How Great is America's Tolerance for Judicial Bias - An Inquiry into the Supreme Court's Decisions in Caperton and Citizens United, their Implications for Judicial Elections, and their Effect on the Rule of Law in the United States

Norman L. Green
Schoeman Updike & Kaufman, LLP

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Judges Commons, and the Supreme Court of the United States Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol112/iss3/8

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
HOW GREAT IS AMERICA’S TOLERANCE FOR JUDICIAL BIAS? AN INQUIRY INTO THE SUPREME COURT’S DECISIONS IN CAPERTON AND CITIZENS UNITED, THEIR IMPLICATIONS FOR JUDICIAL ELECTIONS, AND THEIR EFFECT ON THE RULE OF LAW IN THE UNITED STATES

By Norman L. Greene*

INTRODUCTION .................................................................................................................. 875

A. The Fundamental Questions .................................................................................. 875
B. Suppose Justice Is Not Impartial ........................................................................ 876
C. The U.S. Supreme Court and Impartiality .............................................................. 877

* Copyright © 2010 by Norman L. Greene. Norman L. Greene is a graduate of Columbia College and New York University School of Law and a member of the firm of Schoeman Updike & Kaufman, LLP, New York, N.Y. He has written many articles and made and organized or participated in many presentations on judicial reform and the rule of law. His most recent articles on judicial reform with an international perspective are Perspectives from the Rule of Law and International Economic Development: Are There Lessons for the Reform of Judicial Selection in the United States?, 86 DENV. U. L. REV. 53 (2008) (analyzing state court judicial elections in the United States in light of prevailing international standards of the rule of law and its relationship to economic development) and Advancing the Rule of Law through Judicial Selection Reform: Is the New York Court of Appeals Judicial Selection Process the Least of Our Concerns in New York?, 72 ALB. L. REV. (2009). He has also written on judicial reform for the Albany Law Review (previously), Court Review, Fordham Urban Law Journal (twice), Idaho Law Review, Mercer Law Review, and the New York State Bar Association Government Law and Policy Journal. He gratefully acknowledges the support and kind inspiration of those who have shared with him the connection between the rule of law domestically and internationally; who are involved in the rule of law in all its international aspects (including development work and how best to go about it) through the American Bar Association Rule of Law Initiative (including staff and volunteers, including rule of law liaisons), the U.S. Department of State, USAID and its many implementers; the Millennium Challenge Corporation, the United Nations, and international financial institutions, including the World Bank and the International Monetary Fund; and many scholars in diverse fields throughout the world, a number of whom have served him as teacher, mentor, and friend, and others who have led simply by example. The author greatly appreciates the scholarship, dedication, collegiality and patience of the editors of the West Virginia Law Review, Brandon Stump (editor-in-chief for allowing this effort to go forward), Adam Tomlinson (senior managing editor, with special thanks for working so closely and diligently with me), Susan Striz (executive research editor), and J. Zak Ritchie (associate editor), all of whom have helped make this Article possible in various ways; and the author is grateful for the privilege of having had the opportunity to work with them. The author also acknowledges partial support from Altria Client Services Inc. in connection with this Article; however, responsibility for all statements contained in this Article is solely that of the author and no other person or entity acknowledged or not acknowledged in it.
D. Some Observations on the International Promotion of the Rule of Law ................................................................. 879
E. Judicial Impartiality as a Fundamental Part of the Rule of Law ............................................................................. 883

I. JUDICIAL IMPARTIALITY, JUDICIAL ELECTIONS, AND CAPERTON ...... 891
A. The Decisions in Caperton ......................................................... 891
   1. Justice Benjamin Refuses to Recuse Himself ................. 891
   2. The U.S. Supreme Court’s Majority Decision ............. 897
   3. The Chief Justice’s Dissent ............................................. 898
B. Justice in the Individual Case vs. Systemic Needs ............. 900
C. Post-Caperton Recusal Movement — Limited Progress ...... 904
D. Some Reflections on Bias and the Judiciary, Judicial Elections, and the Rule of Law ............................................. 907
E. An Observation on Caperton’s Futility .................................. 910

II. JUDICIAL IMPARTIALITY, JUDICIAL ELECTIONS, AND CITIZENS UNITED .................................................................................. 912
A. The Holding in Citizens United ............................................. 913
B. Citizens United as Applied to Judicial Elections ............ 916
C. Citizens United — What About Corruption? ................. 920
D. Caperton as Applied to Judicial Elections Following Citizens United — How Much Does Caperton Help? ........... 922
E. What Should Be Done? What May Be Done? ............... 923
F. Who’s Right, How May We Tell, and Does It Matter? Will It Be the Lady or the Tiger? ................................................................. 926
   1. What Has Been Done? .................................................. 926
   2. What May Be Done? .................................................... 929
G. A Short Lesson on Judicial Independence and an Historical Interlude .............................................................................. 933
H. What Did the U.S. Supreme Court Do? What Should Americans Do? ................................................................. 940

CONCLUSION ................................................................................................. 941

If a litigant cannot be guaranteed that his or her cause will be decided by an honest assessment of the facts and a conscientious application of the law to the facts, unencumbered by extraneous influences, then the outcome will merely be a decision for the sake of a decision; having nothing to do with the law, it will be the negation of the rule of law.1

* * *

A recent study of Michigan, Nevada, and Texas judges . . . concludes that campaign contributions have an impact on judicial decisions in states with partisan election of judges. How can we confidently proclaim that our democratic system of justice is a model for the world when members of our own public — and even many individuals who hold judicial office — doubt its impartiality? \(^2\)

* * *

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. \(^3\)

- Justice John Paul Stevens

INTRODUCTION

A. The Fundamental Questions

How much risk will Americans tolerate to the rule of law in the United States and the ideal of an impartial system of justice? How much risk are we tolerating already? How did we get to this point? Is there anything that we can do to pull back or change course? If we do not, what are the consequences? Should we really have to be asking these questions at this late stage of American democracy?

This Article will consider the recent United States Supreme Court decisions in *Caperton*\(^4\) and *Citizens United*\(^5\) which directly or indirectly raise these


[S]urveys have shown that three-quarters of the public believes money and special interests play a significant role in how judicial decisions are made. In Texas . . . a study of judges, lawyers, and the public showed that a substantial number of each, 48, 79, and 85 percent, respectively, believe that campaign contributions had an effect on judicial decisions. . . . A recent study of Michigan, Nevada, and Texas judges reveals that these perceptions may not be unfounded; the paper concludes that campaign contributions have an impact on judicial decisions in states with partisan election of judges. How can we confidently proclaim that our democratic system of justice is a model for the world when members of our own public — and even many individuals who hold judicial office — doubt its impartiality?

*Id.* (footnotes omitted; emphasis in text).


questions concerning elected state court judiciaries. Many countries do not have a reliably impartial justice system; and Americans’ ability to keep their system of justice impartial (either in fact or in appearance) in their elected state courts is in doubt. According to public opinion surveys and extensive commentary, a high percentage of people “believe[] money and special interests play a significant role in how judicial decisions are made.”

Business groups are likewise concerned about bias overall, as shown through the recent report of the U.S. Chamber of Commerce’s Institute for Law Reform, noting that bias is perceived as a key factor by its survey respondents in assessing the fairness of a state’s liability system. Although Americans may allay concerns about impartiality with presumptions of impartiality and other soothing doctrines, the system is at risk and perhaps has already deteriorated.

B. Suppose Justice Is Not Impartial

Without impartial judges, justice is pointless, and as noted in a quote commencing this Article, merely results in a decision for the sake of a deci-
It may also legalize unfairness and oppression. Benjamin Franklin, when asked about the nature of the country’s new form of government, answered to the effect that our form of government is a republic (if we can keep it). The quote is often repeated, but the lesson that vigilance is needed to preserve our republic and its values — however versatile they may seem — is timeless and relevant to judicial impartiality. The lack of impartiality is not something that is “someone else’s problem.” If the judge in your case is biased or appears to be biased, you will find it impossible to ignore; and unless this is corrected, you will wonder whatever happened to the American dream of impartial justice.

C. The Supreme Court and Impartiality

This Article begins with reference to general principles of the rule of law, described by Chief Justice John Roberts in *Citizens United* as a “constitutional ideal,” principally concerning an impartial judiciary. It will then consider the nature and implications of *Caperton* and *Citizens United*.

Although *Caperton* upheld a litigant’s right to recusal of the judge whose electoral success was financially engineered by the litigant’s adversary, it was a near-miss narrow (5–4) decision, which just barely rescued Caperton from having his case reviewed by the legally biased judge. According to *Caperton*, there is limited hope of addressing bias under the federal constitution in future cases, with the issue being largely left to the states.

In a separate 5–4 decision, *Citizens United* invalidated long-standing campaign finance reform on First Amendment grounds. In the name of free speech rights, the case permits extensive corporate and union funding of elections, and by inference, judicial elections; and unless legislatively restricted, the

10 Rodley, supra note 1, at 512.


> Benjamin Franklin left the Constitutional Convention, on September 18, 1787, a certain Mrs. Powel shouted out to him: “Well, doctor, what have we got?,” and Franklin responded: “A Republic, if you can keep it.” Like many of the Founding Fathers, he was intensely concerned that the democratic institutions they were crafting would deteriorate over time.

12 An interesting description of the rule of law appears at Venelin I. Ganev, *The Rule of Law as an Institutionalized Wager: Constitutions, Courts and Transformative Social Dynamics in Eastern Europe*, 1 HAGUE J. ON THE RULE OF L. 263, 282 (2009) (quoting Michael Oakeshott, *The Rule of Law, in On History and Other Essays* 178 (1999)). “The rule of law bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised.” *Id.*

case has the potential for pouring more money into the judicial election system and further exacerbating bias risks.

Although Republican Party of Minnesota v. White is not at the center of this Article, some also question the effect on impartiality of expanded judicial campaign speech under this U.S. Supreme Court 2002 decision; a separate concern is excessive responsiveness to the views of local voters, since the judge needs the voters’ continuing support in order to be reelected. 14 “The ‘situation’ of apparent judicial bias has never been so obvious as it is in the current climate. White shows a Supreme Court unwilling to curtail political speech; thus, judicial candidates are free to announce their legal and political biases with impunity[,]”15 although they may not make campaign promises on how they would decide cases.16 The danger of bias as a result of candidate speech has been a special concern in criminal cases where judges have campaigned on “law and order” platforms.17 Observations on White may be made throughout the Article as well.

---

16 According to Chief Justice Randall Shepard of the Indiana Supreme Court, a campaign promise by a judge to rule consistently with that promise arguably implicates bribery: [A] litigant ought to make a passable case against a sitting judge by asserting that the judge has a direct, personal interest in ruling in accordance with his promise because it is central to his reelection, his personal employment. This interest is by any measure substantial. ... [T]his interest is pecuniary inasmuch as the judge is paid and the benefits flowing from the payment inure not to the court system but to the judge personally. Arguably, therefore, a campaign promise is a bribe offered to voters, paid with rulings consistent with that promise, in return for continued employment as a judge.
17 An amicus brief in Caperton, from the National Association of Criminal Defense Attorneys, made this very point about the risk of bias in criminal cases arising from campaign statements on toughness on crime: Under the Due Process Clause, every litigant is entitled to a fair hearing before a fair tribunal. This mandate is particularly crucial to criminal defendants who face the loss of liberty or life and depend on judges to protect their constitutional rights. There is a tension between an elected judge’s accountability
The Article will also consider various potential solutions, such as a change in judicial selection systems away from judicial elections, altered recusal procedures, and legislative responses to *Citizens United* to reduce threats to judicial impartiality.

### D. Some Observations on the International Promotion of the Rule of Law

The United States, through the Department of State, USAID, other agencies, and their various implementers; international financial institutions, such as the World Bank and the International Monetary Fund; the European Union and various other countries; the American Bar Association through its Rule of Law Initiative; and many NGO’s have been engaged in rule of law promotion for many years in developing countries, with expenditures of billions of dollars. These rule of law efforts have involved improved governance and institutions, including judicial and related institutions, and have been traced, to those constituencies who assisted in his or her election and the judge's role as independent and impartial arbiter. This tension is particularly pronounced in criminal cases because elected judges often run on "tough on crime" platforms.


> Recusal should be mandatory in any criminal case that will raise an issue about which the judge promised to be "tough." Mandatory recusal (disqualification) offers the additional benefit of giving judicial candidates cover to avoid "tough on crime" rhetoric and promises. In addition, such a policy diminishes the risk that political considerations will taint judicial decisions; that is, the rule shields judges seeking re-election from political attacks for making legally correct but politically unpopular decisions.

*Id.* at 5–6.


The principles advocated by the United States abroad through rule of law promotion are relevant to the evaluation of America’s own practices. See *Perspectives From the Rule of Law*. See also David Rosenbaum, *Abram Chayes, John Kennedy Aide, Dies at 77*, *N.Y. Times*, Apr. 18, 2000 (quoting Abram Chayes, a “professor of international law at Harvard for more than 40 years and a top State Department official in the Kennedy administration”: “There is ‘nothing wrong . . . with holding the United States to its own best standards and best principles.’”).
with some controversy, to improved economic development. The efforts may also include improving civil and criminal codes, judicial and other legal education, bar association development, civic education, anti-corruption, women’s rights, and other topics.

The promotion of women’s rights, including enhancement of women’s educational and other opportunities and eliminating violence against women through legislation or otherwise, is an important part of rule of law reform. Indeed, some have identified such improvement as an essential link in economic development, including at a recent conference in Washington, D.C. on women’s empowerment in Morocco. If one wishes to “enliven” economies, “leaders of

19 The cause and effect relationship between rule of law reform and economic progress has often been asserted and sometimes questioned. See generally Perspectives From the Rule of Law, supra note 18, at 76. Policymakers nevertheless have spent vast sums on such reforms for various reasons, including their assumption of a connection between improved rule of law and economic development. Id.; see also id. at 55 (“The notion that the rule of law promotes economic development is built on various factors, including common sense, practical assumptions, logic, and to some extent, empirical studies.”).

20 See Norman L. Greene, Provocative, Fast-Moving Conference Held in Washington on Women’s Empowerment in Morocco, MoroccoBoard, March 23, 2010, available at http://www.moroccoboard.com/news/34-news-release/949-provocative-fast-moving-conference-held-in-washington-on-womens-empowerment-in-morocco (copy also on file with the West Virginia Law Review). The March 17, 2010 event commenced with the observations of co-chair and moderator Martha Dye, a Washington, D.C. attorney experienced in the promotion of women’s rights, particularly in Morocco. “Recalling the slogan from the 1992 Clinton campaign ‘It’s the economy, stupid,’ [Ms. Dye] observed that the battle cry today, for those seeking to advance development, should be: ‘It’s women’s rights, stupid.’” Id. The conference, which the author attended, also included extensive presentations by attorney Stephanie Willman Bordat of Global Rights in Morocco on attempts to secure legislation outlawing violence against women and by other experts on the promotion of women’s rights — Professor Fatima Sadiqi (Senior Professor of Linguistics and Gender Studies at the University of Fez, Morocco), Dr. Susan Schaeffer Davis (an anthropologist with extensive experience with Moroccan women and adolescents and the author of two books on those topics), and Dr. Salma Lemtouni (a physician expert on women’s health issues) — from the standpoint of relevant historical forces, economic empowerment, and emotional empowerment. The conference was one of the twenty events held in March 2010, celebrating the twentieth anniversary of the Washington Moroccan American Club, a Washington, D.C. community organization, described at http://www.washingtonmorccanclub.org/ For a description of some of the events and participants, see Norman L. Greene, The Washington Moroccan American Club’s Ambitious 20/20 Project Takes Shape, WASH. MOROCCAN CLUB, Feb. 28, 2010, available at http://www.washingtonmoroccanclub.org/articles/the-washington-moroccan-american-clubs-ambitious-2020-project-takes-shape--.html (written anonymously by author) (copy also on file with the West Virginia Law Review), and Norman L. Greene, WMC 20 Organizing Committee of Washington Moroccan American Club Holds Planning Meeting available at http://www.washingtonmoroccanclub.org/articles/wmc-20---organizing-committee-of-washington-moroccan-american-club-holds-planning-meeting-.html (describing January 10, 2010 meeting; written anonymously by author) (copy also on file with the West Virginia Law Review).

Although the conference focused on Morocco, the themes were universal as well as multi-disciplinary. According to international development expert and author Wade Channell, for example, “investment in women’s education has one of the highest returns in development activities.” Interview of Wade Channell by author in Washington, D.C. (Mar. 25, 2010). Mr. Channell is, among other things, the author of Wade Channell, Lessons Not Learned About Legal Reform,
poor countries” should educate and provide employment opportunities to women.21 “The economic advantages of empowering women are so vast as to persuade nations to move in that direction.”22 The then Secretary General of the UN noted in 2006, “As study after study has taught us, there is no tool for development more effective than the empowerment of women.”23

Rule of law promotion has also historically included ensuring or promoting a qualified, independent, and impartial judiciary. Although the problems addressed in developing nations are challenging, the United States has challenges of its own in that regard, as shown by the recent United States Supreme

in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., Carnegie Endowment for Int’l Peace 2006). Accord, NICHOLAS D. KRISTOF & SHEeryl WUDUNN, HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE 169–170 (2009) (“One study after another has shown that educating girls is one of the most effective ways to fight poverty. Schooling is also often a precondition for girls and women to stand up against injustice, and for women to be integrated into the economy. Until women are numerate and literate, it is difficult for them to start businesses or contribute meaningfully to their national economies... [T]he case for investing in girls’ education is still very, very strong.”).


21 See KRISTOF AND WUDUNN, supra note 20, at 240:

Girls in poor countries are particularly undernourished, physically and intellectually. If we educate and feed those girls and give them employment opportunities, then the world as a whole will gain a new infusion of human intelligence — and poor countries will garner citizens and leaders who are better equipped to address those countries’ challenges. The strongest argument we can make to leaders of poor countries is not a moral one but a pragmatic one: If they wish to enliven their economies, they had better not leave those seams of human gold buried and unexploited.

The title of the book refers to the Chinese proverb cited in the book that “Women hold up half the sky” referenced early in the book, following the title page.

22 See id. at 250.

23 See id. at 185 (quoting former UN Secretary General Kofi Annan).
Court decisions which are the subject of this Article. The problems are not of the same magnitude and otherwise different. Among other things, with negligible and limited exceptions, no other countries elect judges, and certainly none do so to the same extent that many states do. Therefore, other countries do not have the same specific issues raised by Caperton or Citizens United as applied to their judiciaries and impartiality. Thus there are no issues of judicial bias as a result of campaign contributions (although there are always going to be issues of judicial bias wherever there are judges); and there are no issues of campaign contributions of any sort fueling inadequate or erroneous campaign advertisements. Nor do other countries have the other troublesome problems associated with judicial elections, including voters lacking knowledge of the judicial candidates, perhaps knowing nothing more than their names.

The lack of elections, however, does not necessarily make foreign judicial systems (let alone any specific system) superior to ours; other factors must be considered, including the context. Legal systems elsewhere may be freighted with other troubles (such as corruption, political interference with the judiciary, poorly developed statutes or codes, lack of legal education, inadequate physical facilities, and other matters). Some may have advantages as well, such as pre-judicial education.

In addition, not all judicial appointment systems are alike, even in the United States. The principal recommended United States model is referred to as commission-based appointment or “merit selection.” In those systems,

---

24 Perspectives From the Rule of Law, supra note 18, at 88 (“Popular judicial elections are a peculiarly American custom.”); see also id. (pointing out the negligible extent of judicial elections worldwide); Shugerman, supra note 14, at 1064 (“Judicial elections are uniquely American: even though many countries have copied other American legal institutions, almost no one else in the world has ever experimented with the popular election of judges.”) (footnote omitted). Judges are nonetheless elected for certain international courts by certain international governmental bodies. Norman L. Greene, Advancing the Rule of Law through Judicial Selection Reform: Is the New York Court of Appeals Judicial Selection Process the Least of Our Concerns in New York, 72 ALB. L. Rev. 633, 645 n.29 (2009).

25 See generally RULE BY LAW, supra note 6. However, as some of the articles in RULE BY LAW point out, courts in authoritarian systems are not all necessarily tainted. See, e.g., Lisa Hilbink, Agents of Anti-Politics: Courts in Pinochet’s Chile, in RULE BY LAW, supra note 6, at 129 (“Just as we should not expect judges in democratic regimes to assert themselves automatically in defense of rights and the rule of law, so in authoritarian contexts, we should not assume that judges will always be hopeless tools of the government.”).


27 Perspectives on Judicial Selection, supra note 14, at 959 et seq. For model provisions for such a system, see generally Norman L. Greene, The Judicial Independence Through Fair Appointments Act, 34 FORDHAM URB. L.J.13 (2007); see Roy A. Schotland, Special Interest Influence: Balancing Independence and Accountability: A Plea for Reality, 74 Mo. L. REV. 507, 512 (2009) [hereinafter Schotland, Special Interest Influence] (referencing the “self-applauding label” of merit selection); see also Nuno Garoupa & Tom Ginsburg, Guarding the Guardians: Judicial Councils and Judicial Independence, 57 AM. J. COMP. L. 103, 104 (2009) (noting “growing scho-
commission governed by rules produces a limited number of nominees for the executive to appoint, sometimes subject to legislative ratification. After the expiration of the judge’s term, the judge either undergoes the commission process again or runs in a retention election where the only question is whether the candidate should be retained. The better-designed systems provide judicial performance review, such as in Colorado, where the voters receive judicial evaluations before voting on retention.

Although the issues might differ across countries, the objectives are similar, including decision-makers who are competent, efficient, and neutral, neither biased nor appearing to a reasonable observer to be biased; and judicial systems need to be designed in order best to achieve these goals. Some time ago, a friend with substantial rule of law experience told me that the efforts to improve our domestic judiciaries and international judiciaries “are really the same.” On that assumption, this Article will explore the two U.S. Supreme Court decisions, borrowing frequently from international as well as domestic sources.

E. Judicial Impartiality as a Fundamental Part of the Rule of Law

International and domestic principles of the rule of law, including the internationally respected model The Bangalore Principles of Judicial Conduct,
require that judges be impartial. To the same effect are the United Nations Principles on the Independence of the Judiciary, noting that judges shall decide “impartially . . . without any improper influences, inducements . . . for any reason.” The United States Supreme Court has recognized “a litigant’s due process right to a fair trial before an unbiased judge.” The lack of bias is a

of little guidance, nor so specific as to be irrelevant to the numerous and varied issues which a judge faces in his or her daily life. They may, however, need to be adapted to suit the circumstances of each jurisdiction.


BANGALORE PRINCIPLES, supra note 31, at Value 2 (“Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made . . . ”). See BANGALORE COMMENTARY, supra note 31, at 5:

The Bangalore Principles of Judicial Conduct have increasingly been accepted by the different sectors of the global judiciary and by international agencies interested in the integrity of the judicial process. In the result, the Bangalore Principles are seen more and more as a document which all judiciaries and legal systems can accept unreservedly. In short, these principles give expression to the highest traditions relating to the judicial function as visualised in all cultures and legal systems.

See David Tolbert & Andrew Solomon, United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies, 19 HARV. HUM. RTS. J. 29, 46 (2006) (“In 1985, the U.N. promulgated a concise set of universally recognized principles of judicial independence that describe the core elements essential to any modern judicial system. The United Nations Basic Principles on the Independence of the Judiciary (‘BPIJ’), was endorsed by the U.N. General Assembly in two resolutions.”) (footnotes omitted).

Central European and Eurasian Law Initiative, U.N. Basic Principles on the Independence of the Judiciary 2 (2004), http://www.abanet.org/rol/docs/judicial_reform_un_principles_independence_judiciary_english.pdf (“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”) (cited in Perspectives From the Rule of Law, supra note 18, at 54); see also id. (citing Sam Rugege, Judicial Independence in Rwanda, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 411, 411, 415 (2007) (noting the relationship between the rule of law, judicial independence and impartiality as well as economic progress: “Judicial independence is a universally recognized principle in democratic societies. It is a prerequisite for a society to operate on the basis of the rule of law[,]” and citing the Asian Development Bank for the following proposition connecting independence with impartiality:

The cornerstone of successful reform is the effective independence of the judiciary. That is a prerequisite for an impartial, efficient and reliable judicial system. Without judicial independence, there can be no rule of law, and without the rule of law the conditions are not in place for the efficient operation of an open economy, so as to ensure conditions of legal security and foreseeability.

Id. at 415.).

“cardinal principle of justice”\textsuperscript{36} and an “indispensable feature of democracy.”\textsuperscript{37} Judges must also appear to be impartial (or unbiased),\textsuperscript{38} deciding “disputes between parties on a case-by-case basis according to the applicable facts and law . . . .”\textsuperscript{39}

While personal corruption is certainly a problem, the appearance of judicial bias — or what could be called “perceived corruption” — is also a problem. Many legal systems view this latter type of corruption as equally dangerous, particularly because it causes public distrust in the judiciary. Public confidence is vital to a well-functioning judiciary, so regardless of whether actual bias exists, the appearance can be sufficient to remove a judge from a particular case.\textsuperscript{40}

As previously noted, Justice John Paul Stevens has observed, “It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.”\textsuperscript{41}

The Bangalore Principles note that “[a] judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to

\textsuperscript{36} Gary Slapper, \textit{The Law Explored: Judicial Bias}, TIMES ONLINE, July 11, 2007, http://business.timesonline.co.uk/tol/business/law/columnists/article2058563.ece; see European Court of Human Rights, Esa Kiiskinen & Mikko Kovalainen v. Finland, Application No. 2623/95, at 7 (“[T]here are two aspects to the requirement of impartiality. . . . First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. . . . Secondly, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. . . .”).

\textsuperscript{37} Elizabeth B. Wydra, \textit{The Fourteenth Amendment’s Due Process Clause and Caperton: Placing the Federalism Debate in Historical Context}, 60 SYRACUSE L. REV. 239, 241 (2010) (“[A] fair and impartial judiciary has been an indispensable feature of democracy. The judicial insistence on unbiased adjudicators goes back at least as far as the early seventeenth century common law, and was invoked by the eighteenth-century American Founders.”) (footnotes omitted).

\textsuperscript{38} See Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 831 (1986) (Brennan, J., concurring) (“[T]he assurance of impartiality . . . is the fundamental requirement of due process.”).


But impartiality is not an end in itself. It is an instrumental value designed to preserve a different end altogether: the rule of law. If the ultimate goal is to enable judges to uphold the rule of law (i.e., to resolve disputes between parties on a case-by-case basis according to the applicable facts and law), then a judge who locks herself into a particular position on the parties, the law, or the facts before a case is heard plainly undermines that goal.

\textit{See id.}


\textsuperscript{41} Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J. dissenting). Justice Stevens’ quote is one of the three introducing this article.
decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially."

"[T]here is an aspiration in the hearts of all men and women for the rule of law. That aspiration depends for its fulfilment on the competent and impartial application of the law by judges."  

The consequences of lack of impartiality are self-evident. For example, if a judge rules in favor of A not B in a case involving money damages because of actual bias (and not because of the law), the judge has taken money from B that belongs to B and given it to A. Otherwise stated, the judge has misappropriated property under the color of law, and that is a rule of law violation. In addition, if a judge who is reasonably believed to be biased rules in favor of A rather than B, that in itself is a rule of law violation, to the extent that “confidence” in the justice system is lost and the system is degraded, and citizens will distrust and cease to see courts as places where justice is done or view the “courts of law” and “courts of justice” as two different places. The rule of law

42 BANGALORE PRINCIPLES, supra note 31, at 2.5.


44 BANGALORE PRINCIPLES, supra note 31, at 2.5: see also Tolbert & Solomon, supra note 33, at 47:

With some input in the selection process from the judiciary itself through judicial qualification commissions, judicial appointments should be made on the basis of objective criteria in order to foster the selection of independent, impartial, and well-qualified judges. Similarly, judges should be appointed for fixed terms that provide guaranteed tenure. Justice sector reform efforts should also seek to raise the qualifications of judges and judicial personnel through training, including the establishment of judicial training centers. Measures must be adopted to provide the judiciary with adequate resources and sufficient judicial personnel to manage caseloads and dispose of cases in a timely and efficient manner. Finally, efforts must be made to strengthen the role of judicial associations that promote the interests of the profession and encourage compliance with ethical standards.

45 JEFFREY M. SHARMAN, INTER-AMERICAN DEVELOPMENT BANK, SUSTAINABLE DEVELOPMENT DEPARTMENT STATE, GOVERNANCE AND CIVIL SOCIETY DIVISION, JUDICIAL REFORM ROUNDTABLE II, JUDICIAL ETHICS: INDEPENDENCE, IMPARTIALITY, AND INTEGRITY 8–9 (1996) (“Hence, judges are expected to avoid not only actual partiality, but the appearance of it as well, because the appearance of a judge who is not impartial diminishes public confidence in the judiciary and degrades the justice system.”).

46 See Slapper, supra note 36:

In 1920, a judge told a London taxi driver to take him to “the courts of justice.” “Where’s that?” the cabbie asked. “The law courts,” said the judge. “Oh, I know,” said the driver “but it ain’t the same thing.”

It is true that justice and law are not the same territory but some ideas of justice are in the heart of British law. It’s a cardinal principle of justice that a judge must not be biased. Laws must be applied impartially. Like an unbalanced set of weighing scales, a biased judge will give an unreliable result.
will be the loser if parties dispute adverse judgments as “rendered in biased courts.” 47 “Far worse, negative perceptions about the justice system encourage citizens to resort to violent, extralegal and possibly criminal practices to secure their rights.” 48 “If private citizens perceive that judges are not impartial, it is likely that courts will not be relied upon as the ultimate fora for dispute resolution.” 49 In some circumstances, this may cause a “descent into chaos,” according to a Kenyan appellate judge. 50

In the international context, it has been observed that failed trust in justice is “lethal for democracy and development,” and “what is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society.” 51 “If the law or the courts are perceived as partisan or arbitrary in their application, the effectiveness of the judicial system in providing social order will be reduced.” 52 In order for the public to accept an independent 53 judi-

47 Shepard, supra note 16, at 1067. Chief Justice Shepard observed specifically:

[J]udges must not only be impartial in fact, they must appear to be impartial. If private citizens perceive that judges are not impartial, it is likely that courts will not be relied upon as the ultimate fora for dispute resolution. Society’s commitment to the rule of law may be irreparably damaged if losing litigants do not respect adverse judgments because they perceive them to have been rendered in biased courts. Thus, rules that restrain favoritism, conflict of interest, prejudgment and the like help ensure that courts are perceived as even-handed institutions.

Id.


49 Shepard, supra note 16, at 1067.


As Kenyan High Court Judge Mary A. Ang’awa wrote, the lack of faith in the justice system played a large role in the descent into chaos:

When the results were announced, the losers felt cheated and were angry. When they were told, “If you are not satisfied with the election results, go to court and challenge them,” they responded, “We have no confidence in the judiciary; we refuse to go to court.”

51 BANGALORE COMMENTARY, supra note 31, at 17 (“Looking beyond the acts themselves, the fact that the public in some countries tends to view the judiciary as a corrupt authority is particularly serious: a lack of trust in justice is lethal for democracy and development and encourages the perpetuation of corruption. Here, the rules of judicial ethics take on major importance. As the case law of the European Court of Human Rights stresses, judges must not only meet objective criteria of impartiality but must also be seen to be impartial; what is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society.”) (emphasis omitted).

ciary, they need to have a judiciary which they believe to be impartial; and for a judiciary to be impartial, it needs to be independent, free of threats or inducements by political or other forces to decide one way or another. In one reported instance, a Chinese judge was threatened with lack of promotion and the loss of her children’s educational opportunities (child will be “a labourer all

As spending escalates, judicial elections more and more appear to be a tool of the wealthy and powerful, casting doubt on the impartiality and legitimacy of the judicial system overall. “A judiciary independent from both government intervention and influence by the parties in a dispute provides the single greatest institutional support for the rule of law. If the law or the courts are perceived as partisan or arbitrary in their application, the effectiveness of the judicial system in providing social order will be reduced.”

Judicial independence and judicial impartiality are sometimes thought of together as related concepts. See, e.g., Laura Denvir Stith & Jeremy Root, The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges, 74 Mo. L. REV. 711, 717 (2009) (“Judicial independence refers to the essential requirement that judges be impartial and free — independent of political or sectarian influence. Such independence is not inconsistent with accountability, as some have suggested, but rather it requires accountability, for judges who fail to be impartial — who intentionally impose their own views rather than their good faith beliefs in what the law requires — should be held to account for their failures.”) (footnotes omitted).

Judges may be impartial, however, but to some extent and in certain circumstances not independent. See Christopher M. Larkins, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, 44 AM. J. COMP. L. 605, 612 (1996), observing as follows:

Judges may be impartial but not insulated; they may have the mindset to act objectively when dealing with the behavior of powerful political and social actors, but will pay the price if and when they attempt to do so. Likewise, judges may be impartial but have no scope of authority with which to challenge the legality of certain agents’ actions. In actuality, both insularity and scope of authority may be lacking while judges remain impartial. Under these circumstances, notwithstanding the high degree of impartiality, it would be less than accurate to label such judges independent.

Id.

Judicial independence is indispensable to a law-based society. Many important structural safeguards facilitate judicial independence, such as lifetime tenure and nonremovability until a certain retirement age. But judicial independence also depends on public support for the judiciary as an institution, and to earn that support the judiciary must appear scrupulously impartial in its decision making. Together with fidelity to the law, impartiality is a means of ensuring the accountability of an independent judiciary in a democratic society and in the international community.”).

See Theodor Meron, Judicial Independence and Impartiality in International Criminal Tribunals, 99 AM. J. INT’L L. 359, 369 (2005) (“Judicial independence is indispensable to a law-based society. Many important structural safeguards facilitate judicial independence, such as lifetime tenure and nonremovability until a certain retirement age. But judicial independence also depends on public support for the judiciary as an institution, and to earn that support the judiciary must appear scrupulously impartial in its decision making. Together with fidelity to the law, impartiality is a means of ensuring the accountability of an independent judiciary in a democratic society and in the international community.”).

See Ibrahim F.I. Shihata, Judicial Reform in Developing Countries and the Role of the World Bank, in THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES 147, 159 (Ibrahim F.I. Shihata et al. eds., 1993) (“While the independence of the judiciary is an important element of a judicial reform program, it should be recalled, however, that such independence is not an end in itself. Rather, it is a means to achieve the goal of the impartiality of the judge and the fairness of judicial procedures.”).
his life”) were she to disregard the directions of the political boss on how a particular case should be decided.56

She then noted that westerners should not second-guess how she responded to the threats: “What do you western judges say I must do in these circumstances?”57 (The judge did not reveal how she responded to the threats.) Another observed that in Nigeria, “[m]ost judges have succumbed to the notion that career development depends on how they rule, especially in high profile cases involving the government.”58

56 For the threats to the Chinese judge and her family in order to influencing her decision-making, see the Honourable Justice David Ipp AO, Maintaining the Tradition of Judicial Impartiality, available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/ipp211108.pdf?File/ipp211108.pdf (last visited Apr. 12, 2010), as follows:

She [the Chinese judge] explained that, usually, she had no trouble from the government, or people in power. But, three or four times a year she would receive a telephone call from a person who was very important politically in the city (in other words, one or other of the political bosses). She would be reminded that the next day she would be hearing some particular case which the man would identify. The man would tell her that the case concerned one of his family members or friends or business or political associates. He would say that this person must win the case. When the judge protested, the man would warn her. He would say: “If this person doesn’t win the case, not only will you never be promoted but we know all about your child, your only child. If this person doesn’t win the case, your child — who is presently in primary school — will never get into the stream to go to university. He will be a labourer all his life. Your child will never receive a proper education. He will have to leave school at 15 years of age and go and work in the fields.” The judge gave me a piercing look and said: “What do you western judges say I must do in these circumstances?”

To the same effect, see also F. Andrew Hanssen, The Political Economy of Judicial Selection: Theory and Evidence, 9 KAN. J. L. & PUB. POL’Y 413 (2000); see, e.g., id. at 418 (“Are there groups today that judges might be a little leery about displeasing? It depends on the institutional structure, and whether that structure gives particular groups the means to affect a judge’s career.”).

57 Honourable Justice David Ipp AO, supra note 56.

58 Oko, supra note 48, at 73–74:

In a system where judges are fearful of the executive, it is futile to expect them to exercise the level of independence needed for them to engage in impartial and dispassionate resolution of conflicts. The climate of intimidation, manipulation and control of the judiciary by the executive often forces judges to engage in a cost-benefit analysis with potentially disastrous consequences for the integrity and independence of the judiciary. Judges have to choose between commitment to justice and risking the ire of the executive or demonstrating their fealty to the executive. Most judges have succumbed to the notion that career development depends on how they rule, especially in high profile cases involving the government. Judges cast in this mold prefer to demonstrate their loyalty to the executive, sacrificing the dictates of justice in an attempt to appease the executive, and thus, maintain their viability in the system.

(footnotes omitted).
These are only two of many examples. Describing a lack of judicial independence, another writer hypothetically observed as follows: “You render decisions that [the ruler] likes, you get a big house, a nice fancy carriage with fancy horses, a lot of servants to wait on you. If you render a decision he doesn’t like, he cuts your head off. So that is the institutional structure: good decision, nice house and carriage; bad decision, no head.” Also, “[t]here are many ways in which a determined executive faction may secure the outcomes it wishes short of threatening or firing judges . . . .” Sometimes rulers may seek to “ensure that only cooperative judges have good careers.” Judges concerned about their careers and even their personal safety “temper justice with self preservation.” “At least in authoritarian states, judicial independence is not a given.” Judicial independence is not a given in the United States either, although the reasons may differ.

See generally Rule by Law, supra note 6. With respect to judicial impartiality in Nigeria, see also Oko, supra note 48, at 17–19:

Most politicians are neither committed to the establishment of a strong, virile and independent judiciary, nor do they believe that the judiciary should have the power to review legislative and executive decisions. Some elected officials have a distorted view of the judiciary as an extension of the executive branch of government. This mindset encourages attempts to control and manipulate the judiciary and to turn judges into “pliable instruments of state power.” The pervasive influence of the executive, its powers of retaliation and ability to advance or hamper a judge’s career make it difficult for judges to adjudicate disputes without fear or favor as required by their oath. Judges concerned about their careers and even their personal safety “temper justice with self preservation.”

For most Nigerians, the judicial process is nothing more than an auction in which justice goes to the highest bidder. Convinced that judges decide cases on the basis of connections and gratification without regard to the legal merits of the case, citizens seek to influence the outcome of cases either by “settling the judge,” or intimidating judicial officers. Far worse, negative perceptions about the justice system encourage citizens to resort to violent, extralegal and possibly criminal practices to secure their rights. Popular distrust of the judiciary has fueled needless attacks on the integrity and the institution of the judiciary.

(footnotes omitted).

Hanssen, supra note 56, at 417.


See also Oko, supra note 48.


Security of tenure, good salaries, good financial support of the courts, and judicial control of key aspects of court administration are recognized as neces-
I. Judicial Impartiality, Judicial Elections, and Caperton

Caperton held that a judge was required to recuse himself “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The remedy of recusal was based on a litigant’s due process right to a fair trial before an unbiased judge.”

* * *

“Though n[o] . . . bribe or criminal influence” was involved, we recognized that “Justice Benjamin [i.e., the judge sought to be recused] would nevertheless feel a debt of gratitude to Blakenship [i.e., the person responsible for the contributions and expenditures] for his extraordinary efforts to get him elected.” Ibid. “The difficulties of inquiring into actual bias,” we further noted, “simply underscore the need for objective rules,” rules which will perforce turn on the appearance of bias rather than its actual existence.

A. The Decisions in Caperton

1. Justice Benjamin Refuses to Recuse Himself

The underlying facts in Caperton are of little relevance to the principal activity of the case which led to the decision by the U.S. Supreme Court. That activity principally turns on the issue of whether a particular judge, West Virginia Supreme Court of Appeals Justice Brent Benjamin, should have participated in the appeal of a $50 million verdict won by Caperton against Massey. The underlying case involved a lawsuit among two coal companies and others, one (Caperton) claiming that the other (Massey) intentionally destroyed its business. Described more colorfully by others (including the alleged reasons for

sary conditions for judges to render impartial decisions. But they may not be sufficient, especially when judicial bureaucracies create strong incentives for judges to conform to the wishes of political masters and informal institutions support this behavior.

Id. at 262 (citation omitted).

67 Id. at 967 (Stevens, J., dissenting).
the destruction), the facts were stated by the U.S. Supreme Court quickly, as follows:

In August 2002 a West Virginia jury returned a verdict that found respondents A. T. Massey Coal Co. and its affiliates (hereinafter Massey) liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations. The jury awarded petitioners Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales (hereinafter Caperton) the sum of $50 million in compensatory and punitive damages. In June 2004 the state trial court denied Massey’s posttrial motions challenging the verdict and the damages award, finding that Massey “intentionally acted in utter disregard of [Caperton’s] rights and ultimately destroyed [Caperton’s] businesses because, after conducting cost benefit analyses, [Massey] concluded it was in its financial interest to do so.”

Rather than a dispute between coal companies, Caperton, therefore, mainly involved Caperton’s attempt to recuse Justice Benjamin from hearing the case, based on the contribution to Benjamin of his principal and major campaign contributor, the CEO of defendant Massey, Don Blankenship. According to the rules, Benjamin heard the recusal motion and decided he could fairly hear the case, issuing a lengthy opinion explaining his reasons for not recusing himself. In his opinion, among other things, he noted:

Insofar as all state judicial offices are filled through the electoral process, every judicial officer in this state is subject to having to decide the merits of a case that involves a party or attorney who contributed to or supported, or, conversely, opposed his or her campaign for office.


“On the day of the closing, at 2 o’clock in the afternoon, they called the whole deal off,” Caperton recalls. “They tanked us at the last second. It forced us into bankruptcy.” So after a stop at the federal bankruptcy court to file a Chapter 11 petition, he hauled Massey into West Virginia state court on various allegations of fraud and tortious contract interference. He won a $50 million jury verdict.

69 Caperton, 129 S. Ct. at 2257.


71 Id. at 303 (Benjamin, Acting C.J., concurring) (refusing to recuse himself from the hearing of the case).
The “campaign contributions” — virtually all independent expenditures — amounted to over $3 million and were lawful, but were made at a time that the contributor Blankenship knew that the case was coming before the West Virginia Supreme Court of Appeals and that if Justice Benjamin were elected, the case would come before him. \(^{72}\) (The U.S. Supreme Court grouped the independent expenditures and contributions together as if they should all be considered “contributions,” without explaining the reasons for this.) \(^{73}\) The payments were generally discoverable through West Virginia’s campaign finance disclosure requirements. \(^{74}\) As the U.S. Supreme Court noted:

The temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The $50 million adverse jury verdict had been entered before the election, and the [West Virginia] Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor’s company $50 million. \(^{75}\)

---

\(^{72}\) It was fortunate for Caperton that he was able to learn the extent of the expenditures that were made by Blankenship, since that is not always possible. See Schotland, Special Interest Influence, supra note 27.

Disclosure of contributions to independent spending efforts: . . . in nearly all states disclosure of contributors to independent spending efforts is not required or the requirement applies only to “express advocacy.” . . . Supreme courts should promulgate a rule requiring parties and counsel in a lawsuit to certify that all their campaign contributions and expenditures with respect to the sitting judge’s campaign(s) within the past X years are set forth in an affidavit filed in that case.

Id. at 526.


[Justice] Kennedy never explains why he blurred the distinction between contributions and expenditures. All we know is that Kennedy acknowledges (only once) that Blankenship engaged in “independent expenditure.” But then, a dozen times he repeatedly re-labels these “independent expenditures” as “contributions.” He discusses the precedent in disqualification cases, and quotes the relevant portions of those cases as referring to “contributions” to the judge, not independent expenditures. Yet, he treats the two words as synonyms and never explains why.

Id. (footnotes omitted).

\(^{74}\) The relevant disclosure statute is W.Va. CODE § 3-8-1 et seq. Cf. Schotland, Special Interest Influence, supra note 27, at 526.

Most of the money was given by Blankenship to a political organization (referred to as a “527”) known to be supporting Benjamin and opposing his opponent, called “And for the Sake of the Kids [hereinafter ASK].” The contributions far exceeded all other amounts spent on behalf of Benjamin. The U.S. Supreme Court observed the following about the sums involved:

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. ... Caperton claims Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined.

Justice Benjamin, commenting on the motion to recuse him with a degree of incredulity, focused on why he should be recused for “independent expenditures” since he had nothing to do with them. In his opinion on the recusal question, he posed the problem as he saw it as follows:

76 According to the U.S. Supreme Court, in “addition to contributing the $1,000 statutory maximum to Benjamin’s campaign committee, Blankenship donated almost $2.5 million to ‘And For The Sake Of The Kids,’ a political organization formed under 26 U. S. C. § 527.” Id. at 2257. With respect to such 527’s, see, e.g., Richard Briffault, The 527 Problem ... and the Buckley Problem, 73 GEO. WASH. L. REV. 949, 949 (2005).

“In the world of campaign finance, 2004 was without a doubt the year of the 527 organization. No other aspect of campaign financing received as much press coverage or public attention as the rise of the 527s. Expenditures by 527s — named after the section of the Internal Revenue Code under which they are organized — active in federal elections amounted to at least $405 million, accounting for more than one-tenth of total federal election spending and perhaps twenty to twenty-five percent of spending in the presidential campaign.”

77 Caperton, 129 S. Ct. at 2264. Fortunately for Caperton, the amount of the campaign contributions were known, but that would not be true in all jurisdictions where judges are elected. To the extent that the contributions are unknown, making a motion to recuse on the basis of contributions would be much harder, if not impossible.

78 For a description of the difference between contributions and independent expenditures, see Rotunda, supra note 73, at 261:

... Blankenship personally spent a lot of his own money (what the Court calls “independent expenditures”) to attack Benjamin’s opponent. Moreover, these expenditures were truly “independent.” No one argued that Blankenship coordinated with Justice Benjamin’s campaign or even that Blankenship and Benjamin were friends.

The distinction between “contributions” — giving money to, or coordinating 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. Independent expenditures — those not coordinated with
The primary thrust of the Appellees’ argument is not that I should be disqualified because a party or attorney to the instant case directly contributed to my campaign. The Appellees’ argument is that I should be disqualified because, without my knowledge, direction or control, an independent nonparty organization, ASK, received contributions from people or groups that included an employee of a party in this case [namely, Blakenship, CEO of Massey], and ASK independently used its contributions to wage a campaign against my opponent four years ago.79

In support of his position, Benjamin cited opinions raising a concern about extensive recusals in states where judges are elected. According to these opinions, if judges who received contributions from or on behalf of litigants or their counsel would recuse themselves, there would be many recusals; and such contributions are therefore generally considered insufficient to

the candidate — are constitutionally protected as free speech . . . . In contrast, the state has much greater leeway in regulating and limiting contributions.

79 Caperton v. A.T. Massey Coal Company, Inc., 679 S.E.2d 223, 303 (2008) (Benjamin, Acting C.J., concurring) (refusing to recuse himself from the hearing of the case). Similarly underscoring that most of the payments on which the Supreme Court focused were independent in nature, see Rotunda, supra note 73, at 266:

Given this merging of contributions and expenditures [by the U.S. Supreme Court], there is little the judge can do to avoid disqualification. He cannot reject the “contribution” because there is no contribution to reject or accept. He cannot change the content of these attack-advertisements because, by hypothesis, these third-party expenditures are not his expenditures; they are truly “independent.”

The attorneys for Massey in Caperton, who lost in the U.S. Supreme Court, observed that the Supreme Court and others combined Blankenship’s contributions and expenditures in order to create one large payment of over $3 million and thereby created a “compelling narrative.” See Andrew L. Frey & Jeffrey A. Berger, The Disconnect Between the Outcome in Caperton and the Circumstances of Justice Benjamin’s Election, 60 SYRACUSE L. REV. 279, 291–92 (2010). This “narrative” was an important factor leading to Massey’s defeat:

Many amici also trumpeted the headline-grabbing simple story. They too focused almost exclusively on the amount of money spent, overlooked the difference between direct contributions and independent expenditures, and disregarded various nuances, such as the amount of money spent opposing Justice Benjamin and the impact of McGraw’s behavior on the outcome. . . . In the end, the narrative shaped by the petitioners, and amplified by the media and amici, affected the outcome — the simple story prevailed and the headline trumped the details. The mantra of “CEO buys judge for $3 million” has a shock-the-conscience salience that was difficult to overcome. It proved irresistible to many, including five members of the Court, and it clearly fueled the Court’s result. The success of the simple story in Caperton reinforces a principle that veteran Supreme Court litigators understand well: legal reasoning goes a long way, but a compelling narrative can make the difference.

Id. (footnotes omitted).
mandate recusal. Thus, he concluded that independent expenditures by their very nature are insufficient to warrant recusal:

Direct contributions to a judicial candidate’s campaign are an insufficient basis, alone, to require disqualification. Therefore, contributions by a third-person to a completely independent campaign — with no ties to the judicial candidate — do not rise to a due process requirement of disqualification.

As both the West Virginia Supreme Court of Appeals and the U.S. Supreme Court noted, “[t]he West Virginia Code of Judicial Conduct requires a judge to ‘disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.’

Following the hearing of the case, Justice Benjamin was the deciding vote in a 3–2 decision of the West Virginia Supreme Court of Appeals in favor

---

80 See Caperton, 679 S.E.2d at 305 (quoting Aguilar v. Anderson, 855 S.W.2d 799, 802 (Tex. App. 1993));

If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge’s opponent.

See also Caperton, 679 S.E.2d at 305 (citing Adair v. State Dep’t of Education, 474 Mich. 1027, 709 N.W.2d 567 (2006));

That a judge has at some time received a campaign contribution from a party, an attorney for a party, a law firm employing an attorney for a party, or a group having common interests with a party or an attorney, cannot reasonably require his or her disqualification. For there is no justice in Michigan in modern times who has not received campaign contributions from such persons.

See also Caperton, 679 S.E.2d at 303 (citing Public Citizen v. Bomer, 115 F. Supp. 2d 743, 746 (W.D. Tex. 2000));

“[C]ampaign contributions by parties with cases pending before the judicial candidate or by attorneys who regularly practice before them is not so irregular or ‘extreme’ as to violate the Due Process Clause of the Fourteenth Amendment.”

81 Caperton, 679 S.E.2d at 306 (Benjamin, Acting C.J., concurring) (refusing to recuse himself from the hearing of the case).

82 Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2266 (2009); see also Caperton, 679 S.E.2d at 295 (citing Canon 3E(1)). The principles for impartiality in West Virginia thus approximate those in the Bangalore Principles. BANGALORE PRINCIPLES, supra note 31, at 2.5. The effectiveness of the impartiality requirement evidently does not depend exclusively on how the requirement is worded but rather how it is interpreted and enforced. Indeed, the U.S. Supreme Court and Justice Benjamin both had the same principle before them and came out differently.
of Massey dismissing the $50 million trial verdict in favor of Caperton. The U.S. Supreme Court agreed to hear the case.

2. The U.S. Supreme Court’s Majority Decision

The U.S. Supreme Court, in a 5–4 decision, held that Benjamin should have recused himself in light of the timing and actual and relative magnitude of the contributions and that his decision to hear the case violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. As the U.S. Supreme Court noted:

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. . . . Applying this principle, we conclude that Blankenship’s campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.

With respect to timing (and significance), the U.S. Supreme Court observed that it was clear that the Caperton case would come before Benjamin at the time the contributions were made:

The temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice.

---

83 That Justice Benjamin was the deciding vote on a 3–2 decision should not be a significant point in future recusal cases involving appellate judges. Even if he was only one of a more substantial majority (such as 5–0 or 4–1), Justice Benjamin’s participation still may have tainted the process. See Karlan, supra note 14, at 102 (“Justice Benjamin’s participation would have tainted the impartial administration of justice even if the state court had upheld the jury’s verdict by a vote of four to one with Justice Benjamin in the dissent or had overturned the verdict by a super-majority that included him. Indeed, the latter possibility might actually have been more troubling to the extent that the lineup was a function of his powers of persuasion over his colleagues.”).

84 Caperton, 129 S. Ct. at 2263–64.

85 Id. at 2256.
Focusing on the “extreme” facts as it saw them, the U.S. Supreme Court rejected claims that the decision would lead to a “flood of recusal motions.” Since, according to the Court, the facts would be unlikely to recur, requests for such relief would be rare:

Our decision today addresses an extraordinary situation where the Constitution requires recusal. Massey and its amici predict that various adverse consequences will follow from recognizing a constitutional violation here ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case. 86

And the U.S. Supreme Court rescued Caperton from his predicament by granting recusal.

3. The Chief Justice’s Dissent

The Caperton majority and the principal dissent by Chief Justice Roberts disagreed on the consequences of recusal, including whether there was a danger of a “flood” of recusal motions. Among other things, through posing a list of forty questions, 87 Chief Justice Roberts contended that the rules set forth by the majority are too vague, that they would encourage baseless recusal claims, and that they would result in systemic damage to the courts:

The Court’s new “rule” provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case. 88

86 Id. at 2265.
He was not persuaded by the majority’s reference to the case being “extreme” and, therefore, its suggestion that Caperton recusals and recusal motions would be rare. Rather, he foresaw many recusal motions:

To its credit, the Court seems to recognize that the inherently boundless nature of its new rule poses a problem. But the majority’s only answer is that the present case is an “extreme” one, so there is no need to worry about other cases. Ante, at 17. The Court repeats this point over and over. See ante, at 13 (“this is an exceptional case”); ante, at 16 (“On these extreme facts”); ibid. (“Our decision today addresses an extraordinary situation”); ante, at 17 (“The facts now before us are extreme by any measure”); ante, at 20 (Court’s rule will “be confined to rare instances”).

In an interesting aside, Chief Justice Roberts noted that perhaps Justice Benjamin should have recused himself. But according to the Chief Justice, it was better for the Supreme Court to leave the judge in place than grant recusal relief, since directing recusal would inevitably lead to a plethora of recusal motions in future cases and reduce confidence in the courts:

I am sure there are cases where a “probability of bias” should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous “probability of bias,” will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts.

Or as Justice Scalia noted in his separate dissent as well:

The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed — which is why some wrongs and imperfections have been called nonjusticiable.

---

89 A commentator noted that “Caperton does tell us that constitutionally-mandated recusals will be rare, but it does not tell us why.” Rotunda, supra note 73, at 278.
90 Caperton, 129 S. Ct. at 2272 (Roberts, C.J. dissenting).
91 Id. at 2274.
92 Id. at 2275 (Scalia, J. dissenting).
B. Justice in the Individual Case vs. Systemic Needs

If the result of federalism is that a litigant needs to have his case decided by an apparently biased judge, what purpose does federalism serve there?

The Roberts dissent saw tension between doing justice in the individual case and doing what is best for the court system. According to the dissent, it was better for Caperton to have borne his burden alone — and presumably have been a good sport about it and done so in good spirits — because (in the Chief Justice’s view) of systemic needs.

In essence, Caperton would be told, “Sorry, we cannot provide you with an impartial judge, because if we give you one, there will be potential problems with other litigants in the future.” This is an example of one part of our government telling the aggrieved litigant that “it’s not my job” to address its problem and leaving the litigant without a remedy where no other part of government has accepted the job.

The Chief Justice’s reference to “an isolated failure to recuse in a particular case” is only a euphemistic way to describe leaving Caperton before an apparently biased judge. For Caperton, the phrase “isolated failure” means nothing — this is his case and his money, and he presumably did not have many cases either. According to the Chief Justice’s dissent, principle tops justice in the individual (Caperton) case:

Extreme cases often test the bounds of established legal principles. There is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle. That cost has been demonstrated so often that it is captured in a legal aphorism: “Hard cases make bad law.”

Caperton reminds us, however, that a victory on a recusal motion is not a victory in the case. The decision on a recusal motion only relates to the need to appear before a biased or apparently biased judge, rather than a loss or victory on the merits.

How might a patient on the fourth floor of a hospital feel if a doctor assigned to the third floor of a hospital refused to treat him because he’s on the fourth floor, even though there were no doctors assigned to the third floor? See also James Sample, Caperton: Correct Today, Compelling Tomorrow, 60 SYRACUSE L. REV. 293, 295 (2010) (“The implication [in the Caperton dissents] is that while ethical rules and judicial prudence counseled Benjamin’s recusal, Benjamin’s lack of compliance was simply Caperton’s ‘tough luck.’”); Stempel, supra note 87, at 6 (“The Roberts dissent embraces an almost indefensible position (that the Court should just let it go when the public could reasonably suspect that a litigant succeeded on appeal by ‘buying’ a key judge through massive campaign support”).

Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J. dissenting). To the same effect is Professor Lawrence Lessig’s view that although Justice Benjamin should have recused himself, the Supreme Court was wrong to intervene to require his recusal, speculating that there would be much future Caperton litigation as a result of the intervention.
The “hard case/bad law” phrase, if used to deny Caperton relief, would have made “very bad law” for Caperton and the Supreme Court. The decision would have left Caperton before a biased judge and degraded the court system by casting doubt on its impartiality. There is a cost to justice and the appearance of justice of using such an often-repeated phrase — frequently divorced from its original nineteenth century or earlier context — to deny litigants the

See Lawrence I. Lessig, What Everyone Knows and Too Few Accept, 123 HARV. L. REV. 104, 112 (2009) (“In my view, it [the Supreme Court] should not have [intervened]. Caperton was a mistake. The Supreme Court was wrong to expand the reach of due process to remedy the bad judgment of this state supreme court justice.”). Professor Lessig nonetheless observes that in some cases the Supreme Court should step in and grant relief, despite risks to the institution of the judiciary such as those he perceives from the Caperton decision, provided that three conditions are met. Yet the standards underlying his proposed exceptions or “conditions” are themselves vague, as he notes:

No doubt, sometimes such risks are worth taking. Where the value is important, where the demands of justice are strong, and where there is no other plausible institution that might address or remedy the problem at issue: in those cases of course the Court should act consistent with fidelity to meaning, despite the costs to the judicial institution. But these three conditions do not obtain in this case.

Id. at 115. When, for example, are the “demands of justice” going to be considered “strong” or a “value” as “important”? Isn’t the right to have an appeal heard before an impartial court an important demand of justice or an important value? As for other institutions available to address the problem, in the case of Caperton, no other institutions were there: either the Supreme Court stepped in to help Caperton or no one could (or would). Some of Professor Lessig’s reasoning criticizing the Caperton holding contradicts his very strong statements on damage done by the facts in Caperton — damage to the system of justice as a whole, not just to the litigant, including by fostering cynicism concerning the judiciary. As he states:

In the context of Congress, cynicism breeds disengagement — why waste your time trying to persuade an institution controlled by money (unless, of course, you too have money)? Critics of Justice Benjamin could rightly fear that if the same attitude about the state judiciary became dominant, a critical asset of the judiciary would be lost — if it has not already been lost.

Id. at 108 (footnotes omitted).


The origins of the phrase are unknown, but it can be traced back as far as the pleas of two English judges of the 1840s, Baron Rolfe and Lord Campbell, that hard cases not be allowed to make bad law (the phrase appears to have been in common usage even then). It was brought into the lore of the Supreme Court by the first Justice Harlan, and was stated most famously by Justice Holmes in the passage from the Northern Securities case . . . .

To understand why hard cases are said to make bad law, one must first appreciate what it is that makes a particular case “hard.” As used in this Article, the term “hard cases” refers to cases where the law, meaning primarily the doctrine announced by the Supreme Court, appears to point strongly towards a particular result, and yet, because the result seems unduly harsh either to an individual or to society at large, it is unpalatable to the reviewing court. In the constitutional, individual-rights context, this most often occurs when a challenged governmental action seems to quite clearly infringe upon a well-
relief they deserve. Moreover, where the issue is entitlement to an impartial judge, denying recusal relief is a deprivation of a fundamental principle of the rule of law.

But the Roberts dissent has attracted the support of other commentary which likewise fears that the cost of granting Caperton the impartial judge he deserved — a supposed “flood” of Caperton motions — was too great, even though Benjamin should have recused himself.97 One problem with this reason-

established constitutional right, and yet the reasons given by the government for its actions are (or at least seem to the reviewing court to be) particularly strong or “compelling.”9

(footnotes omitted).

See also id. at 968:

The traditional aphorism makes a good deal more sense, however, if understood to refer to hard cases... — cases which are “morally” hard, even if they apparently do not require difficult legal analysis. Under this understanding, the phrase “hard cases make bad law” is a plea to judges and other rulemakers not to deviate from, or to alter, clear and well-established rules because of the equities of a particular case. “Bad law” in this context is understood as the distortion or even the disregard of clear rules for the sake of a “just” result (or perhaps more accurately, a result that is acceptable to the deciding judge).

See also Supreme Court Justice Oliver Wendell Holmes’s phrase in his dissent in N. Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J.):

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

97 According to Professor Lessig, what Benjamin did was “bad judgment” and Benjamin should have recused himself:

Thus again, whether Justice Benjamin should have recused himself is in my view a straightforward question: he should have. By not stepping down, he strengthened the suggestion that money buys results not just in the political branches, but also in the judicial branch. He had a duty not to impose this cost upon the West Virginia courts.

Lessig, supra note 95, at 112. But as noted above, Lessig goes on to conclude that the Supreme Court should not have recused him.

At some point, such legalistic arguments part company with common sense which is entitled to a reasonable amount of respect if courts are to receive legitimacy among our citizens. See also Terri R. Day, Buying Justice: Caperton v. A.T. Massey: Campaign Dollars, Mandatory Recusal and Due Process, 28 Miss. C. L. Rev. 359, 379 (2009), contending that the Supreme Court should not have recused Benjamin, but nonetheless noting the extremity of the circumstances:

Justice Benjamin created a firestorm of constitutional proportions when he refused to recuse himself from the case. Whether Justice Benjamin was or could be impartial is irrelevant. The perceived unfairness is evident. The confluence of the campaign contribution, its enormity in amount and relative proportion to the total spent during the election campaign, the connection in time of the contribution to Massey’s appeal and the refusal to recuse amounted to, what Justice Souter termed, the “ethos of total unreasonableness.”
ing is that there is no evidence that an unreasonable expansion of recusal litigation would take place, especially given the majority’s circumscribed holding. What comes next is unknown, and pessimism about the potential outcome — an onslaught of motions — is not evidence.

It is difficult to imagine how and why such a principle should take precedence over the right to an impartial judge. Alternatively, why does such a principle mean that Caperton must have a “decision for the sake of a decision,” which is the “negation of the rule of law,” as noted in an introductory quote to this Article, rather than a decision by an impartial judge? What is so special about the hard case/bad law phrase?

The dissent is also reminiscent of the complaint that rule-makers are sometimes detached from the havoc that their rules cause “on the ground.” This may be true in various contexts, including wartime, according to a complaint by famed World War II veteran E.B. Sledge:

“Possibly I lost faith that politicians in high places who do not have to endure war’s savagery will ever stop blundering and sending others to endure it.”

If the direction that the rules point is to leave litigants unable to have their cases heard before an impartial judge, the rules are wrong. The same would be the case if the rules required the punishment of the innocent, which was the subject of a recent observation by a law professor following up on comments by Justices Scalia and Thomas in a dissent. At least this time, while many with legal training are used to hearing, making, or being trained to make such hard case/bad law arguments, their repetition does not disguise the jarring effect they have on one’s sense of justice and fairness.

98 See Dahlia Lithwick, Caperton Symposium, 60 SYRACUSE L. REV. 215, 219 (2010) (“Because the truth is that we do not know whether a more rigorous inquiry into judicial bias will be better or worse for democracy, and we do not yet know what form that inquiry should take. We do not yet know what the impact of Caperton on the ground will be. We cannot know if it will create modest improvements in state recusal rules, or lead to a spate of vicious judge-shopping.”).

99 Rodley, supra note 1, at 512.


101 See Stempel, supra note 87, at 66 (“Although states’ rights are an important component of the American system, deference to state courts cannot be so great that it permits decision-making by judges who reasonably appear to lack neutrality.”).

102 A good example of such legal argument occurred in a recent observation by Harvard Law Professor Alan Dershowitz concerning a dissent by Supreme Court Justices Antonin Scalia and Clarence Thomas about the constitutional significance of proof of innocence in capital cases — i.e., the constitutionality of executing an innocent person. As Professor Dershowitz wrote:

I never thought I would live to see the day when a justice of the Supreme Court would publish the following words:
however, for one litigant (Caperton), the Supreme Court came to the rescue. But what about the others yet to come?

C. Post-Caperton Recusal Movement — Limited Progress

Caperton has at least two facets, one progressive, the other not. First, the case recognizes that judicial elections are different, and campaign contributions may under certain circumstances lead to recusal. Second, it acknowledges that the Due Process Clause will not rescue the litigants despite campaign contributions except in extreme cases, and therefore state recusal standards will govern in most situations. In most states, however, recusal is a difficult process: the target judge typically decides the recusal motion; and for reasons of reputation, a judge may declare herself impartial even when she knows that is incorrect or may not recognize bias since some biases are unconscious in nature.103 Also, the appellate courts typically affirm denials of recusal, and the burden of proof to be met by the party seeking recusal is substantial.104

“This court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged ‘actual innocence’ is constitutionally cognizable.”

Yet these words appeared in a dissenting opinion issued by Justices Antonin Scalia and Clarence Thomas on Monday. Let us be clear precisely what this means. If a defendant were convicted, after a constitutionally unflawed trial, of murdering his wife, and then came to the Supreme Court with his very much alive wife at his side, and sought a new trial based on newly discovered evidence (namely that his wife was alive), these two justices would tell him, in effect: “Look, your wife may be alive as a matter of fact, but as a matter of constitutional law, she’s dead, and as for you, Mr. Innocent Defendant, you’re dead, too, since there is no constitutional right not to be executed merely because you’re innocent.”


104 See JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, BRENNAN CTR. FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 18 (2008), available at http://brennancenter.org/content/resource/fair_courts_setting_recusal_standards/;

In all for-cause disqualification motions, the evidentiary and persuasive burdens rest with the movant; judicial bias, partiality, and interest are never presumed. These burdens are heavy. To prevail, the movant “ordinarily must adduce facts that would raise significant doubt as to whether justice would be done in the case.” On appeal, odds of success are even worse. Nearly every appellate court, state and federal, will overturn a lower court’s disqualification or recusal decision only for an “abuse of discretion.”
The response by the states in the comparatively brief time since *Caperton* was decided has been mixed and indecisive in terms of recusal reform, with few exceptions. Although the legislative or judicial climate could change, there has been some resistance to recusal reform, including to legislation providing clear monetary limits as a grounds for recusal and to having recusal motions heard by judges other than the judge sought to be recused. Michigan is an exception, allowing de novo review by other judges when a judge denies a recusal motion. To date, however, the rules are essentially the same as before, and the problem of dealing with money in judicial politics through recusal remains.

A number of knowledgeable commentators have already weighed in on the subject of how to improve recusal standards and procedures. In brief, however, some reform proposals include reducing deference to the target judge; allowing de novo review by other judges than the target judge, if the target judge denies the recusal motion; setting specific cut-off limits for contributions, which, when exceeded, automatically require recusal (leaving an intense dispute over how high or low the limit should be); peremptory disqualifi-
cation of judges,\textsuperscript{110} and the like. Still others suggest procedural details, like requiring a recusal motion to be in writing and promptly made.\textsuperscript{111}

Some of the proposals for recusal reform have problems, including in the case of specific cut-off limits, handling contributions made to disfavored judges so as to result in a strategic disqualification of those judges. In other words, one might adopt a strategy of getting rid of a judge one does not like simply by contributing over the amount of the specified limit to her campaign. In addition, if the cut-off limit is too high, some may be concerned that unsavory situations will remain uncorrected. If the limit is too low, others may be concerned that recusals will be frequent — even when contributions are so small that one might reasonably believe bias is remote.

With deference to judges other than the target, there are also concerns about strategic recusals, where one judge or group of judges is inclined to disqualify another principally because of a voting disagreement, as opposed to a recusal standard necessarily being met. But without a transfer or review process, where judges other than the target review the motion, it is difficult to avoid an observation — and this is not meant to be original — that the recusal process is like a judge grading her own paper.\textsuperscript{112} Indeed, the concept invites many clever observations, and one of the better ones follows:

The uproar over conflicts of interest at the West Virginia Supreme Court calls into question the practice of giving judges the final say in their recusals — even when they’re faced with demands to step down. . . . “There’s a lot not to like in leaving it up to the conscience of the individual judge,” said Deborah

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{110}] Penny White, Relinquished Responsibilities, 123 Harv. L. Rev. 120, 149 (2009) (“As a complementary component of recusal reform, states should enact statutes allowing for peremptory judicial challenges. Judicial peremptory challenge statutes, already in existence in several states, allow parties to substitute one judge without stating a reason. By allowing each side to recuse a judge as a matter of course, litigants would be insulated against an overly strict application of Caperton’s constitutional disqualification rule.”) (footnotes omitted).
\item[\textsuperscript{111}] Id. at 147–48. In addition to monetary recusals, judges need to recuse themselves when they have indicated in their campaigns “willingness to rule a specific way on a particular issue or to reach a certain result in a case.” Id. at 149.
\item[\textsuperscript{112}] See also Roy A. Schotland, Caperton Capers: Comment on Four of the Articles, 60 Syracuse L. Rev. 337, 342 (2010) (“[W]e can do better than having a judge deliberate with herself about whether to recuse. . . . [A]t many appellate courts and almost all high courts, recusal cries for procedures to assure fairness and protect public confidence — and to work effectively and smoothly, no small challenge in multi-member courts. In a very few high courts (Alabama and Texas formally and by practice in a few others), motions seeking recusal are reviewed by the full court. But many multi-member courts (especially high courts) simply leave recusal decisions entirely to the judge targeted by a motion.”).
\end{itemize}
\end{footnotesize}
Rhode, director of the Center for Ethics at Stanford University’s law school. So it was in West Virginia where it was up to Justice Benjamin to decide his own recusal motion. Indeed, making someone a judge in her own case is ill-advised, even in everyday matters. One might not wish to defer to another person (judge or non-judge) on the question of whether such person is intelligent, good-looking, speaks or sings well, deserves a promotion or a raise, or is a good cook. Similarly, one might also hesitate to defer to a judge who is supposed to adjudicate her own neutrality.

After awhile, with all the frustration, one might be inclined to rest — except in the more extreme cases like *Caperton* in which a judge is really caught — on the unempirical or arguably ostrich-like statement that adjudicators are presumed to be impartial; on the “myth” of the “judicial sanctity;” or on the fatalistic observation that “that’s just the way things are.” With all the problems in achieving recusals for campaign contributions, exasperation would be understandable.

**D. Some Reflections on Bias and the Judiciary, Judicial Elections, and the Rule of Law**

The apparently biased judge may do great damage in terms of destroying public confidence in the courts. If the courts appear biased, the consequences may be unwelcome (to put it delicately): e.g., leading to disrespect for

---


114 See W. Va. R. App. P. 29(b) (“A justice shall disqualify himself or herself, upon proper motion or sua sponte, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct or, when sua sponte, for any other reason the justice deems appropriate.”); See also Steven Lubet, *It Takes a Court*, 60 *Syracuse L. Rev.* 221, 223 (2010) (“Under the rules of the West Virginia Supreme Court of Appeals, disqualification motions are addressed only ‘to the justice whose disqualification is sought,’ and they are never considered by the full court. Thus, the challenged justice has the sole, and unreviewable, authority to decide whether his or her own impartiality ‘might reasonably be questioned.’”) (footnotes omitted).


the courts, avoidance of the courts, unpredictability of the courts, uncertainty of transactions, and, for lack of a better phrasing, the unfortunate sense that under color of law money is going to A which should be going to B. In addition, businesses may decline to invest in a state where this is not addressed, leading to a loss of jobs and tax revenue. The judge may also do great damage in an individual case.

Although some litigants may assume that they are protected by the presumption that judges are impartial, the presumption is of no value if inconsistent with reality. Indeed, there is little “safety” in relying on such a presumption — much like a driver’s presumption when driving that a deer will not jump out of the trees, dash into the highway and collide with the driver’s car — just because there is no “deer-crossing sign.” The chances of a biased decision occurring may be small, but when it occurs, the damage is unacceptable.

Eliminating judicial elections will not avoid all threats of bias. But doing so may be a good start toward achieving impartiality and other ideals. While not implying that judicial elections are unconstitutional per se, Supreme Court Justice Anthony Kennedy, in a 2008 concurring opinion, commented that they may be inconsistent with the rule of law because of their effect on the “perception and reality of judicial independence and excellence:”

When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the per-

---

117 Perspectives From the Rule of Law, supra note 18, at 103 (discussing potential economic consequences of judicial elections). The relationship between poor economic outcomes in a country and the lack of the rule of law (not merely judicial bias or lack of judicial independence) has been repeatedly made. Although the strength and extent of the relationship have sometimes been questioned, billions of dollars have been spent in reliance on the connection over decades. Id. at 55-56, 103, 113.

118 As Chief Justice Roberts phrased the presumption:

There is a “presumption of honesty and integrity in those serving as adjudicators.” Withrow v. Larkin, 421 U. S. 35, 47 (1975). All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise. See Republican Party of Minn. v. White, 536 U. S. 765, 796 (2002) (Kennedy, J., concurring) (“We should not, even by inadvertence, ‘impute to judges a lack of firmness, wisdom, or honor’” (quoting Bridges v. California, 314 U. S. 252, 273 (1941))).

Caperton, 129 S. Ct. at 2267 (Roberts, C.J. dissenting).

119 See also Brief for the Conference of Chief Justices as Amicus Curiae In Support of Neither Party, Caperton v. A.T. Massey Coal Company, Inc., 2009 WL 45973, at *22:

While there is a presumption of integrity in the judiciary, the very fact that it is merely a presumption indicates that in some situations it can and will be overcome. Thus, in evaluating whether a judge’s potential bias violates a litigant’s due process rights, the question is not whether a judge of the highest integrity may be able to resist the temptation of partiality. Rather, the question is whether an average judge would be tempted under the circumstances.
sisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.\textsuperscript{120}

Whether something could be inconsistent with modern standards of the rule of law and nevertheless be constitutional is beyond the scope of this Article. (It also has even been observed that judicial elections may themselves be unconstitutional,\textsuperscript{121} yet states may tolerate them because of an "uncritical fondness for elections."\textsuperscript{122}) Nevertheless, one would hope that our constitution would be interpreted so as to equal or exceed the rule of law.

Elections do provide the ability — however limited — to choose candidates, even though some judicial elections may present an odd and meaningless choice. Because one does not know and cannot readily find out about what one needs to know about the candidates in order to make an intelligent choice,\textsuperscript{123} the choice is illusory. "Elections are crude forums, at best, for airing and making

\textsuperscript{120} See N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring) (upholding the constitutionality of New York’s election of certain state court trial judges). See generally Perspectives From the Rule of Law, supra note 18 (inconsistency of judicial elections with the rule of law). Justice Kennedy’s observations on fund-raising in the quote from Lopez Torres recognize the problem of money in judicial elections. At least the spirit of his remarks seem to conflict with his opinion for the majority in Citizens United which will have the effect of injecting even more campaign contributions into judicial elections by removing limits on certain corporate, union and other contributions.

\textsuperscript{121} White, supra note 110, at 127 (“If we are serious about providing a fair trial before a fair tribunal, then we should recognize forthrightly that the Due Process Clause perhaps should have a nullifying, or at least a limiting, effect on judicial elections.”).

\textsuperscript{122} Id. at 127:

[W]e persistently avoid a discussion about the constitutionality of judicial elections and view such a discussion as counterproductive because surveys suggest that most Americans want to elect their judges. But it is equally true that most Americans (arguably all Americans) want fair, independent, and impartial courts. What has led us to this juncture at which we consistently endorse the importance of elections over other, core constitutional rights? The current tendency to liken judicial elections to other elections is neither historically accurate nor constitutionally sound. It is a tendency animated by an uncritical fondness for elections and an unthinking linkage to the First Amendment, at the expense of the surpassingly important right to a fair trial before a fair tribunal.

\textsuperscript{123} Perspectives From the Rule of Law, supra note 18, at 91 n.149; Norman L. Greene, Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience, 68 ALB. L. REV. 597, 601–02 (2005) (“Voters in New York, as elsewhere, generally do not even know who the candidates for judge are, and they often do not vote for judicial candidates at all.”).
decisions about judicial performance." 124 Faced with such a choice, according to a protagonist in one of J.M. Coetzee’s novels, the unfortunate voter has several options, “not voting, or else spoiling his ballot paper” (if paper ballots are used) in which case, the vote is “not counted, that is to say, is discounted, ignored.” 125 The voter could also vote “blind” without knowing anything about either candidate. Furthermore, in many cases, judicial offices — although nominally elective — are unopposed or politically controlled; 126 and then there is no choice at all.

E. An Observation on Caperton’s Futility

The West Virginia Court, once again, overturned the $50 million judgment against Massey Coal, by a lopsided 4 to 1 vote.

124 Schotland, Special Interest Influence, supra note 27, at 514; see also id.: Roe v. Wade, flag salutes, lightning-rod capital cases, cases about a child, and cases about other dramatically personal plights (e.g., Terri Schiavo) are infinitely far from the docket of virtually any judge who faces some election — but many judicial campaigns have involved, often centered on, such matters. . . . The hot-button issues or cases likely to get attention in campaigns are a complete (or near-complete) distortion of what the judge or candidate has done or can do. Would anyone say that the public discourse about hot-button cases is any better than distorting, hyper-simplification, and slanting? Such episodes are outbursts of passion seeking to displace our processes and dispassionate, deliberative efforts to act justly — the opposite of all we revere as the rule of law.

125 J.M. COETZEE, DIARY OF A BAD YEAR 8 (2007). Coetzee elaborates on illusory electoral choices in democracies as follows:

The ballot paper does not say: Do you want A or B or neither? It certainly never says: Do you want A or B or no one at all? The citizen who expresses his unhappiness with the form of choice on offer by the only means open to him — not voting, or else spoiling his ballot paper — is simply not counted, that is to say, is discounted, ignored.

Faced with a choice between A and B, given the kind of A and the kind of B who usually make it onto the ballot paper, most people, ordinary people, are in their hearts inclined to choose neither. But that is only an inclination, and the state does not deal in inclinations. . . . What the state deals in are choices. The ordinary person would like to say: Some days I incline to A, some days to B, most days I just feel they should both go away; or else, Some of A and some of B, sometimes, and at other times neither A nor B but something quite different. The state shakes its head. You have to choose, says the state: A or B.

Id.

So, after all of the litigation, the case ends up exactly where it was before the U.S. Supreme Court reviewed the case.127

* * *

The disqualification issue herein gives the appearance of being a diversion away from the solid basis for the majority’s opinion herein.128

To be fair, the recusal effort was not quite a “diversion,” despite Justice Benjamin’s comment above. Seeking fair and impartial justice is never a diversion but essential. Caperton underwent a long and probably costly appeal that succeeded in the United States Supreme Court. 129 The apparently biased judge was disqualified. But in the end it was futile for Caperton. Rather than change the decision, a new set of judges (without the recused judge) reached the same result on the merits as the previous set of judges, with an even greater majority. (4–1 instead of 3–2).130 As the West Virginia Supreme Court of Appeals noted on remand from the U.S. Supreme Court following recusal:

Based upon our thorough consideration of the parties’ arguments, the relevant case law, and the record on appeal, this Court concludes, based upon the existence of a forum-selection clause contained in a contract that directly related to the conflict giving rise to the instant lawsuit, that the circuit court erred in denying a motion to dismiss filed by A.T. Massey Coal Company and its subsidiaries. Accordingly, we reverse the judgment in this case and remand for the circuit court to enter an order

127 Rotunda, supra note 73, at 278 (footnote omitted); see also id. (“Caperton also does not say that the decision on the merits must come out differently. The Supreme Court merely remanded the case to the West Virginia Supreme Court of Appeals. The state court once again reversed the judgment.”).
129 Although research has not disclosed the cost of the appeal, the cost of the overall case has evidently been substantial for Caperton. See Gibeaut, supra note 68. “At 53, Caperton says the case has taken its toll not only on his bank account, but also on his health. ‘It’s miserable,’ he says. ‘It’s like living in purgatory. It’s cost me everything I’ve got. I’ve spent every nickel I’ve ever had trying to right this wrong.’” Id.
After all that, it just ended for Caperton, U.S. Supreme Court victory notwithstanding.

How may that futility be avoided? One solution would be to ensure that litigants receive a prompt (and fair) decision on recusal without it costing a fortune. Standards for recusal may be relaxed or made more certain so that a party considering recusal will have a better way to assess the likelihood of success. Litigants might (but should not) have to weigh whether their underlying case is strong or weak on the merits before undergoing a recusal process. A litigant in every case, regardless of its strength, is entitled to an unbiased judge; and it should not be overly complicated to obtain one.

II. JUDICIAL IMPARTIALITY, JUDICIAL ELECTIONS, AND CITIZENS UNITED

Then I charged your judges at that time, saying, ‘Hear the cases between your fellow countrymen, and judge righteously between a man and his fellow countryman, or the alien who is with him.’

131 Caperton, 690 S.E.2d at 328. The Supreme Court of Appeals of West Virginia alluded to the tangled history of finding the correct unbiased judges to hear the case, as follows:

The first opinion filed in connection with this appeal was vacated based upon the subsequent voluntary disqualification of two of the justices who participated in the earlier proceedings in this Court. A second opinion entered on rehearing was reversed by the United States Supreme Court based upon that Court’s determination that an additional justice should have been disqualified. See Caperton v. A.T. Massey Coal Co., Inc., US, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009). A detailed recitation of the complex procedural history of this case is set out in the body of this opinion at Section II. page 10 infra.

Id. at 328, n.1.

132 Deuteronomy 1:16. Chief Justice Randall Shepard of the Indiana Supreme Court wrote an account of ancient views of judicial impartiality which bears citation in full:

Long before there were judicial elections, or even a First Amendment, societies took steps to assure the impartiality of the judges who held sway over them. Moses gave strict instructions to his judges in words frequently cited over the intervening centuries: “Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous.” Cicero later built on this idea by identifying three causes of judicial impropriety: favoritism, coercion, and bribery. A stern attitude about judicial misbehavior led to formal efforts at curbing abuses and, if the ancient writings may be believed, the penalty of death was not unknown in medieval times. In one European kingdom during the Seventh Century, the penalties for judicial partiality evolved to a form more readily recognized by modern minds: a judge who refused to hear a plaintiff’s claim or grant relief due to favoritism or friendship was liable to the plaintiff for that which the plaintiff would have received from his adversary. By the Eighth Century, the idea arose that a misbehaving judge might owe a penalty
You shall not show partiality in judgment; you shall hear the small and the great alike. You shall not fear man, for the judgment is God's. The case that is too hard for you, you shall bring to me, and I will hear it.\textsuperscript{133}

\section{The Holding in \textit{Citizens United}}

\textit{Citizens United} invalidated federal campaign finance restrictions on independent expenditures made by corporations from their general treasury funds (that is, their “own funds”) which advocate the election or defeat of a candidate in certain federal elections.\textsuperscript{134} The Court stressed the First Amendment free speech rights of corporations and noted that they applied to political speech like such expenditures; that the campaign finance restrictions abridged those First Amendment rights; and First Amendment distinctions may not be drawn on the basis of the status of the speaker, whether an individual or a corporation.

The Supreme Court rejected the claim that corporations do not warrant the same First Amendment protections as natural persons. As the Supreme Court noted: “Political speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.’”\textsuperscript{135} The scope of the decision extends beyond corporate spending to spending by others, including unions. “[P]olitical speech of corporations or other associations should [not] be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”\textsuperscript{136}

The equating of corporate and individual free speech rights drew a sharp dissent from Justice Stevens. As his dissent in \textit{Citizens United} noted in protest,

\textsuperscript{133} Deuteronomy 1:17.
\textsuperscript{134} \textit{Citizens United} v. Federal Election Commission, 130 S. Ct. 876 (2010); see \textit{id.} at 897 (“The law before us is an outright ban, backed by criminal sanctions. [Two U.S.C. §] 441b makes it a felony for all corporations — including nonprofit advocacy corporations — either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election.”); see also \textit{id.} at 880–81 (Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an “electioneering communication” or for speech expressly advocating the election or defeat of a candidate. 2 U.S.C. § 441b.”).
\textsuperscript{135} \textit{id.} at 904 (citation omitted).
\textsuperscript{136} \textit{id.} at 900.
It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

To take this one step further, corporations do not marry (a merger is not the same thing), have children or grandchildren, get sick or die, or ever go to war.

Restrictions on independent expenditures by corporations in election campaigns have been upheld for a long time on theories, among other things, that they are necessary to avoid corruption or the appearance of corruption in government. The Supreme Court in Citizens United held that those justifications are no longer pertinent since such contributions do not give rise to either:

The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Govern-

137 Id. at 972 (Stevens, J. dissenting).

138 See also Dahlia Litwick, The Pinocchio Project: Watching as the Supreme Court Turns a Corporation into a Real Live Boy, SLATE, Jan. 21, 2010, http://www.slate.com/id/2242208/. Although the Supreme Court focused on corporations, as previously noted, Citizens United applies to other organizations, including to unions. See generally Steven J. Law, Organized Labor and Citizens United, WALL ST. J., Mar. 11, 2010, at A.15.

139 Other theories asserted in favor of the existing reforms restricting corporate independent expenditures included protecting shareholder rights and preventing corporations from receiving an unfair political advantage (namely, the anti-distortion rationale). See with respect to shareholder rights, Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 977 (2010) (citing Austin) and id. at 911 (“The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech.”). With respect to the distortive effect of contributions, see Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659–60 (1990), noting:

Michigan’s regulation . . . aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas. . . The Act does not attempt “to equalize the relative influence of speakers on elections,” . . . ; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations. . . Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.
ment does not claim that these expenditures have corrupted the political process in those States. . . . [W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.\textsuperscript{140}

But the Court upheld existing disclosure and disclaimer laws in connection with contributions, finding that the laws served an important purpose and did not unconstitutionally infringe on speech. Those laws required information on the source of the campaign advertisements and the identities of contributors.\textsuperscript{141} Among other things, the Court found no showing that "these requirements would impose a chill on speech or expression."\textsuperscript{142}

\begin{footnotesize}
\footnote{140} Citizens United, 130 S. Ct. at 908-09; see also id. at 910 ("The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.".). For a recent case following Citizens United, see SpeechNow.Org. et al v. Federal Election Commission, ___ F.3d ___, No. 08-5223 (D.C. Cir. 2010) (en banc), slip. op., at 10, 14 (noting that Citizens United "held that the government has no anti-corruption interest in limiting independent expenditures;" concluding that "the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow;" and invalidating contributions limits as applied to SpeechNow.) As the D.C. Circuit noted:

In light of the Court’s holding as a matter of law that independent expenditures do not corrupt or create the appearance of quid pro quo corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The Court has effectively held that there is no corrupting “quid” for which a candidate might in exchange offer a corrupt “quo.”

\textit{Id.} at 14.

\footnote{141} The Supreme Court identified the disclaimer and disclosures rules as follows:

Citizens United next challenges BCRA’s disclaimer and disclosure provisions as applied to Hillary and the three advertisements for the movie. Under BCRA § 311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that "[the individual] is responsible for the content of this advertising." 2 U.S.C. § 441d(d)(2). The required statement must be made in a "clearly spoken manner," and displayed on the screen in a "clearly readable manner" for at least four seconds. Ibid. It must state that the communication "is not authorized by any candidate or candidate’s committee"; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. § 441d(a)(3). Under BCRA § 201, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. 2 U.S.C. § 434(f)(1). That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. § 434(f)(2).


\footnote{142} \textit{Id.} at 916.
\end{footnotesize}
B. Citizens United as Applied to Judicial Elections

In the name of First Amendment imperatives, *Citizens United* permits the injection of vast additional amounts of money into American elections, including, by inference, U.S. state court judicial elections. Many state judicial elections are already bedeviled by excess campaign spending and ensuing irrelevant, misleading and negative advertisements.\(^{143}\) This does not mean that more money will be spent and advertisements placed, only that they can be. (The basis for the Supreme Court exempting judicial elections from *Citizens United* on the basis of its threat to an impartial judiciary is unclear, particularly given the current makeup of the Court.)

*Citizens United* thus exacerbates the threat to judicial impartiality already recognized by *Caperton* through judicial elections. In United States state court judicial elections, where judges need to collect and receive campaign contributions (directly or indirectly)\(^{144}\) and seek favor from voters, the risks to judicial impartiality have already been perceived as severe. The integrity of judges has been described as falling under a “dark shadow.”\(^{145}\) “Today, judicial elections weaken state courts and reduce their willingness to defend the rule of law against public opposition or special interests.”\(^{146}\) By the very nature of the situation, judges may appear to be biased in favor of local voters and significant campaign contributors.\(^{147}\) “Just as judicial candidates may face a temptation to shade their decisions to attract voters’ support, so too they may face the tempta-
tion to shade their decisions to attract the financial support that enables them to appeal to voters.” These temptations are important in light of the duty of judges to be impartial, something which separates judges from other elected officials. Although some have put forward public financing of judicial elections as a solution, others have observed that it has been “oversold” and may not be financially feasible. Following a report of its Independent Commission on Judicial Reform, West Virginia has recently adopted a pilot public financing plan for certain judicial races.

Although observations and surveys about the problems with judicial elections may not be conclusive proof, they do demonstrate a level of concern that policymakers may consider as a basis for action. Legislatures proposing reforms in judicial selection and citizens voting on such reforms are free to act on lesser standards than empirical proof. Policymakers proposing rules on re-

148 Karlan, supra note 14, at 90; Perspectives on Judicial Selection, supra note 14, at 957.
149 Erwin Chemerinsky, Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections, 74 CH.-KENT L. REV. 133, 149 (1998); see also id. at 143:

Indeed, Buckley can be distinguished based on differences between judicial candidates and those running for Congress or President. Buckley, of course, involved exclusively the latter: candidates for Congress and for President and Vice-President. It is accepted that these officials are influenced by many factors, including explicit lobbying. Certainly, buying their votes or decisions with campaign contributions or expenditures is impermissible, but some influence is accepted as a part of the system.

150 Schotland, Special Interest Influence, supra note 27, at 524–25. Professor Schotland observes that although public funding of judicial elections “unquestionably brings advances,” it is “oversold” since it will not end “independent spending” and might encourage it; it also might encourage competition and therefore political pressure on judges running for office; and because of its cost, it is likely to be feasible only in “small-population states.” Id.

151 Editorial, From Scandal to Example in West Virginia, N.Y. TIMES, Mar. 18, 2010, available at http://www.nytimes.com/2010/03/19/opinion/19fri3.html?scp=1&sq=west%20virginia%20and%20public%20financing&st=cse (“West Virginia, which will join North Carolina, New Mexico and Wisconsin in adopting public financing of judicial races, is setting a good example at a time when judicial neutrality and the appearance of neutrality is under severe threat across the country from escalating special-interest spending on judicial campaigns.”); see Final Report, West Virginia Independent Commission on Judicial Reform, Nov. 15, 2009; Ry Rivard, Judicial Report Reforms Gradual Measures Were Praised by Some, Dismissed by Others as a Failure, CHARLESTON DAILY MAIL, Nov. 17, 2009 (quoting author, among others, on the final West Virginia plan).

152 A collection of sources can sometimes give the impression that the subject is “locked up,” both qualitatively and quantitatively, and that the propositions are firmly established in every single state with indisputable evidence. An example of such a pile-up of sources appears in Shugerman, supra note 14, at 1064. Obviously, evidence is stronger in some places than in others, and sometimes one extrapolates from evidence in one state to reach conclusions about another. Moreover, in order to assess quantitative evidence, one would need to assess the methodology (including the fairness and comprehensiveness of gathering evidence and the selection of variables), and often no one goes behind executive summaries or assertions in articles.
cusal and judges deciding recusal motions may and do act on lesser standards as well.

In addition, empirical proof is not the only meaningful evidence here. Impartial justice relates to the appearance of impartiality and the existence of extraneous inducements and incentives to favor one side or another. These are not always quantifiable or measurable, and there is a role for subjective factors, including logic and common sense.

If one’s judge has made campaign statements about policies implicated by a lawsuit, has financially benefited from the campaign efforts of one’s adversary, or is ruling on a matter of local interest potentially memorable by the voters at election time, it is logical and a matter of common sense for concerns to arise. In evaluating impartiality, one must ask what are the incentives and inducements affecting the judge. Nonetheless, an empirical study on judicial impartiality may potentially be designed; and to some extent, some studies already exist, such as those considering the extent to which judges are deciding (or apparently deciding) in favor of campaign contributors.\footnote{\textsuperscript{153}}

According to the dissent in \textit{Citizens United}, substantial expenditures on “candidate elections” sometimes “will raise an intolerable specter of \textit{quid pro quo} corruption” or “dollars exchanged for political favors.”\footnote{\textsuperscript{154}} As amplified by the Supreme Court in an earlier case:

\begin{quote}
Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial \textit{quid pro quo}: dollars for political favors.\footnote{\textsuperscript{155}}
\end{quote}

\begin{footnotes}


When \textit{Buckley} identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to \textit{quid pro quo} corruption. See \textit{McConnell, supra}, at 296–298 (opinion of Kennedy, J.) (citing \textit{Buckley, supra}, at 26–28, 30, 46–48); \textit{NCPAC}, 470 U. S., at 497 (“The hallmark of corruption is the financial \textit{quid pro quo}: dollars for political favors”); \textit{id.}, at 498.

\textit{Id.} at 909–10.


For an extensive discussion of the subject of corruption and campaign finance cases, see, e.g., Peter J. Henning, \textit{Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law}, 18 ARIZ. J. INT’L & COMP. LAW 793, 842 (2001) (including section on corruption and campaign contributions; noting, among other things: “As the Supreme Court noted, ‘Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.’ The United
The spending of vast sums in campaigns is “inextricably associated with the appearance of corruption.”

If campaign contributions in judicial election campaigns are perceived as a problem, allowing even more contributions to be made potentially worsens the situation, and, according to former Justice Sandra Day O’Connor, may do so quite soon; and this may further damage the appearance of impartiality in the courts. (Both Justice O’Connor and Justice Ruth Bader Ginsburg have declared their opposition to state court judicial elections.)

Although Caperton and cases following the extreme Caperton fact pattern may present litigants with a remedy of recusal under the federal Due Process Clause, many other cases involving lesser spending than Caperton equally impinge on impartiality con-


156  Paul Carrington, Judicial Independence and Democratic Accountability in Highest State Courts, 61 LAW & CONTEMP. PROBS. 79, 118 (1998) (“[T]he practice of spending large sums of money on a political campaign is inextricably associated with the appearance of corruption, and the reality of defamation and fraud, that degrades the courts”).

157  Adam Liptak, Former Justice O’Connor Sees Ill in Election Finance Ruling, N.Y. TIMES, Jan. 26, 2010, at A16, available at http://www.nytimes.com/2010/01/27/us/politics/27judge.html [hereinafter Former Justice O’Connor Sees Ill] (“In invalidating some of the existing checks on campaign spending,” Justice O’Connor said [at a Georgetown Law Center conference held on January 26, 2010], “the majority in Citizens United has signaled that the problem of campaign contributions in judicial elections might get considerably worse and quite soon.”) In addition to the NY TIMES’ Supreme Court Reporter Adam Liptak, the author of this Article also attended the Georgetown conference.

158  Citizens United, 130 S. Ct. at 968 (Stevens, J. dissenting) (“The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, see, e.g., O’Connor, Justice for Sale, WALL ST. J., Nov. 15, 2007, p. A25; Brief for Justice at Stake et al. as Amici Curiae 2, the Court today unleashes the floodgates of corporate and union general treasury spending in these races.”).

siderations, and no federal remedy may be available. As Justice Stevens observed in his dissent in *Citizens United*:

> The Court today unleashes the floodgates of corporate and union general treasury spending in these races. Perhaps “Caperton motions” will catch some of the worst abuses. This will be small comfort to those States that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.\(^{160}\)

The logic of the majority’s argument that because twenty-six states were not corrupted by the contributions permitted in *Citizens United* that the balance of the states would not be either is unpersuasive. First, the basis for the conclusion that corruption does not exist in the alleged twenty-six states is unclear. Among other things, the methodology for reaching that conclusion is unstated, and the nature and reliability of any data require explanation. It is also unclear whether the lack of corruption in twenty-six states is sustainable. Second, just because (or even if) some conditions do not exist in certain locales (that is, in the twenty-six states) as a result of campaign spending, one may not validly or necessarily argue that they would not pertain in other locales. In other words, the experience in one location may be different from that in another.

C. *Citizens United — What About Corruption?*

Although the *Citizens United* majority found that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,”\(^{161}\) the dissent found the conclusion “unfair as well as unreasonable,” adding that “Congress and outside experts have generated significant evidence corroborating this rationale . . . .”\(^{162}\)

How contributions may appear and whether contributions may actually give rise to corruption seem to be questions of fact not readily resolvable by the Supreme Court. The Supreme Court’s decision in that regard appears arbitrary

---

\(^{160}\) *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 968 (2010) (Stevens, J. dissenting); *see also* Adam Liptak, *Justices, 5–4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 21, 2010, at A1 (“The justices in the majority brushed aside warnings about what might follow from their ruling in favor of a formal but fervent embrace of a broad interpretation of free speech rights.”); Brief Amici Curiae of Campaign Legal Center, et al. in Support of Appellee on Supplemental Question in *Citizens United*, 2009 WL 2365222, at *22 (“This Court should not lightly topple one of the fundamental legal pillars of American elections that has stood for three generations, and that has successfully prevented aggregated wealth from subverting the electoral system.”).

\(^{161}\) *Citizens United*, 130 S. Ct. at 909.

\(^{162}\) *Id.* at 966 (Stevens, J. dissenting).
and troublesome. That is not the only example of such reasoning in *Caperton*. The dissent noted in a related context that “[t]he majority declares by fiat that the appearance of undue influence by high-spending corporations will not cause the electorate to lose faith in our democracy.”\textsuperscript{163} According to the dissent, the majority lacked any substantial basis for its conclusion as to the loss of faith, in essence “elevating their own optimism into a tenet of constitutional law.”\textsuperscript{164}

Finding a set of facts by fiat essentially creates a “new reality” — the way things are — which may or may not be true,\textsuperscript{165} and it does not present a sound basis for decision. The Supreme Court had the power to do this on the basis of little or no research or sound or unsound logic since it had the power to write the decision, its decision is final, and there is no further review. So does a lifeguard have the power to declare that there is no “shark in the water” and therefore no danger of shark attacks. But the lifeguard’s declaration provides no consolation to someone who relies on the declaration, goes swimming, encounters the shark, and is eaten.

If the dissent is correct that *Citizens United* will exacerbate the appearance of corruption in the United States, the price may have been too high to pay, even if the First Amendment rights of “non-persons” have been increased. Among other things, it is unclear how helpful First Amendment rights will be in a corrupt or apparently corrupt environment, including how sustainable the rights may be. If corruption is afoot, who will enforce our rights? It also remains to be seen how Americans will respond: \textit{e.g.}, adjust to corruption (as has reportedly occurred in some less developed countries, such as Russia where citizens reportedly do) or seek redress from the holding in *Citizens United*\textsuperscript{166}

\textsuperscript{163} Id. at 963 n.64.

\textsuperscript{164} Id.

\textsuperscript{165} In \textit{DIARY OF A BAD YEAR}, a protagonist made this observation on how a fictitious statement may turn into a truth that people believe:

> It’s like makeup. Makeup may be a lie, but not if everyone wears it. If everyone wears makeup, makeup becomes the way things are, and what is the truth but the way things are?

\textit{Coetzee, supra} note 125, at 86. Similar frustration with such Supreme Court “fact-finding” appears in an analysis of *Caperton*, noting:

> \textit{Caperton} based its argument, as Justice Kennedy noted, on “Blankenship’s pivotal role in getting Justice Benjamin elected.” One wonders how one could prove that point, at least without a hearing. Kennedy then announces, “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal, but this is an exceptional case.” How does one determine that?

\textit{Rotunda, supra} note 73, at 272 (footnotes omitted). \textit{Cf. SUPREME POWER, supra} note 116, at 49 (referencing Judge Jerome Frank’s criticism of “judges’ incantation of ‘magical phrases’ to create the appearance of consistency, clarity, and impartiality in decisions where none existed.”).

\textsuperscript{166} With respect to a reportedly factually corrupt Russian legal system, it has been noted that “corruption [in the judiciary] is part of the status quo to which Russians have adjusted.” Kathryn Hendley, “Telephone Law” and the “Rule of Law”: The Russian Case, 1 HAGUE J. ON THE RULE
D. Caperton as Applied to Judicial Elections Following Citizens United — How Much Does Caperton Help?

Although Citizens United opened up the possibility of the expenditure of even more money in judicial elections already beset by too much money, Caperton recognized that judicial elections are different and that extensive campaign contributions, under particular circumstances, may create an appearance of bias and require the judge’s recusal. Caperton cautions that in most cases, however, the problem of apparent bias will not be addressed by the federal constitution; if the states have not acted to pass more stringent recusal rules, the litigants will be left as they are before the judge in question. As Caperton states:

It is for this reason that States may choose to “adopt recusal standards more rigorous than due process requires.”

Chief Justice Roberts’ dissent in Caperton notes to the same effect:

States are, of course, free to adopt broader recusal rules than the Constitution requires — and every State has — but these developments are not continuously incorporated into the Due Process Clause.

In deferring to state recusal regulations unless the circumstances are extreme, Caperton reacted in a manner characterized as a “timid” response to an

---

167 Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2267 (2009); Bracy v. Gramley, 520 U. S. 899, 904 (1997) (distinguishing the “constitutional floor” from the ceiling set “by common law, statute, or the professional standards of the bench and bar”).


169 See White, supra note 110, at 150 (“Some observers urge a restrictive view of Caperton. Fortified by the majority’s timid opinion, they argue that the decision is sui generis and must be confined to its extreme facts.”). See also Karlan, supra note 14, at 92 (“[T]he Caperton majority took some pains to insist that it was not opening the floodgates to litigation challenging the impartiality of state court judges. The “principle” it announced had so many moving parts and was hedged with so many qualifications, . . . .”) (footnotes omitted).

For a broad statement cautioning that not every campaign contribution to judges should be a problem for judicial impartiality, see Lessig, supra note 95, at 106:

If campaigns were cheap, if contributions were small, if contributors were many or unknown — in any of those cases, the fact that money was contributed to a judge’s campaign could not lead anyone reasonably to believe that the contribution would effect any particular result. In these cases, money would be benign, and the raising of money in these cases should not undermine trust in the institution of the judiciary, at least for any reasonable soul. But to suggest that a reasonable soul should discount the effect of money in
“alarm ing” set of facts, both to domestic and foreign observers. As a result, *Caperton* may leave many litigants rem ediless in situations requiring court intervention to present an appearance of judicial impartiality. Although somewhat “light-handed in policing state court bias,” *Caperton* at least laid down some constitutional law in this area, some restraining federal principle. Imagine if *Caperton* had come out the other way.

E. What Should Be Done? What May Be Done?

One should not assume that the Supreme Court made the correct decision in *Citizens United* just because it was a majority decision; and given the

(footnotes omitted).

170 See White, supra note 110, at 122 (describing her presentation of *Caperton* to Brazilians who met her “description of the facts underlying *Caperton*... with looks of disbelief and bewilderment accompanied by a few audible gasps. ... Notwithstanding our countries’ different judicial selection methods, the reaction of the Brazilian audience to the *Caperton* facts was not unlike the reaction of most American journalists, scholars, and citizens. To most, the facts are alarming.”).

171 See Stempel, supra note 87, at 8–9.

Despite its imperfections, *Caperton* v. Massey is a correctly decided case announcing a workable rule of law. Although the opinion is imperfect (and arguably too light-handed in policing state court bias), the decision deserves support and not the death-by-a-thousand-cuts criticism of the dissent and its supporters.

Whatever its imperfections, *Caperton* likely has changed forever the inertia on this issue, although it will be neither the immediate dawn of a new day desired by judicial ethics reformers nor the disaster prophesized by the dissenters.

Id.

172 See, e.g., Lessig, supra note 95, at 112 (disagreeing with the Supreme Court’s decision in *Caperton* for institutional reasons, yet also agreeing that Judge Benjamin should have recused himself:

Thus again, whether Justice Benjamin should have recused himself is in my view a straightforward question: he should have. By not stepping down, he strengthened the suggestion that money buys results not just in the political branches, but also in the judicial branch. He had a duty not to impose this cost upon the West Virginia courts. But the question the Supreme Court had to address in *Caperton* v. A.T. Massey Coal Co. was not whether Justice Benjamin behaved badly.

Id.).

The question is whether similarly situated litigants to Caperton would have been better off without any support from the Due Process Clause, and if, so why. The answer is self-evident: such litigants would have lost an important safeguard of judicial impartiality. *Caperton* vindicated the principle at least for this case and in those circumstances that he was entitled to a trial before an impartial judge, regardless whether that judge ultimately votes for or against him; and for similarly situated litigants, that is obviously good news. (Ironically, it would not have mattered to Caperton himself since he ended up losing his case anyway.)
outcry over the decision, no such assumption is being made. Even the Supreme Court majority in *Citizens United* would recognize that as it overruled long-standing precedents established by prior Supreme Court majorities. As Justice Robert Jackson noted in a much-quoted observation on the correctness (or justice) of Supreme Court decisions:

> [R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.173

Commentators are divided on the extent of the problems (if any) caused by *Citizens United*. Pessimistic and alarmed responses by some express a variety of observations, including describing the case as an out-of-control locomotive174 and “radical.”175 Others have observed the contrary, focusing on, among other things, states where campaign finance reforms are similarly limited but where there are allegedly no adverse consequences.176 As previously noted, the

173 Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring). Moreover, to suggest that such constitutional interpretation represents “the popular will” as manifested in presidential elections makes several false assumptions. First, it implies that the public considered positions on campaign finance reform when voting for Republicans over Democrats; and in so doing, the public sought a president likely to appoint justices inclined to strike down campaign finance reform. Second, even if the decision did represent the popular will, a decision is supposed to reflect an assessment of the constitutionality of the legislation, not the popular will.


There are a good many self-conscious signals in the *Citizens United* opinion that the engineer knew deep down that he might be speeding down the track too swiftly. Fully 15 of Kennedy’s 60-page opus are spent explaining why the court simply could not turn down any of the alternate, less dramatic routes offered up by the parties and amici. The Chief Justice and Alito added many, similar words in a concurrence, just to emphasize why all this had to happen right now. Maybe that signals that at the last minute, some of the justices realized there was an unexpected bend in the road. They hurtled ahead anyway.

Id. See also Lanie Rutkow, Jon S. Vernick and Stephen Teret, *The Potential Health Effects of Citizens United*, 362 NEW ENG. J. MED. 1356, 1356 (Apr. 2010) (decision gives “corporations unprecedented influence over the election of the people who determine health policy.”)


176 See Appellant Amicus Curiae Brief for the Chamber of Commerce of the United States of America in Support of the Appellant, at 8–9, Citizens United v. Federal Election Commission, 2009 WL 2365220 [hereinafter Appellant Amicus Curiae Brief for the Chamber of Commerce]
logic of resting on a claim that just because in some states there are no “adverse consequences” depends on the definition of “adverse consequences,” the reliability of the methodology used for determining that there were no such consequences, and, even if there were no such consequences and the methodology was unexceptionable, the basis for concluding that the same lack of consequences would obtain elsewhere.

Some commentary focuses on the limitations of the decision. For example, the decision only affects independent expenditures, some other types of spending remain regulated, and certain disclosure laws exist to limit (although not eliminate) donor secrecy. Still others occupy a middle ground: they con-

(“At least 26 states and the District of Columbia permit corporations (as well as labor unions, and similar groups) to engage freely in independent electoral advocacy on the same basis as individuals. If Austin were correct in speculating that corporate speech would result in distortions due the deployment of immense corporate wealth, such effects should appear in these states. The Government offered no such demonstration, nor has the Chamber identified any.”). In a Wall Street Journal interview, First Amendment specialist Floyd Abrams was reported to have adopted similar views:

Mr. Abrams defends corporate free speech on practical grounds as well, arguing that there is no evidence it causes social harm. Federal regulations do not apply to campaigns for state and local office, and “over half the states have allowed unlimited expenditures and contributions by corporations and unions for a number of years. We haven’t seen any explosion of corporate domination or union domination of the political landscape.” Nor are states without limits more corruption-prone than those with them.


177 The author of the U.S. Chamber of Commerce’s amicus brief in Citizens United, in an article after the decision, elaborated on Citizens United by suggesting the limited scope of the changes effected by the decision, as follows:

One would think from all this that corporations and unions are now free to buy candidates on the open market. But what, if anything, will be different in our elections?

Will corporations and unions be able to give money to candidates or political parties? No. Federal law, which regulates campaigns for president, the Senate and the House, prohibits such contributions. The ban was left untouched by the Supreme Court.

Can corporations spend money in cahoots with candidates and political parties? No. The Supreme Court decision addressed only “independent expenditures,” which are, by definition, “not coordinated with a candidate.” Monies spent in collaboration with candidates or parties are treated as contributions — and are still banned.

Perhaps all of this corporate spending will be secret? Wrong again. The Supreme Court upheld the laws that require any corporate or union spender to file reports with the Federal Election Commission within 24 hours of spending the first dime.

tend that the implications are what neither side suggests or even are unknown, leaving the subject of what will happen next in the realm of fortune-telling. According to still another observer, “It’s impossible, at the moment, to tell whether the reaction to Citizens United will be the beginning of a torrential backlash or will fade into the ether.”

F. Who’s Right, How May We Tell, and Does It Matter? Will It Be the Lady or the Tiger?

1. What Has Been Done?

If the Citizens United majority is correct, the decisions restricting corporate contributions violated the First Amendment and striking down the campaign finance legislation will have no ill effects. Or, if there are ill effects to come, the majority does not identify them. If the dissent is correct, the decision will corrupt democracy, certainly without corrective legislation. These hypotheses are partly consistent since a decision may be correct constitutionally even if it leads to unfortunate side effects.

The majority and minority therefore diverge substantially on likely consequences, and both to some extent seem to rely on predictions. In some sense

178 Posting of Laurence H. Tribe to SCOTUSblog, http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united (Jan. 25, 2010, 20:30 EST) (“I share neither the jubilant sense that the First Amendment has scored a major triumph over misbegotten censorship nor the apocalyptic sense that the Court has ushered in an era of corporate dominance that threatens to drown out the voices of all but the best-connected and to render representative democracy all but meaningless.”).

179 Joseph E. Sandler & Neil P. Reiff, Beware the Fortunetellers, NAT’L L. J., Feb. 1, 2010, available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202439595364&Beware the _fortunetellers&slreturn=l&hbxlogin=1 (“None of this is to say that Citizens United won’t make a real difference in the way money gets channeled in U.S. politics. Chances are it will; it’s just very hard to say exactly how. Democrats and progressives should not be overly discouraged. Republicans should not be overly confident. And next time you see a confident prediction about what the decision means for the 2010 elections, give it about as much credence as what you could find out from your local fortuneteller.”).


181 See David D. Kirkpatrick, Does Corporate Money Lead to Political Corruption, N.Y. TIMES Jan. 23, 2010, at WK1 (“Democrats called the ruling a threat to democracy; Republicans cheered it as a victory for free speech.”); see also id. (“In the United States, studies comparing states like Virginia with scant regulation against those like Wisconsin with strict rules have not found much difference in levels of corruption or public trust.... The most insistent advocates of the campaign finance laws argue that the benefits are real even if academics can’t measure them.”).

182 Some First Amendment absolutists may not be concerned whether the results are adverse or unpredictable, so long as the results follow from the First Amendment. The problem with that sort of thinking is what are we supposed to do about the side effects? There are many acceptable restrictions on free speech, such as obscenity, defamation, and more; and perhaps some restrictions should be accepted to protect the need for judicial impartiality.
the “lady or the tiger” analogy seems apt since the answer to the question (will it harm our democracy?) is difficult to know in advance and the consequence of making a wrong decision (which will harm democracy) may be disastrous (one gets the tiger, not the lady).\textsuperscript{183} To be fair, sometimes things are mixed, and the result may partake somewhat of the lady and somewhat of the tiger. In the case of judicial elections at least, however, it is hard to see how more spending will help the image of the judiciary as impartial and not beholden to donors and how more advertising that misinforms or under-informs the electorate will improve their choice of judges.

Of course, those predicting adverse consequences may be incorrect for a number of reasons. For example, the union or corporate donors may decide not to contribute or not to contribute much more than they are already doing. Various reasons exist why they might not wish to spend money on political campaigns, including other more pressing priorities, and specifically in the case of corporations, concerns of alienating their customers or shareholders.\textsuperscript{184} For public companies, reasons for restraint on spending include the need to “deal with earnings targets, investment analysts [and] rating agencies” as well as demands for dividends,\textsuperscript{185} and for unions, their membership.\textsuperscript{186} According to one observer, the danger of union spending is the greatest of those listed because “most corporations . . . spend little or nothing on politics and can be expected to do the same going forward,” but labor unions are a different matter. They “can spend whatever they want on elections with no accountability at all.”\textsuperscript{187} Although such voluntary restraint by corporations or unions is conceivable, a lack of voluntary restraint is equally conceivable and no one knows whether either or both will take place. Motorists may voluntarily stop at busy intersections with-

\textsuperscript{183} See Bruce A. Campbell & Ruth A. Kollman, The Lady or the Tiger? Opening the Door to Lawyer Discipline Standards, 1 F.L. COASTAL L.J. 231, 231 (1999) (“The lawyer disciplinary system in Texas resembles the fable in which a prisoner is given a choice of two doors, behind which lurks either happiness or death, sealing his fate. Behind one door beckons a beautiful lady. Behind the other grows a tiger. The prisoner is given no clue to inform his choice. He must simply decide and take his chances.”) (footnotes omitted). The analogy references the short story The Lady, Or the Tiger (1882) (citing FRANK R. STOCKTON, THE LADY, OR THE TIGER? (Charles Scribner’s Sons 1914) (1884)).

\textsuperscript{184} Tribe, supra note 178. Among other things, it has been observed that “business corporations are necessarily risk-averse and hesitate to alienate large sectors of their customer and client base by pouring large sums of money, at least if they must do so openly and visibly, into candidate campaigns even when their economic interests would clearly be better served by one outcome rather than by another.” Id.

\textsuperscript{185} Law, supra note 138, at A15. The author is chief legal officer and general counsel of the U.S. Chamber of Commerce. According to the author, the “winners” in Citizens United are “organized labor” who “outspend any corporation on politics” or “any group representing business.” Id.

\textsuperscript{186} Cf. id.

\textsuperscript{187} Id. The author recommends consideration of legislation to address the impact of Citizens United on union spending so as “to protect the free speech rights of union members who don’t support their leaders’ political agenda, and to ensure the integrity of union political activism.” Id.
out stop signs or traffic lights and laws requiring compliance with them, but no one should rely on motorists doing so.

The dissent in *Citizens United* observed that some corporations prefer campaign finance limitations to protect them against demands by politicians for campaign contributions in exchange for favorable legislation. Theoretically, the “shake down issue” may not be as important in the world of judicial politics as in other politics. Any judge who regarded contributions as a prerequisite for a fair and impartial decision would not only not be “independent,” but the judge would also be factually corrupt. When contributions are made to judges by lawyers and litigants, however, appearances alone may sometimes lead to

---

188 As Justice Stevens’ dissent in *Citizens United* observed, “some corporations have affirmatively urged Congress to place limits on their electioneering communications. These corporations fear that officeholders will shake them down for supportive ads, that they will have to spend increasing sums on elections in an ever-escalating arms race with their competitors, and that public trust in business will be eroded.” *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 973 (2010).

The reference by Justice Stevens to avoiding shakedowns was to an amicus brief by a business group, which noted:

All of this is not to say that companies do not value their right to speak on issues important to their economic activities. The current statutory regime, however, does not meaningfully impinge on corporate political speech or even on corporate involvement in elections. It restricts (1) only electioneering communications, not issue advocacy and (2) only the use of corporate treasury funds, not the organization of segregated funds structured to facilitate political participation. Consequently, the current regime strikes an appropriate balance between protecting corporations from coerced support for candidates and permitting corporations to engage in genuine expression.

Amicus Curiae Brief from the Committee for Economic Development in Support of the Appellee, 2009 WL 2365230, at *16–17. To the same effect, see Amicus Brief from the Center for Political Accountability in Support of the Appellee, 2009 WL 2349016, at *4 (“Corporations will feel compelled to keep up with their competitors, particularly in the face of a shakedown by elected officials who write the laws and regulations that corporations must follow on a daily basis.”).


189 The corporate shakedown argument was also adopted by E.J. Dionne. Posting by E.J. Dionne to The New Republic, http://www.tnr.com/article/politics/court-and-racket (Mar. 8, 2010, 12:00 EST) (“But conservatives and Republicans should also be alarmed that this decision could encourage politicians to extort campaign spending from businesses. Is it really so hard to imagine a congressional leader quietly approaching a business executive and suggesting that unless her company invested heavily in certain key electoral contests, this regulation or that spending program might be changed at the expense of her enterprise?”).

190 See Adam Liptak, *Judges Can Solicit Election Funds, Court Rules*, N.Y. TIMES, Oct. 12, 2006 (reporting on a Kentucky case; “Judge Caldwell said that the ban on personal solicitation might make “direct shakedowns by a corrupt judicial candidate” less likely “because it eliminates the moment when a judicial candidate can say, ‘Contribute to my campaign, and I will rule in your favor.’” But such corruption, she wrote, is already prohibited by other ethics rules and by criminal laws.”).
2010] HOW GREAT IS AMERICA'S TOLERANCE FOR JUDICIAL BIAS? 929

sinister conclusions:See, e.g., Carrington, supra note 156, at 91 ("Judicial candidates receive money from lawyers and litigants appearing in their courts; rarely are there contributions from any other source. Even when the amounts are relatively small, the contributions look a little like bribes or shake-downs related to the outcomes of past or future lawsuits."); Grimes, supra note 15, at 865 ("Almost all contributions to judicial candidates come from attorneys and litigants who expect to come before those to whom they are contributing. Attorneys and litigants appear to give significant contributions to judicial candidates for one of two reasons: they hope the contributions will sway judges in their favor, or they seek the election of those with judicial philosophies attuned to their interests."); Shugerman, supra note 14, at 1065 ("It has been a long-established practice for parties and lawyers to donate to the judges who will later hear their cases, but recently the size of such donations has increased dramatically.").

2. What May Be Done?

A constitutional amendment, of course, may be sought overruling the decision, such as one expressly providing that the First Amendment is not intended to reach such campaign finance legislation or granting Congress the power to legislate campaign finance reform of the sort invalidated by the Supreme Court. The difficulties of such an amendment process are well known, although interest in such an amendment and how it would read has arisen following Citizens United. As President

See James Lindgren, Blackmail: Morals: The Theory, History and Practice of the Bribery-Extortion Distinction, 141 U. PA. L. REV. 1695, 1711 (1993) (describing a corrupt taking “without an explicit quid pro quo,” as follows:...An elected judge approaches a lawyer in a major case pending before the judge and says, ‘I haven't heard from you yet. Would you donate $ 100,000 to my re-election fund?'”).

As for passing a constitutional amendment to undo Citizens United, speculation focuses on the difficulty in doing so as is virtually always the case. Adam Liptak, Supreme Court Gets a Rare Rebuke, in Front of a Nation, N.Y. TIMES, Jan. 29, 2010, at A12 [hereinafter Rare Rebuke] (“The sharp attack from the president, echoing those of other Democrats and their allies, suggested that the left has found a decision to rail against, even if there is not much that can be done about it....The core of the Citizens United decision said corporations have a First Amendment right to make independent expenditures in candidate elections. Only a constitutional amendment, which is exceedingly unlikely, could undo that core holding.”); but see Lawrence Lessig, Change Congress, Professor Lawrence Lessig's Essay on the Need for a Constitutional Amendment, available at http://action.change-congress.org/page/s/amendmentpetition#essay (advocating constitutional amendment); Posting by Lawrence Lessig to The New Republic, http://www.tnr.com/article/politics/citizens-unite (Mar. 16, 2010, 12:00 EST) (suggesting amendment to this effect: “Nothing in this Constitution shall be construed to restrict the power to limit, though not to ban, campaign expenditures of non-citizens of the United States during the last 60 days before an election.”).

Obama suggested in his 2010 State of the Union address, perhaps legislation short of such an amendment will be helpful to ameliorate some anticipated effects of the decision:

With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests — including foreign corporations — to spend without limit in our elections. . . . I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities. . . . They should be decided by the American people. And I’d urge Democrats and Republicans to pass a bill that helps to correct some of these problems. 195

Suggested legislative responses are already emerging, including enhancing corporate contribution disclosure requirements, 196 creating a federal cause of

---

Nearly three-quarters of self-identified conservative Republicans say they oppose the Supreme Court ruling, with most of them strongly opposed. Some two-thirds of conservative Republicans favor congressional efforts to limit corporate and union spending, though with less enthusiasm than liberal Democrats.

See also Dionne, supra note 189 (“A Washington Post-ABC News poll last month found that seventy-six percent of Republicans were opposed to the ruling, along with eighty-one percent of independents and eighty-five percent of Democrats.”).

195 Barack Obama, State of the Union Address, Jan. 27, 2010, available at http://www.nytimes.com/2010/01/28/us/politics/28obama.text.html?hp &pagewanted=all (ap- plause references deleted). The President’s observations about Citizens United were the subject of Adam Liptak’s January 29, 2010, article in the New York Times. Rare Rebuke, supra note 193 (“It is not unusual for presidents to disagree publicly with Supreme Court decisions. But they tend to do so at news conferences and in written statements, not to the justices’ faces.”) For more on the controversy resulting from the State of the Union speech, see Posting by Helene Cooper to the Caucus, http://thecaucus.blogs.nytimes.com/2010/03/10/white-house-spars-with-the-chief-justice/?hp (Mar. 10, 2010, 11:05 EST). Among other things, the article involved negative comments on the President’s reference to Citizens United during the speech by Chief Justice Roberts and a response by White House press secretary Robert Gibbs, quoted as follows:

“What is troubling is that this decision opened the floodgates for corporations and special interests to pour money into elections — drowning out the voices of average Americans. The president has long been committed to reducing the undue influence of special interests and their lobbyists over government. That is why he spoke out to condemn the decision and is working with Congress on a legislative response to close this loophole.”

Id. Roberts specifically objected to “the political scene surrounding the State of the Union speech” when the President made his observations on the case. Id.

196 Tribe, supra note 178. With respect to enhanced disclosure requirements, Professor Tribe notes:

The disclaimer should have to include a statement by the corporate sponsor’s CEO, by name, providing information about how much of the corporation’s general treasury was being expended in aggregate on the communication in
action for corporate waste arising from contributions,\textsuperscript{197} and improving corporate accountability to shareholders by requiring notice of expenditures.\textsuperscript{198} Still other proposed measures include banning “expenditures from corporations with a high percentage of foreign ownership; from corporations that win federal contracts; and from those that received TARP funds”\textsuperscript{199}, and enhancing disclosure question and certifying the CEO’s personal conclusion, as in Sarbanes-Oxley, that making the expenditure from general treasury funds, as opposed to making it through a corporate PAC, significantly advances the corporation’s business interest.

Id.\textsuperscript{197} Id. With respect to a federal cause of action for corporate waste by making political expenditures, Professor Tribe notes:

For example, it could provide a greater incentive for suit, by offering statutory damages or treble damages (i.e., reimbursement of three times the challenged expenditure, part of which reimbursement would go directly to the plaintiffs rather than into the corporation’s coffers), as well as attorneys’ fees, and it could provide better deterrence by imposing individual liability for the corporate officers authorizing the improper political expenditure. And the “business judgment” rule making such cases notoriously difficult to bring under state law could be replaced with a rule less deferential to management and more focused on the existence of a convincing justification for using general treasury funds as such rather than relying entirely on PAC funds contributed by people with politics in mind.

Id.\textsuperscript{198} Monica Youn, Counsel at the Brennan Center for Justice at New York Univ. School of Law, Testimony before the Comm. on the Judiciary, U.S. House of Representatives (Feb. 3, 2010) available at http://www.brennancenter.org/content/resource/monica_youns_testimony_for_the_subcommittee_on_the_constitution_civil_right/ (“[F]irst, require managers to obtain authorization from shareholders before making political expenditures with corporate treasury funds; and second, require managers to report corporate political spending directly to shareholders. These requirements will increase corporate accountability by placing the power directly in the hands of the shareholders, thereby ensuring that shareholders’ funds are used for political spending only if that is how the shareholders want their money spent.”) To the same effect, see Ciara Torres-Spelliscy, Counsel at the Brennan Center for Justice at New York Univ. School of Law, Testimony before the Comm. on House Administration, U.S. House of Representatives (Feb. 3, 2010) available at http://www.brennancenter.org/content/resource/ciara_torres-spelliscys_testimony_for_the_committee_on_house_administration/.

\textsuperscript{199} These are suggestions reportedly backed by New York Senator Charles Schumer and Democratic Congressional Campaign Committee Chairman Chris Van Hollen. See Wilson, supra note 175 (“Sen. Chuck Schumer (D-NY) and DCCC chair Chris Van Hollen announced Thursday they will begin work on a legislative framework aimed at tightening limits on certain corporate expenditures and outright banning others after last month’s Citizens United v. FEC ruling.”); see also Eric Lichtblau, Democrats Push to Require Corporate Campaign Disclosure, N.Y. TIMES, Apr. 12, 2010 (“The Democrats’ proposal would require corporations or groups like labor unions, advocacy groups and so-called 527 organizations that are involved in political expenditures to identify all their financial donors or set up separate accounts to handle political spending and identify the donors to that account. . . . With some exceptions, the proposal would also ban political expenditures by government contractors, companies that received bailout money from the government under the Troubled Asset Relief Program and companies that have more than 20 percent foreign ownership.”); Summary of Citizens United Legislation Introduced by Senator Charles E. Schumer
requirements, including by requiring “corporations and unions to make public details of what they spend [in contributions] directly or through advocacy groups.”\textsuperscript{200} The likelihood of success of any legislation is beyond the scope of this Article, and even if passed, some may result in court challenges against it under \textit{Citizens United} as indirect means to abridge free speech.\textsuperscript{201}

Will more or less extreme candidates benefit from \textit{Citizens United}? Because more extreme and presumably less impartial candidates may attract more funds, such candidacies might become more attractive after \textit{Citizens United}.\textsuperscript{202}

\begin{flushleft}
\end{flushleft}
\textsuperscript{200} David D. Kirkpatrick, \textit{Democrats Try to Rebuild Campaign Spending Barriers}, \textit{N.Y. Times}, Feb. 12, 2010, at A19 [hereinafter \textit{Democrats Try to Rebuild Barriers}] (identifying proposals, including “[i]f a corporation paid for a political commercial, the company’s chief executive would be required to appear at the end taking responsibility, just as political candidates must now do. If an advocacy group or trade association paid for a commercial, the biggest donor would be required to appear and the five biggest corporate contributors would be listed by name.”); Lichtblau, \textit{supra} note 199.

In supporting legislative reform, outgoing United States Senator Evan Bayh explicitly noted the threat that he saw from \textit{Citizens United}:

The recent Supreme Court ruling in \textit{Citizens United v. Federal Election Commission}, allowing corporations and unions to spend freely on ads explicitly supporting or opposing political candidates, will worsen matters. The threat of unlimited amounts of negative advertising from special interest groups will only make members more beholden to their natural constituencies and more afraid of violating party orthodoxies.

I can easily imagine vulnerable members approaching a corporation or union for support and being told: “We’d love to support you, but we have a rule. We only support candidates who are with us at least 90 percent of the time. Here is our questionnaire with our top 10 concerns. Fill it out.” Millions of campaign dollars now ride on the member’s response. The cause of good government is not served.

\begin{flushright}
\end{flushright}
\textsuperscript{201} \textit{Democrats Try To Rebuild Barriers}, \textit{supra} note 200 (“leading legal critic of campaign-finance rules, noted that the court had often disapproved of indirect efforts to accomplish objectives it has already found unconstitutional — such as, in this case, banning political commercials paid for by corporations.”). \textit{But see id.} (“Several legal scholars said that the many disclosure requirements in the measure appeared to stand on firmer constitutional ground than the full bans on political commercials by foreign companies or government contractors. The court has frowned on speech restrictions aimed at specific speakers and leaned toward disclosure as a constitutionally permissible response to fears of corruption or und[ue] influence.”). Professor Lawrence Lessig has criticized the proposed legislation and instead called for a constitutional amendment and other legislation to address \textit{Citizens United}. See Posting of Lawrence Lessig to Fix Congress First! http://www.fixcongressfirst.org/blog/entry/breaking-congressss-response-to-citizens-united/#reactions (Feb. 11, 2010) (the proposed legislation is “filled with ideas that either won’t work or that, if they worked, would only invite the Supreme Court to strike again.”).

\textsuperscript{202} As for more extreme candidates, see Dorothy Samuels, \textit{Hanging a “For Sale” Sign Over the Judiciary}, \textit{N.Y. Times}, Jan. 30, 2010, at A22 (quoting Professor James Sample, Hofstra Law School, and noting as follows: “The accelerated money war, [Professor Sample] warns, will inevitably polarize the bench “because more moderate candidates are unlikely to be considered a
Alternatively, more moderate candidates may receive funding because they may be perceived as more likely to win.\textsuperscript{203} Both suppositions are reasonable although not presently verifiable.

Because of the anticipated effect of contributions on state court judicial elections, other responses suggested have included amending state constitutions so as to introduce judicial appointment systems instead of elections.\textsuperscript{204} The struggle to obtain appointment systems within the states is ongoing and well-known, but eliminating judicial elections would obviously eliminate the effect of \textit{Citizens United} on those elections by removing money from the process of selecting judges. It would also eliminate the need for recusal motions under \textit{Caperton} because of campaign contributions or expenditures.

\textbf{G. A Short Lesson on Judicial Independence and an Historical Interlude}

In light of the intensity of the reaction to \textit{Citizens United}, it is a good time to reflect on judicial independence. Although classic support for judicial independence has justified it in terms of empowering judges to make unpopular decisions, the independence sought is not unmixed. Judicial independence is presumably independence to make decisions like the pro-integration decisions in the South during the civil rights era, as opposed to deciding cases like \textit{Lochner} in the early part of the twentieth century\textsuperscript{205} and other reviled or discredited decisions.\textsuperscript{206} From the comments made by some opponents of \textit{Citizens United}, one
might assume that there are limits to the support for the making of unpopular decisions, even from proponents of judicial independence.

The unpopularity or potential consequences of *Citizens United* present a moment for historical reflection as well. Consider the possibility of a bad decision (or series of decisions) of the United States Supreme Court opposed by masses of the American public — for example, precedents that threatened to exacerbate the current bad economic situation — decided on the basis of “doctrinaire logic” or “wooden application” of rules or even on a well-grounded and unimpeachable constitutional basis. Such decisions bring to mind another era in which extreme measures were considered and rejected, such as President Franklin D. Roosevelt’s plan to “pack the court,” or as he later suggested, “to compel it, by the application of pressure, to assume a more liberal outlook.” The plan, which was entitled the Judiciary Reorganization Bill of 1937, would have enabled the President to add judges other than through the ordinary appointment process, as follows:

The Judiciary Reorganization Bill of 1937, which provided for broad reform of the federal judicial system, allowed President Roosevelt to appoint an additional member to the Supreme Court for every sitting justice over the age of seventy, which

---

207 “Doctrinaire” interpretations of constitutional provisions regardless of social consequences have also led to observations like Robert Jackson’s dissent in *Terminiello v. Chicago*, 337 U.S. 1 (1949), as follows:

This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

*Id.* at 36 (Jackson, J. dissenting). To the same effect is Justice Stevens’ observation in *Citizens United* (“In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules.”) *Citizens United*, 130 S. Ct. at 979 (Stevens, J. dissenting)). What is “doctrinaire logic” or “wooden application” and what is not, of course, may also be subjective — what is doctrinaire or wooden to some may be fair constitutional interpretation to others.

Although taking into account whether constitutional interpretation leads to unacceptably adverse consequences may be unobjectionable, a dispute may arise over what is “adverse” and what is “unacceptably adverse.” A further issue is whether the Supreme Court is in the best position to assess adverse effects as compared to other branches of government, such as the legislature following fact-finding hearings.

Of course, the ability of the legislature to modify court decisions through legislation provides an important safety valve as does the ability to seek constitutional change. The burden of the constitutional process in many cases may make that safety valve little more than theoretical, however.

would have resulted in a total of six new justices at the time the bill was introduced.\textsuperscript{209}

\begin{flushright}
\textsuperscript{209} United States Senate Committee on the Judiciary, Recess Reading: An Occasional Feature From the Judiciary Committee, Franklin Delano Roosevelt's "Court Packing" Plan, available at http://judiciary.senate.gov/about/history/CourtPacking.cfm (last visited Apr. 5, 2010). The plan was described by President Roosevelt in a fireside chat as follows:

What is my proposal? It is simply this: whenever a judge or justice of any federal court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the president then in office, with the approval, as required by the Constitution, of the Senate of the United States.

That plan has two chief purposes. By bringing into the judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the administration of all federal justice, from the bottom to the top, speedier and, therefore, less costly; secondly, to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries.

The number of judges to be appointed would depend wholly on the decision of present judges now over seventy, or those who would subsequently reach the age of seventy.

If, for instance, any one of the six justices of the Supreme Court now over the age of seventy should retire as provided under the plan, no additional place would be created. Consequently, although there never can be more than fifteen, there may be only fourteen, or thirteen, or twelve. And there may be only nine.

There is nothing novel or radical about this idea. It seeks to maintain the federal bench in full vigor. It has been discussed and approved by many persons of high authority ever since a similar proposal passed the House of Representatives in 1869.

Why was the age fixed at seventy? Because the laws of many states, and the practice of the civil service, the regulations of the Army and Navy, and the rules of many of our universities and of almost every great private business enterprise, commonly fix the retirement age at seventy years or less.

The statute would apply to all the courts in the federal system. There is general approval so far as the lower federal courts are concerned. The plan has met opposition only so far as the Supreme Court of the United States itself is concerned. But, my friends, if such a plan is good for the lower courts, it certainly ought to be equally good for the highest Court, from which there is no appeal.


Among other things, today such a plan would be objectionable to some because of the references to “new and younger blood” and the suggestion that judges at age seventy lack “full vigor.” (Life expectancy and health are undoubtedly better now.) Even when proposed, the age-based restriction was an issue. For instance, certain proponents were concerned that the plan would be perceived “as a slur against a perfectly able and thoroughly progressive old judge [referencing Justice Brandeis who was then on the Court.]” SUPREME POWER, supra note 116, at 263-64. Undoubtedly
The era into which the bill was introduced has been described as follows:

By 1937, the Court’s majority had made amply clear that the very notion of the New Deal — its use of governmental power to relieve the suffering caused by the Great Depression and to create a new and more just social and economic order — was an affront to the Constitution, whether that power was exercised by the federal government or the states. . . . If reform was now impossible, so was recovery.210

To the same effect was President Roosevelt’s response to the Schecter decision211 which struck down the National Industrial Recovery Act. According to the President, the Supreme Court’s interpretation of the Interstate Commerce Clause of the federal constitution was drawn from another era and prevented the government from addressing the nation’s economic problems:

The implications of this decision . . . are more important than any decision probably since the Dred Scott case, because they bring the country as a whole up against a very practical question. . . . [D]oes this decision mean that the United States government has no control over any national economic problem?” . . . Would Americans stand for that? Or would they give their federal government — like that of “every other nation in the world” — the power to apply national solutions to national problems . . . ?” We have been relegated to the horse-and-buggy definition of interstate commerce.212

The Supreme Court’s eradication of minimum wage legislation in another case led to particular outrage.213 “For most Americans, “the liberty of

---

210 Id. at 3.
contract’ was an abstraction; ‘the liberty to starve,’ . . . was, for many, reality.”

The court-packing plan has been often considered a misguided attack on judicial independence. An historian of the period has cautioned President Obama that this “is an analogy to avoid,” and the “only sure way [for the president] to change the court’s direction [in the Roosevelt era] was to change its members when vacancies occurred” and that is true now. Also, other factors may effect change: the “Supreme Court does not operate in a vacuum . . . and [j]ustices are human, and are open to influence by public events and political pressure.” But it is understandable how reasonable minds might have considered such extreme measures appropriate during the New Deal era to avoid a greater evil, such as the destitution of large portions of the American public.

SUPREME POWER, supra note 116, at 222 (quoting THE NEW REPUBLIC); see also id. at 221–22 (“The sacred right of liberty of contract again — the right of an immature child or a helpless woman to drive a bargain with a great corporation. If this decision does not outrage the moral sense of the country, then nothing will.” (quoting then Secretary of the Interior Harold Ickes) “The condemnation, this time, was near universal.”).

From the historical perspective, there is no need to defend the plan. It lost, the Supreme Court shifted its views anyway, and history moved on. The details of the plan barely matter, although, as noted above, the idea of considering 70-year old judges old in this age of greater sensitivity to age discrimination might be unpopular. The main point is that this was an effort to change decision-making at the Supreme Court by changing court personnel other than through the normal appointment process.

JUSTICES WILL PREVAIL, supra note 116 (raising court-packing retrospective as a response to Citizens United and suggesting that the President not “lead the charge.”). Shesol was not specifically considering an effort to pack the court, but rather the president’s escalating “war of words with the court.” Id.; see Cooper, supra note 195. Shesol noted that the “justices are not easily intimidated;” the president [Obama]’s critics would portray him as “unconcerned with the independence of the judiciary and eager to consolidate power in his own hands;” and in any case, “[i]f the Roberts court, like the court led by Charles Evans Hughes in the 1930’s, continues to defy popular opinion as flagrantly as it did in Citizens United, American might well turn against it . . . In that event, progressives might well erupt in protest; Congress might be tempted to curb the court.”

JUSTICES WILL PREVAIL, supra note 116.

Cf. E-mail from Barry Friedman, Jacob D. Fuchsberg Professor of Law, New York University School of Law, to author (Mar. 14, 2010) (on file with the West Virginia Law Review) (hereinafter Friedman E-mail) (“President Obama should be strategic and careful and not go over the line but the Supreme Court is not immune from criticism and the president is the criticizer in chief”). Professor Friedman is the author of THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

JUSTICES WILL PREVAIL, supra note 116. According to Shesol, “Patience, in the face of pressing national challenges, is hard. But change, as is now amply clear, does not come quickly.” Id. Cf. Friedman E-mail, supra note 216 (Supreme Court not immune from criticism and president is criticizer in chief).

JUSTICES WILL PREVAIL, supra note 116.

For a history of the period in addition to Jeff Shesol’s writings, see also, e.g., Barry Cushman, Rethinking the New Deal Court, 80 VA. L. REV. 201 (1994); Barry Friedman, THE HISTORY OF THE COUNTERMAJORITARIAN DIFFICULTY, PART FOUR: LAW’S POLITICS, 148 U. PA. L. REV. 971, 1049 (2000) [hereinafter Friedman, The History of the Countermajoritarian Difficulty].
Indeed, in a “fireside chat” at the time discussing the plan, President Roosevelt explained his reasoning, including the need “to meet the unanswered challenge of one-third of a Nation ill-nourished, ill-clad, ill-housed,” as well as expressed his belief in the importance of an “independent judiciary” and the “rule of law,” concepts which some would assume would dictate against the court-packing plan.

President Roosevelt’s New Deal goals were “savaged” by the Supreme Court, which struck “down no less than sixteen New Deal laws within a thirteen-month period” and his program was in “shambles.” Henry J. Abraham, *Judicial Independence in the United States, in Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* 32 (2001). The court packing plan sparked a “firestorm of opposition . . . within the halls of Congress, the press, and the public, the proposed legislation being perceived for what, in fact, it was: an assault on judicial independence.”

“Court packing is by no means the only way in which political authorities may abuse the power they possess over judicial structure.” Peter H. Russell, *Toward a General Theory of Judicial Independence, in Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* 14 (2001) (mentioning, among other things, stripping “courts of their jurisdiction to adjudicate matters in which the government of the day has a vital interest . . .”). Of course, the concept of taking extreme measures to avoid evil can be and has been used to take measures in the name of national security at the expense of civil liberties.

President Obama’s response to *Citizens United*, as noted above, was the measured one of calling for legislative change to respond to the Court’s ruling, noting, “And I’d urge Democrats and Republicans to pass a bill that helps to correct some of these problems.” Obama, * supra* note 193. Chief Justice Roberts may not have considered the President’s approach so “measured,” however. *See Cooper, supra* note 195.

Consider President Roosevelt’s speech to the nation on the court-packing plan, noting the need to avoid an economic “catastrophe.” *See Terence J. Lau, Judicial Independence: A Call for Reform, 9 Nev. L.J. 79, 119–20 (2008):*

On March 9, 1937, President Roosevelt took his case for the court-packing plan to the public. In one of his famous “fireside chats,” he outlined the issue, the stakes and his solution. Certain portions of his speech are worth reprinting here:

The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions. We are at a crisis in our ability to proceed with that protection . . . . I want to talk with you very simply about the need for present action in this crisis — the need to meet the unanswered challenge of one-third of a Nation ill-nourished, ill-clad, ill-housed.

(footnotes omitted.)

*See also* President Roosevelt’s Fireside Chat on Reorganization of the Judiciary, * supra* note 209.

We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution and not over it. In our courts we want a government of laws and not of men.

I want — as all Americans want — an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce
It is likewise understandable why reasonable minds might oppose such court-altering plans — despite anger at the Supreme Court — in light of institutional imperatives. At the time of the conservative New Deal decisions, the public both opposed the decisions and the effort to alter the Supreme Court. The opposition even came from the farm movement and organized labor.\footnote{See Friedman, \textit{History of the Countermajoritarian Difficulty}, supra note 219, at 1049: \textquote[See Friedman, \textit{History of the Countermajoritarian Difficulty}, supra note 219, at 1049: ]{[T]he public was extremely angry about Supreme Court decisions and the Court's constant interference with the New Deal agenda. At the same time, many parts of that same public — including those who favored the New Deal measures struck down by the courts — opposed the Court-packing plan. This phenomenon was confirmed by Gallup polls that showed both dissatisfaction with Court decisions and opposition to tinkering with the Court. As Thurman Arnold explained, “much of the opposition to the proposal came not from those who were opposed but from those in favor of the main outlines of the Roosevelt policies,” including the farm movement and organized labor. In addition, many members of Congress were enthusiastic New Dealers who were eager to solve the Court problem, but insisted on doing so by constitutional amendment, rather than by Court packing. (footnotes omitted).\hfill}}

Intimidating the Court may also weaken it and lead it to defer too much to the other branches of government when the opposite is required.\footnote{Id.} Court-packing, in addition to disturbing judicial independence, may well be ineffective in achieving the result proponents of a plan would seek. For example, adding new justices would only assist the opponents of a series of decisions if it could be accurately predicted how new judges would vote in a case involving the same issues and if they would continue to vote in that manner.

Furthermore, supporting such a course of action might open the door to even less palatable approaches. While changing the make-up of the New Deal Supreme Court to preserve Roosevelt’s legislative agenda may have had surface appeal to supporters of the New Deal frustrated by the Supreme Court, the same procedure invoked by another President to alter the make-up of the Supreme Court after \textit{Brown v. Board of Education}\footnote{Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).} in order to slow the process of integration would have been regarded by some as far more troublesome, if not evil.
Yet the Supreme Court is not immune from criticism, and criticism sometimes leads to change. Neither academics, journalists (what else is a free press for?), politicians, nor other members of the public need be silent and accepting in the face of Supreme Court decisions. Although the court-packing plan failed, the Supreme Court began to uphold New Deal legislation, the President took credit for the change, and many others agreed. According to an historian of the period, the Supreme Court justices were not merely judges; they were men — politically minded and socially aware men. All, to varying degrees, were attuned to changes in the climate of opinion and mindful of the level of public esteem for their institution and themselves as individuals. They were, again to different degrees, open to influence by legal briefs, oral arguments, pressure from their peers, and, not least, national events.

The subject remains an area of ongoing scholarly interest and debate, even (and some might say especially) now.

H. What Did the U.S. Supreme Court Do? What Should Americans Do?

Controlling the appearance of corruption and other types of corruption through campaign finance reform has been regarded as settled policy, even if the effectiveness of the policy could not be demonstrated through mathematical models. On the basis of precedent alone (“that’s the way we’ve been doing it for years”), the approach could have been upheld.

---

226 "SUPREME POWER, supra note 116, at 522 ("To most who had witnessed the [court-packing] fight (and many who had not), it seemed self-evident that the [Supreme] Court had bent before the storm."). Cf. id. at 523 (noting scholarly disagreement as to the reason for the change in the Court’s decisions). See also ROOSEVELT, supra note 224, at 217 (declining to resolve dilemma, noting that measures such as a court-packing proposal may be effective in creating change, but adding that some point out that the Supreme Court during the New Deal was rethinking its jurisprudence “before the announcement of the plan and would have proceeded without it.”).

227 "SUPREME POWER, supra note 116, at 523–24.

228 Scholars still debate and consider the propriety of Roosevelt’s threats to pack the Supreme Court. See Peter H. Russell, Toward a General Theory of Judicial Independence, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 14 (2001) ("Whether Roosevelt’s threat was justified depends on one’s overall evaluation of the situation of the United States at that time and the long-term consequences of Roosevelt’s action for constitutional democracy."). Justices Will Prevail, supra note 116.

229 Judges need not work with mathematical precision, however. Were a judge to strike down campaign finance reform without mathematical proof that campaign spending has a corrupting or other undesirable influence — and it did — our democratic processes might be damaged in the meantime until the proof, if ever, came in. It therefore might be a reasonable approach for a judge to assess that the First Amendment risks are less significant than the corruption risks and uphold the law. Sometimes policymakers need to work with the best available information or take the risk of societal harm if they fail to act. Cf: Perspectives From the Rule of Law, supra note 18, at
In addition, campaign finance reform could have been preserved on the theory of necessity. It was observed even before *Citizens United* that campaign finance limitations in judicial elections were essential to preserve judicial independence—even if they impinged on speech. “[E]xpenditure restrictions limit political speech [even in judicial elections],” but “this is constitutional because it is the only apparent way to achieve an undoubtedly compelling interest: preserving an independent judiciary in the face of the corrosive effects of ever larger spending in judicial elections.”  

The principal dilemma for the court was instead as follows: if it upheld the legislation, First Amendment freedoms (as it saw them) might have been adversely affected and if it struck it down (as it did), there was a risk of harm to the interests the campaign finance laws were intended to protect. *Citizens United* resolved the dilemma by overweighting what it identified as First Amendment interests and underweighting or discounting the other competing interests that campaign finance reform was intended to address. (The only exception was through its approval of the existing disclaimer and disclosure legislation.) 

But what about controlling an increase in spending on judicial election campaigns? As of now, voluntary restraint (by corporations and others) stands in the way of increased spending on independent expenditures in judicial elections as a result of *Citizens United*, and the risks of such spending are enhanced. Whether we will see a worsened judicial selection climate is now in the area of speculation, guess work, and premonition. If past spending foretells future spending, there will be more expensive races, unless opponents are exaggerating the likely effects of the decision. But whether the past predicts the future is presently unclear.

Whether curative activity, either legislative or constitutional, is possible is up to the political process and ultimately, American citizens and their representatives. But to paraphrase Benjamin Franklin, and at the risk of overdramatizing the situation, this might be a time to take action to preserve, if not the republic itself, then an important element of it as well as the rule of law—namely, an impartial judiciary.

**CONCLUSION**

*Consider the problem of knowing that the judge is biased against you or your client or so it appears, and the judge refuses to step down from your case. How can a lawyer represent*
his client under these circumstances, and how can a client accept an adverse verdict as legitimate?

America’s ability effectively to address the risk of judicial bias is in doubt, and if not properly addressed, may only be continuing to deteriorate, and, as Justice O’Connor noted, will get worse “soon.”232 To answer the question posed by the title to this Article, therefore, America is willing — or at least is prepared — to accept too much risk of judicial bias. How much risk is too much? Even small percentages may be unacceptable. For instance, if the risk were too high in just one percent of the cases, that might be many, many cases, despite the small percentage. If the risk were too high in twenty-five percent of the cases, would we be prepared to accept that, even if that were to mean that in the “vast majority of cases,” there is no problem? (Seventy-five percent certainly does qualify as the “vast majority.”).

Caperton did not do enough to remedy the problem of bias, and Citizens United did not help either. How is it that our collection of precedents and laws has collectively gotten us to this juncture? Even assuming that each individual precedent was correctly decided, are we prepared to live with the results overall? If Americans do not face up to this problem, how are things going to improve? Answering these questions is a first step in trying to do something about bias in our courts.

Caperton did establish a vague Due Process limit for bias where campaign contributions were “extreme” and untimely — i.e., made when the beneficiary judicial candidate was likely to hear the case if he or she prevailed in the election. But nothing was changed as a matter of federal constitutional law for the less “extreme” cases, except to leave the remedy to the states as before if the states chose to act. As of the time of this Article, very little has been done by the states to tighten their recusal procedures. But there is still time for the states to respond. Not even a year has passed since the decision. On the positive side, Caperton avoided a substantial problem: a contrary decision in that case would have sent a troubling message that money does not matter and given the states even weaker encouragement to improve their procedures. Matters could have been worse.

But Caperton was a precarious decision, since there were four dissenters. Chief Justice Roberts, supported by some subsequent commentary, would not have granted relief even here: he was principally concerned with a potential outbreak of recusal litigation. That combined with Justice Kennedy’s limited decision stressing the extreme facts might make it difficult for the next Caperton motion that comes before the Supreme Court. But things did work out this time for Caperton. The Supreme Court did step in here to rescue him (even by one vote). (It is curious that “rescue” and “recuse” have the same letters.) That is at least “something,” at least until he lost again in West Virginia.

232 Former Justice O’Connor Sees Ill, supra note 157.
Even before *Citizens United*, judicial elections have been regarded as tainted by money, which has impaired the appearance of judicial impartiality.\footnote{See Perspectives From the Rule of Law, supra note 18, at 94 (citing Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1).} This problem will remain so long as there are elections and the need to raise money and secure votes. On the theory that more money in judicial politics is worse than less, *Citizens United* potentially worsens judicial elections since more expenditures are possible in more races. But the emphasis should be on the words “worsens” and “more expenditures.”

It is interesting that *Caperton*, with its massive campaign spending, emerged from the old pre-*Citizens United* regime: even before *Citizens United*, money was not being kept out of the system very well. The same types of arguments about too much money in judicial politics are and were in play before and after *Citizens United*. It is unknown whether interest groups (however defined) are ready to spend more now than they did before. (If they did, would it really matter, given all that is being spent already?) But the fact that they may if they wish is a matter of concern.\footnote{See Karlan, supra note 14, at 90; Perspectives on Judicial Selection, supra note 14, at 957 (“Some claim judges are, or appear to be, pressured to decide cases in popular ways or in ways favorable to their campaign contributors — as opposed to on the basis of the law — to avoid retribution on election day by the voters.”).}

Finally, as noted above, some “non-monetary” problems with judicial elections are the same both before and after *Citizens United*. The problem with judicial elections is not *just* money and the incentive of judicial candidates to pander both to campaign contributors and local voters.\footnote{The concept that judges may be tempted to shade their decisions to attract financial support should not pass unnoticed. Although judges who are tempted in authoritarian regimes to cooperate with the authorities in decision-making are regarded as object lessons on why the American system of justice is preferable, the prior statement by Professor Karlan should give a neutral observer pause when assessing American superiority. See also Perspectives From the Rule of Law, supra note 18, at 95 (describing telephone justice).} The danger of judges pandering in certain criminal cases has been particularly acknowledged by Justice John Paul Stevens\footnote{In *Harris v. Alabama*, 513 U.S. 504 (1995), Justice Stevens expressed concern over the impact of judicial elections on capital sentencing by judges, noting in dissent as follows: The “higher authority” to whom present day capital judges may be “too responsive” is a political climate in which judges who covet higher office — or who merely wish to remain judges — must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years. Ala. Code §17-2-7 (1987). The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III. Id. at 519–20 (footnote omitted).} and others.\footnote{See Perspectives From the Rule of Law, supra note 18, at 94 (citing Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1).} As for some of the other problems un-
related to money, the public elects judges, for the most part, without knowing who the candidates are, how they have performed, and how they are likely to perform. In addition, the information received through campaign advertising is often misleading and unreliable and generally does not answer the question of who is likely to be a good a judge. Voters typically receive no information about which judicial candidates rate highly in temperament, scholarship, integrity, and efficiency; and sometimes voters know nothing more about a judge than his or her name. Neither is anything typically known of the judge’s commitment to impartiality.

Many references throughout this Article consider international concepts of the rule of law and international efforts at achieving rule of law reform. There is nothing wrong with holding ourselves to our own best standards and principles, a phrase made famous by Professor Abram Chayes; taking the lessons learned from the rule of law and international development sphere home; and examining judicial bias in the United States through the lens of the rule of law. It is interesting to imagine what we might say about the existence of judicial bias — such as we see in the United States — were it prevalent in a developing nation. Americans should “act in accordance with the noble principles that this country espouses and that set it apart from the rest of the world.”

237 According to recent submissions by the National Association of Criminal Defense Attorneys, this pandering may affect criminal as well as civil cases, such as when a judicial candidates runs on the slogan of being tough on crime. See supra note 17.

238 See generally Perspectives From the Rule of Law, supra note 18, at 99 et seq. (detailing problems with judicial elections, including voter ignorance of the candidates). States with adequate judicial performance review systems are an exception, but judicial performance review is most often used in appointment systems where a judge runs in a retention election following the expiration of her term.

239 See Rosenbaum, supra note 18 (quoting Abram Chayes); Perspectives From the Rule of Law, supra note 18, at 112. See also, Paul S. Reichler, Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court, 42 Harv. Int’l L.J. 15, 15 (2001):

To the innumerable inquiries about why he was representing the Sandinistaled government of Nicaragua in its World Court lawsuit against the Reaganistaled government of the United States, Professor Abram Chayes--Abe--always gave the same answer:

To hold America to its own best standards.

To Abe, America’s best standards included: respect for the rule of law; commitment to the peaceful resolution of disputes; tolerance of a broad range of political and philosophical opinion; sympathy for the victims of oppression and injustice; and vocation for truth in public discourse.

240 See Reichler, supra note 239, at 15:

To Abe Chayes, the lawsuit was much more than a defense of Nicaragua’s universally recognized rights as a sovereign state: political independence; territorial sovereignty; and freedom from foreign intervention in its internal affairs. It was, above all, a challenge to the powerful in Washington to act in ac-
An observer has noted that democracy is an “institutionalized wager . . .
everyone who supports it and wishes to belong to a democratic political com-
community assumes the risk” that the “‘wrong’ people and policies are chosen as the
result of fair elections.” It is unclear whether this is a reasonable wager to
ask Americans to make with regard to their elected judiciaries under present
conditions. Where too often neither they nor their neighbors know enough to
have any substantial basis for voting for one candidate or another, let alone
whether any candidate has any conception of, or commitment to, impartiality, it
seems unfair to ask Americans to be taking a risk of that sort.

Recognizing all this is the first step to doing something about it if we
choose to move forward as a rule of law society.

cordance with the noble principles that this country espouses and that set it
apart from the rest of the world.

See also id. at 46 (“Let us all honor Abe’s memory, and the country he loved, by assuring that
America is always held to its own best standards.”) For Professor Chayes’ earlier career back-
ground, including his clerkship for U.S. Supreme Court Justice Felix Frankfurter and his role in
the U.S. State Department as Legal Adviser under President John F. Kennedy, see Nuclear Wea-
pons, The World Court, and Global Security: Living History Interview [With Abram Chayes], 7
TRANSNAT’L L. & CONTEMP. PROBS. 459, 459-460 (1997) (“The President appoints the Legal Ad-
viser with the advice and consent of the Senate. The Legal Adviser has the rank of Assistant Sec-
retary of State and has duties similar to those of the General Counsel of other cabinet departments.
He or she is the principal adviser to the Secretary in all matters of international law arising in the
conduct of U.S. foreign relations. The Secretary of State, in turn, acts as the principal foreign
policy adviser to the President and supervises the foreign relations of the United States. The Legal
Adviser also provides general legal advice and services to the Secretary and other officials of the
Department on legal matters concerning the Department and overseas posts.”) Professor Chayes
was recently recalled in speeches by current Legal Adviser Harold Koh before the American
Society of International Law in Washington, D.C. on March 25, 2010 and again before the Ameri-
can Bar Association’s Section of International Law’s Meeting on April 14, 2010. The March
25, 2010 speech appears at http://faisalkutty.com/editors-picks/full-text-of-harold-koh%E2%80%99s-
address-to-asil-mar-25-2010/

241 Ganev, supra note 12, at 267 (citing Guillermo O’Donnell, Democracy, Law and Compara-
tive Politics, in 36 STUDIES IN COMPARATIVE INTERNATIONAL DEVELOPMENT (2001)). O’Donnell
wrote:

What is the wager, then? It is that, in a democracy, every ego must accept that
practically every other adult participates — by voting and eventually by being
elected — in the act, fair elections, that determines who will govern them for
some time. It is an institutionalized wager because it is imposed on every ego
independently of his will: ego must accept it even if he believes that allowing
certain individuals to vote or be elected is very wrong. Ego has no option but
to take the chance that the “wrong” people and policies are chosen as the re-
sult of competitive elections.

Id. at 18.