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Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings

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ARTICLES

ONCE UPON A TIME IN THE WEST: *CITIZENS UNITED*, *CAPERTON*, AND THE WAR OF THE COPPER KINGS

Larry Howell*

He is said to have bought legislatures and judges as other men buy food and raiment. By his example he has so excused and so sweetened corruption that in Montana it no longer has an offensive smell.

—Mark Twain¹

[T]he Copper Kings are a long time gone to their tombs.

—District Judge Jeffrey Sherlock²

I. INTRODUCTION

Recognized by even its strong supporters as “one of the most divisive decisions” by the United States Supreme Court in years,³ *Citizens United v.*

* Associate Professor, The University of Montana School of Law. Thanks to the staff of the *Montana Law Review* for their invaluable editing assistance. Any remaining mistakes are the author’s.

1. Mark Twain, *Mark Twain in Eruption* “Senator Clark of Montana,” 72 (Bernard DeVoto ed., Harper & Bros. 1940) (writing in 1907 about William Andrews Clark, one of Montana’s three infamous “Copper Kings”).

2. *West. Tradition Partn., Inc. v. Mont. Atty. Gen.*, 2010 Mont. Dist. LEXIS 412 at *14 (Mont. 1st Jud. Dist. Oct. 18, 2010), *rev’d*, *West. Tradition Partn., Inc. v. Atty. Gen.*, ___ P.3d ___, 2011 WL 6888567 (Mont. Dec. 30, 2011).

3. Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right that Big Corporations Should Have But Do Not Want*, 34 Harv. J.L. & Pub. Policy 639, 641 (2011). The qualifying language “one of the most divisive” is only necessary because the Supreme Court set its benchmark for dividing the country just 11 years ago. See *Bush v. Gore*, 531 U.S. 98 (2000). The chair of the Senate Judiciary Committee, Patrick Leahy, made just that point on the floor of the Senate when he labeled *Citizens United* “the most partisan decision since *Bush v. Gore*.” Adam Liptak, *Washington Memo: A Rare Rebuke, In Front of a Nation*, New York Times, <http://query.nytimes.com/gst/fullpage.html?res=9803E1DA133EF93AA15752C0A9669D8B63> (Jan. 29, 2010).

*Federal Election Commission*⁴ was met with a wave of criticism and predictions of dire consequences for the country's political system. The unusually harsh reaction began in the dissenting opinion by four Justices, who bluntly stated that the decision "threatens to undermine the integrity of elected institutions across the Nation," as well as "do damage" to the legitimacy of the Supreme Court as an institution.⁵

President Barack Obama amplified that theme during his 2010 State of the Union address when he described *Citizens United* as pro-corporate judicial activism while six Justices, including three who signed the 5–4 majority opinion,⁶ sat in the audience front and center. "With all due deference to separation of powers," Obama told the Justices, the Congress, and the Nation, "last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."⁷ Obama's unusually direct criticism received even more attention because Justice Samuel A. Alito Jr., who voted with the majority in *Citizens United*, reacted by vigorously shaking his head and muttering "not true, not true" while millions read his lips at home.⁸

Justice Alito's dissenting views notwithstanding, two years later the President's prediction about special-interest floodgates has been proven correct,⁹ although the Court did recently alleviate concerns about allowing foreign contributions.¹⁰ And the accuracy of Obama's statement that *Citizens United* overturned decades of settled law was never in dispute. By holding that corporations and unions have the right under the free-speech clause of the First Amendment to make unlimited independent expenditures

4. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (holding that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.>").

5. *Id.* at 931 (Stevens, Ginsburg, Breyer, & Sotomayor, JJ., dissenting in part and concurring in part).

6. Those three were Chief Justice John G. Roberts Jr., and Justices Anthony M. Kennedy, who authored the majority opinion, and Samuel A. Alito Jr. Also in attendance were dissenting Justices Ruth Bader Ginsburg, Stephen G. Breyer, and Sonia Sotomayor. See Liptak, *supra* n. 3.

7. Barack Obama, *Remarks by the President in State of the Union Address* (D.C. Jan. 21, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>).

8. See Liptak, *supra* n. 3; see also Robert Barnes, *A Justice's Reaction: Alito Dissents on Obama Critique of Court Decision*, Washington Post, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012800053.html> (Jan. 28, 2010).

9. T.W. Farnam, *Corporations Are Sending More Contributions to Super PACs*, Washington Post, http://www.washingtonpost.com/politics/corporations-are-sending-more-contributions-to-super-pacs/2012/02/02/gIQAL4dYIQ_story.html?hpid=Z2 (Feb. 2, 2012) (reporting, for example, that in 2011 Karl Rove's American Crossroads "super PAC" received 39 percent of its tens of millions of dollars from corporations).

10. See *Bluman v. FEC*, 132 S. Ct. 1087 (2012) (summarily affirming a lower court ruling upholding the constitutionality of a federal statute prohibiting contributions and independent expenditures by foreign nationals).

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in campaigns for elected office, the Supreme Court not only struck down a federal statute¹¹ and overturned two of its own key campaign-finance decisions,¹² it also effectively struck down laws in 24 states that had long banned or restricted independent corporate expenditures.¹³

Or at least it effectively struck down laws in 23 of them. One state has refused to give up on its century-old ban on corporate campaign expenditures: “Only Montana,” as the *Washington Post* reported, “still wages a lonely court battle to maintain the ban.”¹⁴ Montana’s lonely struggle became national news¹⁵ on December 30, 2011, when the Montana Supreme Court upheld a Montana statute prohibiting corporate expenditures that a lower court, citing *Citizens United*, had declared unconstitutional in early 2011.¹⁶ That case, formerly known as *Western Tradition Partnership, Inc. v. Attorney General*, will almost certainly be reviewed by the United States Supreme Court, which stayed the Montana Supreme Court’s decision on February 17, 2012, at the request of the corporations challenging the statute.¹⁷

Montana’s continued effort to restrict independent corporate expenditures in campaigns for elected office is rooted in the State’s history of corrupt elections during the War of the Copper Kings, which took place at the turn of the twentieth century.¹⁸ At the time, the State was infamous for what historian K. Ross Toole described as the “massive corruption of the machinery of government”¹⁹ that resulted from the willingness of three

11. *Citizens United*, 130 S. Ct. at 913 (majority) (holding 2 U.S.C. § 441b unconstitutional).

12. *Id.* (overruling *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990) and *McConnell v. FEC*, 540 U.S. 93 (2003)).

13. See Natl. Conf. of St. Legis., *Citizens United and the States, Life After Citizens United* <http://www.ncsl.org/default.aspx?tabid=19607#laws> (updated Jan. 4, 2011) (noting that while *Citizens United* did not directly strike down state laws, “it is likely that states will choose not to enforce these laws” and “[m]any of these states are looking at repealing or re-writing these laws to avoid legal challenges”).

14. Robert Barnes, *Citizens United Decision Reverberates in Courts Across Country*, *Washington Post*, http://www.washingtonpost.com/politics/citizens-united-decision-reverberates-in-courts-across-country/2011/05/20/AFbJEK9G_story.html (May 22, 2011).

15. The New York Times alone published three editorials in 15 days supporting the Montana Supreme Court’s decision. See *Montana and the Supreme Court*, *New York Times*, http://www.nytimes.com/2012/02/14/opinion/montana-and-the-supreme-court.html?_r=4 (Feb. 13, 2012); *The Court and Citizens United II*, *New York Times*, http://www.nytimes.com/2012/02/22/opinion/the-supreme-court-and-citizens-united-take-2.html?_r=2 (Feb. 21, 2012); and *Undermining State Campaign Laws*, *New York Times*, http://www.nytimes.com/2012/02/29/opinion/undermining-state-campaign-laws.html?_r=2 (Feb. 28, 2012).

16. *West. Tradition Partn., Inc.*, ___ P.3d at ___, 2011 WL 6888567 at *1.

17. *Am. Tradition Partn., Inc. v. Bullock*, ___ S. Ct. ___, 2012 WL 521107 (Feb. 17, 2012). The caption of the case has changed because the lead plaintiff has changed its name. This article will use “*Western Tradition Partnership*” when referring to the litigation in Montana’s courts, and “*American Tradition Partnership*” when referring to the case before the United States Supreme Court.

18. For a good overview of this “legendary struggle between mining barons,” see Michael P. Malone & Richard B. Roeder, *Montana: A History of Two Centuries* 152–177 (U. of Wash. Press 1976).

19. K. Ross Toole, *Twentieth-Century Montana: A State of Extremes* 104 (U. of Okla. Press 1972).

mining barons, or “copper kings,” to spend millions of dollars in their battle to control both Montana’s vast copper deposits and its government.²⁰ That corruption led fed-up Montana voters to enact by citizen initiative the State’s first ban on corporate campaign expenditures, the Corrupt Practices Act of 1912,²¹ which was the precursor to the statute at issue in *Western Tradition*.²² One hundred years later, that same history of corruption, according to the Montana Supreme Court, provided the compelling interest necessary to uphold the Montana statute²³ even though *Citizens United* struck down a similar federal statute as facially unconstitutional.²⁴ As one opposing amicus brief filed in the Montana Supreme Court phrased it, the State is asserting “a ‘Montana Exception’ to the Free Speech Clause” based on Montana’s unique history of corrupt elections a century ago.²⁵

This article first details the extent of that corruption, which was so pervasive that in 1908, President Theodore Roosevelt’s Solicitor General, echoing Mark Twain,²⁶ described Montana as a place “where open confessions of sales of political and even judicial influence were lightly looked upon.”²⁷ The article describes three examples that the Roosevelt Administration certainly had in mind. The first involved the election of copper king William Andrews Clark to the United States Senate in 1899. Clark won his election through a brazen bribery campaign that ended up being the focus of an investigation by the United States Senate, which forced Clark to resign a few months after taking office.²⁸ The other two examples concern corrupt district judges elected in Butte in 1900, Edward Harney and William Clancy, who were widely believed to have been “bought and paid for”²⁹ by another copper king, F. Augustus Heinze, although direct bribery was never proven.³⁰ Their numerous biased rulings in Heinze’s favor in some of the most high-stakes litigation in the United States had substantial impacts on the state and the nation. In fact, the results of Clancy’s rulings in particular

20. See Michael P. Malone, *The Battle for Butte: Mining and Politics on the Northern Frontier, 1864–1906* 53–56, 80–83, 147–158 (U. Wash. Press 1981).

21. Malone & Roeder, *supra* n. 18, at 201.

22. Mont. Code Ann. § 13–35–227 (2011).

23. *West. Tradition Partm.* ___ P.3d at ___, 2011 WL 6888567 at **7–9.

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

25. Amicus Curiae Br. of Ctr. for Competitive Pol. at 8, *West. Tradition Partm., Inc. v. Atty. Gen.*, 2011 WL 6888567.

26. Twain, *supra* n. 1, at 72.

27. Donald MacMillan, *Smoke Wars: Anaconda Copper, Montana Air Pollution, and the Courts, 1890–1924* 173 (Mont. Historical Socy. Press 2000).

28. Malone, *supra* n. 20, at 126.

29. Toole, *supra* n. 19, at 109.

30. Malone & Roeder, *supra* n. 18, at 172; see also *Patrick v. State*, 257 P.3d 365, 370 (Mont. 2011).

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are still felt in Montana today in significant ways, not the least of which was the passage of Montana's Corrupt Practices Act.³¹

The article next analyzes *Citizens United* and how its sweeping conclusions about independent campaign expenditures and corruption conflict with the way the Court treated those same expenditures a year earlier in *Caperton v. A.T. Massey Coal Co.*,³² which involved a judicial election. The article then discusses *Western Tradition Partnership*. In that case, Montana successfully argued that *Citizens United* did not invalidate Montana's 100-year-old ban on independent corporate expenditures because the law was originally enacted directly by citizens trying to take their state back from the corporations that had seized control of it.³³

Surprising many observers, the Montana Supreme Court upheld the statute in a 5–2 decision, thus giving the United States Supreme Court a chance to reconsider its ill-advised decision in *Citizens United*. At least two Justices on the Court apparently are willing to do just that. On February 17, when the Court granted American Tradition's application for a stay of the Montana decision, Justices Ginsburg and Breyer, while supporting the stay, voiced their view that it was already time to revisit *Citizens United*:

Montana's experience, and experience elsewhere since this Court's decision in *Citizens United v. Federal Election Comm'n*, make it exceedingly difficult to maintain that independent expenditures by corporations "do not give rise to corruption or the appearance of corruption." A petition for certiorari will give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway.³⁴

Human nature and political ideology being what they are, however, the likelihood seems small that any of the five members of the *Citizens United* majority would confess so soon to making such a monumental mistake. Various experts, including one of the dissenting Montana justices, have predicted a summary reversal without briefs on the merits.³⁵ And absent a confession of error by at least one of their colleagues, not even Justices Ginsburg and Breyer apparently think the *Western Tradition* decision can stand. Although the Montana Supreme Court explained in detail why its decision did not conflict with *Citizens United* because of the state's unparal-

31. W. William Leaphart, *First Right of Recusal*, 72 Mont. L. Rev. 287, 287–289 (2011); Malone, *supra* n. 20, at 201.

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

33. *West. Tradition Partn.*, ___ P.3d at ___, 2011 WL 6888567 at *9.

34. *Am. Tradition Partn., Inc.*, ___ S. Ct. ___, 2012 WL 521107 (citations omitted).

35. *West. Tradition Partn.*, ___ P.3d at ___, 2011 WL 6888567 at *41 (Nelson, J., dissenting). See also Richard L. Hasen, *Occupy the Super PACs*, Slate (available at http://www.slate.com/articles/news_and_politics/politics/2012/02/justice_ruth_bader_ginsburg_is_ready_to_speak_out_on_the_danger_of_super_pacs_.html) (Feb. 20, 2012).

leed history of elections corrupted by outside corporate interests,³⁶ Justices Ginsburg and Breyer indicated they were not persuaded. Even though they announced their interest in revisiting *Citizens United*, they wrote that they voted to grant the stay because “lower courts are bound to follow this Court’s decisions until they are withdrawn or modified.”³⁷ Therefore, without an abrupt change of course by the Court, Montana’s law, like those of the 23 states with similar laws,³⁸ cannot survive the sweeping language of *Citizens United*.

However, even if the Court holds that the law is unconstitutional when applied to partisan political elections of legislators and executive branch officials, this article argues that the ban on independent corporate expenditures should be upheld when applied to judicial elections, which all but 11 states require in some form.³⁹ Those elections, which do not exist at the federal level, are different in fundamental and obvious ways from elections for legislative and executive branch positions. The United States Supreme Court implicitly recognized as much in *Caperton*, decided the year before *Citizens United*, when it held that large independent campaign expenditures on behalf of judicial candidates pose a “serious, objective risk of actual bias”⁴⁰ and “offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true” in deciding cases important to the person or entity making the expenditure.⁴¹ Yet the majority opinion in *Citizens United* only referenced *Caperton* in one cursory, four-sentence paragraph in which it failed to draw any distinction between judicial and political elections.⁴²

The logical way to reconcile *Caperton* and *Citizens United* is to recognize that because judicial elections are fundamentally different from political elections, states should be allowed to shield them from the risk of corruption posed by unlimited independent corporate expenditures. The sole purpose of corporate campaign expenditures, given the self-interested nature of corporations, is to support candidates perceived as sympathetic to the financial or political interests of the corporation. A corporation’s “legal loyalties necessarily exclude patriotism”⁴³ and other civic virtues. That distinguishes corporate citizens from flesh-and-blood citizens, who are at least capable of acting in the best interest of society even when self-interest urges

36. *West. Tradition Partn.*, ___ P.3d at ___, 2011 WL 6888567 at **7–9.

37. *Am.Tradition Partn.*, ___ S. Ct. ___, 2012 WL 521107.

38. See Natl. Conf. of St. Legis., *supra* n. 13.

39. Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections 2*, <http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1> (May 5, 2010).

40. *Caperton*, 129 S. Ct. at 2265 (internal quotations omitted).

41. *Id.* at 2261.

42. *Citizens United*, 130 S. Ct. at 910.

43. Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 393 n. 245 (2009).

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a different course of conduct. And that difference means that a ban on independent corporate expenditures in judicial elections not only fulfills a compelling governmental interest; it also is narrowly tailored, because the problem is with the fundamentally self-interested nature of corporations. Corporate self-interest is particularly at odds with society's vital interest in a judiciary free of bias toward special interests. In fact, corporate self-interest represents a type of "corruption"—a disregard of the public good—that the Framers of the Constitution not only recognized as "a central threat to government," but one "they believed would eventually founder America."⁴⁴

Therefore, even if the Supreme Court strikes down Montana's Corrupt Practices Act as a whole, the Supreme Court should use *American Tradition Partnership* to revisit the issue of independent corporate expenditures in judicial elections and reconsider at least that aspect of *Citizens United*.

II. "THE MONTANA SITUATION"

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.

—Justice Anthony M. Kennedy⁴⁵

In the late nineteenth century, copper became perhaps the most important strategic mineral in the world, as the rapid spread of electricity and telephones led demand to skyrocket.⁴⁶ As a result, the rough-and-tumble frontier mining town of Butte, Montana, which sat on top of almost limitless deposits of copper ore, became known as "the richest hill on earth."⁴⁷ Those underground riches made Montana, and Butte in particular, the site of one of the more corrupt and colorful battles of industrial titans the country has ever seen. The War of the Copper Kings was fought on various levels: by hundreds of miners below ground with fire hoses, slaked lime, and even dynamite;⁴⁸ by scores of lawyers⁴⁹ in court with lawsuits, injunc-

44. *Id.* at 348, 374. As Professor Teachout persuasively explains in a subsequent article, the Framers—as well as Supreme Court Justices serving before the mid-twentieth century—would be astounded at the current Court's single-minded focus in political campaign cases on protecting free-speech rights, rather than on the greater public good of preventing corruption of government. "In the nineteenth-century cases involving money and politics, speech concerns were never mentioned, but corruption concerns always were." Zephyr Teachout, *The Historical Roots of Citizens United v. FEC: How Anarchists and Academics Accidentally Created Corporate Speech Rights*, 5 Harv. L. & Policy Rev. 163, 165–166 (2011). Something, perhaps, an originalist such as Justice Scalia might want to ponder.

45. *Citizens United*, 130 S. Ct. at 910 (Kennedy, J., writing for the majority).

46. Malone, *supra* n. 20, at 34–35.

47. *Id.* at 56.

48. *Id.* at 181.

49. Toole, *supra* n. 19, at 112 (noting that by 1902 one copper king, F. Augustus Heinze, had 37 attorneys on his staff and was involved in almost 100 lawsuits involving mining properties worth nearly \$200 million).

tions, appeals, and writs;⁵⁰ and, most importantly, by corporate officers and their bagmen with seemingly endless amounts of cash to buy votes, newspapers, and politicians.⁵¹

A. *Senator William Andrews Clark*

The 1899 election of copper king William Andrews Clark to the United States Senate is the most notorious example of Montana's political corruption, even drawing the critical eye of Mark Twain, who called him "a shame to the American nation."⁵² One historian described events surrounding Clark's election as "one of the most remarkable, most sordid political spectacles in the history of the United States."⁵³ Clark was one of the richest men in America at the time, reputedly worth \$50 million in 1900, and was arguably Montana's most influential citizen, having served as presiding officer at both the 1884 and 1889 Montana constitutional conventions.⁵⁴ Yet his most fervent desire was to become a member of the United States Senate.⁵⁵ To satisfy that desire, Clark reportedly was willing to spend as much as a million dollars of his fortune to bribe state legislators,⁵⁶ who elected senators until adoption of the Seventeenth Amendment in 1913, at the rate of up to \$10,000 per vote.⁵⁷ When later asked to justify his bribery, he reportedly said: "I never bought a man who wasn't for sale."⁵⁸

Clark prevailed despite widespread public knowledge of the bribery scheme. But it took him many more rounds of voting than expected; late in the game he had to raise the amount offered to as much as \$50,000 per legislator.⁵⁹ In the end, Clark may have paid more than \$430,000 for 47 legislators' votes and reportedly offered another \$200,000 to 13 more who refused the bribes.⁶⁰ Clark's celebration was short-lived, however, as com-

50. The corruption in Butte's district courts even led the Montana Supreme Court to invent a previously unknown writ that allowed it to immediately review discretionary pretrial rulings by lower court judges—Clancy in particular—without having to wait for appeal from a final judgment, which could take years. See Larry Howell, "Purely the Creature of the Inventive Genius of the Court": State ex rel. Whiteside and the Creation and Evolution of the Montana Supreme Court's Unique and Controversial Writ of Supervisory Control, 69 Mont. L. Rev. 1 (2008).

51. See Malone, *supra* n. 20, at 111–130.

52. Twain, *supra* n. 1, at 72.

53. Malone, *supra* n. 20, at 111.

54. *Id.* at 196; see also James McClellan Hamilton, *History of Montana: From Wilderness to Statehood* 271 (Merrill G. Burlingame ed., 2d ed., Binford & Mort 1970).

55. Malone, *supra* n. 20, at 111.

56. Adjusted for inflation based on the Consumer Price Index, \$1,000,000 in 1899 bribes would be the equivalent of more than \$25,000,000 in bribes today. See S. Morgan Friedman, *The Inflation Calculator*, <http://www.westegg.com/inflation/> (accessed Feb. 8, 2012).

57. *Id.* at 113.

58. *Id.* (noting the quote may be apocryphal).

59. *Id.* at 117.

60. *Id.* at 120.

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plaints from anti-Clark Montanans led the United States Senate Committee on Privileges and Elections to hold hearings from January through April 1900, investigating the manner by which Clark had been elected.⁶¹ Those legislators who took Clark's money were subpoenaed to explain in person before the Committee how they had suddenly acquired such wealth. Many "severely embarrassed themselves and their home state" in the process,⁶² including one who denounced his own prior sworn statement that he had been bribed as a "pack of dam [sic] lies."⁶³ The national press was appalled by the sad state of affairs in Montana. As one reporter noted, the hearings had shown what "not overly scrupulous multi-millionaires can accomplish for the political degradation of a commonwealth."⁶⁴

Even the three justices on the Montana Supreme Court were dragged into the scandal. Served with subpoenas by federal marshals, they were forced to travel from Helena to Washington, D.C., in the middle of winter, to testify about how Clark's agents had tried unsuccessfully to bribe them in a related case, with one being offered as much as \$100,000 to vote for the outcome Clark wanted.⁶⁵ Despite some unpleasant cross-examination by Clark's lawyers, the justices' reputations remained largely unsullied, and their credible testimony was cited by the Committee as deserving of "special consideration"⁶⁶ when it unanimously declared Clark's election "null and void on account of briberies, attempted briberies, and corrupt practices by his agents."⁶⁷ Clark resigned to avoid expulsion by the full Senate.⁶⁸

61. See Sen. Comm. on Privileges and Elections, *The Right and Title of William A. Clark to a Seat as Senator from the State of Montana*, 56th Cong. (Jan. 5, 1900) [hereinafter Sen. Comm.]. This three-volume, 3,000-page compilation includes documents, exhibits, and testimony from the United States Senate Committee hearings into Clark's corrupt efforts to become a member of the world's most exclusive club, as well as from various related proceedings in Montana.

62. Malone, *supra* n. 20, at 125.

63. Sen. Comm. at 1085–1087.

64. Malone, *supra* n. 20, at 129.

65. Sen. Comm. at 1631–1668, 1732–1742.

66. Sen. Comm. Rpt. 56–1052 at 14 (Apr. 23, 1900).

67. *Id.* at 1. For reasons that will become clear during this article's discussion of *Citizens United* below, it is worth noting that the Senate Committee on Privileges and Elections defined corrupt practices to include more than *quid pro quo* bribery and attempted bribery. See *infra* nn. 165–177.

68. Malone, *supra* n. 20, at 126. Clark was not yet ready to give up, though, and instead engaged in one last desperate effort to reclaim his seat, which only served to besmirch Montana's reputation even more. Before Clark formally submitted his resignation letter, Clark's political allies in Montana lured the Governor, who opposed Clark, out of state. Clark then submitted his letter to the Lieutenant Governor, who supported Clark. As acting governor, the Lieutenant Governor immediately appointed Clark to the seat he had just resigned. The Governor, upon learning of the episode, called it "another one of the many dirty tricks, perjuries and crimes resorted to by Clark." He revoked the appointment when he returned to Montana, but Clark ultimately prevailed when he won the Senate seat without incident the next year after his supporters gained control of the legislature in the 1900 election. Clark served one undistinguished term and did not run again. *Id.* at 126–130, 148–156, 195 (internal quotations omitted).

The entire episode exposed the nation to what the Committee described in its recommendation to expel Clark as “the bad repute into which the State had fallen.”⁶⁹ Perhaps the only bright spot was that Clark’s 1899 election campaign ultimately helped ensure adoption of the Seventeenth Amendment, which took election of senators away from easily bribed state legislators and gave it directly to voters.⁷⁰

B. The Second Judicial District Court, Silver Bow County, Montana

The “Montana situation,” as the Roosevelt Administration referred to the state’s corrupt political culture, also included judges among the elected officials who were for sale.⁷¹ In particular, two Butte district court judges, William Clancy and Edward Harney, serve as cautionary tales about the dangers of allowing corporate interests to spend freely to elect judges.

In the early 1900s, F. Augustus “Fritz” Heinze was engaged in a fierce legal battle with the Amalgamated Copper Company. Controlled by some of the directors of Standard Oil, including Henry Rogers and William Rockefeller, Amalgamated Copper had recently taken ownership of the famous Anaconda Copper Mining Company, which had been created by the third copper king, Marcus Daly.⁷² Daly died in November 1900,⁷³ shortly after “the most turbulent and complex election in Montana’s history.”⁷⁴ Before that election, Heinze and Clark formed an alliance against Daly and Amalgamated Copper.⁷⁵ Clark’s goal was to elect enough supporters to the Montana Legislature that he would not have to bribe them to be elected to the United States Senate this time. Heinze’s goal was to control the district court judges in Butte so he could continue to tie up Amalgamated Copper in court.⁷⁶ Both were successful.⁷⁷

With Clancy’s re-election and Harney’s election, those two judges could control the docket in Butte district court by outvoting the independent third judge, thus allowing Heinze’s judges to decide which cases were assigned to which judge.⁷⁸ As a result, Heinze consistently received favorable but often legally unsound rulings from the two judges he had helped elect.⁷⁹ That was especially true of Clancy, who presided over most

69. Sen. Comm. Rpt. 56–1052 at 15.

70. Hamilton, *supra* n. 54, at 600.

71. MacMillan, *supra* n. 27, at 173.

72. Malone & Roeder, *supra* n. 18, at 158.

73. *Id.* at 169.

74. Malone, *supra* n. 20, at 148.

75. *Id.*

76. *Id.* at 148–149.

77. *Id.* at 159–160.

78. *Id.* at 160.

79. *Id.* at 144, 160, 170.

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of Heinze's and Amalgamated Copper's competing claims to the tens of millions of dollars of ore under Butte.⁸⁰ Most of Clancy's pretrial decisions on who controlled various mines could not be appealed until after a final judgment in the litigation, which, thanks to Clancy's willingness to drag matters out, was often years away.⁸¹ Nor did Montana have a statute allowing parties to disqualify judges for alleged bias.⁸² So Heinze's strategy was to gain control and mine the disputed claims while the litigation was still in the trial courts of Butte, and to keep it there as long as possible.⁸³

Of the two judges doing Heinze's bidding, Harney's conduct was the more shocking, thanks to one case involving not just allegations of bribery but also illicit love letters. Harney, according to the Montana Supreme Court, engaged in a "carnival of drunkenness and debauchery" with a female employee of Heinze's company during a bench trial in which the company was the defendant.⁸⁴ But Clancy's misconduct was by far the more significant due to its lasting consequences. In fact, Clancy might, unfortunately, be the most noteworthy judge in Montana history because of the far-reaching impact his biased rulings had—not just on Montana's reputation, but on its current laws and judicial procedures.⁸⁵

1. *The Honorable Edward Harney*

One of the more significant cases in which Clancy and Harney presumably exercised their control over the Butte docket involved a small but strategically located mine known as the Minnie Healy. The case was assigned to Harney for a bench trial in 1901. Heinze claimed he bought the property under an oral agreement from Miles Finlen. Finlen claimed there had been no sale and sued. He was backed by his friend Marcus Daly and Amalgamated Copper because they feared that Heinze would use the Minnie Healy, which was adjacent to valuable Amalgamated Copper mines, to steal ore from those mines or even try to claim ownership of the ore under mining's apex law.⁸⁶

Before his election, Harney was known as a talented trial attorney, but had become a "hard drinker who had fallen into a life of dissolution."⁸⁷ After the Minnie Healy bench trial, Harney ruled in Heinze's favor, and

80. See Howell, *supra* n. 50, at 32–39.

81. Malone, *supra* n. 20, at 172–173.

82. Leaphart, *supra* n. 31, at 288.

83. Howell, *supra* n. 50, at 33–34.

84. *Finlen v. Heinze*, 73 P. 123, 129 (Mont. 1903).

85. Leaphart, *supra* n. 31, at 287–289.

86. Malone, *supra* n. 20, at 169. The apex law allowed the owner of property on which a vein of ore surfaced, or apexed, to mine that vein wherever it went underground, even if it moved laterally under the property of others. *Id.* at 144.

87. *Id.* at 170.

Finlen appealed. In a remarkable opinion, the Montana Supreme Court ordered a new trial based on Harney's conduct outside the courtroom.⁸⁸ The Court described in detail how Harney, who was married with a family, had an affair during the trial with a woman, Ida Brackett, who worked for Heinze's company.⁸⁹ The two exchanged letters, which Amalgamated Copper's lawyers somehow obtained and submitted with affidavits to the Court during the appeal.⁹⁰ The justices were blunt in their assessment of Harney's conduct:

[T]he district judge who tried this cause was completely lost to all sense of decency and propriety, and . . . he made of the occasion, while off the bench, a carnival of drunkenness and debauchery, in company with a female employé of [Heinze's] Montana Ore Purchasing Company, one of the defendants to the action.⁹¹

A letter from Brackett to Harney, which became known popularly as the "dearie" letter because of its salutation, contained an offer of financial assistance to Harney, reminded him "who his friends were" before he became a judge, informed Harney that Brackett had been authorized to promise him certain "generous[]" things after he left the bench, and referred to statements that Harney had made to her about the evidence in the Minnie Healy case.⁹² The Court wrote that "[t]here is absolutely nothing in that so-called 'dearie' letter which could with any show of propriety be the proper subject of discussion between the judge trying a cause and an employé of the one of the parties to the action"⁹³ Harney's receptive response to Brackett, in which he wrote that he would be "glad to talk further with [her] about the subject therein mentioned," outraged the Court even more.⁹⁴ The final straw was that Harney's own affidavit, which the Court said was "most remarkable for what it does not say," failed to deny the allegations.⁹⁵ The Court concluded by stating:

No judgment of a court of justice so tainted with corruption as the record leaves this should stand, and its cancellation in this instance will be the evidence of the determination of this court to pursue to the utmost its constitutional and lawful authority, to the end that public confidence in our judicial system may not be lessened, and that the fountain of justice may be kept pure.⁹⁶

88. *Finlen*, 73 P. at 131.

89. *Id.* at 129.

90. *Id.*

91. *Id.* at 128–129.

92. *Id.* at 129.

93. *Id.*

94. *Finlen*, 73 P. at 129.

95. *Id.*

96. *Id.* at 130–131. It was never proven, however, that either Harney or Clancy ever received direct *quid pro quo* bribes. *Malone & Roeder, supra* n. 18, at 172.

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The Court then granted Finlen a new trial before a different judge. Unfortunately for him and Amalgamated Copper, the new judge was William Clancy.⁹⁷ More importantly, assigning the case to Clancy would, as explained below, result in Montana's ultimate degradation.

2. *The Honorable William Clancy*

Clancy was first elected judge in Butte as a Populist in 1896, four years before Harney and before Heinze's legal battles heated up.⁹⁸ But he soon became "the key to Heinze's political power" due to his "unflinching loyalty"⁹⁹ and the convenient fact that Heinze's cases always seemed to end up assigned to Clancy through "some clerical jugglery."¹⁰⁰ A "curbstone lawyer of . . . little education,"¹⁰¹ Clancy was well liked by the working class, who considered him one of them and believed he would "safeguard the interests of the common man from the capitalistic grasp of the plutocrats."¹⁰² Those common men also appreciated his unkempt appearance, which often included remnants of past meals and tobacco juice in his flowing white beard.¹⁰³

Even before Amalgamated Copper was formed in April 1899, Heinze and his Montana Ore Purchasing Company had already begun their legal battles. Heinze had filed several lawsuits against the Boston & Montana Consolidated Copper & Silver Mining Company, which would later become part of Amalgamated Copper.¹⁰⁴ Although no one ever proved that Heinze directly bribed Clancy,¹⁰⁵ his bias in favor of Heinze had become noticeable to the Montana Supreme Court as early as 1898, when it first began chastising him in its opinions. For instance, in November 1898, the Court found Clancy had abused his discretion in refusing to issue an injunction against Heinze's company in a suit for trespassing on another mining claim. Although even Clancy had found that the evidence supported the injunction, the Court said he had refused to issue it "on the wholly untenable ground" that it would put some of Heinze's miners out of work.¹⁰⁶ The Court also criticized Clancy's reliance on a statute to support another ruling

97. Malone, *supra* n. 20, at 171.

98. *Id.* at 144.

99. *Id.*; see also Howell, *supra* n. 40, at 32–39.

100. Malone, *supra* n. 20, at 143–144.

101. C. B. Glasscock, *The War of the Copper Kings: Builders of Butte and Wolves of Wall Street* 156–157 (Grosset & Dunlap 1935).

102. *Id.* at 157 (internal quotations omitted).

103. *Id.*

104. Malone, *supra* n. 20, at 139, 141.

105. Malone & Roeder, *supra* n. 18, at 172.

106. *Butte & Bos. Consol. Mining Co. v. Mont. Ore-Purchasing Co.*, 55 P. 112, 113 (Mont. 1898).

that the Court reversed, stating that the statute was “not susceptible of the interpretation which the court below gave it.”¹⁰⁷

A few months later, the Court again used strong words in reversing Clancy, this time for granting Heinze a preliminary injunction preventing his opponent from mining on its own property, even though Heinze’s own expert witnesses did not support his claim for trespass. But the Court was particularly offended that Clancy had prohibited the defendant from suing Heinze without an order from Clancy authorizing the litigation in advance. The Court held that Clancy “violated the plainest rules which confine [his] power within the bounds of law and sound legal discretion.”¹⁰⁸

As long as Clancy’s biased pretrial rulings for Heinze could come before the Court on direct appeal, as in the two preliminary injunction cases discussed above, the Court could reverse Clancy’s ruling and undo the damage. But when his rulings involved crucial pretrial matters that were interlocutory, and therefore not appealable until after entry of final judgment, the Court was in a quandary. No matter how unfair a ruling might be, the Court’s hands were tied until the case came to it on direct appeal after final judgment.¹⁰⁹ Under Montana law, the Court could not even issue an extraordinary writ, such as certiorari or prohibition, as long as Clancy had not exceeded his jurisdiction. So in another lawsuit, when Heinze asked Clancy to appoint one of Heinze’s cronies as receiver for a competing mining company pending trial—effectively giving Heinze himself control over the company and its \$40 million in assets—the Supreme Court issued a series of opinions acknowledging it was powerless to review Clancy’s rulings because he had jurisdiction to appoint a receiver.¹¹⁰ Even if Clancy was biased in favor of Heinze, the Court held it could do nothing at this stage:

We cannot grant the writ upon the showing made of Judge Clancy’s prejudice or enmity. . . . The facts that Judge Clancy does not like . . . counsel for relators, that he has decided various cases against relators, and is on friendly terms with the officers of [Heinze’s] Montana Ore-Purchasing Company, and may not select a fit person as receiver, if he appoints one, are far from sufficient to oust the lower court of jurisdiction.¹¹¹

107. *Id.* at 114.

108. *Mont. Ore-Purchasing Co. v. Bos. & M. Consol. Copper & Silver Mining Co.*, 56 P. 120, 124 (Mont. 1899).

109. Howell, *supra* n. 50, at 35–36.

110. *See State ex rel. Bos. & Mont. Consol. Copper & Silver Mining Co. v. Second Jud. Dist. Ct.*, 56 P. 219 (Mont. 1899) [hereinafter *Bos. & Mont. I.*]; *State ex rel. Bos. & Mont. Consol. Copper & Silver Mining Co. v. Second Jud. Dist. Ct.*, 56 P. 281 (Mont. 1899); *State ex rel. Bos. & Mont. Consol. Copper & Silver Mining Co. v. Second Jud. Dist. Ct.*, 56 P. 687 (Mont. 1899); *State ex rel. Bos. & Mont. Consol. Copper & Silver Mining Co. v. Second Jud. Dist. Ct.*, 56 P. 865 (Mont. 1899).

111. *Bos. & Mont. I.*, 56 P. at 226.

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The four opinions by the Court on this issue led one historian to write that “Heinze fared quite well with the Supreme Court”¹¹² But those opinions actually reveal the Court’s increasing frustration with both Clancy and the limits on the Court’s own power to do anything about him. The Court would soon do something to address both, but only after the justices, “men of unimpeachable character and the highest integrity,”¹¹³ had been splattered with the mud of Montana’s corruption themselves. As noted above, at the same time the justices were frustrated by their inability to control Judge Clancy, they were subpoenaed to make the long trip to Washington D.C. in the winter of 1900, to be questioned about their own honesty before an investigative committee of the Senate.¹¹⁴ That unpleasant trip could not help but bring home to the justices the impact Montana’s corruption was having on the reputation of the state’s elected officials, including themselves.¹¹⁵

As a result, less than a year after their forced visit to Washington, the Court created a new and previously unknown writ allowing it to immediately review crucial but non-appealable pretrial interlocutory rulings by trial judges like Clancy.¹¹⁶ In *State ex rel. Whiteside v. District Court of First Judicial District*, the Court announced the creation of a new writ of supervisory control that allowed the Court great latitude “to control the course of litigation in the inferior courts.”¹¹⁷ The writ remains in active use today and is codified in the Montana Rules of Appellate Procedure.¹¹⁸

Little doubt exists that the writ was invented largely to control Clancy, and to a lesser extent Harney. Between late 1900, when the writ was created, and early 1905, when Clancy and Harney left office after losing reelection bids, the Supreme Court discussed issuing the writ of supervisory control 29 times. All but three of them involved those two Butte judges, and most involved Clancy.¹¹⁹ The unique and powerful writ of supervisory control, which has sparked considerable disagreement over the decades within Montana’s bench and bar and among delegates to Montana’s 1972 Constitutional Convention,¹²⁰ is therefore one of the significant and lasting impacts that Clancy’s corruption has had on Montana.

Two additional significant and lasting impacts arose from Clancy’s handling of the Minnie Healy case, one directly and the other indirectly.

112. Malone, *supra* n. 20, at 144.

113. Hamilton, *supra* n. 54, at 592.

114. *Supra* nn. 65–67.

115. See Howell, *supra* n. 50, at 40–44.

116. *Id.* at 45–49; see also Leaphart, *supra* n. 31, at 287–288.

117. *State ex rel. Whiteside v. Dist. Ct. of First Jud. Dist.*, 63 P. 395, 400 (Mont. 1900).

118. Leaphart, *supra* n. 31, at 287–288; Mont. R. App. P. 14(3).

119. Howell, *supra* n. 50, at 48.

120. See *id.* at 49–71.

After sitting on the case for several years with little action, on October 22, 1903, Clancy ruled in favor of Heinze and awarded him full ownership of the Minnie Healy.¹²¹ At the same time, he ruled in another lawsuit that Amalgamated Copper, a foreign corporation, could not buy any Montana mining companies without the consent of every shareholder, which effectively meant that Amalgamated Copper was illegal and Heinze had won the war.¹²² Amalgamated Copper's response was swift and brutal. Although the Supreme Court would eventually reverse Clancy, the company was not going to wait the months necessary for that. Instead, Amalgamated Copper ordered the immediate shut down of most of its Montana operations.¹²³ The "Great Shutdown" threw the majority of Montana's labor force, more than 15,000 workers, suddenly out of work.¹²⁴ And before Amalgamated Copper would resume operations, it issued a demand to Governor Joseph Toole. Unless he called a special session of the Legislature to pass a "Fair Trials" bill, allowing litigants to disqualify a trial judge based on the mere allegation of bias, it would remain shut down.¹²⁵

The Governor resisted Amalgamated Copper's demand for more than two weeks, but on November 10, 1903, he acquiesced and agreed to call the special session in December so that Montana's workers could survive the winter.¹²⁶ The Legislature quickly passed the bill Amalgamated Copper demanded,¹²⁷ leading to widespread condemnation of Montana for giving in to corporate blackmail. As one out-of-state newspaper noted, "It took the Amalgamated Copper Company just three weeks to coerce Montana into falling on her knees with promises of anything that big corporation might want."¹²⁸

Subsequently, the Montana Supreme Court reluctantly held that the bill was constitutional, despite its unprecedented breadth.¹²⁹ At the time, there were only 15 district judges in the entire state, but the Fair Trials bill—or Clancy Bill, as it became known—allowed each party to disqualify up to five judges each simply by alleging they were biased.¹³⁰ Fittingly, the case in which the Court upheld the Fair Trials bill involved Clancy, who had refused to follow the Act and disqualify himself after being accused of bias.¹³¹ As with William Clark's bribery scandal several years earlier, the

121. Malone, *supra* n. 20, at 173.

122. *Id.*

123. Malone & Roeder, *supra* n. 18, at 174.

124. *Id.*

125. *Id.* at 175.

126. *Id.*

127. *Id.*

128. *Id.* (quoting The Idaho State Tribune).

129. *State ex rel. Mont. Copper Mining Co. v. Clancy*, 77 P. 312, 318 (Mont. 1904).

130. *Id.* at 313.

131. *Id.* at 313–314.

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Great Shutdown of 1903 “called national attention to the prostitution of the commonwealth of Montana by mining interests.”¹³² But this time judicial corruption was the root cause, even though quid pro quo bribery was never proven.

Finally, the “Montana situation,”¹³³ a euphemism for the corruption that pervaded almost every aspect of the State’s culture and politics, had one more lasting impact. It led the residents of Montana to rise up in 1912, and pass the Corrupt Practices Act by citizen initiative.¹³⁴ As discussed below, that public response to the degradation of Montana politics at the hands of corporate interests is the basis for the Montana Supreme Court’s holding that *Citizens United* did not require it to declare unconstitutional Montana’s ban on corporate campaign expenditures.

III. JUDICIAL ELECTIONS AND INDEPENDENT EXPENDITURES: *CITIZENS UNITED, CAPERTON, AND WESTERN TRADITION PARTNERSHIP*

At a time when concerns about the conduct of judicial elections has reached a fever pitch . . . the Court today unleashes the floodgates of corporate and union general treasury spending in these races.

—Justice John Paul Stevens¹³⁵

We figured out a long time ago that it’s easier to elect seven judges than to elect 132 legislators.

—Anonymous AFL-CIO official¹³⁶

In addition to the widespread criticism of the majority opinion in *Citizens United* as judicial activism,¹³⁷ a second criticism has focused on its failure to distinguish between elections for political office and elections for judicial office.¹³⁸ That failure is surprising because Justice Kennedy, who wrote the 5–4 majority opinion in *Citizens United*, also wrote the 5–4 majority opinion in *Caperton v. A.T. Massey Coal Co.*, the Court’s recent case on judicial bias.¹³⁹ There is a pronounced disconnect between the two

132. Malone, *supra* n. 20, at 174.

133. MacMillan, *supra* n. 27, at 173.

134. Malone & Roeder, *supra* n. 18, at 201.

135. *Citizens United*, 130 S. Ct. at 968 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., dissenting in part and concurring in part) (Justice Stevens, writing for the dissent).

136. Sample et al., *The New Politics of Judicial Elections, 2000–2009: Decade of Change* 9 (Brennan Center for Justice 2008) (available at http://brennan.3cdn.net/d091dc911bd67ff73b_09m6yvpvgv.pdf) (accessed on Nov. 5, 2011) (quoting anonymous AFL-CIO official).

137. *See supra* nn. 3–13.

138. *See* Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 Mich. L. Rev. 581, 611 (2011) (noting the “conflict between *Citizens United* and the Court’s recent jurisprudence related to money and judicial elections”).

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

opinions, despite their close proximity and common author.¹⁴⁰ That disconnect provides the necessary opening to uphold Montana's ban on independent corporate expenditures as applied to judicial elections,¹⁴¹ even if the United States Supreme Court concludes, as seems likely, that the ban is unconstitutional in political elections. In other words, the Court should do what it failed to do in *Citizens United*: recognize that judicial elections need greater protection from corruption, including the appearance of it, than political elections.

A. *Citizens United v. Federal Election Commission*

Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. . . . Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

—Justice John Paul Stevens¹⁴²

Citizens United has been criticized almost as much for the way the Court reached its result as for the result itself. The case concerned a 90-minute documentary, *Hillary: The Movie*, produced by Citizens United, a non-profit corporation.¹⁴³ The documentary was a critical biography of Senator Hillary Clinton, who was then running for president.¹⁴⁴ Federal law at the time, 2 U.S.C. § 441b, prohibited corporations from making either direct contributions to candidates or independent expenditures that expressly advocated for the election or defeat of candidates for certain federal offices.¹⁴⁵ The Supreme Court had upheld a similar law at the state level in *Austin v. Michigan Chamber of Commerce*.¹⁴⁶ Additionally, § 203 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) had amended § 441b to prohibit corporations from publicly distributing via radio or television any “electioneering communication” referring to a federal candidate, even if

140. Because Justice Kennedy not only wrote both opinions but also was the only Justice who voted with the majority in each decision, responsibility for this disconnect, or “incoherence,” can be placed directly at his feet. See Hasen, *supra* n. 138, at 613–615.

141. See Norman L. Greene, *How Great Is America's Tolerance for Judicial Bias? An Inquiry into The Supreme Court's Decisions in Caperton and Citizens United, Their Implications For Judicial Elections, And Their Effect on The Rule of Law in The United States*, 112 W. Va. L. Rev. 873, 916 (Spring 2010) (noting the likelihood of “the Supreme Court exempting judicial elections from *Citizens United* on the basis of its threat to an impartial judiciary is unclear, particularly given the current makeup of the Court.”); see also *infra* n. 258.

142. *Citizens United*, 130 S. Ct. at 930 (Stevens, Ginsburg, Breyer, & Sotomayor, JJ., dissenting in part and concurring in part).

143. *Citizens United*, 130 S. Ct. at 886–887 (majority).

144. *Id.* at 887.

145. 2 U.S.C. § 441b (2006).

146. *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990).

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it did not expressly advocate for or against the candidate, within 30 days of a primary election or 60 days of a general election.¹⁴⁷ Relying on *Austin*, the Court had previously upheld that provision in *McConnell v. FEC*.¹⁴⁸

Fearing that distributing *Hillary* would violate § 441b, Citizens United brought a declaratory judgment action against the FEC and sought a preliminary injunction barring enforcement of the law. Citizens United argued that the prohibition on independent corporate expenditures was unconstitutional and also challenged the constitutionality of the statute's disclaimer and disclosure requirements.¹⁴⁹ In its complaint, Citizens United alleged that the statute was unconstitutional both facially and as applied to *Hillary*.¹⁵⁰ After the preliminary injunction was denied by the three-judge panel of the district court authorized to hear challenges to the law, Citizens United appealed directly to the Supreme Court as allowed,¹⁵¹ but the appeal was denied.¹⁵² Citizens United then stipulated with the FEC to dismiss its facial challenge in the district court, after the FEC had said it would need more time to gather the evidence necessary to refute such a broad claim.¹⁵³ The three-judge panel subsequently granted the FEC summary judgment, and Citizens United again appealed directly to the Supreme Court.¹⁵⁴ In its notice of appeal, Citizens United expressly stated that it was raising only an as-applied challenge.¹⁵⁵ The case was briefed and argued on that basis.

Subsequently, the Court *sua sponte* ordered the parties to submit supplemental briefs addressing whether § 441b was facially invalid and whether the Court should also overrule *Austin* and the part of *McConnell* that upheld the ban on electioneering communications in BCRA.¹⁵⁶ The 5–4 majority opinion ultimately answered those questions affirmatively, concluding that § 441b's prohibition on independent expenditures amounted to an "outright ban" on corporate speech.¹⁵⁷ The Court did, by an 8–1 vote with only Justice Clarence Thomas dissenting, uphold the disclaimer and disclosure requirements of the law.¹⁵⁸

147. 2 U.S.C. §§ 434(f)(3)(A), 441b(b)(2).

148. *McConnell v. FEC*, 540 U.S. 93, 203–209 (2003).

149. *Citizens United*, 130 S. Ct. at 888.

150. *Id.* at 892.

151. *Id.* at 886–887; 28 U.S.C. § 1253.

152. *Citizens United v. FEC*, 552 U.S. 1278 (2008).

153. *Citizens United*, 130 S. Ct. at 933 (Stevens, Ginsburg, Breyer, & Sotomayor, JJ., dissenting in part and concurring in part).

154. *Id.* at 887 (majority).

155. *Id.* at 931–932 (Stevens, Ginsburg, Breyer, & Sotomayor, JJ., dissenting in part and concurring in part).

156. *Id.* at 888 (majority).

157. *Id.* at 897.

158. *Id.* at 917.

The dissenting Justices harshly characterized the unusual procedure the majority used to declare the statute unconstitutional: “Essentially, five justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.”¹⁵⁹ Although the majority opinion spends pages defending its decision to decide the case on the broadest possible basis even though neither party had argued for that, it only cursorily addressed the most significant problem with its decision: the lack of the detailed factual record usually required to determine that no circumstances exist under which a statute would be constitutional. As the dissent explained:

The problem goes still deeper, for the Court does all of this on the basis of pure speculation. Had *Citizens United* maintained a facial challenge, and thus argued that there are virtually no circumstances in which BCRA § 203 can be applied constitutionally, the parties could have developed, through the normal process of litigation, a record about the *actual* effects of § 203, its actual burdens and its actual benefits, on *all* manner of corporations and unions. . . . In this case, the record is not simply incomplete or unsatisfactory; it is non-existent. Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress’ efforts without a shred of evidence on how § 203 or its state-law counterparts have been affecting any entity other than *Citizens United*.¹⁶⁰

The lack of a developed record, especially regarding the extent and impact of corruption, gravely concerned states like Montana that had similar laws and their own experiences with electoral corruption. The Montana Attorney General’s Office took the lead in writing and filing an amicus brief on behalf of 26 states after the Court ordered rehearing.¹⁶¹ The states urged the Court not to resolve the case on a facial challenge: “The sparse record below is particularly ill-suited to a facial challenge that would call into question the century of state and federal laws and decisions that led to *Austin*.”¹⁶² The undeveloped record in *Citizens United*, juxtaposed against the extensive and unique history of corruption that led Montanans to enact the Corrupt Practices Act, is at the heart of the Montana Supreme Court’s reasoning as to why *Western Tradition* did not have to be decided the same way as *Citizens United*.¹⁶³

159. *Citizens United*, 130 S. Ct. at 932 (Stevens, Ginsburg, Breyer, & Sotomayor, JJ., dissenting in part and concurring in part).

160. *Id.* at 933 (emphasis in original) (citations and footnotes omitted).

161. See Amici Curiae Br. of the states of Montana, Arizona, Connecticut, Florida, Hawaii, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, *Citizens United*, 130 S. Ct. 876 (2010).

162. *Id.* at 4.

163. *West. Tradition Parm.* ___ P.3d at ___, 2011 WL 6888567 at *5.

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The majority rejected the states' entreaty, asserting without apparent irony that because it had reviewed an extensive record when it had held the same statute constitutional in *McConnell*, it had all the record it needed to declare the statute unconstitutional seven years later.¹⁶⁴ That reasoning becomes even more questionable when one looks at what the majority in *McConnell* concluded about that same record. In his dissent in *McConnell*, Justice Kennedy unsuccessfully argued for the same narrow view of corruption that ultimately prevailed in *Citizens United* based on what that Court's 5–4 majority said was its review of the record in *McConnell*.¹⁶⁵ Yet the reason the majority in *McConnell* rejected Kennedy's dissent in that case was because the record, in the majority's view, provided ample support for upholding § 213 of BCRA: "This crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation."¹⁶⁶ As noted earlier, this "crabbed view" of corruption also ignores the Framers' understanding of corruption and the dangers they believed it posed to the nation.¹⁶⁷

Despite the lack of a record in *Citizens United* or citations to any empirical evidence in support of its holding, the majority in *Citizens United* reached several remarkably sweeping conclusions about the impact of corruption on the electoral process.¹⁶⁸ The first was the Court's categorical assertion "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."¹⁶⁹ The Court also held that the only "sufficiently important governmental interest in preventing corruption or the appearance of corruption . . . was limited to *quid pro quo* corruption."¹⁷⁰ In other words, the only corruption the government has a compelling interest in preventing is outright bribery. Additionally, the Court stated that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt: 'Favoritism and influence are not . . . avoidable in representative politics.'"¹⁷¹ And finally, the Court stated: "there is only scant evidence

164. *Citizens United*, 130 S. Ct. at 894 (majority).

165. *McConnell*, 540 U.S. at 291–292 (Kennedy, J., concurring in part and dissenting in part).

166. *Id.* at 152 (majority) (emphasis added).

167. See Teachout, *supra* n. 44, at 165–166.

168. As one commentator noted: "How contributions may appear and whether contributions may actually give rise to corruption seem to be questions of fact not readily resolvable by the Supreme Court. The Supreme Court's decision in that regard appears arbitrary and troublesome." Greene, *supra* n. 141, at 920–921.

169. *Citizens United*, 130 S. Ct. at 909.

170. *Id.*

171. *Id.* at 910 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part)).

that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption.”¹⁷²

The dissenting Justices found the majority’s view of corruption narrow and unrealistic, and they said it ignored both precedent and the record from *McConnell* on which the majority claimed to have relied:

Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one’s behalf. Corruption operates along a spectrum, and the majority’s apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. *It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other’s backs—and which amply supported Congress’ determination to target a limited set of especially destructive practices.*¹⁷³

As for the majority’s additional pronouncement that “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy,”¹⁷⁴ the dissent labeled that wishful thinking by judicial “fiat.”¹⁷⁵ “The electorate itself has consistently indicated otherwise, both in opinion polls and in the laws its representatives have passed, and our colleagues have no basis for elevating their own optimism into a tenet of constitutional law.”¹⁷⁶ Finally, and most significantly for purposes of this article, the dissent also noted that the majority’s narrow view of corruption was in conflict with its decision in *Caperton* the year before.¹⁷⁷

B. *Caperton v. A. T. Massey Coal Company*

The citizen’s respect for judgments depends in turn upon the issuing court’s absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

—Justice Anthony Kennedy¹⁷⁸

172. *Citizens United*, 130 S. Ct. at 910.

173. *Id.* at 961 (Stevens, Ginsburg, Breyer, & Sotomayor, JJ., dissenting in part and concurring in part) (emphasis added).

174. *Id.* at 910 (majority).

175. *Citizens United*, 130 S. Ct. at 963 n. 64 (Stevens, Ginsburg, Breyer, & Sotomayor, JJ., dissenting in part and concurring in part).

176. *Id.* (citations omitted); *see also* Greene, *supra* n. 141, at 921 (“Finding a set of facts by fiat essentially creates a ‘new reality’—the way things are—which may or may not be true . . .”). Of course, one might note that if Montana’s citizenry had not lost faith in their state’s democracy, 77 percent of them would not have enacted the Corrupt Practices Act by citizen initiative in 1912. *See* Malone & Roeder, *supra* n. 18, at 201.

177. *Citizens United*, 130 S. Ct. at 967–968 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., dissenting in part and concurring in part).

178. *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

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The Court's 2009 decision in *Caperton* also received widespread media coverage, but not because it overturned decades of law or arguably undermined democracy. Instead, *Caperton* generated unusual public interest because its backstory was so compelling that novelist John Grisham drew upon the case¹⁷⁹ for his courtroom thriller, *The Appeal*.¹⁸⁰ Hugh Caperton owned a small mining company that sued mining giant A.T. Massey Coal Company for fraudulent misrepresentation, concealment, and tortious interference with contractual relations.¹⁸¹ A West Virginia jury awarded Caperton \$50 million in compensatory and punitive damages in 2002.¹⁸² In June 2004, the trial court denied Massey Coal's post-trial motions challenging the verdict and damage award, writing that Massey Coal had "intentionally acted in utter disregard of [Caperton's] rights and ultimately destroyed [Caperton's] businesses because, after conducting cost-benefit analyses, [Massey] concluded it was in its financial interest to do so."¹⁸³ Massey Coal eventually appealed to the West Virginia Supreme Court.¹⁸⁴

Before the appeal was heard, West Virginia held a partisan election for a seat on its Supreme Court, in which the incumbent, Justice Warren McGraw, a Democrat, was running for re-election.¹⁸⁵ His opponent was Republican lawyer Brent Benjamin.¹⁸⁶ Knowing the West Virginia Supreme Court would eventually review Caperton's judgment, Don Blankenship, Massey Coal's chairman, CEO, and president, threw his considerable wealth behind challenger Benjamin. Besides making the \$1,000 maximum contribution allowed by state law directly to Benjamin's campaign, Blankenship gave almost \$2.5 million to a non-profit organization created to oppose McGraw and support Benjamin.¹⁸⁷ The group, named "And For the Sake of The Kids," ran ads suggesting that McGraw had voted to let "a child rapist go free" to work in the schools.¹⁸⁸ Blankenship's contribution to the group amounted to more than two-thirds of the money the group raised.¹⁸⁹ Additionally, Blankenship spent another \$500,000 of his own money on independent expenditures for direct mailings and advertisements,

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

180. John Grisham, *The Appeal* (Doubleday 2008).

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

182. *Id.*

183. *Id.* (citation omitted) (brackets in original).

184. *Id.*

185. *Id.*

186. Biskupic, *supra* n. 179.

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

188. Robert Barnes, *Case May Define When a Judge Must Recuse Self*, The Washington Post, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/01/AR2009030102265.html?hpid=topnews&sid=ST2009030201125> (Mar. 2, 2009).

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

bringing the total amount he personally spent to support Benjamin's election to more than \$3 million,¹⁹⁰ all but \$1,000 in independent expenditures. That was more than the total spent by all other Benjamin supporters combined and three times as much as Benjamin's own campaign committee spent.¹⁹¹ Benjamin defeated McGraw with 53 percent of the vote.¹⁹²

In 2005, Caperton asked then-Justice Benjamin to recuse himself from hearing Massey Coal's appeal due to Blankenship's contributions, but Benjamin refused.¹⁹³ In 2007, Benjamin voted with the 3–2 majority to reverse Caperton's \$50 million verdict against Massey Coal.¹⁹⁴ Although the opinion found that Massey Coal's conduct warranted the damages awarded, it reversed the trial court for two questionable reasons. First, the Court held that a forum-selection clause, in a contract to which Massey Coal was not a party, barred the suit in West Virginia. Second, the Court also held that res judicata barred the suit based on an out-of-state judgment to which Massey Coal also was not a party.¹⁹⁵ Caperton sought a rehearing and moved again to disqualify not just Benjamin, but also another justice after photos came to light showing that justice vacationing in the French Riviera with Blankenship while the appeal was pending.¹⁹⁶ Meanwhile, Massey Coal moved to disqualify one of the two dissenting justices for publicly criticizing Blankenship over his spending in the 2004 election.¹⁹⁷ Both the justice who vacationed with Blankenship and the dissenting justice who criticized Blankenship recused themselves.¹⁹⁸ In his memorandum granting Massey Coal's recusal motion, the dissenting justice urged Justice Benjamin to also recuse himself because "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court."¹⁹⁹ Benjamin again refused.²⁰⁰

Benjamin, now serving as acting chief justice, selected two judges to replace the recused justices, and the Court granted rehearing.²⁰¹ Caperton requested for the third time that Benjamin recuse himself, this time citing a poll showing that two-thirds of West Virginians did not think he would decide the case impartially.²⁰² Benjamin again refused, and the Court again

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 2257–2258.

194. *Id.*

195. *Caperton*, 129 S. Ct. at 2258.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* (citation omitted).

200. *Id.*

201. *Caperton*, 129 S. Ct. at 2258.

202. *Id.*

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reversed Caperton's verdict by a 3–2 vote, with the two dissenting justices writing that “[n]ot only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair” and therefore raised federal due process concerns.²⁰³

The United States Supreme Court granted certiorari and, in another 5–4 decision authored by Justice Kennedy, agreed with the dissenting justices' assessment and reversed the West Virginia Supreme Court.²⁰⁴ “[T]he risk that Blankenship's influence engendered actual bias,” Kennedy wrote, “is sufficiently substantial that it ‘must be forbidden if the guarantee of due process is to be adequately implemented.’”²⁰⁵ That was true, even though “there is no allegation of a *quid pro quo* agreement,”²⁰⁶ because “Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.”²⁰⁷

Caperton involved a due process challenge to a judge's refusal to recuse himself over bias allegedly created by the large independent expenditures of an individual with an interest in the litigation. So at first glance the case might not seem especially relevant to the issue in *Citizens United* of whether restrictions on independent campaign expenditures by corporations violate the First Amendment. That is essentially how the majority in *Citizens United* summarily dismissed the dissent's argument that the results of the two cases were at odds with each other.²⁰⁸ *Caperton* “is not to the contrary,” the majority wrote, because its “holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.”²⁰⁹

But as explained below, despite the limited nature of the holding in *Caperton*, the Court's conclusions about the corrosive effect of large independent campaign expenditures in that case is inconsistent with the broad statements about the lack of harm from those same expenditures in *Citizens United*. The disconnect between the two cases' statements about corruption provides an opportunity for the Supreme Court in *American Tradition Part-*

203. *Id.* (citation omitted).

204. *Id.* at 2256, 2267.

205. *Id.* at 2264 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

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

207. *Id.* at 2262. This “debt of gratitude” rationale has drawn substantial criticism, with one commentator calling it a “humdinger” due to its potential ramifications, including the notion of a debt of ingratitude. See Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After Republican Party of Minnesota v. White, Caperton, and Citizens United*, 64 Ark. L. Rev. 1, 55 (2011) (“[I]f Benjamin had lost and his opponent won, must that opponent recuse himself because the opponent would feel *ingratitude* or animosity against Blankenship?”). The possibility of a debt of ingratitude is, of course, one more reason why large independent expenditures in judicial campaigns are problematic.

208. *Citizens United*, 130 S. Ct. at 967–968 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., dissenting in part and concurring in part).

209. *Id.* at 910 (majority).

nership to address that inconsistency by upholding Montana's Corrupt Practices Act at least as applied to judicial elections.²¹⁰

C. *Western Tradition Partnership v. Attorney General*

What was true a century ago is as true today: distant corporate interests mean that corporate dominated campaigns will only work "in the essential interest of outsiders with local interests a very secondary consideration."

—Professor Emeritus Harry Fritz²¹¹

After *Citizens United* was decided, Western Tradition Partnership—a Colorado corporation—and two small Montana corporations sued to overturn Montana Code Annotated § 13–35–227(1).²¹² That statute provides: “A corporation may not make a contribution or an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or political party.”²¹³ Western Tradition Partnership focused its challenge on the ban against corporate independent expenditures, not the ban against direct contributions.²¹⁴ To defend the statute during summary judgment proceedings, the Attorney General submitted testimony about Montana's history of corruption via an affidavit from Harry Fritz, professor emeritus of history at the University of Montana and former Montana legislator in both the House and Senate.²¹⁵ Fritz's uncontroverted testimony established that “[f]or two decades around the turn of the Twentieth Century, William Clark and his fellow ‘Copper Kings’ suffocated Montana's public sphere through the influence of their mining corporations” and “dominated political debate in Montana . . . drown[ing] out Montanans' own voices in the political process.”²¹⁶ Fritz cited the incidents surrounding Clark's 1899 bribery campaign to become a United States Senator,²¹⁷ the corruption in the Butte trial courts,²¹⁸ and the Great Shutdown of 1903 after Judge Clancy had ruled against Amalgamated Copper one too many times.²¹⁹

210. See *infra* nn. 241–265.

211. St.'s Combined Br. Opposition Pl.s' Mot. S.J. & Supporting St.'s Mot. S.J., Aff. Dr. Harry Fritz at ¶ 29, *West. Tradition Partn., Inc. v. Atty. Gen.*, 2010 Mont. Dist. LEXIS 412 (Mont. 1st Jud. Dist. Oct. 18, 2010) [hereinafter *Aff. Fritz*] (citation omitted).

212. *West. Tradition Partn.*, ___ P.3d at ___, 2011 WL 6888567 at *1. Western Tradition's sole corporate purpose apparently is “to act as a conduit of funds for persons and entities including corporations who want to spend money anonymously to influence Montana elections.” *Id.*

213. Mont. Code Ann. § 13–35–227(1) (2011).

214. *West. Tradition Partn.*, ___ P.3d at ___, 2011 WL 6888567 at *3.

215. *Aff. Fritz*, *supra* n. 211, at ¶¶ 1–3.

216. *Id.* at ¶¶ 17–18.

217. See *supra* nn. 52–70.

218. See *supra* nn. 71–120.

219. See *supra* nn. 121–132.

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Fritz described the Great Shutdown as “naked corporate blackmail of a sovereign state, and Montanans never forgot it.”²²⁰

As a result of that corruption, Montanans amended Montana’s Constitution in 1906, and granted themselves the right to enact laws through citizen initiative “after decades of trying to take back their state from corporate interests.”²²¹ Six years later, they used the power of initiative to enact Montana’s Corrupt Practices Act, with 77 percent of Montana voters in favor.²²² The Act stated that no corporation or individual holding the majority of stock in any corporation “shall pay or contribute in order to aid, promote or prevent the nomination or election of any person, or in order to aid or promote the interests, success or defeat of any political party or organization.”²²³ Fritz testified that the Corrupt Practices Act “reflected Montanans opposition to, and intolerance of abuses that grew out of corporate revolution of the late 19th century, including the power wielded by the ‘Copper Kings’ of Montana and other powerful corporate interests.”²²⁴

Fritz’s expert testimony made no difference to the district court. In granting summary judgment to Western Tradition Partnership, Judge Sherlock questioned the relevance of Montana’s history of corruption by succinctly noting that “the Copper Kings are a long time gone to their tombs.”²²⁵ Citing *Citizens United*, Judge Sherlock then rejected all of the State’s arguments as to why it had a compelling interest in prohibiting independent corporate expenditures, noting that Montana’s law was even broader than § 441b.²²⁶

On December 30, 2011, the Montana Supreme Court reversed, concluding that Montana, based on its history of corrupt elections, had a sufficiently compelling reason to justify prohibiting independent corporate expenditures. In a 5–2 decision authored by Chief Justice Mike McGrath, the Court distinguished *Western Tradition* from *Citizens United* because “unlike *Citizens United*, this case concerns Montana law, Montana elections and it arises from Montana history.”²²⁷ Stating that “the factual record before a court is critical to determining the validity of a governmental provision restricting speech,” the Court rejected the assertion by the lower court and the two dissenting justices that “*Citizens United* holds unequivocal

220. Aff. Fritz, *supra* n. 211, at ¶16.

221. *Id.* at ¶ 24.

222. *Id.* at ¶ 4.

223. *Id.* at ¶ 25.

224. *Id.* at ¶ 5.

225. *West. Tradition Parm.*, 210 Mont. Dist. LEXIS 412 at *10–14.

226. *Id.*

227. *West. Tradition Parm.*, ___ P.3d at ___, 2011 WL 6888567 at *5.

cally that no sufficient government interest justifies limits on political speech.”²²⁸

Instead, the Court interpreted *Citizens United* as only requiring the traditional case-by-case determination of whether a particular restriction on speech was justified by a compelling interest. The Court held that Montana’s history more than met that test:

[T]he State of Montana, or more accurately its voters, clearly had a compelling interest to enact the challenged statute in 1912. At that time the State of Montana and its government were operating under a mere shell of legal authority, and the real social and political power was wielded by powerful corporate managers to further their own business interests. The voters had more than enough of the corrupt practices and heavy-handed influence asserted by the special interests controlling Montana’s political institutions. Bribery of public officials and unlimited campaign spending by the mining interests were commonplace and well known to the public.²²⁹

Given that undisputed and unique history, the Court distilled the question of whether Montana’s Corrupt Practices Act could survive after *Citizens United* down to its essence: “The question then, is when in the last 99 years did Montana lose the power or interest sufficient to support the statute, if it ever did.”²³⁰ The Court also noted that although the copper kings are indeed long gone, Montana remains particularly susceptible to harm from large corporate political expenditures:

Issues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government. Clearly Montana has unique and compelling interests to protect through preservation of this statute.²³¹

Finally, the Court identified two other compelling interests that supported the statute. The first is encouraging the full participation of the electorate by ensuring that Montana voters’ relatively small contributions to candidates still have an impact. “[U]nlimited corporate money would irrevocably change the dynamic of local Montana political office races, which have historically been characterized by the low-dollar, broad-based campaigns run by Montana candidates.”²³²

The second additional compelling interest is protecting the integrity of the State’s system of electing judges. That means not only ensuring that the judiciary is fair and impartial, but also “preserving the appearance of judicial propriety and independence so as to maintain the public’s trust and

228. *Id.*

229. *Id.* at *11.

230. *Id.* at *12.

231. *Id.*

232. *Id.*

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confidence.”²³³ The Court held that Montana’s judicial elections would be particularly vulnerable to large corporate expenditures because of their traditionally low-cost campaigns, such as the 2008 campaign for chief justice in which total media expenditures were less than \$60,000.

It is clear that an entity like Massey Coal, willing to spend even hundreds of thousands of dollars, much less millions, on a Montana judicial election could effectively drown out all other voices. The historic Heinze–Anaconda conflict noted above illustrates the obvious negative and corrupting effects of a “bought” judiciary.²³⁴

One of the more interesting aspects of the *Western Tradition* decision is that while the majority opinion rejects the idea that *Citizens United* dictates the outcome, it is one of the dissenting opinions that engages in a blistering attack on *Citizens United*’s reasoning. As one Supreme Court reporter put it, Justice James C. Nelson “unloaded on that Supreme Court decision with Scalia-like levels of derision and scorn.”²³⁵ Although I recommend Nelson’s dissent be read in full to truly appreciate its angry populism, one can get a sense of the tone from the conclusion, where he ridicules the idea that corporations are “persons” under the law and have many of the same rights as real people:

I find the entire concept offensive. Corporations are artificial creatures of law. As such, they should enjoy only those powers—not constitutional rights, but legislatively-conferred powers—that are concomitant with their legitimate function, that being limited-liability investment vehicles for business. Corporations are not persons. Human beings are persons, and it is an affront to the inviolable dignity of our species that courts have created a legal fiction which forces people—human beings—to share fundamental, natural rights with soulless creations of government. Worse still, while corporations and human beings share many of the same rights under the law, they clearly are not bound equally to the same codes of good conduct, decency, and morality, and they are not held equally accountable for their sins. Indeed, it is truly ironic that the death penalty and hell are reserved only to natural persons.²³⁶

Justice Nelson was also offended by the idea that before *Citizens United* corporations were unable to have their voices heard in politics:

[T]he notion that corporations are disadvantaged in the political realm is unbelievable. Indeed, it has astounded most Americans. The truth is that corporations wield inordinate power in Congress and in state legislatures. It is hard

233. *West. Tradition Parm.*, ___ P.3d at ___, 2011 WL 6888567 at **12–13.

234. *Id.* at *14.

235. Dahlia Lithwick, *In Montana, Corporations Aren’t People: Can Montana Get Away With Defying the Supreme Court on Citizens United?*, Slate http://www.slate.com/articles/news_and_politics/jurisprudence/2012/01/montana_supreme_court_citizens_united_can_montana_get_away_with_defying_the_supreme_court_.html (Jan. 4, 2012) (accessed Mar. 2, 2012).

236. *West. Tradition Parm.*, ___ P.3d at ___, 2011 WL 6888567 at *41 (Nelson, J., dissenting).

to tell where government ends and corporate America begins; the transition is seamless and overlapping.²³⁷

Nevertheless, Justice Nelson wrote that even though he thought Montana had established several compelling interests sufficient to uphold the Corrupt Practices Act, each of them had been raised by the dissenters in *Citizens United* and rejected by the majority. Finding himself “in the distasteful position of having to defend the applicability of a controlling precedent with which [he] profoundly disagree[d],”²³⁸ Justice Nelson chastised his colleagues in the majority for failing in their duty to follow the Supreme Court’s binding precedent. “Like it or not, *Citizens United* is the law of the land as regards corporate political speech. There is no ‘Montana exception.’”²³⁹

Given the sweep of the majority opinion in *Citizens United*, Justice Nelson is likely correct²⁴⁰ that the Supreme Court will reject the argument that Montana’s unique past exempts it from the broad holding in *Citizens United* that “the Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”²⁴¹

D. *Caperton v. Citizens United*: Judicial Elections Are Different

Judges are not politicians who can promise to do certain things in exchange for votes.

—Chief Justice John G. Roberts²⁴²

While the United States Supreme Court will likely be unwilling to reverse itself and allow prohibitions on corporate independent expenditures generally, it should be willing to articulate a different rule in the context of judicial elections due to the disconnect between *Citizens United* and *Caperton*. That disconnect arises from two striking inconsistencies in the

237. *Id.* at *39.

238. *Id.* at *21.

239. *Id.* at *22.

240. But one leading campaign finance expert, Harvard Law Professor Lawrence Lessig, who clerked for Justice Scalia, recently stated that he was “confident” the Court will soon reverse *Citizens United*. “I think it’s quite likely Justice Kennedy is about to flip,” Lessig said, adding that Kennedy “is completely surprised by how much damage this decision has done—even Scalia doesn’t like the world where all the money in the world is on one side.” Corbin Hiar, *Lawrence Lessig on Campaign Finance Reform: Overturning ‘Citizens United’ Isn’t Enough*, The Center for Public Integrity, http://www.iwatchnews.org/2012/02/29/8278/lawrence-lessig-campaign-finance-reform-overturning-citizens-united-isnt-enough?utm_source=IWatch&utm_medium=social_media&utm_campaign=twitter (Feb. 29, 2012).

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

242. John G. Roberts Jr., Confirmation Hearing Opening Statement, *Transcript: Day One of the Roberts Hearings* <http://www.washingtonpost.com/wpdyn/content/article/2005/09/13/AR200509130693.html> (Sept. 13, 2005).

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opinions. Examining those inconsistencies suggests that if confronted squarely with the issue of independent corporate expenditures in judicial elections, a majority of the Court might be willing to recognize what seems obvious to many—judicial elections really are different and should be treated that way under campaign finance law.²⁴³

The first inconsistency is the way the two opinions characterize the independent expenditures at issue in each case. In *Citizens United*, the Court followed the longstanding distinction in its cases between contributions made directly to candidates and independent expenditures made without coordination with the candidates' campaigns. The Court has long held that direct contributions, because of the risk of *quid pro quo* corruption they pose, can be restricted in amount in the case of individuals and banned entirely in the case of corporations and unions.²⁴⁴ But when it comes to independent expenditures, individuals like Don Blankenship cannot be restricted in any way in deciding how they independently spend their money, as long as they do not coordinate with a campaign. After *Citizens United*, corporations also are not restricted in their independent expenditures, but they still cannot make direct contributions to candidates. So the distinction between contributions and expenditures remains a crucial one.²⁴⁵

But not in *Caperton*. There, the Court ignored its longstanding distinction, and instead repeatedly referred to Blankenship's \$3 million in independent expenditures as "contributions" to Justice Benjamin's campaign.²⁴⁶ As the dissenters in *Citizens United* noted, the *Caperton* majority had

accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption. Indeed, this premise struck the Court as so intuitive that it repeatedly referred to Blankenship's spending on behalf of Benjamin—spending that consisted of 99.97% independent expenditures (\$3 million) and 0.03% direct contributions (\$1,000)—as a "contribution."²⁴⁷

The majority's response to the dissent on this point was so brief that it has been described as "curt and dismissive," as well as "unpersuasive."²⁴⁸ Rather than respond directly to the dissent's point, the majority focused solely on the remedy involved: "*Caperton*'s holding was limited to the rule

243. A decade ago, four Justices indicated they would be open to recognizing that difference, although two of them have since retired. See *Republican Party of Minn.*, 536 U.S. at 805 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting) (the Court should "differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons.").

244. See Rotunda, *supra* n. 207, at 58–61.

245. *Id.*

246. *Citizens United*, 130 S. Ct. at 967–968 (Stevens, Ginsburg, Breyer, & Sotomayor, JJ., dissenting in part and concurring in part).

247. *Id.* at 967.

248. Hasen, *supra* n. 138, at 612.

that the judge must be recused, not that the litigant's political speech could be banned."²⁴⁹ Given the opportunity by the dissent to explain its conflation of independent expenditures with direct contributions, and thus address head-on the question of whether judicial elections are different from political elections, the majority passed, leaving the question open for a future case.

The blurring of any difference between contributions and expenditures suggests that in the context of judicial elections, the *Caperton* majority—and particularly Justice Kennedy, the swing vote and author in both *Citizens United* and *Caperton*—sees little difference between the two methods of financially supporting a candidate in terms of the risk of corruption they pose, and it chose to use the terms synonymously to make that point.²⁵⁰ That suggestion draws further support from the majority's recognition that "'public confidence in the fairness and integrity of the nation's elected judges' . . . is a vital state interest."²⁵¹ Compare that statement to statements in *Citizens United* that "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt,"²⁵² and "there is only scant evidence that independent expenditures even ingratiate. . . . Ingratiation and access, in any event, are not corruption."²⁵³ While the majority in *Citizens United* might believe influence over, ingratiation with, and access to politicians by campaign supporters is not corruption, it almost defies belief to think all of them would believe the same about elected judges, given the state's vital interest in public confidence in judicial fairness and integrity.

The second inconsistency is the two cases' conflicting views on whether independent expenditures even pose a risk of corruption. In *Citizens United*, the majority opinion held categorically that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,"²⁵⁴ although the actual basis for the certainty of that counterintuitive assertion is never made clear. The majority also asserted, again without support, that "[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy."²⁵⁵ Yet in *Caperton*, decided just seven months earlier, the Court held that large independent expenditures in support of a judicial candidate could create "a serious, objective risk of actual bias" that violated an

249. *Citizens United*, 130 S. Ct. at 910 (majority).

250. In fact, one could argue that independent expenditures, because they are not subject to dollar limits like most contributions, are more corrosive.

251. *Caperton*, 129 S. Ct. at 2266 (citations omitted).

252. *Citizens United*, 130 S. Ct. at 910.

253. *Id.*

254. *Id.* at 909.

255. *Id.* at 910.

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opposing litigant's due process rights.²⁵⁶ To reach that conclusion, the majority had to reject the categorical assertions about independent expenditures that it would make a few months later in *Citizens United*. To determine that Don Blankenship's independent expenditures on behalf of Justice Benjamin required the justice to recuse himself, those expenditures by definition had to "give rise to corruption or the appearance of corruption," or at least run the risk of "caus[ing] the electorate to lose faith in our democracy," or both.²⁵⁷ Yet *Citizens United* would soon tell us with certainty that neither could happen.

Taken together, these inconsistencies suggest that the Court, or at least Justice Kennedy, is willing to scrutinize judicial elections with a different, brighter light than political elections when it comes to the corrupting influence of large amounts of money flowing into them.²⁵⁸ The possibility that Justice Kennedy recognizes that judicial elections are different should not surprise because, after all, numerous other knowledgeable people and groups believe just that. Those groups include the Conference of Chief Justices, which consists of the highest judicial officer in each state, the District of Columbia, and each United States commonwealth and territory.²⁵⁹ In 2007, it adopted a declaration bluntly entitled *Judicial Elections Are Different From Other Elections*, in which it condemned the impact of increasingly large sums of money injected into state judicial elections.²⁶⁰ That trend "threaten[s] to damage and possibly even destroy the systems that individual states have adopted to keep judicial elections different from elections for other elective officials."²⁶¹

That threat also led five former justices of the Montana Supreme Court to file an amicus brief in *Western Tradition*, urging the Court to uphold this State's ban on independent corporate expenditures in judicial elections, regardless of how it ruled on the statute as a whole. They noted that, "[m]embers of legislative and executive branches are meant to be respon-

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

257. Hasen, *supra* n. 138, at 583, 613.

258. In his dissent in *Western Tradition*, Justice Nelson concluded it was unlikely the Court would carve out an exception to *Citizens United* for judicial elections based on Justice Kennedy's concurring opinion in *Republican Party of Minnesota* that states cannot "censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer." *West. Tradition Partn.*, ___ P.3d at ___, 2011 WL 6888567 at *41 (Nelson, J., dissenting) (quoting *Repub. Party of Minn.*, 536 U.S. 794) (Kennedy, J., concurring). However, Justice Kennedy's next sentence provides the opening for a judicial exception to that rule by narrowing it to the facts of the case, which concerned restrictions on the speech of the judicial candidates themselves, not corporations seeking to elect sympathetic judges. "Deciding the relevance of *candidate speech* is the right of the voters, not the State." *Repub. Party of Minn.*, 536 U.S. at 794 (Kennedy, J., concurring) (emphasis added).

259. Conf. of Chief Justices, *About CCJ*, <http://ccj.ncsc.dni.us/about.html> (accessed Oct. 8, 2011).

260. Conf. of Chief Justices, *Declaration: Judicial Elections Are Different From Other Elections*, <http://ccj.ncsc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html> (Feb. 7, 2007).

261. *Id.*

sive to the interests of their constituents. On the other hand, despite being popularly elected in nonpartisan elections, judges are expected to be impartial and independent in applying the law to any given circumstance”²⁶² The former justices also pointed out that Alexander Hamilton, one of the more influential Framers of the Constitution, wrote that “the complete independence of the courts of justice is peculiarly essential” to the United States’ form of government.²⁶³

Perhaps more importantly, given the need for public confidence in the judiciary, citizens overwhelmingly share the concern about the impact of money on judicial elections. After *Caperton*, Professor Lawrence Lessig observed that even today, despite controversial decisions like *Bush v. Gore* and accusations of activist judges with political agendas, the public still largely “presume[s] the integrity” of the judicial branch of the federal government, while at the same time it largely “presume[s] the corruption” of Congress. “The difference is enormously important to the health and power of each: trust in the judicial branch has been steady and strong; trust in the legislative branch has been falling and weak.”²⁶⁴ Yet a USA Today/Gallup Poll taken in February 2009, shortly before *Caperton* was argued, indicates that trust in the integrity of elected state judges may be dropping fast.²⁶⁵ The poll

found 89% of those surveyed believe the influence of campaign contributions on judges’ rulings is a problem, and 52% deem it a ‘major’ problem. More than 90% of the 1,027 adults surveyed said judges should be removed from a case if it involves an individual or group that contributed to the judge’s election campaign.²⁶⁶

In other words, today’s citizenry does not seem to be buying the majority’s optimistic assertion in *Citizens United* that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy”²⁶⁷ any more than Montana’s citizenry accepted the same premise in 1912, when 77 percent of them voted to enact via citizen initiative the Corrupt Practices Act at issue in *American Tradition*.

262. Amicus Curiae Br. of former Mont. Sup. Ct. Justices William Hunt, William Leaphart, James Regnier, Terry Trieweiler & John Warner, 11 *West. Tradition Partn.*, 2011 WL 6888567 [hereinafter Amicus Br. of former Mont. Justices].

263. *Id.* (quoting *The Federalist No. 78* 426 (E.H. Scott ed., 1898)).

264. Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 *Harv. L. Rev.* 104, 109 (Nov. 2009).

265. Biskupic, *supra* n. 179.

266. *Id.*

267. *Citizens United*, 130 S. Ct. at 910.

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IV. CONCLUSION

Even if the Court does not significantly walk back *Citizens United*, it should nevertheless resolve that case's conflict with *Caperton* by expressly recogniz[ing] that independent spending does have the potential to corrupt, but that outside the context of judicial elections where we are concerned especially with the public's confidence in the fairness of the judicial process, the state's interest in preventing such corruption is outweighed by the considerable First Amendment costs of limiting such spending.²⁶⁸

As the former Montana justices argued in their *Western Tradition* amici brief:

Montana's compelling state interest in preserving the independence and impartiality of the judiciary intersects with the anti-corruption interest articulated by the [Attorney General] in this case. As the U.S. Supreme Court recognized in *Caperton*, the need to insure judicial elections are free from any appearance of bias or corruption is unquestionably stronger than the need in elections for legislative or executive offices.²⁶⁹

Citizens United dismissed concerns about electoral corruption generally by declaring that just because someone who independently spends large sums in a campaign "may have influence over or access to elected officials does not mean that th[o]se officials are corrupt."²⁷⁰ What *Citizens United* disregarded is that if the elected officials in question are judges, it means exactly that.

268. Hasen, *supra* n. 138, at 615 n. 231.

269. Amicus Br. of former Mont. Justices, *supra* n. 262, at 11.

270. *Citizens United*, 130 S. Ct. at 910.

