

Citizens United, Caperton, and Judicial Elections in California

A Comprehensive Background Paper Prepared by
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"A judicial system that requires judges to solicit contributions from interests appearing before the court risks removing the blindfold from the eyes of Lady Justice."

– Carolyn B. Lamm, President, American Bar Association, *ABA Journal*,
March 1, 2010.

Introduction: It is a long-standing tradition that during the President's annual State of the Union address, members of the United States Supreme Court sit quietly and without expression in the first row while members of Congress frequently interrupt the address with raucous cheers and applause. Yet, despite all the rousing ovations, the justices sit, seemingly unmoved. Their stoic demeanor reflects a common view that the justices, answerable only to the law, are above the political fray and passions of the moment.

President Obama's most recent State of the Union address marked a rare exception to traditional decorum. It began when President Obama chided a recent Supreme Court decision on campaign finance reform that, he worried, would "open the floodgates for special interests . . . to spend without limits in our elections." Justice Samuel Alito, who had voted with the majority in that opinion, was noticeably perturbed and appeared to mouth the words, "Not true, Not true," for all the world to see. The decision that caused this uncharacteristic breach of decorum – arguably on the part of both President Obama and Justice Alito – was *Citizens United v. The Federal Elections Commission*, decided on January 21, 2010, less than a week before the State of the Union address. Most immediately, *Citizens United* struck down provisions of federal law that had prohibited corporations and unions from using treasury funds to finance certain campaign advertisements in the weeks leading up to an election. Whether the decision will in fact "open the floodgates" to special interest campaign spending remains to be seen; in the meantime, it has certainly unleashed a flood of commentary – most of it filled with worry -- about its likely effects.

The purpose of this special oversight hearing of the Judiciary Committee is to consider the potential effect of the *Citizens United* decision – and other recent trends and decisions – on judicial election campaign spending in California. Although much of the debate surrounding the decision has understandably focused on the decision's possible effects on the political campaigns for legislative and executive offices, there has been a growing chorus of concern regarding the potentially negative effects the decision might have on judicial elections. Many highly-respected voices have expressed such deep concerns, including former Associate Justice of the United States Supreme Court Sandra Day O'Connor, and the current renowned Chief Justice of the California Supreme Court, Ronald George. Similar concerns have been raised by the nationally-recognized speakers for this hearing: Justice Ming Chin of the California Supreme Court and Chair of the

California Commission for Impartial Courts; and Professors Erwin Chemerinsky and Pamela Karlan – two of the nation's leading constitutional scholars.

The Supreme Court's Unusual Action In *Citizens United* And The Decision's Troubling Implications For Campaign Finance Limits: In *Citizens United*¹, the U.S. Supreme Court considered a provision of the federal Bipartisan Campaign Reform Act (BCRA) of 2002, also known as "McCain-Feingold" for its joint Senate authors. The provision in question prohibited corporations and unions from using general treasury funds to make "independent expenditures" for "electioneering communications" within 60 days of a general election or within 30 days of a primary election.² At issue in *Citizens United* was a controversial documentary entitled, *Hillary*, which was highly critical of then-Senator Hillary Rodham Clinton, a candidate in the 2008 Democratic presidential primary. Citizen's United, a non-profit corporation, wanted to make the documentary available by "video-on-demand" within the 30 days of the primary election. Concerned that the broadcast might be prohibited by BCRA, Citizens United sought declaratory and injunctive relief that the BCRA did not apply to the documentary and, indeed, would be unconstitutional if applied to the showing of *Hillary*. A district court denied the request. Citizen's United appealed to the United States Supreme Court.³

Citizens United originally only asked the Court to find that BCRA did not apply to the *Hillary* broadcast, and would be unconstitutional *as applied* in its case. For example, Citizens United argued that, as a matter of statutory interpretation, the film was not an "electioneering communication" as defined in BCRA. Most notably, Citizens United argued that the film was only available to viewers who subscribed to "video-on-demand" and had purposefully elected to watch it; therefore, Citizens United contended, it was not "publicly broadcast" within the meaning of the BCRA. Additionally, Citizens United pointed to other facts that allegedly made BCRA inapplicable: for example, Citizens United argued that BCRA did not apply to nonprofit corporations and that the content of the film, while critical, fell short of the kind of "express advocacy" that the law targeted.⁴

Despite these much narrower grounds upon which the Supreme Court *could have* decided the case in favor of Citizens United -- and traditionally would have confined its focus -- the Court instead "reached out of the boundaries of the case" and asked the parties to submit supplemental briefs on the constitutionality of the BCRA provisions in question, and whether the Court should overturn parts of *McConnell v. FEC* (2003)⁵, which had upheld the same provision of the BCRA. Necessarily, the Court would also need to decide whether to overturn the opinion upon which *McConnell* was partially based, *Austin v. Michigan Chamber of Commerce* (1990).⁶

After reframing the question in this extraordinarily broad way, the Court then proceeded to overturn both of *Austin* and *McConnell* -- even though it clearly did not need to reach those decisions in the *Citizens United* case -- holding that the First Amendment prohibits Congress from

¹ 2010 U.S. LEXIS 766.

² BCRA defined an "electioneering communication" as any "publicly distributed" broadcast that expressly took a position for or against a candidate.

³ *Id.* at 21-22.

⁴ *Id.* at 22-33.

⁵ 540 U.S. 93

⁶ 494 U.S. 652.

imposing any limits on "independent expenditures" by corporations – even if those expenditures are used to finance political advertisements that reference a candidate by name.⁷ As we will learn today from Professors Chemerinsky and Karlan, this pronouncement by the nation's highest court may, ironically, have profound ramifications for the future of the independence of the judiciary itself.

Background: *Buckley* and its Progeny. In order to fully appreciate the degree to which *Citizens United* departed from past Supreme Court holdings it is necessary to briefly consider some of the initial cases that treated campaign contributions and expenditures as a form of "speech" protected under the First Amendment.

Although the courts have consistently held that both campaign contributions and campaign expenditures are forms of protected speech, the courts have held that only limitations on "contributions" can be justified by a compelling state interest. In the seminal case of *Buckley v. Valeo* (1976)⁸, the Supreme Court considered a challenge to the Federal Election Campaign Act (FECA) as amended in 1974. The 1974 amendments imposed caps on both the amount of the *contribution* that an individual or committee could give to a federal candidate, as well as a cap on the *expenditures* that an individual or committee could make on behalf of a candidate. In addition, the 1974 amendments limited the amount of expenditures that a candidate could make from personal funds.⁹

Buckley's Strict Scrutiny Standard: In considering the validity of the FECA amendments, the Court in *Buckley* made a distinction between "contributions" and "expenditures." *Buckley* reasoned that both contributions and expenditures were forms of speech protected by the First Amendment and, therefore, Congress could only prohibit that speech if it served a "compelling governmental interest" and used means "narrowly tailored" to serve that interest. In short, because the First Amendment entails a fundamental right, the Court will apply "strict scrutiny."

Applying this reasoning to FECA, the Court held in *Buckley* that Congress could properly limit "contributions" to candidates because such limits served a compelling governmental interest in preventing the actuality or appearance of *quid pro quo* corruption. However, the Court stated that "expenditures" *by the candidate* – or "independent expenditures" made on behalf of, but not directly to, the candidate – did not, in its collective judgment, create the same likelihood of actual or apparent *quid pro quo* corruption. Therefore the Court found in *Buckley* that Congress' action to limit such campaign expenditures did not meet the "compelling interest" requirement.¹⁰ Although *Buckley* struck down a federal law pertaining to federal elections, the same reasoning would apply to state efforts to limit campaign expenditures.¹¹

⁷ Justice Kennedy begins the Court's leading plurality opinion by stating, "In this case we are asked to reconsider *Austin* and, in effect, *McConnell*." (*Citizens United, supra* at 17, Emphasis added.) This statement is somewhat misleading; indeed it reverses the actual order of things: as noted above, the parties actually asked the Court to decide the case on narrower grounds; the Court asked the parties to submit supplemental briefs reconsidering *Austin* and *McConnell*.

⁸ 424 U.S. 1

⁹ 2 U.S.C. Section 441 (1994) and 18 U.S.C. Section 608 (e) (1) (subsequently repealed).

¹⁰ *Buckley* 424 U.S. at 19-27, 48-49.

¹¹ In a subsequent case of *First National Bank of Boston v. Belotti*, 435 U.S. 765, the court applied this same rule to a state law limiting expenditures and clarified that corporations were persons who, like the flesh and blood variety, were entitled to First Amendment protections. (*Id.* at 778.) Therefore, the court held that state regulatory laws could not impose limits based on the source (i.e. a corporation) of the speech.

It is important to stress that *Buckley* did not say that state or federal law could never restrict campaign expenditures. Rather, it said that any laws restricting either contributions or expenditures could only be justified by a "compelling interest" that was narrowly tailored to serve that interest.¹² The *Buckley* Court found, to the chagrin of many commentators then and now, that the nexus between "expenditures" and *quid pro quo* corruption was not strong enough to create a "compelling" governmental interest for regulation of campaign expenditures in the facts of that case. In other words: if a state *could* show that it had a compelling interest in limiting expenditures, and used narrowly tailored means to achieve that interest, then a limitation on expenditures could, in theory, pass constitutional muster.

Austin v. Michigan Chamber: Several years later, the Supreme Court recognized just such a compelling interest in limiting expenditures as well as contributions. In *Austin v. Michigan Chamber of Commerce* (1990)¹³, the Court upheld a state law that prohibited corporations from using corporate treasury funds for independent expenditures to support or oppose any candidate for state office.¹⁴ The law, however, still allowed a corporation to use "segregated funds" (e.g. voluntary donations by shareholders to a separate fund) to fund political action committees. The Court upheld the statute against a First Amendment challenge on the grounds that the law served a "compelling governmental interest" in preventing the "distortion" that is created when a corporation can create large aggregations of wealth that bear no relationship to the public's support of its political ideas.¹⁵

The Enactment of McCain-Feingold: Although decisions like *Austin* permitted certain narrow regulations of independent campaign expenditures, it was not long before candidates, corporations, and political parties found creative ways around the proscriptions. These efforts to circumvent regulations produced countering landmark legislation in Congress that sought to address the most troublesome types of campaign financing techniques, most notably the BCRA of 2002, known as "McCain-Feingold." Although the McCain-Feingold primarily sought to regulate so-called "soft money" (i.e. channeling contributions to candidates through parties), it also enacted provisions banning corporate and union financing of "electioneering communications" in designated periods immediately preceding a primary or general election.

¹² See e.g. Erwin Chemerinsky, "Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections," 74 *Chicago-Kent L. Rev.* 133, 134-135 (1998) (arguing that, because of the grave threat that contributions pose to judicial independence, a state may have a compelling interest in limiting expenditures for judicial elections even if it does not have a compelling interest in limiting expenditures in executive or legislative branch elections.)

¹³ 494 U.S. 652

¹⁴ Showing the importance of who sits on the Supreme Court at any given time, the *Austin* decision was written by Justice Thurgood Marshall and joined by Justices Rehnquist, Brennan, White, Blackmun, and Stevens. Justice Kennedy, joined by O'Connor and Scalia, dissented.

¹⁵ *Id.* at 660. Although the majority opinion in *Citizens United* overturned *Austin* on the grounds that it represented a "significant departure" from settled rules established by *Buckley*, the six-member majority in *Austin* saw its ruling as fully consistent with *Buckley*'s more general holding that restrictions on either contributions or expenditures could be justified if supported by a sufficiently "compelling" interest. The *Austin* Court merely concluded that preventing "distortion" – i.e. the use of the artificial corporate form to create immense aggregations of wealth far beyond what many natural persons could raise – constituted a sufficiently "compelling" interest. In short, the *Austin* court went beyond the narrow view that the only form of "corruption" that governments have a compelling interest in preventing is the *quid pro quo* variety. Moreover, the Court noted that the state law at issue in *Austin* was sufficiently narrowly tailored, since it still permitted corporations to freely use segregated funds for political purposes and left open ample alternative avenues for corporate political speech.

McConnell v. FEC: The Supreme Court first considered the constitutionality of McCain-Feingold in *McConnell v. FEC* (2003).¹⁶ The complicated *McConnell* ruling – with the 5-4 decision producing eight different opinions – upheld most of the provisions of the law, including – just seven years ago -- the very one recently struck down by *Citizens United*.¹⁷ Specifically, the Court in *McConnell* upheld limitations on the use of corporate and union treasury funds to finance campaign advertisements that were the "functional equivalent" of express advocacy. Although the many opinions issued in *McConnell* are almost impossible to summarize, the majority clearly held that regulations of the source, content, and timing of political advertising – so long those regulations do not amount to a complete ban – do *not* violate the First Amendment. Importantly, the lead opinion by Justices O'Connor and Stevens reasoned that government had a legitimate interest in preventing "both the actual corruption threatened by large financial contributions . . . and *the appearance of corruption*." O'Connor and Stevens noted that "money, like water, will always find an outlet," and Congress can surely respond when groups devise schemes to circumvent contribution limits.¹⁸

The Immediate Legal Effect of Citizens United in Overturning the Supreme Court's Earlier Seminal Campaign Finance Decisions: In overturning both its *Austin* and *McConnell* decisions, the Supreme Court in *Citizens United* rejected its earlier idea that "distortion" constitutes a compelling governmental interest and held that corporations and unions are now free to spend unlimited amounts on "independent expenditures" -- even for advertisements that expressly mention the candidate by name. Although most immediately the decision only struck down a provision of federal law, by implication, *Citizens United* arguably renders unenforceable laws in 24 states (California is not one of them) that impose limits on independent expenditures similar to the BCRA provision that the Court struck down.¹⁹

Campaign Spending "On Steroids?" The Resulting Reaction to *Citizen's United*: The *Citizen's United* decision has been roundly criticized by many political and legal commentators because it removes virtually all limits on corporation and union expenditures. In addition, it has also been condemned as an unabashed and some say ironic example of profound judicial activism by the very justices who usually laud judicial restraint. Professor Erwin Chemerinsky, for example, describes the opinion as "a stunning example of judicial activism," insofar as it not only failed to show any deference to Congress, but also because it overturned years of precedent.²⁰ What makes this activism all the more remarkable, many others have noted, is that the Court could have decided the case on much narrower grounds. Indeed, Justice Stevens, quoting a prior appeals court opinion by Chief Justice Roberts, noted that the "cardinal" principle of the judicial process is,

¹⁶ 540 U.S. 93.

¹⁷ Between the *McConnell* and *Citizens United* rulings, Justices Rehnquist, O'Connor, and Souter had been replaced by Justices Roberts, Alito, and Sotomayor.

¹⁸ *Id.* at 205 (quoting *Austin*, 494 U.S. at 660.) In addition, *McConnell* affirmed the "distortion" rationale articulated in *Austin*: "We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form that have little or no correlation to the public's support for the corporation's political ideas.'"

¹⁹ See Ian Urbina, "24 States' Laws Open to Attack after Campaign Finance Ruling," *New York Times*, January 22, 2010. See also Associated Press, "States Reassessing Campaign Laws After *Citizens United*," January 23, 2010, available at <http://www.firstamendmentcenter.org/news.aspx?id=22535> *Citizens United* does not immediately affect California law because our state does not have any provision prohibiting corporate or union financing of independent expenditures. California does impose contribution limits and requires disclosures for both contributions and expenditures, but these are not affected by the decision.

²⁰ Erwin Chemerinsky, "Who are the Judicial Activists Now?" *Los Angeles Time*, January 22, 2010.

"if it is not necessary to decide more, it is necessary *not* to decide more"²¹ – yet that is precisely what the Court conservative majority proceeded to do. As Professor Richard Hasen of Loyola Law School put it, in *Citizens United* the Supreme Court ignored the well-established doctrine of 'constitutional avoidance,' by which it avoids deciding tough constitutional questions when there is a plausible way to make a narrower ruling based on a plain old statute."²²

Whether or not the Supreme Court showed proper deference and restraint, many commentators allege, as did President Obama in his State of the Union address, that the decision will soon "open the floodgates" to corporate campaign spending and, equally important, call into question virtually all federal and state attempts to regulate campaign financing. Many observers believe that lifting restraints on independent expenditures will especially increase the number of attack advertisements funded by special interest groups.

According to Republican campaign strategist Benjamin Ginsberg, the decision may also take more campaign control away from the candidates and parties, as independent groups seek to shape the issues whether the candidates or parties agree with the characterizations or not. According to Ginsberg, the decision "will put on steroids the trend that outside groups are increasingly dominating campaigns. Candidates lose control of the message [and] . . . parties will sort of shrink in the relative importance of things."²³ Writing in the *Christian Science Monitor*, Common Cause President Bob Edgar flatly asserts that the decision is "bad for democracy," and he calls upon Congress to "respond swiftly and forcefully to ensure that corporations do not take over our political process."²⁴ Indeed, members of Congress are trying to respond, but the ruling appears to leave a very limited range of potentially inadequate options, such as enhancing existing disclosure requirements and requiring corporations to get some form of approval from shareholders.²⁵

Impact of *Citizens United* on Judicial Elections. While responses to *Citizens United* have primarily focused on the likely impact on elections for executive and legislative branch offices, a growing number of critics are highlighting the potential impact on judicial elections and state efforts to regulate them. In his lengthy and forceful dissent, Justice Stevens noted that the majority holding in *Citizens United* would "not be limited to the legislative or executive context." He continued:

The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch . . . the Court today unleashes the floodgates of corporate and union general treasury spending in these races . . . [After] today, [states] 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.²⁶

²¹ *Citizens United* at 164 (Stevens, J. dissenting), quoting *PDK Labs, Inc. v. United States DEA*, 362 F.3d 786, 799 (CA DC 2004) (Roberts, J., concurring.)

²² Richard Hansen, "Money Grubbers: The Supreme Court Kills Campaign Finance Reform," *Slate.Com Magazine*, January, 21, 2010, available at <http://www.slate.com/toolbar.aspx?action=print&id=2242209>.

²³ David Kirkpatrick, "Lobbyists Get Potent Weapon in Campaign Ruling," *New York Times*, January 21, 2010;

²⁴ Bod Edgar, Supreme Court's Campaign Ruling: A Bad Day for Democracy," *Christian Science Monitor*, January 22, 2010.

²⁵ David Kirkpatrick, "Democrats Try to Rebuild Campaign-Spending Barriers," *New York Times*, February 12, 2010.

²⁶ *Citizens United* at 262 (Stevens, J. dissenting).

Justice Steven's concerns about money in judicial elections are echoed by organizations like Justice at Stake (JAS), an organization established long before *Citizens United* and devoted to reforming judicial elections. Joined by about twenty other reform organizations, JAS filed an amicus brief in *Citizens United* which argued that overturning *Austin* and *McConnell* "would have a profound and negative effect on the selection of state court judges and could damage the integrity of the judiciary." ²⁷

The Already Dramatic Increase In Corporation Funding In States That Have Judicial Elections: The JAS brief noted above began by providing empirical evidence of the dramatic increase in corporation funding of judicial campaigns in the 39 states that have some form of judicial elections – whether they take the form of partisan contested elections, nonpartisan contested elections, non-contested elections, or retention elections. For example, between 1989 and 1998, state-level Supreme Court candidates nationally raised \$85.4 million. From 1999 to 2008, however, the amount climbed to \$200.4 million, almost double that of the previous decade. ²⁸ Removing limits on independent expenditures at this time, JAS argues, will only accelerate this already troubling trend. As limits are lifted, JAS contends, even those corporate litigants who presently feel no need to make contributions will feel undue pressure to get ahead of the game, so to speak. That is, they will take advantage of the lifting of restraints because they believe that their opponents will do the same. ²⁹ Finally, citing various public opinion surveys, JAS argued that unlimited spending on judicial elections will erode judicial integrity by, among other things, convincing the public that money spent on campaigns influences judge's opinions in particular cases, whether it does so in fact or not. ³⁰

Brennan Center Study: In addition to JAS, the Brennan Center for Justice at the New York University School of Law recently published a study (revealingly titled, "Buying Justice") which argues that *Citizens United* will result in increased spending in judicial elections and "will almost certainly exacerbate existing public concerns that justice is for sale to the highest bidder."³¹ The Brennan Center study pulls from a variety public opinion surveys some remarkably consistent themes. Anywhere from 70% to 90% of respondents generally believed that judges' decisions were influenced by campaign contributions. Even more striking, this view is not merely shared by members of the public who have little experience with the judicial process. For example, one poll showed that 79% of *attorneys* believed that campaign contributions affected judicial opinions. Even more striking, this opinion was also shared by many *judges*! A 2002 poll of 2,400 judges nationwide found that 46% believed that judges were influence by campaign contributions. A 2004 survey of judges in New York found that 60% of New York State judges believe that contributions affect decisions. Not surprisingly, the 2002 poll showed that a majority of judges (55%) agreed with the statement that "judges should be prohibited from presiding over and ruling in cases when one of the sides has given money to their campaign." ³²

²⁷ Brief of Amicus Curiae Justice at Stake, et. al. at 2.

²⁸ *Id.* at 5-8.

²⁹ *Id.* at 10-11, 17

³⁰ *Id.* at 11-16.

³¹ Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections* (Brennan Center for Justice, 2010.)

³² *Id.* at 4-7, quote at 7. The Feuer legislation currently being considered in the California Legislature, AB 2487, discussed below, does just this.

While JAS and the Brennan Center have led the charge for more regulation of spending in judicial elections, other prominent voices have also argued that *Citizens United* will exacerbate already troubling trends. Most notably, as noted above former U.S. Supreme Court Justice Sandra Day O'Connor has devoted much of her time to the issue since retiring from the nation's high court. In response to *Citizens United*, O'Connor stated that "the problem of campaign contributions in judicial elections might get considerably worse and quite soon."³³ But O'Connor's concern with judicial elections long pre-dates *Citizens United*. In the past few years O'Connor has been warning audiences that money in judicial elections poses a serious threat to judicial independence, and that attack ads on sitting justices are requiring them to spend more time raising money. However, O'Connor believes that the solution to the problem goes beyond limiting contributions and expenditures; instead, she advocates doing away with contested judicial elections altogether and replacing them with a merit-based appointment system.³⁴

While many reformers agree that unlimited spending erodes public confidence in judicial impartiality – and that *Citizens United* will only make things worse – they have offered a number of proposals for addressing the problem. Some reformers share Justice O'Connor's belief that the most sensible solution is to do away with judicial elections altogether. As Stanford Law Professor Pamela Karlan has written, "Money, after all, gains its power in elections because it is the fuel of politics and can be converted into votes." If campaign contributions influence judge's opinions, then so too will political considerations about how a particular ruling might affect voter opinions and possible "electoral retaliation."³⁵ However, Karlan is also "quite pessimistic" about doing away with elections because, even though people worry about the influence of money on judicial elections, "they want to elect their judges."³⁶

Short of dropping judicial elections in favor of merit-based appointment – which may, as some commentators in California have noted, not have "political legs" – some reformers have floated a number of other proposals. For example, North Carolina, New Mexico, West Virginia, and Wisconsin have either recently adopted, or are in the process of adopting, public financing for state appellate court races. In addition, consistent with ongoing legislation by the Chair of the Assembly Judiciary Committee Mike Feuer, the Brennan Center, among others, advocates strong disclosure and recusal rules that would prevent judges from hearing cases in which a party or counsel has made a campaign contribution to the judge.³⁷ Also, short of shifting entirely to a merit-based appointment system, states could prohibit contested elections and instead devise a system of initial appointment with periodic, *uncontested*, retention elections.³⁸

The *Caperton* Case, Seeking to Choose Your Own Supreme Court Justice, And Perceptions Of Judicial Impartiality: While *Citizens United* has brought forth predictions of how judicial elections *might* be affected by unlimited campaign contributions, other cases provide real-life, and some

³³ As quoted in Adam Liptak, "Former Justice O'Connor Sees Ill in Election Finance Ruling," *New York Times*, January 27, 2010. According to Liptak, O'Connor also quipped: "Gosh. I step away for a couple of years and there's no telling what's going to happen." O'Connor, with Justice Stevens, authored the plurality opinion in *McConnell* that had upheld the very provisions that *Citizens United* struck down.

³⁴ *Id.* See also Dorothy Samuels, "Hanging a 'For Sale' Sign over the Judiciary," *New York Times*, January 29, 2010.

³⁵ Pamela S. Karlan, "Electing Judges, Judging Elections, and the Lessons of *Caperton*," 123 *Harvard L. Rev.* 80, 81 (2009).

³⁶ See Tony Mauro, "Reformers Hope High Court Decisions Will Kill Judicial Elections," *National Law Journal*, February 1, 2010 (quoting Karlan from an address given to the Georgetown University Law Center.)

³⁷ See description of this legislation *infra* at page 12.

³⁸ For a convenient summary of different reform proposals, see Skaggs, *supra* note 31 at 12-24.

contend chilling, examples of what has already occurred. A particularly egregious example comes from West Virginia. In *Caperton v. Massey Coal Co.* (2009)³⁹, the U.S. Supreme Court last year held that a West Virginia appellate judge should have recused himself from a case in which a single litigant had spent a stunning \$3 million in contributions and independent expenditures to get the judge elected to the state's Supreme Court. In *Caperton*, the jury had rendered a \$50 million judgment against Massey Coal Company,⁴⁰ on the grounds that the company had engaged in fraudulent misrepresentation, concealment, and tortuous interference in its contractual relationship with the other party, Caperton.

After Massey appealed the jury verdict – but before the case reached the West Virginia Supreme Court of Appeals – Massey spent \$3 million in contributions and expenditures to help then-candidate Brent Benjamin in his election to unseat an incumbent supreme court justice. Benjamin won the election and was sitting on the state's supreme court when it heard and decided Massey's appeal of the \$50 million jury verdict. Despite Caperton's motion requesting that Benjamin recuse himself on the reasonable grounds that the opposing party had just spent \$3 million getting Benjamin elected, to the shock of many, Benjamin denied the motion, claiming that he could still be fair and impartial notwithstanding the whopping contribution he had personally received from one of the very parties before him. After Benjamin then proceeded to vote with the majority just how Massey Coal Company had hoped, joining in the 3-2 vote to overturn the \$50 million jury verdict, Caperton appealed to the U.S. Supreme Court. (Massey meanwhile was arguably enjoying what some contend was a fairly hefty \$47 million return on its \$3 million "investment"!)

The U.S. Supreme Court's *Caperton* Decision: In what many would have considered a "slam dunk" example of an "improper refusal for recusal," the U.S. Supreme Court -- by a surprisingly narrow 5-4 vote -- agreed with Caperton, and ordered a new trial with a new justice in a case involving one of the state supreme court justices having received \$3 million in contributions and expenditures from a party litigant. The narrow Court majority concluded that the amount and timing of the campaign contribution created such a clear conflict of interest that it denied Caperton a fair and impartial trial – and thus denied Caperton his 14th amendment due process rights.

The majority conceded that in most cases, Codes of Judicial Ethics leave it to the discretion of the judge to decide whether he or she can decide the case impartially. But the majority held that in such an "extreme" case, "the probability of actual bias on the part of the judge . . . is too high to be constitutionally permissible." The dissenters argued that the precedents only justified taking discretion away from the judge in cases where the judge had a *direct financial interest* in the outcome of a case, or in certain cases trying a defendant for criminal contempt (i.e. where a judge would be subsequently ruling on his own previous contempt findings.)

Thus, at a minimum, *Caperton* appears to make clear that states not only have a compelling interest, but also an affirmative duty, to ensure that contributions to judicial candidates do not deny litigants a fair trial. Other opinions suggest that in addition to an interest in protecting due process, states also have a compelling interest in preserving the appearance of judicial integrity

³⁹ 129 S.Ct. 2252.

⁴⁰ This is the same coal company that recently experienced the worst U.S. mining disaster in 40 years, where 29 miners were killed at a West Virginia coal mine.

and judicial impartiality.⁴¹ In sum, *Caperton* and other cases confirm that a state has a compelling interest in (1) preserving judicial impartiality and the appearance of judicial impartiality; and (2) protecting the due process rights of all litigants to a fair and impartial trial. It follows, therefore, that any limitation on judicial elections that is narrowly tailored to further either one or both of those compelling interests would appear to be constitutionally permissible.⁴² If *Citizens United* does indeed result in increased spending in judicial elections as many commentators fear, states may therefore need to scramble to find constitutional means for serving these compelling governmental interests.

California After *Citizens United* And *Caperton*: For the most part, California has thus far appeared to be largely spared the highly partisan and expensive judicial campaigns that have unfolded in other states such as Texas, Illinois, and, of course, West Virginia. In large measure this appears to thus far be the case because appellate court elections in California, for the most part, are uncontested. California appellate justices are appointed and then run in "retention" elections without an opposing candidate. Superior Court judges must run for election every six years, and these elections can be either contested or not – and thus far most such superior court races are not contested.

Our state Supreme Court justices have also to date rarely faced substantial challenges in their retention elections, though the celebrated case of former Chief Justice Rose Bird (where the chief justice and two of her colleagues faced unprecedented and ultimately successful campaigns to block their retention) illustrates that controversial rulings may force Supreme Court justices to raise funds for a statewide campaign. However, given the potential for much more funding availability post-*Citizens United*, it must also be acknowledged that "all bets may be off" and future such occasions where Supreme Court retention elections become more hotly funded may grow. So while spared the worst thus far regarding judicial campaign funding fights, California is certainly not immune.⁴³ Indeed, as California Supreme Court Justice Ming Chin has noted of the national trends: "the question is not *if* these trends [will] spread to California, but *when*."⁴⁴ In short, Justice Chin firmly believes that California should act now to prevent the distressing and dangerous national trend of increased campaign fundraising in judicial elections from reaching California.

⁴¹ For example, in *Republican Party of Minnesota v White* (2002), the U.S. Supreme Court considered the constitutionality of a provision in the Minnesota Code of Judicial Conduct that prohibited a judicial candidate from making public "announcements" about "disputed legal or political matters." The idea behind the provision was that such announcements might commit, or appear to commit, the justice to a predetermined conclusion should the matter come before the justice. In a 5-4 decision, the Court held that the provision violated the judicial candidate's free speech rights under the First Amendment. However, in making this determination, the Court did not challenge the holding of the 8th Circuit Court that the state had a compelling interest in preserving the independence and impartiality of the judiciary, as well as the appearance of independence and impartiality. The Court struck down the "announce" provision, instead, because of its sweeping nature – for example, it prohibited announcements on political as well as legal matters, and it prohibited announcing mere opinions about those matters as opposed to "promises" to decide a case in a particular way. In short, the Court held that provision was not narrowly tailored enough to meet the admittedly compelling state interest in preserving judicial impartiality or the appearance thereof – it did not deny that the interest was compelling. *Id.* at 774-775.

⁴² See Chemerinsky, *supra* at note 12 for additional reasons why regulating contributions and expenditures in judicial elections may meet a compelling interest even if the same might not be the case for elections to executive or legislative branch offices.

⁴³ Two current examples show how contested superior court races can force sitting judges to raise large sums of money. San Francisco is now in the midst of two contested superior court elections that have caused at least two candidates to raise more than \$100,000 each. ("S.F. Bench Candidate Tops \$100K," *San Francisco Recorder*, March 23, 2010.) Another example can be seen in San Diego, where a group called Better Courts Now is launching a campaign to support challengers to San Diego County Superior Court judges. (See the groups website at www.bettercourtsnow.org)

⁴⁴ Ming W. Chin, "An Introduction to the Work of the Commission for Impartial Courts," *California Courts Review*, Fall 2007-Winter 2008, p. 13. [Emphasis in original.]

The California Commission for Impartial Courts: In response to growing concerns about increasingly partisan and expensive judicial elections, California Chief Justice Ronald George and the Judicial Council established the Commission for Impartial Courts (CIC) in 2007. The CIC was asked to devise proposals to ensure judicial quality, impartiality, and accountability. Under the able leadership of Justice Ming Chin, the CIC developed draft recommendations and invited public comment. The result of this process was a December 2009 *Final Report* that made 71 recommendations relating to judicial candidate campaign conduct, judicial campaign finance, judicial selection and retention procedures, and public information and education.⁴⁵

Some of the recommendations made by the CIC called for changes in the Code of Judicial Ethics, others called for legislation, and still others called for enhanced educational efforts on the part of the legal profession. One of the recommendations, for example, required judges to disqualify themselves if they received a campaign contribution from a party or counsel in excess of \$1500 (the current threshold for disqualification when a judge has a "financial interest" in a party or in the outcome of a case.) The CIC concluded that these reforms were meant to address increasing public concerns throughout the country about the impact of money in judicial elections, especially "given the unique role of the judiciary in our structure of government." The CIC defended its effort at judicial campaign finance reform as follows:

The public expects and is entitled to impartiality in judicial decisions and, as a result, the more influence that moneyed interests have or appear to have on judicial candidates, the more harm is done to the public's trust and confidence that judicial decisions are based on the rule of law as opposed to other considerations. [Mandatory disqualification and disclosure will] enhance the public's confidence that the system has safeguards in place to prevent judicial decision making from being influenced by monetary contributions.⁴⁶

The footnotes in the CIC *Final Report* indicate that the drafters were aware that the *Citizens United* ruling was forthcoming as the report was being completed. However, with the one exception noted below, *Citizens United* does not appear to alter any of the specific recommendations. If anything, the decision makes the recommendations all the more compelling. Many of the recommendations would not necessarily require legislation, including calls for changes in professional codes of conduct, encouraging the Bar to more actively discipline attorney candidates who engage in campaign misconduct, and educational efforts targeted both at judges and the public. The recommendations listed below, however, are those that would appear to require legislative action.

1. Statutory slate mailer disclaimers should be strengthened by requiring mailers to cite Canon 5 of the Code of Judicial Ethics, and disclose other relevant information. Also, an amendment should be made to Government Code Section 84305.5 making it apply to organizations that support or oppose judicial candidates. (It presently only applies to other candidates and ballot measures.)

⁴⁵ California Commission for Impartial Courts [hereafter CIC] *Final Report: Recommendations for Safeguarding Judicial Quality, Impartiality, and Accountability in California*, December 2009

⁴⁶ CIC, *Final Report* at 8, 30.

2. Judicial candidates should be prohibited from seeking or using endorsements of "political organizations," as defined in the Code of Judicial Ethics.
3. Both trial court and appellate judges should be subjected to mandatory disqualification from hearing any matter involving a party, counsel, party affiliate, or other party who has made a monetary contribution of a certain amount to a judicial campaign.
4. Corporations and unions should be prohibited from expending treasury funds on contributions directly to judicial candidates or to groups making independent expenditures in connection with judicial campaigns. (However footnotes in the Commission's Final Report indicate that this recommendation was contingent upon the outcome of *Citizens United*, which was pending when the report was issued. Given the outcome, it appears that CIC would no longer support this recommendation.)
5. All Candidates for judicial office should be required to file in electronic form with the Secretary of State all campaign disclosure documents that they are now required to file in paper form.

Pending California Legislation: AB 2487 by Committee Chair: Concerned about the implications of *Citizens United* and the troubling national trends discussed above, Assembly Member Mike Feuer, the Chair of the Judiciary Committee, introduced AB 2487 this year, a bill that closely follows the CIC recommendations noted above on mandatory disqualification and disclosure for Superior Court judges.

Existing law requires a judge in California to recuse himself or herself if he or she has a financial interest in a party or in the subject matter of the action before the court, if the amount of the financial interest is in excess of \$1500. However currently "financial interest" is not defined to include campaign contributions. Feuer's legislation would disqualify a judge from hearing any matter in which a party or counsel to the matter before the court has given the judge a campaign contribution in excess of \$1500.

In addition, if a judge has received a campaign contribution of less than \$1500 from a party or counsel in a case before him or her, then the judge under AB 2487 would be required to disclose that fact on the record, and to the other parties and counsel. The requirements of AB 2487 would apply for the duration of the term (six years for Superior Court judges) for which the contribution was made. In order to prevent a party or counsel from manipulating the requirement by making a contribution in order to disqualify a disfavored judge, AB 2487 would also allow the non-contributing party to waive the disqualification requirement.

Assembly Member Feuer believes that requiring disclosure and disqualification in such situations will clearly serve the state's compelling interest in preserving both the reality and the perception of judicial impartiality. AB 2487 has received extraordinary bipartisan support: the bill recently cleared the Assembly Judiciary Committee on a 10-0 vote and passed off the Assembly Floor on a 71-0. It is currently in the Senate Rules Committee awaiting referral to a policy committee.

Conclusion: Reflecting the extraordinary bipartisan support of the Feuer legislation currently traveling through the Legislature, it is clear that protecting the actuality and appearance of judicial impartiality in the California judicial system is a strongly held bipartisan principle. This seems especially so after *Citizens United*. California policymakers, in collaboration from the judicial and executive branches, will need to work hard and tactically in joint efforts to mitigate the fear expressed by President Obama and others that the floodgates are now open for uncontrolled campaign spending in judicial elections.