing judicial elections.¹⁵⁰

First, let us sum up the *White* decision and then consider how other campaign restrictions might stack up in light of the active review in which the Court engaged in *Republican Party of Minnesota v. White*.

2. A Brief Précis of the White Decision

Republican Party of Minnesota v. White considered constitutional challenges to the Minnesota Code of Judicial

149. Cf. Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 GEO. J. LEGAL ETHICS 127, 131 (2001).

150. See ROTUNDA & NOWAK, *supra* note 26, §§ 20.50-20.51 (discussing constitutional limits on government efforts to regulate campaign speech of elected officials, typically in the legislative or executive branches); cf. Ronald D. Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda*, 53 TEX. L. REV. 935 (1975).

Conduct.¹⁵¹ That Code, like the ABA Model Code of Judicial Conduct, places various limits on the candidates' speech when the state selects its judges by election. One rule prohibited a judicial candidate or judge from making pledges or promises on how he will rule in a particular case.¹⁵² That clause was not before the Court. The constitutional issue focused on a second Minnesota rule of judicial ethics. It prohibited a candidate for judicial office from "announcing" a view on any "disputed legal or political" issue if the issue might come before a court.¹⁵³ This clause prohibited a candidate's "mere statement" even if he did not bind himself to maintain that position after election.

The ABA Model Judicial Code at the time did not have (and still does not have) the "announce" provision, but the Minnesota Supreme Court said that its "announce" provision was intended to be similar to another provision of the ABA Model Judicial Code that prohibits judicial candidates from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."¹⁵⁴

151. See generally 536 U.S. 756.

152. MINN. CODE OF JUDICIAL CONDUCT R. 2.10(B) (2008). The corresponding ABA provision is MODEL CODE OF JUDICIAL CONDUCT R. 2.10(B) (2007). The rule at issue in *White* was MINN. CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i), which has since been abrogated. See Order Promulgating Revised Minn. Code of Judicial Conduct (Minn. Dec. 18, 2008) (No. ADM08-8004).

153. Canon 5A(3)(d)(i) of the Minnesota Code of Judicial Conduct stated that judicial candidates may not "make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] announce his or her views on disputed legal or political issues . . ." (emphasis added).

154. MODEL CODE OF JUDICIAL CONDUCT, Canon 5A(3)(d)(ii) (1998). The ABA, in the 1972 version of its Model Code, had an "announce clause," but, because of First Amendment concerns, dropped it and replaced it with the "appear to commit" language. See LISA MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE 50* (1992). Minnesota refused to adopt the ABA's new formulation, but at oral argument contended that its "announce" clause was really the same as the ABA provision *that it had specifically refused to adopt!*

At oral argument, respondents argued that the limiting constructions placed upon Minnesota's announce clause by the Eighth Circuit, and adopted by the Minnesota Supreme Court, render the scope of the clause no broader than the ABA's 1990 canon. This argument is somewhat curious because, based on the same constitutional concerns that had motivated the ABA, the Minnesota Supreme Court was urged to replace the announce clause with the new ABA language, but, unlike other jurisdictions, declined. The ABA, however, agrees with respondents' position . . . We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA

Minnesota claimed that its “announce clause” is really the same as the ABA “commit or appear to commit” clause.¹⁵⁵ Thus, the Minnesota Supreme Court placed limitations upon the scope of the announce clause that, in the words of the United States Supreme Court, “are not (to put it politely) immediately apparent from its text.”¹⁵⁶ The Court accepted this remarkable piece of legislative surgery and then proceeded to invalidate this clause, even with the newly discovered limitations on its breadth.

In *Republican Party of Minnesota v. White*,¹⁵⁷ Justice Scalia, writing for five members of the Court, held that this second prohibition on judicial candidates violates the First Amendment. In order for the announce clause to survive strict scrutiny, it must be narrowly tailored to serve a compelling state interest. And, in order to be narrowly tailored, it must not “unnecessarily circumscrib[e] protected expression.”¹⁵⁸ The Minnesota rule did not meet this rigorous test.

The announce clause was not narrowly tailored to promote “impartiality,” in the sense of no bias for or against any party to the proceeding because it did not restrict speech for or against particular parties, but rather speech for or against particular issues. If the state meant to promote “impartiality” in the sense of no preconception for or against a particular legal view, that is not a compelling state interest, the Court said, because it is both “virtually impossible,” and also not desirable, to find a judge who does not have preconceptions about the law.¹⁵⁹ Indeed, the Minnesota Constitution specifically requires judges to be “learned in the law.”¹⁶⁰

Nor did the Minnesota announce clause promote impartiality in the sense of “open-mindedness” because it is

canon are one and the same. No aspect of our constitutional analysis turns on this question.

White, 536 U.S. at 773 n.5 (citations omitted).

155. Transcript of Oral Argument at 39-40, *Republican Party v. Kelly*, *decided sub nom.* *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (No. 01-521).

156. *White*, 536 U.S. at 771.

157. 536 U.S. 736.

158. *Id.* at 775 (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)).

159. *Id.* at 777.

160. MINN. CONST., art. VI, § 5.

woefully underinclusive for that purpose.¹⁶¹ For example, the rule allows a judge to confront a legal issue on which he had already expressed an extrajudicial opinion while on the bench. The Minnesota Code of Judicial Conduct, in fact, encourages judges to speak out on disputed legal issues outside the context of adjudication, such as in classes that they teach, and in books and speeches that they may write.¹⁶²

The Minnesota rule prohibited a judicial candidate from saying, “I think it is constitutional for the legislature to prohibit same-sex marriage.” Yet she may say the very same thing up until the very day before she declares herself a candidate. If she is already a judge and running for reelection, she may make that statement repeatedly (until litigation is pending). The Court held that the announce clause is so underinclusive that to believe its purpose is to promote open-mindedness is “a challenge to the credulous.”¹⁶³

The Court concluded that what Minnesota may not do is to “censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer. Deciding the relevance of candidate speech is the right of the voters, not the State.”¹⁶⁴

3. *The Role of Strict Scrutiny*

What is important is not merely the conclusion that *White* reached but the test that it applied in getting there. The Court not only acted as if it were applying a rigorous, strict-scrutiny test, as the summary of its reasoning shows, but *White* explicitly adopted that test with vigor, holding that those who seek to

161. *White*, 536 U.S. at 778-79

162. MINNESOTA CODE OF JUDICIAL CONDUCT, Canon 4B (2002) stated: “A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law . . .” The comment to the Minnesota Code of Judicial Conduct, Canon 4(B) then added, “To the extent that time permits, a judge *is encouraged* to do so.” (emphasis added).

163. *White*, 536 U.S. at 780.

164. *Id.* at 794 (Kennedy, J., concurring) (citing *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)). Justice O’Connor also filed a concurring opinion. Justice Stevens filed a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined. Justice Ginsburg filed a dissenting opinion in which Justices Stevens, Souter, and Breyer joined. Justice Ginsburg’s dissent argued: “In view of the magisterial role judges must fill in a system of justice, a role that removes them from the partisan fray, States may limit judicial campaign speech by measures impermissible in elections for political office.” *Id.* at 807 (Ginsburg, J., dissenting).

justify content-based restrictions of speech by candidates for public office have the burden to prove that any restriction is (1) narrowly tailored, to serve (2) a compelling state interest. The strict-scrutiny test represents very active judicial review, which is why the Court almost always invalidates laws when the Court evaluates them under strict scrutiny. Hence, the conclusion that the Court agreed to apply the strict scrutiny test is significant.

I emphasize this point because, oddly enough, the West headnotes claim that there was only a plurality on this issue. I realize that headnotes are not part of the opinion, and that a lawyer should not rely on headnotes to determine what the Court held anymore than an English major should rely on Cliff's Notes to understand what Hamlet really means. Still, we are often in a hurry and often we just want the shortened version of a long opinion. In this case, the shortened version, in the form of headnotes, is wrong.¹⁶⁵

One who would rely on these headnotes would think that a majority of the Court *rejected* strict scrutiny. One headnote says "Under the strict-scrutiny test, party challenging content-based restriction of speech by candidates for public office has the burden to prove that the restriction is (1) narrowly tailored, to serve (2) a compelling state interest. (Per Justice Scalia, with three justices concurring and one concurring in the result)."¹⁶⁶

West reemphasizes this point in its next headnote:

In order for party challenging content-based restriction of speech by candidates for public office to show that restriction is narrowly tailored under the strict scrutiny test, party must demonstrate that restriction does not unnecessarily circumscribe protected expression. (Per Justice Scalia, with three justices concurring and one concurring in the result).¹⁶⁷

These two headnotes are, frankly, inaccurate. If one turns to the actual decision instead of the Cliff's Notes version, it is clear that a majority of the Court holds that the proper test is strict scrutiny. The Court opinion says that it is a majority

165. One does not find this claim in the summary in the official United States Reports. 536 U.S. 765. Nor do the headnotes of the Lawyer's Edition make this assertion. 153 L. Ed. 2d 694.

166. 122 S. Ct. at 2529 headnote 2.

167. *Id.* at 2529 headnote 3.

opinion and lists the names of the five Justices who joined it.¹⁶⁸ There were two concurring opinions, both labeled “concurring.”¹⁶⁹ Neither of these Justices labeled their opinion as “concurring in part” or “concurring in the result.”

The Justices who wrote these two concurring opinions certainly thought that they were joining the opinion of the Court and that the Court’s opinion uses strict scrutiny. First, Justice O’Connor, in her concurring opinion made her position unambiguous as she said simply, “I join the opinion of the Court”¹⁷⁰

Justice Kennedy, the only other concurring opinion, also made it quite plain that he embraced the strict-scrutiny test. First, he acknowledged that there are prior cases that constitute “authority for the Court to apply strict scrutiny analysis to resolve some First Amendment cases,” and that “the Court explains in clear and forceful terms why the Minnesota regulatory scheme fails that test.”¹⁷¹ That sentence is followed by the succinct statement: “So I join its opinion.”¹⁷² In other words, he joins the majority *because* it uses “that test,” i.e., strict scrutiny.

Indeed, one could read Kennedy’s opinion as saying that he agrees that the opinion of the Court has followed the strict-scrutiny test, but, if he had his druthers, he would apply an even stricter test than strict scrutiny: he would adopt a *per se* rule invalidating such campaign restrictions. In the sentence following the one just quoted, Justice Kennedy said, “I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests.”¹⁷³

At a minimum, we still have a majority of the Court adopting strict scrutiny, but one of these Justices would prefer an even stricter standard that would simply ban state efforts to regulate the content of campaign speech. As Kennedy instructs

168. See *White*, 536 U.S. at 766.

169. *Id.* at 788 (O’Connor, J., concurring); *id.* at 792 (Kennedy, J., concurring).

170. *Id.* at 788 (O’Connor, J., concurring).

171. *Id.* at 792 (Kennedy, J., concurring) (citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991)).

172. *White*, 536 U.S. at 792.

173. *Id.* at 793.

us, “The political speech of candidates is at the heart of the First Amendment, and direct restrictions on the content of candidate speech are simply beyond the power of government to impose.”¹⁷⁴

4. Campaign Restrictions on Judicial Speech As Incumbent Protection Legislation

During the course of the oral argument in *White*, the Justices revealed their concern that the judicial restrictions at issue appeared to be designed less to protect voters and more to protect incumbent judges from criticism from challengers. The restrictions on what judicial candidates could say in the course of a political campaign were, in practice, one-sided. Incumbent judges when writing their majority opinions, or concurrences, or dissents were free to say whatever they wanted in terms of criticizing their colleagues, explaining how they would have ruled in that case or how they would rule in the future, why their view is correct, and so forth. The Minnesota rule restricting judicial campaign speech did not apply to dictum, even when judges knew that newspapers would likely quote that dictum.

The opinion of the Court does not delve into motives behind the incumbent judges adopting ethics rules that apply to challengers in a different way than they apply to sitting judges. But, in the oral argument, at least one Justice was more candid and blunt. That Justice said:

And what we end up with at the end of the day is a system where an incumbent judge can express views in written opinions, and perhaps otherwise, as well, and yet a candidate for that office is somehow restricted from discussing the very same thing in the election campaign. *That’s kind of an odd system, designed to what? Maintain incumbent judges, or what?*¹⁷⁵

The *White* decision, its method of analysis, and its invocation of the strict-scrutiny test indicate that the Court will

174. *Id.*

175. Transcript of Oral Argument at 24-25, *Republican Party of Minnesota v. Kelly*, decided *sub nom.* *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (emphasis added).

be wary of campaign-reform legislation that is disguised incumbent-protection legislation.

In recent times, campaigning and electioneering have become a regulated industry, and the regulators are the incumbents. The Court is aware of the self-interest, whether conscious or unconscious, of those who do the regulating. *White* is signaling that the Court will not grant the deference to these regulators that it grants in situations not implicating the First Amendment. *White*, in short, casts a net that may catch far more than overly restrictive judicial campaign restrictions. *White* is a harbinger of what is to come in any challenges to other laws, regulations, or court rules. *Citizens United*,¹⁷⁶ discussed below, is understandable in light of *White*. But first we must take a brief detour with *Caperton*.¹⁷⁷

VI. DISQUALIFYING JUDGES WHO BENEFIT FROM SUBSTANTIAL CAMPAIGN EXPENDITURES: CAPERTON AND THE LIMITS OF A “DEBT OF GRATITUDE”

Court rules, case law, and state statutes (not constitutional law) usually govern when judges must disqualify themselves because of “kinship, personal bias, state policy, [and] remoteness of interest.”¹⁷⁸ The Due Process Clause imposes few rules requiring judicial disqualification. Before *Caperton v. A.T. Massey Coal Co.*,¹⁷⁹ due process imposed judicial disqualification in two basic situations:¹⁸⁰ (1) the judge had a direct, personal, substantial pecuniary interest in the case; or (2) the judge acted as judge, jury, prosecutor, and complaining witness when there was no need for an instant response.¹⁸¹

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

177. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009).

178. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (citing *Wheeling v. Black*, 25 W. Va. 266, 270 (1884)); see also *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (“Of course, most questions concerning a judge’s qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard.”).

179. 129 S. Ct. 2252. For further analysis, see Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247 (2010).

180. *Caperton*, 129 S. Ct. at 2259-61.

181. See *id.*

Caperton adds a third category. The facts of the case and the holding are deceptively simple to summarize, at least initially. As the majority pithily explains, there was a dispute between A.T. Massey Coal Co. (Massey) and three corporations under the control of Caperton, the petitioner.¹⁸² The trial court entered a jury verdict of \$50 million against Massey, and the West Virginia Supreme Court of Appeals reversed (3 to 2).¹⁸³ Chief Justice Benjamin was in the majority, and (according to the United States Supreme Court) he “had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation [Don Blankenship] found liable for the damages.”¹⁸⁴ That, said the majority, meant that Benjamin’s refusal to recuse himself violated due process.

One reason this summary is deceptive is that existing statutes already imposed limits on campaign contributions, a maximum of \$1000. Blankenship gave only the statutory maximum contribution to Benjamin’s campaign.¹⁸⁵ If the problem was the excessive contribution, existing statutes already took care of that. And, \$1000 is hardly “excessive.”

The second reason that this summary is deceptive is because the problem that the Court (speaking through Justice Kennedy) identifies is not Blankenship’s contribution—his \$1000 donation was insignificant—but Blankenship’s independent expenditures.¹⁸⁶ There is no statutory maximum on independent expenditures, and the Court in *Citizens United* (also speaking through Justice Kennedy) held that the government cannot restrict the free speech right of individuals and entities to spend money promoting their views, as long as these expenditures are independent of the candidate.¹⁸⁷ People like Mr. Blankenship have a constitutional right to make unlimited independent expenditures. Neither Justice Benjamin nor the

182. *Id.* at 2257.

183. *Id.* at 2256-57.

184. *Id.* at 2256-57 (emphasis added). The political action committee (PAC) of A.T. Massey Coal Company also contributed \$1000 to Benjamin’s campaign. Massey Coal Company itself gave no money to either candidate.

185. *Caperton*, 129 S. Ct. at 2257; see also Rotunda, *supra* note 179, 258 (discussing limits in West Virginia).

186. *Caperton*, 129 S. Ct. at 2257 (emphasis added).

187. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

State of West Virginia could prohibit Blankenship from making these independent expenditures or control how he spent his money.

Hence, *Caperton* creates this third constitutional category that requires judicial recusal: sometimes, a judge must disqualify himself because an individual—who is not a lawyer or party before the Court but who has an interest in a case that is before the court—made *independent* campaign expenditures that may have benefited the sitting judge in securing his election.¹⁸⁸ The question is when does “sometimes” occur? And, what exactly was Blankenship’s interest in the case? We know that he is not a party, but the Court does not pursue the line of inquiry except to say that Blankenship was “interested” in the case.

The answer to these questions is not nearly as neat or as simple as one might think. *Caperton* described its holding, as follows:

In this case the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of \$50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion. The basis for the motion was that the justice *had received campaign contributions in an extraordinary amount* from, and through the efforts of, the board chairman and *principal officer* of the corporation found liable for the damages.¹⁸⁹

The news media replicated the majority’s summary of the case. For example, a *New York Times* editorial rhapsodized:

Indeed, the only truly alarming thing about [the *Caperton*] decision was that it was not unanimous. The case drew an unusual array of friend-of-court briefs from across the political spectrum, and such an extreme case about an ethical matter that should transcend ideology should have united all nine justices. Chief Justice Roberts is fond of likening a judge’s role to that of a baseball umpire. It is hard to imagine that professional baseball team

188. *Caperton*, 129 S. Ct. at 2255-56.

189. *Id.* at 2256-57 (emphasis added).

or its fans would trust the fairness of an umpire who accepted \$3 million from one of the teams.¹⁹⁰

Given this description of the case, the result should be obvious. Yet, four Justices dissented. The dissenters appeared to reject the common-sense notion that there is judicial bias when, “without the consent of the other parties—a man chooses the judge in his own cause.”¹⁹¹ After all, the umpire should not accept \$3 million from one of the teams before calling strikes and fouls.¹⁹²

The dissenters, however, did not argue that one party to a controversy should choose the judge who decided the dispute. They dissented because they did not believe the majority when it said “the justice *had received campaign contributions.*”¹⁹³ Indeed, even the majority ends up conceding that the board chairman (Don Blankenship) did not give any large contribution to Chief Justice Benjamin. Instead, Blankenship spent a lot of his money attacking the incumbent, Chief Justice Warren McGraw. And, Mr. Blankenship had no personal financial interest in the case, or at least no interest (if one would pierce the corporate veil) that was anywhere near the \$3 million he spent to attack Justice McGraw, the incumbent.

Blankenship’s “independent expenditures” paid for a steady stream of advertisements that attacked Justice McGraw, the incumbent. No one argued before the Court that Blankenship in any way coordinated with Benjamin’s campaign. These expenditures were truly independent. Blankenship spent “over \$500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements” attacking McGraw.¹⁹⁴ He was the prime funder (almost \$2.5 million of Blankenship’s money) behind an independent entity called, “And For The Sake Of The Kids” (ASK), a political organization dedicated to opposing McGraw.¹⁹⁵ Blankenship focused like a laser beam on attacking

190. Editorial, *Honest Justice*, N.Y. TIMES, June 9, 2009, at A26.

191. *Caperton*, 129 S. Ct. at 2265 (emphasis added).

192. See *Honest Justice*, *supra* note 190.

193. *Caperton*, 129 S. Ct. at 2256 (emphasis added).

194. *Id.* at 2257.

195. *Id.* As the news reported at the time, ASK was dedicated to opposing McGraw:

The group has been running ads assailing McGraw’s vote in a 3-2 court edict that reinstated probation for convicted child rapist Tony Dean Arbaugh.

McGraw. He said his real purpose was to defeat McGraw.¹⁹⁶ Benjamin benefited from Blankenship's attacks on McGraw because there were only two candidates in the race and whatever hurt one had to help the other.

The dissenters believed, with justification, that that the Court must treat independent expenditures differently than contributions. This distinction between "contributions"—giving money to, or spending money that is coordinated with the candidate—and "expenditures"—spending one's own money to advocate what one feels like advocating—is hardly technical. It is of constitutional dimension.¹⁹⁷

The Court has long protected independent expenditures—those not coordinated with the candidate—as free speech.¹⁹⁸ "[M]oney talks."¹⁹⁹ In contrast, the state has much greater leeway in regulating and limiting contributions.²⁰⁰ Advocating

While on probation, Arbaugh, once charged with assaulting 11 children, some as young as 4, violated conditions and even pleaded guilty to smuggling marijuana into a regional jail.

McGraw's campaign manager, A.V. Gallagher, pointed out the donation by Blankenship alone is six times the amount the incumbent justice has received for the general election "Warren McGraw says he's for the 'working man,' but he's not," Blankenship said in a statement. "He's for trial lawyers and he's for himself. His brother (Attorney General) Darrell McGraw buys what is clearly campaign material with thousands of dollars of public money.

Mannix Porterfield, *For the Sake of the Kids Gets \$2.5 Million, Mostly Massey Cash*, REG.-HERALD, Oct. 15, 2004, reposted at W. VA. CITIZEN ACTION GROUP, http://www.wvcag.org/news/fair_use/2004/10_15.htm (last accessed Feb. 1, 2011). At the time, commentators complained that ASK was a front to oust incumbent Supreme Court Justice Warren McGraw by linking him to his ruling regarding a child molester released from prison. Diane Mufson, Op-Ed., *Blankenship, Massey Could Have Funded New School*, HERALD-DISPATCH (May 12, 2010, 12:00 AM), <http://www.herald-dispatch.com/opinions/x540217122/Diane-Mufson-Blankenship-Massey-could-have-funded-new-school>.

196. *E.g.*, Adam Liptak, *Case May Alter the Election of Judges*, N.Y. TIMES, Feb. 15, 2009, at 29.

197. ROTUNDA & NOWAK, *supra* note 26, § 20.51(b).

198. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 24-25, 47 (1976) (per curiam) ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."); *see also* Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2 ELECTION L.J. 79 (No.1, 2003).

199. *Buckley*, 424 U.S. at 262 (White, J., concurring in part and dissenting in part); *see also* MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 114-46 (2001).

200. *See Buckley*, 424 U.S. at 262.

the “defeat of candidates” has no less “protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.”²⁰¹ Blankenship was exercising his core First Amendment speech when he paid for attack advertisements against Justice McGraw, the sitting justice whom Benjamin defeated.

The following Term of Court, in *Citizens United v. FEC*,²⁰² Justice Kennedy—the same Kennedy who authored *Caperton*—emphasized the importance of independent expenditures. *Citizens United* held that a federal statute prohibiting a corporation’s independent expenditures for electioneering communications violated the First Amendment.²⁰³ Thus, Blankenship was exercising a core constitutional right when he criticized McGraw and urged voters to reject the incumbent. So, the Court tells us that due process requires Benjamin to disqualify himself because Blankenship was exercising his First Amendment rights.²⁰⁴

The state could not ban Blankenship’s independent expenditures anymore than it could ban any political activist from purchasing a megaphone so that the crowd could hear his message more clearly.²⁰⁵ Activists who have more money—e.g., Ross Perot—can buy expensive television commercials to propagate their views. Those of us who do not have the deep pockets of Mayor Bloomberg of New York²⁰⁶ may not use the government to silence the millionaire because our resources are less.²⁰⁷ The idea that “government may restrict the speech of

201. *Id.* at 48 (majority opinion).

202. 130 S. Ct. 876 (2010).

203. *Id.* at 886.

204. The ABA has noticed the interplay between *Citizens United* and *Caperton*. ABA STANDING COMM. ON JUDICIAL INDEPENDENCE, PROPOSED AMENDMENTS TO THE MODEL CODE OF JUDICIAL CONDUCT, at 2 (Discussion Draft 2010).

205. ROTUNDA & NOWAK, *supra* note 26, § 20.51(b)(i), (b)(iii), (b)(v), (c)(ii), (d)(viii).

206. Michael Bloomberg’s campaign treasury totaled more than \$85 million, which was a national record for a personally financed campaign. Henry Goldman, *Bloomberg Wins Third NYC Mayor Term, Beats Comptroller Thompson* (Nov. 4, 2009, 1:36 AM), http://www.bloomberg.com/apps/news?pid=20601103&sid=a0sKkIZ1Dr_w.

207. *See Davis v. FEC*, 128 S. Ct. 2759, 2766 (2008), where the Court invalidated a federal law that said if a self-financed candidate spent in excess of \$350,000 of his or her money, the statute would ease the spending restrictions but only for the non-self-financed candidate.

some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”²⁰⁸

Not only was Blankenship exercising core free speech when he made his independent expenditures; there was little that either Justice McGraw or his challenger, Brent Benjamin, could do about it. Neither McGraw nor Benjamin could control Blankenship’s independent expenditure because Blankenship made those decisions independently. Neither McGraw nor Benjamin could limit or affect what Blankenship was saying, even if they disagreed with the style and tone of the Blankenship message. Benjamin could control only the \$1000 that Blankenship gave to Benjamin’s campaign.²⁰⁹ Neither A.T. Massey Coal Company nor any of its subsidiaries contributed any money to Benjamin’s campaign. They also did not make any independent expenditures that either supported Benjamin or criticized his opponent. Nor did Massey or any of its subsidiaries provide any money to the nonprofit entity, ASK,²¹⁰ the organization that Blankenship funded from his personal fortune. ASK published attack advertisements against McGraw, and Benjamin’s campaign had no control over that either, even if the message of those advertisements did not fit (or was counter to) the message that Benjamin was seeking to distribute.

Campaigns go to great lengths to develop precise messages and strategies. An insensitive or ham-handed ad campaign by an independent third party might distort the campaign’s message or cause a backlash against the candidate, even though the candidate was not responsible for the ads.²¹¹

Justice Kennedy acknowledges (only once) that Blankenship engaged in “independent expenditure.”²¹² But then, a dozen times later he repeatedly relabels these “independent expenditures” as “contributions.”²¹³ He discusses

208. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam).

209. Joint app., vol. I at 208a, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213, at *201A.

210. ASK was an organization established under 26 U.S.C. § 527(e) (2006).

211. *Caperton*, 129 S. Ct. at 2273 (Roberts, C.J., dissenting).

212. *Id.* at 2257 (majority opinion).

213. *See id.* at 2256 (“[T]he justice had received *campaign contributions* in an extraordinary amount from, and through the efforts of, the board chairman”); *id.* at 2257 (discussing “Blankenship’s \$3 million in *contributions*”); *id.* at 2263 (“Not every

the precedent in disqualification cases, and quotes the relevant portions of those cases as referring to “contributions” to the judge, not independent expenditures.²¹⁴ He treats the two concepts, “contributions to Judge Benjamin’s campaign” and “independent expenditures attacking McGraw,” as synonymous but does not explain why. Nor does he suggest that in the future the Court will treat independent expenditures the same as contributions. Indeed, shortly after this opinion, Justice Kennedy, for the Court, reemphasized the distinction between contributions and expenditures.²¹⁵

Blankenship’s independent expenditures opposing Justice McGraw were hardly unusual for him. Blankenship is an activist, daresay an eccentric, who often makes independent expenditures to support his favored causes in West Virginia elections on issues entirely unrelated to Massey. For example, Blankenship spent millions of his own money to unseat candidates who opposed abolishing the state sales tax on food.²¹⁶ He also spent millions to defeat a bond referendum.²¹⁷

campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal”); *id.* at 2264 (“The inquiry centers on the *contribution’s* relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such *contribution* had on the outcome of the election.”); *id.* (“Blankenship *contributed* some \$3 million to unseat the incumbent and replace him with Benjamin. His *contributions* eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin’s campaign committee.”); *id.* (“Whether Blankenship’s *campaign contributions* were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry.”); *id.* (discussing “Blankenship’s *campaign contributions*—in comparison to the total amount *contributed* to the campaign”); *id.* (“The temporal relationship between the *campaign contributions*, the justice’s election, and the pendency of the case is also critical.”); *id.* (stating “when the *campaign contributions* were made”); *id.* at 2265 (“Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship’s extraordinary *contributions* were made”) *Id.* at 2266 (“[S]ome States require recusal based on *campaign contributions*.”); *id.* at 2265 (“The parties point to no other instance involving judicial *campaign contributions* that presents a potential for bias comparable to the circumstances in this case.”) (emphasis added in all cases). This last comment is intriguing. Of course the parties point to no other case—there is no precedent because Justice Kennedy created the rule for the first time in this case. One could just as well say, there is no precedent supporting Caperton’s position. That is a fact of life, not a reason why petitioner should win.

214. *Id.* at 2260 (citing *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972)).

215. *Citizens United v. FEC*, 130 S.Ct. 876, 908 (2010).

216. Brief for Respondents at 6, *Caperton*, 129 S. Ct. 2252 (No. 08-22) [hereinafter Massey Brief].

217. *Id.*

Caperton does not reject the Court's earlier (and later) distinction between contributions and expenditures. Instead, it says that this case has something more—a combination of factors that requires disqualification. The Court considered “all the circumstances of this case” and concluded that “due process requires recusal” because the “probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”²¹⁸

Justice Kennedy thought this case was an “extreme” one, and disqualification under it would be limited to “rare instances.”²¹⁹ He stated: (1) This case is “extreme by any measure;”²²⁰ (2) this is “an exceptional case;”²²¹ (3) this is “an extraordinary situation” that “requires recusal;”²²² (4) the Court could find “no other instance . . . that presents a potential for bias comparable to the circumstances in this case.”²²³ One must apparently look at “all the circumstances of this case.”²²⁴ Let us look at these circumstances.

Justice Kennedy said it was significant that Blankenship had a “personal stake” in this particular case.²²⁵ That is an important factor for the Court, but Kennedy does not explain why it is true. He simply accepted—without discussion—the proposition that this case meant a lot to Blankenship because of Blankenship's financial stake in the outcome.²²⁶

It is true that Blankenship was a principal officer of Massey—he was the Chairman, CEO, and President of Massey.²²⁷ However, his ownership interest was minor. Blankenship is a wealthy man, but he was not anywhere near a

218. *Caperton*, 129 S. Ct. at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). However, *Withrow* said only that the probability of actual bias on the part of a judge or a decisionmaker is too high to be constitutionally tolerable if the decisionmaker has a pecuniary interest in the outcome of the case, or if he “has been the target of personal abuse or criticism from the party before him.” *Withrow*, 421 U.S. at 47. Those factors were not part of *Caperton*.

219. *See Caperton*, 129 S. Ct. at 2265-67.

220. *Id.* at 2265.

221. *Id.* at 2263.

222. *Id.* at 2265.

223. *Id.* at 2265.

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

225. *Id.* at 2263-64.

226. *Id.* at 2265.

227. *Id.* at 2265.

controlling stockholder in Massey. Blankenship owned only 0.35% of Massey's stock.²²⁸

If we were to pierce the corporate veil and pretend that the proportional share of Caperton's damage claim against Massey would come directly out of Blankenship's personal wallet, his share of the judgment in this case (assuming that Massey was liable) would be only \$175,000.²²⁹ If Blankenship really thought he could buy a judge, he was not getting value for his money. It makes little economic sense for Blankenship to spend \$3 million of his own money in order to have a chance to save \$175,000. Perhaps Mr. Blankenship was emotionally tied to this case—an emotion divorced from rationality. But that was not Justice Kennedy's point; Kennedy simply asserted that Blankenship was financially tied to this case. The cold calculus of finances does not explain Blankenship's financial interest.

Prior to *Caperton*, Benjamin decided other cases involving Massey Coal. No party had asked for Benjamin to recuse himself, so he decided and he often ruled against Massey.²³⁰ And, after *Caperton*, Benjamin ruled against Massey in other cases. For example, shortly after the *Caperton* decision in the West Virginia court, Benjamin voted to deny review in another case, which meant that he and his colleagues let stand a \$243 million verdict *against* Massey.²³¹ The \$50 million verdict against Massey was a very large amount to be sure, but it paled in comparison to the quarter of a *billion* dollars that Justice Benjamin approved in the other case, where no one raised disqualification.

One might argue that Benjamin did not cast the deciding vote in that other case but he did in *Caperton*. The problem with that argument is that any rule on disqualification cannot turn on whether the judge will cast the deciding *vote* after oral argument

228. Massey Brief, *supra* note 216, at 5 n.1.

229. *See id.*

230. Justice Benjamin voted against Massey companies at the merits stage in *Helton v. Reed*, 638 S.E.2d 160 (W. Va. 2006), and *U.S. Steel Mining Co. v. Helton*, 631 S.E.2d 559 (W. Va. 2005). He has also ruled against Massey at the petition stage. (*Brown v. Rawl Sales & Processing Co.*, No. 06-1700, slip op. (W. Va. Sept. 7, 2007); *McNeely v. Independence Coal Co.*, No. 042156, slip op. (W. Va. Feb. 9, 2005)); *see also* Press Release, Supreme Court of Appeals of W. Va., Summary of Chief Justice Benjamin's Dispositive Voting Record Regarding Massey Energy Cases from 01/01/2005 to 12/31/2008 (Mar. 2, 2009), http://www.state.wv.us/wvsca/press/march2_09.htm.

231. Massey Brief, *supra* note 216, at 9.

and the deliberation of the judges. Parties have to make their disqualification motion *before* the judges decide. The law does not allow litigants to see how things work out before they file their motion because the disqualified judge is not even supposed to participate in the deliberations.²³²

Kennedy stressed that this judicial election was “decided by fewer than 50,000 votes,”²³³ and so Blankenship’s independent expenditures may have been crucial to Justice Benjamin’s election to the bench. Granted, 50,000 votes is a narrow victory in a well-populated state like California, but not so in West Virginia. Benjamin beat McGraw by 53.3% to 46.7%.²³⁴ The difference between the winner and the loser was seven percentage points! That is not a close election. Consider that in the 2008 election, President Obama enjoyed what many commentators called a landslide.²³⁵ Yet, only 52.87% of the voters picked Obama.²³⁶

Chief Justice Roberts, in his dissent, disputed Kennedy’s assumption that Blankenship’s expenditures were all that important to Benjamin. “Many observers believed that Justice Benjamin’s opponent doomed his candidacy by giving a well-publicized speech that made several curious allegations; this speech was described in the local media as ‘deeply disturbing’ and worse.”²³⁷

232. As Justice Blackmun explained in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), a case involving the disqualification of another judge:

[T]he constitutional violation in this case should not depend on the Court’s apparent belief that Justice Embry cast the deciding vote—a factual assumption that may be incorrect and, to my mind, should be irrelevant to the Court’s analysis. For me, Justice Embry’s mere participation in the shared enterprise of appellate decisionmaking—whether or not he ultimately wrote, or even joined, the Alabama Supreme Court’s opinion—posed an unacceptable danger of subtly distorting the decisionmaking process.

Id. at 831 (Blackmun, J., concurring).

233. *Caperton*, 129 S. Ct. at 2264.

234. *Id.* at 2274 (Roberts, C.J., dissenting).

235. *E.g.*, Mark Silva, *Voters’ Message to GOP: Change*, CHI. TRIB, Nov. 6, 2009, at C13 (“Democrat Barack Obama’s Landslide . . . will demand a new era of rebuilding for a tattered Republican Party.”).

236. Dave Leip’s Atlas of U.S. Presidential Elections, 2008 PRESIDENTIAL GENERAL ELECTION RESULTS, <http://uselectionatlas.org/RESULTS/index.html> (last visited Dec. 31, 2009).

237. *Caperton*, 129 S.Ct. at 2274 (Roberts, C.J., dissenting).

Roberts was much too kind to Justice McGraw. Roberts does not discuss the substance of the speech, but one can easily find discussions in the West Virginia newspapers. On Labor Day, 2004, shortly before the November election, McGraw gave his strange stump speech. Unfortunately for him, someone tape recorded it. McGraw said, for example, that his opponents “tell you that members of my party have opposed school prayer. False! Not so! It’s the Republican Party! . . . And, just this year, *not more than six months ago, the United States Supreme Court approved gay marriage! Not Democrats!*”²³⁸ The speech became known as “The Scream at Racine.” The GOP rebroadcasted it repeatedly.²³⁹ Justice McGraw’s own words defeated him. The more the people learned about Justice McGraw, the more they decided not to vote for him.

As we analyze *Caperton* carefully, we learn that it is difficult to divine or discern a test to determine when due process requires disqualification in a case that is similar to, but not exactly like *Caperton*. We know that the Court will disqualify a judge on constitutional grounds if five members decide that the facts are “extreme.” And, in making the determination, as an “*objective matter*,” that a person who was not a party (but was interested in a case) should not “*choose the judge in his own cause*,” the five members will not distinguish between campaign expenditures and independent campaign contributions.²⁴⁰ What else they will consider is something left to future cases.

Granted, not all legal tests have the nice precision of a diamond jeweler’s scale.²⁴¹ Still, the Supreme Court should be able to offer judges a better test than “it all depends” in deciding whether the judge must recuse himself as a matter of constitutional law. What we do know is that, as a matter of due process, excessive *contributions* or excessive *independent expenditures* may require judges to recuse themselves when a

238. Warren McGraw’s “Rant in Racine,” YOUTUBE, <http://www.youtube.com/watch?v=TQ6nQaE2FM8> (last visited Dec. 31, 2009).

239. Scott Finn, *Caperton v. Massey: What a Long, Strange Case It’s Been*, W. VA. PUB. BROADCASTING (June 9, 2009), <http://www.wvpubcast.org/newsarticle.aspx?id=9955>.

240. *Caperton*, 129 S. Ct. at 2264-65 (emphasis added).

241. Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1361 (2006).

party (or a lawyer to a party) objects, even though Mr. Blankenship had a free speech right to spend—even squander—his own money in the form of independent expenditures.

The Supreme Court remanded the *Caperton* case to the West Virginia Supreme Court of Appeals.²⁴² Justice Benjamin recused himself, and another West Virginia judge sat in his place by special designation.²⁴³ The West Virginia Court, once again, overturned (4 to 1) the \$50 million judgment against Massey Coal.²⁴⁴ So, after all of the litigation, the case ended up exactly where it was before the United States Supreme Court reviewed the case.

Obviously, in the future, lawyers will want to know when they should move to disqualify under *Caperton*, and judges will want to know when they should grant such a motion. Unfortunately, Justice’s Kennedy’s majority opinion is short on specifics. His opinion offers no objective test although he purports to talk of objective and reasonable perceptions:

We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—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. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.²⁴⁵

Kennedy acknowledged that “sometimes no administrable standard may be available” to determine when the judge should disqualify herself.²⁴⁶ He also repeatedly emphasized that this case was unusual, “extreme by any measure,”²⁴⁷ “exceptional,”²⁴⁸ “an extraordinary situation”²⁴⁹ requiring

242. *Caperton*, 129 S. Ct. at 2267.

243. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 357 (W. Va. 2008).

244. *Id.* at 357.

245. *Caperton*, 129 S. Ct. 2263-64.

246. *Id.* at 2265.

247. *Id.*

248. *Id.* at 2263.

249. *Id.* at 2265.

recusal. No other instance “presents a potential for bias comparable to the circumstances in this case.”²⁵⁰ So, the Supreme Court suggests that the case will not lead to a flurry of recusal motions. But whether that is true will depend on how lower courts interpret it.

We should try to create a rule that codifies *Caperton*, so judges have fair warning of what they may not do. Yet, this effort is likely to be fruitless. Expensive judicial campaigns are troublesome and *Caperton* is one effort of the Court to limit what many people see as the corrosive effects of judicial campaign financing.²⁵¹ Yet, it is hard to create a bright-line rule when independent *expenditures* are so excessive that they require the recusal of the judge who had no control over those expenditures.

Justice Kennedy concluded that, under all the circumstances, Blankenship’s “pivotal role in getting Justice Benjamin elected” meant that Justice Benjamin would “feel a *debt of gratitude* to Blankenship for his extraordinary efforts to get him elected.”²⁵² This “debt of gratitude” test is no more a refined test than a rule that says the judge must disqualify herself when the case is “extreme by any measure.”²⁵³ As Blankenship told one interviewer:

I’ve been around West Virginia long enough to know that politicians don’t stay bought, particularly ones that are going to be in office for 12 years . . . So I would never go out and spend money to try to gain favor with a politician. Eliminating a bad politician makes sense. Electing somebody hoping he’s going to be in your favor doesn’t make any sense at all.²⁵⁴

Blankenship’s reaction is exemplified by Henry Adams’ epigram, “a friend in power is a friend lost.”²⁵⁵

250. *Caperton*, 129 S. Ct. at 2265.

251. See the thoughtful discussion in James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 295 (2010).

252. *Caperton*, 129 S. Ct. at 2262 (emphasis added).

253. *Id.* at 2265.

254. Adam Liptak, *Case May Alter Judge Elections Across Country*, N.Y. TIMES (Feb. 14, 2009), <http://www.nytimes.com/2009/02/15/washington/15scotus.html>.

255. HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 84 (Mass. Hist. Soc’y 2007).

Blankenship knew that West Virginia Supreme Court terms are twelve years. Once the people elected Benjamin, would Benjamin decide a case a particular way now, because he might run for reelection in a dozen years and would hope to secure the support of Blankenship again (assuming both are even alive)?

Caperton, like any vague decision, raises many questions, and this “debt of gratitude” rationale is a humdinger. If, as Justice Kennedy argued, independent expenditures create a “debt of gratitude”²⁵⁶ in the judge who benefits from the expenditures, what if there is a debt of ingratitude? For example, if Benjamin had lost and his opponent won, must that opponent recuse himself because the opponent would feel *ingratitude* or animosity against Blankenship? If a newspaper endorsement supported a successful candidate, must the judge disqualify himself in a libel case brought against the newspaper?

If Benjamin had lost the election and the incumbent, Justice Warren McGraw, had won, should Blankenship be entitled to disqualify McGraw? After all, Blankenship had spent a substantial amount of money to defeat McGraw. Blankenship would be worried that McGraw harbored a debt of ingratitude.

Such a result would have the perverse result of increasing the incentives of activists to spend money in judicial campaigns. These activists, even if they were unsuccessful in seating their favorite candidate, would be successful in disqualifying the candidate who won. It is a win-win situation for parties who want to disqualify a particular judge—just contribute to his opponent and whoever wins must disqualify himself.

Commentators typically think of *Caperton* as affecting judicial campaign financing, and so it may. But as the discussion of “debt of gratitude” shows, gratitude does not have to be limited to campaign contributions or independent expenditures. The test of gratitude may well invite or even require a great number of judicial disqualifications of Article III judges, if the rather vague test in that case will leak into the appointed judiciary. For example, if a president appoints a judge to the federal bench, will there be some circumstances where the judge has a debt of gratitude that would require the

256. *Caperton*, 129 S. Ct. at 2262.

judge to recuse herself if the case involved the president or an issue of importance to the president?

President Nixon appointed Chief Justice Burger, Justice Blackmun, and Justice Powell, all of whom did not hesitate to rule against him in *United States v. Nixon*.²⁵⁷ Justices Breyer and Ginsburg participated in *Clinton v. Jones*, although Clinton had appointed both of them. Both ruled against Clinton, with Ginsburg joining the majority and Breyer concurring in the judgment. If they had a disqualifying “debt of gratitude,” they surely did not show it. Yet, after *Caperton*, should these Justices have rethought their participation? Future litigants may seek to disqualify federal judges because of a possible debt of gratitude to the senator or mentor or president who was important in securing their appointment.

The present ABA Model Code of Judicial Conduct has no disqualification rule dealing with a “debt of gratitude.” It does, however, have a rule, Model Rule 2.11(A)(4), dealing with *contributions* to judicial campaigns,²⁵⁸ but not *independent expenditures*, i.e., amounts that an individual spends to attack or embrace a candidate for judicial office. So, Rule 2.11(A)(4) would not have affected the disqualification in *Caperton* even if West Virginia had adopted the ABA Rule. In fact, it has been a full decade since the ABA proposed Model Rule 2.11(A)(4), and since that time not a single state has adopted it.²⁵⁹ It is, however, a bright-line rule, easily understood and enforced.

The Wisconsin Supreme Court, in response to *Caperton*, examined that case and decided not to codify it. Indeed, Wisconsin did the opposite: it adopted a rule that explicitly provides that endorsements, campaign contributions and

257. 418 U.S. 683 (1974). Nixon also appointed Justice Rehnquist, who disqualified himself in that case, for a different reason (his friendship with Attorney General Mitchell). Later, Rehnquist joined the majority in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), along with Powell, who wrote the majority opinion, and Burger, who also concurred. Blackman, yet another Nixon appointee, dissented.

258. MODEL CODE OF JUDICIAL CONDUCT, R. 2.11(A)(4); *see also* MODEL CODE OF JUDICIAL CONDUCT R. 4.4(B)(1) & cmt. 3.

259. ABA STANDING COMM. ON JUDICIAL INDEPENDENCE, Proposed Amendments to the Model Code of Judicial Conduct, at 16 (Discussion Draft 2010). Alabama has a provision governing campaign contributions, but it predates ABA Model Rule 2.11(A)(4). ALA. CODE §§ 12-24-1, -2 (West 2011) (effective Jan. 1, 1996). Mississippi also has a provision that deals with this issue although it does not follow the ABA Model Rule. MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(2) (2008).

independently run advertisements in themselves are *not* enough to force a judge's recusal.²⁶⁰

Every future Justice Benjamin would like a clear rule, so they know what to do. To the extent that there is bright-line test (or, at least a test that approaches a bright line), judges will follow it. Litigants will know when to file their motions. Indeed, if the line is bright enough, judges can recuse themselves *sua sponte*. The brighter line reduces the transaction costs for litigants and for the judges. Judges can follow the rules without worry that a higher court will conclude, months or years later, that the judge was unethical in not recusing himself, after weighing all the factors. Granted, it is not easy to draft a litmus test to determine disqualification. In some cases, such a test may be unusually difficult. *Caperton* looks like it falls in that category. It is never easy to systematize the law. In the case of *Caperton*, it is simply impossible.

There is a concern that *Caperton v. A.T. Massey Coal Co.* will force judges to disqualify themselves if a party is related to an independent group that had supported the judicial candidate.²⁶¹ It is too soon to judge the effect of *Caperton*, but there are plenty of indications in the five-person majority that the case has little growth. First, as discussed below, the majority itself emphasized that the case was unique. Second, the case does not involve campaign *contributions* to judicial candidates; instead, it involved *independent campaign* expenditures that appeared to benefit the judge who should have disqualified himself. The difficulty (if not inability) to codify the holding in that case—because the majority lists so many different reasons that, all added together, support the disqualification—also points to the conclusion that the case is a rare combination of factors.

VII. JUDICIAL CAMPAIGN EXPENDITURES AFTER *CITIZENS UNITED*

We all want to know the future. I hesitate to make predictions because it will serve as evidence of my fallibility.

260. See *In re* Amendment of the Code of Judicial Conduct's Rules on Recusal, Nos. 08-016, 08-25, 09-10, 09-11, 2010 WI 73 (Jul. 7, 2010), available at <http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=51874>.

261. See generally Rotunda, *supra* note 179.

Nonetheless, I will venture that *Citizens United v. FEC*²⁶² will not cause major upheaval in the financing of judicial elections. It will make spending more transparent. Unlike *Caperton*, it is easy to codify *Citizens United*. All entities, including unions and individuals, have free speech rights that the government cannot restrict. They have a right to spend money (independent expenditures) to promote their views.

Much of the controversy surrounding *Citizens United* is misplaced. It does not favor business at the expense of unions. It simply restricts the heavy hand of government in regulating core First Amendment political speech, which is why the ACLU supported the position of the petitioner and opposed the FEC's regulation.²⁶³ Corporations and unions, instead of creating PACs, can now engage in political speech directly, by spending money for advertisements, media, and so forth. They cannot contribute to candidates but they can engage in independent expenditures.

Before *Citizens United*, over half of the states already allowed corporations to engage in unlimited independent election expenditures under state law, and two more allowed limited corporate expenditures.²⁶⁴ These states, representing over 60% of the nation's population, "were not overwhelmed by corporate or union spending in state elections."²⁶⁵

However, corporations and other entities still cannot contribute to a political candidate. All that has happened is that the Court is now giving entities who engage in core political speech the free speech protection that it has long given to purveyors of pornography, viewers of nude dancing, and movies marketed as pure entertainment, not political statements.²⁶⁶

To find out where we are, we first must look at where we have been. Congress, in 1947, first prohibited corporations and

262. 130 S. Ct. 876 (2010).

263. See ACLU Brief, *supra* note 16, at 2-4.

264. Bradley A. Smith, "We the People? Corporate Spending in American Elections after *Citizens United*," Testimony before the United States Senate Committee on the Judiciary, at 4, Mar. 10, 2010, <http://judiciary.senate.gov/pdf/10-03-10Smith'sTestimony.pdf>.

265. *Id.*

266. I do not mean to suggest that the Framers only intended to include political speech within the First Amendment. They spoke of "free speech," not political speech, and they did not intend to exclude speech that is not "pure speech." Mark R. Killenbeck, *The Qualities of Completeness: More? or Less?*, 97 MICH. L. REV. 1629, 1670 (1999).

labor unions from independent expenditures in political campaigns with the Taft-Hartley Act.²⁶⁷ Congress passed this law over President Truman's veto, which warned that banning expenditures was a "dangerous intrusion on free speech."²⁶⁸ In dictum in several cases over the years, various Justices have concluded that the ban on independent expenditures by unions and corporations violated free speech.²⁶⁹

Then, in 1971, Congress enacted the Federal Election Campaign Act, which created the FEC.²⁷⁰ The complicated law limited the amount that individuals could *contribute* to political candidates as well as limits on *expenditures*—what individuals could spend in support of candidates.

That led to the constitutional distinction between *expenditures* versus *contributions*. In *Buckley v. Valeo*,²⁷¹ the Court found that government's interest in limiting contributions was significant, to "deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions."²⁷² While the government's interest is great, the interest of the contributor to give an unlimited amount of money to a candidate is not great. It entails, the Court said, "only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."²⁷³ In addition, restrictions on contributions do not prohibit a candidate from obtaining funding; they only require the candidate to secure a broader base of contributors rather than relying on a smaller number.

267. Labor Management Relations Act, 1947, Pub. L. No. 101 § 304, 61 Stat. 159; see also Sarah Kellogg, *In the Wake of Citizens United: Where Liberty and Equality Meet*, WASH. LAW. NOV. 2010, at 19, 20.

268. 93 CONG. REC. 7488 (1947) (Message from the President of the United States).

269. *United States v. CIO*, 335 U.S. 106, 135 nn.10 & 11 (1948) (Rutledge, J., joined by Black, J., Douglas, J., & Murphy, J., concurring in result); see also *id.* at 143 (arguing that there is a "loss for democratic processes resulting from the restrictions upon free and full public discussion"). In *United States v. Auto. Workers*, 352 U.S. 567, 597 (1957) (Douglas, J., joined by Warren, C.J. & Black, J., dissenting to the Court's remand) (arguing that claiming that a group is too powerful is no "justificatio[n] for withholding First Amendment rights from any group-labor or corporate").

270. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3.

271. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

272. *Id.* at 28.

273. *Id.* at 20-21.

In contrast, *expenditures* are constitutionally different for First Amendment purposes. Expenditure limitations contained in the Federal Election Campaign Act represent substantial, rather than merely theoretical, restraints on the quantity and diversity of political speech.²⁷⁴ Thus, while the Court upheld the law's contribution provisions, it concluded that the expenditure provisions violate the First Amendment.²⁷⁵ The freedom "to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."²⁷⁶

The Court has treated expenditures that one *coordinates* with a candidate as contributions to the candidate. Hence the government can limit such "contributions." However, *independent* expenditures—those that the speaker does not coordinate with the candidate—are expenditures, which the Government cannot limit.

In the decades since *Buckley v. Valeo*, the Court has kept this expenditure/contribution distinction.²⁷⁷ The idea is that when I spend money independently—by renting a hall or posting up a sign in my picture window or by buying an advertisement—I am speaking for myself. Almost all speech takes money if you want to amplify your message. I may buy or rent a megaphone, or I may join with others to rent a hall or put up a billboard. Money talks, not only figuratively but literally.

Later, the Court held that government could not limit a candidate from using his own money to promulgate his message because a candidate's own expenditures cannot corrupt him.²⁷⁸

274. *Id.* at 39 ("The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech.").

275. *Id.* at 143.

276. *Buckley*, 424 U.S. at 19 n.18.

277. *E.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 900-03 (2010); *Randall v. Sorrell*, 548 U.S. 230, 242 (2006); *McConnell v. FEC*, 540 U.S. 93, 134 (2003); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000); *Colo. Republican Fed. Campaign Comm'n v. FEC*, 518 U.S. 604, 610 (1996) (plurality opinion); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986); *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 491 (1985).

278. *See Davis v. FEC*, 128 S. Ct. 2759, 2771 (2008). The Court invalidated section 319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA). Section 319(a) is sometimes called the "Millionaire's Amendment." BCRA limited contributions by individuals to a candidate in a general election to \$2300 per campaign. The law also limited coordinated expenditures by political party committees to \$40,900. If, however, a candidate is running against a self-financed candidate (an opponent who is spending in

And, thus government could not create different contribution limits simply because one candidate could speak more loudly than the other.²⁷⁹ In the old days, before political campaigns became a regulated industry, a rich patron—let us say a Ross Perot—could decide to bankroll a candidate that he thought had the best chance of winning. Now, Perot can spend all he wants to elect himself (which is what he did when he ran unsuccessfully for president), but the law limits him greatly if he tries to contribute to a political campaign. An unintended consequence is that the present laws favor plutocrats who wish to become officeholders.

If I have deep pockets, I can spend my own money—as much as I want—to publish advertisements in favor of a candidate or a political issue. Does my constitutional right change if I join with others in order to make my voice a little bit louder and my pockets a little deeper? And, does the result change if my colleagues and I decide to use the corporate form?

excess of \$350,000 of his or her own money), then section 319(a) eased the restrictions, but only for the non-self-financing candidate by trebling his individual contribution limit and allowing unlimited coordinated party expenditures. Section 319(b) also required candidates intending to contribute (or lend) more than \$350,000 to their campaign to notify the FEC and opponents of that intent and then file frequent reports on their self-funding. The Government justified the amendment as an attempt to level the playing field for less-wealthy candidates who compete against self-financed candidates. The Court invalidated section 319(a). The interest in preventing the “actual and apparent corruption of the political process” does not justify penalizing a candidate who uses his own money because he cannot corrupt himself. *Davis*, 128 S. Ct. at 2771. While the BCRA did not cap a candidate’s expenditure of personal funds, “it impose[d] an unprecedented penalty [discriminatory fundraising limitations] on any candidate who robustly exercise[d] that First Amendment right.” *Id.* The Court has “never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other.” *Id.* at 2269. The government has no legitimate interest in leveling electoral opportunities for candidates of different personal wealth. Some candidates:

are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, and *it is a dangerous business for Congress to use the election laws to influence the voters’ choices.*

Id. at 2774 (emphasis added) (citation omitted).

279. *Randall*, 548 U.S. at 262 (Vermont’s expenditure limits on political campaigns violate the First Amendment’s free speech guarantees under *Buckley*).

Two major decisions focused on these questions and led to the result of *Citizens United*. In *First National Bank v. Bellotti*,²⁸⁰ plaintiffs (national banking associations and business corporations) wanted to spend money to publicize their views opposing a referendum that would authorize the state legislature to enact a graduated personal income tax. They challenged the constitutionality of a Massachusetts criminal statute that prohibited business corporations from making contributions or expenditures “for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.”²⁸¹ This case did not involve any challenge to the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees.²⁸²

The divided Court invalidated the statute. Corporations may talk about political issues.²⁸³ “The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”²⁸⁴ If the state could ban corporations from talking about issues, where would that power end? Could corporations pay for public-service advertisements, educational, charitable, cultural, or human-rights causes? Could

280. 435 U.S. 765 (1978). The dissent recognized the implication of the majority’s holding—an implication that became law with *Citizens United*:

By holding that Massachusetts may not prohibit corporate expenditures or contributions made in connection with referenda involving issues having no material connection with the corporate business, the Court not only invalidates a statute which has been on the books in one form or another for many years, but also casts considerable doubt upon the constitutionality of legislation passed by some 31 States restricting corporate political activity, as well as upon the Federal Corrupt Practices Act, 2 U.S.C. § 441b (1976 ed.).

Id. at 803 (footnote omitted) (White, J., dissenting).

281. MASS. GEN. LAWS ANN., ch. 55, § 8 (West 1977) (repealed 1986), *invalidated* by *First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978).

282. *Bellotti*, 435 U.S. at 788 n.26.

283. *Bellotti* was not a case out of the blue. *NAACP v. Button*, 371 U.S. 415 (1963), held that the NAACP may assert the First Amendment right on its own behalf, “because, *though a corporation*, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail.” *Id.* at 428 (emphasis added).

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), invalidated an expenditure ban that applied to individuals, corporations, and unions, because it “fail[ed] to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process.” *Id.* at 47-48.

284. *Bellotti*, 435 U.S. at 777.

the government ban informational advertising on what a particular corporation is doing to reduce its carbon footprint, or increase the search for energy reserves? Could the state ban a corporation from paying for a commercial cautioning the viewers about the dangers of inflation or protectionism, or the need to conserve energy? It would hardly be unreasonable to consider many of these subjects as “social,” “political,” or “ideological.”²⁸⁵

A contrast to this case is *Austin v. Michigan Chamber of Commerce*,²⁸⁶ another divided opinion. *Austin* upheld provisions of the Michigan Campaign Finance Act that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office. The particular law offered an exception for media corporations, but the majority did not say that the exception is required. Indeed, Justice Marshall, for the Court, said that “the press’ unique societal role *may not entitle the press to greater protection* under the Constitution,” but it was proper for the State of Michigan to grant this exception, apparently as a matter of legislative grace.²⁸⁷ As Justice Scalia warned in dissent, “The Court today holds merely that media corporations *may* be excluded from the Michigan law, not that they *must* be.”²⁸⁸

That, in turn, led to the issue in *Citizens United*. The Bipartisan Campaign Reform Act of 2002 prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that is an “electioneering communication” or for speech that expressly advocates the election or defeat of a candidate. An electioneering communication is “any broadcast, cable, or satellite communication that: refers to a clearly identified candidate for Federal office” and is made within thirty days of a primary election and that is “publicly distributed,” which, in the case of a candidate seeking presidential nomination, means that the communication “[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held

285. *Id.* at 782 n.18.

286. 494 U.S. 652 (1990).

287. *Id.* at 668 (emphasis added) (citation omitted).

288. *Id.* at 691 (Scalia, J., dissenting).

within 30 days.”²⁸⁹ The Court broadly upheld these provisions in *McConnell v. FEC*,²⁹⁰ which relied on *Austin*.

Last September of 2009, the Supreme Court did something quite unusual: it cut short its summer vacation to hear *Citizens United v. FEC*, a case it held over from the prior term. The issue: can the United States government ban a nonprofit corporation, Citizens United, from distributing its 90-minute documentary—called *Hillary: the Movie*—on a video-on-demand basis?

In January 2010, the Supreme Court said no: free speech prohibits the government from banning speech, even political speech that criticizes politicians.²⁹¹ President Obama specifically criticized the Supreme Court Justices in his State of the Union address. If he knew what the government’s lawyers were arguing, he might have a different view.

Supporters of Hillary Clinton would probably call this movie a hatchet job on her. Of course, there are those who would call *Fahrenheit 911* a hatchet job on President Bush. And many people whom *60 Minutes* has featured would have similar views about its video vignettes.

Political campaigns often produce film biographies of their candidates that read like hagiographies—biographies of the saints. But, independently produced biographies like *Hillary: the Movie*, are not flattering, so candidates do not like them. Neither does the FEC. That is how the case got to the Supreme Court. *Citizens United* admitted that federal campaign-finance laws banned it from distributing this movie, but it argued that this ban violated the First Amendment. The FEC responded that the feature-length movie is “electioneering communications.” It is that; it is also political speech within the very core of free speech.

Last spring, the Supreme Court asked the Government how much power it is really claiming. In particular, does the statute authorize government bureaucrats to ban books? The Government’s answer was yes: “we could prohibit the

289. 11 C.F.R. § 100.29 (2010), *invalidated by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

290. 540 U.S. 93, 203-09 (2003).

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

publication of the book using the corporate treasury funds.”²⁹² Wow! The Government argued that the logic of recent precedent compelled that result—the precedent that *Citizens United* overruled.

At another point, Chief Justice Roberts asked, if it is “a 500-page book, and at the end it says, and so vote for X, the government could ban that?”²⁹³ Again, the Deputy Solicitor General said, “Well, if it says vote for X, it would be express advocacy and it would be covered by the preexisting Federal Election Campaign Act provision.”²⁹⁴ Even a few words in a lengthy book would allow the government to ban the book.

At reargument on September 9, 2009, our new Solicitor General, former Dean of Harvard Law School Elena Kagan, announced that the “government’s answer has changed.”²⁹⁵ She said that the statute still covered books, but the publisher would have a good argument that the statute, “as applied” to books, would be unconstitutional.²⁹⁶

However, while she conceded that the FEC cannot constitutionally regulate books, she argued that the FEC could constitutionally regulate *pamphlets* because of their political content. Let me quote the exact language so you do not think I am making this up. I am not clever enough to do that.

Chief Justice Roberts: “But we don’t put our—we don’t put our First Amendment rights in the hands of FEC bureaucrats; and if you say that you are not going to apply it to a book, *what about a pamphlet?*”

General Kagan: “*I think a—a pamphlet would be different.* A pamphlet is pretty classic electioneering, so there is no attempt to say that

292. Transcript of Oral Argument at 30, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205) (initial argument).

293. *Id.* at 29.

294. *Id.*

295. Transcript of Oral Argument at 64, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205) (reargument) [hereinafter *Reargument Transcript*].

296. Solicitor General Elena Kagan stated: “We went back, we considered the matter carefully, and the government’s view is that although section 441b *does cover full-length books*, that there would be quite good as-applied challenge to any attempt to apply 441b in that context.” *Id.* at 65 (emphasis added).

section 441b only applies to video and not to print.”²⁹⁷

It gets worse and worse. Justice Scalia said, “So you’re—you are a lawyer advising somebody who is about to come out with a book and you say don’t worry, the FEC has never tried to send somebody to prison for this. This statute covers it, but don’t worry, the FEC has never done it. Is that going to comfort your client?”²⁹⁸ Again, Kagan responded: section 441b “does cover books, except that I have just said that there would be a good as-applied challenge and that there has been no administrative practice of ever applying it to the books.”²⁹⁹

In other words, “Trust me; I’m from the government and here to help you.” It is said that the three lies of the 1990s are: (1) I will love you just as much in the morning; (2) the check is in the mail; and (3) I’m from the government and I’m here to help you. And the three lies of the 2000s: (1) This is just a cold sore; (2) My BMW is paid for; and (3) I’m from the government and I’m here to help you. You see, some things never change.

It is no wonder that the ACLU—hardly a conservative organization—supported Citizens United, not the Government. The ACLU’s brief explained that the powers that the Government claimed “threatened speech that lies at the heart of the First Amendment, including genuine issue ads by nonpartisan organizations like the ACLU.”³⁰⁰

Kagan said the FEC could ban pamphlets. Thomas Paine would not be pleased. In 1776, Paine published *Common Sense*, a pamphlet recognized as the most influential tract of the American Revolution. Paine published his pamphlet anonymously, because of fear of British censors. Now, we have come full circle, with the government he helped launch arguing that it could ban his booklet.

Indeed, several dissenters wanted to withdraw First Amendment rights from all corporations. This is a stretch. Remember that the First Amendment does not speak in terms of corporations, or unions, or citizens. It simply prohibits Congress from abridging Freedom of Speech or of the Press.

297. *Id.* at 66 (emphasis added).

298. *Id.* at 67.

299. *Id.*

300. ACLU Brief, *supra* note 16, at 2-3.

Nonetheless, during oral argument in the *Citizens United* case, Justice Ginsburg suggested that the Court deny free speech rights to corporations. “A corporation, after all, is not endowed by its Creator with inalienable rights.”³⁰¹ In his dissent, Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, argued that the Framers had “little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.”³⁰²

This is a dangerous argument—virtually all newspapers are corporations, not individual Americans. Most book publishers are corporations; ditto for movie studios.

Admittedly, the Constitution did not endow corporations with the right to the pursuit of happiness, but it did give them at least two important rights as legal persons. One is that the government cannot take their property without just compensation, and the other is that the government cannot censor them. To save the federal election statute, some members of the Court want to take away First Amendment rights for corporations. Under the dissent’s theory, could the government also expropriate their property? Should the government now assure that the pages of the *New York Times* are balanced in their coverage? These are the “liberals.”³⁰³

301. Reargument Transcript, *supra* note 295, at 4.

302. *Citizens United v. FEC*, 130 S. Ct. 876, 950 (footnote omitted) (Stevens, J., concurring in part and dissenting in part).

303. Opponents of *Citizens United* sometimes claim that it authorizes foreign corporations to campaign for candidates and dominate American elections. *Citizens United* explicitly provides that it would not reach the question of whether the government could restrict foreign individuals or foreign corporations from making independent political expenditures [advertising for or against a candidate] in elections in our country:

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation’s political process. Cf. 2 U.S.C. § 441e (contribution and expenditure ban applied to ‘foreign national[s]’). Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominantly by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process.

Id. at 911 (majority opinion).

Over a half-century ago, in *Joseph Burstyn, Inc. v. Wilson*,³⁰⁴ the Supreme Court held that the First Amendment protects more than political speech; it also protects movies created purely for entertainment. Now, the Government is arguing that the First Amendment gives less protection to core political speech than it gives to Star Trek. Fortunately, the Court majority rejected that argument. If the First Amendment protects movies about fantasy it surely should protect movies about the lives of politicians.

VIII. CONCLUSION

Happily, the law no longer embraces the theory of *Bonin* that gave little weight to the free speech interests of judges. *Republican Party of Minnesota v. White* acknowledges that judges have free speech rights as does the electorate. It is a sorry business for government to seek to regulate campaign speech. The debate is not really between Republicans and Democrats; it is between incumbents and us, the voters. In that battle, if we do not enforce the protections of the First Amendment, the incumbents always win because they write the regulations.

Granted, there can be cases where campaign contributions require judicial disqualification. *Caperton* would be an easy case if it involved contributions rather than independent expenditures. We are not likely to see much principled growth from *Caperton* because the majority does not create a test of when the judge must disqualify himself. It simply lists various factors for the judge to consider.

And that leads us to *Citizens United*. The fear—expressed by President Obama during his State of the Union address during which he scolded the Supreme Court Justices who were invited to sit in the audience—is that malefactors of great corporate wealth will overrun our election process. And, that foreign corporations will have undue sway with their vast wealth.

Thus far, the evidence that will happen is not evident. First, *Citizens United* says nothing about allowing foreign corporations to make campaign contributions or expenditures.

304. 343 U.S. 495 (1952).

As for domestic corporations, the empirical evidence of undue corporate influence is underwhelming. Indeed, the main participants who have engaged in these independent expenditures have not been corporations—President Obama’s claim—but unions.

In 2010 elections, in the off-year elections for senators and representatives, the campaign’s biggest spender was the American Federation of State, County, and Municipal Employees, AFCME.³⁰⁵ It is a union, not a business corporation. It spent \$87.5 million to help Democrats.³⁰⁶ The United States Chamber of Commerce spent \$75 million to help other candidates, mainly Republicans.³⁰⁷ The Service Employees International Union (SEIU), another union, spent \$44 million; the National Education Association, yet another union, spent \$40 million.³⁰⁸ And the Democratic and Republican Parties spent together, nearly \$1 billion—dwarfing these corporate and union contributions.³⁰⁹

It is inevitable that money will flow into political campaigns: indeed, economic studies question why the major players do not invest more in the campaigns, given that so much money rides on the outcome.³¹⁰ Campaigns are expensive. As long as politicians and judges decide billion-dollar issues, there will be billion-dollar campaigns. The 2010 elections involved campaign expenditures of about \$4 billion, almost a billion more than in 2006. Yet, the year before that, the Nielsen Company reports that Americans spent \$117 billion to advertise nonpolitical goods and services.³¹¹ In the 2000 federal election, the total amount spent was between \$2.4 and \$2.5 billion. That

305. Brody Mullins & John D. McKinnon, *Campaign’s Big Spender*, WALL ST. J., Oct. 22, 2010, at A1.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *E.g.*, Stephen Ansolabehere, et. al., *Are Campaign Contributions Investment in the Political Marketplace or Individual Consumption? Or “Why Is There So Little Money in Politics?”* (Oct. 2002), http://web.mit.edu/jdefig/www/papers/invest_or_consumpt.pdf; James M. Snyder, Jr. *Campaign Contributions as Investments: The U.S. House of Representatives: 1980-1986*, 98 J. POL. ECON. 1195 (1990).

311. Press Release, Nielsen Wire, U.S. Ad Spend Falls Nine Percent in 2009, Nielsen Says (Feb. 24, 2010), <http://blog.nielsen.com/nielsenwire/consumer/u-s-ad-spend-falls-nine-percent-in-2009-nielsen-says/>.

year, Americans spent \$7.8 billion on movie tickets.³¹² For the 1995-96 election cycle, the total campaign contributions for all federal elections were a little over \$2 billion. That sounds like a lot, and, in one sense it is. But it amounts to 0.02% of this country's GDP during that same time period. And, during that period, it was only one-third of the amount given just to the United Way.³¹³ During that same time frame, individuals donated over \$300 billion to all charitable causes, while corporations gave more than \$15 billion.³¹⁴

The federal and state governments are a trillion-dollar enterprise. Politicians routinely enact laws that take money from the pocket of Peter and put it into the pocket of Paul. As long as government has such sway over our pocketbooks, unions, business, tort lawyers, and other interest groups will spend money to get their friends elected. Economists have a term for this behavior: rent-seeking. Political campaigns engage in rent-seeking in spades.

Yet, we know that in elections, the person who spends the most is not the inevitable winner. Just ask Jon Corzine, former Governor in New Jersey, or Meg Whitman, the recent California gubernatorial candidate. And, we know that judges who are elected are not necessarily better or worse than appointed judges. Indeed, the empirical evidence that he who pays the money gets the judge he wants is decidedly mixed.

Judges, of course, want to preserve their "independence." Yet, when judges decide billion-dollar class actions or decide hot-button social issues like gay marriage or drug policy, it should be no surprise that deep-pocketed individuals (e.g., George Soros) or entities (the AFCME union, the Chamber of Commerce) are drawn to the judicial campaign like flies to sugar. As long as judges decide important issues, particularly if judges act like legislators, there will be expensive campaigns.

312. *McConnell v. FEC*, 540 U.S. 93, 262 (Scalia, J., dissenting).

313. Milyo, *supra* note 87, at 539.

314. *Id.*