

Other Voices

Views from beyond the Barron's staff ■ by Skip Kaltenheuser

The Price of Justice

IN *CITIZENS UNITED V. FEC*, FIVE JUSTICES of the U.S. Supreme Court found that the First Amendment protection of free speech prohibited Congress from banning political advocacy by organizations, including pushing for the election or defeat of candidates. Tightly blindfolded, Justice Anthony Kennedy concluded, "Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." Justice Kennedy should observe what's happening to state courts.

Citizens United was a campaign-finance accelerant, and not just in federal races. It threatens the integrity of state courts, which hear 95% of the nation's cases.

At the state level, a majority of judges and justices stand in some form of election. These elections are the minor leagues of U.S. politics, even more vulnerable to the power of money than elections for Congress and state legislatures. Donors who try to buy laws and lawmakers are interested in buying the interpretation of the laws, as well.

A poll conducted by 20/20 Insight last year found that nine of 10 American voters believe both direct contributions and independent spending affect courtroom decisions. Earlier polls have consistently shown citizens losing confidence in the courts. Other polls show sizable cohorts of state judges and justices believing decisions are affected.

It's not just past contributors calling the tunes. It's anticipation of getting contributions in the future, perhaps in a run for a higher court, as well as the chilling fear of being attacked by well-financed opponents. Though big majorities of judges say they want fixes for the campaign-finance arms race, more of them are playing the game.

Influence mischief was under way long before Citizens United, but a report from the Brennan Center for Justice, the National Institute on Money in State Politics, and Justice at Stake shows the 2010 Citizens United ruling's rising impact on judicial races.

There was a 50% rise over the prior record, of 2003-2004, in independent spending by interest groups in state Supreme Court races in 2011-2012. Spending that was not controlled by candidates or their campaign committees was 27% of total campaign spend-

ing, not counting spending by the political parties. More than a third of all funds spent on state supreme court races came from seven special-interest groups and three state political parties. Television ads backing candidates for high courts took a huge leap—over a quarter funded by special interests, much of it attack ads involving hot button issues and wild distortions of controversial rulings.

You might think that a judge should recuse himself if a party to a case contributed to the judge or spent money on supportive election materials, and 92% of the people responding to a Justice at Stake/Brennan Center for Justice poll would agree with you. But the grounds for a judge's recusal are judged by the judge.

The U.S. Supreme Court took a half-step toward a higher standard in a case from the West Virginia Supreme Court. Anticipating an important case against A.T. Massey Coal Co., Massey's CEO flooded money into ads attacking an incumbent justice, who lost the election. The winning beneficiary of the Massey money refused to recuse himself when the case reached the state Supreme Court. A majority opinion in 2009 by Justice Kennedy said that while not every litigant contribution requires recusal, "extreme facts" can create a "probability of bias" violating due process. On rehearing, the West Virginia court determined the case should have been filed in Virginia.

Throughout the land, significant campaign contributions haven't generated many recusals. In some states, including Pennsylvania and Wisconsin, half of the cases before the highest court involved litigants who contributed to justices. John Grisham needn't fear running short of plots based on reality.

Joanna Shepherd, an economist and professor at Emory University School of Law, wrote a study for the American Constitution Society examining the relationship between campaign contributions and state Supreme Court decisions in 2010-12. After excluding cases in which two businesses squared off against each other, Shepherd found strong patterns: The more contributions justices garner from business interests, the more likely their decisions will favor those interests.

Donor disclosure offers little solace. Dark

money often travels through layers of obscurity, including through Super PACs and through 501(c)(4) "social welfare" organizations that needn't disclose their donors. Anyway, voters show limited interest or limited ability to sort out conflicts of campaign interest. There are over 50 judges on a ballot in Harris County (Houston), Texas; such elections tend to be straight partisan votes.

However one comes down on whether the First Amendment sanctions unlimited spending on campaigns, judicial elections are different. And if judicial elections aren't different, judges ought to be. States should insist that judges recuse themselves in cases involving their contributors and their campaign supporters. That would ease the arms race.

To thwart independent expenditures and dark money, the states should move from elections toward merit-based appointments. Insulate the process from politics, using a diverse, professional selection committee.

A U.S. Supreme Court justice discussed the loss of confidence in the courts in a 1999 interview on *Frontline*: "We weren't talking about this 30 years ago because we didn't have money in elections. Money in elections presents us with a tremendous challenge, a tremendous problem, and we are remiss if we don't at once address it and correct it...if an attorney gives money to a judge with the expectation that the judge will rule...in his client's interest.... It's corrosive of judicial independence." Justice Anthony Kennedy might review these words before writing his next campaign-finance decision. They're his.

Give judges gavels; take away their tin cups. ■

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Though it's often framed as a federal issue, money in politics is even more powerful in state elections, especially those for state judges and justices.