

SPEAKING FROM THE BENCH: JUDICIAL CAMPAIGNS, JUDGES' SPEECH, AND THE FIRST AMENDMENT

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I. INTRODUCTION

According to a 2009 report by the American Judicature Society, thirty-nine states select or retain judges by election in at least some respect.¹ Evidence suggests that in the past decade judicial elections have become increasingly political, partisan, and expensive.² The Brennan

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1. See AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2009), http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf (calculating election by counting all states with an “x” in the non-partisan election or partisan election columns and any state with a retention election designation in the method of retention column).

2. See, e.g., Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 IND. L. REV. 755, 755 (2002) (noting that “[s]ome activities of special interest groups in recent judicial elections . . . have been pernicious” and examining ways in which states might compel reporting of political activities that may influence judicial elections (quoting *Call To Action: Statement of the*

Center for Justice (the Center) reported that in 2006, ninety-one percent of states with contested supreme court elections featured television advertising.³ Moreover, the Center noted that “over two-thirds of citizens and nearly half of state judges believe that campaign contributions influence judges’ decisions.”⁴

There are many examples of judicial elections that are heavily influenced by activist group funding. For example, as Judge Diane S. Sykes of the Seventh Circuit Court of Appeals described in a 2008 speech, an incumbent Wisconsin Supreme Court justice was unseated (for the first time in forty-one years) in a campaign “predominated—some might say overwhelmed—by millions of dollars in saturation advertising on television, much of which was crass, misleading, and at times utterly inconsistent with the judicial role.”⁵ Much of this advertising, she pointed out, was funded by third-party interest groups.⁶

In an equally dramatic example, a special interest group made up of several corporate organizations dominated the 2000 Ohio Supreme Court election with advertising, which, by sheer volume, overwhelmed that of its disfavored candidates.⁷ The special interest group, whose primary member was the United States Chamber of Commerce, spent at least five million dollars (more than the total spending of all candidates, the supporters of the other candidates, and the political parties) in an advertising campaign, the primary target of which was an incumbent justice who had been a member of several four-to-three majority decisions with which the

National Summit on Improving Judicial Selection, 34 LOY. L.A. L. REV. 1353, 1359 (2001)).

3. JAMES SAMPLE ET AL., BRENNAN CENTER FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 11 (2008), http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf.

4. *Id.*

5. Diane S. Sykes, *Independence v. Accountability: Finding a Balance Amidst the Changing Politics of State-Court Judicial Selection*, 92 MARQ. L. REV. 341, 341 (2008). Judge Sykes suggested that accountability to the public may be best served by having judges appointed by the executive and confirmed by the legislature, noting that “governors, like presidents, will be inclined to appoint judges of conservative or liberal judicial philosophy, depending upon their own philosophical approaches to government, which the voters have explicitly endorsed by electing them to office.” *Id.* at 352.

6. *Id.* at 341.

7. David Goldberger, *The Power of Special Interest Groups to Overwhelm Judicial Election Campaigns: The Troublesome Interaction Between the Code of Judicial Conduct, Campaign Finance Laws, and the First Amendment*, 72 U. CIN. L. REV. 1, 4–5 (2003).

Chamber disagreed.⁸ The attacks on this justice were personal and aggressive; one advertisement accused her of deciding cases based on who gave her money.⁹ Interestingly, this justice was re-elected, but many credited her win to the backfiring of her opponents' aggressive advertising tactics rather than to the justice's own record or campaign messages.¹⁰

Judicial elections in which corporate or personal influence is a determining factor in the outcome raise serious concerns about the independence and integrity of the judiciary. The Supreme Court of the United States addressed one such problematic election in 2009 in *Caperton v. A.T. Massey Coal Co.*¹¹ At issue in *Caperton* was the failure of a sitting state supreme court justice to recuse himself from a case in which one of the parties had contributed large amounts of money to the justice's election campaign and whether that failure to recuse resulted in a denial of due process to the other party.¹² The Court, by a five-to-four vote, stated that in this "extraordinary situation," the Constitution required that the judge recuse himself from the case because one of the parties had contributed significantly to the judge's election campaign.¹³

After *Caperton*, several states passed laws regulating judicial elections and campaign finance. On December 1, 2009, Wisconsin became the third state, joining North Carolina¹⁴ and New Mexico,¹⁵ to provide a public funding option for judicial elections.¹⁶ The Impartial Justice Bill provides public funding for state supreme court candidates (one hundred thousand dollars for primary elections and three hundred thousand dollars for general elections) who choose this option.¹⁷ If a nonpublicly funded candidate or a special interest group spends more than one hundred twenty percent of the public funding against the publicly funded candidate, the publicly funded candidate is eligible to receive additional funds (up to

8. *Id.* at 6–7.

9. *Id.* at 7.

10. *Id.* at 10–11.

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

12. *Id.* at 2256–57.

13. *Id.* at 2265.

14. The North Carolina Public Campaign Fund, N.C. GEN. STAT. §§ 163-278.61–278.70 (2009).

15. See Voter Action Act, N.M. STAT. §§ 1-19A-1 to -17 (1978 & Supp. 2009). "Covered office" means any office of the judicial department subject to statewide elections and the office of public regulation commissioner." *Id.* § 1-19A-2(D).

16. WIS. STAT. § 11.511 (2009).

17. *Id.* §§ 11.511(2)–(3).

three times the initial amount for each type of election).¹⁸ Additionally, nonpublicly funded candidates must provide notice on any print or broadcast advertisement that the advertisement was paid for with private funds and that the candidate “has not agreed to abide by campaign contribution and spending limits.”¹⁹ The Wisconsin law was immediately challenged by Wisconsin Right to Life (WRTL) as an infringement of its free speech rights.²⁰ The group alleged that its speech is chilled because it would not spend money on a judicial candidate’s campaign knowing that its funding would be matched by state funds.²¹ Also in December 2009, Illinois passed an amendment to its election code that, for the first time, sets limits on judicial campaign contributions.²² In November 2009, the Michigan Supreme Court issued an amendment to its recusal rules reflecting the Supreme Court’s ruling in *Caperton*.²³

The issue of judicial selection reform has received attention from former Supreme Court Justice Sandra Day O’Connor. A vocal opponent of judicial elections,²⁴ she has joined the University of Denver’s Institute for the Advancement of the American Legal System in the creation of the

18. *Id.* § 11.513(2).

19. *Id.* § 11.522(2).

20. Patrick Marley, *Group Sues over Public Financing of Court Candidates*, MILWAUKEE J. SENTINEL, Dec. 18, 2009, available at http://www.jsonline.com/news/stat_eopolitics/79675192.html.

21. *Id.* The complaint alleges that the Impartial Justice Bill abridges the First and Fourteenth Amendments by reducing WRTL’s ability to “participate in judicial elections by mandating significant reporting of independent expenditures and causing the receipt of independent expenditures and ‘obligated’ independent expenditures, above a threshold amount, in support of a nonparticipating judicial candidate to release all publicly financed candidates from their agreed to expenditure limits.” Complaint at 1–2, *Wis. Right to Life v. Brennan*, No. 3:09-cv-764 (W.D. Wis. filed Dec. 18, 2009).

22. S. 1466, 96th Gen. Assem., Reg. Sess. (Ill. 2009).

23. Amendment of Rule 2.003 of the Michigan Court Rules, AMD File No. 2009-04, at 1–2 (Nov. 25, 2009), available at <http://www.courts.michigan.gov/supremecourt/Resources/Administrative/2009-04-112509.pdf> (“Disqualification of a judge is warranted for reasons that include, but are not limited to, the following: . . . [t]he judge, based on objective and reasonable perceptions, has . . . a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey*.”).

24. See, e.g., Debra Cassens Weiss, *O’Connor: Want a Qualified, Impartial Judiciary? Don’t Use Contested Elections*, A.B.A. J., Dec. 10, 2009, http://www.abajournal.com/news/article/oconnor_want_a_qualified_impartial_judiciary_dont_use_contested_elections/ (“What the people need and want at the end of the day is a fair and impartial judiciary, one that’s qualified, fair and impartial,” O’Connor said. “It is much more difficult to achieve that by using popular campaign-funded elections.”).

O'Connor Judicial Selection Initiative.²⁵ The Initiative will support states desiring to move away from judicial elections toward merit-based selection systems.²⁶

In 2010, with the issue of partisan and heavily-financed judicial elections still simmering, the Supreme Court, in a controversial and high-profile decision, overturned several of its recent decisions and portions of the Bipartisan Campaign Reform Act of 2002 in *Citizens United v. FEC*.²⁷ In eliminating restrictions on independent campaign expenditures by corporations, the Court said that “[t]he First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker and the content of the political speech.”²⁸ The Court’s decision provoked heated rhetoric on both sides of the political aisle, including a statement from President Barack Obama decrying the decision’s impact on “everyday Americans” and calling on Congress for a “forceful response.”²⁹ Several members of Congress immediately condemned the decision, predicting that spending on political campaigns by outside groups will sharply increase as a result.³⁰

25. O'Connor Judicial Selection Initiative, http://www.du.edu/legalinstitute/judicial_selection.html (last visited Apr. 13, 2010). As of this date, the only text on the website was a suggestion to return in April for more information.

26. Posting of Jordan Weissmann to The Blog of Legal Times, <http://legal.times.typepad.com/blt/2009/12/oconnor-to-helps-launch-new-initiative-against-judicial-elections-.html> (Dec. 10, 2009, 13:50).

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

28. *Id.*

29. Press Release, The White House, Statement from the President on Today's Supreme Court Decision (Jan. 21, 2010), available at <http://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0>. The President explained:

With its ruling today, the Supreme Court has given a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans. This ruling gives the special interests and their lobbyists even more power in Washington—while undermining the influence of average Americans who make small contributions to support their preferred candidates. That's why I am instructing my Administration to get to work immediately with Congress on this issue. We are going to talk with bipartisan Congressional leaders to develop a forceful response to this decision. The public interest requires nothing less.

Id.

30. See, e.g., Representative Zoe Lofgren, Lofgren Responds to Supreme

Whether judges should be elected or appointed, while hotly contested, is outside the scope of this work.³¹ Instead, we are interested in the intersection between *Caperton* and *Citizens United* in an examination of judicial recusal standards. This Article first examines these and other governing cases in more detail, including *Republican Party of Minnesota v. White*, in which the Court rejected attempts to prohibit judicial candidates from expressing their viewpoints on potential cases, and several recent circuit court cases.³² The Article next turns to the following questions: To what extent should the First Amendment protect judges' campaign speech using direct campaign contributions? To what extent should the First Amendment protect the ability of individual donors to spend money directly or indirectly in support of or in opposition to a judicial candidate? To what extent should the First Amendment protect the ability of corporate or advocacy groups to spend money in support of or in opposition to a judicial candidate? And finally, is recusal a better remedy for judicial conflicts of interest than restrictions on speech? We propose a multi-factor model under which states can draft their own approaches to judicial recusal.

Court's Ruling on Citizens United Case (Jan. 21, 2010), available at http://www.lofgren.house.gov/index.php?option=com_content&task=view&id=573&Itemid=89 ("This decision isn't about free speech, it's about money. The Court has opened the door to unlimited and unrestricted spending by the largest and wealthiest corporations."); Press Release, Representative Jerrold Nadler, Nadler Examines Implications of Supreme Court's Decision in Citizens United, Considers Legislative Responses (Feb. 3, 2010), available at http://nadler.house.gov/index.php?option=com_content&task=view&id=1382&Itemid=119 ("So now that corporations—including those controlled by foreign interests—have the same rights as any voter, what is in store for our democracy? Perhaps, one day, we will have Exxon as a colleague here in Congress."); Senator Sheldon Whitehouse, Sheldon Condemns Supreme Court Decision on Campaign Finance (Jan. 29, 2010), available at <http://whitehouse.senate.gov/newsroom/speeches/speech/?id=97d6a9df-48cb-48ab-82d5-e5ff363cdc29> ("Although the decision was cast as being about the rights of individuals to hear more corporate speech, its effect will be with corporations . . . now all moving without restriction into the American election process.").

31. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring) ("I am concerned that, even aside from what judicial candidates may say while campaigning, the very practice of electing judges undermines this interest [in judicial impartiality].").

32. See *id.* (noting that prohibiting judicial candidates from "announcing their views on disputed legal and political issues" as violative of the First Amendment).

II. THE *CAPERTON* CONUNDRUM

In *Caperton*, the Court was asked to evaluate whether donations by an individual to a judicial campaign might require the judge to recuse himself from a case in which that individual is a party.³³ In 2002, a West Virginia jury awarded a \$50 million judgment to Hugh Caperton in his case against A.T. Massey Coal Co. for fraudulent misrepresentation and interference with existing contractual relationships.³⁴ The state trial court subsequently denied posttrial motions by Massey challenging the verdict.³⁵ In 2004, attorney Brent Benjamin ran for a seat on West Virginia's highest tribunal, the Supreme Court of Appeals, and won with 53.3% of the vote in a high profile and expensive election.³⁶ One supporter, Don Blankenship, the chairman, CEO, and president of Massey, contributed more than 60% of the nearly \$5 million spent during Benjamin's campaign—\$3 million to directly or indirectly support Benjamin's candidacy.³⁷

Before Massey appealed the trial court verdict to the Supreme Court of Appeals, Caperton moved for Justice Benjamin's recusal, citing Blankenship's significant campaign contributions.³⁸ Benjamin denied the motion, saying that he would be fair and impartial.³⁹ In 2007, the court overturned the award against Massey by a three-to-two vote, and Caperton moved for a rehearing.⁴⁰ Three justices were asked by the litigants to disqualify themselves; two did but Benjamin did not, despite this being the third request for his recusal.⁴¹ Caperton charged that both the Due Process Clause of the Fourteenth Amendment and West Virginia law (under which the relevant inquiry is whether a reasonable, prudent person who knew the facts would doubt Benjamin's ability to be fair) required Benjamin to recuse.⁴² Acting as Chief Justice, Benjamin appointed two new judges for the rehearing, and in 2008, a three-to-two majority again found for Massey.⁴³ The United States Supreme Court granted certiorari.⁴⁴

33. *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2256–57 (2009).

34. *Id.* at 2257.

35. *Id.*

36. *Id.*

37. *See id.*

38. *Id.*

39. *Id.* at 2257–58.

40. *Id.* at 2258.

41. *Id.*

42. *Id.* at 2257–58.

43. *Id.* at 2258.

44. *Id.* at 2259.

The question the Court addressed was “whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion.”⁴⁵ A five-to-four majority of the Court held that it was.⁴⁶ Justice Anthony Kennedy, writing for a majority that included Justices Ruth Bader Ginsburg, John Paul Stevens, David Souter, and Stephen Breyer,⁴⁷ traced the Supreme Court’s jurisprudence in two areas: when a judge has a “financial interest in the outcome of a case,”⁴⁸ and when a judge has a conflict from participating in a prior proceeding.⁴⁹

First, Justice Kennedy turned to the 1927 case of *Tumey v. Ohio*, in which the Court required disqualification of a mayor who also sat as judge without a jury in cases of alcohol possession and who received financial compensation only when there was a conviction.⁵⁰ The Court stated that:

“[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.”⁵¹

Justice Kennedy also noted that the Court had required recusal in *Aetna Life Insurance Co. v. Lavoie*, which held that recusal would be required when the judge’s decision in one case would positively affect the financial outcome in his or her own case.⁵²

In the second area, conflicts from prior proceedings, Justice Kennedy focused on *In re Murchison*, in which a judge charged one witness with contempt of court and a second witness with perjury and then proceeded to try and convict them both.⁵³ Justice Kennedy explained that the Court in

45. *Id.* at 2256.

46. *Id.* at 2256–57.

47. *Id.* at 2256.

48. *Id.* at 2259–60.

49. *Id.* at 2261.

50. *Id.* at 2260 (citing *Tumey v. Ohio*, 273 U.S. 510, 520, 522, 535 (1927)).

51. *Id.* (quoting *Tumey*, 273 U.S. at 532).

52. *Id.* at 2260–61 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823–24 (1986) (concluding that when an Alabama Supreme Court Justice participated in a decision that had clearly and immediately enhanced the legal status and settlement value of a class action lawsuit in which the Justice was the lead plaintiff, judicial recusal was warranted)).

53. *Id.* at 2261 (citing *In re Murchison*, 349 U.S. 133, 134–35 (1955)).

Murchison found that the Due Process Clause had been violated because the judge had prior relationships with both petitioners—“[h]aving been a part of [the one-man grand jury] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused,” Justice Kennedy wrote, “because ‘[a]s a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his ‘grand-jury’ secret session.’”⁵⁴

Turning to the case at hand, Justice Kennedy noted that Justice Benjamin had engaged in serious consideration of his own recusal and had found no objective facts that would require it.⁵⁵ While not questioning Justice Benjamin’s determination of his own lack of bias, Justice Kennedy asked “whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’”⁵⁶

Because the circumstances in this case were “exceptional,” Justice Kennedy wrote, recusal was appropriate.⁵⁷ Blankenship’s contributions had a significant impact on the outcome of the election, and they were a large proportion of both the total money contributed to the campaign and the total amount spent in the election.⁵⁸ “Due process,” Justice Kennedy explained, “requires an objective inquiry into whether the contributor’s influence on the election under all the circumstances ‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’”⁵⁹ Justice Benjamin’s own search for bias was only part of the inquiry, as due process may require recusal even when judges have no bias and would do their best to be fair and impartial.⁶⁰

In dissent, Chief Justice John Roberts characterized the majority opinion as creating a third mandate for judicial recusal: “probability of bias.”⁶¹ This new standard, Justice Roberts wrote, was not sufficiently defined by the majority to be of use to judges, and could result in increased

54. *Id.* (quoting *Murchison*, 349 U.S. at 138).

55. *Id.* at 2262–63.

56. *Id.* at 2263 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

57. *Id.* at 2265.

58. *Id.* at 2264.

59. *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

60. *Id.* at 2265.

61. *Id.* at 2267 (Roberts, C.J., dissenting).

claims of judicial bias regardless of whether such bias existed.⁶² Friendships with attorneys or litigants had not been a reason for recusal prior to *Caperton*, even though they could be viewed as creating a “probability of bias.”⁶³ Justice Roberts offered a list of forty questions that courts would have to consider when looking for bias.⁶⁴ The questions ranged from the amount of money spent on campaign donations, to whether alleged bias decreases over time, to whether friendships between judges and litigants would require recusal.⁶⁵ Justice Antonin Scalia, in his dissent, lamented that the Court’s decision would do more to erode public confidence in the judiciary than to shore it up.⁶⁶

The *Caperton* ruling was intended to correct what the Court viewed as an egregious violation of due process, although the decision provided little guidance for distinguishing between egregious and non-egregious cases.⁶⁷ Still, the remedy of recusal was viewed as appropriate because of the special concerns of judicial independence and impartiality.⁶⁸ One reason recusal may be viewed as an appropriate course is the Court’s relatively consistent view that other types of judicial regulations are problematic. The Court has struck down several attempts at regulating both judicial speech and judges’ campaigns. The next section discusses a few such cases and their implications.

III. THE FIRST AMENDMENT AND JUDICIAL SPEECH

Judges occupy a special place in American democracy and therefore have rights and responsibilities aimed at protecting the independence and impartiality of the judiciary. States began adopting judicial codes of conduct in the 1920s, based on the Canons of Judicial Ethics developed by the American Bar Association (ABA) in 1924.⁶⁹ Later revisions placed

62. *Id.*

63. *See id.* at 2268 (citing *Tumey*, 273 U.S. at 523).

64. *Id.* at 2269–72.

65. *Id.* at 2269–70.

66. *Id.* at 2274–75 (Scalia, J., dissenting).

67. *See id.* at 2265–67 (majority opinion).

68. *See id.* at 2266–67 (noting that states are free to impose more stringent recusal requirements to counter concerns of the appearance of impartiality).

69. Matthew D. Besser, Note, *May I Be Recused? The Tension Between Judicial Campaign Speech and Recusal After Republican Party of Minnesota v. White*, 64 OHIO ST. L.J. 1197, 1200 (2003); Stephanie Cotilla & Amanda Suzanne Veal, Note, *Judicial Balancing Act: The Appearance of Impartiality and the First Amendment*, 15 GEO. J. LEGAL ETHICS 741, 741–42 (2002).

limits on the speech of judges and judicial candidates.⁷⁰ A revision in 1972 created pledge and announce clauses, stating that a judicial candidate “should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [or] announce his views on disputed legal or political issues.”⁷¹ In 1990, the ABA eliminated the announce clause and replaced it with a less restrictive commit clause, which provided that candidates for judicial office shall not “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”⁷² Because the Canons clearly place limits on the speech of judges and judicial candidates, their constitutionality has long been debated.⁷³

Many of these restrictions became suspect after the Supreme Court struck down some of these provisions as a violation of the First Amendment in *Republican Party of Minnesota v. White* in 2002.⁷⁴ Minnesota’s Code of Judicial Conduct included an announce clause that prohibited judges from announcing their views on legal issues or cases.⁷⁵ During his campaign, a Minnesota Supreme Court candidate distributed literature criticizing past decisions of that court.⁷⁶ In response to a complaint about this literature, the Minnesota Office of Lawyers Professional Responsibility said that it doubted that the announce clause would be constitutional and dismissed the complaint.⁷⁷ When the candidate again ran for a position on the court two years later, he asked the regulatory board for an advisory opinion on whether it would enforce the announce clause.⁷⁸ The board responded that it could not answer the question because the candidate had not submitted a list of what he wanted to say.⁷⁹ The candidate then filed suit and sought an injunction, alleging that state enforcement of the announce clause would violate the First Amendment.⁸⁰ The district court upheld the announce clause, granting

70. Besser, *supra* note 69, at 1200.

71. *Id.* (quoting CODE OF JUDICIAL CONDUCT Canon 7(b)(1)(C) (1972)).

72. *Id.* at 1200–01 (quoting MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990)).

73. *Id.* at 1201–02.

74. See *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

75. *Id.* at 768 (citing MINNESOTA CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

76. *Id.*

77. *Id.* at 768–69.

78. *Id.*

79. *Id.* at 769.

80. *Id.* at 769–70.

summary judgment for the State; the Eighth Circuit affirmed the ruling.⁸¹ The Supreme Court, however, reversed.⁸²

In a five-to-four decision, the Court held the announce clause could not survive the applicable strict scrutiny.⁸³ The State's alleged compelling interest—judicial impartiality—was barely served by the announce clause, Justice Scalia wrote.⁸⁴ Moreover, Justice Scalia pointed out, “[t]here is an obvious tension between the article of Minnesota’s popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court’s announce clause which places most subjects of interest to the voters off limits.”⁸⁵ The dissenters, Justices Ginsburg, Stevens, Souter, and Breyer, focused on the role that judges play in the American governmental system.⁸⁶ Justice Ginsburg argued for different systems of election for different political players, noting that members of the executive and legislative branches are representatives of the people, while members of the judicial branch “do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency.”⁸⁷ Justice Sandra Day O’Connor, while concurring with the outcome, wrote separately to express her concern that judicial elections might result in decreased public confidence in a fair and impartial judiciary.⁸⁸

At least one other court has upheld a judge’s right to speak in other situations. In *Jenevein v. Willing*, the Fifth Circuit overturned part of a public censure issued to a judge by the Texas Commission on Judicial Conduct.⁸⁹ The commission censured the judge for holding a press conference in his judicial robe from his courtroom and for sending an e-mail about the matter from the county’s computer during official hours.⁹⁰ The Fifth Circuit said that the state had a compelling interest in assuring

81. *Id.* at 770.

82. *Id.* at 788.

83. *See id.* at 777.

84. *Id.* at 776–77.

85. *Id.* at 787.

86. *See id.* at 806 (Ginsberg, J., dissenting).

87. *Id.*

88. *Id.* at 790 (O’Connor, J., concurring) (“Even if judges were able to refrain from favoring donors, the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public’s confidence in the judiciary.”).

89. *See Jenevein v. Willing*, 493 F.3d 551, 560 (5th Cir. 2007).

90. *Id.* at 555.

the integrity of the judiciary, but because Judge Robert Jenevein's press conference concerned an issue of court administration—a fear of judicial corruption—and a call to attorneys to fight against such conduct, the state's interest could not be met by prohibiting the speech.⁹¹ The court stated that “the narrow tailoring of strict scrutiny is not met by deploying an elusive and overly-broad interest in avoiding the ‘appearance of impropriety.’”⁹²

After *White*, courts began to interpret judicial canons in the context of election speech. A number of lower and appellate courts reviewed challenges to state judicial canons or codes and found some portions unconstitutional, particularly announce, commit, pledge, and solicitation clauses. For example, in 2002 the Eleventh Circuit invalidated part of Georgia's judicial code as it applied to a judicial candidate's brochures outlining his disagreement with his opponent's positions on gay marriage and the death penalty.⁹³ Kentucky's solicitation clause, forbidding direct solicitation of funds by judicial candidates, was invalidated by a federal district court.⁹⁴ The court stated that having a judge's agent solicit funds on behalf of the judge “does not appreciably lessen the damage caused by such solicitations to the state's interest in an impartial and open-minded judiciary or the appearance of the same.”⁹⁵ In North Dakota, the “commit” and “pledges and promises” clauses of the judicial code were challenged, and a federal court struck them down, holding that the clauses forbid the same kind of speech that was constitutionally protected in *White*.⁹⁶

91. *See id.* at 560.

92. *Id.* The court left in place the part of the censure that addressed the judge wearing his robe and appearing in his courtroom for the press conference. The court held “that it is within the Commission's power to censure Judge Jenevein for wielding state electronic equipment and choosing to don his robe and conduct his press conference in the courtroom, instead of walking to a public forum a block away.” *Id.* at 561.

93. *See Weaver v. Bonner*, 309 F.3d 1312, 1320 (11th Cir. 2002) (“For fear of violating these broad prohibitions, candidates will too often remain silent even when they have a good faith belief that what they would otherwise say is truthful. This dramatic chilling effect cannot be justified by Georgia's interest in maintaining judicial impartiality and electoral integrity.”).

94. *See Carey v. Wolnitzek*, No. 3:06-36-KKC, 2008 WL 4602786, at **14–17 (E.D. Ky. Oct. 15, 2008).

95. *Id.* at *17. *But see Simes v. Ark. Judicial Discipline and Disability Comm'n*, 247 S.W.3d 876, 884 (Ark. 2007) (“We do not believe anyone can seriously argue that a judge personally soliciting campaign contributions from attorneys having cases before him or her should be permissible.”).

96. *See N.D. Family Alliance v. Bader*, 361 F. Supp. 2d 1021, 1024, 1039

Courts, however, have not always invalidated these types of clauses. A challenge to Alaska's commit and pledges and promises clauses was dismissed as unripe by the Ninth Circuit.⁹⁷ The court stated that "[w]ithout a clearer showing that a judge would reasonably risk discipline" by answering a questionnaire sent out by a right-to-life group, the record could not support an evaluation of the plaintiff's First Amendment challenges.⁹⁸ Similarly, the Tenth Circuit dismissed as moot a challenge to Kansas's pledge, commit, and solicitation clauses after the Kansas Supreme Court narrowed the clauses' scope and breadth.⁹⁹

IV. THE FIRST AMENDMENT AND ELECTIONEERING COMMUNICATION

In *White*, the Court struck down laws directly limiting speech by judges.¹⁰⁰ In a more dramatic and far-reaching fashion, the Court extended the First Amendment further into campaign finance regulations in 2010 by striking down provisions of campaign finance laws that the Court had upheld as recently as 2003. In *Citizens United*, the Supreme Court overturned two of its relatively recent precedents and dramatically shifted its campaign finance regulation doctrine.¹⁰¹ Experts from both sides of the political spectrum hailed the decision as one of the most consequential of the Roberts Court.¹⁰² The *Wall Street Journal's* editorial board wrote that the Court's action was a "landmark decision supporting free political speech by overturning some of Congress's more intrusive limits on election spending."¹⁰³ The *New York Times*, on the other hand, lamented that the decision returned politics to the "robber-baron era of the 19th century" and added that while "[d]isingenuously waving the flag of the First Amendment, the [C]ourt's conservative majority has paved the way for corporations to use their vast treasuries to overwhelm elections and intimidate elected officials into doing their bidding."¹⁰⁴

(D.N.D. 2005).

97. Alaska Right to Life Political Action Comm. v. Feldman, 504 F.3d 840, 850–51 (9th Cir. 2007).

98. *Id.*

99. Kan. Judicial Review v. Stout, 562 F.3d 1240, 1246 (10th Cir. 2009).

100. See Republican Party of Minn. v. White, 536 U.S. 765 (2002).

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

102. See, e.g., Adam Liptak, *Justices, 5–4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 21, 2010, at A1.

103. Editorial, *A Free Speech Landmark*, WALL ST. J., Jan. 22, 2010, at A18, available at <http://online.wsj.com/article/SB10001424052748703699204575016843479815072.html>.

104. Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 21, 2010, at

The decision suggests that future legislative attempts to rein in campaign spending will likely raise serious First Amendment problems. To understand why judicial recusal standards are appealing alternatives to campaign finance restrictions, it is important to briefly review government attempts to regulate campaign funding and the corresponding First Amendment problems raised by such attempts.

In *Citizens United*, the Court ruled that limits on independent corporate spending for political advertisements violated basic First Amendment principles that provide citizens and associations of citizens, including corporations, with a fundamental right to engage in political speech.¹⁰⁵ The case began when Citizens United, a nonprofit corporation, sought a declaratory judgment and injunction against the FEC in order to allow a documentary film called *Hillary: The Movie* to air on pay-per-view television and advertising for the film to air during the thirty days prior to the 2008 presidential primaries, in which Hillary Clinton was a candidate.¹⁰⁶ A provision of the Bipartisan Campaign Reform Act of 2002 (commonly called McCain–Feingold) prohibited, during certain periods prior to elections, corporately-funded, independent expenditure advertisements on broadcast, cable, or satellite television which fit the definition of “electioneering communication.”¹⁰⁷

The district court, applying McCain–Feingold, denied Citizens United’s requested relief, ruling that Citizens United was not able to establish that its case had the “requisite probability of prevailing on the merits” because the law was constitutional on its face and as applied to Citizens United.¹⁰⁸ The district court determined that the film fit the statutory definition of “electioneering communication” because it was “susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.”¹⁰⁹

Citizens United sought a narrower ruling from the Supreme Court, arguing that the film was more akin to journalism than to “electioneering

A30.

105. *See Citizens United*, 130 S. Ct. at 913.

106. *Id.* at 886–87.

107. 2 U.S.C. § 441b (2006).

108. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275, 278, 280–81 (D.D.C. 2008).

109. *Id.* at 279.

communication” and thus was exempt from regulation under the statute.¹¹⁰ A number of media groups filed amicus curiae briefs in support of Citizens United, arguing that the film was a form of advocacy journalism that, while adopting a critical point of view, followed many journalistic conventions.¹¹¹ They feared a chilling effect on more mainstream journalism if the Court upheld a ban on the film.¹¹²

The worries went further than just journalism. Some legal observers suggested that the Court could deal with the case on relatively narrow grounds, ruling that the statute, as applied to Citizens United, was an unconstitutional infringement of the organization’s First Amendment right to engage in political speech.¹¹³ During the second round of oral arguments in the case, Ted Olson, arguing for Citizens United, seized upon the possibility that books could be banned from distribution or publication under the government’s interpretation of its authority to regulate campaign speech.¹¹⁴ The implication was that Congress and the FEC had the authority to ban any corporation-funded political speech in the thirty or sixty days prior to an election that could be interpreted as expressly advocating the election or defeat of a candidate. Olson further argued that “the most fundamental right that we can exercise in a democracy under the First Amendment is dialogue and communication about political candidates. We have wrapped up that freedom, smothered that freedom, with the most complicated set of regulations and bureaucratic controls.”¹¹⁵

The Supreme Court agreed with the district court’s conclusion that the film constituted electioneering communication. “The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. . . . There is little doubt that the thesis of the film is that she is unfit for the Presidency,” the majority

110. See *Citizens United*, 130 S. Ct. at 890 (citing Brief of Appellant at 35, *Citizens United*, 130 S. Ct. 876).

111. See, e.g., Brief for Reporters Committee for Freedom of the Press as Amici Curiae Supporting Appellant at 3–5, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205), available at <http://www.rcfp.org/news/documents/20090115-amicusbrie.pdf>.

112. See *id.*

113. See, e.g., Brief of The Foundation for Free Expression as Amicus Curiae Supporting Petitioner at 23–28, *Citizens United*, 130 S. Ct. 876 (No. 08-205), available at <http://www.cuvfec.com/documents/case-08-205/CU-Merits-7.pdf>.

114. Transcript of Oral Argument at 3, *Citizens United*, 130 S. Ct. 876 (No. 08-205).

115. *Id.* at 23.

wrote.¹¹⁶ In the end, however, the Court used the occasion to expand First Amendment protections to political speech by revisiting and overturning several key precedents.¹¹⁷ The Court could have ruled in favor of Citizens United on narrower grounds, and therefore avoided the problem of stare decisis. Instead, the Court stated:

We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject. . . .

. . . [T]he court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment.¹¹⁸

The genesis of the Supreme Court's First Amendment doctrine with regard to campaign speech is found in the landmark case of *Buckley v. Valeo*, in which the Court ruled that campaign finance laws implicate free speech and press rights.¹¹⁹ The Court reviewed a challenge to the Federal Election Campaign Act of 1971 and its 1974 amendments, which created a ban on independent expenditures.¹²⁰ While not exactly stating that money is the equivalent of speech, the Court held that limits on an individual's ability to spend money to amplify his or her political message was a limit on his or her First Amendment rights, and thus the government can do so only through narrowly tailored laws that advance compelling interests.¹²¹ In *Buckley*, the Court struck down limits on campaign expenditures but upheld limits on direct contributions to candidates, reasoning that such regulations were narrowly tailored to advance anti-corruption principles, which the Court characterized as a compelling government interest.¹²² The decision signaled that the First Amendment would be a shield against regulating money in politics, but not an impenetrable one. Thus, Congress and the states continued to embark on attempts to limit the influence of

116. *Citizens United*, 130 S. Ct. at 890.

117. *Id.* at 913.

118. *Id.* at 892.

119. *Buckley v. Valeo*, 424 U.S. 1, 19–23, 39 (1976).

120. *Id.* at 6–7; *see also* Federal Election Campaign Act of 1971, 86 Stat. 3 (1972), *amended by* Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263.

121. *Buckley*, 424 U.S. at 16, 22, 25, 49.

122. *Id.* at 25–29, 47–51.

spending on political campaigns.¹²³

In 1986, the Supreme Court invalidated a section of the Federal Election Campaign Act as applied to an advocacy pamphlet published by a nonprofit organization using its general treasury funds.¹²⁴ Justice William Brennan, writing for a unanimous Court in *FEC v. Massachusetts Citizens for Life, Inc.*, determined that section 441b of the Federal Election Campaign Act applied to the pamphlet sent out by Massachusetts Citizens for Life, which educated voters about which candidates supported the pro-life agenda, because the pamphlet also encouraged readers to vote for those candidates.¹²⁵ After noting that “restrictions on contributions require less compelling justification than restrictions on independent spending,”¹²⁶ Brennan applied strict scrutiny and found that the state’s asserted interest in limiting corruption was insufficient to save the statute:

Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form. Given this fact, the rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom.¹²⁷

Over a decade later, the Court used the rationale established in *Buckley* and clarified in *Massachusetts Citizens for Life* to uphold limits on contributions to state offices. In *Nixon v. Shrink Missouri Government PAC*, the Court upheld a Missouri statute limiting campaign contributions to state candidates.¹²⁸ The plaintiffs, a political action committee and a state auditor candidate, alleged that the statute, which imposed contribution limits ranging from \$275 to \$1,075, violated the First and Fourteenth Amendments.¹²⁹ The Court did not apply strict scrutiny, but instead used *Buckley*’s standard: “A contribution limit involving ‘significant interference’ with associational rights could survive if the Government demonstrated that contribution regulation was ‘closely drawn’

123. See generally Joel M. Gora, *The Legacy of Buckley v. Valeo*, 2 ELECTION L.J. 55 (2003) (noting the precedential and political developments that have occurred since the Court’s decision in *Buckley*).

124. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

125. *Id.* at 249.

126. *Id.* at 259–60.

127. *Id.* at 263.

128. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 397–98 (2000).

129. *Id.* at 382–83.

to match a ‘sufficiently important interest,’ though the dollar amount of the limit need not be ‘fine tun[ed].’”¹³⁰ Adding that the limits imposed by the Missouri law would not adversely impact the ability of political action committees or candidates to raise money, the Court concluded that “[t]here is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case in support of the Missouri statute.”¹³¹

In the two cases overturned by *Citizens United*, the Court upheld additional campaign finance regulations using similar analyses.¹³² In *Austin v. Michigan State Chamber of Commerce*, the Court upheld a Michigan law that prohibited corporate independent expenditures supporting or opposing a candidate for state office.¹³³ In articulating the antidistortion interest, the Court recognized that the State advanced a compelling government interest in the prevention of “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.”¹³⁴ The *Austin* Court emphasized that state action is involved in the creation of corporations and contributes to corporate accumulation of wealth by granting perpetual life and limited liability, and the Court relied, in part, on this state action to justify restricting corporate speech.¹³⁵ The Court wrote:

[T]he unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. 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.¹³⁶

In the 2003 case *McConnell v. FEC*, the Court upheld several provisions of the Bipartisan Campaign Reform Act of 2002 (McCain–Feingold),¹³⁷ which amended the Federal Election Campaign Act of

130. *Id.* at 387–88 (internal citations omitted).

131. *Id.* at 395–96.

132. *See, e.g.,* *McConnell v. FEC*, 540 U.S. 93, 137–38 (2003); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 661–65 (1990).

133. *Austin*, 494 U.S. at 655.

134. *Id.* at 660.

135. *Id.* at 658–59.

136. *Id.* at 660.

137. *See McConnell*, 540 U.S. at 201–02.

1971.¹³⁸ Among other things, McCain–Feingold limited so-called soft money donations to political parties,¹³⁹ limited issue advocacy broadcast advertisements prior to elections by independent groups and corporations,¹⁴⁰ and extended disclosure requirements for electioneering communication.¹⁴¹ The deeply-split Court upheld most of these provisions, based in part on the *Buckley* anticorruption and the *Austin* antidistortion interests.¹⁴² The decision was characterized as a “major victory for the campaign finance reform movement” by the Brennan Center for Justice.¹⁴³

McConnell marked the zenith of the Supreme Court’s deference to legislative acts limiting campaign cash in the interest of cleaning up political elections.¹⁴⁴ In the 2006 case of *Randall v. Sorrell*, the Court struck down a Vermont campaign finance law that set expenditure limits and relatively low contribution limits, determining that the statute did not meet the First Amendment strict scrutiny requirements of compelling government interests and narrow tailoring.¹⁴⁵ The following year, in *FEC v. Wisconsin Right to Life*, the Court ruled that McCain–Feingold was unconstitutional as applied to television advertisements run by a Wisconsin right-to-life group.¹⁴⁶ The Court narrowed the *McConnell* decision by ruling that electioneering advertisements were subject to regulation only if the advertisement was “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹⁴⁷ The *Randall* and *Wisconsin Right to Life* decisions signaled the doctrinal shift that came with the appointments of Chief Justice John Roberts and Justice Samuel Alito. But it was not until *Citizens United* that the Justices executed the shift. The *Citizens United* Court struck down *Austin* and key parts of *McConnell*, making it clear that the Court would be skeptical of

138. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101, 116 Stat. 81, 82 (2002) (codified as amended in scattered sections of 2 U.S.C.).

139. *Id.*

140. *Id.* at 89.

141. *Id.* at 88–90.

142. See *McConnell*, 540 U.S. at 137–38.

143. See BRENNAN CENTER FOR JUSTICE, SUMMARY OF SUPREME COURT RULINGS IN *MCCONNELL V. FEC* 1 (2003), http://www.brennancenter.org/page/-/d/download_file_47858.pdf.

144. See generally Richard Briffault, *Decline and Fall? The Roberts Court and the Challenges to Campaign Finance Law*, 6 FORUM 1, 4 (2008) (noting the Court’s openness in regard to campaign finance regulation).

145. *Randall v. Sorrell*, 548 U.S. 230, 246–53 (2006).

146. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

147. *Id.* at 470.

further attempts to regulate campaign speech.¹⁴⁸

The *Citizens United* decision is based on several key premises and conclusions about the First Amendment.¹⁴⁹ In conducting the First Amendment analysis in *Citizens United*, Justice Kennedy characterized the campaign finance regulations at issue as the functional equivalent of a prior restraint.¹⁵⁰ The Court described the regulations as targeting political speech, thus aiming at the core of the First Amendment.¹⁵¹ The Court noted that the law is an outright ban on political speech, “backed by criminal sanctions.”¹⁵²

In the application of strict scrutiny, Justice Kennedy discussed the different government interests in regulating direct contributions and independent expenditures.¹⁵³ While the Court accepted the *Buckley* premise—that limits on direct contributions adequately served the government’s legitimate interest in protecting against bribes and corruption that could arise in unlimited direct contributions—the same rationale was not persuasive when it came to regulating independent expenditures.¹⁵⁴ However, the decision distinguished the government claims in *Citizens United* from the *Buckley* compelling interest. The Court concluded that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.¹⁵⁵ The Court acknowledged that the mere fact “[t]hat speakers may have influence over or access to elected officials does not mean that

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

149. *See id.* at 899–903.

150. *Id.* at 895–96 (“This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and government practices of the sort that the First Amendment was drawn to prohibit.” (internal citations omitted)).

151. *Id.* at 892.

152. *Id.* at 897.

153. *See id.* at 908–12.

154. *Id.* at 908.

155. *See id.*

those officials are corrupt.”¹⁵⁶ Further, the Court reasoned that “the appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”¹⁵⁷

The Court characterized as not compelling the government’s claims of anticorruption and shareholder-protection interests.¹⁵⁸ Further, the Court rejected the *Austin*-based antidistortion interest that justified the regulation of corporate campaign speech in that case.¹⁵⁹ The majority wrote:

If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. If *Austin* were correct, the Government could prohibit a corporation from expressing political views in the media beyond those presented here, such as by printing books. The Government responds “that the FEC has never applied this statute to a book,” and if it did, “there would be quite [a] good as-applied challenge.” This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.¹⁶⁰

The majority also stated that *Austin* was inconsistent with the Court’s rhetoric in *First National Bank of Boston v. Bellotti*, in which the Supreme Court ruled that corporations have First Amendment rights.¹⁶¹ In *Bellotti*, the Court overturned a state supreme court decision prohibiting corporations from spending corporate funds to influence referendum elections.¹⁶²

Justice Stevens issued a blistering ninety-page dissent in *Citizens United* emphasizing what he claimed was the fundamental mistake in the majority’s analysis: analogizing corporations to human beings for purposes

156. *Id.* at 910.

157. *Id.*, distinguished by *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263–64 (2009) (providing a limited rule concerning when a judge must recuse but not addressing when a litigant’s political speech may be banned).

158. *Citizens United*, 130 S. Ct. at 908, 911.

159. *See id.* at 904.

160. *Id.* (internal citations omitted).

161. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784–85 (1978).

162. *Id.* at 771–74, 795.

of First Amendment protection.¹⁶³ Quoting Chief Justice Marshall, Justice Stevens wrote: “[A] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it.”¹⁶⁴

Liberals and progressives condemned the decision for its conflation of corporate rights with individual rights and worried that the decision would open the floodgates of corporately-funded political advertisements that would further erode the integrity of political campaigns.¹⁶⁵ Conservatives and libertarians, meanwhile, hailed the *Citizens United* decision as an important victory for the First Amendment. They argued that restrictions on the individual and corporate right to spend money to amplify a message are unconstitutional infringements on the ability to engage in political speech. Professor Bradley A. Smith, a former chairman of the FEC, wrote:

[T]he Supreme Court had to rule in favor of Citizens United, and what is remarkable is not that it did, but that four Justices dissented. Remember, the government’s position in the case was that under the Constitution, it had the power to ban the distribution of books through Kindle; to prohibit political movies from being distributed by video on demand technology; to prevent Simon & Schuster from publishing, or Barnes & Noble from selling, a 500-page book with even one sentence of candidate advocacy; or to prevent a union from hiring a writer to author a book about the benefits to working Americans of the Obama agenda. For all the outrage about this opinion, I have yet to hear anybody seriously defend that result.¹⁶⁶

It is clear that *Citizens United* has created important new contours of a First Amendment doctrine. Limits on campaign spending, by individuals or collections of individuals, are viewed as curtailments of the right to political speech, and the Court has shifted the scales of its strict scrutiny analysis against legislative action. So it will become necessary for scholars

163. See *Citizens United*, 130 S. Ct. at 930–31 (Stevens, J., concurring in part and dissenting in part).

164. *Id.* at 950 (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)).

165. See generally David D. Kilpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES, Jan. 22, 2010, at A1 (highlighting reactions from liberal and progressive organizations and politicians).

166. Posting of Bradley A. Smith to SCOTUS blog, <http://www.scotusblog.com/2010/02/citizens-united-shareholder-rights-and-free-speech-restoring-the-primacy-of-politics-to-the-first-amendment/> (Feb. 2, 2010, 13:57).

and legislatures to develop alternative means to clean up political campaigns in ways that do not run afoul of these new First Amendment rules. Almost immediately, First Amendment scholars critiqued the decision through various lenses. Noted First Amendment attorney Floyd Abrams praised the decision for evoking clear First Amendment boundaries limiting government regulation of political speech.¹⁶⁷ First Amendment scholar Robert Drechsel, meanwhile, criticized the decision as reflecting the policy choices of conservative Court appointees and running afoul of the conservative justices' proclaimed antipathy toward judicial activism.¹⁶⁸

Citizens United presents a stark First Amendment problem for future attempts to regulate electioneering speech. In striking down two of its precedents, the Court's majority demonstrated a clear deference to claims of political-speech infringements and showed strong skepticism to the government interests in regulating campaign-related expenditures and speech.¹⁶⁹ This decision suggests that other remedies to regulating judicial conduct may be more likely to withstand constitutional scrutiny. We now address judicial recusal as one of those options.

V. RECUSAL AS A SPEECH-PROTECTIVE APPROACH?

We return now to the questions posed at the beginning of this Article. First, to what extent should the First Amendment protect judges' campaign speech using direct campaign contributions? The decisions in *White*, *Jenevein*, and others from lower courts provide strong and unequivocal protection for this type of speech—attempts to regulate a judge's speech will likely be evaluated using strict scrutiny, and it is unlikely that such regulations will pass constitutional muster.¹⁷⁰ The courts have also been deferential to the interests of citizens in learning about candidates for

167. See James Taranto, *The Media and Corporate Free Speech*, WALL ST. J., Jan. 30, 2010, available at <http://online.wsj.com/article/SB10001424052748704094304575029791336276632.html> (quoting James Abrams on *Citizens United*).

168. Robert E. Drechsel, *The Limits of Libertarianism*, CENTER FOR JOURNALISM ETHICS, Feb. 4, 2010, http://journalismethics.info/feature_articles/limits_of_libertarianism.html.

169. See *Citizens United*, 130 S. Ct. at 913.

170. See *Republican Party of Minn. v. White*, 536 U.S. 765, 777 (2002) (holding impartiality is not a compelling state interest and thus fails strict scrutiny); see also *supra* Part III (examining cases in which the Court struck down attempts to regulate judicial speech).

judicial office.¹⁷¹ The resistance against judicial speech restrictions is the appropriate outcome because, as the Fifth Circuit pointed out in *Jenevein*, “[t]o leave judges speechless, throttled for publicly addressing abuse of the judicial process by practicing lawyers, ill serves the laudable goal of promoting judicial efficiency and impartiality.”¹⁷²

Do donors to political campaigns have similar rights? To answer that, we turn to the Article’s second and third questions: To what extent should the First Amendment protect the ability of individual donors to spend money—directly, indirectly, or both—in support of or in opposition to a judicial candidate? To what extent should the First Amendment protect the ability of corporate or advocacy groups to spend money in support of or in opposition to a judicial candidate? *Citizens United* suggests that such spending is highly protected, even if it comes from a corporation.¹⁷³ Moreover, although the Court in *Nixon* acknowledged that states can have legitimate interests in establishing campaign contribution limits,¹⁷⁴ *Randall* mandates that those limitations cannot be placed too low.¹⁷⁵ States must therefore exercise caution in passing limits on campaign contributions and their use. It remains to be seen whether the *Citizens United* decision will result in the dire consequences predicted by some commentators.¹⁷⁶

Finally, we turn to the last question: Is recusal a better remedy for judicial conflicts of interest than restrictions on speech? Other commentators have suggested recusal policies that range from simple¹⁷⁷ to

171. See, e.g., *White*, 536 U.S. at 782 (“We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.”).

172. *Jenevein v. Willing*, 493 F.3d 551, 560 (5th Cir. 2007).

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

174. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390–95 (2000) (discussing the rationale for state campaign contribution limits).

175. See *Randall v. Sorrell*, 548 U.S. 230, 232 (2006) (“Contribution limits that are too low also can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.”).

176. See, e.g., *supra* text accompanying notes 29–30.

177. See, e.g., Talbot D’Alemberte, *Forward: The Legacy of Republican Party of Minnesota v. White: Judicial Independence, Judicial Selection, and the First Amendment in the Post-White Era*, 55 *DRAKE L. REV.* 597, 610 (2007) (proposing to “require a judicial candidate to reveal to the public the requirement of disqualification when making a formal statement on a political issue”); John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 *HARV. J. ON LEGIS.* 69, 81 (2000) (“Allow contributors to give whatever they want to political candidates, but

quite complex.¹⁷⁸ To address this issue, we offer a set of standards under which states could model their own recusal policies. The standards proposed below take into account both the *Caperton* and *Citizens United* decisions, acknowledging that *Citizens United* paves the way for increased corporate expenditures, but also recognizing that there are times when judges should recuse themselves to preserve the due process rights of litigants.¹⁷⁹ This is a better approach than attempting to stifle either judges' or donors' speech rights.

We reject a bright-line rule that attempts to establish a dollar amount or percentage of total contributions as a measurement of the need for recusal. The Court in *Caperton* used a loose standard taking into account “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.”¹⁸⁰ In effect, the Court used a reasonable person approach—in the extreme *Caperton* case, a reasonable person would believe that the total amount spent by Blankenship, the proportion of that amount in the election, and the effect of the contribution on the election’s outcome would require Judge Benjamin’s recusal.¹⁸¹

require any successful candidates to recuse themselves from voting on or participating in any legislation or other matters that affects those contributors.” (emphasis removed)); Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 DRAKE L. REV. 691, 716–17 (2007) (suggesting the adoption of broader judicial peremptory strike provisions); Besser, *supra* note 69, at 1226 (suggesting an addition to the commentary of ABA Canon 3E: “The existing restrictions on judicial campaign speech safeguard against campaign speech that risks undermining the appearance of impartiality in the courts. Thus, campaign statements that do not violate this canon are, by themselves, presumably insufficient to require recusal under the standard set forth in Canon 3E(1) of this Code.”).

178. See, e.g., Molly McLucas, Note, *The Need for Effective Recusal Standards for an Elected Judiciary*, 42 LOY. L.A. L. REV. 671, 701–05 (2009) (suggesting several substantive factors that should be considered, including total amount of contribution, percentage of contribution, timing, and intent); David K. Stott, Comment, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481, 502–11 (recommending the adoption of the American Bar Association’s public statement provision, the assignment of recusal motions to other judges, and a reduction in the financial burden of filing recusal motions).

179. As the Court said in *Citizens United*, “*Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.” *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010).

180. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2264 (2009).

181. See *id.*

In addition to financial considerations, the case for recusal should include three other factors: the donating parties, the issues they favor in their support, and the timing of the donation.¹⁸² Thus, the confluence of funding, timing, issue, and party would constitute the strongest case for recusal. Consider the following scenarios based on these facts: Judge Smith receives campaign support from Freedom For All (FFA), a third-party advocacy group, for her re-election campaign. FFA's campaign advertising on behalf of Judge Smith focuses on her past judicial history of supporting free speech issues. The donations by FFA comprise five percent of her entire campaign funding. She is re-elected. A case comes before her in which FFA is a party.

Scenario 1: The case centers on whether FFA has violated a city ordinance banning billboards over a certain size. Judge Smith should probably recuse because FFA's support was based on its positive opinion of her free speech jurisprudence, and the public might consider her participation in the case to be suspect.

Scenario 2: The case centers on whether FFA can obtain a building permit for its new facilities in town. Judge Smith probably need not recuse.

Scenario 3: FFA's support is generic in nature—simply a “Vote For Smith” message. Judge Smith probably need not recuse regardless of the case's content.

Scenario 4: The election occurs just before FFA knew its case would come before a judge. Judge Smith's recusal will depend on the amount donated and the content of both FFA's pending case and its campaign support.

Scenario 5: FFA's support comprises eighty percent of the judge's entire campaign budget. Regardless of the issue, Judge Smith should probably recuse, as a reasonable person would consider her participation to be a due process violation.

This approach is not without its problems. It does not address several concerns raised by Chief Justice Roberts in his *Caperton* dissent. What happens if the judge does not agree with the supporter's position or tactics,¹⁸³ or if a fervent campaign opponent comes before the judge?¹⁸⁴ It

182. See McLucas, *supra* note 178, at 702 (explaining her model which includes the timing element adopted in this Article).

183. *Caperton*, 129 S. Ct. at 2270 (Roberts, C.J., dissenting) (“17. What if the judge disagrees with the supporter's message or tactics? What if the judge expressly *disclaims* the support of this person?”).

does not take the judge's past record into account,¹⁸⁵ nor that of supporters or opponents. Because it does not contain bright-line rules, it could be challenged as vague. Savvy political and activist organizations could challenge the model by arguing that their First Amendment rights are chilled because they may not want to support judges by talking about issues important to them for fear that the judge they help elect will recuse on cases that address those very issues.

However, given courts' deference to both the needs of citizens to be informed about political candidates and the compelling state interest in the integrity of the judiciary, this method provides a way to satisfy both by taking into consideration a number of factors that could erode public confidence in the judiciary. This multi-factor model would help states evaluate judicial recusal as an option less impactful on the First Amendment rights of both judges and donors than smothering the speech of either through restrictive judicial codes or campaign finance regulations.

184. *Id.* (“18. Should we assume that elected judges feel a ‘debt of hostility’ towards major *opponents* of their candidacies? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him?”).

185. Chief Justice Roberts anticipated this problem as well. *See id.* (“16. What if the judge voted against the supporter in many other cases?”).